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ICC ARBITRATION CASE No. 15416/JRF/CA

MOBIL CERRO NEGRO, LTD
Bahamas

Claimant (“Mobil CN”)

VS.

1. PETRÓLEOS DE VENEZUELA, S.A.
Venezuela

Respondent 1 (“PDVSA”)

2. PDVSA CERRO NEGRO, S.A.
Venezuela

Respondent 2 (“PDVSA-CN”)

FINAL AWARD

THE ARBITRAL TRIBUNAL:

Mr. Henri C. Alvarez (Co-Arbitrator)

Mr. Jacques Salès (Co-Arbitrator)

Prof. Dr. Karl-Heinz Böckstiegel (Chairman)

Ms. Katherine Simpson, LL.M. (Administrative Secretary to the Tribunal)

Date of this Award: 23 December 2011

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Abbreviations

¶/¶¶	Paragraph / paragraphs
2001 Hydrocarbons Law	Decree No. 1510, Decree with Force of Organic Law of Hydrocarbons, (Official Gazette No. 37.323 published 13 November 2001) [<i>Decreto N° 1.510, Decreto con Fuerza de Ley Orgánica de Hidrocarburos</i>]
App./Apps.	Appendix / Appendices
Art.	Article / Articles
AA	Cerro Negro Association Agreement
Bpd	Barrels per day
C-I	Claimant's Request for Arbitration (January 2008)
C-II	Claimant's Reply to Respondents' Counterclaims (9 May 2008)
C-III	Claimant's Principal Memorial (30 September 2008)
C-IV	Claimant's Reply Memorial (15 May 2009)
C-V	Claimant's Post-Hearing Brief (25 October 2010)
C-VI	Claimant's Reply Post-Hearing Brief (November 2010)
C.Closing	Claimant's Closing Argument (24 September 2010)
C.Costs	Claimant's Statement of Costs (10 January 2011)
C.Costs.Reply	Claimant's Comments to Respondents' Cost Submission (24 January 2011)
C.Opening	Claimant's Opening Argument (30 August 2010)
C.Reply	Claimant's Reply to Respondents' Application for an Order Directing Claimant to Withdraw Attachments of 15 October 2008
CEX	The Party's pro rata share of actual Chargeable Expenditures for such FY
Claimant	Mobil Cerro Negro
Conf.	Conferencing
Curtailment Measures	Measures imposing production and export curtailments
DCO	Diluted Crude Oil

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Decree-Law 5200	Decree No. 5200 with Rank, Value and Force of Law on the Migration to Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as of the Shared-Risk-and-Profit Exploration Agreements [<i>Decreto No. 5.200 con Rango, Valor y Fuerza de Ley de Migración a Empresas Mixtas de los Convenios de Asociación de la Faja Petrolífera del Orinoco, así como de los Convenios de Exploración a Riesgo y Ganancias Compartidas</i>] This is referred to as the “Nationalization Decree” throughout Claimant’s memorials.
EHO	Extra-Heavy Crude Oil
Enabling Law	Law that Authorizes the President of the Republic to Issue Decrees with Rank, Value and Force of Law in Delegated Subject Matters (as published in the Official Gazette No. 38617 of 1 February 2007) [<i>Ley que Autoriza al Presidente de la República para Dictar Decretos con Rango, Valor y Fuerza de Ley en las Materias que se Delegan</i>]
ESAI	Energy Security Analysis, Inc
Ex.	Exhibit
Expert Conf.	Expert Conferencing
fn.	Footnote
FY	Fiscal Year
GCA	Gaffney, Cline and Associates, Inc.
Government	Government of the Bolivarian Republic of Venezuela
Graves-A&M	R. Dean Graves of Alvarez & Marsal
Guaranty or PDVSA Guaranty	PDVSA Guaranty of 28 October 1997
ICAPM	International Capital Asset Pricing Models
ICC Decision 2008	Decision Regarding Respondents’ Application for an Order Directing Claimant to Withdraw Attachments of 19 December 2008
ICSID	International Centre for Settlement of Investment Disputes
ICSID Decision	ICSID Decision on Jurisdiction (10 June 2010)
Investment Law	Law on the Promotion and Protection of Investments
IT	The Party’s pro rata share of Income Taxes paid with respect to such FY

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Law on Effects	Law on the Effects of the Migration Process to Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as of the Shared-Risk-and-Profit Exploration Agreements [<i>Ley Sobre los Efectos del Proceso de Migración a Empresas Mixtas de los Convenios de Asociación de la Faja Petrolífera del Orinoco, Así Como de los Convenios de Exploración a Riesgo y Ganancias Compartidas</i>] (as published in the Official Gazette No. 38785 of 8 October 2007)
MBD	Thousand barrels per day
MCN	Mobil CN
Mobil	Mobil Oil Company
Mobil CN	Mobil Cerro Negro
Mobil Marketing	Mobil Sales & Supply Corporation
n.	Footnote
Nationalization Law	Organic Law Reserving to the State the Industry and Commerce of Hydrocarbons (1975)
NY CPLR	New York Code – Civil Practice Law and Rules
OCN	Operadora Cerro Negro
OPEC	Organization for Petroleum Exporting Countries
p. / pp.	Page / pages
PDVSA	Petróleos de Venezuela, S.A.
PDVSA-CN	PDVSA Cerro Negro
PO	Procedural Order
Project	Cerro Negro Project
R	Total liftings during such FY multiplied by the Price Formula applicable to such Production, plus Joint revenues received during such FY
R-I	Respondents' Answer to the Request of Arbitration (2 April 2008)
R-II	Respondents' Principal Memorial (16 February 2009)
R-III	Respondents' Reply Memorial (17 August 2009)
R-IV	Respondents' Post-Hearing Brief (25 October 2010)
R-V	Respondents' Reply Post-Hearing Brief (8 November 2010)
R.App.	Respondents' Application for an Order Directing Claimant to Withdraw Attachments (29 August 2008)
R.Closing	Respondents' Closing Argument (24 September 2010)
R.Costs	Respondents' Cost Claim (10 January 2011)

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R.Cost.Reply	Respondents' Comments on Claimant's Statement of Costs (24 January 2011)
R.Opening	Respondents' Opening Argument (30 August 2010)
Respondents	PDVSA and PDVSA-CN
ROY	The actual Royalty paid by a Party or on behalf of and for the account of a Party during such FY
RRA	Royalty Reduction Agreement
Royalty Measures	Repudiation of the RRA and the imposition of the Extraction Tax
ICC Rules	International Chamber of Commerce Rules of Arbitration (1998)
SCO	Synthetic Crude Oil
Sp. Hr. Tr.	Spanish Transcript from hearings dated 30 August 2010 through 24 September 2010
TIT	The Party's pro rata share of Income Taxes that would have been paid with respect to such FY, absent the alleged Discriminatory Measure
TOR	Terms of Reference
Tr.	Transcript
TR	Total liftings during such time period, multiplied by the Base Price, plus Joint Revenues received during such FY
TROY	Royalty that would have been paid by a Party during such FY, absent the alleged Discriminatory Measure

A. The Parties and their Counsel

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B. The Arbitral Tribunal

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C. Short Identification of the Case

1. The short identification below is without prejudice to the Parties' full presentation of the factual and legal details of the case and the Tribunal's considerations and conclusions.

C.I. Claimant's Perspective

2. The following quotations from **Claimant's Principal Memorial** and **Claimant's Reply Memorial** summarize the main aspects of the dispute as follows (C-III ¶¶ 17 – 18, 341; C-IV ¶¶ 2 – 5; C-V ¶ 2; footnotes omitted):

2. In the 1990s, because of declining oil production, PDVSA and the Government invited Mobil CN and other foreign oil companies to enter into joint ventures to develop EHO reserves, located in the Orinoco Oil Basin, which had never been commercially exploited. Attracting foreign investment to EHO projects was a difficult task, because the Republic of Venezuela had expropriated the interests of foreign oil companies (including Mobil Oil Corporation) in 1975. To overcome foreign investors' concerns about another expropriation, the Government provided investors with financial incentives to make the projects commercially attractive, and contractual and legal protections against governmental measures that might harm their investments. Those incentives and protections were enacted into law during the Government's "Oil Opening" and embodied in agreements with investors, including the Cerro Negro AA, which was approved by the Venezuelan Congress. Chief among the contractual protections was PDVSA-CN's commitment, guaranteed by PDVSA, to indemnify Mobil CN for any "expropriation or seizure" of its interests and for other "Discriminatory Measures" imposed by the Government that caused a Materially Adverse Impact on Mobil CN's cash flows from the Project. (C-IV ¶ 2).
3. Under a new administration and in a changed political climate, the Government began to dismantle the Oil Opening and to eliminate PDVSA's managerial and financial autonomy. Although Government officials repeatedly assured Mobil CN and other investors that the Government would respect the terms of their agreements, in late 2004 the Government revoked the Royalty Reduction Agreement that it had concluded with investors in EHO projects. Starting in 2005, the Government imposed a new "extraction" tax that further raised the royalty rate; it increased the income-tax rate despite a commitment not to do so; it curtailed production and exports; and it withdrew other financial incentives embodied in the Oil Opening Regime and protected by the AA. In 2007, the Government took the ultimate step. It seized the operations and assets of the Cerro Negro Project (without compensation) ("Project") and gave them to a PDVSA subsidiary. The

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Project has ceased to exist and part of its assets now belongs to a new project known as “PetroMonagas.” (C-IV ¶ 3).

4. Although the Respondents use euphemisms — such as “migration to a mixed enterprise” or Mobil CN’s supposed refusal to “confor[m] its activities to the existing regulatory framework” — they cannot conceal that the Government seized Mobil CN’s entire interest in the joint venture without paying compensation. Mobil CN negotiated with Government officials throughout 2004-07 in the hope that it could agree on a new basis for continuing its participation in the Project or, failing that, on fair compensation. In the end, Mobil CN faced a stark ultimatum: either (i) to participate in a new Government-controlled “mixed enterprise” with reduced equity, loss of management rights, surrender of all the legal protections of the AA (including indemnification and international arbitration), and a different operating project with no business plan, or (ii) to have its entire interests in the Project expropriated and pursue arbitration, despite warnings from Government officials that an arbitral award would not be honored. (C-IV ¶ 4).
5. The very purpose of the indemnification provisions of the AA was to guarantee that Mobil CN would receive contractual indemnification for the damages that the Government’s measures have caused, while Mobil CN pursues full compensation from the Republic of Venezuela. Mobil CN performed its part of the bargain: its large investment of money, technology and know-how succeeded beyond expectations and made the Project a highly profitable joint venture that, by 2005, was poised substantially to expand production during the 30 years that remained in the Project. The Respondents, by contrast, having accepted and benefited from Mobil CN’s part of the bargain, have disclaimed the obligations they undertook in the AA and the Guaranty. Under the Government’s tight control, they ignored the Notices of Discriminatory Measure and the Demand for Performance by which Mobil CN requested its contractual indemnification. The Respondents now offer a succession of hairsplitting defenses espousing the view that the AA is the proverbial “scrap of paper” that they can disregard at their convenience. How else to explain their remarkable assertion that Mobil CN’s “proper recovery is zero”? (C-IV ¶ 5).
17. For Mobil CN (and other ExxonMobil affiliates), by contrast, the damages sought in this proceeding do not remotely provide full compensation for the financial injury imposed by the expropriation. To begin with, the indemnification formula contains negotiated limitations under which Mobil CN does not receive full compensation for its actual losses. Beyond that, the expropriation deprives Mobil CN of the chance to benefit from the risks it incurred when it could not be known whether the Project would succeed. For every successful investment in the oil industry, there are multiple failures. The successes must accordingly provide large returns to finance the many uncertain ventures that must be undertaken to produce the few successes. Here, the expropriation denies the Claimant participation in the expansion of Cerro Negro during the next 27 years — an expansion that will go far beyond the 120,000 bpd for which damages are sought in this case. To replace the

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petroleum reserves of which Mobil CN has been deprived will entail new investments and new risks. (C-III ¶ 17).

18. The Respondents and the Republic of Venezuela have already profited handsomely by seizing the Claimant's investment and breaking all the commitments they made to induce that investment. Ironically, the Respondents now accuse the Claimant of greed and overreaching. The facts speak for themselves. [The Hearing confirmed that there is no dispute that, on 27 June 2007, by operation of Decree-Law 5200, PDVSA took possession and control of MCN's interests and assets related to the activities of the Cerro Negro Project. Nor did the Respondents deny that, for generations to come, PDVSA will enjoy billions of dollars of revenue generated by the investment, technology, and know-how that MCN brought to the Cerro Negro Project. (C-V ¶ 2)]. (C-III ¶ 18).
341. In their Answer to the Request for Arbitration, the Respondents allege that the Claimant "is indebted to" PDVSA-CN for an amount "in respect of the transactions involving the project financing [...]." Although the basis for that assertion is unclear, Mobil CN acknowledges that it continues to be indebted for one-half of the outstanding bonds issued in June 1998 to finance the Project, but not for any portion of the premium and other costs that PDVSA paid to purchase such bonds in December 2007 — a transaction that would have been unnecessary had the Government not expropriated Mobil CN's interests in the Project. Likewise, Mobil CN acknowledges that it has received a benefit from PDVSA's payment of Mobil CN's portion of the bank debt incurred to finance the Project in 1998; that benefit has been accepted as mitigation of damages. Accordingly, Mobil CN is willing to deduct from the compensation paid by the Respondents pursuant to an award entered in this case (i) an appropriate amount to be determined by the Tribunal for any obligations the Claimant may have to PDVSA for the bonds held by PDVSA, as long as PDVSA tenders such bonds for cancellation; and (ii) Mobil CN's portion of the bank debt paid off by PDVSA, as long as PDVSA produces appropriate releases. The Claimant reserves the right to address this subject in detail in replying to the Respondents' counterclaims. (C-III ¶ 341).

C.II. Respondents' Perspective

3. The following quotations from the Respondents' Principal Memorial, Respondents' Reply Memorial and Respondents' Post-Hearing Reply Memorial summarize the dispute as follows (R-II ¶ 2 – 9, 221 – 231; R-III ¶¶ 14 – 15, R-V ¶ 45, footnotes omitted):

45. As stated at the hearing, this is a case that never should have been brought. With the ICSID case moving too slowly for ExxonMobil, it decided to prepare an ICC case against PDVSA and PDVSA-CN that would allow it the opportunity to obtain a worldwide freezing order and attachments not available in the context of the ICSID proceeding.

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ExxonMobil apparently also wants to use this case to build an argument supporting a future seizure of the 50% interest of a PDVSA subsidiary in the Chalmette refinery in Louisiana. None of those tactical reasons has anything to do with the merits of an indemnity claim against PDVSA-CN under the AA. (R-IV ¶ 45).

2. From the beginning, Claimant has attempted to paint this as a simple case of expropriation without compensation, requiring Respondents to either pay what it considers appropriate compensation or suffer accusations of bad faith. Claimant would have the Tribunal ignore both the applicable law and the facts and proceed immediately to verify the mathematics of its experts' calculations. (R-II ¶ 2).
6. According to Claimant, Respondents acted in bad faith by not immediately concurring with Claimant on its interpretation of the facts, the applicable law and the Cerro Negro Association Agreement ("AA"), and not paying any amount under what Mr. Plunkett referred to as the simple, straightforward formula set forth in the indemnity provisions of the AA. Of course, it is not clear what amount Claimant expected Respondents to pay, whether it was the US\$12 billion calculated by Mr. Plunkett, the US\$10 billion set forth in the Summary of Claimant's Position in the Terms of Reference, the US\$7.6 billion originally calculated by one of Claimant's external experts, the US\$6.45 to US\$6.85 billion now claimed, or the US\$5 billion that Claimant requested without explanation or discussion in the summer of 2007 for all of its interests in Venezuela, including the Project and another project known as "La Ceiba." Indeed, the first time Claimant purported to quantify an amount due under the indemnity provisions of the AA was in December 2007, when it justified its surprise attachment of PDVSA-CN's funds in New York by claiming it was owed US\$12 billion by PDVSA-CN. In short, the only bad faith exhibited in this case has been the manner in which Claimant presented its claim for purposes of obtaining the worldwide freezing order and attachments in various jurisdictions in an inappropriate attempt to apply undue pressure in negotiations. (R-II ¶ 6).
7. While Claimant would have preferred that Respondents provide it with a windfall as it exited the Venezuelan petroleum industry, life is not that simple. Because of Claimant's insistence on unreasonable positions in negotiations, this Tribunal will have to review all of the troublesome legal, contractual and factual issues that Claimant would rather avoid. When those issues are examined, it becomes clear that Claimant is in the wrong forum, relying on contractual provisions that are of no avail to it, and that even Claimant's latest calculation of damages constitutes a gross exaggeration of the amount of its alleged loss and a distortion of the very formula upon which it relies. (R-II ¶ 7).
8. The fact is that the full value of Claimant's entire interest in the Project, even without considering or giving effect to the limitation of liability in the AA, was less than US\$1 billion, and that settlement with the Government would have been reached quite easily had Claimant not insisted on receiving exorbitant compensation. In the context of this proceeding, which involves claims against PDVSA and PDVSA-CN,

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not the Government, such valuation issues have relevance only because they reflect directly upon the credibility of Claimant and its witnesses and provide further evidence that none of the amounts presented by Claimant is serious, as the AA limits – rather than expands – liability for governmental action. In other words, if the full value of the interest without consideration of any limitation of liability would have been less than US\$1 billion, and indemnity under the AA would, as Ms. Otton-Goulder stated in London, yield compensation “substantially less” than full value, the amount of any indemnity even under Claimant’s theory of the case would be less than the amount of Respondents’ counterclaims. (R-II ¶ 8).

9. More importantly, the mere fact that Claimant believes that it has been wronged does not entitle it to any compensation at all, not even a single dollar, from these Respondents in these proceedings. This is not only a case of exaggerated claims; it is also a case involving legal issues and principles, as well as matters of contract interpretation that point inexorably to the conclusion that the proper recovery is zero. This would not be the first time that a claimant has ended up with no recovery on a large claim, and it would not even be the first time that an ExxonMobil company has asserted a multibillion dollar claim in an ICC arbitration only to wind up with an award of zero because its claim simply did not meet basic legal or contractual requirements. For the reasons explained in this Memorial, that is precisely the appropriate result in this case. (R-II ¶ 9).
14. As discussed in Respondents’ Principal Memorial and later in this Reply, this case involves a number of serious issues aside from the problems Claimant faces with the formula and with its argument for a risk-free discount rate, including (i) the applicability of the Venezuelan law principles relating to *causa extraña no imputable* (non-imputable external cause) and *caducidad*, (ii) the fact that the “scope” of any arbitration under Article XV of the AA does not cover indemnity for future FYs, and (iii) the fact that the governmental measures at issue do not constitute “Discriminatory Measures” within the meaning of that term in the AA. The first of these issues leads to a result that Claimant considers too harsh, as it implies the dismissal of the entire claim, but harshness of result is not a legal ground for opposing the application of well-established principles of Venezuelan law in a case that is governed exclusively by Venezuelan law. The other issues mentioned above should also constitute a total bar to the claims asserted herein, either as a matter of the application of Venezuelan legal principles or as a matter of application of the plain language of the contract. Claimant cannot unilaterally expand the scope of the indemnity provision to cover future FYs; nor could it in any event expect to receive an indemnity for any governmental measures for which it did not even meet the requirements for indemnity set forth in the contract or which did not even constitute “Discriminatory Measures” as defined in the contract. (R-III ¶ 14).
15. Finally, Claimant’s repeated references to an “expropriation without compensation” – clearly designed to create the impression that it is a victim deserving of equitable compensation in this case even if it has no legal basis for its claim – are belied by the facts. What Claimant has

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sought from the beginning, from its take-it-or-leave-it demand for US\$5 billion in negotiations with the Government to its abusive litigation based on patently false allegations of a US\$12 billion claim, is nothing short of a windfall. Had Claimant negotiated in good faith rather than seek a windfall, there would have been no need for any tribunal to deal with these issues. (R-III ¶ 15).

230. Following the migration, after entering into express understandings of good faith cooperation in areas of common interest, including the continued operation of the Chalmette joint venture and the repayment of the outstanding Cerro Negro debt, ExxonMobil determined that it had not made sufficient progress in the negotiations with the Government and needed to apply pressure by asserting claims against Respondents for US\$12 billion in damages. The New York attachment was made despite the express understanding of good faith cooperation relating to the financing that the Parties had been acting under for nearly an entire year and despite the provisions of the Termination Agreement, in which Claimant represented that “there is no provision of law, statute, regulation, rule, order, injunction, decree, writ or judgment. . . that . . . would prohibit, conflict with or in any way prevent the execution, delivery or performance of the terms of this Agreement.” (R-II ¶ 230).
231. The New York attachment of PDVSA-CN’s US\$301,095,355 has caused significant damage, as those funds have been held in a low (or now no) interest-bearing account pending the outcome of this Arbitration. The interest paid on the attached funds since February 25, 2008 (when the court account into which the funds were deposited was established) has totaled only US\$3,323,574 (an average rate of approximately 1.1%), and recently, with the economic crisis, the interest rate has been 0%. On the other hand, during this period, PDVSA general obligation bonds yielded on average 14.77%, representing the cost to PDVSA to borrow funds. The difference between the interest received and PDVSA’s cost of borrowing represents the damage that Respondents have suffered (and will continue to suffer) as a result of the attachment. (R-II ¶ 231).
228. In 2007, shortly after the issuance of **Decree-Law 5200**, PDVSA-CN and Mobil CN agreed to work together cooperatively and in good faith to avoid a potential default with respect to the financing obligations for the Project and to determine an appropriate strategy. The bank debt posed no substantial hurdles because there were no prepayment penalties; however, if the bond debt were to be redeemed, a redemption premium of approximately US\$100 million would have applied. Rather than redeem the bonds, PDVSA made a tender offer for the bonds which required the payment of principal, accrued interest and a premium equal to about one-third of the redemption premium that would have been required in a redemption scenario. (R-II ¶ 225). “[A]s a result of PDVSA’s payments, Claimant was relieved of any obligations to the creditors, and the collateral that had been established for the benefit of the creditors, including cash of approximately US\$250 million in collateral accounts maintained at the Bank of New York, was released to Mobil CN.” (R-II ¶ 226). With respect to the disputed sums, the transactions at issue were required to avoid a potential declaration of

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default under the financing agreements. That potential declaration of default resulted from actions by the Government, and not actions by PDVSA-CN or PDVSA. Having benefited from the transactions that were funded by PDVSA, Mobil CN cannot now claim that PDVSA must bear the full costs on its own. (R-II ¶ 228).

221. Upon expiration of the four-month period for agreement on migration, SCO production from the Project continued to be shipped to the Chalmette Refinery. A total of 2.98 million barrels of SCO, with a value of US\$171,552,666, was shipped for the account of Mobil CN. These facts are undisputed. (R-II ¶ 221).
222. Claimant admits that it had no interest in approximately 1.68 million of the 2.98 million barrels of SCO, and that it owes PDVSA-CN US\$96.1 million in respect of those barrels. As for the remaining 1.3 million barrels of SCO, which had a value of US\$75.5 million, Claimant asserts that the SCO was produced from extra-heavy crude oil that had been extracted and was in “inventory” prior to June 27, 2007, and that it therefore does not owe PDVSA-CN anything for these shipments. This claim is without merit because, when Mobil CN chose not to migrate, it lost all of its interest in the Project, including any barrels in “inventory.” (R-II ¶ 222).

D. Procedural History

4. Mobil Cerro Negro (“*Claimant*” or “*Mobil CN*”) commenced the current arbitration proceedings against Respondents *Petróleos de Venezuela (“PDVSA”)* and *PDVSA-Cerro Negro, S.A. (“PDVSA-CN”)* (together “*Respondents*”) by submitting a **Request for Arbitration** dated **January 2008** to the ICC Court pursuant to two interrelated agreements: the Association Agreement (“*AA*”) and the PDVSA Guaranty. Article 18.2 of the AA and Section 12 of the PDVSA Guaranty provide for arbitration “*in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce,*” to be conducted in New York, New York, USA. (C-I ¶¶ 14 – 15). The ICC received Claimant’s request for arbitration on **25 January 2008**.
5. On **2 April 2008**, Respondents submitted their **Answer to the Request for Arbitration** and rejected each of Claimant’s allegations. Respondents submitted **Counterclaims** against the Claimant relating to product sold and delivered after 26 June 2007 and to transactions involving the financing for the Project. (R-I ¶ 45). Respondents requested that the Tribunal undertake

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the **Interim Measure** of ordering Claimant to immediately take actions necessary to lift the attachment orders in New York, the Netherlands Antilles, and Aruba. (R-1 ¶ 46).

6. On 8 April 2008, the Secretary General of the ICC Court confirmed the nominations as co-arbitrators of Henri C. Alvarez and Jacques Salès, pursuant to **Article 9(2) of the ICC Rules**.
7. On 9 May 2008 Claimant submitted its **Reply to Respondents' Counterclaims** to the Secretariat. Therein, Claimant asserted that the counterclaims were each insufficient in that the Respondents failed to explain both the legal basis of each claim and the Tribunal's basis for asserting jurisdiction over each claim. (C-II ¶ 10).
8. On 19 June 2008, the ICC Court appointed Dr. Robert Briner as Chairman of the Arbitral Tribunal, upon the proposal of the Swiss National Committee, pursuant to **Article 9(3) of the ICC Rules**.
9. On 25 July 2008, the Parties created the **Terms of Reference**. These were submitted to the Secretariat of the ICC Court on 29 July 2008. On 14 August 2008, the Terms of Reference were transmitted to the ICC Court, as required by **Article 18(2) of the ICC Rules**. For ease of reference, Sections 1 – 11 of the Terms of Reference are set out below:

1. **The full names and descriptions of the Parties**

1.1. **The Claimant**

MOBIL CERRO NEGRO, LTD. (the « Claimant » or « MOBIL CERRO »)
Shirley House, 50 Shirley St
Nassau – New Providence
Bahamas

a corporation organized and existing under the laws of the Commonwealth of the Bahamas

1.2. **The Respondents**

PETROLEOS DE VENEZUELA, S.A. (« PDVSA »)
Attn: Dr. Armando Giraud
Avenida Libertador

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Edificio Petroleos de Venezuela, S.A.
La Campina - Caracas - Venezuela

and

PDVSA CERRO NEGRO, S A (« PDVSA-CN »)
Attn. Eulogio Del Pino
Avenida Veracruz con Calle Cali
Edificio Pawa
Las Mercedes – Venezuela (together the « Respondents »)

two corporations organized and existing under the laws of the Republic of Venezuela

2. The Addresses of the Parties to which notifications and communications arising in the course of the Arbitration may be made

2.1. The Claimant:

Oscar M. GARIBALDI,
Eugene D. GULLAND
Miguel LOPEZ FORASTIER,
David A. SHUFORD
and Luisa F. TORRES
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and

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Counsel for the Claimant.

2.2. The Respondents

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6, avenue Vélasquez pwolrich@curtis.com
75008 Paris
France

Counsel for the Respondents.

2.3 ICC Secretariat

Copies of all correspondence and submissions are also to be sent to the ICC Secretariat:

José Ricardo Feris Tel. 0033 1 49 53 29 03
Counsel Fax 0033 1 49 53 57 79
Secretariat ica1@iccwbo.org
ICC International Court of Arbitration
38, Cours Albert 1er
F-75008 Paris

3. **Documents Submitted So Far**

The Parties have to date submitted the following briefs and exhibits:

- * *Request for Arbitration* dated January 2008, received by the ICC Court on 25 January 2008 together with Exhibits 1 to 10.
- * *Answer to the Request for Arbitration* received by the ICC Court on 4 April 2008 together with Exhibits 1 to 11 (Vol. I) and 12 to 17 (Vol. II).
- * *Reply to Respondents' Counterclaims* dated 9 May 2008, received by the ICC Court on 13 May 2008 together with Exhibits 11 to 24. (Vol. I) and 25 to 38 (Vol. II)

Directives for the filing of further written submissions will be issued in the further course of the proceedings.

4. **Background**

The dispute between MOBIL CERRO, on the one hand and PDVSA (Venezuela's national oil company) and PDVSA-CN on the other, arises out of two interrelated agreements: the Association Agreement to which MOBIL CERRO and PDVSA-CN are parties and the Guaranty made by PDVSA for the benefit of MOBIL CERRO. The Association Agreement entered into on October 28, 1997 relates to the exploitation of certain oil fields located In Venezuela.

Pursuant to this Association Agreement, PDVSA-CN agreed to indemnify MOBIL CERRO for any "*Medida Discriminatoria*" (translated by

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Claimant as “Discriminatory Action” and by Respondents as “Discriminatory Measure”) taken by the Government that results in a “Materially Adverse Impact” upon MOBIL CERRO subject to the terms and conditions contained in the Association Agreement. On October 28, 1997, PDVSA agreed to guarantee the performance of PDVSA-CN's obligations under the Association Agreement.

5. Summary of the Parties' Respective Claims, Counterclaims and Relief Sought by Each Party

5.1. The Claimant

5.1.1 Summary of the Claimant's position :

a. Mobil-CN's Claims

In 1975, Venezuela expropriated the investments of Mobil Corporation (Mobil). To induce Mobil to accept the Government's invitation to return to Venezuela in the 1990s, PDVSA-CN agreed in the Association Agreement to indemnify Mobil-CN if Venezuela expropriated its investment again. The relevant provision indemnified Mobil-CN according to a contractual formula while it was resolving its dispute with the Government and provided Mobil-CN a remedy supplemental to the difficult process of enforcing its rights against the Government. To strengthen the protection, PDVSA guaranteed the performance of all PDVSA-CN's obligations under the Association Agreement, including guaranteeing PDVSA-CN's indemnification obligation. In 2007, Venezuela expropriated Mobil-CN's investment. PDVSA-CN and PDVSA have failed to honor their contractual commitments to compensate Mobil-CN. This arbitration is to enforce those commitments and to determine the amount due to Mobil-CN under the indemnification formula in the Association Agreement. The evidence will show that, under the contractual formula, the cumulative damages exceed US\$10 billion, before any discounting to present value (this figure does not include interest).

PDVSA invited Mobil to form a joint venture to exploit the largely untapped extra-heavy crude oil in the Cerro Negro area because PDVSA lacked the financial and technical resources to exploit the reserves on its own. To attract Mobil and other selected foreign investors, the Government, following PDVSA's advice, offered various fiscal incentives, including a reduced income-tax rate and a reduced royalty. The income-tax reduction was guaranteed by the Framework of Conditions for the Cerro Negro Joint Venture approved by the Venezuelan Congress. The royalty reduction was granted by an agreement (the Royalty Reduction Agreement) among the Ministry of Energy and Mines, PDVSA Petróleo y Gas, S.A., and Mobil-CN and other parties.

In addition to the fiscal incentives given by the Government, PDVSA, through its Guaranty, and PDVSA-CN, through the Association Agreement, agreed to indemnify Mobil-CN, in an amount determined under a contractual formula (Article VII in Annex G to the Association Agreement), for any Discriminatory Action that caused a Materially Adverse Impact (as those terms are defined in that Agreement), including the expropriation of Mobil-CN's interests in the Cerro Negro venture.

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The Cerro Negro Joint Venture, which was inaugurated on 28 October 1997, was successful until the Government adopted a series of Discriminatory Actions that caused a Materially Adverse Impact on Mobil-CN. Those actions included: (a) the direct expropriation of Mobil-CN's interests in the Cerro Negro Joint Venture and (b) measures that preceded the expropriation, including (i) repudiation of the Royalty Reduction Agreement and imposition of a so-called extraction tax, (ii) refusal to allow the expansion of the Project as previously agreed, (iii) increases in income-taxes on Orinoco Oil Belt participants, (iv) curtailment of production and exports from the Cerro Negro Joint Venture.

After unsuccessfully seeking just compensation for the Discriminatory Actions from the Government Mobil-CN sought compensation from PDVSA-CN and PDVSA under the indemnification formula in the Association Agreement and the Guaranty.

Under Venezuelan law PDVSA-CN must discharge its contractual obligations in good faith. In addition, the Association Agreement provides that, if PDVSA-CN concurs with Mobil-CN that a Discriminatory Action has occurred and has resulted in a Materially Adverse Impact PDVSA-CN is obligated to "negotiate in good faith compensatory damages."

PDVSA-CN ignored the Claimant's demand for compensation even while acknowledging that the Government expropriated Mobil-CN's interests in the Cerro Negro Joint Venture. Contrary to the duty to perform its contractual obligations in good faith, PDVSA-CN has breached its obligations by failing (i) to give notice of concurrence that the expropriation constituted a Discriminatory Action resulting in a Materially Adverse Impact within the meaning of the Association Agreement; (ii) to engage in good faith in a joint calculation of the compensation due Mobil-CN under the Association Agreement; and (iii) without prejudice to Mobil-CN's right to full compensation from the Government, to indemnify Mobil-CN as required and determined under Article 15 of the Association Agreement and Article VII of Annex G thereto.

Mobil-CN gave notice to PDVSA as guarantor that PDVSA-CN was in breach of the Association Agreement and demanded prompt performance by PDVSA but PDVSA has not replied to Mobil-CN's demand for payment.

b. The Respondents' Counterclaims

The Respondents' Answer asserts counterclaims (i) for an undetermined amount of compensation for "damage" allegedly caused to the Respondents by "Claimant's worldwide campaign of harassment against Respondents"; (ii) for approximately US\$172 million for "product sold and delivered after June 26, 2007" plus interest and (iii) for approximately US\$320 million in respect of the transactions involving the project financing for the Project described in the Affidavit of Brian O'Kelly (Ex. R-14, ¶¶ 4-9), plus interest.

Due to the deficient pleading of the counterclaims, it is unclear whether the Tribunal has jurisdiction to entertain the counterclaims. The Answer does not explain the legal basis for any of the counterclaims, nor does it explain the grounds for jurisdiction over each counterclaim. Without adequate explanations, each counterclaim is insufficient.

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Because of the Respondents' failure to specify the legal basis for each counterclaim, Mobil-CN reserves its right to contest jurisdiction for each counterclaim if and when the Respondents explain the alleged basis for such jurisdiction. In any event, as explained in Claimant's Reply, the counterclaims appear to be without merit.

5.1.2 The Claimant's Claims and the Relief sought:

In their Request for Arbitration dated January 2008, Claimant requests that the Tribunal renders an Award:

- a. Declaring that several Discriminatory Actions have occurred and that such Actions have caused Mobil Cerro to suffer a Materially Adverse Impact in FY 2007 and in all future FYs through FY 2035.
- b. Declaring that Respondent PDVSA-CN has breached the Cerro Negro Association Agreement
 - i. by failing to compensate Mobil Cerro for the Discriminatory Actions described above; and
 - ii. by failing to deal in good faith with Mobil Cerro and failing to quantify in good faith with Mobil Cerro the compensatory damages that PDVSA-CN owes to Mobil Cerro under the Cerro Negro Association Agreement for the Discriminatory Actions.
- c. Declaring that Respondent PDVSA has breached the PDVSA Guaranty by failing to perform the obligations of its Guaranteed Affiliate, PDVSA-CN, under the Cerro Negro Association Agreement
- d. Ordering Respondents PDVSA and PDVSA-CN, jointly and severally, to pay Mobil Cerro
 - i. compensatory damages calculated according to the Cerro Negro Association Agreement and the Accounting Procedures Agreements; and
 - ii. attorneys' fees and costs according to Article 13 of the PDVSA Guaranty.
- e. Granting pre-award compound interest on all compensatory damage from the date of each breach to the date of issuance of the award and post-award compound interest on all amounts awarded from the date of the award to the date of payment.
- f. Granting costs of the arbitration (including reasonable attorneys' fees) to the extent not included in subparagraph d (ii).
- g. Granting any other or further relief that may be just and proper,

In its Reply to the Respondents' Counterclaims, the Claimant further requests the following:

- a. Dismissing the Respondents' counterclaims.
- b. Granting costs and reasonable attorneys' fees related to defending the Respondents' counterclaims,
- c. Granting any other or further relief that may be just and proper,

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For the avoidance of doubt, the Claimant also notes that it does not consent to the Respondents broad reservation of rights to assert new claims or counterclaims and additional defenses (see Section 5.2.2, *infra*) and reserves Claimant's right to oppose such claims, counterclaims and defenses to the extent that they are inconsistent with Article 19 of the ICC Rules or other pertinent authority.

Similarly, the Claimant denies that the Respondents are entitled to any interim measures (see Section 5.2.2(a), *infra*) and reserves the right to seek interim measures in appropriate circumstances.

5.2. The Respondents

5.2.1. Summary of the Respondents' position :

Under the governing law, the Cerro Negro Association Agreement cannot form the basis for any claims made by Claimant; even if the governing law were to be ignored, the claims would not fall within the terms of the Association Agreement; even if they would, there would be no basis for Claimant's interpretation of the compensation provisions upon which it relies; even if Claimant's interpretation of the compensation provisions were correct, the Association Agreement expressly provides that neither party would have any liability for failure to perform to the extent such non-performance is due to acts, orders or decisions of government; and in any event there is no basis for Claimant's calculation of the amount of its claims.

More particularly, Respondents' position is that:

- a. Pursuant to the Law on the Effects of the Process of Migration referred to in the Request for Arbitration, the Association Agreement was extinguished and all related controversies referred to Venezuelan Jurisdiction. Therefore, since Claimant concedes that Venezuelan law governs, the Association Agreement cannot form the basis of a claim by Claimant in this arbitration. This point at once goes to the merits and to the Jurisdiction of the Tribunal.
- b. Even if the Association Agreement had not been extinguished, the claims in any event would have no merit for various reasons:
 - (i) There could be no claim for compensation against Respondents unless the governmental measures complained of fell within the definition of "Discriminatory Measure" under the Association Agreement and they did not.
 - (ii) Claimant failed to meet the conditions precedent for asserting a claim under Article 15 of the Association Agreement by (a) failing to provide "immediately" the required notice of the occurrence of a Discriminatory Measure that might have a Material Adverse Impact, (b) failing to provide "immediately" the required notice that it has suffered a Material Adverse Impact as a result of such Discriminatory Measure and (c) failing to commence and pursue legal actions to reverse or obtain relief from such Discriminatory Measure. These failures both render the claims defective and show that Claimant itself never considered the compensation provisions of the Association Agreement to be applicable.
 - (iii) With respect to the period prior to 2007, the limitation of liability provisions of Article 15 of the Association Agreement would have precluded a claim even if Claimant had asserted one, which it never

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did. Even now Claimant does not seriously articulate any claim for compensation based on governmental measures taken during that period.

- (iv) With respect to the claim for future cash flows, even if (a) the Association Agreement had not been extinguished, (b) the governmental actions had constituted “Discriminatory Measures” and (c) the conditions precedent specified in Article 15 of the Association Agreement had been met, the provisions of that same Article make clear that future cash flows were not covered. In fact the scope of the arbitration proceedings delineated in Article 15.1(b) of the Association Agreement confirms that future cash flows were not covered and that any such claim would not fall within the jurisdiction of this Tribunal.
 - (v) In any event, Article 21.1 of the Association Agreement expressly provided that neither party would have any liability for non-performance to the extent such non-performance was due to “acts of government or orders, judgments, resolutions, decisions or other actions or omissions of any governmental authority.”
- c. Finally, with respect to future cash flows, even if (a) the Association Agreement had not been extinguished, (b) the governmental actions had constituted “Discriminatory Measures,” (c) the conditions precedent specified in Article 15 of the Association Agreement had been met and (d) the provisions of the Association Agreement did cover future cash flows, the amount of that claim would still not be more than a small fraction of the sum which Claimant has asserted in the attachment proceedings it has commenced in connection with this arbitration for various reasons, including the mistaken assumptions used by Claimant to project future cash flows and its failure to do any discounting of those assumed flows. While it should not be necessary for the Tribunal to reach those issues, the obvious defects in Claimant's calculations, particularly its failure to do any discounting, underscore the nature of both this proceeding and the accompanying worldwide campaign of freezing orders and attachments as merely an attempt to intimidate Respondents into acceding to Claimant's demand for exorbitant compensation.

5.2.2. The Respondents' Counterclaims and the Relief sought:

In their Answer to the Request for Arbitration, the Respondents request the Tribunal to:

- a. Consider as a matter of priority the question of taking interim measures and order the Claimant immediately to take the actions necessary to lift the remaining attachment orders in New York, the Netherlands, the Netherlands Antilles and Aruba ;
- b. Dismiss the claims asserted by the Claimant;
- c. Grant the Respondents' counterclaims and order the Claimant to pay to the Respondents
 - i. compensation for the damages caused to the Respondents by the “Claimant's worldwide campaign of harassment against the Respondents”; and

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- ii. amounts owed by the Claimant to PDVSA-CN, comprising (i) the amount of approximately US\$ 172 million for product sold and delivered after June 26, 2007, and (ii) “the amount of approximately US\$ 320 million in respect of the transactions involving the project financing for the Project described in the Affidavit of Brian O’Kelly (Ex. R-14, ¶¶4-9),” in each case plus interest.
- d. Award to the Respondents all costs incurred in connection with this Arbitration, including, without limitation, the fees and expenses of the arbitrators and the ICC administrative fees fixed by the Court, as well as the fees and expenses of any experts appointed by the Tribunal and the reasonable legal and other costs incurred by the Respondents in connection with this Arbitration;

The Respondents expressly reserve the right to submit such additional defenses, evidence, arguments, claims and counterclaims as they may deem appropriate, to supplement or augment this Answer, to respond to any allegations made by Claimant in connection with this Arbitration and to define the relief or remedies appropriate to the Tribunal's determination of this controversy.

6. Issues

The issues to be determined by the Arbitral Tribunal shall be those resulting from the Parties' submissions, including forthcoming submissions, and which are relevant to the adjudication of the Parties respective claims and defenses, without prejudice to the provisions of Article 19 of the ICC Rules.

7. Arbitration Clause

The Association Agreement contains an arbitration clause (Article 18.2) which, in its English translation submitted by the Claimant as Exhibit 2 together with its Request for Arbitration, reads as follows:

Any dispute arising out of or concerning this Agreement shall be settled exclusively and finally by arbitration. The arbitration shall be conducted by three (3) arbitrators (except as established below) in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the “ICC Rules”), or such other rules as may be agreed by all of the Parties to the relevant dispute. If there are two Parties to the dispute, or if all Parties to the dispute agree to be grouped together into two groups on the basis of a common interest and position in the dispute, then each of the Parties or groups, as the case may be, shall select an arbitrator in accordance with the ICC Rules. The arbitrators so nominated shall then agree within thirty (30) days on a third arbitrator to serve as Chairman. If there are more than two parties to the dispute and they do not promptly agree to be grouped together into two groups, then all three arbitrators, including the Chairman, shall be selected by the International Court of Arbitration of the International Chamber of Commerce in accordance with the ICC Rules, as if the parties had failed to nominate arbitrators. Notwithstanding the foregoing, disputes submitted to arbitration with respect to Sections 12.1 (a) or 16.3, shall be resolved by a single arbitrator selected in accordance with the ICC Rules. Unless all parties to the arbitration agree to the contrary, all arbitration proceedings under this Agreement shall be conducted in New York City (United States of America). Any decision of

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the arbitral tribunal (or the sole arbitrator) shall be final and binding upon the parties to the arbitration. Judgment for execution of any award rendered by the arbitral tribunal (or the sole arbitrator) shall be entered by any court of competent jurisdiction without review of the merits of the dispute.

The Guaranty contains an arbitration clause (Article 12) which in its English translation submitted by the Claimant as Exhibit 3 together with its Request for Arbitration, provides that:

Any dispute arising out of or concerning this Guaranty shall be resolved exclusively and finally by arbitration. The arbitration shall be conducted and finally settled by three (3) arbitrators in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the "ICC Rules"), or such other rules which all the parties involved in the dispute may agree to. If there are two parties in the corresponding dispute, or if all parties to the dispute agree to be grouped together into two groups on the basis of their common interest and common position in the dispute, then each party or group, as the case may be, shall select an arbitrator in accordance with the ICC Rules. The arbitrators so nominated shall agree within a thirty (30) day time period on a third arbitrator who shall serve as President. If there are more than two parties to the dispute and the parties to the dispute do not promptly agree to be grouped into two groups, then the three arbitrators, including the President, shall be selected by the International Court of Arbitration of the International Chamber of Commerce in accordance with the ICC Rules, as if none of the parties had designated an arbitrator. Unless the parties agree otherwise, all arbitration proceedings shall be conducted in New York City (United States of America). Notwithstanding the foregoing, if a dispute involves the Guarantor and the Guaranteed Affiliate, the arbitration proceeding shall be performed in accordance with Section 18.2 of the Agreement, as the only proceeding, and the Guarantor and Guaranteed Affiliate shall jointly have the rights of the Guaranteed Affiliate in accordance with Section 18.2.

8. Applicable Law

Article 18.1 of the Association Agreement provides:

This Agreement shall be governed by and interpreted in accordance with the laws of the Republic of Venezuela.

Article 9 of the Guarantee provides :

This Guarantee shall be governed by and interpreted in accordance with the laws of the Republic of Venezuela.

9. The Arbitral Tribunal

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FASKEN MARTINEAU DUMOULIN LLP	Fax 001 604 632 3129
2900-550 Burrard Street	halvarez@fasken.com
Vancouver, BC V6C0A3	
Canada	

Nominated by the Claimant and confirmed as co-arbitrator by the Secretary General of the ICC Court on 8 April 2008, pursuant to Article 9(2) of the ICC Rules.

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Jacques SALÈS
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Jointly nominated by the Respondents and confirmed as co-arbitrator by the Secretary General of the ICC Court on 8 April 2008, pursuant to Article 9(2) of the ICC Rules.

Robert BRINER
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1205 Geneva
Switzerland

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rb@brinerarb.com

Appointed by the ICC Court on 19 June 2008 as Chairman of the Arbitral Tribunal, upon the proposal of the Swiss National Committee, pursuant to Article 9(3) of the ICC Rules.

10. Language of the Arbitration

The Arbitral Tribunal notes that the Parties have agreed that the language of the arbitration is English. Consequently, all briefs shall be submitted and all hearings shall take place in that language.

Documentary evidence existing in another language shall be translated by the party producing it into English. Any translation submitted by a party shall be accepted as complete and correct unless the other party objects as soon as reasonable to its accuracy and proposes another translation. Any dispute concerning translation shall be determined by the Arbitral Tribunal.

Documentary and testimonial evidence in another language shall be translated by the Party producing it into English.

11. Place of Arbitration

In accordance with the arbitration clause, the place of arbitration is New York, U.S.A.

10. On 26 August 2008, the Chairman, on behalf of the Arbitral Tribunal, issued **Procedural Order No. 1 Regarding the Further Procedure & The Provisional Timetable** (PO-1) setting forth, among other items, the timetable for the filing of the further written briefs and the dates for a hearing regarding the procedure on the Respondents' **Request for an Order That The Remaining Attachments Be Withdrawn** (which date had already been set by the Arbitral Tribunal on 29 July 2008).
11. On 29 August 2008, Respondents filed an **Application for an Order Directing Claimant to Withdraw Attachments**.

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12. On 30 September 2008, Claimant submitted Claimant's Principal Memorial to the Tribunal.
13. On 15 October 2008, Claimant submitted its Reply to Respondents' Application for an Order Directing Claimant to Withdraw Attachments.
14. By e-mail of 20 October 2008 to the Tribunal, the Respondents requested the presence of Jim R. Massey at the hearing in order to examine him with respect to the various affidavits he had submitted on behalf of the Claimant.
15. On 13 November 2008, in preparation for the 2 and 3 December 2008 hearing on the Respondents' Application for an Order Directing Claimant to Withdraw Attachments, the Tribunal issued Procedural Order No. 2 (PO-2). For ease of reference, the entire operative provisions of PO-2 are set out below:

The Arbitral Tribunal has taken note of the Submissions of the Parties regarding the organization of the Hearing to be held in New York starting 2 December 2008.

In view of the importance of this Case and the inter-relation between the various attachment proceedings in the Courts of England, New York, Curaçao, Aruba and Amsterdam with the present ICC Arbitration Case 15416/JRF, the Arbitral Tribunal exceptionally considers it appropriate to also allow the questioning of Mr. Jim M. Massey on his "Second Affidavit" dated 26 February 2008, first submitted in the High Court of Justice in London and then submitted as Annex R-10 by the Respondents in the present proceedings in addition to the "Direct Testimony" of Mr. Massey dated 13 October 2008 submitted by the Claimant as C-196 in the present proceedings.

Furthermore, the Respondents are also allowed to cross-examine Mr. Plunkett on the contents of his "First Affidavit" dated 21 January 2008, first submitted in the High Court of Justice and then submitted in this Arbitration by the Respondents as R-15.

The Arbitral Tribunal therefore orders

1. A Hearing on the Application of the Respondents for an Order Directing Claimant to Withdraw Attachments and on the further procedure in this Case will take place in New York at

The New York Helmsley
212 East 42nd Street
New York, NY 10017

starting on 2 December 2008 at 09:00 a.m.

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2. Agenda

2.1. Opening by the Chairman.

2.2. Hearing of the Witnesses on their Affidavits

Short Direct Examination basically limited to the identification of Mr. Massey on his Affidavits filed in these proceedings as R-10 and C-196 and then of Mr. Plunkett on his Affidavit filed as R-15.

Each Witness, after his Direct Examination, will be cross-examined by the Respondents followed by a possible redirect and recross-examination.

2.3. Each Side, first the Respondents, then the Claimant will sum up its position, maximum one hour, possibly to be followed by a rebuttal round of not more than fifteen minutes for each Side.

Thereafter, depending on the time of day still on 2 December or, otherwise, on 3 December, the Arbitral Tribunal will discuss with the Parties any possible open questions in relationship to the continuation of these proceedings, including a discussion on a Hearing date.

3. The Arbitral Tribunal would appreciate it if one complete file of all material so far submitted in this Arbitration could be made available for the Arbitral Tribunal in the Hearing Room.

4. The Arbitral Tribunal understands that the Parties have reached an agreement on the reservation of the Hearing Rooms. It would appreciate receiving further details regarding the number of the rooms reserved and how the rent for these rooms is being paid.

5. The Arbitral Tribunal also understands that an agreement has been reached regarding the Court Reporter and in this respect the Tribunal would also appreciate receiving the necessary details regarding the Court Reporter retained and how the fees and expenses of this service are being paid.

6. If there should still be any issues for which the Parties would require some guidance from the Arbitral Tribunal, they are invited to submit them forthwith.

16. Following emails received from both Parties setting forth their disagreement on the questions of the time allocation and the presence of a witness during the examination of the other, the Chairman informed the Parties by email of **21 November 2008** that the Tribunal had decided that (1) the question regarding the presence of witnesses during the hearing would be discussed with the Parties at the commencement of the hearing; (2) the hearing on Respondents' Application would take place on 2 December; and (3) the discussion on the continuation of the proceedings would take place immediately after the closing statements or on the morning of 3 December 2008.

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17. The hearing took place in New York on **2 December 2008**. A transcript of the hearing was made available to the Parties and the Arbitral Tribunal on 3 December 2008.
18. On **19 December 2008**, the Arbitral Tribunal denied Respondents' Application and issued its Decision Regarding Respondents' Application for an Order Directing Claimant to Withdraw Attachments. (*"ICC Decision 2008"*).
19. On **16 February 2009**, Respondents submitted Respondents' Principal Memorial to the Tribunal.
20. On **15 May 2009**, Claimant submitted Claimant's Reply Memorial to the Tribunal.
21. At its session on **13 August 2009**, the Court accepted the tender of resignation of Dr. Robert Briner pursuant to Article 12(1) of the ICC Rules. Pursuant to Article 12(4) of the ICC Rules, the Court directly appointed Prof. Karl-Heinz Böckstiegel as Chairman of the Arbitral Tribunal in replacement of Dr. Briner at the same session on which the Court accepted the tender of resignation of Dr. Briner.
22. On **17 August 2009**, Respondents submitted Respondents' Reply Memorial to the Tribunal.
23. On **15 September 2009**, Claimant submitted a letter to the Tribunal stating that it would not file a Rebuttal Memorial on Counterclaims. Claimant reasoned that Respondents' Reply Memorial had added nothing to the discussion of the Counterclaim and referred the Tribunal to ¶¶ 222 – 244 of Claimant's Reply Memorial, submitted on 15 May 2009.
24. On **27 October 2009**, the Tribunal held a Procedural Meeting in New York. After conferring with the Parties, the Tribunal Issued Procedural Order No. 3 Regarding the Further Procedure in this Case (PO-3) on 14 November 2009.

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25. On 24 May 2010, **Procedural Order No. 4** (PO-4) was issued inviting deposit payments from the Parties to the ICC account for VAT on the fees of the Arbitrators.
26. On 28 May 2010, Respondents submitted a letter to the Tribunal in accordance with Section 3.8 of PO-3 indicating their intent to call the following as witnesses at the September 2010 hearing: (1) Thomas L. Cranmer, (2) Timothy J. Cutt, (3) Paul Hoenmans, (4) Brian Lawless, (5) James R. Massey, (6) Hobert E. Plunkett, (7) Mark R. Ward, (8) Allan R. Brewer-Carías, (9) William B. Cline, (10) Neil Earnest, (11) R. Dean Graves, (12) Eugenio Hernández-Breton, (13) Scott T. Jones, and (14) Stewart C. Myers. They also intend to call as their own witnesses (1) José A. Pereira, (2) Vladimir Brailovsky and Louis T. Wells to answer questions regarding the Brailovsky/Wells Reports, (3) Jeffrey Leitzinger and Anthony Finizza of EconOne to answer questions regarding the EconOne Reports, (4) José Mélich-Orsini, and (4) Enrique Urdaneta Fontiveros.
27. On 9 July 2010, the Court confirmed the appointment of Ms. Katherine Simpson as Administrative Secretary.
28. On 12 July 2010, the Tribunal issued **Procedural Order 5 Regarding the Preparation and Details of the Hearing** (PO-5).
29. On 30 June 2010, Claimant submitted Claimant's **Documents Submission** and Respondents submitted **Respondents' Supplemental Exhibit Submission** pursuant to Section 3.10 of PO-3 to the Tribunal.
30. On 14 July 2010, Claimant submitted its rebuttal evidence to the Tribunal in accordance with Section 3.11 of PO-3.
31. On 30 July 2010, Claimant submitted Claimant's **Letter Regarding Legal Expert Conferencing** in accordance with Section 4.4 of Procedural Order No. 5, and Claimant's **Letter Regarding Updated Calculations** in accordance with Section 3.12 of PO-3.

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32. On 30 July 2010, Claimant submitted Exhibits C-327 – C-330 to the Tribunal pursuant to Section 3.12 of PO-3.
33. On 30 July 2010, Respondents submitted Respondents' Submission Pursuant to Sections 4.2 and 4.4 of PO-5 to the Tribunal.
34. On 7 August 2010, Claimant submitted an email to the Tribunal, requesting that it be allowed to use two of its twenty-seven allotted hours to present its Opening Statement, in derogation of Section 3.2 of PO-5. Claimant requested that Respondents join in the request.
35. On 7 August 2010, Respondents replied, requesting that the one-hour time limit for opening statements be maintained, as was agreed at the 27 October 2009 Procedural Meeting.
36. On 9 August 2010, The Tribunal responded via email, ruling that the one hour length of the opening statement would be maintained. For ease of reference, the entire operative text of the email is provided below:

The Tribunal has taken note of the Parties' mails regarding the length of the opening statements at the hearing.

In view of the objection by Respondent, as the one hour length of the opening statements was agreed by both Parties, and for reasons of equal treatment of the Parties, the Tribunal concludes that this length should not be changed at this late stage before the hearing.

37. Two hearings were held in New York City from late August through September 2010. A transcript was made at each hearing. Prior to testifying, each witness and expert read either a "*witness declaration*" or an "*expert declaration*" aloud, as appropriate. The text of both declarations is provided below for ease of reference.

I am aware that in my testimony I have to tell the truth and nothing but the truth. I'm also aware that if I do not comply with this obligation, I may face severe legal consequences. (hereinafter "*witness declaration*").

I solemnly declare upon my honor and conscience that my statement will be in accordance with my sincere belief. (hereinafter "*expert declaration*").

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38. The **first hearing** was held from **30 August 2010 – 2 September 2010**. The following individuals attended the hearing: for the Tribunal: Karl-Heinz Böckstiegel, Jacques Salès, Henri C. Alvarez, and Administrative Secretary Katherine Simpson; for Claimant: Oscar Garibaldi, Eugene D. Gulland, Thomas L. Cabbage, III, Les P. Carnegie, III, Miguel Lopez Forastier, Luisa Torres, David Shuford, Toni Hennike, and Mark Duenser; for Respondents: George Kahale, III, Benard V. Preziosi, Jr., Miriam K. Harwood, and Kabir Duggal. Also present were Hildegard Rondon de Sauso, Dr. Bernard Mommer, Dr. Alvaro Silva Calderon, Dr. Joaquin Parra, Dr. Moreeliec Pena, Dr. Alvaro Ledo, Arinna Sanchez, Robert Garcia, Prof. Enrique Urdaneta Fontiveros, Prof. José Mélich-Orsini, Jeffrey Leizinger, Anthony Finizza, Daniel Bartolomeo, Prof. Louis Wells, Vladimir Brailovsky, Orietta Fraenkel, Bianca Granados, Elizabeth O'Connell, Gloria Diaz, Gene Silva, Alberto Rivell, Anna Knull, Maria Hernandez, Mark Cuevas, Nicholas E. Cox, Silva Colla, Charlie Roberts, and Daniel Giglio. (2010 Tr. pp. 1 – 4).
39. Mr. Mark Ward testified on **30 August 2010**. (2010 Tr. pp. 138 – 337).
40. On **31 August 2010**, the Tribunal heard testimony from Mr. Paul Hoenmans (2010 Tr. 348 – 422), Mr. Thomas L. Cranmer (2010 Tr. 423 – 473), and Mr. Jim Massey (2010 Tr. 474 – 632).
41. On **1 September 2010**, the Tribunal heard testimony from Mr. Timothy J. Cutt (2010 Tr. 639 – 781) and Mr. Hobert E. Plunkett (2010 Tr. 782 – 889).
42. On **2 September 2010**, an Expert Conferencing involving Dr. Enrique Urdaneta Fontiveros, Dr. José Mélich-Orsini, Dr. Hernandez-Breton, and Dr. Allan R. Brewer-Carías took place. This was not a traditional examination through direct and cross-examination, but rather involved each of the legal experts sitting as a panel and answering questions from the Tribunal and then from counsel. The purpose of the witness conference was to learn about Venezuelan law. (2010 Tr. pp. 900 *et seq.*).

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43. Prior to closing the first week of hearings, the Tribunal asked the Parties if there were any other procedural matters. The Parties indicated that they would confer about the organization for the second week of hearings and that the Parties would submit a proposal to the Tribunal.
44. On **15 September 2010**, the Claimant, by letter, requested the authorization to submit one more document, excerpts from PDVSA's 2009 Annual Report, for use at the hearing. The entire text of Claimant's request is provided below for ease of reference.

The Claimant hereby requests authorization to submit the enclosed document as Exhibit C-331 for use at the hearing, under the "exceptional circumstances" exception of section 4.3 of Procedural Order No. 3 and section 2.1 of Procedural Order No. 5.

The document consists of excerpts from PDVSA's 2009 Annual Report, in Spanish with an English translation. The report was made public on 3 August 2010. Accordingly, it could not have been included in the Claimant's pre-hearing submission of 30 June or that of 14 July 2010.

Since this is a new document that PDVSA itself has prepared and recently released, there is no question of unfair surprise or prejudice to the Respondents in introducing it at this time.

45. The Tribunal invited Respondents to submit any comments they may have regarding Claimant's letter of **15 September 2010**.
46. On **16 September 2010**, Respondents objected to the proposed exhibit, stating that Respondents did not see the exceptional circumstances.
47. On **17 September 2010**, Claimant submitted its **List of Errata** for the transcript of the hearing conducted from 30 August 2010 until 2 September 2010.
48. The **second hearing** took place from **20 – 24 September 2010**. The following individuals attended the hearing on **20 September 2010**. Present for the Tribunal were: Karl-Heinz Böckstiegel, Jacques Salès, Henri C. Alvarez, and Administrative Secretary Katherine Simpson. Present for Claimant were: Oscar Garibaldi, Eugene D. Gulland, Thomas L. Cabbage, III, Les P. Carnegie, III, Miguel Lopez Forastier, Luisa Torres, Philip

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Scarborough, Enrique Armijo, Mipe Okunseinde, Andres Barrera, Mark Cuevas. Present for Respondents were: George Kahale, III, Benard V. Preziosi, Jr., Miriam K. Harwood, and Kabir Duggal. Also present were Dr. Joaquin Parra, Dr. Moreeliec Pena, Robert Garcia, Prof. Enrique Urdanetta Fontiveros, Liliana Dealbert, Jeffrey Leitzinger, Anthony Finizza, Daniel Bartolomeo, Prof. Louis Wells, Vladimir Brailovsky, John Kirtley, Orietta Fraenkel, Bianca Granados, Elizabeth O'Connell, Gloria Diaz, Toni D. Hennike, Eugene J. Silva, II, Alberto Ravell, Anna Knull, Mary T. Hernandez, Alice Brown, Norman Kreutter, Robert McClure, Raymond J. Kaszuba, Charlies Augustine, William Cline, Neil Earnest, R. Dean Graves, Aaron Stai, Scott Jones, Alexis Maniatis, Nicholas E. Cox, Silvia Colla, Charlie Roberts, Daniel Giglio, and Ameer Tambawala. (2010 Tr. pp. 1016 – 1020).

49. On **20 September 2010**, the Tribunal considered whether to allow the proposed exhibit C-331 to be admitted. Considering that the document was created at a time when neither party had an opportunity to submit it within the timetable, and in light of the fact that the document is a public document, the Tribunal concluded that it should admit the document.
50. On **20 September 2010**, the Tribunal heard testimony from Mr. José Pereira (2010 Tr. pp. 1030 – 1115), Mr. Brian Lawless (2010 Tr. pp. 1115 – 1213), Mr. William B. Cline (2010 Tr. pp. 1213 – 1284), and Mr. Neil K. Earnest (2010 Tr. pp. 1285 – 1312).
51. On **21 September 2010**, the Tribunal heard testimony from Mr. Scott T. Jones (2010 Tr. pp. 1324 – 1524) and Mr. R. Dean Graves (2010 Tr. pp. 1524 – 1618).
52. On **22 September 2010**, Mr. Graves continued his testimony (2010 Tr. pp. 1630 – 1673). The Tribunal also heard testimony from Prof. Stewart C. Myers (2010 Tr. pp. 1674 – 1771), Mr. Anthony Finizza (2010 Tr. pp. 1771

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- 1819), Mr. Jeffrey Leitzinger (2010 Tr. pp. 1819 – 1832), and Mr. Vladimir Brailovsky (2010 Tr. pp. 1834 – 1893).
53. On **23 September 2010**, the Tribunal heard testimony from Prof. Louis T. Wells (2010 Tr. pp. 1913 – 1950).
54. On **23 September 2010**, the Tribunal convened an expert conference with Prof. Myers and Mr. Brailovsky. (2010 Tr. pp. 1950 – 1991).
55. On **24 September 2010**, the Tribunal heard closing arguments from Claimant and Respondents. (2010 Tr. pp. 2018 – 2194). The Chairman asked the Parties if there were “*any objections to the way that this Tribunal has conducted this procedure up until now*” and the Parties indicated that they had no objections. (2010 Tr. pp. 2196). Thereafter, the hearings ended.
56. On **27 September 2010**, the Tribunal issued **Procedural Order 6 Regarding the Procedure After the Hearing in New York** (PO-6).
57. On **30 September 2010**, the Tribunal recognized the apparent typo in PO-6 and clarified that, in paragraph 3.6 of PO-6, the reference should have been to Clause 23.7 AA, rather than to Clause 12.7.
58. On **5 October 2010**, Claimant submitted its **List of Errata** for the transcript of the hearing conducted from 20 - 24 September 2010.
59. On **8 October 2010**, Respondents submitted their proposed corrections to the transcript of the hearings on the merits, entitled **Respondents’ Proposed Corrections to Transcript of Hearings on the Merits, New York, August 30, 2010 – September 2, 2010 and September 20, 2010 – September 24, 2010, Based upon Comparison with Audio Recording.**
60. On **25 October 2010**, Claimant submitted **Claimant’s Post-Hearing Brief** and Respondents submitted **Respondents’ Post-Hearing Memorial**, via email and by courier, to the Tribunal.

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61. On 8 November 2010, Claimant submitted Claimant's Post-Hearing Reply and Respondents submitted Respondents' Post-Hearing Reply Memorial, via email and by courier, to the Tribunal.
62. On 10 January 2011, Claimant and Respondents simultaneously submitted their respective statements regarding costs, pursuant to ¶ 2.1 of PO-6 via email and by courier. Claimant, in its Claimant's Statement of Costs, seeks recovery of fees and costs in the amount of US\$ 24,852,177.53. Respondents, in their Cost Claim, seek recovery of fees and costs in the amount of US\$ 18,508,775.64.
63. On 24 January 2011, Claimant and Respondents simultaneously submitted their responses to the other Party's statements regarding costs, via email and by courier.
64. On 27 April 2011, the ICC Secretariat informed the Parties and the Tribunal that, at its session of 21 April 2011 and pursuant to Article 24(2) of the ICC Rules, the ICC International Court of Arbitration extended the time-limit for rendering the Final Award to 31 July 2011.
65. On 23 May 2011, the Tribunal sent the following interim notice to the Parties:

As the Parties are well aware, this procedure and its file are of exceptional volume and complexity.

Therefore, after receiving the last submissions from the Parties, the Tribunal has had several rounds of deliberations and may well need several further rounds of deliberations.

The Tribunal hopes that it will nevertheless be able to finalize its Award before the end of July.

This interim notice is meant to keep the Parties up to date on the progress of the procedure.
66. The Parties each responded on 24 May 2011, thanking the Tribunal for the update.

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67. Nevertheless, the Tribunal required additional time to render the Award. The time-limit for rendering an Award was initially extended to 30 September 2011. The Tribunal requested an additional extension of the time-limit, and on 23 September 2011, the ICC Secretariat informed the Parties and the Tribunal that, at its session of 22 September 2011 and pursuant to Article 24(2) of the ICC Rules, the ICC International Court of Arbitration extended the time-limit for rendering the Final Award until 31 December 2011.
68. On **26 October 2011**, the Tribunal notified the Parties that it declared the proceedings closed pursuant to Article 22 of the ICC Rules, and submitted the draft Award to the Court for approval pursuant to Article 27 of the ICC Rules on that same date.
69. The Court approved the Award at its session of **24 November 2011** and later extended the time limit for rendering the Award to 31 January 2012.

E. The Principal Relevant Legal Provisions

70. Without prejudice to the relevance of other contractual or law provisions, certain relevant provisions of the AA, Annex G, the Guaranty, and of Venezuelan law are presented below. The sections containing Venezuelan law has been organized chronologically. Throughout, there are numerous instances where only one Party has provided the Tribunal with a copy of a legal text and a translation. All of the translations that the Tribunal has found relevant have been provided in the tables below, and the Tribunal makes no judgment as to the validity of any translation provided.

E.I. Principal Relevant Provisions of the Association Agreement

71. The principal relevant provisions of the AA are found at C-87 and R-112. For ease of reference, the charts below provide the original Spanish text of the AA and the Claimant's and Respondents' translations, where available. Where only one party has provided the Tribunal with a translation, the

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comparison between the Spanish original and the English translation is provided in a two-column chart. The Tribunal makes no judgment as to the validity of either Claimant's or Respondents' translations. Where helpful, the citation to where the text may be found in the record is indicated below the appropriate column.

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E.I.1. Article 1 - Definitions

Spanish (Original)	Claimant's Translation	Respondents' Translation
<p><u>DEFINICIONES</u></p> <p>“Precio Base” significará \$ 27 por barril (en Dolares de 1996).</p> <p>“Medida Discriminatoria” significará cualquier cambio en (o cualquier cambio en la interpretación o aplicación de) la ley venezolana, o cualquier Medida Gubernamental que sea injusta y que sea aplicable al Proyecto o a cualquier Parte Extranjera en su condición de participante en el Proyecto y que no se aplique en forma general a entes públicos o privados involucrados en proyectos para el mejoramiento de crudo Extrapesado en la República de Venezuela; o, con relación a tasas de impuesto, controles de ocupación de activos del Proyecto o de los intereses de una Parte Extranjera en el Proyecto, siempre y cuando dicho cambio en (o cualquier cambio en la interpretación o aplicación de) la ley venezolana, o cualquier Medida Gubernamental no sea aplicable con carácter general a Empresas en la República de Venezuela (incluyendo la imposición de impuesto sobre la renta al Proyecto o a cualquier Parte Extranjera en su condición de participante en el Proyecto, a una tasa que no se corresponde con lo previsto en la última oración</p>	<p><u>DEFINITIONS</u></p> <p>“Base Price” shall mean \$ 27 per barrel (in 1996 Dollars).</p> <p>“Discriminatory Measure” shall mean any change in (or any change in the interpretation or application of) Venezuelan law, or any Governmental Measure which is unjust and is applicable to the Project or any Foreign Party in its capacity as a participant in the Project and is not generally applied to public or private entities engaged in extra-heavy crude upgrading projects in the Republic of Venezuela; or, with respect to tax rates, foreign exchange controls or the expropriation or seizure [“ocupación”] of assets of the Project or of a Foreign Party’s interests in the Project, provided that such change in (or any change in the interpretation or application of) Venezuelan law, or any Governmental Measure is not generally applicable to Companies in the Republic of Venezuela (including the imposition of income tax on the Project or on any Foreign Party in its capacity as a participant in the Project, at a rate that does not correspond with what is provided in the last sentence of the Fifteenth Condition); or, with respect to municipal taxes (license to perform industrial and commercial activities), the</p>	<p><u>DEFINITIONS</u></p> <p>[No Translation Provided]</p> <p>“Discriminatory Measure” shall mean any change in (or any change in the interpretation or application of) Venezuelan law, or any Governmental Measure, which is unjust and is applicable to the Project or any Foreign Party in its capacity as a participant in the Project and which is not generally applicable to public or private entities engaged in projects for upgrading extra-heavy crude oil in the Republic of Venezuela; or, with respect to tax rates, foreign exchange controls or the expropriation or seizure of assets of the Project or of a Foreign Party’s interests in the Project, provided that such change in (or any change in the interpretation or application of) Venezuelan law, or any Governmental Measure is not applicable with general character to Companies in the Republic of Venezuela (including the imposition of income tax on the Project or any Foreign Party in its capacity as a participant in the Project, at a rate that does not correspond with what is set forth in the last sentence of the Fifteenth Condition); or with respect to municipal taxes (commercial and industrial</p>

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de la Condición Décima Quinta); o con respecto a impuestos municipales (patente de industria y comercio), la imposición de impuestos municipales a las Partes Extranjeras en su condición de participantes en la Asociación a pesar de lo previsto en la Condición Décima Quinta, solo si la carga total del impuesto municipal sobre los ingresos brutos de la Parte Extranjera afectada provenientes del Proyecto, excede en un cuatro por ciento (4%) los ingresos brutos de la Parte Extranjera afectada provenientes del Proyecto en el Año Fiscal de que se trate, en cuyo caso, la cantidad de impuestos municipales que exceda dicho cuatro por ciento (4%) constituirá una medida discriminatoria. Una medida que esté dentro de la definición de Medida Discriminatoria será considerada injusta si resulta en un Impacto Substancialmente Adverso.

imposition of municipal taxes on the Foreign Parties in their capacity as participants in the Association notwithstanding the provision in the Fifteenth Condition, only if the aggregate burden of the municipal tax on the affected Foreign Party's gross revenue from the Project, exceeds by four percent (4%) the affected Foreign Party's gross revenue from the Project in the Fiscal Year at issue, in which event, the amount of municipal taxes that exceeds such four percent (4%) shall be a discriminatory measure. A measure that falls within the definition of Discriminatory Measure shall be deemed unjust if it results in a Materially Adverse Impact.

permits), the imposition of municipal taxes on the Foreign Parties in their capacity as participants in the Association in spite of what is set forth in the Fifteenth Condition, only if the aggregate municipal tax burden on the affected Foreign Party's gross revenues from the Project exceeds four percent (4%) of the affected Foreign Party's gross revenues from the Project in the Fiscal Year in question, in which event the amount of municipal taxes which exceeds such four percent (4%) shall constitute a discriminatory measure. A measure that would fall within the definition of Discriminatory Measure will be deemed unjust if it results in a Material Adverse Impact.

"Medidas Gubernamentales" significará cualquier medida gubernamental central o local incluyendo, entre otros, la emisión, publicación o ejecución de cualquier acto administrativo, decreto expropiatorio, confiscación o requisición de instalaciones por parte de autoridades gubernamentales, independientemente de que tales medidas sean posteriormente anuladas o revocadas por alguna autoridad judicial o administrativa competente.

"Governmental Measures" shall mean any central or local governmental measure including, inter alia, the issuance, publication or enforcement of any administrative act, expropriation decree, confiscation or requisition of facilities by governmental authorities, whether or not such measures are subsequently annulled or revoked by any competent judicial or administrative authority.

"Governmental Measures" shall mean any central or local government measure including, among others, the broadcast, publication or exercise of any administrative act, expropriation decree, confiscation or requisition of facilities by government authorities, irrespective of whether such measures are subsequently annulled or revoked by any judicial or administrative authority having jurisdiction.

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"Impacto Substantialmente Adverso" significará una disminución en el Flujo de Caja Neto de una de las Partes Extranjeras en cualquier Año Fiscal de más de un cinco por ciento (5%), en comparación con lo que habría sido el Flujo de Caja Neto de la Parte Extranjera de no existir la(s) Medida(s) Discriminatorias del caso. Para los efectos de esta definición, la disminución total en el Flujo de Caja Neto de una de las Partes Extranjeras en cualquier Año Fiscal será determinada considerando todas las Medidas Discriminatorias aplicables a la Parte Extranjera en dicho Año Fiscal (independientemente de que hayan comenzado durante ese Año Fiscal o en un Año Fiscal anterior).

"Materially Adverse Impact" shall mean a decrease in a Foreign Party's Net Cash Flow in any Fiscal Year by more than five percent (5%), as compared to what such Foreign Party's Net Cash Flow would have been absent the Discriminatory Measure(s) at issue. For the purposes of this definition, the aggregate decrease in a Foreign Party's Net Cash Flow in any Fiscal Year shall be determined taking into account all Discriminatory Measures applicable to the Foreign Party in such Fiscal Year (whether they have commenced in such Fiscal Year or in a prior Fiscal Year).

"Material Adverse Impact" shall mean a decrease in a foreign Party's Net Cash Flow in any Fiscal Year of more than five percent (5%) as compared to what such Foreign Party's Net Cash Flow would have been absent the applicable Discriminatory Measure(s). For the purposes of this definition, the total decrease in a Foreign Party's Net Cash Flow in any Fiscal Year shall be determined taking into account all Discriminatory Measures applicable to the Foreign Party in said Fiscal Year (independently of whether they commenced during that Fiscal Year or in a prior Fiscal Year).

"Precio del Crudo Brent" significará el promedio, durante el periodo de tiempo en cuestión, del promedio aritmético diario de las cotizaciones altas y bajas por barril del Dated Brent Blend, FOB Sullom Voe, como sea publicada en Platt's Oilgram Price Report, International Spot Crude Price Assesments for Brent (DTD), publicado diariamente por la Commodities Division of Standard & Poor's, expresado en dólares promedio de 1996, según el Índice de Inflación de los Estados Unidos. En caso de que la Mezcla Brent deje de ser representativa de los precios mundiales del crudo, las Partes convendrán en un crudo de referencia diferente y en una publicación de referencia diferente que reemplace el "Precio de

"Price of Brent Crude" shall mean the average, over the period of time in question, of the daily arithmetic average of the high and low quotes per barrel of Dated Brent Blend, FOB Sullom Voe, as published in Platt's Oilgram Price Report, International Spot Crude Price Assessments for Brent (DTD), published daily by the Commodities Division of Standard & Poor's, expressed in average 1996 dollars, according to the US Inflation Index. In the event that Brent Blend ceases to be representative of world crude prices, the Parties shall agree on a different reference crude and on a different reference publication to replace the "Price of Brent Crude" used in this Agreement.

"Price of Brent Crude Oil" shall mean the average, over the period of time in question, of the daily arithmetic average of the high and low quotes per barrel of Dated Brent Blend, FOB Sullom Voe, as published in Platt's Oilgram Price Report, International Spot Crude Price Assessments for Brent (DTD), published daily by the Commodities Division of Standard & Poor's, expressed in average 1996 Dollars, according to the US Inflation Index. In the event that Brent Blend ceases to be representative of world crude oil prices, the Parties shall agree on a different reference crude oil and on a different reference publication to replace the "Price of Brent Crude Oil" used in this Agreement.

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Crudo Brent” utilizado en este Convenio.

“Flujo de Caja Referencial” significará, con relación a una de las Partes en cualquier Año Fiscal, el flujo de caja estimado de dicha Parte asumiendo un Precio del Crudo Brent equivalente al Precio Base, calculado de acuerdo con la fórmula establecida en los Procedimientos Contables.

“Reference Cash Flow” shall mean, with respect to one of the Parties in any Fiscal Year, such Party’s estimated cash flow assuming a Price of Brent Crude equivalent to the Base Price, calculated pursuant to the formula set forth in the Accounting Procedures.

“Threshold Cash Flow” shall be defined, in relation to one of the Parties in a given Fiscal Year, as the estimated cash flow of said Party assuming a Price of Brent Crude Oil equivalent to the Threshold Price, calculated in accordance with the formula established in the Accounting Procedures.

“Filial” significará lo siguiente: (i) con relación a Lagoven CN, Filial significará PDVSA (definida más adelante) o cualquier entidad controlada directa o indirectamente por PDVSA; (ii) con relación a MPIV, Filial significará Mobil o cualquier entidad controlada directa o indirectamente por Mobil; (iii) con relación a Veba OVO, Filial significará Veba Oel o cualquier entidad controlada directa o indirectamente por Veba Oel; y (iv) con relación a cualquier otra Persona, Filial significará cualquier entidad directa o indirectamente controlada por, que controle o que esté bajo el control común de dicha Persona (definido más adelante). Cuando se utiliza en relación con esta definición, “control” significará la propiedad de más del cincuenta por ciento del capital y los derechos de voto en una sociedad, de igual forma serán entendidos los términos “controlados por” y “que controle”. La República de Venezuela no será considerada como una Filial a los efectos de este

“Affiliate” shall mean the following: (i) with respect to Lagoven CN, Affiliate shall mean PDVSA (as defined below) or any entity directly or indirectly controlled by PDVSA; (ii) with respect to MPIV, Affiliate shall mean Mobil or any entity directly or indirectly controlled by Mobil; (iii) with respect to Veba OVO, Affiliate shall mean Veba Oel or any entity directly or indirectly controlled by Veba Oel; and (iv) with respect to any other Person, Affiliate shall mean any entity directly or indirectly controlled by, which controls or is under common control of such Person (as defined below). When used in connection with this definition, “control” shall mean the ownership of more than fifty percent of the equity interests and voting rights in a company, and “controlled by” and “which controls” shall be understood in the same manner. The Republic of Venezuela shall not be deemed to be an Affiliate for purposes of this Agreement, nor shall any other sovereign state, nor any political subdivision of

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Convenio, ni lo será ningún otro estado soberano, ni ninguna subdivisión política de la República de Venezuela, ni de cualquier otro estado soberano. the Republic of Venezuela or of any other sovereign state.

E.I.2. Article 7.2(a) - Development Production**Spanish (Original)****Claimant's Translation**

Producción de Desarrollo. (a) Las Partes serán las propietarias de la Producción de Desarrollo en la cabeza del pozo, en proporción a su Porcentaje de Participación. Las Partes tendrán derecho a tomar en especie su Porcentaje de Participación en la Producción de Desarrollo, en el entendido que Lagoven CN y MPIV celebrarán con la Asociación de Chalmette un contrato de suministro, cuyos términos de precio se acompañan como Anexo E (“Convenio de Suministro de Crudo de la Asociación”), según el cual dichas Partes venderán a la Asociación de Chalmette, en circunstancias normales, FOB terminal de exportación, substancialmente toda su cuota parte en la Producción de Desarrollo (en la forma de crudo diluido) a precios de mercado; y, en el entendido que Veba OVO celebrará un contrato de suministro con Veba Oel o una de sus Filiales (el “Convenio de Suministro de Veba”), según el cual, Veba OVO venderá al sistema de refinación de Veba Oel en Alemania, FOB terminal de exportación, substancialmente toda su cuota parte en la Producción de Desarrollo (en la forma de crudo diluido) a precios de mercado. El Convenio de Suministro de Crudo de la Asociación y el Convenio de Suministro de Veba serán en lo sucesivo denominados los “Convenios de Suministro”.

Development Production (a) The Parties shall be the owners of the Development Production at the wellhead, in accordance with their Percentage Interests. The Parties shall be entitled to take in kind its Percentage Interest of Development Production, in the understanding that Lagoven CN and MPIV shall enter into a supply agreement, the pricing terms of which are attached as Annex E, with the Chalmette Association (the “Association Oil Supply Agreement”), pursuant to which each such Party shall sell to the Chalmette Association, in normal circumstances, FOB export terminal, substantially all of such Party’s share of the Development Production (in the form of blended crude) at market prices; and in the understanding that Veba OVO shall enter into a supply agreement with Veba Oel or one of its Affiliates (the “Veba Supply Agreement”) pursuant to which Veba OVO shall sell to Veba Oel’s refinery system in Germany, FOB export terminal, substantially all of Veba OVO’s share of the Development Production (in the form of blended crude) at market prices. The Association Oil Supply Agreement and the Veba Supply Agreement shall be collectively referred to as the “Supply Agreements.”

E.I.3. Articles 8.2(a) & (b) – Commercial Production**Spanish (Original)****Claimant's Translation**

Producción Comercial. (a) Le producción Commercial Production (a) The production

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de la Producción Comercial comenzará de la Fecha de Terminación del Mejorador, de conformidad con lo previsto en el Plan de Negocios de la Fase IV.

of Commercial Production shall commence following the Upgrader Completion Date, in accordance with what is provided in the Business Plan for Phase IV.

(b) Las Partes serán las propietarias de la Producción Comercial en la cabeza del pozo, de conformidad con sus respectivos Porcentajes de Participación. Cada una de las Partes tendrá derecho a tomar en especie su Porcentaje de Participación de la Producción Comercial, en el entendido que Lagoven CN y MPIV venderán a la Asociación de Chalmette, en circunstancias normales y de conformidad con el Convenio de Suministro de Crudo de la Asociación, substancialmente toda su cuota parte del SCO resultante del mejoramiento de la Producción Comercial, a precios de mercado, FOB terminal de exportación; y, en el entendido que Veba OVO venderá a Veba Oel o una de sus filiales, de acuerdo con el Convenio de Suministro de Veba, substancialmente toda su cuota parte en el SCO resultante del mejoramiento de la Producción Comercial, a precios de mercado, FOB terminal de exportación.

(b) The Parties shall be the owners of the Commercial Production at the wellhead, in accordance with their respective Percentage Interests. Each one of the Parties shall be entitled to take in kind its Percentage Interest of Commercial Production, in the understanding that Lagoven CN and MPIV shall sell to the Chalmette Association, in normal circumstances and pursuant to the Association Oil Supply Agreement, substantially all of such Party's share of the SCO resulting from the upgrading of the Commercial Production, at market prices, FOB export terminal; and in the understanding that Veba OVO shall sell to Veba Oel or one of its affiliates, pursuant to the Veba Supply Agreement, substantially all of its [Veba OVO's] share of the SCO resulting from the upgrading of the Commercial Production, at market prices, FOB export terminal.

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E.I.4. Articles 14.1 & 14.2 – Production Curtailment**Spanish (Original)****Claimant's Translation**

14.1 Reducción. Las Partes reconocen que podrían verse obligadas a reducir la producción como resultado de medidas gubernamentales adoptadas de acuerdo con los compromisos internacionales de Venezuela. En caso de que se requiera dicha reducción, el porcentaje de reducción de las Partes no excederá del porcentaje de reducción de la producción requerido de las Empresas petroleras que operan en Venezuela como un todo, determinado sobre la base de la capacidad de producción disponible. Para este propósito, “la capacidad disponible de producción” significa la capacidad para la producción de hidrocarburos de los tipos sujetos a la reducción, en la medida en que dicha capacidad esté en ese momento en producción o cuya producción podría ser razonablemente iniciada dentro de los tres (3) meses siguientes a la fecha correspondiente. La capacidad de producción disponible de las Partes para cualquier período de tiempo correspondiente, se basará en la capacidad planificada de Producción establecida en el Plan de Negocios que cubra ese período, y será revisada en los períodos subsiguientes en base a la capacidad planificada para dichos períodos (excepto en la medida en que dicha capacidad planificada sea modificada como resultado de la reducción).

14.2 Mitigación del Efecto de la Reducción. En caso de que sea necesario para recuperar las pérdidas de una de las Partes a consecuencia de una reducción de la producción, el plazo del Convenio será extendido hasta por cinco (5) años para permitir la producción del mismo volumen que las Partes dejaron de producir como resultado de la reducción de la producción

14.1 Curtailment The Parties acknowledge that they may be required to curtail production as a result of governmental measures adopted in compliance with Venezuela's international commitments. In the event that such a curtailment is required, the percentage of curtailment of the Parties shall not exceed the percentage of curtailment of production required of oil Companies operating in Venezuela as a whole, determined on the basis of available production capacity. For this purpose, “available production capacity” means capacity for the production of hydrocarbons of the types that are subject to the curtailment, to the extent such capacity is in production at that time or which production may reasonably be commenced within the three (3) months following the corresponding date. The available production capacity of the Parties for any corresponding time period shall be based on the planned Production capacity set forth in the Business Plan covering such period, and shall be revised in subsequent periods based on the planned capacity for such periods (except to the extent that such planned capacity is modified as a result of the curtailment).

14.2 Mitigation of Effect of Curtailment. In the event necessary to recoup the losses of a Party resulting from a production curtailment, the term of the Agreement shall be extended by up to five (5) years to allow production of the same volume that the Parties failed to produce as a result of the production curtailment.

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E.I.5. Article 15.1.– Consequences of Governmental Actions

Spanish (Original)	Claimant's Translation	Respondents' Translation
<p><u>General.</u></p> <p>(a) En caso de que una de las Partes Extranjeras determine que se ha producido una Medida Discriminatoria que pueda resultar en un Impacto Substancialmente Adverso, dicha Parte Extranjera inmediatamente notificará a Lagoven CN sobre la Medida Discriminatoria. Adicionalmente, en caso de que dicha Parte Extranjera determine que realmente ha sufrido un Impacto Substancialmente Adverso como resultado de las Medidas Discriminatorias de la cual previamente ha notificado a Lagoven CN, inmediatamente notificará dicha determinación a Lagoven CN (la "Notificación de Medida Discriminatoria"). En la medida en que se disponga de cualquier recurso legal para revertir u obtener una reparación de dicha Medida Discriminatoria, la Parte Extranjera iniciará y ejercerá acciones legales para mitigar cualquier daño sufrido como resultado de la Medida Discriminatoria. Si Lagoven CN está de acuerdo en que se ha producido la Medida Discriminatoria y que ha resultado en un Impacto Substancialmente Adverso, Lagoven CN colaborará con la Parte Extranjera en el ejercicio de las antes mencionadas acciones legales y las Partes negociarán de buena fe los</p>	<p><u>General.</u></p> <p>(a) In the event that one of the Foreign Parties determines that a Discriminatory Measure has occurred which may result in a Materially Adverse Impact, such Foreign Party shall immediately provide notice of the Discriminatory Measure to Lagoven CN. Further, in the event that such Foreign Party determines that it has actually suffered a Materially Adverse Impact as a result of the Discriminatory Measures of which it has previously notified Lagoven CN, it shall immediately give notice of such determination to Lagoven CN (a "Notice of Discriminatory Measure"). To the extent any legal recourse is available to reverse or obtain relief from such Discriminatory Measure, the Foreign Party shall commence and pursue legal actions to mitigate any damages suffered as a result of the Discriminatory Measure. If Lagoven CN concurs that the Discriminatory Measure has occurred and has resulted in a Materially Adverse Impact, Lagoven CN shall cooperate with the Foreign Party in the pursuit of the aforesaid legal actions and the Parties shall negotiate in good faith the compensatory damages and/or possible modifications to the</p>	<p><u>General.</u></p> <p>(a) In the event that one of the Foreign Parties determines that a Discriminatory Measure which may lead to a Material Adverse Impact has occurred, such Foreign Party shall immediately provide notice of the Discriminatory Measure to Lagoven CN. In addition, in the event that such Foreign Party determines that it has actually suffered a Material Adverse Impact as a result of Discriminatory Measures for which notice has previously been provided to Lagoven CN, it shall immediately give notice of such determination to Lagoven CN (the "Notice of Discriminatory Measure"). To the extent any legal remedy is available to reverse or obtain relief from such Discriminatory Measure, the Foreign Party shall commence and pursue legal actions to mitigate any damages suffered as a result of the Discriminatory Measure. If Lagoven CN concurs that a Discriminatory Measure has occurred and has resulted in a Material Adverse Impact, Lagoven CN shall cooperate with the Foreign Party in pursuing the aforesaid legal actions and the Parties shall negotiate in good faith compensatory damages and/or possible modifications to the Agreement in order to</p>

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daños compensatorios y/o posibles modificaciones al Convenio a fin de restablecer el beneficio económico que la Parte Extranjera hubiera recibido si no se hubiera producido la Medida Discriminatoria. Cualesquiera beneficios netos recibidos por la Parte Extranjera como resultado del ejercicio de las acciones legales antes mencionadas (después de la deducción de los costos legales incurridos por la Parte Extranjera en relación con las mismas) serán (i) imputados a cualquier monto que finalmente se determine que Lagoven CN adeuda de acuerdo con esta Cláusula o (ii) reembolsado a Lagoven CN si Lagoven CN ha hecho pagos previamente a la Parte Extranjera con relación a la Medida Discriminatoria en cuestión.

Agreement in order to restore the economic benefit that the Foreign Party would have received had the Discriminatory Measure not occurred. Any net benefits received by the Foreign Party as a result of the pursuit of the aforesaid legal actions (after deduction of the legal costs incurred by the Foreign Party in connection therewith) shall be (i) applied against any amount ultimately determined to be owed by Lagoven CN pursuant to this Clause or (ii) reimbursed to Lagoven CN if Lagoven CN has previously made payments to the Foreign Party with respect to the Discriminatory Measure in question.

restore the economic benefit that the Foreign Party would have received had the Discriminatory Measure not occurred. Any net proceeds received by the Foreign Party as a result of the pursuit of the aforesaid legal actions (after deduction of the legal costs incurred by the Foreign Party in connection therewith) shall be (i) applied against any amount ultimately determined to be owed by Lagoven CN pursuant to this Article or (ii) reimbursed to Lagoven CN if Lagoven CN previously has made payments to the Foreign Party with respect to the Discriminatory Measure in question.

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(b) Si Lagoven CN, dentro de los 90 días siguientes al recibo de la Notificación de la Medida Discriminatoria, no notifica a la Parte Extranjera sobre su concurrencia en que se han producido Medidas Discriminatorias que han resultado en un Impacto Substancial Adverso, cualquiera de las Partes podrá iniciar procedimientos de arbitraje de acuerdo con la Sección 18.2. Sin embargo, en ningún caso podrá una de las Partes iniciar procedimientos de arbitraje más de una vez por año calendario. El ámbito de los procedimientos de arbitraje incluirá: (i) una determinación de si una o más Medidas Discriminatorias se han producido y, si ese es el caso, si dichas medidas han tenido un Impacto Substancialmente Adversos sobre la Parte Extranjera; y (ii) en caso de una respuesta afirmativa a las dos interrogantes planteadas en el punto (i) de este literal, una indemnización por daños para compensar a la Parte Extranjera por las consecuencias económicas de la Medida Discriminatoria sufrida por ella hasta la fecha y recomendaciones sobre enmiendas al Convenio que restablecerían el beneficio económico que la Parte Extranjera hubiera recibido si no se hubiera producido la Medida Discriminatoria.

(c) En caso de que la Medida Discriminatoria por la cual Lagoven CN está pagando una compensación a la Parte Extranjera, o en respuesta a la cual el

(b) If, within the ninety (90) days following the receipt of the Notice of Discriminatory Measure, Lagoven CN does not give the Foreign Party notice of its concurrence that Discriminatory Measures resulting in a Material Adverse Impact have occurred, any Party may commence arbitration proceedings in accordance with Section 18.2. In no event, however, may any one of the Parties initiate arbitration proceedings more than once per calendar year. The scope of the arbitration proceedings shall include: (i) a determination of whether one or more Discriminatory Measures have occurred and, if so, whether such measures have had a Materially Adverse Impact on the Foreign Party; and (ii) in the event of an affirmative answer to the two questions specified in clause (i) of this paragraph, an award for damages to compensate the Foreign Party for the economic consequences of the Discriminatory Measure suffered by it to date and recommendations on amendments to the Agreement that would restore the economic benefit that the Foreign Party would have received had the Discriminatory Measure not occurred.

(c) In the event that the Discriminatory Measure for which Lagoven CN is paying compensation to the Foreign Party, or in response to which the

(b) If Lagoven CN does not, within 90 days of receiving a Notice of Discriminatory Measure, give the Foreign Party notice of its concurrence that Discriminatory Measures resulting in a Material Adverse Impact have occurred, any Party may commence arbitration proceedings in accordance with Section 18.2. In no event, however, may any Party initiate arbitration proceedings more than once per calendar year. The scope of the arbitration proceedings shall include: (i) a determination of whether one or more Discriminatory Measures have occurred and, if that is the case, whether such measures have had a Material Adverse Impact on the Foreign Party; and (ii) in the event of an affirmative response to the two questions specified in clause (i) of this paragraph, a payment for damages to compensate the Foreign Party for the economic consequences of the Discriminatory Measure suffered by it to date and recommendations on amendments to the Agreement that would restore the economic benefit that the Foreign Party would have received if the Discriminatory Measure had not occurred.

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<p>Convenio ha sido modificado, se revierte o deja de surtir efectos, la obligación de Lagoven CN de pagar la compensación, o la modificación hecha al Convenio, igualmente dejará de surtir efecto; siempre y cuando la Parte Extranjera haya sido compensada por los daños sufridos anteriormente como resultado de dicha Medida Discriminatoria. En caso de que Lagoven CN haya pagado a la Parte Extranjera con relación a la Medida Discriminatoria que es revertida o que deja de surtir efecto, por encima de los daños realmente sufridos como resultado de dicha Medida Discriminatoria, la Parte Extranjera inmediatamente reembolsará a Lagoven CN por el monto de dicho exceso.</p>	<p>Agreement has been modified, is reversed or ceases to be in effect, the obligation of Lagoven CN to pay the compensation, or the modification made to the Agreement, shall equally cease to be in effect; provided that the Foreign Party has been compensated for the damages previously suffered as a result of such Discriminatory Measure. In the event that Lagoven CN has paid to the Foreign Party with respect to the Discriminatory Measure that is reversed or that ceases to be in effect, in excess of the damages actually suffered as a result of such Discriminatory Measure, the Foreign Party shall immediately reimburse Lagoven CN for the amount of such excess.</p>
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E.I.6. Article 15.2– Limitation on Lagoven CN’s Obligations

Spanish (Original)	Claimant’s Translation	Respondents’ Translation
<p><u>Limitación de la Obligación de Lagoven CN.</u></p> <p>(a) No obstante lo anterior, después del primer período de seis (6) meses consecutivos durante el cual el Precio del Crudo Brent sobrepase el Precio Base, Lagoven CN no tendrá la obligación de compensar a ninguna Parte Extranjera por Medidas Discriminatorias en relación a cualquier Año Fiscal en que el promedio del Precio del Crudo Brent</p>	<p><u>Limitation on Lagoven CN’s Obligation.</u></p> <p>(a) Notwithstanding the foregoing, after the first period of six (6) consecutive months during which the Price of Brent Crude exceeds the Base Price, Lagoven CN shall not have the obligation to compensate any Foreign Party for Discriminatory Measures with respect to any Fiscal Year in which the average Price of Brent Crude</p>	<p><u>Limitation on Lagoven CN’s Obligation.</u></p> <p>(a) Notwithstanding the foregoing, after the first period of six (6) consecutive months during which the Price of Brent Crude Oil is in excess of the Threshold Price, Lagoven CN will not be required to compensate any Foreign Party for Discriminatory Measures with respect to any Fiscal Year in which the average Price of Brent Crude Oil is</p>

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sobrepase el Precio Base, y dicha Parte Extranjera reciba un Flujo de Caja Neto, después de tomar en cuenta el efecto de la Medida Discriminatoria, cónsono con un precio de referencia por la Producción producida por las Partes que por lo menos guarde una relación razonable, ajustada en cuanto a las diferencias de calidad y transporte, al Flujo de Caja Referencial para ese Año Fiscal.

exceeds the Base Price, and such Foreign Party receives a Net Cash Flow, after taking into account the effect of the Discriminatory Measure, commensurate with a reference price for the Production produced by the Parties which bears at least a reasonable relationship, adjusted for quality and transportation differences, to the Reference Cash Flow for such Fiscal Year.

in excess of the Threshold Price, and such Foreign Party receives a Net Cash Flow, after taking into account the effect of the Discriminatory Measure, commensurate with a reference price for the Production produced by the Parties that bears at least a reasonable relationship, adjusted for quality and transportation differences, to the Threshold Cash Flow for such Fiscal Year.

(b) En todo caso, Lagoven CN no tendrá obligación de compensar a una Parte Extranjera por daños sufridos, o de convenir en modificaciones al Convenio, como resultado de cualquier Medida Discriminatoria que se produzca después de que el Estado Venezolano reduzca su interés directo o indirecto a (i) menos del 12,5% en el Proyecto o (ii) menos del 49,9% de Lagoven o cualquier otra Empresa petrolera operadora subsidiaria de PDVSA a la cual hayan sido transferidas las acciones de Lagoven CN o sus intereses en el Proyecto.

(b) In any event, Lagoven CN shall have no obligation to compensate a Foreign Party for damages suffered, or to agree to amendments to the Agreement, as a result of any Discriminatory Measure occurring after the Venezuelan State reduces its direct or indirect interest to (i) less than 12.5% in the Project or (ii) less than 49.9% of Lagoven or any other operating oil Company subsidiary of PDVSA to which the shares of Lagoven CN or its interests in the Project may have been transferred.

[No translation provided]

(c) En caso de que la Medida Discriminatoria por la cual Lagoven CN está pagando una compensación a la Parte Extranjera, o en respuesta a la cual el Convenio ha sido modificado, se revierte o deja de surtir efectos, la obligación de Lagoven CN de pagar la compensación, o la modificación hecha al Convenio, igualmente dejará de surtir efecto; siempre y cuando la Parte Extranjera haya sido compensada por los daños sufridos

(c) In the event that the Discriminatory Measure for which Lagoven CN is paying compensation to the Foreign Party, or in response to which the Agreement has been modified, is reversed or ceases to be in effect, the obligation of Lagoven CN to pay the compensation, or the modification made to the Agreement, shall equally cease to be in effect; provided that the Foreign Party has been compensated for the damages previously

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anteriormente como resultado de dicha Medida Discriminatoria. En caso de que Lagoven CN haya pagado a la Parte Extranjera con relación a la Medida Discriminatoria que es revertida o que deja de surtir efecto, por encima de los daños realmente sufridos como resultado de dicha Medida Discriminatoria, la Parte Extranjera inmediatamente reembolsará a Lagoven CN por el monto de dicho exceso.

suffered as a result of such Discriminatory Measure. In the event that Lagoven CN has paid to the Foreign Party with respect to the Discriminatory Measure that is reversed or that ceases to be in effect, in excess of the damages actually suffered as a result of such Discriminatory Measure, the Foreign Party shall immediately reimburse Lagoven CN for the amount of such excess.

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E.I.7. Articles 16.1(a) & (b) - Termination**Spanish (Original)****Claimant's Translation**

Terminación. (a) A menos que sean terminados con anterioridad de acuerdo con las Secciones 3.1, 5.2, 6.2, 12.5 o esta Sección 16.1(a), todos los derechos y obligaciones de las Partes bajo este Convenio terminarán en el trigésimo quinto (35) aniversario de la Fecha de Inicio; en el entendido que el plazo de este Convenio puede ser extendido hasta por cinco (5) años de acuerdo con la Sección 14.2; y entendido además que, en caso de un cambio en la ley venezolana que permita que este Convenio tenga un plazo indefinido, el plazo del Convenio será automáticamente extendido hasta el agotamiento del Area Designada. Este Convenio también podrá ser terminado en cualquier momento mediante el mutuo consentimiento de las Partes (la fecha en la cual este Convenio termina de acuerdo con las Secciones 3.1, 5.2, 6.2, 12.5 o esta Sección 16.1(a), la "Fecha de Terminación").

(b) Los derechos y obligaciones de las Partes en relación con cualquier anticipo de acuerdo con la Cláusula XII, los pagos de acuerdo con la Cláusula XV, las indemnizaciones de acuerdo con la Sección 12.6 y 17.2, los pasivos contingentes que no se hayan arreglado de acuerdo con la Sección 16.4, el abandono de los pozos de acuerdo con la Sección 16.6, la Información del Proyecto de acuerdo con la Sección 19.1 y las obligaciones de confidencialidad de acuerdo con las Secciones 5.2, 6.2 y la Cláusula XX, sobrevivirán a la terminación de este Convenio.

(C-87; R-112)

Termination Unless terminated earlier pursuant to Sections 3.1, 5.2, 6.2, 12.5 or this Section 16.1(a), all rights and obligations of the Parties under this Agreement shall terminate on the thirty-fifth (35th) anniversary of the Commencement Date; in the understanding that the term of this Agreement may be extended for up to five (5) years in accordance with Section 14.2; and in the further understanding that, in the event of a change in Venezuelan law permitting this Agreement to have an indefinite term, the term of the Agreement shall automatically be extended until the depletion of the Designated Area. This Agreement may also be terminated at any time by the mutual consent of the Parties (the date upon which this Agreement terminates in accordance with Sections 3.1, 5.2, 6.2, 12.5 or this Section 16.1(a), the "Termination Date").

(b) The rights and obligations of the Parties in respect of any advance under Clause XII, payments under Clause XV, indemnities under Sections 12.6 and 17.2, contingent liabilities not settled pursuant to Section 16.4, the abandonment of wells pursuant to Section 16.6, Project Information under Section 19.1, and confidentiality obligations pursuant to Sections 5.2, 6.2 and Clause XX, shall survive the termination of this Agreement.

(C-87)

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E.I.8. Article 17.2 - Indemnification**Spanish (Original)****Respondents' Translation**

Artículo 17.2(c)

Article 17.2(c)

Inmediatamente después del recibo por una Parte Indemnizada de la notificación del inicio de cualquier acción por la cual la Parte Indemnizada pueda tener derecho a indemnización de acuerdo con esta Sección 17.2, dicha Parte Indemnizada notificará a la Parte que Indemniza por escrito del inicio de la misma; en el entendido que omitir dicha notificación (i) no relevará a la Parte que Indemniza de responsabilidad bajo esta Sección 17.2 a menos que no haya tenido conocimiento de la acción por ningún otro medio y la falta de notificación resulte en pérdida de derechos y defensas substanciales de la Parte que Indemniza.

Immediately after the receipt by an Indemnified Party of notice of the commencement of any action for which the Indemnified Party may be entitled to indemnification pursuant to this Section 17.2, such Indemnified Party shall notify the Indemnifying Party in writing of the commencement thereof; provided that the failure to so notify [the Indemnifying Party] (i) shall not relieve the Indemnifying Party from liability under this Section 17.2 unless it did not otherwise learn of such action and such failure results in the forfeiture of substantial rights and defenses of the Indemnifying Party.

E.I.9. Articles 18.1, 18.2, & 18.4 – Governing Law; Arbitration; Sovereign Rights**Spanish (Original)****Claimant's Translation****Respondents' Translation**18.1 Ley Aplicable.18.1 Governing Law.18.1 Applicable Law.

Este Convenio se regirá e interpretará de acuerdo con las leyes de la República de Venezuela.

This Agreement shall be governed by and interpreted in accordance with the laws of the Republic of Venezuela.

This Agreement shall be governed by and interpreted in accordance with the laws of the Republic of Venezuela.

18.2 Arbitraje.18.2 Arbitration.**[No Translation Provided]**

Cualquier disputa que surja o se relacione con este Convenio será dirimida exclusiva y definitivamente mediante arbitraje. El arbitraje será realizado por tres (3) árbitros (salvo lo que se establece más adelante) de acuerdo con las Reglas de Conciliación y

Any dispute arising out of or concerning this Agreement shall be settled exclusively and finally by arbitration. The arbitration shall be conducted by three (3) arbitrators (except as established below) in accordance with the Rules of Conciliation and

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Arbitraje de la Cámara Internacional de Comercio (las "Reglas ICC"), o cualesquiera otras normas que sean acordadas por todas las Partes en la correspondiente disputa. Si la controversia se plantea entre dos Partes, o si todas las Partes en conflicto convienen en ser agrupadas en dos grupos basándose en una posición e interés común en la controversia, cada una de las Partes o grupos, según sea el caso, seleccionará a un árbitro de acuerdo con las Reglas ICC. Los árbitros así nombrados acordarán en treinta (30) días sobre el nombramiento de un tercer árbitro que servirá de Presidente. Si hay más de dos partes involucradas en la controversia y éstas no pueden acordar rápidamente en ser agrupados en dos grupos, entonces los tres árbitros, incluyendo al Presidente, serán designados por la Corte Internacional de Arbitraje de la Cámara Internacional de Comercio de acuerdo con las Reglas ICC, como si las partes no hubieran nombrado árbitros. No obstante, las controversias sometidas a arbitraje con relación a las Secciones 12.1(a) o 16.3, serán dirimidas por un solo árbitro seleccionado de acuerdo con las Reglas ICC. A menos que todas las partes en el arbitraje convengan lo contrario, todos los procedimientos de arbitraje según este Convenio serán realizados en la Ciudad de Nueva York (Estados Unidos de América). Cualquier decisión del tribunal de arbitraje (o del árbitro único) será firme y obligatoria para las partes en

Arbitration of the International Chamber of Commerce (the "ICC Rules"), or such other rules as may be agreed by all of the Parties to the corresponding dispute. If there are two Parties to the dispute, or if all Parties to the dispute agree to be grouped together into two groups on the basis of a common interest and position in the dispute, then each one of the Parties or groups, as the case may be, shall select an arbitrator in accordance with the ICC Rules. The arbitrators so nominated shall then agree within thirty (30) days on the nomination of a third arbitrator to serve as Chairman. If there are more than two parties to the dispute and they do not promptly agree to be grouped together into two groups, then all three arbitrators, including the Chairman, shall be selected by the International Court of Arbitration of the International Chamber of Commerce in accordance with the ICC Rules, as if the parties had failed to nominate arbitrators. Notwithstanding the foregoing, disputes submitted to arbitration related to Sections 12.1(a) or 16.3 shall be resolved by a single arbitrator selected in accordance with the ICC Rules. Unless all parties to the arbitration agree to the contrary, all arbitration proceedings under this Agreement shall be conducted in New York City (United States of America). Any decision of the arbitral tribunal (or the sole arbitrator) shall be final and binding upon the parties to the arbitration. Judgment

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<p>el arbitraje. La ejecución de cualquier decisión dictada por el tribunal de arbitraje (o del árbitro único) será acordada por cualquier tribunal competente sin revisión del fondo de la controversia.</p>	<p>for execution of any award rendered by the arbitral tribunal (or the sole arbitrator) shall be entered by any court of competent jurisdiction without review of the merits of the dispute.</p>
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18.4 Derechos Soberanos.

18.4 Sovereign Rights.

18.4 Sovereign Rights.

Este Convenio, así como las actividades y operaciones contempladas en el mismo, en ningún caso impondrán obligaciones a la República de Venezuela o limitarán el ejercicio de sus potestades soberanas.

This Agreement, as well as the activities and operations contemplated herein, shall in no event impose obligations on the Republic of Venezuela or limit the exercise of its sovereign powers.

This Agreement, as well as the activities and operations contemplated hereby, shall in no event impose any obligations on the Republic of Venezuela or limit the exercise of its sovereign powers.

E.I.10. Articles 21.1(a) & (b) – *Force Majeure*

Spanish (Original)

Claimant’s Translation

Respondents’ Translation

21.1 Causa Extraña no imputable; Definición.

21.1 Non-imputable Extraneous Cause; Definition

Force Majeure

(a) No se considerará que hay incumplimiento de alguna de las Partes a los efectos de este Convenio, cuando dicho incumplimiento sea causado por un Hecho de Fuerza Mayor.

(a) There shall not be considered to be a breach by any of the Parties for purposes of this Agreement, when such breach is caused by an Event of Force Majeure.

[No Translation Provided]

(b) A los efectos de este Convenio, un “Hecho de Fuerza Mayor” significará cualquier hecho o circunstancia, distinta de la falta de fondos, más allá del control razonable o

(b) For the purposes of this Agreement, an “Event of Force Majeure” shall mean any event or circumstance, other than lack of funds, beyond the reasonable control of, or unforeseen by,

(b) For the purposes of this Agreement, an “Event of Force Majeure” shall mean any event or circumstance, other than the lack of funds, beyond the reasonable control of, or unforeseen by,

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imprevista para la Parte obligada a cumplir con la obligación correspondiente, o que, si siendo previsible, no pudo ser evitada en todo o en parte ejerciendo la debida diligencia, incluyendo, a título enunciativo, huelgas, boicots, lockouts y otras dificultades laborales, incendios, terremotos, temblores, deslizamientos de tierra, avalanchas, inundaciones, huracanes, tornados, tormentas, u otros fenómenos o calamidades naturales, explosiones, epidemias, guerras (declaradas o no), hostilidades, actividades de guerrilla, actos de terrorismo, disturbios, insurrecciones, alteraciones civiles, actos de sabotaje, bloqueos, embargos, o actos de gobierno u órdenes, sentencias, resoluciones, decisiones u otras acciones u omisiones de cualquier autoridad gubernamental, civil o militar.

the Party obligated to perform the corresponding obligation, or which, being foreseeable, could not be avoided in whole or in part by the exercise of due diligence, including, but not limited to, strikes, boycotts, lockouts and other labor difficulties, fires, earthquakes, tremors, landslides, avalanches, floods, hurricanes, tornadoes, storms, or other natural phenomena or calamities, explosions, epidemics, wars (declared or not), hostilities, guerrilla activities, terrorist acts, riots, insurrections, civil disturbances, acts of sabotage, blockades, embargoes, or acts of the government or orders, judgments, resolutions, decisions or other acts or omissions of any governmental authority, civil or military.

the Party obligated to perform the relevant obligation, or that, if foreseeable, could not be avoided in whole or in part by the exercise of due diligence, including, but not limited to, strikes, boycotts, lockouts and other labor difficulties, fires, earthquakes, tremors, landslides, avalanches, floods, hurricanes, tornadoes, storms, and other natural phenomena or calamities, explosions, epidemics, wars (declared or not), hostilities, guerrilla activities, terrorist acts, riots, insurrections, civil disturbances, acts of sabotage, blockades, embargoes, or acts of government or orders, judgments, resolutions, decisions or other acts or omissions, of any governmental authority, civil or Military.

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E.I.11. Article 21.2 – Notice; Duty to Mitigate**Spanish (Original)****Claimant's Translation**Notificación; Deber de Mitigar.Notice; Duty to Mitigate

(a) Si una de las Partes no puede cumplir con alguna obligación asumida de acuerdo con este Convenio, debido a un Hecho de Fuerza Mayor, dicha Parte notificará a las otras Partes por escrito lo más pronto posible informando los motivos del incumplimiento, detalles sobre el Hecho de Fuerza Mayor y la obligación afectada por el mismo. Cualquier obligación de las Partes será temporalmente suspendida durante el período en el cual dicha Parte no pueda cumplir por motivos de Fuerza Mayor, pero solo en la medida de dicha imposibilidad para cumplir. Las Partes continuarán obligadas a cumplir con aquellas obligaciones bajo este contrato que puedan ser cumplidas a través de instalaciones que no hayan sido afectadas por el Hecho de Fuerza Mayor. La Parte afectada por el Hecho de Fuerza Mayor inmediatamente notificará a las otras Partes tan pronto como dicho hecho haya cesado y ya no le impida cumplir con sus obligaciones, e inmediatamente después reanudará el cumplimiento de las obligaciones derivadas de este Convenio.

(a) If one of the Parties cannot comply with any obligation assumed in accordance with this Agreement because of an Event of Force Majeure, such Party shall notify the other Parties in writing as soon as possible giving the reasons for non-compliance, particulars of the Event of Force Majeure and the obligation affected thereby. Any obligation of the Parties shall be temporarily suspended during the period in which such Party is unable to perform by reason of Force Majeure, but only to the extent of such inability to perform. The Parties shall continue to be obliged to perform such obligations under this agreement which can be fulfilled through facilities that have not been affected by the Event of Force Majeure. The Party affected by the Event of Force Majeure shall immediately notify the other Parties as soon as such event has ceased and no longer prevents it from performing its obligations, and shall immediately thereafter resume performance with the obligations derived from this Agreement.

(b) La Parte afectada por un Hecho de Fuerza Mayor se esforzará por mitigar los efectos del Hecho de Fuerza Mayor en el cumplimiento de sus obligaciones. Cuando un Hecho de Fuerza Mayor continúe por más de sesenta (60) días, las Partes se reunirán para revisar la situación y sus implicaciones para el Proyecto y discutirán las acciones a tomar ante esas circunstancias.

(b) The Party affected by an Event of Force Majeure shall endeavor to mitigate the effects of the Event of Force Majeure on the performance of its obligations. When an Event of Force Majeure continues for more than sixty (60) days, the Parties shall meet to review the situation and its implications for the Project and shall discuss the course of action to be taken in those circumstances.

E.1.12. Article 23.2 – Integrity of the Agreement**Spanish (Original)**

Integridad del Convenio. Este Convenio (incluyendo los Anexos y Programas que forman parte de este Convenio) establece todo el acuerdo entre las Partes en cuanto a las materias cubiertas en el mismo y reemplaza cualquier entendimiento, convenio o declaración (oral o escrita) anterior, incluyendo, a título enunciativo, la Carta de Intención de fecha del 20 de diciembre de 1994 entre Lagoven y Mobil Oil Corporation y sus modificaciones, y el Memorandum de Entendimiento entre Lagoven, Mobil Oil Corporation, MPIV y Veba Oel, con fecha efectiva del 1 de enero de 1997.

Claimant's Translation

Integrity of the Agreement. This Agreement (including the Annexes and Schedules which are part of this Agreement) sets forth the entire agreement among the Parties as to matters covered herein and supersedes any prior understanding, agreement or statement (written or oral), including, without limitation, the Letter of Intent dated 20 December 1994 between Lagoven and Mobil Oil Corporation, and its amendments, and the Memorandum of Understanding among Lagoven, Mobil Oil Corporation, MPIV and Veba Oel, with effective date of 1 January 1997[.]

E.I.13. Article 23.4(a) – Waiver and Amendments**Spanish (Original)**

Renuncia y Enmiendas. (a) Para la validez de la renuncia de una de las Partes de cualquiera de sus derechos bajo este Convenio, se requerirá que la misma sea hecha por escrito y firmada por un funcionario autorizado. La renuncia de derechos se considerará limitada únicamente al asunto específico descrito en dicho escrito y de ninguna manera disminuirá los derechos de la Parte renunciante en cualquier otro asunto.

Claimant's Translation

Waiver and Amendments (a) For the validity of the waiver by a Party of any of its rights under this Agreement, it shall be required that such waiver be made in writing and be signed by an authorized officer. The waiver of rights shall be deemed limited only to the specific matter described in such writing and shall in no way impair the rights of the waiving Party in any other matter.).

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E.I.14. Article 23.7(a) – Official Language

Spanish (Original)

23.7 Idioma Oficial. Este Convenio se celebra en tres ejemplares originales en el idioma castellano.

Claimant's Translation

23.7 Official Language. This Agreement is being executed in three originals in the Spanish language.

E.1.15. Article 23.9 – Contracts Outside the Scope of This Agreement

Spanish (Original)

Artículo 23.9

Contratos fuera del Alcance de Este Convenio. Cualquier convenio celebrado por cualquiera de las Partes que viole alguna disposición de este Convenio o que esté fuera del alcance de este Convenio, no será oponible a las demás Partes, el Operador o cualquier Ente de la Asociación. Solamente la Parte que celebra dicho convenio estará sujeta a cualquier responsabilidad que surja del mismo. Cada una de las Partes será responsable por su propio financiamiento y ninguna de las Partes incurrirá en responsabilidad por la deuda, intereses u honorarios que surjan de cualquier financiamiento obtenido por las demás Partes (o por sus Filiales) en relación con el Proyecto; en el entendido que ninguna de las Partes estará obligada a participar en financiamientos disponibles para las otras Partes.

Claimant's Translation

Article. 23.9

Contracts Outside the Scope of this Agreement. Any agreement entered into by any of the Parties which violates any provision of this Agreement or is outside the scope of this Agreement shall not be binding on the other Parties, the Operator or any Association Entity. Only the Party entering into such agreement shall be subject to any liability that might arise therefrom. Each one of the Parties shall be liable for its own financing and none of the Parties shall incur liability for the debt, interest or fees arising from any financing obtained by the other Parties (or their Affiliates) in connection with the Project; it being understood that none of the Parties shall be obligated to participate in financings available to the other Parties.

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E.I.16. Article 23.11 – No Governmental Guaranties**Spanish (Original)**

Ausencia de Garantías Gubernamentales. Las Partes reconocen que las obligaciones asumidas por cada una de ellas a los fines de este Convenio, con respecto al financiamiento, desarrollo y operación del Proyecto no han sido ni serán garantizadas por la República de Venezuela

Claimant's Translation

Absence of Government Guaranties. The Parties acknowledge that the obligations undertaken by each one of them pursuant to this Agreement in connection with the financing, development and operation of the Project have not been and shall not be guaranteed by the Republic of Venezuela.

E.II. Annex G, Accounting Procedures

72. The principal relevant provisions of the Annex G Accounting Procedures are found at C-87 and R-127. As in the previous section, charts presenting the Spanish original and the Claimant's and Respondents' translations, where available, are provided below, without making any judgment as to the validity of either Party's translations.

E.II.1 Article 1.1, Purposes**Spanish (Original)**

Propósitos. Los propósitos de estos Procedimientos Contables son establecer los principios de contabilidad para llevar los registros, relativos al Proyecto, necesarios para (i) reflejar de una forma consistente los costos reales de las actividades verticalmente integradas de explotación, producción, transporte y mejoramiento del Petróleo Extrapesado obtenido del Area Designada y comercialización del Petróleo Extra-pesado mezclado y mejorado (el "Proyecto"), (ii) facilitar el pago de las Regalías, (iii) permitir a las Partes y al Operador cumplir con sus otras obligaciones y responsabilidades en virtud del Convenio y del Convenio de Operaciones, y (iv) proveer los mecanismos de generación de toda la información requerida para permitir a las Partes cumplir con sus obligaciones legales en Venezuela y de cualquier otra

Claimant's Translation

Purposes. The purposes of these Accounting Procedures are to establish the accounting principles for record keeping, relating to the Project, necessary to (i) reflect in a consistent manner the actual costs of the vertically integrated activities of exploitation, production, transportation and upgrading of the EHO obtained from the Designated Area and commercialization of the blended and upgraded EHO (the "Project"), (ii) facilitate the payment of the Royalties, (iii) permit the Parties and the Operator to comply with their other obligations and responsibilities pursuant to the Agreement and the Operating Agreement, and (iv) provide the mechanisms of generation of all the information required to allow the Parties to comply with their legal obligations in Venezuela and of any other information

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información requerida por la Junta. required by the Board.

La intención y propósito de estos Procedimientos Contables es que ninguna Parte se beneficie con ganancias o sufra pérdidas con respecto a las otras Partes únicamente como resultado de la aplicación de estos Procedimientos Contables. The intent and purpose of these Accounting Procedures is that no Party benefits with profits or suffers losses with respect to the other Parties solely as a result of the application of these Accounting Procedures.

E.II.2. Article 7.1, Net Cash Flow

Spanish (Original)	Claimant's Translation	Respondents' Translation
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Fórmula de Flujo de Caixa Neto.	Net Cash Flow Formula.	Net Cash Flow Formula.
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El Flujo de Caja Neto de una Parte para un Ejercicio Económico dado (según se mida con base en las Cuentas en Dólares) será determinado de la siguiente forma:	The Net Cash Flow of a Party for a given Fiscal Year (as measured based on the Dollar Accounts) shall be determined as follows:	A Party's Net Cash Flow for a given Fiscal Year (as measured based on the Dollar Accounts) shall be determined as follows:
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R - ROY - CEX - IT	R - ROY - CEX - IT	R - ROY - CEX - IT
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Donde:	Where:	Where:
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R = total de levantamientos durante tal Ejercicio Económico multiplicado por la Fórmula de Precio aplicable a tal Producción, más los Ingresos Conjuntos recibidos durante tal Ejercicio Económico	R = total liftings during such Fiscal Year multiplied by the Price Formula applicable to such Production, plus Joint Revenues received during such Fiscal Year	R = total lifting during such Fiscal Year, multiplied by the Formula Price applicable to such Production, plus Joint Revenues received during such Fiscal Year
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ROY = la Regalía real pagada por una Parte o en nombre y por cuenta de ésta durante tal Ejercicio Económico	ROY = the actual Royalty paid by a Party or on behalf of and for the account of such Party during such Fiscal Year	ROY = the actual Royalty paid by a Party or on its behalf and for its account during such Fiscal Year
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CEX = la porción proporcional de Gastos Imputables reales de la Parte	CEX = the Party's pro rata share of actual Chargeable Expenditures for such	CEX = the Party's pro rata share of actual Chargeable Expenditures for such Fiscal
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para tal Ejercicio Económico.	Fiscal Year	Year
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IT = la porción proporcional de la Parte de Impuestos sobre la Renta pagados con respecto a tal Ejercicio Económico	IT = the Party's pro rata share of Income Taxes paid with respect to such Fiscal Year	IT = the Party's pro rata share of Income Taxes paid with respect to such Fiscal Year.
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E.II.3. Article 7.2, Adjusted Net Cash Flow

Spanish (Original)	Claimant's Translation	Respondents' Translation
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Flujo de Caia Neto Ajustado.	Adjusted Net Cash Flow.	Adjusted Net Cash Flow.
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El Flujo de Caja Neto Ajustado de una Parte para un Ejercicio Económico dado (según se mida con base en las Cuentas en Dólares) será igual al Flujo de Caja Neto para una Parte para tal Ejercicio Económico, calculado sobre la base de la Fórmula de Precio ajustada aplicable, la cual será igual a la Fórmula de Precio para tal Producción inicial, con los ajustes por diferenciales por transporte y calidad según se compare con el Crudo Brent.	The Adjusted Net Cash Flow of a Party for a given Fiscal Year (as measured based on the Dollar Accounts) shall be equal to the Net Cash Flow for a Party for such Fiscal Year, calculated on the basis of the applicable adjusted Price Formula, which shall be equal to the Price Formula for such initial Production, adjusted for transportation and quality differentials as compared to Brent Crude.	The Adjusted Net Cash Flow of a Party for a given Fiscal Year (as measured based on the Dollar Accounts) shall be equal to the Party's Net Cash Flow for such Fiscal Year, calculated on the basis of the applicable adjusted Formula Price, which shall be equal to the Formula Price for such initial Production, adjusted for transportation and quality differentials as compared to Brent Crude Oil.
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E.II.4. Article 7.3, Reference (Threshold) Cash Flow

Spanish (Original)	Claimant's Translation	Respondents' Translation
Formula de Flujo de Caja Referencial.	Reference Cash Flow Formula.	Threshold Cash Flow Formula.
El Flujo de Caja Referencial de una Parte para un Ejercicio Económico dado (según se mida con base en la Cuentas en Dólares) será determinado de la siguiente forma:	The Reference Cash Flow of a Party for a given Fiscal Year (as measured based on the Dollars Accounts) shall be determined as follows:	The Threshold Cash Flow of a Party for a given Fiscal Year (as measured based on the Dollars Accounts) shall be determined according to the following formula:
TR - TROY - CEX - TIT	TR - TROY - CEX - TIT	TR - TROY - CEX - TIT
Donde:	Where:	Where:
TR = total de levantamientos durante tal período de tiempo, multiplicado por el Precio Base, más los Ingresos Conjuntos recibidos durante tal Ejercicio Económico.	TR = total liftings during such time period, multiplied by the Base Price, plus Joint Revenues received during such Fiscal Year.	TR = total lifting during such period of time, multiplied by the Threshold Price, plus Joint Revenues received during such Fiscal Year
TROY = la Regalía que hubiese sido pagada por una Parte durante tal Ejercicio Económico, en ausencia de la pretendida Acción Discriminatoria.	TROY= the Royalty that would have been paid by a Party during such Fiscal Year, absent the alleged Discriminatory Action.	TROY = the Royalty that would have been paid by a Party during such Fiscal Year, absent the alleged Discriminatory Measure
CEX = la porción proporcional de Gastos Imputables reales de la Parte para tal Ejercicio Económico, en ausencia de la pretendida Acción Discriminatoria.	CEX= the Party's pro rata share of actual Chargeable Expenditures for such Fiscal Year, absent the alleged Discriminatory Action.	CEX = the Party's pro rata share of actual Chargeable Expenditures for such Fiscal Year, absent the alleged Discriminatory Measure
TIT = la porción proporcional de Impuestos sobre la Renta de la Parte que hubiese sido pagada con	TIT = the Party's pro rata share of Income Taxes that would have been paid with respect to such Fiscal Year,	TIT = the Party's pro rata share of Income Taxes that would have been paid with respect to such Fiscal Year,

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respecto a tal Ejercicio Económico, en ausencia de la pretendida Acción Discriminatoria	absent the alleged Discriminatory Action.	absent the alleged Discriminatory Measure.
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E.II.5. Article 7.4, Damages Payable

Spanish (Original)	Claimant's Translation	Respondents' Translation
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Daños Pagaderos.	Damages Payable.	Damages Payable.
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Los daños pagaderos por Lagoven CN a una Parte, de acuerdo con la Sección XV del Convenio, serán equivalentes a lo que exceda a: (i) el monto en que, en ausencia del efecto de la Acción Discriminatoria en cuestión, el Flujo de Caja Neto de tal Parte para un Ejercicio Económico dado hubiese excedido (ii) el Flujo de Caja Neto de tal Parte para tal Ejercicio Económico; en el entendido de que tales daños sólo serán pagaderos si tal exceso es mayor del cinco por ciento (5%) del Flujo de Caja Neto de tal Parte para tal Ejercicio Económico (caso en el cual tales daños serán pagaderos en su totalidad) y tales daños estarán sujetos al límite establecido en la Sección 7.5.	The damages payable by Lagoven CN to a Party, pursuant to Section XV of the Agreement, shall be equal to the excess of: (i) the amount by which, absent the effect of the Discriminatory Action in question, such Party's Net Cash Flow for a given Fiscal Year would have exceeded (ii) such Party's Net Cash Flow for such Fiscal Year; in the understanding that such damages shall be payable only if such excess is greater than five percent (5%) of such Party' Net Cash Flow for such Fiscal Year (in which case such damages will be payable in full) and such damages shall be subject to the limit set forth in Section 7.5.	The damages payable by Lagoven CN to a Party pursuant to Section XV of the Agreement, shall be equal to the excess of: (i) the amount by which, absent the effect of the Discriminatory Measure in question, such Party's Net Cash Flow for a given Fiscal Year would have exceeded (ii) such Party's Net Cash Flow for such Fiscal Year; it being understood that such damages shall be payable only if such excess is greater than five percent (5%) of such Party's Net Cash Flow for such Fiscal Year (in which case such damages will be payable in full) and such damages shall be subject to the limitation set forth in Section 7.5.
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E.II.6. Article 7.5, Limitation

Spanish (Original)	Claimant's Translation	Respondents' Translation
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Limitación	Limitation[.]	Limitation.
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El límite de la obligación de compensación de Lagoven CN de acuerdo con la	The limit of Lagoven CN's compensation obligation pursuant to Section 15.2 (a)	The limitation on Lagoven CN's compensation obligation pursuant to
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<p>Sección 15.2 (a) del Convenio será el excedente del Umbral de Flujo de Caja de una Parte sobre el Flujo de Caja Neto Ajustado de tal Parte durante el Ejercicio Económico en cuestión.</p>	<p>of the Agreement shall be the excess of the Threshold Cash Flow of a Party over the Adjusted Net Cash Flow of such Party during the Fiscal Year in question.</p>	<p>Section 15.2(a) of the Agreement shall be the excess of the Threshold Cash Flow of a Party over such Party's Adjusted Net Cash Flow during the Fiscal Year in question.</p>
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E.II.7. Article 7.7, Project Expansion**Spanish (Original)**

Expansión del Proyecto. De acuerdo con la Sección 8.1 (c) del Convenio, si una o más Partes eligiesen aportar fondos adicionales para el Proyecto, sin el consentimiento unánime de todas las Partes, a fin de incrementar la capacidad del Mejorador o expandir la producción del Petróleo Extrapesado, las Partes se reunirán y de buena fe intentarán llegar a un procedimiento de contabilidad equitativo por medio del cual se asignarán ingresos y se efectuarán asignaciones de depreciación y agotamiento relacionados con tales gastos. Si las Partes no lograsen llegar a un acuerdo dentro de los ciento veinte (120) días siguientes a que una Parte solicite tal reunión, la determinación de tal procedimiento de contabilidad será sometida a la firma de contadores independiente de Arthur Andersen & Co. o a otra firma de contadores independiente que las Partes puedan convenir para la determinación definitiva.

Claimant's Translation

Project Expansion. In accordance with Section 8.1 (c) of the Agreement, should one or more Parties elect to contribute additional funds to the Project, without the unanimous consent of all the Parties, in order to increase the capacity of the Upgrader or expand the production of EHO, the Parties shall meet and in good faith shall attempt to reach an equitable accounting procedure by which revenues shall be allocated and depreciation and depletion allowances related to such expenditures shall be effected. Should the Parties fail to reach an agreement within one hundred and twenty (120) days after a Party requests such a meeting, the determination of such accounting procedure shall be submitted to the independent accounting firm Arthur Andersen & Co. or such other independent accounting firm as the Parties may agree for the final determination.

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E.III. Principal Relevant Provisions of the Guaranty

73. The principal relevant provisions of The Guaranty are found at C-3 and R-41. As in the previous section, charts presenting the Spanish original and the Claimant's and Respondents' translations, where available, are provided below. The translations are provided for ease of reference, and are provided without making any judgment as to the validity of either Party's translations.

E.III.1. Section 3

Spanish (Original)	Claimant's Translation	Respondents' Translation
<p>La Fiadora garantiza adicionalmente en forma incondicional e irrevocable a cada una de las Beneficiarias, como deudora y obligada principal, el cumplimiento oportuno de todas las obligaciones de la Filial Garantizada en virtud del Convenio y del Convenio de Operación. Si la Filial Garantizada dejare de cumplir cualquiera de sus obligaciones en la forma y en el momento exigidos, la Fiadora cumplirá o hará cumplir dicha obligación al exigirlo cualquiera de las Beneficiarias.</p>	<p>The Guarantor additionally unconditionally and irrevocably guarantees to each of the Beneficiaries, as primary debtor and obligor, the timely performance of all of the obligations of the Guaranteed Affiliate under the Agreement and the Operating Agreement. If the Guaranteed Affiliate fails to perform any of its obligations in the manner and at the time required, the Guarantor shall perform or procure the performance of such obligation upon demand by any of the Beneficiaries.</p>	<p>The Guarantor additionally unconditionally and irrevocably guarantees to each of the Beneficiaries, as primary debtor and obligor, the timely performance of all of the obligations of the Guaranteed Affiliate under the Agreement and the Operating Agreement. If the Guaranteed Affiliate fails to perform any of its obligations in the manner and at the time required, the Guarantor shall perform or procure the performance of such obligation upon demand by any of the Beneficiaries</p>

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E.III.2. Section 5

Spanish (Original)	Claimant's Translation	Respondents' Translation
<p>Las disposiciones contenidas en el Artículo 547 del Código de Comercio de Venezuela serán plenamente aplicables a esta Fianza. En vista de ello, las Beneficiarias no tendrán obligación de intentar ningún recurso o acción contra la Filial Garantizada o con respecto a la misma antes de exigir sus derechos en virtud de esta Fianza directamente contra la Fiadora. Además, la Fiadora no podrá alegar que las Beneficiarias tenían el deber de evitar o mitigar, en cualquier forma o mediante cualquier acción, los daños resultantes del incumplimiento por la Filial Garantizada de sus obligaciones en virtud del Convenio o del Convenio de Operación.</p>	<p>The provisions contained in Article 547 of the Commercial Code of Venezuela shall be fully applicable to this Guaranty. Accordingly, the Beneficiaries shall not have the obligation to pursue any remedy or action against or with respect to the Guaranteed Affiliate before enforcing their rights under this Guaranty directly against the Guarantor. In addition, the Guarantor may not claim that the Beneficiaries had any duty to avoid or to mitigate, in any manner or through any action, the damages resulting from the breach by the Guaranteed Affiliate of its obligations under the Agreement or the Operating Agreement.</p>	<p>The provisions contained in Article 547 of the Commercial Code of Venezuela shall be fully applicable to this Guaranty. Accordingly, the Beneficiaries shall not have the obligation to pursue any remedy or action against or with respect to the Guaranteed Affiliate before enforcing their rights under this Guaranty directly against the Guarantor. In addition, the Guarantor may not claim that the Beneficiaries had any duty to avoid or to mitigate, in any manner or through any action, the damages resulting from the breach by the Guaranteed Affiliate of its obligations under the Agreement or the Operating Agreement.</p>

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E.III.3. Section 6(ii)

Spanish (Original)	Claimant's Translation	Respondents' Translation
<p>Las obligaciones de la Fiadora estarán limitadas a la garantía de (i) el pago por la Filial Garantizada de la porción de la Filial Garantizada en cualesquiera de las Contribuciones de Capital y otros montos pagaderos exclusivamente por la Filial Garantizada (y no por las Partes como un todo) en virtud del Convenio y el Convenio de Operación o en virtud de cualquier ley o reglamento venezolano en relación con actividades llevadas a cabo en virtud del Convenio o del Convenio de Operación, (ii) el cumplimiento por la Filial Garantizada de sus otras obligaciones en virtud del Convenio y del Convenio de Operación que recaigan exclusivamente sobre la Filial Garantizada (a diferencia de las Partes como un todo), [...]</p>	<p>The obligations of the Guarantor shall be limited to the guaranty of the (i) payment by the Guaranteed Affiliate of the Guaranteed Affiliate's share in any of the Capital Contributions and other amounts payable exclusively by the Guaranteed Affiliate (and not by the Parties as a whole) under the Agreement or the Operating Agreement or under any Venezuelan law or regulation related to the activities carried out under the Agreement or the Operating Agreement, (ii) the performance by the Guaranteed Affiliate of its other obligations under the Agreement and the Operating Agreement which fall exclusively on the Guaranteed Affiliate (as opposed to the Parties as a whole), [...]</p>	<p>The obligations of the Guarantor shall be limited to the guaranty of the (i) payment by the Guaranteed Affiliate of the Guaranteed Affiliate's share in any of the Capital Contributions and other amounts payable exclusively of the Guaranteed Affiliate (and not by the Parties as a whole) under the Agreement or the Operating Agreement or under any Venezuelan law or regulation related to the activities carried out under the Agreement or the Operating Agreement, (ii) the performance by the Guaranteed Affiliate of its other obligations under the Agreement and the Operating Agreement which fall exclusively on the Guaranteed Affiliate (as opposed to the Parties as a whole), [...]</p>

E.III.4. Section 7

Spanish (Original)	Claimant's Translation	Respondents' Translation
<p>Todas las obligaciones de la Fiadora establecidas en el presente documento serán vinculantes para la Fiadora y sus sucesores. La Fiadora no podrá ceder ni delegar sus deberes u obligaciones en virtud de la presente Fianza sin el previo consentimiento escrito de las Beneficiarias, y cualquier cesión o delegación hecha sin dicho consentimiento será nula e inválida. La Fiadora</p>	<p>All the obligations of the Guarantor set forth herein shall bind the Guarantor and its successors. The Guarantor shall not assign or delegate its duties or obligations hereunder without the prior written consent of the Beneficiaries, and any assignment or delegation made without such consent shall be null and void. The Guarantor confirms that this Guaranty</p>	<p>All the obligations of the Guarantor set forth herein shall be binding on the Guarantor and on its successors. The Guarantor may not assign or delegate its duties or obligations hereunder without the prior written consent of the Beneficiaries, and any assignment or delegation made without such consent shall be null and void. The Guarantor confirms that this</p>

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confirma que esta Fianza permanecerá en vigencia con respecto a cualquier cesionario de las obligaciones de la Filial Garantizada en virtud del Convenio o del Convenio de Operación, siempre que dicho cesionario sea una Filial de la Filial Garantizada. Al ocurrir cualquier tal cesión el cesionario será considerado como la Filial Garantizada para todos los propósitos de la presente en la medida de las obligaciones cedidas. La Fiadora adicionalmente confirma que cualquier cesionario permitido de una Beneficiaria en virtud del Convenio o del Convenio de Operación podrá ejercer todos los derechos y recursos de tal Beneficiaria en virtud de esta Fianza. Ninguna otra persona o entidad será beneficiaria de esta Fianza ni tendrá ni adquirirá derechos en virtud de la misma. La Fiadora conviene en que, sin el consentimiento de las Beneficiarias, no traspasará ni cederá ningún interés directo o indirecto que pueda tener en la Filial Garantizada si, como resultado de dicho traspaso o cesión, cualquier obligación de la Fiadora (o derecho de las Beneficiarias) en virtud de la presente garantía fuese restringida o terminada.

shall remain in effect with respect to any assignee of the obligations of the Guaranteed Affiliate under the Agreement or the Operating Agreement, provided that such assignee is an Affiliate of the Guaranteed Affiliate. Upon any such assignment the assignee shall be considered as the Guaranteed Affiliate for all purposes hereunder to the extent of the assigned obligations. The Guarantor additionally confirms that any permitted assignee of a Beneficiary under the Agreement or the Operating Agreement may exercise all rights and remedies of such Beneficiary under this Guaranty. No other person or entity shall be a beneficiary of this Guaranty or shall have or acquire rights under it. The Guarantor agrees that it shall not, without the consent of the Beneficiaries, transfer or assign any direct or indirect interest it may have in the Guaranteed Affiliate if, as a result of such a transfer or assignment, any obligation of the Guarantor (or right of the Beneficiaries) hereunder would be restricted or terminated.

Guaranty shall remain in effect with respect to any assignee of the obligations of the Guaranteed Affiliate under the Agreement or the Operating Agreement, provided that such assignee is an Affiliate of the Guaranteed Affiliate. Upon any such assignment the assignee shall be considered as the Guaranteed Affiliate for all purposes hereunder to the extent of the assigned obligations. The Guarantor additionally confirms that any permitted assignee of a Beneficiary under the Agreement or the Operating Agreement may exercise all rights and remedies of such Beneficiary under this Guaranty. No other person or entity shall be a beneficiary of this Guaranty or shall have or acquire rights under it. The Guarantor agrees that it shall not, without the consent of the Beneficiaries, transfer or assign any direct or indirect interest it may have in the Guaranteed Affiliate if, as a result of such a transfer or assignment, any obligation of the Guarantor (or right of the Beneficiaries) hereunder would be restricted or terminated.

E.III.5. Section 9**Spanish (Original)****Claimant's Translation****Respondents' Translation**

Esta Fianza será regida por e interpretada de acuerdo con las leyes de la República de

This Guaranty shall be governed by and interpreted in accordance with the laws

This Guaranty shall be governed by and interpreted in accordance with the laws

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Venezuela. of the Republic of of the Republic of
Venezuela. Venezuela. Venezuela.

E.III.6. Section 12

Spanish (Original)	Claimant's Translation	Respondents' Translation
<p>Cualquier disputa que surja de o con respecto a esta Fianza será resuelta exclusiva y definitivamente por arbitraje. El arbitraje será realizado y resuelto en forma definitiva por tres (3) árbitros de acuerdo con las Reglas de Conciliación y Arbitraje de la Cámara de Comercio Internacional (las "Reglas ICC"), o aquellas otras reglas que puedan convenir todas las partes envueltas en la disputa. Si hubiere dos partes en la disputa correspondiente , o si todas las partes en disputa convienen en agruparse en dos grupos en base al interés común y posición común en la disputa, entonces cada parte o grupo, según sea el caso, seleccionará un árbitro de acuerdo con las Reglas ICC. Los árbitros así nombrados deberán convenir dentro del plazo de treinta (30) días en un tercer árbitro que servirá de Presidente. Si hubiere más de dos partes en disputa y las partes en disputa no acordaren prontamente agruparse en dos grupos, entonces los tres árbitros, incluyendo el Presidente serán seleccionados por la Corte Internacional de Arbitraje de la Cámara Internacional de Comercio de acuerdo con las Reglas ICC, tal como si ninguna de las partes hubiese designado árbitro. Salvo que las Partes convengan otra</p>	<p>Any dispute arising out of or concerning this Guaranty shall be resolved exclusively and finally by arbitration. The arbitration shall be conducted and finally settled by three (3) arbitrators in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the "ICC Rules"), or such other rules which all the parties involved in the dispute may agree to. If there are two parties in the corresponding dispute, or if all parties to the dispute agree to be grouped together into two groups on the basis of their common interest and common position in the dispute, then each party or group, as the case may be, shall select an arbitrator in accordance with the ICC Rules. The arbitrators so nominated shall agree within a thirty (30) day time period on a third arbitrator who shall serve as President. If there are more than two parties to the dispute and the parties to the dispute do not promptly agree to be grouped into two groups, then the three arbitrators, including the President, shall be selected by the International Court of Arbitration of the International Chamber of Commerce in accordance with the ICC Rules, as if none of the parties had</p>	<p>Any dispute arising out of or concerning this Guaranty shall be resolved exclusively and finally by arbitration. The arbitration shall be conducted and finally settled by three (3) arbitrators in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the "ICC Rules"), or such other rules which all the parties involved in the dispute may agree to. If there are two parties in the corresponding dispute, or if all parties to the dispute agree to be grouped together into two groups on the basis of their common interest and common position in the dispute, then each party or group, as the case may be, shall select an arbitrator in accordance with the ICC Rules. The arbitrators so nominated shall agree within a thirty (30) day time period on a third arbitrator who shall serve as President. If there are more than two parties to the dispute and the parties to the dispute do not promptly agree to be grouped into two groups, then the three arbitrators, including the President, shall be selected by the International Court of Arbitration of the International Chamber of Commerce in accordance with the ICC Rules, as if none of the parties had</p>

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<p>cosa, todos los procedimientos de arbitraje serán conducidos en la Ciudad de Nueva York (Estados Unidos de América). No obstante lo anterior, en el caso de que una disputa involucre tanto a la Fiadora como a la Filial Garantizada, el arbitraje será realizado de acuerdo con la Sección 18.2 del Convenio, como un procedimiento único, y la Fiadora y la Filial Garantizada tendrán conjuntamente los derechos de la Filial Garantizada en virtud de dicha Sección 18.2.</p>	<p>designated an arbitrator. Unless the parties agree otherwise, all arbitration proceedings shall be conducted in New York City (United States of America). Notwithstanding the foregoing, if a dispute involves the Guarantor and the Guaranteed Affiliate, the arbitration proceeding shall be performed in accordance with Section 18.2 of the Agreement, as the only proceeding, and the Guarantor and Guaranteed Affiliate shall jointly have the rights of the Guaranteed Affiliate in accordance with Section 18.2.</p>	<p>designated an arbitrator. Unless the parties agree otherwise, all arbitration proceedings shall be conducted in New York City (United States of America). Notwithstanding the foregoing, if a dispute involves the Guarantor and the Guaranteed Affiliate, the arbitration proceeding shall be performed in accordance with Section 18.2 of the Agreement, as a sole proceeding, and the Guarantor and Guaranteed Affiliate shall jointly have the rights of the Guaranteed Affiliate in accordance with Section 18.2.</p>
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E.III.7. Section 13

Spanish (Original)	Claimant’s Translation	Respondents’ Translation
<p>La Fiadora pagará al serle exigido y contra presentación de facturas todos los costos y gastos razonables y realmente incurridos por las Beneficiarias en relación con la ejecución satisfactoria de esta Fianza, incluyendo, sin limitación, los gastos y honorarios razonables de abogados.</p>	<p>The Guarantor shall pay upon demand and presentation of invoices all reasonable and actual costs and expenses incurred by the Beneficiaries in connection with the satisfactory execution of this Guaranty, including, without limitation, reasonable attorneys’ expenses and fees.</p>	<p>The Guarantor shall pay upon demand and presentation of invoices all reasonable and actual costs and expenses incurred by the Beneficiaries in connection with the satisfactory execution of this Guaranty, including, without limitation, reasonable attorneys’ expenses and fees.</p>

E.IV. Association Oil Supply Agreement (Chalmette Offtake Agreement)

74. The Chalmette Offtake Agreement was executed in the English language only. The principal relevant provisions of the Chalmette Offtake Agreement are found at C-141 and R-72.

Section 10.1., Chalmette Offtake Agreement

Force Majeure

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Excuse from Obligations; Definition.

(a) The failure of a Party to perform any obligation incurred under this Agreement shall be excused and shall not be considered a default hereunder during the time and to the extent that such non-performance is caused by an Event of Force Majeure.

(b) For the purposes of this Agreement, an "Event of Force Majeure" shall mean any event or circumstance, other than a lack of finances, beyond the reasonable control of and unforeseeable by the Party obligated to perform the relevant obligation, or which, if foreseeable, could not have been avoided in whole or in part by the exercise of due diligence. including but not limited to strikes, boycotts, stoppages, lockouts and other labor or employment difficulties, fires, earthquakes, tremors, landslides, avalanches, floods, hurricanes, tornadoes, storms, other natural phenomena or calamities, epidemics, quarantines, wars (declared or undeclared), hostilities, guerrilla activities, terrorist acts, riots, insurrections, civil disturbances, acts of sabotage, blockades, embargoes, or acts of state of any governmental body or any order, judgment, ruling, decision or other act or failure to act of any governmental, civil or military authority.

E.V. Principal Relevant Provisions of Venezuelan Law

E.V.1. 1943 Hydrocarbons Law (as published in the Official Gazette on 13 March 1943)

75. The principal relevant provision of the 1943 Hydrocarbons Law is at R-2.

Spanish (Original)

Respondents' Translation

Ley de Hidrocarburos (Gaceta Oficial N° 31 Extraordinario del 13 de marzo de 1943)

1943 Hydrocarbons Law
Published in Official Gazette No. 31 on
March 13, 1943

Artículo 41

Article 41

Todos los concesionarios indicados en el artículo 39 pagarán; además:

All concessionaires referred to in article 39 shall additionally pay:

1 - El impuesto de explotación, que será igual al 16 2/3 por ciento del petróleo crudo extraído, medido en el campo de producción, en las instalaciones en que se efectúe la fiscalización. Este impuesto se pagará total o parcialmente, en especie o en efectivo, a elección del Ejecutivo Nacional.

I - The exploitation tax, which will be equal to 16 2/3 percent of the crude oil extracted, measured in the production field in the facilities where the inspection is carried out. This tax shall be totally or partially paid, in kind or in cash, at the election of the National Executive

Parágrafo Único.- Con el fin de prolongar

Sole Paragraph.- For the purpose of

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la explotación económica de determinadas concesiones queda facultado el Ejecutivo Federal para rebajar el impuesto de explotación a que se refiere este ordinal en aquellos casos en que se demuestre a su satisfacción que el costo creciente de producción, incluido en éste el monto de los impuestos, haya llegado al límite que no permita la explotación comercial. Puede también el Ejecutivo Federal elevar de nuevo el impuesto de explotación ya rebajado hasta restablecerlo en su monto original, cuando a su juicio se hayan modificado las causas que motivaron la rebaja.[...]

extending the economic exploitation of certain concessions, the Federal Executive is hereby authorized to reduce the exploitation tax referred to in this subparagraph in those cases in which it is evidenced to its satisfaction that the increasing production cost, including tax amounts, has reached a limit that does not permit commercial exploitation. The Federal Executive is also authorized to increase again the reduced exploitation tax until restoring it to its original amount, when, in its judgment, the causes motivating the reduction have changed.[...]

E.V.2. Venezuelan Commercial Code (as published in the Extraordinary Official Gazette No. 475 of 21 December 1955)

76. Article 282 and Article 547 of the Venezuelan Commercial Code are found at R-119 App. 57 and C-140, respectively.

Spanish (Original)	Claimant's Translation	Respondents' Translation
CÓDIGO DE COMERCIO DE LA REPÚBLICA DE VENEZUELA (Eduven, Caracas 1955)	Commercial Code	VENEZUELAN COMMERCIAL CODE (Eduven, Caracas 1955)
<u>Artículo 282</u>	[No Translation Provided]	<u>Article 282</u>
Los socios que no convengan en el reintegro o en el aumento del capital, o en el cambio del objeto de la compañía, tienen derecho a separarse de ella, obteniendo el reembolso de sus acciones, en proporción del activo social, según el último balance aprobado.		The shareholders that do not agree on a capital replenishment (reintegro) or capital increase, or in the change of the corporate purpose, shall have the right to withdraw from [the corporation], receiving reimbursement for their shares, in proportion to the corporate assets, in accordance with the last approved financial statement.

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La sociedad puede exigir un plazo hasta de tres meses para el reintegro, dando garantía suficiente.

The corporation may require a term of up to three months for the replenishment (reintegro), providing sufficient guarantee.

Si el aumento de capital se hiciera por la emisión de nuevas acciones, no hay derecho a la separación de que habla este artículo.

If the capital increase is carried out by issuing new stock, there shall be no right of withdrawal as mentioned in this article.

Los que hayan concurrido a algunas de las asambleas en que se ha tomado la decisión, deben manifestar, dentro de las veinticuatro horas de la resolución definitiva, que desean el reembolso. Los que no hayan concurrido a la asamblea, deben manifestarlo dentro de quince días de la publicación de lo resuelto.

Those [shareholders] that have attended the shareholders' meetings in which the decision was taken, shall, within twenty-four hours of the final resolution, notify [the corporation] if they want reimbursement. Those [shareholders] that have not attended the shareholders' meeting, shall so notify [the corporation] within fifteen days of the publication of the resolution.

Artículo 547

Article 547

[No Translation Provided]

El fiador mercantil responde solidariamente como el deudor principal, sin poder invocar el beneficio de excusión, ni el de división.

The mercantile guarantor responds jointly as the principal debtor, without being able to invoke the benefits of excusión or division.

E.V.3. Organic Law Reserving to the State the Industry and Commerce of Hydrocarbons (as published in the Official Gazette No. 1769 of 29 August 1975)

77. The principal relevant provisions of the Nationalization Law are found at C-55 and R-44.

Spanish (Original)

Claimant's Translations

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Ley Orgánica que Reserva al Estado la Industria y el Comercio de los Hidrocarburos

Organic Law Reserving to the State the Industry and Commerce of Hydrocarbons

Organic Law that Reserves to the State the Industry and Trade of Hydrocarbons

Artículo 1

Article 1

[No Translation Provided]

Se reserve al Estado, por razones de conveniencia nacional, todo lo relativo a la exploración del territorio nacional en busca de petróleo, asfalto y demás hidrocarburos; a la explotación de yacimientos de los mismos, a la manufactura o refinación, transporte por vías especiales y almacenamiento; al comercio interior y exterior de las sustancias explotadas y refinadas, y a las obras que su manejo requiera, en los terminos señalados por esta ley. Como consecuencia de lo dispuesto en este artículo, quedarán extinguidas las concesiones otorgadas por el Ejecutivo Nacional y la extinción se hará efectiva el día 31 de diciembre de mil novecientos setenta y cinco.

For reasons of national convenience, anything related to the exploration of the national territory in search of petroleum, asphalt and other hydrocarbons; to the exploitation of reservoirs thereof; to the manufacture or refining, transportation by special means and storage; to the internal and external commerce of the exploited and refined substances, and to the works required for their handling, are reserved to the State under the terms set forth by this law. As a consequence of the provisions of this article, the concessions granted by the National Executive shall be extinguished and the extinction shall be effective on December 31, nineteen hundred and seventy-five.

Se declaran de utilidad pública y de interés social las actividades mencionadas en el presente artículo, así como las obras, trabajos y servicios que fueren necesarios para realizarlas.

The activities mentioned in this article, as well as the works, labors and services required to carry them out are declared of public utility and of social interest.

Lo referente a la industria del gas natural y el Mercado interno de los productos derivados de hidrocarburos, se regirá por lo dispuesto en la Ley que Reserva al Estado la Industria del Gas Natural y la Ley que Reserva al Estado la

All matters related to the natural gas industry and to the internal market of hydrocarbon by-products, shall be governed by the provisions of the Law that Reserves to the State the Natural Gas Industry and the Law that Reserves to the

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Explotación del Mercado Interno de los Productos Derivados de Hidrocarburos, respectivamente, en cuanto no colida con dispuesto en la presente ley.

State the Exploitation of the Internal Market of Hydrocarbon By-products, respectively, insofar as they do not collide with the provisions of this law.

Artículo 5

El Estado ejercerá las actividades señaladas en el artículo 1 de la presente Ley directamente por el Ejecutivo Nacional o por medio de entes de su propiedad, pudiendo celebrar los convenios operativos necesarios para la mejor realización de sus funciones, sin que en ningún caso estas gestiones afecten la esencia misma de las actividades atribuidas.

Article 5

The State shall carry out the activities indicated in Article 1 of this Law directly through the National Executive or through entities owned by it, being able to enter into the operating agreements necessary for the better performance of its functions, without these arrangements affecting in any case the very essence of the activities assigned.

Article 5

The State shall carry out the activities indicated in Article 1 of this Law directly through the National Executive or through state-owned entities, being able to enter into operating agreements necessary for the better performance of its functions, but in no case shall such transactions affect the essence of the reserved activities.

En casos especiales y cuando así convenga al interés público, el Ejecutivo Nacional o los referidos entes podrán, en el ejercicio de cualquiera de las señaladas actividades, celebrar convenios de asociación con entes privados, con una participación tal que garantice el control por parte del Estado y con una duración determinada. Para la celebración de las Cámaras en sesión conjunta, dentro de law condiciones que fijen, una vez que hayan sido debidamente informadas por el Ejecutivo Nacional de todas las circunstancias pertinentes.

In special cases and when convenient to the public interest, the National Executive or the aforesaid entities may, in the exercise of any of the aforementioned activities, enter into association agreements with private entities, with a participation such that guarantees the control by the State and with a determined duration. In order to enter into such agreements, the prior authorization of the Chambers in a joint session shall be required, under the conditions they [the Chambers] establish, once they have been duly informed by the National Executive of all relevant circumstances.

In special cases and if convenient for the public interest, the National Executive or such entities may, in the exercise of any of the indicated activities, enter into association agreements with private entities, with a participation that guarantees control on the part of the State and with a specified duration. The execution of such agreements shall require the prior authorization of the [Congressional] Chambers in joint session, within the conditions that they establish, once they have been duly informed by the National Executive of all the pertinent circumstances.

Artículo 6Article 6**[No Translation Provided]**

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<p>A los fines indicados en el artículo anterior, el Ejecutivo Nacional organizará la administración y gestión de las actividades reservadas, conforme a las siguientes bases:</p>	<p>For the purposes indicated in the preceding article, the National Executive shall organize the administration and management of the reserved activities, in conformity with the following bases:</p>
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<p>Primera: creará, con las formas jurídicas que considere conveniente, las empresas que juzgue necesario para el desarrollo regular y eficiente de tales actividades, pudiendo atribuirles el ejercicio de una o más de éstas, modificar su objeto, fusionarlas o asociarlas, extinguirlas y liquidarlas y aportar su capital a otra u otras de esas mismas empresas. Estas empresas serán de la propiedad del Estado, sin perjuicio de lo dispuesto en las base Segunda de este artículo, y en caso de revestir la forma de sociedades anónimas, podrán ser constituidas con un solo socio. [...]</p>	<p>First: [the National Executive] shall create, in the juridical forms it considers convenient, the enterprises that it deems necessary for the regular and efficient development of such activities, being able to assign to them the exercise of one or more of these [activities], modify their object, merge or associate them, extinguish and liquidate them and contribute their capital to another or others of those same enterprises. These enterprises shall be the property of the State, without limiting the provisions of the Second basis of this Article, and putting on the form of stock companies ["sociedades anónimas"], they may be constituted with only one partner.</p>
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E.V.4. Organic Law of the Supreme Court of Justice (as published in Extraordinary Official Gazette No. 1.893 30 July 1976)

78. The relevant portion of the Organic Law of the Supreme Court of Justice is found at R-90.

Spanish (Original)

Respondents' Translation

Ley Orgánica de la Corte Suprema de Justicia

Organic Law of the Supreme Court of Justice

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Artículo 42

Es de la competencia de la Corte como más alto Tribunal de la República:

1. Declarar la nulidad total o parcial de las leyes y demás actos generales de los cuerpos legislativos nacionales, que colidan con la Constitución;

2. Decidir acerca de la inconstitucionalidad de las leyes que solicite el Presidente de la República antes de ponerle el ejecútese, conforme al artículo 173 de la Constitución;

3. Declarar la nulidad total o parcial de las constituciones o leyes estatales, de las ordenanzas municipales y demás actos generales de los cuerpos deliberantes de los Estados o Municipios, que colidan con la Constitución;

4. Declarar la nulidad total o parcial de los reglamentos y demás actos de efectos generales del Poder Ejecutivo Nacional, que colidan con la Constitución;

9. Declarar la nulidad, cuando sea procedente por razones de ilegalidad, de los actos generales de los órganos unipersonales o colegiados del Poder Público, salvo en los casos previstos en las disposiciones transitorias de esta Ley;

10. Declarar la nulidad, cuando sea procedente por razones de inconstitucionalidad o de ilegalidad, de los actos administrativos individuales del Poder Ejecutivo Nacional;

11. Declarar la nulidad, cuando sea procedente por razones de inconstitucionalidad, de los actos de los órganos del Poder Público, en los casos no previstos en los ordinales 3, 4, y 6 del artículo 215 de la Constitución;

12. Declarar la nulidad, cuando sea procedente por razones de

Article 42

The [Supreme] Court, as the highest Court of the Republic, has jurisdiction (competencia):

1. To declare the total or partial nullity of laws and other general acts of national legislative bodies, which collide with the Constitution;

2. To decide, upon the request by the President of the Republic, on the unconstitutionality of laws prior to their enforcement, pursuant to Article 173 of the Constitution;

3. To declare the total or partial nullity of state laws and constitutions, municipal ordinances and other general acts of state or municipal deliberative bodies, which collide with the Constitution;

4. To declare the total or partial nullity of regulations and other acts of general effects of the National Executive Power, which collide with the Constitution;

9. To declare the nullity, where appropriate due to illegality, of the general acts of one person or collegiate bodies of the Public Power, except for the cases provided in the temporary provisions of this Law;

10. To declare the nullity, where appropriate due to unconstitutionality or illegality, of the individual administrative acts of the National Executive Power;

11. To declare the nullity, where appropriate due to unconstitutionality, of the acts of the Public Power, in cases not contemplated in subparagraphs 3, 4 and 6 of Article 215 of the Constitution;

12. To declare the nullity, where appropriate due to unconstitutionality or illegality, of

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inconstitucionalidad o de ilegalidad, de los actos administrativos generales o individuales del Consejo Supremo Electoral o de otros órganos del Estado de igual jerarquía a nivel nacional; [...] the general or individual administrative acts of the Electoral Supreme Council or other State bodies of equal rank at the national level[...]

E.V.5. Organic Law on Administrative Procedures, (as published in Extraordinary Official Gazette No. 2.818 published 1 July 1981)

79. The relevant portions of the Organic Law on Administrative Procedures are found at R-69 App. 28 and R-119 App. 58.

Spanish (Original)

Respondents' Translation

Ley Orgánica de Procedimientos Administrativos

Organic Law on Administrative Procedures

Artículo 91

Article 91

El recurso de reconsideración, cuando quien deba decidir sea el propio Ministro, así como el recurso jerárquico, deberán ser decididos en los noventa [90] días siguientes a su presentación.

The recourse of reconsideration (recurso de reconsideración), when the one who has to decide is the Minister, as well as the appeal to a higher [administrative] authority (recurso jerárquico) shall be decided in the ninety (90 days) following their filing.

Artículo 93

Article 93

La vía contencioso administrativo quedará abierta cuando interpuestos los recursos que ponen fin a la vía administrativa, éstos hayan sido decididos en sentido distinto al solicitado, o no se haya producido decisión en los plazos correspondientes. Los plazos para intentar los recursos contenciosos son los establecidos por las leyes correspondientes.

The judicial remedy to administrative matters (vía contenciosa administrativa) shall be open when, once petitions that put an end to the administrative remedies have been filed, they have been decided different than what was petitioned, or if no decision was made in the established deadline. The deadlines to seek the judicial remedies (recursos contenciosos) to [administrative matters] are those set by the respective laws.

Artículo 94

Article 94

Es recurso de reconsideración procederá contra todo acto administrativo de carácter particular y deberá ser interpuesto dentro de los quince [15] días siguientes a la

The recourse of reconsideration (recurso de reconsideración) shall proceed against all administrative acts of particular effects and must be initiated before the government

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notificación del acto que se impugna, por ante al funcionario que lo dictó. Si el acto no pone fin a la vía administrativa, el órgano ante el cual se interpone este recurso, decidirá dentro de los quince [15] días siguientes al recibo del mismo. Contra esta decisión no puede interponerse de Nuevo dicho recurso.

official who dictated the act within 15 days following notification of the act being challenged.

Artículo 95

Article 95

El recurso jerárquico procederá cuando el órgano inferior decida no modificar el acto de que es autor en la forma solicitada en el recurso de reconsideración. El interesado podrá, dentro de los quince (15) días siguientes a la decisión a la cual se refiere el párrafo anterior, interponer el recurso jerárquico directamente para ante el Ministro.

The appeal to the highest administrative authority (recurso jerárquico) shall be appropriate when the subordinate body (órgano inferior) decides not to modify the act it made, as petitioned in the reconsideration appeal (recurso de reconsideración).

The interested party may be able to file the appeal to the highest administrative authority (recurso jerárquico) directly with the Minister., within fifteen (15) days after the decision referred to in the previous paragraph.

E.V.6 Venezuelan Civil Code (as published in the Official Gazette No. 2990 of 26 July 1982)

80. The principal relevant provisions of the Venezuelan Civil Code are found at C-240, C-134, C-215 App. 21 R-46, R-68 App. 6, R-69 App. 7, R-118 App. 46, and R-119. The original Spanish texts and the translations – where available – have been inserted into the 3 column chart below. In some instances, Claimant has provided the Tribunal with multiple, slightly different translations. Those are provided in the table below. Each section contains a reference to where the text may be found in the record, and this reference is immediately following the text, rather than at the end of the table. As in the previous sections, the Tribunal makes no judgment as to the validity of any of the translations provided below.

Spanish (Original)	Claimant’s Translation	Respondents’ Translation
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Código Civil de la República de Venezuela Venezuelan Civil Code Civil Code of the Republic of Venezuela

Artículo 1. **[No Translation Provided]** Article 1.

La Ley es obligatoria desde su publicación en la Gaceta Oficial o desde la fecha posterior que ella misma indique. (R-68 App. 6; R-69 App. 7)

The law is mandatory from the date of publication in the Official Gazette or from a later date indicated therein. (R-68 App. 6; R-69 App. 7).

Artículo 3. Article 3. **[No Translation Provided]**

La Ley no tiene efecto retroactivo. (R-69 App. 7)

The Law does not have retroactive effect. (C-240).

Artículo 6. Article 6. Article 6.

No pueden renunciarse ni relajarse por convenios particulares law leyes en cuya observancia están interesados el orden público o las buenas costumbres. (R-69 App. 7)

Laws in the compliance of which the public order and good customs are interested cannot be waived or relaxed through private agreements. (C-240; C-134).

Laws the observance of which is of interest to the public policy or sound morality cannot be waived or relaxed by private agreements. (R-69 App. 7)

Artículo 547. Article 547. Article 547.

Nadie puede ser obligado a ceder su propiedad, ni a permitir que otros hagan uso de ella, sino por causa de utilidad pública o social, mediante juicio contradictorio e indemnización previa. Las reglas relativas a la expropiación por causa de utilidad pública o social se determinan por leyes especiales. (R-119 App. 56)

Nobody can be obliged to assign his property, or to allow others to use it, except by cause of public or social utility, through a contradictory judicial process and prior compensation. Rules related to expropriation for reason of public or social utility shall be determined by special laws. (C-240)

No one may be forced to transfer his property, or to allow others to make use of it, unless for reasons of public or social utility, through a court proceeding (juicio contradictorio) and prior indemnification. The rules regarding expropriation for public or social utility shall be established in special laws [. . .] (R-119 App. 56).

Artículo 782. **[No Translation Provided]** Article 782.

Quien encontrándose por más de un año en la posesión legítima de un

Whomever finds themselves in legitimate possession of real property, an in rem

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inmueble, de un derecho real, o de una universalidad de muebles, es perturbado en ella, puede, dentro del año, a contar desde la perturbación, pedir que se le mantenga en dicha posesión. El poseedor precario puede intentar esta acción en nombre y en interés del que posee, a quien le es facultativo intervenir en el juicio. En caso de una posesión por menor tiempo, el poseedor no tiene esta acción sino contra el no poseedor o contra quien lo fuere por un tiempo más breve. (R-119 App. 56)

right, or a collection of personal property (universalidad de muebles), and where such possession is challenged (perturbado), may, within one year, counted from the challenge, petition to retain such possession. The adverse possessor (poseedor precario) may file this action on behalf of and in the interest of the possessor, who has the option to participate in the proceeding. In the event of possession for a shorter period of time, the possessor does not have a cause of action except for one against the non-possessor or the possessor for a shorter period of time. (R-119 App. 56).

Artículo 783.

Quien haya sido despojado de la posesión, cualquiera que ella sea, de una cosa mueble o inmueble, puede, dentro del año del despojo, pedir contra el autor de él, aunque fuere el propietario, que se le restituya en la posesión. (R-119 App. 56)

[No Translation Provided]Article 783.

Whomever has been divested of possession of any kind, whether personal or real property, may, within one year of the divestment, petition for restoration of the possession against the perpetrator of such [divestment], even if [the perpetrator] is the owner. (R-119 App. 56).

Artículo 1159.

Los contratos tienen fuerza de ley entre las partes. No pueden revocarse sino por mutuo consentimiento o por las causas autorizadas por la ley. (R-68 App. 6; R-69 App. 7; R-119 App. 56; C-134; C-240)

Article 1159.

Contracts have force of Law between the parties. They cannot be revoked except for mutual consent or for causes authorized by Law. (C-240; C-134)

Article. 1159.

Contracts have the force of Law between the parties. They can only be revoked by mutual consent or by the causes authorized by law. (R-69 App. 7; R-68 App. 6)

Artículo 1160.

Los contratos deben ejecutarse de buena fe y obligan no solamente a cumplir lo expresado en

Article 1160.

Contracts shall be performed in good faith and bind not only to comply with what they provide, but

Article 1160.

Contracts must be performed in good faith and oblige compliance not only with their own provisions,

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ellos, sino a todas las consecuencias que se derivan de los mismos contratos, según la equidad, el uso o la ley. (R-68 App. 6; R-69 App. 7; R-119 App. 56; C-240)

also to all the consequences derived from such contracts, according to equity, usage or Law. (C-240)

but also with all of the consequences derived from the contracts themselves, according to equity, use or law. (R-119 App. 56)

Artículo 1167.

Article 1167.

[No Translation Provided]

[NO SPANISH ORIGINAL PROVIDED]

In a bilateral contract, if one of the parties does not perform its obligation, the other [party] can - at its election - claim judicially the performance of the contract or its termination [resolución] with damages in both cases if they are in place. (C-240; C-134)

Artículo 1215.

[No Translation Provided]

Article 1215.

Si el deudo se ha hecho insolvente, o por actos propios hubiere disminuido las seguridades otorgadas al acreedor para el cumplimiento de la obligación, o no le hubiere dado las garantías prometidas, no puede reclamar el beneficio del término o plazo. (R-118 App. 46)

If the debtor becomes insolvent, or by his own actions has diminished the guarantees provided to the creditor for the fulfillment of the obligation, or has failed to deliver the promise dguarantees, he may not claim the benefit of the term or time period. (R-118 App. 46)

Artículo 1264.

Article 1264.

[No Translation Provided]

Law obligaciones deben cumplirse exactamente como han sido contraídas. El deudor es responsable de daños y perjuicios, en caso de contravención (C-240; C-134)

Obligations shall be performed exactly as they have been contracted. The debtor is liable for damages, in case of breach. (C-240). C-134

Artículo 1271.

Article 1271.

Article 1271.

E deudor sera condenado al pago de los daños y

The debtor shall be ordered to pay damages, both for

The debtor shall be condemned to pay damages

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perjuicios, tanto por inejecución de la obligación como por retardo en la ejecución, si no prueba que la inejecución o el retardo provienen de una causa extraña que no le sea imputable, aunque de sup arte no haya habido mala fe. (R-69 App. 7)

failure to perform the obligation and delay in performance, if s/he does not prove that the failure or delay result from an extraneous cause not attributable to him/her, even if there has not been bad faith on his/her part. (C-134)

for non or late performance, unless he proves that late or non-performance arises from a non-imputable external cause, even in the case when he did not act in bad faith. (R-69 App. 7; R-68 App. 6)

Article 1271.

The debtor shall be ordered to pay damages, both for failure to perform the obligation and for delay in performance, unless he proves that the failure or delay are due to an extraneous cause not imputable to him, even though he may not have acted in bath faith. C-240.

Artículo 1272.

El deudor no está obligado a pagar daños y perjuicios, cuando, a consecuencia de un caso fortuito o de fuerza mayor, ha dejado de dar o de hacer aquéllo a que estaba obligado o ha ejecutado lo que estaba prohibido.(R-69 App. 7)

Article 1272.

The debtor is not obligated to pay damages , when, as a consequence of a fortuitous event or force majeure, he failure to give or do what he was obligated or has performed what was prohibited. (C-240)

Article 1272.

The debtor is not compelled to pay damages when, as a result of an act of God or force majeure, he has not given or done what he was compelled to do or he has performed what was prohibited. (R-68 App. 6; R-69 App. 7)

Artículo 1273.

Los daños y perjuicios se deben generalmente al acreedor, por la pérdida que haya sufrido y por la utilidad de que se le haya privado, salvo las modificaciones y excepciones establecidas a continuación. (R-68 App. 6; R-69 App. 7; C-240; C-134)

Article 1273.

Damages are generally owed to the creditor, for the loss he has suffered and the profits from which he has been deprived, except for the modifications and exceptions established below. (C-240).

Article 1273.

Damages are generally owed to the creditor, for the loss s/he has suffered and the profits from which s/he

[No Translation Provided]

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has been deprived, except for the modifications and exceptions established below. (C-134)

Artículo 1274.

El deudor no queda obligado sino por los daños y perjuicios previstos o que han podido perverse al tiempo de la celebración del contrato, cuando la falta de cumplimiento de la obligación no proviene de su dolo. (C-240; C-134)

Article 1274.

The debtor shall not be liable but for the damages foreseen or that could have been foreseen at the time of the execution of the contract, when the failure to perform the obligation does not result from its willful misconduct [dolo]. (C-240 – exact; C-134).

[No Translation Provided]

Artículo 1275.

Aunque la falta de cumplimiento de la obligación resulte de dolo del deudor, los daños y perjuicios relativos a la pérdida sufrida por el acreedor y a la utilidad de que se le haya privado, no deben extenderse sino a los que son consecuencia inmediata y directa de la falta de cumplimiento de la obligación. (C-240; C-134)

Article 1275.

Even if the failure to perform the obligation results from the debtor's willful misconduct [dolo], damages relating to the loss suffered by the creditor and the profit from which s/he has been deprived, shall not extend but to those which are immediate and direct consequence of the failure to perform the obligation. (C-240; C-134).

[No Translation Provided]

Artículo 1276.

Cuando en el contrato se hubiere estipulado que quien deje de ejecutarlo debe pagar una cantidad determinada por razón de daños y perjuicios no pueda el acreedor pedir una mayor, ni el obligado pretender que se le reciba una menor.

Article 1276.

When the contract shall have stipulated that who fails to perform it shall pay a determined amount on account of damages, the creditor cannot ask for a larger [amount], nor can the debtor pretend that a lower [amount] be received. (C-240). (C-134)

[No Translation Provided]

Sucede lo mismo cuando la determinación de los daños y perjuicios se hace bajo la formula de cláusula [illegible] por medio de arras. (C-240; C-134)

The same occurs when the determination of damages is made under the formula of a penalty clause or through security deposit [arras]. (C-240; C-134).

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Artículo 1277.

A falta de convenio en las obligaciones [illegible] que tienen por objeto una cantidad de dinero, los daños [illegible] perjuicios resultants del retardo en el cumplimiento [illegible] siempre en el pago del interés legal, salvo disposiciones especiales.

Se deben estos daños desde el día de la mora sine que el acreedor esté obligado a comprobar ninguna pérdida. (C-240; C-134)

Article 1277.

Absent an agreement[,] on obligations that have a sum of money as their object, the damages resulting from the delay in performance always consist in the payment of legal interest, except for special provisions.

These damages are owed from the day of default [mora] without the creditor being required to prove any loss. (C-240; C-134).

[No Translation Provided]

Artículo 1354.

Quien pida la ejecución de una obligación debe probarla, y quien pretenda que ha sido liberto de ella debe por sup arte probar el pago o el hecho que ha producido la extinción de su obligación. (C-240)

Article 1354.

Whoever requests the performance of an obligation must prove it, and whoever pretends that he has been freed from that obligation must[,] on his part[,] prove the payment or the event that has produced the extinction of his obligation. (C-240).

Artículo 1500.

[NO SPANISH ORIGINAL PROVIDED]

Article 1500.

In all of the cases specified in the previous articles, the action for price increase that corresponds to the seller and that which corresponds to the buyer, for the reduction of the price or the contract, must be attempted within one year counting from the day the contract was entered into, under pain of losing the respective rights. (C-240).

[No Translation Provided]

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E.V.7. Organic Law of Protection (Amparo) of Constitutional Rights and Guarantees (as published in Official Gazette No. 34.060 27 September 1988)

81. The principal relevant provisions of the Amparo Law are found at R-69 App. 29.

Spanish (Original)

Respondents' Translation

Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales

Organic Law of Protection (Amparo) of Constitutional Rights and Guarantees

Título 1: DISPOSICIONES FUNDAMENTALES

Title 1: FUNDAMENTAL PROVISIONS

Artículo 2

Article 2

La acción de amparo procede contra cualquier hecho, acto u omisión provenientes de los órganos del Poder Público Nacional, Estatal o Municipal. También procede contra el hecho, acto u omisión originados por ciudadanos, personas jurídicas, grupos u organizaciones privadas, que hayan violado, violen o amenacen violar cualquiera de las garantías o derechos amparados por esta ley.

The amparo action is appropriate against any deed, act or omission arising from the organs of the National, State or Municipal Public Power.

Se entenderá como amenaza válida para la procedencia de la acción de amparo aquella que sea inminente.

It is also appropriate against a deed, act or omission arising from citizens, legal persons, groups or private organizations, that have violated, that violate or threaten to violate any constitutional right or guarantee protected by this law.

Artículo 3

Article 3

También es procedente la acción de amparo, cuando la violación o amenaza de violación deriven de una norma que colida con la Constitución, en este caso, la providencia judicial que resuelva la acción interpuesta deberá apreciar la inaplicación de la norma impugnada y el Juez informará a la Corte Suprema de Justicia acerca de la respectiva

The amparo action is also appropriate when the violation or threat of violation arises out of a norm that collides with the Constitution. In this case, the judicial decision that resolves the action shall determine the inapplicability of the challenged law and the Judge shall inform the Supreme Court of Justice about such

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decisión.

La acción de amparo también podrá ejercerse conjuntamente con la acción popular de inconstitucionalidad de las leyes y demás actos estatales normativos, en cuyo caso, la Corte Suprema de Justicia, si lo estima procedente para la protección constitucional, podrá suspender la aplicación de la norma respecto de la situación jurídica concreta cuya violación se alega, mientras dure el juicio de nulidad.

Artículo 5

La acción de amparo procede contra todo acto administrativo, actuaciones materiales, vías de hecho, abstenciones u omisiones que violen o amenacen – violar un derecho o una garantía constitucionales, cuando no exista un medio procesal breve, sumario y eficaz acorde con la protección constitucional.

Cuando la acción de amparo se ejerza contra actos administrativos de efectos particulares o contra abstenciones o negativas de la Administración, podrá formularse ante el Juez Contencioso-Administrativo competente, si lo hubiere en la localidad conjuntamente con el recurso contencioso-administrativo de anulación de actos administrativos o contra las conductas omisivas, respectivamente, que se ejerza, en estos casos, el juez, en forma breve, sumaria, efectiva y conforme a lo establecido en el artículo 22, si lo considera procedente para la protección constitucional, suspenderá los efectos del acto recurrido como garantía de dicho derecho constitucional violado, mientras dure el juicio.

Paragrafo unico: Cuando se ejerza la acción de amparo contra actos administrativos conjuntamente con el recurso contencioso-administrativo que se fundamente en la violación de un derecho constitucional, el ejercicio del recurso procederá en cualquier tiempo, aún después de transcurridos los lapsos de caducidad previstos en la ley y no será necesario el

decision.

The amparo action may also be exercised together with the popular action of the unconstitutionality of laws and other normative governmental acts, in which case the Supreme Court of Justice, if it deems it appropriate for the constitutional protection, may suspend the application of the law with respect to the specific legal situation the violation of which is alleged, during the pendency of the annulment proceedings.

Article 5

The amparo action is appropriate against all administrative acts, actions, de facto acts (“vías de hecho”), abstentions or omissions which violate or threaten to violate a constitutional right or guarantee, when there is no brief, expeditious and effective procedural means appropriate for constitutional protection.

When the amparo action is exercised against administrative acts with particular effects or against abstentions or refusals of the State (Administración), it could be filed before the competent administrative judge (juez contencioso-administrativo), if [such a judge] exists in such place, together with the administrative remedy of annulment (recurso contencioso-administrativo de anulación) of administrative acts or against omissions, respectively, which could be filed. In these cases, the Judge, in a brief, expeditious, and effective manner and pursuant to what is provided in Article 22, if it considers it appropriate for constitutional protection, shall suspend the effects of the challenged act as a guarantee of such violated constitutional right, during the pendency of the proceedings.

Sole Paragraph: When the amparo action against administrative acts is filed together with the administrative remedy (recurso contencioso-administrativo) based on the violation of a constitutional right, the filing of this remedy shall be appropriate at any time, even after the terms of forfeiture (caducidad) provided in the Law have elapsed, and it shall not be necessary to

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agotamiento previo de la vía administrativa. previously exhaust administrative remedies.

TITULO II: DE LA ADMISIBILIDAD TITLE II: ON ADMISSIBILITY

Artículo 6

Article 6

No se admitirá la acción de amparo: [...] The action of amparo shall not be admissible. [...]

4) Cuando la acción u omisión, el acto o la resolución que violen el derecho o la garantía constitucionales hayan sido consentidos expresa o tácitamente, por el agraviado, a menos que se trate de violaciones que infrinjan el orden público o las buenas costumbres. 4) When the action or omission, the act or decision, which violate the Constitutional right or guarantee, was expressly or tacitly accepted by the aggrieved party, unless it concerns violations that infringe public policy or sound morality (buenas costumbres).

Se entenderá que hay consentimiento expreso. Cuando hubieren transcurrido los lapsos de prescripción establecidos en leyes especiales o en su defecto seis (6) meses después de la violación o la amenaza al derecho protegido. It shall be understood that there is an express consent, when the terms of statute of limitations established in special laws have expired, or alternatively, six (6) months after the violation or threat [of the violation] of the protected right. Tacit consent is that which has unequivocal evidence of acceptance.

El consentimiento tácito es aquel que estrañ signos inequívocos de aceptación.

E.V.8. Venezuelan Code of Civil Procedure (as published in the Extraordinary Official Gazette No. 4.209 of 18 September 1990)

82. Article 12 and Article 13 of the Venezuelan Code of Civil Procedure are found at C-215 App. 21, C-44 App. 6 and Respondents' Closing Slide 26.

Spanish (Original)	Claimant's Translation	Respondents' Translation
Código de Procedimiento Civil	Venezuelan Code of Civil Procedure	Venezuelan Code of Civil Procedure
<u>Artículo 12.</u>	<u>Article 12.</u>	[No Translation Provided]

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<p>En la interpretación de 99ontraltos o actos que presenten oscuridad, ambigüedad o deficiencia, los jueces se alentarán al propósito y a la intención de las partes o de los otorgantes, lamiendo en mira las exigencias de la ley; de la verdad y de la Buena fe.</p>	<p>In the interpretation of contracts or acts that are obscure, ambiguous or deficient, judges shall be subject to the parties' purpose and intention taking into account the requirements of the law, the truth and good faith. (C-215 App. 21)</p>
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(C-215 App. 21)

(C-215 App. 21)

Artículo 13

[No Translation Provided]

Article 13

El juez decidirá el fondo de la causa con arreglo a la equidad, cuando las partes de común acuerdo así lo soliciten y la controversia se refiera a derechos disponibles

...shall decide the merits of the case according to equity, when the parties, by mutual agreement, so request him and the controversy refers to rights that can be transacted

(C-44 App. 6)

R Closing Slide 26

E.V.9 Law on Partial Amendment to the Income Tax Law and Income Tax Law (both as published in the Extraordinary Official Gazette No. 5023 of 18 December 1995)

- 83. The relevant provisions of the Law on Partial Amendment to the Income Tax Law are found at C-177. The original text of Article 53 provides different percentage numbers than were provided by the Claimant's translation. This Award provides the numbers exactly as provided by Claimant's translation – this is not a typo.

Spanish (Original)

Claimant's Translation

Ley de Reforma Parcial de la Ley de Impuesto sobre la Renta

Law on Partial Amendment to the Income Tax Law

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Artículo 1

Article 1

Se modifica al primer aparte del artículo 9º, así:

The first separate paragraph of article 9 is modified, thus:

Quedan excluidos del régimen previsto en este artículo, las empresas que se constituyan bajo convenios de asociación celebrados conforme a la Ley Orgánica que Reserva al Estado la Industria y al Comercio de los Hidrocarburos o mediante contratos de interés nacional previstos en la Constitución, para la ejecución de proyectos integrados verticalmente en materia de explotación, refinación, industrialización, emulsificación, transporte y comercialización de petróleos crudos extrapesados, bitumanes naturales y gas natural costa afuera, y las empresas ya constituidas y domiciliadas en Venezuela que realicen actividades integradas de producción y emulsificación de bitumen natural, todas las cuales tributarán, bajo el régimen ordinario establecido en esta Ley para las compañías anónimas y los contribuyentes asimilados a éstas.

Enterprises constituted under association agreements entered into in accordance with the Organic Law that Reserves to the State the Industry and the Commerce of Hydrocarbons or through national interest contracts under the Constitution, for the execution of vertically integrated projects related to the exploitation, refining, industrialization, emulsification, transport and commercialization of extra-heavy crude oil, natural bitumens and natural gas offshore, and enterprises already constituted and domiciled in Venezuela which realize integrated activities of production and emulsification of natural bitumen, shall be excluded from the regime provided for in this article, all of which shall be taxed under the ordinary regime established in this Law for stock companies [compañías anónimas] and the taxpayers assimilated to them.

Artículo 53

Article 53

En enriquecimiento global neto anual/obtenido por los contribuyentes a que se refiere el artículo 7 de la presente Ley se gravará salvo, disposición en contrario, con base en la siguiente tarifa expresada en unidades tributarias (U.T.):

The aggregate annual net income, obtained by the taxpayers referred to in Article 7 of this Law shall be taxed except as otherwise provided, on the basis of the following rate expressed in taxing units (T.U.):

Tarifa Nº 2

RATE NUMBER 2

1. Por la fracción comprendida hasta 2.000,00 15%
2. Por la fracción que exceda de 2.000,00 hasta 3.000,00 22%
3. Por la fracción que exceda de 3.000,00 34%

1. For the fraction contained up to 2.000 15%
2. For the fraction exceeding 2.000 up to 3.000 30%
3. For the fraction exceeding 3.000 34%

E.V.10. Congressional Authorization of the Framework of Conditions for the Cerro Negro Association Agreement (as published in Official Gazette No. 36.224, published 10 June 1997)

84. The principal relevant provisions of the Framework of Conditions are found at C-11 and R-43.

Spanish (Original)	Claimant's Translation	Respondents' Translation
<p>Acuerdo mediante el cual se aprueba el Marco de Condiciones que regirá el Convenio de Asociación para la explotación, transporte, mejoramiento y comercialización de crudos extrapesados a ser producidos en el área Cerro Negro de la Faja Petrolifera del Orinoco, a celebrarse entre Lagoven, S.A., Filial de Petróleos de Venezuela, y las empresas Mobil Corporation y Veba Oel AG</p>	<p>Framework of Conditions for the Association Agreement for the exploitation, transporting, upgrading and marketing of extra-heavy crude oil to be produced in the Cerro Negro area of the Orinoco Oil Belt</p>	<p>Congressional Authorization of the Framework of Conditions for the Cerro Negro Association Agreement</p>
<p><u>DECIMA</u></p>	<p><u>TENTH</u></p>	<p><u>TENTH</u></p>
<p>Cada Parte recibirá la propiedad de su correspondiente cuota parte de petróleo crudo extrapesado producido (incluyendo la "Producción de Desarrollo", tal como se define en la Condición Novena), en la cabeza de cada pozo en proporción a su respectiva participación en LA ASOCIACION. La propiedad del gas asociado con el petróleo crudo extrapesado y la de los otros productos generados en el mejoramiento del petróleo crudo extrapesado recaerá en LAS PARTES, en proporción a su respectiva participación en LA ASOCIACION, al momento</p>	<p>Each Party shall receive property of its respective share of produced extra-heavy crude oil (including the "Development Production," as defined in Ninth Condition), at each wellhead proportionately to its respective participation in THE ASSOCIATION. The property of the gas associated with the extra-heavy crude oil and that of other products generated in the upgrading of the extra-heavy crude oil shall belong to THE PARTIES, proportionately to their respective participation in THE ASSOCIATION, at the time of its recovery or production. THE PARTIES</p>	<p>Each Party shall receive property of its respective share of produced extra-heavy crude oil (including the "Development Production," as defined in Ninth Condition), at each wellhead proportionately to its respective participation in THE ASSOCIATION. The property of the gas associated with the extra-heavy crude oil and that of other products generated in the upgrading of the extra-heavy crude oil shall belong to THE PARTIES, proportionately to their respective participation in THE ASSOCIATION, at the time of their recovery or production. THE PARTIES</p>

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de su recuperación o producción. LAS PARTES establecerán un plan para el uso, venta disposición de todo el referido gas asociado y otros productos.

shall establish a plan for the use, sale, or disposal of all such associated gas and other products.

shall establish a plan for the use, sale, or disposal of all such associated gas and other products

DECIMA TERCERA

THIRTEENTH

THIRTEENTH

En caso de que LAS PARTES sean requeridas a reducir su producción como resultado de los compromisos internacionales de la República de Venezuela, tal disminución no excederá el porcentaje de reducción generalmente aplicable a la industria petrolera nacional como un todo. Este porcentaje será calculado con base a la capacidad disponible de producción. LAS PARTES deberán acordar una extensión apropiada del tiempo duración del Convenio de Asociación en caso de alguna reducción de las aquí señaladas, para permitir a LAS PARTES producir en volumen acumulado que dejaron de producir debido a las reducciones impuestas, siempre y cuando con dicha extensión el término del Convenio de Asociación termine no más allá del cuadragésimo (40º) aniversario de la Fecha de Comienzo.

If THE PARTIES are required to reduce their production as a result of the international commitments of the Republic of Venezuela, such reduction shall not exceed the reduction percentage generally applicable to the national oil industry as a whole. This percentage shall be calculated based on the available production capacity. THE PARTIES shall agree on an appropriate extension of the term of the Association Agreement in the event of a reduction as those indicated herein, to allow THE PARTIES to produce the accumulated volume they did not produce due to the reductions imposed provided that with the extension the term of the Association Agreement ends no later than on the fortieth (40th) anniversary of the Starting Date.

If THE PARTIES are required to reduce their production as a result of the international commitments of the Republic of Venezuela, such reduction shall not exceed the reduction percentage generally applicable to the national oil industry as a whole. This percentage shall be calculated based on the available production capacity. THE PARTIES shall agree on an appropriate extension of the term of the Association Agreement in the event of a reduction as those indicated herein, to allow THE PARTIES to produce the accumulated volume they did not produce due to the reductions imposed, provided that with the extension the term of the Association Agreement ends no later than on the fortieth (40th) anniversary of the Starting Date.

DECIMA QUINTA

FIFTEENTH

FIFTEENTH

Por cuanto la regulación y administración de los hidrocarburos se encuentran bajo la competencia del Poder Nacional, de conformidad con el artículo 136, ordinales 8º y 10º de la

Since the regulation and administration of hydrocarbons are under the authority of the National Government, pursuant to article 136, sections 8 and 10 of the Constitution of the

Since the regulation and administration of hydrocarbons are under the authority of the National Government, pursuant to Article 136, Sections 8 and 10 of the Constitution of the

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Constitución de la República de Venezuela, y por cuanto las actividades a ser ejecutadas por LAS PARTES de acuerdo con el Convenio de Asociación están reservadas al Estado, de conformidad con los artículos 1° y 7° de la Ley Organica que Reserva al Estado la Industria y el Comercio de los Hidrocarburos, dichas actividades no estaran sujetas al pago de Impuestos Municipales (Patente de Industria y Comercio) o Estadales, asimismo, de conformidad con lo previsto en el segundo párrafo del artículo 9 de la Ley de Impuesto sobre la Renta vigente, LAS PARTES y cada uno de los Entes pagarán impuestos bajo el régimen ordinario establecido en dicha ley para compañías y entes asimilados a ellas, por cualquier ingreso obtenido en relación con las actividades de LAS PARTES (incluyendo la Producción de Desarrollo).

Republic of Venezuela, and since the activities to be carried out by THE PARTIES under the Association Agreement are reserved to the State, pursuant to articles I and 7 of the Organic Law that Reserves to the State the Industry and Commerce of Hydrocarbons, such activities shall not be subject to payment of Municipal Taxes (Industry and Commerce Excise) or State taxes; furthermore, pursuant to the second paragraph of article 9 of the Income Tax Law in force, THE PARTIES and each of the Entities shall pay taxes under the ordinary regime established in said law for companies and assimilated entities, for any income obtained in connection with the activities of THE PARTIES (including the Development Production).

Republic of Venezuela, and since the activities to be carried out by THE PARTIES under the Association of Agreement are reserved to the State, pursuant to Articles 1 and 7 of the Organic law that Reserves to the State the Industry and Trade of Hydrocarbons, such activities shall not be subject to payment of Municipal Taxes (Industry and Trade Excise Tax) or State taxes; furthermore, pursuant to the second paragraph of Article 9 of the Income Tax Law in force, THE PARTIES and each of the Entities shall pay taxes under the ordinary regime established in said law for companies and similar entities, for any income obtained in connection with the activities of THE PARTIES (including the Development Production).

DECIMA OCTAVA

El Convenio de Asociación, y todas las actividades y operaciones conducidas conforme a él, no impondran ninguna obligación a la República de Venezuela ni restringirán sus potestades soberanas, el ejercicio de las cuales no dara derecho a reclamación alguna, sin importar la naturaleza o características de la reclamación, por parte de otros estados o poderes extranjeros.

EIGHTEENTH

The Association Agreement, and all activities and operations conducted under it, shall not impose any obligation on the Republic of Venezuela nor shall they restrict its sovereign powers, the exercise of which shall not cause any claim, regardless of the nature or characteristics of the claim, from other states or foreign powers.

EIGHTEENTH

The Association Agreement, and all activities and operations conducted under it, shall not impose any obligation on the Republic of Venezuela nor shall they restrict its sovereign powers, the exercise of which shall not give rise to any claim, regardless of the nature or characteristics of the claim, by other states or foreign powers.

VEGÉSIMA

El Convenio de Asociación incluirá provisiones que

TWENTIETH

The Association Agreement shall include provisions

TWENTIETH

The Association Agreement shall include provisions

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permitan la renegociación del Convenio en la forma que sea necesaria para compensar a cualquier Parte distinta de LAGOVEN, en terminus equitativos, por consecuencias económicamente adversas y significativas que surjan de la adopción de decisiones emanadas de autoridades gubernamentales, o cambios en la legislación, que causen un tratamiento discriminatorio a LA ASOCIACION, cualquier entidad o LAS PARTES en su condición de participantes en LA ASOCIACION. Sin embargo, no se considera que una Parte ha sufrido una consecuencia económicamente adversa y significativa como resultado de cualquiera de dichas decisiones o cambios en la legislación, en cualquier momento en que la Parte este recibiendo ingresos de LA ASOCIACION igual a un precio del petróleo crudo por encima de un precio máximo que será especificado en el Convenio de Asociación. De no haber acuerdo entre LAS PARTES, los correspondientes cambios al Convenio de Asociación, así como la indemnización por daños serán determinados a través de un arbitraje.

allowing the renegotiation of the Agreement as necessary to compensate any Party other than LAGOVEN, under equitable terms, for economically adverse and significant consequences arising from the adoption of decisions made by governmental authorities or changes in legislation that cause a discriminatory treatment of THE ASSOCIATION, any entity or THE PARTIES in their capacity as participants in THE ASSOCIATION. However, it shall not be considered that the Party has suffered an economically adverse and significant consequence as a result of any of said decisions or changes in legislation at any time when the Party receives income from THE ASSOCIATION equal to a price of crude oil above a maximum price that shall be specified in the Association Agreement. In the absence of agreement among THE PARTIES, the corresponding changes in the Association Agreement, as well as the indemnities for damages shall be determined by way of arbitration.

allowing the renegotiation of the Agreement as necessary to compensate any Party other than LAGOVEN, on equitable terms, for adverse and significant economic consequences arising from the adoption of decisions made by governmental authorities, or changes in legislation, that cause a discriminatory treatment of THE ASSOCIATION, any entity or THE PARTIES in their capacity as participants in THE ASSOCIATION. However, it shall not be considered that a Party has suffered an adverse and significant economic consequence as a result of any of said decisions or changes in legislation, at any time when the Party is receiving income from THE ASSOCIATION equal to a price of crude oil above a maximum price that shall be specified in the Association Agreement. If there is no agreement between THE PARTIES, the corresponding changes to the Association Agreement, as well as the indemnification for damages shall be determined by way of arbitration.

E.V.11. Agreement between the Venezuelan Ministry of Energy and Mines and PDVSA S.A. to Calculate the Royalty under Article 41 of the Hydrocarbons Law (29 May 1998)

85. The principal relevant provisions of the Royalty Reduction Agreement (“RRA”) are found at C-80.

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Spanish (Original)

Claimant's Translation

[Spanish Original Not Provided]

Agreement between the Venezuelan Ministry of Energy and Mines and PDVSA S.A. to Calculate the Royalty under Article. 41 of the Hydrocarbons Law

QUINTA: DE LA METODOLOGIA PARA EL OTORGAMIENTO DE LA REBAJA

Fifth: Methodology for Granting Reduction

Para propósitos de calcular la REGALIA, se procederá a multiplicar el volumen de crudo extraído en la cláusula SEGUNDA de este CONVENIO por el VM obtenido de la aplicación de la fórmula establecida en la cláusula TERCERA por el porcentaje resultante de aplicar el procedimiento que se establece a continuación en esta cláusula.

For purposes of calculating the ROYALTY, the volume of extracted crude referred to in clause SECOND of this AGREEMENT shall be multiplied by the VM obtained from the application of the formula established in clause THIRD by the percentage resulting from applying the procedure established below in this clause.

5.1. Durante el período de producción temprana o de desarrollo de cada ASOCIACION, el porcentaje aplicable para el cálculo de la REGALIA, será de 16 2/3%.

5.1. During the period of early or development production of each ASSOCIATION, the percentage applicable to the calculation of the ROYALTY shall be 16 2/3%.

5.2. Para determinar el porcentaje que se aplicará para el cálculo de la REGALIA a pagar por cada ASOCIACION, durante el período de producción comercial, se utilizará el indicador (I), resultante de la relación entre los INGRESOS BRUTOS ACUMULADOS y la INVERSION TOTAL, de manera que:

5.2. In order to determine the percentage to be applied for the calculation of the ROYALTY to be paid by each ASSOCIATION, during the commercial production period, indicator (I) shall be used, resulting from the ratio of the ACCUMULATED GROSS INCOME to the TOTAL INVESTMENT, so that:

a) Si el indicador (I) es menor o igual a 3,00, el porcentaje aplicable para el cálculo de la REGALIA será 1%

a) If indicator (I) is lower than or equal to 3.00, the percentage applicable to the calculation of the royalty shall be 1%.

b) Si el indicador (I) es mayor a 3,00, el porcentaje aplicable será 16 2/3%. Máximo actualmente permitido por la Ley de Hidrocarburos.

b) If indicator (I) is higher than 3.00, the applicable percentage shall be 16 2/3%, which is the maximum presently permitted by the Law of Hydrocarbons.

5.3. En ningún caso, el porcentaje de 1% aplicable para el cálculo de la REGALIA podrá exceder de nueve (9) años contados a

5.3 In no case may the 1% percentage applicable to the calculation of the royalty exceed nine (9) years as from the

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partir del inicio de la producción comercial de cada ASOCIACION.

commencement of the commercial production of each ASSOCIATION.

A los efectos de lo previsto en este CONVENIO se entenderá que:

For the purposes of the provisions of this AGREEMENT, it shall be understood that:

PRODUCCION TEMPRANA O DE DESARROLLO significa la producción de petróleo crudo obtenida, durante el período pre-operativo, con el propósito de verificar la productividad de los yacimientos, optimizar el plan de desarrollo y alcanzar el nivel óptimo de producción para el momento en el cual las instalaciones para el mejoramiento comiencen operaciones comerciales.

EARLY OR DEVELOPMENT PRODUCTION means the crude oil production obtained during the pre-operative period, with the purpose of verifying the productivity of the reservoirs, optimizing the development plan, and reaching an optimum production level by the time at which the facilities for the upgrading commence commercial operations.

INICIO DE LA PRODUCCION COMERCIAL de cada ASOCIACION significa lo Contemplado en los respectivos convenios de asociación.

COMMENCEMENT OF COMMERCIAL PRODUCTION of each ASSOCIATION means what is prescribed in the respective association agreements.

INGRESOS BRUTOS ACUMULADOS ó IBA será igual al monto total acumulado de las ventas brutas de crudo, productos y servicios, en dólares corrientes, contados a partir del inicio de la producción de crudo extra pesado de cada ASOCIACION.

ACCUMULATED GROSS INCOME or IBA shall be equal to the total accumulated amount of the gross sales of crude, products and services in current dollars, counted as from the beginning of the extra-heavy crude production of each ASSOCIATION.

INVERSION TOTAL ó IT será igual al monto total invertido por cada ASOCIACION, en dólares corrientes, hasta el inicio de la producción comercial.

TOTAL INVESTMENT or IT shall be equal to the total amount invested by each ASSOCIATION in current dollars, until the commencement of the commercial production.

La IT de cada ASOCIACION incluirá, entre otros, todas las inversiones en pozos, líneas de flujo, campo de producción, tuberías, mejorador, infraestructura, costos pre-operativos capitalizables, capital de trabajo, costos del financiamiento, intereses durante construcción, estudios, asesorías y similares, necesarios para y hasta el inicio de la producción comercial de cada ASOCIACION.

The IT of each ASSOCIATION shall include, among others, all the investments in wells, flow lines, production field, pipes, upgrader, infrastructure, capitalizable pre-operative costs, working capital, financing costs, interest during construction, studies, advices and the like, which are necessary for and until the commencement of the commercial production of each ASSOCIATION.

Para el cálculo de IBA e IT antes señalado, la conversión de bolívares corrientes a dólares corrientes se efectuará utilizando la

For the calculation of the above-mentioned IBA and IT, the conversion of current bolivars into current dollars shall be made

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tasa de cambio referencial del bolívar con respecto al dólar de los Estados Unidos de América, establecida por el Banco Central de Venezuela, para el momento en el cual se realicen los correspondientes registros contables.

using the bolívar reference exchange rate with respect to the dollar of the United States of America, established by the Central Bank of Venezuela, at the time when the respective accounting records are made.

E.V.12. Law on the Promotion and Protection of Investments (as published in the Official Gazette No. 5390 of 22 October 1999)

86. The relevant portion of the Investment Law is found at ¶¶ 67 – 68 of the ICSID Decision on Jurisdiction (10 June 2010). The Parties have not provided the original text or a translation of the Investment Law in this proceeding.

Spanish (Original)

Translation (ICSID)

Artículo 22

Article 22

Las controversias que surjan entre un inversionista internacional, cuyo país de origen tenga vigente con Venezuela un tratado o acuerdo sobre promoción y protección de inversiones, o las controversias respecto de las cuales sean aplicables las disposiciones del Convenio Constitutivo del Organismo Multilateral de Garantía de Inversiones (OMGI-MIGA) o del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados (CIADI), serán sometidas al arbitraje internacional en los términos del respectivo tratado o acuerdo, si así éste lo establece, sin perjuicio de la posibilidad de hacer uso, cuando proceda, de las vías contenciosas contempladas en la legislación venezolana vigente.

Disputes arising between an international investor whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or disputes to which are applicable the provision of the Convention Establishing the Multilateral Investment Guarantee Agency (OMGI –MIGA) or the Convention on the Settlement of Investment Disputes between States and National of other States (ICSID), shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so provides, without prejudice to the possibility of making use, when appropriate, of the dispute resolution means provided for under the Venezuelan legislation in effect.

E.V.13. Venezuelan Constitution dated 20 December 1999 (as published in Extraordinary Official Gazette No. 5453 of 24 March 2000)

87. The principal relevant provisions of the Venezuelan Constitution are found at C-224, R-68, R-69, and R-118. The texts are copied below and are cited to the relevant exhibit. Respondents, through witnesses, have provided the

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Tribunal with two translations for Article 302. These translations are presented immediately following one another, in the chart below.

Spanish (Original)	Claimant's Translation	Respondents' Translation
Constitución de la República Bolivariana de Venezuela	Venezuelan Constitution	Constitution of the Bolivarian Republic of Venezuela
<u>Artículo 24</u>	<u>Article 24</u>	<u>Article 24</u>
Ninguna disposición legislativa tendrá efecto retroactivo, excepto cuando imponga menor pena. Las leyes de procedimiento se aplicarán desde el momento mismo de entrar en vigencia, aun en los procesos que se hallaren en curso; pero en los procesos penales, las pruebas ya evacuadas se estimarán en cuanto beneficien al reo o a la rea, conforme a la ley vigente para la fecha en que se promovieron.	No legislative provision shall have retroactive effect, except when it imposes a lesser penalty. Procedural laws shall apply from the time they enter into force, even to proceedings in course; but in criminal proceedings, the evidence already produced shall be considered to the extent it benefits the charged individual [reo o rea], according to the laws in force at the time it was produced.	No legislative provision shall have retroactive effect, except when it imposes a lesser sanction. Procedural laws shall be applicable from the moment of their entry into force, even for the proceedings in progress. However, in criminal proceedings, the evidence already produced shall be valued to the extent that it benefits the defendant, pursuant to the law in effect at the time that the [proceedings] were commenced.
Cuando haya dudas se aplicará la norma que beneficie al reo o a la rea. (C-224; R-69 App. 2)	In case of doubt the norm that benefits the charged individual [reo o rea] shall be applied. (C-224)	In case of doubt, the norm that benefits the defendant shall be applied. (R-69 App. 2)
<u>Artículo 27</u>	<u>Article 27</u>	<u>Article 27</u>
Toda persona tiene derecho a ser amparada por los tribunales en el goce y ejercicio de los derechos y garantías constitucionales, aun de aquellos inherentes a la persona que no figuren expresamente en esta Constitución o en los instrumentos internacionales sobre derechos humanos.	[No Translation Provided]	Every person has the right to be protected by the courts in the enjoyment and exercise of constitutional rights and guarantees, even of those [rights and guarantees] inherent to the person that are not expressly stated in this Constitution or in the international instruments on

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[...]

human rights [...]

(C-224; R-69 App. 2)

(R-69 App. 2)

Artículo 115

Article 115

Article 115

Se garantiza el derecho de propiedad. Toda persona tiene derecho al uso, goce, disfrute y disposición de sus bienes. La propiedad estara sometida a las contribuciones, restricciones y obligaciones que establezca a ley con fines de utilidad pública o de interés general. Sólo por causa de utilidad pública o interés social, mediante sentencia firme y pago oportuno de justa indemnización, podrá ser declarada la expropiación de cualquier clase de bienes. (C-224; R-68 App. 5)

The right to property is guaranteed. Every person has the right to use, enjoy and dispose of his/her/its assets. Property shall be subject to contributions, restrictions and obligations established by law for the purposes of public utility or general interest. Only by reason of public utility or social interest, by means of a final judicial decision [sentencia firme] and with the prompt payment of just compensation, may the expropriation of any type of assets be declared. (C-224)

The right to property is guaranteed. All persons have the right to the use, enjoyment and disposal of their assets. Property shall be subject to contributions, restrictions and obligations established by law for the purposes of public utility or general interest. Only for reasons of public utility or social interest and by a final judgment and timely payment of just compensation, an expropriation of any class of assets may be declared. (R-68 App. 5)

Artículo 131

Article 131

Article 131

Toda persona tiene el deber de cumplir a acatar esta Constitución, las leyes y los demás actos que en ejercicio de sus funciones dicten los órganos del Poder Público. (C-224; R-69 App. 2)

Every person has the duty to comply with and obey this Constitution, the laws and other official acts that the organs of Public Power dictate in the exercise of their functions. (C-224)

Every person has the duty to comply with and obey this Constitution, the laws and other acts dictated by the bodies of the Public Power, in performance of their functions. (R-69 App. 2)

Artículo 253

Article 253

Article 253

La potestad de administrar justicia emana de los ciudadanos y ciudadanas y se imparte en nombre de la República por autoridad de la ley.

The authority to administer justice emanates from the citizens and is granted in the name of the Republic by authority of law.

[No Translation Provided]

Corresponde a los órganos del Poder Judicial conocer de las causas y asuntos de su competencia mediante los

It corresponds to the organs of the Judicial Power to take cognizance of [conocer] suits and matters of their

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procedimientos que determinen las leyes, y ejecutar o hacer ejecutar sus sentencias. competence through the procedures that the laws determine, as well as to enforce their decisions or to have them enforced.

El sistema de justicia está constituido por el Tribunal Supremo de Justicia, los demás tribunals que determine la ley, el Ministerio Público, la Defensoría Pública, los órganos de investigación penal, los o las auxiliares y funcionarios o funcionarias de justicia, el sistema penitenciario, los medios alternativos de justicia, los ciudadanos o ciudadanas que participant en la administración de justicia conforme a la ley y los abogados autorizados o abogadas autorizadas para el ejercicio. (C-224) The system of justice is constituted by the Supreme Tribunal of Justice, the other courts that the law determines, the Public Ministry, the Public Ombudsman, the organs of criminal investigation, the auxiliaries or officials of justice, the penitentiary system, the alternative means of justice, the citizens who participate in the administration of justice in accordance with the law and the lawyers authorized for practice. (C-224)

Artículo 236

[No Translation Provided]

Article 236

Son atribuciones y obligaciones del Presidente o Presidenta de la Republica

The powers and obligations of the President of the Republic are:

8. Dictar, previa autorización por una ley habilitante, decretos con fuerza de ley. (R-118 App. 45)

8. To issue, with prior authorization through an enabling law, decrees with force of law. (R-118 App. 45)

Artículo 302

Article 302

Article 302

El Estado se reserva, mediante la ley orgánica respective, y por razones de conveniencia nacional, la actividad petrolera y otras industrias, explotaciones, servicios y bienes de interés público y de caracter estrategico. El Estado promoverá la manufactura nacional de materias primas provenientes de la

[No Translation Provided]

The State reserves to itself, through the respective organic law, and for reasons of national convenience (conveniencia nacional), oil activities and other industries, exploitations, services and assets having a public interest and strategic character. The State shall promote the national manufacture of raw

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explotación de los recursos naturales no renovables, con el fin de asimilar, crear e innovar tecnologías, generar empleo y crecimiento económico, y crear riqueza y bienestar para el pueblo.

(C-224; R-68 App. 5; R-69 App. 2)

materials derived from the exploitation of non-renewable national resources, with the goal of incorporating, creating and innovating technology, creating employment and economic growth, and generating wealth and well-being for the people. (R-69 App. 2)

The State reserves to itself, through the respective organic law, and for reasons of national convenience (conveniencia nacional), oil activities and other industries, exploitations, services and assets having a public interest and strategic character. The State shall promote the national manufacture of raw materials derived from the exploitation of non-renewable national resources, with the goal of incorporating, creating and innovating technology, creating employment and economic growth, and generating wealth and well-being for the people. (R-68 App. 5)

E.V.14. Decree No. 1510, Decree with Force of Organic Law of Hydrocarbons (as published in Official Gazette No. 37.323 published 13 November 2001)

88. The principal relevant provisions of the 2001 Hydrocarbons Law are found at C-128 and R-57.

Spanish (Original)	Claimant's Translation	Respondents' Translation
Decreto N° 1.510, Decreto con Fuerza de Ley Orgánica de Hidrocarburos	Decree with the Force of Organic Law of Hydrocarbons of 2001	Decree No. 1.510, Decree with Force of Organic Law of Hydrocarbons

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Artículo 9

Las actividades relativas a la exploración en busca de yacimientos de los hidrocarburos comprendidos en este Decreto Ley, a la extracción de ellos en estado natural, a su recolección, transporte y almacenamiento iniciales, se denominan actividades primarias a los efectos de este Decreto Ley.

De conformidad con lo previsto en el artículo 302 de la Constitución de la República Bolivariana de Venezuela, las actividades primarias indicadas, así como las relativas a las obras que su manejo requiera, quedan reservadas al Estado en los términos establecidos en este Decreto Ley.

Artículo 44

De los volúmenes de hidrocarburos extraídos de cualquier yacimiento, el Estado tiene derecho a una participación de treinta por ciento (30%) como regalía.

El Ejecutivo Nacional, en caso de que se demuestre a su satisfacción que un yacimiento maduro o de petróleo extrapesado de la Faja del Orinoco, no es económicamente explotable con la regalía del treinta por ciento (30%) establecida en este Decreto Ley, podrá rebajarla hasta un límite de veinte por ciento (20%) a fin de lograr la economicidad de la explotación y queda facultado igualmente para restituirla, total o

Article 9

The activities relating to the exploration in search of hydrocarbon reservoirs encompassed in this Decree-Law, to their extraction in natural state, to their initial production, transport and storage, are denominated as primary activities for purposes of this Decree-Law.

In accordance with what is provided in article 302 of the Constitution of the Bolivarian Republic of Venezuela, the primary activities indicated, as well as those relating to works required by their management, remain reserved to the State in the terms established in this Decree-Law.

Article 44

Of the volumes of hydrocarbons extracted from any reservoir, the State has the right to a thirty-percent (30%) participation by way of royalty.

The National Executive, in the event that it is demonstrated to its [the National Executive's] satisfaction that a mature reservoir or [a reservoir] of EHO in the Orinoco Oil Belt is not economically exploitable at the royalty of thirty percent (30%) set forth in this Decree-Law, may reduce it [the royalty] to a limit of twenty percent (20%) in order to attain the economic viability of the exploitation and is

Article 9

The activities related to the exploration in search of the hydrocarbon deposits referred to in this Decree-Law, to the extraction thereof in their natural condition, to the initial gathering, transportation and storage thereof, are denominated primary activities for purposes of this Decree-Law.

Pursuant to the provisions of Article 302 of the Constitution of the Bolivarian Republic of Venezuela, the specified primary activities, as well as those related to the works required for the handling thereof, are reserved to the State on the terms set forth in this Decree-Law.

Article 44

In respect of the hydrocarbon volumes extracted from any field, the State has a right to a thirty percent (30%) share as a royalty.

The National Executive, in the event that it is demonstrated to its satisfaction that a mature field or an EHO field from the Orinoco Belt is not economically exploitable with the thirty percent (30%) royalty established in this Decree-Law, may reduce it down a limit of twenty percent (20%) in order to make the exploitation economic, and likewise shall have the right to restore it, in whole or in

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parcialmente, hasta alcanzar de Nuevo el treinta por ciento (30%), cuando se demuestre que la economicidad del yacimiento pueda mantenerse con dicha restitución.

empowered to restore it [the royalty], totally or partially, until reaching again the thirty percent (30%), when it is demonstrated that the economic viability of the reservoir could be maintained with such restoration.

part, until reaching again thirty percent (30%), when it is demonstrated that the economic viability of the field can be maintained with such reinstatement.

El Ejecutivo Nacional, en caso de que se demuestre a su satisfacción que proyectos para mezclas de bitúmenes procedentes de la Faja Petrolífera del Orinoco, no son económicamente viables con la regalía de treinta por ciento (30%) establecida en este Decreto Ley, podrá rebajarla hasta en límite de dieciséis dos tercios por ciento (16 2/3%), a fin de lograr la economicidad de tales proyectos y queda igualmente facultado para restituirla, total o parcialmente, hasta alcanzar de Nuevo el treinta por ciento (30%), cuando se demuestre que la rentabilidad de los proyectos pueda mantenerse con dicha restitución.

The National Executive, in the event that it is demonstrated to its [the National Executive's] satisfaction that projects for mixing bitumen coming from the Orinoco Oil Belt, are not economically viable with a royalty of thirty percent (30%) set forth in this Decree-Law, may reduce it [the royalty] to the limit of sixteen-two-thirds percent (16 2/3%), in order to attain the economic viability of such projects and is likewise empowered to restore it [the royalty], totally or partially, until reaching again the thirty percent (30%), when it is demonstrated that the profitability of the projects could be maintained with such restoration.

The National Executive, in the event that it is demonstrated to its satisfaction that projects for bitumen blends originating from the Orinoco Crude Oil Belt are not economically viable with the thirty percent (30%) royalty established in this Decree-Law, may reduce it down to a limit of sixteen and two thirds percent (16 2/3%), in order to achieve the economic viability of such projects, and shall likewise have the right to restore it, in whole or in part, until reaching again thirty percent (30%), when it is demonstrated that the economics of the projects can be maintained with such reinstatement.

E.V.15. Organic Law of the Office of the General Comptroller of the Republic and of the National System of Fiscal Control (as published in Official Gazette No. 37.347 17 December 2001)

89. The principal relevant provision of the Organic Law of the Office of the General Comptroller of the Republic and of the National System of Fiscal Control is found at exhibit R-73.

Spanish (Original)

Respondents' Translation

Ley Orgánica de la Contraloría General de la República y del Sistema Nacional de

Organic Law of the Office of the General Comptroller of the Republic and the

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Control Fiscal

National System of Fiscal Control

Artículo 91

Article 91

Sin perjuicio de la responsabilidad civil o penal, y de lo que dispongan otras Leyes, constituyen supuestos generadores de responsabilidad administrativa los actos, hechos u omisiones que se mencionan a continuación:

Notwithstanding civil or criminal liability, and other Laws, the acts, deeds, or omissions, mentioned below, constitute circumstances (supuestos) that produce administrative liability:

12. efectuar gastos o contraer compromisos de cualquier naturaleza que puedan afectar la responsabilidad de los entes y organismos señalados en los numerales 1 al 11 del artículo 9 de esta Ley, sin autorización legal previa para ello, o sin disponer presupuestariamente de los recursos necesarios para hacerlo; salvo que tales operaciones sean efectuadas en situaciones de emergencia evidentes, como en casos de catástrofes naturales, calamidades públicas, conflicto interior o exterior u otros análogos, cuya magnitud exija su urgente realización, pero informando de manera inmediata a los respectivos órganos de control fiscal, a fin de que procedan a tomar las medidas que estimen convenientes, dentro de los límites de esta Ley.

12. making expenditures or entering into commitments of any nature that may affect the liability of the entities and bodies mentioned in sections 1 to 11 of Article 9 of this Law, without prior legal authorization to do so, or without having budgeted the necessary resources to do so; except if such operations are carried out in situations of evident emergency, as in the case of natural disasters, public calamities, internal or external conflict or other analogous situations, the magnitude of which requires urgent [expenditures], but immediately informing the respective bodies of fiscal control so that they may proceed to take the measures they deem appropriate, within the limitations of this Law.

14. el pago, uso disposición ilegal de los fondos u otros bienes de que sean responsables el particular o funcionario respectivo, salvo que estos comprueben haber procedido en cumplimiento de orden de funcionario competente y haberle advertido por escrito la ilegalidad de la orden recibida, sin perjuicio de la responsabilidad de quien impartió la orden.

14. illegal payment, use or disposition of funds or other assets for which the respective individual or government employee is responsible, except if they prove that they proceeded in compliance with an order from a competent government employee and that they notified him in writing of the illegality of the received order, without prejudice to the liability of the issuer of the order.

15. la aprobación o autorización con sus votos, de pagos ilegales o indebidos, por parte de los miembros de las juntas directivas o de los cuerpos colegiados encargados de la administración del patrimonio de los entes y organismos señalados en los numerales 1 al 11 del artículo 9 de esta Ley, incluyendo a los miembros de los cuerpos colegiados que ejercen la función legislativa en los Estados,

15. approval or authorization through voting of illegal or improper payments, by members of the board of directors or the collegial bodies in charge of the management of the patrimony of the entities and bodies mentioned in sections 1 to 11 of Article 9 of this Law, including the members of the collegial bodies that carry out the legislative function in the States, Districts, Metropolitan Districts and

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Distritos, Distritos Metropolitanos y Municipalities.
Municipios.

23. quienes ordenen iniciar la ejecución de contratos en contravención a una norma legal o sublegal, al plan de organización, las políticas, normativa interna, los manuales de sistemas y procedimientos que comprenden el control interno.

23. those who order the performance of contracts in contravention of a legal or sublegal norm, the organizational plan, the policies, the internal regulation, the manuals of systems and procedures that that make up the internal control.

E.V.16. Procedure for Payment of Extraction Tax (Royalty) for Extra Heavy Crude Oil Produced and Sulfur Extracted by Operadora Cerro Negro, S.A. [*Procedimiento para el Pago del Impuesto de Explotación (Regalía) del Crudo Extrapesado Producido y del Azufre Extraído por Operadora Cerro Negro S.A. (OCN)*] (16 January 2002)

90. The principal relevant provisions of the Royalty Procedures Agreement are found at C-169.

Spanish (Original)

Procedimiento para el Pago del Impuesto de Explotación (Regalía) del Crudo Extrapesado Producido y del Azufre Extraído por Operadora Cerro Negro S.A. (OCN)

1. Objetivo

El objetivo de este procedimiento es determinar los pasos a seguir para el pago del Impuesto de Explotación (REGALIA) ante el Ministerio de Energía y Minas, por concepto del petróleo extrapesado producido y del Azufre extraído por Operadora Cerro Negro. S.A. (OCN) durante la etapa de producción comercial de la Asociación, conforme a lo previsto en el Convenio de Asociación y en el Convenio de Regalía suscrito entre PDVSA Petróleo y Gas. S.A. y el Ministerio de Energía y Minas (MEM) el 29 de Mayo de 1998, al cual Mobil Producción e Industrialización de Venezuela INC., Veba Oel Venezuela Orinoco Ghmb (Veba OVO) y Lagoven Cerro Negro, S.A. se adhirieron mediante comunicación de 05 de noviembre de 1998, en su condición de participantes en la

Claimant's Translation

Procedure for Payment of Extraction Tax (Royalty) for Extra Heavy Crude Oil Produced and Sulfur Extracted by Operadora Cerro Negro, S.A.

1. Objectives

The objective of this procedure is to determine the steps to be taken vis-a-vis the Ministry of Energy and Mines for payment of the Exploitation Tax (ROYALTY) on the extra heavy crude oil produced and sulfur extracted by Operadora Cerro Negro, S.A. (OCN) during the Association's commercial production stage, pursuant to the provisions of the Association Agreement and the Royalty Agreement signed by PDVSA Petróleo y Gas, S.A. and the Ministry of Energy and Mines (MEM) on May 29, 1998, to which Mobil Producción e Industrialización de Venezuela, Inc., Veba Oel Venezuela Orinoco Ghmb [sic] (Veba OVO), and Lagoven Cerro Negro, S.A. adhered by communication dated November 5, 1998 in their capacity as participants in the Strategic Association for the

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<p>Asociación Estratégica para la explotación y mejoramiento del petróleo extrapesado proveniente del área Cerro Negro.</p>	<p>exploitation and upgrading of extra heavy oil from the Cerro Negro area.</p>
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4.4.1

Si el indicador I es menor o igual a 3; el porcentaje de Regalía a pagar será 1%.

4.4.1

If the indicator I is less than or equal to 3, the Royalty percentage payable shall be 1%.

4.4.2

Si el indicador I es mayor a 3, el porcentaje de Regalía a pagar sera 16 2/3 %.

4.4.2

If the indicator I is greater than 3, the Royalty percentage payable shall be 16 2/3%.

E.V.17. Law Against Corruption (as published in Extraordinary Official Gazette No. 5.637 7 April 2003)

91. The principal relevant provisions of the Law Against Corruption are found at R-74.

Spanish (Original)

Respondents' Translation

Ley Contra la Corrupción

Law Against Corruption

Artículo 53

Article 53

Cualquiera de las personas indicadas en al artículo 3 de esta Ley que teniendo, por razón de su cargo, la recaudación, administración o custodia de bienes del patrimonio público o en poder de algún órgano o ente público, diere ocasión por imprudencia, negligencia, impericia o inobservancia de leyes, reglamentos, órdenes o instrucciones, a que se extravíen, pierdan, deterioren o dañen esos bienes, será penada con prisión de seis (6) meses a tres (3) años.

Any of the persons indicated in Article 3 of this Law that, due to their position, have the collection (recaudación), management or custody of assets of the public patrimony (patrimonio público) or in the hands of any public body or entity, by recklessness, negligence, or inobservance of laws, regulations, orders or instructions, brought about the mislay, loss, deterioration, or damage of those assets, shall be sentenced to six (6) months to three (3) years imprisonment.

Artículo 54

Article 54

El funcionario público que, indebidamente, en beneficio particular o para fines contrarios a los previstos en las leyes, reglamentos, resoluciones u órdenes de servicio, utilice o permita que otra persona utilice bienes del patrimonio público o en poder de algún organismo público, o de empresas del Estado cuya administración, tenencia o custodia se le haya confiado, será penado con prisión de seis (6) meses a cuatro (4) años.

The Government employee that, unduly, for his own benefit or for goals that are contrary to those provided by laws, regulations, resolutions or service orders, uses, or allows another person to use, assets that belong to the public patrimony (patrimonio público), or [that are] in the hands of any public body, or State companies, the management, possession or custody of which was trusted to them, shall be sentenced to six (6) months to four (4) years imprisonment.

Con la misma pena será sancionada la

The same sentence shall be imposed to the

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persona que, con la anuencia del funcionario público, utilice los trabajadores o bienes referidos.

person that, with the consent of the Government employee, uses the aforementioned workers or assets.

Artículo 56

Article 56

El funcionario público que ilegalmente diere a los fondos o rentas a su cargo, una aplicación diferente a la presupuestada o destinada, aun en beneficio público, será penado con prisión de tres meses a tres años, según la gravedad del delito.

The Government employee who illegally uses funds or revenues, which he is responsible for, for a purpose different than the one that was budgeted or envisaged, even if he acts in the public interest, shall be sentenced to three months to three years imprisonment, depending on the gravity of the crime.

E.V.18. Organic Law of the Supreme Tribunal of Justice of the Bolivarian Republic of Venezuela (as published in Official Gazette No. 37.942, published 20 May 2004)

92. The principal relevant provisions of the Organic Law of the Supreme Tribunal of Justice are found at R-69 App. 31.

Spanish (Original)

Respondents' Translation

Ley Orgánica del Tribunal Supremo de Justicia de la República Bolivariana de Venezuela

Organic Law of the Supreme Tribunal of Justice of the Bolivarian Republic of Venezuela

Artículo 5

Article 5

Es de la competencia del Tribunal Supremo de Justicia como más alto Tribunal de la República:

The Supreme Tribunal of Justice, as the highest Tribunal of the Republic, has jurisdiction to:

6. Declarar la nulidad total o parcial de las leyes nacionales y demás actos con rango de ley de la Asamblea Nacional, que colidan con la Constitución de la República Bolivariana de Venezuela, mediante el ejercicio del control concentrado de la constitucionalidad. La sentencia que declare la nulidad total o parcial deberá publicarse en la Gaceta Oficial de la República Bolivariana de Venezuela, determinando expresamente sus efectos en el tiempo;

6. To declare the total or partial nullity of national laws and other acts having the rank of law of the National Assembly, which collide with the Constitution of the Bolivarian Republic of Venezuela, through an action of concentrated control of constitutionality. The judgment which declares the total or partial nullity must be published in the Official Gazette of the Bolivarian Republic of Venezuela, determining expressly its effects in time;

8. Declarar la nulidad total o parcial de los actos con rango de ley dictados por el

8. To declare the total or partial nullity of acts having the rank of law decreed by the

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Ejecutivo Nacional, que colidan con la Constitución de la República Bolivariana de Venezuela, mediante el ejercicio del control concentrado de la constitucionalidad. La sentencia que declare la nulidad total o parcial deberá publicarse en la Gaceta Oficial de la República Bolivariana de Venezuela;

National Executive, which collide with the Constitution of the Bolivarian Republic of Venezuela, through an action of concentrated control of constitutionality. The judgment which declares the total or partial nullity must be published in the Official Gazette of the Bolivarian Republic of Venezuela;

14. Resolver las colisiones que existan entre diversas disposiciones legales y declarar cuál debe prevalecer;

14. To resolve the collisions that exist between different legal provisions and declare which one should prevail;

30. Declarar la nulidad total o parcial de los reglamentos y demás actos administrativos generales o individuales del Poder Ejecutivo Nacional, por razones de inconstitucionalidad o ilegalidad;

30. To declare the total or partial nullity of regulations or other general or individual administrative acts of the National Executive Power, for reasons of unconstitutionality or illegality;

31. Declarar la nulidad, cuando sea procedente por razones de inconstitucionalidad o de ilegalidad, de los actos administrativos generales o individuales de los órganos que ejerzan el Poder Público de rango Nacional;

31. To declare the nullity, when it is appropriate for reasons of unconstitutionality or illegality, of general or individual administrative acts of the organs which exercise the Public Power of National rank;

Artículo 21 [...]

Article 21 [...]

Toda persona natural o jurídica, que sea afectada en sus derechos o intereses por una ley, reglamento, ordenanza u otro acto administrativo de efectos generales emanado de alguno de los órganos del Poder Público Nacional, Estatal o Municipal, o que tengan interés personal, legítimo y directo en impugnar un acto administrativo de efectos particulares, puede demandar la nulidad del mismo ante el Tribunal Supremo de Justicia, por razones de inconstitucionalidad o de ilegalidad. El Fiscal General de la República y demás funcionarios a quienes las leyes les atribuyan tal facultad, podrán también solicitar la nulidad del acto, cuando éste afecte un interés general. [...]

Each natural or legal person, whose rights or interests are affected by a law, regulation, ordinance or other administrative act of general effects issued by any of the organs of the National, State or Municipal Public Power, or who has a personal, legitimate and direct interest in challenging an administrative act of particular effects may petition its annulment before the Supreme Tribunal of Justice, for reasons of unconstitutionality or illegality. The Attorney General of the Republic and other officials with the authority granted by law may also petition the annulment of the act, when it affects a general interest. [...]

Las acciones o recursos de nulidad contra los actos generales del Poder Público podrán intentarse en cualquier tiempo, pero los dirigidos a anular actos particulares de la administración caducarán en el término de seis (6) meses, contados a partir de su publicación en el respectiva órgano oficial,

The actions or petitions for annulment (acciones o recursos de nulidad) against general acts of the Public Power may be filed at any time, but those aimed at the annulment of particular acts of the administration will lapse (caducarán) in the period of six (6) months, from the date of its

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o de su notificación al interesado, si fuere procedente y aquélla no se efectuare, o cuando la administración no haya decidido el correspondiente recurso administrativo en el término de noventa (90) días continuos, contados a partir de la fecha de interposición del mismo. Sin embargo, aun en el Segundo de los casos señalados, la ilegalidad del acto podrá oponerse siempre por vía de excepción, salvo disposiciones especiales. Cuando el acto impugnado sea de efectos temporales, el recurso de nulidad caducará a los treinta (30) días.

publication in the respective official body, or from its notice to the interested party, if it is appropriate and if it is not made, or when the administration has not decided the corresponding administrative petition in the period of ninety (90) consecutive days, from the date of its filing. . . .

El Tribunal Supremo de Justicia podrá suspender los efectos de un acto administrativo de efectos particulares, cuya nulidad haya sido solicitada, a instancia de parte, cuando así lo permita la ley o la suspensión sea indispensable para evitar perjuicios irreparables o de difícil reparación por la definitiva, teniendo en cuenta la circunstancias del caso. A tal efecto, se deberá exigir al solicitante preste caución suficiente para garantizar las resultas del juicio.

The Supreme Tribunal of Justice may suspend the effects of an administrative act of particular effects, the annulment of which has been petitioned by a party, where the law permits or its suspension is necessary to avoid irreparable harm, or which cannot be remedied by final [judgment], taking into consideration the circumstances of the case.

E.V.19. Law of Partial Reform of Decree No. 1.510 with Force of Organic Law of Hydrocarbons (as published in Official Gazette No. 38.443 24 May 2006)

93. The principal relevant provisions of the Law of Partial Reform of Decree No. 1.510 with Force of Organic Law of Hydrocarbons are found at R-62.

Spanish (Original)

Respondents' Translation

Ley de Reforma Parcial del Decreto N° 1.510 con Fuerza de Ley Orgánica de Hidrocarburos

Law of Partial Reform of Decree No. 1.510 with Force of Organic Law of Hydrocarbons

Artículo 5

Article 5

Se modifica el artículo 48, en la forma siguiente:

Article 48 is modified, in the following form:

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Artículo 48

Sin perjuicio de lo que en material impositiva establezcan otras leyes nacionales, las personas que realicen las actividades a que se refiere la presente Ley, deberán pagar los impuestos siguientes:

[...]

4. Impuesto del Extracción. Un tercio (1/3) del valor de todos los hidrocarburos líquidos extraídos de cualquier yacimiento, calculado sobre la misma base establecida en el artículo 47 de esta Ley para el cálculo de la regalía en dinero. Este impuesto será pagado mensualmente junto con la regalía prevista en el artículo 44 de esta Ley, por la empresa operadora que extraiga dichos hidrocarburos. Al calcular el Impuesto de Extracción, el contribuyente tiene el derecho a deducir lo que hubiese pagado por regalía, inclusive la regalía adicional que esté pagando como ventaja especial. El contribuyente también tiene el derecho a deducir del Impuesto de Extracción lo que hubiese pagado por cualquier ventaja especial pagable anualmente, pero solamente en períodos subsiguientes al pago de dicha ventaja especial anual.

El Ejecutivo Nacional, cuando así lo estime justificado según las condiciones de Mercado, o de un proyecto de inversión específico para incentivar, entre otros, proyectos de recuperación secundaria, podrá rebajar, por el tiempo que determine, el Impuesto de Extracción hasta un mínimo de veinte por ciento (20%). Puede igualmente restituir el Impuesto de Extracción a su nivel original cuando estime que las causas de la exoneración hayan cesado.

Article 48

Without prejudice to any tax regulation established by other national laws, the persons carrying out the activities referred to in this law, shall pay the following taxes:

[...]

4. Extraction Tax. A third (1/3) of the value of all liquid hydrocarbons extracted from any field, calculated on the same base as was set by Article 47 of this Law for calculating the royalty payable in cash. This tax shall be paid monthly, together with the royalty set forth in Article 44 of this Law, by the operating company extracting said hydrocarbons. In calculating the Extraction Tax, the taxpayer has the right to deduct what it would have paid in royalties, including the special contribution (ventaja especial). The taxpayer also has the right to deduct from the Extraction Tax any amounts paid for any special contribution (ventaja especial) payable annually, but only in periods subsequent to those in which such annual special contribution (ventaja especial) was paid.

The National Executive, when it deems it justified according to market conditions, or conditions of a specific investment project to incentivize, among others, secondary recovery projects, may reduce the Extraction Tax for a period to be set by it, to a minimum of twenty percent (20%). The National Executive may likewise reinstate the Extraction Tax to its original level when it deems that the causes of the exception have ceased.

E.V.20. Law on Partial Amendment to the Organic Law of Hydrocarbons and Organic Law of Hydrocarbons (as amended) (both documents as republished in the Official Gazette No. 38493 of 4 August 2006)

94. The principal relevant provisions of the Partial Amendment to the Organic Law of Hydrocarbons and Organic Law of Hydrocarbons are found at C-112.

Spanish (original)

Claimant's translation

Ley de reforma Parcial del Decreto No. 1.510 con Fuerza de Ley Organica de Hidrocarburos

Law of Partial Amendment to Decree No. 1510 with the Force of Organic Law of Hydrocarbons

Artículo 1

Article 1

Se modifica el Titulo de la Ley, en la forme siguiente:

The Name of the Law is amended in the following manner:

LEY ORGÁNICA DE HIDROCARBUROS

ORGANIC LAW OF HYDROCARBONS

Artículo 2

Article 2

Artículo 2. Se modifica el artículo 2, en la forma siguiente:

Article 2 is amended in the following manner:

Artículo 2. Las actividades relativas a los hidrocarburos gaseosos se rigen por la Ley Orgánica de Hidrocarburos Gaseosos, salvo la extracción de hidrocarburos gaseosos asociados con el petróleo que se [illegible] por la presente Ley

Article 2. The activities related to gaseous hydrocarbons are governed by the Organic Law of Gaseous Hydrocarbons, except for the extraction of gaseous hydrocarbons associated with petroleum, which shall be governed by this Law.

Artículo 5

Article 5

Se modifica el artículo 48, en la forma siguiente:

Article 48 is amended in the following manner:

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Artículo 48 [...]

Article 48. (omissis ...)

3. Impuesto de Consume General. Por cada litro de producio derivado de los hidrocarburos vendido en el Mercado interno entre el treinta y cincuenta por ciento (30% y 50%) del precio pagado por el consumidor final, cuys alicuola entre ambos limites será fijada anualmente en la Ley de Presupuesto. Esto impuesto a ser pagado por el consumidor final será retenido en la fuente de suministro para ser enterado instrumente al Fisco Nacional.

3. General Consumption Tax. Per each liter of hydrocarbons by-product sold in the domestic market, between thirty and fifty percent (30% and 50%) of the price paid by the end consumer, the rate of which between both limits shall be annually fixed in the Budget Law. This tax to be paid by the end consumer shall be withheld at the source of supply in order to be monthly deposited with the National Treasury.

Dada, firmada y sellada en el Palacio Federal Legislativo, sede de la Asamblea Nacional, en Caracas a los dieciséis del mas de mayo de dos mil seis. Año 196° de la independencia y 147° de la Federación.

Legislative act performed in the Federal Legislative Palace, seat of the National Assembly, in Caracas, on the third day of the month of August of two thousand and six. Year 196° since Independence and 147° since Federation.

E.V.21. Law on Partial Amendment to the Income Tax Law (29 August 2006) (as published in the Official Gazette No. 38529 of 25 September 2006)

95. The relevant portions of the Law on Partial Amendment to the Income Tax Law are found at C-113.

Spanish (original)

Claimant's Translation

Ley de Reforma Parcial de la Ley de Impuesto sobre la Renta

Law on Partial Amendment to the Income Tax Law

Artículo 1

Article 1

Los enriquecimientos anuales, netos y disponibles obtenidos en dinero o en especie, causarán impuestos según las normas establecidas en esta Ley.

The annual, net and available income obtained in money or in kind, shall incur taxes under the norms established in this Law.

Salvo disposición en contrario de la presente Ley, toda persona natural o jurídica, residente o domiciliada en la República Bolivariana de Venezuela, pagará impuestos sobre sus rentas de cualquier origen, sea que la causa o la fuente de ingresos esté situada dentro del país o fuera de el. Las personas naturales o jurídicas no residentes o no

Except as provided to the contrary in this Law, every natural or legal person, resident or domiciliary in the Bolivarian Republic of Venezuela, shall pay taxes over [his/her/its] income of any origin, whether the cause or the source of the income is located inside or outside the country. The natural or legal persons not residing or not domiciled in the

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domiciliadas en la República Bolivariana de Venezuela estarán sujetas al impuesto establecido en esta Ley siempre que la fuente o la causa de sus enriquecimientos esté u ocurra dentro del país, aun cuando no tengan establecimiento permanente o base fija en la República Bolivariana de Venezuela. Las personas naturales o jurídicas domiciliadas o residenciadas en el extranjero que tengan un establecimiento permanente o una base fija en el país, tributarán exclusivamente por los ingresos de fuente nacional o extranjera atribuibles a dicho establecimiento permanente o base fija.

Bolivarian Republic of Venezuela shall be subject to the tax set forth in this Law so long as the source or the cause of their income is or occurs inside the country, even when they do not have a permanent establishment or fixed base in the Bolivarian Republic of Venezuela. Natural and legal persons domiciled or residing abroad who have a permanent establishment or fixed base in the country, shall be taxed exclusively for the income of a national source or of a foreign [source] attributable to such permanent establishment or fixed base. [...]

Artículo 9

Las compañías anónimas y los contribuyentes asimilados a éstas que realicen actividades distintas a las señaladas en el artículo 11 de esta Ley, pagarán impuesto por todos sus enriquecimientos netos, con base a la tarifa prevista en el artículo 52 y a los tipos de impuesto fijados en sus párrafos.

Article 9

Stock companies [compañías anónimas] and taxpayers assimilated to them, which carry out activities different than those indicated in article 11 of this Law, shall pay tax for all their net income, based on the rate provided in article 52 and the kinds of tax fixed in its paragraphs.

A las sociedades o corporaciones extranjeras, cualquiera sea la forma que revistan, les será aplicado el régimen previsto en este artículo.

The regime provided in this article shall apply to foreign companies or corporations, whatever form they have.

Las entidades jurídicas o económicas a que se refiere el literal e del artículo 7 de esta Ley, pagarán el impuesto por todos sus enriquecimientos netos con base en lo dispuesto en el artículo 52.

The juridical or economic entities to which paragraph e of article 7 of this Law refers shall pay tax for all their net income based on what is provided in article 52

Las fundaciones y asociaciones sin fines de lucro pagarán con base al artículo 50 de esta Ley.

Non-profit foundations and associations shall pay based on article 50 of this Law.

Artículo 11

Los contribuyentes distintos de las personas naturales y de sus asimilados, que se dediquen a la explotación de hidrocarburos y de actividades conexas, tales como la refinación y el transporte, o a la compra o adquisición de hidrocarburos y derivados para la explotación, estarán sujetos al

Article 11

Taxpayers other than natural persons and than their assimilated persons, which are engaged in the exploitation of hydrocarbons and related activities, such as the refining and transport, or the purchase or acquisition of hydrocarbons and their derivatives for exploitation, shall be subject to the tax

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impuesto previsto en el literal b del artículo 53 de esta Ley por todos los enriquecimientos obtenidos, aunque provengan de actividades distintas a las de tales industrias.

provided in paragraph b) of Article 53 of this Law for all income obtained, even if it comes from activities unrelated to such industries

Quedan excluidos de régimen previsto en este artículo, las empresas que realicen actividades integradas o no de exploración y explotación del gas no asociado, de procesamiento, transporte, distribución, almacenamiento, comercialización y exportación del gas y sus componente, o que se dediquen exclusivamente a la refinación de hidrocarburos o al mejoramiento de crudos pesados y extrapesados.

Enterprises that engaged in integrated or non-integrated activities, of exploration and exploitation of non-associated gas, of processing, transportation, distribution, storage, commercialization and exportation of gas and its component, or that engage exclusively in hydrocarbons' refining or in upgrading heavy and extra-heavy crudes shall be excluded from the regime provided for in this article.

Artículo 52

Article 52

El enriquecimiento global neto anual obtenido por los contribuyentes a que se refiere el artículo 9 de esta Ley, se gravará salvo disposición en contrario, con base en la siguiente Tarifa expresada en unidades tributarias (U.T.):

The annual net global income obtained by the taxpayers referred to in article 9 of this Law shall be taxed, except as otherwise provided, based on the following Rate expressed in tax units (T.U.):

Tarifa Nº 2

Rate No. 2

Por la fracción comprendida hasta 2.000,00 15%

For the fraction containing up to 2.000,00 15%

Por la fracción que exceda de 2.000,00 hasta 3.000,00 22%

For the fraction exceeding 2.000,00 up to 3.000,00 22%

Por la fracción que exceda de 3.000,00 34%

For the fraction exceeding 3.000,00 34%

[...]

[...]

Artículo 53

Article 53

Los enriquecimientos anuales obtenidos por los contribuyentes a que se refieren los artículos 11 y 12 de esta Ley se gravarán, salvo disposición en contrario, con base en la siguiente Tarifa:

The annual income obtained by the taxpayers referred to in articles 11 and 12 shall be taxed, except as otherwise provided, based on the following Rate:

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Tarifa Nº 3

RATE No. 3

[...]

[...]

b. Tasa proporcional de cincuenta por ciento (50%) para los enriquecimientos señalados en el artículo 11 de esta Ley.

b) A proportional rate of fifty percent (50%) for the income specified in article 11 of this Law.

A los fines de la determinación de los impuestos a que se contrae el encabezamiento de este artículo, se tomará en cuenta el tipo de contribuyente, las actividades a que se dedica y el origen de los enriquecimientos obtenidos.

For the purpose of determining the taxes to which the heading of this Article refers, the type of taxpayer, the activities it engages in and the origin of the obtained income shall be taken into account.

[...]

E.V.22. Decree No. 5200 with Rank, Value and Force of Law on the Migration to Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as of the Shared-Risk-and-Profit Exploration Agreements (as published in the Official Gazette No. 38632 of 26 February 2007)

96. The principal relevant provisions of the Decree-Law 5200 are found at C-99 and R-7.

Spanish (Original)

Claimant's Translation

Respondents' Translation

Decreto No. 5.200 con Rango, Valor y Fuerza de Ley de Migración a Empresas Mixtas de los Convenios de Asociación de la Faja Petrolífera del Orinoco, así como de los Convenios de Exploración a Riesgo y Ganancias Compartidas

Decree No. 5200 with Rank, Value and Force of Law on the Migration to Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as of the Shared-Risk-and-Profit Exploration Agreements

Decree No. 5.200 with Rank, Effect and Force of Law on the Migration to Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as the Exploration Risk and Profit Sharing Agreements

Artículo 1

Article 1

Article 1

Las asociaciones existentes entre filiales de Petróleos de Venezuela, S.A. y el sector

The associations existing between affiliates of Petróleos de Venezuela,

The existing associations between subsidiaries of Petróleos de Venezuela,

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privado que operan en la Faja Petrolífera del Orinoco, y en las denominadas de Exploración a Riesgo y Ganancias Compartidas, deberán ser ajustadas al marco legal que rige la industria petrolera nacional, deblendo transformarse en empresas mixtas en los términos establecidos en la Ley Orgánica de Hidrocarburos.

S.A. and the private sector which operate in the Orinoco Oil Belt, and in [sic] the so-called Shared-Risk-and-Profit Exploration, shall be adjusted to the legal framework that governs the national oil industry by being transformed into mixed companies according to the terms established in the Organic Hydrocarbons Law.

S.A. and the private sector operating in the Orinoco Oil Belt, as well as in those referred to as Exploration Risk and Profit Sharing Agreements, must be adjusted to the legal framework governing the national petroleum industry, and must be transformed into mixed companies in accordance with the terms set forth in the Organic Hydrocarbons Law.

En consecuencia de lo antes previsto, todas las actividades ejercidas por asociaciones estratégicas de la Faja Petrolífera del Orinoco, constituidas por las empresas Petrozuata, S.A.; Sincrudos de Oriente, S.A., Sincor, S.A., Petrolera Cerro Negro S.A. y Petrolera Hamaca, C.A.; los convenios de Exploración a Riesgo y Ganancias Compartidas de Golfo de Paria Oeste, Golfo de Parla Este y la Ceiba, así como las empresas o consorcios que se hayan constituido en ejecución de los mismos; la empresa Orifuels Sinovensa, S.A., al igual que las filiales de estas empresas que realicen actividades comerciales en la Faja Petrolífera del Orinoco, y en toda la cadena productiva, serán transferidas a las nuevas empresas mixtas.

As a consequence of the foregoing, all of the activities performed by strategic associations of the Orinoco Oil Belt, formed by the companies Petrozuata, S.A.; Sincrudos de Oriente, S.A., Sincor, S.A., Petrolera Cerro Negro S.A. and Petrolera Hamaca C.A.; the Shared-Risk-and-Profit agreements of Golfo de Paria Oeste, Golfo de Paria Este, and La Ceiba, as well as the companies or consortia that may have been incorporated for the performance of the same; the company Orifuels Sinovensa, S.A., and the affiliates of these companies that carry out commercial activities in the Orinoco Oil Belt and in all of the productive chain, shall be transferred to the new mixed companies.

As a result of the foregoing, all activities carried out by strategic associations of the Orinoco Oil Belt, composed by Petrozuata, S.A., Sincrudos de Oriente, S.A., Sincor, S.A. Petrolera Cerro Negro, S.A. and Petrolera Hamaca, c.A., the Exploration Risk and Profit Sharing Agreements of the West Paria Gulf, East Paria Gulf and La Ceiba, as well as the companies and consortia created in execution of the same; the company Orifuels Sinovensa, S.A., as well as the subsidiaries of these companies that carry out commercial activities in the Orinoco Oil Belt, and through the entire production chain, shall be transferred to the new mixed companies.

Artículo 3

La Corporación Venezolana del Petróleo, S.A. o la filial de Petróleos de Venezuela, S.A. que se designe al efecto para ser accionista en las nuevas Empresas Mixtas, conformará dentro de los

Article 3

The Corporación Venezolana del Petróleo, S.A. or the affiliate of Petróleos de Venezuela, S.A. designated to be the shareholder of the new Mixed Companies, shall set

Article 3

Corporación Venezolana del Petróleo, S.A. or the subsidiary of Petróleos de Venezuela, S.A. designated for purposes of becoming the shareholder in the new Mixed Companies, shall

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siete (7) días a partir de la fecha de publicación del presente Decreto-Ley en la Gaceta Oficial de la República Bolivariana de Venezuela, una Comisión de Transición para cada asociación señalada el artículo 1° del presente Decreto-Ley, que se incorporará a la actual directiva de la asociación respectiva, a fin de garantizar la transferencia a la empresa estatal el control de todas las actividades que las asociaciones realizan. Este proceso de transferencia debe culminar el 30 de abril de 2007. Las empresas del sector privado que son parte en las asociaciones referidas deberán cooperar con la Corporación Venezolana del Petróleo, S.A. para efectuar un cambio seguro y ordenado de operadora.

up within seven (7) days following the date of publication of this Decree-Law in the Official Gazette of the Bolivarian Republic of Venezuela, a Transition Commission for each association indicated in article 1 of this Decree-Law, which shall be incorporated into the current board of directors of each association, in order to ensure the transfer to the State company of the control over all of the activities carved out by the associations. This transfer process must be completed on 30 April 2007. The companies of the private sector that are parties to the aforesaid associations shall cooperate with the Corporación Venezolana del Petróleo, S.A. to effect a safe and orderly change of operator.

form, within seven (7) days after the date of publication of this Decree Law in the Official Gazette of the Bolivarian Republic of Venezuela, a Transitional Commission for each of the associations mentioned under Article 1 of this Decree Law, which shall be incorporated to the current board of directors of the respective association, in order to guarantee the transfer of control to the state company of all the activities being performed by the associations. This transfer process shall be completed by April 30, 2007. The private sector companies that are parties to the aforementioned associations shall cooperate with Corporación Venezolana del Petróleo, S.A. in order to conduct a safe and orderly change of operator.

Artículo 4

A las empresas del sector privado que actualmente son partes en las asociaciones referidas en el artículo 1° se les concederá un período de cuatro (4) meses, a partir de la fecha de publicación del presente Decreto-Ley en la Gaceta Oficial de la República Bolivariana de Venezuela, para acordar los términos y condiciones de su posible participación en las nuevas empresas Mixtas. Se concederán dos (2) meses adicionales para someter los señalados términos y condiciones a la Asamblea Nacional a fin de solicitar la autorización correspondiente de conformidad con la Ley

Article 4

The companies of the private sector that are currently parties to the associations referred to in article 1 shall be given a period of four (4) months from the date of publication of this Decree-Law in the Official Gazette of the Bolivarian Republic of Venezuela, to agree to the terms and conditions of their possible participation in the new Mixed Companies. Two (2) additional months shall be given to submit said terms and conditions to the National Assembly in order to request the corresponding authorization according to the Organic Hydrocarbons

Article 4

The private sector companies that are currently parties to the associations referred to in Article 1 shall be granted a period of four (4) months, as of the date of publication of this Decree-Law in the Official Gazette of the Bolivarian Republic of Venezuela, to agree on the terms and conditions of their possible participation in the new Mixed Companies. Two (2) additional months shall be granted for submitting such terms and conditions to the National Assembly for purposes of requesting the corresponding authorization in accordance with the

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Orgánica de Hidrocarburos. Law. Organic Hydrocarbons Law.

Artículo 5

Transcurrido el plazo establecido en el artículo 4º del presente Decreto-Ley, sin que se hubiera logrado acuerdo para la constitución y funcionamiento de la Empresas Mixtas, la República, a través de Petróleos de Venezuela, S.A. o cualquiera de sus filiales que se designe al efecto, asumirá directamente las actividades ejercidas por las asociaciones referidas en al artículo 1º del presente Decreto-Ley a fin de preservar su continuidad, en razón de su carácter de utilidad pública e interés social.

Article 5

If the period established in article 4 of this Decree-Law expires without an agreement having been reached for the incorporation and operation of the Mixed Companies, the Republic, through Petróleos de Venezuela, S.A. or any of its affiliates that may be designated for such purpose, shall directly assume the activities of the associations referred to in article 1 of the present Decree-Law in order to preserve their continuity, by reason of their public utility and social interest character.

Article 5

Once the term established in Article 4 of this Decree-Law has expired, and if no agreement has been reached on the incorporation and operation of the Mixed Companies, the Republic, through Petróleos de Venezuela, S.A. or any of its subsidiaries designated for that purpose, shall assume directly the activities carried out by the associations referred to in Article 1 of this Decree-Law for purposes of preserving their continuity, in light of their characteristic of public utility and social interest.

Artículo 13

Todos los hechos y actividades vinculados al presente Decreto-Ley se regirán por la Ley Nacional, y las controversias que de los mismos deriven estarán sometidas a la jurisdicción venezolana, en la forma prevista en la Constitución de la República Bolivariana de Venezuela.

Article 13

All the events and activities related to this Decree-Law shall be governed by the National Law, and the controversies derived from the same shall be subject to Venezuelan jurisdiction, in the manner provided in the Constitution of the Bolivarian Republic of Venezuela.

Article 13

All acts and activities related to this Decree-Law shall be governed by National Law and all controversies that may be derived from the same shall be subject to Venezuelan jurisdiction, in the manner established in the Constitution of the Bolivarian Republic of Venezuela.

E.V.23. Law on the Effects of the Migration Process to Mixed Enterprises of the Association Agreements of the Orinoco Oil Belt, As Well As of the Shared-Risk-And-Profit Exploration Agreements (as published in the Official Gazette No. 38785 on 8 October 2007)

97. The principal relevant provisions of the Law on Effects are found at C-104 and R-17.

Spanish (Original)	Claimant's Translation	Respondents' Translation
Ley Sobre los Efectos del Proceso de Migración a Empresas Mixtas de los Convenios de Asociación de la Faja Petrolífera del Orinoco, Así Como de los Convenios de Exploración a Riesgo y Ganancias Compartidas	Law on the Effects of the Migration Process to Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as of the Shared-Risk-and-Profit Exploration Agreements	Law on the Effects of the Process of Migration into Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as the Exploration Risk and Profit Sharing Agreements
<u>Artículo 1</u>	<u>Article 1</u>	<u>Article 1</u>
Los convenios que dieron origen a las asociaciones aludidas en el Artículo 1 del Decreto-Ley N° 5.200 con Rango, Valor y Fuerza de Ley de Migración a Empresas Mixtas de los Convenios de Asociación de la Faja Petrolífera del Orinoco, así como de los Convenios de Exploración a Riesgo y Ganancias Compartidas, quedarán extinguidos a partir de la fecha de publicación en la Gaceta Oficial de la República Bolivariana de Venezuela del decreto que transfiera el derecho a ejercer actividades primarias a las empresas mixtas que se hubieran constituido conforme con lo previsto en dicho Decreto-Ley.	The agreements that gave rise to the associations referred to in Article 1 of Decree-Law No. 5200 with the Rank, Value and Force of Law of Migration to Mixed Enterprises of the Association Agreements of the Orinoco Oil Belt, as well as of the Shared-Risk-and-Profit Exploration Agreements, shall be extinguished as of the date of publication in the Official Gazette of the Bolivarian Republic of Venezuela of the decree that transfers the right to exercise primary activities to the mixed enterprises constituted according to what is provided in said Decree-Law.	The agreements that gave origin to the associations referred to in Article I of Decree-Law No. 5,200 with Rank, Effect and Force of Law on the Migration to Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as the Exploration Risk and Profit Sharing Agreements, shall be extinguished as of the date of publication in the Official Gazette of the Bolivarian Republic of Venezuela of the decree that transfers the right to exercise primary activities to the mixed companies incorporated as provided under such Decree-Law.
Igualmente se extinguirán, a	Likewise, those agreements	Likewise, there shall be

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partir de la fecha de publicación de esta Ley en la Gaceta Oficial de la República Bolivariana de Venezuela, aquellos convenios en que ninguna de las empresas privadas que fueran parte en las asociaciones correspondientes, hubiera alcanzado un acuerdo de migración a empresa mixta dentro del plazo establecido en el Artículo 4 del Decreto-Ley N° 5.200 con Rango, Valor y Fuerza de Ley de Migración a Empresas Mixtas de los Convenios de Asociación de la Faja Petrolífera del Orinoco, así como de los Convenios de Exploración a Riesgo y Ganancias Compartidas.

Artículo 2

Los intereses, acciones y participaciones en las asociaciones referidas en el Artículo 1 del Decreto-Ley N° 5.200 con Rango, Valor y Fuerza de Ley de Migración a Empresas Mixtas de los Convenios de Asociación de la Faja Petrolífera del Orinoco, así como de los Convenios de Exploración a Riesgo y Ganancias Compartidas, en las sociedades constituidas para desarrollar los proyectos correspondientes, y en los activos utilizados para la realización de las actividades de tales asociaciones, incluyendo derechos de propiedad, derechos contractuales y de otra naturaleza, que hasta el vencimiento del plazo establecido en el Artículo 4 del referido Decreto-Ley, correspondían a las empresas parte del sector privado con las cuales no se logró un acuerdo de migración a empresa mixta,

in which none of the private enterprises that were a party to the corresponding associations reached an agreement for the migration to mixed enterprise within the period of time established in Article 4 of Decree-Law 5.200 with the Rank, Value and Force of Law of Migration to Mixed Enterprises of the Association Agreements of the Orinoco Oil Belt, as well as of the Shared-Risk-and-Profit Exploration Agreements shall be terminated as from the date of publication of this Law in the Official Gazette of the Bolivarian Republic of Venezuela.

Article 2

The interests, shares and participations in the associations referred to in Article 1 of Decree-Law 5200 with the Rank, Value and Force of Law of Migration to Mixed Enterprises of the Association Agreements of the Orinoco Oil Belt, as well as of the Shared-Risk-and-Profit Exploration Agreements, in the companies constituted to develop the respective projects, and in the assets used to realize the activities of such associations, including property rights, contractual rights and [rights] of other nature, which until the expiration of the term established in Article 4 of said Decree-Law, belonged to enterprises of the private sector with which no agreement was reached to migrate to a mixed enterprise, are transferred, based on the reversion principle

extinguished as of the date of publication of this Law in the Official Gazette of the Bolivarian Republic of Venezuela, those agreements in which none of the private companies parties to the corresponding associations had reached an agreement to migrate into a mixed company within the term set forth in Article 4 of Decree-Law No. 5,200 with Rank, Effect and Force of Law on the Migration to Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as the Exploration Risk and Profit Sharing Agreements.

Article 2

The interests, shares of stock and participations in the associations referred to in Article I of Decree-Law No. 5.200 with Rank, Effect and Force of Law on the Migration to Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as the Exploration Risk and Profit Sharing Agreements, in the companies incorporated for the development of the corresponding projects, and in the assets utilized in carrying out of the activities of such associations, including property rights, contract rights and rights of other nature, which as at the expiration of the term set forth in Article 4 of the above-mentioned Decree-Law belonged to the private sector companies with which no agreement was reached to migrate into a mixed company, shall be transferred, based on the

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quedan transferidos, con base en el principio de reversión, sin necesidad de acción o instrumento adicional, a las nuevas empresas mixtas constituidas como resultado de la migración de las asociaciones respectivas, salvo lo previsto en el Artículo 3 de la presente Ley.

Artículo 3

En los casos en que ninguna de las empresas que constituían la parte privada del convenio de asociación hubiera alcanzado un acuerdo de migración a empresa mixta dentro del plazo establecido en el Artículo 4 del Decreto-Ley N° 5.200 con Rango, Valor y Fuerza de Ley de Migración a Empresas Mixtas de los Convenios de Asociación de la Faja Petrolífera del Orinoco, así como de los Convenios de Exploración a Riesgo y Ganancias Compartidas, los intereses, acciones, participaciones y derechos referidos en el Artículo 2 de la presente Ley, se mantendrán en propiedad de la filial de Petróleos de Venezuela, S.A., que hubiera asumido las actividades de la asociación de que se trate, hasta que el Ejecutivo Nacional determine la filial que en definitiva deberá asumir tales actividades.

Artículo 4

Las transferencias de intereses, acciones, participaciones y derechos previstas en la presente Ley no generarán obligaciones

[principio de reversión], without the need of any action or additional instrument, to the new mixed enterprises constituted as a result of the migration of the respective associations, except as provided in Article 3 of the present Law.

Article 3

In the cases where none of the enterprises that constituted the private party of the association agreement reached an agreement for the migration to mixed enterprise within the term established in Article 4 of Decree-Law No. 5200 with the Rank, Value and Force of Law of Migration to Mixed Enterprises of the Association agreements of the Orinoco Oil Belt, as well as of the Shared-Risk-and-Profit Exploration Agreements, the interests, shares, participations and rights referred to in Article 2 of the present Law shall remain the property of the affiliate of Petróleos de Venezuela, S.A. that assumed the activities of the association involved, until the National Executive determines the affiliate that definitively shall assume such activities.

Article 4

The transfers of interests, shares, participations and rights provided in the present Law shall not give rise to tax obligations in the

reversion principle, without the need of any action or additional instrument, to the new mixed companies incorporated as a result of the migration of the respective associations, except as provided in Article 3 of the present Law.

Article 3

In those cases in which none of the companies that were the private parties to the association agreement had reached an agreement to migrate into a mixed company within the term set forth in Article 4 of Decree-Law No. 5.200 with Rank, Effect and Force of Law on the Migration to Mixed Companies of the Association Agreements of the Orinoco Oil Belt as well as the Exploration Risk and Profit Sharing Agreements, the interests, shares of stock, participations and rights referred to in Article 2 of the present Law, shall remain property of the subsidiary of Petróleos de Venezuela, S.A. to have assumed the activities of the respective association until the National Executive determines the subsidiary that shall definitively assume such activities.

Article 4

The transfer of interests, shares of stock, participations and rights set forth in this Law shall not generate tax obligations in

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<p>tributarias en la República Bolivariana de Venezuela para ninguna persona o entidad.</p>	<p>Bolivarian Republic of Venezuela for any person or entity.</p>	<p>the Bolivarian Republic of Venezuela for any person or entity.</p>
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Artículo 5

Article 5

Article 5

<p>Todas los hechos y actividades objeto de la normativa que antecede se regirán por las leyes de la República Bolivariana de Venezuela, y las controversias que de los mismos deriven estarán sometidas a su jurisdicción, en la forma prevista en la Constitución de la República Bolivariana de Venezuela.</p>	<p>All facts and activities subject-matter of the foregoing provisions shall be governed by the laws of the Bolivarian Republic of Venezuela, and the disputes derived from the same shall be subject to its jurisdiction, as prescribed in the Constitution of the Bolivarian Republic of Venezuela.</p>	<p>All the facts and activities subject to the above-mentioned provisions shall be governed by the laws of the Bolivarian Republic of Venezuela, and the controversies deriving from them shall be submitted to its jurisdiction, in the manner established in the Constitution of the Bolivarian Republic of Venezuela.</p>
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E.V.24. Decree No. 5916 Transferring to PetroMonagas S.A. the Right to Develop Primary Exploration Activities Specified Therein (as published in the Official Gazette No. 38884 of 5 March 2008)

98. The relevant portion of **Decree 5916** is found in C-129 (bold in original).

Spanish (Original)

Claimant's Translation

Decreto No. 5916, mediante el cual se transfiere a la empresa PetroMonagas, S.A. el derecho a desarrollar actividades primarias de exploración que él se especifican

Decree No. 5916 Transferring to Petro Monagas S.A. the Right to Develop Primary Exploration Activities Specified Therein

Artículo 1

Article 1

Se transfiere a la empresa **PetroMonagas, S.A.**, el derecho a desarrollar actividades primarias de exploración en busca de yacimientos de petróleo crudos en su estado natural, y su recolección, transporte y almacenamientos iniciales, de conformidad con el artículo 9º de la Ley Orgánica de Hidrocarburos. **PetroMonagas, S.A.**, podrá además

The right to develop primary activities of exploration in search of reservoirs of heavy and extra-heavy crude oil, the extraction of such crude oil in its natural state, and its initial production, transport and storage is transferred to the enterprise **PetroMonagas, S.A.**, according to article 9 of the Organic Law of Hydrocarbons. **PetroMonagas, S.A.**, may additionally develop activities of

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desarrollar actividades de mejoramiento de petróleo crudo producido por sí misma en las actividades primarias antes referidas, comercializar y vender el petróleo crudo mejorado y cualquier otro producto resultante del mejoramiento del petróleo crudo, y realizar otras actividades relacionadas con dichas actividades primarias y actividades de mejoramiento, incluyendo actividades de transporte y almacenamiento, en al área geográfica delimitada por el Ministerio del Poder Popular para la Energía y Petróleo, mediante Resolución N° 220 de fecha 09 de noviembre de 2007, publicada en la Gaceta Oficial de la República Bolivariana de Venezuela N° 38.809 de fecha 13 noviembre de 2007.

upgrading of the crude oil produced by itself in the aforesaid primary activities, commercialize and sell the upgraded crude oil and any other product resulting from the upgrading of the crude oil, and carry out other activities related to said primary activities and upgrading activities, including transportation and storage activities, in the geographic area delimited by the Ministry of the Popular Power for Energy and Petroleum, through Resolution N° 220, dated 9 November 2007, published in Official Gazette of the Bolivarian Republic of Venezuela N° 38.809 dated 13 November 2007.

F. Relief Sought by the Parties Regarding the Principal Claims

F.I. Relief Sought by the Claimant

99. The most recent version of the relief sought by Claimant on the merits is found in **Claimant's Reply Memorial (15 May 2009)** (C-III ¶ 246).

246. For the foregoing reasons, Mobil CN requests that the Tribunal render an award in favor of the Claimant:

- (a) Dismissing the defenses raised in the Respondents' Principal Memorial and the Respondents' counterclaims;
- (b) Declaring that Discriminatory Measures have occurred that have caused a Materially Adverse Impact on Mobil CN's cash flows from the Project in FY 2007 and in all subsequent FYs through the end of the term of the Association Agreement;
- (c) Declaring that Respondent PDVSA-CN has breached the Association Agreement;
- (d) Declaring that Respondent PDVSA has breached the Guaranty by failing to perform the obligations of its Guaranteed Affiliate, PDVSA-CN, under the Association Agreement;
- (e) Ordering PDVSA-CN and PDVSA, jointly and severally, to pay Mobil CN:
 - (i) compensation for damages calculated in accordance with the Association Agreement (including Annex G) and Venezuelan law, in the amounts specified in Part V of the Claimant's Principal Memorial and Part V of this Reply, as updated at the time of the award;

[For FY 2007, Claimant seeks an indemnity in the amount of 80.5 million. For FYs 2008 – 2035, Claimant seeks an indemnity in an amount ranging from US\$6.45 billion to US\$6.86 billion. (C-IV ¶ 18)]

- (ii) pre-award and post-award interest, as specified in Part V of the Claimant's Principal Memorial;
 - (iii) attorneys' fees and costs;
- (f) Ordering PDVSA-CN and PDVSA to protect Mobil CN from taxation of the amount awarded, as specified in the Claimant's Principal Memorial; and
- (g) Granting such further or other relief as may be just and proper.

F.II. Relief Sought by the Respondent

100. The most recent version of the relief sought by Respondents on the merits is found at the end of **Respondents' Reply Memorial (17 August 2009)** (R-III ¶ 244):

244. For the reasons set forth above and in Respondents' Principal Memorial, Mobil CN's claim should be dismissed in its entirety because:

- (i) the Association Agreement, which was extinguished by operation of law, cannot form the basis of a claim;
- (ii) even if the Association Agreement had not been extinguished, Claimant is precluded from pursuing any claim because of failure to comply with the express requirements set forth in Section 15.1(a) of the Association Agreement;
- (iii) the measures at issue in this case do not constitute "Discriminatory Measures" as defined in the Association Agreement;
- (iv) even if the measures did qualify as "Discriminatory Measures," no compensation would be due for FY 2007;
- (v) the indemnity provisions of the Association Agreement and the Accounting Principles do not cover future cash flows; and
- (vi) even if the indemnity provisions were to be applied on a forward-looking basis, the amount of compensation that would be due under those provisions would be entirely offset by amounts owed by Claimant to Respondents.

101. Respondents also requested that the Tribunal provide the following relief in the **Terms of Reference** (TOR 5.2.2.d):

5.2.2.d. Award to the Respondents all costs incurred in connection with this Arbitration, including, without limitation, the fees and expenses of the arbitrators and the ICC administrative fees fixed by the Court, as well as the fees and expenses of any experts appointed by the Tribunal and the reasonable legal and other costs incurred by the Respondents in connection with this Arbitration.

G. Relief Sought by the Parties Regarding the Counterclaim

G.I. Relief Sought by the Respondents

102. Respondents request that the Tribunal grant the Counterclaims. Respondents state: “*Claimant is liable to Respondents in the amount of US\$508.6 million, plus interest, in respect of unpaid shipments of crude oil, financing obligations for the Project, and damages resulting from the unwarranted pre-judgment attachment in New York.*” (R-II ¶ 233).

G.II. Relief Sought by the Claimant

103. Claimant requests that the Tribunal dismiss Respondents’ counterclaims. (C-IV ¶ 246).

H. Factual Background

104. Without prejudice to their relevance for the considerations and conclusions of the Tribunal, the following section briefly summarizes the factual allegations regarding the claims and counterclaims, as presented by Claimant and Respondents. The facts are largely undisputed, but the source of the information is mentioned at the end of each paragraph. More comprehensive coverage of the facts can be found in **Claimant’s Principal Memorial** (C-III ¶¶ 19 – 167 and Apps. B - D), **Claimant’s Reply Memorial** (C-IV ¶¶ 20-31 and App. A), and **Respondents’ Principal Memorial**. (R-II ¶¶ 11 – 37, 69).
105. For clarity, the Tribunal notes that the titles “*Minister of Energy and Mines*” and “*Minister of Energy and Petroleum*” and likewise “*Ministry of Energy and Mines*” and “*Ministry of Energy and Petroleum*” have been used interchangeably throughout the Parties’ submissions, likely due to a change in that Ministry’s name. To avoid confusion, the Tribunal refers to both as either “*Minister of Energy*” or “*Ministry of Energy*”, respectively. The Tribunal, however, leaves the Parties’ own language, where quoted and where used in the citations, undisturbed.

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106. Claimant reports that, in 1975, Venezuela expropriated the interests of all foreign oil companies in the country, including Mobil Oil Corporation (“Mobil”). (C-III ¶ 3-4). Claimant states that the private sector was effectively excluded from participating in the Venezuelan oil industry until the Oil Opening (*Apertura Petrolera*) in the early 1990s. (C-III ¶ 28).

The Oil Opening was based on Article 5 of the Nationalization Law, which authorized the participation of private parties in the oil industry under two types of contracts between [the state-owned] PDVSA and private companies: (i) operating services agreements, under which the private company would provide specified services to PDVSA in exchange for a fee; and (ii) association agreements, under which private companies and PDVSA would enter into a joint venture for a specified term in ‘special cases [...] convenient to the public interest.’ (C-III ¶ 33).

107. Claimant reports that, in **September 1990**, PDVSA approached Mobil to determine how Mobil would react to PDVSA’s new policy of international cooperation and its envisioned policy of working in long-term joint ventures of at least 25 years’ duration to pursue expansion in the Orinoco Oil Belt. (C-III ¶¶ 42-43).
108. Respondents state that Mobil saw an opportunity in Venezuela’s EHO reserves. According to Respondents, while low oil prices were projected to continue, Mobil determined that 3 projects in Venezuela combined would entail an initial investment of US\$ 1.7 billion and could deliver an annual after tax income of US\$ 200 million. (R-II ¶ 14).
109. Claimant states that the idea of working with PDVSA in the Orinoco Oil Belt, however, was not initially attractive. Claimant explains that Mobil had already been expropriated by Venezuela in 1975 and the projected rate of return of the proposed project was low. (C-III ¶¶ 45- 46). Further, the Orinoco Oil Belt, while home to one of the largest proven reserves of Venezuela, is one of the most cost-intensive and difficult regions in the world to acquire oil. The oil itself is also very low quality and requires significant processing in order to be marketable. (C-III ¶¶ 37 – 41). Thus, Claimant states: “*to persuade Mobil to invest in an extra-heavy crude*

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project in the Orinoco Oil Belt, PDVSA and the Republic of Venezuela offered Mobil (i) a series of fiscal incentives, among them income-tax and royalty reductions, and (ii) contract protections designed to provide Mobil with prompt and adequate relief in the event of an expropriation or other adverse measures affecting the economics of the project.” (C-III ¶ 48).

110. Claimant reports that, in **August 1991**, the Republic of Venezuela adopted the **Law on Partial Amendment to the Income Tax Law**. This law reduced the income-tax rate applicable to income arising from new exploitation and refining of heavy and extra-heavy crude oil under association agreements from 67.7% to 30%. (C-III ¶ 50).
111. On **1 November 1993**, the **Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Venezuela** was signed. (C-III ¶ 50).
112. Claimant states that, in **1994**, the **Law on Partial Amendment to the Income Tax Law** was amended and the reduced income-tax rate was raised to 34%. According to Claimant, this was the same rate imposed on companies engaged in non-oil-related activities in Venezuela. (C-III ¶ 50).
113. Claimant states that, in **August 1994**, Lagoven, a PDVSA subsidiary designated to work with Mobil, offered additional incentives to improve the economic projections of the proposed venture. One of these incentives was a reduced royalty rate.

The applicable royalty would be 16 2/3% during the early production or development phase of the Project. Upon achieving commercial production (defined under the AA as the upgrader completion date), the royalty would be reduced to 1% until such time as the accumulated gross income from the Project exceeded three times the total initial investment (from the start of the Project until the beginning of commercial production), but in no event would the reduction period exceed nine years from the beginning of commercial production. (C-III ¶ 56).

114. On **17 March 1997**, the Ministry of Energy submitted the proposed **Framework of Conditions** [*Marco de Condiciones*] for the AA to the

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Venezuelan Congress, pursuant to Article 5 of the Nationalization Law. According to Claimant, the Framework of Conditions contained specific provisions for each of the following contract protections. (C-III ¶ 65). *First*, “Respondent PDVSA-CN undertook to indemnify Mobil CN in the event of an expropriation of any of its interests in the Project or other governmental measures that changed, to Mobil’s detriment, the fiscal terms applicable to the Project.” (C-III ¶ 60). *Second*, “PDVSA guaranteed, through a separate Guaranty, that PDVSA-CN would perform all of its obligations under the AA.” (C-III ¶ 61). *Third*, the Parties agreed to submit any dispute with Mobil CN to international arbitration. (C-III ¶ 62).

115. On **10 April 1997**, the Congressional Joint Committee recommended approval of the Framework of Conditions and the same were approved by the Venezuelan Congress on **24 April 1997**.
116. On **2 October 1997**, the Venezuelan Congress formally authorized the execution of the AA. (C-III ¶¶ 71-73).
117. Claimant reports that, on **28 October 1997**, Lagoven Cerro Negro, S.A. (Lagoven CN, a Lagoven subsidiary, renamed “PDVSA-CN” on 11 May 1998), Mobil Producción e Industrialización de Venezuela, Inc. (Mobil PIV), and Veba Oel Venezuela Orinoco, GmbH (Veba Orinoco) signed the AA and created the Cerro Negro Joint Venture. Mobil PIV assigned its rights in the AA to Mobil CN the following day.

The Project contemplated by the AA included: (i) exploiting and developing the extra-heavy crude oil fields in the Cerro Negro area; (ii) constructing an upgrader in the Jose Complex on the Venezuelan coast with the capacity to upgrade approximately 120,000 bpd of extra-heavy crude oil to a level of 16.5° API; (iii) laying pipelines between the Cerro Negro area and the Jose Complex (approximately 315 km); and (iv) selling the resulting products of Mobil CN and PDVSA-CN to the Chalmette Joint Venture. (C-III ¶ 76).

118. According to Claimant, the AA granted its parties an undivided interest in the assets and liabilities of the venture in proportion to their respective interests. Title to the oil produced by the Cerro Negro Joint Venture vested

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in the participants at the wellhead, also in proportion to their respective interests. The percentage interests of the parties in the Cerro Negro Joint Venture were as follows: PDVSA-CN – 41 2/3%; Mobil CN – 41 2/3%; and Veba Orinoco – 16 2/3%. The AA established an unincorporated joint venture (the Cerro Negro Joint Venture) for a term of thirty-five years from 30 June 2000. (C-III ¶¶ 74-75, 77).

119. Claimant reports that, on **28 October 1997**, concurrently with the execution of the AA, PDVSA issued the PDVSA Guaranty. Under this Guaranty, “*PDVSA shall guarantee all of LAGOVEN’s obligations under the AA in the same terms and conditions.*” (C-III ¶ 68).
120. Claimant explains that the Project is vertically integrated. Mobil and PDVSA established a related downstream joint venture, the Chalmette Joint Venture, to refine the products resulting from the Project. (C-III ¶ 85).
121. On **28 October 1997**, PDV Chalmette, Inc. (a PDVSA subsidiary), Mobil Oil Corporation, and Mobil Pipe Line Company entered into an Amended and Restated Limited Liability Company Agreement. The agreement created Chalmette Refining, LLC (Chalmette Refining), a company equally owned by PDVSA and Mobil through their respective subsidiaries. Chalmette Refining owns and operates the Chalmette Refinery, which is especially designed to refine diluted crude oil (“*DCO*”) and synthetic crude oil (“*SCO*”) from the Project into marketable products. (C-III ¶ 86).

The AA provided for the creation of a Venezuelan company, Petrolera Cerro Negro, S.A. (Petrolera Cerro Negro), to direct, coordinate, and supervise the activities related to the Project. Petrolera Cerro Negro is a Venezuelan company owned by the participants in the Cerro Negro Joint Venture in proportion to their respective interests in the Project. (C-III ¶ 82).

122. Claimant reports that, on **1 November 1997**, Mobil CN and PDVSA-CN entered into the Association Oil Supply Agreement (also known as the Chalmette Offtake Agreement) with Chalmette Refining. Under that agreement, Chalmette Refining was required to buy, at an agreed formula price, PDVSA-CN’s share and Mobil CN’s share of DCO and SCO

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produced from the Project for the life of the Cerro Negro Joint Venture. (C-III ¶ 87).

123. On **1 December 1997**, Petrolera Cerro Negro, PDVSA-CN, Mobil CN, and Veba Orinoco signed an Operating Agreement with Operadora Cerro Negro, S.A. (“OCN”), a wholly-owned subsidiary of Mobil Corporation. Under the Cerro Negro Operating Agreement, OCN became the operator of the Project, acting as an agent of the participants in the Cerro Negro Joint Venture. (C-III ¶ 83). Claimant states that OCN could not be removed as the operator of the Project unless, among other requirements, a competent operator was duly appointed by the board of Petrolera Cerro Negro. (C-III ¶ 84).
124. Claimant states that, on **11 March 1998**, the Ministry of Energy approved a *Memoria Descriptiva* land designated for the Project, which stated that the “[o]riginal [o]il in [p]lace” in the designated area was approximately 28.6 billion barrels of EHO. (C-III ¶ 78).
125. On **29 May 1998**, the Ministry of Energy and PDVSA Petróleo y Gas, S.A., a subsidiary of PDVSA, entered into a **Royalty Reduction Agreement for the Orinoco Oil Belt** (the Royalty Reduction Agreement, “RRA”). According to Claimant, the RRA provided that companies participating in strategic associations could become parties to the agreement by expressing their consent in writing to the Ministry of Energy. (C-III ¶ 55).
126. Claimant describes the project financing as follows:

The combined shares of Mobil CN and PDVSA in the estimated initial costs of the Cerro Negro Project amounted to US\$1.66 billion. Forty percent of this amount was financed by equity contributions from the participants and revenues from the venture. The remainder was financed by third parties, through an issuance of bonds and loans from financial institutions. On **11 June 1998**, Cerro Negro Finance, Ltd. issued bonds for US\$600 million. Mobil CN and PDVSA-CN also obtained a US\$300 million loan from a consortium of financial institutions to finance the Project. The proceeds of those two sources were used to fund the respective investments of PDVSA-CN and Mobil CN in the Cerro Negro Joint Venture. PDVSA-CN and Mobil CN were ultimately responsible

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for those obligations, as each severally guaranteed payment of one-half of the principal and interest. (C-III ¶ 90).

127. Claimant reports that, on **18 June 1998**, Mobil CN, PDVSA-CN, Mobil Sales & Supply Corporation (Mobil Marketing), and the Bank of New York signed the Offtake Support Agreement. Under the Offtake Support Agreement, Mobil Marketing would be required to lift and purchase, at the same formula price agreed for sales to Chalmette Refining minus a small marketing fee, any SCO shipped for the account of PDVSA-CN or Mobil CN that was not accepted by Chalmette Refining for any reason. This assumption by Mobil-CN of the ultimate marketing risk for the production from the Project was a key factor in obtaining financing. (C-III ¶ 89).
128. On **5 November 1998**, Mobil CN became a party to the RRA. (C-III ¶¶ 53-55).
129. In **August 2001**, the Project began commercial production. Production capacity exceeded 120,000 bpd, according to Claimant. (C-III ¶ 9).
130. According to Claimant, on **6 September 2001**, “*the Cerro Negro participants formally adopted the Business Plan for Phase IV, which listed the evaluation of opportunities for increased production as one of the main goals of the Operations Phase.*” (C-III ¶ 121). The participants discussed the elimination of bottlenecks as a means of increasing production. The participants developed a “*De-Bottlenecking Project*” in order to increase the production of the Project to 144,000 bpd. (C-III ¶ 122).
131. On **13 November 2001**, President Hugo Chávez of the Bolivarian Republic of Venezuela issued the **Organic Law of Hydrocarbons** (“**2001 Hydrocarbons Law**”), which replaced the **Nationalization Law** and the **Law of Hydrocarbons of 1943**. Claimant states that this new law dismantled many of the legal incentives and protections that had been enacted during the Oil Opening by reserving oil production activities to the state and authorizing private parties only through mixed enterprises in

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which the State owned more than 50% of the shares. Claimant explains that, pursuant to this, production from a mixed enterprise would be subject to a royalty of 30% and would have to be sold to PDVSA or another state-owned company. (C-III ¶ 102). Claimant states that, on 16 **January 2002**, the Ministry of Energy and OCN (on behalf of the Project participants) signed an Agreement on Procedures for the Payment of the Exploitation Tax (Royalty) of the Extra-Heavy Crude Produced and the Sulphur Extracted by OCN, S.A. (the Royalty Procedures Agreement). According to Claimant, although the Organic Law of Hydrocarbons was already in effect, the Royalty Procedures Agreement reaffirmed that the royalty would remain at the reduced rate of 1% in accordance with the formula set forth in the Cerro Negro RRA and that it would not exceed 16 2/3% during the life of the Project. (C-III ¶ 106).

132. In **November 2003**, the Project participants endorsed a work plan and budget for the De-Bottlenecking Project. Claimant states that this plan would require only minor investment, no interruption in production, and would increase production to 144,000 bpd in the first quarter of 2006. (C-III ¶ 123). According to Claimant:

To meet these goals, and particularly to install the equipment at the upgrader during the upcoming shutdown, the participants formally agreed on **1 April 2004** to proceed with an accelerated engineering and execution schedule. As the [De-Bottlenecking Project] went through different stages, the Project participants authorized monthly expenses related to the De-Bottlenecking Project. In **April 2004**, the participants agreed to formalize approval of the project at the next Board meeting of Petrolera Cerro Negro, then scheduled for June 2004. (C-III ¶ 124).

133. Claimant states that, a few days before the scheduled formal approval of the De-Bottlenecking Project, PDVSA-CN demanded additional concessions, including that the Project participants agree to pay a 16 2/3% royalty on any extra production achieved from the De-Bottlenecking Project and that all incremental production from the De-Bottlenecking Project be sold to PDVSA-CN. Claimant states that it accepted PDVSA-CN's new conditions to move the project forward and to complete it as scheduled. (C-III ¶ 125).

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134. Claimant explains that, on **14 July 2004**, the Project participants approved the De-Bottlenecking Project and agreed to formalize that approval at the next Board meeting, which was scheduled for 20 July 2004. In the meantime, OCN continued to carry out the engineering and modification activities necessary to meet the implementation schedule that the Cerro Negro participants had established. All the expenditures for these activities were approved by the participants. Per PDVSA-CN's request, the next Board meeting was postponed until 1 December 2004. (C-III ¶¶ 125, 126).
135. Claimant states that, on **10 October 2004**, President Chávez announced in his weekly television program, "*Aló Presidente*," that the royalty rate applicable to the Orinoco Oil Belt projects, including the Project, would be increased immediately to 16 2/3%. The following day, Ministry of Energy notified PDVSA of this change by letter dated 8 October 2004. (C-III ¶¶ 109 - 111). The Government had determined that the temporary 1% royalty rate originally granted to the associations under the RRA during a time of low prices in the 1990s no longer made sense as prices of oil exceeded everyone's expectations. (R-II ¶ 21).
136. On **18 October 2004**, PDVSA informed Mark Ward, President of ExxonMobil de Venezuela S.A., of the rate increase. (C-III ¶ 111).
137. Claimant states that, on **2 November 2004**, ExxonMobil de Venezuela responded that "*it was not a party to the AA or an investor in the Project and noting that there was a legally valid agreement between the State and the participants regarding the applicable royalties.*" (C-III ¶ 112).
138. On **15 November 2004**, the Ministry of Energy notified ExxonMobil de Venezuela of this increase of rate, effective on 8 October 2004. (C-III ¶ 112). Claimant states that it paid the 16 2/3% royalty under protest.
139. Claimant states that, at the **1 December 2004** Board meeting, PDVSA-CN refused to formalize the approval of the De-Bottlenecking Project under the terms to which the Project participants had agreed in July. "*In light of the*

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government's recent decision to increase the royalty applicable to the participants of strategic associations in the Orinoco Oil Belt, PDVSA-CN and the Ministry of Energy would not allow the De-Bottlenecking Project to move forward at the agreed-upon royalty of 16 2/3%, unless the extra volumes from the project came from enhanced-oil-recovery (EOR) techniques.” (C-III ¶ 127).

140. Claimant states that, as a result, the De-Bottlenecking Project was cancelled. *“By the time the De-Bottlenecking Project was cancelled, OCN had completed about 70% of the planned work at the upgrader and 20% of the planned work at the central production facilities. As a result, the participants lost the approximately US\$30 million they had invested up to 1 December 2004 and incurred over US\$10 million in costs to halt the activities related to the De-Bottlenecking Project.” (C-III ¶ 129).*
141. In **2004**, Rafael Ramírez began to serve as both the Minister of Energy and the President of PDVSA. (C-V ¶ 4).
142. Claimant states that, on **2 February 2005**, Mobil CN addressed a letter to the Minister of Foreign Affairs of Venezuela, the Minister of Energy of Venezuela, and the Attorney General of Venezuela, complaining of an increase in royalties from 1% to 16 2/3% and alleging that the Government was not honoring its commitments regarding the 1% royalty rate. (R-II ¶ 69).
143. Respondents state that, in **April 2005**, the Government determined that the *“operating service agreements”* entered into during the Apertura Petrolera were fundamentally inconsistent with the **Nationalization Law**. Contrary to that law, the purported service contractors were not merely services contractors but also had participated in the business. (R-II ¶ 23).
144. On **12 April 2005**, the Minister of Energy issued an Instruction setting in motion an orderly process of *“migration”* of those agreements to the new form of mixed companies required under the **2001 Hydrocarbons Law**.

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145. On **25 May 2005**, the Minister of Energy delivered a speech entitled “*Full Oil Sovereignty: A National, Popular and Revolutionary Petroleum Policy*.” Respondents state that in this speech, he identified violations committed by foreign oil companies in the Orinoco Oil Belt. (R-II ¶ 25).
146. Respondents state that, on **2 June 2005**, Mobil CN addressed a letter to the Minister of Foreign Affairs of Venezuela, the Minister of Energy of Venezuela and the Attorney General of Venezuela, complaining about speeches made by the President of Venezuela and the Minister of Energy of Venezuela. (R-II ¶ 69).
147. According to Respondents, on **20 June 2005**, “*Mobil CN addressed a letter to the Minister of Foreign Affairs of Venezuela, the Minister of Energy and Petroleum of Venezuela and the Attorney General of Venezuela, complaining of a June 8, 2005 notice from an official of the Ministry of Energy and Petroleum that the 30% royalty rate under the 2001 Hydrocarbons Law should be applied to the production under the AA, as well as of a statement by the Minister of Energy and Petroleum on June 15, 2005 announcing the introduction of a bill to have the oil income tax rate of 50% apply to the associations operating in the Orinoco Oil Belt.*” (R-II ¶ 69). Claimant states that, on **23 June 2005**, the Ministry of Energy declared that it was illegal for the Project to produce more than a monthly average of 120,000 bpd of EHO. In a letter communicating its decision, the Ministry of Energy reserved its right to pursue legal actions for any violation of the alleged limit and directed that any production in excess of a monthly average of 120,000 bpd would be subject to a 30% royalty. (C-III ¶ 130).
148. On **1 August 2005**, Mobil CN sent a letter to Minister of Energy of Venezuela objecting to the communication dated 23 June 2005 that production could not exceed 120,000 barrels per day of extra-heavy crude oil and that blending, rather than upgrading, of crude oil would not be allowed. (C-III ¶ 131; R-II ¶ 69).

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149. Claimant states that, on **14 January 2006**, Vice-Minister of Hydrocarbons Dr. Bernard Mommer told Mobil CN that it would support the sale of Mobil CN's interest to a third party. (C-III ¶ 152).
150. Claimant states that, on **22 March 2006**, the Government prevented Mobil CN from selling its interests to an interested third party. (C-III ¶ 152).
151. Claimant explains that, on **16 May 2006**, the National Assembly approved a **partial amendment to the Organic Law of Hydrocarbons**, which created an additional royalty in the form of the so-called "*Extraction Tax*" [*Impuesto de Extracción*]. The law directs that all liquid hydrocarbons extracted from the soil would be subject to an Extraction Tax of 33.33%, and would so equalize fiscal conditions for all players in the oil industry. (C-III ¶ 114; R-II ¶ 26). "*The new Extraction Tax is calculated and collected in exactly the same way as the royalty. Royalty payments were to be credited to the liability for the Extraction Tax. [...]*" (C-III ¶ 115). Claimant states that it paid the additional royalties at the increased rate of 16 2/3% and the extraction tax at the rate of 16.67% under protest and with full reservation of rights. (C-III ¶ 117).
152. Respondents state that, on **26 May 2006**, Mobil CN "*addressed a letter to Minister of Foreign Affairs of Venezuela, the Minister of Energy and Mines of Venezuela and the Attorney General of Venezuela, complaining about the May 2006 amendment to the 2001 Hydrocarbons Law to create a new extraction tax on the production of hydrocarbons, which Mobil CN stated would have the 'practical consequence of increasing the royalty,' and an announcement by the President of Venezuela of the proposal to increase the income tax rate on the associations to 50%.*" (R-II ¶ 69).
153. Claimant states that, on **18 August 2006**, Mr. Tim Cutt, the President of Mobil CN, met with Vice-Minister Mommer, to discuss operational matters. Vice-Minister Mommer informed Mr. Cutt that the Venezuelan Government "*intended that a mixed enterprise in which Respondent PDVSA would own*

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at least a 51% of the shares take over the production component of the Project.” (C-III ¶¶ 138 – 139). On **29 August 2006**, the National Assembly enacted a special amendment to the Income Tax Law targeting EHO projects. This law increased the income-tax rate applicable to all participants in EHO projects in the Orinoco Oil Belt from 34% to 50%, as of 1 January 2007. (C-III ¶ 132; R-II ¶ 27). Claimant states that, on **6 September 2006**, the Ministry of Energy sent Mr. Cutt a document containing “*Non-Binding Terms for the Migration of the Association.*” Claimant reports that the document also stated that the Government intended to impose a new structure under which (i) Respondent PDVSA would control the commercialization and export of crude oil; (ii) the acreage of the joint venture would be reduced; and (iii) the term of the new venture would be reduced to 25 years (three fewer years than the remaining term of the AA). The Terms would also require Mobil CN to waive all claims it might have against the Government. (C-III ¶ 140, partially quoted).

154. Claimant reports that, on **27 September 2006**, Vice-Minister Mommer informed Mr. Cutt that the Venezuelan government would “migrate” the entire operations of the Cerro Negro Joint Venture. Mobil CN met with Dr. Mommer several times between August and November 2006. At these meetings, the Government made it clear that it was unwilling to negotiate the terms and conditions of the “migration.” (C-III ¶ 141).
155. Claimant states that, on **9 October 2006**, the Ministry of Energy ordered the Cerro Negro Joint Venture to cut production by 50,000 bpd as of 5 October 2006. (C-III ¶ 135).
156. Respondents state that, on **16 October 2006**, Mobil CN “addressed a letter to the Vice Minister of Hydrocarbons of Venezuela, responding to his invitation to discuss matters relating to the ‘obligatory migration of the Cerro Negro AA to a mixed company agreement’ under the 2001 Hydrocarbons Law.” (R-II ¶ 69).

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157. According to Claimant, on **27 October 2006**, the Ministry of Energy ordered a 17,000 bpd reduction on the Project's production for November 2006. (C-III ¶ 135).
158. Respondents state that, on **2 November 2006**, Mobil CN "*addressed a letter to the Minister of Energy and Petroleum regarding production curtailments ordered by the Ministry, which Mobil CN alleged were inconsistent with Article XIV of the AA as 'Curtailment of Production.'*" (R-II ¶ 69).
159. Respondents state that, on **20 November 2006**, Mobil CN "*addressed a letter to the Minister of Foreign Affairs of Venezuela, the Minister of Energy and Petroleum of Venezuela and the Attorney General of Venezuela, complaining of various governmental decisions published on November 14, 2006, regarding the calculation of royalties.*" (R-II ¶ 69).
160. Claimant reports that, beginning on **1 January 2007**, it was subject to an income tax rate of 50%. (C-III ¶ 133).
161. Claimant states that, on **8 January 2007**, the Ministry of Energy ordered OCN to export no more than 2.4 million barrels per month – a 1.1 million barrel per month reduction from the 3.5 million barrels the Project exported in September 2006. Mobil CN objected to this measure. (C-III ¶ 136).
162. Claimant states that, on **8 January 2007**, Minister of Energy and President of PDVSA, Rafael Ramírez, issued a press release, "*announcing that President Chávez would seek from the National Assembly 'special powers for the creation of [...] revolutionary laws [... to] nationaliz[e] [...] the enterprises that operate in the Orinoco Oil Belt.'*" (C-III ¶ 142).
163. Respondents state that, on **12 January 2007**, Mobil CN addressed a letter to Minister of Energy of Venezuela referring to the 8 January 2007 curtailment and alleged that the curtailment was discriminatory. They alleged that the curtailment, thus, violated Article XIV of the AA, which addressed production curtailment, as well as the conditions approved by the Congress

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in 1997, the Investment Law, bilateral investment treaties, and international law. (R-II ¶ 69).

164. Claimant reports that, on **15 January 2007**, Minister Ramírez announced that the Government had been unable to reach agreements with international oil companies that had projects in the Orinoco Oil Belt and that “[n]ow there was no possible negotiation, the nationalization [had to] be accomplished by law.” (C-III ¶ 142).
165. On **1 February 2007**, the National Assembly enacted the Law That Authorizes the President of the Republic to Issue Decrees with Rank, Effect and Force of Law in the Delegated Matters (hereinafter “*Enabling Law*”), granting to the President the authority to issue decrees with the force of law in areas such as hydrocarbons and their derivatives, for 18 months. (C-III ¶ 143; R-II ¶ 29).
166. Claimant states that, on **1 February 2007**, Minister Ramírez ordered OCN to reduce the export of SCO from the Project for the month of February by 39,200 bpd, for a monthly total of 1,097,600 barrels. PDVSA increased that curtailment to 2.1 million barrels. (C-III ¶ 136).
167. Claimant reports that, on **26 February 2007**, President Chávez’s Decree-Law 5200 on the Migration to Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as of the Shared-Risk-and-Profit Exploration Agreements, under the authority granted to him pursuant to the Enabling Law, was published. (R-II ¶ 29). Decree-Law 5200 ordered, *inter alia*, that the strategic associations located in the Orinoco Oil Belt, including Cerro Negro, be transformed (“*migrated*”) into new mixed companies operating under the statutory framework of the Organic Law on Hydrocarbons. (R-II ¶ 29, C-III ¶ 145). PDVSA, or one of its subsidiaries, would hold at least a 60% participation interest in the new mixed companies. (C-III ¶ 145).

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168. Under Article 3 of Decree-Law 5200, OCN was required to surrender control of all activities and operations related to the Project to Corporación Venezolana de Petróleos S.A., a wholly owned subsidiary of PDVSA (or another PDVSA affiliate) no later than 30 April 2007. (C-III ¶ 147; R-II ¶ 30).
169. According to Article 4 of the Decree-Law 5200, Mobil CN and other participants in strategic associations located in the Orinoco Oil Belt had four months (until **26 June 2007**) to accept participation in the new mixed companies. (C-III ¶ 146, R-II ¶ 31).
170. Claimant explains that the mixed companies would be established and would operate under a different statutory framework (the **2001 Hydrocarbons Law**). They would operate under new contractual arrangements that would replace the previous association agreements. (C-III ¶ 146). The new contractual terms would be as follows:
- Mobil CN would have to waive all claims against the Government. Mobil CN would no longer have enough shares to block major business and investment decisions regarding the Project, and would be a minority participant in a new enterprise with no business plan defined in advance.
 - The acreage of the Project would be reduced and the Government would not disclose the size and location of the new acreage.
 - Mobil CN would be precluded from assigning its interests and shares in the new mixed enterprise without the written consent of the Ministry and the other potential partners and the new arrangement contained no provision that would allow Mobil CN to withdraw from the enterprise.
 - The Government would have the right to terminate the agreement at any time under undefined conditions.
 - All controversies regarding the agreement would be subject to the jurisdiction of the Venezuelan courts, as opposed to international arbitration, which was the dispute-resolution mechanism provided in the AA and one of the conditions for Mobil to invest in Venezuela in the 1990s.
 - The term of the new contract would be twenty-five years; three years less than the remaining term of the AA.
 - The Government refused to discuss market value compensation for the taking of Mobil CN's rights under the AA or the diminished value of the potential participation in the mixed enterprise. (C-III ¶ 150).

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171. According to Claimant, **Article 5 of the Decree-Law 5200** provided that, if participants in strategic associations, such as Mobil CN, refused to accept the terms for new mixed companies by the end of the four-month period in **Article 4** “*the Republic, through Petróleos de Venezuela S.A. or any of its subsidiaries that may be designated for the purpose, shall directly assume the activities of the associations.*” (C-III ¶ 149).
172. Claimant states that, in **March 2007**, the Ministry of Energy ordered OCN to export no more than 2.4 million barrels during that month. By that time, OCN was working on the transfer of operations of the Project to an affiliate of PDVSA, as mandated by the **Decree-Law 5200**, and it was understood that the export limitation would be in effect until the end of June 2007. (C-III ¶ 136).
173. According to Respondents, on **5 March 2007**, Mobil CN “*addressed a letter to the Minister of Foreign Affairs of Venezuela, the Minister of Energy and Mines of Venezuela and the Attorney General of Venezuela, complaining of **Decree-Law 5200**, which set forth the timetable for the migration to the mixed company structure under the **2001 Hydrocarbons Law**. Mobil CN alleged that it considered **Decree-Law 5200** to constitute an ‘expropriation’ in violation of the Netherlands-Venezuela bilateral investment treaty, international law and Venezuelan law, including the Investment Law.*” (R-II ¶ 69).
174. Respondents report that, on **8 March 2007**, Mobil CN wrote to Minister of Foreign Affairs of Venezuela, Minister of Energy of Venezuela and Attorney General of Venezuela, noting that the production and export curtailments starting in 2006 through 2007 constituted investment disputes with the Government. (R-II ¶ 69).
175. Claimant states that, on **30 March 2007**, bank lenders informed PDVSA-CN and Mobil CN that a “*Prospective Default may have occurred*” as a consequence of **Decree-Law 5200**. (C-II ¶ 30).

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176. According to Claimant, on **26 April 2007**, project-finance creditors of the Project sent PDVSA-CN and Mobil CN Notice of a Prospective Default on the ground that an expropriation had occurred though the 26 February 2007 signing of Decree-Law 5200. (C-III ¶ 156).
177. Claimant reports that, on **30 April 2007**, OCN transferred the operations and control of all activities related to the Project, under compulsion and a show of military force, with full reservation of rights. Control was transferred to PDVSA Petróleo, S.A. (“*PDVSA Petróleo*”), a PDVSA subsidiary. As part of the enforced takeover of operations, the Government and PDVSA took possession of proprietary technology — including software and trade secrets — that ExxonMobil affiliates and unrelated parties had licensed only to Mobil CN and OCN to use in relation to the Project. (C-III ¶¶ 147 – 148).
178. Claimant states that, on **1 May 2007**, ExxonMobil de Venezuela and PDVSA Petróleo entered into a Consulting and Support Agreement to provide to PDVSA Petróleo consulting and support services “*related with the operation of the Project.*” (C-IV ¶ 74).
179. Respondents state that, on **4 May 2007**, Mobil CN “*addressed a letter to the Minister of Foreign Affairs of Venezuela, the Minister of Energy and Mines of Venezuela and the Attorney General of Venezuela, concerning a May 1, 2007 speech by the President of Venezuela in which he stated that the ‘Orinoco Oil Belt Strategic Associations are in breach of their contractual obligations.’ The letter referred to the prior correspondence in which it had ‘informed the Bolivarian Republic of Venezuela that investment disputes had arisen in respect of measures taken by the Republic . . . as well as the decisions relating to ‘de-bottlenecking and other expansion projects.’*” (R-II ¶ 69).
180. On **15 June 2007**, PDVSA Petróleo issued a cash call to cover expenses related to the Project in July. (C-II ¶ 21).

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181. On **20 June 2007**, Brown Rudnick, a law firm representing bondholders, sent a letter to PDVSA and Mobil CN threatening to issue a **Notice of Declared Event of Default** unless bonds were refinanced or restructured. (C-II ¶ 21).
182. Claimant states that, on **22 June 2007**, Mobil CN “gave written notice to both PDVSA-CN and PDVSA that ‘(i) the expropriation of Mobil CN’s entire interest in the Cerro Negro Joint Venture, (ii) breach and repudiation of the RRA and imposition of the so-called “extraction tax,” (iii) increase in the income-tax rate applicable to Mobil CN in violation of the Framework of Conditions, and (iv) imposition of production and export curtailments applicable to the Project’ ‘constitute[d] Discriminatory Measures under Clause XV of the AA and will probably cause a Materially Adverse Impact on Mobil CN’s Net Cash Flows in FY 2007 and future FYs.’” (C-III ¶ 163).
183. On **25 June 2007**, Mobil CN sent a further written **Notice of Discriminatory Measure** to both PDVSA-CN and PDVSA, demanding prompt payment of the indemnity pursuant to the AA. (C-III ¶ 164; R-II ¶ 73).
184. **26 June 2007** was the deadline to form a mixed company under **Decree-Law 5200**. Mobil CN did not participate in the formation of a new mixed company. (C-III ¶ 149).
185. At the expiration of the four-month period, “negotiations immediately commenced for an amicable settlement of any claims ExxonMobil’s subsidiary might have in respect of its exit from Venezuela. [...] ExxonMobil representatives proposed a package consisting of cash, free crude oil deliveries, and assets having a total value approximating US\$5 billion, representing its interest in Project and the La Ceiba Project.” (R-II ¶ 36, partially quoted).
165. [As of **27 June 2007**, at the expiration of the term contemplated in the **Decree-Law 5200**, the Venezuelan Government expropriated or seized, without compensation, the interests of Mobil CN in the Cerro Negro

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Joint Venture. (C-III ¶ 154).] On 27 June 2007, Mobil CN delivered a Notice of Discriminatory Measure to PDVSA-CN and PDVSA, explaining that the Decree-Law 5200 had expropriated Mobil CN's interests in the Project and the expropriation had caused a Materially Adverse Impact. Mobil CN demanded prompt payment of indemnification pursuant to the AA. (C-III ¶ 165).

186. On 15 July 2007, PDVSA Petróleo issued a cash call to cover expenses related to the Project for August 2007. (C-II ¶ 21).
187. Claimant states that, on 29 July 2007, President Chávez changed the name of the Project to "*PetroMonagas*" in order to reflect "*the socialist process that has put an end to the Oil Opening*." (C-III ¶ 160).
188. Claimant states that, on 30 July 2007, Mobil CN responded by letter, "*addressed to the operator and the Minister*" and copied to PDVSA-CN. The letter stated that, even though the Government had expropriated Mobil CN's interests in the Project as of 27 June 2007, Mobil CN was honoring the cash calls but doing so under protest in respect of any item related to production of crude after 26 June 2007. (C-II ¶ 21).
189. Claimant reports that, on 7 August 2007, Mobil CN's inventory in the Project was depleted. (C-II ¶ 20).
190. On 6 September 2007, Claimant filed a Request for Arbitration against Venezuela before the International Centre for Settlement of Investment Disputes ("*ICSID*"). (R-I ¶ 20; C-I ¶ 78).
191. On 2 October 2007, the National Assembly adopted a Resolution (*Acuerdo*) authorizing the formation of the mixed enterprise PetroMonagas, S.A. ("*PetroMonagas*") in which Corporación Venezolana del Petróleo, S.A., a PDVSA subsidiary, would hold 83.33% of the equity and Veba Oil & Gas Cerro Negro GmbH would hold the remaining 16.67%. (C-III ¶ 161).

On 5 October 2007, the National Assembly enacted the Law on the Effects of the Process of Migration to Mixed Companies of the Agreements of the Orinoco Oil Belt, as well as of the Shared-Risk-and-Profit Exploration Agreements ("*Law on Effects*"). Article 1 directed that the association agreements of the Orinoco Oil Belt, such as the AA, "*shall be extinguished as*

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of the date of publication in the Official Gazette of the Bolivarian Republic of Venezuela of the decree that transfers the right to exercise primary activities to the mixed enterprises constituted according to what is provided in said Decree-Law.” (C-III ¶ 157).

192. On **10 October 2007**, Claimant states that Mobil CN notified PDVSA that PDVSA-CN was in breach of the AA and demanded prompt performance of PDVSA’s indemnity obligation. (C-III ¶ 167).
193. On **10 October 2007**, ICSID registered the **Request for Arbitration**. (C-1 ¶ 78).
194. On **29 November 2007**, PDVSA made a public offer to buy all of the outstanding bonds.
195. On **27 December 2007**, Mobil CN filed an *ex parte* **Complaint for an Order of Attachment in Aid of International Arbitration** against PDVSA-CN with the United States District Court for the Southern District of New York. Judge Castell, acting as emergency judge, ordered the US\$ 300,000,000 attachment on PDVSA-CN’s assets in Bank of New York. (ICC Decision 2008 ¶ 1.2.2).
196. On **28 December 2007**, PDVSA acquired nearly all of the outstanding bonds. (C-II ¶ 35). PDVSA paid US\$ 129,138,839 to repay bank debt, US\$ 501,140,756 to acquire more than 99% of the outstanding bonds, and US\$ 1,094,726 for fees and transaction costs. (R-II ¶ 220).
197. The facts related to the attachments have been recorded as follows (ICC Decision 2008 1.2.1 – 1.2.3, summarized and reorganized):

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- 1.2.2 On **8 January 2008**, Judge Batts issued a **Supplemental Attachment Order** for an additional US\$15 million at the Bank of New York. (ICC Decision 2008 ¶ 1.2.2).
- 1.2.1 On **22 January 2008**, Mobil CN filed with the High Court of Justice – Queen’s Bench Division Commercial Court an *ex parte* **Application Notice for a Freezing Injunction and Disclosure Order** against PDVSA. (ICC Decision 2008 ¶ 1.2.1).
- 1.2.1 On **24 January 2008**, the Hon. Mr. Justice Teare issued a **Freezing Injunction and Disclosure** enjoining PDVSA from disposing assets up to a value of US\$12 billion and ordering PDVSA to disclose, no later than five days following the receipt of the Order, all of its assets worldwide exceeding US\$5,000 in value. (ICC Decision 2008 ¶ 1.2.1).
- 1.2.3 On **1 February 2008**, Mobil CN filed *ex parte* applications for attachment in the District Court of Amsterdam, the Court of First Instance of Willemstad, Curacao and the Court of First Instance of Aruba in Oranjestad. On the same date, the Courts of Aruba and Curacao issued the requested orders to attach PDVSA’s shares for an amount of US\$12 billion. A similar attachment order was issued on 5 February 2008 by the District Court of Amsterdam for the attachment of PDVSA’s shares in an amount of €8.5 billion. (ICC Decision 2008 ¶ 1.2.3).
- 1.2.2 Following the hearing which took place on **13 February 2008**, Judge Batts issued on **20 February 2008** an **Order Confirming the Attachments** of an amount of US\$ 315 million on deposit with or held by The Bank of New York Mellon Corporation. (ICC Decision 2008 ¶ 1.2.2).
198. Claimant reports that, since **3 March 2008**, PDVSA has been participating in the Project under a new legal form and a new name, through its subsidiary Corporación Venezolana del Petróleo, S.A. (C-III ¶ 20).
199. Claimant states that, on **4 March 2008**, PDVSA ceased to participate in the Cerro Negro Joint Venture through its wholly-owned subsidiary PDVSA-CN. On the following day, the AA terminated. (C-III ¶ 20).
200. On **5 March 2008**, President Chávez’s **Decree No. 5916** was published and transferred to PetroMonagas “[t]he right to develop primary activities of exploration in search of reservoirs of heavy and extra-heavy crude oil, the extraction of such crude oil in its natural state, and its initial production, transport and storage [...] according to **Article 9 of the Organic Law of**

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Hydrocarbons.” According to Article 1 of the Law on Effects, the AA was terminated as of that date.

201. On **20 March 2008**, the London High Court of Justice “*ordered that the Freezing Injunction and all ancillary orders be discharged.*” (Decision 1.2.1).
202. On **8 August 2008** the ICSID Tribunal was deemed duly constituted. (C-III ¶ 239).

J. The Disputed Issues

J.I. Short Summary of Contentions of the Claimant

203. A more comprehensive coverage of the contentions can be found in the Claimant’s Reply Memorial (C-IV ¶¶ 9, 11-19, partially quoted, footnotes omitted, emphasis in original); and Claimant’s Principal Memorial C-III ¶ 201 – 203).

11. *Sovereign Powers.* [...] Mobil CN seeks in this proceeding to enforce the Respondents’ contractual obligations. It makes no claim against the Republic of Venezuela and raises no question about the Government’s exercise of sovereign powers. [The Congressional Authorization] contains a critical qualification: “The AA [...] shall not [...] restrict [the Republic’s] sovereign powers, the exercise of which shall not [give rise to] any claim [by] *other states or foreign powers.*” The restriction does not apply to the contract claims against the Respondents, but to inter-government diplomatic espousals of the claims of foreign nationals.
12. *“Extinguishment” of the Agreement.* [Respondents theory that Decree-Law 5200 and the Law on Effects have] immediate effects that extinguish or terminate the AA, leaving Mobil CN without any contract rights and depriving this Tribunal of jurisdiction. This contention [...] fails for three separate reasons: (i) by its own terms, the extinguishment of the AA provided in the Law on Effects did not become effective until March 2008, many months after Mobil CN’s claims had already arisen and become vested; (ii) the Respondents’ theory violates the Venezuelan Constitution, under which even laws of *orden público* having immediate effect may not be applied retroactively to past facts and effects; and (iii) by [Respondents’] own conduct, [treating] the AA as effective throughout 2007 and [...] their assertion of counterclaims[...]
13. *“Act of the Prince,” Non-Imputable Extraneous Cause, and Force Majeure.* [...] By asserting these defenses of excused performance, the

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Respondents necessarily concede their obligation to perform, and that concession precludes their “extinguishment” defense. The [...] AA expressly allocates to Respondent PDVSA-CN the risk of “acts of the prince” such as those the Respondents invoke [and] the indemnification provisions [...] preclude any excuse based on such “acts of the prince,” whether the excuse is predicated on the general rules on non-imputable extraneous cause or on the *force majeure* clause of the contract. The obligations of a public entity that is a party to an administrative contract such as the AA cannot be excused by an “act of the prince” of the same Government that owns the public entity. The Respondents also ignore that neither the legal excuse of non-imputable extraneous cause nor the contractual excuse of *force majeure* may be asserted by a party that failed diligently to take all available actions to prevent the loss from occurring, [none of which Respondents took]. Nor did the Respondents ever comply with the provisions of the AA requiring them to provide written notice of any circumstance constituting *force majeure*.

14. *Forfeiture of Indemnification.* [...] Under Venezuelan law, a party to a contract does not forfeit contract rights unless the contract specifies the circumstances and terms of the forfeiture. [...] The Agreement declares no forfeiture of indemnification rights in the case of any supposed delay in issuing Notices of Discriminatory Measure or any failure to pursue legal remedies. The Respondents do not contend that they suffered any prejudice by reason of Mobil CN’s supposed delay in issuing the notices or pursuing a legal action in an allegedly wrong forum. The proper remedy for any such damage would not be forfeiture, but a counterclaim or offset to compensate the Respondents for any proven injury.
15. *The Allegedly Delayed Notices.* [...] Mobil CN’s conduct was entirely reasonable and consistent with the underlying purpose of the indemnification provisions and with the obligations of good faith and fair dealing:
 - [...] Clause XV [requires] that notices be issued [...] upon Mobil CN’s “*determination*” that [Discriminatory Measures] have occurred, [thereby according]. Mobil CN a reasonable discretion in determining whether, and when, it should assert claims [...].
 - [...]The AA provides that, once the “*determinations*” are made and the Notices are issued, Mobil CN must pursue “any legal recourse [against the Government] available [...] to mitigate any damages suffered as a result of the Discriminatory Measure.” From 2004 through 2007, Mobil CN participated in negotiations with the Government for the purpose of avoiding litigation and mitigating damages. It is uncontested that representatives of both the Government and PDVSA-CN warned Mobil CN that it should pursue those negotiations instead of commencing arbitration. Serving the notices and commencing arbitration against the Republic of Venezuela at that time would not have served the purpose of mitigating damages. Accordingly, the Respondents cannot now reasonably take the position that Mobil CN should hastily have made the “*determinations*,” issued the notices, and launched the requisite “legal action.”

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- Respondents can show no prejudice for the alleged delay in issuing those notices, [as Mobil CN is not seeking any indemnification for damages suffered prior to 2007].
16. *The Legal Action Requirement.* [...] Mobil CN fulfilled its obligation to pursue available legal actions that would mitigate damages, by commencing an ICSID arbitration against the Republic of Venezuela in September 2007. [...] An ICSID arbitration offers the best — and probably the sole — means by which Mobil CN can mitigate its damages [and hence satisfies the legal action requirement]. The Respondents have no basis for their suggestion that the legal-action requirement is an exhaustion-of-domestic-remedies requirement. The AA does not require Mobil CN to embark on a futile quest for redress that is neither available in the courts of Venezuela nor a prerequisite to initiating arbitration. Nor do the terms of the Agreement provide any support for the Respondents' contention that ICSID arbitration was not foreseen as a possible remedy at the time the Agreement was signed.
201. [S]tarting in October 2004, the Venezuelan Government took a series of measures against Mobil CN that were Discriminatory Measures under the AA. Those measures included: (i) the expropriation of Mobil CN's entire interest in the Cerro Negro Joint Venture, (ii) breach and repudiation of the RRA and imposition of the so-called "extraction tax," (iii) increase in the income-tax rate applicable to Mobil CN in violation of the Framework of Conditions, and (iv) imposition of production and export curtailments applicable to the Project.
202. [...] *First*, each measure was a "Governmental Measure" or a change in Venezuelan law or in the interpretation or application of such law. *Second*, each measure either increased tax rates or effected the "expropriation or seizure" of Mobil CN's interests related to the Project. *Third*, each measure was not "generally applicable to Companies in the Republic of Venezuela" and, in the case of the increase in the applicable income-tax rate, the increase did not "correspond with what is provided in the last sentence of the Fifteenth Condition."
203. [T]he measures have caused, in the aggregate, a Materially Adverse Impact in respect of FY 2007 and all future FYs through FY 2035.
17. [...] Respondents [...] distort[] the contractual damages formulas in ways that disregard the wording of the Agreement and produce perverse results that the parties could not have intended.
- [The] Agreement uses a hypothetical "**Reference (Threshold) Cash Flow**" that constitutes the ceiling on indemnification in almost all cases. **Reference (Threshold) Cash Flow** consists of hypothetical revenues ("*TR*"), *minus* royalties ("*TROY*"), *minus* the party's *pro rata* chargeable expenses ("*CEX*"), *minus* income taxes ("*TIT*"). The algebraic notation reflects that the three "*T*-" components — *TR*, *TROY*, and *TIT* — are hypothetical or notional items in which "*TR*" is the hypothetical **Reference (Base) Price** multiplied by "liftings;" "*TROY*" is royalty calculated from "*TR*;" and "*TIT*" is income tax calculated from "*TR*." Only "*CEX*" — which has no "*T*-" prefix — is calculated using "actual" cost data, because chargeable expenses are not

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(in contrast to royalties and taxes) determined as a percentage of revenues. Nevertheless, the Respondents argue that *TROY* and *TIT* should be based on much higher *actual* revenues, not hypothetical *TR* revenues. The Respondents' mixing of apples and oranges — the use of low hypothetical *TR* for revenues but subtracting the much higher royalties and income tax associated with much higher actual revenues — is a double reduction that would eliminate or substantially reduce any indemnification.

- [...]Mobil CN's interpretation yields a **Reference (Threshold) Cash Flow** that rises steadily with increases in the relevant price of oil until the ceiling is reached, after which the **Reference (Threshold) Cash Flow** levels off and stays on a straight-line plateau even when oil prices continue to rise. By contrast, the Respondents' interpretation also rises steadily with oil price increases until the ceiling is reached — *but then declines to zero as oil prices rise further* and Mobil CN continues to receive *no revenue*. There is no rational explanation for [Respondents' construction of the indemnification]. The Respondents propose an "elimination," not a "limitation."
 - For 2007, [...] the Respondents propose an "adjustment" that raises the **Chalmette Formula Price** (the sales price for SCO) to equal the much higher price of Brent Crude Oil. This improperly inflated **Adjusted Net Cash Flow** is then subtracted from the **Reference (Threshold) Cash Flow** — which is already significantly below the actual sales price because it is calculated using the hypothetical *TR* as the low Reference (Base) Price. [The AA does not justify such a price adjustment, whose only discernible purpose is to curtail the indemnity in incongruous ways].
9. The Respondents also ignore the fundamental purpose of the AA when they contend that Mobil CN has no indemnification remedy for an expropriation because the Agreement does not allow what they call "future damages." [...]
- [The indemnification damages embrace all economic consequences of the Discriminatory Measures. Section 15.1(b) [...] provides for "damages to compensate the Foreign Party for the economic consequences of the Discriminatory Measure suffered by it to date" (the controlling Spanish text making clear that "suffered to date" refers to the "Discriminatory Measure," not to the "damages").
 - Mobil CN is not seeking "future damages," but compensation for the "economic consequences" of the Discriminatory Measures at the time they were suffered. In the case of the expropriation of Mobil CN's entire interest in the Project, Mobil CN immediately suffered all "economic consequences" (including the loss of all its right to future revenues from the Project) at the time of the expropriation.
 - The Respondents try to frustrate the indemnification provisions by arguing that indemnification can only be provided on a "retrospective" year-by-year basis based on the actual annual financial results of the Project. Beyond their misreading of the agreement, as they well know, it is impossible to make calculations on that basis because the Project no longer exists. Its assets have been transferred by Government fiat to

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one or more new ventures, including primarily the Petromonagas venture, having a different operator, assets and participants.

- If the Respondents were correct that Mobil CN's damages cannot be calculated using the formulas in the AA, the consequence would not be that Mobil CN loses its right to be indemnified, but instead that the Respondents cannot use the formulas to impose a limitation on the indemnification damages. Both the Congressional authorization and the AA make clear that the chief function of the formulas is to impose limitations on damages when the "Foreign Party is receiving revenues" or a "Net Cash Flow" from the operation of the Project. As Mobil CN will never receive any revenues or cash flow from the Project, it would be more consistent with the Agreement to eliminate the limitation on indemnification than to eliminate the indemnification itself.
18. [...] Respondents' evidence and arguments about the calculation of damages are wholly lacking in substance and credibility. [...]
- The [...] argument that Mobil CN's damages should be substantially discounted by a "default risk" factor — *i.e.* the risk that the Respondents would not honor their indemnity obligations is preposterous. This arbitration is a breach-of-contract case to enforce indemnity obligations, not a case establishing the fair market value of assets through project cash flows. The Respondents' contractual debt to Mobil CN became fixed and payable at the time of breach. If their theory were accepted, parties breaching a contract could always argue that the damages payable should be reduced to reflect their "default risk."
 - The Respondents' experts [use discount rates created by non-standard methods and inflated with improper adjustments under the guise of accounting for risks that supposedly would affect the Project.]. They discount the expected cash flows [based on] [...] the risk of hypothetical and more risky alternative investments. Furthermore, they imagine a range of unquantified and inapplicable risks to "justify" an indefensibly high discount rate — approaching 20 percent — that results in a steep reduction of the Respondents' indemnification obligations. [Respondents' failed distinguish between the Project cash flows and the cash flows created by the contractual indemnification formulas] ... [Mobil CN's expert] Professor Stewart Myers, the foremost expert in the field [...] explains that Mobil CN has taken the proper approach — calculating cash flows that incorporate the downside risks and applying a discount rate that matches the systematic risk of those cash flows. [...]
 - [...] The Respondents arbitrarily reduce the output and revenues of the Project by assuming production constraints, lack of storage capacity, and restrictive OPEC quotas that are each unsupported. They inflate the operating and capital costs of the Project by including costs that occurred because of the expropriation and that would not have occurred otherwise. They seize on several months of data during the short-term oil-price spikes of 2008 to contend that the costs of oilfield equipment and labor — which jumped with the rising price of oil but have since declined — would remain at their temporary peak. And they contradict

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themselves by offering unreasonable scenarios of future oil price crashes — without acknowledging that costs decline along with reductions in the price of oil.

- The approach that best accords with the terms of the AA, and that most simplifies all calculations, is the Fixed **Reference (Threshold) Cash Flow** method, which uses data known by both parties in 2007 as the basis for every succeeding year's results, [and reflects that the Project has been terminated]. [...] Confirming the fairness of this approach is the Forecast **Reference (Threshold) Cash Flow** model, which hypothesizes a continuing Project and uses standard discounted cash flow analysis. [These two models correctly yield indemnification damages of US\$6.45 billion to US\$6.86 billion.
19. None of the Respondents' counterclaims has merit.
- [Mobil CN cannot be required to pay restitution for property it owned, much less for property that was not expropriated.] [U]nder the AA, Mobil CN had title to its share of the SCO in storage at the time of the expropriation and that share was properly sold for Mobil CN's account [because title vested at the wellhead]. **Decree-Law 5200** contains no provision expropriating oil inventories owned by participants in the Project.
 - [...] Because Mobil CN has at all times made timely payments on outstanding bonds, there has been no default and hence no basis for acceleration of the principal amount. [...] PDVSA unilaterally restructured [...] the Project financing because the expropriation was an event of default under the bond and bank financing instruments. PDVSA did so to preserve its reputation in international credit markets and to avoid litigation with the creditors. Mobil CN has no obligation to pay Respondents
 - [...] The Respondents make no showing that the attachment was wrongful in any respect and they ignore that, under New York law, the federal district court in New York possesses jurisdiction over claims for damages arising from attachments granted by that court.

J.II. Short Summary of Contentions of the Respondents

204. Respondents' summary of contentions is found at ¶ 10 and ¶ 220 of **Respondents' Principal Memorial** and Section 5.2.1 of the **Terms of Reference**.

10. [...]
- Pursuant to the governing law, the AA cannot form the basis of a claim by Claimant in this Arbitration. This conclusion emanates from the plain meaning and effect of the laws referred to in Claimant's Principal Memorial, as well as the well-established principles relating to the

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consequences of an *hecho del príncipe* (act of the prince), to which neither Claimant nor its legal experts make any reference.

- Even if the AA could form the basis of a claim, Claimant failed to meet what one of ExxonMobil's former top executives, Mr. Jim Massey, has called the procedural requirements that triggered the indemnity obligation, namely, the express requirements set forth in Article XV of the AA. In this regard, as Mr. Massey himself frankly admitted, Claimant (a) failed to provide the required "immediate" notice of the occurrence of a "Discriminatory Measure" that might lead to a "Material Adverse Impact" and (b) failed to provide the required "immediate" notice that it in fact suffered a "Material Adverse Impact" as a result of an alleged "Discriminatory Measure." As discussed below, Claimant also failed to meet the third requirement of commencing and pursuing administrative or judicial actions challenging the alleged "Discriminatory Measures." These failures at once constitute legal barriers to the assertion of Mobil CN's claim and provide compelling evidence that Claimant itself has known all along that it had no claim under the AA.
 - [N]one of the governmental measures at issue in this case falls within the definition of "Discriminatory Measure." As such, there can be no basis for a claim of indemnity against PDVSA-CN under the AA and no basis for a claim against PDVSA based on the Guaranty.
 - Claimant and its legal experts argue that, under Venezuelan law, the contractual indemnification provisions of the AA must be applied "exactly" as written. Yet those provisions, by their own terms, limit the scope of any arbitration for indemnity to the "economic consequences of the Discriminatory Measure suffered by it to date" and do not cover a claim for future damages, which constitutes by far the bulk of Mobil CN's damage claim. As for "FY" 2007, an application of the indemnity formula contained in the AA "exactly" in accordance with its terms leads to the conclusion that no indemnity would be owed for that "FY" as well. (R-III ¶ 10)
- 5.2.1 (iii) With respect to the period prior to 2007, the limitation of liability provisions of Article 15 of the AA would have precluded a claim even if Claimant had asserted one, which it never did. Even now Claimant does not seriously articulate any claim for compensation based on governmental measures taken during that period,
- (iv) With respect to the claim for future cash flows, even if (a) the AA had not been extinguished, (b) the governmental actions had constituted "Discriminatory Measures" and (c) the conditions precedent specified in Article 15 of the AA had been met, the provisions of that same Article make clear that future cash flows were not covered. In fact the scope of the arbitration proceedings delineated in Article 15.1(b) of the AA confirms that future cash flows were not covered and that any such claim would not fall within the jurisdiction of this Tribunal
- (v) In any event, Article 21.1 of the AA expressly provided that neither party would have any liability for non-performance to the extent such non-performance was due to "acts of government or orders, judgments, resolutions, decisions or other actions or omissions of any governmental authority."

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c. Finally, with respect to future cash flows, even if (a) the AA had not been extinguished, (b) the governmental actions had constituted "Discriminatory Measures," (c) the conditions precedent specified in Article 15 of the AA had been met and (d) the provisions of the AA did cover future cash flows, the amount of that claim would still not be more than a small fraction of the sum which Claimant has asserted in the attachment proceedings it has commenced in connection with this arbitration for various reasons, including the mistaken assumptions used by Claimant to project future cash flows and its failure to do any discounting of those assumed flows. While it should not be necessary for the Tribunal to reach those issues, the obvious defects in Claimant's calculations, particularly its failure to do any discounting, underscore the nature of both this proceeding and the accompanying worldwide campaign of freezing orders and attachments as merely an attempt to intimidate Respondents into acceding to Claimant's demand for exorbitant compensation. (TOR 5.2.1)

10. Finally, even if Claimant could overcome all of the foregoing hurdles, the total amount it could claim as damages would still not be more than a small fraction of the sum it seeks to recover in this Arbitration for various reasons, including the mistaken assumptions used by Claimant to project future cash flows and the unjustifiably low discount rate it applies to those assumed flows. Such amount, even under assumptions most favorable to Claimant, would not exceed the value of Respondents' counterclaims, which are easily quantifiable and largely uncontested. (R-III ¶ 10)

220. [...]

- First, after Mobil CN chose not to participate in the 2007 migration process, it ceased to have any interest in the Project. Despite that fact, Mobil CN continued to receive proceeds of shipments of SCO produced by the Project to the Chalmette Refinery, for which it is liable to PDVSA-CN in the amount of US\$171,552,666.)
- Second, with respect to the joint financing for the Project that was obtained by Mobil CN and PDVSA-CN, and for which Mobil CN and PDVSA-CN were equally liable, PDVSA entered into transactions in December 2007 that required it to (a) pay US\$129,138,839 to repay the bank debt, (b) pay US\$501,140,756 to acquire more than 99% of the outstanding bonds and (c) pay fees and transaction costs totaling US\$1,094,726. As a result of those transactions, Mobil CN owes PDVSA a total of US\$315,687,161 (less certain amounts that have been paid by Mobil CN to PDVSA on the outstanding bonds after the transactions closed).
- Third, PDVSA and PDVSA-CN have suffered damages as a result of the attachments obtained by Claimant, including primarily the attachment of US\$301,095,355 in New York. Those funds are held in an account established on February 25, 2008 that has paid low interest rates – an average of approximately 1.1% for the period through February 4, 2009 (and recently 0%). In contrast, the cost to PDVSA to borrow funds has averaged 14.77% during the period since the attachment account was established on February 25, 2008. The amount

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of damages due to this attachment is approximately US\$39.04 million to date, but is increasing each day. (R-III ¶ 220)

**K. Considerations and Conclusions of the Tribunal
Regarding the Claims**

205. The Tribunal considered the extensive factual and legal arguments presented by the Parties in their written and oral submissions, all of which the Tribunal has found helpful. In this Award, the Tribunal discusses the Parties' arguments that were most relevant for the Tribunal's decisions. The Tribunal's reasoning, without repeating all the arguments advanced by the Parties, addresses what the Tribunal considers to be the determinative factors required to decide the issues arising in this case.

K.I. Preliminary Considerations

**K.I.1. Parties' Answers to Tribunal's Questions in
Procedural Order No. 6**

206. Hereafter, the Parties' answers to the Tribunal's Questions in PO-6 are summarized. The Tribunal takes these answers into account in later sections of this Award in so far as it considers them to be relevant for the conclusions regarding the respective issues.

K.I.1.a. Relevance of ICSID Proceedings

207. At section 3.1 of PO-6, the Tribunal invited the Parties to respond to the following question:

3.1 Are the parallel ICSID proceedings relevant for the present case? If so, in which way and what is their present status?

K.I.1.a.i. Arguments by Claimant

208. Claimant argues that the ICSID proceeding is relevant in only two respects. *First*, the ICSID proceeding meets the "legal action" requirement of Article 15.1(a) of the AA. *Second*, the ICSID proceeding may need to be taken into account in the future to prevent a double recovery. (C-V ¶¶ 31 – 39).

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209. With respect to its “*legal action*” argument, the ICSID arbitration fulfills Article 15.1(a) AA which requires the Claimant to pursue legal actions to mitigate damages suffered as the result of a Discriminatory Measure. (C-V ¶ 32). The Discriminatory Measures at issue in this ICC arbitration are among those at issue in the ICSID proceeding. (C-V ¶ 32).
210. With respect to its “*prevention of double recovery*” argument, Claimant states as follows:
35. According to [Article 15.1(a)], if MCN receives from the Respondents payment of any damages awarded in this Arbitration, and later receives payment of any damages awarded in the ICSID case, MCN will reimburse the Respondents (after deducting legal costs) for the payment they made, to the extent both payments relate to the same Discriminatory Measures. Conversely, should MCN receive payment of damages awarded in the ICSID case in respect of Discriminatory Measures affecting the Project before an award of damages is entered in this Arbitration (an unlikely scenario), such payment shall be applied towards any amount owed by the Respondents in this Arbitration. (C-V ¶ 35).
211. Claimant opposes Respondents’ argument that Claimant’s remedies lie solely with the ICSID arbitration and states that such an argument is inconsistent with the terms of the AA. (C-V ¶ 37). Instead, Claimant states that the Parties knew that pursuing a claim against the Government would be difficult and lengthy and that they, therefore, crafted the indemnity provisions such that they would function regardless of any claim that the Claimant may have against the Republic of Venezuela. (C-V ¶ 37). Article 15.1(a) contemplates an action against the Republic of Venezuela that would be conducted independently, but in parallel, with arbitration against PDVSA-CN. (C-V ¶ 34, partially quoted). Claimant further characterizes Respondents’ argument that all relief lies in the ICSID proceeding as disingenuous, citing the Government’s statement that it has no intention of paying an award. (C-V ¶ 38).
212. Claimant explains that the progression of the ICSID case, which was filed on 6 September 2007 and is scheduled for a hearing on all remaining issues

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in February 2012, demonstrates why the indemnification provisions are a critical legal protection for Claimant. (C-V ¶ 38).

213. Finally, Claimant presents a third argument in favor of the parallel ICC arbitration. A ruling that PDVSA-CN has breached the AA is a form of relief that is available before the ICC, but not ICSID. (C-V ¶ 39). Such a ruling would enable the Claimant to purchase PDV Chalmette's Interest in Chalmette Refining LLC under Section 8.6 of the Chalmette Agreement. (C-V ¶ 39).

214. Claimant argues that the ICSID arbitration has no relevance in the determination of the merits of this case. (C-V ¶ 36). Claimant did, however, reference the ICSID case in its discussion of the discount rate:

30. [...] The discount rate applicable to cash flows from Claimant's interest in the Project will be determined in the ICSID case, not this one. (C-V ¶ 30).

K.I.1.a.ii. Arguments by Respondents

215. Respondents argue that the ICSID proceedings are the main proceedings regarding this controversy, but explain that the ICSID case has nothing to do with *“revers[ing] or obtain[ing] relief from a Discriminatory Measure,[...] but rather to obtain damages for alleged violations of international law and Venezuelan law.”* (R-IV ¶ 83).

216. Respondents put forward that Claimant *“has always understood that it did not have a claim under the AA”*, and states that this is why Claimant has always dealt with the Government. Respondents state that Claimant's first mention of a claim before the ICC pursuant to the AA was made in order to *“prepare the way for attachments and freezing orders not available to it in connection with the ICSID proceeding.”* (R-IV ¶ 84). Respondents urge the Tribunal to *“[leave the Claimant] to its strategy of dealing with the State.”* (R-IV ¶ 84).

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217. Finally, with respect to “*double compensation*”, Respondents put forward that Claimant’s ICSID claim against the Government would be less than the indemnity that it seeks in this arbitration. (R-IV ¶ 85).

K.I.1.a.iii. The Tribunal

218. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties’ Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-III	¶¶ 16 – 17, 59, 240 – 241
C-IV	¶¶ 112 – 115
R-II	Fn. 154, 157
R-III	¶¶ 86 – 88

Exhibits:

Exhibit	Document Name
C-8	Notice of Registration of the Request for Arbitration filed before ICSID (10 October 2007)
C-41	Testimony of Thomas L. Cranmer (25 September 2008) at ¶¶ 25, 30
C-42	Testimony of Mark Ward (26 September 2008) at ¶ 27
C-87	Cerro Negro Association Agreement and Annexes [<i>Convenio de Asociación Proyecto Cerro Negro</i>] (28 October 1997) (hereinafter “ <i>Association Agreement</i> ”), Article 15.1(a)
C-119	Amended and Restated Limited Liability Company Agreement of Chalmette Refining, LLC (28 October 1997) § 8.6
C-136	Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Venezuela [<i>Convenio Para el Estimulo y Protección Recíproca de Las Inversiones Entre la República de Venezuela y el Reino Unido de los Países Bajos</i>], signed at Caracas, 22 October 1991, entered into force 1 November 1993 (as published in the Official Gazette No. 35.269 of 6 August 1993) Art. 9.3
C-138	Letter dated 8 August 2008 from Secretary of the ICSID Tribunal to Mobil Corporation, Venezuela Holdings, B.V.; Mobil Cerro Negro Holding, Ltd.; Mobil Venezolana de Petróleos Holdings, Inc.; Mobil Cerro Negro, Ltd.; Mobil Venezolana de Petróleos, Inc.; and Bolivarian Republic of Venezuela confirming constitution of the Tribunal
C-215	Second Declaration of Professor Eugenio Hernández-Bretón (14 May 2009) ¶¶ 49 – 52, 70
C-256	Law on the Promotion and Protection of Investments [<i>Ley sobre</i>

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	<i>Promoción y Protección de Inversiones</i>] (as published in the Official Gazette No. 5390 of 22 October 1999)
C-257	Mobil's Questions and Answers (October 1997) at 1
C-258	Mobil Document entitled "Venezuela Key Issues" (May 1998) at 1
C-259	Common Security Agreement among Mobil Cerro Negro Holding, Ltd., <i>et al.</i> (18 June 1998) at Section 6.07
C-8	Notice of Registration of the Request for Arbitration filed before ICSID (10 October 2007)
R-4	First Affidavit of Bernard Mommer (11 February 2008) ¶ 12
R-37	Outline Argument on Behalf of Claimant In Support of Its Application For an Order for Alternative Service and In Opposition to the Application by the Respondent to Discharge the Worldwide Freezing Order, dated February 27, 2008, <i>Mobil Cerro Negro Limited v. Petróleos de Venezuela, S.A.</i> , Claim No. 2008 Folio 61, High Court of Justice, Queen's Bench Division, Commercial Court (London) ¶ 82
R-68	Legal Expert Opinion of Professor José Mélich-Orsini (10 February 2009) fn. 23
R-69	Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (10 February 2009) fn. 43
R-112	Association Agreement between Lagoven Cerro Negro, S.A., Mobil Producción e Industrialización de Venezuela Inc. and Veba Oel Orinoco GMBH, executed 28 October 1997 (hereinafter " <i>Association Agreement</i> ")
R-114	Supplemental Expert Report on the Discount Rate to be Applied to Projected Cash Flows, Prepared by Vladimir Brailovsky and Louis T. Wells and Appendices, (14 August 2009) (hereinafter " <i>Supplemental Brailovsky/Wells Report</i> ") ¶¶ 52-57
R-119	Second Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (14 August 2009) ¶¶ 49 - 52
Unnumbered	<i>Mobil Corporation et al. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010) <i>available at</i> http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1510_En&caseId=C256 [hereinafter " <i>ICSID Decision on Jurisdiction</i> "] at ¶ 209(a), (b)
Unnumbered	Republic of Venezuela's ICSID Memorial on Jurisdiction at ¶¶ 25-26

At and Following the 2010 Hearings:

Submission	Pinpoint
C-V	¶¶ 30 – 39
R-IV	¶¶ 83 - 86
R. Closing Slides	88 - 89

Speaker	Citation
C. Opening	34 - 35, 53-54
C. Closing	2039-2040
Cutt	702-703, 710-711

Jones	1383-1383, 1437
Massey	594-595
R. Closing	2183-2187
R. Opening	101-102
Ward	147, 238-240, 278-280, 286
C. Opening	34 - 35, 53-54

219. The Tribunal notes that the ICSID proceedings have passed the jurisdictional phase. The briefing schedule ends on **15 December 2011**, and the hearing on all remaining issues is scheduled for February 2012. (R-IV ¶ 86).

K.I.1.b. Interpretation of Term “*Occurred*” and the Relevance of Ongoing Settlement Discussions

220. At section 3.2 of PO-6, the Tribunal invited the Parties to respond to the following question:

- 3.2 How should the term “*occurred*” in the first sentence of Clause 15.1 of the Association Agreement (AA) be interpreted? What is the relevance of ongoing settlement discussions between the contractual parties or with the Government of Venezuela in that context?

K.I.1.b.i. Arguments by Claimant

221. Claimant explains that the term “*occurred*” is modified by the term “*determines.*”

41. In [Article 15.1(a)], the *determination* made by the Foreign Party has a double function: (i) it is a pre-condition to the requirement to give the first notice; and (ii) it starts the running of the period (described by the adverb “immediately”) within which the first notice is to be given. The determination has two components: (i) a legal determination — that a measure that meets the definition of Discriminatory Measure has *occurred* and (ii) a financial determination — that such measure may result in a Materially Adverse Impact, as this term is defined in the Agreement. (C-V ¶ 41, citations omitted).
42. In principle, a determination that a Discriminatory Measure “has occurred” implies a determination that the measure has been taken, and that the taking of it has become public or known to the Foreign Party. A measure will normally “occur” when it is officially adopted and published, unless the *effects* that make it a Discriminatory Measure under the definition are postponed until a later date or are subject to condition. In such cases, the measure will not “occur” until the postponement expires or the condition is fulfilled and those effects take place. (C-V ¶ 42, citations omitted, emphasis in original).

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222. With respect to **Decree-Law 5200**, the various effects of the decree did not occur until later specified dates. The takeover of operations was to occur not later than 30 April 2007, and the “*expropriation or seizure of the foreign participants’ interests*” was to take place four months later, on 27 June 2007. (C-V ¶ 43). Claimant argues that the total expropriation occurred on 27 June 2007, and in support of this argument cites **Article 2 of the Law on Effects**, which confirms that Claimant’s interests in the Project had belonged to Claimant until 26 June 2007. (C-V ¶ 44).
223. Claimant argues that it was not required by either the AA, the principle of good faith, or otherwise to make any determination regarding the expropriation carried out by **Decree-Law 5200** until after 27 June 2007. Claimant argues that it acted in good faith by sending the first notice 5 days prior, on 22 June 2007, when it became clear that the expropriation would occur on 27 June 2007.
224. Claimant states that the settlement discussions with the Government are relevant to the determinations related to **Decree-Law 5200** (C-V ¶¶ 47 – 49, emphasis in original, citations omitted):
47. The evidence shows that MCN determined in June 2007, when all hopes for a settlement with the Government had vanished, that all the Discriminatory Measures at issue in this case may cause (first notice) and had caused (second notice) a Materially Adverse Impact for FYs 2007-2035. [...] The negotiations with the Government were a key factor in the timing of MCN’s determinations for two reasons:
48. *First*, MCN would have incurred no Materially Adverse Impact for Fiscal Years 2007-2035 if the Government and MCN had reached a global settlement in respect of all governmental measures at issue in this case. (In fact, the undisputed evidence shows that, under the indemnity formulas, MCN was not entitled to any indemnity for Fiscal Years 2004-2006.) Therefore, it was entirely appropriate to make the determinations about the impact of those measures when it became clear that the settlement negotiations had failed.
49. *Second*, once the second notice was given, MCN was required to pursue a legal action against the Government, for the purpose of mitigating damages. But in light of the threats from the Government and PDVSA against arbitration and Mobil’s businesses in Venezuela, it became clear to MCN that settlement discussions with the Government offered the only realistic way to mitigate damages. Making early determinations

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leading to an early action against the Government would have aggravated the disputes and jeopardized the chances of a negotiated settlement. (C-V ¶¶ 47 – 49).

225. Claimant rejects Respondents' argument that the event that triggered the obligation to issue the notice was the mere "*occurrence*" of the events and states that such an argument is directly contradicted by the express terms of Article 15.1(a). The AA does not require an "*objective determination*" – rather, the AA requires knowledge and a legal analysis and conclusion that the measure meets the definition of "*Discriminatory Measure*" and will have the required financial impact. (C-V ¶ 50 – 51). Contrary to Respondents' argument, the AA does not require the issuance of the notices when the determination "*could have been made.*" (C-V ¶ 52).
226. Claimant does not contend that it had the right to withhold the determinations and insists that its determinations were made in good faith. Addressing the timing of the determinations, Claimant urges the Tribunal to assess the conduct of the Parties in light of good faith, as required under Venezuelan law where the contract provides no term. Here, Claimant states that the relevant circumstances influencing the timing of the determinations include threats from the Government and PDVSA, as well as hope that negotiations would be successful and arbitration could be avoided. (C-V ¶ 53)

K.I.1.b.ii. Arguments by Respondents

227. Respondents explain that the term "*occurred*" should be interpreted in accordance with its plain meaning, as a synonym for "*to happen*" or "*to take place.*" (R-IV ¶ 87). An occurrence is measured by an objective standard and is "*not determined by a party subjectively deciding to announce its occurrence.*" (R-IV ¶ 87). Rather, Article 15.1(a) focuses on knowledge of the occurrence of an event "*that may lead to*" a Material Adverse Impact. It does not use a subjective standard, as advocated by Claimant. (R-V ¶ 18; R. Closing Slide 43).

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228. Respondents also argue that the standard enunciated by Claimant where a measure “occurs” when it was taken or publicly announced would require the Tribunal to dismiss all of the claims. (R-V ¶ 23). Even assuming that each measure was discriminatory, there was no doubt that as of the date of publication of each measure, each was one that “may lead to” a Material Adverse Impact. (R-V ¶ 24).

229. Claimant’s theory that it fulfilled the requirements for triggering indemnity, based on its definition of “determination” is without merit. In that respect, Respondents state as follows:

- If Claimant can withhold notice or action to reverse or obtain relief from a measure until it subjectively determines that notice should be given, Article 15.1(a) would have no rational meaning.
- The provision calls for taking immediate action once Claimant has objectively determined that an event has occurred that “may lead to a Material Adverse Impact.”
- The very notion of waiting until “all hope has vanished” is irreconcilable with the purpose of Article 15.1(a), which is to provide a timely opportunity to resolve the matter before hope has vanished.
- Claimant’s interpretation not only violates common sense, but it requires reading both words and concepts into the provision that are simply not there. (R. Closing Slide 34).

230. With respect to the impact of settlement discussions, Respondents state as follows:

87. [...] the existence of ongoing settlement discussions has no bearing whatsoever on whether an event has “occurred which may result in a Material Adverse Impact,” as the event still would have occurred and the possibility of it resulting in a Material Adverse Impact if the negotiations fail will still have existed. (R-IV ¶ 87, citations omitted).

231. Respondents do not concede that there have been negotiations with the Government about all of the measures alleged here (especially the Royalty Measure) or that such have been “ongoing.” (R-IV ¶ 88). Instead, with respect to the Royalty Measure, Respondents state that the notion that negotiations were “ongoing” – occurring throughout the three years since the first measure was taken, defies common sense and is “belied by Claimant’s own testimony” that, by early 2005, there was no doubt that

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there would be no ongoing negotiations regarding the Royalty Measure. (R-IV ¶ 88).

232. The AA requires the provision of notice upon the determination that an event has occurred, not after all hope of settlement has vanished. (R-IV ¶ 30). Respondents' arguments at R-V ¶ 26 are relevant to compare with Claimant's "*good faith*" arguments:

26. Claimant's argument that it did not mention a claim for indemnity against PDVSA-CN because it was allegedly told that arbitration against the Government would not be helpful in negotiations is difficult to fathom. Even if Claimant believed that the Government would take offense to arbitration proceedings, that obviously did not deter Claimant from sending thirteen formal notices to the Government cataloguing alleged violations and purporting to preserve its rights against the Government. Against this history of overzealous conduct in protecting and preserving legal positions, it is hard to imagine that Claimant would feel reluctant to even mention to PDVSA-CN (or anyone else) the possibility that it also might have an indemnity claim against PDVSA-CN under the AA. (R-V ¶ 26).

233. Respondents' conclusions with respect to the requirements of Article 15.1(a) of the AA are found at R. Closing Slide 43:

- Claimant was aware of the existence and significance of the requirements and that its right to indemnity from PDVSA-CN under the contract was dependent upon fulfilling them.
- Claimant knew that the acts may, and as a matter of mathematical certainty would, lead to a Material Adverse Impact if they were not reversed.
- Claimant made a conscious business decision not to fulfill the requirements and instead to pursue its strategy directly with the Government, not PDVSA-CN or PDVSA.
- Having failed to meet the acknowledged requirements for triggering indemnity, Claimant cannot now maintain its indemnity claims.

K.I.1.b.iii. The Tribunal

234. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties' Briefs and of the evidence:

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Party Submissions:

Submission	Pinpoint
C-IV	¶¶ 15, 102 – 111
C-III	¶¶ 163 – 165, 194 – 195, 231 – 236
R-II	¶¶ 66, 68 – 70, 76 – 79

Exhibits:

Exhibit	Document Name
C-5	22 June 2007 Notice of Discriminatory Actions that May Result in a Materially Adverse Impact in Fiscal Year 2007 and Future Fiscal Years [<i>Notificación de Medidas Discriminatorias que Pueden Resultar en Impacto Sustancialmente Adverso en el Año Fiscal 2007 y Años Fiscales Futuros</i>]
C-6	25 June 2007 Notice of Discriminatory Actions that have caused a Materially Adverse Impact in Fiscal Year 2007 and Future Fiscal Years [<i>Notificación de Medidas Discriminatorias que han Causado un Impacto Sustancialmente Adverso en el Año Fiscal 2007 y Años Fiscales Futuros</i>]
C-7	27 June 2007 Notice of Discriminatory Actions that have caused a Materially Adverse Impact in Fiscal Year 2007 and Future Fiscal Years [<i>Notificación de Medidas Discriminatorias que han Causado un Impacto Sustancialmente Adverso en el Año Fiscal 2007 y Años Fiscales Futuros</i>]
C-22	Transcript of “Declarations of the Minister of Popular Power for Energy and Petroleum and President of PDVSA, Rafael Ramírez, on the ExxonMobil - PDVSA Arbitration Case” [<i>Declaraciones del Ministro del Poder Popular para la Energía y Petróleo y Presidente de PDVSA, Rafael Ramírez, sobre el caso Arbitraje Exxon Mobil-PDVSA</i>] dated 8 February 2008, available at www.pdvsa.com . at 2
C-42	Testimony of Mark Ward (26 September 2008) ¶¶ 23 – 28
Ex. 11	Minutes of 1 December 2004 Meeting of the Board of Directors of Petrolera Cerro Negro pp. 47 - 48
C-43	Testimony of Tim Cutt (26 September 2008) ¶¶ 15, 17, 54 - 59
C-44	Declaration of Professor Eugenio Hernández-Bretón (27 September 2008) ¶¶ 78 - 79
C-47	Expert Report of R. Dean Graves of Alvarez & Marsal, Dispute Analysis & Forensic Services, LLC, on 2007 ICC Damages Payable (26 September 2008) p. 6
Ex. 5	2004-2006 Damages Calculation
C-87	Association Agreement, Clause I <i>defining</i> “Materially Adverse Impact”, Sections 2.1(a), 15.1(a)-(b)
C-99	Decree No. 5200 with Rank, Value and Force of Law on the Migration to Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as of the Shared-Risk-and-Profit Exploration Agreements [<i>Decreto No. 5.200 con Rango, Valor y Fuerza de Ley de Migración a Empresas Mixtas de los Convenios de Asociación de la Faja Petrolífera del Orinoco, así como de los Convenios de Exploración a Riesgo y Ganancias</i>]

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- C-104 *Compartidas*] (as published in the Official Gazette No. 38632 of 26 February 2007) (hereinafter “Decree-Law 5200”) Art. 3 – 5
Law on the Effects of the Migration Process to Mixed Companies of the Association Agreements of the Orinoco Oil Belt, as well as of the Shared-Risk-and-Profit Exploration Agreements [*Ley Sobre los Efectos del Proceso de Migración a Empresas Mixtas de los Convenios de Asociación de la Faja Petrolífera del Orinoco, Así Como de los Convenios de Exploración a Riesgo y Ganancias Compartidas*] (as published in the Official Gazette No. 38785 of 8 October 2007) (hereinafter “Law on Effects”) Art. 2
- C-134 Venezuelan Civil Code [*Código Civil*] (as published in the Official Gazette No. 2990 of 26 July 1982) Art. 1160 (hereinafter “Venezuelan Civil Code”)
- C-158 Letter from Mobil CN (26 May 2006)
- C-221 Emerson-ESAI Reply at p. 4
- C-223 Mommer Interview at 6
- C-242 Minutes of PDVSA-CN Shareholders’ Meetings held on 27 October 2003 and 4 March 2005 at 5
- C-252 *Aló Presidente*, No. 177 (11 January 2004) at 2
- C-253 *Mobil Cerro Negro, Ltd. V. Petróleos de Venezuela S.A. and PDVSA Cerro Negro, S.A.*, ICC Case No. 15416/JRF, Official Transcript of 2 December 2008 hearing pp. 23, 135-136, 167 (hereinafter “Tr. of 2 December 2008 Hearing”)
- C-277 Report of Operadora Cerro Negro to the Minister of Energy on Royalties and Extraction Tax (27 September 2006)
- C-291 José Mélich-Orsini, EL PAGO 151 (2000)
- R-35 Tr. of 2 December 2008 Hearing pp. 127 - 135
- R-68 Legal Expert Opinion of Professor José Mélich-Orsini (10 February 2009) ¶¶ 27 - 28
- App. 19 Judgment, Political-Administrative Chamber of the Supreme Tribunal of Justice, *Tierras Carreteras y Puentes, S.A. (TICAPSA) v. Ministro de Hacienda* (December 12, 2006) (English Translation, Extract)
- R-69 Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (10 February 2009) ¶ 42, fn. 35
- R-75 Letter from Mark Ward, President of Mobil Cerro Negro, Ltd. And Mobil Cerro Negro Holdings, Ltd. To Alí Rodríguez, Minister of Foreign Affairs, Rafael Ramírez, the Minister of Energy and Petroleum and Marisol Plaza, Attorney General (2 February 2005)
- R-76 Letter from Mark Ward, Mobil Cerro Negro, Ltd., Mobil Cerro Negro Holdings, Ltd. And Operadora Cerro Negro, S.A. to Alí Rodríguez, Minister of Foreign Affairs, Rafael Ramírez, Minister of Energy and Mines and Marisol Plaza, Attorney General (2 June 2005)
- R-77 Letter from Mark Ward, President of Mobil Cerro Negro, Ltd., Mobil Cerro Negro Holdings, Ltd. And Operadora Cerro Negro, S.A. to Alí Rodríguez, Minister of Foreign Affairs, Rafael Ramírez, Minister of Energy and Petroleum and Marisol Plaza, Attorney General (20 June 2005)

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- R-78 Letter from Mark Ward, Mobil Cerro Negro, Ltd. To Rafael Ramírez, Minister of Energy and Petroleum (1 August 2005)
- R-79 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. And Mobil Cerro Negro Holdings, Ltd. And Representative of Venezuela Holdings, B.V. to Bernard Mommer, Vice Minister of Hydrocarbons (16 October 2006)
- R-80 Letter from Timothy Cutt, Operadora Cerro Negro, S.A. to Rafael Ramírez, Minister of Energy and Petroleum (2 November 2006)
- R-81 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. And Mobil Cerro Negro Holdings, Ltd. And Representative of Venezuela Holdings, B.V. to Nicolás Maduro, Minister of Foreign Affairs, Rafael Ramírez, Minister of Energy and Petroleum and Gladys María Gutiérrez, Attorney General (20 November 2006)
- R-82 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. To Rafael Ramírez, Minister of Energy and Petroleum (12 January 2007)
- R-83 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. And Mobil Cerro Negro Holdings, Ltd. And Representative of Venezuela Holdings, B.V. to Nicolás Maduro, Minister of Foreign Affairs, Rafael Ramírez, Minister of Energy and Mines and Gladys María Gutiérrez, Attorney General (5 March 2007)
- R-84 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. And Mobil Cerro Negro Holdings, Ltd. And Representative of Venezuela Holdings, B.V. to Nicolás Maduro, Minister of Foreign Affairs, Rafael Ramírez, Minister of Energy and Mines and Gladys María Gutiérrez, Attorney General (8 March 2007)
- R-85 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. And Mobil Cerro Negro Holding, Ltd. And Representative of Operadora Cerro Negro, C.A., Venezuela Holdings B.V., Mobil Corporation, Agencia Operadora La Ceiba, C.A., Mobil Venezolana de Petróleos Holdings, Inc., and Mobil Venezolana de Petróleos, Inc. To Nicolás Maduro, Minister of Foreign Affairs, Rafael Ramírez, Minister of Energy and Mines and Gladys María Gutiérrez, Attorney General (4 May 2007)
- R-86 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. to Eulogio Del Pino, PDVSA Cerro Negro, S.A. and Rafael Ramírez, Petróleos de Venezuela, S.A. (22 June 2007)
- R-87 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. to Eulogio Del Pino, PDVSA Cerro Negro, S.A. and Rafael Ramírez, Petróleos de Venezuela, S.A. (25 June 2007)
- R-88 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. to Eulogio Del Pino, PDVSA Cerro Negro, S.A. and Rafael Ramírez, Petróleos de Venezuela, S.A. (27 June 2007)
- R-89 First Affidavit of Jim Massey (January 21, 2008) *Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela, S.A.*, Claim No. 2008 Folio 61, High Court of Justice, Queen's Bench Division, Commercial Court (London) ¶ 20
- R-112 Association Agreement
- R-118 Second Legal Expert Opinion of Professor José Mélich-Orsini

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- and Appendices (14 August 2009) at ¶¶ 34, 37
- R-120 Outline Argument on Behalf of Claimant in Support of Application for Worldwide Freezing Order, dated January 23, 2008, submitted in *Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela, S.A.*, High Court of Justice, Queen's Bench Division, Commercial Court (London), Claim No. 2008 Folio 61 ¶ 64
- R-121 Letter from William B. Berry, Executive Vice President of Exploration and Production, ConocoPhillips, to Rafael Ramírez, Minister of Energy and Mines (14 January 2005)

At and Following the 2010 Hearings:

Submission	Pinpoint
C-V	¶¶ 40 – 54
R-IV	¶¶ 28 – 33, 87 – 88
R-V	¶¶ 23 - 26
R. Closing Slides	29, 33 - 43

Speaker	Citation
C. Closing	2035-2039
C. Opening	52-53
Cutt	702-703, 710- 714, 727-728, 729, 730, 768-769
Graves	1671-1672
Leitzinger	1821 – 1823
Massey	546, 544-549, 550, 628
Procedural	131, 132-133 (Concerning Massey Cross-examination)
R. Closing	2134, 2136, 2137-2138, 2142 - 2145
R. Opening	105
Ward	147, 238-240, 278-280, 285-286

K.I.1.c. Relationship Between “Discriminatory Measures” and “Force Majeure” in AA and Venezuelan Law

235. At section 3.3 of PO-6, the Tribunal invited the Parties to respond to the following question:

3.3 What is the relationship and interaction between “Discriminatory Measure” according to Clause 15 AA, “Force Majeure” according to Clause 21 AA, and *Force Majeure* in the law of Venezuela?

K.I.1.c.i. Arguments by Claimant

236. Claimant states that the terms “*non-imputable extraneous cause*” and “*force majeure*” have been used interchangeably. Under Venezuelan law, including Articles 1271 and 1272 of the Venezuelan Civil Code, the failure to

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perform or delay in performing an obligation is excused if it results from a “*non-imputable extraneous cause*” / “*force majeure*.” (C-V ¶ 55). Claimant explains that the operation of this general excuse can be modified by a private agreement. Where risk of an event that would otherwise qualify as a “*non-imputable extraneous cause*” or “*force majeure*” is allocated to a party, the occurrence of the event can no longer serve as an excuse for non-performance under Venezuelan law. Claimant explains that in Clause XV, the Parties allocated the risk of a Governmental Measure that would meet the definition of “*Discriminatory Measure*” on to PDVSA-CN. Claimant concludes that “*Clause XV, together with the definition of ‘Discriminatory Measure,’ trumps the general excuse set forth in Articles 1271 and Article 1272 of the Civil Code.*” (C-V ¶ 56).

237. Claimant rejects Respondents’ argument that “*the defined term ‘Discriminatory Measure’ embraces only events that ‘do not affect or impede in any way the ability of any party to the AA to perform its obligations thereunder[sic].’*” Claimant characterizes Respondents’ argument as requiring “*non-imputable extraneous causes*” and “*force majeure*” to be specifically carved out of the scope of “*Discriminatory Measures.*” (C-V ¶ 57). Nothing in the AA or Venezuelan law, however, supports Respondents’ argument. Claimant states that “[*i*]f a given governmental act fits within the scope of ‘*Discriminatory Measure*’ and also within the scope of ‘*non-imputable extraneous cause*’ / ‘*force majeure*’, the characterization of the act under Clause XV and the definition of ‘*Discriminatory Measure*’ must prevail because that is the *raison d’être* of a risk-allocation clause under Venezuelan law.” (C-V ¶ 58).
238. The issue of the relationship between Clauses XXI and XV is moot, as Respondents conceded their failure to comply with the notice requirements in Article 21.2. (C-V ¶ 61). Still, Claimant explains that Clause XV prevails as *lex specialis* in respect of Clause XXI because XV refers to a narrower class of governmental acts: those that meet the definition of Discriminatory

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Measure. Such treatment of the relationship between XXI and XV does not deprive either clause of its meaning. On the other hand, Claimant continues that “[a]s all Discriminatory Measures are necessarily ‘acts of the government,’ an interpretation that gives prevalence to Clause XXI would deprive Clause XV and the definition of ‘Discriminatory Measure’ of any purpose, in violation of the principle of *effet utile*.” (C-V ¶ 60).

239. With respect to Respondents’ “*Non-Imputable Extraneous Cause*” defense, Claimant first puts forward that **Decree-Law 5200** and the resulting expropriation of all of Claimant’s interests in the Project is a Discriminatory Measure for which PDVSA-CN assumed the risk under Clause XV. Claimant states “[a]s Clause XV trumps both the general principles of ‘non-imputable extraneous cause’/‘force majeure’ and the definition of ‘Event of Force Majeure’ in Clause XXI, the Respondents cannot rely on **Decree-Law 5200** to excuse non-fulfillment of their obligations under the Agreement.” (C-V ¶ 64). Alternatively, the 5 March 2008 extinguishment cannot excuse PDVSA-CN’s failure to indemnify Claimant because (i) the claims had arisen prior to the extinguishment and the extinguishment cannot affect past effects of the contract; (ii) under Venezuelan law, the risk allocation in Clause XV survives the termination of the contract; and (iii) “*Section 16.1(b) of the AA expressly contemplates the survival of Claimant’s claims to indemnification under Clause XV.*” (C-V ¶ 65).

K.I.1.c.ii. Arguments by Respondents

240. Respondents’ arguments are best left to their own words, found at R-IV ¶¶ 89 – 91 (citations omitted).

89. The concepts of Discriminatory Measure under the AA and Force Majeure under either the AA or Venezuelan law are distinct. Force majeure is an act that impedes performance by a contracting party, whereas Discriminatory Measures under the AA are certain types of acts that affect the economics of the Project to the Foreign Party. Under the AA, if an act qualifying as a Discriminatory Measure occurred and the requirements of the AA were met, the Foreign Party would not claim force majeure, but it would claim indemnity under Article XV.

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90. Force Majeure under the Agreement is defined in Article 21, and includes “acts of the government or orders, judgments, resolutions, decisions or other acts or omissions of any governmental authority, civil or Military,” preventing a party from complying with its contractual obligations. That includes an act of the Venezuelan Government, as demonstrated by OCN’s invoking a similar force majeure clause in the Chalmette Supply Contract on behalf of both Mobil-CN and PDVSA-CN based on production curtailments ordered by the Venezuelan Government.
91. As noted earlier, Claimant spent much of its legal argument in the closing trying to establish that the requirements of the force majeure clause had not been met, saying that Respondents had invoked it, but the record is clear that Respondents never invoked the force majeure clause in the AA because the Agreement had been extinguished by operation of law. Respondents only pointed out that if the contract had not been extinguished, the force majeure clause could have been invoked. The extinction of the contract in this case has as a consequence under the Venezuelan Civil Code a release of responsibility of the parties inasmuch as the extinction was due to a *causa extraña no imputable* (non-imputable external cause).

K.I.1.c.iii. The Tribunal

In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties’ Briefs and of the evidence: **Party Submissions:**

Submission	Pinpoint
C-IV	¶¶ 83 – 84, 88, 93 – 96
R-II	¶¶ 58 – 63
R-III	¶¶ 53 – 54
TOR	5.2.1(v)

Exhibits:

Exhibit	Document Name
C-2	Association Agreement Articles 18.4, 21.1, 21.1(b).
C-44	Declaration of Professor Eugenio Hernández-Bretón (27 September 2008) at ¶ 91
C-87	Association Agreement, Clause I <i>defining</i> of “ <i>Discriminatory Measure</i> ” and “ <i>Governmental Measure</i> ”, Articles 16.1(b); 21.1(b), 21.2,
C-214	Second Declaration of Professor Allan R. Brewer-Carías (14 May 2009) at ¶¶ 18-26
C-215	Second Declaration of Professor Eugenio Hernández-Bretón (14 May 2009) at ¶¶ 66 - 67; 73 –77, 84
C-232	JOSÉ MÉLICH-ORSINI, DOCTRINA GENERAL DEL CONTRATO (4th ed. 2006) at §§ 304, 339-C, 339-D, 340(b), 456
C-240	Venezuelan Civil Code Art. 1271, 1272, 1354
C-241	MADURO LUYANDO & PITTIER SUCRE, CURSO DE OBLIGACIONES

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	(2008) § 389
C-289	José Mélich-Orsini, DOCTRINA GENERAL DEL CONTRATO (2006) (excerpt, Chapter XVII, Section 456) at fn. 48
R-7	Decree-Law 5200 Art. 13
R-17	Law on Effects Art. 5
R-43	Congressional Authorization of the Framework of Conditions for the Cerro Negro Association Agreement, Official Gazette No. 36.224, published 10 June 1997, Eighteenth Condition (hereinafter “ <i>Congressional Authorization</i> ”)
R-68	Legal Expert Opinion of Professor José Mélich-Orsini (10 February 2009) at ¶¶ 9 – 15
R-69	Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (10 February 2009) at ¶¶ 11 – 27
R-70	Association of International Petroleum Negotiators, AIPN Model Lifting Agreement (2001)
R-71	Letter from Operadora Cerro Negro, S.A. to Chalmette Refining, L.L.C. (10 January 2007)
R-72	Association Oil Supply Agreement (Chalmette Supply Contract) (1 November 1997) Art. 10.1(b)
R-73	Organic Law of the Office of the General Comptroller of the Republic and the National System of Fiscal Control, Official Gazette No. 37.347 [<i>Ley Orgánica de la Contraloría General de la República y del Sistema Nacional de Control Fiscal</i>] (17 December 2001) Art. 91(12), (14), (15), and (23)
R-74	Law Against Corruption, Official Gazette No. 5.637 (Extraordinary) [<i>Ley Contra la Corrupción</i>] (7 April 2003) Art. 53, 54, and 56
R-112	Association Agreement Article 21.1(b)
R-118	Second Legal Expert Opinion of Professor José Mélich-Orsini (14 August 2009) at ¶¶ 3 – 20
R-119	Second Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (14 August 2009) at ¶¶ 3 – 28

At and Following the 2010 Hearings:

Submission	Pinpoint
C-V	¶¶ 55 – 65
R-IV	¶¶ 44 – 46, 89 – 91

Speaker	Citation
Brewer-Carías	911-912
C. Closing	2044 – 2052
C. Opening	55-56, 57-58
Cutt	770-773
Expert Conferencing	931 – 935
Hernández-Bretón	918-919, 947-948
Mélich-Orsini	912 (Sp. Hr. Tr. 15: 5-12), 941-942 (Sp. Hr. Tr. 39: 7-12)
R. Closing	2119 – 2128,
R. Opening	98 – 101

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Urdaneta

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K.I.1.d. Ability of State-Owned Enterprises To Rely on State Actions to Excuse Non-Fulfillment of a Contract

241. At section 3.4 of PO-6, the Tribunal invited the Parties to respond to the following question:

- 3.4 Can an enterprise owned and controlled by the State rely on acts of that State as an excuse for non-fulfillment of a contract a) in the law of Venezuela, b) particularly under the AA?

K.I.1.d.i. Arguments by Claimant

242. Claimant's arguments are best presented using Claimant's own words, found at C-V ¶¶ 66 – 70 (citations omitted, emphasis in original):

66. Under general principles of Venezuelan Administrative Law, a State-owned enterprise may not rely on an act of government (act of the prince) to excuse non-fulfillment of its contractual obligations, when the act at issue emanates from a governmental entity of the same territorial level of government to which the State-owned enterprise belongs. Such governmental act is not considered extraneous to the State-owned company.
67. The same is true if the issue is analyzed from the perspective of the “act of the prince” theory as a source of liability. In administrative contracts such as the AA, the public contracting party must compensate the private co-contracting party for acts of the government that alter the economic equilibrium of the contract. Venezuelan authors concur that this is so whether the act at issue emanates from the same public entity that is a party to the contract, *or from another public entity of the same territorial level of government (or legal order)*. *A fortiori*, neither type of government act may serve to excuse the public contracting entity from non-fulfillment of its contractual obligations.
68. The Respondents and Mr. Urdaneta argue that liability under the Administrative Law doctrine of “act of the prince” arises only when the act emanates from the same public entity that is a party to the contract, and if the act comes from another entity it may operate as an excuse. Their theory is largely based on a misunderstanding or mistranslation of French authors and does not reflect Venezuelan law.
69. The Respondents and Mr. Urdaneta rely on an excerpt from an article by Henrique Iribarren. But the excerpt they cite is an *incomplete* quotation from a passage of Professor Jean Rivero's treatise of French Administrative Law. The full passage from Professor Rivero's treatise,

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which neither the Respondents nor Mr. Urdaneta brought to the Tribunal's attention, contradicts their argument:

“La théorie [du fait du prince] ne joue jamais quand la mesure qui alourdit les charges du cocontractant émane non de la personne publique contractante, mais d'une autre personne publique, par exemple quand un décret, acte de l'Etat, aggrave, en matière sociale, la situation des cocontractants des collectivités locales.”

[“The [act of the prince] theory never applies when the measure that burdens the obligations of the co-contracting party emanates, not from the contracting public person [personne publique], but from another public person [personne publique], for example when a decree from the State aggravates, on labor matters, the situation of co-contracting parties of local authorities.”]

70. In Professor Rivero's example, the public contracting party is a local authority and the measure burdening the private party is an act of the French State. In such a case, the “act of the prince” doctrine does not apply because the measure emanates from another *personne publique*, that is, another level of government. As Professor Brewer-Carías explained at the Hearing, the term “*personne publique*” is a term of art in French Administrative Law that refers to the various territorial levels of government. Accordingly, French legal authorities restricting the application of the “act of the prince” doctrine as a source of liability to acts of the same “*personne publique*,” are referring to acts emanating from a governmental entity of the same level of government as the public contracting party. Other authorities on which the Respondents rely are misrepresented or cited out of context.
243. Claimant has not asserted that the Government, PDVSA, and PDVSA-CN are the same legal person, but argued that the fact of their distinct legal personalities is irrelevant to the establishing of the extraneousness requirement for their “*non-imputable extraneous cause*” and “*force majeure*” defense. The acts on which Respondents rely are those that were of the same level of government to which the Respondents belong. PDVSA carried out the seizure of Claimant's assets and was the chief beneficiary of that seizure. (C-VI ¶ 34, partially quoted).
244. Claimant explains that Decree-Law 5200 was not extraneous to Respondents:
35. [T]he pretense that Decree-Law 5200 is extraneous to the Minister of Energy and Petroleum/President of PDVSA because it is a law and it was also signed by other ministers ignores once again the realities of

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this case. It is beyond doubt that Minister Ramírez, the Minister in charge of the sector to which the measures relate, was the chief architect of the measures. The Respondents' unsupported assertion that President Chávez prepared Decree-Law 5200 without the intimate involvement of the Minister responsible for petroleum policy and for the implementation of the Decree is just not credible. (C-VI ¶ 35).

245. Claimant argues that the inquiry under the AA is moot:

71. The reference to “acts of the government” in Clause XXI does not help the Respondents. *First*, as already shown, the Respondents have forcefully disclaimed any reliance on Clause XXI. *Second*, because the alleged Event of *Force Majeure* (Decree-Law 5200) is a Discriminatory Measure, it falls under Clause XV, not Clause XXI. *Third*, by the express terms of Clause XXI, an act of the government can support a *Force Majeure* defense only if it meets the requirements of Section 21.1(b), which are essentially the same as those of “non-imputable external cause / force majeure” as a general principle. Section 21.1(b) requires that the event that prevents performance of a Party's contractual obligation be “beyond the reasonable control of, or unforeseen by, the Party obligated to perform the corresponding obligation, or which being foreseeable, could not be avoided in whole or in part by the exercise of due diligence[...]” (C-V ¶ 71, citations omitted).

K.I.1.d.ii. Arguments by Respondents

246. Under Venezuelan law and the decisions of the French *Conseil d'Etat*, a state-owned enterprise may rely on acts of that state to excuse non-performance. (R-IV ¶ 92). What is at issue is whether the act of state is external to the state-owned enterprises, *i.e.* whether the act was promulgated by the Government in the exercise of its sovereign powers. (R-IV ¶ 46).
247. Respondents state that PDVSA and PDVSA-CN are legal persons which are separate and distinct from the state, and that this fact has been acknowledged and accepted by both Parties. (R-IV ¶¶ 2, 94). In the London proceedings, Claimant forcefully presented thorough arguments – through counsel and through the affidavit of a legal expert – explaining why PDVSA must, as a matter of fact and law, be considered as separate and distinct from the Government, and that PDVSA did not constitute a department of the Government. (R-IV ¶ 5; R-V ¶ 8). Claimant stated that in the AA, the Parties worked to make clear that “*neither PDVSA nor PDVSA-CN was a*

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subdivision of the Republic of Venezuela.” (R-IV ¶¶ 5, 93 - 94). This is even reflected in the text of the AA, where the definitions of “*Affiliate*”, “*Governmental Action*”, and “*Reservation of Sovereign Rights*” in Article 18.4, the “*No Government Guarantee*” provision of Article 23.11, and the *Force Majeure* provision of Article 21 treat the PDVSA-CN, PDVSA, and the Government as distinct entities. (R-IV ¶ 94).

248. Respondents also cite Claimant’s communication with the Government as evidence that Claimant believes the three entities to be separate. While addressing production curtailments in 2007, Claimant addressed letters to the Government, claiming *force majeure* on PDVSA-CN’s behalf – an action that would not be possible if Claimant believed PDVSA-CN and the Government to be the same. (R-IV ¶ 3).
249. Respondents argue that “*the exercise of sovereign powers is a matter uniquely within the province of the Government, not state companies such as PDVSA-CN or PDVSA.*” (R-IV ¶ 2). Respondents urge the Tribunal to reject Claimant’s new position that PDVSA and PDVSA-CN are not separate from the Government. (R-IV ¶ 93).
250. Respondents also address Claimant’s statement that Minister Ramírez authored the **Decree-Law 5200**, calling it “*untrue.*” (R-IV ¶ 4). Respondents explain that **Decree-Law 5200** was lawfully issued:
4. [...] the Decree-Law was a law of general application promulgated by the President of the Republic in the exercise of the power conferred by Article 236(8) of the Constitution (which permits the President to issue decrees with the force of law upon enactment of an enabling law) and in accordance with the authority granted to him by the Venezuelan legislature in the Enabling Law of February 1, 2007. Claimant also makes much of the fact that Minister Ramirez “countersigned” Decree-Law 5.200, but the Venezuelan Constitution mandates that the President shall exercise the powers granted by Article 236(8) “in the Council of Ministers” which is why Minister Ramirez, along with eighteen other Ministers, “countersigned” it. (R-IV ¶ 4, citations omitted).
251. Addressing the matter of “*extraneousness*”, Respondents characterize it as irrelevant that Minister Ramírez holds both the positions of President of

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PDVSA and that of Minister of Energy. This is because the separate and distinct legal status of PDVSA and PDVSA-CN is not dependent upon the individuals who occupy its executive positions, or the perceived political orientation of PDVSA. (R-IV ¶ 4, partially quoted).

7. On Claimant's second contention, the notion that a law of general application promulgated by the national government does not have the same legal consequences for a state company as it does for a private company defies logic. Both the controlling Venezuelan authority on this subject and the French authority and doctrine improperly invoked by Claimant support Respondents' position. In addition, Claimant's argument that an act of the Venezuelan Government cannot excuse PDVSA-CN and PDVSA from responsibility is directly contradicted by Claimant's own action in invoking force majeure on behalf of both Mobil CN and PDVSA-CN as a consequence of the Government's production curtailment. This legal conclusion is even more compelling when the act at issue is a law of general application, as was the case here. (R-V ¶ 7).

K.I.1.d.iii. The Tribunal

252. There has been considerable overlap between the answers to this question and the discussion on the "*hecho del principio*" found at Section K.V.1 of this Award. While effort has been made to limit discussion and the references in this section to the information presented that was in direct answer to or helpful in the understanding of the question, some repetition cannot be avoided.
253. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties' Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-IV	¶¶ 85 – 86, 91 – 92
R-II	¶¶ 41, 50, 55
R-III	¶¶ 29 – 31, n. 66

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Exhibits:

Exhibit	Document Name
C-3	PDVSA Guaranty [<i>Fianza de Fiel Cumplimiento de PDVSA</i>] dated 28 October 1997 (hereinafter “ <i>PDVSA Guaranty</i> ”)
C-45	Declaration of Professor Allan R. Brewer-Carías (26 September 2008) at ¶¶ 49 – 55
C-51	Cambridge Energy Research Associates, “The Cerro Negro Extra-heavy Oil Development: A World-class Asset” (26 September 2008) at 36
C-87	Association Agreement Clause I defining “Affiliate” and “Governmental Measures”, Articles 16.1(b), 21.1(b), 23.11
C-99	Decree-Law 5200 Art. 12
C-129	Decree No. 5916 Transferring to Petro Monagas S.A. the Right to Develop Primary Exploration Activities Specified Therein [<i>Decreto No. 5916, mediante el cual se transfiere a la empresa PetroMonagas, S.A. el derecho a desarrollar actividades primarias de exploración que él se especifican</i>] (as published in the Official Gazette No. 38884 of 5 March 2008)
C-160	Heads of Agreement between Lagoven, Mobil Oil Corporation, and Mobil de Venezuela (17 September 1996) (hereinafter “ <i>Heads of Agreement</i> ”)
C-214	Second Declaration of Professor Allan R. Brewer-Carías (14 May 2009) at ¶¶ 51, 56, 58 – 62; fn. 78
App. 35	Eloy Lares Martínez, <i>Manual de Derecho Administrativo</i> , 8a. Edición, Caracas 1990, pp. 361 – 363
C-215	Second Declaration of Professor Eugenio Hernández-Bretón (14 May 2009) at ¶ 73 – 84
C-232	JOSÉ MÉLICH-ORSINI, <i>DOCTRINA GENERAL DEL CONTRATO</i> (4th ed. 2006) §§ 304, 339-C, 339-D, 340, 456
C-240	Venezuelan Civil Code
C-241	MADURO LUYANDO & PITTIER SUCRE, <i>CURSO DE OBLIGACIONES</i> (2008) §§ 389 – 396
C-243	2008 Organic Law of the Public Administration (as published in Extraordinary Official Gazette No. 5890 of 31 July 2008)
C-244	<i>Lyondell-CITGO Refining, LP v. PDVSA</i> (S.D.N.Y. No. 02-CV-0795), Declaration of Álvaro Silva Calderón (23 May 2002) at ¶ 17
C-245	Organic Law that Reserves to the State Assets and Services Related to Hydrocarbons’ Primary Activities [<i>Ley Orgánica que Reserva al Estado Bienes y Servicios Conexos a las Actividades Primarias de Hidrocarburos</i>] (as published in Official Gazette No. 39173 of 7 May 2009)
C-246	The PDVSA of Chávez Produces 1.2 Million Less Barrels Per Day (11 May 2009), at http://laverdad.com/detnotic.php?CodNotic=12392 (last accessed 14 May 2009)
C-247	Index of Materials Regarding the Transformation of PDVSA Into an Instrument of the Socialist Revolution
C-248	Financial and Operational Information of PDVSA and Affiliates [<i>Información Financiera y Operacional, PDVSA y sus Filiales</i>] as of 31 December 2007, Message from the President of PDVSA at 6-

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- 7 and Notes to the Consolidated Financial Statements at 38, 49
- C-249 Ministry of Energy Press Release (25 February 2008)
- C-250 Air France, Court of Cassation of France (15 April 1970), reported in *Recueil Dalloz Sirey* 1971, at 107, 109, 110
- C-324 Rafael Badell Madrid, RÉGIMEN JURÍDICO DEL CONTRATO ADMINISTRATIVO (2001)151 – 152 (2001)
- C-325 Rafael Badell Madrid, *La Ejecución del Contrato Administrativo: Teoría de la Imprevisión, Depreciación Monetaria e Inflación* in RÉGIMEN JURÍDICO DE LOS CONTRATOS ADMINISTRATIVOS (1991) at 68, 69
- C-326 Alfredo Romero Mendoza, *El Hecho del Príncipe en los Contratos Administrativos y su Regulación en el Decreto que Contienen las Condiciones General de Contratación para la Ejecución de Obras* in TRIBUNAL SUPREMO DE JUSTICIA, REVISTA DE DERECHO No. 4 (2002)
- R-7 Decree-Law 5200
- R-43 Congressional Authorization
- R-64 Law that Authorizes the President of the Republic to Issue Decrees with Rank, Value and Force of Law in Delegated Subject Matters (as published in the Official Gazette No. 38617 of 1 February 2007) (hereinafter “*Enabling Law*”)
- R-68 Legal Expert Opinion of Professor José Mélich-Orsini (10 February 2009) at ¶¶ 7, 9-15
- App. 5 Constitution of the Bolivarian Republic of Venezuela, Official Gazette No. 36.860, published 30 December 1999 [*Constitución de la República Bolivariana de Venezuela (1999)*] Art. 131
- R-69 Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (10 February 2009) at ¶¶ 11-27
- App. 2 Constitution of the Bolivarian Republic of Venezuela, Official Gazette No. 36.860, published 30 December 1999 [*Constitución de la República Bolivariana de Venezuela (1999)*] Art. 131
- R-71 Letter from Operadora Cerro Negro, S.A. to Chalmette Refining, L.L.C. (10 January 2007)
- R-72 Association Oil Supply Agreement (Chalmette Supply Contract) (1 November 1997)
- R-73 Organic Law of the Office of the General Comptroller of the Republic and of the National System of Fiscal Control [*Ley Orgánica de la Contraloría General de la República y del Sistema Nacional de Control Fiscal*] Art. 91(12)
- R-74 Law Against Corruption, Official Gazette No. 5.637 (Extraordinary), published 7 April 2003 [*Ley Contra la Corrupción*] Art. 53 – 54, 56
- R-112 Association Agreement Clause I defining “Governmental Measures”, Articles 18.4, 21.1,
- R-118 Second Legal Expert Opinion of Professor José Mélich-Orsini (14 August 2009) at ¶¶ 3 – 2 0
- App. 45 Constitution of the Bolivarian Republic of Venezuela, Official Gazette No. 36.860, published 30 December 1999 [*Constitución de la República Bolivariana de Venezuela (1999)*] Art. 236
- R-119 Second Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (14 August 2009) at ¶¶ 3 – 28

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App. 38	Allan R. Brewer-Carías, ADMINISTRATIVE CONTRACTS (Editorial Jurídica Venezolana, Caracas 1992) p. 242 – 243
App. 40	DOCTRINE OF THE OFFICE OF THE ATTORNEY GENERAL OF THE REPUBLIC, September 27, 1966 (Editora Vene-Gráfica, C.A., Caracas 1967) p. 77
App. 42	Henrique Iribarren Monteverde, <i>The Economic Equilibrium in Administrative Contracts and the Theory of Hardship</i> , in INTERNATIONAL CONGRESS ON ADMINISTRATIVE LAW COMMEMORATING PROF. LUIS H. FARIÁS MATA, VOLUME I 141 (Rafael Badell Madrid ed., Universidad Católica Andrés Bello, Caracas 2006) p. 152 – 153
App. 43	Fanny Luxembourg, <i>Fait du Prince: Convergence of Private and Public Law</i> , LA SEMAINE JURIDIQUE EDITION GÉNÉRALE No. 8, I 119 (February 20, 2008)
App. 44	André de Laubadère, Jean-Claude Venezia and Yves Gaudemet, TREATISE OF ADMINISTRATIVE LAW, VOLUME I (L.G.D.J., 15 th ed., Paris 1999) p. 837
App. 45	Christophe Guettier, LAW OF ADMINISTRATIVE CONTRACTS (Presses Universitaires de France, Paris 2004) p. 562, ¶ 717
App. 46	First Affidavit of Luis A. Ortiz-Álvarez, dated January 22, 2008, submitted in <i>Mobil Cerro Negro Ltd. v. Petróleos de Venezuela, S.A.</i> , High Court of Justice, Queen's Bench Division, Commercial Court (London), Claim No. 2008, Folio 61 ¶¶ 15, 85
R-120	Outline Argument on Behalf of Claimant in Support of Application for Worldwide Freezing Order, dated January 23, 2008, submitted in <i>Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela, S.A.</i> , High Court of Justice, Queen's Bench Division, Commercial Court (London), Claim No. 2008 Folio 61 pp. 23 – 25
Unnumbered	J. Rivero, DROIT ADMINISTRATIF 112 (14ème Ed.) (1992)
Unnumbered	G. Vedel, Droit Administratif 415 (1959)
Unnumbered	G. Vedel et P. Delvolvé, 2 Droit Administratif 382-383 (1990)
Unnumbered	M. Waline, Droit Administratif 256 (1959)

At and Following the 2010 Hearings:

Submission	Pinpoint
C-V	¶¶ 66 – 71
C-VI	¶¶ 34 – 35
R-IV	¶¶ 2-5, 45 – 46, 92 – 94
R-V	¶ 7, 8

Speaker	Citation
Brewer-Carías	929-931, 936-937
C. Closing	2019-2020, 2052
C. Opening	33, 34, 58
Cutt	702-703, 710-711, 770-775
Expert Conf.	931-935
Massey	544-545, 594-595
R. Closing	2124 – 2128
R. Opening	85-86, 101

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Urdaneta 931 - 932
Ward 238-240, 278-280, 286

K.I.1.e. Interpretation of Clause 15.1(b)(ii) and Term “*To Date*”

254. At section 3.5 of PO-6, the Tribunal invited the Parties to respond to the following question:

3.5 Assume for this question that Clause 15.1(b)(ii) AA becomes applicable and no recommendations on amendments to the AA are possible due to the termination of the AA. Should, after the part of 15.1(b)(ii) which provides for an award for damages to compensate the Foreign Party for the economic consequences of a Discriminatory Measure suffered by it “*to date*”, the following part of the sentence be interpreted to the effect that the Tribunal cannot and must not decide on any measure or remedy “*that would restore the economic benefit that the Foreign Party would have received had the Discriminatory Measure not occurred?*”

K.I.1.e.i. Arguments by Claimant

255. The Tribunal “*has the power to issue an award for compensatory damages within the limitations imposed by the Agreement and the formulas in the Accounting Procedures, and MCN is entitled to such an award.*” (C-V ¶ 74). In the event that the limitations do not apply or the formulas do not work, “*then the Tribunal’s powers revert to those granted by the general arbitration clause of Article 18.2 and by the general principles of Venezuelan law, which require full indemnification for breach of a contractual obligation.*” (C-V ¶ 75). Claimant argues that “[*t*]he Tribunal’s power under Article 15.1(b) to compensate MCN for the economic consequences of an expropriation necessarily entails the power to consider the loss of MCN’s rights to produce EHO and sell [SCO] from 26 June 2007 through 30 June 2035.” (C-V ¶ 76).

256. Claimant states that the cross examination testimony of Mr. Massey confirms that the words “*to date*” means “*up to now.*” (C-VI ¶ 15). With respect to the grammatical construction of “*suffered by it to date*”, Claimant maintains that “*to date*” modifies “*Discriminatory Measures*” and that Claimant is seeking compensation for the economic consequences of

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Discriminatory Measures that it has already suffered. (C-V ¶ 75). For ease of reference, Claimant presents its argument as follows:

75. MCN has explained that the controlling Spanish text makes clear that “suffered by it to date” (“*sufrida por ella hasta la fecha*”) refers to “Discriminatory Measure” (“*Medida Discriminatoria*”) and not to “economic consequences” (*consecuencias económicas*). The Respondents concede that in Spanish “*sufrida*” goes only with “*Medida*,” but argue that “to date” (*hasta la fecha*) could apply “just as easily” to “economic consequences” (*consecuencias económicas*). That is grammatically impossible, both in the official Spanish text and in the English translation. The adverbial phrase “to date” (*hasta la fecha*) modifies the accompanying past participle “suffered” (*sufrida*). The full expression in the contract is “suffered by it to date” (*sufrida por ella hasta la fecha*). And the singular past participle *sufrida* cannot grammatically refer to a plural noun (*consecuencias económicas*). (C-V ¶ 75).
257. Claimant also presents the alternative argument, stating that even if “*suffered by it to date*” refers to the economic consequences, Claimant asserts that it has already suffered the economic consequences of the expropriation, namely, on the date of the expropriation. (C-V ¶ 76).
258. Claimant argues that the above textual analysis is supported by **Article 12 of the Venezuelan Code of Civil Procedure** and **Article 1160 of the Civil Code**, which require the application of standards of good faith to contract interpretation and performance. (C-V ¶¶ 77- 78). This is not the same as empowering the Tribunal to base an award on equity alone. Equity is, however, relevant to the good-faith interpretation and performance of the contracts. (C-VI ¶¶ 21-23). Claimant explains how the application of the legal standard of good faith would function in this case.
78. [...] The standard of good faith under Venezuelan law [...] precludes the Respondents from seeking to avoid their contractual commitment to indemnify MCN for the economic consequences of Decree-Law 5200 by invoking supposed difficulties in applying the Accounting Procedures now that there is no longer a Cerro Negro Project generating annual cash flows. The Accounting Procedures were adopted for the purpose of determining a limitation on the indemnity for the Respondents’ benefit. The Respondents, who participated in the actions that have made it impossible to apply the Accounting Procedure formulas retrospectively, and who benefited from the seizure of MCN’s

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interest, cannot in good faith use the difficulties in computing that limitation to deny any remedy to MCN. (C-V ¶ 78).

259. Claimant states that the law of the forum may inform the interpretation of Article 15.1(b). New York law requires that an arbitration clause be construed to give fair meaning to the words of the contract in order to realize the parties' "reasonable expectations." (C-V ¶ 79). Claimant states that "[t]he text of the Agreement and undisputed testimony show that Mobil CN had a reasonable expectation that the contract provided for arbitration allowing a meaningful award for expropriation of Mobil CN's interests in the Project." (C-V ¶ 79).
260. Finally, Claimants contextualize Prof. Myers's observation that "*we are outside of the contract*", stating that he was referring to the fact that he was "*out[side] of the specific implementation of the contract on a year to year basis.*" (C-V ¶¶ 83 – 84). He was referring to the situation where it is impossible to calculate the indemnity on a year-by-year basis, because the contract indemnity was only designed to work where the project continued, which it does not here. (C-V ¶¶ 83 – 84).

K.I.1.e.ii. Arguments by Respondents

261. Respondents' answer to the Tribunal's question is best described in their own words, found in their Post-Hearing Reply Memorial (R-IV ¶ 95, citations omitted):

95. The answer to this question is yes, the Tribunal should not decide on any remedy for the future. Section 15.1 (b) only contemplated "recommendations" for the future. This is evident not only from the text of Section 15.1 (b), but also from the testimony in this case, including the testimony of Claimant's experts that "we are outside of the contract." (R-IV ¶ 95).

262. Respondents make the following three points to Tribunal related to the meaning of "*to date*":

- (i) Section 15.1(b) provides only for the possibility of a monetary award based on the consequences to date as quantified by the indemnity provisions and formulas, and even specifies that no more than one indemnity arbitration may be brought per FY;

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- (ii) every single provision of the indemnity, including all the formulas in the Accounting Procedures, operates on a FY-by-FY basis; and
 - (iii) for the future, Section 15.1(b) expressly provides that an arbitral tribunal hearing an indemnity claim may only make “recommendations.” which, [...] should not be done in this case in light of the extinction of the AA. (R-V ¶ 9, citations omitted).
95. Since there is no dispute that the AA has been extinguished, no recommendations for the future can be made. The issue of whether the extinction gives rise to any rights on the part of Claimant is a matter between Claimant and the State. (R-IV ¶ 95).
263. Respondents argue that that Claimant distorted the meaning of “*to date*” and seeks to have the Tribunal ignore each and every provision of the indemnity and the Accounting Procedures, all of which operate on a FY by FY basis, fitting perfectly with the concept of “*to date*” in Article 15.1(b). The plain meaning of Article 15.1(b), alone or in conjunction with the Accounting Procedures, stands firmly against Claimant’s “*sophistry*” that it suffered all of the “*economic consequences*” of the alleged discriminatory expropriation by mid 2007. (R-IV ¶ 15).
264. Under Venezuelan law, indemnity provisions are to be strictly construed. (R-IV ¶ 48). Contrary to Claimant’s argument, **Article 12 of the Venezuelan Code of Civil Procedure** requires a judge to “*restrict himself to the legal norms, unless the Law empowers him to decide according to equity.*” (R-IV ¶ 49). **Article 13 of the Venezuelan Code of Civil Procedure**, as well as **Article 17 of the ICC Rules**, make it clear that the decider may only decide cases according to equity if the parties have so agreed. No such agreement exists in this case. (R-IV ¶ 49).

K.I.1.e.iii. The Tribunal

265. There has been considerable overlap between the answers to this question and the discussion on the “*Damages Jurisdiction*” found at Section K.VII.1 of this Award. While effort has been made to limit discussion and the references in this section to the information presented in direct answer to or helpful in the understanding of the question, some repetition cannot be avoided.

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266. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties' Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-III	Fn. 528
C-IV	¶¶ 53 – 56
R-II	¶ 160
R-III	¶ 186
TOR	5.2.1.b.(iv)

Exhibits:

Exhibit	Document Name
C-19	Mobil Cerro Negro, Ltd. v. PDVSA Cerro Negro S.A., U.S. District Court for the Southern District of New York, Civil Action No. 07 Civ. 11590 (DAB)
C-44	Declaration of Professor Eugenio Hernández-Bretón (27 September 2008) at ¶¶ 28 – 33, 39, 94 – 95
App. 6	Venezuelan Code of Civil Procedure [<i>Código de Procedimiento Civil</i>] (published in Extraordinary Official Gazette No. 4.209 of September 18, 1990) Art. 12
App. 7	José Mélich-Orsini, <i>Doctrina General del Contrato</i> , 4th. Edition, Academia de Ciencias Políticas y Sociales, Serie Estudios Nr. 61, Caracas, 2006, pp. 398 – 408, 416 – 17, 808 – 13
C-69	Offering Memorandum, Cerro Negro Finance Ltd. (11 June 1998) pp. 106 – 10
C-87	Association Agreement Articles 15.1(a) - (b), 15.2, 23.7 & Annex G
C-134	Venezuelan Civil Code Art. 1160
C-215	Second Declaration of Professor Eugenio Hernández-Bretón (14 May 2009) at ¶ 40
App. 21	Venezuelan Code of Civil Procedure [<i>Código de Procedimiento Civil</i>] (published in Extraordinary Official Gazette No. 4.209 of September 18, 1990) Art. 12
C-233	Venezuela Supreme Tribunal of Justice, Constitutional Chamber, <i>Decision No. 1541</i> (17 October 2008) at 365.488 (English Tr. at 27 – 29)
C-239	<i>Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela S.A.</i> , High Court of Justice, Queen's Bench Division, Transcript of Public Proceedings, Commercial Court, Day 2 (29 February 2008), at 38
C-285	José Mélich-Orsini, <i>DOCTRINA GENERAL DEL CONTRATO</i> (2006) (excerpt, Chapter IX, Sections 302-304) pp. 415 – 416
R-15	First Affidavit of Hobert Plunkett (21 January 2008)
R-32	Argument of Ms. Otton-Goulder, <i>Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela, S.A.</i> , High Court of Justice, Queen's Bench Division, Commercial Court (London), 2008 Folio 61

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R-35	Tr. of 2 December 2008 Hearing , pp. 30 – 31, 69 – 71, 129 – 130
R-38	Tr. (24 January 2008) <i>Mobil Cerro Negro Limited v. Petróleos de Venezuela, S.A.</i> , Claim No. 2008 Folio 61, High Court of Justice, Queen's Bench Division, Commercial Court (London), pp. 8, 9, 70 – 71, 84 – 85
R-39	First Affidavit of R. Dean Graves, (25 February 2008) <i>Mobil Cerro Negro Limited v. Petróleos de Venezuela, S.A.</i> , Claim No. 2008 Folio 61, High Court of Justice, Queen's Bench Division, Commercial Court (London)
R-112	Association Agreement Article 15.1(b)
R-118	Second Legal Expert Opinion of Professor José Mélich-Orsini (14 August 2009) ¶¶ 44 – 47
App. 46	Venezuelan Civil Code
App. 49	Venezuelan Code of Civil Procedure, Official Gazette No. 4.209 (Extraordinary), published September 18, 1990, [<i>Código de Procedimiento Civil, Artículo 12</i>] Art. 12
R-119	Second Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (14 August 2009) ¶¶ 96 – 104
Unnumbered	<i>Republic Mortgage Ins. Co. v. Countrywide Financial Corp.</i> , No. 603915/2009, 28 Misc.3d 1214(A), 2010 WL 2927286, at **2 (N.Y. Supreme Court, N.Y. County, July 22, 2010)
Unnumbered	Karl-Heinz Böckstiegel, Public Policy and Arbitrability, in <i>Comparative Arbitration Practice and Public Policy in Arbitration</i> , ICCA Congress Series 177, 201-203 (Pieter Sanders ed., 1987);
Unnumbered	Pierre Lalive, Transnational (or Truly International) Public Policy and International Arbitration, in <i>Comparative Arbitration Practice and Public Policy in Arbitration</i> , ICCA Congress Series 258, at ¶¶ 141-142 (Pieter Sanders ed., 1987)

At and Following the 2010 Hearings:

Submission	Pinpoint
C-V	¶¶ 72 – 84
C-VI	¶¶ 15, 21 – 23, 45
R-IV	¶¶ 14 – 18, 48 – 49, 95
R-V	¶¶ 9 – 17
R. Closing Slides	23 - 27, 48 – 59, 65 – 76

Speaker	Citation
Brewer-Carías	1007
C. Closing	2044 – 2048, 2057 – 2064
C. Opening	55 – 56, 60 – 63
Cranmer	443, 444
Cutt	759 – 760
Expert Conf.	906 (Question by Mr. Chairman); 990 – 999
Finizza	1814 – 1815
Hoemans	356
Hernández-Bretón	1005 – 1006, 1008, 1010
Jones	1375 – 1377, 1387, 1388, 1389, 1512
Massey	504, 575-576
Mélich-Orsini	1008 – 1010

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Myers	1676, 1695-1698, 1707 – 1708
Pereira	1037 – 1040
Plunkett	802, 837 – 850, 874
R. Closing	2109, 2121 – 2123, 2149 – 2157, 2166
R. Opening	127
Ward	290, 293 – 296

K.I.1.f. Translation Considerations

267. At section 3.6 of PO-6, the Tribunal invited the Parties to respond to the following question:

- 3.6 Without prejudice to Clause 23.7 AA, in case of discrepancies of the legal meaning of wording between the Spanish original and the English translations of the AA used by the Parties, what considerations should apply?

K.I.1.f.i. Arguments by Claimant

268. Claimant argues that, even where the English translation of the text is ambiguous, the Spanish original is the controlling text, stating that “[a]n ambiguous unofficial translation of the official text cannot prevail over the corresponding, unambiguous official text.” (C-V ¶ 86).
269. In response to any suggestion that the AA could be modified by reference to the pre-contractual documents, Claimant states that Article 23.2 AA is an integration clause. (C-V ¶ 87). Article 23.2 AA states that the AA “sets for the entire agreement among the Parties as to matters covered herein and supersedes any prior understanding, agreement or statement [...]”, thereby making it impossible to modify the original text by reference to non-binding preliminary documents. (C-V ¶ 87).

K.I.1.f.ii. Arguments by Respondents

270. Respondents’ argument is best taken from their own words, found at R-IV ¶ 96 (citations omitted):

96. Section 23.7 states that the AA is executed in the Spanish language. Claimant has said that the Agreement was negotiated and drafted in English and that there are a number of translation errors. There was no

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testimony at the hearing about any irreconcilable discrepancies between the two versions. Claimant has tried to make an issue out of the Spanish version of Section 15.1(b), but, as demonstrated in both the Urdaneta and the Mélich-Orsini expert opinions, which were never answered by Claimant, the Spanish text is reconcilable with the English and, taken in the context of the Agreement as a whole, is unquestionably of the same effect as all the testimony in this case, namely, that the provision contemplates an arbitration dealing with the economic consequences as of that date and only recommendations for the future.

271. The argument that the Spanish version of the text requires an interpretation that is contrary to the English has not been articulated or proven at the hearing and should be rejected. (R-V ¶ 16). All of the relevant testimony in this case on the meaning of Article 15.1(b) was in English and based on the English text. (R-V ¶ 16).

K.I.1.f.iii. The Tribunal

272. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties' Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-III	fn. 528, 540
R-II	¶¶ 157 – 162
R-III	¶¶ 183 – 191
TOR	5.2.1.b(iv)

Exhibits:

Exhibit	Document Name
C-2	Association Agreement, Article 15.1(b)
C-87	Association Agreement Articles 15.1(b), 18.1, 23.2, 23.7
R-32	Argument of Ms. Otton-Goulder, <i>Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela, S.A.</i> , High Court of Justice, Queen's Bench Division, Commercial Court (London), 2008 Folio 61
R-35	Tr. of 2 December 2008 Hearing pp. 70 – 17, 84 – 85
R-37	Outline Argument on Behalf of Claimant In Support of Its Application For an Order for Alternative Service and In Opposition to the Application by the Respondent to Discharge the Worldwide Freezing Order, dated February 27, 2008, <i>Mobil Cerro Negro Limited v. Petróleos de Venezuela, S.A.</i> , Claim No. 2008 Folio 61, High Court of Justice, Queen's Bench Division, Commercial Court (London) p. 28

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R-38	Tr. January 24, 2008, <i>Mobil Cerro Negro Limited v. Petróleos de Venezuela, S.A.</i> , Claim No. 2008 Folio 61, High Court of Justice, Queen's Bench Division, Commercial Court (London) pp. 8 – 9
R-112	Association Agreement Article 15.1(b)
R-118	Second Legal Expert Opinion of Professor José Mélich-Orsini (14 August 2009) ¶¶ 44 – 47
R-119	Second Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (14 August 2009) ¶¶ 96 – 104

At and Following the 2010 Hearings:

Submission	Pinpoint
C-V	¶¶ 85 - 87
R-IV	¶ 96

Speaker	Citation
Jones	1387
Massey	575 – 576
Myers	1697 – 1698
R. Closing	2146 – 2147
Ward	295 – 296

K.I.2. Applicable Law**K.I.2.a. Arguments by Claimant**

273. The applicable laws of Venezuela include the “*Constitution, the Civil Code and the Commercial Code, the Investment Law, international treaties, the Framework of Conditions, and the legal framework for the EHO projects that was in effect at the time the AA was concluded and that created vested rights in Mobil CN.*” (C-III ¶ 175). Claimant asserts that “*ex post facto pronouncements that any branch of the Venezuelan Government may have issued or may choose to issue in the future in a self-serving effort to deprive Mobil CN of its vested rights under the AA and the Guaranty*” are not applicable to this case. (C-III ¶ 175).
274. The U.S. federal law and New York law, including laws related to arbitration as well as those related to the attachment of funds, are applicable as *lex arbitri*. (C-III ¶ 176).
275. Claimant also argues that its claims under the AA “*do not call into question the Republic of Venezuela’s exercise of its sovereign powers.... Whether the*

Discriminatory Measures adopted by the Republic of Venezuela are a lawful or unlawful exercise of those sovereign powers is not at issue in this arbitration.” Instead, this is a matter concerning Respondents’ breach of their contractual obligation to indemnify Mobil CN. (C-IV ¶ 65).

K.I.2.b. Arguments by Respondents

276. Respondents argue that the AA and the Guaranty are governed exclusively by Venezuelan law and, as a result, cannot form the basis of a claim in this arbitration. (R-II ¶ 38). Respondents state that neither agreement “*contain[s] any limitation on the application of Venezuelan law, either by reference to international legal principles or any other body of law, and it expressly provides that it ‘shall in no event impose obligations on the Republic of Venezuela or limit the exercise of its sovereign rights.’*” (R-I ¶ 29).
277. *First*, the Respondents note that there is no stabilization clause in the AA and that there is no indication that such a clause would be permissible under the Congressional Authorization. The Congressional Authorization expressly provides that neither agreement shall “*impose obligations on the Republic of Venezuela or limit the exercise of its sovereign rights.*” (R-I ¶ 29). Respondents emphasize that the express reservation to the State’s sovereign powers negates any argument with respect to stabilization or freezing of the law with respect to the Project. (R-II ¶ 25). The idea of a stabilization clause was discussed and the negotiations between the Parties resulted in no stabilization clause being included in the AA. This negotiation is reflected in Article 18.4 of the AA and the Eighteenth condition of the Framework of Conditions. (R-II ¶ 16).
278. As the AA lacked a “*freezing*” or “*stabilization clause that would preclude the applicability of changes in Venezuelan law,*” (R-V n. 1), the evolving law will be applicable to the contract. (R-II ¶ 38).
279. *Second*, Respondents state that the AA was not internationalized in any way and that it was to be governed exclusively by Venezuelan law. (R-III ¶ 25).

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For these reasons and those presented in section K.I.3 concerning “*extinguishment*”, Respondents state that the AA cannot form the basis of a claim.

K.I.2.c. The Tribunal

280. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties’ Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-III	¶¶ 175 – 182
C-IV	¶¶ 62 – 65
R-I	¶ 29
R-II	¶¶ 15 – 16, 38, 61
R-III	¶ 25
TOR	¶¶ 5.2.1(a), 8

Exhibits:

Exhibit	Document Name
C-2	Association Agreement Articles 18.1, 18.4
C-3	PDVSA Guaranty Section 9
C-11	Congressional Authorization Eighteenth Condition
C-44	Declaration of Professor Eugenio Hernández-Bretón (27 September 2008) at ¶¶ 24 – 27, 35, 38 – 39, 86 – 88
C-45	Declaration of Professor Allan R. Brewer-Carías (26 September 2008) ¶¶ 17 – 18
C-87	Association Agreement Articles 18.1, 18.4
C-134	Venezuelan Civil Code
C-173	Federal Arbitration Act, 9 U.S.C. § 1 <i>et seq.</i>
C-228	Anadarko Petroleum Corporation 2008 Annual Report (24 February 2009) at 12 – 13
R-43	Congressional Authorization Eighteenth Condition
R-44	Organic Law that Reserves to the State the Industry and Trade of Hydrocarbons, Official Gazette No. 1.769 (Extraordinary), published August 29, 1975 [<i>Ley Orgánica que Reserva al Estado la Industria y el Comercio de los Hidrocarburos</i>] Art. 5
R-67	Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, Comparative International Commercial Arbitration (Kluwer 2003) 449, §§ 18-36 & 18-37
R-69	Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (10 February 2009)
App. 22	Fabiola Romero, “Autonomy of the Parties,” in <i>Law of Private International Law, Commentary</i> , Tomo II, Universidad Central de

Venezuela, Caracas, 2005 pp. 777 – 778

At and Following the 2010 Hearings:

Submission	Pinpoint
R-V	fn. 1

281. The Parties agree, and the Tribunal agrees as well, that the AA and the Guaranty are governed by Venezuelan law. (C-III ¶ 175, R-I ¶ 29). This is reflected in the TOR at Section 8, as well as in the Parties' memorials:

8. Applicable Law

Article 18.1 of the AA provides:

This Agreement shall be governed by and interpreted in accordance with the laws of the Republic of Venezuela.

Article 9 of the Guarantee [sic] provides:

This Guarantee [sic] shall be governed by and interpreted in accordance with the laws of the Republic of Venezuela.

282. The Tribunal also considers that the law of the United States and New York are also relevant and applicable, insofar as they are *lex arbitri* and this arbitration has its seat in New York.

283. At issue is whether laws enacted after the signing of the AA are applicable to this matter. More extensive consideration regarding this point is found later in this Award.

K.I.3 Whether Association Agreement was Extinguished

284. This section contains one of Respondents' affirmative defenses and, therefore, presents Respondents' arguments prior to Claimant's arguments.

K.I.3.a. Arguments by Respondents

285. Respondents argue that, regardless of the severability issue, the AA was extinguished by Venezuelan law and, therefore, cannot form the basis of a claim for damages against Respondents under Venezuelan law. (TOR 5.2.1.a; R-I ¶ 40; R-II ¶ 50; R-III ¶ 27; R-IV ¶ 13). Respondents' experts

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explain that, pursuant to Article 1159 of the Venezuelan Civil Code, legislative acts or other acts having the force of law can extinguish a contract. (R-II ¶ 40).

286. Under Article 131 of the 1999 Constitution and Article 1 of the Venezuelan Civil Code, the Law on Effects was effective upon publication in the Official Gazette on **October 8, 2007** and extinguished the AA as of that date. (R-I ¶ 40, R-II ¶ 41). With respect to the effective date of the extinguishment, Respondents argue that Claimant has already stated that the AA was *cancelado* as of **June 26, 2007** by reason of Decree-Law 5200. (R-IV ¶ 39; R-V ¶ 4).

4. Claimant places heavy emphasis on the Law on the Effects, but its own letters and court applications show that it viewed the AA as having been extinguished at least as early as June 27, 2007, the end of the four-month period for agreeing on migration. Indeed, in its applications for attachments in various jurisdictions, Claimant stated that Decree-Law 5200 of February 26, 2007 announced the cancellation of the Agreement. The same view was echoed by Prof. Brewer-Carías in his writings. (R-V ¶ 4).

287. While Claimant now argues that the extinction occurred in **March 2008** (in an effort to argue that its claim arose prior to March 2008), the date of the extinction is irrelevant. The AA was validly nullified by a law of public policy. Such a law of public policy can affect existing contracts, and alter existing relationships without violating the principle of non-retroactivity. (R-IV ¶ 41).

288. Respondents note that the legal principle of extinguishment is not new. Rather, *“it was clearly enunciated in the 1974 Supreme Court decision upholding the constitutionality of the Reversion Law against a challenge on retroactivity grounds in a case involving a Mobil Affiliate as a plaintiff.”* (R-IV ¶ 41).

289. At issue is not a law retroactively making prior conduct illegal. Rather, this case involves a law of public policy precluding any further exercise of a right existing under a prior contract. (R-IV ¶ 41). Respondents argue that

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Claimant has confused “*retroactivity*” with immediate effect. (R-II ¶ 43). Respondents state that “*the principle of non-retroactivity of laws does not prevent the immediate effect of new laws dealing with matters of public order, even with respect to existing legal relationships.*” (R-II ¶ 42, partially quoted).

290. Respondents’ expert Professor Mélich-Orsini explains that “*public order*” is a limit to the principle of non-retroactivity of the law:

42. Rules of public order ... are those rules that embody, at a given time, the objective principle of justice governing a *colectividad humana* (human community). By establishing a rule of public order, the State determines the compulsory and imperative ‘*deber ser*’ (duty) required at the time by the *conciencia jurídica colectiva* (legal community). . . .

Once the public policy character of a norm has been determined, it must be applied to all existing relationships, even without considering whether these are effects that were produced before the new law took effect and based on prior law. It asserts (*se postula*) the supremacy of the principle incorporated by the new norm over all vested rights that contradict it, thereby preventing the holders of such rights from escaping the application of the new norm shielded by the principle of non-retroactivity of the law established in Article 3 of the Civil Code. (R-II ¶ 42, emphasis in original).

291. Furthermore, even Claimant’s expert Brewer-Carías relies on Professor Sánchez-Covisa, who has agreed with the above, writing that “[*n*]o one may pretend to have vested rights opposed to public policy” and that the immediate applicability of public policy laws is considered to be non-retroactive. (R-II ¶ 43).

292. Respondents direct the Tribunal’s attention to a decision of the Supreme Court of Justice of Venezuela in which the Ministry of Energy applied a new law and declared several mining concessions extinguished. Therein, the Court held that the “*retroactive*” effect of the law should not be confused with its “*immediate*” effect. (R-II ¶¶ 44 – 45, partially quoted, footnotes omitted, emphasis in original).

44. The norms or Laws of public policy – as mandatory as they are, since they are enacted to protect and safeguard the general interests of the community, against which it is not possible to invoke vested rights –

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constitute, in effect, without a doubt, a necessary exception to the original intangibility of the concessions, which the petitioner has alleged in such an absolute manner for his [concessions] in this case.

The “retroactive” effect of the law should not be confused with its “immediate” effect. Nor must it be understood that to abolish powers and rights granted by the old law is to incur retroactivity: No[,] it is to create new situations that fall under the immediate and direct governance of the new law. To say that this power of the legislator means retroactivity is to pretend to paralyze the law, give it an indefinite and absolute permanence, that collides with the progress and social development, with the needs of the community (*medio*) and the requirements of the collective well-being, would be to implant the absurd norm that the law can never be changed. Portalis had already proclaimed: “To destroy an existing institution is certainly not making a law retroactive; because, if this would be the case, we would have to agree that the laws should never be changed. That the present and the future are under its domain.” It is obvious that persons - natural or legal - do not have against the State, or better, against the Legislative Power, the “vested right” that no laws be enacted in any manner that modify matters in which, if we are individually interested, the public well-being is likewise.

45. [To find otherwise would be to assume] that when the State grants a mining concession, that is to say, when it grants to a private party the right to exploit part of the public wealth constituted by the mines, it also alienates with [the concession] part of its own Sovereignty, such as its right and power to legislate to set forth its own mining policy in the manner that it deems more adequate and convenient to the general interests of the country.
293. Respondents further add a statement from the Attorney General in 1972, that “[t]o pretend that the rights recognized by this status are everlasting subjective situations would be to disregard the legislative power.” (R-II ¶ 46).
294. The Supreme Court of Justice of Venezuela made it clear in the case *Compañía Anónima Western Ore Company v. La Nación Venezolana* that matters related to the hydrocarbon industry in Venezuela are in fact matters of “*public order*.” (R-II ¶ 48). With respect to Claimant’s argument that it is immaterial whether the Migration Laws are properly described as part of the Venezuelan public order, Respondents state as follows (R-III ¶¶ 46-47, footnotes omitted):
46. Claimant’s entire argument appears to rest on the theory that indemnity for all FYs, including the 27.5 future FYs, was due prior to the

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extinction of the AA and that therefore the principle of non-retroactivity applies. In turn, this argument hinges upon the precise date that the extinction occurred, which Claimant alleges was in March of 2008, the date of issuance of the transfer decree authorizing the new mixed company formed by Corporación Venezolana del Petróleo, S.A. (a subsidiary of PDVSA) and Veba Oil & Gas Cerro Negro GMBH (a subsidiary of BP, ExxonMobil's former partner in the Project which participated successfully in the migration process), to conduct primary activities in accordance with the 2001 Organic Hydrocarbons Law.

47. Claimant overlooks the fact that the character of the AA was irretrievably altered as of the first of the **Migration Laws, Decree-Law 5200**, which provided for the transfer of control of operations and the mandatory migration within a specified time period. The parties continued to operate using the AA only as a provisional legal regime in order to allow time for an orderly migration. Claimant itself has repeatedly argued that it lost all interest in even this transitory arrangement as of June 26, 2007, not March 2008, and that the Law on the Effects of the Migration merely "confirmed" or "ratified" what it calls an expropriation that had already taken place.
295. Respondents add that the factual underpinning of this argument is further invalidated by the fact that no amount of indemnity for 27.5 years had accrued, as such can only apply on a FY to FY basis. (R-III ¶ 49).

K.I.3.b. Arguments by Claimant

296. Claimant outlines its arguments with respect to extinguishment as follows (C-III ¶ 174, partially quoted, footnotes omitted):
- the validity and effects of the arbitration clauses at issue are independent of the validity and effects of the contracts in which they are inserted (principle of separability) and are not necessarily governed by the law that applies to the merits Mobil CN's claims under the AA arose prior to the "extinction" of that agreement in March 2008 by operation of the **Law on Effects**.
 - The AA expressly provides that the indemnity obligation under Clause XV (the determination of which requires arbitration) survives any termination of the agreement.
 - Venezuelan law, including the Constitution, forecloses the possibility that governmental measures, like the **Decree-Law 5200** and the **Law on Effects**, could be applied retroactively to impair the provisions of the AA, including the arbitration clause, that are precisely designed to operate in the event of governmental measures and contractual breaches such as those that occurred in this case.
297. Regardless of whether **Decree-Law 5200** or the **Law on Effects** in full or in part can properly be described as part of the Venezuelan *ordre public* or

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whether they have immediate effect on existing contracts, their provisions do not impair the claims asserted. Mobil CN's interests in the Project had vested by the time these laws took effect. Further, the Venezuelan Supreme Tribunal of Justice recently held that matters of public order may be subject to arbitration. (C-VI ¶ 22).

298. The Law on Effects, not Decree-Law 5200, purports to extinguish or terminate the association agreements. Pursuant to Article 1 of the Law on Effects, the AA would be "*extinguished as of the date of publication in the Official Gazette of the Bolivarian Republic of Venezuela of the decree that transfers the right to exercise primary activities to the mixed enterprises constituted according to what is provided in [Decree-Law 5200].*" (C-IV ¶ 70). Claimant argues that under these express terms, the AA was not terminated until 5 March 2008 – the date that Decree No. 5916 transferred rights previously assigned to the Project to PetroMonagas, S.A. (C-IV ¶¶ 69 – 70; C-VI ¶ 37).
299. Nothing in either the Law of Effects or Decree-Law 5200 purports to extinguish existing claims of Foreign Parties under the Agreement. Further, as the legal experts agreed in New York, such an effect would be unconstitutionally retroactive. (C-VI ¶ 38).
300. Claimant submits that, as of **5 March 2008** date of the "*extinguishment*", all of Claimant's claims had arisen and Claimant's rights to compensation and to pursue relief had vested. (C-IV ¶ 71). By that time, Claimant had sent the notices of Discriminatory Measures (June 2007), had commenced the ICSID arbitration against the Republic of Venezuela (September 2007), and had commenced this arbitration (January 2008). (C-IV ¶ 75; C-V ¶ 11). The Parties' conduct also confirms that the extinguishment occurred in March 2008: the Parties continued to perform under the contract after February 2007, and PDVSA and the Government kept the AA alive until after the financing for the Project was restructured in December 2007. (C-V ¶ 12).

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301. With respect to Respondents' expert Professor Mélich-Orsini's opinion that **Decree-Law 5200** "*effectively extinguished*" the AA, Claimant states that Respondents have provided no explanation of the term "*effective extinguishment*." Claimant further adds that the various deadlines imposed by **Decree-Law 5200**, as well as the later enacted **Migration Laws**, demonstrate that **Decree-Law 5200** did not extinguish the AA. (C-IV ¶¶ 71-73). The argument that **Decree-Law 5200** extinguished the AA as of February 2007 is contradicted by Respondents' and the Government's conduct: (C-IV ¶ 74, partially quoted, emphasis in original).

- Respondents' three counterclaims against Claimant relate to events occurring between June 2007 and February 2008. By filing these, Respondents concede that the Tribunal has jurisdiction over these claims based on the AA.
- On 1 May 2007, ExxonMobil de Venezuela, S.A., an affiliate of Mobil CN, and PDVSA Petróleo, S.A. (PDVSA Petróleo), [...] entered into a Consulting and Support Agreement, [the object of which] was to provide to PDVSA Petróleo consulting and support services "related with the operation of the Project." The agreement defined "Project" as the project "property of Mobil CN LTD. (MCN), PDVSA Cerro Negro S.A. (PDVSA-CN) and Veba Oil & Gas Cerro Negro GMBH (VEBA OIL), [...] consist[ing] of the vertically integrated activities of exploitation, production, transport and upgrading of EHO obtained in an Area located in the Orinoco Oil Belt, all in accordance with the AA for said Project subscribed on 28 October 1997 (the 'Project')."
- PDVSA Petróleo relied on the AA, including the Operating Agreement to make cash calls[...] to fund the expenses of the project in June, July, and August 2007.
- Between 26 February and 26 June 2007, Mobil CN continued to receive its share of the production of the Project and to fund its share of the expenses of the Project according to the terms of the AA.
- **Article 2 of the Law on Effects** provides that [t]he interests, shares and participations in the associations referred to in **Article 1 of Decree-Law 5200** [...] in the companies constituted to develop the respective projects, and in the assets used to realize the activities of such associations, including property rights, contractual rights and [rights] of other nature, which until the expiration of the term established in **Article 4 of said Decree-Law** [26 June 2007], belonged to enterprises of the private sector with which no agreement was reached to migrate to a mixed enterprise, are transferred, based on the reversion principle [principio de reversión], without the need of any action or additional instrument, to the new mixed enterprises constituted as a result of the migration of the respective associations, except as provided in **Article 3 of the present Law**.

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- According to the terms of the Draft Conversion Agreement to Mixed Enterprise prepared by the Ministry of Energy, the participants in the Project were required to “*recognize and accept, effective on the Closing Date and without the necessity of any additional act or instrument, the termination of the AA without any of such Parties or any of their affiliates having a right to receive any compensation derived from the AA [...]*” “Closing Date” was defined as the date that “*CVP fixes [...]* which shall be (i) within the course of ten (10) calendar days [...] following the date on which the Transfer Decree is published in the Official Gazette of the Republic [...].”
302. Claimant further considers Respondents’ repudiation of their duties and their “*extinguishment*” argument to be a sign of bad faith. (C-III ¶ 312). International public policy precludes any argument that Decree-Law 5200 somehow abrogated Claimant’s right to arbitration of this dispute. (C-VI ¶ 22).
303. PDVSA’s counsel in the London High Court attachment proceedings also admitted that the arbitration agreement survives the termination of the AA:
80. [...] your Lordship will have in mind that it is now a commonplace of our law that an arbitration clause survives the destruction of the contract. That is so the fact that you are arguing about whether or not the contract itself had been frustrated does not prevent the arbitration clause biting to determine that very issue. (C-IV ¶ 80).
304. Regardless of extinguishment, Article 16.1(b) of the AA expressly provides that claims “*shall survive the termination of this Agreement.*” (C-IV ¶¶ 68, 77). Moreover, under general principles of Venezuelan law, risk-allocation clauses such as Clause XV survive termination. (C-V ¶ 11).
305. With respect to Respondents’ argument that there is no liability without an award, Claimant argues that Claimant’s claims arose when the Respondents failed to meet their obligations under the AA and the Guaranty. The Respondents breached the AA when they failed to respond to Mobil CN’s notices, failed to cooperate in the legal action against the Government, failed to cooperate in good faith in calculating the amount owed, and failed to pay the indemnity. (C-V ¶ 12, partially quoted; C-VI ¶ 39).

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K.I.3.c. The Tribunal

306. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties' Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-III	¶¶ 173 – 182, 312
C-IV	¶¶ 66 – 80
R-I	¶¶ 40 – 41
R-II	¶¶ 40 – 50
R-III	¶¶ 27, 43 – 49, App. A

Exhibits:

Exhibit	Document Name
C-2	Association Agreement Articles 15, 21
C-3	PDVSA Guaranty Section 9
C-4	Annex G (Accounting Procedures) to the Association Agreement Section 7
C-33	Letter dated 30 July 2007 from David Pérez, Vice President of Mobil Cerro Negro, Ltd. to Eulogio del Pino, PDVSA Petróleo, S.A., and Minister Rafael Ramírez, Minister for Popular Power for Energy and Petroleum of the Bolivarian Republic of Venezuela, p. 2
C-44	Declaration of Professor Eugenio Hernández-Bretón (27 September 2008) at ¶¶ 24 – 27, 30, 35, 38 – 39, 86 – 88, 90 – 95
C-45	Declaration of Professor Allan R. Brewer-Carías (26 September 2008) at ¶¶ 17 – 19, 29, 33 – 37, 50, 52 – 53, 60, 64
App. 16	Allan R. Brewer-Carías, “La estatización de los convenios de asociación que permitían la participación del capital privado en las actividades primarias de hidrocarburos suscritos antes de 2002, mediante su terminación anticipada y unilateral y la confiscación de los bienes afectos a los mismos,” in Víctor Hernández Mendible (Coordinador), <i>Nacionalización, Libertad de Empresa y Asociaciones Mixtas</i> , Editorial Jurídica Venezolana, Caracas, 2008. Available at www.allanbrewercarias.com , Biblioteca Virtual, II.4 Artículos y Estudios, No. 559, 2008 (under “La Estatización Petrolera en 2006-2007 con la terminación unilateral y anticipada de los contratos operativos y de asociación respecto de las actividades primarias de hidrocarburos.”) p. 37
App. 28	Allan R. Brewer-Carías, “La terminación anticipada y unilateral mediante leyes de 2006 y 2007 de los convenios operativos y de asociaciones petroleros que permitían la participación del capital privado en las actividades primarias suscritos antes de 2002,” in <i>Revista de Derecho Público</i> , No. 109 (enero-marzo 2007), Editorial Jurídica Venezolana, Caracas 2007, pp. 47-54. Available at

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- www.allanbrewercarias.com, Biblioteca Virtual, II.4 Artículos y Estudios, No. 510, 2007 p. 10
- C-87 Association Agreement Articles 2, 16.1(b), 18.1, 18.2
- C-99 Decree-Law 5200 Art. 1, 3, 4, 5
- C-101 Draft Form of Contract for Conversion to a Mixed Company (17 January 2007) Art. 1.4, 2
- C-104 Law on the Effects Art. 1, 2
- C-129 Decree No. 5916 Transferring to Petro Monagas S.A. the Right to Develop Primary Exploration Activities Specified Therein [*Decreto No. 5916, mediante el cual se transfiere a la empresa PetroMonagas, S.A. el derecho a desarrollar actividades primarias de exploración que él se especifican*] (as published in the Official Gazette No. 38884 of 5 March 2008) Art. 1
- C-130 Gary B. Born, *International Commercial Arbitration* pp. 55 – 56, 110 (2d ed. 2001)
- C-131 Final Award in ICC Case No. 6162 of 1990, XVII Yearbook of Commercial Arbitration 153 *et seq.* (1992) (ICC Case No. 6162)
- C-132 Award in ICC Case No. 5832 of 1988, COLLECTION OF ICC ARBITRAL AWARDS 1986-1990 (1994) at 540
- C-133 Final Award of 22 February 1988 in ICC Case No. 5294, COLLECTION OF ICC ARBITRAL AWARDS 1986-1990 (1994) at 183
- C-134 Venezuelan Civil Code [*Código Civil*] (as published in the Official Gazette No. 2990 of 26 July 1982) Art. 1160
- C-173 Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*
- C-214 Second Declaration of Professor Allan R. Brewer-Carías at ¶¶ 10-14, 16 – 26,
- C-215 Second Declaration of Professor Eugenio Hernández-Bretón (14 May 2009) at ¶¶ 51, 61 – 63, 65 – 71
- App. 29 Commercial Arbitration Law [*Ley de Arbitraje Comercial*] (published in Official Gazette 36.430 of April 7, 1998) Art. 7 and 25
- C-224 Venezuelan Constitution [*Constitución Venezolana*], dated 20 December 1999 (as published in Extraordinary Official Gazette No. 5453 of 24 March 2000) Art. 253
- C-229 Consulting Support Agreement [*Contrato de Consultoría de Apoyo y Soporte*] (29 October 1997), Second Whereas and Section 1
- C-230 PDVSA Petróleo, S.A. June, July, and August 2007 Cash Calls
- C-231 Venezuela Supreme Tribunal of Justice, Constitutional Chamber, *Decision No. 15* (15 February 2005), *reprinted in Revista de Derecho Público*, no. 101 (Jan.-March 2005) at p. 85
- C-232 JOSÉ MÉLICH-ORSINI, DOCTRINA GENERAL DEL CONTRATO § 456 n.48 (4th ed. 2006)
- C-233 Venezuela Supreme Tribunal of Justice, Constitutional Chamber, *Decision No. 1541* (17 October 2008) Eng. Tr. pp. 13-14, 27 – 29, 34
- C-234 *Cardegna v. Buckeye Check Cashing, Inc.*, 546 U.S. 440, 448 – 49 (2006)
- C-235 *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967)
- C-236 *Sphere Drake Ins. Ltd. v. Clarendon Nat. Ins. Co.*, 263 F.3d 26, 31 (2nd Cir. 2001)

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- C-237 *ACE Capital re Overseas Ltd. v. Central United Life Ins. Co.*, 307 F.3d 24, 34-36 (2d Cir. 2002)
- C-238 *Pinson v. Pinson*, 824 N.Y.S. 2d 758 (N.Y. Sup. 2006, unreported)
- C-239 *Mobil Cerro Negro, Ltd. v. Petroleos de Venezuela S.A.*, High Court of Justice, Queen's Bench Division, Transcript of Public Proceedings, Commercial Court, Day 2 (29 February 2008) at p. 38
- C-248 Financial and Operational Information of PDVSA and Affiliates [*Información Financiera y Operacional, PDVSA y sus Filiales*], as of 31 December 2007 and 2006 [*Notas a los Estados Financieros Consolidados, 31 de diciembre de 2007 y 2006*] at 140
- C-289 José Mélich-Orsini, *DOCTRINA GENERAL DEL CONTRATO* (2006) (excerpt, Chapter XVII, Section 456) at n. 48
- R-7 Decree-Law 5200 Art. 1, 3
- R-16 Attachment Order of the Court of First Instance of Aruba, 1 February 2008; attachment Order of the Court of First Instance of the Curaçao Section, 1 February 2008; attachment Order of the District Court of Amsterdam, 5 February 2008 ¶ 14
- R-17 Law on Effects Art. 3 & 5
- R-41 PDVSA Guaranty
- R-43 Congressional Authorization
- R-57 Decree No. 1.510, Decree with Force of Organic Law of Hydrocarbons, Official Gazette No. 37.323, published 13 November 2001 ("2001 Hydrocarbons Law")
- R-68 Legal Expert Opinion of Professor José Mélich-Orsini (10 February 2009) at ¶¶ 7, 9 – 23, 34, 39
- App. 3 José Mélich-Orsini, *General Contract Doctrine*, 4th Edition, Academia de Ciencias Políticas y Sociales, Serie Estudios N° 61, Caracas, 2006 § 194 pp. 236 – 237
- App. 5 Constitution of the Bolivarian Republic of Venezuela, Official Gazette No. 36.860, published December 30, 1999 [*Constitución de la República Bolivariana de Venezuela (1999)*] Art. 131, 302
- App. 6 Venezuelan Civil Code Art. 1, 1.159, 1.271, 1.272
- R-69 Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (10 February 2009) at ¶¶ 8, 11 – 39
- App. 2 Constitution of the Bolivarian Republic of Venezuela, Official Gazette No. 36.860, published December 30, 1999 [*Constitución de la República Bolivariana de Venezuela (1999)*] Art. 131, 203
- App. 7 Venezuelan Civil Code Art. 1, 6, 1.159, 1.271, 1.272
- App. 16 Joaquín Sánchez-Covisa, *The Temporal Effect of the Law in the Venezuelan Legal System*, Academia de Ciencias Políticas y Sociales, Serie Clásicos Venezolanos, No. 2, Caracas, 2007 pp. 193, 197
- App. 17 Judgment, Political-Administrative Chamber of the Supreme Court of Justice, *Compañía Anónima Western Ore Company v. La Nación Venezolana* (December 21, 1967) pp. 20 – 23
- App. 18 Opinion of the Office of the Attorney General of the Republic on the Law on Assets Subject to Reversion in Hydrocarbons Concessions, dated March 8, 1972, in *Public Law and Administration Sciences Archives – Tribute to Professor Antonio Moles Caubet by the Institute of Public Law*, Universidad Central de Venezuela, Facultad de Ciencias Jurídicas y Políticas, Instituto

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- de Derecho Público, Caracas, 1981, Tomo 2, Vol. 3 p. 699 *et seq.*
- App. 19 Judgment, Full Chamber of the Supreme Court of Justice, *Regarding a request for nullity on constitutional grounds of the Law on Assets Subject to Reversion in Hydrocarbons Concessions* (December 3, 1974) p. 733
- App. 20 Judgment, Political-Administrative Chamber of the Supreme Court of Justice, *Asfalto de Petróleo (ASFAPETROL C.A.) v. Petróleos de Venezuela, S.A.* (PDVSA) p. 1
- App. 21 Judgment, Political-Administrative Chamber of the Supreme Tribunal of Justice, *Minas de San Miguel C.A. v. Ministerio de Energía y Minas* (July 16, 2008) 2
- R-112 Association Agreement
- R-118 Second Legal Expert Opinion of Professor José Mélich-Orsini (14 August 2009) at ¶¶ 3-9, 11 – 16, 22 – 23, 28
- R-119 Second Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (14 August 2009) at ¶¶ 3, 22 – 23, 28
- App. 46 Venezuelan Civil Code
- R-130 Allan R. Brewer-Carías, *La intervención del estado en la actividad mercantil*, JORNADAS DE DERECHO MERCANTIL (Universidad Católica Andrés Bello, Facultad de Derecho, Caracas 1978) p. 558
- Unnumbered Karl-Heinz Böckstiegel, *Public Policy and Arbitrability*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, ICCA CONGRESS SERIES 177, 201-203 (Pieter Sanders ed., 1987);
- Unnumbered Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, ICCA CONGRESS SERIES 258, at ¶¶ 141-142 (Pieter Sanders ed., 1987).

At and Following the 2010 Hearings:

Submission	Pinpoint
C-V	¶¶ 10 – 13
C-VI	¶¶ 22, 37 - 39
R-IV	¶¶ 12 -13, 39 – 41
R-V	¶¶ 4 – 5
R. Closing Slides	14, 21

Speaker	Citation
Brewer-Carías	911 – 912, 1007
C. Closing	2044 – 2048
C. Opening	55 – 56
Expert Conf.	908 – 926, 914 – 915 (Mr. Chairman), 951 – 954, 965 – 968, 984 – 990, 1006 – 1007
Hernández-Bretón	918 – 919, 1008
Mélich-Orsini	912 [Sp. Hr. Tr. 15: 5-12]
R. Closing	2119 – 28
R. Opening	104 – 106

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307. The Tribunal agrees that, irrespective of whether the AA was extinguished, the claims based on the AA survive. Article 16(1)(b) of the AA is very helpful in this respect, which states:
- (b) The rights and obligations of the Parties in respect of any advance under Clause XII, payments under Clause XV, indemnities under Sections 12.6 and 17.2, contingent liabilities not settled pursuant to Section 16.4, the abandonment of wells pursuant to Section 16.6, Project Information under Section 19.1, and confidentiality obligations pursuant to Sections 5.2, 6.2 and Clause XX, shall survive the termination of this Agreement.
308. The AA, thus, still needs to be applied, without regard to whether it was extinguished.
309. There is no real dispute that the AA is governed by Venezuelan law and that there is no stabilization or freezing clause that would purport to freeze Venezuelan law as it existed in 1997. There is no dispute either that Venezuelan law, including the Constitution, forecloses the possibility that governmental measures could be applied retroactively to impair the provisions of a contract. However, the “*retroactive*” effect of the law should not be confused with its immediate effect, nor must it be understood that to abolish powers and rights granted by an old law is to incur retroactivity. To say that this power of the legislation means retroactivity would be to seek, in the words of Respondents, “*to paralyze the law, give it an indefinite and absolute permanence that collides with the progress and social development, with the needs of the community and the requirements of the collective well-being, would be to implant the absurd norm that the law can never be changed.*”
310. The Tribunal also notes that Claimant’s expert, Mr. Brewer-Carías, agrees that no one may pretend to have vested rights opposed to public policy and that the immediate applicability of public policy laws is considered to be non-retroactive. Consensus therefore appears to exist on this general issue

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between Claimant and Respondents that a new law can amend an old law with immediate effect.

311. The Tribunal finds, however, that the amendment or abrogation of an old law would not prevent a party from seeking indemnification under a contract providing, as does the AA, for (1) indemnification of that party in certain circumstances and (2) survival of the indemnification provision in the event of amendment, termination or extinguishment of the contract. The Tribunal's finding is subject, however, to the relevant party not being barred from seeking such indemnification by a force majeure clause, a non-imputable extraneous cause or contractual provisions regulating the triggering of the action for indemnification.

K.I.4 Relevance of Decisions of Other Tribunals

K.I.4.a. Arguments by Claimant

312. Claimant explains that the progression of the ICSID case, filed on 6 September 2007 with a briefing schedule ending on 15 December 2011 and a final hearing scheduled for February 2012, demonstrates why the indemnification provisions are a critical legal protection for Claimant. (C-V ¶ 38).
313. Claimant opposes Respondents' argument that Claimant's remedies lie solely with the ICSID arbitration and states that such an argument is inconsistent with the terms of the AA. (C-V ¶ 37). Instead, Claimant states that the Parties knew that pursuing a claim against the Government would be difficult and lengthy and that they, therefore, crafted the indemnity provisions such that they would function regardless of any claim that the Claimant may have against the Republic of Venezuela. (C-V ¶ 37). Article 15.1(a) contemplates an action against the Republic of Venezuela that would be conducted independently from, but in parallel with, arbitration against Respondents. (C-V ¶ 34, partially quoted). Claimant further characterizes Respondents' argument that all relief lies in the ICSID

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proceeding as disingenuous, citing the Government's statement that it has no intention of paying an award. (C-V ¶ 38).

314. Claimant presents a third argument in favor of this parallel ICC arbitration. A ruling that PDVSA-CN has breached the AA is a form of relief that is available before this ICC Tribunal, but not in the ICSID case. (C-V ¶ 39). Such a ruling would enable the Claimant to purchase PDV Chalmette's Interest in Chalmette Refining LLC under Section 8.6 of the Chalmette Agreement. (C-V ¶ 39).

315. Claimant argues that the ICSID arbitration has no relevance in the determination of the merits of this case. (C-V ¶ 36). Claimant did, however, reference the ICSID case in its discussion of the discount rate:

30. [...] The discount rate applicable to cash flows from Claimant's interest in the Project will be determined in the ICSID case, not this one. But when that occurs, the discount rate for an established project like Cerro Negro should be substantially lower than 10%. (C-V ¶ 30).

K.I.4.b. Arguments by Respondents

316. Respondents argue that the ICSID proceedings are the main proceedings regarding this controversy, but explain that the ICSID case has nothing to do with "*revers[ing] or obtain[ing] relief from a Discriminatory Measure, [...] but rather to obtain damages for alleged violations of international law and Venezuelan law.*" (R-IV ¶ 83).

317. Respondents suggest that Claimant "*has always understood that it did not have a claim under the AA*", and states that this is why Claimant has always dealt with the Government. Respondents state that Claimant's first mention of a claim before the ICC pursuant to the AA was made in order to "*prepare the way for attachments and freezing orders not available to it in connection with the ICSID proceeding.*" (R-IV ¶ 84). Respondents urge the Tribunal to "*[leave the Claimant] to its strategy of dealing with the State.*" (R-IV ¶ 84).

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K.I.4.c. The Tribunal

318. In the context of this section, the Tribunal, without repeating the contents, further takes particularly into account the following sections of the Parties' Briefs and of the evidence in reply to Question 3.1 raised by the Tribunal to the Parties in PO-6:

Party Submissions:

Submission	Pinpoint
C-V	¶¶ 30 – 39
R-IV	¶¶ 83 – 86

Exhibits:

Exhibit	Document Name
C-8	Copy of 10 October 2007 Notice of Registration of the Request for Arbitration filed before the International Centre for Settlement of Investment Disputes.
C-41	Testimony of Thomas L. Cranmer (25 September 2008) at ¶ 30
C-42	Testimony of Mark Ward (26 September 2008) at ¶ 27
C-87	Association Agreement Article 15.1(a)
C-119	Amended and Restated Limited Liability Company Agreement of Chalmette Refining, LLC (28 October 1997), § 8.6
R-4	First Affidavit of Bernard Mommer (11 February 2008) ¶ 12
R-37	Outline Argument on Behalf of Claimant In Support of Its Application For an Order for Alternative Service and In Opposition to the Application by the Respondent to Discharge the Worldwide Freezing Order (27 February 2008) <i>Mobil Cerro Negro Limited v. Petróleos de Venezuela, S.A.</i> , Claim No. 2008 Folio 61, High Court of Justice, Queen's Bench Division, Commercial Court (London) ¶ 82
R-112	Association Agreement
R-114	Supplemental Brailovsky/Wells Report (August 14, 2009) ¶ 52 – 57
Unnumbered	ICSID Decision on Jurisdiction at ¶¶ 209 (a) – (b)
Unnumbered	Republic of Venezuela's ICSID Memorial on Jurisdiction at ¶¶ 25-26

At and Following the 2010 Hearings:

Submission	Pinpoint
R. Closing Slides	88, 89

Speaker	Citation
C. Opening	34 – 35, 53 – 54
C. Closing	2039 – 2040
Cutt	702 – 703, 710 – 711

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Jones	1378, 1383 – 1383, 1437
Massey	594 – 595
Myers	1762
R. Closing	2183 – 2187
R. Opening	101 – 102
Ward	147, 238 – 240, 278 – 280, 286

319. The disputes that arose after **21 February 2006** between Claimant and the Republic of Venezuela are subject to a currently pending ICSID arbitration (ICSID Decision). Relevant portions of the ICSID Tribunal's decisions are incorporated, where appropriate, in this Award.
320. The Tribunal notes that the ICSID proceedings have passed the jurisdictional phase. The briefing schedule ends on 15 December 2011, and the hearing on all remaining issues is scheduled for February 2012. (R-IV ¶ 86).
321. As the ICSID dispute does not involve the same Parties as the present ICC case, the Tribunal does not consider the ICSID proceeding to have any direct relevance for the present case. Whether the Republic's and its government's role involving the Respondents in the present case is of relevance will be considered later in this Award.
322. In the legal arguments made in their written and oral submissions, the Parties relied on numerous decisions of other courts and tribunals. Accordingly, it is appropriate for the Tribunal to make certain general preliminary observations in this regard.
323. First of all, the Tribunal considers it should make it clear from the outset that it regards its task in these proceedings as the very specific one of interpreting and applying the relevant provisions of the Parties' contracts whose arbitration clauses provide the mandate for this Tribunal, *i.e.* the AA and the PDVSA Guaranty, in order to decide on the relief sought by the Parties.

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324. Without prejudice to the applicable law, in international arbitration, there is no duty to respect precedent with regard to decisions of other arbitral tribunals or of the national courts. However, this does not preclude the Tribunal from considering arbitral decisions or court decisions and the arguments of the Parties based upon them, to the extent that it may find that they shed any useful light on the issues that arise for decision in this case.
325. In so far as relevant, such an examination is conducted by the Tribunal later in this Award, after the Tribunal has considered the Parties' contentions and arguments regarding the various issues argued and relevant for the interpretation of the applicable legal provisions.

K.II. Jurisdiction

K.II.1. Arguments by Claimant

326. Article 18.2 of the AA and Article 12 of the PDVSA Guaranty both provide that any dispute arising from those agreements shall be settled by arbitration “in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce,” to be conducted in New York, NY. (C-I ¶¶ 14-15; C-III ¶¶ 168 – 172; see also TOR ¶ 8; C.Closing Slide 9).
327. Claimant provides the following responses to Respondents' jurisdictional challenges (C-III ¶ 174, footnotes omitted):
- *First*, the validity and effects of the arbitration clauses at issue are independent of the validity and effects of the contracts in which they are inserted (principle of separability) and are not necessarily governed by the law that applies to the merits.
 - *Second*, Mobil CN's claims under the AA arose prior to the “extinction” of that agreement in March 2008 by operation of the **Law on Effects**.
 - *Third*, the AA expressly provides that the indemnity obligation under Clause XV (the determination of which requires arbitration) survives any termination of the agreement.
 - *Fourth*, Venezuelan law, including the Constitution, forecloses the possibility that governmental measures, like the **Decree-Law 5200** and the **Law on Effects**, could be applied retroactively to impair the provisions of the AA, including the arbitration clause, that are precisely designed to

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operate in the event of governmental measures and contractual breaches such as those that occurred in this case.

328. Claimant also argues that Respondents' assertion of three counterclaims in this matter should be understood as an acceptance of this Tribunal's jurisdiction over this matter. (C-IV ¶ 74).
329. Claimant rejects Respondents' argument that "*the principle of severability of arbitration clauses [...] does not trump a law of public policy.*" (C-VI ¶ 21). Claimant presents six counter-arguments to Respondents' attempt to extend the "*extinguishment*" theory to this Tribunal's jurisdiction. *First*, nothing in Decree-Law 5200 or the Law on Effects purports to address – or can address – disputes arising from the obligations of PDVSA-CN under the AA or those of PDVSA under the Guaranty. *Second*, Claimant is not seeking relief against the Government for events related to those laws. *Third*, "*Venezuelan jurisdiction... includes arbitration*" and this is a favored dispute-resolution mechanism under the Venezuelan Constitution. (C-IV ¶ 79; C-VI ¶ 22). *Fourth*, whether Decree-Law 5200 has public order provisions is irrelevant to the question of jurisdiction: the Venezuelan Supreme Tribunal of Justice has recently held that matters of public order may be subject to arbitration. *Fifth*, international public policy precludes any argument that Decree-Law 5200 somehow abrogated Claimant's right to arbitration of this dispute. (C-VI ¶ 22, partially quoted). *Sixth*, the AA itself provides that any dispute relating to the Agreement – logically including termination or "*extinguishment*" of the contract – shall be settled by arbitration. (C-IV ¶ 79).
330. In response to the Tribunal's question about which law applies to the interpretation of arbitration clauses, Professor Hernández Bretón explained that the Tribunal may determine the applicable law, without regard to the substantive law chosen by the Parties. (C. Closing Slide 9, C. Closing Statement p. 6, partially quoted). Typically, a Tribunal will apply the *lex fori* to determine the validity and interpretation of arbitration clauses. The approach also finds support under Article V(1)(a) of the New York

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Convention, where this approach is used at the time of the enforcement of an award.

331. Claimant explains how, under New York and Venezuelan law, arbitration clauses must be interpreted in good faith, to give effect to the parties' reasonable expectations (C. Closing Statement p. 6; C. Closing Slide 9):

- For example, just two months ago, a New York court ruled that an arbitration clause must be interpreted to “give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized.” *Republic Mortgage Ins. Co. v. Countrywide Fin. Corp.*
- And the U.S. Court of Appeals for the Second Circuit (the circuit that includes New York) has held that the interpretation of an arbitration clause “must ascertain and implement the reasonable expectations of the parties who undertake to be bound by its provisions.” *Spear, Leads & Kellogg v. Cent. Life Assurance Co.*
- The same conclusions follow from a good-faith interpretation of the contract under Article 12 of the Venezuelan Code of Civil Procedure.

K.II.2. Arguments by Respondents

332. From the outset, the Respondents have maintained that their “*participation in this arbitration should not be construed as acceptance of the jurisdiction of this or any other tribunal to determine the effect of the Law on Effects, and should not be viewed as a precedent for any case as to the appropriateness of settling disputes dealing with matters of public order in Venezuela, such as the legal framework regarding hydrocarbons, through international arbitration.*” (R-I ¶ 40 fn. 19).

333. In the Terms of Reference and Respondents' Reply Memorial, Respondents stated: “*Pursuant to the Law on Effects referred to in the Request for Arbitration, the AA was extinguished and all related controversies referred to Venezuelan Jurisdiction. Therefore, since Claimant concedes that Venezuelan law governs, the AA cannot form the basis of a claim by Claimant in this arbitration.*” (TOR 5.2.1.a; R-III ¶ 25).

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334. Laws of public policy, such as Decree-Law 5200, can affect existing contracts. By its express terms, Decree-Law 5200 referred all controversies regarding its interpretation and implementation to Venezuelan tribunals. Inasmuch as the AA has been extinguished by a law of general application, the Parties are precluded from basing substantive claims on it. (R-V ¶¶ 2 – 3). This has rendered the interaction between the severability of arbitration clauses on the one hand and laws of public policy on the other, somewhat academic.
335. With respect to the severability of arbitration clauses, Respondents state that, although severability is recognized in Venezuelan law, the principle of severability does not trump Decree-Law 5200 – a law of public policy. (R-IV ¶ 12).

K.II.3. The Tribunal

336. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties' Briefs and of the evidence:

Party Submissions:

Submission		Pinpoint
C-I	¶¶	14 – 15
C-III	¶¶	168 – 174
C-IV	¶	74
R-I	¶¶	40 – 41
R-II	¶¶	41 – 49
R-III	¶	25
TOR	¶	5.2.1(a).

Exhibits:

Exhibit	Document Name
C-2	Association Agreement Articles 15.2(a), 18.2, 21
C-3	PDVSA Guaranty Art. 12
C-4	Annex G (Accounting Procedures) to the Association Agreement Section 7
C-33	30 July 2007 letter from David Perez, Vice President of Mobil Cerro Negro, Ltd. to Eulogio del Pino, PDVSA Petróleo, S.A., and Minister Rafael Ramírez, Minister for Popular Power for Energy and Petroleum of the Bolivarian Republic of Venezuela. p. 2

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- C-44 Declaration of Professor Eugenio Hernández-Bretón (27 September 2008) ¶¶ 24, 25, 28 – 33, 90 – 95
- C-45 Declaration of Professor Allan R. Brewer-Carías (26 September 2008) ¶¶ 19, 29, 44 – 47, 50, 53, 64
- C-87 Association Agreement Art. 15.1(b), 16.1(b), 18.2, 21, Annex G
- C-99 Decree-Law 5200 Art. 13
- C-101 Draft Form of Contract for Conversion to a Mixed Company (17 January 2007) Art. 1.4, 2
- C-104 Law on Effects Art. 2
- C-130 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 110 (2d ed. 2001) pp. 55 – 56, 110
- C-131 Final Award in ICC Case No. 6162 of 1990, XVII YEARBOOK OF COMMERCIAL ARBITRATION (1992), 153 *et seq.*
- C-132 Award in ICC Case No. 5832 of 1988, COLLECTION OF ICC ARBITRAL AWARDS 1986-1990 (1994) at 540
- C-133 Final Award of 22 February 1988 in ICC Case No. 5294, COLLECTION OF ICC ARBITRAL AWARDS 1986-1990 (1994) at 183
- C-134 Venezuelan Civil Code Art. 1160
- C-215 Second Declaration of Professor Eugenio Hernández-Bretón (14 May 2009) at ¶¶ 51, 61 – 71
- App. 21 Venezuelan Code of Civil Procedure [*Código de Procedimiento Civil*] (published in Extraordinary Official Gazette No. 4.209 of September 18, 1990) Art. 12
- App. 29 Commercial Arbitration Law [*Ley de Arbitraje Comercial*] (published in Official Gazette 36.430 of April 7, 1998) Art. 7 and 25
- C-224 Venezuelan Constitution [*Constitución Venezolana*], dated 20 December 1999 (as published in Extraordinary Official Gazette No. 5453 of 24 March 2000) Art. 253
- C-229 Consulting Support Agreement [*Contrato de Consultoría de Apoyo y Soporte*] (29 October 1997), Second Whereas and Section 1
- C-230 PDVSA Petróleo, S.A. June, July, and August 2007 Cash Calls
- C-233 Venezuela Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1541 (17 October 2008) at 365.488 (English Trans. 13 – 14, 27 – 29, 34)
- C-234 *Cardegna v. Buckeye Check Cashing, Inc.*, 546 U.S. 440, 448 - 449 (2006)
- C-235 *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967)
- C-236 *Sphere Drake Ins. Ltd. v. Clarendon Nat. Ins. Co.*, 263 F.3d 26, 31 (2nd Cir. 2001)
- C-237 *ACE Capital re Overseas Ltd. v. Central United Life Ins. Co.*, 307 F.3d 24, 34 – 36 (2d Cir. 2002)
- C-238 *Pinson v. Pinson*, 824 N.Y.S. 2d 758 (N.Y. Sup. 2006, unreported)
- C-239 *Mobil Cerro Negro, Ltd. v. Petroleos de Venezuela S.A.*, High Court of Justice, Queen's Bench Division, Transcript of Public Proceedings, Commercial Court, Day 2 at 38 (29 February 2008)
- R-7 Decree-Law 5200 Art. 1, 13
- R-17 Law on Effects Art. 1, 5
- R-57 2001 Hydrocarbons Law
- R-68 Legal Expert Opinion of Professor José Mélich-Orsini (10 February

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- 2009) at ¶¶ 11-12, 14, 16-24, 39
- App 3 José Mélich-Orsini, *General Contract Doctrine*, 4th Edition, Academia de Ciencias Políticas y Sociales, Serie Estudios N° 61, Caracas, 2006
- App. 5 Constitution of the Bolivarian Republic of Venezuela, Official Gazette No. 36.860, published December 30, 1999 [*Constitución de la República Bolivariana de Venezuela (1999)*]
- R-69 Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (10 February 2009) at ¶¶ 8, 11 – 12, 30, 32 – 39
- App. 2 Constitution of the Bolivarian Republic of Venezuela, Official Gazette No. 36.860, published December 30, 1999 [*Constitución de la República Bolivariana de Venezuela (1999)*]
- App. 7 Venezuelan Civil Code [*Código Civil de la República de Venezuela*] Art. 6, 131
- App. 16 Joaquín Sánchez-Covisa, *The Temporal Effect of the Law in the Venezuelan Legal System*, Academia de Ciencias Políticas y Sociales, Serie Clásicos Venezolanos, No. 2, Caracas, 2007 pp. 193, 197
- App. 17 Judgment, Political-Administrative Chamber of the Supreme Court of Justice, *Compañía Anónima Western Ore Company v. La Nación Venezolana* (December 21, 1967) pp. 20 – 22
- App. 18 Opinion of the Office of the Attorney General of the Republic on the Law on Assets Subject to Reversion in Hydrocarbons Concessions, dated March 8, 1972, in *Public Law and Administration Sciences Archives – Tribute to Professor Antonio Moles Caubet by the Institute of Public Law*, Universidad Central de Venezuela, Facultad de Ciencias Jurídicas y Políticas, Instituto de Derecho Público, Caracas, 1981, Tomo 2, Vol. 3 pp. 699 *et seq.*
- App. 19 Judgment, Full Chamber of the Supreme Court of Justice, *Regarding a request for nullity on constitutional grounds of the Law on Assets Subject to Reversion in Hydrocarbons Concessions* (December 3, 1974) p. 733
- App. 20 Judgment, Political-Administrative Chamber of the Supreme Court of Justice, *Asfalto de Petróleo (ASFAPETROL C.A.) v. Petróleos de Venezuela, S.A. (PDVSA)* (August 14, 1992) p. 1
- App. 21 Judgment, Political-Administrative Chamber of the Supreme Tribunal of Justice, *Minas de San Miguel C.A. v. Ministerio de Energía y Minas* (July 16, 2008) p. 2
- R-118 Second Legal Expert Opinion of Professor José Mélich-Orsini (14 August 2009)
- App. 49 Venezuelan Code of Civil Procedure, Official Gazette No. 4.209 (Extraordinary), published September 18, 1990[*Código de Procedimiento Civil, Artículo 12*] Art. 12
- Unnumbered Karl-Heinz Böckstiegel, *Public Policy and Arbitrability*, in *COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION*, ICCA CONGRESS SERIES 177, 201-203 (Pieter Sanders ed., 1987);
- Unnumbered Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in *COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION*, ICCA CONGRESS SERIES 258, at ¶¶ 141-142 (Pieter Sanders ed., 1987).

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- Unnumbered Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958), Art. V(1)(a) [hereinafter “*New York Convention*”].
- Unnumbered *Republic Mortgage Ins. Co. v. Countrywide Fin. Corp.*, 2010 WL 2927286, Slip. op. at *2 (N.Y. Sup. Ct. July 22, 2010).
- Unnumbered *Spear, Leads & Kellogg v. Cent. Life Assurance Co.*, 85 F.3d 21, 28 (2d Cir. 1996).

At and Following the 2010 Hearings:

Submission	Pinpoint
C-VI	¶¶ 21 – 23
R-IV	¶ 12
R-V	¶¶ 2 – 3
C. Closing Slide	9
C. Closing	pp. 5 – 7
R. Closing Slides	14 – 21

Speaker	Citation
Brewer-Carías	1006 – 1007
C. Closing	2044 – 2048
C. Opening	55-56
Expert Conf.	908 – 26, 984 – 90
Hernández-Bretón	902 – 903, 905 – 908, 1008

337. Respondents have consistently maintained that their participation in this arbitration should not be construed as acceptance of the jurisdiction of this Tribunal to determine the effect of the **Law on the Effects** and should not be viewed as a precedent for any case as to the appropriateness of settling disputes dealing with matters of public order in Venezuela, such as the legal framework regarding hydrocarbons, through international arbitration.
338. The Tribunal does not understand this, however, to mean that Respondents challenge the jurisdiction of this Tribunal in this arbitration in a general manner. Rather, they argue that the AA cannot form the basis of a claim by Claimant in this arbitration because of a number of reasons, from the well-established principles relating to the consequences of an “*hecho del príncipe*”, to the allegation that Claimant has forfeited its right to compensation under the AA for various reasons and, as a consequence, that Claimant has no claim against PDVSA-CN under the AA and, therefore, no claim against PDVSA under the Guaranty.

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339. It thus appears that Respondents are not actually challenging the jurisdiction of this Tribunal over this dispute, but merely stating, for political or other reasons, that they do not accept that international arbitration tribunals are the appropriate forums for settling disputes dealing with matters of public policy in Venezuela.
340. On the other hand, Respondents' assertion of three counterclaims in this matter shows that they accept this Tribunal's jurisdiction over this matter.
341. For ease of reference, the relevant provisions of the AA and the PDVSA Guaranty, together with their appropriate citations in the record, are set out here:

Articles 16.1(b) AA - Termination**Spanish (Original)**

(b) Los derechos y obligaciones de las Partes en relación con cualquier anticipo de acuerdo con la Cláusula XII, los pagos de acuerdo con la Cláusula XV, las indemnizaciones de acuerdo con la Sección 12.6 y 17.2, los pasivos contingentes que no se hayan arreglado de acuerdo con la Sección 16.4, el abandono de los pozos de acuerdo con la Sección 16.6, la Información del Proyecto de acuerdo con la Sección 19.1 y las obligaciones de confidencialidad de acuerdo con las Secciones 5.2, 6.2 y la Cláusula XX, sobrevivirán a la terminación de este Convenio.

(C-87; R-112)

Claimant's Translation

(b) The rights and obligations of the Parties in respect of any advance under Clause XII, payments under Clause XV, indemnities under Sections 12.6 and 17.2, contingent liabilities not settled pursuant to Section 16.4, the abandonment of wells pursuant to Section 16.6, Project Information under Section 19.1, and confidentiality obligations pursuant to Sections 5.2, 6.2 and Clause XX, shall survive the termination of this Agreement.

(C-87)

Article 18.2 AA - Arbitration**Spanish (Original)**18.2 Arbitraje.

Cualquier disputa que surja o se relacione

Claimant's Translation18.2 Arbitration.

Any dispute arising out of or concerning

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con este Convenio será dirimida exclusiva y definitivamente mediante arbitraje. El arbitraje será realizado por tres (3) árbitros (salvo lo que se establece más adelante) de acuerdo con las Reglas de Conciliación y Arbitraje de la Cámara Internacional de Comercio (las "Reglas ICC"), o cualesquiera otras normas que sean acordadas por todas las Partes en la correspondiente disputa. Si la controversia se plantea entre dos Partes, o si todas las Partes en conflicto convienen en ser agrupadas en dos grupos basándose en una posición e interés común en la controversia, cada una de las Partes o grupos, según sea el caso, seleccionará a un árbitro de acuerdo con las Reglas ICC. Los árbitros así nombrados acordarán en treinta (30) días sobre el nombramiento de un tercer árbitro que servirá de Presidente. Si hay más de dos partes involucradas en la controversia y éstas no pueden acordar rápidamente en ser agrupados en dos grupos, entonces los tres árbitros, incluyendo al Presidente, serán designados por la Corte Internacional de Arbitraje de la Cámara Internacional de Comercio de acuerdo con las Reglas ICC, como si las partes no hubieran nombrado árbitros. No obstante, las controversias sometidas a arbitraje con relación a las Secciones 12.1(a) o 16.3, serán dirimidas por un solo árbitro seleccionado de acuerdo con las Reglas ICC. A menos que todas las partes en el arbitraje convengan lo contrario, todos los procedimientos de arbitraje según este Convenio serán realizados en la Ciudad de Nueva York (Estados Unidos de América). Cualquier decisión del tribunal de arbitraje (o del árbitro único) será firme y obligatoria para las partes en el arbitraje. La ejecución de cualquier decisión dictada por el tribunal de arbitraje (o del árbitro único) será acordada por cualquier tribunal competente sin revisión del fondo de la controversia.

this Agreement shall be settled exclusively and finally by arbitration. The arbitration shall be conducted by three (3) arbitrators (except as established below) in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the "ICC Rules"), or such other rules as may be agreed by all of the Parties to the corresponding dispute. If there are two Parties to the dispute, or if all Parties to the dispute agree to be grouped together into two groups on the basis of a common interest and position in the dispute, then each one of the Parties or groups, as the case may be, shall select an arbitrator in accordance with the ICC Rules. The arbitrators so nominated shall then agree within thirty (30) days on the nomination of a third arbitrator to serve as Chairman. If there are more than two parties to the dispute and they do not promptly agree to be grouped together into two groups, then all three arbitrators, including the Chairman, shall be selected by the International Court of Arbitration of the International Chamber of Commerce in accordance with the ICC Rules, as if the parties had failed to nominate arbitrators. Notwithstanding the foregoing, disputes submitted to arbitration related to Sections 12.1(a) or 16.3 shall be resolved by a single arbitrator selected in accordance with the ICC Rules. Unless all parties to the arbitration agree to the contrary, all arbitration proceedings under this Agreement shall be conducted in New York City (United States of America). Any decision of the arbitral tribunal (or the sole arbitrator) shall be final and binding upon the parties to the arbitration. Judgment for execution of any award rendered by the arbitral tribunal (or the sole arbitrator) shall be entered by any court of competent jurisdiction without review of the merits of the dispute.

(C-87; R-112)

(C-87)

Section 12 PDVSA Guaranty

Spanish (Original)

Claimant's Translation

Respondents' Translation

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Cualquier disputa que surja de o con respecto a esta Fianza será resuelta exclusiva y definitivamente por arbitraje. El arbitraje será realizado y resuelto en forma definitiva por tres (3) árbitros de acuerdo con las Reglas de Conciliación y Arbitraje de la Cámara de Comercio Internacional (las "Reglas ICC"), o aquellas otras reglas que puedan convenir todas las partes envueltas en la disputa. Si hubiere dos partes en la disputa correspondiente, o si todas las partes en disputa convienen en agruparse en dos grupos en base al interés común y posición común en la disputa, entonces cada parte o grupo, según sea el caso, seleccionará un árbitro de acuerdo con las Reglas ICC. Los árbitros así nombrados deberán convenir dentro del plazo de treinta (30) días en un tercer árbitro que servirá de Presidente. Si hubiere más de dos partes en disputa y las partes en disputa no acordaren prontamente agruparse en dos grupos, entonces los tres árbitros, incluyendo el Presidente serán seleccionados por la Corte Internacional de Arbitraje de la Cámara Internacional de Comercio de acuerdo con las Reglas ICC, tal como si ninguna de las partes hubiese designado árbitro. Salvo que las Partes convengan otra cosa, todos los procedimientos de arbitraje serán conducidos en la Ciudad de Nueva York (Estados Unidos de América). No obstante lo anterior, en el caso de que una disputa involucre tanto a la Fiadora como a la Filial Garantizada, el arbitraje

Any dispute arising out of or concerning this Guaranty shall be resolved exclusively and finally by arbitration. The arbitration shall be conducted and finally settled by three (3) arbitrators in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the "ICC Rules"), or such other rules which all the parties involved in the dispute may agree to. If there are two parties in the corresponding dispute, or if all parties to the dispute agree to be grouped together into two groups on the basis of their common interest and common position in the dispute, then each party or group, as the case may be, shall select an arbitrator in accordance with the ICC Rules. The arbitrators so nominated shall agree within a thirty (30) day time period on a third arbitrator who shall serve as President. If there are more than two parties to the dispute and the parties to the dispute do not promptly agree to be grouped into two groups, then the three arbitrators, including the President, shall be selected by the International Court of Arbitration of the International Chamber of Commerce in accordance with the ICC Rules, as if none of the parties had designated an arbitrator. Unless the parties agree otherwise, all arbitration proceedings shall be conducted in New York City (United States of America). Notwithstanding the foregoing, if a dispute involves the Guarantor and the Guaranteed Affiliate, the

Any dispute arising out of or concerning this Guaranty shall be resolved exclusively and finally by arbitration. The arbitration shall be conducted and finally settled by three (3) arbitrators in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the "ICC Rules"), or such other rules which all the parties involved in the dispute may agree to. If there are two parties in the corresponding dispute, or if all parties to the dispute agree to be grouped together into two groups on the basis of their common interest and common position in the dispute, then each party or group, as the case may be, shall select an arbitrator in accordance with the ICC Rules. The arbitrators so nominated shall agree within a thirty (30) day time period on a third arbitrator who shall serve as President. If there are more than two parties to the dispute and the parties to the dispute do not promptly agree to be grouped into two groups, then the three arbitrators, including the President, shall be selected by the International Court of Arbitration of the International Chamber of Commerce in accordance with the ICC Rules, as if none of the parties had designated an arbitrator. Unless the parties agree otherwise, all arbitration proceedings shall be conducted in New York City (United States of America). Notwithstanding the foregoing, if a dispute involves the Guarantor and the Guaranteed Affiliate, the

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será realizado de acuerdo con la Sección 18.2 del Convenio, como un procedimiento único, y la Fiadora y la Filial Garantizada tendrán conjuntamente los derechos de la Filial Garantizada en virtud de dicha Sección 18.2.

arbitration proceeding shall be performed in accordance with Section 18.2 of the Agreement, as the only proceeding, and the Guarantor and Guaranteed Affiliate shall jointly have the rights of the Guaranteed Affiliate in accordance with Section 18.2.

arbitration proceeding shall be performed in accordance with Section 18.2 of the Agreement, as a sole proceeding, and the Guarantor and Guaranteed Affiliate shall jointly have the rights of the Guaranteed Affiliate in accordance with Section 18.2.

(C-3; R-41)

(C-3)

(R-41)

342. In any event, the Tribunal observes that:

- Article 18.2 of the AA and Section 12 of the PDVSA Guaranty both provide that any dispute arising from those agreements shall be settled by arbitration in accordance with the ICC Rules;
- Under the principle of separability, well established internationally and in Venezuela as well (articles 7 and 25 of the Commercial Arbitration Law and acknowledged by the Constitutional Chamber of the Supreme Court of Justice), the validity and effects of the arbitration clauses at issue are independent from the validity and effects of the contracts in which they are inserted; and
- Article 16.1(b) of the AA itself expressly provides that the indemnity obligation under Clause XV (the determination of which requires arbitration) survives any termination of the AA.

343. Further, in addition to being recognized in Venezuelan law, the principle of severability is also recognized in New York law.

344. For the above reasons, the Tribunal concludes that it has jurisdiction over this dispute.

K.III. Procedural Requirements Triggering Respondents' Duty to Indemnify Claimant

K.III.1. Notice pursuant to Article 15.1(a) Association Agreement

K.III.1.a. Arguments by Claimant

345. The timing of Claimant's notices to PDVSA-CN has become an issue in this arbitration. Article 15.1(a) of the AA requires that "*in the event that one of the Foreign Parties determines that a Discriminatory Measure has occurred*

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which may result in a Materially Adverse Impact, such Foreign Party shall immediately provide notice of the Discriminatory Measure to Lagoven CN.”

Claimant maintains that it met its burden by providing Respondents two succeeding **Notices of Discriminatory Measure**, to enforce PDVSA-CN’s indemnity obligation. (C-III ¶ 194). Claimant provides a timeline detailing how it notified Respondents that it had determined that the measures at issue in this arbitration constituted Discriminatory Measures that would likely cause a Materially Adverse Impact on Claimant’s Net Cash Flows, within the meaning of Clause XV of the AA. (C-III ¶¶ 163 – 167; 232 - 236 partially quoted):

- On **22 June 2007**, Mobil CN issued its first notice to both PDVSA-CN and PDVSA that it regarded the four Measures at issue [(i) the anticipated expropriation of Mobil CN’s interests in the Project on **27 June 2007**, (ii) the repudiation of the **RRA** and the imposition of the extraction tax; (iii) the increase in the applicable income tax rate; and (iv) the imposition of production and export curtailments] to be Discriminatory Measures within the meaning of the AA.
- On **25 June 2007**, Claimant sent a **Notice of Discriminatory Measure** to both PDVSA-CN and PDVSA, demanding prompt payment of the indemnification according to the AA.
- On **27 June 2007**, Claimant delivered a **Notice of Discriminatory Measure** to PDVSA-CN and PDVSA stating that Claimant’s interests in the Project had been expropriated by the Government through the **Decree-Law 5200**. Claimant again demanded prompt payment of the indemnification. As of **27 September 2007** – 90 days after their issuance, Respondents had not replied to any of these requests.
- On **10 October 2007**, Claimant, through a written **Demand for Performance**, Under the PDVSA Guaranty notified PDVSA that PDVSA-CN was in breach of the AA and demanded PDVSA’s prompt performance of its obligations under the PDVSA Guaranty.

346. Claimant argues that it issued the **first notice** immediately after Claimant concluded that the measures may result in a Materially Adverse Impact for FY 2007 – 2035. (C-III ¶ 233). Claimant issued the **second notice**, the **Notice of Discriminatory Measure**, immediately after Claimant concluded that the measures would have a Materially Adverse Impact. (C-III ¶ 234). Finally, Claimant issued the **third notice** once it became clear that the Venezuelan Government would not compensate Claimant for the expropriation. (C-III ¶ 235).

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347. Both Parties provided the Tribunal with extensive analysis concerning the individual terms within Clause XV. With respect to the definition of “*occurred*”, Claimant explains as follows:

42. In principle, a determination that a Discriminatory Measure “has occurred” implies a determination that the measure has been taken, and that the taking of it has become public or known to the Foreign Party. A measure will normally “occur” when it is officially adopted and published, unless the effects that make it a Discriminatory Measure under the definition are postponed until a later date or are subject to condition. In such cases, the measure will not “occur” until the postponement expires or the condition is fulfilled and those effects take place. (C-V ¶¶ 41 - 42, citations omitted).

348. The various effects of Decree-Law 5200 did not occur until later specified dates. The take-over of operations was to occur not later than **30 April 2007**, and the “*expropriation or seizure of the foreign participants’ interests*” was to take place four months later, on **27 June 2007**. (C-V ¶ 43). Claimant argues that, pursuant to Article 2 of the Law on Effects, the total expropriation occurred on **27 June 2007**. (C-V ¶ 44).

349. The Article 15.1(a) “*determination*” serves a double function: (i) it is a pre-condition to the requirement to give the first notice; and (ii) it starts the running of the period (described by the adverb “*immediately*”) within which the first notice is to be given. (C-V ¶ 41). Claimant explains that, by the express terms of Article 15.1(a), the requirement to give the first notice depends not on the actual occurrence of the measure, but on Claimant’s *determination* that a Discriminatory Measure that may result in a Materially Adverse Impact has occurred. (C-V ¶ 50, partially quoted, emphasis added). The Article 15.1(a) *determination*, thus, goes beyond the knowledge that a measure has occurred and requires a legal and financial analysis to establish whether the measure meets the definition of a “*Discriminatory Measure*.” (C-IV ¶¶ 41 – 45; 50 – 51). Respondents’ argument that the first notice must be given once Claimant “*objectively determined*” that the said event had occurred reads additional language into Article 15.1(a), thereby requiring the issuance of the notices once the determinations “*could have been made*”

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– a requirement not found in the AA. Rather, the timing of the first notice is triggered when the determination “*is actually made.*” (C-V ¶ 52).

350. Claimant argues that it was not required by either the AA, the principle of good faith, or otherwise to make any determination regarding the expropriation carried out by Decree-Law 5200 until after **27 June 2007**. Claimant argues that it acted in good faith by sending the first notice 5 days prior, on **22 June 2007**, when it became clear that the expropriation would occur on **27 June 2007**.
351. Claimant does not contend that it had the right to withhold its determinations and insists that its determinations were made in good faith. (C-V ¶ 53). The test of whether the determination was timely is measured by the legal standard of good faith, which takes all relevant circumstances into account. Such circumstances include (1) the threats Claimant received from the Government and PDVSA and (2) the hope that negotiations with the Government could avoid arbitration. (C-V ¶ 53).
352. The notification procedures were linked to the overall objective of mitigating damages. (C-IV ¶¶ 99, 104). Under this procedure, PDVSA-CN would have had the “*opportunity to use its best offices to broker a negotiated solution to any dispute between the Venezuelan Government and the Foreign Party arising out of a Discriminatory Measure.*” (C-IV ¶ 104). This intent is confirmed by the Parties’ history. Although Respondents were still independent when the AA was signed, both had direct access to high Government officials and were well positioned to negotiate with them. (C-IV ¶ 104). After 1998, however, Claimant had no reason to expect that Respondents could act independently to help reach an amicable settlement. (C-IV ¶¶ 105 – 106). In light of this, issuing the notices under the AA could have been counter-productive, placing Claimant on a collision course with the Government and the Respondents and impacting Claimant’s ability to remain in Venezuela. (C-IV ¶ 8). Claimant’s interpretation was reasonable, as PDVSA-CN had even urged Claimant not to pursue legal remedies

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against the Royalty Measures or the income-tax increase, arguing that to do so would only make matters worse for Claimant. (C-IV ¶ 106).

353. A premature notice would have been detrimental to settlement negotiations and would have thwarted any mitigation of damages:

49. [...] once the second notice was given, Mobil CN was required to pursue a legal action against the Government, for the purpose of mitigating damages. But in light of the threats from the Government and PDVSA against arbitration and Mobil's businesses in Venezuela, it became clear to Mobil CN that settlement discussions with the Government offered the only realistic way to mitigate damages. Making early determinations leading to an early action against the Government would have aggravated the disputes and jeopardized the chances of a negotiated settlement. (C-V ¶ 49, citation omitted).

354. Respondents' argument that the purpose of the notification procedure was to avoid arbitration is preposterous in light of Respondents' conduct. Their attempt to avoid arbitration was based on threats against Claimant's interests, as well as warnings that Respondents would not comply with an award. Arbitration, however, could have been avoided if Respondents had concurred with the notices and cooperated as intended under the AA. (C-V ¶ 54).

355. Claimant's determination that the measures may result in a Materially Adverse Impact was inextricably bound with the attempt to negotiate an amicable settlement with the Venezuelan government. When these negotiations failed, Claimant made the determination that the Materially Adverse Impact would occur and issued the appropriate notices. (C-IV ¶¶ 110 – 111). Claimant would not have incurred any Materially Adverse Impact for FYs 2007 – 2035 if the settlements had been successful, making it inappropriate to make determinations about the impact of those measures prior to the failure of the negotiations. (C-V ¶ 48).

356. Even if the notices were untimely, however, Respondents did not rely on Claimant's alleged failure to provide notice. (C-IV ¶ 108). Even an alleged "*business judgment*" not to make a determination could not have generated

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reliance or detriment, because such judgment was not communicated to the Respondents. (C-VI ¶ 40). Further, Respondents “*have not alleged any damage or other prejudice resulting from Mobil CN’s alleged failure to provide timely notices or to initiate what the Respondents consider the required legal actions.*” (C-IV ¶¶ 101, 108). Claimant is not asserting any damages for years prior to 2007, when it issued the **Notices of Discriminatory Measures**. Rather, Claimant is only seeking damages for those years after the formal notice was given. (C-IV ¶ 101). As an aside, Claimant states that, even if Claimant had issued the notices earlier, it would not have been entitled to any indemnity for FYs 2004 – 2006 under the AA. (C-VI ¶ 11).

357. It is not relevant that the June 2007 notices did not state that the measures preceding **Decree-Law 5200** were expropriations. The AA does not require that the notices explain why a measure qualifies as a Discriminatory Measure. (C-VI ¶ 32).
358. Respondent PDVSA-CN’s obligation becomes fully enforceable upon Claimant’s issuance of the notices. (C-III ¶ 197). Claimant was permitted to commence arbitration proceedings in accordance with Article 18.2 of the Arbitration Agreement because Respondents failed to concur that a Discriminatory Measure had occurred within 90 days of receipt of the **Notice of Discriminatory Measure**. Claimant maintains that this failure to concur demonstrates Respondents’ bad faith, as PDVSA-CN had acknowledged the fact of the Discriminatory Measure of expropriation to third parties. (C-III ¶¶ 199 – 200, 244 - 247; C-V ¶ 54).
359. Claimant further states that the notices constituted mere “*formalities.*” (C-III ¶ 236). Respondents were already on notice that the Discriminatory Measures had occurred/were occurring. Until June 2007, Respondent PDVSA-CN was in the same position as Claimant: each had a 41 2/3% interest in the Project and being subjected to the same governmental measures. Additionally, the President of PDVSA-CN concurrently served as

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the Minister of Energy and “*was one of the chief architects of the measures.*” (C-III ¶ 236). Further, Respondents conceded that the President of PDVSA knew that Claimant had formally protested all of the measures at issue and sought an amicable resolution to those disputes with the Government. (C-IV ¶ 109). The evidence shows that the Respondents and the Government acted in concert, that there was no realistic chance that the Respondents would take Claimant’s side and convince the Government to undo the measures, and that the Respondents suffered no damage as a result of the timing of the notices. (C-V ¶ 54; C-VI ¶¶ 11-12).

360. Under Venezuelan law, forfeiture must be clearly established as a sanction in the agreement. (C-IV ¶ 101, partially quoted).

If the parties to the AA had intended to impose a conventional forfeiture of rights for failure to give notice, they would have provided (i) an express reference to forfeiture of the right, (ii) a more precise measure of time within which the notices were to be given and (iii) an objective standard to determine the starting point of such period. (C-IV ¶¶ 98 - 99).

361. While Claimant maintains that it provided timely notice, Claimant argues that the consequence of an untimely notification under the AA cannot have been the forfeiture of a right. Respondents’ interpretation that the AA imposes “*the draconian – but unstated – sanction of depriving a party of a fundamental substantive right for that party’s alleged delay in complying with procedural requirements*” finds no support in the contract itself or Venezuelan law. (C-IV ¶ 101). Claimant explains that, under Article 23.4(a) of the AA, a waiver must be in written form and must be signed by an authorized officer. In other portions of the AA where the failure to comply with certain requirements would result in a forfeiture of rights, the Parties expressly provided for such forfeiture. (C-IV ¶ 100, citing ¶¶ 5.2(a), 5.2(c), 6.2(a), and 6.2(c) AA).
362. Respondents’ loss of rights theory and the new theory that forfeiture results from applying the doctrine of *venire contra factum proprium* are without merit for the following reasons:

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8. *First*, there is no prior act; silence is not an act under Venezuelan law. *Second*, providing notice does not contradict any prior (non-existent) act. *Third*, the Respondents have not alleged or proven that they relied in any way on MCN's silence. *Fourth*, the Respondents have demonstrated no detriment as a result of their (non-existent) reliance. (C-V ¶ 8, citations omitted).
363. Further, not only is Article 17.2(c) not in support of Respondents' "*caducidad*" argument, but Respondents' new theory that the notices "*trigger*" their liability is inconsistent with their *caducidad* theory. The Respondents cannot claim at the same time that the obligation to indemnify arises only after the notices are sent (their trigger theory) and that the right to indemnification exists but is lost if the notices are not sent (their *caducidad*/forfeiture theory). (C-VI ¶ 40 n. 91).
364. Finally, Claimant explains that the remedy for a genuine breach of the notice requirements under Venezuelan law would be for the Tribunal to award Respondents a credit against the indemnification owed under Clause XV. (C-IV ¶ 101). Such a remedy would be inappropriate here, as Respondents have suffered no prejudice as a result of any alleged breach and Claimant only seeks damages for the years 2007 and onwards. (C-IV ¶ 101).

K.III.1.b Arguments by Respondents

365. The Parties do not dispute the fact that meeting the notice requirements of Article 15.1(a) is required to trigger the indemnity. (R-IV ¶ 36). Claimant understood both the existence and the significance of the requirements of Article 15.1(a), and even stated in London that these requirements had to be met "*to trigger*" the indemnity obligation. (R-IV ¶ 30; R-V ¶ 21; R. Closing Slides 38, 43). Respondents maintain that Claimant failed to immediately provide them the notice of a Discriminatory Measure required under Article 15 and is, therefore, precluded from asserting any claims against PDVSA and PDVSA-CN based on those Measures. (R-I ¶¶ 36-37; R. Closing Slide 43). Respondents characterize the inadequacy of the notices provided by Claimant as follows:

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71. On June 22, 2007, Claimant sought to provide the first of the two required immediate notices under Article 15.1(a), of the following Discriminatory Actions that may result in Material Adverse Impact: (i) the royalty measure taken approximately 32 months earlier, in October of 2004; (ii) the decision not to allow project expansion on terms desired by Claimant, also taken in 2004; (iii) the imposition of the extraction tax in May 2006, more than a full year prior to the date of this purported notice to PDVSA-CN; (iv) the increase in the income tax, which was enacted in September 2006 and had been announced as early as June 2005, when Claimant first notified the Government of a potential investment dispute based on that measure; (v) the production curtailments in October 2006; (vi) the reduction in exports in January 2007; and (vii) the ‘expropriation’ by virtue of Decree-Law 5200, which had been issued almost four months earlier on February 26, 2007 and in respect of which Claimant had officially notified the Government of a claim within one week.
72. Realizing that Article 15.1(a) of the AA required a second immediate notice whenever it determined “that it has actually suffered a Material Adverse Impact,” Claimant, three days after its June 22, 2007 “immediate” notice that a “Discriminatory Measure which may lead to a Material Adverse Impact has occurred,” sent PDVSA-CN another notice under Article 15.1(a) of the AA, this time purporting to inform PDVSA-CN that Claimant had actually suffered a Material Adverse Impact as a result of all of the actions and measures taken since 2004, except for the so-called “expropriation” effected by Decree-Law 5200. (R-II ¶¶ 71-72, partially quoted, emphasis in original).
366. With respect to Claimant’s argument that it had not made the “*determination*” triggering its obligation to issue the notices, Respondents state that such an interpretation renders the immediate notice requirements meaningless and finds no support in the record. (R-III ¶ 76; R-IV ¶ 28; R. Closing Slide 34). Claimant knew, at the moment of the royalty rate increase from 1% to 16 2/3%, that that increase would result in a more than 5% impact on Net Cash Flow. (R. Closing Slides 35, 37). Respondents assert that Claimant had made the determination that the measures would result in a Materially Adverse Impact if not reversed, but that they had also determined that notice to PDVSA-CN would not serve Claimant’s purpose because the Parties’ interests were no longer aligned. (R-III ¶ 80). Regardless of Claimant’s intentions, however, Article 15.1(a) required Claimant “*to provide the requisite notices immediately*” and Claimant failed to do so. (R-III ¶ 81).

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367. Compliance with the notice requirements must be measured using an objective standard, focusing on knowledge of the occurrence of an event “*that may lead to*” a Material Adverse Impact. (R-V ¶ 18, R. Closing Slide 33). Article 15.1(a) focuses on knowledge of the occurrence of an event “*that may lead to*” a Material Adverse Impact. The term “*occurred*” should be interpreted in accordance with its plain meaning, as a synonym for “*to happen*” or “*to take place.*”
368. Respondents also argue that the standard enunciated by Claimant whereby a measure “*occurs*” when it was taken or publicly announced would require the Tribunal to dismiss all of the claims. (R-V ¶ 23). Even assuming that each measure was “*discriminatory*”, there was no doubt that as of the date of publication of each measure, each was one that “*may lead to*” a Material Adverse Impact. (R-V ¶ 24).
369. Respondents further argue that Claimant conceded that the alleged Discriminatory Measures had a Material Adverse Impact in FY 2005 and 2006. Claimant’s witnesses have admitted that its notices to Respondents were late. Jim Massey’s sworn affidavit before the High Court of Justice in London and before this Tribunal stated that the procedural requirements triggering the indemnity had not been met, thereby also conceding that the notice requirements were a necessary pre-requisite for an indemnity. (R-III ¶ 67; R-II ¶ 75; R. Closing Slide 38).
370. Claimant’s explanation that its failure to provide notice was part of a strategy to reach an agreement with the Government is incredible. (R-II ¶ 76 - 78). Claimant’s statement that it held out until the last minute in the hopes of a resolution is premised on the fact that Claimant had already made the determination under Article 15.1(a), but had chosen not to act. (R-III ¶ 82). The very notion of waiting until “*all hope has vanished*” is irreconcilable with the purpose of Article 15.1(a), which is to provide a timely opportunity to resolve the matter before hope has vanished. (R-IV ¶ 30; R. Closing Slide 34). The “*last minute*” passed in October 2004, when Claimant was told that

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the elimination of the 1% royalty holiday was “*non-negotiable*.” (R-III ¶ 84).

371. Respondents do not concede that there have been negotiations with the Government about all of the measures alleged here (especially the Royalty Measure) or that such have been “*ongoing*.” (R-IV ¶ 88). Instead, with respect to the Royalty Measure, Respondents state that the notion that negotiations were “*ongoing*” – occurring throughout the three years since the first measure was taken, defies common sense and is “*belied by Claimant’s own testimony*” that, by early 2005, there was no doubt that there would be no ongoing negotiations regarding the Royalty Measure. (R-IV ¶ 88).

372. With respect to the impact of settlement discussions, Respondents state as follows:

87. [...] the existence of ongoing settlement discussions has no bearing whatsoever on whether an event has “occurred which may result in a Material Adverse Impact,” as the event still would have occurred and the possibility of it resulting in a Material Adverse Impact if the negotiations fail will still have existed. (R-IV ¶ 87, citations omitted).

373. Claimant knew that an event had occurred which, if not reversed, may and in effect would lead to a material adverse impact. (R. Closing Slide 39 – 40, 42). Rather than send notices to either of the Respondents, Claimant sent notices to officials and ministries in the Venezuelan Government. Respondents cite 12 such communications, from 2 February 2005 to 4 May 2007 where Claimant complains of measures taken and yet to be taken. (R-II ¶ 69). It was not until late June 2007 that Claimant sent any notices to the Respondents. (R-I ¶ 36). Claimant knew that notices of Discriminatory Measures had to be given to PDVSA-CN and that the notices to the Government were not the same as notices to PDVSA-CN. (R-IV ¶ 3, partially quoted). Further, Respondents state that “*Claimant’s conduct over the course of nearly three years in sending multiple letters to the Government detailing every conceivable violation it believed to have occurred and never once mentioning indemnity under the AA to anyone,*

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either orally or in writing, shows that Claimant never believed it had a valid claim for indemnity against PDVSA-CN, and allowed Respondents to reasonably conclude the same.” (R-V ¶ 25). To borrow Respondents’ words:

26. Claimant’s argument that it did not mention a claim for indemnity against PDVSA-CN because it was allegedly told that arbitration against the Government would not be helpful in negotiations is difficult to fathom. Even if Claimant believed that the Government would take offense to arbitration proceedings, that obviously did not deter Claimant from sending thirteen formal notices to the Government cataloguing alleged violations and purporting to preserve its rights against the Government. Against this history of overzealous conduct in protecting and preserving legal positions, it is hard to imagine that Claimant would feel reluctant to even mention to PDVSA-CN (or anyone else) the possibility that it also might have an indemnity claim against PDVSA-CN under the AA. (R-V ¶ 26).

374. As Mr. Cutt stated in New York, Claimant made a business decision not to meet the requirements of Article 15.1(a). (R-V ¶ 22). Claimant determined long before the notices that an event occurred that may lead to a Material Adverse Impact, but Claimant decided against pursuing indemnity under the AA. (R-IV ¶ 33). The provision, however, required giving notice immediately upon the determination of the occurrence of the event, not after all hope had vanished. (R-IV ¶ 31, partially quoted, emphasis in original). Respondents argue that Claimant’s failure to notify has both legal and evidentiary consequences. (R-III ¶ 65).

375. Of particular relevance are the Venezuelan legal principles/norms of “*caducidad*” (forfeiture) and “*carga*” (burden). According to these, the Claimant must timely satisfy its self-interested burden (“*carga*”) of sending the appropriate notices or suffer the irreparable loss of the right (“*caducidad*”) to the indemnity. As a consequence of Claimant’s failure to meet its burden of immediately notifying Respondents pursuant to Article 15.1(a), Respondents argue that Claimant has forfeited its right to compensation under the AA. (R-II ¶¶ 80 – 86).

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376. Respondents argue that it is immaterial that the AA did not expressly provide for *caducidad* in the event of a failure to satisfy the pre-requisites to an indemnity claim. (R-III ¶ 63; R-V ¶ 20). Respondents also state that there is no support in Venezuelan law for Claimant's theory that *caducidad* does not apply unless the contract specifically provides for it. (R-III ¶ 64). Rather, Respondents explain that "*if a party is required to undertake certain actions to conserve a right but fails to do so, the remedy is caducidad, whether or not that sanction is expressly set forth in the contract – especially when the parties emphasize the importance of immediate action.*" (R-III ¶ 64, partially quoted). The term "*immediate*" has been defined by the case *Tierras Carreteras y Puentes S.A. (TICAPSA) contra el Ministro de Hacienda*, in which the Supreme Tribunal of Justice held that the term means "*without delay.*" (R-III ¶ 73).
377. In response to Claimant's contractual intent argument, Respondents distinguish Articles 5.2 - 6.2 of the AA, highlighted by Claimant. Those provisions expressly provide strict forfeiture procedures because those provisions are of a different nature, addressing the progression of the Project from phase to phase. (R-III ¶ 68). Article 17.2 of the AA expressly states that a failure to notify will not result in a forfeiture of a right to an indemnity when the indemnitor otherwise learned of the action and was not prejudiced by the failure to notify. (R-III ¶ 70; R-IV ¶ 35). Thus, for the instance where failure to notify would not release the indemnitor from its obligations, the Parties so contracted. (R-III ¶ 70). Article 15.1(a) of the AA, however, had no such provisions, despite the Parties' demonstrated ability to create such. Absent such saving provisions, the normal rules of *caducidad* apply. (R-IV ¶ 35).
378. Respondents also assert that Claimant is precluded from seeking indemnity by virtue of principles of good faith, which are integral to Venezuelan law. By "*lying in wait*", Claimant robbed Respondents of the opportunity to address the measures with the Venezuelan Government and their possible

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consequences under the AA. (R-III ¶¶ 90 - 91). Claimant misled Respondents into believing that Claimant did not consider any of the governmental measures to be Discriminatory Measures under the AA. (R-III ¶¶ 91-92). Claimant's attempt to take a position that is inconsistent with its own prior conduct is an act of bad faith, and is inconsistent with principles of loyalty and honesty. (R-III ¶¶ 93 - 98). Finding that Claimant is precluded by virtue of principles of good faith has the same effect as if the Claimant had waived its rights by failing to notify, the difference being that "*waiver is premised on the will to abandon a subjective right, whereas the rule venire contra factum proprium non valet is applied against someone to prevent him from exercising a right contradictory to prior conduct and even though that person did not manifest his intention to waive the right.*" (R-III ¶ 99).

379. Respondents counter Claimant's closing argument, stating that the doctrine of *venire contra factum proprium*, as well as the general principle that the Parties' conduct is relevant in interpreting a contract, is relevant here. Not only did Claimant fail to meet the contractual requirements to trigger the indemnity, but it also made a "*business decision*" not to seek an indemnity from PDVSA-CN – choosing instead to deal directly with the Government. (R-IV ¶ 37; R-V ¶ 22). As an evidentiary matter, Respondents submit that Claimant's failure to notify should be interpreted as an indication that Claimant believed a dispute existed with the Venezuelan Government, not with PDVSA-CN. Claimant even claimed *force majeure* on behalf of PDVSA-CN in response to the production curtailments in 2007. (R-IV ¶ 3). Respondents characterize the current matter as "*the belated attempt to manufacture a cause of action against Respondents, paving the way for the attachment of assets that could not be achieved against the Government.*" (R-II ¶ 86). The thirteen notices Claimant sent to the Government, along with their failure to mention any indemnity under the AA, should be viewed in this light. (R-IV ¶ 37).

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380. In response to Claimant's argument that Respondents were already "on notice" due to the issuance of the notices to the Government, Respondents point out that it is irrelevant that PDVSA had become aligned with the Government. Article 15.1(a) does not depend on any political analysis of who was or was not aligned with whom. (R-IV ¶ 32). Likewise, contrary to Claimant's assertion, the requirements of 15.1(a) do not depend on whether Claimant believed that the notices would have resulted in a reversal of the measures in question. (R-IV ¶ 32).

K.III.1.c. The Tribunal

381. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties' Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-I	¶¶ 76 – 78, 83
C-III	¶¶ 163 – 167, 194 – 200, 232 – 236, 244 – 247
C-IV	¶¶ 15, 98 – 111
R-I	¶¶ 36 – 37
R-II	¶¶ 64 – 86
R-III	¶¶ 58 – 85, 89 – 108
TOR	¶ 5.2.1

Charts:

Submission	Pinpoint
R-III	¶ 77

Exhibits:

Exhibit	Document Name
C-2	Association Agreement Article 15.1(a)
C-5	22 June 2007 Notice of Discriminatory Actions that May Result in a Materially Adverse Impact in Fiscal Year 2007 and Future Fiscal Years [<i>Notificación de Medidas Discriminatorias que Pueden Resultar en Impacto Sustancialmente Adverso en el Año Fiscal 2007 y Años Fiscales Futuros</i>]
C-6	25 June 2007 Notice of Discriminatory Actions that have caused a Materially Adverse Impact in Fiscal Year 2007 and Future Fiscal Years [<i>Notificación de Medidas Discriminatorias que han Causado un Impacto Sustancialmente Adverso en el Año Fiscal 2007 y Años</i>]

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- Fiscales Futuros*
- C-7 27 June 2007 Notice of Discriminatory Actions that have caused a Materially Adverse Impact in Fiscal Year 2007 and Future Fiscal Years [*Notificación de Medidas Discriminatorias que han Causado un Impacto Sustancialmente Adverso en el Año Fiscal 2007 y Años Fiscales Futuros*]
- C-9 25 July 2007 Letter from Steven Reisman of Curtis-Mallet Prevost Colt & Mosle LLP (on behalf of PDVSA Cerro Negro S.A.) to James Garden, Esq. of Carter Ledyard & Millburn LLP.
- C-10 10 October 2007 Demand for Performance under the PDVSA Guaranty from Mobil Cerro Negro, Ltd. to Petróleos de Venezuela S.A. (PDVSA)
- C-22 Tr. of “Declarations of the Minister of Popular Power for Energy and Petroleum and President of PDVSA, Rafael Ramírez, on the ExxonMobil - PDVSA Arbitration Case” [*Declaraciones del Ministro del Poder Popular para la Energía y Petróleo y Presidente de PDVSA, Rafael Ramírez, sobre el caso Arbitraje Exxon Mobil-PDVSA*] dated 8 February 2008, available at www.pdvsa.com at p. 2
- C-42 Testimony of Mark Ward (26 September 2008) at ¶¶ 23 – 28
- Ex. 11 Minutes of 1 December 2004 Meeting of the Board of Directors of Petrolera Cerro Negro pp. 47 - 48
- C-43 Testimony of Tim Cutt (26 September 2008) at ¶¶ 15, 17, 54, 56 – 60
- C-44 Declaration of Professor Eugenio Hernández-Bretón (27 September 2008) at ¶¶ 33 – 46, 78 – 88
- C-47 Expert Report of R. Dean Graves of Alvarez & Marsal, Dispute Analysis & Forensic Services, LLC, on 2007 ICC Damages Payable (26 September 2008) p. 6
- Ex. 5 2004-2006 Damages Calculation
- C-87 Association Agreement Clause I defining “Governmental Measures”, Articles 2.1(a), 5.2(a), 5.2(c), 6.2(a), 15.1(a), 15.1(b), 23.4(a)
- C-99 Decree-Law 5200 Art. 3 – 5
- C-104 Law on Effects Art. 2
- C-134 Venezuelan Civil Code Art. 1160
- C-157 Letter dated 1 August 2005 from Mobil Cerro Negro to Ministry of Energy and Mines
- C-158 Letter dated 26 May 2006 from Mobil Cerro Negro to Ministry of Relations, Ministry of Energy and Mines and Prosecutor General
- C-215 Second Declaration of Professor Eugenio Hernández-Bretón (14 May 2009) at ¶¶ 45, 55 – 57
- C-221 Reply Expert Report of Sarah A. Emerson of Energy Security Analysis, Inc. p. 4
- C-223 Transcript of Bernard Mommer Interview (12 February 2008) p. 6
- C-242 Minutes of PDVSA-CN Shareholders’ Meetings held on 27 October 2003 and 4 March 2005 p. 5
- C-251 REAL ACADEMIA ESPAÑOLA, DICCIONARIO DE LA LENGUA ESPAÑOLA (2d ed. 2001)
- C-252 *Aló Presidente*, No. 177 (11 January 2004) at p. 2
- C-253 Tr. of 2 December 2008 Hearing pp. 135 – 136, 167

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- C-254 Letter from Mobil Cerro Negro, Ltd. to Ministry of Relations, Ministry of Energy and Petroleum, and Prosecutor General (20 June 2005)
- C-255 PDVSA biography, Eulogio del Pino, from www.pdvs.com (last accessed on 14 May 2009)
- C-274 Mélich-Orsini, *La Prescripción Extintiva y la Caducidad* at ¶¶ 149,150, 158, 163, 166
- C-277 Report of Operadora Cerro Negro to the Minister of Energy on Royalties and Extraction Tax (27 September 2006)
- C-279 Judgment, Supreme Court, *Corporación Venezolana del Fomento v. C.A. General de Seguros y Reaseguros et al.* (17 October 1967) at 54
- C-280 Judgment, First Superior Court, *Instalaciones Radio Eléctricas v. Seguros Orinoco, C.A.* (22 September 1975) at 16
- C-281 Jud Judgment, Sixth Superior Court, *Talleres de Diamantes Guayana, C.A. v. Adriática Venezolana de Seguros, C.A.* (24 February 1976) at 123
- C-291 José Mélich-Orsini, *El Pago* 151 (2000)
- R-2 1943 Hydrocarbons Law, Official Gazette No. 31, published March 13, 1943 [*Ley de Hidrocarburos*] Art. 41
- R-4 First Affidavit of Bernard Mommer (11 February 2008) at ¶ 4
- R-35 Tr. of 2 December 2008 Hearing pp. 110 – 113, 127-135
- R-68 Legal Expert Opinion of Professor José Mélich-Orsini (10 February 2009) at ¶¶ 14, 24 – 30
- App. 16 José Mélich-Orsini, *The Statute of Limitations and Caducidad*, Academia de Ciencias Políticas y Sociales, Serie Estudios, N° 58, Caracas, 2002 ¶¶ 149, 152
- App. 18 Humberto Cuenca, *Civil Procedure Law*, Tomo I, Caracas, 2000 (Ediciones de la Biblioteca de la Universidad Central de Venezuela 2000) p. 273 – 274
- App. 19 Judgment, Political-Administrative Chamber of the Supreme Tribunal of Justice, *Tierras Carreteras y Puentes, S.A. (TICAPSA) v. Ministro de Hacienda* (December 12, 2006) [*Sentencia, Sala Político-Administrativa del Tribunal Supremo de Justicia, Tierras Carreteras y Puentes S.A. (TICAPSA) contra el Ministro de Hacienda (12 de diciembre de 2006)*]
- R-69 Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (10 February 2009) at ¶¶ 11, 40 – 62
- App. 23 Judgment, Political-Administrative Chamber of the Supreme Tribunal of Justice, *Tierras Carreteras y Puentes S.A. (TICAPSA) contra el Ministro de Hacienda* (December 12, 2006) [*Sentencia, Sala Político-Administrativa del Tribunal Supremo de Justicia, Tierras Carreteras y Puentes S.A. (TICAPSA) contra el Ministro de Hacienda (12 de diciembre de 2006)*] at 4, 12
- App. 24 José Mélich-Orsini, *The Statute of Limitations and Caducidad*, Academia de Ciencias Políticas y Sociales, Serie Estudios, N° 58, Caracas, 2002 ¶ 156
- App. 25 Arminio Borjas, *Commentary on the Venezuelan Civil Procedure Code*, Tomo III, Caracas, 1964 p. 115 – 116
- App. 26 Judgment, Accidental Federal Chamber of the former Federal and Cassation Court, *Aldo Caruso v. Junta Directiva del Hipódromo*

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- Nacional y la Nación* (March 6, 1951) [*Sentencia, Sala Federal Accidental de la Corte Federal y de Casación, Aldo Caruso vs. Junta Directiva del Hipódromo Nacional y la Nación (6 de marzo de 1951)*] p. 141
- App. 27 José Luis Aguilar Gorrondona, *Civil Law-Persons*, *Manuales de Derecho*, Universidad Católica Andrés Bello, Editorial Arte, Caracas, 1984 pp. 55 – 56
- R-71 Letter from Operadora Cerro Negro, S.A. to Chalmette Refining, L.L.C. (10 January 2007)
- R-72 Association Oil Supply Agreement (Chalmette Supply Contract), (1 November 1997)
- R-75 Letter from Mark Ward, President of Mobil Cerro Negro, Ltd. and Mobil Cerro Negro Holdings, Ltd. to Alí Rodríguez, Minister of Foreign Affairs, Rafael Ramírez, the Minister of Energy and Petroleum and Marisol Plaza, Attorney General (2 February 2005)
- R-76 Letter from Mark Ward, Mobil Cerro Negro, Ltd., Mobil Cerro Negro Holdings, Ltd. and Operadora Cerro Negro, S.A. to Alí Rodríguez, Minister of Foreign Affairs, Rafael Ramírez, Minister of Energy and Mines and Marisol Plaza, Attorney General (2 June 2005)
- R-77 Letter from Mark Ward, President of Mobil Cerro Negro, Ltd., Mobil Cerro Negro Holdings, Ltd. and Operadora Cerro Negro, S.A. to Alí Rodríguez, Minister of Foreign Affairs, Rafael Ramírez, Minister of Energy and Petroleum and Marisol Plaza, Attorney General (20 June, 2005)
- R-78 Letter from Mark Ward, Mobil Cerro Negro, Ltd. to Rafael Ramírez, Minister of Energy and Petroleum (1 August 2005)
- R-79 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. and Mobil Cerro Negro Holdings, Ltd. and Representative of Venezuela Holdings, B.V. to Bernard Mommer, Vice Minister of Hydrocarbons (16 October 2006)
- R-80 Letter from Timothy Cutt, Operadora Cerro Negro, S.A. to Rafael Ramírez, Minister of Energy and Petroleum (2 November 2006)
- R-81 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. and Mobil Cerro Negro Holdings, Ltd. and Representative of Venezuela Holdings, B.V. to Nicolás Maduro, Minister of Foreign Affairs, Rafael Ramírez, Minister of Energy and Petroleum and Gladys María Gutiérrez, Attorney General (20 November 2006)
- R-82 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. to Rafael Ramírez, Minister of Energy and Petroleum (12 January 2007)
- R-83 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. and Mobil Cerro Negro Holdings, Ltd. and Representative of Venezuela Holdings, B.V. to Nicolás Maduro, Minister of Foreign Affairs, Rafael Ramírez, Minister of Energy and Mines and Gladys María Gutiérrez, Attorney General (5 March 2007)
- R-84 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. and Mobil Cerro Negro Holdings, Ltd. and Representative of Venezuela Holdings, B.V. to Nicolás Maduro, Minister of Foreign Affairs, Rafael Ramírez, Minister of Energy and Mines and Gladys María Gutiérrez, Attorney General (8 March 2007)

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- R-85 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. and Mobil Cerro Negro Holding, Ltd. and Representative of Operadora Cerro Negro, C.A., Venezuela Holdings B.V., Mobil Corporation, Agencia Operadora La Ceiba, C.A., Mobil Venezolana de Petróleos Holdings, Inc., and Mobil Venezolana de Petróleos, Inc. to Nicolás Maduro, Minister of Foreign Affairs, Rafael Ramírez, Minister of Energy and Mines and Gladys María Gutiérrez, Attorney General (4 May 2007)
- R-86 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. to Eulogio Del Pino, PDVSA Cerro Negro, S.A. and Rafael Ramírez, Petróleos de Venezuela, S.A. (22 June 2007)
- R-87 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. to Eulogio Del Pino, PDVSA Cerro Negro, S.A. and Rafael Ramírez, Petróleos de Venezuela, S.A. (25 June 2007)
- R-88 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. to Eulogio Del Pino, PDVSA Cerro Negro, S.A. and Rafael Ramírez, Petróleos de Venezuela, S.A. (27 June 2007)
- R-89 First Affidavit of Jim Massey (21 January 2008) *Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela, S.A.*, Claim No. 2008 Folio 61, High Court of Justice, Queen's Bench Division, Commercial Court (London) at ¶¶ 2, 6, 20
- R-112 Association Agreement Articles 15.1(a), 17.2(c)
- R-118 Second Legal Expert Opinion of Professor José Mélich-Orsini (14 August 2009) at ¶¶ 28 – 43
- R-119 Second Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros and Appendices (14 August 2009) at ¶¶ 29 – 71
- App. 53 Luis Ávila Merino, *COMMERCIAL SURETY* (Universidad Católica Andrés Bello, 2nd ed., Caracas 2005) p. 103
- App. 54 José Mélich-Orsini, *THE STATUTE OF LIMITATIONS AND CADUCIDAD*, (Academia de Ciencias Políticas y Sociales, Caracas 2002) pp. 167 – 173
- App. 55 Enrique Urdaneta Fontiveros, *LIABILITY FOR DEFECTIVE PRODUCTS* (Academia de Ciencias Políticas y Sociales, Caracas 2008) p. 143
- App. 56 *VENEZUELAN CIVIL CODE* (Ediciones Centauro, Caracas 1982) [*CÓDIGO CIVIL DE LA REPÚBLICA DE VENEZUELA (Ediciones Centauro, Caracas 1982)*] Art. 782, 783, 1160, 1525
- App. 57 *VENEZUELAN COMMERCIAL CODE* (Eduven, Caracas 1955) [*CÓDIGO DE COMERCIO DE LA REPÚBLICA DE VENEZUELA (Eduven, Caracas 1955) Artículos 282*] Art. 282
- App. 58 Organic Law on Administrative Procedures, Official Gazette No. 2.818 (Extraordinary), published July 1, 1981 [*Ley Orgánica de Procedimientos Administrativos, Artículo 95*] Art. 95
- App. 60 José Mélich-Orsini, *GENERAL CONTRACT DOCTRINE* (Academia de Ciencias Políticas y Sociales, 4th ed., Caracas 2006) p. 411 – 412, 423
- App. 61 Venezuelan Code of Civil Procedure, Official Gazette No. 4.209 (Extraordinary), published September 18, 1990 [*Código de Procedimiento Civil, Artículo 12*] Art. 12
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- App. 63 Alfredo Morles Hernández, COURSE ON COMMERCIAL LAW, VOLUME IV (Universidad Católica Andrés Bello, Caracas 2004) p. 2215
- App. 64 Alejandro Borda, THE THEORY OF ONE'S OWN ACTS (Abeledo-Perrot, 3rd ed., Buenos Aires 2000) pp. 11, 51, 101, 133 – 134
- App. 66 María Laura Estigarribia Bieber, *Evolution of the Principles of Contract Interpretation, with Special Reference to the Argentine Republic*, in TREATISE ON CONTRACT INTERPRETATION IN LATIN AMERICA, VOLUME I 291 (Carlos A. Soto Coaguila ed., Editora Jurídica Grijley E.I.R.L., Lima 2007) p. 302
- App. 67 Superior Court of Civil and Administrative Matters of the Central Occidental Region, *Rosa Elizabeth Fernandez v. Universidad Nacional Experimental Politécnica "Antonio José de Sucre" (UNEXPO)* (December 10, 2003) pp. 4 – 5
- App. 68 Haydee Barrios De Acosta, *Interpretation of Contract by a Judge in Internal Law and Private International Law*, in BOOK COMMEMORATING JOSÉ MÉLICH-ORSINI, VOL. I (Universidad Central de Venezuela, Caracas 1982) pp. 59 – 60
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- App. 70 Aída Kemelmajer de Carlucci, *Reflections on the Interpretation of Contracts*, in TREATISE ON CONTRACT INTERPRETATION IN LATIN AMERICA, VOLUME I 197 (Carlos A. Soto Coaguila ed., Editora Jurídica Grijley E.I.R.L., Lima 2007)
- App. 71 Superior Labor Court, *Sindicato de Calzado y pieles v. U.S. Rubber International* (April 29, 1963), in VENEZUELAN JURISPRUDENCE 279 (Ramírez & Garay, S.A., Caracas 1963)p. 280
- R-120 Outline Argument on Behalf of Claimant in Support of Application for Worldwide Freezing Order, (23 January 2008) submitted in *Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela, S.A.*, High Court of Justice, Queen's Bench Division, Commercial Court (London), Claim No. 2008 Folio 61 ¶ 64
- R-121 Letter from William B. Berry, Executive Vice President of Exploration and Production, ConocoPhillips, to Rafael Ramírez, Minister of Energy and Mines (14 January 2005)
- R-122 Congressional Authorization of the Association Agreement between Maraven S.A. and Conoco Inc. (Petrozuata Project), Official Gazette No. 35.293 published 9 September 1993
- R-123 Congressional Authorization of the Framework of Conditions for the Association Agreement between Corpoven S.A. Filial de Petróleos de Venezuela and the companies Atlantic Richfield Co. (ARCO), Phillips Petroleum Company and Texaco, Inc. (Hamaca Project), Official Gazette No. 36.209, published 20 May 1997

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At and Following the 2010 Hearings:

Submission	Pinpoint
C-V	¶¶ 8, 40 – 54
C-VI	¶¶ 8 – 12, 32, 40
R-IV	¶¶ 3, 28 – 37, 87 - 88
R-V	¶¶ 18 – 26
R. Closing Slides	29 – 43

Speaker	Citation
C. Closing	2035 - 2039, 2041, 2043
C. Opening	48, 52 – 53, 55
Cutt	702 – 703, 710-714, 727 - 730, 733, 768 – 780
Graves	1671-1672
Hernández-Bretón	962-964
Leitzinger	1820-1823
Massey	544-554, 594-595, 628
R. Closing	2134, 2136 – 2138, 2142-2145
R. Opening	105 - 106, 111-113
Ward	146-147, 238-240, 261, 278-280, 285 - 286

382. *First*, it is a fact that although Claimant did not send notices to either of the Respondents until 22 June 2007, it did send notices over the years to officials and ministries in the Venezuelan government, complaining both of measures taken and yet to be taken by the government. Respondents thus cite 12 such communications, from 2 February 2005 to 4 May 2007, where complaints were notified by Claimant to the Minister of Foreign Affairs, the Minister of Energy, and the Attorney General of Venezuela. As a whole, the Tribunal is satisfied that the Minister of Foreign Affairs, the Minister of Energy and the Attorney General of Venezuela were aware that an “*investment dispute*” had arisen in respect of various measures taken by the government.

383. *Second*, even though the notices referred to in the preceding paragraph were not sent to PDVSA-CN and PDVSA, the Tribunal is satisfied that, to a certain extent, (i) PDVSA-CN, which until June 2007 was in the same position as Claimant, each having a 41.66% interest in the Project and being subjected to the same governmental measures, and (ii) PDVSA, whose President, Mr. Rafael Ramirez, concurrently served as the Minister of

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Energy of Venezuela since 2004, had been made immediately aware that certain actions by the government of Venezuela could constitute Discriminatory Measures “*which may result in a Material Adverse Impact.*” Indeed, on 2 February 2005, Claimant sent a letter to the Minister of Foreign Affairs, the Minister of Energy, and the Attorney General of Venezuela, complaining that the government had increased the royalties from 1% to 16.66% and stating that “*the Cerro Negro Parties consider that the Government of Venezuela is not honoring its contractual commitments under the Royalty Agreement or the obligations undertaken by the Bolivarian Republic of Venezuela under the [...] Investment Law*” (R-75), and the Tribunal notes that Respondents themselves acknowledge that “*the increase in royalty payments from 1% to 16 2/3% would obviously have a ‘Material Adverse Impact’ on Claimant’s ‘Net Cash Flow.’*” (R-II ¶ 69). Further, by letter dated June 20, 2005, Claimant informed the government that the increase to 30% of the royalty applicable to the AA and the increase of the oil income tax rate from 34% to 50% have “*broadened the investment dispute that [Claimant] brought to [the] attention [of the government] by letter dated 2 February 2005.*” The ten notices that followed the 20 June 2005 letter complained about (i) the abrogation of the right to expand the Cerro Negro Project, thereby frustrating the *De-Bottlenecking Project* (R-78), (ii) a new extraction tax on the production of hydrocarbons and the announcement of the proposal to increase the income tax rate on the associations to 50% (C-158), (iii) the obligation to operate the migration of the Cerro Negro Association to a mixed company (R-79 and R-83), (iv) production and export curtailments (R-80, R-82 and R-84), (v) calculation of royalties (R-81), and (vi) challenging the fact that “*Orinoco Oil Belt Strategic Associations are in breach of their contractual obligations*” (R-85). Even though, in these 12 notices sent by Claimant to the government from February 2, 2005 to May 4, 2007, no mention was made of any claim against Respondents for compensation for a Discriminatory Measure, nor to Clause XV of the AA, it cannot be denied that Respondents were aware from the outset in February 2005 that certain actions by the government of

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Venezuela could constitute Discriminatory Measures “*which may result in a Material Adverse Impact.*”

384. *Third*, the Tribunal accepts that there may be some ground for Claimant’s argument that the notification procedures were linked with the overall objective of mitigating damages and with PDVSA-CN’s warning to Claimant not to pursue legal remedies against the royalty measures or the income tax increase on the ground that to do so would only make matters worse for Claimant. The Tribunal can understand that a premature notice might have been detrimental to settlement negotiations and might have thwarted any mitigation of damages. In such circumstances, Claimant may have been justified in not sending the formal notices required under 15.1(a).
385. *Fourth*, the meaning of “*occurred*”, “*determined*”, and the settlement discussions are relevant to this question. “*Determination*” brings a subjective factor in for the timing of “*when they determined.*” Thus, it is entirely plausible that Claimant complied with the “*immediacy*” requirement upon sending the notices after it considered that all hope for an amicable settlement had vanished.
386. *Fifth*, the Tribunal is also aware of the fact that (i) Respondents apparently suffered no prejudice as a result of the timing of the notices, since Claimant is only seeking damages for those years after the formal notice was given and that (ii) the evidence tends to show that there was no realistic chance that the Respondents would support the Claimant’s position and attempt to convince the Venezuelan government to undo the allegedly discriminatory measures.
387. *Finally*, the Tribunal notes that under Venezuelan law, forfeiture must be clearly established as a sanction in a contract and that, accordingly, in other portions of the AA, such as Articles 5.2(a), 5.2(c), 6.2(a) and 6.2(c), when the Parties intended that failure to comply with a certain requirement would result in a forfeiture of a right, they expressly provided for such forfeiture.

There is no express prohibition against bringing the claim without notice. Further, the Tribunal notes that, if Article 15.1(a) is interpreted and applied as Respondents maintain it should be, failure to give notice in year 1 would not prevent an arbitration in year 2.

388. For the above reasons, the Tribunal finds that, everything considered, the notice provided by the Claimant to the Respondents was sufficient. In any event, regardless of whether Claimant complied with the formal notice requirements, the Tribunal finds that any failure by Claimant to give to the Respondents the notices required by Article 15.1(a) of the AA would not result in a legal barrier to Claimant's assertion of its rights of indemnification.

K.III.2. Exhaustion of Remedies

K.III.2.a. Arguments by Claimant

389. Claimant concedes that it has a duty under Article 15.1(a) to mitigate damages by asserting claims against the Venezuelan Government. (C-III ¶ 195). In Claimant's **Request for Arbitration**, Claimant explains that it complied with this requirement by commencing a legal action against the Venezuelan Government, filing a **Request for Arbitration with the International Centre for Settlement of Investment Disputes** (ICSID) on **6 September 2007**. (C-I ¶ 78). The stated purpose of Article 15.1(a) to mitigate damages is, thus, fulfilled and any amount recovered in the ICSID proceeding will be credited toward the indemnity owed by Respondents in this arbitration. (C-I ¶¶ 84 – 85; C-IV ¶ 113; C-V ¶¶ 31 - 39).
390. The ICSID action satisfies the requirements of Article 15.1(a) which "*leaves no doubt that a legal action is required 'to the extent that it is available,'*" and that "*any legal recourse ... to ... obtain relief [reparación] from such 'Discriminatory Measure' satisfies the requirement.*" (C-IV ¶ 113, C-V ¶ 32). The Discriminatory Measures at issue in this ICC arbitration are among those at issue in the ICSID proceeding. (C-V ¶ 32). Claimant adds that

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Article 15.1(a) contemplates an action against the Republic of Venezuela that is being conducted independently but in parallel with the arbitration against PDVSA-CN. (C-V ¶ 34).

391. Claimant argues that it is irrelevant that the ICSID arbitration remedy was not available when the AA was signed, as the AA does not limit the Parties to pursue only remedies then available - any legal recourse would suffice. (C-IV ¶ 114). Further, because arbitration is both favored and considered part of the system of justice of the Republic of Venezuela, the Parties likely contemplated arbitration against the Republic of Venezuela as a means to pursue and collect “*Expropriation Compensation*.” (C-IV ¶ 115).
392. Claimant also reasons that, as Respondents are aware of the injuries suffered by Claimant and have confirmed the occurrence of such to third parties, the principles of good faith obligate Respondents to cooperate in the ICSID arbitration against the Republic of Venezuela. (C-III ¶ 244).

K.III.2.b Arguments by Respondents

393. Respondents argue that the purpose of Article 15.1(a) was to require Claimant to first challenge any Discriminatory Measure by exhausting its remedies under Venezuelan law. (R-II ¶ 89, partially quoted). Claimant has failed to pursue such remedies. Having failed to carry out this contractual burden, Claimant has forfeited any claim to indemnification under the AA as a matter of Venezuelan law. (R-II ¶ 98).
394. The ICSID case is not the kind of remedy that was contemplated in the AA, as it has nothing to do with “*revers[ing] or obtain[ing] relief from a Discriminatory Measure, [...] but rather to obtain damages for alleged violations of international law and Venezuelan law.*” (R-IV ¶ 83; R-V ¶ 24). Not only is the ICSID arbitration an action to recover damages, but further, it is unlikely that the Parties contemplated arbitration as a remedy, as the **Investment Law** was not enacted when the AA was signed. (R-II ¶ 88; R-III ¶ 88).

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395. Finally, with respect to “*double compensation*”, Respondents put forward that Claimant’s ICSID claim against the Government would be less than the indemnity that it seeks in this arbitration. (R-IV ¶ 85).
396. Respondents explain that there are three types of constitutional actions that Claimant could have used to assert their rights: “(1) *amparo against legislative acts, also referred to as amparo against norms (amparo contra norma)*; (2) *amparo against administrative acts*; and (3) *amparo against judicial acts*.” (R-II ¶ 93).
397. Respondents present the laws under which Claimant could have sought remedy: (R-II ¶¶ 91 - 97, partially quoted, italics in original)
- Under **Article 94 of the Organic Law on Administrative Procedures**, Claimant could have sought the modification or withdrawal of any measure implemented by the Ministry of Energy and Petroleum that Claimant believed had an effect on it individually (*carácter particular*). Under this procedure, called a “recourse of reconsideration” (*recurso de reconsideración*), the Claimant would be empowered to challenge the measure based upon alleged violations of constitutional, legal or treaty rights.
 - Under the **Organic Law of Protection (*Amparo*) of Constitutional Rights and Guarantees** (the “**Amparo Law**”), Claimant could have initiated an autonomous summary proceeding to guarantee constitutional rights that were infringed by the administrative actions or laws (*acción de amparo constitucional autónomo*).
 - Under the Amparo Law, Claimant could have challenged the alleged retroactive application of **Decree-Law 5200** and other laws enacted by the National Assembly in an action for constitutional protection (*recurso de amparo constitucional*).
 - Under the **Organic Law of the Supreme Tribunal of Justice** (the “**Supreme Tribunal Law**”), Claimant could have pursued an action for annulment (*recurso de nulidad*) to challenge acts of the public power (*poder público*). Under this law, the Supreme Tribunal of Justice has the power to declare the total or partial nullity of administrative acts of the Government as well as of laws enacted by the National Assembly or decreed by the National Executive (*Ejecutivo Nacional*).
398. Under the AA, Claimant was required to pursue “*any legal remedy available*.” Claimant was not at liberty to pick and choose the legal actions that it would take or would take or would refrain from taking while the potential indemnity accrued. (R-III ¶ 87).

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K.III.2.c. The Tribunal

399. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties' Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-I	¶¶ 78, 84 – 85
C-III	¶¶ 237 – 241, 244
C-IV	¶¶ 112 – 115
R-II	¶¶ 87 – 98
R-III	¶¶ 86 – 88

Exhibits:

Exhibit	Document Name
C-2	Association Agreement
C-5	22 June 2007 Notice of Discriminatory Actions that May Result in a Materially Adverse Impact in Fiscal Year 2007 and Future Fiscal Years [<i>Notificación de Medidas Discriminatorias que Pueden Resultar en Impacto Sustancialmente Adverso en el Año Fiscal 2007 y Años Fiscales Futuros</i>].
C-7	27 June 2007 Notice of Discriminatory Actions that have caused a Materially Adverse Impact in Fiscal Year 2007 and Future Fiscal Years [<i>Notificación de Medidas Discriminatorias que han Causado un Impacto Sustancialmente Adverso en el Año Fiscal 2007 y Años Fiscales Futuros</i>].
C-8	10 October 2007 Notice of Registration of the Request for Arbitration filed before the International Centre for Settlement of Investment Disputes.
C-9	25 July 2007 Letter from Steven Reisman of Curtis-Mallet Prevost Colt & Mosle LLP (on behalf of PDVSA Cerro Negro S.A.) to James Garden, Esq. of Carter Ledyard & Millburn LLP.
C-41	Testimony of Thomas L. Cranmer (25 September 2008) at ¶ 30
C-42	Testimony of Mark Ward (26 September 2008) at ¶ 27
C-43	Testimony of Tim Cutt (26 September 2008) at ¶¶ 9, 15
C-44	Declaration of Professor Eugenio Hernández-Bretón (27 September 2008) at ¶¶ 33-40, 80-81, 85-88
C-87	Association Agreement Article 15.1(a)
C-119	Amended and Restated Limited Liability Company Agreement of Chalmette Refining, LLC (28 October 1997)
C-136	Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Venezuela [<i>Convenio Para el Estimulo y Protección Recíproca de Las Inversiones Entre la República de Venezuela y el Reino Unido de los Países Bajos</i>], signed at Caracas, 22 October 1991, entered into force 1 November 1993 (as published in the

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- Official Gazette No. 35.269 of 6 August 1993) Art. 9.3
- C-137 Law on the Promotion and Protection of Investments [*Ley Sobre Promoción y Protección de Inversiones*] (as published in the Official Gazette No. 5390 of 22 October 1999)
- C-138 Letter dated 8 August 2008 from Secretary of the ICSID Tribunal to Mobil Corporation, Venezuela Holdings, B.V.; Mobil Cerro Negro Holding, Ltd.; Mobil Venezolana de Petróleos Holdings, Inc.; Mobil Cerro Negro, Ltd.; Mobil Venezolana de Petróleos, Inc.; and Bolivarian Republic of Venezuela confirming constitution of the Tribunal
- C-139 Letter dated 17 September 2008 from Secretary of the ICSID Tribunal to Mobil Corporation, Venezuela Holdings, B.V.; Mobil Cerro Negro Holding, Ltd.; Mobil Venezolana de Petróleos Holdings, Inc.; Mobil Cerro Negro, Ltd.; Mobil Venezolana de Petróleos, Inc.; and Bolivarian Republic of Venezuela confirming date of first session of ICSID Tribunal
- C-215 Second Declaration of Professor Eugenio Hernández-Bretón (14 May 2009) at ¶¶ 49 -52, 70
- C-224 Venezuelan Constitution [*Constitución Venezolana*], dated 20 December 1999 (as published in Extraordinary Official Gazette No. 5453 of 24 March 2000), Art. 253
- C-256 Law on the Promotion and Protection of Investments [*Ley sobre Promoción y Protección de Inversiones*] (as published in the Official Gazette No. 5390 of 22 October 1999)
- C-257 Mobil's Questions and Answers (October 1997) at p. 1
- C-258 Mobil Document entitled "Venezuela Key Issues" (May 1998)
- C-259 Common Security Agreement among Mobil Cerro Negro Holding, Ltd., *et al.* (18 June 1998) Article 6.07
- R-4 First Affidavit of Bernard Mommer (11 February 2008) ¶ 12
- R-8 *Mobil Cerro Negro Limited v. Petroleos de Venezuela, S.A.*, High Court of Justice, Queen's Bench Division, Commercial Court (London), 2008 Folio 61 (Justice Walker), *Reasons for Judgment Approved by the Court for Handing Down and Order Discharging Freezing Injunction* (20 March 2008) at ¶ 46
- R-37 Outline Argument on Behalf of Claimant In Support of Its Application For an Order for Alternative Service and In Opposition to the Application by the Respondent to Discharge the Worldwide Freezing Order (27 February 2008) *Mobil Cerro Negro Limited v. Petróleos de Venezuela, S.A.*, Claim No. 2008 Folio 61, High Court of Justice, Queen's Bench Division, Commercial Court (London) ¶ 82
- R-68 Legal Expert Opinion of Professor José Mélich-Orsini (10 February 2009) at ¶¶ 24 – 30 fn. 23, 33
- R-69 Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (10 February 2009) at ¶¶ 41 – 62
- App. 2 Constitution of the Bolivarian Republic of Venezuela, Official Gazette No. 36.860, published December 30, 1999 [*Constitución de la República Bolivariana de Venezuela (1999)*] Art. 27
- App. 28 Organic Law on Administrative Procedures, Official Gazette No. 2.818 (Extraordinary), published July 1, 1981 [*Ley Orgánica de Procedimientos Administrativos*] Art. 91, 93, 94

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App. 29	Organic Law of Protection (<i>Amparo</i>) of Constitutional Rights and Guarantees, Official Gazette No. 34.060, published September 27, 1988 [<i>Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales</i>]
App. 31	Organic Law of the Supreme Tribunal of Justice of the Bolivarian Republic of Venezuela, Official Gazette No. 37.942, published May 20, 2004 [<i>Ley Orgánica del Tribunal Supremo de Justicia de la República Bolivariana de Venezuela</i>] Art. 21
App. 32	Judgment, Constitutional Chamber of the Supreme Tribunal of Justice, <i>Cervecería Polar C.A.</i> (December 12, 2005) [<i>Sentencia, Sala Constitucional del Tribunal Supremo de Justicia, Cervecería Polar C.A. (12 de diciembre de 2005)</i>]
R-90	Organic Law of the Supreme Court of Justice, Official Gazette No. 1.893 (Extraordinary), dated July 30, 1976 [<i>Ley Orgánica de la Corte Suprema de Justicia</i>] Art. 42
R-112	Association Agreement Clause I, Articles 15.1(a) and 15.1(c)
R-114	Supplemental Brailovsky/Wells Report ¶¶ 52 - 57
R-119	Second Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (14 August 2009) at ¶¶ 49-52
Unnumbered	ICSID Decision on Jurisdiction ¶ 209(a) – (b)
Unnumbered	Republic of Venezuela’s ICSID Memorial on Jurisdiction at ¶¶ 25-26 & n.33

At and Following the 2010 Hearings:

Submission	Pinpoint
C-V	¶¶ 31 – 39
C-VI	¶ 43
R-IV	¶ 83
R-V	¶ 24
R. Closing Slides	88 – 89

Speaker	Citation
C. Closing	2039 – 2040
C. Opening	34 – 35, 53 - 54
Cutt	702-703, 710-711
Jones	1383-1383, 1437, 1510
Massey	594-595
Myers	1763 – 1764
R. Closing	2183 – 2187
R. Opening	101 - 102
Ward	147, 278 – 280, 286

400. At the outset, the Tribunal notes that Article 15.1 of the AA qualifies the legal action which Claimant is to take in two ways:

- (1) by the wording “*To the extent any legal recourse is available to reverse or obtain relief from such Discriminatory Measure*” and
- (2) by the wording “*to mitigate any damages suffered as a result.*”

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401. *First*, the Tribunal will consider the legal action which, in fact, Claimant did take, *i.e.* submitting a claim to ICSID against the State of Venezuela. Since the above qualifications do not exclude arbitration and do not necessarily only ask for legal action against the two Respondents in the present arbitration, it can well be argued that initiating ICSID arbitration against the State itself may be included if it refers to the same government measures. In this context, the Tribunal notes that on 10 June 2010, the ICSID Tribunal issued its **Decision on Jurisdiction**. Therein, that tribunal concluded that it could not derive the Republic of Venezuela's consent to arbitration from **Article 22 of the Investment Law**. (ICSID Decision ¶ 140). However, the ICSID Tribunal found that it does have jurisdiction under the ICSID Convention and the BIT with respect to any dispute in respect of the Project born after 21 February 2006 and has no jurisdiction under the **Investment Law** in respect of any dispute born before that date. (ICSID Decision ¶ 207).
402. For ease of reference, the **Dispositive Part of the ISCID Decision** is provided below:

For the foregoing reasons;

The Tribunal unanimously decides:

- (a) that it has jurisdiction over the claims presented by Venezuela Holdings (Netherlands), Mobil CN Holding and Mobil Venezolana Holdings (Delaware), Mobil CN and Mobil Venezolana (Bahamas) as far as:
 - (i) they are based on alleged breaches of the Agreement on encouragement and reciprocal protection of investments concluded on 22 October 1991 between the Kingdom of the Netherlands and the Republic of Venezuela;
 - (ii) they relate to disputes born after 21 February 2006 for the Project and after 23 November 2006 for the La Ceiba Project and in particular as far as they relate to the dispute concerning the nationalization measures taken by the Republic of Venezuela;
- (b) that it has no jurisdiction under Article 22 of the Venezuelan Decree with rank and force of law No. 356 on the protection and promotion of investments of 3 October 1999;

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- (c) to make the necessary order for the continuation of the procedure pursuant to Arbitration Rule 41 (4);
- (d) to reserve all questions concerning the costs and expenses of the Tribunal and the costs of the Parties for subsequent determination[.] (ICSID Decision ¶ 207).

403. Therefore, the Claimant obviously did “*commence and pursue legal actions to mitigate any damages*” available against the Discriminatory Measures by initiating the ICSID arbitration.

404. Did Claimant have, in addition, a duty under the AA to initiate legal proceedings before the domestic courts of Venezuela? The present Tribunal considers that bringing an action before the national courts of Venezuela was not required and was also, arguably, unrealistic. The dispute settlement between the Parties to the AA and to the Guaranty was expressly submitted to ICC arbitration as the legal recourse of choice between the contractual Parties. Whether for the purposes of the settlement of disputes between Claimant and the Government, the exhaustion of local remedies was required is a matter to be decided by the ICSID Tribunal and not by the present Tribunal.

405. Further, Respondents have not demonstrated that they have suffered any prejudice as a result of Claimant not having pursued legal remedies within Venezuela. Therefore, attempts to bring the claim first before the domestic courts was not required to fulfill the express purpose mentioned in Article 15(1), *i.e.* “*to mitigate any damages suffered as a result.*”

406. For the above reasons, the Tribunal concludes that Claimant is not prevented from pursuing its claim in this ICC arbitration due to lack of exhaustion of local remedies.

**K.IV. Liability under the Association Agreement for
Discriminatory Measures**

**K.IV.1. Definition of Discriminatory Measure Causing a
Materially Adverse Impact under the Association
Agreement**

407. The Parties have each applied their own analysis to each of the measures described in this section. For convenience and to avoid repetition, this section begins by presenting the Claimant's and Respondents' respective analytical frameworks relating to Discriminatory Measures.

K.IV.1.a. Arguments by Claimant

408. According to Clause I of the AA, a measure is a Discriminatory Measure if it possesses three characteristics (C-III ¶¶ 188 – 190, footnotes omitted, partially quoted):

188. First, the measure must be either (i) a “change in (or any change in the interpretation or application of) Venezuelan law” or (ii) a “Governmental Measure” that is applicable to the Project or a Foreign Party such as Mobil CN in its capacity as participant in the Project. The term “Governmental Measure” is defined in Clause I to include governmental measures of any kind, including expropriation, confiscation and requisition of facilities:

“any central or local governmental measure including, inter alia, the issuance, publication or enforcement of any administrative act, expropriation decree, confiscation or requisition of facilities by governmental authorities, whether or not such measures are subsequently annulled or revoked by any competent judicial or administrative authority.” (C-III ¶ 188, footnotes omitted).

189Second, the measure in question must fall into one of three categories, of which only the second is currently relevant to this case. The second category embraces measures that both (i) concern specific subject matters — i.e. tax rates, foreign-exchange controls, and expropriation or seizure [ocupación] of assets of the Project or the Foreign Party's interests in the Project — and (ii) are applicable to the Foreign Party but are not generally applicable to “Companies in the Republic of Venezuela.” This second category was intended to protect, and does protect, the Foreign Party from measures that single out that company, or participants in the Project, or companies engaged in the oil industry, or companies engaged in the extra-heavy sector of the industry, instead of applying generally to all companies in Venezuela. In the case of income-tax rates, the definition is even more specific: the measure falls

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within this category if the rate is different from that provided in the last sentence of the Fifteenth Condition of the Framework of Conditions. Each of the governmental measures at issue in this case falls within this second category. (C-III ¶ 189, footnotes omitted, italics in original).

190. *Third*, the measure must be unjust, [meaning that it] results in a Materially Adverse Impact. (C-III ¶ 190).

409. Respondents' argument that the definition of Discriminatory Measure was intended to encompass only those measures "*that applied with general effect to all companies to which it could possibly apply*" finds no support. Instead, "*the parties intended precisely what the Respondents now disclaim, because the purpose of the definition was to protect Mobil CN from another industry-wide expropriation.*" (C-IV ¶ 39). Respondents' self-defeating notion of discrimination deprives the second part of the definition of "*Discriminatory Measure*" of any meaning or effect. (C-VI ¶ 33).

410. Contractual rights can be the subject of expropriation under Venezuelan law. Claimant maintains that each measure preceding **Decree-Law 5200** expropriated or seized Claimant's 41 2/3% interests in the rights and assets impacted by all of the measures preceding **Decree-Law 5200**. (C-VI ¶ 29).

K.IV.1.b. Arguments by Respondents

411. Respondents argue that none of the measures at issue in this arbitration constitute "*Discriminatory Measures*" within the meaning of the AA and the Congressional Authorization. (R-II ¶¶ 90 – 100). Respondents argue that Clause I of the AA was designed to implement the **Twentieth Condition of the Congressional Authorization**, which states that the AA:

101. [...] shall include provisions allowing the renegotiation of the Agreement as necessary to compensate any Party other than LAGOVEN, on equitable terms, for adverse and significant economic consequences arising from the adoption of decisions made by governmental authorities or changes in legislation that cause a discriminatory treatment of THE ASSOCIATION, any entity or THE PARTIES in their capacity as participants in THE ASSOCIATION. However, it shall not be considered that the Party has suffered an adverse and significant economic consequence as a result of any of said decisions or changes in legislation, at any time when the Party is receiving revenues from THE ASSOCIATION equal to a price of crude

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oil above a maximum price that shall be specified in the AA. (R-II ¶ 101, emphasis in original).

412. The definition of a “*Discriminatory Measure*” is central to the Article 15 indemnity. Under this definition, non-economic governmental measures do not give rise to indemnity obligations. (R-II ¶ 102; R-III ¶¶ 132 – 133; R. Closing Slide 45). Rather, the purpose of this and Article 15 “*was to provide equitable compensation when the foreign party suffered an adverse economic consequence from a governmental measure directed at the association or at that party in its capacity as a participant in the association. It was not to provide a remedy for all governmental measures affecting a party.*” (R-III ¶ 133).
413. There is a distinction within the definition of “*Discriminatory Measure.*” The first part of the definition exempts governmental action affecting the EHO projects in Venezuela in a non-discriminatory manner. (R-III ¶ 111). The second part exempts governmental action related to taxes, exchange controls, or the expropriation or seizure of assets of the Project or of a Foreign Party’s interests in the Project, only if those are “*applicable with general character to Companies in the Republic of Venezuela.*” (R-III ¶ 111). Respondents characterize Claimant’s arguments with respect to the alleged Discriminatory Measures below as follows:

112. In an effort to work its way around this two-part definition, Claimant argues that everything is an “expropriation or seizure.” In this way, Claimant reaches the remarkable conclusion that every governmental measure at issue in this case is subsumed within the “narrower category,” rendering the first part of the definition meaningless. This broad brush approach lacks any foundation in the language of the provision and cannot substitute for a careful review of each of the measures in question. (R-III ¶ 112).

414. Respondents continue that if every governmental measure were to be considered an expropriation, then there would be no need for the lengthy definition of “*Discriminatory Measure*” in the AA. (R-IV ¶¶ 19-20). In their closing argument, Respondents accuse Claimant and its experts of “*mistakenly assume[ing] that all measures were discriminatory, without*

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support in the record and without testimony at the hearing.” (R. Closing Slide 46).

415. Respondents argue that the documentary evidence shows that there was only one measure that Claimant classified as an expropriation: the “*surrender of its interest in the Project.*” All other pre-migration measures were characterized as “*measures that preceded the expropriation.*” (R-IV ¶ 22).
416. With respect to the second part of the definition of “*Discriminatory Measure*” referring to an expropriation or seizure of assets, Respondents argue that the royalty, tax, and production curtailment measures at issue did not take any asset of the project and Claimant’s 41 2/3% interest in the Project remained unchanged after each measure. (R-IV ¶ 23).

K.IV.1.c. The Tribunal

417. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties’ Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-I	¶¶ 51 - 58
C-III	¶¶ 185 – 191, 201 – 204, 229 – 230
C-IV	¶¶ 35 – 41
R-II	¶¶ 99 – 102
R-III	¶¶ 109 – 112, 130 – 140
TOR	¶ 5.1.1.a.

Exhibits:

Exhibit	Document Name
C-11	Congressional Authorization
C-41	Testimony of Thomas L. Cranmer (25 September 2008) at ¶ 26
C-44	Declaration of Professor Eugenio Hernández-Bretón (27 September 2008) at ¶¶ 41-57, 71, 74, 76-77
C-47	Expert Report of R. Dean Graves of Alvarez & Marsal, Dispute Analysis & Forensic Services, LLC, on 2007 ICC Damages Payable (26 September 2008)
C-48	Expert Report of Professor Stewart C. Myers of the Brattle Group on the Value of Indemnification Cash Flows (28 September 2008)

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- C-50 Expert Report of Dr. Scott T. Jones of FTI Consulting, Inc. and Compass Lexecon (“Lexecon”), a Wholly-Owned Subsidiary of FT Consulting, Inc. (26 September 2008)
- C-69 Offering Memorandum, Cerro Negro Finance Ltd. (11 June 1998) p. A-6
- C-87 Association Agreement Clause 1 defining “Discriminatory Action”, “Government Action”, and “Materially Adverse Impact”, Article 2.1
- C-100 Instrument of Transfer of Operations of the Cerro Negro Project [*Acta de Entrega de Operaciones del Proyecto Cerro Negro*] (25 April 2007) (without Annexes) and Letter dated 25 April 2007 from Mobil Cerro Negro, Ltd. and Operadora Cerro Negro S.A. to Ministry of Energy and Petroleum, PDVSA, PDVSA CN, and Veba Oil & Gas
- C-158 Letter dated 26 May 2006 from Mobil Cerro Negro to Ministry of Relations, Ministry of Energy and Mines and Prosecutor General
- C-160 Heads of Agreement between Lagoven, Mobil Oil Corporation, and Mobil de Venezuela (17 September 1996)
- C-213 Testimony of Brian Lawless (14 May 2009)
- C-215 Second Declaration of Professor Eugenio Hernández-Bretón (14 May 2009) at ¶¶ 24, 32
- C-216 Reply Expert Report of Dr. Scott T. Jones of FTI Consulting, Inc. and Compass Lexecon (15 May 2009)
- C-217 Reply Expert Report of R. Dean Graves of Alvarez & Marsal (12 May 2009)
- C-220 Reply Expert Report of Professor Stewart C. Myers of the Brattle Group (13 May 2009)
- R-4 First Affidavit of Bernard Mommer (11 February 2008) at ¶ 10
- R-7 Decree-Law 5200 Art. 3
- R-35 Tr. Hearing of 2 December 2008 pp. 127 – 129, 137, 141 - 142, 145 – 149
- R- 43 Congressional Authorization Fifteenth and Twentieth Condition
- R-65 Instrument of Transfer of Operations of the Cerro Negro Project (25 April 2007)
- R-68 Legal Expert Opinion of Professor José Mélich-Orsini (10 February 2009) ¶¶ 19, 21(c)
- R-75 Letter from Mark Ward, President of Mobil Cerro Negro, Ltd. and Mobil Cerro Negro Holdings, Ltd. to Alí Rodríguez, Minister of Foreign Affairs, Rafael Ramírez, the Minister of Energy and Petroleum and Marisol Plaza, Attorney General (2 February 2005)
- R-76 Letter from Mark Ward, Mobil Cerro Negro, Ltd., Mobil Cerro Negro Holdings, Ltd. and Operadora Cerro Negro, S.A. to Alí Rodríguez, Minister of Foreign Affairs, Rafael Ramírez, Minister of Energy and Mines and Marisol Plaza, Attorney General (2 June 2005)
- R-77 Letter from Mark Ward, President of Mobil Cerro Negro, Ltd., Mobil Cerro Negro Holdings, Ltd. and Operadora Cerro Negro, S.A. to Alí Rodríguez, Minister of Foreign Affairs, Rafael Ramírez, Minister of Energy and Petroleum and Marisol Plaza, Attorney General (20 June, 2005)
- R-78 Letter from Mark Ward, Mobil Cerro Negro, Ltd. to Rafael

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- R-79 Ramírez, Minister of Energy and Petroleum (1 August 2005)
Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. and Mobil Cerro Negro Holdings, Ltd. and Representative of Venezuela Holdings, B.V. to Bernard Mommer, Vice Minister of Hydrocarbons (16 October 2006)
- R-80 Letter from Timothy Cutt, Operadora Cerro Negro, S.A. to Rafael Ramírez, Minister of Energy and Petroleum (2 November 2006)
- R-81 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. and Mobil Cerro Negro Holdings, Ltd. and Representative of Venezuela Holdings, B.V. to Nicolás Maduro, Minister of Foreign Affairs, Rafael Ramírez, Minister of Energy and Petroleum and Gladys María Gutiérrez, Attorney General (20 November 2006)
- R-82 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. to Rafael Ramírez, Minister of Energy and Petroleum (12 January 2007)
- R-83 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. and Mobil Cerro Negro Holdings, Ltd. and Representative of Venezuela Holdings, B.V. to Nicolás Maduro, Minister of Foreign Affairs, Rafael Ramírez, Minister of Energy and Mines and Gladys María Gutiérrez, Attorney General (5 March 2007)
- R-84 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. and Mobil Cerro Negro Holdings, Ltd. and Representative of Venezuela Holdings, B.V. to Nicolás Maduro, Minister of Foreign Affairs, Rafael Ramírez, Minister of Energy and Mines and Gladys María Gutiérrez, Attorney General (8 March 2007)
- R-85 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. and Mobil Cerro Negro Holding, Ltd. and Representative of Operadora Cerro Negro, C.A., Venezuela Holdings B.V., Mobil Corporation, Agencia Operadora La Ceiba, C.A., Mobil Venezolana de Petróleos Holdings, Inc., and Mobil Venezolana de Petróleos, Inc. to Nicolás Maduro, Minister of Foreign Affairs, Rafael Ramírez, Minister of Energy and Mines and Gladys María Gutiérrez, Attorney General (4 May 2007)
- R-86 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. to Eulogio Del Pino, PDVSA Cerro Negro, S.A. and Rafael Ramírez, Petróleos de Venezuela, S.A. (22 June 2007)
- R-87 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. to Eulogio Del Pino, PDVSA Cerro Negro, S.A. and Rafael Ramírez, Petróleos de Venezuela, S.A. (25 June 2007)
- R-88 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. to Eulogio Del Pino, PDVSA Cerro Negro, S.A. and Rafael Ramírez, Petróleos de Venezuela, S.A. (27 June 2007)
- R-89 First Affidavit of Jim Massey (21 January 2008) *Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela, S.A.*, Claim No. 2008 Folio 61, High Court of Justice, Queen's Bench Division, Commercial Court (London) at ¶¶ 19, 21(c), 25
- R-112 Association Agreement Clause I *defining* “Discriminatory Measure” and Article 15
- R-113 Supplemental Expert Report on Fiscal Year 2007 Indemnity Cash Flow Calculation, Prepared by Vladimir Brailovsky (14 August 2009) at ¶ 28

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R-116	Supplemental Direct Testimony of José Ángel Pereira Ruimwyk (11 August 2009)
R-118	Second Legal Expert Opinion of Professor José Mélich-Orsini (14 August 2009) at ¶ 22
R-122	Congressional Authorization of the Association Agreement between Maraven S.A. and Conoco Inc. (Petrozuata Project), Official Gazette No. 35.293 published 9 September 1993
R-123	Congressional Authorization of the Framework of Conditions for the Association Agreement between Corpoven S.A. Filial de Petróleos de Venezuela and the companies Atlantic Richfield Co. (ARCO), Phillips Petroleum Company and Texaco, Inc. (Hamaca Project), Official Gazette No. 36.209, published 20 May 1997
R-124	Cerro Negro, Confidential Preliminary Information Memorandum, Vol. I, March 1998 p. XV-6
R-126	Congressional Authorization of the Association Agreement between Maraven - Total - Itochu and Marubeni (Sincor Project), Official Gazette No. 35.293 published 9 September 1993

At and Following the 2010 Hearings:

Submission	Pinpoint
C-VI	¶¶ 29, 33
R-IV	¶¶ 19 – 23
R-V	¶¶ 28 – 30
R. Closing Slides	28 - 33

Speaker	Citation
C. Closing	2030, 2035
C. Opening	46
Jones	1451 – 1458
Massey	500 – 501, 586 – 587
Ward	155 – 157

418. Clause 1 of the AA provides the starting point for the analysis of what constitutes Discriminatory Measure:

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Spanish (Original)	Claimant's Translation	Respondents' Translation
DEFINICIONES	DEFINITIONS	DEFINITIONS
<p>“Medida Discriminatoria” significará cualquier cambio en (o cualquier cambio en la interpretación o aplicación de) la ley venezolana, o cualquier Medida Gubernamental que sea injusta y que sea aplicable al Proyecto o a cualquier Parte Extranjera en su condición de participante en el Proyecto y que no se aplique en forma general a entes públicos o privados involucrados en proyectos para el mejoramiento de crudo Extrapesado en la República de Venezuela; o, con relación a tasas de impuesto, controles de cambio, o la expropiación u ocupación de activos del Proyecto o de los intereses de una Parte Extranjera en el Proyecto, siempre y cuando dicho cambio en (o cualquier cambio en la interpretación o aplicación de) la ley venezolana, o cualquier Medida Gubernamental no sea aplicable con carácter general a Empresas en la República de Venezuela (incluyendo la imposición de impuesto sobre la renta al Proyecto o a cualquier Parte Extranjera en su condición de participante en el Proyecto, a una tasa que no se corresponde con lo previsto en la última oración de la Condición Décima Quinta); o con respecto a impuestos municipales (patente de industria y comercio), la imposición de impuestos municipales a las Partes Extranjeras en su condición de participantes</p>	<p>“Discriminatory Measure” shall mean any change in (or any change in the interpretation or application of) Venezuelan law, or any Governmental Measure which is unjust and is applicable to the Project or any Foreign Party in its capacity as a participant in the Project and is not generally applied to public or private entities engaged in Extra-heavy crude upgrading projects in the Republic of Venezuela; or, with respect to tax rates, foreign exchange controls or the expropriation or seizure [“ocupación”] of assets of the Project or of a Foreign Party’s interests in the Project, provided that such change in (or any change in the interpretation or application of) Venezuelan law, or any Governmental Measure is not generally applicable to Companies in the Republic of Venezuela (including the imposition of income tax on the Project or on any Foreign Party in its capacity as a participant in the Project, at a rate that does not correspond with what is provided in the last sentence of the Fifteenth Condition); or, with respect to municipal taxes (license to perform industrial and commercial activities), the imposition of municipal taxes on the Foreign Parties in their capacity as participants in the Association notwithstanding the provision in the Fifteenth Condition, only if the aggregate burden of the</p>	<p>“Discriminatory Measure” shall mean any change in (or any change in the interpretation or application of) Venezuelan law, or any Governmental Measure, which is unjust and is applicable to the Project or any Foreign Party in its capacity as a participant in the Project and which is not generally applicable to public or private entities engaged in projects for upgrading extra-heavy crude oil in the Republic of Venezuela; or, with respect to tax rates, foreign exchange controls or the expropriation or seizure of assets of the Project or of a Foreign Party’s interests in the Project, provided that such change in (or any change in the interpretation or application of) Venezuelan law, or any Governmental Measure is not applicable with general character to Companies in the Republic of Venezuela (including the imposition of income tax on the Project or any Foreign Party in its capacity as a participant in the Project, at a rate that does not correspond with what is set forth in the last sentence of the Fifteenth Condition); or with respect to municipal taxes (commercial and industrial permits), the imposition of municipal taxes on the Foreign Parties in their capacity as participants in the Association in spite of what is set forth in the Fifteenth Condition, only if the aggregate municipal tax</p>

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en la Asociación a pesar de lo previsto en la Condición Décima Quinta, solo si la carga total del impuesto municipal sobre los ingresos brutos de la Parte Extranjera afectada provenientes del Proyecto, excede en un cuatro por ciento (4%) los ingresos brutos de la Parte Extranjera afectada provenientes del Proyecto en el Año Fiscal de que se trate, en cuyo caso, la cantidad de impuestos municipales que exceda dicho cuatro por ciento (4%) constituirá una medida discriminatoria. Una medida que esté dentro de la definición de Medida Discriminatoria será considerada injusta si resulta en un Impacto Substancialmente Adverso.

municipal tax on the affected Foreign Party's gross revenue from the Project, exceeds by four percent (4%) the affected Foreign Party's gross revenue from the Project in the Fiscal Year at issue, in which event, the amount of municipal taxes that exceeds such four percent (4%) shall be a discriminatory measure. A measure that falls within the definition of Discriminatory Measure shall be deemed unjust if it results in a Materially Adverse Impact.

burden on the affected Foreign Party's gross revenues from the Project exceeds four percent (4%) of the affected Foreign Party's gross revenues from the Project in the Fiscal Year in question, in which event the amount of municipal taxes which exceeds such four percent (4%) shall constitute a discriminatory measure. A measure that would fall within the definition of Discriminatory Measure will be deemed unjust if it results in a Material Adverse Impact.

419. Article 15 of the AA may also be of relevance.

Spanish (Original)	Claimant's Translation	Respondents' Translation
<u>General.</u>	<u>General.</u>	<u>General.</u>
(a) En caso de que una de las Partes Extranjeras determine que se ha producido una Medida Discriminatoria que pueda resultar en un Impacto Substancialmente Adverso, dicha Parte Extranjera inmediatamente notificará a Lagoven CN sobre la Medida Discriminatoria. Adicionalmente, en caso de que dicha Parte Extranjera determine que realmente ha sufrido un Impacto Substancialmente Adverso como resultado de las Medidas Discriminatorias de la cual previamente ha notificado a Lagoven CN, inmediatamente notificará	(a) In the event that one of the Foreign Parties determines that a Discriminatory Measure has occurred which may result in a Materially Adverse Impact, such Foreign Party shall immediately provide notice of the Discriminatory Measure to Lagoven CN. Further, in the event that such Foreign Party determines that it has actually suffered a Materially Adverse Impact as a result of the Discriminatory Measures of which it has previously notified Lagoven CN, it shall immediately give notice of such determination	(a) In the event that one of the Foreign Parties determines that a Discriminatory Measure which may lead to a Material Adverse Impact has occurred, such Foreign Party shall immediately provide notice of the Discriminatory Measure to Lagoven CN. In addition, in the event that such Foreign Party determines that it has actually suffered a Material Adverse Impact as a result of Discriminatory Measures for which notice has previously been provided to Lagoven CN, it shall immediately give notice of such determination to

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dicha determinación a Lagoven CN (la "Notificación de Medida Discriminatoria"). En la medida en que se disponga de cualquier recurso legal para revertir u obtener una reparación de dicha Medida Discriminatoria, la Parte Extranjera iniciará y ejercerá acciones legales para mitigar cualquier daño sufrido como resultado de la Medida Discriminatoria. Si Lagoven CN está de acuerdo en que se ha producido la Medida Discriminatoria y que ha resultado en un Impacto Substancialmente Adverso, Lagoven CN colaborará con la Parte Extranjera en el ejercicio de las antes mencionadas acciones legales y las Partes negociarán de buena fe los daños compensatorios y/o posibles modificaciones al Convenio a fin de restablecer el beneficio económico que la Parte Extranjera hubiera recibido si no se hubiera producido la Medida Discriminatoria. Cualesquiera beneficios netos recibidos por la Parte Extranjera como resultado del ejercicio de las acciones legales antes mencionadas (después de la deducción de los costos legales incurridos por la Parte Extranjera en relación con las mismas) serán (i) imputados a cualquier monto que finalmente se determine que Lagoven CN adeuda de acuerdo con esta Cláusula o (ii) reembolsado a Lagoven CN si Lagoven CN ha hecho pagos previamente a la Parte Extranjera con relación a la Medida Discriminatoria en cuestión.

to Lagoven CN (a "Notice of Discriminatory Measure"). To the extent any legal recourse is available to reverse or obtain relief from such Discriminatory Measure, the Foreign Party shall commence and pursue legal actions to mitigate any damages suffered as a result of the Discriminatory Measure. If Lagoven CN concurs that the Discriminatory Measure has occurred and has resulted in a Materially Adverse Impact, Lagoven CN shall cooperate with the Foreign Party in the pursuit of the aforesaid legal actions and the Parties shall negotiate in good faith the compensatory damages and/or possible modifications to the Agreement in order to restore the economic benefit that the Foreign Party would have received had the Discriminatory Measure not occurred. Any net benefits received by the Foreign Party as a result of the pursuit of the aforesaid legal actions (after deduction of the legal costs incurred by the Foreign Party in connection therewith) shall be (i) applied against any amount ultimately determined to be owed by Lagoven CN pursuant to this Clause or (ii) reimbursed to Lagoven CN if Lagoven CN has previously made payments to the Foreign Party with respect to the Discriminatory Measure in question.

Lagoven CN (the "Notice of Discriminatory Measure"). To the extent any legal remedy is available to reverse or obtain relief from such Discriminatory Measure, the Foreign Party shall commence and pursue legal actions to mitigate any damages suffered as a result of the Discriminatory Measure. If Lagoven CN concurs that a Discriminatory Measure has occurred and has resulted in a Material Adverse Impact, Lagoven CN shall cooperate with the Foreign Party in pursuing the aforesaid legal actions and the Parties shall negotiate in good faith compensatory damages and/or possible modifications to the Agreement in order to restore the economic benefit that the Foreign Party would have received had the Discriminatory Measure not occurred. Any net proceeds received by the Foreign Party as a result of the pursuit of the aforesaid legal actions (after deduction of the legal costs incurred by the Foreign Party in connection therewith) shall be (i) applied against any amount ultimately determined to be owed by Lagoven CN pursuant to this Article or (ii) reimbursed to Lagoven CN if Lagoven CN previously has made payments to the Foreign Party with respect to the Discriminatory Measure in question.

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(b) Si Lagoven CN, dentro de los 90 días siguientes al recibo de la Notificación de la Medida Discriminatoria, no notifica a la Parte Extranjera sobre su concurrencia en que se han producido Medidas Discriminatorias que han resultado en un Impacto Substancial Adverso, cualquiera de las Partes podrá iniciar procedimientos de arbitraje de acuerdo con la Sección 18.2. Sin embargo, en ningún caso podrá una de las Partes iniciar procedimientos de arbitraje más de una vez por año calendario. El ámbito de los procedimientos de arbitraje incluirá: (i) una determinación de si una o más Medidas Discriminatorias se han producido y, si ese es el caso, si dichas medidas han tenido un Impacto Substancialmente Adverso sobre la Parte Extranjera; y (ii) en caso de una respuesta afirmativa a las dos interrogantes planteadas en el punto (i) de este literal, una indemnización por daños para compensar a la Parte Extranjera por las consecuencias económicas de la Medida Discriminatoria sufrida por ella hasta la fecha y recomendaciones sobre enmiendas al Convenio que restablecerían el beneficio económico que la Parte Extranjera hubiera recibido si no se hubiera producido la Medida Discriminatoria.

(b) If, within the ninety (90) days following the receipt of the Notice of Discriminatory Measure, Lagoven CN does not give the Foreign Party notice of its concurrence that Discriminatory Measures resulting in a Material Adverse Impact have occurred, any Party may commence arbitration proceedings in accordance with Section 18.2. In no event, however, may any one of the Parties initiate arbitration proceedings more than once per calendar year. The scope of the arbitration proceedings shall include: (i) a determination of whether one or more Discriminatory Measures have occurred and, if so, whether such measures have had a Materially Adverse Impact on the Foreign Party; and (ii) in the event of an affirmative answer to the two questions specified in clause (i) of this paragraph, an award for damages to compensate the Foreign Party for the economic consequences of the Discriminatory Measure suffered by it to date and recommendations on amendments to the Agreement that would restore the economic benefit that the Foreign Party would have received had the Discriminatory Measure not occurred.

(b) If Lagoven CN does not, within 90 days of receiving a Notice of Discriminatory Measure, give the Foreign Party notice of its concurrence that Discriminatory Measures resulting in a Material Adverse Impact have occurred, any Party may commence arbitration proceedings in accordance with Section 18.2. In no event, however, may any Party initiate arbitration proceedings more than once per calendar year. The scope of the arbitration proceedings shall include: (i) a determination of whether one or more Discriminatory Measures have occurred and, if that is the case, whether such measures have had a Material Adverse Impact on the Foreign Party; and (ii) in the event of an affirmative response to the two questions specified in clause (i) of this paragraph, a payment for damages to compensate the Foreign Party for the economic consequences of the Discriminatory Measure suffered by it to date and recommendations on amendments to the Agreement that would restore the economic benefit that the Foreign Party would have received if the Discriminatory Measure had not occurred.

420. The above quotations show that, in the AA, the term “*Discriminatory Measures*” is defined in a very complicated way.

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421. Further, the Tribunal appreciates that, for a correct understanding of the intent of the contracting Parties, one may have to go beyond the wording and take into account that the expropriation in 1975, well known to the Parties, must also be considered as a background and in the context of the AA.
422. Pursuant to Article 15.1(b) of the AA, Claimant may commence arbitration proceedings in accordance with Article 18.2 of the AA in the event that, as is the case here, PDVSA-CN does not concur that a Discriminatory Measure resulting in a Material Adverse Impact has occurred.
423. In the following sections in K.IV, the Tribunal will address each alleged discriminatory action individually (a) beginning with **Decree-Law 5200**, (b) continuing with the Royalty and Extraction Tax Measures, (c) followed by the Income Tax Increase, (d) and then with the Production and Export Curtailments.

K.IV.2. Decree-Law 5200

K.IV.2.a. Arguments by Claimant

424. Claimant argues that the Government's expropriation of its entire interest in the Project by means of **Decree-Law 5200** was a Discriminatory Measure. *First*, **Decree-Law 5200** was a governmental measure and a change in Venezuelan law. *Second*, the **Decree-Law 5200** expropriated or seized Claimant's interests in the Project, including its shares and participation in the Project:

The interests expropriated or seized included Mobil CN's 41- 2/3% participation interest in the Project, as well as its undivided interest in and to the assets, rights, and liabilities of the Project to the extent of that participation. Mobil CN's rights as a participant in the Project included, among other things, the right to exploit the Cerro Negro area, to take title to the EHO produced from the Project at the wellhead, and title to the movable and immovable property and intellectual property dedicated to the Project, as well as title to performance under the AA and related agreements. (C-III ¶ 209).

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425. *Third*, as Respondents concede, Decree-Law 5200 was not generally applicable to all companies in Venezuela, but rather that it applied to all companies operating outside of the legal framework of the 2001 Hydrocarbons Law. (C-IV ¶ 39).
426. Claimant states that the fact that its interests were expropriated or seized as of 27 June 2007 has been recognized by the Project's project-finance creditors in their Notice of Prospective Default. (C-III ¶ 156). This fact of the "*expropriation*" has also been confirmed by statements made by President Chávez, the Minister of Energy and President of PDVSA Rafael Ramírez, and other representatives of PDVSA and PDVSA-CN. (C-III ¶ 155).
427. Claimant characterizes Respondents' argument that Decree-Law 5200 merely "*nationalized or reserved to the State*" rather than "*expropriated*" Claimant's investment as both hairsplitting and irrelevant.

(i) neither Decree-Law 5200 nor the Law on Effects could accomplish such a "reservation" because the 1975 Nationalization Law had already reserved those oil activities to the State; (ii) a "nationalization" like the one the Respondents assert Decree-Law 5200 implemented involves expropriation; and (iii) in the end, the hair-splitting distinctions among "nationalization," "reserve" and "expropriation" do not matter, because the contract uses the alternative concept "seizure," and the Respondents do not and cannot deny that the Republic of Venezuela "seized" Mobil CN's entire investment on 27 June 2007. (C-IV ¶ 42, partially quoted).

The Respondents' attempt to re-characterize the events of 27 June 2007 as something other than an expropriation offends any reasonable understanding of the facts and the law. The notion that this case involves a voluntary transfer of interests and a voluntary departure from the country is preposterous. The transfer was compelled by Decree-Law 5200. Mobil CN cooperated with an orderly transfer of operations out of a respect for law and a commitment to safety. But Mobil CN went along with the transfer with full reservation of rights and in the face of threats of armed force. (C-VI ¶ 25, citations omitted, partially quoted).

428. Vice-Minister Mommer's statement that the Republic of Venezuela expropriated Claimant's interests in the Project through Decree-Law 5200 has not been refuted. For ease of reference his statement was: "[w]e

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annulled that association, expropriated the assets and owe them compensation.” (C-VI ¶ 5).

429. Claimant explains that Venezuelan scholars use the term “*nationalization*” to refer to a governmental measure that combines “(i) *reservation of an economic activity to the State with (ii) the transfer of private assets engaged in that activity to the State, usually by expropriation. According to this usage, neither Decree-Law 5200 nor the Law on Effects is genuinely a ‘nationalization’ law, [as the reservation was accomplished in 1975.]” (C-IV ¶ 42). Further, as Prof. Brewer-Carías explained, a “*nationalization*” involves an expropriation. (C-VI ¶ 26). Likewise, as Prof. Hernández-Bretón explained, even a “*regulation*” can constitute an expropriation, especially where it, as Decree-Law 5200 did, totally destroys the value of the assets. (C-VI ¶ 27).*
430. Further, Claimant states that Respondents’ argument that the pre-contractual Heads of Agreement uses the term “*condemnation*” (not “*expropriation*”) and that, therefore, “*expropriation*” excludes takings of property as part of a policy of nationalization or reservation, is irrelevant. The terms of the AA are controlling, and “*even if the AA had used the term ‘condemnation,’ that term does not exclude the taking of property as part of a broader policy of nationalization.*” (C-IV ¶ 42, footnotes omitted).
28. There is no evidence on the record that the notion of “expropriation or seizure” is limited to the U.S. law concept of “condemnation” or to physical taking of assets. The reference to the Heads of Agreement and the attempt to refer to U.S. legal concepts is inappropriate because the AA has an integration clause (Section 23.2) and is governed by Venezuelan law. And the AA cannot have been intended to refer only to physical takings, because the definition of Discriminatory Measure refers to intangible property like “assets” or “interests” which are not subject to physical taking. (C-VI ¶ 28, citation omitted).
431. Even taken by itself, the expropriation reduced Claimant’s Net Cash Flow by more than five percent for FY 2007 and for the remaining 28-year term of the AA. (C-III ¶ 230).

K.IV.2.b. Arguments by Respondents

432. Respondents state that the Tribunal must assess whether the individual provisions of Decree-Law 5200 constitute Discriminatory Measures. Under Article 3 of the Decree-Law 5200, operatorship was to be transferred. With respect to the cost calculations in the damages section, Claimant has argued that increases in costs for the Project were caused by the change in operatorship. The argument assumes that the transfer of control of operations was a Discriminatory Measure. (R-III ¶ 135). The change in operatorship was carried out in every EHO project in the Orinoco Oil Belt and was, therefore, not discriminatory under the first part of the definition. (R-III ¶ 136). Claimant's presentation that ExxonMobil was an efficient operator should be disregarded in its entirety. (R-III ¶ 134).
433. The required migration under Articles 4 and 5 also applied to all EHO associations in the Orinoco Oil Belt. Respondents argue that the migration process was not an "expropriation" within the meaning of the term "Discriminatory Measure" in the AA and that therefore, Clause XV does not apply. (R-III ¶ 138; R-IV ¶ 26).
434. Respondents also state that there was no "seizure." The Heads of Agreement provides guidance as to the Parties' intent that the term "seizure" or "ocupación" connotes a physical taking of possession, rather than a transfer by agreement or operation of law, such as through Decree-Law 5200. (R-IV ¶ 26).
435. Respondents explain that Venezuelan law distinguishes between expropriation and nationalization or reservation. (R-II ¶ 122). An expropriation is "the taking of specific property for use by the Government" and is "distinguished from nationalization or reservation of a particular activity to the State, which by definition is not discriminatory in nature." (R-II ¶ 121). Respondents state that this interpretation is consistent with Venezuelan law and the language of the definition of Discriminatory Measures in the AA. (R-III ¶ 138).

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436. **Decree-Law 5200** implemented a policy of nationalization and, at the same time, allowed private parties to participate in the petroleum industry by migrating to mixed companies in which a state company maintained control through a shareholding of at least 60%. (R-II ¶ 121). Claimant was offered “*the opportunity to continue its participation in the Venezuelan petroleum industry by conforming its activities to the existing regulatory framework, with compensation for any diminution of its interest*” on the same basis as most companies, including Claimant’s partner in the Cerro Negro Joint Venture, BP. (R-II ¶ 125). Respondents state that Claimant made a business decision not to accept the new legal structure – and that this refusal does not transform the “*migration*” into an “*expropriation or seizure*” within the meaning of the AA. (R-IV ¶ 27).
437. Respondents further state that, even if the law accomplished an “*expropriation or seizure of assets of the Project or the Foreign Party’s interests in the Project*”, such legislative action will only be considered a Discriminatory Measure if it did not apply with a “*general character*” to companies in Venezuela. (R-III ¶ 138).

The second part of the definition does not characterize any “*expropriation or seizure*” as a Discriminatory Measure. Rather, an “*expropriation or seizure of assets of the Project or the Foreign Party’s interests in the Project*” is only to be considered a Discriminatory Measure under the terms of the definition when the measure does not apply with a “*general character*” to companies in Venezuela. This latter qualification would have no meaning except in connection with a policy of nationalization that applied equally to all companies involved in the oil industry. Otherwise, the qualification could only be given effect in the circumstance that all assets of all companies in Venezuela are expropriated, a scenario which is not only incredible but which has no foundation under any concept of expropriation, whether direct, indirect or otherwise, in Venezuelan law. (R-III ¶ 138, citations omitted).

438. Respondents argue that the Parties intended “*a measure that applied with general effect to all companies to which it could possibly apply, i.e., to all companies engaged in the production of hydrocarbons in Venezuela, would not constitute a Discriminatory Measure.*” (R-II ¶ 124). Here, the migration process applied to all 9 companies in Venezuela operating outside the legal framework of the **2001 Hydrocarbons Law**. (R-II ¶ 123).

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K.IV.2.c. The Tribunal

439. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties' Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-I	¶¶ 59 – 63
C-III	¶¶ 138 – 162, 205 – 211, 229 – 230
C-IV	¶¶ 39 – 42
R-II	¶¶ 120 – 126
R-III	¶¶ 130 – 140

Exhibits:

Exhibit	Document Name
C-9	Copy of 25 July 2007 Letter from Steven Reisman of Curtis-Mallet Prevost Colt & Mosle LLP (on behalf of PDVSA Cerro Negro S.A.) to James Garden, Esq. Of Carter Ledyard & Millburn LLP
C-15	Uncertainty Reigns Among Companies that Operate in the Belt [<i>Incertidumbre Reina entre Empresas que Operan en la Faja</i>], El Universal (9 January 2007)
C-17	Tr. of speech "President Chávez in Nationalization Act of the Belt: 'We Have Buried 10 Years of Nefarious Oil Opening'" [<i>Presidente Chávez en Acto de Nacionalización de la Faja: "Hemos Enterrado 10 años de Nefasta Apertura Petrolera"</i>], broadcasted from the José Antonio Anzoátegui Industrial Complex on 1 May 2007, available at www.pdvsa.com at 2
C-35	26 April 2007 letter from Deutsche Bank Trust Company Americas Trust & Securities Services, as Bond Trustee, to The Bank of New York.
C-41	Testimony of Thomas L. Cranmer (25 September 2008) at ¶ 26
C-43	Testimony of Tim Cutt (26 September 2008) at ¶¶ 32 – 54
C-44	Declaration of Professor Eugenio Hernández-Bretón (27 September 2008) at ¶¶ 56, 60 – 71
C-45	Declaration of Professor Allan R. Brewer-Carías (26 September 2008) at ¶¶ 49 – 68, 72, 74, 79, 87
C-47	Expert Report of R. Dean Graves of Alvarez & Marsal, Dispute Analysis & Forensic Services, LLC, on 2007 ICC Damages Payable (26 September 2008) at 6
C-48	Expert Report of Professor Stewart C. Myers of the Brattle Group on the Value of Indemnification Cash Flows (28 September 2008)
C-50	Expert Report of Dr. Scott T. Jones of FTI Consulting, Inc. And Compass Lexecon (" <i>Lexecon</i> "), a Wholly-Owned Subsidiary of FT Consulting, Inc. (26 September 2008)
C-69	Offering Memorandum, Cerro Negro Finance Ltd. (11 June 1998) p. A-6

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- C-87 Association Agreement Clause I *defining “Government Measures” and “Materially Adverse Impact”*
- C-95 Non-Binding Terms for the Migration of Associations (August 2006)
- C-96 Ministry of Energy and Petroleum Press Release, *Presidente Chávez Solicitará Habilitante a la AN Para Favorecer al Sector Energético* [*President Chavez Will Solicit Enabling Law from the National Assembly to Encourage the Energy Sector*] (8 January 2007)
- C-97 *Venezuela Buscará Tomar Control Participación AES en EDC* [*Venezuela Shall Seek to Take Control Participation [sic] AES in EDC*], EL UNIVERSAL (15 January 2007)
- C-98 Law that Authorizes the President of the Republic to Issue Decrees with Rank, Value and Force of Law in Delegated Subject Matters [*Ley Que Autoriza al Presidente de la República Para Dictar Decretos con Rango, Valor y Fuerza de Ley en las Materias que se Delegan*] (as published in the Official Gazette No. 38617 of 1 February 2007) Art. 11
- C-99 Decree-Law 5200 Art. 1 – 5, 7
- C-100 Instrument of Transfer of Operations of the Cerro Negro Project [*Acta de Entrega de Operaciones del Proyecto Cerro Negro*] (25 April 2007) (without Annexes) and Letter dated 25 April 2007 from Mobil Cerro Negro, Ltd. And Operadora Cerro Negro S.A. to Ministry of Energy and Petroleum, PDVSA, PDVSA CN, and Veba Oil & Gas
- C-101 Draft Form of Contract for Conversion to a Mixed Company (17 January 2007), Art. 2, 5, 6.1 – 6.3, 7 (17 January 2007)
- C-102 Transcript High Court of Justice – Queen’s Bench Division Commercial Court (29 February 2008) at 23
- C-103 Tr. from Public Proceedings *Mobil Cerro Negro, Ltd. V. Petróleos de Venezuela, S.A.*, High Court of Justice – Queen’s Bench Division Commercial Court, Claim No. 2008-61 (29 February 2008) pp. 8 – 9
- C-104 Law on Effects Art. 1, 2, 4
- C-105 PDVSA Press Release, *Nacen Petro Anzoátegui, Petro Cedeño, Petro Piar y Petro Monagas* [*Petro Anzoátegui, Petro Cedeño, Petro Piar y Petro Monagas are Born*], (29 July 2007)
- C-106 Resolution [*Acuerdo*] Approving the Incorporation of Mixed Company PetroMonagas S.A. between Corporación Venezolana de Petróleo, S.A. and Veba Oil & Gas Cerro Negro or their Respective Affiliates [*Acuerdo mediante el cual se aprueba la constitución de la empresa mixta PetroMonagas, S.A., entre la Corporación Venezolana de Petróleo, S.A. y Veba Oil & Gas Cerro Negro, o sus respectivas afiliadas*] (as published in the Official Gazette No. 38798 of 29 October 2007), Fourth Whereas and Art. I, 2.1, 2.12
- C-117 *Sin Transición en la faja* [*Without Transition in the Belt*], EL UNIVERSAL (26 August 2006)
- C-126 Index of Materials With Admissions By Government Officials Regarding Expropriation/Nationalization of Mobil Cerro Negro’s Assets
- C-128 Organic Law of Hydrocarbons [*Ley Organica de Hidrocarburos*]

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- (as published in the Official Gazette No. 37323 of 13 November 2001)
- C-129 Decree No. 5916 Transferring to Petro Monagas S.A. the Right to Develop Primary Exploration Activities Specified Therein [*Decreto No. 5916, mediante el cual se transfiere a la empresa PetroMonagas, S.A. el derecho a desarrollar actividades primarias de exploración que él se especifican*] (as published in the Official Gazette No. 38884 of 5 March 2008) Art. 1
- C-160 Heads of Agreement between Lagoven, Mobil Oil Corporation, and Mobil de Venezuela (17 September 1996) Ex. D
- C-186 Transcript of *Aló Presidente* No. 288 (29 July 2007)
- C-213 Testimony of Brian Lawless (14 May 2009)
- C-214 Second Declaration of Professor Allan R. Brewer-Carías (14 May 2009) at ¶¶ 34-37, 40-42, 48
- C-215 Second Declaration of Professor Eugenio Hernández-Bretón (14 May 2009) at ¶¶ 9 – 13, 15, 30, 32
- C-216 Reply Expert Report of Dr. Scott T. Jones of FTI Consulting, Inc. and Compass Lexecon
- C-217 Reply Expert Report of R. Dean Graves of Alvarez & Marsal (12 May 2009)
- C-220 Reply Expert Report of Professor Stewart C. Myers of the Brattle Group (13 May 2009)
- C-223 Tr. of Bernard Mommer Interview (12 February 2008) p. 8
- R-4 First Affidavit of Bernard Mommer(11 February 2008) at ¶ 10
- R-7 Decree-Law 5200 Art. 1, 3, 5
- R-35 Tr. of 2 December 2008 Hearing pp. 137, 141 – 142
- R-43 Congressional Authorization Twentieth Condition
- R-57 2001 Hydrocarbons Law
- R-65 Instrument of Transfer of Operations of the Cerro Negro Project, dated 25 April 2007
- R-68 Legal Expert Opinion of Professor José Mélich-Orsini (10 February 2009) at ¶¶ 31-48
- R-89 First Affidavit of Jim Massey (21 January 2008) *Mobil Cerro Negro, Ltd. V. Petróleos de Venezuela, S.A.*, Claim No. 2008 Folio 61, High Court of Justice, Queen’s Bench Division, Commercial Court (London) at ¶ 19
- R-92 Black’s Law Dictionary (West Publishing Co., 6th ed. 1990) p. 292
- R-112 Association Agreement Clause 1 *defining “Discriminatory Measure”*
- R-113 Supplemental Expert Report on Fiscal Year 2007 Indemnity Cash Flow Calculation, Prepared by Vladimir Brailovsky (14 August 2009) at ¶ 28
- R-116 Supplemental Direct Testimony of José Ángel Pereira Ruimwyk (11 August 2009)
- R-118 Second Legal Expert Opinion of Professor José Mélich-Orsini (14 August 2009) at ¶¶ 21 – 27
- R-119 Second Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (14 August 2009) at ¶¶ 72 – 95
- R-122 Congressional Authorization of the Association Agreement between Maraven S.A. and Conoco Inc. (Petrozuata Project), Official Gazette No. 35.293 published 9 September 1993

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- R-123 Congressional Authorization of the Framework of Conditions for the Association Agreement between Corpoven S.A. Filial de Petróleos de Venezuela and the companies Atlantic Richfield Co. (ARCO), Phillips Petroleum Company and Texaco, Inc. (Hamaca Project), Official Gazette No. 36.209, published 20 May 1997
- R-124 Cerro Negro, Confidential Preliminary Information Memorandum, Vol. I, March 1998 p. XV-6
- R-126 Congressional Authorization of the Association Agreement between Maraven – Total – Itochu and Marubeni (Sincor Project), Official Gazette No. 35.293 published 9 September 1993
- R-130 Allan R. Brewer-Carías, *La intervención del estado en la actividad mercantil*, JORNADAS DE DERECHO MERCANTIL (Universidad Católica Andrés Bello, Facultad de Derecho, Caracas 1978)

At and Following the 2010 Hearings:

Submission	Pinpoint
C-VI	¶¶ 5, 26 – 28
R-IV	¶¶ 26 – 27

Speaker	Citation
C. Closing	2034
C. Opening	44 – 45
Cranmer	433, 447 – 448, 455 – 457
Expert Conf.	944, 976 – 977
Graves	1543
Hoenmans	404
Jones	1427 – 1428

440. At the outset, the Tribunal points out that the Decree-Law 5200 was enacted prior to the contract's alleged extinguishment and, thus, its evaluation in the present context is not dependent on whether the Tribunal finds that the AA was indeed extinguished.
441. Now turning to the language in Clause I of the AA, the Tribunal cannot agree with Respondents' argument that the words "*expropriation*" and "*seizure*" connote a physical taking of possession, rather than a transfer by agreement or operation of law such as through Decree-Law 5200, and, therefore, that the transfer of operatorship and the migration of the Project to a mixed company (i) was not an "*expropriation*" or "*seizure*" within the meaning of the definition of "*Discriminatory Measure*" in Article 1 of the AA, but (ii) was rather a "*nationalization*" or "*reservation*", which Venezuelan law distinguishes from "*expropriation*" and is not covered by

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the definition of Discriminatory Measure. Indeed, the Tribunal observes that it is commonly accepted in international investment practice that: [C-215 ¶ 32; C-215, App. 13 “*in other words, we can talk about expropriation, indirect expropriation, when the essential content of the right to property is eroded; when permitted ‘limitations’ turn into intolerable ‘restrictions’ because they denaturalize the right; when the owner loses ‘control’ over his/her property*”]; I. Fadlallah, Ch. Leben, E. Teynier, « Investissements internationaux et arbitrage », in Les Cahiers de l’Arbitrage, Vol. IV – 2008] that an expropriation can be direct, implying a physical taking of property, as well as indirect. According to one author, “*direct takings of property can take various forms, ranging from outright nationalization in all economic sectors or on an industry-wide basis, to large-scale takings of land by the state, or specific taking. Indirect takings include creeping expropriations and regulatory takings. There are many forms of indirect takings that are generally recognized in the literature and in the arbitral awards as compensable. Such forms, inter alia, include the forced sale of alien property; exercising management control over the investment; unreasonable or excessive taxation*” and “*an indirect expropriation may exist if the measure attributable to the State has the effect of depriving the investor of other rights incidental to the enjoyment of its investment, even where the legal title to the property is not affected.*” [Dr. Zeyad A. Alqurashi, International Oil and Gas Arbitration, OGEL special study – vol. 3, January 2005, page 137, 139]. According to another author, “*intangible property, including rights arising from a contract are susceptible of an expropriation in the same way as tangible property*” (C-135) and “*the decisive element in an indirect expropriation is the substantial loss of control or economic value of a foreign investment without a physical taking. This may take place through a large variety of forms of indirect interference with the investors’ economic interests.*” (C-135).

442. The Tribunal considers that Respondents’ distinction between “*reservation*” and “*nationalization*”, on the one hand, and “*expropriation*” on the other

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hand, borders on semantics and is irrelevant as well because the AA equates “*expropriation*” and “*seizure*.”

443. The Tribunal, in particular, concludes that:

- * Respondents denial, on legal grounds, that the Republic of Venezuela “*seized*” Claimant’s entire investment on June 27, 2007 is unfounded;
- * The notion that this case involves a voluntary transfer of interests and a voluntary departure of Mobil from Venezuela cannot be seriously entertained;
- * the transfer was compelled by **Decree-Law 5200**;
- * Mobil CN’s cooperation for an orderly transfer of operations was made with full reservation of rights, and the exception contemplated by the AA is not applicable here, as **Decree-Law 5200** was “*not generally applicable to Companies in the Republic of Venezuela*”, even if the change in operatorship was carried out in every EHO project in the Orinoco Oil Belt.

444. In this context, the Tribunal notes that Dr. Bernard Mommer, Vice Minister of Energy, acknowledged in the following terms on 12 February 2008 that the Republic of Venezuela had expropriated Claimant’s interest in the Project through **Decree-Law 5200**:

We annulled that association, expropriated the assets and owe them compensation. (Ex. C-103).

445. Taking into account the foregoing considerations, the Tribunal concludes that **Decree-Law 5200** was a Discriminatory Measure under Clause I of the AA and that Article 15 of the AA is therefore applicable, that the expropriation implemented by **Decree-Law 5200** came into effect on 27 June 2007, and as of that date, Claimant lost all of its rights in the Project and under the AA.

K.IV.3. Royalty and “*Extraction Tax*” Measures

K.IV.3.a. Arguments by Claimant

446. Claimant’s arguments are best taken from its own words, found at C-IV ¶¶ 43 – 47 (citations omitted).

- a. **Each Measure Is an Expropriation or Seizure**

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43. The Venezuelan Government repudiated the Royalty Reduction Agreement and applied a 16 2/3% royalty in 2004. It later imposed an Extraction Tax, which “effectively raised the royalty rate to 33 1/3%.” These measures abolished Mobil Cerro Negro’s vested rights under the Royalty Reduction Agreement and the Royalty Procedures Agreement. They are Discriminatory Measures that expropriated and seized the rights guaranteed by the two Royalty Agreements.
 44. The Royalty Reduction Agreement guaranteed Mobil Cerro Negro a royalty rate of 1%, once the upgrader became operational, until either of two conditions was met: (i) the accumulated gross income from the Project exceeded three times the total initial investment or (ii) nine years elapsed from the beginning of commercial production involving the upgrader. When the Government abolished the Royalty Reduction Agreement, neither condition had been met. The Royalty Reduction Agreement further guaranteed a maximum royalty rate of 16 2/3%, which was the maximum rate specified in the 1943 Hydrocarbons Law. The Government nevertheless imposed the Extraction Tax, which raised the effective royalty rate to 33 1/3%.
 45. The royalty measures expropriated or seized Mobil Cerro Negro’s vested rights in the Royalty Reduction Agreement and the Royalty Procedures Agreement. Venezuelan law recognizes that contract rights, “property,” “assets of any nature” or “rights” are protected from expropriation without compensation. Professor Hernández Bretón explains that “any type of assets, including contractual rights, can be subjected to expropriation [...]” The Respondents do not appear to contest this point.
 46. The Respondents nevertheless contend that the royalty increases (as well as the other measures discussed below) were not “expropriation” but “‘contributions, restrictions and obligations’ on property or limitations on economic freedom that are different in character from an ‘expropriation’ under Venezuelan law.” This characterization of the measures disregards their true impact and the specific provisions of the Association Agreement. The measures completely abrogated discrete contract rights having great value and, as a consequence, expropriated or seized those rights. As Professor Hernández Bretón explains, the concept of expropriation under Venezuelan law includes indirect expropriation, that is, “when the core (essential content) of the right to property is eroded by State action,” when the “‘limitations’ denature the right, and when the owner loses control of the property. The Venezuelan Supreme Court has held that when the limitations imposed on the right to property go beyond the essence or nature of the right, the right is extinguished. Because the Government’s royalty increases deprived Mobil Cerro Negro of its valuable rights under the Royalty Reduction Agreement and the Royalty Procedures Agreement, each of those measures is an expropriation.
- b. Both Royalty Measures Are Discriminatory**
47. The royalty increases were discriminatory under the standard of the second part of the definition of “Discriminatory Measure,” because they did not apply to all companies in Venezuela. The Respondents admit

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that these measures were not “generally applicable” to all companies in Venezuela. As in the case of the “nationalization,” however, they assert that the measures are not “discriminatory” because they applied to all companies to which they could apply, that is to all companies “eligible for the royalty holiday” and to all oil companies, respectively. As discussed above, this argument disregards the special standard of discrimination that the Association Agreement applies to expropriation or seizure, which are deemed discriminatory whenever they do not apply to all companies in Venezuela. That very broad protection against expropriation was an essential term of the Association Agreement. It required the Respondents to indemnify Mobil Cerro Negro for any expropriation or seizure that singled out the Claimant and other oil companies for adverse treatment, including actions withdrawing the special inducements for their investments.

447. *Finally*, Claimant also argues that the Executive did not have the right to end the royalty holiday at will:

19. [...] the Respondents mischaracterize a decision by the Venezuelan Supreme Court as confirming “that the State always had the right [...] to end the royalty holiday when the circumstances motivating it no longer existed.” But in that case there had been no challenge to any RRA; the question was whether certain clauses of an *Acuerdo* of the Venezuelan Congress authorizing the execution of the At-Risk-and-Shared-Profit Exploration Agreements were valid, and whether the Executive could reduce the royalty in certain oil-production projects at the beginning of the project or only when the depletion of the reservoir made the exploitation uneconomical. In that very different setting, the Supreme Court held that the Executive could reduce the royalty at any stage of a project. (C-VI ¶ 19).

K.IV.3.b. Arguments by Respondents

448. Respondents argue that the Royalty Measures fall squarely within the “*laws of general applicability*” exception in the definition of “*Discriminatory Measures*” because they applied to each of the EHO projects in Venezuela. (R-II ¶ 105). The royalty increase applies “*generally*” to every company in Venezuela eligible for the royalty holiday. (R-II ¶ 107). The Extraction Tax applies to every company producing any kind of crude oil. (R-II ¶ 115).
449. Respondents assert that Claimant’s argument that the Royalty Measures constitute an expropriation is belied by its own documents introduced in this case, in which Claimant refers to the Royalty Measures as “*measures that preceded the expropriation.*” (R-II ¶ 108; R-III ¶ 124). Respondents reject

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Claimant's argument that the Royalty Measures constitute an "expropriation" and are, therefore, encompassed by the definition of Discriminatory Measure that deals with "tax rates, foreign exchange controls, or the expropriation or seizure of assets of the Project or of a Foreign Party's interests in the Project." (R-II ¶ 106).

450. First, "there is no basis in Venezuelan law [...] for equating the Royalty Measures with an expropriation" and such an interpretation could elevate every government act to the level of an expropriation. (R-II ¶ 107). Claimant's reference to "vested rights" and "indirect expropriation" is irrelevant. (R-III ¶¶ 115, 119).
451. Second, the Royalty Measures do "not even involve a breach by the State of any obligation to Claimant with respect to Royalties." (R-III ¶ 119). "[T]he 1943 Hydrocarbons Law under which the royalty reduction had been granted expressly preserved the Minister's authority and discretion to eliminate the royalty reduction when the causes motivating the reduction no longer exist." (R-III ¶ 116). By 2004, the cause motivating the royalty reduction had been eliminated due to the drastic increase in the price of Brent crude oil. (R-III ¶ 118). Respondents state that Claimant has not provided any evidence to challenge this point or to disagree with the factual basis for the Government's decision. (R-IV ¶ 24). Claimant has argued that the holiday would have ended in December 2007 if it had not been terminated in October 2004. Claimant's argument is, however, based on an unaudited 2004 Price Waterhouse report that did not take into account the capitalized pre-operative costs required by the RRA. A correct calculation would reveal that the royalty holiday would have ended in 2006. (R-IV ¶ 25).
452. Third, the "power of unilateral rescission of the contract" is "a well-settled and completely uncontroversial principle of Venezuelan law that the State has a legal right to unilaterally modify or terminate its own administrative

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contract” and such “*can never be considered an ‘expropriation.’*” (R-III ¶¶ 120, 122).

K.IV.3.c. The Tribunal

453. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties’ Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-I	¶¶ 28 – 30, 64 – 68
C-III	¶¶ 212 – 218
C-IV	¶¶ 43 – 47
C-VI	¶ 19
R-II	¶¶ 103 – 109, 113 – 115
R-III	¶¶ 113 – 125
TOR	¶ 5.1.1(a)

Exhibits:

Exhibit	Document Name
C-2	Association Agreement Clause I
C-41	Testimony of Thomas L. Cranmer (25 September 2008) at ¶¶ 19, 25-26
C-44	Declaration of Professor Eugenio Hernández-Bretón (27 September 2008) at ¶¶ 72-74
C-45	Declaration of Professor Allan R. Brewer-Carías (26 September 2008) at ¶¶ 37-41
C-47	Expert Report of R. Dean Graves of Alvarez & Marsal, Dispute Analysis & Forensic Services, LLC, on 2007 ICC Damages Payable (26 September 2008)
App. 3	ICC Damages Flow Chart (For Years in Which “ <i>Discriminatory Measures</i> ” Reduced Net Cash Flow by More Than 5%) p. 2
C-69	Offering Memorandum, Cerro Negro Finance Ltd. (11 June 1998) at pp. 37, A-6, App. C
C-80	Agreement between the Venezuelan Ministry of Energy and Mines and PDVSA S.A. to calculate the Royalty under Article 41 of the Hydrocarbons Law (Royalty Reduction Agreement) (29 May 1998) Section 5
C-87	Association Agreement Clause I
C-112	Law on Partial Amendment to the Organic Law of Hydrocarbons [<i>Ley de reforma Parcial del Decreto No. 1.510 con Fuerza de Ley Organica de Hidrocarburos</i>] (16 May 2006) and Organic Law of Hydrocarbons (as amended) (both documents as republished in the Official Gazette No. 38493 of 4 August 2006) Art. 1, 2, 5 (modifying Article 48)

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- C-135 Christoph Schreuer, *The Concept of Expropriation Under the ETC and Other Investment Protection Treaties*, 2 TDM, vol. 5 (November 2005) at ¶ 64
- C-160 Heads of Agreement between Lagoven, Mobil Oil Corporation, and Mobil de Venezuela (17 September 1996)
- C-169 Procedure for Payment of Extraction Tax (Royalty) for Extra Heavy Crude Oil Produced and Sulfur Extracted by Operadora Cerro Negro, S.A. (OCN) [*Procedimiento para el Pago del Impuesto de Explotación (Regalía) del Crudo Extrapesado Producido y del Azufre Extraído por Operadora Cerro Negro S.A. (OCN)*] (Royalty Procedures Agreement), Articles 1, 4.4.1, 4.4.2
- C-214 Second Declaration of Professor Allan R. Brewer-Carías (14 May 2009) ¶¶ 44 – 46, 49
- C-215 Second Declaration of Professor Eugenio Hernández-Bretón (14 May 2009) ¶¶ 24, 32 – 34
- C-217 Reply Expert Report of R. Dean Graves of Alvarez & Marsal (12 May 2009)
- App. 3 PDVSA 2004 Form 20F Filing with the U.S. Securities and Exchange Commission
- C-224 Venezuelan Constitution [*Constitución Venezolana*], dated 20 December 1999 (as published in Extraordinary Official Gazette No. 5453 of 24 March 2000) Art. 115
- C-225 Law on Expropriation for Public Utility Cause [*Ley de Expropiación por Causa de Utilidad Pública o Social*], dated 1 July 2002 (as published in Official Gazette No. 37475 of 1 July 2002), Art. 2 and 7
- C-226 *Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, Award of 29 June 1989, 21 Iran-U.S. C.T.R. 79, 106 (1989)
- C-227 *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB 84/3, Award of 20 May 1992, 8 ICSID Review-Foreign Inv. L.J. 328, 375 (1989)
- R-1 2001 Hydrocarbons Law Art. 44
- R-2 1943 Hydrocarbons Law, Official Gazette No. 31, published 13 March 1943 [*Ley de Hidrocarburos*], Art. 41
- R-35 Tr. of 2 December 2008 Hearing pp. 127 – 128
- R-57 Decree No. 1.510, Decree with Force of Organic Law of Hydrocarbons, Official Gazette No. 37.323, published 13 November 2001 Art. 44
- R-62 Law of Partial Reform of Decree No. 1.510 with Force of Organic Law of Hydrocarbons, Official Gazette No. 38.443, published 24 May 2006
- R-68 Legal Expert Opinion of Professor José Mélich-Orsini (10 February 2009) at ¶¶ 27 – 48
- R-69 Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (10 February 2009)
- App. 6 Decree No. 5.916, PetroMonagas S.A., Transfer Decree, Official Gazette No. 38.884, published March 5, 2008 [*Decreto N° 5.916, mediante el cual se transfiere a la empresa PetroMonagas, S.A., el derecho a desarrollar actividades primarias de exploración que en él se especifican*]
- R-86 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. To

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- Eulogio Del Pino, PDVSA Cerro Negro, S.A. and Rafael Ramírez, Petróleos de Venezuela, S.A. (22 June 200)
- R-87 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. To Eulogio Del Pino, PDVSA Cerro Negro, S.A. and Rafael Ramírez, Petróleos de Venezuela, S.A. (25 June 2007)
- R-88 Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. To Eulogio Del Pino, PDVSA Cerro Negro, S.A. and Rafael Ramírez, Petróleos de Venezuela, S.A. (27 June 2007)
- R-89 First Affidavit of Jim Massey (21 January 2008) *Mobil Cerro Negro, Ltd. V. Petróleos de Venezuela, S.A.*, Claim No. 2008 Folio 61, High Court of Justice, Queen's Bench Division, Commercial Court (London) at ¶ 25
- R-91 Letter from Rafael Ramírez, Minister of Energy and Mines to Alí Rodríguez, President of Petróleos de Venezuela, S.A. (8 October, 2004)
- R-92 Black's Law Dictionary (West Publishing Co., 6th ed. 1990), p. 292
- R-93 Expert Report of Barry Pulliam and Anthony Finizza, Ph.D., Econ One Research, Inc. (16 February 2009) ¶¶ 13, 42 – 53, Table 1
- App. 3 Proyecto Cerro Negro, Report of Independent Accountants and Financial Statements, December 31, 1999 and 1998
- App. 4 Proyecto Cerro Negro, Report of Independent Accountants and Financial Statements, December 31, 2000 and 1999
- App. 5 Proyecto Cerro Negro, Report of Independent Accountants and Financial Statements, December 31, 2001 and 2000
- App. 6 PDVSA Cerro Negro, S.A., Financial Statements, 31 December 2001 and 2000
- App. 7 Mobil Cerro Negro, Ltd., Report of Independent Public Accountants and Financial Statements, December 31, 2001 and 2000
- App. 23 Supporting Data for Figure 4, Annual Average World Oil Prices 1970-2008
- R-94 Expert Report on Fiscal Year 2007 Indemnity Cash Flow Calculation, prepared by Vladimir Brailovsky, Economía Aplicada, S.C., (16 February 2009) ¶¶ 37 – 46
- App. 5 Proyecto Cerro Negro, Report of Independent Accountants and Financial Statements, December 31, 1999 and 1998
- App. 6 Proyecto Cerro Negro, Report of Independent Accountants and Financial Statements, December 31, 2000 and 1999
- App. 7 Proyecto Cerro Negro, Report of Independent Accountants and Financial Statements, December 31, 2001 and 2000
- App. 9 Wood Mackenzie, *ExxonMobil, Upstream RADAR Report*, July 2007
- R-112 Association Agreement Article 2.1(a)
- R-113 Supplemental Expert Report on Fiscal Year 2007 Indemnity Cash Flow Calculation, Prepared by Vladimir Brailovsky (14 August 2009) ¶¶ 22 – 24
- R-115 Supplemental Expert Report of Econ One Research, Inc., (14 August 2009) ¶¶ 49 – 53
- R-118 Second Legal Expert Opinion of Professor José Mélich-Orsini and Appendices (14 August 2009) at ¶ 26
- R-119 Second Legal Expert Opinion of Professor Enrique Urdaneta

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- App. 37 Fontiveros (14 August 2009) at ¶¶ 72-95
Supreme Court of Justice (Full Chamber), *Nullity Action For Unconstitutionality Filed By Simón Muñoz Armas, Elías Eljuri Abraham and Others Against the Tenth, Seventeenth, Second and Fourth Clauses of Article 2 of the Authorization of the Congress of the Republic Approved on July 4, 1995*, Case No. 812-829 (August 17, 1999) [*Corte Suprema de Justicia (Sala Plena Accidental), Acción de nulidad por inconstitucionalidad de Simón Muñoz Armas, Elías Eljuri Abraham y otros en contra de las cláusulas décima, decimoséptima, segunda y cuarta del Artículo 2° del Acuerdo del Congreso de la República aprobado en fecha 4 de Julio de 1995, Exp. N° 812-829 (17 de agosto de 1999)*] at 20
- App. 38 Allan R. Brewer-Carías, *ADMINISTRATIVE CONTRACTS* (Editorial Jurídica Venezolana, Caracas 1992) [*Allan R. Brewer-Carías, CONTRATOS ADMINISTRATIVOS (Editorial Jurídica Venezolana, Caracas 1992)*] pp. 182 – 183
- App. 41 Eloy Lares Martínez, *ADMINISTRATIVE LAW MANUAL* (Universidad Central de Venezuela, 12th ed., Caracas 2001) [*Eloy Lares Martínez, MANUAL DE DERECHO ADMINISTRATIVO (Universidad Central de Venezuela, 12^a ed., Caracas 2001)*] p. 295
- R-124 Cerro Negro, Confidential Preliminary Information Memorandum, Vol. I, March 1998 p. XV-6
- R-125 Congressional Authorization of the formation of the mixed company, PetroMonagas S.A., between Corporación Venezolana del Petróleo S.A. and Veba Oil & Gas Cerro Negro GMBH, or their respective affiliates Official Gazette No. 38.798 (29 October 2007) Second Condition, subparagraph 6

At and Following the 2010 Hearings:

Submission	Pinpoint
C-VI	¶¶ 19, 29, 31
R-IV	¶¶ 24 – 25
R. Closing Slides	45 – 46

Speaker	Citation
Cline	1248
Cutt	679 – 683
Expert Conf.	976 – 82
Graves	1639 – 1648
Jones	1435 – 1458
Massey	500 – 501
R. Closing	2114
Ward	164 – 167

454. The Tribunal considers that, since the Parties have each considered the repudiation of the RRA and the Extraction Tax measures together as the “*Royalty Measures*” (R-III ¶ 113 – 125; C-IV ¶ 43; C-III 212 – 218), it is appropriate for the Tribunal to do the same.

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455. For the following reasons, the Tribunal finds that neither the repudiation of the RRA, nor the imposition of the Extraction Tax is compensable under the indemnity provisions of the AA.
456. The starting point for this analysis is Clause I of the AA. *First*, the Tribunal considers that the end of the royalty holiday under the RRA and the imposition of the Extraction tax were each brought about by statute and thus at the very least constitute “a change in the [...] application of Venezuelan law” under the definition of “Discriminatory Measure” under Clause I of the AA.
457. *Second*, it was clear from the record that one of the Royalty Measures – the repudiation of the RRA – was “unjust” under Clause 1 of the AA, which, in its very last sentence, defines as “unjust” any Governmental Measure which results in a Materially Adverse Impact. The repudiation of the RRA resulted in an increase of the royalty rate from 1% to 16 2/3%, and, therefore, undoubtedly resulted in a Materially Adverse Impact for Claimant. This is because “Materially Adverse Impact” under Clause I of the AA is 5% of Net Cash Flow, and an increase of the royalty rate by 15 2/3% (from 1% to 16 2/3%) assessed on the gross value of EHO production necessarily has a greater than 5% impact on Net Cash Flow. While it is certainly plausible that, as Claimant has argued, the imposition of the Extraction Tax, which also added 16 2/3% to the royalty to be collected, also resulted in a Materially Adverse Impact, for the same reasons as above, it is also plausible that, as both Parties have argued, the Extraction Tax is largely moot, since the royalty is creditable against the extraction tax (R-III fn. 193; C-III ¶ 115). The Parties, however, seem to agree that the effect of the Royalty Measures is that the royalty rate was increased to 33.33%. (*See e.g.* R-II ¶ 237 applying a 33.33% ROY rate if the Royalty Measures are not compensable; C-III ¶ 116). Against this background, the Tribunal agrees and finds that the combined effect of the Royalty Measures was to increase the applicable royalty from 1% to 33.33%.

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458. Under the first part of the definition of Discriminatory Measure found at Clause I AA, however, this change in law which resulted in a Materially Adverse Impact will only be a Discriminatory Measure and, therefore, will only be compensable under Clause XV AA, if the Tribunal concludes that the Royalty Measures did not apply to all companies engaged in extra-heavy crude upgrading projects in the Republic of Venezuela. Here, the Tribunal considers that there was no discrimination as required by the definition of Discriminatory Measures in Clause I AA. The Royalty Measures applied to every company engaged in extra-heavy crude upgrading projects in Venezuela. The Royalty increase applied “*generally*” to every company in Venezuela eligible for the royalty increase, and the Extraction Tax applied to every company producing any kind of crude oil. This being the case, the Tribunal concludes that it cannot be said that the Royalty Measures were discriminatory as contemplated by the definition of “*Discriminatory Measure*”, to the extent the Royalty Measure applied to all Venezuelan companies to which they could possibly have applied and did not single out the Claimant in a discriminatory manner. Accordingly, applying the contract as written, the Tribunal must find that the imposition of the Royalty Measures is not subject to the indemnity.
459. Further, Claimant has presented extensive arguments that the Royalty Measures constituted “*expropriations*”, with the effect that the Royalty Measures would be considered under the second part of the Article 1 definition. Indeed, if the Royalty Measures could be considered “*tax rates, foreign exchange controls, or the expropriation or seizure of assets*”, Claimant may be able to seek compensation. No arguments were submitted as to whether the Royalty Measures were changes of laws concerning tax rates. Thus, the Tribunal’s focus, based on the submissions of the Parties, is on whether the Royalty Measures were “*expropriations*.” But, as will be seen below, even if at least the Extraction Tax would be considered a tax under the second alternative of the definition of Discriminatory Measures in

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Clause I AA, for the foregoing reasons, the Tribunal finds that the Royalty Measures were not Discriminatory Measures.

460. Turning first to the RRA, on **5 November 1998**, Mobil CN became a party to the RRA entered into on **29 May 1998** between the Ministry of Energy and a subsidiary of PDVSA. The RRA provided that companies participating in strategic associations could become parties to that Agreement by expressing their consent in writing to the Ministry of Energy.
461. Pursuant to Article 5.2 of the RRA, the percentage applicable for the calculation of the royalty to be paid by each association during the commercial production period was to be (i) 1% if a given “*indicator*” were lower than or equal to 3.00, and (ii) if the “*indicator*” were higher than 3.00, then the royalty rate would be 16 2/3 % “*which is the maximum presently permitted by the Law of Hydrocarbons.*” Article 5.3 further provided that “*in no case may the 1% percentage applicable to the calculation of the royalty exceed nine (9) years as from the commencement of the commercial production of each association.*”
462. On **13 November 2001**, President Hugo Chávez issued the **2001 Hydrocarbons Law** which reserved oil production to the State and authorized private parties to conduct their business only through mixed enterprises majority-owned by the State. Pursuant to **Article 44 of the 2001 Hydrocarbons Law**, “*in respect of the hydrocarbon volumes extracted from any field, the State has a right to a 30% share as a royalty.*” However, the State retained the right (i) to reduce it to 20% in the case of mature or EHO fields from the Orinoco Belt, or to 16 2/3% for bitumen blends originating from the Orinoco Crude Oil Belt, if the National Executive became convinced that such projects were not economically viable with the 30% royalty, and (ii) to restore it again up to 30% “*when it is demonstrated that the economics of the projects can be maintained with such reinstatement.*”

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463. On 10 October 2004, President Chávez announced that the circumstances justifying the royalty holiday had changed, thereby eliminating the justification for the royalty holiday, and that the royalty rate applicable to the Orinoco Oil Belt project would be increased immediately to 16 2/3%, from the 1% rate.
464. Article 5.3 of the RRA clearly only limits the length of the 1% percentage to a maximum of 9 years, but does not, by any means, give any assurance that it will indeed be granted for that full period. Had the latter been the intention of the Parties, it would have been very easy to choose language expressing that intention. Without such an assurance, the Tribunal interprets this provision as permitting an increase of the percentage at an earlier stage in the nine year period.
465. Therefore, irrespective of whether that 9-year period was to expire in December 2007 as contended by Claimant or in 2006 as contended by Respondents, the Tribunal finds that Article 5.3 of the RRA made it clear that the State was not contractually prevented, but rather was permitted to increase the royalty rate before the expiration of the 9-year period to 16 2/3%, which under Article 5.2(b) of the RRA “*is the maximum presently permitted by the law of Hydrocarbons.*”
466. Since the RRA permitted such an increase, the increase was not an “*expropriation*” as required by the second alternative of the definition of Discriminatory Measure in Clause I of the AA. The Tribunal considers that, in view of the above interpretation, such a vested right has not been provided by the RRA, and has not been shown to exist otherwise, and thus it cannot be seen as the object of an expropriation.
467. As far as the so-called Extraction Tax enacted in May 2006 is concerned, Claimant argues that this addition violated its right to pay a royalty in the amount established under the RRA. As the Tribunal does not agree that Claimant had a vested right to a lower indemnity under the RRA, the

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Tribunal, likewise, does not agree that the Extraction Tax amounts to an expropriation.

468. The Tribunal has further noted that Claimant, in the **Terms of Reference**, referred to the Royalty Measures as “*pre-expropriation*” measures. This indicates that, at least initially, Claimant also doubted that the Royalty Measures rose to the level of an expropriation.
469. Indeed, as the Parties have both considered the repudiation of the RRA and the Extraction Tax measures together as the “*Royalty Measures*” (R-III ¶ 113 – 125; C-IV ¶ 43; C-III 212 – 218), it is difficult for the Tribunal to consider the Extraction Tax separately. However, in any case, though it could be argued that the parties to the RRA did not or could not foresee the further increase of the royalties effected by the Extraction Tax, and even if the contractual admission of royalty increases by Article 5.3 of the RRA, therefore, would not be considered as covering the 2006 increase, the Extraction Tax still cannot be considered a Discriminatory Measure as argued by Claimant, because there was not the discrimination required by that second alternative of Clause I of the AA for the following reasons.
470. The Royalty Measures applied to every company engaged in extra-heavy crude upgrading projects in Venezuela. Since the Royalties and the respective laws were never “*generally applicable to companies in the Republic of Venezuela*” as the wording of this second alternative of Article 1 of the AA provides, their respective changes and the law raising the royalties obviously also could not have such a general application, This wording of the second alternative must be interpreted taking that into account. Thus, even though the Royalty Measures did not apply to all companies doing business in Venezuela, the Royalty increase applied “*generally*” to every company in Venezuela eligible for the royalty increase, and the Extraction tax applied to every company producing any kind of crude oil. Consequently, the Tribunal finds that the “*laws of general applicability*” exception in the definition of “*Discriminatory Measures*”

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does apply with respect to the Royalty Measures. This being the case, the Tribunal concludes that it cannot be said that the Royalty Measures were discriminatory as contemplated by the definition of “*Discriminatory Measure*,” to the extent the Royalty Measures applied to all Venezuelan companies to which they could possibly have applied and therefore did not single out the Claimant in a discriminatory manner. In this regard, the Tribunal distinguishes the Royalty Measures from the income tax increase, which, as explained in section K.IV.4, applied only to EHO ventures in the Orinoco Oil Belt while the ordinary regime continued for other companies in Venezuela, thus making the “*laws of general applicability*” exception in the definition of “*Discriminatory Measures*” inapplicable with respect to the income tax increase. Therefore, irrespective of the RRA, and irrespective of whether the Extraction Tax is considered as an expropriation or as a tax, consideration of the Extraction Tax separate from the earlier Royalty Measures does not lead to another result.

471. For these reasons, the Tribunal finds that the Royalty Measures are not Discriminatory Measures in the sense of the AA.
472. The above conclusion, in so far as it concerns the Extraction Tax, is the majority view of the Tribunal. Mr. Alvarez dissents from this conclusion on the basis that, in his view, the Extraction Tax was a tax different from the existing royalties, was implemented separately and was unrelated to the RRA and the latter’s termination. While Mr. Alvarez agrees with the majority’s conclusion that the early termination of the royalty rate reduction is not a Discriminatory Measure, albeit on the different basis that this measure was foreseen by the RRA itself and was not a change in Venezuelan law, he disagrees with the majority’s conclusion that the Extraction Tax is not a Discriminatory Measure. Mr. Alvarez agrees with the majority that the Extraction Tax was not an expropriation. However, he would have accepted the Claimant’s argument that the imposition of the Extraction Tax constituted a change in Venezuelan law (see, for example C-

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III ¶ 215). In his view, the imposition of the Extraction Tax qualified as a change in tax rates which was “not generally applicable to Companies in the Republic of Venezuela.” In his view, as it applies to “tax rates, foreign exchange controls or expropriation or seizure...of assets,” the definition of a Discriminatory Measure does not except or exclude changes in tax rates that apply to all companies producing a certain kind of oil or to which the tax could apply. Rather, it simply provides that changes in tax rates are included in the definition of a Discriminatory Measure if those changes are “not generally applicable to Companies in the Republic of Venezuela.” Thus, in his view, the majority’s interpretation would require reading in language which is not present in the AA. Further, the definition of a Discriminatory Measure, as it relates to tax rates, is plainly not limited to income tax and includes the introduction of the new Extraction Tax. In light of its magnitude, the Extraction Tax would result in a Materially Adverse Impact and be deemed unjust pursuant to the terms of the definition. For these reasons, Mr. Alvarez would have found that the Extraction Tax qualified as a Discriminatory Measure under the terms of the AA.

K.IV.4. Income-Tax Increase**K.IV.4.a. Arguments by Claimant**

473. Claimant argues that the increase in the income-tax rate applicable to participants in EHO projects in the Orinoco Oil Belt to 50% constituted a Discriminatory Measure. *First*, increase in the income-tax rate was brought about by statute and, thus, plainly constitutes a change in Venezuelan law regarding tax rates. (C-III ¶ 219). *Second*, the measure is encompassed by the definition of “*Discriminatory Measure*” which includes “*the imposition of income tax on the Project or on any Foreign Party in its capacity as a participant in the Project, at a rate that does not correspond to what is provided in the last sentence of the Fifteenth Condition.*” (C-III ¶ 221). Claimant argues that, regardless of whether the measure was an expropriation or a seizure, the income tax increase was contrary to the

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purpose of the Fifteenth Condition of the Framework of Conditions, which was to guarantee “*that the participants would pay income tax under the ‘ordinary regime’ applicable to companies,*” which was based on an income-tax rate of 34%. (C-III ¶ 221, C-IV ¶ 49). The income tax increase only applied the rate of 50% to EHO ventures in the Orinoco Oil Belt. The “*ordinary regime*” for companies and assimilated entities continued to impose a maximum tax rate of 34%. (C-III ¶ 222). Therefore, the measure “*deprived Mobil CN of its vested right to a rate not exceeding that of the ordinary regime applicable to companies in Venezuela and, by so doing, it effected a ‘seizure.’*” (C-IV ¶ 48).

K.IV.4.b. Arguments by Respondents

474. Respondents incorporate by reference their arguments related to “*expropriation*” in their analysis of the Royalty Measures above and state that the income tax increase was neither an expropriation, seizure, nor a Discriminatory Measure. (R-II ¶¶ 116 – 118; R-III ¶ 127).
475. With respect to Claimant’s argument that the “*ordinary regime*” of income taxes is 34%, Respondents explain that “*the increase in the income tax rate to 50% effectuated by the amendment to the Income Tax Law in 2006 actually brought the EHO projects in line with all other companies dedicated to the exploitation of hydrocarbons, which were already paying that rate.*” (R-III ¶ 127). Recalling the Tribunal’s attention to the Twentieth Condition of the Congressional Authorization, there is no “*discriminatory treatment*” where the 50% oil income tax rate applies uniformly to all companies to which it could possibly apply. (R-II ¶ 118; R-III ¶ 127, partially quoted).
476. Further, Respondents argue that “[i]f a change in the income tax rate referred to in the Fifteenth Condition of the Congressional Authorization (which is also specifically referred to in the definition of ‘Discriminatory Measure’) were meant to be treated as an ‘expropriation or seizure of assets of the Project or of a Foreign Party’s interests in the Project,’ there

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would have been no need to list a change in the income tax rate separately.”
(R-III ¶¶ 126 - 127).

K.IV.4.c. The Tribunal

477. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties’ Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-I	¶¶ 26 – 27, 71 – 72
C-III	¶¶ 219 – 223
C-IV	¶¶ 48 – 49
R-II	¶¶ 116 – 118
R-III	¶¶ 126 – 128

Exhibits:

Exhibit	Document Name
C-11	Congressional Authorization Fifteenth Condition
C-44	Declaration of Professor Eugenio Hernández-Bretón (27 September 2008) at ¶¶ 75-76
C-73	Law on Partial Amendment to the Income Tax Law [<i>Ley de Reforma Parcial de la Ley de Impuesto sobre la Renta</i>] (as published in the Extraordinary Official Gazette No. 4300 of 13 August 1991) Art. 7, 30
C-75	Decree No. 188 on Amendment to the Income Tax Law [<i>Decreto de Reforma de la Ley de Impuesto sobre la Renta</i>] (25 May 1994) and Income Tax Law (as amended) (both documents as published in the Extraordinary Official Gazette No. 4727 of 27 May 1994) Article 14 (modifying Art. 53 Income Tax Law)
C-87	Association Agreement Clause I <i>defining</i> “ <i>Discriminatory Measure</i> ”
C-113	Law on Partial Amendment to the Income Tax Law [<i>Ley de Reforma Parcial de la Ley de Impuesto sobre la Renta</i>] (29 August 2006) and Income Tax Law (as amended) (both documents as published in the Official Gazette No. 38529 of 25 September 2006) Art. 1, 9, 52, 53
C-177	Law on Partial Amendment to the Income Tax Law [<i>Ley de Reforma Parcial de la Ley de Impuesto sobre la Renta</i>] and Income Tax Law (both as published in the Extraordinary Official Gazette No. 5023 of 18 December 1995) Art. 9, 53
C-214	Second Declaration of Professor Allan R. Brewer-Carías (14 May 2009) at ¶ 49
C-215	Second Declaration of Professor Eugenio Hernández-Bretón (14 May 2009) at ¶ 33

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R-43	Congressional Authorization, Fifteenth and Twentieth Conditions
R-68	Legal Expert Opinion of Professor José Mélich-Orsini (10 February 2009) at ¶¶ 31 – 48 and n. 34
R-86	Letter from Timothy Cutt, President of Mobil Cerro Negro, Ltd. to Eulogio Del Pino, PDVSA Cerro Negro, S.A. and Rafael Ramírez, Petróleos de Venezuela, S.A. (22 June 2007)
R-112	Association Agreement Clause I

478. **Article 53 of the Law of 29 August 2006 on Partial Amendment to the Income Tax Law** provides that:

the annual income obtained by the taxpayers referred to in articles 11 and 12 [namely, the “*PARTICIPANTS IN EHO PROJECTS IN THE ORINOCO OIL BELT*” (EX. C-1, N° 222)] shall be taxed [...] based on the following rate :

Rate N° 3

[...]

(b) a proportional rate of 50% for the income specified in article 11 of this Law.

479. According to the **Income Tax Law of 29 August 2006**, the other rates applicable to other taxpayers in Venezuela were respectively 15%, 22%, and 34%.

480. As the 50% income tax rate made applicable by that law to participants in EHO projects in the Orinoco Oil Belt was brought about by statute, the Tribunal finds that it plainly constituted a change in Venezuelan law regarding tax rates.

481. The Tribunal also finds that the income tax increase is covered by the definition of “*Discriminatory Measure*” which specifically includes “*the imposition of income tax on the Project or on any Foreign Party in its capacity as participant in the Project, at a rate that does not correspond with what is provided in the last sentence of the Fifteenth Condition*” of the Framework of Conditions for the AA as set forth in the Congressional Authorization published on June 10, 1997. That Fifteenth Condition was to guarantee that the participants would pay income tax “*under the ordinary regime established [...] for companies and similar entities, for any income*

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obtained in connection with the activities of the parties”, which “*ordinary regime*” was based on an income tax rate of 34%.

482. As the income tax increase only applied the rate of 50% to EHO ventures in the Orinoco Oil Belt, with the “*ordinary regime [...] for companies and similar entities*” continuing at a maximum tax rate of 34%, the Tribunal also finds that the “*laws of general applicability*” exception in the definition of “*Discriminatory Measure*” does not apply.
483. The income tax increase from a rate of 34% to 50% undoubtedly resulted in a Materially Adverse Impact for Claimant, and may therefore be deemed “*unjust*” under the definition of “*Discriminatory Measure*” of the AA. This is because “*Material Adverse Impact*” under Article 1 of the AA is 5% of Net Cash Flow, and an increase of the income tax rate by 16% (from 34% to 50%) assessed on the gross value of EHO production necessarily has a greater than 5% impact on Net Cash Flow.
484. In view of the above considerations, the Tribunal concludes that the Income Tax increase was a Discriminatory Measure in the sense of the AA.

K.IV.5. Production and Export Curtailments

K.IV.5.a. Arguments by Claimant

485. Claimant argues that the measures imposing production and export curtailments (“*Curtailment Measures*”) on the Project were also Discriminatory Measures under the AA. *First*, the Curtailment Measures were ordered by the Minister of Energy and were, thus, Governmental Measures. (C-III ¶ 225). *Second*, the Curtailment Measures expropriated or seized Mobil CN’s vested interests “*by imposing production and exports curtailments on the Project notwithstanding the AA and the Framework of Conditions, the Respondents expropriated Mobil CN’s vested right[s] to produce [and export] at full capacity without being subjected to curtailment of production except in limited circumstances not present at the time the curtailments were imposed.*” (C-III ¶ 226).

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486. *Third*, the measures were not generally applicable to companies in Venezuela in that they only applied “*to companies engaged in the production of EHO in the Orinoco Oil Belt, not to all oil companies in Venezuela.*” (C-III ¶ 227).
487. *Finally*, Claimant asserts that Respondents have not argued that the Curtailment Measures were not discriminatory. Because this and all of the above measures in the aggregate caused a Materially Adverse Impact for FY 2007, the Curtailment Measures are Discriminatory Measures. (C-IV ¶ 51).

K.IV.5.b. Arguments by Respondents

488. The Curtailment Measures, apart from the fact that they were not “*expropriations*”, were temporary in nature. Further, they are not even relevant to this claim because Claimant has made no claim for FY 2006 and it has no claim for FY 2007 because its Net Cash Flow exceeded its Threshold Cash Flow. (R-II ¶ 119).

K.IV.5.c. The Tribunal

489. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties’ Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-I	¶¶ 73 – 75
C-III	¶¶ 224 – 228
C-IV	¶¶ 50 – 51
R-II	¶ 119
R-III	¶ 129

Exhibits:

Exhibit	Document Name
C-11	Congressional Authorization, Thirteenth Condition
C-44	Declaration of Professor Eugenio Hernández-Bretón (27 September 2008) at ¶ 77
C-87	Association Agreement Articles 8.2(b), 14.1
C-214	Second Declaration of Professor Allan R. Brewer-Carías (14 May

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R-116 2009) at ¶ 49
Supplemental Direct Testimony of José Ángel Pereira Ruimwyk
(11 August 2009) at ¶ 8, n. 8

490. It is obvious that the measures imposing production and export curtailments (“*Curtailment Measures*”) on the Project were ordered by the Minister of Energy and were thus Governmental Measures.
491. Regarding their legal basis, the Tribunal finds that the Curtailment Measures were not authorized by Article 14.1 of the AA and the Framework of Conditions, Thirteenth Condition, which entitled Claimant to produce at full capacity without being subjected to curtailment of production except “*as a result of the international commitments of the Republic of Venezuela*”, circumstances not present at the time the curtailments were imposed. The Curtailment Measures likewise were not authorized under Article 8.2 of the AA, which entitled Claimant to export all production.
492. The Tribunal also finds that the Curtailment Measures were not generally applicable to companies in Venezuela, in that they only applied to companies engaged in the production of EHO in the Orinoco Oil Belt and not to all oil companies, let alone generally to companies in Venezuela.
493. The export curtailments undoubtedly resulted in a Materially Adverse Impact for Claimant, and may therefore be deemed “*unjust*” under the definition of “*Discriminatory Measure*” of the AA. This is because “*Material Adverse Impact*” under Article 1 of the AA is based on 5% of Net Cash Flow, and a loss in exports of 2,300,000 barrels in 2007 (*i.e.* Mobil CN’s share of the loss in exports of about 5.5 million fewer barrels of SCO by the end of June 2007, as compared with the export target for the first half of 2007) (C-III ¶ 137), multiplied by the gross value of EHO production necessarily has a greater than 5% impact on Net Cash Flow.
494. In view of the above considerations, the Tribunal concludes that the Curtailment Measures were indeed Discriminatory Measures in the sense of the AA.

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495. The Tribunal notes that, since the Curtailment Measures were temporary, Claimant has filed no claim for 2006. The possible effect on the relief sought by Claimant for the years 2007 and thereafter will be considered in the section on Quantum.

K.V. Excuse for Respondents' Non-Performance

496. This section presents Respondents' affirmative defenses and, therefore, lists Respondents' arguments prior to Claimant's arguments.

K.V.1. Hecho del Príncipe

K.V.1.a. Arguments by Respondents

497. Respondents' experts explain that a *hecho del príncipe* (*factum principis*) (Act of the Prince) is an obstacle to the performance of a promised activity that arises from a legislative act or from an administrative authority, acting in the public interest. Under **Articles 1271 and 1272 of the Venezuelan Civil Code**, the occurrence of a “*non-imputable external cause, including a hecho del príncipe, renders contractual performance impossible and, therefore, releases the obligor from any performance obligation and any liability or responsibility for non-performance.*” (R-II ¶¶ 55 – 57, partially quoted). An Act of the Prince meets the requirements of a non-imputable external cause in that it (1) renders performance of obligation impossible, due to the general or specific provisions of the law of mandatory compliance, and (2) is irresistible because there is no possibility of avoiding its effects. (R-II ¶¶ 51 – 54, partially quoted, footnotes omitted).

498. Respondents state that Claimant's argument that a law of general application does not have the same legal consequences for a state company as it does for a private company defies logic. Claimant's argument that an act of the Venezuelan Government cannot excuse PDVSA-CN and PDVSA from responsibility is directly contradicted by Claimant's own action in invoking *force majeure* on behalf of both Mobil CN and PDVSA-CN as a consequence of the Government's Production Curtailment. (R-V ¶ 6).

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499. Firmly in their opinion that the AA was extinguished, Respondents also argue the *hecho del principio* (*factum principis*) has the same effect as if the AA had been formally extinguished. (R-II ¶ 58; R-III ¶ 55).
500. Respondents explain that “[t]he administrative law principle that a public contracting entity must compensate its counterparty for acts that make performance more burdensome does not apply when the acts may be attributable to a different administrative entity.” (R-III ¶¶ 30, 33). Respondents reject Claimant’s argument that the AA is an administrative contract to which the normal principles of *causa extraña no imputable* do not apply, and characterizes Claimant’s argument as a request that the Tribunal not apply Venezuelan law. (R-III ¶¶ 26).
501. Respondents state that the Claimant’s reference to the French Cour de Cassation is irrelevant. Respondents distinguish that case, arguing that it, unlike the present matter, involved “a simple decision by the supervising authority organically linked to the normal functioning of the company.” These circumstances did not meet the “*extraneousness*” requirement of a *hecho del principio*. Respondents further argue that under the French law cited in the experts’ opinion, a state party cannot be held contractually liable for measures emanating from other public persons. (R-III ¶ 29). Under Venezuelan law and the decisions of the French Conseil d’Etat, a state-owned enterprise may rely on acts of that state to excuse non-performance. (R-IV ¶ 92). What is at issue is whether the act of state is external to the state-owned enterprises, *i.e.* whether the act was promulgated by the Government in the exercise of its sovereign powers. (R-IV ¶ 46).
502. Respondents state that the governmental actions emanated from the state and were external to both PDVSA and PDVSA-CN. (R-III ¶ 36). Respondents argue that “the exercise of sovereign powers is a matter uniquely within the province of the Government, not state companies such as PDVSA-CN or PDVSA.” (R-IV ¶ 2).

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503. Turning to Claimant's argument that the Respondents are State Enterprises that "*cannot avail themselves as a matter of law, of acts of the supervising and controlling Government to justify non-performance of their contractual obligations*", Respondents argue that Claimant's and Claimant's expert's past behavior precludes this argument. Respondents urge the Tribunal to reject Claimant's new position that PDVSA and PDVSA-CN are not separate from the Government. (R-IV ¶ 93).
504. In the London proceedings, Claimant forcefully presented thorough arguments – through counsel and through the affidavit of a legal expert – explaining why PDVSA must, as a matter of fact and law, be considered as separate and distinct from the Government, and that PDVSA did not constitute a department of the Government. (R-IV ¶ 5; R-V ¶ 8). In that proceeding, Claimant's legal expert concluded that PDVSA "*has a distinct legal personality, incorporated under the laws of Venezuela in 1975, capable of suing and being sued in its own right,*" that it "*does not perform any of the powers of the executive as set out in the Venezuelan Constitution of 1999 or Public Administration Organic Law,*" that it has "*operated as a commercial entity since its formation as an entity separate from the Venezuelan Government,*" and that "*the separate legal status of PDVSA has been confirmed by the Venezuelan courts, notwithstanding the fact that the Republic of Venezuela is its sole shareholder.*" (R-III ¶ 35, footnotes omitted).
505. Respondents explain further that the Parties have recognized the distinct, separate legal personalities of PDVSA-CN, PDVSA, and the State, as demonstrated by the separate Guaranty Agreement and the text of the Congressional Authorization and the AA. (R-III ¶¶ 36, 40 – 42; R-IV ¶¶ 2-5, 92 – 94). Claimant stated that in the AA, the Parties worked to make clear that "*neither PDVSA nor PDVSA-CN was a subdivision of the Republic of Venezuela.*" (R-IV ¶¶ 5, 93 - 94). This is even reflected in the text of the AA, where the definitions of "*Affiliate*", "*Governmental Action*", and

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“*Reservation of Sovereign Rights*” in Article 18.4, the “*No Government Guarantee*” provision of Article 23.11, and the *Force Majeure* provision of Article 21 treat the PDVSA-CN, PDVSA, and the Government as distinct entities. (R-IV ¶ 94).

506. Respondents also cite Claimant’s communication with the Government as evidence that Claimant believes the three entities to be separate. While addressing production curtailments in 2007, Claimant addressed letters to the Government, claiming *force majeure* on PDVSA-CN’s behalf – an action that would not be possible if Claimant believed PDVSA-CN and the Government to be the same. (R-IV ¶ 3).

507. The doctrine of *causa extraña no imputable* applies to administrative contracts. (R-III ¶¶ 27 – 36). At issue is whether generally applicable law should be considered external to PDVSA-CN and PDVSA. Respondents argue that **Decree-Law 5200** was external to the Respondents and states that neither entity has the authority or power to perform legislative functions. (R-IV ¶ 45). Further, the fact that PDVSA is engaged in the hydrocarbons sector, which is the subject area of **Decree-Law 5200**, is irrelevant to the issue of externality. (R-IV ¶ 46). The fact that Minister Ramírez is the President of PDVSA and the Minister of Energy is also irrelevant, as externality is not dependent on who is the leader of the organizations. (R-IV ¶ 4). Rather, what is relevant is whether **Decree-Law 5200** was an act of PDVSA-CN or PDVSA. Since it was promulgated by the Government in the valid exercise of the Government’s powers, it is external to the Respondents. (R-IV ¶ 46).

508. Respondents also address Claimant’s statement that Minister Ramírez authored the **Decree-Law 5200**, calling it “*untrue*.” (R-IV ¶ 4). Respondents explain that **Decree-Law 5200** was lawfully issued:

4. [...] the **Decree-Law** was a law of general application promulgated by the President of the Republic in the exercise of the power conferred by Article 236(8) of the Constitution (which permits the President to issue decrees with the force of law upon enactment of an enabling law) and in

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accordance with the authority granted to him by the Venezuelan legislature in the Enabling Law of February 1, 2007. Claimant also makes much of the fact that Minister Ramirez “countersigned” Decree-Law 5.200, but the Venezuelan Constitution mandates that the President shall exercise the powers granted by Article 236(8) “in the Council of Ministers” which is why Minister Ramirez, along with eighteen other Ministers, “countersigned” it. (R-IV ¶ 4, citations omitted).

509. In response to Claimant’s discussion on the irresistibility of Decree-Law 5200, Respondents consider that Claimant’s expert has acknowledged “*that unless and until declared unconstitutional, ‘Decree-Law 5200 had to be enforced and applied in Venezuela.’*” (R-III ¶ 39).

K.V.1.b. Arguments by Claimant

510. Claimant considers that Respondents’ “*Act of the Prince*” argument constitutes a concession that Respondents had obligations under the AA – making the entire “*Act of the Prince*” argument inconsistent with Respondents’ extinguishment theory. (C-IV ¶ 82).
511. Claimant also argues that the “*Acts of the Prince*” (Decree-Law 5200 and the Law on Effects) in this matter do not constitute a “*non-imputable extraneous cause*” excusing Respondents from performance. *First*, Clause XV is a *pactum praestando causa* – an agreement to perform even in the face of an Act of God or of *Force Majeure*. It allocates the risk of “*Acts of the Prince*” to PDVSA-CN, therefore displacing general provisions of law excusing liability for “*Acts of the Prince*.” (C-IV ¶ 84; C-V ¶ 64).
512. *Second*, Claimant argues that Respondents are state enterprises and, therefore, cannot avail themselves of acts of the supervising and controlling Government to justify non-performance of their contractual obligations. (C-IV ¶ 85, partially quoted). This principle finds support in a French Cour de Cassation decision, where the Court held that “*that the intervention of the supervising authority to impede the performance of the debtor’s contractual obligations cannot be invoked by the debtor subject to supervision as the*

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unforeseeable and insurmountable act of an extraneous third party.” (C-IV ¶ 86).

513. *Third, “under general principles of Venezuelan Administrative Law, a state-owned enterprise may not rely on an act of government (Act of the Prince) to excuse non-fulfillment of its contractual obligations, when the act at issue emanates from a governmental entity of the same territorial level of government to which the State-owned enterprise belongs. Such governmental act is not considered extraneous to the state-owned company.”* (C-V ¶ 66). This is also supported by French Administrative Law, where acts of the same *personne publique* (that is, acts that emanate from a governmental entity of the same level of government as the public contracting party), will not excuse the public party from its obligations under the contract. (C-V ¶ 70).

514. Claimant provides a more detailed response to Respondents’ arguments to the contrary (C-V ¶¶ 68 – 70, italics in original):

68. The Respondents and Mr. Urdaneta argue that liability under the Administrative Law doctrine of “act of the prince” arises only when the act emanates from the same public entity that is a party to the contract, and if the act comes from another entity it may operate as an excuse. Their theory is largely based on a misunderstanding or mistranslation of French authors and does not reflect Venezuelan law.

69. The Respondents and Mr. Urdaneta rely on an excerpt from an article by Henrique Iribarren. But the excerpt they cite is an incomplete quotation from a passage of Professor Jean Rivero’s treatise of French Administrative Law. The full passage from Professor Rivero’s treatise, which neither the Respondents nor Mr. Urdaneta brought to the Tribunal’s attention, contradicts their argument:

“La théorie [du fait du prince] ne joue jamais quand la mesure qui alourdit les charges du cocontractant émane non de la personne publique contractante, mais d’une autre personne publique, par exemple quand un décret, acte de l’Etat, aggrave, en matière sociale, la situation des cocontractants des collectivités locales.”

[“The [act of the prince] theory never applies when the measure that burdens the obligations of the co-contracting party emanates, not from the contracting public person [personne publique], but from another public person [personne publique], for example when a decree from the State aggravates, on labor matters, the situation of co-contracting parties of local authorities.”]

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70. In Professor Rivero's example, the public contracting party is a local authority and the measure burdening the private party is an act of the French State. In such a case, the "act of the prince" doctrine does not apply because the measure emanates from another *personne publique*, that is, another level of government. As Professor Brewer-Carías explained at the Hearing, the term "*personne publique*" is a term of art in French Administrative Law that refers to the various territorial levels of government. Accordingly, French legal authorities restricting the application of the "act of the prince" doctrine as a source of liability to acts of the same "*personne publique*," are referring to acts emanating from a governmental entity of the same level of government as the public contracting party. Other authorities on which the Respondents rely are misrepresented or cited out of context.
515. Claimant argues that the extraneous character of the impediment means that "*the event of which the impossibility derives, must be extraneous to the activity of the debtor and deprived of any connection with said activity.*" (C-IV ¶ 88). Here, the distinct legal personalities of PDVSA, PDVSA-CN, and the Government are irrelevant. Respondents are part of the Government, are run by "*functionaries*," and are instrumentalities of the Venezuelan Government. Further, Minister Ramírez, one of the architects of all the Discriminatory Measures, has been and remains both Minister of Energy and President of PDVSA. (C-IV ¶ 91). PDVSA and the Ministry have been jointly managed, in the same building and the same office complex. (C-V ¶ 4). PDVSA cooperated in the design and execution of the Government's policies against Claimant's investments. (C-V ¶ 4). The acts on which Respondents rely are those that were of the same level of Government to which the Respondents belong. PDVSA carried out the seizure of Claimant's assets and was the chief beneficiary of Claimant's investment, the seizure and the termination of the AA. (C-IV ¶ 92; C-VI ¶ 34, partially quoted).
516. Claimant's arguments with respect to the extraneousness of **Decree-Law 5200** are best taken from its own language:
35. [T]he pretense that **Decree-Law 5200** is extraneous to the Minister of Energy and Petroleum/President of PDVSA because it is a law and it was also signed by other ministers ignores once again the realities of this case. It is beyond doubt that Minister Ramírez, the Minister in charge of the sector to which the measures relate, was the chief architect

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of the measures. The Respondents' unsupported assertion that President Chávez prepared Decree-Law 5200 without the intimate involvement of the Minister responsible for petroleum policy and for the implementation of the Decree is just not credible. (C-VI ¶ 35).

517. Regardless of whether an act of government emanates from the same public entity that is a party to the contract or from another public entity of the same territorial level of government or legal order, Respondents have a responsibility to compensate Claimant for acts of government that alter the economic equilibrium of the contract. (C-V ¶ 67). Neither type of government act may excuse the public entity from non-fulfillment of its contractual obligations. (C-V ¶ 67).
518. Claimant also argues that the Respondents have not met their burden of proving that "*Act of the Prince*" prevented their performance or that the alleged "*Act of the Prince*" was unforeseeable, irresistible, and extraneous. (C-IV ¶ 89).
519. Claimant argues that "*the requirement of irresistibility 'refers to the insurmountable character of the event,' implying 'the debtor's obligation to employ that supreme effort to comply with what was promised, without permitting him to be excused by difficulties that do not really signify an impossibility of performance.'*" (C-IV ¶ 88). Respondents have made "*no effort to comply with their respective obligations under the AA and Guaranty, let alone did they employ 'all licit means available,'*" despite having been on formal notice of Claimant's demands under the AA as of **June 2007**. (C-IV ¶ 90).
520. Claimant's claims had arisen by the **5 March 2008** extinguishment of the AA, and this extinguishment cannot affect Claimant's rights under the contract. (C-V ¶ 65). Claimant also argues that "*neither Decree-Law 5200 nor the Law on Effects purports to prohibit, directly or by implication, the performance of obligations to pay money due under contracts, such as PDVSA-CN's indemnity obligations under the AA or those of PDVSA under the Guaranty.*" (C-IV ¶ 90). Finally, even if the AA had been terminated,

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Clause XV of the AA survives the termination of the agreement. (C-IV ¶ 90; C-V ¶ 65).

K.V.1.c. The Tribunal

521. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties' Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-IV	¶¶ 81 – 92
R-II	¶¶ 50 – 58
R-III	¶¶ 25 – 51

Exhibits:

Exhibit	Document Name
C-2	Association Agreement Article 21.1
C-3	PDVSA Guaranty
C-44	Declaration of Professor Eugenio Hernández-Bretón at ¶¶ 12, 30, 76, 82, 87 – 92, 95
C-45	Declaration of Professor Allan R. Brewer-Carías (26 September 2008) at ¶¶ 19, 49 – 55, 60
C-51	Cambridge Energy Research Associates, "The Cerro Negro Extra-heavy Oil Development: A World-class Asset" (26 September 2008) at 36
C-87	Association Agreement Clause I <i>defining</i> "Affiliate", Articles 16.1(b), 23.11
C-129	Decree No. 5916 Transferring to Petro Monagas S.A. the Right to Develop Primary Exploration Activities Specified Therein [<i>Decreto No. 5916, mediante el cual se transfiere a la empresa PetroMonagas, S.A. el derecho a desarrollar actividades primarias de exploración que él se especifican</i>] (as published in the Official Gazette No. 38884 of 5 March 2008)
C-160	Heads of Agreement between Lagoven, Mobil Oil Corporation, and Mobil de Venezuela (17 September 1996)
C-214	Second Declaration of Professor Allan R. Brewer-Carías (14 May 2009) at ¶¶ 18 – 26, 51, 56, 58-62
App. 35	Eloy Lares Martínez, <i>Manual de Derecho Administrativo</i> , 8a. Edición, Caracas 1990, pp. 361- 363.
C-215	Second Declaration of Professor Eugenio Hernández-Bretón (14 May 2009) at ¶¶ 67, 73 – 75, 77 – 79, 81 – 83
C-232	JOSÉ MÉLICH-ORSINI, <i>DOCTRINA GENERAL DEL CONTRATO</i> (4th ed. 2006) §§ 339-B to 339-D, 340
C-240	Venezuelan Civil Code Art. 1271, 1272, 1354
C-241	MADURO LUYANDO & PITTIER SUCRE, <i>CURSO DE OBLIGACIONES</i> (2008) §§ 390 – 396

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- C-243 2008 Organic Law of the Public Administration (as published in Extraordinary Official Gazette No. 5890 of 31 July 2008)
- C-244 *Lyondell-CITGO Refining, LP v. PDVSA* (S.D.N.Y. No. 02-CV-0795), Declaration of Álvaro Silva Calderón (23 May 2002) at ¶ 17
- C-245 Organic Law that Reserves to the State Assets and Services Related to Hydrocarbons' Primary Activities [*Ley Orgánica que Reserva al Estado Bienes y Servicios Conexos a las Actividades Primarias de Hidrocarburos*] (as published in Official Gazette No. 39173 of 7 May 2009)
- C-246 The PDVSA of Chávez Produces 1.2 Million Less Barrels Per Day [*La PDVSA de Chávez Produce 1.2 Millones de Barriles Diarios Menos*], *La Verdad Daily* [*Diario La Verdad*] (11 May 2009), at <http://laverdad.com> (last accessed 14 May 2009)
- C-247 Index of Materials Regarding the Transformation of PDVSA Into an Instrument of the Socialist Revolution
- C-248 Financial and Operational Information of PDVSA and Affiliates [*Información Financiera y Operacional, PDVSA y sus Filiales*], as of 31 December 2007, and Notes to Consolidated Financial Statements, 31 December 2007 and 2006 [*Notas a los Estados Financieros Consolidados, 31 de diciembre de 2007 y 2006*] at 7, 38, 49
- C-249 Ministry of Energy Press Release, "Ramírez: We have recuperated control over 500 thousand barrels that had been privatized" [*Ramírez: Hemos recuperado el control de 500 mil barriles que estaban privatizados*] (25 February 2008)
- C-250 *Air France*, Court of Cassation of France (15 April 1970), reported in *Recueil Dalloz Sirey* 1971, at 107, 109 – 110
- C-289 José Mélich-Orsini, DOCTRINA GENERAL DEL CONTRATO (2006) (excerpt, Chapter XVII, Section 456) n. 48
- C-324 Rafael Badell Madrid, RÉGIMEN JURÍDICO DEL CONTRATO ADMINISTRATIVO (2001)
- C-325 Rafael Badell Madrid, *La Ejecución del Contrato Administrativo: Teoría de la Imprevisión, Depreciación Monetaria e Inflación* in RÉGIMEN JURÍDICO DE LOS CONTRATOS ADMINISTRATIVOS (1991)
- C-326 Alfredo Romero Mendoza, *El Hecho del Príncipe en los Contratos Administrativos y su Regulación en el Decreto que Contienen las Condiciones General de Contratación para la Ejecución de Obras* in TRIBUNAL SUPREMO DE JUSTICIA, REVISTA DE DERECHO No. 4 (2002)
- R-4 First Affidavit of Bernard Mommer (11 February 2008) at ¶ 12
- R-7 Decree-Law 5200 Art. 3, Signatures
- R-41 PDVSA Guaranty
- R-43 Congressional Authorization, Eighteenth Condition
- R-64 Enabling Law
- R-68 Legal Expert Opinion of Professor José Mélich-Orsini (10 February 2009) at ¶¶ 7, 9-23
- App. 3 José Mélich-Orsini, *General Contract Doctrine*, 4th Edition, Academia de Ciencias Políticas y Sociales, Serie Estudios N° 61, Caracas, 2006
- App. 4 José Mélich-Orsini, "The Sanction for Contractual Non-

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- Performance,” in *Civil Law Studies*, Vol. I, 2 volumes, Ediciones Fabretón, Caracas, 1974, subsequently reprinted in 1986
- R-69 Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (10 February 2009) at ¶¶ 12 – 39
- App. 7 Venezuelan Civil Code Art. 6, 1271 - 1272
- App. 8 José Mélich-Orsini, *General Contract Doctrine*, 4th Edition, Academia de Ciencias Políticas y Sociales, Serie Estudios N° 61, Caracas, 2006
- App. 9 Eloy Maduro Luyando and Emilio Pittier Sucre, *Course on Obligations, Civil Law III*, Tomo I, Universidad Católica Andrés Bello, Caracas, 1999 pp. 226 – 227
- App. 10 Rafael Bernad Mainar, *Patrimonial Civil Law, Obligations*, Tomo I, Universidad Central de Venezuela, Facultad de Ciencias Jurídicas y Políticas, 2006 p. 174
- App. 11 Judgment, Political-Administrative Chamber of the Supreme Tribunal of Justice, *Banco Provincial, S.A. contra Banco Central de Venezuela* (27 April 2005)
- App. 13 José Mélich-Orsini, “The Sanction for Contractual Non-Performance,” in *Civil Law Studies*, Vol. I, 2 volumes, Ediciones Fabretón, Caracas, 1974, reprinted in 1986
- App. 15 Magaly Carnevali de Camacho, *Law of Obligations*, Universidad de los Andes, Mérida, 1993
- App. 17 Judgment, Political-Administrative Chamber of the Supreme Court of Justice, *Compañía Anónima Western Ore Company v. La Nación Venezolana* (December 21, 1967)
- App. 18 Opinion of the Office of the Attorney General of the Republic on the Law on Assets Subject to Reversion in Hydrocarbons Concessions, dated March 8, 1972, in *Public Law and Administration Sciences Archives – Tribute to Professor Antonio Moles Caubet by the Institute of Public Law*, Universidad Central de Venezuela, Facultad de Ciencias Jurídicas y Políticas, Instituto de Derecho Público, Caracas, 1981, Tomo 2, Vol. 3
- App. 19 Judgment, Full Chamber of the Supreme Court of Justice, *Regarding a request for nullity on constitutional grounds of the Law on Assets Subject to Reversion in Hydrocarbons Concessions* (December 3, 1974)
- App. 20 Judgment, Political-Administrative Chamber of the Supreme Court of Justice, *Asfalto de Petróleo (ASFAPETROL C.A.) v. Petróleos de Venezuela, S.A. (PDVSA)* (August 14, 1992)
- App. 21 Judgment, Political-Administrative Chamber of the Supreme Tribunal of Justice, *Minas de San Miguel C.A. v. Ministerio de Energía y Minas* (July 16, 2008)
- R-71 Letter from Operadora Cerro Negro, S.A. to Chalmette Refining, L.L.C. (10 January 2007)
- R-72 Association Oil Supply Agreement (Chalmette Supply Contract) (1 November 1997)
- R-73 Organic Law of the Office of the General Comptroller of the Republic and the National System of Fiscal Control [*Ley Orgánica de la Contraloría General de la República y del Sistema Nacional de Control Fiscal*] Official Gazette No. 37.347, published 17 December 2001 Art. 91(12)

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- R-112 Association Agreement Articles 18.4 and 21.1
- R-118 Second Legal Expert Opinion of Professor José Mélich-Orsini (14 August 2009) at ¶¶ 3 – 20, 47
- App. 45 Constitution of the Bolivarian Republic of Venezuela, Official Gazette No. 36.860, published December 30, 1999, Articles 203 and 236(8) [*Constitución de la República Bolivariana de Venezuela (1999), Artículos 203 y 236(8)*]
- R-119 Second Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (14 August 2009) at ¶¶ 3 – 28
- App. 38 Allan R. Brewer-Carías, ADMINISTRATIVE CONTRACTS (Editorial Jurídica Venezolana, Caracas 1992) p. 243
- App. 39 DOCTRINE OF THE OFFICE OF THE ATTORNEY GENERAL OF THE REPUBLIC, January 14, 1970 (Ediciones del Ministerio de Educación, Caracas 1971) 104 – 105
- App. 40 DOCTRINE OF THE OFFICE OF THE ATTORNEY GENERAL OF THE REPUBLIC, September 27, 1966 (Editora Vene-Gráfica, C.A., Caracas 1967) p. 76
- App. 42 Henrique Iribarren Monteverde, *The Economic Equilibrium in Administrative Contracts and the Theory of Hardship*, in INTERNATIONAL CONGRESS ON ADMINISTRATIVE LAW COMMEMORATING PROF. LUIS H. FARIAS MATA, VOLUME I 141 (Rafael Badell Madrid ed., Universidad Católica Andrés Bello, Caracas 2006) 152 – 153
- App. 43 Fanny Luxembourg, *Fait du Prince: Convergence of Private and Public Law*, LA SEMAINE JURIDIQUE EDITION GÉNÉRALE No. 8, I 119 (February 20, 2008)
- App. 44 André de Laubadère, Jean-Claude Venezia and Yves Gaudemet, TREATISE OF ADMINISTRATIVE LAW, VOLUME 1 (L.G.D.J., 15th ed., Paris 1999) p. 837
- App. 45 Christophe Guettier, LAW OF ADMINISTRATIVE CONTRACTS (Presses Universitaires de France, Paris 2004)
- App. 46 First Affidavit of Luis A. Ortiz-Álvarez, dated January 22, 2008, submitted in *Mobil Cerro Negro Ltd. v. Petróleos de Venezuela, S.A.*, High Court of Justice, Queen’s Bench Division, Commercial Court (London), Claim No. 2008, Folio 61 ¶¶ 15, 85
- R-120 Outline Argument on Behalf of Claimant in Support of Application for Worldwide Freezing Order (23 January 2008) submitted in *Mobil CN Ltd. v. Petróleos de Venezuela, S.A.*, High Court of Justice, Queen’s Bench Division, Commercial Court (London), Claim No. 2008, Folio 61, pp. 23-25
- Unnumbered Karl-Heinz Böckstiegel, Public Policy and Arbitrability, in Comparative Arbitration Practice and Public Policy in Arbitration, ICCA Congress Series 177, 201-203 (Pieter Sanders ed., 1987);
- Unnumbered Pierre Lalive, Transnational (or Truly International) Public Policy and International Arbitration, in Comparative Arbitration Practice and Public Policy in Arbitration, ICCA Congress Series 258, at ¶¶ 141-142 (Pieter Sanders ed., 1987).

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At and Following the 2010 Hearings:

Submission	Pinpoint
C-V	¶¶ 4, 62 – 71
C-VI	¶¶ 34 - 36
R-IV	¶¶ 2 – 5, 44 – 46, 92 – 94
R-V	¶¶ 6 – 8

Speaker	Citation
Brewer-Carías	911 – 912, 929 – 931, 936 – 937
C. Closing	2044 – 2052
C. Opening	33, 57 – 58
Cutt	702 – 703, 710 – 711, 770 – 775
Expert Conf.	931 – 935
Hernandez	918 - 919
Massey	544 – 545, 594 – 595
Mélich-Orsini	912
R. Closing	2019 – 2020, 2048 – 2049, 2052, 2119 – 2128
R. Opening	85 – 86, 98 – 101
Urduaneta	952, 931 - 932
Ward	238 – 240, 257 278 – 280, 286

522. The Tribunal is aware that, indeed, there have been many arbitrations where a state party or state entities tried to excuse themselves from performance based on their own government's actions and such an excuse was not accepted by the tribunals. The Tribunal sees no reason why this principle should not be applicable here. Respondents are government companies. PDVSA's President, Mr. Ramírez, was simultaneously both the President of PDVSA and the Minister of Energy. The Tribunal also notes that, although the government and PDVSA are separate legal entities, under Article 15.2(b) of the AA there is no obligation for indemnification if the government reduces its direct or indirect interest in Respondents. In this manner, there is a link to government control within the contract
523. However, in the present case, the Tribunal considers that it does not have to rely on this general principle or such general considerations in view of the specific provisions agreed in the AA.

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524. While the two Respondents in the present arbitration are different legal entities from the Republic of Venezuela, they are, by the AA and the Guaranty, contractual parties subject to the respective arbitration clauses referring disputes to ICC arbitration and to the contractual remedies provided in these legal instruments. Regardless of whether an act of government emanates from the same public entity that is a party to the contract or from another public entity, Respondents have a responsibility to compensate Claimant for acts of government in so far as such a responsibility is expressly provided for in the AA, and particularly in its Article 15. The definition of Discriminatory Measure in Clause I expressly refers to both changes in the law and governmental measures and thereby clearly indicates the scope of the contractual responsibility of the Respondents. In so far as that scope goes, it is therefore clear that neither type of state act can be considered a *hecho del príncipe* which may excuse the contractual parties from non-fulfillment of their contractual obligations.
525. It seems obvious to the Tribunal that Claimant had a reasonable expectation that Clause XV would provide for an arbitration whose scope would allow a meaningful award. Both New York law [Republic Mortgage Ins. Co. v. Countrywide Financial Corp., No. 603915/2009, 28 Misc.3d 1214(A), 2010 WL 2927286, at ** (N.Y. Supreme Court, N.Y. County, July 22, 2010), cited in C-V § 79] and Venezuelan law (in particular **Article 12 of the Venezuelan Code of Civil Procedure**) are consistent in this respect, namely, that the arbitration clause should be constructed to give fair meaning to the contractual language. **Article 12 of the Venezuelan Code of Civil Procedure** deals with risk allocation, which is relevant to Article 15 of the AA.
526. In view of the above considerations, the Tribunal concludes that Respondents cannot rely on *hecho del príncipe* to excuse non-compliance with contractual obligations covered by Article 15 AA.

K.V.2. Force Majeure

K.V.2.a. Arguments by Respondents

527. Respondents state that they have not claimed *force majeure* under the AA, but rather have stated that PDVSA-CN could have invoked *force majeure* under the AA if it had not been extinguished. (R-IV ¶ 44).
528. Article 21.2(b) of the AA defined Force Majeure as including “*acts of government or orders, judgments, resolutions, decisions or other acts or omissions, of any governmental authority, civil or military.*” (R-II ¶ 59). Inasmuch as the **Migration Laws** are valid and binding laws of Venezuela which Respondents, as entities unquestionably subject to the jurisdiction of Venezuela, cannot disregard, these fall within the scope of the force majeure clause in the AA. (R-II ¶ 63). Respondents maintain that this force majeure clause did not allocate the risk of a hecho del príncipe impeding contractual performance to PDVSA-CN. (R-III ¶ 54, partially quoted).
529. Respondents argue that the Government’s action prevented Respondents from performing obligations under the AA and the PDVSA Guaranty. They state “*not only could Respondents as state companies not make any payments under non-existent contracts, but any functionary of either Respondent who made (or authorized) such payment would be exposed to administrative and criminal sanctions.*” (R-II ¶ 62).
530. Respondents explain that acts of the Government were included within the *force majeure* clause. (R-III ¶ 55-56, partially quoted, footnotes omitted):
- 55. [The AA] which expressly included “acts of government” as events of *force majeure* without excluding acts of the Government, would have constituted a defense under the language of the agreement itself interpreted in accordance with Venezuelan law.
 - 56. This in fact was the interpretation given to a similar *force majeure* clause by ExxonMobil itself, when OCN, S.A., the operating subsidiary of ExxonMobil for the Project, invoked *force majeure* on behalf of both PDVSA-CN and Mobil CN as sellers under the crude oil supply contract with the Chalmette Refinery. The *force majeure* in question at that time was the Government’s order limiting exports.

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531. In response to the Tribunal's question at PO-6 ¶ 3.3 regarding the relationship and interaction between "*Discriminatory Measure*" under Clause XV AA, "*Force Majeure*" under Clause XXI AA, and *Force Majeure* in the law of Venezuela, Respondents state as follows:

89. The concepts of Discriminatory Measure under the AA and Force Majeure under either the AA or Venezuelan law are distinct. Force majeure is an act that impedes performance by a contracting party, whereas Discriminatory Measures under the AA are certain types of acts that affect the economics of the Project to the Foreign Party. Under the AA, if an act qualifying as a Discriminatory Measure occurred and the requirements of the AA were met, the Foreign Party would not claim force majeure, but it would claim indemnity under Article XV.
90. Force Majeure under the Agreement is defined in Article 21, and includes "acts of the government or orders, judgments, resolutions, decisions or other acts or omissions of any governmental authority, civil or Military," preventing a party from complying with its contractual obligations. That includes an act of the Venezuelan Government, as demonstrated by OCN's invoking a similar force majeure clause in the Chalmette Supply Contract on behalf of both Mobil-CN and PDVSA-CN based on production curtailments ordered by the Venezuelan Government.
91. As noted earlier, Claimant spent much of its legal argument in the closing trying to establish that the requirements of the force majeure clause had not been met, saying that Respondents had invoked it, but the record is clear that Respondents never invoked the force majeure clause in the AA because the Agreement had been extinguished by operation of law. Respondents only pointed out that if the contract had not been extinguished, the force majeure clause could have been invoked. The extinction of the contract in this case has as a consequence under the Venezuelan Civil Code a release of responsibility of the parties inasmuch as the extinction was due to a *causa extraña no imputable* (non-imputable external cause). (R-IV ¶¶ 89 -91).

K.V.2.b. Arguments by Claimant

532. Claimant states that the terms "*non-imputable extraneous cause*" and "*force majeure*" have been used interchangeably. Under Venezuelan law, including **Articles 1271 and 1272 of the Venezuelan Civil Code**, the failure to perform or delay in performing an obligation is excused if it results from a "*non-imputable extraneous cause*"/"*force majeure*." (C-V ¶ 55). Claimant explains that the operation of this general excuse can be modified by a private agreement. Where risk of an event that would otherwise qualify as a

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“*non-imputable extraneous cause*” or “*force majeure*” is allocated to a party, the occurrence of the event can no longer serve as an excuse for non-performance under Venezuelan law. Claimant explains that in Clause XV, the Parties allocated the risk of a Governmental Measure that would meet the definition of “*Discriminatory Measure*” on to PDVSA-CN. Claimant concludes that “*Clause XV, together with the definition of ‘Discriminatory Measure,’ trumps the general excuse set forth in Articles 1271 and Article 1272 of the Civil Code.*” (C-V ¶ 56).

533. Claimant argues that Respondents’ reading of Clause XV in which they state that “*actions taken by the Government*” are an event of *force majeure*, deprives Clause XV of its intended purpose of compensating Claimant in the event of certain governmental measures. (C-IV ¶ 93). Claimant argues that Clause XV allocates the risk of Governmental Measures to PDVSA-CN:

95. It is clear that Clause XV was intended, *inter alia*, to allocate to PDVSA-CN certain risks that may be events of *force majeure* in contracts between *private* parties. For instance, the definition of “Discriminatory Measures” in the AA uses the defined term “Governmental Measure” to include all those measures for which PDVSA-CN was required to indemnify a Foreign Party under the Agreement. In contrast, “acts of the government” in Clause XXI is not a defined term, which indicates that only acts of the government *other than those that could trigger PDVSA-CN’s obligation to indemnify under Clause XV* were intended to be included. Clause XV acts as the carve-out provision that, as the Respondents observe, is missing from Clause XXI. (C-IV ¶ 95, footnotes omitted, emphasis in original).

534. Contrary to Respondents’ argument, the defined term “*Discriminatory Measure*” does not embrace only events that “*do not affect or impede in any way the ability of any party to the AA to perform its obligations.*” This argument attempts to carve such events out of the scope of a Discriminatory Measure. (C-V ¶ 57). Instead, “*the whole point of a risk allocation clause like Clause XV is to resolve the overlap between ‘Discriminatory Measure’ and non-imputable extraneous cause / force majeure in the opposite way, which means that the area and overlap between the scope of ‘Discriminatory Measure’ and the scope of non-imputable extraneous cause*

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/ force majeure is carved out of the later.” (C-V ¶ 58). Since Clause XV allocates to PDVSA-CN the risk of Governmental Measures that meet the definition of “*Discriminatory Measures*”, such “*Discriminatory Measures*” cannot excuse PDVSA-CN from fulfilling its contractual obligations. Clause XV and the definition of “*Discriminatory Measure*” trump the general excuse set forth in **Articles 1271 and 1272 of the Venezuelan Civil Code**. (C-V ¶ 56, partially quoted). Claimant states that “[*if a given governmental act fits within the scope of ‘Discriminatory Measure’ and also within the scope of ‘non-imputable extraneous cause’/‘force majeure’, the characterization of the act under Clause XV and the definition of ‘Discriminatory Measure’ must prevail because that is the raison d’être of a risk-allocation clause under Venezuelan law.*” (C-V ¶ 58).

535. Under Clause XXI, an “*Event of Force Majeure*” includes “*acts of government or orders, judgments, resolutions decisions or other acts or omissions of any governmental authority, civil or military.*” (C-V ¶ 59). With respect to the relationship between Clauses XV and XXI, Claimant states as follows:

60. In principle, Clause XXI allocates the risk of an Event of Force Majeure to the obligee of the breached obligation. But while both Clause XXI and Clause XV deal with risks associated with governmental acts, Clause XV prevails because it is *lex specialis* in respect of Clause XXI. Clause XV refers to a narrower class of governmental acts: those that meet the definition of Discriminatory Measure, while Clause XXI refers to “acts of the government” in general. As all Discriminatory Measures are necessarily “acts of the government,” an interpretation that gives prevalence to Clause XXI would deprive Clause XV and the definition of “Discriminatory Measure” of any purpose, in violation of the principle of *effet utile*. Conversely, if Clause XV is given prevalence, the reference to “act of government” in Clause XXI still preserves a purpose — to deal with those governmental measures that do not meet the definition of “Discriminatory Measure.” Accordingly, the risk of an act of government that qualifies as a Discriminatory Measure lies on PDVSA-CN, whether or not such governmental measure may have otherwise qualified as an Event of Force Majeure under Clause XXI. (C-V ¶ 60, citations omitted).

536. Finally, Claimant argues that, even if the measures did constitute *force majeure*, this issue is moot because Respondents have not complied with the

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notice, mitigation, and negotiation requirements of Article 21.2. (C-IV ¶ 96; C-V ¶¶ 61, 70).

71. The reference to “acts of the government” in Clause XXI does not help the Respondents. First, as already shown, the Respondents have forcefully disclaimed any reliance on Clause XXI. Second, because the alleged Event of Force Majeure (**Decree-Law 5200**) is a Discriminatory Measure, it falls under Clause XV, not Clause XXI. Third, by the express terms of Clause XXI, an act of the government can support a Force Majeure defense only if it meets the requirements of Section 21.1(b), which are essentially the same as those of “non-imputable external cause / force majeure” as a general principle. Section 21.1(b) requires that the event that prevents performance of a Party’s contractual obligation be “beyond the reasonable control of, or unforeseen by, the Party obligated to perform the corresponding obligation, or which being foreseeable, could not be avoided in whole or in part by the exercise of due diligence.[...]” (C-V ¶ 71, citations omitted, emphasis in original).

537. With respect to Respondents’ “*Non-Imputable Extraneous Cause*” defense, Claimant first puts forward that **Decree-Law 5200** and the resulting expropriation of all of Claimant’s interests in the Project is a Discriminatory Measure for which PDVSA-CN assumed the risk under Clause XV. Claimant states “[a]s Clause XV trumps both the general principles of ‘non-imputable extraneous cause’/‘force majeure’ and the definition of ‘Event of Force Majeure’ in Clause XXI, the Respondents cannot rely on **Decree-Law 5200** to excuse non-fulfillment of their obligations under the Agreement.” (C-V ¶ 64). Alternatively, the 5 March 2008 extinguishment cannot excuse PDVSA-CN’s failure to indemnify Claimant because (i) the claims had arisen prior to the extinguishment and the extinguishment cannot affect past effects of the contract; (ii) under Venezuelan law, the risk allocation in Clause XV survives the termination of the contract; and (iii) “*Article 16.1(b) of the AA expressly contemplates the survival of Claimant’s claims to indemnification under Clause XV.*” (C-V ¶ 65).

K.V.2.c. The Tribunal

538. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties’ Briefs and of the evidence:

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Party Submissions:

Submission	Pinpoint
C-IV	¶¶ 84, 93 – 96
R-II	¶¶ 58 – 63
R-III	¶¶ 52 – 57
TOR	5.2.1(v)

Exhibits:

Exhibit	Document Name
C-2	Association Agreement Articles 18.4, 21.1(b), 21.2(a) and (b)
C-87	Association Agreement Clause 1 <i>defining</i> “Governmental Measures” and “Discriminatory Measures”, Articles 16.1(b), 18.4, 21.1(b), 21.2(a) and (b)
C-99	Decree-Law 5200 Art. 12
C-214	Second Declaration of Professor Allan R. Brewer-Carías (14 May 2009) at ¶¶ 18-26
C-215	Second Declaration of Professor Eugenio Hernández-Bretón (14 May 2009) at ¶¶ 66 – 67, 73 -76, 84
C-232	JOSÉ MÉLICH-ORSINI, DOCTRINA GENERAL DEL CONTRATO (4th ed. 2006) § 340
C-240	Venezuelan Civil Code Art. 1271 – 1272
C-248	Financial and Operational Information of PDVSA and Affiliates [<i>Información Financiera y Operacional, PDVSA y sus Filiales</i>], as of 31 December 2007, and Notes to Consolidated Financial Statements, 31 December 2007 and 2006 [<i>Notas a los Estados Financieros Consolidados, 31 de diciembre de 2007 y 2006</i>] 6 – 7
C-289	José Mélich-Orsini, DOCTRINA GENERAL DEL CONTRATO (2006) (excerpt, Chapter XVII, Section 456) at n. 48
C-324	Rafael Badell Madrid, RÉGIMEN JURÍDICO DEL CONTRATO ADMINISTRATIVO (2001) at 151
C-325	Rafael Badell Madrid, <i>La Ejecución del Contrato Administrativo: Teoría de la Imprevisión, Depreciación Monetaria e Inflación</i> in RÉGIMEN JURÍDICO DE LOS CONTRATOS ADMINISTRATIVOS (1991) at 68 – 69
C-326	Alfredo Romero Mendoza, <i>El Hecho del Príncipe en los Contratos Administrativos y su Regulación en el Decreto que Contienen las Condiciones General de Contratación para la Ejecución de Obras</i> in TRIBUNAL SUPREMO DE JUSTICIA, REVISTA DE DERECHO No. 4 (2002) at 472
R-7	Decree-Law 5200 Art. 13
R-17	Law on Effects Art. 5
R-43	Congressional Authorization Eighteenth Condition.
R-68	Legal Expert Opinion of Professor José Mélich-Orsini (10 February 2009) at ¶¶ 9-15
R-69	Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (10 February 2009) at ¶¶ 11 – 27
R-70	Association of International Petroleum Negotiators, AIPN Model Lifting Agreement (2001)
R-71	Letter from Operadora Cerro Negro, S.A. to Chalmette Refining,

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	L.L.C. (10 January 2007)
R-72	Association Oil Supply Agreement (Chalmette Supply Contract), dated 1 November 1997 Art. 10.1(b)
R-73	Organic Law of the Office of the General Comptroller of the Republic and the National System of Fiscal Control, Official Gazette No. 37.347, published 17 December 2001 Art. 91(12), (14), (15) and (23)
R-74	Law Against Corruption [<i>Ley Contra la Corrupción</i>] Official Gazette No. 5.637 (Extraordinary), published 7 April 2003 Art. 53, 54 and 56
R-112	Association Agreement Article 21.1(b)
R-118	Second Legal Expert Opinion of Professor José Mélich-Orsini (14 August 2009) at ¶¶ 3 – 20
R-119	Second Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (14 August 2009) at ¶¶ 3 – 28
Unnumbered	J. Rivero, <i>Droit Administratif</i> (14ème Ed.) 40 (1992)
Unnumbered	G. Vedel, <i>Droit Administratif</i> 415 (1959)
Unnumbered	G. Vedel et P. Delvolvé, <i>2 Droit Administratif</i> 382-383 (1990)
Unnumbered	M. Waline, <i>Droit Administratif</i> 256 (1959)

At and Following the 2010 Hearings

Submission	Pinpoint
C-V	¶¶ 36, 55 – 65, 70
R-IV	¶¶ 44, 89 – 91
C. Closing	pp. 16 – 17
R. Closing Slide	20

Speaker	Citation
Brewer-Carías	911 – 912, 937
C. Closing	2044-2050
C. Opening	55 - 58
Hernández-Bretón	918 – 919; 947-948
Mélich-Orsini	912 (Sp. Hr. Tr. 15: 5-12) 941-942 (Sp. Hr. Tr. 39: 7-12)
R. Closing	2119-2128
R. Opening	98-101
Urdaneta	951-953

539. **Article 1271 of the Venezuelan Civil Code** provides, in English translation, that “*the debtor shall be ordered to pay damages, both for failure to perform the obligation and for delay in performance, unless he proves that the failure or delay are due to an extraneous cause not imputable to him [...].*” **Article 1272 of the Civil Code** provides for its part, also in English translation, that “*the debtor is not obligated to pay*

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damages when, as a consequence of a fortuitous event or force majeure, he fails to give or do what he was obligated [...].”

540. In the light of these two consecutive articles of the Venezuelan Civil Code, the Tribunal finds that the terms “*non-imputable extraneous cause*” and “*force majeure*” can be used interchangeably for present purposes to refer to an excuse for the failure to perform or delay in performing an obligation.
541. The Tribunal further notes that, under Article 1159 of the Venezuelan Civil Code, “*contracts have the force of law between the parties.*” Consequently, the Tribunal finds that the operation of the general “*force majeure*” or “*non-imputable extraneous cause*” excuse can be modified if such modification is mutually agreed by the Parties.
542. More specifically, the Tribunal finds that where risk of an event that would otherwise qualify as a “*non-imputable extraneous cause*” or “*force majeure*” is contractually allocated to a party, the occurrence of the event can no longer serve as an excuse for non performance under Venezuelan law.
543. The Tribunal also finds that if a given governmental act fits within the scope of “*Discriminatory Measure*” and also within the scope of “*non-imputable extraneous cause*”/“*force majeure*”, the characterization of the act under Clause XV of the AA and the definition of “*Discriminatory Measure*” must be considered as a *lex specialis* and must prevail. In other words, assuming an alleged event of force majeure is a “*Discriminatory Measure*”, it falls under Clause XV (“*Consequences of Governmental Actions*”), not under Clause XXI (“*Force Majeure*”).
544. Finally, without espousing Claimant’s view that Minister Ramirez was “*the chief architect*” of the alleged “*Discriminatory Measures*”, or that as a general proposition an enterprise owned and controlled by the State cannot rely on acts of that State as an excuse for non fulfillment of a contract, the Tribunal, addressing again the matter of extraneousness, finds that it is not “*irrelevant*” that Mr. Ramirez was simultaneously both the Minister of

Energy and the President of PDVSA, and, in the same vein, that Decree-Law 5200 is not necessarily extraneous to the Minister of Energy / President of PDVSA.

545. The Tribunal thus concludes that Article 15 AA, as a *lex specialis* over Article 21, allocates the risk for actions of the Republic of Venezuela that might otherwise be *force majeure*. Indeed, the Tribunal considers that this must have been the intention of the Parties in view of the well known history among the Parties before the conclusion of the AA.
546. Therefore, the Tribunal rules that any responsibility found for the Respondents for Discriminatory Measures due to Article 15 AA is not excused by *force majeure*.

K.VI. Liability under the PDVSA Guaranty

K.VI.1. Arguments by Claimant

547. PDVSA issued the PDVSA Guaranty on **28 October 1997**, concurrently with the execution of the AA. Under Section 3 of the Guaranty PDVSA, as the guarantor, unconditionally and irrevocably guarantees to Mobil CN (as beneficiary) the timely performance of all the obligations assumed by PDVSA-CN in the AA and related agreements. Claimant states that the Guaranty also requires PDVSA to pay on demand all reasonable costs and attorneys fees incurred by Claimant in all matters related to the enforcement of the Guaranty. (C-I ¶¶ 48 – 50, partially quoted).
548. Claimant argues that on **10 October 2007**, Claimant notified PDVSA that its Guaranteed Affiliate, PDVSA-CN, was in breach of the AA and demanded PDVSA's prompt performance of its indemnity obligation. (C-III ¶ 252). As PDVSA "*has neither paid the compensation owed to Claimant by PDVSA-CN nor even replied to Claimant's demand for performance of PDVSA's guarantee obligation,*" PDVSA is in breach of its obligations under the PDVSA Guaranty. (C-III ¶ 252; C-V ¶ 12).

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K.VI.2. Arguments by Respondents

549. Respondents maintain that Claimant has no claim against PDVSA-CN under the AA and, therefore, no claim against PDVSA under the Guaranty. (R-I ¶ 42). Respondents further state “*refusing to accede to absurd demands for compensation does not constitute bad faith under Venezuelan or any other law.*” (R-I ¶ 30).
550. With respect to whether an indemnity is due, Respondents explain that the idea that a claim for indemnity for the next 27.5 years accrued prior to the extinction is belied by the language of Article 15.1(b). No indemnity is due under that provision unless and until an award for indemnity had been rendered establishing that a Discriminatory Measure causing a Materially Adverse Impact in a particular FY had accrued. Thus, no claim for breach of the indemnity obligation had even accrued for FY 2007 (due to the rise in oil prices), prior to the extinction of the contract. (R-IV ¶ 42).

K.VI.3. The Tribunal

551. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties’ Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-I	¶¶ 48 – 50
C-III	¶¶ 252 – 253
C-V	¶ 12
R-I	¶¶ 30, 42 – 44
R-IV	¶¶ 42

Exhibits:

Exhibit	Document Name
C-3	PDVSA Guaranty Art. 6(ii), 7, 13
C-10	10 October 2007 Demand for Performance under the PDVSA Guaranty from Mobil Cerro Negro, Ltd. to Petróleos de Venezuela S.A. (PDVSA)
C-87	Association Agreement Article 13.1(d)(i)

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R-112 Association Agreement
 R-127 Association Agreement Annex G Accounting Procedures

At and Following the 2010 Hearings:

Speaker	Citation
R. Closing	2122
R. Opening	104 - 106

552. At the outset, the Tribunal recalls the text of the most relevant provision of the Guaranty:

Section 3

Spanish (Original)	Claimant's Translation	Respondents' Translation
La Fiadora garantiza adicionalmente en forma incondicional e irrevocable a cada una de las Beneficiarias, como deudora y obligada principal, el cumplimiento oportuno de todas las obligaciones de la Filial Garantizada en virtud del Convenio y del Convenio de Operación. Si la Filial Garantizada dejare de cumplir cualquiera de sus obligaciones en la forma y en el momento exigidos, la Fiadora cumplirá o hará cumplir dicha obligación al exigirlo cualquiera de las Beneficiarias.	The Guarantor additionally unconditionally and irrevocably guarantees to each of the Beneficiaries, as primary debtor and obligor, the timely performance of all of the obligations of the Guaranteed Affiliate under the Agreement and the Operating Agreement. If the Guaranteed Affiliate fails to perform any of its obligations in the manner and at the time required, the Guarantor shall perform or procure the performance of such obligation upon demand by any of the Beneficiaries.	The Guarantor additionally unconditionally and irrevocably guarantees to each of the Beneficiaries, as primary debtor and obligor, the timely performance of all of the obligations of the Guaranteed Affiliate under the Agreement and the Operating Agreement. If the Guaranteed Affiliate fails to perform any of its obligations in the manner and at the time required, the Guarantor shall perform or procure the performance of such obligation upon demand by any of the Beneficiaries.
(C-3; R-41)	(C-3)	(R-41)

553. Further, the Tribunal notes that Respondents, while insisting that the Guarantor is not liable due to the alleged lack of liability of the Guaranteed Affiliate, does not seem to contest that, should that Affiliate, *i.e.* PDVSA-CN, the 1st Respondent in this case, be found to be liable, that liability

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would also apply to the Guarantor, *i.e.* PDVSA, the 2nd Respondent in this case.

554. Indeed, the Tribunal also does not see a reason why this should not be so and, therefore, concludes that the 1st Respondent's liabilities found by this Tribunal under the AA, also lead to the same liability of the 2nd Respondent under the Guaranty.

K.VII. Compensation

K.VII.1. Jurisdiction

K.VII.1.a. Arguments by Claimant

555. In 1997, PDVSA-CN promised to indemnify Mobil CN against the economic consequences of Discriminatory Measures. (C. Closing Statement p. 21; C. Closing Slides 23, 26). Claimant argues that the Tribunal has jurisdiction over its claim for compensation through FY 2035, both under the plain meaning of the AA, and pursuant to the Parties' intent. (C. Closing Slides 27 – 29).

556. With respect to the grammatical construction of “*suffered by it to date*”, Claimant maintains that “*to date*” modifies “*Discriminatory Measures*” and that Claimant is seeking compensation for the economic consequences of Discriminatory Measures that it has already suffered. (C-V ¶ 75). For ease of reference, Claimant presents its argument as follows:

75. MCN has explained that the controlling Spanish text makes clear that “suffered by it to date” (“*sufrida por ella hasta la fecha*”) refers to “Discriminatory Measure” (“*Medida Discriminatoria*”) and not to “economic consequences” (*consecuencias económicas*). The Respondents concede that in Spanish “*sufrida*” goes only with “*Medida*,” but argue that “to date” (*hasta la fecha*) could apply “just as easily” to “economic consequences” (*consecuencias económicas*). That is grammatically impossible, both in the official Spanish text and in the English translation. The adverbial phrase “to date” (*hasta la fecha*) modifies the accompanying past participle “suffered” (*sufrida*). The full expression in the contract is “suffered by it to date” (*sufrida por ella hasta la fecha*). And the singular past participle *sufrida* cannot

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grammatically refer to a plural noun (*consecuencias económicas*). (C-V ¶ 75).

557. Pursuant to Article 23.7 of the AA, the Spanish language text is the official text. (C. Closing Statement p. 22). Claimant argues that, even where the English translation of the text is ambiguous, the Spanish original is the controlling text, stating that “[a]n ambiguous unofficial translation of the official text cannot prevail over the corresponding, unambiguous official text.” (C-V ¶ 86).
558. In the alternative, Claimant asserts that it “*was deprived, at the time of the expropriation, of its right to the value of cash flows from the Project for the remaining term of the joint venture.*” (C-V ¶¶ 75 – 77). “*Compensation for that lost right is not ‘future damages,’ as the Respondents mischaracterize it, but damages for the economic consequences that Mobil CN suffered at the moment its investment was expropriated or seized.*” (C-IV ¶ 56, emphasis in original; C. Closing Slides 26 – 30; C-V ¶ 76). Claimant contends that its interpretation is consistent with Venezuelan law:
255. Venezuelan law requires full indemnification for the consequences of a contractual breach. The damages (*daños y perjuicios*) to be compensated include both out-of-pocket losses (*daño emergente, damnum emergens*) and lost profits (*lucro cesante, lucrum cessans*), as long as the damages are the direct and immediate consequence of the breach. Both *daño emergente* and *lucro cesante* are subject to compensation as of the time the obligation was breached. The quantum of the compensation for *daño emergente* and *lucro cesante* is established as of the time of the judicial or arbitral decision. (C-III ¶ 255, italics in original).
559. Claimant states that the law of the forum may inform the interpretation of Article 15.1(b). New York law requires that an arbitration clause be construed to give fair meaning to the words of the contract in order to realize the parties’ “*reasonable expectations.*” (C-V ¶ 79). Claimant states that “[t]he text of the AA and undisputed testimony show that Mobil CN had a reasonable expectation that the contract provided for arbitration allowing a meaningful award for expropriation of Mobil CN’s interests in the Project.” (C-V ¶ 79).

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560. Claimant argues that the compensation it seeks find support in both Venezuelan and New York Law. Pursuant to **Article 12 of the Venezuelan Code of Civil Procedure** and **Article 1160 of the Civil Code**, “[t]he Tribunal’s power under Article 15.1(b) to compensate Claimant for the economic consequences of an expropriation necessarily entails the power to consider the loss of Claimant’s rights to produce EHO and sell SCO from 26 June 2007 through 20 June 2035.” (C-V ¶¶ 76 – 77; C. Closing Slides 28 - 30).

77. **Article 12 of the Venezuelan Code of Civil Procedure** provides that contracts are to be interpreted according to “the parties’ purpose and intention, taking into account the requirements of the law, the truth, and good faith.” And **Article 1160 of the Civil Code** provides that “[c]ontracts shall be performed in good faith and bind not only to comply with what they provide, but also to all the consequences derived from such contracts, according to equity, usage or Law.” (C-V ¶ 77, emphasis in original, citations omitted, see also C. Closing Statement pp. 22-23).

561. As Claimant suffered all of the economic consequences of the expropriation effected by **Decree-Law 5200** on 27 June 2007, the absence of an acceleration clause in the contract is irrelevant. (C. Closing Slide 31). The promised indemnity for economic consequences was due and payable in 2007. (C. Closing Statement p. 23). In the alternative, Respondents are in anticipatory breach of the contract. (C. Closing Slides 31 - 32). Under **Article 1215 of the Venezuelan Civil Code**, when a debtor becomes insolvent or deprives the creditor of contractual assurances, that debtor loses the benefit of any contractual term (*i.e.* time period) to perform his obligation. (C-V ¶ 82, partially quoted). Respondents overlook that PDVSA-CN, a debtor, is insolvent. There is no need to wait to know that Mobil CN will earn nothing after 2007. (C. Closing Slide 32). Even if this case were analogous to an installment debt, **Article 1215** would accelerate payments even in the absence of an acceleration clause. (C-VI ¶ 46). As the entire Project has been expropriated, there is no reason to wait for future actual costs and liftings would be. (C. Closing Statement p. 24).

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562. Claimant is not asking the Tribunal to render an award *ex aequo et bono*. Respondents' reference to Article 13 of the Code of Civil Procedure, which deals with proceedings in which the parties ask the court to render a decision according to equity, is irrelevant. (C-VI ¶ 23). Equitable principles are, however, applicable to the good-faith interpretation and performance of contracts. (C-VI ¶¶ 21-23; C. Closing Slide 28). Here, the standard of good faith precludes Respondents - who participated in the actions making it impossible to apply the Accounting Procedure formulas retrospectively and who benefited from the seizure of Claimant's interest – from seeking to avoid their commitments by invoking difficulties in applying the Accounting Procedures now that the Project is no longer generating cash flows. (C-V ¶ 78).
563. Claimant argues that Parties had intended to apply the indemnification obligations in the expropriation or seizure of assets – events that would prevent Claimant from receiving any “*actual*” cash flows and, therefore, would render a “*backward-looking*” analysis based on actual results impossible. (C-IV ¶ 57). Furthermore, as the Project no longer exists, the only means of redress is compensation. Claimant argues, therefore, that if the Parties are unable to negotiate such compensation pursuant to Article 15.1(a), then the Tribunal must issue such an award, pursuant to Article 15.1(b). (C-IV ¶ 53).
564. Claimant accuses Respondents of “*trying to frustrate the indemnification provisions by arguing that indemnification can only be provided on a 'retrospective' year-by-year basis based on the actual annual financial results of the Project.*” (C-IV ¶ 9). Claimant rejects Respondents' position that the expropriation or seizure has made it impossible to apply the indemnity formulas to FYs 2008 – 2035. Claimant explains that Respondents' position of requiring actual results would have the consequence of placing no limitations on the amount of the indemnification, rather than having it be calculated on a year-by-year basis:

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The primary function of the indemnification formulas — and use of look-back data in the formulas — was to *limit the amount of indemnification in years in which Claimant actually received revenues*. When Mobil CN is receiving no revenues or **Net Cash Flow**, then the formula limiting indemnification should not be applied at all if, as the Respondents contend, the expropriation or seizure has made it impossible to apply the formulas. (C-IV ¶ 58, emphasis in original).

565. Claimant suggests that applying the indemnity provisions to this situation where the *“investment was expropriated or seized, the contract was terminated, and the Project ceased to exist”* is a “reasonable business approach that is consistent with the language of the AA.” (C-IV ¶ 60).

566. Claimant also explains that applying the indemnity provisions is consistent with principles of equity.

Bearing in mind that the limitation mechanisms of the Accounting Procedures were intended for PDVSA-CN’s benefit, and that Respondents acted in concert with the government, it would be inconsistent with equitable principles to interpret the contract so that difficulties in the application of those mechanisms would render the promise of protection an illusion in the context of expropriation of production rights. (C. Closing Statement p. 22).

567. Turning to the interpretation of Articles 15.1(a) and 15.1(b) of the AA, Claimant states as follows:

Section 15.1(a) embodies the basic promise of protection, by specifying that Mobil CN would be entitled to damages from PDVSA-CN to restore the economic benefit that Claimant would have received but for a Discriminatory Measure. That basic right is made enforceable by Section 15.1(b), which specifies that Claimant is entitled to seek and receive an award of damages in arbitration to compensation for the “economic consequences of the Discriminatory Measure.” (C. Closing Statement p. 22).

568. Finally, Respondents are misquoting Prof. Myers and taking his observation that *“we are out of the contract”* completely out of context. This arbitration involves a situation where it is impossible to calculate the indemnity on a year-by-year basis. In trying to value the indemnity payments that are due to Claimant under the indemnity contract, Prof. Myers stated *“I didn’t say we are out of the indemnity provisions. We are trying to apply them or figure out what damages are appropriate in a situation where the contract*

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is not working as designed, where the project is no longer what it was, et cetera." (C-V ¶¶ 83 -84).

569. Since the AA has been terminated and it is not possible to recommend amendments to the AA, the Tribunal's power is limited to issuing an award for compensation within the framework of the AA and its Accounting Procedures. (C-V ¶ 74). In the event that the limitations do not apply or the formulas do not work due to the existence of a Discriminatory Measure consisting of the expropriation or seizure of Claimant's entire interest in the Project, then the Tribunal's powers revert to those granted by the general arbitration clause of Article 18.2 and by the general principles of Venezuelan law, which require full indemnification for breach of a contractual obligation. (C-V ¶¶ 74 - 75, partially quoted).

K.VII.1.b Arguments by Respondents

570. Respondents' dispute that the Tribunal may issue an Award granting any remedy for the future. (R-IV ¶ 95, citations omitted):

95. [T]he Tribunal should not decide on any remedy for the future. Section 15.1 (b) only contemplated "recommendations" for the future. This is evident not only from the text of Section 15.1 (b), but also from the testimony in this case, including the testimony of Claimant's experts that "we are outside of the contract." (R-IV ¶ 95).

571. Respondents argue that Claimant distorted the meaning of "*to date*" and seeks to have the Tribunal ignore each and every provision of the indemnity and the Accounting Procedures, all of which operate on a FY-by-FY basis, fitting perfectly with the concept of "*to date*" in Article 15.1(b). The plain meaning of Article 15.1(b), alone or in conjunction with the Accounting Procedures, stands firmly against Claimant's "*sophistry*" that it suffered all of the "*economic consequences*" of the alleged discriminatory expropriation by mid 2007. (R-IV ¶ 15).

572. Respondents make the following three points to the Tribunal related to the meaning of "*to date*":

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- (i) Section 15.1(b) provides only for the possibility of a monetary award based on the consequences to date as quantified by the indemnity provisions and formulas, and even specifies that no more than one indemnity arbitration may be brought per FY;
 - (ii) every single provision of the indemnity, including all the formulas in the Accounting Procedures, operates on a FY-by-FY basis; and
 - (iii) for the future, Section 15.1(b) expressly provides that an arbitral tribunal hearing an indemnity claim may only make “recommendations” which [...] should not be done in this case in light of the extinction of the AA. (R-V ¶ 9, citations omitted).
95. Since there is no dispute that the AA has been extinguished, no recommendations for the future can be made. The issue of whether the extinction gives rise to any rights on the part of Claimant is a matter between Claimant and the State. (R-IV ¶ 95).

573. Respondents’ argument with respect to Claimant’s linguistic argument is best taken from their own words, found at R-IV ¶ 96 (citations omitted):

96. Section 23.7 states that the AA is executed in the Spanish language. Claimant has said that the Agreement was negotiated and drafted in English and that there are a number of translation errors. There was no testimony at the hearing about any irreconcilable discrepancies between the two versions. Claimant has tried to make an issue out of the Spanish version of Section 15.1(b), but, as demonstrated in both the Urdaneta and the Mélich-Orsini expert opinions, which were never answered by Claimant, the Spanish text is reconcilable with the English and, taken in the context of the Agreement as a whole, is unquestionably of the same effect as all the testimony in this case, namely, that the provision contemplates an arbitration dealing with the economic consequences as of that date and only recommendations for the future.

574. The argument that the Spanish version of the text requires an interpretation that is contrary to the English has not been articulated or proven at the hearing and should be rejected. (R-V ¶ 16). All of the relevant testimony in this case on the meaning of Article 15.1(b) was in English and based on the English text. (R-V ¶ 16).

575. Respondents’ perspective is summarized in the **Post Hearing Brief**:

61. The indefensible manner in which Claimant began this litigation is relevant to Respondents’ counterclaims, but for present purposes Claimant’s original no discounting position and the subsequent change in instructions to which Mr. Graves referred demonstrate that Claimant is not here applying the indemnity provisions at all, but instead is insisting that the Tribunal “must find a way” to fashion an award for Claimant, in the words of Prof. Myers, “outside of the contract” and

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outside of what the parties “originally intended.” By urging this Tribunal to engage in that dangerous exercise, Claimant is asking it to stray beyond the jurisdiction of any tribunal hearing an indemnity claim under Article XV of the AA. (R-IV ¶ 61, citations omitted).

576. Respondents contend that the Tribunal lacks jurisdiction over a claim for future compensation. In this respect, Article 15.1(b) expressly indicates that the Tribunal may only make “*recommendations on amendments to the Agreement that would restore the economic benefit that the Foreign Party would have received if the Discriminatory Measure had not occurred.*” (R-II ¶ 160; R-IV ¶ 18; R-V ¶¶ 9 - 17).
577. Under Venezuelan law, indemnity provisions are strictly construed. (R-IV ¶ 48). Contrary to Claimant’s argument, **Article 12 of the Venezuelan Code of Civil Procedure** requires a judge to “*restrict himself to the legal norms, unless the Law empowers him to decide according to equity.*” (R-IV ¶ 49). **Article 13 of the Venezuelan Code of Civil Procedure**, as well as **Article 17 of the ICC Rules**, make it clear that the decider may only decide cases according to equity if the parties have so agreed. No such agreement exists in this case. (R-IV ¶ 49). The damages formulas, under **Article 1264 of the Venezuelan Civil Code**, need to be performed exactly as written – making it inappropriate to alter the contract by reading into the Threshold Cash Flow formula and all of the related provisions of the indemnity, essential provisions that are not there. (R-IV ¶ 50, partially quoted).
578. Respondents argue that Article 15.1(b) contemplates indemnity for the historical economic consequences of Discriminatory Measures. Article 15.1(b) can be read in either English or Spanish to mean “*a payment for damages to compensate the Foreign Party for the economic consequences to date of the Discriminatory Measure suffered by it.*” (R-III ¶ 186; R-IV ¶ 14). This reading accords the appropriate meaning to each word in the text and eliminates any redundancies that would occur by applying the words “*to date*” to the term “*Discriminatory Measure.*” Respondents present their argument as follows (R-III ¶ 187):

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187. Section 15.1(b) of the AA addresses the scope of an arbitration. Quite clearly, a tribunal in an arbitration would only be addressing the Discriminatory Measures that had already occurred (or been “suffered”), and would not be anticipating the possible occurrence of additional Discriminatory Measures in the future. Accordingly, there would be no point in applying the words “to date” to Discriminatory Measures. On the other hand, the words “to date” do have a purpose when applied to the concept of “economic consequences.” Assuming a determination that a Discriminatory Measure has occurred, the provision contemplates a payment to compensate the Foreign Party for economic consequences “to date.” For the future, the provision only contemplates “recommendations on amendments to the Agreement.” That is why every single provision of the AA and the Accounting Procedures relating to the indemnity is backward-looking, requiring the Tribunal to apply data from past FYs on a FY-by-FY basis. (R-III ¶ 187, footnotes omitted).
579. All of the formulas for calculating the indemnity require a FY-by-FY analysis using the available data from past FYs. (R-III ¶ 183, 188 – 191; R-IV ¶¶ 42, 50). In support of this, Respondents provided the Tribunal with **Appendix A: Backward-Looking Provisions of the AA**. Therein, Respondents explain that Articles I, 15.1(b) and 15.2(a) of the AA, as well as Articles 7.1 – 7.5 of the Accounting Procedures (Annex G), require the use of actual data, with and without the effect of the Discriminatory Measure(s). (R-III App. A). The AA provides no methodology for calculating **Net Cash Flows** in future FYs, when no data can be available. (R-II ¶¶ 163 - 165). Respondents assert that the only departures from this indemnity formula using actual data relate to the determination of the **Reference (Threshold) Price**. (R-II ¶ 167). *“There is no basis in the formula for applying any kind of projection or estimate, much less a budget prepared in 2006 which obviously bears no relationship to the reality that will unfold during the next 27.5 years.”* (R-V ¶ 11). The fact that no discount rate has been established in the contract is further evidence that 15.1(b) contemplates indemnity for historical economic consequences of Discriminatory Measures.
580. Respondents also point out that, pursuant to Article 15.1(b), no more than one indemnity arbitration may be brought per FY as further support for the

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fact that the indemnity would be for historical economic consequences only. (R-V ¶ 9).

581. Claimant's argument that "*the economic consequences to date include all of the lost future cash flows*" misconstrues what is at issue in this arbitration. This arbitration is not for an expropriation, but rather for specific indemnity under specific formulas. (R-V ¶ 14, partially quoted).

582. Respondents state that, even if an indemnity obligation had been fixed for each of the next 27.5 years, it would not be due now because the AA lacks an acceleration clause. (R-IV ¶ 16). Indeed, Claimant's argument in favor of acceleration finds no support in either the contract or the applicable law. (R-V ¶ 6).

16. That basic legal proposition is not unique to Venezuelan law; it is a general principle, which is why virtually all term loan agreements contain express acceleration clauses to override the rule that otherwise would prevail and to specifically provide for acceleration in accordance with specific procedures upon the happening of specified events. The AA contains no such provision. (R-IV ¶ 16, citations omitted).

583. Respondents further argue that Claimant's proposed acceleration pursuant to **Article 1215 of the Venezuelan Civil Code** is erroneous because none of the three required circumstances – the insolvency of the debtor, the impairment of the debtor's security, and the failure of the debtor to provide the security promised – are relevant in this case. (R-IV ¶ 17; R-V ¶ 15). Finally, Respondents explain that acceleration would be inappropriate, as this matter does not concern a purported fixed promissory-note like payment, but rather an indemnity that is contingent upon future events and calculations. (R-IV ¶ 17).

584. Respondents also call the Tribunal's attention to Claimant's argument in London, where it stated: "*[i]f the parties had intended there to be some provision to take account of accelerated receipt, they could have done so.*" (R-IV ¶ 60).

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585. In response to Claimants *ex aequo et bono* argument, Respondents state that the Tribunal is not authorized to decide this matter according to equity because there has been no agreement authorizing the Tribunal to decide the case according to such principles. (R-IV ¶ 49).
586. Addressing questions of an alleged “*misquoting*” of Prof. Myers, Respondents state that the extended quote of Prof. Myers’s candid observation that “*we are outside of the contract*” was that he was referring to a situation where “*it is impossible to calculate the indemnity on a year by year basis.*” (R-V ¶ 10). Even Mr. Massey conceded that the indemnity operated on a FY-by-FY basis. (R-V ¶ 10).

K.VII.1.c. The Tribunal

587. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties’ Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-III	¶¶ 255 – 258, 263; n. 528
C-IV	¶¶ 9, 52 – 60, 77 - 78
R-II	¶¶ 157 - 176
R-III	¶¶ 10, 141, 183 – 191
TOR	¶ 5.2.1.b.(iv)

Charts:

Submission	Pinpoint
C-IV	Appendix A:
R-III	Appendix A “ <i>Backward-Looking Provisions of the Association Agreement</i> ”

Exhibits:

Exhibit	Document Name
C-2	Association Agreement Clause 1, Article 15.1(b)
C-4	Annex G (Accounting Procedures) to the Association Agreement Article 7.4
C-11	Congressional Authorization, Twentieth Condition
C-19	Order Confirming Attachments dated 20 February 2008 rendered in

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- Mobil Cerro Negro, Ltd. v. PDVSA Cerro Negro S.A.*, U.S. District Court for the Southern District of New York, Civil Action No. 07 Civ. 11590 (DAB).
- C-22 Rafael Ramírez, Minister of Popular Power for Energy and Petroleum, Declarations of the Minister of Popular Power for Energy and Petroleum and President of PDVSA About the ExxonMobil-PDVSA Arbitration Case (8 February 2008) at pp. 2
- C-44 Declaration of Professor Eugenio Hernández-Bretón (27 September 2008) ¶¶ 28 – 40, 94 – 97
- App. 6 Venezuelan Code of Civil Procedure [*Código de Procedimiento Civil*] (published in Extraordinary Official Gazette No. 4.209 of September 18, 1990) Art. 12
- App. 7 José Mélich-Orsini, *Doctrina General del Contrato*, 4th. Edition, Academia de Ciencias Políticas y Sociales, Serie Estudios Nr. 61, Caracas, 2006, n. 16
- C-45 Declaration of Professor Allan R. Brewer-Carías (26 September 2008) ¶ 18
- C-69 Offering Memorandum, Cerro Negro Finance Ltd. (11 June 1998) pp. 106 - 110
- C-87 Association Agreement Articles 15.1, 15.1(b), 15.2, 23.7, Annex G (Accounting Procedures)
- C-134 Venezuelan Civil Code Art. 1160, 1273, 1275, 1276
- C-215 Second Declaration of Professor Eugenio Hernández-Bretón (14 May 2009) at ¶ 34 – 40
- App. 21 Venezuelan Code of Civil Procedure [*Código de Procedimiento Civil*] (published in Extraordinary Official Gazette No. 4.209 of September 18, 1990) Art. 12
- App. 32 Angel Cristóbal Montes, *El Incumplimiento de las Obligaciones*
- C-233 Venezuela Supreme Tribunal of Justice, Constitutional Chamber, Decision No. 1541 (17 October 2008) at 365.488 (English Tr. at 27-29)
- C-239 *Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela S.A.*, High Court of Justice, Queen's Bench Division, Transcript of Public Proceedings, Commercial Court, Day 2 (29 February 2008) at 38
- C-328 Updated Expert Report of Dr. Scott T. Jones of FTI Consulting, Inc. and Compass Lexecon (30 July 2010)
- R-15 First Affidavit of Hobert Plunkett (21 January 2008)
- R-32 Argument of Ms. Otton-Goulder, *Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela, S.A.*, High Court of Justice, Queen's Bench Division, Commercial Court (London), 2008 Folio 61
- R-35 Tr. Hearing of 2 December 2008 pp. 30 – 31, 69 – 71, 129 – 130
- R-36 Letter from Eugene D. Gulland, Esq., to Ben Preziosi, Esq. (23 December 2008)
- R-37 Outline Argument on Behalf of Claimant In Support of Its Application For an Order for Alternative Service and In Opposition to the Application by the Respondent to Discharge the Worldwide Freezing Order, dated 27 February 2008, *Mobil Cerro Negro Limited v. Petróleos de Venezuela, S.A.*, Claim No. 2008 Folio 61, High Court of Justice, Queen's Bench Division, Commercial Court (London) p. 28
- R-38 Tr. January 24, 2008, *Mobil Cerro Negro Limited v. Petróleos de*

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- Venezuela, S.A.*, Claim No. 2008 Folio 61, High Court of Justice, Queen's Bench Division, Commercial Court (London) pp. 8, 9, 70 – 71
- R-39 First Affidavit of R. Dean Graves (25 February 2008) *Mobil Cerro Negro Limited v. Petróleos de Venezuela, S.A.*, Claim No. 2008 Folio 61, High Court of Justice, Queen's Bench Division, Commercial Court (London)
- R-42 *The Next Shock?*, THE ECONOMIST, March 4, 1999, available at www.economist.com
- R-72 Association Oil Supply Agreement (Chalmette Supply Contract), (1 November 1997)
- R-93 Expert Report of Barry Pulliam and Anthony Finizza, Ph.D., Econ One Research, Inc. (16 February 2009) ¶¶ 98 – 109 n. 43
- R-94 Expert Report on Fiscal Year 2007 Indemnity Cash Flow Calculation, prepared by Vladimir Brailovsky, Economía Aplicada, S.C. (16 February 2009) n. 22
- R-95 Direct Testimony of José Ángel Pereira Ruimwyk (12 February 2009) ¶¶ 10 – 15
- R-98 Expert Report on the Discount Rate to be Applied to Projected Cash Flows Prepared by Vladimir Brailovsky and Louis T. Wells (16 February 2009) ¶¶ 63 – 70
- R-111 Tr.2 December 2008 Hearing pp. 54, 87
- R-112 Association Agreement Article 15.1(b)
- R-118 Second Legal Expert Opinion of Professor José Mélich-Orsini (14 August 2009) at ¶¶ 44 – 47,
- App. 46 Venezuelan Civil Code Art. 1215
- App. 49 Venezuelan Code of Civil Procedure, Official Gazette No. 4.209 (Extraordinary), published September 18, 1990, [*Código de Procedimiento Civil*] Art. 12
- R-119 Second Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (14 August 2009) at ¶¶ 96 – 104
- R-127 Annex G (Accounting Procedures) Association Agreement
- Unnumbered *Republic Mortgage Ins. Co. v. Countrywide Financial Corp.*, No. 603915/2009, 28 Misc.3d 1214(A), 2010 WL 2927286, at **2 (N.Y. Supreme Court, N.Y. County, July 22, 2010)
- Unnumbered Karl-Heinz Böckstiegel, *Public Policy and Arbitrability*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, ICCA CONGRESS SERIES 177, 201-203 (Pieter Sanders ed., 1987)
- Unnumbered Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, ICCA CONGRESS SERIES 258, at ¶¶ 141-142 (Pieter Sanders ed., 1987)

At and Following the 2010 Hearings:

Submission	Pinpoint
C-V	¶¶ 72 – 87
C-VI	¶¶ 21 – 23, 44 - 46
R-IV	¶¶ 12, 14 – 18, 42 – 43, 48 – 49, 60 – 61, 95 – 96
R-V	¶¶ 6, 9 – 17

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C. Closing Slides		22 – 32
C. Closing	pp.	22 – 24
R. Closing Slides		23 – 27, 48 – 59, 65 – 76, 80

Speaker	Citation
Brewer-Carías	1007
C. Closing	2044 – 2048, 2054, 2057 – 2064
C. Opening	55 – 56, 60 – 63
Cranmer	443 - 444
Cutt	759 – 760
Expert. Conf.	906 (Question by Chairman), 990 – 999, 1002 - 1005
Finizza	1814 – 1815
Graves	1653 – 1668
Hernández-Bretón	1005 - 1006, 1008, 1010
Hoemans	356
Jones	1358 – 1363, 1370, 1375 – 1377, 1387 – 1389, 1512
Leitzinger	1823 – 1824
Massey	504, 575 – 576
Mélich-Orsini	1008 – 1010 (Sp. Hr. Tr. pp. 92 – 93)
Myers	1676, 1695 – 1698, 1707 – 1708, 1746 – 1747
Pereira	1037 – 1040, 1090 – 1091, 1096, 1103
Plunkett	802, 804, 837 – 850, 874
R. Closing	2109, 2121 – 2123, 2149 – 2157, 2166
R. Opening	127
Urdaneta	1002 - 1005
Ward	290, 293 - 296

588. The Claimant's claim is for payment of compensation pursuant to the terms of the AA. It says that PDVSA-CN has failed to concur that a Discriminatory Measure has occurred and has refused to pay indemnification pursuant to the AA.

589. Article 15.1(b) of the AA provides that the scope of the arbitration proceedings between the Parties shall include:

Spanish (Original)	Claimant's Translation	Respondents' Translation
(b) [...] (i) una determinación de si una o más Medidas Discriminatorias se han producido y, si ese es el caso, si dichas medidas han tenido un Impacto Substancialmente Adversos sobre la Parte Extranjera; y	(b) [...] (i) a determination of whether one or more Discriminatory Measures have occurred and, if so, whether such measures have had a Materially Adverse Impact on the Foreign Party; and (ii) in the event of an affirmative answer to the	(b) [...] (i) a determination of whether one or more Discriminatory Measures have occurred and, if that is the case, whether such measures have had a Material Adverse Impact on the Foreign Party; and (ii) in the event of an affirmative

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<p>(ii) en caso de una respuesta afirmativa a las dos interrogantes planteadas en el punto (i) de este literal, una indemnización por daños para compensar a la Parte Extranjera por las consecuencias económicas de la Medida Discriminatoria sufrida por ella hasta la fecha y recomendaciones sobre enmiendas al Convenio que restablecerían el beneficio económico que la Parte Extranjera hubiera recibido si no se hubiera producido la Medida Discriminatoria.</p>	<p>two questions specified in clause (i) of this paragraph, an award for damages to compensate the Foreign Party for the economic consequences of the Discriminatory Measure suffered by it to date and recommendations on amendments to the Agreement that would restore the economic benefit that the Foreign Party would have received had the Discriminatory Measure not occurred.</p>	<p>response to the two questions specified in clause (i) of this paragraph, a payment for damages to compensate the Foreign Party for the economic consequences of the Discriminatory Measure suffered by it to date and recommendations on amendments to the Agreement that would restore the economic benefit that the Foreign Party would have received if the Discriminatory Measure had not occurred.</p>
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590. Article 15.2(a) of the AA further provides that PDVSA-CN's liability to Claimant shall in all cases be limited as follows:

Spanish (Original)	Claimant's Translation	Respondents' Translation
<p><u>Limitación de la Obligación de Lagoven CN.</u></p> <p>(a) No obstante lo anterior, después del primer período de seis (6) meses consecutivos durante el cual el Precio del Crudo Brent sobrepase el Precio Base, Lagoven CN no tendrá la obligación de compensar a ninguna Parte Extranjera por Medidas Discriminatorias en relación a cualquier Año Fiscal en que el promedio del Precio del Crudo Brent sobrepase el Precio Base, y dicha Parte Extranjera reciba un Flujo de Caja Neto, después de tomar en cuenta el efecto de la Medida Discriminatoria, cónsono con un precio de referencia por la Producción producida por las Partes que por lo menos guarde una relación razonable, ajustada en cuanto a las diferencias</p>	<p><u>Limitation on Lagoven CN's Obligation.</u></p> <p>(a) Notwithstanding the foregoing, after the first period of six (6) consecutive months during which the Price of Brent Crude exceeds the Base Price, Lagoven CN shall not have the obligation to compensate any Foreign Party for Discriminatory Measures with respect to any Fiscal Year in which the average Price of Brent Crude exceeds the Base Price, and such Foreign Party receives a Net Cash Flow, after taking into account the effect of the Discriminatory Measure, commensurate with a reference price for the Production produced by the Parties which bears at least a reasonable relationship, adjusted for quality and transportation</p>	<p><u>Limitation on Lagoven CN's Obligation.</u></p> <p>(a) Notwithstanding the foregoing, after the first period of six (6) consecutive months during which the Price of Brent Crude Oil is in excess of the Threshold Price, Lagoven CN will not be required to compensate any Foreign Party for Discriminatory Measures with respect to any Fiscal Year in which the average Price of Brent Crude Oil is in excess of the Threshold Price, and such Foreign Party receives a Net Cash Flow, after taking into account the effect of the Discriminatory Measure, commensurate with a reference price for the Production produced by the Parties that bears at least a reasonable relationship, adjusted for quality and</p>

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de calidad y transporte, al Flujo de Caja Referencial para ese Año Fiscal.	differences, to the Reference Cash Flow for such Fiscal Year.	transportation differences, to the Threshold Cash Flow for such Fiscal Year.
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591. Article 15.2(b) provides a second limitation in the event the Venezuelan State reduces its interest in either the Project or the corporate entity which participates in the Association Agreement:

Spanish (Original)	Claimant's Translation	Respondents' Translation
<u>Limitación de la Obligación de Lagoven CN.</u>	<u>Limitation on Lagoven CN's Obligation.</u>	<u>Limitation on Lagoven CN's Obligation.</u>

(b) En todo caso, Lagoven CN no tendrá obligación de compensar a una Parte Extranjera por daños sufridos, o de convenir en modificaciones al Convenio, como resultado de cualquier Medida Discriminatoria que se produzca después de que el Estado Venezolano reduzca su interés directo o indirecto a (i) menos del 12,5% en el Proyecto o (ii) menos del 49,9% de Lagoven o cualquier otra Empresa petrolera operadora subsidiaria de PDVSA a la cual hayan sido transferidas las acciones de Lagoven CN o sus intereses en el Proyecto.	(b) In any event, Lagoven CN shall have no obligation to compensate a Foreign Party for damages suffered, or to agree to amendments to the Agreement, as a result of any Discriminatory Measure occurring after the Venezuelan State reduces its direct or indirect interest to (i) less than 12.5% in the Project or (ii) less than 49.9% of Lagoven or any other operating oil Company subsidiary of PDVSA to which the shares of Lagoven CN or its interests in the Project may have been transferred.	[No translation provided]
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592. Although the respective English translations of these articles as supplied by the Claimant are not strictly identical to those supplied by Respondents, the Tribunal is satisfied that there is no material difference between Respondents-supplied and Claimant-supplied English translations of Articles 15.1(b) and 15.2(a) of the AA.

593. Annex G "Accounting Procedures" to the AA provides, *inter alia*, definitions of "Net Cash Flow" (Article 7.1), "Adjusted Net Cash Flow" (Article 7.2), "Reference (Threshold) Cash Flow" (Article 7.3). Article 7.4

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deals with “*Damages Payable*” and Article 7.5 with the “*Limitation*” of such Damages Payable.

594. Finally, Article 1.1 of Annex G “*Purposes*” provides, inter alia, that “*the purposes of these Accounting Procedures are to establish the accounting principles for recordkeeping, relating to the Project, necessary to [...] (iii) permit the Parties and the Operation to comply with their other obligations and responsibilities pursuant to the [Association] Agreement [...]*”
595. Here again, the Tribunal is satisfied that there is no material difference between Claimant-supplied English translation of the Accounting Procedures and Respondents-supplied English translation.
596. Respondents argue that there is no jurisdiction for an Award granting any remedy for the future.
597. The Tribunal’s task is to apply the Parties’ common intention, as reflected in the AA. The AA must be interpreted according to the plain and ordinary meaning of the Parties’ terms, considering the agreement as a whole in its general context. In this case, the evidence shows and it is undisputed that the AA was negotiated in the context of a previous nationalization/expropriation of foreign oil companies in Venezuela in 1975, and government attempts to attract these companies to return to Venezuela to invest in order to assist in the development of the oil industry, in particular in the extra-heavy crude oil in the Orinoco Belt.
598. Here, the Parties’ intention, particularly considered in the context of the previous expropriation and the contractual scheme of the AA, including Article 15 and the definition of “*Discriminatory Measures*”, was clearly to provide indemnification where expropriation, whether partial or complete, occurred. In the Tribunal’s view, good faith interpretation of the AA requires the application of the compensatory provisions of Clause XV in the case of a complete expropriation, as occurred here.

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599. Article 15.1 reflects the common intention of the Parties that in the event a Discriminatory Measure occurs, PDVSA-CN is required to assist the Foreign Party (the Claimant, Mobil CN) in reversing or obtaining relief from such Discriminatory Measure and negotiate in good faith the payment of “*compensatory damages and/or possible modifications of the agreement in order to restore the economic benefit that the Foreign Party would have received had the Discriminatory Measure not occurred.*” In the event that PDVSA-CN accepts that the Discriminatory Measure has occurred and that it has a materially adverse impact on the Foreign Party, this obligation applies directly. In the event PDVSA-CN does not concur and give the Foreign Party notice of its concurrence within 90 days following receipt of a notice of Discriminatory Measure, then any party may commence arbitral proceedings in accordance with Article 18.2 of the AA. The scope of any such arbitration includes a determination of whether a Discriminatory Measure has occurred and whether any such measure has had a materially adverse impact on the Foreign Party. If these questions are answered in the affirmative, as in this case, then the Arbitral Tribunal shall award damages to compensate the Foreign Party for the economic consequences of the Discriminatory Measure suffered to date by the Foreign Party and make recommendations on amendments to the Agreement that would restore the economic benefit that the Foreign Party would have received absent the Discriminatory Measure. Article 15.1(c) goes on to provide that in the event that the Discriminatory Measure in question is modified, reversed or ceases to be in effect, the obligation of PDVSA-CN to pay compensation or to cause the agreement to be modified, shall cease, provided that the Foreign Party has been compensated for the damages previously suffered as a result of the Discriminatory Measure. In addition, any payments in excess of the damages suffered as a result of the Discriminatory Measure are to be reimbursed to PDVSA-CN. These provisions reflect the clear intention that PDVSA-CN is responsible for paying compensation to the Claimant in order to compensate it for the damages suffered as a result of a

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Discriminatory Measure and to maintain for the Foreign Party the economic benefit originally agreed by the Parties under the AA.

600. Article 15.2 introduces two limitations on PDVSA-CN's obligations under article 15.1. Article 15.2(a) places a limit or cap on the amount payable in compensation by PDVSA-CN in respect of a Discriminatory Measure based on the base price (of US\$ 27 per barrel in 1996 dollars) and various defined terms in the AA and the formulas contained the accounting procedures in Annex G to the AA. This limitation does not affect PDVSA-CN's obligation to negotiate (or to agree to) amendments to the AA to restore the economic benefit that the Foreign Party would have received absent the Discriminatory Measure. Article 15.2(b) establishes a link between PDVSA-CN's obligation to compensate a Foreign Party for damages suffered, or to agree to amendments to the Agreement, as a result of any Discriminatory Measure and the interest held by the Venezuelan State in the Project or in PDVSA-CN. In the event the Venezuelan State reduces its direct or indirect interest to less than 12.5% in the Project or less than 49.9% of PDVSA-CN (or other subsidiary to which those interests are transferred), then PDVSA-CN has no obligation to compensate or to agree to amendments of the AA. It is common ground that no such reduction of the Venezuelan State's interest occurred in this case. Nevertheless, it is of some significance that the Parties linked PDVSA-CN's obligations to compensate the Foreign Party and/or negotiate/agree to amendments of the AA, to the Venezuelan State's interest in the Project and PDVSA-CN.
601. In the Tribunal's view, Article 15 imposes an obligation on PDVSA-CN – if the latter concurs that a Discriminatory Measure has occurred and has resulted in a Materially Adverse Impact – to assist the Foreign Party to obtain relief from Discriminatory Measures adopted by the Venezuelan State and to cooperate in the restoration of the economic benefit that the Foreign Party would have received had the Discriminatory Measures not occurred while the Venezuelan State holds the percentage interest in the

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Project or PDVSA-CN specified in Article 15.2(b). The only limitation on these obligations, when applicable, is the cap on compensation set out in article 15.2(a).

602. The Respondents argue that the limitation or cap on compensation depends on actual results on a fiscal year by fiscal year basis and cannot apply in the circumstances of this case where the AA has been extinguished and the formulas set out in the accounting procedures cannot be applied. The Tribunal is unable to accept this narrow interpretation of the intention of the Parties as reflected in Clause XV of the AA. Article 15.2(a) places a limit on the amount of compensation payable by PDVSA-CN in certain circumstances and, in doing so, refers to the Base Price of oil in any fiscal year and refers to defined terms and the accounting procedures which refer to cash flow and actual results achieved in specific fiscal years. These provisions appear to have as their primary focus Discriminatory Measures which could affect the concession subject of the AA on an ongoing basis and permit the application of the formula contained in the accounting procedures and the calculation of the limitation on compensation on a fiscal year basis in circumstances in which the concession and the AA continue to operate. However, this does not preclude the payment of compensation in the case of the termination and extinguishment of the AA and a complete seizure or expropriation of the Claimant's interest under the Agreement.

603. The basic obligation upon PDVSA-CN pursuant to Article 15.1 is the payment of compensatory damages and/or the possible modification of the AA in order to restore the economic benefit that the Foreign Party would have received absent the Discriminatory Measure. Pursuant to Article 15.1(b), an arbitral tribunal has the power to issue an award for compensatory damages, subject to any limitations contained elsewhere in the Agreement and the formulas in the accounting procedures. Further, the Tribunal has the authority to recommend amendments to the agreement that would restore the benefit the foreign party would have received had the

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Discriminatory Measure not occurred. This reflects the intention to permit the Foreign Party to recover the portion of the injury or damages not remedied by an award because of the limitations contained in Article 15.2(a) and is also forward looking in that it addresses the future effect of the Discriminatory Measure by authorizing recommendations on amendments to the AA. The provisions of Articles 15.1(a) and (b) contemplate an ongoing concession and a duty to cooperate and negotiate to maintain the benefit that the Foreign Party (the Claimant) would have received during the course of the AA had the Discriminatory Measures not occurred. These requirements and the Tribunal's power to make recommendations to restore the economic benefit of the Foreign Party are relevant for both additional compensation in any given fiscal year which might not be remedied by an arbitral award because of the limitation placed on compensation in Article 15.2(a) and for future fiscal years during the term of the AA. While Article 15.1(b) provides that a party may only initiate one arbitration proceeding per calendar year, which is consistent with assessment of indemnification on an annual basis in an ongoing concession and agreement, an arbitration may be commenced in the following year in the event that negotiations between the Parties are not successful or recommendations by the Tribunal under Article 15.1(b) are not adopted by the Parties.

604. In the Tribunal's view, these provisions foresee an ongoing concession and intention to maintain the economic benefit of the Foreign Party for the duration of the AA within the limitations contained in that Agreement. In the event of a termination of the contract and the seizure of all of the Claimant's interest, the application of the limitation contained in Article 15.2(a) is made more difficult and the Arbitral Tribunal's authority to make recommendations on amendments to the AA that would restore the economic benefit to the Foreign Party absent the Discriminatory Measure is defeated. In the Tribunal's view, it would not be consistent with the intention of the Parties to prevent the Claimant from recovering any

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compensation due to the nature of the Discriminatory Measure and the ensuing difficulty in applying the limitation contained in Article 15.2(a).

605. The Tribunal is unable to accept the Respondents' interpretation of what they say is the very limited scope of an arbitration pursuant to Article 15.1(b) of the AA. In this regard, the Tribunal notes that the arbitration clause contained in article 18.2 is very broad. Further, Article 15.1(b), in referring to arbitration pursuant to article 18.2, states that the arbitration proceedings "*shall include*" a determination as to whether a qualifying Discriminatory Measure has occurred and, if so, an award to compensate the Foreign Party for the economic consequences of the Discriminatory Measure suffered by it to date and recommendations on amendments to the agreement that would restore the economic benefit to the Foreign Party. Neither article contains any express exclusion or limitation on the granting of a remedy for the future. Indeed, the express language of Article 15.1(b) contemplates the jurisdiction of the Arbitral Tribunal to recommend modifications to the agreement to restore the economic benefit that the Foreign Party would have received had the Discriminatory Measure not occurred. In addition, Article 15.2(b) seems to imply that PDVSA-CN may have some obligation to agree to the Tribunal's recommendations while the Venezuelan State maintains the requisite holdings on the Project and/or PDVSA-CN.

606. Further, the Tribunal is not persuaded that the authority to award compensation to the Foreign Party is limited to the "*economic consequences*" suffered "*to date*" in the sense that only those economic consequences suffered and reflected in actual figures for a fiscal year and suffered "*to date*" can be compensated. While the English translation of article 15.1(b) may be, to some extent ambiguous in this regard, the official Spanish version of the relevant part of the article is clear. The words "*suffered by it to date*" ("*sufrida por ella hasta la fecha*"), refers to "*Discriminatory Measure*" ("*Medida Discriminatoria*") and not to

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“economic consequences” (“consecuencias económicas”). This emerges clearly from the Claimant’s analysis of the Spanish text of the AA. In this case, the Discriminatory Measure at issue, the expropriation of the Claimant’s interest in the Project, had clearly occurred or been suffered by both the date on which the Claimant requested indemnification and the date on which it requested arbitration. Further, and in any event, in the case of the complete seizure or expropriation of the Claimant’s interest in the project, it is logical to conclude that the economic consequences were suffered at the time of the expropriation. The evidence clearly established that the Claimant would earn nothing from the Project in the future and there is no need to wait to confirm this.

607. The Claimant argues that if the limitation in Article 15.2(a) does not apply, or the formulas are impossible to implement in the case of a complete seizure or expropriation of the Foreign Party’s entire interest in the Project, then the Tribunal’s powers are those granted by the general arbitration clause contained in Article 18.2 and by the general principles of Venezuelan law which require full indemnification for breach of a contractual obligation. In certain regards, this argument has some appeal since the Discriminatory Measure in this case has deprived the Claimant of any **Net Cash Flow** in the future. Nevertheless, in the Tribunal’s view, the basic formula contained in Section VII of the accounting procedures can properly apply in the absence of a Net Cash Flow and respect the Parties’ intention to apply a limitation on compensation payable pursuant to the indemnification formula when the price of oil meets the conditions described in Article 15.2(a).
608. The indemnity provisions of the AA reflect an intention to ensure that in the event of Discriminatory Measures, the Foreign Party will receive cash flow calculated pursuant to the **Reference Cash Flow** Formula. The history of the Project and the profits it generated, as well as the world price of oil at the relevant times, indicate that using the **Reference (Threshold) Cash**

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Flow in these circumstances would be consistent with this intention and reasonable on the facts. The calculation of a limitation on compensation on the basis of the difference between a **Reference (Threshold) Cash Flow** and **Adjusted Cash Flow** of zero is consistent with the intention of the Parties. As discussed below in addressing quantum, in circumstances where the Discriminatory Measure deprives the Claimant of any future cash flow, the limitation on indemnification contained in Article 15.2 can properly apply in a manner consistent with the intention of the Parties.

609. In reaching this conclusion, the Tribunal is not deciding in equity or *ex aequo at bono*. Rather, the Tribunal's conclusion is the result of the interpretation of the AA pursuant to the rules of contractual interpretation of Venezuelan law, which include the interpretation of contracts in good faith and the obligation to perform contracts in good faith. The interpretation resulting from these principles applies the common intention of the Parties to provide a basic level of compensation in the event of the occurrence of the Discriminatory Measures found to have occurred in this case.
610. Therefore, this Tribunal concludes that it has jurisdiction to award compensation according to Article 15 of the AA, whether related to past fiscal years or the balance of the term of the AA as originally agreed by the Parties.

K.VII.2. Calculation of Indemnity for FY 2007

611. Pursuant to Claimant's suggestion in Claimant's Reply Memorial, the term **Reference (Threshold) Cash Flow** will be used in this Award to describe what Claimant has referred to as **Reference Cash Flow** and what Respondents have referred to as **Threshold Cash Flow**. (C-IV ¶ 120). The term **Base (Threshold) Price** shall describe what Claimant had referred to as **Base Price** and Respondents have referred to as **Threshold Price**. (C-IV n. 306).

K.VII.2.a. Arguments by Claimant

612. Claimant stated that, going back three and a half years from June 2010, the Discriminatory Measures have reduced Mobil CN's cash flows by nearly US\$ 2 billion – US\$ 425 million of which are from 2007 alone. (C. Closing Slide 23). Claimant argues that it is entitled to a net indemnity in the amount of approximately US\$ 80.5 million for FY 2007, subject to updating at the time of the Award. (C-III ¶¶ 260, 309). This amount is based on the Graves-A&M Report (calculations shown below) stating that the gross indemnity amounted to US\$ 177 million, less a US\$ 96 million credit representing Respondents' interest in the ten shipments of SCO sent for Claimant's account after 26 June 2007. (C-III ¶¶ 260, 309). Claimant did not discuss the US\$ 96 million credit during its closing argument.
613. Claimant explains that Annex G provides a two-step procedure for determining the indemnity. (C-III ¶¶ 261, 265 – 296; C-IV ¶ 119). *The first step* involves determining the amount of the indemnity payable to Claimant, which “*is equal to the difference between (i) the Net Cash Flow that Mobil CN would have received during the relevant period if the Discriminatory Measure(s) had not occurred (to be referred to as the **But-For Net Cash Flow**) and (ii) the Net Cash Flow that Mobil CN actually received during that period, after taking into account the impact of the Discriminatory Measure(s).*”
614. *The second step* serves to limit the amount of the indemnity.

Section 15.2 of the AA and Annex G contain (i) limitations aimed at avoiding indemnification for *de minimis* impacts of less than 5% of the party's Net Cash Flow; and (ii) limitations related to increases in the price of oil and a hypothetical cash flow based on the **Base (Threshold) Price**. The second limitation comes into play when the “Price of Brent Crude” has exceeded a “**Base (Threshold) Price**” of US\$27 per barrel (measured in 1996 Dollars) for a six-month period after execution of the Agreement and requires a comparison between a **Reference (Threshold) Cash Flow** and the Net Cash Flow actually received by Claimant in the relevant period. (C-III ¶¶ 268, 273, partially quoted, footnotes omitted).

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615. Claimant contends that the amount of compensation payable to Claimant is the difference between **Reference (Threshold) Cash Flow** and **Adjusted Net Cash Flow**. The terms **Net Cash Flow** (defined by Article 7.1 of Annex G), **Adjusted Net Cash Flow** (defined by Article 7.2), and **Reference (Threshold) Cash Flow** (defined by Article 7.3) depend on retrospective data, and, in the event of an expropriation, on the latest available retrospective data. (C-III ¶ 275).
616. Claimant explains that the **Net Cash Flow** “*is determined by subtracting, from [Claimant’s] share of the total gross revenues from the Project, [Claimant’s] share of the royalties, chargeable capital and operating expenditures, and income taxes paid.*” (C-III ¶ 278):
- The **Net Cash Flow** of a Party for a given FY (as measured based on the Dollar Accounts) shall be determined as follows:
- R – ROY – CEX – IT**[.] [w]here:
- R**= total liftings during such FY multiplied by the Price Formula applicable to such Production, plus Joint Revenues received during such FY
- ROY**= the actual Royalty paid by a Party or on behalf of and for the account of a Party during such FY [paid to the Government (C-III ¶ 281).]
- CEX**= the Party’s pro rata share of actual Chargeable Expenditures for such FY
- IT**= the Party’s pro rata share of Income Taxes paid with respect to such FY. (C-III ¶ 278; C-87 Annex G Article 7.1).
617. Claimant argues that **R** is equal to the revenues for Claimant’s share of the oil production using the formula price set forth in the **Oil Supply Agreement** and Joint Revenues from the sale of by-products. (C-III ¶ 279-280).
618. The **Adjusted Net Cash Flow** is “*determined by making an adjustment to Mobil CN’s Net Cash Flow to address the possibility that the Formula Price for SCO no longer bears the same relationship to the price for the specified benchmark crude oil (Brent) as the relationship between them that prevailed at the time of ‘initial Production’ from the Project.*” (C-III ¶¶ 283-

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284). For 2007, this has the effect of reducing the indemnification. (C-III ¶ 286). Claimant asserts that, for the **Adjusted Net Cash Flow**, the Parties selected the **Price of Brent Crude Oil**, and not the **Chalmette Formula Price**, as the benchmark to determine whether global oil prices had reached a point at which the limitations of Annex G would enter into force. (C-IV ¶ 143).

619. Claimant insists that neither Annex G, Article 7.2, nor the Parties' intent support the Respondents' conclusion that "**the [Chalmette] Formula Price** used in the **Net Cash Flow** formula must be adjusted upward to a Brent-equivalent price to derive **Adjusted Net Cash Flow**." (C-IV ¶ 140). Claimant explains:

The parties knew in 1997 that SCO would be priced lower than Brent crude oil. Accordingly, if the parties had meant to include a special price adjustment in the limitation on indemnification solely to take account of this price differential, they could have done so. If the parties had intended Section 7.2 to mean what the Respondents contend it means, it would read as follows: "The **Adjusted Net Cash Flow** of a Party for a given FY (as measured by the Dollar Accounts) shall be equal to the **Net Cash Flow** for a Party for such FY, calculated on the basis of the applicable **[Chalmette] Formula Price**, *which shall be equal to the Price of Brent Crude Oil*." But Section 7.2 does not read that way. More particularly, if the parties had intended to replace the **Chalmette Formula Price** by the "Price of Brent Crude Oil," which is a term defined in the AA, they would have used that defined term. (C-IV ¶ 141, emphasis in original).

620. Claimant further states that, other than arbitrarily reducing the amount of indemnification, there is no discernible reason for adjusting the **Chalmette Formula Price** revenues from the Project upward to much higher "*Brent-equivalent*" revenues. (C-IV ¶ 142).
621. Claimant disagrees with Respondents' interpretation of Article 7.2 because it does not give effect to the phrase "*such initial Production*." (C-IV ¶ 144).
622. Claimant maintains that the **Reference (Threshold) Cash Flow** "*is an estimate of the hypothetical Net Cash Flow that Mobil CN would receive, absent any Discriminatory Measure, if the oil production from the Project were deemed to have the stipulated value assigned to it by the Parties using a defined Base (Threshold) Price*." (C-III ¶ 287). The **Reference**

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(Threshold) Cash Flow is calculated by applying a **Base (Threshold) Price** of US\$ 27 per barrel (in 1996 Dollars), escalated for inflation as of the date of breach: **25 September 2007**. This adjusted **Base (Threshold) Price** is US\$ 34.38 per barrel. (C-III ¶¶ 289-290). This adjusted **Base (Threshold) Price** acts as a uniform ceiling on the **Reference (Threshold) Cash Flow** because it is independent of fluctuations in market prices. (C-IV ¶¶ 124, 133). **Reference (Threshold) Cash Flow** is calculated as follows:

The **Reference [(Threshold)] Cash Flow** of a Party for a given FY (as measured based on the Dollar Accounts) shall be determined as follows:

TR - TROY - CEX - TIT[,] [w]here:

TR= total liftings during such time period, multiplied by the Base Price, plus Joint Revenues received during such FY. [Threshold Revenues]

TROY= the Royalty that would have been paid by a Party during such FY, absent the alleged Discriminatory Action.

CEX= the Party's pro rata share of the actual Chargeable Expenditures for such FY, absent the alleged Discriminatory Action.

TIT= the Party's pro rata share of Income Taxes that would have been paid with respect to such FY, absent the alleged Discriminatory Action. (C-III 287, C-87 Annex G Section 7.3, footnotes omitted).

623. The **CEX**, unlike the **TROY** and **TIT**, is not related to revenues (C-IV ¶ 128). Claimant argues that *"the amount CEX should be determined by reference to the jointly approved capital expense and operating expense budget for FY 2007"* because the definition of **CEX** in the AA indicates the Parties' expectation that both Mobil CN and PDVSA-CN would have participated in planning the budget for **CEX** and approving actual expenditures. FY 2007 is the last FY for which such circumstances existed. As a result, calculations for all FYs should be made with reference to the jointly approved capital expense and operating expense budget for FY 2007. (C-III ¶ 293, partially quoted).
624. Using the *"actual"* expenditures would not appropriately capture the operating and capital expenditures *"absent the alleged Discriminatory Measure"*, as required by Article 7.3 of the Accounting Procedures. (C-217 Graves at p. 12).

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625. The deviations from the 2007 budget are explained by the takeover of the Project by PDVSA at the end of April 2007 and the disruptions related to that rapid transition. (C-IV ¶ 159). This is confirmed by the history of the Project. During FYs 2002 – 2006, the budgeting of the Project was accurate when compared to the actual expenses for the Project. (C-IV ¶ 157, Graves at pp. 14 – 15). The 2007 deviations were not – as Respondents argue – a result of an unrealistic budget for FY 2007 expenses. (C-IV ¶ 159). In response to Respondents’ argument that the budget was unreasonably low as compared to prior years, Claimant’s witness, Mr. Lawless, explains that the 2007 operating budget did not contain projected turnaround expenses, as did the budgets for FYs 2005 and 2006. The reason for this is that no turnaround was planned for FY 2007, making the budget understandably lower. (C-213, Lawless at ¶ 8).
626. Claimant also puts forth a “*fairness and necessity*” argument for using the 2007 budgeted expenses. After **27 June 2007**, Claimant was afforded no access to records or other evidence of costs, thus making it necessary to calculate the *CEX* using the only data available: the 2007 budget. (C-IV ¶¶ 156-157). This approach was reasonable, according to the Claimant, in light of the fact that the Project’s actual expenditures were historically consistently close to their budgeted expenditures. (C-IV ¶ 157).
627. Claimant argues that the *TROY* and *TIT*, unlike the *CEX*, are to be determined using hypothetical or counterfactual results, and that the word “*actual*” does not appear in their definition. (C-IV ¶¶ 124-126). The *TROY* and *TIT* definitions use the subjective mood – further supporting Claimant’s arguments that they are to be determined by hypothetical or counterfactual, rather than “*actual*” facts. (C-IV ¶ 129). Claimant explains:

The prefix “*T-*” added to all of the variables in the **Reference (Threshold) Cash Flow** formula other than *CEX* confirms that they are based upon the scenario in which the **Base (Threshold) Price** is employed to determine the variable *TR* (*Threshold Revenues*). Contrary to the Respondents’ contention that *TROY*, *TIT*, and *CEX* should all be calculated on the same basis (actual Project revenues), the prefixes in Section 7.3 distinguish *TROY* and *TIT* from

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CEX. If the Parties had intended for **Reference (Threshold) Cash Flow** royalties and income taxes to be based upon actual Project revenues, they could have repeated the variables **ROY** and **IT** used in Section 7.1, as they did with the variable **CEX**. Instead, Section 7.3 uses **TROY** (*Threshold Royalties*) and **TIT** (*Threshold Income Taxes*) to signify their relationship to the variable **TR** (*Threshold Revenues*). (C-IV ¶ 127).

628. Here, “[t]he amount **TR** (*Threshold Revenues*) represents Mobil CN’s share of the gross revenues from the Project under the hypothetical scenario used to construct the **Reference (Threshold) Cash Flow**. As in the case of **R**, the amount **TR** is the sum of two (in this case hypothetical) revenue amounts: (i) gross revenues for Mobil CN’s share of the oil production from the Project assuming the stipulated **Base Price** [US\$34.38] and (ii) ‘Joint Revenues’ from by-products.” (C-III ¶ 288, footnotes omitted).

629. To determine the **TROY**, Claimant advocates using the 1% royalty rate allowed under the **RRA** rather than the rate of 16 2/3%. Claimant maintains that the higher rate constitutes a Discriminatory Measure. (C-III ¶ 291; C-IV ¶¶ 150-155). Claimant’s expert calculated the per barrel royalty rate as follows:

Before the expropriation or seizure of Mobil CN’s interests in the Project, royalties for EHO production from the Project were calculated by applying the royalty rate to a value specified by the Government for those barrels. After examining the historical relationship in 2007 between the Formula Price for SCO generated from Cerro Negro EHO and the value for such EHO on which the Government based royalty obligations, Graves-A&M determined that EHO was valued at 94% of the Formula Price for royalty purposes. (C-III ¶ 292).

630. Claimant contends that the **TIT** should be calculated with the income-tax rate of 34% because the imposition of a higher tax rate on such income constituted a Discriminatory Measure. (C-III ¶ 294). The appropriate calculation of the **TIT** under Venezuelan law allows deductions for operating expenses and depreciation, but not for capital expenditures. (C-IV ¶¶ 131, 160-161). Claimant asserts that the discrepancies between Claimant’s and Respondents’ **TIT** calculations relate to the fact that Respondents prepared their tax analysis according to U.S., rather than Venezuelan, law. (C-IV ¶ 161).

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631. Claimant explains its opposition to Respondents' characterization of the *TROY* and the *TIT* in its Reply Memorial:

134. Under the Respondents' interpretation of *TROY* and *TIT*, the indemnity that the Respondents would owe in the case of expropriation of the Claimant's entire interests would increase as the **Chalmette Formula Price** at the relevant time increases until the **Chalmette Formula Price** equaled the **Base (Threshold) Price** — *but then the indemnity would decrease as the Chalmette Formula Price increases still further*. In other words, the Respondents' interpretation argues for an indemnity that peaks when the **Chalmette Formula Price** equals the **Base (Threshold) Price**, and declines even though the amount of Claimant's lost revenues increases. At a certain **Chalmette Formula Price**, the Respondents' interpretation would deprive Mobil CN of any indemnity — even though Mobil CN would no longer receive its share of revenues from the Project. The Respondents' interpretation of Section 7.3 does not merely impose a ceiling on the indemnity; *it eventually eliminates the indemnity, even as the value of the net cash flow taken from Claimant grows*. (partially quoted, emphasis in original).

136. Respondents' interpretations of *TROY* and *TIT* would have similar perverse effects upon the indemnity in the event of impermissible increases in the royalty or income-tax rate and other Discriminatory Measures short of expropriation or seizure of Mobil CN's entire interests. In such circumstances, Mobil CN would continue to receive some revenues based on the market-based **Chalmette Formula Price**. Such revenues would be taken into account in the calculation of **Adjusted Net Cash Flow** under Sections 7.1 and 7.2 of Annex G, not in the calculation of **Reference (Threshold) Cash Flow** under Section 7.3. Because Claimant's Net Cash Flow (and **Adjusted Net Cash Flow**) would increase as the **Chalmette Formula Price** rose, such an increase would reduce the indemnity beneath the limit established by the **Reference (Threshold) Cash Flow**. [...] Under the Respondents' interpretation of Section 7.3 the **Reference (Threshold) Cash Flow** would *also* decrease as the **Chalmette Formula Price** increased. The Respondents' interpretation thus amounts to giving a rising **Chalmette Formula Price** a compounded negative effect: (i) reducing the indemnity ceiling through reduction of the **Reference (Threshold) Cash Flow** while (ii) simultaneously reducing the indemnity by increasing the Net Cash Flow (and **Adjusted Net Cash Flow**). (C-IV ¶¶ 134, 136, partially quoted, emphasis in original).

632. Claimant charges that Respondents' interpretation of the indemnity provisions is contrary to the manifest intent of the Parties.

The AA (Annex G in particular) shows the Parties' intent that the **Reference (Threshold) Cash Flow** defined by Section 7.3 be calculated as a relatively straightforward notional net cash flow that Mobil CN would have received if (i) the price for each barrel of liftings were equal to the stipulated **Base**

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(Threshold) Price, (ii) notional royalties and taxes were proportional to those revenues, and (iii) no Discriminatory Measures had occurred. The **Net Cash Flow** resulting from the hypothetical circumstances of such a **Base (Threshold) Price** scenario represented the amount that PDVSA-CN was willing to pay, and Claimant was willing to accept, as the *quantum* of the contractual indemnity in a high price (*i.e.*, greater than **Base (Threshold) Price**) oil market. (C-IV ¶ 137 footnotes omitted, emphasis in original).

633. Defending its interpretation, Claimant maintains that the indemnity would increase in relation to the **Chalmette Formula Price** until the **Chalmette Formula Price** exceeded the **Base (Threshold) Price**, at which point the indemnity would remain constant. (C-IV ¶ 135).
634. With respect to the indemnity calculations, Claimant alleges that Respondents' calculations for FY 2007 are incorrect for two reasons. *First*, Respondents' experts improperly increase the **Adjusted Net Cash Flow** due to their flawed interpretation of Article 7.2 which allows them to convert the **Chalmette Formula Price** to what they regard as the value equivalent to the value of Brent Crude. *Second*, Respondents' experts improperly reduce the **Reference (Threshold) Cash Flow** by US\$ 258 million through their flawed interpretation of Article 7.3. The experts' calculations applied the "*actual*," **Chalmette Formula Price**-based royalties and income taxes that they believe Claimant would have paid during the entire year, but for the expropriation. Claimant contends that Respondents' experts should have applied the **Base (Threshold) Price**-based values required by the **TROY** and **TIT** in their estimates. (C-IV ¶¶ 146-148).
635. Claimant retained Graves-A&M to compute the amount of compensation payable for the FY 2007. Graves-A&M applied the Claimant's interpretation in the above formulas and calculated the amount as follows (C-III ¶¶ 299 – 309, partially quoted, partially summarized, footnotes omitted, italics in original):

- Claimant's **But-For Net Cash Flow** and **Net Cash Flow** for FY 2007 were computed by subtracting, from its share of the Project's total gross revenues, Claimant's share of the royalties, chargeable capital and operating expenditures, and income taxes paid in that FY. Claimant's **But-For Net Cash Flow** was US\$607 million and its **Net Cash Flow**

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was US\$182 million in FY 2007. The difference between the two (US\$425 million) exceeds 200%, which is greater than the 5% *de minimis* limitation referred to in Section 7.4 of Annex G.

- The **Reference [(Threshold)] Cash Flow** was US\$361 million and the **Adjusted Net Cash Flow** was US\$184 million. The difference between the **Reference [(Threshold)] Cash Flow** and the **Adjusted Net Cash Flow** is US\$177 million. Graves-A&M determined the hypothetical oil revenue component of **TR** by multiplying the **Base (Threshold) Price** (US\$34.38 per barrel [US\$27 per barrel in 1996 Dollars escalated to value at the date of breach]) times the volume of SCO production (“liftings”) budgeted for the Project in FY 2007 (108,000 bpd) times Claimant’s interest in the Project (41.67%). This calculation determined a hypothetical oil revenue, applying the **Base (Threshold) Price**, of approximately US\$565 million. Graves-A&M then determined the hypothetical Joint Revenues (by-product) component of **TR** (net of royalties) by multiplying the hypothetical oil revenue amount by 2.74%, thus adding approximately US\$15 million to bring the amount **TR** to approximately US\$580 million.
- Graves-A&M determined the **TROY** by multiplying the budgeted volume of EHO production for FY 2007 (120,000 bpd) times the **Base (Threshold) Price** times 94% (to establish the value on which royalties would have been assessed), then times either 1% (for revenue until 22 December 2007) or 16 2/3% (for revenue after 22 December 2007).
- Graves-A&M determined the **CEX** using data available at the date of breach – namely, the jointly-approved capital expense and operating expense budget for FY 2007. This amount was approximately US\$63 million.
- To determine the **TIT**, Graves-A&M first determined the hypothetical taxable income in the but-for scenario assumed by the **Reference [(Threshold)] Cash Flow**. That hypothetical taxable income consists of the revenue amount **TR**, minus the royalty expense value **TROY**, the operating expense component of amount **CEX**, and the estimated depreciation for FY 2007. Graves-A&M then multiplied the resulting hypothetical taxable income times 34%. This analysis determined a hypothetical income tax expense in the **Reference Threshold)] Cash Flow** scenario of approximately US\$148 million.
- Finally, applying the cap of the indemnity which is the lesser of (i) the difference between **But-For Net Cash Flow** and **Net Cash Flow** (US\$425 million) and (ii) the difference between the **Reference [(Threshold)] Cash Flow** and **Adjusted Net Cash Flow** (US\$177 million), the gross amount of the indemnity owed to Claimant for FY 2007 is US\$177 million. This amount is diminished by a credit in favor of PDVSA-CN in the amount of US\$96 million for shipments sent for the account of Claimant, making the net indemnity approximately US\$80.5 million.

636. In FYs 2005 – 2007, Claimant received net cash flows, despite Discriminatory Measures. Mr. Graves’s application of Article 7.5 (and thus

Article 15.2(a)) by offsetting the **Reference (Threshold) Cash Flow** with the **Adjusted Net Cash Flow**, resulted in Claimant being entitled to no indemnity for FY 2005 and 2006, and to a reduced indemnity for FY 2007. This approach, unlike Respondents' use of US\$ 19.78 for the Base Price in post-2007 calculations, was faithful to Article 15.2(a). (C-V ¶ 19, partially quoted).

K.VII.2.b Arguments by Respondents

637. Respondents contend that, even if the Tribunal were to find for Claimant on the merits and to reject all of Respondents' defenses, Claimant has no claim for an indemnity for FY 2007 due to the formula in the AA which limits liability. (R-II ¶ 130, R-III ¶¶ 141, 175; R-IV ¶¶ 65, 79). Under Article 15.2(a) of the AA and Article 7.5 of the Accounting Procedures, "*any indemnity is capped at the difference between the **Reference (Threshold) Cash Flow** (i.e., what Claimant's cash flow would have been absent the Discriminatory Measure, but imposing a ceiling on revenues based on a price per barrel of US\$27 in 1996 dollars) and Claimant's **Adjusted Net Cash Flow**.*" (R-II ¶ 129, footnotes omitted). Respondents claim that it is undisputed that "*no indemnity could possibly be owed with respect to FY 2007 if the **Adjusted Net Cash Flow** exceeds the **Reference (Threshold) Cash Flow**.*" (R-III ¶ 175).
638. Respondents state that under Article 15.2(a) of the AA and Articles 7.4 and 7.5 of the Accounting Procedures, "*the determination of the indemnity due under the AA contemplated the calculation of four distinct cash flows: (i) **Net Cash Flow**, (ii) the **But-For Net Cash Flow** (**Net Cash Flow** absent the effects of the Discriminatory Measures), (iii) **Adjusted Net Cash Flow**, and (iv) **Reference (Threshold) Cash Flow**.*" (R-III ¶ 143).
639. Respondents explain how to calculate the **But-For Net Cash Flow**, **Adjusted Net Cash Flow**, and **Reference (Threshold) Cash Flow** in the following (R-II ¶ 146; R-III ¶¶ 148-150, partially quoted, underlining in original):

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148. [T]he **But-For Net Cash Flow** [$R - ROY - CEX - IT$] is a notional cash flow based upon actual results, except that, [...] (a) **ROY** is equal to the Royalty that would have been paid by or on behalf of a Party during such FY, absent the alleged Discriminatory Measure; (b) **CEX** is equal to the Party's pro rata share of actual Chargeable Expenditures for such FY, absent the alleged Discriminatory Measure; and (c) **IT** is equal to the Party's pro rata share of Income Taxes that would have been paid with respect to such FY, absent the alleged Discriminatory Measure. Contrary to Claimant's assertion, this means the amounts that the royalties and taxes would actually have been if there were no Discriminatory Measures, not the amount they would have been in a world in which the sales price of SCO equaled the Base (Threshold) Price and the price of extra-heavy crude oil was 94% of the SCO price.
149. **Adjusted Net Cash Flow** is a notional cash flow based upon actual results – *i.e.*, actual “liftings,” “Joint Revenues received,” “the actual Royalty paid,” “actual Chargeable Expenses,” and “the Party's pro rata share of Income Taxes paid” – except that liftings are multiplied by the Formula Price adjusted upward to its Brent-equivalent. **Adjusted Net Cash Flow**, like **Net Cash Flow**, account for the effects of the Discriminatory Measures.
150. **Reference (Threshold) Cash Flow** [$TR - TROY - CEX - TIT$] is an “estimated cash flow assuming a Price of Brent Crude Oil equivalent to the Base (Threshold) Price,” as calculated in accordance with Section 7.3 of the Accounting Procedures and eliminating the effects of the Discriminatory Measures. The revenues in the **Reference (Threshold) Cash Flow** formula are based upon an assumed Brent price applied to actual liftings plus Joint Revenues actually received, and (a) **TROY** is equal to the “Royalties that would have been paid by or on behalf of a Party during such FY, absent the alleged Discriminatory Measure”; (b) **CEX** is equal to “the Party's pro rata share of actual Chargeable Expenditures for such FY, absent the alleged Discriminatory Measures,” and (c) **TIT** is equal to “the Party's pro rata share of Income Taxes that would have been paid with respect to such FY, absent the alleged Discriminatory Measure.” [Unlike in the formula to calculate **But-For Cash Flow**, the **Reference (Threshold) Cash Flow** formula requires that the **Base (Threshold) Price** be used in place of the actual sales price under the **Chalmette Formula Price**. (R-II 146)].
640. Nothing in the **Reference (Threshold) Cash Flow** formula contemplates using a budget, an estimate, or a projection of any kind, for the future. (R-IV ¶ 58). Respondents highlight difficulties that occur when attempting to apply the decidedly backward looking indemnity provisions to forward looking events:
51. The term “**TR**” in the **Reference (Threshold) Cash Flow** formula is defined as total lifting during the Fiscal Year, multiplied by the Threshold Price, plus Joint Revenues received during the Fiscal Year. It is not possible now to know either what the Threshold Price would be

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or what the liftings or actual Joint Revenues would be for each of the next 27.5 years, as the formula contains no guidance whatsoever as to what assumptions should be made for inflation, liftings or Joint Revenues for the future. To overcome this basic point, Claimant assumes for 2007 and for every year thereafter that the Project will produce 120,000 barrels per day (“BPD”) of extra-heavy crude oil and will convert those volumes into 108,000 BPD of SCO. This unrealistic assumption is based upon the budget for 2007 that was prepared in November 2006 but the hearing established that the assumption was not even valid for 2007, a year in which production was far lower than the budget due to the large number of inactive wells at the field and repairs to the coker drums. Even a pro rata implementation of the production curtailments in 2007 would have reduced production by approximately 7,000 BPD. In future years, events similarly affecting production are likely. Claimant’s assumption that production shortfalls can be made up over time ignores the Government’s limit of 120,000 BPD on EHO production (on a monthly average basis), a limit that is not claimed as a Discriminatory Measure. (R-IV ¶ 51).

52. It is also not possible now to determine what the royalty or income taxes would be in a future Fiscal Year, as royalties are dependent on both the volume and value of extra-heavy crude oil produced and taxes are dependent upon revenues and deductible costs, all of which are unknown. Also unknown, yet inappropriately assumed by Claimant, are whether non-discriminatory measures regarding either royalties or taxes might have been taken in the future. There is simply no basis for assuming a fixed royalty or tax rate for the next 27.5 years, as Claimant’s experts were instructed to do so. (R-IV ¶ 52).

641. Respondents argue that “*an application of the Reference (Threshold) Cash Flow formula as written, rather than as Claimant would have it rewritten, yields a Reference (Threshold) Cash Flow of US\$103.2 million, whereas the calculation of the Adjusted Net Cash Flow as written and as required by the entire structure of the AA and its indemnity provisions reviewed above, yields US\$196.2 million.*” (R-III ¶ 175). Because the **Adjusted Net Cash Flow** (US\$ 196.2 million) is greater than the **Reference (Threshold) Cash Flow** (US\$ 103.2 million), no indemnity is owed to Claimant for FY 2007.

642. Respondents calculated the **Reference (Threshold) Cash Flow** using the same equation as presented by Claimant above (TR - TROY - CEX – TIT = Reference (Threshold) Cash Flow):

- (i) taking the total liftings during the year (14.1 million barrels), multiplying by the **Base (Threshold) Price** (US\$34.47 per barrel for

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FY 2007) and adding Joint Revenues received during the FY (US\$17.6 million), to determine 'TR' (US\$504.9 million);

- (ii) subtracting **TROY**, the royalty that would have been paid during FY 2007 absent the alleged Discriminatory Measure (US\$133.4 million);
- (iii) subtracting **CEX**, Claimant's pro rata share of actual Chargeable Expenditures for FY 2007 absent the alleged Discriminatory Measure (US\$74.6 million); and
- (iv) subtracting **TIT**, the income taxes that Claimant would have paid for FY 2007 absent the alleged Discriminatory Measure (US\$193.6 million). (R-II ¶ 132, partially quoted, footnotes omitted).

643. Respondents calculate the **Adjusted Net Cash Flow** in the same manner as the **Net Cash Flow**, except that liftings are multiplied by the Formula Price adjusted upward to its Brent-equivalent, and present the formula as well as its results:

138. A calculation of Claimant's **Adjusted Net Cash Flow** for FY 2007, applying the formula for **Net Cash Flow** [$R - ROY - CEX - IT$] [,] but adjusting the Formula Price for the quality and transportation differentials with Brent crude oil, yields the result of US\$196.2 million for FY 2007. This result is calculated as follows:

- (i) taking the total liftings by Claimant during the FY (only 5.54 million barrels of oil because Claimant ceased participating in the project on 26 June 2007), multiplying by the Formula Price for the upgraded crude oil as adjusted for the aforementioned quality and transportation differentials (US\$60.95 per barrel) and adding Joint Revenues received during FY 2007 (US\$8.2 million), to determine 'R' (US\$346.1 million);
- (ii) subtracting **ROY**, the royalty actually paid by Claimant during FY 2007 (US\$92.5 million);
- (iii) subtracting **CEX**, Claimant's actual Chargeable Expenditures paid during FY 2007 (US\$32.7 million); and
- (iv) subtracting further **IT**, the income taxes actually paid by Claimant for FY 2007 (US\$24.6 million). (R-II ¶ 138).

644. Respondents explain that, under **Article 15.2(a) Limitation on Liability and Adjustment for Quality**, the maximum protected cash flow was based on an SCO price of US\$ 19.78. Respondents arrive at the US\$ 19.78 by using the agreed Brent/SCO differential where SCO is approximately 73% of the price of Brent. Thus, where Brent is US\$ 27, SCO will be 73% of that amount: US\$ 19.78. All additional profits could be taken by the

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Government, as those would be deemed “*extraordinary profits.*” (R-IV ¶ 62; R-V ¶ 31).

645. Respondents present counter-arguments to Claimant’s interpretations of the terms as follows (R-II ¶¶ 140 – 145; R-III ¶¶ 164, 168; R-IV ¶¶ 63 – 64, partially quoted):

- Claimant presents an unfounded interpretation of the term “**Adjusted Net Cash Flow**” and attempts to read out of the **Reference (Threshold) Cash Flow** formula all words requiring the use of “actual” figures or amounts that “would have been paid absent the alleged Discriminatory Measure” in favor of invented concepts such as amounts that might have been paid under a hypothetical market scenario.
 - Claimant’s misapplication of the terms “**Adjusted Net Cash Flow**” and the concept of “differentials” led Claimant to assert that the formula at Section 7.3 calls for subtracting “notional expense amounts from a hypothetical revenue amount.” The term “differential” is widely used in the international petroleum industry to refer to a difference in price between one crude oil and another. The AA does not refer to changes in differentials from one period to another as Claimant alleges. Rather, it refers to the adjustment of the price “for quality and transportation differences” with Brent crude oil. This adjustment was necessary in order to account for the substantial difference in quality between Brent crude oil - a light crude oil with a gravity of 38° API - and the much heavier upgraded Cerro Negro crude oil, with a gravity of 16° API. If this were not done, the entire purpose of the limitation of liability, which was triggered when Brent crude oil reached a price of US\$27 per barrel in 1996 dollars, would be defeated. Unless the **Net Cash Flow** were adjusted upward to take account of the differential between upgraded Cerro Negro crude oil and Brent crude oil, the ceiling on liability would be artificially increased.
 - Claimant’s interpretation of **Adjusted Net Cash Flow** completely ignores the text of this provision, which clearly calls for an adjustment of the actual **Net Cash Flow** to a Brent-equivalent cash flow to be properly compared with the **Reference (Threshold) Cash Flow**. According to the plain language of the provision, if the Foreign Party receives income commensurate, when adjusted for the quality and transportation differential with Brent crude oil, with the **Reference (Threshold) Cash Flow**, no indemnity would be owed.
63. [...]. The terms of Section 15.2(a) clearly required an adjustment of the Net Cash Flow (calculated on the basis of an SCO price equal to the Formula Price under the Chalmette Offtake Agreement) to account for the quality differential between SCO and Brent, so that the Net Cash Flow, as so adjusted (*i.e.*, “the Adjusted Net Cash Flow”), could be compared on an apples-to-apples basis with the Threshold Cash Flow calculated on the basis of the Price of Brent Crude Oil equal to the Threshold Price. This means that in an ongoing contractual

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relationship, which Claimant's experts testified is what the indemnity provisions contemplated, the maximum protected cash flow was a cash flow based on an SCO price of US\$19.78.

64. By arguing that the indemnity calls for comparison of a cash flow of zero with a Threshold Cash Flow calculated on the basis of an SCO price equal to the Threshold Price, Claimant is in effect seeking to expand the maximum protected cash flow from one based on a US\$19.78 SCO price to one based on a US\$27 SCO price. Under Claimant's theory, it would actually be better off out of the Agreement than in. Claimant's argument cannot be made without completely ignoring both Section 15.2(a) and the definition of Threshold Cash Flow in the body of the AA, which is precisely what Claimant has done throughout this case. Its experts barely mentioned either provision in their affidavits and at the hearing they stated that Section 15.2(a), the basic limitation provision in the Agreement, was irrelevant to their calculations. That position cannot be reconciled with the concept of limitation embodied in Section 15.2(a) and the fact that the maximum protected cash flow under the Agreement was based on a US\$19.78 SCO price (in 1996 dollars). (R-IV ¶ 64; R-V ¶ 31).
646. For FY 2007, Claimant ignored the essence of the limitation in Article 15.2(a), arguing that the "*adjustment*" referred to in that provision and in Article 7.2 of the Accounting Procedures applied only when there was a change or difference in the Brent/SCO differential. Article 15.2(a), however, requires an adjustment for the Brent/SCO quality differential, not for the difference in the differential. The calculation using the required adjustment results in there being no indemnity owed under the AA for FY 2007, even if the contract had not been extinguished. (R-IV ¶ 65, partially quoted; R-V ¶¶ 31, 32).
647. Finally, Respondents contend that Claimant's "*reasonable business approach*" involves a redrafting of the Accounting Procedures.
160. The crux of Claimant's "reasonable business" argument is that at very high prices the operation of the formula would eventually eliminate the indemnity because royalties and taxes would be calculated on a high base while revenues would be capped at the **Base (Threshold) Price**. That is correct as a matter of operation of the formula, but the fact that the result in such price scenarios is unfavorable to Claimant, reducing indemnity eventually to zero as the prices continue to rise above the **Base (Threshold) Price**, does not provide Claimant with a license to rewrite the formulas in its favor. (R-III ¶ 160).

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648. Respondents assert that Claimant has sought to inflate the **Reference (Threshold) Cash Flow** by misinterpreting the **TROY** and the **CEX** calculations. *First*, Respondents note that Claimant's interpretation of the **TROY** would require a complete rewriting of those provisions such that it would read as follows: "[t]he Royalty that would have been paid by a Party during such FY if the Formula Price had been equal to the Base (Threshold) Price, calculated based upon a value for the extra-heavy crude oil determined by applying the historical ratio between the value of extra-heavy crude oil and the Formula Price, absent the alleged Discriminatory Measure." (R-II ¶¶ 148 – 149, underlining to indicate text Respondents argue would be required under Claimant's interpretation).
649. Second, Claimant's interpretation of the **TIT** would require a rewriting of those provisions to read as follows: "[t]he Party's estimated pro rata share of Income Taxes which would have been paid with respect to such FY, calculated based upon hypothetical revenues derived from the calculation of TR and using hypothetical deductions for royalties calculated as provided in TROY and hypothetical deductions for operating expenditures based upon the budget for the FY in question, absent the alleged Discriminatory Measure." (R-II ¶¶ 153 – 155, underlining to indicate text which Respondents argue would be required under Claimant's interpretation).
650. *Third*, Venezuelan law requires the enforcement of contractual obligations exactly as written – not as Claimant would re-write them. (R-II ¶¶ 150, 151). Respondents, therefore, maintain that the **CEX** formula, as written in Article 7.3 of the Accounting Procedures requires subtraction of actual, rather than budgeted, expenses. Indeed, none of Claimant's witnesses were unable to answer the fact that nothing in the **Threshold Cash Flow** formula contemplates using a budget, rather than the actual expenses. (R-IV ¶ 58).
651. Respondents state that actual and budget expenses rarely coincide in the petroleum industry. Actual expenses in the oil industry have dramatically increased in recent years, as has demand for oil industry materials and

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services. These forces have quickly rendered the most meticulously prepared budgets obsolete. (R-II ¶ 152). Even for FY 2006, cited by Claimant as a year where the budgeted and actual expenses coincided, the Project's actual operating costs were US\$ 163.3 million, 11.5% higher than the US\$ 146.4 million that was budgeted for that year. (R-II ¶ 152).

652. Fourth, Respondents argue that Claimant *"has no legal basis for ignoring the actual facts concerning the costs of operations in its cash flow projections and no basis for imposing its projection of ExxonMobil's operating efficiency on the calculations of future cash flows"* because the provisions of Decree-Law 5200 relating to control over operations do not constitute a Discriminatory Measure. (R-III ¶ 136).

653. Claimant, however, has not factored in any costs that could result from possible non-discriminatory Government regulations. (R-IV ¶ 57). In addition, Respondents present a list of issues with the 2006 budget and Claimant's cost projections:

- (i) the total disregard of Venezuelan inflation (Claimant's cost expert, Mr. Cline, said he did not even know what Venezuelan inflation was) that, unlike in earlier years, was not (and cannot be assumed in the future to be) offset by currency devaluations, coupled with Claimant's view that inflation could be controlled by accessing the "parallel" currency market or contracting with local vendors in dollars, both of which are illegal;
- (ii) the gross underestimation of capital expenditures (Claimant's Fixed Reference Cash Flow, based upon the 2007 budget prepared in November 2006, uses the absurd amount of US\$6 million per year for the life of the Project, thereby ignoring turnaround costs and the enormous capital expenditures necessary to drill wells to offset what Mr. Cline said was the decline in well productivity,
- (iii) the failure to take account of the dramatic, industry-wide increase in the cost of oil services in 2008, when the price of oil hit an all-time high;
- (iv) the failure to appreciate the actual cost of turnarounds in Venezuela, including the turnaround costs for Venezuelan projects like Hamaca (US\$230 million in 2009), where Chevron remains a partner; and

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- (v) the failure to appreciate the true cost of the hypothetical “put” that Prof. Myers suggested might be purchased to protect against the possibility of the SCO price dropping below the Threshold Price in any future year. (R-IV ¶ 56).

654. Respondents present four calculations, purported to demonstrate the operation of the indemnity provisions and to illustrate “*the exaggerated nature of the claims asserted, even if Claimant’s view of the case on the legal issues concerning the migration were to be adopted in toto.*” Nevertheless, Respondents present four alternate calculations to illustrate the operation of the indemnity provisions under various assumptions. (R-III ¶¶ 178 – 182; R-IV ¶ 78, numbers rounded, citations omitted):

Alternative 1: using hypothetical royalties and taxes that might have been paid if the sales of SCO were equal to the **Base (Threshold) Price** – which increases the **Reference (Threshold) Cash Flow** in favor of Claimant - and assuming that the royalty measures do not constitute Discriminatory Measures, the 2007 Indemnity is equal to US\$12.7 million.

Alternative 2: using the identical data as in Alternative 1, except that the income tax increase to 50% does not give rise to an indemnity claim, no indemnity is owed for FY 2007.

Alternative 3: using the identical data as in Alternative 2, except that the actual costs for FY 2007 are used, rather than the projected costs based on the 2006 budget, no indemnity is owed for FY 2007.

Alternative 4: assuming that all royalty and tax measures are “Discriminatory Measures”, but that Reference (Threshold) Cash Flow is calculated using actual data for costs for FY 2007 and that the volumes sold were those pursuant to the curtailment measures, the indemnity owed is equal to US\$3.5 million.

K.VII.2.c. The Tribunal

655. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties’ Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-III	¶¶ 260 – 309
C-IV	¶¶ 116 – 161 (Apps. A, B, C)
R-II	¶¶ 127 – 156, 166 – 167
R-III	¶¶ 136 – 137, 141 – 182

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Charts:

Submission	Pinpoint
C-IV	¶ 134 Figure 1: Relationship of FY 2010 Reference (Threshold) Cash Flows to Pro Forma Chalmette Formula Prices Using the Respondents' Interpretation of Section 7.3
	¶ 135 Figure 2: Relationship of Fiscal year 2010 Reference (Threshold) Cash Flows to Pro Forma Chalmette Formula Prices Using Claimant's Interpretation of Section 7.3
	App. A: Comparison of Key Terms of Cerro Negro Project and PetroMonagas, S.A.
	App. B (explaining Terms)
	App. C (Annex G 7.1 – 7.4)
R-11	¶ 140 Calculation of Damages FY 2007
R-III	¶ 151 Indemnity Calculation Definitions
	¶ 179 Calculation Alternative 1 for FY 2007
	¶ 180 Calculation Alternative 2 for FY 2007
	¶ 181 Calculation Alternative 3 for FY 2007
	¶ 182 Calculation Alternative 4 for FY 2007

Exhibits:

Exhibit	Document Name
C-2	Association Agreement Clause 1, Article 15.2(a)
C-4	Annex G (Accounting Procedures) to the Association Agreement Articles 7.1 – 7.5
C-43	Testimony of Tim Cutt (26 September 2008) ¶ 44
C-44	Declaration of Professor Eugenio Hernández-Bretón (27 September 2008) at ¶¶ 29, 31, 97
C-45	Declaration of Professor Allan R. Brewer-Carías (26 September 2008) at ¶18
C-46	Expert Report of William B. Cline of Gaffney, Cline & Associates, Inc., "Technical Assessment of the Cerro Negro Contract Area" (26 September 2008) pp. 6, 28, 34
C-47	Expert Report of R. Dean Graves of Alvarez & Marsal, Dispute Analysis & Forensic Services, LLC, on 2007 ICC Damages Payable (26 September 2008) pp. 6 – 17
Ex. 2	2007 But-For Economic Damages Prior to Limitation (Mobil-CN – 120kbd)
Ex. 4b	Price of Brent Crude Oil (1996 Dollars) vs. Base Price [Graph]
Ex. 4d	Base Price (Inflation Adjustment Calculation)
Ex. 5	2004-2006 Damages Calculation
Ex. 8a	Comparison of Formula Price to Brent Crude Oil – 9/9/2001 through 9/8/2002
Ex. 8b	Comparison of Formula Price to Brent Crude Oil – 2007
Ex. 9	Adjusted Formula Price Based on Brent Ratio
Ex. 10	2007 Damages Payable Calculation (Mobil-CN – 120kbd)
App. 2	Mobil-CN Audited Consolidated Financial Statements for the

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- Years Ended 2003 through 2006, together with the Reports of Independent Auditors fn. 2j, 7
- App. 3 Special Report of PriceWaterhouseCoopers About the Application of the Procedures Agreed September 5, 2001
- C-48 Expert Report of Professor Stewart C. Myers of the Brattle Group on the Value of Indemnification Cash Flows (28 September 2008) pp. 3, 8, 15, fn. 21
- C-50 Expert Report of Dr. Scott T. Jones of FTI Consulting, Inc. And Compass Lexecon ("*Lexecon*"), a Wholly-Owned Subsidiary of FT Consulting, Inc. (26 September 2008) at 11, 12
- Figure 4 Calculation of Fixed Reference Cash Flow
- C-69 Offering Memorandum, Cerro Negro Finance Ltd. (11 June 1998) at App. C, C-40
- C-80 Agreement between the Venezuelan Ministry of Energy and Mines and PDVSA S.A. to calculate the Royalty under Article 41 of the Hydrocarbons Law ("*Royalty Reduction Agreement*") (29 May 1998) Section 5
- C-87 Association Agreement Clause II defining "*Price of Brent Crude Oil*", "*Base Price*", "*Production*", "*Commercial Production*", "*US Inflation Index*", "*Development Production*", Articles 14, 15.1(b), 15.2(a) and Annex G (Accounting Procedures) Articles 1.2, 7.1 – 7.5,
- C-134 Venezuelan Civil Code Art. 1273 – 1275
- C-141 Association Oil Supply Agreement (also known as Chalmette Offtake Agreement), Mobil Cerro Negro, Lagoven Cerro Negro, S.A. and Chalmette Refining (1 November 1997) Annex B
- C-154 Letter dated 23 June 2005 from Ministry of Energy and Mines to Cerro Negro, Communication # 935
- C-213 Testimony of Brian Lawless (14 May 2009) at ¶¶ 7 – 9, 14, 16 – 18, 26
- C-216 Reply Expert Report of Dr. Scott T. Jones of FTI Consulting, Inc. And Compass Lexecon (15 May 2009) at ¶¶ 4 – 6, 18, 20, 37, 39, fn. 16
- Figure 1 Wood Mackenzie, Upstream RADAR Report for ExxonMobil, July 2007
- Figure 2 ExxonMobil Corporation 2008 Financial & Operating Review
- Figure 6 Robert Pirog, "CRS Report for Congress: The Role of National Oil Companies in the International Oil Market," Congressional Research Service, August 21, 2007
- Figure 7 Stacy Eller, Petery Hartley, & Kenneth Medlock, "Empirical Evidence on the Operational Efficiency of National Oil Companies," Rice University: The Changing Role of National Oil Companies in International Oil Markets, March 2007
- C-217 Reply Expert Report of R. Dean Graves of Alvarez & Marsal (12 May 2009) pp. 4 – 7, 12 – 31
- App. 1 Operadora Cerro Negro, S.A. Sample Monthly Reports (December 2005 and December 2006)
- App. 3 PDVSA 2004 Form 20F Filing with the U.S. Securities and Exchange Commission [excerpt]
- C-218 Reply Expert Report of William B. Cline of Gaffney, Cline & Associates, Inc. (12 May 2009) pp. 6 – 8, 12 – 14

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- C-220 Reply Expert Report of Professor Stewart C. Myers of the Brattle Group (13 May 2009)
- C-226 *Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, Award of 29 June 1989, 21 Iran-U.S. C.T.R. 79, 143 (1989)
- C-232 JOSÉ MÉLICH-ORSINI, *DOCTRINA GENERAL DEL CONTRATO* (4th ed. 2006) § 304, at 409
- C-260 Larousse Grammar Spanish Language [*Larousse Gramática Lengua Español*] and Auroch Dictionary [*Diccionario Auroch*]
- C-310 Comparison of Claimant and Pulliam/Finizza Basis for Calculation of Reference (Threshold) Cash Flow
- C-328 Updated Expert Report of Dr. Scott T. Jones of FTI Consulting, Inc. And Compass Lexecon (30 July 2010)
- C-329 Updated Expert Report of Professor Stewart C. Myers of the Brattle Group on the Value of Indemnification Cash Flows (30 July 2010)
- R-4 First Affidavit of Bernard Mommer (11 February 2008) ¶ 10
- R-15 First Affidavit of Hobert Plunkett (21 January 2008)
- R-32 A Argument of Ms. Otton-Goulder, *Mobil Cerro Negro, Ltd. V. Petróleos de Venezuela, S.A.*, High Court of Justice, Queen's Bench Division, Commercial Court (London), 2008 Folio 61
- R-35 Tr. Of 2 December 2008 Hearing pp. 30 – 31, 58-59, 62-63, 141
- R-39 First Affidavit of R. Dean Graves (25 February 2008) *Mobil Cerro Negro Limited v. Petróleos de Venezuela, S.A.*, Claim No. 2008 Folio 61, High Court of Justice, Queen's Bench Division, Commercial Court (London)
- R-42 *The Next Shock?*, THE ECONOMIST, (4 March 1999)
- R-43 Congressional Authorization
- R-93 Expert Report of Barry Pulliam and Anthony Finizza, Ph.D., Econ One Research, Inc. (16 February 2009) at ¶¶ 14 – 17, 20 – 34, 38, 39, 41 – 61, 88, 102, 121 – 122, fn. 9, 23, 35, 43, 71
- App. 8 Wood Mackenzie, *ExxonMobil, Upstream RADAR Report*, July 2007
- App. 9 Summary Table, Potential Damages for Fiscal Year 2007 Under Section VII of Accounting Procedures
- R-94 Expert Report on Fiscal Year 2007 Indemnity Cash Flow Calculation, prepared by Vladimir Brailovsky, Economía Aplicada, S.C., (16 February 2009) at ¶¶ 12 – 19, 21 – 23, 28 – 46, fn. 9, 14, 16, 18, 20
- App. 9 Wood Mackenzie, *ExxonMobil, Upstream RADAR Report*, July 2007
- R-95 Direct Testimony of José Ángel Pereira Ruimwyk (12 February 2009) at ¶¶ 9 – 16, 25, 26, fn. 1, 9, 13 – 15, 24, 25, 27
- App. 5 Petrolera Cerro Negro Board of Directors Meeting, November 2, 2006: Work Plan and Budget 2007 p. 32
- R-96 Letters from Ministry of Energy and Petroleum to Operadora Cerro Negro (8 January 2007, 1 February 2007 and 5 March 2007)
- R-97 Howard R. Williams and Charles J. Meyers, *MANUAL OF OIL AND GAS TERMS* (LexisNexis 13th ed. 2006)
- R-98 Expert Report on the Discount Rate to be Applied to Projected Cash Flows Prepared by Vladimir Brailovsky and Louis T. Wells (16 February 2009) at ¶¶ 49, 76 – 77 fn. 33 and Table 7
- R-104 *Exxon Mobil to spend \$125 billion on production in next 5 years*,

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	DENTON RECORD-CHRONICLE (6 March 2008)
R-105	Jad Mouawad, <i>Exxon Plans to Lift Output a Million Barrels a Day</i> , NEW YORK TIMES (8 March 2007)
R-112	Association Agreement Clause 1 <i>defining "Threshold Cash Flow"</i> , Article 15.2(a)
R-113	Supplemental Expert Report on Fiscal Year 2007 Indemnity Cash Flow Calculation, Prepared by Vladimir Brailovsky (14 August 2009) at ¶¶ 9 – 19, 26 – 28, Table 2
App. 11	Calculations of Alternative Scenarios
R-114	Supplemental Brailovsky/Wells Report at ¶¶ 48 – 51, 53, 62 – 76, 79
R-115	Supplemental Expert Report of Econ One Research, Inc. (14 August 2009) at ¶¶ 11, 13 – 31
R-116	Supplemental Direct Testimony of José Ángel Pereira Ruimwyk (11 August 2009) ¶¶ 2 – 16, 22 – 32, and n. 8
App. 27	Organic Labor Law [<i>Ley Orgánica del Trabajo</i>] Official Gazette No. 5.152 (Extraordinary), published 19 June 1997, Art. 195 and 207
App. 29	Law Against Illicit Exchanges [<i>Ley Contra los Ilícitos Cambiarios</i>] Official Gazette No. 38.879, published 27 February 2008, Art. 19
R-117	Bernard Mommer, <i>Venezuela, Politics and Petroleum</i> (Cuadernos del Cendes, Year 16, No. 42 September-December 1999)
R-124	Cerro Negro, Confidential Preliminary Information Memorandum, Vol. I, March 1998, p. I-8
R-127	Annex G (Accounting Procedures) to the Association Agreement Articles 7.1 – 7.5

At and Following the 2010 Hearings:

Submission	Pinpoint
C-V	¶ 19
C-VI	¶¶ 50 - 51
R-IV	¶¶ 50 – 65, 78 – 79
R-V	¶¶ 31 - 32
C. Closing	pp. 21 – 32
C. Closing Slides	23, 31 – 34, 36, 41 – 42, 48
R. Closing Slides	3 – 4, 65 – 76, 80, 83, 86

Speaker	Citation
Brailovsky	1836-1837
C. Opening	63
Cline	1240, 1242-1250, 1266-1268, 1275-1278
Cranmer	446
Cutt	691-692
Expert Conf. 1	980-1985
Finizza	1772-1775, 1795-1797
Graves	1528, 1564, 1568-1572, 1581-1582, 1597-1603, 1606-1608, 1630-1632, 1653-1669, 1671-1672
Hoenmans,	405, 414-415
Jones	1335, 1360-1363, 1375-1377, 1408, 1410-1412,

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	1418, 1419, 1427, 1441-1442, 1449-1450, 1451-1453, 1457-1458
Lawless	1188-1189
Leitzinger	1823-1824
Myers	1695-1698, 1707-1708, 1735, 1737, 1746-1747
Pereira	1033-1034, 1037-1040, 1057, 1106-1108
Plunkett	796, 836-850
R. Opening	86, 127-131
R. Closing	2158-2165, 2174-2175, 2194
Ward	223-224

656. After considering all of the arguments and the evidence submitted, the Tribunal concludes that, by application of the Second Limitation on liability found in Article 7.5 of the Accounting Procedures, an indemnity in the amount of US\$ 12.681 million is owed to Claimant for FY 2007. The Tribunal will now identify several points which are directly relevant to this conclusion.

657. *First*, the assessment of the indemnity naturally starts with the text of the AA. Here, although the translations are not identical, the Tribunal is satisfied that there are no material differences between the Parties' translations of Article 15.1(b) and Article 15.2(a) of the AA, found at C-87 and R-112, and provided here.

Articles 15.1(b) – Consequences of Governmental Actions

Spanish (Original)	Claimant's Translation	Respondents' Translation
(b) [...] El ámbito de los procedimientos de arbitraje incluirá: (i) una determinación de si una o más Medidas Discriminatorias se han producido y, si ese es el caso, si dichas medidas han tenido un Impacto Substancialmente Adversos sobre la Parte Extranjera; y (ii) en caso de una respuesta afirmativa a las dos interrogantes planteadas en el punto (i) de este literal, una indemnización por daños para compensar a la	(b) [...] The scope of the arbitration proceedings shall include: (i) a determination of whether one or more Discriminatory Measures have occurred and, if so, whether such measures have had a Materially Adverse Impact on the Foreign Party; and (ii) in the event of an affirmative answer to the two questions specified in clause (i) of this paragraph, an award for damages to compensate the Foreign Party for the economic consequences of the	(b) [...] The scope of the arbitration proceedings shall include: (i) a determination of whether one or more Discriminatory Measures have occurred and, if that is the case, whether such measures have had a Material Adverse Impact on the Foreign Party; and (ii) in the event of an affirmative response to the two questions specified in clause (i) of this paragraph, a payment for damages to compensate the Foreign Party for the economic

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<p>Parte Extranjera por las consecuencias económicas de la Medida Discriminatoria sufrida por ella hasta la fecha y recomendaciones sobre enmiendas al Convenio que restablecerían el beneficio económico que la Parte Extranjera hubiera recibido si no se hubiera producido la Medida Discriminatoria.</p>	<p>Discriminatory Measure suffered by it to date and recommendations on amendments to the Agreement that would restore the economic benefit that the Foreign Party would have received had the Discriminatory Measure not occurred.</p>	<p>consequences of the Discriminatory Measure suffered by it to date and recommendations on amendments to the Agreement that would restore the economic benefit that the Foreign Party would have received if the Discriminatory Measure had not occurred.</p>
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Article 15.2(a) – Limitation on Lagoven CN’s Obligations

Spanish (Original)	Claimant’s Translation	Respondents’ Translation
<p>Limitación de la Obligación de Lagoven CN.</p> <p>(a) No obstante lo anterior, después del primer período de seis (6) meses consecutivos durante el cual el Precio del Crudo Brent sobrepase el Precio Base, Lagoven CN no tendrá la obligación de compensar a ninguna Parte Extranjera por Medidas Discriminatorias en relación a cualquier Año Fiscal en que el promedio del Precio del Crudo Brent sobrepase el Precio Base, y dicha Parte Extranjera reciba un Flujo de Caja Neto, después de tomar en cuenta el efecto de la Medida Discriminatoria, cónsono con un precio de referencia por la Producción producida por las Partes que por lo menos guarde una relación razonable, ajustada en cuanto a las diferencias de calidad y transporte, al Flujo de Caja Referencial para ese Año Fiscal.</p>	<p>Limitation on Lagoven CN’s Obligation.</p> <p>(a) Notwithstanding the foregoing, after the first period of six (6) consecutive months during which the Price of Brent Crude exceeds the Base Price, Lagoven CN shall not have the obligation to compensate any Foreign Party for Discriminatory Measures with respect to any Fiscal Year in which the average Price of Brent Crude exceeds the Base Price, and such Foreign Party receives a Net Cash Flow, after taking into account the effect of the Discriminatory Measure, commensurate with a reference price for the Production produced by the Parties which bears at least a reasonable relationship, adjusted for quality and transportation differences, to the Reference Cash Flow for such Fiscal Year.</p>	<p>Limitation on Lagoven CN’s Obligation.</p> <p>(a) Notwithstanding the foregoing, after the first period of six (6) consecutive months during which the Price of Brent Crude Oil is in excess of the Threshold Price, Lagoven CN will not be required to compensate any Foreign Party for Discriminatory Measures with respect to any Fiscal Year in which the average Price of Brent Crude Oil is in excess of the Threshold Price, and such Foreign Party receives a Net Cash Flow, after taking into account the effect of the Discriminatory Measure, commensurate with a reference price for the Production produced by the Parties that bears at least a reasonable relationship, adjusted for quality and transportation differences, to the Threshold Cash Flow for such Fiscal Year.</p>

658. Based on the foregoing texts, it is obvious that any decision taken in relation to damages depends on the Tribunal’s above conclusions on what measures constitute Discriminatory Measures. Above, the Tribunal has determined

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that the expropriation caused by Decree-Law 5200, the Income Tax Increase and the production and export curtailments constitute Discriminatory Measures that could lead to a Materially Adverse Impact under Clause I of the AA, whereas the Royalty Measures did not constitute such Discriminatory Measures. The Tribunal need not consider whether each Discriminatory Measure separately resulted in a Materially Adverse Impact. Rather, the aggregate impact of the Discriminatory Measures is relevant.

659. *Second*, the Tribunal finds that, in respect of its application to FY 2007, the Parties have no relevant disagreement as to the use of Article 7.1 of the Annex G Accounting Procedures to determine **Net Cash Flow** or Article 7.2 of the Annex G Accounting Procedures to determine **Adjusted Net Cash Flow**. These sections provide as follows:

Article 7.1, Net Cash Flow

Spanish (Original)	Claimant's Translation	Respondents' Translation
Fórmula de Flujo de Caixa Neto.	Net Cash Flow Formula.	Net Cash Flow Formula.
El Flujo de Caja Neto de una Parte para un Ejercicio Económico dado (según se mida con base en las Cuentas en Dólares) será determinado de la siguiente forma:	The Net Cash Flow of a Party for a given Fiscal Year (as measured based on the Dollar Accounts) shall be determined as follows:	A Party's Net Cash Flow for a given Fiscal Year (as measured based on the Dollar Accounts) shall be determined as follows:
R - ROY - CEX - IT	R - ROY - CEX - IT	R - ROY - CEX - IT
Donde:	Where:	Where:
R = total de levantamientos durante tal Ejercicio Económico multiplicado por la Fórmula de Precio aplicable a tal Producción, más los Ingresos Conjuntos recibidos durante tal Ejercicio Económico	R = total liftings during such Fiscal Year multiplied by the Price Formula applicable to such Production, plus Joint Revenues received during such Fiscal Year	R = total lifting during such Fiscal Year, multiplied by the Formula Price applicable to such Production, plus Joint Revenues received during such Fiscal Year
ROY = la Regalía real pagada por una Parte o en nombre y por cuenta de ésta durante tal Ejercicio Económico	ROY = the actual Royalty paid by a Party or on behalf of and for the account of such Party during such Fiscal Year	ROY = the actual Royalty paid by a Party or on its behalf and for its account during such Fiscal Year
CEX = la porción	CEX = the Party's pro rata	CEX = the Party's pro rata

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<p>proporcional de Gastos Imputables reales de la Parte para tal Ejercicio Económico.</p>	<p>share of actual Chargeable Expenditures for such Fiscal Year</p>	<p>share of actual Chargeable Expenditures for such Fiscal Year</p>
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<p>IT = la porción proporcional de la Parte de Impuestos sobre la Renta pagados con respecto a tal Ejercicio Económico</p>	<p>IT = the Party's pro rata share of Income Taxes paid with respect to such Fiscal Year</p>	<p>IT = the Party's pro rata share of Income Taxes paid with respect to such Fiscal Year.</p>
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Article 7.2, Adjusted Net Cash Flow

Spanish (Original)	Claimant's Translation	Respondents' Translation
Flujo de Caixa Neto Ajustado.	Adjusted Net Cash Flow.	Adjusted Net Cash Flow.
El Flujo de Caja Neto Ajustado de una Parte para un Ejercicio Económico dado (según se mida con base en las Cuentas en Dólares) será igual al Flujo de Caja Neto para una Parte para tal Ejercicio Económico, calculado sobre la base de la Fórmula de Precio ajustada aplicable, la cual será igual a la Fórmula de Precio para tal Producción inicial, con los ajustes por diferenciales por transporte y calidad según se compare con el Crudo Brent.	The Adjusted Net Cash Flow of a Party for a given Fiscal Year (as measured based on the Dollar Accounts) shall be equal to the Net Cash Flow for a Party for such Fiscal Year, calculated on the basis of the applicable adjusted Price Formula, which shall be equal to the Price Formula for such initial Production, adjusted for transportation and quality differentials as compared to Brent Crude.	The Adjusted Net Cash Flow of a Party for a given Fiscal Year (as measured based on the Dollar Accounts) shall be equal to the Party's Net Cash Flow for such Fiscal Year, calculated on the basis of the applicable adjusted Formula Price, which shall be equal to the Formula Price for such initial Production, adjusted for transportation and quality differentials as compared to Brent Crude Oil.

660. The Tribunal is satisfied that the Parties' translations of these sections have no material differences. In particular, the Tribunal finds that the concepts of **Net Cash Flow** and **Adjusted Net Cash Flow** are identical, except for the price to be used. In the case of the **Net Cash Flow**, the "*Price Formula*" or "*Formula Price*" is the sales price specified in the **Chalmette Supply Contact**. (C-III ¶ 279-280). This is uncontroversial and the Tribunal can, thus, proceed to the next step of determining the indemnity.

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661. On this basis, the Tribunal proceeds to determine the indemnity for 2007. The first step for determining the indemnity is found in Article 7.4 of the Annex G Accounting Procedures:

Article 7.4, Damages Payable

Spanish (Original)	Claimant's Translation	Respondents' Translation
Daños Pagaderos.	Damages Payable.	Damages Payable.
Los daños pagaderos por Lagoven CN a una Parte, de acuerdo con la Sección XV del Convenio, serán equivalentes a lo que exceda a: (i) el monto en que, en ausencia del efecto de la Acción Discriminatoria en cuestión, el Flujo de Caja Neto de tal Parte para un Ejercicio Económico dado hubiese excedido (ii) el Flujo de Caja Neto de tal Parte para tal Ejercicio Económico; en el entendido de que tales daños sólo serán pagaderos si tal exceso es mayor del cinco por ciento (5%) del Flujo de Caja Neto de tal Parte para tal Ejercicio Económico (caso en el cual tales daños serán pagaderos en su totalidad) y tales daños estarán sujetos al límite establecido en la Sección 7.5.	The damages payable by Lagoven CN to a Party, pursuant to Section XV of the Agreement, shall be equal to the excess of: (i) the amount by which, absent the effect of the Discriminatory Action in question, such Party's Net Cash Flow for a given Fiscal Year would have exceeded (ii) such Party's Net Cash Flow for such Fiscal Year; in the understanding that such damages shall be payable only if such excess is greater than five percent (5%) of such Party's Net Cash Flow for such Fiscal Year (in which case such damages will be payable in full) and such damages shall be subject to the limit set forth in Section 7.5.	The damages payable by Lagoven CN to a Party pursuant to Section XV of the Agreement, shall be equal to the excess of: (i) the amount by which, absent the effect of the Discriminatory Measure in question, such Party's Net Cash Flow for a given Fiscal Year would have exceeded (ii) such Party's Net Cash Flow for such Fiscal Year; it being understood that such damages shall be payable only if such excess is greater than five percent (5%) of such Party's Net Cash Flow for such Fiscal Year (in which case such damages will be payable in full) and such damages shall be subject to the limitation set forth in Section 7.5.

662. The Tribunal regards its first task under Article 7.4 of the Accounting Procedures as being to determine whether, in the aggregate of all of the Discriminatory Measures, there was a 5% difference between the **But-For Cash Flow** (the **Net Cash Flow** absent Discriminatory Measures) and the **Net Cash Flow**. The Parties' calculations resulted in an excess of the **But-For Cash Flow** over the **Net Cash Flow** of greater than the 5% required by Article 7.4 of the Accounting Procedures. (C-49 § IV A; R-93 App. 9). The Tribunal therefore finds that, as to the equations for determining damages

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and the process by which damages are to be determined, this first limitation (5% hurdle) of Article 7.4 of the Accounting Procedures has been met.

663. In light of the foregoing, the issue before the Tribunal is which variable inputs are to be used in the equations for the Second Limitation under Article 7.5 of the Annex G Accounting Procedures:

Article 7.5, Limitation

Spanish (Original)	Claimant's Translation	Respondents' Translation
Limitación	Limitation[.]	Limitation.
El límite de la obligación de compensación de Lagoven CN de acuerdo con la Sección 15.2 (a) del Convenio será el excedente del Umbral de Flujo de Caja de una Parte sobre el Flujo de Caja Neto Ajustado de tal Parte durante el Ejercicio Económico en cuestión.	The limit of Lagoven CN's compensation obligation pursuant to Section 15.2 (a) of the Agreement shall be the excess of the Threshold Cash Flow of a Party over the Adjusted Net Cash Flow of such Party during the Fiscal Year in question.	The limitation on Lagoven CN's compensation obligation pursuant to Section 15.2(a) of the Agreement shall be the excess of the Threshold Cash Flow of a Party over such Party's Adjusted Net Cash Flow during the Fiscal Year in question.

664. With respect to the second limitation, the Parties' main differences relate to the following issues:

- (a) The use of **Actual Data** as opposed to **Budget Data**, specifically with respect to Sales Volumes, Costs, and Depreciation. This issue affects **Reference [Threshold] Cash Flow** calculations; and
- (b) The determination of the **Adjusted Formula Price**, which affects the **Adjusted Net Cash Flow** calculations.

665. Turning first to the issue of the **Reference (Threshold) Cash Flow** for FY 2007, the Tribunal first must decide whether the **Reference (Threshold) Cash Flow** formula calls for the subtraction of "*notional expense amounts from a hypothetical revenue amount*", as Claimant contends (C-III ¶ 287), or whether the formula is exactly the same as the "*But-For Net Cash Flow*" formula except that the **Base (Threshold) Price** is used in place of the actual sales price under the **Chalmette Supply Contract** (*i.e.* the "*Formula Price*"), as Respondent argues. (R-II ¶ 146).

666. There is no disagreement between the Parties that **Reference (Threshold) Cash Flow** is calculated under Section 7.3 of the Accounting Procedures

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Article 7.3, Reference (Threshold) Cash Flow

Spanish (Original)	Claimant's Translation	Respondents' Translation
Formula de Flujo de Caja Referencial.	Reference Cash Flow Formula.	Threshold Cash Flow Formula.
El Flujo de Caja Referencial de una Parte para un Ejercicio Económico dado (según se mida con base en la Cuentas en Dólares) será determinado de la siguiente forma:	The Reference Cash Flow of a Party for a given Fiscal Year (as measured based on the Dollars Accounts) shall be determined as follows:	The Threshold Cash Flow of a Party for a given Fiscal Year (as measured based on the Dollars Accounts) shall be determined according to the following formula:
TR - TROY - CEX - TIT	TR – TROY – CEX – TIT	TR – TROY – CEX – TIT
Donde:	Where:	Where:
TR = total de levantamientos durante tal período de tiempo, multiplicado por el Precio Base, más los Ingresos Conjuntos recibidos durante tal Ejercicio Económico.	TR = total liftings during such time period, multiplied by the Base Price, plus Joint Revenues received during such Fiscal Year.	TR = total lifting during such period of time, multiplied by the Threshold Price, plus Joint Revenues received during such Fiscal Year
TROY = la Regalía que hubiese sido pagada por una Parte durante tal Ejercicio Económico, en ausencia de la pretendida Acción Discriminatoria.	TROY= the Royalty that would have been paid by a Party during such Fiscal Year, absent the alleged Discriminatory Action.	TROY = the Royalty that would have been paid by a Party during such Fiscal Year, absent the alleged Discriminatory Measure
CEX = la porción proporcional de Gastos Imputables reales de la Parte para tal Ejercicio Económico, en ausencia de la pretendida Acción Discriminatoria.	CEX= the Party's pro rata share of actual Chargeable Expenditures for such Fiscal Year, absent the alleged Discriminatory Action.	CEX = the Party's pro rata share of actual Chargeable Expenditures for such Fiscal Year, absent the alleged Discriminatory Measure
TIT = la porción proporcional de Impuestos sobre la Renta de la Parte que hubiese sido pagada con respecto a tal Ejercicio Económico, en ausencia de la pretendida Acción Discriminatoria	TIT = the Party's pro rata share of Income Taxes that would have been paid with respect to such Fiscal Year, absent the alleged Discriminatory Action.	TIT = the Party's pro rata share of Income Taxes that would have been paid with respect to such Fiscal Year, absent the alleged Discriminatory Measure.

667. The Tribunal observes that the **Twentieth Condition of the Congressional Authorization for the Cerro Negro Project**, found at C-11 and R-43 stated (emphasis added):

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El Convenio de Asociación incluirá provisiones que permitan la renegociación del Convenio en la forma que sea necesaria para compensar a cualquier Parte distinta de LAGOVEN, en terminus equitativos, por consecuencias económicamente adversas y significativas que surjan de la adopción de decisiones emanadas de autoridades gubernamentales, o cambios en la legislación, que causen un trato discriminatorio a LA ASOCIACION, cualquier entidad o LAS PARTES en su condición de participantes en LA ASOCIACION. Sin embargo, no se considera que una Parte ha sufrido una consecuencia económicamente adversa y significativa como resultado de cualquiera de dichas decisiones o cambios en la legislación, en cualquier momento en que la Parte este recibiendo ingresos de LA ASOCIACION igual a un precio del petróleo crudo por encima de un precio máximo que será especificado en el Convenio de Asociación. De no haber acuerdo entre LAS PARTES, los correspondientes cambios al Convenio de Asociación, así como la indemnización por daños serán determinados a través de un arbitraje.

The Association Agreement shall include provisions allowing the renegotiation of the Agreement as necessary to compensate any Party other than LAGOVEN, under equitable terms, for economically adverse and significant consequences arising from the adoption of decisions made by governmental authorities or changes in legislation that cause a discriminatory treatment of THE ASSOCIATION, any entity or THE PARTIES in their capacity as participants in THE ASSOCIATION. However, it shall not be considered that the Party has suffered an economically adverse and significant consequence as a result of any of said decisions or changes in legislation at any time when the Party receives income from THE ASSOCIATION equal to a price of crude oil above a maximum price that shall be specified in the Association Agreement. In the absence of agreement among THE PARTIES, the corresponding changes in the Association Agreement, as well as the indemnities for damages shall be determined by way of arbitration.

The Association Agreement shall include provisions allowing the renegotiation of the Agreement as necessary to compensate any Party other than LAGOVEN, on equitable terms, for adverse and significant economic consequences arising from the adoption of decisions made by governmental authorities, or changes in legislation, that cause a discriminatory treatment of THE ASSOCIATION, any entity or THE PARTIES in their capacity as participants in THE ASSOCIATION. However, it shall not be considered that a Party has suffered an adverse and significant economic consequence as a result of any of said decisions or changes in legislation, at any time when the Party is receiving income from THE ASSOCIATION equal to a price of crude oil above a maximum price that shall be specified in the Association Agreement. If there is no agreement between THE PARTIES, the corresponding changes to the Association Agreement, as well as the indemnification for damages shall be determined by way of arbitration.

668. This observation leads the Tribunal mechanically to conclude that the purpose of the formula defined by Section 7.3, within the mathematical equation defined by Section 7.5 – the provision implementing a limitation of the indemnity under Section 7.4 -- is to take into account that “*maximum price*” mentioned in the Twentieth Condition of the Congressional Authorization: in other words, the **Base (Threshold) Price** specified in

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Article 1 of the AA as “\$27 per barrel (in 1996 Dollars).” The Tribunal notes that there is no disagreement between the Parties that this US\$ 27 amount is adjusted – or “escalated” -- annually for inflation, in accordance with the AA, using the U.S. Inflation Index. Accordingly, the **Base (Threshold) Price** of US\$ 27 per barrel is US\$ 34.47 per barrel for FY 2007. (C-47 p. 7; R-93 p. 11).

669. Consequently, the Tribunal finds that the **Reference (Threshold) Cash Flow** formula of Section 7.3 is exactly the same as the formula used to calculate the so-called “*But-For Net Cash Flow*”, except that, under Section 7.3, the **Base (Threshold) Price** is used in place of the actual sales price specified in the **Chalmette Supply Contract** (that is, the “*Formula Price*”).
670. Based on the foregoing findings and observations, the Tribunal decides that application of the **Reference (Threshold) Cash Flow** formula in accordance with its terms yields US\$ **236.848 million** as the Reference (Threshold) Cash Flow for Fiscal Year 2007, calculated as follows (R-113 App. 11):
- taking total liftings during the year (108.000 SCO), multiplied by the Base (Threshold) Price (US\$34.47 per barrel for Fiscal Year 2007) and adding Joint Revenues received during the Fiscal Year (US\$15.513 million), to determine **TR (US\$581.683 million)**;
 - subtracting **TROY**, the royalty (at a rate of 33.33%) that would have been paid during the Fiscal Year 2007 absent the alleged Discriminatory Measure (**US\$197.300 million**);
 - subtracting **CEX**, Claimant’s pro rata share of budgeted Chargeable Expenditures for Fiscal Year 2007 absent the alleged Discriminatory Measure (**US\$62.958 million**); and
 - subtracting **TIT** (at the rate of 34%), the income taxes that Claimant would have paid for Fiscal Year 2007 absent the alleged Discriminatory Measure (**US\$84.577 million**).

671. The Tribunal’s considerations and conclusions regarding the Adjusted Formula Price are as follows. The definition for “*Adjusted Net Cash Flow*” is found in Article 7.2 of the Accounting Procedures:

Article 7.2, Adjusted Net Cash Flow

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Spanish (Original)	Claimant's Translation	Respondents' Translation
Flujo de Caixa Neto Ajustado.	Adjusted Net Cash Flow.	Adjusted Net Cash Flow.
El Flujo de Caja Neto Ajustado de una Parte para un Ejercicio Económico dado (según se mida con base en las Cuentas en Dólares) será igual al Flujo de Caja Neto para una Parte para tal Ejercicio Económico, calculado sobre la base de la Fórmula de Precio ajustada aplicable, la cual será igual a la Fórmula de Precio para tal Producción inicial, con los ajustes por diferenciales por transporte y calidad según se compare con el Crudo Brent.	The Adjusted Net Cash Flow of a Party for a given Fiscal Year (as measured based on the Dollar Accounts) shall be equal to the Net Cash Flow for a Party for such Fiscal Year, calculated on the basis of the applicable adjusted Price Formula, which shall be equal to the Price Formula for such initial Production, adjusted for transportation and quality differentials as compared to Brent Crude.	The Adjusted Net Cash Flow of a Party for a given Fiscal Year (as measured based on the Dollar Accounts) shall be equal to the Party's Net Cash Flow for such Fiscal Year, calculated on the basis of the applicable adjusted Formula Price, which shall be equal to the Formula Price for such initial Production, adjusted for transportation and quality differentials as compared to Brent Crude Oil.

672. On this basis, the Tribunal is required to decide whether the **Adjusted Net Cash Flow** formula calls for adjusting the **Formula Price** (i) based on the change in the Brent/SCO differentials that existed during the first twelve months of commercial production as compared with those that existed in FY 2007, as Claimant contends, or (ii) based on the Brent/SCO differentials as they existed in FY 2007, as Respondents argue.
673. As a factual matter, in the view of the Tribunal the evidence shows, and the Parties seem to agree, that there is a difference in quality between Brent Crude Oil, which is a light crude oil with a gravity of 38° API, and Cerro Negro Crude Oil, which is a heavy crude oil with a gravity of 16° API. (R-93 ¶ 102). For the term “*differential*”, Claimant’s industry expert, Mr. Plunkett, confirmed Respondents’ definition of the term “*differential*” as the difference in price between one crude oil and another. (R-97 and C-46). The Tribunal has reviewed the AA and concluded that the AA does not refer to changes in differentials, as Claimant argues, but rather to the difference in price between one crude oil and another.

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674. The Tribunal agrees with Respondents' analysis that Article 7.2 of the Accounting Procedures requires that the Tribunal adjust the Formula Price for upgraded crude oil in the calculation of the Net Cash Flow upwards in order to arrive at a Brent-equivalent for use in the determination of the Adjusted Net Cash Flow. Here, the Tribunal adopts the Graves Report differential of 0.7327, which represents the average differential between Brent and upgraded crude oil during the first 12 months of production. Thus, the average Formula Price for upgraded crude oil for the first 214 days of 2007, US\$ 47.19/bbl, was divided by 0.7327 to obtain the US\$ 64.41/bbl adjusted price to be applied in arriving at the **Adjusted Net Cash Flow**. (R-113 ¶ 12).
675. In this context, the Tribunal finds that, to enable the comparison contemplated under Article 7.5 and Article 15.2(a) between (i) the **Reference (Threshold) Cash Flow**, based on a Brent-equivalent price of US\$ 27 (in 1996 dollars, *i.e.* US\$ 34.47 in 2007 dollars), on the one hand, and (ii) the **Net Cash Flow**, on the other hand, the **Formula Price** used in the **Net Cash Flow** formula must be adjusted upward (as prescribed by the **Adjusted Net Cash Flow** formula) to arrive at a Brent-equivalent price reflecting this quality differential of 73% between Brent Crude Oil and SCO. If this were not the case, the limitation of liability would be greater than contemplated under the AA because the second half of the expression in the subtraction equation represented by the formula [**Reference (Threshold) Cash Flow – Adjusted Net Cash Flow**] would be artificially too low given the intrinsically lower value of SCO as compared with benchmark Brent Crude Oil.
676. Moreover, since the quality and transportation differentials have essentially remained the same since the AA was signed, the Tribunal further observes that Claimant in effect is asking the Tribunal to compare (i) the **Reference (Threshold) Cash Flow**, based on a Brent-equivalent price of US\$ 27 (in 1996 dollars, escalated for inflation), on the one hand, and (ii) the **Net Cash**

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Flow, where the sales price used is the actual sales price specified in the Chalmette Supply Contract (that is, the “*Formula Price*”), on the other hand. As discussed above, the Tribunal does not agree that this was what the Parties contemplated under Article 7.5 and Article 15.2(a) and such reasoning would result in providing a “*potential economic windfall*” to Claimant over the intended indemnity. (R-115 ¶ 18). On that basis, the Tribunal finds that the **Adjusted Net Cash Flow** calculation yields **US\$ 224.167 million**, adopting the calculation found in R-113 Table 2 and Appendix 11.

677. Turning to the question of the use of actual data as opposed to budgeted data, the Tribunal accepts that the FY 2007 budget is the best indicator of what the Project participants expected to happen absent Discriminatory Measures. The Tribunal considers that the following points are relevant in this regard:

- (1) actual data reflecting actual sales and costs from the Project does not exist;
- (2) even if actual data exists, Claimant was precluded from having access to records or documents indicating operations and costs of the Project after 27 June 2007, making it necessary to use budgeted data;
- (3) the Accounting Procedures require data that is unaffected by the Discriminatory Measures and the FY 2007 budget reflects amounts that are relevant and reliable and have not been affected by Discriminatory Measures;
- (4) the Project no longer exists and has become part of a substantially different venture whose entire structure was dictated by Discriminatory Measures, making relying on information from this venture inappropriate and inadequate.

678. The Tribunal is not disregarding the plain language of Article 7.3. To the contrary, the Tribunal considers that, had the Parties cooperated under the AA as they expressly intended to by signing it, the budget would have been an accurate reflection of the actual costs incurred by the Project in FY 2007. The Tribunal accepts Claimant’s arguments that the deviations from the 2007 budget are explained by the takeover of the Project by PDVSA at the end of April 2007 and the disruptions related to that rapid transition. (C-IV ¶

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159). This is confirmed by the history of the Project. During FYs 2002 – 2006, the budgeting of the Project was accurate when compared to the actual expenses for the Project. (C-IV ¶ 157, Graves at pp. 14 – 15). The 2007 deviations were not – as Respondents argue – a result of an unrealistic budget for FY 2007 expenses. (C-IV ¶ 159).

679. Considering the variable “*Depreciation*”, Claimant’s expert, Prof. Myers, uses a figure of US\$ 75.2 million, whereas Respondents apply a depreciation of US\$ 28.25 million. Prof. Myers accounted for depreciation expense on the following basis:

MCN would have depreciated its share of assets in place on the date of expropriation and also capital investments made after expropriation. I forecasted depreciation using Venezuelan tax accounting, which is based on the inflation-adjusted cost for capital investment. Assets are depreciated in Bolivars through the September 25, 2007 breach date using the Venezuelan Consumer Price Index for inflation. Cash flows after that date calculated are in U.S. dollars, and depreciation expense assumes inflation equal to the actual change in the U.S. GDP deflator through June 30, 2008 and at a forecast rate of 2% thereafter. (C-48 p. 15 footnote 21).

680. The Tribunal finds Prof. Myers’s analysis persuasive and, accordingly, applies Claimant’s figure of US\$ 75.168 million as the depreciation variable for FY 2007. (C-48 p. 15; R-113 App. 11).
681. The Tribunal has determined that the Royalty Measures were not Discriminatory Measures within the meaning of Clause I of the AA. Therefore, the relevant royalty rate for the calculation of damages for FY 2007 is 33 1/3 %.
682. As stated above, the Tribunal has determined that the Income Tax Measures were Discriminatory Measures under Clause I of the AA.
683. Based on the foregoing analysis, the Tribunal conducts the indemnity calculations as in exhibit R-113 App. 11, according to which the **Reference (Threshold) Cash Flow** formula in accordance with its terms yields **US\$ 236.848 million** and the **Adjusted Net Cash Flow** calculation yields **US\$**

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224.167 million. The resulting indemnity is the **Reference (Threshold) Cash Flow** less the **Adjusted Net Cash Flow: US\$ 12.681 million.**

684. The **Adjusted Net Cash Flow** calculation presented by Respondents includes the 1.3 million barrels of SCO and US\$ 0.7 million of sub-products delivered after **27 June 2007**, which form part of the counterclaim in this case. The Tribunal's considerations and conclusions regarding that counterclaim are found in that section.

K.VII.3. Calculation of Indemnity for FY 2008 - 2035**K.VII.3.a. Arguments by Claimant**

685. Going back three and a half years from June 2010, Discriminatory Measures have reduced Mobil CN's cash flows by nearly US\$ 2 billion – US\$ 1.534 billion of which are from the years 2008 - 2010 alone. (C. Closing Slide 23). Claimant claims that, under both the AA and Venezuelan law, it is entitled to damages in the amount ranging from approximately US\$ 6.778 billion (Jones-Lexecon Analysis) to US\$ 6.855 billion (Myers-Brattle analysis) for FY 2008-2035. This amount is expressed as a discounted present value as of **25 September 2007** and is subject to adjustment at the time of the Award. (C-III ¶¶ 260, 310).

686. Claimant argues that the Parties intended that the limitations in Annex G apply even in the case of expropriation and, therefore, adopts a "*reasonable business approach*" which uses historical data to complete the variables in the indemnity formulas. (C-IV ¶ 60). Claimant maintains that the most practical way to calculate the **Fixed Reference (Threshold) Cash Flow** uses actual Project data known at the time of PDVSA-CN's contractual breach (**25 September 2007**). (C-IV ¶ 163). According to the Claimant, this approach eliminates virtually all of the Respondents' objections concerning forecast data. (C-IV ¶ 166). Based on Claimant's "*reasonable business approach*", the quantum for the indemnity for FY 2008 – 2035 is determined by the **Fixed Reference (Threshold) Cash Flow**. (C-III ¶ 310).

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687. On 25 September 2007 the Parties knew (1) that the **Chalmette Formula Price** exceeded the **Base (Threshold) Price**; and (2) the Project was capable of continually producing more than 120,000 bpd of EHO and more than 108,000 of SCO. (C-IV ¶ 164). Claimant's analysis as to the relevance of this information is as follows:

When [the fact that the **Chalmette Formula Price** exceeded the **Base (Threshold) Price**] is applied to the formulas of Annex G, it results in a determination that the **But-For Net Cash Flow** (determined by the **Chalmette Formula Price**) exceeds the **Reference (Threshold) Cash Flow** (determined by the **Base (Threshold) Price**). Because the **Reference (Threshold) Cash Flow** acts as a limit on the indemnity, it also establishes the *quantum* of the indemnity in these circumstances. (C-IV ¶ 165).

688. Claimant's financial experts were instructed by counsel to apply a single interpretation to the relevant formulas. (C-V ¶ 14). Claimant explains its experts Professor Stewart Myers of The Brattle Group (Myers-Brattle) and Dr. Scott Jones of Compass Lexecon (Jones-Lexecon) calculated the indemnity as follows (C-III ¶¶ 315 - 323, footnotes omitted, partially quoted):

The experts first determined an annual **Fixed Reference Cash Flow** based on the **Base Price** on the date of breach (US\$34.38), operational and expense data available on that date, and a royalty rate of 16 2/3%. This post-2007 annual **Fixed Reference Cash Flow** is materially the same as the **Reference (Threshold) Cash Flow** that Graves-A&M calculated for FY 2007, except for the different royalty rate. Then Myers-Brattle and Jones-Lexecon applied that **Fixed Reference Cash Flow** to each FY for the period 1 January 2008 through 30 June 2035. The **Fixed Reference Cash Flow** values for that period were then discounted to their present value as of the time of the breach.

The experts determined the hypothetical oil revenue component of *TR* by multiplying the **Base (Threshold) Price** (US\$34.38) times budgeted annual SCO liftings as of the date of breach times Claimant's interest in the Project. The resulting oil-revenue component is estimated to be US\$565 million. The experts then determined the hypothetical Joint Revenues component of amount *TR* in the same manner used by Graves-A&M for FY 2007 – *i.e.* they estimated by-product revenues (net of royalties) to be 2.74% of oil revenues, or approximately US\$15 million. The amount *TR* is the sum of these two components, or US\$580 million.

The experts then calculated the hypothetical oil royalty amount *TROY* in the **Reference (Threshold) Cash Flow** formula for the FY 2008-2035. They assumed a production budget of 120,000 bpd, multiplied by the **Base (Threshold) Price** times 94% (to establish the value on which the royalties

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would have been assessed) times 16 2/3 %. The resulting **TROY** for FY 2008 – 2035 is US\$98 million.

For the **CEX**, the experts used the budgeted amounts for capital-expense and operating-expense approved by both Claimant and PDVSA-CN for FY 2007. These amounts totaled US\$63 million.

To determine the **TIT**, the experts determined the hypothetical taxable income in the but-for scenario assumed by the **Reference (Threshold) Cash Flow**. That hypothetical taxable income consists of the revenue amount **TR**, minus the royalty expense value **TROY** and the operating expense component of amount **CEX** and an estimate of the depreciation for FY 2007. The experts then multiplied the resulting hypothetical taxable income times 34%.

Under this analysis, the annual undiscounted **Fixed Reference Cash Flow** for each FY from 2008 to 2034 would be approximately US\$300 million and US\$150 million for FY 2035. This is similar to Claimant's US\$316 million **Net Cash Flow** in FY 2006.

Finally, using real risk-free tax adjusted discount rates, Myers-Brattle and Jones Lexecon determined the present value of the indemnity owed as of 25 September 2007 to be approximately US\$6.855 billion and US\$6.778 billion, respectively. The difference between the two results is based on their use of slightly different discount rates.

689. The validity of the **Fixed Reference (Threshold) Cash Flow** calculation (US\$ 301 million) is confirmed by comparing it to Claimant's **Net Cash Flows** before the expropriation (in 2005 and 2006, US\$ 298 and US\$ 316 million, respectively). (C-IV ¶ 167). Claimant notes, however, that the indemnity calculation should not be confused with the cash flows that would have stemmed in future years from the operation of the Project, had it continued. This calculation is for the contractual indemnity only. (C-IV ¶ 169).
690. Claimant criticizes Respondents' experts' approach for estimating the **Reference (Threshold) Cash Flow** which involved calculating it exactly the same as the **But-For Net Cash Flow**, except that the **Base (Threshold) Price** is used rather than the **Chalmette Formula Price**. This approach reduced the undiscounted value of the indemnity from FY 2007 – 2035 by approximately US\$ 7.5 billion. (C-IV ¶¶ 123, 162). Claimant asserts that Respondents start from the unsupported premise that, except for **TR**, the **Reference (Threshold) Cash Flow** should be calculated using "actual" inputs, despite the fact that the word "actual" does not appear in the

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definitions of *TROY* or *TIT*, but rather only in the *CEX*. (C-IV ¶ 125). The use of “*actual*” revenue inputs to determine *TROY* and *TIT* has the effect of causing the indemnity to vanish as Claimant’s lost cash flow grows – a nonsensical result. (C-V ¶ 20). Claimant, thus, maintains that the **Reference (Threshold) Cash Flow** calculation is to be determined on the basis of a hypothetical **Base (Threshold) Price** scenario. (C-IV ¶ 126).

691. With respect to *TR*, Respondents’ witnesses have presented two calculations. Finizza and Pulliam performed the 2007 – 2035 calculation multiplying liftings by US\$ 27 per barrel (in 1996 dollars). Mr. Brailovsky, on the other hand, presented a new calculation for *TR*, achieved by multiplying liftings by US\$ 19.78 per barrel rather than by US\$ 27 per barrel (both in 1996 dollars). Respondents have provided no explanation for the inconsistencies between their experts. (C-V ¶ 16). Still, however, Respondents advocate for Mr. Brailovsky’s US\$ 19.78 per barrel approach as a means of giving effect to Article 15.2(a). By its terms, however, the limitation in Article 15.2(a) only becomes applicable in a FY in which the foreign party has received a **Net Cash Flow**, notwithstanding Discriminatory Measures. Clearly, the foreign party will not receive a **Net Cash Flow** after 2007. (C-V ¶ 17). Thus, Article 15.2(a) will not reduce the indemnity after 2007 because since then Claimant has not and will not receive any cash flow. (C-VI ¶ 47).

692. Claimant refutes Respondents’ closing argument that the price applied to SCO liftings should be less than the Base Price when the price of Brent crude oil exceeds US\$ 27 per barrel (in 1996 dollars). The text of Articles 7.4 and 7.5 of the Accounting Procedures is unambiguous in that respect and requires the use of the Base Price of US\$ 27. (C-V ¶ 18; C-VI ¶ 47). There is no need to read any “*essence*” of Article 15.2(a) into the Accounting Procedures. (C-VI ¶ 47).

693. Claimant also attacks the instructions given to Respondents’ experts:

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14. Respondents' experts from EconOne admitted that they received no guidance from the Respondents' counsel in construing the provisions of the AA or the Accounting Procedures, and that they purported to apply the contract "as written." But the official text of the contract is in Spanish, and these experts admitted that they cannot read Spanish. Nor are any of the Respondents' financial experts trained as lawyers. For these reasons, the interpretations of the contract they advocate are not worthy of consideration. (C-V ¶ 14).
694. In support of their discount rate, Claimant contends that a real risk-free tax adjusted discount rate is appropriate because it applies historical data known on the date of the breach and, therefore, reflects the non-contingent nature of the **Fixed Reference (Threshold) Cash Flow**. (C-IV ¶ 168).
695. As a "cross check", the Claimant's experts also calculated the **Forecast Reference (Threshold) Cash Flow** (C-III ¶¶ 324 – 331, partially quoted):
- This is essentially the same calculation as above except that it involves using a projected **Base Price**, escalated for inflation projected by the "U.S. Inflation Index", for *each* FY from 2008 to 2035, and that it uses the Project's production capacity rather than the budgeted liftings to calculate the **TR**. Claimant's experts calculated the **TR** by assuming a SCO production of 108,600 bpd, which is below capacity for the Project, rather than using the budgeted liftings for 2007 as in the **Reference (Threshold) Cash Flow** calculation. For the Joint Revenues component of the **TR**, the experts estimate hypothetical by-product revenues at 2.74% - according to their historic relationship with oil revenues. The resulting **TR** ranged from US\$570 million in 2008 to US\$999 million in the end term of the AA.
 - Claimant's experts calculated the hypothetical oil royalty amount **TROY** on the basis of the notional values of EHO production by multiplying the **Base (Threshold) Price** for each FY from 2008 through 2035 by 94%. This was then multiplied by the royalty rate absent Discriminatory Measures of 16 2/3%. These expense forecasts vary between US\$65 million and US\$170 million per year over the remaining life of the AA.
 - Claimant's experts determined the income tax amount **TIT** resulting from the use of an escalated **Base (Threshold) Price** and forecasted expense and operational data. This value was calculated by using the amount **TR**, minus the royalty expense value **TROY**, the operating expense component of amount **CEX**, and the estimated depreciation and other allowable tax deductions, and then multiplied by the income tax rate of 34%. Claimant's experts found the amount **TIT** resulting from this analysis to vary in the range between US\$120 million and US\$202 million during FY 2008 through 2035.
 - Finally, Claimant's experts subtracted from the amount **TR** the amounts **TROY**, **CEX**, and **TIT**. Because the **Base (Threshold) Price** as

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escalated to each FY after 2007 varied, and the forecasted expense and depreciation data varied, the undiscounted **Forecast Reference (Threshold) Cash Flow** values for each of the full years varied in a range between US\$296 million and US\$517 million, as shown by Claimant's experts' Myers-Brattle's and Jones-Lexecon's respective reports.

696. Claimant concludes that *“these pricing analyses show that the **Forecast Reference (Threshold) Cash Flow** for FY 2008 to 2035 (calculated using the escalating **Base (Threshold) Price** in each year) would be less than the **But-For Net Cash Flow** (escalated using the **Formula Price**). As the lesser of the two, even when the **Base (Threshold) Price** is adjusted for inflation for future years (rather than fixed as of September 2007), the **Forecast Reference (Threshold) Cash Flow** would provide the proper quantum of the indemnity obligation for FY 2008-2035 in this cross-check analysis using forecasted data.”* (C-III ¶ 334, partially quoted). The **Forecast Reference (Threshold) Cash Flow** as of September 2007 would range between US\$ 6.450 billion (as calculated by Myers-Brattle) and US\$ 6.668 billion (as calculated by Jones-Lexecon). (C-III ¶ 339).
697. Claimant did not instruct its experts on the discount rate applicable to the **Forecast Reference (Threshold) Cash Flow**, and the experts determined the discount rate independently. (C-VI ¶ 58). Claimant's experts discounted the **Forecast Reference (Threshold) Cash Flow** values to present rates using risk-free tax adjusted discount rates. (C-III ¶ 335). This was appropriate because uncertainty about future production of SCO was taken into account in the *TR* equation, which assumed a production of heavy-oil at 10% more than would be necessary to produce the 108,600 bpd SCO. The Annex G formulas have the effect of minimizing the impact of relevant contingencies. (C-IV ¶ 210). Currency risk does not affect the discount rate. The risk of PDVSA-CN or PDVSA default and the risk of expropriation by the Government were not taken into account. (C-III ¶ 338).
698. Claimant affirms that the production volume risks, operating costs and capital expenditure risk, and price risk were all considered by Claimant's

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experts in calculating the **Forecast Reference (Threshold) Cash Flow**. (C-IV ¶ 219). The arguments below are Claimant's response to Respondents' Rebuttal to the **Forecast Reference (Threshold) Cash flow** calculations and Respondents' analysis of the discount rate as it relates to production capacity (C-IV ¶¶ 179 – 190, partially quoted, footnotes omitted):

- The Project's production capacity of 120,000 bpd of EHO and 108,600 SCO from the upgrader was demonstrated throughout the life of the Project and has nothing to do with the Project's storage capacity.
- OPEC has historically had little, if any, impact on Venezuelan oil production and does not justify a higher discount rate. Even if it did, however, Section 14.2 of the AA contemplates the need to recoup losses from Production Curtailments and allows for a 5-year extension of the AA to accomplish that. The prospect of an OPEC curtailment requiring limitation of production from the Project in the future is approximately 1% per annum (not, as the Respondents contend, 3.7% per annum). Further, the possibility of an OPEC curtailment cannot be deemed an uncertainty that may appropriately be used to justify a higher discount rate. Claimant's experts indicate that, the likelihood of an OPEC-required, imposed curtailment on the Project would not likely have an impact on the present value of Forecast Reference (Threshold) Cash Flows for FY 2008 through 2035 of greater than the range of US\$21 million to US\$27 million. Such cash flow reductions are equivalent to an increase to the discount rate of approximately 0.03%.
- Under Article 14.1 of the AA, disproportionate curtailments are not excluded from the definition of Discriminatory Measures and, therefore, should not be taken into account when determining the **Reference (Threshold) Cash Flow**. If future OPEC-related curtailments in compliance with Article 14.1 are considered to have some likelihood, these should be factored into the indemnity cash flows along with the allowed mark up and there would be no reason to adjust the discount rate to address this issue.

699. Professor Myers explained that macro or market risks (risks that investors cannot escape) must be considered in a discount rate in order to discount a cash flow to present value. Such risks include uncertainty about future inflation, interest rates, or oil prices. Risks about future inflation and interests rates are reflected in long-term treasury bonds, which is why it was appropriate for Prof. Myers to use that bond rate. Risks related to oil prices, however, are irrelevant in this case because the indemnity is not determined by an actual price – instead, they are determined by the base price. (C-IV ¶ 23). Even if the price were to fall below the base price (SCO Price Risk),

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“that risk would not justify the massive increase in the discount rate that the Respondents advocate.” (C-V ¶ 24).

700. Project specific risks (unconnected to macro or market risks) should not affect the discount rate. Rather, these risks should be taken into account when determining the cash flow before discounting. (C-V ¶¶ 22 - 23).
701. Claimant characterizes Respondents’ *“marketing risk”* argument, that it is difficult to sell SCO, as fanciful. The Project was able to correct the fire and safety hazard that had caused the Chalmette Refinery to temporarily stop accepting SCO. Claimant asserts that, absent the Discriminatory Measure, the Chalmette Joint Venture would have continued to provide a stable outlet for Project sales, in addition to the other refiners in the Gulf of Mexico region. (C-IV ¶ 220).
702. Claimant advocates using the budgeted *CEX* rather than the actual expenditures for any of the years, stating that it would be imprudent to include operator costs that Claimant would not have tolerated if it had remained as a Project participant. (C-VI ¶ 54). Claimant’s arguments with respect to using the 2007 budget for FY 2007 are incorporated herein by reference.
703. Claimant states that Respondents’ arguments related to the *CEX* value, in particular about the operational costs and expenditures necessary to maintain the Project in the future, are unsupported by technical evidence. (C-IV ¶ 191). Claimant addresses several aspects of Respondents’ arguments.
704. *First*, the Project’s costs show a declining tendency, which accords with longstanding industry experience that rising costs can be offset by savings achieved through improved knowledge and greater efficiency, particularly as a new project settles into its long-term production phase. (C-IV ¶¶ 193 – 194; C-213 Lawless ¶ 10). This was true even when local inflation was high. (C-VI ¶ 55). Flat to declining budgets are the norm for ExxonMobil-

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managed operations, unless new facilities are added. (C-213 Lawless at ¶ 10).

705. *Second*, Claimant short-term cost volatility illustrates why a longer-term view is required to forecast costs through 2035. While increases in oil prices have been met with increasing oil industry costs, the price spikes – in particular those from 2008 – were not sustained and a substantial decline in oil industry costs has occurred since then. (C-IV ¶ 192). In the long-term, the data undermines Respondents' experts' contention that oil industry cost inflation has outpaced the rate of general inflation. (C-IV ¶ 192).

706. *Third*, with respect to future cost inflation, Respondents' experts' decision to increase Gaffney, Cline and Associates, Inc.'s (GCA's) baseline forecasts of costs after 2008 by 20 – 30% based on oil industry inflation, before escalating those costs to account for general inflation, is unjustified. (C-IV ¶ 195). Claimant states that:

[...] the potential impact on the indemnity cash flows that could stem over time from the risk of oil industry inflation outpacing general inflation is relatively minor in the context of the entire indemnity damages. For example, the fastest growing inflation measure relied upon by the Respondents' experts exceeded the growth in the Consumer Price Index by 0.5%. If the Project experienced cost inflation at a rate 0.5% higher than general inflation, then the present value of the Forecast Reference (Threshold) Cash Flow for FYs 2008 through 2035 would decrease by US\$72 million related to operating expenditures and US\$14 million related to capital expenditures. These differences are equivalent to increases to the low-risk discount rate of only 0.09% and 0.02%, respectively. (C-IV ¶ 196).

707. *Fourth*, local currency inflation in Venezuela is not a ground for criticizing the cost budget for the Project and GCA's cost forecasts. Claimant states that, as the costs of the Project have always been calculated in dollars rather than local currency, it is not appropriate to include currency risk when forecasting costs. (C-IV ¶ 198).

708. *Fifth*, there is little risk that the Project would need to modify existing structures to comply with environmental laws and that these modifications would increase costs. (C-IV ¶ 198). The Cerro Negro facilities were built in

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the late 1990s and exceeded then-existing Venezuelan requirements. Only modest modifications would be needed if Venezuela were to match the U.S. Clean Air Act standard. (C-IV ¶¶ 191 – 198). Such modifications could be accomplished below the US\$ 0.5 million sustaining capital expenditures budget for the upstream operations and within the US\$ 10.5 million annual allocation for sustaining capital expenditures for the upgrader in the analysis prepared by GCA and relied upon by Myers-Brattle and Jones-Lexecon in their **Forecast Reference (Threshold) Cash Flow** calculations. (C-IV ¶ 198, partially quoted).

709. *Sixth*, Claimant states that GCA's cost forecasts – including GCA forecast that drilling in 2001 would cost US\$ 2.8 million per well, even though drilling in 2005 cost less than US\$ 1.6 million per well – aligns with the past experience of the Project. Mr. Pereira's statement that PetroMonagas spent an average of US\$ 4.1 million to drill seven wells in 2008, however, is out of line with both the experience of the Project and with likely future costs, in light of current deflation. (C-IV ¶ 193, partially quoted, see also C-218 at 3 *et seq.*).
710. *Seventh*, Respondents' reliance on Mr. Pereira's assertions about PetroMonagas's costs is misplaced, as Mr. Lawless's testimony exposed Mr. Pereira's ignorance of past Project turnaround costs. (C-VI ¶ 53). For example, Respondents' experts expect that turnaround costs for 2010 are expected to be US\$ 100 million. In 2006, however, the turnaround of the Cerro Negro upgrader cost approximately US\$ 31 million (C-218 at p. 9). This turnaround was well-planned and OCN was able to call upon ExxonMobil affiliates to resolve maintenance and operational issues. PetroMonagas's costs may be higher because it lacks the same high level of technical services that the Project previously enjoyed through Claimant's involvement. (C-IV ¶¶ 199 – 200; C-VI ¶¶ 52 - 56). PDVSA does not have access to the same high level of service and has, as a result, addressed such issues in a much more costly fashion. (C-IV ¶ 200, partially quoted). The

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cost increases are a result of the fact that OCN can no longer rely on ExxonMobil's expertise. (C-218, C-216 ¶¶ 18 - 24). It would be imprudent to include in the *CEX* operator costs that Claimant would not have tolerated if it had remained as a Project participant. (C-VI ¶ 54).

711. Further, PetroMonagas's costs and liftings are not merely those of the Project. As Claimant explained with respect to PetroMonagas in its closing statement:

Mr. Pereira acknowledged that PetroMonagas is not merely the Cerro Negro Project under a new name, even though it ultimately received some of the interests of that Project. Nor are PetroMonagas's activities the same as those of Cerro Negro. Mr. Pereira admitted that the former Cerro Negro upgrader has been used to process EHO from other projects. He admitted that the former Cerro Negro upgrader has been used to create higher grade SCO than Cerro Negro had produced, making its likely cost experience different. And he admitted that PetroMonagas has a smaller concession area in the production field than Cerro Negro. (C. Closing Statement p. 24).

712. The costs incurred by the new operators of the former Project are irrelevant to the calculation of the **Reference (Threshold) Cash Flow**, which assumes that the expropriation did not take place. Furthermore, the post-takeover cost data are not reliable evidence of the value attributable to *CEX* in the **Reference (Threshold) Cash Flow** — *i.e.* the *CEX* that would have occurred absent the expropriation of Mobil CN's entire interests in the Project.
713. With respect to reducing the **Reference (Threshold) Cash Flow** by the Science and Technology and Anti-Drug Enforcement contributions, Claimant states that these would not be included under the *CEX* because these two initiatives are based upon the revenue or income of each participant. (C-VI ¶ 56).
714. With respect to price forecasts, Claimant maintains that, pursuant to the contract, "*price forecasts have a very limited function: to determine whether to use the stipulated **Base (Threshold) Price** in calculating the indemnity owed according to the Annex G formulas. For that purpose, it is*

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*appropriate to examine whether the likely **Chalmette Formula Price** prevailing throughout the period of 'economic consequences' would exceed the **Base (Threshold) Price**. [...] The total **But-For Net Cash Flow** for FY 2008-2035 of which Mobil CN was deprived [...] are clearly shown by these averages for the entire period to be virtually certain to exceed the **Reference (Threshold) Cash Flow** for that period. That showing suffices to establish that Mobil CN's indemnity is limited by — but therefore also measured by — the **Reference (Threshold) Cash Flow** calculated using the **Base (Threshold) Price** for the entire FY 2008-2035 period.” (C-IV ¶ 203, partially quoted, footnote omitted).*

715. Claimant's experts do not forecast that the market price for SCO will fall below the **Base Price**, regardless of recessionary scenarios, as they have not done so as a response to the 2008 recession. (C-III ¶¶ 332 – 333; C-IV ¶ 205). Claimant states that “[t]he average **Chalmette Formula Price** for FY 2008 as a whole (US\$83.94 per barrel) remained well above the **Base (Threshold) Price** as escalated to 2008 Dollars (US\$35.17 per barrel) and the average **Chalmette Formula Price** is on track as of April 2009 to do so again in FY 2009.” (C-IV ¶ 205, footnotes omitted). Claimant believes that this trend will likely continue as reductions in oil investment will constrain supply and positively influence the price. Further, in response to Respondents' concerns, “*Energy Security Analysis, Inc. ('ESAI')* has analyzed the issue and concluded that recent events confirm that the likelihood that the average **Chalmette Formula Price** in any particular FY before 2036 will fall below the **Base (Threshold) Price** is no more than roughly 10%”, an estimate also reached by Respondents' experts Pulliam/Finizza. (C-IV ¶ 206).
716. Claimant addresses Respondents' contention that Claimant could not use its surplus capacity to make up for temporary shortfalls due to curtailments (which Respondents state have not been claimed as a Discriminatory Measure). Claimant states that the document on which Respondents rely at

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R-IV ¶ 51 merely announces that production above an average of 120,000 bpd would be subject to a 30% royalty. (C-VI ¶ 48; R-IV ¶ 51). The hearings did not establish that the Project could not have actually produced 120,000 bpd in 2007, but rather, that the Project could maintain the 120,000 bpd level through 2035 and beyond if called upon. (C-VI ¶ 49).

717. In response to Respondents' analysis concerning the discount rate, Claimant insists that "*Respondents and their experts seek to obscure the contractual nature of the indemnity cash flows and treat them, for discount rate purposes, as akin to operational cash flows of the Project.*" (C-IV ¶ 212). Claimant also characterizes Respondents' consideration of the Project risk within the discount rate as a strategy whereby the indemnity is reduced by "*applying a discount rate that adds back the very risks that the indemnity protects against, including the risk of expropriation.*" (C-VI ¶ 57).

718. The discount rate is of tremendous significance, as it has a compounding effect:

29. [...] the effect on present value of the difference between discounting at 4% and 6% is far greater than the effect of the difference between discounting at 18% and 20%. As Dr. Jones observed, "if you discount something at 20 percent, you're cutting it in half every three and a quarter years [...]" (C-V ¶ 29).

719. Claimant further contends that Respondents' analysis proposing extraordinarily high discount rates "*has no analytical foundation and consists of little more than subjective, ad hoc assertions aimed at reducing the value of Mobil CN's indemnity rights.*" (C-IV ¶ 211). Claimant emphasizes that the AA already protected it from many of the uncertainties – and Respondents' use of these uncertainties in the projected cash flows results in a double-counting. (C-IV ¶ 213). The only risks that are relevant to the discount rate are non-diversifiable risks and such risks are not reflected in the cash flows. (C-IV ¶ 214; C-V ¶ 25).

720. Claimant challenges Respondents' experts' reliance on two sets of irrelevant, non-standard, and illegitimate benchmarks to arrive at the 19.8%

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discount rate: (i) estimated returns on ExxonMobil stock (which reflects a mixture of ExxonMobil's investments worldwide with varying degrees of risk) and capital projects stock and (ii) so-called International Capital Asset Pricing Models ("ICAPM"). (C-IV ¶¶ 214-217). Claimant states that Respondents have failed to quantify how particular risks would impact cash flows and have not demonstrated how these risks would justify the multi-billion dollar reduction in present value, resulting from the discount rate. (C-VI ¶ 59).

721. Respondents' experts improperly used so-called internal rates of return to calculate the discount rates. (C-V ¶ 28). With respect to reliance on the expected rate of return for investments in oil projects, *"those forward-looking estimates predict internal rates of return. Internal rates of return are not estimates of the cost of capital (which is relevant to the discount rate), but rather they express the rate of return that would make the net cash flow from a project equal to zero."* (C-IV ¶ 217, footnote omitted, emphasis in original). Claimant states that Respondents' experts use of internal rates of return result in a *"figure [that] is above the 7.5% to 8.7% discount rates cited by other independent analysts for ExxonMobil."* (C-IV ¶ 217).

28. [...] Professor Wells defended use of IRRs by testifying that they "did not use the IRR [...] as the principal method of determining the discount rate," but rather "as a make whole approach, that is, what kind of cash now would enable Exxon Mobil to replace the cash flow that would be lost or would be earned from the indemnity flows." Professor Myers exposed the fallacy of this "make whole approach," observing that "you can't put somebody back in the same position by taking something safe away from him or her and then telling him or her to invest it in something risky." It was in this context that Professor Myers observed that, "[i]f somebody takes a hundred dollar bill from me, I want a hundred dollars back, and it shouldn't matter whether I was going to give that hundred dollars to charity or buy groceries with it or play the lottery with it." (C-V ¶ 28).

722. Claimant notes that ICAPM purport to incorporate an *ad hoc* assessment of the local and political risk to which a typical investment in a country would be exposed — including the risk of expropriation. (C-IV ¶ 218). Claimant maintains that use of this model is not appropriate in this case because the

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indemnity provisions require the calculation of cash flows absent Discriminatory Measures. (C-IV ¶ 218; C-V ¶ 25). Brailovsky's inclusion of the risk of expropriation in his discount rate is especially inappropriate. (C-V ¶ 26).

723. Claimant insists that the discount rate should not be raised on the basis of PDVSA's default risk. *First*, Respondents' argument in favor of so doing is precluded by both commercial practice and by Venezuelan law which states that "*the economic or financial condition of the debtor is irrelevant for the determination for the quantum of the damages.*" (C-IV ¶ 171; C-V ¶ 27). *Second*, an extension of this argument would enable "*contract debtors [to] always argue that court judgments and arbitral awards should discount the amount they owe by the risk that the debtor might refuse to repay the debt.*" (C-IV ¶ 172).

60. Concerning default risk, the Respondents continue to ignore that this is a breach-of-contract case. They also confuse the value of a debt to the creditor with its value to a third party. Default risk is relevant only to the latter. Even in the Respondents' inapt analogy to an annuity, the insurer's creditworthiness would not be relevant in determining the value owed by the insurer (even in present value terms) to the annuitant himself. (C-VI ¶ 60).

724. *Third*, Respondents' experts (Brailovsky/Wells) use a measure of default risk that includes risks irrelevant to the indemnity cash flows. Respondents' experts ignore the fact that "*the yield on PDVSA bonds implicitly incorporates the risk to its bondholders of PDVSA liability to Mobil CN in this proceeding.*" (C-IV ¶ 174). Finally, Respondents' statements to the High Court in London that PDVSA "*remains one of the world's most important national oil companies*" with "*a balance sheet showing more than US\$100 billion in assets*" and is "*still active in the international capital markets*" makes it even less appropriate to select a higher discount rate based on the likelihood of Respondents' default. (C-IV ¶ 175, partially quoted).

725. Claimant referenced the ICSID case in its discussion of the discount rate:

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30. [...] The discount rate applicable to cash flows from Claimant's interest in the Project will be determined in the ICSID case, not this one. But when that occurs, the discount rate for an established project like Cerro Negro should be substantially lower than 10%. (C-V ¶ 30).
726. In response to Respondents citation of *Phillips Petroleum* and *Himpurna*, Claimant states as follows (C-VI ¶¶ 61 - 62):

61. [...] *Phillips Petroleum* did not involve the valuation of indemnification cash flows but rather the determination of the fair market value of a project. The discount rate adopted in *Himpurna* also has no precedential value because it is a self-described ad-hoc "equitable assessment," without any basis in principles of finance. The tribunal in *Himpurna* expressed concern about the ability of the respondent in that case to pay a large award, and the tribunal applied a high discount rate "to alleviate [the Respondents'] burden as much as possible [...]." The reverse is true here: PDVSA has reaped multi-billion-dollar gains as a direct result of the Government measures at issue in this case, and the Respondents themselves have informed this Tribunal that PDVSA is one of the most profitable and important national oil companies in the world. (C-VI ¶ 61).

62. The tribunal in *Himpurna* made other observations that are relevant to this case:

Another consideration concerns the nature of the breach. The respondent did not seek actively to dispossess the claimant of valuable contractual rights; it has suffered helplessly from a precipitate deterioration in the macroeconomic value of a project with respect to which it had accepted the entire market risk. In this regard, this case stands in stark contrast with a number of illustrious arbitral precedents [...] in which [...] the defending State entity has acted to evict the foreign investor from a healthy ongoing profitable venture. Thus the notion of the victim's lost profits has gone hand in glove with that of the breaching party's gain. (C-VI ¶ 62).

K.VII.3.b Arguments by Respondents

727. Respondents explain that neither of Claimant's invented calculations - the **Fixed Reference Cash Flow** or the **Forecast Reference Cash Flow** - bears any relationship to the indemnity provisions in Annex G. (R-II ¶ 172). Respondents urge the Tribunal not to accept Claimant's invitation to rewrite the formula and expand the scope of the indemnity using its so-called "*reasonable business approach*." There is no basis in Venezuelan law or the AA for such an exercise. (R-III ¶¶ 196 - 197; R-IV ¶¶ 50, 54).

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728. Testimony in New York demonstrated that there would have been no indemnity due in 2008, even if Claimant had agreed to migrate and if Claimant could prevail on all of the issues, including its approach to the **Threshold Cash Flow** and the **Adjusted Net Cash Flow** formulas. (R-IV ¶ 81).
729. Respondents contend that applying the indemnity provisions on the basis of projected rather than actual cash flows results in an indemnity of US\$ 345 million. This amount is reduced to US\$ 232 million “*when basic, conservative adjustments to the projected cash flows [are] made based on actual experience of the Project, still assuming that all governmental actions constituted Discriminatory Measures.*” (R-III ¶ 192). Respondents arrive at this number by (1) “*application of the **Reference (Threshold) Cash Flow** formula as written (with the major exception of adapting it to the future), which requires deducting from revenues the royalties and taxes that would have been paid in the FY in question absent the Discriminatory Measures*” and (2) applying “*a market discount rate derived from methodologies widely accepted in business and finance.*” (R-III ¶ 193, partially quoted).
730. To calculate the **Reference (Threshold) Cash Flow**, Respondents used the price scenario proffered by Claimant. That high price scenario, as Claimant has recognized, resulted in high royalties and taxes, and therefore a low **Reference (Threshold) Cash Flow**. (R-III ¶ 195, partially quoted, footnote omitted). Under the plain language of the formula as written, higher prices result in a declining indemnity. (R-III ¶ 196; R-IV ¶ 53). There is no evidence of the Parties’ intent regarding this result. (R-IV ¶¶ 53 – 54).
731. Nothing in the **Reference (Threshold) Cash Flow** formula contemplates using a budget, an estimate, or a projection of any kind, for the future. (R-IV ¶ 58). As stated with respect to the 2007 calculations, the clear language of the **CEX** demands that the **CEX** that are subtracted from **TR** are “*the Party’s pro rata share of actual Chargeable Expenditures for such FY, absent the*

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alleged Discriminatory Measures.” (R-II ¶ 150). The definition requires the subtraction of actual expenses, not budgeted expenses. (R-II ¶ 151).

732. Respondents state that none of Claimant’s witnesses was able to provide an explanation for the fact that nothing in the **Reference (Threshold) Cash Flow** formula contemplates using a budget or estimate or projection of any kind. (R-IV ¶ 58; R. Closing Slide 67; Tr. pp. 846 - 849). Neither Party expected that the budget prepared in 2006 for FY 2007 would be able to accurately reflect the *CEX* for the next 27.5 years. (R Closing Slide 72).

56. The testimony showed that there are myriad issues with both the 2006 budget and Claimant’s cost projections, including: (i) the total disregard of Venezuelan inflation (Claimant’s cost expert, Mr. Cline, said he did not even know what Venezuelan inflation was) that, unlike in earlier years, was not (and cannot be assumed in the future to be) offset by currency devaluations, coupled with Claimant’s view that inflation could be controlled by accessing the “parallel” currency market or contracting with local vendors in dollars, both of which are illegal; the gross underestimation of capital expenditures (Claimant’s **Fixed Reference Cash Flow**, based upon the 2007 budget prepared in November 2006, uses the absurd amount of US\$6 million per year for the life of the Project, thereby ignoring turnaround costs and the enormous capital expenditures necessary to drill wells to offset what Mr. Cline said was the decline in well productivity); (iii) the failure to take account of the dramatic, industry-wide increase in the cost of oil services in 2008, when the price of oil hit an all-time high; (iv) the failure to appreciate the actual cost of turnarounds in Venezuela, including the turnaround costs for Venezuelan projects like Hamaca (US\$230 million in 2009), where Chevron remains a partner; and (v) the failure to appreciate the true cost of the hypothetical “put” that Prof. Myers suggested might be purchased to protect against the possibility of the SCO price dropping below the Threshold Price in any future year. (R-IV ¶ 56, citations omitted).

733. As the FY 2007 budget was not even accurate for 2007, using the budgeted costs for FY 2008 – 2035 is even more absurd. (R-II n. 276). The budget included virtually no capital expenditures or turnaround costs and bore no relationship to what the actual expenditures for the next 27.5 years would be. (R-IV ¶ 55). As Respondents’ experts Messrs. Pulliam and Finizza point out, Claimant’s expert Mr. Cline’s estimates forecasting operating costs were 20% too low in FY 2007 and more than 30% too low for FY 2008. The inaccuracy of Mr. Cline’s forecasts for the near term makes

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reliance on his forecasts for 10 – 20 years into the future inappropriate. (R-93 ¶ 87).

734. Respondents explain that the notion of using data that existed 3/4s of the way through FY 2007 or budgets prepared in 2006 for each of the succeeding 27.5 years is completely untenable (R-II ¶ 175). Since the FY 2007 budget was prepared in 2006, there have been dramatic cost increases for the Project, making the budget grossly inaccurate for the past and an unrealistic projection for the future. (R-II ¶ 192). Indeed, actual operating and capital costs were 18.5% higher than budgeted, totaling US\$ 179.1, rather than US\$ 151.1 million for FY 2007. (Respondents' expert Mr. Pereira states that actual operating costs incurred in FY 2007 totaled US\$ 176.4 million, 21.6% higher than the US\$ 145.1 million budget set by OCN. R-95 ¶ 13). This trend continued in 2008, where operating costs were US\$ 210.4 million – 39.2% higher than budgeted. (R-II ¶ 192 n. 301).
735. Regarding the difference between actual expenses and budgeted expenses, Respondents state as follows:
152. Expert opinions are not required to prove that actual expenses and budgeted expenses rarely coincide in the petroleum industry or, indeed, in any industry. As Claimant well knows, actual expenses in the oil industry have increased dramatically in recent years with the price of oil, as demand for oil industry materials and services skyrocketed, quickly rendering the most meticulously prepared budgets obsolete. It should come as no surprise that the Cerro Negro Project was no exception. As detailed in the Direct Testimony of José Pereira, the Finance Manager for PetroMonagas, the mixed company that now operates the Cerro Negro Project, actual expenses of the Cerro Negro Project for 2007 were much higher than the budgeted amounts used by Claimant and its experts in their calculations of Adjusted Net Cash Flow for Fiscal Year 2007. (R-II ¶ 152).
736. Claimant's assumption of annual cost increases of only 2% *per annum* finds no support in either the formulas in the AA, the experience of the oil industry, or the history of the Project where actual costs have regularly exceeded budgeted costs. (R-II ¶¶ 192, 197). In the oil industry, the inflation rate in 2005 – 2007 alone was 4.5 greater than general inflation in the U.S. (R-II ¶ 191). Respondents' experts provide tables demonstrating that, over

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the 5 year period ending in 2007, cost inflation in the petroleum industry ranged from 19 – 41%, while inflation in the U.S. economy generally was just over 8%. (Pulliam and Finizza, R-93 ¶ 88 Table 13). These costs move upward when the price of oil rises, but do not fall with declines in oil prices. (Brailovsky and Wells, R-98 ¶¶ 77-76). Realistic projections of costs based on actual Project data and industry experience are necessary.

737. Respondents state that it is widely known that budgets in large oil projects, such as the Project, can be and often are off-target by wide margins. (R-III ¶ 217). This was also consistent with the experience of the Project, where there have been serious underestimations of important cost items, even in short-term projections. (R-III ¶ 218). Respondents provide several examples based on the history of the Project, demonstrating “*the obvious reality that the budgeting process is characterized by uncertainty and inexactness and that one can never substitute a budget for actual experience even in the short term.*” (R-III ¶ 119).
218. [OCN] budgeted the initial turnaround of the Cerro Negro upgrader at US\$18 million in December 2004. In November 2005, after having expanded US\$9 million on the turnaround, OCN budgeted an additional US\$23.3 million for the completion of the turnaround activities in 2006. By the end of 2006, the turnaround had already cost almost US\$44 million against an original budget of US\$18 million. (R-III ¶ 218).
220. Claimant’s argument with respect to the potential cost of future turnarounds is even more far-fetched. Attempting to undermine the estimate of US\$100 million in 2010 dollars provided by José Pereira in his Direct Testimony, Claimant introduces statistics and testimony that do not relate to the specific circumstances of the Cerro Negro Project, ignoring both the actual cost of the limited initial turnaround that had commenced in 2005, oil industry and Venezuelan inflation since 2005, and the expected scope of the more expansive second turnaround in 2010. (R-III ¶ 220).
221. Claimant’s calculations initially assumed that future turnarounds would cost US\$22.6 million in 2007 dollars. It then adjusted its position to US\$31.6 million in 2007 dollars for future turnarounds based upon the Direct Testimony of Mr. Lawless who stated that the initial turnaround cost US\$30.5 million in 2006 dollars. As described above, and as detailed in the Supplemental Pereira Direct Testimony, the actual cost of the initial turnaround was approximately US\$44 million in 2005 and 2006 dollars. Just by applying oil industry inflation indices and

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Venezuelan inflation to that figure, one arrives at an estimated cost for a 2010 turnaround of US\$94.7 million [...] (R-III ¶ 221).

738. Respondents' expert describes Mr. Lawless's estimate that future turnarounds should cost no more than US\$ 28 million in 2006 dollars as indefensible. (R-116 ¶ 31). Respondents provide tables to demonstrate these arguments at R-III ¶¶ 221 and 222.
739. In order to make an appropriate cost forecast, Respondents' experts adjusted costs upward based on the actual cost history relative to budget, over the past 2 years. They assume a turnaround cost of US\$ 100 million over 5 years (rather than US\$ 22.6 million, as Mr. Cline assumes). (R-93 ¶ 121 (iii)).
740. The consequences of Claimant's use of the 2006 budget are wide reaching, even extending into the *TIT* calculations. (R-II ¶ 154). Using the FY 2007 budget and a risk-free discount rate, as Claimant's witnesses were instructed to do, conveniently assumes away all risks for the 27.5 years in question. (R-II ¶ 210).
741. In his written testimony, Pereira suggests that the budget for 2007 was unrealistically low – the budget was less than the expenses that had been incurred during 2005 and less than the budget for 2006 (where the actual expenses were 11.5% greater than the budget amount, amounting to US\$ 163.3 million). (R-95 ¶ 11). When creating the 2007 budget, OCN knew of the inflationary pressures on costs on a going forward basis. (R-95 ¶ 12). Claimant's expert's (GCA) estimates for annual capital expenditure over the period 2009 – 2011 is lower than what was actually spent in 2008. (R-98 ¶ 74).
742. The cost experts also explain that coker drums will require repairs, and that this will result in increased costs. (R-116 ¶¶ 8 *et seq.*; C-213 ¶¶ 24 – 26). Respondents' expert notes that the repairs to the coker drums suggested by Claimant in Lawless testimony were inadequate. (R-116 ¶ 13). OCN's costs of US\$ 2.1 million to repair 2 of the 4 coker drums likely would have been

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higher than those that were actually incurred, unless OCN came to the timely conclusion that its technique was inappropriate. (R-116 ¶ 16).

743. Each of the following six arguments related to Claimant's **cash flow** calculations, in addition to the arguments related to the *CEX*, are relevant in Respondents' discount rate calculation.
744. *First*, Claimant has misrepresented the production capacity of the field at the time of the migration, ignoring facts that were well known to it. Rather than having the production capacity of 132,000 bpd of extra-heavy crude oil, in May 2007 the potential production capacity was only 110,000. At that time, 42 of the 150 wells were inactive "*due to pump failures, sand infiltration or high gas-to-oil ratios, as well as OCN's failure to rehabilitate inactive wells.*" (R-III ¶¶ 225-227). The number of inactive wells was on the increase as Claimant left Venezuela. (R-III ¶ 226).
745. *Second*, the history of the Project speaks against Claimant's assumption that production of extra-heavy crude oil over the 27.5-year period will always be at the level of 120,000 bpd and that production and sale of SCO will always be 108,600 bpd. The average sales of SCO being 96.6 million bpd – 11% less than Claimant's 108.6 estimate. Furthermore, the estimate ignores the high likelihood that production of either extra-heavy or SCO, or both, will be interrupted by events such as natural disasters, political events, work stoppages, equipment failure, and governmental and/or OPEC action.
746. *Third*, the assumption that all Government Actions over the next 27.5 years that would reduce cash flows constitute "*Discriminatory Measures*" overlooks the fact that neither the AA nor the Congressional Authorization for the Project purports to "*freeze*" the law of Venezuela or prevent such Governmental Action. Further, there are many measures affecting all oil upgrading projects in Venezuela, including environmental and conservation measures, sustainable development requirements, rental increases, and a

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host of others that would decrease cash flows without being “*Discriminatory Measures.*” (R-II ¶¶ 204 – 207).

747. *Fourth*, the demand for SCO over the 27.5 year period is uncertain. Marketing the Cerro Negro SCO has been difficult, as it is by far the worst quality of all SCO produced in Venezuela due to its low gravity and high sulfur content.
748. *Fifth*, Respondents point out that Claimant has failed to demonstrate that the change in operatorship was either a Discriminatory Measure or caused the increase in costs. (R-IV ¶ 56; R. Closing Slide 46). Mr. Massey even contradicted the theory. (R-IV ¶ 56). “*Even if it were true that the change in operatorship resulted in higher costs, that fact would not constitute a basis for indemnity under the AA unless the required change itself constituted a Discriminatory Measure, which clearly was not the case here.*” (R-III ¶ 215; R-IV ¶ 57).
749. *Sixth*, Respondents oppose Claimant’s assessment that the price of SCO will always remain above the **Reference (Threshold) Price**. Oil prices have been historically volatile and an “*average*” of price is not relevant under the **Threshold Cash Flow** formula. Rather, the price in each of the FY in question is important. (R-II ¶¶ 198 – 203).
750. In response to Claimant’s argument that the credit risk was not that of PDVSA but rather of the buyers of SCO, Respondents state that Claimant has fundamentally misunderstood what is at issue in the discount rate analysis, as there is no question that the alleged indemnification cash flows would come from PDVSA, not from the buyers of SCO. This is made clear by the entire analysis of Claimant’s own experts, who never mentioned that they were valuing cash flows from SCO buyers rather than PDVSA. (R-IV ¶ 74).
751. Respondents argue that it is impossible to determine what an appropriate markdown in volume of production and sales would be if one were to

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attempt to project revenues over the next 27.5 years. Respondents contend that, at the very least, the 5% reduction used by Respondents' experts based upon the history of the Project should be used. Other significant remaining risks would then be accounted for in the appropriate discount rate. (R-II ¶ 190).

752. Respondents take issue with Claimant's witnesses' testimony on virtually all aspects of the indemnity. Their conclusions were not based on expertise, but rather on the extensive instructions of counsel. (R-V ¶¶ 40 - 41).
753. Respondents assert that Claimant's witnesses' "*real risk-free tax-adjusted*" discount rate (which counsel instructed them to use) in effect is "*below risk-free*" and assumes away every risk that could come forward in 27.5 years. (R-II ¶¶ 208-210; R-III ¶ 198; R-IV ¶ 67). Respondents state that this rate does not comport with any recognized methodology for valuing future cash flows and that it ignored multiple types of risks – including operational, cost, price, governmental, and default risks – that must be taken into account in the determination of the discount rate. (R-II ¶ 212, R-III ¶ 198). Claimant's witnesses have stated that they considered all of these risks, but rather than account for them, the witnesses ignored them. (R-IV ¶ 70).
754. Respondents' experts also charge that Claimant's expert Prof. Myers's argument that "*[t]he risks of the indemnification cash flows, which are contractual obligations of PDVSA-CN and PDVSA, are minimal, similar to the interest and principal payments on a safe long-term bond*" is unsustainable. The diversification of risk theory that Prof. Myers used to arrive at this conclusion was also rejected in the Phillips case, chaired by the late Dr. Briner. (R-V ¶ 33; C-226; R-I47). The argument that the cash flows are as secure as a U.S. Treasury bond is also unsupported by the market treatment of the bond, which never considered the PDVSA bond to be the same as a U.S. Treasury bond. (R-III ¶¶ 201, 205; R-IV ¶ 71; R-V ¶ 34). "*The logical conclusion is that the discount rate for a fixed PDVSA payment obligation would have to be considerably higher than the U.S. Treasury*

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rate, and a discount rate for a contingent indemnification cash flow would have to be even higher to account for the additional risks not faced by a PDVSA bondholder.” (R-IV ¶ 71). Likewise, the US\$ 100 analogy made by Prof. Myers is both inapplicable and inapt. First, it demonstrates Claimant’s misunderstanding of the issue and task of an expert, namely, to determine the appropriate discount rates based on the risks of the cash flow. Second, it assumes that the alleged indemnification cash flow was as safe as a U.S. Treasury Bond, demonstrating that Claimant’s position that a risk-free discount rate should be used is completely untenable. (R-V ¶ 36).

755. Respondents maintain that, if the recognized ICAPM and other recognized methods for arriving at discount rates are not used, “*the absolute floor of any discount rate would have to be the PDVSA bond rate [Calculated at 9.91% based on the yield on the longest term PDVSA bond as of June 2007], as the purported cash flows are to come from PDVSA-CN or PDVSA itself under the PDVSA Guaranty.*” (R-III ¶¶ 199, 206; R-IV ¶ 72). Respondents’ experts emphasize the necessity of calculating the cash flow risks into the discount rate: “*unlike a general obligation bond of PDVSA, which has fixed amounts payable out of any PDVSA funds from all PDVSA projects, the indemnity cash flows at issue here would be totally dependent upon the Project’s performance and future events, all of which involve risks in addition to those of a PDVSA bond.*” (R-III ¶ 205; R-IV ¶ 71; R-V ¶ 34). Respondents’ experts assert that these cash flow risks, which are acknowledged, but underestimated by Claimant’s experts, could lower the prices and, therefore, the indemnity. Even Mr. Plunkett conceded that risks, including increased cost or reduced production as a result of non-discriminatory Venezuelan governmental measures or other potential events and incidents worldwide, would have a profound impact on the indemnity. (R-V ¶ 34).

756. In response to Prof. Myer’s argument that Respondents’ 19.8 % discount rate was double what the project discount rate should be, Respondents

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performed a calculation of the value of the Project, disregarding the limitation and using a 10% discount rate. The resulting number was lower than the present value of the purported indemnity cash flow using a risk-free discount rate. This result contradicts Claimant's argument that the value of the indemnity cash flow is but a "*tiny fraction*" of what the Project value would be without applying the limitation and demonstrates that the use of a risk-free discount would result in a value that would exceed the value of Claimant's interest in the Project. (R-IV ¶ 76; R-V ¶¶ 37 - 39).

757. There is no support for Claimant's argument that even a 10% discount rate would be too high. (R-V ¶ 39). Without conceding that the rate would be appropriate, Respondents state that even Prof. Myers states that 10% would be within an acceptable range for the Project. (R-V ¶ 39).
758. In response to Claimant's argument against incorporating Respondents' default risk into the discount rate, Respondents explain the Venezuelan principle of law that "*in a damage claim the court does not take into account the debtor's ability to pay in assessing damages,*" is irrelevant in this matter. (R-III ¶ 201). Unlike in a breach of contract action where the breaching party is responsible for the damage suffered, the damages complained of by Claimant are economic losses as the result of alleged "*Discriminatory Measures.*" The Tribunal is considering the valuation of indemnity cash flows, rather than compensation for any wrongful act of PDVSA. (R-IV ¶ 73). The economic losses at issue were not caused by an alleged breach by PDVSA-CN. The indemnity cash flows are, in effect, a form of insurance contract, "*and it is elementary that no valuation would ever be made of such an indemnity without considering the default risk of the insurer.*" (R-IV ¶ 73).
759. The appropriate discount rate is essential to establish the value of the indemnity cash flows. Respondents calculated their discount rate as follows:

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213. Respondents' experts Vladimir Brailovsky and Professor Louis T. Wells were instructed to use their best judgment and experience, without limitation, to determine the appropriate discount rate to be applied in calculating the present value of the projected future cash flows. [...] They were asked to assume only that: (a) contrary to the language of the AA, the formulas in the Accounting Procedures apply to future cash flows; (b) all of the measures taken by the Venezuelan Government at issue in this case constituted "Discriminatory Measures," even though that is clearly not the case; and (c) all of the other fundamental defenses interposed by Respondents, as set forth herein, are not accepted by this Tribunal. (R-II 213, partially quoted).
760. Respondents' experts analyzed Claimant's parent company ExxonMobil's historical rates of return and considered the hypothetical return that could be gained if a willing buyer were found for the Project prior to any events giving rise to the indemnity. For the latter analysis, Respondents' experts gathered data from unchallenged published sources and "*utilized variations of the well-known Capital Asset Pricing Model (CAPM) that have been developed for international markets (generally called International CAPM or ICAPM models) to determine the return on equity that would be required (and the discount rate that would be employed) by a buyer of the future stream of cash flows from an oil project in Venezuela. They benchmarked the results of their analysis against an on-going survey of bankers involved in international projects who rate countries worldwide to assess risk of default.*" (R-III ¶ 203, partially quoted, footnotes omitted; R-IV ¶ 69; R-V ¶ 33). As a result of these analyses, Respondents' experts concluded that the appropriate discount rate to use in connection with the stream of projected cash flows at issue in this case would be 19.8%. (R-III ¶¶ 213 – 217). Respondents' experts point out that Claimant's experts GCA have agreed that a similar and possibly higher rate of return would be acceptable for international projects. (R-III ¶ 205).

[Applying the 19.8% discount rate] to the cash flows of the project, utilizing all of the cost, volume and price assumptions that were used by Drs. Myers and Jones, with a single change – namely, they determine the **Reference (Threshold) Cash Flow** for each [FY] from 2008 through 2035 based upon the actual language of the formula, as described above, which requires deduction from **Reference (Threshold) Revenues** of the royalties and income taxes that "would have been paid," adjusted only to eliminate the effects of the alleged Discriminatory Measures. This change reduces the alleged undiscounted cash

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flows from US\$10.3 billion, calculated by Myers and Jones based upon the instructions of counsel described above, to US\$2.621 billion. Applying the 19.8% discount rate to that undiscounted cash flow would yield a net present value of US\$345 million, even assuming no adjustments to Claimant's unrealistic assumptions regarding costs and volume over the life of the project. Reasonable adjustments to the cost and volume projections – based upon actual historical figures as opposed to the 2006 budgeted figures used by Claimant's experts, would reduce the undiscounted cash flow to US\$1.837 billion. Applying the 19.8% discount rate to this figure results in a net present value of US\$232 million. (R-II ¶¶ 218-219, partially quoted, footnotes omitted).

761. Respondents challenge the “*application of a low discount rate as urged by Claimant [because such] would effectively defeat the entire purpose of the limitation of liability reflected in Article 15.2(a) of the AA and the implementing provisions of the Accounting Procedures.*” (R-III ¶ 208; R-IV ¶ 75). A low rate inflates the present value of the indemnity cash flows – even to the point to making the indemnity exceed the value of the interests in the Project, resulting in a windfall for Claimant, yielding a present value higher than the value of the entire Project without consideration of any limitation. (R-III ¶ 208; R-IV ¶ 75). To illustrate this “*windfall*”, Respondents apply the market discount rates of 19.8%, 18% and 16% to price scenarios that assume double and triple the **Reference (Threshold) Cash Flow** amount. Tables comparing these results to Claimant's are available at R-III ¶¶ 209 – 212 and R. Closing Slide 89.
762. Respondents present an additional series of calculations to illustrate how the indemnity provisions conceivably might operate if they were to be applied to future FYs under a variety of assumptions. (R-III ¶ 229 – 241). Each calculation employs the 19.8%, 18%, and 16% discount rates. Each “*adopts Claimant's interpretation of the calculation of royalties and taxes in arriving at the Reference (Threshold) Cash Flow. In Claimant's scenario, the royalties and taxes should be calculated as if the sales price of the SCO produced by the Project were not the market price but the Base (Threshold) Price, so that the royalties and taxes to be deducted from revenues are not, as the formula states, the royalties and taxes that 'would have been paid' in the FY in question absent the Discriminatory Measures but the royalties and taxes that might have been payable if the SCO price were equal to the Base*

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(Threshold) Price.” (R-III ¶ 231). Each calculation “*also gives effect to the provisions of the AA and the Accounting Procedures contemplating, and requiring, a comparison of a Brent-equivalent cash flow with the Reference (Threshold) Cash Flow.*” (R-III ¶ 232).

763. Respondents also provide a calculation for the event that the AA was extinguished and a forward-looking analysis were required, arguing that the purpose of the indemnity provisions would be served by determining the maximum indemnity to which Claimant might have been entitled had the Project continued with Claimant involved.

That amount would have been calculated based on the trigger for limitation of liability, which would have been reached, as stated in both the definition of **Reference (Threshold) Cash Flow** in the AA and in Section 15.2(a) itself, when the price per barrel of Brent crude oil reached US\$27 in 1996 dollars (which is US\$35.88 today). At that point, no indemnity would apply, even if the Government had taken discriminatory action against the Project or Claimant. As Claimant concedes, the price of the SCO produced by the Project was approximately 73% of the Brent price, due to the inferior quality of SCO as compared to Brent. Thus, when the price of Brent reached US\$27 per barrel in 1996 dollars, the sales price of SCO would be approximately US\$19.78 per barrel. The maximum cash flow protected by the indemnity would therefore be the cash flow resulting from the application of a sales price of production from the Project of US\$19.78 per barrel in 1996 dollars (or US\$26.29 today). (R-III ¶ 234, footnotes omitted; R-IV ¶¶ 61 – 64, partially quoted).

764. Respondents’ calculations are based on this concept of maximum protected cash flows, which adopts Claimant’s view of the **Reference (Threshold) Cash Flow** but gives effect to the entire structure of the AA and Accounting Procedures regarding the adjustments necessary to account for the quality and transportation differential between Brent and SCO as follows (R-III ¶¶ 235 – 241 numbers rounded, partially quoted, footnotes omitted):

236. Alternative 1. Assuming that all of Respondents’ defenses have been rejected and all measures constituted Discriminatory Measures and the projected cash flows are as fixed by Claimant based on the 2006 budget, the net present value of the **Reference (Threshold) Cash Flow** for FYs 2008 – 2035 as of 25 September 2007 would be US\$1,445 million (discount rate 16%), US\$1,288 million (discount rate 18%) or US\$1,173 million (discount rate 19.8%).

237. Alternative 2. Applying the same data as above, but assuming that the royalty does not give rise to an indemnity obligation, the net present

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value of the **Reference (Threshold) Cash Flow** for FYs 2008 – 2035 as of 25 September 2007 would be US\$1,004 million (discount rate 16%), US\$895 million (discount rate 18%) or US\$815 million (discount rate 19.8%).

238. Alternative 3. Applying the same data as the second alternative, but assuming that the income tax increases do not give rise to an indemnity obligation, the net present value of the **Reference (Threshold) Cash Flow** for FYs 2008 – 2035 as of 25 September 2007 would be US\$907 million (discount rate 16%), US\$811 million (discount rate 18%) or US\$740 million (discount rate 19.8%).
239. Alternative 4. Assuming the same data as in the first calculation except applying Respondents' experts reasonable adjustments to the cash flows based on the actual history of the project, the net present value of the **Reference (Threshold) Cash Flow** for FYs 2008 – 2035 as of 25 September 2007 would be US\$1,156 million (discount rate 16%), US\$1026 million (discount rate 18%) or US\$931 million (discount rate 19.8%).
240. Alternative 5. Assuming the same data as in the Fourth calculation, and that the royalty measures do not give rise to an indemnity obligation, the net present value of the **Reference (Threshold) Cash Flow** for FYs 2008 – 2035 as of 25 September 2007 would be US\$708 million (discount rate 16%), US\$628 million (discount rate 18%) or US\$570 million (discount rate 19.8%).
241. Alternative 6. Applying the same information as Alternative 5 and assuming that the tax measure does not give rise to an indemnity obligation, the net present value of the **Reference (Threshold) Cash Flow** for FYs 2008 – 2035 as of 25 September 2007 would be US\$643 million (discount rate 16%), US\$570 million (discount rate 18%) or US\$517 million (discount rate 19.8%).
765. Finally, Respondents remind the Tribunal of 2 cases in the record that address the issue of discount rates in international arbitrations and demonstrate the soundness of Respondents' approach to the discount rate issue:
77. [...] In the *Phillips* case, the tribunal, chaired by the late Dr. Briner, flatly rejected Prof. Myers' approach to determining the discount rate, and in particular his reduction of the discount rate based upon risk "diversification" (a theory which he said in this case permitted him to eliminate the discount rate implications of certain risks, but which is contrary to the discussion of diversification in Dr. Jones's article. [See also R-V ¶ 33.] The *Himpurna* case involved damages based on the value of a stream of future cash flows that the supplier would have earned under a take-or-pay power supply contract in Indonesia but for the breach. The tribunal recognized the importance of the "fundamental issue of country risk, obvious to the least sophisticated businessman," and found that a 19% discount rate was appropriate even though the

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cash flows at issue had no price risk, no currency risk and no marketing risk. (R-IV ¶ 77, citation omitted; case found at R-148 and C-226).

35. [...] *Himpurna* was introduced into this Arbitration by Respondents because it supports their position on discount rate. Commencing in the paragraph immediately succeeding the one cited by Claimant, the tribunal in *Himpurna* explained that although a cash flow “may be denominated in US dollars,” and although the contract “may stipulate absolute obligations to pay, it still makes a difference whether the issuer is Switzerland or Swaziland. . . . This is the fundamental issue of country risk, obvious to the least sophisticated businessman.” For that reason, the *Himpurna* tribunal rejected claimant’s proposed 8.5% discount rate as being far too low because it only included a 3% risk premium, which the tribunal considered to be “absurd.” The *Himpurna* tribunal found that a 19% discount rate was appropriate for that case, which involved a fixed and unconditional payment obligation under a long-term take-or-pay power purchase agreement in Indonesia, involving no marketing risk and no currency risk. In this case, the purported indemnity obligation is neither fixed nor unconditional and involves all of those and many other risks explored at the hearing. (R-V ¶ 35, citations omitted; case found at R-147).

K.VII.3.c. The Tribunal

766. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties’ Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-III	¶¶ 15, 265, 310 – 341
C-IV	¶¶ 9, 17 – 18, 57 – 60, 123 – 126, 162 – 221
R.App	¶¶ 6-7
R-II	¶¶ 150 – 219
R-III	¶¶ 192 – 241

Charts:

Submission	Pinpoint
R-II	¶ 186 (SCO Sales)
	¶ 215 (Table of Discount Rates)
	¶ 216 (Table of Discount Rates)
R-III	¶ 209 Inconsistent valuations when applying different discount rates to indemnity cash flows and project cash flows without limitation
	¶¶ 221, 222 (Turnaround Costs)
	¶¶ 225 – 227 (Production Capacity)
	¶¶ 236 – 241 (Indemnity Calculations with Discount Rates)

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Exhibits:

Exhibit	Document Name
C-2	Association Agreement Clause I <i>defining "Discriminatory Measures"</i> , Article 15.1(b)
C-4	Annex G (Accounting Procedures) to the Association Agreement Article 7.3
C-11	Congressional Authorization Fifteenth and Twentieth Conditions
C-18	Order and Reasons for Judgment Approved by the Court for Handing Down dated 20 March 2008 rendered in <i>Mobil Cerro Negro Limited and Petróleos de Venezuela, S.A.</i> , High Court of Justice – Queen's Bench Division Commercial Court, Case No: 2008 Folio 61, [2008] EWHC 532 ¶ 68
C-44	Declaration of Professor Eugenio Hernández-Bretón (27 September 2008) at ¶¶ 98 – 99
C-46	Expert Report of William B. Cline of Gaffney, Cline & Associates, Inc., "Technical Assessment of the Cerro Negro Contract Area" (26 September 2008) at pp. 16 – 26, 32, 34
App. 1	Production and Cost Profiles
Figure 13	Production Entitlement Distribution – Continuation of Current Operations
C-47	Expert Report of R. Dean Graves of Alvarez & Marsal, Dispute Analysis & Forensic Services, LLC, on 2007 ICC Damages Payable (26 September 2008)
Ex. 5	2004-2006 Damages Calculation
Ex. 10	2007 Damages Payable Calculation (Mobil-CN – 120kbd)
C-48	Expert Report of Professor Stewart C. Myers of the Brattle Group on the Value of Indemnification Cash Flows (28 September 2008) pp. 2 – 4, 6 – 20, fn. 22
App. C	Local Risks at C1-C9
App. D.	Legal Instruction for the Calculation of the Appropriate Quantum of the Indemnity for Fiscal Years 2008-2035 at D-1
Table 1	Fixed Reference Cash Flow Summary
Table 2	Fixed Reference Cash Flow (120,000 bbl/day EHO)
Table 3	Fixed Reference Cash Flow Present Value (120,000 bbl/day EHO)
Table 4	Forecast Reference Cash Flow (120,000 bbl/day EHO)
Table 5	Forecast Reference Cash Flow (Base Price and Forecasted SCO Price)
Table 6	Reference Cash Flow (Summary 2008 – 2035)
C-49	Expert Report of Sarah A. Emerson of Energy Security Analysis, Inc., "The Long-Term Price of Cerro Negro Crude" (15 September 2008) at pp. 3, 5 – 9, 11
C-50	Expert Report of Dr. Scott T. Jones of FTI Consulting, Inc. And Compass Lexecon ("Lexecon"), a Wholly-Owned Subsidiary of FT Consulting, Inc. (26 September 2008) and Attachments at 2 – 16
AttachB	Calculation of Forecast Reference Cash Flow at 2 – 6, 8
Figure 4	Calculation of Fixed Reference Cash Flow
Figure B3	Calculation of Revenues for Forecast Reference Cash Flow
Figure B4	Calculation of Forecast Reference Cash Flow

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- C-51 Cambridge Energy Research Associates, “The Cerro Negro Extra-heavy Oil Development: A World-class Asset” (26 September 2008) at 36, 40, 45
- C-69 Offering Memorandum, Cerro Negro Finance Ltd. (11 June 1998) at pp. 128 – 129, C-39-40
- C-87 Association Agreement Clause I, Articles 3.3, 4.5(i), 4.5(n), 11.1(a), 14.1, 14.2, 15.1(b), 15.2(a), 18.4, 23.7, Annex F Articles 3.3, 4.2 – 4.3, Annex G (Accounting Procedures) Articles 1.9.1, 1.2, 1.4, 2.12, 7.3, 7.5, 7.52
- C-134 Venezuelan Civil Code Art. 1276
- C-141 Association Oil Supply Agreement (also known as Chalmette Offtake Agreement), Mobil Cerro Negro, Lagoven Cerro Negro, S.A. and Chalmette Refining (1 November 1997) Annex B
- C-154 Letter dated 23 June 2005 from Ministry of Energy and Mines to Cerro Negro, Communication # 935
- C-167 BARRON’S DICTIONARY OF BUSINESS TERMS (3d ed. 2000)
- C-186 Transcript of *Aló Presidente* No. 288 (29 July 2007) p. 5
- C-213 Testimony of Brian Lawless (14 May 2009) at ¶¶ 5, 10, 12, 13, 17 – 32, 34 – 46, 48 – 51, 54, 59 – 68
- Ex. 1 1 December 2004 PCN Board Presentation
- Ex. 2 2 November 2006 PCN Board Presentation
- C-215 Second Declaration of Professor Eugenio Hernández-Bretón (14 May 2009) at ¶ 86
- C-216 Reply Expert Report of Dr. Scott T. Jones of FTI Consulting, Inc. And Compass Lexecon (15 May 2009) at ¶¶ 4, 13 – 16, 18 – 27, 31 – 32, 35, 37, 39, 95 Figures 2, 4, 6-7
- App. 17 Ramón Espinasa, “The Performance of the Venezuelan Oil Sector 1997–2008: Official vs. International and Estimated Figures,” Center for Hemispheric Policy, University of Miami, (26 February 2009)
- C-217 Reply Expert Report of R. Dean Graves of Alvarez & Marsal (12 May 2009) pp. 15 – 32
- C-218 Reply Expert Report of William B. Cline of Gaffney, Cline & Associates, Inc. (12 May 2009) pp. 3 – 15, Figures 2, 4
- C-219 Expert Report of Neil Earnest of Muse Stancil (11 May 2009) at ¶¶ 19 – 26, 33 – 37
- C-220 Reply Expert Report of Professor Stewart C. Myers of the Brattle Group (13 May 2009) at ¶¶ 5 – 8, 10 – 35, 38, 41, fn. 35, App. A and B
- Ex. 2 R. A. Brealey, S. C. Myers & F. Allen, *Principles of Corporate Finance*, 9th ed., New York: McGraw-Hill (2008)
- Ex. 4 Macquarie Research, ExxonMobil, “Put a Tiger in Your Bank,” December 13, 2007 pp. 4, 19
- Ex. 7 *Ibbotson Cost of Capital 2008 Yearbook*, Chicago: Morningstar, Inc. (2008)
- C-221 Reply Expert Report of Sarah A. Emerson of Energy Security Analysis, Inc. At 3 – 5, 8 – 11
- C-226 *Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, Award of 29 June 1989, 21 Iran-U.S. C.T.R. 79 (1989)
- C-227 *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB 84/3, Award of 20 May 1992, 8

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- C-244 ICSID Review-Foreign Inv. L.J. 328, 375 (1989)
Lyondell-CITGO Refining, LP v. PDVSA (S.D.N.Y. No. 02-CV-0795), Declaration of Álvaro Silva Calderón (23 May 2002)
- C-259 Common Security Agreement among Mobil Cerro Negro Holding, Ltd., *et al.* (18 June 1998) App. N
- C-261 PDVSA Bond Prospectus (4 December 2007) at 92 – 93
- C-262 *Lyondell-CITGO Refining, LP v. PDVSA* (S.D.N.Y. No. 02-CV-0795), Report of Barry Pulliam (30 September 2004)
- C-263 U.S. Energy Information Administration, “How dependent are we on foreign oil?” (27 April 2009)
- C-264 OPEC 2008 World Oil Outlook at 25
- C-275 DAN B. DOBBS, *DOBBS LAW OF REMEDIES*, Vol. 3, at 126 (2d ed. 1993)
- C-276 *American List Corp. V. U.S. News & World Report, Inc.*, 550 N.Y.S.2d 590, 593-94 (N.Y. 1989)
- C-327 Updated Expert Report of R. Dean Graves of Alvarez & Marsal, Dispute Analysis & Forensic Services, LLC (30 July 2010)
- C-328 Updated Expert Report of Dr. Scott T. Jones of FTI Consulting, Inc. And Compass Lexecon (30 July 2010)
- C-329 Updated Expert Report of Professor Stewart C. Myers of the Brattle Group on the Value of Indemnification Cash Flows (30 July 2010)
- C-330 Updated Expert Report of Sarah A. Emerson of Energy Security Analysis, Inc., “The Long-Term Price of Cerro Negro Crude” (July 2010)
- R-7 Decree-Law 5200 Art. 3
- R-8 *Mobil Cerro Negro Limited v. Petróleos de Venezuela, S.A.*, High Court of Justice, Queen’s Bench Division, Commercial Court (London), 2008 Folio 61 (Justice Walker), *Reasons for Judgment Approved by the Court for Handing Down and Order Discharging Freezing Injunction* (20 March 2008) ¶¶ 4, 5, 28(ii), 45, 68
- R-15 First Affidavit of Hobert Plunkett (21 January 2008)
- R-32 Argument of Ms. Otton-Goulder, *Mobil Cerro Negro, Ltd. V. Petróleos de Venezuela, S.A.*, High Court of Justice, Queen’s Bench Division, Commercial Court (London), 2008 Folio 61, 27 – 28
- R-35 Tr. 2 December 2008 Hearing pp. 2, 30 – 31, 58 – 59, 70 – 71, 84 – 85, 130, 141 – 142, 162
- R-36 Letter from Eugene D. Gulland, Esq., to Ben Preziosi, Esq., (23 December 2008)
- R-37 Outline Argument on Behalf of Claimant In Support of Its Application For an Order for Alternative Service and In Opposition to the Application by the Respondent to Discharge the Worldwide Freezing Order, dated 27 February 2008, *Mobil Cerro Negro Limited v. Petróleos de Venezuela, S.A.*, Claim No. 2008 Folio 61, High Court of Justice, Queen’s Bench Division, Commercial Court (London) ¶ 82, pp. 27 & 28
- R-38 Tr. 24 January 2008, *Mobil Cerro Negro Limited v. Petróleos de Venezuela, S.A.*, Claim No. 2008 Folio 61, High Court of Justice, Queen’s Bench Division, Commercial Court (London) p. 8, 9
- R-39 First Affidavit of R. Dean Graves (25 February 2008), *Mobil Cerro Negro Limited v. Petróleos de Venezuela, S.A.*, Claim No. 2008

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- R-43 Congressional Authorization Eighteenth and Twentieth Conditions
- R-72 Association Oil Supply Agreement (Chalmette Supply Contract) (1 November 1997)
- R-93 Expert Report of Barry Pulliam and Anthony Finizza, Ph.D., Econ One Research, Inc. (16 February 2009) at ¶¶ 1, 29 – 34, 41, 54(ii), 62 – 129, fn. 38, 43, Tables 11 – 13, 16
- App. 23 Supporting Data for Figure 4, Annual Average World Oil Prices 1970-2008 at 26
- App. 32 Supporting Data for Table 16, Calculation of Threshold Cash Flows, Fiscal Years 2008 – 2035
- R-94 Expert Report on Fiscal Year 2007 Indemnity Cash Flow Calculation, prepared by Vladimir Brailovsky, Economía Aplicada, S.C. (16 February 2009) at ¶¶ 22(i), (iv), 32 – 36
- App. 9 Wood Mackenzie, *ExxonMobil, Upstream RADAR Report*, July 2007
- R-95 Direct Testimony of José Ángel Pereira Ruimwyk (12 February 2009) at ¶¶ 7, 10 – 16, 18, 19, 22, 24 – 29, 31 – 33, fn. 1, 2, 9, 13, 14, 23, 24, 25, 26, 27, 30
- App. 5 Petrolera Cerro Negro Board of Directors Meeting, 2 November, 2006: Work Plan and Budget 2007 p. 31
- R-98 Expert Report on the Discount Rate to be Applied to Projected Cash Flows Prepared by Vladimir Brailovsky and Louis T. Wells, (16 February 2009) at ¶¶ 13 – 14, 19 – 44, 47 – 98, fn. 4, 33 and Tables 5 – 10
- R-99 *Marchers Back Work Stoppage in Venezuela*, LOS ANGELES TIMES, 24 December 2002
- R-100 Letter from Chalmette Refining, LLC to PDV Chalmette, Inc. (7 February 2008)
- R-101 *America is Addicted to Foreign Oil*, August 7, 2008, available at www.PickensPlan.com
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- R-107 International Energy Agency, MEDIUM-TERM OIL MARKET REPORT July 2008
- R-108 Gaffney, Cline & Associates Inc., *Memorandum: Expected Returns and Approval Economics* (18 May 2008)

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- R-112 Association Agreement Clause I, Article 15.2(a)
- R-113 Supplemental Expert Report on Fiscal Year 2007 Indemnity Cash Flow Calculation, Prepared by Vladimir Brailovsky (14 August 2009) at ¶¶ 9 – 16
- App. 12 Cash Flows for Fiscal Year 2008
- R-114 Supplemental Brailovsky/Wells Report at ¶¶ 7 – 39, 48 – 57, 62 – 81, 162 – 174, fn. 58, Table 2, 4
- App. 25 Richard J. Miller, “Sources and Uses of Non-proprietary Economic Data: What Every Evaluation Engineer Should Know,” Society of Petroleum Engineers No. 68596, April 2001
- App. 26 Glenn Boyle, “Corporate Investment Policy: What is the Cost of Capital?,” for *Telecom: Submission to Commerce Commission*, LECG (10 June 2002) pp. 8 – 9, 15 – 16
- App. 38 Calculation of the Net Present Value of Threshold Cash Flow under Alternative Assumptions
- R-115 Supplemental Expert Report of Econ One Research, Inc. (14 August 2009) at ¶¶ 19 – 31, 37 – 45
- R-116 Supplemental Direct Testimony of José Ángel Pereira Ruimwyk (11 August 2009) at ¶¶ 2 – 32, fn. 8, 23, 41, 43
- App. 27 Organic Labor Law [*Ley Orgánica del Trabajo*] Official Gazette No. 5.152 (Extraordinary), published 19 June 1997, Art. 195 and 207
- App. 28 PetroMonagas, “Automatic Head Opening System of Delta Valve” (English Translation and Spanish Original); Delta Valve Technical Specifications for Coker Drum Sliding Valves and Customer List
- App. 29 *Ley Contra los Ilícitos Cambiarios* (Law Against Illicit Exchanges) Official Gazette No. 38.879, published February 27, 2008, Art. 19
- R-117 Bernard Mommer, *Venezuela, Politics and Petroleum* (Cuadernos del Cendes, Year 16, No. 42 September-December 1999)
- R-124 Cerro Negro, Confidential Preliminary Information Memorandum, Vol. I, March 1998 p. I-8
- R-127 Annex G (Accounting Procedures) to the Association Agreement Articles 7.2, 7.3
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- R-146 Daniel Yergin, *It's Still the One*, FOREIGN POLICY (Sept./Oct. 2009)
- R-147 *Himpurna California Energy Ltd. (Bermuda) v. PT (Persero) Perusahaan Lustruk Negara (Indonesia)*, Final Award dated May 4, 1999, YEARBOOK COMMERCIAL ARBITRATION, Vol. XXV (A. Jan van den Berg ed., Kluwer Law International 2000) ¶¶ 13, 332, 335, 357 – 358, 364 – 371, 386
- R-148 *Phillips Petroleum Company Iran v. The Islamic Republic of Iran, The National Iranian Oil Company*, Case No. 39, Award No. 425-39-2 dated 29 June 1989, 21 IRAN-U.S. C.T.R. 79 (1989) ¶¶ 113, 136 – 155
- R-149 The Nineteenth Annual Society of Petroleum Evaluation Engineers Survey of Economic Parameters Used in Property Evaluation (June 2000) pp. 9, 11 – 12
- R-150 The Twentieth Annual Society of Petroleum Evaluation Engineers Survey of Economic Parameters Used in Property Evaluation (June 2001) pp. 15, 20 – 21
- R-151 S SPEE 2007 Property Evaluation Survey pp. 19, 24, 26
- Unnumbered Ministry of Energy, *Petróleo y Otros Datos Estadísticos 2006* (49th ed. 2008), at 61

Hearings:**At and Following the 2010 Hearings:**

Submission	Pinpoint
C-V	¶¶ 14 – 30
C-VI	¶¶ 47 – 62
R-IV	¶¶ 50 – 82
R-V	¶¶ 31 - 44
C. Closing	p. 24
C. Closing Slides	23, 34 – 54, 80
C. Opening Slides	30 – 48, 51 - 56

Speaker	Citation
Brailovsky	1835-1837, 1845, 1848-1849, 1855-1856, 1861, 1878-1883, 1885-1889, 1967
C. Closing	2086-2090, 2096
C. Opening	35, 63, 78

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Cline	1218, 1240, 1242-1250, 1266-1268, 1275-1278
Cranmer	446, 450, 458
Cutt	645, 651, 653 – 657, 691-692
Expert Conf.	1980-1985
Finizza	1772-1780, 1782-1783, 1786-1790, 1793-1797, 1812-1815, 1818
Graves	1526-1528, 1534-1535, 1537-1538, 1547-1548, 1558-1559, 1564, 1568-1572, 1581-1582, 1597-1603, 1606-1608, 1630-1632, 1653-1669, 1671-1672
Hoenmans	405, 414-415
Jones	1328-1330, 1335, 1358-1363, 1375-1378, 1383-1384, 1386, 1408 – 1410, 1417 – 1420, 1427, 1430-1431, 1435-1438, 1441-1442, 1449-1453, 1457-1460, 1471-1474, 1476, 1479-1483, 1487, 1503, 1504-1505
Lawless	1119-1121, 1123-1124, 1176, 1188-1189
Leitzinger	1823-1825, 1832
Massey	484, 500 - 501
Myers	1678-1679, 1682-1688, 1690, 1692-1693, 1695-1698, 1700, 1704, 1707-1708, 1714, 1716, 1735-1737, 1746-1747, 1762, 1765-1766, 1968 - 1969
Pereira	1033-1034, 1037-1040, 1048-1049, 1057, 1093-1096, 1101, 1103-1104, 1106-1108
Plunkett	796, 836-850
R. Closing	2107-2108, 2158-2165, 2169, 2170, 2174-2175, 2178-2180, 2182-2183, 2194
R. Opening	86, 91-92, 127-131
Ward	198, 223-224, 228, 307 – 308
Wells	1916, 1923, 1926-1929, 1935, 1938-1939, 1945-1947

767. As indicated above, the Tribunal's task is to apply the common intention of the Parties reflected in the AA. The interpretation of the Parties' agreement, and their intention should be based on the plain and ordinary meaning of the terms used by them, considering the agreement as a whole and its general context. The Tribunal has concluded that the intention of the Parties as reflected in the terms of the AA is to provide a basic level of compensation to the Claimant in the event of the occurrence of a Discriminatory Measure such as the ones it has found to have occurred in this case.

768. In light of the Tribunal's decisions and considerations, set out above, that it has jurisdiction to consider the issue of indemnity for FY 2008 – 2035, and its interpretation of the relevant provisions of the AA, the Tribunal hereby issues an Award of US\$ 894.9 million in favor of Claimant. The Tribunal

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thus accepts Respondents' calculation alternative 2 at the Discount Rate of 18%, found at Exhibit R-114 App. 38. This calculation assumes that all measures except for the Royalty Measures, could be classified as Discriminatory Measures. As a result of this calculation, the net present value of the Threshold Cash Flow for 2008 – 2035 as of 25 September 2007 is US\$ 894.9 million, using an 18% discount rate. The reasons for this decision, which are consistent with the decision above for FY 2007, are as follows.

769. As indicated and extensively discussed above, the Tribunal is authorized to award compensation for FYs 2008 – 2035. Pursuant to the terms of the AA, the calculation of compensation for the economic consequences of Discriminatory Measures, in general, is subject to a limitation contained in a formula which calculates compensation on a FY by FY basis. In this case, the Respondents argue that there can be no compensation because this formula and limitation cannot be applied in the future, since there will be no operations by the Claimant in the future and no actual figures on which to base the application of the formula. Indeed, this fact makes it difficult to apply the indemnity formula. While this fact makes it more difficult to apply the indemnity formula, the Tribunal considers that the mere fact of difficulty in applying the formula is not sufficient reason for it not to award compensation. Difficulty in calculating damages or compensation is often faced by arbitral tribunals and is not sufficient reason to deny compensation where liability has been established. In this case, the intention of the Parties was to provide a certain level of compensation to the Claimant in the circumstances found by the Tribunal to have occurred.
770. In this case, it is clear that after the expropriation of the Claimant's rights, the Claimant could have no **Net Cash Flow** as defined in the relevant provisions of the AA and the Accounting Procedures. As a result, the limitation based on the use of an actual **Net Cash Flow** cannot apply. This leaves two alternatives: (i) apply the provisions of the AA and the formulas

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in the Accounting Procedures in such a way that absence of actual **Net Cash Flow** does not prevent the application of the limitation intended by the Parties; or (ii) award damages “*at large*” under general damages principles at Venezuelan law. Neither of these alternatives would result in deciding *ex aequo et bono*. Rather, either would be the consequence of the application of the intention of the Parties as reflected in the AA as interpreted by the Tribunal. In the Tribunal’s view, the most satisfactory of the alternatives is the application of the limitation contained in the provisions of the AA and the Accounting Formulas. This approach reflects the Parties’ intention to provide limited contractual indemnification for Discriminatory Measures, rather than providing another broader form of compensation “*at large*.” In the Tribunal’s view, this can be achieved by adopting the approach proposed by the Claimant and its experts in respect of the application of the formulas in the Accounting Procedures. This is a reasonable, practical approach which is consistent with the Parties’ intention to provide a limited form of compensation. The Tribunal also accepts the Claimant’s use of budget data and historical results in the calculation of the various components of the formulas. However, as described below, it takes a different view with respect to the appropriate discount rate, which leads it to accept the Respondents’ alternative calculation of compensation payable contained in R-114, App. 38, Table A.38.3 (NPV @ 18%).

771. As in the previous section concerning the indemnity for 2007, the Tribunal again considers that the FY 2007 budget is the most accurate reflection of the Parties’ intent and expectation for the Project’s production, as well as costs. Indeed, the Parties agreed to this budget before the dispute arose. The budget also accurately indicates the anticipated SCO production and costs absent Discriminatory Measures. Finally, there is ample evidence in the record that it is not only feasible, but also probable that the Project, had it continued, could have met the budget – not only for 2008, but also for the years thereafter. (C-48 ¶ 3, p. 5). The Project had a demonstrated capacity to support the base EHO production of at least 120,000 bpd. (C-48 ¶ 3, p. 5).

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Accordingly, the Tribunal concludes that it is appropriate in the circumstances of this case and under the meaning of the AA to use the FY 2007 budget amounts for production and costs in the indemnity calculation.

772. As a practical matter, the use of budgeted data may prevent the double counting of some production risks when calculating the indemnity. In this way, the selected discount rate can accurately encompass the relevant potential risks in the indemnity cash flow.
773. With respect to the Discount Rate, the Tribunal notes that the AA does not explicitly provide a discount rate or provide the Tribunal direction in this respect. The Tribunal does not view this as evidence that the Parties did not intend for the indemnification calculations to apply in the event that the Project were to no longer exist, in situations such as that before the Tribunal. Nor does the Tribunal consider that the absence of a discount rate is evidence that the Tribunal should award an undiscounted compensation package, especially where industry and accounting practice speaks against such. (See R-98). Rather, the Tribunal considers that an integral part of its assessment of compensation due involves selecting an appropriate discount rate for the indemnity values. The Parties have each conceded the necessity of discounting the indemnity cash flows and have presented alternative calculations using different discount rates. The dispute is which discount rate is appropriate under the circumstances.
774. Generally speaking, the Tribunal considers that there is a difference between valuing future cash flows under an indemnity formula and valuing the potential cash flows from a project. There is a valid distinction between the two exercises, not the least of which being that there may be fewer risks to indemnity cash flows than to Project cash flows. At the same time, it is essential not to apply a discount rate which would “*add back the very risks that the indemnity protects against.*” (Myers’s Testimony at p. 1684). Rather, the discount rate should accurately reflect the risks related to the indemnity cash flow. In the present case, there are multiple risks to be taken

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into consideration and the indemnity cash flows are linked with Project cash flows. Accordingly, historical rates of return, as well as other methods for evaluating and selecting an appropriate discount rate, are of relevance.

775. Given volatility in rates of return and the contractual 35-year duration of the Project, the Tribunal considers that long-term historical rates of return are relevant in determining the discount rate. (R-98 ¶ 23). Likewise, the historical return to shareholders, both in ExxonMobil and in other comparable oil companies, is also of relevance. In this respect, it is important to note that the average return for ExxonMobil shareholders has been 18.4%, while shareholders in the five largest companies, including ExxonMobil, earned an average return of 17.1%. (R-98 ¶ 26). This is relevant and is some indication of the reasonable expectation of rates of return.
776. The Tribunal has also considered the WAAC or hurdle rates that companies set for their investments. The Tribunal also notes that Gaffney, Cline & Associates has stated that an 18% return for large projects would be acceptable. (R-108).
777. In the view of the Tribunal, the 18% Discount Rate proposed as an alternative by Respondents' counsel, while lower than the rates provided in the *Phillips* decision and the *Himpurna* case, appropriately reflects the risks related to the indemnity cash flow analysis in the present case. The "risk free" rate proposed by the Claimant is not acceptable. While the Tribunal does not accept that valuation of the indemnification payments is the same as valuation of the Project itself, in the circumstances of this case, the Discount Rate of 18% is the most appropriate of the rates proposed by the Parties.
778. In view of the above considerations, the Tribunal concludes that, for the period of 2008 to 2035, Respondents must pay Claimant compensation of US\$ 894.9 million.

K.VIII. Breach of the Association Agreement

K.VIII.1 Arguments by Claimant

779. As specified in ¶ 356 of Claimant's **Principal Memorial**, Claimant requests that the Tribunal declare that PDVSA-CN breached the AA (i) by failing to indicate its concurrence, pursuant to Section 15.1(b) of the AA, that Discriminatory Measures causing a Materially Adverse Impact had occurred;(ii) by failing to cooperate with Claimant in the prosecution of its legal action against the Republic of Venezuela; (iii) by failing to negotiate in good faith the calculation of the indemnity that PDVSA-CN was obligated to pay Claimant under the AA; and (iv) by failing to pay to Claimant the indemnity that PDVSA-CN was obligated to pay under the AA. Claimant also requests that the Tribunal declare that PDVSA breached the Guaranty by failing to perform the obligations of its Guaranteed Affiliate, PDVSA-CN, under the AA.
780. Claimant maintains that under Section 15.1(b) of the AA, PDVSA-CN had ninety (90) days after receiving a Notice of Discriminatory Measure to give notice of concurrence that Discriminatory Measures resulting in Materially Adverse Impact had occurred and to fulfill its obligations under Sections 15.1(a) and (b). Claimant further maintains that it provided such notices in June 2007 to PDVSA-CN, which – in spite of having acknowledged the expropriation of Claimant's interest in the Project – ignored these notices, failed to perform its obligations and thus breached the AA (C-I ¶ 82; C-III ¶ 247; C-VI ¶ 5). Specifically, Claimant contends that PDVSA-CN (i) failed to give Claimant notice of concurrence that Discriminatory Measures have occurred that caused a Materially Adverse Impact; (ii) failed to cooperate with Claimant in its legal action against the Government; (iii) failed to negotiate in good faith the calculation of the compensation required; and (iv) ultimately, failed to pay the compensation it owes to Claimant under the AA (C-III ¶ 243, 245-246).

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781. In particular, Claimant argues that (i) Article 1160 of the Civil Code required PDVSA-CN to interpret the AA in good faith and perform its obligations under the AA in good faith and (ii) that PDVSA-CN, in good faith, could not have failed to concur that at least the expropriation of Claimant's entire interest in the Project by operation of Decree-Law 5200 was a Discriminatory Measure resulting in a Materially Adverse Impact (C-III ¶ 244).
782. Furthermore, Claimant argues that PDVSA breached the Guaranty by failing to perform the obligations of its Guaranteed Affiliate, PDVSA-CN, under the AA, obligations which PDVSA was required to perform if PDVSA-CN did not and PDVSA was jointly and severally liable with PDVSA-CN (C-I ¶ 83).
783. In particular, Claimant maintains that on 10 October 2007, Claimant gave notice to PDVSA that PDVSA-CN was in breach of the AA and demanded performance by PDVSA of its obligation under the Guaranty, but that PDVSA did not perform PDVSA-CN's obligations and has not paid the compensation owed to Claimant and thus is in breach of its obligations under the Guaranty (C-I ¶ 83).
784. Finally, Claimant argues that its claims arose when Respondents failed to meet their obligations under the AA and the Guaranty. According to Claimant, Respondents breached the AA when they failed notably (i) to respond to Claimant's notices; (ii) to cooperate in good faith in negotiating and calculating the amount owed; and (iii) to pay the indemnity (C-V ¶ 12).

K.VIII.2 Arguments by Respondents

785. Respondents contend that, despite Claimant's efforts to argue that Respondents breached their obligations under the AA and the Guaranty by not immediately paying over whatever sum Claimant desired, it is clear under the AA that PDVSA-CN could not be in breach of anything and that PDVSA therefore could not be in breach of the Guaranty. According to

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Respondents, PDVSA-CN would have been perfectly within its rights to dispute the allegation (i) that a Discriminatory Measure had occurred giving rise to an indemnity obligation; (ii) that the other requirements of the AA for triggering indemnity had been met; or (iii) that the amount sought by Claimant was appropriate. Respondents assert that given the shortcomings of Claimant's case, Respondents' challenges are justified, and that the issue of breach would only arise if and when an arbitral tribunal determined that indemnification in a certain amount for specified Discriminatory Measures was due and was not thereafter paid in a timely manner. Respondents contend, therefore, that there has not been any breach of the AA by Respondents (R-III ¶ 50).

786. Thus, Respondents maintain that Respondents cannot be held to have acted in bad faith by not immediately (i) concurring with Claimant on its interpretation of the facts, the applicable law and the terms of the AA, and (ii) paying the amount claimed by Claimant, whether it was the US\$ 12 billion calculated by Mr. Plunkett, the US\$ 10 billion set forth in the Summary of Claimant's Position in the Terms of Reference, the US\$ 7.6 billion originally calculated by one of Claimant's external experts, the US\$ 6.45 to US\$ 6.85 billion claimed in the present arbitration, or the US\$ 5 billion that Claimant requested without explanation or discussion in the summer of 2007 for all of its interests in the Republic of Venezuela, including the Project and another project known as "*La Ceiba*." In light of the above, Respondents maintain that it is not clear what amount Claimant expected Respondents to pay (R-II ¶ 6).

787. Respondents contend that since the ICSID case was moving too slowly for Claimant, the latter brought this arbitration against Respondents in order (i) to obtain a worldwide freezing order and attachments not available in the context of the ICSID proceeding and (ii) to use this case to build an argument under the Chalmette Offtake Agreement supporting a future seizure of the 50% interest of a PDVSA subsidiary in the Chalmette refinery

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in Louisiana. According to Respondents, none of the tactical reasons mentioned above has anything to do with the merits of an indemnity claim against PDVSA-CN under the AA (R-V ¶ 45).

K.VIII.3 The Tribunal

788. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties' Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-I	¶¶ 76-85, 90
C-III	¶¶ 242-253; 356
C-IV	¶ 246
C-V	¶ 12
C-VI	¶ 5
R-I	¶¶ 16-19
R-II	¶ 2-10
R-III	¶ 50
R-V	¶ 45

Exhibits:

Exhibit	Document Name
C-44	Expert Opinion of Professor Hernández-Bretón at ¶¶ 33-40; 88, 96-106
C-103	106
C-141	Transcript of Bernard Mommer Interview (12 February 2008) p. 8 Chalmette Offtake Agreement

789. The Tribunal observes that Section 15.1(b) of the AA sets forth the conditions under which a party to the AA may commence arbitration under the AA. Section 15.1(b) provides that “[i]f, within the ninety (90) days following the receipt of the Notice of Discriminatory Measure, [PDVSA-CN] does not give [Claimant] notice of its concurrence that Discriminatory Measures resulting in a Material Adverse Impact have occurred, any Party may commence arbitration proceedings in accordance with Section 18.2.” The above provision therefore does not oblige PDVSA-CN to give notice of its concurrence that Discriminatory Measures resulting in a Material Adverse Impact have occurred within the specified ninety (90) days, as

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Claimant argues. To the contrary, Section 15.1(b) contemplates the possibility of bona fide disputes between the parties to the AA concerning the occurrence of Discriminatory Measures resulting in a Material Adverse Impact and sets up a framework for the resolution of such disputes by means of arbitration. In other words, PDVSA-CN and Claimant are free under the AA to disagree on whether Discriminatory Measures resulting in a Material Adverse Impact have occurred. In the event no agreement is reached between the Parties, any party may commence arbitration to resolve any outstanding disputes, including disputes relating to the occurrence of Discriminatory Measures, whether such measures have had a Materially Adverse Impact on the Foreign Party, the compensation payable in the event a Discriminatory Measure having a Materially Adverse Impact occurs and the appropriate recommendations on amendments to the AA to restore the economic benefit to the Foreign Party.

790. The Tribunal considers (i) that, given the complexity of the many issues that were raised and that were examined above, a bona fide dispute existed and exists between the parties to the AA concerning whether Discriminatory Measures resulting in a Material Adverse Impact have occurred in this case; (ii) that PDVSA-CN's participation in this arbitration initiated by Claimant for the resolution of the said dispute is contemplated by the procedure contained in Clause XV of the AA and, more specifically, in Section 15.1(b) of the AA; and (iii) that Claimant has not proven any bad faith on the part of PDVSA-CN.
791. In particular, the Tribunal is not persuaded by Claimant's argument that PDVSA-CN, in good faith, could not have failed to concur that at least the expropriation of Claimant's entire interest in the Project by operation of Decree-Law 5200 was a Discriminatory Measure resulting in a Materially Adverse Impact. The Tribunal considers it relevant in this context that Claimant, through written notice letters to Respondents (see e.g. C-5, C-6, and C-7), went directly to the Republic of Venezuela and entered into

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negotiations for an amicable settlement with the Government immediately after the four-month period established by Decree-Law 5200 for negotiation of the terms of migration ended without agreement having been reached with Claimant. Consequently, the Tribunal concludes, Claimant did not effectively attempt to negotiate from PDVSA-CN an admission that a Discriminatory Measure occurred, or a resulting payment, and/or modifications to the AA, concentrating, rather, on approaching the Government. The Tribunal next observes that Section 15.1(a) of the AA provides that PDVSA-CN shall cooperate with Claimant in the pursuit of legal actions undertaken by the latter to mitigate any damages suffered by it as a result of a Discriminatory Measure, “[i]f [PDVSA-CN] concurs that the Discriminatory Measure has occurred and has resulted in a Materially Adverse Impact [...]” The AA, through the above provision, therefore does not oblige PDVSA-CN, in every case, to cooperate with Claimant in the prosecution of its legal action against the Republic of Venezuela, as Claimant appears to argue. To the contrary, the AA obliges PDVSA-CN to cooperate with Claimant in such legal actions only if PDVSA-CN concurs that a Discriminatory Measure has occurred and has resulted in a Materially Adverse Impact.

792. The Tribunal considers, for the reasons stated above, that the AA therefore imposed no formal obligation on PDVSA-CN to cooperate with Claimant in the prosecution of Claimant’s legal action against the Republic of Venezuela. In addition, the Tribunal has already noted that, in fact, Claimant did not initiate any legal proceedings before the domestic courts of the Republic of Venezuela, but only filed the ICSID arbitration which was against the Government of Venezuela and in which PDVSA-CN was not a party or directly involved. Consequently, there were no legal actions in which PDVSA-CN could in fact cooperate with Claimant.
793. The Tribunal further observes that Section 15.1(a) of the AA also provides that PDVSA-CN and Claimant shall negotiate in good faith the

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compensatory damages necessary to remedy a Discriminatory Measure. Once again, however, this obligation under the AA applies only “[i]f [PDVSA-CN] concurs that the Discriminatory Measure has occurred and has resulted in a Materially Adverse Impact [...].”

794. The Tribunal considers, once again, that particularly since Claimant directly negotiated with the Government, the AA therefore imposed no formal obligation on PDVSA-CN to negotiate with Claimant the calculation of any indemnity. Even if one considers Dr. Mommer’s acknowledgement of expropriation as tantamount to concurrence that a Discriminatory Measure resulting in a Material Adverse Impact had occurred in this case, as the Tribunal has already noted, in fact, Claimant did not effectively attempt to negotiate payment from PDVSA-CN and/or modification to the AA, concentrating, rather, on the Republic of Venezuela, with which Claimant entered into negotiations for an amicable settlement immediately after the four-month period established by Decree-Law 5200 for negotiation of the terms of migration ended without agreement having been reached with Claimant. The Tribunal finally observes that Section 15.1(b) of the AA defines, in the following terms, the scope of arbitration proceedings brought to resolve disputes between the parties to the AA concerning whether Discriminatory Measures resulting in a Material Adverse Impact have occurred: “(i) a determination of whether one or more Discriminatory Measures have occurred and, if so, whether such measures have had a Materially Adverse Impact on [Claimant] ; and (ii) in the event of an affirmative answer to the two questions specified in clause (i) of this paragraph, an award for damages to compensate [Claimant] for the economic consequences of the Discriminatory Measure suffered by it to date [...].” Pursuant to this provision, therefore, when PDVSA-CN does not concur that Discriminatory Measures resulting in a Material Adverse Impact have occurred, PDVSA-CN is under no obligation to pay any indemnity to Claimant until an arbitral tribunal constituted in accordance with Section 18.2 of the AA has rendered an award (i) deciding that Discriminatory

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Measures resulting in a Material Adverse Impact have occurred and, (ii) in such a case, deciding the amount of compensation to be awarded.

795. In view of the above considerations, the Tribunal considers that the issue of breach would only arise if and when an arbitral tribunal determined that indemnification in a certain amount for specified Discriminatory Measures was due and was not thereafter paid in a timely manner. Such a determination is the purpose of the present award, which is particularly justified in light of the Tribunal's finding above that, in view of the complexity of the issues involved, (i) neither party was in a position to correctly evaluate its rights under the AA in the factual circumstances of this case when the dispute arose, and (ii) Claimant in good faith could believe it was entitled to billions of dollars and Respondents in good faith could believe that nothing was due under the AA.

796. Therefore, the Tribunal concludes that PDVSA-CN did not breach the AA for any of the reasons argued by Claimant and that, consequently, PDVSA did not breach the Guaranty by failing to perform the obligations of its Guaranteed Affiliate, PDVSA-CN, under the AA. Accordingly, the Tribunal finds that there are no grounds to grant Claimant's request for a declaration that PDVSA-CN breached the AA and that PDVSA breached the Guaranty.

**L. Considerations and Conclusions of the Tribunal
Regarding the Counterclaims**

797. This section considers Respondents' counterclaims and, therefore, presents Respondents' arguments prior to Claimant's arguments. To avoid confusion, "Respondents" in this section refers to PDVSA and PDVSA-CN, and Claimant continues to refer to "Mobil CN."

L.I. Jurisdiction**L.I.1 Arguments by Respondents**

798. Respondents have not presented any arguments related to jurisdiction.

L.I.2. Arguments by Claimant

799. Claimant argues that “*ICC tribunals have limited jurisdiction, based on the Parties’ agreement. In this case, the Respondents’ failure to specify the legal basis for each counterclaim has obvious jurisdictional implications.*” (C-II ¶ 10).

800. With respect to the counterclaim for damages resulting from the attachments in New York, Claimant submits that the Federal District Court in New York possesses jurisdiction over claims for damages arising from attachments granted by that court. (C-IV ¶ 19 point 3, ¶¶ 243-244).

L.I.3. The Tribunal

801. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties’ Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-II	¶ 10
C-IV	¶¶ 19, 243 - 244

Exhibits:

Exhibit	Document Name
C-189	Order of Attachment dated 27 December 2007 rendered in <i>Mobil Cerro Negro, Ltd. v. PDVSA Cerro Negro S.A.</i> , U.S. District Court for the Southern District of New York, Civil Action No. 07 Civ. 11590 (DAB)
C-201	New York Civil Practice Law and Rules § 6212(e)
C-273	<i>E.T.I. Euro Telecom International N.V. v. Bolivia</i> , No. 08-civ-4247 (S.D.N.Y. 9 December 2008)

Tribunal Materials

Document Name and Pinpoint

ICC Case 15416 Decision on Application by the Respondents for an Order Directing the Claimant to Withdraw the Attachments (19 December 2008)

802. The Tribunal is not persuaded by Claimant's objections to jurisdiction over the counterclaims. Claimant refers to the merits of the counterclaims which will be examined hereafter.
803. For the same reasons for which the Tribunal has accepted its jurisdiction above regarding the claims raised by Claimant, in view of the very broad wording of the arbitration clause in Article 18.2 AA, the Tribunal also has jurisdiction over the counterclaims raised.

L.II. Compensation for Attachment in New York

L.II.1. Arguments by Respondents

804. Respondents present their argument that they are entitled to relief for damages incurred as a result of the conservatory measures undertaken by Claimant at R-II ¶ 230 (partially quoted, footnotes omitted):

230. [...] ExxonMobil determined that it had not made sufficient progress in the negotiations with the Venezuelan Government and needed to apply pressure by asserting claims against Respondents for US\$12 billion in damages. The New York attachment was made despite the express understanding of good faith cooperation relating to the financing that the parties had been acting under for nearly an entire year and despite the provisions of the Termination Agreement, in which Claimant represented that "there is no provision of law, statute, regulation, rule, order, injunction, decree, writ or judgment. . . that . . . would prohibit, conflict with or in any way prevent the execution, delivery or performance of the terms of this Agreement." (R-II ¶ 230)

805. The attachments were unnecessary and improper in light of the fact that Respondent PDVSA, through PDV Chalmette, is still a 50/50 partner with an affiliate of ExxonMobil in Chalmette Refining. This joint venture has an estimated value of US\$ 3.6 billion. (R.App. ¶ 10). Respondents' interest cannot be sold without ExxonMobil's permission. Respondents argue that this provided Claimant a security as a matter of fact.

L.II.2. Arguments by Claimant

806. Claimant states that it sought and obtained conservatory measures in five jurisdictions (New York, England and Wales, the Netherlands, Curacao, and Aruba) to ensure that the Award to be rendered in this case would not become illusory through dissipation of the Respondents' assets.

242. The undisputed evidence demonstrates that the attachments were necessary to preserve [its] ability to enforce the Award it seeks in this arbitration proceeding. PDVSA-CN has been stripped of all its assets other than the funds attached in New York. Venezuelan officials have publicly stated that "PDVSA-CN does not exist." PDVSA's financial condition has declined over the last several years, and PDVSA has sold or announced its intention to sell many of its assets in the United States, the Netherlands Antilles, the Bahamas, Germany, the Netherlands, Sweden, and the United Kingdom. Mobil CN faced the possibility that, before this arbitration could begin, any eventual award from the Tribunal would be meaningless. (C-IV ¶ 242, partially quoted, footnotes omitted).

807. The conservatory measures were permissible under Article 23(2) of the ICC Rules and the respective jurisdictions. (C-II ¶¶ 12-13, 15, 16). All except the conservatory measures in England and Wales remain.

808. Finally, Claimant states that "*the New York attachment was issued subject to a fully contested proceeding which Respondents have chosen not to appeal.*" (C.Reply ¶ 4; C-IV ¶¶ 241). Further, "*Respondents have made no showing that the attachment was wrongful in any respect and they ignore that, under New York law, the federal district court in New York possesses jurisdiction over claims for damages arising from attachments granted by that court.*" (C-IV ¶¶ 19 point 3, 243-244).

L.II.3. The Tribunal

809. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties' Briefs and of the evidence:

Party Submissions:

<u>Submission</u>	<u>Pinpoint</u>
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C-II	¶¶	12 – 16
C-IV	¶¶	19, 240 – 244
C. Reply	¶¶	4 – 5
R-II	¶¶	230 – 232, n. 359
R. App	¶	10

Exhibits:

Exhibit	Document Name
C-18	Order and Reasons for Judgment Approved by the Court for Handing Down dated 20 March 2008 rendered in <i>Mobil Cerro Negro Limited and Petróleos de Venezuela, S.A.</i> , High Court of Justice - Queen's Bench Division Commercial Court, Case No: 2008 Folio 61, [2008] EWHC 532
C-19	Order Confirming Attachments dated 20 February 2008 rendered in <i>Mobil Cerro Negro, Ltd. v. PDVSA Cerro Negro S.A.</i> , U.S. District Court for the Southern District of New York, Civil Action No. 07 Civ. 11590 (DAB)
C-20	28 January 2008 letter from the Claimant to The Secretariat of the International Court of Arbitration, informing of application for and issuance of Freezing Injunction and Disclosure Order against Respondent Petróleos de Venezuela, S.A. in the High Court of Justice - Queen's Bench Division Commercial Court in London
C-21	8 February 2008 letter from the Claimant to The Secretariat of the International Court of Arbitration, informing of application for and issuance of orders of attachment against Respondent Petróleos de Venezuela, S.A. in the District Court of Amsterdam, the Kingdom of the Netherlands; the Court of First Instance of the Netherlands Antilles in Willemstad, Curacao; and the Court of First Instance of Aruba in Oranjestad, Aruba
C-22	Tr. of "Declarations of the Minister of Popular Power for Energy and Petroleum and President of PDVSA, Rafael Ramírez, on the ExxonMobil - PDVSA Arbitration Case" [<i>Declaraciones del Ministro del Poder Popular para la Energía y Petróleo y Presidente de PDVSA, Rafael Ramírez, sobre el caso Arbitraje Exxon Mobil-PDVSA</i>] dated 8 February 2008, available at www.pdvsa.com
C-23	Petróleos de Venezuela, S.A.'s Offer to Purchase and Consent Solicitation Statement dated 29 November 2007
C-24	Articles of Incorporation and By-Laws of Mixed Company Petromonagas, S.A. [<i>Acta Constitutiva y Estatutos Sociales de la Empresa Mixta Petromonagas, S.A.</i>] (published in Official Gazette of the Bolivarian Republic of Venezuela No. 38.883 of 4 March 2008)
C-25	Consolidated Financial Statements as of 31 December 2007 and 2006 of Petróleos de Venezuela, S.A. and Affiliates With Report from the Independent Public Accountants [<i>Estados Financieros Consolidados 31 de diciembre 2007 y 2006 de Petróleos de Venezuela, S.A. y sus Filiales Con el Informe de los Contadores Públicos Independientes</i>]
C-26	<i>PDVSA 1H07 Profits Drop 68.5% to US\$896mn</i> , Business News

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- Americas, 21 February 2008
- C-27 *Citgo Scales Back in the U.S. to Fund Chávez's Goals*, The Wall Street Journal, 16 November 2007
- C-28 *BORCO Buyers Inject \$550M in Equity Capital*, The Tribune, 30 April 2008
- C-29 *Citgo Sells Eagle Oil Products Line to Explorer*, Reuters UK, 24 August 2007
- C-30 *Citgo Sold the Refineries Paulsboro and Savannah to NuStar* [*Citgo vendió las refinerías Paulsboro y Savannah a NuStar*], El Universal, 8 November 2007
- C-31 *Venezuela Considers Sale of U.S. Refineries*, The New York Times, 2 February 2005
- C-32 President Chávez Announced the Strategy to Latinoamericanize International Investments of PDVSA [*Presidente Chávez Anunció la Estrategia de Latinoamericanizar Inversiones Internacionales de PDVSA*], press release of Ministry of Popular Power for Communication and Information of the Bolivarian Republic of Venezuela, 1 February 2005
- C-38 Propernyn B.V.'s Annual Accounts 2003 and Report to Management dated 20 December 2005
- C-189 Order of Attachment dated 27 December 2007 rendered in *Mobil Cerro Negro, Ltd. v. PDVSA Cerro Negro S.A.*, U.S. District Court for the Southern District of New York, Civil Action No. 07 Civ. 11590 (DAB)
- C-190 Order of Supplemental Attachment (S.D.N.Y. 8 January 2008)
- C-201 New York Civil Practice Law and Rules § 6212(e)
- C-202 *SiVault Sys., Inc. v. Wondernet, Ltd.*, 2005 WL 681457 (S.D.N.Y. 25 March 2005)
- C-203 Declaration of Leonardus Cornelis Jacobus Maria Spigt at 13-18
- C-273 *E.T.I. Euro Telecom International N.V. v. Bolivia*, No. 08-civ-4247 (S.D.N.Y. 9 December 2008)
- R-12 First Affidavit of Armando Giruad (13 February 2008) 30 – 33
- R-15 First Affidavit of Hobert Plunkett (21 January 2008)
- R-16 Attachment Order of the Court of First Instance of Curaçao (1 February 2008); Attachment Order of the Court of First Instance of Aruba (1 February 2008); Attachment Order of the District Court of Amsterdam (5 February 2008)
- R-28 PDVSA Discussion Materials (Chalmette Refinery), prepared by Morgan Stanley (July 10, 2007)
- R-30 Affidavit of Brian O'Kelly (23 January 2008) submitted to the U.S. District Court for the Southern District of New York in *Mobil Cerro Negro, Ltd. v. PDVSA Cerro Negro, S.A.*, 07 Civ. 11590 (DAB at ¶¶ 30-37)
- R-32 Argument of Ms. Otton-Goulder, *Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela, S.A.*, High Court of Justice, Queen's Bench Division, Commercial Court (London), 2008 Folio 61
- R-35 Tr. of 2 December 2008 Hearing 100, 110 – 114, 169 – 170
- R-39 First Affidavit of R. Dean Graves (25 February 2008) *Mobil Cerro Negro Limited v. Petróleos de Venezuela, S.A.*, Claim No. 2008 Folio 61, High Court of Justice, Queen's Bench Division, Commercial Court (London)

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- R-110 Docket Account Management System Report, Case No. 1:07 CV 11590-1, United States District Court, Southern District of New York
- R-119 Second Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (14 August 2009) at ¶¶ 26 – 27
- App. 46 First Affidavit of Luis A. Ortiz-Álvarez (22 January 2008) submitted in *Mobil Cerro Negro Ltd. v. Petróleos de Venezuela, S.A.*, High Court of Justice, Queen's Bench Division, Commercial Court (London), Claim No. 2008, Folio 61
- R-120 Outline Argument on Behalf of Claimant in Support of Application for Worldwide Freezing Order (23 January 2008) submitted in *Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela, S.A.*, High Court of Justice, Queen's Bench Division, Commercial Court (London), Claim No. 2008 Folio 61 pp. 23 - 25

Tribunal Materials

Document Name and Pinpoint

ICC Case 15416 *Decision on Application by the Respondents for an Order Directing the Claimant to Withdraw the Attachments* (19 December 2008)

At and Following the 2010 Hearings:

Submission	Pinpoint
R-IV	¶¶ 5, 59 – 61
R. Closing	p. 94
R. Closing Slides	23, 80

Speaker	Citation
C. Opening	63
Cutt	773-775
Graves	1653-1668
Jones	1358-1363
Leitzinger	1823-1824
Myers	1697-1698, 1707 – 1708, 1746-1747
R. Closing	2124-2128
R. Opening	85-86

810. First, it is recalled that, on **19 December 2008**, this Tribunal denied the **Application by the Respondents for an Order Directing the Claimant to Withdraw the Attachments**. The relevant text of this Decision is provided in the Procedural History of this Award.

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811. The Tribunal notes that the procedure for attachments was permitted by Article 23.2 of the ICC Rules and that the courts in New York found the attachment to be justified. Where courts have issued interim measures, arbitral tribunals are generally reluctant, absent specific circumstances, to assess damages that may have flowed from the measures adopted by a state court. Here the New York courts considered the measure and upheld it. Damages related to the proceedings in London can be pursued there.
812. The Tribunal does not see specific circumstances which, nevertheless, would provide for the liability of the Claimant for compensation. First, it is noted that Respondent did not appeal the decision of the New York courts. Further, the Tribunal does not find that the attachment was abusive. Neither Party was in a position to correctly evaluate its rights under the AA in the factual circumstances of this case at that time. The Tribunal accepts that Claimant in good faith believed it was entitled to billions of dollars and Respondent in good faith believed nothing was due under the AA.
813. In view of the above considerations, the Tribunal concludes that the initiation of the attachments was not a breach of the AA or of the ICC Rules incorporated by its arbitration clause, and therefore no damages are due to Respondent in this regard.
814. However, even though this Tribunal has no competence to rule on enforcement, it deems it appropriate to state, *motu proprio*, and without creating any obligation for Claimant, that it would seem to be desirable that the attached amount of approximately US\$ 315 million, together with any accrued interest, be used by Claimant to partially satisfy the amount of the Award, to the fullest extent reasonably possible under the circumstances.
815. The Tribunal is also of the view that it has at least a *bona fide* responsibility to consider how payment of the attached funds can be made in order to avoid a situation where further court proceedings by either Party would become necessary to recover the attached funds together with any accrued

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interest, or where after payment of the present Award by Respondents, Claimant still has the attached funds at its disposition. Though this Tribunal cannot rule on these attached funds, it seems clear that it would indeed be abusive for Claimant to claim in such case payment of the attached funds for claims decided by the present arbitration. In view of this consideration, the Tribunal will grant Respondents 60 days to pay, in order to enable the Parties to agree on a solution in this regard, such as for example, either for Claimant to release the attached funds or to reduce the amount payable by Respondents in the same amount. It should be noted that this period is also relevant with regard to the cancellation of bonds considered later in this Award.

816. Finally, the Tribunal finds that the Claimant has not breached any obligation to Respondents and that, therefore, no payments or additional costs are due to Respondents.

L.III. Product Sold and Delivered After 26 June 2007**L.III.1. Arguments by Respondents**

817. After the four-month period for the agreement on migration, 2.98 million barrels of SCO with a value of US\$ 171,552,666 from the Project were shipped to the Chalmette Refinery. (R-II ¶ 221). When Mobil CN chose not to migrate, it lost all of its interest in the Project, including any barrels in “inventory.” (R-II ¶ 222 partially quoted, footnotes omitted). Mobil CN admits that it had no interest in approximately 1.68 million of the 2.98 million barrels of SCO that were delivered and that it owes PDVSA-CN approximately US\$ 96.1 million in respect of those barrels. The remaining 1.3 million barrels of SCO were valued at approximately US\$ 75.5 million, which is owed to Respondents.

L.III.2. Arguments by Claimant

818. Under Article 8.2(b) of the AA, title to the EHO extracted from the Project vested in the participants at the wellhead upon extraction, according to their

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participation in the Project. Accordingly, Mobil CN was the owner of its 41 2/3% share of EHO extracted before 27 June 2007 and of the SCO produced from that EHO. Mobil CN does not have to pay restitution for property it owned. (C-IV ¶ 224, footnotes omitted).

819. Claimant argues that **Decree-Law 5200** would not strip Claimant of title to the extracted oil because “[t]he operative part of **Decree-Law 5200** requires transfer of the activities of the Cerro Negro Association to PDVSA and does not purport to apply to oil inventory owned by the participants.” (C-IV ¶ 225).
820. As a further indication that Claimant had title to the oil, Claimant highlights that “[a] PDVSA subsidiary (PDVSA Petróleo, S.A.) prepared the bills of lading that designated the volumes as shipped ‘on behalf of Mobil CN’” and that this designation by a PDVSA subsidiary confirms that the 1.3 million barrels were, in fact, owned by Mobil CN. (C-IV ¶ 225).

L.III.3. The Tribunal

821. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties’ Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-II	¶¶ 18, 20, 24
C-III	¶ 309
C-IV	¶¶ 19, 223 - 226
R-II	¶¶ 221 - 223

Exhibits:

Exhibit	Document Name
C-33	30 July 2007 letter from David Perez, Vice President of Mobil Cerro Negro, Ltd. to Eulogio del Pino, PDVSA Petróleo, S.A., and Minister Rafael Ramírez, Minister for Popular Power for Energy and Petroleum of the Bolivarian Republic of Venezuela.
C-47	Expert Report of R. Dean Graves of Alvarez & Marsal, Dispute Analysis & Forensic Services, LLC, on 2007 ICC Damages

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	Payable (26 September 2008) pp. 15-17
Ex. 9	Adjusted Formula Price Based on Brent Ratio
Ex. 11	Summary of Post-Expropriation Shipping Revenue
C-87	Association Agreement Clause I <i>defining</i> “ <i>Commercial Production</i> ”, Article 8.2(b)
C-99	Decree-Law 5200 Art. 4, 5
C-265	Bills of Lading dated 28 June 2007, 2 August 2007, and 20 August 2007
R-14	First Affidavit of Brian O’Kelly (8 February 2008) ¶¶ 4-9

822. The entitlement to the 1.6 million barrels of oil in question (valued at US\$ 96,073,622 in Exhibit C-47 Ex. 11, which is referenced by both Parties) extracted after 26 June 2007 is not disputed: the Parties agree that this oil did not belong to Claimant and, therefore, its value should be offset against any amount of compensation ultimately awarded to Claimant in this Award.
823. As there is no dispute between the Parties in this regard, the Tribunal accepts Respondents’ claim to this extent. The Claimant has already acknowledged that the amount payable to it by the Respondents pursuant to this Award should be automatically reduced by US\$ 96,073,622 upon receipt by it of an appropriate release.
824. The 1.3 million barrels of oil (valued at US\$ 75,479,045, again in the same expert report referenced by both Parties) extracted before 26 June 2007 vested at the wellhead and became the property of Claimant under Article 8.2(b) of the AA, which remained in effect until that date. The Arbitral Tribunal does not see any legal basis to order restitution of property owned by Claimant to Respondent. The Tribunal, therefore, denies the counterclaim in respect of this portion of the 2.98 million barrels at issue.
825. Finally, the Tribunal finds that the Claimant has not breached any obligation to Respondents and that, therefore, no payments or costs are due to Respondents.

L.IV. Project Financing

L.IV.1. Arguments by Respondents

826. The essential facts are not in dispute. Claimant and Respondent PDVSA-CN were each responsible for 50% of the debt for the US\$ 600 million raised through the sale of bonds and the US\$ 300 million bank loan obtained to finance the Project. (R-II ¶ 224; C-IV ¶ 229).
827. After the issuance of **Decree-Law 5200**, PDVSA-CN and Claimant agreed to determine an appropriate strategy to avoid a potential default. Rather than redeem the bonds and incur a redemption premium of US\$ 100 million, *“PDVSA made a tender offer for the bonds which required the payment of principal, accrued interest[,] and a premium equal to about one-third of the redemption premium that would have been required in a redemption scenario.”* (R-II ¶ 225).
828. On **28 December 2007**, PDVSA repaid the outstanding bank debt and accrued interest in the amount of US\$ 129,138,839 million and paid US\$ 501,140,756 to acquire 99.11% of the outstanding bonds. PDVSA incurred fees and transactional costs totaling US\$ 1,094,726. (R-II ¶ 226; C-217 p. 35). Respondents argue that these transactions were necessary to avoid a declaration of default under the financing agreements which would have resulted from the Government’s actions – not from any actions of the Parties before this arbitration. (R-II ¶ 228).
829. Mobil CN has benefitted from Respondents’ actions. Mobil CN made no payments to creditors and was relieved of any obligations toward creditors. Further, *“the collateral that had been established for the benefit of the creditors, including cash of approximately US\$250 million in collateral accounts maintained at the Bank of New York, was released to Mobil CN.”* (R-II ¶ 226). Having benefitted from the transactions that were funded by PDVSA, Claimant cannot now claim that PDVSA must bear the full costs on its own. (R-II ¶ 228).

L.IV.2. Arguments by Claimant

830. Claimant argues that PDVSA has no right to pursue a counterclaim based on the outstanding bonds, unless Mobil CN were to default on its payment obligations under those bonds. PDVSA acknowledges that, since December 2007, Mobil CN has made principal payments toward Mobil CN's portion of the bond liability and interest payments as due. (C-IV ¶ 233 footnotes omitted).

831. Although PDVSA has no right to pursue a counterclaim based on the outstanding bonds, Claimant states that it is willing to credit its 50% share of the outstanding amounts of the bonds held by PDVSA against the Award obtained in this proceeding, provided that PDVSA cancels the bonds. Claimant is not liable for the bond premium and transactional costs, which were caused by the expropriation of Claimant's investments. (C-IV ¶ 228).

832. Claimant acknowledges that it received a benefit from PDVSA's repayment of the bank loan and that an amount of approximately US \$64.6 million corresponds to Claimant's share of the repaid debt. It states that it is willing to have this amount credited against an award against the Respondents in return for an appropriate release. Claimant also argues that it is also not liable for the bank loan restructuring costs. Under Article 23.9 of the AA, neither party shall have liability arising from transactions of the kind the Respondents executed to restructure the debt. Article 23.9 of the AA provides as follows:

23.9 Any agreement entered into by any of the Parties which [...] is outside the scope of this Agreement shall not be binding on the other Parties [...]. Only the Party entering into such agreement shall be subject to any liability that might arise there from. Each one of the Parties shall be liable for its own financing and none of the Parties shall incur liability for the debt, interest or fees arising from any financing obtained by the other Parties (or their Affiliates) in connection with the Project; it being understood that none of the Parties shall be obligated to participate in financings available to the other Parties.

833. Claimant maintains that "*the repayment of the bank debt and purchase of the bonds occurred at PDVSA's initiative, as a result of negotiations*

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between PDVSA and its creditors, and was designed to avoid the adverse consequences that PDVSA would have suffered from a declared default.” (C-IV ¶ 237). Claimant did not participate in the bond tender offer and PDVSA was the sole purchaser of the bonds. (C-IV ¶ 238; C-23). Further, there is no legal authority for PDVSA’s alleged right to recover costs that were attributable to its actions – especially in light of the fact that *“the restructuring was prompted by the expropriation of Mobil CN’s participation in the venture by PDVSA’s owner.”* (C-IV ¶ 237).

834. Claimant also points out that PDVSA acknowledges that the debt restructuring was necessary because of *“actions by the Venezuelan Government”* and puts forward an equity argument in this respect:

To require Mobil CN to pay for the debt restructuring necessitated by the expropriation of its assets to preserve the creditworthiness of PDVSA — whose sole shareholder, the Republic of Venezuela, carried out the expropriation — serves no equitable interest. On the contrary, equity demands that PDVSA bear the entire cost of the transactions. Mobil CN has already affirmed its willingness to credit its share of the bank loans against an award from this proceeding as well as its willingness to credit the outstanding bonds against such an award, provided that PDVSA cancels them. In equity and good conscience, PDVSA can ask for nothing more. (C-IV ¶ 239).

L.IV.3. The Tribunal

835. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties’ Briefs and of the evidence:

Party Submissions:

Submission		Pinpoint
C-II	¶¶	28 – 38
C-III	¶¶	341
C-IV	¶¶	227 - 239
R-I	¶	45
R-II	¶¶	224 – 229 fn. 357

Exhibits:

Exhibit	Document Name
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C-23	Petróleos de Venezuela, S.A.'s Offer to Purchase and Consent Solicitation Statement dated 29 November 2007 at 1
C-34	30 March 2007 letter from Allen Broyles, First Vice-President of ABN AMRO Bank, N.V., acting as Facility Agent for Bank Lenders, to Mr. Eulogio del Pino, PDVSA Cerro Negro, S.A. and Mr. James Massey, Mobil Cerro Negro, Ltd.
C-35	26 April 2007 letter from Deutsche Bank Trust Company Americas Trust & Securities Services, as Bond Trustee, to The Bank of New York.
C-36	20 June 2007 letter from Andrew P. Strehle, Brown Rudnick Berlack Israels LLP, to Steven J. Reisman, Esq., Curtiss, Mallet-Prevost, Colt & Mosle LLP, and Mitchell A. Seider, Esq., Latham & Watkins LLP.
C-37	Amended & Restated Bond Indenture among Cerro Negro Finance, Ltd., Mobil Cerro Negro, Ltd., PDVSA Cerro Negro, S.A., and Deutsche Bank Trust Company Americas, dated 28 December 2007 (without exhibits) §§ 1.01, 2.09, 5.06
C-47	Expert Report of R. Dean Graves of Alvarez & Marsal, Dispute Analysis & Forensic Services, LLC, on 2007 ICC Damages Payable (26 September 2008) p. 17
C-69	Offering Memorandum, Cerro Negro Finance Ltd. (11 June 1998)
C-87	Association Agreement Article 23.9
C-217	Reply Expert Report of R. Dean Graves of Alvarez & Marsal (12 May 2009) at 32, 33
App. 8	Bond Payment Information
C-327	Updated Expert Report of R. Dean Graves of Alvarez & Marsal, Dispute Analysis & Forensic Services, LLC (30 July 2010)
R-14	Affidavit of Brian O'Kelly ¶¶ 4 – 9

836. The Tribunal considers it obvious that Claimant should not be liable for any financing or additional costs caused by the Government's Discriminatory Measures.

837. The Tribunal takes note of Claimant's statement that it is willing to credit its share (50%) of the bank loan repaid by PDVSA against an Award in this proceeding, as well as its share (50%) of the outstanding amounts of the bonds held by PDVSA against an Award obtained in this proceeding upon receipt by it of an appropriate release. Indeed, there seems to be no controversy between the Parties that Claimant is 50% responsible for the principal amount of the bonds and loans.

838. The Tribunal notes that in 2007, shortly after the issuance of **Decree-Law 5200**, the Parties "[...] agreed to work together [...] to avoid a potential

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default with respect to the financing obligations for the Cerro Negro Project and to determine an appropriate strategy.” (R-II ¶225). In these circumstances, doubts could be raised as to whether the financing would be solely an obligation of PDVSA.

839. However, the Tribunal considers that Article 23.9 of the AA is so broadly phrased that it must cover also this situation, notably by providing that “[...] *each party is liable for its own financing and none of the Parties shall incur liability for the debt, interest or fees arising from any financing obtained by the other Parties [...]*”
840. Therefore, the Tribunal concludes that this counterclaim for related costs must be denied.
841. With respect to the outstanding bond liability, the Tribunal notes that neither of the Parties sought any express relief regarding the cancellation of the bonds. The Tribunal accepts the Claimant’s position that while it maintains its payment obligations under the bonds, there is no basis for a claim against it for repayment of its share of the outstanding bond liability. Further, there was no evidence that the Claimant was in default of any of its obligations under the bonds. Accordingly, there is no basis to grant this portion of the Respondents’ counterclaim. Nevertheless, the Claimant has repeatedly stated that it is willing to credit its 50% share of the outstanding bond liability against an award obtained against the Respondents in this proceeding, provided that PDVSA cancels the bonds. In light of this, the Tribunal is prepared to grant the Respondents a period of 60 days to pay the award in order to permit PDVSA time to make appropriate arrangements to cancel the bonds and provide suitable confirmation to the Claimant. If this can be achieved within the 60 day period, the amount owing by the Claimant may be set off against the Award granted in its favor.
842. With respect to the Claimant’s share of the bank debt repaid by PDVSA, US\$ 129,138,839, the Tribunal notes that the Claimant does not dispute its

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responsibility for half of this amount, US\$ 64,569,420 and is willing to have this amount credited against an Award entered against the Respondents subject to obtaining an appropriate release from PDVSA. (C-217 p. 35). In these circumstances, the Tribunal finds that the Respondents' counterclaim in the amount of US\$ 64,569,420 is warranted and should be granted on the condition that an appropriate release be obtained and provided to the Claimant. Provided this is done within 60 days of this Award, the amount of US\$ 64,569,420 on account of this aspect of the Respondents' counterclaim may be set off against the Claimant's Award against the Respondents.

843. Finally, the Tribunal finds that the Claimant has not breached any obligation to Respondents and that, therefore, no payments are due to Respondents.

M. Pre-Award and Post-Award Interest

M.I. Arguments by Claimant

844. In its closing argument, Claimant stated that the Award should be quantified as of the date of the Award. Claimant explained that that would be akin to pre-award interest, given the valuation in the indemnity equations and in the memorials was only provided as of September 2007. Claimant also argued that the Award should declare that Claimant is entitled to post-award interest until payment is made in full. (C.Closing pp. 39 - 40).
845. Claimant's legal argument in favor of pre-award and post-award interest is best taken from its own words, found at C-III ¶¶ 342-344:
342. Under Venezuelan law, the quantum of the compensation must be determined at the time of the judgment or award. In the event of a time lag between the last update of the damages calculation and the award, the principle of full indemnification under Venezuelan law requires that Mobil CN be compensated by pre-award interest on the amount of the compensation, from the date of the calculation to the date of the award.
343. In addition, Mobil CN is entitled to post-award interest (*i.e.* interest accruing on the amount awarded from the date of the award until

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payment or a court judgment enforcing the award) under the law of New York, which is the *lex arbitri*. Under New York law, post-award interest is a procedural matter governed by New York Civil Practice Law and Rules (CPLR) 5002. CPLR 5002 provides in relevant part:

Interest shall be recovered upon the total sum awarded, including interest to verdict, report or decision, in any action, from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment.

An arbitrator's award is a "report or decision" for the purposes of this provision. New York courts have confirmed that, under CPLR 5002, post-award, pre-judgment statutory interest accrues on arbitral awards from the date of the award.

344. Under the law of New York, post-award interest accrues at the simple interest rate specified in CPLR 5004. CPLR 5004 provides that "[i]nterest shall be at the rate of nine per centum per annum, except where otherwise provided by statute."

M.II. Arguments by Respondents

846. While Respondents have reserved the right to submit additional defenses, evidence, arguments, and claims as appropriate, Respondents have not made any arguments related to pre- and post-award interest. (R-III ¶ 245).
847. Respondents have, however, consistently referenced the idea that they seek relief "*plus interest*" in the counterclaims. (R-I ¶ 45, R-II ¶¶ 223 – 224, 229, 232 – 233; R-III ¶ 244). The only instance where Respondents give a "*start date*" for such interest, however, is with regard to Respondents' counterclaim concerning the shipments, where Respondents state that they seek interest on the amounts at issue from the date of each shipment. (R-II ¶ 223).
848. In one case cited by Respondents, *Phillips Petroleum* (R-148), the tribunal considered it fair to award interest at the rate of 10 % starting from the date of the taking, based on the "*Treaty of Amity*" referenced in that case. (R-148 ¶¶ 215, 217(a)). Respondents submitted this exhibit in defense of its "*discount rate*" position and have not, however, referenced it for any other argument.

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M.III. The Tribunal

849. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties' Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-III	¶¶ 257; 342 - 344
R-I	¶ 45
R-II	¶¶ 223 – 224, 229, 232 - 233
R-III	¶¶ 244 - 245

Exhibits:

Exhibit	Document Name
C-44	Declaration of Professor Eugenio Hernández-Bretón (27 September 2008) at ¶ 107
C-142	New York Civil Practice Law and Rules §§ 5002, 5004
C-143	<i>Murphy v. Wack</i> , 576 N.Y.S.2d 129, 130-31 (1991)
C-144	<i>Kavares v. Motor Vehicle Acc. Indemnification Corp.</i> , 285 N.Y.S.2d 983, 986 (1967)
C-145	<i>East India Trading Co. v. Halari</i> , 114 N.Y.S.2d 93, 94 (1952)
C-171	28 U.S.C. § 1961
R-148	<i>Phillips Petroleum Co. Iran v. Islamic Republic of Iran, The National Iranian Oil Company</i> , Case No. 39, Award No. 425-39-2 dated 29 June 1989, 21 Iran-U.S. C.T.R. 79 (1989) ¶¶ 215, 217(a)

At and Following the 2010 Hearings:

Submission	Pinpoint
C. Closing	pp. 39 – 40

Speaker	Citation
C. Closing	2099

850. The Claimant has requested pre-award and post-award interest, as specified in Part V of the Claimant's **Principal Memorial**.

851. The Tribunal's decision on interest is subject to positive and negative constraints, which may result from (i) *lois de police* of the law governing the contract or the *lex arbitri*, or (ii) the terms of the contract itself. Absent

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these constraints, the Tribunal should decide on how considerations of justice are best served by an award of interest.

852. The Tribunal finds that the Parties have not provided compelling arguments regarding the question of which law is applicable to pre-award and post-award interest. The Claimant appears to have referred to Venezuelan law as applying to pre-award interest and to New York law as applying to post-award interest without explaining this differentiation. The Tribunal does not see any compelling reason for such a differentiation and, using its discretion according to Art. 17.1. and 2 ICC Rules, finds that New York law is applicable to its decisions on interest, since the contracts (Art. 18.2 AA and section 12 of the Guaranty) provide for New York as the seat of arbitration and therefore New York law is the *lex arbitri*, and applicable to this arbitration

853. Regarding **pre-award interest**, the New York CPLR § 5002, however, does not provide a positive compelling rule for the Tribunal (*i.e.* there is no entitlement to pre-award interest pursuant to this statute, cited by Claimant). Thus, the Tribunal retains its discretion with regard to such an award. In making this decision, the Tribunal has identified four theoretical “*starting dates*” for the running of pre-award interest:

- * On the date of filing the Request for Arbitration
- * On the date of dispossession of rights
- * On the date of breach
- * On the date of notice to pay

854. The Tribunal has eliminated from consideration these four “*starting dates*” for the following reasons. *First*, a tribunal may award pre-award interest based on the date of filing the Request for Arbitration when the claimant has specifically made such a demand. Claimant, however, made no such demand in this case. *Second*, while the practice of awarding pre-award interest is common in expropriation cases, and while the Tribunal has found

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an expropriation constituting a Discriminatory Measure causing a Materially Adverse Impact had occurred under the AA, this case is, first and foremost, a contractual matter. Accordingly, the Tribunal finds it preferable to approach the issue of pre-award interest contractually. While awarding pre-award interest from the date of breach may constitute a practice, the Tribunal has found, for the reasons set forth in § K.VIII above, that Respondents were not in breach of contract. Furthermore, while a tribunal may award pre-award interest based on the date that notice to pay was given, this Tribunal has found, for the reasons also stated in § K.VIII above, that notice under the AA did not oblige PDVSA-CN to make any payment to the extent the latter did not concur that a Discriminatory Measure causing a Materially Adverse Impact had occurred under the AA. Indeed, by reference to Section 15.1(b) of the AA, and as further explained below, the Tribunal considers that the conditions of Respondents' liability toward Claimant and the amount due could not be known by the Parties until this Award is rendered and that, therefore, a certain and liquidated debt is only due by Respondents on the date of this Award.

855. Recalling its considerations above in section K.VIII.3 concluding that there was no breach of the AA, the Tribunal is aware that this is a case of exceptional magnitude and complexity, as the procedure has shown in many ways. As the Tribunal has also had occasion above in this Award to observe in the context of the court attachments, it must be appreciated as a realistic evaluation that neither Party was in a position to correctly evaluate its rights under the AA in the factual circumstances of this case at an early stage. The Tribunal accepts that Claimant in good faith believed it was entitled to billions of dollars and Respondents, also in good faith, believed nothing was due under the AA. Indeed, as in many other disputes and arbitrations, the Parties could not interpret and apply the contract without the Tribunal's assistance and, therefore, it can only be this Award in this case that can give a certain value to the compensation due by Respondents to Claimant and to any credit accepted in this Award in favor of Respondents.

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856. In view of these specific circumstances, the Tribunal considers it should use its discretion regarding the details of the interest, due to the fact that the awarded debt was not liquidated and due until the moment it was determined by this Award. For the Parties, the debt upon which interest is to be calculated was and is not certain, liquidated, and due until the moment of the Award. It is only when the Tribunal issues this Award that the payment obligations under the contract will become an obligation to pay a definite amount.
857. Therefore, the Tribunal decides not to grant pre-award interest either on the Claimant's claims or on the amounts credited in favor of Respondents in this Award.
858. Regarding **post-award interest**, the above difficulties and considerations do not exist, and such interest must be granted as part of the compensation due.
859. As provided by NY CPLR § 5002, which is also applicable since New York law, as *lex arbitri*, is applicable to arbitrations that are seated in New York, interest should start to run from the date of the Award.
860. For several practical reasons mentioned above (*i.e.* court attachments and cancellation of bonds) the Tribunal has concluded that it would be helpful for both Parties if the Tribunal were to grant a grace period of 60 days for Respondents' payment of the amount due pursuant to this Award. Indeed, the Tribunal is also aware that, for practical purposes, Respondents must be given the opportunity to satisfy the Award, which Respondents cannot do until the Award is notified and until Respondents have had a reasonable opportunity to comply with the Award. However, this does not change the conclusion that, in order to fully compensate Claimant, the amount of post-award interest is legally due as from the date of the Award. Therefore, although Respondents have been granted a grace period of 60 days within which to pay the Award, interest will nonetheless begin to run as of the date of this Award.

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861. As to the interest rate, Article 17(2) of the ICC Rules requires the arbitrators to take account of the provisions of the contract. Absent an interest rate specified in the contract, the Tribunal may determine the interest rate, subject to any mandatory interest rate under the law applicable to interest.
862. Here, Claimant has claimed that the legal rate of interest under CPLR § 5004 is 9 percent per annum, but has not indicated whether the legal rate of interest is a *loi de police* (mandatory law governing the contract). If it is a *loi de police*, the Tribunal's discretion would be limited to providing the rate of 9 percent. However, the Tribunal does not consider itself to be constrained by a *loi de police* in this regard.
863. In the absence of a *loi de police* the Tribunal considers that, as is the practice in international arbitration, the market rate or a reasonable commercial rate would be the most appropriate interest rate.
864. Considering the circumstances of the contract and the Parties involved, the Tribunal concludes that the interest rate should be compound interest at the New York Prime Rate (annual) on the amounts awarded by the Tribunal from the date of this Award until the date payment is made. Interest shall be calculated on a prorated basis for any period less than one full year.
865. Regarding the principal amount on which interest is to be calculated in favor of Claimant, the two set-offs in favor of Respondents accepted above by the Tribunal have to be taken into account, *i.e.* (i) US\$ 96,073,622 referred to in § 820 above, plus (ii) US\$ 64,569,420. These have to be deducted from the original amount awarded to Claimant of US\$ 907,581,000, leading to a principal amount for the calculation of interest of US\$ 746,937, 958.
866. Beyond that calculation, the Tribunal recalls from its considerations above in this Award that, even though this Tribunal has no competence to rule on enforcement, it considers that the attached assets of approximately US\$ 315 million, together with any accrued interest, should, to the fullest extent

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reasonably possible under the circumstances, be used by Claimant to partially satisfy the amount of the Award. However, the Tribunal is not in a position to introduce that consideration into its calculation of interest:

1. The Tribunal does not know the procedure and how quickly the Court will proceed in respect of release of the attached funds. As a result the Parties may be able to have these funds released quickly, or it may take a significant period of time.
2. The Tribunal does not know the details of the bank account and interest rate (if any) applicable to the attached funds.
3. The release of the funds is subject to court order and specific directions from the court.
4. A further solution of this court procedure may depend upon an agreement between the Parties.

867. Therefore, in addition to this Tribunal having no competence to rule on enforcement, this leaves too many variables of the court procedure undetermined for the Tribunal to attempt to deal in more detail with the set-off of these funds and interest payable on them beyond the expectation expressed above.

N. Arbitration Costs

N.I. Arguments by Claimant

868. Claimant seeks to recover its costs of US\$ 24,852,177.53, which it reasonably incurred to enforce its contractual rights against Respondents. (C.Costs ¶ 1). Claimant divides these costs into four categories, summarized and partially quoted here (C.Costs ¶¶ 6 – 9, partially quoted):

6. *First*, US\$22,085,058.22 of the Claimant's costs were incurred in connection with presenting its claims which are now submitted to the Tribunal. Those costs include attorneys' fees and other expenses incurred in the preparation and submission of C-I – C-VI (including the witness statements, expert reports, and documentary evidence submitted

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therewith) and in connection with the Hearing. [C.Costs does not contain any claim for expenses incurred to engage non-testifying consulting experts. (C.Costs.Reply)]

7. *Second*, US\$593,440.86 of Claimant's costs were incurred in connection with obtaining conservatory measures in aid of this arbitration proceeding from courts in New York, the Netherlands, the Netherlands Antilles (Curaçao) and Aruba before this Tribunal was constituted.
8. *Third*, US\$719,380.45 of Claimant's costs were incurred in its successful opposition of the Respondents' application for an interim measure in the form of an order directing the Claimant to withdraw the foregoing conservatory measures. In connection with this application, Claimant made written submissions and participated in a hearing, which included oral argument and examination of witnesses, in December 2008.
9. *Fourth*, the Claimant has also incurred US\$1,454,298 in the form of its portion of the fees and administrative expenses of the Tribunal and the ICC.

869. With respect to costs regarding the ICC Decision 2008 , Claimant states as follows:

8. [...] The Tribunal ruled in the Claimant's favor by denying the application. Consequently, the Tribunal has already determined that the Claimant has prevailed in respect of the dispute giving rise to these particular costs. The PDVSA Guaranty requires imposition of these costs on Respondent PDVSA. The Claimant has incurred and seeks recovery of such costs in the amount of US\$719,380.45. (C.Costs ¶ 8).

870. Claimant explains that Section 13 of the PDVSA Guaranty requires the imposition of costs on PDVSA who, as guarantor, shall pay "*all reasonable and actual costs and expenses incurred by the Beneficiaries in connection with the satisfactory execution of this Guaranty, including, without limitation, reasonable attorneys' expenses and fees.*" (C.Costs ¶ 2).

871. Pursuant to **Article 31.3 of the ICC Rules**, the Tribunal "*shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.*" (C-III ¶ 347, emphasis in original). Article 31.1 further defines costs of the arbitration as "*the fees and expenses of the arbitrators and the ICC administrative expenses [. . .] the fees and expenses of any experts appointed by the Arbitral Tribunal, and the reasonable legal and other costs incurred by the parties for the arbitration.*"

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872. This Tribunal should exercise its discretion in favor of requiring PDVSA-CN to pay the costs and expenses incurred by Claimant in bringing this arbitration on the ground that PDVSA-CN has failed to act in good faith. Although PDVSA-CN acknowledged to third parties that Mobil CN had been deprived of its participation in the venture and that, in effect, it would no longer have any cash flow from the Project, PDVSA-CN unjustifiably (1) failed to concur that a Discriminatory Measure causing a Materially Adverse Impact had occurred, (2) failed to engage in good faith negotiations on the calculation of the indemnity due, and (3) failed to pay any indemnity. As a consequence of PDVSA-CN's failure to act in good faith, Mobil CN was compelled to proceed to arbitration to seek enforcement of its rights under the AA. In these circumstances, the Tribunal should exercise its discretion in favor of Mobil CN's request and award it the costs and expenses, including attorneys' fees, incurred in the instant arbitration. (C-III ¶¶ 347-348).

873. Regarding Respondents' Cost Claims, Claimant argues that **Article 31 of the ICC Rules** would not support an Award to the Respondents of expenses incurred to employ Messrs. Kirtley and Marques. (C.Costs.Reply). Neither provided a report to the Tribunal and neither testified. Respondents' description that they were "*consultants for technical and financial matters*" does not provide sufficient detail as to what services were provided, how these services were related to the case, and whether the fees charged were reasonable in the circumstances. (C.Costs.Reply).

N.II. Arguments by Respondents

874. Respondents have reserved the right to submit additional defenses, evidence, arguments, and claims as appropriate. (R-III ¶ 245). Respondents submit their **Cost Claim** without prejudice to their jurisdictional defenses. (R.Costs).

875. In accordance with **Article 31 of the ICC Rules**, Respondents seek recovery of US\$ 18,508,775.64. Respondents present these costs in a table

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found at p. 3 of the R.Costs. Included in these costs, Respondents seek recovery of US\$ 1,446,900 for Arbitrators' fees and expenses, ICC administrative costs, and the VAT Advance; US\$ 12,348,970.50 for the legal fees of the Curtis Firm; and US\$ 3,306,826.25 for the legal and financial expert fees.

876. Respondents describe Claimant's Cost Claim as "*staggering*" and excessive. Claimant's costs are more than US\$ 6.3 million higher than Respondents'. Respondents compare aspects of their claim to Claimant's, briefly summarized and partially quoted below (R.Costs.Reply ¶¶ 3-4):

3. Claimant's total submission for legal fees, US\$13,134,268.22, is 6% higher than Respondents' request of US\$12,348,970.50. Respondents' counsel has been working in two languages, Spanish and English, throughout the case.
4. Claimant seeks US\$8,504,319.23 in fees and expenses for their economic experts, while Respondents seek only approximately one third of that: US\$2,958,034.59.

877. Respondents divide Claimant's costs relating to economic experts and address costs incurred for discount rate experts and costs incurred by all other experts. With respect to discount rate experts, Claimant seeks a total of US\$ 4,687,717.53 (as compared to Respondents' costs of US\$ 1,052,940). This is particularly troubling in light of Prof. Myers' testimony that he was performing an uncomplicated, straightforward calculation. Even Claimant's counsel indicated that Claimant's calculations required only "*primary school arithmetic*." Further, Claimant's experts were instructed to use a "*risk free*" discount rate. Respondents posit that "*[i]t is hard to imagine that it cost as much as it apparently did for these experts to report the risk-free discount rate and apply it to cash flows that they were directed on how to calculate*" and argue that Claimant's costs for its discount rates are excessive. (R.Costs.Reply ¶¶ 6-7).

878. With respect to all other economic experts, Respondents report that Claimant seeks US\$ 3,816,601.70, compared to Respondents' US\$ 1,741,331.25. This gap is difficult to fathom in light of the fact that the

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expert (Graves) was instructed on all aspects of the formulas. Although Claimant is entitled to retain as many experts as it wishes, there was an obvious duplication of effort among Claimant's experts. For example, Mr. Graves, in his affidavit, reported to the Tribunal what Mr. Cline's and Mr. Plunkett's conclusions were. This duplication should never be considered a legitimate part of even a meritorious cost application. (R.Costs.Reply ¶¶ 8-9).

879. Respondents reject Claimant's attempt to recover costs incurred in connection with its provisional measures campaign before national courts. Claimant obtained these freezing orders on the basis of a damage claim which even Claimant's experts have openly conceded to have been calculated on an "*indefensible*" basis. (R.Costs.Reply ¶ 10; see also Hearing Tr., pp. 1360 – 63; 1653-68; 1707 – 09).

880. Respondents' final argument with respect to cost recovery is best taken from their own language (R. Costs. Reply ¶ 11):

11. The reality is that none of Claimant's costs is recoverable considering the lack of any legal or factual basis for the claim asserted in this Arbitration. Even if for some reason any part of the claim were to survive the legal and factual deficiencies evident in the record, there can be no doubt that the amount of any such claim has from the outset been grossly exaggerated by Claimant and that a large part of the costs for both parties has been incurred to deal with the issues generated by such exaggerations. Indeed, those exaggerations were the reasons this case and the case being pursued by Claimant and its affiliates against the State in ICSID were not settled amicably long ago.

881. Respondents also responded to Claimant's good faith argument (R-III fn. 172, citations omitted):

172. It is ironic that Claimant, on the one hand, urges that PDVSA-CN breached an obligation of good faith performance by not responding favorably to Claimant's June 2007 notice letters within 90 days, even though the AA itself has no such requirement and in fact specifically contemplates the procedure that will be followed in the event that PDVSA-CN does not affirmatively concur in any such notice, yet urges that it acted in good faith when it consciously chose not to provide the immediate notices that are specified in the same provision of the AA and that were admittedly designed to provide PDVSA-CN with the

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opportunity to address the issues on a timely basis with the Venezuelan Government. While Claimant can point to absolutely no text or illustration of the principles of good faith that would even remotely support its frivolous argument on good faith, there is substantial and specific authority to the effect that the conduct of Claimant in this case in attempting to assert a claim now for indemnity when its prior conduct over a long period of time indicated the contrary would be inconsistent with well-established Venezuelan law principles of good faith.

N.III. The Tribunal

882. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties' Briefs and of the evidence:

Party Submissions:

Submission	Pinpoint
C-III	¶¶ 345 – 348
R-III	¶¶ fn. 172, 245

Exhibits:

Exhibit	Document Name
C-3	PDVSA Guaranty [<i>Fianza de Fiel Cumplimiento de PDVSA</i>] dated 28 October 1997 Art. 13
C-48 App. D	Expert Report of Professor Stewart C. Myers of the Brattle Group on the Value of Indemnification Cash Flows (28 September 2008)
	Legal Instruction for the Calculation of the Appropriate Quantum of the Indemnity for Fiscal Years 2008-2035
C-50	Expert Report of Dr. Scott T. Jones of FTI Consulting, Inc. and Compass Lexecon (" <i>Lexecon</i> "), a Wholly-Owned Subsidiary of FT Consulting, Inc. (26 September 2008) pp. 7 – 8
C-200	Tr. of Hearing on 13 February 2008 in <i>Mobil Cerro Negro, Ltd. v. PDVSA Cerro Negro S.A.</i> , U.S. District Court for the Southern District of New York, Civil Action No. 07 Civ. 11590 (DAB) at 2-3
C-332	Cost Summary for Fees and Expenses
R-39	First Affidavit of R. Dean Graves (25 February 2008) <i>Mobil Cerro Negro Limited v. Petróleos de Venezuela, S.A.</i> , Claim No. 2008 Folio 61, High Court of Justice, Queen's Bench Division, Commercial Court (London) ¶13
R-118	Second Legal Expert Opinion of Professor José Mélich-Orsini (14 August 2009) ¶¶ 38 – 39
R-119	Second Legal Expert Opinion of Professor Enrique Urdaneta Fontiveros (14 August 2009) ¶¶ 53 - 71

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Tribunal Materials

Document Name and Pinpoint

ICC Rules Art. 30, 31.3

PO-6 ¶ 2.1

ICC Case 15416 Decision on Application by the Respondents for an Order Directing the Claimant to Withdraw the Attachments (19 December 2008)

At and Following the 2010 Hearings:

Submission	Pinpoint
C.Costs	¶¶
C.Costs.Reply	
R.Costs	
R.Costs.Reply	

Speaker	Citation
C. Opening	63
Chairman	2008
Graves	1653 – 1668
Jones	1360 – 1363
Myers	1705, 1707 – 1709

883. For its decision on costs pursuant to Article 31.3 of the ICC Rules as to which Party shall bear costs of the arbitration, the Tribunal takes into account the following:
884. In this case of exceptional volume and complexity, the Claimant has prevailed with its claim that Respondents are liable and has been accorded in this Award a substantial amount, but has failed in a substantial other part of the quantum it sought. On the other hand, the Respondents have failed with their objections to jurisdiction and liability, but prevailed in their objections to a major part of the quantum sought by Claimant. Furthermore, irrespective of these results, for many of the issues disputed between the Parties, this has been “*a close case.*” In fact, this Tribunal concluded in its consideration of pre-award interest, that it can be accepted that both Parties have been *bona fidedly* not in a position to quantify their claims before these were decided by this Award.
885. The Tribunal recalls that the costs of Respondents’ Application for an Order Directing Claimant to Withdraw Attachments are to be fixed at

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the time of the Award. (ICC Decision 2008 at 4). However, the Tribunal considers that, at the present stage of the procedure, these specific costs - which are of no considerable size when compared to the total costs claimed by the Parties - do not justify a specific ruling and can be included in the general consideration of the costs at the end of this procedure.

886. In view of the above considerations, the Tribunal concludes that the costs of this procedure should be shared equally and that each Party shall bear its own costs.

887. Claimant and Respondent each paid US\$ 1,350,000 towards the advance on costs. At its session of **24 November 2011**, the Court fixed the costs of arbitration (*i.e.* fees and expenses of the Arbitral Tribunal and ICC administrative expenses) at US\$ 2,700,000. Consequently, and in light of the Tribunal's decision above that the costs of this procedure should be shared equally, the Tribunal concludes that no reimbursement is due.

888. From the additional deposits paid to the trust account of the ICC by the Parties for the advance on VAT, payments will be made by the ICC to the members of the Tribunal for the VAT they have to pay on their fees. Any remaining part of the deposit for VAT will be reimbursed to the Parties in equal shares.

O. Taxation of Award

O.I. Arguments by Claimant

889. In order to prevent unjust enrichment and to ensure that Claimant will not be subject to double taxation, the Tribunal must require Respondents to pay the amount of taxes deducted and retained in connection with the indemnity calculation to the Venezuelan Treasury on Claimant's behalf. The Tribunal must also require Respondents to indemnify the Claimant against any attempt by the Venezuelan Government to impose liability on the Claimant in connection with those taxes. (C-III ¶¶ 349 – 353). Both of the above are required under the Framework of Conditions and the AA.

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890. The indemnity calculations contained in Annex G already take hypothetical taxes to be paid into consideration and, in effect, credit PDVSA-CN with the amount of income tax that Claimant would have paid on its hypothetical revenues, absent the Discriminatory Measures. (C-III ¶ 352). If Respondents would not be required to pay the taxes deducted by the formulas, PDVSA-CN would be unjustly enriched by keeping for itself the amount of taxes that were deducted in the calculation of the indemnity. Claimant (1) would be unjustly penalized by having its indemnity reduced by the effect of the tax while its tax liability remained undischarged and (2) would be left exposed to double taxation if the Venezuelan Government attempted to tax the indemnity which was calculated on an after-tax basis. Such a result would be inconsistent with the principle of full compensation adopted by both the AA and Venezuelan law, would violate the principle of good faith that governs the interpretation and application of the Agreement, would contradict the expressed intent and purpose of Annex G to the Agreement, and would defy common sense. (C-III ¶ 352).

891. Claimant further argues that any attempt by the Venezuelan Government to impose a tax rate higher than the 34% rate that was used in the calculation of the indemnity would be a further violation of the Framework of Conditions and would constitute a Discriminatory Measure for which PDVSA-CN and PDVSA must compensate it. (C-III ¶ 353).

O.II. Arguments by Respondents

892. Respondents had reserved the right to submit additional defenses, evidence, arguments, and claims as appropriate, but did not do so within the timetable provided in the procedure. (R-III ¶ 245).

O.III. The Tribunal

893. In the context of this section, the Tribunal, without repeating the contents, takes particularly into account the following sections of the Parties' Briefs and of the evidence:

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Party Submissions:

Submission	Pinpoint
C-III	¶¶ 349 - 354
R-III	¶ 245

Exhibits:

Exhibit	Document Name
C-44	Declaration of Professor Eugenio Hernández-Bretón (27 September 2008) at ¶¶ 97-99
C-87	Association Agreement Article 15.1(b) Annex G (Accounting Procedures) to the Association Agreement, Articles 7.1 - 7.4

894. The Tribunal recalls that the Republic of Venezuela, though involved in the parallel ICSID arbitration, is not a party to the AA or this ICC arbitration. Therefore, this Tribunal has no authority to rule in any way regarding the conduct of this third party.

895. On the other hand, the Tribunal accepts Claimant's reasoning that the amount of compensation resulting from the application of the formulas contained in Annex G AA, Sections 7.1, 7.2, 7.3, and 7.4 (Ex. C-87), is effectively calculated on an after-tax basis, *i.e.* that the formula reduces the compensation by the taxes applicable to Mobil Cerro Negro's share of the income from the Project (C-III ¶¶ 349-353). The Tribunal agrees with Claimant's analysis that the Reference Cash Flow, in particular, is reduced by the amount of *TIT* to account for the income tax (at the rate of 34%) that Mobil Cerro Negro would have owed to the Government of Venezuela. It therefore follows, as Claimant argues, that (i) *TIT* should be considered as an amount credited to PDVSA-CN, equivalent to the amount of the income tax that Mobil Cerro Negro would have paid on its hypothetical revenues, had the Discriminatory Measures not occurred, and (ii) this income tax, deducted by application of the indemnity formulas mentioned above, must represent taxes withheld by PDVSA-CN, to be paid to the Venezuelan Treasury, on behalf of Mobil Cerro Negro, to discharge Mobil Cerro Negro's tax liability in respect of the relevant fiscal years

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896. Accordingly, the Tribunal considers it appropriate to grant Claimant's request for an Award ordering Respondents: (i) to pay into the Venezuelan Treasury, on behalf of Mobil Cerro Negro, the aggregate amount of taxes that the Tribunal will have deducted, by application of the foregoing formulas, to arrive at the compensation owed by Respondents to Mobil Cerro Negro; (ii) to pay into the Venezuelan Treasury, on behalf of Mobil Cerro Negro, any additional tax liability that may be imposed by the Venezuelan Government on Mobil Cerro Negro's income from the Project or the compensation awarded by the Tribunal; and (iii) generally, to hold Mobil Cerro Negro harmless from any such tax liabilities.
897. The Tribunal accepts Claimant's argument that the foregoing decision is necessary to ensure that Mobil Cerro Negro will not be left in a situation where its indemnity is reduced by the effect of the tax, while its tax liability to the Government of Venezuela remains non-discharged and, conversely, to ensure that PDVSA-CN will not be unjustly enriched, by being left in a position where it might keep for itself the amount of taxes that were deducted in the calculation of the indemnity.

(For reasons of convenience for the signing procedure, the Decisions and signatures of the Tribunal are placed hereafter on separate pages of this Award.)

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P. Decisions

1. The Tribunal finds it has jurisdiction over the claims and the counterclaims pursuant to the arbitration clause in Article 18.2 of the Association Agreement and that Claimant is not prevented from pursuing its claims due to lack of exhaustion of local remedies.
2. Discriminatory Measures have occurred and caused a Materially Adverse Impact as defined in Clause XV of the Association Agreement dated 28 October 1997.
3. Respondent No.2 (PDVSA-CN) is liable for the economic consequences of Discriminatory Measures according to Clause XV of the Association Agreement dated 28 October 1997.
4. Respondent No.1 (PDVSA) is liable for the economic consequences of the same Discriminatory Measures due to the GUARANTY dated 28 October 1997 in favor of the above Association Agreement.
5. As a result of their liability mentioned above, both Respondents are jointly and severally liable to pay to Claimant an amount of US\$ 12,681,000 for 2007 and US\$ 894,900,000 for the period 2008 – 2035, for a total of US\$ 907,581,000, subject to the two set-offs mentioned hereafter.
6. Based on Respondents' Counterclaim, US\$ 96,073,622 shall be automatically set-off against the Award and, subject only to a satisfactory release by Respondent No. 1 (PDVSA) within the 60-day grace period mentioned hereafter in paragraph 7, US\$ 64,569,420 also shall be set-off in favor of Respondents against the payment due under this Award, resulting in a net amount after both set-offs of US\$ 746,937,958.
7. Further, the Tribunal takes note that Claimant is willing to credit its 50% share of the outstanding amounts of the bonds held by PDVSA after its tender offer and its respective payment, provided that PDVSA cancel the bonds within the 60-day grace period mentioned hereafter in paragraph 8.
8. Respondents are granted a period of 60 days to effect the payment of the amounts awarded.

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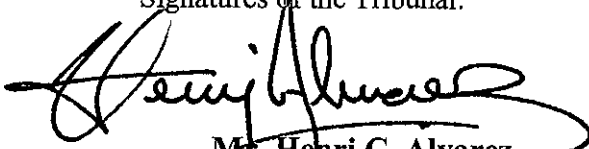
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9. Respondents shall be liable for post-award compound interest at the New York Prime Rate (annual) on the principal amounts awarded by the Tribunal after the set-offs accepted above, *i.e.* on US\$ 746,937,958, from the date of this Award until the date payment is made.
10. The amounts awarded shall be paid in full by Respondents, which shall, in addition, be required to: (i) pay into the Venezuelan Treasury, on behalf of Mobil Cerro Negro, the aggregate amount of taxes that the Tribunal has deducted, by application of the relevant formulas, to arrive at the compensation owed by Respondents to Mobil Cerro Negro and (ii) hold Mobil Cerro Negro harmless from any additional tax liability that may be imposed by the Venezuelan Government on Mobil Cerro Negro's income from the Project or the compensation awarded by the Tribunal pursuant to this Award.
11. In so far as not granted above, all other claims and counterclaims are denied.
12. The costs of this procedure, as determined by the ICC Court, are US\$ 2,700,000.00. They shall be shared equally between the Parties and each Party shall bear its own costs. In light of the fact that the Parties paid the advance on costs in equal shares, no reimbursement is due.

Place of Arbitration: New York, NY USA

Date of this Award: 23 December 2011

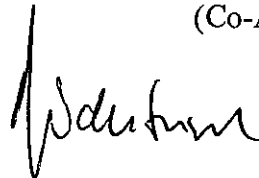
Signatures of the Tribunal:



Mr. Henri C. Alvarez
(Co-Arbitrator)



Mr. Jacques Salès
(Co-Arbitrator)



Prof. Dr. Karl-Heinz Böckstiegel
(Chairman)