



School of International Arbitration

School of International Arbitration, Queen Mary, University of London

# International Arbitration Case Law

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**VALLE VERDE SOCIEDAD FINANCIERA S.L.**

**V.**

**BOLIVARIAN REPUBLIC OF VENEZUELA**

**(ICSID CASE NO. ARB/12/18)**

**DECISION ON PROVISIONAL MEASURES**

Case Report by Raúl Pereira de Souza Fleury\*\*  
Edited by Ignacio Torterola\*\*\*

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In a Decision on Provisional Measures issued on 25 January 2016, an International Centre for Settlement of Investment Disputes (“ICSID”) Tribunal, unanimously rejected both Valle Verde’s First and Additional requests for Provisional Measures seeking Venezuela to make: (a) the advanced payment for its portion of the proceedings’ cost and repay the payment advanced by Claimant; and (b) to correct or destroy certain information published in two websites reporting a statement made by the President of Venezuela’s National Assembly against DLA Piper and Valle Verde’s representative, and to refrain from carrying out other conduct which could aggravate or extend the dispute.

**Main Issues:** **Provisional measures, competence to recommend provisional measures, admissibility and requirements for provisional measures**

**Tribunal:** Dr. Enrique Barros Bourie (President), Professor Franco Ferrari (Appointed by Claimant), Dr. Raúl Vinuesa (Appointed by Respondent).

**Claimant's Counsel:** Mezgravis & Asociados (as of 28 August 2015, Caracas, Venezuela); DLA Piper LLP (until 29 June 2015).

**Respondent's Counsel:** Procuraduría General de la República (Caracas, Venezuela); Guglielmino & Asociados (Buenos Aires, Argentina)

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## *Digest*

### **1. Facts of the Case and Procedural Background**

Claimant, Valle Verde Sociedad Financiera S.L. (“Valle Verde” or “Claimant”) is a financial entity organized under the laws of Spain. Respondent is the Bolivarian Republic of Venezuela (“Venezuela” or “Respondent”) (¶ 1). Valle Verde brought this claim under the Agreement between the Kingdom of Spain and the Republic of Venezuela for the Reciprocal Promotion of Investments (“BIT”) dated 2 November 1995 (in force since 10 September 1997), and the ICSID Convention dated 18 March 1965 (in force since 14 October 1966) (¶ 2).

The dispute arose from the expropriation of Casa Propia Entidad de Ahorro y Préstamo, C.A. (“Casa Propia”), as well as Valle Verde’s capital contributions and funds held for investment in Casa Propia, through actions of *Venezuela’s Superintendencia de las Instituciones del Sector Bancario* in breach of the BIT (¶ 3).

On 25 July 2012, ICSID’s Secretary-General registered Claimant’s request for arbitration (¶ 4) and on 26 December 2012, the Tribunal was constituted with the appointments of Dr. Enrique Barros Bourie (Chilean, President, appointed pursuant to Article 38 of the ICSID Convention); Prof. Franco Ferrari (Italian, appointed by Claimant); and Dr. Raúl E. Vinuesa (Argentine-Spanish,<sup>1</sup> appointed by Respondent) (¶ 5).

On 27 December 2012, ICSID requested both parties to make a first advance payment (US\$250,000) to meet the expenses to be incurred during the first three to six months of proceedings (¶ 7). Claimant advanced both its payment of US\$125,000 (¶ 11) and the outstanding sum of US\$125,000, that is, Venezuela’s half (¶ 15).

On 8 August 2014, the Tribunal granted Respondent’s Request for Bifurcation of the proceedings (¶ 25).

On 12 August 2014, ICSID requested a second advance payment of US\$500,000 to meet the expenses incurred and future costs incurred during the next three to six months of the proceedings (¶ 26). On 20 May 2015, ICSID received from Valle Verde the US\$500,000 advance payment and proceedings resumed (¶¶ 32, 33).

On 1 September 2015, Claimant requested provisional measures (“Claimant’s First Request”). On 16 September 2015, Venezuela responded to Claimant’s First Request and, on 2 October 2015, Claimant responded to Venezuela’s response, requesting an additional provisional measure (“Claimant’s Additional Request”). On 19 October 2015, Respondent submitted its rejoinder on Claimant’s Additional Request (¶¶ 40, 44, 46).

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<sup>1</sup> Dr. Vinuesa communicated its Spanish nationality on 5 April 2014.

In its First Request for Provisional Measures, Claimant requested the Tribunal to order Respondent to do three things: (i) make the advance payment for its portion on costs as set by the ICSID Secretariat; (ii) repay within a reasonable time, the sum of US\$375,000 that Claimant had to pay in advance due to Respondent's unjustified failure to do so; and (iii) in case Venezuela is reluctant to comply, to issue on its own initiative any other provisional measure it may deem convenient (§ 55, 56).

In its Additional Request for Provisional Measures, Claimant requested the Tribunal to order the Respondent to correct or destroy the information published in two websites reporting a statement made by the President of Venezuela's National Assembly against DLA Piper and Valle Verde's representative, and to refrain from carrying out any other conduct, which could aggravate or extend this dispute. In addition, Claimant submitted a new Witness Statement from Mr. Camejo Blanco, which referred to Valle Verde's current financial situation and to several actions adopted by the Venezuelan authorities against him (§ 55, 63).

## 2. *Tribunal's Analysis of Preliminary issues*

The Decision addresses Claimant's First and Additional Requests for Provisional Measures, as well as the admissibility of Mr. Camejo Blanco's Witness Statement being Mr. Camejo Blanco a representative of Valle Verde. In order to reach its decision, the Tribunal first analyzed three issues discussed by the parties in their submissions:

### 2.1. *Tribunal's Authority to Recommend Provisional Measures*

Upon Claimant's request for the Provisional Measures, Respondent questioned the Tribunal's authority to adopt the requested measures because their jurisdiction to rule on the dispute was under objection, which led to the bifurcation of the proceedings. In consequence, the Tribunal could not assume *prima facie* jurisdiction to grant the provisional measures (§ 76).

The Tribunal then analyzed Article 47 of the ICSID Convention, and Rule 39 of the ICSID Arbitration Rules and concluded that both rules unquestionably grants to a tribunal operating under the ICSID Convention and ICSID Arbitration Rules, the authority to order provisional measures to preserve a party's right, a practice that is well established among ICSID tribunals (§ 75).

Therefore, the Tribunal disagreed with Respondent on this matter and gave four reasons to explain why:

(a) The fact that the Tribunal's jurisdiction is being contested is not enough to exclude its power to recommend provisional measures. In this regard, Article 47 and Rule 39 are formulated in broad terms, in order not to restrict the tribunal's authority to grant such measures, even if the tribunal has not yet ruled on its jurisdiction. The wording "any time" in Rule 39(1) includes the time before a tribunal's determination on jurisdiction (§ 77(a)).

(b) The instruments governing the Tribunal's jurisdiction (i.e. the ICSID Convention and the BIT), which are the basis for Claimant's arguments in favor of jurisdiction, can afford a basis on which jurisdiction could be found. Therefore, the Tribunal was satisfied that it had *prima facie* jurisdiction (§ 77(b)).

(c) The decision to bifurcate the proceedings do not undermine the Tribunal's authority to recommend provisional measures, because bifurcation it is merely a case management determination that falls within the discretionary powers of the tribunal (§ 77(c)).

(d) Finally, the Tribunal stressed that interim measures are essentially provisional, and therefore, any recommendation on the matter would not prejudge the dispute on jurisdiction or merits (§ 77(d)).

The Tribunal then concluded that it has authority and *prima facie* jurisdiction to recommend provisional measures (§ 78).

## 2.2. Connection between the Claimant's Petition of 9 June 2013 and Claimant's First Request of 1 September 2015

On 9 June 2013, Claimant petitioned (and was denied) an interim measure requesting that: (i) the advance payments not made by Venezuela be reflected in the final award on costs; and (ii) Venezuela would bear additional costs resulting from dilatory and abusive tactics. The Tribunal considered whether this petition prevented the Claimant from making the First Request based on the doctrine of estoppel (§ 79). The Tribunal decided that it did not for the following reasons:

(a) Interim measures are provisional in nature, meaning that their existence depends on the existence and maintenance of the circumstances that justified their adoption. Therefore, the Tribunal held that nothing prevents parties from requesting the same or

different measures if new circumstances arise, even if the request is based on the same facts (¶ 80(a)).<sup>2</sup>

(b) The doctrine of estoppel, as recognized by Venezuela, seeks to prevent, in a procedural context, a dramatic and abusive change of position from one party that undermines the position of the other party. With this definition in mind, the Tribunal did not consider that Valle Verde's First Request met that threshold. The First Request did not modify the arguments from the 9 June 2013 petition. As well, Respondent did not act in reliance of Claimant's petition such that its position has been undermined (¶ 80(b)).

The Tribunal concluded that the measures requested on 9 June 2013 were substantially different from that of the First Request and therefore, the doctrine of estoppel did not prevent Claimant from submitting its First Request for Provisional Measures (¶ 81).

### 2.3. Compatibility between Claimant's First Request and ICSID Administrative and Financial Regulation 14(3)(d)

As a final preliminary issue, the Tribunal analyzed ICSID's Administrative and Financial Regulation 14(3)(d) and concluded that Claimant's First Request for Provisional Measures was incompatible with such regulation.

Valle Verde requested the Tribunal to enforce Venezuela's obligation to pay its half of the advanced payments fixed by ICSID's Secretariat. However, the default structure of Regulation 14(3)(d) follows another scheme, which is "allow[ing] the interested party to cover the unpaid portion of the advances in order to avoid the discontinuance of the proceeding." That is the remedy for non-compliance provided by Regulation 14(3)(d). The Tribunal stressed that the payment of the outstanding portion by the interested party did not mean that the other party is discharged from its obligation to pay. Regulation 14(3)(d) provides that the tribunal, pursuant to Article 61(2) of the ICSID Convention, has the authority to mend such a situation in the final allocation of costs by awarding costs to the party that financed the proceeding (¶ 84).

Additionally, the Tribunal explained that Claimant should have taken into account the possibility of default in an ICSID arbitration, stating that "Valle Verde always knew about the possibility of having to cover Venezuela's share and therefore could not claim a breach of its procedural rights once this possibility materialized" (¶ 84).

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<sup>2</sup> Here the Tribunal cited *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (ICJ Reports 2006), First Decision on Provisional Measures, 13 July 2006, ¶ 86, and Second Decision on Provisional Measures, 3 January 2007, ¶ 55.

The Tribunal held that Claimant's First Request for Provisional Measures did not proceed under the default structure provided by Regulation 14(3)(d), but reiterated the obligation of Venezuela to pay its share of the advance payment. Therefore, the Tribunal reserved its right to rely on the defaulted advance payments when considering its final allocation of costs (§ 85).

### 3. *Tribunal's Analysis on the Requirements for the adoption of Provisional Measures*

After considering the preliminary issues, the Tribunal went on to analyze the requirements that Claimant needed to fulfil when submitting its First and Additional Requests for Provisional Measures. In addition, the Tribunal also considered the admissibility of Mr. Camejo Blanco's Witness Statement, included in Claimant's Additional Request.

The Tribunal explained first that, according to Article 47 of the ICSID Convention and Rule 39(1) of the ICSID Arbitration Rules, the recommendation of provisional measures must be motivated by *exceptional circumstances*. These circumstances must be *urgent* (the applicant cannot await the outcome of the decision on the merits) and *necessary* (the measures are necessary to protect an existing right and avoid irreparable harm) (§ 86).

#### 3.1. First Request for Provisional Measures

In its analysis of the *Compatibility between Claimant's First Request and ICSID Administrative and Financial Regulation 14(3)(d)*, the Tribunal had already decided that the First Request was not admissible. However, the Tribunal explained that even if the First Request were admissible it would reject it because it did not meet the requirements for its adoption (§ 87).

The Tribunal held that Claimant has not proven the existence of circumstances that could prevent it from exercising its procedural right of defense. Moreover, the Tribunal noted that Claimant recognized the availability of other sources of funding, and even if that could pose financial difficulties for Valle Verde, it would not be an impediment for the continuation of the proceedings (§ 88).

Thus, the Tribunal concluded that the First Request did not meet the legal requirements for its adoption (§ 89).

#### 3.2. Additional Request for Provisional Measures

Claimant's Additional Request sought the correction or destruction of information published in two websites reporting certain statements made by the President of

Venezuela's National Assembly against DLA Piper LLP and Mr. Camejo Blanco; and for Venezuela to refrain from carrying out any other conduct that could aggravate or extend the dispute in breach of the full protection and security standard (§ 90).

Venezuela contended that Claimant failed to demonstrate how such statements could aggravate the dispute. In addition, Respondent argued that those statements could not be attributed to the Venezuelan State and that the Tribunal could not exercise coercive powers over Venezuela (§ 91).

The Tribunal considered that these issues be dealt with in the merits phase (if the Tribunal finds it has jurisdiction) and in any case, Claimant failed to show the required *urgency* and *necessity* in order to grant this measure (§ 92). Thus, the Tribunal also rejected Claimant's Additional Request for Provisional Measures (§ 93).

### 3.3. Admissibility of Mr. Camejo Blanco's Witness Statement

Lastly, the Tribunal analyzed the admissibility of Mr. Camejo Blanco's witness statement submitted by Claimant with its Additional Request. The Tribunal reminded that in its Procedural Order No. 2, Section 11.5, it established that the Tribunal "shall not admit any testimony or other evidence that has not been filed with the written submissions, unless the Tribunal determines that exceptional circumstances exist."

It considered that the limitation contained in Section 11.5 did not apply to submissions made in the context of a request for provisional measures and therefore, understanding that the submission of Mr. Camejo Blanco's witness statement was made in the context of the requested provisional measures, the Tribunal accepted the introduction into the record of such statement (§ 94).

## **4. Decision**

The Tribunal rejected Claimant's both First and Additional Requests for Provisional Measures, and accepted Mr. Camejo Blanco's witness statement in the record.

## **5. Costs**

The Tribunal decided that the allocation of costs will be decided in the final award.