INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

VANNESSA VENTURES LTD.
(CLAIMANT)

AND

THE BOLIVARIAN REPUBLIC OF VENEZUELA
(RESPONDENT)

(ICSID CASE NO. ARB(AF)/04/6)

AWARD

Members of the Tribunal
Professor Vaughan Lowe QC, *President*
Hon. Charles N. Brower, *Arbitrator*
Professor Brigitte Stern, *Arbitrator*

Secretary of the Tribunal
Ms Ann Catherine Kettlewell

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Representing Respondent

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Date of Dispatch to the Parties: January 16, 2013

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TABLE OF ABBREVIATIONS

Additional Facility Rules	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes in effect from January 1, 2003
Arbitration Rules	Schedule C to the Additional Facility Rules (as defined above)—Arbitration (Additional Facility) Rules
Canada-Venezuela BIT or the BIT or the Treaty	The Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments dated July 1, 1996, which entered into force on January 28, 1998
Claimant or Vannessa	Vannessa Ventures Ltd.
Claimant's Memorial	Memorial on the Merits of Vannessa Ventures Ltd., January 13, 2006
Claimant's Reply	Reply on the Merits of Vannessa Ventures Ltd., August 21, 2009
Copper Concessions	Concessions for the exploitation of copper on the Las Cristinas sites issued in 1996
CVG	Corporación Venezolana de Guayana.
Decision on Jurisdiction	Decision on Jurisdiction of August 22, 2008
Ex. C-	Exhibit filed by Claimant
Ex. R-	Exhibit filed by Respondent
Extension Agreement	Agreement between Corporación Venezolana de Guayana, Placer Dome, Inc., Placer Dome de Venezuela, C.A. and Minera Las Cristinas, C.A. of August 8, 2000
FET	Fair and equitable treatment
First Pinedo Witness Statement	First Witness Statement of José Antonio Pinedo, January 10, 2006
First Rauguth Witness Statement	First Witness Statement of Erich Rauguth, July 22, 2009
FPS	Full protection and security
ICSID or the Centre	International Centre for Settlement of Investment Disputes

MEM	Venezuela's Ministry of Energy and Mines
MINCA	Minera Las Cristinas C.A.
MINCA Bylaws	Minera Las Cristinas C.A. Bylaws dated August 28, 1997
Original Transaction Agreement	Transaction Agreement between Placer Dome B-V Limited, Vannessa Ventures Ltd. and Vannessa Holdings Corporation dated July 25, 2001
PBV	Placer B-V Limited
PDV	Placer Dome de Venezuela, C.A.
Phoenix Project	Las Cristinas Project Staged Development Feasibility Study dated April 2000
Placer Dome or PDI	Placer Dome Inc.
REMINCA	Relaves Mineros Las Cristinas S.A.
Respondent or Venezuela	Bolivarian Republic of Venezuela
Respondent's Counter-Memorial	Counter-Memorial on Merits and Jurisdiction of the Bolivarian Republic of Venezuela, March 13, 2009
Respondent's Memorial on Jurisdiction	Memorial on Jurisdiction of the Bolivarian Republic of Venezuela, August 28, 2006
Respondent's Rejoinder	Rejoinder on Merits and Jurisdiction of the Bolivarian Republic of Venezuela, February 1, 2010
Scotia	Scotia Capital Inc.
Second Patines Witness Statement	Second Witness Statement of Franqui Patines, March 3, 2009
Tr. [day:page: line]	Transcript of the hearing on jurisdiction and merits held from October 3 to 6, 2011
Work Contract	Work Contract entered by CVG and MINCA on March 3, 1992
1991 Shareholders Agreement	Shareholders Agreement between Corporación Venezolana de Guayana and Placer Dome, Inc. of July 25, 1991
1997 Amended Shareholders Agreement	Amended Shareholders Agreement between Corporación Venezolana de Guayana and Placer Dome, Inc. of July 31, 1996

PROCEDURAL HISTORY

1. On July 9, 2004, the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") received a request from Vannessa Ventures Ltd. (the "**Claimant**" or "**Vannessa**") for arbitration against the Bolivarian Republic of Venezuela (the "**Respondent**" or "**Venezuela**") (jointly, the "**Parties**") under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility Rules) in effect as of January 1, 2003 (the "**Additional Facility Rules**"). The proceeding was brought under the Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments dated July 1, 1996 (the "**Canada-Venezuela BIT**" or the "**BIT**" or the "**Treaty**"), which entered into force on January 28, 1998.

2. By letters dated August 23, 2004, and September 15, 2004, Claimant supplemented its Request for Arbitration.

3. On October 28, 2004, the Secretary-General of ICSID approved Claimant's access to the Additional Facility in accordance with Article 4 of the Additional Facility Rules. On the same day, the Secretary-General registered the Request for Arbitration in accordance with Article 4 of Schedule C to the Additional Facility Rules—the Arbitration (Additional Facility) Rules (the "**Arbitration Rules**")—and pursuant to Article 5 of the Arbitration Rules invited the Parties to constitute an arbitral tribunal.

4. No agreement was reached between the Parties on the constitution of the tribunal. Accordingly, Claimant invoked Article 6(1) of the Arbitration Rules according to which the tribunal would be composed of three arbitrators—one appointed by each party, and the third, the presiding arbitrator, appointed by agreement of the Parties.

5. By letter dated January 26, 2005, Claimant appointed Judge Charles N. Brower, a national of the United States of America, as arbitrator. On February 15, 2005, Respondent appointed Mr Jan Paulsson, at that time, a national of France, as arbitrator.

6. On May 20, 2005, the Parties informed the Centre that they had jointly appointed Mr V.V. Veeder, a national of the United Kingdom, as the third and presiding arbitrator.

7. On June 7, 2005, the ICSID Secretary-General notified the Parties and the arbitrators that the Tribunal had been constituted and that the proceeding was deemed to have commenced on that date in accordance with Article 13(1) of the Arbitration Rules. On the same date, the Parties were informed that Mr José Antonio Rivas, ICSID Counsel, had been appointed as Secretary of the Tribunal.

8. On July 29, 2005, the Tribunal held its First Session with the Parties in London, U.K. The following individuals were present at the First Session:

Members of the Tribunal

Mr V.V. Veeder, *President*
Judge Charles N. Brower, *Arbitrator*
Mr Jan Paulsson, *Arbitrator*

ICSID Secretariat

Mr José Antonio Rivas, *Secretary of the Tribunal*

Representing Claimant

Mr John Terry, *Torys LLP*
Ms Julie Maclean, *Torys LLP*

Representing Respondent

Dr Ronald E.M. Goodman, *Winston & Strawn LLP*

9. During the First Session, the Tribunal decided on several procedural matters and, with the Parties' agreement, set a timetable for the Parties to make their submissions and produce documents. This timetable was later amended on several occasions in accordance with the Parties' requests. It was also confirmed that Additional Facility Arbitration Rules in effect from January 1, 2003 were applicable to the proceeding.

10. On December 23, 2005, the Centre informed the Tribunal and the Parties that Mr Martin M. Serrano, ICSID Counsel, had been appointed as Secretary of the Tribunal in replacement of Mr José Antonio Rivas.

11. On January 13, 2006, Claimant submitted its Memorial.

12. On February 28, 2006, Claimant submitted an amendment to its Request for Arbitration. By letter dated March 3, 2006, Respondent stated its opposition to Claimant's request to introduce an amendment. After considering the Parties' observations on the matter, the Tribunal decided on March 15, 2006, pursuant to Articles 47 and 35 of the Arbitration Rules, to grant Claimant's request and to introduce the amendment as an ancillary claim and to treat it as having been made and pleaded on February 28, 2006.

13. On April 4, 2006, the Centre informed the Tribunal and the Parties that Ms Claudia Frutos-Peterson, ICSID Counsel, had been appointed as Secretary of the Tribunal in replacement of Mr Martin M. Serrano.

14. On July 5, 2006, Respondent raised objections to the Tribunal's jurisdiction and requested a suspension of the proceedings in accordance with Article 45(4) of the Arbitration Rules. On July 10, 2006, Claimant objected to the suspension of the proceedings.

15. On July 14, 2006, the Centre informed the Parties that the Tribunal had suspended the proceeding in accordance with Article 45(4) of the Arbitration Rules, and had established a schedule for the Parties' submissions on jurisdiction. The schedule was modified twice subsequently pursuant to requests by the Parties.

16. Pursuant to the revised schedule, on August 28, 2006, Respondent submitted its Memorial on Jurisdiction. On December 15, 2006, Claimant submitted its Counter-Memorial on Jurisdiction. On February 16, 2007, Respondent filed its Reply on Jurisdiction. On April 16, 2007, Claimant submitted its Rejoinder on Jurisdiction.

17. On April 25, 2007, the Tribunal was provided with a revised list of individuals who would participate in the hearing on jurisdiction. Among the persons listed as representing Claimant was Professor Christopher Greenwood. On April 27, 2007, the Centre transmitted to the Parties declarations by two Tribunal members with respect to Professor Greenwood. On May 3, 2007, Respondent submitted observations on the further declarations. On May 4, 2007, the Tribunal invited Claimant to provide its comments on Respondent's observations. Claimant provided its observations on May 4, 2007.

18. On May 7, 2007, the hearing on jurisdiction took place in London, U.K. The following individuals were present at the hearing:

Members of the Tribunal

Mr V.V. Veeder, *President*
Judge Charles N. Brower, *Arbitrator*
Mr Jan Paulsson, *Arbitrator*

ICSID Secretariat

Ms Claudia Frutos-Peterson, *Secretary of the Tribunal*

For Claimant

Mr John Laskin, *Torys LLP*
Mr John Terry, *Torys LLP*
Ms Julie Maclean, *Torys LLP*
Prof. Christopher Greenwood, *Essex Court Chambers*
Ms Marianna Almeida, *Vannessa Ventures Ltd.*
Mr John Morgan, *Vannessa Ventures Ltd.*
Mr Ross Melrose, *Vannessa Ventures Ltd.*

For Respondent

Dr Ronald E.M. Goodman, *Winston & Strawn LLP*
Mr Paolo Di Rosa, *Arnold & Porter LLP*
Ms Gaela Gehring Flores, *Arnold & Porter LLP*
Mr Dmitri Evseev, *Winston & Strawn LLP*
Ms Cristina Sorgi, *Winston & Strawn LLP*
Mr Bonard Molina-García, *Winston & Strawn LLP*
Mr Kelby Ballena, *Winston & Strawn LLP*
Ms Margarita Sánchez, *Winston & Strawn LLP*
Mr Gustavo Álvarez, *Asesor adjunto al Despacho de la Procuradora General de la República*
Mr Tulio F. Cusman, *Asesor externo de la Procuraduría General de la República*

19. During the hearing, having heard the Parties' positions regarding the participation of Professor Greenwood in the case, the President of the Tribunal submitted his resignation. His resignation was accepted by his two co-arbitrators, Judge Brower and Mr Paulsson. Before the session ended, Mr Paulsson also submitted, with the Parties' consent, his resignation for personal reasons. The proceeding was suspended in accordance with Article 16(2) of the Arbitration Rules.

20. On June 21, 2007, Respondent appointed Professor Brigitte Stern, a national of France, as arbitrator to replace Mr Paulsson. On October 18, 2007, Respondent and Claimant separately informed the Centre that the Parties had agreed to appoint Dr Robert Briner, a national of Switzerland, as the presiding arbitrator to replace Mr Veeder.

21. On October 29, 2007, after Dr Briner had accepted his appointment, the Tribunal was deemed to have been reconstituted and the proceeding resumed.

22. On November 29, 2007, the Tribunal informed the Parties that a hearing on jurisdiction would be held in Paris, France on February 14 and 15, 2008. On December 28, 2007, the Tribunal confirmed these dates, and noted that a further date, February 16, 2008, would be made available for the hearing, if necessary. On January 31, 2008, the Parties informed the Tribunal of their proposed agreed schedule for the hearing. On February 7, 2008, the Tribunal confirmed its approval of the Parties' proposed agreed schedule.

23. The hearing on jurisdiction was held in Paris, France on February 14 and 15, 2008. The following individuals were present at the hearing:

Members of the Tribunal

Dr Robert Briner, *President*
Judge Charles N. Brower, *Arbitrator*
Prof. Brigitte Stern, *Arbitrator*

ICSID Secretariat

Ms Claudia Frutos-Peterson, *Secretary of the Tribunal*

For Claimant

Mr John Laskin, *Torys LLP*
Mr John Terry, *Torys LLP*
Ms Julie Maclean, *Torys LLP*
Prof. Christopher Greenwood, *Essex Court Chambers*
Ms Marianna Almeida, *Vannessa Ventures Ltd.*
Mr John Morgan, *Vannessa Ventures Ltd.*
Mr Ross Melrose, *Vannessa Ventures Ltd.*

For Respondent

Dr Ronald E.M. Goodman, *Foley Hoag LLP*
Mr Paul Reichler, *Foley Hoag LLP*
Ms Janis Brennan, *Foley Hoag LLP*
Ms Geraldine Fischer, *Foley Hoag LLP*
Ms Angélica Villagrán-Agüero, *Foley Hoag LLP*
Ms Gaela Gehring Flores, *Arnold & Porter LLP*
Mr Dmitri Evseev, *Arnold & Porter LLP*
Mr Bonard Molina-García, *Arnold & Porter LLP*
Mr Kelby Ballena, *Arnold & Porter LLP*
Mr Gustavo Álvarez, *Procuraduría General of the Bolivarian Republic of Venezuela*
Mr Tulio F. Cusman, *Asesor externo de la Procuraduría General de la República*

24. On August 22, 2008, the Tribunal issued its decision on jurisdiction. It held that:

> a) The defense raised by the Respondent that the Arbitral Tribunal lacks jurisdiction because the Claimant has never acquired any right to the Las Cristinas or did so in a manner not in accordance with the laws of Venezuela, as required by Article 1(f) of the applicable bilateral investment treaty, is joined to the merits.
>
> b) The other three objections to jurisdiction of the Arbitral Tribunal are denied.
>
> c) The allocation of the costs of this phase of the proceeding is reserved for later.
>
> d) The Arbitral Tribunal, after consultation with the Parties, will issue an Order for the further procedure.[1]

25. By letter dated August 27, 2008, the Tribunal invited the Parties to consult regarding a timetable for the organization of the merits phase.

26. By letter dated October 16, 2008, the Centre informed the Tribunal and the Parties that Ms Katia Yannaca-Small, ICSID Counsel, had been appointed as Secretary of the Tribunal in replacement of Ms Claudia Frutos-Peterson. The same day, the Tribunal informed the Parties that the hearing on the merits would take place from December 7 through 17, 2009.

27. By letter dated February 12, 2009, Claimant informed the Tribunal that the Parties had reached an agreement regarding the schedule for the submission of written pleadings. By

[1] *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/04/6, Dec. on Jurisdiction ("**Decision on Jurisdiction**"), August 22, 2008, p. 33.

letter dated February 18, 2009, the Tribunal informed the Parties that it had no objection to the proposed schedule for the submission of written pleadings.

28. On March 13, 2009, Respondent submitted its Counter-Memorial on Merits and Jurisdiction.

29. By letter dated July 7, 2009, Claimant informed the Tribunal that the Parties had reached an agreement to amend the schedule for the submission of written pleadings. The Tribunal informed the Parties on July 8, 2009 that it accepted the schedule as amended.

30. By letter dated July 28, 2009, the Centre informed the Parties of the resignation of Dr Briner as arbitrator and president of the Tribunal due to ill health, and confirmed that the proceeding was suspended pursuant to Article 16 of the Arbitration (Additional Facility) Rules. The Parties were invited to consult in order to proceed with the appointment of another presiding arbitrator.

31. On August 21, 2009, Claimant submitted its Reply on Merits and Jurisdiction.

32. As two months had elapsed since the resignation of Dr Briner as President of the Tribunal, by letter dated October 1, 2009, the Centre reminded the Parties that arrangements had been made for the hearing on the merits to take place from December 7 through 17, 2009, and requested that the Parties furnish an update regarding their discussions concerning the appointment of a presiding arbitrator by October 5, 2009.

33. The same day, Claimant informed the Centre on behalf of both Parties that the discussions for the replacement of Dr Briner were on going and, therefore, that it would be impossible to hold the hearing from December 7 through 17, 2009. Claimant requested that the arrangements for the hearing be cancelled. On October 2, 2009, the Centre informed the Parties that it would cancel the hearing arrangements and would notify the other Tribunal members accordingly.

34. By email dated December 15, 2009, Claimant informed the Centre that the Parties continued to seek agreement on a new presiding arbitrator.

35. Respondent submitted its Rejoinder on Merits and Jurisdiction on February 1, 2010.

36. By letter dated May 4, 2010, Respondent requested the discontinuance of the proceeding pursuant to Article 50 of the Arbitration Rules alleging a lack of interest on Claimant's part to continue its claims. By letter of even date, Claimant objected to the discontinuation of the proceeding.

37. By letters dated May 7, 2010, Claimant and Respondent indicated their renewed intention to seek agreement on appointment of a presiding arbitrator. On May 27, 2010, Claimant advised the Centre, on behalf of both Parties, that an agreement had been reached to appoint Professor Vaughan Lowe QC, a national of the United Kingdom, as President of the Tribunal.

38. By letter dated June 25, 2010, the Centre informed the Parties that Professor Lowe had accepted his appointment and that the proceeding was resumed.

39. By letter dated September 9, 2010, the Centre informed the Tribunal and the Parties that Ms Janet Whittaker, ICSID Counsel, had been appointed as Secretary of the Tribunal in replacement of Ms Katia Yannaca-Small.

40. On November 3, 2010, the Tribunal made a proposal to the Parties to hold a two-week hearing from September 26 through October 7, 2011. On January 12, 2011, the Tribunal invited the Parties to confirm their availability for the hearing during the proposed dates. By correspondence dated January 18, 2011, and January 26, 2011, the Parties informed the Tribunal of their availability for a hearing on the proposed dates in Washington, D.C., United States of America.

41. From September 2010 to February 2011, the Parties exchanged observations regarding Claimant's request to submit additional evidence in response to evidence submitted by Respondent with its Rejoinder on Merits and Jurisdiction. On February 23, 2011, the Tribunal issued a decision regarding Claimant's request. On March 14, 2011, the Tribunal accorded Respondent the opportunity to respond to the additional evidence submitted by Claimant.

42. By letter dated March 25, 2011, Respondent objected to the admission of an expert report submitted by Claimant on March 21, 2011. By letter of June 2, 2011, the Tribunal, having considered the submissions of the Parties, permitted Claimant to submit the expert report.

43. On July 27, 2011, the Tribunal provided the Parties with an indication of areas where the Tribunal considered that it would have a particular interest in hearing further submissions or might wish to put questions to the Parties.

44. On September 20, 2011, the Tribunal held a pre-hearing call with the Parties.

45. The hearing on the merits was held in Washington, D.C., United States of America from October 3 to October 6, 2011. The following individuals were present at the hearing:

Members of the Tribunal

Prof. Vaughan Lowe QC, *President*
Judge Charles N. Brower, *Arbitrator*
Prof. Brigitte Stern, *Arbitrator*

ICSID Secretariat

Ms Janet M. Whittaker, *Secretary of the Tribunal*

For Claimant

Mr John Laskin, *Torys LLP*
Mr John Terry, *Torys LLP*
Mr Yousuf Aftab, *Torys LLP*
Ms Rita Villanueva Meza, *Torys LLP*
Ms Marianna Almeida, *MINCA*
Mr Eric Rauguth, *MINCA*
Mr John Morgan, *Infinito Gold*
Mr John Amunrud, *Infinito Gold*

For Respondent

Dr Ronald E.M. Goodman, *Foley Hoag LLP*
Ms Janis Brennan, *Foley Hoag LLP*
Mr Alberto Wray, *Foley Hoag LLP*
Ms Mélida Hodgson, *Foley Hoag LLP*
Ms Tafadzwa Pasipanodya, *Foley Hoag LLP*
Ms Analía González, *Foley Hoag LLP*

Mr Diego Cadena, *Foley Hoag LLP*
Dr Constantinos Salonidis, *Foley Hoag LLP*
Mr Yuri Parkhomenko, *Foley Hoag LLP*
Ms Diana Tsutieva, *Foley Hoag LLP*
Ms Oonagh Sands, *Foley Hoag LLP*
Ms Martha Madero, *Foley Hoag LLP*
Mr Timothy H. Hart, *Credibility Consulting LLC*

46. On November 22, 2011, the Parties filed their submissions on costs.

47. By letter dated November 16, 2012, the Centre informed the Tribunal and the Parties that Ms Ann Catherine Kettlewell, ICSID Counsel, had been appointed as Secretary of the Tribunal in replacement of Ms Janet Whittaker. By letter dated December 18, 2012, the Tribunal declared the proceeding closed in accordance with Article 44 of the Arbitration Rules.

48. The Tribunal, having deliberated fully, makes the determinations set forth below.

THE FACTS

49. In 1990, Corporación Venezolana de Guayana ("**CVG**"), a Venezuelan Government agency which had been created in 1960 to oversee development of the Guayana region in Bolivar State, wrote to Placer Dome Inc. ("**Placer Dome**" or "**PDI**"), a Canadian corporation. The letter, dated March 30, 1990, was addressed to Placer Dome in Toronto, Canada; and it said:

> Please be informed that CORPORACIÓN VENEZOLANA DE GUAYANA is interested in developing a mining prospectus of low law and high tonnage located in the concessions of Las Cristinas 4, 5, 6 and 7, State of Bolivar, Venezuela.
>
> In order to develop this prospectus, we will work with a joint public-private company with the participation of a company of recognized experience in similar exploitation, which must be commercially and financially solvent, and it must provide the technology for the open pit and underground exploitation and metallurgical processing of ores.
>
> We believe that the potential of the LAS CRISTINAS deposits (stockworks and major veins) is more than 50,000,000 tons ≥ 3 g/t of gold.
>
> If this proposal is of interest to you, please notify us and send credentials, in order to consider your prequalification for the referenced project. The deadline for receipt of notification will be April 30, 1990, and you may notify us via fax, as indicated below.

> This invitation shall not create any obligation on the part of CORPORACIÓN VENEZOLANA DE GUAYANA or its subsidiary companies.
>
> Very truly yours,
>
> [Illegible signature]
>
> Dr Vicente Mendoza
> Vice President – Mining Sector
>
> CREDENTIALS REQUIRED:
>
> 1. LEGAL ASPECT:
> - Legal registration of the Company.
>
> 2. TECHNICAL ASPECT:
> - Report regarding experience in exploiting and processing metallurgical ores, similar to that proposed above.
>
> 3. COMMERCIAL ASPECT:
> - Commercial and financial aspects of the company
> - profit and loss statements of the company for the past three (3) years.[2]

50. Placer Dome was among the companies that submitted pre-qualification information and was one of four companies (the other three being Venezuelan)[3] that participated in a meeting with CVG in July 1990.[4] Those four interested companies were subsequently narrowed down to two by CVG, and those two were the subject of a detailed evaluation report by CVG dated November 14, 1990.[5]

51. In the evaluation report, the companies were rated according to a weighted scale, in which 25% of the points were allocated on the basis of "general information" concerning the company. That 25% was broken down under the headings of: 1) Technical Capacity – Research, Technicians / professionals, proprietary technologies; 2) International Experience – in mining, in gold (underground and open pit exploitation), other; 3) Exploration and Development / Gold Exploitation – exploration investments, development investments, production and trends;

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2 Ex. R-1.

3 Memorial of Vannessa Ventures Ltd., January 13, 2006 ("**Claimant's Memorial**") ¶ 27.

4 Counter-Memorial on Merits and Jurisdiction of the Bolivarian Republic of Venezuela, March 13, 2009 ("**Respondent's Counter-Memorial**") ¶ 23.

5 Ex. R-3. *Cf*., Respondent's Counter-Memorial ¶ 29.

4) Level of Company Integration; 5) International Assoc. Method (Joint Public-Private Companies); 6) Financial Aspects – consolidated capital, revenue from sales of gold, profits, indebtedness, investments in new development, production costs; and 7) Motivation to Invest in Venezuela.[6]

52. The remaining 75% of the points available to be awarded in the evaluation report were allocated in respect of "relevant aspects of the offer." That 75% was broken down under the headings of: 1) Conditions – offer vs. contract, requirements and conditions; 2) Evaluation-Exploration Programs of Lodes, Alluvia and Veins – schedule, estimated amount of investments, proposed activities; 3) Expectations from Exploitation and Benefit from Lodes, Alluvia and Veins; 4) Environmental Recovery Program; 5) Financial Support; 6) Project Management Method; and 7) Special Benefits.[7]

53. Out of a possible 100 points, Placer Dome scored 86.55, and the other company scored 76.75, in the evaluation report.

54. On November 30, 1990, CVG awarded the bid to Placer Dome.[8] Placer Dome's understanding of the relationship into which it was entering with CVG was recorded in a letter from Placer Dome to CVG dated May 17, 1991. Placer Dome wrote as follows:

> In regards to the position of chairman, we have been guided by our understanding that CVG chose Placer Dome as the majority partner for its proven technical and commercial capacity to develop large-scale mines and not as a provider of technical services under contract, or as a simple technical adviser. If this is the case, it seems logical and normal that Placer Dome would take on the majority of the operational decisions. In January we agreed that CVG would appoint the Director of Human Resources, the Controller and the Secretary, but we reserved the right to appoint the general manager, the primary finance officer and the mine manager. We assume that CVG would like to appoint the chairman, although the operational authority of this position is, to a certain extent, only a formality, because for the joint company public relations and lobbying will be of great importance, and we

6 Ex. R-3.

7 *Id.*

8 Ex. R-62.

> believe that these tasks could be best carried out by a Venezuelan appointed by CVG.[9]

There is no suggestion or indication that CVG disagreed with this view.

55. In April 1991, a Venezuelan company, Placer Dome de Venezuela, C.A. ("**PDV**") was incorporated by Placer B-V Limited ("**PBV"**), a wholly-owned subsidiary of PDI incorporated in Barbados.[10] PDV was to act as the vehicle for PDI's investment and participation in the exploitation of Las Cristinas.

56. On July 25, 1991, CVG and PDI entered into the **1991 Shareholders Agreement**,[11] in which they agreed to form two Venezuelan companies. One, Minera Las Cristinas C.A. ("**MINCA**"), was to explore and, if economically feasible, produce gold from Las Cristinas 4, 5, 6, and 7. The other, Relaves Mineros Las Cristinas S.A. ("**REMINCA**"), was to evaluate and, if economically feasible, process existing tailings at Las Cristinas 4 and 5.[12]

57. The 1991 Shareholders Agreement entered into between CVG and Placer Dome provided that 70% of the MINCA shares would be subscribed by PDV and 30% of the MINCA shares by a wholly-owned subsidiary of CVG. In the case of REMINCA, 51% of the shares would be subscribed by PDV and 49% by CVG. In the case of both MINCA and REMINCA, each of PDI and CVG was stipulated to be "jointly and severally liable for the obligations of its investor."[13]

58. The 1991 Shareholders Agreement included the following provision, in Article V:

> D. Assignment; Binding Effect
>
> Except as otherwise provided in this Agreement, neither party may assign any of its rights or delegate any of its duties under this Agreement without first obtaining the prior written consent of the other party which shall not be unnecessarily withheld. This Agreement shall enure to and be binding upon

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9 Ex. R-4.

10 Ex. R-117. *Cf.*, Respondent's Counter-Memorial, ¶ 39.

11 Ex. C-5A.

12 Ex. C-5A, Preamble and Art. I.

13 Ex. C-5A, Art. I.A.2 and Art. I.B.2.

> each of the parties hereto and their respective successors and permitted assigns.[14]

59. On March 3, 1992, CVG and MINCA entered into a contract (the "**Work Contract**") under which CVG agreed that MINCA exclusively would explore, develop, and exploit, under MINCA's "own account and risk," Las Cristinas 4, 5, 6, and 7.[15] Clause Twenty Eighth of the Work Contract provided that: "The parties may not assign in any manner this agreement, except by prior written approval of the other party."[16]

60. The Work Contract was stipulated to continue in full force for 20 years, extendable in specified circumstances for additional 10 year terms.[17]

61. In 1996, concessions for the exploitation of copper on the Las Cristinas sites (the "**Copper Concessions**") were issued by Venezuela's Ministry of Energy and Mines (the "**MEM**") to CVG.[18] This was necessary because the recovery of copper was an integral part of the commercial plan for, and the commercial viability of, the recovery of the gold. The Copper Concessions were subject to detailed conditions in respect of matters such as reporting to the MEM, the training of Venezuelan personnel, the improvement of the physical, cultural, social, and economic conditions of the population in the neighbourhood of the concessions, and the protection and renewal of the environment. It was understood that the holding of copper rights in the legal form of copper concessions was necessary in order that Placer Dome could arrange guarantees for loans necessary for the exploitation of Las Cristinas.[19] Rights under the Copper Concessions were transferred to CVG in 1996, and then transferred in turn to MINCA[20] in 1999.[21]

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14 Ex. C-5A, Art. V.D.

15 Ex. C-20A, Clause First.

16 Ex. C-20A, Clause Twenty Eighth.

17 Ex. C-20A, Clause Thirty First.

18 Ex. C-39A.

19 Respondent's Counter-Memorial ¶¶ 55-56.

20 Respondent's Counter-Memorial ¶¶ 73-76. *See also* Ex. R-67; First Witness Statement of José Antonio Pinedo, January 10, 2006 ("**First Pinedo Witness Statement**") ¶ 51.

21 Ex. C-40A.

62. Between 1992 and 1998, PDV, on behalf of MINCA, prepared a number of feasibility studies.[22] By August 1, 1996, PDV had spent over US$ 50 million on the exploratory phase and feasibility studies, and in July 1996 it estimated that the total cost for the construction and exploitation of the Las Cristinas mine would be US$ 536.5 million.[23]

63. CVG, which had committed to provide a power transmission line for Las Cristinas at a cost to Venezuela of US$ 45 million, and which was due to contribute another US$ 40 million, was unable to contribute further funds. Accordingly, in 1997, the 1991 Shareholders Agreement was revised in order to increase the financial commitment and shareholding of PDV and decrease that of CVG.

64. MINCA was reorganized, so that PDV's share was increased to 95% and CVG's share was reduced to 5%, though CVG had the option to increase its share up to 30% in the future by making contributions. The reorganization was formalized in the **1997 Amended Shareholders Agreement**[24] entered into by CVG, PDI**,** and PDV "in its capacity as PDI's investor."[25]

65. Article X of the 1997 Amended Shareholders Agreement read as follows:

> ASSIGNMENT; BINDING EFFECT
>
> Section 10.01. Assignment of Amended Agreement: Unless otherwise provided herein, the parties cannot assign their rights or delegate their obligations hereunder without the other party's prior written consent. This Amended Agreement shall be binding upon and inure to the benefit of each contracting party, and their permitted assignees.

66. The Canada-Venezuela BIT entered into force on January 28, 1998.

67. After time spent arranging further financing, large-scale construction at Las Cristinas was inaugurated at a ceremony attended by President Hugo Chavez on May 2, 1999.

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22 First Pinedo Witness Statement ¶ 8.

23 First Pinedo Witness Statement ¶¶ 16, 31.

24 Ex. C-30.

25 Description of PDV given in the Preamble to the Amended Shareholders Agreement, *see* Ex. C-30.

At that time the price of gold had fallen to under US$ 300 per ounce.[26] The falling gold price affected the profitability of the Las Cristinas project.

68. Six weeks later, on July 15, 1999, a meeting of the MINCA Board of Directors, which had been called by PDV, resolved to suspend the Las Cristinas project in accordance with the 1997 Shareholders Agreement and the MINCA Bylaws (the "**MINCA Bylaws**"). The CVG-appointed director voted against the suspension and MEM officials expressed their displeasure at the decision.[27] It appears that exploitation of the mine never in fact began.

69. In the view of CVG, because the suspension was a unilateral, unauthorized step, CVG had the contractual right to rescind the Work Contract if the suspension continued for more than one year,[28] *i.e.*, beyond July 15, 2000. This view of the Work Contract appears to have been shared by MINCA.[29]

70. Placer Dome sought to devise alternative plans, including a 'staged development plan' (the "**Phoenix Project**"), for the development of Las Cristinas,[30] and discussed the matter with CVG. CVG did not accept the staged development plan. No new plan was agreed.

71. Placer Dome regarded the exploitation of the mine as not economically viable and, according to a Placer Dome press release dated June 14, 2000, decided to suspend the project until technology or market conditions improved. That press release also stated that "Placer Dome will write off the carrying value of its investment in Las Cristinas, totalling $116 million, and will reclassify the property's 7.4 million ounces of gold reserves as resources.[31]"

72. MINCA sought the agreement of CVG to the extension of the suspension for a further year, and CVG gave its agreement. An Extension Agreement was concluded by CVG,

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26 First Pinedo Witness Statement ¶¶ 54-58.

27 First Pinedo Witness Statement ¶ 60.

28 *See* Ex. C-20A, Clause Nineteenth.

29 *See* "Las Cristinas Project. Staged Development Feasibility Study. Volume 4 – General Matters. April 2000," prepared by MINCA in collaboration with Placer Dome Technical Services Limited, Ex C-277: p. 4.2, "The Work Contract allows MINCA to suspend the project for a period of up to 12 months. After such period, CVG can unilaterally rescind the Work Contract."

30 *See*, *for example*, Ex. R-10.

31 *See* Ex. R-15.

PDI, PDV, and MINCA on August 8, 2000 (**"Extension Agreement**").[32] Under the Extension Agreement, the property would be maintained and the social programs in the Guyana region undertaken, and the Las Cristinas project would continue; however, the mining project would be suspended until July 14, 2001.[33] CVG considered that, under this agreement, it would again be entitled to exercise its right to cancel the Work Contract on July 15, 2001, because of the earlier unauthorised suspension.[34]

73. The MINCA Board retained Scotia Capital Inc. ("**Scotia**"), an investment bank, in order to locate an investor by January 31, 2001 that would complete the transaction by June 30, 2001, i.e., before the expiry of the agreed extension. The process was not smooth. In November 2000, Scotia submitted a list of 28 possible investors (Vannessa's name was not on that list).[35] PDV considered that CVG was failing to cooperate in this effort.[36] CVG considered that Scotia was insisting upon the offering of incentives to investors that were beyond CVG's powers to offer and that were, in CVG's opinion, unnecessary to attract an investor.[37] Scotia suspended its activities on March 18, 2001, and its contract was cancelled on May 18, 2001.[38]

74. Subsequent events need to be read against the background of Article 9 of the MINCA Bylaws, which established a right of pre-emption in the event that one of the shareholders wished to sell all or part of its shareholding in MINCA. It provided that:

> […] The Shareholders shall have a preferential right to purchase the shares that other Shareholders wish to sell for a consideration, in the proportion which the number of shares held by each shareholder at the time the sale offer is known bears to the total number of shares of the Company. For these purposes, the selling Shareholder shall send a letter to the Board of Directors of the Company informing it of the number of shares it wishes to sell, the name of the intended buyer and the purchase price. The Board of Directors

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32 Ex. C-60A.

33 First Pinedo Witness Statement ¶¶ 62-68.

34 Second Witness Statement of Franqui Patines, March 3, 2009. ("**Second Patines Witness Statement**") ¶ 19.

35 Second Patines Witness Statement ¶ 24.

36 First Pinedo Witness Statement ¶¶ 69-73.

37 Second Patines Witness Statement ¶¶ 24-26, 32.

38 First Pinedo Witness Statement ¶ 73.

> shall give immediate notice of the offer to the other Shareholders, who shall have a term of thirty (30) calendar days to exercise their preferential right.
>
> If the other Shareholders do not exercise their preferential right, or exercise it partially, the selling Shareholder may sell the remaining shares for a price no lower than the price informed to the Board of Directors.
>
> Any transfer made in violation of this Clause shall be deemed to be void and without any effect upon the Company. Notwithstanding the foregoing, transfers of shares to related companies, wholly-owned by Shareholders, directly or indirectly, or by the Shareholder's parent Company are hereby authorized.[39]

75. The need to bring a new investor into MINCA remained. Mr José Antonio Pinedo, the in-house counsel for PDV at the time and now Vice-President, General Counsel, and Secretary of Placer Dome America, testified that:

> Placer Dome decided that while it still wanted to retain an interest in Las Cristinas and maintain the possibility of re-entering the project at some future date, it could no longer feasibly develop the project on its own in Venezuela. Placer Dome decided that it would seek an investor to purchase its shares in Placer Dome Venezuela while still retaining back-in and royalty rights to the [Las Cristinas] project.[40]
>
> Before entering into negotiations with any third party, Placer Dome offered to sell its interest in Las Cristinas to CVG...[41]

76. On April 17, 2001, William Hayes [sic then Placer Dome's Executive Vice President – United States & Latin America] attended a meeting with the president of CVG, General Rangel Gomez, to propose the sale.[42]

77. One week later, on April 25, 2001, Mr Hayes wrote to the President of CVG as follows:

> […] I would like to confirm the interest of Placer Dome (Placer) in exploring the possibility of an agreement with the Corporation that you preside (CVG) to transfer to CVG the economic interest of Placer in MINCA.-

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39 Ex. C-6A.

40 First Pinedo Witness Statement ¶ 74.

41 First Pinedo Witness Statement ¶ 75.

42 *Id*.

As a preliminary step, we have anticipated a viable alternative to facilitate a transition of the Project in the form of a sale or transfer of the economic interest of Placer in MINCA to CVG, so that CVG would become the sole owner of MINCA.-

Placer has thought that the sale of the economic interest could be for a determined amount which would be paid in deferred payments with the income from the Project, if it is indeed developed by CVG, on its own, in combination with third parties, by third parties related to it, or completely on its own. The calculation and payment of said amount would be on the basis of a percentage of the income from the Project, the value of the mineral extracted, or a similar formula. To this end, Placer proposes that it be paid 5% of the income from the sale of the Project mineral, in quarterly payments.-

It is very important that, in the event that this proposal should prove feasible, and once both parties have defined the proposal in all its conditions (including the approval by the respective corporate entities of CVG and Placer), it be executed before July 15, 2001, the date on which the suspension period of the Project expires. Beyond this date, Placer cannot continue to cover the cost of infrastructure, facilities and social programs of the Project.-

In order for it to be completed within the desired time period this proposal requires joint, full time, diligent and sustained work by the negotiation teams of the parties. The Project involves many legal aspects and businesses that need to be taken into consideration in order to resolve the aforementioned proposal. Therefore, if CVG is interested in pursuing conversation on the proposal, we think that the best way to do so is to immediately designate the negotiation teams and instruct them on the need to give priority to the discussion on this subject in order to close it on the date that we spoke of, next May 31.-

Placer is at the disposal of CVG to initiate the negotiation of this alternative. The aforementioned notwithstanding, Placer would like to leave other Project negotiation options open until such a time as this operation is concluded.-

As we have stated, Placer believes that current conditions do not allow the development of the Project as it was conceived and, as you know, MINCA contacted Scotia Capital in search of alternatives for developing the Project, but the results of this search were negative. However, these conditions could change in the future. Therefore, Placer wants to offer the possibility that if no mining project is developed in Las Cristinas after a certain period of time past the date of the Placer interest in MINCA to CVG, Placer could reacquire this interest for the same price as was negotiated with CVG.[43]

[43] Ex. C-74A.

78. CVG was interested in considering Placer Dome's proposal. On May 14, 2001, CVG replied to Placer Dome, stating that it would create a team to evaluate the offer.[44] There is no evidence that a sale price or other precise terms of sale were at any time proposed by Placer Dome to CVG. On June 7, 2001, Placer Dome wrote again to CVG, noting that the extended suspension would soon expire (on July 15, 2001) and proposing a meeting in Venezuela on June 14 or 15, 2001, to discuss the matter.[45]

79. On July 11, 2001, the president of CVG wrote to the Minister at the MEM to make it aware of the situation with MINCA. He observed that Placer Dome had a 70% stock participation in MINCA, and that CVG had 30%. He noted that: (i) CVG had invested US$ 110 million in the project; (ii) Placer Dome had notified CVG of its intention not to continue with the project (including the cost of the electric transmission lines); and (iii) CVG and the MEM had held meetings in search of an institutional consensus on ways to preserve and reactivate the project. He noted the imminent expiry of the extended deadline, which would occur on July 15, and said that "we find ourselves in urgent need of continuing the execution of the Las Cristinas Mining project through the company MINCA, assuming total stock control of said company."[46]

80. On the same day, July 11, 2001, Mr Pinedo, for PDV, met Mr Franqui Patines, then President of MINCA. Mr Patines testified that the purpose of the meeting was to inform Placer Dome of CVG's decision to consider Placer Dome's proposal. He said that he was "astonished" when he "heard Mr Pinedo's news, that Placer Dome was about to sign an agreement with a third party," and that he was unaware that Placer Dome was negotiating with a third party.[47]

81. Mr Pinedo testified that a Scotia representative had suggested that a deal with Vannessa might be possible, that Vannessa had contacted Placer Dome with a potential offer in

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44 First Pinedo Witness Statement ¶ 75.

45 Ex. C-76A.

46 Ex. C-90A (stating in Spanish at Ex. C-90: "nos vemos en la imperiosa necesidad de continuar con la ejecución del proyecto Minero Las Cristinas a través de la empresa MINCA, asumiendo el control accionario total de la misma").

47 Second Patines Witness Statement ¶ 35.

April 2001, and that Placer Dome and Vannessa had met that month in New York. He wrote that:

> We met for the entire day and by the end of the meeting we had worked out the essential elements of a deal for Placer Dome to transfer its shares in Placer Dome de Venezuela to Vannessa. Placer Dome understood that once the deal was in place Vannessa would begin work on the Las Cristinas Project immediately through a $50 million staged development plan. Vannessa had a workable plan that could be implemented immediately. … Placer Dome had confidence in Vannessa because Placer Dome had entered into a deal with it in the past for a mine in Costa Rica….
>
> During this negotiation period, Placer Dome maintained its offer with the CVG. Placer Dome told Vannessa that until a deal was finalized between Placer Dome and Vannessa, the CVG retained its option to accept Placer Dome's offer. Placer Dome told the CVG that it was considering offers from third parties and, as a result, the CVG should act upon its offer quickly. But it did not specifically advise the CVG of its negotiations with Vannessa and was not required to do so under any of its agreements with the CVG.[48]

82. There is no evidence in the record of any detailed technical or financial presentation made by Vannessa to Placer Dome before July 2001. Indeed, there is no document in evidence that records Vannessa's detailed technical or financial plans for the Las Cristinas project at all. Questioned by the Tribunal, counsel for Claimant was unable to identify any such presentation or plans.

83. The only document in evidence that indicates even the possibility of financial backing for Vannessa is a letter dated May 25, 2001, from Mr L. B. Gordon, President of Coril Holdings Ltd, a Canadian global investment and management company, which had received assets worth in excess of $2 billion in 1998 and 1999.[49] The letter, which contains no firm undertaking to finance Vannessa, read as follows:

> To Project Owner
>
> Dear Sirs,
>
> Re: Vannessa Ventures Ltd (Vannessa)

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48 First Pinedo Witness Statement ¶¶ 80-81.

49 Ex. R-18, *see also* Respondent's Rejoinder ¶ 959.

> Coril Holdings Ltd ("Coril") is interested in providing financing to Vannessa regarding the development projects of Vannessa ranging from US$ 15 million and higher, in accordance with a feasibility study acceptable to Coril and on terms satisfactory to Coril.
>
> Coril, through predecessor subsidiary companies, has a lengthy and successful history in the mining industry in North America and has the experience and financial capacity to invest in mining development projects.
>
> Coril is a major shareholder of Vannessa and as such is very interested in providing support to Vannessa in its initiatives to develop resources. In an agreement with Vannessa, Coril has a right of first refusal to provide any future debt, equity or other financing proposed to be undertaken by Vannessa. Coril remains committed to maintaining this position in Vannessa.
>
> Should you require any further information, please do not hesitate to contact me at [telephone number].
>
> Yours truly,
>
> [sgd]
>
> L.B. Gordon
> President[50]

84. July 13, 2001 was a Friday and the last business day before the expiry of the extended suspension on July 15, 2001. On July 13, 2001, Placer Dome finalized its agreement with Vannessa in the **Original Transaction Agreement**. According to Section 1.01 of this Agreement, all of the shares of PDV held by PBV, together with loans of over $68,000,000 made by PDV to MINCA, were bought for a total of US$ 50.[51] Section 2.04 of the Agreement recorded that:

> [E]ach of the Vannessa Signatories acknowledges that the purchase of the PBV Interests is on an 'as-is/where-is' basis and 'with all faults' and that the consideration for the purchase of the PBV Interests is a reasonable and adequate valuation thereof.[52]

85. In the Original Transaction Agreement, Vannessa agreed that it would "automatically assume all obligations of Placer, PBV, and all other Indemnified Persons" (*i.e.*,

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50 *Id*.

51 Ex. C-4, Art. II, Section 2.02(a). To be precise, the shares were bought for US$ 25, and the loans advanced by PDV to MINCA, totaling over £68m, were bought for US$ 25.

52 Ex. C-4, Art. II, Section 2.04.

all past, present and future Subsidiaries and Affiliates of PDI other than PDV and MINCA, and all officers, directors, shareholders, counsel, *etc*.).[53]

86. The Original Transaction Agreement made provision for a number of possible scenarios. It provided for payment of a percentage of revenues to PBV if Vannessa exploited Las Cristinas.[54] It gave PBV irrevocable options to repurchase the MINCA interests in certain circumstances, including (according to Section 4.01 (a)(i)):

> (B) the occurrence of any of the following, other than as a result, direct or indirect, of any act or omission by Vannessa or any of its affiliates (including, without limitation, MINCA, PDV and Vannessa Barbados) and provided that Vannessa is not then using its best efforts to cure or to vigorously contest the validity or consequence of such matter, or is not pursuing or exercising all rights and remedies with respect thereto to the best of its ability: any loss or material breach of the Work Contract or the Copper Concession, or any cancellation, revocation, rescission or termination thereof, or any determination or claim that the Work Contract or the Copper Concession was void *ab initio*, unconstitutional, invalid, unenforceable, illegal or *ultra vires*, or any notice, claim or allegation of any of the foregoing; (C) a Change of Control or proposed Change of Control of Vannessa ….[55]

87. The Original Transaction Agreement also gave PBV an irrevocable right of first refusal in the event of a proposed sale by Vannessa of its interests.[56]

88. The final section of the Original Transaction Agreement contemplated, not exploitation of Las Cristinas under the Work Contract, but rather suing Venezuela for breach of the Work Contract. It provided for the division between Vannessa and PBV of any damages recovered by Vannessa in litigation such as the present. It read as follows:

> Section 8.19 Distribution of Recovery Proceeds. If Vannessa (or any of its Affiliates) is permitted to contest or otherwise exercise rights or pursue remedies with respect to any Action referred to in Section 4.01 (a)(i)(B), the Parties hereby agree that (a) no settlement or compromise with respect thereto shall be made except with the prior consent of PVB; (b) Vannessa (or

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53 Ex. C-4, Art. II, Section 2.02(b).

54 Ex. C-4, Art. III, Section 3.01.

55 Ex. C-4, Art. IV, Section 4.01(a)(i). The term "Change of Control" is defined in great detail in Art. I of the Original Transaction Agreement.

56 Ex. C-4, Art. IV, Section 4.01(a)(ii).

> its Affiliates) shall be solely responsible for all legal and other costs and expenses relating to the conduct of such contest, exercise of rights or pursuit of remedies, as the case may be (collectively, "Action Costs"); and (c) all damages, settlement or compromise amounts, costs and expenses (collectively, the "Recovered Amounts") recovered by Vannessa and all of its Affiliates with respect to such Action shall be applied in the following order of priority: (i) to pay all Action Costs, (ii) any Recovered Amounts remaining thereafter shall be shared equally between Vannessa and PBV; provided that the aggregate amount of all Recovered Amounts applied in the manners described in sub-clauses (i) and (ii) shall not exceed U.S. $ 10.000.000 and (iii) any remaining Recovered Amounts remaining thereafter shall be shared between Vannessa and PBV in a ratio equal to 1:3.[57]

89. The broad aim of the Original Transaction Agreement appears to have been that PDI would transfer its responsibilities in respect of Las Cristinas to Vannessa, but retain a right to resume its participation in the project or to share in any profits from the Project or to share in any damages resulting from the present case or similar litigation.

90. On the same day, July 13, 2001, Placer Dome informed CVG of the transaction with Vannessa by fax.[58] Again on July 13, 2001, Vannessa Ventures Ltd. wrote to the MEM. Vannessa's letter read as follows:

> Mr Álvaro Silva Calderón
>
> Minister of Energy and Mines,
>
> His Office.
>
> Greetings from the company directors.
>
> We hereby wish to introduce ourselves. We are a Canadian public company, with investments in Venezuela since 1993, and we are very pleased to expand our interests in the country through the purchase of the Placer Dome de Venezuela company by Vannessa Ventures.
>
> We made this purchase for the purpose of developing the Las Cristinas project, and make it profitable, sustained and sustainable in time, adapting ourselves to the disadvantages of the current economy.
>
> Our company has not been heavily promoted in the country. However, we have the necessary technical and financial capability, in addition to the corporate mentality, to develop the project and reach the required levels. We

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57 Ex. C-4, Art. VIII, Section 8.19.

58 First Pinedo Witness Statement ¶¶ 83-85.

> are sure that you will be satisfied with our achievement of the social and economic interests in the region.
>
> Although Vannessa Ventures is a young company, our directors have more than thirty (30) years experience in 'large scale' mining in several countries around the world.
>
> We would like to set up, through this channel, a meeting with you and some of your directors,[59] in order to present our company, and acquaint you with our work plans.
>
> We are sure that we can rely on your support to achieve the proposed goals and benefits.
>
> Sincerely
>
> [Sgd][60]

91. A slightly more detailed account appeared on Canada Newswire on the same day:

> Placer Dome Inc. is pleased to announce that its indirect wholly owned subsidiary, Placer B-V Limited (PBV), has entered into an agreement to sell all of the shares of Placer Dome de Venezuela C.A. (PDV) to a subsidiary of Vannessa Ventures Ltd. of Vancouver, Canada. PDV holds a majority interest in Mineras Las Cristinas (MINCA), the corporation formed to develop the Las Cristinas property in Bolivar State, Venezuela.
>
> PBV will retain an interest in the gold and copper revenues generated by the Las Cristinas property and will, under certain circumstances, have the right to re-acquire the shares. If PBV re-acquires the shares, Vannessa will be entitled to an interest in the gold and copper revenues. MINCA suspended construction on Las Cristinas in 1999 due to low metal prices and Placer Dome wrote off the carrying value of its investment in mid-2000.[61]

92. On Saturday July 14, 2001, Mr Rauguth, for Vannessa, wrote to CVG. The letter read as follows:

> I respectfully write to you in order to notify you that, in addition to the content of the correspondence sent this past Friday, in which we state our decision to develop the mining concession Las Cristinas, Kilometer 88, State of Bolivar. I would also like to apologize for the delay in making you aware

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59 The Tribunal notes that the English translation provided by Respondent of Ex. R-145 is different as to the reference to "your directors" in the Spanish original which says "Nos gustaría, a través de esta comunicación, concretar una reunión con su persona y algunos de nuestros directivos,…" (emphasis added). Therefore, this part should be translated as "our directors."

60 Ex. R-145.

61 Ex. C-93.

> of our existence and intention vis-à-vis the project of the aforementioned mining concession. The delay in signing the negotiation between our parent company Vannessa Ventures Ltd., and the selling company Placer Dome, which was totally out of our control, prevented us from any public statement.
>
> Therefore, we are asking for a vote of confidence toward our company and offer the assurance of our wish for a peaceful and prosperous coexistence between Vannessa Ventures Ltd. and the national community at large.
>
> [Sgd]
>
> Erich Rauguth.[62]

93. On the same day, July 14, 2001, Mr Rangel Gómez of CVG wrote to Mr Hayes of Placer Dome. The letter read as follows:

> TO: Board of Directors, Placer Dome de Venezuela, Caracas.
>
> In relation to communication WMH-C-072/2001 of July 13 of this year, signed by Mr. William M Hayes, President of Placer Dome for Latin America, in which he informs this Corporation of a transaction between Placer Dome de Venezuela and ICH [sic. sc. IHC] Corp., the latter a subsidiary of Vannessa Ventures Ltd. I would like to inform you that the Venezuelan Guyana Corporation does not acknowledge or agree with the share sales agreement with the aforementioned company, or any other company, that may have taken place in violation of the terms and conditions established in the Modified Shareholders Agreement, the Extension Agreement and the legal norms that regulate the matter and, therefore, the relations in our country of this transnational company could be seriously impaired.[63]

94. On July 16, 2001, Mr Rauguth, for Vannessa, wrote to Mr Pinedo, for MINCA, as follows:

> Please undertake to inform the CVG that MINCA has made, subject to approval of the MINCA Board of Directors, a management decision on request of IHC Corp, a subsidiary of Vannessa Ventures Ltd and the new owner, the shares of Placer Dome de Venezuela, to undertake all necessary steps to place the Cristinas Property in commercial production with financing arranged by Vannessa Ventures Ltd. [sic].[64]

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62 Ex. C-96A.

63 Ex. C-98.

64 Ex. C-100 and *cf.*, Ex. C-101A (communicating MINCA's decision by Mr Pinedo to the Principal and Alternate MINCA Directors).

95. Mr Pinedo summoned members of the MINCA Board to hear the IHC Corp proposal, but Mr Patines and Mr Madeo, the Directors representing CVG, did not attend "since CVG does not acknowledge and rejects the sale agreement of shares regarding the aforementioned company."[65]

96. On July 20, 2001, Mr Rangel Gómez wrote to Mr Hayes, saying that: (i) he had met MINCA representatives that morning; (ii) he considered that "Placer Dome unilaterally, and in our opinion, behind the back of the Republic … negotiated in an indirect and biased manner with third parties" to sell its shares in MINCA "without informing [CVG] or making any formal and legal offers;" and (iii) "it would be desirable for Placer Dome to take a look at such an unpleasant and insincere negotiation so that we may resume conversations, if you so desire, in a more transparent manner."[66]

97. Later in July 2001, further agreements were made by Placer Dome and Vannessa to complete the sale of Placer Dome's interests to Vannessa, and PDV was renamed Vannessa de Venezuela C.A.[67]

98. On August 6, 2001, CVG gave 90 days' notice of its intention to rescind the Work Contract with MINCA.[68] CVG's letter enumerated various acts and omissions that it considered to be justifications for this rescission, including: (i) the failure to file reports as required by Clause Ninth of the Work Contract;[69] (ii) MINCA's failure to end the suspension of work at Las Cristinas in accordance with Clause Nineteenth of the Work Contract and the subsequent extension, which expired on July 15, 2001; and (iii) the transfer by Placer Dome of its shares in PDV to Vannessa Ventures Ltd, without the written authorization of CVG, which CVG said was required by the Work Contract.[70]

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65 Ex. C-103A.

66 Ex. C-284A.

67 Ex. C-4; Ex. C-286A; Ex. R-21; Ex. R-138; Ex. R-139; and Ex. R-140.

68 Ex. C-109A. *See also* Ex. C-20A, Clause Twenty Sixth.

69 Ex. C-20A, Clause Ninth.

70 The letter refers to Clause Twenty Fifth of the Work Contract, which deals with waiver of breaches and the voiding of contractual provisions. The requirement for written authorization in fact appears in Clause

99. There were several exchanges of views between the interested parties, but the dispute was not settled. In one such exchange, Mr Rauguth, writing as President of MINCA, requested arbitration of the dispute under Clause Twenty Sixth of the Work Contract; but that request was not taken up.[71] It is not necessary to rehearse those exchanges in detail here.

100. On November 6, 2001, CVG formally notified MINCA of the termination of the Work Contract and gave it seven days to vacate the Las Cristinas site.[72] On November 16, 2001, CVG took physical possession of the site and of certain associated physical assets.[73]

101. In 2002, various measures were taken under the law of Venezuela to cancel the concessions and transfer control of the rights under them to the Government of Venezuela. It is not necessary to rehearse them in detail.[74]

102. In May 2002, the MEM authorized CVG to enter into operation agreements with third parties for the exploitation of Las Cristinas. In July 2002, CVG considered bids from five companies and, in September 2002, CVG announced that it had reached an agreement with Crystallex, a Canadian company, for the exploitation and development of Las Cristinas.[75]

103. MINCA, now controlled by Vannessa, brought ten sets of legal proceedings in the Venezuelan courts to protect its rights to Las Cristinas and to nullify the CVG-Crystallex agreement as follows:

> (i) a constitutional petition filed on September 11, 2001, to protect MINCA's property and enforce the arbitration provisions in the work contract. On November 8, 2001, the court held the application inadmissible; and on March 19, 2002, that decision was confirmed by the Supreme Court.
>
> (ii) a constitutional petition filed on November 16, 2001, to prevent CVG taking over the Las Cristinas site. On February 19, 2002, the court held that

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Twenty Eighth, which stipulates that "[t]he parties may not assign in any manner this agreement, except by prior written approval of the other party." *See* Ex. C-20A, Clause Twenty Eighth.

71 Ex. C-145.

72 Ex. C-148A.

73 First Witness Statement of Erich Rauguth, July 22, 2009 ("**First Rauguth Witness Statement**") ¶ 87.

74 Ex. C-166A; Ex. C-167A; Ex. C-172A; and Ex. C-173A.

75 Claimant's Memorial ¶¶ 180-84.

it was the wrong forum; and on April 30, 2002, the second court declined to admit the application.

(iii) a constitutional petition filed on January 18, 2002, challenging MINCA's termination of the Work Contract and seeking an injunction to prevent CVG disposing of MINCA's rights. On March 20, 2002, the court held the application inadmissible because it was a contractual and not a constitutional matter. An appeal was rejected on February 26, 2003.

(iv) an action filed on May 3, 2002, with requests for interim relief, seeking nullification of CVG's decision to terminate the Work Contract. The case was withdrawn in July 2004, by which time it had proceeded to the evidentiary stage.

(v) an action filed on May 13, 2002, with requests for interim relief, seeking nullification of a MEM decision of March 8, 2002, reassuming rights to the Las Cristinas gold concessions. The case was admitted by the court on July 7, 2004.

(vi) an action filed on May 15, 2002, with requests for interim relief, seeking nullification of the Presidential Decree of April 2002 relating to the gold concessions. The case was admitted on July 17, 2002. On May 11, 2004, the court decided that the case should proceed to the evidentiary stage.

(vii) an action filed on May 30, 2002, seeking to compel CVG to attend arbitration. On July 15, 2004, the court declined to admit the application.

(viii) an action filed on September 26, 2002, with requests for interim relief, seeking nullification of an MEM decision of March 8, 2002, cancelling MINCA's copper concession. The court had made no decision on admissibility by the time that Vannessa filed its Request for Arbitration on July 9, 2004.

(ix) an action filed on November 14, 2002, seeking to nullify the CVG/Crystallex agreement. The case was admitted by the court on March 27, 2003. An appeal by Crystallex had not been dealt with by the time that Vannessa filed its Request for Arbitration on July 9, 2004.

(x) an action filed on September 11, 2003, seeking nullification of the Presidential Decree of March 2003 relating to the Copper Concessions.[76]

104. Between December 2001 and 2003, MINCA also made a series of requests to the Venezuelan National Assembly and to the Fiscalía (Prosecutor's Office)[77] to investigate various

[76] Claimant's Memorial ¶¶ 185-200.

[77] *See* Respondent's Counter-Memorial ¶¶ 221f, 489f. Claimant refers to the "Fiscalía" as the "Attorney General."

aspects of the Las Cristinas matter.[78] None led to any report or action that Vannessa regarded as an impartial and satisfactory upholding of its rights.

105. On July 9, 2004, Vannessa filed its Request for Arbitration. It claimed monetary damages in an amount not less than US$ 1,045,000,000 plus compound interest.[79]

106. In paragraph 344 of its Memorial, Claimant requested:

> (a) a declaration that Venezuela had unlawfully expropriated Vannessa's investments in Venezuela contrary to Article VII of the BIT;
>
> (b) a declaration that Venezuela had failed to accord investments of Venezuela [sic. sc. of Vannessa] fair and equitable treatment and full protection and security contrary to Article II(2) of the BIT;
>
> (c) restitution of its unlawfully expropriated investments as well as monetary damages for deterioration or loss of those assets, for lost profits caused by delay of the development of Las Cristinas, and for expenses incurred by MINCA, Vannessa Venezuela and Vannessa to defend their rights and interests, plus compound interest;
>
> (d) in lieu of restitution, monetary damages in an amount to be determined plus compound interest;
>
> (e) all of its costs, including tribunal costs, in bringing these proceedings; and
>
> (f) such further and other relief that Vannessa may claim and the Tribunal grant.

107. Similarly, in paragraph 639 of its Reply, Claimant reiterated

> […] its requests for relief set out at paragraph 344 of its Memorial, including its request for restitution of MINCA's right to mine gold and copper at Las Cristinas, or, in lieu of restitution, an award equal to its past and future losses as at the date of the Tribunal's award, calculated by reference to current information, for the damages caused by Venezuela's breaches of the Bilateral Investment Treaty described in this Reply. Vannessa also claims all of its costs, including Tribunal costs, in bringing these proceedings.

108. In paragraph 588 of its Counter-Memorial, Respondent requested that "Claimant's claims should be dismissed in their entirety and Venezuela should be awarded compensation for

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78 Claimant's Memorial ¶¶ 209-30.

79 Request for Arbitration ¶ 102.

all the expenses and costs associated with defending against these claims." The same request was made in paragraph 1013 of Respondent's Rejoinder.

I. JURISDICTION

109. In its Decision on Jurisdiction, the Tribunal (then differently constituted):

> [N]ote[d] that the main defense of the Respondent, namely that the transfer of the PDV shares constituted a breach of the Shareholders Agreement of the MINCA By-Laws and therefore rendered the transfer null and void with the result that the Claimant never acquired property in the MINCA shares is likely to constitute a defense on the merits of the case. At the same time, the Respondent alleges as a jurisdictional objection that this transfer was unlawful under Venezuelan law within the meaning of the BIT according to which the investment must be "*in accordance with the laws of Venezuela*."[80]

For convenience, we refer to the requirement set out in the italicized words as the "legality requirement." The requirement derives from Article I(f) of the BIT, which stipulates that:

> '[I]nvestment' means any kind of asset owned or controlled by an investor of one Contracting Party either directly or indirectly, including through an investor of a third State, in the territory of the other Contracting Party in accordance with the latter's laws.

110. In light of the complexity of the issues of Venezuelan law involved and the possible relevance of Venezuelan law to both jurisdictional and merits questions, the Tribunal concluded in its Decision on Jurisdiction that "justice is better served if this objection to the competence of the Tribunal is joined to the merits."[81]

111. The present Tribunal has considered the position in light of the law applicable to each of the instruments relevant to its decision. The Tribunal is satisfied that it is the law of Venezuela that is the governing law of the Shareholders' Agreement, of the Amended Shareholders' Agreement, of the Work Contract and of the Extension Agreement, as well as of the MINCA By-Laws. It was not argued that any other legal system operated as the governing law in respect of these instruments. The BIT is governed by public international law.

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80 Decision on Jurisdiction, p. 22.

81 *Id.*, p. 23.

112. The Tribunal is unanimous in deciding that Claimant's claims are to be rejected in their entirety. As is explained below, the Tribunal finds that Placer Dome's sale and Claimant's acquisition of its interest in MINCA was incompatible with the legal relationship between PDI and Venezuela, reflected in the Shareholders' Agreements of 1991 and 1997, and confirmed by Article 9 of the MINCA Bylaws (set out above.).[82] The termination of the Work Contract and the taking of the associated steps to terminate PDI's interests in Las Cristinas were measures justified by PDI's breach of its agreements with CVG, from which Claimant's legal interests in this case derived, and in particular from PDI's breach of the Extension Agreement. None of the steps taken by Venezuela amounted to a breach of the BIT.

113. While the Tribunal is unanimous in holding that Claimant's claims are to be rejected in their entirety, it is not unanimous in all of the steps in the reasoning that lead to that conclusion. The majority of the Tribunal considers that the Tribunal has jurisdiction in this case and that the claims fail because, on the facts of this case, Respondent's treatment of the investment does not constitute a breach of the Treaty. One of us considers that, on the facts of this case, there was no good-faith investment and that the BIT does not cover investments not made in good faith, and accordingly the Tribunal lacks jurisdiction. The majority accepts that good faith has an important role in the analysis but considers that, in the absence of a treaty provision ascribing some different effect to the principle of good faith, it is only in circumstances where the application of good faith as a principle of national law invalidates the acquisition of the investment that a lack of good faith means that there is no "investment" for jurisdictional purposes. In other circumstances, the question of good faith does not go to jurisdiction but is a matter to be considered by the Tribunal when exercising its jurisdiction and to be applied in the context of admissibility and/or the application of the substantive protections of the Treaty at the merits phase.

114. These divergences in view are reflected in the following paragraphs. However, all members of the Tribunal have subscribed to this Award, on the basis that the decision on jurisdiction is carried by the majority, and that the member who dissented on the question of jurisdiction considers that, on the premise that jurisdiction exists, Claimant's claims are to be

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[82] *See* ¶ 74 above.

rejected in their entirety for the reasons that are set out below in the section of the analysis that addresses the merits of this case.

115. The analysis begins by addressing the jurisdictional issues. It addresses the question whether there was an investment within the meaning of the BIT, and it does so in two steps, starting with the question whether there was an "investment" in "any asset", and then moving to the question whether the alleged investment was "owned or controlled . . . in accordance with the [host State's] laws." The merits of the claim are considered afterwards.

A. Definition of "Investment" Step One: "any kind of asset…"

1. Respondent's Position

116. At the outset, Respondent considers that the issue of the existence of an "investment" has not yet been decided by the Tribunal. It also takes the view that the definition of an "investment" in the ICSID Convention can be applied in this particular arbitration. It says that while the Additional Facility Rules differ from the ICSID Convention in important respects (particularly regarding *ratione personae* jurisdiction), the Additional Facility Rules do not bar, and in fact require, the application of the definition of "investment" that is applicable under the ICSID Convention. It says that Claimant's investment does not satisfy the so-called "*Salini*" criteria for an investment to exist:[83] *i.e.*, "contributions, certain duration of performance of the contract and a participation in the risks of the transaction … [and a] contribution to the economic development of the host State."[84]

2. Claimant's Position

117. Claimant argues that the definition of "investment" under the ICSID Convention is irrelevant for the present arbitration, which is conducted under the Additional Facility Rules. It emphasises the legal and conceptual distinctiveness of arbitration under the ICSID Convention and arbitration under the Additional Facility Rules, which it says precludes the transposition of

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83 Rejoinder on Merits and Jurisdiction of the Bolivarian Republic of Venezuela, February 1, 2010 ("**Respondent's Rejoinder**") ¶¶ 600-50. *See also* Respondent's Counter-Memorial ¶¶ 368-80; Tr. Day 3:722-31 (Goodman).

84 *Salini Costruttori S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001, ¶ 52. *Cf*., Schreuer *et al*, *The ICSID Convention. A Commentary*, 2nd ed. (2009), ¶¶ 152-74.

the definition of "investment" from the former regime to the latter. In any event, Claimant asserts that its investment would satisfy even the strictest version of the definition.[85]

3. The Tribunal's Decision

118. The question whether there is an "investment" within the meaning of the BIT is a question that must be answered by reference in the first place to the BIT.

119. There is no doubt that Claimant, a Canadian company, bought shares in PDV, a Venezuelan company, for the price of US$ 50 and "owned or controlled" those shares in PDV within the meaning of Article I(f) of the BIT. Ownership or control of shares is listed in Article I(f)(ii) of the BIT as one of the examples of an asset whose ownership or control can constitute an investment.

120. Accordingly, it appears on the face of it that Claimant's ownership of shares in PDV could amount to an "investment" in PDV. There are, however, other aspects of Claimant's interest that must be considered before the question of the existence of jurisdiction under the BIT in respect of the claim in this case is definitively answered.

121. The Tribunal had serious concerns about the nature and extent of Claimant's interest in Venezuela, and about the distinction between the making of an investment and the buying of a legal claim against the host State. The purely nominal purchase price (US$ 50) of its shareholding in PDV and its interest in the loans to MINCA[86] is a notable feature of this case.

122. The nominal purchase price does not of itself necessarily indicate that there was no real investment by Claimant. It is not unusual for the bulk of costs and benefits of an investment in a licence or concession to arise after the date of the licence or concession contract, in the form of contractually-obligated expenditure on the investment and of royalty and tax payments. (That possibility does, however, underline the importance of the continuing confidence of the contracting partners in one another, and emphasizes the great importance of the identity of the contracting partners.)

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[85] Claimant's Reply Memorial ¶¶ 479-85; Tr. Day 2:370-77 (Terry); Tr. Day 4:837 (Terry).

[86] *See* fn. 51 above.

123. In the present case, however, Claimant's nominal payment for the shareholding occurred in a context that included the terms of the Original Transaction Agreement (and, in particular, Section 8.19 thereof, providing for the distribution between Vannessa and PBV of any proceeds recovered in this litigation),[87] and the absence of any concrete technical or financial preparations on the part of Claimant such as could have enabled it at least to begin the resumption of operations at the Las Cristinas site promptly after its acquisition of the shares in PDV. Taken together, these factors make it debatable whether Claimant can properly be regarded as having made an investment in mining in Venezuela.

124. Consideration of the commercial stature and position of Vannessa at that time does not assuage this concern. Claimant says that Mr Rauguth, the founder of Vannessa, was a mining engineer with knowledge and experience of the mining industry in Venezuela. It says that Vannessa, while a small company lacking in-house financial and technical capabilities, and having no track record of commercially-successful mining, did possess experience and contacts that could have made it possible for it to draw together the resources required to exploit the opportunities in Las Cristinas. Respondent, on the other hand, viewed Vannessa as a small, speculative enterprise, noting that it had not been included among the 28 potential investors identified by Scotia in November 2000, and that it was lacking in mining and processing experience and had no operating revenues, cash flow, or relevant technical expertise.[88] It was accepted by both sides that Vannessa had put forward no detailed plans of work whatever for Las Cristinas, and had secured neither the funding nor the equipment necessary to begin immediate work at the site in the summer of 2001.

125. There is more than one way in which these factors might be addressed, and more than one way in which any lack of good faith might put a putative "investment" outside of the scope of BIT protections. The "reality" or "genuineness" of the investment and the good faith of the investor are matters that might bear upon questions of jurisdiction, upon questions of admissibility, and upon questions of merits.

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87 *See* ¶ 88 above.

88 Memorial on Jurisdiction of the Bolivarian Republic of Venezuela, August 28, 2006 ("**Respondent's Memorial on Jurisdiction**") ¶ 6.

126. Article I of the BIT requires that in order to qualify as an "investor" a national or enterprise of one BIT Contracting Party must own or control, directly or indirectly, an asset of any kind (including shares or any other form of participation in a company, business enterprise or joint venture) in the territory of the other Contracting Party in accordance with the latter's laws. Article I does not explicitly assert that there is, beyond the requirement that the asset be owned or controlled in accordance with the host State's laws, a further requirement that the putative investment must qualify as a "genuine" or "substantial" investment in order to fall within the definition in Article I(f) of the BIT.

127. The Tribunal considers that the requirement in Article I(f) of the BIT that the asset be "owned or controlled … *in accordance with the latter's laws*" is the next focus of attention in the analysis. As was explained above,[89] one of us would have rejected the claim on the ground that there was no good-faith investment made by the Claimant in this case—good faith being a principle of Venezuelan law—and that the alleged investment fell, therefore, outside the scope of Article I of the BIT. The majority considers that the claim should not be rejected on the ground that the Claimant's investment was not made in good faith, because good faith is not an independent element of the definition of a protected investment in the BIT.

B. Definition of "Investment" Step Two: "asset owned or controlled . . . in accordance with" the host State's laws

1. Respondent's Position

128. Respondent considers that Claimant's interpretation of Article I(f) (see below) as a provision that is concerned only with the ownership of the asset is contrary to the duty to interpret the Treaty in good faith. Respondent argues that investments that are "unlawful" under domestic law cannot be protected under international investment law, and that the entitlement of investments to MFN treatment does not affect the prior question of the definition of the term "investment" itself.[90] Respondent further emphasises that the 'legality requirement' demands

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89 *See* ¶ 113 above.

90 Respondent's Rejoinder ¶¶ 460-71. *See also* Tr. Day 3:706-10 (Goodman on why the argument about investments "owned" rather than "made" should be rejected); Tr. Day 3:710-12 and Tr. Day 3:715-16 (Goodman on the MFN treatment argument).

conduct in good faith, both under Venezuelan Civil Law and, more broadly, as a paramount principle governing contractual relations.[91]

129. In the oral proceedings, Respondent argued that the expression "laws of Venezuela" is not restricted to the type of legal rules formally defined as law (*i.e.*, statutes, decrees, *etc.*), which is what Claimant had submitted, but includes "all of the legal system."[92] That inclusive view would extend to contractual obligations in instruments such as the Shareholders' Agreement and Amended Shareholders' Agreement, the Work Contract, and the August 8, 2000 agreement (Extension Agreement) to suspend the performance of the Work Contract for one year beginning on July 15, 2000.

2. Claimant's Position

130. In Claimant's Reply on Merits and Jurisdiction, two preliminary points are raised regarding the requirement under Article I(f) of the Canada-Venezuela BIT that the investment be "in accordance with the latter's [the other contracting party's] laws." Claimant points out that the BIT requires the investment to be "owned", rather than "made", in accordance with the laws of the host State,[93] and argues that this requirement was satisfied in this case by the registration with the Venezuelan Mercantile Registry of the books of the company recording the transfer of shares in Placer Venezuela to Vannessa Barbados and the renaming of Placer Venezuela as Vannessa Venezuela, without any objection by Venezuela, in July 2006.[94]

131. Moreover, Claimant invokes the MFN treatment rules in Article III(1) and (2) of the Canada-Venezuela BIT to rely on what it says is the more favourable treatment in the Venezuela-UK BIT, which does not have the "legality requirement" in its definition of an "investment."[95]

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91 Respondent's Rejoinder ¶¶ 472-79; Tr. Day 3:713-15 (Goodman).

92 Tr. Day 2:478-79 (Wray).

93 Claimant's Reply ¶¶ 287-91.

94 Claimant's Reply ¶¶ 292-96. *See also* Tr. Day 1:29-33 (Laskin).

95 Claimant's Reply ¶¶ 297-98. *See also* Tr. Day 1:33-37 and 1:67-69 (Laskin).

132. At the oral proceedings, in response to a question by the Tribunal, Claimant argued specifically that "a violation of a contract is not, *ipso facto*, a violation of the law."[96] Claimant also argued that the "legality requirement" is limited in its application to breaches of fundamental principles of law and of laws concerning foreign investments, and that it does not apply so as to bar the existence of jurisdiction in circumstances where that would be a disproportionate response to a breach of the law.[97] An example might be late compliance with a requirement for registration of a share transfer that is not otherwise forbidden by the local law: such a breach, in Claimant's view, should not necessarily bar jurisdiction under the BIT.

3. The Tribunal's Decision

133. As far as the MFN provision is concerned, the Tribunal considers that the MFN treatment under the Canada-Venezuela BIT is promised to investments as defined in Article I of the BIT. The benefit of the MFN provision in Article III of the Canada-Venezuela BIT can only be asserted in respect of investments that are within the scope of Article I(f) of the Canada-Venezuela BIT to begin with. The MFN clause cannot be used to expand the category of investments to which the Canada-Venezuela BIT applies.

134. The Tribunal considers that the reference to a host State's "laws" ("*lois de [l'autre partie contractante]*," "*leyes de [la otra Parte Contratante]*") in Article I(f) of the BIT is a reference to the laws and regulations made by, or under the authority of, the public authorities of the State, and does not extend to purely contractual obligations. The Tribunal reaches this conclusion by giving the term "laws" / "lois" / "leyes" its plain and ordinary meaning, in circumstances where Respondent did not demonstrate that the term should be given a different meaning.

135. That ordinary meaning points to laws made by the host State, and not to obligations created under the law by private persons. The Tribunal accordingly decides that, even if the transfer of shares in PDV to Claimant involved a breach of the contractual

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96 Tr. Day 1:38 (Laskin). *See generally* Tr. Day 1:37-43 (Laskin).

97 Tr. Day 1:43-47 (Laskin).

stipulations in the Shareholders Agreement, such breaches would not constitute a violation of Venezuela's "laws" for the purposes of BIT Article I(f).

136. The arguments relating to the "legality requirement" were developed further by the Parties in the specific contexts of: (i) constraints applicable as a matter of Venezuelan contract law and the doctrine of *intuitu personae* contracts; (ii) Venezuelan law on public procurement and administrative contracts; (iii) the principles of good faith and public policy; and (iv) Venezuelan Decree 2095. We address these in turn, in light of our decision on the meaning of "[host State] laws."

C. Constraints on the Transfer of the Shareholding under Venezuelan Contract Law

1. Respondent's Position

137. For Respondent, the starting point of the analysis of the contractual issues is that Placer Dome was "selected as a result of a private bid process [and] signed several instruments with the CVG to achieve a common public objective ... All of these agreements are instrumental to the objective pursued, that is, they were signed as a means of achieving the expressed public objective – a joint venture to develop Las Cristinas."[98] One of the consequences of this joint venture, as a matter of Venezuelan law, is the legal indivisibility of related contracts; namely, that all of the contracts instrumental to the development and exploitation of Las Cristinas have an identical objective, are interrelated, and cannot be considered in isolation.[99]

138. Respondent argues that, as a matter of Venezuelan law, the contracts instrumental to the development of Las Cristinas were of an *intuitu personae* nature and that "this is a characteristic inherent to the economic operations in which all of the contracts are related and which therefore must be considered in interpreting them."[100] It emphasises that Placer Dome "was chosen specifically because of its characteristics to be the partner of CVG and, with CVG's

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98 Respondent's Rejoinder ¶ 486. *See generally* Respondent's Rejoinder ¶¶ 480-87. *See also* Tr. Day 2:404-33 (Brennan).

99 Respondent's Rejoinder ¶¶ 489-501. With respect to indivisibility, *see* Tr. Day 2:435-43 (Brennan); Tr. Day 2:452-57 (Brennan); Tr. Day 2:485-504 (Wray).

100 Respondent's Rejoinder ¶ 503.

consent it participated in MINCA through PDV, its vehicle, through which Placer Dome was going to exercise and perform its *intuitu personae* rights and obligations."[101] PDV is not the real party in this matter; it is the continued participation by Placer Dome that is critical.

139. Respondent rejects Claimant's argument that the 1991 Shareholders Agreement was superseded by the 1997 Amended Shareholders' Agreement. According to Respondent, the 1997 Agreement cancelled only the provisions of earlier agreements relating to its purpose (*i.e.*, the amendment of the financing terms), rather than the whole of the earlier agreements. In any event, the 1997 Amended Shareholders Agreement was itself an *intuitu personae* agreement and could not be assigned or delegated without the consent of CVG. Further, PDV is described in the preamble to the 1997 Amended Shareholders Agreement as being a party to that 1997 agreement "in its capacity as PDI's investor."[102] Finally, the participation of Placer Dome was so intertwined with that of PDV that, for Claimant to argue that they were different legal entities, would be to ignore reality.[103]

140. Respondent argues that the Original Transaction Agreement breached Venezuelan law by violating the *intuitu personae* nature of the obligations of Placer Dome with respect to the development of Las Cristinas. The rights and obligations acquired *intuitu personae* could not be transferred to Claimant without the express consent of CVG.[104] The practice of CVG regarding changes of control in other mining companies, to which Claimant referred, is irrelevant: in those cases, unlike in this one, the "creditor" (*in casu*, CVG) was satisfied with the personal qualifications of the third party.[105] Moreover, the transfer to Claimant of the shares effectively constituted an unauthorised transfer of the contract,[106] in breach of the rules of Venezuelan contract law on non-assignment.[107]

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101 Respondent's Rejoinder ¶ 513.

102 Ex. C-30.

103 Respondent's Rejoinder ¶¶ 489-515. On the relationship between the 1991 and 1997 agreements, *see* Tr. Day 4:895-921 (Brennan).

104 Respondent's Rejoinder ¶¶ 776. *See also* Respondent's Counter-Memorial ¶¶ 232-46.

105 Respondent's Rejoinder ¶ 535.

106 Respondent's Rejoinder ¶¶ 536-41.

107 Respondent's Rejoinder ¶¶ 542-46.

2. Claimant's Position

141. As far as the restraints arising under Venezuelan contract law on the transfer of the shares in PDV are concerned, Claimant starts from the proposition that "[i]t is a fundamental principle of both Venezuelan commercial and public law that shares of companies are freely transferable,"[108] and that restrictions on transferability must be explicitly provided for.[109] Claimant argues that a provision that prohibits the assignment of contractual rights held by a company should not be presumed to prohibit the transfer of shares in that company or a change in the control of that company. Accordingly, the transfer of ownership or change of control of the company (MINCA) does not amount to a violation of the prohibition on the assignment of the company's contractual rights. Further, Claimant says that the application of these principles is not changed by labelling the relationship between CVG and PDV in MINCA as a "joint venture", as Respondent does.[110]

142. Claimant says that there were no explicit prohibitions applicable to the share purchase. While the Work Contract[111] and the 1997 Amended Shareholders' Agreement[112] contained non-assignment provisions, neither they nor the MINCA Bylaws[113] contained change

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108 Claimant's Reply ¶ 308. *See also* Tr. Day 1:51-52 and 1:136-37 (Laskin).

109 Tr. Day 1:51-55 (Laskin).

110 Tr. Day 1:60-61 (Laskin).

111 Ex. C-20A, Clause Twenty Eighth ("The parties may not assign in any manner this agreement except by prior written approval of the other party.").

112 Ex. C-30, Art. X (Assignment; Binding Effect) ("Assignment of Amended Agreement: Unless otherwise provided herein, the parties cannot assign their rights or delegate their obligations hereunder without the other party's prior written consent. This Amended Agreement shall be binding upon and inure to the benefit of each contracting party, and their permitted assignees.").

113 The Bylaws did, however, give a right of first refusal. *See* Ex. C-6A, Art. 9 ("[…].The Shareholders shall have a preferential right to purchase the shares that other Shareholders wish to sell for a consideration, in the proportion which the number of shares held by each shareholder at the time the sale offer is known bears to the total number of shares of the Company. For these purposes, the selling Shareholder shall send a letter to the Board of Directors of the Company informing it of the number of shares it wishes to sell, the name of the intended buyer and the purchase price. The Board of Directors shall give immediate notice of the offer to the other Shareholders, who shall have a term of thirty (30) calendar days to exercise their preferential right.

If the other Shareholders do not exercise their preferential right, or exercise it partially, the selling Shareholder may sell the remaining shares for a price no lower than the price informed to the Board of Directors.

of control clauses, unlike certain other contracts concluded by Venezuelan governmental agencies in the mining and oil sector which do include specific provisions on change of control.[114]

143. Claimant, challenging the view that these were *intuitu personae* contracts, says that the information provided in the private bidding process that led to the choice of Placer Dome was incomplete, and that there was accordingly nothing unique about Placer Dome.[115] Counsel for Claimant submitted in the oral proceedings that "[b]oth the bidding process and the fact of the broad assignment provision really are inconsistent with any suggestion of *intuitu personae*."[116]

144. Further, Claimant rejects even the possibility that the *intuitu personae* nature of the Las Cristinas contracts (which it denies) could render the share transfer to Vannessa contrary to Venezuelan law. In Claimant's view, "[t]he doctrine of *intuitu personae* ... provides that some obligations under a contract are so personal in nature that they can only be performed expressly by the party that has assumed the obligations under the contract."[117] However, the doctrine has no broader implications regarding other related contracts by the same party or contracts by its shareholders.[118]

145. In terms of the contractual obligations, Claimant says that at the time of the transfer of shares from Placer Dome to Claimant (*i.e.*, on July 13, 2001) Placer Dome itself was (and continued to be) bound only by the 1997 Amended Shareholders' Agreement, and further that it only had one narrow obligation under that agreement, namely, to assist in resolving financial issues.[119] The 1991 Shareholders' Agreement was not applicable because it had been

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Any transfer made in violation of this Clause shall be deemed to be void and without any effect upon the Company. Notwithstanding the foregoing, transfers of shares to related companies, wholly-owned by Shareholders, directly or indirectly, or by the Shareholder's parent Company are hereby authorized.").

114 Claimant's Reply ¶¶ 308-12. *See also* Tr. Day 1:55-56 (Laskin). With respect, in particular, to the general practice on change of control clauses, *see* Tr. Day 1:118-21 (Laskin).

115 Tr. Day 1:58-59 (Laskin) and Tr. Day 1:69-76 (Laskin).

116 Tr. Day 1:123 (Laskin). *See generally* Tr. Day 1:123-27 (Laskin).

117 Claimant's Reply ¶ 319. *See also* Tr. Day 1:121 (Laskin).

118 Claimant's Reply ¶¶ 316-21.

119 Claimant's Reply ¶¶ 322-26.

replaced by the 1997 Shareholders' Agreement (and not merely amended by it),[120] as is stated in the 1997 Amended Agreement itself[121] and confirmed by the practice of CVG, Placer Dome, and PDV.[122] In any event, even the 1991 Shareholders' Agreement did not contain any restrictions on ownership of the shares of PDV.[123]

146. Claimant also rejects the argument that Placer Dome could have been jointly liable for the obligations of PDV. While conceding Placer Dome's ownership and factual involvement in the affairs of PDV, it says that, in the absence of explicit contractual language to the contrary, Placer Dome and PDV maintained their separate personalities for the purposes of the analysis of their legal rights and obligations.[124] Finally, the acquisition by Claimant of the shares of PDV accorded with the general practice of other mining companies that had exploration agreements with CVG.[125]

3. The Tribunal's Decision

147. In the view of the Tribunal, the evidence demonstrates that as a matter of fact the identity of Placer Dome was a material element in the conclusion of the contracts relating to the exploitation of the Las Cristinas mines, and in particular of the 1991 Shareholders Agreement and the 1997 Amended Shareholders Agreement, the 1992 Work Contract, and the Copper Concessions. It cannot plausibly be argued that CVG was indifferent to the identity of the other party to the concessions and the Work Contract.

148. Two key indicators point to this conclusion. The first is the process by which Placer Dome was selected from among the companies that had expressed an interest in Las Cristinas. It is evident that PDI was selected after a deliberate, detailed, and careful

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120 Claimant's Reply ¶¶ 340-42. On the relationship between the 1991 and 1997 agreements, *see generally* Tr. Day 1:127-33 (Laskin).

121 Claimant's Reply ¶¶ 328-34 (citing Art. XIII (Entire Agreement) of the 1997 Amended Agreement).

122 Claimant's Reply ¶¶ 335-39.

123 Claimant's Reply ¶ 343.

124 Claimant's Reply ¶¶ 344-55.

125 Claimant's Reply ¶¶ 356-64.

consideration of its technical and financial capacity and experience, and which had been planned in advance.[126]

149. Second, it is apparent that the Parties themselves considered that Placer Dome had been chosen, not as an anonymous or generic supplier of services, but for its own particular qualities. Placer Dome wrote to CVG on May 17, 1991, not long after it had succeeded in the private bid process, on the subject of the organization of the project through what became MINCA:

> In regards to the position of chairman, we have been guided by our understanding that CVG chose Placer Dome as the majority partner for its proven technical and commercial capacity to develop large-scale mines and not as a provider of technical services under the contract, or as a simple technical advisor. If this is the case, it seems logical and normal that Placer Dome would take on the majority of the operational decisions. In January we agreed that CVG would appoint the Director of Human Resources, the Controller and the Secretary, but we reserved the right to appoint the general manager, the primary finance official and the mine manager. We assume that CVG would like to appoint the chairman, although the operational authority of this position is, to a certain extent, only a formality, because for the joint company public relations and lobbying will be of great importance, and we believe that these tasks could be best carried out by a Venezuelan appointed by CVG.[127]

It is no less clear that CVG understood the relationship to have an *intuitu personae* character. It had the same view as Placer Dome, as evidenced by a memorandum to the President of Venezuela dated November 30, 1990, before the approval of the overall scheme by the cabinet in July 1991, in which the CVG stated: "[n]one of the parties can transfer their rights or delegate obligations without prior consent by the other party, in writing, which cannot be denied without justifiable cause."[128]

150. All of the evidence that the Tribunal has seen is consistent with this view of the relationship between CVG and Placer Dome. While it may be true that CVG's description of the relationship as a "joint venture" could not change the legal nature of the relationship, the

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126 *See* ¶¶ 50-54 above.

127 Ex. R-4.

128 Ex. C-17A. The original Spanish version provided by Claimant does not include the following phrase which is included in the English version of the document, also provided by Claimant: "which cannot be denied without justifiable cause".

description could reflect the clear and consistent understanding of CVG and Placer Dome as to the nature of the enterprise that Placer Dome had applied to undertake with CVG, and for which it had been selected. The Tribunal finds that it did reflect such an understanding.

151. In that context, the Tribunal was assisted by the expert evidence of Professor Luis García Montoya concerning the *intuitu personae* nature of the relationship and the contracts.[129]

152. Further, it is plain that PDV was regarded as Placer Dome's vehicle for the purposes of this investment, so that it stood in the same relationship to CVG as did Placer Dome itself. Indeed, the preamble to the 1997 Amended Shareholder Agreement records explicitly that its provisions are the product of the agreement of "CVG, PDI, *and PDVEN, in its capacity as PDI's Investor*" (emphasis added).[130]

153. It is also evident that Vannessa had a radically different technical and financial profile from that of Placer Dome. Placer Dome was a very large mining company, specializing in gold mining, with mining operations in several countries. At the time when the transfer to Vannessa took place, within hours of the expiry of the agreed suspension period, Vannessa, in contrast, had no firm financial or technical capacity in place which could have made immediate resumption of operations at Las Cristinas even a possibility. When it took over the shares in PDV, Vannessa was not in a position to discharge the obligations that Placer Dome had assumed in respect of Las Cristinas. Moreover, the "staged development plan", which Vannessa was apparently contemplating into 2001, appears to have been essentially the same as the staged development plan that CVG had refused to accept when it was proposed by Placer Dome in 2000.[131]

154. Nonetheless, the *intuitu personae* character of the contracts does not itself put Claimant's ownership of shares *in PDV* outside the scope of the Canada-Venezuela BIT. As was indicated above,[132] the Tribunal has decided that the ordinary meaning of the reference to "the

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129 *See* the Expert Reports of Professor Luis García Montoya dated August 10, 2006, February 14, 2007, March 10, 2009, and January 27, 2010.

130 Ex. C-30. PDI is defined as Placer Dome Inc., and PDVEN is defined as Placer Dome de Venezuela C.A.

131 *See* ¶ 70 above.

132 *See* ¶ 133 above.

[host State's] laws" is a reference to laws imposed by public authority. It is a corollary of this decision that obligations created by persons in the exercise of their powers under the general laws of contract are not "laws", and should not be treated as creating "requirements" which, if not satisfied, will automatically place ownership of an asset outside the scope of the definition of an investment in Article I(f) of the Canada-Venezuela BIT. The Tribunal's view that the participation of Placer Dome, rather than any other company, was an essential part of the *contractual* arrangements in respect of Las Cristinas does not, therefore, preclude Claimant's ownership of shares *in PDV* from satisfying the BIT's definition of "investment." That is not, however, to say that the *intuitu personae* character of the contracts relating to Las Cristinas is without any legal effect, as is explained below.[133] The point is plainly relevant to the question whether Claimant acquired an interest in MINCA and Las Cristinas that is protected by the BIT.

D. In Accordance with the Law on Public Procurement and Administrative Contracts

1. Respondent's Position

155. Respondent takes the view that Claimant's investment was made in violation of the Venezuelan law of public procurement. That law limits a private party's ability to transfer rights and obligations under a contract awarded in a bid process so that they would not wind up in the hands of unreliable third parties (as indeed happened, in Respondent's opinion, in this particular instance).[134]

156. Respondent notes Claimant's recognition that the Work Contract is an administrative contract.[135] Respondent rejects the argument by Claimant that the Shareholders' Agreements and MINCA Bylaws, in contrast, are not administrative contracts. In Respondent's view, the test is whether the contract has a "public purpose", and there is no requirement under Venezuelan public law for an administrative contract to have a direct, rather than an indirect, public purpose. In any event those Shareholder Agreements and MINCA Bylaws would, in Respondent's view, satisfy even a "direct purpose" requirement, because they address the

133 *See* ¶ 164 below.

134 Respondent's Rejoinder ¶¶ 547-51.

135 Respondent's Rejoinder ¶ 362.

adoption of provisions concerning the mining operations at Las Cristinas.[136] Respondent argues that the transfer of rights and obligations arising under an administrative contract would breach Venezuelan public law, by rendering meaningless the bidding process and the nature of administrative contracts.[137]

2. Claimant's Position

157. Claimant challenges the assertion by Respondent that Placer Dome had been selected for the Las Cristinas project through a public bidding process. Claimant disagrees with Respondent's argument on two levels: first, as a general matter, the bidding process was conducted in private and not in public;[138] second, in any event, the public nature of the bidding process could not turn the contracts into administrative contracts, or make the conditions of the bid an inherent part of the contract, or give greater rights of revocation to CVG.[139]

158. Claimant accepts that the Work Contract could be considered to be an administrative contract, because its purpose was directly to carry out mining activity (assuming that mining is a public service under Venezuelan law).[140] However, the Shareholders' Agreements and MINCA Bylaws do not themselves satisfy the cumulative criteria under Venezuelan law which identifies administrative contracts.[141] Further, the administrative nature of the Work Contract would not have any effect on the transferability of the shares in PDV.[142]

3. The Tribunal's Decision

159. The Tribunal recalls that in Section 3.2.4 of the Decision on Jurisdiction, the (differently-constituted) Tribunal in this case said that:

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136 Respondent's Rejoinder ¶¶ 516-23.

137 Respondent's Rejoinder ¶¶ 547-51.

138 Claimant's Reply ¶¶ 367-73.

139 Claimant's Reply ¶¶ 374-77.

140 Claimant's Reply ¶ 387.

141 Claimant's Reply ¶¶ 388-93.

142 Claimant's Reply ¶¶ 395-96.

> [I]t is obvious from the file that [the Respondent] never ruled on the permissibility or lack thereof of the share transfer. What it complained of and acted accordingly was that it considered the behaviour of PDI and the Claimant to constitute a breach of the agreements binding PDI to the Las Cristinas Project. It, however, never stated that it did not authorize the transfer of the shares which, after all, were transferred and have remained with the Claimant.

160. That observation was made in the context of Section II(3)(b) of the Annex to the Canada-Venezuela BIT, according to which decisions of a Contracting Party not to permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors are not subject to the dispute settlement provisions of Article XII of the BIT. Though the transfer of shares had not been barred for the purposes of that provision, it is necessary to consider here whether the (legally effective) transfer of the shares constitutes a breach of Venezuelan law on public procurement and administrative contracts that would take the shareholding outside the scope of the definition of an investment in Article I(f) of the BIT so as to deprive the Tribunal of jurisdiction in this case. The Tribunal finds that the public procurement law does not impact whether Claimant's shareholding amounts to an "asset owned or controlled . . . in accordance with" Venezuelan law as required to satisfy the BIT's definition of "investment." Respondent does not deny that Vannessa Barbados legally owned, and continues to own, the shares in question in accordance with the Venezuelan Commercial Code, as recorded in the Venezuelan Mercantile Registry.[143] The question whether the acquisition by Claimant of that shareholding also had the legal effect of validly transferring to Claimant an interest in MINCA and in Las Cristinas that is protected by the BIT is a question that relates to the stage at which the Tribunal considers the admissibility and the merits of the claim.

E. In Accordance With Good Faith and Public Policy

1. Respondent's Position

161. Respondent argues that Claimant violated both Venezuelan and international law by consciously engaging in conduct equivalent to fraud on the law, *i.e.*, "a performance of

[143] Respondent's Rejoinder, ¶¶ 465-564; Claimant's Reply, ¶ 293.

actions that are legitimate in form or appearance, but are illicit in their object and purpose."[144] Respondent says that the agreements were concluded behind CVG's back, against its opposition and ignoring its interests.[145] Respondent argues that bad-faith investments are not protected by the BIT as a matter of international law. It says that Claimant's bad-faith conduct fits the characteristics identified in earlier arbitral decisions, in that it involved: acting in secrecy or without transparency; misrepresentation and false statements; disavowal of obligations and circumvention of agreements; and the abuse of legal process for improper purposes.[146]

2. Claimant's Position

162. Claimant argues that the acquisition of shares took place in good faith. It says that it is up to Respondent to prove Claimant's bad faith, that the burden of proof is a demanding one, and that Respondent has not met it.[147] In terms of arbitral decisions addressing fraud and good faith, Claimant distinguishes this particular dispute as not involving any of the aspects considered decisive in other decisions (*e.g.*, falsification of documents, breach of domestic law against the advice of the investor's counsel, or misrepresentation).[148] In factual terms, Claimant rejects the argument that Placer Dome acted in bad faith, arguing that Placer Dome met and even exceeded its contractual obligations, and that it had reasonable prudential business reasons not to disclose the identity of the prospective purchaser of shares to CVG.[149] It says that, in any event, Placer Dome is not a claimant in this case, and its possible bad faith should not affect the Arbitral Tribunal's jurisdiction.[150]

163. Claimant also challenges Respondent's argument that, as a matter of fact, Vannessa had no capacity to develop the Las Cristinas property and only acquired the shares to bring this arbitral claim. Claimant acknowledges that it is a small company but argues that it was

144 Respondent's Rejoinder ¶ 552.

145 Respondent's Rejoinder ¶¶ 553-64.

146 Respondent's Rejoinder ¶¶ 565-99.

147 Tr. Day 1:140 (Laskin).

148 Claimant's Reply ¶¶ 408-10.

149 Claimant's Reply ¶¶ 412-25.

150 Claimant's Reply ¶ 411; Tr. Day 1:140-41 (Laskin).

able to undertake that particular project, and that it had taken the mining project seriously.[151] Claimant also noted in the oral proceedings that Crystallex, an investor that subsequently signed an agreement with CVG regarding Las Cristinas, appeared not to be substantially better qualified than Claimant.[152]

3. The Tribunal's Decision

164. In the view of the majority of the Tribunal, the arguments about good faith and public policy that have been advanced in this case are not determinative of whether Claimant's shares in PDV were owned or controlled in accordance with Venezuelan law. Instead, good faith and public policy bear upon the question whether the acquisition by Claimant of its shareholding in PDV was effective to transfer to Claimant an interest in MINCA and in Las Cristinas that is protected by the BIT. Accordingly, the majority of the Tribunal does not consider that in the circumstances of this case the principles of public policy and good faith place Claimant's ownership of shares in PDV beyond the BIT's definition of investment.

F. In Accordance With Venezuelan Decree 2095

1. Respondent's Position

165. Respondent argues that Claimant failed to give notice of the transfer of the shares in PDV, and also to register the investment (which had apparently not been registered by the original owner, Placer Dome), as required under Venezuela's Decree 2095, and that the failure to comply with this mandatory legal requirement means that the investment was not in accordance with law.[153]

2. Claimant's Position

166. Claimant takes the view that it did in fact comply with the requirements for providing notice about share purchases to the Foreign Investments Commission, as required by

151 Claimant's Reply ¶¶ 427-50.

152 Tr. Day 4:746-54 (Laskin).

153 Respondent's Rejoinder ¶¶ 284-87.

the Venezuelan Decree 2095.[154] In any event, the failure to comply with the Decree would not make the transfer of shares invalid, as demonstrated by the lack of Venezuela's response to widespread failures of notification during the 1990s.[155]

3. The Tribunal's Decision

167. The Tribunal considers that reporting obligations concerning the registration of foreign investments, which do not entail any application for permission or approval and which are not expressed as conditions of the making of an investment, are not relevant to the question whether the investment exists. Further, the jurisdictional significance of the "legality requirement" in the definition of an investment in Article I(f) is exhausted once the investment has been made. It accordingly rejects the jurisdictional challenge based on the provisions of Decree 2095.

G. The Tribunal's Conclusion on Jurisdiction

168. For the reasons stated above, the majority of the Tribunal is satisfied that Claimant has an "investment" within the meaning of Article I of the Canada-Venezuela BIT, and that the Tribunal has jurisdiction to decide the merits of this dispute. While the majority of the Tribunal rests its decision on that ground, it recognizes that there are different ways in which the principle of good faith might be applied in the context of decisions on jurisdiction and admissibility.

169. One of us takes the view that if an investment is acquired in bad faith, this is a factor that goes to the existence of the Tribunal's jurisdiction. That member would have rejected the claim on the basis that it falls outside the jurisdiction of the Tribunal because the investment was not made in good faith. As was noted above (and is explained further below), however, all three members agreed that, in light of the manner in which Vannessa was substituted for Placer

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154 Claimant's Reply ¶¶ 451-60.

155 Claimant's Reply ¶¶ 451-58; Tr. Day 1:144-46 (Laskin).

Dome in the project for the exploitation of Las Cristinas,[156] the treatment of the investment by Respondent does not amount to a breach of the standards of treatment required by the Treaty.

II. MERITS

170. The Tribunal is unanimously of the view that the claim in this case must fail because of the manner in which the transfer of shares to Claimant occurred. Its reasoning is set out in the following paragraphs.

171. Claimant alleges that Respondent's actions breach the obligations: (a) not to expropriate the investment except in accordance with the conditions set out in Article VII of the Treaty; and (b) to treat the investment in a fair and equitable manner and to accord it full protection and security under Article II(2).

A. Expropriation

1. Claimant's Position: Gold Rights

172. Claimant argues that the standard for finding an expropriation of contractual rights is that "the State has gone beyond its role as a mere party to the contract and relied on its superior governmental power. [...] [T]he State uses its public authority and steps out of the role of the contracting party."[157] In the oral proceedings, Claimant argued that "there is culmination of the State acting in terminating the contract for reasons that are not legitimate contractual considerations; plus the State stepping out of the contractual framework and exercising State powers to terminate in a way that a private party can't; plus, thirdly, the CVG in the particular case acting in conjunction with other State agencies."[158]

173. Claimant argues that expropriation is evidenced in three instances. The first is when CVG rescinded the Work Contract on November 6, 2001. It says that Venezuelan law precludes unilateral termination of a contract without first resorting to the agreed mechanism of

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156 *See* ¶ 201 below.

157 Claimant's Reply ¶ 492 (internal footnotes omitted).

158 Tr. Day 1:182 (Terry). *See more generally*, the discussion of the test of expropriation of contractual rights at Tr. Day 1:161-86 (Terry).

dispute settlement, whether in court or via arbitration. Though the Work Contract provided for ICC arbitration, CVG did not resort to it but rather relied on its exorbitant administrative law powers that allegedly exempted it from this requirement regarding administrative contracts.[159] Therefore, the case is distinguishable from those investment arbitrations where the State committed a merely contractual breach and other remedies were available to the investor.[160] In the oral proceedings, Claimant also relied on its legitimate expectations regarding the competence of the government to submit contractual disputes to arbitration.[161] Further, it also clarified its position by suggesting that termination and failure to arbitrate constituted two separate bases for its expropriation claim.[162]

174. Secondly, according to Claimant, CVG relied on exorbitant administrative powers to seize MINCA's assets on November 16, 2001. The seizure of assets by a squadron of the Venezuelan National Guard to enforce an administrative act without resorting to judicial assistance could not have been carried out by a party exercising merely its commercial prerogatives.[163]

175. Thirdly, and more broadly, Claimant argues that the Ministry of Energy and the President of the Republic had assisted CVG in carrying out its expropriation. Rather than merely disposing of the mining rights after the rescinding of the Work Contract, the Ministry and the President were necessary and active participants in the expropriation.[164]

176. Claimant considers that the expropriation was unlawful because it did not satisfy the criteria of lawfulness set out in Article VII(1) of the BIT.[165] First, while Venezuelan law

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159 Claimant's Reply ¶¶ 494-508. Counsel for Claimant emphasized that there was agreement between experts and probably parties that "the termination, whether it was lawful or not as a matter of Venezuelan law was carried out by a State agency using its exorbitant power. As Dr. Grau says, to quote him again, using a public power, not a power having a contractual source." *See* Tr. Day 4:820 (Terry). *See also* Tr. Day 4:822 (Terry).

160 Claimant's Reply ¶¶ 494-508; Tr. Day 4:811-27 (Terry).

161 Tr. Day 2:258-60 (Terry).

162 Tr. Day 2:311-13 (Terry).

163 Claimant's Reply ¶¶ 520-27.

164 Claimant's Reply ¶¶ 515-19.

165 *See* Ex. R-39 (*i.e.*, that the expropriation be for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation).

provides that contracts may be terminated for reasons of general or public interest, rather than on the basis of the breach, so long as compensation is paid, CVG never invoked reasons of such a nature. Secondly, due process was not provided either in the contractually agreed arbitral forum or in the domestic courts. Thirdly, the expropriation was discriminatory because no other company or property received this treatment. Fourthly, no compensation was paid to Claimant.[166]

177. Finally, Claimant rejects Respondent's argument that the allegedly expropriated contractual rights were already null and void. Claimant says that the Venezuelan authorities had never sought to nullify Claimant's ownership of the shares, and the attempt to terminate the Work Contract necessarily presupposed that the Work Contract continued to exist.[167]

2. Claimant's Position: Copper Rights

178. In Claimant's view, MINCA had valid and binding rights to the Las Cristinas Copper Concessions, assigned by CVG in January 1999 in accordance with the 1997 Amended Shareholders' Agreement. These rights were expropriated when the Ministry of Energy and Mines cancelled the concession on March 8, 2001. The failure of MINCA to file reports and feasibility studies could not justify the cancellation because the Ministry itself had not obtained for MINCA the necessary land use permit, without which exploration could not begin.[168]

179. Claimant argues that the expropriation of the right to mine copper was unlawful because of the discriminatory nature of the cancellation, which affected only Claimant; because the alleged public purpose disguised the real reason – which was to transfer rights to CVG (and eventually to Crystallex); because of the failure of due process; and because of the clear absence of compensation.[169]

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166 Claimant's Reply ¶¶ 528-40. On due process, *see also* Tr. Day 2:290-302 (Terry), Tr. Day 2:313-14 (Terry). In the context of due process, Claimant explained that the nullity action was withdrawn in July 2004 because of the time limits for BIT claims and the requirement to discontinue other proceedings. *See* Tr. Day 2:302-03 (Terry).

167 Claimant's Reply ¶¶ 541-42.

168 Claimant's Reply ¶¶ 543-46; Tr. Day 2:320-23 (Terry).

169 Claimant's Reply ¶¶ 547-50.

3. Respondent's Position: Gold Rights

180. Respondent states that "the key question in assessing whether a State's taking of a claimant's property constitutes an expropriation is not whether the State acted as only a private party could act, but rather, did the State step out of its role as a contracting party and interfere with the contract on the basis of its sovereign authority."[170] Claimant errs in setting the criterion as whether a State has acted as a "private party", because the State is never simply a private party; and even in its contractual capacity the State retains such inherent capabilities as acting through resolutions and decrees.[171] Also, Claimant is wrong in alleging that the availability of a pre-agreed forum for the resolution of disputes is necessary if the wrongful termination of a concession or similar agreement is to be treated as a contractual dispute and not as an expropriation; and, in any event, MINCA could have referred, but did not refer, the termination of the Work Contract to ICC arbitration.[172]

181. Respondent argues that it has rightfully terminated MINCA's rights to exploit gold in response to MINCA's breaches of contract. CVG had the right under the Work Contract to terminate the contract in case of an uncorrected contractual breach by the other party. Three breaches warranted the termination: (i) suspension by MINCA of exploitation works without a duly justified reason for more than 12 months; (ii) failure by MINCA to submit detailed reports on its activities for a period of two years; and (iii) most importantly, the breach of the obligation of non-assignment without approval by the other party.[173]

182. Regarding the particular instances of expropriation alleged by Claimant, Respondent takes the view that it had acted only as a State contracting party to an administrative contract, and not on the basis of an unlawful exercise of sovereign authority. Respondent rejects

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170 Respondent's Rejoinder ¶ 664. On the standard, *see also*, Tr. Day 3:536-51 and Tr. Day 3:561-83 (Goodman).

171 As Respondent's counsel put it, "if you sign up for a footrace with a three-legged person, you know that that person will have that kind of attribute and that they may in that sense outperform you. ... [I]t's a question of the CVG having that authority. It's not something that it's exerting in order to interfere with the contractual process. It can't do otherwise. It's part of the administrative law scheme." *See* Tr. Day 3:540 (Goodman).

172 Respondent's Rejoinder ¶¶ 653-67.

173 Respondent's Rejoinder ¶¶ 668-76.

the argument that contractual termination by CVG without resort to ICC arbitration amounted to expropriation. The Work Contract does not include such a requirement, and Venezuelan law does not provide such a rule for administrative contracts.[174] The fact that CVG terminated the contract by means of a decree is, on its own, irrelevant: State organs commonly act through decrees and resolutions. What is important is that termination took place in response to a contractual breach, and was promulgated within the contractual framework rather than in contravention of it.[175]

183. Secondly, Respondent rejects the argument that CVG's recovery of MINCA's assets amounted to expropriation. In its view, Claimant has asked the wrong question – could a private party have done it? – rather than whether "the CVG's actions exceed the normal conduct that other State entities party to an administrative contract would have taken in executing its termination."[176] By applying this criterion, the recovery of property was within the four corners of CVG's rights to recover the property in accordance with the administrative contract.[177]

184. Thirdly, the involvement of the Ministry of Energy and Mining and the President would not amount to expropriation. It has not been demonstrated that their acts breached the Work Contract, and in any event their involvement occurred after its termination.[178]

185. Respondent rejects the argument that there was discriminatory treatment of Claimant, arguing that the transfers of shares of other mining companies, which the State had accepted, took place in significantly different circumstances.[179] Respondent denies any obligation to pay compensation.[180] Respondent argues that any expropriation would not have been unlawful in any event because the challenged acts pursued a public purpose, were not

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174 As the counsel for Respondent put it at the hearing, "[T]he decision made by the public administration is self-imposed. ... [T]he public administration has the power of self-protection ... [A] decision made by the administration is imperative. There is no need to resort to a court." *See* Tr. Day 3:517 (Wray).

175 Respondent's Rejoinder ¶¶ 680-96.

176 Respondent's Rejoinder ¶ 698.

177 Respondent's Rejoinder ¶¶ 697-708; Tr. Day 3:589-94 (Hodgson).

178 Respondent's Rejoinder ¶¶ 709-15; Tr. Day 3:594-98 (Hodgson).

179 Respondent's Rejoinder ¶¶ 677-78.

180 Respondent's Rejoinder ¶¶ 780-86.

discriminatory, and complied with due process,[181] and the lack of compensation alone does not render expropriation unlawful.[182]

186. Finally, Respondent takes the view that the unlawful assignment of the contractual rights to Claimant invalidated both the Work Contract and the transfer of shares. The invalidation of the underlying contractual relationships that have been allegedly expropriated, by reason of the conduct of Claimant and of Placer Dome, provides an alternative ground for rejecting the expropriation claim.[183]

4. Respondent's Position: Copper Rights

187. Respondent argues first, that MINCA did not hold any valid Copper Concession rights in the first place; and secondly, that the Ministry of Energy and Mining lawfully extinguished any residual concessionary rights of MINCA that might have existed. The lack of any valid concession rights flows from four considerations: (i) the absence of mandatory permits for land use and exploration; (ii) the invalidation of the incidental rights to copper by the termination of the Work Contract; (iii) the invalidity of the assignment of the Copper Concessions; and (iv) the absence of serious plans by Claimant to mine copper.[184] In any event, the cancellation of the Copper Concessions took place on the basis of MINCA's non-compliance, and the alleged governmental involvement neither is demonstrated in factual terms nor would amount to expropriation by the application of the correct standard of expropriation.[185] Finally, Respondent notes that Claimant had been provided with due process,[186] and denies any obligation to pay compensation.[187]

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181 Respondent's Rejoinder ¶¶ 862-73.

182 Respondent's Rejoinder ¶¶ 874-77.

183 Respondent's Rejoinder ¶¶ 772-79.

184 Respondent's Rejoinder ¶¶ 716-38; Tr. Day 3:598-600 (Hodgson).

185 Respondent's Rejoinder ¶¶ 739-62; Tr. Day 3:600-05 (Hodgson).

186 Respondent's Rejoinder ¶¶ 763-71.

187 Respondent's Rejoinder ¶¶ 780-86.

5. The Tribunal's Decision

188. The Tribunal considers that the rights in respect of gold and the rights in respect of copper were so closely interrelated and interdependent that they can be considered together in relation to the arguments that Claimant's rights under the Canada-Venezuela BIT have been violated. That conclusion follows both from the history and structure of the commercial relationship between the Parties, and from a close reading of the relevant legal instruments.

189. While the Work Contract of March 4, 1992 does not specifically mention copper, it appears to the Tribunal that the Copper Concessions were granted in such a way that they were covered by the Work Contract. The Amended Shareholders Agreement of July 31, 1997 stated that:

> CVG, at MINCA's request, has filed applications with MEM for copper concessions at Las Cristinas, in performing the provisions relating to new minerals set forth in the [Work Contract dated] March 4, 1992. CVG hereby undertakes to transfer said concession to MINCA, by means of direct assignment, as soon as the same are awarded by MEM to CVG ….[188]

190. Indeed, on April 7, 1999, the Work Contract was amended to reflect, among other things, that the royalty scheme for gold would apply to copper as well.[189] Finally, the Copper Concession Agreement (made between CVG and MINCA on April 19, 1999) itself also explained that MINCA would pay CVG a royalty for "copper under the same terms and conditions as specified in Annex III of the [Work Contract of March 1992]." Thus, viewing these agreements together, it is clear that the copper concession was interrelated with the Work Contract in such a way that termination of the Work Contract operated to terminate it as well. As far as the termination of the Work Contract itself is concerned, the Tribunal finds that Venezuela's action was both justified and legitimate.

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188 Ex. C-30 at Section 4.02.

189 Ex. C-21A at pp. 3-4. In addition, it should be noted that the sixth paragraph of the Copper Concession Agreement states that the property "will be reverted … *if for any cause the Republic decides to revoke the CONCESSIONS*, or if they lapse with the expiration of the term for which they were granted" (emphasis added), *see* Ex. R-67.

191. On 8 August 2000, CVG, Placer Dome, PDV, and MINCA entered into an agreement to suspend the performance of the Work Contract for a period of one year beginning on 15 July 2000 (Extension Agreement).[190]

192. The Extension Agreement had a very clear purpose: to grant the parties time "to find an investor interested in participat[ing] in MINCA and/or in the Project"[191] and to do so "by mutual agreement."[192]

193. Specifically, the parties to the Extension Agreement agreed that, within 30 days following its execution, they would hire an investment bank "*by mutual agreement*;"[193] prepare a schedule of activities "*by mutual agreement*" together with an investment bank "*chosen by the Parties*" to establish the parameters for locating an investor;[194] and in the event that a third party expressed its interest in participating in MINCA and/or the Project and met the standards jointly determined, "*the Parties* shall make their best efforts to favour the incorporation of such third party to the Project."[195]

194. Thus, the Extension Agreement, which necessarily modified the Work Contract, spelled out that Placer Dome and the CVG would work *together* to find either an entirely new party to replace Placer Dome, or a third party to join Placer Dome and CVG in the Project.

195. Yet although the Extension Agreement plainly required mutual cooperation and agreement in selecting an investor, Placer Dome engaged in secret negotiations and share transfers with Vannessa, only to "inform" CVG after the fact, on July 13, 2001, that it had been

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190 *See* Ex. C-60A. The Work Contract is referred to as "the Agreement" in the Extension Agreement, but is elsewhere in the pleadings and this award referred to as the Work Contract.

191 *Id.* at 2.

192 *Id.* at 3-5.

193 *Id.* at 4.

194 *Id.* at 3.

195 *Id.* at 3-5 (emphasis added).

successful in "its" search for a new investor within the period governed by the Extension Agreement.[196]

196. Since that Agreement extended until July 14, 2001, Placer Dome was obligated to work with CVG up until the end of the extension to find a mutually-acceptable new investor, and it was not open to Placer Dome to thrust a new investor on CVG without its consent. Thus the failure of Placer Dome to work mutually under the Extension Agreement to insert a new investor provided a legitimate basis upon which CVG could terminate the Work Contract. In other words, the term on which the one-year extension was granted was breached by Placer Dome and hence the Extension Agreement was voided.[197]

197. As Claimant has pointed out, the Extension Agreement "was a consensual 12-month suspension, not the kind of unjustified 12-month stoppage that would give the CVG the right to rescind under Article 19 of the [Work] Contract."[198] As this consensual suspension was rendered void by Placer Dome's actions in incorporating Vannessa as the putative new investor, Venezuela's right to rescind under Article 19 was revived.

198. Claimant acknowledges that the breach of the Extension Agreement was one of the main bases upon which CVG sought to terminate the Work Contract. In a letter to MEM, General Rangel Gómez stated that the decision was "essentially based on the conduct of the company Placer Dome … to transfer its shares in PDV to the company I.H.C. Corp., a subsidiary of Vanesa [sic] Ventures L.T.D., as a way of evading the C.V.G.'s … right to participate in the selection of a new (third-party) shareholder in MINCA, as expressly stipulated in contractual

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196 *See* Ex. C-95A, Letter from W. Hayes, Placer Dome Executive Vice President for the United States and Latin America to F. Rangel Gómez, CVG President (July 13, 2001) at 1. *See also* Ex. R-105, Letter from E. Rauguth, Vannessa Ventures, Ltd Executive Vice President, to F. Rangel, CVG President (October 30, 2001) (English translation) at 1 ("Our negotiation with Placer Dome was governed by strict rules of confidentiality, forbidding the parties from discussing or sharing it with any third party. That is the reason why Vannessa did not contact the CVG prior to the purchase.").

197 It is of no moment that Scotia Capital, the investment bank chosen to find a new investor, suspended its activities in May 2001 by agreement of the CVG and Placer Dome. The Extension Agreement itself was never terminated and its spirit still underlay the parties' search for a new investor. Indeed, that the "spirit" of the Extension Agreement still governed the parties' behavior is admitted by Placer Dome in its July 13, 2001 letter. *See infra*. Furthermore, even if Vannessa's allegations are true that the CVG failed to act diligently in attempts to find a new investor, this is insufficient justification for Placer Dome to have acted in excess of its power in order to incorporate a new investor unilaterally.

198 *See* Claimant's Reply ¶ 82.

provisions signed by both parts of that company … ."[199] In its Reply, Claimant states that "[t]he contracts to which General Rangel Gomez was referring were the MINCA Bylaws ..., the 1997 Shareholders' Agreement …, and the *Extension Agreement*."[200]

199. Moreover, in its July 13, 2001 letter to CVG, Placer Dome implicitly admitted that it was required to comply with the Extension Agreement, taking the position (without elaboration) that its agreement to sell its shares in PDV to Vannessa fell "within the spirit" of the Extension Agreement.[201] Yet, as just explained, far from falling "within the spirit" of the Extension Agreement, Placer Dome's actions in incorporating Vannessa as a third-party investor unilaterally, and without CVG's input, were in fact directly contrary to that spirit and, what is more, to the Extension Agreement's plain language.

200. Such a violation of the Extension Agreement amounts to a breach, rendering Venezuela's subsequent decision to terminate the Work Contract both justified and legitimate. It destroyed the basis of the relationship upon which the exploitation of Las Cristinas by CVG and its partner in the project was premised.

201. The Tribunal has already explained that it considers that the evidence shows clearly that the identity and specific experience and characteristics of Placer Dome were material factors in its selection as the foreign investor in the Las Cristinas project.[202] That is evident from the process by which Placer Dome came to be selected, and is a factor of central importance in this case. There is no basis on which it could reasonably be supposed that Venezuela was indifferent to the identity or the technical and commercial characteristics and experience of its partner in the Las Cristinas project, or that it would be consistent with the nature of the relationship as understood by the Parties simply to substitute one company for another in that

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199 Ex. R-48 (emphasis added).

200 Claimant's Reply at ¶¶ 208-09 (emphasis added).

201 *See* Ex. C-95A, Letter from W. Hayes, Placer Dome Executive Vice President for the United States and Latin America to F. Rangel Gómez, CVG President (July 13, 2001) at 1 ("*Este acuerdo [celebrado entre Placer Dome y Vannessa] que por este medio le participamos se encuentra dentro del espíritu del último convenio de prórroga* …) (emphasis added). It should be noted that the English translation Claimant provided does not contain the words "within the spirit" (though they are plainly contained in the Spanish version), but translates the phrase simply thus: "The agreement [entered into by Placer Dome and Vannessa] that we are notifying you of at this time falls within the last extension agreement … ."

202 *See* ¶¶ 50-54 above.

role, without Venezuela's consent. Besides having been recognized by both parties, as mentioned in paragraph 54 of this Award, the *intuitu personae* character of the relationship was also acknowledged through provisions in a series of documents.

202. First, both Shareholders' Agreements included an article restricting the transfer of the rights of their signatories under them. In the 1991 Shareholders' Agreement, entered into between Placer Dome and CVG, Article V.D. stated:

> Except as otherwise provided in this Agreement, neither party may assign any of its rights or delegate any of its duties under this Agreement without first obtaining the prior written consent of the other party which shall not be unreasonably withheld. This Agreement shall enure to and be binding upon each of the parties hereto and their respective successors and permitted assigns.[203]

In the 1997 Shareholders' Agreement, entered into between Placer Dome, PDV, and CVG, Section 10.01 stated:

> Unless otherwise provided herein, the parties cannot assign their rights or delegate their obligations hereunder without the other party's prior written consent. This Amended Agreement shall be binding upon and inure to the benefit of each contracting party, and their permitted assignees.[204]

203. Second, the MINCA By-laws also included an article by which the shares belonging to one of the shareholders could not be sold before they had first been offered to the other shareholders, which means that any such transfer also needed a kind of implied authorization of the other shareholder, constituted by its refusal to buy the shares. Article 9 of the MINCA By-laws provided that:

> […] The Shareholders shall have a preferential right to purchase the shares that other Shareholders wish to sell for a consideration, in the proportion which the number of shares held by each shareholder at the time the sale offer is known bears to the total number of shares of the Company. For these purposes, the selling Shareholder shall send a letter to the Board of Directors of the Company informing it of the number of shares it wishes to sell, the name of the intended buyer and the purchase price. The Board of Directors shall give immediate notice of the offer to the other Shareholders, who shall have a term of thirty (30) calendar days to exercise their preferential right. If the other Shareholders do not exercise their preferential right, or exercise it

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203 Ex. C-5A.

204 Ex. C-30.

> partially, the selling Shareholder may sell the remaining shares for a price no lower than the price informed to the Board of Directors.
>
> Any transfer made in violation of this Clause shall be deemed to be void and without any effect upon the Company. Notwithstanding the foregoing, transfers of shares to related companies, wholly-owned by Shareholders, directly or indirectly, or by the Shareholder's parent Company are hereby authorized.[205]

204. While in this case it was not PDV that was selling its shares in MINCA, but rather a senior wholly owned subsidiary of Placer Dome that was selling its shares in PDV, this does not detract from the indication that is implicit in Article 9 of the MINCA Bylaws that it mattered who the partners in the project were, and that new shareholders could not be introduced without the consent of the other shareholders.

205. Third, Clause Twenty Eighth of the Work Contract stipulated that "the parties may not assign in any manner this agreement except by prior written approval of the other party."[206] Article X (Assignment; Binding Effect) of the 1997 Amended Shareholders' Agreement[207] made by CVG and Placer Dome stipulated:

> Unless otherwise provided herein, the parties cannot assign their rights or delegate their obligations hereunder without the other party's prior written consent. This Amended Agreement shall be binding upon and inure to the benefit of each contracting party, and their permitted assignees.

The fact that an assignment "in any manner" was forbidden unless prior written consent was obtained from the other party means, in the understanding of the Tribunal, that an assignment could not be made indirectly by a change of the owner of the shares of MINCA.

206. Moreover, as was noted above, the only clear way in which a change of control could be effected in accordance with the MINCA Bylaws, through the Article 9 pre-emption procedure, was not followed.[208] Placer Dome clearly sought to withdraw from the partnership that was secured by the structure of MINCA and to insert another company in its place. But Placer Dome did not present CVG with the price of the deal with Vannessa before it was

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205 Ex. C-6A.

206 Ex. C-20A, Clause Twenty Eighth.

207 Ex. C-30.

208 *See* ¶ 74 above.

completed and allow 30 days for CVG to meet that price. Indeed, at the very meeting at which the President of MINCA met Mr Pinedo, in-house counsel for PDV, to inform Placer Dome of CVG's decision to consider Placer Dome's proposal, Mr Pinedo advised MINCA's President for the first time of the impending sale to Vannessa. Despite Placer Dome's proposal to sell to CVG, and CVG's interest in considering the proposal, Claimant disrupted this process by thrusting on CVG the deal that it had agreed with Vannessa.

207. The unavoidable conclusion is that this series of provisions shows clearly that the whole operation had to remain inside the joint venture between Placer Dome and CVG, without the introduction by either party, through one device or another, of a new party without the consent of the other party.

208. Though it was apparent that Placer Dome was actively seeking a new investor to step into the Las Cristinas project, it is not disputed that Placer Dome did not inform CVG of its intention to transfer its interests in PDV to Vannessa until a matter of hours before the expiry of the agreed period of suspension on July 15, 2001. Nor is it disputed that CVG had the right to terminate the Work Contract with MINCA in the event of any further unauthorized suspension. Further, it is evident that the termination of the Work Contract would have terminated the basis upon which Placer Dome had made its investment.

209. It is well established that, in order to amount to an expropriation under international law, it is necessary that the conduct of the State should go beyond that which an ordinary contracting party could adopt.[209] In the present case, although in 2002 various legal measures were adopted to cancel rights in respect of Las Cristinas, those measures were all consequent upon the initial termination of the Work Contract – as was the physical occupation of the Las Cristinas site by CVG.

210. The evidence points to the termination being a step for which CVG and Placer Dome had made contractual provision, motivated by the unauthorised continuation of the work suspension and the withdrawal of Placer Dome from its participation (via PDV) in the Las

[209] *See*, *e.g.*, *Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005 (hereinafter, *Impregilo v. Pakistan*), ¶ 260; *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, December 22, 2003, ¶ 51; ILC Articles on State Responsibility, Commentary on Article 4, ¶ 6.

Cristinas project.[210] Claimant has not shown that Respondent's actions were more than legitimate contractual responses to what the Tribunal considers to be contractual breaches.

211. The Tribunal takes note that the notice of the breach,[211] dated August 6, 2001, invokes three contractual breaches by MINCA: (1) the violation of its obligation to submit detailed reports to CVG; (2) the failure to resume work on the mine, after the expiration of the last extension on July 15, 2001; (3) the entry into a transaction with Claimant for the transfer of all of the shares of MINCA "thus contravening express contractual provisions contained in Clause Twenty-fifth [in fact, Twenty Eighth] of the above referenced Contract [i.e., the Work Contract], by virtue whereof it was bound to obtain due written authorization by CVG therefor *in view of the scope such transfer has over MINCA* … ."

212. The three same violations were also asserted in the notice of cancellation of the Work Contract[212] on 6 November 2001, after the lapse of the 90 day period given to Claimant to remedy the violations.

213. The Tribunal finds no evidence that termination was motivated by an intention to confer benefits upon CVG, Crystallex (with whom Respondent subsequently made an agreement concerning Las Cristinas), or any other entity.

214. The Tribunal does not consider that the termination of the Work Contract rises above the "high threshold"[213] that separates a contractual dispute from a violation of a treaty prohibition on expropriation. The claim that Respondent has violated Article VII of the Canada-Venezuela BIT by the termination of the Work Contract and the steps consequential upon that termination is accordingly rejected.

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210 Respondent also cited the failure of MINCA to file reports as a reason for termination of the Work Contract. *See* Ex. C-109A, Ex. R-85.

211 Ex. C-109A (emphasis added).

212 Ex. C-148A.

213 *Impregilo v. Pakistan*, ¶ 267.

215. As to the taking of physical assets in the context of the November 2001 takeover of the Las Cristinas site,[214] the Seventeenth Clause of the Work Contract provided that those assets would revert to Venezuela (or CVG) upon termination of the Contract:

> Permanent works done by the Company [MINCA], including facilities, accessories, equipment and any other goods acquired in ownership to be used for the exploration, development and exploitation subject hereof shall pass in full title to the Corporation [CVG], free of encumbrances and charges, and without any indemnity, once this Agreement terminates, whatever the cause.

While the Seventeenth Clause of the Work Contract was modified on April 7, 1999[215] to change the reference to "the Corporation" to "the Nation," this change does not affect the analysis because, either way, Placer Dome had no right to them, and consequently Vannessa could have no right to claim damages for them.

B. Fair and Equitable Treatment and Full Protection and Security

216. Claimant's submissions regarding alleged violations of the provisions on fair and equitable treatment ("**FET**") and full protection and security ("**FPS**"), both contained in Article II(2) of the Canada-Venezuela BIT, are both considered in this section, although they are two distinct standards of protection of an investor's rights.

1. Claimant's Position

217. Claimant claims a breach of the right to fair and equitable treatment through the unilateral termination by CVG of the Work Contract without first resorting to "arbitration according to the Venezuelan Civil Procedural Code, performed in accordance with the arbitration rules of the International Chamber of Commerce in Paris" as provided in Clause Twenty Sixth of the Work Contract, and also in the conduct of CVG and the Venezuelan courts which, it says, prevented MINCA from commencing the ICC arbitration in respect of the contractual disputes.[216] Claimant rejects Respondent's argument that MINCA itself had failed to present a case to the ICC and instead chose to pursue a process of "formalisation" of arbitration before the

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214 *See* ¶ 100 above.

215 Ex. C-21A.

216 Tr. Day 2:291-305 (Terry).

Venezuelan courts, arguing that the formalisation process was required by the applicable rules of the Venezuelan Civil Procedure Code. Claimant says that CVG had explicitly rejected the possibility of arbitrating disputes in respect of (allegedly) administrative contracts. More broadly, Claimant argues that it was mistreated by the judicial system because delays and dismissals of its claims by courts, which were less than independent and impartial and were acting against the background of political controversy, had the effect of denying its right to arbitration.[217] Claimant also invokes its reasonable and legitimate expectations that CVG would respect the contractual right to go to arbitration.[218]

218. Claimant considers that the standard of FPS applies to the protection by the State of foreign investments from actions of the State's officials and agencies. Claimant argues that Respondent failed to provide full protection and security to its investment by not exercising due diligence in protecting Claimant from injurious acts of Respondent's officials and agencies. Claimant argues that "full protection and security" is not limited to cases involving civil strife and also applies to a situation such as that in the present dispute. In particular, Claimant argues that: the Ministry of Energy and Mines failed to exercise its obligations of supervision and control in respect of the Las Cristinas project; the Venezuelan *Fiscalía* failed to properly investigate the unlawful expropriations of Claimant's rights; and the National Assembly committees failed to properly investigate its complaints.[219]

2. Respondent's Position

219. Respondent denies that it breached the obligation to provide fair and equitable treatment. It argues that Claimant's position is fundamentally flawed in two respects: first, MINCA itself prevented the Venezuelan courts from ordering arbitration, by the procedures that it chose to pursue before those courts; secondly, MINCA never tried to initiate the arbitration with the ICC. More broadly, Claimant's arguments, even if true, would not satisfy "[t]he standard for denial of justice [that] requires evidently arbitrary, unjust, idiosyncratic,

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217 Claimant's Memorial ¶¶ 190-208; Claimant's Reply ¶¶ 551-64.

218 Tr. Day 4:837-38 (Terry). For a broader view, *see* Tr. Day 2:314-19 (Terry).

219 Claimant's Reply ¶¶ 565-74. *See also* Tr. Day 2:319-20 (Terry).

discriminatory acts."[220] In the oral proceedings, Respondent rejected Claimant's arguments about its legitimate expectations as being vague and unsubstantiated.[221]

220. Respondent considers that the FPS standard is in principle limited to the duty of the State to protect investors against physical violence, and notes the uncertainty about the application of the standard outside the context of protection from physical violence.[222] Respondent says that it has not denied full protection and security to Claimant. In any event, it says that the Ministry of Energy and Mines did not have any obligation to prevent CVG from exercising its contractual rights, and that the events alleged could not establish a breach of an obligation to protect.[223] Claimant did not have any right to an investigation by the *Fiscalía* or any right to have committees of the National Assembly investigate its complaints.[224]

3. The Tribunal's Decision

221. The Tribunal has found that the decision to terminate the Work Contract, and the consequent steps to take over the Las Cristinas site and to bring rights in respect of Las Cristinas under the control of Respondent, did not amount to an expropriation. They were contractual responses to what the Tribunal considers to be contractual breaches. The questions here are whether Respondent violated the Treaty by treating the investment unfairly or inequitably, and whether there was any failure to accord full protection and security to the investment.

222. The Tribunal recognizes that there are different formulations of the precise content of the FET standard, but observes that they all have in common the requirement that the standard does not guarantee the success or profitability of an investment but requires that the treatment of investments not fall below a minimum standard of fairness and equitableness that all investors have a right to expect. The Tribunal agrees that in this case the treatment of Claimant's investment by Respondent, in light of the manner in which the investment was made and of the

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220 Respondent's Rejoinder ¶ 813. *See generally* Respondent's Rejoinder ¶¶ 792-832; Tr. Day 3:605-14 (Hodgson).

221 Tr. Day 3:564-69 (Goodman); Tr. Day 3:585-87 (Hodgson).

222 Tr. Day 3:615-17 (Hodgson).

223 Respondent's Rejoinder ¶¶ 833-48; Tr. Day 3:618-19 (Hodgson).

224 Respondent's Rejoinder ¶¶ 849-53; Tr. Day 3:614-15 (Hodgson).

contractual framework that had been agreed for the development of Las Cristinas, cannot be regarded as falling below that minimum standard, however the standard might be formulated in its precise details.

223. Similarly, as far as the content of the FPS standard is concerned, the Tribunal is broadly in agreement that it applies at least in situations where actions of third parties involving either physical violence or the disregard of legal rights occur, and requires that the State exercise due diligence to prevent harm to the investor, it being understood that the FPS standard does not grant the investor an "insurance against all and every risk." While members of the Tribunal do not consider that there is a more precise formulation of the content of the standard that is universally accepted,[225] they are in agreement that even the most demanding formulation of the FPS standard for which Claimant contended was not violated in the present case.

224. More specifically, the Tribunal does not accept that the termination of the Work Contract without first resorting to arbitration constitutes a violation of either the right to fair and equitable treatment or the right to full protection and security.

225. Having considered the evidence concerning Venezuelan law that was put before it, the Tribunal is not persuaded that arbitration was an essential precondition to termination of the contract, although under Clause Twenty Sixth of the Work Contract arbitration was plainly an option for the resolution of disputes arising out of the termination of the contract.

226. Furthermore, in the view of the Tribunal, Claimant has not proved its claim that Respondent has violated Claimant's right to fair and equitable treatment or its right to full protection and security under the BIT by obstructing the access of Claimant to the Venezuelan courts or to arbitration in order to pursue its claims. It is true that in the ten sets of proceedings listed above[226] there are instances in which the Venezuelan Courts failed to deal promptly, or at all, with applications for interim relief; and it is true that there were considerable delays in

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225 For example, the different approaches in *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Award, July 1, 2004, ¶¶ 183-87, and in *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶¶ 522-23 both command support.

226 *See* ¶ 103 above.

dealing with many of the applications. The Tribunal does not, however, consider that the delays are of an order that violates Respondent's obligations under the Treaty.

227. Tribunals in other cases have pointed to the high threshold in this regard. In *Waste Management*, the award referred to "a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice."[227] The Tribunal considers that to be the correct approach. The question is not whether the host State legal system is performing as efficiently as it ideally could: it is whether it is performing so badly as to violate treaty obligations to accord fair and equitable treatment and full protection and security. The Tribunal does not consider that the delays in this case are of an order that constitute conduct that falls below the minimum standard demanded by the Treaty.

228. Allegations of a lack of independence and impartiality are more difficult to deal with. They often amount to allegations of violations of professional rules, or even of criminal laws, and it is not to be expected that evidence will be readily available. Such allegations would, if proven, constitute very serious violations of the State's treaty obligations. But they must be properly proved; and the proof must, at least ordinarily, relate to the specific cases in which the impropriety is alleged to have occurred. Inferences of a serious and endemic lack of independence and impartiality in the judiciary, drawn from an examination of other cases or from anecdotal or circumstantial evidence, will not ordinarily suffice to prove an allegation of impropriety in a particular case. The evidence in this case does not warrant a conclusion that the decisions of the courts in Venezuela in the proceedings instituted by Claimant demonstrate a lack of independence or impartiality, and the Tribunal does not accept that they amount to breaches of either the right to fair and equitable treatment or the right to full protection and security.

229. As far as concerns Claimant's submissions concerning access to ICC arbitration are concerned, the Tribunal notes that Claimant did not file an application directly with the ICC, but chose to seek an order from the Venezuelan courts that CVG must accept ICC arbitration. Claimant had also sought to litigate various aspects of the dispute before the Venezuelan courts,

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[227] *Waste Management v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 98. *Cf*., *Loewen Group v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, ¶ 132; *Alex Genin v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001, ¶ 371.

but eventually decided to waive its right to continue its proceedings before the Venezuelan courts in order to pursue the present arbitration. Such a waiver is a necessary precondition of access to arbitration under the Canada-Venezuela BIT, stipulated by Article XII(3)(b). That provision also requires that Claimant waive its rights to initiate or continue "a dispute settlement procedure of any kind" to which the dispute has been referred. The right to ICC arbitration had, therefore, to be waived in order that Claimant could bring the case before this Tribunal.

230. Further, the Tribunal notes that a three-year time limit is imposed by Article XII(3)(d) of the BIT, in respect to arbitration under the Treaty. Access to this Tribunal is an agreed alternative to the pursuit of remedies in national courts or in contractual arbitrations, in relation to complaints of conduct that is alleged to amount to a violation of the Treaty.

231. Claimant did not support its allegations that its treatment by Respondent was discriminatory. No evidence of dissimilar treatment of investors in a position similar to that of Claimant was adduced. Similarly, no further evidence to support the allegation of a breach of the "fair and equitable treatment" provision or the "full protection and security" provision in the BIT was adduced. The Tribunal does not consider that Claimant has substantiated either allegation.

232. In these circumstances, the Tribunal finds that there has been no violation of the duty to accord Claimant's investment fair and equitable treatment or the duty to accord it full protection and security under the BIT.

III. CONCLUSION

233. For the reasons given above, the Tribunal concludes that there has been no violation of the rights of Claimant under the Canada-Venezuela BIT.

IV. COSTS

234. The Tribunal having found that there has been no violation of Claimant's rights under the BIT, the question of costs remains. The Decision on Jurisdiction reserved the allocation of costs for later determination, and the Tribunal accordingly has to decide on the allocation of costs for both the jurisdiction and the merits phases of this case.

235. The Tribunal notes that both Parties employed outside counsel and experts. It notes further that the total costs exceeded US $20 million and that Claimant's costs were under one-half of Respondent's costs. While it understands the magnitude of the issues at stake, and that each Party took its own decisions on how best to protect its interests, the Tribunal considers it regrettable that the costs of what should be an efficient and reasonably expeditious procedure are so high.

236. In this case, Claimant was in effect the winner of the jurisdiction phase and the loser of the merits phase of this case. Given the logistics of case preparation and the extent to which issues are intertwined, it is practically impossible to separate out the costs of the two phases. Taking account of the extent to which each side has prevailed, and the respective expenditures of each Party, the Tribunal has decided that each side should bear its own costs and one-half of the costs of the Tribunal and of ICSID.

V. DISPOSITIF

237. For the above reasons, and pursuant to Article 52 of the Arbitration Rules, the Arbitral Tribunal:

i) by a majority rejects the objections to jurisdiction made by the Bolivarian Republic of Venezuela, and decides that it has jurisdiction to determine the dispute;

ii) unanimously dismisses all of the claims made by Claimant against Respondent under the Canada-Venezuela Bilateral Investment Treaty in this case, summarized in paragraph 344 of Claimant's Memorial and paragraph 639 of Claimant's Reply; and

iii) unanimously decides that each Party shall bear its own costs and one-half of the costs of the Tribunal and of ICSID.

[Signed]
Hon. Charles N. Brower, Arbitrator

Date: 12-17-2012

[Signed]
Professor Brigitte Stern, Arbitrator

Date: 12-10-2012

[Signed]
Professor Vaughan Lowe QC, President

Date: 12-14-2012