

International Centre for Settlement of Investment Disputes

Washington, D.C.

DECISION ON JURISDICTION

in the matter of an arbitration

between

Vannessa Ventures Ltd.

and

The Bolivarian Republic of Venezuela

(ICSID Case N° ARB(AF)/04/6)

Members of the Tribunal

Dr. Briner, President

Professor Brigitte Stern

Judge Charles Brower

Secretary of the Tribunal

Ms. Claudia Frutos-Peterson

ON BEHALF OF THE CLAIMANT

Mr. John Laskin
Mr. John Terry
Torys LLP
Suite 3000
Toronto, ON
Canada M5K 1N2

ON BEHALF OF THE RESPONDENT

Dra. Gladys Gutiérrez Alvarado
Procuradora General de la República
Avenida Lazo Martí
Edificio Procuraduría General de la República
Piso 8, Santa Mónica
Caracas, Venezuela

AND

Dr. Ronald E.M. Goodman
Mr. Paul S. Reichler
Foley & Hoag LLP
1875 K Street, N.W., Suite 800
Washington, D.C. 20006
U.S.A.

August 22, 2008

TABLE OF CONTENTS

1. BACKGROUND	3
2. PROCEDURAL HISTORY	6
3. JURISDICTION	11
3.1. Introduction	11
3.2. Acquisition Exception	15
3.2.1. Introduction	15
3.2.2. Position of the Respondent	16
3.2.3. Position of the Claimant.....	17
3.2.4. The Tribunal’s Decision	17
3.3. The Venezuelan Law Issue.....	20
3.3.1. Introduction	20
3.3.2. Position of the Respondent	20
3.3.3. Position of the Claimant.....	21
3.3.4. The Tribunal’s Decision	22
3.4. The Waiver Issue.....	23
3.4.1. Introduction	23
3.4.2. Position of the Respondent	25
3.4.3. Position of the Claimant.....	26
3.4.4. The Tribunal’s Decision	27
3.5. Copper Concessions Claim.....	28
3.5.1. Introduction	28
3.5.2. Position of the Respondent	29
3.5.3. Position of the Claimant.....	30
3.5.4. The Tribunal’s Decision	30

1. BACKGROUND

In order to understand the main events which led up to this dispute and to identify the various Parties directly or indirectly involved, the Arbitral Tribunal felt it useful to briefly describe the background and the occurrences which led to this Arbitration.

The Las Cristinas property is located in the south eastern corner of Venezuela in the State of Bolivar. It consists of a number of mining concessions held by Venezuela through the Ministry of Energy and Mines. It contains what is reported to be one of the largest gold reserves in the world.

Corporación Venezolana de Guayana (“CVG”) is a Government agency created in 1960 to oversee the economic development of the Guayana Region in Bolivar State, where the Las Cristinas (“Las Cristinas”) property is located.

Placer Dome, Inc. (“PDI”) was a Canadian corporation with its head office in Vancouver. It was listed on various stock exchanges and described as one of the largest gold mining companies of the world. In 2006, it was acquired and absorbed into by Barrick Gold Corporation which has its headquarters in Toronto, Canada and is quoted on the Toronto and New York stock exchanges. After a selection process, PDI was selected for the development of the gold mines in the Las Cristinas concessions 4, 5, 6 and 7. For this purpose, CVG entered on 25 July 1991 into a Shareholders Agreement (“Shareholders Agreement 1991”)¹ with PDI. According to this Agreement, two mining companies were formed, Minera Las Cristinas (“MINCA”) and Relaves Mineros Las Cristinas (“REMINCA”). The purpose of MINCA was to initially explore and, if economic feasibility is established, produce gold in Las Cristinas 4, 5, 6 and 7. REMINCA was to evaluate and, if economic feasibility is established, process existing tailings on Las Cristinas 4 and 5. REMINCA is apparently not directly at issue in this Arbitration.

Seventy percent of the shares of the capital stock of MINCA were subscribed by Placer Dome de Venezuela, C.A. identified as the “PDI Investor”, a domestic Venezuelan company (“PDV”). Apparently for tax purposes, the shares of PDV were not held directly by the

¹ CD-5.

Canadian parent company PDI, but through an intermediary company Placer Dome Ltd. (Barbados) (“PD Barbados”). CVG in turn held 30% of the shares of MINCA.

On 4 March 1992, CVG and MINCA entered into a Work Contract to explore and exploit Las Cristinas (“Work Contract”)². This contract designated MINCA as the sole and exclusive operator for the exploration, development and exploitation of Las Cristinas 4, 5, 6 and 7 for an initial period of twenty years with extensions of additional ten year periods so long as the project remained economically feasible.

Upon the discovery of the presence of copper on the Las Cristinas property, the Ministry of Energy and Mines issued copper concessions to CVG for Las Cristinas 4, 5, 6 and 7 on 30 December 1996³. These copper concessions were transferred to MINCA on 28 January 1999⁴.

Between 1995 and 1998, Pre-Feasibility Studies, Feasibility Studies and Updates thereto were prepared⁵.

The July 1996 Feasibility Study Update was approved: (i) by the MINCA Board of Directors at a meeting held on 1 August 1996⁶; and (ii) by the Ministry of Energy and Mines by letter dated 26 June 1997⁷:

In view of the increased financial needs for the construction phase, the shareholders of MINCA in August 1996 agreed to a re-organization of the corporate structure whereby PDV’s shareholding would be increased from 70% to 95% and CVG’s shareholding reduced from 30% to 5% with an option for CVG to increase its ownership to 30% in the future through cash and non-cash contributions⁸. This re-organization was formalized in the 1997 Amended Shareholders Agreement entered into on 31 July 1997 (Shareholders Agreement 1997)⁹.

² CD-20.
³ CD-39.
⁴ CD-40.
⁵ CD-29.
⁶ CD-32.
⁷ CD-33.
⁸ CD-43.
⁹ CD-30.

For various reasons and from 1999 onwards, mainly because of the important decline of the price of gold, exploitation was apparently never really commenced and at a Board of Directors Meeting of MINCA held on 15 July 1999 the Project was suspended¹⁰.

After MINCA had made the decision to further suspend its activities, CVG, PDI, PDV and MINCA entered into an agreement on 8 August 2000¹¹ according to which the suspension of the performance of the Work Contract was extended for a further year from 15 July 2000.

During this time, attempts were made to review the strategic options for the property with the help of an investment advisor and to find a third-party investor to become involved in the project. PDI also made a formal proposal to CVG to sell its interest in MINCA in exchange for future royalty payments to it. No agreements were reached between the Parties regarding the future direction of the project.

In October 2000, General Rangel Gomez became President of CVG. He wrote a letter on 11 July 2001 to the Minister of Energy and Mines informing him that CVG intended to assume total control of MINCA¹².

On 13 July 2001, the “Original Transaction Agreement (PBV)” was entered into which provided among other things for Vanessa Ventures Ltd., a company organized under the laws of the Province of British Columbia, Canada (“Vanessa” or “the Claimant”) and its wholly-owned subsidiary IHC Corp., a corporation organized under the laws of Barbados and PD Barbados to acquire the PDV shares and certain loans.

General Rangel Gomez, President of CVG, was informed in writing by William M. Hayes, Executive Vice President – United States and Latin America, about this transaction which was publicly announced the same day¹³.

On 14 July 2001, General Rangel Gomez wrote a letter to PDV according to which CVG did not acknowledge or agree with this share sales agreement¹⁴.

¹⁰ CD-57.
¹¹ CD-60.
¹² CD-90.
¹³ CD-95.
¹⁴ CD-97.

The transaction was closed on 25 July 2001 when the Original Transaction Agreement (PBV) was replaced by the Transaction Agreement (PBV)¹⁵ between PD Barbados, Vanessa and Vanessa Holdings Corporation, a corporation organized under the laws of Barbados (“Vanessa Barbados”). PDV later changed its name to Vanessa Venezuela C.A.

On 6 August 2001, CVG proceeded to rescind the Work Contract upon 90 days notice of breach to MINCA¹⁶.

On 6 November 2001, 90 days after CVG’s notice of breach, CVG issued a formal notice of termination of the Work Contract and granted MINCA an additional seven days to vacate Las Cristinas¹⁷.

On 16 November 2001, CVG forcefully took possession of the Las Cristinas mine site.

On 8 March 2002, the Ministry of Energy and Mines issued two Resolutions, Resolution 35¹⁸ transferring to the Republic the Las Cristinas gold concessions and Resolution 36¹⁹ declaring MINCA’s concession to the Las Cristinas copper concessions expired.

On 29 April 2002, President Chavez issued a Presidential Decree reserving Las Cristinas gold concessions for direct exploitation by the Government of Venezuela²⁰. This Decree was published on 7 May 2002.

On 10 September 2002, President Chavez issued a further Presidential Decree reserving the copper concessions for direct exploitation, which Decree was published on 12 March 2003²¹.

2. PROCEDURAL HISTORY

2.1. Arbitration Agreement and Constitution of the Arbitral Tribunal

¹⁵ CD-4.
¹⁶ CD-109.
¹⁷ CD-148.
¹⁸ CD-166.
¹⁹ CD 167.
²⁰ CD-172.
²¹ CD-173.

On July 9, 2004, the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) received an arbitration request from Vanessa Ventures S.A. (“the Claimant”) against the Bolivarian Republic of Venezuela (“the Respondent” or “Venezuela”) under the ICSID Additional Facility Mechanism provided by the 1996 Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (“BIT”).

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

On October 28, 2004, the Secretary-General informed the Parties of his approval to access the Additional Facility Mechanism pursuant to Article 4(5) of the Additional Facility Rules. On the same day, the Secretary-General registered the request and invited the Parties to proceed with the constitution of an arbitral tribunal pursuant to Article 5(a) and (e) of the Additional Facility Arbitration Rules.

In the absence of an agreement between the Parties on the constitution of the Arbitral Tribunal, it was decided that pursuant to Article 6(1) of the Additional Facility Arbitration Rules, the Tribunal would be composed of three arbitrators, with one appointed by each party, and the third, who would be the President of the Tribunal, appointed by agreement of the Parties.

On January 27, 2005, the Claimant appointed the Honorable Charles N. Brower, a national of the United States of America, as arbitrator. On February 15, 2005, the Respondent appointed Mr. Jan Paulsson, a national of France, as arbitrator.

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

On June 7, 2005, the Acting Secretary-General of ICSID notified the Parties and the above-mentioned arbitrators that the Tribunal had been constituted and the proceeding deemed to have begun on that day in accordance with Article 13(1) of the Additional Facility 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 in this case. Later on, Mr. Rivas was replaced by Dr. Claudia Frutos-Peterson, ICSID Counsel.

2.2. Proceedings

On July 29, 2005, the Tribunal held its first session with the Parties in London. Present at the session were:

- The Members of the Tribunal,
- The Secretary of the Tribunal,
- On behalf of the Claimants: Messrs. John Terry and Ms. Julie Maclean of Torys LLP, and
- On behalf of the Respondent: Mr. Ronald Goodman of Winston & Strawn LLP.

During the session, the Tribunal decided on several procedural matters and, in agreement with the Parties, set a timetable for the Parties' respective submissions and production of documents. This timetable was later amended on several occasions per the Parties' requests.

On January 13, 2006, in accordance with the amended timetable, the Claimant submitted its Memorial.

On February 28, 2006, the Claimant submitted an amendment to its Request for Arbitration. After hearing the Respondent's objections to this request, the Tribunal decided, pursuant to Articles 35 and 47 of the Additional Facility Arbitration Rules, to grant the Claimant's request and to introduce the amendment as an ancillary claim.

2.3. Proceeding on Jurisdiction

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

On July 14, 2006, the Centre informed the Parties that the Tribunal had suspended the proceeding in accordance with Article 45(4) of the Additional Facility Arbitration Rules and set out a schedule for the Parties' respective submissions on jurisdiction. The schedule was modified twice subsequently per the Parties' requests.

In accordance with the revised schedule, the Respondent on August 28, 2006, submitted its Memorial on Jurisdiction. On December 16, 2006, the Claimant submitted its Counter-Memorial on Jurisdiction. On February 16, 2007, the Respondent filed its Reply on Jurisdiction, and on February 16, 2007, the Claimant submitted its Rejoinder on Jurisdiction.

On April 25, 2007, the Tribunal was provided with a revised list of participants for the upcoming hearing on jurisdiction. Among the persons listed as representing the Claimant was Prof. Christopher Greenwood. On April 27, 2007, the Centre transmitted to the Parties further declarations by two Tribunal members with respect to Prof. Greenwood. On May 3, 2007, the Respondent submitted its observations on the further declarations. On May 4, 2007, the Tribunal invited the Claimant to provide any observations which it might have with respect to the Respondent's letter in this matter. The Claimant provided its observations the same day.

As agreed, on May 7, 2007, the hearing on jurisdiction took place in London. At the hearing, the following persons appeared as legal counsel and representatives for the Claimant: Messrs. John Laskin and John Terry and Mesdames Julie Maclean and Ruth Anne Flear of Torys LLP, as well as Prof. Greenwood of Essex Chambers. Ms. Marianna Almeida and Messrs. John Morgan and Ross Melrose, all of Vanessa Ventures Ltd., also appeared as representatives of the Claimant.

The following persons appeared on behalf of the Respondent as its legal counsel and representatives: Messrs. Ronald Goodman, Dmitri Evseev, Bonard Molina-Garcia and Kelby Ballena and Mesdames Cristina Sorgi and Margarita Sánchez, all of Winston & Strawn LLP; Mr. Paolo Di Rosa and Ms. Gaela Gehring Flores of Arnold & Porter LLP, and Messrs. Gustavo Álvarez and Tulio Cusman of the Procuraduría General of the Bolivarian Republic of Venezuela.

During the session, after hearing the Parties' positions regarding the participation of Prof. 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, in accordance with the Additional Facility Arbitration Rules. Before the session ended, Mr. Paulsson also submitted, with the Parties' consent, his resignation for personal reasons. The

proceeding was consequently suspended until the vacancies on the Tribunal were filled according to Additional Facility Arbitration Rule 17(1).

2.4. Reconstitution of the Tribunal and Resumption of the Proceeding on Jurisdiction

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

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

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

The hearing on jurisdiction was held in Paris on February 14 and 15, 2008. At the hearing, the following persons appeared as legal counsel and representatives for the Claimant: Messrs. John Laskin and John Terry and Ms. Ruth Anne Flear of Torys LLP, and Prof. Christopher Greenwood of Essex Chambers. The following persons also appeared as representatives of the Claimant: Ms. Marianna Almeida and Messrs. John Morgan and Ross Melrose, all of Vanessa Ventures Ltd.

The following persons appeared as legal counsel and representatives for the Respondent: Messrs. Ronald Goodman and Paul Reichler and Mesdames Janis Brennan, Geraldine Fischer and Angélica Villagrán-Agüero of Foley Hoag LLP, Ms. Gaela Gehring Flores and Messrs. Dmitri Evseev, Bonard Molina-Garcia and Kelby Ballena of Arnold & Porter LLP, and Mr. Gustavo Álvarez of the Procuraduría General of the Bolivarian Republic of Venezuela. Messrs. Carlos Mouriño Vaquero, Luis García Montoya and Gustavo Grau Fortoul also appeared as independent experts/advisers for the Respondent.

3. JURISDICTION

3.1. Introduction

The Respondent in the letter of its counsel to ICSID of 5 July 2005 raised four jurisdictional objections:

Summary of Objections

1. This dispute arises directly out of the Republic’s decision not to permit the acquisition of an existing business enterprise by Claimant, and therefore falls squarely within the exclusion from investor-state arbitration agreed by the Contracting Parties under the Agreement Between The Government of Canada and the Government of The Republic of Venezuela for the Promotion and Protection of Investments (“BIT”), Annex Article II(3)(b) (the “acquisition exception”).

The investor-state dispute resolution provisions pursuant to which this case has been registered with ICSID are contained in Article XII of the BIT. However, Annex Article II(3)(b) of the BIT states:

Decisions by either 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 shall not be subject to the provisions of Article XII of this Agreement.

Clearly, a dispute that arises directly out of a Contracting Party’s decision not to permit the acquisition of an existing business enterprise is outside the Tribunal’s jurisdiction. As the Republic will demonstrate, the present dispute fits squarely within the jurisdiction exclusion of Annex Article II(3)(b), because it stems from the Republic’s refusal to permit Claimant’s takeover of MINCA, the business enterprise at issue in this proceeding.

2. Claimant has never acquired any rights to Las Cristinas or did so in a manner contrary to the Republic’s laws.

Vannessa’s alleged rights to Las Cristinas stem from the 25 July 2001 Transaction Agreement with Placer B-V, an offshore subsidiary of Placer Dome. Under that agreement, Vannessa, contrary to the Amended Shareholder’s Agreement, purported to assume all obligations of Placer Dome under the Amended Shareholders’ Agreement and all other related documents. (See Cl. Ex. 4, § 2.02(b)). At the same time, Placer B-V disclaimed any warranties as to the nature, validity or assignability of any of the rights purportedly being transferred. (See id. At § 2.04(a)). In fact, Placer B-V’s attempted assignment of any rights to

Las Cristinas to Vanessa was invalid. As a result, Claimant has never possessed any legitimate rights to Las Cristinas under the Amended Shareholders Agreement or related documents, and has no standing to bring such claims before this Tribunal.

Furthermore, even if Vanessa did acquire rights to MINCA, such rights were acquired in a manner that prevents them from being classified as an “investment” under the BIT. Article I(f) of the BIT requires that an “investment” in the territory of a Contracting Party be “in accordance with the latter’s laws.” It therefore flows that an acquisition that takes place in circumvention of explicit statutory and contractual prohibitions cannot serve as the basis of any claims under the BIT because it does not meet the BIT’s definition of an “investment”, to which the substantive protections of the BIT attach.

Here, the 25 July 2001 Transaction Agreement and surrounding events point to a scheme devised by Placer Dome and Vanessa in an unlawful attempt to force CVG and the Republic to accept a new and unknown own entity in place of Placer Dome, just as the final extension of the MINCA work contract was set to expire. It can hardly be doubted that the Contracting Parties intended to exclude from the scope of their consent to arbitrate disputes concerning alleged rights acquired under such circumstances.

3. *Vanessa has not waived its right to initiate or continue proceedings in relation to the subject matter of this dispute in the courts of Venezuela, and has therefore failed to comply with an essential jurisdictional requirement of Article XII (3)(b) of the BIT.*

Article XII (3)(b) of the BIT states that an investor may refer a dispute to arbitration under the BIT only where

The investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind.

Article XII (12) (a) of the BIT confirms that the waiver constitutes a jurisdictional requirement

Where an investor brings a claim under this Article regarding loss or damage suffered by an enterprise the investor directly or indirectly owns or controls, the following provisions shall apply:

...(ii) both the investor and the enterprise must give the waiver referred to in subparagraph (3)(b)

On 8 July 2004, Vanessa filed its Request for Arbitration in the present case. On that date, Vanessa also submitted statements on behalf of itself, Vanessa Venezuela and MINCA, purporting to waive the right to initiate or continue any proceedings within the meaning of Article XII(3)(b). At the time,

however, MINCA and Vannessa had no fewer than ten cases pending before the Political-Administrative Chamber of the Venezuelan Supreme Court based on the same facts as its ICSID claims (“related proceedings”), and had taken no affirmative steps to withdraw many of them.

In one such case, the Political-Administrative Chamber of the Venezuelan Supreme Court rendered a final judgment against MINCA a week after Vannessa filed its Request for Arbitration. Then, on 15 September 2004, MINCA filed a new claim, seeking extraordinary review and nullification of that decision by the Constitutional Chamber of the Venezuelan Supreme Court.

Over the next two months, in the context of Venezuela’s opposition to the registration of Vannessa’s Request for Arbitration (partly on the basis of Article XII(3)(b)), Vannessa and MINCA filed motions to discontinue the related proceedings (except the case mentioned in the preceding paragraph). These motions, however, specifically reserved the right to initiate future proceedings based on the same claims.

Venezuelan law recognizes two forms of voluntary withdrawal of a claim, one of which is with prejudice to future suits and the other without prejudice. Depending on the stage of the proceeding, withdrawal without prejudice may require consent of the opposing party and/or of the court. Withdrawal with prejudice does not. As of today, none of the related proceedings has been withdrawn with prejudice by Vannessa.

The BIT, however, is unequivocal in its requirement that an investor must renounce its right not only to continue ongoing litigations, but also to initiate new ones, before its Request for Arbitration can be validly submitted. In other words, the BIT requires a legally binding waiver of claims, which must be with prejudice to the filing of future claims. Venezuela first drew attention to Vannessa’s non-compliance with Article XII(3)(b) shortly after the filing of the Request for Arbitration. Nevertheless, Vannessa has failed to take sufficient steps to follow through on the waivers submitted to the Tribunal. To the contrary, Vannessa’s and MINCA’s conduct in the courts of Venezuela subsequent to the filing of the Request for Arbitration demonstrates that it is unwilling to act in accordance with the waivers submitted to the Tribunal. Because the waivers are an essential jurisdictional requirement under Article XII of the BIT, Claimant’s case must be dismissed forthwith.

4. In its Request for Arbitration, Claimant failed to assert a claim under the BIT with respect to the cancellation of MINCA’s copper concessions.

In accordance with Article XII(3)(d) of the BIT,

An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:

...

(d) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

MINCA's copper concessions were officially cancelled by the MEM on 8 March 2002, by means of a public resolution, and with notice of the same to MINCA. Thus, MINCA and Vanessa became aware of the alleged breach no later than 8 March 2002. To the extent that Vanessa brings forth claims for "loss and damages suffered by Vanessa and its investments ... Vanessa Venezuela ... and ... MINCA" (Cl. Memorial ¶ 1) on the basis of the cancellation of the copper concessions, it is barred under Article XII(3)(d) from asserting a claim based on such cancellation as of 8 March 2005. Nonetheless, Vanessa first articulated a claim based on the cancellation of the copper concessions in its Memorial dated 13 January 2006 – ten months after the deadline imposed by Article XII(3)(d) of the BIT.

As the Republic first noted in its correspondence of 7 October 2005, Vanessa's Request for Arbitration (dated 8 July 2004), failed to articulate a claim of treaty breach based on the cancellation of the copper concessions. Neither Vanessa's list of alleged breaches of the BIT (paragraphs 91-100), nor its list of remedies requested (paragraphs 101-02) mentions the cancellation of MINCA's copper concessions as the basis for a claim under the BIT. Vanessa's subsequent attempts to expand the scope of this arbitration to include claims regarding the cancellation of the copper concessions are out of time; in accordance with the BIT, such claims cannot be considered by this Tribunal.

* * *

For the foregoing reasons, the Republic submits that the present dispute is not within the competence of the Tribunal and requests that this arbitration be dismissed accordingly.

The Respondent therefore raised four objections, namely

- the Acquisition Exception, i.e., that the Republic had decided not to permit the acquisition of the MINCA shares by the Claimant;
- the Venezuelan Law Issue, i.e., that the Claimant never acquired any rights to Las Cristinas or did so in a manner contrary to the Republic's laws;
- the Waiver Issue, i.e., that the Claimant had not in a definite fashion waived its right to initiate or continue proceedings in the courts of Venezuela in relation to the subject matter of this dispute; and

- the Copper Concessions Claim, i.e., that the Claimant had not in a timely fashion commenced arbitration with respect to the Copper Concessions.

These objections were further developed in the two Submissions of the Respondent of 28 August 2006 and 16 February 2007 and answered by the Claimant in its Submissions of 15 December 2006 and 16 April 2007.

Although the Arbitral Tribunal considers that it is presently not in a position to decide the second issue which it therefore joins to the merits, it is in a position to decide the three other defenses raised by the Respondent regarding the competence of this Tribunal. It will therefore in the following paragraphs explain its decision regarding the arguments of the Parties to the extent that this is needed.

3.2. Acquisition Exception

3.2.1. Introduction

The Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (BIT) provides in Article XII:

***Settlement of Disputes between an Investor
And the Host Contracting Party***

1. *Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor or an enterprise owned or controlled directly or indirectly by the investor has incurred loss or damage by reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them.*

However, the Annex to the BIT provides in II(3)(b):

- (b) *Decisions by either 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 shall not be subject to the provisions of Article XII of this Agreement.*

The meaning of the word “Decisions” is disputed.

3.2.2. Position of the Respondent

The Respondent points to a long line of letters and actions taken by CVG objecting to the transfer of the PDV shares commencing immediately after it was informed on 13 July 2001 of the transaction between PDI and the Claimant.

- *14 July 2001* *The CVG states to Placer Dome that the CVG “does not acknowledge or agree with the share sales agreement with the aforementioned company, or any other company.*
- *16 July 2001* *The CVG-appointed directors of MINCA refuse to attend a meeting of the MINCA board of directors called at the request of Claimant.*
- *20 July 2001* *The CVG asks Placer Dome to reconsider its negotiations “behind the back” of the Republic.*
- *6 August 2001* *The CVG, faced with Placer Dome’s repudiation and impossibility of accepting Claimant’s acquisition, decides to rescind the Work Contract and gives notice of rescission.*
- *17 August 2001* *Vannessa seizes control of MINCA; the CVG representatives reject “illegitimate transfer by Placer Dome of shares in Placer Dome Venezuela” to Claimant and refuse to attend further meetings.*
- *29 August 2001* *The CVG-appointed directors advise MINCA that they will not attend the board meeting on 30 August pursuant to their objection to the transaction.*
- *26 October 2001* *The CVG director attends Special Shareholders’ Meeting of MINCA and declares that the CVG does not recognize Vannessa acquisition.*
- *6 November 2001* *The CVG gives final notice of termination of the Work Contract.*

- 16 November 2001 *The CVG takes possession of Las Cristinas.*
- 20 November 2001 *The CVG writes the MEM to inform it of the CVG's actions and to reiterate that cancellation of the Work Contract was motivated by Placer Dome's illegitimate attempt to have Claimant acquire its rights and obligations.*
- 8 March 2002 *The MEM cancels copper concessions associated with the project.*²²

3.2.3. Position of the Claimant

According to the Claimant, the Respondent took no actions which could be qualified as “Decisions” not to permit the Claimant’s acquisition of the shares of PDV. When terminating the Work Contract with letter of 6 August 2001²³, Mr. Angel Gomez in his capacity as President of CVG qualified the conduct of PDI stating that the transfer of the MINCA shares constituted violations of the Work Contract, of the Shareholders Agreement of 1997 and of the Extension Agreement of 8 August 2000. However, this letter and the final termination of the Work Contract on 6 November 2001²⁴ were measures terminating the investment of the Claimant but not “Decisions” by Venezuela “*not to permit ... acquisition of an existing business enterprise or a share of such enterprise by the Canadian investor Vanessa*”.

3.2.4. The Tribunal’s Decision

The term “Decision” is not defined in the BIT, it therefore needs to be interpreted by the Tribunal.

The Parties have not drawn the attention of the Tribunal to any *travaux préparatoires* which might cast some light on the meaning of the term “Decisions”. Mr. Greenwood of behalf of the Claimant stated that “*there are no travaux préparatoires of which we are aware. We have asked Venezuela if there are any travaux préparatoires but we have not been given any*”²⁵.

²² Memorial on Jurisdiction of 28 August 2006, pages 42 and 43.

²³ CD-109.

²⁴ CD-148.

²⁵ Hearing Transcript, Day 1, page 208, 19-22; see also: Mr. Terry, Transcript, Day 2, page 128, 14-25 & 129, 1-6.

The Arbitral Tribunal is also not aware that the interpretation of the word “Decisions” ever gave rise to any dispute between the Contracting Parties involving the procedure provided for in Article XIV of the BIT.

The BIT is a treaty between two States and is therefore governed by international public law. With respect to the interpretation of treaties, Article 31 of the Vienna Convention on the Law of Treaties of 1969 provides:

- 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
- 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.**
- 3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
 - (c) any relevant rules of international law applicable in the relations between the parties.**
- 4. A special meaning shall be given to a term if it is established that the parties so intended.*

The Arbitral Tribunal is not aware of any elements listed from paragraphs 2 through 4 which could be taken into consideration. It bases its analysis therefore only on paragraph 1 taking into account the text, including the preamble and annexes.

The Parties have adduced definitions contained in a number of legal and general dictionaries. The Arbitral Tribunal notes that the Respondent has quoted the definition in

Black's Law Dictionary, but from the abridged 6th Edition of 1991²⁶. The definition in the 8th Edition of 2004, however, reads as follows:

***Decision, n. 1.** A judicial or agency determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case.*

It is obvious from the file that CVG from the beginning did not recognize the transfer of the shares. It is also not contested that CVG took a number of measures demonstrating its opposition to the transfer of the shares, finally culminating in the termination of the Work Contract.

The Tribunal comes to the conclusion that the ordinary meaning of the term "Decision" necessitates, as indicated in Black's Law Dictionary (8th Edition), a determination in the form of a ruling or an order. Leaving aside the question whether or not CVG would at all have been empowered to render any such ruling or order, it is obvious from the file that it never ruled on the permissibility or lack thereof of the share transfer. What it complained of and acted accordingly was that it considered the behavior 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.

The Respondent did not draw the attention of the Arbitral Tribunal to any other measures of an official Venezuelan body which could be characterized to constitute a "Decision".

The context of the term "Decision" in the Treaty and an interpretation in the light of its object and purpose in no way affect this interpretation based on the ordinary meaning to be given to the term "Decision".

The Arbitral Tribunal therefore holds that Annex II(3)(b) of the BIT does not apply and that this defense of the Respondent is denied.

²⁶ Respondent's Reply on Jurisdiction, page 14, footnote 49.

3.3. The Venezuelan Law Issue

3.3.1. Introduction

This issue deals with two intermingled questions. Firstly, whether the Claimant through the Transaction Agreement (PBV) was legally able to acquire the rights which PDI (indirectly) held in the Las Cristinas project and, secondly, assuming that it was able to acquire these rights, if this acquisition was in conformity with the BIT.

According to Article I(f) of the BIT,

“investment” 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.

3.3.2. Position of the Respondent

The position of the Respondent may be summarized as follows:

- The successive Shareholders Agreements (1991 and 1997) should be considered as creating a joint venture between PDI and CVG;
- Due to the nature of the agreement between the Parties, there are *intuitu personae* obligations;
- PDV is not a real party to the two Shareholders Agreements, but has to be considered as an investor of PDI;
- The 1991 Shareholders Agreement provides that (Article V. D.);

[...] the parties cannot assign their rights or delegate their obligations hereunder without the other party’s prior consent [...].

- PDI sold its affiliated company PDV to the Claimant in breach of the above quoted provisions;

- Article 9 of the MINCA Bylaws states that:

“Stockholders shall have a preferential right to acquire the shares which other Stockholders wish to sell [...].

Any transfer made in violation of this Article shall 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 Shareholders’ parent company are hereby authorized.[...]

- By selling PDV to the Claimant, PDI also breached Article 9 of the MINCA Bylaws;
- The breach of the Shareholders Agreements and of the MINCA Bylaws rendered the assignment of the shares to Vanessa null and void and the Claimant therefore never acquired property of the MINCA shares;
- Furthermore, as a result of said breaches, the Claimant made no investment within the meaning of the BIT as the investment was not made in accordance with ... the laws of Venezuela insofar as a violation of a contract is ipso facto a violation of Venezuelan law pursuant to Article 1159 of the Venezuelan Civil Code, which provides that “Contracts shall have the force of Law between the Parties”;
- In addition, the Claimant did not make the investment in good faith. For this reason also, no investment in accordance with the law of Venezuela, embodying the principle of good faith occurred;
- The Respondent furthermore considers that the investment, if an investment was ever made, was achieved in bad faith, which would also constitute a violation of international public law and would therefore deny jurisdiction for the Arbitral Tribunal to decide any alleged claims of the Claimant arising from the alleged breach of the BIT.

3.3.3. Position of the Claimant

- The Claimant respected all the formalities imposed by Venezuelan law with regard to the transfer of the shares of PDV;

- PDI did not breach the Shareholders Agreements as neither Article 10.01 of the 1997 version nor Article V.D. of the 1991 version restricted PDI's ability to sell its shares in its subsidiaries to a third party;
- PDI did not breach Article 9 of the MINCA Bylaws. This Article only provided a right of first refusal relating to the sale of MINCA shares, but contained no requirement with respect to the sale of PDV shares;
- Even if a breach of the above-mentioned provisions would have occurred, said breach cannot be considered to constitute a violation of Venezuelan law;
- No *intuitu personae* obligations on PDI existed, which could have prevented the transfer of shares to the Claimant;
- A transfer of shares could only be deemed to be null and void *ab initio* under Venezuelan law if it violated an express rule of law, which was not the case. Moreover, a contract must be considered as valid until a court declares its nullity.

3.3.4. The Tribunal's Decision

The Arbitral Tribunal notes that the main defense of the Respondent, namely that the transfer of the PDV shares constituted a breach of the Shareholders Agreements and of the MINCA By-Laws and therefore rendered this 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*".

The Arbitral Tribunal has received a great number of expert opinions on questions of Venezuelan law, but it has not had the benefit of the examination of such experts by the Parties, nor have the members of the Arbitral Tribunal been able to put questions to the experts.

Based on the record presently before it, the Arbitral Tribunal therefore does not consider itself to be in a position to determine in a final way at the present time whether or not the

MINCA shares are owned or controlled by the Claimant in accordance with Venezuelan law as is required for this Arbitral Tribunal to have jurisdiction (Article 1(f) BIT).

The Arbitral Tribunal has considered whether it would therefore be more rational from a procedural viewpoint to re-open the procedure on jurisdiction and ask for further filings and an oral hearing with examination of experts. The Tribunal, however, is conscious of the fact that the possible breach by the original investor PDI of agreements with CVG is an element that might be relevant for the jurisdictional issue, but might also have consequences on the merits. On balance, the Arbitral Tribunal therefore considers that justice is better served if this objection to the competence of the Tribunal is joined to the merits and that new time-limits be fixed for the further procedures (ICSID Additional Facility Arbitration Rule 45(5)).

3.4. The Waiver Issue

3.4.1. Introduction

Article XII(3)(b) of the BIT states that an investor may submit a dispute to arbitration under the BIT *only if*

the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind.

Article XII(12)(a) of the BIT further confirms that the waiver must be made not only by the investor, but also by any enterprise in which the investor has invested:

Where an investor brings a claim under this Article regarding loss or damage suffered by an enterprise the investor directly or indirectly owns or controls, the following provisions shall apply:

... (ii) both the investor and the enterprise must give the waiver referred to in subparagraph (3)(b) ...

In a letter to the ICSID Secretary-General dated 8 July 2004, filed with the Request for Arbitration, John Morgan, President of Vanessa, stated:

I, John Morgan, on behalf of Vanessa Ventures Ltd., consent to arbitration in accordance with the procedures set out in the Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (the “Bilateral Investment Treaty”), and waive the right of Vanessa Ventures Ltd. to initiate or continue any other proceedings in relation to the measures of the Government of Venezuela that are alleged to be in breach of the Bilateral Investment Treaty before the courts or tribunals of Venezuela or in a dispute procedure of any kind.

Vannessa also filed with the Request for Arbitration:

- (a) a Resolution of the Vannessa Board of Directors dated 18 June 2004, that stated, among other things:

Vannessa waives its right to initiate or continue any other proceedings in relation to the measures that are alleged to be in breach of the Bilateral Investment Treaty before the courts or tribunals of Venezuela or in a dispute settlement procedure of any kind;

- (b) a letter to the ICSID Secretary-General dated 8 July 2004 from Marianna Almeida, legal representative of Vannessa Venezuela, declaring, together with the consent to arbitration, that Vannessa Venezuela,

... renuncio al derecho a iniciar o continuar cualquier otro procedimiento en relación con las medidas del Gobierno de la República Bolivariana de Venezuela que se pretende que constituyen incumplimiento del Tratado Bilateral de Inversiones ante las cortes o tribunales de Venezuela o en cualquier otro tipo de procedimiento de arreglo de controversias.

- (c) a letter to the ICSID Secretary General dated 8 July 2004 from Marianna Almeida, legal representative of MINCA, declaring, together with the consent to arbitration, that MINCA,

... renuncio al derecho a iniciar o continuar cualquier otro procedimiento en relación con las medidas del Gobierno de la República Bolivariana de Venezuela que se pretende que constituyen incumplimiento del Tratado Bilateral de Inversiones ante las cortes o tribunales de Venezuela o en cualquier otro tipo de procedimiento de arreglo de controversias.

According to the Claimant,

The filing by Vanessa of these waivers with the Request for Arbitration fulfilled the requirements of Articles XII(3)(b) (the requirement that the investor (Vanessa) file the waiver) and Article XII(12)(a)(ii) (the requirement that the investments (Vanessa Venezuela and MINCA) file the waiver).

3.4.2. Position of the Respondent

According to the Respondent, the purpose of the waiver requirement is to ensure that the Claimant as well as the companies affiliated to the Claimant should not later on, possibly after the close of the investment dispute, be in a position to commence actions against the State arising from claims which were the object of the BIT procedure. The Respondent states that the Claimant had a choice in its form of withdrawal from Venezuelan court proceedings, namely either withdrawal with prejudice or withdrawal without prejudice. According to the Venezuelan Civil Procedure Code, the act by which a party withdraws from a case is termed “*desistimiento*”, which can be effected in one of two ways: (a) withdrawal with prejudice to future suits (“*desistimiento de la demanda*”) or (b) withdrawal without prejudice to future suits (“*desistimiento del procedimiento*”):

*There are critical differences between these two methods of withdrawal. Withdrawal with prejudice (“*desistimiento de la demanda*”) forecloses a given claimant from filing suit again on the same claim or claims. In other words, the claimant does not retain the right to re-initiate its claim in the same forum. As Venezuelan administrative law expert Dr. Gustavo Grau explains,*

*... the object of the withdrawal of Article 263 (withdrawal with prejudice) is the claim itself ... the term “claim” in this context must be understood as the equivalent of a **cause of action** or the **right that is claimed against the other party**. In accordance with the provisions of Article 263 of the CCP, the effect on the proceedings of a withdrawal with prejudice is like **res judicata**, like that of a ruling handed down by judicial authority, i.e., once approved by the judge, it terminates the suit definitively, without any possibility of a new suit being filed by means of an identical claim, with the same parties and the same purpose.*

*On the other hand, if a claimant withdraws without prejudice effecting a “*desistimiento del procedimiento*”, that claimant may re-file the same suit on the same claim and retains the right to re-initiate his cause of action in domestic courts. As expert Dr. Grau notes, this type of withdrawal without prejudice refers to “the possibility that the claimant may limit the scope of its withdrawal to*

*simply not continuing with the **proceedings** [“withdrawal without prejudice”] initiated by its filing of the claim.” Additionally, Dr. Grau explains that “the object of the withdrawal stated by the claimant is limited to a **termination of the procedural stage**, that is, the claimant has the option of not continuing with the process, without prejudice to the same party re-filing said claim subsequently, after a period of ninety (90) days following approval of the withdrawal.*

As indicated above, the difference between the two forms of withdrawal is significant because depending on which of the two forms the claimant chooses, the outcome will be substantially different. Dr. Grau notes,

... this distinction, far from being a merely dogmatic or trivial, represents an element of summary importance, in order to be able to determine the consequences of each type of withdrawal, and specifically to determine whether a claimant may bring the same claim against the same counterparty and within the same scope, even after having filed a withdrawal.²⁷

The Respondent furthermore states that the Claimant and its affiliated companies in the various cases pending before Venezuelan courts did not immediately withdraw pending actions with the competent court, as on 15 September 2004, one month after the Claimant filed its Request for Arbitration, MINCA filed a new claim before the Constitutional Chamber of the Venezuelan Supreme Court seeking extraordinary review and nullification of a decision of that Court.

According to the Respondent, the purpose of the waiver provisions in the BIT is clear in that a Party cannot circumvent the BIT by alleging that it had waived its right to initiate or continue its right to bring a claim while at the same time preserving its right to re-initiate it at a later date.

3.4.3. Position of the Claimant

According to the Claimant, the *desistimiento* was drafted by Hernández-Breton, the head of the Administrative Law Litigation Department of the Caracas Office of Baker & McKenzie. The Claimant furthermore submitted reports from two Venezuelan experts, Dr. Ramón Escovar and Professor Luis Ortiz Alvarez who opine that the *desistimiento* filed was appropriate and that the Constitutional Chamber’s decision definitively prevents Vanessa from re-opening any of its court actions.

²⁷

Memorial on Jurisdiction of 28 August 2006, pages 70 and 71.

According to the Claimant, the form of the *desistimiento* chosen was in order to not be deemed to have waived the rights to the Additional Facility Procedure before ICSID or possible enforcement actions of an award. The action before the Supreme Constitutional Court did not relate to any claim advanced in these ICSID proceedings but only concerned a previous decision on costs which MINCA considered to be wrong.

3.4.4. The Tribunal's Decision

This Arbitral Tribunal is confronted with the question as to what might occur in the future if the Claimant or one of its affiliated companies seizes a Venezuelan court. The statements of the experts presented by the Parties come to opposing conclusions.

The Arbitral Tribunal has read with attention the Decision of the Constitutional Chamber of the Supreme Court of Justice of 28 October 2005 where this court of highest instance had held as follows:

In this regard, the Chamber must note that Article XII (3)(c) of the Agreement between the Government of the Republic of Venezuela and the Government of Canada for the Promotion and Protection of Investments, signed in Caracas on July 1, 1996, and incorporated to our legal system through the corresponding approbatory law (Special O.G. No. 5,207 of 01.20.98) “an investor may submit a controversy [...] to arbitration according to paragraph (4) if: [...] (b) the investor has waived its right to bring or continue any proceeding regarding the measure that it purports to be a default on this agreement before the courts by the contracting party or in any type of proceeding for the settlement of disputes.”

Having seen the contents of that rule, this Chamber deems that it cannot be sustained that the revision requested is in no way related to the controversy arisen with regard to the exploration, development and exploitation of alluvial and vein gold in the area named Las Cristinas, between the parent company of the plaintiff and the Republic and Corporación Venezolana de Guayana, because the sentencing to pay court costs that is now being impugned had its origin, precisely, on a request for formalization of arbitration regarding the same dispute, but made to our national jurisdiction by way of the Political-Administrative Chamber of this Supreme Court.

From this perspective, the Chamber cannot make a thorough examination regarding this review, not assessing the fairness of the monetary sentence against the petitioner, because by having requested the [International Centre for Settlement of Investment Disputes] to settle the conflict arisen, it undoubtedly waived filing or continuing any proceeding related – either indirectly or directly –

to the so-often referred to controversy. For this reason, this Chamber must declare that it dismisses the review requested. So it is decided.”²⁸

It would therefore seem to this Tribunal that it need not try to analyze the opinions of the experts called upon by the Parties regarding the question of what the difference between the various waivers under Venezuelan procedural law is and whether or not the Claimant and its affiliated companies chose the proper version. The Supreme Court has clearly stated that the waiver prevents Venezuelan courts from deciding claims regarding the Las Cristinas Project. In its Decision, the Supreme Court not only refers to the proceedings pending before it regarding the petition to review a cost decision of a previous judgment, but the Constitutional Chamber went on to state

... because by having requested the [International Centre for Settlement of Investment Disputes] to settle the conflict arisen, it undoubtedly waived filing or continuing any proceeding related – either indirectly or directly – to the so-often referred to controversy.

In view of the fact that the question of the scope of the waiver, if this issue should in the future arise, is a matter to be decided under Venezuelan law by the Venezuelan Courts, this Tribunal considers that the Supreme Court of Venezuela is best qualified to interpret Venezuelan law. The Tribunal therefore holds that the waiver fulfils the requirements of the BIT and that this defense of the Respondent is denied.

3.5. Copper Concessions Claim

3.5.1. Introduction

Article XII, paragraph 2 of the BIT provides:

If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph (4). For the purposes of this paragraph, a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement,

²⁸

Decision of the Constitutional Chamber of the Supreme Court of Justice, 28 October 2005, V V 321A/7.

and that the investor or an enterprise owned or controlled directly or indirectly by the investor has incurred loss or damage by reason of, or arising out of, that breach.

Article XII, paragraph 3 of the BIT provides:

An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:

- a. ...*
- b. ...*
- c. ...*
- d. not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.*

The question which arises is whether the Claimant when delivering its notice in writing regarding the alleged breach of the BIT with respect to the Copper Concessions held by MINCA did so within the three-year period provided for in Article XII(3)(d) of the BIT.

3.5.2. Position of the Respondent

The Respondent holds that the Copper Concessions Claim was not pleaded prior to the expiry of the statute of limitations contained in the BIT and is therefore time barred. The Respondent considers that when the Claimant submitted the dispute to investor-state arbitration on 8 July 2004, the date on which it presented its Request for Arbitration to ICSID, this Request did not include the Copper Concessions Claim. The date on which the Claimant first became aware of the potential BIT breach was, at the latest, 8 March 2002, but the Claimant first presented its Copper Claim in January 2006 as part of its Memorial, therefore more than three years after 8 March 2002. According to the Respondent, the Claimant's Request for Arbitration contained no allegations of a breach of the BIT or a request for relief in relation to the cancellation of MINCA's Copper Concessions and the references in the Request for Arbitration to the Copper Concessions either fail to constitute any such claim or are so vague that they shed no light on the Claimant's alleged Copper Claim.

3.5.3 Position of the Claimant

According to the Claimant, its claim arising from the cancellation of the Copper Concessions is not time-barred:

The mining of, and contracts and concessions in respect of, gold and copper at Las Cristinas have always been intertwined.

...

Vannessa makes two claims in this arbitration that involve the copper concessions. The first claim is about Resolution 36 of the Ministry of Energy and Mines dated March 8, 2002, which revoked MINCA's concession to the Las Cristinas copper concessions. The second claim is about Presidential Chavez's Decree 1962, published March 12, 2003, that reserved the copper concessions for direct exploitation by the Government of Venezuela. These are the only two claims that Venezuela asserts are time-barred.

Vannessa's first claim about Resolution 36 was clearly pleaded at paragraphs 74, 88(v), 95 and 102 of the Request for Arbitration. Vannessa sets out these paragraphs at paragraph 212 of its Counter-Memorial on Jurisdiction. Venezuela has never set out any proper basis for concluding that Vannessa's pleading of this claim in its Request for Arbitration is deficient. The Request for Arbitration setting out this claim was filed on July 9, 2004, less than three years after Resolution 36 was issued on March 8, 2002. This claim is therefore not time-barred.

While Vannessa did not make a specific reference to Decree 1962 in its pleadings until it filed its memorial on Merits on January 13, 2006, it amended its Request for Arbitration to include this claim, with the Tribunal's consent, effective February 28, 2006. This claim was pleaded in both the Memorial and the Request for Arbitration less than three years after Presidential Decree 1962 was published on March 12, 2003. This claim too is therefore not time-barred.²⁹

3.5.4 The Tribunal's Decision

On 8 March 2002, the Ministry of Energy and Mines issued Resolution 36³⁰ declaring MINCA's concession to the Las Cristinas Copper Concessions expired.

²⁹ Claimant's Rejoinder on Jurisdiction of 16 April 2007, pages 81 and 82.
³⁰ CD-167.

For the Arbitral Tribunal, only this date is relevant regarding the commencement of the statute of limitation period. The Presidential Decree of President Chavez of 10 September 2002 published on 12 March 2003 reserving the Copper Concessions for direct exploitation by the Government of Venezuela is of no relevance in this context as already the previous Resolution of 8 March 2002 of the Ministry of Energy and Resources had deprived MINCA of any right to exploit the Copper Concessions which CVG had transferred to it on 28 January 1999.

The relevant document regarding the interruption of the statute of limitation is therefore the Request for Arbitration filed on 8 July 2004.

According to Article XII, paragraph 2 of the BIT in order to initiate the dispute the Investor must deliver a

notice in writing to the other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement, and that the investor or an enterprise owned or controlled directly or indirectly by the investor has incurred loss or damage by reason of, or arising out of, that breach.

The Arbitral Tribunal considers that the purpose of such a statute of limitation provision is to require diligent prosecution of known claims and insuring that claims will be resolved when evidence is reasonably available and fresh, therefore to protect the potential debtor from late actions.

The Tribunal keeps in mind that this dispute between the Parties mainly concerns the gold mining rights which had been granted to MINCA with the Work Contract in 1992, whereas the copper rights were only granted in 1999 and that little, if any, mining activity regarding copper exploitation is recorded. As long as the Respondent was given notice with the filing of the Request for Arbitration that its claims under the BIT not only concerned the gold mining rights but that the alleged treatment by the Respondent regarding the MINCA Copper Concessions also constituted a subject matter of this dispute, the purpose of the prescription provision is fulfilled.

In this context, the Arbitral Tribunal notes that in paragraph 13 of the Request for Arbitration, the Las Cristinas Project is described as “a gold and copper mining project”. In paragraph 74,

the Claimant states (i) *“in cancelling the copper concessions, the Ministry did not follow the administrative procedures with which it was required to comply under Venezuelan law”*.

In paragraph 88, the Claimant recited the written notice of breaches of the BIT which on 5 June 2002 was given to the Minister of Foreign Affairs of the Government of Venezuela in accordance with Article XII(2) of the BIT. In this list, it mentioned under (v) *“the expropriation of MINCA’s mining rights in Las Cristinas through resolutions of the Ministry of Energy and Mines in March 2002 reassuming the rights to Las Cristinas and canceled the Las Cristinas copper concessions held by MINCA.”* (Emphasis added).

In the Chapter of the Request for Arbitration dealing with the breaches of the BIT, in paragraph 91, the Claimant in a general way refers to the alleged expropriation of the Claimant’s investments in the Las Cristinas project and the lack of fair and equitable treatment and full protection and security with respect to MINCA and in paragraph 95, reference is made to *“the actions taken by the Ministry of Energy and Mines”*.

From an objective viewpoint, the Request for Arbitration must be understood to have included the alleged violations of MINCA’s rights (and therefore of the Claimant) relating to the Copper Concessions and the Respondent was therefore, upon receipt of the Request, aware of the fact that the dispute also concerned the termination of the Copper Concessions.

The Arbitral Tribunal therefore holds that the Copper Concessions Claim is not time-barred and that this defense of the Respondent is denied.

NOW THEREFORE,
THE ARBITRAL TRIBUNAL DECIDES AS FOLLOWS :

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.

The Arbitral Tribunal

[Signed]

[Signed]

[Signed]

Professor Brigitte Stern

Dr. Robert Briner

Judge Charles N. Brower

Arbitrator

President

Arbitrator