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

In the arbitration proceeding between

GOLD RESERVE INC.

Claimant

and

BOLIVARIAN REPUBLIC OF VENEZUELA

Respondent

ICSID Case No. ARB(AF)/09/1

AWARD

Members of the Tribunal
Professor Pierre Marie Dupuy, *Arbitrator*
Professor David A.R. Williams QC, *Arbitrator*
Professor Piero Bernardini, *President*

Secretary of the Tribunal
Ann Catherine Kettlewell

Date of dispatch to the Parties: September 22, 2014

REPRESENTATION OF THE PARTIES

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TABLE OF AUTHORITIES

Cases

TABLE OF ABBREVIATIONS

1945 Mining Law	Mining Law and Regulations, Official Gazette No. 121 dated 18 January 1945
1999 Mining Law	Presidential Decree No. 295 dated 5 September 1999, Official Gazette Special Ed. No. 5.382 dated 28 September 1999
2001 Mining Regulations	Decree No. 1.234, Official Gazette No. 37.155 dated 9 March 2001
AARN(s)	Authorisation(s) to Affect Renewable Natural Resources
Addendum to the V-ESIA of the Brisas Project or Addendum to the V-ESIA	Addendum to the Environmental and Socio-Cultural Impact Assessment (V-ESIA) of the Brisas Project, July 2005 (C-187)
Additional Esperanza Contract	Contract between Gold Reserve and MINCA dated 7 May 2004 (C-1285)
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 April 2006
Additional Yusmari Contract	Contract between Gold Reserve and MINCA dated 7 May 2004 (C-1286)
AOT	Authorisation to Occupy Territory
Arbitration (Additional Facitlity) Rules	Schedule C to the Additional Facility Rules (as defined above) – Arbitration (Additional Facility) Rules
ARD	Acid Rock Drainage
Bárbara, Zuleima and Lucía Assignment Contract	Assignment and Delegation Contract for Exploration and Exploitation of Alluvial and Hard-Rock Gold and Diamonds between Placer Dome de Venezuela, C.A. and Compañía Aurífera Brisas del Cuyuní, C.A. dated 16 October 1998 (C-8)
Barbarita Concession	Barbarita Mining Title, Official Gazette of Bolivar State, Special Ed. No 218 dated 10 June 2005
Belanger I	First Witness Statement of Mr Belanger dated 20 September 2010
Belanger II	Second Witness Statement of Mr Belanger dated 29 July 2011
Brewer-Carías I	First Expert Legal Opinion of Mr Brewer-Carías dated 15 September 2010

Brewer-Carías II	Second Expert Legal Opinion of Mr Brewer-Carías dated 28 July 2011
Brisas Company	Compañia Aurífera Brisas del Cuyuni, C.A.
Brisas or Alluvial Concession or Brisas Mining Title	Brisas Mining Title dated 11 April 1988, Official Gazette No. 33.947 dated 18 April 1988
Brisas Project	Unicornio and Brisas Concessions
Brisas Project Feasibility Study	Brisas Project Feasibility Study dated February 2001 (C-170); supplemented by Letter from Gold Reserve to MEM (now MINAMB) dated 27 November 2002 (C-575)
Brown & Kowal II (Joint Expert Procedure)	Joint Expert Procedure Rebuttal Report of Dr Brown & Dr Kowal dated 3 July 2013
Burrows I	First Expert Report of Dr Burrows dated 14 April 2011
Burrows II	Rejoinder Report of Dr Burrows dated 8 December 2011
Burrows II (Joint Expert Procedure)	Joint Expert Procedure Rebuttal Report of Dr Burrows dated 3 July 2013
C-XXX	Exhibit filed by Claimant
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 1 July 1996, which entered into force on 28 January 1998
Carpio I	Witness Statement of Mr Carpio dated 11 April 2011
CIMVal	Canadian Institute of Mining, Metallurgy and Petroleum on Valuation of Mineral Properties
Claimant or Gold Reserve	Gold Reserve Inc.
Claimant's Comments on Reports of the Experts Submitted in Response to Procedural Order No. 2	Claimant's Comments on Reports of the Experts Submitted in Response to Procedural Order No. 2 dated 5 August 2013
Claimant's Joint Expert Procedure Post-Hearing Brief	Claimant's Joint Expert Procedure Post-Hearing Brief dated 23 December 2013
Claimant's Post-Hearing Brief	Post-Hearing Brief of Gold Reserve Inc. dated 16 March 2012
Claimant's Response to Respondent's Comments on Second Post-Hearing Brief	Claimant's Response to Respondent's Comments on Second Post-Hearing Brief dated 18 July 2012
Claimant's Second Post-Hearing Brief	Claimant's Second Post-Hearing Submission (Comments on Respondent's Annex A) dated 25 May 2012

Construction Permit or Phase I Permit	Authorisation to Affect Natural Resources to Gold Reserve de Venezuela-Compañia Aurifera Brisas del Cuyuni for the Infrastructure and Services Construction Phase of the Brisas Project for Exploitation and Processing of Gold and Copper Mineral dated 27 March 2007
Counter-Memorial	Counter-Memorial on Merits and Jurisdiction of the Bolivarian Republic of Venezuela, 14 April 2011
CVG	Corporación Venezolana de Guayana
DCF	Discounted Cash Flow
De los Rios I	First Expert Report of Professor De los Rios dated 7 April 2011
EAE	Strategic Enviornmental Evaluation; MinAmb Official Letter No. 2353 dated 31 July 2006 (C-455)
EIA	Environmental Impact Study; Letter from Gold Reserve to MARN (now MinAmb) dated 14 October 1998 (C-617)
El Pauji Concession	El Pauji Mining Title, published Official Gazette No. 34.011 dated 20 July 1988
Feasibility Study	"Geo-exploratory and Techno-economic Feasibility Study," MEM (now MIBAM) Official Letter DM-DT-04 dated 24 February 1994 (C-405)
FET	Fair and Equitable Treatment
Herrera I	Witness Statement of Mr Herrera dated 23 March 2011
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Inspection Report	MIBAM Inspection Report dated 11 March 2008 (C-78)
Iribarren I	First Legal Opinion of Mr Iribarren Monteverde dated 5 December 2011
Kaczmarek II	Second Expert Report of Mr Kaczmarek (Navigant) dated 27 July 2011
Kaczmarek II (Joint Expert Procedure)	Joint Expert Procedure Second Supplemental Report of Mr Kaczmarek (Navigant) dated 3 July 2013
Lambert I (Joint Expert Procedure)	Joint Expert Procedure Supplemental Report of Mr Lambert dated 24 May 2013
LCT	Locked-Cycle Tests

May 2006 Update	Letter from Gold Reserve to MIBAM dated 12 May 2006 (C-453)
Memorial	Memorial on the Merits of Gold Reserve Inc. dated September 24, 2010
Memorial on Jurisdiction	Memorial on Jurisdiction of the Bolivarian Republic of Venezuela dated 22 December 2010
MFN	Most Favoured Nation
MIBAM Resolution dated 25 May 2009	MIBAM Resolution No. DM/No. 050/2009 dated 25 May 2009, Official Gazette No. 39.186 dated 25 May 2009
MIBAM Resolution dated 17 June 2010	MIBAM Official Letter No. 281/10 dated 17 June 2010
MIBAM or MEM	Ministry of Mines, initially known as the Ministry of Energy and Mines, then later as the Ministry of the People's Power for Basic Industries and Mining
MinAmb or MARN	Ministry of the Environment, initially known as the Ministry of the Environment and Natural Resources, then later as the Ministry of the People's Power for the Environment
Opening Act	MIBAM Notice of Commencement of Administrative Proceedings No. MPPIBAM-DVM-DGFCM-ITR No. 1-IFMLC-001-09 dated 4 November 2009 (C-128)
Ortiz I	First Expert Legal Opinion of Mr Ortiz-Alvarez dated 20 September 2010
Ortiz II	Second Expert Legal Opinion of Mr Ortiz-Alvarez dated 27 June 2011
Pingle II	Second Expert Report of Mr Pingle dated 23 July 2011
R-XX	Exhibit filed by Respondent
Rejoinder	Rejoinder on Merits and Jurisdiction of the Bolivarian Republic of Venezuela dated 9 December 2011
Reply	Reply on the Merits of Gold Reserve Inc. dated 29 July 2011
Request for Arbitration	Claimant's Request for Arbitration dated 21 October 2009
Respondent or Venezuela	Bolivarian Republic of Venezuela
Respondent's Comments on Claimant's Second Post-Hearing Brief	Respondent's Comments on Claimant's Second Post-Hearing Brief dated 8 June 2012

Respondent's Comments on the Joint Expert Procedure Reports	Respondent's Comments on the Joint Expert Procedure Reports dated 5 August 2013
Respondent's Joint Expert Procedure Post-Hearing Brief	Respondent's Joint Expert Procedure Post-Hearing Brief dated 23 December 2013
Respondent's Post-Hearing Brief	Post-Hearing Brief of the Bolivarian Republic of Venezuela dated 16 March 2012
Revocation Order	MinAmb Administrative Order No. 088-08 dated 14 April 2008 (C-121)
Rigby II (Joint Expert Procedure)	Joint Expert Procedure Rebuttal Report of Dr Rigby, Mr Swanson and Dr Tinucci dated 3 July 2013
Rivero I	Witness Statement of Mr Rivero dated 23 September 2010
Rodriguez I	First Witness Statement of Mr Rodriguez dated 23 March 2011
Romero I	Witness Statement of Mr Romero dated 27 January 2011
SAE	Strategic Environmental Evaluation
Suspension Order	MIBAM Act No. MIBAM-DGFCM-ITRG No. 1-IFMLC-001-09 dated 18 March 2009 (C-94)
Transcript, February 2012, [day, page: line]	Transcript of the hearing on jurisdiction and merits held from 13 to 17 February 2012
Transcript, October 2013, [day, page: line]	Transcript of the hearing implementation of Procedural Order No. 2 held from 15 to 16 October 2013.
Tribunal	Arbitral Tribunal constituted as of 9 March 2010
TIPS	Treasury Inflation Protected Securities
Unicornio Concession or Unicornio Mining Title	Unicornio Mining Title dated 12 February 1998, Official Gazette No. 36.405 dated 3 March 1998 (C-5)
Unicornio Termination Decision	MIBAM Official Letter No. 281/10 dated 17 June 2010 (C-129)
V-ESIA of the Brisas Project 2005 or V-ESIA	Environmental and Socio-Cultural Impact Assessment (V-ESIA) of the Brisas Project, July 2005 (C-178)
WACC	Weighted Average Cost of Capital

CHAPTER I. THE PARTIES

A. Claimant

1. Claimant in this arbitration is Gold Reserve Inc. (hereinafter "**Gold Reserve**" or "**Claimant**"). Gold Reserve is a mining company incorporated under the laws of the Yukon Territory in Canada and is listed on the Toronto Venture Exchange and the NYSE Amex. Claimant's registered address is at Suite 200, 926 West Sprague Avenue, Spokane, Washington 99201, United States. Claimant is represented in this arbitration by Ms Abby Cohen Smutny, Mr Darryl S. Lew, Mr Hansel Pham, Mr Petr Polášek and Mr Michael Roche of White and Case LLP (Washington, United States).

B. Respondent

2. Respondent in this arbitration is the Bolivarian Republic of Venezuela (hereinafter "**Venezuela**" or "**Respondent**"). It was originally represented in this arbitration by Dr Ronald E.M. Goodman, Ms Melida Hodgson and Mr Alberto Wray of Foley Hoag LLP (Washington, United States). Their authority was revoked by letter dated 10 May 2011.[1] Venezuela was then represented by the Attorney-General; Venezuelan counsel, Mr Antonio Guerrero and Mr Luis Torres Darias (appointed on 22 February 2011); and Mr Paolo di Rosa and Ms Gaela Gehring Flores of Arnold & Porter LLP (as of 12 May 2011). On 27 September 2011, Respondent informed the Tribunal that Foley Hoag LLP had been reappointed to represent Respondent, and on 28 September 2011, Respondent revoked the authority of the Venezuelan counsel, Mr Antonio Guerrero and Mr Luis Torres Darias. Venezuela is also presently represented by Dr Manuel Enrique Galindo Ballesteros, *Procurador General (E) de la República* of the *Procuraduría General de la República*.

CHAPTER II. THE PARTIES' CLAIMS AND PRAYERS FOR RELIEF

3. The dispute has its origins in a number of mining concessions, known as the "**Brisas Concession**" and the "**Unicornio Concession**", and mining rights held indirectly by Claimant in Venezuela.

[1] The termination of their authority was based upon Venezuelan regulations which forbid the renewal of legal retainers after the retainer has been in force for three years. The competence and integrity of these Counsel is beyond question.

4. Claimant submits that Respondent has violated Articles II, III and VII of the Treaty between the Government of Canada and the Government of Venezuela for the Promotion and Protection of Investments, which entered into force on 28 January 1998 (the "BIT"). Respondent disputes this.

5. Claimant requests that the Tribunal:

1) Hold that Respondent breached its obligations under Article II of the BIT;
2) Hold that Respondent breached its obligations under Article III of the BIT;
3) Hold that Respondent breached its obligations under Article VII of the BIT;
4) Award Claimant compensation in the total amount of US$ 1,735,124,200, plus interest running from 14 April 2008 up through the date of the award at the US Prime Rate of interest plus 2 percent, compounded annually;[2]
5) Award Claimant compensation on such other basis as the Tribunal may deem to be warranted;
6) Award Claimant the amount of the legal fees and costs incurred in these proceedings; and
7) Award Claimant interest on the full amount of the Award so established, up to the date of payment, at the interest rate equivalent to the annualized yield on US dollar-denominated Venezuelan Government bonds, compounded annually.[3]

6. Respondent requests that the Tribunal:

1) Find that the Tribunal lacks jurisdiction to hear Gold Reserve's claims with respect to the Brisas and Unicornio Concessions in accordance with Article XII of the BIT;
2) Find that Claimant has failed to state a claim with respect to its Choco 5 claim and that this claim is therefore not admissible;
3) If it has jurisdiction to hear Claimant's claims, find that Claimant's claims should be dismissed in their entirety; and
4) Award Venezuela compensation for all the expenses and costs associated with defending against the claims.[4]

[2] In its Memorial, Claimant had originally requested a total amount of US$ 1,669,351,700, plus interest running from 14 April 2008 up through the date of the award at the US Prime Rate of interest plus 2 percent, compounded annually. Claimant's Memorial, para. 467.

[3] Claimant's Reply, para. 687. Further to the Tribunal's directions at the October 2013 Hearing, Claimant submitted a list of the questions that it requested the Tribunal to address in its decision. Claimant's Joint Expert Procedure Post-Hearing Brief, pp. 58-63.

CHAPTER III. SUMMARY OF THE MAIN FACTS OF THE CASE

A. Introduction

7. The subsequent summary is intended to provide a general overview of the issues in dispute between the Parties. It is not intended to be an exhaustive description of all facts considered relevant by the Tribunal. These will be addressed in the context of the Tribunal's analysis of the issues in dispute, and will be supplemented by relevant facts, including those provided by witnesses and experts in their written statements and reports and in the course of oral examination at the hearings.

8. Mining of minerals in Venezuela generally works in the following way. While the minerals belong to the State, a private party is permitted to exploit those minerals when the State grants it a concession, which, through conditions in the concession and mining law and regulations, gives that party a set of rights and obligations. The Ministry of Mines (initially known as the Ministry of Energy and Mines, or "**MEM**", then later as the Ministry of the People's Power for Basic Industries and Mining, or "**MIBAM**"), oversees the concessionaire's compliance with a mining title, law and regulations. Concessionaries must file an annual report with MIBAM, and MIBAM must verify whether they have complied with their obligations.

9. The Ministry of the Environment (initially known as the Ministry of the Environment and Natural Resources, or "**MARN**", then later as the Ministry of the People's Power for the Environment, or "**MinAmb**") issues permits and approves environmental impact studies to ensure that the concessionaire exploits the mine in accordance with Venezuelan environmental standards.

B. Concessions Held by Claimant

The Brisas Concession

10. The Brisas (or Alluvial Gold Exploitation) Concession covers the near-surface gold resources located within the 500-hectare Brisas property. The Brisas property is in the Kilometre 88 mining

[4] Counter-Memorial, para. 773 and Rejoinder, para. 670. Further to the Tribunal's instructions provided at the October 2013 Hearing, Respondent submitted a list of questions for the Tribunal to address. Respondent's Joint Expert Procedure Post-Hearing Brief, pp. 60-64.

district in South-Eastern Venezuela. The Brisas Concession was for 20 years, and could be renewed for two additional ten-year terms if so requested six months before expiration (**"Brisas Concession**" or "**Alluvial Concession**").

11. On 18 April 1988, the Brisas Concession was granted to a Venezuelan company, Compañia Aurífera Brisas del Cuyuní, C.A. ("**Brisas Company**").[5] In November 1992, Gold Reserve de Venezuela, the Venezuelan subsidiary of the United States company Gold Reserve Corporation (hereinafter, Gold Reserve Corp.), acquired the Brisas Company.[6] On 5 October 1998, Gold Reserve Inc., the Claimant, was incorporated in Canada as a wholly owned subsidiary of Gold Reserve Corp.[7] In early 1999, Gold Reserve Inc. became the parent company of Gold Reserve Corp. Gold Reserve Inc. thus became indirectly the owner of the Brisas Company, which held the Brisas Concession.

The Unicornio Concession

12. In 1993, the Brisas Company applied for rights to the hard rock mineralisation underlying the Brisas Concession. MIBAM granted the Brisas Company the Unicornio (or Hard Rock) Concession on 3 March 1998. This granted the Brisas Company the right to extract gold, copper and molybdenum from the hard rock underlying the Alluvial Concession. The Unicornio Concession, like the Alluvial Concession, was for a period of 20 years, and could be extended for two additional ten-year terms if so requested six months before expiration ("**Unicornio Concession**").

The Brisas Project

13. Following the grant of the Unicornio Concession, which underlay the Brisas Concession, for reasons of better coordination and efficiency Gold Reserve planned to exploit the two Concessions together as part of a larger Brisas Project (**"Brisas Project**").

[5] Brisas Mining Title dated 11 April 1988, Official Gazette No. 33.947 dated 18 April 1988 (C-3).

[6] *See* Gold Reserve News Release No. NR-92-9 dated 6 November 1992 (C-268).

[7] Gold Reserve, Proxy Statement/Joint Prospectus dated 30 November 1998 (C-1251).

C. Events Subsequent to the Acquisition of the Brisas and Unicornio Concessions

14. In August 1993, Gold Reserve submitted to MIBAM a "Geo-exploratory and Techno-economic" Feasibility Study regarding the Brisas Concession. MIBAM approved this study on 24 February 1994 ("**Feasibility Study**").[8]

15. From 1993 to 1998, Claimant[9] applied for and was granted by MinAmb six Authorisations to Affect Natural Resources ("**AARNs**"), each for one-year term, regarding the Brisas Concession, which allowed Claimant to, for example, build roads or clear land.

16. Claimant submitted an Environmental Impact Study ("**EIA**") on the project for the exploitation of alluvial gold in the Brisas Concession to MinAmb on 14 October 1998.[10] Claimant informed the MinAmb of the underlying Unicornio Concession it had obtained earlier that year and stated its intention to exploit both Concessions in an integrated or comprehensive manner. It also requested that MinAmb grant it authorisation to affect resources for the purposes of the exploitation of the Alluvial Concession in accordance with the study.

17. MinAmb approved the EIA on 28 October 1999,[11] but did not grant Claimant the authorisation to exploit the Brisas Concession. MinAmb instead stated that it would assess the environmental impact for the other areas in the expanded project.

18. Claimant applied for and was granted a one-year extension to submit its feasibility study for the Unicornio Concession. On 22 February 2001, it submitted to MIBAM the "Unicornio Concession Technical Financial and Environmental Feasibility Study".[12] The study in fact referred to both Concessions or the Brisas Project. It was supplemented on 27 November 2002 and again throughout the project ("**Brisas Project Feasibility Study**"). After requesting additional

[8] MEM (now MIBAM) Official Letter DM-DT-04 dated 24 February 1994 (C-405).

[9] The term "Claimant" is used for convenience only in lieu of "the Brisas Company" or any actual holder of title to the Brisas and Unicornio Concessions and other mining rights included in the Brisas Project, in which Claimant held indirectly an interest.

[10] Letter from Gold Reserve to MARN (now MinAmb) dated 14 October 1998 (C-617).

[11] MARN (now MinAmb) Official Letter No. 77-01-45-617/99 dated 28 October 1999 (C-621).

[12] Brisas Project Feasibility Study dated 22 February 2001 (C-170).

information, MIBAM approved this study on 6 January 2003 as complying with the Special Advantage No. 5 of the Unicornio Concession.[13]

19. Claimant had also examined the possibility of exploiting the Brisas and Unicornio Concessions together with the neighbouring Las Cristinas properties. In September 2001, Corporación Venezolana de Guayana ("**CVG**"), the State-owned regional development corporation, announced that it would pursue the combined Las Cristinas-Brisas project. Respondent later elected not do so.

20. On 25 June 2004 and 14 December 2005 respectively, MinAmb authorised Claimant to occupy Zuleima and Bárbara, two parcels of land adjoining the Brisas and Unicornio Concessions.[14]

21. On 29 July 2005, Claimant submitted the Brisas Project Environment and Socio-Cultural Impact Study to MinAmb, and requested that MinAmb issue the AARN for the phase of construction of the Infrastructure and Services and for the phase of gold and copper mineral exploitation for the Brisas Project (hereinafter "**V-ESIA of the Brisas Project**" or **"V-ESIA**").[15] On 31 July 2006, MinAmb informed Gold Reserve that it intended to conduct a "Strategic Environmental Evaluation" ("**EAE**") to complement the studies submitted so far.[16] On 19 December 2006, MinAmb invited Claimant and CVG to conduct a EAE.[17] MinAmb indicated that rather than issuing a single permit, it would prefer to issue separate permits for each phase of the work. On 30 January 2007, Claimant submitted an updated V-ESIA in respect of which it renewed the request made on 29 July 2005.[18] On 9 February 2007, MinAmb approved Claimant's V-ESIA for part of the works of the Brisas Project.[19]

22. On 27 March 2007, MinAmb issued the "Authorization to Affect Natural Resources for the Infrastructure and Services Construction Phase of the Brisas Project for the Exploitation of Gold and Copper Mineral" (the "**Construction Permit**", also referred to as "**Phase I Permit**").[20] The

[13] MEM (now MIBAM) Official Letter No. DGM-003 dated 6 January 2003 (C-253).

[14] MARN (now MinAmb) Administrative Order No. COAA-01-00-19-05-232/005 dated 14 December 2005 (C-33); MARN (now MinAmb) Official Letter No. 01-00-19-05-427/2004 dated 25 June 2004 (C-62).

[15] Letter from Gold Reserve to MARN (now MinAmb) dated 29 July 2005 (C-431).

[16] MinAmb Official Letter No. 2353 dated 31 July 2006 (C-455).

[17] MinAmb Official Letter No. 6154 dated 19 December 2006 (C-463).

[18] Letter from Gold Reserve to MinAmb dated 30 January 2007 (C-605).

[19] MinAmb Official Letter No. 010303-527 dated 9 February 2007 (C-252).

[20] MARN (now MinAmb) Official Letter No. 010303-1080 dated 27 March 2007 (C-44).

effect of the Construction Permit was that, provided Gold Reserve complied with certain conditions specified in the Construction Permit, and provided the MinAmb signed an Initiation Act formally recognising that Claimant had so complied, Claimant could begin construction.

23. On 16 May 2007, Claimant provided MinAmb with evidence of its compliance with the Construction Permit conditions, and requested that MinAmb sign the Initiation Act.[21] MinAmb did not respond to this request. On 11 July 2007, Claimant sent another written request.[22] MinAmb then advised Claimant that it would not sign the Initiation Act until Claimant addressed its concerns over the location of a proposed alternative access road to the Brisas Project site. On 25 July 2007, Claimant submitted a plan to re-route the road, which was approved by MinAmb on 14 August 2007.[23]

24. On 14 April 2008, MinAmb issued Administrative Ruling No. 088-08 declaring the "absolute nullity" of the Construction Permit and revoking it for "reasons of public order."[24]

25. The Brisas Concession was set to expire on 18 April 2008, 20 years after it had initially been granted. On 17 October 2007, more than six months before the date of the expiry, Claimant had submitted to MIBAM an application to extend the Brisas Concession.[25] It attached a certificate of compliance that MIBAM had issued on 14 September 2007, which stated that Claimant had fully complied with the provisions of the corresponding 1999 Mining Law and was "solvent".[26] In August 2008, MinAmb told Claimant that it had been advised by MIBAM that the Brisas Concession had expired in April 2008. Upon enquiring with MIBAM, Claimant was told that there had been an omission as MIBAM had received the request for an extension, but had not properly filed it.[27] On 18 March 2009, MIBAM issued a Suspension Order suspending all mining

[21] Letter from Gold Reserve to MinAmb dated 16 May 2007 (C-480).

[22] Letter from Gold Reserve to MinAmb dated 11 July 2007 (C-485).

[23] Letter from Gold Reserve to MinAmb dated 25 July 2007 (C-487).

[24] MinAmb Administrative Order No. 625 dated Apr. 14, 2008, containing Administrative Ruling 088-08 (hereinafter the "**Revocation Order**") dated 14 April 2008 (C-121).

[25] Application for Extension of Alluvial Concession dated 17 October 2007 (C-494).

[26] MIBAM Official Letter No. LC-111-07 dated 14 September 2007 (C-77).

[27] MIBAM Official Letter No. DGFCM-2008-163 dated 8 September 2008 (C-522)

activities in the Brisas Concession, stating that there was no evidence in the file of an administrative act extending the Brisas Concession.[28]

26. On 25 May 2009, MIBAM issued a resolution denying Claimant's requested extension and terminating the Brisas Concession, citing Claimant's lack of solvency and alleged failure to comply with a number of Special Advantages.[29]

27. In October 2009, the Government seized Claimant's assets and occupied the site of the Brisas Project. On 20 October 2009, MIBAM commenced an administrative proceeding to revoke the Unicornio Concession.[30] Claimant filed a challenge to termination proceeding on 18 November 2009,[31] then discontinued that challenge on 4 March 2010.

28. On 17 June 2010, MIBAM terminated the Unicornio Concession on two grounds: first, Claimant had allegedly failed to commence exploitation within 7 years, in violation of Article 61 of the 1999 Mining Law; second, Claimant had breached Special Advantage No. 10 regarding the hiring of interns.[32]

CHAPTER IV. THE PROCEDURE

A. Institution of the Proceedings

29. On 21 October 2009, ICSID received a Request for the institution of arbitration proceedings under the ICSID Arbitration (Additional Facility) Rules (hereinafter "**the Additional Facility Rules**") on behalf of Gold Reserve against Venezuela.

30. On 23 October 2009, ICSID transmitted copies of the Request, its accompanying documentation and Claimant's letter dated 21 October 2009 to Respondent.

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[28] MIBAM Act No. MIBAM-DGFCM-ITRG No. 1-IFMLC-001-09 (hereinafter the "**Suspension Order**") dated 18 March 2009 (C-94).

[29] MIBAM Resolution No. DM/No. 050/2009 dated 25 May 2009, Official Gazette No. 39.186 dated 25 May 2009 (hereinafter "**MIBAM Resolution dated 25 May 2009**") (C-91).

[30] MIBAM Notice of Commencement of Administrative Proceeding MPPIBAM-DVM-DGFCM-ITR No. 1-IFMLC-001-09 dated 20 October 2009 (C-128).

[31] Gold Reserve Response to Opening Act for the Unicornio Administrative Proceeding filed with MIBAM on 18 November 2009 (C-259).

[32] MIBAM Official Letter No. 281/10 dated 17 June 2010 (hereinafter **"MIBAM Resolution dated 17 June 2010**") (C-129).

31. On 9 November 2009, pursuant to Article 4(5) of the Additional Facility Rules, the Secretary-General of ICSID registered the Request for Arbitration and, on the same day, in accordance with Article 4 of Schedule C of the Additional Facility Rules (hereinafter "**the Arbitration (Additional Facility) Rules**"), dispatched to the Parties the Notice of Registration, inviting them to proceed to the constitution of the Arbitral Tribunal.

32. By letter to the Secretary-General of ICSID dated 8 January 2010, Claimant noted that the Parties had failed to reach agreement on the number of arbitrators and the method of their appointment within 60 days of the registration of the Request for Arbitration. Claimant also invoked Article 9(1) of the Additional Facility Rules.

33. On 11 January 2010, the Secretary-General informed the Parties that the Tribunal would be constituted in accordance with that Article (*i.e.*, the Tribunal would be comprised of three arbitrators, with one arbitrator appointed by each party and the third, the President of the Tribunal, appointed by agreement of the Parties). The Secretary-General also informed Respondent that pursuant to Article 9(1) of the Additional Facility Rules, Claimant had appointed Professor David A.R. Williams QC, a national of New Zealand, as arbitrator and proposed Professor Hans van Houtte as President of the Tribunal. The Secretary-General invited Respondent to name an arbitrator and either to concur in the appointment of Professor van Houtte as President or to propose another person.

34. On 7 February 2010, Respondent appointed Professor Pierre-Marie Dupuy as arbitrator.

35. Professor Williams accepted his appointment on 14 January 2010 and Professor Dupuy on 9 February 2010.

36. By letter dated 9 February 2010, Claimant noted that after 90 days from the registration of the Request for Arbitration the Tribunal had not been constituted and the Parties had not agreed to extend the time for doing so. Claimant requested that, pursuant to Article 6(4) of the Additional Facility Rules, the Chairman of the Administration Council appoint the President of the Tribunal.

37. By email of 27 February 2010, Claimant informed the Secretariat that the Parties had agreed to extend the time for the constitution of the Tribunal.

38. By letters dated 4 March 2010, Claimant and Respondent advised the Secretariat of their agreement to appoint Professor Piero Bernardini as the presiding arbitrator. The Secretariat acknowledged receipt of these letters by letter dated 5 March 2010.

39. Professor Bernardini accepted his appointment on 9 March 2010.

40. On 9 March 2010, the Secretary-General of ICSID informed the Parties that, having received from each arbitrator the acceptance of his appointment, the Arbitral Tribunal (the "**Tribunal**") was deemed to have been constituted, and the proceedings were deemed to have begun on that date. The Secretary-General designated Mrs. Katia Yannaca-Small to serve as Secretary of the Tribunal. By letter dated 9 September 2010 the Secretariat informed the Parties and the Tribunal that Mrs. Yannaca-Small had been replaced as Secretary by Ms Janet Whittaker. By letter dated 16 November 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.

B. The First Session

41. By agreement of the Parties, the First Session of the Tribunal concerning the procedural rules and the agenda of the arbitration was held on 23 April 2010 via teleconference.

42. This First Session considered matters listed on an agenda circulated to the Parties by the Secretary of the Tribunal on 24 March 2010, as well as the Parties' joint proposals of 16 April 2010 regarding these matters (attached to the Minutes as Annex 1).

43. The Minutes of the First Session, signed by the arbitrators and the Secretary of the Tribunal, were transmitted to the Parties on 20 May 2011. The First Session was also audio recorded. The Secretary sent audio recordings in CD-ROM format to the Tribunal and the Parties on 21 May 2010.

C. Exchange of Written Pleadings

44. The agenda set out in the Minutes of the First Session directed Claimant to file its Memorial on the Merits by 24 September 2010, and Respondent to file its Counter-Memorial no later than 7 March 2011.

45. In accordance with this agenda, Claimant filed its Memorial dated 24 September 2010, together with exhibits; international legal authorities; Venezuelan legal authorities; the expert reports of Mr Brent C. Kaczmarek of Navigant Consulting, Mr Richard J. Lambert, Mr Allan R. Brewer-Carías, Professor Luis A. Ortiz-Alvarez and Mr Rex E. Pingle; the witness statements of Mr Arturo Rivero Acosta, Mr Robert A. McGuiness and Mr A. Douglas Belanger; and the joint witness statement of Ms Jane Spooner and Ms Mani M. Verma.

46. By letter dated 19 January 2011, Respondent requested an extension of time until 9 May 2011 for the filing of the Counter-Memorial in light of Claimant's refusal to date to produce documents requested by Respondent. Respondent also suggested that the due date for Claimant's Reply be 15 August 2011 and the due date for Respondent's Rejoinder be 21 November 2011. By letter dated 20 January 2011 the Tribunal invited Claimant to comment on Respondent's letter by 24 January 2011. On 24 January 2011, Claimant replied objecting to Respondent's request for an extension. Respondent replied by email dated 25 January 2011, and Claimant replied to this response in its letter of the same date.

47. In its Procedural Order No 1, dated 3 February 2011, the Tribunal granted a one-month extension of the period for filing Respondent's Counter-Memorial and the subsequent written submissions. It therefore directed that Respondent file its Counter-Memorial by 14 April 2011; that Claimant file its Reply by 15 July 2011; and that Respondent file its Rejoinder by 17 October 2011.

48. On 14 April 2011, Respondent submitted its Counter-Memorial on the Merits together with exhibits; legal authorities; and the expert reports of Mr James C Burrows, Professor Isabel De Los Rios, Professor Henrique Iribarren and Dr Neil Rigby.

49. By letter to the Tribunal dated 1 July 2011, Claimant requested an extension from 15 July 2011 to 29 July 2011 to file its Reply, and a corresponding extension until 14 November 2011 for Respondent to file its Rejoinder. Claimant cited as its reasons for the request the Tribunal's

shortening by one week of the initial time period agreed on for submitting the Reply, and the need to address jurisdictional issues.

50. On 4 July 2011, the Tribunal invited Respondent to comment on Claimant's requested extension by 6 July 2011.

51. By letter to the Tribunal dated 6 July 2011, Respondent informed the Tribunal that it agreed with Claimant's proposed extension.

52. By email to the Parties dated 7 July 2011, the Tribunal confirmed that the revised dates were to be as follows: Claimant would file its Reply by 29 July 2011, and Respondent its Rejoinder by 14 November 2011.

53. On 29 July 2011, Claimant filed its Reply, together with the expert reports of AATA, TetraTech and Mr Mehrdad Nazari; the reply expert reports of Mr Rex E. Pingle, Professor Luis A. Ortiz-Alvarez, Mr Richard A. Lambert, Mr Brent C. Kaczmarek (of Navigant Consulting), and Mr Allan R. Brewer-Carías; the witness statements of Mr Coromoto Gallegos; the reply joint witness statement of Ms Jane Spooner, Ms Mani M. Verma and Mr Christopher R. Lattanzi; and the reply witness statements of Mr Arturo Rivero Acosta, Mr Douglas Belanger and Mr Brad Yonaka.

54. By letter dated 11 October 2011, Respondent requested that the deadline for filing its Rejoinder be extended to 3 February 2011, and accordingly that the hearing, due to begin on 6 February 2012, be postponed, citing as its reason that Foley Hoag had been reinstated as counsel for Respondent. On 12 October 2011, the Tribunal invited Claimant to comment on Respondent's letter. By letter dated 17 October 2011, Claimant objected to Respondent's requests. Respondent reiterated its request in its email dated 19 October 2011.

55. In its letter of 20 October 2011, the Tribunal directed that the deadline for filing Respondent's Rejoinder be extended until 5 December 2011. The Tribunal noted that Respondent had been given almost four months to prepare its Rejoinder, and that Respondent's reasons for its request were based on decisions it had made with respect to changing its counsel twice since filing its Counter-Memorial.

56. Respondent objected to the Tribunal's decision by letter dated 26 October 2011. By its letter dated 27 October 2011, the Tribunal explained that in making its decision of 20 October, it had been guided by the Parties' agreement regarding the schedule for the proceeding (ICSID Arbitration Rule 20(2)), and by the rule of equality of treatment (ICSID Convention Article 52(1)(d)).

57. Respondent, in its letter dated 31 October 2011, again requested the Tribunal to reconsider its decision. Claimant responded on 1 November 2011, again reiterating its opposition to Respondent's request.

58. By letter dated 5 November 2011, the Tribunal, while correcting the reference previously made to the ICSID Convention and the ICSID Arbitration Rules by referring to the corresponding Article 33(2) of the Arbitration (Additional Facility) Rules, confirmed Respondent's time limit for filing the Rejoinder and the hearing dates.

59. By letter dated 29 November 2011, Respondent requested that, if the hearing was postponed to 9 February 2012 (see below for details of this request), it be granted a three-day extension (from 5 December to 8 December) for the filing of its Rejoinder.

60. Claimant, in its letter of 29 November 2011, objected to Respondent's request.

61. Respondent, by email dated 30 November 2011, reiterated its request but confirmed that English translations of expert reports on damages would be submitted on 8 December, witness statements in English and Spanish as well as exhibits to the Rejoinder by midday on 9 December, and English translations of legal expert reports on a rolling basis as available.

62. By email dated 29 November 2011, and on the basis of Respondent's undertakings as detailed above, Claimant withdrew its objection to Respondent's request for an extension.

63. By letter to the Parties dated 1 December 2011, the Tribunal agreed to extend the date for submission of Respondent's Rejoinder, subject to Respondent's commitments that a) it would file its expert reports on damages together with its Rejoinder; b) it would file the exhibits to its Rejoinder and all witness statements in both English and Spanish by noon on 9 December; and c) it would provide translations of its legal expert reports on a rolling basis as soon as they become available.

64. On 8 December 2011, Respondent filed its Rejoinder on Jurisdiction and the Merits, together with exhibits; the witness statements of Mr Francisco Salas, Mr Sergio Rodriguez, Mr Alejandra González Moreno and Mr Pedro Romero; the second expert reports of Professor Henrique Iribarren, Professor Isabel De Los Rios, Dr Neil Rigby of SRK Consulting (both an environmental report and a mining report), and Mr James C. Burrows of CRA.

D. The Organization of the Hearing of February 2012

65. The Tribunal and the Parties had confirmed in the First Session that the hearing would commence on 5 December 2011 and that ten hearing days would be reserved. On 3 November 2010, the Tribunal informed the Parties that these dates were no longer possible for the Tribunal and sought the Parties' agreement on a fresh set of dates. On 12 November 2010, the Tribunal informed the Parties that the hearing would take place from 6 February to 17 February 2012.

66. By letter dated 4 February 2011, the Tribunal expressed a preference for Paris as the venue of the hearing, and invited the Parties to comment on this proposal no later than 18 February 2011.

67. On 17 February 2011, Claimant requested that the hearing be held in Washington, DC. By email dated 18 February 2011, Respondent made the same request.

68. By letter dated 23 February 2011, the Tribunal informed the Parties that it agreed to hold the hearing in Washington, D.C.

69. In its letter of 21 November 2011, the Tribunal explained that one of its members needed to undergo a medical procedure shortly before the hearing, and proposed delaying the commencement of the hearing until 9 February 2012, and sitting on Saturday 11 February 2012, to make up the lost time.

70. By letter dated 22 November 2011, Claimant agreed to the Tribunal's proposition. By letter dated 9 November 2011, Respondent also agreed to the Tribunal's proposition, subject to the granting of a three-day extension for the filing of its Rejoinder.

71. On 30 November 2011, the Tribunal wrote to the Parties confirming that the hearing would commence on 9 February 2012, and that the Tribunal would also sit on Saturday 11 February 2012.

72. By email to the Parties dated 16 December 2011, the Tribunal proposed draft procedural rules for the hearing. It invited the Parties to confer about the rules and submit their joint comments by 9 January 2012.

73. On 9 January 2012, the Parties submitted their joint comments. In these, they requested that the hearing day start at 9:00 a.m. rather than 9:30 a.m., and agreed that time should be shared equally and that they would submit a draft joint detailed hearing schedule.

74. On 18 January 2012, the Tribunal transmitted to the Parties the final procedural rules of the hearing.

75. By letter dated 26 January 2012, Respondent informed the Tribunal that the Attorney-General for Venezuela had passed away. The Tribunal acknowledged receipt of this letter by letter of the following day, expressing its deep regret for this sad event. Respondent then requested, by email dated 1 February 2012, that the commencement of the hearing be postponed to 13 February.

76. By letter of 2 February 2012, Claimant indicated that it would object to Respondent's proposal if that proposal were to reduce the time available to Claimant to conduct direct examination of its own witnesses and cross-examination of Respondent's witnesses.

77. On 2 February 2012, the Tribunal agreed to Respondent's request to delay the commencement of and hence shorten the hearing, due to the passing away of the Venezuelan Attorney-General. The Tribunal noted the following points by way of guidance to assist the Parties to agree upon a schedule for the hearing:

    1. "The principle of equal sharing of the available hearing time set forth in Rule 2.1 of the Procedural Rules for the Hearing does not apply in this new situation, which is attributable to Respondent. Claimant, therefore, is entitled to more time than one-half of the five hearing days;

2. Unless more time is available, Claimant's opening submissions should last no longer than 4 hours and 30 minutes. Respondent is entitled to use equal time to make its opening submissions;

3. Claimant may call its own fact and expert witnesses in accordance with Rule 3.2 of the Procedural Rules for the Hearing, which limits the scope of direct examination to new issues rising since the exchange of witness statements; and

4. In the event that the Parties do not submit a hearing schedule reflecting the Tribunal's positions set forth at 1-4 above by Tuesday, 7 February 2012, the hearing schedule shall be fixed by the Tribunal."

78. In its letter of 6 February 2012, Claimant, in accordance with Item 16 of the Minutes of the First Session of the Tribunal and Rule 4.2 of the Final Procedural Rules for the Hearing, requested to introduce into the record a press release announcing that as of 1 February 2012 Gold Reserve was listed on the Toronto Stock Exchange.

79. By letter dated 7 February 2012, the Tribunal granted Claimant's request.

80. By letter dated 7 February 2012, Respondent requested that the principle of equal time for both sides be respected, that Claimant not be allowed to present its own fact and expert witnesses, and that, if Claimant was to be permitted to do so, it must explain which new issues have arisen since the exchange of witness statements and why those new issues must be presented by a witness.

81. Claimant responded in its letter of 7 February 2012, and Respondent replied to this response in its own letter of 8 February 2012. Claimant sent a further letter on 7 February 2012.

82. By letter dated 8 February 2012, the Tribunal directed as follows:

1. "That its directions of 2 February 2012 were confirmed;

2. That Claimant should specify no later than 9 February 2012 which "new issues" raised in Respondent's Rejoinder and enclosed witness statements and expert reports would be addressed by each of its witnesses and experts, and that no witnesses or experts called by Claimant would be heard in the absence of this indication;

3. That the hearing schedule would be as follows:

Monday, 13 February: Claimant's statement of its case (Tribunal's questions, if any)

Tuesday, 14 February: Respondent's statement of its case (Tribunal's questions, if any)

Wednesday, 15 February: With continuation on

Thursday, 16 February: Examination of witnesses and experts called by Claimant (with actual examination time to be adjusted by the Tribunal if necessary)

A Douglas Belanger Arturo Rivero Acosta Coromoto Gallegos	15 minutes 30 minutes 15 minutes
Pedro Romero Sergio Rodriguez Angel Carpio	45 minutes 45 minutes 30 minutes
Allan Brewer-Carías Rex E Pingle Brent Kaczmarek, Navigant	30 minutes 45 minutes 1 hour
Dr Burrows, CRA	3 hours
Micon International, Ltd Richard J Lambert Tetra Tech AATA International, Inc. Mehrdad Nazari	30 minutes 45 minutes 30 minutes 30 minutes 15 minutes
SRK Consulting	3 hours

Friday, 17 February: Time for completion of witnesses' and experts' examination, then 2 hours per party to make closing arguments and answer Tribunal's questions

4. That the Tribunal reserved any decision regarding the filing of post-hearing briefs following consultation with the Parties at the end of the hearing."

83. In its letter of 9 February 2012, Claimant specified the new issues raised in Respondent's Rejoinder and enclosed witness statements and expert reports.

84. By letter dated 10 February 2012, Respondent replied to Claimant's letter. Claimant then responded by its own letter of the same date. Respondent sent a further letter dated 11 February 2012. Claimant again replied by letter of the same date.

E. Respondent's Requests for Production of Documents

85. In accordance with the procedure set out in Section 16 of the Minutes of the First Session, Respondent submitted its requests for production of documents to Claimant on 15 November 2010.

On 17 November 2010, Claimant invited Respondent to explain the relevance of each of its requests. Respondent replied on 24 November 2010. By letter dated 1 December 2010, Claimant refused to produce the requested documents.

86. On 10 December 2010, Claimant filed its requests for production of documents with the Tribunal and attached the above-mentioned letters as exhibits.

87. By letter to the Parties dated 14 December 2010, the Tribunal requested that Claimant state in more detail the reasons for its objections to each of Respondent's requests. Claimant responded on 24 December 2010, and Respondent replied to this response on 14 January 2011. By letter dated 19 January 2011, the Tribunal then invited Claimant to reply in brief to Respondent's letter of 14 January by 26 January 2011. Claimant filed its reply as directed on 26 January 2011.

88. In its Procedural Order No 1 dated 3 February 2011, the Tribunal noted which requests had been withdrawn, granted certain requests, and refused others.

89. On 7 February 2011, Claimant supplied Respondent with a USB drive containing copies of the non-proprietary documents that the Tribunal had requested that Claimant produce. This was supplemented by a USB drive provided by Claimant on 9 February 2011. Claimant also invited Respondent to contact it to make arrangements in accordance with the Tribunal's order that Claimant allow Respondent's experts to access proprietary documents. By letter dated 11 February 2011, Claimant informed Respondent that it did not have any documents pertaining to requests 32 and 54.

90. By email dated 11 February 2012, Respondent inquired whether Claimant could provide "view only" access to the proprietary documents remotely or at Gold Reserve's offices in Colorado. Claimant replied on 14 February 2011, rejecting these propositions but confirming that it could make the documents available in the manner directed by the Tribunal, namely at its Spokane offices.

91. On 16 February 2011, Respondent informed Claimant that some of the non-proprietary documents provided on a USB drive were illegible and requested clear copies of them.

92. In a further email of the same date, Respondent proposed the week of 28 February 2011 for inspecting the proprietary documents at Claimant's Spokane offices. Claimant agreed to the proposed dates by email the same day.

93. By email dated 17 February 2011, Claimant provided clearer copies.

94. By letter dated 3 November 2011, Respondent explained that Claimant had only granted Respondent access to the geological block model on Claimant's premises, and had not allowed Respondent to make copies. Respondent alleged that a copy of the model appeared in the expert report of Mr Lambert, an expert of Claimant. Respondent requested that the Tribunal direct Claimant to provide Respondent's experts equal access to the block model, including the right to make copies.

95. Claimant responded in its letter of 4 November 2011, claiming that Claimant's expert was not provided greater access to the block model than was provided to Respondent's experts and that it had permitted Respondent to take print-outs of the model (which Respondent did not do). Claimant further stated that it was prepared to allow Respondent's experts to take screen shots of the block model.

96. By letter dated 7 November 2011, the Tribunal noted Claimant's offer, and invited counsel for the Parties to coordinate to arrange the necessary access. The Tribunal also reserved the right to intervene further in the matter if necessary.

F. The Issue of Jurisdiction

97. By letter dated 22 December 2010, pursuant to Rule 45(2) of the Arbitration (Additional Facility) Rules, Respondent objected to the competence of the Tribunal to decide the dispute and requested that the Tribunal suspend the proceedings on the merits, fix a time limit within which the Parties might file observations on the objections, and deal with the objections as a preliminary question. Claimant replied on 23 December 2010 proposing to respond to Respondent's objections by 14 January 2011 and submitting that Rule 45(4) of the Arbitration (Additional Facility) Rules does not automatically suspend proceedings on the merits.

98. By letter dated 29 December 2010, the Tribunal directed Claimant to file observations on Respondent's jurisdictional objections by 14 January 2011; Respondent to file a reply by 31 January 2011; and Claimant to file a rejoinder by 14 February 2011. The Tribunal confirmed that the proceedings had not been suspended and directed Respondent to continue preparing its Counter-Memorial for submission on 7 March 2011.

99. Claimant submitted its observations on Respondent's jurisdictional objections on 14 January 2011.

100. By letter dated 19 January 2011, Respondent proposed that, should its request for an extension for filing its Counter-Memorial be granted, it would abandon its request for a bifurcated proceeding, file pleadings on jurisdiction prior to or with its Counter-Memorial, and a one-day hearing on jurisdiction could ensue. By letter dated 24 January 2011, Claimant agreed that if the Tribunal thought that further pleadings were warranted, Respondent should submit these with its Counter-Memorial and Claimant should submit its rejoinder to Respondent's objections with its Reply. Claimant also submitted that an oral hearing was unnecessary and that, should oral arguments be necessary, they could be heard during the hearing on the merits rather than in a separate one-day hearing.

101. As directed, Respondent filed its response to Claimant's observations of 14 January on 31 January 2011.

102. Claimant submitted its rejoinder by letter dated 14 February 2011.

103. By letter dated 25 February 2011, the Tribunal stated the following:

> "The Tribunal refers to Respondent's request of 22 December 2010, that the proceedings on the merits be suspended and that its jurisdictional objections be treated as a preliminary matter separate from the merits.
>
> In accordance with its letter of 29 December 2010, the Tribunal has examined the observations filed by both Parties with respect to this request. The Tribunal is of the opinion that the reasons adduced by Respondent do not warrant the suspension of the proceedings on the merits. Accordingly, Respondent's jurisdictional objections are joined to the merits in accordance with Arbitration (Additional Facilities) Rule 45(5). The procedural calendar fixed by Procedural Order No. 1 of 3 February 2011 (see para. 18) remains unchanged."

G. Claimant's Request for Production of Documents

104. In accordance with the procedure set out in Section 16 of the Minutes of the First Session, on 6 May 2011, Claimant requested that Respondent produce documents relating to the pre-arbitration analysis of its experts, Dr Neil Rigby and SRK Consulting. Claimant also requested that to the extent that the documents were in the custody and control of the two experts, as opposed to Respondent, that the Tribunal request Respondent and the two experts to make reasonable efforts to produce the documents, including by seeking the consent of third parties, or producing the documents with confidential information redacted or subject to a confidentiality undertaking.

105. By 16 May 2011, since Respondent had not replied, Claimant filed its request for production of documents with the Tribunal, attaching the letter mentioned above.

106. By letter dated 17 May 2011, the Tribunal invited Respondent to respond to Claimant's request by 25 May 2011.

107. By letter dated 24 May 2011, Respondent requested an extension of time for submitting its response until 1 June 2011, and noted that Claimant had agreed with this request.

108. By letter to the Parties dated 25 May 2011, the Tribunal granted Respondent's request.

109. On 1 June 2011, Respondent filed its response, in which it objected to all of Claimant's requests. Respondent alleged that Claimant had failed to establish that the documents were relevant and material to the outcome of its case, or in Respondent's possession.

110. Claimant responded in its letter of 2 June 2011, and Respondent replied to this in its letter of 8 June 2011.

111. On 9 June 2011, the Tribunal wrote to the Parties as follows:

> "Having considered the content of the request, Respondent's comments thereon, and the Parties' subsequent correspondence about this matter, the Tribunal has decided to dismiss Claimant's request."

H. The Hearing of February 2012

112. The hearing on jurisdiction and merits took place in Washington, D.C., United States of America, on 13 to 17 February 2012. The following individuals were present at the hearing:

Members of the Tribunal

Professor Piero Bernardini, *President*
Professor Pierre-Marie Dupuy, *Arbitrator*
Professor David A. R. Williams QC, *Arbitrator*

ICSID Secretariat

Ms Ann Catherine Kettlewell, *Acting Secretary of the Tribunal*

Representing Claimant

Mr James H. Coleman, *Gold Reserve Inc.*
Mr Rockne J. Timm, *Gold Reserve Inc.*
Mr A. Douglas Belanger, *Gold Reserve Inc.*
Mr Robert McGuinness, *Gold Reserve Inc.*
Ms Mary Smith, *Gold Reserve Inc.*
Mr Arturo Rivero, *Gold Reserve Inc.*
Mr Coromoto Gallegos, *Gold Reserve Inc.*
Mr David P. Onzay, *Gold Reserve Inc.*
Ms Abby Cohen Smutny, *White & Case LLP*
Mr Darryl S. Lew, *White & Case LLP*
Mr Francis A. Vasquez, Jr., *White & Case LLP*
Mr Jaime M. Crowe, *White & Case LLP*
Mr Hansel T. Pham, *White & Case LLP*
Mr Petr Polášek, *White & Case LLP*
Mr Michael A. Roche, *White & Case LLP*
Mr Robert Williams, *White & Case LLP*
Ms Leah E. Witters, *White & Case LLP*
Ms Courtney E. Hague, *White & Case LLP*
Ms Nancy H. Hull, *White & Case LLP*
Mr Mario Velez, *White & Case LLP*
Ms Allison Navone, *White & Case LLP*
Mr Frederick LaMontagne III, *White & Case LLP*
Ms Gabriela Isabel Yvette Lopez Davila, *White & Case LLP*
Mr William Butler, *White & Case LLP*
Ms Jane Spooner, *Micon International*
Mr Mani M. Verma, *Micon International*
Mr Christopher R. Lattanzi, *Micon International*
Mr John G. Aronson, *AATA International*
Mr Robert K. Simons, *AATA International*
Mr Allan R. Brewer-Carías, *Baumeister & Brewer*
Ms Caterina Ballaso, *Baumeister & Brewer*
Mr Richard J. Lambert, *Scott Wilson Roscoe Postle Associates, Inc.*

Mr Brent C. Kaczmarek, *Navigant Consulting, Inc.*
Mr Garrett Rush, *Navigant Consulting, Inc.*
Mr Mehrdad Nazari, *Prizma LLC*
Mr Luis A. Ortiz-Alvarez, *Raffalli de Lemos Halvorssen Ortega y Ortiz*
Mr Rex E. Pingle, *PMD International, Inc.*
Mr Mike E. Henderson, *Tetra Tech*
Ms Amy L. Hudson, *Tetra Tech*

Representing Respondent

Dr Ronald Goodman, *Foley Hoag LLP*
Ms Mélida Hodgson, *Foley Hoag LLP*
Mr Alberto Wray, *Foley Hoag LLP*
Ms Tafadzwa Pasipanodya, *Foley Hoag LLP*
Ms Christina Beharry, *Foley Hoag LLP*
Ms Diana Tsutieva, *Foley Hoag LLP*
Mr Diego Cadena, *Foley Hoag LLP*
Ms Analía González, *Foley Hoag LLP*
Dr Constantinos Salonidis, *Foley Hoag LLP*
Mr Yuri Parkhomenko, *Foley Hoag LLP*
Mr Kenneth Figueroa, *Foley Hoag LLP*
Mr Moin Ghani, *Foley Hoag LLP*
Ms Michelle Miller, *Foley Hoag LLP*
Ms Angelica Villagran, *Foley Hoag LLP*
Ms Carmen Roman, *Foley Hoag LLP*
Professor Henrique Iribarren Monteverde, *Universidad Católica Andrés Bello*
Professor Isabel de los Ríos, *Universidad Central de Venezuela*
Vice Minister Sergio Rodríguez, *Bolivarian Republic of Venezuela*
Mr Pedro Romero, *Bolivarian Republic of Venezuela*
Mr Angel Carpio, *Bolivarian Republic of Venezuela*
Dr Lizett Carrero, *Bolivarian Republic of Venezuela*
Dr Neal Rigby, *SRK Consulting*
Dr James Burrows, *Charles River Associates*
Mr Francis Brown, *Charles River Associates*
Mr Daniel Powers, *Charles River Associates*

I. Post-Hearing Submissions

113. The hearing was recorded and a transcript provided to the Parties. By letter dated 29 February 2012, the ICSID Secretariat invited the Parties to make corrections to the transcript no later than 29 March 2012.

114. By letter dated 16 February 2012, the Tribunal invited the Parties to respond to a list of questions.

115. By further letter to the Parties dated 21 February 2012, the Tribunal invited the Parties to make the following post-hearing submissions:

> 1. "A joint proposal for corrections to the transcript, to be delivered to the Secretary of the Tribunal no later than one month from the date of receipt of the audio of the hearing;
>
> 2. Post-hearing briefs, containing a summary of the Parties' relevant arguments as well as an answer to the questions posed by the Tribunal in its letter of 16 February 2012. These briefs should not exceed 50 pages (letter size, double spaced, font Times New Roman 12), and should not include any additional evidence, only references to existing documents on the file. They should be exchanged simultaneously and submitted to the Tribunal by 16 March 2012, at which point the Tribunal would decide whether reply briefs are necessary."

116. On 16 February 2012, both Respondent and Claimant submitted their post-hearing briefs.

117. By letter dated 20 March 2012, Respondent objected to Claimant's submission with its post-hearing brief of new evidence (namely, Appendix B, Memorandum from the Ministers of Mining, Energy and Petroleum, and Foreign Relations to the President of the Republic dated 23 August 2011).

118. Claimant responded to Respondent's objection by letter dated 20 March 2012.

119. The Tribunal, in its letter of 22 March 2012, granted Claimant leave to submit its Memorandum on the grounds that the Memorandum in part met the request the Tribunal made at the hearing for information regarding the status and plans for further development of the Brisas Project.

120. By letter dated 21 February 2012, Respondent submitted its corrections to the transcript of the hearing.

121. The Tribunal then wrote to the Parties on 22 March 2012, reiterating the request made in its letter of 21 February 2012 that the Parties submit a joint proposal on corrections by 29 March 2012. The Tribunal granted until 12 April 2012 for the filing of a joint proposal.

122. On 6 April 2012, Claimant communicated to the Tribunal the Parties' agreed amendments to the transcript to the Tribunal.

123. On 25 May 2012, in response to the Tribunal's directions of 30 April 2012, Claimant submitted additional materials, and Respondent submitted brief comments on Appendix A to Claimant's post-hearing brief. Respondent's submission indicated that "upon review of Claimant's revised Annex A, in a format and manner that more easily allows for a comparison, if necessary, Venezuela will supplement these comments in order to better respond to the Tribunal's invitation."[33] By letter dated 26 May 2012, Claimant objected to Respondent's brief comments in response to the Tribunal's directions of 30 April. On 2 May 2012, Respondent expanded on its observations with regards to Appendix A to Claimant's post-hearing brief and requested leave to file, by 8 June 2012, brief comments on Claimant's submission of 25 May.

124. By letter dated 30 May 2012, the Tribunal confirmed receipt of Respondent's comments contained in its letter dated 28 May 2012 and granted both Parties leave to submit comments. On 8 June 2012, Respondent filed a response to Claimant's submission of 25 May 2012. On 18 June 2012, Claimant filed observations on Respondent's submissions of 28 May 2012 and 8 June 2012.

125. By letter dated 21 June 2012, Respondent's requested leave to file further comments on Claimant's submission of 18 June 2012. On the same day, Claimant objected to Respondent's request.

126. On 25 July 2012, the Tribunal issued Procedural Order No. 2 concerning additional evidence from the Parties' experts. Specifically, Procedural Order No. 2:

> "invites the Parties to request their experts to confer and produce jointly a report estimating:
> a) the loss of reserves as a result of the absence of a layback agreement within the North Parcel;
> b) the changes required to adjust the "Brisas Project's" mine plan due to the absence of a layback agreement within the North Parcel;
> c) the impact on the fair market value of the "Brisas Project" of (a) and (b) above."[34]

127. Procedural Order No. 2 requested that the joint report responding to the directions of the Tribunal be filed by 15 November 2012, and that the Parties' comments thereto be filed by 14 December 2012.

[33] *See* Respondent's Letter to the Tribunal dated 25 May 2012.

[34] Procedural Order No. 2 dated 25 July 2012, at para. 2.1

J. Implementation of Procedural Order No. 2

128. On 4 September 2012, Claimant requested that the deadlines indicated in Procedural Order No. 2 be amended to allow additional time for the Parties' experts to confer and present the joint report, and to provide the Parties extra time to comment on the joint report. At the request of the Tribunal, by letter dated 12 September 2012, Respondent agreed that additional time to comply with Procedural Order No. 2 was necessary but instead proposed another procedural calendar.

129. In its 12 September 2012 letter, Respondent also raised objections to Procedural Order No. 2, in part because it considered that "[t]he three questions posed by the Tribunal have been considered and addressed by Claimant on site prior to this arbitration and by the Parties and their experts in all the pleadings in this case."[35] Respondent further considered that Procedural Order No. 2 required unnecessary additional expense; nonetheless, Respondent indicated its willingness to assist in the compliance with Procedural Order No. 2 provided certain confidentiality restrictions concerning the requested access to the drill-hole data base and geological block model be imposed.

130. On 18 September 2012, Claimant commented on Respondent's objections of 4 September 2012. In its letter, Claimant stated that the Tribunal "has the authority to request further expert evidence" and that Respondent had "[failed] to raise its objection in a timely manner."[36] Claimant also objected to Respondent's request for certain confidentiality restrictions concerning the requested access to the drill-hole data base and geological block model.

131. After considering the Parties' requests to modify Procedural Oder No. 2, on 20 September 2012, the Tribunal amended the procedural calendar.

132. By letter dated 10 December 2012, Claimant informed the Tribunal that it had not heard from Respondent concerning the Tribunal's request in Procedural Order No. 2. Respondent, by letter dated 14 December 2012, indicated that it would report back within seven business days, and advanced the possibility of requesting an amendment to the procedural calendar. Respondent also requested leave to submit a substantive response to Claimant's letter of 10 December 2012. By letters dated 14 December 2012 and 18 December 2012, Claimant submitted its objections. On 19

[35] *See* Respondent's Letter to the Tribunal dated 12 September 2012 (footnote omitted).

[36] *See* Claimant's Letter to the Tribunal dated 18 September 2012.

December 2012, the Tribunal granted Respondent's leave to comment, by 17 January 2013, on Claimant's letters of 18 September 2012 and 10 December 2012.

133. On 21 December 2012, the Tribunal informed the Parties that it would advise them concerning the implementation of Procedural Order No. 2 in the first weeks of January 2013.

134. By email dated 4 January 2013, Respondent proposed a new timetable for the implementation of Procedural Order No. 2. On 8 January 2013, Claimant commented on Respondent's email. The Parties submitted further comments concerning the issue by separate letters dated on the same day.

135. On 14 January 2013, the Tribunal indicated to the Parties that it would advise them concerning the implementation of Procedural Order No. 2 after receiving Respondent's comments on Claimant's letters of 18 September 2012 and 10 December 2012.

136. As instructed by the Tribunal by letter dated 19 December 2012, Respondent submitted, on 18 January 2013, comments on Claimant's letters of 18 September 2012 and 10 December 2012. On 21 January 2013, as previously indicated by the Tribunal, the Tribunal issued directives to the Parties concerning the implementation of Procedural Order No. 2. In its directives, the Tribunal requested the Parties to agree on a new procedural calendar by 31 January 2013 and that failure to do so would result in "the schedule [being] set by the Tribunal" or alternatively, "the Tribunal may appoint an expert to provide advice regarding the issues indicated in Point 2.1 of Procedural Order No. 2."[37]

137. By letter dated 25 January 2013, Claimant requested clarification from the Tribunal concerning Procedural Order No. 2. On the same day, Respondent submitted comments on Claimant's letter, and on 29 January 2013, the Tribunal advised the Parties that "the Order [was] clear and [did] not need clarification."[38]

138. On 29 January 2013, Claimant requested the Tribunal "to modify the terms of Procedural Order No. 2 to incorporate a Tribunal-appointed mining expert … to ensure that the Tribunal is presented with a meaningful basis to assess the merits of the highly technical aspects … disputed between the parties."[39] In its letter, Claimant also proposed a revised procedural calendar concerning the implementation of Procedural Order No. 2. By letter dated 30 January

[37] *See* Letter to the Parties dated 21 January 2013 at paras. 2-4.

[38] *See* Letter to the Parties dated 29 January 2013.

[39] *See* Claimant's Letter dated 29 January 2013.

2013, the Tribunal asked Respondent to comment on Claimant's letter by 31 January 2013, and specifically, to comment on Claimant's proposed revised calendar. Respondent did so by letter dated 31 January 2013.

139. On 1 February 2013, the Tribunal confirmed the following procedural calendar agreed by the Parties:

> "The Parties' experts to submit their report(s) on 26 April 2013;
> The Parties submit their observations on 24 May 2013; and
> Any hearing to be scheduled during the first half of June 2013."[40]

140. On 20 February 2013, Respondent requested that Claimant to produce a limited set of documents and that they be delivered directly to the experts. On 21 February 2013, Claimant objected to this request and suggested that Respondent allowed both sets of metallurgical experts to discuss the scope of what should be considered.

141. On 26 February 2013, Respondent filed a request for the Tribunal to decide on production of documents. By email dated 28 February 2013, the Tribunal informed the Parties that they would rule on Respondent's request by 1 March 2013. On the same date, Claimant filed observations on Respondent's request of 26 February 2013. Shortly after, Respondent submitted a letter amending the request filed on 26 February 2013, and indicated they had not yet reviewed Claimant's letter.

142. On 1 March 2013, the Tribunal issued a decision, allowing Claimant to respond to Respondent's letter of 28 February 2013. On 5 March 2013, Claimant filed a response to Respondent's letter. By letter of 6 March 2013, the Tribunal granted Respondent permission to submit a short comment on Claimant's letter by 8 March 2013, and also granted Claimant permission to file a reply by 11 March 2013.

143. On 8 March 2013, Respondent submitted comments on Claimant's letter of 5 March 2013, and Claimant then submitted a reply on 11 March 2013.

144. On 12 March 2013, the Tribunal issued a decision on Respondent's amended request for production of documents dated 28 February 2013.[41]

[40] *See* Letter to the Parties dated 1 February 2013.

[41] *See* Letter to the Parties dated 12 March 2013.

145. By letter of 25 March 2013, Claimant requested to the Tribunal to set specific hearing dates estimated a hearing of two (2) days to be sufficient. On 26 March 2013, Respondent proposed a two-day hearing on 6 and 7 June 2013 or 10 and 11 June 2013.

146. On 28 March 2013, the Tribunal informed the Parties of its availability to hold the hearing on any two days on 25, 26 or 27 June 2013, and invited the Parties to confirm their availability for those dates by 5 April 2013.

147. By letter of 1 April 2013, Claimant indicated its unavailability during the dates suggested by the Tribunal and requested that the hearing be held during the first two weeks of June in Washington, D.C. By letter of 5 April 2013, Respondent also expressed availability issues and suggested that the hearing be held in Paris, during 25, 26 or 27 June, 2013, or 13, 14 or 15 June 2013. Alternatively, Respondent suggested that the hearing be held in Washington, D.C., 10, 11 or 12 June 2013.

148. On 9 April 2013, the Tribunal informed the Parties that due to other commitments it would not be available on the dates proposed in their exchange, and indicated that its earliest availability would be 14, 15, 16 and 17 October 2013, and that its preference for location would be Paris, France.

149. By letter of 10 April 2013, Claimant indicated that it would be available on 15 and 16 October 2013 for the hearing and requested that the Parties be allowed to file reply expert reports with their comments on the expert reports to be filed on 24 May 2013. By email of 4 April 2013, the Tribunal invited Respondent to comment on Claimant's letter by 15 April 2013.

150. On 12 April 2013, Respondent confirmed its availability to hold the hearing anytime from 14 to 17 October 2013. Also, in the same letter, Respondent expressed disagreement on Claimant's proposal to submit reply expert reports but suggested that, in the event the Tribunal required additional expert reports, the Parties' comments be submitted subsequent to the second expert reports. On the same day, Claimant responded to Respondent's letter providing further arguments in favour of its proposal to file reply expert reports.

151. On 15 April 2013, the Tribunal acknowledged receipt of the Parties' exchanges regarding the hearing dates and amended the procedural calendar as follows:

> "The Parties' experts to submit their report(s) on April 26, 2013;

> Each Party's expert to submit a report in reply to the individual report of the other Party's expert on May 24, 2013;
> The Parties to submit their observations on 24 June 2013;
> The hearing to be held in Paris on 15 and 16 October 2013."[42]

152. By letter of 22 April 2013, Claimant requested that the deadline to file the expert reports be extended to 10 May 2013, the reply report on 14 June 2013 and the Parties' observations on 12 July 2013. The Tribunal, by letter for 23 April 2013, invited Respondent to comment on Claimant's letter.

153. By email of 25 April 2013, Respondent sent a communication to the Tribunal indicating that they had reached an agreement with Claimant's counsel regarding the deadlines suggested by Claimant on its letter for 22 April 2013. Claimant later confirmed this joint agreement by email.

> "The Parties requested that the deadlines be as follows:
> The Parties' Experts will file their initial reports on 10 May 2013
> The Parties' Experts will file their reply reports on 28 June 2013
> The Parties' Counsel will file their comments on the experts' reports on 5 August 2013."[43]

154. On 26 April 2013, the Tribunal confirmed the amended procedural calendar proposed by the Parties.

155. By email of 7 May 2013, Respondent, on behalf of the Parties, requested that the deadline to file the initial expert reports be extended to 24 May 2013. Shortly after, Claimant confirmed its agreement. The Tribunal, by letter of the same date, granted the requested extension to the Parties.

156. On 24 May 2013, Claimant and Respondent filed their respective expert reports pursuant to Procedural Order No. 2 and further procedural calendar amendments.

157. On 31 May 2013, the Parties submitted the translations of their expert reports.

158. By email of 27 June 2013, Respondent, on behalf of the Parties, requested that the deadline for the submission of the reply expert reports be extended to 3 July 2013. Claimant confirmed this agreement. On 28 June 2013, the Tribunal indicated they had no objection to the Parties' amendment to the procedural calendar.

[42] *See* Letter to the Parties dated 15 April 2013.

[43] *See* Respondent's email dated 25 April 2013.

159. On 3 July 2013, the Parties filed their respective reply expert reports pursuant to Procedural Order No. 2 and further amendments.

160. By letter of 5 July 2013, Claimant raised an objection to Respondent's reply expert submission and requested that the expert report by Mr Pekka Toukkola be stricken from the record, on the grounds that Mr Toukkola was a newly introduced expert and the amendment to Procedural Order No. 2 indicated that each Party's expert would submit a report in reply to the individual report of the other. Claimant also objected to the content of the issues addressed in Mr Toukkola's report.

161. On 10 July 2013, Claimant submitted the translations of its reply expert reports. On the same date, Respondent indicated it would be submitting its translations by 11 July 2013.

162. On 11 July 2013, Respondent submitted the translations of its reply expert reports.

163. On 12 July 2013, Respondent submitted comments on Claimant's request to strike Mr Toukkola's report form the records, challenging all grounds presented by Claimant, and requested that the request be disregarded.

164. On the same date, Claimant submitted further comments and identified the relevant emails to the issue raised as exhibit C-1485 and C-1486, which had been submitted with RPA's Supplemental Report dated 24 May 2013.

165. By letter dated 15 July 2013, Respondent commented on Claimant's letter of 12 July 2013, stating that the email exchanges had reached its expert, but that the expert had not seen it until after the submission of the reply expert reports.

166. On 17 July 2013, the Tribunal issued a communication in reference to Claimant's request of 5 July 2013 and Respondent's reply of 12 July 2013, stating that Mr Toukkola's report would not be stricken from the record and that the Parties would have an opportunity to comment on it and to cross-examine Mr Toukkola at the hearing. By letter of the same date, Claimant objected to the Tribunal's decision not to strike Mr Toukkola's expert report, asserting it had been denied equal opportunity.

167. On 18 July 2013, the Tribunal invited Respondent to submit comments on Claimant's objection of 17 July 2013. By letter of the same date, Respondent expressed disagreement with Claimant's assertions.

168. On 23 July 2013, having considered the correspondence from the Parties in regards to Mr Toukkola's expert report, the Tribunal further decided that:

> "The Decision is confirmed. Claimant shall have until August 5, 2013 to file a short expert reply to Mr Tuokkola's Expert Report. No further changes shall be made to the Provisional Timetable."[44]

169. On 31 July 2013, Claimant, on behalf of the Parties, submitted a letter to the Tribunal with corrections to be made to the reply expert reports. Respondent later confirmed its agreement by separate communication. On 5 August 2013, the Parties filed their Comments on the Joint Procedure Reports. In addition, Claimant filed the Third Supplemental Expert Report of Richard Lambert.

170. By letter of 6 August 2013, Claimant requested that the Tribunal direct Respondent to withdraw new exhibits introduced with their Comments filed on 5 August 2013, and all corresponding references to the same, claiming that Procedural Order No. 2 directed the Parties to submit comments, and that "such comments plainly were not to include new exhibits but rather were limited to observations and argument based on the reports of the experts."[45]

171. As instructed by the Tribunal, Respondent submitted its comments on 8 August 2013 on Claimant's letter of 6 August 2013, and it requested that the Tribunal deny Claimant's request that Respondent be directed to withdraw its exhibits.

172. By email of 8 August 2013, Claimant raised issue with Respondent's letter of the same date, expressing it was "an addendum to its brief" and that it went beyond the Tribunal's invitation for comment.[46] Further, it requested that, should the Tribunal consider Respondent's arguments, Claimant be allowed to respond.

173. On 12 August 2013, Claimant submitted the translations of its Comments on the Joint Procedure Expert Reports and of its Third Supplemental Expert Report. Respondent submitted the translations of its Comments on the Joint Expert Procedure on 13 August 2013.

[44] *See* Letter to the Parties dated 23 July 2013.

[45] *See* Claimant's letter dated 6 August 2013.

[46] *See* Claimant's email dated 8 August 2013.

174. On 19 August 2013, the Tribunal addressed the Parties in response to Claimant's request of 6 August 2013 and Respondent's reply of 8 August 2013, noting that Procedural Order No. 2 did not prohibit the Parties from filing additional exhibits with their comments on the expert reports. The Tribunal denied Claimant's request but granted leave for it to file any additional exhibits no later than 26 August 2013.

K. The Organization of the Hearing of October 2013

175. On 22 August 2013, Respondent sent correspondence to the Tribunal stating that the Parties had not reached an agreement regarding the procedure for the Joint Expert Procedure Hearing. Respondent proposed organizing the hearing around the areas of Mine Design and Mine Planning, Metallurgy, and Valuation and Financial Issues; outlined a presentation procedure for experts and suggested that counsel had the opportunity to give opening and closing statements.[47] By letter of 23 August 2013, the Tribunal invited Claimant to comment on Respondent's proposal by 28 August 2013.

176. As requested by the Tribunal, on 26 August 2013, Claimant reiterated its position regarding Respondent's submission of new exhibits, while it did not present new evidence, it offered an update for exhibit C-1495, filed as exhibit C-1563. On the same date, Claimant sent a second letter in response to Respondent's letter of 22 August 2013. Claimant confirmed that the Parties had not reached an agreement regarding the hearing and that, in fact, Claimant did not request a hearing and did not consider it necessary. Further, Claimant rejected the procedure suggested by Respondent and offered an alternative one, and requested that a pre-hearing conference be organized, should the Tribunal deem the hearing necessary.

177. By instructions of the Tribunal, on 28 August 2013 and 29 August 2013, Respondent and Claimant presented their respective replies in support of their initial arguments.[48]

178. By letter of 2 September 2013 the Tribunal referred to the Parties' exchanges in regards to the hearing and noted, as per paragraph 3.6 of Procedural No. 2, the hearing had been requested by Respondent, the Tribunal considered it necessary and this hearing would take place on 15 and 16 October 2013. The Tribunal proposed dates for a pre-hearing conference call. The Parties

[47] *See* Respondent's letter dated 22 August 2013.

[48] *See* Respondent's letter of 28 August 2013 *and* Claimant's letter of 29 August 2013.

indicated their availability for 5 September 2013. The Secretary of the Tribunal, by email of 2 September 2013, requested that the Parties conferred on a convenient time to hold the conference call, as per the Tribunal's instructions. Each Party submitted their preferred times by email on that same date.

179. On 3 September 2013, the Tribunal issued a communication to the Parties regarding Claimant's submission of exhibit C-1563 in its letter of 26 August 2013, inviting Respondent to inform the Tribunal of any objections no later than 5 September 2013. The Tribunal also informed the Parties that the pre-hearing conference call would be held at 9:30 a.m. on 5 September 2013 and outlined some of the Parties agreement regarding the main subject areas of the hearing. Further, the Tribunal indicated that the Parties should identify sub-issues for the main areas to "make the expert's examination more conducive to the better understanding of the individual issues."[49]

180. On 5 September 2013, a pre-hearing conference call was held to discuss the hearing procedures. The following participants were present in the call:

Members of the Tribunal

Professor Piero Bernardini, *President*
Professor Pierre-Marie Dupuy, *Arbitrator*
Professor David A. R. Williams QC, *Arbitrator*

ICSID Secretariat

Ms Ann Catherine Kettlewell, *Secretary of the Tribunal*

Representing Claimant

Ms Abby Cohen Smutny, *White & Case LLP*
Mr Hansel Pham, *White & Case LLP*
Mr Petr Polášek, *White & Case LLP*
Mr A. Douglas Belanger, *Gold Reserve Inc*

Representing Respondent

Dr Ronald E.M. Goodman, *Foley Hoag LLP*
Ms Mélida Hodgson, *Foley Hoag LLP*
Ms Tafadzwa Pasipanodya, *Foley Hoag LLP*

[49] *See* Letter from the Centre on behalf of the Tribunal of 3 September 2013.

181. The pre-hearing conference call was recorded, and the audio recording was made available to the Parties and the Tribunal at the FTP site created by the Secretariat.

182. On 5 September 2013, Respondent submitted its objections to Claimant's exhibit C-1563. By letter of 6 September 2013, the Tribunal informed the Parties of its decision to include Claimant's exhibit C-1563 in the record.

183. On 9 September 2013, the Tribunal issued Procedural Order No. 3 outlining the rules and procedure for the Joint Expert Procedure Hearing.

184. Pursuant to Procedural Order No. 3, by letter of 12 September 2013, Respondent, on behalf of the Parties, submitted to the Tribunal a joint outline of the sub-topics within the three main subject areas, previously agreed on during the 5 September 2013 pre-hearing conference call. Claimant confirmed its agreement by separate email, on the same date. By letter of 13 September 2013, the Tribunal confirmed the sub-topics which had been jointly selected by the Parties.

185. On 14 September 2013, Respondent submitted a letter informing the Tribunal that the two of the reply expert reports filed on 3 July 2013 contained numerical errors and that it intended to file amended reports with the correct values. Claimant, by letter of the same date, objected and requested that Respondent to submit the proposed corrections before filing corrected reports, and to provide the underlying spreadsheets and calculations in electronic format. Claimant also reserved the right to object to the proposed corrections.

186. The Tribunal, by letter of 16 September 2013, granted Respondent leave to submit corrections to the expert reports by 23 September 2013, and invited Claimant to respond to said corrections two days thereafter, on 25 September 2013.

187. On 23 September 2013, Respondent filed corrected Joint Expert Procedure Reply Reports of Dr James Burrows and of Dr Neal Rigby, Mr Bret Swanson, and Dr John Tinucci. By letter of 24 September 2013, Claimant requested an extension to present comments on the corrected reports submitted by Respondent. On the same date, the Tribunal granted Claimant's request for an extension to submit its response to Respondent's corrections by 27 September 2013.

188. Pursuant to the Tribunal's instructions, by letter of 27 September 2013, Claimant stated that it did not object to Respondent's corrections of 23 September 2013.

189. By email dated 7 October 2013, Claimant expressed that the Parties were disagreeing on the interpretation of Procedural Order No. 3 and requested a conference call to discuss the rolling order of witnesses and experts, and the estimated examination time. By letter of the same date, Respondent replied to Claimant's letter and submitted a proposed schedule for the hearing. Claimant, by letter of the same date, reiterated its request for a conference call and elaborated on the issues on which there was disagreement.

190. Pursuant to Procedural Order No. 3, on 5 September 2013, the Parties submitted their list of experts per subject topic.

191. By letter of 8 October 2013, the Tribunal acknowledged receipt of the Parties' exchange and informed them that it would not be available for a conference call, but it would consider their position and decide on the hearing schedule. By letter of the same date, Respondent replied to Claimant's second letter of 7 October 2013, and maintained its position regarding the hearing schedule. By letter of the same date, Claimant submitted a reply to Respondent's letter.

192. On 8 October 2013, the Parties submitted the demonstrative exhibits for the Hearing on Joint Expert Procedure, pursuant to Procedural Order No. 3.

193. On 9 October 2013, having considered the arguments of the Parties, the Tribunal issued a hearing schedule.

194. By letter of 9 October 2013, Claimant requested clarification on the interpretation of paragraph 4 of Procedural Order No. 3, regarding the direct examination of experts for the hearing. On the same date, Claimant submitted another letter with objections to twelve (12) of Respondent's demonstrative exhibits. Claimant requested that the Tribunal directed Respondent not to use the exhibits or to seek leave to introduce their content into the record.

195. On 10 October 2013, Respondent submitted a letter regarding its interpretation of paragraph 4 of Procedural Order No. 3. The Tribunal issued a response to the Parties on the same date, providing the clarification requested by Claimant, and invited Respondent to comment on Claimant's objections to its demonstrative exhibits.

196. As per the Tribunal's instruction, Respondent submitted a response to Claimant's objections by the established deadline, and requested that the Tribunal denied Claimant's request. Claimant

issued a response to Respondent's letter, withdrawing its objection to certain exhibits but maintaining the others.

197. By email of 10 October 2013, Claimant requested that the Tribunal reconsider its interpretation of the paragraph 4 of Procedural Order No. 3 regarding the direct examination of experts.

198. By letter of 11 October 2013, the Tribunal addressed Claimant's concern regarding direct examination and indicated that Claimant's reasons for its objections were convincing and directed Respondent not to use the exhibits in question at the hearing. By letter of the same date, Respondent reiterated its request for the Tribunal to deny Claimant's request regarding its demonstrative exhibits.

199. By letter of 14 October 2013, the Tribunal reconsidered its decision and allowed Respondent to use demonstrative exhibits 16, 17, 22 and 23 during the hearing, but confirmed its decision regarding exhibits 18, 19, 20, 21, 24 and 25. However, the Tribunal advised that "The fact that the six demonstrative exhibits are not allowed does not preclude Respondent to directly examine its experts for a "short reply to issues raised in the opposing of expert(s) last report which have not been previously commented," as provided by Procedural Order No. 3, paragraph 4(i)(b)."[50] On the same date, Respondent requested the Tribunal to reconsider its decision, and Claimant later objected to this request for reconsideration and submitted a letter in which it summarised the views of its experts regarding the content of the exhibits in question.

L. The Hearing of October 2013

200. The Hearing on Joint Expert Procedure took place on 15 and 16 October 2013, at the World Bank, Paris. The following individuals were present:

Members of the Tribunal

Professor Piero Bernardini, *President*
Professor Pierre-Marie Dupuy, *Arbitrator*
Professor David A. R. Williams QC, *Arbitrator*

ICSID Secretariat

Ms Ann Catherine Kettlewell, *Secretary of the Tribunal*

[50] *See* Letter to the Parties dated 14 October 2013.

Representing Claimant:

Counsel:

Ms Abby Cohen Smutny, *White & Case LLP*
Mr Darryl S. Lew, *White & Case LLP*
Mr Hansel T. Pham, *White & Case LLP*
Mr Petr Polášek, *White & Case LLP*
Mr Michael A. Roche, *White & Case LLP*
Mr Reuben Blum, *White & Case LLP*
Mr Kees De Ridder, *White & Case LLP*

Parties:

Mr James H. Coleman, QC, *Gold Reserve, Inc.*
Mr Rockne J. Timm, *Gold Reserve, Inc.*
Mr A. Douglas Belanger, *Gold Reserve, Inc.*
Mr Douglas E. Stewart, *Gold Reserve, Inc.*

Experts:

Mr Richard J. Lambert, *RPA Ltd.*
Dr Kathleen A. Altman, *RPA Ltd.*
Mr Mike E. Henderson, *Tetra Tech*
Mr Erik Spiller, *Tetra Tech*
Mr Dave Hallman, *Tetra Tech*
Mr Cameron Wolf, *Tetra Tech*
Mr Brent C. Kaczmarek, *Navigant Consulting, Inc.*
Mr Garrett W. Rush, *Navigant Consulting, Inc.*

Representing Respondent:

Counsel:

Dr Ronald E.M. Goodman, *Foley Hoag LLP*
Ms Mélida Hodgson, *Foley Hoag LLP*
Ms Tafadzwa Pasipanodya, *Foley Hoag LLP*
Ms Christina Beharry, *Foley Hoag LLP*
Ms Alexandra Meise Bay, *Foley Hoag LLP*
Ms Natalia Tchoukleva, *Foley Hoag LLP*
Mr Pedro Ramírez, *Foley Hoag LLP*
Mr Peter Hakim, *Foley Hoag LLP*
Ms Angélica Villagrán, *Foley Hoag LLP*
Ms Carmen Roman, *Foley Hoag LLP*

Party:

Mr Armando Giraud Torres, *Petróleos de Venezuela, S.A.*

Experts:

Dr James Burrows, *Charles River Associates*
Dr Francis Brown, *Charles River Associates*

Mr Leonard Kowal, *Charles River Associates*
Mr Kevin Moran, *Charles River Associates*
Mr Michael Loreth, *Charles River Associates*
Dr Neal Rigby, SRK *Consulting Inc.*
Mr Bret Swanson, *SRK Consulting Inc.*
Dr John Tinucci, *SRK Consulting Inc.*
Ms Lisa Brown, *SRK Consulting Inc.*
Mr Pekka Tuokkola

201. The President of the Tribunal, during the Hearing on Joint Expert Procedure, stated that the Tribunal did not see basis for further reconsideration regarding Respondent's demonstrative exhibits.

202. By letter of 17 October 2013, Claimant referred to an agreement during the hearing, by which Respondent would be able to reference the demonstrative exhibits only if Claimant was given the opportunity to submit a brief letter summarising the views of its expert regarding the contents of the demonstratives; the deadline for this letter was 23 October 2013. Claimant further explained that it would not be filing said letter, but it would address observations regarding this matter in its post-hearing brief.

203. On the same date, Claimant submitted a second letter proposing that both Parties file their corrections to the hearing transcripts by 25 October 2103 and that post-hearing briefs be filed by 20 December 2013.

204. By letter of 18 October 2013, Respondent addressed Claimant's letters of the previous day. Respondent presented no objections to Claimant's addressing any further observations regarding the content of the demonstrative exhibits, and it also suggested slightly different deadlines for the corrections to the transcripts and post-hearing briefs: 1 November 2013 and 23 December 2013, respectively. By email of the same date, Claimant agreed with Respondent's proposed schedule.

205. On 22 October 2013, the Tribunal issued Procedural Order No. 4 concerning procedural matters, which established deadlines for the Parties' submissions. Corrections to the hearing transcripts would have to be submitted by 1 November 2013, and the Tribunal would issue a decision by 10 November 2013. Post-hearing briefs would be due on 23 December 2013.

M. Post-Hearing Submissions

206. On 30 October 2013, the Parties submitted joint corrections to the hearing transcripts.

207. On 5 December 2013, Respondent requested that the final version of the hearing transcripts be finalized and that an official transcript be introduced into the record, so that the Parties would be able to cite it in their post-hearing briefs.

208. On the same date, Claimant sought confirmation on acceptable formatting of the post-hearing brief. Respondent confirmed its agreement by email.

209. By letter of 6 December 2013, the Tribunal accepted the changes and corrections to the hearing transcripts proposed by the Parties and it advised on the post-hearing brief formatting inquiry.

210. By email of 19 December 2013, Respondent, on behalf of the Parties, informed the Tribunal that the Parties had agreed to extend the page limit of the post-hearing brief. Claimant later confirmed this agreement. On 20 December 2013, the Tribunal informed the Parties that it had no objection to the page limit extension.

211. On 23 December 2013, the Parties submitted their post-hearing briefs.

212. On 30 December 2013, Claimant submitted the Spanish translation of its post-hearing brief, Respondent submitted its Spanish translation on 2 January 2014.

N. Submission on Costs

213. By letter of 19 March 2014, Claimant requested the opportunity to submit the amount of the legal fees and expenses it incurred in connection with these proceedings in support of its claims for compensation, including for its costs.

214. On 20 March 2014, the Tribunal clarified that statement of fees and costs is normally filed by the Parties following the closure of the proceedings according to Article 44 of the Arbitration (Additional Facility) Rules. At the closing, the Tribunal should fix a time limit to that effect.

215. On 28 April 2014, the Tribunal invited the Parties to submit their respective submissions on costs costs by 26 May 2014.

216. On 20 May 2014, the Tribunal invited the Parties to submit comments on the other party's respective submission on costs by 9 June 2014.

217. On 23 May 2014, Claimant filed its submission on costs. On 26 May 2014, Respondent filed its submission on costs. Both submissions were acknowledged and forwarded by the Secretary to the Tribunal on 26 May 2014.

218. On 2 June 2014, Claimant informed the Tribunal that the Parties had agreed that it was not necessary to submit observations on the costs submissions as invited by the Tribunal's letter of 20 May 2014.

219. On 3 June 2014, the Tribunal indicated that it had no objection to the Parties' agreed waiver of the right to comment on the other party's cost statement.

220. On 10 July 2014, Claimant submitted further information in reference to the Tribunal's request at the February 2012 hearing for information regarding the status and plans for further development of the Brisas Project. On 11 July 2014, Respondent requested leave to submit comments to the information provided by Claimant. On 21 July 2014, pursuant to the Tribunal's instructions, Respondent submitted its response to Claimant's submission of 10 July 2014. On 23 July 2014, the Tribunal decided not to admit into the record the information submitted by Claimant since it was unauthorized and untimely and also decided not to admit into the record Respondent's letter of 21 July 2014 to the extent it develops arguments in reply.

O. Closure of Proceedings

221. On 23 July 2014, the Tribunal declared the proceeding closed in accordance with Article 44 of the Arbitration (Additional Facility) Rules.

CHAPTER V. THE TRIBUNAL'S JURISDICTION

A. The Parties' Positions

Respondent's Position

222. According to Article I(g) of the BIT, in the case of Canada an "investor" must be both "any enterprise incorporated or duly constituted in accordance with applicable laws of Canada" and one

"who makes the investment in the territory of Venezuela". According to Respondent, Claimant does not satisfy these requirements.

223. Respondent submits that Claimant is not a *bona fide* Canadian enterprise within the object and purpose of the BIT. Following its incorporation under the laws of the Yukon Territory in Canada in October 1998 (shortly after the entry into force of the BIT in January 1998) and the corporate reorganization in 1999 by which it acquired indirectly the shares of the Venezuelan subsidiary, Claimant never moved its operations to Canada, where it had only as a registered agent a Canadian law firm. It continued to operate as the original US company under the same management and board of directors, making decisions regarding the so-called Brisas Project from its seat in Spokane, Washington. According to Respondent, this paper company with no genuine connections to Canada is not the kind of Canadian entity that the Contracting States had in mind to protect under the BIT.

224. Alternatively Respondent argues that, should it be held that Claimant satisfy the first prong of the definition of "investor" based on a strict reading of the BIT, based on the same strict reading Claimant fails to satisfy the second prong since it is not the one "who made the investment in the territory of Venezuela". The fact that its investment consists in the indirect ownership of the shares of the Brisas Company or in the mining rights held by the latter in Venezuela, as it has alleged in various sections of the Reply, does not make it the one "who made the investment in Venezuela".

225. Respondent states that the Brisas Company has in fact acquired the Brisas and Unicornio Concessions prior to Claimant's existence. Claimant did not have to expend any capital to indirectly "acquire" the shares of the Venezuelan subsidiary due to the share-to-share swap by which the 1999 corporate reorganization of Gold Reserve Corp. was achieved.

226. It was Gold Reserve Corp. that made the economic contribution to the so-called Brisas Project, Claimant having misrepresented to Venezuela and the Tribunal what constituted its alleged investment of nearly US$ 300 million to the project by purposefully conflating Gold Reserve Inc. with Gold Reserve Corp. in order to piggyback on Gold Reserve Corp.'s history of investments in Brisas and Unicornio Concessions. Claimant's equivocal statements to the Venezuelan authorities and to the Tribunal regarding its association with the Brisas Company were made also in the Request for Arbitration. The Tribunal should deny the BIT protection to Claimant on the grounds of abuse of rights.

227. Respondent contends that Claimant had not effectively rebutted the lack of significant business connections to Canada. It failed also to present evidence attesting its allegedly active role in making the investment even after the 1999 acquisition. Even if Claimant raised the funds as it alleges, at most it acted as fundraiser and not as actual maker of investments for the Brisas Project, which was Gold Reserve Corp.

228. Claimant's nexus to Canada contrasted with its significant links to the United States, Claimant itself stating that it does not carry on any business in Canada, no offices, employees or any physical assets being in Canada. On 30 November 2011, Claimant received a notice of delisting from Toronto Stock Exchange for failure to meet certain listing requirements.

229. In Respondent's submission, "to make the investment in the territory of Venezuela", as required by Article I(g) of the BIT, means to effect, originate or cause the investment to be completed. In terms of economics, investment is "putting money to work, in the hope of making more money", which comports with the object and purpose of the BIT, as mentioned in its preamble, *i.e.* the "promotion" of investments by the investor of one Contracting Party in the territory of the other Contracting Party as "conducive to the stimulation of business initiative and to the development of economic cooperation between them". The particular wording for the definition of "investor" under the BIT must be given full effect. The 1999 corporate reorganization did not constitute "making the investment" since it was a share-to-share intragroup swap without any capital expenditure.

230. Respondent further submits that "acquiring an investment" is not equivalent to "making an investment", as the term "make" requires some kind of capital flow or movement of funds to Venezuela, which was absent in the present case. Claimant's reference to the definition of "investment" as including assets "owned or controlled" "directly or indirectly" by an investor overlooks the fact that in any case Claimant must have also "made" the investment.

231. It is a well-established principle that an investment will not be protected if it has been created in violation of national or international principles of good faith or "if its creation itself constitutes a misuse of the system of international investment protection under ICSID Convention."[51] The proper test against abuse of a legal personality is the test of genuine connection — the mere fact of

[51] *Gustav FW Hamester v. Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 123.

Claimant being incorporated in Canada does not fulfil the ordinary meaning of the term "investor" under the BIT.

232. Respondent suggests that Claimant's attempt to benefit from the BIT constitutes an abuse of rights. As explained by the International Court of Justice in the *Barcelona Traction*[52] case, international law mandates "lifting the corporate veil" to prevent misuse of the privileges of legal personality. Claimant took on the Canadian domicile by setting up a mailbox presence there and now seeks to benefit from the protection of the BIT by evading *bona fide* compliance with its legal requirements. Claimant has made equivocal representations to the Venezuelan authorities and the Tribunal regarding the nature of its association with the Brisas Project, including referring to Gold Reserve Inc. as the company that made the investment in 1992, *i.e.* six to seven years prior to its alleged acquisition of the investment in Venezuela.

233. Arbitral tribunals have routinely found that misrepresentations of a corporate identity are indicative of abuse. Respondent refers to evidence that Claimant engaged in abusive treaty-shopping for more than a decade by the shifting of legal domiciles to gain access to various treaties. These facts give rise to abuses of rights and establish a basis on which the protection of the BIT should be denied. The Tribunal should look beyond the formal satisfaction of the nationality requirement and ascertain whether the alleged investor is the entity that made the investment by considering the underlying economic reality. The facts of this case demonstrate that corporate nationality has been misused by Claimant and therefore should be disregarded by the Tribunal.

Claimant's Position

234. Claimant contends that Respondent's arguments that Claimant does not qualify as "investor" under the BIT because (i) it did not "make" an investment in the territory of Venezuela and (ii) it does not have a sufficient connection with Canada, have no merit and should be dismissed.

235. It is undisputed that Claimant was incorporated in 1998 under the laws of the Yukon Territory in Canada and that in 1999 it acquired the shares of Gold Reserve Corp., thereby acquiring indirectly the shares of the Venezuelan subsidiary that held mining rights in that State's territory.

[52] *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)* (hereinafter "*Barcelona Traction*"), ICJ Rep. (1970), Judgment, 5 February 1970.

236. However, according to Respondent, "making" an investment in the territory of the other Contracting Party to the BIT does not include "acquiring" such an investment. There was in fact no investment "made" in Venezuela for such acquisition, but only an investment made in the United States.

237. This argument should, in Claimant's view, be rejected as being contrary to the ordinary meaning of the terms of the BIT in light of its object and purpose. Claimant referred to the dictionary definition of "to make" which includes "to acquire", "to gain through behaviour or effort…" This is confirmed by the Spanish and French texts of the BIT regarding the definition of "investor". The Energy Charter Treaty provides that "make an investment" means establishing new investments or "acquiring all or part of existing investments."[53]

238. Claimant notes that Respondent itself accepts that there is no real distinction between making an investment and acquiring an investment when arguing that Gold Reserve Inc. "by acquiring shares in Gold Reserve Corp. made an investment in the United States."[54]

239. Claimant rejects Respondent's interpretation that it is only the entity that acquires assets in Venezuela directly, not indirectly or through an investor of a third State, that "makes" the investment. Claimant says that this interpretation cannot be reconciled with the definition of investment in Article 1(f) of the BIT, which provides that 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…". Respondent's interpretation is not supported by the ordinary meaning to be given to the terms of the BIT in context, including its preamble.

240. Claimant also argues that the acquisition of investments held by third parties is likely to be followed by further capital investments by the acquiring party and by stimulated economic activities for the host State. It says that the investment treaty decisions referred to by Respondent do not support Respondent's interpretation that an investment would not be covered by the BIT unless Claimant had purchased interests in a local company directly, rather than purchasing interests in a third party that owned the local company and then contributing substantial sums to

[53] Energy Charter Treaty, Article 1(8).

[54] Reply, para. 403; *see also* Counter-Memorial, para. 404.

the local company's operations. Claimant invested millions of dollars raised in the Canadian market toward development of the Brisas Project.

241. According to Claimant, the decision in *Encana v. Ecuador*[55] demonstrates that Respondent's objection is without merit. In that case, the relevant treaty had the same definition of investor and investment as the BIT in this case. The issue in dispute was the same as the present case, namely whether Encana qualified as an investor under the treaty in view of its acquisition of the shares of two local companies through another Canadian company, Pacalta, which owned directly said shares. The tribunal in that case concluded that there was no doubt that Encana qualified as an investor under the treaty.

242. The reference made by Respondent to Article XVI of the BIT is incorrect. This provision is misread. It protects investments made before and after the entry into force of the BIT, and only excludes those disputes arising from actions taken by the Contracting States prior to the BIT's entry into force.

243. Claimant further contends that no "genuine link" between a State and its national is required under the BIT for a national of that State to qualify as an investor in addition to nationality. The customary rules relied upon by Respondent, which relate to the right of diplomatic protection, do not apply where special agreements are in place between States regarding claims that may be presented, except where rules of *ius cogens* apply (such are not the customary international rules of diplomatic protection). Nothing in Article XII(7) of the BIT, which refers to "applicable rules of international law", supports the conclusion that customary rules regarding diplomatic protection should apply.

244. While States may impose other conditions in their agreements, such as limiting covered investors to those that have "substantial business activities" within the territory of their State of incorporation, there is no basis for a tribunal to impose such a requirement where there is none. As Claimant is incorporated in Canada, it satisfies the requirement of the BIT and as such is eligible to claim the BIT protection.

[55] *EnCana Corp. v. Republic of Ecuador* (hereinafter *"EnCana v. Ecuador"* or *"EnCana")*, LCIA Case No. UN3481, UNCITRAL, Award, 3 February 2006.

245. Although irrelevant, Claimant nonetheless notes its substantial connections to Canada. It successfully raised significant capital through the Canadian capital markets, nearly all of which was directed to its activities in Venezuela. Contrary to Respondent's assertion, the percentage of Canadian ownership of its shares rose from 52% to 68% during the period 1998-2005. The Canadian Government intervened on several occasions in support of Claimant in dealing with Venezuelan officials. The local authorities clearly understood that Claimant was a Canadian company, its Canadian identity having been a matter of public record for more than a decade.

246. Claimant submits that there is therefore no basis to deny Claimant the BIT protection, since it qualifies as an investor under the BIT. Exceptional circumstances must exist to justify a denial of treaty rights by disregarding legal personality through piercing the corporate veil, as it was the case in the *Barcelona Traction* case referred to by Respondent. None of the other cases cited by Respondent in support of its abuse of rights argument provides any basis to deny Claimant the BIT protection.

247. Claimant argues that it manifestly did not engage in illegitimate "treaty shopping". Treaty shopping occurs when an already existing claim against a State belonging to a party with no treaty protection is transferred to an entity entitled to treaty protection for the sole purpose of obtaining access to such a remedy. This is not Claimant's case since it was incorporated in Canada and made its investment in Venezuela nearly a decade before the events leading to the dispute.

B. The Tribunal's Analysis

248. According to Article I(g)(ii) of the BIT, "investor" in the case of Canada means, for non-natural persons, "any enterprise incorporated or duly constituted in accordance with applicable laws of Canada who makes the investment in the territory of Venezuela and who does not possess the citizenship of Venezuela."

249. Apart from the requirement that the investor "make the investment in the territory of Venezuela" which will be examined below, according to this definition Gold Reserve has to prove that:

(i) it is an enterprise incorporated or duly constituted in accordance with applicable laws of Canada; and
(ii) it does not possess the citizenship of Venezuela.

250. Both conditions are clearly satisfied in the present case; Gold Reserve was incorporated in 1998 under the laws of the Yukon Territory in Canada and does not possess Venezuelan nationality. No objections have been raised by Venezuela regarding either condition.

251. Respondent argues that despite being a duly incorporated Canadian company, Gold Reserve should not be entitled to the protections of the BIT because its management is headquartered in the United States (and it is essentially one and the same with the US based Gold Reserve Corp.); the Canadian entity is therefore characterized as a "shell company". Conversely, counsel for Claimant stated at the hearing that "Gold Reserve's decision to incorporate in Canada was not motivated primarily by investment treaty concerns",[56] citing instead other reasons including attracting investment and taxation advantages as the primary motivation for establishing a Canadian parent.[57]

252. In the Tribunal's view, Gold Reserve is a Canadian entity within the definition of investor provided in the BIT. As many previous ICSID tribunals have found, where the test for nationality is "incorporation" as opposed to control or a "genuine connection", there is no need for the tribunal to enquire further unless some form of abuse has occurred. Such abuse might be found where the company has been incorporated in a given State after the dispute arose so as to take advantage of a treaty concluded by that State.[58] This is clearly not the case here. None of the cases referred to by Respondent indicates that the plain meaning of the nationality test should not be applied in situations where incorporation in Canada occurred before the dispute arose, for legitimate purposes. It is irrelevant whether the company is headquartered at the location of incorporation or if it is the result of a corporate restructuring.[59]

253. Respondent argued that the present case involves an "extreme" set of facts not seen before in other ICSID cases. Yet, it has not identified any particular facts that make it so "extreme" when compared to other cases of alleged "shell" companies where jurisdiction has been held to exist. There is nothing exceptional in the circumstances of the present case to distinguish it from, for

[56] Transcript, February 2012, Day 1, 45:18-20.

[57] First Witness Statement of Mr Belanger (hereinafter "**Belanger I**") dated 20 September 2010, para. 9; Second Witness Statement of Mr Belanger (hereinafter "**Belanger II**") dated 29 July 2011, para. 71-74.

[58] *Phoenix Action Ltd. v. Czech Republic*, (hereinafter "*Phoenix v. Czech Republic*"), ICSID Case No. ARB/06/5, Award, 15 April 2009.

[59] *Aguas del Tunari S.A. v. Republic of Bolivia*, (hereinafter *"Aguas del Tunari v. Bolivia")*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005; *Mobil Corp. v. Bolivarian Republic of Venezuela*, (hereinafter *"Mobil v. Venezuela")*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, paras. 204-205.

example, the *Saluka* case, in which respondent alleged that claimant was no more than a shell company within a corporate chain, established for no other purpose than to take advantage of the protections offered by the Netherlands-Czech BIT.

254. The tribunal in *Saluka* found as follows:

> "In dealing with the consequences of that way of acting, the Tribunal must always bear in mind the terms of the Treaty under which it operates. Those terms expressly give a legal person constituted under the laws of The Netherlands…the right to invoke the protection of the Treaty. To depart from that conclusion requires clear language in the Treaty, but there is none…The parties having agreed that any legal person constituted under their laws is entitled to invoke the protection of the Treaty, and having so agreed without reference to any question of their relationship to some other third State corporation, it is beyond the powers of this Tribunal to import into the definition of "investor" some requirement relating to such a relationship having the effect of excluding from the Treaty's protection a company which the language agreed by the parties included within it."[60]

255. The Canada-Venezuela BIT is clear – the criterion an investor must satisfy involves the place of incorporation: "any enterprise incorporated or duly constituted in accordance with applicable laws of Canada". The Parties could have chosen to include a "genuine link" test or a "management" test, but did not. The Tribunal cannot read these criteria into the BIT and is therefore satisfied that Claimant falls within the definition of "investor", so far as it is a company incorporated in Canada. In any case, the significant funding of the group sourced through the Canadian financial market from Canadian investors means that Gold Reserve has a clear and genuine connection to Canada. Furthermore, and for the sake of argument, even if the requirement of a "genuine link" had been applicable, Gold Reserve's substantial connections to Canada were evidenced by the growing percentage of its shares held by Canadian investors (from 52 to 68% between 1998 and 2005) and by the direct intervention of the Canadian Government on several occasions in support of Claimant in dealing with Venezuelan authorities for which the nationality of the investor did not seem in any doubt.

256. However, incorporation alone is not sufficient to qualify an enterprise as an "investor" of Canada. As noted above, an investor must also make an investment in the territory of Venezuela. Respondent provided an account of the corporate restructuring that occurred in early 1999 within

[60] *Saluka Investments B.V. v. Czech Republic*, (hereinafter "*Saluka*"), UNCITRAL Partial Award (17 March 2006), para. 229. The tribunal in *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd v. Republic of Hungary* (hereinafter "*ADC v. Hungary*" or "*ADC*"), ICSID Case No. ARB/03/16, Award, 2 October 2006, paras. 357-359, adopted similar reasons in rejecting arguments relating to "genuine connection" and customary international law principles.

the Gold Reserve group, which has not been disputed by Claimant. This restructure was achieved through a merger of Gold Reserve Corp. with a subsidiary company of Gold Reserve Inc., combined with a share-swap through which shareholders acquired shares in Gold Reserve Inc., the present Claimant, in return for trading-in their shares in Gold Reserve Corp. As a result, Gold Reserve Inc. became the holding company of the group while the former holding company, Gold Reserve Corp., became a subsidiary. No money transfer or flow of funds into Venezuela resulted from the restructure, which took place through a share-to-share swap outside of Venezuela.

257. By virtue of the corporate restructuring, Claimant has become the indirect owner of the share capital of the Venezuelan company, Brisas Company, which held title to mining rights and concessions in Venezuela. There is no dispute that indirect ownership or control of mining rights constitutes an investment under the BIT. Indeed, the definition of investment in Article I(f) expressly includes "rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources".

258. In addition, the definition of "investment" includes "shares, stock, bonds and debentures or any other of participation in a company, business enterprise or joint venture" (under Article I(f)(ii)). Therefore, both the indirect share ownership of a Venezuelan subsidiary and the mining rights and concessions held by such subsidiary constitute protected investments under the BIT.

259. Since an "investment", as so identified, may be "owned or controlled by an investor of one Contracting Party either directly or indirectly…in the territory of the other Contracting Party,"[61] Claimant can be said to control indirectly the concession held by the Venezuelan subsidiary. The fact that an "investment" exists is therefore not in any doubt.

260. However, the Parties have debated at length whether the process leading to the indirect share ownership by Claimant of a local subsidiary and, through the latter, to the holding of title to mining rights and concessions[62] satisfies the condition of "making" an investment in the territory of Venezuela. The dispute is whether the Canadian company can be said to have "made" the investment, given that the mining rights had already been granted to the Venezuelan subsidiary

[61] BIT, Article I(f).

[62] Which, according to Claimant, constitutes its investment in Venezuela; *see* Transcript, February 2012, Day 5, 1182-1185.

before the restructure through which Gold Reserve Inc., the Canadian company, acquired Gold Reserve Corp., the US company. Venezuela argued that, as the investment already existed before the Canadian company was even incorporated, the Canadian company cannot be said to have made that investment.

261. According to the ordinary meaning of the words, "making an investment in the territory of Venezuela" does not require that there must be a movement of capital or other values across Venezuelan borders.

262. If such a condition were inferred it would mean that an existing investment in Venezuela, owned or controlled by a non-Venezuelan entity, would not be protected by the BIT if it were acquired by a third party, with cash or other consideration being paid outside Venezuela, even if the acquiring party then invested funds into Venezuela to finance the activity of the acquired business. Clearly, this was not the intention of the parties to the BIT and nor does it reflect the ordinary meaning of the definition. Whether Claimant made an investment when it acquired the shares in Gold Reserve Corp., is not affected by the fact that the acquisition took place through a share-to-share swap outside Venezuela.

263. In *EnCana v. Ecuador*,[63] the Tribunal considered jurisdiction under the Canada-Ecuador BIT which has a similar definition of investment. In particular, that BIT included the same "enterprise…who makes the investment" language found in the Canada-Venezuela BIT.

264. In the *EnCana v. Ecuador* case, the Canadian parent company similarly acquired the shares in the previous parent company whose subsidiaries had been granted mining concessions in Ecuador. All but one of these concession contracts had been granted before EnCana acquired the shares. While jurisdiction was hotly contested in the case, at no stage did either party or the tribunal find any issue with the fact that the concession contracts had been granted to the subsidiary companies before EnCana acquired the parent company. The fact that EnCana acquired the parent which owned the companies who held the concessions was considered by all to be sufficient to constitute the "making" of an investment.

265. Respondent contended that the *EnCana* case can be distinguished from the present case because this case involves a corporate restructure, as opposed to an acquisition by an arm's length third

[63] *Supra* footnote 55.

party. In particular, the fact that no money was exchanged for the shares in the US corporation featured strongly in Respondent's reasoning. The Tribunal is not persuaded by this argument. The internal workings of the acquisition does not affect whether the parent "makes" an investment. This is particularly so where the driver behind the restructure was the ability to access further funds from the Canadian market which were then used to further the investment in the Brisas Project.[64]

266. Further cases cited by the Parties support this conclusion. For example, in *Millicom v. Senegal*[65] the investment was acquired through an internal restructure.

267. Millicom (a Dutch company) acquired indirect ownership of the local subsidiary which held the relevant concession two years after the concession had been granted to the subsidiary. This ownership was acquired through an internal transaction (the local subsidiary having always been part of the Millicom group). The tribunal did not consider the indirect control exercised by claimant to be problematic, nor was the fact that it had acquired the shares after the issue of the concession even raised as an issue by respondent. The only distinguishing factor was that a Dutch company had always been involved in the ownership structure of the local subsidiary, so in that sense the Netherlands-Senegal BIT had always been relevant.

268. In *Aguas del Tunari v. Bolivia*,[66] the tribunal made it clear that the insertion of a Netherlands company into the ownership structure after the concession had been granted (but before the dispute arose) did not create any jurisdictional problems, as it did not affect any of the undertakings contained in the underlying concession agreement. The tribunal found it had jurisdiction under the Netherlands-Bolivia BIT.

269. Similarly, in *Mobil v. Venezuela*, the tribunal held that restructuring in order access treaty protections after a dispute had arisen would be an abuse of process, but to do so in order to gain protection for future disputes was "a perfectly legitimate goal."[67]

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[64] As shown by the Second Expert Report of Mr Pingle (hereinafter "**Pingle II**") dated 23 July 2011, paras. 106-107, 122.

[65] *Millicom Int. Operations v. Senegal* (hereinafter "*Millicom v. Senegal*"), ICSID Case No. ARB/08/20, Decision on Jurisdiction, 16 July 2012.

[66] *Supra* footnote 59.

[67] *Ibid.*

270. In summary, there is no support in previous cases for contentions pertaining to a lack of investment as a result of (1) the parent company entering the structure after the concession had been granted; (2) the parent company being inserted as a result of an internal corporate restructure; or (3) the new parent company being incorporated in a jurisdiction with a BIT which has previously not been relevant. Therefore, provided that the corporate restructure or investment transfer is not made for improper purposes (for example, to gain treaty protection after the dispute had arisen), then the fact that it occurred after the concession had been granted does not affect jurisdiction.[68]

271. Finally, considering specifically the concept of "making" an investment as required under the BIT, Respondent notes in its Rejoinder that the making of an investment requires a "contribution in economic terms."[69] Again, in opening submissions at the hearing, Counsel for Respondent stated "[t]he ordinary meaning of the phrase 'who makes the investment in the territory' would appear to be one who positively and personally acts and effects the movement of capital or some other economic contribution – know-how, for example – into the territory of Venezuela."[70] Even if this were so, Respondent had previously acknowledged Claimant's argument that post-1999 the majority of funding came from Claimant (albeit complaining the details of this funding were not provided). Respondent had attempted to belittle this contribution as amounting to no more than a "fund-raiser", and yet the provision of funds (or "capital") seems to be the crux of its definition of making an investment. As noted above, Claimant has stated that one of the reasons for incorporating the Canadian entity was to raise funds in Canada for its mining activities in Venezuela and most of the US$ 300 million invested in the so-called Brisas Project came through Canadian investors.

272. In conclusion, it is the Tribunal's view that Claimant satisfies the definition of investor both as a Canadian incorporated company and as a company that made an investment in Venezuela. The Tribunal therefore has jurisdiction to hear the claim.

[68] As it was the case in *Phoenix v. Czech Republic*, *supra* footnote 58.

[69] Rejoinder, para. 249.

[70] Transcript, February 2012, Day 2, 466:7-12.

CHAPTER VI. NATURE AND EXTENT OF CLAIMANT'S INVESTMENT

273. This Chapter considers the nature and extent of Claimant's mining rights that existed at the time of the alleged BIT breaches by Respondent. In particular, this Chapter examines whether the Brisas and Unicornio Concessions were validly terminated and whether Claimant had any legal right to use/access the other parcels of land included in the so-called "Brisas Project".

274. As noted above, Claimant's mining rights were owned indirectly through the Brisas Company which held the relevant concessions in Venezuela. Claimant indicates that the reference date for the determination of the extent of its mining rights should be April 2008, this being the date on which the Construction Permit was revoked by Respondent[71] and Respondent contends the Brisas Concession expired.[72] Respondent has not challenged the use of April 2008 as the relevant date for damage assessment purposes (if required).

275. In addition to the Brisas and Unicornio Concessions, Claimant asserts that in April 2008 it enjoyed rights regarding parcels adjacent to the Concessions. Given the size of the Brisas Project, there was the need to site infrastructure on such parcels of land in order to mine rationally and according to best industry practices so as to ensure optimum recovery of mineral resources.

276. The parcels as to which Claimant asserts it acquired rights in April 2008 to use for infrastructure and services for the exploitation of the Brisas Project were: Bárbara, Zuleima, NLEAV1, NLSAV1, Esperanza, Yusmari, the North Parcel (NLNA1-NLNV1), El Pauji, Morauana, Venamo, Cuyuni and Mireya.

A. Brisas Project

Claimant's Position

277. According to Claimant, its investment in Venezuela consisted in the mining rights indirectly owned through the ownership and control of the Brisas Company, the entity holding such rights in

[71] *Supra* para. 24.

[72] *Supra* para. 25.

Venezuela.[73] It is therefore to be determined which were Claimant's mining rights when, in April 2008, measures were taken by Respondent that, in Claimant's opinion, were in violation of the standards of treatment guaranteed by the BIT.

278. Claimant observed that it informed the Administration of its intention to develop the expanded Brisas Project in 1999. It gained a one year extension to submit the Brisas Project Feasibility Study, submitted in February 2001. The extension was required because it needed more time to address the "project" as a whole – being the Brisas and Unicornio Concessions along with surrounding mining properties needed to support project infrastructure. Many other documents and permits following this time referred to the Brisas Project. In particular, the V-ESIA addressed the Project as a whole, which included the surrounding properties. Claimant noted that the Construction Permit issued in 2007 referred to the "Brisas Project".

279. Claimant contended that internal MinAmb documents evidence that "the Administration considered the Brisas Project as an integrated project encompassing several parcels,"[74] along with approvals gained feasibility studies, the V-ESIA and the various permits and authorisations issued which all refer to the Brisas Project.

280. According to Claimant, during the entire course of the works to develop the so-called "Brisas Project", Respondent had never raised any objections regarding the merit of the Project, its environmental impact, its planning, its compliance with law or the Mining Titles. This was so even when, in 2005, President Chávez announced that all contracts with foreign companies had to be reviewed to ensure that they provided "maximum benefit" to the State. However, Claimant says its reliance on the government's continued good faith evaluation and support of the Brisas Project was misplaced.

[73] The nature of Claimant's investment was made clear at the hearing in February 2012 where the question was put to its Counsel and answer received as follows: President Bernardini: "So, I gather, but correct me if I'm wrong, you consider "investment" basically the mining rights that are indirectly owned through the chain of share ownership". Mrs. Cohen Smutny: "Yes, absolutely". (Transcript, February 2012, 1184: 19-22; 1185: 1).

[74] Reply, para. 50, referring to MARN (now MinAmb) Memorandum No. 01-00-19-04-268/2005 of 15 November 2005 (C-1053) acknowledging "the legal basis for Gold Reserve's right to use those properties" (Reply, para. 52 referring to C-44).

Respondent's Position

281. Respondent maintains that Claimant was granted the Brisas (alluvial) and Unicornio (hard-rock) Concessions and entered into work contracts authorizing the exploitation of various parcels of land, none of which it ever exploited, subject to the conditions set out in the Mining Titles, the concessions, the work contracts and the additional contractual requirements. It says that Claimant misrepresents the operation of Venezuelan law with respect to the obligation to exploit and the granting of extensions of concessions and, in addition, it ignores the importance of the regulatory environmental regime regarding its Mining Titles. "Brisas Project" was neither a "Project" nor "poised for success", as alleged by Claimant.[75]

282. Respondent states that the "Brisas Project" described by Claimant consisted of an enormous mine pit (comprising of two concession areas, an alluvial one overlying an underground hard rock concession) and 12 surrounding parcels of land to use for waste rock and liquid storage area, a crushing plant, a processing plant and other infrastructure. Respondent contends that Claimant incorrectly states that it had acquired rights of use for these parcels and that it was in compliance with all its obligations under the mining rights.

283. According to Respondent, the massive "Brisas Project" raised critical environmental issues, since it was to be located in the environmentally fragile Imataca Forest Reserve, which was subject to a special management plan not to degrade the environment and to preserve the rights of indigenous peoples. Eventually, MinAmb granted only a limited Phase I Permit allowing Claimant to build roads and conduct other preliminary activities while completing a more thorough impact assessment. When MinAmb realized its mistake in granting the permit, it refused to authorise initiation of the works and subsequently declared the permit null.

The Tribunal's Analysis

284. Throughout the Parties' pleadings, written and oral, reference has been made to the "Brisas Project" as a term meant to cover more than just one Mining Title or mining right. The term was introduced by Claimant when, having been granted the Unicornio Concession on 3 March 1998, it felt the need to combine its development with that of the Brisas Concession, the latter lying on top

[75] Counter-Memorial, para. 44.

of the former. Claimant considered it was reasonable that, for a number of reasons, the two concessions should be considered "in an integrated manner as one comprehensive mining project".[76]

285. Starting in late 1998, Claimant focused on the notion of "Brisas Project", introducing this new concept in its correspondence with the Venezuelan Administration. The EIA for the Brisas Concession filed on 14 October 1998, although not yet referring to the Brisas Project, mentions the underlying concession obtained earlier that year with the prospect of "assessing it comprehensively."[77] This was followed by an exchange of communications from MinAmb on 28 January 1999, requesting modifications for the environmental assessment of the new project[78] and from Claimant on 7 May 1999, responding to the MinAmb and referring, for the first time to the "Brisas Project."[79] Reference to the Brisas Project continued to be made throughout 1999 by Claimant, but not yet by Respondent which referred rather to an "expanded project."[80]

286. The process leading to the introduction of the concept of an expanded project comprising more than just one Mining Title culminated in February 2001 with the filing by Claimant of the Brisas Project Feasibility Study where, despite the title, the content referred to the Brisas Project as comprising the Brisas and Unicornio Concessions as well as NLEAV1-NLSAV1, Bárbara, Zuilema, NLNA1–NLNV1, ALUPLATA, VELAPLATA, El Pauji Mining Concession, Morauana and a strip of land for easements.[81] This study was updated by Claimant in November 2002 confirming the components of the Brisas Project.[82] NLEAV1 and NLSAV1, Bárbara and Zuleima parcels were made part of the Feasibility Study as "comprising the Brisas Project."[83]

[76] Memorial, para. 37.

[77] Letter from Gold Reserve to MARN (now MinAmb) dated 14 October 1998 (C-617, p.2).

[78] MARN (now MinAmb) Official Letter No. 77-01-45-045/99 dated 28 January 1999 (C-618).

[79] Letter from Gold Reserve to MARN (now MinAmb) dated 7 May 1999 (C-619).

[80] Letter from Gold Reserve to MARN (now MinAmb) dated 19 July 1999 (C-620), MARN (now MinAmb) Official Letter No. 77-01-45-617/99 dated 28 October 1999 (C-621) (Ministry's approval of the EIA on 28 October 1999) and Letter from Gold Reserve to MARN (now MinAmb) dated 8 November 1999 (C-622), all communications exchanged during 1999.

[81] Brisas Project Feasibility Sudy dated Feb 2001 (C-170), specifically para. 1.3: "Mining Rights, Easements and Location".

[82] Letter from Gold Reserve to MEM (now MINAMB) dated 27 November 2002 (C-575).

[83] *Ibid.* p.3.

287. The Brisas Project Feasibility Study, submitted in 27 November 2002, was approved by MIBAM on 6 January 2003 as being in compliance with Special Advantage No. 5 of the "relevant mining title,"[84] where the "relevant Mining Title" for the Ministry was the Unicornio Concession. The Parties disagree whether or not, despite this qualification, the Ministry's approval related comprehensively to all Mining Titles and rights covered by the Brisas Project Feasibility Study.

288. Reference by Claimant to the "Brisas Project" became common in its relations with the Administration. All studies prepared and filings made by Claimant since that time referred to this concept, including the V-ESIA.[85] As updated, the V-ESIA referred to the two Concessions, Brisas and Unicornio, and the various mining parcels comprising the Brisas Project. The Study was approved by MinAmb on 9 February 2007, without objections or comments on the use of the concept of Brisas Project.[86]

289. Following approval of the V-ESIA, MinAmb issued on 27 March 2007 the Phase I Permit.[87] This document lists in the "whereas" section all mining rights to which it refers as part of the Brisas Project. The references made in the Phase I Permit's text regarding MIBAM[88] suggest that MIBAM was aware of it and its content. Several other documents in the file originating from MIBAM and MinAmb during those years refer to the Brisas Project.[89]

290. Respondent referred initially to the Brisas Project in its Counter-Memorial as "imaginary."[90] Then, in its Rejoinder, it referred to it as a unilateral reference by Claimant to its various mining interests not in accordance with Venezuelan law, the latter not recognising or regulating a mining

[84] MEM (now MIBAM) Official Letter No. DGM-003 dated January 6, 2003 (C-253).

[85] Environmental and Socio-Cultural Impact Assessment of the Brisas Project, July 2005 (C-178). The V-ESIA was updated in January 2007.

[86] MEM (now MIBAM) Official Letter No. DGM-003 dated 6 January 2003 (C-253).

[87] MARN (now MinAmb) Official Letter No. 010303-1080 dated 27 March 2007 – "Authorization to Affect Natural Resources to Gold Reserve de Venezuela-Compañia Aurifera Brisas del Cuyuni for the Infrastructure and Services Construction Phase of the Brisas Project for Exploitation and Processing of Gold and Copper Mineral" (C-44).

[88] *Ibid.* as in condition n. 23, p.28.

[89] MARN (now MinAmb) Official Letter No. 00168 dated 27 May 2004 (C-31) (MinAmb Administrative Ruling dated 27 May 2004), MinAmb Administrative Ruling dated 25 June 2004 (C-32), MARN Official Letter No. 00170 dated 27 May 2004 (C-61), Official MEM (no MIBAM) Letter No. DGM-107 dated 24 March 2004 (C-421), MARN (now MinAmb) Memorandum No. 01-00-19-04-268/2005 dated 15 November 2005 (C-1053), MIBAM Technical Report El Paují Concession dated 26 September 2006 (C-1319). A description of the content of the Brisas Project is in the Reply, para. 155. *See also* C-446.

[90] Counter-Memorial, Section II.C.2.

project made of multiple parcels.[91] Claimant, for its part, was aware that under Venezuelan mining law each mining right is subject to a separate regulation, as evidenced by the fact that in March 2006 it proposed to MIBAM, without success, to amend the Mining Law to regulate the concept of "Mining Project."[92]

291. The Tribunal recognizes that there was for some time a measure of misunderstanding between the Parties as to existence and material consistency of the "Brisas Project", a concept the use of which had initially been a unilateral initiative of Claimant. Nevertheless, as soon as the competent Venezuelan authorities, including MIBAM and MinAmb, actually agreed to explicitly use the same formulation for identifying the integrated project, Claimant was entitled to believe that the two sides had finally reached an agreement on the existence of the "Brisas Project", if not necessarily on the exact scope and consistency thereof. This was at least the case in March 2007, when the Phase I Permit was issued.

292. The Tribunal finds that the Administration's conduct, as evidenced by the lack of reaction and, more than that, by its explicit reference to the concept of the "Brisas Project" in a number of official documents, founded Claimant's expectation that it could rely on Venezuela's acceptance of this concept as a practical way of dealing comprehensively with all Mining Titles and rights it intended to exploit. This was particularly the case with respect to the environmental consideration of mining activity, due to the obvious need for an integrated evaluation of its effects on the environment. In a document issued by MinAmb on 27 May 2004, one reads:

> "The Brisas Project, with an investment of 67 million dollars to date, out of a required 400 million dollars, is a mixed large mining project (alluvial and vein) and is considered by the Ministry of Energy and Mines as a project of National Interest in view of its dimensions and its social and economic effects for the country."[93]

In another document issued by MIBAM on 26 September 2006 it is stated as "Recommendations" to Claimant:

> "Proceed before MARN for the Environmental permits for this mining right, as this forms part of the Brisas Project, which will contribute to the economic and technological development of the Mining Projects, which to this date are quite diminished."[94]

[91] Rejoinder, paras. 6-8.

[92] Letter from Gold Reserve to MIBAM dated 19 March 2006 (C-446).

[93] MARN (now MinAmb) Official Letter No. 00170 dated 27 May 2004 (C-61), p.4.

[94] MIBAM Technical Report El Pauji Concession dated 26 September 2006 (C-1319), p. 5.

The time for a change of the State policy regarding mining activities and, more specifically, the Brisas Project had yet to come.

293. Respondent's position denying any value to the concept of "Brisas Project" is unwarranted. The Administration's conduct reinforced Claimant's reasonable expectation that further steps would be taken by Respondent to permit the full exploitation of the Brisas and Unicornio Concessions through the use of adjoining parcels of land included within the concept of the "Brisas Project".

B. The Brisas Concession

Claimant's Position

294. The Brisas Concession was acquired by the Brisas Company in April 1988. In November 1992, Gold Reserve Corp.'s Venezuelan subsidiary acquired the Brisas Company. Following the reorganization of Gold Reserve group in early 1999, Claimant became the indirect owner of the Brisas Company and, accordingly, of the Brisas Concession.

295. Claimant refers to its successful efforts, with the support and approval of the Government, to bring the Brisas Concession into compliance with the Mining Title and mining law. It says that the mining rights under the concession were therefore unlawfully terminated by Respondent with effect from the date of expiration of its initial term, *i.e.* from 18 April 2008.[95]

296. Claimant had filed a timely request in October 2007 to extend the Brisas Concession, as acknowledged by Respondent.[96] When six months passed without a decision by MIBAM, Claimant contends that the extension was granted by operation of Article 25 of the 1999 Mining Law. It refutes Respondent's assertion that the 1999 Mining Law is not applicable.[97] The May 2009 Resolution purporting to terminate the Brisas Concession relied on Article 25 of the 1999 Mining Law[98] and, in addition, the Supreme Court ruled in November 2011 that Article 25 of the

[95] The Resolution of the MIBAM of 25 May 2009 declaring terminated the mining rights under the Brisas Concession (point two) states initially that the extension requested is not granted (point 1), thus fixing the termination date on the expiry of the initial 20-year term (C-91).

[96] As confirmed by one of Respondent's Witnesses, Witness Statement of Mr Herrera (hereinafter "**Herrera I**") dated 23 March 2011, para. 5.

[97] Counter-Memorial, para. 585.

[98] MIBAM Resolution dated 25 May 2009 (C-91), p. 2.

1999 Mining Law applies to concessions granted prior to such law, including where the concession has a special advantage regarding its extension (like the Brisas Concession).[99]

297. Claimant sees no merit in Respondent's argument that in order to benefit from the positive administrative silence the concessionaire must be "solvent", since the decision regarding whether or not the condition is satisfied must be taken within the six-month time provided by the 1999 Mining Law. In addition, MIBAM repeatedly confirmed Claimant's "*solvencia*" by issuing certificates of compliance, the last one in September 2008.[100]

298. Claimant said it had no reason to doubt its compliance with its obligations as concessionaire, given the certifications of compliance repeatedly received from MIBAM. It had a legitimate expectation as a matter of Venezuelan law that the Brisas Concession would be extended, as contemplated also by the Feasibility Study that had been approved by MinAmb in 2003.

299. Under Article 25 of the 1999 Mining Law, MIBAM had six months to decide on the Concessionaire's request for extension. If no response was received, the extension would be deemed to have been granted according to the principle of positive administrative silence. MIBAM improperly failed to recognize the extension and more than one year after the concession was extended by operation of law revoked it for reasons that were without a basis in law or fact.

300. Claimant also contends that Respondent's argument that the Administration is free to decide in its discretion whether a concession should be extended is wrong. As explained by Professors Brewer-Carías and Ortiz-Alvarez, a decision whether a concession is to be extended is based on the standard of "pertinence" under the Mining Law, which is an indeterminate legal concept that does not provide for a discretionary decision. Instead, the decision should be based on whether or not an extension is necessary to meet the needs of the project.[101]

301. Contrary to what is asserted by Respondent,[102] MIBAM had no discretion to decide whether to grant an extension, Article 25 of the 1999 Mining Law only requiring the Ministry to determine

[99] Claimant's Post-Hearing Brief, para. 74.

[100] Memorial, para. 188.

[101] Second Expert Legal Opinion of Mr Brewer-Carías (hereinafter "**Brewer-Carías II**") dated 28 July 2011, paras. 17-24; Second Legal Opinion of Mr Ortiz-Alvarez (hereinafter "**Ortiz II**") dated 27 June 2011, paras. 143-189.

[102] Counter-Memorial, para. 7

whether an extension, would be "pertinent". Such determination is based on constitutional and other principles to ensure that it is not arbitrary and is based on "criteria of rationality, proportionality, equity and justice."[103]

302. On 3 October 2008, MIBAM sent Claimant forms for payment of the surface tax due for the Brisas Concession through 18 April 2008 (as if the concession had expired on that date). Assuming this to be due to an oversight, Claimant filed a reconsideration appeal with the office issuing the tax forms.

303. On 28 November 2008, the office rejected the appeal concluding that the Brisas Concession expired as of 18 April 2008 in the absence of any evidence that the requested extension had been granted.[104]

304. On 18 March 2009, MIBAM ordered the "immediate suspension" of all mining activities on the Brisas Concession, the preparation of inventories and the safekeeping of the concession's assets which were to revert to the State.[105] On 25 May 2009 the Brisas Concession was declared terminated.[106]

305. Claimant notes that MIBAM's Resolution terminating the Brisas Concession was based on three internal memoranda prepared by the Ministry's offices, two dated 29 April 2009[107] and one dated 12 May 2009,[108] which purported to find Claimant to be non-compliant with obligations related to the concession. The two April memoranda asserted that Claimant did not comply with Special Advantages Nos. 5-9 and 11-14 of the Brisas Mining Title. They post-dated Claimant's 21 April 2009 notice of dispute under the BIT which was also addressed to the Minister of Mines Rodolfo Sanz.[109]

[103] Brewer-Carías II, para. 17.

[104] MIBAM Act No. MIBAM-DGFCM-ITRG No. 1-IFMLC-001-09 dated 18 March 2009 (C-94)

[105] Administrative Ruling No. MIBAM-DGFCM-CCF-226 dated 23 December 2008 (C-101).

[106] MIBAM Resolution dated 25 May, 2009 (C-91).

[107] MIBAM Memoraundum No. LC-034-09 dated 29 April 2009 (C-840) and MIBAM Memorandum No. CSCM-049 dated 29 April 2009 (C-841).

[108] MIBAM Memorandum No. DGCM-094-09 dated 12 May 2009 (C-735).

[109] Letter from Gold Reserve to President Chávez and others dated 17 April 2009 (Request for Arbitration, Exh. 4).

306. Claimant asserts that MIBAM acted unlawfully because the determination of non-compliance did not support termination of the Brisas Concession. The requested extension had been supported by MIBAM's own written certification unequivocally stating that Claimant "has fully complied with the provisions of the above [Mining] Law, its Regulations and Mining Titles and is, therefore, declared Solvent as of 14 September 2007."[110] Another certificate of compliance was issued one year later, on 2 September 2008, again confirming that Claimant was "solvent."[111]

307. Claimant replies as follows to the alleged non-compliance with the Special Advantages referred to in the April 2009 memoranda:

(i) Special Advantage No. 5 related to the payment of the 3% exploitation tax of gold refined. Such taxes had been paid, as confirmed in the tax payment forms submitted to MIBAM.

(ii) Special Advantage No. 6 related to the obligation to use for exploitation the period of 20 years for which the Concession was granted. Under the Mining Law, "exploitation" means not only the physical extraction of minerals but also performing activities "necessary in order to extract minerals, with the unequivocal intention of economically exploiting the concession". These preparatory activities to develop the Brisas Concession had been performed by Claimant, as shown by the technical, economic and environmental studies ultimately approved by the Administration. The theory of Respondent's legal expert, Professor Iribarren, that "exploitation" is synonymous with "extraction"[112] finds no support in the text of the law.

(iii) Special Advantage No. 7 related to the commencement of exploitation within three years from the date of publication of the Mining Title in 1988 in the Official Gazette. This term having already expired when Claimant acquired the concession in 1992, MIBAM allowed it to cure the deficiencies of the prior owner, including extending the time-limit to submit a feasibility study. The latter was approved in February 1994.[113]

(iv) Special Advantage No. 8 related to the manufacturing and refining of the extracted minerals within Venezuela. The limited quantities of minerals extracted by Claimant from 1992 to 1997 were manufactured and refined in Venezuela, as reported to MIBAM in Claimant's annual

[110] MIBAM Official Letter No. LC-111-07 dated 14 September 2007 (C-77).

[111] MIBAM Official Letter No. IFMLC-095-2008 dated 2 September 2008 (C-79).

[112] Counter-Memorial, para. 204 (quoting the First Legal Opinion of Mr Iribarren (hereinafter "**Iribarren I**") dated 5 December 2011, para. 40.

[113] MEM (now MIBAM) Official Letter No. DM-DT-04 dated 24 February 1994 (C-405).

reports. For the future, the feasibility studies contemplated a processing plant in Venezuela to that purpose.

(v) Special Advantage No. 9 related to the transfer to Venezuela of mining technology and to the requirement to establish a training program for personnel. It required that 95% of the non-laborer employees were to be Venezuelan citizens within ten (10) years from the commencement of exploitation. According to Claimant, technology transfer and development of research activities were achieved by delivering technical reports and information and making donations. A training program for employees had been implemented and the targeted level of 95% for Venezuelan non-laborer employees had been achieved.

(vi) Special Advantage No. 11 related to measures to be taken to protect the environment. Claimant had submitted a highly detailed environmental impact assessment for the Brisas Concession to MinAmb in late 1994 and to MIBAM in early 1995, which was approved by MinAmb in October 1999. The V-ESIA containing environmental protection measures was submitted in July 2005, supplemented in January 2007 and then approved in February 2007 by MinAmb.

(vii) Special Advantage No. 12 contemplated constituting a company to carry out the industrialization and marketing of minerals, with 20% of the shares to be transferred to a State institution "when the Ministry so requests". The Ministry never requested the transfer of shares of any company.

(viii) Special Advantage No. 13 related to the costs of two paid internships each year for mining or geology students, to be paid by Claimant. Claimant met and even exceeded this requirement.

(ix) Special Advantage No. 14 required maintaining the performance bond that had been posted. This was done on an annual basis through November 2009, as shown by the annual reports to MIBAM.

308. The 12 May 2009 Memorandum, relied upon in the MIBAM Resolution dated May 2009 denying the extension of the Brisas Concession, related to Claimant's alleged failure to obtain certain environmental permits. Claimant states that it could not have obtained these permits due to MinAmb's improper treatment of Claimant, either by refusing to act on the application to extend the exploration permit or by revoking the Construction Permit on 14 April 2008.

309. Claimant refers to a number of changes in policy that occurred at the time the Brisas Concession was terminated. For example, President Chávez announced in his January 2009 "Address to the Nation", that the Administration planned to develop the Cristinas and Brisas concession areas

jointly with a new joint venture partner, Rusoro.[114] On 23 August 2011, President Chávez signed and approved a "Strategic Action Plan for the Orinoco Oil Belt and Mining Arch" establishing a plan to develop the State's mining resources, expressly including those found at Brisas.[115]

310. Claimant alleges that, as political priorities for the Chávez regime shifted, Respondent acted first to frustrate and then to expropriate the Brisas Project. This change began when, having granted on 27 March 2007 the Construction Permit to Claimant, MinAmb refused to sign the Initiation Act. The signature of this Initiation Act was required under Condition No. 9 to the Construction Permit before any authorized activity could begin.

311. According to Claimant's expert on Venezuelan law, Professor Brewer-Carías, the Initiation Act was no more than a "procedural formality" to be signed following Claimant's satisfaction of other conditions imposed by the Construction Permit, so as to formally certify such satisfaction.[116] As such, contrary to the contentions of Respondent and its expert Professor de los Rios,[117] the signing of the Initiation Act was not discretionary for the Administration once the concessionaire had complied with the conditions imposed by the Construction Permit. Claimant had satisfied said conditions and had so notified MinAmb on 16 May 2007 requesting that the Initiation Act be signed on 24 May 2007,[118] explaining to the Ministry that, in compliance with Condition No. 23, molybdenum was not part of its exploitation plan for the Brisas Project.[119]

312. Claimant refutes Respondent's explanation in this arbitration that MinAmb's refusal to sign the Initiation Act was motivated by its concern over the environmental impacts the Brisas Project would cause,[120] saying that this is not supported by contemporaneous evidence as no such concerns were communicated to Claimant at the time. On the contrary, after the issuance of the Construction Permit, MinAmb requested in mid-July 2007 that the main access road be moved to satisfy MIBAM's requirements. Claimant had agreed to construct this alternative access road,

[114] Annual Message to the Nation by President Chávez dated 13 January 2009 (C-692). For statements of a similar content by the Administration see *infra* para. 580.

[115] Claimant's Post-hearing Brief, paras. 80-81 and Annex B.

[116] First Expert Legal Opinion of Mr Brewer-Carías (hereinafter "**Brewer-Carías I**") dated 15 September 2010, para. 279.

[117] Counter-Memorial. paras. 325-326, 574; First Expert Report of Professor Isabel De los Rios (hereinafter "**De los Rios I**") dated 7 April 2011, paras. 95-100, 118.

[118] Letter from Gold Reserve to MinAmb dated 16 May 2007 (C-480).

[119] Letter from Gold Reserve to MinAmb and MIBAM dated 14 May 2007 (C-479).

[120] Counter-Memorial, para. 9.

which was finally approved by MIBAM on 14 August 2007. Claimant states that, if Respondent's story were true, then it clearly acted in bad faith misleading Claimant into believing that the Initiation Act would be signed and the Phase II AARN would be issued.

313. Following repeated requests that the Initiation Act be signed and Claimant's compliance with MinAmb's request that a proposed alternative access road be provided, a meeting was held on 1 October 2007 with Minister Ortega and Vice-Minister García. As recounted by Mr Rivero, the president of Gold Reserve Venezuela, in his witness statement, following Claimant's presentation of the Brisas Project and answers to questions from Minister Ortega, the latter told Claimant that even if Brisas Project were different, "there is nothing I can do because this issue is in the hands of the President", Vice-Minister García adding that the future of the Brisas Project "is out of our control."[121] This was an alarming development for Claimant since it now appeared that the future of the Project would be decided as a political matter by President Chávez.

314. Claimant states that it sent a letter to President Chávez on 19 November 2007 requesting a meeting to discuss the future of the Brisas Project,[122] with no response from the President's office. Eventually, a meeting was held on 28 January 2008 with the Vice-Minister of Presidential Relations, Fidel González, who promised to look into the matter. However, nothing was heard further from him. Claimant's additional requests to MIBAM and MinAmb concerning the need to sign the Initiation Act were ignored.

315. On 14 April 2008, the Revocation Order was issued by MinAmb declaring the "absolute nullity" of the Construction Permit and revoking it "for reason of public order."[123] Claimant alleges that the Revocation Order was a factually baseless, legally flawed and plainly pretextual action to terminate the Brisas Project and deprive Claimant of its investment.

316. Contrary to what was stated in the Revocation Order, Claimant says there was no "uncontrolled mining" by a "large number of miners" at the Brisas Project, as attested to by MIBAM's inspection one month before the Revocation Order was issued.[124] Nor was Claimant going to engage

[121] Witness Statement of Mr Rivero (hereinafter "**Rivero I**") dated 23 September 2010, para. 105.

[122] Letter from Gold Reserve to President Chávez dated 19 November 2007 (C-502).

[123] MinAmb Administrative Order No 625, *see* footnote 24.

[124] MIBAM Inspection Report dated 11 March 2008 (C-78).

"irrational mining practices", the operating and environmental plan having been thoroughly reviewed and approved by the Administration.

317. The Revocation Order had no valid legal basis according to Claimant. The Emergency Decree referred to by the Revocation Order did not prevent MIBAM and MinAmb from granting permits to explore or exploit minerals, as shown by the fact that each Ministry had issued a variety of mining permits during the life of this Decree. In any case, the Emergency Decree had expired nine months prior to the issuance of the Revocation Order, on 26 June 2007. As opined by Professor Brewer-Carías, no circumstances existed regarding the issuance of the Construction Permit justifying a declaration of absolute nullity and further, the declaration of absolute nullity was inconsistent with the "reason of public order" cited as an additional basis for the Revocation Order.[125]

318. Respondent claims that under Articles 91 and 109 of the Organic Law on the Environment, the Revocation Order was lawful because it was "founded" upon the Ministry's authority to revoke annual permits that are contrary to Venezuela's environmental laws and its constitutional obligation to protect the environment, promote a sustainable development and protect the rights of indigenous people.[126] Claimant says this argument is misplaced. First, the Revocation Order does not refer to the Organic Law on the Environment or to any violation of environmental laws and new reasons cannot be added after the Revocation Order had been issued. Second, even if Respondent had revoked the Construction Permit due to a real concern of grave and irremediable environmental damage, it would still be required to compensate Claimant for damages, as opined by Professor Brewer-Carías.[127]

319. The Revocation Order was also unlawful because it was issued without allowing Claimant an opportunity to be heard in advance. Claimant pursued legal avenues in Venezuela to challenge the Order, but eventually waived those rights when initiating this arbitration. Contrary to Respondent's view,[128] Claimant had no option to appeal against MinAmb's failure to sign the Initiation Act since no negative decision had been communicated to Claimant.

[125] Brewer-Carías I, paras. 286 and 315-322.

[126] Counter-Memorial, para. 306.

[127] Reply, para. 321; Brewer-Carías II, para. 192.

[128] Counter-Memorial, para. 667.

320. Claimant contends that the government's motive for revoking the Brisas concession became apparent on 23 May 2008 when Mr Rivero received a portion of a "MIBAM Power Point presentation" from a friend who had contacts at MIBAM. The document records that one of the "GOALS" of the government's action was "to reduce the presence of transnational monopoly capital in gold and diamond exploitation: American companies (Hecla), Canadian companies (Cristalex and Gold Reserve)". It also states that "IMMEDIATE ACTIONS" include the "Suspension of the environmental permits granted to the companies Cristalex and Gold Reserve, for the exploitation of the Las Cristinas mines."[129]

321. Subsequent thereto, Claimant continued to be presented with irrational propositions regarding the Brisas Project, such as Vice-Minister García's unfeasible proposal that minerals be mined underground rather than through open-pits. The open-pit operating plan and associated environmental and social impact assessment had been previously approved by MIBAM and MinAmb in the Brisas Project Feasibility Study and V-ESIA, respectively.

322. Starting in June 2008, statements made by MinAmb,[130] MIBAM[131] and President Chávez no longer expressed environmental concerns, but rather the political objective to recover gold mines to the State.[132] This series of public announcements culminated with President Chávez "Annual Message to the Nation" on 13 January 2009, which confirmed the government's intention "to exploit and control the gold fields Las Cristinas this year, one of the largest gold fields in the Americas… estimated to hold approximately 35.2 million gold ounces…"[133]

323. The reasons why the government had terminated the Brisas Project by revoking the Construction Permit had therefore become clear to Claimant in the light of these public announcements and statements. Claimant contends that subsequent government actions directed at the Brisas Project were equally arbitrary and unlawful.

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[129] E-mail from [name redacted] to ejrivero@gmail.com dated 23 May 2008, with attachment (C-911).

[130] *"Environmental Minister says Venezuela is asserting National Interest in Mining Sector"*, Associated Press, 21 June 2008 (C-687).

[131] *"Venezuela Offers Russian Big Gold Projects"*, Reuters, 6 November 2008 (C-690).

[132] These various public announcements and statements shall be referred to later in this Award. *See infra* para. 580.

[133] The referenced "35.2 million gold ounces reflects the approximate combined gold resources of Las Cristinas and Brisas Projects" (Memorial, para. 178).

324. According to Article 25 of the 1999 Mining Law, which was applicable in this case, the requested extension of the Brisas Concession was tacitly granted by application of the positive administrative silence due to MIBAM's failure to notify the concessionaire that it had been denied the extension within the following 6 months.[134]

325. Once the concession extension was granted by a "tacit administrative act", Respondent could not revoke the grant of the extension since the individual rights created by such act could only be revoked in circumstances of absolute nullity and in accordance with a proper administrative procedure providing Gold Reserve any due process in connection with such revocation.[135]

Respondent's Position

326. The Brisas Concession had been granted on 18 April 1988 to the Brisas Company for a term of twenty years, with the option of requesting a ten-year renewal under the 1945 Mining Law. Claimant's Venezuelan subsidiary, Gold Reserve de Venezuela, acquired the rights to the Brisas Concession in November 1992, when it acquired the Brisas Company. Pursuant to the Brisas Mining Title, Claimant undertook a number of obligations (Special Advantages). Respondent states Claimant utterly failed to comply with these obligations.

327. Thus, in breach of the Special Advantage No. 7, which required the concessionaire to begin exploiting within three years of the publication of the Mining Title in the *Gaceta Oficial*, Claimant's exploration program lasted more than five years. During a five-year period through 1998, Claimant was granted yearly AARN's to complete the exploration program. The latter was completed in early 1999.[136]

328. According to Respondent, Claimant was in no hurry to start exploiting the Brisas Concession since it took the company three years from the date of receipt of MinAmb's observations to finalize the necessary EIA, which was done in October 1998, ten years after the granting of the concession.[137] MinAmb only partially approved the EIA in October 1999.[138]

[134] Reply, para. 336.

[135] *Ibid*. paras. 343-344.

[136] 1999 Brisas Annual Report and Inventory, Sect. 4.1, pp.28-29 (C-349).

[137] Environmental Impact Study, Brisas del Cuyuni Concession, Vols. I-III dated 14 October 1998 (C-136).

329. From 1999, Claimant focused on the new so-called "Brisas Project", invoking the lack of environmental permits on other parcels adjacent to the Brisas Concession as preventing them from going forward with the exploitation of the Brisas Concession. Respondent recalls that this situation was worrisome for MIBAM whose Technical Evaluation Division issued a Memorandum to the *Director de Fiscalización y Control Minero* on 1 July 2005 suggesting an inspection of the concession area and mentioning that delays by MinAmb in issuing the necessary permits, as alleged by Claimant as the reason for their delay, do not interrupt the time period for beginning exploitation under the mining law.

330. On 29 July 2005, Claimant submitted the V-ESIA,[139] requesting the issuance of an AARN "for the infrastructure construction stage and exploitation of gold and copper for the Brisas Project."[140] The study was partially approved by MinAmb on 9 February 2007.[141]

331. On 27 March 2007, MinAmb granted Claimant an AARN authorising the construction of infrastructure and services for Phase I of its proposed "Brisas Project" (known as Phase I Permit).[142] The permit stated that it did not authorize Claimant to affect natural resources for exploration or exploitation of minerals. It also specified that Claimant would need an *Acta de Inicio* to be signed before it commenced the permitted activities. In exercise of its discretion, Respondent says the *Acta de Inicio* was never signed by MinAmb. On 14 April 2008, MinAmb annulled the Phase I Permit due to serious concerns regarding its potential environmental impact.[143]

332. Contrary to what is stated by Claimant,[144] Respondent contends the Phase I Permit was extremely limited and significant work remained before MinAmb could determine whether to authorize the Brisas Project development. Such authorization was in no way guaranteed since

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[138] MARN Official Letter No. 77-01-45-617/99 of 28 October 1999 (C-621) reserving the issuance of the relevant AARN to the environmental evaluation of the other areas of the extended project.

[139] V-ESIA (C-178); *see also* Claimant's letter to MIBAM of 29 July 2005 submitting the V-ESIA (C-433).

[140] Letter from Gold Reserve to MARN (now MinAmb) dated 29 July 2005 (C-431); Letter from Gold Reserve to MARN (now MinAmb) dated 29 July 2005 (C-432).

[141] MinAmb Official Letter No. 010303-527 dated 9 February 2007 (C-252).

[142] MARN (now MinAmb) Official Letter No. 010303-1080 dated 27 March 2007 (C-44).

[143] MinAmb Administrative Order No. 625 dated 14 April 2008 (C-121).

[144] Memorial, para. 63.

MinAmb had identified a number of significant environmental concerns during its review of the project. Additional environmental permits also depended upon the results of the EAE to be conducted based on Claimant's cooperation with the CVG and Crystallex to comply with the Ministry's requirements to minimize the cumulative impact of the neighbouring projects.

333. From the very beginning of the process, Respondent states that MinAmb had grave concerns about the Brisas Project, mainly due to the fact that it was to be located in an ecologically and culturally sensitive area. The concerns related in particular to water resources management (including the Acid Rock Drainage and Metal Leading problem), biodiversity protection (regarding in particular the massive land clearing to construct the mine and associated infrastructure), the socio-economic impacts (regarding in particular the protection of indigenous peoples' rights), the Environmental Management Plan and the mine closure.

334. Regarding any and all such concerns, Respondent found Claimant's V-ESIA of the Brisas Project 2005 and other documents to be deficient due to the failure to analyze critical issues, as noted by Respondent's technical experts SRK.

335. Due to the tremendous size, scope and predicted adverse impacts of the Brisas Project, Respondent observes that MinAmb's approach was deliberately very cautious, as required under Venezuelan law. In addition, MinAmb had grave concerns about the cumulative effects of the project when considered in the context of other mining projects in the immediate proximity, specifically another massive open-pit gold mine proposed by Crystallex's Las Cristinas project, immediately to the north of the Brisas Concession. This had led MinAmb to notify Claimant, on 31 July 2006, of the need to conduct EAE, the result of which would be used to determine whether to grant the requested authorization.[145]

336. Claimant's response at the time was to minimize the Ministry's requirements asserting, on 27 October 2006,[146] that it had complied with them despite the fact that on such a date no joint studies had been completed by the two companies.

[145] MinAmb Official Letter No. 2353 dated 31 July 2006 (C-455).

[146] Letter from Gold Reserve to MinAmb dated 27 October 2006 (C-459).

337. In a meeting held on 22 December 2006, and in subsequent letters sent to both companies that same month, MinAmb's requirements were specified.[147] As of April 2008, Respondent submits that Claimant had not complied with those requirements.

338. Respondent notes that prior to commencing even the initial construction and site preparation activities authorized in the Phase I Permit, Claimant had to satisfy a number of permit conditions, one of which was to obtain MinAmb's signature of the Initiation Act. Contrary to Claimant's contention, Respondent states that the Initiation Act was not a "simple administrative formality". Like any other permit condition, the Initiation Act was a valid exercise of ministerial authority so that MinAmb was not compelled to sign it. No less than twelve letters were sent by Claimant to MinAmb and to President Chávez as a part of an intense lobbying campaign to obtain the signature of the Initiation Act. As of April 2008, Respondent asserts that it was Claimant's own delays that were responsible for slowing the Brisas Project down.

339. Following the issuance of the Phase I Permit in March 2007, MinAmb continued to consider the subsequent phases of the Brisas Project, growing increasingly concerned about the environmental impacts that those phases would generate. As a result of these concerns, consistent with its legal obligation to protect the environment, MinAmb annulled the permit on 14 April 2008.[148] In addition to the fundamental environmental concerns, Respondent notes that Claimant had failed to adequately address impacts to indigenous people and as of April 2008 had not completed an environmental study that was satisfactory to MinAmb nor complied with the Ministry's requirements to study with Crystallex cumulative impacts, to develop joint infrastructure plans or to contribute to the EAE.

340. Claimant alleges that certain press statements made by MinAmb subsequent to the revocation of Phase I Permit suggest an improper motivation of such revocation. According to Respondent, these statements have no weight since they do not represent the official position of the Ministry or the Venezuelan Government. Gold Reserve's president himself, Douglas Belanger, cautioned its investors in that regard not to consider "rumors" reported in the press.[149]

[147] MEM (now MIBAM) Memo No. DFCM-349 dated 12 August 2003 (C-423); MARN (now MinAmb) Official Letter No. 01-00-19-05-486/2004 dated 26 July 2004 (C-50); Minutes of Meeting between MinAmb, Gold Reserve, and CVG and List of Attendees dated 22 December 2006 (C-464).

[148] MinAmb Administrative Order No. 625 of 14 April 2008 (C-121).

[149] Final Transcript, GRZ-Q1 2008 Gold Reserve Earnings Conference Call of 17 June 2008 (R-57).

341. According to Respondent, Phase I Permit was revoked pursuant to MinAmb's statutory authority to annul permits that are contrary to Venezuelan law and its constitutional obligations to protect the environment, promote sustainable development and protect the rights of indigenous people. Based on the significant environmental and socio-cultural risks that were at stake, MinAmb determined that Claimant was not entitled to any further development authorization.

342. Respondent's position is that sixteen years after the Brisas Concession was granted, Claimant was yet to exploit the parcel as required by the Mining Title. MIBAM refused to extend the Brisas Concession by the MIBAM Resolution dated 25 May 2009.[150] The decision was based on a series of investigations and analysis reporting on Claimant's non-compliance with its concessionary obligations, in particular the obligation to exploit the Brisas Concession. Due to such non-compliance, although Claimant had submitted a timely request for extension it could not benefit from the *silencio administrativo positivo* under Article 25 of the 1999 Mining Law so that the concession's term could not be extended. Respondent observes that only concessionaires that are "solvent" are entitled to request an extension according to MIBAM.[151]

343. Respondent maintains that MIBAM's refusal to extend the Brisas Concession was in accordance with Venezuelan law. Contrary to the allegations of Claimant's expert, Professor Ortiz-Alvarez, a concessionaire has no automatic right to the extension of its mining interest under the law, Venezuela having broad discretion to administering mining concession, as explained by Respondent's expert, Professor Iribarren.[152] There was no need to provide Claimant with any notice regarding the expiry of the Brisas Concession when it came to the end of its term on 18 April 2008.

344. Accordingly, on 4 July 2008 the *Dirección de Fiscalización* issued to Claimant tax payment forms requesting payment of taxes through 18 April 2008. When the extension request was discovered, it was noted that contrary to Claimant's normal practice, no copies of such request had been filed to MinAmb in its monthly, quarterly and annual reports. Following issuance of the tax forms, Claimant filed a *recurso de reconsideración* on 23 October 2008, requesting the office to correct the tax payment forms to provide for tax payment through 30 June 2008 rather than 18

[150] MIBAM Resolution dated 25 May 2009 (C-91).

[151] Rejoinder, para. 151.

[152] Iribarren I, para. 22.

April 2008, considering that the concession had been extended by operation of *silencio administrativo positivo* under Article 25 of the 1999 Mining Law.[153] Claimant was informed by the *Dirección de Fiscalización* on 23 December 2008 that no new tax forms would be issued, and that the decision regarding Claimant's extension request was MIBAM's responsibility.[154]

345. A *recurso jerárquico* was filed by Claimant on 9 February 2009 against the decision of the *Dirección de Fiscalización*. The *recurso* was denied by MIBAM by resolution of 29 June 2009 arguing that the *Dirección de Fiscalización* had acted appropriately in the absence of any act granting the extension of the concession.[155] Claimant was advised that it could file an appeal to nullify the decision with the *Sala Politico-Administrativa* of the *Tribunal Supremo de Justicia*. However, Claimant did not do so.[156]

346. The MIBAM Resolution dated 25 May 2009 denied Claimant's request to extend the term of the Brisas Concession.[157] Respondent notes that the decision was based on a series of investigations and recommendations by various offices within the Ministry, as recorded by two memoranda of 29 April 2009 emphasizing that Claimant had failed to comply with numerous concessionary obligations, most importantly the requirement to exploit the Brisas Concession.[158] Another memorandum of 12 May 2009 recommended that the requested extension be denied because, although the request had been timely, the concessionaire was not "solvent" at the time of such request.[159]

347. In MIBAM Resolution dated 25 May 2009 which terminated the Brisas Concession, MIBAM explained that although Gold Reserve had submitted a timely request for an extension, *silencio administrativo positivo* could not extend the Brisas Concession's term because Claimant had not been in compliance with its obligations under the Concession at the time of its extension. It stated that only concessionaires that are "solvent" with Venezuela could request an extension of their concession. Claimant was not *solvente* with Venezuela since it had failed to comply with many

[153] Reconsideration appeal filed by Gold Reserve *(Recurso de reconsideración)* of 24 October 2008 (C-99).

[154] Administrative Ruling No. MIBAM-DGFCM-CCF-226 dated 23 December 2008 (C-101).

[155] MIBAM Resolution DM/No. 64 dated 29 June 2009 (C-103).

[156] Counter-Memorial, para. 494.

[157] MIBAM Resolution dated 25 May 2009 (C-91).

[158] MIBAM Memorandum No. LC-034-09 dated 29 April 2009 (C-840); MIBAM Memorandum No. CSCM-049 dated 29 April 2009 (C-841).

[159] MIBAM Memorandum No. DGCM-094-09 dated 12 May 2009 (C-735).

obligations under the concession and the Mining Title, specifically Special Advantages Nos. 5, 6, 7, 8, 9, 11, 12, 13 and 14.

348. Under the Special Advantage No. 6, Claimant was required to use the Brisas Concession for exploitation in gold within the initial term of the concession. Respondent contests Claimant's expert's view that the term "exploitation" under Venezuelan law means not only the physical extraction of minerals but also performing all activities "necessary in order to extract minerals, with the unequivocal intention of economically exploiting the concession and in proportion to the nature of the substance and the magnitude of the deposit."[160] According to Respondent's expert, Professor Iribarren, there is clearly a difference between exploration and exploitation so that the mine is not in exploitation when only exploratory activities have been done.[161] Respondent notes that this interpretation was shared by Claimant which in 2003 requested that MIBAM count the activities related to the extraction of minerals from the moment when the environmental authorizations are granted.[162] This request was denied by MIBAM.

349. Claimant argues that it cannot be blamed for not complying with its obligation to exploit the Brisas Concession since MinAmb, although approving its environmental study, failed to grant the necessary authorization to exploit the concession.[163] Respondent asserts that this is disingenuous, since Claimant planned to affect twelve other parcels in conjunction with its mining of the Brisas Concession, as shown by the V-ESIA it submitted in July 2005. It was appropriate for MinAmb to seek to understand Claimant's plans for each of these concessions in order to evaluate the effects of these activities on the environment. In any case, Claimant received numerous environmental permits that it never fully utilized.

350. Respondent contends that, under the Special Advantage No. 7, Claimant was required to begin exploitation within three years of the publication of the Brisas Mining Title in the *Gaceta Oficial*, an obligation that was violated by Claimant. Respondent rejects Claimant's argument that it did not violate its obligation because three years had already passed when it obtained the Brisas Concession. According to Respondent, Claimant knowingly took a risk in purchasing the

[160] Brewer-Carías I, para. 180.

[161] Iribarren I, para. 40.

[162] Letter from Gold Reserve to MEM (now MIBAM) dated 3 September 2003 (C- 424).

[163] Memorial, para. 209.

concession and cannot now say that MIBAM acted unlawfully for holding the concessionaire to its obligations.

351. MIBAM found Claimant to be in violation also of the Special Advantage No. 8 requiring the concessionaire to manufacture or refine extracted minerals in Venezuela. Respondent does not accept Claimant's allegation that its plan for future production, as laid out in its feasibility study, evidenced its plans to manufacture or refine gold in Venezuela. As explained by Respondent's expert Professor Iribarren, this obligation had in any case to be fulfilled not later than at the end of the legal term for the commencement of exploitation.[164]

352. According to the MIBAM Resolution dated 25 May 2009, Claimant was also in breach of its obligation under the Special Advantage No. 9 by not transferring technology to the mining sector and to the country. The funding of conferences and meetings, as alleged by Claimant, is not sufficient to meet the technology transfer obligation according to Respondent.

353. Under the Special Advantage No. 12, Claimant had the obligation to carry out extraction activities and to market extracted minerals, as well as to transfer twenty percent of the companies' shares to a State company. Respondent states that Claimant failed to comply with this obligation by never establishing a company for the extraction or marketing of minerals.

354. Claimant also failed to pay exploitation taxes as required under the Special Advantage No. 5. Claimant claims to have fulfilled this obligation by paying these taxes on the limited quantity of gold extracted. As in the case of the Special Advantage No. 8, Claimant's failure to comply with one special advantage did not excuse it from complying with other special advantages linked to exploitation.

355. In addition, Claimant was found in violation of the Special Advantage No. 11 requiring it to take measures to protect the environment, the Special Advantage No. 13 requiring it to support Venezuela interns and the Special Advantage No. 14 requiring that it maintains a performance bond. Claimant has elaborated on how it fulfilled these obligations, but Respondent says it failed to challenge the Resolution within the Venezuela administrative proceedings. In any case, according

[164] Iribarren I, para. 143.

to Respondent, the failure to comply with any one of the special advantages could result in the termination of a concession.

356. Respondent maintains that Claimant's breaches cannot be cured by the "Certifications of Compliance" it received from MIBAM's technical officials. The individuals who issued them, the Fiscal Inspectors of Las Claritas, being among the lowest ranked officials, lacked the authority to grant such certifications under the 1999 Mining Law or the General Regulations of the Mining Law. Article 88 of the Mining Law makes no mention of the duties and authority of fiscal inspectors, stating simply that the National Executive through MIBAM shall oversee, monitor and control the activities of any person regarding issues governed by the law and its regulations. As mentioned by Respondent's expert Professor Iribarren, these monitoring and supervisory obligations are exercised through the Ministry's distinct internal divisions, offices, such as *Inspectorias Tecnicas Regionales* or *Inspectorias Fiscales* having only, respectively, technical or tax-related competence.[165]

357. Respondent asserts that Article 96.1 of the General Regulations of the Mining Law also fails to support Claimant's position, since it addresses neither fiscal inspectors nor the authority of any entity to issue certificates of *solvencia* with Venezuela. Article 97 of the same General Regulations of the Mining Law nowhere provides for the authority of fiscal inspectors to issue such certificates as part of the detailed duties it describes for such inspectors. Without an express delegation of authority a technical functionary could not pronounce a concessionaire's *solvencia* with Venezuela.

358. According to Respondent, the certificate of *solvencia* attached to Claimant's request for extension of 17 October 2007 reflects the limited capacity of the fiscal inspector signing it since it declares Claimant "solvent with this office", not with Venezuela. This was confirmed by the person who signed it, Mr Carpio, explaining that requesting or receiving certificates of *solvencia* "was not a common practice."[166]

359. Claimant alleges that its due process rights under Venezuelan law were violated.[167] Respondent replies that, throughout the process that denied the extension request to renew the Brisas

[165] Iribarren I, paras. 146-148.

[166] Witness Statement of Mr Carpio (hereinafter "**Carpio I**") dated 11 April 2011, paras. 6-8.

[167] Memorial, para. 203

Concession, MIBAM accorded Claimant due process of law. A *recurso de reconsideración* was opened to Claimant following MIBAM's Resolution dated 25 May 2009, which terminated the Brisas Concession. However, it chose not to exercise this right.[168]

360. Respondent maintains that the Brisas Concession was recovered in a manner consistent with Venezuelan law, specifically Article 102 of the 1999 Mining Law as well as the Special Advantage No. 15 under the Brisas Mining Title. Recovering of assets was peacefully executed almost five months after MIBAM's Resolution dated 25 May 2009. An *Acta de Recepción* was signed, a copy of which was given to Claimant's representatives. The recovery of assets was based on an inventory and only assets belonging to Brisas were recovered. As confirmed by Mr Rivero, president of Gold Reserve Venezuela, C.A., he was informed that the recovering of the Brisas Concession assets was not intended to affect Claimant's right to the Unicornio Concession assets.[169]

The Tribunal's Analysis

361. It is agreed by the Parties that the Brisas Concession was granted on 18 April 1988 for an initial term of twenty years and that it was due to expire on 18 April 2008, but could be extended for two additional ten-year terms if so requested at least six months before the expiration date.

362. Claimant's request for extension was filed on 17 October 2007.[170] It was therefore timely. It was accompanied by the most recent certificate issued by MIBAM stating that the company "has fully complied with the provisions of the above [Mining] Law, its Regulations and the Mining Titles and is, therefore, declared Solvent" as of 14 September 2007.[171]

363. MIBAM acknowledged the timely filing of the application for extension in the MIBAM Resolution dated 25 May 2009 terminating the Brisas Concession.[172] It disputed the validity and effects of the certificates of compliance and, specifically, Claimant's compliance with Special

[168] Counter-Memorial, para. 496.

[169] Rivero I, para. 187.

[170] Application for Extension of Alluvial Concession dated 17 October 2007 (C-494).

[171] MIBAM Official Letter No. LC-111-07 dated 14 September 2007 (C-77), attached to C-494.

[172] MIBAM Resolution dated 25 May 2009 (C-91).

Advantages Nos. 5-9 and 11-14 of the Brisas Mining Title.[173] It declared the Brisas Concession terminated and that the company was not "solvent" with the obligations as described in two 29 April 2009 and one 12 May 2009 memoranda.[174] Previously, on 18 March 2009, MIBAM had ordered the "immediate suspension" of all mining activities of the Brisas Concession, the preparation of inventories and the safekeeping of the concession assets, which were to revert to the State.[175]

Request for Extension – Positive Administrative Silence

364. Prior to examining whether the relevant Special Advantages had been complied with, the Tribunal will examine the legal effects of the timely filed request for extension, in light of the absence of objection by MIBAM within six months thereafter.

365. As held by the Venezuelan Supreme Court of Justice in its decision of 2 November 2011,[176] requests for extension of mining titles, including mining titles issued prior to the 1999 Mining Law (like the Brisas Concession), are governed by Article 25 of the 1999 Mining Law and not by the 1945 Mining Law, as asserted by Respondent.[177] The Resolution terminating the Brisas Concession makes explicit reference to Article 25 as applicable to Claimant's extension request.[178]

366. Article 25 of the 1999 Mining Law states the following:

> "The concessions granted by the National Executive authorities in accordance with this law shall only be for exploration and subsequent exploitation. Their term shall not be longer than twenty (20) years from the date of publication of the Exploitation Certificate in the Official Gazette. However, such term may be extended for successive terms of no more than ten (10) years each, if requested by the concession holder within three (3) years before expiration of the initial term, and if approved by the Ministry of Energy and Mines, However, the extensions may never exceed the original term granted in the concession.
> SINGLE PARAGRAPH. The concession holder may only request an extension after complying with all its obligations to the Republic, and such

[173] *Ibid.*

[174] C-840 and C-841 as to the 29 April 2009 memoranda and C-735 as to the 12 May 2009 memorandum.

[175] MIBAM Act No. MIBAM-DGFCM-ITRG No. 1-IFMLC-001-09 dated 18 March 2009 (C-94).

[176] Copy of the Venezuelan Supreme Court decision of 2 November 2011 was filed by Claimant by letter of 1 February 2012, such filing having been accepted by the Tribunal (Transcript, February 2012, Day 1, 222:4-17).

[177] Counter-Memorial, para. 585.

[178] MIBAM Resolution dated 25 May 2009 (C-91, 4th whereas).

request shall be submitted within the above three-year term. However, the request shall be submitted six (6) months before expiration of the initial term, at the latest, and the Ministry shall make a decision within six (6) months. If no notice is given, this shall mean that the extension has been granted." [179]

367. Under Article 25 of the 1999 Mining Law, therefore, an extension request will be considered granted where it is applied for in a timely manner by a "solvent" concessionaire and the authority fails to notify the concessionaire that the request has been denied within six months prior to the expiration of the original concession term based on the principle of positive administrative silence (*silencio administrativo positivo*). Respondent recognizes that the 1999 Mining Law "confers a positive effect to the Ministry's administrative silence that was not present in either the 1945 Mining Law or in the relevant Regulations."[180]

368. In the absence of any notice by MIBAM to the concessionaire within the six-month term that its request had been denied for lack of "solvency" or for any other reason, the extension must be deemed as granted by a "tacit administrative act" under Article 25 of the 1999 Mining Law, with "the same nature and … governed by the same rules" as any other administrative acts."[181]

369. MIBAM did not give Claimant any notice in the six months after the extension request was filed. The Administration was consequently provided with the requisite time to investigate Claimant's solvency and it is to be assumed that it did not discover during that time any reason not to extend the Concession. Consequently, this Tribunal finds that the extension of the Brisas Concession was granted according to the principle of positive administrative silence.

370. The Tribunal shall now consider whether it is possible for the extension so granted to later be revoked by the Administration. In the opinion of Respondent's expert, Professor Iribarren,

[179] The English translation of Article 25 was provided by Claimant (C-2). The Spanish text of the Article is as follows:

"Las concesiones que otorgue el Ejecutivo Nacional conforme a esta Ley serán únicamente de exploraciòn y subsiguiente explotación, su duración no excederá de veinte (20) años, contados a partir de la fecha de publicación del Certificado de Explotación en la Gaceta Oficial de la República de Venezuela, pudiendo prorrogarse su duración por períodos sucesivos no mayores de diez (10) años, si así lo solicitase el concesíonario dentro de los tres (3) años anteriores al vencimiento del período inicial y el Ministerio de Energìa y Minas lo considere pertinente, sin que las prórrogas puedan exceder del perìodo original otorgado.

Parágrafo Unico: La solicitud de prórroga solo podrá hacerla el concesionario solvente con la República dentro del perìodo de tres años señalados en este artículo, la cual, en todo caso, deberá formularse antes de los seis (6) meses anteriores al vencimiento del período inicial y el Ministerio deberá decidir dentro del mismo lapso de seis (6) meses; en caso de no haber notificación, se entenderá otorgada la prórroga".

[180] Counter-Memorial, para. 20.

[181] Brewer-Carías II, para. 62; Ortiz II, paras. 225-243.

administrative acts, allegedly granted through positive administrative silence, are revocable according to Venezuelan jurisprudence.[182] In the present case, as opined by Professor Iribarren, even assuming the operation of positive administrative silence, "the action derived from that silence would have been validly revoked by the express response of the government denying the renewal contained in MIBAM act of 25 May 2009."[183]

371. Contrary to Professor Iribarren's opinion, Professor Brewer-Carías opines that "[i]n Venezuelan administrative law … no administrative act creating or declaring rights in favour of its addressee may be considered revocable. On the contrary, every administrative act that creates or declares rights in favour of a beneficiary, regardless of whether the product of an express administrative act or of a tacit administrative act is irrevocable."[184]

372. Regarding an administrative act, Professor Brewer-Carías indicates that it is possible for the Administration to initiate "an administrative procedure to declare its absolute nullity" and reverse the extension, "but in such a case it has to respect the concessionaire's due process rights and specifically the right to be heard and to defense". In the absence of this due process, the revocation would be null and void according to Article 19 of the Organic Law and Administrative Procedure.[185] Initiating this procedure might have been an option for the Administration in order to review the tacit administrative act "to determine whether the granted extension was legitimate or not and whether the legal requirements had been satisfied, granting the beneficiary (*i.e.* the concessionaire) the right to participate to such administrative procedure."[186]

373. The Tribunal agrees with Professor Brewer-Carías that any revocation of an extension previously granted could only be undertaken if the concessionaire's due process rights were observed. It is evident that no such rights were observed in the present case. The manner in which the Revocation Order was dictated has further effects on Venezuela's international obligations as it will be examined in Chapter VII.

Request for Extension - Solvency and Value of Compliance Certificates

[182] Iribarren I, para. 123.

[183] *Ibid.* para. 124

[184] Brewer-Carías II, para. 64

[185] Brewer-Carías I, para. 101 and Brewer-Carías II, para. 66.

[186] Brewer-Carías II, para. 67.

374. The above analysis does not require the Tribunal to determine whether Claimant was "solvent" when it applied for the extension. In the Tribunal's view, the correct interpretation of Article 25 is that the Administration is provided with a six month period in which to verify solvency and to deny the extension should it deem the concessionaire to be insolvent. To hold otherwise would deprive Article 25 of any useful effect and would be contrary to the principle of positive administrative silence embodied in this provision. It would also mean that an extension granted by positive administrative silence could be unwound many years later (with many dollars invested during this period), if it were later discovered that a concessionaire was not solvent at the time of making the request. This cannot be correct. Nonetheless, because it is relevant to the later discussion on violations of the BIT, the Tribunal shall now review the concessionaire's alleged breaches of the 1999 Mining Law and the corresponding Mining Titles.

375. The value of the certificates of compliance as evidence of Claimant's solvency is central to this issue. The certificates of compliance issued by MIBAM during the life of the project, including one month before the requested extension and confirmed one year later,[187] are evidence that the authority had verified Claimant's solvency. Since it has been disputed by Respondent, this point shall be considered hereafter.

376. Pursuant to Article 88 of the 1999 Mining Law, MIBAM is the authority empowered to "oversee, monitor and control the activities carried out by any natural person or legal entity…as regards the issues governed by this law and its regulations". As a consequence of the permanent and continuous process of this supervision of mining activities, the concessionaires have the obligation to file monthly and annual reports before MIBAM about their activities. For its part, MIBAM must verify in a permanent way the compliance by the concessionaires of their duties and obligations, as prescribed in the 1999 Mining Law and its Regulations as well as in the provisions of existing mining titles and mining contracts.

377. In order to demonstrate the compliance with such obligations, the supervising and controlling officials of MIBAM, upon request of the concessionaires, issue "compliance certificates" by which the Administration certifies facts that are within its competence. As generally stated in the certificates, after due verification and control including review of the administrative file and, at

[187] Specifically, in September 2008 (C-79).

times, inspection at the site,[188] the Ministry certifies that the concessionaire has given due compliance to the different clauses of the Mining Titles, the mining contracts,[189] and the provisions of the 1999 Mining Law and its Regulations and declares the same "solvent". These "compliance certificates" are issued by the mining officers empowered to that effect on behalf of MIBAM.[190]

378. Respondent's contention that due to the "lower level" of public officers issuing certificates of compliance the latter may not be given a particular weight[191] is not acceptable. As correctly noted by Claimant's legal expert, the weight of the certificates depends on the power granted to the certifying officers by the competent authority, not by their position within the Administration.[192] Under the 2001 Mining Regulations, the power and duty to "ensure that the holders of mining rights fulfil their obligations under the Mining Law, its regulations and all other applicable provisions" is entrusted to the *Inspectoría Técnica Regional*.[193] Under the Regulations, the *Inspectoría Técnica Regional* shall establish an *Inspectoría Fiscal* to better perform its functions.[194]

379. As indicated by Claimant's legal expert, the *certificados de solvencia* attesting that the concessionaire has complied with its mining duties, "are administrative acts with their own legal effects, issued by empowered public officers, as provided by article 96 of the General Regulation of the Mining Law, enacted pursuant to the general power granted to the Ministry by article 88 of the Law."[195] The power of the *Inspectorias Técnicas Regionales* has been recognized and accepted by "high" level authorities of MIBAM. The General Director confirmed that the "lower level" Inspectors of Mines have the authority to certify Gold Reserve's compliance with its obligations under the Mining Titles and concessions. In its 12 May 2009 memorandum entitled "Decision on

[188] MEM (now MIBAM) Official Letters: No. EC-160-94 dated 29 June 1994 (C-67); No. EC-699-95 dated 20 November 1995 (C-68); No. EC-616-96 dated 25 October 1996 (C-69); No. EC-529-97 dated 19 December 1997 (C-70); No. EC-260-98 dated 4 December 1998 (C-71); No. EC-414-99 dated 14 December 1999 (C-72).

[189] Such as those signed with CVG: *infra* paras. 447 and 470.

[190] As shown, for example, by certificates in exhibits C-63 to C-79 and C-81 to C-84, which refer to the "*controles que debe llevar a cabo el Ministerio de Energia y Minas*". That control and compliance extend to any obligations under the Mining Titles, including the Special Advantages, was confirmed by MIBAM's General Director in his Memorandum dated 12 May 2009 (C-735, C-1321). Reply, para. 251.

[191] Counter-Memorial, paras. 174-175.

[192] Brewer-Carías II, para. 173.

[193] Decree No. 1.234, Official Gazette No. 37.155 dated 9 March 2001, Article 96.1 (C-867).

[194] *Ibid.* Article 96.7

[195] Brewer-Carías II, para. 176.

the extension request of the Brisas del Cuyuni Concession term", the General Director of Mining Concessions explains that "whether or not the request should be granted depends on the inspections and reviews to be conducted by the competent Ministry officers."[196] The General Director then states that the authors of the technical reports of 29 April 2009 are "the officers empowered to inspect and verify concessionaires' compliance with their obligations."[197] In other words, the same office that had until then declared Claimant to be "solvent" determined few months later its "insolvency" as the basis for the termination of the Brisas Concession. This contradiction must be reconciled under Venezuelan administrative law since all such officers are organs of a Ministry and therefore organs of Venezuela, regardless of their level in the public administration organization.

380. It is therefore surprising that one of Respondent's witnesses, Mr Ángel Carpio, gave evidence that when issuing mining compliance certificates he "certified" the compliance of the concessionaire with his office, the *Inspectoría las Claritas*, not with Venezuela.[198] As stated by Claimant's legal expert, "his office, being part of MIBAM, is an organ of Venezuela and the concessionaire owes its duties to Venezuela, not to individual offices of MIBAM."[199]

381. Since the power to issue the certificates of compliance is granted by MIBAM to officers of that Administration entrusted to control the activities subjected to the 1999 Mining Law, the certification relates to the compliance by Claimant with its obligations under the Mining Law and the Mining Title. This is confirmed by the formulation of the last part of most of the certificates, stating that the concessionaire "is solvent" or *solvente por este concepto* or "solvent with the Ministry of Basic Industries and Mining."[200]

382. Regarding certificates of compliance, Claimant's legal expert, Professor Brewer-Carías, opines that:

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[196] MIBAM Memorandum No. DGCM-094-09 dated 12 May 2009 (C-735), p. 3.

[197] *Ibid.*

[198] Carpio I, para. 6.

[199] Brewer-Carías II, para. 176. Documents in the file indicate that Las Claritas Fiscal Inspectorate is part of the Office of the Vice-Minister of Mines-MIBAM (C-1113). As already mentioned (*supra* para. 378), the Fiscal Inspectorate is an office of the *Inspectoría Técnica Regional* which assists the latter in performing the functions of supervising the concessionaire's compliance with its obligations.

[200] Reply, para. 260.

> "in these constant relations between the concessionaires and the Administration, after verifying the compliance of obligations, the supervising authorities issue "compliance certificate" that as aforementioned, are administrative acts of certification. Nonetheless, if after all the day-to-day supervision and control of mining activities, after the filing of subsequent (monthly and annual) reports as to the compliance of obligations, and after issuing successive "compliance certificates", all confirming, both implicitly and explicitly, compliance with the terms of a concession and the applicable legislation, the Administration realizes, contrary to earlier determinations, that in a particular situation listed in Article 98 of the Law, the concessionaire has not fulfilled its obligations and that there is non-compliance, in order to contradict the previous administrative actions, the Administration must be extremely cautious in order to terminate the concession."[201]

383. Commenting on the opinion of Respondent's legal expert, Professor Iribarren, Professor Brewer-Carías adds that "such certificates of compliance, as a written acknowledgment of the verifications undertaken by the *Inspectores regionales* in exercise of their duty to verify and control the concessionaires mining activities are not issued to "invalidate" or supersede any power of any other offices in the Ministry of Mines,"[202] adding that "nor are they to determine in a final, indisputable and irrevocable manner whether or not a concessionaire has met its essential obligations to exploit, and whether it has done so within the specific time frames.[203] However, he further adds "nor can these certifications, once issued, be ignored in any subsequent evaluation of the compliance of the concession in relation to the time periods covered by these certifications."[204] The other legal expert for Claimant, Professor Ortiz-Alvarez, expresses the opinion that "[t]he Administration cannot disregard the previous declarations of solvency without further arguments and new compelling evidence showing a serious or grave situation of breach by the concessionaire and addressing the legitimate expectations created by MIBAM's earlier certifications to the contrary.[205]

384. Respondent's legal expert, Professor Iribarren, opines the following regarding the value of the certificates of compliance (*certificados de solvencia*):

> "The experts Brewer-Carías and Ortiz-Alvarez, as proof of good standing, emphasize the issuance of what they call multiple certificates

[201] Brewer-Carías I, para. 203 (internal references omitted)

[202] Brewer-Carías II, para. 179, mentioning that this "has been wrongly argued by Iribarren".

[203] *Ibid.* adding again that this "is also wrongly asserted by Iribarren".

[204] Brewer-Carías II, para. 179.

[205] Ortiz II, para. 407.

> of good standing issued by officials of the Tax Inspectorate. In this regard, basing myself on the circumstances in which the certificates were issued and their content, I reiterate my opinion that these documents refer to verifications carried out by local officials in relation to compliance with specific activities whose execution had been provided for by the concession holder's own plans, pertaining to the sphere of competence of those officials, and that they cannot take away from the authority of the Ministry of Mines to verify if, throughout the duration of the concession, the concession holder was or was not in good standing in regards to the Republic."[206]

385. The Tribunal notes that the Parties' legal experts appear to agree that under Venezuelan law the certificates of compliance do not deprive MIBAM of the authority to verify and control the concessionaire's mining activities and that they do not determine in a final and irrevocable manner the concessionaire's compliance with essential obligations. However, they cannot be ignored when evaluating the timely compliance of said obligations. The Tribunal accepts this position, and further notes that, with regard to extension requests, the six month period provided to the Administration is for the purpose of finally determining such compliance. As such, the value of the certificates of compliance is in creating a *prima facie* assumption of solvency. If the Administration wishes to terminate a concession or deny an extension on the grounds of insolvency, it must provide clear reasons for doing so within the six month period, and must comply with all due process rights.

Alleged Breaches of Special Advantages

386. Pursuant to the above, MIBAM retained the authority to determine whether Claimant was in compliance with its essential obligations to Venezuela (*solvente con la República*). The Tribunal shall accordingly now examine Claimant's breaches that have been alleged by Respondent as a ground for denying the requested extension and to declare the Brisas Concession terminated on the expiry of the initial term of 20 years, *i.e.* on 18 April 2008. MIBAM's Resolution dated 25 May 2009 indicates that the following Special Advantages had been breached by Claimant, making the latter insolvent before Venezuela: Nos. 5, 6, 7, 8, 9, 11, 12, 13 and 14.[207] They shall be examined in turn.

[206] Iribarren II, para. 55.

[207] MIBAM Resolution dated 25 May 2009 (C-91, 5th Whereas).

387. Special Advantage No. 5. It provides for the payment by the concessionaire, as exploitation tax, the three percent (3%) of the market value in Caracas of the gold refined. Claimant relies on Mr Rivero's statement explaining that, as confirmed by the tax payment forms submitted to MIBAM, taxes were paid on the limited amount of gold extracted by the prior owner and as by-product of Claimant's exploration and development activities.[208] Respondent has not disputed Claimant's statement in that regard. It may be noted that this ground of alleged non-compliance, even if proven, would be disproportionate regarding the sanction of denial of the extension of the term of the Brisas Concession. However, the Tribunal is satisfied that the exploitation tax was regularly paid and that therefore there is no breach of Special Advantage No. 5.

388. Special Advantages No. 6 and No. 7 refer to the exploitation phase generally; Special Advantage No. 8 refers to manufacturing or refining mineral; Special Advantage No. 9 refers to the transfer of mining technology to the mining industry, promotion of connected sectors, personnel training related to the extracting phase of the concession; Special Advantage No. 11 refers to the protection of natural resources as a consequence only of the process of extracting mineral; Special Advantages No. 12 refers to the constitution of a new company for the purpose of mineral extraction, industrialization and commercialization of extracted minerals contemplated as possible during the extraction of minerals; Special Advantages No. 13 refers to the incorporation of two intern students during the exploitation phase; and Special Advantage No. 14 refers to the bond regarding the above-mentioned Special Advantages. Since all these Special Advantages relate to the exploitation phase of the Brisas Concession, it is necessary to determine whether the Brisas Concession was in the exploration or in the exploitation phase at the time the extension of its term was requested.

389. In the post-hearing phase, the Parties have debated whether the Phase I Permit, which was the last permit issued to Claimant before the termination of the Brisas Concession, related to exploitation or to exploration. Respondent has characterized the Phase I Permit as relating to "the construction of infrastructure and services for the exploration phase of the Brisas Project"[209] while

[208] Rivero I, para. 139, enclosing Brisas Exploitation Tax Forms from 1985 to 1997.

[209] Respondent's Post-Hearing Brief, Annex (under Brisas del Cuyuni).

Claimant has contended that, consistent with its request for an "exploitation" AARN,[210] the permit was for exploitation.[211]

390. The language used by Claimant in its various requests for an AARN is different from the operative language of the Phase I Permit. Claimant had requested (*Petitorio*) an "Administrative Authorization for the Affectation of Natural Resources for the Phase of Construction of Infrastructure and Services and for the Phase of Gold and Copper mineral exploitation of the Brisas Project" (*Autorización Administativa para la Afectación de Recursos Naturales para la Etapa de Construcción de Infrastructuras y Servicios y para la Etapa de Explotación del mineral de Oro y Cobre del Proyecto Brisas*),[212] while the Phase I Permit refers to an "Authorization to Affect Natural Resources….for the Infrastructure and Services Construction Phase of the Brisas Project for Exploitation and Processing of Gold and Copper Mineral" (*Autorización...para llevar a cabo la Etapa de Construcción de Infraestructura y Servicios del Proyecto Brisas para la Explotación y Procesamiento de Mineral de Oro y Cobre*),[213] where the word *Explotación* is not mentioned as the object of the *Etapa* (as in Claimant's request) but rather as the object of the *Proyecto Brisas*.[214] The same language of the Phase I Permit is used by MinAmb's decision revoking the Permit.[215]

391. The different language used by MinAmb when granting the Phase I Permit was likely due to the agreement reached with Claimant at the meeting of 13 February 2007. As recorded by the minutes of that meeting, Claimant had accepted the suggestion that the Project be divided into two phases: "*Fase I: Ejecución de Obras Preliminares y Fase II: Construcción de Infraestructura y Explotación*".[216] The Tribunal is of the view that the division of exploitation into two phases[217]

[210] In correspondence with MARN (now MinAmb) dated 29 July 2005 (C-431), 24 January 2007 (C-635) and 30 January 2007 (C- 605).

[211] Claimant's Response to Respondent's Comments on Second Post-Hearing Brief, paras. 6-8.

[212] Claimant's letters to MARN (now MinAmb) dated 29 July 2005 (C-431), 30 January 2007 (C-605) and 24 January 2007 (C-635).

[213] Phase I Permit (R-44, p. 3).

[214] This point is made by Respondent's Comments on Claimant's Second Post-Hearing Submission of 8 June 2012, at footnote 16.

[215] MinAmb Administrative Order No. 625 dated 14 April 2008 (C-121), p. 3, under *Resuelve*.

[216] MinAmb Minutes of Meeting dated 13 February 2007 (C-133), point 6, top of page 2 of the Spanish text and page 1 of the English text.

[217] Witness Statement of Mr Romero dated 27 January 2011 (hereinafter "**Romero I**"), when dealing with the Phase I Permit, refers to the decision to divide the exploitation phase of the project into two phases, as had been agreed at the meeting at MinAmb on 13 February 2007 which he attended. The decision was made because, "the project did not comply with all the Ministry's requirements to authorize the mining exploitation activities" (para. 6). He adds

had been accepted by Claimant to accommodate MinAmb's environmental concerns in view of the issuance of the AARN it had repeatedly requested.

392. However, the decision to divide construction and exploitation into two phases is not determinative of whether Claimant had commenced the exploitation phase under the 1999 Mining Law. Nor is the language used in the Phase I Permit determinative of this issue. For this purpose, the relevant reference point is the definition of "exploitation" provided in the 1999 Mining Law itself. It is to this definition that the Tribunal now turns for evaluating the fulfilment by the concessionaire of its obligations under such Law and the Brisas Mining Title.

393. Article 58 of the 1999 Mining Law states:

> "It is understood that a concession is considered in exploitation when its substances are being extracted from the mines, or when the necessary efforts are made for the unequivocal purpose of obtaining some economic profit from such substances based on their nature and the dimension of the deposit."[218]

394. Prof Brewer-Carías explains the effect of Article 58 as follows:

> "Exploitation, therefore, is being undertaken not only when the concessionaire is actually digging out minerals from the selected parcels, but also according to Article 58 of the 1999 Mines Law – as it was under the 1945 Mines Law regime (Article 24) – when the concessionaire is doing what is necessary in order to extract minerals, with the unequivocal intention of economically exploiting the concession and in proportion to the nature of the substance and the magnitude of the deposit. Consequently, a concession can be considered as being in exploitation without minerals actually being extracted…"[219]

395. Respondent translates the definition of "exploitation" in the 1945 Mining Law (which it says also reflects the 1999 Mining Law) as "the concession is in exploitation when the substances to which the present Law refers are being extracted from it, or when doing what is necessary to achieve its extraction through the construction works that according to the case are appropriate to this end, and provided that it is worked by at least five labourers per day …"[220]

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that the Permit granted to Gold Reserve on 27 March 2007 "only authorized the company to carry out preliminary activities to prepare for the mining [*explotación*, in the Spanish original] itself" (para. 7).

[218] Translation of Mining Law provided by Claimant (C-2).

[219] Brewer-Carías I, para. 180.

[220] Counter-Memorial, para. 29.

396. The Tribunal notes that in Respondent's view, even if according to both the 1945 and 1999 Mining Laws the concept of "exploitation" is extended to preparatory activities, such activities should be understood as "material" activities unequivocally aimed at extraction.[221] In order to support the "materiality" aspect of the activity, Respondent offers a translation of Article 24 of the 1945 Mining Law (as set out in the previous paragraph) where the reference to "works" that are necessary to achieve exploitation is qualified by adding the word "construction" before "works" in order to "more accurately emphasize" the intent of the law.[222] The Tribunal is not persuaded that "materiality", whatever its precise meaning, should be added to qualify the concept of "exploitation", considering also that the parallel text of Article 58 of the 1999 Mining Law, as provided by Respondent at the hearing,[223] which applies to this case, contains an even more open language when defining "exploitation". However, it appears that all experts accept that exploitation does not require actual extraction of minerals and that construction of infrastructure required for extraction minerals would be considered part of the exploitation phase. As such, given that the Phase I Permit was clearly for preliminary construction, the Tribunal finds that the Brisas Project was in the exploitation phase from March 2007.

397. The fact that Claimant had completed its exploration phase by March 2007 (*i.e.*, before it filed a request for the extension of the Brisas Concession) is confirmed by Respondent itself and by documents in the file. According to Respondent, "[t]he Company finally completed its exploration program for the Brisas Concession in early 1999."[224] After that, further exploration permits were issued which appear to relate to the Unicornio Concession. In December 2005, a final one-year extension of the exploration AARN was granted by MIBAM.[225] This is consistent with the exploration phase of the Brisas Project (*i.e.*, both the Brisas and Unicornio Concessions) coming to an end by the beginning of 2007.

398. Accordingly, as stated above, the Tribunal finds that Claimant had completed its exploration phase and that the Phase I Permit (concerning construction works such as building access road, clearing sites for infrastructure, installing wells to pump water into sediment points and the like),

[221] *Ibid.* with reference to the legal opinion of Iribarren.

[222] Counter-Memorial, at footnote 43, with reference to the text of the 1945 Mining Law (C-1).

[223] Respondent's February 2012 Opening Presentation.

[224] Counter-Memorial, para. 118.

[225] *See* Respondent's Post-Hearing Brief, at Annex (under Brisas del Cuyuni).

falls within the definition of "exploitation" according to Article 58 of the 1999 Mining Law, as being "activities necessary in order to extract minerals, with the unequivocal intention of economically exploiting the concession."[226] In this sense, no distinction is necessary between Phase I and Phase II construction – both form part of the exploitation of the Concessions.

399. Having concluded that Claimant had already commenced exploitation when it requested the extension of the Brisas Concession, it is to be examined whether Claimant was in compliance with Special Advantages Nos. 6, 7 and 11 as relating to obligations to be fulfilled in view of commencing the phase of exploitation activities. Special Advantages Nos. 8, 9, 12, 13 and 14 shall not be considered as they all relate to the extraction of minerals subsequent to the construction works.[227]

400. It may be worth recalling in this context that, in a letter to MIBAM, Claimant had alleged that the lack of requested environmental AARNs from MinAmb for the alluvial gold exploitation activities in the Brisas Concession constituted *force majeure* and that this circumstance justified the request to MIBAM that the time limits within which mineral extraction activities must begin under the 1999 Mining Law should run from the date of the granting of the AARN for exploitation.[228] Failing any reply, Claimant wrote again to MIBAM on 3 September 2003.[229] In its reply of 14 October 2003, MIBAM denied the request by stating the following:

> "Please note that after analyzing the requests made in this regard by your principal, the Office of the General Director of Mines has determined that the Authorizations to Affect Natural Resources are subject to the condition that the company must first obtain the Authorizations for Territorial Occupation of the additional areas proposed by your principal for the expansion of the Brisas del Cuyuni Project in accordance with the recommendations issued by the State Director's Office, Bolivar Region, by means of Official Letter No. 77-01-45-045/99 dated January 28, 1999 on the request that the tailing and slag ponds from the exploitation be located outside the Brisas del

[226] This is consistent with Brewer-Carías' approach that: "Article 58 of the Mining Law plainly contemplates that once the exploration phase has ended, the subsequent activities required to later start extracting minerals, all of which are necessary for doing so, are considered as exploitation of the concession, comprising, e.g., the preparation and drafting of the exploitation project, the completion of the feasibility studies, the construction of the infrastructure and access to the field, and the buildings needed for the management of the exploitation process and services, as well as the activities devoted to request all the environmental authorizations required for the extraction of substance process": Brewer-Carías II, para. 145.

[227] All these Special Advantages are held by MIBAM Resolution dated 25 May 2009 (C-91, 5th whereas) to have been breached by Claimant: *supra* para. 386.

[228] Claimant's letter to MEM (now MIBAM) dated 21 February 2003 (C-420), regarding the Brisas Concession; (C-576), regarding the Unicornio Concession.

[229] Letter from Gold Reserve to MEM (now MIBAM) dated 3 September 2003 (C-424).

> Cuyuni concession area. Therefore, and as the initiation of the exploitation activities in the Brisas del Cuyuni and Unicornio concessions depend [sic] on the granting of environmental permits by a different authority, I urge you to continue taking all necessary measures to obtain the Authorizations for Territorial Occupation for the areas where the tailing and slag ponds will be placed in order to begin insofar as possible, the exploitation activities in the abovementioned concession within the terms prescribed in the Mining Law and its Regulations."[230]

401. Turning now to Special Advantages Nos. 6 and 7, the Tribunal recalls that Special Advantage No. 6 of the Mining Title states:

> "Use the twenty (20) year period for exploitation of the concession, beginning on the date of publication of the respective Title in the Official Gazette of the Republic of Venezuela, with the option of extending the term of the Title at the concessionaire's request submitted within a period of three (3) months prior to the expiration of the original period and if the Ministry believes it is appropriate, without exceeding a maximum of forty (40) years in accordance with the guidelines of Article 188 of the Mining Law for this type of concession."

402. Special Advantage No. 7 of the Mining Title states:

> "Begin exploitation within a period of three (3) years following the date of publication of the respective Title in the Official Gazette of the Republic of Venezuela. For purposes of compliance with this special advantage, the commencement of exploitation is understood as all of the activities performed for the purposes of developing the mining project pursuant to the development chronogram approved by the Ministry in accordance with the terms set forth in the First Special Advantage."

403. Claimant was therefore required under Venezuelan law to commence exploitation within three years of the publication of the Brisas Mining Title and that; consequently, the purpose of the 20 year term of the Concession was for "exploitation". While Claimant has explained that it diligently engaged in a wide range of preparatory activities necessary to develop the Brisas Concession for the purpose of commercial production, the fact remains that it did not commence exploitation until 2007 – 19 years after the Concession had commenced. Although this delay may be partly explained by delays in receiving permits from the Administration,[231] it is nonetheless clear that Claimant was not compliant with Special Advantages Nos. 6 & 7. Moreover,

[230] MEM Official letter No. DGM-395 dated 14 October 2003 (C-426).

[231] *Supra* para. 400.

administrative delays alone cannot excuse Claimant for the totality of the period to be used for exploitation nor has Claimant offered convincing evidence to that effect.

404. The substantial nature of the delay in commencing exploitation also means that the fact Claimant took over the Concession after the initial three year period is irrelevant. The delay accumulated after Claimant took over the Concession was considerable.

405. Special Advantage No. 11 of the Mining Title states:

> "Take the necessary measures to protect the forests, rivers, soil fauna, and atmosphere and, in general, take appropriate environmental protection measures. In this regard, the concessionaire agrees to perform the studies necessary to obtain the permits required by the corresponding government agencies on a national level. In this regard, the concessionaire will prepare and submit a comprehensive environmental and ecological protection study to the Ministry of the Environment and Natural Resources (MARNR) as well as the Ministry of Energy and Mines (MEM) prior to proceeding with the exploitation activities, including the conservation and protection measures required as well as reforestation plan for the impacted areas."

406. According to Respondent, in breach of Special Advantage No. 11, Claimant had failed to take the measures necessary to guarantee environmental protection by not providing MinAmb and MIBAM, before starting its exploitation activities, with the required environmental and ecological protection study, together with a reforestation plan for affected areas. According to the witness statements of Messrs. Belanger and Rivero and the documents cited therein, Claimant had prepared a highly detailed environmental impact assessment for the alluvial concession which was submitted to MinAmb in late 1994 and to MIBAM in early 1995 and a subsequent study in October 1998, with copy to MIBAM, which was approved by MinAmb on 28 October 1999.[232] Claimant also submitted its reforestation plan to MinAmb in May 1996,[233] with copy to MIBAM.[234] Finally, in connection with the Brisas Project encompassing both the alluvial and hard rock concessions, Claimant had prepared and submitted the V-ESIA to MinAmb on 29 July 2005,[235] complemented by a further study in November 2006,[236] which was supplemented on 24

[232] MARN (now MinAmb) Official Letter No. 77-01-45-617/99 dated 28 October 1999 (C-621).

[233] Plan for Forest Repopulation in Areas Affected by the Open Pit Gold Exploitation: Brisas del Cuyuni Mining Concession dated 3 May 1996 (C-695).

[234] Letter from Gold Reserve to MEM (now MIBAM) dated 9 May 1996 (C-406).

[235] V-ESIA of the Brisas Project 2005 (C-178).

[236] AATA International Inc., *Brisas del Cuyuni Project, Enviromental and Social Impact Assessment, Final Draft version 2.0*, November 2006 (C-186).

January 2007 in response to a request from MinAmb[237] and then was approved by MinAmb on 9 February 2007.[238] The V-ESIA contained a comprehensive reforestation plan. Prior to receiving Phase I Permit, Claimant also submitted evaluations of arboretum forest species at the Brisas Concession in March 1997, December 1999 and December 2000.[239] MinAmb's approval of the V-ESIA had regard to compliance of all requirements to execute some identified service works in view of Claimant's request for the AARN which, according to MinAmb, was for the "Infrastructure and Services Construction Stage and for the Exploration Stage of Gold and Copper Mineral of the Brisas Project".[240] Other service works (power line, processing plant, perimeter of the tailing dam, sedimentation ponds, conveyor belt and crushing plant) had to wait for the results of the Strategic Environmental Evaluation "for their full definition".[241]

407. The Tribunal is of the view that these reports and studies satisfy the requirements of Special Advantage No. 11 and that therefore Claimant was "solvent" in that regard when it requested the extension of the Brisas Concession. The Tribunal notes that the requirements in question were preliminary to the exploitation phase, as confirmed by the language of the Special Advantage No. 11 and of MinAmb's approval of the V-ESIA.

408. In conclusion, although exploitation had been commenced by the time the Phase I Permit was issued in 2007, under Venezuelan law Claimant was in breach of Special Advantages Nos. 6 and 7 by failing to commence exploitation within the required time limits. Breach of these Special Advantages were among the stated grounds for the MIBAM Resolution dated 25 May 2009 terminating the Brisas Concession, thereby providing a legal basis under Article 98 of the 1999 Mining Law and Special Advantage No. 15 for the termination of the Brisas Concession. According to Special Advantage No. 15, the "breach of any of the obligations described above [*i.e.*, any Special Advantage] will be grounds for extinction of the rights related to the concession."[242] The Tribunal notes that Claimant's breach had been cured by the time the

[237] Letter from Gold Reserve to MinAmb dated 24 January 2007 (C-635).

[238] MinAmb Official Letter No. 010303-527 dated 9 February 2007 (C-252).

[239] Respectively, First, Second and Third Evaluation of Arboretum Forest Species Established in the Brisas del Cuyuni Mining Concession in Km. 88 of Bolivar State (C-756; C-757; C-758).

[240] MinAmb Official Letter No. 010303-527 dated 9 February 2007 (C-252, first sentence).

[241] MinAmb Official Letter dated 9 February 2007 (C-252).

[242] In the presence of a breach of essential obligations under the Mining Law and the Mining Title there is no reason for examining the distinction whether the Administration would have made use in this case of a discretionary power

Construction Permit was granted,[243] a circumstance founding Claimant's legitimate expectation also under Venezuelan law[244] of the continued validity of the Brisas Concession Mining Title.

409. The Tribunal further notes that the legal basis that existed under Venezuelan law for the termination as a result of breach of Special Advantages does not mean that the termination was itself valid. Although the legal experts agree that it may be possible to nullify the "tacit administrative act" by which the Brisas Concession had been extended by operation of law,[245] this possibility does not mean that the purported nullification was valid. Such a termination or nullification would only have been valid under Venezuelan law if the Administration had followed the correct administrative procedure to ensure that Claimant's due process rights were respected. No such administrative procedure was initiated nor was Claimant's due process rights respected, Respondent having chosen to revoke the extension and terminate the Brisas Concession by Resolution of 25 May 2009. The Tribunal shall revert to Respondent's conduct in this regard when examining the alleged BIT violations.

C. The Unicornio Concession

Claimant's Position

410. The Unicornio Concession was granted to the Brisas Company on 3 March 1998. It was still in force in April 2008, but was subsequently terminated by MIBAM Resolution dated 17 June 2010.[246]

411. On 4 November 2009, MIBAM commenced an administrative proceeding to revoke the Unicornio Concession for alleged non-compliance with the Mining Law and various special advantages under the Unicornio Mining Title.[247] The administrative proceeding relied on three internal memoranda prepared by different offices of the Ministry, dated respectively 29 and 30

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or rather applied "indeterminate legal concepts", as discussed between the Parties' legal experts (Brewer-Carías II, paras. 17-24 and 110-115; Iribarren II, paras. 24-26).

[243] *Supra* paras. 397-398.

[244] Regarding legitimate expectations under Venezuelan law, see Brewer-Carías I, paras. 25-31.

[245] *Supra* paras. 370-372.

[246] MIBAM Notice of Commencement of Administrative Proceedings dated 20 October 2009 (C-128); MIBAM Official Letter dated 17 June 2010 (C-129).

[247] MIBAM Notice of Commencement of Administrative Proceedings No. MPPIBAM-DVM-DGFCM-ITR No. 1-IFMLC-001-09 dated 4 November 2009 (C-128).

April 2009 and 15 May 2009.[248] Claimant filed a challenge to each of the grounds for termination alleged in MIBAM's resolution, claiming *inter alia* the violation of its rights to defense and due process since the said internal memoranda had not been notified to it and it was unaware of their content.[249]

412. On 17 June 2010, MIBAM issued its resolution terminating the Unicornio Concession.[250] Claimant asserts that, contrary to the administrative proceeding which claimed that Claimant had failed to comply with Article 61 of the 1999 Mining Law and with seven special advantages, this resolution terminating the Unicornio Concession only relied on Article 61 of the 1999 Mining Law and Special Advantage No. 10 under the Unicornio Mining Title. Respondent has not discussed or undertaken to defend the lawfulness of those grounds, simply noting that Claimant "decided to discontinue its challenge and waive its right to legal proceedings in Venezuela in order to pursue its claims under the present arbitration."[251]

413. Claimant submits that MIBAM's termination of the Unicornio Concession was equally unlawful. It was premised on Claimant's alleged failure to commence exploitation within seven years from the grant of the concession and to support two interns as required by the Unicornio Mining Title.[252] The evidence shows that Claimant did not fail to exploit the Unicornio Concession,[253] and that it supported interns in compliance with the Unicornio Mining Title and received compliance certificates. As both Professor Brewer-Carías and Professor Ortíz-Álvarez explain, termination based on such a ground and without prior notification violated principles of due process and proportionality of administrative action.[254]

414. Regarding the alleged non-compliance with Article 61 of the 1999 Mining Law providing that "the parcels subject to mining rights must be put in exploitation within maximum period of seven (7) years counted from the date of publication of the respective Certificate in the Official Gazette,"

[248] Counter-Memorial, para. 430, *see also* C-132 for the 29 April 2009 memorandum; C-736 for the 30 April 2009 memorandum and C-737 for the 15 May 2009 memorandum.

[249] Gold Reserve Response to Unicornio Administrative Proceeding filed with MIBAM on 18 November 2009 (C-259).

[250] MIBAM Official Letter No. 281/10 dated 17 June 2010 (C-129).

[251] Counter-Memorial, para. 255.

[252] MIBAM Official Letter No. 281/10 MIBAM Resolution dated 17 June 20120 (C-129).

[253] Mining-Law (C-2), Article 58; Brewer-Carías I, paras. 177-185 and 369-371; Brewer-Carías II, paras. 143-151.

[254] Brewer-Carías I, paras. 34; 373-374; First Expert Legal Opinion of Mr Ortiz-Alvarez (hereinafter "**Ortiz I**") dated 20 September, paras. 85-92.

Claimant notes the following. The Unicornio Mining Title, like many of the mining titles issued before the 1999 Mining Law, did not require that a separate exploitation certificate be issued and specifically addressed the consequences of not commencing exploitation within the period set forth in the law by prescribing to the concessionaire, under the second special advantage, to pay double the otherwise applicable surface tax "until exploitation starts."[255] According to Claimant, MIBAM never imposed such double taxes, so that, the concession may not be terminated for failure to commence exploitation.

415. Claimant contends that MIBAM consistently issued written letters of certification confirming Claimant's compliance with the 1999 Mining Law (necessarily including Article 61), the applicable regulations and the requirements of the Unicornio Mining Title.[256] Claimant thus had a legitimate right to and did rely on these letters of certification. According to Claimant, as a matter of Venezuelan law, after years of such official determinations of compliance, the Ministry could not simply ignore these certifications, deem Claimant to be non-compliant with Article 61 and terminate the Unicornio Concession based on a contrary interpretation of the law, as confirmed by its legal expert, Professor Brewer-Carías.[257]

416. Claimant further contends that, even assuming that non-compliance with Article 61 in theory could provide a basis for terminating the Unicornio Concession, the MIBAM's termination of the Unicornio Concession for that reason was manifestly inconsistent with the law because Claimant did commence exploitation within the meaning of the law. Under Article 58 of the 1999 Mining Law (as under the previously applicable 1945 Mining Law), "exploitation" does not mean only the actual physical extraction of minerals, but also undertaking the necessary preparatory activities in view of such extraction "with the unequivocal purpose of obtaining some economic profit from such substances". According to Claimant, it diligently took steps to develop the Unicornio Concession towards its exploitation, as it was required to do in order to prepare and submit the Brisas Project Feasibility Study in February 2001, approved by MIBAM in January 2003, and the V-ESIA in July 2005, approved by MinAmb in February 2007. Furthermore, still according to

[255] Unicornio Mining Title, Special Advantage No. 2 (C-5).

[256] MEM (now MIBAM) Official Letter No. EC-260-98 dated 4 December 1998 (C-71); MEM (now MIBAM) Official Letter EC-414-99 dated 14 December 1999 (C-72); MIBAM Official Letter No. EC-004-01 dated 23 January 2001 (C-73); MEM (now MIBAM) Official Letter No. EC-044-03 dated 2 May 2003 (C-74); MIBAM Official Letter No. LC-061-05 dated 11 April 2005 (C-75); MIBAM Official Letter No. LC-065-06 dated 21 February 2006 (C-76); MIBAM Official Letter No. LC-112-07 dated 14 September 2007 (C-906); MEM (now MIBAM) Official Letter No. IFMLC-092-2008 dated 2 September 2008 (C-907) (Memorial, footnote 123).

[257] Brewer-Carías I, para. 372.

Claimant, MinAmb's wrongful refusal to sign the Initiation Act prevented Claimant from commencing construction and, necessarily, from reaching commercial production.

417. Claimant contends that the government took over the Brisas Project site and assets unlawfully, in disregard of the still valid Unicornio Concession. Even if the denial of the extension of the Brisas Concession were lawful, the seizure of the Project site and assets was not since both land and assets were subject to the still valid Unicornio Concession.

Respondent's Position

418. Pursuant to the Unicornio Concession, Claimant obtained in 1998 the exclusive right to exploit copper, molybdenum and gold for a period of twenty years, subject to its compliance with pertinent legal norms and to the fulfilment of commitments under seventeen special advantages, including, but not limited to, a requirement to begin exploiting minerals within the period of seven years specified by the 1999 Mining Law.

419. As required under the Special Advantage No. 5 and within the extended time limit, in February 2001 Claimant submitted the Brisas Project Feasibility Study. As explained by the study, the plan to develop the Unicornio and Brisas Concessions in the new brand "Brisas Project" depended on Claimant being able to acquire rights to various parcels of lands in the region, including NLEAV1-NLSAV1, Bárbara, Zuleima, NLNA1-NLNV1, Aluplata, Velaplata, El Pauji and Morauana.[258] The study being incomplete, it had to be supplemented by additional information, which was provided on 27 November 2002. The Brisas Project Feasibility Study was approved on 6 January 2003.[259]

420. According to Respondent, it was only in 2005, more than seven years after it had obtained the concession, that Claimant submitted the environmental and socio-cultural impact study as required in order to obtain the AARN for exploitation.[260] Respondent observes that, by this time, the seven

[258] Brisas Project Feasibility Study of February 2001 (C-170, p. 18-ii).

[259] MEM (now MIBAM) Official Letter No. DGM-003 dated 6 January 2003 (C-253). According to Respondent, MIBAM "did not, however, approve a "Brisas Project" feasibility study" but only a study related to the Unicornio Concession (Counter-Memorial, para. 150: see also para. 159). Claimant asserts on the contrary that the Feasibility Study expressly states that "the Brisas Project [was] the subject of this study" (Claimant's Post–Hearing Brief, para. 42).

[260] V-ESIA of the Brisas Project 2005 (C-178).

years granted to begin exploitation on Unicornio had expired. As evidenced by Gold Reserve's own annual reports on the Unicornio Concession from 1998 to 2008, Claimant managed only to conduct exploratory work, optimize its mine design and monitor wells and water courses on the concession.[261]

421. Respondent notes that the administrative proceeding to terminate the Unicornio Concession commenced on 4 November 2009, based on Claimant's failure to comply with Article 61 of the 1999 Mining Law and with a number of Special Advantages (3, 4, 7, 8, 10, 14, and 15).[262] It notes further that Article 61 required a concessionaire to begin exploitation within seven years following the publication of the mining title in the *Gaceta Oficial*.

422. In the course of the administrative proceeding to terminate the Unicornio Concession, Claimant filed its challenge to each of the grounds for termination, denying that it had violated any of its commitments by reason of the delay by MinAmb in granting the requested environmental permits and authorizations.[263] On 4 March 2010, Claimant discontinued the challenge in order to pursue its claim in this arbitration. Accordingly, on 23 June 2010, MIBAM formally notified Claimant of the Ministry's decision to terminate the Unicornio Concession due to the failure to comply with Article 61 of the 1999 Mining Law requirement to begin exploitation within seven years and the Special Advantage No. 10 requiring it to support practical training for Venezuelan interns.[264]

423. Respondent argues that the Unicornio Concession was justifiably terminated in conformity with the relevant practice and procedure under Venezuelan law. Following an analysis of Claimant's mining activities and compliance with its legal obligations by the competent office, the *Director General of Fiscalización y Control Minero* commenced on 4 November 2009 an administrative proceeding in view of terminating the concession.[265]

[261] Unicornio Annual Reports and Inventories for each of the years 1998-2008 (respectively, under C-373, C-374, C-375, C-376, C-377. C-379, C-380, C-381, C-382, C-383, C-384)

[262] MIBAM Notice of Commencement of Administrative Proceedings dated 20 October 2009 (C-128).

[263] Gold Reserve Response to Opening Act for the Unicornio Administrative Proceeding filed with MIBAM dated 18 November 2009 (C-259).

[264] MIBAM Official Letter No. 281/10 dated 23 June 2010 (C-129).

[265] MIBAM Notice of Commencement of Administrative Proceedings No. MPPIBAM-DVM-DGFCM-ITR No. 1-IFMLC-001-09 dated 4 November 2009 (C-128).

424. Respondent contends that MinAmb was reasonable and responsive throughout the permitting process, as recognized by Gold Reserve's president Douglas Belanger in its remarks to shareholders in April 2007.[266] However, from 1992 to 1999, Claimant did not even seek permits for the Brisas Project. Only in October 1998, did it submit an EIA to MinAmb which was partially approved only one year later, in October 1999.[267] Following Claimant's acquisition of the Unicornio Concession in 1998 and the remodelling of Claimant's mining plans into the so-called Brisas Project, the environmental permitting process had to begin again from scratch, the 1999 approval of the EIA being no longer of value for the project.

425. During the period 1999-2004, the environmental permitting was subject to the Supreme Court's injunction prohibiting MIBAM from issuing new mining titles and permits within the Imataca Forest Reserve. While the parcels making up the Brisas Project were ultimately designated for mining use, Respondent notes that MinAmb was limited in its ability to grant environmental permits until the process of revising the Reserve's Management Plan was complete. This had been recognized by Claimant in a February 2004 letter to MIBAM.[268] Claimant's complaint that it lacked Authorisation to Occupy Territory ("**AOT**") permits for Bárbara, Zuleima and Lucia parcels that were part of the Brisas Project is false, according to Respondent, because it was granted the remaining AOT permits in May 2004.[269] However, according to Respondent, Claimant never sought and never obtained rights to certain critical parcels of land that were necessary to develop the proposed Brisas Project.

426. When Claimant finally submitted its V-ESIA for the Brisas Project on 29 July 2005, Respondent maintains that MinAmb was efficient and responsive by allowing certain preliminary activities to proceed while reserving its judgment regarding allowing actual mineral exploitation. Following Claimant's submission of an Addendum to the V-ESIA on 24 January 2007[270] and a Phase I Environmental Management Plan on 1 March 2007,[271] on 27 March 2007 Claimant was granted

[266] Final Transcript, GRZ-Q4 2006 Gold Reserve Earnings Conference Call April 2007 (R-70).

[267] Counter-Memorial, para. 262.

[268] Letter from Gold Reserve to MEM (now MIBAM) dated 16 February 2004 (C-427) which, after referring to the requests for Environmental Authorizations for Territorial Occupation and to Affect Natural Resources submitted to MinAmb, states: "The grant of those authorizations is subject to the resolution of the legal issues affecting the Imataca Forest Reserve".

[269] MARN (now MinAmb) Official Letter No. 00168 dated 27 May 2004 (C-31) for Bárbara; MARN (now MinAmb) Official Letter No. 00170 dated 27 May 2004 (C-61) for Zuleima.

[270] Letter from Gold Reserve to MinAmb dated 24 January 2007 (C-635).

[271] Letter from Gold Reserve to MinAmb dated 1 March 2007 (C-473).

the Phase I Permit allowing initial construction and site development but explicitly prohibiting mining.[272] Claimant recognized again the excellent relationship with the Administration in its report to shareholders.[273]

427. Regarding the other components of the so-called "Brisas Project", Respondent observes that Claimant ought to have received, but did not, authorization to develop its separate mining interests as an integrated project. Claimant knew that it had no right to develop the multiple parcels to be used for exploitation or infrastructure as a unified project since under Venezuelan law each concession and mining right or contract was to be administered on individual basis. In any case, Claimant did not comply with its obligations regarding each of the mining interests that it unilaterally integrated into the so-called "Brisas Project".

The Tribunal's Analysis

428. Two grounds were relied upon by MIBAM to justify termination of the Unicornio Concession on 17 June 2010: (i) alleged failure to commence exploitation in violation of Article 61 of the 1999 Mining Law; and (ii) alleged breach of Special Advantage No. 10 regarding the hiring of interns.[274]

429. In order to revoke the Unicornio Concession, MIBAM had commenced on 4 November 2009 an administrative proceeding for alleged non-compliance with the 1999 Mining Law and numerous special advantages established by Unicornio Mining Title, specifically Nos. 3-4, 7-8, 10, 14 and 15.[275]

430. On 18 November 2009, Claimant filed an initial response to the Ministry's allegations[276] but then discontinued "in view of the requirements of the BIT".[277]

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[272] MARN (now MinAmb) Official Letter No. 010303-1080 dated 27 March 2007 (C-44).

[273] GRZ- Q3 2007 Gold Reserve Earnings Conference Call of 19 November 2007 (R-45).

[274] MIBAM Official Letter No. 281/10 dated 17 June 2010 (hereinafter "**Unicornio Termination Decision**"), (C-129, under "*Resuelve*").

[275] MIBAM Notice of Commencement of Administrative Proceedings No. MPPIBAM-DVM-DGFCM-ITR No. 1-IFMLC-001-09 dated 4 November 2009 (hereinafter "**Opening Act**") (C-128).

[276] Gold Reserve Response to Opening Act for the Unicornio Administrative Proceeding filed with MIBAM on 18 November 2009 (C-259).

[277] Memorial, para. 241.

431. The Tribunal shall examine only the two grounds for termination relied upon by the MIBAM Resolution dated 17 June 2010. All other grounds mentioned in the Opening Act of 4 November 2009 are no longer included in said resolution and do not therefore constitute grounds for termination of the Unicornio Concession.

Article 61

432. Article 61 of the 1999 Mining Law provides as follows:

> "Exploitation in the parcels subject to mining rights shall begin within seven (7) years from the date of publication of the exploitation certificate in the Official Gazette. Exploitation of the concession may not be suspended without a justified reason, and such suspension may never last more than one (1) year, except due to acts of God or Force Majeure. The Ministry of Energy and Mines shall be notified of such circumstances, and it shall make any necessary decision in this regard. During such suspension, however, the holder of mining rights shall continue performing the activities and work that are necessary to maintain such mining rights."

433. The Unicornio Concession was issued in March 1998, and therefore exploitation should have commenced by March 2005 in accordance with Article 61 above. As noted for the Brisas Concession above, the Tribunal has found that exploitation on the Brisas Project (including the Unicornio Concession) did not in fact commence until early 2007. This is evidenced by the fact that Claimant's exploration AARN was extended for a further year in December 2005.

434. Claimant's reliance on the wider meaning of "exploitation" under Article 58 of the 1999 Mining Law has already been taken into account when reaching this conclusion, and does not therefore alter it. According to Claimant, it had commenced exploitation of the Unicornio Concession well before March 2005, specifying the steps it had taken towards exploitation.[278] Claimant has denied that it could be held liable for having failed to commence exploitation within the prescribed time limit because it was precluded from extracting copper, molybdenum and vein gold by the lack of the environmental permits and authorizations requested to that purpose.[279]

[278] Memorial, para. 252. The "steps towards exploitation" mentioned by Claimant are indicated *supra* para. 416.

[279] Claimant's Response to Unicornio Administrative Proceedings dated 18 November 2009, p.10 (C-259). Memorial, para. 254.

435. As noted above, the Tribunal does not consider that the various steps referred to by Claimant as taken towards exploitation would fall within the expanded notion of "exploitation" under the 1999 Mining Law. The only evidence offered by Claimant to demonstrate that this ground for the termination of the Unicornio Concession was "baseless factually and legally" is the expert report of Professor Brewer-Carías and the testimony of Mr Rivero.[280]

436. In addition, the Tribunal is not persuaded by Claimant's argument that, because no double taxation had been imposed by Special Advantage No. 2, it was not in breach of Article 61.[281] The Tribunal notes that under the Special Advantage No. 2, the doubling of the surface tax in case of failure to commence exploitation within the period of time contemplated in Article 24 of the 1945 Mining Law is conditioned upon the concessionaire having timely requested the renewal of the title in accordance with Article 55.2 of the 1945 Mining Law. There is no evidence in the record of this proceeding that such renewal had been requested by Claimant. Significantly, this argument is not mentioned in Claimant's Response of 18 November 2009 to MIBAM's Opening Act.

437. As to the number and continuity of certificates of compliance issued by MIBAM regarding the Unicornio Concession, the value to be attributed to such certifications, has already been indicated by the Tribunal.[282]

438. The Tribunal further notes that, the lack of permits and authorizations which are duly requested may result in a *force majeure* suspending the time limit set by Article 61 of the 1999 Mining Law. Respondent asserts that Claimant cannot blame MinAmb for having failed to grant the required permits "when it had not requested a single environmental permit for Unicornio by the time the deadline for exploiting the concession lapsed" and that no environmental impact assessment had been presented regarding the Unicornio Concession.[283] The Tribunal notes in this regard that MIBAM had to intercede with MinAmb in March 2004 to unblock the permitting process.[284] As to

[280] Memorial, paras. 251-252. No clear inference may be drawn in this regard from MIBAM's Analysis of February-March 2005 for Unicornio's Concession (C-1331), stating (under FOUR): "Exploitation period IN PROGRESS", such statement following repeated references to the fact that "no exploitation activities are being performed at present at the concession" (under THREE and SIX).

[281] *Supra* para. 414.

[282] *Supra* para. 385.

[283] Rejoinder, para. 170.

[284] Letter from Gold Reserve to MEM (now MIBAM) dated 18 March 2004 (C-659) and MEM (now MIBAM) Official Letter No. DGM-107 dated 24 March 2004 (C-421).

the environmental impact assessment, the V-ESIA, which included the Unicornio Concession,[285] was submitted on 29 July 2005 for the Brisas Project. When the study was presented, however, the 7-year time limit under Article 61 had already expired. MinAmb's delay in granting the requested authorizations may not excuse Claimant's failure to respect the said time-limit considering, on the one hand, the legal issues affecting the Imataca Forest Reserve,[286] which were recognized by Claimant, and, on the other hand, that the V-ESIA had to be complemented and supplemented by Claimant in order to be approved by MinAmb, which approval intervened on 9 February 2007.[287]

Special Advantage No. 10

439. Special Advantage No. 10 provides as follows:

> "From the commencement of exploitation, the concessionaire will cover the internship expenses, once a year during two (2) months, for 2 (two) Mining Engineering and/or Geology and/or Geophysics students from the National Universities or Colleges."

440. Regarding the alleged failure by Claimant to comply with Special Advantage No. 10 of the Unicornio Mining Title, the following may be noted. This Special Advantage provides that "from the commencement of exploitation, the concessionaire will cover the internship expenses, once a year during two (2) months for two (2) Mining Engineering and/or Geology and/or Geophysics students to the National Universities or Colleges." This Special Advantage is substantially similar to Special Advantage No. 13 in the Brisas Mining Title.

441. Claimant contends that following the acquisition of the Brisas Concession and throughout the course of project development, it regularly hosted and supported student interns, including thesis candidates, at the project site, sponsoring 55 student internships from 1993 to 2008 and also providing other benefits, such as room and board and payment of travel and other related expenses.[288] Claimant understands that the student intern requirement, as set out in the respective Brisas and Unicornio Mining Titles, was that it would begin sponsoring interns when the project commenced production. Such production did not occur on Unicornio, so the obligation had not commenced, whereas it was due to be fulfilled in regard to the Brisas Concession.[289] Claimant

[285] V-ESIA of the Brisas Project 2005 (C-178, paras. 1, 2.1.1, 2.1.3 and Annex 2.1.)

[286] *Supra* para. 425.

[287] MinAmb Official Letter No. 010303-527 dated 9 February 2007 (C-252).

[288] Memorial, para. 258.

[289] Memorial, para. 259.

reported to MIBAM in its annual reports for each year from 1998 through 2006 that this Special Advantage would be fulfilled "in due course" and relied on the compliance certificates issued during such period as a confirmation that it was taking the necessary steps to be in compliance.[290]

442. Claimant asserts that over the course of the Brisas Project it sponsored 55 interns, 23 more than the 32 required for the Brisas Concession, which was enough to cover the 22 Unicornio interns required during the 1998 to 2008 time period. Therefore, even if there was no specific designation of interns for the Unicornio Concession, the overall contributions was sufficient to satisfy this obligation under both the Brisas and the Unicornio Concessions. In any case, according to Claimant even if its compliance with Special Advantage No. 10 remained at issue, using the alleged non-compliance as a ground for terminating the Unicornio Concession violated principles of proportionality of administrative action.[291]

443. The Tribunal notes Respondent's contradictory position whereby it founds the MIBAM Resolution dated 17 June 2010, on the one hand, on Claimant's alleged failure to commence exploitation within the legally prescribed time limit, and, on the other hand, on the alleged non-fulfilment of an obligation which was due only "from the commencement of exploitation". Respondent did not challenge Claimant's indication of the number of sponsored interns during the relevant period of time.[292]

444. Claimant's position regarding the fact that the obligation under Special Advantage No. 10 would have been due not "upon commencement of exploitation", but only upon actual production from the mine seems reasonable considering that only following actual production would Claimant have started earning profits. The Tribunal notes that Respondent has provided no comments on this interpretation.

445. The Tribunal finds that the breach of Special Advantage No. 10 is not a valid ground for terminating the Unicornio Concession since the relevant obligation would have been enforceable upon commencement of production and production had not yet occurred when the concession was terminated. In any event, termination by reason of such breach would have been out of proportion considering the gravity of such sanction.

[290] Memorial, para. 260.

[291] Memorial, paras. 264-265.

[292] The only source of this information and data is Rivero's Witness Statement, which was not challenged on this point.

446. For the reasons set out above, the Tribunal concludes that Respondent could under Article 98 of the 1999 Mining Law and Special Advantage No. 17[293] rely upon Claimant's failure to comply with the time limit set out in Article 61 of the 1999 Mining Law in order to terminate the Unicornio Concession. However, as stated in paragraph 409 above for the Brisas Concession, Respondent was still required to follow the correct procedure when terminating the Unicornio Concession on this ground, in order for the termination to be valid. Respondent's conduct regarding such termination shall be examined when dealing with the alleged BIT violations. The Tribunal notes that the termination did not occur until June 2010 and that, as at April 2008, all parties agree that the Concession was still in place.

D. Bárbara, Zuleima, Lucia, NLEAV1-NLSAV1

Claimant's Position

447. Claimant planned to site the mineral processing plant and the tailings dam on the Bárbara parcel, the waste rock and organic soil stockpiles on the Zuleima parcel and proposed to site a fauna and ecological reserve on the Lucia parcel. The authority to exercise mining rights over Bárbara, Zuleima and Lucia parcels had been delegated in 1990 to the State mining enterprise, CVG.[294] In 1992, CVG had concluded mining contracts with the private company Placer Dome[295] that, with CVG's approval, assigned those contracts to Claimant, with effect in July 1999 and until the remainder of their contract terms, *i.e.* until April 2013.[296]

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[293] Special Advantage No. 17 under the Unicornio Mining Title dated 12 February 1998, provides that "the failure to comply with any of the foregoing shall be grounds for termination of the rights in said concession" (C-4, under d).

[294] Presidential Decree No. 1409 dated 29 December 1990 (R-15, Articles 2 and 5).

[295] Contract for the Exploration, Development, and Exploitation of Alluvial and Hard-Rock Gold and Diamond Minerals in the Bárbara Parcel between Corporación Venezolana de Guayana and Placer Dome de Venezuela, C.A. dated 23 April 1992, hereinafter "**Bárbara Mining Contract**"), (C-7); Contract for the Exploration, Development, and Exploitation of Alluvial and Hard-Rock Gold and Diamond Minerals in the Zuleima Parcel between Corporación Venezolana de Guayana and Placer Dome de Venezuela, C.A., dated 26 April 1993 (hereinafter "**Zuleima Mining Contract**"), (C-10); Contract for the Exploration, Development, and Exploitation of Alluvial and Hard-Rock Gold and Diamond Minerals in the Lucía Parcel between Corporación Venezolana de Guayana and Placer Dome de Venezuela, C.A., dated 26 April 1993 (hereinafter "**Lucía Mining Contract**"), (C-12).

[296] Assignment and Delegation Contract for Exploration and Exploitation of Alluvial and Hard-Rock Gold and Diamonds between Placer Dome de Venezuela, C.A. and Compañía Aurífera Brisas del Cuyuní, C.A., dated 16 October 1998 (hereinafter "**Bárbara, Zuleima and Lucía Assignment Contract**"), (C-8); CVG's Resolution No. 8240 dated 22 July 1999 (C-6, p.1-2).

448. By letter dated 27 July 1998, Claimant informed MIBAM about the purpose of the assignment of CVG-Placer Dome contracts for Bárbara and Zuleima since, in addition to possible mineral findings that could add reserves to the Brisas Project, those parcels "rule out areas without mineralization that could be used to locate infrastructure of the same project such as tailings basin and waste dumps."[297] MIBAM had taken note of the assignments, without objection, on 3 September 1998.[298]

449. Claimant had concluded a contract with CVG on 3 February 1994 regarding NLEAV1 and NLSAV1.[299] The original term of the contract ran until 26 January 2016, extendable for two successive periods of ten years. Claimant notes that it planned to explore these parcels and, upon ruling out mineralization, to use NLEAV1 to accommodate part of the saprolite heap and NLSAV1 to site a section of the conveyor belt running from the pit to the processing plant.[300]

450. Claimant contends that the Administration was fully informed as to Claimant's activities regarding the NLEAV1-NLSAV1 parcels, approved their use and confirmed Claimant's compliance with its contractual obligations, as reflected in many of the same documents regarding Bárbara, Zuleima and Lucia parcels.

451. In the Brisas Project Feasibility Study, which was filed in 2001, Claimant described its plan to use the Bárbara parcel for the "dam and containment structures for 280 million tons of tailings"[301] and the Zuleima parcel as a waste rock disposal site.[302] The proposed use was confirmed in the study update dated 27 November 2002.[303] Description of the planned use of NLEAV1-NLSAV1 is also contained in the Brisas Project Feasibility Study.[304]

[297] Letter from Gold Reserve to MEM (now MIBAM) dated 27 July 1998 (C-1211, p. 2).

[298] MEM (now MIBAM) Official Letter No. DG-104/98 dated 3 September 1998 (C-1213, pp. 1-2).

[299] Contract between CVG and CABC dated 3 February 1994 (C-13).

[300] Addendum to V-ESIA of the Brisas Project (C-187, pp. 28,73).

[301] Brisas Project Feasibility Study dated February 2001 (C-170, para. 8.4).

[302] *Ibid*. para. 4.1.

[303] Letter from Gold Reserve to MEM (now MIBAM) dated 27 November 2002 (C-575, para. 3).

[304] Brisas Project Feasibility Study dated February 2001 (C-170, paras. 1.3.3, 2.1, 2.4.3 and Annexes 2-1 to 2).

452. The Brisas Project Feasibility Study was approved by MIBAM on 6 January 2003, without objection to the proposed use of any of the parcels for infrastructure for the Brisas Project.[305] Subsequently, Claimant proposed to develop a "fauna reserve" and "ecological station" on the Lucia parcel.[306] By the issuance of Phase I Permit on 27 March 2007, MinAmb authorised works to support (i) the conveyor belt area on the NLEAV1-NLSAV1 parcel;[307] and (ii) the tailing pond area, processing plant and man-camp areas on the Bárbara parcel.[308] The Zuleima parcel was not considered since it was not needed until after Phase I dewatering[309] and the Lucia parcel was not considered since it was no longer needed for the Brisas Project.[310]

453. Claimant observes that it kept the Ministry regularly advised on its exploration activities regarding each of these parcels, demonstrating, by reference to condemnation drilling conducted in the areas, that there was no economic mineralization on the Bárbara parcel,[311] the Zuleima parcel,[312] and the NLEAV1-NLSAV1 parcel[313] and that siting of infrastructure on those areas was appropriate. MIBAM confirmed Claimant's compliance with its obligation by providing certificates of compliance for each of those parcels.[314]

454. In the V-ESIA, Claimant explained the proposed use of each of these parcels. Specifically, the Study identifies Bárbara for tailing dams,[315] Zuleima for waste rock dumps[316] and NLEAV1-

[305] MEM (now MIBAM) Official Letter No. DGM-003 dated 6 January 2003 (C-253).

[306] Letters from Gold Reserve to MIBAM dated 19 March 2006 (C-446) and 26 July 2006 (C-828, p.3).

[307] MARN (now MinAmb) Official Letter No. 010303-1080 dated 27 March 2007 (C-44, at 4, maps at the end).

[308] *Ibid.* at 4-25, maps at the end.

[309] Claimant's Second Post-Hearing Brief, Appendix A, p.11.

[310] *Ibid.* p.12.

[311] 2004 Bárbara Annual Report (C-1215); 2006 Bárbara Annual Report (C-1216); see also January 2004 Bárbara Monthly Report (C-1217), January 2000 Bárbara Monthly Report (C-1218), January 2000 Brisas del Cuyuní Monthly Report (C-1219).

[312] 2005 Zuleima Annual Report (C-1220); *see also* February 2004 Zuleima Monthly Report (C-1222), September 1999 Zuleima Monthly Report (C-1223), January 2000 Brisas del Cuyuní Monthly Report (C-1219).

[313] 2000 NLEAV1-NLSAV1 Annual Report (C-1235); 2005 NLEAV1-NLSAV1 Annual Report (C-1236); 2006 NLEAV1-NLSAV1 Annual Report (C-1238).

[314] MEM Official Letter No. EC-414-99 dated 14 December 1999 (C-72) for 1999; MEM Official Letter No. EC-005-01 dated 23 January 23 (C-63) for 2001; MEM Official Letter No. EC-045-03 dated 2 May 2003 (C-64) for 2003; MIBAM Official Letter No. LC-065-06 dated 21 February 2006 (C-76) for 2006; MIBAM Official Letter No. LC-081-07 dated 2 August 2007 (C-65) for 2007; MIBAM Official Letter No. IFMLC-093-2008 dated 2 September 2008 (C-66) for 2008, all such certificates relating to NLEAV1, NLSAV1, Bárbara, Zuleima and Lucía.

[315] V-ESIA (C-178, para. 2.16.3).

[316] *Ibid.* para. 2.3.3.1.

NLSAV1 for part of the "saprolitic mineral heap to be located there."[317] Claimant notes that the V-ESIA with its addendum dated 24 January 2007 was approved by MinAmb on 9 February 2007, without any objection regarding the proposed use of these parcels.[318] The intended use of Bárbara, Zuleima and all other parcels had already been analysed by MinAmb's Memorandum dated 15 November 2005, with no legal impediments having been found.[319]

455. Claimant applied to convert the NLEAV1-NLSAV1, Bárbara and Zuleima contracts into concessions on 14 December 1999. The application was not acted upon by MIBAM, although Claimant states that the conversion was provided as a matter of right by Article 132 of the 1999 Mining Law. However, it notes that such conversion was not necessary for infrastructure use of those parcels.[320]

Respondent's Position

456. According to Respondent, the rights Claimant had acquired for each such parcel did not allow it to use the parcels for the use intended by Claimant. In particular, Claimant was not authorized to site a mineral processing plant and a tailings dam on Bárbara, waste rock and soil stockpiles on Zuleima, a fauna and ecological reserve on Lucia and a saprolitic heap and conveyor belt on NLEAV1-NLSAV1.

457. The purpose of Claimant's mining contracts for Bárbara, Zuleima, Lucia and NLEAV1-NLSAV1 is the exploration, development and exploitation of alluvial and vein gold and diamond minerals.[321] Respondent asserts that Claimant unilaterally decided to use these parcels to accommodate infrastructures and oil dumps without any permission to do so. According to Respondent, none of the indicia alleged by Claimant of Venezuela's "full agreement" evinces permission for this unlawful use of the parcels for infrastructure.

[317] *Ibid.* para. 2.16.2.

[318] MinAmb Official Letter No. 010303-527dated 9 February 2007 (C-252).

[319] MARN Memorandum No. 01-00-19-04-268/2005 dated 15 November 2005 (C-1053, pp. 12-13).

[320] Reply, para. 66.

[321] *See* Bárbara Mining Contract (C-7) for Bárbara, Zuleima Mining Contract (C-10) for Zuleima, Lucía Mining Contract (C-12) for Lucía and Contract between CVG and CABC dated 3 February 1994 (C-13) for NLEAV1-NLSAV1 parcels.

458. The approval of the Brisas Project Feasibility Study was not, as contended by Claimant, an approval of the use of the parcels for infrastructure of the Brisas Project. First, it was not an approval of a feasibility study for the Brisas Project but only for Unicornio Concession, each parcel requiring a separate feasibility study, as shown by Claimant's Annual Reports for Zuleima, Lucia, NLEAV1-NLSAV1.[322] In any case, as opined by Professor Iribarren, Venezuela's legal expert, by approving a feasibility study the government only expresses the view that the execution of the future project is technically, financially and environmentally possible.[323]

459. Secondly, Respondent argues that the mining contracts of each parcel provided for their use for exploration and exploitation of minerals, not for infrastructure. The Fifth Clause of each contract provides for a procedure to be undertaken by Claimant should it be determined that "there was no economic mineralization on the properties," in which case the contract may be considered as terminated. Claimant's contemporaneous documents show that it had not determined that the parcels lacked valuable minerals and that, accordingly, MIBAM had not been so informed, so that they could not be used for other purposes.

460. The fact that Claimant wrote to MinAmb asking it to process environmental permits for adjacent parcels or that MIBAM was aware of Claimant's intention to use adjacent parcels for infrastructure cannot be taken as approval that Claimant would breach its obligations to use the parcels for mineral exploration and exploitation.

461. Respondent asserts that none of the provisions of the 1999 Mining Law cited by Claimant supports the unilateral conversion of its contractual obligations. Article 11 does not do so, as it provides that the concessionaire may be granted an easement permitting the use of other property to carry out mining activities, but Claimant did not seek easements to build infrastructure on these parcels. Article 13 also does not do so, as it provides that the concessionaire may use empty lots, but none of these parcels was shown to be "empty lots". Finally, Article 46 does not do so as, under this provision, concessions that are terminated are free areas which the Administration may grant to a new party.

[322] 2005 Zuleima Annual Report (C-1220); 2007 Lucía Annual Report (C-1225); 2006 NLEAV1-NLSAV1 Annual Report (C-1238).

[323] Iribarren I, paras. 190-193.

462. In addition, Respondent alleges that Claimant failed to comply with many of its obligations under the Bárbara, Zuleima, Lucia, NLEAV1-NLSAV1 contracts with CVG. First, it did not fulfil its obligation to use the four parcels for exploitation, as required by the First Clause of the contracts. It apparently acquired the parcels from Placer Dome believing that there was no prospect of economic mineralization on them.[324] Second, it did not comply with its obligation to conduct an exploratory program within two years, as required by the Second Clause. Third, it did not submit the geographical maps required for Bárbara, Zuleima and Lucia under the Third Clause of the relevant contract. Fourth, it did not submit feasibility studies for each of the four parcels, as required by the Fourth and Sixth Clauses of the contracts.

463. Claimant denies that it breached its contractual obligations for each such parcels since the "Ministry never indicated to Gold Reserve that it considered its activities in regard to these parcels to be inconsistent with its contractual obligation" and it received "certification of compliance on each of these parcels."[325] Respondent counters that these are absurd arguments. Letters by low-level technical functionaries purporting to certify compliance with all legal obligations cannot cure Claimant's breaches.

464. Respondent notes that MinAmb never received a feasibility study for Bárbara, Zuleima, Lucia and NLEAV1-NLSAV1. It issued one AOT, two AARNs for exploration for Bárbara,[326] one AOT and four AARNs for Zuleima[327] and two AOTs and four AARNs for exploration for NLEAV1-NLSAV1.[328] It did not issue any authorization for Lucia parcel. Phase I Permit did not authorize any activity on Zuleima or Lucia.[329]

[324] Reply, paras. 28, 34.

[325] Reply, paras. 40-42; 71-72.

[326] Respectively, MARN Official Letter No. 00168 dated 27 May 2004 (C-31), MARN Official Letter No. 01-00-19-05-425/2004 dated 25 June 2004 (C-32) and MARN Administrative Order No. COAA-01-00-19-05-232/2005 dated 14 December 2005 (C-33).

[327] Respectively, MARN Official Letter No. 00170 dated 27 May 2004 (C-61), MARN Official Letter No. 01-00-19-05-427/2004 dated 25 June 2004 (C-62) and MARN Official Letter No. 01-00-19-05-635/2007 dated 5 September 2007 (C-396).

[328] Respectively, CVG Official Letter No.VPCSM/035-96 dated 13 February 1996 (C-53), MARN Official Letter No. 000149 dated 4 September 1998 (C-54), MARN Official Letter No. 77-01-42-195/97 dated 27 May 1997 (C-55), MARN Official Letter No. 77-01-42-197/2002 dated 14 August 2002 (C-903), MARN Official Letter NO. 01-00-19-05-423/2004 dated 25 June 2004 (C-56) and MinAmb Official Letter No. 01-00-19-05-607 dated 30 August 2007 (C-57).

[329] Respondent's Comments on Claimant's Second Post-Hearing Brief, para. 8(d).

465. Claimant requested that the mining contracts with CVG for Bárbara, Zuleima Lucia and NLEAV1-NLSAV1 be converted to a concession in 1999 in accordance with Article 132 of the 1999 Mining Law. Such conversion, which was never granted, was essential for the viability of the planned "Brisas Project".

The Tribunal's Analysis

466. Having examined the Parties' positions regarding Bárbara, Zuleima and NLEAV1-NLSAV1 parcels[330] and the evidence filed in that regard, the Tribunal is satisfied that both MIBAM and MinAmb were aware of Claimant's intent to use these parcels for infrastructure and services. Neither Ministry ever expressed any reservations regarding such use when examining (and, where required, approving) studies, reports and other documentation filed by Claimant indicating the intended use of each parcel.[331] MIBAM's letter dated 24 March 2004 inviting MinAmb to expedite the granting of permits to Claimant records that Ministry's understanding that the areas of Bárbara, Zuleima and Lucia contracts "are expected to be used as dumps for the materials resulting from the exploitation of the Brisas del Cuyuni and Unicornio Concessions pertaining to the referred project" (*i.e.*, the Brisas Project).[332]

467. The last permit issued by MinAmb, the Phase I Permit dated 27 March 2007, authorized works as planned on Bárbara and NLEAV1-NLSAV1 parcels.[333] Phase I Permit describes in the introduction these parcels as part of the wider Brisas Project, thus confirming that the Ministry was aware and had approved the use of these parcels for infrastructure and services.

468. Claimant kept MIBAM regularly informed of the activities conducted on each parcel during the relevant period through monthly and annual reports. One section of each report described the "geological-exploration activities" that had been carried on, including the number of condemnation drillings and whether economic mineralization had been found.[334] Based on these reports, the

[330] Lucía parcel shall not be examined since it was no longer required by Claimant.

[331] This was the case of the Feasibility Study filed with MIBAM and approved by the latter on 6 January 2003 and the V-ESIA filed with MinAmb and approved by the latter on 9 February 2007.

[332] MEM (now MIBAM) Official Letter No. DGM-107 dated 24 March 2004 (C-421).

[333] Claimant's Second Post-hearing Brief, Annex A, p.1.1 Zuleima was not considered since it was "not needed until after Phase I dewatering": *ibid*, p. 11.

[334] *Supra* para. 453.

Ministry issued regularly certificates of compliance for each such parcel.[335] The last certificate, dated 2 September 2008, attests as did the previous ones, that Claimant "has fully complied with the provisions of the above [Mining] Law, its Regulations and Mining Titles and is therefore "solvent."[336] In addition, from 1998 to 2003, CVG issued certificates regarding Claimant's compliance with its contractual obligations.[337] MIBAM's analysis of Claimant's first quarterly reports for these parcels in 2005 found Claimant to be in compliance with its obligations and that non-compliance with other obligations was due to the failure to issue environmental permits.[338]

469. Based on the above review and analysis, the Tribunal is satisfied that Claimant had valid title to the mining contracts concluded with Placer Dome for Bárbara and Zuleima parcels and with CVG regarding NLEAV1-NLSAV1 parcel and that such parcels could have been used to site infrastructure and services for the exploitation of the Brisas Project. The fact that Claimant's contractual rights to these parcels of land were not converted into concessionary rights does not *per se* prevent their use under the mining contracts for the planned purpose. There is no need to examine the status of the Lucia parcel since, as mentioned by Claimant, the same was no longer needed for the Brisas Project.[339]

E. Esperanza and Yusmari

Claimant's Position

470. Mining contracts for Esperanza and Yusmari had been executed by CVG and Minera Las Cristinas C.A. (MINCA), a joint venture between CVG (30%) and Placer Dome (70%), on 5 January 1993 for a period of 20 years. The planned use of the parcels was for exploration and exploitation of alluvial and hard-rock gold and diamond.

[335] Reference to such certificates is made *supra* footnote 314.

[336] MIBAM Official Letter No. IFMLC-093-2008 dated 2 September 2008 (C-66).

[337] Reply, para. 68 and footnote 126.

[338] MEM Analysis of 2005 Zuleima First Quarterly Report (C-1248) and MEM Review of 2005 NLEAV1-NLSAV1 First Quarterly Report (C-1250).

[339] *Supra* para. 452.

471. Claimant and MINCA executed easement agreements and additional agreements on 7 May 2004.[340] Claimant states that it planned to use the Esperanza parcel for waste rock and a sedimentation pool and the Yusmari parcel for an organic soil heap.

472. By letter of 1 December 2005, Claimant informed MIBAM about the easement agreements concluded with MINCA regarding "infrastructure and services works it deems convenient or necessary in the Regions of the Areas, including, without limitation, dumps or sterile material deposits."[341]

473. Claimant also noted that reference to the use of the Esperanza and Yusmari parcels was made by Claimant's May 2006 Update to the Brisas Project Feasibility Study ("**May 2006 Update**").[342]

474. The V-ESIA included a reference to the Esperanza and Yusmari parcels and the V-ESIA Addendum referred to the Esperanza parcel.[343] The V-ESIA was approved by MinAmb for the Phase I works on 9 February 2007, without any objection regarding the planned use of these parcels.[344]

475. The Phase I Permit authorized works as planned on the Esperanza and Yusmari parcels.[345]

Respondent's Position

476. In relation to the Esperanza and Yusmari parcels, Respondent states that Claimant never obtained valid rights to put such parcels to use as infrastructure. The easements obtained from MINCA, a company that had the right to explore and exploit the parcels through a contract with CVG, were invalid since MINCA had no right to transfer its contractual rights to another entity

[340] Contract between MINCA and CABC dated 7 May 2004 (C-15).

[341] Letter to MIBAM dated 1 December 2005 (attaching MINCA Contract of 7 May 2004) (C-1287, p.3).

[342] Letter from Gold Reserve to MIBAM dated 12 May 2006 (C-453, pp. 10, 52-54).

[343] V-ESIA of the Brisas Project (C-178, paras. 1, 2.1.3, 2.3.3.1, 2.3.3.4; Annex 2.1); Addendum to V-ESIA of the Brisas Project, January 2007 (C-187, pp. 82 and 13, respectively).

[344] MinAmb Official Letter No. 010303-527 dated 9 February 2007 (C-252).

[345] MARN (now MinAmb) Official Letter No. 010303-1080 dated 27 March 2007 (C-44, pp. 16, 20, 22, 24-25 and 18-19, 24-25, respectively).

without CVG's approval. Even with such approval, it was legally impossible for MINCA to grant the right to site slag heaps on the parcels.[346]

477. MIBAM never received a feasibility study for Esperanza and Yusmari. MinAmb issued two AARNs for exploration for each of these parcels.[347]

The Tribunal's Analysis

478. Under the terms of an agreement with MINCA of 7 May 2004, MINCA, as holder of certain mining contracts with CVG over the area of the two parcels, authorized Claimant to conduct additional exploration studies and to perform the infrastructure and services works deemed convenient or necessary in the area. The agreement states that it does not create "an assignment or delegation of the rights and/or obligations that belong to MINCA under the aforementioned Mining Contracts."[348] The content of the agreement was reported to MIBAM on 2 December 2005.[349]

479. On the same date of 7 May 2004, the parties entered into two additional agreements, one for each such parcels, providing that in the event that there existed sufficient gold or diamond reserves in Esperanza/Yusmari to justify proceeding to exploitation, the parties would enter into a new agreement regulating such exploitations. If there did not exist sufficient mineral reserves to proceed to exploitation, MINCA would allow Claimant to obtain the exclusive right to use Esperanza/Yusmari for infrastructure purposes.[350]

480. Contrary to Respondent's contention, there was no assignment by MINCA to Claimant of the mining rights it held with CVG. MIBAM was informed of the content of the agreements with MINCA. Neither this Ministry nor MinAmb raised any objections to the use by Claimant of these

[346] Contract between CVG and MINCA dated 5 January 1993 for exploitation of the Esperanza parcel (C-14, First Clause).

[347] MARN Official Letter No. 01-00-19-05-482/2004 dated 26 July 2004 (C-832), and MinAmb Official Letter No. 01-00-19-05-626/2007 dated 4 September 2007 (C-52), for Esperanza; MARN Official Letter No. 01-00-19-05-484/2004 dated 26 July 2004 (C-59), and MinAmb Official Letter No. 01-00-19-05-633/2007 dated 5 September 2007 (C-60), for Yusmari.

[348] Contract between MINCA and CABC dated 7 May 2004 (C-14, p.2).

[349] Letter from Gold Reserve to MIBAM dated 1 December 2005 (C-1287).

[350] Contract between Gold Reserve and MINCA dated 7 May 2004 (hereinafter "**Additional Esperanza Contract**"), (C-1285, Second Clause); Contract between Gold Reserve and MINCA dated 7 May 2004 (hereinafter "**Additional Yusmari Contract**"), (C-1286, Second Clause).

parcels to support infrastructure, as shown by the approval, respectively, of the Brisas Project Feasibility Study and of the V-ESIA. Both studies indicated the proposed use of the two parcels for infrastructure and services for the Brisas Project.

481. The Phase I Permit further authorized works as planned on the Esperanza and Yusmari parcels in March 2007, as indicated in the text of the Permit enclosed as Appendix B to Claimant's Second Post-hearing Submission.

482. Having examined the Parties' positions regarding Esperanza and Yusmari parcels and the evidence filed in that regard, the Tribunal is satisfied that Claimant had valid contracts for the use of these two parcels.

F. NLNA1-NLNV1 (the North Parcel)

Claimant's Position

483. According to Claimant, as a result of a surveying error the North Parcel was not included in the Brisas Concession. Although the error was recognised by MIBAM,[351] it was never officially corrected. As a result, in November 2003, Claimant submitted an *alfarjeta* concession application to acquire rights to use the North Parcel.[352] The application was not acted upon by MIBAM.

484. Claimant avers that it had a legitimate expectation that the right to use the North Parcel would be granted, particularly considering that it could be economically exploited only jointly with the Brisas and Unicornio Concessions.[353] Significantly, the Brisas Project Feasibility Study contemplated the incorporation of the North Parcel.[354] The study was approved by MIBAM on 6 January 2003.[355]

485. The V-ESIA included the North Parcel.[356] It was approved by MinAmb for the Phase I works on 9 February 2007.[357]

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[351] MEM (now MIBAM) Memorandum No. DT-144 dated 6 October 1993 (C-1298, p.2).

[352] NLNA1-NLNV1 Alfarjeta Application dated 24 November 2003 (C-1310).

[353] Reply, paras. 110-111.

[354] Brisas Project Feasibility Study dated February 2001(C-170, para. 1.3.6; Table 2.1, p. 49; figure 4.1, pp. 4-8).

[355] MEM (now MIBAM) Official Letter No. DGM-003 dated 6 January 2003 (C-253).

[356] V-ESIA of the Brisas Project 2005 (C-178, paras. 1.1, 2.1.3, Annex 2.1).

486. The Phase I Permit, granted by MinAmb on 27 March 2007, authorized works on the North Parcel.[358]

Respondent's Position

487. Claimant applied for a concession on NLNA1–NLNV1 in 1993, but its application was never granted. Respondent argues that without this concession, Claimant could not construct the mine pit it had designed in order to develop the Brisas and Unicornio Concessions. Claimant's attempt to rely on legitimate expectation that "the MIBAM could confirm its right to use the North Parcel"[359] is, in Respondent's view, without merit since under the 1999 Mining Law an express resolution granting the concession was required. Accordingly, the project was impossible.

The Tribunal's Analysis

488. Claimant never acquired the *alfarjeta* concession it had requested for this parcel. There is no evidence in the file that Claimant acquired a right of use of NLNA1-NLAV1 for infrastructure or services for the Brisas Project under any other legal or contractual ground.

489. The fact that Claimant expected to be able to use this parcel, even if accepted in the light of the circumstances of the case,[360] would not create a right when the same, although duly requested, had not been granted. The fact that the Brisas Project Feasibility Study contemplated use of the North Parcel does not remedy this defect, as the study clearly states that no title to the parcel land yet been acquired.[361] MIBAM's approval of the Brisas Project Feasibility Study was therefore contingent upon the concession being granted, which did not occur.

490. The V-ESIA referred to the North Parcel as a component of the Brisas Project, mentioning that the grant of an *alfarjeta* concession on the parcel was pending (*en curso*). The MinAmb's approval

[357] MinAmb Official Letter No. 010303-527 dated 9 February 2007 (C-252).

[358] MARN (now MinAmb) Official Letter No. 010303-1080 dated 27 March 2007 (C-44; maps at the end).

[359] Reply, paras. 182-184 and Section II.B.3 .

[360] This aspect will be examined in the context of the BIT violations.

[361] In the part of the Brisas Project Feasibility Study dealing with NLNA1-NLAV1 it is stated: "There is currently an application before the MEM to obtain the respective mineral rights to the concession" (C-170, para. 1.3.6).

of the V-ESIA cannot therefore be interpreted recognizing Claimant's right to use the land, as Claimant knew that the concession had not yet been granted by the competent authority. For the same reason, the reference made to NLNA1-NLNV1 in the Phase I Permit[362] does not imply any recognition of an entitlement to use the parcel in the absence of a legal or contractual right.

491. The absence of rights regarding the North Parcel would have prevented the implementation of the layback agreement with the company Las Cristinas that had mining rights on the adjoining Cristina IV parcel. The layback agreement would have in fact required the holding of mining rights on the North Parcel in order for Claimant to be able to extend its pit into the neighbouring parcel of the other concessionaire. In any case, even if the two parties had reached agreement on the substantive aspects of the layback, as asserted by Claimant, the agreement was never signed.[363]

492. For the above reasons, the Tribunal considers that Claimant had no rights to NLNA1-NLNV1 (North Parcel) and that this parcel should be excluded as a component of the Brisas Project for all relevant purposes.

G. El Pauji

Claimant's Position

493. A concession for the exploration and exploitation of alluvial gold and diamonds had been granted to ARAPCO on 24 February 1983,[364] with exploitation certificate published on 20 July 1988 ("**El Pauji Concession**").[365] In the absence of action by MIBAM on a request to transfer the concession to Claimant, an easement agreement was concluded by ARAPCO with Claimant on 27 January 2006, for a term equal to that of the concession,[366] to develop an access road and build various infrastructures. A copy of the easement agreement was provided by ARAPCO to MIBAM on 22 May 2006.[367]

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[362] MARN (Now MinAmb) Official Letter No. 010303-1080 dated 27 March 2007 (C-44).

[363] As recognized by Claimant, *see* Reply, para. 188.

[364] Resolution No. 197, Official Gazette No. 3333.796 dated 4 September 1987 (C-20).

[365] Official Gazzette No. 34.011 dated 20 July, 1988 (C-18).

[366] Agreement for the Constitution of Rights of Use and Way between CABC and ARAPCO dated 27 January 2006 (C-16).

[367] Letter from ARAPCO to MIBAM dated 22 May 2006 (C-1318).

494. The concession term was for 20 years, *i.e.* until 20 July 2008, extendable for two successive ten-year periods.[368] According to Claimant, the concession was extended for additional ten years by operation of law under Article 25 of the 1999 Mining Law and the principle of positive administrative silence pursuant to a timely request for extension filed on 17 January 2008 and the lack of any reply by MIBAM during the following six months.[369] The easement agreement with ARAPCO was extended accordingly, as contended by Claimant.

495. As testified by Mr Rivero, one of Claimant's witnesses, on 19 January 2009 MIBAM, in disregard of the extension of the Concession, issued tax forms calculating the period of tax until the expiry of the Concession initial term, to then order, on 18 March 2009, the immediate suspension of any activities on El Pauji and the reversion of its assets to Respondent.[370] By Resolution dated 22 May 2009, MIBAM denied the requested extension declaring that ARAPCO's rights to the concession had been terminated.[371] The reconsideration appeal filed by Claimant on behalf of ARAPCO on 12 June 2009[372] was denied.[373]

496. The Resolution denying the extension of the concession was based on alleged "non-compliance" by ARAPCO with its obligation under the Certificate of Exploitation and the 1999 Mining Law, as documented by three memoranda of the same date and prepared by the same officers as those on which the termination of the Brisas Concession was based.[374] Such memoranda were never communicated to either ARAPCO or Gold Reserve.[375] Respondent's stated grounds for denying the concession extension were, according to Claimant, pretextual, MIBAM having "repeatedly analysed and verified that the concession was in compliance."[376]

[368] Official Gazette No. 34.011 dated 20 July 1988 (C-18, Special Advantage No. 7).

[369] Reply, para. 121.

[370] Rivero I, paras. 129-131.

[371] MIBAM Resolution DM/No. 048-2009 dated 22 May 2009, Official Gazette No. 39.184 dated 22 May 2009 (C-105).

[372] Reconsideration Appeal filed by Gold Reserve on behalf of ARAPCO dated 12 June 2009 (C-107).

[373] MIBAM Resolution No. DM/N°066-2009 dated 28 July 2009 (C-106).

[374] MIBAM Memoranda No. LC-033-09 (C-876) and No. CSCM-048 (C-1320) dated 29 April 2009, and MIBAM Memorandum No. DGCM-095-09 dated 12 May 2009 (C-1321).

[375] Reply, para. 124.

[376] Reply, para. 127 and footnote 249.

497. Reference to the use of El Pauji as part of the Brisas Project was made in the approved Brisas Project Feasibility Study[377] and the May 2006 Update.[378] The use of El Pauji Concession for infrastructure for the Brisas Project was recognized by MIBAM's Technical Report of 26 September 2006. The Ministry's Report states: "This concession forms an integral part of the Brisas Project given that it considers the possibility of placing in it infrastructure and installations of this project". It recommends at the end that action be taken before the MinAmb for the necessary environment permits to be issued for this parcel to move the Brisas Project forward.[379]

498. Claimant notes that the V-ESIA also referred to El Pauji Concession[380] and likewise its Addendum.[381] The V-EISA was approved by MinAmb on 9 February 2007, without objection as to the intended use of El Pauji for the development of the Brisas Project.

499. The Phase I Permit did not refer to El Pauji since the relevant parcel was not needed until after Phase I dewatering.[382] Its use for infrastructure had been recognised by MinAmb, noting no legal impediments.[383]

Respondent's Position

500. Claimant envisioned using the El Pauji parcel for the siting of a slag heap and a tourist port. It had acquired an easement to use the parcel from ARAPCO, the concessionaire, in 2006.[384]

501. According to the Fourth Clause of the easement agreement, the validity of the easement was subject to the duration of the concession. Respondent asserts that the concession ended in July 2008 when the Ministry refused to extend its term. Claimant requested that this decision be

[377] Brisas Project Feasibility Study dated February 2001(C-170, paras. 1.3.8, 4.1).

[378] Letter from Gold Reserve to MIBAM dated 12 May 2006 (C-453, pp. 10, 52-54).

[379] MIBAM Technical Report El Pauji Concession dated 26 September 2006 (C-1319).

[380] V-ESIA of the Brisas Project 2005 (C-178, paras. 1, 2.1.3, 2.3.3.1, 2.3.3.4 and Annex 1).

[381] Addendum to V-ESIA of the Brisas Project (C-187, para. 82).

[382] Claimant's Second Post-Hearing Brief, Appendix A, p. 19.

[383] MARN (now MinAmb) Memorandum No. 01-00-19-04-268/2005 dated 15 November 2005 (C-1053, pp. 7-8); MinAmb Letter No. 01-00-19-05-609/2007 dated 30 August 2007 (C-51).

[384] Agreement for the Constitution of Right of Use and Way between CABC and ARAPCO dated 27 January 2006 (C-16).

reconsidered but its request was denied on 28 July 2009.[385] The easement was extinguished with the termination of El Pauji concession. In any case, Phase I Permit did not authorize activities on El Pauji.[386]

The Tribunal's Analysis

502. Having examined the Parties' positions regarding this parcel and the evidence filed in that regard, the Tribunal notes the following. Based on the power of attorney obtained from ARAPCO, the holder of the El Pauji Concession, to deal in all matters related to this concession,[387] Claimant timely filed the application for extension on 17 January 2008, as confirmed by MIBAM.[388] MIBAM failed to respond within the six-month period provided by Article 25 of the 1999 Mining Law. MIBAM could not therefore deny, as it did by Resolution dated 22 May 2009,[389] the requested extension and declare ARAPCO's rights to the concession terminated.

503. Apart from noting in the last regard that MIBAM had issued to the El Pauji concessionaire, in a consistent and continuous way, certificates of compliance in respect of the 1999 Mining Law, its Regulation and the concession Mining Title,[390] pursuant to Article 25 of the 1999 Mining Law the term of the El Pauji Concession had been extended by operation of law by an additional ten year term from 20 July 2008. Accordingly, the easement agreement with ARAPCO relating to the El Pauji Concession remained in effect, allowing Claimant to make use of the relevant parcel to site infrastructure and services for the exploitation of the Brisas Project.

504. MIBAM Resolution denying the extension of El Pauji concession relies on the breach of a number of Special Advantages (Nos. 6, 7, 8, 9, 10, 11, 12 and 13 and 14), out of which Special Advantages No. 7 (utilize the term of twenty (20) years from the publication of the Exploitation Concession in the Official Gazette for exploitation of the chosen plots within the lots of the concession) and 8 (commence the exploitation with the term of three (3) years from the same publication) consist of major obligations. As indicated by the *recurso de reconsideración*,

[385] MIBAM Resolution No. DM/N°066-2009 dated 28 July 2009 (C-106).

[386] Respondent's Comments on Claimant's Second Post-Hearing Brief, para. 8(d).

[387] Power of Attorney between ARAPCO and Gold Reserve dated 12 February 2004 (C-19).

[388] MIBAM Resolution dated 22 May 2009 (C-105), Third Whereas, p. 2.

[389] *Ibid*., First Resolution, p. 5.

[390] The following exhibits containing certificates of compliance relating to the El Pauji Concession were issued by MIBAM: C-81, C-82 and C-83, the last one dated 14 September 2007 (*i.e.*, few months before the extension application was filed).

Claimant, acting on behalf of ARAPCO, relied essentially on the certificates of solvency dated 14 September 2007 annexed to the extension request (under "F") and the automatic extension pursuant to the "positive administrative silence principle."[391]

505. The situation under Venezuelan law regarding the extension of the El Pauji Concession is the same as the one previously examined concerning the extension of the Brisas Concession.[392] Also in this case, in fact, Respondent terminated the El Pauji Concession by a resolution denying an extension that had already intervened[393] instead of initiating an administrative proceeding in view of the revocation of the "tacit administrative act" by which the El Pauji Concession had been extended, guaranteeing in that context Claimant's due process rights.

506. As in the case of termination of the Brisas Concession, Respondent's conduct regarding termination of the El Pauji Concession shall be examined in the context of the alleged BIT violations.

H. Carabobo and Virgen de Lourdes Parcels

Claimant's Position

507. Claimant noted that the Lucia, Carabobo and Virgen de Lourdes parcels, previously indicated as required, were no longer needed for operational purposes of the Brisas Project as at 2008.

Respondent's Position

508. Claimant never obtained an easement over the Carabobo parcel and was thus unable to use and expand the road on this parcel, as planned. Claimant also acquired no easement over the Virgen de Lourdes parcel to use for installing power lines and conveyor belts for its project.[394] Claimant states that it no longer planned to place any infrastructure on Virgen de Lourdes,[395] but the fact remains that it never acquired rights to this parcel.[396] In any case, Phase I Permit did not authorize any activity on the two parcels.

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[391] Reconsideration Appeal filed by Gold Reserve on behalf of ARAPCO dated 12 June 2009 (C-107, pp. 9-10).

[392] *Supra* para. 367.

[393] MIBAM Resolution DM/No. 048-2009 dated 22 May 2009, Official Gazette. No. 39.184 dated 22 May 2009 (C-105).

[394] Letter from Gold Reserve to MIBAM dated 19 March 2006 (C-446).

[395] Reply, para. 133.

[396] Respondent's Comments on Claimant's Second Post-Hearing Brief, para. 8(d).

The Tribunal's Analysis

509. The Tribunal accepts Claimant's position that these parcels were no longer required as at April 2008 and that therefore they do not form part of the Brisas Project.

I. Morauana, Cuyuni, Mireya and Venamo

Claimant's Position

510. A concession over these parcels had been granted to the China Clay Guyana and Refinadora Ecologica de Caolín by the Bolivar State Government on 8 December 2006 for the exploration and exploitation of kaolín in the area.[397] An easement agreement was executed on 8 December 2006 by China Clay Guyana and Refinadora Ecologica de Caolín with Claimant regarding these parcels. The easement agreement, which had the same duration of the concession (*i.e.*, 20 years), had been approved by the Bolivar Government on 29 November 2006.[398]

511. Claimant states that, as shown by the Brisas Project Feasibility Study, the planned use for these parcels was for infrastructure, including access roads, conveyor belt and power line.[399] The Brisas Project Feasibility Study was approved by MIBAM on 6 January 2003.[400] The May 2006 Update made also reference to these parcels.[401]

512. The V-ESIA of the Brisas Project 2005[402] and its Addendum[403] included Morauana and the use of Barbarita as a quarry. MinAmb approved the study on 6 January 2003.

513. Claimant observes that the Phase I Permit authorized works over the four parcels and Barbarita, specifically construction of access roads and site clearing for the conveyor belt and, as to Barbarita, of a quarry, a quarry material processing area and a quarry access road.[404]

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[397] Contract between CABC, China Clay, and Refinadora de Caolin dated 8 December 2006 (C-21).

[398] *Ibid.*

[399] Brisas Project Feasibility Study dated February 2001 (C-170, para. 1.3.9). For a description of the planned use, see Reply, para. 133.

[400] MEM (now MIBAM) Official Letter dated 6 January 2003 (C-253).

[401] Letter from Gold Reserve to MIBAM dated 12 May 2006 (C-453, pp. 52-54).

[402] V-ESIA of the Brisas Project 2005 (C-178, paras. 1.1, 2.1.3, 2.16.2, 2.2.6 and Annex 2.1).

[403] Addendum to V-ESIA of the Brisas Project (C-187, paras. 2.1.6 and 2.1.11).

514. Contrary to Respondent's characterization of the Brisas Project as being "varied widely" or having a "mercurial scope",[405] Claimant contends the Brisas Project remained essentially the same. Out of the concession and parcels identified in Section 2.1.3 of the V-ESIA, eleven remained part of the project when Phase I Permit was granted. Two parcels (Carabobo and Virgen de Lourdes) were replaced by three others (Cuyuni, Mireya and Venamo) while Lucia was not an operational part of the Brisas Project.[406] The Administration was kept updated of these changes.[407]

Respondent's Position

515. Claimant acquired an easement over Morauana through a contract with China Clay Guayana and Refinidora de Caolín on 8 December 2006.[408] Respondent notes that Claimant never sought any environmental permits from MinAmb for this parcel.

516. Claimant acquired the Barbarita Concession on 10 June 2005, valid for 5 years, for the exploration and exploitation of amphibolite ("**Barbarita Concession**").[409] It never submitted a feasibility study on Barbarita to MIBAM. The Ministry of Environment issued one AARN on 23 February 2006.[410]

517. The parcels comprising the Brisas Project have changed by eliminating some of them and adding others subsequent to the configuration of the project in the 2005 V-ESIA. Respondent notes that this is the reason why it has not commented on the Cuyuni, Mireya and Venamo parcels.[411]

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[404] MARN (now MinAmb) Official Letter No. 010303-1080 dated 27 March 2005 (C-44, at pp. 3-4, 9-10, 15-16, 21-24 and maps at the end).

[405] Respondent's Comments on Claimant's Second Post-Hearing Brief, paras. 2 and 18(a).

[406] Claimant's Response to Respondent's Comments on Second Post-Hearing Brief, para. 14.

[407] *Ibid*. para. 13.

[408] Contract between CABC, China Clay, and Refinadora de Caolín dated 8 December 2006 (C-21).

[409] Official Gazette of Bolivar State, Special Ed. No 218 dated 10 June 2005 (C-9).

[410] MARN (now MinAmb) Official Letter No. 01-00-19-05-093/2006 dated 23 February 2006 (C-831).

[411] Respondent's Comments on Claimant's Second Post-Hearing Brief, para. 18(a).

The Tribunal's Analysis

518. The analysis of the evidence in the file and of the Parties' positions in this proceeding leads the Tribunal to conclude that these parcels were available to Claimant for use for the exploitation of the Brisas Project.

519. Respondent has noted the absence of environmental permits for Morauana and of a feasibility study for Barbarita. However, the V-ESIA, approved by MinAmb on February 2007, included Morauana,[412] while a feasibility study for Barbarita had been submitted to the Bolivar State Government as evidenced by the obtainment of a certificate of exploitation of the Barbarita Concession on 1 January 2009.[413] The Brisas Project Feasibility Study included Barbarita.[414]

520. The Phase I Permit authorized works on Morauana and Barbarita, as well as on Cuyuni, Mireya and Venamo parcels.[415]

J. Choco 5

Claimant's Position

521. Claimant submits that it was forced to suspend all exploration activities on Choco 5 in March 2009 due to MinAmb's failure to act on its application to renew the exploration permit. In addition, MIBAM submitted Claimant's Choco 5 investment to a comprehensive audit on 28 January 2010, after this arbitration was commenced, requesting information that it already possessed.[416]

522. After having expended approximately US$ 1.5 million on Choco 5, Claimant states it had no expectation that it would be permitted reasonably to develop Choco 5 property given the developments regarding the Brisas Project.

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[412] V-ESIA of the Brisas Project 2005 (C-178, paras. 1.1, 2.1.3, 2.3, 16.2 and Annex 2.1); Addendum to V-ESIA of the Brisas Project (C-187).

[413] Exploration Certificate dated 1 January 2009 (C-875); Claimant's Second Post-Hearing Brief, Appendix A, p.24.

[414] Letter from Gold Reserve to MIBAM dated 12 May 2006 (C-453, p. 54).

[415] MARN (now MinAmb) Official Letter No. 010303-1080 dated 27 March 2007 (C-44. pp. 4-6, 9, 12-13, 17-22, 24-25).

[416] Memorial, paras. 267-268

523. In Claimant's view, Respondent wrongly asserts that Claimant abandoned Choco 5 for commercial reasons. It contends that having timely applied for renewal of the exploration permit, it could no longer work after March 2009 because MinAmb did not act on its application consistent with Venezuela's new approach to Claimant's activities. It was literally forced to stop work after March 2009. Had Claimant remained at Choco 5, it says its investment there would have met a fate similar to the Unicornio Concession that was terminated on pretextual grounds at that time.

Respondent's Position

524. Respondent rejects Claimant's justifications for its failure to exploit the Choco 5 Concession, saying that it is a reconstructed fiction. Respondent contends that Claimant sat idle for at least 5 years. In September 2009, GR Minerals El Choco C.A.[417] submitted narratives of the activities performed under the successive AARNs during the period of those permits.[418] However, as shown in the narratives, the majority of the exploratory activities that GR Minerals El Choco C.A. was authorized to carry out were never initiated, other activities being barely performed or performed in only a partial manner.

525. In an attempt to show that it was complying with its obligations under the respective mining title and the sublease agreement, Claimant argues that as a result of CVG's routine inspections GR Minerals El Choco C.A. received recurring certifications from CVG regarding its compliance with all of its obligations under the sublease agreement. Respondent replies that these documents do not constitute a certification of compliance with obligations, being merely inspection minutes showing the absence of evidence of exploratory activities. GR Minerals El Choco C.A. delayed almost three years in seeking the required environmental permits and then had almost five years to execute its exploration program, but did not.

526. GR Minerals El Choco C.A. abandoned Choco 5 on its own initiative, arguing that it "could not reasonably or rationally proceed to invest further in the development of [Choco 5]"[419] as a result of MIBAM's refusal to extend the Brisas Concession and the revocation of Phase I Permit for the

[417] A wholly-owned subsidiary of Gold Reserve, sublessee of Choco 5 Concession from Compañia General de Mineria de Venezuela C.A. that in turn had been leased the Concession by CVG.

[418] Under C-368 (2006 Annual Report for the Choco 5 Mining Concession), MinAmb Official Letter No. 01-00-19-05-633/2007 dated September 2007 (C-60) and MARN Official Letter No. 00170 dated 27 May 2004 (C-61).

[419] Memorial, para. 22.

Brisas Project. Respondent suggests that this claim has no logic since each mining title has a separate set of authorizations and Claimant has presented no facts indicating that either MIBAM or MinAmb treated Choco 5 Concession as part of the Brisas Project or linked its fate to the Brisas Concession. As a matter of fact, long after the Brisas Concession had expired MIBAM was still dealing with Choco 5 as a distinct entity.

527. Respondent contends that Claimant's complaint that it was forced to suspend all exploration activities in Choco 5 because MinAmb failed to act on the application for renewal of the exploration permit[420] is ludicrous. Gold Reserve did not wait even a month after its request to file the Notice of Arbitration on 17 April 2009. The sublease agreement is still in effect, as admitted by Claimant.[421] The audit complained of by Claimant was part of the Ministry's control of the obligations assumed by the concessionaire and the so-called audit was no more than a standard request for information by MIBAM's local office.

The Tribunal's Analysis

528. The Tribunal is not convinced that the failure to obtain the renewal of the exploration permit was sufficient justification for the abandonment by Claimant of the works on Choco 5 property.

529. It is true that, in March 2009, the process that led to the termination of the Brisas Concession two months later had been initiated and the change of policy by the Administration regarding mineral resources exploitation had been announced. However, the mining title to Choco 5 was held by a different entity, Claimant being a sub-lessee from the holder of title, each mining title being subject to a separate regulation. In the Tribunal's view, therefore, the failure by the Administration to grant the requested extension of the exploration permit amounted to conduct that might have entitled Claimant to suspend, not to abandon, the works on Choco 5. The so-called "order of an audit" was just a standard request for information by the local MIBAM office tasked with monitoring mining activities. Respondent states that it cannot be transformed into a "measure equivalent to expropriation".

[420] Memorial, para. 267.

[421] Belanger I, para. 109.

530. For these reasons, the Tribunal considers that Claimant's suspension of works on Choco 5 was unjustified. It will therefore not include Choco 5 when considering below whether Respondent violated the BIT.

CHAPTER VII. THE ALLEGED BIT VIOLATIONS

A. The Applicable Legal Framework

531. Before determining whether or not any violation of the international standards of protection of Claimant's investments under the BIT has occurred, it is appropriate to identify the legal framework and the legal rules applicable to the merits of this dispute within which the relevant facts must be examined. Once ascertained, the facts, as they result from the record, will be analysed in the light of the applicable rules.

532. Article 54 (Applicable Law) of the Arbitration (Additional Facility) Rules provides as follows in the pertinent part:

> "(1) The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply (a) the law determined by the conflict of law rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable."

Article XII(7) of the BIT provides as follows:

> "7. A tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law. An interpretation of this Agreement to which both Contracting Parties have agreed shall be binding upon the tribunal."

533. Based on Respondent's offer of arbitration under the BIT and Claimant's acceptance of such offer by the Request for Arbitration, the Parties have agreed that the rules of law "applicable to the substance of the dispute" are the BIT and applicable rules of international law, as provided by Article XII(7) of the BIT. In addition, as acknowledged by the Parties' reference in their written and oral submissions, Venezuelan law is relevant when determining certain factual matters related to Claimant's mining rights and as further mentioned below.

534. The issue is to determine the role to be assigned to international law on the one hand and domestic law on the other. The governing law in this case is the BIT and international law, supplemented by such rules of public international law that shall be applicable. The Tribunal has thus been tasked with determining whether Respondent has breached obligations to Claimant under the BIT. The role of Venezuelan law is nevertheless important in two respects. On the one hand, it informs the content of Claimant's rights and obligations within the legal framework established by the relevant municipal legislation, as in the field of mining, social rights and the protection of the environment. On the other hand, Venezuelan law also informs the content of commitments made by Respondent to Claimant that the latter alleges have been violated.

535. Finally, Venezuelan law may be relevant for establishing the rights Venezuela recognises as belonging to Claimant. A modification or cancellation of such rights, even if legally valid under Venezuelan law, is relevant to, but not determinative of, a violation of a protection guaranteed by the BIT. Whether a violation has in fact occurred is a matter to be decided on the basis of the BIT itself and other applicable rules of international law, taking into account every element pertinent to the present dispute, including the rules of Venezuelan law applicable to both Parties.

536. According to Claimant, by its conduct and actions to the prejudice of its investment, including regarding the Brisas Concession and the Unicornio Concession, Respondent breached Articles II, III and VII of the BIT. These alleged breaches shall be examined in turn below.

B. Fair and Equitable Treatment

537. Article II of the Canada-Venezuela BIT provides in pertinent part:

> 1. Each Contracting Party shall encourage the creation of favourable conditions for investors of the other Contracting Party to make investments in its territory.
> 2. Each Contracting Party shall, in accordance with the principles of international law, accord investments or returns of investors of the other Contracting Party fair and equitable treatment and full protection and security.

Claimant's Position

538. In relation to Article II, Claimant devotes an extensive analysis to investment treaty cases having described the conditions under which a breach of the fair and equitable treatment standard may be deemed to have arisen. The essential aspects of this analysis may be summarized as follows.

539. Whether particular treatment is considered to be fair and equitable is a fact-dependent, case-specific inquiry that must be assessed in the light of all of the facts and circumstances of the particular case. Claimant submits that the focus of the inquiry should be the legitimate expectations of the investors in the full context of the case.[422]

540. Relying on prior investment treaty cases, Claimant states that fair and equitable treatment means a treatment that is "just", "even-handed" "unbiased", "legitimate", "conducive to fostering the promotion of foreign investment", avoiding a "prejudicial conduct to the investors", its breach implying a "treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective."[423] As it has been emphasized, the host State's conduct must not "manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination" and "the host State must never disregard the principles of procedural propriety and due process and must grant the investor freedom from coercion or harassment by its own regulatory authorities."[424] A breach of this standard need not arise out of individual acts but can result from a series of circumstances and does not presuppose bad faith on the part of the State."[425]

541. According to Claimant, numerous tribunals have underscored the central role of the investor's legitimate expectations in the analysis of the fair and equitable treatment obligation, such expectation being created when a State's conduct is such that an investor may reasonably rely on

[422] Memorial, para. 273.

[423] Memorial, paras. 271-272, referring to *Saluka Investment v. Czech Republic*, cit., para. 297; *MTD Equity Sdn Bhd v. Republic of Chile* (hereinafter "*MTD v. Chile*" or "*MTD*"), ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 113.

[424] *See ex multis* referred to by Claimant: *Saluka*, paras. 307-308; *Rumeli Telekom A.S. & Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (hereinafter "*Rumeli v. Kazakhstan")*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paras. 100-101.

[425] *Bayindir Insaat Turizm Ticaret ve Sanayi AS v. Islamic Republic of Pakistan* (hereinafter "*Bayindir v. Pakistan*" or "*Bayindir*"), ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 181.

such conduct.[426] It has also been held that the foreign investor expects "the State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand… the goals of the relevant policies and administrative practices and directives…"[427]

542. Seen in light of the foregoing standard, Claimant observes that the facts in this proceeding demonstrate that Venezuela failed to accord Claimant's investments fair and equitable treatment. After years of governmental support and encouragement that the Brisas Project would continue to receive the permits and approvals necessary for the Brisas Project to proceed,[428] "Venezuela dashed these settled expectations by first frustrating and then terminating the Brisas Project

[426] *International Thunderbird Gaming Corp. v. United Mexican States* (hereinafter "*International Thurnderbird v. Mexico*"), UNCITRAL (NAFTA), Award, 26 January 2006, para. 147; *PSEG Global Inc. & Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (hereinafter "*PSEG v. Turkey*" or "*PSEG*"), ICSID Case No. ARB/02/5, Award, 19 January 2007, para. 240; *Saluka*, cit., para. 302; *Duke Energy Electroquil Partners v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, paras. 339-340.

[427] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (hereinafter "*Tecmed v. Mexico*"), ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 154.

[428] Claimant's list of the governmental manifestation of encouragement and support includes the following:

> "• allowing Gold Reserve to bring the alluvial concession into compliance upon first acquiring it from the prior owner;
>
> • approving the feasibility study and later the environmental assessment for the alluvial concession;
>
> • issuing and renewing multiple permits allowing Gold Reserve to further explore and develop the alluvial concession;
>
> • granting Gold Reserve the hard rock concession;
>
> • approving the Brisas Project Feasibility Study and the V-ESIA setting forth a development plan for the project which was to include development of both concessions simultaneously, together with supporting infrastructure as needed on several adjacent parcels;
>
> • providing rights of use in respect of those adjacent parcels, including by permitting CVG to conclude contracts with Gold Reserve in regard to many of them;
>
> • issuing and renewing multiple further permits allowing Gold Reserve to explore and develop additional parcels as part of the Brisas Project;
>
> • requesting numerous updates to the Brisas Project Feasibility Study and V-ESIA to which the Company always responded;
>
> • holding numerous meetings with the Company in regard to all aspects of the Brisas Project and its development in which the amount of investment being made by the Company to realize the project was clearly presented and in which the government never registered any objection to the viability of the Project, including also in meetings with project lenders;
>
> • engaging in correspondence regarding the development of the Brisas Project over many years without ever raising doubts about the Company's ability to realize the Project as approved;
>
> • consistently confirming in writing Gold Reserve's compliance with the applicable mining titles (including special advantages), contracts, the mining laws and regulations, including after conducting on-site inspections; and
>
> • issuing the Construction Permit for the Brisas Project".
>
> (Memorial, para. 299)

through a series of arbitrary, capricious, non-transparent, pretextual and abusive measures undertaken in furtherance of the evolving political agenda of the Chávez Administration."[429]

543. According to Claimant, the measures in question include:

> "•the Ministry of Environment's conditioning the effectiveness of the Construction Permit on its signing of the Initiation Act and, following Gold Reserve's compliance with the conditions of the Permit, refusing to do so, thereby preventing the Brisas Project from proceeding;
> • President Chávez's commandeering the decision of whether the Initiation Act would be signed and whether the Brisas Project was allowed to proceed;
> • the Ministry of Environment's peremptory revocation, in a manner that violated fundamental principles of Venezuelan law, without prior notice to Gold Reserve or an opportunity to be heard, of the Construction Permit it had issued one year earlier and on which Gold Reserve relied to invest more than US$ 115 million more in the Project, which revocation was based on purported environmental grounds that were without legal basis and that were not supported by the facts of the Brisas Project, and where the revocation (and all subsequent government acts directed at the Company) were in reality motivated by the political agenda of the Chávez Administration, revealed and confirmed in words and deeds of the government and its officials, including President Chávez, to remove North American investment in the gold sector and replace it with more politically desirable alternatives;
> • the government's conditioning any opportunity for Gold Reserve to regain the revoked Construction Permit on Gold Reserve's agreeing to mine the Brisas Project underground, which was irrational technically and economically and which conflicted with the Ministry of Mines and Ministry of Environment's prior approvals;
> • the Ministry of Mines' negligent treatment of the application to extend the Brisas alluvial concession, its subsequent refusal to recognize in several administrative acts the extension granted by operation of law, culminating in the Ministry's denial of the extension and termination of the concession, without prior notice to Gold Reserve or an opportunity to be heard, based on a determination of alleged non-compliance by the Company with special advantages in the mining title that contradicted years of written certifications issued by the same Ministry, on which the Company reasonably relied, confirming the Company's compliance with those very same obligations;
> • the government's subsequent seizure and occupation of the Brisas Project site, its seizure of all of the Company's mining assets despite being on notice that those assets were all attributable to the then-valid Unicornio Concession, its transfer of those assets and the site to the state-owned company CVG Minerven, and its physical eviction of Gold Reserve's personnel and contractors from the Brisas Project site; and
> • the Ministry of Mines' revocation of the Unicornio mining title, which, like the termination of the Brisas mining title, was based on a purported determination by the Ministry of non-compliance by the Company with special advantages in the mining title and with the mining law that

[429] Memorial, para. 300.

contradicted years of written certifications issued by the Ministry confirming the Company's compliance with those same obligations."[430]

544. Claimant alleges that many of these measures violated fundamental principles of Venezuelan law, which is a further demonstration of their arbitrary nature and the fact that they undermined Claimant's legitimate expectations to be treated in accordance with the law of the country in which it agreed to invest.

Respondent's Position

545. Respondent states that Claimant has not established that Venezuela failed to accord fair and equitable treatment in accordance with Article II(2) of the BIT. Respondent contests Claimant's view that Venezuela's unstinting support created expectations that were suddenly dashed in 2008 with MIBAM's refusal to extend the Brisas Concession and MinAmb's nullification of the Phase I Permit. Claimant's goal is to establish that it did not receive fair and equitable treatment because its legitimate expectations were frustrated by a series of arbitrary, capricious, non-transparent, pretextual and abusive measures which were unfair and inequitable. However, Respondent says Claimant has failed to meet its burden of showing conduct by Venezuela that in any way rises to the level of a violation of the BIT.

546. Under Article II of the BIT, Respondent advocates that the ordinary meaning of the fair and equitable treatment clause references the minimum standard of treatment of aliens and their property under customary international law. As held by the *Neer* decision,[431] a high threshold for finding a breach of the minimum standard of treatment of the rights of aliens is required. Claimant has suggested that no investment treaty tribunals other than NAFTA tribunals have interpreted the reference to international law as meaning "the minimum standard of treatment under customary international law."[432] Respondent says this is mistaken since also non-NAFTA tribunals have so held.[433]

[430] *Ibid.*

[431] *LFH Neer and Pauline Neer v. Mexico* (hereinafter "*Neer*"), United States - Mexico General Claims Commission, Decision of 15 October 1926, 4 UNRIAA 60, pp. 61-62, referred to by the Counter-Memorial, para. 533.

[432] Reply, paras. 466-471.

[433] Rejoinder, paras. 306-308.

547. Respondent notes that this standard has been adhered to by numerous tribunals that have made reference to conduct "rising to the level that is internationally unacceptable"[434] or "decision clearly improper and discreditable,"[435] "outright and unjustified repudiation of the relevant regulations,"[436] "gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination or a manifest lack of reasons, falling below acceptable international standards,"[437] to measures "grossly unfair, unjust or idiosyncratic, arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure."[438]

548. Respondent contends that Claimant's reference to cases in which tribunals have held that "fair and equitable treatment" means "treatment in accordance with the principles of international law" not limited to the minimum standard of treatment, is inapposite. Claimant relegates the reference to "principles of international law" to function as an interpretative aid rather than as a source of legal obligation. Respondent's position is that this reference is to be understood as only reflecting the minimum standard of treatment.[439] Moreover, Respondent recalls that Canada has consistently expressed the position, relied upon by NAFTA tribunals, that standards of treatment afforded under its post-NAFTA BITs (including the BIT applicable to this proceeding) contain the same standard of treatment as Article 1105 of the NAFTA, namely customary international law minimum standard.[440] Article 32 of the Vienna Convention allows recourse to supplementary means of interpretation to confirm the meaning resulting from Article 31 of the Vienna Convention.[441] Other treaties on the same subject-matter offer supplementary means of interpretation. Canada's new model foreign investment protection agreement confirms Canada's pre-existing intention in negotiating Article II(2) of the BIT.[442]

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[434] *S.D. Myers v. Canada* (hereinafter "*S.D. Meyers v. Canada*"), UNCITRAL (NAFTA), Final Award, 30 December 2002, para. 263.

[435] *Mondev International Ltd v. United States* (hereinafter "*Mondev*"), NAFTA, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 127.

[436] *GAMI Investments Inc. v. United Mexican States* (hereinafter "*GAMI v. Mexico*" or "*GAMI*"), (NAFTA) UNCITRAL, Award, 15 November 2004, para.103.

[437] *International Thunderbird v. Mexico*, cit., para. 194.

[438] *Cargill Inc, v. United Mexican States* (hereinafter "*Cargill v. Mexico*"), ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 296.

[439] Rejoinder, para. 312.

[440] Rejoinder, para. 315.

[441] Rejoinder, para. 317.

[442] Rejoinder, para. 321.

549. ICSID jurisprudence cited by Claimant requires it to show that specific representations or promises or commitments were made for there to be legitimate expectations. In other words, such expectations cannot be solely the subjective expectations or motivations of the investor.[443] Respondent states that there had been no assurances by any Venezuelan authorities that Claimant would receive all the permits necessary for the so-called Brisas Project, such authorities having timely expressed concerns about the commercial viability of the Brisas Project and the significant environmental and social implications thereof.

550. In contrast to the facts in previous investment cases referenced, Respondent alleges that Claimant was not willing to discuss cooperative solutions, as suggested by MinAmb in order to proceed with the mining project in an environmentally sound manner, nor was it treated in a non-transparent way as related concerns were communicated to it in a timely manner following the review of the V-ESIA. The assessment of the reasonableness of expectations must take into account the investor's due diligence regarding the host State's regulatory environment and the business risk. Venezuela's correct exercise of its regulatory discretion cannot be deemed a breach of the BIT's fair and equitable treatment obligation.

551. Respondent's position is that Claimant's expectations regarding the Brisas Project are not legitimate or reasonable. Venezuela did not make any specific assurances or commitment to induce Claimant's expectations. Respondent asserts that granting concessions or approving feasibility studies is not a promise that all necessary permits will be granted, particularly permits from a different ministry. MIBAM spent years trying to get Claimant to make sufficient progress to advance the exploitation phase, to the point of intervening when Claimant complained of MinAmb's delay in granting permits to occupy the concession territory.[444] The delay was for a limited period of time and was due to the need to assess the effects of the Supreme Court's injunction regarding the Imataca Forest Reserve.

552. Respondent declares that halfway through the twenty year term of the Brisas Concession, Claimant dramatically changed its mining development plan. This change necessitated different authorizations and delayed further the framework for exploitation. Venezuela's previous behaviour could not therefore have given rise to legitimate and reasonable expectations on behalf of Claimant that permits would be granted, especially considering the concerns repeatedly

[443] *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 219; *Saluka*, Partial Award, 17 March 2006, para. 304.

[444] MIBAM Official Letter No. DGM-107 of 24 March 2004 (C-421).

expressed by various governmental agencies regarding the mitigation of the environmental consequences of a massive "project".

553. Claimant was aware that the viability of the new project depended on its ability to acquire concessionary interests for at least twelve parcels of land and on the agreement with third parties regarding the use of neighbouring Cristina 4 as part of the Brisas Project. It was also aware of the environmental and social challenges of the new project, situated in one of the most important forest reserves. Respondent maintains that Claimant was not authorized at any time to change the use of the land and MIBAM never agreed to convert the work contracts into concessions, as requested by Claimant. The fact that the intended use of the parcels was disclosed to MinAmb does not imply consent by MIBAM for such parcels to be used for any purpose other than for exploitation of minerals.

554. Respondent also contends that Claimant's reliance on the certificates of solvency was unreasonable. According to Respondent, these certificates were issued by low-level functionaries lacking authority to certify compliance with all of Claimant's legal obligations under Venezuelan law and the corresponding mining title.

555. According to Respondent, the threshold State conduct for finding a breach of the minimum standard of treatment under customary international law is high.[445] Even if Claimant appears to accept the minimum standard of treatment as the applicable treatment under the BIT, it asserts that the minimum standard has moved beyond the principle identified in the *Neer* case to a more flexible, less stringent standard, claiming that NAFTA tribunals have repeatedly rejected *Neer*.[446] Respondent asserts that, whether or not the *Neer* standard has survived the test of time, the severity of State conduct required for a finding of the minimum standard of treatment under customary international law remains reflected in the substance of the *Neer* standard.[447] Claimant has failed to meet the burden of establishing the evolution from the *Neer* standard.[448]

556. Finding a breach of the minimum standard must, in Respondent's view, take into account all relevant circumstances, including the nature and complexity of the concerned issue and the good

[445] *Supra* para. 546.

[446] Reply, paras. 472-481.

[447] Rejoinder, para. 324.

[448] Rejoinder, para. 340.

faith effort on the part of the State agencies to fulfill the requirements of host State law. Moreover, a finding of such breach must be made in the light of the high level of deference that international law generally extends to the host State's right to regulate matters within its borders, as held by other tribunals.[449] Present circumstances distinguish the case from other cases relied on by Claimant,[450] in which governmental agencies were found to have "abused" their authority or otherwise coerced investors to "give up" concession rights.

557. Respondent states that it would not have been prudent for MinAmb to sign the *Acta de Inicio* while the strong environmental concerns of the technical staff were being discussed. Claimant chose not to challenge MinAmb's decision not to sign by a *recurso por abstención* or *recurso en carencia*, as so identified by Respondent's expert Professor Iribarren.[451] The annulment of Phase I Permit was founded upon MinAmb's statutory and constitutional authority to annul permits that are contrary to Venezuela's environmental laws and its constitutional obligations to protect the environment, promote sustainable development and protect the rights of indigenous peoples. Claimant having chosen not to pursue its due process rights under Venezuelan law regarding that decision, it cannot now complain of a denial of such rights.

558. According to Respondent, Claimant had no automatic right to the extension of the Brisas Concession under Venezuelan law nor a right that the Unicornio Concession would not be terminated, regardless of Claimant's compliance with its obligations under the mining titles.[452] No abusive or arbitrary conduct may therefore characterize MIBAM's failure to extend the concession. MIBAM provided detailed justification for its administrative decision terminating the Brisas Concession and informed Claimant of the right to appeal any such decision. Claimant, however, decided to waive its right to proceed further in the process in favour of this arbitration.

559. The principle of *silencio administrativo positivo* could not operate to renew the concession since it does not apply to the Brisas Concession, which was granted under the 1945 Mining Law. Even if applicable, it operates only where the requesting concessionaire is "solvent", which was not Claimant's case. The seizure of assets relating to the concession was also in accordance with due process under Venezuelan law.

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[449] *S.D. Myers v. Canada*, cit., para. 261; *Cargill v. Mexico*, cit., paras. 292-293.

[450] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (hereinafter "*Vivendi II*"), ICSID Case No. ARB/97/3, Award, 20 August 2007 and *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008; Memorial, paras. 292-293.

[451] Iribarren I, para. 158.

[452] Rejoinder, para. 344.

560. Respondent states that the Unicornio Concession was subject to the requirement that Claimant comply with pertinent legal norms under the concession and Venezuelan law, as well as with any of the seventeen special advantages in the Unicornio Mining Title and constituting as many grounds for termination of the concession.

561. When Claimant had not fulfilled its obligations ten years into the concession, MIBAM rightfully terminated the Unicornio Concession. This was done in accordance with a fully transparent administrative proceeding initiated on the basis of Claimant's breaches of Articles 61 and 98 of the 1999 Mining Law, as well as some of the special advantages under the Unicornio Mining Title. Claimant waived its due process rights in that regard, choosing to pursue its claims under the present arbitration.

562. Respondent notes that the cases cited by Claimant in support of its proposition that legitimate expectations may be based on "general" promises do not dispute the fundamental proposition that such expectations may arise only as a result of specific and unambiguous State representations directed at the investor.[453]

563. Venezuela submits that Claimant's allegation that its investments were denied fair and equitable treatment under Article II(2) of the BIT is unfounded in law and in fact. Consequently, it must be dismissed in its entirety.[454]

The Tribunal's Analysis

564. Having thoroughly considered the Parties' written and oral submissions and the evidence in the file of this proceeding, the Tribunal has concluded that by its conduct Respondent has breached the obligation to accord Claimant's investment fair and equitable treatment ("**FET**") under Article II(2) of the BIT.

565. In the reasoning that follows, the Tribunal shall begin by analysing the content of the FET standard in accordance with the principles of international law, such principles being expressly

[453] Rejoinder, para. 342.

[454] Rejoinder, para. 376.

referred to by Article II(2) of the BIT. It shall then describe the measures and conduct undertaken by Respondent that in its opinion result in the breach of the FET.

566. The Tribunal shares the view expressed by other investment treaty tribunals that in order to establish whether an investment has been accorded fair and equitable treatment, all of the facts and circumstances of the particular case must be considered. In particular, the Tribunal agrees that even if a measure or conduct by the State, taken in isolation, does not rise to the level of a breach of the FET, such a breach may result from a series of circumstances or a combination of measures.[455] In the Tribunal's view, this is the more so when the measures are part of a State policy aimed at gaining control of the object of the investment.

567. Article II(2) of the BIT[456] refers to the "principles of international law" in accordance with which fair and equitable treatment is to be bestowed. To determine these principles the Tribunal must consider the present status of development of public international law in the field of investment protection. It is the Tribunal's view that public international law principles have evolved since the *Neer* case and that the standard today is broader than that defined in the *Neer* case on which Respondent relies.[457] As authoritatively held, the *Neer* award "had nothing to do with the treatment of foreign investors or investments. It did not address what is fair and equitable", noting "that *Neer* is far from what is fair and equitable".[458] As held by the tribunal in *Mondev* when disregarding the *Neer* standard as controlling today, "both the substantive and procedural rights of the individual in international law have undergone considerable developments."[459]

[455] The cumulative effects of State's measures or conduct as integrating a breach of the FET has been considered in *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, holding as follows: "The fact that none of the measures analysed – that were not outside the Tribunal's jurisdiction or not excluded from consideration by the Tribunal because they did not result in any significant damage – were regarded, in isolation, as violations of the FET standard does not prevent the Tribunal from taking an overall view of the situation and to analyse the consequences of the general behaviour of Argentina" (para. 459).

[456] The text of Article II is reproduced *supra* para. 537.

[457] *Supra* para. 546.

[458] Schwebel, "*Is Neer Far From Fair and Equitable?*", Remarks on 5 May 2011 at the International Arbitration Club, London (C-1471)

[459] *Mondev*, cit., para. 116, cited with approval by other tribunals: *ADF Affiliate Group v. United Statesof America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 181; *Waste Management, Inc. v. United Mexican States* (hereinafter "*Waste Management v. Mexico*" or "*Waste Management*"), ICSID Case No ARB/AF/00/3, Award, 30 April 2004, para. 93; *GAMI v. Mexico*, cit., para. 95.

568. Rather than conducting an extensive review of the many decisions that have addressed the conditions under which a breach of the FET may be deemed to have arisen, the Tribunal shall examine a few cases whose factual circumstances appear to be closer to the facts of the present case to then draw the principles applicable for deciding the dispute pending before it.[460]

569. As held by the tribunal in *Saluka*, a foreign investor protected by the particular treaty providing for, among others, the FET standard,

> "may in any case properly expect that the [State will] implement[] its policies *bona fide* by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination". In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to the foreign-owned investment."[461]

The tribunal held that the State had failed to accord the investor fair and equitable treatment because it failed to consider in an "unbiased, even-handed, transparent and consistent way" the investor's good faith proposals to resolve the bank crisis, and by "unreasonably refus[ing] to communicate with IPB and Saluka/Nomura in an adequate manner."[462]

570. Other tribunals have underscored the central role of an investor's legitimate expectations in the analysis of whether treatment was fair and equitable in the circumstances. Legitimate expectations are created when a State's conduct is such that an investor may reasonably rely on that conduct as being consistent.[463] Fair and equitable treatment also requires that any regulation of an investment be done in a transparent manner, the importance of transparency in this regard, as noted by Claimant,[464] being reflected in Article XV of the BIT.[465]

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[460] The Tribunal's analysis shall not be limited to cases referred to by the Parties.

[461] *Saluka*, cit., paras. 307-308.

[462] *Ibid*, para. 407.

[463] *See, e.g. International Thunderbird v. Mexico*, cit., para. 147 ("a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages"); *MTD v. Chile*, cit., para.164 ("Chile is not a passive party and the coherent action of the various officials through which Chile acts is the responsibility of Chile, not of the investor").

[464] Memorial, footnote 624.

[465] Article XV of the BIT ("Transparency") provides as follows:

"Each Contracting Party shall, to the extent practicable, ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Contracting Party to become acquainted with them". It is only logical to infer from this provision that "transparency" should

571. The investor's legitimate expectations are based on undertakings and representations made explicitly or implicitly by the host State. As authoritatively held, "specific representations play a central role in the creation of legitimate expectations. Undertakings and representations made explicitly or implicitly by the host State are the stronger basis for legitimate expectations. A reversal of assurances by the host State that have led to legitimate expectations will violate the principle of fair and equitable treatment."[466]

572. In *Tecmed*, the tribunal explained that

> "[t]he foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand… the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations… The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the functions usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation."[467]

In that case, the relevant State agency's decision not to renew claimant's permit breached the obligation to provide fair and equitable treatment, because the agency failed to provide the investor with advance notice that its permit might not be renewed and did not provide the investor an opportunity either to justify its actions or to solve any alleged deficiencies:

> "During the term immediately preceding the Resolution [denying renewal of the Permit], INE did not enter into any form of dialogue through which Cytrar or Tecmed would become aware of INE's position with regard to the possible non-renewal of the Permit and the deficiencies attributed to Cytrar's behaviour – including those attributed in the process of relocation of operations – which would be the grounds for such a drastic measure and, thus, Cytrar or Tecmed did not have the opportunity, prior to the Resolution, to inform of, in turn, their position or provide an explanation with respect to such deficiencies, or the way to solve such deficiencies to avoid the denial of renewal and, ultimately, the deprivation of Claimant's investment."[468]

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also be ensured regarding the manner by which "laws, regulations, procedures and administrative rulings of general application" are applied by the Administration.

[466] Dolzer and Schreuer, *Principles of International Investment Law*, 2012, p. 145.

[467] *Tecmed v. Mexico*, cit., para. 154.

[468] *Ibid*. para. 173.

Referring to *Tecmed*, the tribunal in *MTD* said that "fair and equitable treatment should be understood to be treatment in an even-handed and just manner."[469]

573. In *Waste Management v. Mexico* the tribunal summarized its position on the FET standard in the following terms:

> "the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to Claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes Claimant to sectional or racial prejudice, or involves 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 in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by Claimant."[470]

574. In *Metalclad*, the Mexican Government "issued federal construction and operating permits" for a landfill and likewise "issued a State operating permit which implied its political support for the [claimant's] landfill project."[471] Metalclad was then assured that it had applied for and received all permits necessary to undertake the landfill and continued to do so until the municipal government issued a "stop work order" on the grounds that Metalclad failed to obtain a necessary municipal construction permit.[472] The tribunal held that "Metalclad was entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill" and that the government had therefore violated the fair and equitable treatment standard by "fail[ing] to ensure a transparent and predictable framework for Metalclad's business planning and investment" or to provide an "orderly process and timely disposition in relation to an investor […] acting in the expectation that it would be treated fairly and justly".[473]

575. Article 54 of the Arbitration (Additional Facility) Rules directs ICSID tribunals to apply "such rules of international law as may be applicable" unless otherwise agreed by the parties. This reference may be considered to include the "general principles of law recognized by civilized nations" referred to in Article 38 of the Statute of the International Court of Justice.

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[469] *MTD v. Chile*, cit., para. 113.

[470] *Waste Management v. Mexico*, cit., para. 98.

[471] *Metalclad Corp. v. United Mexican States* (hereinafter "*Metalclad v. Mexico*" or "*Metalclad")*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 78.

[472] *Ibid*., para. 87.

[473] *Ibid*., para. 89, 99.

576. With particular regard to the legal sources of one of the standards for respect of the fair and equitable treatment principle, *i.e.* the protection of "legitimate expectations", these sources are to be found in the comparative analysis of many domestic legal systems.[474] This has been succinctly stated recently by other ICSID tribunals, for example in *Total v. Argentina*[475] and in *Toto Construzioni Generali SpA v Republic of Lebanon*[476]. Based on converging considerations of good faith and legal security, the concept of legitimate expectations is found in different legal traditions according to which some expectations may be reasonably or legitimately created for a private person by the constant behavior and/or promises of its legal partner, in particular when this partner is the public administration on which this private person is dependent. In particular, in German law,[477] protection of legitimate expectations is connected with the principle of *Vertraensschutz*[478] (protection of trust) a notion which deeply influenced the development of European Union Law, pointing to precise and specific assurances given by the administration.[479] The same notion finds equivalents in other European countries such as France in the concept of *confiance légitime*.[480] The substantive (as opposed to procedural) protection of legitimate expectations is now also to be found in English law,[481] although it was not recognized until the last decade.[482] This protection is also found in Latin American countries, including in Argentina, as stated by the Tribunal in *Total v*

[474] F. Orrego Vicuna, *Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society*, 5/3 INT. L. FORUM 188, 2003, p. 194; see also F. Dupuy, *La protection de l'attente légitime des parties au contrat. Etude de droit international des investissements à la lumière du droit comparé*, Thèse (PhD), Univ. Paris-Panthéon-Assas/Humbolt Universität, 30 Nov. 2007, 71-102; St. Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Law* in St. Schill (Ed.) *International Investment Law and Comparative Public Law*, Oxford University Press 2010, 151, spec. 156-157; M. Potestà, *Legitimate Expectations in Investments Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, ICISD Review, Vol. 28, N°1 (2013) 88-122.

[475] *Total v. Argentine Republic* (hereinafter *"Total"* or *"Total v. Argentina"*), ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 11 and 128.

[476] *Toto Construzioni SpA v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, para. 166.

[477] Hans-Uwe Erichsen & Wolfgang Martens, *Allgemeines Verwaltungsrecht*, Walter de Gruyter, 5. Auflage, 214.

[478] OVG Berlin VII B 12/56, DVBl 72/1957, p. 503, note Haueisen F.

[479] ECJ 3 May 1978, Aff. 112/77, *Gesellschaft GmbH in Firma August Töpfer et Co. c/ Commission*, Rec. 1978, 1019, concl. Mayras, 1034.

[480] P. Fraisseix, *La notion de confiance légitime dans la jurisprudence administrative française*, Revue de la recherche juridique. Droit prospectif. 1999/2, p. 403, p. 417; see also F. Dupuy, cit., 92-102.

[481] *See* R.Thomas, *Legitimate expectations and proportionality in administrative law*, Oxford - Portland Oregon, 2000, p. 25; R. Stevens, *Law and Politics: the Hause of Lords as a judicial Body, 1800-1976*, Weidenfeld and Nicolson, London, 1979, pp. 565-569.

[482] *See R v North and East Devon Health Authority, ex p Coughlan*, 2001, QB 213. *See* Paul Craig and Soren Schonberg, Substantive Legitimate Expectations after Coughlan (2000) Public L 684.

Argentine Republic,[483] and exists equally in Venezuelan administrative law, as indicated in the first legal opinion of Professor A. Brewer-Carías, annexed to Claimant's Memorial.[484]

Applying FET to the present facts

577. The measures that, according to Claimant, violated the FET provision have been set out in the summary of Claimant's position.[485] The Tribunal shall now review such measures to determine whether they were contrary to the FET, based on the principles outlined above. Before doing so, however, it shall make reference to the change of the State policy regarding mining since in the Tribunal's view such change is of relevance in the present context.

578. For almost twenty years from the granting of the Brisas Concession, the Administration raised no objections to Claimant's mining activities regarding what in the last stage of the relations it alleged to be a failure to respect time-limits fixed by the corresponding Mining Law and the Mining Title, leading to the termination of the various concessions. By the approval of required studies, such as the Brisas Project Feasibility Study on 6 January 2003 and the V-ESIA on 9 February 2007 and, subsequently, by the issuance of the Phase I Permit in March 2007, Respondent had impliedly confirmed the content of the many certificates of compliance consistently issued by MIBAM. By Phase I Permit an "Authorization to Affect Natural Resources" was issued to Claimant regarding the Brisas Project, expressly referring to the Brisas Concession and the other concessions and mining rights comprising the Brisas Project (as mentioned in the long preamble). Even if Phase I Permit was issued by MinAmb, MIBAM was kept informed of the process leading to such issuance and had raised no objections and made no comments in that regard.[486]

579. Claimant had therefore good reasons to rely on the continuing validity of its mining titles and rights and an expectation that it would obtain the required authorization to start the exploitation of the concessions. Claimant's reliance and expectations were reinforced by the absence of any

[483] *Total v Argentina*, cit., para. 128, fn 136.

[484] Brewer-Carías I, para. 28.

[485] *Supra* para. 543.

[486] That MIBAM had no objections is confirmed by the Report regarding the Brisas Concession of February-March 2005, in which MIBAM certified that all Special Advantages regarding exploitation had been "complied with" (C-1113, points 4 and 7).

warnings or formal notice from Respondent regarding alleged failures to fulfill its mining obligations, even if of an essential nature. Further, in May 2007, Claimant was assured that MinAmb was committed to the Brisas Project when it requested data and information for the Phase II works. This information was provided by Claimant in June 2007.[487] This continued until 1 October 2007, when Claimant learnt from MinAmb that all decisions regarding the Brisas Project would be made by the President.[488]

580. In the Tribunal's view, the reasons for the termination of the Brisas, Unicornio and El Pauji Concessions are not limited to those officially stated by MIBAM in the Resolutions of 25 May 2009, 17 June 2010 and 22 May 2009, respectively. Rather, they are to be found in the change of political priorities of the Administration. This is shown by the position taken regarding mining of mineral reserves starting in late 2007 by the highest levels of authority, including President Chávez, as evidenced by a stream of statements and public announcements in November 2007,[489] 10 May 2008,[490] 21 June 2008,[491] 19 September 2008,[492] 6 November 2008,[493] 17 December 2008,[494] 13 January 2009[495] and 2 July 2009.[496]

581. These statements and public announcements clearly indicate that all decisions regarding the issuance of mining permits to Gold Reserve and the future of the Brisas Project would from that time on be taken by the highest authority,[497] not by the competent Ministries. The State's objective was the "recovery" of mineral resources (including Brisas del Cuyuni mine) to be

[487] Letter from Gold Reserve to Ministry of Environment dated 11 June 2007 (C-1100): *see* Claimant's Post-Hearing Brief, paras. 56 and 68.

[488] *Infra* para. 588.

[489] As mentioned by the Letter from Gold Reserve to President Chávez dated 19 November 2007 (C-502).

[490] *Chávez to Decide This Week on Crystallex, Gold Reserve Permits*, Bloomberg, 10 May 2008 (C-686).

[491] *Environment Minister says Venezuela is Asserting National Interest in Mining Sector*, Associated Press, 21 June 2008 (C-687).

[492] *Chávez Says He is "Recovering" Large Mines in Venezuela*, Reuters, 19 September 2008 (C-689).

[493] *Venezuela Offers Russians Big Gold Projects*, Reuters, 6 November 2008 (C-690).

[494] *Government to Withdraw Las Cristinas, Brisas Concessions-Venezuela*, Business News, 17 December 2008 (C-691).

[495] Annual Message to the Nation by President Chávez dated 13 January 2009 (C-692).

[496] Transcript from Aló Presidente Program No. 4 dated 2 July 2009 (C-930).

[497] *Chávez to Decide This Week on Crystallex, Gold Reserve Permits*, Bloomberg, 10 May 2008 (C-686).

exploited in accordance with the "new national mining policy."[498] On 17 December 2008, MIBAM announced the government's decision of "withdrawing the Brisas Concession from Canadian miner Gold Reserve" as part of the national government's policy to recover the country's mining resources, primarily gold and diamonds.[499] In his Address to the Nation of 13 January 2009, President Chávez announced: "[t]us, with this field, the Venezuelan State will control 30 billion dollars, which is the current estimate of this field, the current estimate 30 billion, organized in five concessions: Cristina IV, Cristina V, Cristina VI and Brisas del Cuyuni. All of them under the control of socialism, for the development of economic growth; for national development."[500] On 23 August 2011, President Chávez approved a "strategic action plan for the Orinoco Oil Belt and Mining Arch,"[501] establishing a plan to develop the State's mining resources, including those found at Brisas.

582. The change of policy by the Venezuelan Administration cannot be disregarded by the Tribunal. It is reasonable to infer that this change at the Presidential level had a decisive bearing on the process of progressive cancellation of Claimant's mining rights. This process originated with the long silence kept by the Administration from March 2007 until April 2008 regarding the signature of the Initiation Act despite Claimant's repeated requests to that effect. It continued with the revocation of Phase I Permit in April 2008 and culminated with the termination of the Brisas Concession on 25 May 2009, the El Pauji Concession on 22 May 2009 and the Unicornio Concession on 17 June 2010. The timing of these various steps in the process and of the change in the State policy is no mere coincidence.

583. The first two measures described by Claimant as allegedly being in violation of the FET were as follows:

> - "the Ministry of Environment's conditioning the effectiveness of the Construction Permit on its signing of the Initiation Act and, following Gold Reserve's compliance with the conditions of the Permit, refusing to do so, thereby preventing the Brisas Project from proceeding;
> - President Chávez's commandeering the decision of whether the Initiation Act would be signed and whether the Brisas Project allowed to proceed".

[498] As reported by the Associated Press on 21 June 2008, Venezuela's Minister of Environment stated that "the government is going to favour national interests over those of foreign companies in the mining sector", that Venezuela is "taking control" to "save and appropriate what is ours" (C-687).

[499] As reported by Business News America (C-691).

[500] Annual Message to the Nation by President Chávez dated 13 January 2009 (C-692, p. 4).

[501] Claimant's Post-Hearing Brief, para. 81.

Due to the unity of context, these two measures shall be considered together.

584. It is worth recalling that the signature of the Initiation Act was one of the conditions to which the Authorization under the Phase I Permit was subject. Condition No. 9 provided as follows (English and Spanish texts):

> "Prior to the commencement of the activities, GOLD RESERVE DE VENEZUELA, C.A., - Compañia Aurifera Brisas del Cuyuni, C.A. will have to notify the Bolivar State Environmental Office, as well as the Environmental Monitoring and Control Office and this Administrative Permit Office, regarding the development of said activity and will have to sign an Initiation Act. In this Act, a detailed schedule of the activities to be developed will be provided, which will form part of the file and will be used for Environmental Auditing and Control".
>
> "*Previo al inicio de las actividades, la GOLD RESERVE DE VENEZUELA, C.A. – Compañia Aurifera Brisas del Cuyuní, C.A. deberá notificar a la Dirección Estadal Ambiental Bolivar, así como a la Direccion Genral de Vigilancia y Control Ambiental y esta Oficina Administrativa de Permisiones, sobre el desarollo de dicha actividad y deberá firmarse un Acta de Inicio. En este acto se consignará un cronograma detallado de las actividades a desarrollar, el cual pasará a formar parte del expediente y sera utilizado como Auditoria y Control Ambiental*".

585. The content of the Initiation Act, namely the provision of "a detailed schedule of activities to be developed" to be used for environmental auditing and control, suggests that it had to be prepared by Claimant. The plain reading of the English text of Condition No. 9 suggests that the Initiation Act had to be signed by Claimant ("Gold Reserve… will have to sign an Initiation Act"), although some doubt regarding the signatory party may arise from the wording of the Spanish text ("… *deberá firmarse*…"). Be that as it may, the fact that the Initiation Act had to be signed by MinAmb is common ground between the Parties and is therefore accepted by the Tribunal.

586. Given the content of the Initiation Act, the Tribunal does not share the view expressed by Claimant's expert, Professor Brewer-Carías, that the signature of the Initiation Act was rather "a procedural formality".[502] The signature of this Initiation Act was in fact conditioned upon the verification by MinAmb that all conditions to be satisfied "prior to beginning any activities" [503] had been fulfilled. Claimant contends that MinAmb was aware that all such conditions had been

[502] *Supra* para. 311.

[503] Specifically, Conditions Nos. 3, 4, 5, 7, 10 and 23: see Claimant's letter to MinAmb dated 16 May 2007 (C-480).

satisfied, as shown by its letter to MinAmb on 16 May 2007.[504] Once such conditions had been satisfied, MinAmb had to sign the Initiation Act, there being no discretion in that regard.

587. MinAmb never suggested to Claimant that the Initiation Act could not be signed because the various conditions precedent had not been satisfied, nor did it express to Claimant any serious concern that may have been present within the Ministry regarding the environmental impact that would be caused by the Brisas Project – a concern that some of Respondent's witnesses gave evidence about during this proceeding.[505] Lack of transparency of Respondent's conduct in this regard is manifest considering that in lieu of raising that concern with Claimant, MinAmb requested that the modification of the main access road that had been requested by MIBAM be provided. This request had been accepted by Claimant.[506] Claimant's letter to MinAmb dated 14 August 2007 evidences that the Ministry had conditioned the signature of the Initiation Act on MIBAM's approval of the alternate main access road. By enclosing with this letter MIBAM's official approval of the same date, Claimant again requested the signature of the Initiation Act,[507] relying on the fact that no remaining conditions had to be fulfilled.

588. No such signature having been obtained, Claimant requested a meeting with MinAmb. During the meeting, which was held on 1 October 2007, according to Mr Rivero, who was present at the meeting, Minister Ortega and Vice-Minister García mentioned that they could do nothing since the issue was "in the hands of the President" and "out of our control."[508] These statements by the highest level of authority within MinAmb[509] have not been disputed by Respondent during this proceeding. Indeed, they could not have been disputed inasmuch as they reflected the actual prospects of the Brisas Project at the time, as shown by the evidence in the file.

589. The veracity of Claimant's narrative of what was said during the 1 October 2007 meeting is confirmed by the letter addressed by Gold Reserve to President Chávez on 19 November 2007, requesting a meeting to discuss the future of the Brisas Project. The letter refers to the content of the 1 October 2007 meeting with Minister Ortega, in particular that "the future of the Brisas Project was in your hands, Mr President, and that the execution of the Initiation Act would be

[504] Letter from Gold Reserve to MinAmb dated 16 May 2007 (C-480).

[505] First Witness Statement of Mr Rodriguez (hereinafter "**Rodriguez I**") dated 23 March 2011, para. 11; Romero I, para. 10.

[506] *Supra* para. 312.

[507] Gold Reserve letter to MinAmb dated 14 August 2007 (C-490).

[508] *Supra* para. 313.

[509] Vice-Minister García had signed the Phase I Permit on 27 March 2007.

suspended until you decide the issue."[510] No reply was given formally to this letter and Claimant was provided with no further clarification on the future of the Phase I Permit until it was revoked in April 2008.

590. These developments reveal that the real reason for MinAmb's failure to sign the Initiation Act was not (or not only) the serious concern over the environmental impacts the Brisas Project, as alleged by Respondent during this proceeding. Clearly, the change of policy by Venezuela regarding mineral exploitation, as evidenced by the numerous announcements and statements made during this period by the highest level of the Administration, including President Chávez,[511] motivated Respondent's conduct.

591. In the Tribunal's view, Respondent violated the BIT's fair and equitable treatment provision through the measures and conduct that have been examined above. Respondent's failure to sign the Initiation Act despite Claimant's repeated requests without explaining the reasons for such inaction,[512] rather reinforcing Claimant's expectation that such signature would be forthcoming once the proposed alternative access road had been accepted, amount to conduct evidencing (through acts and omissions) a lack of transparency, consistency and good faith in dealing with an investor.

592. The second measure in alleged breach of the FET is described by Claimant as follows:

> "The Ministry of Environment's peremptory revocation, in a manner that violated fundamental principles of Venezuelan law, without prior notice to Gold Reserve or an opportunity to be heard, of the Construction Permit it had issued one year earlier and on which Gold Reserve relied to invest more than US$ 115 million more [sic] in the Project, which revocation was based on purported environmental grounds that were without legal basis and that were not supported by the facts of the Brisas Project, and where the revocation (and all subsequent government acts directed at the Company) were in reality motivated by the political agenda of the Chávez Administration, revealed and confirmed in words and deeds of the government and its officials, including President Chávez, to remove North American investment in the gold sector and replace it with more politically desirable alternatives.
> The government's conditioning any opportunity for Gold Reserve to regain the revoked Construction Permit on Gold Reserve's agreeing to mine the Brisas Project underground, which was irrational technically and economically and

[510] Letter from Gold Reserve to President Chaves dated 19 November 2007 (C-502).

[511] *Supra* para. 580.

[512] Requested at the hearing of 15 February 2012 whether MinAmb had ever informed Claimant that the Initiation Act would not be signed, Romero, one of Respondent's witnesses, replied: "Yes, it is as you say" (Transcript, February 2012, Day 3, 874:17-20).

which conflicted with the MIBAM and the Ministry of Environment's prior approvals."[513]

593. As noted above, in the Revocation Order, MinAmb declared the "absolute nullity" of the Construction Permit issued on 27 March 2007 and as a result revoked the same "for reasons of public order."[514] The Revocation Order refers initially to the "fundamental duty of the Venezuelan State to guarantee the protection of the environment and populations confronted with situations that constitute a threat to, make vulnerable, or risk the people's physical integrity, as well as involve imminent damage to the environment". It also refers to the public administration ability "to review and correct its administrative actions, including the revocation of administrative acts".

594. The Revocation Order sets out the grounds for the revocation of the Construction Permit, essentially referring to the state of emergency declared on 26 June 2006 in the area of the Imataca Forest Reserve "as the mining activities in Bolivar State had altered the environment…thus having affected the nearby populations, indigenous communities, and the rest of the collective". It then refers to the "serious environmental deterioration of the rivers, soil, flora, fauna and biodiversity in general, caused by the uncontrolled mining activities performed by the large number of miners present in the area".

595. The Tribunal acknowledges that a State has a responsibility to preserve the environment and protect local populations living in the area where mining activities are conducted. However, this responsibility does not exempt a State from complying with its commitments to international investors by searching ways and means to satisfy in a balanced way both conditions.

596. The Emergency Decree referred to in the Revocation Order was in force when the Construction Permit was issued on 27 March 2007. It is to be assumed that MinAmb had verified, prior to issuing the Construction Permit, that the works to be authorized did not conflict with the objective of the Emergency Decree. That this concern was well considered appears to be confirmed by the reference in the text of the Construction Permit to a number of conditions imposed on Claimant for the protection of the "environment, including, but not limited to, posting a performance bond "guaranteeing the use of the required conservation and recovery measures in the event of environmental deterioration."[515] Almost all of the conditions set out at the end of the Construction

[513] Memorial, para. 300.

[514] MinAmb Administrative Order No. 625 dated 14 April 2008 (C-121).

[515] MinAmb Official Letter No. 010303-1080 dated 27 March 2007 (C-44, Sixteenth Whereas).

Permit relate to the environment. The Emergency Decree had a one-year term, and thus expired on 26 June 2007. There was no warning by MinAmb that the situation regarding the environment had significantly deteriorated since the date on which the Construction Permit was issued.

597. The reference in the Revocation Order to "uncontrolled mining activities" being conducted in the area by a large number of miners is contradicted by the Inspection Report issued by MIBAM one month before the date of the Revocation Order. This Report states (at the end) that "no evidence of (exploration or exploitation) mining activities was found during the walk around."[516] It is only logical that had "uncontrolled mining" been conducted in the area, particularly if by a "large number of miners," MIBAM's Inspection Report would have so indicated.

598. Respondent contends that following the issuance of the Phase I Permit, MinAmb's concerns regarding the impacts of the Brisas Project on the environment increased and that, as of April 2008, Claimant had not completed a satisfactory EAE or the requested joint study with Crystallex regarding the development of joint infrastructure plans. The Tribunal does not underestimate MinAmb's concerns regarding environmental protection. It notes that none of the above grounds of concern was mentioned in the Revocation Order and, in any case, that the better course of action for addressing any growing concerns would have been to examine with Claimant how best to proceed to alleviate the same.

599. At a meeting held on 18 June 2008 jointly with Crystallex, MinAmb's Vice-Minister García said that President Chávez had decided to provide an opportunity for the permitting of both projects to be reconsidered. The proposal was to mine the projects underground rather than through open pits, so as to enhance environmental and social aspects of the projects. However, according to Claimant, the only feasible way to mine was through open pit mining given the nature of the mineral deposit. The open pit mining had already been approved by both MIBAM and MinAmb in the Brisas Project Feasibility Study and V-ESIA, respectively. Claimant therefore stated that underground mining was not a feasible option. Three days later, on 21 June 2008, MinAmb's Vice- Minister García was quoted in the press saying that the government would favour national interest over foreign companies in the mining sector and that the State was "taking control" to "save and appropriate what is ours."[517]

[516] MIBAM Inspection Report dated 11 March 2008 (C-78).

[517] *Environment Minister says Venezuela is Asserting National Interest in Mining Sector*, Associated Press, 21 June 2008 (C- 687).

600. The Tribunal finds that Respondent's conduct did not accord with the obligations required by the FET standard in the BIT. Respondent issued the Revocation Order without allowing Claimant an opportunity to be heard. It is only reasonable to infer that MinAmb's conduct was determined by the change of State's policy inaugurated by President Chávez.

601. The above considerations lead the Tribunal to conclude that Respondent breached the FET provisions regarding the measure under consideration. The absence of any recourse by Claimant against the Revocation Order that may have been available under Venezuelan law, as alleged by Respondent, does not change this conclusion. The fact that Claimant chose to pursue the present arbitration, rather than any alternative domestic remedies does not exculpate Respondent's conduct. Raising pretextual questions such as the access road issue, or untenable propositions, such as underground mining, and deliberately avoiding any dialogue with Claimant aimed at solving outstanding problems made things irreversible.

602. The third measure taken by Respondent allegedly in violation of the FET is described by Claimant as follows:

> - "the Ministry of Mines' negligent treatment of the application to extend the Brisas alluvial concession, its subsequent refusal to recognize in several administrative acts the extension granted by operation of law, culminating in the Ministry's denial of the extension and termination of the concession, without prior notice to Gold Reserve or an opportunity to be heard, based on a determination of alleged non-compliance by the Company with special advantages in the mining title that contradicted years of written certifications issued by the same Ministry, on which the Company reasonably relied, confirming the Company's compliance with those very same obligations;
>
> - the government's subsequent seizure and occupation of the Brisas Project site, its seizure of all of the Company's mining assets despite being on notice that those assets were all attributable to the then-valid Unicornio Concession, its transfer of those assets and the site to the state-owned company CVG Minerven, and its physical eviction of Gold Reserve's personnel and contractors from the Brisas Project site."[518]

603. The events surrounding the requested extension of the Brisas Concession and its subsequent termination by MIBAM's Resolution of 25 May 2009 have already been described and shall not be repeated here. Such events involve issues of Venezuelan law on which the Parties and their legal experts thoroughly disagree. The Tribunal has already determined those issues and shall not revisit

[518] Memorial, para. 300.

them, except to the extent that they reveal conduct by Respondent that is in breach of the FET obligation under the BIT.

604. Among such issues, the most relevant one is the value and effect of the "certifications of compliance", as to which the Tribunal has already reached a conclusion to the extent necessary for its determination regarding BIT violations.[519]

605. The Tribunal shall add at this juncture that Respondent must have been aware that MIBAM's repeated and consistent certifications of Claimant's compliance with its obligations under the concessions, the mining rights and the mining contracts, as the case may be, generated an expectation that delays or other failures to fully abide by the applicable rules had been and would continue to be accepted by the Administration. Because of Respondent's consistent attitude, Claimant expected to be permitted to continue working on the project by investing substantial amounts to provide the necessary financing.

606. In the present case, Respondent's breach of legitimate expectations as a FET component is of particular significance in view of the value attributed to legitimate expectations by Venezuelan law. As opined by Claimant's legal experts, Professor Brewer-Carías, administrative acts terminating the concessions had to respect a number of principles governing such acts as they affect individual rights: they have to be "reasonable, rational, logical, proportional, equalitarian and non-discriminative; and, in this case, issued according to the principles of *bona fide* and respecting legitimate expectation (*confianza legitima*) created on the matter by the same Administration."[520] The same expert adds that "these administrative acts of certification create legitimate confidence in the concessionaires regarding the verification by the public administration of the accomplishment of their mining duties and obligations according to the concessions and contracts."[521] Respondent's legal expert, Professor Iribarren, confirms the application of the principle of "legitimate confidence" developed in his opinion mainly by Venezuelan case law.[522] He points out that for its application under administrative law in the case of public entities, especially Governments, "the conduct must be *constant* and *reiterated* to the point of constituting a stable situation and presupposing its "indefinite" repetition over time whenever the same

[519] *Supra* para. 385.

[520] Brewer-Carías I, para. 203.

[521] *Ibid*. para. 189.

[522] Iribarren II, para. 4

circumstances exist."[523] The Tribunal notes that these conditions are fully met by the compliance certificates consistently issued by the Administration to Claimant throughout the life of the latter's mining and contractual rights.

607. The practice that had been so consistently followed regarding the handling of relations with Claimant as holder of mining rights in Venezuela changed when the State's policy concerning mining activities changed. This fact does not excuse Respondent's conduct, rather it confirms that such conduct was in breach of the FET standard as it was driven by political reasons. This also explains Respondent's failure to accept that the Brisas Concession term had been extended by operation of law, just as it had for the El Pauji Concession at about the same time.

608. Further evidence of conduct contrary to the BIT standard is the delay by which MinAmb failed to grant the required environmental permits. This delay made it difficult for Claimant to comply with the time periods prescribed by the corresponding Mining Law and the Mining Title. That such delays occurred and that they were MinAmb's responsibility is shown by the fact that MIBAM had to intervene to ask MinAmb to expedite the granting of such permits, stressing that Claimant's project was in the "national interest".[524] Nothing would have prevented MIBAM from considering such delays as a *force majeure* event under Article 61 of the 1999 Mining Law or under other rules of Venezuelan law, with the effect of suspending the period for Claimant's fulfilment of obligations. However, this was not done.[525]

609. The reasons given by the tribunal in the *Metalclad v. Mexico* case for concluding that a breach of the FET provision had occurred can also be applied to the present case: "failing to ensure a transparent and predictable framework for Metaclad's business planning and investment" or to provide an "orderly process and timely disposition in relation to an investor acting in the expectation that it would be treated fairly and justly…"[526] The conclusion here is the same as in the *Metalclad* case: Respondent failed to accord Claimant FET regarding the whole process leading to the termination of the Brisas Concession by failing *inter alia* to respect Claimant's due process rights.[527]

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[523] *Ibid*. para. 6.

[524] Letter by MIBAM to MinAmb No. DGM-107 dated 24 March 2004 (C-421).

[525] *Supra* para. 400.

[526] *Supra* para. 574.

[527] *Supra* para. 409.

610. The process by which, following termination of the Brisas Concession, the government recovered the mining assets of the concession, conformed to its entitlement according to the Special Advantage No. 15 under the Brisas Concession. A copy of the *Acta de Recepción* recording the recovery of assets listed as belonging to the Brisas Concession was given to Claimant's representative. However, Respondent's failure to respect due process rights of Claimant regarding the manner by which the Brisas Concession was terminated equally applies to the Government's recovery of the mining assets of that Concession.

611. The last measure complained of by Claimant is so described:

> "The Ministry of Mines' revocation of the Unicornio mining title, which, like the termination of the Brisas mining title, was based on a purported determination by the Ministry of non-compliance by the Company with special advantages in the mining title and with the mining law that contradicted years of written certifications issued by the Ministry confirming the Company's compliance with those same obligations."[528]

612. As in the case of the Brisas Concession, the events surrounding the termination of the Unicornio Concession have already been described and shall not be repeated here.

613. When considering the manner in which relations with Claimant had been handled by Respondent regarding the Brisas Concession, one cannot fail to note the changed attitude adopted with regard to the last period of the Unicornio Concession term. Respondent's cooperative attitude regarding Claimant's conduct of the mining activities lasted for the entire initial term (twenty years) of the Brisas Concession. This attitude changed drastically with regard to the Unicornio Concession long before the end of its initial term (still of twenty years). The Unicornio Concession's termination was based substantially on the same grounds as the Brisas Concession's termination. However, with regard to the Brisas Concession these grounds were not raised by Respondent for a considerably longer period of time than regarding the Unicornio Concession. In both cases, Claimant had relied on Respondent's acceptance of the manner in which the mining activities were being conducted due to the combined effect of the certifications of compliance and the absence of specific complaints by the Administration. As a result, despite the fact that the two concessions had been issued at different times (in 1988 as to the Brisas Concession and in 1998 as to the Unicornio Concession), their termination dates were rather close: 25 May 2009 for the Brisas Concession and 17 June 2010 for the Unicornio Concession. As in the case of the Brisas

[528] Memorial, para. 300.

Concession, failure to ensure a transparent and predictable framework for the Unicornio Concession was in breach of the FET.

614. In addition to the measures examined above, the following may be noted regarding Respondent's conduct in light of its obligation to accord Claimant FET under the BIT. Respondent's actions were part of a well-coordinated program aimed at cancelling the Brisas Project, as confirmed by the circumstances leading to the termination of El Pauji Concession when compared to those leading to the termination of the Brisas Concession. The date the two concessions were to expire was more than three months apart – *i.e.* 18 April, 2008 and 20 July 2008, respectively. However, less than a year later MIBAM ordered the suspension of the works for both concessions on the same day, 18 March 2009. As noted by Claimant, like the "denial" of the extension of the Brisas Concession, the El Pauji extension "denial" was based on internal memoranda analysing the state of the concessionaire's compliance, prepared by the same officials on exactly the same dates as the memoranda written for the Brisas Concession. "The orders denying the extension were issued only two days apart – on May 25, 2009 for Brisas and on May 22, 2009 for El Pauji".[529] The need to terminate the two Concessions expeditiously as a part of the same process led Respondent to deny Claimant's due process rights by failing to initiate a specific administrative procedure to revoke the extension of the two Concessions,[530] thus violating the FET standard also in that regard.

615. As shown by the above analysis, Respondent violated the FET standard regarding the Brisas, Unicornio and El Pauji Concessions in many different respects, including by failing to initiate a separate administrative procedure to revoke the extension of the Brisas and El Pauji Concessions. The number, variety and seriousness of the breaches make the FET violation by Respondent particularly egregious. The compensation due to Claimant for such breaches should reflect the seriousness of the violation.

[529] Reply, paras. 123-124.

[530] *Supra* paras. 408 and 504, respectively.

C. Full Protection and Security

Claimant's Position

616. Claimant further alleges that Respondent's conduct violated also the duty to accord full protection and security to Claimant's investment. Various tribunals have held that this standard of treatment is not limited to physical security.[531]

617. Respondent failed to accord full protection and security to Claimant's substantial investment in the Brisas Project by (i) refusing to deal with Claimant in a transparent manner regarding its intentions for the project; and (ii) refusing even to meet Claimant's representatives to explain how Claimant should proceed following the shift in State policy towards the investment.

Respondent's Position

618. Respondent argues that Venezuela did not breach its obligation to accord full protection and security under Article II(2) of the BIT. As established by the jurisprudence of international courts and tribunals and as made evident by the reference of the BIT provision to the "principles of international law", the full protection and security standard in the BITs codifies the general duty to provide for protection and security of aliens under the customary international law minimum standard of treatment.

619. Respondent submits that the standard of protection and security under customary international law requires a host State to exercise due diligence to protect foreigners and their property from "physical" harm, not to provide legal or economic security. This interpretation has been endorsed by arbitral tribunals.[532] Only exceptionally this standard will "be related to a broader ambit."[533] The cases cited by Claimant do not withstand close scrutiny, considering also that the wording of the relevant treaty provisions differs from that of Article II(2) of the BIT.

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[531] *Azurix Corp. v. Argentine Republic* (hereinafter "*Azurix v. Argentina*" or "*Azurix*"), ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 408; *Vivendi II*, para. 7.4.16.

[532] Counter-Memorial, paras. 602-603, referring to prior cases, including: *Rumeli v. Kazakhstan*, cit., para. 668*; BG Group Plc v. Argentine Republic* (hereinafter "*BG Group v. Argentina*"), Ad hoc-UNCITRAL, Award, 24 December 2007, paras. 323-328*; Saluka v. Czech Republic*, cit., para. 484; *AWG Group v. Argentine Republic* (hereinafter "*AWG v. Argentina")*, UNCITRAL, Decision on Liability, 30 July 2010, para. 177; *Noble Ventures Inc. v. Romania* (hereinafter "*Noble Ventures v. Romania*" or "*Noble Ventures*"), ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 164.

[533] *Ibid.* para. 604, referring to *PSEG v. Turkey*, cit., para. 258.

620. According to Respondent, Claimant has failed to establish that Venezuela has breached its obligations under Article II(2) of the BIT. The mere statement that the "Project" was unlawfully revoked in breach of the full protection and security does not demonstrate the alleged lack of protection and security. The vague allegations of wrongful conduct by Venezuela do not satisfy the burden to prove a breach of the treaty standard which is high and has to be supported by conclusive evidence.[534]

621. Respondent submits Claimant's allegation of breach of the full protection and security standard under Article II(2) of the BIT is unfounded in law and in fact and must be dismissed in its entirety.[535]

The Tribunal's Analysis

622. The Tribunal finds that Claimant's claim under Article II(2) of the BIT, to the extent that it provides for the duty to accord full protection and security to Claimant's investments, is to be dismissed. While some investment treaty tribunals have extended the concept of full protection and security to an obligation to provide regulatory and legal protections, the more traditional, and commonly accepted view, as confirmed in the numerous cases cited by Respondent is that this standard of treatment refers to protection against physical harm to persons and property. As noted in *Saluka v Czech Republic*, "[t]he practice of arbitral tribunals seems to indicate, however, that the "full security and protection" clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force."[536] This position was confirmed more recently in *AWG v Argentina* where, following an analysis of previous decisions on the subject, the tribunal concluded that the obligation of full protection and security required "due diligence to protect investors and investments primarily from physical injury."[537]

623. Accordingly, the Tribunal finds that the obligation to accord full protection and security under the BIT refers to the protection from physical harm. There has been no suggestion in the present

[534] *Ibid.* para. 614, referring to *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 83; *Noble Ventures*, Award, 30 July 2009, para. 165.

[535] Rejoinder, para. 408.

[536] *Saluka v. Czech Republic*, cit, para. 484.

[537] *AWG v. Argentina*, cit., para. 179.

case that Respondent failed to protect Claimant's investment from physical harm, and therefore no breach of the full protection and security standard occurred.

D. Most Favoured Nation

624. Article III of the Canada-Venezuela BIT provides:

> 1. Each Contracting Party shall grant to investment, or returns of investors of the other Contracting Party, treatment no less favourable than that which, in like circumstances, it grants to investments or returns of investors of any third State.
>
> 2. Each Contracting Party shall grant investors of the other Contracting Party, as regards their expansion, management, conduct, operation, use enjoyment, sale, or disposal of their investments or returns, treatment no less favourable than that which, in like circumstances, it grants to investors of any third State.

Claimant's Position

625. Claimant relies on Dolzer's and Schreuer's confirmation that "[t]he weight of authority clearly supports the view that an MFN rule grants a claimant the right to benefit from substantive guarantee contained in third treaties."[538]

626. Claimant refers to the Agreement between the Government of Venezuela and the Government of Barbados for the Promotion and Protection of Investments entered into force on 31 October 1995 which provides in Article 2(2) that Venezuela undertakes not to impair investments by arbitrary or discriminatory measures and to observe any obligation it may have entered into regarding the treatment of investments of nationals or companies of the other Contracting Party.

627. Similarly, under the Agreement with Paraguay for the Reciprocal Promotion and Protection of Investments, entered into force on 14 November 1997, Venezuela undertook specifically (in Article 3) not to arbitrarily deny or unduly delay the granting of permits regarding investments from Paraguay.

[538] Dolzer and Schreuer, *Principles of International Investment Law*, cit., pp.190-191. *See also Rumeli v. Kazakhstan*, cit., paras. 575, 581, 591; *MTD*, cit., paras. 100-06; *Bayindir*, cit., paras. 148-67.

628. On that basis, Claimant states that Respondent's treatment of Claimant, which was arbitrary and discriminatory, including by arbitrarily delaying and denying necessary permits for the Brisas Project, was in breach of Article III of the BIT.

Respondent's Position

629. Respondent contends that Claimant has failed to demonstrate that Venezuela breached Article III of the BIT. Claimant seeks to benefit from allegedly more favourable fair and equitable treatment obligations found in bilateral investment treaties entered into by Venezuela with Barbados, Paraguay and Russia. Respondent says that Claimant cannot avail itself of the MFN provision in the BIT to import an entirely new treatment provision into the BIT from another bilateral investment treaty. Several preconditions under Article III of the BIT must be satisfied for its application.

630. In particular, the "treatment", "in like circumstances", should be "less favourable" than that accorded to investors of Barbados, Paraguay or Russia. Respondent notes that Claimant has the burden of proving that each one of these elements is satisfied, but manifestly it failed to do so. Firstly, the "treatment" under the other treaties is a completely different treatment from the fair and equitable treatment under Article II of the BIT. Article III of the BIT does not extend the MFN obligation to "all matters" covered by the BIT distinguishing between "treatment", on the one side, and "rights" or "privileges", on the other, as made clear by Article II(1) of the Annex to the BIT. Further, Article III requires a comparison of treatment accorded to investors or their investments that are "in like circumstances", which comparison is fact specific.[539] Respondent contends that no comparative analysis is provided by Claimant. Likewise Claimant has failed to establish the third element necessary to establish a violation of Article III of the BIT: the "less favourable treatment".

631. Accordingly, Respondent says Claimant has failed to prove that Venezuela's conduct violates even the third party treaty standard referenced by Claimant, let alone that this standard should be imported into the Canada-Venezuela BIT.[540]

[539] Counter-Memorial, para. 626; Rejoinder, para. 419.

[540] Rejoinder, para. 422.

The Tribunal's Analysis

632. The Tribunal considers that there is no need to reach a conclusion as to whether Article III of the BIT imports more favorable provisions from other bilateral investment treaties with the effect of extending the breach of FET standard to include "arbitrary or discriminatory" treatment. Given the Tribunal's findings on FET, there is nothing to be gained by importing these additional standards of treatment.

E. Expropriation

633. Article VII(1) of the BIT provides, in relevant part:

> Investments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation.

Claimant's Position

634. Claimant submits that numerous international tribunals have recognized that a taking of property may occur under international law through interference by a State in the use of that property or with its enjoyment and benefit, even if legal title to the property is not affected. This was recognized also by the European Court of Human Rights, ruling that one must look behind the appearances to ascertain whether the situation amounted to a *de facto* expropriation.[541]

635. Claimant notes that it is not the State's intention, but the effect of its measures, that determines whether interference with the use of the property rises to the level of an expropriation by depriving the owner, in whole or in part, of the use or reasonably-to-be expected economic benefit of property.[542]

636. Rights and interests under licenses or contracts may be expropriated. This occurs whenever the State uses its authority to deprive a foreign investor of the use, enjoyment or value of such

[541] Memorial, para. 315, citing *Sporrong v. and Lönnroth v. Kingdom of Sweden*, Ser. A. No. 52, Judgment, 23 September 1982, para. 63.

[542] *Metalclad v. Mexico*, cit., para. 103; *Siemens A.G. v. Argentine Republic* (hereinafter "*Siemens v. Argentina*"), ICSID Case No. ARB/02/08, Award, 6 February 2007, para. 270.

rights.[543] Legislative or regulatory action can also constitute expropriation of concessions and other contractual rights.[544] Claimant states that if expropriation is to occur lawfully it must be effected under due process of law and in accordance with international law requirements.[545] It must be non-discriminatory[546] and any taking must be accompanied by the payment of prompt, adequate and effective compensation representing the genuine value of the investment.[547]

637. Claimant submits that Respondent expropriated Claimant's investment in breach of Article VII of the BIT by subjecting it to measures tantamount to expropriation which deprived Claimant entirely of the benefit of the Brisas Project. Such expropriation was not for a legitimate public purpose, was not effected under due process of law, was discriminatory and was effected without any compensation.

638. It is Claimant's position that even if acceptable under the applicable municipal law, authorities relied on by Respondent recognize that permanently suspending portions of an investment without giving the investor an opportunity to correct the error may give rise to treaty violations.[548]

639. It adds that expropriation occurs where State's allegations of breach are "a pretext designed to conceal a purely expropriatory measure."[549] It relies on *Gemplus v. Mexico*[550] where the tribunal held that a sovereign decision was reached to "pull the plug on the Concession regardless of whether or not it was legally justified; and the manner and timing of such termination was dictated by a strategy calculated to minimize the risk of legal proceedings and the payment of compensation to the Concessionaire (including Claimants)."[551]

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[543] *Vivendi II*, para. 7.5.18.

[544] *Shufeldt Claim ("United States of America v. Guatemala"), ad hoc* Award, 24 July 1930, reprinted in 2 R.I.A.A. 1083, 1094-98 (1949); *Tecmed v. Mexico*, cit., para. 122.

[545] *ADC*, cit., para. 435.

[546] *Liberian Eastern Timber Corp. v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986 and Rectification of 14 May 1986, paras. 366-367; *ADC*, paras. 441-443.

[547] *CME Czech Republic B.V. v. Czech Republic* (hereinafter "*CME*"), UNCITRAL, Final Award, 14 March 2003, paras. 490-502; *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, paras 47-130; *BG Group v. Argentina*, cit., paras. 245, 420.

[548] Reply, para. 537, referring to *Siemens v. Argentina*, cit., para. 258.

[549] Reply, para. 538 (referring to authorities cited by Respondent: *Malicorp Ltd. v. Arab Republic of Egypt* (hereinafter "*Malicorp v. Egypt*"*or "Malicorp")*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 142; *Bayindir*, cit., paras. 460-461).

[550] *Gemplus S.A. and Talsud S.A. v. Mexico* (hereinafter "*Gemplus v. Mexico*" or "*Gemplus*"), ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010. *See also* Reply, para. 538.

[551] *Ibid*, as cited in Reply, para. 538.

640. According to Claimant, as demonstrated by Professors Brewer-Carías and Ortiz-Alvarez, Respondent's contentions that its actions regarding Claimant's investments were taken in full compliance with Venezuela law are wrong since Respondent's measures violated fundamental principles of such law.[552] Claimant contends that the reasons cited by Respondent for termination were "pretextual and baseless", with the real reason for the alleged expropriation being the policy change instigated by the President. As a result, Claimant says that the purported terminations were "not legitimately taken within the legal framework governing the concessions."[553]

641. Claimant submits it had no effective recourse against the government's political decision not to sign the Initiation Act which, as stated by MinAmb, was "in the hands of the President". The subsequent revocation of the Construction Permit violated Venezuelan law and was an improper and arbitrary act. The termination of the Brisas and Unicornio Concessions after years of certifications of compliance was a serious due process violation, Claimant having not being given an opportunity to cure the alleged deficiencies.

642. Claimant concludes that the evidence shows that the expropriation was discriminatory in view of the State's stated preference for Russian investors and to avoid dealing with US and Canadian companies, as made evident by the President's own statements as well as those of his Ministers.

Respondent's Position

643. Respondent contends that Claimant has failed to offer details as to the precise rights that were "expropriated" or the specific measures taken by Venezuela that are equivalent to expropriation. It says Claimant's allegations are almost entirely contrary to fact and Claimant did not possess a "bundle of rights and legitimate expectations to develop and benefit from the development of the Brisas Project."[554]

644. Respondent states that Claimant decided to change its project radically in 1998, ten years before the Brisas Concession was scheduled to expire and when it was already in breach of its obligation to begin exploiting the concession by April 1991. The viability of the new project depended on

[552] Reply, para. 539.

[553] Reply, para. 535.

[554] Memorial, para. 356.

Claimant's ability to acquire concessionary interests for at least eight parcels of land, including Bárbara, El Pauji, Esperanza, Lucia, NLNA1-NLNV1, NLEAV1-NLSVA1, Yusmari and Zuleima. Claimant decided to attempt to obtain all of these concessions at a time when mining in the Imataca Forest Reserve was subject to the limitations imposed by the *Tribunal Supremo de Justicia*'s injunction in 1997.

645. The new project would have required the use of the neighbouring Cristina 4 parcel, which was under the control of third parties, so that the pit would extend or "layback" onto that parcel. Respondent notes that mining parcels in Venezuela are regulated by MIBAM and MinAmb on the basis of separate and individual mining concessions and contracts rather than as unified mining projects. The new project was likely to produce diverse, irreversible or unprecedented environmental impacts.

646. Claimant was unable to acquire the NLNA1-NLNV1 concession, that was vital to its project, as well as valid rights to Esperanza and Yusmari and to have its limited contractual rights to Bárbara, Lucia, Zuleima and NLEAV1-NLSAV1 converted into broader concessionary rights, all these parcels being essential to locate installations and the storage of dams and waste heaps. It failed to obtain the use of the Cristina 4 parcel without which, as itself acknowledged, "exploitable minerals reserves would be drastically reduced, making the project unviable."[555]

647. Hence, it is Respondent's position that Claimant could not possibly have a "bundle of rights and legitimate expectations" to develop the so-called "Brisas Project" and consequently no such "Project" existed. As held by previous international tribunals, investment treaty arbitrations are not intended to protect investors from the commercial risk inherent in their business ventures and in the host country's political and economic environment.[556] Having designed a project that it ultimately could not implement, Claimant alone must bear the consequences of its inability to develop the Brisas Project. Venezuela could not have expropriated Claimant's bundle of rights and legitimate expectations to develop the Brisas Project because Claimant never acquired such rights and legitimate expectations.

[555] Letter from Arturo Rivero Acosta to Dr Ana Elisa Osorio, Minister of Environment dated 2 June 2004 (R-19).

[556] *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, para. 64; *Eudoro A. Olguin v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001, para. 73; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, para. 153; *MTD*, cit., para. 178; *Waste Management*, cit., para. 177.

648. Respondent submits that the measures taken by Venezuela to terminate the individual Brisas and Unicornio Concessions were not expropriatory, since termination was pursuant to its express rights under the Concessions and in accordance with Venezuelan law. For a State action to be considered an expropriation, the State should have acted outside the legal framework of the contract or concession on the basis of superior sovereign authority (*puissance publique*).[557]

649. Respondent contends that any analysis of whether termination of a concession constitutes an expropriation "must begin with an understanding of the legal framework of the Concession,"[558] requiring an assessment of the allegedly expropriated contractual rights with regard "to the domestic law under which the rights were created."[559] Where, as is the case here, the termination of the concession is in response to a breach of obligations by the concessionaire, Venezuela is entitled to rescind the concession. Thus, there is no expropriation,[560] unless Claimant demonstrates that the State acted on the basis of superior governmental authority rather than pursuant to its rights under the concession contract.[561]

650. The Brisas Concession conferred to Claimant the exclusive right to extract and use gold for a period of twenty years, renewable for two additional ten-year periods if the concessionaire submitted a timely request and if MIBAM deemed it appropriate. In exchange for the right to exploit the Brisas Concession, Claimant made fifteen commitments to Venezuela, in the form of "special advantages", and agreed that upon extinguishment of the concession for any reason all works, improvements, assets and any other property acquired for the purpose of the concession will become the full property of the Nation, without indemnification. Breach of any of such obligations was a ground for extinction of the rights related to the mining title, any disputes arising under the concession to be decided by the competent Venezuelan courts in accordance with Venezuelan law.

[557] *Bayindir*, cit., para. 470; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 447.

[558] *Suez, Sociedad General de Aguas de Barcelona, InterAguas Servicios Integrales del Agua v. Argentine Republic* (hereinafter "*Suez v. Argentina*" or "*Suez*"), ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 64.

[559] *Ibid*, para. 140.

[560] *Malicorp v. Egypt*, cit., para. 125.

[561] *Consortium R.F.C.C. v. Kingdom of Morocco* (hereinafter "*RFCC v. Kingdom of Morocco*"), ICSID Case No. ARB/00/6, Award, 22 December 2003, para. 65; *Siemens v. Argentina*, cit., para. 253; *Bayindir*, cit., para. 460.

651. According to Respondent, only a concessionaire that is *solvente* with Venezuela may obtain an extension of the concession. The principle of *silencio administrativo positivo* could not renew the Brisas Concession since Claimant was not in compliance with its obligations under the corresponding Mining Law and the Mining Title. Each of the numerous violations of the concession would have been sufficient to prevent the operation of *silencio administrativo positivo* to renew the concession.

652. As noted by Respondent's legal expert, Professor Iribarren, Article 25 of the 1999 Mining Law providing for this principle applies only to concessions granted under this law.[562] The Brisas Concession was regulated by the 1945 Mining Law which makes no provision for the operation of *silencio administrativo positivo*, a "concept that has always been exceptional and of restricted interpretation" under Venezuelan law and jurisprudence.[563]

653. Having breached the majority of its obligations, Claimant's right to the Brisas Concession terminated when Venezuela exercised its right not to renew the concession. Respondent states that MIBAM's Resolution of 25 May 2009 terminating the Brisas Concession lawfully denied Claimant's request to renew the concession upon expiry of its twenty-year term on 18 April 2008.

654. Respondent rejects Claimant's characterization of this decision as "pretextual" or "false" under the jurisprudence. It says that Claimant never fulfilled its obligations to exploit gold and never received environmental permits for the exploitation of Brisas and Unicornio – prerequisites to Claimant's ability to comply with its obligation to exploit gold.[564] The recovery of the Brisas Concession assets did not constitute a *de facto* expropriation, as alleged by Claimant, since Venezuela had an express right under Article 102 of the 1999 Mining Law and the Special Advantage No. 15 under the Brisas Concession to recover all assets acquired in the development of a concession upon its termination for any reason.[565]

655. According to Claimant, the annulment of the Phase I Permit was expropriatory because it was motivated by "politics not law."[566] Respondent counters that Claimant failed to establish that MinAmb regulatory conduct annulling the Phase I Permit constitutes expropriation under

[562] Iribarren I, paras. 86-137.

[563] Iribarren I, para. 116.

[564] Rejoinder, paras. 443-444.

[565] Rejoinder, paras. 458-459.

[566] Reply, paras. 541-545.

international law. Claimant's loss of Phase I Permit was not necessarily permanent since Claimant could have reapplied for it.[567] According to Respondent, the revocation of the Phase I Permit was an act in the exercise of the State's policy to promote only environmentally sustainable mining in the Imataca Forest Reserve, out of *bona fide* concern of the impact of Claimant's mining activities.[568] The PowerPoint presentation allegedly produced by MIBAM discussing the goal to reduce the presence of Gold Reserve and other North American companies in gold and diamond exploitation, recommending the suspension of Claimant's environmental permit, carries no probative value in Respondent's submission. Similarly, speeches by President Chávez which were delivered long after the annulment of the Phase I Permit and termination of the Brisas and Unicornio Concessions are irrelevant.

656. Correctly, in Respondent's view, the *Dirección de Fiscalización* issued tax payment forms until 18 April 2008. Contrary to its regular communication practice with various officials of MIBAM, Respondent alleged that Claimant did not once mention that it had requested the renewal of the concession during the six-month period prior to its expiry. The fact that Claimant's extension request was later found does not alter the fact that the concession had expired. Respondent states that, after duly considering Claimant's arguments in the *recurso jerárquico* against the *Dirección de Fiscalización*, MIBAM Minister ratified the decision of that office. Claimant was advised of its right to appeal against the Minister's decision before the *Tribunal Supremo de Justicia* within six months. Claimant never did so.

657. Similarly, the Unicornio Concession Mining Title granted Claimant the exclusive right to exploit hard-rock gold, copper and molybdenum for twenty years, with possible renewal. The Unicornio Mining Title listed seventeen special advantages and stated that breach of these provisions would be grounds for termination of the concession (like any other grounds established in the Mining Law). Respondent notes that, in the event of termination for any reason, all works and assets acquired for the purpose of the concession would become property of Venezuela, without any compensation. Disputes arising under the concession were to be heard by Venezuelan courts in accordance with Venezuela law.

658. Respondent states that Venezuela terminated the Unicornio Concession on 23 June 2010 pursuant to its rights under the concession and in accordance with Venezuelan law. Claimant never

[567] Rejoinder, paras. 477-478.

[568] Rejoinder, para. 497.

availed itself of the right to file a *recurso de reconsideración* against the Minister's resolution terminating the concession, that remedy being available under the concession.

659. Respondent also states that there is no requirement for the Administration to notify the expiration of the concession, this operating independently as stated by Article 97 of the 1999 Mining Law. Contrary to the allegations of Claimant's expert, Professor Ortiz-Alvarez, the private party has no right to receive a concession or to have a concession that has expired renewed.[569] Considering the above rules, Respondent terminated the Brisas and Unicornio Concessions within the legal framework of the concession. Previous tribunals have held that a State's termination of a concession in response to a claimant's breach does not constitute expropriation where the reasons provided by the State were sufficiently "plausible" and "serious".[570]

660. According to Respondent, the political reasons alleged by Claimant are flawed in many respects. In particular, Claimant lost its right to the concession when Respondent exercised its right to terminate the Brisas and Unicornio Concessions due to Claimant's breaches.

The Tribunal's Analysis

661. As set out in paragraphs 361-409 and 432-438 above, Claimant's failure to commence exploitation in accordance with the provisions of the corresponding Mining Titles and the Mining Law was relied on by Respondent to terminate the Brisas and Unicornio Concessions.

662. However, the Tribunal has found that the manner in which the two Concessions as well as the Pauji Concession were terminated constituted a breach of FET. The sudden termination of the two Concessions conflicted with the way in which Respondent had controlled Claimant's activities over a long period of time without raising objections as to Claimant's conduct or performance. Respondent's conduct generated Claimant's legitimate expectations, under both international and Venezuelan law, that it could continue its mining activities and invest additional money, confident of being rewarded for its investment by the mineral exploitation. The Tribunal has also found that the decision to terminate the Concessions and, as a result, the Brisas Project, was driven by the

[569] Iribarren I, para. 22.

[570] Counter-Memorial, paras. 474-481 (quoting *Malicorp v. Egypt*, cit., paras. 126-143).

change of State policy regarding mining development. As previously found,[571] this conduct by Respondent was in serious violation of the standard of a fair, transparent and consistent behaviour due by the State under Article II(2) of the BIT.

663. The Tribunal now considers whether the same conduct was also an expropriation and therefore a breach of Article VII of the BIT. In relation to the terminations of the Concession contracts for Brisas and Unicornio, to be able to be considered an expropriation there must have been an exercise of sovereign authority, not just a contractual termination.

664. The Tribunal has debated at some length whether to give prevalence to the State's interference leading to the termination of the Brisas Project or to the formal compliance with the 1999 Mining Law and the Mining Titles as a ground for the terminations. In the former case, expropriation would have occurred due to Respondent's acting in the exercise of a sovereign, not merely regulatory, power (*iure imperii*). However, if the State was acting as a regulatory power enforcing contractual rights, no expropriation would have occurred.

665. In their submissions, the Parties provided the Tribunal with a number of investment cases setting out their position on this matter. In *Suez v. Argentina*, the tribunal held that "while Argentina exercised its public authority on various occasions during the crisis, the Tribunal does not consider that the Province's termination of the Concession Contract was an exercise of such authority. Rather, its actions were taken according to the rights it claimed under the Concession Contract and the legal framework."[572] Similarly, in *Siemens v. Argentina* the tribunal stated: "for the State to incur international responsibility it must act as such, it must use its public authority. The actions of the State have to be based on its 'superior governmental power'."[573] Other cases espousing similar principles include *RFCC v. Morocco* and *Malicorp v. Egypt.*

666. However, as noted by Claimant, the above cases are also clear that an action purportedly taken under a contractual regime may constitute expropriation where the true nature of the act was one of exercising sovereign authority. In *Bayindir v. Pakistan* the tribunal observed that "the fact that a State exercises a contract right or remedy does not in and of itself exclude the possibility of a treaty breach."[574] In *Malicorp v. Egypt* the tribunal stated that "an expropriation occurs where a

[571] *Supra* para. 607.

[572] *Suez v. Argentina*, cit., para. 143.

[573] *Siemens v. Argentina*, cit., para. 253.

[574] *Bayindir*, cit., para. 138.

State's allegations of contractual breach are 'a pretext designed to conceal a purely expropriatory measure'."[575] Thus, the key issue is to determine whether the reasons cited for the terminations of the Brisas and Unicornio Concessions were sufficiently well-founded and, if so, the terminations would not be considered expropriations.

667. This is not a straight-forward issue, as the political motivations that undoubtedly existed make it difficult to distinguish between sovereign and regulatory acts. As noted above, the Tribunal has considered the issue at length. On balance, the Tribunal concludes that the nature of the breach by Claimant (failure to exploit within the required timeframe) was such that termination on this ground could not be said to be merely "pretextual". This was an important provision in both Concessions which Claimant had not complied with, and neither Respondent's prior reassurances nor its political motivations alter the fact that a contractual right to terminate existed upon plausible grounds. As such, this Tribunal adopts a similar position to that taken by the *Malicorp* tribunal that the reasons given by Respondent for terminating the Concessions were sufficiently well founded that the terminations cannot be considered as a form of expropriation under international law.

668. Consequently, the Tribunal finds that Respondent's acts were an exercise of regulatory powers under the 1999 Mining Law and the relevant Mining Titles, and therefore not acts of an expropriatory nature. This does not detract from the fact that the manner by which such regulatory powers were exercised has led to a finding of a serious breach by the State of the FET standard under Article II(2) of the BIT. The seriousness of the breach shall be duly taken into account when determining the amount of the compensation due to Claimant in that regard.

669. Finally, the Tribunal notes that it has focussed in the above paragraphs on the terminations of the Concessions, although Claimant also referred to the revocation of the Phase I Permit and Respondent's failure to sign the Initiation Act as part of its expropriation claim. As previously stated in this Award,[576] the Tribunal is of the view that the grounds provided for the revocation of the Phase I Permit cannot be sustained and nor was there any reasonable justification for failing to sign the Initiation Act. However, these points are moot in light of the legal justification for the subsequent termination of the Concessions. Even if the prior revocation of the Phase I Permit and failure to sign the Initiation Act could in themselves constitute an indirect expropriation, the

[575] *Malicorp*, cit., para. 142. *Also see Gemplus v. Mexico*, cit., para. 4-175.

[576] *See supra* paras. 582-591.

subsequent revocation of the Concessions means these prior acts had no material impact on the Tribunal's finding of absence of expropriation. However, such conduct is relevant in establishing Respondent's breach of other BIT provisions.

CHAPTER VIII. DAMAGES

A. Applicable Legal Framework

670. Before determining the quantum of damages, if any, to be awarded, the Tribunal must first address the applicable legal principles which provide the basis for its damages assessment. The principles that apply to determining damages in the case of a violation of FET are examined in this section.

Claimant's Position

671. Claimant submitted its damages calculations based on a fair market value of the investment. It contended that the valuation remained valid if the Tribunal finds only an FET breach (*i.e.*, no expropriation), because the breach deprived Claimant of the entire value of the investment and the State is under an obligation to make full reparation for injury.[577] Claimant cited the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ("**ILC Articles on State Responsibility**") and the principles in the *Chorzów Factory* case[578] in support of its position and rejected Respondent's argument that Article VII of the BIT created a *sui generis* remedy that excluded application of general international law principles, for both expropriation and other BIT violations resulting in the deprivation of property. It also referred to a number of ICSID decisions which have applied these principles in the case of an FET breach stating that "in the context of other treaty violations, tribunals in other investment treaty cases have observed that there too the remedy may entail compensation for the value of property of which the investor was deprived, to be assessed on the basis of the fair market value of that property."[579]

[577] Memorial, para. 362 *et seqq.*

[578] *Chorzów Factory (Ger. v. Pol.)* (hereinafter "*Chorzów Factory*"), Judgment No. 13 (Merits), Sept. 13, 1928, P.C.I.J. Series A, No. 17 (1928).

[579] Memorial, para. 375. Cases cited include *PSEG*; *CME*; *Vivendi II* and *Azurix*.

672. Claimant further contended that the principles of full reparation and of wiping-out consequences in international law enable the Tribunal to award damages as at the date of the Award, rather than the date of breach, if appropriate. This is particularly so where the value of the investment has increased significantly since the date of breach. Nonetheless, Claimant's experts calculated damages by assessing the fair market value of the Brisas Project as at April 2008 (the date of breach).

Respondent's Position

673. Respondent countered that the principles set out in the ILC Articles on State Responsibility and *Chorzów Factory* do not apply because this is not a State-to-State arbitration. It contended that Article VII of the BIT establishes a *sui generis* principle of compensation for expropriation – "prompt, adequate and effective compensation" (which it acknowledged was equivalent to fair market value). Respondent submitted that the Article VII standard should apply to breaches of Articles II and III of the BIT, as well as Article VII, where total deprivation of the investment occurred. In essence, Respondent's position was that the standard of compensation should be fair market value – being prompt, adequate and fair compensation – as at April 2008,[580] including for breach of FET. Respondent rejected Claimant's assertion that a later date, such as the date of the Award, could be viewed as the date of valuation.

Tribunal's Analysis

674. The Tribunal begins its analysis of applicable legal framework by noting that, although other solutions could have been adopted, both Parties contend that, even in the case of no expropriation, the appropriate measure of damages in the present circumstances is fair market value. Both Parties have also used April 2008 as the valuation date for assessing the fair market value of the investment.

675. Article XII(9) of the BIT provides the Tribunal with the power to award monetary damages or restitution in the case of breach of an obligation contained therein. This provision provides the tribunal with a wide discretion when assessing damages for breach of FET. Article XII(7) of the BIT also requires the Tribunal to decide the issues in dispute in accordance with the treaty and the applicable rules of international law. Therefore, the Tribunal is empowered to award monetary

[580] Rejoinder, para. 566.

damages or restitution in accordance with principles of international law and the provisions in the BIT. There is no suggestion in the present case that restitution is an appropriate remedy. Therefore, the Tribunal now considers the international law principles applicable to the award of monetary damages for breach of FET, as well as any relevant provisions of the treaty.

676. Both Parties have devoted considerable argument to whether the reference to "prompt, fair and adequate compensation" in Article VII provides a *sui generis* remedy for expropriation (and for breaches of other provisions which result in total deprivation of property), such that principles of international law would not apply. The Tribunal does not find it necessary to determine whether prompt, fair and adequate compensation is the appropriate remedy for expropriation, given no breach of Article VII has been found. Concerning its application to breaches other than expropriation, the Tribunal is not convinced that even if prompt fair and adequate compensation could correctly be categorized as a *sui generis* remedy under Article VII, that it should be considered a *sui generis* remedy for other breaches where a total deprivation of the investment has resulted. Respondent has produced no evidence to support such a claim, nor is it an approach that, as far as the Tribunal is aware, has been taken in previous investment treaty cases. Finally, there is nothing in language of the treaty itself that would support such an interpretation. Therefore, the Tribunal concludes that the appropriate course of action is that it award monetary compensation under Article XII(9) in accordance with applicable rules of international law.

677. In any case, the discussion regarding whether Article VII provides a *sui generis* remedy may be somewhat academic, at least in the present circumstances, as its primary relevance (given that Respondent acknowledges that prompt, adequate and fair compensation is equivalent to fair market value) is to arguments advanced by Claimant that, in some circumstances, more than fair market value could be awarded by a tribunal. The Tribunal acknowledges that, in some circumstances, changing the date of valuation may be appropriate, but does not consider that those circumstances exist here. The Tribunal therefore finds that the valuation date to be applied to the assessment of damages is 14 April 2008.

678. Turning now to the relevant principles of international law applicable to the award of damages for breach of FET, the Tribunal begins with an analysis of the *Chorzów Factory* principles. It is true that this was a case involving State-to-State liability and, as Respondent correctly noted, cannot therefore automatically be applied to a State-Investor situation. However, it is well accepted in international investment law that the principles espoused in the *Chorzów Factory* case,

even if initially established in a State-to-State context, are the relevant principles of international law to apply when considering compensation for breach of a BIT. It is these well-established principles that represent customary international law, including for breaches of international obligations under BITs, that the Tribunal is bound to apply. Even a cursory analysis of previous ICSID cases considering this issue confirms as much.[581] As stated in *Impregilo v. Argentina*:[582]

> "As regards compensation, the basic principle to be applied is that derived from the judgment of the Permanent Court of International Justice in the Chorzów Factory case. According to this principle, reparation should as far as possible eliminate the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. In other words, Impregilo should in principle be placed in the same position as it would have been, had Argentina's unfair and inequitable treatment of Impregilo's investment not occurred."

679. The above principles complement those found in the ILC Articles on State Responsibility, particularly in Article 31 to make full reparation for injury caused through violating an international obligation. This, in turn, reflects customary international law. Respondent rightly cautioned that the ILC Articles on State Responsibility primarily concern internationally wrongful acts against States, not individuals or other non-State actors, and some prominent commentators have warned against an uncritical conflation of the two.[583]

680. This Tribunal has given due consideration to these arguments. Nevertheless, the serious nature of the breach in the present circumstances and the fact that the breach has resulted in the total deprivation of mining rights suggests that, under the principles of full reparation and wiping-out the consequences of the breach, a fair market value methodology is also appropriate in the present circumstances. As noted above, both Parties have taken this position in the submissions.

681. In summary, this Tribunal is empowered to award monetary compensation in accordance with the principles of international law. The relevant principles of international law applicable in this situation are derived from the judgment of the Permanent Court of International Justice in the

[581] For applicable references, see Reply, paras. 599-606 and fns. 1171 and 1211.

[582] *Impregilo S.p.A. v. Argentine Republic* (herinafter "*Impregilo v. Argentina*"), ICSID Case No. ARB/07/17, Award, 21 June 2011, para. 361.

[583] See, for example, J. Crawford, "*Investment Arbitration and the The International Law of Investment Claims Articles on State Responsibility*," 25 ICSID Review - Foreign Investment Law Journal 1 (2010); Z. Douglas, "*Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID*" in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law Of International Responsibility* (2009).

Chorzów Factory case that reparation should wipe-out the consequences of the breach and re-establish the situation as it is likely to have been absent the breach. As the consequence of the serious breach in the present situation was to deprive the investor totally of its investment, the Tribunal considers it appropriate that the remedy that would wipe-out the consequences of the breach is to assess damages using a fair market value methodology. This conclusion accords with the submissions of the Parties, both of whom have acknowledged that a fair market value methodology is an appropriate way of providing effective compensation in the present circumstances. The Tribunal therefore finds that this methodology should be applied, with a valuation date as at 14 April 2008.

682. Finally, the fair market value of the investment is influenced by a number of different factors that each party's experts have addressed. As noted above, the Tribunal has already found that the Brisas Project did not include the North Parcel of land to which no legal title existed. The Tribunal therefore considers that the fair market value should be calculated without reference to that parcel. While a willing buyer might have thought it could have acquired rights to this land in the future, it could not be certain of doing so and therefore it would be speculative of the Tribunal to assume a buyer would have valued the Brisas Project as if the legal right had been acquired. As such, the Tribunal will value the Project using a "no layback" scenario. As noted above, no compensation is due in relation to the Choco 5 investment.

Burden and Standard of Proof

683. Claimant acknowledges that it carries the burden of proof for proving its damages. It argues that while damages cannot be speculative, they also do not need to be certain. The appropriate standard of proof is the balance of probabilities and the "certainty principle" relates to the fact of loss rather than the quantum.

684. Respondent similarly contends that Claimant has the burden of proving damages and that such damages cannot be speculative. However, Respondent submits that damages must be proved with "a sufficient degree of certainty" rather than being more probable than not. Respondent also devoted considerable argument seeking to demonstrate that lost profits claimed in situations where the investment was not yet operational are inherently speculative and do not meet the required standard of proof.

685. The Tribunal agrees with the Parties that Claimant bears the burden of proving its claimed damages. The Tribunal finds no support for the conclusion that the standard of proof for damages should be higher than for proving merits, and therefore is satisfied that the appropriate standard of proof is the balance of probabilities. This, of course, means that damages cannot be speculative or merely "possible", as both Parties acknowledge. In the Tribunal's view, all of the authorities cited by the Parties – including by Respondent in relation to its claim that a degree of certainty is required – accord with the principle that the balance of probabilities applies, even if some tribunals phrase the standard slightly differently.[584] In particular, those cases that discuss the requirement for "certainty" do so in the context of distinguishing "proven" damages from speculative damages, rather than suggesting that a higher degree of proof is applied to damages than to liability.

686. The Tribunal further notes that, while a claimant must prove its damages to the required standard, the assessment of damages is often a difficult exercise and it is seldom that damages in an investment situation will be able to be established with scientific certainty. This is because such assessments will usually involve some degree of estimation and the weighing of competing (but equally legitimate) facts, valuation methods and opinions, which does not of itself mean that the burden of proof has not been satisfied. Because of this element of imprecision, it is accepted that tribunals retain a certain amount of discretion or a "margin of appreciation" when assessing damages, which will necessarily involve some approximation.[585] The use of this discretion should not be confused with acting on an *ex aequo et bono* basis, even if equitable considerations are taken into account in the exercise of such discretion.[586] Rather, in such circumstances, the tribunal exercises its judgment in a reasoned manner so as to discern an appropriate damages sum which results in compensation to Claimant in accordance with the principles of international law that have been discussed earlier.

B. Approach to Calculating Fair Market Value

687. As explained above, the Parties agreed that if any damages were awarded by the Tribunal, the calculation of these damages should be done using a fair market value approach. Each party

[584] *See* S. Ripinsky and K. Williams, "*Damages in International Investment Law*" (2008), 164-165, quoted in Claimant's Reply, para. 620.

[585] *See Himpurna California Energy v. PT (Persero) Perusahaan Listruik Negara*, UNCITRAL, Award, 4 May 1999, para. 441.

[586] The parties referred to the application of equitable considerations and to principles of *ex aequo et bono* in relation to awarding lost profits (see Reply, para. 630 *et seqq* and Rejoinder, paras. 603-605).

presented a number of experts on both mining and valuation issues to assist the Tribunal in determining the fair market value of the Brisas Project as at April 2008. The following experts presented written expert reports to the Tribunal:

For Claimant:

RPA:	Mr Richard Lambert (mining and metallurgical experts)
Navigant:	Mr Brent Kaczmarek (valuation expert)

For Respondent:

SRK:	Dr Neal Rigby (mining expert)
CRA:	Dr Francis Brown and Mr Leonard Kowal (metallurgical experts)
CRA:	Dr James Burrows (valuation expert)
Boliden:	Mr Pekka Tuokkola (saleability)

688. At the hearing of 15-16 October 2013, the above experts gave evidence, together with the following persons who had assisted in preparing the experts reports:

For Claimant:

RPA:	Dr Kathleen Altman (metallurgical issues)
Tetra Tech:	Mr Mike Henderson and Mr Dave Hallman (mining issues), Mr Erik Spiller (metallurgical issues)

For Respondent:

SRK:	Mr Bret Swanson, Mr John Tinucci (mining issues)

689. It is noted that, in this Chapter, the Tribunal refers to positions taken in the expert's written reports by stating the name of the expert followed in brackets by the relevant firm. This is because in the Parties' submissions experts were sometimes referred to by name and at other times by firm. Where the Tribunal references something said during the oral hearing, the Tribunal references the relevant expert's name only.

690. Both valuation experts used the Discounted Cash Flow ("**DCF**") method as the primary method for assessing the quantum of damages payable if Claimant succeeded on liability (as explained at paragraph 822 below, Mr Kaczmarek (Navigant) also used the comparable transactions and market

capitalisation methods). Dr Burrows (CRA) did not provide a separate DCF calculation on behalf of Respondent, but critiqued and made adjustments to the DCF calculation advanced by Mr Kaczmarek (Navigant) on behalf of Claimant.

691. Clearly, any DCF calculation is dependent upon an assessment of the quantum of the mineral deposits likely to be extracted over the 20 year period of the extended concession. The DCF valuation by both Mr Kaczmarek (Navigant) and Dr Burrows (CRA) was initially based on reserves estimated using a layback on the North Parcel of land. Pursuant to Procedural Order No. 2, the experts adjusted the valuation for a no-layback scenario which excluded the North Parcel. This revision required a re-estimation of mineral deposits which in turn required examination of the following issues by the mining and metallurgical experts: (i) pit shape and design; (ii) need for a buffer zone; (iii) impact of stockpiling; (iv) likely delays for obtaining permits in the no-layback scenario; (v) metallurgical issues including ramp-up, mill capacity, and metal recovery rates and concentrate grades; and (vi) their saleability.

692. The Tribunal addresses each of the above issues in the paragraphs that follow. The Tribunal then considers a number of financial issues which were disputed by the valuation experts, whether the with-layback or the no-layback scenario applied. These issues include: (i) fair market value methodology; (ii) metal prices; (iii) inflation rate; (iv) discount rate; (v) delay in receiving revenues; and (vi) fuel and electricity costs.

693. It is only after considering all of the above issues that the Tribunal has been able to reach a conclusion as to the damages owed to Claimant as a result of Respondent's breach of its FET obligations under the BIT. This conclusion is set out in paragraph 848 and 849 below.

C. Mine Plan Issues

694. The following section considers the issues relating to the mine plan, as follows: Mine Pit Design; Buffer Zone; Stockpiles; and Delays. It concludes by assessing the impact on the estimate of mineral deposits available to be mined under the no-layback scenario.

695. The experts that provided evidence at the hearing on these issues were: Mr Lambert (RPA), Mr Henderson and Mr Hallman (both of Tetra Tech) for Claimant and Dr Rigby, Mr Swanson and Mr Tinucci (all of SRK) for Respondent.

696. While all experts were well qualified on the issues at hand, the Tribunal found the RPA Reports and the witnesses from RPA and Tetra Tech to be more convincing on the mine plan issues. Respondent's experts, as might be expected, challenged certain aspects of the RPA optimal mine plan but, as noted below, some of these challenges were formulated in a general way without providing any supporting analysis as to the specific effect of the alleged impact on the overall calculation.

D. Mine Pit Design - Shape of Pit and Placement of Ramps

Claimant's Position

697. So as to determine the optimal shape of the mine pit in the various possible no-layback scenarios (0 meter, 25 meter and 100 meter buffer), Mr Lambert (RPA) used a software program known as "Whittle" to design the shape of the mine pit in the no-layback scenario. Claimant stated that:

> "Due to the parties' disagreement as to whether a 100-meter buffer was needed in the north, the parties agreed to generate alternative "Whittle pits," with different geographic boundaries to the north, from which alternative mine plan scenarios could be considered. For all scenarios, the parties agreed to use the pit slope parameters included in the 2008 Marston mine plan. The parties also agreed that for all scenarios, they would use the metal prices assumed in the NI 43-101 Technical Report prepared for the Brisas Project and the mining cost assumptions set forth in the 2008 Marston mine plan." [587]

698. Mr Lambert (RPA) adopted the shape of the pit produced by the Whittle program with a zero meter buffer as his "optimal scenario". He stated that this design maximized access to high quality ore in the northern section of the pit. In doing so, Mr Lambert (RPA) considered that he was not bound under Procedural Order No. 2 to retain the original shape of the with-layback pit used in the 2008 Marston mine plan and rejected Dr Rigby's (SRK) assertions on this point. During the hearing, Mr Lambert noted that Dr Rigby had not in fact adopted the Marston shape without modification as SRK had adjusted the pit shape in the south-east side in order to access what was termed a "bullseye" (an area that had not been included in the Marston plan).[588]

[587] Claimant's Joint Expert Procedure Post-Hearing Brief, para. 3 (footnotes excluded).

[588] Transcript, October 2013, Day 1, 31:22-32:10.

699. Regarding the ramps, Mr Lambert (RPA) placed them along the eastern wall of the no-layback mine pit, so as to allow maximum access to the high quality ore on the northern boundary. He used the ramp locations suggested by Pincock, Allen & Holt in 2004 for their no-layback design which did not include ramps on the north wall.

700. Mr Lambert (RPA) contended that the ramp design – which mirrored the with-layback Marston design – used by Dr Rigby (SRK) did not make sense in the case of a no-layback scenario. Using the same design as the with-layback scenario meant that the ramps were placed over key mineral deposits. Mr Lambert (RPA) said that given the amount of high grade copper in the area, it would be irrational to place ramps on the northern wall.

701. Mr Lambert (RPA) rejected Dr Rigby's (SRK) analysis that the dual ramp system on the north wall was required due to the unstable nature of the wall. In particular, it rejected the suggestion that this instability was known, but not specifically included, in the Marston Report. Indeed, Mr Lambert (RPA) said that his design made the northern wall safer as including ramps on the northern wall would have placed additional stress on that wall, which would have been undesirable had it been unstable.

702. During oral evidence, Mr Lambert suggested that the haulage times for his ramp design would be the same as estimated in the Marston Report as the ramps would have exited the pit at approximately the same point as the Marston ramps and the length of the ramps were similar.[589]

Respondent's Position

703. Dr Rigby (SRK) did not agree with Mr Lambert (RPA) that adjusting the mine pit shape to maximize access to mineral deposits was the preferable option. He considered that the original Marston pit shape should be retained so as to retain the statistical accuracy of the Marston Report to a feasibility level (+/- 15%) and to be consistent with Procedural Order No. 2. He suggested that using the original pit shape would allow statistics in the Marston Report to remain valid for the no-layback design. He therefore simply moved the position of the pit to adjust for the required buffer zone and did not change its shape.

[589] Transcript, October 2013, Day 1, 26: 14-27:22.

704. Dr Rigby (SRK) also retained the ramp positions used in the original Marston mine plan – placing a dual ramp system on the north wall. He said that Mr Lambert's (RPA) new design left the mine vulnerable if a wall collapsed because (i) the dual ramp system in place on the northern wall in the with-layback design provided alternative access in case of a wall collapse or slip and (ii) it provided a geotechnical catch bench on the northern wall of around 70 meters to catch sloughage that may fall from the unstable saprolite rock in the upper section of the north wall.

705. According to Dr Rigby (SRK), the dual ramp system was desirable for safety reasons and addressed poor geotechnical conditions, as indicated by the Marston Report when it stated: "[t]wo haul roads were designed into phases 5 and 6 and the ultimate pit to provide greater flexibility in ore and waste haulage routes and pit access. *This also provides alternative access in the event of slope failures*."[590]

706. In its Joint Expert Procedure Post-Hearing Brief, Respondent also said that moving the ramps had an effect on haulage times for transporting ore out of the pit, even if the ramp length and exit points were similar, because the entry points were different. It criticised Mr Lambert (RPA) for estimating costs based on haulage times that had been calculated using the dual ramp system, and therefore did not take into account any increase in costs. Respondent also emphasized that the mine design would affect the stripping ratio which would in turn affect the costs of producing saleable metal. It said that even if the amount of metal itself increased, the economics of carting all the extra waste, would not make it worthwhile.

Tribunal's Analysis

707. The initial issue that the Tribunal must consider is whether the experts were confined to using the Marston 2008 mine design when considering the impact of a no-layback scenario or whether the experts were able to redesign the pit to optimize value in a no-layback scenario. Claimant's expert took the latter position, using the Whittle tool to create an optimal design. The Tribunal concludes that nothing in Procedural Order No. 2 required the experts to retain the with-layback pit design to value the concession absent the North Parcel. Indeed, just the opposite - Procedural Order No. 2 specifically asked the experts to estimate "the changes required to adjust the Brisas Project's mine plan due to the absence of a layback agreement within the North Parcel". While the

[590] Joint Expert Procedure Rebuttal Report of Dr Rigby, Mr Swanson and Dr Tinucci dated 3 July 2013 (hereinafter "**Rigby II (Joint Expert Procedure)**"), para. 36 (emphasis in the original).

Tribunal agrees with the Parties that it is desirable to maintain the Marston parameters so far as possible, there is no reason to do so where the particular no-layback circumstances suggest otherwise, including adjusting the pit shape to maximize access to mineral deposits.

708. Indeed, all experts agreed that the Marston pit was not optimal for a no-layback scenario and both experts made adjustments for this. Given that Dr Rigby (SRK) accepted a so-called "bulls-eye" in the south-eastern corner of the original pit, there is no clear rationale not to accept a re-shaping along the northern boundary so as to access to high quality mineral deposits in this area. Similarly, Procedural Order No. 2 did not prevent the experts from re-locating ramps if there is sound rationale for doing so. The Tribunal regrets that the experts did not request clarification from the Tribunal on this point, as provided by the Order, at the time of producing the joint expert report, as it may have facilitated additional agreement.

709. Based on the foregoing analysis, the Tribunal considers that the Whittle program produces the optimum mine pit shape in a no-layback scenario. Moreover, a reasonable investor would seek to adjust the pit to ensure access to key mineral deposits and therefore changes to the both the Southern and Northern corners of the pit were rational in accordance with sound mining practice. The Tribunal therefore adopts the pit shape proposed by Claimant's expert.

710. In relation to ramp location, the Tribunal accepts Mr Lambert's evidence that it would not make "logical sense"[591] for an investor to place the ramps on the north wall and therefore lose access to valuable ore, unless there was a specific reason (for example, a safety reason) for doing so.

711. The Tribunal discusses safety concerns regarding the north wall in more detail at paragraphs 726-734 below. It is sufficient to note here that the Tribunal finds no evidence of safety concerns regarding the north wall. Moreover, the Tribunal finds it unlikely that the Marston Report would have failed to refer to safety concerns regarding the stability of the north wall, had Marston been aware of any such concerns at the time. This is especially so if Marston had deliberately designed the dual ramp system to address such safety concerns. The Tribunal therefore finds, in the absence of any evidence to the contrary, that no such concerns existed at the time of the Marston Report. The Tribunal also notes Dr Rigby's comments that a mine designer would not place a main haulage road directly underneath an unstable slope.[592] This also supports the conclusion that

[591] Transcript, October 2013, Day 1, 25:7 -9.

[592] Transcript, October 2013, Day 1, 72:16-22.

Marston had no significant concerns about the safety of the northern wall. Aside from the erroneous factor of safety calculations discussed above, Dr Rigby adduced no evidence to suggest that safety concerns were discovered by Marston or otherwise after the Marston Report was issued. Consequently, the Tribunal finds that Claimant's ramp locations are to be preferred and accordingly they are adopted for the purpose of calculating damages.

712. On this topic, there are three matters which, for completeness, should be mentioned at this point. First, as to haulage times, Mr Lambert said that there would be no increase in haulage times using his ramp design from those used in the Marston Report because the ramps would be about same length and would exit the pit at same location. In its Joint Expert Procedure Post-Hearing Brief, Respondent stated that even if this were so, the entry point for the ramp would differ which would "necessarily result in different haul times, thus requiring adjustments to project plans and potentially increasing production costs."[593] However, this assertion was not accompanied by any attempt at calculating the additional haulage time specific to reaching the entry point of the ramp (Respondent refers to a difficulty in calculating haulage times to stockpiles given uncertainty of their location,[594] but this is a separate issue). The Tribunal accepts Mr Lambert's evidence that the length and exit points for his proposed ramp were the same as the previous ramps, and notes that Respondent did not contest this. The Tribunal is not in a position to speculate on whether any additional haulage time would have been incurred due to a varying entry point and if so what the cost impact may have been. If Respondent wished to pursue this point it should have offered a costing calculation and, as it did not, the Tribunal finds that no adjustment is required to the DCF calculation on account of haulage times relating to ramp location.

713. Secondly, in its Joint Expert Procedure Post-Hearing Brief,[595] Respondent suggested that the stripping ratio for mining the additional sectors of the pit that would be mined pursuant to Claimant's optimal no-layback pit design would be very high at 16:1 (compared to an average project ratio of 3:1), which would increase costs. This assertion is problematic for two reasons. First, although this was an issue raised with Mr Lambert during the hearing in relation to the shape of the mine pit,[596] it was referred to be Dr Rigby and Mr Swanson in relation to accessing

[593] Respondent's Joint Expert Procedure Post-Hearing Brief, para. 12.

[594] Respondent's Joint Expert Procedure Post-Hearing Brief, footnote 28.

[595] Respondent's Joint Expert Procedure Post-Hearing Brief, para. 13.

[596] Transcript, October 2013, Day 1 40-41.

"additional resources" rather than reserves.[597] The Tribunal addresses additional resources separately below and does not consider that a high stripping ratio generated by accessing resources (rather than reserves) is of relevance to the more general issues of pit shape. In addition, aside from asserting that a high stripping ratio would be uneconomic (which was refuted by Mr Lambert[598]), once again no calculations have been provided to the Tribunal regarding the effect on the DCF calculation, assuming a Whittle pit shape. Without costing calculations, the Tribunal is unable to speculate as to the cost impact of any increased stripping ratio on the DCF calculation, if indeed an increase would result in relation to reserves (rather than resources).

714. Finally, Dr Rigby suggested at the hearing that retaining the original pit shape was required so that the Marston figures, which were accurate to a feasibility level (within 15%) could be retained. He considered that changing the pit shape resulted in a loss of accuracy, such that the figures might be accurate within 40%, which was not at feasibility study level.[599] Mr Lambert refuted this, maintaining that the figures proposed in his expert report were accurate to a feasibility level.[600] The Tribunal has carefully considered Dr Rigby's concerns, but is not convinced that this provides sufficient reason not to adjust the mine plan where it is reasonable to do so. A loss of accuracy was always inevitable when the Tribunal issued Procedural Order No. 2 and requested the experts to estimate the impact of a no-layback scenario, which clearly entailed deviating from the Marston figures where required. Claimant has an obligation to meet its burden of proof. As noted earlier, the Tribunal found Mr Lambert to be more persuasive and there is no basis on which to assert that a reasoned and well-founded adjustment to the shape of the mine pit would suddenly render Claimant's damages calculations speculative.

E. 100 Meter Buffer Zone

Claimant's Position

715. Mr Lambert's (RPA) optimal no-layback pit design did not include a buffer zone between the northern wall of the pit and the northern boundary of the concession.

[597] Transcript, October 2013, Day 1, 222:2-8 and 230:25- 231:5.

[598] Transcript, October 2013, Day 1, 41.

[599] Transcript, October 2013, Day 1, 48:10-25; 58:25- 59:10.

[600] Transcript, October 2013, Day 1, 32:16-17.

716. The original with-layback pit design had contained a 100 meter buffer zone. Mr Lambert (RPA) noted that this buffer had been inserted to ensure that there would be no water seepage issues resulting from the planned water diversion channel in the Las Cristinas concession (as required by Venezuelan law). However, in April 2008, the planned location for the channel had been moved north so it necessarily followed that the reason for the buffer was removed.

717. Mr Lambert (RPA) rejected Dr Rigby's (SRK) assertion that a 100 meter buffer remained necessary for safety reasons. He submitted that the contemporaneous pit design took account of the unstable top layer of rock with flatter slopes at the top than at the bottom. Using these gradients, all of the independent experts who contemporaneously analyzed the design for Claimant prior to 2008 (Vector, Marston and Micon) had confirmed that the northern wall was sufficiently stable. Mr Lambert (RPA) used these gradients from the original design in his no-layback scenario.

718. Regarding safety, all experts agreed that calculating a factor of safety of 1.3 or above would indicate a stable wall. To do this calculation, Mr Lambert (RPA) requested the assistance of Tetra Tech (previously Vector Colorado a firm specializing in geochemical and geotechnical analysis and engineering) to conduct a new safety analysis of the no-layback scenario. Vector Colorado had conducted the original safety analysis for Claimant. Using Vector's contemporaneous data taken from six hard rock boreholes and four saprolite boreholes, as well as geotechnical data gathered from other drilling holes in the area, Tetra Tech calculated the safety factor of various parts of the north wall in Mr Lambert's (RPA) no-layback pit design. The lowest factor of safety recorded was 1.3.

719. Mr Lambert (RPA) rejected Dr Rigby's (SRK) calculation of much lower factors of safety and during the hearing Claimant questioned Dr Tinucci, Dr Rigby's colleague, about apparent errors in SRK's factor of safety calculations. Claimant suggested that incorrect data had been entered into the relevant software program which resulted in a significantly lower safety of factor being generated. Claimant also suggested that Dr Rigby had over-estimated the depth of the saprolite and "weak rock" layers at the northern boundary, thereby inferring a less stable wall than would have existed had the pit been mined.

Respondent's Position

720. Dr Rigby (SRK) asserted that a 100 meter buffer zone between the edge of the northern boundary and the start of the pit wall was required to ensure safety and guard against slope failure. This was because the upper portion of the rock face at the northern wall was inherently unstable. The inclusion of a buffer zone would prevent the pit from encroaching into neighbouring property in the event of a slope failure. Alternatively, Dr Rigby (SRK) stated that the slope gradient could be flatter so as to prevent slope failure (both Parties had adopted the Marston slope gradients).

721. Dr Rigby (SRK) performed a factor of safety calculation based on the contemporaneous data provided by Vector for Claimant's. He calculated a range of local and global safety factors, the lowest being a local safety factor of 0.87, well below the required 1.3.

722. Dr Rigby (SRK) stated that the instability at the northern wall was caused by the "saprolite" rock layer which extended for approximately 225 meter below the surface. It was this upper portion of the wall for which the "local" factor of safety of 0.87 was calculated. Dr Rigby (SRK) stated that he had checked his results using the "more robust finite element method" which calculated a safety factor for the upper portion of the wall of 1.12, still below 1.3.

723. Dr Rigby (SRK) criticised the amount of data available for the northern section of the wall, stating that fewer boreholes were drilled than would be expected, and data from other drill holes could not be relied upon. Dr Rigby (SRK) also rejected Tetra Tech's analysis, suggesting that Tetra Tech was not independent as it was formally Vector – the company that performed the original analysis.

724. Due to the alleged paucity of data, Dr Rigby (SRK) made a comparison between the north wall and the M1 sector of the pit for which more contemporaneous data was available. Dr Rigby (SRK) considered that the M1 sector most closely resembled the geotechnical nature of the northern wall. However, Dr Rigby (SRK) acknowledged that this sector had a safety factor of 1.32, which Claimant noted was still above the required "safe" level (1.3).

725. Dr Rigby (SRK) also made a number of comparisons with other pits, such as the Cleo pit in Australia where one of the walls collapsed following significant rainfall.

Tribunal's Analysis

726. The original mine plan used by Marston for the with-layback scenario included a 100 meter buffer zone between the northern wall of the mine pit and the proposed diverted water channel in the Crystallex project. As the position of the channel had been moved to a more northern location, both Parties agreed that there was no water seepage issue on April 2008 and, consequently, the original reason for the buffer zone had disappeared.

727. The experts also agreed that a stability buffer zone is not required by industry standards generally and therefore it is only needed if there is a specific reason for it in a given scenario, such as slope stability.[601] Consequently, the central issue to be addressed here is whether or not there was a specific safety risk in the no-layback scenario which would suggest that a buffer zone was required.

728. Again, the Tribunal starts from the position that the rational investor would wish to adopt the mine plan which maximises access to mineral deposits, unless there is a technical, legal or safety reason which would prevent this. Dr Rigby's (SRK) inclusion of a buffer zone was based on his safety analysis which he said demonstrated that the northern wall was unstable and therefore a risk of slope failure existed. Indeed, with regard to the buffer, the difference in the factor of safety calculated by the experts appears to be the key issue. The Tribunal therefore addresses that now.

729. The experts agreed that a factor of safety of 1.3 or above is considered stable. In Mr Lambert's (RPA) calculation, the lowest factor for any portion of the north wall was 1.3, whereas Dr Rigby (SRK) calculated a lowest factor of 0.87 (which related specifically to the upper portion of the wall and was a so-called "local" safety factor). Both Parties relied upon the contemporaneous rock strength information provided by Vector to Claimant.

730. During the hearing it became evident that some errors had occurred in Respondent's safety calculations.[602] In particular, it appears that certain data inputs were entered erroneously resulting in a significantly lower factor of safety being generated. Dr Tinucci (a colleague of Dr Rigby) could not explain why the Young's Modulus figures that had been entered into SRK's model were

[601] Respondent's Joint Expert Procedure Post-Hearing Brief, para. 16.

[602] Transcript, October 2013, Day 1, 101-105 (Mr Hallman) and 125-132 (Dr Tinucci).

incorrect and that, as a result, the "value is probably low".[603] Moreover, the Tribunal was not convinced by Dr Tinucci's explanation that a typographical error had been made in the heading of the certain columns, but that the figures were still correct. Due to the fact that the headings generated by the computer program could not have been changed manually (as Dr Tinucci acknowledged[604]) and the fact that the data inputted corresponded to other data available, the Tribunal finds that a number of unintentional data entry errors occurred, resulting in an incorrect calculation. As such, the Tribunal cannot rely on the data presented by Respondent. It therefore accepts the calculations provided by Claimant which it finds to be robust.

731. The use of Claimant's data is further compelled by Mr Hallman's (of Tetra Tech) explanation that Claimant ran approximately 5,000 tests (including both local and global factors of safety) and reported the lowest factor of 1.3 in its submissions.[605]

732. The only remaining issue is whether the Vector data is sufficient to be able to be relied upon. The Tribunal considers it is in no position to question this data when it was relied upon in the original Marston Report which did not question its reliability, nor did the various independent experts who reviewed that Report at the time. Moreover, the Tribunal accepts Claimant's explanation that 10 boreholes (six in hard rock and four in saprolite) together with geotechnical data gather the from over 800 other drill holes provided sufficient data. Claimant also explained that Vector had conducted an analysis of Sector I stability but, in line with industry practice, only included four sectors in its report (which did not include Sector I). As such, the Tribunal finds no basis on which it should reject calculations that rely on the contemporaneous Vector data.

733. The above findings lead the Tribunal to conclude that the lowest factor of safety applicable at the North wall was 1.3 and that therefore there is no safety reason for including a buffer zone at the Northern boundary. The Tribunal will accordingly calculate fair market value using the zero buffer scenario.

734. Before leaving this topic, the Tribunal recalls the question put by Professor Dupuy to the experts during the confrontation at the hearing in relation to the effect of climate and specifically of heavy rainfall on the safety of the northern wall.[606] It is evident that heavy rainfall may have had a

[603] Transcript, October 2013, Day 1, 129:24.

[604] Transcript, October 2013, Day 1, 125:10-11 and 126:16.

[605] Transcript, October 2013, Day 1, 107:16-18 and 108:10-11.

[606] Transcript, October 2013, Day 1, 149:3-8.

considerable effect on the stability of the saprolite material in the upper portion of the northern wall. However, the Tribunal is satisfied that RPA has taken adequate account of this in its pit design and that the contemporaneous testing provided was satisfactory. In particular, the Tribunal considers that it is unable to ignore the site-specific testing done for the Brisas Project on the basis of the experience at the Cleo pit in Australia cited by Respondent. The Tribunal does not have sufficient information to satisfy itself that the conditions and the design at the Cleo pit were so similar that it could reasonably equate the two mines, nor of the specific climatic circumstances that occurred to cause to slope failure and whether they could reasonably be expected to be replicated. There are simply too many uncertainties involved in such a comparison. The Tribunal finds it appropriate to rely on the test results at the Brisas mine, especially given that no clear evidence has been provided that such tests were deficient or failed to reach industry standards.

F. Stockpiles

735. In the no-layback scenario, the Parties agreed that hard rock stockpiles not included in the original mine plan would be needed which would then be blended to ensure a more consistent copper head grade was fed into the processing plant. The experts disagreed on a number of issues regarding these stockpiles including size, location, management, costs, environmental impacts and the effect of oxidation.

Claimant's Position

736. Mr Lambert (RPA) proposed the use of large blending stockpiles (one for low grade and one for high grade ore) in order to smooth out fluctuations in the head grade ore being fed into the processing plant. Large variability in the copper grade of ore would affect mill performance and the quality of the product and blending would help to counter this. As such, blending would assist in maintaining the average copper head grade in a no-layback scenario (with no buffer zone) of 0.10%. This would be lower than the average copper head grade predicted in the with-layback scenario but, Mr Lambert (RPA) explained, it would be within acceptable limits.

737. Mr Lambert (RPA) proposed the use of two stockpiles which would have a combined capacity of up to 68 million tonnes and would reach a maximum height of 96 meters each. Mr Lambert (RPA) claimed that this size was not unusual and that the use of temporary stockpiles such as these

were standard industry practice. One stockpile would be for low grade ore (0.02-0.03%) and the other for higher grade ore.

738. Mr Lambert (RPA) contended that the preferable location for the stockpiles would be on the NLSAV1 parcel where saprolite stockpiles were already planned. Mr Lambert (RPA) suggested replacing the saprolite stockpiles (which would be depleted in the early years of the Project) with hard rock stockpiles which would only be needed several years into the project. This location option was based on an estimated maximum height for the stockpiles of 96 meters, which Mr Lambert (RPA) said was lower than the waste rock stockpiles already included in the Marston mine plan. Alternatively, if more space were required as per Respondent's argument below, space would be available north of the waste rock dump (Esperanza parcel).

739. Claimant said that the additional costs involved in establishing and managing these stockpiles would be minimal, noting that the main cost would be in supplying some additional haulage trucks and loaders. On this basis, Claimant's financial experts, Mr Kaczmarek (Navigant), included an additional $53 million in capital for the stockpile expenditure - $20 million for new equipment and $33 million for replacement capital expenditure over the life of the mine.

740. Regarding mining costs, Mr Lambert (RPA) estimated that the use of the stockpiles would result in a 1% increase in mining costs, but that the increased mining rate would yield a 2% decrease in costs. Because these figures essentially cancelled each other out, Mr Lambert (RPA) made no adjustments to Marston figures. In response to criticism that the mining rate departed too far from the original Marston figures, Mr Lambert (RPA) noted that Respondent's mining rate (as predicted by the production schedules) was even higher. Mr Lambert (RPA) also emphasized that only 17% of the hard rock would be stockpiled and therefore averred that the change to the mine plan was not as significant as Respondent was suggesting.

741. Regarding environmental impacts, Mr Lambert (RPA) contended that testing done for the V-ESIA showed that there was little potential for generating acid rock drainage or for deteriorating copper concentrate. In particular, the high carbonate component in the rock would neutralize acid and effectively create a buffer against leakage. He also said that waste rock and saprolite stockpiles were included in the original mine plan, so environmental concerns had already been addressed. In particular, Mr Lambert (RPA) noted that water treatment equipment had already been factored into the original mine plan at the site where stockpiles were planned. He also

highlighted that contemporaneous assessments concluded that no geomembrane liner was required for the other stockpiles, as the compacting of the saprolite rock by trucks/diggers preparing the site would create an effective liner that would prevent any acid leaching.

742. Mr Lambert (RPA) also dismissed oxidation concerns. He cited tests which showed that over the course of two years there was very little oxidation of the copper content in stockpiled ore. He also emphasized that (i) the stockpile would be composed primarily of large pieces of rock minimizing surface exposure of the ore; (ii) the high stockpiles in its optimal design would also minimize such exposure; and (iii) the hard rock has low permeability. Therefore, oxidation (if any) would be negligible. Finally, Mr Lambert (RPA) noted that evidence of potential oxidation referred to by Respondent's experts was based on crushed ore stockpiles which would inevitably be more susceptible to oxidation. It also pertained to a different type of rock and was based on much wetter conditions than would be the case with the proposed stockpiles. At the hearing, Mr Lambert gave evidence regarding the location and management of the stockpiles and Mr Henderson (from Tetra Tech) gave evidence regarding environmental issues.

Respondent's Position

743. Dr Rigby (SRK) submitted that the inclusion of new large hard rock stockpiles introduced speculation into the valuation and were a significant change. He criticized Mr Lambert (RPA) for failing to provide sufficient detail as to the management and operation of these stockpiles. In particular, Dr Rigby (SRK) considered that Mr Lambert (RPA) had insufficiently addressed the costs and management issues surrounding the stockpiles, and had simply assumed that everything in the stockpile could be accessed and used.

744. Dr Brown and Mr Kowal (CRA) acknowledged that stockpiles were possible, but that "it requires very close control and coordination of both mining and stockpile construction and management operations to be efficient and effective."[607] Dr Rigby (SRK) stated that to ensure an average head grade of 0.10%, rock within each stockpile would need to be classified into high/low grades. Respondent's experts proposed a design for the stockpile that they contended would ensure this access and would segregate incoming ore into recordable areas so that operators could select the exact grade of ore required for blending.

[607] Joint Expert Procedure Rebuttal Report of Dr Brown & Dr Kowal dated 3 July 2013 (hereinafter "**Brown & Kowal II (Joint Expert Procedure)**"), para. 76.

745. Respondent's experts contended that lower stockpiles were necessary because (i) the practicalities of managing the blending process meant that the ore needs to be accessible at all times; and (ii) it had load-bearing concerns regarding the saprolite rock. Lower stockpiles with a maximum height of 10 meter were advocated by Respondent, although this would require significantly more area. Dr Rigby (SRK) estimated approximately 300 hectares would be required.

746. Regarding Mr Lambert's (RPA) suggestion that the hard rock stockpiles could replace the saprolite stockpiles (already included in the original mine plan) over time, Dr Brown and Mr Kowal (CRA) said that this was not possible. They concluded that the hard rock stockpiles could not effectively be sequenced to utilize space vacated by saprolite stockpiles, as they would need to be built up faster than the saprolite stockpiles would be depleted. Respondent's experts said that Mr Lambert (RPA) was wrong to suggest that hard rock stockpiling would begin several years into production; rather Claimant would need to blend north and south rock from early years of the Project to ensure a copper head-grade of 0.10%.

747. Dr Rigby (SRK) noted that the alternative locations suggested by Mr Lambert (RPA) would significantly increase the haulage times for mined rock, which would have implications for operational costs. Mr Lambert (RPA) used the cycle times in the original Marston Report, but Dr Rigby (SRK) said that these would be inapplicable for many of the suggested stockpile locations. Dr Burrows (CRA) instead estimated costs based on an 18 minute cycle time, rather than the 7 minute cycle time used by Mr Kaczmarek (Navigant).

748. In relation to environmental impacts, Dr Rigby (SRK) contended that the testwork undertaken by Claimant was insufficient and inadequate to support its conclusion that acid rock drainage/metal leaching would not occur. It remained an environmental risk to the project and therefore a geomembrane liner should be inserted, as well as a collection system for any water seepage through the stockpiles into the underlying rock and a treatment plant for such water if it were acidic.

749. Dr Brown and Mr Kowal (CRA) also contended that oxidation may be an issue in the stockpiles, which would deplete the copper content that is recoverable from the ore. They estimated that the ore would be in stockpiles for up to 6.75 years (depending on procedure adopted for managing the stockpile), and therefore Mr Lambert (RPA) could not rely on two year tests undertaken

contemporaneously. Respondent did not state definitively that oxidation would in fact occur, rather that there was insufficient evidence to conclude that it would not occur – and that no proper verification was done.[608]

750. Regarding the costs involved in introducing such stockpiles, Dr Burrows (CRA) said that many of the management costs were not "hard coded" as Claimant had assumed, but would increase with the volume of rock mined, transported and stockpiled. This meant that, in most years, costs would increase from the original layback design. Dr Burrows (CRA) also noted that Claimant had kept most costs the same for the no-layback scenario as for the with-layback scenario which he concluded "makes no sense. The two mine plans are very different".[609] He calculated that stockpile costs (including the geomembrane liner and additional haulage time) would reduce Mr Lambert's (RPA) DCF valuation by $107 million.[610] Dr Burrows (CRA) noted that the geomembrane liner would be a "big item"[611] within this cost, however no precise break-down was provided. The Tribunal also understands this figure to include contingency and indirect costs.[612]

Tribunal's Analysis

751. It is evident that the use of hard rock stockpiles for blending purposes is not uncommon and that both Parties agree that they could, and should, be used as part of a no-layback mine plan to smooth out fluctuating copper grades.

752. The Tribunal found the oral evidence provided at the hearing and the Parties' post-hearing briefs useful in distilling the key areas of difference between experts. It appears to the Tribunal that there are two key issues that need to be addressed initially, with a number of more minor issues to consider thereafter. The first of these key issues concerns the purpose of the blending process itself. This in turn will determine the size and management of the stockpiles. The second issue concerns the environmental effects on the ore as a result of exposure to air and rain.

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[608] Brown & Kowal II (Joint Expert Procedure), para. 87.

[609] Joint Expert Procedure Rebuttal Report of Dr Burrows dated 3 July 2013 (hereinafter "**Burrows II (Joint Expert Procedure)**"), para. 44.

[610] *See* Slide 3 referred to by Dr Burrows at the October 2013 Hearing at Transcript, October 2013, Day 2, 216:21-217:1.

[611] Transcript, October 2013, Day 2, 217: 5.

[612] Joint Expert Procedure Second Supplemental Report of Mr Kaczmarek dated 3 July 2013 (hereinafter "**Kaczmarek II (Joint Expert Procedure)**"), para. 81.

753. Turning to the first issue, Claimant contended that only blending would be required to smooth out, but not eliminate, the fluctuations in head grade. Respondent considers that to consistently produce a head grade of 0.10 copper more precise blending is required. For the rough blending advocated by Claimant, two large stockpiles – one containing low grade ore and one containing high grade ore – would be sufficient. Whereas, for more precise blending, it is evident that greater access to ore would be required, hence Respondent's preferred plan of 10 meter high stockpiles where ore could be separated according to the specific grade of copper contained therein.

754. The first point that the Tribunal notes is that Mr Lambert stated at the hearing that the low-grade stockpile would have very little variation and would contain 0.02-0.03% copper. Respondent did not challenge this at the hearing or in its Joint Expert Procedure Post-Hearing Brief. Indeed, it seemed to recognize this when it stated "Mr Lambert acknowledges that there will be variations in grade, especially in the higher grade pile…"[613]

755. As a result, subject to safety concerns addressed below, the Tribunal considers that whether or not rough blending or more precise blending is required, it is clear that the low-grade stockpile could be of a larger size and would not need to be spread into 10 meter high piles for the purpose of accessing ore.

756. Regarding the high-grade stockpiles, the Tribunal accepts Claimant's explanation that, unlike gold blending, where precision is important, there would be no need for such precision for copper blending. As such, the aim of the blending is to avoid extreme fluctuations, rather than to eliminate fluctuations altogether to ensure that a constant head grade is consistently fed into the mill. Respondent has not provided any evidence or explanation as to why precise blending would be necessary for copper, as the examples it used as comparables related to gold blending only.

757. Nonetheless, even Claimant seems to have acknowledged it would be preferable to have slightly more precise blending than can be delivered by two large stockpiles in which ore is simply placed anywhere. At the very least, as Mr Lambert said, regarding "the higher grade stockpile, you may put in three or four areas that have a slight variation in grade."[614] This suggests that two large stockpiles in which ore is placed indiscriminately within each pile would not work in the case of

[613] Respondent's Joint Expert Procedure Post-Hearing Brief, para. 25.

[614] Transcript, October 2013, Day 1, 170:21-24.

the high grade ore. This would lead credence to the argument that slightly flatter, or a few more, stockpiles are required.

758. Overall, the Tribunal finds that Claimant's mine plan that includes larger stockpiles is credible and should be preferred. However, as noted above, the high grade pile may need to be spread over a slightly larger area than initially anticipated so to allow for the separation of ore into three or four areas. The impacts of this in terms of costs and location of the stockpiles are discussed further below.

759. For completion, the Tribunal notes that it is satisfied that there would be no stability issues with locating the stockpiles of the saprolite surface, as similar height stockpiles for waste rock were already included in the original mine plan.

760. The only remaining issue with regard to the height of the stockpiles is whether safety concerns dictate that smaller piles are required. Respondent contended that 96 meter high stockpiles would pose a risk to those working at their base. However, this concern appeared more relevant where precise blending was required, as attempting to select ore buried deep within such a high pile would no doubt create issues. Claimant provided a number of examples of other stockpiles which had a similar height to those proposed here, including stockpiles that would be depleted over the life of the mine. Given that it does not seem unusual to build stockpiles of this height, and in a scenario where the selection of precise ore grades from within the piles is not necessary, the Tribunal finds no evidence that safety would require stockpiles to be limited to 10 meter in height.

761. Regarding management costs, the Tribunal is sympathetic to Respondent's concerns that Claimant's experts have not fully considered the detail of the management or operation of the stockpiles. Mr Lambert himself said during the hearing that the Tribunal only asked the experts to "estimate" and therefore he had not gone into the detail.[615] While it is true that the Tribunal asked the experts to "estimate" design changes in a no-layback scenario, Claimant still has a burden of proof to satisfy. Because of the limited analysis of the detail of the stockpiles undertaken by Claimant's experts, the Tribunal considers that the costs of operating such stockpiles could indeed be higher than Claimant suggests.

762. The Tribunal has studied the Parties and expert submissions in detail with regard to the costs of managing stockpiles. It considers that the suggested deduction by Dr Burrows of $107 million is

[615] Transcript, October 2013, Day 1, 196:4-8.

too high, especially as it includes environmental issues.[616] It also included contingency costs. However, as noted above, the Tribunal considers that Mr Lambert's estimate of an additional $52 million in capital costs may not be sufficient to cover all costs associated with the stockpiles. On balance, looking at the issue overall, the Tribunal finds that a deduction of US$ 80 million from Claimant's DCF calculation would be fair and reasonable, taking into account any need to store higher grade ore in three of four different areas and general costs that will likely arise in establishing and managing such stockpiles.

763. This deduction would also take account of any increase in haulage time required if Claimant's preferred stockpile location is not possible. As with the consideration of management costs, the Tribunal finds that Claimant's experts have not sufficiently analyzed whether the saprolite stockpiles could actually be depleted at a rate that would allow the hard rock stockpiles to replace them. The Tribunal has built in the additional costs in paragraph 848 below to allow for extra haulage time if another location is required.

Environmental concerns

764. The Tribunal now considers the second key issue regarding stockpiles: the potential for Acid Rock Drainage ("**ARD**") and oxidation of the ore. Claimant asserts that ore will be in the stockpiles for approximately three years, while Respondent considered that it could there for up to six years.

765. Based on contemporaneous testing, RPA asserted that neither ARD nor oxidation is of significant concern. In particular, Mr Henderson noted that the carbonate levels in the rock would ensure that any acidity is countered so to keep the pH neutral, and Dr Rigby acknowledged this buffering potential.[617] It also seems to be accepted that much of the rock in the temporary stockpiles would be in the form of large boulders, rather than crushed ore making it less susceptible to ARD or oxidation. The minimal risk indicated by the contemporaneous testing, even if over a shorter period than the ore would be stored for on either Claimant's or Respondent's estimates, is persuasive. The Tribunal finds that it has no evidence before it to suggest that ARD or oxidation would be in issue and, indeed, all evidence points to the contrary.

[616] Transcript, October 2013, Day 2, 217:5 (see also Transcript, October 2013, Day 1, 163:13-15 where Mr Henderson said "I think the additional costs, as I recall, were mostly related to the aerial extent and the desire for geomembrane liners.")

[617] Transcript, October 2013, Day 1, 172:16-173:12 and 178:2-8 (Henderson) and 186:15-17 (Rigby).

766. This conclusion is not at odds with Respondent's position: Dr Rigby was careful to clarify at the hearing that his position was not that the ore would oxidise, rather that it "might" and that he did not consider he had enough evidence to state that it would not.[618] Respondent's concern was that the contemporaneous testing did not mirror the exact time period or conditions that would exist in the stockpiles and therefore one could not be sure that such environmental hazards would not occur. This may be true, but given that all the evidence suggests that the risk of ARD or oxidation is very low, the Tribunal is satisfied that no additional cost needs to be built into the valuation to allow for the building to geomembrane liners etc. or that the recoverability of metal would be significantly lowered by oxidation. The Tribunal notes that any evidence that did suggest that environmental concerns may exist was based on crushed ore studies and is therefore not sufficiently analogous to the present situation in which larger portions of rock would predominantly be stored.

G. Delay

Parties' Positions

767. Respondent incorporated into its DCF calculation a two year delay to allow for obtaining new permits and undertake any further feasibility studies associated with a no-layback scenario, and in particular with the hard rock stockpiles.

768. Claimant disagreed with incorporating time to get additional permits. Its position was that the Parties should assess the no-layback scenario as if it had always been the preferred option – *i.e.*, an alternative, hypothetical world.[619] It also stated that, even if some delay may have occurred, Respondent had not provided any rationale to explain why a two year period is appropriate.

769. Claimant's valuation expert, Mr Kaczmarek (Navigant), stated that the two year delay has a significant financial impact, being worth $221 million. Mr Burrows (CRA) calculated that this would be $217 million, if additional resources were excluded.

[618] Transcript, October 2013, Day 1, 185:24-186:2.

[619] Claimant's Comments on Reports of the Experts Submitted in Response to Procedural Order No. 2, dated August 5, 2013, para. 149.

Tribunal's Analysis

770. The issue of delay is important due to its financial impact. Claimant noted that "[d]ue to the significant impact on a DCF measure of value of reducing early revenues, this … assumption represents the largest difference between the experts' valuations specific to the no-layback scenario".[620]

771. Given the delays that had occurred in the Project prior to 2008 in relation to the granting of permits and the approval of feasibility and environmental studies, it is reasonable to factor in some time allowance for relevant approvals. The Tribunal does not agree with Claimant that the valuation should be assessed as an "alternative world" scenario, as if the no-layback plan had always been in place. The task of the experts was to value the Brisas Project as it was at April 2008. As no lay-back agreement was in place and Claimant had no legal right to use the North Parcel, this must be factored into the valuation. It would therefore be reasonable to assume that some additional approvals would have been required to implement the no-layback design.

772. The Tribunal is not, however, convinced that a two year delay is necessary. In the Tribunal's view, the changes to the mine plan, while important, are not so significant that they would have required extensive additional work in order to be approved. The Tribunal therefore finds that a one year delay is reasonable and will take this into account in its calculations. Consequently, the Tribunal shall deduct US$ 108,500,000 from the DCF calculation (being half of Dr Burrows' estimated cost of a two year delay). The Tribunal notes that the experts agreed that, although it is only an approximation of the financial impact, this figure would be roughly correct for a one year delay.[621]

H. Impact on Resources

773. The Parties and their experts agreed that "mineral reserve" is a defined term that identifies proven and probable resources that are demonstrated to be economic to extract. "Mineral resources" are made up of the "measured and indicated" and "inferred" resources that may become profitable to mine in the future if metals prices were to increase. Mineral reserves are said to be more geologically certain, with "inferred resources" being the least geologically certain.

[620] *Ibid.*, para. 245.

[621] Transcript, October 2013, Day 2, 225:13-17.

Parties' Positions

774. Mr Lambert (RPA) calculated that the optimal no-layback design would result in mineral reserves would be 9.087 million ounces of gold and 985 million pounds of copper. This represented a reduction of reserves by approximately 11% in the case of gold and 29% in the case of copper, as compared to a with-layback scenario.

775. In its Joint Expert Procedure Post-Hearing Brief, Respondent stated that:

> "There is no disagreement as to this process, and both experts discussed at the hearing how mineral resources undergo a technical process, through which they are converted to become reserves with demonstrated economic value. And although there is disagreement as to the amount of gold and copper ore reserves that will be lost under the no-layback scenario, there is general agreement that this is due to the different mine design plans."[622]

776. Mr Lambert (RPA) also estimated "additional resources" using prices of US$ 800/oz gold and US$ 3.25/lb copper to be 3,384,356 ounces of gold and 473,184,949 pounds of copper. Dr Rigby (SRK) disputes the inclusion of additional resources in any valuation, stating that by definition such resources would have been uneconomic to mine as at April 2008 unless metals prices significantly changed. Respondent argues that these resources are speculative and would not be included in securities filings such as the NI 43-101.

Tribunal's Analysis

777. As indicated by Respondent's Joint Expert Procedure Post-Hearing Brief quoted above, and by the discussion between the experts at the hearing,[623] the experts agreed upon the definition and process for measuring reserves and resources. The fundamental differences came down to pit shape/location (which has already been addressed by the Tribunal) and whether additional resources were to be included. Dr Rigby stated at the hearing that he accepted the estimate provided by Mr Lambert for Claimant's "optimal" zero buffer scenario.[624] Because the Tribunal has determined that no buffer is required and has therefore adopted Claimant's preferred mine

[622] Respondent's Joint Expert Procedure Post-Hearing Brief, para. 30

[623] Transcript, October 2013, Day 1, 226:16-226:6.

[624] Transcript, October 2013, Day 1, 226:17-227-10.

design, the mineral reserves estimate provided by Mr Lambert (RPA) should be used when calculating fair market value. That is, mineral reserves are estimated to be 9.087 million ounces of gold and 985 million pounds of copper.[625]

778. In relation to additional resources, the Tribunal understands that additional resources can and often are reported for different purposes and, in some scenarios, might be ascribed value. However, for other purposes and reports, such as the NI 43-101 Technical Report filed by Claimant with the Toronto Stock Exchange, no value is ascribed to additional resources.

779. Mr Lambert (RPA) concluded that certain additional resources may become economic to mine at a metals price of US$ 800/oz gold and US$ 3.25/lb copper – it is at this point that they may have value. The Tribunal understands that it is industry practice to estimate resources at a higher price.

780. However, the Tribunal must consider what the value that a willing buyer would have been likely to ascribe to such resources as at April 2008. Given that, as described by Respondent, these resources have the "lowest level of geological confidence"[626] and that the Canadian Institute of Mining, Metallurgy and Petroleum on Valuation of Mineral Properties ("**CIMVal**") Guidelines, to which Claimant refers, acknowledges the "higher risk or uncertainty" associated with these resources and cautions that they should only be used with great care, the Tribunal finds the additional resources to be too speculative to include in the present valuation. The Tribunal concludes in this case that for the purposes of a fair market valuation, it will not ascribe any value to the additional resources in its calculations.

781. The Tribunal also finds that the valuation should not include silver resources. As noted by Mr Kaczmarek (Navigant), "Gold Reserve applied for concession rights to exploit silver, but the Ministry of Mines never acted on this application"[627] and Gold Reserve itself acknowledged silver was not covered by the corresponding mining titles. No evidence has been presented of any inferred right to mine silver and therefore any value ascribed to this metal would be on the speculative basis that such a right be granted in the future. The Tribunal does not find this

[625] Claimant's Joint Expert Procedure Post-Hearing Brief, para. 65.

[626] Respondent's Joint Expert Procedure Post-Hearing Brief, para. 105.

[627] Second Expert Report of Mr Kaczmarek, dated 27 July 2011 (hereinafter "**Kaczmarek II**"), para. 89.

convincing and considers that no value should be ascribed to any silver reserves in the DCF valuation.

782. Consequently, the Tribunal shall reduce Claimant's DCF valuation by US$ 31 million[628] to account for silver included in Claimant's valuation and by a further US$ 162 million[629] to amount for additional resources included in Claimant's valuation.[630]

I. Metallurgical Issues

783. A number of metallurgical issues were raised by the Parties as impacting on the valuation. The most important of these issues involved the processing plant performance and the resulting metal recovery rates and concentrate grades. Before addressing this significant issue, the Tribunal considers two more minor issues – ramp up rates and mill capacity.

784. The Tribunal heard evidence at the October 2013 hearing on metallurgical issues from Dr Altman (RPA) and Mr Spiller (Tetra Tech) on behalf of Claimant and from Dr Brown (CRA) on behalf of Respondent. The Tribunal found Dr Brown's evidence to be particularly convincing and helpful in the determination of these very technical issues.

J. Ramp-up Rates

785. Ramp-up refers to the time it takes for the processing plant to "ramp-up" to its full capacity. This is not an issue specific to a no-layback scenario, but was addressed by the experts in the Joint Expert Procedure reports and therefore the issue is addressed here by the Tribunal.

Claimant's Position

786. Mr Lambert (RPA) stated that he used the ramp-up figures from the Marston Report of 2008 in both the with-layback and no-layback scenarios. This Report determined that the plant would operate at 87.5% of capacity in the first year, made up of 60% capacity in first quarter, rising to

[628] Burrows II (Joint Expert Procedure), para. 48 and Table 1, p. 19.

[629] *Ibid*., para. 12.

[630] Figures taken from Kaczmarek II (Joint Expert Procedure), para. 58.

90% in second and full capacity after that. Micon had independently verified the Marston figures at the relevant time.

787. Mr Lambert (RPA) criticized Dr Rigby's (SRK) use of comparisons with other mining projects, stating that they used "selective and skewed sampling" [631] which were not truly comparable with the Brisas Project. Mr Lambert (RPA) also countered that many of those mines actually performed better than anticipated, and ended up with ramp-up rates higher than 87.5%. Mr Lambert (RPA) also submitted that the calculations used by Dr Rigby (SRK) to estimate ramp-up were incorrect.[632]

Respondent's Position

788. Dr Rigby (SRK) submitted that the ramp-up figures in the Marston Report, and used by Mr Lambert (RPA), were too high. It used other "comparable" processing plants to demonstrate that the figures should be lower and stated that the resultant lower predicted income in the early years would impact the DCF valuation. However, Dr Burrows (CRA) said that modeling the impact of slower ramp-up times is very complex, so to be conservative, he did not include any adjustment to the DCF to account for slower ramp-up times.[633]

Tribunal's Analysis

789. As Respondent did not include any financial impact for slower ramp-up rates in its DCF adjustments, the Tribunal understands that this is not an issue that will affect any damages to be awarded hereunder. It is also not an issue on which the Parties concentrated at the hearing or in their Post-Hearing Briefs. As such, the Tribunal will only address this issue briefly.

790. The Tribunal is persuaded by Claimant's evidence that the comparable processing plants referred to by Dr Rigby (SRK) are not sufficiently reliable to conclude that a move away from the Marston figures is warranted. The Tribunal is also persuaded that Mr Lambert's use of the Marston ramp-up rates is the correct approach in the present case. Moreover, the Tribunal accepts Mr Lambert's submission that Dr Rigby (SRK) made crucial errors in his ramp-up calculations which prevents the Tribunal from placing any weight on the conclusions which might otherwise be drawn from

[631] Joint Expert Procedure Supplemental Report of Mr Lambert dated 24 May 2013 (hereinafter "**Lambert I (Joint Expert Procedure)**"), paras. 136 and 153.

[632] Lambert I (Joint Expert Procedure), paras. 135-153.

[633] Burrows II (Joint Expert Procedure), para. 52.

those calculations. The Tribunal notes that, as this is not an issue that is affected by the no-layback scenario, strong evidence would be required for the Tribunal to depart from the figures adopted in the Marston Report, as approved and reviewed by Micon and Pincock, Allen & Holt, and on which the Parties have frequently placed reliance in other areas. Given no such evidence exists, the Tribunal finds that the ramp-up rates in the Marston Report should be applied in a fair market valuation.

K. Mill Capacity

Parties' Positions

791. Respondent's experts submitted that the processing mill had a processing capacity of 25.2 million tonnes of ore per year. Claimant's expert said that this estimated capacity was for the "SNC Lavalin" mill design in 2006, but the mill was subsequently redesigned so that its processing capacity increased to 27 metric tons of ore in early years and up to 29.2 metric tons later for the Brisas Project. In particular, Mr Lambert (RPA) said that he used Marston's contemporaneous mill capacity data, which was independently verified at the time by Pincock Allan & Holt and Micon.

Tribunal's Analysis

792. The Tribunal notes once again that this is not an issue specific to the no-layback scenario. Therefore, as with the ramp-up issue above, the Tribunal finds that the figures used in the Marston Report should apply, unless convincing evidence to the contrary is provided. No such evidence exists in the present case and therefore the Marston figures should apply as per Claimant's analysis. The Tribunal accepts that the processing capacity changed and therefore using the original figures from the SNC Lavalin mill would not be appropriate.

L. Metal Recovery Rates and Concentrate Grades

793. This is the central issue regarding the metallurgical analysis. The grade of the gold-copper concentrate coming out of the processing plant is dependent upon (i) the plant's average metal recovery rate; and (ii) the "mass" recovery, referring to the density of the recovered concentrate. Density depends on how successful the plant is at separating waste rock from valuable metal.

794. Contemporaneous testing in 2008 for the with-layback scenario predicted that, with an assumed 0.10% copper head-grade:

(a) the average copper concentrate grade would be 24%;

(b) the average metal recovery rate would be 87.4% for copper and 83.2% for gold; and

(c) the average mass recovery would be 0.36%.

795. These results were based on a number of tests carried out by Gold Reserve before the dispute arose. The most reliable of these tests for the purposes of recovery rates were the Locked-Cycle Tests ("**LCTs**"), of which eight were performed (although only seven were relevant to the issues discussed here). Both experts accepted the accuracy of the LCTs, although Respondent disputed whether a sufficient number of LCTs had been carried out so as to produce reliable data.

796. The experts agreed that the head grade of the ore fed into the plant in a no-layback scenario is likely on average to be lower than in the with-layback scenario. The experts agreed that the mill itself would be able to handle lower head grade ore. The fundamental disagreement appears to be how this would then affect mill performance.

Claimant's Position

797. Mr Lambert (RPA) contended that the contemporaneous test results could still be applied to the no-layback scenario to predict metal recovery rates because, although in some years the average copper head-grade would be below 0.1%, there was nothing to indicate that the metal recovery rate would materially reduce with the slightly expanded range of copper head-grade expected in a no-layback scenario. Moreover, Mr Lambert (RPA) suggested that the mineralogy of the deposit was more important than the head grade when considering mill performance. This would not change in the no-layback scenario and the type of ore is easy to process.

798. According to Claimant, LCT No. 8 most closely reflected the process to be adopted for the processing plant. Although the LCTs were used as the primary basis to design the processing plant and determining average metal recovery rate, Claimant suggested that a certain amount of professional judgment was also used in the design which should in turn be used when assessing the impact of the no-layback scenario.

799. The contemporaneous data was based on an assumed head grade feed range of 0.083% - 0.176% (with average grade of 0.131%). RPA contended that in its optimal no buffer scenario the head grade feed range would be between 0.075% - 0.182%, with an overall average of 0.1%. It was therefore not substantially different from the head grade range predicted in a with-layback scenario and therefore the contemporaneous testing could be relied upon to predict metal recovery rates. Accordingly, Mr Lambert (RPA) predicted that the average copper recovery rate in the no-layback scenario (assuming 0 meter buffer) would be the same as for the with-layback scenario tested contemporaneously – 87.4% for copper and 83.2% of gold. He said that only in the 100 meter buffer zone scenario would the contemporaneous testing become unreliable.

800. Mr Lambert (RPA) also stressed that the processing plant had sufficient flexibility to cope with slightly lower head grades and only significantly lower head grades would likely reduce recovery rates. This was also consistent with the fact that the LCTs did not show a significant correlation between head grade and metal recovery, with some lower head grades producing high metal recoveries.

801. While contemporaneous data could be used to estimate metal recovery rate, this is not so for the average concentrate grade of the copper that would result from different head grades below 0.1%. For the years in which the head grade is 0.1% or above, Mr Lambert (RPA) said that the average of 24% copper concentrate used in the contemporaneous testing was appropriate. In years when the average head grade falls below 0.1%, the anticipated concentrate was based on the "definitional relationship between concentrate grade, metal recovery, head grade and mass recovery and the processing plant design criteria."[634] More specifically, Mr Lambert (RPA) used an equation whereby the concentrate grade is equal to the (head grade x metal recovery rate) / mass recovery. Claimant contended that this equation is more accurate than relying on the "assumed" concentrate grade used in the testing. Using the equation, Mr Lambert (RPA) predicted concentrates of between 18-22% for 10 years of the project's life and above 22% for 7 years.

802. In relation to Dr Brown and Mr Kowal's (CRA) analysis, Mr Lambert (RPA) contended that they had used test data inappropriately and consequently that their analysis generated flawed and unrealizable results. This was because the model chosen required more data points than were available from the LCTs. In particular, Respondent's model used tests that were conducted for

[634] Claimant's Joint Expert Procedure Post-Hearing Brief, para. 83.

other purposes and under different conditions than would exist in the processing plant as designed. Therefore, the tests also involved samples that were unrepresentative of the general ore content put through the processing plant. Mr Lambert (RPA) said that the LCTs are the best indicator and that one should use only these tests when analyzing metal recovery rates.

803. Mr Lambert (RPA) and Mr Kaczmarek (Navigant) stated that this issue was worth US$ 175 million.

Respondent's Position

804. Dr Brown and Mr Kowal (CRA) used a "non-linear exponential" model to predict metal recovery rates and concentrate grades. They too relied on contemporaneous data in their model, but from a wider range of tests than just the LCTs. They opined that this wider range of data points demonstrated that metal recovery rates fell as the head grade fell and that this reflected standard expectation in the industry. Using this model, Dr Brown and Mr Kowal (CRA) predicted copper concentrate grades of between approximately 15-23% in the no buffer scenario (*i.e.*, Claimant's optimal scenario).

805. Dr Brown and Mr Kowal (CRA) noted that for recovery of gold, test data at pilot plant for the Brisas Project Feasibility Study showed differing gold recovery results from that used by Mr Lambert (RPA). Hence, they said that Mr Lambert (RPA) had overestimated gold recovery, making the concentrate appear more valuable than it would have been in reality.

806. Dr Brown and Mr Kowal (CRA) criticised Mr Lambert's (RPA) analysis as overly-simplistic and based on too many assumptions to be reliable. They said that the assumption that the concentrate grade would be 24% at head grades above 0.1% is not consistent with other available information which would suggest the head grade would need to be at least 0.15% to produce a 24% concentrate. Micon reported that material from the North (high copper) and the South (low copper) should be blended to produce concentrate 24% from ore containing 0.13-0.15% copper. Dr Brown and Mr Kowal (CRA) pointed out that other documents say marketable concentrates could not be produced from head grade under 0.1% - this would be lower limit and that the LCT tests at head grades of 0.12-0.13% show percentage recovery at 16-21%. They said that the LCTs were all based on higher copper grades and it is speculative to apply them to mill performance for lower copper grades.

Tribunal's Analysis

807. This area is both technical and complex and has been the subject of significant disagreement between the experts. The Tribunal understands the Parties to agree that the processing plant performance depends on the range of copper grades fed into the mill and that this range will be lower in the no-layback scenario than it would have been with a layback. The dispute between the experts concerns first the percentage that the head grade would drop and secondly the impact that this drop would have on metal recovery rates.[635]

808. The experts appeared to agree that the mill as designed would be capable of processing the ore at lower head grades. It is the performance of the mill in terms of metal recoveries and concentrates that is at issue. Claimant's basic position was that the both the average head grade of the ore and the range of head grade to be fed into the mill – while lower than the with-layback scenario – is not so significantly lower to affect mill performance. Therefore the data obtained in the LCTs can be reasonably relied upon to predict performance. Respondent's position is that the head grade of the ore would be "significantly lower" and therefore a mathematical model should be used to extrapolate from the available test data what mill performance would be at these lower head grades.

809. The Tribunal notes that both Parties accepted the accuracy of the tests performed by SGS Lakefield, as reported in the Marston Report and reviewed by Micon, Pincock Allan & Holt and SNC Lavalin. However, Respondent's experts considered that insufficient LCT data was available for lower head grades to confidently predict mill performance. This is especially so, claimed Respondent, because the head grade of ore fed into the mill would be below an average of 0.10% in the first 13 years of the life of the mine.

810. The importance of using the contemporaneous data wherever possible is undisputed, as is the fact that the LCTs provided the most reliable indication of mill performance. However, given that the LCTs did not provide sufficient data to run a statistical model for estimating performance in the no-layback scenario, the Tribunal considers it both practical and preferable to use the next best data available – that generated by other tests including batch flotation tests and pilot plant data.

[635] Claimant's Joint Expert Procedure Post-Hearing Brief, para. 80; Respondent's Joint Expert Procedure Post-Hearing Brief, para. 38.

The Tribunal prefers such a statistical analysis over the use of "professional judgment"[636] which is subjective and, as has been demonstrated by the substantial disagreement between the highly-qualified experts involved in the present case, can legitimately produce widely variable results. The Tribunal notes that both Parties relied on data gathered from these other tests for various parts of their analysis[637] and the key, as Mr Spiller noted during the hearing, was to use that data "carefully".[638]

811. Moreover, the Tribunal is not convinced that metal recovery rates predicted by the LCTs would remain the same at lower head grades. The Tribunal is not persuaded by Claimant's experts' assertions that mineralogy rather than head grade is more important in determining metal recovery or that there would be no correlation between head grade and metal recovery evident from the testing. The Tribunal notes Dr Brown's observation that industry standard practice would expect metal recovery to reduce with lower head grades, and considers that Claimant has not provided any convincing rationale for why the Brisas mine would behave differently. The Tribunal consequently prefers the statistical model advocated by Respondent for predicting metal recovery rates and lower grades, rather than simply assuming that metal recovery would stay the same.

812. In relation to concentrate grades, the Tribunal also finds Respondent's statistical approach to be more convincing and reliable than the pull model adopted by Claimant which incorporated a number of assumptions. The Tribunal accepts the criticisms made by Respondent's experts as to incorrect nature of the assumptions made by Claimant's experts on which the pull model relied for its accuracy. In particular, the Tribunal notes Respondent's criticism that:

> "[The pull model] can only be used as a predictive model if one knows the dependence of recovery on head grade, as well as the dependence of pull on head grade. Since evaluations of the data regarding recovery and pull were not made, the pull "model" is wholly dependent on the assumptions that Claimant's experts make in this regard."[639]

813. Moreover, at the hearing, Dr Altman was unable to answer Dr Brown's criticisms of her assumptions simply stating "we know that plant will operate that way."[640] In the absence of

[636] Transcript, October 2013, Day 2, 2:5-8.

[637] Transcript, October 2013, Day 2, 19:24 - 20:13.

[638] Transcript, October 2013, Day 2, 51:15-18.

[639] Respondent's Joint Expert Procedure Post-Hearing Brief, para. 67.

[640] Transcript, October 2013, Day 2, 54:11-12.

evidence that would support Claimant's assumptions, the Tribunal does not consider the pull model appropriate in the present circumstances.

814. Consequently, the Tribunal finds that Claimant's DCF valuation should be adjusted to reflect that Respondent's mill performance analysis. This requires a reduction of US$ 101 million as reflected in paragraph 848 below.

M. Saleability of Concentrates

Parties' Positions

815. The experts agreed that the concentrate produced under a no-layback scenario would be saleable. The issue therefore was whether the copper content would fall below agreed levels such that the draft commercial terms that had been agreed with three smelters in 2005 would need to be renegotiated. The three smelters were Aurubis (Germany), Sumitomo (Japan), and Boliden (Sweden).

816. Respondent contended that smelters would seek to maintain their margin by negotiating higher treatment and refining charges in the case of lower copper concentrates (which cost the smelters more to treat). It estimated the cost to be approximately $50 million. Respondent introduced evidence from Mr Tuokkola who was the Vice-President of Operations at the Boliden smelter at the time the draft terms were negotiated with Claimant.

817. Claimant submitted that, even if concentrate grades fell below agreed levels, it was unlikely that the smelters would seek to renegotiate terms because the market had shifted significantly between 2005-2008 against the smelters. In particular, treatments and refining charges had halved by 2008 as regards those agreed in the 2005 terms and smelters were no longer able to charge price participation. Claimant contended that the smelters would not risk losing these benefits by re-opening the terms to negotiation. However, if a renegotiation did occur, it would result in a DCF deduction of no more than US$ 5 million.

Tribunal's Analysis

818. The experts agreed that market conditions had changed since the negotiation of the smelter agreement in favour of the mines, particularly in relation to treatment/refining charges and the inclusion of price participation provisions. The Tribunal is not persuaded that, given the significant drop in average treatment and refining charges which had effectively halved between 2005 and 2008, that the smelters would risk renegotiation. Even if renegotiation were sought, the Tribunal is not convinced that it would have any material impact on the DCF calculation as, in the market that existed in 2008, Gold Reserve would be as likely to benefit from the renegotiation as it would to be disadvantaged by it – indeed, more likely to benefit than not. As such, the Tribunal considers that there is no need to make any further adjustment to the DCF valuation to account for any potential renegotiation.

N. Valuation / Financial Issues

Claimant's Position

819. Claimant's primary position was that the absence of a formal legal right to the North Parcel of land as at April 2008 would not have had any material effect on damages. This is because, according to Claimant and its valuation expert, Mr Kaczmarek (Navigant), a "reasonably informed buyer" would have assumed the good faith application of Venezuelan law which, in turn, would mean that the buyer would have been able to obtain the right to use the North Parcel as a layback. Thus, the Brisas Project would be purchased on this assumption. Therefore, the fact that the legal right had not been acquired as at April 2008 did not affect the value, as the right would be acquired in the future.

820. To support this conclusion, Claimant cited the following reasons for assuming a layback would be granted in the future: it was required to maximize the concession; laybacks are common in the industry; laybacks and easements were being approved at the time; Crystallex's filings indicated it expected the layback agreement to be implemented; third party valuations at the time assumed a layback; those minerals were included in Claimant's reserves in the 2008 NI 43-101 Technical Report filed with the Toronto Stock Exchange (in which a qualified person independently reported reserves to the public). Finally, Claimant contended that the owner of the Brisas Project had a right to obtain use of the North Parcel and a layback agreement onto the Cristinas 4 parcel by Court order if necessary.

821. However, Claimant also provided (as requested under Procedural Order No. 2) an alternative valuation based on the assumption that no layback existed (*i.e.*, the no-layback scenario). Mr Kaczmarek (Navigant) determined the value of the Brisas Project on this alternative basis to be US$ 1,374,492,000 (which was 21% drop in value from the with-layback scenario).

822. To calculate this value, Mr Kaczmarek (Navigant) used same methodology as it did in the original reports, adjusted for the new mine plan with no layback. This methodology comprised the weighted average of (i) DCF method; (ii) comparable publically traded company method; and (iii) comparable transaction method. The weightings attached to each methodology were 50%, 35% and 15% respectively. Mr Kaczmarek (Navigant) contended that using a weighted average of these three methods meant that the valuation was not over-sensitive to changes in inputs and that including a comparable transaction method ensures the valuation is not too far removed from the market.

823. Mr Kaczmarek (Navigant) criticized Dr Burrows' (CRA) zero dollar valuation, stating that there was clearly economic value in the significant gold and copper mineral deposits at Brisas (as shown by the mineral reserves which are by definition economic to mine). It also cited a number of errors in Dr Burrows' (CRA) methodology including use of an incorrect base value and discount rate. Most of these criticisms are not specific to the no-layback scenario and were also made during the initial quantum phase. Differences that were specific to the no-layback scenario stem primarily from the differences between the mining experts already addressed above.

Respondent's Position

824. Respondent's position, based on the analysis by Dr Burrows (CRA), is that the Brisas Project had a zero dollar fair market value (with or without layback) as at April 2008.

825. Respondent rejected Claimant's assertion that a willing buyer would assume a future layback, even if no legal right had been granted at that time, and therefore would value the concession on this basis. Respondent stated that the absence of a layback had a significant effect on value, noting that, in March 2008, Pincock Allen & Holt wrote "in the event an agreement [on the layback] is not reached, the reserve estimate will have to be reduced significantly."[641]

[641] Respondent's Comments on the Joint Expert Procedure Reports, para. 4.

826. Dr Burrows (CRA) assessed the value of the Brisas Project based on the DCF method only, stating that a comparables-based methodology is inappropriate because nature of the geology and mineralization varies so much from site to site that no valid comparables exist.

827. For the no-layback scenario (as for the with-layback scenario), Dr Burrows did not produce his own DCF calculation, but began with Mr Kaczmarek's (Navigant) DCF valuation for its optimum no-layback scenario (*i.e.*, 0 meter buffer and large stockpiles). He then made a number of "fundamental corrections" to allow for lower metals recovery, higher smelter charges, revisions to reflect better the revised mine plan (ramps etc.), and a two year delay to obtain additional permits etc. (*i.e.*, all the corrections that Respondent's mining experts suggested). He also corrected the assumed speed at which Claimant would receive revenue which reduced the value by a further $43 million. In total, these corrections significantly decreased the DCF value to $614 million.

828. Dr Burrows (CRA) then went on to make a number of further corrections to the value regarding gold/copper prices, inflation, cost of capital etc. These corrections reflected criticisms previously made of Mr Kaczmarek's (Navigant) model and were not specific to the no-layback scenario. The key points in Mr Kaczmarek's (Navigant) methodology with which Dr Burrows (CRA) took issue were summarized at paragraphs 24 and 26.[642] The result of making all of these adjustments is a zero dollar value attributed to the Brisas Project. In effect, his view was that the concession would have been uneconomical to mine.

Tribunal's Analysis

Claimant's Primary Case

829. The Tribunal does not accept Claimant's primary position that the absence of a legal right to use the North Parcel of land would have no effect on the value of the Project. There is no doubt that any reasonable purchaser would take into account the possibility that it would not acquire the right to use the North Parcel, especially given that Claimant had failed to secure the right or reach an agreement on a layback by April 2008. Moreover, the Tribunal simply cannot compensate Claimant for the deprivation of a right that it never possessed.

[642] Burrows II (Joint Expert Procedure), paras. 24-26.

830. Claimant's experts have modelled an alternative value based on a weighted average of a DCF valuation, comparable publically traded company and comparables transactions. Although the Brisas Project was never a functioning mine and therefore did not have a history of cashflow which would lend itself to the DCF model, the Tribunal accepts the explanation of both Dr Burrows (CRA) and Mr Kaczmarek (Navigant) that a DCF method can be reliably used in the instant case because of the commodity nature of the product and detailed mining cashflow analysis previously performed.[643] The Tribunal also notes that the experts agreed on the DCF model used, and it is only the inputs that are contested. Many of these have already been discussed above, with the remaining variables discussed below.

Comparables

831. With regard to the use of comparables, Respondent contended that there were simply no comparable companies or transactions close enough to be used as a measure of value.[644] The Tribunal notes that the DCF method is a preferred method of valuation where sufficient data is available. This conclusion is supported by the CIMVal Guidelines (referred to at paragraph 780 above) to which both experts referred. In the present cases, many of the arguments in favour of a DCF approach (a commodity product for which data such as reserves and price are easily calculated) mitigates against introducing other methods such as comparable transactions or market capitalization, unless close comparables can be found. On several occasions in this Award, the Tribunal has rejected a comparable with other mines on the basis that many variables are specific to each mine (such as climatic and geological conditions) all of which have an impact on value.[645] Dr Burrows observed in relation to the comparables used by Mr Kaczmarek (Navigant) that "[t]he characteristics of these deposits vary widely. They were in very different locations with different geopolitical risks, different types of deposits, different kinds of mining technologies, different process technologies, different stages of production and different stages of development."[646] He also noted that no adjustments were made to take account of differences. Although the Tribunal appreciates Claimant's concern that the DCF model can be over-sensitive to changes in inputs, the Tribunal is not convinced that the comparables offered are sufficiently similar to enable then to be

[643] Claimant's Joint Expert Procedure Post-Hearing Brief, para. 118.

[644] Respondent's Joint Expert Procedure Post-Hearing Brief, para. 87.

[645] *See*, for example, paras. 734, 756 and 790.

[646] Transcript, October 2013, Day 2, 139:6-18.

used in a weighted valuation calculation. Because of this uncertainty, the Tribunal prefers to use the DCF model only.

832. This does not mean, however, that the comparables analysis conducted should be ignored completely. However, rather than ascribed a weighted value to each methodology, the Tribunal prefers to use the DCF value to assess compensation and refer to comparable companies and transactions as a cross-reference as to the reasonableness of the DCF valuation. It is noted that, at least for the original DCF valuation advanced by Claimant, the comparables were in a close range, suggesting the DCF value was reasonably accurate. Similarly, contemporaneous valuation reports prepared by independent analysts from JP Morgan, RBC Capital, and Trevor Ellis are useful references to ensure that the compensation awarded is reasonable. Once again, these analyses produced values reasonably similar to that derived from Mr Kaczmarek's (Navigant) DCF valuation.

Dr Burrows' Negative Valuation

833. Turning now to the specific DCF values advanced by the Parties, the Tribunal did not find Dr Burrows' (CRA) negative valuation, resulting in no compensation, convincing. This would essentially mean that the mine was completely uneconomic to operate – a highly unlikely proposition given the effort and expense to which Gold Reserve had committed to get the mine operational. The detailed feasibility study and various impact studies all demonstrated that the level of analysis that had gone into the mine was significant. Moreover, Claimant demonstrated that its valuation was consistent with other independent valuations in 2006 and 2007 by Trevor Ellis, JP Morgan and RBC Capital.[647] To suggest that all of these independent valuations are worthless is simply not credible. If mining the concessions had been uneconomic, Claimant would have been aware of this and no doubt would not have been proceeding with the venture. In addition, Mr Pingle (who provided expert evidence on behalf of Claimant for the first hearing) confirmed the financing that had been arranged for the project, indicating that a convincing business case had been made to obtain the debt. The absence of a layback on the North Parcel is hardly likely to be such a significant change as to turn a highly profitable investment into an unprofitable one.

[647] Kaczmarek II, para. 39.

834. The Tribunal's rejection of Dr Burrows' negative valuation, together with the endorsement of Mr Kaczmarek's (Navigant) valuation by its reasonable proximity to the comparables methodologies and to independent valuations conducted during the relevant period, strongly suggests that Claimant's DCF analysis is to be preferred to that of Dr Burrows. However, as indicated in the previous sections of this damages chapter, the Tribunal finds it appropriate to make certain adjustments to the DCF valuation to account for some of the no-layback specific valuation issues. These adjustments are set out in paragraph 848 below. However, in relation to other disputes between the experts on issues not specific to the no-layback scenario, the Tribunal generally prefers the methodology and evidence advanced by Mr Kaczmarek (Navigant). For the sake of completeness, the Tribunal briefly addresses each of these additional issues below.

Metal Prices

835. The first issue is the appropriate metal prices to be used. In relation to gold, both experts used the futures prices available through to the end of 2012 for calculating prices up until this date. Thereafter, Mr Kaczmarek (Navigant) continued to apply the last known futures price (as at December 2012) through to the end of the project. Dr Burrows (CRA) instead used long-term price forecasts from analysts to calculate the price of metals after December 2012. The dispute therefore regards the price to be applied from the beginning of 2013.

836. In relation to copper, Mr Kaczmarek (Navigant) used the futures price through June 2010 and assumed that the price would stay constant (at $3.55 per pound) thereafter. Dr Burrows (CRA) used Mr Kaczmarek's (Navigant) projection of the copper price through 2014 and the analysts' expectations thereafter.

837. The Tribunal accepts Claimant's explanation that the approach adopted by Mr Kaczmarek (Navigant) is conservative and holding the last futures contract price constant in a forecast is a common forecasting methodology in commodity sectors. Dr Burrows' (CRA) approach results in a sudden and significant price drop as at the beginning of 2013 and in turn creates an "unrealistic pricing pattern."[648] As noted by Mr Kaczmarek (Navigant), Dr Burrows' (CRA) analysis is the result of mixing two quite different types of forecasts which in turn have predicted vastly different prices. In the Tribunal's view, this mixing of methodologies which creates a pricing prediction that is clearly at odds with normal price patterns is inappropriate. Given that holding the final futures prices is a both a common and conservative methodology in the instant case, and appears

[648] Claimant's Joint Expert Procedure Post-Hearing Brief, para. 122.

more consistent with a realistic (albeit conservative) pricing pattern, the Tribunal does not consider that any adjustment needs to be made to Claimant's DCF valuation regarding the prices of copper or gold. Although not relevant to the analysis, the Tribunal notes that actual pricing patterns since 2008 confirm that conservative nature of the metal prices used by Claimant, reinforcing the Tribunal's decision not to adjust the valuation further.

Inflation Rate

838. Regarding the inflation rate to be applied, Mr Kaczmarek (Navigant) calculated a 2.39% inflation rate based on the difference between the yield on 20-year treasury inflation protected securities ("**TIPs**") and the yield on standard treasury bonds of a similar maturity. Dr Burrows (CRA) used 20-year US dollar inflation swap rates to project inflation of 2.89%. Mr Kaczmarek (Navigant) stated that its methodology provided a market estimate for the expected rate of inflation[649] and, while acknowledging that debate exists on the topic, said that "many well-regarded valuation texts relied on by valuation practitioners advocate the use of TIPs."[650] It is evident that the use of inflation swaps to predict inflation is also a valid method of predicting inflation. Faced therefore with two valid methodologies for estimating inflation over the relevant 20 year period, the Tribunal is persuaded by the five alternative predictions of long-term US dollar inflation presented by Claimant at paragraph 178 of Mr Kaczmarek's Second Expert Report of July 2011 (which provided a range between 2% and 2.5%) that Claimant's inflation rate should be adopted in the present case.

Discount Rate

839. The experts calculated the discount rate to be applied in the present case using the weighted average cost of capital (or "**WACC**"). Mr Kaczmarek's (Navigant) calculation yielded a WACC of 8.22% made up of the cost of equity; equity/total capital; cost of debt; and debt/total capital. Dr Burrows (CRA) agreed with the formula to calculate the WACC, put not with the specific inputs used by Mr Kaczmarek (Navigant) in the calculation. Dr Burrows (CRA), using different inputs, calculated a WACC discount rate of between 16.5% and 23.8%.

840. Of the different inputs used by Dr Burrows (CRA), the largest discrepancy concerned the country risk premium applied as part of the cost of equity. Mr Kaczmarek's (Navigant) uses a

[649] Kaczmarek II, para. 175.

[650] Kaczmarek II, para. 176.

country risk premium of 1.5% which he says was confirmed by assessments by independent analysts in 2008.[651] Dr Burrows' (CRA) country risk premium, unlike Mr Kaczmarek's (Navigant), was based on both full and "generic" country risk for an investment in Venezuela in April 2008. He used a figure of between 6.7% and 16.4%. Thus, it took account of Venezuela's policies at the time, including the President's policy of ousting North American companies from the mining sector, thus increasing the risk significantly.

841. The Tribunal agrees with Mr Kaczmarek's (Navigant) contention that it is not appropriate to increase the country risk premium to reflect the market's perception that a State might have a propensity to expropriate investments in breach of BIT obligations. As such, the Tribunal finds the range of country risk premiums offered by Dr Burrows (CRA) to be too high, as all of these include some element reflective of the State policy to nationalise investments which has been discussed in earlier sections of this Award. However, the Tribunal also considers that the country risk premium adopted by Mr Kaczmarek (Navigant) is too low, as it takes into account only labor risks and not other genuine risks that should be accounted for - including political risk, other than expropriation. The Tribunal considers that Mr Kaczmarek (Navigant) has not taken adequate account of these other risks when estimating his country risk premium. The Tribunal is also mindful of the fact that it has found that no expropriation occurred in the present case and that Claimant's failure to exploit the Concessions within the required timeframes provided the legal basis on which Respondent terminated the Concessions (albeit inconsistently with its FET obligations). This fact further detracts from Mr Kaczmarek's position that expropriation concerns were the cause of the higher risk premiums estimated by other analysts in 2008. The Tribunal therefore finds that the country risk premium should be increased to properly reflect the risks involved.

842. Having considered the various premiums used by analysts in 2008, the Tribunal decides to adopt a country risk premium of 4% as used in the RBC Capital Markets Report, which was one of the reports referenced by Mr Kaczmarek[652] (*i.e.*, a 2.5% increase). The Tribunal accepts Dr Burrows' (CRA) explanation that this premium appropriately considers political risks, together with other risks, but has not been over-inflated on account of expropriation risks.[653] The Tribunal calculates that using a 4% country risk premium results in a cost of equity of 11.92%, with a resulting

[651] Claimant's Joint Expert Procedure Post-Hearing Brief, para. 120; Kaczmarek II, paras. 128-146.

[652] Kaczmarek II, paras. 144-145.

[653] Rejoinder Report of Dr Burrows dated 8 December 2011 (hereinafter "**Burrows II**"), para. 105.

WACC rate of 10.09% (rather than 8.22% as used by Claimant). This results in an increase to the WACC rate of 1.87%. The Tribunal recalls that it asked Dr Burrows and Mr Kaczmarek at the October 2013 Hearing whether it could calculate approximate adjustments to the DCF based on the information provided by the experts to date. In relation to the discount rate, Dr Burrows noted that although a little complicated, "you could make a back-of-the-envelope calculation and probably come up with a reasonable adjustment factor without having to actually rewind the model."[654] While acknowledging that its estimate might be "rough"[655] the Tribunal finds it appropriate to deduct US$ 130 million from Claimant's DCF total to reflect the fact that Mr Kaczmarek's country risk premium was too low.[656]

843. With regard to the other inputs used to calculate the cost of equity, the Tribunal prefers those used by Mr Kaczmarek (Navigant). The Tribunal is convinced that the use of a geometric mean to calculate the equity market risk premium is appropriate in the present case and also agrees that a proxy beta rate was required given that Gold Reserve's beta rate had been affected by Respondent's policies. These inputs, as well as the country risk premium are reaffirmed by the fact that Mr Kaczmarek's (Navigant) calculation resulted in a WACC that is consistent with those applied by independent experts both to Gold Reserve and other similar companies at the time. As such, no change is made to the discount rate and no reduction to the overall valuation on account of this issue is required.

844. The Tribunal accepts the cost of debt calculated by Mr Kaczmarek (Navigant) and finds that his methodology was sound. Mr Kaczmarek (Navigant) applied the interest rate that had been negotiated by Gold Reserve with the Mandatory Lead Arrangers for $425 million debt, being 6.24% (or LIBOR plus 3.55%). He demonstrated that this rate was unlikely to change thus suggesting it is an appropriate indicator of cost of debt. He also convincingly rebutted the concerns raised by Dr Burrows (CRA) and demonstrated why each of these concerns did not invalidate the rate applied, nor did they support the much higher rate that Dr Burrows (CRA) had proposed instead. The exception was Dr Burrows' (CRA) suggestion that the interest rate include an additional 0.72 percent premium to convert the floating LIBOR rate into a fixed rate. Mr

[654] Transcript, October 2013, Day 2, 226:7-226:9.

[655] Transcript, October 2013, Day 2, 227:1-3.

[656] Calculated on the basis that Dr Burrows' use of a 16.5% discount rate resulted in a $575 million difference (see Burrows II (Joint Expert Procedure), Table 3.

Kaczmarek (Navigant) agreed and adjusted its cost of debt to 6.96% to include this premium.[657] The Tribunal therefore finds that no further adjustment is required to Navigant's WACC rate on account of cost of debt. Consequently, subject to the country risk premium adjustment set out in paragraph 843 above, the Tribunal determines that the discount rate calculated and applied by Mr Kaczmarek (Navigant) was appropriate and no further adjustments are required.

Capital and Operating Costs

845. In its quantum submissions prior to the Joint Expert Procedure, Respondent advocated a number of capital adjustments that were based primarily on assessments by Dr Rigby (SRK) which in turn were based on a number of errors in Dr Rigby's original report summarised in Claimant's (Original) Post-Hearing Brief at paragraph 106. Given the seminal nature of these errors, the Tribunal considers that it cannot rely on Dr Rigby's evidence in this regard. Conversely, the Tribunal considers the evidence provided by Claimant's experts supports the conclusion that capital costs adopted by Mr Kaczmarek (Navigant) were reasonable and appropriately supported. The Tribunal therefore finds that no adjustments should be made to Claimant's DCF valuation on account of capital or operating costs.

Delay in Receiving Revenues

846. Dr Burrows (CRA) suggested that the 2008 NI 43-101 Report failed to account for a delay in receiving revenues and although he admitted the delay and its financial impact were uncertain, he advocated that some account should be taken of this in the DCF valuation. He estimated a delay of delayed 75 days for concentrate and 30 days for dore would be appropriate. Dr Burrows (CRA) acknowledged that some delay would be offset by a delay in payables.[658] Given that the 2008 NI 43-101 Report does not include such a delay and that the smelting agreements for concentrate included a highly favourable terms which would have allowed Gold Reserve to receive 90% of the sales proceeds when the ship was loaded, the Tribunal does not consider that it would be justified to reduce the DCF in this regard. As such, the Tribunal accepts Mr Kaczmarek's conclusion his calculation is conservative on this point and that the favourable terms in the relevant smelting agreements "would allow Gold Reserve to collect revenues faster than it would need to pay many

[657] Kaczmarek II, para. 157.

[658] Expert Report of Dr Burrows dated 14 April 2011 (hereinafter "**Burrows I**"), para. 198.

of its operating costs and to reduce its overall cost of debt by using some of the cash advances to pay down debt principle."[659]

Fuel and Electricity Costs

847. Finally, the Tribunal also accepts Mr Kaczmarek's (Navigant) calculations regarding fuel and electricity costs, which is consistent with the 2008 NI 43-101 Report. Moreover, given "Venezuela's long-standing policy of subsidizing low electricity and fuel prices,"[660] the Tribunal does not consider it reasonable to double such prices over the forecast period as Dr Burrows (CRA) did in his analysis. The prices adopted by Mr Kaczmarek (Navigant) are inflation adjusted and consistent, or even conservative, in the light of historical trends demonstrating prices had previously tracked downwards. Therefore, the Tribunal finds that no adjustment to Claimant's DCF calculation is required regarding fuel and electricity costs.

O. Damages Calculation

848. Taking all of the foregoing considerations into account and doing its conscientious best on the evidence presented to it, the Tribunal finds it appropriate to award Claimant damages in the sum of US$ 713,032,000 calculated as follows:

Adjustments	**Amount**
Claimant's DCF value	1,325,532,000
- Less Additional Resources	(162,000,000)
- Less Metal Recovery and Concentrate Grades	(101,000,000)
- Less Stockpiles	(80,000,000)
- Less Delay	(108,500,000)
- Less Silver	(31,000,000)
- Less Country Risk Premium	(130,000,000)
Total	713,032,000

[659] Kaczmarek II, para. 191.

[660] Claimant's Post-Hearing Brief, para. 90.

849. The Tribunal has attempted to keep the sequence of the deductions the same as the order used by the experts so as to minimise any impact from making adjustments for some issues, but not others.[661] It has based its figures and the sequence on Dr Burrows' analysis at Table 1 and Table 3 of his Rebuttal Joint Expert Procedure Report dated 3 July 2013. The Tribunal recognizes that these figures are estimates of financial impact, but as the experts acknowledged at the hearing, these "rough" calculations can be used to "come up with a reasonable adjustment factor without having to actually rerun the model."[662] This is what the Tribunal has done and it considers that the overall damages figure resulting from the calculation reflects a fair and reasonable level of compensation to Claimant and has the effect of wiping out the consequences of the breach of FET.

P. Interest

Parties' Positions

850. Claimant requested interest be paid on any damages awarded and advocated three potential rates that the Tribunal might apply: Prime+2%, LIBOR+4%, or the US dollar denominated Venezuela sovereign bond yields. More specifically, in its Memorial, Claimant requested that pre-Award interest be awarded at a rate of US Prime plus 2% compounded annually, as this would appropriately compensate Claimant for loss of the use of funds and represented a normal, commercial bank lending rate (as did the alternative rate of LIBOR plus 4%). Claimant requested post-Award interest at a rate equivalent to a willing creditor of the Venezuelan Government (being the yield on Venezuelan Government Bonds), compounded annually. It argued that, until any damages awarded in this arbitration were paid, Claimant would effectively become an unwilling lender to the Venezuelan Government and should therefore be compensated for any delay in receiving its compensation at an interest rate no less than a willing lender to Venezuela would accept.

851. During the Joint Expert Procedure, Respondent contended that it is well established the appropriate interest rate for pre-Award interest is a risk-free interest rate. It therefore submitted that the Tribunal should order interest, if any, at the US Treasury Bill Rate. Respondent also rejected Claimant's request for compound interest, citing case references in support of its proposition that simple interest should be awarded unless the specific circumstances of the case

[661] Transcript, October 2013, Day 2, 226:10-227:3.

[662] Transcript, October 2013, Day 2, 226:8-9.

require compound interest. It said that no such circumstances existed in the present case and therefore simple interest would be appropriate. Finally, Respondent disputed Claimant's request for post-Award interest stating that interest should only be calculated to the date of the Award.

Tribunal's Analysis

852. The Tribunal is empowered to award interest under Article XII(9) of the BIT which provides that the Tribunal may award "monetary damages and any applicable interest". Claimant has requested both pre- and post-Award interest, and the Tribunal will address each of these separately, beginning with pre-Award interest.

853. The Tribunal considers that the appropriate purpose of pre-Award interest is to ensure Claimant is properly compensated for the FET breach that has occurred, although it need not compensate Claimant as a "borrower". The Tribunal finds that the US Government Treasury Bill rate represents a reasonable and fair rate of interest that would fulfil this purpose.

854. However, the Tribunal does not accept Respondent's contention that pre-Award should be awarded on a "simple" basis. While awarding simple interest was once the norm in investment arbitration as demonstrated by the cases referred to by Respondent in its Counter-Memorial,[663] the Tribunal agrees with Claimant that there has been an evident shift in investment treaty cases in recent years towards awarding compound interest.[664] Compound interest better reflects current business and economic realities and therefore the actual damage suffered by a party. It is also commensurate with the serious nature of the breach involved in the present case, as there is an observable trend in recent years to award compound interest in cases involving the total deprivation of property.

855. Accordingly, the Tribunal finds that Claimant is entitled to pre-Award interest from 14 April 2008 to the date of this Award at the US Government Treasury Bill Rate compounded annually.

856. With regard to post-Award interest, the Tribunal finds that it is empowered to award such interest and indeed that it is common practice to do so.[665] As requested by Claimant, the Tribunal

[663] Counter-Memorial, paras. 765-768.

[664] *See Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt,* ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 595.

[665] *See* Reply, footnote 1270.

may also determine a different interest rate to apply to post-Award interest than that applied to pre-Award interest. This is because the purpose of post-Award interest is arguably different – damages become due as at the date of the Award, and from this time, Respondent is essentially in default of payment. As such, the Tribunal considers that continuing to apply a risk-free interest rate would be inappropriate. The Tribunal considers that a rate of LIBOR plus 2% reflects an appropriate, commercial post-Award interest rate. Accordingly, the Tribunal finds that Claimant is entitled to post-Award interest from the date of this Award until payment in full at a rate of LIBOR plus 2% compounded annually.

CHAPTER IX. COSTS

Parties' Positions

857. In its Memorial, Claimant claimed that the Tribunal should order Respondent to bear all the legal expenses incurred by Gold Reserve related to this proceeding, including its attorneys' fees, the fees of expert witnesses, the fees and expenses of the members of the Tribunal, and the charges for the use of the facilities of the Centre, in their entirety.[666] In support of its claim for costs, Claimant cited a number of investment cases where the "loser pays" principle has been applied and stated that the "Respondent's challenge of every conceivable point of both fact and law and without an evidentiary or legal basis for doing so has increased the expense of this arbitration considerably and needlessly."[667]

858. Respondent did not make any detailed submissions on costs but requested that it "be awarded compensation for the expenses and costs associated with defending against these claims."[668]

Tribunal's Analysis

859. The Tribunal has the power to order costs under Article XII(9) of the BIT which provides that the tribunal "may also award costs in accordance with the applicable arbitration rules." Article 52(1)(j) of the Arbitration (Additional Facility) Rules provides that the award shall contain "any

[666] Memorial, para. 464.

[667] Reply, para. 685.

[668] Counter-Memorial, para. 773.

decision of the Tribunal regarding the cost of the proceeding" and Article 58(1) provides that "the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the Parties in connection with the proceeding shall be borne," such decision to "form part of the award" in accordance with Article 58(2).

860. As noted by Claimant, while the traditional position in investment arbitration has been that the Parties bear their own legal costs and share equally the costs of the arbitration, there have been a number of cases which have departed from this principle and have awarded costs on a "loser pays" basis. The Tribunal finds that, in the circumstances of this particular arbitration, the application of the "loser pays" principle is appropriate. Compensating Claimant for the cost of bringing this proceeding is required to wipe out the consequences of Respondent's breach of the BIT and is particularly appropriate in the current case given the serious and egregious nature of the breach.

861. Following the Tribunal's requests on April 28 and May 20, 2014, both Parties have filed cost submissions as follows:

- Claimant on May 23, 2014 for a total amount of US$ 20,462,628, not considering ICSID fees and costs;
- Respondent on May 26, 2014, for a total amount of US$ 12,788,517.23 plus Euro 20,851.46, excluding ICSID fees and costs.

By exchange of communications dated June 3, 2014 the Parties have agreed that it was not necessary to submit observations on the respective cost submissions. On the same date the Tribunal accepted the Parties' agreed course of action.

862. In view of the outcome of the case, substantially in Claimant's favour, the difficulty of issues pertaining to damages evaluation and the material disproportion between the Parties' respective costs, the Tribunal considers appropriate that Respondent reimburse Claimant for part of the latter's fees and costs in the amount of US$ 5 million, all other fees and costs incurred by each Party to be borne by such Party, except that the Parties shall bear equally all costs incurred for the Tribunal's and ICSID's fees and costs.

CHAPTER X. AWARD

863. For all of the foregoing reasons, and rejecting all submissions and contentions to the contrary, the Tribunal DECLARES, AWARDS and ORDERS as follows in respect of the issues arising for determination in these proceedings:

(i) Venezuela breached Article II(2) of the BIT by failing to accord fair and equitable treatment to Gold Reserve's investment.

(ii) Venezuela shall pay Gold Reserve compensation for the breach of the BIT in the sum of US$ 713,032,000, increased by interest from 14 April 2008 to the date of this Award at the United States Government Treasury Bill Rate, compounded annually.

(iii) Post-award interest shall run on the total amount awarded under (ii) above at a rate of LIBOR plus 2%, compounded annually, from the date of the Award until payment in full.

(iv) The Parties shall bear all their own legal costs and expenses, except that Venezuela shall reimburse Gold Reserve the sum of US$ 5 million as part of the latter's legal costs and expenses. The Parties shall bear equally all costs incurred for the Tribunal's and ICSID's fees and costs.

All other claims and requests for relief by either Party are dismissed.

Professor Pierre-Marie Dupuy
Arbitrator

Date: September 18, 2014

Professor David A.R. Williams, Q.C.
Arbitrator

Date: September 17, 2014

Professor Piero Bernadini
President

Date: September 19, 2014