

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**(ADDITIONAL FACILITY)**

IN THE PROCEEDINGS BETWEEN

**ANGLO AMERICAN PLC**

*(Claimant)*

**-and-**

**BOLIVARIAN REPUBLIC OF VENEZUELA**

*(Respondent)*

**ICSID Case No. ARB(AF)/14/1**

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**AWARD**

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*Members of the Tribunal*

**Mr. Yves Derains, President**  
**Dr. Guido Santiago Tawil, Arbitrator**  
**Dr. Raúl E. Vinuesa, Arbitrator**

*Secretary of the Tribunal*  
Marco Tulio Montañés-Rumayor

Date of dispatch to the Parties: **January 18, 2019**

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## GLOSSARY OF DEFINED TERMS

<b>AF Rules</b>	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes dated April 10, 2006.
<b>Arbitration (AF) Rules</b>	Arbitration (Additional Facility) Rules of April 10, 2006.
<b>AMSA</b>	Anglo American Corporation of South America S.A.
<b>Claimant</b>	Anglo American plc
<b>Cofeminas</b>	Corporación Federal de Minas, S.A.
<b>Costs</b>	Parties' Submissions on Costs dated April 28, 2017
<b>Counter-claim</b>	Respondent's Counter-claim together with its Counter-Memorial dated November 13, 2015
<b>Counter-Memorial</b>	Memorial on Jurisdiction and Counter-Memorial on the Merits of the Bolivarian Republic of Venezuela dated November 13, 2015
<b>Expropriation Law</b>	Expropriation Law for Public and Social Use of July 1, 2002
<b>First Concessions</b>	Concessions were granted for the following sectors with ore deposits in 1992: (i) el Tigre, (ii) San Onofre Nos. 1, 2, and 3; (iii) Camedas Nos. 1, 2, 3, 4, and 5; and (iv) San Antonio No. 1.
<b>Hearing</b>	Hearing on Jurisdiction and on the Merits held on December 9, 12, 13, 14, 15 and 16, 2016.
<b>ICJ</b>	International Court of Justice
<b>ICSID or the Centre</b>	International Centre for Settlement of Investment Disputes
<b>Inventory</b>	Raw materials, spare parts and consumables associated with the processing held by MLDN in inventory on the expiry of MLDN's Remaining Concessions.
<b>Investment Law</b>	Law on Promotion of Private Investment under the Concession System of September 17, 1999
<b>LDN deposit</b>	Loma de Níquel ore deposit
<b>LDNH</b>	Loma de Níquel Holdings Limited
<b>LO</b>	Legal Opinion
<b>LO2</b>	Supplemental Legal Opinion

<b>Manual</b>	Standards and Procedures Manual on Value Added Tax Credit Refunds for Exporter Taxpayers of 2010
<b>Memorial</b>	Claimant's Memorial on the Merits dated April 25, 2015
<b>Mining Law</b>	1945 Mining Law
<b>1999 Mining Law</b>	1999 Mining Law
<b>MLDN</b>	Minera Loma de Níquel C.A.
<b>Parties</b>	Claimant and Respondent
<b>PHBs</b>	Post-Hearing Briefs dated March 31, 2017
<b>PO1</b>	Procedural Order No. 1 dated December 2, 2014
<b>Processing assets</b>	Infrastructure, buildings and equipment used for the processing of nickel laterite ore into ferronickel, including but not limited to the metallurgical plant
<b>Processing Plant or Plant</b>	Processing facilities to process the extracted ore into ferronickel
<b>RPA</b>	Roscoe Postle Associates Inc.
<b>Rejoinder</b>	Respondent's Rejoinder on the Merits and Reply to the Counter-claim submitted by the Respondent, dated August 29, 2016
<b>Remaining Concessions</b>	The San Antonio 1, Camedas 1, and Camedas 3 concessions, which were part of the first concessions, were revised on January 7, 2000 and will expire on November 10, 2012.
<b>Reply</b>	Claimant's Reply on the Merits and Response to the Respondent's Counter-claim dated May 14, 2016
<b>Request</b>	Request for Arbitration dated March 13, 2014
<b>Request for Bifurcation</b>	Respondent's Request for Bifurcation of the Proceedings dated May 15, 2015.
<b>Respondent</b>	Bolivarian Republic of Venezuela
<b>Response to the Counter-claim</b>	Claimant's Response to the Respondent's Counter-claim, dated September 26, 2016
<b>Response to the Withdrawal of Claims</b>	Venezuela's Response to the Withdrawal of Claims dated November 11, 2016
<b>SENIAT</b>	National Integrated Service of Customs and Tax Administration [ <i>Servicio Nacional Integrado de Administración Aduanera y Tributaria</i> ].

<b>Second Concessions</b>	Four other mining concessions were granted in 1995: Cofemina 4, 5, 6, and 7.
<b>Third Concessions</b>	In 1999, the last two mining concessions on the LDN deposit were granted in the Cofemina sectors Nos. 1 and 2.
<b>Tr. Day #, Page #: Line #</b>	Transcript of Hearing
<b>Treaty or BIT</b>	Agreement between the Government of the Republic of Venezuela and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments dated March 15, 1995, which entered into force of August 1, 1996
<b>VAT CERTS</b>	VAT Credit Certificates
<b>VAT Law</b>	VAT Law of 2002
<b>Withdrawal of Claims</b>	Claimant's Submission dated September 26, 2016 by which it withdrew part of its claims
<b>Vienna Convention</b>	The Vienna Convention on the Law of Treaties

**I. THE PARTIES**

1. The Parties to this arbitration are:

A. The Claimant

2. The Claimant is *Anglo American plc.* (“**Anglo American**” or the “**Claimant**”), a company incorporated under the laws of the United Kingdom<sup>1</sup> and holding an indirect participation of 91.37 percent of *Minera Loma de Níquel C.A.* (“**MLDN**”).<sup>2</sup> MLDN is a Venezuelan company whose operations until November 2012 comprised the exploration and exploitation of the Loma de Níquel ore deposit, the processing of the ore, and the marketing of the resulting ferronickel.<sup>3</sup>

3. Representing the Claimant:

Mr. Nigel Blackaby	Freshfields Bruckhaus Deringer LLP
Ms. Sylvia Noury	Freshfields Bruckhaus Deringer LLP
Mr. Jean-Paul Dechamps	Freshfields Bruckhaus Deringer LLP
Mr. Michael Kotrly	Freshfields Bruckhaus Deringer LLP
Ms. Katrina Woolcock	Freshfields Bruckhaus Deringer LLP
Ms. Annie Pan	Freshfields Bruckhaus Deringer LLP
Mr. Eugenio Hernández Bretón	Baker & McKenzie
Mr. Ben Keisler	Anglo American plc
Mr. Michael Schottler	Anglo American plc
Mr. Alfonso Almenara	Minera Loma de Níquel CA

B. The Respondent

4. The Respondent is the Bolivarian Republic of Venezuela (“**Venezuela**,” the “**Republic**” or the “**Respondent**”).

5. Representing the Respondent:

Dr. Reinaldo Enrique Muñoz Pedroza  
Attorney General of the Republic

Dr. Henry Rodríguez Facchinetti  
Head of the Litigation Department  
Office of the Attorney General of the Republic

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<sup>1</sup> Claimant’s Memorial on the Merits of April 25, 2015 (“Memorial”), ¶1.

<sup>2</sup> Memorial, ¶4.

<sup>3</sup> Memorial, ¶3.

The following lawyers of the firm Foley Hoag LLP also represented the Respondent:<sup>4</sup>

Ms. Mélida Hodgson  
Mr. Kenneth Figueroa  
Ms. Tafadzwa Pasipanodya  
Mr. Diego Cadena  
Ms. Analía González  
Ms. Erin Argueta  
Ms. Patricia Cruz Trabanino  
Ms. Anna Toubiana  
Ms. Manuela de la Helguera  
Ms. Carol Kim  
Ms. Francheska Loza  
Ms. Angélica Villagrán

6. The Claimant and the Respondent are jointly called the “**Parties**” and individually, as indicated above.

## **II. SUMMARY OF PROCEEDINGS**

7. This dispute arises from the supposed expropriation of the Claimant’s alleged investments in MLDN through a variety of measures taken by the Government of Venezuela.
8. On March 13, 2014, Anglo American filed a Request for Arbitration (“**Request**”) with the International Centre for Settlement of Investment Disputes (“**ICSID**”) accompanied by Annexes C-1 to C-70 against Venezuela, based on the Agreement signed on March 15, 1995 between the Government of the Republic of Venezuela and the Government of the United Kingdom for the Promotion and Protection of Investments, which entered into force on August 1, 1996 (the “**Treaty**” or “**BIT**”) and the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (“**AF Rules**”) which entered into force on April 10, 2006. Through the Request, the Secretary-General of ICSID was also asked to approve access to the Additional Facility.
9. On April 10, 2014, the Secretary-General of ICSID registered the Request pursuant to Articles 4 and 5 of the Arbitration (Additional Facility) Rules

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<sup>4</sup> By letter of March 20, 2018, the Centre was informed that the representation of the Respondent by Foley Hoag LLP had terminated on March 19, 2018.

[“**Arbitration (AF) Rules**”]. On that same date, the Secretary-General approved access to the Additional Facility in accordance with Article 4 of the AF Rules. Finally, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal in accordance with Article 5(e) of the Arbitration (AF) Rules.

10. Subsequent to the registration of the Request, and in the absence of agreement between the Parties, the Arbitral Tribunal was established in accordance with the method provided in Article 9 of the Arbitration (AF) Rules.
11. On June 9, 2014, the Claimant appointed Dr. Guido Santiago Tawil, a national of Argentina, as Arbitrator.
12. On July 28, 2014, the Respondent appointed Dr. Raúl E. Vinuesa, a national of Argentina, as Arbitrator.
13. On September 30, 2014, the Parties notified ICSID of their agreement to appoint Mr. Yves Derains, a national of France, as President of the Tribunal.
14. By letter dated October 2, 2014, the Secretary-General of ICSID informed the Parties that Messrs. Yves Derains, Guido Santiago, and Raúl E. Vinuesa had accepted their appointments as Arbitrators. The Tribunal was therefore constituted and the proceedings would start on that date in accordance with Article 13(1) of the Arbitration (AF) Rules. In the same letter, ICSID also informed the Parties that Mr. Marco Tulio Montañés-Rumayor would act as Secretary of the Tribunal.
15. On October 14, 2014, the Secretary on behalf of the Tribunal proposed to the Parties the dates for the first session and provided them with the first draft of Procedural Order No. 1 (“**PO1**”) with the agenda.
16. By letters dated November 4 and 5, 2014, the Parties accepted the appointment of Ms. Aurore Descombes as Assistant to the President of the Tribunal in these proceedings.
17. On November 7, 2014, the Parties transmitted the draft PO1 that they had discussed to the Secretary of the Tribunal. The Parties agreed to send a joint communication to the Tribunal on November 11, 2014, setting out their respective positions on the points at issue of draft PO1.

18. On November 11, 2014, the Parties informed the Tribunal that they would not make any new written submission regarding draft PO1 but would orally present their respective positions during the first session by telephone conference on November 26, 2014.
19. On November 26, 2014, the Tribunal and the Parties held the first session by telephone conference in accordance with Article 21 of the Arbitration (AF) Rules.
20. On December 2, 2014, the Tribunal sent the Parties the final signed version of PO1. PO1 established that the place of the arbitration proceeding was Paris, that the procedural languages were English and Spanish, and that the Award would be rendered in those two languages.
21. By letters dated December 4 and 5, 2014, the Parties and the Tribunal set the procedural calendar (Annex A of PO1).
22. On April 25, 2015, the Claimant submitted its Memorial on the Merits (“**Memorial**”), accompanied by Exhibits C-71 to C-159; the witness statements of Mr. Euler Piantino and Ms. Rebecca Charlton; the expert reports of TR Consulting, Inc; RPA Inc., and FTI Consulting; the legal opinion of Dr. Allan R. Brewer-Carías; and the legal authorities CLA-1 to CLA-106.
23. On April 28, 2015, the Claimant submitted an amended version of its Memorial.
24. On April 29, 2015, the Parties proposed dates for a possible hearing on jurisdiction (with or without bifurcation of the proceedings) and for the hearing on the merits, and requested that the time limits for the written phase be extended.
25. On May 15, 2015, the Respondent submitted its Request for Bifurcation (“**Request for Bifurcation**”) accompanied by Annexes R-1 to R-2, and the legal authorities RLA-1 to RLA-22.
26. On May 18, 2015, the Secretary of the Tribunal sent the Parties an amended version of the procedural calendar in Annex A of PO1. In addition, as agreed between the Parties and the Tribunal, the Secretary of the Tribunal presented proposed dates for a possible hearing on jurisdiction and for the hearing on the merits.

27. On May 29, 2015, the Claimant submitted its Response to the Respondent's Request for Bifurcation ("**Response to Bifurcation**") accompanied by the legal authorities CLA-107 to CLA-127.
28. On June 19, 2015, the Tribunal informed the Parties of Procedural Order No. 2 ("**PO2**"), which dismissed the Respondent's Request for Bifurcation.
29. On September 9, 2015, the Claimant provided the Tribunal with corrections to the report prepared by its damages expert, TR Consulting, Inc.
30. On September 10, 2015, the Respondent acknowledged receipt of the revised expert report.
31. On September 21, 2015, as a follow-up to its mail dated September 10, 2015, the Respondent indicated that for the moment it had no comments on the revised expert report and that any comments would be included in its submission of November 13, 2015.
32. On November 13, 2015, the Respondent submitted a Memorial on Jurisdiction and Counter-Memorial on the Merits ("**Counter-Memorial**"), accompanied by documentary annexes R-3 to R-49; the witness statements of Mr. Freddy Angulo, Ms. Erika Figueroa, Mr. Luis Gómez, Mr. Endes José Palencia Ortiz, Mr. José Manuel Raposo, Mr. José Solano, Ms. Jhomnata Venegas Chacón, and Ms. Irene Villasmil; the expert reports of Bara Consulting and Econ One Research, Inc.; the legal opinion of Dr. Alejandro Canónico Sarabia; and the legal authorities RLA-8 (bis) and RLA-28 to RLA-139. In its Counter-Memorial, the Respondent filed a Counter-claim ("**Counter-claim**") in accordance with Article 47 of the Arbitration (AF) Rules.
33. On November 16, 2015, the Parties submitted to the Tribunal amendments to the procedural calendar in relation to the production of documents.
34. On November 18, 2015, the Tribunal accepted the changes to the procedural calendar proposed by the Parties.
35. On January 29, 2016, in accordance with PO1 and the revised calendar of proceedings, the Parties submitted their respective *Redfern Schedules*. The

Respondent invoked attorney-client privilege in the case of 16 documents the production of which the Claimant had requested.

36. On February 3, 2016, the Claimant submitted its comments on the list of documents considered privileged by the Respondent. On the same day, the Respondent sent a letter to the Tribunal responding to the Claimant's comments.
37. On February 12, 2016, the Tribunal issued Procedural Order No. 3 (“**PO3**”) with its decisions regarding the production of documents requested in the *Redfern Schedules* submitted by the Parties and described in Annexes 1 and 2 of such schedules. The Tribunal ordered the production by the Respondent of 10 documents for which the Respondent had invoked attorney-client privilege, with the clarification that, as requested by the Respondent, those documents would be subject to a Protection Order.
38. On February 22, 2016, in compliance with the principle of equality between the Parties, the Tribunal asked the Claimant if it wanted to submit a response to the Respondent's Counter-claim in its reply on the merits.
39. On February 25, 2016, the Claimant confirmed that it wanted to respond to the Counter-claim in its reply on the merits. The Claimant added that, if the Respondent presented other submissions about its Counter-claim in its Rejoinder on the Merits, the Claimant should have the opportunity to reply to preserve the principle of equality of the Parties.
40. On March 1, 2016, the Respondent informed the Tribunal that it had no objection to the Claimant's request, but it reserved the right of reply if the Response to the Counter-claim went beyond its purpose. The Respondent also requested that the number of pages for the Claimant's Reply be fixed so that it is proportional to the Respondent's Counter-Memorial, in order to ensure the principle of equality of the Parties.
41. On March 2, 2016, the Claimant requested authorization from the Tribunal to submit additional testimony along with its Reply on the Merits.
42. On March 3, 2016, the Tribunal acknowledged receipt of the Claimant's letter of March 2 and invited the Respondent to respond to the letter by March 9, 2016. On

the same day, the Tribunal invited the Claimant to send its comments on the Respondent's observations regarding its proposal to limit the number of pages of its Reply.

43. On March 3, 2016, the Tribunal issued Procedural Order No. 4 (“**PO4**”) including the Protection Order regarding the production of privileged documents. As agreed between the Parties, PO4 defined the concepts of “Protected Document” and “Protected Information.” In addition, PO4 imposed rules of conduct on the persons who would be in contact with said documents, and limited access to above-mentioned documents to a restricted list of persons connected to the case. Finally, the Procedural Order contemplated the issue of the destruction of said documents once the arbitration proceedings were completed. According to the procedural calendar amended by the Parties and accepted by the Tribunal, the Respondent had to provide said Protected Documents to the Claimant on March 4, 2016.
44. On March 4, 2016, the Claimant opposed the limitation on the number of pages as requested by the Respondent since its Reply on the Merits, including its Response to the Counter-claim, should be subject to the sole condition that it answered the points highlighted in the Counter-Memorial (including the Counter-claim). On that same day, the Respondent confirmed the production of the documents requested by the Claimant.
45. On March 9, 2016, the Respondent objected to the Claimant's request to present a new witness and reserved its right to present new evidence in the event the Claimant's request was accepted.
46. On March 10, 2016, the Respondent explained that it considered that the Claimant had misinterpreted its proposal in relation to the number of pages and reserved its rights in relation to the number of pages for the second round of written pleadings.
47. On March 17, 2016, the Tribunal issued Procedural Order No. 5 (“**PO5**”), in which it held that the principle of equality of the Parties does not rest on the number of pages but on the opportunity accorded to each Party to answer the claims of the other Party. In this regard, it was necessary that the Claimant, *de facto* Respondent to the Respondent's Counter-claim, should have the opportunity

to submit a Rejoinder on the Respondent's Counter-claim, as the Respondent had the opportunity to submit a Rejoinder on the Claimant's claims. Also, the Tribunal modified the arbitration calendar in order to incorporate the submission of a Rejoinder on the Counter-claim on September 23, 2016.

48. On March 18, 2016, the Arbitral Tribunal authorized the Claimant to present a new witness statement in order to respond to Ms. Villasmil's witness statement. At the same time, it authorized the Respondent to respond to said witness statement by means of a new witness statement confined to the facts addressed in the witness statement submitted by the Claimant.
49. On May 14, 2016, the Claimant filed its Reply on the Merits and Response to the Respondent's Counter-claim ("**Reply**") one day after the deadline agreed between the Parties. This document was accompanied by documentary annexes C-160 to C-245; the witness statements of Mr. Óscar Pérez, Mr. Euler Piantino, and Ms. Rebecca Charlton; the expert reports of FTI Consulting Inc., and RPA Inc.; the legal opinion of Dr. Allan R. Brewer-Carías; and the legal authorities CLA-128 to CLA-177.
50. On May 17, 2016, the Respondent wrote to the Tribunal explaining that it reserved its rights in relation to the Reply submitted on May 14 instead of May 13, 2016. On the same day, the Tribunal acknowledged receipt of the emails from the Parties.
51. On May 19, 2016, the Parties informed the Tribunal of their agreement for the Respondent to submit a rejoinder on the merits no later than August 29, 2016 (instead of the original August 26, 2016 deadline). On May 20, 2016, the Tribunal approved the agreement of the Parties.
52. On June 29, 2016, the Parties informed the Tribunal of their agreement that the Claimant could submit a rejoinder on the Counter-claim on September 26, 2016 instead of September 23, 2016. The Tribunal approved this agreement on the same day.
53. On August 29, 2016, the Respondent submitted its Rejoinder on the Merits and Response to the Counter-claim ("**Rejoinder**") accompanied by the documentary

annexes R-50 to R-79; the witness statements of Ms. Erika Figueroa, Mr. Luis Gómez, Mr. Endes José Palencia Ortiz, Mr. José Manuel Raposo, Mr. José Solano, Ms. Jhomnata Venegas Chacón, and Ms. Irene Villasmil; the expert reports of Bara Consulting and Econ One Research, Inc.; the legal opinion of Dr. Alejandro Canónico Sarabia; and the legal authorities RLA-14 (bis), RLA-95 (bis), RLA-96 (bis), and RLA-140 to RLA-173.

54. On September 26, 2016, the Claimant submitted a rejoinder on the Counter-claim (“**Rejoinder on Counter-claim**”) and a pleading in which it withdrew part of its claims (“**Withdrawal of Claims**”). The Claimant proposed that the Respondent submit a response to the Withdrawal of Claims within a month to preserve the date of the hearing scheduled for December.
55. On September 30, 2016, the Tribunal invited the Respondent to comment on the Claimant’s proposal regarding the deadline for responding to the Withdrawal of Claims.
56. On October 5, 2016, the Respondent disagreed with this deadline and reserved until October 26, 2016 the right to object to the hearing being held in December.
57. On October 11, 2016, the Tribunal issued Procedural Order No. 6 (“**PO6**”), in which it set a deadline of October 24, 2016 for the Respondent to submit its comments on the holding of a hearing in December; and set October 31, 2016 as the deadline for the Claimant to submit its comments on the Respondent’s comments. In addition, it ordered the Respondent to submit its Response to the Withdrawal of Claims on November 11, 2016. Finally, it was agreed that a telephone conference call would be held during the week of November 14, 2016 to specify the dates of the hearing and to prepare to organize it.
58. On October 26, 2016, the Respondent confirmed its availability for the hearing in December. In addition, it requested that the Tribunal order the Claimant to present revised versions of its Request for Arbitration, its Memorial, its Reply, as well as its Rejoinder on the Counter-claim and the Withdrawal of Claims, deleting all the factual and legal arguments associated with the Withdrawal of Claims, and to remove from the record the testimonies of certain witnesses.

59. On October 27, 2016, the Tribunal took note of the agreement of the Parties to hold the hearing in December 2016. The Tribunal also invited the Claimant to comment no later than October 31 on the Respondent's request for a corrected version of all its submissions to date, deleting any factual or legal reference to the claims withdrawn.
60. On October 27, 2016, the Claimant wrote to the Tribunal to decline the Respondent's request regarding the obligation to submit revised submissions and to confirm the Claimant's counter-proposal that each Party identify the paragraphs in the submission that were no longer relevant to the resolution of the claim and the counter-claim.
61. On the same day, the Respondent maintained its position and indicated that it was opposed to the alternative proposal of the Claimant.
62. On October 28, 2016, the Claimant wrote to the Tribunal to clarify that the Parties did not agree with presenting closing arguments during the hearing.
63. On October 28, 2016, the Tribunal indicated that it did not consider it useful for the Parties to undertake the laborious task of modifying their various submissions as a result of the Withdrawal of Claims. The Tribunal explained that it was in a position to disregard the facts and legal arguments related to the withdrawn claims. Finally, the Tribunal asked the Parties to send it a list compiling all their current claims.
64. On November 1, 2016, the Tribunal decided that brief closing arguments should be made at the hearing.
65. On November 3, 2016, the Tribunal invited the Parties to reach agreements on the sequence in which witnesses and experts would be examined, as well as on the extent and scope of their examination, and asked them to communicate their answer jointly. Also, in regard to a request from the Respondent, the Tribunal decided that it did not intend to question witnesses or experts other than those indicated by the Parties.
66. On November 10, 2016, the Tribunal received from the Parties the agreements and positions of each of them regarding the organization of the hearing ("*Joint*

*Hearing Procedure Proposal*”). They proposed that the hearing be held from December 9 to 16, 2016.

67. On November 11, 2016, the Parties sent an updated version of the “*Joint Hearing Procedure Proposal*” to the Tribunal.
68. On the same day, the Respondent submitted a response to the Withdrawal of Claims (“**Response to Withdrawal of Claims**”) to the Tribunal.
69. On November 15, 2016, a telephone conference was held to organize the hearing. It was confirmed *inter alia* that the hearing would take place from December 9 to 16, 2016.
70. On November 18, 2016, the Tribunal sent out the final text of the “*Joint Hearing Procedure Proposal*.” In addition, the President requested the consent of the Parties to go ahead and replace Ms. Aurore Descombes with Ms. Marie Girardet as Assistant to the President of the Tribunal.
71. By letters dated November 18 and 21, 2016, the Respondent and the Claimant accepted, in turn, the appointment of Ms. Marie Girardet as Assistant to the President of the Tribunal.
72. On November 28, 2016, the Claimant submitted an index of its new annexes and legal authorities.
73. The hearing on jurisdiction and on the merits (“**Hearing**”) was held on December 9, 12, 13, 14, 15, and 16, 2016. In addition to the members of the Tribunal, the Secretary of the Tribunal and the Assistant to the President of the Tribunal, the following persons attended the Hearing:

Representing the Claimant:

Mr. Nigel Blackaby (Freshfields Bruckhaus Deringer LLP)  
Ms. Sylvia Noury (Freshfields Bruckhaus Deringer LLP)  
Mr. Jean Paul Dechamps (Freshfields Bruckhaus Deringer LLP)  
Mr. Michael Kotrly (Freshfields Bruckhaus Deringer LLP)  
Ms. Katrina Woolcock (Freshfields Bruckhaus Deringer LLP)  
Ms. Annie Pan (Freshfields Bruckhaus Deringer LLP)  
Ms. Anne Marie Doernenburg (Freshfields Bruckhaus Deringer LLP)  
Ms. Anushi Amin (Freshfields Bruckhaus Deringer LLP)

Ms. Stephanie Mbonu (Freshfields Bruckhaus Deringer LLP)  
Mr. Eugenio Hernández Bretón (Baker & McKenzie)  
Mr. Brian Thompson (Immersion Legal Graphics)  
Mr. Ben Keisler (Anglo American PLC)  
Mr. Michael Schottler (Anglo American PLC)  
Mr. Alfonso Almenara (Minera Loma de Níquel, CA)

Witnesses and experts presented by the Claimant:

Mr. Óscar Pérez (Witness)  
Mr. Euler Piantino (Witness)  
Ms. Rebecca Charlton (Witness)  
Mr. Howard Rosen (Expert)  
Mr. Chris Milburn (FTI Consulting)  
Mr. Alex Lee (FTI Consulting)  
Mr. Rick Lambert (Expert)  
Mr. Phillip Mackey (Expert)  
Ms. Brenna Scholey (RPA Inc)  
Mr. Allan Brewer-Carías (Expert)

Representing the Respondent:

Mr. Mélida Hodgson (Foley Hoag LLP)  
Mr. Kenneth Figueroa (Foley Hoag LLP)  
Ms. Tafadzwa Pasipanodya (Foley Hoag LLP)  
Mr. Diego Cadena (Foley Hoag LLP)  
Ms. Analía González (Foley Hoag LLP)  
Ms. Erin Argueta (Foley Hoag LLP)  
Ms. Patricia Cruz Trabanino (Foley Hoag LLP)  
Ms. Anna Toubiana (Foley Hoag LLP)  
Ms. Manuela de la Helguera (Foley Hoag LLP)  
Ms. Carol Kim (Foley Hoag LLP)  
Ms. Francheska Loza (Foley Hoag LLP)  
Ms. Angélica Villagrán (Foley Hoag LLP)  
Mr. Reinaldo Muñoz Pedroza (Bolivarian Republic of Venezuela)  
Ms. Érika Fernández (Bolivarian Republic of Venezuela)  
Mr. Roberto Mirabal Acosta (Bolivarian Republic of Venezuela)

Witnesses and experts presented by the Respondent:

Ms. Jennyfer Gordon (Petróleos de Venezuela, S.A. (PDVSA))  
Ms. Érika Figueroa (Witness)  
Ms. Lis Gómez (Witness)  
Mr. José Solano (Witness)  
Ms. Irene Villasmil (Witness)  
Mr. Alejandro Canónico (Expert)  
Mr. Patrick Willis (Expert)  
Mr. Nicholas Barcza (Expert)  
Mr. Daniel Flores (Expert)

Mr. Ettore Comi (Econ One Research, Inc.)  
Mr. Brendan Moore (Econ One Research, Inc.)

74. On February 2, 2017, the Parties requested that the Tribunal approve an extension of the period established in the “*Joint Hearing Procedure Proposal*” in which to present the agreed-upon transcript of the Hearing in English and Spanish. In addition, the Parties highlighted the fact that they discovered discrepancies in the translations of the transcripts.
75. On February 3, 2017, the Tribunal accepted the proposals of the Parties for resolving the translation problems and extended the deadline for submitting the transcript of the Hearing until February 10, 2017.
76. On February 10, 2017, the Parties submitted their corrected version of the transcripts to the Tribunal.
77. On March 24, 2017, the Parties agreed to attach several legal authorities to their post-hearing briefs. In sum, the Claimant stated that it had no objection to the Respondent presenting an annex with its post-hearing brief.
78. On March 31, 2017, the Parties submitted their respective Post-Hearing Briefs (“**PHBs**”).
79. On April 21, 2017, the Claimant submitted its translation into Spanish of its PHB. On the same day, the Respondent submitted its translation into English of its PHB.
80. On April 28, 2017, the Parties submitted their respective Submissions on Costs (“**Costs**”).
81. On May 8, 2017, the Respondent submitted its translation into English of its Submission on Costs. Also, it sent a letter to the Tribunal calling attention to the Claimant’s Submission on Costs.
82. On May 11, 2017, the Tribunal acknowledged receipt of the Respondent’s communication and invited the Claimant to submit any observations it may have on said communication no later than May 15, 2017.
83. On May 12, 2017, the Claimant replied to the Respondent’s communication.

84. On May 28, 2017, the Tribunal acknowledged receipt of the Claimant's letter dated May 12, 2017 in response to the Respondent's letter dated May 8, 2017.
85. On March 20, 2018, the Centre was notified that the representation of the Respondent by Foley Hoag LLP had terminated on March 19, 2018.
86. The Tribunal declared the proceeding closed on August 1, 2018 in accordance with Article 44 of the Arbitration (AF) Rules.

### III. FACTS

87. Anglo American initiated this arbitration in order to obtain full compensation for the alleged damages caused by Venezuela's supposed unlawful conduct with regard to its alleged investments in MLDN, a company incorporated under the laws in force in Venezuela. Until November 10, 2012, MLDN's operations in Venezuela comprised the exploration and exploitation of the Loma de Níquel ore deposit ("**LDN Deposit**"), the processing of the ore and the marketing of the resulting ferronickel.
88. In 1992, the Ministry of Mines granted the Corporación Federal de Minas, S.A. ("**Cofeminas**") the first ten mining concessions ("**First Concessions**") in the following sectors of the LDN Deposit: (i) El Tigre; (ii) San Onofre Nos. 1, 2, and 3; (iii) Camedas Nos. 1, 2, 3, 4, and 5; and (iv) San Antonio No. 1.<sup>5</sup>
89. The Anglo American group invested in Venezuela for the first time in 1993, with the acquisition of a ten percent indirect participation in Cofeminas, through its Panamanian subsidiary Anglo American Corporation of South America S.A. ("**AMSA**").
90. In 1995, the Ministry of Mines granted Cofeminas another four mining concessions on the LDN Deposit ("**Second Concessions**") in the following sectors: Cofemina Nos. 4, 5, 6, and 7.<sup>6</sup>

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<sup>5</sup> Concessions - El Tigre, San Onofre No. 1, 2, and 3, Camedas No. 1, 2, 3, 4, and 5, and San Antonio No. 1, the "First Concessions" (C-3).

<sup>6</sup> Mining Titles - Cofemina Nos. 4, 5, 6, and 7, published in the *Gaceta Oficial* of March 1995 (C-5).

91. In 1996, the Anglo American group increased its indirect participation in Cofeminas to 85 percent. The 85 percent participation of Anglo American in MLDN was held at that time through Loma de Níquel Holdings Limited (“LDNH”), which in turn was the owner of 94 percent of MLDN. LDNH itself was owned by AMSA (84 percent) and other third parties (16 percent). AMSA also held a direct minority participation of six percent in MLDN<sup>7</sup> and changed the name of the company, which was renamed MLDN.<sup>8</sup>
92. The First Concessions were renewed in 1997 and in 1998.<sup>9</sup> The expiry date of these was scheduled for November 10, 2012.
93. In 1999, the Ministry of Mines granted MLDN the last two mining concessions on the LDN Deposit in Cofemina sectors Nos. 1 and 2 (“**Third Concessions**”).<sup>10</sup>
94. Anglo American plc was established in 1998 and, by 1999, it had become the parent company of the Anglo American business group, including MLDN. In 2001, by a series of consecutive actions, Anglo American increased its indirect participation in MLDN to 91.37 percent, a share it continues to maintain until today.<sup>11</sup>
95. In September 1999, the new mining legislation called the 1999 Mining Law (“**1999 Mining Law**”)<sup>12</sup> was enacted and replaced the 1945 Mining Law (“**1945 Mining Law**”).<sup>13</sup>
96. On January 7, 2000, the San Onofre 3, San Antonio 1, and Camedas 1, 2, 3, 4, and 5 concessions were revisited.<sup>14</sup>

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<sup>7</sup> See Annual Report Minorco S.A. (extract), 1996, p. 31 (C-8).

<sup>8</sup> Structure chart of Anglo American’s investment in MLDN, 1996, C-9, Memorial, ¶ 40; Counter-Memorial, ¶ 19.

<sup>9</sup> Renewed Concessions - El Tigre and Camedas Nos. 1-5, in the *Gaceta Oficial Extraordinaria* No. 5,190, December 11, 1997, C-13; Renewed Mining Concessions San Onofre No. 1, No. 2 and No. 3 and San Antonio No. 1 (extract), January 13, 1998, (C-15).

<sup>10</sup> Mining Titles - Cofemina Nos. 1 and 2, published in the *Gaceta Oficial Extraordinario* of February 1999 (“Mining Titles - Cofemina Nos. 1 and 2”) (C-18).

<sup>11</sup> Structure chart indicating the participation of Anglo American plc in MLDN from 2001 to date (C-68).

<sup>12</sup> 1999 Mining Law (C-19).

<sup>13</sup> 1945 Mining Law, (C-1).

<sup>14</sup> San Onofre 3, p. 2; Camedas 1, page 5; Camedas 2 p.7; Camedas 3 p. 9; Camedas 4, p. 12, Camedas 5, p. 14; San Antonio 1 p. 16. (C-20).

97. On entering into the concession agreements, the concessionaire undertook to comply with the special provisions stipulated by the Ministry of Mines, as well as to pay an exploitation tax related to the extraction of the mineral.<sup>15</sup>
98. The concession agreements (so-called “**Mining Titles**”) provided that upon the expiry or termination of the concessions, certain mining assets acquired by MLDN would be transferred free of charge to the State (*reversionary assets*).<sup>16</sup>
99. Construction of the MLDN processing plant (“**Processing Plant**” or “**Plant**”) began in 1997 and production commenced in 2001.<sup>17</sup>
100. MLDN operations involved the acquisition of goods and services in Venezuela. As an exporter, MLDN could recover the VAT it paid for purchases of goods and services in Venezuela, in accordance with the recovery procedure provided for in Article 43 of the 2002 VAT Law (“**VAT Law**”). The recovery process was achieved with the issuance of VAT credit certificates (“**VAT CERTS**”).
101. In December 2007 and January 2008, the Ministry of Mines published resolutions declaring the *caducidad* of 13 of the 16 mining concessions.<sup>18</sup>
102. After the *caducidad* of these 13 mining concessions, the three Remaining Concessions were Camedas No. 1, Camedas No. 3, and San Antonio No. 1 (the so-called “**Remaining Concessions**”) the expiry of which was provided for on November 10, 2012 (the so-called “**Expiry Date**”).<sup>19</sup>

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<sup>15</sup> Memorial, ¶44; Counter-Memorial, ¶25.

<sup>16</sup> In relation to the Remaining Concessions see Clause 18, C-20 “*It is understood that the works and other permanent improvements, in addition to the machinery, tools, equipment and materials, including the facilities, accessories, and equipment and any other assets used for the purpose of the concession and that form an integral part thereof, regardless of how they were acquired, shall become the full property of the State free of liens and encumbrances, without any compensation, upon termination of the concession regardless of the cause [...]*”

<sup>17</sup> Memorial ¶39 and Annex B; Counter-Memorial ¶46, 446.

<sup>18</sup> *Gaceta Oficial Extraordinaria* No. 5.869, December 28, 2007 (extract), pp. 7 to 35 (C25), whereby the expiry of the Camedas 2, 4, and 5, El Tigre, and San Onofre 1 2, and 3 mining concessions was declared; see also *Gaceta Oficial* No. 38,844 (extract), January 7, 2008 (C-26), pp. 358,809 to 358,824, which declared the expiry of the Cofemina 1, 2, 4, 5, 6, and 7 mining concessions.

<sup>19</sup> See Renewed Mining Titles - El Tigre and Camedas Nos. 1-5, published in the *Gaceta Oficial* No. 5.190 (December 11, 1997) (“Renewed Mining Titles - El Tigre and Camedas Nos. 1-5”), (C-13); Renewed Mining Titles San Onofre Nos. 1, 2, and 3 and San Antonio No. 1, in *Gaceta Oficial* No. 5.206 (January 13, 1998) (“Renewed Mining Titles San Onofre Nos. 1, 2, and 3 and San Antonio No. 1”), (C-15).

103. On December 27, 2011, MLDN requested that the Remaining Concessions be renewed for a further period of ten years.<sup>20</sup>
104. On May 17, 2012, the Ministry of Mines formally rejected MLDN's request for an extension.<sup>21</sup>
105. The Remaining Concessions expired according to their terms on November 10, 2012 and the procedure for handover of the MLDN project, including the ore deposit, the Processing Plant, and other works and facilities, to the Republic began.<sup>22</sup> On November 11, 2012 the Certificate of Delivery of the MLDN Project was signed.<sup>23</sup>

#### IV. **PRESENTATION OF THE PARTIES' PETITIONS**

106. After its Withdrawal of Claims, the Claimant's pleadings are summarized below. It has (i) withdrawn the claim for export prohibition in its entirety, (ii) partially withdrawn its claim for VAT to the extent that it relates to the VAT refunds earned from January 1, 2012 onwards, and (iii) made certain adjustments to its claim for damages arising from the claim for non-reversionary assets.
107. The Claimant's final requests relate to two actions of the Respondent about which Anglo American complains, the first related to "the seizure of the assets," which the Claimant considers "*non-reversionary*," and the second related to the "VAT."
108. In relation to the first action, the seizure of assets, Claimant alleges that the following assets were expropriated:
  - MLDN's "Processing Assets", that is, the infrastructure, buildings and equipment used for the processing of nickel laterite ore into ferronickel, including, but not limited to, the metallurgical plant; and

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<sup>20</sup> Ministry of Mines ("Request for Extension of Mining Concessions"), December 27, 2011, (C-27).

<sup>21</sup> Letter from Ramírez Carreño (Minister of Energy and Oil) to A. Nelson (MLDN) (May 17, 2012) (C-31).

<sup>22</sup> Memorial, ¶120; Counter-Memorial, ¶111.

<sup>23</sup> Ministry of People's Power for Oil and Mining, *Acceptance Certificate* (November 11, 2012) (C-58), Counter-Memorial, ¶118.

- the “Inventory”, that is the raw material, spare parts and consumables associated with the processing held by MLDN in inventory on the expiry of MLDN’s Remaining Concession.<sup>24</sup>

109. It should be noted that in submitting its Withdrawal of Claims, Anglo American withdrew any claim in relation to the processed ferronickel reserves (“**Reserves**”), as part of the claim for non-reversionary assets<sup>25</sup>.

110. As a result of the seizure of the assets by Venezuela, the Claimant alleges:

- a breach of Article 5 of the Treaty (expropriation); and
- two breaches of Article 2(2) of the Treaty (violation of the standard of fair and equitable treatment, as well as breach of the obligation of full protection and security).

111. In relation to the second action, i.e. the VAT, the Claimant alleges that as an exporter, MLDN was entitled to reimbursement for VAT paid on its purchases of Venezuelan goods and services. The Claimant applied for said VAT tax credits but Venezuela did not approve its applications and consequently no tax credit certificates (“**CERTS**”) were issued.<sup>26</sup>

112. As a result of Venezuela’s actions in regards to the VAT, the Claimant alleges:

- two breaches of Article 2(2) of the Treaty (violation of the standard of fair and equitable treatment, as well as breach of the obligation of full protection and security); and
- a breach of Article 3 of the Treaty (obligation of no less favorable treatment).

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<sup>24</sup> Claimant’s PHB, ¶ 25.

<sup>25</sup> Withdrawal of Claims, ¶ 25. See also Claimant’s PHB, ¶25, where Claimant ceased to include processed ferronickel reserves in its definition of reversionary assets.

<sup>26</sup> Tr. D2, p. 381, Examination of Mr. Oscar Perez (“through August 2010”).

113. The Respondent's Counter-claim is based on the alleged breach by MLDN, the indirect subsidiary of Anglo American, of its obligations as concessionaire with respect to exploitation taxes and special advantages.
114. Both Parties object to the jurisdiction of the Tribunal to hear the claims of the other Party.
115. The Tribunal summarizes hereafter what in the respective submissions of the Parties it considers relevant to decide the case that was submitted to it. From the fact that all the arguments presented are not mentioned, it should not be inferred that they were not taken into account. The Tribunal duly considered all the Parties' written and oral submissions of fact and of law.

**A. Claimant's Petitions**

116. The Claimant is asking the Tribunal to:

- “(a) DECLARE that Venezuela has breached Articles 2(2), 3, and 5 of the Treaty;*
- (b) ORDER that Venezuela pay the Claimant the sum of US\$235.4 million for its breaches of the Treaty or such other sum as the Tribunal determines will ensure full reparation;*
- (c) ORDER Venezuela to pay pre-award interest on (b) above in the sum of US\$157.2 million, calculated at a rate of eleven percent from the dates of the actions of Venezuela that resulted in damages suffered by Anglo American on 31 March 2017 until the date of the Tribunal's award, or at such other rate and compounding period as the Tribunal determines will ensure full reparation;*
- (d) ORDER Venezuela to pay post-award interest on the same basis as pre-award interest accruing from the date of the award until payment is made in full;*
- (e) DECLARE that the award of damages and interest in (b), (c) and (d) shall be net of applicable Venezuelan taxes and that Venezuela may not deduct*

*taxes in respect of the payment of the award of damages and interest from (b), (c), and (d);*

- (f) *DECLARE that it lacks jurisdiction to hear Venezuela's counter-claim and that, therefore, said claim is not admissible; or in the alternative, DISMISS Venezuela's counter-claim in its entirety;*
- (g) *AWARD such other relief as the Tribunal considers appropriate; and*
- (h) *ORDER Venezuela to pay all of the costs and expenses of this arbitration, including the Claimant's legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal and ICSID's Additional Facility costs.*"<sup>27</sup>

117. The Claimant states that:

- in relation to the alleged violation of Article 5 of the Treaty by the seizure of the assets: "*[a]lternatively, if the Tribunal were to decide that the Non-Reversionary Assets did revert to the State, the Claimant would still be entitled to compensation for the non-amortized value of the Processing Assets.*"<sup>28</sup>
- in relation to the alleged violation of Article 2(2) of the Treaty by the seizure of assets: "*Even if the Tribunal were to find that the Non-Reversionary Assets were not MLDN's assets when they were seized, because they were in fact reversionary under Venezuelan law, Venezuela's taking of those assets without paying compensation for the non-amortized portion of the Processing Assets (as per Anglo American's alternative claim) would still breach its fair and equitable treatment obligations.*"<sup>29</sup>

118. Regarding the detail of its petition for damages, the Claimant stated:

*"As compensation for Venezuela's breaches of the Treaty, Anglo American claims damages (before interest) in respect of its ownership interest in:*

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<sup>27</sup> Claimant's PHB, ¶276.

<sup>28</sup> Claimant's PHB, ¶89.

<sup>29</sup> Claimant's PHB, ¶147.

- (a) *The fair market value (FMV) of the Processing Assets and the Inventory in the primary Non-Reversionary Assets claim worth (i) US\$202.6 million if measured applying a DCF valuation or (ii) US\$343.4 million if measured by their NBV; or, in the alternative should the Tribunal find these assets to be reversionary, (iii) US\$316.7 million for the non-amortized value of the Processing Assets; as well as*
- (b) *the VAT CERTS worth US\$32.8 million.*<sup>30</sup>

**B. Respondent's Petitions**

119. The Respondent requests that the Tribunal:

- “a) Declare that it lacks jurisdiction to hear the Claimant’s claims under the Treaty and the Additional Facility;*
- b) Should the Tribunal determine that it has jurisdiction to hear any of the Claimant’s claims determine that it also has jurisdiction over the counter-claim;*
- c) Dismiss in their entirety all the Claimant’s claims for failure to satisfy its burden of proof and for lack of factual and legal merit;*
- d) In the event that the Tribunal were to determine that Venezuela has violated any clause of the Treaty, or that Venezuela is otherwise legally liable, dismiss Claimant’s claim for damages because of the Claimant’s failure to prove their existence, cause, or amount in accordance with the standards of the Treaty and of International Law, and declare that Venezuela has no obligation to pay compensation to the Claimant;*
- e) Determine that Venezuela is entitled to receive payment of compensation for the damage suffered in accordance with Venezuela’s counter-claim and order the Claimant to pay the damages requested in that counter-claim;*
- f) Order the Claimant to pay the costs related to the administrative costs of this arbitration, as well as Venezuela’s defense in the arbitration*

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<sup>30</sup> Claimant’s PHB, ¶152.

*proceedings, as well as compensate the Republic for the expenses incurred for its defense; and*

g) *Grant Venezuela any other relief that the Tribunal deems appropriate.*<sup>31</sup>

120. The Respondent specifies the following in relation to its Counter-claim:

*“For the foregoing reasons, if the Tribunal determines that it has jurisdiction to hear the Claimant’s claims, it must decide that it also has jurisdiction to hear Venezuela’s counter-claim. MLDN, the indirect subsidiary of Anglo American, failed to comply with its obligations as a concessionaire in relation to the exploitation taxes and special advantages, and it owes a total of 531,409,475 bolivares fuertes to the Republic or US\$123,583,598.84, applying, as did the Claimant, the 2012 exchange rate of 4.3—not including the applicable fines.”*<sup>32</sup>

## **V. INTRODUCTION TO THE PARTIES’ ARGUMENTS**

121. The Arbitral Tribunal will undertake the analysis of the case in the following manner: first, it will study the jurisdictional objections raised by Venezuela (**VI**); then, it will study the claims of the Claimant (**VII**) and, in the event these claims are accepted, it will make a decision on the Claimants’ monetary claims (**VIII**). The Tribunal will then rule on its jurisdiction over the Counter-claim submitted by the Respondent, and, if deemed competent, on its merit (**IX**). Finally, the Arbitral Tribunal will award the costs and expenses of the arbitration proceedings (**X**).

## **VI. JURISDICTION**

122. The Tribunal will present the positions of the Respondent (A) and of the Claimant (B) in turn, before deciding on its jurisdiction with respect to the Claimant’s claims (C).

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<sup>31</sup> Respondent’s PHB, ¶251.

<sup>32</sup> Respondent’s PHB, ¶92.

**A. Respondent’s position: The Tribunal does not have jurisdiction over the dispute**

123. First of all, the Respondent argues that the Claimant failed to meet the burden of proof to demonstrate that the Tribunal has jurisdiction to hear its claims. It is a generally accepted principle of international law that the burden of proving jurisdiction rests with the Claimant in application of the standard rule of evidence *actori incumbit probatio*.<sup>33</sup> The Respondent considers that the Claimant violated said rule by not demonstrating that the Tribunal has jurisdiction to hear its claims.<sup>34</sup>

124. In short, the Respondent’s defense is that there is no jurisdiction given that Anglo American has not made a protected investment in Venezuela (1) and that in any event a reversionary claim must be decided by the Venezuelan courts (2).

1) Anglo American has not made an investment in Venezuela protected under the BIT

125. The Treaty defines the term “investment” as follows:

*“(a) the term “investment” means every kind of asset and in particular, though not exclusively, includes:*

- (i) movable and immovable property and any other property rights, such as mortgages, liens or pledges;*
- (ii) shares in and stock and debentures of a company and any other form of participation in a company;*
- (iii) claims to money or to any performance under contract having a financial value;*
- (iv) intellectual property rights, goodwill, technical processes and know-how;*

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<sup>33</sup> Counter-Memorial, ¶251.

<sup>34</sup> Respondent’s PHB, ¶64.

- (v) *business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.*”<sup>35</sup>

126. The Respondent notes that, according to Anglo American, its alleged investment consists of two interests: (i) an indirect shareholding interest in MLDN, and (ii) an indirect stake in MLDN’s assets. The Respondent considers that neither of these two interests constitutes an investment for purposes of the Treaty.<sup>36</sup>

i. The indirect shareholding of Anglo American in MLDN is not an investment protected by the Treaty

127. Contrary to the Claimant’s arguments, its indirect shareholding in MLDN is not an investment protected by the Treaty.<sup>37</sup> First, the Claimant has not substantiated its claims in an alleged investment but has merely presented an assessment of certain assets of MLDN which cannot be equated to an assessment of the indirect participation in that company.<sup>38</sup>

128. Second, even if Anglo American had based its claims on this alleged investment, the Tribunal would have no jurisdiction over this dispute since the Treaty does not protect indirect shareholdings. This is the conclusion that can be drawn from the interpretation of the Vienna Convention on the Law of Treaties (“**Vienna Convention**”). This instrument calls for interpretation of the Treaty based on the ordinary meaning of its terms, in light of its object and purpose, and, if necessary, allows for an examination of the Contracting States’ intent to assign a particular meaning to the terms used in the Treaty. However, at no time did Anglo American attempt to interpret the Treaty in accordance with the Vienna Convention.<sup>39</sup>

129. Likewise, the Treaty does not protect shareholding interests such as those of Anglo American in MLDN: the Contracting States chose to exclude any reference to indirect shareholding interests. Contrary to what Anglo American advocated during the Hearing, the silence of the Treaty to that effect cannot be interpreted in

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<sup>35</sup> Counter-Memorial, ¶251 also referring to the BIT between Venezuela and the United Kingdom, Art. 1 (a) (English version available as C-6) (RLA-48).

<sup>36</sup> Counter-Memorial, ¶219; Respondent’s PHB, ¶66.

<sup>37</sup> Counter-Memorial, ¶221.

<sup>38</sup> Counter-Memorial, ¶220.

<sup>39</sup> Counter-Memorial, ¶222.

the sense that it did not intend to exclude protection. Anglo American wants the phrase “*every kind of asset*” in the Treaty to be interpreted as “*all types of assets invested directly or indirectly*” even though those words do not appear in the text of the Treaty.<sup>40</sup> The Respondent recalls that the Claimant itself urged the Tribunal to reject invitations “*to read into the silence of the BIT,*”<sup>41</sup> a statement with which the Respondent agrees: silence is not tantamount to protection.<sup>42</sup>

130. On the contrary, the exclusion of indirect interests from the definition of “investment” in the Treaty is clearly deliberate: the practice followed by Venezuela and the United Kingdom in drafting bilateral investment treaties shows that when those States wish to extend the treaty’s protection to indirect interests they do so explicitly. It cites examples from other treaties in which Venezuela and the United Kingdom have specified that the definition of “investment” extends to indirect interests through the use of constructions such as “*every kind of asset invested directly or indirectly,*” “*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*” and “*every kind of economic asset, owned or controlled directly or indirectly.*”<sup>43</sup> In contrast, the Venezuela-United Kingdom Treaty did not include indirectly invested assets in its definition of “investment.
131. In support of its claim, the Respondent emphasizes that when the Treaty was drafted: (i) there was no pattern of case law that interpreted “investment” so expansively as to include indirect interests in that definition and (ii) it was the common practice among sovereign States to explicitly distinguish between direct and indirect investments.<sup>44</sup>
132. The Claimant relies heavily on the *Guaracachi v. Bolivia* case for its argument that clear language is needed to exclude indirect investments from the Treaty. The tribunal in *Guaracachi* endorsed that rule of interpretation based on the purpose of the BIT to promote and protect foreign investment. The Respondent objects that in the case of the Venezuela-United Kingdom Treaty the purpose was not only

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<sup>40</sup> Counter-Memorial, ¶222 Respondent’s PHB, ¶68.

<sup>41</sup> Respondent’s PHB, ¶68; Counter-Memorial, ¶223.

<sup>42</sup> Respondent’s PHB, ¶68.

<sup>43</sup> Counter-Memorial, ¶224.

<sup>44</sup> Counter-Memorial, ¶226.

to promote foreign investment but also to strengthen bilateral ties and increase prosperity in both States. The Respondent deduces from the foregoing that the reasoning of the tribunal in *Guaracachi* cannot be extrapolated to the present case since the Treaty does not have the sole objective of protecting foreign investment and, if extrapolated, it would be contrary to the objectives of the Treaty.<sup>45</sup>

133. Requiring explicit language in order to exclude indirect interests would render meaningless the commitment to the “reciprocal protection” of investments under the Treaty. This was the sense in which it was interpreted by the tribunal in the *Standard Chartered Bank v. Tanzania* case. If the principle advocated by the Claimant were to be accepted, the expansive definition of “investment” put forward by Anglo American would allow it to assert claims on behalf of entities whose States of nationality are not contracting parties to the Treaty.<sup>46</sup>
134. As revealed by the Claimant itself, there are seven levels of corporate ownership between MLDN and Anglo American. Within these levels of ownership, six of the intermediary entities have an indirect interest in MLDN, one of them is of Dutch nationality and two others have Luxembourg nationality.<sup>47</sup>
135. It follows from the foregoing that Anglo American’s claim, in effect, includes claims of entities that are not protected under the Treaty.<sup>48</sup>
136. In short, the fact of requiring an explicit language to exclude indirect interests is also incompatible with the principle of legal personality: every legal entity has its own property rights, such that the assets of other entities cannot be considered assets belonging to Anglo American. The Claimant does not own a single share in MLDN and has not explained why, despite this, it considers its indirect shareholding in this company as an investment under the Treaty.<sup>49</sup>
137. Given that the Claimant has not proven that the protection of the Treaty extends to its indirect shareholding, jurisdiction must be denied.<sup>50</sup>

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<sup>45</sup> Counter-Memorial, ¶227.

<sup>46</sup> Counter-Memorial, ¶229.

<sup>47</sup> Counter-Memorial, ¶230.

<sup>48</sup> Counter-Memorial, ¶230.

<sup>49</sup> Counter-Memorial, ¶232.

<sup>50</sup> Counter-Memorial, ¶233.

ii. Anglo American’s alleged indirect shareholding interest in MLDN’s assets is not an investment protected by the Treaty

138. The Respondent objects to the Claimant’s assertion that its indirect participation in the assets of MLDN is an investment protected by the Treaty. According to the Respondent, international tribunals have acknowledged that a shareholder cannot “ask for compensation for interference with [the] assets” belonging to the company in which it has a stake.<sup>51</sup>
139. Unless a treaty expressly allows it, which is not the situation in the present case, a shareholder cannot be compensated “*for interference with the assets belonging to the company of which it is a shareholder, but rather it may only file a claim for the effect of such interference on the value of its own shares.*”<sup>52</sup> In short, a shareholder’s rights are limited to claiming the loss of value of its shares stemming from interference with the assets of the company in which it directly or indirectly owns shares when it is determined that the pertinent treaty so allows.
140. In the opinion of the Respondent, Anglo American misrepresents the decisions of certain tribunals to attempt to challenge the fact that these principles are widely recognized. Likewise, comparisons with the *Azurix v. Argentina* and *Enron v. Argentina* cases are inappropriate since in the case at hand the Treaty does not consider the interests in the assets of the companies controlled directly or indirectly as a protected investment.<sup>53</sup> Similarly, the reference to the *Paushok v. Mongolia* case is inappropriate since that case endorsed a claim over the shares, and not a claim directly over the assets of the subsidiary. However, in this case, Anglo American has failed to base any of its claims on an alleged impact on the value of its shares.<sup>54</sup>
141. In short, the Respondent complains that the Claimant misinterprets the cases submitted in support of the Respondent’s argument.<sup>55</sup>
142. In another vein, it cannot be stated that Article 5(2) of the Treaty extends the right to compensation for expropriation of the assets of the locally incorporated

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<sup>51</sup> Counter-Memorial, ¶234.

<sup>52</sup> Respondent’s PHB, ¶66.

<sup>53</sup> Counter-Memorial, ¶¶236, 237.

<sup>54</sup> Counter-Memorial, ¶238.

<sup>55</sup> Counter-Memorial, ¶239 *et seq.*

company (such as MLDN) owned by a foreign company (such as Anglo American), directly to the foreign company. In fact, Article 5(2) does not have such an effect. The guarantees provided by this rule only apply to nationals or companies of the Contracting Party that own shares in the company whose assets have been expropriated. Since the Claimant itself recognizes that it does not own a single share in MLDN, Article 5(2) does not apply to it. Notwithstanding the foregoing, the purpose of said Article is to guarantee protection against the expropriation of protected investments, not to grant jurisdiction when it does not exist.<sup>56</sup>

143. The Respondent concludes that the Claimant's failure to show that either international law or the Treaty allows a shareholder to present claims directly over the assets of a company in which it holds shares means that the Claimant has not met its burden of proving that this Tribunal has jurisdiction over the present dispute.<sup>57</sup>

2) The Reversion Claim must be decided by the Venezuelan courts

144. The mining concessions and the Mining Law contain exclusive forum selection clauses that require that the disputes arising from the concession be "*decided by the competent courts of the Republic of Venezuela*" and "*may not for any reason or cause give rise to foreign claims.*"<sup>58</sup> By virtue of the foregoing, the Respondent considers that the dispute over the reversion must be resolved by Venezuelan courts and not before an international tribunal.

145. The position taken by the Claimant in relation to the argument regarding the exclusive forum clauses does not convince the Respondent. It should also be noted that the Claimant, in this regard, argued that: (i) the clauses are not binding on it since MLDN and not Anglo American was the contracting party for the Mining

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<sup>56</sup> Counter-Memorial, ¶242.

<sup>57</sup> Counter-Memorial, ¶243.

<sup>58</sup> See, for example, Mining Titles - El Tigre, San Onofre Nos. 1, 2, and 3, Camedas Nos. 1, 2, 3, 4, and 5, and San Antonio No. 1 (C-3). According to the Respondent, all the Mining Titles under discussion in this case contain similar language. See Mining Titles - Cofemina Nos. 4, 5, 6, and 7 (C-5); Renewed Mining Titles - El Tigre and Camedas Nos. 1-5 (C-13); Renewed Mining Titles San Onofre Nos. 1, 2, and 3 and San Antonio No. 1 (C-15); Mining Titles - Cofemina Nos. 1 and 2 (C-18).

Titles and (ii) its claims are not of a contractual nature, but rather based on the Treaty so the dispute can be settled in an international tribunal.<sup>59</sup>

146. With respect to the Claimant's first argument, the Respondent contends that the fact that MLDN and not Anglo American is the concessionaire does not invalidate the application of the exclusive forum clause of the Mining Titles. Anglo American's indirect subsidiary, MLDN, accepted the language that limits jurisdiction to the Venezuelan courts when it obtained or renewed the majority of its mining concessions, including the three "Remaining Concessions" that it had in 2012.<sup>60</sup> Furthermore, the Claimant submitted claims directly over MLDN's assets, including its mining concessions. Anglo American cannot have it both ways: it cannot assert claims that properly belong only to MLDN and at the same time refuse to accept the terms concerning the jurisdiction of the Venezuelan courts to which MLDN agreed. The Respondent refers to the principle of estoppel and the concept of *venire versus factum proprium*.<sup>61</sup>
147. With respect to the precedents referred to by the Claimant to advocate that the presence of a forum clause does not strip an ICSID tribunal of jurisdiction, the Respondent is of the opinion that they cannot be compared with the present case. In the *Vivendi I v. Argentina* case, the claims were not based on the concession contract in which the forum clause was included. In contrast, the claims of Anglo American are based on the concessions' Mining Titles so they can in fact be subject to the jurisdiction of the Venezuelan courts.<sup>62</sup> It also discusses the relevance of the *Aguas del Tunari v. Bolivia* case contrasting it with the present case where the forum clause clearly expresses the Parties' intent to limit jurisdiction to the Venezuelan courts and thus exclude ICSID jurisdiction, as well as that of any other foreign forum.<sup>63</sup> Finally, it also rules out any possible similarity with the *Urbaser v. Argentina* case since the present case is not a "treaty claim with contractual elements, rather it is purely contractual."<sup>64</sup> It is for all these reasons that the Respondent concludes that the Claimant has failed to meet

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<sup>59</sup> Respondent's PHB, ¶70.

<sup>60</sup> Counter-Memorial, ¶251.

<sup>61</sup> Counter-Memorial, ¶252.

<sup>62</sup> Counter-Memorial, ¶255.

<sup>63</sup> Counter-Memorial, ¶256

<sup>64</sup> Counter-Memorial, ¶257.

its burden of proving that, even if its alleged investments were protected under the Treaty, the Arbitral Tribunal has jurisdiction over its claims despite the existence of the exclusive forum selection clause.<sup>65</sup>

148. With respect to the Claimant's second argument to contest the argument regarding the exclusive forum selection clause, which is to allege that its claims are not contractual, the Respondent objects that Anglo American labels Venezuela's "*seizure of the non-reversionary assets*" as a breach of Articles 2(2) and 5 of the Treaty, but has formulated this claim purely in terms of compliance with the provisions of the concessions' Mining Titles and the Mining Law.<sup>66</sup>
149. In short, the fundamental element of the Claimant's claim is that certain MLDN assets were erroneously designated as reversionary and Anglo American therefore asks the Tribunal to determine the correct interpretation of the terms of the mining concessions. It follows from the foregoing that when a claim has a breach of contract as the fundamental element, it cannot be considered a Treaty claim. To the contrary, the correct interpretation of the mining concessions is purely a question of domestic law for the Venezuelan courts.
150. In support of its allegations, the Respondent expressly refers to the *Iberdrola v. Guatemala* case to deduce that, as in that case, Anglo American's claim is not a "*dispute under the Treaty and international law*" but rather deals with differences in the interpretation of Venezuelan legal provisions.
151. According to the Respondent, the Hearing left no doubt that the reversionary claim is based purely on differences in the interpretation of Venezuelan legal provisions, specifically, the Mining Titles and the Mining Law. It adds that the central issue of the dispute is whether the Plant is integrated into the operation of the mine. In fact, counsel for the Claimant in his opening stated that "*the question of what assets are reversionary and what assets are non-reversionary must primarily be answered by reference to Venezuelan law*" indicating that "*the core question for expropriation is who owns the processing assets and it is agreed between the Parties that this question of ownership is a matter of Venezuelan law.*"<sup>67</sup> It follows

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<sup>65</sup> Counter-Memorial, ¶258.

<sup>66</sup> Counter-Memorial, ¶248.

<sup>67</sup> Respondent's PHB, ¶71.

from the foregoing that Anglo American itself made it clear that it considers this claim to be a matter of domestic law, thus confirming “*the wisdom of the forum selection clause, which channels disputes based on Venezuelan law to the decision-maker with expertise to resolve such disputes: the Venezuelan courts.*”<sup>68</sup>

152. As a result, in accordance with the forum selection clause, therefore, it falls squarely on the Venezuelan courts to resolve this dispute concerning the interpretation of domestic law.

**B. Claimant’s position: The Tribunal has jurisdiction over the dispute**

153. The Claimant considers that it has met the burden of proof and demonstrated that the Tribunal has jurisdiction to decide Anglo American’s claims.

154. The Claimant states that it has demonstrated that (i) Anglo American is a protected UK company under the Treaty, (ii) Anglo American has made protected investments in Venezuela under the Treaty, (iii) the Parties have consented to resolve the present dispute by arbitration in accordance with the Arbitration (AF) Rules, and (iv) the requirements for access to the Additional Facility have been met.<sup>69</sup>

155. It also emphasizes that the Respondent has not raised any objection to the Claimant’s nationality, or to the specific jurisdiction requirements imposed by the Additional Facility Rules, nor does it address the consent of the Parties to submit the present dispute to arbitration in accordance with those Rules.<sup>70</sup>

156. In sum, the Respondent’s objections are limited to questions of knowing (1) whether Anglo American’s indirect investments in MLDN shares and assets constitute an investment protected by the Treaty, and (2) whether the forum selection clause in MLDN’s concessions operates as a bar to this Tribunal exercising jurisdiction over Anglo American’s claims.<sup>71</sup>

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<sup>68</sup> Respondent’s PHB, ¶72.

<sup>69</sup> Memorial, ¶¶ 134-148.

<sup>70</sup> Memorial, ¶ 133.

<sup>71</sup> Respondent’s PHB, ¶126.

1) The Treaty protects direct and indirect investments

157. The Respondent bases its first objection to jurisdiction on the wording of Article 1(a) of the Treaty. However, there is no language in that Article limiting protection of the Treaty to directly held investments. On the contrary, it uses the most expansive form of language by referring to the protection of “*every kind of asset*”<sup>72</sup> before establishing a non-exclusive list of examples including “*shares in and stock and debentures of a company*” or “*any other form of participation in a company.*”<sup>73</sup>
158. Contrary to Respondent’s assertion, for indirect investments to be included in the definition of the concept of investment contained in the Treaty, it is not necessary to have an express wording to that effect.<sup>74</sup> The Respondent is not able to identify decisions made under an investment treaty that supports its position. In contrast, various tribunals have concluded that the ordinary meaning of the term “every kind of asset” or “all assets” supports the interpretation that indirect investments are included. In this regard, it cites the cases *Siemens v. Argentina*, *Ioannis Kardassopoulos v. Georgia*, and *Venezuela Holdings v. Venezuela*. These cases found that the literal reading of the definition of investments (being “*every kind of asset*”) “*does not support the allegation that the definition of investment excludes indirect investments.*”<sup>75</sup>
159. In addition, and in relation to the Respondent’s argument that the Parties to the Treaty have negotiated an express formula to include indirect investments in other treaties signed with other Contracting States, the Claimant points to the reasoning of the tribunal in the *Conoco Phillips v. Venezuela* case from which it follows that if the ordinary meaning of the words contained in a given investment protection treaty includes indirect investment in the notion of protected investments, that

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<sup>72</sup> Translation of the expression “every kind of asset” from the original English version of the Treaty (C-6) as “*toda clase de bienes*” in the Rejoinder and as “*toda clase de activos*” in the Claimant’s PHB, ¶127

<sup>73</sup> Treaty, Article 1(a) (C-6), and Claimant’s PHB ¶127

<sup>74</sup> Reply, ¶¶136, 137.

<sup>75</sup> *Siemens AG v. Argentine Republic* (ICSID Case No. ARB/02/8), Decision on Jurisdiction, August 3, 2004, ¶137 (CLA-83); *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18), Decision on Jurisdiction, ¶ July 6, 2007, 123-124 (CLA-46); *Venezuela Holdings BV and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction, June 10, 2010, ¶165 (CLA-58).

meaning is not affected by the fact that the Parties to that treaty may have negotiated express wording to include indirect investments in other treaties.<sup>76</sup>

160. According to the Claimant, Anglo American's holdings in MLDN's shares and its assets clearly fall under the concept of "every kind of asset." Likewise, a literal reading of Article 1(a) does not support the Respondent's argument and, if admitted, the Tribunal would be interpreting the Treaty at odds with prevailing investment arbitration case law, as the Respondent itself recognizes.
161. Venezuela's arguments to the contrary have all been roundly dismissed by other investment tribunals, including those in Venezuela's own cases. These cases expressly rejected the reasoning of the Respondent when it argued: (i) that the Contracting Parties would not have foreseen the need to specifically exclude indirect investments, and (ii) that the extension of protection to indirect investments would destroy the bilateral application of the Treaty, and its objective of increasing prosperity in the two Contracting States.
162. In relation to the first argument, according to which it is not reasonable to consider that the Parties could have foreseen the need to specifically exclude indirect interests, the Claimant points out that half a decade before the Treaty was concluded, the *European American Investment Bank* tribunal found that indirect investments in a foreign country were already so commonplace that an unrestricted reference in a BIT to investments as comprising "*all assets*" naturally included indirect interests within its ordinary meaning.<sup>77</sup>
163. Regarding the second argument, the case law rejected it, considering that the protection of indirect investments could be inferred from the object and purpose of investment treaties given that the purpose of said instruments is precisely to promote and protect foreign investment.<sup>78</sup>
164. In the same vein, the Claimant objects to the argument that a broad interpretation of the definition of investments in the Treaty would allow Anglo American to assert claims on behalf of entities whose States of nationality are not contracting

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<sup>76</sup> Reply, ¶¶138, 139.

<sup>77</sup> Reply, ¶¶140, 141.

<sup>78</sup> Reply, ¶142.

parties to the Treaty.<sup>79</sup> It also argues that Anglo American is “*the ultimate holder of the investment (and the real source of capital and expertise invested in Venezuela) even if for commercial reasons, the investment is held through a number of subsidiaries (most of which would be protected by other bilateral investment treaties anyway).*”<sup>80</sup> It follows from the foregoing that it cannot seriously be denied that the protection of the ultimate holder of an investment and thus the real party in interest is in accordance with the object and purpose of the Treaty.<sup>81</sup>

165. With respect to the Respondent’s argument that Anglo American’s position is contrary to the principle of legal personality recognized by international law in the *Barcelona Traction* case decided by the ICJ, the Claimant replies that tribunals have constantly rejected the validity of this principle in the investment treaty context where it is the investment treaty which provides the definition of protected investment and defines it broadly. In this regard, it cites the *CMS v. Argentina* case.<sup>82</sup>

166. During the Hearing, the Respondent did not counter the reasoning followed by those tribunals to reject those arguments.

167. The Claimant considers that the conclusion of the discussion above is that Anglo American’s indirect interest in MLDN shares constitutes a qualifying investment protected under the Treaty.<sup>83</sup>

i. The indirect shareholding of Anglo American in MLDN constitutes an investment protected under the Treaty

168. One of the examples of investment listed in Article 1(a) of the Treaty consists of “*shares in and stock and debentures of a company and any form of participation in a company.*” To this end, it can be affirmed that Anglo American’s indirect shareholding in MLDN constitutes a form of participation in a company. That is the conclusion reached by the tribunal in the *Siemens v. Argentina* case, without

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<sup>79</sup> Reply, ¶142.

<sup>80</sup> Reply, ¶143.

<sup>81</sup> Reply, ¶143.

<sup>82</sup> Reply, ¶143.

<sup>83</sup> Reply, ¶148.

imposing a requirement that there be no interposed companies between the investment and the ultimate owner of the company.<sup>84</sup>

169. Similarly, in the case of *Venezuela Holdings v. Venezuela*, the tribunal exercised its jurisdiction over claims brought by Dutch claimants under the Netherlands-Venezuela BIT despite the claimants holding their investments in Venezuela through both US and Bahamas holding companies.<sup>85</sup>
170. Similar solutions were adopted in the *Cemex v. Venezuela* and the *Teinver v. Argentina* cases.
171. Hence the ordinary meaning of the text of the Treaty confirms the jurisdiction of the Tribunal over Anglo American's shareholding in MLDN.
172. Finally, the Claimant objects to the argument put forward by the Respondent that Anglo American's quantification of damages somehow affects the jurisdiction of the Tribunal. Anglo American submitted an assessment of the loss it suffered as a result of Venezuela's measures. This loss can be measured by either the diminution in the value of Anglo American's interest in MLDN's shares, or the loss of the value of MLDN's assets, since they are the same. In any event, issues of quantum, essential to the merits of the case, cannot affect the Tribunal's jurisdiction.<sup>86</sup>

ii. The indirect participation of Anglo American in MLDN's assets constitutes a protected investment under the Treaty

173. The same reasons espoused in support of the assertion that Anglo American's indirect shareholdings in MLDN constitutes an investment protected under the Treaty are grounds for arguing that Anglo American's indirect interest in MLDN's assets also constitutes a qualifying investment protected under the Treaty.
174. Without limiting the foregoing, the Claimant considers the position advocated by the Respondent that Anglo American can claim for "*the shares, all the shares but only the shares*" also referring to the *El Paso v. Argentina*, *Poštová Banka v. Greece*, and *ST-AD v. Bulgaria* cases to be wrong. Anglo American does not

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<sup>84</sup> Reply, ¶150.

<sup>85</sup> Reply, ¶152.

<sup>86</sup> Reply, ¶156.

dispute that certain tribunals have found that an investor has no standing to pursue claims directly over the assets of a company in which it owns shares, but objects that other tribunals have adopted the opposite interpretation. In this regard, it does not consider the distinction made by the Respondent in order to rule out the relevance of such cases to be meaningful, which is to underline that in those cases the applicable treaty expressly provided that protected investments included investments owned or controlled directly by a foreign investor, including interests in the assets of those companies.<sup>87</sup>

175. The Claimant emphasizes that where a treaty defines “investment” broadly as “*all assets*” or “*every kind of asset*,” tribunals have found that the unrestricted scope of these words naturally includes investments “*owned or controlled directly or indirectly*.”<sup>88</sup>
176. Nor does Anglo American agree with the Respondent’s analysis of the tribunal’s decision in the *Paushok* case, which makes no such definitive assertion as alleged by the Respondent. While the tribunal in that case considered that the relevant investment consisted of shares in a the local company, it went on to confirm that the Claimants were entitled to make claims concerning alleged treaty breaches resulting from actions affecting the assets of the local company and cited with approval the reasoning of the *ad hoc* committee in *Azurix* affirming that indirectly held assets of the subsidiary in that case qualified as investments protected by the treaty.<sup>89</sup>
177. In short, the Claimant argues that the assets fall specifically under the protection of the Treaty under the provisions of Article 5(2), which grants investors a direct claim over the expropriated assets of a local investment company in which they own shares.<sup>90</sup> Contrary to Respondent’s arguments, Article 5(2) of the Treaty does not only apply when the investor is the direct owner of shares of the company whose assets were expropriated. In order to undercut this assertion, the Claimant

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<sup>87</sup> Reply, ¶160.

<sup>88</sup> Reply, ¶162.

<sup>89</sup> Reply, ¶163.

<sup>90</sup> Treaty, Article 5(2); Tr. D1, 64: 22-65: 23, Claimant’s Opening Submission, slides 85-86; Reply, ¶164-167; Claimant’s PHB, ¶128.

refers to its reading of the Treaty which cannot be interpreted as distinguishing investments directly owned from those indirectly owned.<sup>91</sup>

178. It follows from the foregoing that Article 5(2) of the Treaty unquestionably affirms the Claimant's standing to assert a claim of expropriation of MLDN's assets.

179. Lastly, it defends the compatibility of its interpretation with the Vienna Convention insofar as it establishes the rule of literal interpretation and insofar as tribunals have clearly found that, under a literal interpretation, treaties that do not expressly exclude indirect investments must be considered to include them.<sup>92</sup>

180. Hence, Respondent's objection on the basis of the indirect nature of Anglo American's investments must be rejected.

2) The forum selection clause in the mining concessions does not deprive this Tribunal of jurisdiction

181. Venezuela's second objection is based on the existence of a forum selection clause in the MLDN mining concessions (and a similar Article in the Mining Law). It should be noted that such a clause cannot deprive the Tribunal of its jurisdiction over Anglo American's claims. This objection cannot affect the VAT claim and must be rejected on the subject of the claim relating to the reversionary assets.<sup>93</sup>

182. Anglo American is not party to the MLDN Concessions so cannot be bound by their dispute resolution clause. The Respondent claims that under the principle of *estoppel* Anglo American must be bound by the terms of the same contracts if it wants to assert claims belonging to MLDN under those contracts. This argument fails to recognize that Anglo American not being a party to the concessions is neither bound by their terms nor able to assert any direct contract claims for breaches of the concessions.<sup>94</sup> Contrary to the Respondent's assertions, it is neither unfair nor contradictory for Anglo American to be allowed to claim for Treaty breaches arising out of MLDN's rights yet not be held liable for MLDN's alleged breaches of its obligations. In fact, Anglo American's non-reversionary

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<sup>91</sup> Reply, ¶165.

<sup>92</sup> Reply, ¶168.

<sup>93</sup> Claimant's PHB, ¶130; Rejoinder, ¶169.

<sup>94</sup> Reply, ¶171.

assets claim is based on its own rights under the Treaty, “*it does not claim in respect of MLDN’s contractual rights under the concessions.*”<sup>95</sup> The Claimant made its claims under the terms of the Treaty and international law.<sup>96</sup>

183. In fact, nothing prevents the Respondent from filing complaints in the appropriate domestic forum against the proper party, MLDN, for alleged breaches of the its obligations. It should be noted in this regard that MLDN’s exploitation tax obligations are currently the subject of domestic proceedings.

184. Notwithstanding that Anglo American is not party to the dispute resolution clause, in any event, the non-reversionary assets claim based on expropriation and unfair treatment is fundamentally a Treaty claim, not a contract claim and thus outside the scope of the forum selection clause in the concessions. Venezuela’s assertion that Anglo American’s claim cannot be a Treaty claim because it involves certain contractual law or Venezuelan legal issues is therefore unsustainable.<sup>97</sup> The Claimant never claimed that the Respondent had violated the concessions as a matter of contract law or that it had violated the Mining Law as a matter of domestic law.<sup>98</sup>

185. Furthermore, the fact that, to determine whether there has been a breach of the treaty and whether Venezuela has complied with its obligations under international law, the Tribunal must decide various points of Venezuelan law, does not deprive the Tribunal of jurisdiction.<sup>99</sup> For the Tribunal to exercise jurisdiction, it suffices that “*Anglo American’s invocation of the substantive protections of the Treaty is not prima facie implausible.*”<sup>100</sup> This is a solution confirmed in the prevailing case law, while Venezuela’s attempt to impose a higher standard is unsupported. In effect, the Respondent is trying to impose a higher standard for the Claimant’s burden of proof in matters of jurisdiction by stating that Anglo American did not offer clear and specific reasoning that explains why the taking of assets allegedly in accordance with domestic law constitutes a Treaty violation. The precedent proposed by the Respondent with the

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<sup>95</sup> Claimant’s PHB, ¶131.

<sup>96</sup> Reply, ¶173.

<sup>97</sup> Reply, ¶177.

<sup>98</sup> Reply, ¶174.

<sup>99</sup> Claimant’s PHB, ¶132; Tr., D1, 67:4-12; Claimant’s Opening Submission, slide 88; Reply, ¶¶174-177.

<sup>100</sup> Claimant’s PHB, ¶132; Tr., D1, 67:4-12; Claimant’s Opening Submission, slide 89; Reply, ¶¶178-180.

*Iberdrola v. Guatemala* case is irrelevant since in that case the tribunal declined jurisdiction because of the manner in which the Claimant had presented its claims.<sup>101</sup> Finally, this solution was described as particularly stringent in the pertinent decision on annulment, also bearing in mind that the prevailing case law confirms that for the tribunal to exercise jurisdiction it suffices that the Claimants' invocation of the substantive protections of the treaty is not *prima facie* implausible.<sup>102</sup>

186. By virtue of the foregoing, the second objection to jurisdiction raised by the Respondent must be dismissed.

### **C. Decision of the Tribunal**

187. The Respondent's objections to the jurisdiction of the Tribunal have led the Tribunal to analyze two issues. The first is in relation to the scope of the definition of investments in the Treaty (1). The second is in relation to the existence of an exclusive forum selection clause in the Mining Titles (2).

#### 1) Analysis of the Respondent's first objection to the jurisdiction of the Tribunal

188. With respect to the Respondent's first objection to the jurisdiction of the Tribunal, the Parties disagree as to whether or not the Treaty protects indirect investments. The disagreement of the Parties affects the concept of indirect investment under two different aspects: first, the question arises as to whether the indirect shareholding of Anglo American in MLDN constitutes an investment protected by the Treaty (b); second, the question arises as to whether Anglo American's indirect holding in MLDN's assets constitutes an investment protected by the Treaty (c). The answer to both questions is found in the definition of the concept of "investment" in the Treaty (a).

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<sup>101</sup> In its Counter-Memorial, Venezuela quoted *Iberdrola v. Guatemala* in support of this higher standard. In the Reply, Anglo American explains that this decision was limited to the facts of that case and was only based on the manner in which the Claimant had raised its claim. Counter-Memorial, footnote 480; Reply, ¶¶178-179; Tr. Day 1, 212:1-213:2.

<sup>102</sup> Reply, ¶177.

a) Interpretation of the definition of “investment” in the Treaty

189. The intent of the Contracting States in relation to the definition of the concept of “investment” protected by the Treaty is reflected in Article 1(a) of the Treaty which provides that:

*(a) “investment” means every kind of asset and in particular, though not exclusively, includes:*

*movable and immovable property and any other property rights, such as mortgages, liens or pledges;*

*shares in and stock and debentures of a company and any other form of participation in a company;*

*claims to money or to performance under contract having a financial value;*

*intellectual property rights, goodwill, technical processes and know-how;*

*business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.”<sup>103</sup>*

190. The Tribunal finds the interpretation of such provision to be decisive insofar as the majority of the arguments developed by the Respondent in support of its first objection postulate that said definition purports to exclude indirect investments from its scope. In effect, the Respondent starts from the premise that when the Contracting States intend to exclude indirect investments from the scope of protected investments, they simply do not mention them and when they want to integrate them, they are stipulated.

191. The Tribunal does not agree with this analysis. The language of the definition of the term investment in the Treaty does not support a narrow interpretation of that word. The expression “*every kind of asset*” is inclusive. In the same way, the fact that the Parties have specified that the list of examples provided below is not

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<sup>103</sup> Treaty, Art. 1(a).

exhaustive but merely indicative (“*not exclusively*”) makes the case for a non-restrictive definition of the concept of protected “investment” under the Treaty.

192. The Tribunal considers that nothing in the wording of the relevant clause of the bilateral Treaty confirms that it was the intention of the Contracting States to limit the protection of the Treaty to direct investments.
193. Hence, the Tribunal agrees completely with the analysis of the tribunal in the *Siemens v. Argentina* case deciding the same question when faced with a very similar clause: “[*the*] Tribunal observes that there is no explicit reference to direct or indirect investments as such in the Treaty. The definition of “investment” is very broad. An investment is every kind of asset considered to be such under the law of the Contracting Party where the investment has been made. The specific categories of investment included in the definition are included as examples rather than with the purpose of excluding those not listed. The drafters were careful to use the words “not exclusively” before listing the categories of “particularly” included investments. One of the categories consists of “shares, rights of participation in companies and other types of participations in companies.” The plain meaning of this provision is that shares held by a German shareholder are protected by the Treaty and that provision imposed no requirement that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.”<sup>104</sup>
194. Other ICSID tribunals have adopted the same solution when faced with similar clauses.<sup>105</sup>
195. The Respondent also suggests that if the Parties did not specify the exclusion of indirect investments in the definition they drafted, it is only because, at the time the Treaty was drafted, there was no pattern of case law that interpreted investment so expansively as to include indirect interests in that definition. The existence or not of such a judicial practice when the Treaty was signed is not a significant

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<sup>104</sup> *Siemens AG v. Argentine Republic* (ICSID Case No. ARB / 02/8), Award, February 6, 2007, (CLA-84).

<sup>105</sup> *Venezuela Holdings BV and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB / 07/27), Decision on Jurisdiction, June 10, 2010, ¶165 CLA-58); *Ioannis Kardassopoulos v. Georgia* - ICSID Case No. ARB / 05/18, Decision on Jurisdiction, July 6, 2007), ¶¶ 123-124

factor. What matters is the economic reality to which the concept of investment referred at the time. The Treaty was concluded in 1996, at which time investments made through companies interposed between the investment and the ultimate owner of the companies were already usual and commonplace. As noted by the tribunal in the *European American Investment Bank* case,<sup>106</sup> it was already half a decade before the bilateral treaty between Venezuela and the United Kingdom was concluded.

196. In any case, it is absurd to argue that since at that time the practice was to distinguish indirect investments from direct investments, this means that the absence of explicit reference to indirect investments necessarily means that it is excluded, without admitting at the same time, given that the practice was to distinguish, that if the Contracting States did not make the distinction when drafting the Treaty it is because it was not their intent to do so.
197. A literal interpretation of Article 1(a) of the Treaty handed down by the Arbitral Tribunal, in addition to being in accordance with the rules of interpretation of the Vienna Convention, is not affected by the mere fact that, in other treaties, the Contracting States have chosen to specify that indirect investments were protected. No interpretative conclusion can be inferred from this circumstance for purposes of this case. It could be interpreted to mean that this circumstance favors the argument put forward by the Respondent that when the Contracting States intend to include indirect investments, they specifically provide for it. On the other hand, it could be interpreted in favor of the Claimant's argument, considering that in order to avoid silence being interpreted as an exclusion they have tried to specify in more detail the scope of its definition of protected investment. In this sense, the Tribunal fully shares the criterion of the tribunal in the *Conoco Phillips v. Venezuela* case, according to which:

*“[the] Tribunal remarks [in] respect of treaty practice that this demonstrates that there is no single way of drafting definitions. Different formulations may have precisely the same effect.”*<sup>107</sup>

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<sup>106</sup> *European American Investment Bank AG (Austria) v. Republic of Slovakia* (Case CPA No. 2010-17), Award on Jurisdiction, October 22, 2012, ¶ 321 (CLA-146).

<sup>107</sup> *ConocoPhillips Petrozuata BV and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB / 07/30), Decision on Jurisdiction and Merits, September 3, 2013, ¶¶282-285 (CLA-24).

198. Nor is it relevant to assert that requiring explicit language to exclude indirect interests makes the reciprocal nature of the protection granted by the Treaty null and void.
199. In this regard, the Respondent suggests in substance that considering the definition of the investments protected by the Treaty as including indirect investments would imply that it would be possible to grant protection to entities whose states of nationality do not allow them to enjoy the protection of the Treaty.
200. However, protecting indirect investments does not imply protecting entities who are not allowed to enjoy the protection of the Treaty because of their nationality. Quite the opposite. When considering the ultimate holder of the investment and not the companies interposed between the investment and whoever is the ultimate owner, reality is preferred and legal fiction is disregarded.<sup>108</sup> The companies interposed between the UK company and the investment in Venezuela are merely forms of investment by a company from one Contracting State in the other, so the Respondent's argument that the protection of indirect investments implies *per se* a breach of reciprocity is incomprehensible. Reciprocity would be breached only if one party were extending more protection than it should. This is precisely the meaning of the tribunal's analysis in the *Standard Chartered Bank* case<sup>109</sup> in support of which the Respondent formulates its allegation. In that case, as the Claimant rightly emphasizes, the claimant had not actively controlled the assets which formed the investment, it merely held such investment passively through a subsidiary and thus could not have been considered to have invested in the respondent State. To that end, the Tribunal notes that, as the Claimant emphasizes, "*Venezuela has not sought to argue to this effect,*" so the reference to that case is not relevant. In fact, in the *Standard Chartered Bank v. Tanzania* case, the rejection of its jurisdiction by the tribunal was not due to the indirect nature of the investment but the claimant's lack of investment in Tanzania.

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<sup>108</sup> In this regard, the Tribunal shares the position of the tribunals in *Siemens AG v. Argentine Republic* (ICSID Case No. ARB / 02/8), Decision on Jurisdiction, August 3, 2004, ¶137 Annex CLA-83, and *Venezuela Holdings BV and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB / 07/27), Decision on Jurisdiction, June 10, 2010, ¶165 (CLA-58).

<sup>109</sup> *Standard Chartered Bank v. United Republic of Tanzania* (ICSID Case No. ARB/10/12), Award, November 2, 2012, (RLA-123).

201. The Tribunal therefore rejects the interpretation that the Treaty by including protection for indirect investments violates the reciprocal nature of the agreement. In the opinion of the Tribunal, Anglo American does not disguise the claims of entities not protected by the Treaty as its own, but submits its claims in its capacity as an effective investor and ultimate holder of the investment.
202. Also, the Tribunal does not consider that the interpretation of the Treaty advocated by the Claimant, and accepted by the Tribunal, violates in any way the objective of prosperity in both States. If this reasoning were accepted, one would reach the absurd conclusion that when Contracting States have explicitly granted protection to indirect investments they deliberately intended to renounce the objective of reciprocal prosperity, which is always one of the objectives of this type of treaty.
203. The Tribunal also does not find the question of the compatibility of the interpretation of the Treaty with the principle of personality as formulated by the ICJ in the *Barcelona Traction* case relevant. Notwithstanding the fact that the ICJ's opinion regarding the principle of personality in that case does not bind this Tribunal, the principle has not remained intact in subsequent decisions of the ICJ. The present case does not concern diplomatic protection under customary international law rather it concerns the scope of protection of investments under an investment protection treaty.
204. In view of the foregoing, the Tribunal concludes that the Treaty protects indirect investments as well as direct investments.

b) *Is an indirect shareholding of Anglo American in MLDN an investment protected by the Treaty?*

205. In interpreting the Treaty to include indirect investments, the Tribunal considers that Anglo America's indirect shareholding in MLDN is an investment protected by the Treaty and that it has jurisdiction to decide disputes on the alleged Treaty violations. Indeed, in the examples of investment listed in Article 1(a) of the Treaty, is the expression "*shares in and stock and debentures of a company and any other form of participation in a company.*"<sup>110</sup> Anglo American holds any

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<sup>110</sup> Treaty, Art. 1(a) (RLA-48).

*other form of participation* in a company, specifically, an indirect shareholding in MLDN.

206. The Respondent objects to the Tribunal's jurisdiction based on the fact that, in any event, the Claimant did not base its claim on said investment since none of the damages claimed would be based on the alleged impact of State measures on the value of the claim. However, this aspect of the dispute regarding alleged damages is not relevant for purposes of deciding on jurisdiction. The question of the link between the damage supposedly suffered by the investor and the protected or unprotected nature of the investment that it claims has been violated must be resolved in the merits phase. It should be noted that the Respondent's objection to the jurisdiction of the Tribunal is that Anglo American's indirect shareholding in MLDN is not a protected investment. If it is true that Anglo American does not claim damages related to such investment, it would not mean that it would not be protected by the Treaty and that therefore the Court has no jurisdiction to decide its claim.

207. In view of the foregoing, the Tribunal finds no reason to justify why Anglo American's indirect shareholding should not be considered an investment protected by the Treaty.

c) *Is the indirect participation of Anglo American in the assets of MLDN an investment protected by the Treaty?*

208. The aforementioned reasons confirm that the indirect participation of Anglo American in MLDN's assets also constitutes an investment protected by the Treaty insofar as they result in equalizing the protection of the shareholder of the local company to that of the indirect shareholder in the local company. However, the Respondent, beyond the argument that the Treaty does not contemplate the protection of indirect investments, refers to the decisions of several tribunals which found that, although an investor can claim damages for its shareholding, directly or indirectly, by measures affecting the company whose shares are held,

the investor has no standing to make claims directly for the assets of that subsidiary but only for “*the shares, all the shares, but only the shares.*”<sup>111</sup>

209. In order to resolve the question thus raised, the Tribunal finds relevant the reference made by the Claimant to Article 5(2) of the Treaty which provides that

*“where the Contracting Party expropriates the assets of a company which is incorporated or constituted under the laws in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate, and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares.”*<sup>112</sup>

210. This provision reflects that the Contracting States contemplated the possibility of a shareholder of a local company being able to claim for the assets of the local company in which it has a shareholding. Although this provision was introduced in the Treaty to specify the compensation conditions of the expropriated investor, it would not make sense if the assets of the company in which the investor has a shareholding interest were not protected by the Treaty as well as the shares themselves.

211. The Respondent considers that such protection only covers the direct shareholder and not the indirect shareholder. However, as the Tribunal interpreted the Treaty to mean that it protects an indirect shareholding investment, the Tribunal considers that an investor with an indirect shareholding in the local company owns them in accordance with the Treaty. Also, as stated by the tribunal in the *Rurelec v. Bolivia* case:

*“[if] one accepts that the ownership of shares can be direct or indirect through the ownership of other shares in other companies, the fact that Rurelec does not directly own the shares of EGSA does not mean that it does not own those shares within the meaning of the BIT, indirectly through intermediate companies, such as Birdsong, BIE, and GAI.”*<sup>113</sup>

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<sup>111</sup> The Respondent further contends that the rights of a shareholder are limited to claiming the loss of the value of its shares resulting from interference with the assets of the company in which it owns shares directly or indirectly, when it is determined that the Treaty so requires. For this, it cites the cases *El Paso v. Argentina*, *Poštová Banka v. Greece* and *ST-AD v. Bulgaria*. See Counter-Memorial, ¶¶ 234, 239-240.

<sup>112</sup> Treaty, Art. 5(2) (RLA-48).

<sup>113</sup> *Guaracachi America Inc and Rurelec PLC v. Plurinational State of Bolivia* (CPA Case No. 2011-17), Award, January 31, 2014, ¶¶ 361 (CLA-43).

212. In the present case if it is accepted that indirect shareholding falls within the “other form of participation” category provided for under the definition of investment in Article 1(a) of the Treaty then it must be understood that Anglo American owns the shares and therefore can claim for the assets of the company whose shares it owns as provided for in Article 5(2) of the Treaty, not only in the case of expropriation but more generally, when those assets are affected by a breach of the State’s obligations under the Treaty.

213. Based on the foregoing, the Tribunal considers that both Anglo American’s indirect shareholding in MLDN and its indirect participation in the assets of MDLN are investments protected by the Treaty. Therefore, the first objection to the jurisdiction of the Tribunal raised by the Respondent is dismissed.

2) Analysis of the Respondent’s second objection to the jurisdiction of the Tribunal

214. The Respondent objects to the jurisdiction of the Tribunal in relation to Anglo American’s reversion claim based on the existence of an exclusive forum-selection clause in the mining concessions and the Mining Law<sup>114</sup> which requires that disputes arising over the concession be “*decided by the competent courts of the Republic of Venezuela*” and “*without giving rise to foreign claims.*”<sup>115</sup>

215. Specifically, the concessions’ Mining Titles include a clause with similar language which states:

*“Questions and disputes of any nature that may arise with regard to this concession and that cannot be resolved amicably by the contracting parties shall be decided by the competent Courts of the Republic of Venezuela, in accordance with its legislation, and may not, for any reason or cause, give rise to foreign claims.”*<sup>116</sup>

216. Regarding the relevance of these clauses in this proceeding, the Parties mutually agree that this depends on the nature of the Claimant’s claim.<sup>117</sup> The Claimant

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<sup>114</sup> See for example, Mining Titles - El Tigre, San Onofre Nos. 1, 2, and 3, Camedas Nos. 1, 2, 3, 4, and 5, and San Antonio No. 1 (C-3). According to the Respondent, all the Mining Titles under discussion in this case contain similar language. See Mining Titles - Cofemina Nos. 4, 5, 6, and 7 (C-5); Renewed Mining Titles - El Tigre and Camedas Nos. 1-5 (C-13); Renewed Mining Titles - San Onofre Nos. 1, 2, and 3 and San Antonio No. 1 (C-15); Mining Titles - Cofemina Nos. 1 and 2 (C-18).

<sup>115</sup> Respondent’s PHB, ¶69.

<sup>116</sup> Counter-Memorial, ¶245.

<sup>117</sup> See Reply, ¶172: “Venezuela does not deny the basic legal premise that a forum selection clause (absent an express waiver of rights under the Treaty) cannot deprive the Tribunal of jurisdiction under the Treaty. Nor does

rightly underlined that, as it is not a party to the mining concessions, the exclusive forum selection clause contained therein is not binding on it and cannot therefore be interpreted as a waiver by the investor of its right to bring its claims under the Treaty. Notwithstanding the foregoing, the Tribunal admits, on the other hand, that such reasoning is only acceptable under the premise that the Claimant has not artificially disguised exclusively contractual claims as claims under the Treaty. Therefore, the decisive question to resolve this objection is whether the claims brought by the Claimant in relation to the reversion are claims based on the Treaty.

217. The Claimant reaffirms that its claims regarding the non-reversionary assets are: the illegal expropriation of those assets without payment of prompt, adequate, and effective compensation, in contravention of Article 5 of the Treaty, as well as unfair, inequitable and arbitrary treatment, in violation of Article 2(2) of the Treaty. Moreover, the Claimant does not deny that in order to decide whether such violations occurred, it is necessary to resolve “*a threshold question of Venezuelan law*” but remember that at no time does it claim that “*Venezuela has breached the Concessions as a point of contract law or that Venezuela has breached the Mining Law as a matter of domestic law.*”<sup>118</sup>

218. The Tribunal agrees with this analysis. It is true that the Claimant’s claims involve interpreting domestic law, but that does not make its claims contractual, simply because the interpretation of local law is very relevant to resolving its claims. This question is only one stage in the reasoning of the Tribunal the aim of which is to decide whether or not there has been a breach or breaches of the Treaty.

219. Applying to this case the criterion of the broadest trend in decided cases,<sup>119</sup> the Tribunal finds that there is no reason to believe that Anglo-American’s claims are anything other than claims based on alleged breaches of the Treaty by Venezuela.

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*Venezuela also dispute “the simple fact that a claim under the Treaty may also involve matters of local law does not strip a tribunal of jurisdiction.”* See also Counter-Memorial, ¶257: “*Anglo American’s reference to the Urbaser case is also mistaken. The excerpt of the award cited by Claimant explains that the simple fact that a claim under the Treaty may also involve matters of local law does not strip a tribunal of jurisdiction. This is an uncontroversial premise. That said, Urbaser has no bearing on this case. Anglo American’s claim is not a Treaty claim with contractual elements; rather, it is purely contractual, and its contractual nature does not change simply because the Claimant labels it otherwise.*”

<sup>118</sup> Reply, ¶174.

<sup>119</sup> *Iberdrola Energía SA v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Decision on Annulment, January 13, 2015, ¶¶ 91 and 94 (CLA-150).

220. By virtue of the foregoing, the Tribunal dismisses the Respondent's second objection to jurisdiction to hear the claim and declares that it is competent to adjudicate all the claims brought by the Claimant.

## **VII. THE MERITS OF THE CLAIMANT'S CLAIMS**

221. The Tribunal will first examine the merits of the claims based on the alleged expropriation of the assets that the Claimant considers to be non-reversionary (A). It will then examine its claims regarding the alleged violation of the standard of fair and equitable treatment (B), the alleged violation of the standard of full protection and security (C), and the alleged violation of the national treatment standard (D).

### **A. Claims based on the alleged expropriation of the assets that Claimant considers to be non-reversionary**

222. The Tribunal will present in turn the positions of the Claimant (1) and of the Respondent (2), before ruling on the existence of the expropriation alleged by the Claimant (3).

#### 1) Position of the Claimant

##### a) Arguments related to ownership of the assets

##### i. *Venezuela expropriated non-reversionary assets*

223. Venezuela's taking ownership of the non-reversionary assets without compensation, due process, or for a public purpose was an unlawful expropriation of Anglo American's investments in the shares and assets of MLDN contrary to Article 5 of the Treaty.

224. According to the Claimant, it is not in dispute that the non-reversionary assets, consisting of MLDN's extensive Processing Assets (including the Plant) and the Inventory were seized. Also, it is not in dispute that the takeover deprived MLDN and its shares of their full value. The only question that can be asked in order to determine whether an expropriation took place is whether MLDN had valid

ownership rights over the non-reversionary assets on the date they were taken. This is a matter of Venezuelan law.<sup>120</sup>

225. The Claimant makes several arguments in support of its assertion that the Processing Assets were non-reversionary and belonged to MLDN.

ii. *The underlying logic of the concept of reversion: the relationship between the reserved activity and the principle of reversion*

226. The Claimant draws the Tribunal's attention to the fact that in making its finding on the issue of ownership of the non-reversionary assets, it is important that the Tribunal bear in mind the policy that lies behind the concept of reversion. The exploration and exploitation of natural resources is, and always has been, an activity reserved for the sovereign, granted to investors strictly in accordance with the terms of their concessions and domestic law.<sup>121</sup>

227. The purpose of the principle of reversion under Venezuelan law is to ensure that assets used for activities that are reserved to the State, and that can therefore only be carried out by private parties pursuant to a concession, revert to the State upon the expiry or termination of the concession.<sup>122</sup>

iii. *The legal framework of the mining sector in Venezuela and MLDN's Remaining Concessions distinguish between activities that have been reserved to the State and those that are not*

228. In Venezuelan law, the activity reserved to the State is defined as "exploration" and "exploitation" and is distinguished from ancillary activities such as processing, which do not require a concession. At the end of a concession, the State can only recover the assets used for the activity granted in the concession. As a result, assets that were not part of the concession activity, such as assets built near a mine to process the material that MLDN had extracted in accordance with its 16 mining concessions, do not revert.<sup>123</sup>

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<sup>120</sup> Claimant's PHB, ¶136.

<sup>121</sup> Claimant's PHB, ¶3.

<sup>122</sup> Reply, ¶188.

<sup>123</sup> *Idem*.

229. In the mining sector, and as regards MLDN, Article 102 of the 1999 Mining Law and Clause 18 of the Remaining Concessions provide that the assets relating to the reserved mining activities, that is, those used to carry out “the object of the concession,” are reversionary.
230. Articles 24 and 25 of the 1999 Mining Law provide that there are only two reserved (or primary) mining activities: exploration and exploitation. They further provide that mining concessions can “only” be granted for exploration and exploitation activities. “Exploitation” means the extraction of minerals from an ore deposit with an economic purpose, as set out in Article 58 of the 1999 Mining Law.
231. The Mining Law distinguishes reserved or primary mining activities (i.e. exploration and exploitation activities) from activities that are “ancillary” or “related” to those mining activities. These ancillary activities are listed in Article 86 of the Mining Law, namely “the *storage, possession, preparation, transport, distribution, and trade of the ores,*” that is, “*beneficiation*”.
232. The term “*beneficio*” is a term of art in the mining industry which means “processing.” While Article 86 *in fine* provides that such “ancillary” activities may become reserved if so ordered through an executive decree, no such executive decree has been issued in relation to the processing or stockpiling of nickel or ferronickel.
233. Assets used for “ancillary” activities such as processing are not reversionary as they are not reserved mining activities and they cannot be the “object” of a concession, pursuant to the Mining Law Article 102 and Clause 18 of the Remaining Concessions.
234. Only exploration and exploitation activities are reserved activities that form the object of the Remaining Concessions, and, therefore, only the assets used for said activities revert to the State upon the expiry or termination of the concession.<sup>124</sup>

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<sup>124</sup> Reply, ¶188.

iv. *Processing Assets were not used for a reserved activity but for an ancillary processing activity*

235. The Claimant notes that the Respondent alleges that exploitation means more than extraction and can encompass processing. This is not tenable in view of the unambiguous terms of Articles 58 and 86 of the Mining Law.<sup>125</sup>
236. In addition, the Respondent argues that the reserved mining activities include not just exploration and exploitation but also *aprovechamiento* which Venezuela interprets to mean “processing.”
237. Venezuela argues that “*in accordance with the Venezuelan mining law, MLDN was granted the right to pursue the mining activity reserved to the State, which includes not only exploitation but also utilization [...] i.e. the processing and possibility of obtaining an economic benefit from it [...].*”<sup>126</sup>
238. In the Claimant’s opinion, the logic of the Respondent is incorrect: Article 25 of the Mining Law clearly establishes that concessions can “only” be granted for exploration and exploitation activities. Moreover, Article 86 of the Mining Law provides that processing activities (i.e. *beneficio*) can be reserved to the State by executive decree. No such executive decree has been issued.
239. Nickel processing is not a “reserved activity,” since any private party can process nickel in Venezuela without the need for a concession agreement. Moreover, the term “*aprovechamiento*” in the Mining Law does not refer to a third primary or reserved activity. Rather it is a reference to the economic or commercial purpose that must drive any exploitation of minerals from mines. Indeed, Venezuela’s translation of the term “*aprovechamiento*” as “*utilisation*” in English is itself misleading. The translation of “*aprovechamiento*” is “*exploitation*.”<sup>127</sup>
240. In addition, Venezuela claims that processing is not an activity that is ancillary or related to mining activities pursuant to Article 86 of the Mining Law, because “*beneficio*” does not mean “processing.”

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<sup>125</sup> Reply, ¶190.

<sup>126</sup> Reply, ¶191.

<sup>127</sup> Reply, ¶¶192, 193.

241. On the contrary, the Claimant considers that “*beneficio*” is a term of art in the mining sector that means “processing” as shown by the definitions of the term provided by the Claimant.

242. In this regard, it should be noted that Article 90 of the Mining Law refers to “una planta de beneficio” meaning a processing plant. No provision of said law uses the word “*aprovechamiento*” in the context of processing.<sup>128</sup>

v. *Processing Assets do not become reversionary assets because processing activities could form an integral part of the activity*

243. In this regard, the Claimant refers to the Respondent’s argument that even if processing is not a reserved mining activity and is instead an ancillary or related activity, the processing assets would be reversionary if processing activities “*formed an integral part of the [...] main purpose of the concession.*” Venezuela notes in this regard that the Project was established as a mining-metallurgical project and the fact that Venezuelan law classifies mining activities as “primary” or “related” does not necessarily mean that such related activities do not form an integral part of the primary mining activities since they are essential to same. It inferred that in these cases, the assets utilized in the related or ancillary activity would also be reversionary because they are an essential to the mining activity. Therefore, it concluded that this would be the case with the Processing Plant.<sup>129</sup>

244. In the Claimant’s opinion, this argument is circular and contradictory. It is based on a deliberate obfuscation between Processing Assets being “integral to the project,” as devised by MLDN, and the scope or purpose of the concession as granted by the Government.<sup>130</sup>

245. Likewise, the Respondent acknowledges there is a distinction under Venezuelan law between “primary” and “related” mining activities but then argues, without any supporting evidence, that related activities can be conflated with primary ones.

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<sup>128</sup> Reply, ¶194.

<sup>129</sup> Reply, ¶195.

<sup>130</sup> Claimant’s PHB, ¶76.

246. The Mining Law clearly distinguishes between primary and related mining activities, and provides that only those assets required for the “primary” activities are reversionary. The assertion that the assets used for related activities are reversionary because they may be labelled as “essential” to primary mining activities is nonsensical and contradicts well-settled administrative law principles governing the issue of the reversion of assets in concessions.
247. While it is agreed that the Claimant admits that the Project was established as a mining-metallurgical project, the two activities (mining and metallurgy) are separate. MLDN did not need to build a Processing Plant to explore for and extract ore from the LDN deposit (i.e. conduct the primary mining activities). A processing plant may have been necessary for the mine to be economically viable, but MLDN could have extracted the ore and transported it outside the area of the concessions for processing by a third party. In short, the fact that it chose to build a plant and process the ore itself in the area of the concessions does not affect the legal nature of the Processing Assets.<sup>131</sup>
248. Moreover, just because an asset is integral to the ultimate commercialization or monetization of the ore extracted, such as offices in urban areas or vehicles at the ports, does not mean that it is integral to the mining of that ore, the latter being the primary activity which is the object of the concessions.<sup>132</sup>
249. It is noteworthy that Venezuela does not go so far as to assert that processing was “the object of the concession.” Pursuant to Clause 18 of the Concessions, assets are only reversionary if they are used for the “object of the concession.” The object of a contract in civil law has a specific meaning that refers to the essential core obligation or service under the contract.<sup>133</sup>

vi. *Processing was not the “object of the concessions”*

250. Processing was not the object of the concessions, because:

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<sup>131</sup> Reply, ¶196.

<sup>132</sup> Reply, ¶197.

<sup>133</sup> Reply, ¶198.

(i) Articles 24 and 25 of the Mining Law provide that “only” exploration and exploitation can be the object of mining concessions.

(ii) MLDN was not obliged under the Remaining Concessions to itself build a Processing Plant or conduct metallurgical processing of the ore extracted from the LDN Deposit. The Concessions included processing activities as special advantages separate from the mining activities that were the object of the concessions. The processing activities thus cannot be argued to constitute the “object” of the Concessions.

(iii) The fact that MLDN proposed in its feasibility study to itself build and operate a processing facility within the area of one of the concessions does not change matters. It is incorrect to say that the Plant was an integral part of the Project from the outset. The Ministry of Mines granted MLDN 10 of its mining concessions (the First Concessions) years before the company even presented a pre-feasibility study providing for the construction of a processing plant. No matter how much Anglo American recognizes that the Plant was necessary for its economic viability, this does not affect the characterization of the activities and Processing Assets under Venezuelan law or the applicable legal principle. The principle cannot change depending on who builds the plant or where they build it. In short, why would the concessionaire invest hundreds of millions in doing so if it did not expect to get a full return on that investment or compensation in lieu?<sup>134</sup>

vii. *There is no “general reservation” of primary and related or ancillary mining activities in the 1999 Mining Law*

251. The Respondent, through its legal expert, also put forward the argument that the Mining Law establishes a “general reservation” arising out of the general declaration of public use in Article 3 of the 1999 Mining Law. According to Professor Canónico, as a result of the foregoing, all mining activities are reserved to the State in one form or another. There are several problems with this argument according to the Claimant.<sup>135</sup>

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<sup>134</sup> Reply, ¶198.

<sup>135</sup> Claimant’s PHB, ¶36.

252. First, a declaration of public purpose cannot be equated with a declaration of reservation to the State. The “public purpose” declaration is a common feature in legislation that involves areas of public interest (including on issues as diverse as agricultural land and private home construction). Professor Canónico himself eventually conceded this at the Hearing.<sup>136</sup>
253. Second, if the argument is true, it would mean that conducting the related activities of the mining sector may only be done through a concession contract. However, there are no concessions for related activities.<sup>137</sup>
254. Third, if the argument is true, it would render superfluous the power granted to the State in Article 86 of the Mining Law to reserve to itself by separate decree related or ancillary activities (including processing).<sup>138</sup>
255. The Claimant also argues that the alternative legal arguments of the Respondent on reversion are flawed. Likewise, it considers that the Respondent’s analysis based on the use of the term “mining activities” in Article 102 of the Mining Law as including both the primary and related mining activities is incorrect. In this regard, it refers to the legal opinions of Professor Brewer-Carías who maintains that the term “mining activities” in Article 102 refers exclusively to primary mining activities. In sum, reading Article 102 of the Mining Law in conjunction with Clause 18 of the Remaining Concessions which limits reversion to assets used for the object of the concession confirms the Claimant’s position.<sup>139</sup>
256. It is also untrue that that MLDN agreed in its concessions contract that all of its assets would revert to the State because contractually it only agreed to the reversion of the assets used for the object of the concession.<sup>140</sup>
257. The Claimant also contests the Respondent’s argument regarding the special advantages suggesting that processing is the object of the concession by virtue of the special advantages which, according to the Respondent, contemplate an obligation to perform processing activities. The Claimant objects to this argument

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<sup>136</sup> Claimant’s PHB, ¶38.

<sup>137</sup> Claimant’s PHB, ¶39.

<sup>138</sup> Claimant’s PHB, ¶40.

<sup>139</sup> Claimant’s PHB, ¶66.

<sup>140</sup> Claimant’s PHB, ¶67.

because the special advantages of Clause 5 of the Remaining Concessions cannot be read either as a commitment to perform processing activities nor as an obligation to build a Plant. Clause 5 of the Remaining Concessions contemplates processing as merely an option.<sup>141</sup>

258. In short, the Claimant objects to the Respondent's argument based on Article 60 of the Law on Promotion of Private Investment under the Concession System ("**Investment Law**"), pointing out that said Article does not apply to the MLDN concessions which were issued in 1992 under Article 63 of said Law, which provides that it will not apply to concession contracts concluded before its entry into force. In addition, Article 60 makes it clear that only concession assets are reversionary.<sup>142</sup>

259. Finally, the Claimant considers the Respondent's argument regarding tax exemptions irrelevant for purposes of reversion. The Respondent contends that if MLDN took advantage of the tax exemptions in relation to assets used for the mining activity it is because it assumed that processing is a mining activity. The Claimant objected to this, stating that under the Mining Law the relevant rule relating to tax exemption covers all assets used for the mining activity in its different phases and MLDN always interpreted the tax exemptions to apply in respect of both its reversionary and non-reversionary assets.<sup>143</sup>

260. By virtue of the foregoing, as long as the Tribunal accepts the premise that the non-reversionary assets were effectively non-reversionary, the ownership of MLDN over the assets is proven and, accordingly, expropriation established.<sup>144</sup>

*viii. Alternatively, even if the Processing Assets were reversionary assets, the Claimant would still be entitled to compensation for the non-amortized value of same*

261. The reversion of assets free of charge to the State only applies in respect of reversionary assets when those assets have been fully amortized by the concessionaire.

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<sup>141</sup> Claimant's PHB, ¶70.

<sup>142</sup> Claimant's PHB, ¶74.

<sup>143</sup> Claimant's PHB, ¶89.

<sup>144</sup> Claimant's PHB, ¶136.

262. This alternative argument is based on Article 48 of the Investment Law, which provides that any reversionary assets that have not been fully amortized by the concessionaire will revert to the State with payment of compensation for the non-amortized portion of the investments.<sup>145</sup>
263. According to the Claimant: *“If the processing assets did revert to Venezuela at the end of the concession, then Venezuela has property rights by law, provided that it compensates for the non-amortized portion of those assets. And in view of the fact that the compensation was not paid, the formal property rights continue with Minera and the confiscation is also an expropriation.”*<sup>146</sup>
264. The Claimant points out that, contrary to the Respondent’s assertion, the issue of compensation for the non-amortized portion of the Processing Assets has been raised in these proceedings since the Claimant’s Memorial.<sup>147</sup>
265. The Claimant emphasizes that the Respondent’s expert in his two reports cited the Investment Law and referred to it as the *“ley de referencia”* in respect of the 1999 Mining Law. In fact, he confirmed that the latter confirmed that the Investment Law applies subsidiarily to issues not addressed in the Mining Law. Moreover, he explicitly confirmed that the Mining Law is silent on the question of non-amortized assets.<sup>148</sup>
266. Contrary to the assertion of the Respondent’s legal expert, Article 48 expressly provides for the possibility that the term of the concession may be insufficient to fully amortize certain assets.<sup>149</sup>
267. The Claimant objects to the assertion that Anglo American has already recovered and amortized its investments in the Processing Assets through its operations between 2001 and 2012. That is not correct. Amortization is an accounting concept that has little to do with the definition that the Respondent purports to apply to it. In that sense, it emphasizes that the portion of an asset’s historical cost

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<sup>145</sup> Claimant’s PHB, ¶91.

<sup>146</sup> Tr. D1, 1443,5-12, Claimant’s Opening Statement.

<sup>147</sup> Claimant’s PHB, ¶92.

<sup>148</sup> Claimant’s PHB, ¶92.

<sup>149</sup> Claimant’s PHB, ¶94.

that is allocated over its expected useful life in amortization has no relationship with the revenue it generates.<sup>150</sup>

268. Finally, Anglo American refers to the fact that the Respondent has suggested that the reference to the concept of amortization in Article 48 is related to a noun in the female gender which allows one to assume that it refers to the amortization of investments (*la amortización de las inversiones*) not of the reversionary assets (*los bienes reversibles*). Anglo American objects that such a distinction does not have the least relevance since the Processing Assets can be considered both as assets and as investments.<sup>151</sup>

b) *Arguments related to the existence of an expropriation*

269. Venezuela does not dispute the well-established principle of international law that an expropriation may occur (i) directly through the seizure or transfer of investments to the State, or (ii) indirectly when the State's measures in respect of an investment have the same practical effect as a direct expropriation, namely the substantial deprivation of the value, use, or economic benefit of property.

270. The Parties agree that the characterization of a particular measure as expropriatory depends upon the actual effect of the measures on the investor's property. If the measures at stake have the effect of depriving an investor of the control, ownership, or use and enjoyment of its investment, there is no need to enquire into the motives, intention, or form of the measures in order to conclude that an expropriation has occurred. Venezuela does not dispute this.<sup>152</sup>

271. In this case, all the requirements for an expropriation have been met:

- (i) Anglo American has an indirect shareholding in MLDN, which is an investment protected by the Treaty, being a "form of participation in a company" under Article 1(a) of the Treaty. The non-reversionary assets held by MLDN conferred significant value to Anglo American's shareholding. That value was destroyed when Venezuela took those assets on the illegitimate basis that they were reversionary, without paying any

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<sup>150</sup> Claimant's PHB, ¶95.

<sup>151</sup> Claimant's PHB, ¶97.

<sup>152</sup> Reply, ¶204.

compensation. Under the Treaty and international law, this constitutes an indirect expropriation of Anglo American's indirect shareholding in MLDN; and

- (ii) The expropriation can also be framed as a direct expropriation of Anglo American's interest in MLDN's assets. This interest is also an investment (a "kind of asset") protected by the Treaty as it constitutes an interest in "movable and immovable property" and a "*claim to money [...] having a financial value*" in the sense of Article 1(a) of the Treaty. On the other hand, Anglo American's interest in MLDN's assets was directly expropriated when Venezuela took those assets on the illegitimate basis that they were reversionary, without paying any compensation.<sup>153</sup>

272. Regardless of the approach adopted, the inevitable conclusion is that Anglo American's investments were expropriated when Venezuela illegitimately took non-reversionary assets in November 2012.<sup>154</sup>

273. The Claimant objects that Venezuela, by blurring its arguments on the merits with its arguments on jurisdiction, argues that Anglo American does not explain how the Plant relates to the investment under the Treaty (acquired through its stake in MLDN) and what value the Plant would have without the concessions.<sup>155</sup>

274. Anglo American points out that the broad definition of investment in the Treaty allows the Plant and other Processing Assets, as well as the Inventory, to be included in that definition.

275. As noted by RPA, most of the funds invested in the Project were spent on the Processing Assets, both from the perspective of capital and operational expenditure. Further, the Plant is related to Anglo American's investment because the Plant is what conferred most value to its shareholding in MLDN once the Concessions were terminated, and that shareholding is a protected investment under the Treaty.<sup>156</sup>

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<sup>153</sup> Reply, ¶205.

<sup>154</sup> Reply, ¶206.

<sup>155</sup> Reply, ¶207.

<sup>156</sup> Reply, ¶208.

276. As regards the value of the Plant without the concessions, that value is explained in FTI's expert reports.<sup>157</sup>

277. The Claimant cites in support of its position, several cases in which:<sup>158</sup>

- (i) Tribunals have awarded compensation equal to the value of all assets of the local subsidiary that had been taken by the Government without seeking to categorize each one as an individual "investment," as the Respondent would have the Tribunal do in this case;
- (ii) Tribunals have determined that an expropriation can arise as a result of the State's misapplication of its domestic law which has the effect of depriving the investor of the use or economic benefit of its investment; and
- (iii) Tribunals have determined that the termination of certain mining concessions without justification under domestic law constituted an indirect expropriation of the Claimant's shareholding in its local subsidiary.

278. The Claimant concludes that, as with the cases referred to above, the taking of MLDN's non-reversionary assets on expiry of the Concessions cannot be justified by Venezuelan law, whether under the principle of reversion or otherwise. In the absence of any justification under Venezuelan law, those assets remained the property of MLDN, and their seizure constituted an expropriation by Venezuela, an expropriation not only of MLDN's assets but also of Anglo American's indirect investments in Venezuela, made through MLDN.

c) *Arguments related to the illegal nature of the expropriation*

279. The Respondent's second argument that if the expropriation had taken place it would have been lawful is erroneous. For an expropriation to be lawful under the Treaty, it has to meet the four cumulative conditions contained in Article 5: the expropriation has to be (i) for a public purpose, (ii) on a non-discriminatory basis, (iii) in accordance with due process, and (iv) against prompt, adequate, and effective compensation. The Claimant alleges that three of those cumulative requirements were not met. The Parties agree that the Tribunal need not find that

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<sup>157</sup> Reply, ¶208.

<sup>158</sup> Reply, ¶¶208-214.

Venezuela violated any of these conditions in order to conclude that Venezuela's conduct was expropriatory.<sup>159</sup>

*i. No compensation was paid*

280. Venezuela did not pay prompt, adequate, and effective compensation. Venezuela does not dispute in fact that it has not paid any compensation. Instead it argues that a breach of this condition alone does not render the expropriation unlawful. The cases cited in support of this contention basically state that when a State offers compensation in good faith that has not been accepted, then, depending on the terms of that offer, the mere fact of non-payment does not render the expropriation unlawful.

281. These cases stand in stark contrast to the present cases since Venezuela made no offer of compensation.

282. When States have failed to offer or provide for compensation for a taking, tribunals have concluded that this fact in itself makes the expropriation unlawful.<sup>160</sup>

*ii. Anglo American did not receive due process*

283. Venezuela failed to accord Anglo American due process in carrying out the expropriation. Venezuela ignored all attempts by the Claimant and MLDN to engage with it regarding the classification of the reversionary and the non-reversionary assets ahead of handover. It did not notify MLDN of its intention to take all project assets on the handover date by forcing its representatives to sign under protest a certificate of transfer without any opportunity to review or amend and then ignored all of Anglo American's and MLDN's attempts to negotiate a solution post-handover. Furthermore, the Respondent deprived MLDN of the protection of the Law on Expropriation for Public Cause or Social Use of July 1, 2002 ("**Expropriation Law**") by effecting its taking as a reversion rather than an expropriation.<sup>161</sup>

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<sup>159</sup> Reply, ¶216.

<sup>160</sup> Claimant's PHB, ¶138.

<sup>161</sup> Claimant's PHB, ¶139.

284. The Respondent cannot be defended by arguing that the Treaty's due process requirement merely requires it to make available an *ex post* right to challenge the expropriation. This argument cannot be sustained in light of the other case law cited by Anglo American supporting a wider reading of due process.<sup>162</sup>
285. Notwithstanding the foregoing, even on Venezuela's own narrow reading, there was no due process in this case. Although it is true that there is case law that determined that the protections under the Expropriation Law were sufficient to accord due process, in this case the Claimant was deprived of said protections since the takeover of the assets was disguised as a reversion instead of an expropriation. Nor is it welcome the Respondent's argument suggesting that Anglo American could have made use of the remedies available to make constitutional *amparo* appeals to challenge the asset seizure. This type of argument has recently been rejected in *Tenaris v. Venezuela II*, with the tribunal dismissing Venezuela's attempt to place the onus on the investor to initiate the procedures the State was obliged to follow.<sup>163</sup>

*iii. The assets seizure was not for a public purpose*

286. Venezuela's expropriation was not undertaken for a public purpose. By taking over the non-reversionary assets under the reversion regime, the Government had not declared any public purpose for the taking. Venezuela does not deny this, yet it asks the Tribunal to afford it deference and a broad margin of appreciation for, in effect, all matters involving its natural resources. The Tribunal, however, cannot give deference to a public purpose that did not exist or was not declared at the time of the events. Neither can it accept that any Government action concerning the mining sector automatically incorporates a public purpose. Accepting this premise would render otiose the need to analyze whether the action taken was for the declared public purpose. As for Venezuela's attempt to shoehorn the expropriation of the non-reversionary assets into its general policy of recovering its natural resources and seeking new associative formulae, such objectives do not justify the taking of the Processing Assets and Inventory without compensation. Also, any public purpose is highly questionable when the State is

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<sup>162</sup> Reply, ¶¶239-240.

<sup>163</sup> Claimant's PHB, ¶140.

considering allowing another private entity (such as Glencore International AG) to use and profit from those assets.<sup>164</sup>

287. Anglo American thus asks the Tribunal to find that Venezuela unlawfully expropriated its investments by taking the non-reversionary assets without compensation, due process, or public purpose.

2) Position of the Respondent

288. The Claimant has not shown that Venezuela violated Article 5 of the Treaty. Under international law, a measure is expropriatory if the claimant is substantially or radically deprived of the use and economic enjoyment of its investments. The Respondent draws the Tribunal's attention to the fact that the Claimant at the Hearing did not place great emphasis on the violation of Article 5 of the Treaty, so much so that it did not even mention it during its closing arguments.<sup>165</sup>

289. During this proceeding the Claimant had difficulty in defining what its investment is, which was supposedly expropriated. It was in its Reply that the Claimant for the first time put forward a theory based on the supposed indirect expropriation of Anglo American's indirect 91.37 percent shareholding in MLDN in addition to a direct expropriation of Anglo American's indirect interest in the non-reversionary assets held by MLDN. During the Hearing, the Claimant seemed to abandon said distinction but did not explain how the shares supposedly lost value due to the taking of assets, or what the relationship was between the assets and its supposed investment. It did not clarify what was the value of its shares before and after the reversion.<sup>166</sup>

290. International case law concurs that the nature and validity of rights and interests that were supposedly expropriated must be analyzed pursuant to the laws and regulations of the host country. In this sense, case law had determined that "*for there to have been an expropriation of an investment [...] the rights affected must exist under the law which creates them.*" It is local law that determines the existence of property rights. In relation to the foregoing, and before examining the

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<sup>164</sup> Claimant's PHB, ¶141.

<sup>165</sup> Respondent's PHB, ¶119.

<sup>166</sup> Respondent's PHB, ¶120.

elements of Article 5 of the Treaty, the Respondent considers it relevant to determine whether the Claimant was entitled to the reversionary assets in accordance with the Venezuelan law elements.<sup>167</sup>

a) Arguments related to ownership of the assets

291. For the Respondent, “*the reversion was contractually agreed without any compensation upon expiration of the concession, with the assets used for the purpose of the concession reverting to the State.*”<sup>168</sup> Consequently, the assets used for the purpose of the concession ceased to be owned by the concessionaire upon expiration of the concession and could not be expropriated. It also maintains that Venezuelan laws confirm that the Plant was not an asset that could be expropriated.

i. *The Mining Titles governed the contractual relationship between the State and the concessionaire, establishing that reversion would take place without compensation*

292. The rights allegedly affected derive from the concession contracts, the so-called Mining Titles, granted in 1992, 1995, and 1999, which have the legal nature of administrative contract between the State and a concessionaire by which the State granted the right to develop an activity reserved exclusively to the State, requiring the concessionaire to comply with several obligations. It is an uncontested fact among the respective legal experts that the Mining Titles have the legal status of a contract. Specifically, under the Mining Titles owned by MDLN the State and the concessionaire agreed that:

- The State grants “*the exclusive right to extract and utilize the ore [...] as well as the other rights determined by the Mining Law in favor of the concessionaire*” and
- when the concession is terminated for any reason, “*the works and other permanent improvements [...] including the facilities, accessories and equipment, and any other assets used for the purpose of the concession and*

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<sup>167</sup> Respondent’s PHB, ¶121, where it refers to *EnCana Corporation v. Republic of Ecuador*, (CAIL Case No. UN3481), Award, February 3, 2006, ¶ 184 (RLA-76).

<sup>168</sup> Respondent’s PHB, ¶121.

*which form an integral part thereof [...] shall become the full property of the State, free of liens and encumbrances, without any compensation.*"<sup>169</sup>

293. According to the Respondent, in accordance with the express terms of the concessions, MLDN had the right to comprehensively extract and use the ore, which is not limited to the extraction of the ore but also includes crushing, enriching, preparation, transportation and commercialization activities.<sup>170</sup>

294. The reversion was thus contractually agreed upon without any compensation upon expiration of the concession, with the assets used for the purpose of the concession reverting to the State. This was an offer of the concessionaire in the form of the special advantages, which became a contractual clause of mandatory compliance for the Parties. Upon expiration of the concessions, the provisions of the Mining Titles were simply complied with. Therefore, there is no case here for an expropriation claim.<sup>171</sup> The Mining Titles clearly establish a reversion obligation of the Plant and this analysis should stop here.<sup>172</sup>

*ii. Venezuelan legislation confirms that the Plant was not an asset susceptible to expropriation*

295. The Claimant decided to embark on a distorted analysis of Venezuelan legislation to support its claim. Likewise, Anglo American incorrectly argues that the 1999 Mining Law must be applied (notwithstanding the fact that the Mining Titles were issued under the 1945 Mining Law) and it incorrectly interprets Article 86 of said Law, which, according to the Claimant, permits the absolute reservation of the "related or similar activities" by means of a decree. Based on this interpretation, the Claimant attempts to create a false distinction (which does not exist in the 1999 Law and certainly not in the 1945 Law) between assets subject to "mining activities" which, according to Anglo American, are reversionary assets and assets involved in "related or ancillary activities," (including processing), which, according to the Claimant, are not reversionary.<sup>173</sup>

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<sup>169</sup> Mining Titles - El Tigre, San Onofre No. and San Antonio No. 1 (November 10, 1992 (C-3), Seventh Special Advantage.

<sup>170</sup> Respondent's PHB, ¶122.

<sup>171</sup> Respondent's PHB, ¶30.

<sup>172</sup> Respondent's PHB, ¶122.

<sup>173</sup> Respondent's PHB, ¶126.

296. Assuming for the sake of argument that the Mining Titles were not sufficiently clear, it would be necessary to also analyse as a default supplement Venezuelan legislation and its guiding principles to establish the context in which they were signed.<sup>174</sup> To that end, the Respondent emphasizes that the Mining Titles were granted while the 1945 Mining Law was in force and it is under this Law that the State made a declaration of public purpose of the entire mining activity, which established a general State reserve over the entire sector, independently of the fact that the Law did not expressly do so.<sup>175</sup> With regard to the “preparation” activity, the law inextricably linked it to the exploitation of the mine or, to put it more precisely, it included it in the mining exploitation right, as can be seen in Articles 63, 64, and 270 of the 1945 Mining Law.<sup>176</sup> In addition, the 1945 Mining Law did not distinguish between primary mining activities and activities related to or ancillary to the primary mining activity, thus making reference to mining rights in general. Therefore, the mining rights granted through the mining exploration and exploitation concessions encompassed the right of extraction, utilization, processing, enrichment and preparation, by virtue of the declaration of public use of all the material and given that the legislation did not establish differentiated regimes for the different activities.<sup>177</sup>
297. With the passing of the 1999 Mining Law, from a practical point of view, the scope of the rights granted and obligations assumed originally by then concessionaire, Cofeminas, under the regime of 1945, which MLDN inherited, was not altered, and thus, the interpretation of the Mining Titles in relation to the terms and scope of the rights granted in the Mining Titles must be made under the 1945 Mining Law. This is so by express provision of the 1999 Mining Law, whose Article 129 stipulated that the effective concessions granted prior to the entry into force of the Law would conserve their exploitation right as they were granted in the respective Titles, including the special advantages stipulated in favor of the Republic offered by the concessionaire, which would remain in force.<sup>178</sup>

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<sup>174</sup> Respondent’s PHB, ¶127.

<sup>175</sup> Respondent’s PHB, ¶127.

<sup>176</sup> Tr. Day 4, 841:6-17 (Canónico).

<sup>177</sup> Respondent’s PHB, ¶130.

<sup>178</sup> Respondent’s PHB, ¶131.

298. Therefore, the 1999 Mining Law did not alter the special advantages originally offered by the concessionaire in the Mining Titles.

299. Therefore, the only Article of the 1999 Mining Law applicable or relevant for purposes of resolving the dispute is Article 102 regarding the reversion of assets without any compensation upon expiration of the concessions, given that said Law was in force upon expiration of the concessions. According to said Article and consistent with what was offered by the concessionaire in the respective Mining Titles, upon expiration of the concessions, the assets used for the purpose of the concession (“extracting and utilization”) would revert to the State without any compensation.<sup>179</sup>

*iii. The Claimant distorts and offers an incorrect interpretation of the 1999 Mining Law*

300. Claimant embarked on an unnecessary analysis of different provisions of the 1999 Mining Law which are not applicable to this dispute. Be that as it may, the distinction made by the 1999 Mining Law regarding primary and ancillary mining activities is irrelevant since the 1945 Mining Law made no such distinction. It is not even made in the Regulations of the 1999 Mining Law. In any event, in accordance with the 1999 Mining Law, there are three primary activities: exploration, exploitation, and utilization, which may be carried out in five different methods, one of which is “exploration and subsequent exploitation concessions.” When reference is made to exploration and exploitation concessions, it necessarily includes the concept of utilization. In other words, there is no doubt that the 1999 Mining Law contemplates a global vision of mining activity and there is no intention to create the distinctions invented by the Claimant and its expert.<sup>180</sup>

301. In addition, there are two possible levels in the reserve of an activity. First, Article 302 of the Constitution of Venezuela establishes that the State reserve of activities must be carried out by legislation, and never by means of a statutory provision of a lower legal rank, such as a decree. In concordance with Article 302 of the Constitution, the 1999 Mining Law declared all mining activity to be of public

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<sup>179</sup> Respondent’s PHB, ¶133.

<sup>180</sup> Respondent’s PHB, ¶137.

use, determining a general reserve over the entire activity. The reserve regime laid down in Articles 23 and 86 of the 1999 Mining Law stipulates a level of subsequent, absolute reserve of the State on minerals and activities, reserving both the management and activity in order to be developed by the public body itself and thus eliminating the possibility of granting concessions. This second level of reserve, “absolute,” is what is referred to by such Articles in the Mining Law and can be carried out by means of a Decree. Therefore, even if an absolute reserve of the ancillary or related activities is not made, said activities are already reserved, but to a lesser degree.<sup>181</sup>

302. Furthermore, even if the Processing Plant and other assets used for the mining activity were deemed to be part of the ancillary or related activities—a distinction we have already seen to be irrelevant for purposes of this dispute—they would also be assets subject to reversion if the processing activities were an integral part of the mining activity. To that end, the Claimant demonstrated that the mining project would not have been economically viable without the construction of a plant.<sup>182</sup>

303. Therefore, based on the reversion stipulated in the Mining Titles, all assets intended for the purpose of the mining activity must be reverted to the State without any compensation. The Plant was an asset subject to reversion under the Mining Titles and under Venezuelan law. Consequently, *“in this case, the concessionaire whose assets are subject to reversion is not allowed any compensation whatsoever because when the prerequisites for reversion of the identified assets are met, the concessionaire loses the property rights to them, which means that even expropriation would not be in order.”*<sup>183</sup>

*iv. The subsidiary claim of the Claimant*

304. Finally, the Respondent refers to the claim the Claimant has referred to as “subsidiary” to the expropriation claim based on Article 48 of the Investment Law. According to the Claimant, if the Processing Assets and the Inventory are deemed reversionary, based on said Article 48, the reversionary assets that have not been

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<sup>181</sup> Respondent’s PHB, ¶139.

<sup>182</sup> Respondent’s PHB, ¶140.

<sup>183</sup> Canónico’s LO, ¶59.

fully amortized should be compensated. However, this thesis is based on a gross distortion of said Article and should be rejected outright.<sup>184</sup>

305. The Investment Law is supplementary to the Mining Law, the special law that regulates mining concessions. As the Claimant admits, the Mining Law regulates the concept of reversion and clearly states that the reversion under the Mining Law is “without compensation.” Therefore, Article 48 turns out to be entirely inapplicable.<sup>185</sup>
306. Second, even if the Investment Law were applicable, the Claimant’s interpretation of Article 48 is erroneous and its approach to the concept of amortization is erroneous.
307. The concept of amortization has a general economic sense that has nothing to do with accounting: it is defined as the recovery of an investment. This interpretation is also consistent with the definition of the concept of concession in the Investment Law which the legislator refers to as the right to exploit the work or the service during a certain period of time sufficient “*to recover the investment, the costs of exploitation incurred and obtain a reasonable rate of return on the investment.*”<sup>186</sup>
308. Based on the foregoing, it is therefore clear that the purpose of Article 48 of the Investment Law was to guarantee the “*recovery of the investment and the expenses incurred.*” This is something very different from an artificial accounting amount.<sup>187</sup>
309. The Respondent emphasizes that Anglo American did not dispute that it recovered its initial investment in the Plant several years ago. The total cost of the investment for 100 percent of the project (i.e. the Plant and the Mine) was US\$550 million. The Claimant recovered this cost and much more and therefore would have nothing to claim even if the Investment Law were applicable.<sup>188</sup>

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<sup>184</sup> Respondent’s PHB, ¶141.

<sup>185</sup> Respondent’s PHB, ¶239.

<sup>186</sup> Respondent’s PHB, ¶240.

<sup>187</sup> Respondent’s PHB, ¶242.

<sup>188</sup> Respondent’s PHB, ¶243.

310. In sum, the Respondent also emphasizes that this Tribunal has as its objective the determination of compliance or non-compliance with the Treaty and, if necessary, of the respective compensation. Its objective is not to execute the domestic laws of Venezuela. Even if Article 48 of the Investment Law required compensation for some unamortized amount, the lack of payment of unamortized accounting amounts does not constitute an expropriation under the Treaty.<sup>189</sup>
311. The Claimant has not explained the reason why an alleged right to an accounting amount under local law constitutes a violation of the Treaty under international law. Neither has it established that there was a violation of due process, since neither MLDN nor the Claimant attempted to assert their supposed rights through the domestic judicial system.<sup>190</sup>
312. In fact, there is no evidence that MLDN even mentioned this supposed right in its communications with the Republic with respect to the reversionary nature of the Plant.
313. Therefore, the Claimant has not established its ownership right over the assets that it claims have been expropriated.

b) Arguments regarding the non-existence of an expropriation

314. Under international law, expropriation can only be carried out with respect to the property of the Claimant that constitutes its “investment” under the Treaty. In turn, Venezuelan law determines whether private assets or rights are property rights granted to the Claimant. The Processing Plant and related assets, regardless of their purchase title, did not represent property rights conferred on Anglo American.
315. Quite the contrary, as essential assets for the enforcement of the objective of MLDN’s mining concessions, these should automatically revert to the State upon expiration of the concessions. Anglo American’s claim is based on its own classification of the assets as non-reversionary assets.<sup>191</sup>

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<sup>189</sup> Respondent’s PHB, ¶244.

<sup>190</sup> Respondent’s PHB, ¶244.

<sup>191</sup> Counter-Memorial, ¶260.

316. Under Article 5(1) of the Treaty, expropriation can only occur with respect to Claimant’s investment. While the Treaty defines the term “investment,” it does not define the term “expropriation.” In its relevant part, under applicable customary international law, a direct expropriation occurs when an investment is nationalized or otherwise directly expropriated through formal transfer of title or physical seizure.<sup>192</sup>
317. A direct expropriation is readily apparent: there is an open, deliberate, and acknowledged taking of property, such as outright seizure, or formal or obligatory transfer of the title in favor of the host State.<sup>193</sup>
318. The text of Article 5 of the Treaty establishes that the question of whether a particular measure amounts to an expropriation must be answered before determining whether the conditions necessary to constitute a lawful expropriation have been met.
319. The onus is also on the Claimant to first demonstrate that its alleged investment—not merely its alleged property rights or other interests—was expropriated. Only if it can establish expropriation can it then attempt to demonstrate that this expropriation was carried out unlawfully.<sup>194</sup>

*c) Arguments related to the legality of the alleged expropriation*

320. According to the Respondent, there is no expropriation given that Anglo American did not succeed in demonstrating non-compliance with the requirements set out in Article 5 of the Treaty, i.e. (i) there was no violation of due process, (ii) reversion had a public purpose, and (iii) the mere lack of compensation does not render an expropriation unlawful. Therefore, the conduct of the State can in no way be deemed unlawful.

*i. There was no violation of due process*

321. The standard applicable to due process requires that the existence of grave procedural irregularities be demonstrated. Due process requires a fair procedure

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<sup>192</sup> Counter-Memorial, ¶262.

<sup>193</sup> *Idem.*

<sup>194</sup> Counter-Memorial, ¶263.

*“that grants an affected investor a reasonable chance, within a reasonable time to claim its legitimate rights and have its claims heard.”*<sup>195</sup> In addition, the due process standard should offer the possibility of judicial review. Likewise, an expropriatory process must be free of arbitrariness.<sup>196</sup>

322. The Claimant alleged that the Respondent ignored all Anglo American’s and MLDN’s attempts to engage with it in relation to the classification of assets before the handover. This allegation was contradicted by the testimony of Anglo American’s witness, Mr. Euder Piantino, who recognized that the so-called “*joint minutes*” or “*draft minutes*” precisely contained both positions (that of the State and that of MLDN) with respect to their understanding regarding the classification of assets.<sup>197</sup>

323. Therefore, the allegation that the Claimant was not heard regarding the classification of assets is false and must be rejected.

324. Likewise, the Claimant alleged that the Respondent denied MLDN all of the protections and procedures in the Expropriation Law of Venezuela by disguising its taking as a reversion rather than an expropriation and that by seizing the assets without any formal administrative act it further denied MLDN the ability to file any administrative appeal. The Respondent maintains that the Expropriation Law is not applicable in the present case, but rather the Mining Law. In addition, as explained by Professor Canónico, the Claimant had several appeals available that it could have filed in Venezuela. The Claimant chose not to file any kind of appeal. Therefore, this cannot constitute a violation of due process, given that, as confirmed by case law, in cases where the Claimant had access to the courts, but chose not to make use of these opportunities, there was no violation of due process. Moreover, the right to contest a supposedly expropriatory measure, after the fact, is sufficient to render nonexistent a violation of due process. Therefore, it is clear that, in the case at hand, there was no violation of due process.<sup>198</sup>

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<sup>195</sup> *DF v. Hungary*, ¶ 435 (CLA-1) (translation of the lawyers: original text in English: “*reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor*”).

<sup>196</sup> Respondent’s PHB, ¶144.

<sup>197</sup> Respondent’s PHB, ¶145.

<sup>198</sup> Respondent’s PHB, ¶147.

*ii. Reversion had a public purpose*

325. States have broad discretion to determine whether an expropriation serves a public purpose. In this case there is no need to declare the existence of a public interest, given that the Mining Titles and the Mining Law clearly stipulate what should occur upon termination of the concessions. The Mining Law declares the public utility of all mining material according to a strategically defined policy that the Venezuelan Government makes regarding its mineral resources. The State had the right to protect the sector and assume control of its natural resources, which was known and, more importantly, agreed to by the concessionaire, safeguarding the general interest. Therefore, the Tribunal must reject the unnecessary analysis regarding what occurred with the Plant and its levels of production after it reverted to the State in order to determine whether there was a public purpose. Case law concurs that, in any event, the determination of the existence of a public purpose must be carried out at the date of expropriation, and not subsequently.<sup>199</sup>

326. It is for all of the foregoing that the Respondent considers that there was no breach of this requirement of Article 5 of the BIT.

*iii. The mere lack of compensation does not render an expropriation unlawful*

327. The Claimant merely states that there was no compensation without demonstrating why the mere lack of payment makes an expropriation unlawful. The right to compensation originates with expropriation and without expropriation there is no right to compensation. Given that the Respondent has already demonstrated that there was no expropriation in this case, the discussion about non-payment is irrelevant.<sup>200</sup>

328. The Claimant's argument that the only exception to the requirement of compensation is when there has been an offer by the State that has been rejected by the concessionaire is not valid here. In effect, in this case, the Mining Titles and the Mining Law did not require the offer of compensation, given that the Plant would revert to the State upon termination of the concession.<sup>201</sup>

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<sup>199</sup> Respondent's PHB, ¶149.

<sup>200</sup> Respondent's PHB, ¶150.

<sup>201</sup> Respondent's PHB, ¶152.

329. For all of the above, there was no violation of Article 5 of the Treaty given that, in accordance with the Mining Titles and the Mining Law, the Plant and other reversionary assets were subject to a reversion. The concessionaire contractually promised that the Plant would be reverted without the right to compensation.<sup>202</sup>

3) Decision of the Tribunal

330. The Claimant has brought a main claim and a secondary claim in relation to the alleged expropriation of assets.

331. The main claim of Anglo American is that the seizure of the non-reversionary assets by Venezuela has led to an expropriation of Anglo American's investment in MLDN under the terms of Article 5(1) of the Treaty.<sup>203</sup>

332. Anglo American's secondary claim is that Venezuela's seizure of the assets, even assuming them to be reversionary, has led to an expropriation under the terms of Article 5(1) of the non-amortized portion of MLDN's assets in which Anglo American has an indirect participation.<sup>204</sup>

333. In order to resolve the Claimant's claims in relation to the alleged expropriation of the so-called Processing Assets and the Inventory, the Parties are unanimous in raising the question of the reversionary status of said assets as decisive. In effect, the indispensable premise to expropriation, before evaluating whether the requirements of said legal concept are met, is that the assets are owned by the Party alleging the expropriation. If, as claimed by the Respondent, the ownership of all the assets of the Plant was transferred to the State when the concessions expired, the issue of the expropriation of those assets does not arise.

334. The Respondent's first line of defense is based on the content of the Mining Titles, which, in its opinion, contractually transferred to the State ownership of all the assets used for the purpose of the concession. It considers that the analysis should

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<sup>202</sup> Respondent's PHB, ¶153.

<sup>203</sup> The main claim of Anglo American is that the Processing Assets should not have been returned to the State and so the claim for them should be quantified on that basis. Reply, ¶471.

<sup>204</sup> Tr. D6, p. 1443: "*If the processing assets revert to Venezuela at the end of the concession, then Venezuela has property rights by law, provided it compensates for the non-amortized portion of those assets. Since compensation has not been paid, the formal property rights remain with Minera and the seizure of the assets is also an expropriation. And its indirect interest under Article 1 and its right to claim for losses under Article 5.2, and that is in respect to the non-amortized portion of the processing assets.*"

stop here<sup>205</sup> and that it is only if the agreement of the Parties in the Mining Titles does not have this consequence that it would be appropriate to analyze Venezuelan legislation and its guiding principles as a secondary claim.<sup>206</sup>

335. The Respondent's approach is logical, but it cannot be accepted in its simplicity. It is true that if through the Mining Titles the ownership of the entire Plant was contractually transferred to the State without compensation when the concessions expired it would not be necessary to look into Venezuelan legislation, nor into what are the non-reversionary assets in order to decide if they were expropriated, nor to rule on the Claimant's secondary claim on whether there is an obligation on the part of the State to pay compensation corresponding to the valuation of the unamortized reversionary assets. However, the Mining Titles are not found in a legal vacuum but within the Venezuelan legal system, from the date on which they were consented to until the date on which they expired. Therefore, it is necessary to analyze Venezuelan legislation to assess the effects of the obligations consented to by the Claimant in the Mining Titles, on the ownership of the assets upon expiry of the concessions and on any rights of the Claimant in cases of reversion. Once this analysis has been made, the Tribunal may decide whether it is true that the entire ownership of the Plant was contractually transferred to the Venezuelan State upon the expiration of the concessions.
336. It is only in case the Tribunal concludes that all the assets of the Plant were not contractually transferred to the State as a result of the Mining Titles that the Tribunal would have to examine the Claimant's arguments regarding any expropriation by the Respondent of assets of the Plant that would not be reversionary under Venezuelan law or, if reversionary, had not been amortized, which would have justified compensation.
337. In this first and necessary phase of its analysis, the Tribunal will first examine the content of the Mining Titles (a) and then examine their effects on the Claimant's property right at the expiry date of the concessions, in light of the Venezuelan legislation applicable at this time (b).

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<sup>205</sup> Respondent's PHB, ¶122.

<sup>206</sup> Respondent's PHB, ¶127.

a) The Mining Titles

338. Each of the Mining Titles awarded to the Claimant contains the following eighteenth clause:

*“The concessionaire is obliged, within its possibilities, to cooperate with entities of a social nature engaged in mining, which will be indicated by the Ministry. Likewise, it will offer to supply these entities with technology, as long as they do not disturb mining development. **It is understood that the works and other permanent improvements, in addition to the machinery, tools, equipment and materials, including the facilities, accessories, and equipment and any other assets used for the purpose of the concession and that form an integral part thereof, regardless of how they were acquired, shall become the full property of the State, free of liens and encumbrances, without any compensation, upon termination of the concession regardless of the cause, without the concessionaire being able to make the withdrawals referred to in the Sole Paragraph of Article 61 of the Mining Law, consequently, it is obliged to conserve and maintain said assets in proven conditions of integrity and proper functioning according to the advances and applicable technical principles. For the purposes of compliance with this obligation, the concessionaire shall inform the Ministry in good time about the acquisition of assets to be used for the concession, within thirty (30) days following the date of each acquisition. It shall also refrain from acts of disposal, deactivation, or withdrawal of any of the assets included in the reversion, without prior written authorization from this Ministry and duly justified request, before the Ministry, for authorization to use third party property assets in the concession works.**”<sup>207</sup> (emphasis added)*

This clause, described by the Parties as a special advantages clause, is found in the so-called Remaining Concessions the assets of which would have been partially

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<sup>207</sup> Revised Mining titles of the Remaining Concessions: San Antonio 1, Camedas 1 and Camedas 3 concessions (C-20). These rights were revised by Resolution of the Minister of Energy and Mines on December 29, 1999, to correct material errors made in the Mining Titles granted in 1996. There are small differences between the revised text and the first text, with no implications for its interpretation. For example, Clause 18 of the revised text was Clause 17 in the first text, with an identical wording.

expropriated according to the Claimant. It is not in dispute between the Parties that this clause establishes a contractual obligation for the concessionaire.<sup>208</sup>

339. According to the Claimant, “[the] Special Advantages are special contractual arrangements between a concessionaire and the Government concerning environmental and other social obligations. Special Advantages are agreed and set out separately from the object of the concession.”<sup>209</sup> For the Respondent, “reversion was not a process arbitrarily imposed by the State upon Anglo American. Reversion is simply a contractual mechanism provided for in the Mining Titles since 1992.”<sup>210</sup>

340. The eighteenth special advantages clause of the Mining Titles establishes two cumulative criteria for an asset to pass in full ownership to the State without compensation:

- (i) The asset is intended for the purpose of the concession; and
- (ii) The asset forms an integral part of the concession.

341. With respect to the first of these criteria, the Parties disagree on whether the Processing Assets and the associated Inventory can be considered as assets intended for the purpose of the concession.

342. The Claimant holds the position that the Processing Assets are not used for the purpose of the concession, since it considers that the purpose of the concession is exclusively exploration and exploitation and that processing is not part of those activities.

343. The Respondent for its part contends that through the Mining Titles which MLDN owned, the State and the concessionaire agreed to the exclusive right to extract and utilize the mineral, which is not restricted to the extraction of the ore, but also includes crushing, enrichment, processing, transportation and commercialization

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<sup>208</sup> Claimant’s PHB, ¶69: “As Professor Brewer-Carías explains, the Special Advantages are special contractual arrangements between a concessionaire and the Government concerning environmental and other social obligations.” Respondent’s PHB, ¶24: “Reversion is simply a contractual mechanism provided for in Mining Titles since 1992.”

<sup>209</sup> Claimant’s PHB, ¶69.

<sup>210</sup> Claimant’s PHB, ¶24.

activities. Therefore, the Processing Assets were intended for the purpose of the concession.

344. Before discussing this issue, it is necessary to define the legal framework in which it is proposed. The concession contracts involved in this litigation were entered into when the 1945 Mining Law was in force.<sup>211</sup> It is to this Law that the Clause 18 of the Mining Titles refers when it mentions Article 61 of the Mining Law. It is this Law therefore that defines the purpose of the concession. In addition to the wording of the Mining Titles, it is also in light of the provisions of the 1945 Mining Law and the principles of interpretation of Venezuelan law<sup>212</sup> that it must be decided whether the Processing Assets can be assets intended for purpose of the concession as mentioned in Clause 18 of the Mining Titles.

345. The content of the 1945 Mining Law is even more significant than the contractual obligation of reversion in Clause 18 of the Mining Titles which corresponds in part to Article 61 of the 1945 Mining Law that also includes an obligation of reversion on the part of the concessionaire. This Article provides that:

*“The concession that reverts to State’s possession passes to it free of all encumbrances, and with all such other works and all other permanent betterments as exist therein, in addition to the abandoned machinery, implements, tools, and materials found within the perimeter of the concession.*

*Sole paragraph. - For purposes of this Article and Article 53, the abandonment of said elements will be considered effective:*

- 1) If they are not withdrawn before the concession is relinquished;*
- 2) If they are not withdrawn before the expiry of the term because the concession is granted; and*

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<sup>211</sup> Claimant’s PHB, ¶54; Brewer-Carías’ LO, ¶ 51; Respondent’s PHB, ¶130; Canónico’s LO, ¶16.

<sup>212</sup> See Article 4 of the Venezuelan Civil Code, which states: “Statutes must be given the sense that appears obvious from the meaning of the words, according to the connection between them and the intent of the legislator. When the provision of the Statute is not precise, the provisions governing similar cases or matters shall be taken into consideration; and, if there is still doubt, the general principles of law shall be applied.”

3) *If they are not withdrawn before the expiry referred to in Article 55 is declared.”*

346. If the contractual reversion envisaged in Clause 18 of the Mining Titles corresponds to the legal reversion of Article 61 of the 1945 Mining Law, it is only in part. The essential difference is that, under the Law the concessionaire can avoid reversion if it withdraws what is within the perimeter of the concession before the expiry of that concession. In the Mining Titles, the concessionaire has waived this power to withdraw. Upon the termination of the concession, it was forced to transfer to the State, without compensation, the ownership of “*the works and other permanent improvements, in addition to the machinery, tools, equipment and materials, including the facilities, accessories and equipment, and any other assets used for the purpose of the concession and which form an integral part thereof...*” Consequently, the concessionaire cannot dispose of what it agrees to leave in the scope of the concession on the grounds that it would become the property of the State. Everything that was used for the purpose of the concession and that was an integral part thereof must remain and only assets that do not fall within this definition can be withdrawn.
347. It follows both from the wording agreed upon by the Parties to the Mining Titles and from the 1945 Mining Law that even if the purpose of the concession is defined as exploration followed by exploitation of the mine, all activity, even after extraction, that has the consequence of profiting or benefiting from the mine, has to be considered as the purpose of the concession.
348. The Claimant alleges that the purpose of the concession is limited to the exploration and extraction of the minerals.<sup>213</sup> The Tribunal notes, however, that, as underscored by the Respondent, the Mining Titles confer on the concessionaire “*the exclusive right to extract and utilize the ore indicated above for twenty (20) years, as well as the other rights determined by the Mining Law in favor of the concessionaire ...*” According to Dr. Brewer-Carías, the legal expert witness for the Claimant, the notion of utilization includes the “*storage, possession, preparation, transport, distribution and trade of the ores.*”<sup>214</sup> Consequently, the

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<sup>213</sup> Claimant’s PHB, ¶28.

<sup>214</sup> Brewer-Carías’ LO, ¶27 note 16.

subject matter of the concessions discussed in this arbitration is not limited to exploration and extraction, but also includes the utilization of the mineral, which includes processing, which is how the Claimant has rendered the word “*beneficio*.”<sup>215</sup>

349. This conclusion is confirmed by several clauses of the Mining Titles. For example, Clause 5 states that “*The concessionaire offers the inclusion of the national added value for metallurgy, refining, manufacturing or industrialization if deemed possible or convenient; otherwise, it shall inform the Ministry of the reasons for the impossibility or inconvenience.*” The Claimant interprets this clause as if the processing activities it describes were optional, by reason of the mention of “*if deemed possible or convenient.*” However, it is enough to read the wording to understand that the only optional thing is the incorporation of added value and not the activities themselves.<sup>216</sup>
350. The eighteenth<sup>217</sup> and twelfth clauses<sup>218</sup> of the Mining Titles are precise indications that processing is part of the purpose of the concession. None of the obligations of the concessionaire according to these clauses could be fulfilled without processing ore.
351. The wording of the 1945 Mining Law in light of which the Mining Titles should be interpreted confirms this conclusion. Its Article 94 states that the concessionaires are obliged:

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<sup>215</sup> The Claimant explains that the term “*beneficio*” or “*beneficiation*” is a technical term of art in the mining sector which is used as a synonym of “*processing*,” Reply, ¶188 e); “*Beneficio*” or *beneficiation* is a technical (mining) term meaning *processing*.” Claimant’s PHB, ¶33.

<sup>216</sup> In this regard, see the statement of Dr. Canónico, legal expert presented by the Respondent, Tr. D4, 847:5-21.

<sup>217</sup> Clause 11: “*The concessionaire undertakes to sell to the manufacturing industry at international market price currencies, up to ten percent (10%) of its final production (ferronickel) during the first ten (10) years, from the beginning of the production of said alloy and up to fifteen percent (15%) in the same terms from the eleventh (11) year until production ends. To this end, the Ministry of Energy and Mines will inform the concessionaire, within the first quarter of each year, of the amount required by the national industry and after that period without obtaining the information, the concessionaire will be able to commit one hundred percent (100%) of its production. It is understood that the percentages indicated will result from the total production of ferronickel obtained from the mineral extracted from the concessions granted to the company Minera Loma de Níquel, C.A.*”

<sup>218</sup> Clause 12: “*The concessionaire is committed to continue the development of activities of industrial application of the mineral, through the provision of appropriate technology and the timely creation of the corresponding industrial establishments in fields not yet existing in the country.*”

1) *To carry out all operations of exploration, exploitation, preparation and transportation of the minerals, subject to the principles and scientific mining practices in each case;*

.....

7) *To submit to the Ministry of Development, within the month of January each year, a General Report in triplicate on the activities of the company in the previous year. In this Report, the following data shall always be given:*

.....

*b) Industrial technical procedures used to extract and prepare the ore;*

.....

*d) The amount of ore exploited per concession in the year, specifying the amount utilized and processed by the company, the amount sold in the country and the amount exported, as well as the number of tons and grade of the proven reserves:*

352. As an additional indication that the 1945 Mining Law incorporates processing within the purpose of the concession, its Article 96 which reads as follows should also be mentioned:

*“Engines, machinery, instruments, utensils, accessories, spare parts, materials, chemical products, lubricants and other work elements that, in the judgment of the Federal Executive, are required in the development and operation of the mines and their facilities, as well as in establishments for the preparation, enrichment and processing of the minerals, shall be exempt from import duties.”*

353. By virtue of the foregoing, the first criterion provided by Clause 18 of the Mining Titles to consider an asset as reversionary is met with respect to the Processing Assets.

354. Regarding the second criterion of Clause 18 of the Mining Titles on the asset forming an integral part of the concession, it is much less controversial than the first, since the Claimant stated in its Post-Hearing Brief: “MLDN’s Processing Assets may have formed an integral part of the Project, but were not part of the

reserved exploration or exploitation activities under the Remaining Concessions.”<sup>219</sup>

355. This criterion remains controversial to the extent that the Claimant considers, as its legal expert, Dr. Brewer Carías, that it is a fact that the Plant is “*included in the MLDN mining-industrial project*” but that “*this did not make it integral to the concession from a legal point of view.*”<sup>220</sup>

356. The Tribunal considers that it is the first criterion that requires that the asset be connected with the activity that is the purpose of the concession or intended for the activity of the concession. On the other hand, it considers that the second criterion, being “integral” to the concession, should be interpreted with reference to the situation of the asset within the concession understood as a physically tangible project. If it were a legal criterion, it would be redundant with the requirement that the asset be used for the purpose of the concession.

357. In short, Clause 18 of the Mining Titles should be interpreted as subjecting to reversion the assets that are allocated to the concession by intended use and by appurtenance.

358. Therefore, the Tribunal considers that the Processing Assets have to be considered as integral to the concession, regardless of whether the project contemplated the construction of the processing plant from the beginning or not.

359. Accordingly, the Tribunal considers that the Processing Assets were assets that were to revert to the Venezuelan State as a result of Clause 18 of the Mining Titles.

360. The Tribunal reaches the same conclusion for the same reasons as regards the Inventory, since it was not suggested that the Inventory consisting of several raw materials, spare parts and consumables associated with the processing, have any other regime for purposes of reversion.

361. Accordingly, the Tribunal concludes that the Parties agreed in the Mining Titles, interpreted in light of the 1945 Mining Law, that, upon the expiry of the

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<sup>219</sup> Claimant’s PHB, ¶5.

<sup>220</sup> Brewer-Carías’ LO2, ¶153.

concessions, ownership of the Processing Assets and the Inventory would pass to the State without compensation.

b) *The effects of Venezuelan law applicable at this time on the Claimant's property rights at the date of expiry of the concessions*

362. The 1945 Mining Law, applicable when the Mining Titles were granted, was followed by the 1999 Mining Law, which entered into force on September 29, 1999. (i) On September 17, 1999, the Investment Law was adopted. (ii) Both Laws were in force when the Remaining Concessions expired on November 10, 2012. Claimant's main lawsuit on expropriation is essentially based on the 1999 Mining Law, while its subsidiary lawsuit is based on the Investment Law. Below the Tribunal will proceed to analyse (i) the 1999 Mining Law and (ii) the Investment Law.

i. *The 1999 Mining Law*

363. The Parties disagree as to the effects of the new Law on the concessions and the Mining Titles granted under the former 1945 Law.

364. According to the Claimant, "... Article 136 of the 1999 Mining Law derogated the 1945 Mining Law. However, Article 129 of the 1999 Mining Law provided for a number of specific exceptions to the immediate application of the new Law. In particular, in respect of pre-existing concessions (such as MLDN's Remaining Concessions), Article 129(e) established that their terms would remain in force and that the 1999 Mining Law (including its provisions for reversion of assets) would become fully applicable to them one year after its entry into force (i.e. on 29 September 2000)."<sup>221</sup> The Claimant adds: "It is therefore uncontroversial that the 1945 Mining Law was derogated by the 1999 Mining Law and that the latter and the Remaining Concessions were in full effect on 12 November 2012 when the Venezuelan Government took over MLDN's Remaining Concessions. As a consequence, the provisions of the 1999 Mining Law and the Remaining Concessions govern the termination of MLDN's Remaining Concessions and the issue of the reversion of MLDN's assets."<sup>222</sup>

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<sup>221</sup> Claimant's PHB, ¶55.

<sup>222</sup> Claimant's PHB, ¶56.

365. However, the dispute denied by the Claimant exists. According to the Respondent, “... *the 1999 Mining Law by no means affects the reversion obligation contained in the Mining Titles granted under the Mining Law of 1945. As shown in Article 129(f) of the Mining Law of 1999, said Law expressly protects the special advantages already offered in concessions that were granted in accordance with the previous Law. Consequently, the Mining Titles and their special advantages, as well as the rights and obligations contained therein, must be interpreted under the Mining Law of 1945.*”<sup>223</sup> It adds that “... *the only Article of the Mining Law of 1999 applicable or relevant to the effects of the resolution of this dispute is Article 102 regarding the reversion of assets without any compensation upon expiration of the concessions, given that said Law was in force upon expiration of the concessions.*”<sup>224</sup>
366. In fact, this position adopted by the Respondent appeared late in this proceeding, first during the Hearing<sup>225</sup> and then in its Post-Hearing Brief,<sup>226</sup> and does not correspond to its previous position, based on the legal opinion of Professor Canónico, who declared without hesitation that the 1999 Mining Law was “[a]pplicable to the concessions of this dispute according to the provisions of Article 129 of the 1999 Mining Law.”<sup>227</sup> In fact, this legal opinion of Professor Canónico is essentially based on the 1999 Mining Law, although it refers to the 1945 Mining Law “*in effect when the concession was granted, for purposes of understanding the scope of the concession.*”<sup>228</sup>
367. The Tribunal agrees with the position of Professor Canónico set forth in his Legal Opinion regarding the interrelationship between the 1945 and the 1999 Laws which is essentially the analysis of the Claimant. The 1999 Mining Law is applicable in a major way to the dispute on reversion, as a result of Article 129(e), which, after having listed several exceptions to the application of the Mining Law to concessions granted before its entry into force, states: “*the other provisions of*

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<sup>223</sup> Respondent’s PHB, ¶28.

<sup>224</sup> Respondent’s PHB, ¶133.

<sup>225</sup> Tr. D6, 1507:8-9 and 1505:22-1506:4.

<sup>226</sup> Canónico’s LO, ¶ 17, note 14.

<sup>227</sup> As mentioned in the previous paragraph.

<sup>228</sup> Canónico’s LO, ¶29.

*this Law shall apply after a period of one (1) year from the date of its publication in the Gaceta Oficial of the Republic of Venezuela”).*

368. However, the exceptions to the application to concessions granted before the entry into force of the 1999 Mining Law are not without significance. This is provided for in Article 129, which states:

*“The concessions in force granted prior to the entry into force of this Law, shall be subject to its provisions in the following terms:*

*(a) They shall retain their right of exploitation only over the minerals and in the form of presentation, as they were granted in the respective right.”*

.....

*(f) The special advantages stipulated in favor of the Republic offered by the concessionaire shall continue in force.”*

369. Accordingly, Clause 18 of the Mining Titles continues to apply, with its effects on the reversion of the Processing Assets and the Inventory, as analyzed by the Tribunal. The Tribunal does not need to enter into an analysis of the 1999 Mining Law to confirm that both the Processing Assets and the Inventory became the property of the State when the concessions expired. Clause 18 is a contractual agreement the scope of which cannot be modified by a subsequent Law that expressly confirms that this clause continues in force.

370. However, even if Clause 18 of the Mining Titles would not continue in force after the entry into force of the 1999 Mining Law, the solution would be no different.

371. To conclude that under the 1999 Mining Law the Processing Assets and the Inventory are not reversionary, the Claimant places special emphasis on the close relationship between the reversionary principle and the reserved nature of the activities used to carry out the object of the concessions. It goes on to explain that the reversionary assets are the assets used for activities reserved to the State and that can therefore only *“be carried out by private parties pursuant to a concession,”* therefore, it states that they *“revert to the State upon the expiry or*

*termination of the concession.*”<sup>229</sup> Anglo American is not limited to the reversion /reserved activity/activity of the concession, but adds to the equation the primary mining activities. Specifically, it argues that, in the legal framework of the Venezuelan mining activity, the primary mining activities are reserved activities and therefore the assets used within the framework of said activities are reversionary assets. The related activities are activities that are not reserved by nature and the assets used to carry out said activities do not revert to the State. It is on the basis of this distinction that the Claimant advocates that the assets related to processing, an activity that it describes as a related activity unlike the primary activities of exploration and exploitation, and therefore a non-reserved activity, are non-reversionary assets. In the same vein, the Claimant argues that since the Mining Titles provide that the reversionary assets are those intended for “the purpose of the concession,” this implies that the assets intended for an activity that, because it is not reserved, does not require the granting of a concession, do not revert.

372. The starting point of the Respondent is different. Remember that the Mining Titles which are by nature administrative contracts expressly provided for a reversion to the State of the assets used for the object of the concession without distinguishing if said assets were involved in carrying out the primary or the related activities thereby forcing the Tribunal to resolve the question of the reversionary or non-reversionary nature of the assets based on analysis, and even limiting this analysis to the Mining Titles and their reversion clause.
373. Notwithstanding that the Tribunal has already indicated that it agrees with the Respondent’s position that the analysis should start with the Mining Titles which are the instruments that regulate ownership of the assets involved in the concession granted to MDLN, the Tribunal considers it appropriate to express why it has not considered the distinction between primary mining activity and related activities—carried out by the Claimant on the basis of the 1999 Mining Law—relevant for purposes of deciding whether an asset is reversionary or not.

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<sup>229</sup> Reply, ¶188 (a).

374. The Claimant has introduced into the reversion debate the issue of the distinction made by the 1999 Mining Law between primary mining activities and related activities, stressing that if the former are activities reserved to the State, the latter are not. In the opinion of the Claimant, the purpose of a concession is limited to its primary activity, which is what warranted the granting of a concession.
375. The Claimant and its expert, Professor Brewer-Carías, consider this circumstance decisive because they suggest that the underlying logic for the concept of reversion in the concession contracts is that they permit the activities to be reserved.
376. This analysis, however, does not convince the Tribunal, for the following reasons.
377. First, regarding the logic underlying the concept of reversion, the Tribunal does not share the Claimant’s opinion. From the writings of legal scholars provided with Professor Brewer-Carías’ legal opinion, it is clear that it is not the carrying out of an activity reserved to the State that accounts for the assets reverting to the State at the end of the contractual relationship but rather the “*compensation for the economic benefits obtained by the concessionaire*” and “*continuity in the provision of the service, because through reversion the granting Administration can continue exploiting the concession, directly or indirectly with the reverted assets.*”<sup>230</sup> The Tribunal understands this last aspect to be extremely important.
378. Second, the distinction between primary activity and related activity is not contemplated in the 1999 Mining Law as a criterion for deciding whether an asset is reversionary or not. Article 102 of the 1999 Mining Law, relevant to this discussion according to both Parties,<sup>231</sup> on the topic of reversion of assets makes reference to the reversion of assets “*acquired for use in mining activities.*” This definition does not cover the Claimant’s position at all since it does not refer to the primary/related distinction laid down in Article 86 of said text, the implication being that Article 102 does not intend to exclude related activities linked to

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<sup>230</sup> Reversion of assets in the concession contract, Carlos Soto “*The purpose of the reversion of assets is, first, it is a technique that serves as compensation for the economic benefits obtained by the concessionaire during the execution of the concession contract (...) Second, it ensures continuity in the provision of the service, because through the reversion the granting Authority can continue to exploit the concession, directly or indirectly with the reverted assets.*” (BC-26) [unofficial translation].

<sup>231</sup> Reply, ¶63; Respondent’s PHB, ¶133.

primary activities from the scope of mining activities. The Claimant's own legal expert when referring to related activities still describes them as "*mining activities*."<sup>232</sup> MLDN itself, when requesting tax exemptions for imports for the purchase of Processing Assets, acknowledged by its own acts that processing activity is a mining activity since the legal framework only allowed such exemptions when the Processing Assets had as its purpose elements indispensable for "mining activity."<sup>233</sup> It does not matter that an activity is considered as ancillary to a primary activity, it does not cease to belong to the category of mining activity. Otherwise, said activities would not be regulated by a legal text with provisions concerning mining activity.

379. Third, the distinction made by the 1999 Mining Law between primary mining activities and related activities did not exist within the legal framework of the mining sector at the time the Mining Titles were signed and they do not make the slightest reference to assets intended for a reserved activity nor to assets intended for the primary activity of the concession. The Tribunal is of the opinion that if the 1999 Mining Law is effectively applicable to the dispute on the reversion under the provisions of Article 129(e) thereof ("*The other provisions of this Law shall apply after a period of one (1) year from the date of its publication in the Gaceta Oficial of the Republic of Venezuela*"), the Mining Titles' clause on reversion cannot be interpreted in light of a text that did not exist when the Mining Titles were awarded. It is a fact that the 1945 Mining Law did not contemplate the distinction between primary mining activities and related mining activities.

380. On the contrary, as indicated, the Mining Titles refer to the assets used for the object of the concession, also allowing for a much broader scope of interpretation than the restrictive interpretation that the Claimant seeks to impose on the basis of mere conjectures about of the link between (i) the reserved nature of an activity

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<sup>232</sup> "*Primary and related mining activities in mining legislation*," Brewer-Carías' LO2, p.24. However, later, Professor Brewer-Carías describes the related activities as activities related or ancillary to mining [by suggesting the use of the conjunction "a"] which do not incorporate mining. The Tribunal understands that Professor Brewer-Carías distinguishes the mining activities under concession from other mining activities and considers that Article 103, when referring to mining activities, refers to the mining activities under concession. However, the fact is that in his opinions the legal expert does not go so far as to affirm that the related activities are not mining activities. At the same time, the Tribunal notes that the legal text does not refer to the mining activities under concession but to mining activities.

<sup>233</sup> Article 92 of the 1999 Mining Law, (C-19).

and the reversion of the assets of a concession, and (ii) the primary nature of an activity and the object of the concession.

381. To summarize, the fact that the 1999 Mining Law establishes a distinction between primary activities and related activities is irrelevant for purposes of determining whether or not the assets are reversionary. The only thing that it does is allow one to determine whether an activity is reserved or not, a point which, as previously explained, is of no interest here.
382. By virtue of the foregoing, the criteria considered by the Tribunal to be decisive for considering an asset as reversionary are the criteria set out in Clause 18 of the Mining Titles, which led the Tribunal to conclude that both the Processing Assets and the Inventory were reversionary. The entry into force of the 1999 Mining Law does not alter that decision.
383. This conclusion is also consistent with the criterion in Article 102 of the 1999 Mining Law, which refers to the reversion of “*assets acquired for the object of mining activities.*”
384. Furthermore, even if it were considered, as the Claimant alleges, that processing is an activity related to the exploitation activity, the same conclusion would be reached. Indeed, the mere fact that an asset is not intended for the primary activity of the concession, but for the related activity, does not make it an activity outside the object of the concession.
385. The Tribunal does not share the restrictive position of the Claimant in relation to the expression “*used for the object of the concession*” in the sense of equating it with the object of a contract in civil law.<sup>234</sup> There is nothing in the wording to confirm that the word “object” has to be considered as the purpose of the contract according to its meaning in civil law. On the contrary, the use of the expression “*assets acquired for the object of mining activities*” in the Mining Law confirms that the concept of reversion in Venezuelan mining activity is related to the assets intended for mining activities and not to the object of the concession contract understood as the essential core obligation or service under the contract.

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<sup>234</sup> Reply, ¶198.

386. The Tribunal therefore categorically rejects the Claimant's postulate that only the assets intended for the primary activity of the concession contract understood as corresponding to the reserved activity should revert.

ii. *Investment Law*

387. In the alternative, the Claimant requests the application of Article 48 of the Investment Law, which provides as follows:

*"The contract will establish the term of the concession, the investments that must be made by the concessionaire and the assets that, due to being used for the works or the service, will revert to the granting entity, unless they could not be fully amortized during the aforementioned term.*

*The contract will also indicate the works, facilities or assets implemented by the concessionaire that are not subject to reversion, which, if deemed to be of public use or public interest, may be subject to reversion after payment of their price to the concessionaire."*

388. The Claimant alleges that if the Processing Assets were considered to be reversionary, they were nevertheless expropriated from the portion of the processing assets the value of which has not been amortized.<sup>235</sup>

389. The Parties have admitted the Investment Law applies subsidiarily to issues not addressed in the Mining Law.<sup>236</sup> This is the result of the wording of Article 4 of

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<sup>235</sup> Anglo American presents no alternative claim relating to the value of the Inventory should it be considered a reversionary rather than a non-reversionary asset: see footnote No. 653 of the Claimant's PHB.

<sup>236</sup> Claimant's PHB, ¶93: "*Professor Canónico has confirmed that the Private Investment Law applies on a supplementary basis to matters not addressed in the Mining Law;*" Canónico's LO2, ¶62 "*As I indicated in my first opinion, a reference law in these cases, applicable on a supplementary basis, is the Law on Promotion of Private Investment under the Concession System of 1999 (Concessions Act), which is aimed at regulating the public works and services concessions in Venezuela but, as Dr. Brewer-Carías agrees, applies to all other concessions on a supplementary basis when their respective legal provisions do not provide specific regulations. The fact that it is applicable on a supplementary basis to concession agreements in general in Venezuela can be seen from Article 4"* Examination of Dr. Brewer-Carías,: "*[On] the reversion of assets in the concessions, it must be taken into account, pursuant to Article 48 of the Investment Law through the 1999 Concessions, that it is also applicable in mining matters and I understand there is no discrepancy between the experts on this,*" Tr. D4, 757: 18-758: 18; Respondent's PHB, ¶239: "*First, the Claimant and its Venezuelan law expert, Prof. Brewer-Carías, admit that the Law of Concessions, which has as its original purpose the regulation of concessions for public works and infrastructure, is supplementary to the Mining Law, the special law that regulates mining concessions."*

the Investment Law, which provides that it should be applied subsidiarily to contracts governed by a *lex specialis*:

*“The concession contracts whose granting, administration or processing is regulated by special laws will be preferably governed by said laws in addition to the provisions of this Decree-Law in such cases.”*

390. Article 63 of the Investment Law, set out below, is also relevant to the discussion:

*“Concession contracts concluded before the entry into force of this Decree-Law shall be executed in accordance with the terms and conditions originally agreed upon. However, the Parties may adapt them to the provisions of this Decree-Law.”*

The content of the Mining Titles was never adapted to the provisions of the Investment Law.

391. This means that the Investment Law reserves the application of the provisions of the Mining Titles to the contracts prior to its entry into force, confirming in this regard the transitional provisions of the 1999 Mining Law, in particular paragraphs (a) and (f) of its Article 129 which, with respect to contracts entered into before its entry into force, provide respectively:

*(a) they shall retain their right of exploitation only over the minerals and in the form of presentation, as they were granted in the relevant title.*

.....

*(f) The special advantages stipulated in favor of the Republic offered by the concessionaire shall continue in force.*

392. Thus, Article 129(e) of the Mining Law and Article 63 of the Investment Law require the implementation of Clause 18 of the Mining Titles, already analyzed by the Tribunal, which states:

*“It is understood that the works and other permanent improvements, in addition to the machinery, tools, equipment and materials, including the facilities, accessories, and equipment and any other assets used for the purpose of the concession and that form an integral part thereof, regardless of how they were acquired, shall become the full property of*

*the State, free of liens and encumbrances, without any compensation, upon termination of the concession regardless of the cause.*"<sup>237</sup>

393. For the Claimant's property to be deemed to have been expropriated from the part of the Processing Assets that had not been amortized when the concessions expired, it would have been necessary, given the non-amortization, for it to have opposed their becoming the property of the Respondent as did the other reversionary assets.
394. The Respondent objects that the Investment Law has a merely supplementary application and since the Mining Law regulates the reversion of reversionary assets without compensation, it must be concluded that Article 48 of that Law is not applicable.
395. Article 102 of the 1999 Mining Law provides as follows:

*"The lands, permanent works, including facilities, accessories and equipment that are an integral part thereof, as well as any other movable or real property, tangible and intangible, acquired for the purpose of mining activities must be maintained and preserved by the respective owner in good operating condition according to the latest technology and applicable technical principles throughout the term of the mining rights and any possible extension thereof, and shall become fully owned by the Republic, free of liens and encumbrances, without any compensation, upon the extinction of such rights, whatever the grounds for the extinction."*

396. It is clear that when Article 102 of the 1999 Mining Law declares that the reversionary assets shall pass in full ownership to the Republic, it does not introduce any distinction between those that were amortized and those that were not. According to the Claimant, the silence in this regard would justify the intervention of the Investment Law as a subsidiary measure and the application of its Article 48, which, indeed, makes the distinction.<sup>238</sup> This silence could also mean, however, that the Mining Law did not mention the non-amortized reversionary assets as they were considered to pass in full ownership to the Republic without compensation, just as those that were amortized.

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<sup>237</sup> Revised Mining Titles of the Remaining Concessions (C-20).

<sup>238</sup> Claimant's PHB, ¶93.

397. Both positions are not credible for the Tribunal. If the 1999 Mining Law had contemplated the particular case of non-amortized reversionary assets, it would have mentioned them. Another explanation as regards the Investment Law could be the one suggested by the Respondent's expert witness, Professor Canónico, that *"the concept of assets that could not be totally amortized during the term of the concession is inadmissible, because the concessionaire should have foreseen that the assets needed for the operation of the concession must be amortized over the course of its term, and that is why Article 2 of the Concessions Law provides that the concession will have a sufficient duration so that the contractor is able to recover its investment."*<sup>239</sup> This last interpretation is also unconvincing: if the Investment Law, dated September 17, 1999, i.e. 12 days before the entry into force of the Mining Law of September 29, 1999, expressly contemplated the situation of assets that were not amortized in the case of reversion at the end of the concession it is because the legislators considered that the problem actually existed and needed a solution.
398. In light of these considerations, the Tribunal concludes that the Investment Law introduced a solution to the particular problem of non-amortized reversionary assets with which the 1999 Mining Law did not deal. As a supplementary law, the Investment Law makes the 1999 Mining Law whole in this regard. Therefore, if there is an unamortized portion of a reversionary asset, the ownership of said unamortized part of the reversionary asset remains the property of the concessionaire, as the Claimant rightly argues. This would be the solution if the Tribunal's analysis ignored the value that Venezuelan legislation assigns to what was agreed upon by the Parties.
399. However, both the 1999 Mining Law (Article 129(a) and (f)) and the Investment Law (Article 63) reserve the application, that is, the full validity, of the provisions of contracts prior to their respective entry into force. This means that the interpretation of the Investment Law and its link with the 1999 Mining Law is not sufficient to determine whether, in the present case, the non-amortized portion of the reversionary assets became the property of the Respondent.

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<sup>239</sup> Canónico's LO2, ¶67.

400. As emphasized by Professor Canónico, “... *the Mining Law establishes a regulation, the concession permit establishes a regulation and neither the Mining Law nor the concession permit speak of the period of amortization in this aspect.*”<sup>240</sup> Either way, when the laws themselves favor contractual agreements and when these agreements contained in the Mining Titles were reached at a time when the solutions contemplated by the new Law did not exist, the intent of the Parties is unfailingly the applicable law between the Parties. But there is more. Admitting that by application of the Investment Law the Claimant had the right to be compensated for the non-amortized portion of the Processing Assets would directly contradict Clause 18 of the Mining Titles which emphasizes that reversion will take place “*without any compensation.*” The agreement of the Parties could not be clearer and the Investment Law requires that it be respected.

401. By virtue of the foregoing analysis, the Tribunal concludes that, as a result of the contractual agreement contained in Clause 18 of the Mining Titles, the ownership of the Processing Assets and the Inventory passed to the State without the Claimant having the right to be compensated. The entry into force of the 1999 Mining Law and the Investment Law, which preserve the validity of previous agreements, did not oppose this transfer of ownership.

402. As the owner of the Processing Assets and the Inventory, the Respondent could not expropriate them. It took possession of assets that it owned by virtue of a contractual obligation with which the Claimant had to comply. Consequently, the Claimant’s claims regarding expropriation are dismissed, both with respect to its main claim and its subsidiary claim.

**B. Claims regarding the alleged breach of the standard of fair and equitable treatment**

403. The Claimant invokes a breach of the standard of fair and equitable treatment in relation to what it calls the claim for the seizure of the reversionary assets and also in relation to the claim for non-issuance of VAT CERTS.

404. Considering that the Tribunal reached the conclusion that the Respondent took assets that it owned by virtue of a contractual obligation with which the Claimant

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<sup>240</sup> Tr. D4, p. 962.

had to comply, no breach of the standard of fair and equitable treatment could occur in relation to said claim. Consequently, the claim of violation of the standard of fair and equitable treatment in relation to the seizure of the assets must be dismissed.

405. Only the claim relating to the alleged breach of the standard of fair and equitable treatment in relation to the non-issuance of VAT CERTS will be examined by the Tribunal. The Tribunal will present in turn the respective arguments of the Claimant (1) and of the Respondent (2), before ruling on the existence of the breach of fair and equitable treatment alleged by the Claimant (3).

1) Position of the Claimant

406. The Claimant notes that Venezuela denies that its action has fallen below the standard of treatment required by the Treaty, which it contends is limited to the minimum standard of treatment required by customary international law. While Anglo American disagrees as a matter of treaty interpretation, it argues that this debate is dogmatic given that modern tribunals recognize that the minimum standard of fair and equitable treatment under customary international law has evolved to require a level of protection equivalent to the autonomous treaty-based fair and equitable treatment standard.<sup>241</sup>

407. Regarding the actual content of the fair and equitable treatment standard, the specific components have been articulated in numerous ways. Anglo American focuses on four core elements of the standard - legitimate expectations, consistency and stability, transparency and due process, and non-arbitrariness— which it considers the Respondent to have breached. It emphasizes that since these elements are independent, breach of any one is sufficient to found a breach of the fair and equitable treatment standard.<sup>242</sup>

408. As an exporter, MLDN was entitled to reimbursement for VAT paid on its purchase of Venezuelan goods and services related to its operations in the form of VAT tax credits (“VAT CERTS”) pursuant to a recovery procedure set out in

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<sup>241</sup> Claimant’s PHB, ¶144.

<sup>242</sup> Claimant’s PHB, ¶145.

Article 43 of the VAT Law and in Partial Regulation No. 1. Save for the deduction requirement, the procedure is not in dispute.<sup>243</sup>

409. For a period of some 10 years from 2001, MLDN applied for and received VAT CERTS corresponding to tax periods between June 2001 and September 2007, in accordance with the VAT Law and Regulations. However, as from January 2009, Venezuela failed to issue any VAT CERTS or even formally respond to MLDN's Requests for VAT tax credit refunds ("**VAT Requests**") relating to tax periods from October 2007 through May 2012. While Venezuela ignored MLDN's Requests, it continued to grant them to other exporters. Venezuela has not denied this. Its only contention is that despite numerous (oral) requests from the National Integrated Service of Customs and Tax Administration ("**SENIAT**"), MLDN refused to deduct from its monthly VAT returns the VAT credits being requested (rather than those granted) as prescribed in an internal manual entitled *Standards and Procedures Manual on Value Added Tax Credit Refunds for Exporter Taxpayers* ("**Manual**").<sup>244</sup>
410. The Claimant describes how the factual and expert evidence before and at the Hearing demonstrates how SENIAT's deduction requirement in the Manual was arbitrary and inconsistent with SENIAT's consistent practice for almost a decade, the VAT Law, and its Regulations. Furthermore, this confirms that SENIAT breached its obligation to formally decide on or respond to MLDN's Requests, including the obligation to formally notify its change of policy. In short, the evidence provided does not show that other exporters complied with the deduction requirement.<sup>245</sup>
411. The Respondent flouted Anglo American's legitimate expectations that SENIAT would grant the requested VAT CERTS to MLDN so long as it satisfied the requirements in the VAT Law and Regulations, as per the common practice between SENIAT and MLDN over a period of nearly a decade. As demonstrated at the Hearing, making the deduction Venezuela relies on to justify its non-issuance of the requisite VAT CERTS was not a true legal requirement. No such

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<sup>243</sup> Claimant's PHB, ¶98.

<sup>244</sup> Claimant's PHB, ¶99.

<sup>245</sup> Claimant's PHB, ¶100.

requirement appeared in the VAT Law or Regulations. Moreover, for almost a decade prior to 2009, MLDN submitted its VAT requests without applying any deduction and SENIAT accepted this practice, issuing the required VAT CERTS without complaint. No change in the VAT Law or in the Regulations took place in 2009 (or, indeed, at any time since 2003). The Respondent had not formally notified MLDN of any change in interpretation of the Law. MLDN was thus legitimately entitled to expect that SENIAT would continue to abide by its common practices unless it was duly notified in writing otherwise. This principle is enshrined in Venezuelan law under the concept of “*confianza legítima*.”<sup>246</sup>

412. Venezuela also breached its obligation to accord a consistent, stable, and predictable legal framework by suddenly requiring MLDN to comply with a deduction rule that went against both the existing VAT Law and Regulations, as well as both Parties’ consistent past practice. In relation to the foregoing, the Claimant emphasizes that the Manual on which the deduction requirement was based was never published in the *Gaceta Oficial* nor shown to MLDN. SENIAT also never formally notified MLDN of the reasons for the change in interpretation of the Law.<sup>247</sup>

413. The Respondent’s conduct further suffered from lack of transparency and due process. As confirmed at the Hearing, SENIAT was required under Venezuelan law to issue a formal response to each of MLDN’s VAT Requests within 30 business days. The only thing MLDN received, however, were three *Actas de Requerimiento* pertaining to three out of its dozens of pending requests. These *Actas de Requerimiento* did not mention the Manual or explain the deduction requirement; they were not even formulated in mandatory terms. MLDN nevertheless responded to them but then never heard back. Ms. Villasmil, the Respondent’s witness at the Hearing, could not point to any formal communication by SENIAT to MLDN informing it of the change in interpretation, despite MLDN’s requests that it do so, which in turn prevented MLDN from making the requested deduction. All this amounts to serious administrative

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<sup>246</sup> Claimant’s PHB, ¶149(a).

<sup>247</sup> Claimant’s PHB, ¶149(b).

negligence and inconsistency in that entity arising to a level sufficient to breach the fair and equitable treatment standard.<sup>248</sup>

414. Finally, Venezuela's conduct was arbitrary, given that SENIAT's request that MLDN comply with the deduction requirement of its Manual was, in effect, a request for MLDN to breach the VAT Law. The Claimant adds that, compounded with SENIAT's refusal to provide MLDN with anything in writing that it could rely on, Venezuela's reliance on a deduction requirement set out in an internal Manual to refuse MLDN the VAT CERTS cannot be anything but "*a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.*"<sup>249</sup>

## 2) Position of the Respondent

415. First, the Respondent defends its understanding of the fair and equitable treatment standard. To that end, the Respondent asserts that the Treaty expressly alludes to treatment "*in accordance with international law*" and adds that the Tribunal must take into account this choice of words, limiting the standard to the customary international law minimum standard of treatment of foreigners and their assets. It emphasizes that in order for there to be a violation of the minimum standard of treatment, it is necessary to demonstrate that the State has acted with a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law. The lack or denial must be gross, manifest, complete, or such as to offend judicial propriety.<sup>250</sup>

416. The Respondent objects to the Claimant's position that it has not, however, justified, which is one that presumes that the United Kingdom and Venezuela intended to agree to a broader standard than the then known minimum standard of treatment under customary international law.<sup>251</sup>

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<sup>248</sup> Claimant's PHB, ¶149(c).

<sup>249</sup> Claimant's PHB, ¶149(d).

<sup>250</sup> Respondent's PHB, ¶94; Counter-Memorial, ¶¶323-33, where the Respondent refers *inter alia* to the *Neer* case.

<sup>251</sup> Respondent's PHB, ¶95.

417. Even considering the components the Claimant seeks to apply, if a tribunal were to consider the investor's expectations relevant, it would have to assess whether the State gave the investor any specific guarantee or made a promise to induce the expectation. However, the Claimant does not identify any specific promise or commitment. On the contrary, its entire argument is based on its disagreement with the interpretation and application of Venezuelan law by different officials. None of these complaints, either individually or as a whole, amount to a violation of the Treaty.<sup>252</sup>
418. Regarding the problem of non-issuance of the VAT CERTS, the Respondent notes that it requires a little gall to claim compensation for a benefit to which one was never entitled, and particularly when the lack of a right is due to the deliberate, continued and obstinate stance of refusing to comply with the requirements to obtain such benefit.<sup>253</sup> The reason for the lack of approval of MLDN's VAT Requests (the step prior to the issuance of VAT CERTS) was MLDN's repeated refusal to deduct the refund amounts requested in the VAT return.<sup>254</sup>
419. The Respondent asserts that Mr. Pérez, a witness for the Claimant, acknowledged that SENIAT notified MLDN on numerous occasions, verbally and in writing, what were the requirements for its tax credits to be approved, but MLDN refused to comply with them. SENIAT even postponed the closing of MLDN applications files in order to give it time to correct its non-compliance, but MLDN rejected the opportunity.<sup>255</sup>
420. The Respondent adds that Mr. Pérez confirmed that SENIAT communicated this requirement to MLDN at no fewer than three different meetings between February and March 2012. MLDN refused to comply with a written notice. SENIAT sent three *Actas de Requerimiento* in July 2012 requesting that the requested refund amount be deducted.<sup>256</sup> Both MLDN and Anglo American in London knew that this requirement existed and that it was not a mere whim on the part of SENIAT: the VAT return mentioned it expressly in line No. 21, as of 2005 and line No. 22

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<sup>252</sup> Respondent's PHB, ¶96.

<sup>253</sup> Respondent's PHB, ¶43.

<sup>254</sup> Respondent's PHB, ¶46.

<sup>255</sup> Respondent's PHB, ¶44.

<sup>256</sup> Respondent's PHB, ¶47.

in recent years. Mr. Pérez even acknowledged that the box corresponding to the deduction requirement on the VAT return “*has always been there.*”<sup>257</sup>

421. Further, the Respondent emphasizes that the witness could not identify even one taxpayer whose refund applications were approved who had not made the deductions.<sup>258</sup>
422. Anglo American justifies the repeated refusal of MLDN to comply with the deduction on the grounds that it was contrary to law. The Claimant relies on Article 38 of the VAT Law that would oblige MLDN to carry forward the tax credits to the following month or months until the total deduction is reached, and the total deduction is the moment when the benefit accrues, and for that reason they could not make the deduction before receiving the corresponding CERT. Nevertheless, the Respondent objects that Article 38 is used to determine the credits and debits in the VAT return - a process that is prior to and separate from the process of VAT refunds to exporters - which is governed by Articles 43 and 44. The separation of these two different regimes is reflected in the fact that Article 38 is found in chapter # “*Determination of Tax Credits and Liabilities*” while Articles 43 and 44 are found in Chapter VI “*Tax Credit Recovery Regimes.*”<sup>259</sup>
423. Anglo American claims that the deduction requirement was contrary to the VAT Law and came from an illegitimate Manual. The Claimant further contends that the Manual has not been published as required by Article 131 of the Organic Tax Code. The Respondent opposes this argument on the ground that there is no contradiction between the VAT Law and the Manual and that the Manual should only be published if it is going to be applied to individuals.<sup>260</sup>
424. In any case, the question of the consistency of the requirement with the VAT Law is a matter of Venezuelan law. Even MLDN seems to have believed that this is a matter of domestic law that must be resolved in Venezuelan courts, which is why it filed an administrative tax appeal against SENIAT in February 2015.<sup>261</sup>

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<sup>257</sup> Respondent’s PHB, ¶50.

<sup>258</sup> Respondent’s PHB, ¶58.

<sup>259</sup> Respondent’s PHB, ¶61.

<sup>260</sup> Respondent’s PHB, ¶222.

<sup>261</sup> Respondent’s PHB, ¶63.

425. A difference in interpretation of domestic law or of administrative practice could only have consequences for the Treaty if Venezuela had denied access to national courts, thus denying the possibility of obtaining redress for the damage suffered or if said difference led to an action by the State that was flagrant and scandalous, manifestly unfair or arbitrary, beyond a simple contradictory or questionable application of administrative policy or procedures. But that was not what happened here.<sup>262</sup>
426. The Respondent denies that the application of the Manual by the officials changed the Republic's consistent practice, as alleged by the Claimant. It explains that the previous practice was not consistent, since the previous Manual allowed too much discretion. It was precisely for this reason that the new manual eliminated that discretion to ensure that the requirements were always met, and not only when the official decided that those requirements had to be met. The Claimant interprets this as an arbitrary change in the practice of SENIAT, but in reality, this was simply a faithful implementation of the law, the regulations, and the standards of SENIAT.<sup>263</sup>
427. The Treaty imposes the minimum standard of treatment of foreigners and their property under customary international law while Anglo American proposed that instead a standard be applied that includes respect for legitimate expectations, consistency and stability of the legal framework, transparency and due process, and the absence of discrimination and arbitrariness. However, a claim under the Treaty can have no grounds when the requirements for receiving the benefit that is being claimed were not met.<sup>264</sup>
428. At the Hearing, the Claimant argued that Venezuela flouted Anglo American's legitimate expectations that the Government would grant VAT CERTS to MLDN as long as it complied with the requirements of the VAT Law and regulations, and would not change the manner in which the Law was being applied, as it had done consistently for a period of ten years. The Claimant also alleged that failure to

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<sup>262</sup> Respondent's PHB, ¶228.

<sup>263</sup> Respondent's PHB, ¶223.

<sup>264</sup> Respondent's PHB, ¶221.

respond to points of disagreement and ignoring VAT Requests constitute serious administrative negligence and inconsistency.<sup>265</sup>

429. The Respondent objects to both assertions. First, it alleges that MLDN did not comply with the requirements of the VAT Law and its regulations so it cannot claim breach of its legitimate expectations under the erroneous premise that it complied with the requirements of the VAT Law. In addition, the Claimant should not have had the expectation of being able to ignore an improved application of the Law through clearer guidance to officials.<sup>266</sup> As for the Venezuelan law principle of legitimate expectations invoked by the Claimant, it is inapplicable in this case where the taxpayer was always informed of its non-compliance and of the necessary steps to remedy it, and it chose not to comply.<sup>267</sup>
430. In relation to the Claimant's second assertion, the Respondent emphasizes that there was no silence or inconsistency in the responses from SENIAT. In fact, the Claimant itself accepts that SENIAT's officials explained the requirement to the MLDN representatives, and MLDN simply refused to comply.<sup>268</sup>
431. The requirement in question to deduct the refund amounts in the VAT return was not a "change" as clarified by Anglo American's own witness, Mr. Oscar Pérez, in answer to a question put by the Tribunal. The witness also admitted that the requirement had been explained to them. However, MLDN refused to comply with the requirement because this was done verbally.<sup>269</sup>
432. The Respondent emphasizes that it is incorrect to assert that the requirement was only explained verbally. SENIAT also sent *Actas de Requerimiento* to MLDN. The *Actas de Requerimiento* informed MLDN of the deficiency in its VAT Requests and how to remedy it. MLDN responded to the *Actas de Requerimiento*, but it did not comply with the indicated requirement.<sup>270</sup>
433. Regarding the alleged delay of the Administration in answering, Mr. Pérez also confirmed that in practice the Administration used to take more than 30 days to

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<sup>265</sup> Respondent's PHB, ¶101.

<sup>266</sup> Respondent's PHB, ¶103.

<sup>267</sup> Respondent's PHB, ¶103.

<sup>268</sup> Respondent's PHB, ¶104.

<sup>269</sup> Respondent's PHB, ¶105.

<sup>270</sup> Respondent's PHB, ¶108.

answer. Therefore, MLDN should never have expected to receive the response in 30 working days.<sup>271</sup>

434. In this case, the 30-day period starts to run only once the Administration has received all the supporting documentation and information required. The term never began to run because MLDN did not deduct the requested amount.<sup>272</sup>

435. The Respondent concludes that there was no breach of fair and equitable treatment in relation to the non-issuance of the VAT CERTS.

3) Decision of the Tribunal

436. According to the Claimant, the non-issuance of VAT CERTS constitutes a violation of Article 2(2) of the Treaty. Also, Anglo American argues the fact that Venezuela's failure to take decisions on MLDN's Requests for the issuance of VAT CERTS was arbitrary, unreasonable, discriminatory, lacking in transparency and was contrary to the requirements of due process. It adds that it frustrated the legitimate expectations of MLDN.

437. In relation to this claim, it is first necessary to resolve the debate regarding the level of protection granted by the Treaty (a) before deciding whether the Respondent's conduct in relation to VAT CERTS can be analyzed as a breach of that standard of protection (b).

a) *The standard of protection under the Treaty is an autonomous standard*

438. The Respondent deduces from the wording of Article 2(2) of the Treaty referring to the standard of "*fair and equitable treatment in accordance with international law*"<sup>273</sup> that fair and equitable treatment under the Treaty is the minimum standard of treatment under international law.

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<sup>271</sup> Respondent's PHB, ¶109.

<sup>272</sup> Respondent's PHB, ¶110.

<sup>273</sup> Treaty, Art. 2(2).

439. The Tribunal does not share the Respondent’s position and considers instead that the formula “*in accordance with international law*” is not synonymous with the “*minimum standard of treatment under international law.*”<sup>274</sup>

440. The Tribunal emphasizes that several tribunals have interpreted clauses similar to the one in dispute, suggesting that its wording is viewed as synonymous with the minimum standard of treatment.<sup>275</sup>

441. The Tribunal fully shares and endorses the words of the tribunal in *Vivendi v. Argentina*, when it emphasizes that:

*“fair and equitable treatment conform to the principles of international law, but this requirement for conformity can just as readily set a floor as a ceiling on the Treaty’s fair and equitable treatment standard. Third, the language of the provision suggests that one should also look to contemporary principles of international law, not only to principles from almost a century ago.”*<sup>276</sup>

442. Notwithstanding the foregoing, the Tribunal shares the Claimant’s position that today such a debate is somewhat sterile since it is equally true that the minimum standard of treatment under customary international law has evolved since the definition of the standard in the 1926 *Neer* case.<sup>277</sup>

443. In light of the foregoing, the Tribunal is of the opinion that the criteria for the standard of fair and equitable treatment advocated by the Claimant, that is, respect for legitimate expectations, transparency, reasonableness, and due process, as well as the absence of discrimination and arbitrariness are criteria that fall within the protection afforded by the Venezuela-United Kingdom Treaty.

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<sup>274</sup> Counter-Memorial, ¶327.

<sup>275</sup> In this regard see *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB (AF)/11/2), Award, April 4, 2016, ¶¶530-531 (CLA-140); *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, (ICSID Case No. ARB/97/3), Second Presentation of the Case, Award, August 20, 2007, ¶7.4.7 (CLA-22); *Franck Charles Arif v. Republic of Moldova*, (ICSID Case No. ARB /11/23), Award, April 8, 2013, ¶ 529 (RLA-125).

<sup>276</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, (ICSID Case No. ARB / 97/3), Second Presentation of the Case, Award, August 20, 2007, ¶ 7.4.7 (CLA-22).

<sup>277</sup> Reply, ¶ 260.

b) *The alleged violation of the fair and equitable treatment standard by the Respondent in not issuing the VAT CERTS and in not responding to the Claimant's requests*

444. As an exporter, MLDN was entitled to a refund for VAT paid for its purchase of Venezuelan goods and services related to its operations in the form of VAT tax credits in accordance with the recovery procedure established in Article 43 of the VAT Law and Regulations. Although the Claimant requested and received the VAT CERTS for a period of 10 years from 2001, as of August 2010 the VAT Requests were not approved and, consequently, the CERTS were not issued.<sup>278</sup>
445. The Respondent justifies that the reason for the Claimant not receiving the VAT CERTS was because MLDN refused to deduct the VAT credits that were requested from its monthly VAT returns. The Claimant alleges that said requirement is a requirement stemming from the Manual that was not published. The Claimant considers that this requirement was inconsistent with the previous practice of SENIAT, in addition to being contrary to the terms of the VAT Law.
446. Anglo American's claim therefore requires an examination of the alleged illegality of the deduction requirement that led to the non-issuance of the VAT CERTS.

i. *The alleged illegal nature of the deduction requirement*

447. The Tribunal's opinion in relation to the alleged conflict between the deduction requirement and the VAT Law is that although the VAT Law does not contemplate that the amount of tax credits requested has to be deducted in the VAT tax return, the mere fact that the Law does not specify it does not *ipso facto* turn this requirement into a violation of the Law.
448. The Claimant also argued that the deduction criterion breached Article 38 of the VAT Law which "*requires that VAT credits for a particular tax period be carried forward until the applicable VAT CERTS are issued and the credits can be deducted.*"
449. However, this claim is not confirmed by the terms of Article 38 of the VAT Law which stipulates that: "*If the amount of the credits that are deductible under this*

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<sup>278</sup> Tr. D2, p. 381, Examination of Oscar Pérez ("up to August 2010").

*Law is greater than the total duly adjusted tax liability, the resulting difference shall be a tax credit in favor of the ordinary taxpayer which shall be transferred to the following tax period or subsequent periods and added to the tax credits of those new tax periods until it is fully deducted.”*

450. Article 38 relating to the VAT return could not refer to the VAT CERTS since CERTS were only recognized for exporters and the relevant Articles of the Law relating to the procedure for recovery of VAT for exporters are Articles 43 and 44.
451. As noted by a witness for the Respondent, the reference to Article 38 is not relevant since, although it is true that it is in the VAT return that the exporter has to deduct the amounts of tax credits requested, the provisions of Article 38 do not contemplate recovery of the VAT for exporters but contemplates the amount of VAT that “*is in the next return*” or that “*may lead to new returns*” but “*never arises from a return.*”<sup>279</sup>
452. In support of the Claimant’s position, its legal expert states: “*[as] is evident, when the particular taxpayer makes the Request, the tax obligation is not affected, so there is no legal basis whatsoever at that time to justify making a deduction of the corresponding amount in the respective return. In fact, the tax credit is only made deductible from the affirmative decision made by the Tax Administration regarding the Request.*”<sup>280</sup>
453. The Tribunal does not consider this premise to be true. The opinion of the Tribunal is that a credit is deductible when it satisfies the criteria to be deducted.
454. Likewise, the Tribunal has not been convinced by the Claimant’s argument that Line 22 of the VAT returns would have to be interpreted as requiring the taxpayer to deduct the amounts once the refund had been received, emphasizing the fact that the word reimbursement implies an action subsequent to the issuance of the CERTS.

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<sup>279</sup> Tr. D3 p.532, Cross-examination of Ms. Villasmil.

<sup>280</sup> Brewer-Carías’s LO2, ¶169.

455. The Tribunal finds that line 22 (or previously 21) required the exporter taxpayer to deduct the amount of the reimbursement requested (or refund requested). Likewise, the Tribunal finds that the common denominator of the terms reimbursement and refund is that they are used together with the word “requested,” words that leave no doubt as to the outstanding nature of the request. The Tribunal, therefore, considers that line 22 (or 21 where appropriate) of the VAT Return form, either when referring to the word reimbursement or to the word refund, clearly refers to a benefit not yet agreed upon.
456. In the Tribunal’s opinion, requiring exporters to deduct from their VAT Return the refund or reimbursement amounts requested as recovery of export tax credits is not a requirement contrary to the Law.
457. The Tribunal cannot, therefore, agree with the Claimant’s premise that the refusal to issue the VAT CERTS was “*unjustified.*” The fact of waiting for a taxpayer to comply with a criterion that the Administration considers essential is not tantamount to the absence of justification. The reason for the Administration imposing this requirement is not unreasonable since it was intended to prevent double counting of credits.
458. However, the examination of Anglo American’s claim does not stop here. The fact that imposing the deduction requirement is not contrary to law does not in itself exclude the existence of a violation of the standard of fair and equitable treatment.

*ii. The alleged violation of the elements that make up fair and equitable treatment*

459. The evidence presented during the Hearing made it clear that since 2005 the VAT return forms already required exporters to deduct VAT credits in line 21 “*refund requested*”<sup>281</sup> or similarly for more recent VAT returns in line 22 “*reimbursement requested.*”<sup>282</sup> The Claimant’s witness confirmed that “*that line has always been there.*”<sup>283</sup> This means that the credit deduction was already contemplated by the Venezuelan Administration even before the introduction of the Manual. Then, when MDLN refused to deduct the requested VAT credits in its returns, it is not

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<sup>281</sup> See Annex IV-8 to Ms. Villasmil’s testimony: VAT return, December 2005.

<sup>282</sup> See Annex III to Ms. Villasmil’s testimony.

<sup>283</sup> Tr. D2, p. 436, Examination of Oscar Pérez.

simply that it refused to comply with a requirement of an internal Manual, but that it refused to fill out the return form in the manner in which the document itself demanded.

460. The Claimant points out that “*it is obvious that neither a VAT Return form nor the Manual can modify the rules in the VAT Law and in the Regulations.*”<sup>284</sup> Although it is true that the VAT Law does not include this requirement, the fact that the VAT Return form always contemplated this requirement confirms that what really changed in the process of recovering tax credits from exporters is the administrative practice. The Venezuelan Administration did not change its return template without warning, but changed its administrative practice by requiring officials to check taxpayers’ compliance with this rule whereas before it simply did not.
461. The Tribunal is of the opinion that the argument pursued by the Claimant that if a State can change its Tax Administration practice the taxpayers have to be informed is correct. In this regard, the Claimant’s reference to the predictable legal framework, transparency and due process is relevant.
462. In the present case, it has been demonstrated that, at first, the Claimant was not informed of the change in the Administration’s practice or the reason for the non-issuance of the CERTS. Ms. Villasmil, a Tax Administration official, refused to formally notify the change in administrative practice. In the opinion of the Tribunal, it is not the change of administrative practice that creates problems but the official’s lack of transparency that prevented the Claimant from knowing the reason for the rejection of its VAT Requests until 2012.<sup>285</sup> In fact, from the evidence taken it turns out that the Claimant was informed of the reason for the rejection of its requests only in March 2012, verbally<sup>286</sup> and then in writing in July

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<sup>284</sup> Claimant’s PHB, ¶104.

<sup>285</sup> Ms. Villasmil states that it was around January 2011, but since there is no convincing evidence of this, the Tribunal considers that it is the date on which the Claimant acknowledged having obtained the information that should be considered. See Testimony of Oscar Perez, ¶21.

<sup>286</sup> Tr. D2, p. 426: “*My question is: this March or April 2012 meeting (...)A: Yes, indeed; When Mr. Bianco informed us of this new requirement, we requested a meeting with Mrs. Villasmil and I was present, together with Yovanny, and that is when we were told about this discount for the first time.*” Since Memories of witnesses do not agree, the Tribunal is of the opinion that one can only believe that in 2012 MLDN was informed of the requirement verbally. (Tr. D3, p. 570 “*Do you know that Mr. Pérez in his statement says that they were not informed about the requirement in the manual not in [March] 2011 but in 2012.*” A: “*He says that in his statement, but I do not agree with that statement.*” Q: “*You do not agree.*”)

2012 through the *Actas de Requerimiento*.<sup>287</sup> The Tribunal has assessed SENIAT's silence and delay in relation to the outstanding requests and the lack of transparency revealed by the attitude of the official, taking into consideration two elements that it considers very relevant.

463. First, the Tribunal took into consideration the fact that once Claimant was informed of the deduction requirement and was offered the opportunity to regularize the status of its claims in respect of previous tax periods it chose not to do so.<sup>288</sup>

464. Second, the lack of transparency on the part of an official is not a violation of the obligation of fair and equitable treatment. MLDN could have gone to the hierarchical superior but it did not do so. Even if there is no obligation to exhaust the local State remedies, the investor does have to make sure that the attitude of an isolated official is representative of the State's position. The apathy of MLDN which waited until February 2015<sup>289</sup> to lodge an appeal against SENIAT's silence limits its legitimacy to complain about a violation of fair and equitable treatment as a consequence of the Administration's delay and silence. The Tribunal agrees with the Respondent's position that there is no doubt that the Claimant "*had access to Venezuelan courts to challenge the actions it now alleges as the basis for its claims under the Treaty.*"<sup>290</sup> The fact that MLDN has filed "*administrative and judicial appeals before the relevant Venezuelan authorities and courts in respect*

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<sup>287</sup> Tr. D3, p. 430: "Q: In addition to these meetings that I mentioned, SENIAT also sent Minera *at least three Records of Request* in July 2012, correct? A: Indeed. The record that *is on the screen is the only written document that we have and it is referring to three tax periods of the 61 that are pending. It only referred to October, November and December. Q: I just wanted to mention that it is on tab number 7 and it is one of the three records referred to. The content of the three is very similar. Mr. Pérez: is it correct that the three records, or at least the one in front of you, indicate that Minera must submit -and I quote- "a copy of the VAT return form where the tax credits requested were discounted?" A: Yes, indeed [...]"*

<sup>288</sup> Oscar Pérez witness statement, ¶24: "*In response to what was requested by Ms. Villasmil, we expressed our disagreement and rejection. The requirement of the SENIAT was not only contrary to the practice that both SENIAT and MLDN had followed for more than ten years in the processing of the Requests, but it went against the provisions of Articles 38 and 43.8 of the VAT Law and Article 16 of its Regulations.*" See also Hearing Day 2, Questioning of Oscar Pérez, page 428: "Q: Did Ms. Villasmil mention that she had draft orders ready to be signed if the discount was made? A: Yes, in that first meeting we were told that as soon as the discount was made, which is what they were orally requesting, they even had already accepted or signed orders that would be issued or notified as soon as the discount was made.. (...) Q: Despite this being told to you by Ms. Villasmil, Minera once again refused to apply the discount?: A. Yes, because we were told that this was done orally and we simply did not agree, so this is why the discount was not made."

<sup>289</sup> Tr. D2, p. 436, Examination of Oscar Pérez: "*So Minera filed an appeal in February 2015 A: Yes, it did so in 2015.*"

<sup>290</sup> Rejoinder, ¶439.

*of all the disputed exploitation tax liabilities,*”<sup>291</sup> as the Claimant emphasized in relation to the Respondent’s Counter-claim, confirms that circumstance. Therefore, not only could the Claimant have appealed SENIAT’s silence long before February 2015, but it also could have challenged the application of the disputed requirement.

465. The Tribunal therefore considers that in light of the above considerations, it is not the lack of transparency of the Venezuelan Administration or the lack of predictability of the Venezuelan legal framework that prevented the Claimant from obtaining the VAT CERTS but its obstinacy in considering the deduction requirement to be improper and its refusal to comply with it. The Tribunal does not consider Claimant’s attitude proper because since 2012 it had the option of complying with the requirement or of objecting to the legality of the tax deduction criterion before the competent courts and opted instead not to comply and not to contest its legality. The only thing it did was to wait three years to question SENIAT’s delay and silence by taking the appropriate procedural measures. In addition, the Tribunal considers that the Claimant cannot allege a violation by the Respondent of its obligation of transparency and predictability of its legal framework.
466. Similarly, the Claimant cannot allege a violation of due process since it adopted a passive position itself in relation to the non-issuance of VAT CERTS and did not seek recourse against SENIAT’s silence until very late. Nor does the Claimant mention that the Venezuelan court has treated unjustly its administrative law claim that is still ongoing.
467. Also, the Claimant alleges that the Respondent violated Anglo American’s legitimate expectations that SENIAT would grant the VAT CERTS. The Tribunal, however, shares the approach of the tribunal in the *Crystallex* case that the protection of legitimate expectations occurs within “*well-defined limits*” and is relative to a “*promise or representation to an investor as to a substantive benefit*”

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<sup>291</sup> Claimant’s PHB, ¶258.

*on which the investor has relied in making its investment, and which later was frustrated by the conduct of the Administration.”*<sup>292</sup>

468. The Claimant has not identified precisely the origin of such expectation and the Tribunal considers that the mere practice prior to 2010 cannot be interpreted as a promise to the Claimant that neither the law nor the administrative practice would change. In the words of the *Parkerings* tribunal “*Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment.*”<sup>293</sup>
469. Accordingly, the Tribunal considers that the Respondent has not violated the legitimate expectations of the Claimant.
470. The Tribunal does not consider that the conduct of Venezuela can be described as arbitrary. As the Claimant itself recognizes when referring to due process to demonstrate the existence of arbitrary conduct,<sup>294</sup> arbitrary conduct implies conduct that cannot be controlled. The Claimant, however, cannot state that the conduct of the Administration could not be limited or censored if it cannot demonstrate that the Venezuelan State prevented it from making an appeal against the conduct of the Tax Administration. MLDN filed a tax appeal against SENIAT before an administrative court, which is still ongoing. Therefore, and even though the conduct of the Venezuelan Administration is not free from criticism, such conduct does not constitute arbitrary conduct as long as the Claimant by its passivity did not prove that the silence of the Respondent was attributable to bad management of its Administration or to a “whim” of the Respondent.
471. Therefore, the Tribunal considers that neither the refusal to issue the CERTS nor the conduct of the Respondent in relation to MLDN’s VAT Requests constituted a violation of the standard of fair and equitable treatment.

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<sup>292</sup> *Crystallex v. Venezuela*, ¶ 547 (RLA-172).

<sup>293</sup> *Parkerings-Compagniet AS v. Republic of Lithuania*, (ICSID Case No. ARB/05/8, Award September 11, 2007 (“*Parkerings-Compagniet v. Lithuania*”), ¶ 306 (translation of the Respondent’s lawyers) (RLA-86).

<sup>294</sup> Claimant’s PHB, ¶149(d).

472. The Claimant's claim for violation of the standard of fair and equitable treatment is dismissed.

**C. Claims for alleged violation of the full protection and security standard**

473. The Tribunal will present in turn the respective arguments of the Claimant (1) and of the Respondent (2), before ruling on whether there has been a violation of the standard of full protection and security as alleged by the Claimant (3).

1) Position of the Claimant

474. The Claimant asserts that the same measures that give rise to a breach of Venezuela's obligation to accord fair and equitable treatment also give rise to a violation of its obligation to ensure full protection and security.<sup>295</sup>

475. Contrary to the Respondent's allegations, such a standard does not apply only in the context of the physical security of investments but also comprises a duty to afford legal security to investments. Venezuela's argument is not supported by the text of the Treaty or in decided cases, many of which, on the contrary, have held that treaty provisions drafted in similar terms should be interpreted broadly.<sup>296</sup>

476. In these cases, tribunals have held that, in the absence of any express limitation in the Treaty, this obligation to grant full protection and security is not limited to physical security, but also comprises a duty to afford legal security to investments.<sup>297</sup>

2) Position of the Respondent

477. The Respondent contends that the Claimant made no effort to demonstrate a violation of the full protection and security standard. The Claimant has the burden of proving a Treaty violation and it failed to do so.<sup>298</sup>

478. Notwithstanding the foregoing, the Respondent argues that the case law concurs that the standard pursuant to customary international law is to limit the obligation

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<sup>295</sup> Claimant's PHB, ¶160.

<sup>296</sup> Reply, ¶ 335.

<sup>297</sup> Reply, ¶ 336.

<sup>298</sup> Respondent's PHB, ¶112.

of full protection and security to protection from physical damage. Moreover, the Claimant's lack of effort to comply with its burden requires that the Tribunal dismiss its claim.<sup>299</sup>

3) Decision of the Tribunal

479. The Claimant invokes a violation of the full protection and security standard in relation to two claims: first, the so-called seizure of the reversionary assets and second, the non-issuance of VAT CERTS.

480. Given that the Tribunal reached the conclusion that the Respondent took property that was its own by virtue of a contractual obligation with which the Claimant had to comply, no violation of the full protection and security standard could occur in relation to the first claim. Accordingly, the Claimant's allegations in this regard must be dismissed.

481. Therefore, the alleged violation of the obligation of full protection and security will be analyzed only in relation to the second claim - conduct of Venezuela in relation to the VAT CERTS.

482. Article 2(2) of the Treaty requires that Venezuela grant Anglo American and its investments "*full protection and security.*" The Tribunal shares the Claimant's position that, if there are no express limits in the Treaty, this obligation is not limited to physical security, but also comprises a duty to afford legal security to investments. This interpretation has been confirmed by various tribunals.<sup>300</sup>

483. The Claimant reasons that the "*same measures*" that give rise to a breach of fair and equitable treatment also give rise to a breach of the full protection and security standard for the same reason. It also states that "[t]he failure by Venezuela to ensure legal stability and predictability, as well as the lack of transparency and

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<sup>299</sup> Respondent's PHB, ¶113.

<sup>300</sup> *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB / 01/12), Award, July 14, 2006, CLA-9, ¶¶ 406, 408; *Siemens A.G. v. Argentine Republic*, Award, February 6, 2007, ¶ 303 (CLA-84); *National Grid P.L.C. v. Argentine Republic* (UNCITRAL), Award, November 3, 2008, ¶ 187 (CLA-62); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB / 05/22), Award, July 24, 2008, ¶¶ 729-730 (CLA-16); *CME Czech Republic B.V. (The Netherlands) v. Czech Republic* (UNCITRAL), Partial Award, September 13, 2001, ¶ 613 (CLA-19).

*due process in its procedures, constitute a breach of its obligation to accord full protection and security to Anglo American's investment in Venezuela.*"<sup>301</sup>

484. The Tribunal has assessed in the previous section the measures relating to the VAT CERTS identified by the Claimant as having caused a violation of fair and equitable treatment and has ruled out the possibility that such measures involved a lack of transparency, due process, stability, and legal predictability.
485. Whenever the Claimant based the violation of the obligation to grant full protection and security to Anglo American's investment on the Respondent's alleged lack of transparency, due process, stability, and legal predictability, the Tribunal had rejected arguments that the Respondent had violated any of those obligations under the Treaty, and it also rejects arguments that the Respondent violated its obligation to grant full protection and security to the Claimant's investment.

**D. The alleged violation of the national treatment standard**

486. The Tribunal will in turn present the respective arguments of the Claimant (1) and of the Respondent (2), before ruling on whether there has been a violation of the national treatment standard as alleged by the Claimant (3).

1) Position of the Claimant

487. The Claimant alleges that Venezuela's refusal to issue the VAT CERTS to which MLDN was entitled breached its obligation to accord Anglo American's investment no less favorable treatment than that accorded to its own investors or to investors from another State. There is no doubt that this is what happened in this case. The Respondent continued to issue VAT CERTS to other exporters while the MLDN's VAT Requests went unanswered.<sup>302</sup>
488. Venezuela justifies its position on the basis that the other exporters complied with the deduction requirement, but was able to produce just two examples of taxpayers

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<sup>301</sup> Memorial, ¶ 276. ("The failure by Venezuela to ensure legal stability and predictability, as well as the lack of transparency and due process in its procedures, constitutes a breach of its obligation to accord full protection and security to Anglo American's investment in Venezuela.")

<sup>302</sup> Claimant's PHB, ¶ 151.

who did so, out of the hundreds of taxpayers it issued VAT CERTS to during the same period. Anglo American therefore asks the Tribunal to draw the appropriate inferences and conclude that the Respondent breached Article 3 of the Treaty in relation to its VAT claim.<sup>303</sup>

## 2) Position of the Respondent

489. Article 3 of the Treaty on the national treatment standard requires proof that there was conduct of the State in (i) similar cases, where (ii) the cases are treated differently (iii) without reasonable justification.<sup>304</sup>
490. Venezuela emphasizes that first, this claim was filed as a claim related to the alleged export ban, which the Claimant has not pursued due to the “irregularities” that occurred in November 2011. Now, what remains of the claim on the violation of the national treatment standard is an allegation related to the lack of approval of VAT refunds, while SENIAT supposedly approved other taxpayers’ refunds. Again, Anglo American has not demonstrated any element of a national treatment violation, nor has it attempted to demonstrate that a national investor in similar circumstances unjustifiably received more favorable treatment.<sup>305</sup>
491. At the Hearing, it was confirmed that other companies that received CERTS complied with the requirements while MLDN simply chose not to follow the process to receive the CERTS.<sup>306</sup>
492. It adds that Mr. Pérez, a witness presented by the Claimant, could not identify any taxpayer that received better treatment when he had to answer this question posed by the Tribunal.<sup>307</sup>
493. Venezuela confirms that the requirements were explained to all taxpayers, and all complied, except for MLDN. The Claimant was also unable to identify third

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<sup>303</sup> Claimant’s PHB, ¶151.

<sup>304</sup> Respondent’s PHB, ¶114.

<sup>305</sup> Respondent’s PHB, ¶115.

<sup>306</sup> Respondent’s PHB, ¶116.

<sup>307</sup> Respondent’s PHB, ¶117.

parties in similar circumstances that were treated differently, much less show that any different treatment was unjustified.<sup>308</sup>

494. The Respondent concludes that the Claimant did not attempt, either in its pleadings or at the Hearing, to prove that any third party received more favorable treatment, let alone a national, and that it is thus clear that it did not substantiate any claimed violation of Article 3 of the Treaty.

3) Decision of the Tribunal

495. Article 3 of the Treaty provides:

(i) *“Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favorable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.*

(ii) *Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favorable than that which it accords to its own nationals or companies or to nationals or companies of any third State.*

(iii) *The treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.”*

496. In relation to the alleged violation of the obligation to accord treatment no less favorable than that accorded to the investments of its own investors or to investors of another State, the Claimant asks the Tribunal to “*draw the appropriate inferences*” from the fact that the Respondent “*was able to produce just two examples of taxpayers*”<sup>309</sup> that complied with the deduction requirement.

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<sup>308</sup> Respondent’s PHB, ¶118.

<sup>309</sup> Claimant’s PHB, ¶151.

497. The Tribunal calls to mind that the burden of proof rests with the Claimant to demonstrate that Venezuela issued CERTS for the benefit of exporters that did not meet the deduction requirement.

498. The Claimant requested in document production that Venezuela “*produce evidence of the fact that other exporters complied with the Manual.*”<sup>310</sup>

499. Although the Respondent has not produced documentation pertaining to “*hundreds of other exporters,*” the fact is that the Respondent has produced documents that demonstrate that:

- it rejected the request of a taxpayer for not having complied with the deduction requirement and required that it do so by means of an *Acta de Requerimiento* similar to the one received by the Claimant;<sup>311</sup>
- one taxpayer met the deduction criterion.<sup>312</sup>

500. The Respondent has shown that it treated exporting taxpayers in similar situations equally and that taxpayers in a different situation (different in so far as they met the requirement) were treated differently. On the other hand, the Claimant’s opposing view, that is, that the Respondent did issue CERTS to exporters that did not comply with the requirement, has not been proven. The witness presented by the Claimant in relation to the VAT CERTS admitted not knowing if other taxpayers received better treatment:

“*CO-ARBITRATOR TAWIL: Did you receive any certification whether the prior procedure continued being applied to third persons.*”

*R: That I don’t know. I won’t be able to answer that question.*”<sup>313</sup>

501. In view of the foregoing, the Tribunal concludes that the Claimant has not demonstrated its premise that Venezuela has issued VAT CERTS to exporters that

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<sup>310</sup> Claimant’s PHB, ¶ 125.

<sup>311</sup> See C-219.

<sup>312</sup> See C-221.

<sup>313</sup> Tr. D2, 448:17-449:9.

did not comply with the deduction requirement and dismisses Anglo American's claim based on the violation of Article 3 of the Treaty.

## **VIII. MONETARY DEMANDS OF THE CLAIMANT**

502. Since all of Anglo American's claims for violation of the Treaty were dismissed, its claims for compensation relating to such violations do not have to be examined.

## **IX. RESPONDENT'S COUNTER-CLAIM**

503. The Respondent alleges that the Claimant breached its obligations as a concessionaire with respect to exploitation taxes and special advantages and requests in its Counter-claim that the Claimant be ordered to pay a total of 531,049,475 bolívares fuertes or US\$123,583,598.84 to the Republic.

504. The Claimant objects to the Tribunal's jurisdiction to consider the Counter-claim.

505. The Tribunal will rule first on its jurisdiction (A) and only if it reaches the conclusion that it has jurisdiction, will it address the merits of the Counter-claim (B).

### **A. Jurisdiction**

506. The Tribunal will in turn present the respective positions of the Claimant (1) and of the Respondent (2), before ruling on its jurisdiction regarding the Counter-claim (3).

#### **1) Position of the Claimant**

507. Anglo American raises two objections to the jurisdiction of the Tribunal to decide on the Respondent's Counter-claim. First, it alleges the lack of consent in Article 8 of the Treaty to arbitrate counter-claims (a). Second, it alleges that the Respondent's Counter-claim is not sufficiently related to the claims of Anglo American (b).

a) *There is no consent to arbitrate counter-claims in Article 8 of the Treaty*

508. The jurisdiction of the Tribunal derives from its jurisdiction under the arbitration agreement between the Parties and that agreement is established in Article 8 of the Treaty. The two provisions of Article 8 that are key to this analysis are the following:

- (a) The first provision of Article 8 provides for the submission to arbitration of “disputes [...] concerning an obligation of (one of the Contracting Parties) under (the Treaty) in relation to an investment (of an investor of the other Contracting Party).”
- (b) The third provision of Article 8 stipulates that “*the jurisdiction of the arbitral tribunal shall be limited to determining whether there has been a breach by the Contracting Party concerned of any of its obligations (under the Treaty)*” and “*whether such breach [...] has caused damage to the [investor].*”<sup>314</sup>

509. It follows that Article 8 narrowly circumscribes the Tribunal’s jurisdiction to the adjudication of disputes concerning Venezuela’s Treaty’s obligations and expressly forecloses the possibility of counter-claims by a host state against an investor.<sup>315</sup>

510. At the Hearing, the Respondent steadfastly refused to discuss the scope of Article 8 as it had in its written submissions. By contrast, the Claimant relied on cases where the tribunals indicated that State counter-claims might be within their jurisdiction. The Claimant specifies that, in those cases, the tribunals were faced with broadly-drafted treaty clauses contemplating the arbitration of disputes concerning investments in general. On the other hand, in every case with a narrowly circumscribed clause limiting the arbitration agreement to disputes concerning host state treaty obligations or treaty breaches, the tribunal declined jurisdiction over State counter-claims. Venezuela has not been able to point to a single case showing otherwise.<sup>316</sup>

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<sup>314</sup> Claimant’s PHB, ¶253.

<sup>315</sup> Claimant’s PHB, ¶254.

<sup>316</sup> Claimant’s PHB, ¶255.

511. The Respondent continues to focus its position on Article 47(1) of the Arbitration (AF) Rules. In fact, it maintains that Article 47(1)'s reference to the possibility of a counter-claim must be taken as implied consent to arbitrate counter-claims. But Article 47(1) does not provide an independent basis of jurisdiction. Rather, it conditions the admission of any counter-claim on it being within the scope of the Parties' arbitration agreement and the Parties not agreeing otherwise. Article 8(1) of the Treaty provides no scope for the arbitration of counter-claims and Article 8(3) constitutes an express agreement otherwise. This is dispositive. Despite the assertion to the contrary, Article 47(1) of the Arbitration (AF) Rules cannot override an express exclusion of counter-claims by the Treaty itself.<sup>317</sup>
512. Venezuela's argument that the Tribunal should hear the exploitation tax claim since MLDN is avoiding the domestic resolution of this dispute is false. MLDN has filed administrative and judicial appeals before the relevant Venezuelan authorities and courts in respect to all the disputed exploitation tax liabilities.<sup>318</sup>
513. In bringing its Counter-claim for exploitation tax before this Tribunal, the Respondent is attempting to re-litigate before this international tribunal under international law, an entirely domestic law dispute.
- b) Venezuela's Counter-claim lacks a close connection with Anglo American's claims
514. Not only does the Respondent fail the jurisdictional hurdle of consent, it also fails to establish that its Counter-claim has the requisite "*close connection*" to Anglo American's claims.<sup>319</sup>
515. Aside from forming part of the factual background of Venezuela's measures against Anglo American's investment in the years leading up to the takeover of the assets, the exploitation tax dispute has no incidence whatsoever on Anglo American's non-reversionary assets claim or VAT claim.
516. The decision in *Paushok v. Mongolia* is instructive in the sense of requiring that the issues raised by the counter-claim can be considered as an "*indivisible part*"

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<sup>317</sup> Claimant's PHB, ¶256.

<sup>318</sup> Claimant's PHB, ¶258.

<sup>319</sup> Claimant's PHB, ¶259.

of the parent company's claims for breach of treaty or as creating a reasonable nexus with the parent company's claims.<sup>320</sup>

517. In view of the above, the Tribunal lacks jurisdiction to entertain the Counter-claim.

2) Position of the Respondent

518. The right to a counter-claim is an integral part of the arbitration system under the Additional Facility Rules. Therefore, when Anglo American accepted the arbitration offer in the Treaty between the United Kingdom and the then Republic of Venezuela, it agreed to arbitration under the ICSID Additional Facility Rules, including the provisions allowing counter-claims.<sup>321</sup>

519. Venezuela objects to Anglo American's argument that Article 8 of the Treaty completely excludes jurisdiction for the Tribunal to resolve any counter-claims by a host State against the investor and the Treaty contains "*an express exclusion of counter-claims.*" But, this is not true, there is no express exclusion. The Treaty must be interpreted in harmony with the ICSID system and the fact that the right to a counter-claim is not mentioned in the context of rights granted to investors does not constitute an exclusion, much less an express exclusion. As expressly explained by the tribunal in the *Antoine Goetz & others and S.A. Affinage des Metaux v. Republic of Burundi* case, the Respondent argues that, since the arbitration rules include the right, "*it does not matter that the BIT does not contain any provisions granting the Tribunal jurisdiction to hear counter-claims.*"<sup>322</sup>

520. Venezuela's right to file the Counter-claim is inextricably linked to the Tribunal's jurisdiction over the Claimant's claims: if the Claimant is permitted to base its claims on a disagreement about Venezuelan law, the Tribunal must also decide the Counter-claim. The Claimant brought this dispute to arbitration and, to the extent that jurisdiction exists, it is an exclusive jurisdiction over the dispute between the Claimant and the State. Therefore, the same jurisdiction to hear Anglo American's claims based on the relationship between MLDN and Venezuela must

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<sup>320</sup> *Paushok v. Mongolia*.

<sup>321</sup> Respondent's PHB, ¶73.

<sup>322</sup> Respondent's PHB, ¶74.

extend to Venezuela's Counter-claim based on the same relationship, facts and mining rights.<sup>323</sup>

521. In short, the Claimant's refusal to pay its taxes and comply with the special advantage in the concessions is closely related to the dispute submitted by Anglo American at the commencement of this arbitration. The Claimant submitted its dispute with Venezuela to this Tribunal and implied that the exploitation tax issue was part of the unfair treatment to which it was allegedly subjected. The Respondent considers that the Counter-claim is part of the response to that allegation: to charge the obligation accepted as a special advantage in accordance with the 1999 Mining Law is not unfair treatment. What is unfair is that the Claimant seeks compensation of hundreds of millions of dollars from Venezuela based on its disagreement with the application of Venezuelan laws to MLDN, while at the same MLDN has refused to pay its debts to the State since 2002.<sup>324</sup>

522. The Claimant also attempts to avoid the Counter-claim, referring to the decision in *Paushok* and affirming that this Tribunal is not empowered to act as Venezuela's tax collector in this arbitration. But this is not Venezuela's position either: what the Respondent alleges is that the Tribunal, having agreed to hear the related allegations of Anglo American, can consider the fact that the Claimant's indirect subsidiary has to pay all its debts as concessionaire. It emphasizes the fact that said debt was due to the contractual obligation offered as a special advantage to obtain the mining rights.<sup>325</sup>

### 3) Decision of the Tribunal

523. The Tribunal has assessed the completeness of the Parties' arguments on this important issue.

524. The Respondent justifies its right to make counter-claims in these proceedings based on the provisions of Article 47(1) of the Arbitration (AF) Rules, which provide:

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<sup>323</sup> Respondent's PHB, ¶75.

<sup>324</sup> Respondent's PHB, ¶76.

<sup>325</sup> Respondent's PHB, ¶77.

*“[e]xcept as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim, provided that such ancillary claim is within the scope of the arbitration agreement of the parties.”*

525. It is clear from said Article that, under the Arbitration (AF) Rules, a counter-claim can be raised under two conditions: (i) the parties have not expressly excluded it and (ii) the counter-claim falls within the scope of the arbitration agreement of the parties.

526. In relation to the first condition, the arbitration clause, in this case, Article 8 of the Treaty providing for submission to arbitration, must be interpreted in the sense of excluding counter-claims from the State, since Article 8, paragraph 3 provides:

*“The jurisdiction of the arbitral tribunal shall be limited to determining whether there has been a breach by the Contracting Party concerned of any of its obligations under this Agreement, whether such breach of its obligations has caused damage to the national or company concerned, and, if such is the case, the amount of compensation.”*

527. The terms chosen by the Contracting States leave no doubt that they intended to draft a clause of a restrictive and precisely limited scope. The use of the expression “*shall be limited*” reflects such a clear intention. In the same way, as the Claimant rightly emphasized, Article 8(3) not only excludes claims from the host State, but also limits jurisdiction to disputes related to obligations of that State.

528. Therefore, the wording of the arbitration offer itself excludes the possibility that the Counter-claim is “*within the scope of the arbitration agreement of the parties.*”

529. In addition, contrary to Respondent’s contention, Anglo American’s claims that involve the examination of the problems of Venezuelan law cannot be equated with its Counter-claim. Anglo American’s claims are based on alleged violations of the Treaty and it is only to rule on these alleged violations that the Tribunal must first examine issues of Venezuelan law. The Counter-claim is not based on a violation of the Treaty or on a violation of international law, only on Venezuelan law.

530. Accordingly, the Tribunal does not have jurisdiction to adjudicate the Counter-claim submitted by the Respondent.

**B. Position of the Parties in relation to the Merits of the Counter-claim**

531. Given that it has no jurisdiction over Respondent's Counter-claim, the Tribunal will not address its respective positions on the merits of the Counter-claim.

**X. COSTS AND EXPENSES OF THE PROCEEDING**

532. The Tribunal will in turn present the respective arguments of the Claimant (A) and of the Respondent (B), and will summarize the costs of the proceeding (C), before adjudicating the costs and expenses of the proceeding (D).

**A. Position of the Claimant**

533. The Claimant requests that the Tribunal order the Respondent to bear the Claimant's costs in their entirety plus interest for the entire period of this proceeding.<sup>326</sup>

534. The Claimant asserts that under Article 58 of the Arbitration (AF) Rules, the Tribunal has the power to decide how to allocate the costs of the arbitration.<sup>327</sup>

535. The Claimant refers to the loser-pays principle and that principle should only be displaced when the winning Party has committed some wrongdoing of a substantive or procedural nature during the proceedings. Anglo American has not committed any such wrongdoing, but the Respondent has obstructed and caused delays to these proceedings.<sup>328</sup>

536. Applying legal standards to the present proceedings, the Claimant emphasizes that the Respondent has pursued meritless jurisdictional objections and a frivolous Counter-claim, has introduced new issues in an untimely manner in its Rejoinder and during the Hearing, and has misrepresented the facts.<sup>329</sup>

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<sup>326</sup> Claimant's Costs, ¶3.

<sup>327</sup> Claimant's Costs, ¶33.

<sup>328</sup> Claimant's Costs, ¶10.

<sup>329</sup> Claimant's Costs, ¶17.

537. The Claimant insists that the withdrawal of its claims should not detract from its entitlement to compensation for costs. It claims that by withdrawing part of its claims, it ultimately reduced the cost of the proceedings.<sup>330</sup>
538. The Claimant's costs are divided into three categories: (i) fees and expenses of the members of the Tribunal and ICSID's administrative fees, (ii) the costs of legal representation, experts and consultants, and (iii) costs and expenses of the Claimant's witness.<sup>331</sup>
539. In relation to the first category, the Claimant has incurred Tribunal fees and expenses and ICSID administrative costs in the amount of US\$425,000.00.
540. In relation to the costs of legal representation, experts and consultants, the Claimant claims the amount of £8,260,682.50 (the Claimant's international lawyers), and US\$1,583,197.51 and £1,025,434.41 and CAD \$971,737.14.<sup>332</sup>
541. As regards the expenses of its witness Ms. Rebecca Charlton, the Claimant claims the amount of US\$46,075.00.
542. The Claimant asks the Tribunal to order the Respondent to pay all of these costs plus interest on a compound basis at the rate of 11 percent annually, and this should run from the date of the Submission on Costs to the date of payment.

## **B. Position of the Respondent**

543. The Respondent requests that the Claimant be ordered to pay all of the costs incurred throughout these arbitration proceedings.
544. The Respondent asserts that under Article 58 of the Arbitration (AF) Rules, the Tribunal has the power to decide how to allocate the costs of the arbitration.<sup>333</sup>
545. Arbitral awards show that tribunals have used their discretion to allocate costs based on the parties' conduct, in particular when one party's conduct, such as that

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<sup>330</sup> Claimant's Costs, ¶18.

<sup>331</sup> Claimant's Costs, ¶20.

<sup>332</sup> See Appendices 1 and 2 of Claimant's Costs.

<sup>333</sup> Respondent's Costs, ¶4.

of the Claimant in this case, has caused the arbitration to be longer, more complicated, and therefore more expensive than necessary.<sup>334</sup>

546. The Respondent considers that Anglo American's claims are claims under Venezuelan law and not international law, and therefore should not have been presented to this Tribunal.<sup>335</sup>

547. In addition, the claims presented by the Claimant lacked crucial facts, which forced the Respondent to present a Counter-claim to provide the missing context of the dispute.<sup>336</sup>

548. Finally, the costs related to the Republic's defense against the claims regarding the temporary suspension of exports should never have been incurred.

549. By virtue of the criterion of the Parties' relative success, the Tribunal must order the Claimant to cover the expenses incurred by the Republic and take into account the reduction in the scope of Anglo American's claims. It should also be noted that the Claimant suggested at the beginning of the proceedings that it would submit a secondary claim regarding the expiry of the concessions, but never presented it. It also emphasizes that the Claimant proceeded to withdraw and modify several of its claims.<sup>337</sup>

550. The costs of the Respondent are broken down into four categories (legal fees, expert fees and expenses, administrative costs and expenses).

551. The Respondent's total costs amount to US\$9,420,462.<sup>338</sup>

552. The Respondent also presents the amount of the legal fees related to its defense to the withdrawn claim for temporary suspension of exports amounting to US\$848,570.<sup>339</sup>

553. The Respondent requests that the Claimant be ordered to reimburse all costs incurred plus interest and, in the alternative, to reimburse the costs incurred as a

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<sup>334</sup> Respondent's Costs, ¶5.

<sup>335</sup> Respondent's Costs, ¶8.

<sup>336</sup> Respondent's Costs, ¶11.

<sup>337</sup> Respondent's Costs, ¶¶15-16.

<sup>338</sup> Respondent's Costs, ¶24.

<sup>339</sup> Respondent's Costs, ¶25.

result of the filing of its unfounded and belatedly withdrawn claim, plus interest as of the date on which those costs were incurred.<sup>340</sup>

**C. Costs of the Proceeding**

554. The costs of the proceeding, including the Tribunal's fees and expenses, ICSID's administrative fees, and the direct expenses, are as follows:

Tribunal's fees and expenses

Mr. Yves Derains	USD 143,706.47
Dr. Guido Santiago Tawil	USD 206,568.50
Dr. Raúl E. Vinuesa	USD 202,011.85
ICSID's administrative fees	USD 180,000.00
Direct expenses <sup>341</sup>	USD 184,918.03
<b>Total</b>	<b>USD 917,204.85</b>

**D. Decision of the Tribunal**

555. Both Parties request that costs be awarded with respect to attorneys' fees and expenses, as well as the costs incurred in connection with the proceedings, and have made submissions in which they quantify their fees and costs.

556. Article 58 of the Arbitration (AF) Rules provides that the Tribunal has the authority to decide the division of costs of this arbitration.

557. Both Parties refer to the principle that the losing party pays. In this case, the Tribunal holds that all of the Respondent's objections to the jurisdiction of the Tribunal to hear the Claimant's claims were dismissed and that the Claimant's objection to the Tribunal's jurisdiction to hear the Respondent's Counter-claim was admitted. However, all of Claimant's claims on the merits were dismissed. In addition, the Claimant withdrew its claim regarding the suspension of exports, causing the Respondent to incur expenses that were found to be unnecessary.

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<sup>340</sup> Respondent's Costs, ¶26.

<sup>341</sup> This amount includes expenses related to meetings, stenographic and translation services, and expenses related with courier services of this Award (courier, printing, among others).

558. The Tribunal also notes that the Respondent objected by a long and inexplicable silence to ICSID's repeated requests to contribute to the financing of the last phase of the proceeding, which can be equated to obstructive conduct.

559. In light of these various elements, the Tribunal sees no reason to justify why one Party should assume the costs and expenses of the other.

560. The Tribunal rules, therefore, that each Party shall bear its own costs and expenses.

## **XI. DECISION**

561. For the reasons set out in the Award, the Tribunal decides as follows:

- a) The Tribunal has jurisdiction to hear the claims brought by the Claimant;
- b) The Tribunal does not have jurisdiction to hear the claims filed in a counter-claim by the Respondent;
- c) The Claimant's claims for breach of Article 5 of the Treaty are dismissed;
- d) The Claimant's claims for breach of the fair and equitable treatment standard under Article 2(2) of the Treaty are dismissed;
- e) The Claimant's claims for breach of the full protection and security standard under Article 2(2) of the Treaty are dismissed;
- f) The Claimant's claim for breach of the national treatment standard under Article 3 of the Treaty is dismissed;
- g) Each Party shall bear the costs and expenses it incurred;
- h) All other petitions and claims are dismissed.

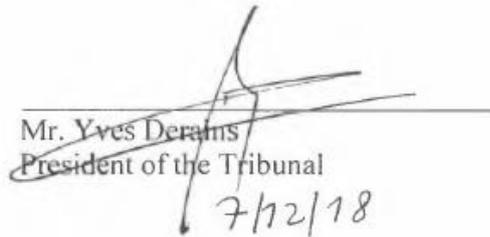
Done in the city of Paris, France



Dr. Guido Santiago Tawil  
Arbitrator  
*Subject to the attached dissenting opinion*  
18-12-18



Dr. Raúl E. Vinuesa  
Arbitrator  
12/12/18



Mr. Yves Derains  
President of the Tribunal  
7/12/18

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**(ADDITIONAL FACILITY)**

IN THE PROCEEDING BETWEEN

**ANGLO AMERICAN PLC**

*(Claimant)*

-and-

**THE BOLIVARIAN REPUBLIC OF VENEZUELA**

*(Respondent)*

**ICSID Case No. ARB(AF)/14/1**

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**Dissenting Opinion of  
Prof. Dr. Guido Santiago Tawil**

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1. I agree with the findings of my distinguished colleagues with respect to the jurisdiction of the Arbitral Tribunal to decide the claims submitted by the Parties in this arbitration.
2. With regard to the decision on the merits, I cannot, unfortunately, concur with the majority on the alleged breach by the Respondent of Article 5 of the Treaty and the standard of fair and equitable treatment under Article 2(2) of the Treaty.
3. First, I do not share the view developed in paragraphs 347 to 353 of the Award that the "Processing Assets" formed part of the object of the concession granted to the Claimant. Although I agree that the Mining Titles shall be constructed in light of the provisions of the 1945 Mining Law,<sup>1</sup> it cannot be concluded from the Mining Titles or the aforementioned law that the activity related to the benefit or processing of the mineral extracted was included in the object of the concession.
4. In accordance with the Mining Titles, the object of the concession was the "exploitation of *níquel de manto*"<sup>2</sup> and granted the holder thereof "*the exclusive right to extract and take advantage of the mineral indicated above for a period of twenty years, as well as the other rights set forth in the Mining Law.*"<sup>3</sup> In light of the 1945 Mining Law, the terms '*take advantage of*' ("aprovechar" in Spanish) contained in the Mining Titles do not refer to the processing or benefit of the mineral, but to the legal requirement that mining exploitation be conducted for an economic purpose.
5. This is indicated in Articles 11, 13, 174, and 179 of the 1945 Mining Law<sup>4</sup> (which set forth, as the object of the concessions regulated therein, the exploration and exploitation

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<sup>1</sup> Award, ¶¶ 344 and 351.

<sup>2</sup> As set forth in the mining titles attached under Annexes C-3 and C-18. Similarly, the mining titles, attached as Annex C-5, stipulated the granting of a "*concession for exploration and subsequent exploitation of níquel de manto.*"

<sup>3</sup> See Annexes C-3 and C-18. The mining titles, attached under Annex C-5, stipulated that these rights conferred "[on the concessionaire] *the exclusive right to exploration of the lot for which the concession was granted and to exploitation of the parcels chosen and demarcated by it within the lot, pursuant to Article 180 of the Mining Law.*"

<sup>4</sup> Articles 11, 13, 174, and 179 of the 1945 Mining Law (Annex C-1) set forth the following: Article 11: "*The Federal Executive may reserve, by means of Decree (...) the exploration and exploitation of any or all the substances mentioned in Article 2 throughout national territory or in the zone(s) to be determined in the respective Decree (...);*" Article 13: "*The right to exploit the minerals referred to in this Law can be acquired only through concessions granted by the Federal Executive in the manner set forth therein;*" Article 174: "*The concessions for the substances mentioned in Article 11 of this Law (...) shall cover the following categories: First: - For the exploration of lots determined by precise demarcations (...), with the concessionaire having the right to the exploitation of the parcels subsequently chosen and demarcated by it (...) Second.- For the exploitation of parcels or lots determined by precise demarcations in the concession permit itself (...) Third.- For the exploitation of the residual national reserves resulting from the performance of the concessions for exploration and subsequent exploitation mentioned in numbered paragraph 1 of this article;*" Article 179: "*The concession confers on the concessionaire (...) the exclusive right to exploration of the lot for which the concession was granted, and the right to obtain, for the purpose of its exploitation, the parcels chosen by it (...)*" (underlining added by author).

of the minerals), Article 1 of Decree No. 2039 on the Reservation with regard to the Exploration and Exploitation of the Minerals on Venezuelan National Territory<sup>5</sup> (in which the Venezuelan State reserved the right to the exploration and exploitation of all the minerals on national territory), and the scope granted to the concept of exploitation by the Venezuelan Ministry of Mining and Hydrocarbons at the time of passage of the 1945 Mining Law.<sup>6</sup> Based on a unified interpretation of these elements, it can be sustained that the concessions granted under the 1945 Mining Law limited their object to the exploration and exploitation of minerals, and that the terms 'take advantage of' mentioned in the mining titles refer to the need for exploitation to take place for economic rather than merely research purposes (as indicated in the aforementioned opinion).

6. In my opinion, neither the fifth, eleventh, and twelfth clauses of the Mining Titles nor Articles 94 and 96 of the 1945 Mining Law (cited in paragraphs 351 and 352 of the Award) preclude this conclusion. The clauses of the abovementioned Mining Titles establish special advantages under Article 91 of the 1945 Mining Law but do not form part of the object of the concession. Similarly, none of the obligations set forth in those clauses lead to the conclusion that the processing or benefit of the minerals formed part of the object of the concession granted to the Claimant.
7. The Mining Titles did not prevent MLDN from processing the mineral through a third party or from carrying out this activity outside the concession zone. It does not seem to be in dispute that, in such situations, the processing or benefit of the mineral would not have formed part of the concession and, consequently, upon its expiry, the assets dedicated to that activity would not have reverted to the Respondent without compensation. If in such cases the assets linked to the processing or benefit of the mineral did not revert because they did not form part of the object of the concession, I

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<sup>5</sup> Article 1 of Decree No. 2039 on the Reservation of the Exploration and Exploitation of all the Minerals on Venezuelan National Territory (Annex BC-10) establishes "*the reservation with respect to the exploration and exploitation on national territory of all the minerals mentioned in Article 2 of the Mining Law that may not have been previously reserved*" (underlining added by author).

<sup>6</sup> See Annex BC-40, which states that the Ministry of Mining and Hydrocarbons maintained that "*if mineral extraction is to constitute the exploitation required by the Law, extraction must be for the clear purpose of economic utilization, present or future, which has already largely moved past the research phase of the substance or deposit and must be proportional to the nature and size thereof.*" This requirement was later included in Article 58 of the 1999 Mining Law (Annex C-19), which states: "*It is understood that a concession is in the exploitation phase when the substances covered by the concession are being extracted from the mines or the necessary action is being taken to do so, for the clear purpose of their economic utilization and in proportion to the nature of the substance and size of the deposit.*"

fail to see the reason for a finding to the contrary in a situation where the Claimant conducted that activity on its own within the concession zone, as happened in this case.

8. In addition, Article 94 of the 1945 Mining Law (cited in paragraph 351 of the Award) does not impose an obligation on the concessionaire that supports the view that the processing of the mineral was included in the object of the concession, and Article 96 of the 1945 Mining Law (cited in paragraph 352 of the Award) only refers to import duty exemptions and is thus not relevant to the matter at hand.
9. The foregoing leads me to conclude that the Processing Assets were non-reversionary assets and, as such, that Respondent should have compensated the Claimant for their value if it was attempting to take control of them. A similar conclusion can be reached, in my opinion, with respect to the assets included in the Inventory, as they involved raw materials, spare parts, and consumables associated with the processing of minerals. However, the assets used for mining tasks that formed part of the object of the concession should revert to the State with no compensation to the Claimant.
10. Second, I do not share the position taken by my distinguished colleagues with respect to the alleged violation of the standard of fair and equitable treatment related to non-issuance of the VAT CERTS.<sup>7</sup> Based on the provisions of Articles 38 and 43 of the VAT Law, it is not clear that the requirement imposed by SENIAT to deduct from the VAT return the amounts requested by way of tax credit recovery for exports is in line with the law.<sup>8</sup>
11. However, my disagreement with the majority does not lie there but on the way of assessing the factual circumstances specific to the case in that regard.
12. It was demonstrated that for almost ten years, SENIAT did not require the deduction from the VAT return of the refund amounts requested to recover tax credits for exports;<sup>9</sup>

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<sup>7</sup> Award, ¶¶ 459-472.

<sup>8</sup> According to Article 43 of the VAT Law (Annex C-21), the tax refund is provided at the time of issuance of the VAT CERTS, which can take place only when the appropriate request for the refund has been settled. Article 38 of the VAT Law states that the tax credit obtained from the difference between tax credits and tax debits must be carried over to the next tax period until the final deduction is made. These provisions, taken collectively, led to the reasonable conclusion that in the requests for VAT refunds, only the inclusion of officially recognized tax credits could be required and not those for which a decision was pending.

<sup>9</sup> See Annex C-236 and hearing, day 3, pages 560, 571, and 572, in which Ms. Villasmil (witness for the Respondent) confirmed that for almost 10 years, SENIAT accepted VAT recovery requests from MLDN and that the requirement imposed by SENIAT marked a change in the way SENIAT and MLDN had operated with respect to the recovery of tax credits.

that the change in position by SENIAT was based on an internal manual that was not published in the Official Gazette or communicated contemporaneously to the Claimant;<sup>10</sup> and that the Respondent did not provide a proper response to the formal requests from MLDN for the recovery of the VAT credits.

13. MLDN submitted more than 50 VAT recovery requests for periods dating back to October 2007,<sup>11</sup> of which the Respondent failed to expressly inform it of the reason for the change in the tax authorities conduct, and limited its actions to three written communications in July 2012,<sup>12</sup> in which it instructed MLDN to resubmit the VAT returns with the required deduction or explain, as applicable, why this deduction was not appropriate. MLDN responded to these communications explaining why, in its view, the deduction required by SENIAT should not be made,<sup>13</sup> but did not obtain a response from the authorities.<sup>14</sup>
14. Under those circumstances, the conduct of the Respondent was not consistent, free from ambiguity, and transparent, as required by the standard of fair and equitable treatment guaranteed under Article 2 (2) of the Treaty.<sup>15</sup> The authorities had the obligation to communicate properly to the taxpayer the change in the position held for almost ten years, and it would be expected that the Respondent would have settled the requests submitted by MLDN either contemporaneously or at the time of escalation of the conflict. Despite the repeated formal requests from MLDN, the Respondent decided to remain silent and did not communicate its position to the Claimant.<sup>16</sup> This leads me to

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<sup>10</sup> See the second witness statement of Ms. Villasmil, paragraph 11; hearing, day 3, page 575 (in which witness Villasmil confirmed that a copy of the manual in question was not provided to MLDN) and the second legal opinion of Canónico, paragraph 135.

<sup>11</sup> See the witness statement of Oscar Pérez, paragraph 18, and hearing, day 3, page 570.

<sup>12</sup> See Annexes R-36, C-198, and C-199 and hearing, day 3, page 576.

<sup>13</sup> See Annexes R-37, C-200, and C-201 and hearing, day 3, page 580.

<sup>14</sup> Witness Villasmil stated during the hearing that SENIAT did not provide a copy of the internal manual to MLDN, did not notify it of the change in administrative procedure, and did not respond to its communications sent in connection with the *actas de requerimiento* [records of request] (hearing, day 3, pages 575, and 582 to 584).

<sup>15</sup> The requirement to act in a consistent manner, free from ambiguity, and with transparency derived from the standard of fair and equitable treatment has been cited repeatedly in several cases. In this regard, see: *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, Award, Case No. ARB (AF)/00/2, May 29, 2003, ¶ 154 (Annex CLA-90); *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, Case No. ARB/06/18, January 14, 2010, ¶ 284 (Annex CLA-49); and *Saluka Investments BV (The Netherlands) v. The Czech Republic*, (UNCITRAL), Partial Award, March 17, 2006, ¶¶ 307-308 (Annex CLA-79).

<sup>16</sup> Despite stating that SENIAT had an obligation to issue well-founded, written decisions within 30 working days in order to respond to a request for [tax] recovery, witness Villasmil stated during the hearing that SENIAT did not respond to the communications sent by MLDN in connection with the *actas de requerimiento* because this was not the usual practice of the Venezuelan tax authorities (hearing, day 3, pages 549 to 551 and 582).

conclude that the Respondent did not demonstrate the consistency and transparency required by the standard of fair and equitable treatment set forth in the Treaty.

15. The fact that officials of the Respondent later verbally informed MLDN of the reasons for non-issuance of the VAT CERTS does not modify the abovementioned conclusion.<sup>17</sup> Given that the issue was subject to opinion -and that the tax authorities acted to the contrary for almost ten years- the change in position should be clear, well founded, and duly communicated to the taxpayer.
16. It was not the responsibility of MLDN to go to other officials or the local courts to seek confirmation that the position verbally communicated to it by an official represented the position of the Venezuelan State in this regard.<sup>18</sup> The principle is exactly the opposite. As MLDN repeatedly submitted formal requests to SENIAT, it was SENIAT the one that had the obligation to provide a proper response to those requests.<sup>19</sup>
17. In my opinion, the fact that the Claimant decided to challenge the silence of SENIAT in February 2015 does not change the Respondent's failure to act with due consistency and transparency.<sup>20</sup> As the legal experts of both Parties have agreed, under Venezuelan law, the authorities have an obligation to respond to the requests of individuals.<sup>21</sup> In systems such as Venezuela's, administrative silence does not constitute a tacit decision of the authorities; instead it is merely a legal fiction or presumption in favor of individuals intended to allow them to access other administrative bodies or courts (as applicable), should a citizen decide to invoke the silence for such purpose.<sup>22</sup> The mere fact that time periods elapsed without a decision does not relieve the authorities of their duty to respond—something that logically flows from the principle of publicity of State acts and

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<sup>17</sup> Award ¶¶ 463.

<sup>18</sup> Award ¶¶ 464.

<sup>19</sup> During the hearing, witness Villasmil further explained that she sent the communications from MLDN in connection with the *actas de requerimiento* to her superiors, but did not know whether they had responded to them (hearing, day 3, page 584).

<sup>20</sup> Award ¶¶ 464.

<sup>21</sup> Second legal opinion of Brewer-Carías, ¶¶ 174 to 178; second legal opinion of Canónico, ¶ 149. Both experts agree that in the Venezuelan legal system, administrative silence has been designed to benefit citizens and that this right or guarantee applicable to individuals is derived from Article 51 of the Venezuelan Constitution.

<sup>22</sup> In this regard, systems such as Venezuela's (or Argentina's) differ from others where denial by means of silence is automatic and could be construed as a decision by the authorities. For this reason, it is said that in the former group "silence benefits citizens and not the authorities." I have addressed, on numerous occasions since 1988 onwards, the issue of administrative inaction and the techniques used to remedy this in comparative law. In this regard, see for example, Tawil, Guido Santiago, "*Administración y Justicia*," Vol. I, Depalma, Buenos Aires, 1993, pages 288 et seq., among many others.

the republican form of government— and the alleged delay in challenging it—which, as explained, was not such in the case as it is only a legal fiction aimed at providing citizens with additional options for such challenges— could not justify or mitigate the Respondent’s failure to act.

18. Given the decision reached by the majority on the Arbitral Tribunal, it is not appropriate for me to render an opinion on the damage alleged, the valuation method used, or the quantum of compensation requested.



Prof. Dr. Guido Santiago Tawil  
Arbitrator

Date: 18-12-18