

PCA CASE N° 2016-39/AA641

**ARBITRATION UNDER THE RULES OF ARBITRATION OF THE  
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE  
LAW**

**GLENCORE FINANCE (BERMUDA) LTD**

Claimant

-v-

**PLURINATIONAL STATE OF BOLIVIA**

Respondent

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**CLAIMANT’S REPLY ON THE MERITS AND  
COUNTER-MEMORIAL ON JURISDICTIONAL  
OBJECTIONS**

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**Freshfields Bruckhaus Deringer US LLP**

601 Lexington Avenue  
31st Floor  
New York  
New York 10022  
United States of America

**FERRERE**

Avenida San Martín, No 155  
Edificio Ambassador Business Center, Piso 18  
Equipetrol  
Santa Cruz de la Sierra  
Bolivia

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## GLOSSARY

Term	Definition
<i>10 May 2012 Agreement</i>	Agreement between the <i>Central Obrera Boliviana</i> , the FSTMB, the Huanuni Union, the Vice President of Bolivia, the Minister of Mining and the Minister of Economy, 10 May 2012
<i>1967 Constitution</i>	Political Constitution of the State of Bolivia, 2 February 1967, as amended in 1994 and 2004
<i>2009 Constitution</i>	Political Constitution of the Plurinational State of Bolivia, 7 February 2009
<i>Administrative Procedure Law</i>	Law No 2,341, 23 April 2002
<i>Antimony Smelter</i>	Vinto antimony smelter
<i>Antimony Smelter Nationalization Decree</i>	Supreme Decree No 499, 1 May 2010
<i>Antimony Smelter Purchase Agreement</i>	Sale and purchase agreement of the Antimony Smelter between the Trade Ministry, Comibol, Colquiri and Comsur, 11 January 2002
<i>Assets</i>	Collectively, the Tin Smelter, the Antimony Smelter and the rights in the Colquiri Mine
<i>BITs</i>	Bilateral investment treaties, including treaties for the promotion and protection of investments and the like
<i>Bolivia / Respondent</i>	Plurinational State of Bolivia
<i>Colquiri Mine Nationalization Decree</i>	Supreme Decree No 1,264, 20 June 2012
<i>Capitalization Law</i>	Law No 1,544, 21 March 1994
<i>Cencomincol</i>	Central Local de Cooperativas Mineras de Colquiri
<i>CDC</i>	Commonwealth Development Corporation
<i>COB</i>	Central Obrera Boliviana
<i>Colquiri</i>	Compañía Minera Colquiri SA
<i>Colquiri Lease</i>	Lease agreement for the Colquiri Mine between the Trade Ministry, Comibol, Colquiri and Comsur, 27 April 2000
<i>Colquiri Mine</i>	Tin and zinc mine in Colquiri

<b>Term</b>	<b>Definition</b>
<i>Colquiri Union</i>	Sindicato Mixto de Trabajadores Mineros de Colquiri
<i>Comibol</i>	State-owned Corporación Minera de Bolivia
<i>Comsur</i>	Compañía Minera del Sur SA
<i>Concentrator Plant</i>	The concentrator plant of the Colquiri Mine
<i>Cooperativa 21 de Diciembre</i>	Cooperativa Minera 21 de Diciembre Ltda
<i>Cooperativa 26 de Febrero</i>	Cooperativa Minera 26 de Febrero Ltda
<i>ECT</i>	The Energy Charter Treaty
<i>EMV</i>	Empresa Metalúrgica Vinto
<i>ENAF</i>	State-owned Empresa Nacional de Fundiciones
<i>Expropriation Law</i>	Law of Expropriation due to Public Utility, 30 December 1884
<i>Fedecomín La Paz</i>	Federación Departamental de Cooperativas Mineras de La Paz
<i>Fencomin</i>	Federación Nacional de Cooperativas Mineras
<i>FSTMB</i>	Federación Sindical de Trabajadores Mineros de Bolivia
<i>GDP</i>	Gross Domestic Product
<i>Glencore</i>	Together, Glencore Plc, Glencore International, Glencore Bermuda and its local subsidiaries
<i>Glencore Bermuda / Claimant</i>	Glencore Finance (Bermuda) Ltd
<i>Glencore International</i>	Glencore International AG
<i>Glencore plc</i>	Glencore International Plc
<i>Huanuni Mine</i>	The tin mine in Huanuni
<i>Huanuni Union</i>	Sindicato Mixto de Trabajadores Mineros de Huanuni
<i>Investment Law</i>	Law No 1,182, 17 September 1990
<i>Investment Promotion Law</i>	Law No 516, 4 April 2014
<i>Iris</i>	Iris Mines & Metals SA
<i>JV Contracts</i>	Joint venture contracts for the Bolívar, Porco and Colquiri mines

<b>Term</b>	<b>Definition</b>
<i>Kempsey</i>	Kempsey SA
<i>Main Ramp</i>	Principal access ramp under construction in the Colquiri Mine, to connect the surface to the -405 level
<i>MAS Political Program</i>	Official agenda published by Movimiento al Socialismo political party in November 2005
<i>Minera</i>	Minera SA
<i>Mining Code</i>	Law No 1,777, 17 March 1997
<i>Mining Law</i>	Law No 535, 24 May 2014
<i>Ministry of Economy</i>	Ministry of Economy and Public Finances
<i>Ministry of Mining</i>	Ministry of Mining and Metallurgy of Bolivia
<i>Notice of Arbitration</i>	Claimant's Notice of Arbitration
<i>New Economic Policy</i>	The comprehensive stabilization program "Nueva Política Económica," August 1985
<i>New Tailings Dam</i>	A new dam to be constructed in the Colquiri Mine to accommodate the tin and zinc tailings
<i>Panamanian Companies</i>	Together, Iris, Kempsey and Shattuck
<i>PCA</i>	Permanent Court of Arbitration
<i>PCIJ</i>	Permanent Court of International Justice
<i>Privatization Law</i>	Law No 1,330, 24 April 1992
<i>Rosario Agreement</i>	Minute of agreement entered into by Colquiri, Fedecomín La Paz, Fencomín, Cencomíncol, Cooperativa 26 de Febrero, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca and the Ministry of Mining, 7 June 2012
<i>San Antonio Proposal</i>	Sinchi Wayra's proposal to cede the exploitation of the San Antonio vein of the Colquiri Mine to the Cooperativa 26 de Febrero, 5 June 2012
<i>Shattuck</i>	Shattuck Trading Co Inc
<i>Sinchi Wayra</i>	Sinchi Wayra SA
<i>Smelters</i>	Together, the Tin Smelter and the Antimony Smelter

<b>Term</b>	<b>Definition</b>
<i>Statement of Defense</i>	Bolivia's Preliminary Objections, Statement of Defence, and Reply on Bifurcation
<i>Swiss-Bolivia BIT</i>	Agreement between the Swiss Confederation and the Republic of Bolivia on the Reciprocal Promotion and Protection of Investments
<i>Tailings Plant</i>	Plant to exploit the old tailings of the Colquiri Mine
<i>Tin Smelter</i>	Vinto tin smelter
<i>Tin Smelter Nationalization Decree</i>	Supreme Decree No 29,026, 9 February 2007
<i>Tin Smelter Purchase Agreement</i>	The sale and purchase agreement of the Tin Smelter between the Trade Ministry, Comibol, EMV and Allied Deals Estañó Vinto SA, 17 July 2001 and 4 July 2001
<i>Tin Stock</i>	161 tonnes of tin concentrates belonging to Colquiri stored at the Antimony Smelter
<i>Trade Ministry</i>	Ministry of Foreign Trade and Investment of Bolivia
<i>Treaty</i>	Agreement for the Promotion and Protection of Investments between the United Kingdom of Great Britain and Northern Ireland and Bolivia, 16 February 1990
<i>UK</i>	United Kingdom of Great Britain and Northern Ireland
<i>UNCITRAL Rules</i>	Arbitration Rules of the United Nations Commission on International Trade Law, as revised in 2010
<i>Vinto</i>	Complejo Metalúrgico Vinto SA

1. This Reply on the Merits and Counter-Memorial on Jurisdictional Objections (**Reply**) is submitted on behalf of Glencore Finance (Bermuda) Ltd (**Claimant** or **Glencore Bermuda**), a company incorporated under the laws in force in the United Kingdom overseas territory of Bermuda (**Bermuda**), pursuant to the Tribunal’s Revised Procedural Calendar dated 15 June 2018.

## **I. INTRODUCTION AND EXECUTIVE SUMMARY**

2. The facts of this case are simple. It is undisputed that Bolivia seized (i) the Tin Smelter<sup>1</sup>—the largest tin smelter in Bolivia and one of a handful of high-grade tin ingot producers in the world; (ii) the non-producing Antimony Smelter and the Tin Stock stored therein; and (iii) the exclusive rights to explore, exploit, and market the mineral products from the Colquiri Mine—the second largest tin mine and one of the most competitive mines in Bolivia. It is also undisputed that these takings deprived Glencore Bermuda of the value of its shares in Colquiri and Vinto. Glencore Bermuda’s experts have valued the resulting damages in US\$675.7 million as of 15 August 2017. As Bolivia openly admits, it has not paid a single cent of compensation for these takings. The arbitration therefore turns only on the legal characterization of these takings and the ensuing economic consequences.
3. In an attempt to evade liability for its actions, Bolivia argues that these were not expropriations but “reversions” effected in the legitimate use of its police powers. Yet, Bolivia has not even come close to *prima facie* proving its claim that the reversions were taken for public purposes to enforce the law, public order, and safety and required no compensation. In fact, Bolivia cannot point to even one relevant Bolivian law provision providing that “reversion” of the Assets was the sanctioned domestic remedy. This is not the first time Bolivia had tried this tactic and failed: in *Quiborax*, Bolivia attempted a similar play with semantics by

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<sup>1</sup> Capitalized terms have the meaning set forth in the Glossary.

calling its actions “revocations” rather than expropriations. The tribunal did not buy it, finding that Bolivia had unlawfully expropriated claimants’ investments.

4. Bolivia’s own actions in this case clearly show that the Assets were not “reverted” but rather “nationalized.” With respect to both the Tin and Antimony Smelters, the Government hung large banners in front of each asset, with the word “nationalized” clearly visible:



5. With respect to the Colquiri Lease, Bolivia’s decision—taken behind Glencore Bermuda’s back—clearly spelled out that it would “nationalize” the Colquiri Mine. Interestingly, this decision came a few weeks after the Minister of Mining had unexpectedly visited the Colquiri Mine to obtain information about its reserves and operations—and prior to the *cooperativistas*’ violent occupation of the mine.
6. Despite Bolivia’s unfounded allegations of illegalities in the privatization, breaches of contractual obligations, and the need to restore public order and public safety in the Colquiri Mine, the reason for Bolivia’s nationalizations is simple: Bolivia had a strategic interest in gaining full control over the tin supply chain and reap greater profits when prices were soaring. Indeed, at the time Bolivia seized the Tin Smelter, the international price of tin had more than doubled since the privatization of the Assets. Similarly, when Bolivia nationalized the Colquiri Lease the prices had more than quadrupled. As the record in this case shows:

- (a) Bolivia seized the Tin Smelter because it would be “profitable” for it to do so. This is confirmed by the report issued by Comibol on 29 January 2007—just ten days before the taking—where it advised that transferring the Tin Smelter to Comibol “will give the latter opportunity to close the production of tin, meaning the production, mining and smelting circuit [...]” The report also noted that the “reversion” would help support the state-run Huanuni Mine’s operations and solve its “economic difficulties.”
  - (b) Bolivia seized the Antimony Smelter to gain access to 161 tons of tin concentrates from the Colquiri Mine that had been temporarily stored there, again, to ease the supply shortages that the already expropriated Tin Smelter was facing at the time.
  - (c) Bolivia nationalized the Colquiri Mine to help solve the severe shortages of tin concentrates that the State-run Tin Smelter was still experiencing due to its inability to pay suppliers and the Huanuni Mine’s deficient operations.
7. Despite Glencore Bermuda’s infinite attempts to reach an amicable solution for more than nine years, the negotiations went nowhere. The Government did not negotiate in good faith. Bolivia delayed and cancelled meetings, refused to recognize its obligation to pay the fair market value of the expropriated Assets, rejected the valuations prepared by Glencore Bermuda’s experts, and went so far as to offer a negative valuation in response—essentially arguing that Glencore Bermuda should pay Bolivia for having taken its Assets. Despite Bolivia’s obligation to provide Glencore Bermuda with “prompt” compensation under the plain language of the Treaty, to this date—over eleven years from its first taking and six years from its last one—Bolivia has not done so.
8. As a result of Bolivia’s conduct, Glencore Bermuda had no choice but to commence the present arbitration. Now, Bolivia argues in these proceedings that

it should be entitled to evade its obligations under the Treaty on the basis of six inconsistent and false jurisdictional and admissibility arguments.

9. *First*, recognizing that Glencore Bermuda's incorporation in Bermuda qualifies it as a protected investor under the Treaty, Bolivia requests that the Tribunal pierce Glencore Bermuda's corporate veil to reveal its "true Swiss nationality." Yet, the corporate veil doctrine is inapposite. Glencore Bermuda is merely exercising its right under international law and not attempting to avoid any type of liability towards third parties as a result of fraud or malfeasance. But even if this doctrine were applicable (which it is not), Bolivia itself admits it solely bases its arguments on mere allegations unrelated to the Assets. Plainly stated: Bolivia has failed to satisfy the heightened burden of proof to justify the piercing of Glencore Bermuda's corporate veil.
10. *Second*, Bolivia claims that the acquisition was structured through Glencore Bermuda solely to obtain Treaty protection at a time when the dispute was reasonably foreseeable. However, this is not the case. There was no restructuring: Glencore Bermuda was the company that acquired and paid for the Assets (not Glencore International). Furthermore, Bolivia's argument makes no sense given that Glencore International also benefited from the protection of an investment treaty (namely, the Switzerland-Bolivia Treaty). In any event, the specific disputes had neither occurred, nor were they reasonably foreseeable at the time the acquisition started in 2004, nor when it was completed in early 2005. Hence, even if the Tribunal were to determine that the investment was structured through Glencore Bermuda for the sole purpose of obtaining the protection of the Treaty (which, as just explained, is clearly not the case), this constituted a legitimate practice consistently recognized by case law and scholars alike.
11. *Third*, Bolivia also alleges that the Treaty would require Glencore Bermuda (i) to actively "make" an investment and (ii) to directly hold an investment. However, these requirements are not provided under the Treaty. The Treaty's definition of "investment" protects "every kind of asset," including "any other form of

participation in a company.” Its plain meaning encompasses Glencore Bermuda’s investment in Vinto, Colquiri, and thereby its indirect stake in their Assets, including any movable and immovable property, rights and claims to money having a financial value.

12. *Fourth*, Bolivia claims that the privatization of the Assets was illegal because its own State officials (although from five different administrations) developed a legal framework applicable to all of Bolivia’s industrial sectors solely to allow its former President Sánchez de Lozada to acquire the three Assets in dispute in this arbitration. Bolivia therefore argues that the Tribunal cannot hear Glencore Bermuda’s claims because it knew (or should have known) at the time it acquired the Assets, five years after their privatization, that Bolivia’s own legal framework was not in fact “legal.” To this date—almost 20 years after the privatizations—no Bolivian court has determined that the privatizations were illegal or that any of the laws and regulations comprising the legal framework governing the privatization were not constitutional. In fact, if there were any merit to Bolivia’s argument, then it should have “reverted” the Tin Smelter, Antimony Smelter and Colquiri Lease at the same time and for the same reasons, since all three assets were subject to the same privatization process. It did not.
13. *Fifth*, Bolivia argues that it was “deprived” of an opportunity to “reach an amicable resolution” of the Tin Stock claims. Bolivia is wrong. The uncontroverted evidence on the record demonstrates that Bolivia was not only notified, but repeatedly reminded of the Tin Stock claims, giving it ample opportunity to amicably resolve them. In any event, Bolivia has done nothing in over a decade to settle any of Glencore Bermuda’s claims, even though it admits it was properly notified of the disputes related to the nationalization of Colquiri, Vinto and the Antimony Smelter. Dismissing the Tin Stock claims and forcing Glencore Bermuda back into amicable settlement talks would be an absurd outcome, and the Tribunal should reject it.

14. *Finally*, Bolivia attempts to escape its obligations under the Treaty by arguing the mandatory applicability of the ICC jurisdiction clause in the Tin Smelter Purchase Agreement, Antimony Smelter Purchase Agreement, and Colquiri Lease. However, this is flatly contradicted by Bolivia's own police powers defense. Bolivia cannot tenably argue that its actions amount to justified exercises of sovereign authority and, at the same time, claim that their validity is subject to mandatory contractual arbitration.
15. None of these arguments withstands scrutiny. As Glencore Bermuda describes at length in this Reply, this Tribunal unquestionably has jurisdiction over Glencore Bermuda's claims and Bolivia's conduct breaches its obligations under the Treaty and international law.

\* \* \*

16. This Reply is structured as follows. Section II describes the relevant facts of the dispute, including Glencore Bermuda's investments in Bolivia and their nationalization by Bolivia without compensation. Section III sets out the law applicable to this dispute. Section IV explains why this tribunal has jurisdiction over this dispute. Section V provides an analysis of the obligations incumbent upon Bolivia through the Treaty, and how Bolivia's actions are in breach of these obligations. Section VI sets out Glencore Bermuda's request for relief.
17. Accompanying this Reply are: (i) the Second Witness Statement of Christopher Eskdale, Head of Global Zinc Operations for Glencore International; and (ii) the Second Witness Statement of Eduardo Lazcano, former General Manager of the Colquiri Mine for Sinchi Wayra. Also submitted with this Reply are Glencore Bermuda's new factual exhibits numbered **C-162** to **C-283**, and legal authorities numbered **CLA-135** to **CLA-229**.

## II. THE FACTS RELEVANT TO THE DISPUTE

### A. THE NEW ECONOMIC POLICY SOUGHT TO ADDRESS THE SEVERE CRISIS THAT AFFECTED THE COUNTRY IN THE 1980S BY ATTRACTING PRIVATE INVESTMENT

18. As explained in the Statement of Claim,<sup>2</sup> the primary aim of Bolivia's privatization program was to attract private investors with sufficient capital and know-how to revitalize Bolivia's various industrial sectors after a severe crisis that paralyzed the nation's economy in the 1980s.<sup>3</sup> This crisis was the result of a decrease in international commodity prices, a lack of access to international financing, and the high interest rates applicable to Bolivian debts.<sup>4</sup> By the mid-1980s Bolivia's hyperinflation surged to an annualized rate of 60,000 percent, making Bolivia's rate of inflation one of the highest in world history.<sup>5</sup>
19. The mining sector was no exception. In a country highly dependent on mining exports,<sup>6</sup> the overnight collapse of international tin prices in the mid-1980s had a "catastrophic" impact on the entire industry.<sup>7</sup> This fall in prices resulted in widespread mine closures across Bolivia "leaving 23,000 of the 30,000 miners in state-run mines jobless."<sup>8</sup> Within three years, from 1983 to 1986, the importance of the mining sector diminished from 10 percent of Bolivia's GDP to a mere 4.3

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<sup>2</sup> Statement of Claim, paras 21-22.

<sup>3</sup> The Bolivian government considered the nation's economic state as being on the verge of "national collapse," causing a "loss of confidence" and marked by "hyperinflation" and "recession." See Supreme Decree No 21,060, 29 August 1985, **R-2**, recitals, p 2.

<sup>4</sup> Statement of Claim, para 20. "Country Profile: Bolivia 1987-88," Economist Intelligence Unit, September 1987, **C-54**, pp 5, 10.

<sup>5</sup> Statement of Claim, para 20. JD Sachs, "The Bolivian Hyperinflation and Stabilization," AEA Papers and Proceedings, May 1987, **C-53**, p 1.

<sup>6</sup> "Country Profile: Bolivia 1987-88," Economist Intelligence Unit, September 1987, **C-54**, pp 7-8, 12.

<sup>7</sup> "Bolivian State Mines: End of an Era?," *IDRC Reports*, January 1992, **C-163**.

<sup>8</sup> *Ibid*, p 1.

percent of the GDP.<sup>9</sup> In short, Bolivia's mining industry was in dire need of private investment.

20. To address this severe crisis and attract much needed capital, in August 1985, under the presidency of Paz Estenssoro, Bolivia launched a comprehensive stabilization program which it coined as the New Economic Policy.<sup>10</sup> The New Economic Policy was comprised of a series of plans for macroeconomic stabilization, trade liberalization, administrative and tax reform, along with the deregulation and privatization of the State-controlled industrial sectors.<sup>11</sup> As Bolivia has noted, this New Economic Policy was the first of many steps in the long process of privatization of Bolivia's industrial sectors.<sup>12</sup>
21. The early years of Bolivia's New Economic Policy proved successful<sup>13</sup> and piqued the interest of private investors in Bolivia's mining and other industries.<sup>14</sup> In order to attract private investment into a recovering economy and a dormant mining sector, Bolivia's New Economic Policy provided certain guarantees to potential investors by issuing a series of new laws and regulations in the course of the 1990s. These included the Investment Law,<sup>15</sup> the Privatization Law,<sup>16</sup> the Capitalization Law<sup>17</sup> and the Mining Code.<sup>18</sup> In addition to establishing

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<sup>9</sup> "Country Profile: Bolivia 1987-88," Economist Intelligence Unit, September 1987, **C-54**, p 7.

<sup>10</sup> Answer to Notice of Arbitration, para 14; Statement of Defense, para 47. Supreme Decree No 21,060, 29 August 1985, **R-2**.

<sup>11</sup> JD Sachs, "The Bolivian Hyperinflation and Stabilization," AEA Papers and Proceedings, May 1987, **C-53**, p 18.

<sup>12</sup> Statement of Defense, para 47.

<sup>13</sup> World Bank, "Bolivia – From Stabilization to Sustained Growth," Report No 9763-BO, 1 October 1991, **C-57**, pp 11, 20.

<sup>14</sup> *Ibid*, p 12.

<sup>15</sup> Investment Law, 17 September 1990, **C-4**, Arts 1, 4-9. The Investment Law remained in effect for almost 24 years, being repealed only in April 2014.

<sup>16</sup> Privatization Law, 24 April 1992, **C-58**, Art 1. *See* Statement of Claim, para 25; Statement of Defense, para 49.

<sup>17</sup> Law No 1,544, 21 March 1994, **R-8**. *See* Statement of Claim, para 25; Statement of Defense para 50.

- guarantees in this new regulatory framework, Bolivia entered into BITs with over 20 countries, including the United Kingdom (*UK*), assuring investors from these countries that Bolivia would protect their investments.<sup>19</sup>
22. Bolivia does not dispute that this legal framework allowed the country to attract interest among private investors,<sup>20</sup> particularly in Bolivia’s mining and hydrocarbons sectors.<sup>21</sup> However, Bolivia alleges that this legal framework, which led to the eventual privatization of the Assets, was designed by former President Sánchez de Lozada, who later took advantage of these policies in order to acquire the Assets.<sup>22</sup> Bolivia’s allegations are baseless.
23. *First*, the initial step towards the privatization process of Bolivia’s industrial sector was taken in 1985, well before Mr Sánchez de Lozada became president.<sup>23</sup>
24. *Second*, the legal framework under which the Assets were privatized was developed by both the Legislative and Executive branches of five different

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<sup>18</sup> Comibol had been created by Bolivia in 1952 with the specific purpose of managing the mining industry, directly assuming the exploration, exploitation, benefit and commercialization of minerals. In 1997 Comibol became a “public, autarchic company dependent on the National Secretariat of Mining.” As such Comibol is subject to State control and has authority to direct and manage the mining industry. Bolivian Mining Code Law 1,777, 17 March 1997, **R-4**, Arts 10, 68-69, 91. *See* Statement of Claim, para 26. *See* Supreme Decree No 3,196, 2 October 1952, published in the *Gaceta Oficial* No GOB-61, 2 October 1952, **C-51**, Art 1; 2009 Constitution, 7 February 2009, **C-95**, Art 372(II); Supreme Decree No 29,894, 7 February 2009, published in the *Gaceta Oficial* No 116, 7 February 2009, **C-96**, Art 75(h).

<sup>19</sup> *See* Statement of Claim, paras 24-25. *See also*, Investment Law, 17 September 1990, **C-4**, Arts 7, 10.

<sup>20</sup> Statement of Defense, paras 47, 49-50.

<sup>21</sup> Statement of Claim, para 22.

<sup>22</sup> Answer to Notice of Arbitration, para 15; Statement of Defense, para 46.

<sup>23</sup> Sánchez de Lozada was in office from 1993-1997 and 2002-2003. Bolivia’s allegation that Sánchez de Lozada was the “key architect” of these policies given his role as Minister of Planning and Coordination is baseless. In fact, Sánchez de Lozada did not assume such position until 1986, one year *after* the privatization framework was put into place by the Paz Estenssoro administration. Decree No 21,060 was issued by President Paz Estenssoro while Sánchez de Lozada was a senator. *See* Answer to Notice of Arbitration, para 15; Statement of Defense para 46, 47. Supreme Decree No 21,060, 29 August 1985, **R-2**. *See* “La extensa carrera política y empresarial de Goni,” *Bolivia.com*, 6 August 2002, **C-185**.

administrations, and affected not only the mining sector,<sup>24</sup> but all of Bolivia's public sectors.<sup>25</sup> More precisely, the National Assembly, under the administration of President Paz Estenssoro (the same government that established the New Economic Policy) passed the Investment Law.<sup>26</sup> The government of President Paz Zamora passed and enacted the Privatization Law<sup>27</sup> and Supreme Decree 23,230-A<sup>28</sup> respectively. The Legislative and Executive branches of President Sánchez de Lozada's administration approved the Capitalization Law,<sup>29</sup> Supreme Decree No 23,991,<sup>30</sup> and the Mining Code.<sup>31</sup> Finally, the legislature of President Banzer's administration, the same administration that privatized the Assets, enacted Law 1,982.<sup>32</sup> In this context, it is simply not credible—as Bolivia has claimed—that this complex, comprehensive legal structure was the work of one individual,

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<sup>24</sup> Statement of Claim, para 22. JD Sachs, "The Bolivian Hyperinflation and Stabilization," AEA Papers and Proceedings, May 1987, **C-53**, p 3. *See also*, Answer to Notice of Arbitration, para 14; Statement of Defense, paras 47, 49-50.

<sup>25</sup> Privatization Law, 24 April 1992, **C-58**, Art 1, stating, "[i]nstitutions, entities and companies of the public sector are authorized to transfer the assets, securities, shares and property rights to natural persons and national or foreign juridical persons, or contribute the same to the constitution of new joint-venture stock companies." (unofficial English translation from Spanish original).

<sup>26</sup> Investment Law, 17 September 1990, **C-4**.

<sup>27</sup> Privatization Law, 24 April 1992, **C-58**.

<sup>28</sup> Supreme Decree 23,230-A regulated for the first time the agreements that Comibol would execute under the mining code enacted in 1991, including lease agreements. *See* Supreme Decree No 23,230-A, 30 July 1992, published in the *Gaceta Oficial* No 1,755 on 16 October 1992, 16 October 1992, **C-164**, Arts 2-7.

<sup>29</sup> Law No 1,544, 21 March 1994, **R-8**.

<sup>30</sup> *See* Statement of Defense para 51. Supreme Decree No 23,991 regulated the Privatization Law and restructuring of private companies. The objective of this Decree was "The reorganization of the State-owned companies and other entities is meant to increase the competitiveness and efficiency of the national economy by a) Transferring to the private sector, in exchange of consideration and in a transparent manner, the productive activities that can be managed more efficiently by this sector; b) Reducing the public sector deficit and reassigning resources from said sector to activities related with social and economic infrastructure investment projects; c) Promoting investments and raising financial, technological and management funds, from internal and external sources, to increase production, exports, employment and productivity." Supreme Decree No 23,991, 10 April 1995, **R-100**, Arts 2(a)-(c). (unofficial English translation from Spanish original).

<sup>31</sup> *See* Statement of Claim, para 26; Statement of Defense, para 52; Law No 1,982, 17 June 1999, **R-9**, Arts 1-2.

<sup>32</sup> Law 1,982 excluded EMV from the scope of the Capitalization Law and instructed the Executive to determine the strategy for its privatization. As a result, the Capitalization Law did not form part of the legal framework under which Vinto was privatized. *See* Law No 1,982, 17 June 1999, **R-9**.

former President Sánchez de Lozada, who decided to reform Bolivia's entire public sector to obtain the Assets. On the contrary, these changes were consistent with the recommendations of international organizations—including the World Bank, the United Nations and the Inter-American Development Bank<sup>33</sup>—and similar reforms taking place in other Latin American states around this same time.<sup>34</sup>

25. Bolivia also tries to undermine the need for the privatization of the Assets by claiming that Comibol and its affiliates operated the Assets successfully.<sup>35</sup> In alleging so, however, Bolivia disregards contemporaneous evidence about the operation of the Smelters and the Colquiri Mine.
26. To start, in 1986 the Tin Smelter shut down following the collapse of the international price of tin the year before.<sup>36</sup> While the Tin Smelter resumed activity in 1987, its annual production proved to be the lowest ever registered during its 22 years of operations. Indeed, between 1981 and 1987, the Tin Smelter accumulated losses of approximately US\$250 million.<sup>37</sup> Importantly, Bolivia's State-owned Empresa Nacional de Fundiciones (*ENAF*), which operated the Tin Smelter, admitted in its 1994 Empresa Metalúrgica Vinto (*EMV*) annual report that “the total lack of managerial and technical-administrative policies needed to address

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<sup>33</sup> See, eg, Joint UNDP/World Bank Energy Sector Management Assistance Program, “Basis for Formulation of a Bolivian National Energy Plan,” Report No 9273, November 1987, **C-162**, pp 12-23. A Ewing and S Goldmark, “Privatization by Capitalization – The Case of Bolivia: A Popular Participation Recipe for Cash-Starved SOEs,” The World Bank, FPD Note No 31, November 1994, **C-165**, p 2.

<sup>34</sup> Starting in the mid-1970s Chile undertook a comprehensive reform resulting in the privatization of its telecommunications, aeronautic, steel and energy sectors. Similarly, during the late 1980s and throughout the 1990s, Argentina privatized several sectors including its telecommunications, electricity, water and sewage, and oil and gas sectors. Colombia and Peru soon followed privatizing sectors such as the telecommunications and energy.

<sup>35</sup> Statement of Defense, paras 28-45.

<sup>36</sup> Paribas, Privatization of Bolivian mining assets, Confidential Information Memorandum, August 16, 1999, **RPA-04**, p 26.

<sup>37</sup> Empresa Metalúrgica Vinto Annual Report 1993-1994, **R-43**, p 20.

such a deep crisis led the Company to the verge of closing its operations.”<sup>38</sup> By the mid-1990s, Bolivia knew that over US\$17 million of investment was needed for improvements to the Tin Smelter.<sup>39</sup> By 1998, the Tin Smelter’s production had decreased markedly<sup>40</sup> and although the State-run EMV attempted to counteract this phenomenon by providing incentives to tin producers,<sup>41</sup> by 1999 it was clear that private investment was necessary to boost local tin production in order to provide the necessary raw material to the Tin Smelter. The fate of Colquiri and the Tin Smelter were thus linked.

27. As for the Antimony Smelter, it sustained constant losses each of the first ten years of the State’s operation, totaling approximately US\$18.9 million, a significantly higher figure than the investment of US\$ 17.5 million that had been required to build the plant.<sup>42</sup> Due to these significant losses,<sup>43</sup> the decline of the international antimony market, and lack of domestic raw material, the Antimony Smelter closed in 1985.<sup>44</sup> The Antimony Smelter remained inactive under State control between 1985 and 1990.<sup>45</sup> Bolivia notes that operations began again in

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<sup>38</sup> *Ibid*, p 21.

<sup>39</sup> Contrary to Bolivia’s allegations, its own technical advisers confirmed in 1999 that the last upgrades to the Tin Smelter had been carried out between 1977 and 1980. Behre Dolbear & Company, Inc, Technical Financial Study for the Capitalization of EMV and Transfer of Operative Responsibilities of Comibol to the Private Initiative, Part I, Vol B, September 1995, **C-167**, p 5. Paribas, Privatization of Bolivian mining assets, Confidential Information Memorandum, August 16, 1999, **RPA-04**, pp 26-27.

<sup>40</sup> Paribas, Privatization of Bolivian mining assets, Confidential Information Memorandum, August 16, 1999, **RPA-04**, p 27.

<sup>41</sup> *Ibid*, p 27.

<sup>42</sup> Empresa Metalúrgica Vinto Annual Report 1993-1994, **R-43**, pp 54, 61. *See* Paribas, Privatization of Bolivian mining assets, Confidential Information Memorandum, August 16, 1999, **RPA-04**, p 60.

<sup>43</sup> Such losses are illustrated in Bolivia’s own evidence. *See* Empresa Metalúrgica Vinto Annual Report 1993-1994, **R-43**, p 62.

<sup>44</sup> The Bolivian Government at this time adopted a “general policy to stop subsidizing unprofitable companies” such as the State-owned ENAF which controlled the Antimony Plant. Empresa Metalúrgica Vinto Annual Report 1993-1994, **R-43**, p 63; *see also* Paribas, Privatization of Bolivian mining assets, Confidential Information Memorandum, August 16, 1999, **RPA-04**, p 60.

<sup>45</sup> During this period of inactivity, a technical-economical evaluations were performed in 1988 which “concluded that the plant was uneconomical given its technology and international prices of

1990<sup>46</sup> yet fails to mention that this was pursuant to a toll contract held by the private US company Laurel Industries, which at the time had a surplus of raw material.<sup>47</sup> This meant that the Antimony Smelter was neither supplying its own raw material, nor commercializing its own production. Upon expiration of the toll contract in 1998, neither EMV nor Laurel Industries had any interest in renewing the contract due to the poor condition of the antimony market and the difficulties in gathering enough antimony concentrates for production in Bolivia.<sup>48</sup> As noted by the US Geological Survey, the end of the contract with Laurel “mark[ed] the end of the road for the Bolivian antimony industry.”<sup>49</sup>

28. Finally, the Colquiri Mine was also operating at a substantial loss in the 1990s.<sup>50</sup> As recognized by Bolivia at the time, it needed at least US\$16 million of investment.<sup>51</sup> In fact, for 13 consecutive years through 1999, small-sized mines and cooperatives replaced Comibol as the leading tin producer and accounted for approximately 60% of Bolivia’s tin production in 1999.<sup>52</sup>

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antimony.” See Paribas, Privatization of Bolivian mining assets, Confidential Information Memorandum, August 16, 1999, **RPA-04**, p 60; see also Behre Dolbear & Company, Inc, Technical Financial Study for the Capitalization of EMV and Transfer of Operative Responsibilities of Comibol to the Private Initiative, Part II, Vol A, August 1995, **C-166**, pp 229-230.

<sup>46</sup> Statement of Defense, para 44.

<sup>47</sup> Paribas, Privatization of Bolivian mining assets, Confidential Information Memorandum, August 16, 1999, **RPA-04**, p 60; Empresa Metalúrgica Vinto Annual Report 1993-1994, **R-43**, pp 63-66.

<sup>48</sup> Paribas, Privatization of Bolivian mining assets, Confidential Information Memorandum, August 16, 1999, **RPA-04**, p 64.

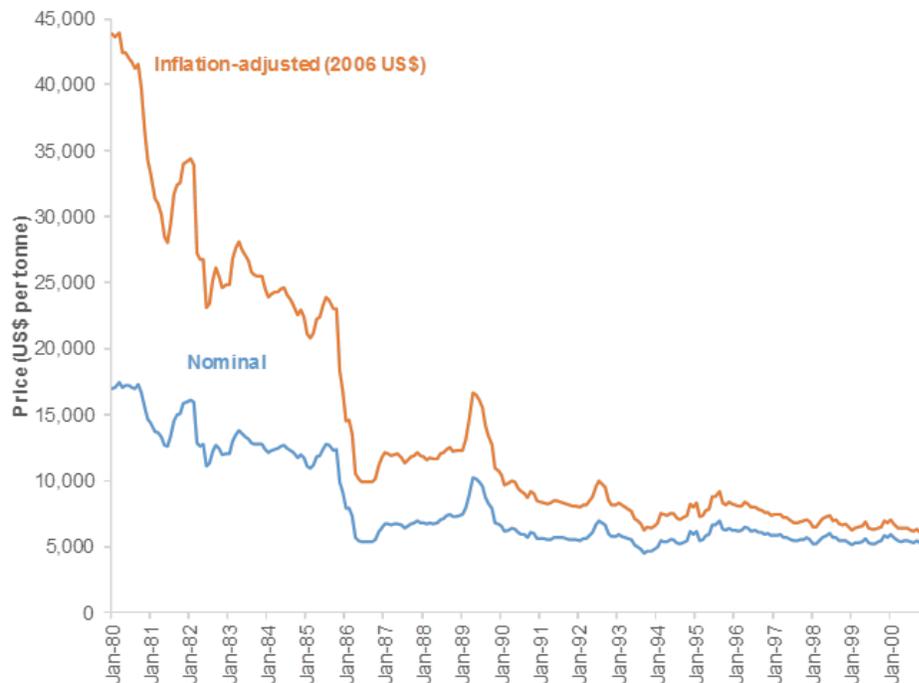
<sup>49</sup> US Geological Survey Minerals Yearbook 1999, “The Mineral Industry of Bolivia”, 1999, **C-174**, p 3.

<sup>50</sup> Behre Dolbear & Company, Inc, Technical Financial Study for the Capitalization of EMV and Transfer of Operative Responsibilities of Comibol to the Private Initiative, Part II, Vol A, August 1995, **C-166**, pp 114-115.

<sup>51</sup> This calculation was limited to the new trackless infrastructure for the mine and the modernization of the concentrator. Behre Dolbear & Company, Inc, Technical Financial Study for the Capitalization of EMV and Transfer of Operative Responsibilities of Comibol to the Private Initiative, Part I, Vol B, September 1995, **C-167**, pp 5-6.

<sup>52</sup> US Geological Survey Minerals Yearbook 1999, “The Mineral Industry of Bolivia”, 1999, **C-174**, p 4.

29. The generally depressed market conditions in the 1990s and the decline in metal prices shown below undoubtedly hindered Bolivia’s mining prospects.<sup>53</sup>



30. In this context, the privatization offered Bolivia a solution to limit its losses and to generate income from the Asset sale. In 1995, Bolivia made its first (albeit failed) attempt to divest the Assets and went on a global road show, targeting various foreign investors<sup>54</sup> and engaging as a technical consultant Behre Dolbear—one of the longest-standing mineral consultancy firms in the world.<sup>55</sup> Behre Dolbear

<sup>53</sup> IMF Primary Commodity Prices, LME Tin (1980-2000), various dates, **C-282**, p 2. *See also* CRU and ITRI, “Tin,” CRU Monitor, February 2007, **C-69**, p 2.

<sup>54</sup> Glencore International was amongst these foreign investors targeted by Bolivia in 1995. Bolivia mischaracterizes the reasons why the first attempt to divest itself of the Assets was declared void. Statement of Defense, para 54. As noted by Bolivia’s then-financial advisor, NM Rothschild & Sons Limited, the first attempt to divest the Assets failed as a result of the government’s mismanagement of the process (including conflict between Comibol and the Ministry of Capitalization, Comibol’s inability to resolve severance packages, and miscommunication with investors). This led to a prolonged and inefficient tender process that not only caused “professional embarrassment” for Bolivia’s adviser, NM Rothschild & Sons Limited, but also resulted in an overall loss of credibility in front of the investors. NM Rothschild & Sons Limited, Capitalization of EM Vinto and transfer of operating control over COMIBOL properties to private sector initiative, **R-102**, pp 8, 13, 14, 18.

<sup>55</sup> Bolivia was seeking to privatize not only the Tin Smelter, the Antimony Smelter, and the Colquiri Mine; but also the Huanuni, San Vicente, San José, and Cerro Rico mines; and the Karachipampa

assessed that in addition to the profits generated from the sale of the Assets, Bolivia expected to “benefit tremendously” from their private operation by participating in services, supplies, and energy, and collecting taxes from the private investors.<sup>56</sup> The total economic impact of these benefits was calculated by it in nearly US\$100 million annually, including over US\$25 million annually from the Tin Smelter, the Antimony Smelter, and the Colquiri Mine.<sup>57</sup> Behre Dolbear further concluded that the privatization would “generate wealth” both directly and indirectly for the Bolivian economy.<sup>58</sup>

31. It was for these reasons, and not as part of a plan created by President Sánchez de Lozada as Bolivia claims, that the Bolivian State (through Comibol and the Trade Ministry) reached out again to potential bidders in 1998 and 1999.<sup>59</sup> In fact, by 1998 Sánchez de Lozada was no longer president.

**B. THE PUBLIC TENDER AND SALE OF THE ASSETS WERE CARRIED OUT IN ACCORDANCE WITH BOLIVIA’S LEGAL FRAMEWORK**

**1. Bolivia never challenged or disputed the legal framework for the privatization of the Assets**

32. After a first failed attempt, in 1999 Bolivia re-launched the bidding process for the Assets and other mining operations.<sup>60</sup> In order to ensure a competitive bidding process, Bolivia hired Paribas—one of the world’s leading investment banks—to

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plant. *See* Behre Dolbear & Company, Inc, Technical Financial Study for the Capitalization of EMV and Transfer of Operative Responsibilities of Comibol to the Private Initiative, Part I, Vol B, September 1995, **C-167**, pp 5, 8-10.

<sup>56</sup> Behre Dolbear & Company, Inc, Technical Financial Study for the Capitalization of EMV and Transfer of Operative Responsibilities of Comibol to the Private Initiative, Part I, Vol B, September 1995, **C-167**, p 9.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*, p 10.

<sup>59</sup> *See* Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-04**, p 1.

<sup>60</sup> *See* Statement of Claim, para 27.

advise it on the technical, financial and legal aspects of the privatization.<sup>61</sup> Importantly, Paribas was commissioned to determine the fair monetary value of the assets and provide minimum values for each asset.<sup>62</sup> However, the Government was the one ultimately setting the price.<sup>63</sup>

33. Between June and August 1999, during Mr Bazner's presidency, Bolivia issued public tender terms for the sale of the Tin Smelter, the Antimony Smelter, and the rights to operate and exploit the Colquiri Mine, among other mining assets.<sup>64</sup> The relevant bidding rules and legal framework for the privatization of the Assets were proposed by the National Council for Economic Policy and approved by both the Trade Ministry and Comibol in June 1999. The public tender was a two-step bidding process.<sup>65</sup> First the bidders had to compete on technical and economic criteria.<sup>66</sup> Only the approved bidders' financial proposals would then be

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<sup>61</sup> In September 1998, Paribas first prepared a report on Vinto and the Colquiri Mine, among other assets, providing an overview of the legal framework governing the privatization of each asset and an account of its institutional history. *See* Paribas, Legal and institutional diagnostic of Vinto, the Oruro Plant, Huanuni and Colquiri, 9 November 1998, **R-91**. Then, in August 1999, Paribas prepared a memorandum that was sent to potential investors describing the privatization program in the Bolivian mining sector, including the Assets. This memorandum included a description of the transaction proposed for each one of the Assets based on the Terms of Reference and the conditions for the sales, as well as a detailed description of each one of the Assets to be tendered, including their historical background, technical descriptions, overview of operations, etc. *See* Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-04**.

<sup>62</sup> Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-04**, pp 11, 15, 53, 113. Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease, 21 December 1999, **R-108**, pp 4-5.

<sup>63</sup> All of the relevant documents, the Paribas memorandums, the bidding rules, and contracts, were prepared by Bolivia with the input and advice of Paribas, and issued prior to the opening of the bidding process and with no intervention whatsoever from the bidders. *See* Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-04**, pp 2, 11 (“[t]he Bolivian Government will remain free to follow Paribas’ recommendation or not.”).

<sup>64</sup> Resolution No 1753/99, 25 June 1999, **C-60**.

<sup>65</sup> *See* Terms of Reference for the Public Tender for the Colquiri Mine Lease, 24 June 1999, **R-104**, Sections 4, 5; Terms of Reference for the Second Public Tender for the Antimony Smelter, 31 July 2000, **R-109**, Sections 4, 5; Terms of Reference for the Public Tender for the Tin Smelter, 24 June 1999, **R-118**, Sections 4, 5.

<sup>66</sup> The tender rules called for experienced bidders with significant financial backing, resources and technical capacities in order to qualify for the tender. *See* Terms of Reference for the Public

assessed by the Qualifying Commission,<sup>67</sup> a commission composed of high-ranking public servants,<sup>68</sup> and created to supervise the privatization process.<sup>69</sup> After evaluating the bids, the Qualifying Commission submitted its recommendation reports<sup>70</sup> “for the consideration” of the President, at the time Mr Banzer, and the Cabinet by the Trade Ministry.<sup>71</sup> The qualified bidders with the highest financial offers were awarded the Assets by Supreme Decrees issued by the President.<sup>72</sup> Importantly, Bolivia never challenged or disputed the legal

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Tender for the Colquiri Mine Lease, 24 June 1999, **R-104**, Section 4; Terms of Reference for the Second Public Tender for the Antimony Smelter, 31 July 2000, **R-109**, Section 4; Terms of Reference for the Public Tender for the Tin Smelter, 24 June 1999, **R-118**, Section 4.

<sup>67</sup> Terms of Reference for the Public Tender for the Colquiri Mine Lease, 24 June 1999, **R-104**, Sections 2.1.2.1 (Financial Capacity), 2.1.2.2 (Technical-Operational Capacity); Terms of Reference for the Second Public Tender for the Antimony Smelter, 31 July 2000, **R-109**, Sections 2.1.2.1 (Financial Capacity), 2.1.2.2 (Technical-Operational Capacity); Terms of Reference for the Public Tender for the Tin Smelter, 24 June 1999, **R-118**, Sections 2.1.2.1 (Financial Capacity), 2.1.2.2 (Technical-Operational Capacity); Amendment No 6 to the Terms of Reference to the Tin Smelter Tender, 2 December 1999, **R-119**, pp 1-3.

<sup>68</sup> The Qualifying Commission was a committee appointed by the Ministry of External Commerce and Investment. Its members included the Trade Minister, the General Director of Metallurgy of the Ministry of Economic Development, the President of EMV and the President of Comibol. *See* Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease, 21 December 1999, **R-108**, p 8, *See also* Statement of Defense, para 58.

<sup>69</sup> Supreme Resolution No 215,521, 13 April 1995, published in the *Gaceta Oficial* No 2,040 on 10 November 1997, 10 November 1997, **C-171**, Arts 3, 6.

<sup>70</sup> Terms of Reference for the Public Tender for the Colquiri Mine Lease, 24 June 1999, **R-104**, Section 5.5.2; Terms of Reference for the Second Public Tender for the Antimony Smelter, 31 July 2000, **R-109**, Section 5.5.2; Terms of Reference for the Public Tender for the Tin Smelter, 24 June 1999, **R-118**, Sections 5.6, 5.8.2. With regard to the Tin Smelter, Section 5.6 of the Terms of Reference set forth a formula for the Qualifying Commission to use to determine its recommendation. Terms of Reference for the Public Tender for the Tin Smelter, 24 June 1999, **R-118**, Section 5.6.

<sup>71</sup> Terms of Reference for the Public Tender for the Colquiri Mine Lease, 24 June 1999, **R-104**, Section 5.5.3 (“The Ministry will present the recommendation report of the Commission for consideration of the President of the Republic in the Council of Ministers, who will make the Adjudication by Supreme Decree.”) (unofficial English translation from Spanish original); Terms of Reference for the Second Public Tender for the Antimony Smelter, 31 July 2000, **R-109**, Section 5.5.3; Terms of Reference for the Public Tender for the Tin Smelter, 24 June 1999, **R-118**, Section 5.8.3.

<sup>72</sup> Supreme Decree No 25,631, 24 December 1999, published in the *Gaceta Oficial* No 2,192, **C-6**, p 6. *See* Terms of Reference for the Public Tender for the Colquiri Mine Lease, 24 June 1999, **R-104**, Section 5.5.3; Terms of Reference for the Second Public Tender for the Antimony Smelter, 31 July 2000, **R-109**, Section 5.5.3; Terms of Reference for the Public Tender for the Tin Smelter, 24 June 1999, **R-118**, Section 5.8.3.

- framework or the rules applicable to the privatization of the Assets during the course of their operations.
34. For the Tin Smelter, the Qualifying Commission considered a bid from UK-based Allied Deals plc for US\$14 million and a lesser offer from a consortium formed by the Commonwealth Development Cooperation (*CDC*), a development institution owned by the government of the UK, and the Bolivia-based Comsur (together, *the Consortium*).<sup>73</sup> After following the set protocol for the tender and bidding process, the Qualifying Commission awarded the Tin Smelter to Allied Deals plc in December 1999, as it presented the highest bidding price.<sup>74</sup>
35. In relation to the Antimony Smelter, the Qualifying Commission evaluated and approved the bid from Colquiri.<sup>75</sup> The company offered to pay US\$1.1 million for the asset, over ten times Paribas's minimum value of only US\$100,000.<sup>76</sup> Colquiri formally acquired the award for the Antimony Smelter in January 2001, and the sale and purchase agreement for the transfer of the Antimony Smelter was signed in January 2002.<sup>77</sup>

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<sup>73</sup> Statement of Defense para 74; Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease, 21 December 1999, **R-108**, pp 5-6. At the time of the privatization of the Assets, Comsur was one of the most experienced players in the Bolivian mining sector and had become the largest zinc producer in the country. Comsur was created in the 1960s and had developed joint ventures with Rio Tinto, as well entered into domestic and international contracts with multinational mining companies. US Geological Survey Minerals Yearbook 2000, "The Mineral Industry of Bolivia", 2000, **C-177**, p 2.

<sup>74</sup> Statement of Defense, para 75; Supreme Decree No 25,631, 24 December 1999, published in the *Gaceta Oficial* No 2,192 on 24 December 1999, **C-6**, Art 1.

<sup>75</sup> Allied Deals also submitted an offer for the Colquiri Mine Lease, but its financial offer did not qualify for evaluation. Report No 001/2000 of the Qualifying Commission of the second public tender for the sale of the Antimony Smelter, 20 November 2000, **R-112**.

<sup>76</sup> After an unsuccessful first attempt to sell the Antimony Smelter, a new tender process took place in August 2000. Report No. 001/2000 of the Qualifying Commission of the second public tender for the sale of the Antimony Smelter, 20 November 2000, **R-112**; Statement of Defense, paras 62, 65.

<sup>77</sup> Supreme Decree No 26,042, 5 January 2001, published in the *Gaceta Oficial* No 2,282 on 9 January 2001, **C-8**. Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**.

36. For the Colquiri Mine Lease, two entities participated in the tender and bidding process, Paranapanema SA and the Consortium.<sup>78</sup> After analyzing the corporate, financial, and operational capabilities of the bidders, the Qualifying Commission determined that the Consortium was the only one that met the criteria published in the Terms of Reference.<sup>79</sup> Accordingly, the Consortium placed the winning bid for the Colquiri Lease,<sup>80</sup> offering to invest US\$2 million over the first two years of operation and a royalty equivalent to 3.5 percent of its net revenues.<sup>81</sup> On that basis, the Qualifying Commission recommended that the Colquiri Lease be awarded to the Consortium<sup>82</sup> and the President and Cabinet approved the award of the Lease through Supreme Decree No 25,631.<sup>83</sup> On 27 April 2000, the Comsur-CDC Consortium (which had been renamed Compañía Minera de Colquiri SA) (*Colquiri*) and Comsur signed a lease agreement with the Trade Ministry and Comibol to exploit, explore, and commercialize minerals from the Colquiri Mine for an initial term of 30 years.<sup>84</sup>

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<sup>78</sup> Statement of Defense, para 57; Minutes of the opening of Envelope A proposals (Colquiri), 20 December 1999, **R-105**, p 2.

<sup>79</sup> Minutes of the opening of Envelope B proposals (Tin Smelter, Antimony Smelter, Colquiri Mine Lease), 20 December 1999, **R-107**, p 6.

<sup>80</sup> *Ibid.*

<sup>81</sup> Notably, Paribas did not establish a minimum bidding price for the Colquiri Mine, but rather had established that any offer for an investment in excess of US\$1 million for the exploration, exploration and development of the Colquiri Mine would be positive. Notarized minutes of the opening of the Envelope A proposals (Tin Smelter, Colquiri), 21 December 1999, **R-116**, pp 4-5; Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease, 21 December 1999, **R-108**, p 6; Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-04**, p 113. *See also* Statement of Claim, para 30.

<sup>82</sup> Notarized minutes of the opening of the Envelope A proposals (Tin Smelter, Colquiri), 21 December 1999, **R-116**, pp 4-5; Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease, 21 December 1999, **R-108**, p 6.

<sup>83</sup> Supreme Decree No 25,631, 24 December 1999, published in the *Gaceta Oficial* No 2,192 on 24 December 1999, **C-6**, recital No 12, Art 2.

<sup>84</sup> Statement of Claim para 30. Colquiri Lease, 27 April 2000, **C-11**, Clauses 4, 7.

## 2. Bolivia was in complete control of the bidding process

37. Despite the thorough and sophisticated bidding procedures described above based on the advice of international consultants, Bolivia now seems to question the transparency of its own bidding process, along with the behavior of its own Government advisers and representatives. Specifically, Bolivia seeks to undermine the binding nature of the agreements through which the Assets were ultimately sold to Comsur and Allied Deals.<sup>85</sup> With no evidence whatsoever, Bolivia baldly asserts that (i) the purchase and lease agreements for the Assets were executed without observing constitutional requirements,<sup>86</sup> and (ii) the Assets were awarded for a low price<sup>87</sup> despite public opposition to their sale.<sup>88</sup> These claims are baseless.
38. *First*, Bolivia has never challenged the validity of the Supreme Decrees that awarded the contracts that privatized the Assets, nor the laws that provided for their execution.<sup>89</sup> Yet, in this arbitration it claims that none of the sale contracts of the Assets obtained the Congressional approval allegedly required by article 59(5) of the 1967 Constitution.<sup>90</sup> This is a clear red herring. Not once did Bolivia raise this during the bidding process, the execution of the contracts, or the subsequent operation of the Assets. To the contrary, the privatization contracts of the Tin Smelter, the Antimony Smelter and the Colquiri Lease, expressly provided that

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<sup>85</sup> Statement of Defense, Section 2.3. As noted in the Statement of Claim, the Colquiri Lease and Antimony Smelter were awarded to Comsur pursuant to the public tender, while the Tin Smelter was awarded to Allied Deals. Comsur subsequently acquired the Tin Smelter in June 2002 following the liquidation of Allied Deals. *See* Statement of Claim, paras 29-31.

<sup>86</sup> Statement of Defense, paras 59, 69 and 81.

<sup>87</sup> *Ibid*, paras 58, 65, and 73-74.

<sup>88</sup> *Ibid*, paras 66-67 and 79-81.

<sup>89</sup> Notably, Bolivia deliberately omits that under Bolivian law all laws, decrees and regulations are deemed constitutional until formally found unconstitutional by the Constitutional Court. Law 1,836, 1 April 1998, published in the *Gaceta Oficial* No 2,058 on 1 April 1998, 1 April 1998, C-172, Art 2.

<sup>90</sup> Constitution of Bolivia, 1967, **R-03**, Art 59(5) (“the powers of the Legislative Power are: [...] 5th Authorize and approve the contracting of loans that compromise the general income of the State, as well as contracts related to the exploitation of national wealth.”) (unofficial English translation from Spanish original).

the Trade Ministry, Comibol and the State-owned company EMV, had complied with all necessary requirements under Bolivian law to sell the Smelters and sign the lease for the Colquiri Mine, as set out below:

13.2 That all measures and formalities required in the Republic of Bolivia have been adopted and fulfilled, as have been all the corporate formalities of an internal nature, that entitle and authorize the SELLER to sign, grant and fulfill the CONTRACT.

13.3 That [EMV] has obtained by law all rights and powers with respect to sale and has the legal power to dispose of the SMELTER, the ASSETS AND RIGHTS, which are duly consolidated, recognized, inscribed and registered when required, in accordance with the laws of the Republic of Bolivia, and thus for such purpose there is no limitation, prohibition, claim, complaint or similar restriction of any kind. [...] The SELLER has fulfilled all the obligations imposed by Bolivian laws to fully maintain in force its rights over the SMELTER, the ASSETS AND RIGHTS, including the payment of patents and applicable taxes. The SELLER has obtained the contractually and legally required authorizations to transfer to the PURCHASER the ASSETS AND RIGHTS.<sup>91</sup>

39. Contrary to Bolivia's allegations,<sup>92</sup> no additional Congressional approval was required. The same Constitution granted Comibol the power to manage its assets,

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<sup>91</sup> Notarization of the sale and purchase agreement of the Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Colquiri and Comsur, 11 January 2002, **C-9**, Clauses 13.2, 13.3. Analogous provisions were included in Tin Smelter Purchase Agreement and in the Colquiri Lease. *See* Tin Smelter Purchase Agreement, 17 July 2001 and 4 July 2001, **C-7**, Clauses 13.2, 13.3; Colquiri Lease, 27 April 2000, **C-11**, Clauses 12.1.9, 12.1.10.

The contracts also expressly provided that the parties had complied with all of the obligations established in the Terms of Reference and all other obligations indicated in the respective agreement. Colquiri Lease, 27 April 2000, **C-11**, Clause 6; Tin Smelter Purchase Agreement, 17 July 2001 and 4 July 2001, **C-7**, Clauses 7.1.3, 7.3.1; Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**, Clauses 7, 7.3.1. Analogous provisions were included in the sale and purchase agreement of the Tin Smelter and in the Colquiri Lease. *See* Tin Smelter Purchase Agreement, 17 July 2001 and 4 July 2001, **C-7**, Clauses 13.2, 13.3, p 19; Colquiri Lease, 27 April 2000, **C-11**, Clauses 12.1.9, 12.1.10, p 27.

Lastly, the contracts expressly provided that the parties had complied with all of the obligations established in the Terms of Reference and all other obligations indicated in the respective agreement. Colquiri Lease, 27 April 2000, **C-11**, Clause 6; Tin Smelter Purchase Agreement, 17 July 2001 and 4 July 2001, **C-7**, Clauses 7.1.3, 7.3.1; Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**, Clauses 7, 7.3.1.

<sup>92</sup> Statement of Defense, paras 59, 69, 81.

including mining rights.<sup>93</sup> Moreover, the Privatization Law<sup>94</sup> and the Mining Code,<sup>95</sup> as sanctioned by the Bolivian Congress, provided the necessary legal authorization for the execution of the sale of the Smelters and the Colquiri Lease. Indeed, Paribas represented to all bidders, with the express authorization of the Bolivian State, that the existing legal framework provided “sufficient legal support”<sup>96</sup> for the transfer of public assets and companies to the private sector.<sup>97</sup> Finally, the executed contracts were submitted to the State Comptroller (*Contraloría*)—tasked with “ensuring the independence and impartiality with respect to the administration of the State”—within five days of their finalization for external audit, as required by Bolivian law. No challenge was raised by the State Comptroller.

40. *Second*, Bolivia’s arguments regarding the supposed “low sale prices” of the Assets are contradicted by all the evidence on the record, including Bolivia’s own sources. Bolivia opportunistically now targets its own advisers and officials, Paribas and the Qualifying Commission, and claim that the offers presented during the bidding process were insufficient and “not fully analyzed.”<sup>98</sup>
41. Bolivia ignores the fact that all information used by Paribas (and therefore the Qualifying Commission) to determine the selling price was provided and approved by the State,<sup>99</sup> which had controlled and operated the Assets for

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<sup>93</sup> Constitution of Bolivia, 1967, **R-03**, Arts 138, 144.

<sup>94</sup> Law No 1,330, 24 April 1992, published in the *Gaceta Oficial* No 1,735, 24 April 1992, **C-58**, Art 1.

<sup>95</sup> *Ibid*; Bolivian Mining Code Law 1,777, 17 March 1997, **R-4**, Arts 91, 94.

<sup>96</sup> Paribas, Legal and institutional diagnostic of Vinto, the Oruro Plant, Huanuni and Colquiri, 9 November 1998, **R-91**, p 82.

<sup>97</sup> *Ibid*, p 87. Letter from Paribas to Comsur, 17 September 1999, attaching Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-04**, p 1.

<sup>98</sup> Statement of Defense paras 58, 65, 76.

<sup>99</sup> *See* Letter from Paribas to Comsur, 17 September 1999, attaching Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-04**, p 1. Despite agreeing to Paribas’s technical, legal and financial assessment of the Assets set forth in this report, Bolivia challenges the final minimum price set by Paribas on the basis of this very

decades. As noted above, all the relevant documents (the Terms of Reference, Paribas Memorandum, Bidding Rules and contracts) were prepared by Bolivia with the input of Paribas.<sup>100</sup> These documents were issued by the State prior to the opening of the bidding process without intervention from the bidders. Following the process described in Section II.B.1, the State not only approved the base price suggested by Paribas; it also approved the final sale price for each Asset.<sup>101</sup>

42. Notwithstanding the context above, there is ample evidence that shows that the sales price for each Asset was adequate, and for that reason accepted by the Qualifying Commission.<sup>102</sup>
43. With respect to the Tin Smelter, Bolivia mistakenly claims that its privatization favored UK-based Allied Deals plc, because (i) the Qualifying Commission ignored several material deficiencies in its qualifications,<sup>103</sup> and (ii) the price was inadequate because it gratuitously received inventory, valued at about US\$1.8 million, which had not been included in the Terms of Reference.<sup>104</sup> Bolivia's allegations are false.<sup>105</sup> First, while the original documents submitted by Allied

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same evaluation. It is notable that despite criticizing Paribas's economic analysis over the Assets, Bolivia has purposefully withheld the report containing Paribas's final recommendations, which was attached to the Qualifying Commission's Report. See Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease, 21 December 1999, **R-108**, p 4 ("The Investment Bank through notes that form an integral part of this report made known the following minimum prices.") (unofficial English translation from Spanish original).

<sup>100</sup> See Section II.B.1.

<sup>101</sup> Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease, 21 December 1999, **R-108**; Supreme Decree No 25,631, 24 December 1999, published in the *Gaceta Oficial* No 2, 192, **C-6**; Report No 001/2000 of the Qualifying Commission of the second public tender for the sale of the Antimony Smelter, 20 November 2000, **R-112**; Supreme Decree No 26.042, 5 January 2001, published in the *Gaceta Oficial* No 2.282, **C-8**.

<sup>102</sup> Each privatization was governed by its respective terms of reference. None of the legal provisions cited by Bolivia to establish the existence of the principle of efficiency under Bolivian law in any way limit the determination of the bidding price. Statement of Defense, paras 331-332.

<sup>103</sup> *Ibid*, para 73.

<sup>104</sup> *Ibid*, paras 76-77. This inventory included spare parts, tin in smelting process and tin concentrates.

<sup>105</sup> Bolivia also suggests that the privatization of the Tin Smelter was irregular because Allied Deals had improper contacts with Comibol's CEO. Once again, this is false. Bolivia admits that the

Deals and the Consortium did not meet the requirements of the Terms of Reference, both parties promptly amended their proposal at the request of the Qualifying Commission and were thus subsequently qualified for the bid.<sup>106</sup> *Second*, Bolivia has conveniently failed to mention<sup>107</sup> that any discrepancies in the inventory listed in the Terms of Reference and received by Allied Deals were ultimately settled by way of mediation in 2004, before Glencore Bermuda acquired the Assets.<sup>108</sup> Indeed, following agreement with Bolivia itself (via EMV), Vinto either paid or returned the very same inventory of which Bolivia now complains.<sup>109</sup> *Third*, Bolivia bases its allegations that the sale price was insufficient on three letters and an information request sent by (i) a congressman, (ii) a union, and (iii) a civic committee to Bolivian officials between February and May 2001 containing general complaints about the sale of the Tin Smelter.<sup>110</sup> In doing so, Bolivia acknowledges that its own State officials considered these

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alleged contacts between Allied Deals and Comibol's CEO occurred months before the tender even commenced. *See* Statement of Defense, para 72.

<sup>106</sup> Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease, 21 December 1999, **R-108**, p 4.

<sup>107</sup> Statement of Defense paras 76-77.

<sup>108</sup> In connection with the report prepared by EMV concerning the US\$1.8 million inventory submitted by Bolivia, Vinto and EMV conducted a joint verification of the Tin Smelter's inventory. As a result of their verification, Vinto agreed to pay US \$1.1 million plus interest in consideration for the assets and materials it had already used or was planning to keep, and to return inventory valued in excess of US\$570,000. In March 2004, Vinto completed the return of assets and made the last payment due of over US\$20,000. Record of Final Delivery of Tin Smelter Inventory, 10 March 2004, **C-190**; Comibol Board of Directors' Resolution No 2765/2003, 18 March 2003, **C-187**.

<sup>109</sup> Not only has Bolivia failed to mention this 2004 agreement with EMV, but in a deceptive manner, it has openly cited letters from 2001 in relation to the inventory in support of its claim that the bidding process was somehow irregular. Comibol Board of Directors' Resolution No 2765/2003, 18 March 2003, **C-187**. *See* Statement of Defense, para 80. Report from EMV (Ms Wilma Morales Espinoza) to COMIBOL (Eng Rafael Delgadillo), 7 July 2000, **R-121**; Statement of the Oruro Civic Committee, 19 February 2001, **R-122**.

<sup>110</sup> Statement of Defense, paras 80-81. Letter from the President of the Oruro Civic Committee to the Contralor General de la República, 21 February 2001, **R-123**; Letter from Representative Pedro Rubín de Celis to the Contralor General de la República, 10 May 2001, **R-124**; Formal complaint by Representative Pedro Rubín de Celis against Minister Carlos Saavedra Bruno, 16 May 2001, **R-125**; Letter from the Oruro Central Obrera to President Banzer Suárez, 23 May 2001, **R-126**.

complaints not worthy of further investigation.<sup>111</sup> *Lastly*, as Bolivia openly acknowledges, the US\$14 million purchase price paid by Allied Deals was 40 percent greater than the US\$10 million minimum value recommended by Bolivia's adviser, Paribas.<sup>112</sup>

44. With respect to the Antimony Smelter, Bolivia is wrong in claiming that it was sold at an undervalue because (i) Colquiri was the only offeror;<sup>113</sup> (ii) the US\$100,000 minimum price set by Paribas was too low;<sup>114</sup> and (iii) Paribas's price did not take into consideration the investments made by the State in the 1990s.<sup>115</sup> *First*, Bolivia's argument that the Antimony Smelter was sold at an undervalue because Allied Deals was disqualified from the bidding process is misleading. Allied Deal's disqualification had no bearing on Colquiri's own qualifications.<sup>116</sup> Moreover, the Terms of Reference expressly provided that the bid would be awarded if there was at least one qualifying offer.<sup>117</sup> *Second*, the US\$1.1 million sales price the Qualifying Commission accepted for the Antimony Smelter was in fact *ten times* higher than the minimum price recommended by Paribas.<sup>118</sup> *Third*, Bolivia's allegation that the price recommended by Paribas did not reflect prior investments misses the point entirely. As this Tribunal knows, the fair market value of an asset is generally determined by the potential cash-flows that such an asset is able to generate and not by past investments, as Bolivia

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<sup>111</sup> Statement of Defense, para 81.

<sup>112</sup> *Ibid*, para 74.

<sup>113</sup> *Ibid*, paras 64, 68.

<sup>114</sup> *Ibid*, paras 65, 68.

<sup>115</sup> *Ibid*, paras 68.

<sup>116</sup> Allied Deals' tender was not considered because it left out vital environmental information required by the tender, despite being given the opportunity to remedy such omission. Its bid was thus considered insufficient by the Qualifying Commission. *See* Report No 001/2000 of the Qualifying Commission of the second public tender for the sale of the Antimony Smelter, 20 November 2000, **R-112**, pp 2-3.

<sup>117</sup> Terms of Reference for the Second Public Tender for the Antimony Smelter, 31 July 2000, **R-109**, p 32.

<sup>118</sup> Statement of Defense, para 65.

- claims.<sup>119</sup> This is particularly true when such an investment is a non-yielding asset such as the Antimony Smelter. The truth is, the Antimony Smelter had been deemed valueless even by 1995, as shown by Bolivia's own evidence.<sup>120</sup>
45. Moreover, as noted by Bolivia's advisors in 1999, the viability of the Antimony Smelter was directly affected by the deterioration of antimony market conditions, insufficient raw material, and the plant's low capacity.<sup>121</sup> In this context, it is not surprising that the price obtained was modest. *Finally*, it is noteworthy that Bolivia again bases its allegations concerning the Antimony Smelter only on three letters sent between October and December 2000 by the *Brigada Parlamentaria de Oruro*<sup>122</sup> and two opposition members of Bolivia's Legislative Assembly to various Bolivian officials requesting that the bidding deadlines be extended for a variety of reasons.<sup>123</sup> These complaints were clearly not credible, as the government failed to take action in response.<sup>124</sup> This was likely due to the fact that these complaints ignored the fact that the bidding process had begun over a year earlier and was subject to strict tender rules, qualifications and timelines.
46. Finally, Bolivia is also wrong in alleging that the Colquiri Lease was awarded "for free and in exchange for no consideration whatsoever."<sup>125</sup> The Colquiri Lease was awarded to the Consortium in exchange for a commitment of at least US\$2

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<sup>119</sup> *Ibid*, para 68.

<sup>120</sup> The low value of the Antimony Smelter also been noted in 1995—after the alleged investments were made by Bolivia in the Antimony Smelter— by Bolivia's then-technical advisor, Behre Dolbear. Behre Dolbear & Company, Inc, Technical Financial Study for the Capitalization of EMV and Transfer of Operative Responsibilities of Comibol to the Private Initiative, Part I, Vol C, September 1995, **C-168**, p 6.

<sup>121</sup> Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-04**, p 69. This was public knowledge in the Bolivian industry. US Geological Survey Minerals Yearbook 1999, "The Mineral Industry of Bolivia", 1999, **C-174**, p 3.

<sup>122</sup> The *Brigada Parlamentaria de Oruro* forms part of the Bolivian Senate and is composed of a group of representatives of the department of Oruro.

<sup>123</sup> Letter from the Oruro Parliamentary Group to President Bánzer Suárez, 27 November 2000, **R-110**; Letter from Leopoldo Fernández Ferreira to President Bánzer Suárez, 5 December 2000, **R-113**; Letter from Humberto Bohrt Artieda to Walter Guiteras Denis, 8 December 2000, **R-114**.

<sup>124</sup> Statement of Defense, para 68.

<sup>125</sup> *Ibid*, para 58.

million investment in Colquiri over the first two years of operation<sup>126</sup> plus a royalty of 3.5 percent of the net revenues over the course of 28 years.<sup>127</sup> This is far from a gratuitous exchange. While Bolivia now criticizes Paribas's recommendation, it made commercial sense given the context in which its assessment was rendered. As noted above,<sup>128</sup> the Colquiri Mine had been operating at a loss for years and needed considerable investments by 1999.<sup>129</sup> Moreover, tin prices were once again hitting new lows,<sup>130</sup> further deepening the crisis in the Bolivian mining sector.<sup>131</sup> Paribas would have also considered the fact that considerable exploration investments were needed at Colquiri before the Colquiri Mine could resume production.<sup>132</sup> Against this backdrop, the Qualifying Commission validly found that the Consortium's bid met all the requirements of

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<sup>126</sup> Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease, 21 December 1999, **R-108**, p 6. Paribas only recommended a minimum of US\$200,000 to be paid annually to Comibol to lease the mine once the operator entered into mining operations and such obligation was included in the Colquiri Mini Lease and to accept bids that offered investments of at least US\$1 million. *See* Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-04**, pp 113, 117; Colquiri Lease, 27 April 200, **C-11**, clause 5.3.

<sup>127</sup> Statement of Claim, para 30, Colquiri Lease, 27 April 200, **C-11**, clause 7. The royalty was later increased to a range of up to 8 percent depending on metal prices. *See* Addendum to the Colquiri Lease, 11 November 2005, **C-12**, Clause 3.

<sup>128</sup> *See* Section II.A.

<sup>129</sup> *See* Behre Dolbear & Company, Inc, Technical Financial Study for the Capitalization of EMV and Transfer of Operative Responsibilities of Comibol to the Private Initiative, Part II, Vol A, August 1995, **C-166**, pp 114-115; Behre Dolbear & Company, Inc, Technical Financial Study for the Capitalization of EMV and Transfer of Operative Responsibilities of Comibol to the Private Initiative, Part I, Vol B, September 1995, **C-167**, pp 5-6; US Geological Survey Minerals Yearbook 1999, "The Mineral Industry of Bolivia", 1999, **C-174**, p 4

<sup>130</sup> CRU and ITRI, "Tin," CRU Monitor, February 2007, **C-69**, p 2.

<sup>131</sup> US Geological Survey Minerals Yearbook 1999, "The Mineral Industry of Bolivia", 1999, **C-174**, p 2.

<sup>132</sup> *See* First Witness Statement of Eduardo Lazcano, paras 21-23. Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-04**, pp 108, 135.

the public tender and was “convenient for the interest of the Bolivian State,” and on that basis, awarded the Colquiri Lease to the Consortium.<sup>133</sup>

47. Even if these allegations were true (which they are not), a low value sale of the Assets would not *per se* amount to an illegality or irregularity, especially when the agreements were sanctioned by the State. Despite Bolivia’s allegations, none of the public tenders that led to the sale of the Assets or the Supreme Decrees awarding them, nor the laws and regulations governing these public tenders,<sup>134</sup> have ever been challenged.<sup>135</sup> To this date the alleged illegalities have not been established by any Bolivian court and thus, the validity of the Supreme Decrees awarding the tender of the Assets remains intact and has not been challenged by Bolivia.<sup>136</sup>
48. As evident from the thorough process carried out by Bolivia, the privatizations, as well as the underlying contracts, were sanctioned by each of the necessary approvals at every step, including during their subsequent private sales, as will be explained further below.

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<sup>133</sup> Statement of Defense footnote 47; Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease, 21 December 1999, **R-108**, p 6.

<sup>134</sup> See Terms of Reference for the Public Tender for the Colquiri Mine Lease, 24 June 1999, **R-104**; Terms of Reference for the Second Public Tender for the Antimony Smelter, 31 July 2000, **R-109**; Terms of Reference for the Public Tender for the Tin Smelter, 24 June 1999, **R-118**.

<sup>135</sup> It was only in 2015—when it became convenient to do so—that Bolivia launched a so-called investigation into the privatization of the Assets through the creation of a task force. This task force has not rendered any findings in respect of the privatization of the Assets or the mining sector, despite having investigated 55 individuals, seven governments, and the privatizations or capitalization of 82 companies across all sectors between 1985 and 2005. The individuals under investigation range from high ranking government officials (ie, Presidents, Ministers) to mere family members of individuals who were involved in the privatization process. “Tres grupos de poder y 55 actores participaron en la privatización en Bolivia,” *Luz Mendoza*, 22 October 2017, **R-99**.

<sup>136</sup> Supreme Decree No 25,631, 24 December 1999, published in the *Gaceta Oficial* No 2,192, **C-6**; Supreme Decree No 26,042, 5 January 2001, published in the *Gaceta Oficial* No 2,282, 9 January 2001, **C-8**. Indeed, the Supreme Decrees nationalizing the Assets did not repeal the Supreme Decrees awarding the tenders. The purportedly illegal Privatization Law (Law 1330) and Supreme Decree 23230A remained in force until 2014, when they were repealed by the Investment Promotion Law (2014).

### 3. Bolivia allowed the Assets to operate and change owner following the privatization

49. The Tin Smelter and Colquiri Mine commenced operations shortly after the award of the Assets to their successful bidders, Allied Deals and Colquiri. Both investors began a process of modernizing the infrastructure inherited from the State.<sup>137</sup> They also established a successful commercial relationship following their agreement that the Colquiri Mine's tin output would be treated at Vinto.<sup>138</sup>
50. Beginning in February 2000, Colquiri began mine preparations, including, among others, the refitting of the mine<sup>139</sup> and gradual engagement of former employees to work in the Colquiri Mine during the exploration and feasibility phase.<sup>140</sup> In September 2000, the Tin Smelter began operating without interruption upon receiving the necessary approvals from the Bolivian government.<sup>141</sup>
51. Following the successful bid for the Antimony Smelter, Colquiri confirmed Paribas's conclusion that the production of antimony was not commercially viable<sup>142</sup> and began exploring whether the smelter's processing of tin concentrates from the Colquiri Mine would be technically feasible.<sup>143</sup> However, this conversion was not technically viable given the equipment at the Antimony

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<sup>137</sup> US Geological Survey Minerals Yearbook 2000, "The Mineral Industry of Bolivia", 2000, **C-177**, p 5.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

<sup>140</sup> Second Witness Statement of Eduardo Lazcano, paras 7-9. Comibol had laid off all of its employees at Colquiri prior to the privatization execution of the Colquiri Lease.

<sup>141</sup> This included, among others, a certificate of environmental compliance from the Ministry of Sustainable Development and Planning. Certificate of Environmental Compliance, various dates, **C-281**. *See also* Letter from Comibol (Mr Córdova) to Vinto (Mr Urjel), 30 October 2002 **C-186**.

<sup>142</sup> This was owing to the lack of mineral output in Bolivia. *See* Paribas, Privatization of Bolivian mining assets, Confidential Information Memorandum, August 16, 1999, **RPA-04**, p 60; US Geological Survey Minerals Yearbook 2000, "The Mineral Industry of Bolivia", 2000, **C-177**.

<sup>143</sup> US Geological Survey Minerals Yearbook 2000, "The Mineral Industry of Bolivia", 2000, **C-177**, p 4.

- Smelter, so the plant was never put into production. Bolivia was well aware of this<sup>144</sup> and never raised any concerns with Comsur or with Glencore.
52. In 2002, in an attempt to maximize synergies in the tin production chain, Comsur sought to purchase the Tin Smelter from the liquidators of now insolvent Allied Deals (which had changed its name to RBG Resources). The sale was sought by both RBG Resources' liquidators<sup>145</sup> and by Bolivia in an attempt to ensure the continuation of the tin smelting operations.<sup>146</sup> The sale from RBG Resources to Comsur was expressly authorized by the State in June 2002.<sup>147</sup>
53. Bolivia claims that the circumstances of RBG Resources' insolvency (an investigation in the UK in relation to an alleged fraud against its own investors)<sup>148</sup> prompted renewed calls for an investigation into the illegal privatization of the Tin Smelter.<sup>149</sup> Bolivia rests its assertion on a handful of press articles containing unfounded (and untrue) claims by the opposition party about alleged illegalities in the privatization.<sup>150</sup> Notably, none of the accusations raised during the RBG

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<sup>144</sup> COMIBOL, Report on the reversion of the Complejo Metalúrgico Vinto to the Bolivian State, 29 January 2007, **R-247**, p 3.

<sup>145</sup> Letter from Grant Thornton (Mr Shierson) to Ministry of Economic Development (Mr Kempff) and Comibol (Mr Córdova), 28 May 2002, **C-180**. This made sense, Bolivia acknowledged that it was in its interest to sell the Tin Smelter to Comsur. Comibol Board of Directors' Resolution No 2574/2002, 10 July 2002, **C-183**.

<sup>146</sup> Letter from Trade Ministry (Mr Mansilla), Ministry of Economic Development (Mr Kempff) and Comibol (Mr Córdova) to Grant Thornton (Mr Shierson), 29 May 2002, **C-181**.

<sup>147</sup> Comibol published a resolution approving the transaction on 10 July 2002. Comibol Board of Directors' Resolution No 2574/2002, 10 July 2002, **C-183**; Letter from Trade Ministry (Mr Mansilla), Ministry of Economic Development (Mr Kempff) and Comibol (Mr Córdova) to Grant Thornton (Mr Shierson), 29 May 2002, **C-181**; Letter from Grant Thornton to the Minister of Economic Development, 7 June 2002, **R-148**. *See also* Letter from EMV (Mr Morales) to Comibol (Mr Córdova) and attached Legal Report G-AL 80/2002, 10 July 2002, **C-184**, p 5.

<sup>148</sup> Statement of Defense, para 83; "Fraud Office raids metal producer over accounts," *Financial Times*, 4 May 2002, **R-130**; "SFO raids \$ 1bn metal trader," *The Guardian*, 4 May 2002, **R-131**.

<sup>149</sup> Statement of Defense, paras 85.

<sup>150</sup> "El MAS pide la renuncia del Canciller Saavedra," *La Razón Digital*, 8 November 2002, **R-134**; "MAS pide la renuncia del Canciller de la Republica," *El Diario*, 4 December 2002, **R-135**.

- Resources investigation involved activities in Bolivia or were in any way related to the privatization of the Tin Smelter, or its subsequent operation.<sup>151</sup>
54. Bolivia also questions the validity of this acquisition by Consur by claiming that the purchase price was half the price of the original privatization.<sup>152</sup> *First*, the price negotiated by two private parties is of no concern to Bolivia. *Second*, Bolivia conveniently overlooks the fact that Consur purchased the Tin Smelter in the context of liquidation proceedings and that the UK liquidator (a partner of leading accounting firm Grant Thornton) was under a legal obligation to obtain the best possible purchase price, which was subject to approval from the UK courts.<sup>153</sup>
55. Finally, Bolivia suggests that the sale of the Tin Smelter to Consur was not in the interest of the State and should have been prevented.<sup>154</sup> *First*, having approved the acquisition, Bolivia’s allegations have no place here. *Second*, as plainly stated by EMV’s legal director at the time, this sale was in the best interest of the State in so far as it guaranteed its continued operation.<sup>155</sup>

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<sup>151</sup> Authorities of the United States and the UK investigated Allied Deals in connection with certain fraudulent practices against its investors, including submitting falsified documents to collect loans from a large consortium of banks across the United States, the UK, Belgium, Germany and China, among others. *RBG Resources Plc (In liquidation) v Rastogi (ADR LR 05/24) Judgment, 24 May 2005, R-127*, para 2.

<sup>152</sup> Statement of Defense, para 90.

<sup>153</sup> See Letter from Grant Thornton (Mr Shierson) to Ministry of Economic Development (Mr Kempff) and Comibol (Mr Córdova), 28 May 2002, **C-180**; Letter from Malcolm Shierson (Grant Thornton) to Carlos Kempff (Ministry of Economic Development) and José Córdova (Comibol), 7 June 2002, **R-148**.

<sup>154</sup> Statement of Defense, para 89.

<sup>155</sup> Letter from EMV (Mr Morales) to Comibol (Mr Córdova) and attached Legal Report G-AL 80/2002, 10 July 2002, **C-184**, p 5. On the other hand, RBG’s other Bolivian asset, the Huanuni Mine, was intervened by Mr Lucio Torrejón—not Comibol or the Minister of Mining—as appointed by a Bolivian Court, to protect the Huanuni Mine by controlling revenue, expenses and production, auditing the accounting books during RGB Resources’ liquidation. “Empresa RBG Huanuni fue intervenida por Comibol,” *La Prensa*, 16 May 2002, **R-140**. Subsequently, Comibol triggered the breach of contract proceeding set forth in the shared risk agreement for the Huanuni Mine, granting RGB Allied Deals 90 days to remedy its contractual breaches. “Centro minero Huanuni vuelve a manos del Estado Boliviano,” *El Diario*, 14 November 2002, **R-141**. During those 90 days RGB Allied Deals failed to remedy its breaches, leading to Comibol to assume the

**C. GLENCORE BERMUDA ACQUIRED THE ASSETS IN AN ARMS-LENGTH TRANSACTION**

56. As explained in the Statement of Claim, in April 2004 Glencore International was approached by Argent Partners, an independent corporate mining and metals processing advisory firm, to participate in a bid for the sale of an international portfolio of assets held by Minera in Bolivia and Argentina.<sup>156</sup> The offer was for the sale of three Panamanian holding companies, Iris, Shattuck, and Kempsey (together, the *Panamanian Companies*).<sup>157</sup> Together, the Panamanian Companies owned 100 percent of the Assets through Comsur, later renamed Sinchi Wayra, which owned 51 percent of Colquiri, the company that controlled Vinto.<sup>158</sup>
57. At that time, commodity prices were on the rise and Glencore wanted to expand its operations in Latin America and was familiar with Bolivia through long term purchasing contracts,<sup>159</sup> making this an attractive opportunity. There was a competitive bidding process for the Assets.<sup>160</sup> Other major international mining and commodities trading companies, including Votorantim Metals of Brazil and

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direct operation of the Huanuni Mine as the only alternative to continue operations. “Centro minero Huanuni vuelve a manos del Estado Boliviano,” *El Diario*, 14 November 2002, **R-141**.

<sup>156</sup> Argent Partners was acting on behalf of Minera, a Panamanian company. With no support whatsoever, Bolivia boldly alleges that Marc Rich, founder of the Glencore International, benefited from a close relationship with Mr Sánchez de Lozada and Comibol. This is false. Glencore was a leading commodities trader in its own right, and it was Glencore International, not Marc Rich, that held long-standing commercial contracts with Comsur (not Mr Sánchez de Lozada). *See* Statement of Claim, para 34; Second Witness Statement of Christopher Eskdale, para 7; First Witness Statement of Christopher Eskdale, para 13; Process Letter from Argent Partners (Mr Simkin) to Glencore International (Mr Eskdale), 30 April 2004, **C-62**.

<sup>157</sup> Statement of Claim, para 36; First Witness Statement of Christopher Eskdale, para 15; Process Letter from Argent Partners (Mr Simkin) to Glencore International (Mr Eskdale), 30 April 2004, **C-62**.

<sup>158</sup> Statement of Claim, para 36; Share register of Sinchi Wayra, undated, **C-16**; Share register of Colquiri, undated, **C-17**; Share register of Vinto, undated, **C-18**.

<sup>159</sup> First Witness Statement of Christopher Eskdale, para 12; Process Letter from Argent Partners (Mr Simkin) to Glencore International (Mr Eskdale), 30 April 2004, **C-62**, p 1. As explained by Mr Eskdale, Glencore had long-standing commercial contracts with Bolivian producers, including Comsur. It was therefore familiar with the Bolivian mining industry well before its acquisition of the Assets. Second Witness Statement of Christopher Eskdale, para 8.

<sup>160</sup> Statement of Claim, para 35; First Witness Statement of Christopher Eskdale, para 17.

Trafigura of Singapore, were also approached for this opportunity.<sup>161</sup> As part of the bidding process, Glencore International and its Peruvian subsidiary, IRSA, participated in a series of negotiations and engaged a series of sophisticated advisers beginning in the summer of 2004 in order to conduct due diligence over the Assets.<sup>162</sup> Each party was supported by highly qualified multijurisdictional counsel to assist with the negotiation and execution of the transaction, as is standard in a deal of this size.<sup>163</sup> As Mr Eskdale explained, he conducted various site visits to the Assets as part of its technical due diligence in the summer of 2004.<sup>164</sup> He was joined by a technical team from Peru who helped assess the condition and commercial viability of the Assets.<sup>165</sup> After knowing the Minera management team for many years, Glencore was confident that it was a highly competent, cost-efficient team. As explained by Mr Eskdale:

[T]he mines had excellent potential to ramp up production and/or extend their mine life through the identification of new reserves, in line with the growth the assets had experienced in previous years. The Colquiri Mine in particular had significant potential to increase production through improvements in infrastructure and the

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<sup>161</sup> First Witness Statement of Christopher Eskdale, para 17.

<sup>162</sup> Second Witness Statement of Christopher Eskdale, paras 9-10; First Witness Statement of Christopher Eskdale, paras 17-18.

<sup>163</sup> The parties to the transaction were advised by international legal counsel such as Curtis, Mallet-Prevost, Colt & Mosle LLP and Gibson, Dunn & Crutcher; as well as international accountants and auditors Deloitte & Touche. There were additional UK governmental institutions that were involved in the transaction, including the World Bank affiliate International Finance Corporation (*IFC*) and CDC, represented by the global asset management firm, Actis Capital. IFC was a minority shareholder in Minera, the seller, had the right to sell its interests back to Minera so that the three holding companies could be sold in their entirety. The IFC had directly invested US\$12 million in Comsur in order to increase zinc production and reduce operating costs. Letter from Glencore International to Argent Partners (Mr Simkin), 22 October 2004, **C-197**, pp 1-2; Put Notice from Actis (on behalf of CDC) to Glencore International, 21 March 2006, **C-67**. Argent Partners Opportunity Overview, April 2004, **C-191**, p 4. International Finance Corporation, “IFC approves US\$99.05 million financing for five projects in Latin America,” *International Finance Corporation*, **R-103**.

<sup>164</sup> Second Witness Statement of Christopher Eskdale, para 10; First Witness Statement of Christopher Eskdale, para 17; *see also* Letter from Argent Partners (Mr Simkin) to Glencore International (Mr Eskdale), 2 June 2004, **C-194**.

<sup>165</sup> Second Witness Statement of Christopher Eskdale, para 10; First Witness Statement of Christopher Eskdale, para 17; Letter from Argent Partners (Mr Simkin) to Glencore International (Mr Eskdale), 2 June 2004, **C-194**.

processing of old tailings that had accumulated from decades of mining activities.<sup>166</sup>

58. Glencore International engaged outside consultants to advise on the deal, including the prominent global consulting firm Deloitte & Touche to assess the accounting and tax implications of the acquisition.<sup>167</sup> Following months of diligence and negotiations, on 30 January 2005, Glencore International concluded stock purchase agreements that would allow it to secure control of Comsur and all of its assets once all of the closing conditions were met.<sup>168</sup>
59. The Government was involved in, and supportive of, Glencore's acquisition of the Assets.<sup>169</sup> Shortly before its acquisition, on 17 January 2005, Eduardo Gutiérrez Calderón, the then Vice Minister of Mining, wrote to Glencore's representatives to learn additional details about the transaction and expressed support for the company's investment in Bolivia:

In the last few days we have become aware of the interest and even the existence of negotiations advanced for the transfer of the interests that you hold in our country Compañía Minera del Sur COMSUR and MINSUR, SA, subsidiary of the Glencore Company.

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<sup>166</sup> Second Witness Statement of Christopher Eskdale, para 10. *See* Glencore inter office correspondence from Mr Eskdale to Mr Strothotte and Mr Glasenberg, 20 October 2004, **C-196**, p 4.

<sup>167</sup> Letter from Glencore International to Argent Partners (Mr Simkin), 22 October 2004, **C-197**, p 2.

<sup>168</sup> *See* Statement of Claim, para 36; Second Witness Statement of Christopher Eskdale, para 167; First Witness Statement of Christopher Eskdale, para 19. On 2 March, Glencore International concluded a stock purchase agreement for the third Panamanian company, Kempsey, that held the outstanding 0.05% of the Assets, as well as a stock purchase agreement in which it acquired CDC's 49% interest in Colquiri. Second Amended and Restated Stock Purchase Agreement between Minera and Glencore International (Iris shares), 30 January 2005, **C-198**; Stock Purchase Agreement between Minera and Glencore International (Shattuck shares), 30 January 2005, **C-199**; Stock Purchase Agreement between Minera and Glencore International (Kempsey shares), 2 March 2005, **C-204**; Stock Purchase Agreement between CDC and Compañía Minera Concepción SA (Colquiri shares), 2 March 2005, **C-202**; *see also* Statement of Claim, para 38; First Witness Statement of Christopher Eskdale, para 22.

<sup>169</sup> Statement of Claim, paras 35, 63; Second Witness Statement of Christopher Eskdale, para 11; First Witness Statement of Christopher Eskdale, para 18.

In this regard, I would like to express to you that the Vice Ministry under my charge has a favorable predisposition towards the development of new investments in the mining sector.<sup>170</sup>

60. As explained by Mr Eskdale, Glencore International immediately made special arrangements to avoid breaching confidentiality agreements with its counterparts in order to meet with Government officials in early February 2005.<sup>171</sup> Glencore then met with the Minister of Mining to discuss the details of the transaction. The Minister in turn explained the new tax regime the Government was planning to impose upon the mining sector. In fact, Glencore took this opportunity to express its full willingness to implement investments in Bolivia as well as its commitment to the development of its economy.<sup>172</sup>
61. On 16 February 2005, Comibol wrote to express concern over what it perceived as a change of ownership of Comsur.<sup>173</sup> This was because the Colquiri Lease prohibited the transfer of rights without the written authorization of Comibol as lessor.<sup>174</sup> Contrary to Bolivia's assertions,<sup>175</sup> at no point did Comibol express

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<sup>170</sup> Letter from the Vice Minister of Mining (Mr Gutiérrez) to Glencore (Mr Capriles), 17 January 2005, **C-63** (unofficial English translation from Spanish original); *see also* Statement of Claim, paras 35, 63.

<sup>171</sup> Second Witness Statement of Christopher Eskdale, para 11; First Witness Statement of Christopher Eskdale, para 18; Letter from Minera (Mr Sánchez de Lozada) to Glencore International (Mr Eskdale), 4 February 2005, **C-200**; "Goni vendió COMSUR," *Bolivia.com*, 5 February 2005, **R-14**.

<sup>172</sup> "Goni vendió COMSUR," *Bolivia.com*, 5 February 2005, **R-14**, noting that "[t]he new owner of Comsur, with a presence in the country, hastened to advance its full will and commitment with Bolivia and the development of its economy, making an immediate investments plan that allows for the generation of more employment and opportunities for common efforts and benefits with the workers, the regions, the State and the Bolivian family." (unofficial English translation from Spanish original); *see also* Letter from the Vice Minister of Mining (Mr Gutiérrez) to Glencore (Mr Capriles), 17 January 2005, **C-63**.

<sup>173</sup> Second Witness Statement of Christopher Eskdale, para 15; Letter from COMIBOL to Comsur (Sinchi Wayra), 16 February 2005, **R-188**; *see also* Minutes of the conclusion of the meetings held between COMIBOL, COMSUR and Compañía Minera Colquiri SA, 11 October 2005, **R-190** ("In March 2005, because it was brought to the attention of [Comibol] that Glencore International AG acquired abroad the shares of Comsur's parent company, its representatives informed the executives of Comibol their disposition to initiate a negotiation process [...] with the intention of considering economic improvements for Comibol based on the improved prices in the international market.") (unofficial English translation from Spanish original).

<sup>174</sup> *See* Letter from COMIBOL to Comsur (Sinchi Wayra), 16 February 2005, **R-188** (citing: Colquiri Lease, 27 April 2000, **C-11**, Clause 10).

concerns about the prior ownership of the Assets acquired by Glencore Bermuda.<sup>176</sup> Comsur promptly replied to Comibol's requests, explaining that the transaction related to the transfer of Comsur's shareholders outside of Bolivia and therefore did not affect the ownership structure of Comsur nor its contractual obligations.<sup>177</sup> Comsur reiterated this in a subsequent letter in early March.<sup>178</sup> Following this communication from Comsur, Comibol did not raise any further concerns regarding the transaction.<sup>179</sup>

62. Accordingly, the purchase securing full ownership of the Assets closed<sup>180</sup> following payment by Glencore Bermuda to the seller on 3 March.<sup>181</sup> Glencore International subsequently assigned all of the rights, titles, and assets attained through the various transactions to Glencore Bermuda, which was the intended owner of the investment due to financial considerations.<sup>182</sup> Glencore Bermuda has historically been the holding company for the vast majority of Glencore International's investments, including those in Latin America.<sup>183</sup> As explained by Mr Eskdale:

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<sup>175</sup> Statement of Defense, para 157.

<sup>176</sup> See Letter from COMIBOL to Comsur (Sinchi Wayra), 16 February 2005, **R-188**.

<sup>177</sup> Letter from Comsur (Sinchi Wayra) to COMIBOL, 17 February 2005, **R-189**.

<sup>178</sup> Letter from Comsur (Mr Urjel) to Comibol (Mr Tamayo), 3 March 2005, **C-206**.

<sup>179</sup> Second Witness Statement of Christopher Eskdale, para 15.

<sup>180</sup> Second Witness Statement of Christopher Eskdale, para 16; Stock Purchase Agreement between Minera and Glencore International (Kempsey shares), 2 March 2005, **C-204**; Stock Purchase Agreement between CDC and Compañía Minera Concepción SA (Colquiri shares), 2 March 2005, **C-202**.

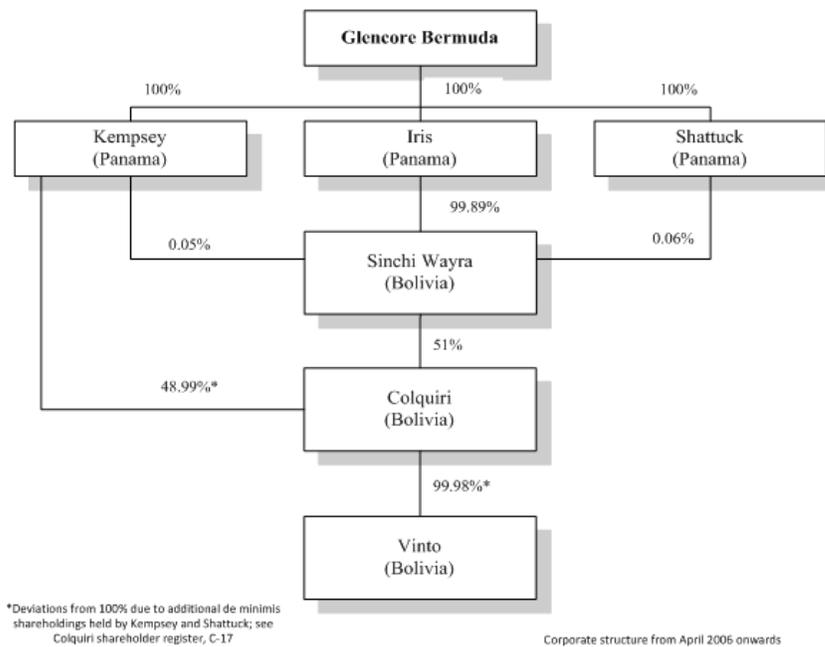
<sup>181</sup> Second Witness Statement of Christopher Eskdale, para 16; Email from Glencore (Mr Eskdale) to Curtis, Mallet-Prevost, Colt & Mosle LLP (Mr Vega), 2 March 2005, **C-205**; Email from Curtis, Mallet-Prevost, Colt & Mosle LLP (Mr Sowah) to Curtis, Mallet-Prevost, Colt & Mosle LLP (Mr Vega), 3 March 2005, **C-208**.

<sup>182</sup> Assignment and Assumption Agreements between Glencore International and Glencore Bermuda, 7 March 2005, **C-64**; see also Statement of Claim, para 37; Second Witness Statement of Christopher Eskdale, para 17; First Witness Statement of Christopher Eskdale, para 20.

<sup>183</sup> Second Witness Statement of Christopher Eskdale, para 17; Witness Statement of Christopher Eskdale, para 20. At year-end 2007, for example, Glencore Bermuda's investments were worth approximately US\$3.28 billion and it held total assets worth US\$9.72 billion. 2007-2008 Glencore Bermuda Financial Statements, 31 December 2008, **C-94**.

Glencore Bermuda was one of the primary holding companies for Glencore’s investments at the time and held the majority of the group’s investments in the Americas. As with all other investments in the region, Glencore Bermuda acquired the shares in the Assets to maximize cash-flows while taking advantage of significant financing benefits received by companies incorporated in Bermuda. Specifically, Glencore Bermuda was the designated vehicle used by the Glencore group at the time for issuing senior notes to US institutional investors. I understand that the reason for this is that there was no withholding of taxes on interest payments in Bermuda, and Glencore Bermuda had become a well-known entity to US pension funds and insurance companies, among others.<sup>184</sup>

63. Therefore, since 7 March 2005, Glencore Bermuda has held the Assets in accordance with the following structure:<sup>185</sup>



<sup>184</sup> Second Witness Statement of Christopher Eskdale, para 17. *See also* 2007-2008 Glencore Bermuda Financial Statements, 31 December 2008, **C-94**; Glencore Bermuda’s Financial Statements for the years ending December 31, 2011 and 2010, 31 December 2011, **C-246**.

<sup>185</sup> *See* Statement of Claim, para 38; Certificate of the Secretary of Kempsey, 19 May 2011, **C-13**; Certificate of the Secretary of Iris, 20 May 2011, **C-14**; Certificate of the Secretary of Shattuck, 19 May 2011, **C-15**; Share register of Sinchi Wayra, undated, **C-16**; Share register of Colquiri SA, undated, **C-17**; Share register of Vinto, undated, **C-18**.

64. After the transaction closed, ownership of the Assets transitioned smoothly, thanks in part to the continuity of the companies' management.<sup>186</sup> As part of the transition, Bolivia maintained key members of the management of Comsur, Colquiri, and Vinto, namely Jaime Urjel and Jorge Szasz, in order to ensure continuity. Both Jorge Szasz and Jaime Urjel held prominent positions on the boards of Comsur, Colquiri, and Vinto. Mr Urjel was the President of the boards, while Mr Szasz held multiple positions related to the finances of each company, including Chief Financial Officer. Both had intimate knowledge of the finances and operations of all of Comsur's assets including Colquiri and Vinto.<sup>187</sup>
65. Bolivia does not dispute the timeline or the structure of Glencore Bermuda's acquisition.<sup>188</sup> However, based on admitted mere "suspicion," Bolivia claims that (i) Glencore Bermuda did not pay any consideration for its investment in the Assets;<sup>189</sup> and (ii) Sánchez de Lozada continues to have rights in Comsur, Colquiri and Vinto with his interests being represented by Mr Szasz on the boards of such companies.<sup>190</sup> While making these allegations, Bolivia complains that Glencore Bermuda has submitted almost no evidence regarding the details of the transaction.<sup>191</sup> But these allegations have no basis.
66. As a preliminary point, it is important to note that Glencore Bermuda submitted with its Statement of Claim all the information that was relevant to prove that it held a protected investment in Bolivia.<sup>192</sup> Contrary to Bolivia's allegations,

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<sup>186</sup> Second Witness Statement of Christopher Eskdale, para 19.

<sup>187</sup> *Ibid.* Bolivia's own documents expand on the qualifications and esteemed careers had by Mr Szasz, Mr Urjel, and Mr Mirabal. Jaime Urjel, for example, served as the President of the Board and CEO of Comsur, Colquiri, and Vinto and continued in those positions after the acquisition until early 2006. "Orvana announces commencement of development at Don Mario Gold Project and executive appointments," 4 March 2002, **R-181**.

<sup>188</sup> Statement of Defense, para 124.

<sup>189</sup> *Ibid.*, para 129.

<sup>190</sup> *Ibid.*, para 126.

<sup>191</sup> *Ibid.*, para 125.

<sup>192</sup> Statement of Claim, para 131.

neither the details of a transaction between private parties nor the acquisition price are relevant to the effect of this arbitration. In any event, Glencore Bermuda has produced all the purchase agreements executed for the acquisition of the Assets (along with their drafts and non-privileged due diligence documents).<sup>193</sup> As this Tribunal will corroborate, none of those documents support any of the allegations by Bolivia. To the contrary, what these documents reveal is that this was a complex, arm's length transaction carried out between highly sophisticated parties—being either experienced mining companies or government sponsored development agencies—over the course of eleven months.<sup>194</sup>

67. Further, as to Bolivia's allegation that Glencore Bermuda did not pay for the assets, it is plainly false. As evidenced by the relevant wire transfers, Glencore Bermuda indeed made the payment to the Seller for all of the Assets acquired.<sup>195</sup>
68. Moreover, contrary to Bolivia's allegations,<sup>196</sup> Glencore International did not transfer the Assets to Glencore Bermuda because it foresaw that the State would take action against them. The reason for the Assignment is clear. As explained above, the deal was structured under the assumption that it would be Glencore Bermuda, as the preferred financing vehicle for investments in the region, who

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<sup>193</sup> Glencore Bermuda produced these documents as part of Claimant's Voluntary Production of Documents on 2 March 2018 as well as Claimant's Production of Documents of 23 April 2018 pursuant to the Tribunal's Decision on Document Production set out in Procedural Order No 4 of 27 March 2018. Second Amended and Restated Stock Purchase Agreement between Minera and Glencore International (Iris shares), 30 January 2005, **C-198**; Stock Purchase Agreement between Minera and Glencore International (Shattuck shares), 30 January 2005, **C-199**; Stock Purchase Agreement between Minera and Glencore International (Kempsey shares), 2 March 2005, **C-204**; Stock Purchase Agreement between CDC and Compañía Minera Concepción SA (Colquiri shares), 2 March 2005; **C-202**.

<sup>194</sup> For example, as noted by Mr Eskdale, the CDC (which held 49% of Colquiri) had a long-standing presence and business experience in Bolivia and enjoyed international credibility and backing of the UK government. Second Witness Statement of Christopher Eskdale, paras 7, 19, 58; First Eskdale Witness Statement, para 21.

<sup>195</sup> Email from Glencore (Mr Eskdale) to Curtis, Mallet-Prevost, Colt & Mosle LLP (Mr Vega), 2 March 2005, **C-205**; Email from Glencore (Mr Eskdale) to Glencore (Mr Peter), 3 March 2005, **C-207**.

<sup>196</sup> Statement of Defense, para 136.

would hold the Assets. The reasons to do so were strictly commercial financing considerations.<sup>197</sup>

69. Finally, as to Bolivia's claim that Mr Sánchez de Lozada maintained an interest in the Assets,<sup>198</sup> it is also unfounded. As is clear from the stock purchase agreements as well as from the various share registries submitted by Glencore Bermuda,<sup>199</sup> Glencore Bermuda has held 100 percent of the Assets since their purchase.<sup>200</sup> Tellingly, Bolivia itself admits that it has no evidentiary support for its allegation that Mr Szasz would have acted as a "proxy" of Mr Sánchez de Lozada.<sup>201</sup> As explained above, Mr Szasz in particular had served Comsur in a variety of important capacities, most notably as the Chief Financial Officer, for over a decade.<sup>202</sup> As such, he had great familiarity with the company's operations and finances. Glencore Bermuda therefore decided to retain him as the Secretary of the Board and CFO to ensure a smooth transition and to capitalize on his valuable institutional knowledge.<sup>203</sup> Mr Szasz remained at the company until in 2010, when he retired. These key relationships ensured that Comsur, under the control of Glencore Bermuda, would be able to assume operations without interruption,

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<sup>197</sup> Second Witness Statement of Christopher Eskdale, para 17.

<sup>198</sup> Statement of Defense, para 126.

<sup>199</sup> Second Amended and Restated Stock Purchase Agreement between Minera and Glencore International (Iris shares), 30 January 2005, **C-198**; Stock Purchase Agreement between Minera and Glencore International (Shattuck shares), 30 January 2005, **C-199**; Stock Purchase Agreement between Minera and Glencore International (Kempsey shares), 2 March 2005, **C-204**; Stock Purchase Agreement between CDC and Compañía Minera Concepción SA (Colquiri shares), 2 March 2005; **C-202**; Certificate of the Secretary of Kempsey, 19 May 2011, **C-13**; Certificate of the Secretary of Iris, 20 May 2011, **C-14**; Certificate of the Secretary of Shattuck, 20 May 2011, **C-15**; Share register of Sinchi Wayra, undated, **C-16**; Share register of Colquiri SA, undated, **C-17**; Share register of Vinto, undated, **C-18**.

<sup>200</sup> Statement of Claim, paras 36-38; Second Witness Statement of Christopher Eskdale, para 16; First Eskdale Witness Statement, paras 19-22.

<sup>201</sup> Statement of Defense, para 126.

<sup>202</sup> Mr Szasz had served in various positions, including as Secretary of the Board, the Vice President of Administration and Finance, and the Chief Financial Officer (CFO) for Comsur, Sinchi Wayra, Vinto, and Colquiri since 1989. *See* Comsur Board of Directors' Meeting Minutes, 24 February 2005, **C-201**; Meeting Minutes of Colquiri Shareholders, 25 February 2010, **R-186**; *see also* Second Witness Statement of Christopher Eskdale, para 22.

<sup>203</sup> Second Witness Statement of Christopher Eskdale, para 22.

- while maintaining the ordinary course of business and dialogue with the Bolivian government.<sup>204</sup>
70. This dialogue would soon include negotiations with Comibol for increased royalties under the Colquiri Lease.<sup>205</sup> On 23 March 2005, Comsur (now Sinchi Wayra) initiated this renegotiation process in an effort to establish good relationships with Comibol and improve Comibol’s economic position under the Colquiri Lease in light of the rising prices on the international market.<sup>206</sup> The parties engaged in several rounds of negotiations during which Comibol acknowledged that Comsur and Colquiri had complied with their investment and operational obligations.<sup>207</sup>
71. Royalty negotiations with Comibol continued for several months<sup>208</sup> until November 2005, when Comibol and Comsur (which had by then changed its name to Sinchi Wayra), signed an agreement to amend the Colquiri Lease, and increase royalties from 3.5 percent to 8 percent.<sup>209</sup>

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<sup>204</sup> *Ibid*, paras 22-23.

<sup>205</sup> *Ibid*, para 23.

<sup>206</sup> Letter from Comsur (Mr Urjel) to Comibol (Mr Tamayo), 23 March 2005, **C-210**; *see also* Minutes of the conclusion of the meetings held between COMIBOL, COMSUR and Compañía Minera Colquiri SA, 11 October 2005, **R-190**, pp 1-2, citing this letter as evidence of Comsur’s proposal to Comibol of its desire to renegotiate royalties “with the purpose of considering economic improvements for Comibol based on the best prices in the international market.”

<sup>207</sup> Second Witness Statement of Christopher Eskdale, para 23; Minutes of the conclusion of the meetings held between COMIBOL, COMSUR and Compañía Minera Colquiri SA, 11 October 2005, **R-190**, p 1. *See also* Addendum to the Colquiri Lease, 11 November 2005, **C-12**, Clause 2.2.

<sup>208</sup> Letter from Comsur (Mr Mirabal) to Comibol (Mr Córdova), 26 September 2005, **C-215**.

<sup>209</sup> Statement of Claim, para 30; Second Witness Statement of Christopher Eskdale, para 24; Colquiri Lease, 27 April 2000, **C-11**, Clauses 2.7, 5.1 (reflecting the original 3.5 percent royalty); Letter from Comsur (Mr Urjel) to Comibol (Mr Tamayo), 23 March 2005, **C-210**; Addendum to the Colquiri Lease, 11 November 2005, **C-12**, Clause 3 (increasing the royalty to 8 percent); *see also* Minutes of the conclusion of the meetings held between COMIBOL, COMSUR and Compañía Minera Colquiri SA, 11 October 2005, **R-190**, pp 1-2.

72. Thereafter, both Comibol and EMV carried on activity in the ordinary course of business with Colquiri, Comsur, and Vinto.<sup>210</sup> Similarly, Vinto also resumed normal operations with Comibol as well as with the State-owned enterprise EMV.<sup>211</sup> No concerns were raised by any authorities at this time.
73. In November 2006 a Bolivian Senator and member of the recently elected MAS party (led by President Evo Morales) submitted a request for a written report to the Minister of External Relations seeking (i) information certifying that Glencore International was a private company constituted in the Swiss Confederation; (ii) whether Gonzalo Sánchez de Lozada was currently a shareholder of Glencore International; and (iii) the principal activities of Glencore International.<sup>212</sup>
74. In response, Sinchi Wayra provided extensive documentation directly responding to all these queries.<sup>213</sup> No further inquiries were made by the Government, nor

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<sup>210</sup> For example, with respect to the Colquiri Mine, Comibol undertook routine inspections. *See, eg*, Letter from Comibol (Mr Cabrera) to Comsur (Mr Urjel), 3 November 2005, **C-217**; Letter from Comibol (Mr Córdova) to Comsur (Mr Mirabal), 19 August 2005, **C-214**.

<sup>211</sup> Comibol requested an advance on tax and monthly payments from Vinto. Similarly, Vinto confirmed to EMV that it was looking into information requested regarding the ENAF brand and provided information on the best Vinto representative to contact for future communications. *See, eg*, Letter from Comibol (Mr Escalante and Mr Arandia) to Vinto (Mr Torrico), 1 September 2006, **C-223**.

<sup>212</sup> Request for written report from Senator Velásquez, 30 November 2006, **C-68**.

<sup>213</sup> Bolivia complains that, in response, “Sinchi Wayra only provided ‘documentation confirming the existence of Glencore International as a private share company governed under the laws of Switzerland as well as detailing the identity of Glencore International’s shareholders and subsidiaries, including Glencore Bermuda.’” However, this is not true. Sinchi Wayra provided more than requested, including (i) information regarding Glencore International’s company name, domicile, purpose, legal nature, capital, instrument for publication, board of directors, persons authorized to sign on behalf of the company and the auditors; (ii) evidence that Gonzalo Sánchez de Lozada was not, and never had been, a shareholder of Glencore International; (iii) information showing Glencore International’s shareholding in Sinchi Wayra; (iv) a director’s certificate of Glencore Bermuda, notarized, apostilled and legalized by the Bolivian Embassy in London with information regarding the shareholding in Glencore Bermuda; (v) directors’ certificates notarized by the Ministry of Foreign Relations of Panama and legalized by the Consulate of Bolivia in Panama, regarding the shareholding of Glencore Bermuda in Iris Mines and Metals SA, Shattuck Trading Co Inc and Kempsey SA; and (vi) a summary of the principal activities of Glencore International AG. *See* Letter from Pestalozzi Lachenal Patry (Mr Pestalozzi) to Senate of Bolivia (Ms Velásquez), 10 January 2007, **C-225**.

were any other concerns raised.<sup>214</sup> Glencore Bermuda thus continue to implement its operations and investment plans.

**D. BOLIVIA’S PURPORTED REASONS FOR NATIONALIZING GLENCORE BERMUDA’S INVESTMENTS ARE PRETEXTUAL AND UNSUPPORTED BY THE FACTS**

**1. Bolivia’s own documents reveal that the true reason for nationalizing the Tin Smelter was to gain full control over the tin supply chain and improve the financial situation of the Huanuni State-owned mine**

75. After a period of transition following the acquisition of the Assets, Glencore Bermuda proceeded with the implementation of its investment plans.<sup>215</sup> However, on 9 February 2007, without prior notice, Bolivia issued the Tin Smelter Nationalization Decree, which ordered the immediate “reversion” of Vinto and all of its assets, including the Tin Smelter, to the State, on the basis of alleged illegalities related to the privatization.<sup>216</sup>

76. It is uncontested that to effect its takeover of Vinto, the State deployed its army and police officers who broke through Vinto’s locked gates,<sup>217</sup> took physical control of the plant, and affixed a banner with the word “nationalized” over the main entrance of the Tin Smelter, as shown in the contemporaneous photograph below.<sup>218</sup> It is important to note that the word is not accidental and is inconsistent with Bolivia’s case that the asset was “reverted.”<sup>219</sup>

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<sup>214</sup> See Statement of Defense, paras 156-161; First Witness Statement of Christopher Eskdale, para 41; Statement of Claim, para 64.

<sup>215</sup> First Witness Statement of Christopher Eskdale, para 39.

<sup>216</sup> Tin Smelter Nationalization Decree, 7 February 2007, **C-20**.

<sup>217</sup> Photos of the Tin Smelter Nationalization, 9 February 2007, **C-70**; First Witness Statement of Christopher Eskdale, para 45.

<sup>218</sup> Statement of Claim, para 66; Photos of the Tin Smelter Nationalization, 9 February 2007, **C-70**, pp 3-6.

<sup>219</sup> Photos of the Tin Smelter Nationalization, 9 February 2007, **C-70**, p 8.



77. Bolivia tries to justify this sizeable presence of the police and military by claiming that it was necessary due to the employees' resistance to the nationalization.<sup>220</sup> However, the evidence on the record clearly shows that the army was met by Vinto's unarmed workers voicing their opposition to the nationalization in a peaceful manner, as can be seen from the following photograph.<sup>221</sup>



<sup>220</sup> Statement of Defense, para 160.

<sup>221</sup> Photos of the Tin Smelter Nationalization, 9 February 2007, C-70, p 2.

78. It bears noting that Bolivia recognizes the loyalty of the workers to Glencore, no doubt reflecting the excellent working conditions provided by the company, which the workers feared would not be replicated in the event of a nationalization. It was the exact opposite of a workers' revolution. It was a nationalization forced upon the workers as well as Glencore.
79. After Bolivia took physical control of the Tin Smelter facilities by force, President Evo Morales arrived in person to publicly announce the nationalization and sign the Tin Smelter Nationalization Decree, as can be seen from the photograph below.<sup>222</sup>



80. President Morales explained that the State was to issue “a Supreme Decree to nationalize Vinto” and that “Vinto will pass on to the hands of the Bolivian State.”<sup>223</sup> The Tin Smelter Nationalization Decree, which was read out loud for the media,<sup>224</sup> did not provide for the payment of compensation to Glencore Bermuda or any of its affiliates, as required under the Treaty, international law,

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<sup>222</sup> *Ibid*, p 11.

<sup>223</sup> “Anuncian la nacionalización de la fundición de Vinto,” *El País*, 9 February 2007, **C-226** (emphasis added).

<sup>224</sup> Video of the Tin Smelter Nationalization, *Unitel*, 9 February 2007, **C-71**.

and Bolivian law.<sup>225</sup> Thus, through the State-owned enterprise EMV, Bolivia took permanent control of the Tin Smelter by force, together with its assets and inventory, including the tin that was in the production pipeline at that time, as well as a number of tax refund certificates issued in favor of Vinto.<sup>226</sup>

81. Bolivia's position is that it "reverted" the Tin Smelter due to alleged irregularities in the privatization process and because "[f]aced with inquiries about Sánchez de Lozada's involvement in the transfer of the Assets to Glencore International, its subsidiary Sinchi Wayra (controlling the Assets) was not inclined to cooperate with the Bolivian authorities."<sup>227</sup> This is not correct.
82. *First*, the State provided no evidence of the allegations on which it based the alleged "reversion." This is not disputed by Bolivia. In fact, the Tin Smelter Nationalization Decree referenced mere contentions and was not based on any finding of illegality.<sup>228</sup> That no wrongdoing had been proven at the time of the

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<sup>225</sup> Statement of Claim, paras 66-68; Tin Smelter Nationalization Decree, 7 February 2007, **C-20**; *see also* Section V.A.

<sup>226</sup> Statement of Claim, para 68. *See* Letter from Vinto (Mr Capriles) to Minister of Mining and Metallurgy (Mr Echazú), 7 December 2007, **C-48**.

<sup>227</sup> Statement of Defense, para 157.

<sup>228</sup> *See* Statement of Claim, para 67; Statement of Defense, para 159. The Tin Smelter Nationalization Decree provided as follows:

Whereas the implementation of a neoliberal model in Bolivia since 1985 resulted in the liquidation of strategic state-owned companies through the capitalization and privatization processes causing relocations and exacerbating unemployment. [...] Whereas Law N° 1544 of 21 February 1994 included the Empresa Metalúrgica Vinto as a public company subject to the capitalization process. However, Law N° 1982 of 17 June 1999 specifically excluded the Empresa Metalúrgica Vinto of the scope of the Capitalization Law, providing that the Executive Power determines the mechanism of its transfer to the private sector within the framework of Law N° 1330 of 24 April 1992 – the Privatization Law, a norm that did not foresee the transfer of strategic productive units. On the basis of this legal inconsistency the then Minister of Foreign Commerce and Investment, through Ministerial Resolution 139-99 of 24 June 1999, approved the Specific Plan N° EMV-ESTANÑO-05-99 which included the illegal transfer of the Empresa Metalúrgica Vinto. [...] Whereas the legal uncertainty in the status of the company, caused by the indicated accumulation of illegalities, creates serious risks for the economy of the country and the labor stability of the workers, circumstances that force the National Government to determine the reversion of the Vinto Tin Smelter to the ownership of the State.

supposed “reversion” is underscored by the fact that, following the nationalization and over the course of the subsequent negotiations, the Government continued asking Glencore Bermuda’s representatives for details concerning the origins of Glencore Bermuda’s investment.<sup>229</sup>

83. *Second*, contrary to Bolivia’s assertion, prior to the nationalization Glencore International had duly and fully complied with any requests for additional information concerning its identity or investment in the country, as explained in Section II.C. Bolivia seems to imply now that Glencore International did not provide all of the requested information.<sup>230</sup> However, that this is not true is not only clear from the record,<sup>231</sup> but it is further confirmed by the fact that no new inquiries or concerns were raised after the information was sent.<sup>232</sup> Neither was Glencore International, nor any of its subsidiaries, made aware that this response was not satisfactory. Even if the information was not to the satisfaction of the Government, as Bolivia now claims, the Government should have indicated to Glencore International or its subsidiaries what was allegedly missing and provided an opportunity to remedy. It did not. Finally, it is worth noting that the request for information did not come from any Bolivian authority competent to decide the nationalization, but from a single Bolivian senator.<sup>233</sup> Thus, it is clear that Bolivia’s allegation that the “reversion” of the Tin Smelter was due to Sinchi Wayra’s lack of cooperation with the inquires of the Bolivian authorities is unfounded.

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Tin Smelter Nationalization Decree, 7 February 2007, **C-20**, pp 1-2 (unofficial English translation from Spanish original).

<sup>229</sup> Letter from Comibol (Mr Quintanilla) to Comsur (Mr Capriles), 27 July 2007, **C-84**.

<sup>230</sup> Statement of Defense, para 158, quoting: First Witness Statement of Christopher Eskdale, para 41.

<sup>231</sup> Sinchi Wayra provided extensive documentation in direct response to the queries raised by the Bolivian Senator. Letter from Pestalozzi Lachenal Patry (Mr Pestalozzi) to Senate of Bolivia (Ms Velásquez), 10 January 2007, **C-225**; *see also* Section II.C.

<sup>232</sup> *See* Statement of Defense, paras 156-161; *see also* Statement of Claim, para 64.

<sup>233</sup> *See* Request for written report from Senator Velásquez, 30 November 2006, **C-68**.

84. In fact, Bolivia’s own evidence in the present arbitration indicates that the State seized the Tin Smelter because it would be “profitable” for it to do so.<sup>234</sup> Specifically, in a report dated 29 January 2007, just ten days prior to the taking, Comibol laid out several “technical justifications” for the “reversion.”<sup>235</sup> In particular, Comibol explained that seizing the Tin Smelter would allow the State to gain full control over the tin supply chain. As explained by Comibol:

The project of reverting Vinto’s smelter is profitable for the country and COMIBOL, even in its current condition, that is, maintaining the current technology.

[...]

The transfer of the Vinto Complex to COMIBOL, it will give the latter opportunity to close the production of tin, meaning the production, mining and smelting circuit, a fact that is common in large mining companies.<sup>236</sup>

85. Indeed, the State-run Huanuni Mine, which remained one of the Tin Smelter’s main suppliers of tin concentrates (together with the Colquiri Mine and local *cooperativas*),<sup>237</sup> was then facing operational and financial difficulties. As noted by Comibol in its 29 January 2007 report, the Tin Smelter’s “reversion” to the State would, in fact, help “support” Huanuni’s “mining operations” and “solve” the economic difficulties that the Huanuni operations were suffering at this time by materially reducing costs:

The operations of the Huanuni company will be covered with a preferential cost of processing by Complejo Vinto, with the purpose of sustaining its mining operations, thus allowing it to face

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<sup>234</sup> COMIBOL Report on the reversion of the Complejo Metalúrgico Vinto to the Bolivian State, 29 January 2007, **R-247**, p 3.

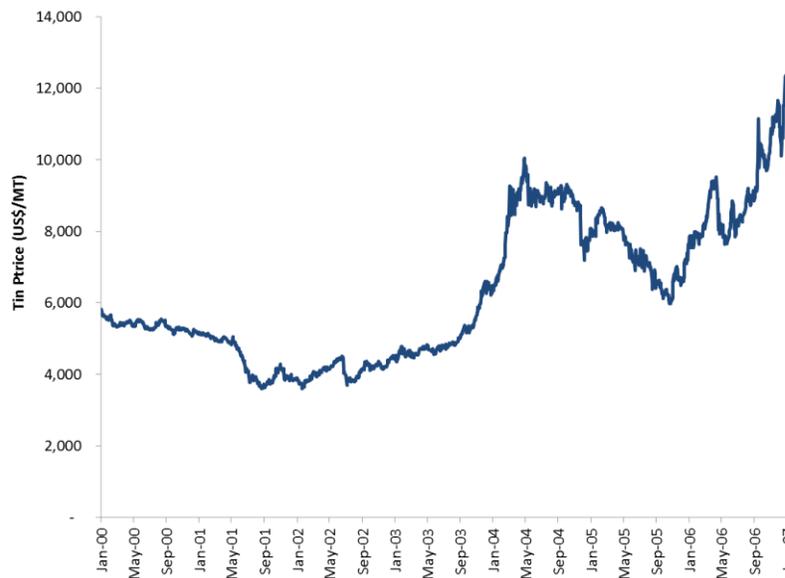
<sup>235</sup> COMIBOL Report on the reversion of the Complejo Metalúrgico Vinto to the Bolivian State, 29 January 2007, **R-247**.

<sup>236</sup> *Ibid*, p 3 (emphasis added) (unofficial English translation from Spanish original).

<sup>237</sup> Expert Report of RPA, paras 42, 64, 158, 194; Expert Report of Compass Lexecon, para 27.

the current situation, lowering the effective cost of processing from 600 \$us/processed tonne to 500 \$us/processed tonne.<sup>238</sup>

86. In Comibol's own words, the takeover of the Tin Smelter was a reasoned decision to support the State's own tin production and allow it to have direct control over the supply chain—from the extraction of tin to its refining—and reap greater profits, taking advantage of the fact that the tin prices had peaked in early 2007 and had more than doubled since the Tin Smelter's privatization, as shown below:



87. Presumably in order to maximize the economic benefit to the State, the Tin Smelter Nationalization Decree did not provide for any compensation to Glencore Bermuda. As a result, just a few days after the nationalization, Glencore International, in representation of itself and Glencore Bermuda, requested a meeting with the Government in order to discuss the amount of compensation due for the taking.<sup>239</sup>

<sup>238</sup> COMIBOL Report on the reversion of the Complejo Metalúrgico Vinto to the Bolivian State, 29 January 2007, **R-247**, p 3 (unofficial English translation from Spanish original).

<sup>239</sup> Letter from Glencore International (Mr Strothotte) to the President of Bolivia (Mr Morales), 22 February 2007, **C-21**.

88. Bolivia now asserts that it was Glencore International rather than Glencore Bermuda that requested negotiations with the State following the nationalization.<sup>240</sup> This is incorrect. In fact, in February 2007 and over the course of subsequent correspondence with the Government, Glencore International specifically provided that it was acting in representation of itself as well as its subsidiaries.<sup>241</sup> Specifically, Glencore International wrote, in relevant part:

As President of Glencore International AG (Glencore) and in representation of its subsidiaries, I greet you [...] In Bolivia, Glencore has made significant investments through its subsidiaries [...] Glencore is a good faith investor that is firmly committed to work, through its subsidiaries, for the mining industry in Bolivia. [...] the [Tin Smelter Nationalization Decree] does not include provisions referencing fair compensation in favor of Glencore or its subsidiaries. Glencore and its subsidiaries consider that this nationalization without compensation entails a violation of the Political Constitution and Law No 1182 of the Bolivian State, as well as international law [...].<sup>242</sup>

89. Bolivia was aware that Glencore Bermuda was one such subsidiary of Glencore International.<sup>243</sup> Furthermore, in December 2007, Glencore Bermuda sent a notice of dispute to Bolivia under the Treaty<sup>244</sup> and provided a Power of Attorney granting a number of individuals—including Christopher Eskdale—authority to negotiate with the Government on its behalf.<sup>245</sup>

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<sup>240</sup> Statement of Defense, para 231.

<sup>241</sup> See Statement of Defense, para 231.a; Letter from Glencore International (Mr Strothotte) to the President of Bolivia (Mr Morales), 22 February 2007, **C-21**, pp 1-2.

<sup>242</sup> Letter from Glencore International (Mr Strothotte) to the President of Bolivia (Mr Morales), 22 February 2007, **C-21**, pp 1-2 (emphasis added).

<sup>243</sup> See Letter from Pestalozzi Lachenal Patry (Mr Pestalozzi) to Senate of Bolivia (Ms Velásquez), 10 January 2007, **C-225**, p 2.

<sup>244</sup> Letter from Glencore Bermuda (Mr Kalmin and Mr Hubmann) to Ministry of the Presidency (Mr Quintana), 11 December 2007, **C-25**, p 2.

<sup>245</sup> Additional authorizes representatives included Eduardo Capriles and Luis Felipe Hartmann. Power of Attorney from Glencore Bermuda, 11 December 2007, **C-90**.

90. Nonetheless, as described in the Statement of Claim and by Christopher Eskdale,<sup>246</sup> the protracted negotiations did not lead to an agreement. The Government repeatedly refused to recognize its obligation to pay the fair market value of the expropriated asset, seeking instead to limit any compensation offer to the amounts invested by Glencore Bermuda in the Tin Smelter since the acquisition.<sup>247</sup>
91. In addition, it soon became clear that the fate of the Tin Smelter compensation was linked to a successful migration of Glencore Bermuda's subsidiaries' mining contracts to shared-risk agreements. As explained in the Statement of Claim, despite the agreed increase in the royalty payments (up to 8 percent from an original 3.5 percent in 2006),<sup>248</sup> Comibol had subsequently requested a minimum 50 percent participation in the contracts.<sup>249</sup> Glencore Bermuda did not oppose the transition to a shared-risk framework, but argued that it would need to be compensated for the market value of what it would cede pursuant to such a migration, including the net present value of its lost future cash flows and the residual value of its investment.<sup>250</sup>
92. The Government, however, claimed that it did not want to conclude the new mining agreements and yet have to defend itself against an international claim over the nationalization of the Tin Smelter.<sup>251</sup> At the same time, however, it was not amenable to pay a fair compensation for the Tin Smelter's taking. With presidential elections on the horizon in late 2009 and falling metal prices,

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<sup>246</sup> First Witness Statement of Christopher Eskdale, paras 55-59; Statement of Claim, paras 73, 75.

<sup>247</sup> See First Witness Statement of Christopher Eskdale, para 55; Statement of Claim, para 73.

<sup>248</sup> Statement of Claim, para 74; Addendum to the Colquiri Lease, 11 November 2005, **C-12**, pp 3-4.

<sup>249</sup> First Witness Statement of Christopher Eskdale, para 54.

<sup>250</sup> Letter from Sinchi Wayra (Mr Capriles) to Comibol (Mr Vargas), 11 October 2007, **C-89**.

<sup>251</sup> First Witness Statement of Christopher Eskdale, para 59.

negotiations over the contracts and the Tin Smelter compensation came to a halt in 2009.<sup>252</sup>

## 2. **Bolivia’s true reason for nationalizing the Antimony Smelter was to have access to the Tin Stock to supply the State-run Tin Smelter**

93. Without warning on 1 May 2010 the State abruptly issued the Antimony Smelter Nationalization Decree, pursuant to which the Antimony Smelter was to be immediately “reverted” to the State on the basis of the Antimony Smelter’s “productive inactivity” over the “last years.”<sup>253</sup> Yet, as Bolivia was well aware, the Antimony Smelter had been inactive prior to Glencore Bermuda’s acquisition and the Government had not requested that Glencore Bermuda, or any of its affiliates, bring it into production.<sup>254</sup>
94. On 2 May 2010, the then Minister of the Presidency, Oscar Coca, publicly announced the nationalization of the Antimony Smelter in a press conference. Immediately thereafter, the Minister of Mining, José Pimentel, read out the Antimony Smelter Nationalization Decree at the plant, while taking control of the premises.<sup>255</sup> Together with the Antimony Smelter, Bolivia also took 161 tonnes of tin concentrates belonging to Colquiri that had been temporarily stored at the Smelter.<sup>256</sup> Again, a banner with the word “nationalized” was affixed at the Antimony Smelter’s entrance, as can be seen in the picture below:<sup>257</sup>

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<sup>252</sup> *Ibid*, para 60.

<sup>253</sup> Antimony Smelter Nationalization Decree, 1 May 2010, **C-26**, recital No 4, sole article; Statement of Claim, para 77.

<sup>254</sup> *See, eg*, Paribas, Privatisation of Bolivian mining assets, Confidential Information Memorandum, August 16, 1999, **RPA-04**, pp 62-69; First Witness Statement of Christopher Eskdale, para 63.

<sup>255</sup> Statement of Claim, para 78.

<sup>256</sup> *See, eg*, Letter from Colquiri (Mr Capriles) to Ministry of Mining (Mr Pimentel), 3 May 2010, **C-28**; Letter from Colquiri (Mr Hartmann) to the Minister of Mining (Mr Pimentel), 5 May 2010, **C-98**; and Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel), 10 May 2010, **C-99**.

<sup>257</sup> The date of the nationalization (Workers’ Day) is not a coincidence. President Morales himself has declared that “[e]very first of May we nationalize.” “Evo anuncia que hay pocas empresas por nacionalizar en el país,” *Página Siete*, 1 May 2016, **C-273** (emphasis added).



95. Once again, the nationalization decree did not provide for the payment of any compensation.<sup>258</sup> In fact, the Minister of Mining announced to the press that “we are not going to pay anything” for the Antimony Smelter.<sup>259</sup> No payment was, in fact, ever made.
96. In its Statement of Defense, Bolivia does not contest that it took the Antimony Smelter or the Tin Stock. Instead, Bolivia tries to justify the reversion of the Antimony Smelter by claiming that Colquiri had failed to comply with a purported obligation to bring the plant back into production.<sup>260</sup> However, Bolivia is wrong.<sup>261</sup>
97. *First*, Bolivia was well aware that the Antimony Smelter had been inactive prior to Glencore Bermuda’s acquisition.<sup>262</sup> And for good reason. In fact, the Antimony Smelter had historically suffered from the scarce availability of antimony

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<sup>258</sup> Statement of Defense, paras 162-168; *see also* Statement of Claim, para 77.

<sup>259</sup> “Glencore reclama propiedad de 150 toneladas de estaño,” *La Patria*, 20 May 2010, **C-242**, p 2 (emphasis added).

<sup>260</sup> Statement of Defense, paras 164-166.

<sup>261</sup> *See* Section V.A.

<sup>262</sup> COMIBOL Report on the reversion of the Complejo Metalúrgico Vinto to the Bolivian State, 29 January 2007, **R-247**, p 3 (noting that the Antimony Smelter had been inactive since 2002); *see also* Statement of Claim, para 77; First Witness Statement of Christopher Eskdale, para 63.

concentrates. Importantly, in 1995, prior to its privatization, Bolivia’s consultants indicated to Bolivia that the Antimony Smelter’s “future functioning depend[ed] on the availability of antimony concentrates in Bolivia,” and that the production of such concentrates was “*en descenso*.”<sup>263</sup> In particular, they signaled to Bolivia that “the antimony mines in Bolivia are running out and there will be a continuous decline in future production.”<sup>264</sup> A combination of limited domestic supply and low international antimony prices meant that the Antimony Smelter remained out of service after it was privatized.<sup>265</sup>

98. When Glencore Bermuda acquired the Antimony Smelter (together with other assets in Bolivia and Argentina), it confirmed that the processing of antimony was not commercially viable, due to the lack of raw material in Bolivia and the low market prices at the time of the acquisition, as explained by Mr Eskdale.<sup>266</sup> By that point, the Antimony Smelter had been inactive since prior to the privatization.<sup>267</sup>
99. Bolivia does not contest this, and in fact, acknowledges that in the five years of Comsur’s ownership, the Antimony Smelter was not producing.<sup>268</sup> While Bolivia now claims that “[i]n the eyes of the State, this was contrary to its position as active promoter of the mining sector, and went even against the rationale of the Privatization itself,”<sup>269</sup> the Government did not challenge the plant’s status or

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<sup>263</sup> Behre Dolbear & Company, Inc, Technical Financial Study for the Capitalization of EMV and Transfer of Operative Responsibilities of Comibol to the Private Initiative, Part II, Vol A, August 1995, **C-166**, p 229.

<sup>264</sup> *Ibid*, p 231 (emphasis added).

<sup>265</sup> First Witness Statement of Christopher Eskdale, paras 38, 63.

<sup>266</sup> Statement of Claim, para 59; First Witness Statement of Christopher Eskdale, para 38.

<sup>267</sup> US Geological Survey Minerals Yearbook 2000, “The Mineral Industry of Bolivia”, 2000, **C-177**, p 4.

<sup>268</sup> *See* Statement of Defense, para 164.

<sup>269</sup> *Ibid*, para 164.

request that Glencore Bermuda or its subsidiaries bring it back into production.<sup>270</sup> Notably, Bolivia does not claim that it did.

100. *Second*, and more importantly, there was no specific obligation in the Antimony Smelter Purchase Agreement requiring Glencore Bermuda to bring the plant into production.<sup>271</sup> In fact, the Antimony Smelter Purchase Agreement was a title transfer agreement, providing for the permanent and unconditional transfer of title at the time of closing.<sup>272</sup>
101. Bolivia attempts to fashion a contractual obligation to bring the Antimony Smelter into production by citing to the Terms of Reference of the public tender and alleging that these terms—which provided, in relevant part, that “[t]he purpose of the tender is [to] enabl[e] the Smelter to continue production thus becoming a source of employment and tax payments, supporting the activities of exploitation and processing of antimony in the country”—had been incorporated by reference into the Antimony Smelter Purchase Agreement.<sup>273</sup>
102. Contrary to Bolivia’s assertions, this language can by no means be translated into a contractual obligation. Indeed, Colquiri’s only obligation under the Antimony

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<sup>270</sup> See First Witness Statement of Christopher Eskdale, para 63; Statement of Claim, para 77.

<sup>271</sup> Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**, Art 2.7.

<sup>272</sup> See Supreme Decree No 25,964, 21 October 2000, published in the *Gaceta Oficial* on 12 January 2001, **C-178**, Art 198; Supreme Decree No 181, 28 June 2009, published in the *Gaceta Oficial* No 122 on 29 June 2009, **C-239**, Art 224; see also Section V.A. This explains why there was no clause providing for unilateral termination due to breach of contract.

<sup>273</sup> Statement of Defense, para 165. The full provision cited to by Bolivia reads as follows:

The purpose of the tender is transferring the assets and rights of the antimony smelter owned by the Empresa Metalúrgica Vinto in exchange for consideration, in favor of a specialized company with economic, financial and technical capacity, that will allow inflows of capital, technology and commercial practices and private management, enabling the Smelter to continue production thus becoming a source of employment and tax payments, supporting the activities of exploitation and processing of antimony in the country. It is also expected that the Company prioritizes the processing of Bolivian minerals, a paramount element to achieve the proposed objectives.

Terms of Reference for the Second Public Tender for the Antimony Smelter, 31 July 2000, **R-109**, Art 1.4. (unofficial English translation from Spanish original).

- Smelter Purchase Agreement was to “exclusively, irrevocably and unconditionally” assume ownership of the Antimony Smelter.<sup>274</sup> Even less can it translate into an absolute obligation to bring the Antimony Smelter into operation if the financial conditions were not appropriate or if there were insufficient raw materials in the country.
103. This is further confirmed by the fact that neither the Terms of Reference nor the Antimony Smelter Purchase Agreement include any parameters against which to measure any future antimony production—there are no timeframes, investment characteristics, nor achievement milestones against which to assess compliance with a purported obligation to reactivate the plant.<sup>275</sup> Most notably, the Antimony Smelter Purchase Agreement does not include a termination clause, meaning that it did not require continuing performance from the parties. Instead, all obligations in the agreement were fulfilled at closing (*ie*, upon payment and transfer of title) and the agreement did not include any future performance obligations.<sup>276</sup>
104. In reality, the true reason for the purported “reversion” relates to the State’s own commercial interests. As explained in the Statement of Claim, after gaining control of the Tin Smelter, Bolivia soon began experiencing severe shortages of tin concentrates to process, because of the decrease in production at the Huanuni Mine and its inability to pay other suppliers (something that Bolivia does not contest).<sup>277</sup> In fact, following the nationalization of Vinto, Sinchi Wayra—as operator of the Colquiri Mine—agreed to continue supplying tin concentrates to

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<sup>274</sup> Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**, Art 10.

<sup>275</sup> The absence of a specific timeframe for performance is particularly noteworthy; it was simply impossible for Colquiri to “breach” a purported obligation to ensure the asset’s productive status, since it had an unlimited amount of time in which to perform it. *See* Terms of Reference for the Second Public Tender for the Antimony Smelter, 31 July 2000, **R-109**; Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**.

<sup>276</sup> Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**, Arts 8.1-8.4.

<sup>277</sup> Statement of Claim, para 80.

the now Government-controlled Tin Smelter.<sup>278</sup> Eventually, however, Sinchi Wayra was forced to terminate the contractual relationship because of EMV's continued failure to meet its payment obligations.<sup>279</sup> With the nationalization of the Antimony Smelter, Bolivia, and its State-owned entity, gained direct access to 161 tonnes of tin concentrates from the Colquiri Mine that were being temporarily stored there.<sup>280</sup>

105. In its Statement of Defense, Bolivia justifies the taking of the Tin Stock by stating that the Antimony Smelter Nationalization Decree ordered the reversion of the smelter "and all its current assets" and also claims that it was "depriv[ed] [...] of the opportunity to reach an amicable resolution of those claims,"<sup>281</sup> because it was Colquiri, rather than Glencore Bermuda, that complained about the taking of the Tin Stock.<sup>282</sup> However, the evidence on the record clearly contradicts Bolivia's position.
106. *First*, as Bolivia itself acknowledged immediately following the May 2010 nationalization, the Tin Stock did not form part of the assets of the Antimony Smelter.<sup>283</sup> However, EMV subsequently determined that the Tin Stock formed part of the nationalized Antimony Smelter's inventory and its return would be addressed in the context of the negotiations to be held in relation to that nationalization.<sup>284</sup>

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<sup>278</sup> See, eg, Letter from Colquiri (Mr Iriarte) to EMV (Mr Infantes), 28 March 2007, **C-73**; Letter from Colquiri (Mr Capriles) to EMV (Mr Infantes), 16 April 2007, **C-74**.

<sup>279</sup> See, eg, Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Echazú), 8 August 2007, **C-85**; Letter from Colquiri (Mr Capriles) to EMV (Mr Infantes), 19 September 2007, **C-87**; First Witness Statement of Christopher Eskdale, para 49.

<sup>280</sup> See Letter from Ministry of Mining (Mr Pimentel) to EMV (Mr Villavicencio), 5 May 2010, **C-29**.

<sup>281</sup> Statement of Defense, para 404; Antimony Smelter Nationalization Decree, 1 May 2010, **C-26**.

<sup>282</sup> Statement of Defense, paras 167-168.

<sup>283</sup> See Letter from Ministry of Mining (Mr Pimentel) to EMV (Mr Villavicencio), 5 May 2010, **C-29**.

<sup>284</sup> Letter from EMV (Mr Villavicencio) to Colquiri (Mr Capriles), 8 June 2010, **C-102**.

107. *Second*, contrary to Bolivia’s position, Colquiri on its own behalf, and that of its shareholders, did immediately complain about the taking of the Tin Stock. Indeed, Bolivia itself concedes in its Statement of Defense that it received a number of “letters that refer to the Tin Stock,”<sup>285</sup> and that several letters were sent “to the Bolivian authorities requesting the Tin Stock to be returned.”<sup>286</sup> By reserving its rights under both Bolivian and international law in these letters, it is clear that Colquiri was acting on behalf of itself as well as its shareholders. And later, when EMV claimed that the fate of the Tin Stock would be addressed as part of the negotiations to be held in relation to the Antimony Smelter’s nationalization, Glencore Bermuda’s representatives continued the discussions about the Tin Stock in that context.<sup>287</sup> In fact, as explained by Christopher Eskdale, from July 2010 onwards,<sup>288</sup> the focus of the negotiations was on reaching a “package” deal, comprising: (i) compensation for the two nationalized Smelters; (ii) migration of the mining contracts to shared-risk agreements; and (iii) return of the tax refund certificates and the Tin Stock held at the time of nationalization at the Tin and Antimony Smelters, respectively.<sup>289</sup> No agreement was, however, reached.

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<sup>285</sup> Statement of Defense, para 410, citing: Letter from Colquiri (Mr Capriles) to Ministry of Mining (Mr Pimentel), 3 May 2010, **C-28**; Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel), 7 June 2010, **C-101**; Letter from EMV (Mr Villavicencio) to Colquiri (Mr Capriles), 8 June 2010, **C-102**.

<sup>286</sup> Statement of Defense, para 168, citing: Letter from Colquiri (Mr Capriles) to Ministry of Mining (Mr Pimentel), 3 May 2010, **C-28**; Letter from Ministry of Mining (Mr Pimentel) to EMV (Mr Villavicencio), 5 May 2010, **C-29**.

<sup>287</sup> Letter from EMV (Mr Villavicencio) to Colquiri (Mr Capriles), 8 June 2010, **C-102**; *see also* “Glencore reclama propiedad de 150 toneladas de estaño,” *La Patria*, 20 May 2010, **C-242**.

<sup>288</sup> As stated in the Statement of Claim, because no response was initially provided, in June 2010 Glencore Bermuda insisted that the talks resume. *See* Statement of Claim, para 82; Letter from Sinchi Wayra (Mr Capriles) to the Minister of Legal Defense (Ms Arismendi), 22 June 2010, **C-103**; Letter from the Minister of Legal Defense (Ms Arismendi) to Sinchi Wayra (Mr Capriles), 28 June 2010, **C-104**; Letter from the Minister of Legal Defense (Ms Arismendi) to Sinchi Wayra (Mr Capriles), 20 July 2010, **C-105**.

<sup>289</sup> Statement of Claim, para 83; First Witness Statement of Christopher Eskdale, para 69.

3. **Bolivia exacerbated the conflict at the Colquiri Mine in order to execute its planned nationalization**
- a. *Colquiri and its workers requested the Government's assistance to address increased criminal activity but instead the Government nationalized the Colquiri Mine as planned*
108. Efforts to reach a comprehensive negotiated solution to the expropriations of the Smelters continued throughout 2010 and 2011. Glencore Bermuda and its subsidiaries also focused their efforts on trying to finalize the new shared-risk agreements for the Colquiri, Porco and Bolivar mining concessions. Glencore Bermuda believed a final understanding was within reach and, in this context, planned to invest (through its subsidiaries) an additional US\$161 million in its Bolivian operations (US\$56 million of which would be invested in the Colquiri Mine).<sup>290</sup>
109. Meanwhile, Colquiri was thriving under Sinchi Wayra's management, which had increased productivity and also made several improvements to the Colquiri Mine,<sup>291</sup> including the reconditioning of the mine, construction of the tailings dam, and deepening of the San José Winze (used to connect the different levels of the San José vein).<sup>292</sup> By the end of 2011, the Colquiri Mine was one of the most competitive mines in Bolivia, operating at an average rate of 96 percent of its capacity, producing almost 290,000 tonnes of ore.<sup>293</sup> The market outlook was very good and tin prices had reached a record high in 2011 (more than six times higher than at the time of the Colquiri Mine's privatization), as shown below:

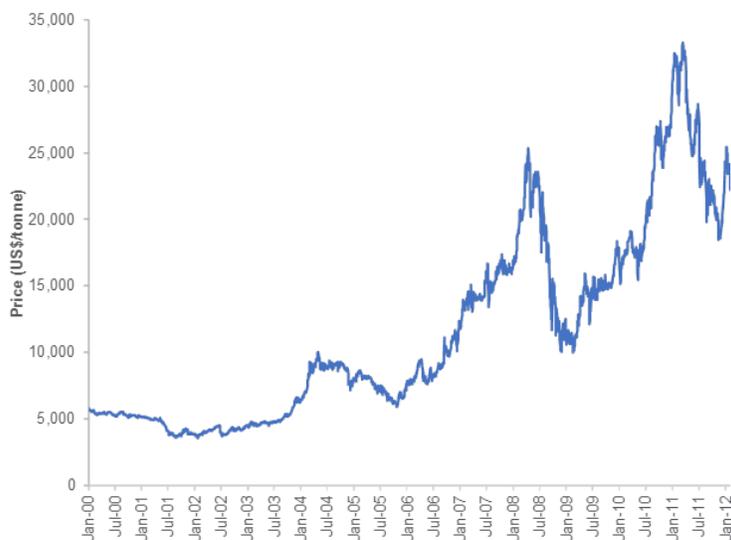
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<sup>290</sup> Letter from Glencore International (Mr Maté) to the President of Bolivia (Mr Morales), 13 June 2012, **C-38bis**.

<sup>291</sup> Statement of Claim, paras 52-58.

<sup>292</sup> Expert Report of RPA, para 121; First Witness Statement of Eduardo Lazcano, para 15.

<sup>293</sup> Second Witness Statement of Eduardo Lazcano, para 30.



Source: CLEX-030, historical tin prices

110. In this context, Colquiri had plans to expand the capacity of the Colquiri Mine. These included the construction of the Tailings Plant,<sup>294</sup> the construction of the New Tailings Dam to accommodate the Colquiri Mine’s increased production,<sup>295</sup> the investment of US\$27.5 million to expand the Concentrator Plant to double its capacity, and the expansion of the Main Ramp to facilitate the extraction of the increased production as a result of the expansion.<sup>296</sup>
111. It is against this background that, around 13 March 2012, the Ministry of Mining visited the Colquiri Mine unexpectedly and requested details about its reserves and the investments made by Sinchi Wayra.<sup>297</sup> As explained by Mr Lazcano, this was surprising, as it was generally Comibol, not the Ministry of Mining, that requested such information pursuant to the Colquiri Lease.<sup>298</sup> And, generally, such

<sup>294</sup> The Tailings Plant was to be built near the existing mill of the Colquiri Mine in order to recover the tailings discarded during the approximately 60 years of operations of the Colquiri Mine, with no associated exploratory risk or activities. *See* Statement of Claim, para 52; First Witness Statement of Christopher Eskdale, para 16(b); Expert Report of RPA, para 30.

<sup>295</sup> The new dam would be used to receive the tailings from both the Concentrator Plant and the Tailings Plant. *See* Statement of Claim, para 57.

<sup>296</sup> Statement of Claim, paras 52-58.

<sup>297</sup> Second Witness Statement of Eduardo Lazcano, para 32.

<sup>298</sup> *Ibid.*

requests were made in writing. It was also unusual for the authorities to personally visit the Colquiri Mine.<sup>299</sup> As Mr Lazcano explains, this was the first time he received a visit of a Minister of Mining in his 30 years of working in Bolivia's mining industry.<sup>300</sup> Sinchi Wayra provided all the requested information and no further requests were received from the Minister of Mining nor from any other Government official at this time.<sup>301</sup>

112. Sinchi Wayra continued advancing with the expansion projects for the Colquiri Mine. In particular, in March 2012, Sinchi Wayra began the civil works for the new warehouse and the construction of the Main Ramp that would have connected all of the Colquiri Mine's levels, from the surface all the way down to the -405 level.<sup>302</sup> Between January and March 2012, the Colquiri Mine continued to successfully operate at 96 percent of its capacity and Sinchi Wayra was able to produce 59 percent more concentrates than what it had produced in the first quarter of 2011.<sup>303</sup>
113. Yet, due to the high tin prices, in mid-March 2012 there was an increase in invasions and thefts of materials carried out by temporary workers. These individuals were primarily hired by the Chojña section of the Cooperativa 26 de Febrero, one of the local *cooperativas* that had been granted rights to exploit areas of the Colquiri Mine by the Government.<sup>304</sup> As a result, the Colquiri Union called on the Government to intervene, warning that the responsibility for material or human losses resulting from any "taking of the mine or other actions" would lay with the Government.<sup>305</sup> Meanwhile, as a measure to prevent further thefts and

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<sup>299</sup> *Ibid.*

<sup>300</sup> *Ibid*; First Witness Statement of Eduardo Lazcano, para 1.

<sup>301</sup> Second Witness Statement of Eduardo Lazcano, para 34.

<sup>302</sup> First Witness Statement of Eduardo Lazcano, para 28.

<sup>303</sup> Second Witness Statement of Eduardo Lazcano, para 31; US Geological Survey Minerals Yearbook 2012, "The Mineral Industry of Bolivia," June 2014, **C-268**, p 7.

<sup>304</sup> Second Witness Statement of Eduardo Lazcano, para 35; *see* Section II.D.3.b.

<sup>305</sup> Colquiri Union General Assembly's Resolution, 14 March 2012, **C-248**.

invasions, on 28 March 2012 Sinchi Wayra physically blocked the Colquiri Mine's North access gate, flooded its ramp, and cut power, water, and air to the -535 level.<sup>306</sup> The next day, the Colquiri Union again wrote to the Minister of Government denouncing the theft and aggression of the *cooperativistas* and asking that the Government intervene.<sup>307</sup>

114. The Government, despite the workers' repeated requests, took no immediate steps to address the situation.<sup>308</sup> On 1 April 2012, again, a group of about one hundred *cooperativistas* unlawfully entered the Colquiri Mine and stole minerals, as well as mining equipment.<sup>309</sup> Similar incidents recurred on 3 April 2012. When spotted by a supervisor, the *cooperativistas* threatened to take his life should he report their unauthorized presence in the Colquiri Mine.<sup>310</sup> In light of the gravity of the incidents, Colquiri immediately informed Comibol, as well as the Ministry of Mining and the Ministry of Government.<sup>311</sup> In asking for the Government's intervention, Colquiri noted that the company had been taking steps to address such interferences, but explained that the situation had become "unsustainable:"

These interferences with the development of the afore-mentioned mining operation, have so far and for the most part been dealt with by our company. Nonetheless, the current situation previously set out has become unsustainable, to the point where the Colquiri Workers' Union has expressed to us its concern about the physical integrity of its members. For this reason, we ask that your organization take the measures necessary to preserve peaceful

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<sup>306</sup> Second Witness Statement of Eduardo Lazcano, para 36; *see also* Letter from Colquiri (Mr Lazcano et al) to Sinchi Wayra (Mr Hartmann), 29 March 2012, **C-252**.

<sup>307</sup> Letter from Colquiri Union (Mr Estallani) to the Ministry of the Presidency (Mr Romero), 29 March 2012, **C-251**.

<sup>308</sup> Second Witness Statement of Eduardo Lazcano, para 38.

<sup>309</sup> Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 3 April 2012, **C-30**.

<sup>310</sup> *Ibid.*

<sup>311</sup> Statement of Claim, paras 87-88; Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 3 April 2012, **C-30**.

possession and public order in the Colquiri mining district, as required by the lease agreement.<sup>312</sup>

115. Sinchi Wayra separately filed a criminal complaint against the individuals responsible for the thefts and acts of aggression.<sup>313</sup> In response, Comibol merely confirmed that it would contribute to Sinchi Wayra's efforts.<sup>314</sup> Bolivia admits to receiving Colquiri's plea for assistance, but tries to excuse its inaction by saying that, "the events of early April were over so quickly that no response was reasonably feasible."<sup>315</sup>
116. Curiously, at the end of April 2012, the Vice Minister of Mining sent a letter to Sinchi Wayra, requesting information on the thefts, but also a number of unrelated details, including figures concerning the Colquiri Mine's production, recovery rates and returns.<sup>316</sup> Sinchi Wayra provided the requested information.<sup>317</sup>
117. In the meantime, in an attempt to address the concerns of the workers in the Colquiri Mine, Glencore Bermuda worked towards finalizing the required shared-risk contracts for the Colquiri, Bolivar and Porco mining concessions (as mandated by the 2009 Constitution),<sup>318</sup> which remained pending. The expectation was that, once the new contractual framework was clearly defined, tensions would ease, and the workers would feel that the source and stability of their employment

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<sup>312</sup> Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 3 April 2012, **C-30** (unofficial English translation from Spanish original).

<sup>313</sup> Second Witness Statement of Eduardo Lazcano, para 42.

<sup>314</sup> Letter from Comibol (Mr Córdova) to Sinchi Wayra (Mr Capriles), 20 April 2012, **C-253**.

<sup>315</sup> Statement of Defense, para 545.

<sup>316</sup> Letter from the Ministry of Mines (Mr Villca) to Sinchi Wayra (Mr Capriles), 26 April 2012, **C-254**; Second Witness Statement of Eduardo Lazcano, para 44.

<sup>317</sup> Second Witness Statement of Eduardo Lazcano, para 44; Letter from Sinchi Wayra (Mr Capriles) to the Vice Minister of Mining Policy, Regulation and Auditing (Mr Villca), 3 May 2012, **C-255**.

<sup>318</sup> As explained in the Statement of Claim, while the 2009 Constitution mandated the renegotiation of existing mining concessions, it did not specify the terms to be included in the new contractual arrangements. These would be delineated in a new mining law which, as of 2012, had yet to be passed by the Bolivian Congress. Statement of Claim, para 76. Mining Law No 535 came into force on 28 May 2014. Between February 2009 and May 2014 there was no legal provision setting forth the criteria and requirements for the renegotiation of contracts pertaining to the exploitation of natural resources.

- was protected by clear parameters. The framework would define the areas where the *cooperativistas* were allowed to operate, and they would no longer be able to exploit any uncertainty to their advantage.<sup>319</sup>
118. However, in early May 2012 Glencore Bermuda’s representatives learned through their local contacts within the Colquiri Union that the Government was planning to exclude Colquiri from the new contractual framework.<sup>320</sup> This rumor was subsequently confirmed in a meeting held on or around 12 May 2012 between representatives of Sinchi Wayra and Comibol, the Mining Minister and a delegation of the Colquiri Union, where the Government expressly suggested that Colquiri be excluded from the new shared-risk contracts negotiation.<sup>321</sup> This was extremely worrying since, as explained by Mr Eskdale, the exclusion of Colquiri from the constitutionally mandated contractual framework could only mean that Bolivia was considering the Colquiri Mine’s nationalization.<sup>322</sup>
119. In fact, by that point, the Government had already decided to nationalize the Colquiri Lease. In a meeting held on 10 May 2012, Bolivia’s top Government officials—*ie*, Bolivia’s Vice President (Mr Álvaro García Linera), Bolivia’s Economy and Public Finances Minister (Mr Luis Arce Catacora) and Bolivia’s Mining Minister (Mr Mario Virreira Iporre)—agreed with the *Federación Sindical de Trabajadores Mineros de Bolivia (FSTMB)* and the Huanuni Union to nationalize the Colquiri Mine. Specifically, the Government and the union

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<sup>319</sup> Second Witness Statement of Eduardo Lazcano, para 48.

<sup>320</sup> First Witness Statement of Christopher Eskdale, para 76; Second Witness Statement of Eduardo Lazcano, para 47; Email from Glencore International (Mr Hartmann) to Glencore International (Mr Eskdale) and Sinchi Wayra (Mr Capriles), 22 May 2012, **C-110**.

<sup>321</sup> *See, eg*, Email from Glencore International (Mr Hartmann) to Glencore International (Mr Eskdale) and Sinchi Wayra (Mr Capriles), 22 May 2012, **C-110**; *see also* First Witness Statement of Christopher Eskdale, para 77. Bolivia does not provide any evidence to dispute this; it merely indicates that, according to Sinchi Wayra’s internal report of some ten days later, Comibol represented to the company that its intention was to “close this negotiation as soon as practical.” Statement of Defense, para 193. However, that statement was made in parallel to the Government’s agreement with Bolivia’s main workers’ unions to nationalize the Colquiri Mine, as explained below.

<sup>322</sup> First Witness Statement of Christopher Eskdale, para 77; Statement of Claim, paras 89-92.

representatives agreed to “summon Colquiri’s workers’ union for a definitive meeting to execute the Nationalization of the Colquiri Mine.”<sup>323</sup> The 10 May 2012 Agreement provided as follows:

### 1. NATIONALIZATION OF THE MINES

COLQUIRI – Will summon Colquiri’s workers’ union for a definitive meeting to execute the Nationalization of the Colquiri Mine [...]<sup>324</sup>

120. At the time, however, neither Glencore Bermuda nor its representatives were aware of this meeting nor of the Government’s decision to nationalize Colquiri. In retrospect, this was, perhaps, not surprising, as the nationalization of the Colquiri Mine would have helped solve the severe shortages of tin concentrates that the State-run Tin Smelter had been experiencing due to its inability to pay its suppliers or properly operate the Huanuni Mine.<sup>325</sup>
121. Indeed, just one day later, on 11 May 2012, the Vice Minister of Mining Development wrote to Sinchi Wayra, stating that a technical commission of eight professionals from SERGEOTECMIN (Bolivia’s national geology and technical mine service), Comibol and the Ministry of Mining would head to Colquiri on 15 May 2012. “For this reason,” the letter requested Sinchi Wayra’s “maximum collaboration, in terms of information.”<sup>326</sup>
122. Given that support from its workers was key for Sinchi Wayra to achieve the migration of the contracts and avert nationalization,<sup>327</sup> on 23 May 2012 Sinchi Wayra’s representatives met with the leaders of the Bolivar, Porco and Colquiri

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<sup>323</sup> 10 May 2012 Agreement, 10 May 2012, **C-256**.

<sup>324</sup> *Ibid* (emphasis added); *see also* Letter from the Ministry of Economy (Mr Arce) to FSTMB (Mr Pérez), 15 May 2012, **C-258**.

<sup>325</sup> US Geological Survey Minerals Yearbook 2012, “The Mineral Industry of Bolivia,” June 2014, **C-268**, p 7. *See also* First Witness Statement of Christopher Eskdale, para 49.

<sup>326</sup> Letter from the Ministry of Mines (Mr Beltrán) to Sinchi Wayra (Mr Capriles), 11 May 2012, **C-257** (emphasis added) (unofficial English translation from Spanish original).

<sup>327</sup> Second Witness Statement of Eduardo Lazcano, para 48.

- unions.<sup>328</sup> At this meeting, the union leaders confirmed their support of Sinchi Wayra, requesting the urgent execution of the new mining contracts to address their growing concerns regarding the potential conflicts that could be generated by the uncertainty over Colquiri’s fate.<sup>329</sup>
123. However, the Government took no action to address any of the requests made by the company and the workers. This inaction in turn emboldened the *cooperativistas*.
124. Indeed, in the early hours of 30 May 2012, over one thousand members of the Cooperativa 26 de Febrero violently took over the Colquiri Mine, attacking Colquiri’s workers with (in the words of Bolivia’s own witness) “sticks, stones and dynamite,”<sup>330</sup> and injuring a number of people. Bolivia openly recognizes that “[t]he grave situation at Colquiri demanded urgent action from the Government.”<sup>331</sup> Yet, despite requests for assistance from Colquiri,<sup>332</sup> as well as demands and complaints from Colquiri’s workers<sup>333</sup> and the *cooperativas* themselves,<sup>334</sup> Bolivia took no adequate steps to contain the conflict. This is not surprising given that the Government had already decided to nationalize. In this context, Bolivia’s assertions that it did take measures to address the “grave situation at Colquiri” ring hollow.<sup>335</sup> As explained by Mr Mamani himself,

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<sup>328</sup> Meeting minutes between Sinchi Wayra and the leaders of the Bolivar, Colquiri, and Porco Unions, 23 May 2012, **C-284**.

<sup>329</sup> *Ibid.*

<sup>330</sup> Witness Statement of Joaquín Mamani, para 25.

<sup>331</sup> Statement of Defense, para 196.

<sup>332</sup> Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 30 May 2012, **C-31**.

<sup>333</sup> Letters from the Colquiri Union to the President of Bolivia (Mr Morales), the Ministry of Mining (Mr Virreira), and Comibol (Mr Córdova), 30 May 2012, **C-111**.

<sup>334</sup> “La Federación de Mineros prepara la retoma de Colquiri,” *La Prensa*, 1 June 2012, **C-114**, p 3 (Albino García, the head of Fencomin, explained that “the occupation on the part of the [C]ooperativa 26 de Febrero is the responsibility of the Government, due to the fact that it has not given [the cooperative] working areas, as requested on various occasions”) (unofficial English translation of Spanish original).

<sup>335</sup> Statement of Defense, para 196.

- Bolivia sent “a police contingent of approximately 30 policemen”<sup>336</sup> to face over one thousand *cooperativistas* armed with dynamite. Not surprisingly, the policemen were not even able to access the occupied Colquiri Mine.<sup>337</sup> Bolivia does not contest this.
125. Faced with this critical situation, Glencore Bermuda approached the Government, the *cooperativistas* and the workers to find a tenable solution. After considering several alternatives and obtaining the support of its workers, Sinchi Wayra agreed to cede the San Antonio vein to the Cooperativa 26 de Febrero.<sup>338</sup> Comibol—who presumably had not been informed of the Government’s decision to nationalize the Colquiri Mine—backed the San Antonio Proposal.
126. In parallel, the Colquiri Union arranged a meeting with the Minister of Mining in Oruro to request the swift execution of the shared-risk contract with Sinchi Wayra.<sup>339</sup> However, the meeting was boycotted by more than 2,000 members of the Huanuni Union which instead requested the nationalization of the Colquiri Mine.<sup>340</sup> This was not surprising, as the Huanuni Union had signed the 10 May 2012 Agreement to nationalize the Colquiri Mine.<sup>341</sup>

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<sup>336</sup> Witness Statement of Joaquín Mamani, para 27.

<sup>337</sup> “La Federación de Mineros prepara la retoma de Colquiri,” *La Prensa*, 1 June 2012, **C-114**, p 3.

<sup>338</sup> Minutes of understanding with the Colquiri Union and the FSTMB, 3 June 2012, **C-115**; Second Witness Statement of Eduardo Lazcano, paras 54, 57. In fact, Mr Mamani confirms that “with the objective of achieving a negotiated end to the conflict, we the members of STMC agreed that Sinchi Wayra make a new offer to the *cooperativistas*.” Witness Statement of Joaquín Mamani, para 33. On 5 June 2012, Colquiri wrote to Comibol and the Ministry of Mining confirming its agreement to cede the San Antonio vein to the Cooperativa 26 de Febrero. In addition, Colquiri offered to provide the *cooperativa* with the necessary technical support and financing for its exploitation, as well as to “create 200 additional jobs in the district with the support of the union.” Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Virreira) and Comibol (Mr Córdova), 5 June 2012, **C-120**; Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Virreira) and Comibol (Mr Córdova), 5 June 2012, **C-119**.

<sup>339</sup> Second Witness Statement of Eduardo Lazcano, para 59.

<sup>340</sup> *Ibid*, para 59; *see also* “Gobierno plantea nacionalizar Colquiri para poner fin al conflicto minero,” *La Patria*, 6 June 2012, **C-123**.

<sup>341</sup> 10 May 2012 Agreement, 10 May 2012, **C-256**.

127. According to Bolivia, the Government relayed the San Antonio Proposal to the Cooperativa 26 de Febrero in a meeting held on 6 June 2012, but the Cooperativa 26 de Febrero rejected the offer.<sup>342</sup> Rather surprisingly, Sinchi Wayra’s representatives were not even asked to join this meeting,<sup>343</sup> despite the fact that they had prepared the San Antonio Proposal.<sup>344</sup> The Cooperativa 26 de Febrero’s rejection “caused great confusion” among the members of the Colquiri Union, as explained by Bolivia’s witness Mr Mamani,<sup>345</sup> since they were still favorable to a negotiated solution that would have protected their means of support.
128. At this point—a mere six days after the *cooperativistas*’ invasion—Bolivia openly proposed the nationalization of the Colquiri Mine.<sup>346</sup> Specifically, in a written proposal submitted to the workers of Colquiri, the Government proposed that “the entire area that is under a lease agreement with the Compañía Minera Colquiri will be nationalized in favor of the State”<sup>347</sup> and expressly envisioned the deployment of its military for the period after the nationalization of the Colquiri Mine.<sup>348</sup> In other words, the Government openly started to “execute the

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<sup>342</sup> Statement of Defense, paras 200-201. Letter from the Ministry of Mines to the Cooperativa 26 de Febrero, 6 June 2012, **R-216**.

<sup>343</sup> Second Witness Statement of Eduardo Lazcano, paras 55, 61; *see also* Statement of Defense, para 200.

<sup>344</sup> Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Virreira) and Comibol (Mr Córdova), 5 June 2012, **C-120**; Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Virreira) and Comibol (Mr Córdova), 5 June 2012, **C-119**.

<sup>345</sup> Witness Statement of Joaquín Mamani, para 34.

<sup>346</sup> Statement of Defense, para 209 (stating that, prior to 7 June 2012 “the Government had discussed in La Paz the option of reverting the Mine with both the workers and the *cooperativistas*”); “Gobierno plantea nacionalizar Colquiri para poner fin a conflicto minero,” *La Patria*, 6 June 2012, **R-221**.

<sup>347</sup> Proposal from the Government to the Cabildo of Colquiri, **R-27**, p 1 (emphasis added) (unofficial English translation from Spanish original). *See also* Statement of Defense, para 210; “Gobierno plantea nacionalizar Colquiri para poner fin al conflicto minero,” *La Patria*, 6 June 2012, **C-123**.

<sup>348</sup> Proposal from the Government to the Cabildo of Colquiri, **R-27** (emphasis added) (unofficial English translation of Spanish original):

**7.- Military presence in the district**

Immediately after the enactment of the decree of reversion and nationalization, the Armed Forces of the Nation will protect the areas of operation and guarantee

- [n]ationalization” of Colquiri, as envisaged in the 10 May 2012 Agreement.<sup>349</sup> In order to muster support for the nationalization, the Government promised to keep the current workers’ jobs and salaries and offered any *cooperativista* who supported the nationalization the possibility of being hired by Comibol.<sup>350</sup>
129. The *cooperativistas*, however, openly opposed nationalization.<sup>351</sup> According to Bolivia, after discussing the nationalization in private meetings with the *cooperativistas* and the workers (and without Glencore Bermuda’s participation), the Government then publicly presented its nationalization proposal during a town hall meeting held on 7 June 2012 in Colquiri, in which village members and mining workers had convened to discuss the future of the Colquiri Mine.<sup>352</sup> While Bolivia summarily notes that, at the end of this town hall, “the *cooperativistas*, the workers of Colquiri and the villagers favoured the reversion of the Mine Lease,”<sup>353</sup> this is inaccurate. Upon conclusion of the meeting, the Colquiri Union issued a resolution stating that they “accepted [...] the political decision of the Central Government” to nationalize the Colquiri Mine.<sup>354</sup> However, significant divisions remained amongst the various stakeholders.
130. The principal section of the Cooperativa 26 de Febrero, known as the San Carlos section, continued to oppose nationalization,<sup>355</sup> as did Fencomin, the national association of cooperatives.<sup>356</sup> The only section of *cooperativistas* to adhere to the

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the security and continuity of the operations, both in the interior of the mine and on the surface of Comibol.

<sup>349</sup> 10 May 2012 Agreement, 10 May 2012, **C-256**; see also “La FSTMB exige nacionalizar Colquiri,” *La Prensa*, 6 June 2012, **C-261**.

<sup>350</sup> Proposal from the Government to the Cabildo of Colquiri, **R-27**.

<sup>351</sup> See Statement of Claim, paras 102, 104; Statement of Defense, para 212; Email from Sinchi Wayra (Mr Capriles) to Glencore (Mr Mate and Mr Eskdale), 6 June 2012, **C-260**.

<sup>352</sup> Statement of Defense, para 210; Proposal from the Government to the Cabildo of Colquiri, **R-27**.

<sup>353</sup> Statement of Defense, para 211.

<sup>354</sup> Operative vote of the Gran Cabildo de Colquiri, 7 June 2012, **R-17** (emphasis added) (unofficial English translation from Spanish original).

<sup>355</sup> Mr Cachi acknowledges as much. See Witness Statement of Andrés Cachi, para 40.

<sup>356</sup> Second Witness Statement of Eduardo Lazcano, para 63.

workers' resolution was the more radical Chojña section of the *Cooperativa 26 de Febrero*, which represented a small fraction of the *cooperativa* without the power or authority to bind it.<sup>357</sup>

131. While Bolivia claims that Glencore Bermuda was “aware of the efforts to settle the dispute undertaken by the Government and the probable outcome of the [town hall],”<sup>358</sup> Bolivia concedes that it did not discuss the nationalization directly with Glencore Bermuda (or its subsidiaries) and that it did not invite Glencore Bermuda’s representatives to make any observations on its proposal.<sup>359</sup> Indeed, in Bolivia’s words, by 6 June 2012, “it no longer made sense for the Government to try to involve Glencore in the negotiations.”<sup>360</sup>
132. Bolivia then goes on to state that, while the Government was discussing the nationalization of the Colquiri Mine with Colquiri’s workers, Glencore Bermuda “convened a meeting in La Paz with a fraction of the members of the *Cooperativa 26 de Febrero* that opposed the reversion,” in which it “secured the presence of a lower rank official from the Ministry of Mines [...] in order to give the appearance of governmental support.”<sup>361</sup> Such allegations are, however, baseless.
133. While Bolivia was executing its nationalization plan pursuant to the 10 May 2012 Agreement behind Sinchi Wayra’s back, Sinchi Wayra continued working to find a negotiated solution that would have allowed it to preserve its rights under the Colquiri Lease. Specifically, Glencore Bermuda’s representatives worked in close coordination with Isaac Meneses, the Vice Minister of Cooperatives, as well as with Leonardo Álvaro Lima, the head of the *Cooperativa 26 de Febrero*, the

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<sup>357</sup> *Ibid*, para 26. The vote of the town hall was only signed by the Chojña section of the *Cooperativa 26 de Febrero* and not by the *cooperativa* itself. Operative vote of the Gran Cabildo de Colquiri of 7 June 2012, **R-17**.

<sup>358</sup> Statement of Defense, para 212.

<sup>359</sup> *Ibid*, paras 208 and 209, providing that the nationalization was discussed with the workers and *cooperativistas* only.

<sup>360</sup> *Ibid*, providing that the nationalization was discussed with the workers and *cooperativistas* only.

<sup>361</sup> Statement of Defense, para 212.

- leaders of Fedecomín La Paz and Fencomín, as well as national and local *cooperativa* representatives.<sup>362</sup>
134. Far from being “a lower rank official” “who was not very familiar with the negotiations,” as claimed by Bolivia,<sup>363</sup> the Vice Minister of Cooperatives was the Government representative who had been sent to Colquiri by the Ministry of Mining for the purpose of negotiating a solution to the conflict.<sup>364</sup> Glencore Bermuda’s representatives reasonably believed that he had authority to bind the Government and in fact engaged in strenuous negotiations to reach an understanding that would have resolved the conflict and avoided nationalization.<sup>365</sup> As further explained by Mr Lazcano, Vice Minister Meneses was an experienced former *cooperativista*, well-respected in the mining industry, who had the mandate to broker an understanding with the Cooperativa 26 de Febrero.<sup>366</sup> In addition, as stated above, the San Carlos section was the principal section of the Cooperativa 26 de Febrero and the one to which its leaders and decision-makers belonged.<sup>367</sup>
135. Once the San Antonio Proposal fell through, Glencore Bermuda considered whether to allow the *cooperativas* to exploit the Rosario vein.<sup>368</sup> Ignorant of the 10 May 2012 Agreement, Glencore Bermuda’s representatives still believed that a compromise was possible to avoid the nationalization of the Colquiri Mine and satisfy both the workers and the *cooperativistas*. To that end, the focus of the company was, as in the past, on identifying separate and independent working areas for the *cooperativistas* and the Colquiri employees, in order to avoid

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<sup>362</sup> Second Witness Statement of Eduardo Lazcano, para 62-68.

<sup>363</sup> Statement of Defense, para 212.

<sup>364</sup> Letter from the Minister of Mining (Mr Virreira) to Cooperativa 26 de Febrero (Mr Lima), 30 May 2012, **C-259**.

<sup>365</sup> See Second Witness Statement of Christopher Eskdale, para 47.

<sup>366</sup> Second Witness Statement of Eduardo Lazcano, para 64.

<sup>367</sup> *Ibid*, para 26, 65.

<sup>368</sup> *Ibid*, para 66.

- accidents and confrontations.<sup>369</sup> On their part, the *cooperativistas* demanded access to the Rosario vein in its entirety; it had a higher concentration of minerals and was in optimal conditions to continue with its immediate exploitation since Sinchi Wayra had already carried out the necessary preparatory works.<sup>370</sup>
136. On 7 June 2012, Colquiri, the Vice Minister of Cooperatives, the leaders of the Cooperativa 26 de Febrero (who had the authority to bind all sections within the organization),<sup>371</sup> representatives of Fencomin and Fedecomín La Paz, amongst others, executed the Rosario Agreement.<sup>372</sup> The Rosario Agreement provided that, with Comibol's approval, the Cooperativa 26 de Febrero would be allowed to carry out mining activities in Colquiri's Rosario vein, so long as the *cooperativa* sold to Colquiri all of the raw material it extracted for its commercialization.<sup>373</sup> The *cooperativistas*, on their part, undertook to immediately cease the occupation of the Colquiri Mine and allow Colquiri to resume work at the deposit.<sup>374</sup> Following discussions with Comibol, on 8 June 2012, Colquiri shared the executed Rosario Agreement with Comibol's President.<sup>375</sup> In other words, for Sinchi Wayra and the *cooperativas*, a workable solution had been found.<sup>376</sup>
137. Indeed, on 8 June 2012, the *cooperativistas* decided to lift their blockade, providing hope that operations could resume.<sup>377</sup> The workers, however, did not

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<sup>369</sup> *Ibid*, para 63; *see* Section II.D.3.b.

<sup>370</sup> Second Witness Statement of Eduardo Lazcano, para 66.

<sup>371</sup> *Ibid*, para 65.

<sup>372</sup> Rosario Agreement, 7 June 2012, **C-35**; Second Witness Statement of Eduardo Lazcano, para 67; Statement of Claim, para 105.

<sup>373</sup> Rosario Agreement, 7 June 2012, **C-35**, Art 2.

<sup>374</sup> *Ibid*, Art 5.

<sup>375</sup> Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 8 June 2012, **C-125**.

<sup>376</sup> *See* Statement of Claim, para 106; First Witness Statement of Christopher Eskdale, para 95.

<sup>377</sup> "Sinchi Wayra entrega veta Rosario a tres cooperativas," *La Razón*, 9 June 2012, **C-36**; Second Witness Statement of Eduardo Lazcano, para 69.

- resume operations. Although they initially opposed nationalization<sup>378</sup> and favored an understanding with the *cooperativas* (as evidenced by their backing of the San Antonio Proposal), they now opposed any compromise. Despite the fact that an agreement had been reached amongst all relevant parties, the Government had managed to convince the workers that nationalization was the *only viable option* to preserve their job stability.<sup>379</sup> They would therefore no longer return to work under Colquiri.
138. The *cooperativistas*, on their part, were enraged when informed about the Government's promise of nationalization and insisted that their newly acquired rights to the Rosario vein be respected.<sup>380</sup> Clashes again broke out between the members of the *cooperativas* and the salaried miners.<sup>381</sup>
139. In response, on or around 12 June 2012, Comibol, the Minister of Mining and the Vice Ministry of Mining entered into an agreement with Fencomin, Fedecomín La Paz and various local *cooperativas*, providing that Comibol would assume direct control over the Colquiri (nationalized) deposit, but would preserve the Cooperativa 26 de Febrero's right to exploit the entirety of the Rosario vein, as had been agreed just days earlier with Colquiri.<sup>382</sup>
140. As explained in the Statement of Claim, Glencore Bermuda only learned of the Government's 12 June 2012 agreement through public declarations made by

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<sup>378</sup> See, eg, "Gobierno plantea nacionalizar Colquiri para poner fin al conflicto minero," *La Patria*, 6 June 2012, **C-123**.

<sup>379</sup> Statement of Defense, para 476.

<sup>380</sup> See "Cooperativistas rechazan acuerdo por la mina Colquiri," *La Razón*, 10 June 2012, **C-128**; "Cooperativistas de Colquiri inician presiones y dialogan con Gobierno," *Los Tiempos*, 12 June 2012, **C-132**.

<sup>381</sup> Statement of Claim, para 107; "Mineros bloquean Conani exigiendo nacionalizar el 100% de mina Colquiri," *La Patria*, 13 June 2012, **C-134**.

<sup>382</sup> Minutes of Agreement among Fencomin, Fedecomín, Cencomincol, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, Cooperativa 26 de Febrero, the Minister of Mining, the Vice Minister of Productive Mining and Metallurgic Development, Comibol, and the Legal Director of the Ministry of Mining, 12 June 2012, **C-129**.

Government officials.<sup>383</sup> In its 13 June 2012 letter addressed to President Evo Morales, Glencore Bermuda expressed its surprise and frustration in hearing about a likely nationalization, especially in light of the Rosario Agreement which had been executed just days earlier with the participation of the Government (*ie*, with the Vice Minister of Cooperatives, sent by the Ministry of Mining), as well as the *cooperativas*.<sup>384</sup>

141. In parallel, Sinchi Wayra tried to avert the nationalization by negotiating with the Colquiri Union. Several of its leaders (including Bolivia’s own witness Mr Mamani) and its members supported Sinchi Wayra operating the Colquiri Mine but requested the payment of a bonus. Sinchi Wayra agreed.<sup>385</sup> However, this was not sufficient. In order to execute the nationalization, the Government promised the workers that they would be allowed to manage the Colquiri Mine, similarly to what had happened with the Huanuni mine.<sup>386</sup> Additionally, the Government convinced the FSTMB—which was controlled by the Huanuni workers—to support the nationalization of Colquiri by agreeing to double the workforce at Colquiri by employing mostly people from Huanuni.<sup>387</sup> Finally, the Government secured the *cooperativas*’ support by promising to abide by the terms of the Rosario Agreement.<sup>388</sup>
142. On 19 June 2012, the Government replied to Glencore Bermuda’s letter of 13 June 2012, inviting Sinchi Wayra to a meeting to discuss “the latest events that have affected its operations in Colquiri” as well as “other matters concerning

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<sup>383</sup> Statement of Claim, para 108; Letter from Glencore International (Mr Maté) to the President of Bolivia (Mr Morales), 13 June 2012, **C-38bis**.

<sup>384</sup> Letter from Glencore International (Mr Maté) to the President of Bolivia (Mr Morales), 13 June 2012, **C-38bis**.

<sup>385</sup> Second Witness Statement of Christopher Eskdale, para 50; Email from Sinchi Wayra (Mr Capriles) to Colquiri (Mr Hartmann et al), 13 June 2012, **C-269**.

<sup>386</sup> Second Witness Statement of Christopher Eskdale, para 50; Second Witness Statement of Eduardo Lazcano, para 70.

<sup>387</sup> *Ibid.*

<sup>388</sup> Second Witness Statement of Christopher Eskdale, para 50; Second Witness Statement of Eduardo Lazcano, para 71-72.

- Sinchi Wayra's operations in the country."<sup>389</sup> However, no such meeting was ever held. In fact, as admitted by Bolivia, on that same day and (again) without Glencore Bermuda's knowledge, the Government was finalizing the nationalization of the Colquiri Mine with the *cooperativas* and the workers.<sup>390</sup>
143. As explained by Bolivia, on 19 June 2012, the Government reached an agreement with the workers and the *cooperativistas*,<sup>391</sup> providing that the Colquiri Lease would be nationalized, but that the Cooperativa 26 de Febrero would be allowed to exploit the Rosario vein.<sup>392</sup> The agreement also allowed Comibol to seek assistance from the State's armed forces to prevent and sanction the stealing of minerals.<sup>393</sup> In other words, the Government essentially accepted what it had refused to approve for Glencore Bermuda.
144. The following day, on 20 June 2012, Bolivia issued the Colquiri Mine Nationalization Decree ordering Comibol to take over control of the Colquiri Mine and nationalizing the machinery, equipment and supplies of Colquiri in favor of a new company called Empresa Minera Colquiri.<sup>394</sup> Although the Colquiri Mine Nationalization Decree provided for limited compensation covering the machinery, equipment and supplies present at the Colquiri Mine,<sup>395</sup> no payment was ever made.

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<sup>389</sup> Letter from the Ministry of Mining (Mr Beltrán) to Sinchi Wayra (Mr Capriles), 19 June 2012, **C-144** (unofficial English translation from Spanish original).

<sup>390</sup> Statement of Defense, paras 220-222; Agreement between the Government of Bolivia, COB, Fencomin, FEDECOMIN-LP, FSTMB, Central de Cooperativas de Colquiri and Sindicato Mixto de Trabajadores Mineros de Colquiri, 19 June 2012, **R-18**.

<sup>391</sup> Statement of Defense, para 222.

<sup>392</sup> Agreement between the Government of Bolivia, COB, Fencomin, FEDECOMIN-LP, FSTMB, Central de Cooperativas de Colquiri and Sindicato Mixto de Trabajadores Mineros de Colquiri, 19 June 2012, **R-18**, Arts 1-2.

<sup>393</sup> *Ibid*, Art 7.

<sup>394</sup> Colquiri Mine Nationalization Decree, 20 June 2012, **C-39**, art 1.IV.

<sup>395</sup> *Ibid*, art 1.IV.

145. As stated in the Statement of Claim, on 27 June 2012 Glencore Bermuda again wrote to the Government providing notification of a dispute under the Treaty as well as noting the company's intention to pursue an amicable resolution.<sup>396</sup> Although Bolivia claims that the notice was sent by Glencore International, the letter specifically states that it was sent on behalf of both Glencore International and Glencore Bermuda, as well as Sinchi Wayra and Colquiri.<sup>397</sup>

***b. Bolivia's attempt to shift the blame for the nationalization to Sinchi Wayra fails in light of Bolivia's decision to nationalize the Colquiri Mine prior to the cooperativistas' invasion***

146. In its Statement of Defense, Bolivia does not challenge Glencore Bermuda's factual account. Instead, it attempts to shift the blame to Glencore Bermuda, arguing that Colquiri "mismanaged and aggravated the social conflicts at the Colquiri Mine it inherited from Comsur" by ceding working areas to the *cooperativistas* and that this led to "unprecedented social conflict at the Mine in 2012."<sup>398</sup> It states that Bolivia, in turn, had "no choice" but to "revert the Mine Lease."<sup>399</sup> However, Bolivia's argument is a mere excuse without any merit. As explained above, since 10 May 2012, the Government had already decided to nationalize the Colquiri Mine and used the conflict with the *cooperativas* as an opportunity to do so.<sup>400</sup> This discussion should, therefore, end here.

147. Nonetheless, for the sake of completeness, Glencore Bermuda will briefly address below how Bolivia's allegations concerning Sinchi Wayra's and Colquiri's supposed mismanagement of relations with the *cooperativas* and the workers at the Colquiri Mine is incorrect and unsupported by the record.

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<sup>396</sup> Statement of Claim, para 113; First Witness Statement of Christopher Eskdale, para 106; Letters from Glencore plc (Mr Maté) to the President of Bolivia (Mr Morales), 27 June 2012, **C-40**.

<sup>397</sup> Letters from Glencore plc (Mr Maté) to the President of Bolivia (Mr Morales), 27 June 2012, **C-40**.

<sup>398</sup> Statement of Defense, para 169.

<sup>399</sup> *Ibid*, para 169.

<sup>400</sup> See Section II.D.3.a. See also 10 May 2012 Agreement, 10 May 2012, **C-256**.

148. Bolivia alleges that, after acquiring the Colquiri Lease, Comsur decided to lay off former Comibol workers, who were forced to join the ranks of the *cooperativas*.<sup>401</sup> According to Bolivia, Comsur and then Sinchi Wayra adopted a policy of agreeing to the *cooperativas*' demands for working areas, which allowed the *cooperativas* to gain insight into the company's operations, and in turn empowered them to access additional areas of the Colquiri Mine.<sup>402</sup> These arguments have no basis.
149. *First*, as acknowledged by Bolivia, *cooperativas* have been (and continue to be) a common and important fixture in the Bolivian mining sector since the 1980s.<sup>403</sup> They are not a phenomenon unique to Colquiri, nor to the privatization. In fact, by 1999 (prior to the Colquiri Mine's privatization), they represented over 85 percent of the Bolivian mining industry's workers.<sup>404</sup> In particular, with respect to Colquiri, Bolivia acknowledges that *subsidiarios* were present in the Colquiri Mine since prior to the privatization.<sup>405</sup> Contrary to Bolivia's allegation,<sup>406</sup> it was in fact Comibol, rather than Comsur, who significantly increased the number of *subsidiarios* / *cooperativistas* in the region by firing most of its workforce prior to the privatization of the Colquiri Mine.<sup>407</sup> When Comsur acquired the Asset, it gradually hired additional employees as activities at the Colquiri Mine resumed,

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<sup>401</sup> Statement of Defense, paras 95, 97.

<sup>402</sup> *Ibid*, paras 98-99, 186.

<sup>403</sup> *Ibid*, paras 33-34.

<sup>404</sup> D Bocangel, Small-Scale Mining in Bolivia: National Study Mining Minerals and Sustainable Development (2001), August 2001, **C-179**, p 5, Table 2; *see also* "Cooperativas mineras en Bolivia," *CEDIB*, 2008, **R-90**, p 9 ("A characteristic of Bolivian mining, which is found only in this country, is the importance of the cooperative sector within the mining sector as a whole. Thus, the number of cooperative members, which is currently [in 2008] estimated, reaches approximately 60,000 people, representing 90% of the national mining employment.") (unofficial English translation from Spanish original).

<sup>405</sup> Statement of Defense, paras 34-35.

<sup>406</sup> Witness Statement of Andrés Cachi, para 12-13; Statement of Defense, paras 95-97.

<sup>407</sup> Second Witness Statement of Eduardo Lazcano, para 8. Comibol reduced its workforce by paying the dismissed workers their accumulated social benefits plus an incentive bonus of \$1,000 for every year worked in Comibol. *See* Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-04**, p 116.

- eventually employing almost the same number of workers as Comibol did pre-privatization.<sup>408</sup>
150. *Second*, and more importantly, as Bolivia and its witness Mr Cachi admit, it was Comibol who established the policy of granting (and expanding) working areas to the *subsidiarios* and *cooperativistas* in 1998, prior to the Colquiri Mine's privatization.<sup>409</sup> Shortly after the signing of the Colquiri Lease in 2000, Comibol even extended the 1998 agreement's duration from a period of two years to a period of 20 years (*ie* until at least 2018) and expanded the working areas originally allocated to the Cooperativa 26 de Febrero.<sup>410</sup>
151. After the Colquiri Mine's privatization, it was Comibol, as lessor of the Colquiri Mine, who held the authority to cede working areas to the *cooperativas*.<sup>411</sup> Neither Comsur nor Sinchi Wayra could, on their own, grant the *cooperativistas* rights to exploit land that was owned by the State. Not surprisingly, therefore, the record indicates that the *cooperativistas* often addressed their requests for working areas directly to Comibol, who would then intercede with Sinchi Wayra

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<sup>408</sup> Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-04**, p 116; Second Witness Statement of Eduardo Lazcano, paras 8-9, 18; Labor sheets of Colquiri, various dates, **C-279**, pp 1-90.

<sup>409</sup> Statement of Defense, paras 35-36; Witness Statement of Andrés Cachi, para 9. For example, in July 1998 Comibol granted the Cooperativa 26 de Febrero (then under the name "*Trabajadores Mineros Contratistas de Colquiri*") the right to explore, exploit and produce minerals in certain sections of the Colquiri Mine. *See* Public Deed No 50/98, lease agreement between COMIBOL and the *subsidiarios* of the Colquiri Mine, 10 July 1998, **R-92**, pp 6-9. Specifically, the *cooperativistas* were allowed access to: (i) the Chojña Area at level -30 in the San Antonio, Zorro, Colquechaca and Doble Ancho faults; (ii) the Triunfo Area at level T + 70 in the Triunfo fault; (iii) the Armas Ocavi Area at the level -40 in the Ocavi fault; and (iv) the tailings in the Colquiri and Totar Uma rivers. This agreement was then amended by Comibol in December 1999 and again in January 2000. *See* Addendum to the Lease Agreement between Comibol and the *Trabajadores Mineros Contratistas de Colquiri*, 16 December 1999, **C-176**; Public Deed No 003/2000, amendment to the lease agreement between COMIBOL and the *subsidiarios* of the Colquiri Mine, 5 January 2000, **R-93**, p 4 (expanding working areas to include level -10 and upwards in the Triunfo area).

<sup>410</sup> Statement of Defense, para 99; Public Deed No 131/2000, lease agreement between Comibol and the Cooperativa 26 de febrero, 13 October 2000, **R-94**, p 5 (emphasis added).

<sup>411</sup> Second Witness Statement of Eduardo Lazcano, para 10, 11, 22.

or Colquiri in order to satisfy the *cooperativas*' demands.<sup>412</sup> Moreover, Comibol, Sinchi Wayra and Colquiri carefully considered the viability of each request and, contrary to Bolivia's allegations, regularly rejected the *cooperativas*' demands to access areas that were already being exploited or were going to be exploited in the near future by the company.<sup>413</sup> Only requests for working areas that were separate, or that could be separated, from the ones currently exploited by the company were granted.<sup>414</sup>

152. In any event, contrary to what Bolivia would like this Tribunal to believe, the number of agreements entered into by Colquiri concerning the expansion of the *cooperativas*' working areas was rather limited. In fact, a total of six such agreements were entered into with the two main *cooperativas* operating at the Colquiri Mine following the privatization of the Colquiri Lease—only two of

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<sup>412</sup> See, eg, Letter from Comibol (Mr Córdova) to Comsur (Mr Urjel), 5 October 2005, **C-216**; Letter from Cooperativa Multiactiva Mesa y Plata Ltda (Mr Solares and Mr Agne) to Comibol (Mr Miranda), 22 March 2007, **C-227**; Letter from Cooperativa 26 de Febrero (Mr Coñaja et al) to Comibol (Mr Miranda), 26 July 2007, **C-229**.

<sup>413</sup> Second Witness Statement of Eduardo Lazcano, para 22. For example, in August 2006, Comibol requested Sinchi Wayra's views on the demands for additional working areas that were being advanced by certain *cooperativas* which were present in the Colquiri Mine. Sinchi Wayra explained that it could not grant the *cooperativas*' request for levels -325 and -405 and 100 percent of the tailings, since the company was currently operating at those levels. It instead noted that Colquiri was negotiating agreements with those *cooperativas* in order to assign working areas "in places that do not interfere with the normal development of the production activities of the company." See Letter from Sinchi Wayra (Mr Hartmann) to Comibol (Mr Córdova), 30 August 2006, **C-222**. Similarly, in July 2009 Sinchi Wayra turned down a request from the Cooperativa 21 de Diciembre to work at the -365 level, because the company was operating there. Minutes of meeting between Sinchi Wayra and Cooperativa 21 de Diciembre, 24 July 2009, **C-240**.

<sup>414</sup> Second Witness Statement of Eduardo Lazcano, para 22. For example, in September 2007 a group of former Colquiri workers requested Comibol's authorization to access the area known as Socávon Inca. Comibol wrote to Colquiri asking whether "the referenced sinkhole that is sought by said organization of former workers does not affect the operations or the facilities of the Compañía Minera Colquiri." Letter from COMIBOL to Colquiri, 3 September 2007, **R-207** (unofficial English translation of Spanish original). While Bolivia uses this communication to argue that, despite such letters from Comibol, "[n]o alarm bells were rung at the time" by Colquiri in relation to "the risks these agreements entailed," it ignores the fact that Colquiri duly replied to Comibol's letter. Statement of Defense, para 179. Colquiri explained that the preliminary work of the Cooperativa Socavon Inca was being carried out in areas in which the company "does not perform any production activity and is not planning to perform any such activity in the immediate future" and therefore did not affect either "the operations nor the facilities of the Compañía Minera Colquiri." Letter from Colquiri (Mr Hartmann) to Comibol (Mr Miranda), 12 October 2007, **C-231** (unofficial English translation of Spanish original).

which were executed following Glencore Bermuda's acquisition. Notably, all six of these agreements were either executed, or approved, by Comibol.<sup>415</sup> More importantly, four out of these six agreements built on the rights that had been initially granted to the Cooperativa 26 de Febrero by Comibol prior to the privatization.

153. Therefore, given that Bolivia repeatedly requested and approved the agreements with the *cooperativas*, it is impossible to understand how Bolivia can allege that Glencore Bermuda's subsidiaries did not involve the Government in its relations with the *cooperativas* and that Colquiri should have alerted the authorities about

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<sup>415</sup> In June 2002, Comibol granted the Cooperativa 26 de Febrero access to an additional area—the south-west section of the “Incalaya” level—following a meeting attended by the Vice Minister of Mining, Vice Minister of Labor, as well as representatives from Colquiri, Comibol, Fencomin, Fedecomín Oruro. Delivery Certificate of an Expanded Working Area from Colquiri to Cooperativa 26 de Febrero, 15 June 2002, **C-182**.

In February 2004, Comibol authorized the Cooperativa 26 de Febrero to work in levels -205 and -245 of the Colquiri Mine. *See* Agreement between Fedecomín Oruro, Cooperativa 26 de Febrero, and Colquiri to Expand Working Areas, 19 November 2003, **C-188**; Letter from Comibol (Mr Manzano) to Colquiri (Mr Mirabal), 20 February 2004, **C-189**.

In April 2004, the Cooperativa 21 de Diciembre was temporarily allowed to work in the old tailings of the Colquiri Mine, subject to the *cooperativa* paying a rental fee to Comibol. Permanent authorization was conditioned on obtaining Comibol's approval, which was granted in December 2005, after Comibol carried out a technical inspection. *See* Agreement between Fencomin, Fedecomín La Paz, Fedecomín Oruro, Workers of the Cooperativas 26 de Febrero and 21 de Diciembre, Colquiri, the Vice Ministry of Mining, and Comibol, 21 May 2004, **C-193**; Memorandum of Definitive Understanding between Comibol, Cooperativa 21 de Diciembre, Colquiri, Fencomin and Fedecomín La Paz, 15 June 2005, **C-212**; Letter from Comibol Technical Manager to the President of Comibol of 20 April 2005, **R-153**; Public deed of sublease of tailings, subscribed by Compañía Minera Colquiri SA and the Cooperativa 21 de Diciembre Colquiri LTDA, 10 March 2006, **R-39** (it is worth noting that, while the copy of the public deed was obtained on 10 March 2006, the agreement itself is dated 6 December 2005).

In May 2004, Comibol signed an agreement expanding the areas in which the Cooperativa 26 de Febrero was allowed to operate to level -285, thus extending the scope of the 1998 agreement as amended in 2000, 2002 and 2003. *See* Agreement between Fencomin, Fedecomín La Paz, Fedecomín Oruro, Workers of the Cooperativas 26 de Febrero and 21 de Diciembre, Colquiri, the Vice Ministry of Mining, and Comibol, 21 May 2004, **C-193**.

Based on the May 2004 agreement and a preliminary agreement signed in January 2009, in October 2009 Comibol granted the Cooperativa 26 de Febrero rights to work at level -325—an area of the Colquiri Mine in which Colquiri was not operating at that time. *See* Preliminary Agreement between Comibol and Colquiri to Authorize Mining Works in an Area of Level 325 of the Colquiri Mine, 13 January 2009, **C-237**; Letter from Sinchi Wayra (Mr Capriles) to Comibol (Mr Miranda), 15 April 2009, **C-238**; Public Deed No 0215/2009 amendment to the lease agreement between COMIBOL and the Cooperativa 26 de Febrero, 21 October 2009, **R-210**, pp 4, 7.

the risks that the agreements supposedly entailed.<sup>416</sup> Had Comibol considered that attending to the requests of the *cooperativas* would be problematic, as Bolivia now alleges, it would certainly not have requested Colquiri to grant such rights or would have refused to approve the agreements. It did not. This is clear evidence that prior to this arbitration, Comibol, the Government and Colquiri considered engaging with the *cooperativas* to be an effective tool to manage the relationship with the *cooperativas* and reduce the risk of potential conflict.

154. *Third*, it is indeed disingenuous for Bolivia to suggest that Colquiri and Sinchi Wayra should have turned their backs on the *cooperativas* or somehow ignored their requests. The *cooperativas* had rights to exploit the Colquiri Mine, granted to them by the Bolivian authorities. More importantly, the *cooperativistas* were inhabitants of the area surrounding the Colquiri Mine, and their subsistence largely depended upon their mining activities at Colquiri. Sinchi Wayra therefore focused on managing the relationship effectively, including by using many of the same tools previously adopted by Comibol both in Colquiri and other mines, such as Porco.<sup>417</sup> Importantly, Sinchi Wayra's approach included providing the *cooperativas* with the necessary technical and financial support in order to help them exploit the areas to which they had been given access prior to Glencore Bermuda's acquisition, thereby minimizing their need to expand into new areas and preventing them from interfering with Colquiri's workers.<sup>418</sup>

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<sup>416</sup> Statement of Defense, paras 179, 203.

<sup>417</sup> Second Witness Statement of Eduardo Lazcano, para 20.

<sup>418</sup> This included, for example, supporting the *cooperativas*' production and transportation of zinc (which is sold in large quantities), as well as helping the *cooperativas* improve their infrastructure and providing them with independent access to the Colquiri Mine. For example in July 2006 the company and the Cooperativa 26 de Febrero established that no new working areas would be granted and that the *cooperativa* would respect the terms of the May 2004 agreement entered into with the Government. Sinchi Wayra agreed to purchase zinc and tin concentrates from the *cooperativa* and assist with its transportation of minerals, so as to curb the *cooperativistas*' need to access unauthorized areas when moving its production within the Colquiri Mine. *See* Minutes of Interinstitutional Agreement between Sinchi Wayra, Cooperativa 26 de Febrero, Comibol, and Fencomin, 12 July 2006, **C-221**. *See also* Interinstitutional Agreements Financing Fund for Technical Assistance, Environmental Management and Productive Investment with Mining Cooperatives in Areas of Influence of Sinchi Wayra's Mining Operations, various dates, **C-277**;

155. Assisting the *cooperativas* with their exploitation worked to the benefit of both Glencore Bermuda and Comibol. In fact, several of the agreements entered into with the *cooperativas* provided that the *cooperativistas* would sell to Colquiri the raw materials they extracted from the Colquiri Mine.<sup>419</sup> Purchasing raw materials from the *cooperativistas* allowed the company to support the *cooperativas*' activities while also ensuring that both Glencore Bermuda and Comibol, who was paid a royalty based on Sinchi Wayra's returns,<sup>420</sup> did not lose the revenue stream associated with the areas the *cooperativistas* were permitted to exploit.
156. *Fourth*, as a responsible operator, Sinchi Wayra attended to the concerns of all of the stakeholders in the area—not just the *cooperativistas*. These included Colquiri's salaried workers and union representatives, as well as local villagers or *comunarios*.<sup>421</sup> The company developed targeted social investment plans to address each group's concerns, foster an ongoing dialogue and allow peaceful operations.<sup>422</sup> For example, it funded scholarships,<sup>423</sup> built classrooms<sup>424</sup> and established a variety of training and cultural programs.<sup>425</sup> Sinchi Wayra also

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Second Witness Statement of Eduardo Lazcano, para 21; Agreement between Sinchi Wayra, Colquiri, Colquiri Union, FSTMB, Cooperativa 26 de Febrero, Fedecomín La Paz, and Fencomín, 22 September 2006, **C-224**, p 2.

<sup>419</sup> See, eg, Minutes of Interinstitutional Agreement between Sinchi Wayra, Cooperativa 26 de Febrero, Comibol, and Fencomín, 12 July 2006, **C-221**, p 1 (agreeing, among other things, that Sinchi Wayra would establish a mechanism to purchase zinc and tin concentrates from the Cooperativa 26 de Febrero at the entrance of the San Juanillo ramp).

<sup>420</sup> Colquiri Lease, 27 April 2000, **C-11**, Clauses 2.7, 5.1; Addendum to the Colquiri Lease, 11 November 2005, **C-12**, Clause 3.

<sup>421</sup> Second Witness Statement of Eduardo Lazcano, para 17.

<sup>422</sup> See, eg, Strategic Plan of Conflict Prevention of Sinchi Wayra, December 2005, **C-218**; Colquiri SA Annual Report for 2007, 18 December 2007, **R-208**, p 2 (noting that “[t]he actions implemented to counteract these threats were the permanent dialogue with the main actors and compliance in the execution of committed projects, the budgetary execution of the social Area reached 97% equivalent to Bs. 1,098,000, substantially improving its execution in comparison with past management”) (unofficial English translation of Spanish original); Colquiri's Triennial Plan for Corporate Social Responsibility, 27 July 2011, **C-243**.

<sup>423</sup> Data of Colquiri's Social Impact, 19 November 2011, **C-244**.

<sup>424</sup> Record of Delivering Social Works, 18 November 2008, **C-235**.

<sup>425</sup> Authorization for Expenditures for mining training programs for local women, 3 May 2010, **C-241**.

regularly invested in local infrastructure projects<sup>426</sup> as well as in the provision of housing.<sup>427</sup>

157. *Fifth*, in so far as tensions between the workers and the *cooperativistas* did arise, they were largely due to unauthorized access by the *cooperativistas* into areas not assigned to them.<sup>428</sup> Bolivia suggests that Colquiri was supposedly “not strict enough” with the *cooperativistas* who trespassed and stole from the Colquiri Mine and that the company “did not take measures against the comrades who [stole] in these areas” and was guilty of releasing the offenders too easily.<sup>429</sup> Astonishingly, Bolivia unashamedly produces a statement from a *cooperativista*, Mr Cachi, who openly admits that “we *cooperativistas* frequently stole materials from the workers” by entering the Colquiri Mine during “so-called ‘dead times’, that is, during shift changes.”<sup>430</sup> He goes so far as stating that he and other *cooperativistas* “bribed” Sinchi Wayra’s security personnel in order to steal ore from deeper areas of the Colquiri Mine, which the *cooperativistas* were not allowed to access.<sup>431</sup>

158. It is surprising that Bolivia attempts to support its claims on the basis of a witness statement that contains direct admissions of criminal activity, including corruption. Bolivia’s statement is even more surprising given that the regulation and punishment of criminal activity is strictly within the purview of the Government rather than Colquiri, a private company, and apparently Mr Cachi has been rewarded and not punished for his actions. In any event, Sinchi Wayra and Colquiri took significant steps to curb and address any unauthorized activities within the Colquiri Mine, including by:

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<sup>426</sup> Examples of Sinchi Wayra’s investments in local infrastructure projects, various dates, **C-278**.

<sup>427</sup> Examples of Sinchi Wayra’s investments in provision of housing, various dates, **C-280**.

<sup>428</sup> Second Witness Statement of Eduardo Lazcano, paras 14, 24.

<sup>429</sup> *See, eg*, Witness Statement of Andrés Cachi, para 27.

<sup>430</sup> *Ibid*, paras 21-22.

<sup>431</sup> *Ibid*, para 26.

- (a) clearly establishing in the agreements with the *cooperativas* (i) “security areas” which the *cooperativistas* were restricted from accessing;<sup>432</sup> (ii) prohibitions on the use of the company’s internal access routes within the mine, so as to avoid any interference with the Colquiri Mine’s infrastructure;<sup>433</sup> and (iii) sanctions on both the individual and the *cooperativa*, including the voiding of the agreement in the event of repeated offenses.<sup>434</sup>
- (b) limiting and controlling the number of *cooperativistas* allowed to operate in the assigned areas;<sup>435</sup>
- (c) requesting that an increased police force be assigned to Colquiri<sup>436</sup> and, when needed, privately contracting security personnel to provide protection inside the Colquiri Mine twenty-four hours a day;<sup>437</sup>

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<sup>432</sup> Agreement between Fedecomín Oruro, Cooperativa 26 de Febrero, and Colquiri to Expand Working Areas, 19 November 2003, **C-188**, p 1.

<sup>433</sup> *Ibid.*

<sup>434</sup> For example, the November 2003 agreement stated that “[t]he Company will establish a surveillance group that will guarantee compliance on the part of the Cooperativa of the present agreement,” and any violation would “be sanctioned with the expulsion of the violating partners.” See *Ibid.* (unofficial English translation from Spanish original). The June 2005 memorandum of understanding concerning the expansion of the Cooperativa 21 de Diciembre’s working areas was made subject to the *cooperativa*’s agreement not to interfere with Colquiri’s operations in the Old Tailings Plant and on the understanding that any breach of the agreement would result in the immediate termination of the authorizations granted to the *cooperativa*. See Memorandum of Definitive Understanding between Comibol, Cooperativa 21 de Diciembre, Colquiri, Fencomin and Fedecomín La Paz, 15 June 2005, **C-212**, p 1. The September 2006 agreement concerning the rehabilitation of infrastructure specifically provided that the Cooperativa 26 de Febrero, as well as Fencomin and Fedecomín La Paz would sanction any member of the *cooperativa* who failed to comply with the terms of the agreement. See Agreement between Sinchi Wayra, Colquiri, Colquiri Union, FSTMB, Cooperativa 26 de Febrero, Fedecomín La Paz, and Fencomin, 22 September 2006, **C-224**, p 2.

<sup>435</sup> For example, the November 2003 agreement provided that the Cooperativa 26 de Febrero was not to increase its membership or replace members that decided to leave the organization; Agreement between Fedecomín Oruro, Cooperativa 26 de Febrero, and Colquiri to Expand Working Areas, 19 November 2003, **C-188**, p 1. The January 2009 preliminary agreement specifically provided that Colquiri and the *cooperativa* would jointly define the number of *cooperativistas* entitled to work in the assigned areas based on the potential and capacity of such area, and the *cooperativa* would not engage any third parties to conduct exploitation activities. See Preliminary Agreement between Comibol and Colquiri to Authorize Mining Works in an Area of Level 325 of the Colquiri Mine, 13 January 2009, **C-237**, p 2.

- (d) submitting formal complaints to the local police when *cooperativistas* were caught stealing minerals or trespassing;<sup>438</sup> and
- (e) requesting the Government's assistance when further action was necessary, in accordance with the terms of the Colquiri Lease.<sup>439</sup>
159. *Finally*, contrary to Mr Cachi's assertions,<sup>440</sup> it is false that by the end of 2011 the *cooperativistas* practically had control of the Colquiri Mine. What happened in 2011 was that the number of temporary workers hired by the *cooperativas* considerably increased, driven by the record-high tin prices.<sup>441</sup> This situation created pressure for the *cooperativistas* to access additional working areas within the Colquiri Mine,<sup>442</sup> increasing the invasions into unauthorized sections, as well as the thefts of tools and minerals. In addition, a growing division emerged between the two sections of the Cooperativa 26 de Febrero—the San Carlos and the Chojña sections.<sup>443</sup> To address this situation, Sinchi Wayra adopted a plan to further support the development of the *cooperativas* operating at the Colquiri Mine and agreed to assist in evaluating the full potential of the areas in which the *cooperativa* was already working.<sup>444</sup>
160. In fact, when in mid-December 2011 the Cooperativa 26 de Febrero demanded additional working areas, the Ministry of Mining—as well as various local stakeholders, including members of the Colquiri Union, representatives of the

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<sup>436</sup> Second Witness Statement of Eduardo Lazcano, para 25.

<sup>437</sup> *Ibid*, para 40.

<sup>438</sup> *Ibid*, paras 25 and 40; Letter from Comibol (Mr Córdova) to Sinchi Wayra (Mr Capriles), 20 April 2012, **C-253**.

<sup>439</sup> *See, eg*, Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 3 April 2012, **C-30**.

<sup>440</sup> Witness Statement of Andrés Cachi, para 31.

<sup>441</sup> Second Witness Statement of Eduardo Lazcano, para 26.

<sup>442</sup> *Ibid*.

<sup>443</sup> *Ibid*.

<sup>444</sup> *Ibid*, para 27; Colquiri's Triennial Plan for Corporate Social Responsibility, 27 July 2011, **C-243**.

*cooperativas* and village members—rejected the *cooperativas*' demands, agreeing instead to preserve and defend the peace in Colquiri.<sup>445</sup>

161. In light of the above, Glencore Bermuda's subsidiaries not only effectively managed the relations between the various groups of stakeholders in the region, but also took appropriate steps to prevent and to address tensions between the workers and the *cooperativistas*. Indeed, 2011 was a very successful year as the Colquiri Mine operated at an average rate of 96 percent of its capacity.<sup>446</sup>

*c. The nationalization of the Colquiri Lease was not only unnecessary, but it failed to prevent "bloodshed"*

162. Bolivia argues that "reverting" the Colquiri Lease to the State was the only means of avoiding further violence,<sup>447</sup> yet it is forced to acknowledge that the conflict actually increased following the nationalization, leaving one person dead and several more injured.<sup>448</sup>
163. Rather than acknowledging its responsibility for the renewed violence, Bolivia again attempts to shift the blame to Sinchi Wayra, arguing that, although the Colquiri Mine Nationalization Decree was "a favourable solution," it was not entirely satisfactory because of the Rosario Agreement.<sup>449</sup> According to Bolivia, the reason why the nationalization only increased the violence is because Sinchi Wayra executed the Rosario Agreement prior to the State's takeover.<sup>450</sup> Bolivia's position is, however, untenable.
164. *First*, as explained above, the Government had decided to nationalize the Colquiri Mine as early as 10 May 2012, when it met with a number of union

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<sup>445</sup> Second Witness Statement of Eduardo Lazcano, para 28-29.

<sup>446</sup> *Ibid*, para 30.

<sup>447</sup> *See, eg*, Witness Statement of Carlos Romero, paras 16-17.

<sup>448</sup> Statement of Defense, paras 220-226; Witness Statement of Carlos Romero, paras 19-21; *see also* "Guerra minera por posesión de yacimientos en Colquiri," *La Patria*, 19 September 2012, **R-228**.

<sup>449</sup> Statement of Defense para 223; *see also* Witness Statement of Carlos Romero, para 16.

<sup>450</sup> Statement of Defense, para 223.

representatives and agreed that it would “summon” Colquiri’s workers in order to execute the nationalization.<sup>451</sup> The Government ultimately used the conflict at Colquiri to do just that—turn Colquiri’s workers against the company behind Glencore Bermuda’s back. Any statement, therefore, that Bolivia had “no choice” but to “revert” the Colquiri Mine is simply false.

165. *Second*, as already explained, the Rosario Agreement was a result of the negotiations led by the Vice Minister of Cooperatives from the Ministry of Mining, and was executed by the three local *cooperativas*, Fencomin, Fedecomín La Paz and the Vice Minister himself.<sup>452</sup> Bolivia cannot therefore portray the Rosario Agreement as an independent initiative of Sinchi Wayra carried out without governmental support.<sup>453</sup>
166. *Third*, the *cooperativistas*’ insistence on their right to exploit the Rosario vein underscores that, in any event, nationalization was not necessary to resolve the conflict and in fact only made matters worse. Just as had been previously done under the Government’s direction and approval, solving the impasse entailed identifying areas for the *cooperativistas* to exploit that were separate and independent from those in which the company’s workers operated. This is exactly what the *cooperativistas* demanded and what was ultimately agreed to in the Rosario Agreement. Had the Government actually supported a negotiated solution rather than convince the workers that full nationalization was the only option, the conflict would have ended with the execution of the Rosario Agreement.

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<sup>451</sup> 10 May 2012 Agreement, 10 May 2012, **C-256**.

<sup>452</sup> Statement of Claim, para 105; Rosario Agreement, 7 June 2012, **C-35**, Art 1. The ceding of the Rosario vein was done with the “approval of [Comibol], as the administrator of the mining rights in the Colquiri mine, on behalf of the Bolivian State, and without objection from Colquiri S.A. as lessee of said mine.” Rosario Agreement, 7 June 2012, **C-35**, Art 1 (unofficial English translation of Spanish original). *See also* Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 8 June 2012, **C-125**.

<sup>453</sup> *See, eg*, Witness Statement of Carlos Romero, para 23 (referring to “the expectations created by Sinchi Wayra”).

167. Instead, the Government purposely exacerbated the conflict to execute its planned nationalization. Although the Government had initially promised the *cooperativas* that the Rosario Agreement would be maintained despite the State's takeover, the Colquiri Mine Nationalization Decree provided that Comibol would keep the southern part of the Rosario vein for its own exploitation.<sup>454</sup> This led to confrontations in the Colquiri Mine, worsened by the fact that both *cooperativistas* and workers had to share common entrances and galleries within the now divided Rosario vein.
168. On 31 August 2012, through another Supreme Decree, the Government delineated the areas of the Rosario vein assigned to the *cooperativistas*,<sup>455</sup> but this only made things worse, as admitted by Bolivia's witness, Mr Romero.<sup>456</sup> The Government confirmed that the southern part of the Rosario vein would be Comibol's and established certain easements in its favor. This second Supreme Decree was met with massive demonstrations by the *cooperativistas* and the Colquiri Union declared a general strike.<sup>457</sup> Again, the parties laid the blame on the Government, denouncing the "government's noncompliance and lack of solutions to this conflict" and faulted it for "not calling for a dialogue."<sup>458</sup> Confrontations between the *cooperativistas* and union members in La Paz turned violent and ended with the death of one *cooperativista* and the injury of nine others.<sup>459</sup>

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<sup>454</sup> Colquiri Mine Nationalization Decree, 20 June 2012, **C-39**, Art 2.II.

<sup>455</sup> Supreme Decree No 1,337, 31 August 2012, **R-30**, Art 2.

<sup>456</sup> Witness Statement of Carlos Romero, paras 20-21.

<sup>457</sup> Statement of Defense, para 224; Se agudiza la tensión entre mineros asalariados y cooperativistas en Colquiri," *América Economía*, 16 September 2012, **R-225**.

<sup>458</sup> Se agudiza la tensión entre mineros asalariados y cooperativistas en Colquiri," *América Economía*, 16 September 2012, **R-225** (unofficial English translation of Spanish original).

<sup>459</sup> Statement of Defense, para 226; "Guerra minera por posesión de yacimientos en Colquiri," *La Patria*, 19 September 2012, **R-228**.

169. On 29 September 2012 the Government, *cooperativistas* and workers finally agreed on a new delimitation of the Rosario vein,<sup>460</sup> which was incorporated in Supreme Decree 1,368 issued a few days later.<sup>461</sup> In the end, after three supreme decrees, one fatality and numerous casualties, the Government was forced to cede to the *cooperativistas*' demands for their own working areas, despite the nationalization.
170. *Finally*, Bolivia argues that since the Colquiri Mine passed under the operatorship of Comibol, no violence of the magnitude of the events in 2012 has resurfaced. This is also incorrect. The FSTMB resumed the conflict in February 2013, only four months after the final delineation of the Rosario vein, demanding the nationalization of the whole Mine.<sup>462</sup> Then, in November 2013 three *cooperativistas* accused of stealing were severely injured by workers.<sup>463</sup> Conflicts between workers and *cooperativistas* regarding the areas assigned to the latter also resurfaced in 2014<sup>464</sup> and 2015.<sup>465</sup> Bolivia cannot, therefore, credibly claim that "the Government's actions in 2012 effectively put an end to the serious social conflict created by Colquiri, under Sinchi Wayra's administration."<sup>466</sup>

#### **4. Despite infinite attempts, Glencore Bermuda did not receive any compensation for the expropriation of its investments**

171. As explained in the Statement of Claim, following the nationalization of Colquiri, Glencore Bermuda went back to the negotiating table.<sup>467</sup> Concerned with the risk

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<sup>460</sup> Agreement between the STMC, the Cooperativa 26 de Febrero, the Central de Cooperativas de Colquiri, COB, FSTMB, FENCOMIN, FEDECOMIN-LP and the Government, 29 September 2012, **R-31**.

<sup>461</sup> Supreme Decree No 1,368, 3 October 2012, **R-32**.

<sup>462</sup> La Patria, "Mineros retoman conflicto de Colquiri y exigen reversión total al Estado," *La Patria* 28 February 2013, **C-263**.

<sup>463</sup> "Cooperativistas y asalariados se pelean en Colquiri," *CEDIB*, 13 November 2013, **C-266**.

<sup>464</sup> "Obreros de Colquiri se declaran en emergencia," *Página Siete*, 5 April 2014, **C-267**.

<sup>465</sup> "Alertan de conflicto en la mina Colquiri," *La Razón*, 25 May 2015, **C-271**.

<sup>466</sup> Statement of Defense, para 229.

<sup>467</sup> Statement of Claim, para 114; Letter from Glencore plc (Mr Capriles) to the Minister of Mining (Mr Virreira), 3 July 2012, **C-145**.

- of further nationalizations, Glencore concluded new shared-risk agreements for the Porco and Bolivar mining concessions.<sup>468</sup>
172. Again, however, despite Glencore Bermuda’s best efforts, the negotiations went nowhere.<sup>469</sup> The Government delayed and cancelled meetings,<sup>470</sup> rejected the valuations prepared by Glencore Bermuda’s experts, and even offered a negative valuation in response—essentially arguing that Glencore Bermuda should pay Bolivia for taking its Assets.<sup>471</sup>
173. The inability to reach an agreement was particularly disappointing to Glencore Bermuda. In fact, by 2012, Glencore Bermuda, through its subsidiaries, had paid royalties, taxes, and fees to Bolivia of over US\$300 million, as well as invested close to US\$250 million in the Bolivian mining industry and wider economy, providing the local community with jobs, education, access to healthcare and improved infrastructure, impacting approximately 30,000 people.<sup>472</sup> As Bolivia’s own evidence confirms, Glencore Bermuda and its subsidiaries invested in Bolivia during financially difficult times even when other companies did not, such as during the 2008 global financial crisis:

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<sup>468</sup> *Ibid.*

<sup>469</sup> Letters from Glencore International (Mr Eskdale) to the Attorney General (Mr Arce), the President of Bolivia (Mr Morales), the Vice President of Bolivia (Mr García), the Ministry of the Presidency (Mr Quintana), the Minister of Mining (Mr Navarro), and the President of Comibol (Mr Quispe), 20 May 2015, **C-148**; Letter from Glencore International (Mr Eskdale) to the Minister of Mining (Mr Navarro), 29 October 2015, **C-156**; Letter from Glencore International (Mr Eskdale) to the Attorney General (Mr Arce), 12 October 2015, **C-155**; Letter from Glencore International (Mr Eskdale) to the Attorney General (Mr Arce), 4 November 2015, **C-158**; Letter from the Attorney General (Mr Arce) to Glencore International (Mr Eskdale), 3 November 2015, **C-157**; Letter from Glencore International (Mr Eskdale) to the Minister of Mining (Mr Navarro), 12 August 2015, **C-152**.

<sup>470</sup> *See, eg*, Letter from Glencore International (Mr Eskdale) to the Minister of Mining (Mr Navarro), 29 October 2015, **C-156**; Letter from Glencore International (Mr Eskdale) to the Attorney General (Mr Arce), 12 October 2015, **C-155**; Letter from Glencore International (Mr Eskdale) to the Attorney General (Mr Arce), 4 November 2015, **C-158**; Letter from the Attorney General (Mr Arce) to Glencore International (Mr Eskdale), 3 November 2015, **C-157**; Letter from Glencore International (Mr Eskdale) to the Minister of Mining (Mr Navarro), 12 August 2015, **C-152**.

<sup>471</sup> First Witness Statement of Christopher Eskdale, paras 113, 116.

<sup>472</sup> Letters from Glencore plc (Mr Maté) to the President of Bolivia (Mr Morales), 27 June 2012, **C-40**, p 2; *see also* Statement of Claim, para 2.

In the middle of the crisis, not everything is bad. There are companies that make an effort to bet and invest in the country. Such is the case of Sinchi Wayra, which successfully issued important securities in the stock market.

Despite the domestic and foreign crisis, the company Sinchi Wayra, one of the largest mining companies in the country [Bolivia], issued securities amounting to 62.5 million dollars in the stock market, mainly aimed, in their entirety, to their short-and long-term investment operations.<sup>473</sup>

174. Glencore Bermuda's goal had been to reach an understanding with the Government in order to be able to continue investing in its operations and in the Bolivian mining sector. Given the Government's stance, however, Glencore Bermuda had no choice but to commence the present arbitration.
175. Bolivia alleges that Glencore Bermuda acted in "procedural bad faith" by describing the negotiations in the current arbitration.<sup>474</sup> These allegations are without merit. Glencore Bermuda did not reveal confidential documents, nor did it disclose specific details of the proposals that were exchanged during this process. Instead, Glencore Bermuda described in general terms the negotiation process and the Parties' positions, as this is essential for the Tribunal to understand why an agreement was not reached in the years following the nationalizations.
176. Bolivia claims that it "reserves all of its rights in this regard and, in particular, the right to produce documents regarding the Negotiations at a further, appropriate stage of these proceedings."<sup>475</sup> But, to the extent Bolivia has any such documents, the "appropriate stage" to disclose them would have been with its Statement of Defense.<sup>476</sup> Bolivia cannot unilaterally decide that it will withhold the referenced

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<sup>473</sup> "Una poderosa minera activa de bolsa," *Nueva Economía*, 13 July 2008, **R-178**, p 1.

<sup>474</sup> See Statement of Defense, paras 233-237.

<sup>475</sup> *Ibid*, para 237.

<sup>476</sup> See UNCITRAL Arbitration Rules, 2010, **CLA-94**, Art 21(2) (providing that the "statement of defence shall reply to the particulars" of the statement of claim and should be accompanied by "all documents and other evidence relied upon by the respondent, or contain references to them"); see also IBA Rules on the Taking of Evidence in International Arbitration, 29 May 2010, **RLA-136**, Art 3(1) (state that "each Party shall submit to the Arbitral Tribunal and to the other Parties all

documents on the negotiations until an unspecified later time. The purpose of the instant Reply is for Glencore Bermuda to address Bolivia’s position as raised in its Statement of Defense. In order to do so, Glencore Bermuda must have had the opportunity to review and consider any documents on which Bolivia intends to rely.<sup>477</sup>

177. Confidential

**III. THE LAW APPLICABLE TO THIS ARBITRATION IS THE TREATY AND INTERNATIONAL LAW**

178. Glencore Bermuda’s claims arise from Bolivia’s obligations as set out in the Treaty. The Treaty, as a *lex specialis*, is the primary source of law governing the

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Documents available to it on which it relies”); Procedural Order No 1, 31 May 2017, para 6.2 (providing that the “Parties shall submit with their written submissions all evidence and authorities on which they intend to rely in support of the factual and legal arguments advanced therein [...] and all other evidence and authority in whatever form”).

<sup>477</sup> *Ibid*, Art 17(1) (providing that the parties are to be “treated with equality” and the arbitral tribunal “shall conduct the proceedings [...] to provide a fair and efficient process for resolving the parties’ dispute”); Procedural Order No 2, 31 January 2018, para 56 (highlighted that “the overarching principle is the fairness and efficiency of this process as a whole”).

<sup>478</sup> Confidential

<sup>479</sup> Confidential

dispute. To the extent it is required, customary international law supplements and informs the Treaty's provisions.<sup>480</sup> Bolivian law, in turn, informs the content of Glencore Bermuda's rights and obligations within the domestic legal and regulatory framework as well as Bolivia's commitments under that same framework.<sup>481</sup> However, it is international law that applies to the substance of the dispute; a State may not invoke domestic law to excuse or preclude a claim under the Treaty.<sup>482</sup>

179. Bolivia does not dispute that the Treaty and international law apply to the instant dispute. Instead, it seems to attempt to limit the Treaty's reach, arguing that the Treaty only "provides the legal basis for Claimant's claims, nothing more."<sup>483</sup> Specifically, Bolivia claims that, "[b]ecause the Treaty does not specify the applicable law," the Tribunal must apply "the law which it determines to be appropriate" in accordance with Article 35(1) of the UNCITRAL Rules.<sup>484</sup> It then goes on to state that the appropriate law includes the Treaty, as well as international human rights treaties and Bolivian law.<sup>485</sup> Bolivia's position calls for some clarification.

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<sup>480</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic* (ICSID Case No ARB/97/3) Decision on Annulment, 3 July 2002, **CLA-37**, para 102 ("the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law"); *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (ICSID Case No ARB/87/3) Final Award, 27 June 1990, **CLA-14**, paras 20-21; *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt* (ICSID Case No ARB/99/6) Award, 12 April 2002, **CLA-34**, paras 85-87.

<sup>481</sup> *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award, 22 September 2014, **CLA-123**, paras 534-535.

<sup>482</sup> See J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (1st edn 2002) (Extract) (2002), **CLA-33**, p 3 (emphasis added); see also *Técnicas Medioambientales Tecmed SA v United Mexican States* (ICSID Case No ARB(AF)/00/2) Award, 29 May 2003, **CLA-43**, para 120 ("[t]hat the actions of the [r]espondent are legitimate or lawful or in compliance with the law from the standpoint of the [r]espondent's domestic laws does not mean that they conform to the [a]greement or to international law").

<sup>483</sup> Statement of Defense, para 250.

<sup>484</sup> *Ibid*, para 247; UNCITRAL Arbitration Rules (2010), **CLA-94**, Art 35(1).

<sup>485</sup> Statement of Defense, para 247.

180. *First*, the Treaty is the applicable substantive law chosen by the Parties. The Parties specifically agreed to arbitrate disputes arising from the rights and obligations provided by the Treaty. It follows that the Tribunal is bound by this agreement and must apply the Treaty as the *lex specialis* governing the dispute. This is not controversial and has indeed been regularly recognized by investment tribunals.<sup>486</sup> General principles of international law may supplement the Treaty where appropriate. For example, to give content to the terms used in the Treaty, such as expropriation or full protection and security, which have been extensively developed in customary international law.<sup>487</sup> Bolivia does not disagree.<sup>488</sup>
181. *Second*, contrary to Bolivia’s position, its obligations under other international legal instruments, including the International Covenant on Civil and Political Rights (*ICCPR*) and the American Convention on Human Rights cannot, and do not, limit Bolivia’s obligations under the Treaty.<sup>489</sup> Bolivia, in fact, fails to articulate why treaties that do not concern the present dispute should supplant or limit the rights and obligations that the parties have specifically agreed would be

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<sup>486</sup> *Quiborax SA and Non Metallic Minerals SA v Plurinational State of Bolivia* (ICSID Case No ARB/06/2) Award, 16 September 2015, **CLA-127**, para 90 (noting that the BIT invoked by claimant in dispute is the “primary source of law”); *The Rompetrol Group NV v Romania* (ICSID Case No ARB/06/3) Award, 6 May 2013, **CLA-209**, para 170 (tribunal found that its sole function was to decide the dispute between the parties “in accordance with ‘such rules of law as may be agreed by the parties,’ which in the present case means essentially the BIT...”) (treaty in that case did not include choice of law); *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador* (UNCITRAL) Partial Award on the Merits, 30 March 2010, **CLA-189**, para 159 (“The substantive law to be applied by the Tribunal consists of the substantive provisions of the BIT...”) (treaty in that case did not include choice of law).

<sup>487</sup> *See, eg, Emmis International Holding, BV, Emmis Radio Operating, BV, MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft v Hungary* (ICSID Case No ARB/12/2) Decision on Respondent’s Objection under ICSID Arbitration Rule 41(5), 11 March 2013, **CLA-208**, para 82 (“Expropriation and nationalization are terms that may also properly refer to the standards of customary international law, where such concepts have been widely considered and applied.”); *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v Argentine Republic* (ICSID Case No ARB/02/1) Decision on Liability, 3 October 2006, **CLA-168**, para 89 (“Likewise, applying the rules of international law is to be understood as comprising the general international law, including customary international law, to be used as an instrument for the interpretation of the Treaty. For example, where a term is ambiguous, or where further interpretation of a Treaty provision is required, the Tribunal will turn to its obligations under Articles 31 and 32 of the Vienna Convention on the Law of Treaties, signed in 1969.”).

<sup>488</sup> Statement of Defense, paras 250-252.

<sup>489</sup> *Ibid*, para 252.

subject to the instant arbitration. Even assuming that the ICCPR or the American Convention on Human Rights were applicable to the present dispute (which they are not),<sup>490</sup> it is a settled principle that, as stated by the tribunal in *Suez v Argentina*, the State “is subject to both international obligations, *i.e.* human rights and treaty obligation, and must respect both of them.”<sup>491</sup> Like in *Suez*, any obligations Bolivia may have had under applicable human rights treaties “are not inconsistent, contradictory, or mutually exclusive” with its obligations under the Treaty<sup>492</sup> and are therefore irrelevant to the resolution of the present dispute. Bolivia has not demonstrated otherwise.

182. *Third*, the role of Bolivian law is limited; it is international law that applies to the substance of the dispute. Notably, the key purpose of BITs is to grant foreign investors direct access to arbitration so that investors may invoke the substantive protections of the BIT, and hold host States to the independent international

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<sup>490</sup> See Section V.B, below.

<sup>491</sup> *Suez, Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales del Agua SA v The Argentine Republic* (ICSID Case No ARB/03/17) Decision on Liability, 30 July 2010, **CLA-191**, para 240 (emphasis in the original); *SAUR International SA v The Republic of Argentina* (ICSID Case No ARB/04/4) Decision on Jurisdiction and Liability, 6 June 2012, **RLA-82**, paras 330-331 (“But these prerogatives are compatible with the rights of investors to receive the protection offered by the BIT. The fundamental right to water and the right of the investor to the protection offered by the BIT, operate on different planes: the concessionaire company of a basic necessity public service finds itself in a situation of dependence on the public administration, which has special powers to guarantee the enjoyment by the sovereignty of the fundamental right to water; but the exercise of these powers is not omnipotent, rather they must be combined with respect to rights and guarantees granted to the foreign investor pursuant to the BIT. If the public authorities decide to expropriate the investment, give the investor unfair or inequitable treatment or deny full protection and security as promised, all in violation of the BIT, the investor will have the right to be compensated per the terms recognized under the Treaty.”) (unofficial English translation from Spanish original).

A Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (1st edn 2009) (Updated Extract), 2009, **CLA-84bis**, p 10 (“In principle, human rights concerns may be treated as any other public purpose pursued by state measures. State measures taken to fulfill international human rights concerns may not, for this reason alone, be exempted from IIA [international investment agreement] obligations. Measures may still give rise to liability where contrary to specific commitments granted to investors.”) (emphasis added).

<sup>492</sup> *Suez, Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales del Agua SA v The Argentine Republic* (ICSID Case No ARB/03/17) Decision on Liability, 30 July 2010, **CLA-191**, para 240.

standard enshrined in that BIT. As explained by the *CME v Czech Republic* tribunal:

A purpose of an international investment treaty is to grant arbitral recourse outside the host country's domestic legal system. The clear purpose is to grant independent judicial remedies on the basis of an international, accepted legal standard in order to protect foreign investments.<sup>493</sup>

183. It follows that, while Bolivian law is relevant as evidence of Glencore Bermuda's investments (*ie*, whether particular assets or rights constituting the alleged investments exist, their scope and in whom they vest), the questions of whether and how Glencore Bermuda's investments are protected under the Treaty need to be analyzed under the Treaty and international law.

#### **IV. THE TRIBUNAL HAS JURISDICTION OVER GLENCORE BERMUDA'S CLAIMS**

##### **A. BOLIVIA HAS THE BURDEN OF PROVING ITS OBJECTIONS TO JURISDICTION AND ADMISSIBILITY**

184. Glencore Bermuda agrees with Bolivia that Glencore Bermuda has the burden to prove that its claims are subject to the jurisdiction of the Tribunal.<sup>494</sup> This is plainly set out in Article 27 of the UNCITRAL Rules: "Each party shall have the burden of proving the facts relied on to support its claim or defence."<sup>495</sup>

185. Glencore Bermuda has met its burden of proof by producing all relevant evidentiary support to satisfy each of the requirements for bringing its claims pursuant to the Treaty in both its Notice of Arbitration and in its Statement of Claim.<sup>496</sup> As a result, the onus has shifted and the burden falls on Bolivia to prove

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<sup>493</sup> *CME Czech Republic BV v Czech Republic* (UNCITRAL) Partial Award, 13 September 2001, **CLA-32**, para 417 (emphasis added).

<sup>494</sup> Statement of Defense, para 256. *See* Statement of Claim, Section IV.

<sup>495</sup> UNCITRAL Rules, Art 27(1).

<sup>496</sup> Notice of Arbitration, Section III; Statement of Claim, Section IV. This is addressed further in Section IV.B, below.

that Glencore Bermuda and its investments do not meet the requirements for protection under the Treaty. In other words, Bolivia has to prove the factual and legal assertions on which its admissibility and jurisdictional objections are based.<sup>497</sup>

186. This results from the well-established and non-contested principle that “who asserts must prove,” which is widely accepted by arbitral tribunals.<sup>498</sup> As explained, for example, by the tribunal in *Pezold v Zimbabwe*:

The general rule is that the party asserting the claim bears the burden of establishing it by proof. Where claims and counterclaims go to the same factual issue, each party bears the burden of proof as to its own contentions. There is no general notion of shifting of the burden of proof when jurisdictional objections are asserted. The Respondent in this case therefore bears the burden of proving its objections. [...] the general principle applies to require the Respondent to produce sufficient evidence to establish its objections to jurisdiction.<sup>499</sup>

187. Applying this principle to the present case, Glencore Bermuda has produced all evidence needed to prove its claims. It has demonstrated its valid incorporation in Bermuda (a UK territory covered by the Treaty),<sup>500</sup> as well as its 100% interest in

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<sup>497</sup> Statement of Defense, paras 255-257.

<sup>498</sup> See also *Limited Liability Company Amto v Ukraine* (SCC Case No 080/2005) Final Award, 26 March 2008, **CLA-175**, para 64.

<sup>499</sup> *Bernhard von Pezold and others v Republic of Zimbabwe* (ICSID Case No ARB/10/15) Award, 28 July 2015, **CLA-126**, paras 174, 176 (emphasis added). See also *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **CLA-129**, para 495. See also *Vito G Gallo v Canada* (PCA Case No 55798) Award (Redacted), 15 September 2011, **CLA-199**, para 277; *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, **CLA-110**, para 2.11 (“[...] it is for the Claimant to allege and prove facts establishing the conditions for jurisdiction under the Treaty; for the Respondent to allege and prove the facts on which its objections are based.”)

<sup>500</sup> See Section IV.B.1 above; Statement of Claim, para 128. Certificate of incorporation of Glencore Bermuda (as Sandon Ltd), 23 December 1993, **C-42**; Certificate of incorporation on change of name of Glencore Bermuda (from Sandon Ltd), 30 December 1994, **C-43**; By-Laws of Glencore Bermuda, 12 December 2012, **C-44**.

the Assets through all of the relevant share registries.<sup>501</sup> Hence, it is now for Bolivia to not only *allege*—but to positively *prove*—the factual basis for its jurisdictional objections.

188. As explained below, Bolivia has failed to meet its burden of proof. Instead, Bolivia has made a series of unsubstantiated claims that—even as Bolivia has acknowledged—are based on mere suspicion,<sup>502</sup> allegations,<sup>503</sup> and with a lack of supporting evidence.<sup>504</sup> In the cases in which Bolivia has tried to prove its allegations, the evidence presented does not satisfy the standard established by the applicable case law or the case law has been mischaracterized and applied incorrectly. As a result, Bolivia’s objections must be rejected.

**B. CONTRARY TO BOLIVIA’S ALLEGATIONS, GLENCORE BERMUDA IS A PROTECTED INVESTOR UNDER THE TREATY**

189. Bolivia does not deny that Glencore Bermuda is a company incorporated and constituted under the laws of Bermuda, a territory to which the Treaty extends pursuant to Article 11.<sup>505</sup> Still, Bolivia argues that “[t]he Treaty excludes jurisdiction asserted on the basis of corporate formalities when the real party in

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<sup>501</sup> Statement of Claim, para 36. Assignment and Assumption Agreements between Glencore International and Glencore Bermuda, 7 March 2005, **C-64**, pp 1, 3; Share register of Sinchi Wayra, undated, **C-16**; Share register of Colquiri, undated, **C-17**; Share register of Vinto, undated, **C-18**.

<sup>502</sup> Statement of Defense, para 126, “We suspect that [Jorge Sasz] was acting as a proxy to protect Sánchez de Lozada’s remaining rights in Comsur, Colquiri, and Vinto, per the terms of the sales contracts between Minera and Glencore International [...]” (emphasis added).

<sup>503</sup> *Ibid*, para 368, “And [the Glencore Group] used Glencore Bermuda to hold its stake in a mining company in the Democratic Republic of Congo to which it funneled loans allegedly destined for corrupt payments” (emphasis added).

<sup>504</sup> *Ibid*, para 127, “Because of the mysteries surrounding Sánchez de Lozada’s transaction with Glencore International (as well as the privatization of the Assets), Bolivia has sought further information in the possession of Sánchez de Lozada through a 28 U.S. Code § 1782 action before the U.S. federal courts” (emphasis added).

*See also*, Bolivia’s Request for Production of Documents, 9 February 2018, comments to Bolivia’s request No 1, providing that “[i]n fact, it is likely that Sánchez de Lozada retained an interest in the Assets, either directly or through Comsur or another entity” (emphasis added).

<sup>505</sup> Statement of Defense, para 137.

interest is not protected.”<sup>506</sup> As a result, Bolivia requests that the Tribunal pierce Glencore Bermuda’s corporate veil, alleging that it is merely a vehicle used to hide the Glencore Group’s misdeeds.<sup>507</sup> Additionally, Bolivia argues that Glencore Bermuda supposedly committed an “abuse of process” by receiving the investment at a time when the dispute was foreseeable.<sup>508</sup> Hence, Bolivia objects to the Tribunal’s *ratione personae* jurisdiction and requests that Glencore Bermuda’s claims be rejected. As explained below, Bolivia’s objections are without merit and should be dismissed.

### 1. **Glencore Bermuda is a protected investor pursuant to Article 1 of the Treaty**

190. According to Article 1(d) of the Treaty, Glencore Bermuda only needs to establish that it is a company duly incorporated or constituted under the laws of Bermuda to benefit from the Treaty’s protection as an “investor.” The Treaty defines protected investors as:

[C]orporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 11.<sup>509</sup>

191. Bolivia has not challenged that Glencore Bermuda is a company incorporated under the laws of Bermuda (one of the territories to which the Treaty was expressly extended).<sup>510</sup> Instead, Bolivia argues that Glencore Bermuda cannot

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<sup>506</sup> *Ibid*, Section 4.4.1, para 349.

<sup>507</sup> *Ibid*, Section 4.4.2.

<sup>508</sup> *Ibid*, Section 4.2. To the extent that the Tribunal finds that Glencore Bermuda committed an “abuse of process,” this would be a matter of admissibility of Glencore Bermuda’s claims, but it would not affect the Tribunal’s jurisdiction. This is because the Tribunal’s jurisdiction exclusively depends upon Glencore Bermuda’s compliance with the requirements set forth in Article 1 of the Treaty and the UNCITRAL Rules. *See* Z Douglas, *The International Law of Investment Claims* (1st edn 2009) (Extract), 2009, **CLA-179**, paras 311, 864-868.

<sup>509</sup> Treaty, **C-1**, Art 1 (d)(i). *See also*, Statement of Claim, para 128. Exchange of Notes, 3 December 1992 and 9 December 1992, **C-2**.

<sup>510</sup> Certificate of incorporation of Glencore Bermuda (as Sandon Ltd), 23 December 1993, **C-42**; Certificate of incorporation on change of name of Glencore Bermuda (from Sandon Ltd), 30 December 1994, **C-43**; By-Laws of Glencore Bermuda, 12 December 2012, **C-44**.

assert protection under the Treaty based on a mere “corporate formality” (*ie*, its incorporation in Bermuda) when “the real party in interest [Glencore International] is not protected by the Treaty”<sup>511</sup>. As a result, Bolivia —alleging that Glencore Bermuda is merely a vehicle used to hide the Glencore Group’s misdeeds— requests that the Tribunal pierce Glencore Bermuda’s corporate veil and “reveal that the Claimant is truly Swiss.”<sup>512</sup> This attempt is misguided.

192. The text of the Treaty means what it says. Unlike other treaties signed by Bolivia,<sup>513</sup> the Treaty does not require ultimate control or economic activity in the State, but rather, only requires a company to be “incorporated” in one of the States party to the Treaty to be considered a protected investor.<sup>514</sup> It is well established that tribunals will apply the express language of a treaty and refuse to read in additional requirements not expressly included in the text of the relevant treaty.<sup>515</sup> In fact, the tribunals in *ADC v Hungary*, *Rompetrol v Romania* and

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<sup>511</sup> Statement of Defense, Section 4.4.1.

<sup>512</sup> *Ibid*, Section 4.4.2.

<sup>513</sup> This substantively differs from other bilateral investment treaties signed by Bolivia. For instance, the bilateral investment treaties signed by Bolivia with Chile, Cuba, and France each have a requirement of control or substantial economic activity in the State of the investor in order to qualify as an investor. *See* BIT between the Republic of Bolivia and the Republic of Chile, signed on 22 September 1994; in force on 21 July 1999, **C-175**, Art 1(b), BIT between the Republic of Bolivia and the Republic of Cuba, signed on 6 May 1995; in force on 23 August 1998, **C-173**, Art 2(b); BIT between the Government of the French Republic and the Government of Bolivia, signed on 25 October 1989; in force on 12 October 1996, **C-169**, Art 1(3).

<sup>514</sup> *See* Treaty, **C-1**, Art 1(d)(i).

<sup>515</sup> *See, eg, Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan* (ICSID Case No ARB/05/16) Award, 29 July 2008, **CLA-79**, paras 190, 326; *Aguas del Tunari SA v Republic of Bolivia* (ICSID Case No ARB/02/3) Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, **CLA-162**, paras 214-323; *See Tokios Tokelés v Ukraine* (ICSID Case No ARB/02/18) Decision on Jurisdiction, 29 April 2004, **CLA-48**, para 36; *KT Asia Investment Group BV v Republic of Kazakhstan* (ICSID Case No ARB/09/8) Award, 17 October 2013, **CLA-118**, para 123; *Yukos Universal Limited (Isle of Man) v Russian Federation* (PCA Case No AA 227) Interim Award on Jurisdiction, 30 November 2009, **CLA-185**, paras 411-415; *Waste Management, Inc v United Mexican States* (ICSID Case No ARB(AF)/00/3) Award, 30 April 2004, **CLA-155**, para 85; *Invesmart BV v Czech Republic* (UNCITRAL) Award (Redacted), 26 June 2009, **CLA-181**, para 180.

*Saluka v Czech Republic*<sup>516</sup> (all cited by Bolivia to support its position)<sup>517</sup> have expressly acknowledged this.<sup>518</sup> The *Saluka* tribunal held that:

[T]he Tribunal must always bear in mind the terms of the Treaty under which it operates. Those terms expressly give a legal person constituted under the laws of The Netherlands – such as, in this case, *Saluka* – the right to invoke the protection of the Treaty. To depart from that conclusion requires clear language in the Treaty, but there is none. The parties to the Treaty could have included in their agreed definition of “investor” some words which would have served, for example, to exclude wholly-owned subsidiaries of companies constituted under the laws of third States, but they did not do so. The parties having agreed that any legal person constituted under their laws is entitled to invoke the protection of the Treaty, and having so agreed without reference to any question of their relationship to some other third State corporation, it is beyond the powers of this Tribunal to import into the definition of “investor” some requirement relating to such a relationship having the effect of excluding from the Treaty’s protection a company which the language agreed by the parties included within it.<sup>519</sup>

193. This was confirmed by the *Rompetrol* tribunal, which made specific reference to other treaties signed by the respondent containing more exacting requirements to qualify as an investor:

It was open to the Respondent to seek an express “high threshold” definition to that effect in the BIT – as indeed various States have done – so as to limit protection to legal persons constituted under the law of a Contracting State if they have “substantial activities”

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<sup>516</sup> *The Rompetrol Group NV v Romania* (ICSID Case No ARB/06/3) Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, **CLA-76**, paras 62, 85; *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 359; *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, para 241.

<sup>517</sup> Statement of Defense, para 358.

<sup>518</sup> Notably, in its Decision on Bifurcation the Tribunal has equally found that there is “no clear textual support in the applicable BIT for the proposition that this agreement requires material or active presence for a company to qualify as investor.” Tribunal’s Procedural Order No 2: Decision on Bifurcation, 31 January 2018, para 42.

<sup>519</sup> *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, para 229.

or “real economic activities” in that State. The absence of such a restriction in The Netherlands-Romania BIT must be deliberate, especially when viewed against other BITs concluded by Romania around the same time, for example the Romania-Argentina BIT signed in 1993, which refers to “real economic activities”, or the Romania-Chile BIT signed in 1995, which refers to companies which “effectively conduct their activities in the territory of the said party.”<sup>520</sup>

194. In accordance with the above, as Glencore Bermuda is incorporated under the laws of Bermuda, it qualifies as a protected investor under the Treaty.

**2. There are no grounds for disregarding the nationality requirements of the Treaty in this case**

195. The Tribunal need not look beyond the clear terms of the Treaty in this case. Tribunals have consistently rejected jurisdictional objections based on allegations that claimant is a “shell company” where the applicable BIT merely required incorporation in a territory for claimant to be considered a protected investor.<sup>521</sup> In fact, all the cases cited by Bolivia are unhelpful to its position.

196. *First*, the tribunals in *Saluka v Czech Republic* and *ADC v Hungary*, cited by Bolivia to support its case for piercing Glencore Bermuda’s corporate veil,<sup>522</sup> have in fact rejected the respective respondent states’ request to pierce claimant’s veil when the plain language of the relevant treaty merely required incorporation to be considered an investor.<sup>523</sup> Given that the Treaty expressly provides only for

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<sup>520</sup> *The Rompetrol Group NV v Romania* (ICSID Case No ARB/06/3) Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, **CLA-76**, para 62.

<sup>521</sup> *See eg, KT Asia Investment Group BV v Republic of Kazakhstan* (ICSID Case No ARB/09/8) Award, 17 October 2013, **CLA-118**, para 113-128; *Yukos Universal Limited (Isle of Man) v Russian Federation* (PCA Case No AA 227) Interim Award on Jurisdiction, 30 November 2009, **CLA-185**, paras 411-415; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan* (ICSID Case No ARB/05/16) Award, 29 July 2008, **RLA-112**, para 313; *Tokios Tokelès v Ukraine* (ICSID Case No ARB/02/18) Decision on Jurisdiction, 29 April 2004, **CLA-48**, para 44.

<sup>522</sup> Statement of Defense, para 358.

<sup>523</sup> *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, paras 229-230, 240-241; *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, paras 357-358.

the criterion of incorporation, Bolivia's arguments that Glencore Bermuda provides no "evidence of any activity in Bermuda," "does not identify any of its employees," "does not reference shareholder or board meetings," and "does not even describe physical facilities"<sup>524</sup> are immaterial to the Tribunal's analysis of whether Glencore Bermuda is a qualified investor.

197. *Second*, the rest of the case law invoked by Bolivia, *Barcelona Traction*, *TSA Spectrum v Argentina* and *Loewen v United States*, either support Glencore Bermuda's case or are inapposite.
198. Bolivia cites *Barcelona Traction* to argue that this Tribunal should look beyond the requirement of incorporation. However, this case does not support Bolivia's position. As a preliminary point, it should be noted that *Barcelona Traction* dealt with diplomatic protection, not the definition of an investor under an investment treaty. It is well established by now that customary law principles of nationality are inapposite to the investment treaty context, and in particular, to determining questions of nationality.<sup>525</sup> More importantly, in *Barcelona Traction* the ICJ applied the place of incorporation criterion to determine Barcelona Traction's Canadian nationality, despite the fact that Barcelona Traction was "a holding company" incorporated in Canada, with 88% Belgian ownership, and whose day-to-day activities were supplying power in Spain.<sup>526</sup>
199. Bolivia also looks to *TSA Spectrum v Argentina* for support on this point. However, contrary to Bolivia's allegations, the *TSA Spectrum* decision is also not

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<sup>524</sup> Statement of Defense, para 364.

<sup>525</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 357 ("As the matter of nationality is settled unambiguously by the Convention and the BIT, there is no scope for consideration of customary law principles of nationality, as reflected in *Barcelona Traction*, which in any event are no different. In either case inquiry stops upon establishment of the State of incorporation, and considerations of whence comes the company's capital and whose nationals, if not Cypriot, control it are irrelevant."). See also Tribunal's Procedural Order No 2: Decision on Bifurcation, 31 January 2018, para 49.

<sup>526</sup> *Barcelona Traction, Light and Power Company, Limited* (Belgium/Spain) [1970] ICJ Reports 3, 5 February 1970, **CLA-7**, paras 8, 71, 95, 103.

applicable to this case, as the tribunal was tasked with interpreting “foreign control” as set forth in Article 25(2)(b) of the ICSID Convention.<sup>527</sup> In any event, the wording of the BIT in *TSA Spectrum*, unlike the Treaty, required more than “place of incorporation,” it required “effective management,” for a company to be considered a protected “investor.”<sup>528</sup>

200. Similarly, Bolivia quotes *Loewen v the United States* to support its case that this Tribunal should “cast aside corporate formalities to protect the interests of third parties.” But *Loewen* bears no resemblance to the present case. As a starting point, *Loewen* deals with the question of continuous nationality, which is not at stake here. Moreover, the claimant was a Canadian investor with investments in the US that reorganized all of its operations in bankruptcy proceedings, and transferred its NAFTA claim to a new Canadian holding company *solely* created to hold the claim being arbitrated and which it acquired after the alleged measures had occurred.<sup>529</sup> After considering that the claimant held no other assets and conducted no other commercial activities,<sup>530</sup> the tribunal concluded that “such a naked entity [...] cannot qualify as a continuing national for the purposes of this proceeding.”<sup>531</sup> Unlike the claimant in *Loewen*, not only has Glencore Bermuda always been the Claimant in this arbitration, but it has been incorporated in Bermuda since 1993,<sup>532</sup> roughly 14 years before Bolivia’s first unlawful nationalization. As explained by Mr Christopher Eskdale, Glencore Bermuda is

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<sup>527</sup> *TSA Spectrum de Argentina SA v Argentine Republic* (ICSID Case No ARB/05/5) Award, 19 December 2008, **RLA-29**, paras 134-162. Glencore Bermuda also notes that Bolivia quoted paragraph 117 of the award in *TSA Spectrum* which stated Argentina’s position, falsely disguising it as part of the TSA Spectrum tribunal’s findings. *See also* Statement of Defense, para 357.

<sup>528</sup> *TSA Spectrum de Argentina SA v Argentine Republic* (ICSID Case No ARB/05/5) Award, 19 December 2008, **RLA-29**, para 21. In fact, this was also recognized by the Tribunal. Tribunal’s Procedural Order No 2: Decision on Bifurcation, 31 January 2018, para 49.

<sup>529</sup> *Loewen Group Inc and Raymond L Loewen v United States of America* (ICSID Case No ARB/AF/98/3) Award, 26 June 2003, **RLA-28**, para 237.

<sup>530</sup> *Ibid*, para 220.

<sup>531</sup> *Ibid*, para 237.

<sup>532</sup> Certificate of incorporation of Glencore (as Sandon Ltd), 23 December 1993, **C-42**; Certificate of incorporation on change of name of Glencore Bermuda (from Sandon Ltd), 30 December 1994, **C-43**.

one of the Glencore group’s primary investment vehicles, managing and securing financing for a diverse multi-billion portfolio of operations around the world.<sup>533</sup>

201. *Finally*, contrary to what Bolivia would have the Tribunal believe,<sup>534</sup> being an investment vehicle does not constitute a misuse of corporate form that would justify the use of the corporate veil doctrine. As noted by the tribunal in *Pac Rim v El Salvador*:

[The tribunal] is not convinced that the piercing of the corporate veil would be appropriate or necessary. In order for it to be justified, as an exception to determining the nationality of a company by reference to its incorporation or seat, there must be specific factors or compelling reasons that call for an inquiry into the company’s actual ownership and control.<sup>535</sup>

202. As previously explained in the Statement of Claim<sup>536</sup> and recognized by Bolivia, investment tribunals and the ICJ have held that piercing the corporate veil can only take place under exceptional circumstances,<sup>537</sup> namely, “where the corporate structure ha[s] been utilized to perpetrate fraud or malfeasance.”<sup>538</sup> The standard was very clearly set forth by the *ADC* tribunal:

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<sup>533</sup> Second Witness Statement of Christopher Eskdale, para 17.

<sup>534</sup> Statement of Defense, para 367.

<sup>535</sup> *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Award, 14 October 2016, **CLA-224**, para 5.58. The *Pac Rim* tribunal emphasized that there was no legal requirement for an inquiry to pierce the corporate veil under the Article 25(1) of the ICSID Convention or the Investment Law, both of which were applicable in that case.

<sup>536</sup> Statement of Claim, para 313.

<sup>537</sup> *See ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 358; *Barcelona Traction, Light and Power Company, Limited* (Belgium/Spain) [1970] ICJ Reports 3, 5 February 1970, **CLA-7**, paras 56-58.

<sup>538</sup> *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, para 230, noting that “The Respondent acknowledges that [the corporate veil doctrine] presents itself as an equitable remedy where corporate structures had been utilised to perpetrate fraud or other malfeasance, but, in the present case, the Tribunal finds that the alleged fraud and malfeasance have been insufficiently made out to justify recourse to a remedy which, being equitable, is discretionary.” *See also Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Award, 14 October 2016, **CLA-224**, para 5.58.

The Respondent makes reference to the principle of “piercing the corporate veil”. Although that principle does exist in domestic legal practice in some jurisdictions, it is rarely and always cautiously applied. Further, it would be inapplicable in this case. The reason is that this principle only applies to situations where the real beneficiary of the business misused corporate formalities in order to disguise its true identity and therefore to avoid liability. In this case, however, Hungary was fully aware of the use of Cypriot entities and manifestly approved it. Therefore, it is the opinion of the Tribunal that the Respondent’s “source of funds” and “control” arguments as well as the “piercing the corporate veil” argument cannot stand.<sup>539</sup>

203. Indeed, it is in a shareholder’s attempt to avoid liability that the true origins of the common law corporate veil doctrine were founded.<sup>540</sup> Thus this doctrine is inapplicable to the present case, as Glencore Bermuda is merely exercising its right under international law and not attempting to avoid any type of liability. But even if this doctrine were applicable (which is not), Bolivia has failed to meet the high standard of proof to demonstrate that Glencore Bermuda committed fraud or malfeasance.<sup>541</sup>

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<sup>539</sup> See *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 358 (emphasis added).

<sup>540</sup> Y Kryvoi, “Piercing the Corporate Veil in International Arbitration” (2011) Vol 1 Global Business Law Review, 2011, **CLA-193**, p 169, noting that “A typical corporate veil piercing case involves a controlling shareholder who sets up an undercapitalized corporation to incur obligations to a third party. When the debt is due, the corporation does not have enough assets to repay it, and the controlling shareholder relies on the concept of limited liability to avoid personal liability. The result is that the third party ends up bearing the risk of the nonpayment of the debt. In such situations, the court or tribunal may intervene to prevent such injustice and pierce the corporate veil by holding the controlling shareholder liable” (emphasis added).

<sup>541</sup> *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (ICSID Case No ARB/05/15) Award, 1 June 2009, **CLA-89**, paras 325-326, raising the standard for allegations of fraudulent acquisition of nationality by a natural investor; *EDF (Services) Limited v Romania* (ICSID Case No ARB/05/13) Award, 8 October 2009, **CLA-184**, para 221, (raising the standard for allegations of corruption); *Mr Saba Fakes v Republic of Turkey* (ICSID Case No ARB/07/20) Award, 14 July 2010, **CLA-190**, para 131, (raising the standard for allegations of forgery. Other tribunals which have found that the standard proof needed not to be raised, despite the gravity of these type of allegations, concluded that more persuasive evidence would nonetheless be required to discharge the burden of proving fraud.) *Libananco Holdings Co. Limited v Republic of Turkey* (ICSID Case No ARB/06/8) Award, 2 September 2011, **CLA-198**, para 125. *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Case No ARB/12/14 and 12/40) Award, 6 December 2016, **RLA-25**, para 244.

204. In fact, Glencore Bermuda has never tried to disguise the identity of its parent company and has been entirely transparent as to the manner in which it initially acquired the Assets through Glencore International.<sup>542</sup> Undeniably, Bolivia was always aware of the corporate structure used to purchase the Assets. In fact, during the due diligence process, Glencore International met with government officials, and was encouraged to make investments in the country.<sup>543</sup>
205. Nor was Glencore International using Claimant as a corporate vehicle in order to “avoid liability for corporate misdeeds.”<sup>544</sup> As explained in the Statement of Claim,<sup>545</sup> Glencore Bermuda has historically been the holding company for the vast majority of Glencore’s International investments, including those in Latin America.<sup>546</sup> As noted by Mr Eskdale:
- [S]ince its incorporation in 1993, Glencore Bermuda was and continues to be an entity that manages a diverse, multi-billion dollar portfolio of operations and investments around the world for the entire Glencore group and secures financing for that portfolio.<sup>547</sup>
206. As such, it was corporate practice which dictated the acquisition of the investment through Glencore Bermuda. As explained above, Glencore International (and not Glencore Bermuda) negotiated the sale because it was the internationally-known commodities trading arm of the Glencore group. Given its widespread reputation, it was only natural that any potential seller would approach Glencore International, as opposed to its financing subsidiary, Glencore Bermuda.<sup>548</sup>

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<sup>542</sup> See Section II.C above; Statement of Claim, paras 36-37.

<sup>543</sup> *Ibid*, para 35; First Witness Statement of Christopher Eskdale, para 18.

<sup>544</sup> Statement of Defense, paras 368-369.

<sup>545</sup> Statement of Claim, para 314.

<sup>546</sup> First Witness Statement of Christopher Eskdale, para 20.

<sup>547</sup> Second Witness Statement of Christopher Eskdale, para 17.

<sup>548</sup> See *Ibid*, para 5. Although the negotiations, diligence, and preparations were led by Glencore International and Glencore’s Peruvian subsidiary, Inversiones República SA (IRSA), we executed the purchase through Glencore Bermuda, our primary holding company for the Glencore group’s investments in the Americas at the time.

However, since it was always envisioned that the latter would be the ultimate owner of the investment, on 2 March, 2005, Glencore Bermuda issued the closing payment for the Assets to Minera.<sup>549</sup> Glencore Bermuda subsequently acquired the investments in Argentina and Bolivia, including the Assets, on 7 March 2005, five days after the closing of the sale between Glencore International and Minera.<sup>550</sup> Therefore, it is clear that Bolivia's claim that "the Bolivian Assets were bought and paid by Glencore International" is flawed.<sup>551</sup>

207. Bolivia's allegations of "misdeeds" are based solely on press reports allegedly stemming from the "Paradise Papers." On the basis of these press reports Bolivia claims that Glencore Bermuda (i) provided loans to an offshore company (SwissMarine) at non-commercial lending rates; (ii) held an interest in a mining operation in Burkina Faso that allegedly suppressed community protests; and (iii) held a stake in a company based in the Democratic Republic of Congo (*DRC*) to which it issued loans that were "allegedly destined" for illicit purposes.<sup>552</sup> These unsupported allegations could not justify disregarding the nationality of Glencore Bermuda, even if the lifting of the corporate veil theory were to apply here (which it does not).
208. *First*, as is apparent from the above, none of these allegations refer to the Assets. Thus, even if these allegations were true, they are unrelated to the Assets at issue and do not show that Glencore Bermuda committed a misdeed which would allow this Tribunal to deny jurisdiction to its investments.
209. *Second*, Bolivia itself notes that these are mere "allegations" and cannot cite to any concrete evidence.<sup>553</sup> In fact, no official finding has been made to date by any

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<sup>549</sup> Email from Glencore (Mr Eskdale) to Curtis, Mallet-Prevost, Colt & Mosle LLP (Mr Vega), 2 March 2005, **C-205**.

<sup>550</sup> *Ibid.*

<sup>551</sup> Statement of Defense, para 361.

<sup>552</sup> *Ibid.*, para 368.

<sup>553</sup> *Ibid.*, para 368.

authority in any jurisdiction on the basis of these allegations. As Glencore has publicly explained:<sup>554</sup>

- (a) Glencore has held an investment in SwissMarine since 2001. However, it has never lent funds to SwissMarine (or any other entity) at non-commercial rates;
- (b) the protests in Burkina Faso arose in the context of the replacement of a contractor due to cost and performance. However, Glencore never forcibly suppressed this (or other) community protests. Glencore is committed to respecting human rights in all of its operations, including in Burkina Faso where it received multiple awards for its community initiatives and investments;<sup>555</sup> and
- (c) Glencore never funneled loans for corrupt payments.

210. To conclude, the Treaty is clear that only the place of incorporation is relevant to determine whether a company qualifies as an investor. It is uncontested that Glencore Bermuda is incorporated in Bermuda. Even if the theory of corporate veil piercing were applicable—which it is not, as there has been no attempt by Glencore Bermuda or Glencore International to avoid liability towards third parties as a result of fraud or malfeasance—Bolivia has failed to satisfy the heightened burden of proof to justify the piercing of Glencore Bermuda’s corporate veil. Therefore, Bolivia’s objections must be rejected.

**3. Contrary to Bolivia’s allegations, there is no abuse of process in this case**

211. In addition to misapplying the corporate veil theory, Bolivia also seeks to avoid its obligations under the Treaty by accusing Glencore Bermuda of receiving the investment from Glencore International at a time when the dispute was

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<sup>554</sup> Updated statement by Glencore to the International Consortium of Investigative Journalists, 6 November 2017, **C-275**.

<sup>555</sup> Glencore sold its investment in Burkina Faso on 31 August 2017.

foreseeable.<sup>556</sup> According to Bolivia, the only plausible purpose for Glencore International transferring the Assets to Glencore Bermuda was to gain protection of the Treaty.<sup>557</sup> Hence, Bolivia urges the Tribunal not to exercise its jurisdiction in this case.<sup>558</sup>

212. As a preliminary point, it should be noted that, contrary to Bolivia's allegations,<sup>559</sup> this is not a case of corporate restructuring made with the purpose of obtaining protection of the Treaty. As described above, Glencore Bermuda was the company that acquired and paid for the Assets.<sup>560</sup> More importantly, Bolivia's argument that this acquisition was made through Glencore Bermuda to obtain the protection of the Treaty makes no sense given that Glencore International also benefited from the protection of an investment treaty, namely the Switzerland-Bolivia Treaty.<sup>561</sup> As previously explained, there were several reasons why Glencore Bermuda acquired the Assets. As explained by Mr Christopher Eskdale:

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<sup>556</sup> Statement of Defense, Section 4.2.

<sup>557</sup> *Ibid*, para 294.

<sup>558</sup> *Ibid*, para 294.

<sup>559</sup> *Ibid*, para 305.

<sup>560</sup> *See* Section II.C above.

<sup>561</sup> Bolivia's argument that Glencore International did not have protection under the Swiss- Bolivia BIT because it had "no substantial Swiss interest in the Glencore Group" is entirely unfounded. *See* Statement of Defense, para 323. Firstly, this is a surprising allegation given that Bolivia has, at every juncture, insisted that Claimant is "purely Swiss in substantive reality," and that its investment is "Swiss in its origins and remains Swiss in its ultimate ownership." Statement of Defense, para 349 (emphasis added). *See also*, para 13, 24, 257, 350, 369, 435. More importantly, at the time of acquisition, Glencore International was not only incorporated in Switzerland, but was held in its entirety by two other Swiss companies (Glencore Holding AG and Glencore LTE AG). Glencore International therefore had a substantial Swiss interest, making it a qualified investor under Article 1(b) the Swiss-Bolivia BIT. *See* Second Witness Statement of Christopher Eskdale, para 17; Glencore International Share Ledger, 9 June 2008, **C-233**; Letter from Sinchi Wayra (Mr Capriles) to the Minister of Mining (Mr Echazú), 1 June 2007, **C-228**, pp 11-14, 18 (attaching previous correspondence with the Bolivian government regarding Glencore group's corporate structure). *See also* Letter from Glencore International (Mr Strothotte) to the President of Bolivia (Mr Morales), 22 February 2007, **C-21**; Letters from Glencore International plc (Mr Maté and Mr Glasenberg) to the President of Bolivia (Mr Morales) and the Ministry of Mining (Mr Pimentel), 14 May 2010, **C-27**; Letters from Glencore International plc (Mr Maté) to the President of Bolivia (Mr Morales), 27 June 2012, **C-40**.

As with all other investments in the region, Glencore Bermuda acquired the shares in the Assets to maximize cash-flows while taking advantage of significant financing benefits received by companies incorporated in Bermuda. Specifically, Glencore Bermuda was the designated vehicle used by the Glencore group at the time for issuing senior notes to US institutional investors. I understand that the reason for this is that there was no withholding of taxes on interest payments in Bermuda, and Glencore Bermuda had become a well-known entity to US pension funds, insurance companies, among others.<sup>562</sup>

213. It is thus clear that Glencore Bermuda's acquisition was not a restructuring and was not done with the purpose of obtaining Treaty protection. The Tribunal's analysis could thus stop here.

*a. Structuring an investment for the sole purpose of obtaining treaty protection is a perfectly legitimate practice*

214. Even if the Tribunal were to determine that the investment was structured through Glencore Bermuda for the sole purpose of obtaining the protection of the Treaty (which as just explained is clearly not the case), this would not constitute an abuse of process. Contrary to Bolivia's allegations,<sup>563</sup> and as recognized by case law invoked by Bolivia, a corporate restructuring done with the sole purpose of obtaining treaty protection is considered a perfectly legitimate practice. This position is supported by case law and scholars alike, including Professor Schreuer:

In principle, there is no reason why a prudent investor should not organize its investment in a way that affords maximum protection under existing treaties. It is neither illegal nor improper for an investor of one nationality to establish a new entity in a jurisdiction perceived to provide a beneficial regulatory and legal environment, including the availability of an investment treaty. The establishment of companies so as to obtain benefits from domestic

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<sup>562</sup> See Section II.C above, Second Witness Statement of Christopher Eskdale, para 17; 2007-2008 Glencore Bermuda Financial Statements, 31 December 2008, **C-94**; Glencore Bermuda's Financial Statements for the years ending December 31, 2011 and 2010, 31 December 2011, **C-246**.

<sup>563</sup> Statement of Defense, para 295.

law and treaties is neither unethical nor illegal and is standard practice in international economic relations. Nationality planning has become as much a standard feature of diligent management as tax planning.

[...]

It appears from these cases, especially from the *Mobil v Venezuela* case, that prospective planning within the framework of existing treaties will be accepted by tribunals. Prospective means that the corporate arrangements must be in place before the dispute arose. What appears to be impossible is to create a remedy for existing grievances after a dispute has broken out, by arranging for a desirable nationality.<sup>564</sup>

215. In fact, the tribunals in *Phoenix Action v Czech Republic*,<sup>565</sup> *Venezuela Holdings v Venezuela*,<sup>566</sup> *Tidewater v Venezuela*,<sup>567</sup> *Philip Morris v Australia*<sup>568</sup> and *Levy v*

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<sup>564</sup> C Schreuer, “Nationality Planning in Contemporary Issues In International Arbitration And Mediation” (2013) *The Fordham Papers* 2012, **CLA-201**, pp 19, 26. *See also*, E Gaillard, “Abuse of Process in International Arbitration” (2017) Vol 32 *ICSID Review* 1, **CLA-225**, pp 19-20; U Topcan, “Abuse of the Right to Access ICSID Arbitration” (2014) Vol 29 *ICSID Review* 3, **CLA-214**, pp 632-633; Z Douglas, *The International Law of Investment Claims* (1st edn 2009) (Extract), 2009, **CLA-179**, para 864.

<sup>565</sup> *Phoenix Action Ltd v The Czech Republic* (ICSID Case No ARB/06/5) Award, 15 April 2009, **RLA-15**, paras 94-95:

International investors can of course structure upstream their investments [...] in a manner that best fits their need for international protection, in choosing freely the vehicle through which they perform their investment. [...]

But on the other side, an international investor cannot modify downstream the protection granted to its investment by the host State, once the acts which the investor considers are causing damages to its investment have already been committed.

<sup>566</sup> *Mobil Corporation, Venezuela Holdings BV, and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27) Decision on Jurisdiction, 10 June 2010, **CLA-97**, para 204:

[T]he aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.

<sup>567</sup> *Tidewater Inc and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Decision on Jurisdiction, 8 February 2013, **CLA-116**, para 184:

[...] it is a perfectly legitimate goal, and no abuse of an investment protection treaty regime, for an investor to seek to protect itself from the general risk of future disputes with a host state in this way.

*Peru*<sup>569</sup> (all cases cited by Bolivia)<sup>570</sup> recognized that it is a perfectly legitimate practice to restructure an investment to obtain treaty protection for future disputes. But the tribunals invoked by Bolivia are not the only ones that recognized the legitimacy of investment restructuring. For example, the tribunal in *Hicee v Slovakia* emphasized that investment restructuring to obtain treaty protection is not unusual, nor reprehensible:

This is not unusual, nor is there anything in the least reprehensible about it; structured investments are commonplace. The purpose is to secure advantages from incorporation or operation in a particular jurisdiction [...] The advantages anticipated often include the protection of particular bilateral (or other) treaties covering foreign investment.<sup>571</sup>

216. Similarly, the tribunal in *MNSS v Montenegro* held that:

As held by other tribunals, to structure an investment with the aim to seek protection of a BIT is not *per se* in breach of the good faith expected of an investor.<sup>572</sup>

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<sup>568</sup> *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **CLA-129**, para 540:

A detailed examination of the relevant cases reveals the following considerations in connection with the legal test for an abuse of right. Among these, it is first and foremost uncontroversial that the mere fact of restructuring an investment to obtain BIT benefits is not *per se* illegitimate.

<sup>569</sup> *Renée Rose Levy and Gremcitel SA v Republic of Peru* (ICSID Case No ARB/11/17) Award, 9 January 2015, **CLA-124**, para 184:

[...] it is now well-established, and rightly so, that an organization or reorganization of a corporate structure designed to obtain investment treaty benefits is not illegitimate *per se*, including where this is done with a view to shielding the investment from possible future disputes with the host state.

<sup>570</sup> Statement of Defense, paras 297-298.

<sup>571</sup> *HICEE BV v Slovak Republic* (PCA Case No 2009-11) Partial Award, 23 May 2011, **CLA-195**, para 103.

<sup>572</sup> *MNSS BV and Recupero Credito Acciaio NV v Montenegro* (ICSID Case No ARB (AF)/12/8) Award, 4 May 2016, **CLA-222**, para 182. See *Sanum Investments Limited v Lao People's Democratic Republic* (PCA Case No 2013-13) Award on Jurisdiction, 13 December 2013, **CLA-212**, para 309; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Republic of Paraguay* (ICSID Case No ARB/07/9) Further Decision on Objections to Jurisdiction, 9 October 2012, **CLA-205**, para 94; *Millicom International Operations BV and Sentel GSM SA v*

217. Tribunals have thus consistently rejected objections of abuse of process made by respondent States in cases where the claimant initiated a corporate restructuring with the sole purpose of obtaining treaty protection (which again is not the case here). Some tribunals have clarified that such practice is legitimate as long as the restructuring took place before the dispute arose. For example, the tribunal in *Gold Reserve v Venezuela* rejected Venezuela’s abuse of process objection and confirmed that corporate restructuring enacted before the dispute arises will not support such an objection:

In the Tribunal’s view, Gold Reserve is a Canadian entity within the definition of investors provided in the BIT. As many previous ICSID tribunals have found, where the test for nationality is “incorporation” as opposed to control or a “genuine connection”, there is no need for the tribunal to enquire further unless some form of abuse has occurred. Such abuse might be found where the company has been incorporated in a given State after the dispute arose so as to take advantage of a treaty concluded by that State. This is clearly not the case here. None of the cases referred to by [Venezuela] indicates that the plain meaning of the nationality test should not be applied in situations where incorporation in Canada occurred before the dispute arose, for legitimate purposes.<sup>573</sup>

218. Similarly, the *Pey Casado and Presidente Allende Foundation v Chile* tribunal rejected Chile’s argument that Mr Pey Casado’s transfer of the majority of its

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*Republic of Senegal* (ICSID Case No ARB/08/20) Decision on Jurisdiction of the Arbitral Tribunal, 16 July 2010, **CLA-99**, para 84.

<sup>573</sup> *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award, 22 September 2014, **CLA-123**, para 252. *See also Isolux Infrastructure Netherlands BV v Kingdom of Spain* (SCC Case No V2013/153) Award, 12 July 2016, **RLA-10**, paras 701, 703:

En estas circunstancias, no parecería extraño al Tribunal Arbitral que inversores extranjeros, como PSP, tengan la preocupación de intervenir en el mercado español de la energía a través de una estructura holandesa para protegerse de posibles medidas dañinas del gobierno español y poder avalarse del TCE, aunque la Demandada no haya aportado la prueba de que fuera el caso. Eso no sería nada más que un caso de “legitimate corporate planning”. [...] Una reestructuración tan usual en las relaciones económicas internacionales no se equipara a un fraude cuyo único propósito sería una manipulación de la reglas ordinarias de competencia. La conclusión del Tribunal Arbitral hubiera sido distinta si, en el momento de la reestructuración, el conflicto ya hubiere nacido.

investment to the Spanish claimant for purposes of obtaining treaty protection was an abuse of process, given that the transfer occurred before the dispute arose.<sup>574</sup>

219. But even in those cases, as recognized by the tribunals in *Chevron v Ecuador* and *Venezuela Holdings v Venezuela* (both invoked by Bolivia),<sup>575</sup> evidence of abuse is found only “in very exceptional circumstances,”<sup>576</sup> after taking into account “all the circumstances of the case.”<sup>577</sup> In fact, as the tribunal in *Levy v Venezuela* (also invoked by Bolivia)<sup>578</sup> held:

[...] the threshold for a finding of abuse of process is high, as a court or tribunal will obviously not presume abuse, and will affirm the evidence of an abuse only “in very exceptional circumstances.”<sup>579</sup>

220. More importantly, even when the restructuring has been done after the dispute arose, the consequence is only an exclusion of jurisdiction regarding the measures already in place at the time of the restructuring.<sup>580</sup>
221. In accordance with the above, it is undisputed that restructuring an investment for the sole purpose of obtaining treaty protection is a legitimate practice and does not affect the jurisdiction of the Tribunal, at least if done before the dispute arose. Without prejudice to the fact that this is not a restructuring case at all, the Parties

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<sup>574</sup> *Víctor Pey Casado and President Allende Foundation v Republic of Chile* (ICSID Case No ARB/98/2) Award, 8 May 2008, **CLA-77**, paras 522, 529-530, 548, 550.

<sup>575</sup> Statement of Defense, footnote 425.

<sup>576</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador* (PCA Case No 34877) Interim Award, 1 December 2008, **RLA-14**, para 143.

<sup>577</sup> *Mobil Corporation, Venezuela Holdings BV, and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27) Decision on Jurisdiction, 10 June 2010, **CLA-97**, para 177.

<sup>578</sup> Statement of Defense, footnote 425.

<sup>579</sup> *Renée Rose Levy and Gremcitel SA v Republic of Peru* (ICSID Case No ARB/11/17) Award, 9 January 2015, **CLA-124**, para 186 (emphasis added).

<sup>580</sup> *See, eg, Mobil Corporation, Venezuela Holdings BV, and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27) Decision on Jurisdiction, 10 June 2010, **CLA-97**, paras 202-206.

agree that, at the time Glencore Bermuda acquired its investments in the Assets in March 2005 the disputes that give rise to this arbitration did not yet exist.

***b. When Glencore Bermuda acquired its investments from Glencore International the present disputes not only did not exist but they were also not foreseeable “with a very high degree of probability” nor “reasonably” foreseeable***

222. Knowing that there was no dispute at the time Glencore Bermuda acquired its investment, Bolivia argues that Glencore Bermuda’s actions are abusive because it acquired the Assets when there was “a reasonable prospect of a dispute concerning the expropriation of the Assets.”<sup>581</sup> Bolivia is wrong. As explained below, when Glencore Bermuda acquired its investments from Glencore International the present disputes were not foreseeable “with a very high degree of probability” nor were they “reasonably” foreseeable.

***i Bolivia misrepresents the standard of foreseeability applicable to determining the existence of abuse of process***

223. Bolivia misrepresents the standard used by investment tribunals to determine when a claimant’s actions can constitute an abuse of process in two ways.

224. *First*, instead of focusing on the “specific dispute” Bolivia argues that “the reasonable prospect of a dispute is sufficient” for a finding of abuse of process.<sup>582</sup> On the basis of this standard, Bolivia then makes general allegations about the political situation in the country at the time and claims that a reasonable prospect of a dispute already existed. More specifically, Bolivia argues that a dispute was foreseeable because by early 2005 (i) Bolivia was emerging from a period of political crisis; (ii) Evo Morales was posed to assume the presidency and his political platform promised a different attitude towards the mining sector; (iii)

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<sup>581</sup> Statement of Defense, paras 305, 307.

<sup>582</sup> *Ibid*, para 301 (emphasis added).

and thus (iv) it was clear that “Bolivia would be less indulgent of private mining interests”<sup>584</sup> as there was a growing public sentiment for renationalization of the mining sector in Bolivia.<sup>585</sup> Bolivia is wrong on both the law and on the facts.

225. The tribunals which looked at this question, including *Tidewater v Venezuela*,<sup>586</sup> *Pac Rim v El Salvador*<sup>587</sup> and *Philip Morris v Australia*<sup>588</sup> (all invoked by Bolivia),<sup>589</sup> have established that when analyzing the timing of a restructuring to determine if there has been an abuse of process, tribunals should focus on the specific dispute which is subject of the arbitration. Similarly, Tribunals have determined that a dispute arises when “a disagreement on a point of law or fact,” or “a conflict of legal views or interests between parties”<sup>590</sup> concerning “clearly identified issues between the parties” which go “beyond general grievances”<sup>591</sup> can be identified. For example, on the basis of ICJ rulings, the tribunal in *Maffezini v Spain*, determined that, for a dispute to crystallize it “must be susceptible of being stated in terms of a concrete claim.”<sup>592</sup> The same was held by

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<sup>583</sup> *Ibid*, paras 307-308.

<sup>584</sup> *Ibid*, para 308.

<sup>585</sup> *Ibid*, para 309.

<sup>586</sup> *Tidewater Inc and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Decision on Jurisdiction, 8 February 2013, **CLA-116**, paras 145, 147, 197, 198.

<sup>587</sup> *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, **CLA-110**, para 2.99. *See also Alaplí Elektrik BV v Republic of Turkey* (ICSID Case No ARB/08/13) Award, 16 July 2012, **CLA-111**, para 403.

<sup>588</sup> *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **CLA-129**, paras 540-554.

<sup>589</sup> Statement of Defense, para 297.

<sup>590</sup> *Maffezini v Kingdom of Spain* (ICSID Case No ARB/97/7) Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, **CLA-24**, para 94; *Impregilo SpA v Islamic Republic of Pakistan* (ICSID Case No ARB/03/3) Decision on Jurisdiction, 22 April 2005, **CLA-159**, paras 301-303.

<sup>591</sup> *Maffezini v Kingdom of Spain* (ICSID Case No ARB/97/7) Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, **CLA-24**, para 94.

<sup>592</sup> *Ibid*, para 94.

- the tribunal in *Helnan v Egypt*, which held that a dispute must be almost equivalent to a specific claim, which can be subject to negotiation.<sup>593</sup>
226. The fact that a potential presidential candidate would be “less indulgent of private mining interests” or that there was a general risk of renationalization of the mining sector is not enough to make a restructuring illegitimate.<sup>594</sup> Nationalization of companies or retaking control of strategic sectors in and of itself does not constitute a breach of the Treaty *per se*. Such actions would only breach the Treaty if and when done without complying with international law obligations. Here, Bolivia’s first violation of the Treaty only occurred in February 2007, when Bolivia expropriated Vinto in violation of due process of law and without any compensation, two years after Glencore Bermuda had acquired its investments in Bolivia and received the Government’s positive feedback.<sup>595</sup>
227. In fact, Evo Morales’ political program relied on by Bolivia in support of its allegation specifically provided guarantees to foreign investments:

### 1.3.3 Foreign Companies

Legal security is guaranteed to foreign companies that submit to the Political Constitution of the State and to the Bolivian laws, to

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<sup>593</sup> *Helnan International Hotels A/S v Arab Republic of Egypt* (ICSID Case No ARB/05/19) Decision of the Tribunal on Objection to Jurisdiction, 17 October 2006, **CLA-170**, para 52.

<sup>594</sup> Bolivia can cite only to the mere possibility of a generic controversy, which rises nowhere near the *Philip Morris* standard of foreseeability. Indeed, it is no accidental omission that when quoting *Philip Morris*, Bolivia conveniently omitted the word “specific” from the following quote:

[...] the initiation of a treaty-based investor-State arbitration constitutes an abuse of rights (or an abuse of process, the rights abused being procedural in nature) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable.

Statement of Defense, para 296 and *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **CLA-129**, para 554 (emphasis added). *See also Tidewater Inc and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Decision on Jurisdiction, 8 February 2013, **CLA-116**, paras 193-197; *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, **CLA-110**, para 2.99.

<sup>595</sup> Second Witness Statement of Christopher Eskdale, paras 5, 61; Letter from the Vice Minister of Mining (Mr Gutiérrez) to Glencore (Mr Capriles), 17 January 2005, **C-63**.

carry out productive activities or services in the country, and that must meet performance requirements referred to generate employment, transfer technology and reinvest part of their earnings.<sup>596</sup>

228. *Second*, Bolivia alleges that the *Philip Morris* tribunal superseded the standard of “high foreseeability” set by the *Pac Rim* and *Alapi* tribunals and claims that the standard applicable is that of “a reasonable prospect of a dispute.”<sup>597</sup> However, contrary to Bolivia’s allegations, the *Philip Morris v Australia* tribunal found that the standard “rest[ed] between the two extremes posited by the tribunal in *Pac Rim v El Salvador*—‘a very high probability and not merely a possible controversy’.”<sup>598</sup> In fact, the *Philip Morris v Australia* tribunal confirmed that “investor-State tribunals have set a high threshold for finding an abuse of process, requiring proof of the foreseeability of the claim and depending on the particular circumstances of each case.”<sup>599</sup>
229. As a result, the Tribunal must first determine when the “specific disputes” underlying this arbitration occurred. Then it must decide whether at the time Glencore Bermuda acquired its investment (which was a multi-step process that began in early 2004 and was finalized in March 2005),<sup>600</sup> these specific disputes

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<sup>596</sup> Political Program of Movimiento Al Socialismo, November 2005, **R-166**, p 13. Indeed, even after his election Mr Morales publicly upheld his commitment to protect foreign investment. Bolivia’s own evidence regarding his presidential win notes Mr Morales’ promise that his government “will never extort money from anyone who wants to invest in our country.” “Morales se declara ganador,” *BBC Mundo*, 19 December 2005, **R-167**, p 2.

Consistent with this approach, in January 2006, nearly one year after Glencore Bermuda’s acquisition of the Assets, President Morales began an international tour where he promised foreign investors (along with their government ministers) that their investments in Bolivia would be protected. This was the same month he finally assumed the presidency. Thus, contrary to Bolivia’s allegations, Mr Morales guaranteed that his administration would treat foreign investors with “legal security.” See “Evo Morales con Montilla, Moratinos, Repsol, Prisa y Felipe González,” *Libertad Digital*, 5 January 2006, **C-219**. Political Program of Movimiento Al Socialismo, November 2005, **R-166**, p 13.

<sup>597</sup> Statement of Defense, para 301.

<sup>598</sup> *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **CLA-129**, paras 550-554.

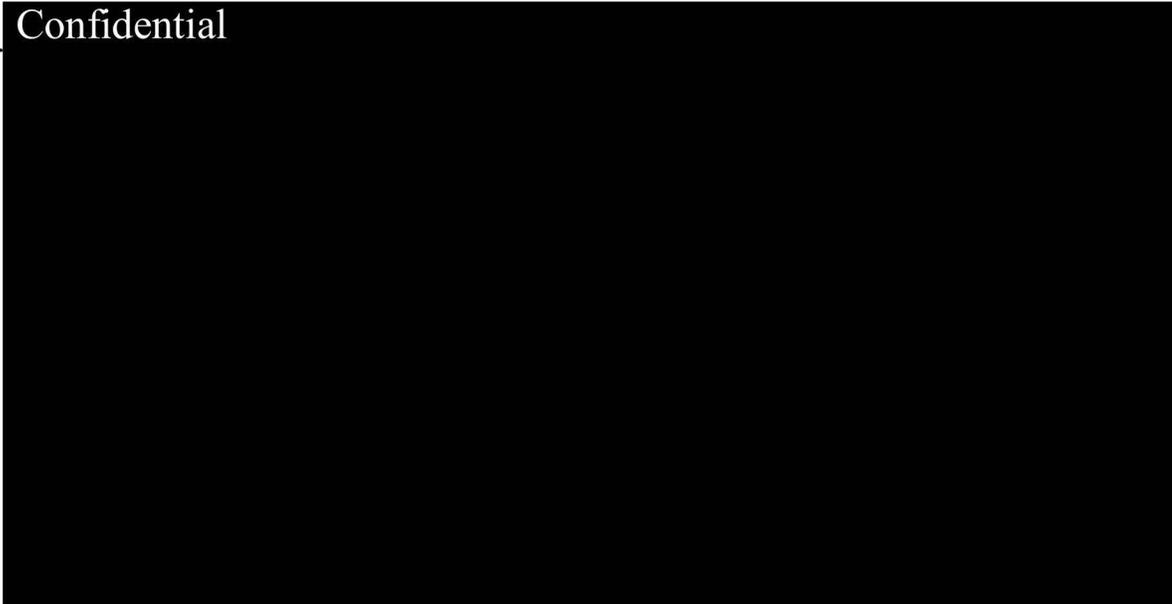
<sup>599</sup> *Ibid*, para 550.

<sup>600</sup> See Section II.C above.

were foreseeable “with a very high degree of probability” or “reasonably” foreseeable, after considering “all the circumstances of the case,” and not as Bolivia suggest when there was “a reasonable prospect of a dispute.”<sup>601</sup>

230. Applying these standards, the specific disputes at the heart of this arbitration arose when Bolivia failed to comply with the Treaty provisions. Bolivia specifically breached the Treaty provisions through (i) the nationalization of the Vinto Tin Smelter without compensation on 9 February 2007; (ii) the nationalization of the Antimony Smelter without compensation, publicly announced on 2 May 2010; (iii) the seizing of the Tin Stock on 2 May 2010; and (iv) the nationalization of the Colquiri Mine without compensation publicly announced on 6 June 2012, after it had been inaccessible since 30 May 2012 due to Bolivia’s failure to provide protection and security. We will address Bolivia’s arguments concerning each of these disputes below.

231. Confidential

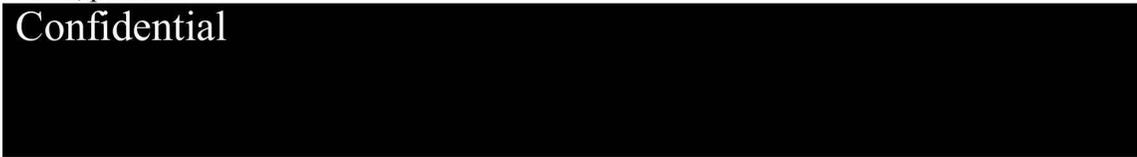


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<sup>601</sup> Statement of Defense, para 301.

<sup>602</sup> *Ibid*, para 307.

<sup>603</sup> Confidential



<sup>604</sup> Statement of Defense, paras 138-140.

Confidential

232. Likewise, Bolivia's general claim that by early 2005 it was foreseeable that the State would take action against the Assets given the rise of Evo Morales and the MAS party does not work as a matter of chronology.<sup>608</sup> At the time of Glencore's acquisition, it was plainly impossible for Glencore to foresee a dispute based on Mr Evo Morales' political platform since neither MAS nor Mr Morales were in power.<sup>609</sup> In fact, Mr Morales had yet to launch his presidential campaign.<sup>610</sup> It was only in October 2005, seven months after Glencore Bermuda made its

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Confidential

Second Witness Statement of

Christopher Eskdale, para 64.

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*Ibid*, para 64.

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Confidential

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Statement of Defense, para 118.

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Second Witness Statement of Christopher Eskdale, para 65.

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*Ibid*.

investment in Bolivia and over a year after Glencore International initiated its due diligence,<sup>611</sup> that Evo Morales announced his candidacy for the presidency.<sup>612</sup>

*ii The dispute over the unlawful expropriation without compensation of the Tin Smelter was not foreseeable “with a very high degree of probability” nor “reasonably” foreseeable*

233. With respect to the Tin Smelter,<sup>613</sup> Bolivia claims that Glencore Bermuda could have reasonably foreseen the dispute over the legality of its privatization because in 2002 some union leaders and parliamentary opposition members (including Evo Morales) were “questioning the legality of the Tin Smelter privatization” due to the “risible purchase price that Allied Deals obtained.”<sup>614</sup> Bolivia’s claims are disingenuous.

234. As previously explained,<sup>615</sup> the privatization of the Tin Smelter was carried out by the State itself in full compliance of the applicable legal framework.<sup>616</sup> Indeed, at the time Glencore Bermuda acquired the Assets no authority had found irregularities in the privatization process, nor questioned that the applicable legal framework was fully in force.<sup>617</sup> On the contrary, the Assets had enjoyed several years of uninterrupted operations since their privatization. They were backed by well-known private and public shareholders, including the UK government institution CDC and the World Bank affiliate IFC—neither of which would have invested in the Assets if there was any doubt as to their legitimacy.<sup>618</sup> Furthermore, as discussed above<sup>619</sup> the price paid for the Tin Smelter, far from

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<sup>611</sup> See Statement of Claim, para 35; First Witness Statement of Christopher Eskdale, para 18; Letter from Argent Partners (Mr Simkin) to Glencore International (Mr Eskdale), 2 June 2004, **C-194**.

<sup>612</sup> See, eg, Political Program of Movimiento Al Socialismo, November 2005, **R-166**.

<sup>613</sup> Statement of Defense, paras 312-313.

<sup>614</sup> *Ibid*, paras 312-313.

<sup>615</sup> See Section II.B.

<sup>616</sup> Statement of Defense, paras 46-55, 73-75.

<sup>617</sup> See Section II.B.1.

<sup>618</sup> Second Witness Statement of Christopher Eskdale, para 58.

<sup>619</sup> See Section II.B.

being “risible low,” was 40 percent higher than the minimum award price set by Paribas, Bolivia’s own financial consultant during the privatization.<sup>620</sup> Thus, there was no reason for Glencore Bermuda to assume that the privatization of the Tin Smelter (or any of the Assets) would be subject to challenge and even less, that the Assets would be nationalized without compensation on the basis of these supposed illegalities.

235. Indeed, Bolivia’s allegations of illegalities are based on a letter from a union leader and a handful of press articles from 2002.<sup>621</sup> Yet, by early 2005 (and during the life of Glencore Bermuda’s investments) no investigation or formal action had been taken in response to these allegations. If these allegations were credible, Bolivia would have been well-positioned to investigate them during this period, having all the necessary evidence and means at its disposal. Rather, it was only eight years later in 2013—when it became convenient to do so given the existing dispute between the Parties—that Bolivia launched a so-called investigation into the privatization.<sup>622</sup> To this day, no finding of illegality has been rendered by this congressional task force or any other authority.<sup>623</sup> In fact, as explained above, to

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<sup>620</sup> *Ibid.*

<sup>621</sup> Statement of Defense, footnotes 444, 445. Notably, to support this argument Bolivia relies on press articles that do not refer to the purported illegalities put forward by Bolivia in this arbitration. In fact, the articles explain that by late 2002 the parliamentary opposition was complaining about certain irregularities in the transfer of the Tin Smelter and the Huanuni Mine because (i) Allied Deals had been incorporated ex post to the transfer, and (ii) the then minister of Foreign Affairs Carlos Saavedra had an alleged interest in Allied Deals, while referring to the so called illegalities of the purchase of the Tin Smelter. See “El MAS pide la renuncia del Canciller Saavedra,” *La Razón Digital*, 8 November 2002, **R-134**; “MAS pide la renuncia del Canciller de la Republica,” *El Diario*, 4 December 2002, **R-135**; “MAS presentó las pruebas de corrupción contra Canciller,” *El Mundo*, 4 December 2002, **R-136**.

<sup>622</sup> “Tres grupos de poder y 55 actores participaron en la privatización en Bolivia,” *Luz Mendoza*, 22 October 2017, **R-99**.

<sup>623</sup> This task force was created in 2013 and is comprised of six congressional representatives has investigated 55 individuals, seven governments, and the privatizations or capitalization of 82 companies across all sectors between 1985 and 2005. The individuals under investigation range from high ranking government officials (ie, Presidents, Ministers) to simple family members of individuals who were involved in the privatization process. Despite its five-year investigation, no findings have been rendered by this task force in connection with the mining and metallurgy industries. See “Tres grupos de poder y 55 actores participaron en la privatización en Bolivia,” *Luz Mendoza*, 22 October 2017, **R-99**.

date, no Bolivian court has recognized these alleged illegalities, and the Tender Supreme Decree's presumption of legality remains intact. Consequently, there is no basis for Bolivia's allegation that, at the time of the acquisition, it was reasonably foreseeable that the Tin Smelter would be unlawfully expropriated without due process or payment of just and effective compensation due to the purchase price, or these isolated, unproven allegations of illegality.

*iii The dispute over the unlawful expropriation of the Antimony Smelter was not foreseeable "with a very high degree of probability" nor "reasonably" foreseeable*

236. With respect to the Antimony Smelter, Bolivia claims that there was an obligation to put the plant into operation because this was the purpose of the privatization outlined in the Terms of Reference.<sup>624</sup> Bolivia further argues that the State had a constitutional commitment to ensure that private property has a social function.<sup>625</sup> As a result, Bolivia contends that Glencore Bermuda could reasonably foresee that failure to put the plant into operation would likely lead to its reversion.<sup>626</sup> This is incorrect.
237. Contrary to Bolivia's allegation, there was no contractual obligation to put the Antimony Smelter into production. As explained by Mr Christopher Eskdale, "Bolivia was aware that [the Antimony Smelter] had been out of commission for years before our purchase and had raised no concern with its prior owner. We did not believe the State would take a different view after Glencore took over."<sup>627</sup> Bolivia's own technical advisers indicated that the operation of the Antimony Smelter had not been commercially viable since 1999.<sup>628</sup>

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<sup>624</sup> Statement of Defense, para 314.

<sup>625</sup> *Ibid*, para 315; Bolivian Constitution, Law, 13 April 2004, **R-235**, Art 7(i).

<sup>626</sup> Statement of Defense, paras 314.

<sup>627</sup> Second Witness Statement of Christopher Eskdale, para 62.

<sup>628</sup> Paribas, Privatization of Bolivian mining assets, Confidential Information Memorandum, August 16, 1999, **RPA-04**, p 26.

238. While it is true that the Terms of Reference mentioned that the purpose of the tender was to transfer the plant to a company “with certain capacities that would permit the smelter to continue production,”<sup>629</sup> the actual text of the Purchase Agreement did not include any such condition.<sup>630</sup> This is further confirmed by the fact that the Purchase Agreement does not establish any timeframes, investment characteristics, and/or achievement milestones against which the aspirational future production mentioned in the Terms of Reference could have been measured.<sup>631</sup> And even if the State had a constitutional commitment to ensure that private property has a social function, as Bolivia claims, this cannot create obligations where there were none.
239. In any event, even if there were an obligation to bring the Antimony Smelter back into production (which there was not), it was not foreseeable with a very high degree of probability (or even reasonably foreseeable) that Bolivia would unlawfully expropriate it without due process or compensation. Instead, a reasonable investor would expect Bolivia to follow the terms of the contract, as supplemented by Bolivian law, requiring the party alleging the breach of contract (in this case Comibol) to first give the counter party notice of that breach and an opportunity to remedy it.<sup>632</sup> Moreover, pursuant to Article 15 of the Purchase Agreement, in the case of a dispute related to a breach of the agreement, Comibol agreed to first negotiate and, if that failed, initiate conciliation and, if that failed,

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<sup>629</sup> Terms of Reference for the Second Public Tender for the Antimony Smelter, 31 July 2000, **R-109**, p 10 (“Objeto de la Licitación.”)

<sup>630</sup> The purpose of the Antimony Smelter Sale and Purchase Agreement is solely “the real sale and perpetual transfer, as onerous title, by the VENDOR in favor of the BUYER, of the SMELTER.” Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**, Clause 4 (unofficial English translation from Spanish original).

<sup>631</sup> Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**.

<sup>632</sup> In any case, due to the nature of the Antimony Smelter Purchase Agreement, ie an agreement to unconditionally transfer property in exchange of consideration, all obligations were extinguished upon closing. This explains why there was no clause providing for unilateral termination due to breach of contract. *See* Supreme Decree No 25,964, 21 October 2000, published in the *Gaceta Oficial* on 12 January 2001, **C-178**, Art 198; Supreme Decree No 181, 28 June 2009, published in the *Gaceta Oficial* No 122 on 29 June 2009, **C-239**, Art 224.

resort to ICC arbitration.<sup>633</sup> Thus, Glencore Bermuda could not have reasonably expected a non-compensated, sudden, expropriation.

*iv The dispute over Bolivia's failure to afford full protection and security to the Colquiri Lease and its unlawful expropriation was not foreseeable "with a very high degree of probability" nor "reasonably" foreseeable*

240. With respect to the Colquiri Lease, Bolivia alleges that "there was a reasonable prospect Bolivia would have to intervene" because, following the Mine's privatization, Comsur significantly reduced its number of employees, forcing them to form *cooperativas* to continue working at the Mine. According to Bolivia, this caused increased tensions with the Colquiri Mine's workers because Comsur "was unable to control the situation."<sup>634</sup> Here, Bolivia once again argues that it was foreseeable that the rise of the political party MAS would intensify the existing conflict.<sup>635</sup> Bolivia's allegations are incorrect.

241. To start, while Bolivia would have this Tribunal believe that the present dispute arose from Claimant's mismanagement of *cooperativas* relations, the reality is far from that. The present dispute arose from Bolivia's premeditated decision to fabricate a conflict between the *cooperativas* and the Colquiri Mine workers in order to have a pretext to nationalize the Colquiri Mine. There was no way that Claimant could have foreseen this specific dispute. As Mr Eskdale explained:

We also could not foresee that Bolivia, after making a decision to nationalize the Colquiri Mine, would purposefully create social unrest in order to then use that unrest as a pretext to intervene and take our investment without compensation.<sup>636</sup>

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<sup>633</sup> It is Bolivia's position that this contract contained a dispute resolution clause "designed to ensure that any dispute touching the Contracts" would be submitted to the ICC. Statement of Defense, para 386.

<sup>634</sup> Statement of Defense, paras 317-319.

<sup>635</sup> *Ibid*, para 318.

<sup>636</sup> Second Witness Statement of Christopher Eskdale, para 63.

242. In any event, as already explained in Section II.D.3 above, in its Statement of Defense, Bolivia expressly acknowledges that since the 1980's *subsidiarios* and *arrendatarios* (present day *cooperativistas*) have worked in the Colquiri Mine under Comibol's supervision<sup>637</sup> and that they have been a significant social group in all large mines in Bolivia as a result of the crisis of the mining sector in the 1980s (most *cooperativistas* being former Comibol employees).<sup>638</sup> In fact, in Article 12.1.6 of the Colquiri Lease, Comibol acknowledged that it had already granted them working areas in the Colquiri Mine.<sup>639</sup> Furthermore, it was Comibol, not Comsur, who laid off the workers of the Colquiri Mine prior to its privatization.<sup>640</sup>
243. Whatever the case may have been, Comsur continued the policy put in place by Comibol and worked alongside it to continue operations in coexistence with the *cooperativas*.<sup>641</sup> There was no indication that this coexistence would not continue into the future under Glencore Bermuda's management. As explained by Mr Eskdale,

We understood that Comsur and Comibol had, until our investment, duly handled relations with the *cooperativistas*, [...]. As an international mining company, we were well aware that these are delicate situations that need to be managed appropriately, and had experience doing so in various parts of the world. The situation in Bolivia was no different. We were therefore fully prepared to (and did) continue this productive dialogue with the *cooperativistas* alongside Comibol and believed that, in case of conflict, Comibol would abide by its obligations under the Colquiri Lease to protect our investment.<sup>642</sup>

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<sup>637</sup> Statement of Defense, para 32.

<sup>638</sup> *Ibid*, para 34. *See also*, Witness Statement of Andrés Cachi, para 9; Witness Statement of Joaquín Mamani, para 8.

<sup>639</sup> Colquiri Lease, 27 April 2000, **C-11**, Clause 12.1.6.

<sup>640</sup> *See* Second Witness of Eduardo Lazcano, para 8.

<sup>641</sup> *See* Section II.D.2-3.

<sup>642</sup> Second Witness Statement of Christopher Eskdale, para 63. Glencore inter office correspondence from Mr Eskdale to Mr Strothotte and Mr Glasenberg, 20 October 2004, **C-196**, p 4.

244. In fact, as recognized by Bolivia and explained above, it was and continues to be common for private mining companies and *cooperativas* to operate side by side in the Bolivian mining industry.<sup>643</sup> It would therefore not be uncommon for occasional tensions to arise between private operators and cooperatives that would require some form of mediation by Comibol.<sup>644</sup> This is why, if a conflict arose, it was Comibol's obligation to provide assistance in its peaceful resolution under the Colquiri Lease.<sup>645</sup>
245. Contrary to Bolivia's allegations, the growing popularity of the MAS party in early 2005 had no bearing on Comibol's compliance with its obligation under the Treaty. Therefore, in 2005 it was not foreseeable with a high degree of probability (or even reasonably foreseeable) that those occasional conflicts would lead to Bolivia to breach its international obligations to safeguard and protect Glencore Bermuda's rights in the Mine, or to expropriate it without following due process or providing just and effective compensation.
246. Finally, it is worth noting that Bolivia relies heavily on the question of foreseeability in the decision rendered in the case *Philip Morris v Australia*.<sup>646</sup> However, *Philip Morris* supports Glencore Bermuda's claims. In *Phillip Morris*, the claimant was a company from Hong Kong which, through a corporate

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<sup>643</sup> Statement of Defense, paras 33-36. *See also* J Michard, *Cooperativas Mineras en Bolivia*, 2008, **R-90**, p 8 ("A characteristic of Bolivian mining, that is only found in this country, is the importance of the cooperative sector within the mining sector overall.") (unofficial English translation of Spanish original).

<sup>644</sup> Conflicts between *cooperativas* and formal workers have been common since *cooperativas* formed initially following Comibol's mass dismissal of miners pursuant to Supreme Decree 21060 (1985). M Cajías de la Vega, "Crisis, Diáspora y Reconstitución de la Memoria Histórica de los Mineros Bolivianos" (2010) Vol X Revista de Estudios Transfronterizos, **R-159**, pp 62, 73.

<sup>645</sup> Colquiri Lease, 27 April 2000, **C-11**, Clause 12.2.1 (Comibol guarantees "the peaceful possession and use and enjoyment of the MINING CENTER, having to defend, protect, guarantee and reclaim rights against incursions, usurpations and other disturbances by third parties...") (unofficial English translation from Spanish original).

<sup>646</sup> Additionally, Bolivia also invokes the decision in *Phoenix Action v Czech Republic*. However, the tribunal's decision in *Phoenix Action* actually supports Glencore Bermuda's position by recognizing that corporations are free to structure their investments however they see fit as long as they do not do so after the events giving rise to the claim have already taken place. *Phoenix Action Ltd v The Czech Republic* (ICSID Case No ARB/06/5) Award, 15 April 2009, **RLA-15**, para 94.

restructuring, had acquired an Australian company almost ten months *after* the Australian parliament had publicly started the legislative process for the law at issue in the arbitration. Although the law was finally approved nine months after the restructuring was completed, the tribunal in *Philip Morris* decided that it was precluded from exercising its jurisdiction because the specific dispute that motivated the arbitration<sup>647</sup> had been reasonably foreseeable even before the restructuring was implemented.<sup>648</sup> As explained above, these facts are a sharp contrast to the facts in the present case where there were no reasonably foreseeable disputes at the moment of acquisition.

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247. To conclude, regardless of whether one applies the standard that the specific dispute has to be foreseeable “with a very high degree of probability” or the more lax standard that the dispute must be “reasonably” foreseeable, as Bolivia claims, it is clear that the specific disputes were not foreseeable at the time the acquisition started in 2004, nor when it was implemented in early 2005. Bolivia failed to discharge its burden of proof that “exceptional circumstances” exist in the present case that would support a finding of abuse of process. Hence, Bolivia’s objection must be rejected.

**C. GLENCORE BERMUDA HAS MADE INVESTMENTS IN BOLIVIA THAT ARE PROTECTED UNDER THE TREATY**

248. As explained in the Statement of Claim, the scope of the Tribunal’s jurisdiction hinges on the definitions of “investor” and “investment” contained in Article 1 of the Treaty. Article 1(a) is particularly clear: protected investments are “every kind of asset,” including “movable and immovable property and any other property rights” and “shares in and stock and debentures of a company and any other form

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<sup>647</sup> *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **CLA-129**, para 539.

<sup>648</sup> *Ibid*, paras 586, 554.

of participation in a company<sup>649</sup>. Glencore Bermuda's indirect shareholding in Vinto and Colquiri thus qualifies as protected investment under the Treaty.

249. Bolivia does not contest that Glencore Bermuda indirectly holds 100% of the shares in Vinto and Colquiri and, as a result, has an indirect stake in all of their assets. Instead, ignoring the clear definition of investment included in Article 1(a) of the Treaty, Bolivia tries to impose two jurisdictional requirements in addition to those already included in the Treaty. *First*, Bolivia argues that an investor must “make an active investment” to enjoy the protection of the Treaty and that merely holding legal title to the Assets does not constitute a protected investment.<sup>650</sup> *Second*, Bolivia contends that since the Treaty does not specifically refer to indirect ownership interests as protected “investments,” the holder of such assets is not entitled to the Treaty’s protection.<sup>651</sup> As explained below, Bolivia’s position is unsubstantiated.

**1. The Treaty does not require an “active” investment in Bolivia**

250. Finding no support to its position in the Article 1(a) of the Treaty which defines “investment” as “every kind of asset” and “any kind of participation,” Bolivia relies on the adjective “made,” included in the preamble and the sunset clause of the Treaty, the preposition “of” in its dispute resolution clause, and the verb “invested” in the transfer of funds provision, to say that an investor must “make an active investment” to enjoy the protection of the Treaty.<sup>652</sup> On the basis of this theory, Bolivia then claims Glencore Bermuda lacks protection because it “did not make any investment at all in Bolivia” since it received the Assets without

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<sup>649</sup> Treaty, C-1, Art 1(a) (emphasis added).

<sup>650</sup> Statement of Defense, Section 4.1.1.

<sup>651</sup> *Ibid*, Section 4.1.2.

<sup>652</sup> *Ibid*, Section 4.1.1.

payment and did not actively manage its investment.<sup>653</sup> Bolivia is wrong on both the law and on the facts.

251. As explained above,<sup>654</sup> investment tribunals have consistently rejected parties' attempts to impose jurisdictional requirements in addition to those already included in the underlying treaty. Of particular relevance here is the decision of the tribunal in *Saluka v Czech Republic*, which analyzed the same "active investment" jurisdictional objection as the one made by Bolivia in the present case based on the definition of investment of the Czech Republic-Netherlands BIT, which is similar to the one of the Treaty.<sup>655</sup> That tribunal determined that the use of verbs and adjectives like "invested" or "made" could not justify a restriction of the definition of investment contained in the treaty:

To a considerable extent, this argument seeks to replace the definition of an "investment" in Article 2 of the Treaty with a definition which looks more to the economic processes involved in the making of investments. However, the Tribunal's jurisdiction is governed by Article 1 of the Treaty, and nothing in that Article has the effect of importing into the definition of "investment" the meaning which that term might bear as an economic process, in the sense of making a substantial contribution to the local economy or to the well-being of a company operating within it. Although the *chapeau* of Article 2 refers to "every kind of asset *invested*", the use of that term in that place does not require, in addition to the very broad terms in which "investments" are defined in the Article, the satisfaction of a requirement based on the meaning of "investing" as an economic process: the *chapeau* needs to contain a verb which is apt for the various specific kinds of investments which are listed, and since all of them are being defined as various kinds of investment it is in the context appropriate to use the verb

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<sup>653</sup> *Ibid*, paras 258, 259, 263, 282-292.

<sup>654</sup> See Section IV.B.1.

<sup>655</sup> In particular, article 1 of the Czech Republic-Netherlands BIT provides: "[...] the term 'investments' shall comprise every kind of asset invested either directly or through an investor of a third State and more particularly, though not exclusively" (emphasis added). *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, para 198.

“invested” without thereby adding further substantive conditions.<sup>656</sup>

252. Additionally, contrary to Bolivia’s allegation, the Treaty does not impose any requirement in relation to what capital must be used to acquire assets, nor does it specify from where the capital must come, in order for an investment to qualify for protection under the Treaty. On the contrary, Article 5(2) of the Treaty expressly protects indirectly held assets from expropriation by providing that the expropriated assets of any Bolivian company owned by a covered foreign investor (such as Glencore Bermuda) are to be treated for compensation purposes as if they were owned by the foreign shareholder.<sup>657</sup> This shows that the Treaty also protects minority shareholders, independently of their nationality or the origin of the invested capital.
253. As confirmed by the dominant case law, it is not possible to impose a requirement on the origin of the capital if it is not expressly provided for in the text of the applicable treaty. The tribunal in *Olguín v Paraguay* reasoned:

During the hearing on the merits of the dispute [...] Paraguay argued that the funds invested by Mr. Olguín in Paraguay came, physically, from the United States (the Claimant’s place of residence), and that therefore, his investment was not protected by the Paraguay–Peru BIT. According to this argument, for an investment to be protected by the Paraguay–Peru BIT, the funds invested must come from the country of which the investor is a national. This requirement is not expressly indicated in the BIT, and, therefore, the Tribunal rejects that argument.<sup>658</sup>

254. The tribunals in the cases *Wena Hotels v Egypt*,<sup>659</sup> *Rompotrol v Romania*,<sup>660</sup> *Venezuela Holdings v Venezuela*,<sup>661</sup> *Saipem v Bangladesh*,<sup>662</sup> *Tradex v Albania*,<sup>663</sup>

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<sup>656</sup> *Ibid*, para 211 (emphasis in the original).

<sup>657</sup> Treaty, **C-1**, Art 5(2).

<sup>658</sup> *Eudoro Armando Olguín v Republic of Paraguay* (ICSID Case No ARB/98/5) Award, 26 July 2001, **CLA-146**, footnote 4 (unofficial English translation from Spanish original).

<sup>659</sup> *Wena Hotels Ltd v Arab Republic of Egypt* (ICSID Case No ARB/98/4) Award, 8 December 2000, **RLA-68**, para 126; *Wena Hotels Ltd v Arab Republic of Egypt* (ICSID Case No ARB/98/4) Decision of the annulment committee, 5 February 2002, **CLA-148**, para 54.

among many others, have applied the same criteria. In particular, the tribunal in *Arif v Moldavia* explained:

[...] Tribunals have generally found the origin of capital used in investments immaterial. According to doctrinal authorities, the origin of the funds is irrelevant for purposes of jurisdiction. Whether investments are made from imported capital, from profits made locally, from payments received locally or from loans raised locally, makes no difference to the degree of protection enjoyed.<sup>664</sup>

255. In fact, the position proposed by Bolivia that the investment has to be made in the host State, would generate an absurd situation where only “direct” and “original” or “initial” investments would be protected by the Treaty. This reading would exclude any indirect acquisition or payment made outside the territory of the host State or any subsequent reinvestment of local profits. As explained by the tribunal in *Gold Reserve v Venezuela*, this position does not reflect the ordinary meaning of the definition of investment in the Treaty nor the intention of the contracting parties, and would result in the destruction of the foreign investment protection system:

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<sup>660</sup> *The Rompetrol Group NV v Romania* (ICSID Case No ARB/06/3) Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, **CLA-76**, para 110 (“The Tribunal accordingly finds that neither corporate control, effective seat, nor origin of capital has any part to play in the ascertainment of nationality under The Netherlands-Romania BIT.”).

<sup>661</sup> *Mobil Corporation, Venezuela Holdings BV, and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27) Decision on Jurisdiction, 10 June 2010, **CLA-97**, para 198 (“It should also be added that the Treaty contains no requirement that the origin of the capital be foreign. Nor does general international law provide a basis for imposing such a requirement.”).

<sup>662</sup> *Saipem SpA v The People’s Republic of Bangladesh* (ICSID Case No ARB/05/07) Decision on jurisdiction and recommendation on provisional measures, 21 March 2007, **CLA-172**, para 106 (“[I]t is true that the host State may impose a requirement that an amount of capital in foreign currency be imported into the country. However, in the absence of such a requirement, investments made by foreign investors from local funds or from loans raised in the host State are treated in the same manner as investments funded with imported capital.”).

<sup>663</sup> *Tradex Hellas SA v Republic of Albania* (ICSID Case No ARB/94/2) Award, 29 April 1999, **CLA-142**, para 111 (“[...] the Tribunal concludes here that the sources from which the investor financed the foreign investment in Albania are not relevant for the application of the 1993 Law [...]”).

<sup>664</sup> *Mr Franck Charles Arif v Republic of Moldova* (ICSID Case No ARB/11/23) Award, 8 April 2013, **RLA-69**, para 383.

If such a condition were inferred it would mean that an existing investment in Venezuela, owned or controlled by a non-Venezuelan entity, would not be protected by the BIT if it were acquired by a third party, with cash or other consideration being paid outside Venezuela, even if the acquiring party then invested funds into Venezuela to finance the activity of the acquired business. Clearly, this was not the intention of the parties to the BIT and nor does it reflect the ordinary meaning of the definition. Whether Claimant made an investment when it acquired the shares in Gold Reserve Corp., is not affected by the fact that the acquisition took place through a share-to-share swap outside Venezuela.<sup>665</sup>

256. More importantly, investment treaty tribunals have expressly rejected that claimants must prove that they have “made” an investment by way of a monetary contribution in the host state.<sup>666</sup> For example, in *Fedax v Venezuela*, the tribunal concluded that the transfer of a promissory note of a non-Dutch investor to Fedax, a Dutch investor, should be considered an investment pursuant to the Venezuela-Netherlands BIT. In that case the jurisdiction was not defeated even though the promissory note could be –and was– passed from investor to investor, without a new capital contribution to the host State over the original contribution made on the bond’s issuance. On the contrary, the *Fedax* tribunal acknowledged that, due to the broad definition of investment of the relevant treaty, the purchase of a promissory note qualified as a protected investment.<sup>667</sup>
257. Similarly, the tribunal in *Levy v Peru* even concluded that an acquisition, without payment of consideration, (which is not the case here) of rights and shares transferred to the claimant qualified as an investment under the France-Peru BIT, despite the fact that the investments had been previously made by investors who were not the claimant:

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<sup>665</sup> *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award, 22 September 2014, **CLA-123**, para 262.

<sup>666</sup> *Flemingo DutyFree Shop Private Limited v Poland* (UNCITRAL) Award (Redacted), 12 August 2016, **CLA-223**, paras 306-308; *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, paras 209-211.

<sup>667</sup> *Fedax NV v Republic of Venezuela* (ICSID Case No ARB/96/3) Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, **CLA-21**, para 18.

It is clear that the Claimant acquired her rights and shares free of charge. However, this does not mean that the persons from whom she acquired these shares and rights did not previously make very considerable investments of which ownership was transmitted to the Claimant by perfectly legitimate legal instruments.<sup>668</sup>

258. The case law Bolivia relies on to support its alleged “objective definition” of the term investment that requires an “active investment” in the host State is inapposite. There are several reasons for this.
259. The majority of arbitral decisions that Bolivia cites in support of a restrictive extra-textual definition of investment are inapplicable here. This is because they were analyzing whether or not the investment satisfied Article 25 of the ICSID Convention,<sup>669</sup> which is inapplicable in an UNCITRAL case, such as this one. The same argument was rejected in the UNCITRAL case of *Rurelec v Bolivia* when rejecting the same jurisdictional objection that Bolivia is making in this case.<sup>670</sup> In the decisions cited by Bolivia, the tribunals were determining the definition of “investment” not solely for purposes of consent under an investment treaty, but also for purposes of jurisdiction within the ICSID system,<sup>671</sup> which some tribunals have concluded imposes an additional and wholly separate jurisdictional test

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<sup>668</sup> *Renée Rose Levy de Levi v Republic of Peru* (ICSID Case No ARB/10/17) Award, 26 February 2014, **CLA-215**, para 148.

<sup>669</sup> Since the ICSID Convention does not define the term “investment,” tribunals have developed a flexible definition that is distinct from that contained in most investment treaties. International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention of the Settlement of Investment Disputes Between States and Nationals of Other States* (1965), **CLA-61**, Section V.27.

<sup>670</sup> *Guaracachi America, Inc and Rurelec Plc v Plurinational State of Bolivia* (UNCITRAL) Award, 31 January 2014, **CLA-120**, para 364.

<sup>671</sup> *See, for example, Standard Chartered Bank v The United Republic of Tanzania* (ICSID Case No ARB/10/12) Award, 2 November 2012, **RLA-8**, para 230 (in any event, the facts in *Standard Chartered Bank* are in sharp distinction to our case, given that in that case the tribunal held that were contractual rights in a loan which was granted by an indirect subsidiary of the claimant could not be considered a protected investment because the claimant had not itself granted the loan, see paras 200, 259, 261, 266). *See also Orascom TMT Investments Sàrl v People’s Democratic Republic of Algeria* (ICSID Case No ARB/12/35) Award, 31 May 2017, **RLA-9**, paras 370-371; *Vestey Group Ltd v Bolivarian Republic of Venezuela* (ICSID Case No ARB/06/4) Award, 15 April 2016, **RLA-5**, paras 185-187; *KT Asia Investment Group BV v Republic of Kazakhstan* (ICSID Case No ARB/09/8) Award, 17 October 2013, **CLA-118**, para 166.

under Article 25 of the ICSID Convention. The tribunal in *White Industries* explained clearly that ICSID’s “investment” definition (known as the “Salini” test) is inapplicable outside the context of the ICSID Convention:

[The *Salini*] test was developed in order to determine whether an ‘investment’ had been made for the purposes of the ICSID Convention. The cases cited by India in support of these requirements were also ICSID decisions.

The present case, however, is not subject to the ICSID Convention. Consequently, the so-called *Salini Test* [...] [is] simply not applicable here. Moreover, it is widely accepted that the ‘double-check’ (namely, of proving that there is an ‘investment’ for the purposes of the relevant BIT *and* that there is an ‘investment’ in accordance with the ICSID Convention), imposes a higher standard than simply resolving whether there is an ‘investment’ for the purposes of a particular BIT.<sup>672</sup>

260. The only three non-ICSID cases that Bolivia cites,<sup>673</sup> the *Isolux*, *Romak* and *Alps Finance* cases, are unhelpful to Bolivia’s position. The *Isolux* case does not support Bolivia’s argument, as it expressly states that to determine whether an investment is protected under the ECT it is irrelevant whether the investor made any financial contribution to acquire the investment.<sup>674</sup> With regard to the *Romak* and *Alps Finance* cases, as recognized by the tribunal in *Rurelec*, they represent a minority view and are premised upon facts that are not present here.<sup>675</sup> In both cases, the tribunals looked beyond the treaty definition of “investment” only because the disputed assets were far from the common-sense conception of the term. Both cases concerned sales contracts.<sup>676</sup> In fact, the *Romak* tribunal found

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<sup>672</sup> *White Industries Australia Limited v Republic of India* (UNCITRAL) Final Award, 30 November 2011, **CLA-200**, paras 7.4.8–7.4.9.

<sup>673</sup> Statement of Defense, paras 259-260.

<sup>674</sup> *Isolux Infrastructure Netherlands BV v Kingdom of Spain* (SCC Case No V2013/153) Award, 12 July 2016, **RLA-10**, para 690 (“[...] El hecho de que el adquirente de la inversión no efectúe alguna contribución financiera[sic] para adquirir la inversión tampoco tiene relevancia.”).

<sup>675</sup> *Guaracachi America, Inc and Rurelec Plc v Plurinational State of Bolivia* (UNCITRAL) Award, 31 January 2014, **CLA-120**, para 364.

<sup>676</sup> In *Romak*, the alleged investment was based on a one-off transaction for the sale of wheat. In *Alps Finance*, it was an assignment of receivables. *Romak SA (Switzerland) v The Republic of*

that applying the term “investment” to a sales contract would lead to an absurd result given that Uzbekistan and Switzerland had signed a separate treaty on trade in goods contemporaneously with the investment treaty in question.<sup>677</sup> It was on this basis that the *Romak* panel proceeded to assess objectively whether the disputed sales contract was an “investment” within the common sense meaning of the word.<sup>678</sup> The facts of this case could not be more different. Here, there is nothing absurd in a literal reading of the phrase “any [...] form of participation in a company.” There can be no question that this definition of investment includes Glencore Bermuda’s shareholding of 100 percent of the mining company Colquiri which owned (i) the exclusive right to explore, exploit, and market the mineral products from the Colquiri Mine, the second largest tin mine in Bolivia; (ii) the Antimony Smelter; and (iii) 100 percent shareholding in Vinto, which owned the Tin Smelter—the largest tin smelter in Bolivia. There is therefore no basis to depart from the plain words of the Treaty.<sup>679</sup>

261. In any event, even if this case law were to be applied here (which is not justified), it does not support Bolivia’s argument. *Romak*, upon which Bolivia relies heavily, does not stand for the proposition that “investment” requires a “capital contribution in the territory of the host State.” Rather, the *Romak* tribunal defined “investment” as entailing three criteria: “a contribution that extends over a certain period of time and that involves some risk.”<sup>680</sup> The *Romak* tribunal defined

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*Uzbekistan* (UNCITRAL) (PCA Case No AA280) Award, 26 November 2009, **RLA-12**, para 242; *Alps Finance and Trade AG v Slovak Republic* (UNCITRAL) Award [Redacted], 5 March 2011, **RLA-11**, para 23.

<sup>677</sup> *Romak SA (Switzerland) v The Republic of Uzbekistan* (UNCITRAL) (PCA Case No AA280) Award, 26 November 2009, **RLA-12**, paras 182, 184-190.

<sup>678</sup> *Ibid*, paras 183-188.

<sup>679</sup> Article 32 of the Vienna Convention on the Law of Treaties allows a tribunal to determine the meaning of a treaty provision via supplementary means when its ordinary interpretation would lead “to a result which is [...] unreasonable.” Otherwise, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of their object and purpose. Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, **CLA-6**, Arts 31, 32.

<sup>680</sup> *Romak SA (Switzerland) v The Republic of Uzbekistan* (UNCITRAL) (PCA Case No AA280) Award, 26 November 2009, **RLA-12**, para 207 (emphasis in original).

“contribution” in “broad terms” as “[a]ny dedication of resources that has economic value, whether in the form of financial obligations, services, technology, patents, or technical assistance. [...] In other words, a ‘contribution’ can be made in cash, kind or labor.”<sup>681</sup> Not a contribution of “assets” as Bolivia argues.<sup>682</sup> Furthermore, the *Romak* tribunal did not interpret the terms “in the territory” of the host State as requiring, as Bolivia argues, that the contribution take place within the borders of that State:

Although the BIT contains numerous references to the “territory” of the Contracting States, the Arbitral Tribunal notes that Article 1(2) of the BIT, which defines the term “investments,” does not. The Arbitral Tribunal can identify no treaty provision requiring that the investor’s contribution physically take place within the boundaries of the host State to trigger substantive protection. Uzbekistan relies particularly on the Preamble of the BIT, which refers to the intention of the Contracting Parties “to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party”. However, the Preamble does not impose any independent requirement for purposes of establishing the existence of an “investment.” The Tribunal considers that, unless contracting States have made “territoriality” an express pre-requisite for treaty coverage (which is not the case in the BIT), references to “territory” normally refer to the benefit that the host State expects

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<sup>681</sup> *Ibid*, para 214. The concept of a “contribution” to the host State’s economy has been broadly defined by other investment treaty tribunals. For instance, in *Société Générale v the Dominican Republic* (LCIA Case No UN 7927) Award on Preliminary Objections to Jurisdiction, 19 September 2008, **CLA-178**, para 35, the tribunal held that an indirect shareholding in a local electricity company acquired for the nominal sum of US\$2 was held to be a qualifying investment under the France–Dominican Republic BIT. The tribunal rejected the respondent’s argument that the claimant had not made a contribution in the Dominican Republic:

The issue of the specific contribution made to the local economy by a transaction of this kind might not be as easy to identify as if a factory was built, but this of course does not disqualify financial investments from protection under the Treaty. The Claimant has convincingly identified as part of such contribution the continuing supply of electricity, the improvement of distribution and the contribution to employment within the country. Moreover, the Claimant has also expressed its intention to undertake the capitalization of [the investment] if the obligations relating to the investment are met.

*Société Générale v the Dominican Republic* (LCIA Case No UN 7927) Award on Preliminary Objections to Jurisdiction, 19 September 2008, **CLA-178**, para 35.

<sup>682</sup> Statement of Defense, para 263.

to derive from the investment. As already stated, in construing the term “investment” the Arbitral Tribunal has taken the Preamble of the BIT into consideration and concluded that, pursuant to the BIT, an “investment” requires a contribution that extends over a certain period of time and entails some risk. It is in light of these three elements (contribution, duration and risk) that the BIT’s reference to “territory” – which involves a benefit to the host State – has been analyzed.<sup>683</sup>

262. In any event, even if one were to apply the criteria identified by the *Romak* tribunal as argued by Bolivia, *ie* a contribution made for a certain duration and involving some risk, Glencore Bermuda’s investment would easily satisfy this criteria. Glencore Bermuda has made substantial contributions, contrary to Bolivia’s allegations. Glencore Bermuda paid a purchase price thirteen years ago of US\$313.8 million, plus related acquisition costs, to acquire its investments in Bolivia which, in turn, included Colquiri and Vinto.<sup>684</sup> This fact alone would satisfy the “contribution” criterion under the ICSID Convention, as recognized by the tribunal in *Quiborax v Bolivia* when it rejected Bolivia’s argument that the Chilean claimant, which had acquired shares in a Bolivian company that held mining concessions, lacked a qualifying “investment” under the ICSID Convention for want of “a contribution of money or assets in the territory of Bolivia”:

[...] as the Tribunal previously concluded, the evidence shows that Quiborax paid for 51% of the shares of NMM. Regardless of where payment was made, this qualifies as a contribution of money

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<sup>683</sup> *Romak SA (Switzerland) v The Republic of Uzbekistan* (UNCITRAL) (PCA Case No AA280) Award, 26 November 2009, **RLA-12**, para 237 (emphasis added).

<sup>684</sup> See para II.C. Contrary to Bolivia’s allegations, Glencore Bermuda’s investment would be considered a substantial contribution of funds in accordance with the ruling of the tribunal in *Bayindir v Pakistan*, which considered that providing bank guarantees and incurring in commission charges constituted a substantial financial contribution, despite the fact that the claimant had already received from Pakistan a third of the contract price in advance. *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Decision on Jurisdiction, 14 November 2005, **CLA-60**, paras 118-120.

because the object of the payment and *raison d'être* of the transaction - the mining concessions- were located in Bolivia.<sup>685</sup>

263. In addition to the payment for its shares in Colquiri and Vinto, Glencore Bermuda, through its subsidiaries, has made significant contributions to the Bolivian economy—including contributions to the local communities and the payment of taxes and royalties—both during and after its operation of the Assets. As explained in the Statement of Claim,<sup>686</sup> Glencore Bermuda's subsidiaries directly employed over 3,500 people and indirectly generated jobs for more than 5,000 people. Bolivia reaped the benefits of these contributions. Glencore Bermuda's investments in Colquiri and Vinto extended over a period of time, namely between 2005 and 2007 (when Vinto was expropriated) and 2012 (when Colquiri was expropriated). By the end of 2012, Glencore Bermuda, through its local subsidiaries, had paid royalties, taxes, and fees to Bolivia of over US\$300 million and had invested close to US\$250 million in the Bolivian mining industry and wider economy in addition to the original purchase price,<sup>687</sup> providing the local community with jobs, education, access to healthcare, and improved infrastructure, impacting approximately 30,000 people. Glencore Bermuda's investment clearly involved risk (eg evolution of costs, risk of demand, and risk of revenues depending on prices). Even if the criteria developed in the ICSID context were to apply (which they do not), Glencore Bermuda's investment amply satisfied all the relevant criteria.
264. While the Tribunal should not refer to any definition of “investment” beyond the text of the Treaty itself, were it inclined to do so, Glencore Bermuda's investment would satisfy even the definition that Bolivia has advanced.

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<sup>685</sup> *Quiborax SA, Non Metallic Minerals S.A. and Allan Fosc Kaplún v Plurinational State of Bolivia* (ICSID Case No ARB/06/2) Decision on Jurisdiction, 27 September 2012, **CLA-204**, para 229 (emphasis added).

<sup>686</sup> Statement of Claim, para 61; Sinchi Wayra, “Social Responsibility and Environment,” undated, **C-160**.

<sup>687</sup> Statement of Claim, para 62.

## 2. The Treaty does protect indirect investments

265. Bolivia also argues that the word “of” in the expression “[D]isputes between a national [...] and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former” which appears in the dispute resolution clause of the Treaty (Article 8(1)), suggests that investments must be held directly by such nationals and companies to be protected.<sup>688</sup> It then alleges that Glencore Bermuda’s indirect shareholding in Colquiri and Vinto does not benefit from the protection of the Treaty.<sup>689</sup> In support of its position, Bolivia claims that other BITs concluded by Bolivia expressly extended jurisdiction to indirect investments. This very argument was unequivocally rejected by the *Rurelec* tribunal interpreting the very same UK-Bolivia Treaty:

[...] the fact, invoked by the Respondent, that other BITs concluded by Bolivia explicitly include indirect investments, is insufficient to support an *a contrario sensu* interpretation that only those BITs containing such an explicit reference cover indirect investments, since it is well accepted that this kind of argument is not on its own strong enough to justify a particular interpretation of a rule of law. The mere absence of an explicit mention of the different categories of investment (direct and indirect) cannot be interpreted as narrowing the definition of investment under the BIT to only direct investment.

The Tribunal therefore agrees with the Claimants and concludes that terms employed in the UK-Bolivia BIT are broad enough on their own to include indirect investments, even without employing further qualifications that would only reinforce what is already clear from the text of the BIT.<sup>690</sup>

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<sup>688</sup> Statement of Defense, paras 377-383.

<sup>689</sup> *Ibid.*, para 370.

<sup>690</sup> *Guaracachi America, Inc and Rurelec Plc v Plurinational State of Bolivia* (UNCITRAL) Award, 31 January 2014, **CLA-120**, paras 354-355 (emphasis in the original).

266. Indeed, the tribunal in *Rurelec* held that Article 8(1) of this Treaty applies to direct and indirect investments.<sup>691</sup> To reach this conclusion, the tribunal in *Rurelec* confirmed<sup>692</sup> the decision of the tribunal in *Cemex* that held that the meaning of the phrase “investments of [nationals]” does not limit the protection of the Treaty to direct investments:

[W]hen the BIT mentions investments “of” nationals of the other Contracting Party, it means that those investments must belong to such nationals in order to be covered by the Treaty. But this does not imply that they must be “directly” owned by those nationals. Similarly, when the BIT mentions investments made “in” the territory of a Contracting Party, all it requires is that the investment itself be situated in that territory. It does not imply that those investments must be “directly” made in such territory.<sup>693</sup>

267. But the *Rurelec* tribunal is not alone. Investment treaty tribunals have consistently interpreted definitions of “investment” similar to the one found in the Treaty to cover indirect investments. For example:

- (a) in *Siemens v Argentina*, the tribunal determined that the Argentina–Germany BIT, which defined “investment” as “every kind of asset” followed by a non-exhaustive list of asset categories, including “shares” and “participation” in companies, covered indirect shareholdings;<sup>694</sup>
- (b) in *Venezuela Holdings v Venezuela*, the tribunal held that the Venezuela–Netherlands BIT, which defined “investment” as “every kind of asset” followed by a non-exhaustive list of asset categories of investments

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<sup>691</sup> *Ibid*, para 365.

<sup>692</sup> *Ibid*, para 356.

<sup>693</sup> *Cemex Caracas Investments BV and Cemex Caracas II Investments BV v Bolivarian Republic of Venezuela* (ICSID Case No ARB/08/15) Decision on Jurisdiction, 30 December 2010, **CLA-192**, para 157.

<sup>694</sup> *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Decision on Jurisdiction, 3 August 2004, **CLA-51**, para 137.

including “shares” and “other kinds of interests” in companies, covered indirect shareholdings;<sup>695</sup>

- (c) in *Tza Yap Shum v Peru*, the tribunal held that the China–Peru BIT, which defined “investment” as “every kind of asset” followed by a non-exhaustive list of asset categories including “shares, stock and any other kind of participation in companies,” covered indirect shareholdings;<sup>696</sup> and
- (d) in *Kardassopoulos v Georgia*, the tribunal held that the Greece–Georgia BIT, which defined “investment” as “every kind of asset” followed by a non-exhaustive list of asset categories including “shares” and “participations” in companies, covered indirect shareholdings.<sup>697</sup> The *Kardassopoulos* decision is particularly illuminating in this regard. The claimant initiated arbitration under the Energy Charter Treaty and the Greece–Georgia BIT. The definition of “investment” in the ECT was qualified by the words “directly or indirectly,” while the Greece–Georgia BIT did not contain such language.<sup>698</sup> This textual difference had no impact on the tribunal’s decision, as it confirmed that the indirect ownership of shares by the claimant constituted an “investment” under *both* the BIT and the ECT.<sup>699</sup>

268. Finally, contrary to Bolivia’s allegations, based on the customary international law on diplomatic protection,<sup>700</sup> international law does recognize claims by shareholders against measures damaging their subsidiaries and their investments

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<sup>695</sup> *Mobil Corporation, Venezuela Holdings BV, and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27) Decision on Jurisdiction, 10 June 2010, **CLA-97**, paras 164-165.

<sup>696</sup> *Mr Tza Yap Shum v Republic of Peru* (ICSID Case No ARB/07/6) Decision on Jurisdiction and Competence, 19 June 2009, **CLA-180**, paras 105-106.

<sup>697</sup> *Ioannis Kardassopoulos v Georgia* (ICSID Case No ARB/05/18) Decision on Jurisdiction, 6 July 2007, **CLA-69**, paras 122-124.

<sup>698</sup> *Ibid.*, paras 121-123.

<sup>699</sup> *Ibid.*, paras 123-24.

<sup>700</sup> Statement of Defense, para 370 *et seq.*

in those subsidiaries. This was expressly acknowledged, for example, by the tribunal in *CMS v Argentina*, a case involving a claim by a minority shareholder in one of the two privatized gas transportation companies (TGN):

The Tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders [...] [this] can now be considered the general rule, certainly in respect of foreign investments and international claims and increasingly in respect of other matters.

[...]

The tribunal concludes that jurisdiction can be established under the terms of the specific provisions of the BIT. Whether the protected investor is in addition a party to the concession or a license agreement with the host state is immaterial for the purpose of finding jurisdiction under those treaty provisions, since there is a direct right of action of shareholders. It follows that the Claimant has *jus standi* before this tribunal under international law, the 1965 Convention and the Argentina-United States Bilateral Investment Treaty.”<sup>701</sup>

269. The tribunal reached this conclusion after examining dicta of the ICJ in *Barcelona Traction*,<sup>702</sup> a decision adduced by Bolivia in support of its case in the present matter.<sup>703</sup> The tribunal in *CMS* found the *dicta* irrelevant and not reflective of the current state of customary international law on the matter of shareholder’s

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<sup>701</sup> *CMS Gas Transmission Company v Republic of Argentina* (ICSID Case No ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, **CLA-150**, paras 48, 65. Similarly, the tribunal in *Inmaris v Ukraine* held:

BITs that do not otherwise restrict the structure of investors’ investments are regularly read to encompass investments in the host state that are owned by investors of the home state through one or more levels of subsidiaries, including subsidiaries incorporated in third countries (even when the BITs are silent on the issue).

*Inmaris Perestroika Sailing Maritime Services GMBH and others v Ukraine* (ICSID Case No ARB/08/8) Decision on Jurisdiction, 8 March 2010, **CLA-188**, footnote 109.

<sup>702</sup> *Barcelona Traction, Light and Power Company, Limited* (Belgium/Spain) [1970] ICJ Reports 3, 5 February 1970, **CLA-7**.

<sup>703</sup> Statement of Defense, para 357.

rights.<sup>704</sup> This holding is fully applicable here.<sup>705</sup> The tribunal also relied on a number of treaty decisions upholding shareholder’s rights to claim independently from the corporate entity.<sup>706</sup>

270. In light of the above, Bolivia’s attempt to find support from ICJ cases, including *Barcelona Traction*, *ELSI* and *Diallo*, is misguided. Glencore Bermuda’s claims are based upon the Treaty, which confers upon shareholders independent protections and rights of action when those protections are infringed.<sup>707</sup> In fact, as one of the world’s leading commentators on investment arbitration, Professor Schreuer, has stated:

[I]ndirect shareholding by way of an intermediary company does not deprive the beneficial owner of its right to pursue claims for damages to the company by the host State. In this context it matters little whether the intermediate owner of the affected company’s shares is incorporated in the claimant’s home state, the host State or in a third state.<sup>708</sup>

271. Against the explicit wording of the Treaty—which covers “every kind of asset,” and “any kind of participation” without exceptions—customary international law

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<sup>704</sup> *CMS Gas Transmission Company v Republic of Argentina* (ICSID Case No ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, **CLA-150**, paras 43-48.

<sup>705</sup> Bolivia’s reliance on ICJ cases, including *Barcelona Traction*, *ELSI* and *Diallo* is thus clearly inapposite.

<sup>706</sup> *CMS Gas Transmission Company v Republic of Argentina* (ICSID Case No ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, **CLA-150**, para 53.

<sup>707</sup> As a matter of fact, the ICJ in *Barcelona Traction* itself recognized the developments in international law on investment protection, especially investment protection treaties, which increasingly accord direct protection to shareholders (“Thus, in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States even more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements. [...] Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures [...]). *Barcelona Traction, Light and Power Company, Limited* (Belgium/Spain) [1970] ICJ Reports 3, 5 February 1970, **CLA-7**, para 90.

<sup>708</sup> C Schreuer, “Shareholder Protection in International Investment Law” (2005) Vol 2(3) *Transnational Dispute Management*, 8 May 2005, **CLA-160**, p 15.

on diplomatic protection of shareholders, whatever its content may be, can have no application.

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272. To conclude, the Treaty’s definition of “investment” is expansive, and its plain meaning encompasses Glencore Bermuda’s investment in Vinto, Colquiri and thereby had an indirect stake in their assets, including any movable and immovable property, rights and claims to money having a financial value. This included rights under the Colquiri Lease, the Smelters, and the Tin Stock. This interpretation of the Treaty is in accord with the relevant *jurisprudence constante*. Bolivia’s attempt to incorporate additional requirements to the broad definition of investment under the Treaty must be rejected.

**D. BOLIVIA’S ALLEGATIONS OF ILLEGALITY ARE FALSE AND UNSUBSTANTIATED**

273. As explained in the Statement of Claim,<sup>709</sup> it is undisputed that Glencore Bermuda did not commit any illegal act in making its investment in March 2005. It is also undisputed that Glencore Bermuda acquired the Assets for fair market value, in a good faith arm’s length transaction, and as such, acquired good title under both Bolivian law and international law.<sup>710</sup>

274. Yet, based on the alleged “inexplicably” low prices for which the Assets were supposedly sold, Bolivia claims that the privatization of the Assets was “riddled with illegalities” orchestrated by Bolivia’s own former President in order to benefit his own interests.<sup>711</sup> Therefore, Bolivia argues that the Tribunal cannot hear Glencore Bermuda’s claims pursuant to the unclean hands doctrine because Glencore International knew (or should have known) at the time it acquired the

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<sup>709</sup> Statement of Claim, paras 35-38.

<sup>710</sup> See Section II.C.

<sup>711</sup> Statement of Defense, para 326.

Assets, five years after their privatization, that Bolivia’s own legal framework was not in fact “legal.”<sup>712</sup>

275. As explained below, Bolivia’s allegations have no merit and cannot deprive the Tribunal of jurisdiction (or affect the admissibility of Glencore Bermuda’s claims).

**1. Bolivia’s allegations of illegality of the privatization process are devoid of any substance**

276. Bolivia argues that the privatization of the Assets was illegal because its own State officials developed a neo-liberal legal framework to privatize the Assets which was designed with the sole purpose of benefitting its former President Sánchez de Lozada, who was able to acquire the Assets at very low prices.<sup>713</sup> Bolivia’s claims lack any merit.

277. As a preliminary point, it is noteworthy that the relevant time to assess any allegation of unlawfulness of the investment is at the time the investor made its investment.<sup>714</sup> Here, it is undisputed that there was no unlawful act at the time of the acquisition of the investment by Glencore Bermuda. Thus, the Tribunal’s inquiry should stop here. For the sake of completion, however, Claimants will address below, Bolivia’s alleged illegalities at the time of the privatization.

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<sup>712</sup> *Ibid*, Section 4.3.2.

<sup>713</sup> *Ibid*, Section 4.3.1.

<sup>714</sup> *Inceysa Vallisoletana SL v El Salvador* (ICSID Case No ARB/03/26) Award, 2 August 2006, **RLA-26**, paras 234-239 (finding that the claimant had engaged in obvious misconduct in order to acquire its investment, which included the “presentation of false financial information as part of the tender,” “false representations during the bidding process,” and falsifying and hiding other corporate information that had been key to claimant being able to acquire the investment); *Plama Consortium Limited v Republic of Bulgaria* (ICSID Case No ARB/03/24) Award, 27 August 2008, **RLA-27**, paras 133, 135 (finding that the claimant made fraudulent misrepresentations regarding its assets and financial resources in order to induce the government of Bulgaria to give its consent for the transfer of the investment to claimant); *Phoenix Action Ltd v The Czech Republic* (ICSID Case No ARB/06/5) Award, 15 April 2009, **RLA-15**, para 103 (finding that “[...] the analysis of the conformity of the investment with the host State’s laws has to be performed taking into account the laws in force at the moment of the establishment of the investment”). *World Duty Free Company Limited v The Republic of Kenya* (ICSID Case No ARB/00/7) Award, 4 October 2006, **CLA-169**, paras 174-175 (finding the illegality was integral to the contract at issue in the arbitration and dismissing the claim).

278. *First*, Bolivia claims that the privatization of the Assets violated the Constitutional requirement that State officials protect the public patrimony. According to Bolivia, Decree 23,991 (implementing the Privatization Law) and 1997 Mining Code —both enacted during President Sánchez de Lozada’s administration— were against the interests of the public patrimony.<sup>715</sup>
279. However, as recognized by Bolivia, the Assets were privatized pursuant to a legal framework applicable to *all of Bolivia’s industrial sectors*, which was developed by the executive and legislative branches of five different administrations over a period of 15 years between 1985 and 2000.<sup>716</sup> The privatization of the Assets was governed by, *inter alia*, the Privatization Law, which had been previously passed by Bolivia’s Legislative Assembly and enacted by the prior President, Paz Zamora.<sup>717</sup> Bolivia has failed to show anything unlawful about the fact that Bolivia’s former President Sánchez de Lozada (along with the entire Presidential Cabinet) signed the decree implementing the previously passed Privatization Law. With regard to the Mining Code, this too was passed by Bolivia’s Legislative Assembly prior to being signed by former President Sánchez de Lozada.<sup>718</sup> More importantly, Bolivia has failed to explain how Supreme Decree 23,991 or the Mining Code were in any way unconstitutional (or even irregular),<sup>719</sup> or *would have* enabled any illegalities by former President Sánchez de Lozada in relation to the Assets. In fact, Mr Sánchez de Lozada left office in 1997, years before the Assets were privatized.<sup>720</sup> Bolivia’s argument shows that it is against the privatization of State assets and other liberal policies implemented by prior

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<sup>715</sup> Statement of Defense, para 328. *See* Constitution of Bolivia, 1967, **R-3**, Art 43.

<sup>716</sup> Statement of Defense, para 46.

<sup>717</sup> *See* Section II.A.

<sup>718</sup> *Ibid.*

<sup>719</sup> Bolivia in fact admits that this specific legislation had the objective of transferring to the private sector “production activities that may be carried out in a more efficient way by the latter.” Statement of Defense, para 328.

<sup>720</sup> As explained at Section II.B, Comsur acquired the Colquiri Lease and Antimony Smelter in 2000 and 2002, respectively. The Tin Smelter was adjudicated to Allied Deals in 1999, and purchased by Comsur in 2001.

governments. However, this is irrelevant for the present case, in so far they were implemented in accordance with the law.

280. *Second*, Bolivia claims that the Assets were privatized in violation of the principles of transparency and good faith as demonstrated by “inexplicably low” prices of each of the Assets.<sup>721</sup> Yet, the evidence on the record clearly shows that privatization was carried out in a transparent process that required good faith participation by each bidder, and prices were determined in accordance with the legal framework then in place.<sup>722</sup>
281. As explained above,<sup>723</sup> the privatization of the Smelters and the execution of the Colquiri Lease were approved by the Bolivian Legislative Assembly via the Mining Code and Law No 1,982. Then the Assets were lawfully awarded to private investors through public tender processes. In particular, there was a Qualifying Commission comprised of several high-ranking public servants in charge of evaluating all bids and the Assets were only awarded to the qualified bidders with the highest financial offers via Supreme Decrees issued by the

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<sup>721</sup> In support of its position that there is a constitutional requirement to protect the public patrimony Bolivia invokes article 137 of the 1967 Constitution which defines State assets as “public and inviolable.” Statement of Defense, paras 326, 332. However, as recognized by the Bolivian Constitutional Court, article 137 is not applicable to public tenders. Statement of Defense, paras 326 and 332. To the contrary, the Bolivian Constitutional Court expressly provided that the transfer of ownership of the assets formerly owned by EMV was not contrary to the 1967 Constitution, after finding that “Regarding the complaint of the alleged violation of the rule provided by Art. 137 of the Constitution by the challenged legal provision, this Constitutional Court concludes that there is no alleged infringement for the following constitutional legal reasons: [...] c) none of the public companies referred to, which are the subject of the contested law [eg EMV], constitute inviolable, inalienable and imprescriptible in the terms referred to by Arts. 137, 138 and 139 of the Fundamental Law, since they are state property subject to the private legal regime [...], that is, they are transferable goods according to the mechanisms and procedures provided by the Constitution and laws.” Constitutional Tribunal, Constitutional Decision No 0019/2005, 7 March 2005, **C-209**, p 18 (unofficial English translation from Spanish original). As to the Colquiri Mine, its ownership was never transferred to Colquiri or Comsur.

<sup>722</sup> As previously explained, the Terms of Reference were approved by the Trade Minister and Comibol in exercise of their constitutional and legal powers. Such Terms of Reference provided for a two-step bidding process aimed at assessing the qualifications and financial offers made by the interested bidders. *See* Section II.B.1.

<sup>723</sup> *See* Section II.A; Statement of Claim para 323.

President and the Cabinet.<sup>724</sup> Indeed, it was on the basis of this legal framework that international investment bank Paribas—Bolivia’s advisor in the privatization process—concluded that the legal framework provided “sufficient legal support” for the transfer of public assets and companies to the private sector.<sup>725</sup>

282. *Third*, contrary to Bolivia’s allegations, none of the sales prices of the Asset constitute proof of illegality in their privatizations. As explained above,<sup>726</sup> the evidence clearly shows the sales prices for each Asset were accepted by the Qualifying Commission in accordance with Bolivian law.<sup>727</sup>
283. *Finally*, to date—almost 20 years after the privatizations—no Bolivian court has determined that the privatizations were illegal, and thus the presumption of legality of the Supreme Decrees privatizing the Assets remains intact.<sup>728</sup> Indeed, no Bolivian court has declared the unconstitutionality of the laws and regulations comprising the legal framework governing the privatization of the Assets. Furthermore, the State Comptroller (*Contraloría*) raised no concerns when the executed contracts were submitted to it to ensure that the contracts were in the State’s best interests, following standard Bolivian administrative law

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<sup>724</sup> See Section II.B.1.

<sup>725</sup> Paribas, Legal and institutional diagnostic of Vinto, the Oruro Plant, Huanuni and Colquiri, 9 November 1998, **R-91**, pp 82, 86-90. See Section II.B.2.

<sup>726</sup> See Section II.B.1.

<sup>727</sup> Each privatization was governed by its respective terms of reference. None of the legal provisions cited by Bolivia to establish the existence of the principle of efficiency under Bolivian law in any way limit the determination of the bidding price. Statement of Defense, paras 331 and 332. See Constitutional Tribunal, Constitutional Decision No 0019/2005, 7 March 2005, **C-209**, p 18.

<sup>728</sup> Under Bolivian law, acts of the public servants are presumed legal until proven otherwise. The Qualifying Commission was composed of public servants, and its recommendations were subject to confirmation and approval by the President and Cabinet, through a Supreme Decree. To date, no authority or court in Bolivia has found that any of the various public servants involved in the asset sales acted improperly; their actions are therefore presumed legal under Bolivian law. Law No 2,341, 23 April 2002, **R-250**, Art 4(g) (“Principle of legality and presumption of lawfulness: The acts of the Public Administration are presumed legal as they are entirely subject to the Law...”); Law No 1,178, 20 July 1990, **R-241**, Art 28(b) (“The lawfulness of the operations and activities carried out by any public servant is presumed, until proven otherwise.”) (unofficial English translation from Spanish original).

procedures.<sup>729</sup> In fact, allegations of illegality were not raised for eight years—until it became politically expedient for Bolivia to do so.<sup>730</sup> Even then, Bolivia has failed to prosecute anyone for these supposed illegal acts that occurred during the privatization of the Assets. These facts speak for themselves. Bolivia’s illegality allegations are devoid of substance and must therefore be rejected.

## 2. **Bolivia cannot rely on the conduct of its own officials to deprive Glencore Bermuda of protection under the Treaty**

284. Unable to establish any unlawful conduct by Glencore Bermuda in making its investments—the only relevant criteria for this Tribunal to decide its jurisdiction—Bolivia argues that the Tribunal cannot hear Glencore Bermuda’s claims pursuant to the unclean hands doctrine because Glencore International knew (or should have known) at the time it acquired the Assets, five years after their privatization, that Bolivia’s own State officials had allegedly failed to protect the public patrimony by privatizing *all of Bolivia’s industrial sectors*.<sup>731</sup>
285. Bolivia is wrong. As explained in the prior section, Bolivia has failed to establish the existence of any Bolivian legal requirements that were not satisfied in the privatization process. But even if Bolivia could prove that its State officials had failed to comply with certain legal requirements, this would not deprive this Tribunal of jurisdiction.
286. *First*, it is undisputed that the Treaty does not expressly require the investment to be made in accordance with Bolivian law.<sup>732</sup> Nevertheless, Bolivia insists on

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<sup>729</sup> Law No 1,178, 20 July 1990, **R-241**, Arts 27(d), 41. Not even after the members of the Brigada Parlamentaria de Oruro and certain members of the parliamentary opposition complained directly to the *Contraloría*, did the Comptroller find any merits to initiate an investigation. *See* Section II.B.2.

<sup>730</sup> No such allegation was made to Glencore Bermuda (or its parent company Glencore International) from the time of the acquisitions in 2005 until Bolivia decided to nationalize the Tin Smelter in 2007. In particular, Bolivia could have raised any concerns about the legality of the investments during the discussions leading to Glencore International’s investment in 2004.

<sup>731</sup> Statement of Defense, paras 346-347.

<sup>732</sup> Treaty, **C-1**, Art 1.

citing legal authorities involving treaties with express requirements for an investment to be made “in compliance with the law.”<sup>733</sup> Indeed, Bolivia’s own legal authority on this issue clearly states that:

[i]n cases based on investment treaties where the parties have not expressly required that the investment in question comply with host-state law, the legality of the investment is not a jurisdictional prerequisite.<sup>734</sup>

287. *Second*, contrary to Bolivia’s allegations,<sup>735</sup> the unclean hands doctrine does not exist as a general principle of international law. For example, in the tribunal in the *Yukos* case analyzed many of the cases invoked by Bolivia in its Statement of Defense, including *Inceysa v El Salvador*, *Plama v Bulgaria* and *Phoenix Action v Czech Republic*, and concluded:

[t]he Tribunal is not persuaded that there exists a ‘general principle of law recognized by civilized nations’ within the meaning of Article 38(1)(c) of the ICJ Statute that would bar an investor from making a claim before an arbitral tribunal under an investment treaty because it has so-called ‘unclean hands.’ General principles of law require a certain level of recognition and consensus. However, on the basis of the cases cited by the Parties, the Tribunal has formed the view that there is a significant amount of controversy as to the existence of an ‘unclean hands’ principle in international law.<sup>736</sup>

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<sup>733</sup> Statement of Defense, paras 338-345, citing to *Phoenix Action Ltd v The Czech Republic* (ICSID Case No ARB/06/5) Award, 15 April 2009, **RLA-15**, para 100; *Inceysa Vallisoletana SL v El Salvador* (ICSID Case No ARB/03/26) Award, 2 August 2006, **RLA-26**, para 242. *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Case No ARB/12/14 and 12/40) Award, 6 December 2016, **RLA-25**, paras 128, 488-506, 208, 518.

<sup>734</sup> R Moloo and A Khachaturian, “The Compliance with the Law Requirement in International Law” (2011) Vol 34 *Fordham International Law Journal* 1473, **RLA-24**, pp 12-13.

<sup>735</sup> Statement of Defense, paras 325, 338-340.

<sup>736</sup> *Hulley Enterprises Limited (Cyprus) v The Russian Federation* (UNCITRAL) Final Award, 18 July 2014, **CLA-156**, paras 1358-1359; *Yukos Universal Limited (Isle of Man) v The Russian Federation* (PCA Case No AA 227) Final Award, 18 July 2014, **CLA-122**, paras 1358-1359; *Veteran Petroleum Limited (Cyprus) v The Russian Federation* (UNCITRAL) Final Award, 18 July 2014, **CLA-157**, paras 1358-1359.

*See also Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited (“Bapex”) and Bangladesh Oil Gas and Mineral Corporation (“Petrobangla”)*

288. The Tribunal then emphatically closed the door to the application of the unclean hands principle: “[t]he Tribunal therefore concludes that ‘unclean hands’ does not exist as a general principle of international law which would bar a claim by an investor, such as the Claimants in this case.”<sup>737</sup>
289. *Third*, Bolivia’s view that the misconduct of its very own officials could deprive Glencore Bermuda’s investment of protection under the Treaty ignores the object and purpose of the Treaty, contrary to the dictates of Article 31 of the Vienna Convention. According to its Preamble, the Treaty was intended to create favorable conditions for foreign investment, and to provide protection for foreign investors and their investments.<sup>738</sup> Interpreted consistently with that object and purpose, any requirement that an investment be made in accordance with host State law could only relate to the investor’s conduct in making the investment. This interpretation is consistent with the principle of international law, as reflected in Article 3 of the International Law Commission’s articles on State responsibility and invoked by tribunals and academics alike, that “[a] State may not invoke its own illegal act to diminish its own liability.”<sup>739</sup>
290. This was precisely the conclusion of the tribunal in *Kardassopolous v Georgia*. There, Georgia argued that the conduct of its own officials had violated Georgian law, and that the claimant’s investment was therefore not protected by the Greece-Georgia BIT. The *Kardassopolous* tribunal held that it was “obvious” that the

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(ICSID Case No ARB/10/18) Decision on Jurisdiction, 19 August 2013, **CLA-210**, para 477 (citing *Guyana v. Suriname* (PCA) Award, 17 September 2007 (under UNCLOS Ch VII)).

<sup>737</sup> *Hulley Enterprises Limited (Cyprus) v The Russian Federation* (UNCITRAL) Final Award, 18 July 2014, **CLA-156**, para 1363; *Yukos Universal Limited (Isle of Man) v Russian Federation* (PCA Case No AA 227) Final Award, 18 July 2014, **CLA-122**, para 1363; *Veteran Petroleum Limited (Cyprus) v The Russian Federation* (UNCITRAL) Final Award, 18 July 2014, **CLA-157**, para 1363.

<sup>738</sup> Treaty, **C-1**, Preamble.

<sup>739</sup> B Cheng, *General Principles of Law as Applied by International Court and Tribunals* (1st edn 1953) (Extract), 2006, **CLA-163**, p 6, International Law Commission, “Draft articles on Responsibility of States for Internationally Wrongful Acts with commentary” [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, Art 3

object and purpose of the treaty would not support this interpretation.<sup>740</sup> In rejecting Georgia’s jurisdictional objection, the *Kardassopolous* tribunal distinguished between illegal conduct arising out of the investor’s conduct and illegal conduct by the host State:

A State [...] retains a degree of control over foreign investments by denying BIT protection to those investments that do not comply with its laws. As noted by one scholar, “no State has taken its fervour for foreign investment to the extent of removing any controls on the flow of foreign investment into the host State”. This control, however, relates to the investor’s actions in making the investment. It does not allow a State to preclude an investor from seeking protection under the BIT on the ground that its own actions are illegal under its own laws. In other words, a host State cannot avoid jurisdiction under the BIT by invoking its own failure to comply with its domestic law.

[...]

It follows that notwithstanding the fact that the JVA and the Concession may be void *ab initio* under Georgian law, Claimant’s investment nonetheless remains entitled to protection under the BIT and the Tribunal so finds.<sup>741</sup>

291. As a result, taking into consideration the general principle of international law that a State cannot rely on its own wrongful acts to avoid complying with its international obligations,<sup>742</sup> Bolivia’s contentions would have no effect on Glencore Bermuda’s case, even if those allegations were substantiated (which they have not been).

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<sup>740</sup> *Ioannis Kardassopoulos v Georgia* (ICSID Case No ARB/05/18) Decision on Jurisdiction, 6 July 2007, **CLA-69**, para 179.

<sup>741</sup> *Ibid*, paras 182, 184.

<sup>742</sup> International Law Commission, “Draft articles on Responsibility of States for Internationally Wrongful Acts with commentary” [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, Art 3, *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Award, 14 October 2013, **CLA-224**, para 5.62; *The Rompetrol Group NV v Romania* (ICSID Case No ARB/06/3) Award, 6 May 2013, **CLA-209**, para 174.

### 3. Bolivia's characterization of the privatization process does not make Glencore Bermuda's investment unlawful

292. Even if it were true that Bolivia can rely on the alleged inappropriate conduct of its own State officials as a basis to challenge the Tribunal's jurisdiction, their failure to follow administrative or legal procedures does not deprive the Tribunal of jurisdiction.
293. Under international law, only significant and intended violations of applicable laws (as opposed to omissions) may serve as grounds for challenging jurisdiction.<sup>743</sup> In the cases that Bolivia cites, tribunals only found illegality as a consequence of serious violations of law when acquiring the investment, such as forgery of documents;<sup>744</sup> deliberately presenting false information during a bidding process;<sup>745</sup> fraudulent misrepresentation about the true ownership of an investment;<sup>746</sup> and the breach of an international principle of good faith because an investment was made for the sole purpose of initiating an investment arbitration.<sup>747</sup> Bolivia has not cited a single case in which a tribunal found illegality due to omissions and even less omissions of the host State to follow its own procedures.<sup>748</sup>

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<sup>743</sup> *Energolians SARL v Republic of Moldova* (UNCITRAL) Award, 23 October 2013, **CLA-211**, para 261 (“in modern international law an approach has formed, that only significant and intentional violations of the investment legislation of the State receiving investments can become the basis for the issuance of a decision about the lack of jurisdiction”). *See also SAUR International SA v The Republic of Argentina* (ICSID Case No ARB/04/4) Decision on Jurisdiction and Liability, 6 June 2012, **RLA-82**, para 308.

<sup>744</sup> *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Case No ARB/12/14 and 12/40) Award, 6 December 2016, **RLA-25**, para 507.

<sup>745</sup> *Inceysa Vallisoletana SL v El Salvador* (ICSID Case No ARB/03/26) Award, 2 August 2006, **RLA-26**, para 236.

<sup>746</sup> *Plama Consortium Limited v Republic of Bulgaria* (ICSID Case No ARB/03/24) Award, 27 August 2008, **RLA-27**, paras 143-146.

<sup>747</sup> *Phoenix Action Ltd v The Czech Republic* (ICSID Case No ARB/06/5) Award, 15 April 2009, **RLA-15**, para 142.

<sup>748</sup> This is not surprising. Both the *Inceysa* and *Plama* tribunals justified denying jurisdiction over the respective investors' claims on the principle that nobody can benefit from their own wrong. *Inceysa Vallisoletana SL v El Salvador* (ICSID Case No ARB/03/26) Award, 2 August 2006, **RLA-26**, paras 240-242; *Plama Consortium Limited v Republic of Bulgaria* (ICSID Case No

294. Bolivia relies on *Churchill Mining v Indonesia* for the proposition that the “illegal conduct need not be that of the investor itself for the claims to be inadmissible.”<sup>749</sup> But *Churchill Mining* is inapposite to the case at hand. Crucially, the fraud established in the *Churchill Mining* case was done by claimant’s own business partner,<sup>750</sup> not by an entirely unrelated third party, or a State official as Bolivia pretends in this case. Further, the claimant in that case had not only failed to perform any diligence whatsoever, but also had failed to take any actions when it discovered the fraud and proceeded to submit further forged documents in an effort to obtain the investment.<sup>751</sup>
295. Here, however, Glencore Bermuda’s acquisition was based on a thorough due diligence conducted by technical, financial and multi-jurisdictional legal teams to cover all relevant aspects of the transaction.<sup>752</sup> Moreover, as part of the due diligence, Glencore International met with government officials, who encouraged Glencore International to make investments in the country.<sup>753</sup> As explained by Mr Eskdale, the results of the due diligence process raised no concerns relating to the title over the Assets, which had been in the hands of private investors for several years.<sup>754</sup> In fact, Bolivia had never prosecuted or challenged the privatization process for the Assets prior to their acquisition by Glencore Bermuda.<sup>755</sup> Therefore, Glencore Bermuda relied on the valid assumption that Bolivia’s own

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ARB/03/24) Award, 27 August 2008, **RLA-27**, paras 141, 143. Here it is Bolivia that invokes its own wrong in failing to follow internal approval procedures to attempt to deprive Glencore Bermuda of protection under the Treaty.

<sup>749</sup> Statement of Defense, para 345.

<sup>750</sup> *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Case No ARB/12/14 and 12/40) Award, 6 December 2016, **RLA-25**, paras 473-474.

<sup>751</sup> *Ibid*, para 509 (concluding that “the Tribunal is struck by the seriousness of the fraud that taints the entire [investment] and by the Claimants’ lack of diligence overseeing the licensing process and investigating allegations of forgery.”)

<sup>752</sup> Second Witness Statement of Christopher Eskdale, para 9.

<sup>753</sup> First Witness Statement of Christopher Eskdale, para 18.

<sup>754</sup> Second Witness Statement of Christopher Eskdale, para 57.

<sup>755</sup> Statement of Claim, para 217.

sovereign acts and existing legal framework were “legal” and acquired the Assets for fair market value in a good faith arm’s length transaction.<sup>756</sup> There was no wrongdoing or lack of diligence on the part of Glencore Bermuda that would justify blame it for not learning about an alleged illegality by State officials.

296. In any event, even if there were a mistake or oversight in the due diligence process (which has not been proven in this case), it was made in good faith. This good faith mistake cannot preclude Glencore Bermuda from benefiting of the Treaty’s protection,<sup>757</sup> as recognized by Bolivia’s own legal authority on the doctrine of unclean hands:

Explaining what it meant by good faith mistakes, the [*Fraport v Philippines*] tribunal gave some examples:

An indicator of a good faith error would be the failure of a competent local counsel's legal due diligence report to flag that issue. Another indicator that should work in favour of an investor that had run afoul of a prohibition in local law would be that the offending arrangement was not central to the profitability of the investment, such that the investor might have made the investment in ways that accorded with local law without any loss of projected profitability. This would indicate the good faith of the investor.<sup>758</sup>

297. It is clear from the above that Glencore Bermuda’s investment was made in accordance with the applicable legal framework in Bolivia and conducted pursuant to standard due diligence that would be required of any investor in its position. The Tribunal should therefore reject Bolivia’s request to decline jurisdiction in this case.

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<sup>756</sup> Second Witness Statement of Christopher Eskdale, para 58.

<sup>757</sup> R Moloo and A Khachaturian, “The Compliance with the Law Requirement in International Law” (2011) Vol 34 Fordham International Law Journal 1473, **RLA-24**, pp 26-27.

[G]ood faith mistakes in relation to the investment should not have the disproportionate effect of precluding a claimant from the benefits of treaty protection.

<sup>758</sup> *Ibid*, p 25 (citing *Fraport v Philippines*).

**4. Bolivia authorized Glencore Bermuda's investment and should thus be precluded from invoking illegality as a defense**

298. Bolivia's claims of illegality are to be dismissed because they are entirely inconsistent with its own prior conduct. Prior to Glencore Bermuda's acquisition, Bolivia did not express any concerns over the validity of Glencore Bermuda's investment due to the legality of the privatization. In fact, Bolivia allowed private investors to hold and operate the Assets for seven to twelve years (depending on the date of nationalization of each Asset), receiving monetary contributions from Glencore Bermuda (in taxes, royalties, etc), in addition to the consideration for each Asset).<sup>759</sup>
299. Moreover, Bolivia knew that the Assets would be acquired by the Glencore group<sup>760</sup> and, instead of raising concerns about the illegality of their privatization, the government encouraged it to make investments in the country, which Glencore continued to do.<sup>761</sup> After the acquisition, Bolivia maintained a commercial relationship with Glencore Bermuda and its affiliates for several years<sup>762</sup> and even negotiated the increase in royalty payments under the Colquiri Lease.<sup>763</sup> It was only after a number of years, when it was politically convenient and metal prices were rising, that Bolivia asserted that the original privatization was unlawful.<sup>764</sup>
300. As a result, Bolivia is now estopped from objecting to the jurisdiction of the

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<sup>759</sup> See Statement of Claim, paras 27-31.

<sup>760</sup> Bolivia was also notified of the change in Comsur's ownership to Glencore numerous times. See Section II.C. See also Letter from Comsur (Sinchi Wayra) to COMIBOL, 17 February 2005, **R-189**; Letter from Comsur (Mr Urjel) to Comibol (Mr Tamayo), 3 March 2005, **C-206**.

<sup>761</sup> First Witness Statement of Christopher Eskdale, para 18; "Una poderosa minera activa de bolsa," *Nueva Economía*, 13 July 2008, **R-178**, p 1.

<sup>762</sup> See Section II.C.

<sup>763</sup> Letter from Comsur (Mr Urjel) to Comibol (Mr Tamayo), 23 March 2005, **C-210**; Letter from Comibol (Mr Tamayo) to Comsur (Mr Urjel), 30 March 2005, **C-211**; Addendum to the Colquiri Lease, 11 November 2005, **C-12**.

<sup>764</sup> See First Witness Statement of Christopher Eskdale, paras 40-41, 52; Request for written report from Senator Velásquez, 30 November 2006, **C-68**; Letter from the Vice Minister of Mining (Mr Gutiérrez) to Glencore (Mr Capriles), 17 January 2005, **C-63**.

Tribunal on the basis of allegations of illegal acts supposedly conducted by its own State officials. Estoppel is an established principle of international law, recognized and applied by investment treaty tribunals.<sup>765</sup> The principle has been described by one investment tribunal as operating “to prohibit a State from taking actions or making representations which are contrary to or inconsistent with actions or representations it has taken previously to the detriment of another.”<sup>766</sup>

301. On the basis of this principle, in the *Shufeldt* case, the United States’ argued that “the Guatemala Government having recognized the contract for six years and received all the benefits [...] and allowed Shufeldt to go on spending money on the concession, is precluded from denying its validity” and the arbitrator described this position as “sound and in keeping with the principles of international law.”<sup>767</sup>
302. Indeed, investment tribunals have repeatedly applied this rule to prevent respondent States from challenging the legality of an investment by reference to previous unidentified violations of their own law. In *ADC v Hungary*, for example, the tribunal discarded Hungary’s contention that the agreements

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<sup>765</sup> See eg, *Copper Mesa Mining Corporation v Republic of Ecuador* (PCA Case No 2012-2) Award, 15 March 2016, **CLA-221**, paras 5.63-64; *Case concerning the Temple of Preah Vihear (Cambodia/Thailand)* Judgment on Merits [1962] ICJ Reports 6, 15 June 1962, **CLA-137**, pp 61-65. See also *Frederica Lincoln Riahi v The Islamic Republic of Iran*, Concurring and Dissenting Opinion of Assadollah Noori (2003), Iran-US Claims Tribunal Case No 485 (600-485-1), 18 September 2003, **CLA-152**, paras 41-43.

<sup>766</sup> *Duke Energy International Peru Investments No 1, Ltd v Republic of Peru* (ICSID Case No ARB/03/28) Award, 18 August 2008, **CLA-177**, para 231. Similarly, the international law principle of *venire contra factum proprium* – also recognized under Bolivian law as (*doctrina de los actos propios*) – provides that no party is entitled to issue a legal claim which belies its own prior conduct, particularly in circumstances where that conduct, objectively construed, justifies reliance by the other party; see KH Böckstiegel, *Arbitration and State Enterprises, Survey on the National and International State of Law of Practice* (1984), **CLA-139**, para 5.6.1. See also Constitutional Tribunal, Constitutional Decision No 0116/2015-S3, 20 February 2015, **C-270**, p 12 (providing that “the acts [of the Administration] cannot be discretionally ignored and be given no effect by the same administration; this is, that situations that generated legal consequences are discretionally ignored by subsequent actions”) (unofficial English translation from Spanish original).

<sup>767</sup> The Shufeldt Claim (*US v Guatemala*) (24 July 1930) 2 RIAA 1079, **CLA-135**, p 17.

underlying the claimant's investment were unenforceable under domestic law because the claimant had concluded certain contracts illegally and observed that:

Almost all systems of law prevent parties from blowing hot and cold. If any of the [agreements] were illegal or unenforceable under Hungarian law one might have expected the Hungarian Government or its entities to have declined to enter into such an agreement [...] it lies ill in the mouth of Hungary now to challenge the legality and/or enforceability of these [a]greements. These submissions smack of desperation [...] Hungary cannot now go behind these [a]greements. They are prevented from doing so by their own conduct.<sup>768</sup>

303. Similarly, in *Fraport*, the tribunal held that the host State was not permitted to rely on breaches of local law to strike out the investor's claim when "it knowingly overlooked them and endorsed an investment which was not in compliance with its law."<sup>769</sup> Indeed, Bolivia's own case law confirms this position:

There are certain circumstances where a host state should be precluded from raising the illegality of the investment to avoid the jurisdiction of the tribunal. Estoppel, generally viewed as a principle of international law, is one such circumstance. Affirmations or declarations by a state party are binding on it and

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<sup>768</sup> See *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 475. See also B Cheng, *General Principles of Law as Applied by International Court and Tribunals* (1st edn 1953) (Extract), 2006, **CLA-163**, pp 141-142, quoting the judgment of Wilde B in *Cave v Mills* (1862) 7 H & N 913, 927; 158 ER 740, 747 ("[i]t is a principle of good faith that 'a man shall not be allowed to blow hot and cold – to affirm at one time and deny at another [...] Such a principle has its basis in common sense and common justice, and whether it is called "estoppel," or by any other name, it is one which courts of law have in modern times most usefully adopted'").

<sup>769</sup> *Fraport v Philippines* (ICSID Case No ARB/03/25) Award, 16 August 2007, **CLA-174**, para 346. See also *Gustav F W Hamster GmbH & Co KG v The Republic of Ghana* (ICSID Case No ARB/07/24) Award, 18 June 2010, **RLA-84**, para 127; *Desert Line Projects LLC v The Republic of Yemen* (ICSID Case No ARB/05/17) Award, 6 February 2008, **RLA-119**, para 104; *Metalpar SA y Buen Aire SA v Argentine Republic* (ICSID Case No ARB/03/5) Decision on Jurisdiction, 27 April 2006, **CLA-164**, para 84 (where the tribunal noted that it would be disproportionate to deny the investor's access to ICSID arbitration for lack of timely registrations that could be sanctioned by the host state in accordance with its laws); *TSA Spectrum de Argentina SA v Argentine Republic* (ICSID Case No ARB/05/5) Award, 19 December 2008, **RLA-29**, para 173 (where the tribunal noted that "[...] the extreme reticence that arbitral tribunals display in granting jurisdictional objections on grounds of claimed illegality.").

entitle reliance by other parties, making it all but impossible for the state to then reverse those actions or its consequences.<sup>770</sup>

[...]

Similarly, an affirmative statement by the government ratifying the actions of the investor may lead a tribunal to conclude that there was no violation of the law in the first place.<sup>771</sup>

304. Affirmations that a contract is valid, made by entities empowered to exercise governmental authority, create a legitimate expectation on the part of the investor that those agreements are indeed valid.<sup>772</sup> In *Southern Pacific Properties v Egypt*, the tribunal rejected Egypt's argument that the acts of Egyptian officials upon which the investor had relied were in fact "legally non-existent or absolutely null and void" under Egyptian law:<sup>773</sup>

It is possible that under Egyptian law certain acts of Egyptian officials, including even Presidential Decree No. 475, may be considered legally nonexistent or null and void or susceptible to invalidation. However, these acts were cloaked with the mantle of Governmental authority and communicated as such to foreign investors who relied on them in making their investments.

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<sup>770</sup> R Moloo and A Khachaturian, "The Compliance with the Law Requirement in International Law" (2011) Vol 34 Fordham International Law Journal 1473, **RLA-24**, p 27, citing Part I.C. MacGibbon, Estoppel in International Law, 7 Int'l & Comp. L.Q. 468, 512 (1958) and Legal Status of Eastern Greenland, Judgment (Den. V. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, para 186 (Apr. 5).

<sup>771</sup> *Ibid*, p 28, citing *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No. ARB/07/16) Award, 20 October 2010, para 302.

<sup>772</sup> This analysis applies even if the State officials are acting *ultra vires*. Article 7 of the ILC Articles on State Responsibility provides that even in cases where an entity is empowered to exercise governmental authority acts *ultra vires* of it, the conduct in question is nevertheless attributable to the State. See International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, reproduced in J Crawford, *The International Law Commission's Articles on State Responsibility* (1st edn 2002) (Extract), 2007, **CLA-171**, Art 7, p 5.

Tribunals have applied this principle of attribution to find that States cannot avoid the legal effect of obligations entered into by their officials, even if such acts were illegal, where "these acts were cloaked with the mantle of Governmental authority and communicated as such to foreign investors who relied on them in making their investments." *Ioannis Kardassopoulos v Georgia* (ICSID Case No ARB/05/18) Decision on Jurisdiction, 6 July 2007, **CLA-69**, paras 189-194.

<sup>773</sup> *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No ARB/84/3) Award on the Merits, 20 May 1992, **CLA-18**, para 81.

Whether legal under Egyptian law or not, the acts in question were the acts of Egyptian authorities, including the highest executive authority of the Government. These acts, which are now alleged to have been in violation of the Egyptian municipal legal system, created expectations protected by established principles of international law. A determination that these acts are null and void under municipal law would not resolve the ultimate question of liability for damages suffered by the victim who relied on the acts.<sup>774</sup>

305. The tribunal in *CTC v Congo* made similar findings to reject Congo's allegation and counterclaim that CTC's contract was void since it had been awarded without undergoing a competitive tender process. Congo alleged that the appropriate government officials had not given the proper consents in accordance with French and Congolese law. However the tribunal rejected this argument, recognizing that the highest Congolese government authorities had contemporaneously endorsed the contract:

[E]ven if this evidence [of Congolese ministers having violated the law when awarding the contract] had been reported, this argument would collide with the well-established principle of international arbitration prohibiting a party from contradicting itself to the detriment of others. The Democratic Republic of Congo cannot, *a posteriori*, try to free itself from a contract, which now, it considers unhelpful, inoperative or unequal, when there is no doubt that it was approved by the highest authorities of the State (see the public announcements which were made at the time [...]).<sup>775</sup>

306. Similarly in the present case, the State officials who executed the contracts for the privatization of the Assets,<sup>776</sup> the Trade Minister<sup>777</sup> and the Executive President of

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<sup>774</sup> *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No ARB/84/3) Award on the Merits, 20 May 1992, **CLA-18**, paras 82-83.

<sup>775</sup> *Customs and Tax Consultancy LLC (CTC) (United States) v Democratic Republic of Congo* (ICC Case No 19515/MCP) Partial Award, 22 July 2015, **CLA-219**, para 109 (unofficial English translation from French original).

<sup>776</sup> The sale and purchase agreement of the Tin Smelter was also signed by the President of the Board of EMV, who was duly authorized to do so. See Tin Smelter Purchase Agreement, 17 July 2001 and 4 July 2001, **C-7**, Clause 1.3.

<sup>777</sup> The Trade Ministry was legally authorized to carry out all activities related to any privatization process of a public company and expressly authorized the privatization of the Assets. Law 1,788,

Comibol,<sup>778</sup> were authorized and instructed to do so under Bolivian law. As explained before, in entering into the privatization contracts of the Tin Smelter, the Antimony Smelter and the Colquiri Lease, the State officials expressly warranted that Comibol had complied with all necessary requirements under Bolivian law to sell the Smelters and sign the lease of the Colquiri Mine.<sup>779</sup>

307. Bolivia's representations and conduct created a legitimate expectation on the part of Glencore Bermuda that its investments fully complied with Bolivian law. Bolivia cannot now seek dismissal of the claims presented on the basis that the Assets were unlawfully privatized under Bolivian law.

\* \* \*

308. Bolivia has failed to meet its burden of proof. The belated allegations of illegality are devoid of substance and support. They are inconsistent with the representations and conduct of Bolivian authorities over the course of many years.

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16 September 1997, published in the *Gaceta Oficial* No 2,034 on 16 September 1997, **C-170**, Art 11; Resolution No 139/99, 24 June 1999, **C-59**.

<sup>778</sup> Comibol was constitutionally and legally authorized to manage the mining industry and privatize its assets. Its Board specifically authorized the privatization of the Assets and instructed its Executive President to sign each one of the contracts. Constitution of Bolivia, 1967, **R-03**, Art 138; Bolivian Mining Code Law 1,777, 17 March 1997, **R-4**, Arts 91, 93, 94; Resolution No 1753/99, 25 June 1999, **C-60**; Colquiri Lease, 27 April 2000, **C-11**, pp 5, 47-51; Tin Smelter Purchase Agreement, 17 July 2001 and 4 July 2001, **C-7**, Clause 1.2; Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**, Clause 1.2.

<sup>779</sup> *Ibid*, Clauses 13.2-13.3 (unofficial English translation from Spanish original):

13.2 That all measures and formalities required in the Republic of Bolivia have been adopted and fulfilled, as have been all the corporate formalities of an internal nature, that entitle and authorize the SELLER to sign, grant and fulfill the CONTRACT.

13.3 That [EMV] has obtained by law all rights and powers with respect to sale and has the legal power to dispose of the SMELTER, the ASSETS AND RIGHTS, which are duly consolidated, recognized, inscribed and registered when required, in accordance with the laws of the Republic of Bolivia, and thus for such purpose there is no limitation, prohibition, claim, complaint or similar restriction of any kind. [...] The SELLER has fulfilled all the obligations imposed by Bolivian laws to fully maintain in force its rights over the SMELTER, the ASSETS AND RIGHTS, including the payment of patents and applicable taxes. The SELLER has obtained the contractually and legally required authorizations to transfer to the PURCHASER the ASSETS AND RIGHTS.

Bolivia's attitude towards private investors in the mining industry may have changed with the sharp increase in metal prices as of early 2007, but political shifts cannot affect the legality of Glencore Bermuda's investment, nor can it allow Bolivia to avoid responsibility under the Treaty for violation of the guarantees made to it.

**E. BOLIVIA WAS DULY NOTIFIED OF ALL DISPUTES AND WAS GIVEN THE OPPORTUNITY TO RESOLVE THEM AMICABLY**

309. It is undisputed that both parties consented to arbitrate and that Glencore Bermuda duly notified Bolivia of the disputes under the Treaty arising from its unlawful conduct in taking over Vinto, Colquiri and the Antimony Smelter.<sup>780</sup> In fact, Bolivia does not contest that it was given the opportunity to amicably resolve these disputes.<sup>781</sup> However, Bolivia argues that Glencore Bermuda failed to notify its claims related to the taking of the Tin Stock in May 2010 and, as a result, Bolivia was “depriv[ed] [...] of the opportunity to reach an amicable resolution of

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<sup>780</sup> For details about how the requirements for jurisdiction and admissibility have been met *see* Statement of Claim, paras 133-137.

<sup>781</sup> Bolivia claims that it negotiated in good faith with Glencore Bermuda's parent company, Glencore International but that “Claimant did not partake in the Negotiations.” Statement of Defense, paras 230-231. This is misguided. Except for the period between February and December 2007, the correspondence included Glencore Bermuda. *See, eg*, Letter from Glencore International (Mr Strothotte) to the President of Bolivia (Mr Morales), 22 February 2007, **C-21** (sent by Mr Strothotte “[A]s President of Glencore International AG (Glencore) and representing its subsidiaries”) (unofficial English translation from Spanish original); Letter from Glencore Bermuda (Mr Kalmin and Mr Hubmann) to Ministry of the Presidency (Mr Quintana), 11 December 2007, **C-25** (sent by Glencore Bermuda); Power of Attorney from Glencore Bermuda, 11 December 2007, **C-90**; Letters from Glencore plc (Mr Maté and Mr Glasenberg) to the President of Bolivia (Mr Morales) and the Ministry of Mining (Mr Pimentel), 14 May 2010, **C-27** (sent “on behalf of Glencore International AG [...], Glencore Finance (Bermuda) Ltd [...] and their subsidiaries in Bolivia”) (unofficial English translation from Spanish original); Letter from Glencore International (Mr Maté) to the President of Bolivia (Mr Morales), 13 June 2012, **C-38bis** (sent “on behalf of Glencore International AG [...], Glencore Finance (Bermuda) Ltd [...] and their subsidiaries in Bolivia”) (unofficial English translation from Spanish original); Letter from Glencore plc (Mr Capriles) to the Minister of Mining (Mr Virreira), 3 July 2012, **C-145** (sent “on behalf of Glencore International plc, Glencore International AG, Glencore Finance (Bermuda) Ltd”).

those claims.”<sup>782</sup> As explained below, Bolivia’s objection is both wrong on the facts and wrong on the law.

310. It is undisputed that Article 8(1) of the Treaty merely requires “a written notification of a claim.” In fact, the requirements for a notice of dispute are minimal. As recognized by several tribunals including those in *Burlington v Ecuador*<sup>783</sup> (invoked by Bolivia),<sup>784</sup> *Salini v Morocco*,<sup>785</sup> *Alps Finance v Slovak Republic*<sup>786</sup> and *Bayindir v Pakistan*,<sup>787</sup> the key is “to provide the State with an opportunity to redress the dispute before the investor decides to submit the dispute to arbitration.”<sup>788</sup> This is exactly what happened in this case.
311. As demonstrated by the uncontroverted evidence on the record, Bolivia was not only notified, but repeatedly reminded of the Tin Stock claims, giving it ample opportunity to amicably resolve them for over six years before this arbitration was initiated.
- (a) On 4 May 2010, two days after Bolivia took control of the Antimony Smelter and Colquiri’s Tin Stock temporarily stored therein, Bolivia’s Mining Minister José Antonio Pimentel received a letter from Colquiri requesting the Minister to “instruct [EMV] to immediately return said tin concentrates to [Colquiri], as these do not relate to Decree No. 499 of 1 May 2010 [...]. In fact, that letter expressly stated that “[t]his letter may

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<sup>782</sup> Statement of Defense, para 404.

<sup>783</sup> *Burlington Resources Inc v Republic of Ecuador* (ICSID Case No ARB/08/5) Decision on Jurisdiction, 2 June 2010, **RLA-38**, para 312.

<sup>784</sup> Statement of Defense, para 402.

<sup>785</sup> *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco* (ICSID Case No ARB/00/4) Decision on Jurisdiction, 23 July 2001, **CLA-145**, para 20.

<sup>786</sup> *Alps Finance and Trade AG v Slovak Republic* (UNCITRAL) Award [Redacted], 5 March 2011, **RLA-11**, para 205 (citing *Burlington Resources Inc v Republic of Ecuador* (ICSID Case No ARB/08/5) Decision on Jurisdiction, 2 June 2010, **RLA-38**, paras 311-312).

<sup>787</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Decision on Jurisdiction, 14 November 2005, **CLA-60**, para 98.

<sup>788</sup> *Burlington Resources Inc v Republic of Ecuador* (ICSID Case No ARB/08/5) Decision on Jurisdiction, 2 June 2010, **RLA-38**, para 312.

not be interpreted as a waiver of rights available under Bolivian law and international law, nor an acceptance of the legality of the measures adopted [...].”<sup>789</sup>

- (b) The following day, on 5 May, Minister Pimentel received another letter from Glencore Bermuda’s local subsidiary “request[ing] a meeting as soon as possible to address the issue set out in our correspondence CMQ 049/2010 delivered to your Ministry on 4 May of this year, whereby we request the return of tin concentrates stored at the Vinto Antimony Plant. As stated in that letter, said concentrates are property of [Colquiri] and therefore do not form part of the Plant’s assets set out in Decree No. 499 of 1 May 2010.”<sup>790</sup> In fact, as a result of that second letter, on the same day, Minister Pimentel instructed EMV to return the tin concentrates to Colquiri.<sup>791</sup> However, this did not happen.
- (c) Hence, on 10 May, 19 May and 7 June, Bolivia’s Minister Pimentel and EMV received letters<sup>792</sup> from Glencore Bermuda’s local subsidiary stating that the Minister’s instruction to EMV to return the Tin Stock “ha[d] not been complied with” and requesting “restitution of the one hundred and sixty tonnes of tin concentrate located at the Vinto antimony smelter at the time of its nationalization, which we are willing to address during meetings held at your convenience, along with other issues pending for discussion. Notwithstanding, we wish to inform you that we have raised this issue with our local and international lawyers so that they may advise

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<sup>789</sup> Letter from Colquiri SA (Mr Capriles) to Minister of Mining (Mr Pimentel), 3 May 2010, **C-28** (emphasis added) (unofficial English translation from Spanish original).

<sup>790</sup> Letter from Colquiri (Mr Hartmann) to the Minister of Mining (Mr Pimentel), 5 May 2010, **C-98** (emphasis added) (unofficial English translation from Spanish original).

<sup>791</sup> See Letter from Ministry of Mining (Mr Pimentel) to EMV (Mr Villavicencio), 5 May 2010, **C-29**.

<sup>792</sup> Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel), 10 May 2010, **C-99**; Letter from Colquiri (Mr Capriles) to EMV (Mr Villavicencio), 19 May 2010, **C-100**; Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel), 7 June 2010, **C-101**.

on the proper legal measures to follow.”<sup>793</sup> Once again, Glencore Bermuda’s local subsidiary stated that “[t]his letter may not be interpreted as a waiver of rights available under Bolivian law and international law, nor an acceptance of the legality of the measures adopted by way of the Supreme Decree.”<sup>794</sup> Not surprisingly, Minister Pimentel and Minister Arismendi even told the press in late May that Glencore Bermuda’s subsidiaries were seeking the return of the Tin Stock.<sup>795</sup>

(d) However, on 8 June 2010 EMV took the position that the Tin Stock formed part of the nationalized Antimony Smelter’s inventory and its return would be addressed in the context of the negotiations to be held in relation to that nationalization.<sup>796</sup>

(e) Therefore, from that time onwards, as confirmed by Mr Eskdale, the return of the Tin Stock became part of Glencore Bermuda’s renewed negotiations with Bolivia following notification of the dispute concerning the taking of the Antimony Smelter.<sup>797</sup>

312. On the basis of these undisputed facts, by the time Glencore Bermuda filed its Notice of Arbitration on 19 July 2016, Bolivia was apprised of both the facts and the likely consequences of not settling the claims related to its taking of the Antimony Smelter and the Tin Stock on 2 May 2010. Bolivia was therefore fully

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<sup>793</sup> Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel), 7 June 2010, **C-101** (emphasis added) (unofficial English translation from Spanish original).

<sup>794</sup> Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel), 7 June 2010, **C-101** (emphasis added) (unofficial English translation from Spanish original). *See also* Letter from Colquiri (Mr Capriles) to EMV (Mr Villavicencio), 19 May 2010, **C-100**.

<sup>795</sup> “Glencore reclama propiedad de 150 toneladas de estaño,” *La Patria*, 20 May 2010, **C-242**, p 1 (“Colquiri [...] claims ownership of 150 tons of tin and asks for the return of the mineral stockpiled in the Vinto-antimony smelter, admitted mining minister José Pimental, saying that the matter should be discussed.”) (unofficial English translation from Spanish original).

<sup>796</sup> Letter from EMV (Mr Villavicencio) to Colquiri (Mr Capriles), 8 June 2010, **C-102**, p 2.

<sup>797</sup> First Witness Statement of Christopher Eskdale, para 69.

on notice of the Tin Stock claims six years prior to the filing of the Notice of Arbitration.

313. The evidence on the record, therefore, meets even the strictest view (which, as will be seen below, is a minority view) within the jurisprudence of the requirements of the Treaty’s notice and amicable settlement provisions. Glencore Bermuda afforded Bolivia “the opportunity to redress the dispute”<sup>798</sup> and to “allow negotiations between the parties which may lead to a settlement.”<sup>799</sup> This is precisely what Article 8 of the Treaty was designed to accomplish: to “avoi[d] [...] that a State be brought before an international investment tribunal all of a sudden, without being given the opportunity to discuss the matter with the other party”<sup>800</sup> and fulfilling “the policy function of conferring upon the State Party an opportunity to address a potential claimant’s complaint before it becomes a respondent in an international investment dispute.”<sup>801</sup> It therefore cannot be disputed that Glencore Bermuda satisfied the standard set by the *Salini v Morocco* tribunal that “the attempt to reach an amicable settlement should essentially include ‘the existence of grounds for complaint and the desire to resolve these matters out-of court’.”<sup>802</sup> Indeed, Glencore Bermuda’s efforts to consult and express its willingness to find an amicable solution with Bolivia exceeded that of many claimants that have been found by tribunals to satisfy this standard with lesser efforts.<sup>803</sup> In fact, even the tribunal in *Tulip v Turkey*<sup>804</sup> invoked by

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<sup>798</sup> *Alps Finance and Trade AG v Slovak Republic* (UNCITRAL) Award [Redacted], 5 March 2011, **RLA-11**, para 205 (citing *Burlington Resources Inc v Republic of Ecuador* (ICSID Case No ARB/08/5) Decision on Jurisdiction, 2 June 2010, **RLA-38**, paras 311-312).

<sup>799</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Decision on Jurisdiction, 14 November 2005, **CLA-60**, para 98.

<sup>800</sup> *Alps Finance and Trade AG v Slovak Republic* (UNCITRAL) Award [Redacted], 5 March 2011, **RLA-11**, para 209.

<sup>801</sup> *Tulip Real Estate and Development Netherlands BV v Republic of Turkey* (ICSID Case No ARB/11/28) Decision on Bifurcated Jurisdictional Issue, 5 March 2013, **RLA-39**, para 62.

<sup>802</sup> *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco* (ICSID Case No ARB/00/4) Decision on Jurisdiction, 23 July 2001, **CLA-145**, para 20.

<sup>803</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Decision on Jurisdiction, 14 November 2005, **CLA-60**, paras 98-102 (the tribunal

Bolivia<sup>805</sup> confirms this. In that case, the claimant had merely informed Turkey that it had an ongoing dispute with one of its wholly-owned companies and only indirectly referred to possible consequences arising under the relevant treaty.<sup>806</sup> However, the tribunal in *Tulip* retained jurisdiction even where the correspondence was “confusing” and “clearly did not employ the most perfect forms” because “what is required by [the relevant treaty] is to apprise the host State of the dispute as arising under the BIT and that the likely consequences if negotiation processes break down are proceedings before an international tribunal pursuant to the BIT.”<sup>807</sup>

314. The two other cases cited by Bolivia in support of its argument,<sup>808</sup> *Burlington v Ecuador* and *Rurelec v Bolivia*, are inapposite.
315. In *Burlington* the problem was quite different. There the claimants sought to include a dispute arising out of a second set of facts that were wholly unrelated to the facts that gave rise to the first dispute.<sup>809</sup> In this case, the claims all arise out of a single set of facts (Bolivia’s taking on 2 May 2010 of both the Antimony Smelter and the Tin Stock) which were clearly communicated to Bolivia.

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held that a claimant’s letter notifying the dispute satisfied that standard, noting the respondent’s failure to make any proposal to engage in negotiations following receipt of that notification); *Alps Finance and Trade AG v Slovak Republic* (UNCITRAL) Award [Redacted], 5 March 2011, **RLA-11**, para 208 (the tribunal held that this standard was satisfied by the claimant’s five letters to the respondent “in which the matter in dispute was identified and the claimant expressed its availability to settle it out-of-court with clarity”); *Mr Franck Charles Arif v Republic of Moldova* (ICSID Case No ARB/11/23) Award, 8 April 2013, **RLA-69**, para 339-340 (holding that standard was satisfied by a claimant sending “two formal letters to Respondent giving notice of the existence of a dispute and expressing his willingness to find an amicable solution with [the] [r]espondent”).

<sup>804</sup> *Tulip Real Estate and Development Netherlands BV v Republic of Turkey* (ICSID Case No ARB/11/28) Decision on Bifurcated Jurisdictional Issue, 5 March 2013, **RLA-39**, para 121.

<sup>805</sup> Statement of Defense, footnote 547.

<sup>806</sup> *Tulip Real Estate and Development Netherlands BV v Republic of Turkey* (ICSID Case No ARB/11/28) Decision on Bifurcated Jurisdictional Issue, 5 March 2013, **RLA-39**, paras 118-120.

<sup>807</sup> *Ibid.*, para 121.

<sup>808</sup> Statement of Defense, footnotes 547, 548.

<sup>809</sup> *Burlington Resources Inc v Republic of Ecuador* (ICSID Case No ARB/08/5) Decision on Jurisdiction, 2 June 2010, **RLA-38**, paras 307-308, 316.

316. Likewise, the *Rurelec* case is also not relevant to the circumstances here. In that case, the claimants also sought to include in the arbitration a dispute arising out of a second set of unrelated facts, which had not even been discussed during the negotiations with the respondent (in fact, it was argued for the first time only with the claimants' statement of claim).<sup>810</sup> This is very different from the situation at hand, where, as previously explained, the same set of facts (Bolivia's taking on 2 May 2010 of the Antimony Smelter and the Tin Stock) gives rise to both sets of claims. In fact, since Bolivia took the position in June 2010 that the return of the Tin Stock formed part of the nationalized Antimony Smelter's inventory, the Tin Stock claims became part of Glencore Bermuda's renewed negotiations with Bolivia.
317. If, contrary to the evidence, the Tribunal were to consider that there were two disputes here as Bolivia claims,<sup>811</sup> additional notice would not be required. Several tribunals have held that where disputes are related, separate notice of dispute is not required for each of them.<sup>812</sup> Indeed, Article 22 of the UNCITRAL

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<sup>810</sup> *Guaracachi America, Inc and Rurelec Plc v Plurinational State of Bolivia* (UNCITRAL) Award, 31 January 2014, **CLA-120**, paras 391, 398.

<sup>811</sup> Statement of Defense, para 400.

<sup>812</sup> For example, in *Teinver v Argentina*, the tribunal held that negotiations regarding a dispute relating to Argentina's regulatory treatment of the claimants' investments in two airlines was "closely related to" Argentina's expropriation of those airlines, and therefore sufficient to satisfy the six-month amicable settlement period of the underlying treaty for both sets of measures. *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentine Republic* (ICSID Case No ARB/09/1) Decision on Jurisdiction, 21 December 2012, **CLA-206**, para 125. The holding in *Teinver* was consistent with the ruling in *CMS v Argentina* and in *Swisslion v. of Macedonia* where the tribunals did not require separate notices of dispute despite the fact that the respondent States argued they had not had the opportunity to negotiate these claims because they were based on measures that occurred after the request for arbitration had been filed. In *CMS*, although the claimant had notified a claim related to a breach of the fair and equitable treatment standard of the relevant treaty, after the service of the request for arbitration Argentina passed a radical new law transforming the claim into one of expropriation. Nevertheless, the *CMS* tribunal held that "the disputes [were] not separate and independent and relate to the *same subject-matter*, [and therefore] it [was] immaterial whether the pertinent events occurred before or after the submission of the dispute to arbitration [...]." In *Swisslion*, the claimant challenged judgments rendered subsequent to the filing of its request for arbitration that related to its expropriation claim. The tribunal found that claims about those judgments did not require a separate request for amicable settlement. *CMS Gas Transmission Company v Republic of Argentina* (ICSID Case No ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction, 17

Rules provides that: “a party may amend or supplement its claim [...] unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstance [provided that it does not] fall[] outside the jurisdiction of the arbitral tribunal.”<sup>813</sup> Accordingly, even if the Tin Stock claims were to be considered a separate dispute from the claims arising out of the nationalization of the Antimony Smelter, as Bolivia now argues,<sup>814</sup> by consenting to UNCITRAL arbitration,<sup>815</sup> Bolivia recognizes that such ancilliary claims can be raised after initiation of an arbitration.

318. Finally, even if this Tribunal were to decide that Bolivia was not adequately notified of the Tin Stock claims, contrary to Bolivia’s allegations, the majority of tribunals that have considered the question do not believe that the failure to notify divests an investment treaty tribunal of its jurisdiction.<sup>816</sup>

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July 2003, **CLA-150**, paras 24, 125; *Swisslion DOO Skopje v Former Yugoslav Republic of Macedonia* (ICSID Case No ARB/09/16) Award, 6 July 2012, **CLA-203**, para 138.

<sup>813</sup> UNCITRAL Rules, Art 22.

<sup>814</sup> Statement of Defense, para 400.

<sup>815</sup> At the time the Treaty entered into force, the UNCITRAL Rules in effect (until 15 August 2010) also provided for the parties the possibility to amend or supplement their claim, the only limitation being that a claim “may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.” UNCITRAL Arbitration Rules, 1976, **CLA-08**, Art 20.

<sup>816</sup> *Abaclat and others v Argentine Republic* (ICSID Case No ARB/07/5) Decision on Jurisdiction and Admissibility, 4 August 2011, **CLA-197**, para 564–565; *Alps Finance and Trade AG v Slovak Republic* (UNCITRAL) Award [Redacted], 5 March 2011, **RLA-11**, para 204; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (ICSID Case No ARB/05/22) Award, 24 July 2008, **CLA-78**, para 343; *Bayindir Insaat Turizm Ticaret ve Sanayi AS v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Decision on Jurisdiction, 14 November 2005, **CLA-60**, para 100; *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (ICSID Case No ARB/01/13) Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, **CLA-151**, para 184; *Ronald S Lauder v Czech Republic* (UNCITRAL) Final Award, 3 September 2001, **CLA-147**, paras 187, 190–191; *Link-Trading Joint Stock Company v Department for Customs Control of Republic of Moldova* (UNCITRAL) Award on Jurisdiction, 16 February 2001, **CLA-144**, pp 5-6; *Wena Hotels Ltd v Arab Republic of Egypt* (ICSID Case No ARB/98/4) Summary Minutes of the Session of the Tribunal, 25 May 1999, **CLA-143**, p 11; *Franz J Sedelmayer v Russian Federation* (SCC) Arbitration Award, 7 July 1998, **CLA-141**, p 86.

319. As explained above, Bolivia’s position that it was “deprived” of an opportunity to “reach an amicable resolution” of the Tin Stock claims is disingenuous. Bolivia has done nothing in over a decade to settle any of the claims, even though it admits it was properly notified by the notices of dispute related to the nationalization of Colquiri, Vinto or the Antimony Smelter. Similarly, it has done nothing since Glencore Bermuda’s Notice of Arbitration<sup>817</sup> to settle the claims related to the taking of the Tin Stock on 2 May 2010. It is thus clear that Bolivia has had ample opportunity to settle all of these claims and that its arguments only aim to impede and obstruct these arbitration proceedings. Dismissing the Tin Stock claims and forcing Glencore Bermuda back into amicable settlement talks would be an absurd outcome, and the Tribunal should reject it.

**F. GLENCORE BERMUDA’S CLAIMS ARE BASED ON THE TREATY – NOT ON CONTRACT**

320. In the Statement of Claim, Glencore Bermuda described how Bolivia nationalized its investments in Colquiri, Vinto, the Antimony Smelter and the Tin Stock without providing compensation.<sup>818</sup> In particular, Glencore Bermuda explained how these nationalizations were announced by President Morales<sup>819</sup> and Presidency Minister Coca,<sup>820</sup> and how Bolivia took physical control over the Tin Smelter, the Antimony Smelter and the Tin Stock, even using its armed forces.<sup>821</sup> Glencore Bermuda noted that three nationalization decrees were issued.<sup>822</sup> Additionally, Glencore Bermuda explained how Bolivia failed to physically protect its investment in Colquiri against violent interference from the local

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<sup>817</sup> Glencore Bermuda’s Notice of Arbitration was filed on 19 July 2016.

<sup>818</sup> Statement of Claim, Section II.E.

<sup>819</sup> “Evo Morales anuncia más nacionalizaciones para este año en Bolivia,” *ABC*, 22 January 2007, **C-19**. First Witness Statement of Christopher Eskdale, para 42. Statement of Claim, para 65.

<sup>820</sup> Statement of Claim, paras 78-79.

<sup>821</sup> Photos of the Tin Smelter Nationalization, 9 February 2017, **C-70**, pp 2-6.

<sup>822</sup> Tin Smelter Nationalization Decree, 7 February 2007, **C-20**; Antimony Smelter Nationalization Decree, 1 May 2010, **C-26**; Colquiri Mine Nationalization Decree, 20 June 2012, **C-39**.

cooperatives, despite the repeated requests made for help.<sup>823</sup> Glencore Bermuda, however, raised no claims of contractual breach at any point in its Statement of Claim.

321. Nevertheless, Bolivia argues that Glencore Bermuda's claims "ultimately arise out of and concern the validity, compliance with, and fulfilment of the Tin Smelter, Antimony Smelter, and Colquiri Lease contracts."<sup>824</sup> Thus, Bolivia argues that the disputes over the unlawful conduct in taking over Vinto, Colquiri and the Antimony Smelter are subject to mandatory ICC arbitration clauses included in the contracts for the Tin Smelter, Antimony Smelter and Colquiri Lease.<sup>825</sup> Bolivia is wrong.
322. As a result of the fundamental distinction between treaty and contract claims, tribunals have held that an exclusive forum selection clause in a contract cannot deprive an investment treaty tribunal of its jurisdiction over treaty claims.<sup>826</sup> The *only* pertinent question for jurisdiction, is whether, on a *prima facie* basis, if

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<sup>823</sup> Statement of Claim, paras 92-97.

<sup>824</sup> Statement of Defense, para 385.

<sup>825</sup> *Ibid*, Section 4.5.

<sup>826</sup> *SGS Société Générale de Surveillance SA v Republic of Paraguay* (ICSID Case No ARB/07/29) Decision on Jurisdiction, 12 February 2010, **CLA-187**, paras 125, 128; *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentine Republic and AWG Group Ltd v Argentine Republic* (ICSID Case No ARB/03/19) Decision on Jurisdiction, 3 August 2006, **CLA-167**, paras 41-45; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No ARB/04/13) Decision on Jurisdiction, 16 June 2006, **CLA-165**, paras 132-133; *Eureko BV v Republic of Poland* (Ad Hoc) Partial Award and Dissenting Opinion, 19 August 2005, **CLA-161**, paras 92-114; *Impregilo SpA v Islamic Republic of Pakistan* (ICSID Case No ARB/03/3) Decision on Jurisdiction, 22 April 2005, **CLA-159**, paras 286-290; *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12) Decision on Jurisdiction, 8 December 2003, **CLA-153**, paras 75-85; *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (ICSID Case No ARB/01/13) Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, **CLA-151**, paras 146-155; *CMS Gas Transmission Company v Republic of Argentina* (ICSID Case No ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, **CLA-150**, paras 70-76; *Compañía de Aguas del Aconquija SA and Vivendi Universal* (formerly Compagnie Générale des Eaux) *v Argentine Republic* (ICSID Case No ARB/97/3) Decision on Annulment, 3 July 2002, **CLA-37**, para 101.

- Glencore Bermuda's allegations are true, they could constitute a breach of the Treaty's provisions.<sup>827</sup>
323. It is clear that Bolivia's jurisdictional objection is meritless from the case law on which it relies.<sup>828</sup> As explained below, all the cases that Bolivia cites support the well-established proposition that the forum selection clauses in contracts do not bar the Tribunal's jurisdiction to hear treaty claims, including umbrella clause claims.
324. For example, in *SGS v Philippines*, cited by Bolivia,<sup>829</sup> the tribunal found that it did have jurisdiction over treaty claims such as the FET and umbrella clause claims (for failure by the Philippines to pay amounts owed under contract) despite the presence of a forum selection clause in the underlying contract. According to the *SGS v Philippines* tribunal, a forum selection clause in a contract could not preclude jurisdiction over treaty claims.<sup>830</sup>
325. Similarly, in *BIVAC v Paraguay*, another case relied on by Bolivia, the tribunal accepted jurisdiction over treaty claims despite the exclusive jurisdiction clause, noting that "[i]t is well established that there is a significant distinction to be drawn between a treaty claim and a contract claim, even if there may be significant interplay between the underlying factual issues" and that "[t]he issue of fair and equitable treatment, and related matters, was not one which the parties to the Contract agreed to refer to the exclusive jurisdiction of the [domestic

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<sup>827</sup> *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12) Decision on Jurisdiction, 8 December 2003, **CLA-153**, para 76; *Helnan International Hotels A/S v Arab Republic of Egypt* (ICSID Case No ARB/05/19) Award, 7 June 2008, **CLA-176**, paras 102-104; *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Decision on Jurisdiction, 3 August 2004, **CLA-51**, para 180.

<sup>828</sup> Statement of Defense, paras 389-392.

<sup>829</sup> *Ibid.*, para 389.

<sup>830</sup> *SGS Société Générale de Surveillance SA v The Republic of the Philippines* (ICSID Case No ARB/02/6) Decision on Objections to Jurisdiction, 29 January 2004, **RLA-32**, paras 154, 162-163.

courts].”<sup>831</sup> In fact, the *BIVAC* tribunal also accepted jurisdiction over the umbrella clause claim finding that the umbrella clause “gives the Tribunal jurisdiction over a claim that arises from or is produced directly in relation to the Contract.”<sup>832</sup>

326. Bolivia even scours international jurisprudence as far back as the 1903-1905 *Woodruff* case to support its claim.<sup>833</sup> But *Woodruff* is wholly inapposite to the case at hand. Crucially, *Woodruff* did not involve any claims concerning Venezuela’s liability for sovereign acts under international law.<sup>834</sup> Moreover, it emphasized that a forum selection clause in a contract could not prevent espousal of a claim under international law.<sup>835</sup>

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<sup>831</sup> *Bureau Veritas Inspection Valuation Assessment and Control BIVAC BV v The Republic of Paraguay* (ICSID Case No ARB/07/9) Decision on Objections to Jurisdiction, 29 May 2009, **RLA-36**, para 127. Similarly, in *Toto v Lebanon* (another case relied on by Bolivia), the tribunal stressed that “the contractual jurisdiction clause [...] cannot exclude the jurisdiction of the Tribunal for claims based upon Articles 2, 3 and 4 of the [Italy-Lebanon] Treaty.” See *Toto Costruzioni Generali SpA v The Republic of Lebanon* (ICSID Case No ARB/07/12) Decision on Jurisdiction, 11 September 2009, **RLA-33**, para 213 (emphasis added).

<sup>832</sup> *Bureau Veritas Inspection Valuation Assessment and Control BIVAC BV v The Republic of Paraguay* (ICSID Case No ARB/07/9) Decision on Objections to Jurisdiction, 29 May 2009, **RLA-36**, para 142. The *Bosh v. Ukraine* tribunal’s *obiter dicta* views on umbrella clause claims invoked by Bolivia are also inapposite to the case at hand. The *Bosh* tribunal specifically noted that “that the question whether the Claimants can submit contractual claims under the umbrella clause [...] will depend on an analysis of the contractual forum selection provision in question.” The forum selection clause in *Bosh* provided broadly that “[a]ll disputes between the Parties in connection to which no agreement has been reached shall be settled in accordance to the Ukrainian legislation.” See *Bosh International Inc and B&P Ltd Foreign Investments Enterprise v Ukraine* (ICSID Case No ARB/08/11) Award, 25 October 2012, **RLA-37**, paras 249-250, 254-255 (emphasis added). In contrast, the forum selection clauses in the Contracts are all restricted to questions arising solely out of the “validity, interpretation, scope and/or compliance with the CONTRACT.” (unofficial English translation from Spanish originals). See Tin Smelter Purchase Agreement, 17 July 2001 and 4 July 2001, **C-7**, Clause 15; Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**, Clause 15; Colquiri Lease, 27 April 2000, **C-11**, Clause 17.

<sup>833</sup> Statement of Defense, footnote 526.

<sup>834</sup> *Woodruff* concerned a claim by a bondholder against Venezuela for payment of bonds that had been issued by a railroad corporation. Venezuela had later acquired the rights of the railroad company and the question at hand was whether, having neither issued nor endorsed the bonds, Venezuela had acquired the obligation to pay the bonds. Opinion of American Commissioner, “Woodruff Case” [1903-1905-IX] Reports of International Arbitral Awards, **RLA-35**, pp 220-222.

<sup>835</sup> *Ibid*, p 222. Similarly, the mixed claims commission in the 1926 *North American Dredging* case invoked by Bolivia found that a forum selection clause in a contract (ie a Calvo clause) did not prevent claims for “internationally illegal act[s].” See General Claims Commission, “North

327. That is why, relying on *Woodruff*, the *Vivendi I* annulment committee stated the well-established proposition under international law that the existence of an exclusive jurisdiction clause cannot bar application of the treaty when the treaty is the fundamental basis of the claim:

[W]here “the fundamental basis of the claim” is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard. [...] A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty.<sup>836</sup>

328. Yet, Bolivia here seeks to do exactly what *Vivendi I* proscribes. Bolivia wrongly relies on the exclusive jurisdiction clauses in the Tin Smelter, Antimony Smelter and Colquiri Lease contracts in an attempt to avoid the characterization of its conduct as internationally unlawful under the Treaty.<sup>837</sup>

329. Glencore Bermuda’s claims directly rely on the Treaty’s provisions prohibiting expropriations without just, effective and prompt compensation, as well as the provisions requiring Bolivia to afford fair and equitable treatment, full protection and security and respect of the obligations assumed towards Glencore Bermuda’s investments. Bolivia cannot seek to avoid its international obligations under the Treaty by labelling this dispute as contractual. Plainly, the dispute has nothing to do with “the validity, interpretation, [and] scope” of the Tin Smelter, Antimony

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American Dredging Company of Texas (USA) v United Mexican States” [1926-IV] Reports of International Arbitral Awards, **RLA-34**, paras 11, 14.

<sup>836</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic* (ICSID Case No ARB/97/3) Decision on Annulment, 3 July 2002, **CLA-37**, paras 101-103 (emphasis added) (internal footnotes omitted). *See also Eureka BV v Republic of Poland* (Ad Hoc) Partial Award and Dissenting Opinion, 19 August 2005, **CLA-161**, para 112; *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentine Republic and AWG Group Ltd v Argentine Republic* (ICSID Case No ARB/03/19) Decision on Jurisdiction, 3 August 2006, **CLA-167**, paras 43-44.

<sup>837</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic* (ICSID Case No ARB/97/3) Decision on Annulment, 3 July 2002, **CLA-37**, para 103.

Smelter and Colquiri Lease contracts. Bolivia's wrongful acts arise from its exercise of sovereign power.<sup>838</sup> These allegations must be accepted *prima facie* for jurisdictional purposes. Whether Bolivia did, in fact, breach the Treaty is a question for the merits. As Glencore Bermuda has demonstrated, there is simply no doubt as to Bolivia's unlawful conduct under the Treaty.<sup>839</sup>

330. In fact, Bolivia itself claims that the purported "reversions" were carried out for a public purpose<sup>840</sup> and amounted to "valid exercises of its police powers, taken to enforce the law, public order, and safety within its territory."<sup>841</sup> Bolivia cannot tenably argue that its actions amount to justified exercises of sovereign authority and, *at the same time*, claim that their validity is subject to mandatory contractual arbitration.<sup>842</sup> If Bolivia truly believed that the instant disputes were governed by mandatory ICC arbitration clauses it should have challenged any purported acts or omissions of Glencore Bermuda's subsidiaries in accordance to the Contracts.<sup>843</sup>

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<sup>838</sup> See Section II.D and Section V.

<sup>839</sup> *Ibid.*

<sup>840</sup> Statement of Defense, Section 2.6.

<sup>841</sup> *Ibid.*, para 444.

<sup>842</sup> In this vein, in *Toto v Lebanon* (a case cited by Bolivia), the tribunal found that an exclusive jurisdiction clause could not bar claims where the State was "act[ing] in the context of the performance of the contract as a '*puissance publique*.'" See *Toto Costruzioni Generali SpA v The Republic of Lebanon* (ICSID Case No ARB/07/12) Decision on Jurisdiction, 11 September 2009, **RLA-33**, para 215.

<sup>843</sup> Colquiri Lease, 27 April 2000, **C-11**, Clause 17 (unofficial English translation from Spanish original):

All disagreements, disputes, disputes, disputes and/or differences that arise between the parties to the CONTRACT that have a direct or indirect relationship with the validity, interpretation, scope and/or compliance of the CONTRACT will be resolved by the parties as follows:

17.1 In a friendly manner and through direct negotiation between them.

17.2 In the event that an agreement cannot be reached through direct negotiation, the parties may request any conciliation procedure [...].

17.3 If the parties do not reach full agreement through the conciliation procedure agreed upon above, all disagreements, conflicts, disputes, disputes and / or pending differences will be resolved and resolved through an arbitration process.

331. Instead of complying with the contractual dispute resolution clauses, Bolivia issued irrevocable sovereign “reversions” of the Assets by Decree for its own benefit. The fact that Bolivia did not take the course of action prescribed by the Contracts only underscores that this new jurisdictional objection is without merit.
332. Indeed, when facing an objection similar to the one Bolivia makes here, the tribunal in *Parkerings v Lithuania* held that “the [c]laimant is alleging [a] treaty violation and there is nothing convincing in the record that may lead to the suspicion of the [c]laimant having disguised contract claims with [t]reaty claims for the benefit of jurisdiction. Whether the [r]espondent did in fact violate the

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Tin Smelter Purchase Agreement, 17 July 2001 and 4 July 2001, **C-7**, Clause 15(unofficial English translation from Spanish original):

All disagreements, disputes, disputes, disputes and / or differences that arise between the parties to the CONTRACT that have a direct or indirect relationship with the validity, interpretation, scope and / or compliance of the CONTRACT will be resolved by the parties as follows:

15.1 In a friendly manner and through direct negotiation between them.

15.2 In the event that an agreement cannot be reached through direct negotiation, the parties may request any conciliation procedure [...].

15.3 If the parties do not reach full agreement through the conciliation procedure agreed upon above, all parties disagreements, conflicts, disputes, controversies and / or pending differences of solution will be submitted and will be solved through an arbitration process.

Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**, Clause 15 (unofficial English translation from Spanish original):

All disagreements, disputes, disputes, disputes and / or differences that arise between the parties to the CONTRACT that have a direct or indirect relationship with the validity, interpretation, scope and / or compliance of the CONTRACT will be resolved by the parties as follows:

15.1 In a friendly manner and through direct negotiation between them.

15.2 In the event that an agreement cannot be reached through direct negotiation, the parties may request a conciliation procedure [...].

15.3 If the parties do not reach full agreement through the conciliation procedure agreed upon above, all parties Disagreements, conflicts, disputes, controversies and / or pending differences of solution will be submitted and will be solved through an arbitration process.

[t]reaty (or the international law) is a matter of substance and merit rather than of jurisdiction.”<sup>844</sup> This Tribunal should hold the same.

## V. **BOLIVIA BREACHED ITS OBLIGATIONS UNDER THE TREATY AND INTERNATIONAL LAW**

333. Bolivia has breached its obligations under the Treaty through a series of omissions and measures taken by its central Government and other State authorities, including the Ministry of Mining, Ministry of the Presidency, Ministry of Government, Ministry of Economy, Ministry of Legal Defense, and Comibol. The actions of these State organs are attributable to Bolivia.<sup>845</sup>

334. In summary:

- (a) as described in Section V.A below, Bolivia seized the Tin Smelter, Antimony Smelter, the Tin Stock and the Colquiri Lease, and in so doing it completely destroyed the value and benefits of Glencore Bermuda’s shareholding in Colquiri and Vinto. Bolivia has refused to compensate Glencore Bermuda for these takings. Each expropriation was unlawful and in violation of Article 5 of the Treaty due to a lack of prompt compensation and due process; and

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<sup>844</sup> *Parkerings-Compagniet AS v Republic of Lithuania* (ICSID Case No ARB/05/8) Award, 11 September 2007, **RLA-83**, para 259.

<sup>845</sup> International Law Commission, “Draft articles on Responsibility of States for Internationally Wrongful Acts with commentary” [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, arts 4, 5. Comibol is a “public, autarchic company dependent on the National Secretariat of Mining” and subject to State control. Bolivian Mining Code Law 1,777, 17 March 1997, **R-4**, Art 91; Supreme Decree No 29,894, 7 February 2009, published in the *Gaceta Oficial* No 116, **C-96**, Art 75(h) (“The functions of the Ministry of Mining and Metallurgy, with respect to the competences assigned at the central level by the Political Constitution of the State, are the following: [...] h. Exercise tuition over the national autarchic mining and metallurgical company, smelting companies, metallurgical companies, iron and steel works companies and entities providing services and assistance for the mining sector.”) (unofficial English translation from Spanish original) (emphasis added).

(b) as described in Sections V.B and V.C below, the way the Tin Smelter, Antimony Smelter, the Tin Stock and the Colquiri Lease were seized also amounts to breaches by Bolivia of Article 2(2) of the Treaty, in particular:

(i) Bolivia failed to accord Glencore Bermuda’s investments full protection and security, including by breaching its obligations to Glencore Bermuda pursuant to the Treaty’s umbrella clause; and

(ii) Bolivia failed to accord Glencore Bermuda’s investments fair and equitable treatment, and to protect it from arbitrary and discriminatory measures.

335. We address each of these claims in detail in the sections below.

**A. BOLIVIA UNLAWFULLY EXPROPRIATED GLENCORE BERMUDA’S INVESTMENTS**

336. Bolivia does not dispute the expropriation standard under the Treaty.<sup>846</sup> Nor does it deny that it seized the assets of Colquiri and Vinto (*ie*, the Tin Smelter, the Antimony Smelter, the Colquiri Lease and the Tin Stock),<sup>847</sup> entirely depriving Glencore Bermuda of the value of its shares in Colquiri and Vinto and its control of the activities of those investments as well as title to the Assets.

337. Instead, Bolivia claims that, “to prove an expropriation, it is also necessary to show that the impugned measures were not valid exercises of police powers.”<sup>848</sup> It then claims that Glencore Bermuda’s investments were *reverted* in a “valid exercis[e] of [Bolivia’s] police powers [...] to enforce law, public order, and safety within its territory.”<sup>849</sup> As a result, Bolivia argues that it does not need to comply with the Treaty obligations concerning expropriation.<sup>850</sup> Subsidiarily,

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<sup>846</sup> Statement of Defense, paras 478-547.

<sup>847</sup> *Ibid*, paras 9-10, 159, 166-167, 222.

<sup>848</sup> *Ibid*, para 447.

<sup>849</sup> *Ibid*, para 444.

<sup>850</sup> *Ibid*, paras 451, 454.

Bolivia claims that, even if its purported “reversions” were considered expropriations, Bolivia did not breach its obligations under the Treaty because: (i) it is under no obligation to pay compensation while negotiations or arbitrations are pending; and (ii) observance of due process is not a requirement for a lawful expropriation and, in any event, Bolivia observed due process of law by making available “*posterior*” remedies.<sup>851</sup>

338. Bolivia’s position is both wrong on the facts and the law. Glencore Bermuda has amply demonstrated the expropriatory nature of Bolivia’s measures: through an outright taking, Bolivia deprived Glencore Bermuda of its title, ownership and control over the Assets. These actions also had the effect of entirely wiping out the value of Glencore Bermuda’s shareholding in Vinto and Colquiri. No compensation was provided and the takings did not comply with due process. Bolivia’s measures therefore amounted to unlawful direct and indirect expropriations, in violation of the Treaty and international law.
339. The substantial deprivation suffered by Glencore Bermuda as a direct result of Bolivia’s measures is sufficient to prove the existence of an expropriation requiring the payment of compensation.<sup>852</sup> This is the case despite Bolivia’s attempt to cloak its measures as legitimate regulations. To the extent that Bolivia wishes to raise a police powers defense, it bears the burden of establishing a *prima facie* case that its measures were justified. For the reasons explained below, Bolivia has not come close to doing so.
340. In any event, it is clear from the facts and the law that Bolivia’s measures cannot be defended as valid exercises of the State’s police powers, because they did not amount to measures to advance public welfare and were carried out in bad faith, in an arbitrary and discriminatory manner, were disproportionate, and violated basic due process guarantees. Thus, even if the measures were taken pursuant to

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<sup>851</sup> *Ibid.*, para 479.

<sup>852</sup> A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (1st edn 2009), **CLA-84bis**, Section 7.27.

police powers (which they were not) it does not relieve Bolivia from the obligation to compensate Glencore Bermuda.

**1. Bolivia’s measures constitute an expropriation of Glencore Bermuda’s investments**

*a. Bolivia’s measures constitute a direct and indirect expropriation of Glencore Bermuda’s investments*

341. Article 5 of the Treaty<sup>853</sup> addresses both (i) direct expropriations—*ie*, formal acts of outright seizure or transfer of property to the State;<sup>854</sup> and (ii) indirect expropriations—*ie*, State measures that have the same practical effect as a direct expropriation, meaning that they result in the substantial deprivation of the use or economic benefit of a foreign national’s property or investment.<sup>855</sup> In the case of indirect expropriations, it is crucial to determine whether “the effect of the measures taken by the [S]tate has been to deprive the owner of title, possession or access to the benefit and economic use of his property.”<sup>856</sup>

342. Therefore, any measure that results in a substantial deprivation of control or of value of the investment can constitute an indirect expropriation. Neither the

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<sup>853</sup> Article 5 provides that “[i]nvestments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation” except under certain conditions, including against the provision of “just and effective compensation” which is to be made “without delay.” Treaty, **C-1**, Art 5 (emphasis added).

<sup>854</sup> *Metalclad Corporation v United Mexican States* (ICSID Case No ARB(AF)/97/1) Award, 30 August 2000, **CLA-27**, para 103.

<sup>855</sup> *Ibid.* See also *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt* (ICSID Case No ARB/99/6) Award, 12 April 2002, **CLA-34**, para 107; *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (ICSID Case No ARB/96/1) Final Award, 17 February 2000, **CLA-25**, para 77.

<sup>856</sup> *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (ICSID Case No ARB/96/1) Final Award, 17 February 2000, **CLA-25**, para 77 (emphasis added). See also *AES Summit Generation Limited and AES-Tisza Erőmű Kft v Republic of Hungary* (ICSID Case No ARB/07/22) Award, 23 September 2010, **CLA-100**, para 14.3.1; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (ICSID Case No ARB/97/3) Award, 20 August 2007, **CLA-70**, para 7.5.20; *Tippetts, Abbott, McCarthy, and Stratton v TAMS-AFFA Consulting Engineers of Iran and others*, Award (1984-Volume 6) Iran-US Claims Tribunal Report, 22 June 1984, **CLA-9**, p 4.

State's intent, nor its subjective motives, nor the form of the action, constitute relevant criteria for establishing whether a measure is expropriatory.<sup>857</sup>

343. Bolivia does not contest that, through different measures, it deprived Glencore Bermuda of title, ownership and control over the Tin Smelter, the Antimony Smelter, the Tin Stock and the Colquiri Lease, thus depriving Glencore Bermuda of the full use and enjoyment of its investments. Briefly:

- (a) On 9 February 2007, Bolivia published the Tin Smelter Nationalization Decree ordering the “reversion to the State’s domain” of Vinto and all of its assets and providing that the State-owned entity EMV “immediately assume administrative, technical, judicial and financial control” over Vinto.<sup>858</sup> Additionally, on that same day the Bolivian armed forces and police forcibly broke through the Tin Smelter’s locked gates and took control of the plant together with its assets and inventory, including the tin that was in the production pipeline at that time, as well as a number of tax refund certificates issued in favor of Vinto.<sup>859</sup>
- (b) On 1 May 2010, Bolivia issued the Antimony Smelter Nationalization Decree ordering the “reversion to the State’s domain” of the Antimony Smelter and all of its assets and providing that the State-owned company EMV “immediately assume administrative, technical, judicial and financial control” of the plant.<sup>860</sup> The next day, Minister of Mining

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<sup>857</sup> See, eg, *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (ICSID Case No ARB/96/1) Final Award, 17 February 2000, **CLA-25**, para 77; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (ICSID Case No ARB/97/3) Award, 20 August 2007, **CLA-70**, para 7.5.20; *Tippetts, Abbett, McCarthy, and Stratton v TAMS-AFFA Consulting Engineers of Iran and others*, Award (1984-Volume 6) Iran-US Claims Tribunal Report, 22 June 1984, **CLA-9**, p 4.

<sup>858</sup> Tin Smelter Nationalization Decree, 7 February 2007, **C-20**, p 3.

<sup>859</sup> Photos of Tin Smelter Nationalization, 9 February 2007, **C-70**; Statement of Claim, para 68; First Witness Statement of Christopher Eskdale, paras 43-45.

<sup>860</sup> Antimony Smelter Nationalization Decree, 1 May 2010, **C-26**, p 2.

Pimentel took control of the Antimony Smelter's premises, including of the Tin Stock, which was property of Colquiri.

- (c) On 20 June 2012 Bolivia issued the Colquiri Mine Nationalization Decree ordering Comibol to “assume control of the Colquiri Mine and the direct management and administration over the deposits granted through the [Colquiri] Lease Agreement,” while also nationalizing the machinery, equipment and supplies of Colquiri located at the Colquiri Mine in favor of a new company to be created called Empresa Minera Colquiri.<sup>861</sup>
344. There can be no doubt that Bolivia deprived Glencore Bermuda of title, ownership and control over the Tin Smelter, the Antimony Smelter, the Tin Stock and the Colquiri Lease. By doing so, Bolivia also completely destroyed the value of Glencore Bermuda's shares in Vinto and Colquiri, therefore entirely depriving Glencore Bermuda of the value of its investments.<sup>862</sup> Thus, through its measures Bolivia effected a direct and an indirect expropriation of Glencore Bermuda's investments.

***b. Bolivia's mere allegation that the measures were a legitimate exercise of police powers does not exclude their expropriatory nature***

345. Bolivia denies the existence of an expropriation because it claims that the measures taken against Glencore Bermuda's investments were a legitimate use of its police powers—*ie*, regulatory actions taken to enforce the law, public order and safety within its territory. Specifically, it argues that it “reverted:” (i) the Tin Smelter because its privatization was allegedly “illegal;” (ii) the Antimony Smelter because of a breach of an alleged contractual commitment to put the plant into production; and (iii) the Colquiri Lease because of the need to restore order

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<sup>861</sup> Colquiri Mine Nationalization Decree, 20 June 2012, **C-39**.

<sup>862</sup> *See* Statement of Claim, para 148.

- and public safety after the violent conflict at the Colquiri Mine.<sup>863</sup> As already explained above,<sup>864</sup> this is incorrect on the law and on the facts.
346. Glencore Bermuda does not disagree that, in certain instances and subject to specific limitations, a State may not incur responsibility for the legitimate and *bona fide* exercise of its sovereign police powers, if employed in a manner that is proportional, non-arbitrary and respectful of due process. However, as the tribunal in *Pope & Talbot v Canada* warned, a State’s police powers must be analyzed with special care and cannot constitute a blanket exception to protections in international law against expropriation without compensation.<sup>865</sup>
347. Importantly, in the recent case of *Bear Creek v Peru*, which—contrary to the present case—dealt with a treaty expressly providing for a police power exception “to protect human life” or “ensure compliance with laws,” the tribunal concluded that this exception “does not offer any waiver from the obligation in [the treaty] to compensate for the expropriation.”<sup>866</sup> The tribunal also observed that the respondent must justify why the lack of compensation to the investor is necessary for the protection of (in that case) human life.<sup>867</sup> In turn, the tribunal in *Vivendi v Argentina II* warned in particular about the “vener of legitimacy” that States frequently use to disguise their expropriatory conduct, and denied that presumably regulatory acts cannot be considered expropriatory.<sup>868</sup> As stated by the tribunal in *Santa Elena v Costa Rica*, the purpose of the State’s measure “does not alter the legal character of the taking” requiring proper compensation:

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<sup>863</sup> Statement of Defense, paras 444, 447.

<sup>864</sup> See Section II.D.

<sup>865</sup> *Pope & Talbot Inc v Government of Canada* (UNCITRAL) Interim Award, 26 June 2000, **CLA-26**, para 99 (emphasis added).

<sup>866</sup> *Bear Creek Mining Corporation v Republic of Peru* (ICSID Case No ARB/14/2) Award, 30 November 2017, **CLA-229**, para 477.

<sup>867</sup> *Ibid.*

<sup>868</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (ICSID Case No ARB/97/3) Award, 20 August 2007, **CLA-70**, para 7.5.20 (emphasis added).

While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.<sup>869</sup>

348. Further, it is to be noted that, as evidenced by the cases cited by Bolivia in support of its police powers argument, this defense generally concerns general regulations enacted to protect public health and the environment,<sup>870</sup> execute tax laws,<sup>871</sup> or prevent economic collapse<sup>872</sup>—and not specific measures effecting a full taking of a targeted investment, as is the case here.<sup>873</sup> Moreover, all but one of the cases

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<sup>869</sup> *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (ICSID Case No ARB/96/1) Final Award, 17 February 2000, **CLA-25**, para 71 (emphasis added).

<sup>870</sup> For example, Bolivia heavily relies on the decision in *Philip Morris v Uruguay*, which concerned general regulatory measures taken by the State to regulate the packaging of tobacco products. See Statement of Defense, paras 449-453. There, the tribunal specifically noted that the measures at issue were regulations that had “been adopted in fulfilment of Uruguay’s national and international legal obligations for the protection of public health.” *Philip Morris Brand Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* (ICSID Case No ARB/10/7) Award, 8 July 2016, **RLA-43**, para 302 (emphasis added). Similarly, in *Chemtura Corporation v Canada*, the product at issue was lindane, an agricultural insecticide said to be harmful to human health and the environment. In finding that the State validly exercised its police powers, the tribunal observed that the relevant Canadian governmental agency “took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment.” *Chemtura Corporation v Canada* (NAFTA/UNCITRAL) Award, 2 August 2010, **RLA-46**, para 266 (emphasis added). In *Methanex v USA* the claimant challenged California’s regulation banning MTBE, a fuel additive found to be harmful to public health. *Methanex Corporation v USA* (NAFTA/UNCITRAL) Final Award on Jurisdiction and Merits, 3 August 2005, **RLA-45**, pt II, ch D, para 2, pt III, ch A, paras 101-102.

<sup>871</sup> *Marvin Roy Feldman Karpa v United Mexican States* (ICSID Case No ARB(AF)/99/1) Award, 16 December 2002, **RLA-49**.

<sup>872</sup> *Total SA v Argentine Republic* (ICSID Case No ARB/04/1) Decision on Liability, 27 December 2010, **CLA-103** (concerning measures that arose from the severe economic crisis in Argentina in the early 2000s); *Suez Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v The Argentine Republic* (ICSID Case No ARB/03/19) Decision on Liability, 30 July 2010, **RLA-47**.

<sup>873</sup> The Harvard Draft Convention limits the scope of application of the police powers doctrine to a handful instances of regulatory conduct: (i) execution of tax laws; (ii) general change in the value of currency; (iii) maintenance of public order, health or morality; and (iv) belligerent rights. “Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens” (1961) Vol 55 *The American Journal of International Law*, **RLA-44**, Art 10(5).

relied on by Bolivia in support of its argument that regulatory measures are not to be considered expropriatory<sup>874</sup> relate to cases where the tribunals found that there was no expropriation because the measures in question were general regulations in furtherance of the public welfare which did not substantially deprive the investor of the value or control over its investment.<sup>875</sup>

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<sup>874</sup> *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**. In *Saluka*, the measure at issue was the government's forced administration of the bank, which was part of a larger set of policies enacted to prevent the collapse of the Czech banking system.

<sup>875</sup> *Philip Morris Brand Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* (ICSID Case No ARB/10/7) Award, 8 July 2016, **RLA-43**, paras 276, 284 (concerning several tobacco-control measures regulating the tobacco industry; the tribunal found that the effects of the regulation in question did not cause a substantial deprivation of the value, use or enjoyment of the claimants' investments); *Methanex Corporation v USA* (NAFTA/UNCITRAL) Final Award on Jurisdiction and Merits, 3 August 2005, **RLA-45**, pt IV, ch D, paras 16-17 (concerning California's regulation banning a fuel additive found to be harmful to public health; the tribunal rejected the expropriation claim and noted that Methanex had not "established that the California ban manifested any of the features associated with expropriation" since what the claimant was lamenting was the loss of customer base, goodwill and market share); *Chemtura Corporation v Canada* (NAFTA/UNCITRAL) Award, 2 August 2010, **RLA-46**, paras 263-265 (concerning measures cancelling the registration of all products containing the pesticide lindane; the tribunal found that the interference with the claimant's investment was not substantial because the sales from the lindane products constituted a small part of claimant's overall sales at all relevant times, claimant remained operational and there was no interference with claimant's management, daily operations or payment of dividends); *Suez Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v The Argentine Republic* (ICSID Case No ARB/03/19) Decision on Liability, 30 July 2010, **RLA-47**, para 140 (concerning measures taken by Argentina to cope with serious financial crisis; the tribunal found no substantial deprivation because, "[a]lthough they may have negatively affected the profitability of the AASA Concession, [the State's measures] did not take or reduce the property rights of AASA or its investors and did not affect the ability of AASA to hold the Concession and to direct its operations and activities"); *Marvin Roy Feldman Karpa v United Mexican States* (ICSID Case No ARB(AF)/99/1) Award, 16 December 2002, **RLA-49**, para 152 (concerning the application of certain tax laws by Mexico to the export of tobacco products; the tribunal held that the challenged regulatory action was not expropriatory because it had "not deprived the Claimant of control of the investment, [...] interfered directly in the internal operations [...] or displaced the Claimant as the controlling shareholder"); *Glamis Gold Ltd v The United States of America* (UNCITRAL) Award, 8 June 2009, **RLA-50**, paras 535-536 (concerning allegations that California adopted legislation and regulations that rendered the claimant's project economically infeasible; the tribunal found that the measures did not cause a sufficient economic impact to effect an expropriation since the claimant still formally possessed its federally granted mining rights which were valued in excess of \$20 million); *Total SA v Argentine Republic* (ICSID Case No ARB/04/1) Decision on Liability, 27 December 2010, **CLA-103**, para 196 (concerning measures taken by Argentina to cope with serious financial crisis; the tribunal found that the claimant had not shown that the negative economic impact of the measures had deprived the investment of all or substantially all its value). Bolivia also relies on *Les Laboratoires Servier*, but in that case the tribunal actually found that the challenged measures did not amount to a valid exercise of police powers. *Les Laboratoires Servier SAS Biofarma SAS Arts et Techniques du Progres SAS v Republic of Poland* (PCA) Final Award, 14 February 2012, **RLA-48**, paras 569-584.

349. Therefore, even if it were true that Bolivia’s direct takings were aimed at enforcing the law and maintaining public safety (which they were not), Bolivia still needs to prove that enforcing the law and maintaining public safety justifies not paying Glencore Bermuda any compensation.<sup>876</sup> As explained below, not only did Bolivia fail to do so, but Bolivia’s measures were arbitrary, discriminatory and disproportionate and carried out in violation of due process. They cannot be considered non-expropriatory.

*c. Bolivia’s measures were not a legitimate exercise of its police powers*

350. Bolivia has not come close to setting forth a *prima facie* justification for its claim that the “reversions were taken for public purposes—protecting public health and safety and confiscating goods unlawfully obtained [...]”<sup>877</sup> and required no compensation. To the contrary, Bolivia’s own words show each taking for what it was—a nationalization. President Morales himself explained that the State was to issue “a Supreme Decree to nationalize Vinto” and that “Vinto will pass on to the hands of the Bolivian State.”<sup>878</sup> With respect to both the Tin and Antimony Smelters, the Government affixed large banners in front of each asset with the word “nationalized” clearly visible.<sup>879</sup> With respect to the Colquiri Lease, on 10 May 2012 the Government agreed to “execute the Nationalization of the Colquiri Mine.”<sup>880</sup> Not surprisingly then, the Colquiri Lease Nationalization Decree itself provided that the equipment of Colquiri and Sinchi Wayra was to be nationalized.<sup>881</sup>

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<sup>876</sup> *Bear Creek Mining Corporation v Republic of Peru* (ICSID Case No ARB/14/2) Award, 30 November 2017, **CLA-229**, para 477.

<sup>877</sup> Statement of Defense, para 456.

<sup>878</sup> “Anuncian la nacionalización de la fundición de Vinto,” *El País*, 9 February 2007, **C-226** (emphasis added).

<sup>879</sup> See Sections II.D.1-II.D.2.

<sup>880</sup> 10 May 2012 Agreement, 10 May 2012, **C-256**; see Section II.D.3.

<sup>881</sup> Colquiri Mine Nationalization Decree, 20 June 2012, **C-39**.

351. In fact, Bolivia cannot point to one relevant provision of its own law providing that “reversion” of the Assets was the sanctioned domestic remedy.<sup>882</sup> Instead, the “reversions” were based on mere allegations that have been neither substantiated nor proven.<sup>883</sup> As to the nationalization of the Colquiri Lease, it was decided before the invasion by the *cooperativistas* and was thus not “taken to restore public order and public safety in the face of a violent conflict at the mine.”<sup>884</sup>
352. But even if one were to assume that Bolivia set forth a plausible justification for its takings (which it did not), it is evident from the facts of the case that Bolivia exercised its sovereign powers in a manner that was arbitrary, discriminatory, and disproportionate disrespectful of due process.<sup>885</sup> The purported “reversions” were, therefore, not a valid exercise of Bolivia’s police powers.
- i The taking of the Tin Smelter was not a legitimate exercise of police powers and was arbitrary, discriminatory, disproportionate and in violation of due process*
353. Bolivia claims that the Tin Smelter was “reverted” due to “illegalities in the privatization process, as a measure to return wrongfully privatized assets to their rightful owner.”<sup>886</sup> Bolivia’s position is entirely unsupported and should be rejected.

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<sup>882</sup> See Statement of Defense, paras 457-477; Section II.D.

<sup>883</sup> See Section II.D.

<sup>884</sup> Statement of Defense, para 447.

<sup>885</sup> See *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 423 (“[W]hile a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants, the rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State’s right to regulate.”) (emphasis added); *Teco Guatemala Holdings LLC v The Republic of Guatemala* (ICSID Case No ARB/10/17) Award, 19 December 2013, **CLA-213**, para 492 (stating that “it is up to an international tribunal to sanction decisions that amount to an abuse of power, are arbitrary, or are taken in manifest disregard of the applicable legal rules and in breach of due process in regulatory matters”).

<sup>886</sup> Statement of Defense, paras 458-459; Tin Smelter Nationalization Decree, 7 February 2007, **C-20**.

354. *First*, Bolivia cannot cite to one relevant provision of its own law in support of its purported right to “revert” the asset, even less without compensation.<sup>887</sup> Instead, Bolivia refers generally to “the inherent powers of the executive under the Bolivian constitution, including to enforce the laws and ensure security and order.”<sup>888</sup> In fact, Bolivia has to resort to the Colombian and Mexican constitutions,<sup>889</sup> as well as to civil forfeiture laws applicable to the regulation of controlled substances in the states of Delaware and Massachusetts, USA, to try to justify its actions.<sup>890</sup> Not only are these provisions plainly not applicable to the instant dispute, but the fact that Bolivia needs to rely on general or foreign legal provisions in support of its “reversion” thesis underscores the absence of any legal support for such action.
355. Indeed, at the time of the Tin Smelter Nationalization Decree, there was no relevant reversion law in place that would apply to Vinto. The only domestic provision addressing reversions in the mining sector was the Mining Code which provided for reversion of mining concessions.<sup>891</sup> The Tin Smelter, however, was not a concession (let alone a mining concession). The fact that the Mining Code was not applicable is evidenced by the fact that it was not even invoked in the Tin

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<sup>887</sup> Statement of Defense, para 462.

<sup>888</sup> *Ibid*, para 516 (citing to Constitution of Bolivia, 1967, **R-3**, Art 96(1), (18); 2009 Constitution, 7 February 2009, **C-95**, Art 172(1)(16)); *see also* Constitutional Tribunal, Constitutional Decision No 0779/2005-R, 8 July 2005, **C-213**.

<sup>889</sup> Statement of Defense, para 462; Colombian Law No. 1708, 20 January 2014, **RLA-53**; Federal Law of Extinction of Domain, implementing Article 22 of the Constitution of the United Mexican States, 29 May 2009, **RLA-54**.

<sup>890</sup> Statement of Defense, para 462; Delaware Code, Title 16 (Health and Safety), Chapter 47 (Controlled Substances Act), **RLA-51**; Massachusetts General Laws, Title XV (Regulation of Trade), Chapter 94C (Controlled Substances Act), **RLA-52**.

<sup>891</sup> The Mining Code provided for reversion of mining concessions in the event of: (i) failure to pay an annual patent on a concession; (ii) failure to register the concession with the Technical Service of Mines; (iii) abandonment of an international bidding process; or (iv) the concession being declared null. Bolivian Mining Code, Law 1,777, 17 March 1997, **R-4**, Arts 65, 67, 95, 155. Under Bolivian law, reversion is an administrative remedy available to rescind rights previously granted over the State’s natural resources, due to the right-holder’s breach of an obligation. In addition to the Mining Code, other administrative norms that provide for reversion in the event of a breach are Bolivia’s Agrarian Law and Forestry Law. Notably, there was no norm addressing the possible reversion of assets privatized under the Privatization Law.

- Smelter Nationalization Decree. It follows that, even if Bolivia’s allegations of illegality had any merit, “reversion” of the Asset was not the sanctioned remedy under Bolivian law. Bolivia has offered no evidence to the contrary.
356. *Second*, contrary to Bolivia’s allegations, the “reversions” were not “to combat illegalities that had tainted the privatization.”<sup>892</sup> In effect, to this date—almost 20 years after the privatizations—no Bolivian court has determined that the privatizations were illegal or that the laws and regulations comprising the legal framework governing the privatization were not constitutional.<sup>893</sup> If there were any merit to Bolivia’s argument, then it should have “reverted” the Tin Smelter, Antimony Smelter and Colquiri Lease at the same time and for the same reasons, since all three Assets were subject to the same privatization process.<sup>894</sup> It did not. Indeed, the real reasons for Bolivia’s “reversion” were clearly set out by Comibol in its pre-expropriation report: acquire control over the tin mining supply chain.<sup>895</sup> The “reversion” was thus plainly a pretext to justify a sovereign act specifically intended to deprive Glencore Bermuda of its investment without compensation.
357. *Third*, Bolivia has not explained why the “reversion” of the Tin Smelter to the State was an adequate remedy in the face of purported illegalities in the privatization of the Asset. In fact, as Bolivia itself recognizes,<sup>896</sup> the remedy under the contract was to be determined by an ICC arbitration tribunal.<sup>897</sup>

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<sup>892</sup> Statement of Defense, para 459.

<sup>893</sup> See Section II.B.

<sup>894</sup> *Ibid.*

<sup>895</sup> *Ibid.* COMIBOL, Report on the reversion of the Complejo Metalúrgico Vinto to the Bolivian State, 29 January 2007, **R-247**, p 3.

<sup>896</sup> Statement of Defense, paras 385-399.

<sup>897</sup> Tin Smelter Purchase Agreement, 17 July 2001 and 4 July 2001, **C-7**, Clause 15, pp 21-24.

358. *Fourth*, Bolivia’s “reversion” did not meet minimum due process guarantees as established under international and Bolivian law.<sup>898</sup> In fact, the Tin Smelter Nationalization Decree was issued without any prior notice and without giving Glencore Bermuda the opportunity to challenge the measure prior to the taking.
359. More importantly, this is not the first time Bolivia tries this “reversion”-“police powers” tactic. In *Quiborax*, Bolivia unsuccessfully attempted a similar play arguing that “Revocation Decrees” were legitimate exercises of its police powers because they purportedly sanctioned violations of Bolivian law. The tribunal, however, determined that Bolivia’s revocations were not a valid exercise of the State’s police powers, because: (i) they were not justified under Bolivian law;<sup>899</sup> (ii) they were not supported by the facts;<sup>900</sup> and (iii) they had been carried out in a manner that violated minimum standards of due process under both international and Bolivian law.<sup>901</sup> The same conclusions apply in this case. Indeed, following the recent rejection of Bolivia’s application for the annulment of the *Quiborax* arbitration award, the Attorney General’s Office filed a complaint against former President Carlos Mesa claiming that he had violated the law when he issued the “illegal decree” at issue in that case.<sup>902</sup> This despite the fact that the Attorney General’s Office had defended the legality of the measure (as a valid exercise of the State’s police powers) over the course of that arbitration. In light of this plain admission, Bolivia’s police powers arguments regarding its supposed “reversions” must be dismissed.

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<sup>898</sup> See Section V.A.2.b.

<sup>899</sup> *Quiborax SA and Non Metallic Minerals SA v Plurinational State of Bolivia* (ICSID Case No ARB/06/2) Award, 16 September 2015, **CLA-127**, paras 212 (“the Respondent has not directed the Tribunal to a single provision of Bolivian law that could justify the revocation of the concessions on such grounds”), 214 (“As the Revocation Decree determines the termination of the concessions for alleged violations of Bolivian law that do not appear to be sanctioned with termination under that law [...] the Tribunal cannot but conclude that the Revocation Decree finds no justification in Bolivian law.”).

<sup>900</sup> *Ibid.*, paras 210-211, 217.

<sup>901</sup> *Ibid.*, paras 221-226.

<sup>902</sup> See “Procuraduría denuncia a Carlos Mesa ante Fiscalía por caso Quiborax,” *La Prensa*, 25 May 2018, **C-276**.

ii *The taking of the Antimony Smelter and the Tin Stock was not a legitimate exercise of police powers and was arbitrary, discriminatory, disproportionate and in violation of due process*

360. Bolivia claims that it legitimately “reverted” the Antimony Smelter due to productive inactivity and “for the public purpose of limiting the private ownership of productive assets to those who will use them productively.”<sup>903</sup> Once more, Bolivia’s position is unsupported.
361. *First*, just like for the Tin Smelter’s supposed “reversion,” Bolivia cannot point to any domestic law provision allowing the “reversion” of the Antimony Smelter (and even less without compensation).<sup>904</sup> While the new 2009 Constitution in force at time the Antimony Smelter was taken allowed the State to carry out reversions, these were limited to instances in which there had been a breach of the laws governing the use and exploitation of natural resources.<sup>905</sup> Again, this provision did not apply to the Antimony Smelter, which is an industrial asset rather than a mining asset. Bolivia does not argue otherwise.<sup>906</sup>
362. *Second*, Bolivia’s purported justification for its taking of the Antimony Smelter—*ie*, that there was an obligation to put the plant into operation because this was the purpose of the privatization pursuant to the Terms of Reference—finds no support

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<sup>903</sup> Statement of Defense, para 464; Antimony Smelter Nationalization Decree, 1 May 2010, **C-26**.

<sup>904</sup> *See* Section II.D.2.

<sup>905</sup> 2009 Constitution, 7 February 2009, **C-95**, Art 358 (“The rights of use and exploitation over natural resources shall be subject to the provisions of the Constitution and the law. These rights will be subject to periodic monitoring of compliance with technical, economic and environmental regulations. Failure to comply with the law will lead to the reversion or cancellation of the rights of use or exploitation.”) (unofficial English translation from Spanish original).

<sup>906</sup> Tellingly, in the Antimony Smelter Nationalization Decree the State did not reference Article 358 of the 2009 Constitution, which provides the rules for the reversion and annulment of rights concerning usage of natural resources. Antimony Smelter Nationalization Decree, 1 May 2010, **C-26**. Bolivia’s general reference to “the inherent powers of the executive under the Bolivian constitution” (Statement of Defense, para 516) similarly leads nowhere. Under the relevant provision of the 2009 Constitution, the President simply has the power to enforce existing laws. 2009 Constitution, 7 February 2009, **C-95**, Art 172(1). This is not what Bolivia did by choosing to “revert” the Antimony Smelter on the basis of a non-existent contractual obligation and in complete disregard of the parties’ agreed-upon dispute resolution mechanisms. *See* Section II.D.2.

in the relevant facts.<sup>907</sup> As explained in detail above, the Antimony Smelter Purchase Agreement provided for the permanent and unconditional transfer of title, for consideration; it did not include any specific requirement to bring the plant into production.<sup>908</sup> In fact, the real reason for the State’s “reversion” was, as already explained, to gain access to the Tin Stock, given the supply shortages that the EMV-controlled Tin Smelter was facing at the time.<sup>909</sup>

363. *Third*, in any event, even if Bolivia’s argument were taken at face value, Glencore Bermuda was never given a chance to cure any perceived shortcomings. In fact, in the five years during which Glencore Bermuda owned the asset, Bolivia never once complained that the plant was not producing. Nor did the State request that it be put in production prior to the “reversion.”<sup>910</sup>
364. *Fourth*, if Bolivia truly wished to challenge the production status of the Antimony Smelter, then it should have notified Glencore Bermuda and sought relief under the Antimony Smelter Purchase Agreement. Indeed, just like in the case of the Tin Smelter, the Antimony Smelter Purchase Agreement provided that all disputes relating to the agreement must be submitted to arbitration.<sup>911</sup> If Bolivia sincerely held that Glencore Bermuda’s subsidiary was not meeting its contractual obligations, it should have asked a tribunal to find a breach of the Antimony Smelter Purchase Agreement and request the return of the assets or compensation.
365. *Finally*, as for the Tin Smelter Nationalization Decree, the Antimony Smelter Nationalization Decree failed to comply with basic tenets of due process in violation of both international and domestic law. The nationalization was announced on 1 May 2010 and the takings were effected on 2 May 2010, giving Glencore Bermuda no opportunity to challenge the measure or assert its position.

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<sup>907</sup> Statement of Defense, para 314.

<sup>908</sup> See Section II.B. Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**, Clause 2.7.

<sup>909</sup> See Section II.D.2.

<sup>910</sup> See Statement of Claim, para 77; First Witness Statement of Christopher Eskdale, para 63.

<sup>911</sup> Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**, Clause 15.

However, the date of the nationalization (Workers' Day) is no accident. President Morales himself has recently declared that "[e]very first of May we nationalize."<sup>912</sup>

*iii The taking of the Colquiri Mine was not a legitimate exercise of police powers and was arbitrary, discriminatory, disproportionate and in violation of due process*

366. Bolivia alleges that the Colquiri Lease was legitimately "reverted" due to violent conflict at the Colquiri Mine. It states that the Government only began to consider "reversion" "when all other solutions had failed" and in order to "prevent any further bloodshed."<sup>913</sup> However, Bolivia's position is false.
367. *First*, contrary to the Tin Smelter and Antimony Smelter nationalization decrees, the Colquiri Lease Nationalization Decree does not even use the word "reversion," but specifies that the equipment of Colquiri and Sinchi Wayra was to be nationalized<sup>914</sup> and provides for the (limited) payment of compensation.<sup>915</sup> Bolivia's claim that it was simply exercising its police powers by "reverting" the Colquiri Lease is, therefore, not even consistent with its own contemporaneous conduct.<sup>916</sup>
368. *Second*, while Bolivia claims that it had the right to "revert" the asset to "protect public safety"<sup>917</sup> this is contradicted by the plain language of the Colquiri Lease

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<sup>912</sup> "Evo anuncia que hay pocas empresas por nacionalizar en el país," *Página Siete*, 1 May 2016, **C-273** (unofficial English translation of Spanish original).

<sup>913</sup> Statement of Defense, para 474.

<sup>914</sup> Colquiri Mine Nationalization Decree, 20 June 2012, **C-39**.

<sup>915</sup> *Ibid*, art 1.IV.

<sup>916</sup> In any event, once more, reversion of a mining concession was only allowed by the Mining Code in limited instances, none of which applied here. Bolivian Mining Code Law 1,777, 17 March 1997, **R-4**, Arts 65, 67, 95, 155. Notably, the Government itself abrogated the revocation decrees at issue in *Quiborax* finding that they suffered from "irreparable legal defects" since the Mining Code "did not provide for the 'revocation' of mining concessions, but rather their *caducidad* or annulment," to be determined following "an administrative proceeding." See *Quiborax SA and Non Metallic Minerals SA v Plurinational State of Bolivia* (ICSID Case No ARB/06/2) Award, 16 September 2015, **CLA-127**, para 216, footnote 236.

<sup>917</sup> Statement of Defense, para 471.

- Nationalization Decree, which does not refer to any threat to public order or safety as a reason for its issuance. Rather, it provides that it is issued as part of the State’s administration of strategic economic sectors with the objective of stimulating mining activity.<sup>918</sup> This is not surprising given the sharp increase of metal prices at the time.<sup>919</sup>
369. *Third*, and more importantly, the Government had already decided to “execute the Nationalization of the Colquiri Mine”<sup>920</sup> on 10 May 2012—twenty days before the *cooperativistas*’ invasion. Consequently, Bolivia’s argument that the nationalization was necessary to “protect public safety and order in the midst of a dangerous dispute”<sup>921</sup> between workers and *cooperativistas* and, therefore, a legitimate exercise of the State’s police powers, is to be rejected outright.
370. *Fourth*, in any event, the evidence indicates that nationalization was not, in fact, the only possible solution to the conflict. Bolivia’s measure was therefore disproportionate. Indeed, the mere fact that the Rosario Agreement was executed shows that a compromise could have been achieved with Glencore Bermuda’s participation and without nationalization of the Colquiri Mine.<sup>922</sup> But this was not the Government’s intention.
371. *Fifth*, contrary to Bolivia’s assertions, the nationalization of the Colquiri Lease did not “prevent any further bloodshed,”<sup>923</sup> underscoring once more that it was not the only available remedy. In fact, the conflicts actually escalated following the issuance of the Colquiri Lease Nationalization Decree.<sup>924</sup> As stated above,

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<sup>918</sup> Colquiri Mine Nationalization Decree, 20 June 2012, **C-39**, Preamble, p 2.

<sup>919</sup> See Section II.D.3.

<sup>920</sup> 10 May 2012 Agreement, 10 May 2012, **C-256**; see Section II.D.3.

<sup>921</sup> Statement of Defense, para 471.

<sup>922</sup> See Section II.D.3.

<sup>923</sup> Statement of Defense, para 474.

<sup>924</sup> See Section II.D.3.

Bolivia's attempt to shift the blame on Sinchi Wayra for the increased violence following nationalization is, at best, disingenuous.<sup>925</sup>

372. *Finally*, the nationalization also failed to respect minimum due process guarantees, as explained in detail below.<sup>926</sup> Bolivia purposefully excluded Glencore Bermuda from the negotiating table and used the conflict to push for a pre-planned nationalization of the Colquiri Mine behind Glencore Bermuda's back. Glencore Bermuda was not given a reasonable opportunity to assert its position or protect its interests.<sup>927</sup>

373. In sum, through each nationalization decree, Bolivia seized outright control of Glencore Bermuda's Assets, depriving Glencore Bermuda of the full use and benefit of its investments without providing any compensation. Despite Bolivia's attempt to recast such actions as valid "reversions," the State's measures fall squarely within the definition of expropriation. It follows that Bolivia cannot reasonably invoke its police powers to skirt its obligations under the Treaty and international law.

## **2. Contrary to Bolivia's allegations, the expropriations of Glencore Bermuda's investments were unlawful**

374. As outlined in the Statement of Claim, in order for Bolivia to carry out a lawful expropriation, it must comply with each of the cumulative conditions set out in Article 5(1) of the Treaty. If it fails to comply with any one of these conditions, then the expropriation is by definition unlawful.<sup>928</sup>

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<sup>925</sup> *Ibid.*

<sup>926</sup> *See* Section V.A.2.b.

<sup>927</sup> *Ibid.*

<sup>928</sup> *See Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (ICSID Case No ARB/05/15) Award, 1 June 2009, **CLA-89**, para 428; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (ICSID Case No ARB/97/3) Award, 20 August 2007, **CLA-70**, para 7.5.21; *OI European Group BV v Bolivarian Republic of Venezuela* (ICSID Case No ARB/11/25) Award, 10 March 2015, **CLA-125**, para 362; *Bernhard von Pezold and others v Republic of Zimbabwe* (ICSID Case No ARB/10/15) Award, 28 July 2015, **CLA-126**, para 496.

375. In the present case, Bolivia failed to comply with the following requirements for a lawful expropriation:

- (a) Bolivia did not pay Glencore Bermuda just and effective compensation, defined as the fair market value of the investments, promptly and without delay; and
- (b) Bolivia did not expropriate Glencore Bermuda's investments in accordance with due process of law.

376. Notably, Bolivia does not dispute that it did not pay Glencore Bermuda compensation and that it did not afford it what it calls "prior" due process. Instead, Bolivia argues that it was not under an obligation to do so. As explained below, this position is unsustainable.

*a. Bolivia violated its obligation to provide Glencore Bermuda with just and effective compensation*

377. Bolivia does not dispute that it did not pay Glencore Bermuda any compensation for the taking of its investments. Rather, Bolivia argues that it "did not have to make any payment at all."<sup>929</sup> Specifically, Bolivia argues that: (i) the Treaty's compensation provision is only breached in the event that no compensation is paid upon conclusion of negotiations and this arbitration; and (ii) mere failure to pay compensation does not make an expropriation unlawful.<sup>930</sup> Both arguments are wrong as a matter of law as explained, in turn, below.

*i The Treaty requires the payment of "prompt" compensation, made "without delay"*

378. According to Bolivia, "because Claimant sought to obtain compensation through arbitration, Bolivia fully satisfied any compensation obligation it might have had

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<sup>929</sup> Statement of Defense, para 495.

<sup>930</sup> *Ibid*, para 481.

(*quod non*) by participating in this process.”<sup>931</sup> Bolivia argues that Article 5 of Treaty is breached “only for failure to pay upon conclusion of negotiations and this arbitration.”<sup>932</sup> It claims that international arbitration satisfies the Treaty’s compensation provision and payment will be timely if made promptly upon termination of the arbitration proceedings and any subsequent challenges to the arbitration award.<sup>933</sup> Bolivia’s proposed standard is untenable under the applicable law and defies common sense.

379. The Treaty’s plain language is clear. Article 5 provides that “[i]nvestments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation” except “against just and effective compensation.”<sup>934</sup> The Treaty goes on to specify that such compensation “shall be made without delay.”<sup>935</sup> Similarly, Article 5(2) of the Treaty—applicable in instances when, like here, the assets of a company incorporated in Bolivia and owned by a foreign investor are expropriated—provides that the expropriating State must “ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee “prompt adequate and effective compensation.”<sup>936</sup>
380. As articulated in the Statement of Claim, delayed compensation has been found to violate treaty provisions on prompt compensation as well as customary international law. For example, in the *Goldenberg case*, the tribunal found that payment for the expropriated property must be made by the State “as quickly as

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<sup>931</sup> *Ibid*, para 482.

<sup>932</sup> *Ibid*, para 481.

<sup>933</sup> *Ibid*, paras 481-482, 494.

<sup>934</sup> Treaty, **C-1**, Art 5(1).

<sup>935</sup> *Ibid*, Art 5(1).

<sup>936</sup> *Ibid*, Art 5(2) (emphasis added).

possible.”<sup>937</sup> In *Norwegian Shipowners’ Claims*, the tribunal concluded that “full compensation” should be paid “at the latest on the day of the effective taking.”<sup>938</sup>

381. Bolivia attempts to minimize the relevance of these cases without, however, citing a single source in support of its position.<sup>939</sup> It also ignores the fact that in this case the clear language of the Treaty does not require any further support from case law since it provides that compensation “shall be made without delay” and shall be “prompt.” In any event, both the *Goldenberg case* and *Norwegian Shipowners’ Claims* reflect principles that have long been considered to form part of the customary international law relevant to expropriation in general and to the requirement of prompt compensation in particular.<sup>940</sup> The date in which the cases were decided has no bearing on their continued validity, as confirmed by the fact that both cases continue to be relied upon by tribunals and scholars.<sup>941</sup> Indeed, the

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<sup>937</sup> *Goldenberg case (Germany/Romania)* Award, 27 September 1928, **CLA-3**, p 10 (unofficial English translation from French original).

<sup>938</sup> *Norwegian Shipowners’ Claims (Norway/USA)* Award, 13 October 1922, **CLA-1**, p 37.

<sup>939</sup> Statement of Defense, para 483.

<sup>940</sup> See, eg, *American International Group, Inc, American Life Insurance Company v Islamic Republic of Iran, Central Insurance of Iran*, Award (1983) Iran-US Claims Tribunal Report, **CLA-138**, p 4; A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (1st edn 2009), **CLA-84bis**, Sections 7.37, 7.39.

<sup>941</sup> *American International Group, Inc, American Life Insurance Company v Islamic Republic of Iran, Central Insurance of Iran*, Award (1983) Iran-US Claims Tribunal Report, **CLA-138**, p 4; International Law Commission, “Draft articles on Responsibility of States for Internationally Wrongful Acts with commentary” [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, Art 3, Commentary 4 (citing *Norwegian Shipowners’ Claim*), Art 12, Commentary 4 (citing to the *Goldenberg case*), Art 35, Commentary 4 (citing *Norwegian Shipowners’ Claim*), Art 36, Commentaries 28, 30 (citing *Norwegian Shipowners’ Claim*); *Koch Minerals Sárl and Koch Nitrogen International Sárl v The Bolivarian Republic of Venezuela* (ICSID Case No ARB/11/19) Award, 30 October 2017, **CLA-228**, para 7.50 (citing *Norwegian Shipowners’ Claim*); *Enkev Beheer BV v The Republic of Poland* (UNCITRAL) First Partial Award, 29 April 2014, **CLA-216**, para 364 (citing *Norwegian Shipowners’ Claim*); *European Media Ventures SA v The Czech Republic* (UNCITRAL) Partial Award on Liability, 8 July 2009, **CLA-183**, paras 64-65 (citing *Norwegian Shipowners’ Claim*); *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Award, 6 February 2007, **CLA-67**, paras 267-270 (citing *Norwegian Shipowners’ Claim*); *Impregilo SpA v Islamic Republic of Pakistan* (ICSID Case No ARB/03/3) Decision on Jurisdiction, 22 April 2005, **CLA-159**, para 274 (citing *Norwegian Shipowners’ Claim*); *Consortium RFCC v Kingdom of Morocco* (ICSID Case No ARB/00/6) Award, 22 December 2003, **CLA-154**, para 61 (citing *Norwegian Shipowners’ Claim*); *Modev International Ltd v United States of America* (ICSID Case No ARB(AF)/99/2) Award, 11 October 2002, **CLA-149**, para 98 (citing *Norwegian Shipowners’ Claim*); *Amco Asia Corporation and others v Republic of*

Iran-US Claims Tribunal cites both the *Goldenberg case* and *Norwegian Shipowners' Claims* in support of the notion that “prompt compensation is also compelled by customary international law.”<sup>942</sup>

382. Bolivia’s attempt to refute the tribunal’s reasoning in *Siag v Egypt* is similarly unpersuasive. Bolivia mischaracterizes *Siag v Egypt*, alleging that the tribunal’s conclusions on prompt compensation are mere dictum limited to a single paragraph.<sup>943</sup> Bolivia is mistaken. The analysis of the *Siag v Egypt* tribunal is based on the cumulative preconditions that determine the lawfulness of expropriation.<sup>944</sup> The tribunal found that the “clear wording” of the treaty’s expropriation provision provided that “all conditions must be met lest an expropriation be deemed unlawful.”<sup>945</sup> Indeed, the *Siag v Egypt* tribunal included adequate and fair compensation as one of these cumulative conditions, focusing on prompt compensation, even though the applicable treaty (unlike the Treaty here) did not specifically refer to “prompt” compensation. In the words of the tribunal:

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*Indonesia* (ICSID Case No ARB/81/1) Award, 20 November 1984, **CLA-140**, para 267 (citing *Norwegian Shipowners' Claim*).

Unsurprisingly, even Bolivia’s legal authorities cite to *Norwegian Shipowners' Claim*. See, eg, *Tidewater Inc Tidewater Investment SRL Tidewater Caribe CA et al v The Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Award, 13 March 2015, **RLA-60**, para 152; *Suez Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v The Argentine Republic* (ICSID Case No ARB/03/19) Decision on Liability, 30 July 2010, **RLA-47**, para 151; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc v United Mexican States* (ICSID Case No ARB(AF)/04/5) Award, 11 November 2002, **RLA-94**, para 241.

<sup>942</sup> *American International Group, Inc, American Life Insurance Company v Islamic Republic of Iran, Central Insurance of Iran*, Award (1983) Iran-US Claims Tribunal Report, **CLA-138**, p 217 (emphasis added).

<sup>943</sup> Statement of Defense, para 489.

<sup>944</sup> *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (ICSID Case No ARB/05/15) Award, 1 June 2009, **CLA-89**, paras 428-443. The five cumulative conditions the tribunal cited are (i) public purpose in the national interest of the State; (ii) adequate and fair compensation; (iii) according to legal procedures; (iv) a non-discriminatory basis; and (v) due process of law. The tribunal further notes that “[s]everal of these requirements have become a part of customary international law.

<sup>945</sup> *Ibid*, para 428 (emphasis added).

It must also be noted that Claimants' investment was expropriated in 1996, some 12 years ago. Dolzer and Schreuer state that under customary international law and "most treaties", compensation must not only be adequate, it must also be promptly paid. Although the Italy – Egypt BIT does not expressly employ the word "prompt" (simply stating that compensation paid must be "adequate and fair"), the Tribunal considers that the absence of that word ought not to be seen to permit Egypt to refrain from paying compensation indefinitely.

Even the most charitable of impartial observers would not, in the Tribunal's view, contend that a 12-year delay (at the least) was "prompt." The Tribunal finds on all the evidence that Egypt has not paid "adequate and fair" compensation to the Claimants.<sup>946</sup>

383. Here, similarly to the *Siag* case, Bolivia has failed to pay Glencore Bermuda any compensation more than eleven years from the first taking.
384. In *Rurelec v Bolivia*, a case interpreting the same Treaty that governs the instant dispute, the tribunal did not conclude that compensation could await the outcome of an international arbitration, but rather confirmed that "any State which carries out an expropriation is expected to accurately and professionally assess the true value of the expropriated assets"<sup>947</sup> and make payment promptly. Bolivia was, therefore, under an obligation to timely calculate and provide payment for its takings at the time of the relevant expropriations.<sup>948</sup> This is even more so given that Bolivia's own domestic law, including the Constitution and Expropriation

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<sup>946</sup> *Ibid*, paras 434-435 (emphasis added).

<sup>947</sup> *Guaracachi America, Inc and Rurelec Plc v Plurinational State of Bolivia* (UNCITRAL) Award, 31 January 2014, **CLA-120**, para 441.

<sup>948</sup> *See also* LB Sohn and RR Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens" (1961) Vol 55 *The American Journal of International Law*, **CLA-136**, p 14 (noting that "the requirement of 'prompt' compensation does not necessarily call for payment in advance but does require that compensation be paid within a reasonable period of time after the taking. Vague assurances at the time of the taking of property to the effect that compensation will be paid in the future are insufficient if action is not taken within a reasonable time thereafter to grant that compensation. While no hard and fast rule may be laid down, the passage of several months after the taking without the furnishing by the State of any real indication that compensation would shortly be forthcoming would raise serious doubt that the State intended to make prompt compensation at all.") (emphasis added); World Bank Group, "Guidelines on the Treatment of Foreign Direct Investment" (1992) Vol 7(2) *ICSID Review-Foreign Investment Law Journal* 297, **CLA-17**, Articles IV(7)-(9).

Law, provide that the State shall afford compensation prior to taking private property.<sup>949</sup> Bolivia's Constitutional Tribunal has applied the Expropriation Law in recent jurisprudence, confirming its continuing applicability.<sup>950</sup>

385. Bolivia cites the World Bank Guidelines on the Treatment of Foreign Direct Investment to support its unfounded allegation that it cannot be expected to pay compensation until the conclusion of the present arbitration proceedings.<sup>951</sup> However, Bolivia does not cite to the relevant section addressing prompt compensation,<sup>952</sup> which does not support Bolivia's proposition. According to the

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<sup>949</sup> Constitution of Bolivia, 1967, **R-3**, Art 22.II (“Expropriation is imposed [...] after fair compensation.”) (emphasis added) (unofficial English translation from Spanish original); 2009 Constitution, 7 February 2009, **C-95**, Art 57 (“Expropriation will be imposed [...] after fair compensation.”) (emphasis added) (unofficial English translation from Spanish original); Expropriation Law, 30 December 1884, **C-49**, Arts 1 (“Since the right of ownership is inviolable, no individual, corporation [...] can be compelled to cede or dispose of whatever is their property for works of public interest, without the following requirements preceding: [...] 3. fair price of what is to be assigned or alienated; 4. payment of the compensation price”) and 8 (“The full price of the appraisal will be paid to the interested party in advance of the eviction”) (emphasis added) (unofficial English translation from Spanish original); Civil Code of Bolivia, 2 April 1976, **C-52**, Art 108(I) (“The expropriation only comes with payment of a fair and prior compensation”) (emphasis added) (unofficial English translation from Spanish original).

<sup>950</sup> *See, eg.*, Constitutional Tribunal, Constitutional Decision No 0565/2015-S3, 10 June 2015, **C-272**, p 11 (“Although it is true that, within the framework of the new conception of the scope of fundamental rights, the Constituent Assembly has determined a limitation on the exercise of the right to private property, which is operated through expropriation, it is no less true that, for the application of this limitation, has established guarantees in favor of the owner of the limited right, which can be summarized as follows: a) the expropriation will only be made after a solemn declaration of the need and public utility, determined by the competent authority; b) the procedure will be subject to the previously established legal provisions; and c) the cession of the proprietary right, as well as the public occupation of the property expropriated, will only materialize upon payment of the just compensation’ [...]”) (unofficial English translation from Spanish original); Constitutional Tribunal, Constitutional Decision No 0486/2013, 12 April 2013, **C-264**, p 7 (“[T]he Expropriation Law provides the steps or stages that must be followed both by the owner of the property to be expropriated and the authority that arranges the affectation of the property, initiating the entire administrative procedure with the declaration of need or public utility and culminates with the establishment and payment of the right to the owner, the consummation of these two guarantees is fundamental for the expropriation to be consummated.”) (emphasis added) (unofficial English translation from Spanish original).

<sup>951</sup> Statement of Defense, para 486.

<sup>952</sup> Rather, Bolivia quotes a provision that describes when compensation will be deemed adequate. *See* Statement of Defense, para 486 *quoting* World Bank. 1992. Guidelines on the Treatment of Foreign Direct Investment. Foreign Investment Law Journal, Chapter IV Expropriation and unilateral alterations or termination of contracts, **CLEX-18**, IV(2). Article IV(2) of the World Bank Guidelines provides that “[c]ompensation for a specific investment taken by the State will, according to the details provided below, be deemed ‘appropriate’ if it is adequate, effective and

World Bank Guidelines, compensation will be prompt “if paid without delay.”<sup>953</sup>  
In the event that the State “faces exceptional circumstances,” prompt compensation shall not exceed five years from the time of the taking:

Compensation will be deemed to be “prompt” in normal circumstances if paid without delay. In cases where the State faces exceptional circumstances, as reflected in an arrangement for the use of the resources of the International Monetary Fund or under similar objective circumstances of established foreign exchange stringencies, compensation in the currency designated under Section 7 above may be paid in installments within a period which will be as short as possible and which will not in any case exceed five years from the time of the taking, provided that reasonable, market-related interest applies to the deferred payments in the same currency.<sup>954</sup>

386. Bolivia does not claim that it faced any such exceptional circumstances, nor could it. In any event, to this date—more than eleven years from its first expropriation and six years from its last expropriation—Bolivia has not provided any compensation to Glencore Bermuda. In addition, the World Bank Guidelines outline the limited instances in which compensation may be determined through international arbitration. These are: (i) in the context of large scale social reforms; (ii) if the State suffers “exceptional circumstances” such as war and revolution; and, in any event (iii) require State-to-State negotiations first.<sup>955</sup>

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prompt.” The World Bank Guidelines discuss adequate compensation at Articles IV(3)-IV(6), “effective” compensation at Article IV(7), and prompt compensation at Article IV(8). Thus, the article cited in the Statement of Defense relates to appropriate compensation, not promptness of payment.

<sup>953</sup> World Bank. 1992. Guidelines on the Treatment of Foreign Direct Investment. Foreign Investment Law Journal, Chapter IV Expropriation and unilateral alterations or termination of contracts, **CLEX-18**, IV(8) (emphasis added).

<sup>954</sup> *Ibid*; see also World Bank Group, “Guidelines on the Treatment of Foreign Direct Investment” (1992) Vol 7(2) ICSID Review–Foreign Investment Law Journal 297, 1992, **CLA-17**, Article IV(8).

<sup>955</sup> World Bank. 1992. Guidelines on the Treatment of Foreign Direct Investment. Foreign Investment Law Journal, Chapter IV Expropriation and unilateral alterations or termination of contracts, **CLEX-18**, IV(10); see also World Bank Group, “Guidelines on the Treatment of Foreign Direct Investment” (1992) Vol 7(2) ICSID Review–Foreign Investment Law Journal 297, 1992, **CLA-17**, Article IV(10).

387. Such conditions are absent in the present case—the nationalizations were not part of large scale social reforms, there were no exceptional circumstances such as war and revolution, nor were they dependent on State-to-State negotiations. Bolivia’s reference to the World Bank Guidelines on the Treatment of Foreign Direct Investment does not, therefore, advance its case. It is noteworthy that Bolivia (represented by the same counsel team) made no such arguments in the *Rurelec* case in which the same Treaty governed.<sup>956</sup>
388. In addition, the passages in the *Tidewater* case upon which Bolivia relies in support of its position address instances where the expropriatory nature of the State’s measures was disputed. In that case the tribunal went on to note that “[m]ost expropriation claims turn on the question whether a measure is expropriatory at all. In such cases, where the tribunal finds expropriation, compensation is almost always due.”<sup>957</sup>
389. Here, the issue in dispute is not the enactment of a regulation with arguable expropriatory effects. Bolivia directly expropriated the Assets, thereby also indirectly expropriating Glencore Bermuda’s shareholding in Vinto and Colquiri. Under the plain language of the Treaty, Bolivia was therefore under an obligation to provide Glencore Bermuda with “prompt” compensation.<sup>958</sup>
390. In *Ampal-American*, another case cited by Bolivia, the tribunal specifically noted that its role was to enforce the State’s obligation to pay compensation for an expropriation in the event that the State failed to comply with such an obligation.<sup>959</sup> This cannot mean, as Bolivia seems to suggest, that the obligation

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<sup>956</sup> See, eg, Permanent Court of Arbitration, PCA Case Repository, *Guaracachi America, Inc and Rurelec Plc v Plurinational State of Bolivia*, <https://www.pcacases.com/web/view/72>.

<sup>957</sup> *Tidewater Inc Tidewater Investment SRL Tidewater Caribe CA et al v The Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Award, 13 March 2015, **RLA-60**, para 138 (emphasis added).

<sup>958</sup> Treaty, **C-1**, Art 5.

<sup>959</sup> *Ampal-American Israel Corporation and others v Arab Republic of Egypt* (ICSID Case No ARB/12/11) Decision on Liability and Heads of Loss, 21 February 2017, **RLA-61**, paras 185-187.

itself only arises following a tribunal’s final determination. Arbitration is a last resort remedy to enforce a breach of a pre-existing obligation; Glencore Bermuda has a right to compensation under the Treaty and international law and should not have to undergo expensive and lengthy dispute resolution proceedings in order to have that right respected.

391. Next, Bolivia claims that “[a]lthough this is not necessary to satisfy a treaty compensation provision,” it “did negotiate in good faith over the course of ten years.”<sup>960</sup> As explained in the Statement of Claim, when the State has not offered acceptable compensation prior to or at the time of the taking, the State is obligated to at least “engage in good faith negotiations to fix the compensation in terms of the standard” established by the governing treaty.<sup>961</sup> However, offers which fail to apply the relevant compensation standard—in this case, fair market value—reflect a lack of good faith and a failure to comply with the obligation to provide compensation promptly.<sup>962</sup>
392. Here, despite Bolivia’s allegations to the contrary, the State did not negotiate in good faith. It was Glencore Bermuda that, throughout the years, pursued negotiations with the Government while Bolivia repeatedly failed to acknowledge its obligation to provide compensation on the basis of the fair market value of what was seized; even going so far as offering Glencore Bermuda a negative valuation as “compensation” for its takings.<sup>963</sup>
393. As the Tribunal in the *Rurelec* case made clear, the failure of Bolivia to make a good faith assessment of the value of the expropriated investment prior to the

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<sup>960</sup> Statement of Defense, para 492.

<sup>961</sup> *ConocoPhillips Petrozuata BV and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/30) Decision on Jurisdiction and the Merits, 3 September 2013, **CLA-117**, para 362.

<sup>962</sup> *Ibid*, paras 362, 394; *see also Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan* (ICSID Case No ARB/05/16) Award, **CLA-79**, para 706.

<sup>963</sup> Statement of Claim, paras 160-168.

arbitration was held to be a failure to comply with the compensation requirement and the expropriation was therefore illegal.<sup>964</sup>

394. Confidential

395. Confidential

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<sup>964</sup> *Guaracachi America, Inc and Rurelec Plc v Plurinational State of Bolivia* (UNCITRAL) Award, 31 January 2014, **CLA-120**, para 441.

<sup>965</sup> Confidential

<sup>966</sup> Confidential

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*ii Bolivia's acknowledged failure to pay prompt and effective compensation renders the expropriations unlawful*

398. Bolivia argues that, in any event, it “did not have to make any payment at all in order for the reversions to be lawful, even assuming (*quod non*) that they were expropriations.”<sup>969</sup> Again, Bolivia misstates the standard under the Treaty and international law.

399. The Treaty’s plain language is clear. Article 5 sets out the requirements for a State to carry out a lawful expropriation. It provides that “[i]nvestments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or

967 Confidential

968 Confidential

969 Statement of Defense, para 495.

subjected to measures having effect equivalent to nationalisation or expropriation [...] in the territory of the other Contracting Party except for a public purpose and for a social benefit related to the internal needs of that Party and against just and effective compensation.”<sup>970</sup> Furthermore, the Treaty provides that compensation “shall be made without delay” and that the expropriating party shall ensure “prompt, adequate and effective compensation.”<sup>971</sup>

400. As explained above, the Treaty’s requirements are cumulative, meaning that each one must be fulfilled in order for an expropriation to be lawful.<sup>972</sup> In other words, non-compliance with any one of the requirements laid out in Article 5 amounts to a breach of that provision.<sup>973</sup> It follows that the taking of Glencore Bermuda’s Assets without providing any compensation renders Bolivia’s expropriations unlawful.
401. Bolivia’s attempt to argue the contrary should be dismissed. In particular, Bolivia mischaracterizes the decision of the PCIJ in *Chorzów Factory*. According to Bolivia, the PCIJ determined that failure to pay compensation did not make an expropriation inherently unlawful.<sup>974</sup> But Bolivia misinterprets the language it has quoted. In *Chorzów Factory*, the PCIJ determined that the taking at issue was not an expropriation which could have been rendered lawful by the payment of compensation, but a seizure of property contrary to the 1922 Geneva Convention—in other words, the taking was unlawful whether or not compensation was paid.<sup>975</sup> Rather than standing for the proposition that lack of

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<sup>970</sup> Treaty, **C-1**, Art 5(1).

<sup>971</sup> *Ibid*, Art 5.

<sup>972</sup> R Dolzer and C Schreuer, *Principles of International Investment Law* (2nd edn 2012), **CLA-202**, p 13.

<sup>973</sup> *See also Bernardus Henricus Funnekotter and others v Republic of Zimbabwe* (ICSID Case No ARB/05/6) Award, 22 April 2009, **CLA-88**, para 98.

<sup>974</sup> Statement of Defense, para 496.

<sup>975</sup> *See also* A Sheppard, “The distinction between lawful and unlawful expropriation” in: *Investment Arbitration and the Energy Charter Treaty* (2006) **RLA-64**, p 16 (“It should also be borne in mind that the PCIJ in the *Factory at Chorzów* case was not dealing with a paradigm case of expropriation under customary international law, where a State has a right to expropriate an alien’s

compensation does not render an expropriation unlawful, the case specifically recognizes that payment is a factor in determining the lawfulness of an expropriation:

The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation—to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation, save under the exceptional conditions fixed by Article 7 of the said Convention. As the Court has expressly declared in Judgment No. 8, reparation is in this case the consequence not of the application of Articles 6 to 22 of the Geneva Convention, but of acts contrary to those articles.<sup>976</sup>

402. Similarly, Bolivia’s additional authorities do not support its blanket (and incorrect) statement that “the failure to pay compensation cannot by itself make an expropriation inherently unlawful.”<sup>977</sup> For example, Mohsen Mohebi, on which Bolivia heavily relies—openly acknowledges that the “[t]hird requirement for the legality of taking aliens’ property is the payment of compensation.”<sup>978</sup> Similarly,

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property and may do so legally if certain conditions are met. Rather, as has been described above, Poland was not entitled (save for exceptional circumstances) to expropriate property of a German national, and could not make the expropriation legal even if it paid fair compensation.”) (emphasis added).

<sup>976</sup> *Case Concerning the Factory at Chorzów (Germany/Poland)* (Merits) [1928] PCIJ Series A, No 17, 1928, **CLA-2**, p 45; *see also* A Sheppard, “The distinction between lawful and unlawful expropriation” in: *Investment Arbitration and the Energy Charter Treaty* (2006), **RLA-64**, p 11 (“explaining that “[w]hat is clear, however, is that the PCIJ considered the taking to be unlawful simply because it was not in conformity with the 1922 Convention; it was not due to any failure on the part of Poland to pay compensation, or because the taking was discriminatory”).

<sup>977</sup> Statement of Defense, para 497.

<sup>978</sup> M Mohebi, *The International Law Character of the Iran-United States Claims Tribunal* (1999), **RLA-62**, p 288. The author then went on to observe that, at the time of writing (1999) there was some disagreement amongst commentators over whether the payment of compensation was a condition of legality or a separate requirement which had to, nevertheless, be fulfilled by the expropriating State (“Here it suffices to mention that although there is a duty to compensate under customary law, it is an independent obligation arising from the taking itself, even a lawful one. Therefore, the payment of compensation is not a condition similar to the other two requirements, i.e., the public purpose and non-discrimination. Indeed, both public purpose, non-discrimination requirements and the payment of compensation rule, are concerned with the legality of a taking, but they function in different ways, viz., non-fulfillment of either of the two former renders a taking *per se* unlawful which will engage the State liability for a wrongful act under international law; whereas the non-payment of compensation does not, as such, make a taking *ipso facto*

Crawford states that “[t]he rule supported by all leading ‘Western’ governments and many jurists in Europe and North America is as follows: the expropriation of alien property is only lawful if ‘prompt, adequate, and effective compensation’ is provided for.”<sup>979</sup> He goes on to observe that such “compensation rule [...] has received considerable support from state practice and international tribunals.”<sup>980</sup> Finally, the commentary by Sheppard that Bolivia relies on recognizes that payment of compensation is one of the conditions for a lawful expropriation under the ECT.<sup>981</sup> The author merely argues that the applicable *standard* of compensation should be the same whether proper payment is the only condition that has not been met or whether the State failed to satisfy any other condition for a lawful expropriation—in either case, the State is under an obligation to provide the investor with proper compensation in order for its taking to be lawful.<sup>982</sup>

403. Not surprisingly then, Bolivia’s assertion that “no investment tribunal has ever drawn any legal consequence from an expropriation found unlawful only for the lack of compensation”<sup>983</sup> is plainly incorrect. International investment tribunals have repeatedly recognized that failure to pay compensation renders an expropriation unlawful. As stated by the tribunal in *Vivendi v Argentina*, for instance, “[i]f we conclude that the challenged measures are expropriatory, there will be a violation of Article 5(2) of the Treaty, even if the measures might be for a public purpose and non-discriminatory, because no compensation has been

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wrongful, rather it is a violation by the expropriating State of an independent duty which applies even to both unlawful and lawful taking.”). M Mohebi, *The International Law Character of the Iran-United States Claims Tribunal* (1999), **RLA-62**, p 289 (emphasis added).

<sup>979</sup> J Crawford, *Brownlie’s Principles of Public International Law* (8<sup>th</sup> edn 2012), **RLA-63**, p 9.

<sup>980</sup> *Ibid*, p 10. After laying out the general principle that expropriations are unlawful unless adequate compensation is provided for, Crawford references a “category of types of expropriation which are illegal apart from a failure to provide for compensation, in which cases lack of compensation is an additional element in, and not a condition of, the legality.” But even in such instances, the State is under an obligation to pay compensation.

<sup>981</sup> In addition, the expropriation must be in the public interest and non-discriminatory. M Mohebi, *The International Law Character of the Iran-United States Claims Tribunal* (1999), **RLA-62**, p 289.

<sup>982</sup> *Ibid*.

<sup>983</sup> Statement of Defense, para 498.

paid.”<sup>984</sup> Similarly, in *Unglaube v Costa Rica*, the tribunal found that “the violation of the Treaty that rendered Respondent’s action internationally wrongful (both under the Treaty and under customary international law), was that adequate compensation [...] was not, in fact, paid [...] within a reasonable time after the State declared its intention to expropriate.”<sup>985</sup> Many other tribunals have reached similar conclusions.<sup>986</sup>

404. In fact, the cases cited by Bolivia do not support its claim that “the overwhelming majority of tribunals confronting failures to pay compensation nevertheless declined to hold the expropriation to be unlawful.”<sup>987</sup> For example, in *Compañía del Desarrollo de Santa Elena SA v. Costa Rica* although the tribunal did not

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<sup>984</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (ICSID Case No ARB/97/3) Award, 20 August 2007, **CLA-70**, para 7.5.21 (emphasis added).

<sup>985</sup> *Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica* (ICSID Case Nos ARB/08/1 and ARB/09/20) Award, 16 May 2012, **CLA-108**, para 305.

<sup>986</sup> *See, eg. Bear Creek Mining Corporation v Republic of Peru* (ICSID Case No ARB/14/2) Award, 30 November 2017, **CLA-229**, paras 443, 448-449; *Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal LDA v Bolivarian Republic of Venezuela* (ICSID Case No ARB/12/23) Award, 12 December 2016, **CLA-133**, paras 382, 384, 386; *Tenaris SA and Talta-Trading E Marketing Sociedade Unipessoal LDA v Bolivarian Republic of Venezuela* (ICSID Case No ARB/11/26) Award, 29 January 2016, **CLA-220**, paras 481-497; *Bernhard von Pezold and others v Republic of Zimbabwe* (ICSID Case No ARB/10/15) Award, 28 July 2015, **CLA-126**, paras 497-498; *OI European Group BV v Bolivarian Republic of Venezuela* (ICSID Case No ARB/11/25) Award, 10 March 2015, **CLA-125**, paras 362, 422-426 (noting that the tribunal, and doctrine, were in agreement: the breach of any one of the requirements for compensation renders the expropriation an unlawful one); *Flughafen Zürich AG and Gestión e Ingeniería IDC SA v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/19) Award, 18 November 2014, **RLA-107**, paras 510-511 (recognizing that the requirements for a lawful expropriation—including the payment of compensation—are cumulative and deciding that since the compensation owed had been neither “settled” nor “satisfied,” the expropriation could not be considered lawful); *Guaracachi America, Inc and Rurelec Plc v Plurinational State of Bolivia* (UNCITRAL) Award, 31 January 2014, **CLA-120**, para 441 (concluding that Bolivia’s measures amounted to an illegal expropriation because “Bolivia did not actually compensate (or intend to compensate) Rurelec as it did not make an accurate assessment of EGSA’s value at the time”); *ConocoPhillips Petrozuata BV and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/30) Decision on Jurisdiction and the Merits, 3 September 2013, **CLA-117**, paras 401; *Gemplus SA and others v United Mexican States, and Talsud SA v United Mexican States* (ICSID Case Nos ARB(AF)/04/3 and ARB(AF)/04/4) Award, 16 June 2010, **CLA-98**, para 8-25; *Sistem Mühendislik İnşaat Sanayi ve Ticaret A v Kyrgyz Republic* (ICSID Case No ARB(AF)/06/1) Award, 9 September 2009, **RLA-67**, para 119; *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Award, 6 February 2007, **CLA-67**, para 273; *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe* (ICSID Case No ARB/05/6) Award, 22 April 2009, **CLA-88**, paras 98, 107.

<sup>987</sup> Statement of Defense, para 498.

qualify the expropriation as unlawful, it considered that the standard of compensation was not different for a lawful and unlawful expropriation.<sup>988</sup> Further, *Venezuela Holdings* and *Tidewater* both concerned cases in which Venezuela had arguably made an offer of compensation. Specifically, in *Venezuela Holdings*, the passage cited by Bolivia stands for the proposition that the expropriation may not necessarily be unlawful despite the lack of payment because the State may have made an appropriate offer of compensation to the investor.<sup>989</sup> With respect to *Tidewater*, Bolivia fails to mention that the parties were actually in agreement that compensation should be paid; what they were unable to agree on was the method by which such payment should be calculated. This led the tribunal to conclude that “the State did not seek to expropriate the assets without compensation.”<sup>990</sup>

405. The above cases do not apply to the present dispute, since Bolivia has not only failed to make any payment whatsoever to Glencore Bermuda, but it has also failed to make a good faith offer of payment based on the fair market value of what was taken. More importantly, Bolivia now altogether rejects its obligation to pay any compensation by attempting to argue that its measures are only a legitimate application of its police powers.
406. By failing to provide adequate compensation in a timely manner, Bolivia breached the Treaty, international law, as well as its own domestic law, thus rendering its expropriations unlawful.

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<sup>988</sup> *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (ICSID Case No ARB/96/1) Final Award, 17 February 2000, **CLA-25**, para 72.

<sup>989</sup> *Venezuela Holdings BV Mobil Cerro Negro Holding Ltd Mobil Venezolana de Petróleos Holdings Inc Mobil Cerro Negro Ltd and Mobil Venezolana de Petróleos Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27) Award, 9 October 2014, **RLA-65**, para 301.

<sup>990</sup> *Tidewater Inc Tidewater Investment SRL Tidewater Caribe CA et al v The Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Award, 13 March 2015, **RLA-60**, paras 143.

*b. Bolivia violated its obligation to carry out the expropriations in accordance with due process*

407. The Tribunal’s analysis could end here, in light of the cumulative nature of the conditions for an expropriation to be lawful under the Treaty and international law. However, in addition to lacking compensation, Bolivia’s expropriations were also contrary to basic due process guarantees. Bolivia’s failure to afford Glencore Bermuda due process is in breach of its obligations under the Treaty and international law<sup>991</sup> and renders its expropriation unlawful independently of the lack of compensation.

408. Bolivia argues that due process is not a requirement for a lawful expropriation under the Treaty and that, in any event, Bolivia did not fail to accord Glencore Bermuda due process.<sup>992</sup> Both statements are inaccurate, for the reasons stated below.

*i Bolivia was required to expropriate in accordance with due process of law*

409. According to Bolivia, “[t]he plain text of the Treaty shows that due process is irrelevant to the legality of [the] expropriation.”<sup>993</sup> It instead argues that all that is required is the availability of a domestic avenue in which the affected individual can challenge the legality of the expropriation, after the taking. In Bolivia’s own words: “the Treaty establishes that individuals must have a right to due process following an expropriation, in order to challenge the legality of the expropriation. It does not make due process a condition of that legality.”<sup>994</sup>

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<sup>991</sup> Article 115(II) of the 2009 Constitution also provides that “the State guarantees the right to due process, to defense and to a plural justice, prompt, timely, transparent and without delay.” 2009 Constitution, 7 February 2009, **C-95**, Art 115(II) (unofficial English translation from Spanish original).

<sup>992</sup> Statement of Defense, para 500.

<sup>993</sup> *Ibid*, para 502 (emphasis added).

<sup>994</sup> *Ibid*, para 505.

410. Under Bolivia’s interpretation of the Treaty, a State would be free to take the private property of an investor without any regard whatsoever to due process, so long as it affords some later domestic avenues in which the investor can contest the taking. This proposition does not find support in either the Treaty or international law.
411. *First*, Bolivia’s reading of the Treaty language is incorrect. The Treaty itself plainly requires a State to expropriate in accordance with due process. Article 5(1) provides that “[i]nvestments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation [...] in the territory of the other Contracting Party except for a public purpose and for a social benefit related to the internal needs of that Party and against just and effective compensation.”<sup>995</sup> It goes on to specify that “[t]he national or company affected shall have the right to establish promptly by due process of law in the territory of the Contracting Party making the expropriation the legality of the expropriation and the amount of the compensation in accordance with the principle set out in this paragraph.”<sup>996</sup>
412. The above language does not stand for the proposition that Bolivia is only required to afford Glencore Bermuda later remedies within which to challenge the expropriation. In fact, if anything, the use of the term “prompt” in the above Treaty provision indicates that an investor’s right to challenge the legality of the expropriation is not limited to after the taking has already occurred. This is further supported by Bolivia’s own Expropriation Law, which provides that the State is to give notice of an impending expropriation as well as an opportunity to the property holder to challenge the State’s intended actions (including, arguably, their legality) prior to the taking.<sup>997</sup> In analyzing similar provisions in treaties entered into by Germany and Switzerland with Zimbabwe, the tribunal in the

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<sup>995</sup> Treaty, **C-1**, Art 5(1).

<sup>996</sup> *Ibid* (emphasis added).

<sup>997</sup> Expropriation Law, 30 December 1884, **C-49**, Arts 3-5, 8, 11-25.

- Pezold* case determined that due process was, in fact, a condition for a lawful expropriation.<sup>998</sup>
413. *Second*, even if one were to assume that the Treaty itself does not expressly include a requirement that expropriations be carried out in accordance with due process, that requirement is embedded in customary international law.<sup>999</sup> As explained by Professors Dolzer and Schreuer, it is a generally accepted principle of customary international law that the legality of an expropriatory measure is conditioned on certain requirements, including that the procedure of expropriation follow principles of due process.<sup>1000</sup> Professors Dolzer and Schreuer further explain that “[d]ue process is an expression of the minimum standard under customary international law.”<sup>1001</sup> It is therefore unclear whether an explicit reference to due process in the treaty “adds an independent requirement for the legality of the expropriation.”<sup>1002</sup> In other words, whether the Treaty references a specific due process obligation is unlikely to alter the State’s requirement to afford an investor due process when taking that investor’s property.
414. In *Norwegian Shipowners’ Claims*, for instance, the tribunal stated that “the right of friendly alien property must always be fully respected.”<sup>1003</sup> The tribunal added that “[t]hose who ought not to take property without making just compensation at

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<sup>998</sup> *Bernhard von Pezold and others v Republic of Zimbabwe* (ICSID Case No ARB/10/15) Award, 28 July 2015, **CLA-126**, paras 489-491.

<sup>999</sup> See A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (1st edn 2009), **CLA-84bis**, Section 7.1 (“International expropriation law, however, generally imposes four conditions on the expropriation of foreign-held property: the expropriation must be for a public purpose, in accordance with due process, non-discriminatory, and accompanied by compensation.”).

<sup>1000</sup> See R Dolzer and C Schreuer, *Principles of International Investment Law* (2nd edn 2012), **CLA-202**, p 14.

<sup>1001</sup> *Ibid.*

<sup>1002</sup> *Ibid.*

<sup>1003</sup> *Norwegian Shipowners’ Claims (Norway/USA)* Award, 13 October 1922, **CLA-1**, p 27.

- the time or at least without due process of law must pay the penalty for their action.”<sup>1004</sup>
415. Further, according to Bolivia, “any breach of due process would require ‘a manifest disrespect of due process that [offends] a sense of judicial propriety’.”<sup>1005</sup> Yet, in support of its proposition Bolivia cites to cases addressing due process in the context of denial of justice claims, which are not applicable in this instance.<sup>1006</sup>
416. Instead, “due process imports a requirement that an expropriation be in accordance with the law of the host state as well as an international minimum standard of due process, including notice, a fair hearing and non-arbitrariness.”<sup>1007</sup> Due process requires, at a minimum, that any expropriation be conducted so as to afford to the expropriated investor a reasonable and timely opportunity to assert its rights and have its claim heard, including with respect to the determination of adequate compensation.<sup>1008</sup> As stated by the tribunal in *Siag v Egypt*:

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<sup>1004</sup> *Ibid* (emphasis added).

<sup>1005</sup> Statement of Defense, para 507 (emphasis in original).

<sup>1006</sup> *Mr Franck Charles Arif v Republic of Moldova* (ICSID Case No ARB/11/23) Award of 8 April 2013, **RLA-69**, paras 422-497; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No ARB/04/13) Award, 6 November 2008, **CLA-83**, paras 187-188. The following case cited by Bolivia address due process in the context of a State’s fair and equitable treatment obligation, *see AES Summit Generation Limited and AES-Tisza Erömü Kft v Republic of Hungary* (ICSID Case No ARB/07/22) Award, **CLA-100**, para 9.3.40. The remaining case cited by Bolivia does not discuss the relevant due process standard at all, but merely indicates that “a manifest and gross failure to comply with the elementary principles of justice in the conduct of criminal proceedings, when directed towards an investor in the operation of his investment, may be a breach, or an element in a breach, of an investment treaty [...] .” *Tokios Tokelés v Ukraine* (ICSID Case No ARB/02/18) Award of 26 July 2007, **RLA-70**, para 133. The analysis of the tribunal in that case is plainly not applicable to the circumstances of the present dispute. In any event, Bolivia’s conduct—the taking of Claimant’s property through surprise “reversion” decrees based on unfounded and unsupported allegations—clearly rises to the level of a “manifest” disregard for due process and one that offends any sense of judicial propriety.

<sup>1007</sup> A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (1st edn 2009), **CLA-84**, p 4. *See also OI European Group BV v Bolivarian Republic of Venezuela* (ICSID Case No ARB/11/25) Award, 10 March 2015, **CLA-125**, para 386.

<sup>1008</sup> *See, eg, ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, **CLA-64**, para 435; *Ioannis Kardassopoulos*

The Tribunal accepts Claimants' submission and finds that [...] as Italian investors protected by the BIT they ought to have received notice that the TDA was considering expropriating the investment. Claimants received no such notice and were not afforded the opportunity, until after the fact, to be heard on the matter. The Tribunal finds that the failure by Egypt to provide such notice constitutes a denial of due process in terms of Article 5 of the BIT.<sup>1009</sup>

417. Similarly, in *ADC v Hungary* the tribunal held that the expropriation had been contrary to due process because the claimants had not received “reasonable advance notice” as well as “a fair hearing.”<sup>1010</sup> The measure had been planned by a small circle of government officials and its implementation took the claimants completely by surprise.<sup>1011</sup> Although Hungary had argued that legal remedies were available to challenge the expropriatory measure, the tribunal ultimately determined that the State’s due process obligation could not be considered satisfied given the manner in which the expropriation was carried out.<sup>1012</sup>
418. In accordance with the above, to the extent that Bolivia was going to expropriate Glencore Bermuda’s investments, it was under an obligation to do so in a manner consistent with basic due process guarantees.

*ii Bolivia did not accord Glencore Bermuda due process*

419. Here, Bolivia claims that it complied with any due process obligations because: (i) the “reversions” were justified and it negotiated in good faith; (ii) Bolivia did not

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*and Ron Ruchs v The Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15) Award, 3 March 2010, **CLA-96**, para 404.

<sup>1009</sup> *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (ICSID Case No ARB/05/15) Award, 1 June 2009, **CLA-89**, para 442 (emphasis added).

<sup>1010</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 435.

<sup>1011</sup> *Ibid*, para 436.

<sup>1012</sup> *Ibid*, para 438; *see also Ioannis Kardassopoulos and Ron Ruchs v The Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15) Award, 3 March 2010, **CLA-96**, para 396-404 (The State had expropriated the claimant’s investments without providing any advance notice. The tribunal applied the standard articulated in *ADC v Hungary* and concluded that the expropriation could not “by any definition be considered to have been carried out under due process of law.”).

need to comply with any formalities under local law because it “did not expropriate the Assets; it reverted them;” (iii) Glencore Bermuda received sufficient advance notice of the “reversions;” (iv) the police and military were present at the “reversions” in order to “guarantee the peaceful transfer of the Asset;” and (v) it provided Glencore Bermuda with later avenues in which to challenge the legality of the expropriations.<sup>1013</sup> Each of these arguments is without merit.

420. *First*, Glencore Bermuda has amply demonstrated above why each of Bolivia’s supposed “reversions” was not, in fact, justified.<sup>1014</sup> Rather: the Tin Smelter was expropriated because Bolivia determined that it would be “profitable” for it to do so and in order to secure control over the tin mineral supply chain; the Antimony Smelter was expropriated in order for Bolivia to gain access to the Tin Stock and solve EMV’s tin shortage problems; and the Colquiri Lease was expropriated when the Government purposefully decided to take the Colquiri Mine for its own benefit during a period of steadily increasing metals prices and especially successful mining operations. In addition, as explained above and in the Statement of Claim, despite Bolivia’s conclusory allegations, Bolivia did not negotiate in good faith following the nationalizations.<sup>1015</sup>

421. *Second*, as already explained above, Bolivia’s “reversions” did not comply with the provisions of its own domestic law. Under Bolivian law, including the Constitution and Expropriation Law, the taking by the State of an individual’s private property requires: (i) a legal norm authorizing the expropriation due to public utility or the property’s failure to perform a social function; and (ii) fair compensation, paid prior to the taking.<sup>1016</sup> Recent jurisprudence from Bolivia’s

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<sup>1013</sup> Statement of Defense, Section 6.1.2.2.

<sup>1014</sup> See Section II.D.

<sup>1015</sup> Statement of Claim, paras 13, 69, 71-76, 82-86, 114-117; see Section II.D.4.

<sup>1016</sup> Constitution of Bolivia, 1967, **R-3**, Art 22.II (“Expropriation is imposed for reasons of public utility or when the property does not fulfill a social function, qualified according to law and after fair compensation.”) (unofficial English translation from Spanish original); 2009 Constitution, 7

Constitutional Tribunal has expressly recognized and reaffirmed these requirements. For example, in a decision from June 2015 the Constitutional Tribunal explained that:

While it is true that, within the framework of the new conception of the scope of fundamental rights, the Constitutional Tribunal has determined a limitation on the exercise of the right to private property, which is operated through expropriation, it is no less true that, for the application of that limitation, guarantees have been established in favor of the owner with the limited right, which can be summarized as follows: a) the expropriation will only be made after a solemn declaration of the need and public utility, determined by the competent authority; b) the procedure will be subject to the previously established legal provisions; and c) the transfer of the property right, as with the public occupation of the expropriated property, will only materialize upon payment of just compensation [...].<sup>1017</sup>

422. Bolivia's Supreme Court reiterated in June 2016 that "expropriation takes place only after payment of the just compensation and that the expropriating entity can only occupy the real property once the payment of the compensation is made."<sup>1018</sup>
423. In addition, Bolivia's Expropriation Law required that, prior to taking privately held property, the State had to: (i) notify all interested parties of the expropriation; (ii) provide the interested parties with an opportunity to present objections to the expropriation before a public authority; (iii) expertly evaluate the property; (iv)

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February 2009, **C-95**, Art 57 ("Expropriation will be imposed because of need or public utility, qualified in accordance with the law and after fair compensation.") (unofficial English translation from Spanish original); Expropriation Law, 30 December 1884, **C-49**, Arts 1, 8; Civil Code of Bolivia, 2 April 1976, **C-52**, Art 108(I).

<sup>1017</sup> Constitutional Tribunal, Constitutional Decision No 0565/2015-S3, 10 June 2015, **C-272**, p 11. In addition, under Bolivian law, public officials who interfere with private property without following the established procedure for an expropriation under the law have been found to commit an unlawful act. Constitutional Tribunal, Constitutional Decision No 291/2013-L, 6 May 2013, **C-265**, p 6.

<sup>1018</sup> Supreme Tribunal of Justice, Supreme Decision No 731/2016, 28 June 2016, **C-274**, p 3.

- present the valuation to the property owners; and (v) pay the value to the property owners.<sup>1019</sup>
424. Here, Bolivia does not even attempt to argue that it complied with the dictates of its own laws. Instead, it summarily notes that the State did not need to follow any local law formalities, because “Bolivia did not expropriate the Assets; it reverted them.”<sup>1020</sup>
425. But this is not accurate. As already stated above, there was no applicable reversion law in place at the time of the takings, nor does Bolivia refer to any such provision in its Statement of Defense or in the nationalization decrees. Even if one were to assume the laws in place somehow allowed the “reversion” of the Assets, any such “reversion” would have been subject to the Administrative Procedure Law and would have required a prior administrative process to determine the existence of a breach of obligations or the law prior to its execution.<sup>1021</sup> None of this happened here, and Bolivia does not argue otherwise.
426. *Third*, Bolivia’s measures did not provide Glencore Bermuda with adequate notice. Bolivia argues that it provided sufficient notice to Glencore Bermuda since “President Morales announced the Tin Smelter reversion on 22 January 2007” and “the Antimony Smelter reversion on 1 May 2007.”<sup>1022</sup> This argument is meritless. On 22 January 2007, President Morales made a public announcement. The President’s speech was not addressed to Glencore Bermuda and its affiliates, nor was it followed by any such communication. Glencore Bermuda could not expect

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<sup>1019</sup> Expropriation Law, 30 December 1884, **C-49**, Arts 3-5, 7, 8, 11-25.

<sup>1020</sup> Statement of Defense, para 516.

<sup>1021</sup> Pursuant to the Administrative Procedure Law, which applies to any administrative process used to impose an administrative sanction (including a reversion of rights), the following is required: (i) preliminary diligence; (ii) an initiation stage, in which the respondent is notified of the allegations and potential consequences; (iii) a processing stage, in which the respondent may present evidence in its defense; and (iv) a closing stage, in which the administrative authority issues a resolution either imposing or dismissing the contemplated administrative sanction. Law No 2,341, 23 April 2002, **R-250**, Arts 80-84. In addition, the 2009 Constitution requires the State to provide due process. 2009 Constitution, 7 February 2009, **C-95**, Art 115(II).

<sup>1022</sup> Statement of Defense, para 514.

that its Asset would be taken through a summary decree with no prior process, no compensation, and no valid justification in fact or in law. Similarly, Bolivia cannot credibly argue that announcing the nationalization of the Antimony Smelter on 1 May 2010 provided Glencore Bermuda with sufficient notice of the taking that occurred on the subsequent day, 2 May 2010. In this timeframe Glencore Bermuda did not have any opportunity to challenge the State's measure or assert its rights. With respect to the Colquiri Lease, Bolivia determined that it would "execute the Nationalization of the Colquiri Mine"<sup>1023</sup> in a meeting that neither Glencore Bermuda nor its representatives attended. It then set out to do just that once the conflict erupted on 30 May 2012, purposely excluding Glencore Bolivia from the negotiations during which the Government advanced its nationalization proposal.<sup>1024</sup> Glencore Bermuda was not, therefore, provided with an opportunity to present any observations on the Government's nationalization proposal prior to the issuance of the Colquiri Lease Nationalization Decree.

427. *Fourth*, Bolivia's use of force to effect the expropriation of the Tin Smelter, Antimony Smelter and the Tin Stock was unnecessary.<sup>1025</sup> As explained above, Vinto's workers were peacefully voicing their opposition to the Government's taking.<sup>1026</sup> Bolivia's claim that the police and military were necessary to carry out its supposed "reversions" is contradicted by the evidence and in stark contrast with Bolivia's response to the *cooperativistas'* invasion of the Colquiri Mine, as described further below.<sup>1027</sup>

428. *Finally*, Bolivia claims that it satisfied any due process obligations by providing domestic avenues in which Glencore Bermuda could challenge the so-called

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<sup>1023</sup> 10 May 2012 Agreement, 10 May 2012, **C-256**.

<sup>1024</sup> According to Bolivia, by 6 June 2012, "it no longer made sense for the Government to try to involve Glencore in the negotiations." Statement of Defense, para 208. *See also* Statement of Defense, para 209, providing that the nationalization was discussed with the workers and *cooperativistas* only.

<sup>1025</sup> Statement of Claim, para 172; Section II.D.1-II.D.2.

<sup>1026</sup> *See* Section II.D.1-II.D.2.

<sup>1027</sup> *See* Section V.B.

“reversions” after they took place.<sup>1028</sup> However, the availability of *ex post* avenues to challenge the legality of the State’s measures—including on the basis of a lack of due process—does not relieve the State from its *ex ante* obligation to carry out an expropriation in accordance with due process. Most notably, in *Quiborax*, the tribunal concluded that Bolivia had failed to accord the claimant due process despite the fact that Bolivian law provided for “several constitutional or administrative actions” through which the claimant could have posteriorly challenged the State’s measures. The tribunal held that “the availability of domestic actions to challenge the Revocation Decree does not change the Tribunal’s conclusion that the revocation did not comply with due process, the determinative factors being that the Claimants were not heard [...] and that the revocation lacked valid reasons.”<sup>1029</sup> Importantly, the tribunal emphasized that Bolivian law provided for basic due process guarantees that had not been provided by the Government.<sup>1030</sup> The same holds true here.

429. In sum, Bolivia’s circuitous game of words cannot change the law or the facts. Bolivia was under an obligation to carry out its expropriations in accordance with due process. Bolivia plainly failed to comply with this standard, issuing a series of nationalization decrees through which it took Glencore Bermuda’s investments for its own benefit without providing the minimum procedural guarantees embodied in the Treaty, international law, as well as its own domestic legal system.

**B. BOLIVIA FAILED TO PROVIDE FULL PROTECTION AND SECURITY AND TO OBSERVE ITS OBLIGATIONS UNDER THE COLQUIRI LEASE**

430. In its Statement of Claim, Glencore Bermuda demonstrated how Bolivia failed to grant full protection and security to the Colquiri Lease, as required under Article

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<sup>1028</sup> Statement of Defense, para 504.

<sup>1029</sup> *Quiborax SA and Non Metallic Minerals SA v Plurinational State of Bolivia* (ICSID Case No ARB/06/2) Award, 16 September 2015, **CLA-127**, para 226.

<sup>1030</sup> *Ibid*, paras 222-223. Those same due process guarantees apply here. *See* Law No 2,341, 23 April 2002, **R-250**, Art 16.

2(2) of the Treaty, and how, through its failures, Bolivia also breached the Treaty’s umbrella clause.<sup>1031</sup> There, Glencore Bermuda explained that, in early April 2012, the Colquiri Mine was attacked by members of a local *cooperativa* who stole minerals and mining equipment and threatened the workers with violence.<sup>1032</sup> As Bolivia openly admits,<sup>1033</sup> despite Colquiri’s immediate requests for prompt intervention,<sup>1034</sup> Bolivia failed to take any measures.

431. Bolivia subsequently—and without Glencore Bermuda’s knowledge—decided to nationalize the Colquiri Mine and agreed with representatives from the country’s main national associations of workers to “summon Colquiri’s workers’ union” in order to “execute the Nationalization of the Colquiri Mine.”<sup>1035</sup>
432. It is therefore not surprising that when, on 30 May 2012, more than one thousand members of the Cooperativa 26 de Febrero violently took over the Colquiri Mine,<sup>1036</sup> Bolivia failed to diligently and actively protect the Colquiri Mine and its workers. Bolivia also failed to use all available measures to reach a peaceful solution that would have restored operations at the Colquiri Mine and maintained Claimant’s rights over the Colquiri Lease. Indeed, contrary to Bolivia’s assertions, this was never the State’s intention. Rather, Bolivia purposely took advantage of the conflict to muster support from Colquiri’s workers for its nationalization proposal, as Bolivia openly admits.<sup>1037</sup> Consequently, the violence increased, leaving the Colquiri Mine inaccessible from 30 May 2012 until its formal

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<sup>1031</sup> Statement of Claim, Section V.B; Treaty, **C-1**, Article 2(2) (requiring Bolivia to afford “full protection and security” to Glencore Bermuda’s investments and stating, in relevant part, that “[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party”).

<sup>1032</sup> Statement of Claim, para 184.

<sup>1033</sup> Statement of Defense, para 545 (“The events of early April were over so quickly that no response was reasonably feasible”).

<sup>1034</sup> Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 3 April 2012, **C-30**.

<sup>1035</sup> 10 May 2012 Agreement, 10 May 2012, **C-256** (emphasis added); *see also* Letter from the Ministry of Economy (Mr Arce) to FSTMB (Mr Pérez), 15 May 2012, **C-258**.

<sup>1036</sup> *See* Section II.D.3.

<sup>1037</sup> *Ibid*; Statement of Defense, paras 208-210.

nationalization on 20 June 2012. Lastly, Bolivia failed to punish the perpetrators of the violent takeover in any way, offering instead permanent jobs to the *cooperativistas* who attacked Glencore Bermuda's property and later supported the nationalization.<sup>1038</sup>

433. These facts are well documented. Rather than confronting them, Bolivia seeks: (i) to impose limits on its obligations under the Treaty that have no basis in law; (ii) to defend the limited actions it did take with respect to Colquiri against the background of a higher (albeit inapplicable) standard of proof; and (iii) to dismiss its obligations under the Colquiri Lease. These arguments can be easily discarded.

**1. Bolivia's restrictive view of its full protection and security obligation is erroneous**

434. Consistent with international law, the Treaty provides, at a minimum, for the physical protection of a foreign investor's property and employees. In particular, Article 2(2) of the Treaty provides:

Investments of nationals or companies of each Contracting Party shall at all times [...] enjoy full protection and security in the territory of the other Contracting Party.<sup>1039</sup>

435. This obligation applies to protection against injury by both State actors and third parties.<sup>1040</sup> It is also well understood that “a violation of the standard of full protection and security could arise in case of failure of the State to prevent the damage, to restore the previous situation or to punish the author of the injury.”<sup>1041</sup>

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<sup>1038</sup> Witness Statement of Joaquín Mamani, para 39; Witness Statement of Andrés Cachi, para 51; Proposal from the Government to the Cabildo of Colquiri, **R-27**; Colquiri Mine Nationalization Decree, 20 June 2012, **C-39**.

<sup>1039</sup> Treaty, **C-1**, Art 2(2).

<sup>1040</sup> See, eg, *Frontier Petroleum Services Ltd v Czech Republic* (UNCITRAL) Final Award, 12 November 2010, **CLA-102**, para 261; *Parkerings-Compagniet AS v Republic of Lithuania* (ICSID Case No ARB/05/8) Award, 11 September 2007, **RLA-83**, para 355; *Vannessa Ventures Ltd v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/04/6) Award, 16 January 2013, **CLA-207**, para 223.

<sup>1041</sup> *Parkerings-Compagniet AS v Republic of Lithuania* (ICSID Case No ARB/05/8) Award, 11 September 2007, **RLA-83**, para 355.

For example, in *Biwater v Tanzania*, the tribunal found a breach of the full protection and security standard when managers of the investor's company were expelled by State representatives from their offices, even if non-violently, since this conduct was considered "unnecessary and abusive."<sup>1042</sup> To take another example, in *Wena Hotels v Egypt* the tribunal found a violation of the full protection and security standard when members of the Egyptian Hotel Company were not "seriously punished" for forcibly dispossessing the claimant of its hotels.<sup>1043</sup> The tribunal in *Wena Hotels* came to this conclusion despite the fact that prosecutions had been launched and convictions obtained.<sup>1044</sup>

436. As recognized by Bolivia, the standard of protection required is one of vigilance and due diligence.<sup>1045</sup> As held by the tribunal in *AAPL v Sri Lanka*, this "objective' standard of vigilance" is violated by the "mere lack or want of diligence', without any need to establish malice or negligence."<sup>1046</sup> Or, as stated by the tribunal in *AMT v Zaire*, "all measure of precaution to protect the investments" must be taken by the host State.<sup>1047</sup> In other words, "the host state is under an obligation to take active measures to protect [an] investment from adverse effects that stem from private parties or from the host state and its organs."<sup>1048</sup> This vigilance standard includes "a duty of prevention and a duty of repression," meaning that a State must prevent harm caused by third parties and, if

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<sup>1042</sup> *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (ICSID Case No ARB/05/22) Award, 24 July 2008, **CLA-78**, para 731.

<sup>1043</sup> *Wena Hotels Ltd v Arab Republic of Egypt* (ICSID Case No ARB/98/4) Award, 8 December 2000, **RLA-68**, paras 94-95.

<sup>1044</sup> *Ibid.*

<sup>1045</sup> Statement of Defense, para 523 ("As developed in investment law, state need only exercise due diligence.").

<sup>1046</sup> *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (ICSID Case No ARB/87/3) Final Award, 27 June 1990, **CLA-14**, para 77.

<sup>1047</sup> *American Manufacturing & Trading Inc v The Republic of Zaire* (ICSID Case No ARB/93/1) Award, 21 February 1997, **CLA-20**, para 6.05.

<sup>1048</sup> *Frontier Petroleum Services Ltd v Czech Republic* (UNCITRAL) Final Award, 12 November 2010, **CLA-102**, para 261. See also R Dolzer and C Schreuer, *Principles of International Investment Law* (1st edn 2008) (Extract), **CLA-73**, p 149.

this is not possible, at the very least exercise due diligence to punish any injuries.<sup>1049</sup>

437. Bolivia does not dispute that it was under an obligation to provide full protection and security to Glencore Bermuda's investment.<sup>1050</sup> However, Bolivia attempts to circumscribe its obligation to afford full protection and security under the Treaty in three impermissible ways.<sup>1051</sup>

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<sup>1049</sup> *El Paso Energy International Company v Argentine Republic* (ICSID Case No ARB/03/15) Award, 31 October 2011, **CLA-106**, para 523.

<sup>1050</sup> Bolivia mischaracterizes Glencore Bermuda's position, stating that the Treaty does not create an obligation of strict liability. This is not what Glencore Bermuda asserts. There is no need to employ a higher strict liability standard to find Bolivia in breach of its obligation. Nor do the decisions cited by Bolivia provide a standard different to that set forth by Glencore Bermuda—they simply address instances in which tribunals found that the State had employed sufficient measures to protect the investor's investment. For example, in *Elettronica Sicula* the International Court of Justice recognized the State's obligation to protect the integrity of claimant's investment and held that, given the specific circumstances of the case, the measures adopted by the State to protect the claimant's investment were adequate, allowing the plant to continue operating despite the workers' peaceful occupation. *Elettronica Sicula SpA (ELSI) (United States of America/Italy)* Judgment [1989] ICJ Reports 15, 20 July 1989, **RLA-72**, paras 105-108. In *Allard v Barbados*, the claimant argued that the State failed to take reasonable care to protect its eco-tourism site against the environmental damage caused by a failure in a publicly-owned sewage treatment plant, which resulted in discharge of raw sewage. Again, analyzing the actions taken by the State, the tribunal in *Allard* concluded that the procedures implemented by the authorities to prevent environmental damage to claimant's investment were sufficient under the relevant due diligence standard. *Peter A Allard v The Government of Barbados* (PCA Case No 2012-06) Award, 27 June 2016, **RLA-73**, paras 231-234, 245-249.

The remaining cases cited by Bolivia similarly do not support its position. See *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme SA v Republic of Albania* (ICSID Case No ARB/11/24) Award, 30 March 2015, **RLA-74**, paras 822-829 (determining that Albania pursued a national policy and made serious efforts to overcome the problems of smuggling, fuel adulteration and tax evasion); *Tulip Real Estate Investment and Development Netherlands BV v Republic of Turkey* (ICSID Case No ARB/11/28) Award, 10 March 2014, **RLA-75**, paras 430-437 (concluding that the State took action by ordering trust representatives to remove their personnel from the construction site and preventing those representatives from repossessing the site); *Toto Costruzioni Generali SpA v Republic of Lebanon* (ICSID Case No ARB/07/12) Award, 7 June 2012, **RLA-76**, para 211 (finding that the claimant did not establish that the State had knowledge or should have had knowledge of the impending obstructions); *Frontier Petroleum Services Ltd v. Czech Republic* (UNCITRAL) Final Award, 12 November 2010, **CLA-102**, paras 335-337 (finding that the Czech Republic "was available to Claimant and responsive to Claimant's requests").

Here, on the other hand, Bolivia did not employ sufficient measures to protect Glencore Bermuda's investment from the *cooperativistas'* violent takeover and in fact only exacerbated the conflict, resulting in Glencore Bermuda's complete loss of its investment.

<sup>1051</sup> Statement of Defense, Section 6.2.

438. *First*, Bolivia argues that a State’s duty to protect only arises when there is “a threat of permanent impairment to [the] physical integrity of the investment.”<sup>1052</sup> Yet, none of the cases cited by Bolivia stand for this proposition. *Elettronica Sicula* and *Toto v Lebanon* are inapposite, as they concerned peaceful occupations that did not materially affect the claimants’ investments.<sup>1053</sup> With respect to *Noble Ventures v Romania*, the tribunal in that case held that the claimant had not proved that the harm it suffered could have been prevented by Romania.<sup>1054</sup> In contrast, as explained by Bolivia’s witness Joaquín Mamani (former Colquiri employee and Secretary General of the FSTMB), the Colquiri Mine was forcefully invaded by over one thousand “very violent”<sup>1055</sup> *cooperativistas*, who carried out attacks “with sticks, stones and dynamite,” injuring over fifteen people working inside the Colquiri Mine.<sup>1056</sup> Bolivia itself recognized that “[t]he grave situation at Colquiri demanded urgent action from the Government.”<sup>1057</sup> Bolivia cannot, therefore, credibly dismiss its duty to intervene on the grounds that the threat of impairment was not significant or permanent enough.
439. *Second*, Bolivia tries to limit its liability by arguing that the “*cooperativistas* are not state actors” and “Bolivia was not involved in their alleged actions against

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<sup>1052</sup> *Ibid*, para 524.

<sup>1053</sup> In *Elettronica Sicula* the workers’ occupation had been a peaceful one and the International Court of Justice considered that it was “not established that any deterioration in the plant and machinery was due to the presence of the workers, and that the authorities were able not merely to protect the plant but even in some measure to continue production.” Therefore, the International Court of Justice concluded that Italy’s conduct did not fall short of the protection it owed under the applicable treaty and international law. *Elettronica Sicula SpA (ELSI) (United States of America/Italy)* Judgment [1989] ICJ Reports 15, 20 July 1989, **RLA-72**, paras 33, 107 and 108. *Toto* concerned former landowners who refused to abandon the disputed property to allow construction by the investor. The tribunal merely noted that, in that case, “the temporary obstructions of some expropriated owners did not amount to an impairment which affected the physical integrity of the investment.” *Toto Costruzioni Generali SpA v Republic of Lebanon* (ICSID Case No ARB/07/12) Award, 7 June 2012, **RLA-76**, paras 100, 123 and 229.

<sup>1054</sup> *Noble Ventures Inc v Romania* (ICSID Case No ARB/01/11) Award, 12 October 2005, **CLA-59**, para 166.

<sup>1055</sup> Witness Statement of Joaquín Mamani, para 25.

<sup>1056</sup> *Ibid*, para 25; *see also* Witness Statement of Andrés Cachi, para 33 (explaining that “[c]onfrontations lasted during approximately two days and left more than 15 people wounded”).

<sup>1057</sup> Statement of Defense, para 196.

Claimant,”<sup>1058</sup> therefore arguing that *AAPL v Sri Lanka* and *AMT v Zaire* are inapplicable to the instant dispute.<sup>1059</sup> Bolivia is wrong. Investment tribunals have recognized repeatedly that the full protection and security standard imposes an obligation on States to actively protect an investor’s investment against interferences by private parties as well as State actors.<sup>1060</sup> In *AMT v Zaire* itself, for example, the tribunal explained that the State’s responsibility is engaged without the tribunal having to inquire “as to the identity of the author of the acts of violence committed on the Zairian territory. It is of little or no consequence

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<sup>1058</sup> *Ibid*, para 532.

<sup>1059</sup> Bolivia also tries to dismiss the standard set by the tribunals in *AAPL v Sri Lanka* and *AMT v Zaire*—two of the leading cases addressing a State’s full protection and security obligation—simply because of the time in which they were decided. Ironically, Bolivia does so while itself principally relying on *Elettronica Sicula*, a case decided in 1989. Regardless, Bolivia’s argument is not a valid ground to dismiss standard-setting precedent. Both *AAPL v Sri Lanka* and *AMT v Zaire* continue to be applicable today and are relevant to the instant dispute. *See, eg, El Paso Energy International Company v Argentine Republic* (ICSID Case No ARB/03/15) Award, 31 October 2011, **CLA-106**, para 522; *Sergei Paushok, CJSC Golden East Company, and CJSC Vostokneftegaz Company v Government of Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, **CLA-194**, para 323; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (ICSID Case No ARB/05/22) Award; 24 July 2008, **CLA-78**, paras 724-726; *BG Group Plc v The Republic of Argentina* (UNCITRAL) Final Award, 24 April 2007, **RLA-100**, para 324; *Noble Ventures Inc v Romania* (ICSID Case No ARB/01/11) Award, 12 October 2005, **CLA-59**, para 164; *Toto Costruzioni Generali SpA v Republic of Lebanon* (ICSID Case No ARB/07/12) Award, 7 June 2012, **RLA-76**, para 169; *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan* (ICSID Case No ARB/05/16) Award, 29 July 2008, **CLA-79**, para 668; *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, para 483; *Wena Hotels Ltd v Arab Republic of Egypt* (ICSID Case No ARB/98/4) Award, 8 December 2000, **RLA-68**, para 84.

In any event, to the extent that investment law has evolved, it has actually broadened the scope of the full protection and security obligation, allowing it to cover, for example, the relevant legal landscape rather than solely physical security. *See, eg, Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12) Award, 14 July 2006, **CLA-63**, para 408.

<sup>1060</sup> *See, eg, Frontier Petroleum Services Ltd v Czech Republic* (UNCITRAL) Final Award, 12 November 2010, **CLA-102**, para 261; R Dolzer and C Schreuer, *Principles of International Investment Law* (1<sup>st</sup> edn 2008) (Extract), **CLA-73**, p 3; *Eastern Sugar BV (Netherlands) v The Czech Republic* (SCC Case No 088/2004) Partial Award, 27 March 2007, **CLA-173**, para 203; *Wena Hotels Ltd v Arab Republic of Egypt* (ICSID Case No ARB/98/4) Award, 8 December 2000, **RLA-68**, para 84; *see also* C Schreuer, “Full Protection and Security” (2010) *Journal of International Dispute Settlement*, 2010, **CLA-186**, pp 2-4.

whether it be a member of the Zairian armed forces or any burglar whatsoever.<sup>1061</sup>

440. *Third*, Bolivia relies on *Pantechniki v Albania* for the proposition that the due diligence standard should be modified to take into account the specific State’s resources.<sup>1062</sup> But *Pantechniki* is inapposite to the case at hand. The problem in *Pantechniki* was quite different, as the disruption that caused the investor’s losses occurred during a period of severe civil unrest that affected the entire country. As described by the tribunal: “[h]undreds of people were killed. The government fell. Disorder was everywhere—particularly in the southern region where the work site was located. Neither public nor private security forces could withstand the onslaught of looting. The contractor’s site [...] was in a remote location. The nearest police station was distant.”<sup>1063</sup>
441. In the present case, Bolivia does not claim that it was unable to adequately respond because of constrained resources or a general crisis. It simply argues that the *cooperativistas* are a “powerful and significant actor in Bolivian politics,”<sup>1064</sup> against which it could not intervene.<sup>1065</sup> In other words, Bolivia would not protect the mining activities from criminal conduct by a particular sector of the population for political reasons. This signifies, in the precise words of the *AAPL* tribunal “a mere lack or want of diligence,”<sup>1066</sup> not a lack of means. In fact, as explained by Mr Lazcano (former general manager of the Colquiri Mine), Comibol regularly intervened to quell potential conflicts with the *cooperativistas*

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<sup>1061</sup> *American Manufacturing & Trading Inc v Republic of Zaire* (ICSID Case No ARB/93/1) Award, 21 February 1997, **CLA-20**, para 6.13; *see also Wena Hotels Ltd v Arab Republic of Egypt* (ICSID Case No ARB/98/4) Award, 8 December 2000, **RLA-68**, para 84.

<sup>1062</sup> Statement of Defense, paras 528-530.

<sup>1063</sup> *Pantechniki SA Contractors & Engineers v Republic of Albania* (ICSID Case No ARB/07/21) Award, 30 July 2009, **RLA-77**, para 1.

<sup>1064</sup> Statement of Defense, para 205.

<sup>1065</sup> *Ibid.*

<sup>1066</sup> *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (ICSID Case No ARB/87/3) Final Award, 27 June 1990, **CLA-14**, para 77.

by, amongst other things, brokering agreements with them, without allowing the situation to escalate as it did at Colquiri in May 2012.<sup>1067</sup> In any event, it is indeed telling that Bolivia first argues that it was unable to intervene due to “the scale of unrest,”<sup>1068</sup> but then compares the Colquiri Mine’s invasion to a peaceful occupation with no impact upon Glencore Bermuda’s investment.<sup>1069</sup> Bolivia’s statements reveal the true reasons for its failure to take steps to solve the conflict: Bolivia did not want to jeopardize the political support it enjoyed from the *cooperativas* and instead wanted to carry out its planned nationalization of the Colquiri Mine. In these circumstances, there cannot be any valid grounds for not compensating Glencore Bermuda for the resulting loss of its investment.

## **2. Bolivia did not exercise due diligence and vigilance in the protection of the Colquiri Mine and its workers**

442. Bolivia did not protect Claimant’s investment actively by failing (i) to prevent the violent takeover of the Colquiri Mine;<sup>1070</sup> (ii) to physically protect the Colquiri Mine and its workers against the occupation and violence by the *cooperativas*;<sup>1071</sup> (iii) to use its diligence to reach a peaceful solution that would have restored operations at the Colquiri Mine and maintained Claimant’s rights over the Colquiri Lease;<sup>1072</sup> and (iv) to punish, seriously or at all, the perpetrators.<sup>1073</sup>

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<sup>1067</sup> See Section II.D.3; Second Witness Statement of Eduardo Lazcano, paras 20, 22.

<sup>1068</sup> Statement of Defense, para 531.

<sup>1069</sup> *Ibid*, para 536.

<sup>1070</sup> See, eg, *El Paso Energy International Company v Argentine Republic* (ICSID Case No ARB/03/15) Award, 31 October 2011, **CLA-106**, para 523.

<sup>1071</sup> See, eg, *Frontier Petroleum Services Ltd v Czech Republic* (UNCITRAL) Final Award, 12 November 2010, **CLA-102**, para 261. See also R Dolzer and C Schreuer, *Principles of International Investment Law* (1st edn 2008) (Extract), **CLA-73**, p 149.

<sup>1072</sup> See, eg, *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (ICSID Case No ARB/87/3) Final Award, 27 June 1990, **CLA-14**, para 77; *American Manufacturing & Trading Inc v Republic of Zaire* (ICSID Case No ARB/93/1) Award, 21 February 1997, **CLA-20**, para 6.05.

<sup>1073</sup> See, eg, *El Paso Energy International Company v Argentine Republic* (ICSID Case No ARB/03/15) Award, 31 October 2011, **CLA-106**, para 523; *Wena Hotels Ltd v Arab Republic of Egypt* (ICSID Case No ARB/98/4) Award, 8 December 2000, **RLA-68**, paras 94-95.

443. *First*, despite being aware of the increasing risk of violent actions by the *cooperativas* against the Colquiri Mine and its workers, and several requests for assistance, the Government did not take any measures to prevent the *cooperativas*' forceful takeover of 30 May 2012. As explained above, in March 2012, following increased thefts and trespasses by unauthorized *cooperativistas* within the Colquiri Mine, the Colquiri Workers' Union specifically called on the Government to take measures, warning that the responsibility for material or human losses resulting from any "taking of the mine or other actions" would lay with the Government.<sup>1074</sup> The Government, however, took no immediate action.<sup>1075</sup> As a result, on 1 and 3 April 2012, groups of about one hundred local *cooperativistas* entered the Colquiri Mine, stole minerals and equipment, and threatened Colquiri's employees. Colquiri immediately informed Comibol as well as the Ministry of Mining and the Ministry of Government of the events, asking for the Government's intervention.<sup>1076</sup> The Government, however, again took no action. It did not mediate with the *cooperativistas* nor did it increase the police presence in the site to prevent future invasions.<sup>1077</sup> Instead, in a closed meeting not attended by Glencore Bermuda's representatives or Colquiri's workers, the Government decided that it would nationalize the Colquiri Mine.<sup>1078</sup>
444. *Second*, after over one thousand members of the Cooperativa 26 de Febrero violently invaded the Colquiri Mine on 30 May 2012,<sup>1079</sup> detonating dynamite,

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<sup>1074</sup> See Section II.D.3; Colquiri Union General Assembly's Resolution, 14 March 2012, **C-247**; Letter from Colquiri Union (Mr Estallani) to the Ministry of the Presidency (Mr Romero), 29 March 2012, **C-250**.

<sup>1075</sup> Second Witness Statement of Eduardo Lazcano, para 38.

<sup>1076</sup> In April, Glencore Bermuda reached out to Comibol, the Ministry of Mining and the Ministry of Government, specifically requesting their assistance and referencing Comibol's obligation under the Colquiri Lease to guarantee safe conditions and, in particular, to protect against interferences from third parties like the *cooperativistas*. Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 3 April 2012, **C-30**; see also Statement of Claim, paras 87-88.

<sup>1077</sup> Second Witness Statement of Eduardo Lazcano, paras 42-43.

<sup>1078</sup> See Section II.D.3.

<sup>1079</sup> See Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 30 May 2012, **C-31**; First Witness Statement of Christopher Eskdale, para 80.

injuring several of Colquiri’s employees and blocking access to the deposit,<sup>1080</sup> Bolivia failed to physically protect the integrity of the Colquiri Mine as well as Colquiri’s workers. Contrary to Bolivia’s allegations,<sup>1081</sup> the evidence on the record,<sup>1082</sup> as well as Bolivia’s own admissions, confirm the grave risk of impairment to the physical integrity of the Colquiri Mine, as well as the serious threat to the safety of Colquiri’s employees.<sup>1083</sup> Bolivia’s witness Mr Cachi, for example, observes that “[t]he takeover of the Mine and the confrontation were extremely serious events.”<sup>1084</sup> Indeed, even Bolivia recognizes that “[t]he grave situation at Colquiri demanded urgent action from the Government.”<sup>1085</sup> Yet, Bolivia’s response failed to address the gravity of the situation. Bolivia’s own witness, Mr Mamani, explains that, when faced with such a “violent conflict between thousands of individuals,” Bolivia responded by sending only “approximately 30 policemen.”<sup>1086</sup> Not surprisingly, the few police officers posted at the site failed to defuse the situation and were unable to enter the Colquiri Mine.<sup>1087</sup>

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<sup>1080</sup> See Section II.D.3; First Witness Statement of Christopher Eskdale, para 80.

<sup>1081</sup> Statement of Defense, para 536.

<sup>1082</sup> For example, the National Association of Miners joined the chorus in denouncing the violent takeover and consequent risk of harm to the workers as well as to the integrity of mineral production:

The abrupt and violent intrusion by outsiders upon the Colquiri mine cannot be overlooked or minimized. These are actions that endanger families of mining workers and give a framework of insecurity to their jobs, product of honest labor. The taking of an important mine like Colquiri has serious implications for the mining production of our country and its possibility to generate resources for our society and the State.

“La Asociación Nacional de Mineros Medianos expresa preocupacion por la toma de la cia. Minera Colquiri SA,” *Asociación Nacional de Mineros Medianos*, 1 June 2012, **R-24** (unofficial English translation from Spanish original).

<sup>1083</sup> Statement of Claim, para 185.

<sup>1084</sup> Witness Statement of Andrés Cachi, para 34.

<sup>1085</sup> Statement of Defense, para 196.

<sup>1086</sup> Witness Statement of Joaquín Mamani, para 27.

<sup>1087</sup> See First Witness Statement of Christopher Eskdale, para 83.

445. In an attempt to justify its feeble reaction to the violent conflict, Bolivia claims that it “had limited capacity to control violent outbursts by *cooperativistas* or mine workers” and that any repression would have been futile and resulted in mass casualties in contravention to human rights treaties.<sup>1088</sup> But these empty justifications do not comply with the level of “diligence” required under the full protection and security standard. Bolivia was expected to mobilize adequate resources and diligently protect lives and the integrity of its investment. Yet, it simply failed to do so. It even failed to try.
446. Bolivia claims that “any forcible police action at Colquiri would have risked violating Bolivia’s human rights obligations under the ICCPR and the American Convention.”<sup>1089</sup> However, it completely fails to articulate what obligations under such human rights treaties would have prevented it from intervening to protect the Colquiri Mine and its workers from the violent interference of the *cooperativistas*, as required by the Treaty and the Colquiri Lease.<sup>1090</sup> In fact, none of the human rights provisions referred to by Bolivia are even remotely applicable to the present dispute.<sup>1091</sup> Nor do they excuse Bolivia from its obligations under the Treaty.<sup>1092</sup>

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<sup>1088</sup> Statement of Defense, para 540.

<sup>1089</sup> *Ibid*, para 542.

<sup>1090</sup> In addition, the Mining Code required that:

The Superintendent of Mines will protect, with the assistance of police force if it were necessary, the mining concessionaire or legal holder that has a resolution amounting to concession, enforcement title, possession or legal tenancy and whose concessions or any facility were subject to invasion or effective disturbances that in any way alter or impair the normal and peaceful performance of mining activities [...].

Bolivian Mining Code, Law 1.777 of 17 March 1997, **R-4**, Art 42 (unofficial English translation from Spanish original).

<sup>1091</sup> In particular: (i) Article 6(1) of the ICCPR provides that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” The remainder of the article limits the circumstances under which a State may impose a sentence of death; (ii) Article 7 of the ICCPR states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”; (iii) Article 4 of the American Convention on Human Rights concerns every individual’s right to life; the remainder of the article addresses capital punishment; (iv) Article 5 of the American Convention on Human Rights addresses every person’s right to humane treatment, including the right to be free from torture and other cruel,

447. Indeed, just months earlier, Bolivia had successfully deployed its police force to address a similar conflict at the Sayaquira mine, operated by Empresa Minera Barrosquira (Embas). In March 2012, that mine was seized by approximately 300 *cooperativistas* and *comunarios*, who carried firearms and dynamite in an attempt to gain control of the mine. Approximately 500 police troops successfully expelled the invading *cooperativistas*, allowing the company to retake control. No injuries or deaths were reported. Instead, the *cooperativistas* fled when confronted with the large contingent of troops that were promptly dispatched.<sup>1093</sup>
448. In the present case, Bolivia simply did not want to intervene. The lack of merit in Bolivia’s arguments is underscored by the fact that Bolivia was perfectly capable of deploying its security forces to protect the property of the State when necessary. For example, the Government’s own proposal for the nationalization of the Colquiri Mine provided for the military’s presence and army’s intervention in order to protect the asset once it passed into State hands:

#### 7.- Military Presence in the district

Immediately after the enactment of the decree of reversion and nationalization, the Armed Forces of the Nation will protect the areas of operation and guarantee the security and continuity of the operations, both in the interior of the mine and on the surface of Comibol.<sup>1094</sup>

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inhuman, or degrading punishment or treatment. International Covenant on Civil and Political Rights, 16 December 1966, **RLA-2**, Arts 6(1) and 7; American Convention on Human Rights, 22 November 1969, **RLA-3**, Arts 4 and 5. Clearly, none of these provisions are applicable to the instant dispute.

<sup>1092</sup> Bolivia’s obligations under the Treaty are not inconsistent with any human rights obligations Bolivia may also have had. *See* Section III; *Suez, Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales del Agua SA v The Argentine Republic* (ICSID Case No ARB/03/17) Decision on Liability, 30 July 2010, **CLA-191**, para 240.

<sup>1093</sup> “La Policía interviene Sayaquira y desaloja a ocupantes ilegales,” *La Razón*, 24 March 2012, **C-249**; “El Gobierno recupera la mina Sayaquira,” *Los Tiempos*, 24 March 2012, **C-250**.

<sup>1094</sup> Proposal from the Government to the Cabildo of Colquiri, **R-27** (unofficial English translation from Spanish original).

449. The Government also authorized Comibol to “contract the services of the Armed Forces and continue the actions that correspond to it” and to implement “preventative and sanctionable measures against Mineral Theft or Robbery.”<sup>1095</sup> In other words, once the Colquiri Mine was property of the State, the Government put in place the very measures it had denied to Glencore Bermuda.
450. Similarly, the State had no difficulty in sending the army when it decided to take over the Tin Smelter, even in the face of the peaceful protest carried out by the unarmed employees of Vinto. Yet, according to Bolivia, a comparable deployment of security forces would have violated human rights treaties if used to protect the Colquiri Mine and its workers from over one thousand dynamite wielding *cooperativistas*. Clearly, Bolivia’s conduct denotes a complete “lack or want of diligence.”<sup>1096</sup>
451. *Third*, even if it were true that it was not possible to send the police forces to address the conflict, Bolivia also failed to diligently pursue a peaceful solution that would have restored operations at the Colquiri Mine. Indeed negotiations had proven effective when conflicts or tensions arose with the *cooperativas* in the past. Since prior to the privatization, Comibol had established a practice of negotiating with the *cooperativistas* to prevent and resolve conflicts.<sup>1097</sup> This practice was employed successfully in Colquiri<sup>1098</sup> as well as other mines, including Porco.<sup>1099</sup>

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<sup>1095</sup> Agreement between the Government of Bolivia, COB, Fencomin, FEDECOMIN-LP, FSTMB, Central de Cooperativas de Colquiri, and Sindicato Mixto de Trabajadores Mineros de Colquiri, 19 June 2012, **R-18**, Clause 7 (unofficial English translation from Spanish original).

<sup>1096</sup> *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (ICSID Case No ARB/87/3) Final Award, 27 June 1990, **CLA-14**, para 77.

<sup>1097</sup> Second Witness Statement of Eduardo Lazcano, paras 19-20. *See, eg*, Public Deed No 50/98, lease agreement between COMIBOL and the subsidiarios of the Colquiri Mine, 10 July 1998, **R-92**; Addendum to the Lease Agreement between Comibol and the Trabajadores Mineros Contratistas de Colquiri, 16 December 1999, **C-176**; Public Deed No 003/2000, amendment to the lease agreement between COMIBOL and the subsidiarios of the Colquiri Mine, 5 January 2000, **R-93**.

<sup>1098</sup> Second Witness Statement of Eduardo Lazcano, para 20. *See, eg*, Internal Memorandum from COMIBOL to the Ministry of Mines, 23 January 2004, **R-152**; Letter from Colquiri (Mr Urjel) to

452. Here, while Bolivia claims that it “sent top government officials” to negotiate a solution,<sup>1100</sup> it openly admits that the Government gave up any efforts to reach a compromise after a mere six days from the takeover of the Colquiri Mine.<sup>1101</sup> In fact, in line with the 10 May Agreement in which Bolivia agreed to “summon Colquiri’s workers’ union” in order to “execute the Nationalization of the Colquiri Mine,”<sup>1102</sup> the Government encouraged Colquiri’s workers to accept nationalization as a solution to the *cooperativistas*’ invasion, in meetings from which Glencore Bermuda had been purposely excluded. Contrary to Bolivia’s assertions, the Government’s failure to actively pursue a negotiated solution with all relevant stakeholders in accordance with its past practice indicates that Bolivia purposely failed to take “all legal actions available”<sup>1103</sup> under the circumstances. Bolivia’s failure to protect Glencore Bermuda’s investment despite repeated pleas for protection led to increased violence and allowed the Colquiri Mine to remain inaccessible from 30 May 2012 until its formal nationalization on 20 June 2012.
453. *Finally*, Bolivia took no steps to punish the individuals responsible for the violent acts of 30 May 2012 or the ensuing confrontations. Instead, it offered any *cooperativista* willing to support the Government’s nationalization permanent employment at the Colquiri Mine and, according to Mr Cachi, did in fact hire

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Comibol, 22 April 2004, **C-192**; Agreement between Fencomin, Fedecomín La Paz, Fedecomín Oruro, Workers of the Cooperativas 26 de Febrero and 21 de Diciembre, Colquiri, the Vice Ministry of Mining, and Comibol, 21 May 2004, **C-193** (showing that the Government successfully intervened to defuse tensions between mine workers and various *cooperativas* by working with local government, engaging in negotiations with the *cooperativas*, and agreeing to act as a broker with Comsur and studying whether certain *cooperativa* demands could be met).

<sup>1099</sup> See Second Witness Statement of Eduardo Lazcano, para 20; Letters, meeting minutes and agreement between Comibol, Sinchi Wayra and cooperativistas in the Porco mine, various dates, **C-283**.

<sup>1100</sup> Statement of Defense, para 546.

<sup>1101</sup> See Section II.D.3. As explained above, by 6 June 2012 the Government was already discussing the nationalization of the Colquiri Mine with both the workers and sections of the *cooperativistas*, without including Glencore Bermuda in the process. See Statement of Defense, paras 199-200, 208-210.

<sup>1102</sup> 10 May 2012 Agreement, 10 May 2012, **C-256**; see also Letter from the Ministry of Economy (Mr Arce) to FSTMB (Mr Pérez), 15 May 2012, **C-258**.

<sup>1103</sup> Statement of Defense, para 538.

several of the *cooperativistas* responsible for the invasion and vandalism of the Colquiri Mine (including himself).<sup>1104</sup>

454. In sum, as explained in the Statement of Claim and again here, Bolivia's conduct fell below the standard of protection Glencore Bermuda could reasonably have expected, first allowing the *cooperativistas* to invade the Colquiri Mine and subsequently failing to secure the deposit's return.<sup>1105</sup> Bolivia used the conflict as an opportunity to advance its own agenda, nationalizing the Colquiri Mine when it was operating at the height of its capacity, expansion projects were underway, and metal prices were rising.

**3. By failing to protect Glencore Bermuda's investment from violent interference by the *cooperativistas*, Bolivia failed to observe its obligations under the Colquiri Lease**

455. Bolivia's obligations under the full protection and security standard are reinforced by Bolivia's obligations under the Treaty's umbrella clause to observe the specific commitment under the Colquiri Lease to "defend, protect, guarantee and reclaim rights against incursions, usurpations, and other disturbances by third parties."<sup>1106</sup>

456. In its Statement of Defense, Bolivia does not dispute that it was bound by the terms of the Colquiri Lease (negotiated directly with the Trade Ministry), nor that Comibol's actions (or inactions) are attributable to the State.<sup>1107</sup> Instead, Bolivia simply argues that the obligations in the Colquiri Lease "add nothing to the

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<sup>1104</sup> Witness Statement of Joaquín Mamani, para 39; Witness Statement of Andrés Cachi, para 51; Proposal from the Government to the Cabildo of Colquiri, **R-27**; Colquiri Mine Nationalization Decree, 20 June 2012, **C-39**, p 4.

<sup>1105</sup> *See Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (ICSID Case No ARB/05/15) Award, 1 June 2009, **CLA-89**, para 448.

<sup>1106</sup> Treaty, **C-1**, Art 2(2), which provides, in the relevant part, that:

[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

<sup>1107</sup> Statement of Claim, paras 188-191; Statement of Defense, paras 550-556.

relevant standard of protection.”<sup>1108</sup> Bolivia is wrong. The obligations contained in the Colquiri Lease, specifically assumed by the State towards Glencore Bermuda’s investment, buttress Bolivia’s obligations under the Treaty to provide protection and security.

457. Specifically, through the Colquiri Lease, Bolivia, represented by the State entity Comibol, committed itself to “not interfere or limit the operations of [Colquiri].”<sup>1109</sup> Bolivia was also under a duty to guarantee “the peaceful possession and use of the mining center,” and agreed to “defend, protect, guarantee and reclaim rights against incursions, usurpations, and other disturbances by third parties,” for the duration of the Colquiri Lease.<sup>1110</sup> This necessarily included protections against interferences by the *cooperativistas*, since Bolivia had granted them rights to exploit areas of the Colquiri Mine prior to the privatization and actually extended such rights at the time of the privatization.<sup>1111</sup>
458. The Colquiri Lease was in force when Bolivia nationalized the Colquiri Mine and terminated the lease agreement. Bolivia plainly violated the terms of the Colquiri Lease when it failed to protect the Colquiri Mine.<sup>1112</sup> Bolivia also failed to comply with the terms of the Rosario Agreement.
459. Because of Bolivia’s failure to provide adequate protection and security, as well as its non-compliance with its contractual obligations, the Colquiri Mine was invaded by *cooperativistas* and remained inaccessible to Glencore Bermuda and its affiliates until it was formally nationalized on 20 June 2012. Bolivia’s inaction and subsequent conduct escalated the conflict and allowed it to carry out its planned expropriation of Glencore Bermuda’s investment.

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<sup>1108</sup> Statement of Defense, para 552.

<sup>1109</sup> Colquiri Lease, 27 April 2000, C-11, Clause 9.2.1 (unofficial English translation from Spanish original).

<sup>1110</sup> *Ibid*, Clause 12.2.1 (unofficial English translation from Spanish original).

<sup>1111</sup> See Section II.D.3.

<sup>1112</sup> The Rosario Agreement noted that Comibol acted on behalf of the Bolivian State with respect to the Colquiri Lease. See Rosario Agreement, 7 June 2012, C-35, Clause 1.

**C. BOLIVIA TREATED GLENCORE BERMUDA'S INVESTMENTS UNFAIRLY AND INEQUITABLY, IMPAIRING THEM THROUGH UNREASONABLE MEASURES**

460. Glencore Bermuda's principal claims in this arbitration are for unlawful expropriation under Article 5 of the Treaty and failure to provide full protection and security and observe obligations with regard to Claimant's investments in accordance with Article 2(2) of the Treaty.<sup>1113</sup> Glencore Bermuda also claims, in the alternative, that the measures adopted by Bolivia, through which it proceeded to directly secure title, ownership and control over the Assets, thereby destroying the value of Vinto and Colquiri, are also in violation of Bolivia's requirement to provide fair and equitable treatment pursuant to Article 2(2) of the Treaty.

461. In its Statement of Claim, Glencore Bermuda established the ways in which Bolivia failed to accord fair and equitable treatment to its investments. Specifically, Glencore Bermuda explained how Bolivia (*i*) failed to provide a transparent legal framework by conducting arbitrary and pretextual nationalizations, unsupported by fact or law and implemented in bad faith;<sup>1114</sup> (*ii*) violated Glencore Bermuda's legitimate expectations by taking the Assets without complying with due process and without providing any compensation, in breach of its international and domestic legal obligations, as well as its commitments under the Colquiri Lease;<sup>1115</sup> and (*iii*) did not engage in good faith negotiations with Glencore Bermuda following the takeovers and repeatedly failed to recognize the State's obligation to afford just compensation.<sup>1116</sup>

462. Bolivia does not deny that the Treaty requires it to accord Glencore Bermuda's investments fair and equitable treatment.<sup>1117</sup> It claims, however, that Glencore

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<sup>1113</sup> See Sections V.A and V.B.

<sup>1114</sup> Statement of Claim, paras 217-220.

<sup>1115</sup> *Ibid*, paras 214-216.

<sup>1116</sup> *Ibid*, para 221.

<sup>1117</sup> Treaty, **C-1**, Art 2(2).

Bermuda cannot “precisely identify” the standard<sup>1118</sup> and incorrectly asserts that Glencore Bermuda’s claim rests solely on a breach of good faith.<sup>1119</sup> Bolivia then goes on to claim that (i) it acted with full transparency and predictability, according Glencore Bermuda due process in the Smelters’ “reversions;” (ii) it acted in good faith towards the Colquiri Mine; (iii) it satisfied Claimant’s legitimate expectations; and (iv) it was not “administratively negligent” during the negotiations.<sup>1120</sup>

463. For the reasons stated below, each of Bolivia’s assertions is without merit and should be dismissed.

**1. Bolivia failed to treat Glencore Bermuda’s investments fairly and equitably**

464. Contrary to Bolivia’s allegations, Glencore Bermuda laid out in the Statement of Claim the relevant fair and equitable treatment standard as well as the specific ways in which Bolivia’s treatment of Glencore Bermuda’s investments fell short of that standard.<sup>1121</sup>

465. Bolivia’s obligation to accord Glencore Bermuda’s investments “fair and equitable treatment” is provided by Article 2(2) of the Treaty.<sup>1122</sup> Pursuant to Article 2(2) Bolivia must also refrain from impairing the management,

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<sup>1118</sup> Statement of Defense, para 558.

<sup>1119</sup> *Ibid*, para 559.

<sup>1120</sup> *Ibid*, Section 6.3.

<sup>1121</sup> Statement of Claim, Section V.C.

<sup>1122</sup> Treaty, C-1, Art 2(2) (“Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment”) (emphasis added). Insofar as this Tribunal finds that Bolivia has breached its obligations under Article 5 and Article 2(2), as described above, it does not need to decide on this ground as well.

maintenance, use, enjoyment or disposal of investments by “unreasonable or discriminatory measures.”<sup>1123</sup>

466. The fair and equitable treatment standard is open-textured and fact-specific in application,<sup>1124</sup> conceived to protect the investor against the State’s unfair and inequitable conduct. The purpose of the provision is to effect the intent of the relevant treaty and its content must be interpreted accordingly. For example, Prof Dolzer has noted that:

[T]he purpose of the [fair and equitable treatment] clause as used in BIT practice is to fill gaps which may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaties.<sup>1125</sup>

467. This does not mean that the fair and equitable treatment standard cannot be “precisely identif[ied]” as Bolivia alleges.<sup>1126</sup> Rather, today it is well established that “the terms ‘fair and ‘equitable’ [...] mean ‘just’, ‘even-handed’, ‘unbiased’, ‘legitimate’”<sup>1127</sup> and that the standard includes:

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<sup>1123</sup> *Ibid.* As stated in the Statement of Claim, both protections are analyzed together, since the fair and equitable treatment standard includes the protection against unreasonable measures. Statement of Claim, para 193.

<sup>1124</sup> *See, eg, MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* (ICSID Case No ARB/01/7) Award, 25 May 2004, **CLA-49**, para 109 (“the meaning of what is fair and equitable is defined when that standard is applied to a set of specific facts” quoting Judge Steven Schwebel); *see also* C Schreuer, “Fair and Equitable Treatment (FET): Interactions with Other Standards” in: C Ribeiro (ed), *Investment Protection and the Energy Charter Treaty* (2008), **RLA-81**, p 38 (concluding that fair and equitable treatment “is indeed an overarching principle that finds its expression in a number of ways in different standards and concepts of modern investment law”).

<sup>1125</sup> R Dolzer, “Fair and Equitable Treatment: A Key Standard in Investment Treaties” (2005) Vol 39(1) *The International Lawyer* 87, **CLA-54**, p 6. *See also* S Vasciannie, “The Fair and Equitable Treatment Standard in International Investment Law and Practice” (1999) Vol 70 *British Year Book of International Law* 99, 2013, **CLA-114**, p 66.

<sup>1126</sup> Statement of Defense, para 558.

<sup>1127</sup> *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12) Award, 14 July 2006, **CLA-63**, para 360; *see also* S Vasciannie, “The Fair and Equitable Treatment Standard in International Investment Law and Practice” (1999) Vol 70 *British Year Book of International Law* 99, 2013 **CLA-114**, p 6 (providing that “treatment is fair when it is ‘free from bias, fraud or injustice; equitable, legitimate [...] not taking undue advantage; disposed to concede every reasonable claim’; and, by the same token, equitable treatment is that which is ‘characterized by equity or fairness [...] fair, just, reasonable’”).

- (a) “the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising coercion,”<sup>1128</sup> and
- (b) “to refrain from [...] frustrating the investor’s reasonable expectations with respect to the legal framework affecting the investment.”<sup>1129</sup>
468. It is also well established that the “precise scope of the standard is [...] left to the determination of the Tribunal which ‘will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable.’”<sup>1130</sup> As explained by the tribunal in *Philip Morris v Uruguay*, a case on which Bolivia itself heavily relies, “whether a particular treatment is fair and equitable depends on the circumstances of the particular case.”<sup>1131</sup>
469. Bolivia argues that Glencore Bermuda’s fair and equitable treatment and impairment claims “are nothing more than repetition” of its other claims and should therefore be dismissed.<sup>1132</sup> Bolivia misses the point. Arbitral tribunals have

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<sup>1128</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Award, 27 August 2009, **CLA-90**, para 178; *see also Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18) Decision on Jurisdiction and Liability, 14 January 2010, **CLA-95**, para 284; *Occidental Exploration and Production Company v Republic of Ecuador* (LCIA Case No UN 3467) Final Award, 1 July 2004, **CLA-50**, paras 183, 186.

<sup>1129</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Award, 27 August 2009, **CLA-90**, para 178.

<sup>1130</sup> *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan* (ICSID Case No ARB/05/16) Award, 29 July 2008, **CLA-79**, para 610 (internal citations omitted); *see also Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award, 4 April 2016, **CLA-130**, para 544.

<sup>1131</sup> *Philip Morris Brand Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* (ICSID Case No ARB/10/7) Award, 8 July 2016, **RLA-43**, para 320 (citing *Mondev International Ltd v United States of America* (ICSID Case No ARB(AF)/99/2) Award, 11 October 2002, para 118; *Waste Management, Inc v United Mexican States* (ICSID Case No ARB(AF)/00/3) Award, 30 April 2004, para 99; *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, para 285); *see also Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award, 4 April 2016, **CLA-130**, paras 539-544.

<sup>1132</sup> Statement of Defense, para 560.

consistently recognized that the same measures can constitute breaches of distinct obligations under a treaty.<sup>1133</sup>

470. With this framework in mind, Glencore Bermuda reiterates below the specific ways in which Bolivia's conduct fell short of its obligation to provide fair and equitable treatment to Glencore Bermuda's investments.

**2. Bolivia carried out the nationalizations of the Assets in a manner that was arbitrary, non-transparent and in violation of due process**

471. Fundamental to the fair and equitable treatment standard is the obligation to act in good faith, in a manner that is non-arbitrary and transparent, and complies with the basic guarantees of due process. Investment tribunals have repeatedly recognized that these principles lie at the heart of the fair and equitable treatment obligation. For example, in *Rumeli v Kazakhstan*, the tribunal explained as follows:

[T]he State must act in a transparent manner; – the State is obliged to act in good faith; – the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; the State must respect procedural propriety and due process.<sup>1134</sup>

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<sup>1133</sup> See, eg, *Valores Mundiales, SL y Consorcio Andino, SL v Bolivarian Republic of Venezuela* (ICSID Case No ARB/13/11) Award, 25 July 2017, **CLA-227**, paras 523-527; *British Caribbean Bank Ltd v Belize* (PCA Case No 2010-18) Award, 19 December 2014, **RLA-105**, para 280; *Vigotop Limited v Hungary* (ICSID Case No ARB/11/22) Award, 1 October 2014, **CLA-217**, paras 310-311; *CME Czech Republic BV v Czech Republic* (UNCITRAL) Partial Award, 13 September 2001, **CLA-32**, paras 610-612; *Flemingo DutyFree Shop Private Limited v Poland* (UNCITRAL) Award (Redacted), 12 August 2016, **CLA-223**, para 597; *SD Myers Inc v Government of Canada* (NAFTA-UNCITRAL) Partial Award, 13 November 2000, **RLA-101**, para 264; see also C Schreuer, "Fair and Equitable Treatment (FET): Interactions with Other Standards" in: C Ribeiro (ed), *Investment Protection and the Energy Charter Treaty* (2008), **RLA-81**, p 26.

<sup>1134</sup> *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan* (ICSID Case No ARB/05/16) Award, 29 July 2008, **CLA-79**, para 609 (the tribunal also confirmed that "to comply with the standard, the State must respect the investor's reasonable and legitimate expectations"); see also *Total SA v Argentine Republic* (ICSID Case No ARB/04/1) Decision on Liability, 27 December 2010, **CLA-103**, paras 109-110 (recounting jurisprudence considering the definition); *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18) Decision on Jurisdiction and Liability, 14 January 2010, **CLA-95**, paras 284-285 (listing elements of the FET standard); *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (ICSID Case

472. Bolivia incorrectly claims that Glencore Bermuda’s sole basis for its claim is a violation of good faith and that “good faith is not in itself a source of obligation where none would otherwise exist.”<sup>1135</sup> This is inaccurate. While it is not necessary that a State act in bad faith to trigger its international responsibility under the fair and equitable treatment provision, a State is obligated to act in good faith. It is indeed ironic that Bolivia argues that good faith is not a principle that should guide State actions. In fact, investment tribunals have repeatedly affirmed that the duty of good faith is inherent in the fair and equitable treatment standard. For example, the tribunal in *Sempra v Argentina* noted that the obligation to act in good faith is “at the heart of the concept of fair and equitable treatment.”<sup>1136</sup> Similarly, the *Waste Management v Mexico* tribunal confirmed that a “basic obligation of the [host] State under the [fair and equitable treatment standard] is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means.”<sup>1137</sup>
473. It is important to note that tribunals have found that the duty of good faith precludes a host State from exercising a right or using a legal instrument for reasons other than those for which the right or the legal instrument was created. The *Saipem v Bangladesh* tribunal noted that it “is generally acknowledged in international law that a State exercising a right for a purpose that is different from that for which that right was created commits an abuse of rights.”<sup>1138</sup> As the *Frontier Petroleum v Czech Republic* tribunal similarly observed, “the termination of the investment for reasons other than the one put forth by the government” constitutes a violation of the requirement of good faith under the fair

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No ARB/05/22) Award, 24 July 2008, **CLA-78**, para 602 (setting out the different components of the fair and equitable treatment standard).

<sup>1135</sup> Statement of Defense, para 602.

<sup>1136</sup> *Sempra Energy International v Argentine Republic* (ICSID Case No ARB/02/16) Award, 28 September 2007, **CLA-71**, para 298 (annulled on other grounds).

<sup>1137</sup> *Waste Management, Inc v United Mexican States* (ICSID Case No ARB(AF)/00/3) Award, 30 April 2004, **CLA-155**, para 138.

<sup>1138</sup> *Saipem SpA v The People’s Republic of Bangladesh* (ICSID Case No ARB/05/7) Award, 30 June 2009, **CLA-182**, para 160.

and equitable treatment standard.<sup>1139</sup> Likewise, the *Flemingo v Poland* tribunal found that the State agency abused its rights when it “used the contractual right to terminate for other reasons than those for which this right was created.”<sup>1140</sup> Similarly, the *Lauder* tribunal held that the “measure was arbitrary because it was not founded on reason or fact [...] but on mere fear reflecting national preference.”<sup>1141</sup> In *Siemens* the tribunal’s finding of arbitrary measures stemmed from Argentina’s failure to explain its noncompliance with contractual obligations.<sup>1142</sup>

474. The duty to ensure transparency and due process generally includes an obligation to forewarn an investor of an intended measure so as to allow the investor reasonable procedural recourse to contest it. For example, the tribunal in *Kardassopoulos and Fuchs v Georgia* stressed the need to give an investor a reasonable chance (within a reasonable timeframe) to assert its legitimate rights and have its claims heard.<sup>1143</sup> In that case, the tribunal went on to note that “contrary to several elements which may be considered to form part of the due process obligation, such as reasonable advance notice and a fair hearing, the expropriation of [the claimant’s] rights was carried out in a manner that can at best be described as opaque.”<sup>1144</sup> Similarly, the *Rumeli* tribunal found a breach of due process where the State had decided that a contract was lawfully terminated

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<sup>1139</sup> *Frontier Petroleum Services Ltd v Czech Republic* (UNCITRAL) Final Award, 12 November 2000, **CLA-102**, para 300.

<sup>1140</sup> *Flemingo DutyFree Shop Private Limited v Poland* (UNCITRAL) Award (Redacted), 12 August 2016, **CLA-223**, paras 549-560.

<sup>1141</sup> *Ronald S Lauder v Czech Republic* (UNCITRAL) Final Award, 3 September 2001, **CLA-147**, para 232.

<sup>1142</sup> *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Award, 6 February 2007, **CLA-67**, para 319.

<sup>1143</sup> *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15) Award, 3 March 2010, **CLA-96**, para 396; *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 435.

<sup>1144</sup> *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15) Award, 3 March 2010, **CLA-96**, para 397 (emphasis added).

“without Claimants having a real possibility to present their position.”<sup>1145</sup> In *Metalclad v Mexico*, the tribunal determined that the Mexican authorities’ refusal to issue a construction permit to the investor constituted a violation of due process, because the permit was denied at a meeting of which the investor received “no notice [...] no invitation, and at which it was given no opportunity to appear.”<sup>1146</sup>

475. As explained below, in the present case, Bolivia failed to act in good faith, in a manner that was transparent and non-arbitrary and that complied with basic due process guarantees when it pretextually nationalized Glencore Bermuda’s investments in complete disregard of the applicable contractual and legal framework and without providing Glencore Bermuda the opportunity to be heard prior to the takings.

*a. The Tin and Antimony Smelter nationalizations were pretextual and violated due process*

476. The nationalizations of the Tin and Antimony Smelters were conducted without prior notice under the pretext of unsubstantiated illegalities or breaches related to the Assets’ privatization—even though Glencore Bermuda had not been involved in the privatization process and could not have violated non-existent contractual obligations in the Antimony Smelter Purchase Agreement.<sup>1147</sup> Similar to *Lauder*, the Tin Smelter Nationalization Decree and the Antimony Smelter Nationalization Decree were “not founded in law or in fact.”<sup>1148</sup> Instead, Bolivia clearly terminated Glencore Bermuda’s investments “for reasons other than [those] put

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<sup>1145</sup> *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan* (ICSID Case No ARB/05/16) Award, 29 July 2008, **CLA-79**, para 617.

<sup>1146</sup> *Metalclad Corporation v United Mexican States* (ICSID Case No ARB(AF)/97/1) Award, 30 August 2000, **CLA-27**, para 91.

<sup>1147</sup> Statement of Claim, para 217.

<sup>1148</sup> *Ronald S Lauder v Czech Republic* (UNCITRAL) Final Award, 3 September 2001, **CLA-147**, para 232.

forth by the Government,”<sup>1149</sup> as amply demonstrated by Glencore Bermuda,<sup>1150</sup> without giving Glencore Bermuda any prior notice and a “real possibility to present [its] position.”<sup>1151</sup>

477. Bolivia claims, however, that: (i) it afforded Glencore Bermuda adequate due process “by making available its courts to challenge the smelter reversions as well as by making available international investment arbitration;”<sup>1152</sup> and (ii) it “acted transparently and predictably in the reversion of the smelters.”<sup>1153</sup> Both claims are meritless.
478. *First*, as explained in detail above, whether Bolivia afforded Glencore Bermuda “after the event” due process does nothing to alter Bolivia’s obligation to provide Glencore Bermuda with adequate process prior to its takings. Not only is the requirement of prior notice a concept recognized by international tribunals,<sup>1154</sup> but in this case, it is demanded by Bolivia’s own laws.<sup>1155</sup> As already stated, the Expropriation Law required the State to take specific steps prior to the taking of privately held property, including providing the interested party with notice so that its objections could be heard.<sup>1156</sup> The Administrative Procedure Law in turn required that prior to the imposition of an administrative sanction (such as a

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<sup>1149</sup> *Frontier Petroleum Services Ltd v Czech Republic* (UNCITRAL) Final Award, 12 November 2000, **CLA-102**, para 300.

<sup>1150</sup> See Section V.A.

<sup>1151</sup> *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan* (ICSID Case No ARB/05/16) Award, 29 July 2008, **CLA-79**, para 617.

<sup>1152</sup> Statement of Defense, para 587.

<sup>1153</sup> *Ibid*, para 589.

<sup>1154</sup> See, eg, *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, **CLA-64**, para 435; *Ioannis Kardassopoulos and Ron Ruchs v The Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15) Award, 3 March 2010, **CLA-96**, para 397.

<sup>1155</sup> Including Bolivia’s own Constitution. 2009 Constitution, 7 February 2009, **C-95**, Art 115(II) (providing that “the State guarantees the right to due process, to defense and to a plural justice, prompt, timely, transparent and without delay”) (unofficial English translation from Spanish original). The 1967 Constitution also enshrined the principles of due process. Constitution of Bolivia, 1967, **R-3**, Art 16.

<sup>1156</sup> Expropriation Law, 30 December 1884, **C-49**, Arts 3-5, 7, 8, 11-25.

reversion): (i) the authorities perform preliminary diligence; (ii) the respondent is notified of the allegations and potential consequences and is allowed to present evidence in its defense; and (iii) only then can the administrative authority impose a sanction.<sup>1157</sup> These requirements underscore the importance of “prior” notice and due process under Bolivian law.<sup>1158</sup>

479. In this case, Bolivia plainly failed to comply with all of these due process requirements. Neither Glencore Bermuda nor any of its subsidiaries were formally notified of Bolivia’s intended nationalization prior to the forceful taking of the Tin Smelter or the issuance of the Antimony Smelter Nationalization Decree, nor were they allowed to present objections before a public authority prior to the takings. Additionally, they received no prior compensation. Even if one were to follow Bolivia’s position that it did not “expropriate” Glencore Bermuda’s investments but rather “reverted” them to punish alleged illegalities or contractual breaches, Bolivia nonetheless failed to comply with its own due process rules. No preliminary diligence was carried out to investigate or substantiate the basis for the “reversions” and neither Glencore Bermuda nor its subsidiaries were provided with proper notice of the Government’s allegations and potential consequences or given an opportunity to defend themselves.<sup>1159</sup>

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<sup>1157</sup> Law No 2,341, 23 April 2002, **R-250**, Arts 80-84. In addition, Bolivia’s 1967 and 2009 constitutions, as well as its Expropriation Law, required a declaration of public utility and the payment of compensation prior to the taking of private property by the State. *See* Constitution of Bolivia, 1967, **R-3**, Art 22.II (“Expropriation is imposed for reasons of public utility or when the property does not fulfill a social function, qualified according to law and after fair compensation.”) (unofficial English translation from Spanish original); 2009 Constitution, 7 February 2009, **C-95**, Art 57 (“Expropriation will be imposed because of need or public utility, qualified in accordance with the law and after fair compensation.”) (unofficial English translation from Spanish original); Expropriation Law, 30 December 1884, **C-49**, Arts 1, 8; Civil Code of Bolivia, 2 April 1976, **C-52**, Art 108(I).

<sup>1158</sup> In addition, the Administrative Procedure Law also establishes the right: (i) to participate in an ongoing proceeding whenever the individual’s legitimate interests are concerned; (ii) to be informed of the status of a proceeding to which he or she is a party; (iii) to submit allegations and evidence; (iv) to receive a reasoned response to any request or application; (v) to demand that the terms and time limits of the proceedings be respected; and (vi) to be treated with dignity, respect, equality and without discrimination. These rights are available to any party dealing with the executive power. Law No 2,341, 23 April 2002, **R-250**, Art 16.

<sup>1159</sup> Second Witness Statement of Christopher Eskdale, paras 27, 28, 34, 35, 49.

480. Most notably, Bolivia’s allegations in this case have already been dismissed by other international tribunals. As already explained, in *Quiborax*, where Bolivia, similarly to the present case, effected a nationalization under the guise of a “revocation,” the tribunal determined that “the availability of domestic actions to challenge the Revocation Decree does not change the Tribunal’s conclusion that the revocation did not comply with due process, the determinative factors being that the Claimants were not heard [...] and that the revocation lacked valid reasons.”<sup>1160</sup>
481. In similar circumstances, the *Gold Reserve* tribunal found that the State violated the investor’s due process rights in terminating the relevant concessions by “deliberately avoiding any dialogue with Claimant aimed at solving outstanding problems.”<sup>1161</sup> It faulted the host State for cancelling mining rights without giving the investor “an opportunity to be heard.”<sup>1162</sup> Here too, Bolivia violated Glencore’s due process rights by “reverting” the asset instead of aiming to correct the issue. Bolivia argues that *Gold Reserve* is inapposite because that case concerned a situation where the state had ulterior motives for its action, while here there are none.<sup>1163</sup> On the contrary, Bolivia’s “reversions” were also motivated by plainly pretextual reasons, as already explained.<sup>1164</sup>
482. *Second*, according to Bolivia, it purportedly acted in a transparent manner in the reversion of the smelters<sup>1165</sup> because (i) it was “well-known that government officials [...] had observed serious irregularities in the privatization of the Tin

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<sup>1160</sup> *Quiborax SA and Non Metallic Minerals SA v Plurinational State of Bolivia* (ICSID Case No ARB/06/2) Award, 16 September 2015, **CLA-127**, para 226.

<sup>1161</sup> *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award, 22 September 2014, **CLA-123**, para 601.

<sup>1162</sup> *Ibid*, para 600.

<sup>1163</sup> Statement of Defense, para 599.

<sup>1164</sup> *See* Section V.A.

<sup>1165</sup> Statement of Defense, para 589.

Smelter;”<sup>1166</sup> and (ii) it was “well known that the regulations for privatization as well as the Antimony Smelter contract required the private owner to invest in and strengthen the smelter.”<sup>1167</sup> But Bolivia’s position cannot stand. Rather, Bolivia’s “reversions” were plainly pretextual and carried out in bad faith.<sup>1168</sup> With respect to the allegations of illegalities or contractual breaches, Bolivia’s own claims confirm that, to this day, no Government authority has made any official determination of any wrongdoing or contractual breach. Further, as already explained, the real reason the Government “reverted” the Tin Smelter was because it would be “profitable” and would allow the State to control the tin mineral supply chain.<sup>1169</sup> As to the Antimony Smelter, Bolivia wanted the Tin Stock for its own use. Notably, through both “reversions,” the Government purposely circumvented the dispute resolution mechanisms provided for in the Purchase Agreements.<sup>1170</sup> Due process certainly includes respecting the procedures expressly agreed to by the parties.

483. Bolivia claims that its acts should have been predicted by Glencore Bermuda since it invested “at a moment of political change”<sup>1171</sup> during which it was clear that “Bolivia would address regulatory issues differently.”<sup>1172</sup> Bolivia also claims that it had the power to address novel problems that could arise.<sup>1173</sup> But, once more, Bolivia’s argument is misplaced and incorrect. Glencore Bermuda’s claims do not concern changes in the legislative framework,<sup>1174</sup> nor were Bolivia’s

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<sup>1166</sup> *Ibid*, para 591.

<sup>1167</sup> *Ibid*, para 592.

<sup>1168</sup> *See* Section V.A.

<sup>1169</sup> *See* Section II.D.1; COMIBOL, Report on the reversion of the Complejo Metalúrgico Vinto to the Bolivian State, 29 January 2007, **R-247**.

<sup>1170</sup> *See* Section V.A.

<sup>1171</sup> Statement of Defense, para 599.

<sup>1172</sup> *Ibid*, para 598.

<sup>1173</sup> *Ibid*, para 597.

<sup>1174</sup> The cases that Bolivia cites in support of this argument are in any event unavailing. In *Parkerings*, Lithuania was transitioning from being part of the Soviet Union into the candidate for the European Union Membership when the investor invested (*Parkerings-Compagniet AS v Republic*

measures taken to address “regulatory issues”<sup>1175</sup> in response to new problems, as Bolivia misleadingly asserts. Rather, Bolivia arbitrarily took measures that were inconsistent with prior State conduct, through which the State had privatized and transferred the Assets.<sup>1176</sup> The *Urbaser* tribunal, on which Bolivia heavily relies for this point, takes Bolivia nowhere. In *Urbaser*, the tribunal discussed the standard against which to measure a State’s conduct in time of crisis, using the example of “an epidemic threat to the health of a very large amount of people.”<sup>1177</sup>

484. The tribunal found that faced with such an unpredictable crisis, the State would be permitted to “take all measures required by the situation even if this implies hurting investors’ interests, provided that the authorities proceed with deference to those interests and with the aim to restore their efficient preservation as soon as the circumstances so allow.”<sup>1178</sup>
485. This has nothing to do with the situation here. Not only was there no crisis, but there was nothing “unpredictable” that could have justified Bolivia’s actions.

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*of Lithuania* (ICSID Case No ARB/05/8) Award, 11 September 2007, **RLA-83**, para 335). Similarly, in *Mamidoil*, at the time of the investment, Albania had “just overcome a highly repressive and isolationist communist regime where the rule of law, administrative procedures, and independent judiciary had been destroyed and where environmental and social protection were irrelevant to the process of policy making” and that it “lived through a severe economic and financial crisis, which brought it to the brink of the complete collapse of its State structures” and it had to establish “new laws and start to implement them.” (*Mamidoil Jetoil Greek Petroleum Products Societe Anonyme SA v Republic of Albania* (ICSID Case No ARB/11/24) Award, 30 March 2015, **RLA-74**, paras 625-628). In *Toto v Lebanon*, the investment was made just as Lebanon was emerging from a lengthy civil war and was facing “substantial economic challenges and colossal reconstruction efforts.” (*Toto Costruzioni Generali SpA v Republic of Lebanon* (ICSID Case No ARB/07/12) Award, 7 June 2012, **RLA-76**, para 245). A period of political transition, as alleged by Bolivia, is certainly not comparable to any of these cases.

<sup>1175</sup> Statement of Defense, para 598.

<sup>1176</sup> See, eg, *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award, 19 January 2007, **CLA-66**, para 253; *CMS Gas Transmission Company v Republic of Argentina* (ICSID Case No ARB/01/8) Award, 12 May 2005, **CLA-57**, para 290.

<sup>1177</sup> *Urbaser SA and Consorcio de Aguas Bilbao Biskaia Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (ICSID Case No ARB/07/26) Award, 8 December 2016, **RLA-86**, para 628.

<sup>1178</sup> *Ibid.*

Moreover, Bolivia's argument that a political transition justifies its "reversion" of the Assets patently exposes the true motive for the nationalizations: a political one.<sup>1179</sup>

486. Even if it could be argued that the "reversions" took place in times of "unpredictable crisis" (and they certainly did not), Bolivia's conduct still breaches the fair and equitable treatment standard. Bolivia has not satisfied the standard that a host State must meet when taking regulatory action in the public interest in such times of crisis. At no time did Bolivia pay any deference to Glencore Bermuda's interests nor make any attempts to restore Glencore Bermuda's investment. As the *Urbaser* tribunal observed, the fair and equitable treatment standard requires that "the authorities of the State shall act in a way to create a climate of cooperation in support of investment activities."<sup>1180</sup> Bolivia has patently failed to do that here.

***b. Bolivia acted in bad faith and in a non-transparent manner when it used the conflict at the Colquiri Mine to execute its planned nationalization***

487. Bolivia also violated the Treaty's fair and equitable treatment standard when it decided to "execute the Nationalization of the Colquiri Mine,"<sup>1181</sup> behind closed doors during a period of rising metals prices and highly successful operations and then used the conflict with the *cooperativas* as a pretext to achieve such nationalization. In fact, only six days after the *cooperativistas'* invasion of the Colquiri Mine, Bolivia gave up any effort to reach a negotiated solution that would have preserved Glencore Bermuda's rights over the Colquiri Lease. Bolivia acted in bad faith and in a non-transparent manner when it negotiated with the

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<sup>1179</sup> See, eg, *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award, 22 September 2014, **CLA-123**, para 580 (observing that the reasons for the cancellation were not limited to those officially stated by the Ministry, but, rather, were to be found in "the change of political priorities of the Administration [...] taken regarding mining of mineral reserves starting in late 2007 by the highest levels of authority").

<sup>1180</sup> *Urbaser SA and Consorcio de Aguas Bilbao Biskaia Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (ICSID Case No ARB/07/26) Award, 8 December 2016, **RLA-86**, para 628.

<sup>1181</sup> 10 May 2012 Agreement, 10 May 2012, **C-256**.

workers and the *cooperativistas* for the nationalization of the Colquiri Mine behind Glencore Bermuda's back, while knowing that Glencore Bermuda and its representatives were actively pursuing a solution with the Vice Minister of Cooperatives.<sup>1182</sup> Indeed, Bolivia disregarded the Rosario Agreement reached by Glencore Bermuda, the *cooperativistas* and the Vice Minister of Cooperatives, that would have ended the conflict and nonetheless proceeded with the nationalization, escalating the violence at Colquiri and depriving Glencore Bermuda of its investment in the Colquiri Lease.<sup>1183</sup>

488. Bolivia claims that it did not act in bad faith with respect to the "reversion" of the Colquiri Lease because it (i) "took all the measures that were legal and reasonable"<sup>1184</sup> following the invasion of the Colquiri Mine by local *cooperativistas*; and (ii) "it is not true that the conflict was resolved at the time of the reversion; it was the reversion that put an end to the dispute."<sup>1185</sup> As addressed in detail above,<sup>1186</sup> neither position holds.

489. *First*, Bolivia spent no more than six days negotiating a solution that would have preserved Glencore Bermuda's rights over the Colquiri Lease. Instead, as soon as the San Antonio Proposal collapsed, Bolivia purposely excluded Glencore Bermuda and its local subsidiaries from the negotiations and proposed nationalization to the conflicting parties as the only possible answer.<sup>1187</sup> The evidence shows that this was Bolivia's intention all along. In the 10 May 2012 Agreement, executed 20 days prior to the *cooperativistas'* invasion, the Government agreed to garner the support of the Colquiri Union for the nationalization of the Colquiri Mine. This is exactly what the Government set out

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<sup>1182</sup> See Section II.D.3; Statement of Claim, paras 219-220.

<sup>1183</sup> See Section II.D.3.

<sup>1184</sup> Statement of Defense, para 604.

<sup>1185</sup> *Ibid.*, para 605.

<sup>1186</sup> See Section III.D.3.

<sup>1187</sup> *Ibid.*

to do in the midst of the conflict with the *cooperativistas*—by 6 June 2012, Bolivia had already presented the workers with a written proposal for the nationalization of the Colquiri Mine.<sup>1188</sup> Even though Bolivia had sent a Government representative to the Colquiri Mine for the purpose of negotiating a solution to the conflict, Bolivia failed to abide by the terms of the agreement that that very representative helped broker (the Rosario Agreement).

490. *Second*, it is simply not true that the “reversion” ended the conflict. In fact, as explained in detail above, the conflict only escalated after Bolivia took control of the Colquiri Mine, leaving one person dead and several others injured.<sup>1189</sup>
491. Clearly, Bolivia’s purported “reversion” of the Colquiri Lease was not carried out in a transparent manner, but was, again, contrary to basic principles of good faith and due process.

### 3. Bolivia’s measures violated Claimant’s legitimate expectations

492. As indicated above, a core aspect of the fair and equitable treatment standard is the requirement that investors be accorded a stable and predictable investment environment.<sup>1190</sup> This includes the “obligation to treat foreign investors so as to avoid the frustration of investors’ legitimate and reasonable expectations.”<sup>1191</sup>
493. Glencore Bermuda had a legitimate expectation that (i) its investments would not be taken by the State in a manner that was in violation of basic due process guarantees; (ii) its investments would not be taken by the State without the

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<sup>1188</sup> *Ibid*; Statement of Defense, para 209; Proposal from the Government to the Cabildo of Colquiri, **R-27**, p 1.

<sup>1189</sup> *See* Section III.D.3.

<sup>1190</sup> *See, eg, Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan* (ICSID Case No ARB/05/16) Award, 29 July 2008, **CLA-79**, para 609.

<sup>1191</sup> *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, para 302; *see also Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Award, 27 August 2009, **CLA-90**, para 178; *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18) Decision on Jurisdiction and Liability, 14 January 2010, **CLA-95**, para 284; *Occidental Exploration and Production Company v Republic of Ecuador* (LCIA Case No UN 3467) Final Award, 1 July 2004, **CLA-50**, para 183.

provision of just, effective, and prompt compensation; (iii) should Bolivia decide to take over its investments, it would do so in compliance with domestic law; and (iv) Bolivia would protect the Colquiri Mine from the violent invasion of the *cooperativistas*, as provided in the Colquiri Lease.<sup>1192</sup>

494. When Glencore Bermuda acquired the Assets it did so in reliance on the existing legal framework at that time and the guarantees it embodied. This properly included the Investment Law, specifically enacted for the purpose of “stimulat[ing]” and “guarantee[ing]” domestic and foreign investments in Bolivia.<sup>1193</sup> The Investment Law itself provided specific assurances to prospective investors, including that their right to property would be “guaranteed with no other limitation other than those set forth in the law.”<sup>1194</sup> More importantly, it was on the back of this law that the Treaty (and other treaties) were signed, creating the expectation for Glencore Bermuda that its investment would be treated in accordance with its terms.<sup>1195</sup> Similar guarantees were contained in the 1967 and 2009 Constitutions and Expropriation Law (which, as already stated, required the State to make a legislative declaration of public utility and pay fair compensation prior to any taking of private property)<sup>1196</sup> and Bolivia’s Administrative Procedure

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<sup>1192</sup> Statement of Claim, Section V.C.

<sup>1193</sup> Article 1 of the Investment Law noted the need “to promote the growth and economic and social development of Bolivia, with a regulatory system that governs both domestic and foreign investments.” Investment Law, 17 September 1990, **C-4**, Art 1 (unofficial English translation from Spanish original). The Investment Law remained in effect for almost 24 years, being repealed only in April 2014.

<sup>1194</sup> *Ibid*, Art 4 (“Se garantiza el derecho de propiedad para las inversiones nacionales y extranjeras sin ninguna otra limitación que las estipuladas en la Ley.”).

<sup>1195</sup> *Ibid*, Art 7.

<sup>1196</sup> Constitution of Bolivia, 1967, **R-3**, Art 22.II (“Expropriation is imposed for reasons of public utility or when the property does not fulfill a social function, qualified according to law and after fair compensation.”) (unofficial English translation from Spanish original); 2009 Constitution, 7 February 2009, **C-95**, Art 57 (“Expropriation will be imposed because of need or public utility, qualified in accordance with the law and after fair compensation.”) (unofficial English translation from Spanish original); Expropriation Law, 30 December 1884, **C-49**, Arts 1, 8; Civil Code of Bolivia, 2 April 1976, **C-52**, Art 108(I).

Law (which applied to the imposition of administrative sanctions, including a reversion of rights).<sup>1197</sup>

495. In addition, Glencore Bermuda relied on Bolivia’s specific undertakings in the relevant contracts: the Tin Smelter Purchase Agreement, Antimony Smelter Purchase Agreement, and the Colquiri Lease. Each included detailed dispute resolution clauses providing for the arbitration of any disputes related to the contracts, including with respect to their “validity,” “scope” and the parties’ “compliance.”<sup>1198</sup> Glencore Bermuda legitimately expected that, if any issue arose relating to the acquisition of the Assets or to supposed performance obligations, these would be resolved by a neutral ICC arbitral tribunal rather than through unsupported “revocations.”<sup>1199</sup> Moreover, under the Colquiri Lease, Bolivia specifically committed to protecting Glencore Bermuda’s investment against interference by third parties.<sup>1200</sup>
496. Bolivia’s position, however, is that Glencore Bermuda did not have any legitimate expectation that could be breached.
497. *First*, Bolivia (rather surprisingly) claims that Glencore Bermuda’s expectation was “that Bolivia would act precisely as Claimant has alleged in this arbitration” (*ie*, in violation of its obligations).<sup>1201</sup> According to Bolivia, this is evidenced by the fact that Glencore Bermuda “was very familiar with Bolivia and the political

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<sup>1197</sup> Law No 2,341, 23 April 2002, **R-250**, Arts 80-84.

<sup>1198</sup> Tin Smelter Purchase Agreement, 17 July 2001 and 4 July 2001, **C-7**, Clause 15; Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**, Clause 15; Colquiri Lease, 27 April 2000, **C-11**, Clause 17.

<sup>1199</sup> *See* Section V.A.

<sup>1200</sup> Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**, Clause 15; Colquiri Lease, 27 April 2000, **C-11**, Clauses 12.2-12.2.1 (“The LESSOR guarantees: 12.2.1. The peaceful possession, use and enjoyment of the CENTRAL MINE, and should defend, protect, guarantee, and reclaim rights against incursions, usurpations, and other disturbances by third parties.”). *See* Section V.B.

<sup>1201</sup> Statement of Defense, para 563.

context in which it acquired [the] Assets **Confidential**  
**Confidential**

498. **Confidential**

**Confidential** Further, contrary to Bolivia’s claims, at the time Glencore Bermuda invested in the Assets, not only was there no sign that Bolivia would expropriate Glencore Bermuda’s investment, but the Government had expressly welcomed its investment.<sup>1204</sup> But, more importantly, even if there had been signs that Bolivia would nationalize mining investments (which there were not), Glencore Bermuda’s expectations could never have been that Bolivia would not comply with its legal obligations, as Bolivia now argues.

499. In fact, as explained in *Tecmed v Mexico*, an investor is entitled to expect that a State will “act consistently, i.e. without arbitrarily revoking any preexisting decisions,” that it will properly apply any relevant legal instruments in conformity with the function usually assigned to them and not expropriate the investor’s property without adequate compensation.<sup>1205</sup> More precisely and relevant for this case, the *ADC v Hungary* tribunal explained that, even if the “Claimants ever envisaged the risk of any possible depriving measures, the Tribunal believes that they took that risk with the legitimate and reasonable expectation that they would

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<sup>1202</sup> *Ibid*, para 564.

<sup>1203</sup> See Section II.D.4.

<sup>1204</sup> Letter from the Vice Minister of Mining (Mr Gutiérrez) to Glencore (Mr Capriles), 17 January 2005, **C-63**; see also First Witness Statement of Christopher Eskdale, para 18; Section II.B.3.

<sup>1205</sup> *Técnicas Medioambientales Tecmed SA v United Mexican States* (ICSID Case No ARB(AF)/00/2) Award, 29 May 2003, **CLA-43**, para 154; see also *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15) Award, 3 March 2010, **CLA-96**, para 441 (stating that an investor may legitimately expect that a State will “conduct itself vis-à-vis his investment in a manner that [is] reasonably justifiable and [does] not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination”); *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, para 309 (holding that a foreign investor “is entitled to expect that the [host State] will not act in a way that is manifestly inconsistent, non-transparent, unreasonable”).

receive fair treatment and just compensation and not otherwise.”<sup>1206</sup> It follows that, contrary to Bolivia’s allegations, Glencore Bermuda reasonably expected that Bolivia’s conduct would not fundamentally contradict basic principles of its own laws and regulations and Bolivia would not act “beyond its authority.”<sup>1207</sup>

500. *Second*, Bolivia argues that “[l]egitimate expectations cannot arise from general legislation such as the Investment Law” and instead can “arise only when the state makes specific undertakings or representations to the foreign investor.”<sup>1208</sup> Bolivia’s position is contradicted by relevant case law, where tribunals have found that general guarantees incorporated in the domestic legislation can constitute a promise to foreign investors as a class.<sup>1209</sup> In *Binder v Czech Republic*, for example, the tribunal observed that “[t]he expectations may relate not only to the existing contractual or other relations between the investor and the host state, but may also concern the general legal framework in the host state.”<sup>1210</sup> In *Total v Argentina*, the tribunal found that the State’s measures violated the fair and equitable treatment standard “in view of their negative impact on the investment and their incompatibility with the criteria of economic rationality,

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<sup>1206</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 424 (emphasis added).

<sup>1207</sup> *Alpha Projektholding GmbH v Ukraine* (ICSID Case No ARB/07/16) Award, 8 November 2010, **CLA-101**, para 422; *see also El Paso Energy International Company v Argentine Republic* (ICSID Case No ARB/03/15) Award, 31 October 2011, **CLA-106**, para 400 (finding that “the legitimate expectations of any investor [...] had to include the real possibility of reasonable changes and amendments in the legal framework, made by the competent authorities within the limits of powers conferred on them by the law”) (emphasis added); *see also Eiser Infrastructure Limited and Energia Solar Luxembourg SàrL v Kingdom of Spain* (ICSID Case No ARB/13/36) Award, 4 May 2017, **CLA-226**, para 382, quoting *El Paso Energy International Company v Argentine Republic* (ICSID Case No ARB/03/15) Award, 31 October 2011, **CLA-106**, para 400.

<sup>1208</sup> Statement of Defense, para 579.

<sup>1209</sup> *See, eg, Enron Corporation and Ponderosa Assets LP v Argentine Republic* (ICSID Case No ARB/01/3) Award, 22 May 2007, **CLA-68**, paras 264-268 (finding that, although no specific undertakings were made to the claimants, the guarantees incorporated in the domestic legislation constituted a promise to foreign investors as a class).

<sup>1210</sup> *Binder v Czech Republic* (UNCITRAL) Final Award, 15 July 2011, **CLA-196**, para 443 (emphasis added).

public interest, reasonableness and proportionality.”<sup>1211</sup> The tribunal concluded that:

A foreign investor is entitled to expect that a host state will follow those basic principles (which it has freely established by law) in administering a public interest sector that it has opened to long term foreign investments. Expectations based on such principles are reasonable and hence legitimate, even in the absence of specific promises by the government.<sup>1212</sup>

501. Likewise, in *Frontier Petroleum Services Ltd v Czech Republic* the tribunal explained that:

Stability means that the investor’s legitimate expectations based on this legal framework and on any undertakings and representations made explicitly or implicitly by the host state will be protected. The investor may rely on that legal framework as well as on representations and undertakings made by the host state including those in legislation, treaties, decrees, licenses, and contracts. Consequently, an arbitrary reversal of such undertakings will constitute a violation of fair and equitable treatment.<sup>1213</sup>

502. Finally, as explained by Prof Schreuer and recognized by a number of investment tribunals, “non-observance of important aspects of domestic law may well affect the transparency and stability of the investment’s regulatory framework and may therefore be contrary to the [fair and equitable treatment] standard.”<sup>1214</sup>

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<sup>1211</sup> *Total SA v Argentine Republic* (ICSID Case No ARB/04/1) Decision on Liability, 27 December 2010, **CLA-103**, para 333.

<sup>1212</sup> *Ibid* (emphasis added).

<sup>1213</sup> *Frontier Petroleum Services Ltd v Czech Republic* (UNCITRAL) Final Award, 12 November 2010, **CLA-102**, para 285 (emphasis added); see also *Suez Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v The Argentine Republic* (ICSID Case No ARB/03/19) Decision on Liability, 30 July 2010, **RLA-47**, paras 237-238 (“Claimants, as participants in any regulated industry, had the legitimate expectation that the Argentine authorities would exercise that regulatory authority and discretion within the rules of the detailed legal framework that Argentina had established for the Concession.”).

<sup>1214</sup> C Schreuer, “Fair and Equitable Treatment (FET): Interactions with Other Standards” in: C Ribeiro (ed), *Investment Protection and the Energy Charter Treaty* (2008), **RLA-81**, p 31; *GAMI Investments, Inc v The Government of the United Mexican States*, Final Award, 15 November 2004, **CLA-158**, paras 91, 94, 97; *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret*

503. The cases Bolivia cites to in support of its proposition do not advance its claim. For example, while Bolivia selectively quotes the tribunal’s decision in *ECE v Czech Republic* to support its assertion that legitimate expectations arise only from specific assurances,<sup>1215</sup> the tribunal in that case went on to state that the fair and equitable treatment standard “is about the operation of the State’s administrative and legal system as a whole.”<sup>1216</sup>
504. Bolivia also relies on the tribunal’s wording in *Philip Morris v Uruguay*.<sup>1217</sup> But this case is inapposite to the present circumstances. There, the claimant challenged Uruguay’s enactment of a general public regulation aimed at addressing the harmful effects of tobacco products.<sup>1218</sup> The tribunal observed that general legislation provisions “applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law.”<sup>1219</sup> Here, Glencore Bermuda is not challenging the enactment of a general regulation, nor denouncing an unfavorable change in the law. Rather, Glencore Bermuda contests the individual sovereign acts through which Bolivia seized the entirety of Glencore Bermuda’s Assets, destroying all value in its investments. These measures were specifically and solely directed at Glencore Bermuda. What is more, they did not amount to a legislative change in the

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*Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award, 19 January 2007, **CLA-66**, para 249.

<sup>1215</sup> Statement of Defense, para 580.

<sup>1216</sup> *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v The Czech Republic* (PCA Case No 2010-5) Award, 19 September 2013, **RLA-85**, para 4.764 (emphasis added).

<sup>1217</sup> See Statement of Defense, para 579.

<sup>1218</sup> *Philip Morris Brand Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* (ICSID Case No ARB/10/7) Award, 8 July 2016, **RLA-43**, para 418.

<sup>1219</sup> *Ibid*, para 426 (emphasis added). *PSEG v Turkey* also does not support Bolivia’s position. There, the tribunal acknowledged that “[r]ecent awards have applied this standard to the assessment of rights affected by inconsistent State action, arbitrary modification of the regulatory framework or endless normative changes to the detriment of the investor’s business and the need to secure a predictable and stable legal environment” and ultimately found there to be a breach of the fair and equitable treatment standard. *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award, 19 January 2007, **CLA-66**, paras 240, 246-256.

- applicable legal framework, but rather to sovereign measures that violated the legal framework in place, as explained above.<sup>1220</sup>
505. *Third*, while Bolivia itself recognizes that the agreements included a number of specific guarantees, it now claims—contradicting its own position—that the specific guarantees provided in a contract cannot constitute legitimate expectations.<sup>1221</sup> To support this (inconsistent) position, Bolivia selectively quotes Prof Schreuer in arguing that if “contracts could give rise to legitimate expectations, ‘the [fair and equitable treatment] standard would be nothing less than a broadly interpreted umbrella clause.’”<sup>1222</sup> But, of course, this is not what Prof Schreuer states. Instead, he observes that “[a]n important aspect of the protection of the investor’s legitimate expectations is the observance of obligations arising from contracts with the host State.”<sup>1223</sup> He goes on to explain that, while not all contract breaches will automatically amount to fair and equitable treatment violations, “[a] look at practice shows that tribunals seem to agree that a failure to perform a contract may amount to a violation of the [fair and equitable treatment] standard.”<sup>1224</sup>
506. In fact, it is clear that Bolivia confuses the principle of legitimate expectations with the issue of whether a mere contractual breach can constitute a treaty breach. But as Prof Schreuer underscores, “an outright repudiation of the contract, brought about through the employment of sovereign prerogative, would lead to a violation of the fair and equitable treatment standard,”<sup>1225</sup> which is exactly the situation of the instant case. This principle was also confirmed by the tribunal in *Noble Ventures v Romania* which noted that the fair and equitable treatment

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<sup>1220</sup> See Section II.D.

<sup>1221</sup> Statement of Defense, para 572.

<sup>1222</sup> *Ibid*, para 573.

<sup>1223</sup> C. Schreuer, “*Fair and Equitable Treatment (FET): Interactions with Other Standards*”, in C Ribeiro (ed.), *Investment Protection and the Energy Charter Treaty*, 2008, **RLA-81**, p 27.

<sup>1224</sup> *Ibid*, p 28 (emphasis added).

<sup>1225</sup> *Ibid*, p 30 (emphasis added).

standard includes “the obligation to observe contractual obligations towards the investor.”<sup>1226</sup>

507. The cases upon which Bolivia relies are inapposite since they discuss whether the violations of the contracts can constitute violations of treaties. For example, in *SAUR*, the tribunal ultimately determined that Argentina did violate the fair and equitable treatment standard, since the conduct in question was not contractual, but rather amounted to a use of the State’s sovereign powers. Similarly, while the *Impregilo v Argentina* tribunal determined that if the acts of the Province of Buenos Aires were “exclusively contractual” they would not amount to a violation of the fair and equitable treatment standard, it ultimately found that this was not the case.<sup>1227</sup> This is not the discussion here.
508. In sum, Bolivia violated Glencore Bermuda’s legitimate expectations that its investments would not be expropriated without providing due process or just compensation and in a manner that was in violation of the Treaty and international law, applicable domestic laws and regulations, as well as contrary to Bolivia’s specific commitments under the Colquiri Lease, the Tin Smelter Purchase Agreement and the Antimony Smelter Purchase Agreement.

#### **4. Bolivia did not negotiate in good faith a fair standard of compensation for the expropriated Assets**

509. As several investment treaty tribunals have held, the host State’s refusal to engage in good faith negotiations with the investor gives rise to a breach of the fair and equitable treatment standard.<sup>1228</sup> As the *ConocoPhillips v Venezuela* tribunal held,

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<sup>1226</sup> *Noble Ventures Inc v Romania* (ICSID Case No ARB/01/11) Award, 12 October 2005, **CLA-59**, para 182 (emphasis added); see also *SGS Société Générale de Surveillance SA v The Republic of the Philippines* (ICSID Case No ARB/02/6) Decision on Objections to Jurisdiction, 29 January 2004, **RLA-32**, para 162.

<sup>1227</sup> *Impregilo SpA v Argentine Republic* (ICSID Case No ARB/07/17) Award, 21 June 2011, **CLA-105**, paras 294, 331.

<sup>1228</sup> See, eg, *National Grid plc v Argentine Republic* (UNCITRAL) Award, 3 November 2008, **CLA-82**, para 179 (“It is the conclusion of the Tribunal that the Respondent breached the standard of fair and equitable treatment because: [...] (b) no meaningful negotiations took place for the two

“it is commonly accepted that the Parties must engage in good faith negotiations to fix the compensation [...] if a payment satisfactory to the investor is not proposed at the outset.”<sup>1229</sup> Here, Bolivia repeatedly failed to offer Glencore Bermuda just and effective compensation, despite Glencore Bermuda’s many attempts to initiate and engage in good faith negotiations over the last ten years.<sup>1230</sup> In particular, the Government delayed and cancelled meetings, continued “reverting” the Assets despite the ongoing negotiations and refused to engage with Glencore Bermuda’s numerous attempts at presenting and discussing valuation analyses based on the Assets’ fair market value.<sup>1231</sup> In fact, Bolivia even presented a negative valuation: suggesting that Glencore Bermuda should pay Bolivia for the Assets’ nationalizations.<sup>1232</sup>

510. Bolivia claims that Glencore Bermuda’s proposed standard for unfair negotiations is a “roller-coaster ride” and that the Tribunal should not find a breach of international law on that account.<sup>1233</sup> This is not Glencore Bermuda’s position. The presence of “roller-coaster” negotiations (to which Bolivia subjected Glencore Bermuda for over ten years) clearly demonstrates a violation of the legal

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years that passed between the adoption of the Measures and the sale of Transener’s shares by the Claimant”); *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award, 19 January 2007, **CLA-66**, paras 246, 248-249 (“The Tribunal is persuaded nonetheless that the fair and equitable treatment standard has been breached, and that this breach is serious enough as to attract liability. Short of bad faith, there is in the present case first an evident negligence on the part of the administration in the handling of the negotiations with the Claimants. The fact that key points of disagreement went unanswered and were not disclosed in a timely manner, that silence was kept when there was evidence of such persisting and aggravating disagreement, that important communications were never looked at, and that there was a systematic attitude not to address the need to put an end to negotiations that were leading nowhere, are all manifestations of serious administrative negligence and inconsistency. The Claimants were indeed entitled to expect that the negotiations would be handled competently and professionally, as they were on occasion.”) (emphasis added).

<sup>1229</sup> *ConocoPhillips Petrozuata BV and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/30) Decision on Jurisdiction and the Merits, 3 September 2013, **CLA-117**, para 362.

<sup>1230</sup> Statement of Claim, paras 13, 69, 71-76, 82-86, 114-117; First Witness Statement of Christopher Eskdale, paras 48, 50-60, 67-70, 72, 107-119.

<sup>1231</sup> *See, eg*, First Witness Statement of Christopher Eskdale, paras 48, 52, 55, 107-119.

<sup>1232</sup> *Ibid*, para 116.

<sup>1233</sup> Statement of Defense, para 607.

standard requiring that negotiations be undertaken in good faith, fairly, even-handedly, and transparently.

511. In *Saluka*, for example, the tribunal explained that while “[a] host State’s government is not under an obligation to accept whatever proposal an investor makes in order to overcome a critical financial situation,” an investor nevertheless is “entitled to expect that the host State takes seriously a proposal that has sufficient potential to solve the problem and deal with it in an objective, transparent, unbiased and even-handed way.”<sup>1234</sup> Here, contrary to Bolivia’s allegations, Glencore Bermuda’s complaint is not that “Bolivia did not give it what it wanted.”<sup>1235</sup> Bolivia’s proposals were simply unacceptable. As already explained, not only were they not close to a fair market value of the Assets, but Bolivia even went so far as to suggest that Glencore Bermuda should pay Bolivia for the honor of having nationalized its Assets.<sup>1236</sup>
512. Bolivia attempts to distinguish *PSEG v Turkey*, on which Glencore Bermuda relies, because the breach of the fair and equitable treatment standard in that case consisted of a “constant back and forth” of legislative changes governing the investment. According to Bolivia, since “[t]he negotiations between Claimant and Bolivia did not take place against a background of constant legal change,” the conclusions of the *PSEG* tribunal are “entirely irrelevant.”<sup>1237</sup> Bolivia’s argument, however, rests on a mischaracterization of *PSEG*. In that case the tribunal found “[v]arious examples of the breach of fair and equitable treatment obligation,”

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<sup>1234</sup> *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, para 363.

<sup>1235</sup> Statement of Defense, para 608.

<sup>1236</sup> First Witness Statement of Christopher Eskdale, paras 113, 116. Unsurprisingly, Bolivia solely focuses on the reference to “bias” in the *Saluka* case and alleges that there was none here. But bias is just one aspect evidencing a breach of good faith in negotiations. *Saluka* also required the host State to act in a manner that was “objective, transparent [...] and even-handed.” *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, para 363. Bolivia ignores these requirements and, in fact, failed to abide by them.

<sup>1237</sup> Statement of Defense, para 609.

among which were “numerous changes in the legislation.”<sup>1238</sup> Yet, in setting out the “most prominent” examples of the breach, the tribunal first pointed to the “serious administrative negligence and inconsistency” in “the handling of the negotiations.”<sup>1239</sup> In particular, the tribunal reproached Turkey because “key points of disagreement went unanswered and were not disclosed in a timely manner, that silence was kept when there was evidence of such persisting and aggravating disagreement, that important communications were never looked at, and that there was a systematic attitude not to address the need to put an end to negotiations.”<sup>1240</sup> The *PSEG* tribunal noted such conduct was in breach of the claimants’ legitimate expectations: “[t]he claimants were indeed entitled to expect that the negotiations would be handled competently and professionally.”<sup>1241</sup> The same can be said for Glencore Bermuda and its representatives.<sup>1242</sup>

513. It follows that Bolivia breached its obligation to afford Glencore Bermuda fair and equitable treatment when it failed to negotiate in good faith over a period of over ten years, refusing to acknowledge its obligation to pay Glencore Bermuda the fair market value of its lost investments.

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514. In sum, Glencore Bermuda correctly articulated the relevant fair and equitable treatment standard, as well as the ways in which Bolivia violated that standard. Glencore Bermuda was entitled to expect, and did in fact expect, that Bolivia would act in compliance with its international and domestic legal obligations and would not pretextually nationalize Glencore Bermuda’s investments without complying with due process and without providing any compensation (and not

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<sup>1238</sup> *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award, 19 January 2007, **CLA-66**, para 252.

<sup>1239</sup> *Ibid.*, paras 246, 252.

<sup>1240</sup> *Ibid.*, para 246.

<sup>1241</sup> *Ibid.*

<sup>1242</sup> First Witness Statement of Christopher Eskdale, paras 48, 50-60, 67-70, 72, 107-119.

even recognizing its obligation to provide just and effective compensation). Bolivia's actions therefore amount to a violation of Article 2(2) of the Treaty.

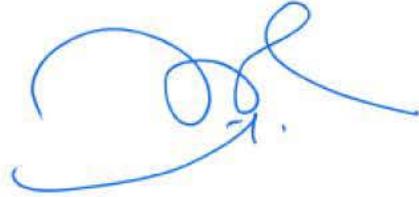
## **VI. REQUEST FOR RELIEF**

515. On the basis of the foregoing, without limitation and reserving Glencore Bermuda's right to supplement these prayers for relief, including without limitation in the light of further action which may be taken by Bolivia, Glencore Bermuda respectfully requests that the Tribunal:

- (a) DECLARE that Bolivia has breached the Treaty and international law, and in particular that:
  - (i) Bolivia unlawfully expropriated Glencore Bermuda's investments in violation of Article 5 of the Treaty;
  - (ii) Bolivia failed to provide full protection and security to Glencore Bermuda's investment in the Colquiri Lease and failed to comply with its obligations under the Treaty's umbrella clause, in violation of Article 2(2) of the Treaty;
  - (iii) In the alternative, Bolivia failed to accord fair and equitable treatment to Glencore Bermuda's investments, in violation of Article 2(2) of the Treaty; and
- (b) In due course and on the basis of the arguments and evidence to be submitted in the valuation phase of this arbitration:
  - (i) ORDER Bolivia to compensate Glencore Bermuda for the losses resulting from Bolivia's breaches of the Treaty and international law which have been calculated at US\$675.7 million as of 15 August 2017, plus interest until payment at a normal commercial rate applicable in Bolivia, compounded annually;

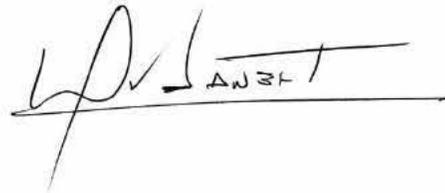
- (ii) DECLARE that: (a) the award of damages and interest in (b)(i) be made net of all Bolivian taxes; and (b) Bolivia may not deduct taxes in respect of the payment of the award of damages and interest in (b)(i);
- (iii) AWARD such other relief as the Tribunal considers appropriate;  
and
- (iv) ORDER Bolivia to pay all of the costs and expenses of these arbitration proceedings.

Respectfully submitted on 22 June 2018



**Freshfields Bruckhaus Deringer US LLP**

Noiana Marigo  
Nigel Blackaby  
Natalia Zibibbo  
Guadalupe López  
Giulia Previti  
Kathy Ibarra  
Diego Rueda  
Allison Kowalski  
Santiago Gatica



**FERRERE**

Pablo Ordoñez  
Bernarda Flores Ivanovic

On behalf of the Claimant