PCA Case No. 2016-39/AA641

Glencore Finance (Bermuda) Ltd.
(Claimant)

– VS –

The Plurinational State of Bolivia
(Respondent)

BOLIVIA'S PRELIMINARY OBJECTIONS, STATEMENT OF DEFENCE, AND REPLY ON BIFURCATION

18 December 2017

Members of the Tribunal:

Prof. Ricardo Ramírez Hernández
Prof. John Y. Gotanda
Prof. Philippe Sands

ESTADO PLURINACIONAL DE BOLIVIA
Procuraduría General del Estado

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1. Pursuant to the Procedural Calendar adopted by the Tribunal in Procedural Order No. 1, the Plurinational State of Bolivia ("**Bolivia**" or the "**State**") hereby submits its Preliminary Objections, Statement of Defence, And Reply On Bifurcation (the "**Statement of Defence**") in response to the Statement of Claim of Glencore Finance (Bermuda) Ltd. ("**Claimant**" or "**Glencore Bermuda**") (Claimant and Respondent are jointly referred to herein as the "**Parties**") filed on 15 August 2017 (the "**Statement of Claim**").

2. Bolivia submits together with its Statement of Defence:

   a. Factual exhibits **R-16** to **R-268**, together with a consolidated list of factual exhibits;

   b. Legal authorities **RLA-1** to **RLA-130**, together with a list of legal authorities;

   c. The witness statement of Mr Carlos Romero Bonifaz, Minister of Government of Bolivia ("**Romero**");

   d. The witness statement of Mr Andrés Cachi, former *cooperativista* and current employee at the State's *Empresa Minera Colquiri* ("**Cachi**");

   e. The witness statement of Mr Joaquín Mamani, worker at the Colquiri Mine at the time it was controlled by Sinchi Wayra (Glencore International AG's subsidiary in Bolivia) and one of the leaders of the *Sindicato Mixto de Trabajadores Mineros de Colquiri* ("**Mamani**");

   f. The witness statement of Eng Ramiro Villavicencio Niño de Guzmán, former employee at Sinchi Wayra and current general manager of the State company *Empresa Metalúrgica Vinto* ("**Villavicencio**");

   g. The witness statement of Eng David Alejandro Moreira, former employee at Sinchi Wayra and current general manager at the State company *Empresa Minera Colquiri* ("**Moreira**");

   h. The expert report of Mr Diego Mirones. Mr Mirones holds a Degree in Architecture from the *Facultad de Arquitectura, Universidad de San Andrés*, in Bolivia, and has over 30 years of experience as a real estate appraiser in Oruro ("**Mirones**");

   i. The expert report of Prof Neil Rigby, Bolivia's mining expert in this arbitration. Prof Rigby is a PhD from the University of Wales and also a founding partner of SRK (UK), a leading international consulting firm that provides advice in the mining and metals industry ("**SRK**"); and

j. The expert report of Dr Daniel Flores, Bolivia's valuation expert in this arbitration. Dr Flores is a PhD in Economics from Boston University and a managing partner at Econ One Research ("**Econ One**").

1. INTRODUCTION

3. **An utterly opportunistic claim**. Claimant attempts to use this investment arbitration as an unmerited insurance policy against its own poor judgment and mismanagement. It asks this Tribunal to ignore the facts that (i) Claimant brings an investment arbitration without having invested a single dime in Bolivia; (ii) it received transfer of its Bolivian assets when fully cognizant that great controversy permeated those assets; (iii) its mismanagement of its so-called investment led directly to the reversions of which it complains in this arbitration; and (iv) it now seeks some US$ 447.9 million (plus interest) in compensation even though it valued the Bolivian assets at no more than US$ 10 million when it obtained them in 2005.

4. **A blatant abuse of the international system for the protection of investments**. It was not Glencore Bermuda, the nominal Claimant, but its parent company, Glencore International AG ("**Glencore International**"), that invested in Bolivia in early 2005. Glencore International simply assigned to Glencore Bermuda, for no compensation whatsoever, the mining assets that are the subject of this arbitration—the Vinto tin smelter (the "**Tin Smelter**"), the Vinto antimony smelter (the "**Antimony Smelter**"), and the Colquiri mine lease (the "**Mine Lease**") (jointly referred to as the "**Assets**"). Glencore International itself negotiated the acquisition, managed the Assets, and negotiated with Bolivia when those Assets were reverted. Glencore Bermuda had no involvement whatsoever with the Assets until Glencore International decided to pursue an investment treaty claim against Bolivia.

5. **An investment rooted in the highly irregular and openly critizised privatization**. When Glencore International made its investment in Bolivia in 2005, it was fully aware of the controversies surrounding the Assets. It knew that it was acquiring the Assets from disgraced former President Gonzalo Sánchez de Lozada (and has deliberately concealed the terms of that transaction), and it knew the latter had obtained the Assets as the result of a privatization process from 1999-2001 that remained highly controversial due to its irregularities. Glencore International also knew that, as part of that 1999-2001 privatization process, Bolivia received a net payment of US$ 0 for Assets that Claimant now alleges are worth US$ 447.9 million (plus interest).

6. **Chronicle of a reversion foretold**. When it acquired the Assets, Glencore International knew about the likelihood of severe social conflict at the Colquiri Mine. Following the privatization of the Colquiri Mine, unemployed former mine workers were forced to work informally as

independent workers, providing an essential source of mine labour. As the independent workers began demanding more rights to work in the mine, an often uncontrollable conflict with the formal mine workers emerged. And, after 2003, as the *Movimiento al Socialismo* party gained increasing political power, with the support of informal mine workers from across Bolivia, these tensions became still more intense and unmanagable. It was at this moment that Glencore International entered Bolivia and acquired the Assets.

7. **All flanks covered**. Fully cognizant of its extremely risky investment, Glencore International took measures that would allow it to benefit from the risk. Bolivia understands that Glencore International took out political risk insurance for the Tin Smelter and suspects it did so for the Antimony Smelter and Colquiri Mine Lease as well, and that it later collected on these policies. It also transferred its Assets to a Bermudan holding company so that it could attempt to claim investment treaty protection when the entirely foreseeable disputes arose.

8. **Glencore International's wrongdoing encouraged the *cooperativistas* to take over the Colquiri Mine**. Glencore International's mismanagement of the Assets, most notably of the Colquiri Mine Lease, directly led to their reversion. Glencore International did nothing to quell the escalating conflict between the informal mine workers and the formal employees. It constantly ceded to demands of the informal workers for ever greater working areas in the Colquiri Mine, even while laying off formal workers. In early 2012, this long-brewing conflict erupted, when the informal workers violently seized control of the mine, demanding permanent control of the entire facility, and the formal workers equally insisted that nothing further be given to the informal workers.

9. **The Rosario Agreement (entered by Glencore International) sparked waves of violence**. Although the Government of Bolivia managed to negotiate an accord that promised to stop the violence, Glencore International deliberately subverted these efforts. Just as Bolivia was completing negotiations with the competing factions, Glencore International offered control of the Rosario vein of the Colquiri Mine to one sector of independent workers. As a result, the violence reignited and spread beyond the mine itself, to blockades on major roads and mass protests. At this point, the only solution to re-establish public safety and order was to remove Glencore International from the Colquiri Mine.

10. **Glencore International's wrongdoings also led to the reversion of the Smelters**. Similar blunders on the part of Glencore International led to the reversion of the Tin and Antimony Smelters. The Antimony Smelter was reverted because Glencore International simply ignored the plain terms of the privatization agreement requiring the Smelter be put to productive use, which Glencore International never did during the five years it held that Asset. And the Tin

Smelter was reverted because Glencore International purchased an Asset that had gone through an irregular privatization process, a fact that Glencore International knew at the time of purchase.

11. **The deal of the century**. Glencore International's carelessness with the Assets was unsurprising since it considered the Assets to be of limited economic value, except perhaps as the basis of insurance and arbitral claims. When Glencore International purchased the Assets in March 2005, it assumed they had a combined value of no more than US$ 10 million. This is a far cry from the US$ 447.9 million (before interest) Claimant now seeks in this arbitration, a figure approximately 45 times greater. Since Glencore International held the assets for only two to seven years, it proposes it received a 72% compound annual rate of return. But, if anything, the Assets would have lost value over time, as the Colquiri Mine Lease had a fixed 30-year term and Glencore International effectively made no investment in that or any of the other Assets.

12. The irregular circumstances in which the Assets were privatized and Glencore International's wrongdoings left the State with no choice but to revert them (**Section 2**).

13. **The Tribunal lacks jurisdiction to hear Claimant's claims**. In addition to these irregularities, the Swiss Glencore International is abusing Claimant's legal personality in order to obtain the protection of the UK-Bolivia Bilateral Investment Treaty (the "**Treaty**"). As a result, and on the the basis of the law applicable to this dispute (**Section 3**), the Tribunal does not have jurisdiction over Claimant's claims, which, in any event, are inadmissible (**Section 4**). Because Bolivia's objections to jurisdiction dispose of Claimant's entire case, the Tribunal must order the bifurcation of the proceedings and rule upon them as a preliminary matter (**Section 5**).

14. **Bolivia's legitimate reaction**. In the alternative, Claimant's claims fail on the merits (**Section 6**). Bolivia's decision to revert the Assets did not breach any of its international obligations. On the contrary, the reversion of the Assets was the logical response to (i) the irregular privatization of the Tin Smelter, (ii) the inactivity of the Antimony Smelter over the years, and (iii) the social conflict created at Colquiri.

15. **A valuation based on unrealistic assumptions**. In the further alternative, Claimant's valuation of the Assets is utterly flawed (**Section 7**). The reason for the gross mismatch between Glencore International's Asset valuation at the time of purchase and Claimant's valuation for this arbitration is clear. Claimant assumes earnings for the Assets that utterly outstrip their actual historical performance. For the Colquiri Mine, it projects earnings that

exceed by five times the average earnings during Glencore International's ownership. For the Tin Smelter, it projects earnings that exceed by three times the average earnings during Glencore International's ownership. Through this technique, it inflates value, seeking to obtain in this arbitration returns it never could have received as the owner of the Assets.

16. **The miraculous triennial plan**. To support its unrealistic valuation for the Colquiri Mine Lease, Glencore International relies only on a single 2011 triennial planning document that lacks even a basic analysis of its economic viability. This lone document was never presented to the management of Colquiri and received no internal approvals, no investment authorizations, and no expenditure authorizations. Unsurprisingly, none of these proposal went anywhere, even prior to the Mine Lease reversion. Even though this document bears no relationship with any plans for the Colquiri Mine, Glencore International build its speculative valuation solely on its feeble foundations.

17. **Bolivia's prayer for relief**. For all these reasons, the Tribunal should reject Claimant's claims and order Claimant to reimburse the costs incurred by Bolivia in this arbitration (**Section 8**).

2. GLENCORE INTERNATIONAL'S IRREGULAR ACQUISITION OF THE ASSETS AND THE UNSUSTAINABLE VIOLENCE IN THE REGION OF COLQUIRI FORCED BOLIVIA TO REVERT THE ASSETS

18. Claimant's claims concern Bolivia's decision to revert the Assets acquired by Glencore International from *Compañía Minera del Sur* ("**Comsur**"), a company controlled by former president of Bolivia, Gonzalo Sánchez de Lozada. The Assets consist of:

    a. A world renowned Tin smelter and the Antimony Smelter located near the city of Oruro and (jointly, the "**Smelters**"); and

    b. The Colquiri mine, a tin mine active since the XIX century located in the Department of La Paz (the "**Mine**"). The Mine operates in a very particular social context, as it is located underground beneath the village of Colquiri.

19. In support of its claims in this arbitration, Claimant submitted a summary of the relevant facts skewed towards showing Glencore as a blameless investor, suffering harm at the hand of the State, as the result of what it claims were sudden and surprising measures taken against its investments. This is an incomplete and often untruthful narrative, and Claimant's attempt to gloss over key circumstances leading to the reversion of the Assets cannot succeed. As explained below, in its presentation of the facts, Claimant fails to take into account the

defining sociological aspects of the Bolivian mining sector, as well as the troubled political history of the State before, during, and subsequent to the Privatization.

20. In fact, prior to the Privatization, the *Corporación Minera de Bolivia* ("**COMIBOL**"), Bolivia's mining state entity, was actively involved in the profitable operation of the Colquiri Mine and maintained good relationships with the local independent mining workers. In parallel, due to the investments made by Bolivia in the Assets, the Tin Smelter gained worldwide renown for its high grade tin, whilst the Antimony Smelter was an active plant processing the raw material generated by local production (**Section 2.1**).

21. During President Sánchez de Lozada's first term in office, between 1993 and 1997, Bolivia sought to capitalize the Assets. Due, at least in part, to the strong and vocal opposition of the local population to such process, capitalization was abandoned – but not without having provided Sánchez de Lozada with a priceless opportunity to gain intimate knowledge of the Assets (**Section 2.2**).

22. The self-serving conduct adopted by President Sánchez de Lozada while in office was perpetuated thereafter. Taking advantage of the policies he helped establish, and likely relying on his knowledge of the Assets, Sánchez de Lozada participated in the tender processes for the Assets. He acquired – irregularly – the Colquiri Mine lease and the Antimony Smelter in 2000-2001 (**Section 2.3**).

23. Sánchez de Lozada's irregular acquisitions did not stop there. Following the illegal privatization of the Tin Smelter in 2000, its new owner Allied Deals plc ("**Allied Deals**") was embroiled in a large fraud scandal and became bankrupt. This provided Sánchez de Lozada with the perfect opportunity to purchase the Tin Smelter for a fraction of what had already been an unjustifiably low purchase price (**Section 2.4**).

24. During Comsur's operatorship of the Colquiri Mine, tensions steadily increased between the *cooperativistas* and the workers of the company, and reached a pinnacle following Sánchez de Lozada's resignation and flight to the US (where he currently resides pending an extradition request). In this context, where it was plainly foreseeable that the State would take action against the Assets, the Swiss Glencore International (Claimant's parent company) acquired, *inter alia*, the Smelters and the Colquiri Mine. Indeed, Glencore International's founder, Marc Rich, was a close friend of Sánchez de Lozada. Marc Rich even obtained the Bolivian citizenship in 1983 in order to avoid extradition to face criminal charges in the US. Immediately following the acquisition, Glencore International transferred the Assets to

Claimant for no compensation through a complex corporate structure, thus artificially creating foreign ownership to protect the Assets (**Section 2.5**).

25. In this context of political change, and as a result of the irregularities in the Privatization, as well as the unsustainable violence in the region, the State was compelled to revert the Assets. Bolivia reverted the Tin Smelter in February 2007, due to its illegal privatization, the Antimony Smelter in May 2010, due to its inactivity, and the Colquiri Mine in June 2012, as a solution to the serious social conflict created by Glencore International's subsidiary, Sinchi Wayra (**Section 2.6**).

26. Following the reversion of the Assets, Bolivia negotiated in good faith with Glencore International. Claimant, in turn, has acted in bad faith by revealing confidential details of the negotiations between the State and its parent company (**Section 2.7**).

27. In the years thereafter, Bolivia has carried out significant investments in the Smelters and at the Mine, and has deployed significant efforts to manage the social relations at Colquiri (**Section 2.8**).

2.1 Prior To The Privatization, Bolivia Successfully Operated The Assets Through COMIBOL And Its Affiliates

28. Before Sánchez de Lozada implemented the policies that led Bolivia to divest from strategic sectors in the 1990s (described in section 2.2 below), the Assets relevant to this dispute were operated by COMIBOL and its affiliates.

29. Prior to the Privatization, COMIBOL actively sought to operate the Mine in a profitable way and to maintain good relationships with the independent mining workers in the region (who would later organize themselves in *cooperativas*) (**Section 2.1.1**). Likewise, prior to the Privatization, COMIBOL made significant investments in the Tin Smelter—achieving historical maximum levels of production—and processed concentrates at the Antimony Smelter (**Section 2.2.2**).

2.1.1 During The Time COMIBOL Operated The Colquiri Mine, The State Maintained Good Relations With The Independent Mining Workers Of The Region

30. The Colquiri Mine is located in the municipality of the same name, in the Province of Inquisivi—Department of La Paz—226 km from La Paz, and 70 km from the city of Oruro. As noted by Paribas, one of the consultants employed by the State during the Privatization process, the Colquiri Mine had been active since the 1850s. At that time, the production of

the Mine was focused on silver. Then, "*[t]owards the turn of the century tin became the predominant product and was subsequently replaced by zinc as the major output*."[1]

31. The concessions comprising the Colquiri Mine are located underground, beneath the town of Colquiri.[2] Given that it has been active for over a century, the Mine is accessible from several mouths of mine and tunnels scattered throughout the town and nearby. The following map shows a general view of the Mine and the approximate areas where old tunnels and mouths of mine exist. Leaving aside the new tailings dam (put in place by Comsur around 2001), the configuration of the Mine has remained the same since before the Privatization.

Map of Colquiri and the Mine as of 2016. In red, approximate location of areas where old mouths of the Mine and tunnels are located[3]

32. COMIBOL, however, was not working alone at the Mine. Since the 1980s, independent and informal mining workers, then known as *subsidiarios* or *arrendatarios*, worked in surface areas of the Mine under COMIBOL's supervision.

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1 Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, p. 121.

2 Map of the concessions of the Colquiri Mine, **R-88**.

3 Map of Colquiri (Google Earth, 2016), **R-89**.

33. Independent mining workers, such as the *subsidiarios*—who, in other regions of Bolivia, were organized in mining cooperatives or *cooperativas mineras*—are a common fixture in the Bolivian mining sector. According to a study published in 2008 by the *Centro de Documentación e Información Bolivia*, "*[u]na característica de la minería boliviana, que sólo se encuentra en este país, es la importancia del sector cooperativista dentro del sector minero en su totalidad. Así, el número de cooperativistas, que se estima actualmente, llega aproximadamente a 60.000 personas, representando el 90% del empleo minero nacional*."[4]

34. The *cooperativistas* and *subsidiarios* emerged as a significant social group in all large mines in Bolivia,[5] as a result of the crisis of the mining sector in the 1980s. Most of the *cooperativistas* were former employees of COMIBOL.[6] This social phenomenon became particularly serious with public divestment from the mining sector in the 1980s and 1990s. In fact, under Law 1.777 of 1997 (the "**1997 Mining Code**"), "*[l]a Corporación Minera de Bolivia es una empresa pública, autárquica, dependiente de la Secretaría Nacional de Minería, encargada de la dirección y administración superiores de la minería estatal. Esta entidad dirige y administra, sin realizar directamente actividades mineras, y solo mediante*

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4 J. Michard, "Cooperativas mineras en Bolivia", CEDIB, 2008, **R-90**, p. 8 (Unofficial translation: "*one characteristic of Bolivian mining, which can only be found in this country, is the preponderance of the cooperatives within the mining sector. Thus, the estimated current number of cooperativistas amounts to some 60,000 people, which represents 90% of the national mining workforce*") (emphasis added).

5 See, for instance, Paribas, Legal and institutional diagnostic of Vinto, the Oruro Plant, Huanuni and Colquiri, **R-91**, p. 6 of the report on the mines ("*En el centro minero de Huanuni se encuentran vigentes contratos que COMIBOL ha suscrito con los cooperativistas mineros (cooperativas formadas a partir de ex trabajadores de COMIBOL que fueron despedidos como consecuencia de la aplicación del D.S. 21060 del año 1985)- Existen cerca de 300 cooperativistas mineros agrupados en cooperativas*") (Unofficial translation: "*Several contracts which COMIBOL had concluded with the mining cooperativistas (cooperatives formed by former workers of COMIBOL who had been laid off as a result of the enforcement of S.D 21060 of 1985) were in force at the Huanuni mining centre. There are around 300 mining cooperativistas organized in cooperatives*").

6 See, also, Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, p. 35 ("*The 'Cooperativistas' are usually people living nearby the mines, coming from miners' families and poorly educated. They work in a very traditional social context and all lack technical guidance in the exploitation process (the cooperatives do not have, generally speaking, an engineer or a geologist to guide them). Many of them are ex- COMIBOL miners, laid out after the mid-80s' commodity crisis*"). See, also, J. Michard, "Cooperativas mineras en Bolivia", CEDIB, 2008, **R-90**, p.12 ("*A pesar de que en su artículo 34 la [Ley General de Sociedades Cooperativas] declare que las minas de propiedad estatal serán administradas preferentemente por cooperativas, las minas fueron administradas y explotadas por la Corporación Minera de Bolivia (Comibol) a partir del 1952, hasta la crisis de la Comibol y su desmantelamiento que se inició en el 1985 con la promulgación del Decreto Supremo No. 21060. A partir de esta fecha, la Comibol dejó poco a poco sus actividades de producción, despidiendo a miles de trabajadores "relocalizados", situación ratificada por el nuevo Código de Minería de 1997 que estipula que la Comibol no puede realizar operaciones directas de producción, sino sólo administrar las concesiones mediante contratos de arrendamiento o de riesgo compartido*") (Unofficial translation: "*Although article 34 of the [General Law on Cooperatives Companies] provides that State-owned mines shall be administered preferably by cooperatives, mines were managed and exploited by the Bolivian Mining Corporation (Comibol) as of 1952 until the crisis of Comibol and its dismantling which commenced in 1985 with the enactment of Supreme Decree No. 21060. From this date, Comibol progressively stepped away from its production activities and laid off thousands of "relocated" employees, a situation that was ratified by the new Mining Code of 1997 which provides that Comibol cannot carry out direct operations of production, but can only administer the concessions through lease contracts or shared risk contracts*").

contratos de riesgo compartido, prestación de servicios o arrendamiento […]."[7] The new role of COMIBOL under the 1997 Mining Code greatly increased the number of *cooperativas* around Bolivia.

35. Bolivia's witness, Mr Cachi, one of the *subsidiarios* at Colquiri before the Privatization, explains how the *subsidiarios* worked with COMIBOL:

> *COMIBOL, además, tenía arrendadas distintas áreas de la Mina a una organización de mineros independientes que en esa época eran conocidos como subsidiarios. El término "subsidiario" ha sido utilizado desde tiempos remotos para referirse a las personas que subsisten del trabajo informal de una mina. A diferencia de los trabajadores, los subsidiarios no gozan de estabilidad laboral ni beneficios sociales. La organización de subsidiarios recibía de la empresa la autorización para explotar distintas zonas y la entrega de algunos implementos mínimos. A cambio, los subsidiarios vendían a la empresa la totalidad del mineral extraído (a un precio que tenía en cuenta deducciones por (i) los implementos recibidos y (ii) las regalías que debíamos pagar a la empresa por la explotación de ese mineral). En algunos casos, recibíamos menos de la mitad del valor comercial del mineral extraído. En esa época, éramos aproximadamente 200 subsidiarios*.[8]

36. *Subsidiarios* and *cooperativistas* often had informal contracts with COMIBOL and the mining companies. For instance, during the 1990s, COMIBOL entered into an agreement with the "*[t]rabajadores Mineros Contratistas de Colquiri*," (*i.e.*, the *subsidiarios*) for "*el arrendamiento de yacimientos mineros para su exploración, reconocimiento, desarrollo, explotación, beneficio y comercialización de los minerales existentes […]*."[9] Their lease agreement clearly delineated the areas granted to the *subsidiarios* (it explicitly stated that "*las áreas que no están especificadas en el presente contrato, claramente señaladas en los planos respectivos, permanecen bajo el dominio y control exclusivo de COMIBOL*"[10]) and provided

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7 Bolivian Mining Code, Law 1.777 of 17 March 1997, **R-4**, Article 91 (emphasis added) (Unofficial translation: "*[t]he Bolivian Mining Corporation is a public company, self-governed and dependent on the National Secretary of Mining, in charge of the high management and administration of State mining. This entity manages and administers, without directly carrying out any mining activities, and only through shared risk, services, or lease agreements*").

8 Cachi, ¶ 9 (Unofficial translation: "*In addition, COMIBOL had leased different areas in the Mine to an organization of independent mining workers who were known at that time as subsidiarios. The term "subsidiario" has been used since ancient times to refer to people who live off informal work in a mine. Unlike workers, subsidiarios do not benefit from employment stability or social benefits. The subsidiarios organization used to receive from the company the authorisation to exploit different zones and the delivery of certain basic tools. In exchange, subsidiarios would sell to the company the entirety of the extracted ore (at a price which took into account certain discounts for: (i) the tools received and (ii) the royalties that we had to pay to the company for the exploitation of that ore). In some cases, we received less than half the commercial value of the extracted ore. At that time, we were approximately 200 subsidiarios*"). See, also, Mamani, ¶ 9.

9 Public Deed No. 50/98, lease agreement between COMIBOL and the *subsidiarios* of the Colquiri Mine of 10 July 1998, **R-92**, clause 3 (Unofficial translation: "*the lease of mineral deposits for their exploration, recognition, development, exploitation, benefit and sale of the existing ore […]*"). See, also, Public Deed No. 003/2000, amendment to the lease agreement between COMIBOL and the *subsidiarios* of the Colquiri Mine of 5 January 2000, **R-93**.

10 Public Deed No. 50/98, lease agreement between COMIBOL and the *subsidiarios* of the Colquiri Mine of 10 July 1998, **R-92**, clause 10 (emphasis added) (Unofficial translation: "*the areas that are not specified in the present contract, clearly marked in the respective plans, remain under the exclusive possession and control of COMIBOL*").

that their activity was subject to "*la supervisión técnica de los ingenieros de COMIBOL*."[11] This agreement—initially valid for a period of 2 years— was subsequently amended after the Privatization in order to extend its validity until 2018.[12]

37. In order to operate the Mine and to properly manage its relations with the *subsidiarios*, COMIBOL employed a significant workforce at Colquiri. The Paribas report prepared for the Privatization confirms that, "*[a]s of end-May 1999, the total workforce amounted to 510 people (excluding health and education services), from 670 at end-August 1998, 165 of which were working in the mine, 180 in the mill and 170 in the administration and services on the surface*."[13] Mr Joaquin Mamani, a former *subsidiario* and Colquiri employee following the Privatization, explains that a high number of COMIBOL employees was crucial to secure a sustainable operation and a good relationship with the *subsidiarios*.[14]

38. As a result of COMIBOL's operation of the Mine and supervision of the *subsidiarios*' activity, operations at Colquiri progressed smoothly prior to the Privatization.[15] As noted by Paribas, the Mine produced 3.121 tons of tin concentrate and 15.622 tons of zinc concentrate in 1998. These results were consistent with production in previous years.

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11 Public Deed No. 50/98, lease agreement between COMIBOL and the *subsidiarios* of the Colquiri Mine of 10 July 1998, **R-92**, clause 8 (b) (Unofficial translation: "*the technical supervision of COMIBOL's engineers*").

12 Public Deed No. 131/2000, lease agreement between Comibol and the *Cooperativa 26 de febrero* of 13 October 2000, **R-94**, clause 5 ("*A petición de la Cooperativa y en virtud de los planes y proyectos de explotación que tiene, COMIBOL resuelve ampliar el plazo de vigencia del contrato hasta veinte años computables a partir de la fecha de suscripción del contrato principal No. 50/98 de diez/cero siete/[98]*") (Unofficial translation: "*Pursuant to the Cooperativa's request and in light of its exploitation plans and projects, COMIBOL decides to extend the contract term to twenty years as of the date of execution of the main contract No. 50/98 of ten/zero seven/[98]*"). See, also, section 2.5.1 below.

13 Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, p. 118.

14 Mamani, ¶ 8 ("*Como anticipé, antes de comenzar a trabajar para Comsur en el año 2002, trabajé en la Mina como subsidiario por más de diez años. Para entonces, la COMIBOL controlaba de cerca las áreas operadas por los subsidiarios gracias a su alto número de empleados que podían vigilar el perímetro estas áreas. Recuerdo que, antes de la privatización de la Mina, la COMIBOL alcanzó a tener unos 600 empleados*") (Unofficial translation: "*As mentioned above, before starting to work for Comsur in 2002, I worked in the Mine as a subsidiario for more than ten years. By then, COMIBOL closely controlled the areas operated by subsidiarios through a high number of employees who could survey the perimeter of these areas. I remember that, before the privatization of the Mine, COMIBOL had up to 600 workers*").

15 Cachi, ¶ 10; Mamani, ¶ 9.

Colquiri tin production

	Mineral processed (t)	Mill head grade (%)	Concentrate produced (t)	Grade of conc (%)	Tin Content (t)	Recovery rate (%)
Total 1997	**243,024**	**1.0**	**3,528**	**39.1**	**1,381**	**55.2**
January '98	19,600	1.0	340	33.9	115	61.1
February	16,230	1.1	245	40.4	99	55.4
March	20,862	0.9	245	39.7	97	50.2
April	20,002	1.0	216	41.8	90	44.3
May	19,591	1.1	238	41.0	97	47.4
June	19,834	1.0	220	42.1	92	46.2
July	19,568	1.2	251	44.3	111	48.6
August	18,054	1.2	190	40.8	78	36.7
September	20,546	1.2	270	45.1	122	49.8
October	22,036	1.2	329	42.5	140	54.7
November	21,447	1.1	303	42.9	130	54.2
December	17,540	1.1	275	40.4	111	56.1
Total 1998	**235,310**	**1.1**	**3,121**	**41.1**	**1,283**	**50.3**
January '99	17,037	1.1	252	37.2	94	50.5
February	12,539	1.0	185	31.9	59	45.3
March	17,779	1.0	302	33.4	101	54.6
April	15,815	1.1	231	39.1	90	52.8
May	16,500	1.4	300	40.8	122	52.6
June	16,000	1.1	230	39.5	91	50.7
Provisional 1999	**95,670**	**1.1**	**1,501**	**37.1**	**557**	**51.4**

Source: Colquiri's management

Colquiri zinc production

	Mineral processed (t)	Mill head grade (%)	Concentrate produced (t)	Grade of Conc (%) Zn	Zinc Content (t)	Recovery rate (%)
Total 1997	**243,024**	**6.6**	**20,836**	**43.1**	**8,974**	**56.3**
January '98	19,600	5.7	1,400	40.2	563	50.4
February	16,230	4.3	803	41.8	336	48.4
March	20,862	5.0	1,272	41.3	526	50.4
April	20,002	4.9	1,084	41.2	447	45.7
May	19,591	4.9	799	40.2	321	33.8
June	19,834	6.2	1,011	41.7	422	34.5
July	19,568	6.9	1,392	40.1	559	41.3
August	18,054	6.7	991	39.3	390	32.3
September	20,546	7.6	1,809	41.9	757	48.8
October	22,036	7.9	1,949	44.2	862	49.4
November	21,447	7.8	1,868	44.9	839	50.2
December	17,540	8.5	1,243	43.4	539	36.2
Total 1998	**235,310**	**6.4**	**15,622**	**42.0**	**6,559**	**43.7**
January '99	17,037	7.7	1,191	43.0	512	39.0
February	12,539	7.4	1,114	40.0	446	48.1
March	17,779	7.4	1,591	44.0	701	53.3
April	15,815	7.2	1,198	43.6	522	45.7
May	16,500	6.7	1,057	42.9	454	41.2
June	16,000	8.0	1,506	42.5	640	50.0
Provisional 1999	**95,670**	**7.4**	**7,657**	**42.8**	**3,274**	**46.3**

Colquiri Tin and Zinc Production as of the time of the Privatization[16]

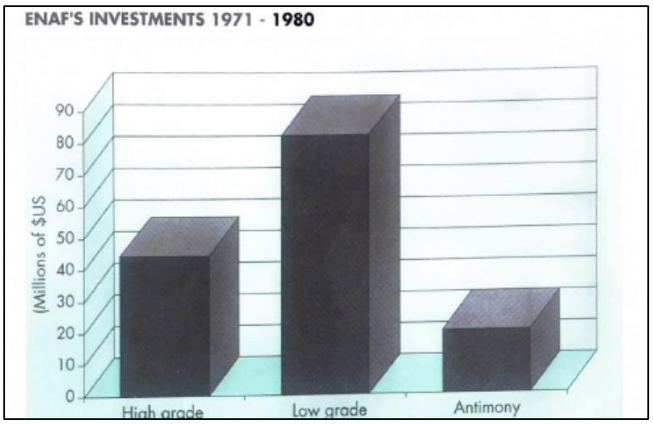
2.1.2 During The 1970-1990s, Bolivia Made Important Investments In The Smelters

39. By the time of the Privatization in early 2000, the State had made important investments that made the Tin Smelter a world renowned plant.

40. The Tin Smelter was built between 1968 and 1970 near the city of Oruro by the State company *Empresa Nacional de Fundiciones* ("**ENAF**"). Over the course of its first decade of operations, ENAF invested over US$ 148 million in the Tin Smelter. These investments were critical to expand production at the Smelter and, in fact, by 1981, ENAF reached a production of 16.390 metric tons of high grade tin and 3.431 metric tons of low grade tin.[17]

16 Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, pp. 130-131.

17 See Villavicencio, ¶ 27.



Investments made by ENAF during the 1970s and 1980s[18]

41. Between 1987 and 1988, after a severe crisis in the mining sector in the 1980s (which also affected the Smelters), ENAF carried out a study to improve production. Likewise, and in order to fully implement the results of this study, ENAF invested over US$ 17 million in the Tin Smelter between 1989 and 1994.[19] As Bolivia's witness, Eng Villavicencio, the current general manager of the State's *Empresa Metalúrgica Vinto* ("**EMV**") explains, these improvements enabled ENAF to become a world reference in metallic tin production.[20] This was confirmed by Paribas during the Privatization: "*EMV tin is highly appreciated worldwide because of its quality. The company has never had problems finding markets for its production, and it obtains important premiums over international tin prices*."[21]

42. In 1999, prior to the Privatization, Paribas noted that the Tin Smelter was "*configured to carry out only high-grade treatment, its production capacity being 20,000 t/year*."[22] Likewise, the investments carried out by ENAF over the course of the last decade enabled the company to reach historical maximum levels of production.

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18 Empresa Metalúrgica Vinto Annual Report 1993-1994, **R-43**, p. 17.

19 Villavicencio, ¶ 32.

20 Villavicencio, ¶ 34 ("*La apuesta por incorporar tecnología de punta en el proceso productivo fue vital: el cambio del proceso en refinación del metal de electrólisis a cristalizadores chinos permitió, en primera instancia, trabajar con la cantidad necesaria de personal en la planta y la refinación óptima del producto (estaño de grado A1 99.95% Sn), consiguiéndose, de esa manera, reducir los costos de producción de forma directamente proporcional en función del tonelaje tratado*") (Unofficial translation: "*The decision to incorporate state-of-art technology in the production process was crucial: the change from the electrolysis process of metal refining to Chinese crystallizers allowed, first, to work with the necessary amount of staff in in the smalter and the optimal refinement of the product (tin of grade A1 99.95% Sn), thus directly permitting to reduce production costs proportionally to the tonnage treated*").

21 Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, p. 38.

22 Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, p. 27.

Production of refined tin (1993-99), in t

Year	Production	Toll contract	Total
1993	14,576.39	4,011.20	18,587.59
1994	15,603.76	4,733.73	20,337.49
1995	13,146.89	5,059.20	18,206.09
1996	11,501.35	4,920.83	16,422.18
1997	12,561.55	3,485.76	16,047.31
1998	10,658.22	-	10,658.22
1999*	4,126.00	-	4,126.00

*Production through May 99
Source: EMV's management

EMV's Tin Production between 1993-1999.[23] In red, historic record year for high grade tin production.

43. In turn, prior to the Privatization, the State secured the activity of the Antimony Smelter in order to process domestic production.[24] The Antimony Smelter was built in 1976, also by ENAF. The initial capacity of the Smelter—which was designed to treat high grade sulphurous antimony concentrates—exceeded 5.000 tons.[25]

44. Contrary to what Claimant asserts,[26] in August 1990, "*the plant started operations again*."[27] The resumption of operations followed significant upgrades to its systems,[28] where "*EMV carried out a new technological design for the production of trioxide of antimony from sulphurous concentrates, with the repairing of rotating furnace and the construction of new*

23 Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, p. 38.

24 Villavicencio, ¶ 93 ("*Con vistas a la privatización de las operaciones, hicimos inversiones entre 1999 y 2000 para rehabilitar la maquinaria e infraestructura. Así, en 2001, la Fundidora de Antimonio tenía nuevamente una capacidad de producción de entre 4.000 a 6.000 toneladas anuales de trióxido de antimonio*") (Unofficial translation: "*In preparation for the privatization of operations between 1999 and 2000 we made investments to rehabilitate the equipment and infrastructure. Thus, in 2001, the Antimony Smelter had once again a production capacity of between 4,000 and 6,000 annual tons of antimony trioxide*").

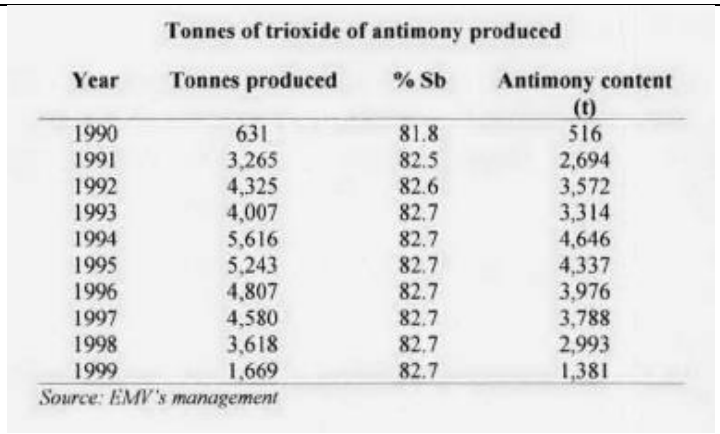
25 Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, p. 61.

26 Statement of Claim, ¶ 59 ("*[The Antimony Smelter] had been inaugurated in 1976 but it had only been operative during the late 1970s and the 1980s*.").

27 Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, p. 61.

28 Villavicencio, ¶ 92 ("*Durante los años que estuvo operativa (esto es, entre 1990 y 1999), la Fundidora de Antimonio alcanzó una producción anual promedio de entre 4.000 y 6.000 toneladas anuales de trióxido de antimonio. El nivel de producción se mantuvo estable por una década (esto es, hasta el año 1999) […]*") (Unofficial translation: "*During the years it operated (that is, between 1990 and 1999), the Antimony Smelter reached an average annual production of between 4.000 and 6.000 annual tons of antimony trioxide. The production level remained stable for a decade (that is, until 1999) […]*").

continuous feeding systems for the furnace and equipment to gather gases and other emissions."[29]



Tonnes of trioxide of antimony produced

Year	Tonnes produced	% Sb	Antimony content (t)
1990	631	81.8	516
1991	3,265	82.5	2,694
1992	4,325	82.6	3,572
1993	4,007	82.7	3,314
1994	5,616	82.7	4,646
1995	5,243	82.7	4,337
1996	4,807	82.7	3,976
1997	4,580	82.7	3,788
1998	3,618	82.7	2,993
1999	1,669	82.7	1,381

Source: EMV's management

Production volumes of the Antimony Smelter during the nineties[30]

* * *

45. In sum, at the time of the Privatization, the Colquiri Mine was producing significant amounts of tin and zinc concentrate in peaceful collaborations with the *subsidiarios*, the Tin Smelter was a valuable asset producing world-renowned high-grade tin, and the Antimony Smelter was an active plant that could process significant amounts of antimony coming from local production. These results were possible thanks to the large investments the State made over more than three decades.

2.2 Between 1994 And 1997, While Former President Sánchez de Lozada Was In Office, Bolivia Sought To Privatize The Smelters And The Colquiri Mine

46. The Colquiri Mine, Tin Smelter and Antimony Smelter described above were transferred to the private sector in the late 1990s and early 2000s, as a result of the neoliberal policies which drove successive governments, starting in 1985. Former President Sánchez de Lozada[31] was a key architect of these policies, which he then took advantage of at the end of his term in office.

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29 Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, p. 61.

30 Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, p. 67.

31 For a comprehensive description of Sánchez de Lozada, see Barcelona Centre for International Affairs, "Gonzalo Sánchez de Lozada", **R-95**; Los Tiempos, *De Trump a Goni: cuando los millonarios llegan el poder*, press article of 6 March 2017, **R-96**.

47. The first step towards the privatization process of Bolivia's industrial sector was the Paz Estenssoro government's enactment of Supreme Decree No. 21.060 of 29 August 1985. This Decree provided, *inter alia*, for the "*descentralización de la Corporación Minera de Bolivia*" through the creation of four affiliated companies.[32] For the following two and a half years, as Minister for Planning and Coordination of President Paz Estenssoro, Sánchez de Lozada was responsible for the implementation this Supreme Decree.[33]

48. The economic policies of the Paz Estenssoro administration were in line with Minister Sánchez de Lozada's personal interests as a businessman. Such policies opened the door to the participation of the private sector in the operation and functioning of State-owned companies, and set the stage for the transfer of the latter to the former. Thus, the administration ushered in what would be one of the most "*radical*" and "*innovative*" neoliberal restructuring processes in Latin America.[34]

49. The economic policies of the Paz Estenssoro government were further developed and reinforced by the centrist government of Jaime Paz Zamora, which enacted Law No. 1.330 of 24 April 1992 (the "**Privatization Law**"). Such law "*autoriza a las instituciones, entidades y empresas del sector público enajenar los bienes, valores, acciones y derechos de su propiedad y transferirlos a personas naturales y colectivas nacionales o extranjeras, o aportar los mismos a la constitución de nuevas sociedades anónimas mixtas*."[35]

50. After taking office as President in August 1993, Sánchez de Lozada promulgated Law No. 1.544 of 21 March 1994 (the "**Capitalization Law**"), which enabled his administration to

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32 Supreme Decree No. 21.060 of 29 August 1985, **R-2**, Article 102 (Unofficial translation: "*decentralization of the Bolivian Mining Corporation*").

33 The Paz Estenssoro government's second step was to enact Supreme Decree No. 21.377 of 25 August 1986, **R-97**, which further modified the structure and functions of COMIBOL in order to ensure the continuity and profitability of its operations. Pursuant to Article 2 of said Supreme Decree, "*[l]as operaciones de la Corporación Minera de Bolivia se efectuarán únicamente mediante unidades descentralizadas con autonomía de gestión, de acuerdo a las siguientes formas de administración: a) Gestión directa de empresas subsidiarias de minería y metalurgia; b) Contratos de arrendamiento con sociedades cooperativas conformadas preferentemente por trabajadores de la Corporación Minera de Bolivia; c) Otro tipo de contratos establecidos en la legislación minera vigente, preservando el patrimonio de la Corporación Minera de Bolivia y la propiedad estatal sobre los grupos mineros nacionalizados*." (Unofficial translation: "*[t]he operations of the Bolivian Mining Corporation shall be carried out exclusively through decentralized units with management autonomy, in accordance with the following types of administration: a) Direct management of mining and metallurgic affiliated companies; b) Lease agreements with cooperative companies formed preferably by workers of the Bolivian Mining Corporation; c) Other types of contracts established pursuant to the mining legislation in force, preserving the assets of the Bolivian Mining Corporation and State ownership of the nationalized mining groups*").

34 B. Kohl, "Challenges to Neoliberal Hegemony in Bolivia", *Antipode*, volume 38, issue 2, **R-98**, p. 305.

35 Law No 1,330, 24 April 1992, published in the *Gaceta Oficial* No 1,735, **C-58**, Article 1 (emphasis added) (Unofficial translation: "*authorizes the institutions, entities and companies of the public sector to transfer the property, assets, shares and ownership rights and to transfer them to natural or legal, national or foreign persons, or to use them as contribution to the constitution of new private-public partnerships*").

increase even further the private sector's involvement in, and control, over state-owned companies. This law was aimed at "*la conversión en sociedades de economía mixta, de acuerdo a disposiciones en vigencia, de Yacimientos Petrolíferos Fiscales Bolivianos (YPFB), Empresa Nacional de Electricidad (ENDE), Empresa Nacional de Telecomunicaciones (ENTEL), Empresa Nacional de Ferrocariles (ENFE) y Empresa Metalúrgica Vinto*."[36]

51. Determined to transfer the State's assets to the private sector, in parallel, the Sánchez de Lozada administration enacted Supreme Decree No. 23.991, regulating the Privatization Law. Pursuant to Article 1 thereof, "*[t]odas las empresas y demás entidades públicas, propietarias de unidades económicas, activos, bienes, valores, acciones y derechos, se someten, a partir de la promulgación del presente decreto supremo, a procesos de reordenamiento, de acuerdo a las normas contenidas en este cuerpo legal*."[37]

52. Sánchez de Lozada's main target was COMIBOL, whose status and functions he altered beyond the comparatively more modest steps towards decentralization taken by prior administrations. On 17 March 1997, the 1997 Mining Code was enacted, requiring COMIBOL to cease direct participation in mining activities and instead turn them over to the private sector.[38]

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[36] Law No. 1.544 of 21 March 1994, **R-8**, Article 2 (emphasis added) (Unofficial translation: "*the conversion to public-private partnerships, pursuant to provisions in force, of Yacimientos Petrolíferos Fiscales Bolivianos (YPFB), Empresa Nacional de Electricidad (ENDE), Empresa Nacional de Telecomunicaciones (ENTEL), Empresa Nacional de Ferrocariles (ENFE) and Empresa Metalúrgica Vinto*"). The Sánchez de Lozada administration reportedly capitalized or privatized as many as 42 State-owned companies, *i.e.*, more than half the total number of transfers to the private sector occurring between 1985 and 2005. See L. Mendoza, *Tres grupos de poder y 55 actores participaron en la privatización en Bolivia*, press article of 22 October 2017, **R-99**, p. 4.

[37] Supreme Decree No. 23.991 of 10 April 1995, **R-100**, Article 1 (emphasis added) (Unofficial translation: "*[a]ll companies and other public entities, owners of economic units, assets, property, shares and rights, shall submit themselves, as of the enactment of the present supreme decree, to reorganization processes, pursuant to the rules provided in this statute*").

[38] Bolivian Mining Code, Law 1.777 of 17 March 1997, **R-4**, Article 91 ("*La Corporación Minera de Bolivia es una empresa pública, autárquica, dependiente de la Secretaría Nacional de Minería, encargada de la dirección y administración superiores de la minería estatal. Esta entidad dirige y administra, sin realizar directamente actividades mineras, y solo mediante contratos de riesgo compartido, prestación de servicios o arrendamiento: a) Los grupos mineros nacionalizados por Decreto Supremo No. 3223 de 31 de octubre de 1952, elevado a rango de Ley el 29 de octubre de 1956; b) Las demás concesiones mineras obtenidas o adquiridas a cualquier título; c) Los residuos minero -metalúrgicos provenientes de las concesiones mineras mencionadas en los incisos anteriores; d) Las plantas de concentración, volatilización, fundición, refinación, plantas hidroeléctricas y otras de su propiedad; y e) El Cerro Rico de Potosí, sus bocaminas, desmontes, colas, escorias, relaves, pallacos y terrenos francos del mismo, respetando derechos preconstituidos*") (emphasis added) (Unofficial translation: "*[t]he Bolivian Mining Corporation is a public company, self-governed and dependent on the National Secretary of Mining, in charge of the high management and administration of State mining. This entity manages and administers, without directly carrying out any mining activities, and only through shared risk, services, or lease agreements: a) The mining groups nationalized by Supreme Decree No. 3223 of 31 October 1952, given the status of law on 29 October 1956; b) The other mining concessions obtained or acquired under any title; c) The mining – metallurgic waste coming from the aforementioned mining concessions; d) Concentration, volatilization, smelting, refining, hydroelectric plants and others of its ownership; and e) El Cerro Rico de Potosí, its mine mouths, cuttings, tailings, slag, concentrate and loam fields of the same, observing pre-existing rights*").

53. The process set out in the Capitalization Law commenced in earnest in September 1995, when four companies presented their credentials and were preselected as a result, for the capitalization of EMV. Glencore International was one of them.[39] Claimant's suggestion that Glencore International's first brush with Bolivia was in the mid-2000s, when it "*sought new opportunities in the region*"[40] thus glosses over Glencore International's Bolivian experience in the early 1990s.

54. The tender process was declared void in June 1997. In fact, no economic offers were submitted by the preselected companies, at least in part because of the public and vocal disagreement expressed by the EMV, Huanuni and Colquiri workers with the potential capitalization and execution of *contratos de riesgo compartido* (joint venture contracts). The situation was such, in fact, that the due diligence team of one of the potential bidders was prevented accessing the Colquiri site and had to withdraw "*in the interest of their physical safety*."[41]

2.3 Taking Advantage Of Policies Put In Place While In Office, Sánchez De Lozada Acquired The Colquiri Mine Lease And The Antimony Smelter

55. In June 1999, the Banzer Suárez administration initiated the process of privatizing several key State-owned companies. In this context, Sánchez de Lozada held himself free to profit from the policies he had put in place and the intimate knowledge of the assets that he had acquired while in office. Through his company Comsur,[42] he bid for, and acquired the valuable Colquiri Mine Lease (**Section 2.3.1**) and the Antimony Smelter (**Section 2.3.2**), both in irregular circumstances.

2.3.1 Sánchez De Lozada, Through Comsur, Bid For And Acquired The Colquiri Mine Lease In 1999-2000

56. Sánchez de Lozada participated in the tender process for the Colquiri Mine Lease through his company, Comsur, and acquired the Asset under extremely favourable conditions.

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39 Letter from Glencore International to the Minister for Capitalization of 20 October 1995, **R-101**.

40 Statement of Claim, ¶ 33.

41 N.M. Rotschild & Sons Limited, Capitalization of E.M. Vinto and transfer of operating control over COMIBOL properties to private sector initiative, **R-102**, p. 5.

42 International Finance Corporation, "IFC approves US$99.05 million financing for five projects in Latin America", press release, **R-103**.

57. The terms of reference for the tender of the Colquiri Mine (the "**Terms of Reference**")[43] were sold to only two potential bidders: Comsur and the Brazilian company Paranapanema S.A.[44] However, only one bid was actually received,[45] from a consortium made up of Comsur and the Commonwealth Development Corporation ("**CDC**") (together, the "**Consortium**").[46]

58. The Qualifying Commission proceeded to review and validate the Consortium's economic and technical proposal, on the basis that it was allegedly in the State's interest.[47] In so doing, however, the Qualifying Commission did not analyse further or in any depth the economic proposal submitted by the Consortium, nor did it consider the implications that accepting such proposal might in fact have had "*para los intereses del Estado Boliviano*."[48] In particular, the Qualifying Commission spared no thought to the fact that the lease would be awarded to the Consortium for free and in exchange for no consideration whatsoever.[49] Nor did the Qualifying Commission reflect on the very small investment commitment offered by the Consortium, totalling US$ 2 million for the first two years of operations.[50] Likewise, the Commission did not spare a single thought to the low percentage of royalties offered by the Consortium, amounting to "*el tres punto cinco por ciento (3.5%) del ingreso neto de fundición.*"[51]

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43 Terms of Reference for the Public Tender for the Colquiri Mine Lease of 24 June 1999, **R-104**.

44 Minutes of the opening of Envelope A proposals (Colquiri) of 20 December 1999, **R-105**, p. 2.

45 Envelope A of the bid for the Colquiri Mine Lease submitted by the Comsur-CDC Consortium (excerpts) of 20 December 1999, **R-106**.

46 Comsur held 51% of the shares, whilst CDC held the remaining 49%. See Statement of Claim, footnote 28, p. 12; Minutes of the opening of Envelope A proposals (Colquiri) of 20 December 1999, **R-105**, p. 1; Minutes of the opening of Envelope B proposals (Tin Smelter, Antimony Smelter, Colquiri Mine Lease) of 20 December 1999, **R-107**, p. 6.

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 of 21 December 1999, **R-108**, p. 6 ("*El precio ofertado por el Consorcio COMSUR –CDC resulta conveniente para los intereses del Estado Boliviano y al no existir un precio mínimo según el informe del Banco de Inversión puede considerarse como una propuesta positiva*") (Unofficial translation: "*The price offered by the COMSUR – CDC Consortium is convenient for the Bolivian State's interests and as there is no minimum price pursuant to the Investment Bank's report, it can be considered to be a positive proposal*").

48 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 of 21 December 1999, **R-108**, p. 6 (Unofficial translation: "*for the Bolivian State's interests*").

49 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 of 21 December 1999, **R-108**, p. 5; Supreme Decree No 25,631, 24 December 1999, published in the *Gaceta Oficial* No 2, 192, **C-6**, Article 2.

50 Supreme Decree No 25,631, 24 December 1999, published in the *Gaceta Oficial* No 2, 192, **C-6**, Article 2.

51 Lease agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**, Article 5.1 (Unofficial translation: "*three point five per cent (3.5 %) of the net smelting revenue*"); Supreme Decree No 25,631, 24 December 1999, published in the *Gaceta Oficial* No 2, 192, **C-6**, Article 2.

59. Absent any competing bids and on the basis of the favourable recommendation of the Qualifying Commission, the Banzer Suárez administration awarded the Colquiri Mine lease to the Consortium.[52] The Consortium, as operator, had the right to exploit, explore and commercialize minerals from the Mine for a period of 30 years (including a two-year exploration phase), and would pay a royalty of 3.5% of its net revenue.[53] As explained in section 4.3.1 below, the award to Comsur of the Colquiri Mine lease did not observe the pertinent constitutional requirements.[54]

60. Following its successful bid for the Mine Lease, the Consortium incorporated a local company: Colquiri S.A. (**"Colquiri**").[55] Initially, Colquiri's shares were held by Comsur at 68% and CDC at 32%.[56] As of July 2001, Comsur's interest in Colquiri amounted to 51%, and CDC's to 49%.[57] As explained below, Colquiri would, in time, come to own the Antimony Smelter and to hold a controlling interest in Vinto, which owned in turn the Tin Smelter.[58]

2.3.2 Sánchez De Lozada, Through Comsur, Bid For And Acquired The Antimony Smelter In 2000-2001

61. The former President did not stop in his quest to acquire the State assets for the privatization of which he had paved the way during his time in office. Through Colquiri, Sánchez de Lozada also submitted a bid for and was successful in the acquisition of the Antimony Smelter in late 2000 – early 2001.

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52 Supreme Decree No 25,631, 24 December 1999, published in the *Gaceta Oficial* No 2, 192, **C-6**, p. 31.

53 Lease agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**, Articles 2.7, 4.1, 4.4, 5.1, 7.1, 8.1.2.

54 Article 59(5) of the 1967 Constitution (**R-3**) provided, in this regard, that one of the attributions of the legislative branch was "*[a]utorizar y aprobar la contratación de empréstitos que comprometan las rentas generales del Estado; así como los contratos relativos a la explotación de las riquezas nacionales*" (Unofficial translation: "*[a]uthorize and approve the borrowing of loans that engage the State's general income; as well as contracts concerning the exploitation of national resources*"). It is undisputable that a lease agreement for the exploration and exploitation of the Bolivian State's mineral resources falls within the scope of this constitutional provision. However, the Bolivian legislative was never consulted in this regard and never authorized nor approved the Colquiri Mine lease. See Section 4.3.1 below.

55 Statement of Claim, ¶ 30.

56 Share register of Colquiri SA, **C-17**, pp. 3-4. CDC would continue to hold this interest in Colquiri until March 2006. See Put Notice from Actis (on behalf of CDC) to Glencore International of 21 March 2006, **C-67**.

57 Share register of Colquiri SA, **C-17**, pp. 3-4. See also Statement of Claim, note 28.

58 See Section 2.4.2 below.

62. Following the failed capitalization attempt discussed in Section 2.2 above, a first, unsuccessful public tender for the Antimony Smelter took place in 1999.[59] Thereafter, a second attempt was made at privatization in 2000,[60] and, in this context, the Asset was acquired by Colquiri.

63. At the time, the context in Bolivia was not favourable for the privatization of the Antimony Smelter and at least two Bolivian companies reportedly requested that the process be postponed.[61] However, the Banzer Suárez administration would not delay the privatization of the Antimony Smelter any further.

64. Sánchez de Lozada's Colquiri submitted one of the only two offers for the Smelter.[62] In fact, Sánchez de Lozada's only competition, Allied Deals, was disqualified and its economic and technical proposal was never considered.[63]

65. The Qualifying Commission recommended accepting Colquiri's bid, which offered only US$ 1.1 million for the Antimony Smelter.[64] Albeit small, this amount was still above the US$ 100,000 minimum price threshold recommended by Paribas.

66. On 27 November 2000, exactly one week following the Qualifying Commission's recommendation, the Oruro Parliamentary Group (*Brigada Parlamentaria de Oruro*) wrote to President Banzer Suárez and expressed concern at the very low price established by

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59 See Supreme Decree No 25,631, 24 December 1999, published in the *Gaceta Oficial* No 2, 192, **C-6**, Article 4. See also 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 of 21 December 1999, **R-108**, p. 8.

60 See Terms of Reference for the Second Public Tender for the Antimony Smelter of 31 July 2000, **R-109**. The Terms of Reference for the original tender were modified and the invitation to tender was published on 24 August 2000.

61 Letter from the Oruro Parliamentary Group to President Bánzer Suárez of 27 November 2000, **R-110**. See, also, Letter from Compañía Minera Salinas to the Minister of Foreign Trade and Investment of 30 October 2000, **R-111** ("*1. Los últimos acontecimientos en el país, con los bloqueos de caminos en Oruro, han impedido la visita de nuestros socios extranjeros a la fundición de antimonio en Vinto. 2. La inestabilidad del precio del antimonio en estos últimos meses, sumado a las vacaciones de verano en el hemisferio norte (donde están todos los compradores) han hecho imposible tomar decisiones en el orden financiero. 3. Tanto EMUSA como nuestra empresa, que producimos la casi totalidad del antimonio boliviano, recién hemos reactivado nuestras operaciones; por consiguiente, precisamos de un plazo razonable para poder participar en condiciones ecuánimes en la licitación de la fundición de antimonio de Vinto*") (Unofficial translation: "*1. Recent events in the country, with the road blockings in Oruro, have prevented the visit of our foreign partners to the antimony smelter in Vinto. 2. The instability of the price of antimony in the latest months, plus the summer holidays in the northern hemisphere (where all the buyers are located) have made it impossible to make any financial decision. 2. Both EMUSA and our company, which produce the quasi totality of Bolivian antimony, have only recently reactivated our operations; as a result, we require a reasonable period of time in order to be able to participate under fair conditions in the tender for the Vinto antimony smelter*").

62 Report No. 001/2000 of the Qualifying Commission of the second public tender for the sale of the Antimony Smelter of 20 November 2000, **R-112**, p. 1.

63 Report No. 001/2000 of the Qualifying Commission of the second public tender for the sale of the Antimony Smelter of 20 November 2000, **R-112**, p. 2.

64 Report No. 001/2000 of the Qualifying Commission of the second public tender for the sale of the Antimony Smelter of 20 November 2000, **R-112**, pp. 3-4.

Paribas.[65] As a result, the Oruro Parliamentary Group requested that the adjudication process be suspended pending further evaluation and analysis.[66]

67. The Oruro Parliamentary Group's concerns were echoed in the President of the Bolivian National Senate, Leopoldo Fernández Ferreira's letter to President Banzer Suárez.[67] Similarly, on 8 December 2000, the Foreign Trade and Investment Minister, Humberto Bohrt Artieda informed the Minister of the Presidency, Walter Guiteras Denis, of a communication transmitted to him by the President of the Bolivian Chamber of Representatives, requesting the immediate suspension of the adjudication process of the Antimony Smelter pending an investigation into the minimum price proposed by Paribas.[68]

68. Paribas' minimum price, *inter alia*, failed to take into account the recent investments that the State had made into the Antimony Smelter. As explained in Section 2.1.2 above, the Antimony Smelter's operations were restarted in August 1990, as a result of the "*new technological design*" implemented at the plant.[69] The State carried out further investments

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65 Letter from the Oruro Parliamentary Group to President Bánzer Suárez of 27 November 2000, **R-110** ("*Consideramos erróneas el proceso de fijación del precio base en $us 100.000 (Cien Mil 00/100 Dólares), por cuanto el Estado boliviano invirtió $us. 12.000.000 (Doce Millones 00/100 Dólares), para el inicio de su funcionamiento a principios de la década de los setenta*") (Unofficial translation: "*We consider erroneous the process of determining the base price at $us 100.000 (One Thousand 00/100 Dollars), given that the Bolivian State invested $us. 12.000.000 (Twelve Million 00/100 Dollars), for it to commence functioning at the beginning of the seventies*").

66 Letter from the Oruro Parliamentary Group to President Bánzer Suárez of 27 November 2000, **R-110**.

67 Letter from Leopoldo Fernández Ferreira to President Hugo Bánzer Suárez of 5 December 2000, **R-113** ("*Explique, si hasta antes de la fecha prevista para la presentación de propuestas y apertura de sobres, por lo menos dos empresas que compraron el Pliego de Condiciones solicitaron ampliación de plazo.- 2.- Explique, si las Empresas adquirientes del Pliego que solicitaron ampliación de plazo, son empresas nacionales y si representan a algún sector.- 3.- Explique, si se comunicó oportunamente a las Empresas Oferentes la negativa de ampliar el plazo y se comunicó que eran dos los oferentes que solicitaron ampliación en la última semana.- 4.- Explique, cuáles las razones por las que no se amplió el plazo, considerando que de esa manera se inhabilitan a dos oferentes nacionales*") (Unofficial translation: "*Explain if until prior to the deadline for the presentation of proposals and opening of envelopes, at least two companies which had acquired the Terms of Reference requested an extension of the deadline.- 2.- Explain if the companies having acquired the Terms and requested the extension of the deadline are national companies and whether they represent any sector in particular.- 3.- Explain if the refusal to extend the deadline was promptly communicated to the Biddeing Companies and whether the fact that two bidders requested a time extension during the last week was communicated.- 4.- Explain the reasons why the deadline was not extended, considering that as a result, two national bidders were disqualified*").

68 Letter from Humberto Bohrt Artieda to Walter Guiteras Denis of 8 December 2000, **R-114** ("*Dígase al Poder Ejecutivo, que el proceso de privatización de la Fundición de Antimonio debe suspenderse, entretanto se forme una comisión en la que participe el Gobierno (Ministerio de Comercio Exterior, la Comisión de Desarrollo Económico (Comité de Minería y Metalurgia) de la H. Cámara de Diputados y la Brigada Parlamentaria de Oruro a propósito de explicar por parte de Banco de Inversiones Paribas la determinación del ridículo precio base de 100.000 $us, para la venta de la fundición de antimonio. Al mismo tiempo revisar toda la documentación del proceso de la Licitación Pública Nacional e Internacional*") (Unofficial translation: "*Inform the Executive Power that the privatization process of the Antimony Smelter must be suspended while a commission is set up, in which the Government (Ministry of Foreign Trade, the Commission for Economic Development (Mining and Metallurgy Committee) of the H. House of Representatives and the Oruro Parliamentary Group will participate with the objective of allowing the Investment Bank Paribas to explain the fixation of the ridiculous base price of 100.000 $us, for the sale of the antimony smelter. At the same time, review all the documentation of the process of National and International Public Tender process*").

69 Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, p. 61.

immediately prior to the privatization.[70] However, the Banzer Suárez administration forged ahead with the privatization.

69. On 5 January 2001, the administration awarded the tender for the Antimony Smelter to Colquiri[71] and the sale purchase agreement was executed on 11 May 2001.[72] This was done, again, without observing the constitutional requirements for the execution of such agreements.[73]

2.4 The Tin Smelter Was Acquired By Allied Deals In Highly Irregular Circumstances And Subsequently Transferred To Sánchez De Lozada

70. Sánchez de Lozada also submitted a bid in the privatization of the Tin Smelter (**Section 2.4.1**). Though that bid was unsuccessful, Sánchez de Lozada ultimately succeeded in acquiring the Tin Smelter in 2002, following the fraud investigation and bankruptcy of the asset's then-owner (**Section 2.4.2**).

2.4.1 Allied Deals Acquired The Tin Smelter In Highly Irregular Circumstances

71. The Tin Smelter was privatized in a process fraught with irregularities, which favoured the UK-based company Allied Deals.

72. Even before the privatization process was properly underway, irregularities in relation thereto became known. For example, a letter from the Foreign Trade and Investment Ministry to the CEO of COMIBOL, Alvaro Rejas, referred to "*contactos no transparentes entre la gerencia de COMIBOL y los directores de Allied Deals*"[74] as early as February 1999. This issue, however grave, was not even considered when, some months later, Allied Deals' low-priced bid for the Smelter was declared successful.

73. On 20 December 1999, the Qualifying Commission proceeded to review the two package proposals for the Tin Smelter and the Huanuni joint venture, received from the Comsur – CDC

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70 Villavicencio, ¶ 93.

71 Supreme Decree No 26.042, 5 January 2001, published in the *Gaceta Oficial* No 2.282, **C-8**.

72 Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**.

73 Article 59(5) of the the 1967 Constitution (**R-3**) provided, in this regard, that one of the attributions of the legislative branch was "*[a]utorizar y aprobar la contratación de empréstitos que comprometan las rentas generales del Estado; así como los contratos relativos a la explotación de las riquezas nacionales*" (Unofficial translation: "*[a]uthorize and approve the borrowing of loans that engage the State's general income; as well as contracts concerning the exploitation of national resources*"). See Section 4.3.1. below.

74 Letter from Foreign Trade and Investment Minister to the Executive President of COMIBOL of 18 February 1999, **R-115** (Unofficial translation: "*non-transparent contacts between COMIBOL management and the directors of Allied Deals*").

Consortium and Allied Deals.[75] The Qualifying Commission, having reviewed the qualifications of the two bidders to participate in the tender, proceeded to declare both of them valid.[76] However, in approving Allied Deals' qualifications,[77] the Qualifying Commission ignored several material deficiencies invalidating the submission.[78]

74. The Qualifying Commission then proceeded to examine the economic proposals of the two bidders. Paribas' minimum price recommended for the sale of the Tin Smelter was set at US$ 10 million.[79] Allied Deals offered US$ 14 million for this asset.[80] The Consortium made a conditional offer, outside the scope of the Terms of Reference,[81] which was in any event less than that of Allied Deals.[82]

75. On this basis, on 24 December 1999, the Government awarded the Tin Smelter (as well as the Huanuni mine joint venture) to Allied Deals.[83] The sale purchase agreement for the Tin Smelter was executed on 9 March 2000[84] and Allied Deals took physical possession of the asset on 16 March 2000.

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75 Notarized minutes of the opening of the Envelope A proposals (Tin Smelter, Colquiri) of 21 December 1999, **R-116**.

76 Notarized minutes of the opening of the Envelope A proposals (Tin Smelter, Colquiri) of 21 December 1999, **R-116**.

77 Notarized minutes of the opening of the Envelope A proposals (Tin Smelter, Colquiri) of 21 December 1999, **R-116**, p. 0002342; 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 of 20 December 1999, **R-117**.

78 Allied Deals did not meet the requirements of Article 2 of the Terms of Reference to be an operator. It did not provide any evidence demonstrating that its turnover was derived from "*ventas brutas provenientes de la actividad de comercializacion de minerales, concentrados y/o metálicos en general*" (Unofficial translation: "*gross sales from the commercialization of ore, concentrates and/or metals in general*"). It also failed to submit evidence of "*alta seguridad y récord ambiental satisfactorios*" (Unofficial translation: "*satisfactory high security and environmental record*"). See Terms of Reference for the Public Tender for the Tin Smelter of 24 June 1999, **R-118**, Articles 2.1.2, 4.5; Amendment No. 6 to the Terms of Reference to the Tin Smelter Tender of 2 December 1999, **R-119**, p. 2; Envelope A proposal submitted by Allied Deals for the tender of the Tin Smelter of 20 December 1999, **R-120**, pp. 116, 139, 163, 185, 188.

79 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 of 21 December 1999, **R-108**, p. 4. No minimum price was set for the Huanuni mine joint venture.

80 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 of 21 December 1999, **R-108**, p. 5.

81 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 of 21 December 1999, **R-108**, pp. 5-6 ("*Los proponentes cumplieron con la documentación legal exigida en el sobre "A", sin embargo el proponente Consorcio COMSUR-CDC condicionó su propuesta económica, aspecto que se encuentra al margen de lo permitido en el Pliego de Condiciones.*") (Unofficial translation: "*The bidders complied with legal documentation required in envelope "A", however, the bidder Consortium COMSUR-CDC conditioned its economic offer, thus exceeding what is allowed by the Terms of Reference*"). See Terms of Reference for the Public Tender for the Tin Smelter of 24 June 1999, **R-118**.

82 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 of 21 December 1999, **R-108**, p. 5.

83 Supreme Decree No 25,631, 24 December 1999, published in the *Gaceta Oficial* No 2, 192, **C-6**, p. 31.

84 Notarizations of the sale and purchase agreement of the Tin Smelter between the Ministry of External Trade and Investment, Corporación Minera de Bolivia**,** Empresa Metalúrgica Vinto and Allied Deals Estaño Vinto SA, **C-7**.

76. In the aftermath of the privatization, it became evident that the price offered by Allied Deals was inadequate. Allied Deals had been gratuitously provided with a series of items which had not been included in the inventory of Smelter (and were thus not covered by the price). This included "*repuestos en almacenes,*" "*estaño en proceso de fundición*" and "*concentrados de estaño para fundir*," the total value of which amounted to some US$ 16,521,556.[85] A report addressed by EMV to the President of COMIBOL in July 2000 provided a breakdown of the value of each category of such items.[86]

77. The total value of the items "gifted" to Allied Deals was greater than the purchase price by US$ 1,821,556. In other words, Allied Deals was essentially paid almost US$ 2 million in order to take possession of a going concern and of the valuable tin in its pipeline. This was also the conclusion of the EMV report mentioned above:

> *De la anterior tabla de items entregados se desprende que la planta de fundición de estaño de alta y baja ley juntamente con toda su infraestructura ha sido entregada gratuitamente además con dólares americanos de millón ochocientos mil adicionales.*[87]

78. The adjudication of the Tin Smelter for this inadequate price sparked immediate outrage in Bolivia, even before the sale purchase agreement was concluded. Several actors from Oruro, where the Smelter is located, in fact denounced the terms of the sale and called for formal inquiries to be made into the circumstances which could have led to them.

79. One of Oruro's core civic organisations, the Oruro Civic Committee (*Comité Cívico de Oruro*) publicly condemned what it termed an "*irrational*" sale and resolved to request (i) the removal from office and prosecution of the President of COMIBOL and (ii) the reversion of the Tin Smelter.[88] On 21 February 2001, the President of the Oruro Civic Committee wrote to the

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85 Report from Ms Wilma Morales Espinoza (EMV) to Eng. Rafael Delgadillo (COMIBOL) of 7 July 2000, **R-121**, p. 2 (Unofficial translation: "*spare parts in warehouses*," "*tin in smelting process*" *and* "*tin concentrates for smelting*").

86 Report from Ms Wilma Morales Espinoza (EMV) to Eng. Rafael Delgadillo (COMIBOL) of 7 July 2000, **R-121**, p. 2.

87 Report from Ms Wilma Morales Espinoza (EMV) to Eng. Rafael Delgadillo (COMIBOL) of 7 July 2000, **R-121**, p. 2 (Unofficial translation: "*It appears from the table of delivered items above that the high and low grade tin smelter together with its infrastructure has been delivered for free and with an additional one million eight hundred thousand American dollars*").

88 Statement of the Oruro Civic Committee, **R-122** ("*TERCERO.- Solicitar al Gobierno la inmediata realización de gestiones para que el daño económico infringido al Departamento de Oruro sea revertido, recuperándose el valor total de los materiales y concentrados obsequiados al Consorcio ALLIED DEALS.*") (Unofficial translation: "*THIRD.- Request the Government to immediately take the necessary measures so that the economic damage caused to the Department of Oruro can be reverted, thus recovering the total value of materials and concentrate gifted to the Consortium ALLIED DEALS*").

Comproller General (*Contralor General de la República*) in this connection, requesting an investigation into "*la fraudulenta compra de la Empresa Metalúrgica de Vinto – Oruro.*"[89]

80. The Oruro Civic Committee's call for an investigation into the sale of the Tin Smelter was echoed by Oruro-elected Representative Pedro Rubín de Celis (a member of the Oruro Parliamentary Group), in his letter to the General Comptroller (*Contralor General de la República*) of 10 May 2001.[90] Representative Rubín de Celis also questioned the award of the Huanuni mine joint venture to Allied Deals and presented a formal request for information against the then-Minister for Economic Development, Carlos Saavedra Bruno, in this connection.[91]

81. The issue was even brought directly to the attention of President Banzer Suárez on 23 May 2001.[92] Yet Bolivia's executive did not take any actions in connection with the irregular privatization of the Tin Smelter and, on 21 November 2001, the sale purchase agreement concluded between Allied Deals, COMIBOL, and EMV was notarized.[93] As in the case of the Antimony Smelter, this was done, again, without observing the constitutional requirements for the execution of such agreements.[94]

82. However, Allied Deals would shortly turn out to have been a bad choice for the privatization of the Tin Smelter and the resulting public scandal would once again bring to the forefront the issue of the Tin Smelter's illegal privatization.

2.4.2 The Bankruptcy And Fraud Scandal Involving Allied Deals In 2002 Set The Stage For The Acquisition Of The Tin Smelter By Comsur

83. After some two years of poor management, Allied Deals became bankrupt and was the subject of a major fraud investigation in the UK. This paved the way for Sánchez de Lozada finally to acquire the Tin Smelter.

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89 Letter from the President of the Oruro Civic Committee to the *Contralor General de la República* of 21 February 2001, **R-123** (Unofficial translation: "*the fraudulent acquisition of Empresa Metalúrgica de Vinto – Oruro*").

90 Letter from Representative Pedro Rubín de Celis to the *Contralor General de la República* of 10 May 2001, **R-124**.

91 Formal complaint by Representative Pedro Rubín de Celis against Minister Carlos Saavedra Bruno, **R-125**.

92 Letter from the Oruro Central Obrera to President Banzer Suárez of 23 May 2001, **R-126**.

93 Notarizations of the sale and purchase agreement of the Tin Smelter between the Ministry of External Trade and Investment, Corporación Minera de Bolivia**,** Empresa Metalúrgica Vinto and Allied Deals Estaño Vinto SA, **C-7**.

94 Article 59 (5) of the 1967 Constitution (**R-3**) provided, in this regard, that one of the attributions of the legislative branch was "*[a]utorizar y aprobar la contratación de empréstitos que comprometan las rentas generales del Estado; así como los contratos relativos a la explotación de las riquezas nacionales*" (Unofficial translation: "*[a]uthorize and approve the borrowing of loans that engage the State's general income; as well as contracts concerning the exploitation of national resources*"). See Section 4.3.1 below.

84. Allied Deals changed its name to RBG Resources plc ("**RBG**") on 5 October 2001.[95] The company's plight commenced in January 2002, when its long-term auditor PriceWaterhouseCoopers resigned citing a breakdown in the relationship of trust which should exist between the directors of a company and its auditors.[96] RBG subsequently became the subject of enquiries by the City of London police, which ultimately referred the case to the Serious Fraud Office, because of the size of the alleged fraud and its complexity.[97] In early May, a petition for the winding up of RBG was submitted to and upheld by the High Court of Justice in London, which proceeded to appoint Grant Thornton as provisional liquidator of RBG.[98]

85. In Bolivia, the bankruptcy of RBG brought up once again the matter of the illegal privatization of the Tin Smelter and prompted renewed calls for investigation. Oruro-elected Senator Carlos Sandy Antezana (from *Movimiento al Socialismo*—"**MAS**"), with the support of party leader and future President Evo Morales, requested that Chancellor Carlos Saavedra Bruno resign from office, on account of having permitted the illegal sale of Vinto and Huanuni while serving as Foreign Trade Minister.[99] In addition, members of the MAS transmitted evidence of the Chancellor's corruption to the *Unidad Técnica de Lucha Contra La Corrupción* (Technical Unit for the Fight Against Corruption) for investigation.[100] In this context, Vice-President Mesa Gisbert was asked to have Chancellor Saavedra to step down.

86. The bankruptcy of RBG also posed a serious socio-economic problem, in light of the over 1.200 jobs provided by the Tin Smelter and the Huanuni mine, which ensured the livelihood of over 30.000 people. In this context, the State was called to intervene in order to avoid the bankruptcy of the Smelter.[101] The President of the Oruro Parliamentary Group, José Sánchez

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95 Notarization of the change of name of Complejo Vinto of 30 August 2002, **C-45**, p. 3.

96 *RBG Resources Plc (In liquidation) v. Rastogi* [2005] ADR.L.R. 05/24, Judgment of 24 May 2005, **R-127**, ¶ 2. PriceWaterhouseCoopers expressed concern that the accounts it had audited may have included non-existent transactions. See Times Online, *SFO raids offices of Rastogi metals firm*, press article of 7 May 2002, **R-128**; Yahoo Finance, *SFO probes failed metal trader*, press article of 3 May 2002, **R-129**.

97 Financial Times, *Fraud Office raids metal producer over accounts*, press article of 4 May 2002, **R-130**; The Guardian, *SFO raids $ 1bn metal trader*, press article of 4 May 2002, **R-131** ("*the criminal investigation is believed to centre around allegations of faked invoices, used to persuade banks to extend credit lines. The credit was then used to cover losses on the London Metal Exchange and to buy assets in Bolivia and Romania, it is alleged*").

98 *RBG Resources Plc (In liquidation) v. Rastogi* [2005] ADR.L.R. 05/24, Judgment of 24 May 2005, **R-127**, ¶ 5; Letter from Mike Jervis (Grant Thornton) to Juan Carlos Valdívia Crespo (RBG Estaño Vinto) of 15 May 2002, **R-132**; Fax from Bolivia's Ambassador to the UK to the Foreign Relations Minister of 21 May 2002, **R-133**, pp. 1, 2.

99 La Razón Digital, *El MAS pide la renuncia del Canciller Saavedra*, press article of 8 November 2002, **R-134**; El Diario, *MAS pide la renuncia del Canciller de la Republica*, press release of 4 December 2002, **R-135**.

100 El Mundo, *MAS presentó las pruebas de corrupción contra Canciller*, press release of 4 December 2002, **R-136**.

101 *DDHH pide que el Estado intervenga, Brigada Parlamentaria pide preservar fuentes de trabajo*, press article, **R-137**; La Patria, *Gobierno: Vinto tiene que seguir funcionando*, press article of 18 May 2002, **R-138**.

Aguilar, was described in the Bolivian press as stating that "*una reversión de la empresa metalúrgica de Vinto, a favor del Estado, podría ser el paso más viable, pero es necesario analizar las condiciones, porque si se anula contrato es preciso establecer en qué condiciones*."[102]

87. The situation in fact subsequently became tense, with the *cooperativistas* threatening to take possession of the Tin Smelter and mine if they were not paid what they were owed.[103]

88. On 15 May 2002, the State intervened in the operations of the Huanuni mine joint venture.[104] In the aftermath, on 20 May 2002, the *Federación Regional de Cooperativas Mineras Huanuni* requested that the sale purchase contract for the Tin Smelter be declared null and void and that the State recover the Smelter:

> *Que también de acuerdo al Convenio del 30/06/01, se revise el Contrato de Riesgo Compartido de Huanuni, según el punto cuarto y se anule en Contrato arriba mencionado y Huanuni sea Revertido al Estado y posteriormente [sic] sé Cooperativise, y la Empresa Metalúrgica de VINTO por ser pieza clave en la Economía del Occidente Boliviano, por ser un mercado de garantía para nuestros concentrados debe volver a manos del estado.*[105]

89. But the Quiroga administration did not intervene at Vinto, despite its promises to guarantee the social stability and safeguard the patrimony of Oruro.[106] Instead, the administration accepted the sale of the Tin Smelter to a private buyer[107] and was kept apprised of the liquidators' efforts towards such transaction, as shown by an internal report dated 15 May 2002:

> *Los liquidadores están DESESPERADOS en encontrar un comprador para las minas, y están contemplando ofrecer Vinto y Huanuni a COMSUR. Me preguntaron cuál sería el impacto de esto dada la situación política del país con las elecciones*

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102 *DDHH pide que el Estado intervenga, Brigada Parlamentaria pide preservar fuentes de trabajo*, press article, **R-137** (Unofficial translation: "*a reversion of the Vinto metallurgical company in favour of the State could be the most viable option, but it is necessary to analyse the conditions, because if the contract is nullified and voided it is necessary to determine under what conditions*").

103 La Patria, *Cooperativistas amenazan con la toma de la empresa*, press article, **R-139**.

104 See La Prensa, *Empresa RBG Huanuni fue intervenida por Comibol*, press article of 16 May 2002, **R-140**; El Diario, *Centro minero Huanuni vuelve a manos del Estado Boliviano,* press article of 14 November 2002, **R-141**.

105 Letter from the *Federación Regional de Cooperativas Mineras de Huanuni* to President Quiroga Ramírez of 20 May 2002, **R-142** (emphasis added) (Unofficial translation: "*Also pursuant to the Agreement of 30/06/01, the Shared Risk Contract of Huanuni be revised in accordance with item four and the aforementioned Contract be nullified and voided and Huanuni Reverted to the State and subsequently be cooperativised, and Empresa Metalúrgica VINTO, given its key role in Bolivian occidental economy and its being a security market for our concentrates, must be returned to the State*").

106 Agreement between the *Comité de defensa del patrimonio orureño* and the Executive regarding EMV of 7 June 2002, **R-143**.

107 La Patria, *Allied Deals negocia libremente transferencia de fundición Vinto*, press article of 26 May 2002, **R-144**.

y si COMIBOL podría ayudarlos en negociar esta venta con ellos. Para salir de esta crisis es necesario involucrar a COMSUR y explorar la esta posibilidad.[108]

90. Ultimately, even though at least one other company had submitted a proposal to acquire the Tin Smelter,[109] an agreement was reached for the sale of this asset to Sánchez de Lozada's Comsur on 1 June 2002.[110] The sale price was reportedly some US$ 6 million,[111] *i.e.*, less than half the already low privatization price and only slightly more than half of Comsur's original offering price. Thus, Sánchez de Lozada ultimately secured the Tin Smelter at a fraction of the price it was worth, and irrespective of the fact that, in early summer 2002, he was in the midst of his second presidential campaign.

2.5 In 2005, At The Height Of Political Change In Bolivia, And When The Reversion Was Foreseeable, Glencore International Acquired The Smelters And Mine Lease From Former President Sánchez De Lozada

91. The particular social context in which operations at the Colquiri Mine were carried out before the Privatization and the relation with the *cooperativas* required special attention and significant resources from COMIBOL. Comsur nevertheless neglected this aspect of the Colquiri Mine operation, which led to deep and increasing tensions between the *cooperativistas* and the workers of the company (**Section 2.5.1**).

92. The poorly managed social relations at Colquiri encouraged the *cooperativistas* to further their interest in taking over the Mine. This situation worsened, in particular, as a result of the important changes in the State's political landscape after October 2003, when President Sánchez de Lozada was forced to resign from office and flee the country amidst political unrest and country-wide protests (**Section 2.5.2**).

93. In this context, in 2005, Glencore International acquired the companies controlling the Assets from Sánchez de Lozada, and then assigned them to Claimant without compensation (**Section 2.5.3**). By this time, it was evident that the State would take action against the Assets (**Section 2.5.4**), which would explain Glencore International's decision not to invest in them following their acquisition (**Section 2.5.5**).

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108 RBG Case Report to the Minister of Economic Development and the President of COMIBOL of 15 May 2002, **R-145**, p. 2 (Unofficial translation: "*The liquidators are DESPERATE to find a buyer for the mines and are contemplating offering Vinto and Huanuni to COMSUR. They asked me what would be the impact of this given the political situation in the country with the elections and whether COMIBOL could help negotiate the sale with them. To exit this crisis it is necessary to involve COMSUR and explore this possibility*"). See also La Patria, *Hasta el fin de mes se definirá futuro de Fundición de Vinto y mina Huanuni*, press article of 18 May 2002, **R-146**.

109 Letter from Expromin S.A. to the Minister of Economic Development and COMIBOL of 22 May 2002, **R-147**; La Patria, *Allied Deals negocia libremente transferencia de fundición Vinto*, press article of 26 May 2002, **R-144**.

110 Letter from Grant Thornton to the Minister of Economic Development of 7 June 2002, **R-148**.

111 La Patria, *Liquidador de Allied Deals pidió $US 6 millones por Vinto y Huanuni*, press article of 2 June 2002, **R-149**; La Prensa, *Comsur será operadora de Vinto, es dueña del 51% de las acciones*, press article of 6 June 2002, **R-150**.

2.5.1 Comsur's Operation Of The Colquiri Mine Lease Created Tensions With The Mining Cooperativas And The Unions At Colquiri

94. By the time Glencore International acquired the Mine Lease from Sánchez de Lozada, Comsur's poor management of social relations at Colquiri had already created tensions between the *subsidiarios* (now organized as *cooperativistas*) and the workers of the company.

95. Shortly after the execution of the Mine Lease, Comsur took over operations at Colquiri and implemented significant changes in the way COMIBOL had operated the Mine. Both Mr Cachi and Mr Mamani—who were working at Colquiri at the time—recall that Comsur decided to lay off all former COMIBOL workers (including, notably, those belonging to the local workers union).[112] Comsur gradually replaced the former workers over the first years of operations, never reaching the same number of employees—even though that would have been necessary to properly operate the Mine and manage the relations of the company with the *cooperativistas*.

96. Comsur's strategic decision had a significant impact on community relations at Colquiri.

97. On the one hand, the population and economy of the town of Colquiri relied exclusively on the Mine. Having been laid off, most of the former COMIBOL workers were forced to join the ranks of the *subsidiarios*, who, by then, had decided to organize themselves in *cooperativas*. Though a number of *cooperativas* operated at the Mine, the largest and most organised ones were the *Cooperativa 26 de Febrero* (still operating inside the Mine today) and the *Cooperativa 21 de Diciembre* (operating at the old tailings dam). In Mr Cachi's words:

> *Como consecuencia de este despido masivo, la mayoría de los trabajadores que no fueron contratados por Comsur pasaron a engrosar las filas de los subsidiarios. Esto alteró la proporción de los trabajadores de la Mina. Si antes de la privatización había 1 subsidiario por cada 3 trabajadores, la proporción ahora era la inversa. Ante este crecimiento, y para organizarnos colectivamente, decidimos formar la Cooperativa 26 de Febrero. Hacia el año 2004, la Cooperativa ya contaba con más de 600 socios. En el 2009, ya contábamos con 940 socios*.[113]

98. On the other hand, given the lack of human resources, Comsur was keen to work with the recently formed *cooperativas* in order to carry out specific tasks at the Mine. This situation

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112 Cachi, ¶ 12; Mamani, ¶ 11.

113 Cachi, ¶¶ 13-14 (Unofficial translation: "*As a result of this massive lay-off, the majority of workers not hired by Comsur joined the lines of the subsidiarios. This altered the proportion of workers of the Mine. If before the privatization there was 1 subsidiario for every 3 workers, the proportion was now reversed. Given this increase, and in order to organize ourselves collectively, we decided to create the Cooperativa 26 de Febrero. Around 2004, the Cooperativa comprised more than 600 partners. In 2009, we had 940 partners*").

enabled the *cooperativistas* to better understand the operations of the company at the lower levels of the Mine. As Mr Mamani recalls:

> *Por otra parte, y para evitar el pago de cargas laborales, Comsur decidió realizar trabajos temporales de rehabilitación con los cooperativistas en los niveles inferiores de la Mina que eran explotados al mismo tiempo por los trabajadores de la empresa. Esto fue un error. Por un lado, al permitirles explotar al mismo tiempo un mismo nivel, generó choques entre cooperativistas y empleados. Por otro lado, consentir la entrada de personas ajenas a la empresa a los niveles inferiores de la Mina permitió a los cooperativistas conocer en detalle su estructura e identificar los turnos del personal de vigilancia y los horarios en los cuales no habría empleados (normalmente entre los distintos turnos, cuando se realizan las explosiones). Los cooperativistas también pudieron identificar accesos clandestinos a los niveles inferiores (sobre todo a través de los ductos de ventilación)*.[114]

99. With a growing number of *cooperativistas*, and without the proper human resources to keep them in check, controlling the Mine gradually became more difficult for Comsur over the years. Moreover, both Mr Mamani and Mr Cachi confirm that, unlike COMIBOL, Comsur handled its relations with the *cooperativas* in an erratic manner, which often benefited the *cooperativas*. This made it easier for the latter to both (i) operate in new areas with Comsur's approval and (ii) illegally access areas in which the company's employees worked.[115] Tellingly, on 13 October 2000 (shortly after the execution of the Mine Lease[116]), COMIBOL granted new areas of the Mine for exploitation to the *Cooperativa 26 de Febrero* (with Comsur's approval) and extended the validity of this agreement until 2018.[117]

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114 Mamani, ¶ 12 (Unofficial translation: "*On the other hand, and in order to avoid paying employment costs, Comsur decided to carry out temporary rehabilitation works with the cooperativistas in the inferior levels of the Mine, exploited at the same time by the company's workers. This was a mistake. On the one hand, by allowing them to exploit at the same time the same level, clashes were generated between cooperativistas and employees. On the other hand, consenting to the entrance of persons outside the company to the lower levels of the Mine permitted the cooperativistas to learn its structure in detail and identify the shifts of the surveillance personnel and the times at which there would be no employees (normally between the shifts, when explosions are detonated). The cooperativistas could also identify clandestine access ways to the lower levels (particularly through ventilation conducts)*").

115 Mamani, ¶ 15 ("*Otro de los problemas ocasionados por la llegada de Comsur fue su falta de reacción ante la toma paulatina, por parte de los cooperativistas, de nuevas partes de la Mina. En vez de defender sus intereses en la Mina (y los intereses de sus trabajadores), como lo hacía la COMIBOL, Comsur comenzó a firmar acuerdos con la Cooperativa 26 de Febrero para ceder áreas que ya habían sido desarrolladas por los trabajadores. Estos acuerdos eran firmados y negociados a nuestras espaldas y nunca eran socializados con los trabajadores de la empresa.*") (Unofficial translation: "*Another problem generated by the arrival of Comsur was its lack of reaction to the gradual takeover by the cooperativistas of new areas of the Mine. Instead of defending its interests in the Mine (and those of its workers), as done by COMIBOL, Comsur started to sign agreements with the Cooperativa 26 de Febrero to assign areas that had already been developed by workers. These agreements were signed and negotiated behind our backs and were never in consultation with the company's workers*").

116 Lease agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**.

117 Public Deed No. 131/2000, lease agreement between Comibol and the *Cooperativa 26 de febrero* of 13 October 2000, **R-94**, clause 5 ("*A petición de la Cooperativa y en virtud de los planes y proyectos de explotación que tiene, COMIBOL resuelve ampliar el plazo de vigencia del contrato hasta veinte años computables a partir de la fecha de suscripción del contrato principal No. 50/98 de diez/cero siete/[98]*") (Unofficial translation: "*Pursuant to the Cooperativa's request*

100. The poorly managed community relations at Colquiri led to rising tensions between the *cooperativas* and the mining workers. While some sectors of the community demanded further "*[c]oncesi[ones] de Área de trabajo para Organización de Cooperativa Minera para trabajadores que viven en Colquiri sin fuente de trabajo*,"[118] the company workers were outraged by the increasing demands of the *cooperativistas*. As put by Mr Mamani, Comsur operated the Mine in a way that "*generaba constantes enfrentamientos entre los empleados de la mina y los cooperativistas, protestas por parte de la población civil e interrupciones en la operación de la Mina*."[119]

101. In addition, under Comsur's administration, the *cooperativistas* "*bajaban a niveles inferiores de la Mina para robar (lo que llamamos en quechua juquear) más y mejor mineral […]. Asimismo, ante la falta de seguridad de Comsur, los cooperativistas frecuentemente robábamos materiales de los trabajadores (como explosivo anfo y barras de perforación), lo que causaba el descontento de los trabajadores que, en algunos casos, debían reponer estos materiales*."[120]

102. The intensity of the tensions made necessary the intervention of the State at various times. For example, on 14 January 2004, officers from the Ministry of Mines and COMIBOL visited Colquiri "*ante el inminente conflicto de enfrentamiento entre trabajadores mineros de la Empresa Minera Colquiri y los Extrabajadores de la misma Empresa Relocalizados y los trabajadores de la Cooperativa Virgen del Carmen [i.e., a recently and non-registered cooperativa]*."[121] The tensions were further deepened by claims that the Mine Lease may have been awarded to Comsur in irregular circumstances.[122] The intervention of the State in this context ensured that a major conflict did not occur.

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and in light of its exploitation plans and projects, COMIBOL decides to extend the contract term to twenty years as of the date of execution of the main contract No. 50/98 of ten/zero seven/[98]").

118 Operative votes of the Neighbourhood Associations of Colquiri of 30 June 2005, **R-151** (Unofficial translation: "*[c]oncessi[ons] of working Areas to Mining Cooperative Organization for workers who live in Colquiri without a source of work* ").

119 Mamani, ¶ 17 (Unofficial translation: "*generated constant confrontations between the mine workers and cooperativistas, protests by the civil population and interruptions in the Mine operations*").

120 Cachi, ¶¶ 20-21 (Unofficial translation: "*descended to lower levels of the Mine to steal (what we call in Quechua juquear) more and better ore […]. Likewise, given the lack of Comsur security, we cooperativistas frequently stole materials from workers (like anfo explosive and drill rods), which made workers unhappy and, in some cases, made them have to replace the materials*").

121 Internal Memorandum from COMIBOL to the Ministry of Mines of 23 January 2004, **R-152**, p. 1 (Unofficial translation: "*in light ofthe imminent confrontation between mining workers of Empresa Minera Colquiri and Former Relocated Workers of the same company and workers of the Cooperativa Virgen del Carmen*").

122 Internal Memorandum from COMIBOL to the Ministry of Mines of 23 January 2004, **R-152**, p. 2 ("*Que La Comisión de Gobierno envié a la Delegada Presidencial Anticorrupción (ZARINA) lic. Lupe Cajias el Contrato de Arrendamiento firmado entre COMSUR y la COMIBOL, para que esta instancia de Gobierno, emita su opinión respecto a los alcances de dicho CONTRATO*") (Unofficial translation: "*That the Government Commission send to the Anticorruption*

103. Likewise, on 16 April 2005, COMIBOL officers attended a meeting with *cooperativistas* and Comsur directors in order to determine new working areas at the old tailings dam. The nature of the *cooperativistas*' demands clearly evidenced Comsur's lack of control over the situation:

> *[E]n el lugar en compañía de los Directivos de la Cooperativa […] y socios de la Cooperativa se recorre el sector solicitado 70 % del total de las colas, aproximadamente 170 metros al sur de su anterior solicitud, en vista de esta situación se realizó un levantamiento topográfico del sector, se encontró algunos socios que vienen explotando las colas en forma rudimentaria, paralelamente se reunieron en una asamblea de emergencia, a cuya finalización nos dan a conocer sus resoluciones solicitando el 100% de las colas, indican que son oriundos de la zona y otros argumentos, finalmente solicitan la continuidad de las negociaciones en el lugar, caso contrario levantaran su cuarto intermedio*.[123]

104. As discussed below, these demands would only increase—and, consequently, would lead to conflicts at Colquiri—with the political and social changes that Bolivia underwent since 2003, when then-President Sánchez de Lozada fled the country amidst protests and riots in response to the policies he implemented which benefitted private investment in strategic sectors.

2.5.2 The Historic Social Changes That Led To The Empowerment Of New And Fundamental Social Actors In Bolivia Further Impacted Operations At Colquiri

105. In its Statement of Claim, Claimant implies that, by the time Glencore International acquired the Assets, Bolivia was a State open to new foreign private investment in the mining sector.[124] This, however, is inaccurate. Comsur's lack of proper management of community relations at Colquiri was already encouraging the *cooperativas* to further their interests, including by possibly taking over the Mine. In addition, the political transformations that the Bolivian society had been undergoing since late 2003 empowered these organizations as a fundamental social actor in the country. As Mr Mamani recalls:

> *[E]l sector cooperativista tomó mucha fuerza en el país al convertirse en uno de los mayores grupos de oposición y protesta contra el gobierno del expresidente Sánchez*

Presidential Delegate (ZARINA) attorney Lupe Cajias the Lease Contract concluded between COMSUR and COMIBOL, so that this governmental entity may issue its opinion on the scope of the aforementioned CONTRACT").

123 Letter from COMIBOL Technical Manager to the President of COMIBOL of 20 April 2005, **R-153** (Unofficial translation: "*[T]here, accompanied by Directors of the Cooperative […] and partners of the Cooperativa, we went through the requested sector 70% of the total amount of tailings, approximately 170 meters to the south from its previous request, in view of this situation a topographic survey of the sector was carried out, several partners were found to exploit the tailings in a rudimentary way, in parallel they met in an emergency assembly, after which they communicated their resolutions requiring 100% of the tailings, they indicate that they are locals of this place and other arguments, finally they require continuity in negotiations in the area, otherwise they will end the truce*").

124 Statement of Claim, ¶¶ 19-26.

de Lozada por los planes de privatización y exportación de recursos naturales (conocidos en Bolivia como la "Guerra del Gas").[125]

106. As a matter of fact, on 6 August 2002—having taking full advantage, through Comsur, of the Privatization policies put in place during his first tenure—Gonzalo Sánchez de Lozada commenced his second term in office. Given that Bolivia has the largest reserves of natural gas in the region, one of the main goals of his second government was to secure agreements with foreign investors in order to export this natural resource on a large scale.

107. These policies were, however, met with countrywide social unrest and protests (especially, in La Paz). This overwhelming opposition to Sánchez de Lozada "*came as little surprise*,"[126] according to the press. Indeed, by the beginning of 2003, less than a year after coming to power, the Sánchez de Lozada administration was actively opposed by the indigenous communities across the country (led by Evo Morales' MAS) and even lacked the support of the military to carry out the investment plans in the gas sector.[127] The press further reported that the miners and *cooperativas* massively arrived in El Alto (near La Paz) to join other social sectors in the protest.[128] The support given by miners and *cooperativas* to the protests explains, in great part, the scale of the conflict.[129] As put by one academic study:

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125 Mamani, ¶ 19 (Unofficial translation: "*[T]he cooperatives sector gained considerable strength in the country when it became one of the major opposition and protest groups against the government of former president Sánchez de Lozada because of the plans for privatization and exporting natural resources (known as the 'Gas War' in Bolivia)*".

126 BBC News, *Bolivia Gas Plans Trigger Unrest*, press article of 16 September 2003, **R-154**.

127 The Economist, *Highly Flammable*, press article of 11 September 2003, **R-155** ("*Pacific LNG believes the project, which involves spending $3.1 billion to build pipelines and a coastal terminal, is economical only if the gas goes through a Chilean port, most probably Patillos […]. Government studies also prefer this route. But nationalists oppose it […]. Even if this obstacle is surmounted, left-leaning Indian leaders do not want the gas sold at all. Many believe that, if it is, the United States and multinational oil companies will benefit from cheap gas at Bolivia's expense. And few trust the government to spend gas revenues wisely. Indeed, few trust it on any issue. Despite reinforcing his coalition government in August, President Gonzalo Sánchez de Lozada is still deeply unpopular. Some analysts think he may be toppled by the armed forces if he opts for the Chilean gas route. With nervous politeness, Mr Sánchez has invited the military men to carry out their own study of the project's potential benefits*").

128 VoltaireNet, *57 muertos en Masacre del 9 al 13 de octubre*, press article of 14 October 2003, **R-156**; El País, *Decenas de tanques protegen el palacio presidencial de Bolivia ante las revueltas*, press article of 15 October 2003, **R-157** ("*Los vecinos, sin embargo, esperan con mucho temor la anunciada llegada de los indígenas de Achacachi, que marchaban ayer hacia la capital con viejos fusiles Mauser, y la llegada de otros miles de colonos del norte de La Paz y trabajadores de Oruro, que se acercan por la carretera troncal. Cerca de medio millar de mineros del centro productor de estaño, Huanuni, lograron llegar a La Paz*") (Unofficial translation: "*However, neighbours expect with great fear the announced arrival of the indigenous community of Achacachi that was marching yesterday towards the capital carrying old Mauser rifles, and the arrival of other thousands of colonists from the north of La Paz and workers from Oruro who are approaching via the main highway. Around half a thousand miners from the tin production centre of Huanuni were able to arrive to La Paz*").

129 La Patria, *Libro refleja aporte de cooperativas mineras en la Guerra del Gas*, press article of 24 November 2015, **R-158** ("*Florencio Coca Cuizara, fue ejecutivo de la Fencomin, durante los años en que se suscitaron los conflictos por la 'Guerra del Gas' (2002-2004), […]. 'Es necesario hablar de cuáles fueron los roles de la minería estatal, la privada y la cooperativizada que fue la que se enfrentó al gobierno de ese entonces, lo que menciono en el libro es la participación de las cooperativas mineras en el proceso de cambio del Estado Plurinacional, es importante conocer cuántos muertos tuvimos como sector y que esta información la conozca la niñez la juventud y todo el pueblo', indicó Coca*") (Unofficial translation: "*Florencio Coca Cuizara was the manager of Fencomin during the years of the 'Gas War' conflicts (2002-2004), […]. 'It is necessary to speak about the roles of State, private and the cooperativa mining,*

> *La presencia en El Alto de La Paz de los 800 mineros de Huanuni y de más de 3.000 cooperativistas mineros, fue altamente significativa en momentos decisivos de la insurrección popular que se desató en octubre de 2003 contra el gobierno de Gonzalo Sánchez de Lozada y que tuvo su epicentro en esa ciudad del departamento de La Paz. No sólo se notó la presencia, en toda la semana que duró el levantamiento popular, de los pobladores de los barrios mineros de relocalizados, principalmente de Santiago II, uno de los lugares donde se produjeron mayores enfrentamientos con el ejército, sino de trabajadores mineros asalariados y cooperativistas llegados desde Huanuni y otras minas. Así, octubre fue sin duda un momento de revelación de "acumulaciones sociales previas", aunque no sólo para el sector minero, sino para el conjunto de los sectores populares en Bolivia […]*.[130]

108. The situation reached a critical point in October 2003, when thousands of protestors congregated in La Paz demanding that Sánchez de Lozada abandon his natural gas export project and resign from office. By 11 October, the Government's attempts to quash the mobilisation, including by installing blockades around the country, had left approximately 64 people dead and more than 400 wounded.[131]

109. As a result of these events, on 17 October 2003, Sánchez de Lozada was forced to resign from office.[132] That same day, he fled the country and sought asylum in the United States.[133] To date, Sánchez de Lozada has an outstanding summons to appear before the Bolivian Courts

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which is the one that confronted the government of that time. In this book, I mention the participation of the mining cooperatives in the change process of the Plurinational State. It is important to know how many people died in the sector and to share this information with the children, the young and the entire population', indicated Coca").

130 M. Cajías de la Vega, "Crisis, Diáspora y Reconstitución de la Memoria Histórica de los Mineros Bolivianos" in *Revista de Estudios Transfronterizos*, Vol. X, No. 2 (2010), **R-159**, 87 (Unofficial translation: "*The presence in El Alto and La Paz of 800 miners of Huanuni and more than 3,000 mining cooperativistas was very significant in decisive moments of the popular uprising triggered in October 2003 against the government of Gonzalo Sánchez de Lozada and the epicentre of which was in that city of the department of La Paz. Not only was the presence of residents of neighbourhoods of relocated miners noted during the entire week of the popular uprising, in particular from Santiago II, one of the places where major confrontations with the army took place – but also the presence of mining employees and cooperativistas from Huanuni and other mines. Thus, October was undoubtedly a moment of revelation of 'previous social accumulations', not only in the mining sector but also in all popular sectors in Bolivia*").

131 BBC Mundo, *La guerra del gas se cobra otra vida*, press article of 11 October 2003, **R-160** ("*Los manifestantes de la ciudad de El Alto, cuyas protestas se iniciaron en oposición a la venta de gas natural, han comenzado a pedir también la renuncia de Sánchez de Lozada, durante cuyo gobierno de algo más de 14 meses, las violentas protestas dejaron un saldo de 68 muertos y unos 300 heridos*") (Unofficial translation: "*Demonstrators of the city of El Alto, who originally protested against the sale of natural gas, also started to demand Sánchez de Lozada's resignation. These demonstrations took place during Sánchez de Lozada's administration, which lasted a bit more than 14 months, and the violent protests left a toll of 68 dead and around 300 wounded*").

132 El País, 18 October 2003, *Goni deja 134 muertos en 14 meses de gestión*; El Deber, 16 February 2013, *Por qué tantas muertes en democracia?*, press articles, **R-12**.

133 El Clarín, *Bolivia:renunció el presidente Sánchez de Lozada*, press article of 17 October 2003, **R-161** ("*El presidente de Bolivia, Gonzalo Sánchez de Lozada, envió hoy al Congreso su renuncia al cargo, tras las protestas que causaron 77 muertos y unos 400 heridos. El mandatario, de 73 años, se encontraba esta noche en la ciudad sureña Santa Cruz de la Sierra aparentemente para viajar a otro país, probablemente Estados Unidos*") (Unofficial translation: "*The President of Bolivia, Gonzalo Sánchez de Lozada, sent today his resignation to Congress, following the protests which resulted in 77 dead and around 400 wounded people. The leader, aged 73, was in the southern city of Santa Cruz de la Sierra that night, apparently to travel to another country, probably the United States*").

for the tragic events that occurred during his second term in office, and Bolivia's request for extradition is still pending before the US authorities.[134]

110. That same day, 17 October 2003, the Bolivian Congress swore in Mr Carlos Mesa, Sánchez de Lozada's Vice-President. In his inaugural speech, Mr Mesa laid out a series of policies to be implemented in order to overcome the social and political crisis created by Sánchez de Lozada. Mr Mesa's government agenda (which would later be known as *La Agenda de Octubre*) prioritized, *inter alia*, the debate as to whether a new constituent assembly was to be organized and promised that the Bolivian citizens would be free to decide the way in which the natural resources of the State (including the mining sector) would be managed and exploited. In Mr Mesa's words:

> *Una Asamblea Constituyente ahora, quiere decir que vamos a discutir qué país queremos y cuáles son las reglas del juego sobre las que este país va a funcionar una vez que ese proceso se lleve adelante. Esto quiere decir que todos y cada uno de nosotros, debemos llevar a la Asamblea Constituyente elementos centrales de forma y de fondo que definirán temas esenciales sobre nuestros recursos naturales, sobre la tierra, sobre la concepción de la participación democrática ciudadana, sobre la estructura del funcionamiento de un mecanismo de representación como es el Congreso Nacional, sobre todos los temas que nos importan*.[135]

111. In this context, social sectors opposing private control of the strategic sectors of the State (including the mining sector) were already prominent in 2003. In particular, by 2003, President Morales' MAS (whose agenda included "*la realización de una Asamblea Constituyente, a través de la convocatoria a asambleas populares comunales, provinciales. etc. en que participarían organizaciones sociales con el fin de defender la soberanía y refundar la nación*"[136]) was already seen as one of the "*nuevas fuerzas políticas importantes*"[137] of the country. Likewise, as discussed above, the *cooperativas* became critical social actors in Bolivian politics.[138]

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134 See, for instance, La Razón, *EEUU admite proceso de extradición de Goni*, press article of 16 February 2016, **R-13**.

135 Speech of Mr Carlos Mesa Gibert before the Bolivian Congress of 17 October 2003, **R-162**, p. 3 (Unofficial translation: "*A Constituent Assembly now means that we will discuss about what country we want and what rules will govern the functioning of this country as this process goes on. This means that each and every one of us, must provide the Constituent Assembly with the main formal and substantial elements that will define the essential themes regarding our natural resources, about the land, about the conception of democratic citizen participation, about the operational structure of a representation mechanism such as the National Congress, about all the issues that matter to us*").

136 Fundación Boliviana para la Capacitación Democrática y la Investigación, "*Opiniones y análisis sobre las elecciones presidenciales de 2002*", 2002, **R-163**, p. 58 (Unofficial translation: "*carrying out a Constituent Assembly, by convening popular assemblies at the communal, provicial etc. levels in which social organizations would participate in order to defend sovereignty and refound the nation*").

137 Fundación Boliviana para la Capacitación Democrática y la Investigación, "*Opiniones y análisis sobre las elecciones presidenciales de 2002*", 2002, **R-163**, p. 49 (Unofficial translation: "*new important political forces*").

138 M. Cajías de la Vega, "Crisis, Diáspora y Reconstitución de la Memoria Histórica de los Mineros Bolivianos" in *Revista de Estudios Transfronterizos*, Vol. X, No. 2 (2010), **R-159**; VoltaireNet, *57 muertos en Masacre del 9 al 13 de octubre*,

112. President Mesa's government advanced a policy of recovering State control of strategic sectors.[139] Yet his government was temporary. After Mesa's resignation in 2005 (amid protests against private investment in the hydrocarbons sector),[140] the interim government of Eduardo Rodríguez organized presidential elections that same year. The political programme of MAS candidate Evo Morales, widely known in Bolivia since the beginning of the decade, openly called for a constituent assembly[141] and for the participation of the State in strategic sectors. Concretely, in regard to the mining sector, and in line with the policies espoused since the immediately prior elections,[142] MAS sought to "*[r]efundar la Corporación Minera de Bolivia (COMIBOL), como empresa estatal con autonomía de gestión y de derecho público, con capacidad para convertirse en actor principal en la actividad productiva del sector*."[143]

113. On 19 December 2005, with an overwhelming majority of the votes, Evo Morales was elected President of Bolivia.[144] Important developments in Bolivian politics followed this event:

114. On the one hand, in June 2006, the new government published a national development plan. As laid down in MAS' political programme, the national development plan stressed the importance of "*un nuevo rol del Estado donde participe directamente en proyectos estratégicos, promueva la actividad productiva de las organizaciones sociales y comunitarias, garantice el desarrollo de la iniciativa privada, y realice un mejor uso y destino*

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press article of 14 October 2003, **R-156**; El País, *Decenas de tanques protegen el palacio presidencial de Bolivia ante las revueltas*, press article of 15 October 2003, **R-157** ("*Los vecinos, sin embargo, esperan con mucho temor la anunciada llegada de los indígenas de Achacachi, que marchaban ayer hacia la capital con viejos fusiles Mauser, y la llegada de otros miles de colonos del norte de La Paz y trabajadores de Oruro, que se acercan por la carretera troncal. Cerca de medio millar de mineros del centro productor de estaño, Huanuni, lograron llegar a La Paz*") (Unofficial translation: "*However, neighbours expect with great fear the announced arrival of the indigenous community of Achacachi that was marching yesterday towards the capital carrying old Mauser rifles, and the arrival of other thousands of colonists from the north of La Paz and workers from Oruro who are approaching via the main highway. Around half a thousand miners from the tin production centre of Huanuni were able to arrive to La Paz*").

139 See, for instance, La Nación, *Anuncian un amplio triunfo del sí en el referéndum sobre el gas en Bolivia*, press article of 18 July 2004, **R-164**.

140 El Mundo, *Presidente de Bolivia presenta su renuncia ante su incapacidad para contener la ola de protestas*, press article of 7 June 2005, **R-165**.

141 Political Program of *Movimiento Al Socialismo* of November 2005, **R-166**, p. 54 ("*El MAS propone la Asamblea Popular Constituyente formada por representantes de las organizaciones sociales que se reúnan con el mandato expreso de elaborar una Constitución del pueblo y para el pueblo de Bolivia*") (Unofficial translation: "*MAS proposes a Constituent Popular Assembly formed by representatives of the social organisations to meet with the express mandate of elaborating a Constitution by the people and for the people of Bolivia*").

142 Fundación Boliviana para la Capacitación Democrática y la Investigación, "*Opiniones y análisis sobre las elecciones presidenciales de 2002*", 2002, **R-163**, p. 58.

143 Political Program of *Movimiento Al Socialismo* of November 2005, **R-166**, p. 19 (Unofficial translation: "*[r]efound the Bolivian Mining Corporation (COMIBOL), as a State company of public law with administrative autonomy, with the capacity to become the main actor of the production activity of the sector*").

144 BBC Mundo, *Morales se declara ganador*, press article of 19 December 2005, **R-167**; Georgetown University, Results of the Presidential Election held on December 18, 2005, **R-5**.

del excedente económico."[145] The development plan further aimed to put an end to the effects of the Privatization in the country.[146]

115. The national development plan was later enacted by means of Supreme Decree 29.272 of 2007. This norm confirmed "*[e]l rol activo del Estado*" in the mining sector and the promotion of "*una actividad minera planificada, racional, inclusiva, moderna, sistematizada, y socialmente aceptable, en la que participen de manera armónica e integral el sector público, pueblos indígenas, originarios, comunidades campesinas y los otros subsectores: grande, mediano, chico y cooperativo*."[147]

116. On the other hand, in August 2006, pursuant to one of the fundamental points of Mesa's *Agenda de Octubre*, President Morales called for elections of a constituent assembly.[148] The new constitution was enacted on 7 February 2009.[149] The Constitution envisioned the State as assuming "*el control y la dirección sobre la exploración, explotación, industrialización, transporte y comercialización de los recursos naturales estratégicos a través de entidades públicas, cooperativas o comunitarias*."[150] In addition, as Claimant mentions, the new Constitution mandated the renegotiation of all existing rights over mining concessions.[151]

117. In this context of significant political changes in Bolivia, as discussed in the section below, Glencore International decided to acquire the Assets from the fleeing Sánchez de Lozada and assign them to Claimant without compensation.

118. In sum, by early 2005, "*[t]he overthrow of the main champion of neo-liberal economics in 2003, the rise of Evo Morales, the palpable shift of politics to the left throughout the country and the decline of the traditional party structure has left the business environment clouded*

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145 Bolivia's National Development Plan of 2006, **R-168**, p. 105 (Unofficial translation: "*a new State role, in which it directly participates in strategic projects, promotes the production activity of social and community organizations, guarantees the development of private initiative, and gives a better use and destination to the economic surplus*").

146 Bolivia's National Development Plan of 2006, **R-168**, p. 9.

147 Supreme Decree No. 29272 of 12 September 2007, **R-169**, p. 160 (Unofficial translation: "*[t]he State's active role [in the mining sector and the promotion of] a mining activity which is planned, rational, inclusive, modern, systemised and socially acceptable, in which may participate in a harminosed and wholesome manner the public sector, indigenous communities, rural communities and other subsectors: large, medium, small and cooperative*").

148 El Universo, *Bolivia inaugura Asamblea Constituyente que pretende refundar el país*, press article of 6 August 2006, **R-170**; Law of 6 March 2006, **R-6**.

149 Constitution of Bolivia of 7 February 2009, **C-95**.

150 Constitution of Bolivia of 7 February 2009, **C-95**, Article 351 (I) (emphasis added) (Unofficial translation: "*the control and direction over the exploration, exploitation, industrialization, transport and sale of strategic natural resources through public, cooperative or community entities*").

151 Statement of Claim, ¶ 76 ("*A new Constitution came into effect in February 2009 (the 2009 Constitution), mandating the renegotiation of existing mining concessions*").

with uncertainty."[152] It was therefore foreseeable that the State could take action against businesses in the mining sector, and, in particular, the Assets.

119. Glencore International decided to acquire the Assets nonetheless.

2.5.3 Glencore International Purchased The Assets From Sánchez De Lozada And Assigned Them To Glencore Bermuda Without Compensation

120. Having resigned from office and fled Bolivia in October 2003, Sánchez de Lozada sought to divest some of the assets that he held through Comsur. For this purpose, he retained newly-incorporated Argent Partners Limited[153] to assist with securing bids for the subsidiaries and affiliates of Andean Resources S.A.[154] This is how, ultimately, Glencore International (and not Claimant[155]) came to acquire the Assets.

121. It bears recalling that Sánchez de Lozada was, reportedly, a close friend of Marc Rich, the founder of Glencore International. Mr Rich had left the US in the early 1980s, and would never return to face trial on charges of fraud. In order to avoid extradition, Mr Rich acquired Bolivian citizenship in 1983.[156] Thereafter, throughout the 1980s and 1990s, Mr Rich carried out business in Bolivia through various wholly-owned Swiss companies, and enjoyed a privileged relationship with the executive and COMIBOL.

122. At the time of Glencore International's acquisition, on the one hand, Andean Resources fully owned Minera S.A.[157] In turn, Minera fully owned Panamanian companies Iris Mines and Metals S.A., Shattuck Trading & Co. Inc. and Kempsey S.A.,[158] which, together, held 100%

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152 Business Monitor International, *Risk Summary - Bolivia*, 14 January 2005, **R-171**.

153 Argent Partners Limited is not a "*leading international advisory firm*," as indicated by Claimant. At the time, it was a single-partner organization, founded in 2002. See Argent Partners Webpage, "Partners", available at http://www.argentpartners.com/partners, **R-172**.

154 Process Letter from Argent Partners (Mr Simkin) to Glencore International (Mr Eskdale) of 30 April 2004, **C-62**, pp. 1-2 ("*Andean Resources S.A. ("ARSA" or the "Company") has retained Argent Partners Limited […] to assist it in exploring its strategic and financial alternatives in connection with a possible negotiated transaction involving the Company's subsidiaries and affiliates, including the Company's interest in Minera S.A.*").

155 See Statement of Claim, ¶¶ 34-36, referring to Glencore, and not Glencore Bermuda, as the party participating in the bid for Sánchez de Lozada's companies. See also Section 4.1 below.

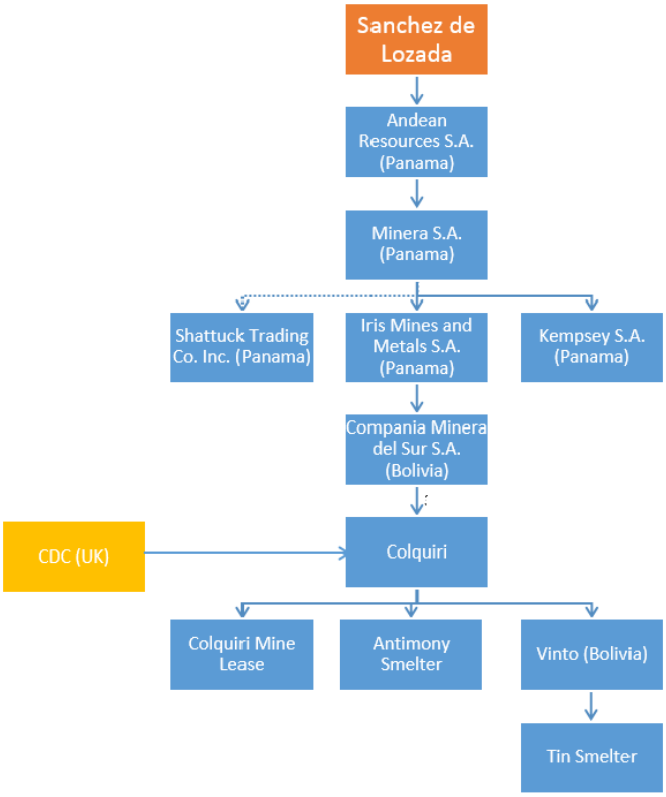
156 Supreme Resolution No. 198045 of 27 May 1983, **R-173**; House Report No. 454, "Justice Undone - Clemency Decisions in Clinton White House", US Congressional Serial Set (Serial No. 14778), 107th Congress, 2nd session, **R-174**, p. 124.

157 Minera S.A., Minutes of Shareholders' Meeting of 23 February 2016, **R-175**, p. 2.

158 Certificate of the Secretary of Iris Mines and Metals SA of 19 May 2011, **C-14**; Certificate of the Secretary of Shattuck Trading Co Inc of 1 February 2012, **C-15**.

of Comsur's shares.[159] In addition to being the chairman of Minera, Sánchez de Lozada's (indirect) ownership and control of this corporate structure was a matter of public record.[160]

123. On the other hand, Comsur held 51% of the shares of Colquiri S.A.,[161] whilst the latter company owned the Colquiri Mine lease and the Antimony Smelter, and held a 99.97% interest in Vinto, which owned in turn the Tin Smelter.[162] This ownership chain is represented schematically below:



159 Compañía Minera del Sur S.A., Minutes of Extraordinary Shareholders' Meeting of 25 February 2005, **R-176**; IFC, Summary of Project Information: Sinchi Wayra of 18 April 2017, **R-177** ("*Compania Minera Del Sur S.A. ("Comsur") is an unlisted Bolivian company 100% owned by Panamanian company Iris Mines and Metal S.A. ("Iris"). Iris is in turn owned by Minera S.A. ("Minera"), a Panamanian company which is the sponsor and guarantor of the project. Both Iris and Minera are unlisted.*"). See also Nueva Economía, *Una poderosa minera activa de bolsa*, press article of 13 July 2008, **R-178**.

160 Bloomberg, Company overview of Minera S.A. of 7 December 2017, **R-179**. See *e.g.* Bolivia.com, *Goni vendió COMSUR*, press article of 5 February 2005, **R-14**; La Razón, *Goni sigue siendo un rey de la minería*, press article of 14 October 2013, **R-180**. See also *Orvana announces commencement of development at Don Mario Gold Project and executive appointments*, press release of 4 March 2002, **R-181**, p. 2 ("*Mr. de Lozada has had almost 40 years of experience as a mining entrepreneur in Bolivia and Argentina. Mr. de Lozada is active in Bolivian politics. He is the controlling shareholder of Minera S.A., a holding company with extensive mining, processing and smelting assets in Bolivia and Argentina. Comsur is a subsidiary of Minera S.A.*").

161 The remaining 49% interest was held by CDC until March 2006. Put Notice from Actis (on behalf of CDC) to Glencore International of 21 March 2006, **C-67**; Statement of Claim, ¶ 38.

162 See Share register of Colquiri SA, **C-17**; Share register of Complejo Metalúrgico Vinto, **C-18**.

124. According to Claimant, Glencore International purchased the Panamanian companies described above between 30 January and 2 March 2005, and gained full indirect ownership of the Mine and Smelters by 2 March 2005. [163]

125. Claimant submits no evidence of the amount Glencore International paid in the transactions described above. In fact, it submits almost no evidence at all regarding the details of a transaction that remains shrouded in mystery. However, the deal is rumoured to have hovered around some US$ 220 million for the entirety of the companies and assets owned by Minera.[164]

126. Compounding the mystery, a longtime close associate of Sánchez de Lozada, Jorge Szasz Pianta,[165] remained on the boards of Comsur,[166] Colquiri,[167] and Vinto[168] after the supposed sale to Glencore, even while Glencore International replaced the remaining board members. We suspect that he 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 (which have deliberately been withheld). We reserve all our rights in this regard.

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.[169] It informed Claimant of this action on 12 December 2017. Because Sánchez de Lozada is neither a party to this arbitration nor under the control of any party, the unique information he possesses about the transaction would otherwise be unavailable to inform the Tribunal's analysis.

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163 Statement of Claim, ¶ 36.

164 In September 2017, discovery was sought against law firm Gibson, Dunn & Crutcher LLP in connection with its representation of the sellers in the transaction between COMSUR and Glencore. The petitioners reported the value of the deal to be of approximately US$ 220 million. See United States District Court, Southern District of New York, *In re application of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. for an order directing discovery from Gibson, Dunn & Crutcher LLP* of 25 September 2017, **R-182**, ¶ 9.

165 Mr. Szasz Pianta has been a member of Sánchez de Lozada's circle at least since 1989. Certificate of Election of New Directors and Board Members of Kaydon Enterprises S.A. of 26 June 1989, **R-183**, p. 4; Compañía Minera San Jose S.A. Certificate of Election of New Directors and Board Members of 22 May 1992, **R-184**, p. 4.

166 Minutes of Sinchi Wayra S.A. Shareholders' Meeting of 25 February 2010, **R-185**, p. 4.

167 Minutes of Colquiri S.A. Shareholders' Meeting of 25 February 2010, **R-186**, p. 5.

168 Minutes of Shareholders' Meeting of Complejo Metalúrgico Vinto S.A. of 11 March 2010, **R-187**, p. 4.

169 In Re: Application of the Plurinational State of Bolivia for an Order directing Discovery from Gonzalo Sanchez De Lozada Y Sanchez De Bustamante Pursuant to 28 U.S.C. § 1782, United States District Court for the Eastern District of Virginia, No. 1:17-mc-00030, 6 December 2017.

128. Immediately after completing the transactions described above, Glencore International proceeded to assign "*all of the rights, assets and interest acquired from the purchase to its wholly-owned subsidiary Glencore Bermuda*."[170]

129. Claimant does not submit any evidence that consideration was paid in exchange for this assignment. Nor does any other evidence on the record suggest that the assignment would have been anything else other than gratuitous. In particular, the agreement through which the shares were transferred by Glencore International to Claimant displays no payment or consideration of any sort from the latter in exchange for the assignment.[171]

130. In this connection, on 16 February 2005, COMIBOL wrote to the CEO of Comsur, Jaime Urjel Dalence, and expressed its unease regarding the transactions that Glencore International was engaging in:

> *De conformidad con las publicaciones en la prensa, COMIBOL ha tomado conocimiento que la totalidad de las acciones de COMSUR han sido transferidas a la GLENCORE, aspecto que nos coloca en una posición de alerta y preocupación por este tipo de transacciones, que deberían ser comunicadas oficialmente a COMIBOL en el marco de los contratos de Riesgo Compartido y Arrendamiento existentes con la Compañía Minera del Sur (COMSUR).*[172]

131. The response was swift and patronizing: the object of the transfer had not been Comsur itself, but foreign companies "*que no afectan de manera alguna a Comsur o a sus relaciones contractantes.*"[173]

132. Thereafter, between September and October 2005, presumably in an attempt to smooth over the relationship with COMIBOL, negotiations were carried out between COMIBOL, Comsur and Colquiri "*con objeto de considerar mejoras en los ingresos económicos para COMIBOL, en relación al contrato de Riesgo Compartido de la mina Bolívar, y los contratos de arrendamiento de las minas Porco y Colquiri*."[174] Likewise, in March 2006, further

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170 Statement of Claim, ¶ 37, 314; Notice of Assignment from Glencore International to CDC of 23 May 2005, **C-66**.

171 Assignment and Assumption Agreements between Glencore International and Glencore Bermuda of 7 March 2005, **C-64**.

172 Letter from COMIBOL to Comsur (Sinchi Wayra) of 16 February 2005, **R-188**, p. 1 (Unofficial translation: "*In accordance with publications in the press, COMIBOL has become aware that the entirety of COMSUR's shares has been transferred to Glencore, situation which causes us alarm and concern over this type of transactions which should be officially communicated to COMIBOL in the framework of the Shared Risk and Lease contracts concluded with Compañía Minera (COMSUR)*").

173 Letter from Comsur (Sinchi Wayra) to COMIBOL of 17 February 2005, **R-189**, p. 1 (Unofficial translation: "*which do not affect in any way Comsur or its contracting relations*").

174 Minutes of the conclusion of the meetings held between COMIBOL, COMSUR and Compañía Minera Colquiri S.A. of 11 October 2005, **R-190** (Unofficial translation: "*with the aim of considering improvements in COMIBOL's economic benefits, in relation to the Shared Risk contract of the Bolívar mine, and the lease contracts of the Porco and Colquiri*

negotiations were carried out between COMIBOL and Colquiri "*para que se efectúe una revisión y renegociación del Contrato de Arrendamiento del Centro Minero Colquiri suscrito con la Compañía Minera Colquiri S.A. buscando una mejor participación económica para la [COMIBOL].*"[175]

133. Such negotiations belie Claimant's assertion that "*the Ministry of Mining and Metallurgy […] expressly wrote to Glencore's representatives to express its 'favorable predisposition towards the development of new investments in the mining sector'.*"[176] As a matter of fact, far from amounting to the warm welcome that Claimant describes, the letter in question simply conveyed to Glencore that the administration was considering modifications to the fiscal regime applicable to the mining sector:

> *Sobre el particular, deseo manifestarle que el Viceministerio a mi cargo tiene una predisposición favorable a que se concreten nuevas inversiones en el sector minero. Sin embargo, y con el ánimo de configurar adecuadamente el contexto de política minera que actualmente está llevando adelante el Gobierno de Bolivia, debo comunicarle que uno de los temas que es objeto de análisis y que con seguridad conducirá a la realización de ajustes es el régimen impositivo minero, bajo la concepción de que el mecanismo más idóneo para brindar seguridad jurídica a las inversiones mineras es posibilitar que las regiones productoras perciban de forma justa y directa los beneficios que la actividad minera otorga.*[177]

134. A second letter included in the same document cited by Claimant confirms that, instead of welcoming Glencore International, the Bolivian government was simply communicating to it that the assets it was acquiring would be the object of legislative and contractual modifications:

> *Es de conocimiento nuestro que su Empresa se encuentra en negociaciones de las acciones de COMSUR, por lo que consideramos importante hacer conocer a ustedes que COMIBOL, tiene firmado con esa empresa un contrato de riesgo compartido (Joint Venture), en la mina de su propiedad denominada "Bolivar", asimismo 2 contratos de arrendamiento en las localidades de Colquiri y Porco.*

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mines"). See also COMIBOL Board Resolution No. 3285/2005 of 1 November 2005, **R-191**; COMIBOL Board Resolution No. 3387/2006 of 28 March 2006, **R-192**.

175 COMIBOL Board Resolution No. 3387/2006 of 28 March 2006, **R-192** (Unofficial translation: "*in order to revise and renegotiate the Lease Contract for the Colquiri Mining Centre concluded with Compañía Minera Colquiri S.A. seeking a better economic return [for COMIBOL]*").

176 Statement of Claim, ¶ 35; Letter from the Vice Minister of Mining to Glencore of 17 January 2005, **C-63**.

177 Letter from the Vice Minister of Mining to Glencore of 17 January 2005, **C-63**, p. 1 (emphasis added) (Unofficial translation: "*Regarding this issue, I wish to inform you that the Vice-ministry under my responsibility is favourable to the realisation of new investments in the mining sector. However, and with the aim of correctly presenting the context of the mining policy which is currently being promoted by the Bolivian Government, I must inform you that one of the issues that is being examined and that will certainly lead to the implementation of adjustments, is the mining fiscal regime, under the notion that the most suitable mechanism to provide legal security to mining investments is to allow producing regions to access, in a just and direct way, the profits resulting from the mining activity*").

> *Es importante hacer conocer que en cumplimento de las cláusulas contractuales, tiene que ser de conocimiento de COMIBOL cualquier modificación de la personería jurídica y/o paquete accionario de dicha empresa.*
>
> *Por otro lado les informamos que COMIBOL en un plazo corto se verá en la necesidad de plantear la revisión de los mencionados contratos.*[178]

135. Thus, Claimant's depiction of the facts does not correspond to the reality of Glencore International's arrival in Bolivia. In fact, Glencore International's attempts to smooth things over in Bolivia were doomed to fail from the start and the company must have known it at the time – which is why the negotiations were commenced in the first place.

2.5.4 Glencore International Assigned The Assets To Glencore Bermuda When It Was Highly Likely That The State Would Take Action Against The Assets

136. It was evident when Glencore International made its purchase that the long and troubled history of such Assets would inevitably prompt the State to take action against them. This prospect was not only highly likely but in fact specifically foreseen by Glencore International. It was against this background that Glencore International transferred the Assets to Glencore Bermuda.

137. As previously explained, after concluding the transaction to acquire the Assets, Glencore International assigned "*all of the rights, assets and interest acquired from the purchase to its wholly-owned subsidiary Glencore Bermuda*."[179] Glencore Bermuda was incorporated in a jurisdiction subject to the Treaty that Claimant has invoked in the present dispute.

138. Recognizing the high risk of a dispute, we understand that Glencore International then proceeded to take out political risk insurance against precisely the sort of actions that Claimant now alleges Bolivia took. We understand that it obtained insurance from a syndicate led by Lloyd's for the Tin Smelter and suspect it likely obtained similar insurance for the Antimony Smelter and Colquiri Mine Lease.

139. Glencore International did so as part of its general policy of obtaining insurance whenever it considered that political risk was significant. As Glencore International's 2011 prospectus reveals, "*Glencore [sought] to remain diversified and where possible to obtain political risk*

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[178] Letter from the Vice Minister of Mining to Glencore of 17 January 2005, **C-63**, p. 2 (Unofficial translation: "*It has come to our knowledge that your Company is negotiating [regarding] COMSUR's shares. This is why we consider it important to inform you that COMIBOL has concluded a shared risk contract (Joint Venture) with that company regarding its mine named "Bolivar", as well as 2 lease contracts in the towns of Colquiri and Porco. It is important to inform you that pursuant to the contractual provisions, COMIBOL must be informed of any modification in the legal status and/or shareholding structure of the aforementioned company. On the other hand, we inform you that COMIBOL will shortly be compelled to propose the revision of the aforementioned contracts*").

[179] Statement of Claim, ¶¶ 37, 314; Notice of Assignment from Glencore International to CDC of 23 May 2005, **C-66**.

insurance from creditworthy financial institutions in situations where Glencore believes that obtaining such insurance is financially prudent."[180] From Glencore International's perspective, Bolivia was precisely such a situation.

140. As these actions reflected, Glencore International confronted strong indications by early 2005 that the Assets were likely to become the subject of a dispute with Bolivia.

141. *First*, concerns over the legality of the privatization of the Tin Smelter had been highly publicized since the privatization of the Smelter and more acutely so since 2001-2002, following Sánchez de Lozada's acquisition thereof.

142. As discussed in Section 2.4.1 above, following the adjudication of the sales contract to Allied Deals, local organizations and unions in Oruro[181] as well as members of the Bolivian Parliament[182] called for investigations to be carried out prior to the conclusion of the sale purchase agreement. Indeed, everything suggested that the price to be paid in consideration for the Tin Smelter was inexplicably low. The Banzer Suárez administration paid no mind to such calls for investigation and proceeded to validate the tender process and conclude the sale.

143. Thereafter, as discussed in Section 2.4.2 above, the public outrage did not diminish. The press reported that members of the Bolivian Parliament, including MAS members, had requested

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180 Prospectus of Glencore International plc of 3 May 2011, **R-193**, p. 57.

181 Statement of the Oruro Civic Committee, **R-122** ("*TERCERO.- Solicitar al Gobierno la inmediata realización de gestiones para que el daño económico infringido al Departamento de Oruro sea revertido, recuperándose el valor total de los materiales y concentrados obsequiados al Consorcio ALLIED DEALS.*") (Unofficial translation: "*THIRD.- Request the Government to immediately take the necessary measures so that the economic harm caused to the Department of Oruro can be reverted, thus recovering the total value of materials and concentrate gifted to the Consortium ALLIED DEALS*"). See, also, Letter from the Oruro Central Obrera to President Banzer Suárez of 23 May 2001, **R-126** ("*la clase trabajadora y lodos los sectores del pueblo de Oruro, nos encontramos agobiados por el hambre y la miseria que reina en nuestro sociedad debido a que nuestro patrimonio y que constituía FUENTE DE TRABAJO, ha sido enajenado ilegalmente y en un monto absolutamente exiguo constituyendo un engaño en la venta del Complejo Metalúrgico de Vinto a la Empresa [Allied Deals]*") (Unofficial translation: "*the working class and all sectors of the people of Oruro are overwhelmed by the hunger and misery that reigns in our society given that our asset, which constituted a SOURCE OF WORK, has been transferred illegally and for a completely inadequate amount, which amounts to fraud in the sale of Complejo Metalúrgico de Vinto to the company [Allied Deals]*").

182 Letter from Representative Pedro Rubín de Celis to the *Contralor General de la República* of 10 May 2001, **R-124**, p. 2 ("*En el numeral 5 del documento denominado 'acta de Entendimiento' en fecha de 2 de marzo de 2000 por los Presidentes de Vinto y COMIBOL, por una parte, y por el representante de ALLIED DEALS PLC dice textualmente: 'la vendedora depositará, a la brevedad posible en sus almacenes – estaño e incluir estaño metálico dentro de los ítems ofertados en la venta de la Fundidora'. De esta manera, los compradores obtuvieron en forma fraudulenta el dinero para comprar la propia fundición en forma de estaño en circuito, en concentrados y en metálico por un valor de [US$ 11,477,539]. A ello habrá que añadir las 500 toneladas de estaño metálico entregadas a favor de la compradora como respaldo al valor ajustado del material en circuito y al valor ajustado de los activos fijos*") (Unofficial translation: "*Item 5 of the document named 'minutes of Understanding' of 2 March 2000 [executed] by the Presidents of Vinto and COMIBOL, on the one hand, and by the representative of ALLIED DEALS PLC, literally says: 'the seller will deposit shortly in its warehouses – tin and include metallic tin within the items offered in the sale of the Smelter. This way, the buyers obtained fraudulently the money to buy the smelter itself in the form of pipeline tin, in concentrates and metal for the amount of [US$ 11,477,539]. To this must be added 500 tons of metallic tin delivered in favor of the buyer as a guarantee of the adjusted value of the pipeline material and the adjusted value of fixed assets*"). See, also, Formal complaint by Representative Pedro Rubín de Celis against Minister Carlos Saavedra Bruno, **R-125**.

"*una reversión de la empresa metalúrgica Vinto, a favor del Estado*"[183] (a request backed by *cooperativistas* from Huanuni,[184] also controlled at the time by RGB[185]).

144. *Second*, the social and political transformations that took place in Bolivia after Sánchez de Lozada's resignation in October 2003, described in Section 2.5.2 above, also made State measures against the Assets likely.

145. In fact, the new policies of the Bolivian Government envisioned the State as "*responsable de las riquezas mineralógicas que se encuentren en el suelo y subsuelo cualquiera sea su origen y su aplicación será regulada por la ley*"[186] and aimed to end the perverse effect the Privatization and the Capitalization had had on the country. Put differently, as a result of the events of October 2003, the Government actively sought to dismantle the economic premises under which the State had functioned for over two decades.[187] This policy had significant implications in the way relations with investors in the mining sector would unfold.

146. One, it was public knowledge since 2001 that the Tin Smelter had been privatized in dubious circumstances. It was therefore to be expected that the State would decide to redress the irregularities that led to this privatization (expressly mentioned in the Government's Development Plan[188]), especially if such irregularities had caused economic harm to the State.

147. Two, the conception of an active State in the mining sector was incompatible with an inactive Antimony Smelter in the hands of private investors. As explained in Section 2.6.2 below,

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183 *DDHH pide que el Estado intervenga, Brigada Parlamentaria pide preservar fuentes de trabajo*, press article, **R-137** (Unofficial translation: "*a reversion of the Vinto metallurgical company in favour of the State*").

184 See, for instance, La Patria, *Cooperativistas amenazan con la toma de la empresa*, press article, **R-139**.

185 Letter from the *Federación Regional de Cooperativas Mineras de Huanuni* to President Quiroga Ramírez of 20 May 2002, **R-142**.

186 Constitution of Bolivia of 7 February 2009, **C-95**, article 369 (Unofficial translation: "*responsible for the mineral resources located in the soil and sub-soil irrespective of their origin and its application will be regulated by law*").

187 Bolivia's National Development Plan of 2006, **R-168**, p. 4 ("*El objetivo principal está centrado, por lo tanto, en la supresión de las causas que originan la desigualdad y la exclusión social en el país, lo que significa cambiar el patrón primario exportador y los fundamentos del colonialismo y el neoliberalismo que lo sustentan. Es decir, desmontar, no sólo los dispositivos económicos, sino también los políticos y culturales, coloniales y neoliberales, erigidos por la cultura dominante, que se encuentran diseminados en los intersticios más profundos de la organización del Estado y también en la mente de las personas a través de la práctica social individual en detrimento de la solidaridad y la complementariedad. El cambio del patrón primario exportador es, por lo tanto, una condición imprescindible para revertir la desigualdad y la exclusión de la población indígena, urbana y rural; erradicar la pobreza en el país y desmontar tales dispositivos*") (Unofficial translation: "*As a result, the main objective is focused on eliminating the causes that generate inequality and social exclusion in the country, which means changing the primary pattern of exports and the foundations of colonialism and neoliberalism that support it. That is to say, to dismantle not only the economic mechanisms but also the political and cultural, colonial and neoliberal ones, erected by the dominant culture, that are scattered in the most deep interstices of the State's organization and also in the mind of the people through individual social practice, to the detriment of solidarity and complementarity. The change in the primary pattern of exports is thus an essential requirement to revert the inequality and exclusion of indigenous, urban and rural communities, to eradicate poverty in the country and dismantle such mechanisms*").

188 Bolivia's National Development Plan of 2006, **R-168**, p. 232.

under the new position and function of the State in the mining sector, such situation was simply untenable. In addition, concerns over irregularities in the privatization of the Antimony Smelter were public knowledge since, at least, 2000.[189]

148. Three, the new Constitution and mining policies of the State empowered and emboldened the *cooperativas* as crucial actors of the mining sector in Bolivia (as a matter of fact, as per the new policies of the Government, the State would carry out "*una actividad minera planificada […] socialmente aceptable, en la que participen de manera armónica e integral el sector público, pueblos indígenas, originarios, comunidades campesinas y los otros subsectores: grande, mediano, chico y cooperativo*"[190]). This was unsurprising since, as discussed above, the massive presence of *cooperativistas* in the demonstrations of late 2003 was instrumental in forcing Sánchez de Lozada to resign.[191]

149. In this context, keeping good relations with the *cooperativista* sector at Colquiri was fundamental to secure continuity of the Mine Lease. However, as of 2003, such continuity had already been compromised by Comsur's poor management of social relations at the Mine.[192] The mismanagement of this volatile situation continued through Glencore International's acquisition of the Assets, and beyond.

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

190 Supreme Decree No. 29272 of 12 September 2007, **R-169**, p. 176 (Unofficial translation: "*a mining activity which is planned […], socially acceptable, in which may participate in a harmonised and wholesome manner the public sector, indigenous communities, rural communities and other subsectors: large, medium, small and cooperative*").

191 M. Cajías de la Vega, "Crisis, Diáspora y Reconstitución de la Memoria Histórica de los Mineros Bolivianos" in *Revista de Estudios Transfronterizos*, Vol. X, No. 2 (2010), **R-159**, p. 87 ("*La presencia en El Alto de La Paz de los 800 mineros de Huanuni y de más de 3.000 cooperativistas mineros, fue altamente significativa en momentos decisivos de la insurrección popular que se desató en octubre de 2003 contra el gobierno de Gonzalo Sánchez de Lozada y que tuvo su epicentro en esa ciudad del departamento de La Paz. No sólo se notó la presencia, en toda la semana que duró el levantamiento popular, de los pobladores de los barrios mineros de relocalizados, principalmente de Santiago II, uno de los lugares donde se produjeron mayores enfrentamientos con el ejército, sino de trabajadores mineros asalariados y cooperativistas llegados desde Huanuni y otras minas. Así, octubre fue sin duda un momento de revelación de "acumulaciones sociales previas", aunque no sólo para el sector minero, sino para el conjunto de los sectores populares en Bolivia […]"*) (Unofficial translation: "*The presence in El Alto and La Paz of 800 miners of Huanuni and more than 3,000 mining cooperativistas was very significant in decisive moments of the popular uprising triggered in October 2003 against the government of Gonzalo Sánchez de Lozada and the epicentre of which was in that city of the department of La Paz. Not only was the presence of residents of neighbourhoods of relocated miners noted during the entire week of the popular uprising, in particular from Santiago II, one of the places where major confrontations with the army took place – but also the presence of mining employees and cooperativistas from Huanuni and other mines. Thus, October was undoubtedly a moment of revelation of 'previous social accumulations', not only in the mining sector but also in all popular sectors in Bolivia*").

192 See section 2.5.1 above.

150. In sum, given the particular social and political context in which Glencore International transferred the Assets to Glencore Bermuda, it could have reasonably been expected that the State would take action in connection with those Assets.

2.5.5 Despite The Acquisition Of The Smelters And The Mine Lease, Glencore Did Not Make Any Substantial Investment During Its Operation Of These Assets

151. Contrary to what Claimant implies, Glencore merely held indirect ownership in companies that controlled the Assets and never made significant investments in Bolivia prior to the reversion.

152. *First*, no substantial investment was made by Glencore during the time it controlled the Mine. As a matter of fact, it is quite revealing that Claimant is unable to point to any significant investments made prior to the reversion of the Mine Lease. None of the projects listed as investments by Claimant in its Statement of Claim was even started, much less completed, as of the time of the reversion. If Colquiri indeed "*worked on constructing a new tailings plant*"[193] and "*sought to construct a new tailings dam*,"[194] the fact of the matter is that such plant and dam were never built. If Colquiri indeed "*planned on doubling the capacity of the concentrator plant*,"[195] such project was, in reality, never carried out. And if Colquiri did "*design[] a principal access ramp that would connect the surface level to a new wider gallery*,"[196] the fact is that such project was less ambitious than presented today and had barely started in 2012.[197]

153. *Second*, as Eng Villavicencio confirms, the expenditures made by Sinchi Wayra in the Tin Smelter between 2005 and 2007 were only aimed at maintaining productions levels and could hardly be characterized as an investment.[198] Just as Comsur had done since the Privatization, Sinchi Wayra benefitted from the important investments made by the State in the 1980s-1990s. It bears recalling that these investments allowed the EMV to levels of production before the Privatization,[199] which were never equaled by either Comsur or Sinchi Wayra thereafter.

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193 Statement of Claim, ¶ 52.

194 Statement of Claim, ¶ 57.

195 Statement of Claim, ¶ 53.

196 Statement of Claim, ¶ 55.

197 Moreira, ¶ 46.

198 Villavicencio, ¶¶ 39-43.

199 Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, pp. 26-27 ("*Constructed in 1968-70, the plant had, in its initial configuration, a capacity to produce 7,000*

154. *Third*, it is undisputed that Glencore only used the Antimony Smelter "*as a storage facility*"[200] and never sought to reactivate production. Nor did Glencore seek to increase the production levels that the Smelter had recorded during the nineties, prior to the Privatization.[201]

2.6 Bolivia Reverted The Assets For Public Purposes

155. As discussed above, Glencore was assigned the Assets by Glencore International in times of great social and political transformations in Bolivia. As had been foreseeable since, at least, 2005, the State decided to revert the Assets:

- In February 2007, the State reverted the Tin Smelter due to the irregularities which had affected the Privatization (**Section 2.6.1**);
- In May 2010, due to its inactivity, the State reverted the Antimony Smelter (**Section 2.6.2**); and
- In June 2012, in order to solve the serious social conflict created at the Colquiri Mine by Glencore's subsidiary, Sinchi Wayra, the State reverted the Mine Lease (**Section 2.6.3**).

2.6.1 Bolivia Reverted The Tin Smelter Due To The Irregularities In The Privatization Process

156. The new political context in Bolivia after the *Guerra del Gas* and Sánchez de Lozada's resignation led the State to take further actions concerning the Assets. This was unsurprising since, as discussed above, the ownership of the Assets had been a sensitive matter in Bolivia from the very moment they were privatized.[202]

157. Faced 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

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metric tons/year of refined tin. This original plant was later expanded to an installed capacity of 11,000 and then 20,000 t/year. The capacity of the smelter increased to 30,000 t/year, through the installation of 10,000 tons of low-grade treatment capacity between 1977 and 1980. The plant is currently configured to carry out only high-grade treatment, its production capacity being 20,000 t/year. The technology used for the engineering of the tin treatment plant has all been devised and installed by the German company Klockner, through various contracts").

200 Statement of Claim, ¶ 59.

201 Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, p. 61 ("*in 1989 EMV carried out a new technological design for the production of trioxide of antimony from sulfurous concentrates, with the repairing of rotating furnace and the construction of new continuous feeding systems for the furnace and equipment to gather gases and other emissions. The overhaul of the plant was made jointly with Laurel Industries Inc., with whom EMV signed a Toll Conversion Contract in 1990. Later that year the plant was converted to be natural gas fired, for cost and quality reasons, and in August the plant started operations again*").

202 Bolivia.com, *Goni vendió COMSUR*, press article of 5 February 2005, **R-14**.

to cooperate with the Bolivian authorities. As a matter of fact, when, on 16 February 2005, COMIBOL expressed concerns over the fact that the transfer to Glencore had not been properly notified to the authorities,[203] Sinchi Wayra simply responded indicating that "*las acciones de Comsur S.A., sea en parte o en su totalidad, no han sido transferidas a ninguna persona individual o colectiva*."[204]

158. Likewise, when members of the Bolivian Parliament became aware of the transactions between Glencore International and Sánchez de Lozada, and requested information in this regard in November 2006,[205] 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*."[206] Sinchi Wayra's attitude towards the Government's inquiries reveals that Glencore International and Claimant were aware of the political risk that acquiring assets from a fleeing president represented.

159. In this context, on 9 February 2007, the State issued a decree ordering the reversion of the Tin Smelter (the "**Tin Smelter Reversion Decree**"),[207] taking into account the irregularities of the Privatization discussed in section 2.4.1 above. In particular, the Tin Smelter Reversion Decree stressed that, despite "*[e]l monto de la adjudicación de $us14.751.349,- (CATORCE MILLONES SETECIENTOS CINCUENTA Y UN MIL TRESCIENTOS CUARENTA Y NUEVE 00/100 DÓLARES AMERICANOS), […] Allied Deals PLC se ha beneficiado además con la entrega ilegal de estaño metálico en circuito, concentrados, materiales y repuestos por más de $us16.000.000.- (DIECISEIS MILLONES 00/100 DÓLARES AMERICANOS) […]*."[208] As a result, the Reversion Decree concluded that "*la Fundición de Estaño Vinto fue entregada a*

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203 Letter from COMIBOL to Comsur (Sinchi Wayra) of 16 February 2005, **R-188**.

204 Letter from Comsur (Sinchi Wayra) to COMIBOL of 17 February 2005, **R-189** (Unofficial translation: "*Comsur S.A.'s shares have not, either partially or in their entiorety, been transferred to any individual or collective person*").

205 Request for written report from Senator Velásquez of 30 November 2006, **C-68**.

206 Eskdale, ¶ 41.

207 Supreme Decree No 29.026 of 7 February 2007, **C-20**.

208 Supreme Decree No 29.026 of 7 February 2007, **C-20**, recitals (Unofficial translation: "*[despite t]he adjudication amount of $us14,751,349,- (FOURTEEN MILLION SEVEN HUNDRED AND FIFTY-ONE THOUSAND THREE HUNDRED AND FORTY-NINE 00/100 AMERICAN DOLLARS) […] Allied Deals PLC has furthermore benefited from the illegal delivery of metallic tin in circuit, concentrate, materials and spare parts for more than $us16.000.000.- (SIXTEEN MILLION 00/100 AMERICAN DOLLARS)*").

la extinta empresa Allied Deals PLC (en situación de quiebra en su país de origen), ocasionando un gravísimo daño a la propiedad del Estado boliviano."[209]

160. Claimant complains about the fact that, on 9 February 2007, the Bolivian armed forces and police were present during the implementation of the Tin Smelter Reversion Decree.[210] However, Claimant glosses over the fact that their presence was in fact necessary to ensure the peaceful transfer of the Tin Smelter, in light of Sinchi Wayra's resistance to the reversion.

161. It is worth emphasizing that Claimant suffered no economic loss from the Tin Smelter reversion. It is our understanding that it cashed out a political risk insurance policy held by a syndicate of several international financial institutions headed by Lloyd's. This is why Glencore International's 2011 prospectus said that "*in 2007, the Bolivian government nationalised a smelter owned by a subsidiary of Glencore*" but "*no material losses were sustained and Glencore continues to do business in Bolivia.*"[211]

2.6.2 Bolivia Reverted The Antimony Smelter Due To Its Inactivity

162. Even though the legal regulation for the Privatization provided for "*la producción, las exportaciones, el empleo y la productividad*"[212] as its goals, it is undisputed that neither Comsur nor Glencore International sought to make the Antimony Smelter a productive asset.

163. Furthermore, as explained in Section 2.5.2 above, on 7 February 2009, Bolivia enacted a new Constitution. Pursuant to Article 396 thereof, the State is "*responsable de las riquezas mineralógicas que se encuentren en el suelo y subsuelo cualquiera sea su origen y su aplicación será regulada por la ley*" and "*ejercerá control y fiscalización en toda la cadena productiva minera*."[213] These new principles governing the activity of the State in the mining sector were also supported by the Government's development plan.[214]

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209 Supreme Decree No 29.026 of 7 February 2007, **C-20**, recitals (Unofficial translation: "*the Vinto Tin Smelter was delivered to the extinct company Allied Deals PLC (bankrupt in its country of origin), causing serious harm to the Bolivian State's property*").

210 Statement of Claim, ¶ 66.

211 Prospectus of Glencore International plc of 3 May 2011, **R-193**, p. 13.

212 Supreme Decree No. 23991, Art. 2(c) (Unofficial translation: "*production, exports, employment and productivity*").

213 Constitution of Bolivia of 7 February 2009, **C-95**, article 369 (Unofficial translation: "*responsible for the mineral resources located in the soil and sub-soil irrespective of their origin and its application will be regulated by law […and] will control and audit the entirety of the mining production chain*").

214 Supreme Decree No. 29272 of 12 September 2007, **R-169**, p. 160 ("*La intervención del Estado en el desarrollo minero será con facultades de control, fiscalización y promoción en todo el circuito productivo, desde la otorgación de concesiones mineras hasta la industrialización, restituyendo a COMIBOL su rol productivo y mejorando la participación del Estado en los beneficios de la actividad minera vía régimen impositivo. Asimismo, la intervención del Estado se manifestará en control y participación en la implementación de medidas que contribuyan a un mejor desempeño ambiental sostenible de los operadores mineros*") (Unofficial translation: "*The State's intervention in mining*

164. At the time the State started to implement these new policies, it had become evident that Glencore had no interest in reactivating production at the Antimony Smelter. Neither Comsur nor Sinchi Wayra sought to use this facility as anything other than a "*storage facility for the Colquiri Mine*"[215] tin concentrates. In 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.

165. As a matter of fact, the Assets were privatized to achieve economic growth for the State by way of private investment-driven increases in productivity. Indeed, per the Terms of Reference, incorporated into the contract,[216] for the privatization of the Antimony Smelter, "*[l]a Licitación tiene por objeto la transferencia a título oneroso de los Activos y Derechos de la fundición de antimonio de la Empresa Metalúrgica Vinto, en favor de una empresa especializada con capacidad económica, financiera y técnica, que permita el ingreso de capital, tecnología, prácticas comerciales y de gestión privada, posibilitando a la Fundición continuar la producción, constituyéndose en una fuente de generación de empleo y tributos, en apoyo a la actividad minera de explotación y concentración de antimonio en el país*."[217]

166. In sum, the inactivity of the Antimony Smelter under the privatization contract was unacceptable for the State. The resulting tension was compounded by the widely publicized and heavily criticized irregularities which the Privatization had been fraught with. As a result, on 1 May 2010, Bolivia issued a decree reverting the Antimony Smelter (the "**Antimony Smelter Reversion Decree**"), noting the asset's inactive status despite the commitments undertaken by the acquirer.[218]

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development shall be with the functions of control, audit and promotion in any production process, from the granting of mining concessions until industrialization, restoring to COMIBOL its productive role and improving the State's participation in the mining activity through the tax regime. Similarly, the State's intervention will reflect in the control of and participation in the implementation of measures that contribute to a sustainable environmental performance of mining operators").

215 Statement of Claim, ¶ 59.

216 Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**, 23(1), p. 21.

217 Terms of Reference for the Second Public Tender for the Antimony Smelter of 31 July 2000, **R-109**, article 1.4 (Unofficial translation: "*[t]he Bid's object is to transfer in exchange for consideration the Assets and Rights of the Antimony Smelter of the Vinto Metallurgical Company to a specialized company with economic, financial and technical capacity, that will allow the inflow of capital, technology, commercial practices and private management, permitting the Smelter to continue production, becoming a source for the generation of employment and tax, in support of the mining activity of exploitation and concentration of antimony in the country*").

218 Supreme Decree No 499 of 1 May 2010, **C-26**, recitals ("*Que en los últimos años se evidenció la inactividad productiva de la Planta Metalúrgica Vinto Antimonio, así como su desmantelamiento, no obstante haberse estipulado en el pliego de condiciones las obligaciones de invertir y fortalecer la Empresa Metalúrgica Vinto Antimonio con capacidad económica, financiera y técnica, que permita el ingreso de capital, tecnología, prácticas comerciales y de gestión privada, posibilitando a la Fundición continuar la producción, constituyéndose en una fuente de generación de empleo,*

167. Pursuant to this Decree, "*[s]e revierte al dominio del Estado Plurinacional de Bolivia la Planta de Vinto Antimonio, con todos sus activos actuales*,"[219] *i.e.*, including the tin concentrates stored at the Antimony Smelter (the "**Tin Stock**"). Consistent with this understanding of the Decree, on 14 May 2010, Glencore International sent a letter to the Bolivian President complaining about the "*nacionalización de la planta de antimonio,*"[220] without referring to the Tin Stock.

168. It was instead Colquiri, Glencore International's subsidiary, who sent several letters to the Bolivian authorities requesting the Tin Stock to be returned.[221] No further actions were taken in this regard by other Glencore International affiliates, nor were any legal remedies sought.

2.6.3 Due To The Social Crisis Created By Sinchi Wayra At The Colquiri Mine, The State Was Left With No Other Choice But To Revert The Mine Lease

169. Colquiri—now under Glencore International's control through Sinchi Wayra—mismanaged and aggravated the social conflicts at the Mine it inherited from Comsur (**Section 2.6.3.1**). This situation led to an unprecedented social conflict at the Mine in 2012 (**Section 2.6.3.2**). In order to solve the conflict created by Glencore—in particular, derived from the agreements it secured with the *cooperativistas*—the State had no choice but to negotiate with the Colquiri union leaders and the *cooperativistas* and to revert the Mine Lease (**Section 2.6.3.3**).

2.6.3.1 During The Time Glencore International Controlled The Colquiri Mine, The Tensions Between Cooperativistas And Workers Increased

170. Glencore International inherited the problems created by Comsur's mismanagement of the social conflicts at the Colquiri Mine, as explained in Section 2.5.1 above. These problems were not resolved in the following years. On the contrary, under Sinchi Wayra's administration, and in the new political context arising in Bolivia since 2003, the

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tributos y de externalidades, en apoyo a la actividad minera de explotación y concentración de antimonio en el país") (Unofficial translation: "*In recent years, the inactivity of the Metallurgical Company Vinto Antimonio became obvious, as well as its dismantling, notwithstanding that the terms of reference provided for the obligation to invest in and reinforce the Metallurgical Company Vinto Antimonio with economic, financial and technical capacity, that would allow the inflow of capital, technology, commercial practices and private management, permitting the Smelter to continue production, becoming a source for the generation of employment and tax, in support of the mining activity of exploitation and concentration of antimony in the country*").

219 Supreme Decree No 499 of 1 May 2010, **C-26**, article 1 (emphasis added) (Unofficial translation: "*[t]he Vinto Antimony Smelter, and all its assets, are reverted to the ownership of the Plurinational State of Bolivia*").

220 Letters from Glencore (Mr Mate and Mr Glasenberg) to the President of Bolivia (Mr Morales Ayma) and the Ministry of Mining (Mr Pimentel Castillo) of 14 May 2010, **C-27** (Unofficial translation: "*nationalization of the antimony smelter*").

221 Letter from Colquiri SA (Mr Capriles Tejada) to Ministry of Mining (Mr Pimentel Castillo) of 3 May 2010, **C-28**; Letter from Ministry of Mining (Mr Pimentel Castillo) to EMV (Mr Ramiro Villavicencio) of 5 May 2010, **C-29**.

cooperativistas' ambitions to take over new parts of the Mine gradually increased, whilst conflicts with the mine workers of the company worsened.

171. Claimant, based on Mr Eskdale's statement,[222] links the Reversion of the Mine Lease to alleged attempts of the *cooperativistas* to steal ore and tools from the Mine in April 2012.[223] Claimant even attempts to portray the *cooperativistas* as "*private groups of miners who carry out mining activities for their own benefit in the area*,"[224] with no relation to Sinchi Wayra's operation at the Mine. This characterization of the facts is inaccurate.

172. Contrary to what Claimant implies, "*[c]on Sinchi Wayra, la seguridad de la Mina decreció aún más y la aprobación del trabajo de los cooperativistas por parte de la empresa fue mayor. Esto causó que el descontento de los trabajadores se tornara, en algunos casos, violento, sobre todo al interior de la Mina, cuando los trabajadores y los cooperativistas se encontraban en la misma área. Los enfrentamientos entre trabajadores y cooperativistas se hicieron más y más frecuentes*."[225]

173. Colquiri, now controlled by Sinchi Wayra, had, since 2005, been aware of—and complied with—the agreements entered into by COMIBOL and the *cooperativas* for the official assignment of certain areas of operation at the Mine (with Comsur's approval).[226] In particular, Colquiri was aware of the existence of the October 2000 agreement, under which areas of the Mine had been assigned to the *Cooperativa 26 de Febrero* until 2018.[227]

174. Furthermore, documents from Colquiri confirm that the company was aware of the tensions between the *cooperativas* and the company's workers since 2005 and that this situation had

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222 Eskdale, ¶ 74 ("*On 1 April 2012, I was informed by Mr Capriles that a group of about one hundred people violently and unlawfully entered the Colquiri Mine*").

223 Statement of Claim, ¶ 87 ("*On 1 April 2012, a group of about one hundred local independent miners, known as cooperativistas, unlawfully entered the Colquiri Mine and stole minerals as well as mining equipment*").

224 Statement of Claim, ¶ 87.

225 Cachi, ¶ 24 (Unofficial translation: "*[u]nder Sinchi Wayra, security in the Mine diminished even more and the approval of the cooperativistas' work by the company was more significant. This led, in some cases, to the workers' discontent becoming violent, in particular within the Mine, when workers and cooperativistas met in the same area. Confrontations between workers and cooperativistas became more and more frequent*").

226 See Public Deed No. 003/2000, amendment to the lease agreement between COMIBOL and the *subsidiarios* of the Colquiri Mine of 5 January 2000, **R-93**; Public Deed No. 131/2000, lease agreement between Comibol and the *Cooperativa 26 de febrero* of 13 October 2000, **R-94**.

227 Public Deed No. 131/2000, lease agreement between Comibol and the *Cooperativa 26 de febrero* of 13 October 2000, **R-94**, clause 5 ("*A petición de la Cooperativa y en virtud de los planes y proyectos de explotación que tiene, COMIBOL resuelve ampliar el plazo de vigencia del contrato hasta veinte años computables a partir de la fecha de suscripción del contrato principal No. 50/98 de diez/cero siete/[98]*") (Unofficial translation: "*Pursuant to the Cooperativa's request and in light of its exploitation plans and projects, COMIBOL decides to extend the contract term to twenty years as of the date of execution of the main contract No. 50/98 of ten/zero seven/[98]*").

not prevented it from working with the *cooperativistas* and assigning them more areas at the Mine.

175. For instance, in its annual operations report for 2005, Colquiri mentioned that, during this year, "*se produjeron paros esporádicos de labores por parte de los trabajadores, por apoyo a disposiciones de sus entidades matrices y debido a amenazas de las que fueron objeto por parte de otros sectores en defensa de sus fuentes de trabajo, así como intervenciones y presiones de parte de las dos cooperativas que trabajan, una en la mina y, la otra en las colas antiguas*."[228] Similar situations took place in 2006, as shown by the annual operations report for that year.[229]

176. Sinchi Wayra did not request the State's intervention in order to alleviate the pressure exerted by the *cooperativas*. On the contrary, on 8 September 2006, Sinchi Wayra advised COMIBOL that "*la Compañía Minera Colquiri S.A. está negociando con cada una de las cooperativas afiliadas a [la Central de Cooperativas Mineras de Colquiri] acuerdos para asignarles áreas de trabajo en lugares que no interfieran el normal desenvolvimiento de las labores de producción de la empresa*."[230]

177. By 2008, the *Cooperativa 26 de Febrero* was authorized to operate in areas covering almost all of the surface of the Mine.

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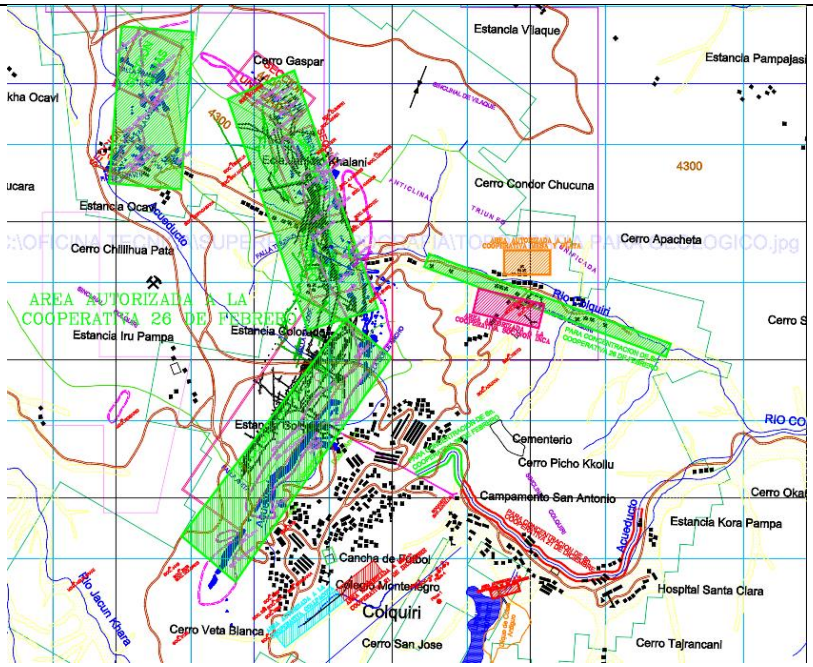
228 Colquiri S.A. Annual Report for 2005, November 2005, **R-194**, p. 1 (emphasis added) (Unofficial translation: "*work was occasionally stopped by the workers, in support of measures of their parent entities and due to threats received from other sectors in defense of their sources of work, as well as interventions and pressure from the two cooperatives which work, one in the mine and the other one at the old tailings dam*").

229 Colquiri S.A. Annual Report for 2006 of 27 November 2006, **R-195**, p.1 ("*Durante la gestión las relaciones laborales en la mina fueron razonables, produciéndose paros esporádicos de labores por parte de los trabajadores que afectaron la producción, por apoyo a disposiciones de sus entidades matrices y debido a amenazas de las que fueron objeto por parte de otros sectores en defensa de sus fuentes de trabajo, así como un conflicto con las cooperativas que trabajan, una en la mina y, la otra en las colas antiguas*") (emphasis added) (Unofficial translation: "*During the operations, working relations in the mine were reasonable. Work was occasionally stopped by the workers, in support of measures of their parent entities and due to threats received from other sectors in defense of their sources of work, as well as interventions and pressure from the two cooperatives which work, one in the mine and the other one at the old tailings dam. This affected production.*").

230 Letter fom Sinchi Wayra to COMIBOL of 8 September 2006, **R-196** (Unofficial translation: "*Compañía Minera Colquiri S.A. is negotiating with each of the cooperatives that are affiliated to [the Association of Mining Cooperatives of Colquiri] agreements to allocate to them working areas in locations which will not interfere with the normal production operations of the company*").



Plan of the Colquiri Mine as of 2008 – In green, areas in which the company authorized the presence of the *Cooperativa 26 de Febrero*.[231]

178. Internal Colquiri documents further confirm that Sinchi Wayra often yielded to the *cooperativas*' demands, even if this decision was not welcomed among the workers of the company. Mr Cachi recalls, in this regard, that, in or around 2008 "*y con el fin de ejercer presión sobre Sinchi Wayra para obtener nuevas áreas, nos tomamos la subestación eléctrica Elfeo que suministra energía a toda la población. Con ello, Sinchi Wayra accedió a darnos más niveles inferiores. Firmamos nuevos convenios con la empresa que nos permitieron llegar a trabajar en el nivel 285*."[232] Indeed, contemporary internal reports show that, in 2007 and 2008, *cooperativistas* from the *Cooperativa 26 de febrero* started working as deep as at level -285 with the approval of Colquiri.[233]

231 Plan of areas assigned by Sinchi Wayra to the *cooperativas* as of 2008, **R-197**.

232 Cachi, ¶ 25 (Unofficial translation: "*and with the aim of exerting pressure over Sinchi Wayra in order to obtain new areas, we took control of the Elfeo sub-station, which supplies energy to the entire population. As a result, Sinchi Wayra agreed to allocate to us additional lower levels. We signed further agreements with the company, allowing us to work at level 285*").

233 See, for instance, Colquiri internal report concerning ore bought and/or transported for the *Cooperativa 26 de Febrero* of 15 December 2007, **R-198**; Colquiri internal report concerning ore bought and/or transported for the *Cooperativa 26 de Febrero* of 21 April 2008, **R-199**; Colquiri internal report concerning ore bought and/or transported for the *Cooperativa 26 de Febrero* of 17 April 2007, **R-200**; Proof of payment for the transport of ore for the *Cooperativa 26 de Febrero* of 21 October 2007, **R-201**; Proof of payment for the transport of ore for the *Cooperativa 26 de Febrero* of 20 November 2007, **R-202**; Proof of payment for the transport of ore for the *Cooperativa 26 de Febrero* of 7 January 2008, **R-203**; Colquiri internal report concerning ore transported for the *Cooperativa 26 de Febrero* of 25 May 2008, **R-204**; Colquiri internal report concerning ore transported for the *Cooperativa 26 de Febrero* of 29 June 2008, **R-205**.

DETALLE DE TRANSPORTE DE MINERAL
COOPERATIVA 26 DE FEBRERO SECCION CHOJÑA
21 DE ABRIL DEL 2008

Item	Nivel	Contrato	Cabecilla	Sacos	Ton.	Costo Trans.(Bs)
1	-165	79	Silverio Mamani Garabito	79	4,74	123
2	-165	100	Ponciano Mamani Choque	33	1,98	51
3	165	53	Miguel Torrez A,	42	2,52	66
4	-285	26	Felix Huarachi	244	14,64	644
5	-285	5	Gualberto Mamani P,	29	1,74	77
6	-165	87	Rene Argollo Mamani	37	2,22	58
7	-285	15	Andrez Cachi	29	1,74	77
8	-285	62	Manuel Nina Lopez	57	3,42	150

Colquiri internal report of transportation of concentrates from the *Cooperativa 26 de Febrero*. In red, the levels at which the *cooperativistas* were working as of 2008[234]

179. Over the course of 2007, COMIBOL followed up with Colquiri on several requests made by the *cooperativas* to gain access to new areas of the Mine in order to "*incrementar volúmenes de productividad con sistema de explotación masiva de minerales de estaño y zinc*."[235] No alarm bells were rung at the time. Instead of properly alerting the authorities about the risks these agreements entailed, Colquiri simply informed in its annual operation reports for 2007 and 2008 that the company secured "*el apoyo a la Cooperativa 26 de Febrero para rehabilitar infraestructura independiente de extracción de minerales y la creación de incentivos para*

234 Colquiri internal report concerning ore bought and/or transported for the *Cooperativa 26 de Febrero* of 21 April 2008, **R-199**, p. 4.

235 Letter from COMIBOL to Colquiri of 4 June 2007, **R-206** ("*Mediante carta s/n de fecha 23/05/07, la Cooperativa Minera '26 de Febrero' Ltda. ha presentado a la Corporación Minera de Bolivia el Plan de Rehabilitación Cuadro Maestro – Rampa Incalacaya Sección Chojña, con la finalidad de incrementar volúmenes de productividad con sistema de explotación masiva de minerales de estaño y zinc, requiriendo para su implementación de mecanización materiales y equipamiento; asimismo, solicita una reunión conjunta entre COMIBOL, la Cia. Minera Colquiri y la citada cooperativa. En este sentido, tenemos a bien invitar a usted a la citada reunión que se realizará el día martes 5 del presente mes a horas 18:00 p.m. en dependencias de la Gerencia Técnica y de Proyectos, 4to piso de COMIBOL*") (Unofficial translation: "*By letter w/n of 23/05/07, the Mining Cooperative '26 de Febrero' Ltda. has presented to the Bolivian Mining Corporation the Rehabilitation Masterplan – Incalacaya Ramp Chojña Section, with the purpose of increasing production volumes using the system of massive exploitation of tin and zinc ore, requiring for its implementation machinery, materials and equipment; likewise, it requests a joint meeting between COMIBOL, Compañía Minera Colquiri and the aforementioned cooperative. In this sense, we invite you to this meeting that will take place on Tuesday the 5th day of this month at 6 p.m. at the premises of the Technical Management and Projects department, 4th floor of COMIBOL*"). See, also, Letter from COMIBOL to Colquiri of 3 September 2007, **R-207** ("*Los ex trabajadores de la Empresa Minera Colquiri han solicitado a la Corporación Minera de Bolivia una orden de cateo para el área denominada Socavón Inca, ubicada en la población civil de Colquiri. En el marco del contrato de arrendamiento que tenemos suscrito, nos permitimos consultar a usted si el indicado socavón pretendido por dicha organización de ex trabajadores no afectan las operaciones ni las instalaciones de la Compañía Minera Colquiri*") (Unofficial translation: "*Former workers of Empresa Minera Colquiri have requested from the Bolivian Mining Corporation a search warrant for the Inca tunnel area, located in the village of Colquiri. In the framework of the lease contract that we concluded, we query if the indicated tunnel requested by this organization of former workers does not affect the operations or the facilities of Compañía Minera Colquiri*").

concentrar su producción en el zinc"[236] and that "*las cooperativas mineras del sector siguen demandando a la empresa que se les entregue más áreas de trabajo*."[237]

180. Sinchi Wayra appeared to ignore the risks these agreements represented for the Mine operation, on the one hand, and the relations between the *cooperativistas* and the workers of the company, on the other hand. In Mr Mamani's words, "*[c]omo trabajadores, nunca vimos con buenos ojos este tipo de acuerdos ya que, con el conocimiento que los cooperativistas habían adquirido del interior de la Mina, sabíamos que se aprovecharían para robar mineral y materiales y hacerse a zonas que estaban siendo explotadas por la empresa*."[238] The evidence shows that this practice was not abandoned by Sinchi Wayra, even though, by the time Glencore International acquired the Mine Lease, such practice had already created long-lasting tensions between *cooperativistas* and mining workers.

181. In any event, if Sinchi Wayra allowed the presence of *cooperativistas* in the areas of the Mine Lease, it was also because it had an interest in working closely with them. In times of low international prices for tin, working with *cooperativistas* was more appealing than having a large payroll at the company. Unlike mining workers, *cooperativistas* "*no gozan de estabilidad laboral ni beneficios sociales*."[239]

182. That was precisely the case in 2009. Faced with a depressed international market for tin,[240] Colquiri attempted to lay off part of its employees while at the same time it negotiated a deal with the *Cooperativa 26 de Febrero* for the assignment of a deeper level of the Mine (-325).[241]

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236 Colquiri S.A. Annual Report for 2007 of 18 December 2007, **R-208**, p. 2 (Unofficial translation: "*support to Cooperativa 26 de Febrero to rehabilitate the infrastructure for independent mineral extraction and the creation of incentives to focus its production on zinc*").

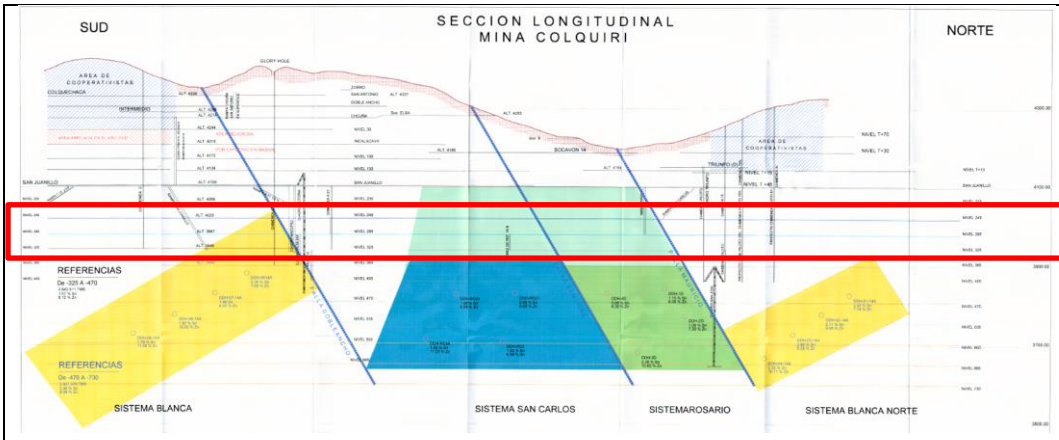
237 Colquiri S.A. Annual Report for 2008 of 22 January 2009, **R-209**, p. 2 (Unofficial translation: "*the mining cooperatives in the sector continue to request that the company award them more working areas*").

238 Mamani, ¶ 16 (Unofficial translation: "*[a]s workers, we never welcomed this type of agreements, because, in light of the knowledge that the cooperativistas had acquired of the interior of the Mine, we knew that they would take the opportunity to steal ore and equipment materials and enter areas that were being exploited by the company*").

239 Cachi, ¶ 9 (Unofficial translation: "*do not benefit from employment stability or social benefits*").

240 See Compass Lexecon Price Forecasts, **CLEX-30**, tab "Historical".

241 Public Deed No. 0215/2009, amendment to the lease agreement between COMIBOL and the *Cooperativa 26 de Febrero* of 21 October 2009, **R-210**, clause 3.



Cross section of the Mine.[242] In Red, inferior levels assigned by Sinchi Wayra to the *Cooperativa 26 de Febrero* in 2009

183. This situation sparked outrage and unrest among the members of the union workers. As Mr Mamani recalls, "*en el año 2009, realizamos movilizaciones masivas en Colquiri (impulsadas por el Sindicato de Trabajadores Mineros de Colquiri […]) para evitar la cooperativización de la Mina y exigir que la empresa nos garantizara estabilidad laboral*."[243] In view of Sinchi Wayra's plan to benefit the *cooperativas*, in January 2009, the *Federación de Sindicatos de Trabajadores Mineros de Bolivia* (the "**FSTMB**") threatened to "*expulsar a estas transnacionales y los trabajadores mineros tomaremos los yacimientos mineralógicos para nacionalizarlos con ayuda del Gobierno Central*."[244]

184. In parallel, the *cooperativas*—which, as discussed earlier, were strong political actors in the country since 2003—demanded more from a passive Sinchi Wayra. As Mr Cachi explains, "*[e]sta facilidad para obtener nuevas áreas de trabajo [facilitated by Sinchi Wayra] aumentó la ambición de los cooperativistas por acceder a áreas más atractivas en las que el trabajo era menos difícil*."[245]

242 Transversal section of the Colquiri Mine, **R-211**.

243 Mamani, ¶ 20 (Unofficial translation: "*in 2009 we carried out massive mobilizations in Colquiri (boosted by the [Colquiri Mining Union]) to prevent the cooperativization of the Mine and demand that the company guarantee our employment stability*").

244 Press release of the *Federación Sindical de Trabajadores Mineros de Bolivia* of 9 January 2009, **R-20** (Unofficial translation: "*expel these transnationals and us mining workers will take the ore deposits to nationalize them with the assistance of the Central Government*").

245 Cachi, ¶ 18 (Unofficial translations: "*[t]his ease in obtaining new working areas [facilitated by Sinchi Wayra] increased the cooperativistas' ambition to access more attractive areas in which work was less difficult*").

185. This situation was far from ideal in the eyes of Sinchi Wayra's workers, in particular since it practically amounted to the invasion of areas where the company was operating.[246] These takeover attempts resulted in even more violent confrontations between the workers and the *cooperativistas* over the course of 2010[247] and 2011. As Mr Cachi recalls:

> *Con el tiempo, los altercados violentos entre trabajadores, la empresa de seguridad y los cooperativistas aumentaron. Recuerdo que, a principios de 2011, tuvimos un enfrentamiento con el personal de seguridad y los ingenieros de la empresa. Cinco personas resultaron gravemente heridas. En otra ocasión, un conductor de una volqueta quiso atropellar a los cooperativistas que estaban saliendo de la Mina por la rampa blanca. Los cooperativistas agarraron al operador y lo querían dinamitar. El operador se liberó al explicarles que solo cumplía las órdenes de sus jefes.*[248]

186. In sum, under the administration of Sinchi Wayra, Colquiri's consistent and considerable leniency with the *cooperativas* over the years aggravated tensions with the mining workers and encouraged them to request and take over new areas at the Mine. At the same time, Colquiri's conduct progressively made operating the Mine considerably more difficult.

187. Encouraged, the *cooperativistas* decided to take over the Mine in 2012.

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246 Mamani, ¶ 22 ("*En resumen, la pasividad de la empresa, la ambición de los cooperativistas y el abandono al que fueron sometidos los trabajadores por parte de Sinchi Wayra hicieron que los ataques a nuestros compañeros aumentaran dramáticamente y las cooperativas se hicieran a áreas más importantes de la Mina. Así ocurrió, por ejemplo, hacia finales de 2011, cuando era frecuente encontrar cooperativistas juqeando en los niveles 405 hacia abajo (unos de los más profundos de la mina). Para el año 2012, ya había reportes de que los cooperativistas estaban extrayendo minerales en el nivel 535*") (Unofficial translation: "*In sum, the company's passiveness, the ambition of the cooperativistas and the neglect of the workers by Sinchi Wayra led to a dramatic increase in the attacks against our colleagues and allowed the cooperatives to reach more important areas in the Mine. This happened for example, in late 2011, when it was normal to find cooperativistas stealing at levels 405 and below (one of the deepest in the mine). By 2012, there were already reports that the cooperativistas were extracting ore at level 535*").

247 Colquiri annual operations report for 2010, **R-212**, p. 2 ("*En cuanto a la relación con la comunidad se aprecia un crecimiento poblacional por migración laboral y vegetativa de fuerza de trabajo local, que busca la actividad minera como 'alternativa' a las actividades agropecuarias tradicionales. Por tanto, existe presión sobre las operaciones mineras que se manifiestan en Solicitudes de áreas para laboreo minero, puestos de trabajo que están ocasionando invasiones de áreas y parajes no autorizados. Estos conflictos sociales a veces se confunden con los laborales propios de la empresa generando un clima de conflicto. Para enfrentar estas situaciones se desarrolla un método de trabajo en base al Relacionamiento Social - Institucional que ha permitido controlar estos problemas sociales y que deberá consolidarse 'en el futuro, dada la complejidad de los problemas sociales que se generan permanentemente*") (emphasis added) (Unofficial translation: "*Regarding the relation with the community, there is a notable increase in population due to the employment and natural migration of the local workforce, which seeks mining activity as an 'alternative' to traditional agricultural activities. As a result, there is pressure on mining operations, manifested in Requests for areas to carry out mining work, work stations that are generating incursions into non-authorized areas and sites. These social conflicts are sometimes confused with the employment conflicts of the company itself, thus generating a conflictual environment. To face these situations a working method is developed on the basis of Social–Institutional Relationships, which has allowed control over this social problem and that which will have to be consolidated in the future, given the complexity of the social problems that are permanently generated*").

248 Cachi, ¶ 30 (Unofficial translation: "*With time, the violent confrontations between workers, the security company and the cooperativistas increased. I recall that, in early 2011, we had a confrontation with the security staff and the company's engineers. As a result, five people were seriously injured. On another occasion, the driver of a dump truck tried to run over the cooperativistas who were exiting the mine through the white ramp. The cooperativistas grabbed the driver and were willing to blow him up. The driver was freed when he explained that he was just following orders from his superiors*").

2.6.3.2 The Violence Created By Glencore At Colquiri In 2012 Left The State With No Choice But To Revert The Mine Lease

188. The complex social conflict that Sinchi Wayra's operatorship aggravated throughout the years reached its pinnacle in mid-2012.

189. Between 1 and 3 April 2012, members of the *Cooperativa 26 de Febrero* entered the Colquiri Mine and, as had occurred on previous occasions, stole materials and ore from the areas where Colquiri was operating, and violently confronted some of the company's workers. This was neither unsurprising nor uncommon as, in Mr Cachi's words, "*[p]ara finales de 2011, los cooperativistas teníamos prácticamente el control de la Mina*."[249]

190. On 3 April 2012, and given that hundreds of *cooperativistas* had perpetrated acts of violence, Colquiri wrote to COMIBOL requesting the State's intervention.[250] Though Claimant seeks to suggest that the Bolivian Government would have been unresponsive, purportedly in light of Colquiri's rights under the Mine Lease,[251] it is Colquiri's own admission that "*[d]ichas perturbaciones al desenvolvimiento de la operación minera señalada, han sido atendidas en gran medida y hasta el momento por nuestra empresa*"[252] (that is, without involving the State's institutions by its own decision).

191. In that letter, Colquiri further requested that COMIBOL "*tome las medidas necesarias para mantener la pacifica posesión y el orden público en el distrito minero de Colquiri, tal como establece el contrato de arrendamiento*."[253] COMIBOL, however, was not in a position to provide a timely and satisfactory solution to Colquiri's demand at a time when the *Cooperativa 26 de Febrero*'s knowledge and control of the interior of the Mine had been increasing for years. Colquiri was asking COMIBOL to resolve a structural problem in a matter of days.

192. Sinchi Wayra's directors were aware that the incursions of the *cooperativas* within the Mine would not be an easy situation to resolve, as no course of action could please both the *cooperativistas* and Colquiri's workers. In fact, in the course of a meeting which took place

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249 Cachi, ¶ 31 (Unofficial translation: "*[b]y the end of 2011, we the cooperativistas practically controlled the Mine*").

250 Letter from Colquiri SA (Mr Capriles Tejada) to Comibol (Mr Córdova Eguivar) of 3 April 2012, **C-30**.

251 Statement of Claim, ¶ 88.

252 Letter from Colquiri SA (Mr Capriles Tejada) to Comibol (Mr Córdova Eguivar) of 3 April 2012, **C-30** (Unofficial translation: "*[s]uch disturbances to the ongoing mining operation indicated have been addressed so far and to a large extent by our company*").

253 Letter from Colquiri SA (Mr Capriles Tejada) to Comibol (Mr Córdova Eguivar) of 3 April 2012, **C-30** (Unofficial translation: "*adopt the necessary measures to maintain the peaceful possession and public order in the Colquiri mining district, as established in the lease agreement*").

on 22 May 2012 between Sinchi Wayra's management and several union representatives of Colquiri, "*[l]os sindicatos demanda[ron] que la empresa inicie acciones legales contra los jukus [i.e. the thieves] de Colquiri por el robo de minerales e implementos/insumos de trabajo, además del daño a las instalaciones productivas (indicamos [i.e. Sinchi Wayra] que esto generaría más conflictos con las cooperativas, pero ellos indican estar cansados de esta incertidumbre)*."[254]

193. That same day, COMIBOL officials met with Sinchi Wayra in order to advance further in the negotiations concerning the migration of Colquiri's rights to a joint venture scheme. In that meeting, COMIBOL officers advised that the proposed contract was sent to the entity's technical and administrative units in order to speed up its negotiation. They further informed Sinchi Wayra that it was likely that "*[Héctor] Cordova [COMIBOL's director] presionara [a Sinchi Wayra] para sacar una versión final hasta la próxima semana, que incorpore los comentarios de las Gerencias Técnica y Administrativa*."[255] Sinchi Wayra's internal reports on COMIBOL's intention to close this negotiation as soon as practical are thus dispositive of Claimant's assertion that "*the government […] suggested that Colquiri be excluded from the new contractual framework [and] such an exclusion meant nationalization*."[256]

194. On 30 May 2012, the situation escalated and spiralled out of control. As both Mr Cachi and Mr Mamani recall, approximately one thousand *cooperativistas* from the *Cooperativa 26 de Febrero* violently took control over the Colquiri Mine, which they accessed through the main amongst the old mouths of the Mine (Sanjuanillo) and other old mouths located near and around the village.

> *Nuestra ambición como cooperativistas por obtener la totalidad del control de la Mina fue creciendo y llegó a su punto máximo a mediados de 2012. Concretamente, el 30 de mayo de 2012, los cooperativistas de la Cooperativa 26 de Febrero decidimos tomar la Mina. Ese día, unos 1.200 cooperativistas ingresamos a la Mina por las bocaminas San Juanillo y El Triunfo. Los trabajadores de la Mina se opusieron a nuestra entrada, lo que ocasionó un enfrentamiento violento. Estos*

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254 Email from Glencore International (Mr Hartmann) to Glencore International (Mr Eskdale) and Sinchi Wayra (Mr Capriles) of 22 May 2012, **C-110**, p. 2 (emphasis added) (Unofficial translation: "*[t]he unions request[ed] that the company initiate legal action against jukus [i.e. the thieves] of Colquiri for the theft of ore and tools/work implements, in addition to damage caused to production units (we [i.e. Sinchi Wayra] indicated that this would generate more conflicts with the cooperatives but they indicated that they were tired of this uncertainty)*").

255 Email from Glencore International (Mr Hartmann) to Glencore International (Mr Eskdale) and Sinchi Wayra (Mr Capriles) of 22 May 2012, **C-110**, p. 3 (Unofficial translation: "*[Héctor] Cordova [COMIBOL's director] would pressure [Sinchi Wayra] to produce a final version by the following week, incorporating the comments of the Technical and Administrative Direction*").

256 Statement of Claim, ¶ 90.

> *enfrentamientos se prolongaron durante aproximadamente dos días y dejaron un saldo de más de 15 heridos*.[257]

195. The violence of the confrontation and the tragic result of 15 wounded[258] prompted a strong reaction from the company's workers, who organized a union general assembly that same day.[259] In letters sent to the Bolivian President, the Minister of Mines, and the Director of COMIBOL, the *Sindicato Mixto de Trabajadores Mineros de Colquiri* (the "**STMC**") advised the Government, *inter alia*, that:

> *Damos un plazo de 24 hrs. al gobierno central y al ministerio de minería para que dé la solución inmediata al problema ocurrido en Colquiri ya que este problema puede traer mayores consecuencias fatales a la familia minera en Colquiri.*
>
> *[D]e no tener una respuesta favorable hacia los trabajadores mineros asalariados nos veremos obligados a retomar nuestras fuentes de trabajo y de darse cualquier hecho lamentable ya sea con pérdidas humanas y materiales responsabilizaremos al gobierno actual y a los actores principales quienes promovieron el avasallamiento de nuestras fuentes de trabajo sin respetar nuestra constitución política del estado*.[260]

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257 Cachi, ¶¶ 32-33 (Unofficial translation: "*Our ambition as cooperativistas to obtain complete control over the Mine gradually increased and reached its peak in mid-2012. Specifically, on 30 May 2012, we the cooperativistas of Cooperativa 26 de Febrero decided to take control over the Mine. That day, some 1.200 cooperativistas entered the Mine through the San Juanillo and El Triunfo mine mouths. The Mine workers blocked our entrance, which led to a violent confrontation. Confrontations lasted during approximately two days and left more than 15 people wounded*"). See, also, Mamani, ¶ 25 ("*En la mañana del 30 de mayo de 2012, cuando nos encontrábamos trabajando en el interior de la Mina, fuimos alertados de que un gran número de cooperativistas (aproximadamente 1200) estaba ingresando por el sector El Triunfo (una antigua bocamina) y que otros se estaban dirigiendo al nivel de extracción de la Mina (que es la bocamina principal que queda en el nivel 165, conocido como Sanjuanillo). Los cooperativistas fueron muy violentos y nos atacaron con palos, piedras y dinamita, hiriendo a algunos de los compañeros que estaban trabajando en ese turno al interior de la mina*") (Unofficial translation: "*On the morning of 30 May 2012, while we were working in the interior of the Mine, we were alerted that a large number of cooperativistas (approximately 1.200) were entering through the El Triunfo sector (a former mine mouth) and that there were others who were going towards the extraction level of the Mine (which is the mouth at level 165, known as Sanjuanillo). The cooperativistas were very violent and attacked us with sticks, stones and dynamite, injuring some of our colleagues who were working during that shift inside the Mine*").

258 La Patria, *Cooperativistas toman mina en Colquiri y hieren a siete mineros*, press article of 31 May 2012, **R-21**.

259 Mamani, ¶ 26 ("*El 30 de mayo, los miembros del STMC [Sindicato de Trabajadores Mineros de Colquiri] nos reunimos en una asamblea general de emergencia y enviamos cartas al Presidente del Estado, al Ministro de Minería y Metalurgia y al Presidente de la COMIBOL pidiendo una solución que nos garantizara nuestras fuentes de trabajo*"). See, also, Press release from the *Federación Sindical de Trabajadores de Mineros de Bolivia* of 31 May 2012, **R-23** (Unofficial translation: "*On 30 May, we the members of the [Colquiri Mining Union] met at a general emergency assembly and sent letters to the President of the State, the Ministry of Mines and Metallurgy and the President of COMIBOL, requesting a solution to guarantee our work sources*").

260 Letters from the Sindicato Mixto de Trabajadores Mineros Colquiri to the President of Bolivia (Mr Morales), the Ministry of Mining (Mr Virreira), and Comibol (Mr Córdova) of 30 May 2012, **C-111** (Unofficial translation: "*We give a delay of 24h to the central government and the ministry of mines to provide an immediate solution to the problem occurring in Colquiri, given that this problem may bring major fatal consequences to the mining family in Colquiri. [A]bsent a favourable answer to the mining workers we will be forced to take control over our work sources and, should any unfortunate event occur, be it human or material losses, we will hold responsible the current government as well as the leading actors who fostered the subjugation of our work sources without respecting the political constitution of our State*").

196. The grave situation at Colquiri demanded urgent action from the Government. On 30 May 2012, police squads arrived in Colquiri,[261] and COMIBOL's President, Mr Héctor Córdova, took measures to prevent the commercialization of the *Cooperativa 26 de Febrero*'s production in the country.[262] The Government also sought to act as a mediator in the conflict between the *cooperativistas* and Colquiri workers, and to preserve Colquiri's rights over the Mine Lease. Claimant's contention that "*the government failed to intervene*"[263] is simply false.

197. On 3 June 2012, the Minister of Mines, the Minister of Labour, and COMIBOL officials met with the SMTC and the FSTMB. Given the historical and social importance of Colquiri in Bolivia's mining sector, the FSTMB had in fact convened a general assembly near Colquiri two days earlier.[264] By that time, the FSTMB had already decided to block the only road connecting Colquiri to the rest of the country, as a counter-measure against the *cooperativistas*.[265]

198. At the end of this meeting, the Government representatives and the union leaders executed minutes of understanding. Pursuant to this agreement, the Government and the unions would work together in order to "*ha[cer] respetar los contratos mineros con derechos*

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261 La Razón, *El Gobierno envía más policías a Colquiri para evitar conflicto*, press article of 1 June 2012, **R-213**.

262 Página Siete, *Gobierno impide salida de mineral de Colquiri*, press article of 1 June 2012, **R-214** ("*el Gobierno impide la salida de mineral de Colquiri para ser comercializado debido a la toma de la mina por el conflicto que existe entre mineros y cooperativistas, dió a conocer ayer el presidente ejecutivo de la [COMIBOL], en entrevista con radio ERBOL. La decisión se asumió el miércoles por la noche después de que el campamento de esa mina fue tomado por cooperativistas. También la energía eléctrica fue cortada en la zona para evitar que la maquinaria funcione*") (Unofficial translation: "*the Government is preventing Colquiri ore from being transferred to be sold due to the mine being taken over as a result of the existing conflict between miners and cooperativistas, stated the executive president of [COMIBOL] yesterday during an interview with radio ERBOL. The decision was made on Wednesday night after cooperativistas took control over the mine compound. Electricity was also cut in the area to prevent the machinery from functioning*").

263 Statement of Claim, ¶ 97.

264 Mamani, ¶ 28 ("*La toma de un yacimiento tan grande como Colquiri tuvo una repercusión en todo el sector minero nacional. Muy rápidamente, varios sindicatos y organizaciones productivas rechazaron la toma de la Mina Colquiri. Por esta misma razón, el 31 de mayo de 2012, la Federación Sindical de Trabajadores Mineros de Bolivia […], entidad que agrupa a los distintos sindicatos mineros del país, convocó a un ampliado nacional de emergencia en la localidad de Caracollo, a unos 39 kilómetros de la Mina, para discutir las acciones violentas de los cooperativistas*") (Unofficial translation: "*The takeover of a site as large as Colquiri had repercussions over the entire national mining sector. Rapidly, several unions and productive organizations rejected the takeover of the Colquiri Mine. For this same reason, on 31 May 2012, the [FSTMB], an entity formed by the different mining unions of the country, convened an emergency national meeting in the town of Caracollo, some 39 kilometers from the Mine, to discuss the violent actions of the cooperativistas*").

265 Mamani, ¶ 29 ("*Recuerdo que, aunque ninguno de los presentes creíamos conveniente un enfrentamiento violento con los cooperativistas, sí acordamos la necesidad de ejercer presión (incluso por la fuerza) para asegurar nuestras fuentes de trabajo. Por este motivo, y a partir de esta fecha, la FSTMB bloqueó las rutas de Caracollo a La Paz y Colquiri (la única vía de acceso a la Mina) y exigió la presencia de representantes del Gobierno Nacional*") (Unofficial translation: "*I recall that, although no one present thought that a violent confrontation with the cooperativistas was desirable, we did agree that it was necessary to put pressure (including by force) to ensure our work sources. For this reason, and from this date, FSTMB blocked the routes that lead from Caracollo to La Paz and Colquiri (the only way to access the Mine) and demanded the presence of representatives of the National Government*").

preconstituidos del distrito minero de Colquiri" as well as to "*proteger el ejercicio del trabajo y la estabilidad laboral*."[266] As Claimant admits,[267] following this meeting, the Government worked closely with Glencore and the unions in order to prepare a proposal that could satisfy all of the parties involved in the conflict.

199. On that same day, COMIBOL and officers from the Ministries of Mines and Labour held a meeting with the leaders of the *Cooperativa 26 de Febrero*. At this meeting, the Government first suggested to hand over the San Antonio vein to the *Cooperativa 26 de Febrero* to put an end to the conflict.[268] Over the following three days, in an attempt to solve the conflict, the Government sought Sinchi Wayra's and the unions' support to work on this proposal, and prepared up to 5 different offers which were then submitted to the *cooperativistas*.[269]

200. On 6 June 2012, the Minister of Mines made a last offer to the *Cooperativa 26 de Febrero*, on the basis of the workers'[270] and Sinchi Wayra's commitments.[271] The Government stated that, "*[e]n atención a las demandas planteadas y con el objetivo de coadyuvar en la solución de los problemas que nos atingen, adjunto para conocimiento y consideración las notas […] suscritas por el Presidente Ejecutivo [de Colquiri] Eduardo Capriles Tejada, donde se compromete a crear 200 puestos de trabajo, como también ceder la veta San Antonio a su cooperativa a través de COMIBOL*."[272] The Government further advised that Sinchi Wayra

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266 Minutes of understanding with the Sindicato de Trabajadores Mineros de Colquiri and the Federación Sindical de Trabajadores Mineros de Bolivia of 3 June 2012, **C-115** (Unofficial translation: "*ensure the observance of mining contracts including pre-existing rights in the mining district of Colquiri […and] protect work and employment stability*").

267 Statement of Claim, ¶ 101.

268 La Patria, *En suspenso acuerdo entre Gobierno y mineros sindicalizados y cooperativistas*, press article of 4 June 2012, **C-117**.

269 La Razón, *Minería hace 5 ofertas, pero aun no convence a los cooperativistas*, press article of 5 June 2012, **R-215**.

270 Mamani, ¶¶ 32-33 ("*Según lo que entendimos, el Gobierno estaba buscando el apoyo de la empresa Sinchi Wayra para entregar a los cooperativistas nuevas áreas en la Mina. Sin embargo, la prensa publicó que las conversaciones no habían avanzado porque los representantes de la cooperativa debían consultar la propuesta con sus bases. A pesar de lo anterior, y con el fin lograr una salida negociada al conflicto, los miembros del STMC aceptamos que Sinchi Wayra hiciera un nuevo ofrecimiento a los cooperativistas. El 5 de junio de 2012, la compañía minera Colquiri confirmó al Estado su intención de crear 200 nuevos puestos de trabajo en la compañía y ceder la veta San Antonio a la Cooperativa 26 de Febrero. Esta veta tiene un acceso a través de una rampa puesta en funcionamiento en 2007 por Sinchi Wayra y puede ser explotada comercialmente en los niveles 240 y 325.*") (Unofficial translation: "*From what we understood, the Government was seeking Sinchi Wayra's support to allocate new areas of the Mine to the cooperativistas. However, the press reported that discussions had not progressed because the representatives of the cooperative had to consult the proposal with their bases. This notwithstanding, and 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. On 5 June 2012, Compañía Minera Colquiri confirmed to the State its intention to create 200 new work positions in the company and to assign the San Antonio vein to the Cooperativa 26 de Febrero. This vein includes an access through a ramp commissioned in 2007 by Sinchi Wayra and can be commercially exploited at levels 240 and 325*").

271 Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Virreira) and Comibol (Mr Córdova) of 5 June 2012, **C-120**.

272 Letter from the Ministry of Mines to the Cooperativa 26 de Febrero of 6 June 2012, **R-216** (Unofficial translation: "*[r]egarding the requests submitted and with the aim of assisting in the resolution of issues that concern us, I attach, for your knowledge and consideration, the notes […] subscribed by the Executive President [of Colquiri] Eduardo*

"*expresa su disposición a otorgar a la Cooperativa 26 de Febrero un financiamiento de hasta US$ 1.000.000 […] más la ayuda técnica para la puesta en marcha de un ingenio*,"[273] and summoned their leaders to a meeting on that same day.

201. The Government's proposal, however, was not acceptable to the *cooperativistas*. Years of mismanagement of the Mine had made it reasonable for the *Cooperativa 26 de Febrero* to believe it could take over the most profitable areas of the Mine and even to expel the operator company.[274] Mr Cachi indeed recalls:

> *Cuando presentamos esta propuesta a las bases, hubo un rechazo casi generalizado. Además de que consideraban que la concentración de mineral en esta veta no era muy alta, su intención para ese entonces era tener acceso a las zonas con mayor reserva de mineral. Por ese motivo, el acuerdo para ceder la veta San Antonio fue rechazado por voto de los cooperativistas en Asamblea General*.[275]

202. Claimant contends that the *cooperativas* did not accept the Government's proposal because of the Government's "*lack of response to their demands*."[276] Such an assertion is both inaccurate and nonsensical.

203. *First*, as explained above, the demands by the *Cooperativa 26 de Febrero*—and the tensions it created with the workers of the company— were "*atendidas <u>en gran medida y hasta el momento</u> por nuestra empresa*", as Colquiri acknowledged.[277] If Glencore decided not to involve the Government in its relations with the *cooperativas* (and the treatment of their demands), it is the only party to be blamed for the "*lack of response to their demands*."[278]

Capriles Tejada, where he commits to create 200 working positions, as well as to assign the San Antonio vein to your cooperative through COMIBOL").

273 Letter from the Ministry of Mines to the Cooperativa 26 de Febrero of 6 June 2012, **R-216** (Unofficial translation: "*manifests its willingness to finance the Cooperativa 26 de Febrero up to US$ 1,000,000 […] in addition to technical assistance for the commissioning of a concentrate plant*").

274 La Patria, *Colquiri: Mineros suspenden labores y cooperativistas no aceptan veta*, press article of 5 June 2012, **C-118** ("*Entretanto, los trabajadores cooperativistas, que se reunieron en el distrito minero de Colquiri, determinaron no aceptar la oferta de acceder a la veta 'San Antonio' en su totalidad y continúan con su exigencia de 'sacar' a la empresa de aquella localidad minera*") (Unofficial translation: "*Meanwhile, the cooperativistas who held meetings in the mining district of Colquiri, decided not to accept the offer of the 'San Antonio' vein in its entirety and continue to require the company's 'exit' from the mining town*").

275 Cachi, ¶ 36 (Unofficial translation: "*When we presented this proposal [from the Government and the company] to the bases, it was largely refused. In addition to considering that the ore concentration in this vein [i.e., San Antonio] was not very high, their intention by then was to gain access to areas with major ore reserves. For this reason, the agreement to assign the San Antonio vein was refused by vote of the cooperativistas during a General Assembly*").

276 Statement of Claim, ¶ 98.

277 Letter from Colquiri SA (Mr Capriles Tejada) to Comibol (Mr Córdova Eguivar) of 3 April 2012, **C-30** (Unofficial translation: "*have been addressed so far and to a large extent by our company*").

278 Statement of Claim, ¶ 98.

204. *Second*, since the time Comsur operated the Mine, COMIBOL had followed up with Colquiri on the situation and agreements with the *cooperativas*[279] and had even sought to assign areas to the *cooperativistas* "*que no sea[n] siempre [en] Colquiri*."[280] However, the particular social context of Colquiri made such solution difficult (if not impossible) to achieve. As Mr Cachi explains, "*[e]n el caso de la Mina, los cooperativistas éramos los mismos habitantes de Colquiri que habíamos trabajado la Mina (ya sea como trabajadores de la empresa o subsidiarios) durante décadas. Por ello, no era extraño que algunas familias tuvieran cooperativistas y trabajadores viviendo conjuntamente de la Mina*."[281]

205. *Third*, Claimant admits that the *cooperativas* are a powerful and significant actor in Bolivian politics,[282] in particular since the events in 2003 which prompted Sánchez de Lozada's resignation and created the basis for a new political agenda in the country.[283] Given the constitutional[284] and legal[285] protection to which the *cooperativistas* are entitled, as well as the agreements they had entered into with COMIBOL, with both Sinchi Wayra's and Comsur's approval,[286] Claimant could not have reasonably expected that the Government simply expel

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279 See, for instance, Letter fom Sinchi Wayra to COMIBOL of 8 September 2006, **R-196**; Letter from COMIBOL to Colquiri of 4 June 2007, **R-206**; Letter from COMIBOL to Colquiri of 3 September 2007, **R-207**.

280 Internal Memorandum from COMIBOL to the Ministry of Mines of 23 January 2004, **R-152**, p. 4 (Unofficial translation: "*that are not always [in] Colquiri*").

281 Cachi, ¶ 15 (Unofficial translation: "*[i]n the case of the Mine, we the cooperativistas were the same inhabitants of Colquiri who had worked at the Mine (either as the company's employees or as subsidiarios) for decades. Therefore, it was not strange that some families had cooperativistas and mining employees living side by side off the Mine*").

282 Statement of Claim, ¶ 87.

283 See section 2.5.2 above.

284 Constitution of Bolivia of 7 February 2009, **C-95**, Article 351 (I) ("*El Estado, asumirá el control y la dirección sobre la exploración, explotación, industrialización, transporte y comercialización de los recursos naturales estratégicos a través de entidades públicas, cooperativas o comunitarias, las que podrán a su vez contratar a empresas privadas y constituir empresas mixtas*") (Unofficial translation: "*The State will assume control and direction over the exploration, exploitation, industrialization, transport and sale of strategic natural resources through public, cooperative or community entities, which at the same time, may contract with private companies and create public-private partnerships*").

285 Supreme Decree No. 29272 of 12 September 2007, **R-169**, p. 160 ("*El rol activo del Estado también se expresará en su función de protagonista y promotor de una actividad minera planificada, racional, inclusiva, moderna, sistematizada, y socialmente aceptable, en la que participen de manera armónica e integral el sector público, pueblos indígenas, originarios, comunidades campesinas y los otros subsectores: grande, mediano, chico y cooperativo. Además, por tratarse de un sector estratégico para el desarrollo nacional, el Estado brindará la seguridad necesaria para su desarrollo y expansión*") (Unofficial translation: "*The State's active role shall also be exercised through its function as a promoter and protagonist of a mining activity which is planned, rational, inclusive, modern, systemised and socially acceptable, in which may participate in a harminosed and wholesome manner the public sector, indigenous communities, rural communities and other subsectors: large, medium, small and cooperative. Furthermore, considering it is a strategic sector for the national development, the State will ensure the necessary security for its development and expansion*").

286 See Public Deed No. 003/2000, amendment to the lease agreement between COMIBOL and the *subsidiarios* of the Colquiri Mine of 5 January 2000, **R-93**; Public Deed No. 131/2000, lease agreement between Comibol and the *Cooperativa 26 de febrero* of 13 October 2000, **R-94**, clause 5 ("*A petición de la Cooperativa y en virtud de los planes y proyectos de explotación que tiene, COMIBOL resuelve ampliar el plazo de vigencia del contrato hasta veinte años computables a partir de la fecha de suscripción del contrato principal No. 50/98 de diez/cero siete/[98]*") (Unofficial translation: "*Pursuant to the Cooperativa's request and in light of its exploitation plans and projects, COMIBOL decides to extend the contract term to twenty years as of the date of execution of the main contract No. 50/98 of ten/zero*

them upon demand. This was all the more so given the grave social conflict created by Colquiri—first under Comsur's then under Sinchi Wayra's administration—over the years.[287]

206. What is more, retaking control of mining assets such as the Mine by the force had proven utterly counterproductive in the past. In fact, in 1996, during Sánchez de Lozada's first tenure, the military intervened at the Amayapampa project (in the Potosí Department) in order to protect the mining concessions of the Canadian company Da Capo Resources. This action was prompted by the uprising of the mining workers and local communities of the region against that private investor. However, this course of action only provoked a violent confrontation with the local population, which led to the tragic result of 7 people dead, about a hundred wounded, and the suspension of the project.[288]

207. In the meantime, the rejection of the Government's proposals by the *cooperativistas* caused great consternation among the workers and their union leaders. As Mr Mamani explains, the presence of Colquiri at the Mine, in the circumstances, did not make sense any longer, and the reversion of the Mine Lease became an option the workers were keen to consider.

> *Como vimos que las negociaciones no avanzaban y que las ambiciones de la Cooperativa 26 de Febrero no eran otras sino hacerse a la totalidad de la mina, nos pareció que no tenía sentido que la Empresa Sinchi Wayra siguiera a cargo de su operación. Por esta misma razón, y para evitar un enfrentamiento violento con los cooperativistas, acordamos con el Gobierno explorar la posibilidad de revertir la operación de la Mina a la COMIBOL. Esta misma solución ha sido aplicada en otros proyectos mineros en Bolivia exitosamente, como fue el caso del Distrito Minero de Huanuni. En dicho distrito, la nacionalización de los derechos de explotación del yacimiento a favor de la COMIBOL en 2006 solucionó un grave conflicto desatado por las ambiciones de los cooperativistas de hacerse al 100% de la mina.*[289]

208. Likewise, it no longer made sense for the Government to try to involve Glencore in the negotiations. On the one hand, the *cooperativistas* were adamant regarding the expulsion of

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seven/[98]"); COMIBOL internal report on Cooperativa minera 26 de febrero Ltda. of 25 April 2012, **R-217**; Public Deed No. 0215/2009, amendment to the lease agreement between COMIBOL and the *Cooperativa 26 de Febrero* of 21 October 2009, **R-210**.

287 See Section 2.6.3.1 above.

288 See, for instance, La Razón, *Amayapampa, un proyecto 'fantasma'* , press article of 4 April 2016, **R-218**; La Patria, *La masacre de "Navidad", Amayapampa y Capasirca*, press article of 19 March 2014, **R-219**.

289 Mamani, ¶ 36 (Unofficial translation: "*Since we saw that negotiations were not progressing and that the ambitions of the Cooperativa 26 de Febrero were none other than to acquire the entirety of the mine, we thought it made no sense for Sinchi Wayra to remain in charge of operating it. For this reason, and in order to avoid a violent confrontation with the cooperativistas, we agreed with the Government to explore the possibility to revert the Mine's operation to COMIBOL. This same solution has been successfully applied in other mining projects in Bolivia, as was the case for the Huanuni Mining District. In this district, the nationalization of exploitation rights over the deposit in favour of COMIBOL in 2006 resolved an important conflict which had been triggered by the cooperativistas' ambitions to take control over 100 % of the mine*").

the company from the Mine and were ready to keep negotiating only "*con los trabajadores asalariados y las autoridades del rubro*."[290] On the other hand, the mining workers had lost all confidence in Glencore's ability to solve the problem and to guarantee their jobs at the Mine. In Mr Mamani's words, the workers advised the directors of Sinchi Wayra "*nuestras preocupaciones (sobre todo, por la forma como la empresa había venido cediendo y entregando áreas de la Mina desde hacía mucho tiempo a los cooperativistas) y que en esos momentos críticos no solamente se estaba jugando la estabilidad laboral de nuestros trabajadores, sino el futuro mismo de la Mina. Para nosotros, ya era claro que Sinchi Wayra había perdido el control de la Mina y la confianza de sus propios trabajadores*."[291]

209. On 7 June 2012—after the Government had discussed in La Paz the option of reverting the Mine with both the workers[292] and the *cooperativistas*[293]—the Colquiri workers and the villagers of Colquiri convened a meeting in a square only 2 km away from the main mouth of the Mine (still under control of the *cooperativistas*). This meeting quickly evolved into a great general open council (*Gran Cabildo*) where the social conflict at Colquiri was to be discussed.[294] Persuaded by the magnitude of this event, a significant portion of the

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290 La Patria, *Colquiri: Mineros suspenden labores y cooperativistas no aceptan veta*, press article of 5 June 2012, **C-118** (Unofficial translation: "*with the employees and the authorities of the sector*").

291 Mamani, ¶ 37 (Unofficial translation: "*our concerns (in particular, regarding the manner in which the company had been assigning and relinquishing areas of the Mine gradually and for a long time) and that during those critical moments, the employment stability of our workers as well as the future of the Mine itself were at stake. In our opinion, there was no doubt that Sinchi Wayra had lost control over the Mine and the trust of its own workers*").

292 La Patria, *Gobierno plantea nacionalizar Colquiri para poner fin a conflicto minero*, press article of 6 June 2012, **R-221** ("*El Gobierno planteó ayer la nacionalización de la mina Colquiri, operada por la empresa privada Sinchi Wayra, para poner fin al conflicto minero que se suscitó desde el pasado miércoles 30 de mayo cuando los trabajadores de la cooperativa minera '26 de Febrero' tomaron el yacimiento*") (Unofficial translation: "*The Government proposed yesterday the nationalization of the Colquiri mine, operated by the private company Sinchi Wayra, in order to put an end to the mining conflict commenced last Wednesday 30 May when the workers of the cooperativa minera '26 de Febrero' took control over the deposit*").

293 La Razón, *Virreira y cooperativa discuten ampliación de áreas de trabajo*, press article of 8 June 2012, **R-26** ("*El miércoles [i.e., 6 June 2012], Virreira reiteró la propuesta a la cooperativa de 'rescindir el contrato de arrendamiento' con la compañía privada para que la administración de la mina Colquiri pase a manos de la Corporación Minera de Bolivia (Comibol), previo "acuerdo común" entre los cooperativistas y los trabajadores asalariados. Álvaro ratificó que los cooperativistas 'repudian' la medida porque 'en nuestro sector trabajamos sin restricción de edad y sólo algunos serían incorporados a los asalariados'*") (Unofficial translation: "*On Wednesday [i.e., 6 June 2012], Virreira reiterated the proposal to the cooperative to 'terminate the lease agreement' with the private company so that the administration of the Colquiri mine be reverted to the Bolivian Mining Corporation (Comibol), following a 'common agreement' between cooperativistas and employees. Álvaro backed the idea that the cooperativistas 'repudiate' the measure because 'in our sector we work without age restrictions and only some would be incorporated as employees'*").

294 Mamani, ¶ 39 ("*Entretanto, los miembros del STMC y la FSTMB nos desplazamos nuevamente hasta la población de Colquiri, donde iniciamos una reunión en Cabildo con una masiva participación de los pobladores e instituciones vivas del poblado (juntas vecinales, autoridades indígenas originarias, gremios, transportistas, etc.). Nuestra reunión se instaló en la Plaza 6 de Agosto, a unos 2km de la bocamina Sanjuanillo, donde las bases de la Cooperativa 26 de Febrero se encontraban reunidas con la presencia de algunos dirigentes que querían desvirtuar la propuesta de nacionalización.*") (Unofficial translation: "*Meanwhile, we the members of STMC and FSTMB travelled again to the village of Colquiri, where we initiated a Council meeting attended by a great number of the village population and central institutions of the village (neighbourhood council, authorities of indigineous communities, guilds, transporters, etc.) Our meeting was set up in the Plaza 6 de Agosto, some 2 km from the Sanjuanillo mine mouth, where the bases of*

cooperativistas decided to take part in the *Gran Cabildo* in order to decide on the future of the Mine. Mr Cachi reminds the reasons that led to this decision:

> *Cuando este cabildo fue convocado, algunos de los cooperativistas que estábamos en Asamblea General en la bocamina Sanjuanillo (un 40%) decidimos abandonar la Asamblea para unirnos al cabildo. En el cabildo, los trabajadores criticaron a la empresa Sinchi Wayra por su manejo de las relaciones entre los trabajadores y los cooperativistas. Además, criticaban a Sinchi Wayra por hacernos enfrentar entre hermanos. Por estos motivos, el cabildo aprobó la nacionalización de la Mina al ser ésta la única alternativa. Algunos de los cooperativistas estaban de acuerdo con esta propuesta. Eso se debía a que, si el Estado retomaba el control de la Mina, podríamos volver a trabajar en mejores condiciones (como en la época en que COMIBOL administró la Mina). Nuestro objetivo era ingresar a la nómina de trabajadores de la Mina y acceder a sus beneficios sociales*.[295]

210. In fact, the Government addressed to this *Gran Cabildo* the same proposal that it had been discussing with the parties in conflict in La Paz. In addition to reverting the Mine Lease, the Government suggested to hire the *cooperativistas* as COMIBOL employees.[296] This, as Mr Cachi explains, represented a substantial improvement for their working conditions.[297]

211. At the end of this *Gran Cabildo*, the *cooperativistas*, the workers of Colquiri and the villagers favoured the reversion of the Mine Lease.[298]

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the Cooperativa 26 de Febrero were assembled, together with some leaders who wanted to subvert the nationalisation proposal.").

295 Cachi, ¶¶ 38-39 (Unofficial translation: "*When this council was convened, some of us, the cooperativistas who were in the General Assembly at the Sanjuanillo mine mouth (around 40%), decided to abandon the Assembly to join the council. In the council, the workers criticised Sinchi Wayra for its management of relations between workers and cooperativistas. Furthermore, they criticized Sinchi Wayra for making us fight between brothers. For these reasons, the council approved the nationalisation of the Mine, as only alternative. Some of the cooperativistas agreed with this proposal. This was due to the fact that if the State recovered control over the Mine, we would be able to work under better conditions (as when COMIBOL administered the Mine). Our objective was to join the Mine's employee ranks and have access to their social benefits*)". See, also, Video Bolivia, *Enfrentamiento en Mina Colquiri. Hay Heridos*, June 2012 (Video), **R-222** ("*Al momento nos indican que los cooperativistas estarían divididos, ya que algunos de ellos habrían decidido ser parte de lo que es los mineros asalariados*") (Unofficial translation: "*Presently they indicate that the cooperativistas would be divided, since some of them would have decided to join the mining employees*").

296 Proposal from the Government to the *Cabildo* of Colquiri, **R-27** ("*Esta reversión supone varios compromisos del Estado (COMIBOL) para cumplir con los trabajadores actuales y nuevos en Colquiri. Estos compromisos son los siguientes: mantener los puestos de trabajo de todos y cada uno de los trabajadores, mantener sus niveles salariales, mantener y respetar sus conquistas sociales y laborales, incorporar a los ex cooperativistas a la planilla de la COMIBOL, dar a COMIBOL el capital operativo y dar a COMIBOL el capital de inversión para el desarrollo de la mina*") (Unofficial translation: "*This reversion implies several commitments by the State (COMIBOL) towards current and new employees in Colquiri. These commitments are the following: maintain the work positions of each and every one of the employees, maintain their salaries, maintain and respect their social and employment achievements, incorporate the former cooperativistas into the workforce of COMIBOL, provide COMIBOL with operational capital and provide COMIBOL with investment capital to develop the mine*").

297 Cachi, ¶ 51.

298 Operative vote of the *Gran Cabildo de Colquiri* of 7 June 2012, **R-17**; La Patria, *Mineros asalariados y cooperativistas aceptan rescisión de contrato en Colquiri*, press article of 8 June 2012, **R-223** ("*mineros asalariados y cooperativistas determinaron […] aceptar la rescisión del contrato de arrendamiento de Colquiri […] para evitar enfrentamientos por la explotación de minerales y demanda de fuentes de empleo […].Ese pronunciamiento surgió un día después que el Gobierno pidió a ambos sectores un 'acuerdo social' para terminar con el conflicto que desataron los cooperativistas, el 30 de mayo reciente, cuando tomaron esa mina en demanda de nuevas áreas de explotación*") (Unofficial translation:

212. Glencore—who was aware of the efforts to settle the dispute undertaken by the Government[299] and the probable outcome of the *Gran Cabildo*— decided to capitalize on the divisions among the *cooperativistas*. In particular, on 7 June 2012, the same day the *Gran Cabildo* was taking place at Colquiri, Glencore decided to take advantage that the *Federación Nacional de Cooperativas Mineras* ("**FENCOMIN**") actively opposed the reversion, and convened a meeting in La Paz with a fraction of the members of the *Cooperativa 26 de Febrero* that opposed the reversion. Glencore also secured the presence of a lower rank official from the Ministry of Mines in this meeting (who was not very familiar with the negotiations) in order to give the appearance of governmental support.

213. On 7 June 2012, being fully aware of the wide support in favour of the reversion of the Mine (as Mr Eksdale confirms,)[300] Glencore International, through Sinchi Wayra and Colquiri, executed in La Paz an agreement in order to assign to the *cooperativas* the Rosario vein at the Mine (the "**Rosario Agreement**").[301]

214. In sum, contrary to Claimant's contention, it was Sinchi Wayra who engaged in "*inconsistent*"[302] agreements when faced with the opposition of its own employees and a significant part of the *cooperativistas*.

"*mining employees and cooperativistas determined […] to accept the termination of the Colquiri lease agreement […] to prevent confrontations due to ore exploitation and the demand for work sources […]. This statement intervened one day after the Government requested from both sectors a 'social agreement' to end the conflict triggered by the cooperativistas on 30 May when they took control over that mine, requesting additional exploitation areas*").

299 See, in particular, Mamani, ¶ 37 ("*Los abogados de Bolivia me indican que la Demandante sostiene que la empresa Sinchi Wayra no estaba al tanto de todas estas conversaciones entre el STMC, la FSTMB y el Estado que condujeron al gobierno a contemplar la nacionalización. Me sorprende tal afirmación. La empresa Sinchi Wayra no solamente sabía que estábamos sentados en la mesa con el Gobierno, sino que estaba informada de la propuesta que nos hizo el gobierno. Recuerdo que, alrededor del 5 de junio de 2012, justo después de la reunión donde consideramos la nacionalización, recibimos una llamada desde el exterior del presidente de Sinchi Wayra, quien me indicó que debíamos rechazar las propuestas del gobierno y que la empresa privada tenía las posibilidades de garantizarnos nuestras fuentes de trabajo*") (Unofficial translation: "*Counsel for Bolivia informs me that Claimant contends that Sinchi Wayra was not aware of all those conversations between STMC, FSTMB and the State, which led the government to contemplate the nationalization. I am surprised by such a statement. Sinchi Wayra was not only aware that we were sat at the table with the Government but was also informed of the proposal that the government made us. I recall that around 5 June 2012, just after the meeting where we considered the nationalization, we received an external call from the president of Sinchi Wayra, who indicated that we had to refuse the government's proposals and that the private company had the ability to guarantee our work sources*").

300 Eskdale, ¶ 91 ("*On or around 6 June 2012, the Minister of Mining proposed the nationalization of the Colquiri Mine. The union workers, although initially opposed to nationalization, now favored the proposal since they were eager to regain access to the mine and avoid more violent confrontation as well as additional days out of work*").

301 Agreement between Colquiri SA, Fedecomin, Fencomin, Central Local de Cooperativas Mineras de Colquiri, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, and Cooperativa 26 de Febrero, **C-35**.

302 Statement of Claim, ¶¶ 11; 106.

215. Glencore's actions created significant unrest among the mining workers and *cooperativistas* at Colquiri and escalated the conflict to new and unprecedented levels of violence. As Mr Mamani recalls:

> *[E]l 8 de junio de 2012, descubrimos que la empresa Sinchi Wayra había negociado en La Paz un acuerdo para entregar a varias cooperativas la veta Rosario a cambio de levantar la toma de la Mina. Este acuerdo generó un desconcierto generalizado entre los miembros del sindicato y confirmó nuestras sospechas de que, si la Mina seguía en manos de la empresa privada, nada iba a asegurar nuestras fuentes de trabajo. Por estos motivos, los miembros del STMC y la FSTMB decidimos tomarnos por la fuerza el yacimiento minero para expulsar a los cooperativistas que aún estaban congregados en la bocamina Sanjuanillo. Esto provocó un grave enfrentamiento violento que duró varias horas (hasta cerca de la medianoche). Esta situación ratificó el deseo de los miembros del sindicato y de la población de Colquiri de que el Estado retomase el control sobre de la Mina.*[303]

216. Blockades, public demonstrations in Oruro[304] and violence between the workers and *cooperativistas* ensued as a consequence of the Rosario Agreement. While the Government had first tried to reach a compromise assigning the Rosario vein to the *cooperativistas* in the following days,[305] this was not acceptable for the mining unions. Conversely, nothing less than the entire Rosario vein appeared acceptable for the *cooperativistas* favourable to the Rosario Agreement. Glencore's actions had thus led the Government to an insurmountable impasse.[306]

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303 Mamani, ¶¶ 41-42 (emphasis added) (Unofficial translation: "*[O]n 8 June 2012, we discovered that Sinchi Wayra had negotiated in La Paz an agreement to assign the Rosario vein to several cooperatives in exchange for lifting the takeover of the Mine. This agreement generated generalized confusion amongst the union members and confirmed our suspicion that if the Mine remained under the private company's control, nothing would ensure our work sources. For these reasons, we the members of the STMC and the FSTMB decided to take control over the mining deposit by force in order to expel the cooperativistas that were still congregated at the Sanjuanillo mine mouth. This caused a violent confrontation that lasted various hours (almost until midnight). This situation confirmed the will of the union members and of the population of Colquiri for the State to recover control over the Mine*"). See, also, Cachi, ¶¶ 43-44 ("*En vista de lo anterior, luego de que se conoció la firma del acuerdo para ceder la veta Rosario, los trabajadores de la empresa anunciaron que se tomarían la Mina por la fuerza. Los cooperativistas que estábamos en Colquiri reiteramos nuestro respaldo. Esto desató un conflicto violento entre, por un lado, los trabajadores de la Mina y la facción de los cooperativistas que exigíamos la nacionalización y, por el otro, la otra facción de cooperativistas que querían el control de la veta Rosario*") (Unofficial translation: "*In light of the foregoing, after the conclusion of the agreement to assign the Rosario vein became known, the company's workers announced that they would take control over the Mine by force. The cooperativistas who were in Colquiri reiterated our support. This triggered a violent conflict between, on the one hand, the Mine workers and the cooperativistas faction requesting the nationalization, and on the other hand, the cooperativistas faction wanting to take control over the Rosario vein*").

304 See, for instance, La Patria, *Marcha de cooperativistas provoca destrozos en propiedad privada*, press article of 12 June 2012, **C-130**.

305 See Minutes of Agreement among Fencomin, Fedecomin, Central Local de Cooperativas Mineras de Colquiri, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, Cooperativa 26 de Febrero, The Ministry of Mining and COMIBOL, **C-129**.

306 Romero, ¶ 23.

217. On 13 June 2012, around a thousand mining workers blocked routes[307] and requested from the Government a clear statement, in light of the contradictory information published by the press following the Rosario Agreement.[308] The miners' protest quickly evolved into a violent confrontation during 14 and 15 June 2012.[309] These events required again the intervention of the Government as a mediator in order to definitely resolve the conflict created by Glencore.

2.6.3.3 In Order To Resolve The Violent Conflict Caused By The Rosario Agreement, The Government Negotiated With The Cooperativistas And The Union Leaders

218. On 17 June 2017, following the violent confrontation with the *cooperativistas* at Colquiri, the company's mining workers sent a letter to the Bolivian Vice-President, ratifying their intention to honour the *Gran Cabildo* resolution. In their letter, the union leaders requested (i) a decree ordering the reversion of the Mine Lease, and (ii) measures against "*el grupo minoritario que quedó en la coop. 26 de febrero*,"[310] which was attempting to forcibly implement the Rosario Agreement. The Government responded to this request by convening a meeting between the parties in La Paz.

219. As Minister Carlos Romero, witness for Bolivia explains, the violent confrontations between the *cooperativistas* and workers from Colquiri in June 2012 changed the nature of the conflict in the eyes of the State. While, up until then, the Government was facing a *mining* conflict, the outcome and the magnitude of the final violent confrontation could turn it into a *social*

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307 *Mineros de Colquiri bloquean conani exigiendo la emisión del D.S. de Nacionalización*, Video (2012), **R-224**.

308 La Patria, Mineros bloquean Conani exigiendo nacionalizar el 100% de mina Colquiri, *press article* of 13 June 2012, **C-134** ("*Según el secretario general del Sindicato de Trabajadores Mineros de Colquiri, Severino Estallani, no está clara la figura de la nacionalización de la mina, pues se pretende revertir para el Estado una parte del yacimiento y ceder otra a los cooperativistas que también estaban movilizados. Desde las 15:00 horas de ayer los mineros, que permanecían en vigilia en Conani desde el viernes pasado con bloqueos esporádicos, decidieron obstruir permanentemente la carretera, hasta que se efectúe una reunión con el vicepresidente del Estado Plurinacional de Bolivia, Álvaro García Linera para que se nacionalice toda la mina*") (Unofficial translation: "*According to the secretary general of the Colquiri Mining Union, Severino Estallani, the option to nationalise the mine is not clear, since the intention is to revert to the State part of the deposit and assign another part to the cooperativistas who were also mobilised. Since yesterday at 15:00 the mining workers, who had been keeping watch in Conani since last Friday with sporadic blockades, decided to block the highway permanently, until a meeting is convened with the vicepresident of the Plurinational State of Bolivia, Álvaro García Linera, to nationalise the entire mine*").

309 La Prensa, *Colquiri se convierte en un campo de batalla*, press article of 15 June 2012, **C-142** ("*Mineros asalariados y afiliados a la cooperativa 26 de Febrero se enfrentaron ayer con dinamita y palos por el control de la mina Colquiri, mientras el Gobierno volvió a convocarlos para dialogar en procura de encontrar una solución al conflicto que ya lleva dos semanas. La llegada de la noche y la explosión de cachorros de dinamita generaron zozobra entre los pobladores de Colquiri, quienes pedían entre sollozos la llegada de efectivos policiales y la pacificación de la zona, que está ubicada en la provincia Inquisivi, del departamento de La Paz*") (Unofficial translation: "*Mining employees and affiliates to the cooperativa 26 de Febrero clashed yesterday, [using] dynamite and sticks, over control of the Colquiri mine, while the Government again summoned them to discuss with a viewt to find a solution to the conflict that has already lasted two weeks. Nightfall and the explosion of dynamite sticks generated anxiety amongst Colquiri's population, who requested, sobbing, the arrival of police forces and the appeasement of the area, located in the province of Inquisivi, in the department of La Paz*").

310 Letter from the *Sindicato Mixto de Trabajadores Mineros de Colquiri* to the Vicepresident of the Plurinational State of Bolivia of 17 June 2012, **R-28** (Unofficial translation: "*the minority group that remained in the coop. 26 de febrero*").

one. For this reason, the negotiations were henceforth led by the Government Ministry (and Minister Romero) and not by the mining authorities.[311]

220. The meeting requested by the Government eventually took place on 19 June 2012 in the premises of the Government Ministry. After a long and difficult discussion, the parties reached an agreement pursuant to which:

a. the State would "*recuperar las áreas mineras otorgadas en contrato de arrendamiento a la Compañía Minera Colquiri S.A. para beneficio de la población boliviana en su conjunto y de Colquiri en particular*";

b. a significant portion of "*[l]a veta Rosario en forma vertical queda en poder de la Cooperativa 26 de Febrero Ltda […]*" in exchange for the rest of areas of the Mine in which this *cooperativa* was operating; and

c. measures against the stealing of ore and materials at the Mine would be implemented.[312]

221. The text of the agreement also stressed that "*[l]a viabilización de estos acuerdos exige a ambas partes la deposición de actitudes de confrontación y la inmediata pacificación del Distrito Minero de Colquiri*."[313]

222. The agreement executed under the aegis of the Government Ministry laid the foundation for the reversion of the Mining Lease. On 20 June 2012, the Government issued Supreme Decree No. 1.264 (the "**Mine Lease Reversion Decree**"),[314] pursuant to which the Mine Lease was

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311 Romero, ¶ 11 ("*La intervención del Ministerio de Gobierno fue necesaria puesto que, en los primeros días de junio, se produjo una grave confrontación violenta en la Mina (los medios de comunicación reportaron varios heridos y detonaciones de dinamita en la población de Colquiri). La gravedad de los enfrentamientos hizo que, para el Gobierno, el conflicto cambiara de naturaleza. Ya no se trataba simplemente de una disputa minera (lo que justificaba la intervención del Ministerio de Minería y Metalurgia y COMIBOL) sino, más bien, de un conflicto social que requería acciones urgentes y la intervención del Ministerio de Gobierno en el marco de sus competencias*") (Unofficial translation: "*The intervention of the Ministry of Government was necessary given that during the first days of June, a serious confrontation took place in the Mine (the media reported several injured people and dynamite detonations in the village of Colquiri). The severity of the confrontations implied, in the eyes of the Government, that the conflict had changed in nature. It was no longer a mining dispute (which justified the intervention of the Ministry of Mines and Metallurgy and COMIBOL) but rather a social conflict that required urgent actions and the intervention of the Ministry of Government, within the framework of its attributions*").

312 Agreement between the Government of Bolivia, COB, Fencomin, FEDECOMIN-LP, FSTMB, Central de Cooperativas de Colquiri, and Sindicato Mixto de Trabajadores Mineros de Colquiri of 19 June 2012, **R-18** (Unofficial translation: "[The State would] *recover the mining areas leased to Compañía Minera Colquiri S.A. for the benefit of the Bolivian population in its entirety and of Colquiri in particular' […] '[A significant part of t]he Rosario vein in vertical form remains under the control of the Cooperativa 26 de Febrero Ltda*'").

313 Agreement between the Government of Bolivia, COB, Fencomin, FEDECOMIN-LP, FSTMB, Central de Cooperativas de Colquiri, and Sindicato Mixto de Trabajadores Mineros de Colquiri of 19 June 2012, **R-18** (Unofficial translation: "*[t]he viability of these agreements requires that both parties abandon all conflictual attitude and the immediate appeasement of the Mining District of Colquiri*").

314 Supreme Decree No 1.264 of 20 June 2012, **C-39**.

reverted to the State. As noted by Minister Romero, the Mine Lease Reversion Decree granted legal recognition to the agreements the Government had reached with *cooperativistas* and mine workers the day before.[315]

223. Even though it was a favourable solution to the conflict, the Mine Lease Reversion Decree and the agreement which prompted it were not entirely satisfactory for the parties. In fact, given "*la determinación de los representantes de los cooperativistas de no ceder la veta Rosario*"[316] (a consequence of the Rosario Agreement negotiated by Glencore), the Government had to face a new confrontation between the *cooperativistas* and the COMIBOL workers. The actions of Sinchi Wayra were still an obstacle to the resolution of the social conflict, even after the Reversion of the Mine. As Minister Romero recalls:

> *Poco tiempo después de suscribir el Acta de Acuerdo en junio de 2012, y de la promulgación del Decreto Supremo de Reversión, se dieron nuevos enfrentamientos entre cooperativistas y trabajadores de la Empresa Minera Colquiri (ahora controlada por COMIBOL). Según estos reportes, y a pesar de lo negociado en junio de 2012, los trabajadores seguían disconformes en que la veta Rosario -la más atractiva de la Mina- estuviese casi en su totalidad en manos de los cooperativistas. Los cooperativistas, por su parte, continuaban expresando que tenían derecho a la referida veta, por el acuerdo obtenido con Sinchi Wayra y que además existía un acuerdo firmado con los trabajadores con visto bueno del Estado […].*
>
> *Las tensiones volvieron a degenerar rápidamente en actos violentos en septiembre de 2012, lo que hizo necesaria nuevamente la intervención del Ministerio a mi cargo.*[317]

224. In fact, after the Government delineated the areas of the Rosario vein assigned to the *Cooperativa 26 de Febrero*,[318] the *cooperativistas* alleged that the Government was not following the agreements underlying the Mine Lease Reversion Decree. As a result, they

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315 Romero, ¶ 18.

316 Mamani, ¶ 44 (Unofficial translation: "*the determination of the cooperativistas' representatives not to give up the Rosario vein*").

317 Romero, ¶¶ 19-21 (Unofficial translation: "*Shortly after we concluded the minutes of agreement in June 2012 and that the Reversion Supreme Decree was enacted, new confrontations between cooperativistas and employees of Empresa Minera Colquiri (now controlled by COMIBOL) took place. Following these reports, and despite the June 2012 negotiations, workers were still not satisfied with the fact that almost the totality of the Rosario vein, the most attractive in the Mine, was under the cooperativistas' control. As for the cooperativistas, they continued to contend that they were entitled to that vein pursuant to the agreement signed with Sinchi Wayra and that furthermore, there was an agreement signed with the workers that had the State's green light […]. Tensions rapidly degenerated again in violent acts in September 2012, and this required again the intervention of the Ministry under my responsibility*").

318 Supreme Decree No. 1.337 of 31 August 2012, **R-30**.

announced massive demonstrations in La Paz, while the unions of Colquiri declared a general strike at the Mine.[319]

225. Over the following days, both *cooperativistas* and union members from around the country arrived in La Paz. In the meantime, the Government tried to reach an agreement that could avoid violent confrontations such as those of June 2012.[320]

226. On 18 September 2012, during the protest (which quickly turned violent[321]), "*[u]n minero murió y otros nueve resultaron heridos cuando trabajadores de cooperativas privadas lanzaron […] dinamita en La Paz contra la sede de la Federación Sindical de Trabajadores Mineros de Bolivia (Fstmb) donde se encontraban los mineros asalariados de la empresa Colquiri, con los que se disputan la veta Rosario.*"[322] As Minister Romero recalls, these serious events forced a new negotiation.[323]

227. The Government then worked on a new partition of the Rosario vein that could satisfy the interests of both the *cooperativistas* and the workers of Colquiri (now under COMIBOL's administration). In Minister Romero's words, "*[d]adas las expectativas que había creado Sinchi Wayra en los cooperativistas, fue muy difícil que accedieran a un punto medio que no implicara algo distinto a cederles el cien por ciento de la veta Rosario […]. Luego de arduas negociaciones en los días finales de septiembre, y sobre la base de planos de las áreas de la veta Rosario y de la Mina, finalmente logramos acordar una nueva división de la veta Rosario satisfactoria para las partes enfrentadas*."[324]

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319 América Economía, *Se agudiza la tensión entre mineros asalariados y cooperativistas en Colquiri*, press article of 16 September 2012, **R-225** ("*De no resolverse el problema desde este lunes ingresaremos en una huelga masiva en La Paz", anunció Edwin Rosales, secretario de Relaciones del Sindicato de Trabajadores de la Empresa Minera Colquiri (EMC). Esto fue ratificado desde ese distrito por Orlando Gutiérrez, secretario de Conflictos de la misma organización. En el otro frente, Segundino Fernández, delegado del Comité de Autodefensa de los Cooperativistas Mineros, anunció que "este martes 120.000 mineros cooperativistas" tomarán las calles de La Paz para protestar por "el incumplimiento y la falta de solución del Gobierno a este conflicto minero*") (Unofficial translation: "*If the problem is not resolved, as of this Monday we will go on a massive strike in La Paz', announced Edwin Rosales, secretary of [public] relations of the Sindicato de Trabajadores de la Empresa Minera Colquiri (EMC). This was confirmed from that district by Orlando Gutiérrez, secretary of conflicts of the same organisation. On the other side, Segundino Fernández, delegate for the Committee of Self-defense of the Mining Cooperativistas, announced that 'this Tuesday 120.000 mining cooperativistas' will protest in the streets of La Paz against the 'non-compliance and the absence of a solution provided by the Government to this mining conflict'*").

320 Los Tiempos, *Colquiri aún dialoga y denuncian más tomas*, press article of 6 September 2012, **R-226**.

321 Cooperativistas atacan sede de la FTSMB, video of September 2012, **R-227**.

322 La Patria, *Guerra minera por posesión de yacimientos en Colquiri*, press article of 19 September 2012, **R-228** (Unofficial translation: "*[o]ne miner died and another nine were injured when workers of private cooperativas launched […] dynamite in La Paz at the headquarters of the Federación Sindical de Trabajadores Mineros de Bolivia (Fstmb) where the mining employees of Colquiri, with whom they are clashing over the Rosario vein, were located*").

323 Romero, ¶ 25. See, also, El Día, *Baja la tensión en el conflicto de Colquiri*, press article of 27 September 2012, **R-229**.

324 Romero, ¶¶ 23-25 (Unofficial translation: "*[g]iven the expectations created by Sinchi Wayra on the part of the cooperativistas, it was very difficult for them to agree to an intermediate solution which would imply anything other*

228. On 30 September 2012, the Government announced that a new agreement had been reached regarding the Rosario vein. This new agreement provided for a new partition of the Rosario vein.[325] On 3 October 2012, as was the case with the Mine Lease Reversion Decree, the government gave this new agreement legal standing through Supreme Decree 1.368 of 2012.[326]

229. In sum, and as both Mr Mamani and Mr Cachi confirm,[327] the Government's actions in 2012 effectively put an end to the serious social conflict created by Colquiri, under Sinchi Wayra's administration. As discussed below,[328] since the Mine passed under the operatorship of COMIBOL, neither tensions nor violence of the magnitude of the events in 2012 have resurfaced. This has been the case even though a part of the Mine remains under the control of the *cooperativistas*.

2.7 Bolivia Has Negotiated With Glencore International In Good Faith

230. Claimant contends that Bolivia has "*acted in bad faith*"[329] and that "*Bolivia was not intent on actually reaching an agreement*"[330] with Glencore International over the course of the negotiations that followed the reversion of the Assets (the "**Negotiations**"). Claimant's portrayal of the Negotiations is inaccurate and goes against Glencore International's confidentiality obligations agreed therewith.

231. *First*, it bears reminding that Claimant did not partake in the Negotiations. The Swiss company Glencore International was the party negotiating with the State in the Negotiations for almost a decade. In fact:

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than to assign them one hundred per cent of the Rosario vein […]. After difficult negotiations during the final days of September, and on the basis of plans of the areas of the Rosario vein and the Mine, we finally reached an agreement to divide the Rosario vein that was satisfactory to both parties in conflict").

325 Jornada, *El fin del conflicto minero de Colquiri se traducirá en Decreto Supremo*, press article of 1 October 2012, **R-230**.

326 Supreme Decree No. 1.368 of 3 October 2012, **R-32**.

327 Mamani, ¶ 47; Cachi, ¶¶ 50-51.

328 See section 2.8.1 *infra*.

329 Statement of Claim, ¶ 222.

330 Statement of Claim, ¶ 116.

a. On 22 February 2007, after Bolivia issued the Tin Smelter Reversion Decree,[331] Glencore International sent a letter to the President of the State protesting such measure. Negotiations with Glencore International ensued.[332]

b. On 14 May 2010, after Bolivia issued the Antimony Smelter Reversion Decree,[333] Glencore International again sent a letter to the President of the State complaining about this measure. In this letter, Glencore noted the good faith of the Bolivian State in the negotiations concerning the Tin Smelter (mentioning that "*en él se avanzó mucho y falta poco para lograr un acuerdo amistoso definitivo, libre de presiones y litigios*"[334]). Negotiations with Glencore International, as opposed to Claimant, ensued.

c. On 27 June 2012, after Bolivia issued the Mine Lease Reversion Decree,[335] Glencore International sent a letter to the President of the State complaining about this measure. Negotiations with Glencore International, as opposed to Claimant, ensued.[336]

232. *Second*, to accuse Bolivia of bad faith in the Negotiations simply goes against reason. Had Glencore truly believed that negotiating with Bolivia was futile, it would have not carried out the Negotiations with the State:

a. For almost 10 years following the issuance of the Tin Smelter Reversion Decree;

b. Over 7 years following the issuance of the Antimony Smelter Reversion Decree; and

c. Over 5 years following the issuance of the Mine Lease Reversion Decree.

233. *Third*, contrary to Bolivia, Claimant has acted in procedural bad faith by revealing details of the Negotiations that are clearly protected by confidentiality agreements.

234. On the one hand, on 6 October 2008, representatives of Sinchi Wayra and Bolivia met and executed minutes laying out the framework of the negotiations following the Tin Smelter Reversion Decree. The provisions of this agreement would cover negotiations concerning

331 Supreme Decree No 29.026 of 7 February 2007, **C-20**.

332 Letter from Freshfields Bruckhaus Deringer (Mr Blackaby) to Ministry of the Presidency (Mr Quintana Taborga) of 4 April 2007, **C-23**.

333 Supreme Decree No 499 of 1 May 2010, **C-26**.

334 Letters from Glencore (Mr Mate and Mr Glasenberg) to the President of Bolivia (Mr Morales Ayma) and the Ministry of Mining (Mr Pimentel Castillo) of 14 May 2010, **C-27** (Unofficial translation: "*major progress was made and little remains to be done in order to reach an amicable and final agreement, free of pressure and disputes*").

335 Supreme Decree No 1.264 of 20 June 2012, **C-39**.

336 Letter from Glencore International PLC (Mr Capriles) to the Minister of Mining (Mr Virreira) of 3 July 2012, **C-145**.

"*Proyecto Mina Bolívar, Porco, Colquiri, y Vinto Estaño y Antimonio*."[337] As regards of confidentiality, Sinchi Wayra and the State further agreed the following:

> *Se acuerda que ninguna de las Partes podrá difundir, hacer uso de la información generada durante el proceso de negociación, ante cualquier instancia judicial o extra judicial de la República o cualquier otro país o tribunal de arbitraje internacional o jurisdiccional.*
>
> *Las Partes dejan expresa constancia que en caso de que la información llegara a ser presentada ante cualquier foro de arbitraje o tribunal jurisdiccional, nacional o extranjero, no se le reconocerá mérito alguno a dichos antecedentes en el proceso, aún en el caso que sea presentada por terceros*.[338]

235. On the other hand, Glencore International confirmed on several occasions that the content, discussions and proposals of the Negotiations would remain confidential and would not be submitted to any international tribunal. Indeed, Glencore advised Bolivia that its participation in any meeting concerning the Assets "*está sujeta al entendimiento acordado de que toda discusión e información intercambiada entre las Partes (Glencore y Bolivia) será mantenida en estricta confidencialidad y no podrá ser utilizada en ningún ámbito o foro, sea judicial o arbitral, relacionado con la solución de controversias o demandas sobre inversiones o semejantes*."[339]

236. Notwithstanding this clear commitment, Claimant (and Mr Eksdale) have disclosed confidential information regarding the negotiations with Bolivia in these proceedings (in particular, concerning the offers made by the State in compensation for the Tin Smelter).

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337 Minutes of First Meeting of Negotiations between Bolivia and Sinchi Wayra S.A of 6 October 2008, **R-231**.

338 Minutes of First Meeting of Negotiations between Bolivia and Sinchi Wayra S.A of 6 October 2008, **R-231**, section (c) (Unofficial translation: "*It is agreed that the Parties will not diffuse, make use of the information generated during the negotiating process, before any judicial or extrajudicial instance of the Republic or of any other country or international arbitration or jurisdictional tribunal. The Parties attest that if this information is presented before any arbitration forum or jurisdictional tribunal, national or foreign, no legal force will be attached to this background information in the process, even if presented by third parties*").

339 Letter from Glencore International (Mr Eskdale) to the Ministry of Mining (Mr Navarro) attaching a letter to the Office of the Attorney General (Mr Menacho) of 28 July 2015, **C-151**. See also, Letter from Glencore International (Mr Eskdale) to the Minister of Mining (Mr Navarro) of 12 August 2015, **C-152** ("*Tal asistencia está sujeta al entendimiento acordado de que toda discusión e información intercambiada entre las Partes (Glencore y Bolivia) será mantenida en estricta confidencialidad y no podrá ser utilizada en ningún ámbito o foro, sea judicial o arbitral, relacionado con la solución de controversias o demandas sobre inversiones o semejantes*"); Letter from Glencore International to the Minister of Mines of 18 September 2015, **R-232** ("*Tal asistencia está sujeta al entendimiento acordado de que toda discusión e información intercambiada entre las Partes (Glencore y Bolivia) será mantenida en estricta confidencialidad y no podrá ser utilizada en ningún ámbito o foro, sea judicial o arbitral, relacionado con la solución de controversias o demandas sobre inversiones o semejantes*"); Letter from Glencore International (Mr Eskdale) to the Attorney General (Mr Arce) of 30 September 2015, **C-154** ("*Tal asistencia está sujeta al entendimiento acordado de que toda discusión e información intercambiada entre las Partes (Glencore y Bolivia) será mantenida en estricta confidencialidad y no podrá ser utilizada en ningún ámbito o foro, sea judicial o arbitral, relacionado con la solución de controversias o demandas sobre inversiones o semejantes*") (Unofficial translation: "*Such assistance is subjected to the agreed understanding that every discussion and information exchanged between the Parties (Glencore and Bolivia) shall be kept strictly confidential and shall not be used in any field or forum, be it judicial or arbitral, related to the resolution of disputes or claims over investments or similar*").

237. Bolivia 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.

238. In any event, Bolivia confirms that, as described above, the State negotiated in good faith with Glencore International for almost 10 years. As Mr Eskdale confirms,[340] over the course of these Negotiations, Bolivia made several offers and engaged in wilful attempts to resolve the present dispute.

2.8 The State Made Significant Investments After The Reversion Of The Smelters And The Reversion Of The Mine Lease

239. Following the reversion of the Assets, the State made significant investments in the Tin Smelter (**Section 2.8.1**). Likewise, the State has invested in the Mine and worked closely with COMIBOL employees and the *cooperativistas* in order to prevent events like the ones that led to the Reversion (**Section 2.8.2**).

2.8.1 In Order To Increase Their Capacity, The State Made Large Investments At The Tin Smelter

240. After years of private operation with no substantial investments in the Tin Smelter, the State had to lay out a new strategy in order to modernize and ensure the viability of this asset. As Eng Villavicencio explains, this strategy required a significant financial effort, which has been successfully carried out in recent years.[341]

241. The State has invested around US$ 39 million in the Tin Smelter for the acquisition of a vertical pit furnace for processing tin concentrates (the "**Ausmelt Furnace**"), in addition to 3 to US$ 4 million on sustaining investment.[342] In Eng Villavicencio's words, this state-of-the-art equipment was instrumental in order to expand production of the Tin Smelter and to improve the performance of the State Company EMV.[343]

340 Eskdale, ¶ 116.

341 Villavicencio, ¶ 44.

342 Villavicencio, ¶ 53.

343 Villavicencio, ¶¶ 47; 58.

New Ausmelt Furnace at Vinto[344]	  *Vista lado este del Edificio Ausmelt, donde se aprecian las torres de enfriamiento de agua de refrigeración.* *Colada de metal, Horno Ausmelt.*

2.8.2 The State Has Invested In The Colquiri Mine And Managed To Solve The Social Crisis Created With The Mining Cooperatives

242. Following the events of September 2012, Bolivia carried out significant investments in the Mine and made significant efforts to prevent conflicts, thereby managing to solve the social crisis between cooperatives and mining workers.

243. In fact, the State Company, *Empresa Minera Colquiri*, under COMIBOL's control, has undertaken extensive exploration programmes and investments (the most important being the construction of a new concentrator plant and the refurbishing of the ramp at the Blanca vein.) These investments represent approximately US$ 75.8 and US$ 11.5 million respectively.[345] As a result, Colquiri's tin production levels increased from 1.072,29 metric tons in 2012 to 4.230,95 metric tons of tin concentrates in 2016.[346]

244. In parallel, Colquiri has made significant efforts in order to prevent serious social conflicts similar the ones that took place under Sinchi Wayra's administration. This was possible, in large part, due to the fact that COMIBOL offered the *cooperativistas* the possibility to join the Mine's workforce under the same employment conditions as those granted to other

344 Villavicencio, ¶ 50.

345 Colquiri Annual Operations Report for 2017, **R-233**, pp. 40-43.

346 Colquiri Annual Operations Report for 2017, **R-233**, p. 49.

employees[347] and to the fact that ambitious social responsibility plans were put in place by the State company.[348]

245. In fact, the majority of Colquiri's employees are currently former *cooperativistas*. As mentioned in a recent Colquiri report, "*[l]a nacionalización atinada por parte del Estado Boliviano, ha dado paso a la generación de más de 800 nuevos empleos directos con trabajo digno, se tiene más de 5.000 asegurados y beneficiarios que gozan de seguridad social a corto plazo con calidad y calidez, convirtiendo al Seguro Delegado de la Empresa Minera Colquiri como un verdadero Seguro Social modelo*."[349]

3. THE LAW APPLICABLE TO THE DISPUTE

246. Although Claimant would largely restrict the law applied in this dispute to nothing more than the Treaty, a wider range of norms are both relevant and applicable in this arbitration.

247. Because the Treaty does not specify the applicable law, Article 35(1) of the UNCITRAL Rules controls the issue. It provides, in this case, that "*the arbitral tribunal shall apply the law which it determines to be appropriate.*"[350] The appropriate law to apply includes the Treaty, but also international human rights treaties and Bolivian law.

248. Despite the Treaty's lack of an applicable law provision, Claimant attempts to assert that the Treaty largely displaces any other legal norms. As Claimant argues, "*[t]he application of the substantive provisions of the Treaty, as lex specialis, is incontestable.*"[351]

249. But this assertion is fundamentally misconceived. The principle of *lex specialis* applies when it applies and not otherwise. Simply asserting that the Treaty applies as *lex specialis* cannot substitute for analyzing whether it satisfies the legal requirements for *lex specialis*. In

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347 Mamani, ¶ 47 ("*A pesar de que hubo serios enfrentamientos posteriores en 2012, las tensiones entre los cooperativistas y los trabajadores de la Mina fueron reduciéndose paulatinamente gracias a las medidas adoptadas por el Gobierno. Esto se debió, en gran parte, a que la COMIBOL contrató a todos los cooperativistas que quisieron, de manera voluntaria, cambiar de régimen y convertirse en trabajadores regulares de la Mina (como lo prometió el Gobierno durante las negociaciones*") (emphasis added) (Unofficial translation: "*[a]lthough there were subsequent serious confrontations in 2012, tensions between cooperativistas and the Mine workers progressively decreased due to the measures adopted by the Government. This was due, to a large extent, to the fact that COMIBOL hired all the cooperativistas who voluntarily wanted, to change regime and become regular workers of the Mine (as promised by the Government during the negotiations*)". See, also, Cachi, ¶ 50.

348 Empresa Minera Colquiri, "Minería Responsable y Sustentable", 2017, **R-234**, p. 8.

349 Empresa Minera Colquiri, "Minería Responsable y Sustentable", 2017, **R-234**, p. 2 (emphasis added) (Unofficial translation: "*the nationalization carried out by the Bolivian State has generated more than 800 new direct and decent work positions. More than 5,000 are insured and benefit from social insurance in the short term with quality and warmth, thus transforming the Delegated Insurance of Empresa Minera Colquiri into a model Social Insurance*").

350 UNCITRAL Arbitration Rules, **CLA-94**, Art. 35(1).

351 Statement of Claim, ¶ 120.

particular, a treaty applies as *lex specialis* only when it addresses the same subject matter as another rule of international law and does so with more specificity. This was the conclusion of Prof. Koskenniemi in his authoritative study of legal fragmentation: "*if a matter is being regulated by a general standard as well as a more specific rule, then the latter should take precedence over the former.*"[352]

250. In the present dispute, the Treaty provides the legal basis for Claimant's claims, nothing more. Like most investment treaties, it does not address any substantive legal issues except the general legal protections to which an investor is entitled. Thus, legal rules and principles that address matters other than legal protections for investors do not regulate the same matter as the Treaty. They cannot be displaced by the Treaty standards.

251. At points, Claimant seems to admit as much. It asserts that "*[t]he Treaty is to be supplemented by other rules of international law since, as the Vienna Convention provides, treaties are 'governed by international law' and must be interpreted in the light of 'any relevant rules of international law applicable.'*"[353]

252. Bolivia agrees that the Treaty must be interpreted in light of other applicable rules of international law. These rules include other treaties to which Bolivia is a party, including treaties governing human rights. Thus, the Treaty provisions cannot displace, and are limited by, Bolivia's obligations to respect and protect human rights under, *inter alia*, the International Covenant for Civil and Political Rights and the American Convention on Human Rights.[354]

253. Apart from international law, Bolivian law also applies to the dispute because that law defines the legal rights to the Assets that were held in Bolivia. It is a fundamental assumption of investment law that domestic law creates the property and contractual rights that are subject to international protections. Zachary Douglas explains that "*[t]he law applicable to an issue relating to the existence or scope of property rights comprising the investment is the municipal*

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352 United Nations International Law Commission, *Fragmentation of International Law: difficulties arising from the diversification and expansion of international law* of 13 April 2006, **RLA-1**, ¶ 56.

353 Statement of Claim, ¶ 121.

354 International Covenant on Civil and Political Rights of 16 December 1966, **RLA-2**; American Convention on Human Rights of 22 November 1969, **RLA-3**.

law of the host state, including its rules of private international law."[355] Recent tribunals, like *Vestey Group*[356] and *Emmis*,[357] reiterate this view.

254. Thus, the Tribunal must not narrowly focus on the Treaty provisions, but also employ other applicable norms from international law and Bolivian law that limited these provisions.

4. THE CLAIMS ARE NOT SUBJECT TO JURISDICTION AND ARE INADMISSIBLE

255. In its Statement of Claim, Claimant does no more than make summary allegations that its claims are admissible and subject to this Tribunal's jurisdiction.[358] It builds these allegations on the flimsiest of evidentiary foundations, declining to submit into evidence the very contracts through which Glencore International acquired its so-called investment or any details about the so-called investor itself.[359]

256. This lack of evidence should be the cause of deepest concern and justifies the bifurcation of these proceedings. It is Claimant's burden to prove that its claims are admissible and subject to the jurisdiction of an investment tribunal. It is for Claimant to prove with sufficient certainty (and not for Bolivia to prove the contrary) that each and every one of the conditions for admissibility and jurisdiction have been met, including the consent of the Parties. Indeed:

> *The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.*[360]

257. Claimant has not come close to meeting this burden. Claimant made no investment in Bolivia (**Section 4.1**). Moreover, Claimant committed an abuse of process in bringing this arbitration (**Section 4.2**) and brings this arbitration on the basis of illegally privatized Assets (**Section 4.3**). The Tribunal also lacks jurisdiction to hear this case under the UK – Bolivia Treaty since Claimant's true nationality is Swiss—not British (**Section 4.4**). Also, Claimant presents its claims contrary to mandatory ICC arbitration clauses (**Section 4.5**), and it submits the Tin Stock claims without properly notifying Bolivia (**Section 4.6**). Claimant's claims

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355 Z. Douglas, *The International Law of Investment Claims*, 2009, **RLA-4**, ¶ 101 et seq.

356 *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award of 15 April 2016, **RLA-5**, ¶ 194.

357 *Emmis International Holding and others v. Hungary*, ICSID Case No. ARB/12/2, Award of 16 April 2014, **RLA-6**, ¶ 162.

358 Statement of Claim, section IV.

359 Statement of Claim, section IV.

360 *ICS Inspection and Control Services Limited (United Kingdom) v. The Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction of 10 February 2012, **RLA-7**, ¶ 280.

must therefore be summarily rejected in a separate preliminary objections phase for each and every one of these reasons.

4.1 The Tribunal Lacks Jurisdiction Because Glencore Bermuda Made No Investment In Bolivia

258. Claimant argues that "*Glencore Bermuda has made qualifying investments in Bolivia*" and so it is entitled to protection under the Treaty.[361] This is straightforwardly false. Glencore Bermuda did not make any investment at all in Bolivia. It merely held legal title to assets for which it made no payment and to which it made no further contribution. This is insufficient to warrant Treaty protection; Glencore Bermuda lacks the necessary link with its purported investments. Thus, there can be no jurisdiction over its claims.

259. It is a general principle of investment law that a so-called investor is entitled to investment treaty protection only if it actively invests in the territory of a contracting party. As the *Standard Chartered Bank* tribunal put it, "*Claimant's status as treaty investor, […] implicates Claimant doing something as part of the investing process, either directly or through an agent or entity under the investor's direction.*"[362]

260. Recent investment jurisprudence has confirmed the jurisdictional requirement. Notably, the *Vestey Group* tribunal concluded that, "*[i]n line with a series of more recent decisions, the Tribunal is of the opinion that the BIT notion of investment implies that the asset falling within the list be the result of an allocation of resources made by the investor.*"[363] Other tribunals to hold similarly include *Orascom TMT v. Algeria*,[364] *KT Asia v. Kazakhstan*,[365] *Isolux v. Spain*,[366] *Alps Finance v. Slovak Republic*,[367] and *Romak v. Uzbekistan*.[368]

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361 Statement of Claim, ¶ 131.

362 *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award of 2 November 2012, **RLA-8**, ¶ 198.

363 *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award of 15 April 2016, **RLA-5**, ¶ 192.

364 *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award of 31 May 2017, **RLA-9**, ¶¶ 371-372.

365 *KT Asia Investment Group BV v Republic of Kazakhstan* (ICSID Case No ARB/09/8) Award of 17 October 2013, **CLA-118**, ¶¶ 164-168 ("Without such a commitment of resources, the asset belonging to the claimant cannot constitute an investment within the meaning of the ICSID Convention and the BIT.").

366 *Isolux Infrastructure Netherlands, BV v. Kingdom of Spain*, SCC Case No. V2013/153, Award of 12 July 2016, **RLA-10**, ¶ 686.

367 *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award [Redacted] of 5 March 2011, **RLA-11**, ¶¶ 231-236.

368 *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award of 26 November 2009, **RLA-12**, ¶¶ 180, 207.

261. The active investment requirement is a manifestation of the concept of investment underlying investment treaties. As the *Romak* tribunal explained, "*the term 'investments' under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk.*" [369] The basic concept of investment requires a connection to an investor in the form of an economic contribution. It is this concept that is embodied in investment treaties.

262. In fact, the requirement is not in serious dispute between the Parties. Claimant's own primary authority on this requirement,[370] the *Bayindir* tribunal, confirms that the investor must itself make a substantial contribution of funds to warrant investment Treaty protection.[371] As that tribunal held, "*[c]onsidering Bayindir's contribution both in terms of know how, equipment and personnel and in terms of injection of funds, the Tribunal considers that Bayindir did contribute 'assets' within the meaning of the general definition of investment set forth in Article I(2) of the BIT.*"[372]

263. Nor is it in serious dispute that Glencore Bermuda utterly failed to make any active contribution of assets. Claimant tacitly admits as much.[373] It admits that Glencore Bermuda simply received transfer of the assets without payment: "*once the investments were acquired by Glencore International, they were immediately transferred to Glencore Bermuda.*"[374] It also admits that Glencore Bermuda itself did not invest funds in Bolivia: "*Glencore Bermuda, <u>through its affiliates</u>, has invested hundreds of millions of dollars in Bolivia and its economy […].*"[375]

264. However, the Treaty establishes a requirement that a protected investor must make an active investment (**Section 4.1.1**), and Glencore Bermuda made absolutely no active investment in the territory of Bolivia or anywhere else (**Section 4.1.2**).

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369 *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award of 26 November 2009, **RLA-12**, ¶ 207.

370 Statement of Claim, ¶ 130.

371 *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Decision on Jurisdiction of 14 November 2005, **CLA-60**, ¶¶ 118-121.

372 *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Decision on Jurisdiction of 14 November 2005, **CLA-60**, ¶ 121.

373 Statement of Claim, ¶ 314.

374 Statement of Claim, ¶ 314.

375 Statement of Claim, ¶ 314.

4.1.1 The Treaty Extends Arbitral Jurisdiction Only To Companies Or Individuals That Actively Invest

265. The Treaty establishes a jurisdictional requirement that the investor must actively invest, in that the investor must direct the making and implementation of the investment. As is well known, Article 31(1) of the Vienna Convention instructs that the Treaty be interpreted "*in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"[376] The active investment requirement follows straightforwardly from such an interpretation.

266. The terms of the Treaty presume that an investor must actively invest in order to be subject to jurisdiction under the Treaty. Article 8(1) of the Treaty establishes that Bolivia's consent to arbitrate was limited to disputes concerning an investment <u>of</u> a company of the other Party:

> *Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been legally and amicably settled shall after a period of six months from written notification of a claim be submitted to international arbitration if either party to the dispute so wishes.*[377]

267. Because Bolivia denounced the Treaty as of May 2014, the Treaty's Article 13 sunset provision adds a further jurisdictional requirement: any protected investment must have been <u>made</u> when the Treaty was in force. Claimants acknowledge this requirement.[378] The Treaty text is clear:

> *Provided that in respect of investments <u>made</u> whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of twenty years after the date of termination and without prejudice to the application thereafter of the rules of general international law.*[379]

268. These and other provisions of the Treaty make clear that an investor must actively invest in order to receive Treaty protection. Throughout its text, the Treaty speaks of an active relationship between an investor and the investment, using slightly different phrases interchangeably to describe this relationship.[380] It repeatedly uses verbs that imply "*some*

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376 Vienna Convention on the Law of Treaties, 1155 UNTS 331 of 23 May 1969, **CLA-6**, Article 31(1).

377 Treaty, **C-1**, Article 8(1).

378 Statement of Claim, ¶ 125.

379 Treaty, **C-1**, Article 13.

380 See, for instance, *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award of 2 November 2012, **RLA-8**, ¶ 219 ("*Neither provision suggests a relationship different from that otherwise regulated by the BIT. On its face, each uses 'investments by investors' or 'investment by nationals and companies' interchangeably with the phrase 'investments of a national or company' employed elsewhere in the BIT*").

action in bringing about the investment, rather than purely passive ownership."[381] This is particularly notable in four instances.

269. *First*, the Treaty leaves no doubt that the investments must be "made," whether before or after the Treaty entered into force. Article 1 of the Treaty states that "*[i]nvestments made before the date of entry into force as well as those made after entry into force shall benefit from the provisions of this Agreement.*"[382] Regardless of the timing, the Treaty is unequivocal that the investments must be "made" by the investor.

270. *Second*, the Treaty specifies that each State party to the Treaty must enable nationals or companies of the other State party to "*invest capital in its territory […].*" Article 2(1) of the Treaty provides that "*[e]ach Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.*"[383]

271. *Third*, the Treaty provides that returns from the investment must be allowed in the currency in which the capital was invested. Article 6 establishes that "*[t]ransfers of currency shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned.*"[384] This provision assumes that the investor made an investment of capital from which it is entitled to receive returns in the original currency.

272. *Fourth*, the Treaty's sunset provision is clear that the investment must have been "made" prior to termination. Article 13 states that, "*[p]rovided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of twenty years after the date of termination […].*"[385] This sunset provision, envisioning an active relationship between investor and investment, is especially relevant because the Treaty has been terminated and so Claimant relies on it for jurisdiction.[386]

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381 *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award of 2 November 2012, **RLA-8**, ¶ 222.

382 Treaty, **C-1**, Article 1.

383 Treaty, **C-1**, Article 2(1).

384 Treaty, **C-1**, Article 6(2).

385 Treaty, **C-1**, Article 13.

386 Statement of Claim, ¶ 125.

273. Thus, across multiple provisions, the Treaty's terms, interpreted in context, presume that an active relationship must exist between a protected investor and its investment. In fact, on the basis of very similar language in the UK-Tanzania BIT, the *Standard Chartered Bank* tribunal concluded that "*the text of the BIT reveals that the treaty protects investments 'made' by an investor in some active way, rather than simple passive ownership.*"[387] Thus, absent such an active relationship, there can be no jurisdiction under the Treaty.

274. And it is not just the text of the Treaty that requires an active relationship for jurisdiction; the Treaty's object and purpose provides ample confirmation of the requirement. This is clear for three principal reasons.

275. *First*, the preamble of the Treaty makes clear that its object and purpose are to create favourable conditions for active investment made by nationals and companies of the UK and Bolivia. The preamble states that the parties desire "*to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State […].*"[388] The use of the preposition "by" specifies that the national or company of one State is the actor that invests in the territory of the other State. It implies an active relationship between investor and investment.

276. *Second*, the preamble also makes clear that the Treaty's protection is designed to promote active investment by nationals and companies of the UK or Bolivia in the territory of the other State. As the preamble explains, the parties recognize "*that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States […].*"[389] But, as the *Standard Chartered Bank* tribunal observed, that protection could not promote investment "*if the national of the Contracting State had no role in deciding to make the investment, funding the investment, or controlling or managing the investment after it was made.*"[390]

277. *Third*, the Treaty's purpose of promoting active investment is also reflected in the general obligation to encourage and create favourable conditions for individuals to invest. Article 2(1) states that "*[e]ach Contracting Party shall encourage and create favourable conditions*

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387 *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award of 2 November 2012, **RLA-8**, ¶ 225.

388 Treaty, **C-1**, Preamble.

389 Treaty, **C-1**, Preamble.

390 *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award of 2 November 2012, **RLA-8**, ¶ 228.

for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital."[391] This provision establishes the Treaty's most general obligation and so reflects its object and purpose. It is specifically concerned with enabling nationals or companies to invest.

278. In short, the Treaty's terms, object, and purpose all confirm that the Treaty extends its protection only to those foreign nationals and companies that have made an active investment in Bolivia.

4.1.2 Glencore Bermuda Made No Investment In Bolivia, Much Less The Active Investment Required By The Treaty

279. It is plain that Glencore Bermuda did not make any active investment in Bolivia, whether directly or indirectly. Claimant has not provided any evidence to the contrary. This is unsurprising. Glencore Bermuda in fact lacked the capacity to make an active investment, as it was no more than an empty shell company that apparently did not even have executives.

280. *First*, Glencore Bermuda did not participate in Glencore International's acquisition of the holding companies for the Tin Smelter, Antinomy Smelter, or Colquiri Mine Lease, much less of those Assets themselves. In this regard, it is striking that Claimant does not even attempt to allege that Glencore Bermuda made any payment for the Assets.

281. It was Glencore International, not Glencore Bermuda, that was invited to bid on the Tin Smelter, Antinomy Smelter, and Colquiri Mine Lease. As Claimant admits, "*Glencore International was invited by Argent Partners […] to participate in an auction*" that included the Assets.[392] Claimant further admits it was "*Glencore International's bid for the […] assets [that] was selected in November 2004*" and "*Glencore International [that] initiated its [alleged] due diligence process […].*"[393] Providing ample confirmation that Glencore Bermuda was not involved, the single exhibit of correspondence put forth to support Claimant's supposed due diligence (and which, as shown below, does nothing of the sort) is not addressed to Glencore Bermuda.[394]

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391 Treaty, **C-1**, Article 2(1).

392 Statement of Claim, ¶ 34 (citing Process Letter from Argent Partners (Mr Simkin) to Glencore International (Mr Eskdale) of 30 April 2004, **C-62**, p. 1).

393 Statement of Claim, ¶ 35.

394 Letter from the Vice Minister of Mining to Glencore of 17 January 2005, **C-63**.

282. However, what conclusively establishes that Glencore Bermuda never invested in Bolivia is that Glencore Bermuda never made a payment of any sort for the Assets (or their holding companies). Claimant concedes that "*Glencore International concluded the purchase of the holding companies of the Assets*,"[395] although it deliberately omits to submit the actual purchase agreements (with the purchase price). Instead, it submits only the agreement through which it assigned the shares from Glencore International to Glencore Bermuda.[396] This agreement displays no payment or consideration of any sort from Glencore Bermuda in exchange for the assignment of the shares in the holding companies.[397] Thus, it is unrebutted that Glencore Bermuda did not pay a single cent for its so-called investment in Bolivia.

283. Nor did Glencore Bermuda subsequently make any payments to develop the Tin Smelter, the Antimony Smelter, or the Colquiri Mine, or to Bolivia more generally. This fact is amply confirmed by the contortions Claimant goes through in an attempt to prove the contrary. Claimant alleges that Glencore Bermuda "*directly employed over 3,500 people*"[398] when in fact only Sinchi Wayra and Colquiri directly employed individuals in Bolivia.[399] Nor did Glencore Bermuda allegedly invest "*in a diverse range of social initiatives*,"[400] if anything, these too were actions taken only by Sinchi Wayra and not Glencore Bermuda, as Claimant admits and its evidence confirms.[401]

284. And Claimant's allegation that Glencore Bermuda spent, through 2012, US$ 550 million in Bolivia, if anything, confirms that Glencore Bermuda made no investment. The allegation is based only on bald assertions in letters from Glencore International (not Glencore Bermuda), confirming that it was Glencore International, if anyone, who made the supposed expenditures.[402] These letters (even if true) do not assert that Glencore Bermuda made a cent of those expenditures.[403]

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395 Statement of Claim, ¶ 36.

396 Assignment and Assumption Agreements between Glencore International and Glencore Bermuda of 7 March 2005, **C-64**.

397 Assignment and Assumption Agreements between Glencore International and Glencore Bermuda of 7 March 2005, **C-64**.

398 Statement of Claim, ¶ 61; Sinchi Wayra, "Social Responsibility and Environment", **C-160**.

399 Sinchi Wayra, "Social Responsibility and Environment", **C-160**; Lazcano, ¶ 43.

400 Statement of Claim, ¶ 61.

401 Lazcano, ¶¶ 41-43; Sinchi Wayra, "Social Responsibility and Environment", **C-160**.

402 Statement of Claim, ¶ 62 (citing Letters from Glencore (Mr Maté) to the President of Bolivia (Mr Morales Ayma) of 27 June 2012, **C-40**).

403 Letters from Glencore (Mr Maté) to the President of Bolivia (Mr Morales Ayma) of 27 June 2012, **C-40**.

285. A similar failure to commit any resources led the *KT Asia* tribunal to reject jurisdiction for failure to make an active investment. The tribunal insisted that, "*[w]ithout such a commitment of resources, the asset belonging to the claimant cannot constitute an investment within the meaning of the ICSID Convention and the BIT*."[404] After observing that the "*the Claimant acquired the shares*" from affiliated companies,[405] it found that "*the price that the Claimant paid […] was significantly less than the market value*"[406] and it "*never actually paid even this price for the BTA shares.*"[407] In fact, unlike in *KT Asia*, Glencore Bermuda did not even make a pretense of payment for the shares; it was simply assigned the rights it passively holds.

286. *Second*, even in the management and operation of the Tin Smelter, Antimony Smelter, and Colquiri Mine, Glencore Bermuda was absent from the scene.

287. Critically, we know who was supposedly managing the Assets in Bolivia on behalf of the Glencore Group. It was Mr Eskdale, Claimant's witness in this arbitration.[408] But Mr Eskdale worked for Glencore International,[409] not for Glencore Bermuda, as Asset Manager for Latin America, Director of Global Zinc Operations, and as Board Member for Sinchi Wayra, Colquiri, and Vinto.[410] There is not a shred of evidence on record that Mr Eskdale has ever held a position at Glencore Bermuda, either as employee or as a director. And there is not a shred of evidence that anyone from Glencore Bermuda had any role in overseeing Sinchi Wayra, Colquiri, and Vinto in Bolivia.

288. It was Glencore International, not Glencore Bermuda, that issued financial reporting for the operating subsidiaries Sinchi Wayra, Colquiri, and Vinto. The front page of the December 2005 and December 2006 financial reports for Vinto—submitted by Claimant—prominently bears the name Glencore International; the documents make no reference whatsoever to

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404 *KT Asia Investment Group BV v Republic of Kazakhstan* (ICSID Case No ARB/09/8) Award of 17 October 2013, **CLA-118**, ¶ 166.

405 *KT Asia Investment Group BV v Republic of Kazakhstan* (ICSID Case No ARB/09/8) Award of 17 October 2013, **CLA-118**, ¶ 181-183.

406 *KT Asia Investment Group BV v Republic of Kazakhstan* (ICSID Case No ARB/09/8) Award of 17 October 2013, **CLA-118**, ¶ 181-183.

407 *KT Asia Investment Group BV v Republic of Kazakhstan* (ICSID Case No ARB/09/8) Award of 17 October 2013, **CLA-118**, ¶ 181-183.

408 Eskdale, ¶¶ 6-7.

409 Letter from Sinchi Wayra (Mr Capriles) to the Ministry of the Presidency (Mr Arce) of 11 May 2007, **C-76**, p. 2 ("El Sr. Eskdale es ejecutivo de Glencore International AG. con base en Zug, Suiza").

410 See Eskdale, ¶ 23; 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) of 20 May 2015, **C-148**.

Glencore Bermuda.[411] Nor is Glencore Bermuda mentioned in Colquiri's financial reports. Indeed, Glencore International issued the reports for both Colquiri[412] and Sinchi Wayra[413] in its own name.

289. In fact, Sinchi Wayra, Colquiri, and Vinto themselves understood that they were subsidiaries of Glencore International, not of Glencore Bermuda. When each of those companies had an opportunity to describe their owners during negotiations, they did not even think to mention Glencore Bermuda, but instead singled out Glencore International as the relevant parent company.[414] It was only in view of launching the present arbitration[415] that these companies were more careful to mention Glencore Bermuda, even though it has previously been a non-entity.

290. Claimant's response to the reversions provides ample confirmation that Glencore Bermuda was uninvolved in Bolivia. As Mr Eskdale testified, "*[j]ust days after the nationalization, Mr Willy R Strothotte, Chairman of Glencore International [not Glencore Bermuda], reached out to Bolivia […].*"[416] The Negotiations (and likely this arbitration) were then led by Christopher

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411 Vinto S.A. - December 2005, **CLEX-11-1**; Vinto S.A. - Monthly Report December - 2005, **CLEX-11-2**; Vinto S.A. - December 2006, **CLEX-11-3**

412 Colquiri S.A. - December 2006, **CLEX-11-4**; Colquiri S.A. - December 2008, **CLEX-11-5**; Colquiri S.A. - December 2009, **CLEX-11-6**; Colquiri S.A. - December 2010, **CLEX-11-7**; Colquiri S.A. - December 2011, **CLEX-11-8**; Colquiri S.A. - December 2012, **CLEX-11-9**.

413 SW Consolidated - Management Report December 2006, **CLEX-11-10**; Colquiri Profit and Production 2008 2010, **CLEX-11-11**; SW Monthly Report - December 2011, **CLEX-11-12**; SW Monthly Report - December 2012, **CLEX-11-13**.

414 Letter from Sinchi Wayra (Mr Capriles) to the Minister of Mining (Mr Echazú) of 20 June 2007, **C-83** ("*Mediante la presente hacemos referencia a la reunion sostenida en Palacio de Gobierno en fecha 12 del mes en curso en la cual nos solicitó que presentemos el monto de la compensación que pide Glencore International AG ('Glencore') por la nacionalización de la Fundición de Estaño de Vinto […]*") (Unofficial translation: "*By this letter we refer to the meeting held in the Government Palace on the 12th of this month during which we were asked to present an amount for the compensation requested by Glencore International AG ('Glencore') for the nationalization of the Vinto Tin Smelter […]*"); Letter from Colquiri (Mr Capriles) to EMV (Mr Infantes) of 16 April 2007, **C-74** ("*En consecuencia, la celebración del Contrato de Suministro de Minerales y Concentrados de Estaño entre nuestras empresas, no implica la renuncia total o parcial a los derechos señalados por parte de la COMPAÑIA MINERA COLQUIRI S.A ni de sus accionistas, ni de GLENCORE INTERNATIONAL AG o sus subsidiarias, como inversores últimos de la COMPAÑIA MINERA COLQUIRI S.A. y de la sociedad COMPLEJO METALURGICO VINTO S.A.*") (Unofficial translation: "*As a result, the execution of the Contract for Supply of Ore and Tin Concentrates between our companies, does not imply a total or partial waiver of the rights indicated by COMPAÑIA MINERA COLQUIRI S.A or by its shareholders, or by GLENCORE INTERNATIONAL AG or its affiliates, as ultimate investors of COMPAÑIA MINERA COLQUIRI S.A. and COMPLEJO METALURGICO VINTO S.A.*"); Letter from Complejo Vinto (Mr Capriles Tejada) to Minister of Mining and Metallurgy (Mr Luis Alberto Echazú A) of 7 December 2007, **C-48** (Vinto) ("*El compromiso que esta carta contiene, no implica renuncia de nuestra sociedad, de sus accionistas o de Glencore International A.G. a percibir una justa indemnización por la nacionalización del Complejo Metalúrgico de Vinto y a ninguno de los derechos que nos asisten conforme a las leyes […]*") (Unofficial translation: "*The commitment contained in this letter does not imply a waiver by our company, by its shareholders or Glencore International A.G of the award of fair compensation for the nationalization of Complejo Metalúrgico de Vinto or of any of the rights to which we are entitled in accordance with the law […]*").

415 Power of Attorney from Glencore Bermuda of 11 December 2007, **C-90**.

416 Eskdale, ¶ 48.

Eskdale along with Daniel Maté, Glencore International's Zinc Director.[417] And when Glencore International took the initial steps to bring the present arbitration through the dormant Glencore Bermuda, it had to designate formal representatives, none of whom appear to have held any prior position in that shell company. It was at this point that it legally named as its representatives Christopher Eskdale, Eduardo Enrique Capriles Tejada, and Luis Felipe Hartmann Luzio.[418]

291. Glencore Bermuda's complete lack of control of its so-called investment is comparable to the facts of *Standard Chartered Bank*. As that tribunal observed, "*[a]bsent any such control, it is difficult to perceive in this record any evidence that could serve to show that the investment process was actually made at the direction of Claimant as investor*."[419] In its view, the lack of control made it impossible to demonstrate the active investment required for jurisdiction under an investment treaty. Because of the "*[f]ailure to demonstrate such control*," it held that "*Claimant has been unable to demonstrate its active participation in the investing process with respect to the Loans.*"[420] For precisely the same reason, Glencore Bermuda is unable to show any active investment in Bolivia, with fatal consequences for jurisdiction under the Treaty.

292. Simply put, Glencore Bermuda was entirely passive throughout its so-called investment in Bolivia. It never made the activity investment that the Treaty requires for jurisdiction.

4.2 The Tribunal Lacks Jurisdiction Because Glencore Bermuda Committed An Abuse Of Process By Receiving The Investment When The Dispute Was Foreseeable

293. It is Claimant's position that the transfer of Glencore International's holdings to Glencore Bermuda in 2005 was entirely innocent and so could not have amounted to an abuse of process. It further adds that, even if it were not innocent, it had purposes other than obtaining Treaty protection for a foreseeable dispute. It thus insists that there was no abuse.

294. Claimant is simply wrong. A change of ownership structure when there is a reasonable prospect of a dispute constitutes an abuse of process, requiring that claims be dismissed, whenever the change had a purpose of obtaining investment treaty protection (**Section 4.2.1**). And obtaining investment treaty protection was the only plausible purpose for transferring the Assets to Glencore Bermuda at a time when changing political conditions in Bolivia foretold

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417 Eskdale, ¶ 51.

418 Power of Attorney from Glencore Bermuda of 11 December 2007, **C-90**.

419 *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award of 2 November 2012, **RLA-8**, ¶¶ 261.

420 *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award of 2 November 2012, **RLA-8**, ¶¶ 264.

precisely the dispute at the heart of this arbitration (**Section 4.2.2**). Thus, the Tribunal must dismiss Claimant's claims in this arbitration for abuse of process.

4.2.1 Structuring An Investment To Obtain Treaty Protection When A Dispute Is Foreseeable Constitutes An Abuse Of Process

295. Claimant argues that there was no abuse of process because "*restructuring an investment in order to obtain treaty protection per se does not amount to an abuse.*"[421] This is simply an incorrect statement of the law. International investment law denies both treaty protection and arbitral jurisdiction to an investment when its ownership structure was changed to gain investment treaty protection. Such behaviour is *per se* abusive.

296. The definitive statement of the law comes from the *Philip Morris* tribunal. After careful consideration, it held that changing ownership structure when a dispute is foreseeable in order to gain treaty protection constitutes an abuse of process and eliminates jurisdiction. As the *Philip Morris* tribunal put it, "*the initiation of a treaty-based investor-State arbitration constitutes an abuse of right (or abuse of process […]) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time where a dispute was foreseeable.*"[422] There is no need to prove additional bad faith; the restructuring itself constitutes bad faith under the circumstances.[423]

297. The *Philip Morris* tribunal reached this conclusion on a thorough review of the prior arbitral jurisprudence.[424] It analyzed in detail the decisions in *Tidewater v. Venezuela*, *Mobil v. Venezuela*, *Pac Rim v. El Salvador*, *Gremcitel v. Peru*, *Lao Holdings v. Laos*, and *Chevron v. Ecuador*.[425]

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421 Statement of Claim, ¶ 318.

422 *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility of 17 December 2015, **CLA-129**, ¶ 554.

423 *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility of 17 December 2015, **CLA-129**, ¶ 539.

424 *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility of 17 December 2015, **CLA-129**, ¶¶ 545-553.

425 *Tidewater Inc and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Decision on Jurisdiction of 8 February 2013, **CLA-116**; *Mobil Corporation, Venezuela Holdings BV, and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27) Decision on Jurisdiction of 10 June 2010, **CLA-97**; *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Decision on the Respondent's Jurisdictional Objections of 1 June 2012, **CLA-110**; *Renée Rose Levy and Gremcitel SA v Republic of Peru* (ICSID Case No ARB/11/17) Award of 9 January 2015, **CLA-124**; *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB/AF/12/6, Decision on Jurisdiction of 21 February 2014, **RLA-13**; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877, Interim Award of 1 December 2008, **RLA-14**.

298. The *Phoenix Action* tribunal clarified why abuse of process excludes claims from investment arbitration. As it explained in an oft-cited passage, "*[t]he abuse here could be called a "détournement de procédure", consisting in the Claimant's creation of a legal fiction in order to gain access to an international arbitration procedure to which it was not entitled. As stated in Inceysa, '(i)n the contractual field, good faith means absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment.' It is the conclusion of the Tribunal that the whole 'investment' was an artificial transaction to gain access to ICSID.*"[426]

299. The prohibition on abuse of process in investment law reflects a broad principle of international law. In this regard, the World Trade Organization Appellate Body confirmed that abusive exercises of international rights are prohibited:

> *[The principle of good faith], at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of abus de droit, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably'*.[427]

300. In the field of investment law, changing the ownership structure of an investment to obtain treaty protection when a dispute is foreseeable is sufficient for abuse of process, for three reasons. Claimant's attempts to narrow this well-established principle are unavailing.

301. *First*, contrary to what Claimant alleges,[428] there is no need for the dispute to be highly foreseeable; reasonable foreseeability—the reasonable prospect of a dispute—is sufficient. As the *Philip Morris* tribunal concluded, building on an identical holding from *Tidewater*, "*[a] dispute is foreseeable when there is a reasonable prospect that a measure that may give rise to a treaty claim will materialise.*"[429] It is worth emphasizing that Claimant too invokes *Philip Morris* and *Tidewater* on this point.[430] This is for good reason: *Philip Morris* and

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426 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, **RLA-15**, ¶ 143.

427 United States - *Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, World Trade Organization, Report of the Appellate Body of 8 October 1998, **RLA-16**, ¶ 158.

428 Statement of Claim, ¶ 320.

429 *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility of 17 December 2015, **CLA-129**, ¶ 585; *Tidewater Inc and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Decision on Jurisdiction of 8 February 2013, **CLA-116**, ¶ 194.

430 Statement of Claim, ¶ 319.

Tidewater consolidated the current understanding of reasonable foreseeability. The earlier *Pac Rim* and *Alapi* tribunals, which Claimant also cites, have been superseded.[431]

302. *Second*, despite what Claimant argues,[432] a change of ownership structure can be abusive even when obtaining treaty protection is only one of its purposes. For the opposite proposition, Claimant places crucial reliance on *Gremcitel v. Peru*.[433] However, *Gremcitel* in no way held that a change of ownership structure is abusive only if there is no other motive for the change.[434] It did find that, on the facts of the case, there was no other motive. The reason why it is sufficient that obtaining treaty protection is only one of several purposes is that there must be, in the words of the *Phoenix Action* tribunal, an "*absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment.*"[435]

303. *Third*, Claimant falsely argues that "*tribunals have found evidence of abuse only 'in very exceptional circumstances,' after taking into account 'all the circumstances of the case.'*"[436] The *Philip Morris* award itself is sufficient to show that this is untrue. The *Philip Morris* tribunal found an abuse of process, and rejected the claims, specifically because restructuring to obtain treaty protection for a foreseeable dispute is abusive. It needed nothing more. Even if some tribunals may have noted additional factors that are also abusive, none has rejected the basic rule that it is, by itself, an abuse of process to restructure the investment to obtain treaty protection in view of a foreseeable dispute.[437]

304. Thus, changing the investment structure with a purpose of obtaining investment treaty protection when there is a reasonable prospect of a dispute constitutes an abuse of process and mandates that the claims be dismissed.

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431 Statement of Claim, ¶ 319.

432 Statement of Claim, ¶ 318.

433 Statement of Claim, ¶ 318.

434 *Renée Rose Levy and Gremcitel SA v Republic of Peru* (ICSID Case No ARB/11/17) Award of 9 January 2015, **CLA-124**, ¶ 192 ("The fact that the only motivation to add Ms. Levy into the Gremcitel ownership structure was her French nationality is confirmed by the language contained in the corporate resolution of Hart Industries dated 7 March 2005.").

435 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, **RLA-15**, ¶ 143.

436 Statement of Claim, ¶ 318.

437 See, in this regard, Statement of Claim, fn. 628, citing: *Renée Rose Levy and Gremcitel SA v Republic of Peru* (ICSID Case No ARB/11/17) Award of 9 January 2015, **CLA-124**, ¶ 186; *Mobil Corporation, Venezuela Holdings BV, and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27) Decision on Jurisdiction of 10 June 2010, **CLA-97**, ¶ 177.

4.2.2 Glencore International Rerouted Its Investment Through Bermuda When A Dispute With Bolivia Was Foreseeable

305. Claimant argues that its actions were not abusive because it did not restructure to obtain Treaty protection and the disputes were not foreseeable at the time of its investment.[438] It is wrong on both counts.

306. *First*, the disputes concerning each of the Assets were clearly foreseeable, and in fact foreseen, at the moment in March 2005 when Glencore International transferred the Assets to Glencore Bermuda. As the *Minnotte* tribunal observed, "*an international business operator*" like Glencore International must be "*deemed to be a competent professional […].*"[439]

307. There can be little doubt Glencore International actually foresaw that there was a reasonable prospect of a dispute concerning expropriation of its Assets. As explained before, we understand that Glencore International took out political risk insurance for the Tin Smelter from a syndicate led by Lloyd's, and we suspect it did so for the Antimony Smelter and Colquiri Mine Lease, to guard against exactly the sort of expropriation that it now claims to have suffered. Claimant cannot seriously allege that there was no reasonable prospect of the current dispute when Claimant itself elected to guard against this specific eventuality.

308. As previously explained, by early 2005, Bolivia was emerging from a period of political crisis. Evo Morales was posed to assume the presidency of the Republic at the head of the MAS party whose political platform promised a different attitude toward the economy in general and the mining sector in particular.[440] It was clearly foreseeable that Bolivia would be less indulgent of private mining interests and would ensure complete respect for the law and the diverse social interests affected by the mining industry.

309. It was against this background that the U.S. Geological Survey specifically warned of the increasingly unsympathetic attitude in Bolivia toward the mining sector. As it observed, "*[r]oyalties on the production of mineral fuels and mine production and other tax revenue from private industry were not perceived by Bolivians to have contributed to much perceptible economic development in the country.*"[441] It further emphasized that, "*[i]f the latest policies to improve the mineral industry's contribution to economic development in the country are*

438 Statement of Claim, ¶¶ 317, 319.

439 *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award of 16 May 2014, **RLA-17**, ¶ 194.

440 See section 2.5.2 above.

441 Steven T. Anderson, *The Mineral Industry of Bolivia*, U.S. Geological Survey Minerals Yearbook, 2004, **RLA-18**, p. 3.13.

not more successful than in the past, then they are not likely to placate the growing public sentiment for renationalization of the mineral industry of Bolivia."[442]

310. Claimant tries to distract from the political context into which it invested by arguing that "*Glencore as a group had decided to make this acquisition by late 2004, after having met with government officials who indicated that they welcomed Glencore's investment.*"[443] But an abuse of process arises not when a group acquires an asset, but when the group transfers the asset to a particular subsidiary that is protected by an investment Treaty. Thus, it is entirely irrelevant what the group could foresee when it first acquired the Assets.

311. What is more, at the time when Glencore Bermuda was assigned the Assets, disputes concerning the Tin Smelter, Antinomy Smelter, and Colquiri Mine Lease were very likely to arise.

312. One, Glencore International was, in all probability, aware that key Bolivian officials considered that the Tin Smelter privatization had been illegal, as reflected in the risible purchase prices that Allied Deals obtained. By 2002, important voices, including government officials and leaders of mining unions from Oruro, were loudly questioning the legality of the Tin Smelter privatization and called for its reversion in response.[444] The MAS members of parliament and even Evo Morales himself added to the calls for a response to the illegalities, including by demanding the resignation of Foreign Trade Minister Chancellor Carlos Saavedra Bruno.[445]

313. Thus, it was evident that a dispute regarding the rights over the Tin Smelter was likely to arise given the public and widespread suspicions that it had been irregularly privatized. And it was precisely on the grounds of the irregular privatization that Bolivia reverted the rights to the the Tin Smelter from Glencore International's subsidiary Vinto. This was plain from the reversion decree. It clearly stated that the Government reverted the Tin Smelter because its privatization was illegal:

> *[E]l Gobierno Nacional, en ejercicio del mandato popular expresado en las elecciones generales del 18 diciembre de 2005 referido a la recuperación de los recursos*

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442 Steven T. Anderson, *The Mineral Industry of Bolivia*, U.S. Geological Survey Minerals Yearbook, 2004, **RLA-18**, p. 3.14.

443 Statement of Claim, ¶ 319.

444 *DDHH pide que el Estado intervenga*, *Brigada Parlamentaria pide preservar fuentes de trabajo*, press article, **R-137**; Letter from the *Federación Regional de Cooperativas Mineras de Huanuni* to President Quiroga Ramírez of 20 May 2002, **R-142**.

445 La Razón Digital, *El MAS pide la renuncia del Canciller Saavedra*, press article of 8 November 2002, **R-134**; El Diario, *MAS pide la renuncia del Canciller de la Republica*, press release of 4 December 2002, **R-135**; El Mundo, *MAS presentó las pruebas de corrupción contra Canciller*, press release of 4 December 2002, **R-136**.

naturales y su industrialización y ante las evidentes y gravísimas ilegalidades antes referidas, se encuentra en la obligación de revertir al dominio del Estado la Fundición de Estaño Vinto con el objeto de alcanzar el desarrollo económico, digno y soberano.[446]

314. Two, Glencore International was, in all probability, aware that continued failure to put the Antimony Smelter into operation would give rise to a conflict. The legal regulation for the privatization process established the objective of increasing "*la producción, las exportaciones, el empleo y la productividad.*"[447] Reflecting this, the Terms of Reference for the Antimony Smelter tender—incorporated as contractual terms[448]—specifically provide that the object and purpose of the privatization was to put the smelter into production. As they explain, the objective was to make possible "*a la Fundición continuar la producción, constituyéndose en una fuente de generación de empleo y tributos, en apoyo a la actividad minera de explotación y concentración de antimonio en el país*."[449]

315. The likelihood of conflict was simply reinforced by Bolivia's constitutional commitment to ensuring that property has a social function. In Bolivian constitutional law, the social function of property establishes that private property is only a right when the property performs a social function.[450] This principle, part of the 1967 Constitution in force at the time Glencore Bermuda received the Assets, was also incorporated into the 2009 Constitution.[451]

316. Thus, it was entirely evident that the failure to put the Antimony Smelter into production would generate a conflict over the rights to the smelter, should it remain dormant. And the reversion of the rights was implemented specifically because of the Antimony Smelter's

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446 Supreme Decree No 29.026 of 7 February 2007, **C-20**, p. 6 (Unofficial translation: "*[t]he National Government, in the exercise of its popular mandate resulting from the general elections of 18 December 2005 regarding the recovery of natural resources and their industrialization and in view of the evident and grave aforementioned illegalities, is obligated to revert the Vinto Tin Smelter to the State's ownership, with the purpose of guaranteeing economic, dignified and sovereign development*").

447 Supreme Decree No. 23.991 of 10 April 1995, **R-100**, Art. 2(c) (Unofficial translation: "*production, exports, employment and productivity*").

448 Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**, 23(1), p. 18.

449 Terms of Reference for the Second Public Tender for the Antimony Smelter of 31 July 2000, **R-109**, p. 9 (Unofficial translation: "*permitting the Smelter to continue production, becoming a source for the generation of employment and tax, in support of the mining activity of exploitation and concentration of antimony in the country*") (emphasis added).

450 Constitution of Bolivia of 7 February 2009, **C-95**, Article 56: "*I. Toda persona tiene derecho a la propiedad privada individual o colectiva, siempre que ésta cumpla una función social; II. Se garantiza la propiedad privada siempre que el uso que se haga de ella no sea perjudicial al interés colectivo*." (Unofficial translation: "*I. All persons have the right to individual or collective private property, provided that it fulfils a social function; II. Private property is guaranteed as long as its use is not detrimental to the collective interest*"). The previous Constitution (promulgated in 2004) also established the same condition in its Article 7(i), see Bolivian Constitution, Law of 13 April 2004, **R-235**.

451 The Constitution also mentions social function in articles 186, 393 and 397. Constitution of Bolivia of 7 February 2009, **C-95**

inactivity. The reversion decree makes plain that the Antimony Smelter was reverted specifically because of this inactivity, in breach of the contractual "*obligaciones de invertir y fortalecer la Empresa Metalúrgica Vinto Antimonio con capacidad económica, financiera y técnica, […] posibilitando a la Fundición continuar la producción […].*"[452] In fact, Claimant does not deny that the Antimony Smelter had remained dormant since its privatization, including during the five years that Claimant counted it among its Assets.

317. Three, Glencore International was, in all probability, aware that there was a reasonable prospect Bolivia would have to intervene in the growing dispute with *cooperativistas* at the Colquiri mine. As previously explained, following the privatization of the mine in 2000,[453] Comsur significantly reduced the number of employees. Because the people living in Colquiri are entirely dependent on the mine, the former COMIBOL workers were forced to become independent mine workers, and ultimately to form the *cooperativas*.[454] These *cooperativas* soon became an essential source of labour for the mine.[455]

318. However, given the influx of *cooperativistas* and a lack of proper control over the mine, tensions rapidly rose between the *cooperativistas* and the formal mine workers.[456] While the *cooperativistas* demanded ever increasing rights to work the mine and frequently stole minerals and equipment from the mine, the company mine workers reacted with outrage to these threats to their own position at the mine.[457] Comsur was unable to control the situation.[458] These tensions led to direct confrontations between the *cooperativistas* and formal mine workers, even necessitating the intervention of the State at times.[459] And with the political empowerment of *cooperativistas* during the ascendency of MAS,[460] these tensions and confrontations over control of the mine continued to grow in intensity.

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452 Supreme Decree No 499 of 1 May 2010, **C-26**, Preamble, p. 17 (Unofficial translation: "*the terms of reference provided for the obligation to invest in and reinforce the Metallurgical Company Vinto Antimonio with economic, financial and technical capacity, […] permitting the Smelter to continue production*").

453 Lease agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**.

454 Cachi, ¶¶ 12-14.

455 Mamani, ¶¶ 13-15.

456 See section 2.5.2 above.

457 See section 2.5.1 above; Mamani, ¶¶ 14-17; Cachi, ¶¶ 17-22.

458 See section 2.5.1 above; Cachi, ¶¶ 20-22; 51.

459 See section 2.5.1 above. See, for instance, Internal Memorandum from COMIBOL to the Ministry of Mines of 23 January 2004, **R-152**.

460 Mamani, ¶19; M. Cajías de la Vega, "Crisis, Diáspora y Reconstitución de la Memoria Histórica de los Mineros Bolivianos" in *Revista de Estudios Transfronterizos*, Vol. X, No. 2 (2010), **R-159**, 87 (Unofficial translation: "*The presence in El Alto and La Paz of 800 miners of Huanuni and more than 3,000 mining cooperativistas was very significant in decisive moments of the popular uprising triggered in October 2003 against the government of Gonzalo*

319. Thus, it was plainly foreseeably by early 2005 that the conflict over the mine would continue to provoke State intervention in the mining, predictably generating disputes with the mine owner regarding the justification, nature, and extent of that intervention. And Claimant in this arbitration complains precisely of Bolivia's intervention in the mine following violent conflicts between the *cooperativistas* and the company mine workers.[461]

320. In view of these facts, Glencore International transferred its Assets in Bolivia to Glencore Bermuda on 7 March 2005. There was no reason for this transfer except to obtain protection of the Treaty.

321. *Second*, in light of Glencore International's clear awareness of the reasonable prospect that the current dispute would arise, it is obvious that the primary purpose for transferring the Assets to Glencore Bermuda was to obtain Treaty protection. Notably, Claimant has not offered any justification for the transfer to Glencore Bermuda, other than to obtain Treaty protection.

322. To the contrary, its main defense seems to be that "*the purpose of the transaction was not only to acquire Bolivian assets but also assets located in Argentina.*"[462] But this assertion does not provide an alternative explanation to the abuse of process, only an irrelevant factual distraction. Because the Assets would have been held by the same corporate structure (although Claimant provides no evidence the so-called Argentine assets exist), to obtain protection for the Bolivian Assets, all of the assets would have to be transferred to Glencore Bermuda.

323. Claimant also attempts to defend the legitimacy of the transfer of its assets to Glencore Bermuda on the grounds that "*Glencore International also benefits from the protection of an investment treaty, the Switzerland-Bolivia Treaty.*"[463] But this is untrue. The Swiss-Bolivia BIT defines "companies" as, "*[i]n the case of the Swiss Confederation, legal entities or associations without legal status but able to possess property, in which, directly or indirectly, there is a substantial Swiss interest […].*"[464] However, there is no substantial Swiss interest

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Sánchez de Lozada and the centre of which was that city of the department of La Paz. Not only was the presence of residents of neighbourhoods of relocated miners noted during theentire week of the popular uprising, in particular from Santiago II, one of the places where major confrontations with the army took place – but also the presence of mining employees and cooperativistas from Huanuni and other mines. Thus, October was undoubtedly a moment of revelation of 'previous social accumulations', not only in the mining sector but also in all popular sectors in Bolivia").

461 Statement of Claim, ¶¶ 8-14.

462 Statement of Claim, ¶ 317.

463 Statement of Claim, ¶ 314.

464 Agreement between the Swiss Confederation and the Republic of Bolivia on the reciprocal promotion and protection of investments, English translation, **RLA-19**, Article 1(b)(aa).

in the Glencore grou; it has widely dispersed holding by a range of global funds.[465] These largest shareholders are US-based funds including Oakmark, Capitol Group American Funds, Oppenheimer, and Vanguard.[466]

324. Simply put, Claimant restructured its so-called investment when there was a reasonable prospect of this very dispute in order to obtain investment treaty protection. Its claims cannot be heard for abuse of process.

4.3 The Tribunal Lacks Jurisdiction Because The Assets Subject To Dispute Were Illegally Privatized

325. It is a generally accepted principle of investment arbitration that a tribunal cannot hear claims regarding an investment tainted by illegality. This is dispositive of Claimant's claims; none can be heard in the present arbitration. The Assets underlying the claims advanced in this arbitration were all illegitimately and illegally privatized (**Section 4.3.1**). Pursuant to the international law principle of unclean hands, these illegalities preclude the Tribunal from hearing the claims (**Section 4.3.2**).

4.3.1 The Privatization Of The Assets Was Illegal Under Bolivian Law And Contrary To International Public Policy

326. The privatization process for the Assets was riddled with illegalities, each of which is individually sufficient to prevent the arbitration from proceeding. The legal framework for the privatizations of the Colquiri Mine Lease and the Antimony Smelter was established by former Bolivian President Sánchez De Lozada to benefit his own economic interests, in violation of the constitutional requirement of impartiality. The Tin Smelter, the Colquiri Mine Lease, and the Antimony Smelter privatizations, carried out under this framework, suffered from an illegal lack of transparency and good faith and violated the requirement that state officials protect the public patrimony, as the prices received in the privatizations were inexplicably low.

327. *First*, Bolivia's 1967 Constitution, in force during Sánchez de Lozada's presidency and during the privatizations, established the basic obligation to act in the public interest, free from partiality and bias. Article 43 of the Constitution provided that, "*[u]na ley especial establecerá el Estatuto del funcionario Público sobre la base del principio fundamental de que los funcionarios y empleados públicos son servidores exclusivos de los intereses de la*

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465 Morningstar, Glencore PLC Major Shareholders, **R-236**.

466 Morningstar, Glencore PLC Major Shareholders, **R-236**.

colectividad y no de parcialidad o partido político alguno."[467] In this regard, Bolivia's Constitution adopted widely accepted constitutional principles,[468] also implemented in Bolivia through regulations.[469]

328. During his presidency, Sánchez de Lozada took advantage of his position in order to implement the policies that would later on allow him to expand his mining operations, in complete disregard of the public interest. In particular, it was during Sánchez de Lozada's first term in office that he put in place the regulations for implementing the Privatization Law via Supreme Decree 23.991.[470] These regulations established the official objective of the transferring to the private sector "*actividades productivas que puedan ser realizadas por este de manera más eficiente […].*"[471] Then, Sánchez de Lozada enacted the 1997 Mining Code, prohibiting COMIBOL from directly carrying out mining activities.[472]

329. There can thus be little doubt that Sánchez de Lozada's conduct while in office was biased and self-serving, with relation to his own best interests as a businessman. He was, thereafter, in a privileged position to reap the benefits of the normative framework he had designed and to acquire the Assets upon which he had set his sights. His acquisition of the Colquiri Mine Lease and Antimony Smelter were thus contrary to Bolivian constitutional requirements.

330. *Second*, in spite of the clear requirements of Bolivian law, the Tin Smelter, Colquiri Mine Lease, and Antimony Smelter were privatized contrary to the basic requirements of transparency and good faith and in blatant disregard of the legal principle that the public patrimony must be protected.

331. The Bolivian legal framework for privatization establishes that public tender processes are governed by the principles of transparency and good faith.[473] The Bolivian Constitutional

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467 Constitution of Bolivia of 1967, **R-3**, Article 43 (emphasis added) (Unofficial translation: "*[a] special law shall establish the Statute of Public servants based on the fundamental principle that public servants and employees serve exclusively the collective interest and not those of any faction or any political party*").

468 Spanish Constitution, **RLA-20**, Article 103; Political Constitution of Colombia, **RLA-21**, Article 209, Constitution of the Republic of South Africa of 1996, **RLA-22**, Chapter 10; L. Machi and E. Machi, "Aplicación de los principios de "ética de la función pública" y de "imparcialidad en el ejercicio de la función" en situaciones en que la administración ejerce potestades discrecionales", Revista de Derecho Público No. 51, 2017, **RLA-23**, p. 53.

469 Supreme Decree No. 2.3318-A of 3 November 1992, **R-237**, Articles 3, 4.

470 See Supreme Decree No. 23.991 of 10 April 1995, **R-100**, Article 1. See also Section 2.2 above.

471 Supreme Decree No. 23.991 of 10 April 1995, **R-100**, Art. 2(a) (Unofficial translation: "*production activities that may be carried out in a more efficient way by the latter*").

472 Bolivian Mining Code, Law 1.777 of 17 March 1997, **R-4**, Article 91. See also Section 2.2 above.

473 Law No 1,330, 24 April 1992, published in the *Gaceta Oficial* No 1,735, **C-58**, Article 4; See Supreme Decree No. 23.991 of 10 April 1995, **R-100**, Article 16; Supreme Resolution No. 215.475 of 20 March 1995, **R-238**, Article 2; Supreme Decree No. 25.964 of 21 October 2000, **R-239**.

Court further reaffirmed the applicability of these principles to public tender processes, emphasizing that this system seeks to assure an objective selection of private contractors.[474]

332. Bolivian law also imposes serious restrictions on public contracting to ensure that it is to the economic benefit of the state. In fact, one of the core principles of Bolivian constitutional law is the protection of the public patrimony of the State, enshrined in Article 137 of 1967 Constitution.[475] Additionally, the public function is governed by the principle of efficiency – expressly recognized in Law No. 1178,[476] Supreme Decree No. 23318-A[477] and the *Estatuto del Servidor Público*.[478]

333. One, Allied Deals acquired the Tin Smelter at an inexplicably low price, causing a significant prejudice to the public patrimony of the State. As explained before, Allied Deals paid roughly US$ 14 million even though the actual value of the Tin Smelter was far greater. The Smelter was handed over to Allied Deals together with certain items not included in the inventory, the value of which was some US$ 16 million.[479] As a result, the Smelter was essentially awarded to Allied Deals for free (or, still worse, Allied Deals was effectively paid to take the Smelter).

334. Two, the minimum price established for the Antimony Smelter was US$ 100,000 and it sold for roughly US$ 1,100,000, but both figures ignore the significant investments that Bolivia had made in the Antimony Smelter. Although the Government was put on notice of the very low price well before the tender was awarded to Sánchez de Lozada's Colquiri, the privatization was allowed to proceed causing a significant loss to the public patrimony of the State.[480]

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474 Bolivian Constitutional Tribunal, Decision 0024/2005 of 11 April 2005, **R-240**, p. 6.

475 Constitution of Bolivia of 1967, **R-3**, Article 137 ("*[l]os bienes del patrimonio de la Nación constituyen propiedad pública, inviolable, siendo deber de todo habitante del territorio nacional respetarla y protegerla*.") (Unofficial translation: "*[t]he assets belonging to the Nation represent public and inviolable property and it is the duty of every inhabitant of the national territory to respect and protect it*") This principle is of particularly strict application in the mining sector. Article 133 of the 1967 Constitution, for example, stated that the State "*propenderá al fortalecimiento de la independencia nacional y al desarrollo del país mediante la defensa y el aprovechamiento de los recursos naturales y humanos en resguardo de la seguridad del Estado y en procura del bienestar del pueblo boliviano*." (Unofficial translation: "*[the State] shall tend to reinforce the national independence and the country's development by defending and guaranteeing an effective use of natural and human resources, safeguarding the State's security and guaranteeing the Bolivian population's well-being*").

476 Law No. 1.178 of 20 July 1990, **R-241**, Article 1(a).

477 Supreme Decree No. 2.3318-A of 3 November 1992, **R-237**, Article 3

478 Law No. 2.027 of 27 October 1999, **R-242**, Article 8(g).

479 Report from Ms Wilma Morales Espinoza (EMV) to Eng. Rafael Delgadillo (COMIBOL) of 7 July 2000, **R-121**, p. 2.

480 See Letter from the Oruro Parliamentary Group to President Bánzer Suárez of 27 November 2000, **R-110**; Letter from Leopoldo Fernández Ferreira to President Hugo Bánzer Suárez of 5 December 2000, **R-113**; Letter from Humberto Bohrt Artieda to Walter Guiteras Denis of 8 December 2000, **R-114**. See, also, section 2.3.2 above.

335. Three, the Colquiri Mine Lease was surprisingly awarded to the Sánchez de Lozada's Colquiri S.A. for free, and only in exchange for a small investment commitment during the first two years of operations. Nonetheless, the Qualifying Commission did not undertake any material analysis of the conditions proposed by Colquiri, not did it consider the implications that accepting such proposal might in fact have had for the interests of the State.

336. In fact, in these proceedings, Claimant alleges that the Mine Lease was worth some US$ 443.1 million as at 29 May 2012.[481] Though, as explained by Econ One, this valuation is grossly overstated, and the real value of the Mine was in fact US$ 39.7 million as at 19 June 2012, it is evident that the conditions in which the Lease was adjudicated caused harm to the State's patrimony. If the Lease was worth US$ 39.7 (or, still worse, Claimant's alleged US$ 443.1.7 million) as at 19 June 2012 when it had only 20 years remaining on its term, it is entirely impossible that the Lease could have been worth nothing more than ten years earlier when the Lease had the full 30 years remaining.[482]

337. These facts clearly show that the circumstances surrounding the privatization of the Assets were contrary to basic requirements of transparency and good faith which rendered the privatization illegal. More importantly, the privatization of the Assets impaired the integrity of the public patrimony, given the unduly low purchase prices proposed to and accepted by the Qualifying Commission.

4.3.2 Claimant Brings Its Claims With Unclean Hands Because The Privatizations Were Illegal

338. The Tribunal is barred from exercising jurisdiction over the claims submitted to it in the present case. Pursuant to the clean hands principle, Claimant cannot present for adjudication before this Tribunal claims tainted by an illegality which Claimant was aware of when it received the Assets.

339. The clean hands principle is the manifestation of a fundamental principle of law: good faith. As such, it is widely recognized both in civil and common law systems and as a "*general principle of law that should be applicable in all cases.*"[483] It is encompassed in the legal maxims *he who comes to equity must come with clean hands* and the *ex injuria jus nor oritur*,

481 Statement of Claim, ¶ 276.

482 Econ One, Table 1.

483 R. Moloo, A. Khachaturian, "The Compliance with the Law Requirement in International Law", 34 Fordham International Law Journal 1473, issue 6, 2011, **RLA-24**, p. 1485.

nemo auditur propiam turpitudinem allegans, *ex turpi causa non oritur actio* and *ex dolo malo non oritur actio* principles.[484]

340. The principle of clean hands had definitively and authoritatively been established in the case law of international investment tribunals. The recent *Churchill Mining* tribunal has definitively established that illegal or fraudulent conduct connected to the basis of a claim renders that claim inadmissible.

341. In reaching that conclusion, the *Churchill Mining* tribunal undertook a systematic and comprehensive review of existing investment jurisprudence.[485] It specifically held that "*claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible as a matter of international public policy.*"[486] It further explained that "*the general principle of good faith and the prohibition of abuse of process entail that the claims before this Tribunal cannot benefit from investment protection under the Treaties and are, consequently, deemed inadmissible.*"[487]

342. In this regard, the *Churchill Mining* tribunal built on a consistent line of investment decisions. The *Inceysa v. El Salvador* case upheld the principle that access to international investment was barred to investments secured through illegal conduct:

> *Applying the first principle indicated above to the case at hand, we can affirm that the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, 'nobody can benefit from his own fraud'*[488]

343. Similarly, in the *Plama v. Bulgaria* case, the tribunal upheld the *ex turpi causa* defence and dismissed the claims before it, in light of its conclusion that an investment treaty's substantive protections cannot cover an investment made contrary to the law.[489]

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484 R. Moloo, A. Khachaturian, "The Compliance with the Law Requirement in International Law", 34 Fordham International Law Journal 1473, issue 6, 2011, **RLA-24**, p. 1479-1480.

485 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, **RLA-25**, ¶¶ 488-506.

486 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, **RLA-25**, ¶ 508.

487 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, **RLA-25**, ¶ 528.

488 *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award of 2 August 2006, **RLA-26**, ¶ 242.

489 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008, **RLA-27**, ¶ 139, 146.

344. The holdings in the above-cited cases are consistent with that of the tribunal in *Phoenix v. Czech Republic*. Indeed, this case stands for the proposition that extending the substantive protection of investment treaties to investments secured through improper means or which are illegal would be inconsistent with the very purpose of international investment arbitration:

> *The purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host State or investments not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system. In other words, the purpose of international protection is to protect legal and bona fide investments.*[490]

345. Following its review of the jurisprudence, the *Churchill Mining* tribunal concluded quite clearly that the illegal conduct need not be that of the investor itself for the claims to be inadmissible. It is sufficient that the claimant did not exercise a reasonable level of due diligence in making the purported investment.[491] In other words, when risks present themselves, the requirements of due diligence are demanding: "*one would expect an investor aware of the risks of investing in a certain environment to be particularly diligent in investigating the circumstances of its investment.*"[492]

346. Glencore International knew—or, at the very least, should have known—at the time it acquired the Assets that they had previously been State-owned and had passed into private property through highly irregular and publicly contested privatization processes. It would have been sufficient for Glencore International to carry out a minimum of due diligence in order for it to confirm that:

- The Assets had inappropriately passed into the hands of Sánchez de Lozada, who had taken advantage of the favourable policies he had implemented while in office;
- The circumstances in which the Antimony Smelter and Colquiri mine lease had passed to Sánchez de Lozada had been highly irregular, as the price paid for the former had been inferior to its value, whilst the only consideration paid for the lease of the latter had been practically insignificant; and

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490 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, **RLA-15**, ¶¶ 100.

491 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, **RLA-25**, ¶ 506.

492 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, **RLA-25**, ¶ 518.

- The circumstances in which the Tin Smelter was acquired by Allied Deals and subsequently by Comsur had also been highly irregular, as the purchase price of the Smelter had been a fraction of its value.

347. Given that Glencore International's founder, Marc Rich, had been a Bolivian citizen since 1983, the company and its affiliates could not have ignored these facts at the time the Assets were acquired. Whether Glencore International did not carry out the required due diligence or whether, having been aware of these facts, it chose to ignore them is of little significance. The claims that Claimant submits to this Tribunal are tainted by its unclean hands and thus inadmissible.

4.4 The Tribunal Lacks Jurisdiction Because The Claimant Is, In Reality, A Swiss Company Not Subject To Treaty Protection Or, Alternatively, Because It Cannot Bring Claims Based On Indirectly Held Rights

348. Claimant argues that the Tribunal has jurisdiction because Glencore Bermuda "*is a company incorporated under the laws of Bermuda*" and nothing more than formal incorporation in Bermuda is necessary to establish jurisdiction under the Treaty.[493]

349. However, Claimant simply ignores the fact that formal ownership structures are insufficient to establish jurisdiction when the investors are purely Swiss in substantive reality. There can be no jurisdiction because the nominal claimant is simply a vehicle through which a Swiss company, Glencore International, attempts to invoke international protection for a Treaty that does not protect Swiss companies. As Claimant admits, the investment in the Smelters and the Mine Lease was Swiss in its origins and remains Swiss in its ultimate ownership.

350. The corporate veil of Glencore Bermuda can and should be pierced in this case to reveal the Swiss nationality of the true claimant. International law recognizes that the corporate veil can be pierced when the corporate form is misused (**Section 4.4.1**). Glencore Bermuda is an empty shell company that Glencore International expressly uses to conceal misdeeds around the globe (**Section 4.4.2**). Its tainted corporate veil cannot be the basis of this Tribunal's jurisdiction.

351. And, even if Glencore Bermuda's tainted corporate veil cannot be pierced, Claimant cannot simultaneously assert claims based on indirectly held rights, effectively piercing the corporate veils of its subsidiaries. It is a general rule of international law that a company cannot assert the rights of an indirectly-held subsidiary before an international tribunal. Given that

493 Statement of Claim, ¶¶ 311-312.

Claimant had no rights of its own to the Assets at issue in this arbitration, there is no jurisdiction over its claims (**Section 4.4.3**).

4.4.1 The Treaty Excludes Jurisdiction Asserted On The Basis Of Corporate Formalities When The Real Party In Interest Is Not Protected

352. Article 8(1) of the Treaty offers the protection of international investment arbitration only to a person from one Contracting Party who invests in a *different* Contracting Party. It does not extend protection to a person from a non-Contracting Party who invests in a Contracting Party:

> *Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been legally and amicably settled shall after a period of six months from written notification of a claim be submitted to international arbitration if either party to the dispute so wishes.*[494]

353. On the basis of a similar provision, the *Loewen v. United States* tribunal famously held that it had no jurisdiction over a Canadian corporation because that corporation was a mere formality and the real party in interest was from the United States. Formalities could not allow a US investor to sue its own State:

> *[T]he Tribunal unanimously decides . . . [t]hat it lacks jurisdiction to determine TLGI's claims under NAFTA concerning the decisions of United States courts in consequence of TLGI's assignment of those claims to a Canadian corporation owned and controlled by a United States corporation.*[495]

354. The *Loewen* holding that economic realities must override corporate formalities reflects a general principle of international law that retains its vitality in international investment law. International law does not permit the use of the corporate veil to evade legal requirements or to harm third parties. Piercing the corporate veil allows international legal decisions to be made on the basis of substantive realities and not corporate formalities.

355. The judgment of the International Court of Justice (the "**ICJ**") in the *Barcelona Traction* case famously recognized that international law permits piercing the corporate veil. It emphasized that the doctrine is especially applicable to defend the interests of those adversely affected by the corporation:

> *Hence the lifting of the veil is more frequently employed from without, in the interest of those dealing with the corporate entity. However, it has also been operated from*

494 Treaty, **C-1**, Article 8(1).

495 *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB/AF/98/3, Award of 26 June 2003, **RLA-28**, Orders, ¶ 1.

> *within, in the interest of—among others—the shareholders, but only in exceptional circumstances.*
>
> *[…]*
>
> *In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders.*[496]

356. The *Barcelona Traction* judgment made clear that the veil may be pierced and corporate formalities cast aside specifically to protect the interests of third parties or to prevent evasion of legal requirements. As the ICJ explained:

> *[T]he law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.*[497]

357. The principles of *Barcelona Traction* have recently been adopted and applied by, *inter alia*, the international investment tribunal in *TSA Spectrum*. That tribunal emphasized veil piercing is available when the corporate form is used to evade otherwise applicable legal requirements:

> *In the Barcelona Traction case, the International Court of Justice stated that, in international law, it is allowed to pierce the corporate veil, for instance to prevent the misuse of the privileges of legal personality or to prevent the evasion of legal requirements or obligations.*[498]

358. The veil must be pierced when the nominal investor is the *alter ego* of the beneficial investor, as shown by misuse of the corporate form. There is no real debate that such a misuse of corporate form justifies piercing the corporate veil. In fact, even Claimant's own cited cases on this point recognize it.[499] The *Saluka* tribunal recognized that it is "*permissible for a tribunal to look behind the corporate structures of companies involved in proceedings before*

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496 *Barcelona Traction, Light and Power Company, Limited* (Belgium/Spain) [1970] ICJ Reports 3, **CLA-7**, ¶¶ 57-58 (emphasis added).

497 *Barcelona Traction, Light and Power Company, Limited* (Belgium/Spain) [1970] ICJ Reports 3, **CLA-7**, ¶ 56.

498 *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award of 19 December 2008, **RLA-29**, ¶ 117 (emphasis added).

499 Statement of Claim, ¶ 313.

it" in some circumstances.[500] One of those circumstances is when, as *ADC* recognized, "*the real beneficiary of the business misused corporate formalities […].*"[501] Claimant's other cited cases do not address veil piercing.[502]

359. In short, the corporate veil must be pierced in the present case to prevent Claimant from evading the clear jurisdictional requirement of the Treaty: the investor must be from a State that is party to the Treaty. Failure to pierce the veil would seriously prejudice Bolivia, a third party that is now in risk of being subject to lengthy and expensive litigation through Claimant's abuse of corporate formalities.

4.4.2 The Corporate Veil Must Be Pierced Because Glencore Bermuda Is An Empty Shell Hiding The True Party In Interest

360. It is Claimant's position that "*Glencore Bermuda is not a shell company*" because "*Glencore Bermuda is the company that has historically been the holding company for the vast majority of Glencore's international investments, including those in Latin America.*"[503] From this it concludes that its corporate veil cannot be pierced to reveal Claimant's true nationality.

361. However, the basic fact is that the Bolivian Assets were bought and paid for by Glencore International. This is not seriously contested. As Claimant admits, Glencore International purchased the rights and then "*subsequently assigned all of the rights, titles and interests acquired from the purchase to its wholly-owned subsidiary Glencore Bermuda.*"[504] Nor is it contested that Glencore International continued to control and benefit from its Bolivian holdings.

362. Instead, Claimant argues that Glencore Bermuda's corporate veil should block the Tribunal from recognizing Claimant's true Swiss nationality. But what is Glencore Bermuda?

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500 *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award of 17 March 2006, **CLA-62**, ¶ 230.

501 *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal of 2 October 2006, **CLA-64**, ¶ 358.

502 See *The Rompetrol Group NV v Romania* (ICSID Case No ARB/06/3) Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility of 18 April 2008, **CLA-76**, ¶¶ 83, 110 (addressing only whether general international law principles of nationality apply in investment treaty disputes); *Fedax NV v Republic of Venezuela* (ICSID Case No ARB/96/3) Decision of the Tribunal on Objections to Jurisdiction of 11 July 1997, **CLA-21**, ¶ 17 (noting that nationality was not in dispute).

503 Statement of Claim, ¶ 314.

504 Statement of Claim, ¶ 37.

363. In effect, Glencore Bermuda is nothing more than a shell company in Bermuda where Glencore International or Glencore International Plc parked subsidiaries engaged in questionable activities or whose activities they would prefer to conceal.

364. The length and breadth of what Claimant has to say about Glencore Bermuda is that it "*is a company incorporated and constituted under the laws in force in Bermuda.*"[505] Claimant does not attempt to put forth a shred of evidence of any activity in Bermuda. It does not identify any of employees. It does not reference shareholder or board meetings. It does not even describe physical facilities.

365. However, thanks to the recently released Paradise Papers, we now know why Claimant is so shy to describe Glencore Bermuda. Glencore Bermuda exists only in a nearly empty room that "*held a filing cabinet, a computer, a telephone, a fax machine and a checkbook*" and apparently nothing more.[506] This room was in the offices not of Glencore Bermuda or Glencore International but of Appleby, the Glencore Group's Bermudan law firm.[507] This is the full extent of Glencore Bermuda's physical existence.

366. Nor does Glencore Bermuda have a staff that is any more substantial. According to the Paradise Papers, in contrast to the Glencore Group's home office in Switzerland with 800 employees, "*the company had only an Appleby employee [in Bermuda] who moonlighted as an official stand-in Glencore director for a 'very limited number of hours.'*"[508] This employee barely performed any work on behalf of Glencore Bermuda: "*[t]he employment contract was designed to keep the stand-in director below thresholds that would invoke payroll taxes and social security insurance coverage, according to a file note prepared by Appleby in May 2014.*"[509]

367. Claimant effectively admits that Glencore Bermuda was nothing more than a shell company. As Mr Eskdale explains, Glencore Bermuda was a "*holding company for Glencore's investments worldwide and as such held at that time the vast majority of Glencore's*

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505 Statement of Claim, ¶ 128.

506 International Consortium of Investigative Journalists, *Room of Secrets Reveals Glencore's Mysteries*, press article of 5 November 2017, **R-243**, p. 1.

507 International Consortium of Investigative Journalists, *Room of Secrets Reveals Glencore's Mysteries*, press article of 5 November 2017, **R-243**, pp. 6-7.

508 International Consortium of Investigative Journalists, *Room of Secrets Reveals Glencore's Mysteries*, press article of 5 November 2017, **R-243**, p. 7.

509 International Consortium of Investigative Journalists, *Room of Secrets Reveals Glencore's Mysteries*, press article of 5 November 2017, **R-243**, p. 7.

investments in the Americas."[510] What this means, according to the Paradise Papers, is that the Glencore Group hid its vast network of offshore companies as subsidiaries of Glencore Bermuda. As the Paradise Papers state, "*[a] Glencore employee told Appleby that the company did not have a complete chart showing all its offshore entities 'mainly because it would take up one wall.'*"[511]

368. And the Glencore Group did not use its Bermudan shell company for noble purposes. By way of example, it used Glencore Bermuda as a repository for its off-the-books holding in shipping company SwissMarine to which it then lent funds at non-commercial interest rates.[512] It used Glencore Bermuda to hold its interest in a zinc operation in Burkina Faso that forcibly suppressed protest from the local community.[513] And it used Glencore Bermuda to hold its stake in a mining company in the Democratic Republic of Congo to which it funnelled loans allegedly destined for corrupt payments.[514]

369. Simply put, Glencore Bermuda is a shell company used to conceal the Glencore Group's misdeeds around the globe. Its marred corporate veil cannot be the basis for this Tribunal's jurisdiction. It must be pierced to reveal that the Claimant is truly Swiss.

4.4.3 Even If (*Quod Non*) The Corporate Veil Protects Glencore Bermuda, International Law Does Not Allow It To Bring Claims For Its Indirect Investment

370. It is undisputed and undisputable that Glencore Bermuda had no direct holding in the Assets at issue in the present arbitration. To the contrary, it held nothing more than shares in three Panamanian companies, which in turn held the Assets through several more layers of corporate intermediaries. International law prohibits Glencore Bermuda from bringing claims based on alleged violations of the rights of a subsidiary when its own rights were untouched. Glencore Bermuda's claims are thus barred.

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510 Eskdale, ¶ 20.

511 International Consortium of Investigative Journalists, *Room of Secrets Reveals Glencore's Mysteries*, press article of 5 November 2017, **R-243**, p. 7.

512 International Consortium of Investigative Journalists, *The Ships Glencore Wanted to Keep 'Hush Hush'*, press article of 9 November 2017, **R-244**, p. 2 ("*Glencore's significant shareholding of SwissMarine and its control over operational matters such as opening a bank account suggest that SwissMarine should have been specified by name in Glencore's recent financial statements, said Prem Sikka, Emeritus Professor of Accounting at the University of Essex.*"; "'*It would be difficult to justify the 18% rate in any context, including the November 2008 financial crisis,' said Nikos Nomikos, professor of shipping risk management at Cass Business School.*").

513 International Consortium of Investigative Journalists, *Development Dreams Stand Still While Mining Money Moves Offshore*, press article of 8 November 2017, **R-245**, pp. 1-2

514 International Consortium of Investigative Journalists, *Room of Secrets Reveals Glencore's Mysteries*, press article of 5 November 2017, **R-243**; International Consortium of Investigative Journalists, *Glencore responds to ICIJ's questions*, press article of 5 November 2017, **R-246**.

371. As an initial matter, it would be the height of unfairness to find jurisdiction despite this rule. This is because the Tribunal would simultaneously have to pierce the corporate veil in favour of Claimant, allowing it to assert the rights of its subsidiaries, while refusing to pierce the corporate veil in favor of Bolivia. Such an inconsistent position cannot be the basis of the Tribunal's jurisdiction.

372. Even apart from the dictates of consistency and fairness, the basic rule of customary international law against protection by substitution precludes jurisdiction over this dispute. This rule establishes that a foreigner may only bring claims for violations of its own rights, not for rights of companies in which it holds an interest. A shareholder may not substitute itself for that of the company in which it holds shares.

373. This rule is given authoritative voice in the International Law Commission's Articles on Diplomatic Protection. Article 11 states:

> *A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:*
> *(a) the corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or*
> *(b) the corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.*[515]

374. Widely recognized, the ICJ recently had occasion to affirm and apply the rule in the *Diallo Case* between Guinea and the Democratic Republic of Congo. It held as follows:

> *The Court, having carefully examined State practice and decisions of international courts and tribunals in respect of diplomatic protection of associés and shareholders, is of the opinion that these do not reveal — at least at the present time — an exception in customary international law allowing for protection by substitution, such as is relied on by Guinea.*[516]

375. The ICJ's holding in *Diallo* built off its earlier dicta in *Barcelona Traction*, where it sharply distinguished between a shareholder's own right, which is actionable, and its interest, which is not. There the ICJ concluded that, "*[n]ot a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the*

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515 International Law Commission, *Draft Articles on Diplomatic Protection*, 2006, **RLA-30**.

516 *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ, Judgment, ICJ Reports 2007 of 24 May 2007, **RLA-31**, ¶ 89.

company's rights does not involve responsibility towards the shareholders, even if their interests are affected."[517]

376. Although the customary international law rule against bringing claims based on the rights of subsidiary companies is clear, the ICJ has recognized that a treaty, such as an investment treaty or a friendship, commerce, and navigation treaty, can vary the basic rule. This is the moral of its *ELSI* judgment.[518]

377. However, the Treaty applicable in the present dispute in no way alters the rule of customary international law that arbitral jurisdiction is limited to claims regarding the investors own rights and not those of its subsidiaries. In this regard, Article 8(1) of the Treaty provides:

> *Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been legally and amicably settled shall after a period of six months from written notification of a claim be submitted to international arbitration if either party to the dispute so wishes.*[519]

378. This provision defines the scope of the claims over which the Tribunal has jurisdiction. It does not extend jurisdiction to indirect investments of a company, as it would need to do in order to alter the background rule of customary international law. An indirect investment is exactly one where the company is not the legal holder of the right to the relevant asset. Nothing in the Treaty's arbitration provision suggests that jurisdiction extends to claims regarding such rights.

379. In this regard, it is worth emphasizing that Bolivia and the United Kingdom, the States Parties to the Treaty, could have extended jurisdiction to indirect investment, thus varying the rule of customary international law. Bolivia has explicitly extended jurisdiction to the direct or indirect investments of foreign companies in other investment treaties, including those concluded contemporaneously with the Treaty. Notably, one such example, from the year before the Treaty, is the BIT concluded between Switzerland and Bolivia.[520] By contrast, Bolivia and the United Kingdom did not agree to alter the customary international law rule of substitution.

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517 *Barcelona Traction, Light and Power Company, Limited* (Belgium/Spain) [1970] ICJ Reports 3, **CLA-7**, ¶ 46.

518 *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ, Judgment, ICJ Reports 2007 of 24 May 2007, **RLA-31**, ¶¶ 87-88.

519 Treaty, **C-1**, Article 8(1).

520 The BIT concluded between Switzerland and Bolivia protects investments owned directly or indirectly by Swiss companies. Article 1(b) establishes "*'Companies' means: (aa) In the case of the Swiss Confederation, legal entities or associations without legal status but able to possess property, in which, directly or indirectly, there is a substantial Swiss interest […].*" Agreement between the Swiss Confederation and the Republic of Bolivia on the reciprocal promotion and protection of investments, English translation, **RLA-19**.

380. This is further confirmed by the definition of investment given in the Treaty. Pursuant to the Treaty, investments are rights that a company might possess, including rights to property, shares, monetary claims, or contractual performance. The Treaty does not include in the category of investments rights that are indirectly held, such as the property rights of a subsidiary.

381. As the Treaty provides in Article 1(a), the forms a qualifying investment may take are:

> *(i) movable and immovable property and any other property rights such mortgages, liens or pledges;*
>
> *(ii) shares in and stock and debentures of a company and any other form participation in a company;*
>
> *(iii) claims to money or to any performance under contract having a financial value;*
>
> *(iv) intellectual property rights and goodwill;*
>
> *(v) any business concessions granted by the Contracting Parties in accordance with their respective laws, including concessions to search for, cultivate, extract or exploit natural resources.*[521]

382. In short, the Treaty does not vary the basic rule of customary international law precluding jurisdiction over claims regarding rights of subsidiaries as opposed to the claimant company.

383. And in the present case there is no dispute that all of Claimant's claims regard such rights of other companies. Claimant freely admits that Glencore Bermuda held nothing more than shares in Kempsey, Iris, and Shattuck, three Panamanian companies, which in turn own Colquiri through Sinchi Wayra.[522] It similarly admits that Colquiri directly owns the Assets (or Vinto, owned by Colquiri, in the case of the Tin Smelter).[523]

384. In light of these plain facts and the prohibition on claims based on the rights of subsidiaries, the Tribunal has no jurisdiction over Claimant's claims.

4.5 The Tribunal Lacks Jurisdiction Because The Dispute Concerns Contracts With Mandatory ICC Arbitration Clauses And Diplomatic Claims Exclusions

385. Claimant attempts to submit to this Tribunal claims that ultimately arise out of and concern the validity, compliance with, and fulfilment of the Tin Smelter, Antinomy Smelter, and Colquiri Lease contracts (the "**Contracts**"). In doing so, it simply ignores the mandatory ICC

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521 Treaty, **C-1**, Article 1(a).

522 Statement of Claim, ¶ 131.

523 Statement of Claim, ¶ 131.

arbitration clauses in each of the Contracts requiring ICC arbitration of the claims. As a result of these clauses, there is no jurisdiction over any of Claimant's claims.

386. Each of the three Contracts contains a very broad ICC arbitration clause designed to ensure that any dispute touching the Contracts directly or indirectly will be submitted to the ICC. The clause reads:

> *Todos los desacuerdos, conflictos, disputas, controversias y/o diferencias que se susciten entre las partes del CONTRATO, que tengan relación directa o indirecta con la validez, interpretación, alcance y/o cumplimiento del CONTRATO, serán solucionadas por las partes de la siguiente manera: […] 15.3 Si las partes tampoco llegaran a un acuerdo total a través del procedimiento de conciliación antes pactado, todos los desacuerdos, conflictos, disputas, controversias y/o diferencias pendientes de solución se someterán y serán solucionados a través de un proceso de arbitraje, el cual se llevará a cabo de acuerdo a las Reglas de la Cámara Internacional de Comercio (International Chamber of Commerce) y a lo estipulado más adelante en la presente cláusula.*[524]

387. Moreover, each of the three Contracts contains a further clause designed to preclude any recourse to dispute resolution under international law:

> *La ARRENDADORA, el ARRENDATARIO y la OPERADORA, en virtud del CONTRATO, hacen expresa renuncia a todo reclamo por la via diplomática en cuanto se refiere a la interpretación y ejecución del CONTRATO.*[525]

388. These contractual provisions, and especially the exclusive ICC arbitration clause, preclude jurisdiction over Claimant's claims before this UNCITRAL tribunal. When the rights asserted in an international investment arbitration arise from a contract, the claimant is bound by any dispute resolution provision (**Section 4.5.1**). Although Claimant is not a direct party to the Contracts, it is bound by the exclusive ICC arbitration clause because it is ultimately asserting

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524 Notarizations of the sale and purchase agreement of the Tin Smelter between the Ministry of External Trade and Investment, Corporación Minera de Bolivia**,** Empresa Metalúrgica Vinto and Allied Deals Estaño Vinto SA, **C-7**, Article 15; Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**, Article 15; Lease agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**, Article 17.3 (Unofficial translation: "*All disagreements, conflicts, disputes, controversies and/or differences arising between the parties to the CONTRACT, directly or indirectly related to the validity, interpretation, scope and/or compliance with the CONTRACT, shall be resolved by the parties as follows: […] 15.3 If the parties do not reach a global agreement following the aforementioned conciliation procedure, all disagreements, conflicts, disputes, controversies and/or differences pending to be resolved shall be submitted and shall be resolved by arbitration under the Arbitration Rules of the International Chamber of Commerce and in accordance with what is further provided in this article*").

525 Notarizations of the sale and purchase agreement of the Tin Smelter between the Ministry of External Trade and Investment, Corporación Minera de Bolivia**,** Empresa Metalúrgica Vinto and Allied Deals Estaño Vinto SA, **C-7**, Article 18; Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**, Article 18 (Unofficial translation: "*The LESSOR, the LESSEE and the OPERATOR, by virtue of the CONTRACT, expressly waive any claim through diplomatic channels relating to the interpretation and performance of the CONTRACT*").

rights to the Tin Smelter, Antinomy Smelter, and Colquiri Mine Lease arising from the Contracts (**Section 4.5.2**).

4.5.1 An Investment Arbitral Tribunal Has No Jurisdiction Over Contract Claims Recast As Treaty Breaches When The Contracts Provide For An Alternative Forum

389. The *SGS v. Philippines* tribunal is recognized for holding that an investment tribunal cannot hear a contract claim when the parties to the contract have stipulated mandatory jurisdiction in a different forum. As it explained:

> *[T]he Tribunal should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively. SGS should not be able to approbate and reprobate in respect of the same contract: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim.*[526]

390. The basic rationale is that Claimant cannot be allowed to pick and choose the parts of the Contracts on which it wishes to rely (its so-called rights to the assets) and disregard the rest (the exclusive arbitration clauses). This was the logic of the *BIVAC v. Paraguay* tribunal (albeit directly addressing the umbrella clause). As it held, "*the parties to a contract are not free to pick and choose those parts of the Contract that they may wish to incorporate into an 'umbrella clause' provision such as Article 3(4) and to ignore others.*"[527] Any contrary conclusion "*would seriously and negatively undermine contractual autonomy*" because "*the parties to a contract […] must respect [their freely assumed] commitments, and they are entitled to expect that others, including international courts and tribunals, also respect them […].*"[528]

391. This is sensible. Arbitral jurisdiction is based on consent. When the parties to a contract have agreed to the exclusive jurisdiction of a forum, there can be no mutual consent to alternative fora. The exclusive consent to ICC arbitration from the Tin Smelter, Antinomy Smelter, and Colquiri Mine Lease Contracts must exclude jurisdiction in any other forum.

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526 *SGS Société Générale de Surveillance S.A. v. The Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction of 29 January 2004, **RLA-32**, ¶ 155. See, also, *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction of 11 September 2009, **RLA-33**¶ 202; General Claims Commission, *North American Dredging Company of Texas (U.S.A.) v. United Mexican States*, UNRIAA, volume IV of 31 March 1926, **RLA-34**, ¶ 23; *Woodruff Case*, UNRIAA, volume IX of 1903-1905, **RLA-35**, p. 222.

527 *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Objections to Jurisdiction of 29 May 2009, **RLA-36**, ¶ 148. See, also, *Bosh International Inc. and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award of 25 October 2012, **RLA-37**, ¶¶ 251-258.

528 *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Objections to Jurisdiction of 29 May 2009, **RLA-36**, ¶ 148.

392. This exclusive consent must even displace the dispute resolution provisions of the Treaty. The contractual arbitration clauses are more specific to the subject matter of the dispute than the Treaty dispute resolution provisions, and so predominantly based on the principle of *lex specialis*. They were concluded later than the dispute resolution provisions of the Treaty, and so predominatnly based on the principle of *lex posteriori*.[529] And the parties to the Contracts specifically elected to exclude any recourse under international law for disputes regarding the Contracts.[530]

4.5.2 Claimant's Claims Concern Obligations Under The Smelter Privatization Contracts And The Colquiri Lease

393. Claimant's claims in this dispute have a direct relationship with the validity, interpretation and fulfillment of the three Contracts underlying the Tin Smelter, the Antinomy Smelter, and Colquiri Mine Lease. In fact, Claimant itself alleges that "*any contractual obligations Bolivia has entered into with respect to Glencore Bermuda's or its local affiliates' investments also amount to obligations under the Treaty.*"[531] Thus, they are precluded by the mandatory ICC arbitration clauses in the Contracts.

394. As an initial matter, there can be no doubt that Claimant alleges in this arbitration that its affected rights arise directly from the contracts. Claimant asserts as much in its pleadings. It concedes that Vinto obtained the Tin Smelter via the Tin Smelter Contract,[532] that Colquiri obtained the Antimony Smelter via the Antimony Smelter Contract,[533] and that Colquiri obtained the Colquiri Mine Lease via the Lease Contract.[534] Thus, the rights asserted in this arbitration are ultimately based in these contracts.

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529 The Treaty was ratified 16 February 1990 while the contracts were concluded between 2000 and 2002.

530 Notarizations of the sale and purchase agreement of the Tin Smelter between the Ministry of External Trade and Investment, Corporación Minera de Bolivia**,** Empresa Metalúrgica Vinto and Allied Deals Estaño Vinto SA, **C-7**, Article 18; Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**, Article 18;Lease agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**, Article 19.

531 Statement of Claim, ¶ 181.

532 Statement of Claim, ¶ 29 (citing Notarizations of the sale and purchase agreement of the Tin Smelter between the Ministry of External Trade and Investment, Corporación Minera de Bolivia**,** Empresa Metalúrgica Vinto and Allied Deals Estaño Vinto SA, **C-7**).

533 Statement of Claim, ¶ 31 (citing Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**).

534 Statement of Claim, ¶ 30 (citing Lease agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**

395. Not only do these rights arise from the Contracts, but Claimant's allegations make it clear that the dispute is about the validity, interpretation, and fulfillment of the Contracts. Consequently, the claims are within the scope of the mandatory ICC arbitration clause.

396. *First*, Claimant alleges, as the foundation of its Tin Smelter claims, that the Tin Smelter reversion was not justified "*on the basis of purported illegalities in the privatization of the asset*."[535] But this allegation is ultimately a question of the legal status of the Tin Smelter contract and the effects it has on the party's obligations under that contract. Bolivia reverted the Tin Smelter exactly because it considered that contract to have been affected by illegalities that eliminated its obligation to perform under the contract by transferring the Tin Smelter.[536] Claimant in fact recognizes that this was Bolivia's stated reason for the reversion.[537] Thus, the Tin Smelter claims are ultimately covered by the mandatory arbitration clause.

397. *Second*, Claimant similarly alleges, as the grounds for its Antimony Smelter claims, that the Antimony Smelter reversion was not justified based "*on the Antimony Smelter's non-production […]*."[538] But this too is a contractual question. Claimant recognizes that Bolivia asserted the productive inactivity as the reason for the reversion. Bolivia's reversion decree specifically stated that the productive inactivity justified the reversion because the terms and conditions for the tender established "*las obligaciones de invertir y fortalecer la Empresa Metalúrgica Vinto Antimonio con capacidad económica, financiera y técnica, […] posibilitando a la Fundición continuar la producción […]*."[539] These terms and conditions were ultimately incorporated into the privatization contract for the Antimony Smelter.[540] Thus, Claimant's Antinomy Smelter claims are ultimately about the fulfilment of the contract.

398. *Third*, Claimant finally alleges that Bolivia could not terminate the Colquiri Mine Lease in response to the violent conflict that erupted at the Mine.[541] But this is straightforwardly a question as to whether Bolivia fulfilled its obligations under the Lease Contract. Claimant specifically alleges that Bolivia breached Article 9.2.1 of the Contract—which states that "*[l]a*

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535 Statement of Claim, ¶ 5.

536 Supreme Decree No 29.026 of 7 February 2007, **C-20**, Preamble.

537 Statement of Claim, ¶ 67.

538 Statement of Claim, ¶ 6.

539 Supreme Decree No 499 of 1 May 2010, **C-26**, Preamble, p. 17 (Unofficial translation: "*obligations to invest and reinforce the Empresa Metalúrgica Vinto Antimonio with economic, financial and technical capacity […] allowing the Smelter to continue production*").

540 Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**, Article 23(1).

541 Statement of Claim, ¶¶ 8-12.

ARRENDADORA se obliga a no interferir ni limitar las operaciones del ARRENDATARIO"[542]—through its actions to ensure public safety and security at the Mine.[543] It is indisputably that Claimant's allegations concern Bolivia's alleged interference and limitations of operations at the Colquiri Mine. Thus, Claimant's Colquiri Mine claims are about Bolivia's fulfillment of the Contract under the circumstances.

399. In conclusion, each set of Claimant's claims are ultimately based on contractual disagreements regarding the privatization and lease contracts. Such disagreements are within the scope of the mandatory ICC arbitration clause. This Tribunal has no jurisdiction over the dispute.

4.6 The Tribunal Lacks Jurisdiction Over The Tin Stock Claims Because They Were Never Notified To Bolivia

400. Claimant alleges that it "*formally notified Bolivia of the existence of the dispute, pursuant to Article 8 of the Treaty*."[544] This is incorrect as to its Tin Stock claims. Claimant never notified Bolivia that it had potential claims regarding the Tin Stock under any international investment treaty, let alone the Treaty applicable in this dispute. This failure to notify eliminates jurisdiction over the Tin Stock claims.

401. The Treaty specifies certain preconditions for arbitration in Article 8(1), among them the requirement to provide written notification of a claim six months before filing for arbitration:

> *Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been legally and amicably settled shall after a period of six months from written notification of a claim be submitted to international arbitration if either party to the dispute so wishes.*[545]

402. The purpose of such a "cooling off period" is to allow for non-contentious resolution of the dispute, in part or in whole. As the *Burlington* tribunal observed, "*[t]he six-month waiting period requirement of Article VI is designed precisely to provide the State with an opportunity to redress the dispute before the investor decides to submit the dispute to arbitration.*"[546]

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542 Lease agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**, Clause 9.2.1 (Unofficial translation: "*The LESSOR commits not to interfere with or limit the LESSEE's operations*").

543 Statement of Claim, ¶ 186.

544 Statement of Claim, ¶ 134(b). Confirmed in Letter from Glencore (Mr Eskdale) to the Solicitor General (Mr Arce Zaconeta) and the Minister of Mining and Metallurgy (Mr Navarro Miranda) of 5 January 2016, **C-41**.

545 Treaty, **C-1**, Article 8(1).

546 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction of 2 June 2010, **RLA-38**, ¶ 312.

However, absent proper notification of a given claim or claims, it is impossible for the state to seek amicable resolution or to provide redress.

403. It is for this reason that investment tribunals insist on strict compliance with the notification requirement.[547] Notably, the *Rurelec* tribunal, interpreting the very Treaty from this dispute, concluded that the notification requirement limits consent to arbitration: "*[t]he explicit wording requiring a written notification and the expiry of a period of six months from that notification leads the Tribunal to consider that the 'cooling off period' narrows the consent given by the Contracting Parties to international arbitration.*"[548]

404. Despite ample opportunities, Claimant never provided Bolivia with written notification of its Tin Stock claims, depriving Bolivia of the opportunity to reach an amicable resolution of those claims.

405. Claimant makes clear in its pleadings that it makes distinct claims concerning the Tin Stock. In its summary of claims, Claimant alleges that "*Bolivia seized the Smelters, the Tin Stock and the Colquiri Lease*" and that "*the way the Smelters, the Tin Stock and the Colquiri Lease were seized also amounts to breaches […].*"[549] Claimant similarly distinguishes the Tin Stock claims from those concerning the other assets repeatedly throughout its Statement of Defense.[550]

406. The reason is clear. It is Claimant's case that the Tin Stock "*was the property of Colquiri and did not form part of the Antimony Smelter's inventory, nor was it included in the Antimony Smelter Nationalization Decree.*"[551] For this reason, it contends that Bolivia committed distinct breaches from those concerning the Antinomy Smelter because "*the Minister of Mining failed to secure its return to Glencore Bermuda or any of its affiliates.*"[552] So, Claimant makes a separate set of claims regarding the Tin Stock on the face of its own pleadings.

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547 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction of 2 June 2010, **RLA-38**, ¶ 312; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue of 5 March 2013, **RLA-39**, ¶ 83.

548 *Guaracachi America, Inc and Rurelec Plc v Plurinational State of Bolivia* (UNCITRAL) Award of 31 January 2014, **CLA-120**, ¶ 388.

549 Statement of Claim, ¶ 139.

550 See, e.g., Statement of Claim, ¶¶ 16, 82, 131, 139, 148, 164-165, 225, 286, 295.

551 Statement of Claim, ¶ 6. See also Statement of Claim, ¶¶ 6, 79, 81, 165, 174, 218.

552 Statement of Claim, ¶ 6. See also Statement of Claim, ¶ 79, 81, 165, 174, 218.

407. Given the nature of the Tin Stock claims, Bolivia should have been given the opportunity to resolve them amicably. It is Claimant's own position that the Tin Stock claims arise from a mistake on the part of Bolivia that potentially could have been resolved more easily than the remaining claims.

408. But Claimant never gave Bolivia that opportunity by notifying the Tin Stock claims to Bolivia. Claimant asserts that "*in its written notices dated 11 December 2007, 14 May 2010 and 27 June 2012 Glencore Bermuda formally notified Bolivia of the existence of the dispute, pursuant to Article 8 of the Treaty*."[553] However, none of its formal notices of dispute make even a single reference to the Tin Stock, much less to Claimant's intention to bring claims regarding the reversion of the Tin Stock.[554]

409. Nor did any of Claimant's additional communications regarding this dispute mention the Tin Stock or the potential Tin Stock claims. To the contrary, they simply mentioned the reversions of the Tin Smelter, the Antimony Smelter, and the Colquiri Mine Lease.[555] In this regard, the final communication from Claimant prior to its Request for Arbitration stated only that, "*en febrero de 2007 y mayo de 2010, el Gobierno dispuso, respectivamente, la nacionalización de las fundiciones de estaño y antimonio pertenecientes al Complejo Metalúrgico Vinto S.A (Vinto), con todos sus activos.*"[556] The possibility of the Tin Stock claims was never even raised.

410. In fact, not a single letter mentions the Tin Stock in connection with Glencore International or Glencore Bermuda, and still less as the basis of a possible investment treaty claim. The only letters that refer to the Tin Stock come from Colquiri and they only seek the return of the

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553 Statement of Claim, ¶ 134(b). See also, Letter from Glencore (Mr Eskdale) to the Solicitor General (Mr Arce Zaconeta) and the Minister of Mining and Metallurgy (Mr Navarro Miranda) of 5 January 2016, **C-41**.

554 Letter from Glencore Bermuda (Mr Kalmin and Mr Hubmann) to Ministry of the Presidency (Mr Quintana), 11 December 2007, **C-25**; 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**; and Letters from Glencore International PLC (Mr Maté) to the President of Bolivia (Mr Morales), 27 June 2012, **C-40**.

555 See, e.g., 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) of 20 May 2015, **C-148**; Letter from Sinchi Wayra (Mr Capriles) to the Minister of Legal Defense (Ms Arismendi) of 22 June 2010, **C-103**.

556 Letter from Glencore (Mr Eskdale) to the Solicitor General (Mr Arce Zaconeta) and the Minister of Mining and Metallurgy (Mr Navarro Miranda) of 5 January 2016, **C-41** (Unofficial translation: "*in February 2007 and May 2010, the Government decided respectively to nationalize the tin and antimony smelters belonging to the Complejo Metalúrgico Vinto S.A (Vinto), together with all its assets*").

Tin Stock following its reversion.[557] None of them mention a possible international claim by Glencore International or Glencore Bermuda.

411. In short, Claimant did not notify its Tin Stock claims prior to arbitration as the Treaty requires. Those claims must be rejected for lack of jurisdiction.

5. BOLIVIA'S REQUEST FOR BIFURCATION SHOULD BE GRANTED

412. As Bolivia has repeatedly emphasized,[558] efficiency and justice demand bifurcation of this dispute. Any of Bolivia's preliminary objections would conclusively dispose of this dispute without further proceedings (with a single exception). Resolution of the dispute following a bifurcation would avoid the substantial time and expense associated with a full merits phase and, more fundamentally, would ensure that Bolivia does not have to defend itself in a forum to which it has not granted its consent.

413. Claimant implicitly recognizes that bifurcation is appropriate in this case. It is for this reason that Claimant has deliberately attempted to block bifurcation through procedural tactics that caused further delay and costs. It refused to submit its arguments on bifurcation when the Tribunal invited it to do so in March, instead commenting only on how to reach a decision on bifurcation.[559] It then insisted on submitting a Statement of Claim prior to any decision on bifurcation.[560] It now attempts to claim that bifurcation would be inefficient, invoking the conditions that Claimant itself created.[561]

414. Despite have intentionally caused delay in the decision on bifurcation, Claimant now has the audacity to allege that Bolivia seeks to delay the case.[562] This allegation is manifestly false. Bolivia has set forth serious jurisdictional objections that could put an immediate end to the dispute (the opposite of delay). But the complaints about delay also lie ill in Claimant's mouth. Claimant was willing to wait almost ten years following the Tin Smelter reversion to

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557 Letter from Colquiri SA (Mr Capriles Tejada) to Ministry of Mining (Mr Pimentel Castillo) of 3 May 2010, **C-28**; Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel) of 7 June 2010, **C-101**; Letter from EMV (Mr Villavicencio) to Colquiri (Mr Capriles) of 8 June 2010, **C-102**.

558 Respuesta a la Notificacion de Arbitraje of 18 August 2016, ¶ 53; Escrito de Bolivia sobre Cuestiones Procesales, ¶ 20; Bolivia's Response on Bifurcation, ¶ 10.

559 Claimant's Letter to the PCA, dated 3 April 2017, pp. 6-8.

560 Claimant's Letter to the PCA, dated 3 April 2017, pp. 7-8.

561 Statement of Claim, ¶¶ 299, 325.

562 Statement of Claim, ¶ 328.

commence this arbitration. It is simply not credible for Claimant now to assert that a jurisdictional phase would be "*unreasonably burdensome.*"[563]

415. Neither Claimant's arguments nor strategic delays can defeat Bolivia's right to have its serious and substantial preliminary objections heard in a bifurcated phase. Bifurcation is to be presumed, absent good cause, for reasons of justice and efficiency (**Section 5.1**). There can be no good cause to deny bifurcation to Bolivia's preliminary objections (**Section 5.2**).

5.1 Granting Bifurcation Prevents States From Having To Defend Themselves When There Is No Jurisdiction And Ensures Efficient Resolution Of Disputes

416. Despite the clear demands of efficiency and justice, Claimant continues to argue that the Tribunal should in effect adopt a presumption against bifurcation.[564] But this is wrong. To the contrary, the Tribunal should presume that the proceedings are to be bifurcated for two reasons that cut to the core of the international arbitral system: procedural justice and procedural efficiency.

417. *First*, it is fundamentally unjust, and even contrary to fundamental legal principles, to demand that a state defend itself against the merits of a claim before a tribunal without jurisdiction or where that jurisdiction is in dispute. Jurisdiction for international adjudication is premised on state consent and only with that consent may a tribunal or court proceed to review state behaviour.

418. No less an authority on international adjudication than Prof. Rosenne has confirmed this rule. As Prof. Rosenne affirms, "*[a] basic rule of international law and a principle of international relations [provides] that a State is not obliged [to] give an account of itself on issues of merits before an international tribunal which lacks jurisdiction or whose jurisdiction has not been established.*"[565] Prof. Thirlway echoes this view. He avows that "*a jurisdictional issue must be dealt with as a preliminary point since a State is entitled to decline to permit its conduct to be scrutinized by a tribunal unless it has conferred jurisdiction on that tribunal.*"[566]

419. In fact, Claimant's own authority, Prof. Lalive, took the same position. Quoting Sir Hersh Lauterpacht with favor, Prof. Lalive affirmed that "*'[a] defendant Government which pleads to the jurisdiction of the Court ought not, without good reasons, and without its consent, to be*

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563 Statement of Claim, ¶ 328.

564 Statement of Claim, section VII(A)(1).

565 S. Rosenne, *The world court: what it is and how it works*, 5th ed., 1995, **RLA-40**, p. 99.

566 H. Thirlway, "Preliminary Objections" in *Max Planck Encyclopedia of Public International Law*, August 2006, **RLA-41**, ¶ 4.

expected to submit to the effort, expense and uncertainty of engaging in proceedings on the merits. "[567] And Prof. Lalive's statement, which Claimant cites out of context, that tribunals sometimes find good reasons to join jurisdiction to the merits, does not change his confirmation of the basic legal position.[568]

420. Bifurcation, in short, is favoured by the basic principles of international adjudication and even of fundamental justice. A state cannot be judged until the tribunal's capacity to do so is confirmed. In this regard, Claimant is simply wrong to argue that the only relevant consideration is efficiency.[569]

421. *Second*, efficiency is, however, an additional consideration that militates in favor of bifurcation. By considering preliminary objections separately, the time and costs associated with consideration of the merits are potentially avoided.

422. The *Philip Morris v. Australia* tribunal, when deciding in favor of bifurcation,[570] emphasized the substantial savings in time and costs that bifurcation could (and in fact did) bring. It recognized that the merits phase would "*be extremely large and complex in the submissions, documents, witness and expert testimonies, and issues to be evaluated*" and so concluded that, "*should preliminary objections prevail with the result that no procedure on the merits becomes necessary, this would result in a major saving of work and costs*."[571] Notably, it reached this conclusion even though "*the Respondent ha[d] already submitted its full Statement of Defence*" and "*the work involved and the period up to a final hearing would be shorter than in the usual scenario […].*"[572]

423. By contrast, the *Caratube* tribunal came to regret that the respondent state had not sought bifurcation, given the great loss of efficiency incurred from hearing the entire dispute in a single phase. As that tribunal observed, "*[w]ith the wisdom of hindsight, the majority of the costs and expenses of each party and of the dispute, both in duration and expense, would have been avoided had Respondent opted for bifurcation and the preliminary determination of its*

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567 P Lalive, "Some objections to Jurisdiction in Investor-State Arbitration," Transcript of Presentation to the 16th ICCA Congress, London, **CLA-35**, p. 8.

568 Statement of Claim, ¶ 302 (citing P Lalive, "Some objections to Jurisdiction in Investor-State Arbitration," Transcript of Presentation to the 16th ICCA Congress, London, **CLA-35**, p. 8).

569 Statement of Claim, ¶ 299.

570 *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Procedural Order No 8 of 14 April 2014, **CLA-121**, ¶¶ 116, 123.

571 *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Procedural Order No 8 of 14 April 2014, **CLA-121**, ¶ 106.

572 *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Procedural Order No 8 of 14 April 2014, **CLA-121**, ¶ 105.

equivalent of Rule 41(1) objections under the Rules."[573] In that case, as in this one, the potential savings in duration and expense included reducing legal time and fees, eliminating experts and their reports, and reduction of hearing length.[574]

424. Claimant tries to discount the costs from an unnecessary merits phase and suggests that bifurcation would also result in inefficiency, as either party may be motivated to challenge the resulting decision on preliminary objections before the domestic courts at the seat of the arbitration.[575] This rebuttal goes nowhere. Just as with the arbitration itself, any set aside proceedings would be vastly simplified and reduced in cost if they only have to address preliminary objections and not the remainder of the dispute. The same is true if there is no bifurcation, because either party may seek to set aside the decision on preliminary objections even when rendered along with a merits award. Thus, Claimant's argument here is simply irrelevant.

425. By resisting bifurcation until after the Statement of Claim (and Statement of Defense), Claimant has already introduced substantial inefficiencies into this proceeding. A failure to bifurcate at this stage would further add to the wasted time and resources by forcing the parties to litigate the merits and quantum, even though the Tribunal lacks the capacity to decide the claims.

426. Given that both justice and efficiency weigh heavily in favor of bifurcation, Claimant instead attempts to distract attention from these facts. It argues that "*[t]he 2010 UNCITRAL Rules, which apply to this case, eliminated any presumption that might have existed under the 1976 UNCITRAL Rules in favor of hearing jurisdictional objections as a preliminary question.*"[576] But this argument is a red herring. Bolivia does not argue that there is a presumption in favor of bifurcation simply because of the language of the UNCITRAL Rules. Instead, it is Bolivia's position that fundamental considerations of justice and efficiency compel bifurcation.

427. Claimant also attempts to distract attention from the demands of justice and efficiency by citing to academic commentary on bifurcation in commercial arbitration.[577] But commercial arbitration, involving commercial parties, is subject to a very different legal framework and

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573 *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award of 5 June 2012, **RLA-42**, ¶ 487.

574 *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award of 5 June 2012, **RLA-42**, ¶¶ 488-490.

575 Statement of Claim, ¶ 327.

576 Statement of Claim, ¶ 300.

577 Statement of Claim, ¶ 303.

legal considerations than investment arbitrations against sovereign states. Commercial companies, even involved in domestic arbitration, do not have the same rights and prerogatives as sovereign states. Notably, sovereign states are never subject to compulsory jurisdiction.

428. In short, the demands of justice and efficiency establish a weighty presumption in favor of bifurcation of international proceedings.

5.2 Bolivia's Objections Comply With All The Requirements For An Order On Bifurcation

429. Taking into account the presumption in favor of bifurcation, the Tribunal's analysis should apply the three criteria from *Philip Morris Asia v. Australia*: "*1) Is the objection prima facie serious and substantial? 2) Can the objection be examined without prejudging or entering the merits? 3) Could the objection, if successful, dispose of all or an essential part of the claims raised?*"[578] If these criteria are plausibly met, the proceedings must be bifurcated.

430. Although Claimant too acknowledges that *Philip Morris* provides the applicable standard, it attempts to distort that standard.[579] It proposes that the standard asks whether the objection has a great "*likelihood of success*" rather than whether the objection is "*serious and substantial.*"[580] But neither *Philip Morris* nor *Glamis Gold*,[581] Claimant's other authority, in fact propose such a criterion, and for good reason: the evaluation of a request for bifurcation cannot require that the tribunal enter into the merits of the preliminary objections. The criteria are as *Philip Morris* sets them forth.

431. Bolivia's objections clearly satisfy the *Philip Morris* criteria. As already mentioned, if any of Bolivia's preliminary objections were granted (except the failure to notify the dispute about the Tin Stock[582]), it would bring an immediate end to the entirety of this arbitration. The objections are serious and substantial, as they are backed by extensive legal authorities and factual exhibits. And the preliminary objections are entirely separate from the merits: the core facts for the objections extend only through when Glencore Bermuda received the Assets in 2005, while the core merits facts are from events in 2007, 2010, 2012, and beyond.

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578 *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Procedural Order No 8 of 14 April 2014, **CLA-121**, ¶ 109.

579 Statement of Claim, ¶ 307.

580 Statement of Claim, ¶¶ 304, 307.

581 *Glamis Gold Ltd v United States of America* (UNCITRAL) Procedural Order No 2 of 31 May 2005, **CLA-58**, ¶ 12(c).

582 Glencore never notified Bolivia that it had potential claims regarding the Tin Stock under any international investment treaty, let alone the Treaty applicable in this dispute. This failure to notify eliminates jurisdiction over the Tin Stock claims. See section 2.6.2 above.

432. *First*, the objection that Glencore Bermuda did not invest relies on the basic principle of investment arbitration that the so-called investor must make an investment to be protected. It further is based on the undisputed fact that Glencore Bermuda was simply assigned the legal rights to shares in the Panamanian companies in 2005, but made no payment or contribution in exchange for its so-called investment. This objection rests on accepted legal principles, uncontested facts, and has no relation to the merits.

433. *Second*, the objection that Claimant committed an abuse of process is based on a widely accepted principle of international adjudication. Its factual foundations regarding the foreseeability of the alleged expropriations are supported by extensive evidence of the controversies surrounding the assets in 2005 when the assets were transferred to Glencore Bermuda. They do not concern whether the later reversions were in fact expropriations or otherwise illegal. The objection thus rests on solid legal and factual bases that are unrelated to the merits.

434. *Third*, the objection that the Assets were illegal privatized concerns a privatization process that occurred from 1999-2002, and was long since over at the time of the alleged expropriations at the core of this dispute. It is a well-established principle of investment law that claims cannot be heard when the underlying asset is tainted by illegality. Thus, the objection is founded on solid legal principles and facts with no relationship to the merits of the dispute.

435. *Fourth*, the objection that Claimant is, in reality, Swiss is based on the legal authority of the ICJ and undisputable facts about Glencore Bermuda. These facts are centered on Bermuda and have nothing at all to do with what is alleged to have happened in Bolivia. The legal and factual bases for the claim are substantial and unrelated to the merits of the dispute.

436. *Fifth*, the objection that this dispute is subject to the mandatory ICC arbitration clauses in the privatization contracts is based on plain contractual provisions. It is widely accepted in international law that mandatory arbitration clauses preclude litigation in other fora. As the objection is based on 2000-2002 mandatory arbitration agreements, it is serious and substantial and unrelated to the merits.

437. Although Bolivia's objections clearly satisfy the *Philip Morris* criteria, Claimant nevertheless argues against bifurcation. It primarily argues that that the preliminary objections "*are clearly closely intertwined with the merits.*"[583] But this response amounts to nothing more than a bald assertion. Claimant does not, and cannot, provide any reasonable explanation as to why

583 Statement of Claim, ¶ 321.

preliminary objections concerning the making of the so-called investment would intertwine with merits facts that occurred after the so-called investment was complete.

438. Instead, Claimant's explanation is that Mr. Eskdale would have to testify twice in the event of bifurcation. But this argument is both legally irrelevant and factually incorrect.[584] The facts for preliminary objections remain legally separate from the merits even if one witness addresses both sets of facts; otherwise any claimant could strategically defeat bifurcation by simply having a witness talk about both sets of facts. It is also incorrect that Mr. Eskdale would necessarily have to testify twice: if any of Bolivia's preliminary objections are accepted, Mr. Eskdale would only have to testify a single time.

439. It does not help Claimant to add that the merits of the dispute concern "*the facts, circumstances and the legal framework on which Glencore Bermuda relied when investing in Bolivia.*"[585] Apart from these considerations having almost nothing to do with the merits (legitimate expectations are nothing more than tack-on claims[586]), Bolivia's preliminary objections do not concern what Claimant did or did not rely on when investing.

440. In short, Bolivia's preliminary objections should all be heard in a bifurcated phase in order to ensure Bolivia is treated with justice and to promote efficiency. The objections are serious and substantial and have nothing to do with the merits of the dispute. Basic principles of international adjudication demand bifurcation.

6. BOLIVIA'S CONDUCT WAS CONSISTENT WITH THE TREATY AND INTERNATIONAL LAW

441. Claimant advances three sets of claims based on the reversion of the Assets. Repeating the same arguments in various permutations and combinations, Claimant essentially alleges that these reversions breached the expropriation clause, full protection and security clause ("**FPS**"), and the fair and equitable treatment ("**FET**") and impairment clauses of the Treaty.

442. Each and every one of these allegations is false. The reversions did not breach the expropriation clause of the Treaty because they were valid exercises of Bolivia's police powers and otherwise lawful (**Section 6.1**). They did not breach the FPS clause of the Treaty because there was never any risk of permanent impairment to the Assets and Bolivia took all reasonable and legal measures of protection available under the circumstances (**Section 6.2**).

584 Statement of Claim, ¶ 315.

585 Statement of Claim, ¶ 325.

586 See section 6.3.1 below.

And they certainly did not breach the FET or impairment clauses; Claimant's allegations to the contrary are mere repetitions of its other claims (**Section 6.3**).

6.1 Bolivia Did Not Expropriate The Assets But Instead Exercised Its Rights Under Bolivian Law And Under The Police Powers Doctrine

443. Claimant's principal allegations in this arbitration are that Bolivia carried out unlawful expropriations of the Tin Smelter, the Antimony Smelter, the Tin Stock, and the Colquiri Mine Lease. It argues that "*Bolivia does not contest that it has nationalized, through an outright taking, the assets of Colquiri and Vinto (ie, the Tin Smelter, the Antimony Smelter, the Colquiri Lease and the Tin Stock)*"[587] and that, "*[i]n order for Bolivia to carry out a lawful expropriation, it must comply with the requirements set out in Article 5 of the Treaty.*"[588]

444. These allegations are riddled with errors. Claimant fails even to consider, much less to disprove, that Bolivia's reversions were valid exercises of its police powers, taken to enforce law, public order, and safety within its territory. The Tin Smelter was reverted because it was illegally privatized and the Antimony Smelter was reverted because of a breach of the basic contractual commitment to put the Smelter into production. And, as is obvious even from Claimant's own pleadings, Bolivia reverted the Colquiri Mine Lease in order to restore public order and safety following a massive conflict that Glencore International allowed to develop with the artisanal miners who shared rights to the Colquiri Mine. (**Section 6.1.1**)

445. Claimant also incurs the basic legal error of assuming that expropriations (which the reversions were not) breach investment treaties and are unlawful whenever compensation is not paid or *prior* due process is not accorded. This assumption is incorrect. The failure to pay compensation pending the outcome of arbitration or court proceedings neither breaches the Treaty nor makes an expropriation unlawful. And the only due process that the Treaty requires is posterior, to be satisfied either by court proceedings before the domestic courts (which Claimant never pursued) or by this very arbitration. There was no breach of the Treaty's requirements for expropriation, even assuming (*quod non*) that one occurred. (**Section 6.1.2**)

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587 Statement of Claim, ¶ 148.

588 Statement of Claim, ¶ 149.

6.1.1 Bolivia Carried Out A Legitimate Exercise Of Its Police Powers To Enforce The Law And To Maintain Public Safety

446. In its attempt to show that the reversions were expropriations, Claimant does nothing more than assert that possession of the Tin Smelter, the Antimony Smelter, the Tin Stock, and the Colquiri Mine Lease were taken from it. But this is entirely insufficient.

447. Under international law, to prove an expropriation, it is also necessary to show that the impugned measures were not valid exercises of police powers (**Section 6.1.1.1**). There can be no doubt that the reversions of the Tin Smelter, Antinomy Smelter, and Tin Stock were such valid exercises. The Tin Smelter was reverted because the privatization was illegal and the Antinomy Smelter was reverted because Colquiri never satisfied the fundamental condition of the privatization, that the Smelter be put back in operation. And the reversion of the Colquiri Mine Lease was a similarly valid exercise of police powers, taken to restore public order and public safety in the face of a violent conflict at the mine (**Section 6.1.1.2**).

6.1.1.1 Legitimate Exercises Of Police Powers To Enforce The Law Or To Maintain Public Safety Are Not Expropriatory

448. It is Claimant's position that allegations of expropriation can be decided on a summary basis. It argues that "*[a] physical occupation, dispossession or assumption of substantial control that is not merely ephemeral and that deprives an investor of the use or enjoyment of its investment, including the deprivation of all or a significant part of the economic benefit of its property, is expropriatory.*"[589] From this, Claimant infers that, "*[i]f the measures at stake have these effects, there is no need to inquire into the motives, intentions or form of the measures in order to conclude that an expropriation has occurred.*"[590]

449. This simplistic view of expropriation is contrary to well-established international law. According to the international doctrine of police powers, an exercise of a state's police powers in the public interest is not an expropriation. This principle holds that "*the State's reasonable bona fide exercise of police powers in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic damage to an investor and that the measures taken for that purpose should not be considered as expropriatory […].*"[591]

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589 Statement of Claim, ¶ 147.

590 Statement of Claim, ¶ 147.

591 *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, **RLA-43**, ¶ 295.

450. Thus, Claimant cannot merely make conclusory allegations based on alleged losses of economic benefit; it must demonstrate that an expropriation has actually occurred.

451. It is beyond serious doubt that the police powers doctrine in international law limits the Treaty obligations concerning expropriation, including the requirement to pay compensation. Article 31(3)(c) of the Vienna Convention on the Law of Treaties mandates the interpretation of the Treaty's expropriation provision in light of "*any relevant rules of international law applicable in the relations between the parties.*"[592] One of these rules is the police powers doctrine.

452. This was the conclusion of the *Philip Morris v. Uruguay* tribunal. The Claimant in that case argued that the exercise of police powers is not an exception or a defense to expropriation.[593] The tribunal flatly rejected the argument. As it explained:

> *The Tribunal disagrees. As pointed out by the Respondent, Article 5(1) of the BIT must be interpreted in accordance with Article 31(3)(c) of the VCLT requiring that treaty provisions be interpreted in the light of "[a]ny relevant rules of international law applicable to the relations between the parties," a reference "which includes … customary international law." This directs the Tribunal to refer to the rules of customary international law as they have evolved.*[594]

453. The *Philip Morris v. Uruguay* tribunal is a recent entry in a long line of authorities to recognize the police powers doctrine. Most notably, the 1961 Harvard Draft Convention on the International Responsibility of States for Injury to Aliens recognized the police powers doctrine as a defense to expropriation claims in a broad range of circumstances:

> *An uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful, provided (a) it is not a clear and discriminatory violation of the law of the State concerned; (b) it is not the result of a violation of any provision of Article 6 to 8 of this Convention [denial of justice]; (c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; and (d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.*[595]

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592 Vienna Convention on the Law of Treaties, 1155 UNTS 331 of 23 May 1969, **CLA-6**, Article 31(3)(c).

593 *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, **RLA-43**, ¶¶ 289-290.

594 *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, **RLA-43**, ¶¶ 289-290.

595 The American Journal of International Law, *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*, 1961, **RLA-44**, Article 10(5).

454. In the years since that Convention, repeated investment tribunals have applied the police powers doctrine as a limitation on expropriation. These tribunals include *Saluka v. Czech Republic*,[596] *Methanex Corp v. USA*,[597] *Chemtura v. Canada*,[598] *Suez v. Argentina*,[599] and *Les Laboratoires Servier, S.A.S. v. Poland.*[600] The doctrine has been applied in substance, if not in name, by many other tribunals.[601]

455. Crucially, the police powers doctrine assigns ***claimant*** the burden of proof to establish that actions allegedly constituting expropriation were ***not*** an exercise of police powers. Once a respondent proposes a *prima facie* justification for the impugned actions, it falls to the claimant to prove that the actions were disproportionate, discriminatory, or in bad faith. As the tribunal in *Les Laboratoires* held:

> *Poland has come forward with prima facie justification for rejecting the Claimant's applications for marketing authorizations. […]*
>
> *In light of such explanations, it would be unreasonable to demand that Poland "prove the negative" in the sense of demonstrating an absence of bad faith and discrimination, or the lack of disproportionateness in the measures taken.*
>
> *Thus, the burden then falls onto the Claimants to show that Poland's regulatory actions were inconsistent with a legitimate exercise of Poland's police powers. If the Claimants produce sufficient evidence for such a showing, the burden shifts to Poland to rebut it.*[602]

456. In short, once Bolivia puts forth evidence that the reversions were taken for public purposes—protecting public health and safety and confiscating goods unlawfully obtained—as it does below, it becomes Claimant's burden to demonstrate that Bolivia's actions were disproportionate, discriminatory, or in bad faith.

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596 *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award of 17 March 2006, **CLA-62**, ¶¶ 255; 262.

597 *Methanex Corporation v. USA*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits of 3 August 2005, **RLA-45**, Part IV, Chapter D, ¶ 7.

598 *Chemtura Corporation v. Canada*, NAFTA/UNCITRAL, Award of 2 August 2010, **RLA-46**, ¶ 266.

599 *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability of 30 July 2010, **RLA-47**, ¶¶ 139-140.

600 *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, PCA, Final Award of 14 February 2012, **RLA-48**, ¶¶ 569-584.

601 *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002, **RLA-49**, ¶ 103; *Total SA v Argentine Republic* (ICSID Case No ARB/04/1) Decision on Liability of 27 December 2010, **CLA-103**, ¶ 123; *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award of 8 June 2009, **RLA-50**, ¶ 804.

602 *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, PCA, Final Award of 14 February 2012, **RLA-48**, ¶¶ 582 – 584.

6.1.1.2 The Reversions Were Exercises Of Police Powers Implemented For Public Purposes

457. There can be little doubt that each of the reversions was made for a public purpose within the scope of the police powers doctrine. The Tin Smelter was reverted due to illegality, the Antimony Smelter due to productive inactivity, and the Colquiri Mine Lease due to violent conflict at the Mine. It is Claimant's burden to disprove that these actions fall within Bolivia's police powers.

458. *First*, Bolivia reverted the Tin Smelter because of illegalities in the privatization process, as a measure to return wrongfully privatized assets to their rightful owner. Thus, this was an exercise of police powers, not an expropriation.

459. The Tin Smelter reversion decree explicitly stated that the reversion was undertaken to combat the illegalities that had tainted the privatization. As it explained, "*del análisis del proceso de privatización se evidencia que la Fundición de Estaño Vinto, fue transferida violando diferentes normas y disposiciones legales.*" [603]

460. Among these violations, the most important was the improper price for which the Smelter was sold. The Tin Smelter was effectively privatized for a negative price; Bolivia received US$ 14,751,349 but included US$ 16,521,556 in tin concentrate and spare parts. As the reversion decree correctly observed, the Smelter was sold "*por el monto de $us14.751.349*" to Vinto SA even though "*se ha beneficiado además con la entrega ilegal de estaño metálico en circuito, concentrados, materiales y repuestos por más de $us16.000.000.*"[604] A report from EMV to COMIBOL in July 2000 confirmed that the Tin Smelter had been transferred along with US$ 16,521,556 in spare parts and tin concentrate.[605]

461. In addition to the inexplicable low price, the tender process suffered from additional serious irregularities: the Tin Smelter tender was awarded even though the purchaser was not qualified pursuant to the Terms of Reference. Allied Deals did not meet the minimum financial requirements to participate in the tender process and acquire the Tin Smelter for Vinto SA.[606] Bidders were required to demonstrate that they had the financial capacity to operate the Tin

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603 Supreme Decree No 29.026 of 7 February 2007, **C-20**, p. 5 (Unofficial translation: "*it appears from the analysis of the privatization process that the Tin Smelter Vinto was transferred in breach of various rules and legal provisions*").

604 Supreme Decree No 29.026 of 7 February 2007, **C-20**, p. 5; COMIBOL, Report on the reversion of the Complejo Metalúrgico Vinto to the Bolivian State of 29 January 2007, **R-247**, p. 2 (Unofficial translation: "*[despite the] adjudication amount of $us14,751,349 […] Allied Deals PLC has furthermore benefited from the illegal delivery of metallic tin in circuit, concentrate, materials and spare parts for more than $us16.000.000.- (SIXTEEN MILLION 00/100 AMERICAN DOLLARS)"*"); see also Supreme Decree No. 29.026 of 7 February 2007, **R-248**.

605 Report from Ms Wilma Morales Espinoza (EMV) to Eng. Rafael Delgadillo (COMIBOL) of 7 July 2000, **R-121**, p. 2.

606 See section 2.4.1 above.

Smelter, something that Allied Deals could not do. And Allied Deals also did not meet the minimum environmental and security requirements for the tender.[607] It did not provide any of the required evidence that it had a satisfactory environmental record.

462. There can be no doubt that the confiscation of illegally acquired assets is a public purpose falling within the scope of the police powers doctrine. It is common across most states to confiscate property tainted by illegality without providing compensation. For example, in many parts of the United States, property may be seized under civil forfeiture laws whenever there is probable cause to believe that the property is connected to certain criminal activity.[608] In other legal systems, a similar effect is accomplished through the legal figure of extinction of domain.[609] Such confiscations are not considered to be expropriations, for the simple reason that an obligation to compensate for the confiscation of illegal goods would effectively defeat the entire purpose.

463. Thus, Bolivia's reversion of the Tin Smelter due to the illegalities tainting its privatization was for a public purpose within the scope of the police powers doctrine. It was not an expropriation.

464. *Second*, the reversion of the Antimony Smelter was similarly for the public purpose of limiting the private ownership of productive assets to those who will use them productively. There was no expropriation of the Antimony Smelter.

465. The reversion decree for the Antimony Smelter makes clear that it was reverted for failure to ensuring the productive activity of the smelter. The reversion decree observes that "*en los últimos años se evidenció la inactividad productiva de la Planta Metalúrgica Vinto Antimonio, asi como su desmantelamiento […].*"[610] It concludes that the inactivity prevents the Smelter from becoming "*una fuente de generación de empleo, tributos y externalidades en apoyo a la actividad minera de explotación y concentración de antimonio en el país.*"[611]

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607 See section 2.4.1 above.

608 See, *e.g.*, Delaware Code, Title 16 (Health and Safety), Chapter 47 (Controlled Substances Act), **RLA-51**, § 4784(c)–(j)); Massachussets General Laws, Title XV (Regulation of Trade), Chapter 94C (Controlled Substances Act), **RLA-52**, § 47(d).

609 Colombian Law No. 1708 of 20 January 2014, **RLA-53**, Article 15; Federal Law of Extinction of Domain, implementing Article 22 of the Constitution of the United Mexican States of 29 May 2009, **RLA-54**, Article 3.

610 Supreme Decree No 499 of 1 May 2010, **C-26**, p. 2 (Unofficial translation: "*In recent years, the inactivity of the Metallurgical Company Vinto Antimonio became obvious, as well as its dismantling*").

611 Supreme Decree No 499 of 1 May 2010, **C-26**, p. 2 (Unofficial translation: "*a source for the generation of employment and tax, in support of the mining activity of exploitation and concentration of antimony in the country*").

Accordingly, the purpose of the reversion was for failure to ensure the productive activity of the Smelter, to the detriment of the public interest.

466. It is commonly accepted across Latin America that the social function of property limits the rights of property holders. Private property exists specifically to ensure that the productive use of assets contributes to society. Non-productive property performs no social function and should not receive protection from the state apparatus, with the result that there is no right to property.[612] States who recognize that private property must have a social function include, in Latin America, Colombia, Chile, and Brazil,[613] and, in Europe, Germany, Italy, and Spain.[614] The Bolivian Constitution similarly adopts the social function doctrine: private property is only a right when the property performs a social function.[615]

467. Reflecting this concern, the legal regulation for privatization established the objective of increasing "*la producción, las exportaciones, el empleo y la productividad,*"[616] which the Antimony Smelter contract directly incorporated in its provisions. According to the tender Terms of Reference —which became part of the final contractual terms[617]— for the Antimony Smelter, the privatization was to guarantee that the Smelter would be put into production. They stated that the privatization would make possible "*a la Fundición continuar la producción, constituyéndose en una fuente de generación de empleo y tributos, en apoyo a la actividad minera de explotación y concentración de antimonio en el país.*"[618]

468. In this regard, COMIBOL issued a report during the privatization process confirming that the public purpose behind the privatization process was to increase the productive efficiency of

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612 D. Bonilla, "Liberalism and Property in Colombia: Property as a Right and Property as a Social Function", 80 Fordham Law Review, 2011, **RLA-55**, pp. 1163-1164.

613 Political Constitution of Colombia, **RLA-21**, Article 58; Political Constitution of the Republic of Chile, **RLA-56**, Article 24; Constitution of the Federative Republic of Brazil, **RLA-57**, Article 5(XXIII).

614 Basic Law for the Federal Republic of Germany, **RLA-58**, Article 14(2); Constitution of the Italian Republic, **RLA-59**, Article 42; Spanish Constitution, **RLA-20**, Article 33.

615 Constitution of Bolivia of 7 February 2009, **C-95**, Article 56: "I. Toda persona tiene derecho a la propiedad privada individual o colectiva, siempre que ésta cumpla una función social; II. Se garantiza la propiedad privada siempre que el uso que se haga de ella no sea perjudicial al interés colectivo." The previous Constitution (promulgated in 2004) also established the same condition in its Article 7(i), Bolivian Constitution, Law of 13 April 2004, **R-235** (Unofficial translation: "*I. All persons have the right to individual or collective private property, provided that it fulfils a social function; II. Private property is guaranteed as long as its use is not detrimental to the collective interest*").

616 Supreme Decree No. 23.991 of 10 April 1995, **R-100**, Art. 2(c) (Unofficial translation: "*production, exports, employment and productivity*").

617 Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**, 23(1), p. 21.

618 Terms of Reference for the Second Public Tender for the Antimony Smelter of 31 July 2000, **R-109**, p. 9 (Unofficial translation: "*permitting the Smelter to continue production, becoming a source for the generation of employment and tax, in support of the mining activity of exploitation and concentration of antimony in the country*").

the assets and the Bolivian economy as a whole. As it explains, "*[e]l reordenamiento de las empresas y demás entidades públicas tiene como objetivo incrementar la competitividad y eficiencia de la economía nacional mediante: a) La transferencia al sector privado, a título oneroso y en forma transparente, de actividades productivas que puedan ser realizadas por éste de manera más eficiente […].*"[619]

469. Claimant does not deny that it left the Antimony Smelter idle, and did not increase the efficiency of its production. Instead, Claimant simply quibbles that it was never instructed to put the Smelter into production,[620] even though the privatization contract itself makes clear that it had an obligation to do so.

470. Thus, the reversion of the Smelter was straightforwardly for the public purpose of ensuring private property is put to productive use, in accordance with the Tin Smelter contract terms as well as with the widely-accepted doctrine of property's social function. Its reversion was an exercise of police powers, not an expropriation.

471. *Third*, Bolivia implemented the Colquiri Mine reversion to protect public safety and order in the midst of a dangerous dispute between the Colquiri Mine workers and the *cooperativistas*. Thus, it was a clear exercise of Bolivia's police powers and not an expropriation.

472. The reversion was a response to a public safety crisis that became critical when, on 30 May 2012, approximately one thousand *cooperativistas* violently occupied the Colquiri Mine, seeking permanent control of the entire facility.[621] As a result of this invasion of the mine, 15 people were wounded.[622] This provoked a direct response from the company workers, who issued an immediate ultimatum to the Government and the Ministry of Mines to solve the

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619 COMIBOL, Legal Report GAD-627/2003 of 27 June 2003, **R-249**, pp. 2-3 (emphasis added) (Unofficial translation: "*[t]he reorganization of companies and other public entities aims to increase the competitiveness and efficiency of the national economy by: a) The transfer to the private sector, for a price and in a transparent manner, of production activities that may be carried out in a more efficient way by the latter*").

620 Statement of Claim, ¶ 6.

621 Cachi, ¶ 33. See, also, Mamani, ¶ 25 ("*En la mañana del 30 de mayo de 2012, cuando nos encontrábamos trabajando en el interior de la Mina, fuimos alertados de que un gran número de cooperativistas (aproximadamente unos 1200) estaba ingresando por el sector El Triunfo (una antigua bocamina) y que otros se estaban dirigiendo al nivel de extracción de la Mina (que es la bocamina que queda en el nivel 165, conocido como Sanjuanillo). Los cooperativistas fueron muy violentos y nos atacaron con palos, piedras y dinamita, hiriendo a algunos de los compañeros que estaban trabajando en ese turno al interior de la mina*") (Unofficial translation: "*On the morning of 30 May 2012, while we were working in the interior of the Mine, we were alerted that a large number of cooperativistas (approximately 1.200) were entering through the El Triunfo sector (a former mine mouth) and that there were others who were going towards the extraction level of the Mine (which is the mouth at level 165, known as Sanjuanillo). The cooperativistas were very violent and attacked us with sticks, stones and dynamite, injuring some of our colleagues who were working during that shift inside the Mine*").

622 La Patria, *Cooperativistas toman mina en Colquiri y hieren a siete mineros*, press article of 31 May 2012, **R-21**.

problem lest they retake the mine by force.[623] As an immediate counter-measure, the union for the company workers imposed a blockade of the *cooperativistas* on the sole road between Colquiri and the rest of Bolivia.[624]

473. The Government and COMIBOL took immediate action to resolve the crisis, to no avail. Police squads were dispatched to Colquiri the very day that that the Mine was invaded[625] and the *cooperativistas* were blocked from selling any of their mineral production.[626] The Government, represented by the Minister of Mines and the Minister of Labour, in collaboration with COMIBOL then sought to mediate a permanent solution to the conflict between the company workers and the *cooperativistas*.[627] They held repeated meetings with the leaders of the mine workers union[628] and the leaders of the *cooperativistas* in which many

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623 Mamani, ¶¶ 26-27; Letters from the Sindicato Mixto de Trabajadores Mineros Colquiri to the President of Bolivia (Mr Morales), the Ministry of Mining (Mr Virreira), and Comibol (Mr Córdova) of 30 May 2012, **C-111**.

624 Mamani, ¶ 29 ("*Recuerdo que, aunque ninguno de los presentes creíamos conveniente un enfrentamiento violento con los cooperativistas, sí acordamos la necesidad de ejercer presión (incluso por la fuerza) para asegurar nuestras fuentes de trabajo. Por este motivo, y a partir de esta fecha, la FSTMB bloqueó las rutas que de Caracollo conducen a La Paz y Colquiri (la única vía de acceso a la Mina) y exigió la presencia de representantes del Gobierno Nacional*") (Unofficial translation: "*I recall that, although no one present thought that a violent confrontation with the cooperativistas was desirable, we did agree that it was necessary to put pressure (including by force) to ensure our work sources. For this reason, and from this date, FSTMB blocked the routes that lead from Caracollo to La Paz and Colquiri (the only way to access the Mine) and demanded the presence of representatives of the National Government*").

625 La Razón, *El Gobierno envía más policías a Colquiri para evitar conflicto*, press article of 1 June 2012, **R-213**.

626 Página Siete, *Gobierno impide salida de mineral de Colquiri*, press article of 1 June 2012, **R-214** ("*el Gobierno impide la salidad de mineral de Colquiri para ser comercializado debido a la toma de la mina por el conflicto que existe entre mineros y cooperativistas […]. También la energía eléctrica fue cortada en la zona para evitar que la maquinaria funcione*") (Unofficial translation: "*the Government is preventing Colquiri ore from being transferred to be sold due to the mine being taken over as a result of the existing conflict between miners and cooperativistas, stated the executive president of [COMIBOL] yesterday during an interview with radio ERBOL. The decision was made on Wednesday night after cooperativistas took control over the mine compound. Electricity was also cut in the area to prevent the machinery from functioning*").

627 Mamani, ¶ 28 ("*La toma de un yacimiento tan grande como Colquiri tuvo una repercusión en todo el sector minero nacional. Muy rápidamente, varios sindicatos y organizaciones productivas rechazaron la toma de la Mina Colquiri. Por esta misma razón, el 31 de mayo de 2012, la FSTMB, entidad que agrupa a los distintos sindicatos mineros del país, convocó a un ampliado nacional de emergencia en la localidad de Caracollo, a unos 39 kilómetros de la Mina, para discutir las acciones violentas de los cooperativistas*") (Unofficial translation: "*The takeover of a site as large as Colquiri had repercussions over the entire national mining sector. Rapidly, several unions and productive organizations rejected the takeover of the Colquiri Mine. For this same reason, on 31 May 2012, the [FSTMB], an entity formed by the different mining unions of the country, convened an emergency national meeting in the town of Caracollo, some 39 kilometers from the Mine, to discuss the violent actions of the cooperativistas*").

628 Minutes of understanding with the Sindicato de Trabajadores Mineros de Colquiri and the Federación Sindical de Trabajadores Mineros de Bolivia of 3 June 2012, **C-115**.

different proposals were considered to end the dispute.[629] Despite the extensive efforts to find a solution, the *cooperativistas* refused to accept any of the proposed terms.[630]

474. It was at this moment, when all other solutions to the crisis had failed, that the Government began to consider reversion as a way to prevent any further bloodshed. The *cooperativistas* were unwilling to accept any solution in which Colquiri would remain at the mine and the company workers wanted a solution that would allow them to return to work and keep their jobs.[631] Following discussions in La Paz regarding reversion as a possible solution,[632] on 7 June 2012, the Government, the *cooperativistas*, and company workers participated in an open

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629 La Patria, *En suspenso acuerdo entre Gobierno y mineros sindicalizados y cooperativistas*, press article of 4 June 2012, **C-117**; La Razón, *Minería hace 5 ofertas, pero aun no convence a los cooperativistas*, press article of 5 June 2012, **R-215**; Mamani, ¶¶ 32-33 ("*Según lo que entendimos, el Gobierno estaba buscando el apoyo de la empresa Sinchi Wayra para entregar a los cooperativistas nuevas áreas en la Mina. Sin embargo, la prensa publicó que las conversaciones no habían avanzado porque los representantes de la cooperativa debían consultar la propuesta con sus bases. A pesar de lo anterior, y con el fin lograr una salida negociada al conflicto, los miembros del STMC aceptamos que Sinchi Wayra hiciera un nuevo ofrecimiento a los cooperativistas. El 5 de junio de 2012, la compañía minera Colquiri confirmó al Estado su intención crear 200 nuevos puestos de trabajo en la compañía y ceder la veta San Antonio a la Cooperativa 26 de Febrero. Esta veta tiene un acceso a través de una rampa puesta en funcionamiento en 2007 por Sinchi Wayra y puede ser explotada comercialmente en los niveles 240 y 325*") (Unofficial translation: "*From what we understood, the Government was seeking Sinchi Wayra's support to allocate new areas of the Mine to the cooperativistas. However, the press reported that discussions had not progressed because the representatives of the cooperative had to consult the proposal with their bases. This notwithstanding, and 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. On 5 June 2012, Compañía Minera Colquiri confirmed to the State its intention to create 200 new work positions in the company and to assign the San Antonio vein to the Cooperativa 26 de Febrero. This vein includes an access through a ramp commissioned in 2007 by Sinchi Wayra and can be commercially exploited at levels 240 and 325*"); Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Virreira) and Comibol (Mr Córdova) of 5 June 2012, **C-120**; Letter from the Ministry of Mines to the Cooperativa 26 de Febrero of 6 June 2012, **R-216**.

630 La Patria, *Colquiri: Mineros suspenden labores y cooperativistas no aceptan veta*, press article of 5 June 2012, **C-118** ("*Entretanto, los trabajadores cooperativistas, que se reunieron en el distrito minero de Colquiri, determinaron no aceptar la oferta de acceder a la veta 'San Antonio' en su totalidad y continúan con su exigencia de 'sacar' a la empresa de aquella localidad minera*") (Unofficial translation: "*Meanwhile, the cooperativistas who held meetings in the mining district of Colquiri, decided not to accept the offer of the 'San Antonio' vein in its entirety and continue to require the company's 'exit' from the mining town*"); Cachi, ¶¶ 35-36; Mamani, ¶¶ 33-34.

631 Mamani, ¶ 36; La Patria, *Colquiri: Mineros suspenden labores y cooperativistas no aceptan veta*, press article of 5 June 2012, **C-118**.

632 La Patria, *Gobierno plantea nacionalizar Colquiri para poner fin a conflicto minero*, press article of 6 June 2012, **R-221** ("*El Gobierno planteó ayer la nacionalización de la mina Colquiri, operada por la empresa privada Sinchi Wayra, para poner fin al conflicto minero que se suscitó desde el pasado miércoles 30 de mayo cuando los trabajadores de la cooperativa minera '26 de Febrero' tomaron el yacimiento*") (Unofficial translation: "*The Government proposed yesterday the nationalization of the Colquiri mine, operated by the private company Sinchi Wayra, in order to put an end to the mining conflict commenced last Wednesday 30 May when the workers of the cooperativa minera '26 de Febrero' took control over the deposit*"); La Razón, *Virreira y cooperativa discuten ampliación de áreas de trabajo*, press article of 8 June 2012, **R-26** ("*El miércoles [i.e., 6 June 2012], Virreira reiteró la propuesta a la cooperativa de 'rescindir el contrato de arrendamiento' con la compañía privada para que la administración de la mina Colquiri pase a manos de la Corporación Minera de Bolivia (Comibol), previo "acuerdo común" entre los cooperativistas y los trabajadores asalariados. Álvaro ratificó que los cooperativistas 'repudian' la medida porque 'en nuestro sector trabajamos sin restricción de edad y sólo algunos serían incorporados a los asalariados'*") (Unofficial translation: "*On Wednesday [i.e., 6 June 2012], Virreira reiterated the proposal to the cooperative to 'terminate the lease agreement' with the private company so that the administration of the Colquiri mine be reverted to the Bolivian Mining Corporation (Comibol), following a 'common agreement' between cooperativistas and employees. Álvaro backed the idea that the cooperativistas 'repudiate' the measure because 'in our sector we work without age restrictions and only some would be incorporated as employees'*").

council in the village of Colquiri to resolve the violent conflict.[633] Against the Government's promise that COMIBOL would hire the *cooperativistas*,[634] the entire community agreed that reversion of the mine lease would be an acceptable solution.[635]

475. However, Glencore International then intervened to disrupt the agreement by granting one sector of the *cooperativistas* control of the Rosario vein of the mine.[636] It did so despite opposition from its own workers, and thus managed to reignite the violence surrounding the Mine.[637] One thousand mine workers imposed blockades on major roads[638] and protests broke

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633 Mamani, ¶ 39 ("*Entretanto, los miembros del STMC y la FSMB nos desplazamos nuevamente hasta la población de Colquiri, donde iniciamos una reunión en Cabildo con una masiva participación de los pobladores. Nuestra reunión se instaló en la Plaza 6 de Agosto, a unos 2km de la bocamina Sanjuanillo, donde las bases de la Cooperativa 26 de Febrero se encontraban reunidas*") (Unofficial translation: "*Meanwhile, we the members of STMC and FSTMB travelled again to the village of Colquiri, where we initiated a Council meeting attended by a great number of the village population and central institutions of the village (neighbourhood council, authorities of indigineous communities, guilds, transporters, etc.) Our meeting was set up in the Plaza 6 de Agosto, some 2 km from the Sanjuanillo mine mouth, where the bases of the Cooperativa 26 de Febrero were assembled, together with some leaders who wanted to subvert the nationalisation proposal*"); Cachi, ¶ 38. See, also, Video Bolivia, *Enfrentamiento en Mina Colquiri. Hay Heridos,* June 2012 (Video), **R-222** ("*Al momento no sindican que los cooperativistas estarían divididos, ya que algunos de ellos habrían decidido ser parte de lo que es los mineros asalariados*") (Unofficial translation: "*Presently they indicate that the cooperativistas would be divided, since some of them would have decided to join the mining employees*").

634 Proposal from the Government to the *Cabildo* of Colquiri, **R-27** ("*Esta reversión supone varios compromisos del Estado (COMIBOL) para cumplir con los trabajadores actuales y nuevos en Colquiri. Estos compromisos son los siguientes: mantener los puestos de trabajo de todos y cada uno de los trabajadores, mantener sus niveles salariales, mantener y respetar sus conquistas sociales y laborales, incorporar a los ex cooperativistas a la planilla de la COMIBOL, dar a COMIBOL el capital operativo y dar a COMIBOL el capital de inversión para el desarrollo de la mina*") (Unofficial translation: "*This reversion implies several commitments by the State (COMIBOL) towards current and new employees in Colquiri. These commitments are the following: maintain the work positions of each and every one of the employees, maintain their salaries, maintain and respect their social and employment achievements, incorporate the former cooperativistas into the workforce of COMIBOL, provide COMIBOL with operational capital and provide COMIBOL with investment capital to develop the mine*").

635 La Patria, *Mineros asalariados y cooperativistas aceptan rescisión de contrato en Colquiri*, press article of 8 June 2012, **R-223** ("*mineros asalariados y cooperativistas determinaron […] aceptar la rescisión del contrato de arrendamiento de Colquiri […] para evitar enfrentamientos por la explotación de minerales y demanda de fuentes de empleo […].Ese pronunciamiento surgió un día después que el Gobierno pidió a ambos sectores un 'acuerdo social' para terminar con el conflicto que desataron los cooperativistas, el 30 de mayo reciente, cuando tomaron esa mina en demanda de nuevas áreas de explotación*") (Unofficial translation: "*mining employees and cooperativistas determined […] to accept the termination of the Colquiri lease agreement […] to prevent confrontations due to ore exploitation and the demand for work sources […]. This statement intervened one day after the Government requested from both sectors a 'social agreement' to end the conflict triggered by the cooperativistas on 30 May when they took control over that mine, requesting additional exploitation areas*").

636 Agreement between Colquiri SA, Fedecomin, Fencomin, Central Local de Cooperativas Mineras de Colquiri, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, and Cooperativa 26 de Febrero, **C-35**.

637 Mamani, ¶¶ 41-42. See, also, Cachi, ¶¶ 43-44 ("*En vista de lo anterior, luego de que se conoció la firma del acuerdo para ceder la veta Rosario, los trabajadores de la empresa anunciaron que se tomarían la Mina por la fuerza. Los cooperativistas que estábamos en Colquiri reiteramos nuestro respaldo. Esto desató un conflicto violento entre, por un lado, los trabajadores de la Mina y la facción de los cooperativistas que exigíamos la nacionalización y, por el otro, la otra facción de cooperativistas que querían el control de la veta Rosario*") (Unofficial translation: "*In light of the foregoing, after the conclusion of the agreement to assign the Rosario vein became known, the company's workers announced that they would take control over the Mine by force. The cooperativistas who were in Colquiri reiterated our support. This triggered a violent conflict between, on the one hand, the Mine workers and the cooperativistas faction requesting the nationalization, and on the other hand, the cooperativistas faction wanting to take control over the Rosario vein*").

638 *Mineros de Colquiri bloquean conani exigiendo la emisión del D.S. de Nacionalización*, Video (2012), **R-224**.

out that quickly resulted in violent confrontations.[639] Thus, it became clear that any solution other than reversion would not resolve the crisis.

476. Following this renewed violence, the Government implemented the reversion of the Colquiri Mine Lease as the only viable solution to the conflict. It called a meeting of the *cooperativistas* and mine workers in La Paz. At this meeting on 19 June 2012, the parties reached a formal agreement to resolve the conflict wherein that the state would revert the Colquiri mine but leave the *cooperativistas* with mining rights.[640] The agreement emphasized that "*[l]a viabilización de estos acuerdos exige a ambas partes la deposición de actitudes de confrontación y la inmediata pacificación del Distrito Minero de Colquiri.*"[641] The very next day, the Government implemented the agreement through the Mine Lease Reversion Decree.

477. Thus, the reversion was a "*reasonable bona fide exercise of police powers in such matters as the maintenance of public order, health or morality*."[642] Bolivia had no reasonable alternative to the reversion if it was to restore public order and safety in the face of the violent confrontation between the workers and the *cooperativistas*. The reversion was not expropriatory.

6.1.2 If The Reversions Were Expropriations (*Quod Non*), They Were Lawful

478. Claimant asserts that, "*[i]n order for Bolivia to carry out a lawful expropriation, it must comply with the requirements set out in Article 5 of the Treaty.*"[643] Claimant then goes on to

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639 La Prensa, *Colquiri se convierte en un campo de batalla*, press article of 15 June 2012, **C-142** ("*Mineros asalariados y afiliados a la cooperativa 26 de Febrero se enfrentaron ayer con dinamita y palos por el control de la mina Colquiri, mientras el Gobierno volvió a convocarlos para dialogar en procura de encontrar una solución al conflicto que ya lleva dos semanas. La llegada de la noche y la explosión de cachorros de dinamita generaron zozobra entre los pobladores de Colquiri, quienes pedían entre sollozos la llegada de efectivos policiales y la pacificación de la zona, que está ubicada en la provincia Inquisivi, del departamento de La Paz*") (Unofficial translation: "*Mining employees and affiliates to the cooperativa 26 de Febrero clashed yesterday, [using] dynamite and sticks, over control of the Colquiri mine, while the Government again summoned them to discuss with a viewt to find a solution to the conflict that has already lasted two weeks. Nightfall and the explosion of dynamite sticks generated anxiety amongst Colquiri's population, who requested, sobbing, the arrival of police forces and the appeasement of the area, located in the province of Inquisivi, in the department of La Paz*").

640 Agreement between the Government of Bolivia, COB, Fencomin, FEDECOMIN-LP, FSTMB, Central de Cooperativas de Colquiri, and Sindicato Mixto de Trabajadores Mineros de Colquiri of 19 June 2012, **R-18**.

641 Agreement between the Government of Bolivia, COB, Fencomin, FEDECOMIN-LP, FSTMB, Central de Cooperativas de Colquiri, and Sindicato Mixto de Trabajadores Mineros de Colquiri of 19 June 2012, **R-18** (Unofficial translation: "*[t]he viability of these agreements requires that both parties abandon all conflictual attitude and the immediate appeasement of the Mining District of Colquiri*").

642 *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, **RLA-43**, ¶ 295.

643 Statement of Claim, ¶ 149.

argue that the supposed expropriations were unlawful because they violated the compensation provision of the Treaty and were undertaken without affording prior due process.[644]

479. Both arguments ignore the meaning of Article 5 of the Treaty as well as applicable international law. An expropriation does not breach Article 5 of the Treaty, and still less is unlawful, simply because no compensation is paid while negotiations or arbitrations are pending (**Section 6.1.2.1**). And Article 5 is clear that no particular procedure is necessary prior to an expropriation; it explicitly establishes that only a mechanism for posterior review is required (**Section 6.1.2.2**). Thus, even if the reversions were (*quod non*) expropriations, they were lawful expropriations in compliance with the terms of the Treaty.

6.1.2.1 Bolivia Would Have Satisfied Any Applicable Compensation Requirement By Participating In Lengthy Negotiations And In This Arbitration

480. It is Claimant's position that the reversions were unlawful because "*Bolivia did not pay just and effective compensation, defined as the fair market value of the investments, promptly and without delay*" in accordance with Article 5 of the Treaty.[645]

481. This position is erroneous. Far from constituting a breach, the Treaty's compensation provision in Article 5 assumes that a dispute regarding an alleged expropriation or compensation due might have to be submitted to the courts or to arbitration. Thus, the provision is breached only for failure to pay upon conclusion of negotiations and this arbitration. Moreover, the mere failure to pay compensation, whether or not in breach of the Treaty, does not make an expropriation unlawful within the terms of international law. International law defines an unlawful expropriation as one that cannot be rectified (except through restitution of the property), and specifically excludes expropriations that lack only the payment of compensation.

482. *First*, because Claimant sought to obtain compensation through arbitration, Bolivia fully satisfied any compensation obligation it might have had (*quod non*) by participating in this process.

483. In their attempt at rebuttal, Claimant places primary reliance on two century-old arbitral awards: *Goldenberg* and *Norwegian Shipowners*.[646] Neither of these dated awards address the interpretation of a treaty expropriation provision, let alone one contained in an investment

644 Statement of Claim, ¶ § V(A)(3)(a)(b).

645 Statement of Claim, ¶ 150.

646 Statement of Claim, ¶¶ 156-157.

treaty. Nor is Claimant able to muster any evidence that any modern investment tribunal follow these awards as authorities.

484. To the contrary, modern investment law finds no treaty breach when a state withholds compensation while the amount of compensation, or even the duty to compensate, remains in controversy.

485. In this regard, the Treaty provides for arbitration to determine compensation precisely when there is controversy as to the legal character of a state action or the amount of compensation due, both of which are present in this case. Article 5 states 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.*"[647]

486. This Treaty provision makes clear that adjudication may be necessary in order to fix the amount of compensation due following an expropriation. One acceptable form of adjudication to determine the compensation – and the one Claimant itself chose – is international arbitration. The World Bank Guidelines on the Treatment of Foreign Direct Investment confirm as much: "*Determination of the 'fair market value' will be acceptable if conducted according to a method agreed by the State and the foreign investor (hereinafter referred to as the parties) or by a tribunal or another body designated by the parties.*"[648] Bolivia cannot be expected to pay compensation before the international arbitration process – the acceptable method selected by Claimant – has finished.

487. The *Tidewater* tribunal reached precisely such a conclusion. As it held, because arbitration is how the appropriate compensation is fixed, the mere failure to pay compensation prior to arbitration cannot breach the compensation provision of an investment treaty:

> *It follows that such a tribunal must have an opportunity to make its determination as to compensation. Where such a tribunal has done so (and assuming that the other conditions are met) the expropriation will not be illegal. […] An expropriation only wanting fair compensation has to be considered as a provisionally lawful expropriation, precisely because the tribunal dealing with the case will determine and award such compensation.*[649]

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647 Treaty, **C-1**, Art. 5.

648 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(4).

649 *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et el. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award of 13 March 2015, **RLA-60**, ¶ 140-141.

488. This same holding was recently reconfirmed by the *Ampal-American* tribunal. It again reasoned that it is the role of an investment tribunal to calculate the compensation, so the failure to pay compensation prior to arbitration cannot be unlawful. As it explained:

> *By these terms, Article III(1) creates an international obligation on the part of the State to pay compensation for the expropriation of an investor's property. This Tribunal is empowered to enforce that obligation, calculating the amount of compensation due according to the standard prescribed in the Treaty, in the event that the State fails to pay such compensation. This does not require the Tribunal to find that the expropriation in question was unlawful, as may be the case in the event that the taking was not done for a public purpose or was discriminatory.*[650]

489. Although Claimant cites to *Siag v. Egypt* to support the opposite conclusion,[651] that tribunal mentioned compensation as nothing more than an afterthought without legal consequence, as it found the expropriation problematic on more serious grounds.[652] The *Siag* tribunal's analysis of the issue was limited to a single paragraph. [653] And, importantly, the tribunal did not hold that its *obiter dictum* about the lack of compensation had any legal effect whatsoever. It is on this thin reed that Claimant elected to build its compensation argument.

490. Thus, it cannot be a breach of Article 5 of the Treaty for a state to withhold compensation on the grounds that the amount or very duty to pay compensation is contested. This is almost always the case when an expropriation claim is brought before an investment tribunal. A state cannot have a treaty obligation to pay contested compensation when it is unable to bring an arbitration against the investor to recover overpayment. And it cannot be right that every tribunal to find expropriation must automatically find a breach of the compensation provision as well.

491. In the present case, Claimant elected to bypass the Bolivian courts and proceed directly to international recourse. The Bolivian courts never had the opportunity to decide whether the reversions were expropriations, whether they were internationally lawful, and what amount of compensation might be due. Claimant cannot allege that Bolivia acted in breach of the Treaty by failure to pay compensation prior to arbitration when basic questions underlying that compensation were in dispute.

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650 *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss of 21 February 2017, **RLA-61**, ¶ 186.

651 Statement of Claim, ¶ 156.

652 *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (ICSID Case No ARB/05/15) Award of 1 June 2009, **CLA-89**, ¶¶ 434-435.

653 *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (ICSID Case No ARB/05/15) Award of 1 June 2009, **CLA-89**, ¶ 434.

492. In fact, Claimant appears to agree but argues that, "*[w]hen 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.*"[654] Although this is not necessary to satisfy a treaty compensation provision, Bolivia did negotiate in good faith over the course of ten years. It is not credible in the least that Claimant thought Bolivia was negotiating in bad faith or that these negotiations were futile, as it continued to negotiate for almost ten years following the Tin Smelter reversion, almost seven years following the Antinomy Smelter Reversion, and almost five years following the Colquiri Mine Lease reversion.

493. It is still less reasonable for Claimant to now complain about a purported lack of compensation when it likely received payment from insurance. It is our understanding, confirmed by Claimant's 2011 prospectus,[655] that Claimant received payment from political risk insurance covering the Tin Smelter. This payment would have been made by a syndicate led by Lloyd's. We suspect that Claimant likely received similar payments from political risk insurance covering the Antimony Smelter and Colquiri Mine Lease.

494. In sum, international arbitration itself satisfies the treaty compensation provision by fixing the amount, if any, of compensation due. Payment will be timely so long as it is made promptly upon the termination of these proceedings and any recourse that may be taken against the outcome of these proceedings.

495. *Second*, in any event, Bolivia 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. Claimant simply ignores the meaning of unlawful expropriation in international law, and instead jumps right to labeling the reversions as unlawful. But it is plain that the reversions could not have been unlawful for lack of compensation.

496. Claimant's authority, *Chorzow Factory*,[656] sets out the classic (albeit outdated) distinction between a lawful and unlawful expropriation, which Claimant here invokes. That judgment contrasted a provisionally lawful expropriation, lacking only compensation, with an inherently unlawful expropriation, entirely prohibited by international law. The failure to pay

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654 Statement of Claim, ¶ 158.

655 Prospectus of Glencore International plc of 3 May 2011, **R-193**, p. 13 ("*For example, in 2007, the Bolivian government nationalised a smelter owned by a subsidiary of Glencore. However, in that instance, no material losses were sustained and Glencore continues to do business in Bolivia.*").

656 Statement of Claim, ¶ 231.

compensation did not make an expropriation inherently unlawful. As the Permanent Court of International Justice ("**PCIJ**") stated in that judgment:

> *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.*[657]

497. In the PCIJ's distinction, the non-payment of compensation does not render the expropriation inherently unlawful because legality relates to whether it is legally permissible for a state to expropriate in the first place; providing compensation is a secondary obligation. As Mohebi explains, "*the non-payment of compensation does not, as such, make a taking ipso facto wrongful, rather it is a violation by the expropriating state of an independent duty which applies evenly to both unlawful and lawful taking […].*"[658] Commentators including Crawford, Brownlie, and Sheppard are in agreement with Mohebi that the failure to pay compensation cannot by itself make an expropriation inherently unlawful.[659]

498. In fact, no investment tribunal has ever drawn any legal consequence from an expropriation found unlawful only for the lack of compensation. This is specifically true for the lone two cases that Claimant has cited,[660] which simply ordered compensation in accordance with the treaty terms.[661] Instead, the overwhelming majority of tribunals confronting failures to pay compensation nevertheless declined to hold the expropriation to be unlawful. These tribunals include *Venezuela Holdings v. Venezuela*, *Santa Elena v. Costa Rica*, *Tidewater v.*

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657 *Case Concerning the Factory at Chorzów* (*Germany/Poland)* (Merits) [1928] PCIJ Series A, No 17, **CLA-2**, p.46.

658 M. Mohebi,*The International Law Character of the Iran-United States Claims Tribunal*, 1999, **RLA-62**, p. 289.

659 J. Crawford, *Brownlie'*s *Principles of Public International Law*, 8th ed., 2012, **RLA-63**, p. 624; A. Sheppard, "The distinction between lawful and unlawful expropriation" in *Investment Arbitration and the Energy Charter Treaty*, JurisNet LLC, 2006, **RLA-64**, p. 171.

660 Statement of Claim, ¶¶ 154-155.

661 *Guaracachi America, Inc and Rurelec Plc v Plurinational State of Bolivia* (UNCITRAL) Award of 31 January 2014, **CLA-120**, ¶ 441, 444 (ordering payment in accordance with the terms of the treaty compensation provision); *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan* (ICSID Case No ARB/05/16) Award of 29 July 2008, **CLA-79**, ¶ 706, 794.

Venezuela,[662] *Metalclad v. Mexico, Tecmed v. Mexico, Abengoa v. Mexico, Sistem v. Kyrgyz Republic, Wena v. Egypt*, and *Middle East Cement v. Egypt*.[663]

499. In short, a failure to pay compensation does not make an expropriation unlawful within the terms of international law. Nor does the failure to pay compensation breach the compensation provision of the Treaty. Thus, even if the reversions were expropriations (*quod non*), they were not unlawful for lack of compensation.

6.1.2.2 Although Due Process Is Not A Requirement For Expropriation, Bolivia Observed Due Process Of Law By Making Available Posterior Remedies

500. Claimant argues that "*Bolivia's conduct was also devoid of any respect for due process, in breach of another key requirement for lawfulness under international law.*"[664] This is doubly incorrect. Due process is not a requirement for lawful expropriation under the Treaty. Nor did Bolivia fail to accord due process to Claimant.

501. *First*, it is simply untrue that due process in *prior* proceedings is a condition for expropriation under the Treaty. Instead, the Treaty specifically provides, as a separate requirement, that individuals must be able to bring a *posterior* challenge to the legality of expropriations with due process.

502. The plain text of the Treaty shows that due process is irrelevant to the legality of expropriation. Article 5 of the Treaty, the expropriation provision, makes no mention of due process as a condition for permissible expropriation. Instead, the conditions for expropriation are (i) that it is for "*a public purpose and for a social benefit related to the internal needs of that Party*,"

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662 *Venezuela Holdings, B.V., 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 of 9 October 2014, **RLA-65**, ¶¶ 306-307; *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (ICSID Case No ARB/96/1) Final Award of 17 February 2000, **CLA-25**, ¶ 101; *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No ARB/84/3) Award on the Merits of 20 May 1992, **CLA-18**, ¶ 158 and 183; *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et el. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award of 13 March 2015, **RLA-60**, ¶ 146.

663 In these last cases, the Tribunals did not deal with the issue directly, but still did not declare the expropriation unlawful and applied the treaty standard of compensation (i.e., the standard for lawful expropriations): *Metalclad Corporation v United Mexican States* (ICSID Case No ARB(AF)/97/1) Award of 30 August 2000, **CLA-27**, ¶ 118; *Técnicas Medioambientales Tecmed SA v United Mexican States* (ICSID Case No ARB(AF)/00/2) Award of 29 May 2003, **CLA-43**, ¶ 187; *Abengoa, S.A. and COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award of 18 April 2013, **RLA-66**, ¶ 681; *Sistem Mühendislik Inşaat Sanayi ve Ticaret A. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award of 9 September 2009, **RLA-67**, ¶¶ 119 and 156; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, **RLA-68**, ¶¶ 101, 118 and 125;*Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt* (ICSID Case No ARB/99/6) Award of 12 April 2002, **CLA-34**, ¶¶ 143-151.

664 Statement of Claim, ¶ 169.

and (ii) that it is "*against just and effective compensation.*"[665] Due process is unconnected to the permissibility of expropriation.

503. Although the Treaty does not make due process a condition for expropriation, many other investment treaties explicitly do so. In fact, almost every award that Claimant invokes on this issue considers investment treaties that do make due process a condition for expropriation.[666] (The lone exception is a case that Claimant cites even though it did not find an expropriation unlawful on the grounds of a due process violation.[667]) Despite the clear option of making due process a condition for expropriation, Bolivia and the United Kingdom did not elect do so. This Tribunal should not read into the Treaty a condition for expropriation that the States Parties did not adopt.

504. Instead, the Treaty establishes a different role for due process. Following an expropriation, the affected individual must have a domestic avenue to challenge the legality of the expropriation and the appropriate amount of compensation. However, this obligation is unrelated to the legality of the expropriation itself, as it contemplates a process to, *inter alia*, determine the legality of the expropriation. As the Treaty provides in Article 5, "*[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.*"[668]

505. Simply put, 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.

506. *Second*, Bolivia accorded full due process because Claimant had ample avenues to bring a posterior challenge to the reversion before the Bolivian courts and in this arbitration. As

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665 Treaty, **C-1**, Article 5(1).

666 *AIG Capital Partners, Inc and CJSC Tema Real Estate Company v Republic of Kazakhstan* (ICSID Case No ARB/01/6) Award of 7 October 2003, **CLA-45**, p. 8 (quoting Article III(1) of the Kazakhstan-U.S. BIT); *Mohammad Ammar Al-Bahloul v Republic of Tajikistan* (SCC Case No V (064/2008)) Partial Award on Jurisdiction and Liability of 2 September 2009, **CLA-91**, p. 33 (quoting Article 13 of the ECT); *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal of 2 October 2006, **CLA-64**, ¶ 368 (quoting Article 4 of the Cyprus-Hungary BIT); *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award of 4 April 2016, **CLA-130**, ¶ 711 (quoting Article VII(1) of the Canada-Venezuela BIT); *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15) Award of 3 March 2010, **CLA-96**, ¶ 386 (quoting Article 13 of the ECT).

667 *Quiborax SA and Non Metallic Minerals SA v Plurinational State of Bolivia* (ICSID Case No ARB/06/2) Award of 16 September 2015, **CLA-127**, ¶¶ 240-254 and ¶ 171-194 (showing that neither claimant nor respondent debated the issue of illegality on the grounds of due process).

668 Treaty, **C-1**, Article 5(1) (emphasis added).

explained, the Treaty envisions only that there must be a posterior remedy for expropriations (which the reversions were not) to challenge the legality and the amount of expropriations. Claimant chose for its own reasons not to pursue the recourse made available to it.

507. As an initial matter, any breach of due process would require "*a manifest disrespect of due process that [offends] a sense of judicial propriety.*"[669] It is not enough that a marginal breach of due process occurs; it must be manifest and it must offend judicial propriety. Any number of tribunals have confirmed this high standard for breach of due process, including *Arif v. Moldova*, *AES v. Hungary*, and *Tokios Tokelés v. Ukraine*.[670] The standard for a breach of administrative due process, as Claimant also seems to allege, is even more difficult to satisfy. The "*processes of administrative decision-making cannot be judged by the standards expected of judicial proceedings*" and do not even require "*a formal adversarial procedure […].*"[671]

508. Claimant could have pursued the avenues provided for by Administrative Procedure Law and the 1967 and 2009 Constitutions in order to challenge the legality of the reversion decrees.

509. One, the Administrative Procedure Law provides that any interested party may file a "*recurso de revocatoria*" before the authority that enacted the respective administrative act.[672] If the authorities confirm the administrative act, the interested party then may challenge its legality before the Supreme Court of Justice through an administrative contentious proceeding.[673] Even the expropriation law, on which Claimant relies, establishes the possibility of challenging an alleged expropriation before the judicial branch.[674]

510. Two, the 1967 Constitution, in force at the time of the Tin Smelter reversion decree, established the possibility of filing a "*recurso de amparo*" against illegal acts or omissions of public officials or private persons that "*restrinjan, supriman o amenacen restringir o suprimir los derechos y garantías de las personas reconocidos por esta Constitución y las leyes*."[675]

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669 *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award of 8 April 2013, **RLA-69**, ¶ 447.

670 *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award of 8 April 2013, **RLA-69**, ¶ 447; *AES Summit Generation Limited and AES-Tisza Erömü Kft v Republic of Hungary* (ICSID Case No ARB/07/22) Award of 23 September 2010, **CLA-100**, ¶ 9.3.40; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award of 26 July 2007, **RLA-70**, ¶ 133; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No ARB/04/13) Award of 6 November 2008, **CLA-83**, ¶ 187.

671 C. McLachlan, L. Shore, M. Weiniger, *International Investment Arbitration: Substantive Principles*, 2nd ed., 2017, **RLA-71**, ¶ 7.193.

672 Law No. 2.341 of 23 April 2002, **R-250**, Art. 64.

673 Law No. 2.341 of 23 April 2002, **R-250**, Art. 70.

674 Law of Expropriation due to Public Utility of 30 December 1884, **C-49**, Arts. 38, 39.

675 Constitution of Bolivia of 1967, **R-3**, Art. 19 (Unofficial translation: "*limit, eliminate or threat to limit or eliminate the rights and guaranties of individuals that are recognized by this Constitution and the law*").

511. Three, the 2009 Constitution further expanded the constitutional actions that Claimant could have pursued against the reversion decrees of the Colquiri Mine Lease and the Antimony Smelter (indeed, even against the Tin Smelter decree). It contemplates the possibility of filing not only an "*acción de amparo*"[676] (similar to the "*recurso de amparo*" provided for in the 1967 Constitution), but also an "*acción de inconstitucionalidad*"[677] and an "*acción de cumplimiento*" before the courts.[678]

512. Despite the availability of these avenues to challenge the reversion decrees, Claimant itself decided not pursue any of them. Instead, it elects to complain about the lack of due process when it failed to pursue the available process.

513. *Third*, Claimant tacks on a grab bag of supposed grievances about the manner of the reversions, repeated from elsewhere in its pleadings, as if this would strengthen its due process argument. Bolivia does not here repeat its prior explanations of why each of the reversions was justified and why it subsequently negotiated in good faith.[679] Instead, it only addresses Claimant's remaining assertions.

514. One, Claimant alleges that it did not receive any advanced notice whatsoever of the Tin Smelter and Antimony Smelter reversions.[680] This allegation is flatly contradicted by Claimant's own factual assertions. Claimant itself admits that President Morales announced the Tin Smelter reversion on 22 January 2007,[681] and the reversion itself did not occur until 7 February 2007. It also admits that President Morales announced the Antimony Smelter

676 Constitution of Bolivia of 7 February 2009, **C-95**, Art. 128 ("*La Acción de Amparo Constitucional tendrá lugar contra actos u omisiones ilegales o indebidos de los servidores públicos, o de persona individual o colectiva, que restrinjan, supriman o amenacen restringir o suprimir los derechos reconocidos por la Constitución y la ley*") (Unofficial translation: "*The 'Acción de Amparo Constitucional' may be brought against illegal or undue acts or omissions of public servants, or of any individual or collective person, which limit, eliminate, threat to limit or eliminate rights recognized by this Constitution and the law*").

677 Constitution of Bolivia of 7 February 2009, **C-95**, Art. 132 ("*Toda persona individual o colectiva afectada por una norma jurídica contraria a la Constitución tendrá derecho a presentar la Acción de Inconstitucionalidad, de acuerdo con los procedimientos establecidos por la ley*") (Unofficial translation: "*Every individual or collective person who is affected by a legal provision which is contrary to the Constitution is entitled to bring an 'Acción de Inconstitucionalidad', pursuant the procedures established by the law*").

678 Constitution of Bolivia of 7 February 2009, **C-95**, Art. 134 ("*La Acción de Cumplimiento procederá en caso de incumplimiento de disposiciones constitucionales o de la ley por parte de servidores públicos, con el objeto de garantizar la ejecución de la norma omitida*") (Unofficial translation: "*The 'Acción de Cumplimiento' may be brought in case of violation of constitutional or legal provisions by public servants, with the objective of guaranteeing the enforcement of the omitted rule*").

679 Sections 2.6 and 2.7 above.

680 Statement of Claim, ¶¶ 173-174.

681 Statement of Claim, ¶ 65,

reversion on 1 May 2007 but the reversion did not occur until 2 May 2007.[682] Thus, it is simply untrue that Claimant received no advanced notice at all of the reversions.

515. Two, Claimant further characterizes the presence of the police and the army during the reversions as a violation of due process.[683] Claimant's argument lies ill in mouth. It is precisely Claimant that has elsewhere complained about Bolivia's supposed failure to provide sufficient police protection.[684] The police and military were present at the reversions precisely to guarantee the peaceful transfer of the Asset. Sinchi Wayra resisted the implementation of the reversion decree: the plant's workers were standing outside the buildings when the Bolivian authorities entered the site and conflict could have erupted at any moment.[685] The situation remained under control precisely because of the police.

516. Three, Claimant argues that "*Bolivia failed to comply with the basic formalities required by Bolivian law for an expropriation to be considered lawful […].*"[686] Even if Claimant's allegations about the relevant formalities were true (which they are not), Bolivia did not expropriate the Assets; it reverted them pursuant to the inherent powers of the executive under the Bolivian constitution, including to enforce the laws and to ensure security and order.[687] As previously explained, the Tin Smelter was reverted due to illegalities in the privatization process,[688] the Antimony Smelter was reverted due to prolonged inactivity contrary to the privatization contract and the law,[689] and the Colquiri Mine Lease was reverted to quell the violent conflict caused by Claimant's unstable relationship with the *cooperativistas*.[690]

517. In conclusion, Claimant has not presented a single reason to think that Bolivia denied it due process in reverting the Assets. The long and short of the matter is that Bolivia provided many posterior opportunities to challenge the reversions, none of which Claimant pursued.

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682 Statemnet of Claim, ¶¶ 77, 78

683 Statement of Claim, ¶ 173.

684 Statement of Claim, ¶ 97

685 Eskdale, ¶¶ 44-45.

686 Statement of Claim, ¶ 176 (emphasis added).

687 Constitution of Bolivia of 1967, **R-3**, Art. 96(1), (18); Constitution of Bolivia of 7 February 2009, **C-95**, Art. 172(1), (16).

688 Section 2.6.1 above.

689 Section 2.6.2 above.

690 Section 2.6.3 above.

6.2 Bolivia Provided Full Protection And Security To The Assets At All Times

518. It is Claimant's position that "*Bolivia has failed to provide full protection and security and to observe its obligations under the Colquiri lease, in breach of the Treaty[.]*"[691] To support this allegation, Claimant effectively asserts that Bolivia has an obligation under the Treaty's FPS provision to guarantee that no private individual would ever adversely affect the Colquiri Mine in any way. On this basis, Claimant then attempts to conclude from the supposition that the *cooperativistas* did adversely affect the mine that it must have been Bolivia's fault.

519. But this reasoning is foreign to the applicable international law and to the facts of this dispute. To provide FPS, a state needs no more than take legal and reasonable measures under the circumstances to prevent the permanent physical impairment of an asset (**Section 6.2.1**)— a standard that is not modificed by the Colquiri Mine Lease (**Section 6.2.3**). This Bolivia did. Bolivia could not reasonably intervene with force in a dispute involving thousands of people, but it implemented those coercive measures available and aggressively attempted to negotiate a solution with the *cooperativistas* and mine workers (**Section 6.2.2**).

6.2.1 Full Protection And Security Requires Only Lawful And Reasonable Measures In Response To A Threat Of Permanent Physical Impairment

520. Claimant attempts to suggest that the Treaty's FPS provision in effect establishes a guarantee that no third party will in any way affect an investment.[692] This position is obviously false. The FPS provision requires nothing more than that the state exercise due diligence —that is make reasonable efforts— appropriate to the circumstances.

521. The meaning of the provision was made plain in the ICJ's *Elettronica Sicula (ELSI)* judgement. According to the Court, such provisions do not create an obligation of strict liability or a guarantee that property will never be affected. To the contrary, a state satisfies such a provision by exercising appropriate due diligence under the circumstances. As the Court explicitly held, the provision "*cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed.*"[693]

522. The ICJ is not alone in this view. Investment tribunals have widely confirmed the Court's holding that protection provisions are not warranties and do not establish obligations of result, but instead require nothing more than due diligence or reasonable action. Recent investment

691 Statement of Claim, § V(B).

692 See Statement of Claim, ¶¶ 178-179.

693 *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment of 20 July 1989, **RLA-72**, ¶ 108.

tribunals to reaffirm the meaning of these clauses include *Allard v. Barbados*,[694] *Mamidoil v. Albania*,[695] *Tulip v. Turkey*,[696] and *Toto v. Lebanon*.[697] In fact, even Claimant's own authority on this issue, the *Frontier Petroleum v. Czech Republic* tribunal, confirms the holding.[698]

523. As developed in investment law, states need only exercise due diligence. This obligation requires the state to take a potential measure of protection only when (i) there is a threat of permanent impairment to physical integrity of the investment; (ii) the potential measure to prevent permanent impairment is lawful; and (iii) the potential measure is reasonable under the circumstances.

524. *First*, there must be a threat of permanent impairment to physical integrity of the investment. Mere occupation by unwelcome third parties does not itself qualify. This was one of the lessons from the ICJ's judgment in *ELSI*.[699] Just as here, *ELSI* concerned the occupation of industrial property by former workers and other individuals who did no significant damage to the property.[700] In such circumstances, the failure of the state to take measures to resolve the occupation cannot breach the FPS provision.

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694 *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award of 27 June 2016, **RLA-73**, ¶ 244: "The obligation is limited to reasonable action, and a host State is not required to take any specific steps that an investor asks of it."

695 *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award of 30 March 2015, **RLA-74**, ¶ 821: "*The Tribunal refers to a jurisprudence constante according to which the standard of constant protection and security does not imply strict liability but rather obliges States to use due diligence to prevent harassment and injuries to investors […]. The Tribunal further concurs with Electrabel v. Hungary that due diligence does not oblige the State to "prevent each and every injury*".

696 *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award of 10 March 2014, **RLA-75**, ¶ 430: "*The Tribunal agrees with the observations in Wena Hotels that the FPS standard does not impose on the State a "strict liability" obligation. That is, the State cannot insure or guarantee the full protection and security of an investment*."

697 *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award of 7 June 2012, **RLA-76**, ¶ 228: "*However, the International Court of Justice in Elettronica Sicula S.p.A.(ELSI) (United States of America v. Italy) found that the provision in a treaty for 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed*".

698 *Frontier Petroleum Services Ltd v Czech Republic* (UNCITRAL) Final Award of 12 November 2010, **CLA-102**, ¶ 269.

699 *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment of 20 July 1989, **RLA-72**, ¶ 108:"*In any event, considering that it is 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, the protection provided by the authorities could not be regarded as falling below "the full protection and security required by international law"; or indeed as less than the national or third-State standards*."

700 *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment of 20 July 1989, **RLA-72**, ¶¶ 107-108

525. This was also the view of the investment tribunals in *Noble Ventures v. Romania*[701] as well as *Toto v. Lebanon*.[702] In particular, the *Toto* tribunal considered whether Lebanon took sufficient action to protect against the occupation of property destined for the construction of a workshop. In rejecting the FPS claim, the tribunal emphasized that there was no breach, in part, because "*the temporary obstructions […] did not amount to an impairment which affected the physical integrity of the investment.*"[703]

526. *Second*, the omitted measures must be permissible under the applicable international and municipal law. This is a common sense requirement. As the *Tecmed* tribunal explained, any alleged failure to act must be assessed "*in accordance with the parameters inherent in a democratic state.*"[704] It rejected the notion that FPS can require the state to take actions that are contrary to basic democratic principles. For this reason, it rejected the allegation that Mexico had taken insufficient actions to stop direct action by opponents of a landfill.[705]

527. *Third*, and relatedly, the omitted measures must be reasonable under the circumstances. Investment tribunals, including *Toto v. Lebanon*, [706] *Mamidoil v. Albania*,[707] and *Tulip v. Turkey*,[708] consistently acknowledge this requirement for a breach of FPS. In this regard, the *Mamidoil* tribunal put the point bluntly: "*The measure of due diligence is conditioned by the circumstances.*"[709] And the *Tulip* tribunal echoed that "*[t]he question of whether the State*

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701 *Noble Ventures Inc v Romania* (ICSID Case No ARB/01/11) Award of 12 October 2005, **CLA-59**, ¶ 165.

702 *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award of 7 June 2012, **RLA-76**, ¶ 229.

703 *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award of 7 June 2012, **RLA-76**, ¶ 229.

704 *Técnicas Medioambientales Tecmed SA v United Mexican States* (ICSID Case No ARB(AF)/00/2) Award of 29 May 2003, **CLA-43**, ¶ 177.

705 *Técnicas Medioambientales Tecmed SA v United Mexican States* (ICSID Case No ARB(AF)/00/2) Award of 29 May 2003, **CLA-43**, ¶ 177: At any rate, the Arbitral Tribunal holds that there is not sufficient evidence supporting the allegation that the Mexican authorities, whether municipal, state, or federal, have not reacted reasonably, in accordance with the parameters inherent in a democratic state, to the direct action movements conducted by those who were against the Landfill.

706 *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award of 7 June 2012, **RLA-76**, ¶ 229.

707 *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award of 30 March 2015, **RLA-74**, ¶ 821.

708 *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award of 10 March 2014, **RLA-75**, ¶ 430.

709 *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award of 30 March 2015, **RLA-74**, ¶ 821.

has failed to ensure FPS is one of fact and degree, responsive to the circumstances of the particular case."[710]

528. The *Pantechniki* sole arbitrator, Jan Paulsson, in fact devoted careful analysis to determining what measures are reasonable in given circumstances. He concluded that the appropriate standard is that proposed by Newcombe and Paradell.[711] That standard, adopted in full by Paulsson, establishes that the measure of due diligence is conditioned by the resources and circumstances of the state. It is a modified objective standard:

> *Although the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified objective standard - the host state must exercise the level of due diligence of a host state in its particular circumstances.*"[712]

529. As *Pantechniki* further explains, the Newcombe and Paradell standard of due diligence reflects the state's level of development and stability. When a state has less capacity to act or greater instability, the due diligence standard is less demanding:

> *In practice, tribunals will likely consider the state's level of development and stability as relevant circumstance in determining whether there has been due diligence. An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo.*[713]

530. Applying this standard, the *Pantechniki* sole arbitrator rejected the investor's FPS claim because Albania could not reasonably intervene to stop looting; the scale of the social unrest precluded any action, rendering the authorities powerless.[714]

531. Now it is Claimant's position that, at least, the last of these factors is irrelevant and that the State should have to intervene regardless of available State resources, regardless of reasonable expectations of security, and regardless of the scale of the unrest. To suggest that international law accepts this view, Claimant relies principally on *AAPL v. Sri Lanka* and *AMT v. Zaire*,

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710 *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award of 10 March 2014, **RLA-75**, ¶ 430.

711 *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009, **RLA-77**, ¶ 81.

712 *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009, **RLA-77**, ¶ 81.

713 *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009, **RLA-77**, ¶ 81.

714 *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009, **RLA-77**, ¶ 82.

the most recent of which was decided twenty years ago.[715] It simply ignores that investment law has evolved in the intervening years.

532. It also ignores that not even these two awards support its legal position. In the present case, it is undisputed that *cooperativistas* are not state actors and that Bolivia was not involved in their alleged actions against Claimant. However, *AAPL* concerned a State-initiated counter-insurgency raid on the area surrounding the shrimp-farm investment,[716] and *AMT* concerned looting by members of the Zairian armed forces.[717] In both cases, State actors directly instigated the damage that the investor suffered.[718]

533. Further revealing the vacuity of its position on FPS, Claimant also places reliance on *Frontier v. Czech Republic*, *Saluka v. Czech Republic*, and *Azurix v. Argentina*,[719] none of which concern the provision of physical protection against third party actions. Instead, these awards all consider the restrictions that the FPS clause imposes on the State's legal system.[720]

534. Simply put, to demonstrate a breach of the FPS provision, Claimant must prove that (i) there was a threat of permanent impairment to the physical integrity of its investment, (ii) Bolivia had legal measures available to it to counter that threat, and (iii) it was unreasonable under the circumstances for Bolivia to omit those measures.

6.2.2 Bolivia Took All Actions That Were Reasonably Available In Light Of The Severe Social Conflict And Limitations From Human Rights Law

535. Claimant alleges that "*Bolivia failed to physically protect Glencore Bermuda's investment, Colquiri, against violence interference from the local cooperatives*"[721] and so breached the FPS clause. This allegation is false, as it does not meet any of the three necessary elements of an FPS claim. Claimant's failure to prove even one is sufficient to defeat its FPS claim.

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715 Statement of Claim, ¶¶ 178-179.

716 *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (ICSID Case No ARB/87/3) Final Award of 27 June 1990, **CLA-14**, ¶ 85(b).

717 See *American Manufacturing & Trading Inc v Republic of Zaire* (ICSID Case No ARB/93/1) Award of 21 February 1997, **CLA-20**, ¶ 3.04.

718 The reliance on Siag v. Egypt suffers from a similar flaw, since in that case the Egyptian courts had ruled that the full protection clause had been breached and the State failed to take the necessary measures to return the investment to the claimants. *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (ICSID Case No ARB/05/15) Award of 1 June 2009, **CLA-89**, ¶ 447-448.

719 Statement of Claim, ¶¶ 179-180.

720 See *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award of 17 March 2006, **CLA-62**, ¶ 490, 493, 495-496; *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12) Award of 14 July 2006, **CLA-63**, ¶ 408; *Frontier Petroleum Services Ltd v Czech Republic* (UNCITRAL) Final Award of 12 November 2010, **CLA-102**, ¶¶ 256, 273.

721 Statement of Claim, ¶ 184.

536. *First*, the Colquiri Mine was in no danger of suffering any permanent physical impairment during the dispute with the workers and *cooperativistas*. To the contrary, both the workers and the *cooperativistas* had a basic interest in preserving the Mine as a productive asset that could support their livelihoods. Competition over who would benefit from this asset was at the heart of the dispute.

537. Although Claimant states that the situation "*posed an ongoing serious risk to the physical security of Glencore Bermuda's workers as well as the integrity of the Colquiri Mine*,"[722] this response goes nowhere. Glencore International's workers were principal protagonists in the violent conflict that broke out and substantially responsible for impeding its resolution, as they blockaded main roads and engaged in violent protests in an attempt to influence events.[723] Any risk was due to their own actions. And Claimant has not put forth any evidence at all that the integrity of the Mine was in any danger of permanent physical impairment.

538. *Second*, Bolivia took all legal actions available to it under the circumstances. Although Claimant does not even make explicit what action it thinks Bolivia failed to take, it implies that Bolivia should have repressed the conflict at the Mine at gunpoint.[724]

539. This suggestion is unreasonable in the extreme. Claimant's implication ignores the fact that over one thousand *cooperativistas* violently took control of the Mine.[725] In response, the mine workers, backed by a powerful union, blockaded the road to Colquiri and threatened to retake the Mine by force.[726] The number of union members involved in the counter-actions

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722 Statement of Claim, ¶ 185.

723 Mamani, ¶¶ 41-42; La Patria, *Marcha de cooperativistas provoca destrozos en propiedad privada*, press article of 12 June 2012, **C-130**.

724 Statement of Claim, ¶ 184.

725 Cachi, ¶ 33. See, also, Mamani, ¶ 25 ("*En la mañana del 30 de mayo de 2012, cuando nos encontrábamos trabajando en el interior de la Mina, fuimos alertados de que un gran número de cooperativistas (aproximadamente unos 1200) estaba ingresando por el sector El Triunfo (una antigua bocamina) y que otros se estaban dirigiendo al nivel de extracción de la Mina (que es la bocamina que queda en el nivel 165, conocido como Sanjuanillo). Los cooperativistas fueron muy violentos y nos atacaron con palos, piedras y dinamita, hiriendo a algunos de los compañeros que estaban trabajando en ese turno al interior de la mina*") (Unofficial translation: "*On the morning of 30 May 2012, while we were working in the interior of the Mine, we were alerted that a large number of cooperativistas (approximately 1.200) were entering through the El Triunfo sector (a former mine mouth) and that there were others who were going towards the extraction level of the Mine (which is the mouth at level 165, known as Sanjuanillo). The cooperativistas were very violent and attacked us with sticks, stones and dynamite, injuring some of our colleagues who were working during that shift inside the Mine*").

726 Mamani, ¶ 29 ("*Recuerdo que, aunque ninguno de los presentes creíamos conveniente un enfrentamiento violento con los cooperativistas, sí acordamos la necesidad de ejercer presión (incluso por la fuerza) para asegurar nuestras fuentes de trabajo. Por este motivo, y a partir de esta fecha, la FSTMB bloqueó las rutas que de Caracollo conducen a La Paz y Colquiri (la única vía de acceso a la Mina) y exigió la presencia de representantes del Gobierno Nacional*") (Unofficial translation: "*I recall that, although no one present thought that a violent confrontation with the cooperativistas was desirable, we did agree that it was necessary to put pressure (including by force) to ensure our work sources. For this reason, and from this date, FSTMB blocked the routes that lead from Caracollo to La Paz and Colquiri (the only way to access the Mine) and demanded the presence of representatives of the National Government*").

eventually reached into the thousands[727] and involved actions not just at the mine but in other parts of the country as well.[728]

540. What Claimant is proposing is not simply sending a few police officers to arrest a lone miscreant but, in effect, to send a military force into the middle of a violent conflict between thousands of individuals taking place across the country and within the tunnels of the underground Colquiri Mine. In addition to being futile, such an action would, in all likelihood, resulted in mass casualties and deaths among the mine workers, the *cooperativistas*, and the police or military sent in to suppress the former. A military intervention in a social mining context may have catastrophic consequences. Claimant cannot seriously propose that Bolivia failed to exercise due diligence for its failure to take such an action.

541. In fact, Bolivia had in the past made the serious mistake of attempting to use force to intervene in a mining dispute. During an uprising of mining workers and local communities against the Canadian company Da Capo Resources, the military intervened at the company's Amayapampa project. The result was a violent confrontation with the civilian protesters led to the deaths of seven people and injuries to about a hundred more. And the violation of human rights did not even serve the intended purpose of protecting the mining project: the project was ultimately suspended.[729]

542. Thus, any forcible police action at Colquiri would have risked violating Bolivia's human rights obligations under the ICCPR and the American Convention.[730] As the Inter-American Court of Human Rights has held, the use of force must always obey the principles of absolute necessity and proportionality.[731] The use of force is prohibited unless it is absolutely

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727 *Mineros de Colquiri bloquean conani exigiendo la emisión del D.S. de Nacionalización*, Video (2012), **R-224**.

728 La Prensa, *Colquiri se convierte en un campo de batalla*, press article of 15 June 2012, **C-142** ("*Mineros asalariados y afiliados a la cooperativa 26 de Febrero se enfrentaron ayer con dinamita y palos por el control de la mina Colquiri, mientras el Gobierno volvió a convocarlos para dialogar en procura de encontrar una solución al conflicto que ya lleva dos semanas. La llegada de la noche y la explosión de cachorros de dinamita generaron zozobra entre los pobladores de Colquiri, quienes pedían entre sollozos la llegada de efectivos policiales y la pacificación de la zona, que está ubicada en la provincia Inquisivi, del departamento de La Paz*") (Unofficial translation: "*Mining employees and affiliates to the cooperativa 26 de Febrero clashed yesterday, [using] dynamite and sticks, over control of the Colquiri mine, while the Government again summoned them to discuss with a viewt to find a solution to the conflict that has already lasted two weeks. Nightfall and the explosion of dynamite sticks generated anxiety amongst Colquiri's population, who requested, sobbing, the arrival of police forces and the appeasement of the area, located in the province of Inquisivi, in the department of La Paz*").

729 See, for instance, La Razón, *Amayapampa, un proyecto 'fantasma'* , press article of 4 April 2016, **R-218**; La Patria, *La masacre de "Navidad", Amayapampa y Capasirca*, press article of 19 March 2014, **R-219**.

730 American Convention, Art. 4, 5; ICCPR, Art. 6, 7

731 *Nadege Dorzema et al. v. Dominican Republic*, Inter-American Court of Human Rights, Judgment of 24 October 2012, **RLA-78**, ¶ 85

necessary in light of "*a threat or a real or imminent danger to the agents or third parties.*"[732] It is also prohibited unless proportionate, meaning that it can only be applied progressively after employing negotiation tactics or control[733] and only when "*there was proportionality between the use of force and the harm it sought to prevent.*"[734]

543. Claimant's implied proposal that Bolivia should have repressed the *cooperativistas* and workers with force is in stark violation of these principles. Claimant would have had Bolivia use force to protect its property rights, which is grossly disproportionate to the risk to human life that the use of force would entail. Claimant also would have had Bolivia forego the progressive response to a situation that human rights law requires, by immediately using force to protect its property rights instead of resolving the situation through negotiation. Private property rights do not take precedence over the human person in international law. Claimant was not entitled to the violent repression of the *cooperativistas* or the workers.

544. *Third*, the measures of protection that Bolivia took were entirely reasonable under and consistent with "*the level of due diligence of a host state in [Bolivia's] particular circumstances.*"[735] Bolivia had limited capacity to control violent outbursts by *cooperativistas* or mine workers, outbursts which could rapidly expand to include thousands of individuals.[736] In fact, the participation *en masse* of the *cooperativistas* in demonstrations against Sánchez de Lozada in 2003 were key in forcing his resignation.[737] Glencore International knew, or should have known this, when it invested.

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732 *Nadege Dorzema et al. v. Dominican Republic*, Inter-American Court of Human Rights, Judgment of 24 October 2012, **RLA-78**, ¶ 85

733 *Nadege Dorzema et al. v. Dominican Republic*, Inter-American Court of Human Rights, Judgment of 24 October 2012, **RLA-78**, ¶ 85

734 *Nadege Dorzema et al. v. Dominican Republic*, Inter-American Court of Human Rights, Judgment of 24 October 2012, **RLA-78**, ¶ 87

735 *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009, **RLA-77**, ¶ 81.

736 La Patria, *La masacre de "Navidad", Amayapampa y Capasirca*, press article of 19 March 2014, **R-219**; El Día, *Se reactiva el conflicto minero en Mallku Khota*, press release of 3 October 2012, **R-251**; M. Cajías de la Vega, "Crisis, Diáspora y Reconstitución de la Memoria Histórica de los Mineros Bolivianos" in *Revista de Estudios Transfronterizos*, Vol. X, No. 2 (2010), **R-159**, p. 87.

737 M. Cajías de la Vega, "Crisis, Diáspora y Reconstitución de la Memoria Histórica de los Mineros Bolivianos" in *Revista de Estudios Transfronterizos*, Vol. X, No. 2 (2010), **R-159**, p. 87 ("*La presencia en El Alto de La Paz de los 800 mineros de Huanuni y de más de 3.000 cooperativistas mineros, fue altamente significativa en momentos decisivos de la insurrección popular que se desató en octubre de 2003 contra el gobierno de Gonzalo Sánchez de Lozada y que tuvo su epicentro en esa ciudad del departamento de La Paz. No sólo se notó la presencia, en toda la semana que duró el levantamiento popular, de los pobladores de los barrios mineros de relocalizados, principalmente de Santiago II, uno de los lugares donde se produjeron mayores enfrentamientos con el ejército, sino de trabajadores mineros asalariados y cooperativistas llegados desde Huanuni y otras minas. Así, octubre fue sin duda un momento de revelación de "acumulaciones sociales previas", aunque no sólo para el sector minero, sino para el conjunto de los sectores populares en Bolivia […]"*) (Unofficial translation: "*The presence in El Alto and La Paz of 800 miners of Huanuni and more than 3,000 mining cooperativistas was very significant in decisive moments of the popular uprising triggered in October 2003 against the government of Gonzalo Sánchez de Lozada and the epicentre of which was in that city of the*

545. Despite the intrinsic limitations it faced, Bolivia took extensive actions in response to the conflict at the Colquiri mine. The events of early April were over so quickly that no response was reasonably feasible.[738] However, immediately following the invasion of the Mine on 30 May 2012, police squads were dispatched to Colquiri[739] and legal restrictions were imposed to prevent the *cooperativistas* from selling minerals from the Mine.[740] Thus, Bolivia took the coercive actions available to it to resolve the situation. Claimant's allegation that Bolivia failed to intervene is entirely false.[741]

546. Recognizing that it could not coercively resolve the situation, Bolivia sought a negotiated solution. It sent top Government officials —the Minister of Mines and the Minister of Labor— as well as COMIBOL representatives to mediate a solution between the workers and the *cooperativistas*.[742] This became an extended effort of exchanging proposals, with multiple

department of La Paz. Not only was the presence of residents of neighbourhoods of relocated miners noted during the entire week of the popular uprising, in particular from Santiago II, one of the places where major confrontations with the army took place – but also the presence of mining employees and cooperativistas from Huanuni and other mines. Thus, October was undoubtedly a moment of revelation of 'previous social accumulations', not only in the mining sector but also in all popular sectors in Bolivia").

738 See section 2.6.3.1 above.

739 La Razón, *El Gobierno envía más policías a Colquiri para evitar conflicto*, press article of 1 June 2012, **R-213**.

740 Página Siete, *Gobierno impide salida de mineral de Colquiri*, press article of 1 June 2012, **R-214** ("*el Gobierno impide la salidad de mineral de Colquiri para ser comercializado debido a la toma de la mina por el conflicto que existe entre mineros y cooperativistas […]. También la energía eléctrica fue cortada en la zona para evitar que la maquinaria funcione*") (Unofficial translation: "*the Government is preventing Colquiri ore from being transferred to be sold due to the mine being taken over as a result of the existing conflict between miners and cooperativistas, stated the executive president of [COMIBOL] yesterday during an interview with radio ERBOL. The decision was made on Wednesday night after cooperativistas took control over the mine compound. Electricity was also cut in the area to prevent the machinery from functioning*").

741 Statement of Claim, ¶ 184(f).

742 Mamani, ¶ 28 ("*La toma de un yacimiento tan grande como Colquiri tuvo una repercusión en todo el sector minero nacional. Muy rápidamente, varios sindicatos y organizaciones productivas rechazaron la toma de la Mina Colquiri. Por esta misma razón, el 31 de mayo de 2012, la FSTMB, entidad que agrupa a los distintos sindicatos mineros del país, convocó a un ampliado nacional de emergencia en la localidad de Caracollo, a unos 39 kilómetros de la Mina, para discutir las acciones violentas de los cooperativistas*") (Unofficial translation: "*The takeover of a site as large as Colquiri had repercussions over the entire national mining sector. Rapidly, several unions and productive organizations rejected the takeover of the Colquiri Mine. For this same reason, on 31 May 2012, the [FSTMB], an entity formed by the different mining unions of the country, convened an emergency national meeting in the town of Caracollo, some 39 kilometers from the Mine, to discuss the violent actions of the cooperativistas*").

different terms considered in extensive and repeated meetings with the relevant leaders.[743] Claimant again falsely states that Bolivia failed to intervene.[744]

547. Only when these initial efforts proved fruitless due to the intransigence of the *cooperativistas*[745] did Bolivia begin to consider reversion as a way to prevent further bloodshed.[746]

548. In addition to falsely alleging that Bolivia failed to act, Claimant also alleges that Bolivia undermined Glencore International's own solution of granting the Rosario vein of the mine to the *cooperativistas*.[747] This too is flatly false. Far from solving anything, proposing the grant of the Rosario vein had the effect of enflaming again a conflict that was just beginning to calm

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743 Minutes of understanding with the Sindicato de Trabajadores Mineros de Colquiri and the Federación Sindical de Trabajadores Mineros de Bolivia of 3 June 2012, **C-115**; La Patria, *En suspenso acuerdo entre Gobierno y mineros sindicalizados y cooperativistas*, press article of 4 June 2012, **C-117**; La Razón, *Minería hace 5 ofertas, pero aun no convence a los cooperativistas*, press article of 5 June 2012, **R-215**; Mamani, ¶¶ 32-33 ("*Según lo que entendimos, el Gobierno estaba buscando el apoyo de la empresa Sinchi Wayra para entregar a los cooperativistas nuevas áreas en la Mina. Sin embargo, la prensa publicó que las conversaciones no habían avanzado porque los representantes de la cooperativa debían consultar la propuesta con sus bases. A pesar de lo anterior, y con el fin lograr una salida negociada al conflicto, los miembros del STMC aceptamos que Sinchi Wayra hiciera un nuevo ofrecimiento a los cooperativistas. El 5 de junio de 2012, la compañía minera Colquiri confirmó al Estado su intención crear 200 nuevos puestos de trabajo en la compañía y ceder la veta San Antonio a la Cooperativa 26 de Febrero. Esta veta tiene un acceso a través de una rampa puesta en funcionamiento en 2007 por Sinchi Wayra y puede ser explotada comercialmente en los niveles 240 y 325*") (Unofficial translation: "*From what we understood, the Government was seeking Sinchi Wayra's support to allocate new areas of the Mine to the cooperativistas. However, the press reported that discussions had not progressed because the representatives of the cooperative had to consult the proposal with their bases. This notwithstanding, and 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. On 5 June 2012, Compañía Minera Colquiri confirmed to the State its intention to create 200 new work positions in the company and to assign the San Antonio vein to the Cooperativa 26 de Febrero. This vein includes an access through a ramp commissioned in 2007 by Sinchi Wayra and can be commercially exploited at levels 240 and 325*"); Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Virreira) and Comibol (Mr Córdova) of 5 June 2012, **C-120**; Letter from the Ministry of Mines to the Cooperativa 26 de Febrero of 6 June 2012, **R-216**.

744 Statement of Claim, ¶ 184(f).

745 La Patria, *Colquiri: Mineros suspenden labores y cooperativistas no aceptan veta*, press article of 5 June 2012, **C-118** ("*Entretanto, los trabajadores cooperativistas, que se reunieron en el distrito minero de Colquiri, determinaron no aceptar la oferta de acceder a la veta 'San Antonio' en su totalidad y continúan con su exigencia de 'sacar' a la empresa de aquella localidad minera*") (Unofficial translation: "*Meanwhile, the cooperativistas who held meetings in the mining district of Colquiri, decided not to accept the offer of the 'San Antonio' vein in its entirety and continue to require the company's 'exit' from the mining town*"); Cachi, ¶¶ 35-36; Mamani, ¶ 33-34.

746 La Patria, *Gobierno plantea nacionalizar Colquiri para poner fin a conflicto minero*, press article of 6 June 2012, **R-221**; La Razón, *Virreira y cooperativa discuten ampliación de áreas de trabajo*, press article of 8 June 2012, **R-26**; Mamani, ¶ 39 ("*Entretanto, los miembros del STMC y la FSMB nos desplazamos nuevamente hasta la población de Colquiri, donde iniciamos una reunión en Cabildo con una masiva participación de los pobladores. Nuestra reunión se instaló en la Plaza 6 de Agosto, a unos 2km de la bocamina Sanjuanillo, donde las bases de la Cooperativa 26 de Febrero se encontraban reunidas*") (Unofficial translation: "*Meanwhile, we the members of STMC and FSTMB travelled again to the village of Colquiri, where we initiated a Council meeting attended by a great number of the village population and central institutions of the village (neighbourhood council, authorities of indigineous communities, guilds, transporters, etc.) Our meeting was set up in the Plaza 6 de Agosto, some 2 km from the Sanjuanillo mine mouth, where the bases of the Cooperativa 26 de Febrero were assembled*"); Cachi, ¶ 38. See, also, Video Bolivia, *Enfrentamiento en Mina Colquiri. Hay Heridos*, June 2012 (Video), **R-222**; Proposal from the Government to the *Cabildo* of Colquiri, **R-27**; La Patria, *Mineros asalariados y cooperativistas aceptan rescisión de contrato en Colquiri*, press article of 8 June 2012, **R-223**.

747 Statement of Claim, ¶ 184(j).

down because of Bolivia's efforts. Because the proposed grant exploited divisions among the *cooperativistas* and its own workers, over a thousand union members blockaded roads in response[748] and protests began, quickly escalating to violence.[749]

549. In conclusion, Claimant has failed to demonstrate that there was threat to the permanent physical integrity of the Mine, that Bolivia did not take legal measures available to it, and that the measures it did take were unreasonable under the circumstances. The FPS claim thus fails many times over.

6.2.3 The Colquiri Mine Lease Contract Adds Nothing To The Full Protection And Security Standard

550. Attempting to shore up its position, Claimant proposes that Articles 9.2.1 and 12.2.1 of the Colquiri Mine Lease, for some unexplained reason, establish a more demanding protection requirement than does the Treaty's FPS clause.[750] This is simply incorrect. Those Articles establish exactly the same standard of protection as the FPS clause.

551. Article 9.2.1 does not establish any requirement of protection at all; it provides only for an obligation of non-interference. It states that "*[l]a ARRENDADORA se obliga a no interferir ni limitar las operaciones del ARRENDATARIO.*"[751] Thus, this provision is entirely irrelevant to the applicable standard of protection.

552. Article 12.2.1 also adds nothing to the relevant standard of protection, as it explicitly incorporates the background legal standard and does not establish any elevated standard. The Article states:

> *La ARRENDADORA garantizará: La pacifica posesión uso y goce del CENTRO MINERO, debiendo defender, proteger garantizar y reivindicar derechos contra*

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748 *Mineros de Colquiri bloquean conani exigiendo la emisión del D.S. de Nacionalización*, Video (2012), **R-224**.

749 La Prensa, *Colquiri se convierte en un campo de batalla*, press article of 15 June 2012, **C-142** ("*Mineros asalariados y afiliados a la cooperativa 26 de Febrero se enfrentaron ayer con dinamita y palos por el control de la mina Colquiri, mientras el Gobierno volvió a convocarlos para dialogar en procura de encontrar una solución al conflicto que ya lleva dos semanas. La llegada de la noche y la explosión de cachorros de dinamita generaron zozobra entre los pobladores de Colquiri, quienes pedían entre sollozos la llegada de efectivos policiales y la pacificación de la zona, que está ubicada en la provincia Inquisivi, del departamento de La Paz*") (Unofficial translation: "*Mining employees and affiliates to the cooperativa 26 de Febrero clashed yesterday, [using] dynamite and sticks, over control of the Colquiri mine, while the Government again summoned them to discuss with a viewt to find a solution to the conflict that has already lasted two weeks. Nightfall and the explosion of dynamite sticks generated anxiety amongst Colquiri's population, who requested, sobbing, the arrival of police forces and the appeasement of the area, located in the province of Inquisivi, in the department of La Paz*").

750 Statement of Claim, ¶ 186.

751 Lease agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**, Clause 9.2.1 (Unofficial translation: "*[t]he LESSOR commits not to interfere with or limit the LESSEE'S operations*").

incursiones, usurpaciones y otras perturbaciones de terceros durante la vigencia del CONTRATO, de acuerdo a las disposiciones legales vigentes, sin excepción alguna asumiendo además su responsabilidad por la evicción de acuerdo a la LEY APLICABLE.[752]

553. On the one hand, any obligation of protection arising from Article 12.2.1 is identical to the background standard of protection from the Treaty. The Article explicitly states that the obligations are those from the applicable legal provisions in force, in this case either the Treaty or Bolivian law. If the applicable legal provisions are from the Treaty, then the Article straightforwardly adds nothing to the Treaty standard of protection. If they are from Bolivian law, then Claimant has failed to argue, much less establish, that they are different from the Treaty standard.

554. On the other hand, even if it were true that Article 12.2.1 establishes an independent standard of protection, the only reasonable interpretation of that standard is that it is no more demanding than the Treaty standard. The leasor of the mine cannot reasonably be expected to be an absolute guarantor that nothing and no one will ever interfere with mine operations. Instead, it can only be expected to take reasonable (and legal) actions under the circumstances to protect the Mine.

555. Moreover, Claimant has not even attempted to specify what actions it considers that COMIBOL should have taken to end the dispute with the *cooperativistas*.

556. In short, Claimant's appeal to the Colquiri Mine Lease is futile; that contract does not establish a heightened standard of protection.

6.3 Although Claimant's Fair And Equitable Treatment Allegations Are Redundant, Bolivia Provided Fair And Equitable Treatment To The Assets At All Times

557. After setting out its principal claims, Claimant tacks on FET and impairment claims that simply repackages its previous allegations.

558. At the outset, Claimant argues that "*[t]he Treaty does not define what constitutes 'fair and equitable treatment', and it is generally accepted that this standard of conduct cannot be summarized in a precise statement of legal obligation.*"[753] Thus, it is the position of Claimant

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752 Lease agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**, Clause 12.2.1 (Unofficial translation: "*The LESSOR will guarantee: The peaceful possession, use and enjoyment of the MINING CENTRE, by defending, protecting, guaranteeing and assert all rights against intrusions, usurpation and other disruptions by third-parties during the CONTRACT term, in conformity with legal provisions in force, with no exception, being furthermore liable for eviction pursuant to the APPLICABLE LAW*").

753 Statement of Claim, ¶ 194.

that Bolivia breached this standard, which not even Claimant can precisely identify, by breaching other provisions of the Treaty.

559. This position is incorrect. It should come as no surprise that it is incorrect, given that not even Claimant considers itself capable of articulating the precise legal obligation that Bolivia supposedly breached. In fact, the lack of any articulable legal standard that supports the claim is so pronounced that Claimant is ultimately compelled to include a claim for breach of good faith as the basis for claiming almost seven hundred million dollars in supposed damages.[754]

560. Because the FET and impairment claims are nothing more than repetition, Bolivia only addresses these separately out of an abundance of caution. However, Bolivia satisfied Claimant's legitimate expectations, such as they were (**Section 6.3.1**), acted with full transparency, predictability, and due process in the Smelter reversions (**Section 6.3.2**), conducted itself in good faith regarding the Colquiri Mine (**Section 6.3.3**), and was not administratively negligent during the negotiations (**Section 6.3.4**). As Claimant has failed to make any distinct allegations concerning impairment of its investment, Bolivia's response to the impairment clause claim is incorporated into its response to the FET claim.[755]

6.3.1 Bolivia Satisfied Glencore Bermuda's Legitimate Expectations At All Times

561. Claimant claims that Bolivia breached its legitimate expectations by (i) allegedly expropriating its investment contrary to the applicable requirements, including for compensation,[756] (ii) allegedly committing actions contrary to the Bolivian investment law,[757] and (iii) allegedly failing to protect the Colquiri Mine from the *cooperativistas* contrary to the Colquiri Mine Lease.[758]

562. Not a single one of these supposed breaches of legitimate expectations in fact occurred. Claimant has not put forward a scrap of evidence that it held any expectations of the sort it claims to have been violated. It has no testimony or documentation to this effect from any employee or director of Glencore Bermuda. (Mr. Eskdale was not affiliated with Glencore Bermuda; only with Glencore International).

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754 Statement of Claim, ¶ 194 *et seq.*

755 Statement of Claim, ¶ 193.

756 Statement of Claim, ¶ 214.

757 Statement of Claim, ¶ 215.

758 Statement of Claim, ¶ 216.

563. To the contrary, Claimant in fact expected that Bolivia would act precisely as Claimant has alleged in this arbitration. The *Minnotte* tribunal observed that "*an international business operator*" such as Glencore International must be "*deemed to be a competent professional […].*"[759]

564. Glencore International was very familiar with Bolivia and the political context in which it acquired Assets. It had extensive experience with the country from the 1990s when it presented its credentials and was preselected to participate in former President Sánchez de Lozada's capitalization process.[760] This was only natural given that Glencore International founder Marc Rich became a Bolivian citizen in 1983[761] and thereafter carried out business in Bolivia in the country, including with his close friend Sánchez de Lozada.[762]

565. We understand that Glencore International took out political risk insurance against the risks it expected could affect the Tin Smelter from a syndicate led by Lloyd's.[763] We suspect that it similarly took out political risk insurance for the Antimony Smelter and Colquiri Mine Lease. These are not the actions of a company that had, much less relied on, the expectations that Claimant now claims.

566. It is black letter law that there can be no FET breach on the basis of expectations unless the investor relied on those expectations when it made its investment. As the *Crystallex* tribunal recently held, "*[a] legitimate expectation may arise in cases where the Administration has made a promise or representation to an investor as to a substantive benefit, on which the investor has relied in making its investment, and which later was frustrated by the conduct of the Administration.*"[764] This holding is in no way controversial. It reiterates a principle long established in cases such as *OKO Pankki Oyj v. Estonia*,[765] *Cargill v. Poland*,[766] and *Micula*

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759 *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award of 16 May 2014, **RLA-17**, ¶ 194.

760 N.M. Rotschild & Sons Limited, Capitalization of E.M. Vinto and transfer of operating control over COMIBOL properties to private sector initiative, **R-102**, p. 1779.

761 Supreme Resolution No. 198045 of 27 May 1983, **R-173**.

762 House Report No. 454, "Justice Undone - Clemency Decisions in Clinton White House", US Congressional Serial Set (Serial No. 14778), 107th Congress, 2nd session, **R-174**, p. 124.

763 Section 2.5.4 above.

764 *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award of 4 April 2016, **CLA-130**, ¶ 547 (emphasis added).

765 *OKO Pankki Oyj and others v. Republic of Estonia*, ICSID Case No. ARB/04/6, Award of 19 November 2007, **RLA-79**, ¶ 247

766 *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Award of 29 February 2008, **RLA-80**, ¶ 459.

v. Romania.[767] Absent such reliance when making an investment, any expectations of the investor would have had no effect and any actions contrary to them would have caused no harm.

567. The complete failure to provide any evidence of actual expectations or reliance is fatal to each of Claimant's legitimate expectations claims. The analysis can and should stop here. However, each of Claimant's three legitimate expectations claims suffer from individually decisive flaws as well.

568. *First*, Claimant alleges that "*Glencore Bermuda had a legitimate expectation that, should Bolivia wish to take over its investments, it would provide Glencore Bermuda with just compensation*" and "*would comply with all other requirements under domestic law and basic principles of due process.*"[768]

569. Claimant's allegation goes nowhere. It is nothing more than an overt repackaging of its allegation that Bolivia expropriated its investment in breach of the Treaty. Bolivia has already explained at length why it did not expropriate Claimant's so-called investment, much less in breach of any applicable requirements.[769] These arguments dispose of Claimant's allegation here as well.

570. *Second*, Claimant alleges that "*Glencore Bermuda's legitimate expectations were derived from the Colquiri Lease*" and that *"Bolivia violated those expectations when it failed to protect the Colquiri Mine from the invasion of the cooperativistas […].*"[770]

571. As with the prior allegation, this one is equally a plain repackaging of Claimant's umbrella clause claim that Bolivia provided insufficient protection to the Colquiri Mine. Bolivia has already explained why the Colquiri Mine Lease is not covered by the umbrella clause (or, *mutatis mutandis*, the FET clause) and why it complied with all protection obligations in that Lease. These explanations provide more than sufficient grounds to reject this allegation as well.

572. However, Claimant's allegation here also rests on a fundamental misunderstanding of investment law. A contract, such as the Colquiri Mine Lease, cannot give rise to any legitimate expectations. Thus, even if Bolivia had acted contrary to the Mine Lease,

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767 *Ioan Micula and others v Romania* (ICSID Case No ARB/05/20) Award of 11 December 2013, **CLA-119**, ¶ 672.

768 Statement of Claim, ¶ 214.

769 Section 6.1 above.

770 Statement of Claim, ¶ 216.

nevertheless there would be no breach of Claimant's legitimate expectations or the FET provision of the Treaty.

573. The reason is simple. As Prof. Christoph Schreuer explained, if contracts could give rise to legitimate expectations, "*the FET standard would be nothing less than a broadly interpreted umbrella clause. […] It cannot be assumed that the umbrella clause adds nothing to the FET standard.*"[771] The umbrella clause must have some effect, so the FET provision cannot protect contractual expectations.

574. Consistent with Prof. Schreuer's view, the *SAUR* tribunal held that mere breaches of contractual expectations do not violate the FET provision. As it explained, "*[q]ue un Estado esté incurriendo en incumplimiento de sus propias leyes o contratos no constituye ni condición necesaria ni suficiente para que se entienda violado el estándar iusinternacional de TJE o de PPS.*"[772] *SAUR* is part of a long line of similar decisions, including those of the *Parkerings*,[773] *Hamester*,[774] *Bayindir*,[775] and *Impregilo*[776] tribunals.

575. In fact, Claimant's own lead authority on legitimate expectations, the *Bayindir* tribunal,[777] reached the same conclusion. It held that, "*because a treaty breach is different from a contract violation, the Tribunal considers that the Claimant must establish a breach different in nature from a simple contract violation, in other words one which the State commits in the exercise of its sovereign power.*"[778]

576. Thus, as a mere repetition of prior arguments that also relies on inadmissible contractual expectations, the allegations based on the Colquiri Mine Lease should be rejected.

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771 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**, pp. 89-90.

772 *SAUR International SA v. The Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability of 6 June 2012, **RLA-82**, ¶ 483 (Unofficial translation: "*[t]he fact that a State is failing to comply with its own laws or contracts is not a necessary or sufficient requirement to consider that the international standard of FET or FPS has been violated*").

773 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, **RLA-83**, ¶ 344.

774 *Gustav F W Hamester GmbH & Co KG v. The Republic of Ghana*, ICSID Case No. ARB/07/24, Award of 18 June 2010, **RLA-84**, ¶¶ 334-337.

775 *Bayindir Insaat Turizm Ticaret Ve Sayani AŞ v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Award of 27 August 2009, **CLA-90**, ¶ 180.

776 *Impregilo SpA v Argentine Republic* (ICSID Case No ARB/07/17) Award of 21 June 2011, **CLA-105**, ¶ 294.

777 Statement of Claim, ¶ 200.

778 *Bayindir Insaat Turizm Ticaret Ve Sayani AŞ v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Award of 27 August 2009, **CLA-90**, ¶ 180.

577. *Third*, Claimant alleges that "*Glencore Bermuda's investment was further based on a legal framework which provided for basic guarantees to foreign investors, consisting of, inter alia, the Investment Law […]*."[779]

578. Despite the allegation, Claimant fails to explain in what way it believes that its expectations stemming from the Investment Law have been breached. It leaves this as a bare allegation without providing any factual allegations at all in support. This empty allegation should be given short shrift.

579. But even if it were substantiated by facts, the allegation is fundamentally flawed. Legitimate expectations cannot arise from general legislation such as the Investment Law. Instead, they arise only when the state makes specific undertakings or representations to the foreign investor. This was the conclusion of the recent *Philip Morris v. Uruguay* tribunal:

> *It clearly emerges from the analysis of the FET standard by investment tribunals that legitimate expectations depend on specific undertakings and representations made by the host State to induce investors to make an investment. Provisions of general legislation 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.*[780]

580. This conclusion confirms that of a number of earlier tribunals, including *ECE v. Czech Republic* and *PSEG v. Turkey*, that legitimate expectations arise only from specific assurances. *ECE* held that, "*[f]or a claimant's expectations to qualify in this sense, however, they must normally be based on specific assurances given by the competent authorities to the investor prior to or at the time of the making of the investment.*"[781] *PSEG*, in turn, held that "*[l]egitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed.*"[782]

581. Agreeing with these conclusions, *Crystallex* explained why general legislation cannot give rise to legitimate expectations. In its view, "*[t]o be able to give rise to such legitimate*

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779 Statement of Claim, ¶ 215.

780 *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, **RLA-43**, ¶ 426.

781 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic*, PCA Case No. 2010-5, Award of 19 September 2013, **RLA-85**, ¶ 4.762.

782 *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award of 19 January 2007, **CLA-66**, ¶ 241.

expectations, such promise or representation – addressed to the individual investor – must be sufficiently specific, i.e. it must be precise as to its content and clear as to its form."[783]

582. However, general legislation is not precise as to its content and clear as to its form because it leaves discretion to the state and is rarely unconditional. As the *Crystellex* tribunal explained, "*[l]aws are general and impersonal in nature; they will usually leave some degree of discretion to the state agencies for the making of their case specific decisions and, in fact, are rarely unconditional in their provisions so that the investor would have difficulty founding an actual expectation akin to a vested right.*"[784]

583. The Investment Law itself displays the exact lack of precision and clarity that impedes the formation of legitimate expectations. The provisions of the Investment Law are abstract, not suggesting with any precision or clarity what they require or how they could be breached. This is likely why Claimant cannot make any specific allegation of how its supposed expectations from the Investment Law were violated. All it can do is assert that "*the Investment Law provided certain guarantees […] in relation to property rights, imports and exports, production and marketing and investment insurance.*"[785] It gives no explanation of how the Law affected its expectations or how Bolivia might have acted contrary to those supposed expectations.

584. Thus, Claimant's empty allegation based on non-existent expectations from the Investment Law should be summarily dismissed.

6.3.2 Bolivia Acted Transparently, Predictably, And With Respect For Due Process

585. Claimant alleges that "*Bolivia also failed to provide a transparent and predictable framework to Glencore Bermuda and its investments, violating Glencore Bermuda's due process rights.*"[786] It asserts that these supposed requirements were breached because (i) "*the Tin Smelter and Antimony Smelter nationalizations were carried out under the pretext of alleged illegalities related to the assets' privatization,*"[787] (ii) "*the Antimony Smelter Nationalization Decree provided that the expropriation was carried out because of the "productive inactivity"*

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783 *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award of 4 April 2016, **CLA-130**, ¶ 547.

784 *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award of 4 April 2016, **CLA-130**, ¶ 552.

785 Statement of Claim, ¶ 215.

786 Statement of Claim, ¶ 217.

787 Statement of Claim, ¶ 217.

of the asset,"[788] and (iii) "*[t]he government also exceeded the scope of the Antimony Smelter Nationalization Decree when it seized the Tin Stock.*"[789]

586. Claimant's allegations that Bolivia breached due process and transparency and predictability are wrong.

587. *First*, Claimant's due process claim is entirely misguided as a matter of law. As Claimant admits, due process requires only "*the need to give an investor a reasonable chance (within a reasonable timeframe) to claim its legitimate rights and have its claims heard.*"[790] Bolivia satisfied this requirement by making available its courts to challenge the smelter reversions as well as by making available international investment arbitration.[791] It was Claimant's own choice not to pursue its available avenues of recourse for almost ten years.

588. In any event, the errors in the due process claim were addressed more fully above; restating the same complaint twice does not make Claimant's case any more convincing.[792]

589. *Second*, the transparency and predictability allegation is equally fallacious.[793] Bolivia acted transparently and predictably in the reversion of the smelters. Bolivia reverted the smelters for precisely the reasons that it stated in the reversion decrees: The Tin Smelter was reverted because of the illegalities in its privatization while the Antimony Smelter was reverted because it was sitting idle, contrary to the contractual terms of its privatization.

590. As Claimant is "*deemed to be a competent professional*,"[794] these grounds for the reversions should have been obvious to Claimant from the time it received its so-called investments in Bolivia for two reasons.

591. One, it was well-known that government officials, and especially representatives of the MAS party, had observed serious irregularities in the privatization of the Tin Smelter. The MAS members of the parliament had formally demanded the resignation of Chancellor Carlos

788 Statement of Claim, ¶ 218.

789 Statement of Claim, ¶ 218.

790 Statement of Claim, ¶ 209.

791 Section 2.1.2.2 above.

792 Section 6.1.2.2 above, see Statement of Claim, ¶ 169 *et seq.* and again ¶ 206 *et seq.*

793 Statement of Claim, ¶¶ 218-219.

794 *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award of 16 May 2014, **RLA-17**, ¶ 194.

Saavedra Bruno due to illegalities in sale of Vinto while serving as Foreign Trade Minister.[795] And Evo Morales himself, future president of Bolivia, was one of the principal voices from the MAS party calling for the resignation.[796]

592. Two, it was also 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. The legal regulation for the privatization process established the objective of increasing "*la producción, las exportaciones, el empleo y la productividad.*"[797] As the Terms of Reference for the Antimony Smelter tender —incorporated into the final contractual terms[798]— explain, the Smelter was privatized specifically to guarantee production, with the concomitant economic benefits. Its text states:

> *La Licitación tiene por objeto la transferencia a título oneroso de los Activos y Derechos de la fundición de antimonio de la Empresa Metalúrgica Vinto, en favor de una empresa especializada con capacidad económica, financiera y técnica, que permita el ingreso de capital, tecnología, prácticas comerciales y de gestión privada, posibilitando a la Fundición continuar la producción, constituyéndose en una fuente de generación de empleo y tributos, en apoyo a la actividad minera de explotación y concentración de antimonio en el país.*[799]

593. The reversion of the smelter was grounded in the failure to fulfill this fundamental object and purpose of the privatization process: ensuring the productive activity of the smelter. As the reversion decree clearly states:

> *en los últimos años se evidenció la inactividad productiva de la Planta Metalúrgica Vinto Antimonio, asi como su desmantelamiento, no obstante haberse estipulado en el pliego de condiciones las obligaciones de invertir y fortalecer la Empresa Metalúrgica Vinto Antimonio con capacidad económica, financiera y técnica, que permita el ingreso de capital, tecnología, prácticas comerciales y gestión privada, posibilitando a la Fundición continuar la producción, constituyéndose en una fuente de generación*

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795 La Razón Digital, *El MAS pide la renuncia del Canciller Saavedra*, press article of 8 November 2002, **R-134**; El Diario, *MAS pide la renuncia del Canciller de la Republica*, press release of 4 December 2002, **R-135**.

796 El Mundo, *MAS presentó las pruebas de corrupción contra Canciller*, press release of 4 December 2002, **R-136**;

797 Supreme Decree No. 23.991 of 10 April 1995, **R-100**, Art. 2(c) (Unofficial translation: "*production, exports, employment and productivity*").

798 Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**, 23(1), p. 21.

799 Terms of Reference for the Second Public Tender for the Antimony Smelter of 31 July 2000, **R-109**, p. 9 (Unofficial translation: "*[t]he Bid's object is to transfer in exchange for consideration the Assets and Rights of the Antimony Smelter of the Vinto Metallurgical Company to a specialized company with economic, financial and technical capacity, that will allow the inflow of capital, technology, commercial practices and private management, permitting the Smelter to continue production, becoming a source for the generation of employment and tax, in support of the mining activity of exploitation and concentration of antimony in the country*").

de empleo, tributos y externalidades en apoyo a la actividad minera de explotación y concentración de antimonio en el país.[800]

594. Claimant freely admits that the Antimony Smelter was in fact inactive and that Claimant had not brought it back into production.[801] Nor does it deny that the object and purpose of the Antimony Smelter privatization contract was to ensure the productive activity of the smelter. Instead, it simply complains that Bolivia failed to ask it to fulfill the contractual purpose associated with the Smelter.[802] But this does not change the fact that the Reversion Decree was transparent about its reasons, and that these reasons were predictable from the terms of the privatization contract.

595. Thus, both the Tin Smelter and Antimony Smelter reversions were transparent and predictable. They were taken for exactly the reasons described in the corresponding decrees, reasons that were long known to Claimant.

596. However, even if a potential regulatory action is not transparent or predictable to an investor at the outset, a state is nevertheless permitted to take regulatory actions in the public interest. This was the conclusion of the recent *Urbaser* tribunal: "*The fair and equitable treatment does not provide for a standard according to which the investor would remain completely isolated and immune from the host State's endeavors to deal with such situations in complying with public interests.*"[803] As the *Urbaser* tribunal reasoned, the investor has to expect the state to address any problems that arise during the course of the investment. It explained that "*[t]he investor is and must be aware of the State's commitment to deal with situations and problems that may emerge over the time and were impossible to anticipate.*"[804]

597. The expectation that novel problems might arise during the course of the investment is particularly strong when circumstances indicate that legal change is likely. The *Parkerings* tribunal observed that, because, "*legislative changes, far from being unpredictable, were in fact to be regarded as likely*," it was the case that, "*as any businessman would, the Claimant*

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800 Supreme Decree No 499 of 1 May 2010, **C-26**, p. 2 (Unofficial translation: "*In recent years, the inactivity of the Metallurgical Company Vinto Antimonio became obvious, as well as its dismantling, notwithstanding that the terms of reference provided for the obligation to invest in and reinforce the Metallurgical Company Vinto Antimonio with economic, financial and technical capacity, that would allow the inflow of capital, technology, commercial practices and private management, permitting the Smelter to continue production, becoming a source for the generation of employment and tax, in support of the mining activity of exploitation and concentration of antimony in the country*").

801 Statement of Claim, ¶ 218.

802 Statement of Claim, ¶ 218.

803 *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, **RLA-86**, ¶ 628.

804 *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, **RLA-86**, ¶ 628.

was aware of the risk that changes of laws would probably occur […]."[805] On this basis, it held that, "*in such a situation, no expectation that the laws would remain unchanged was legitimate.*"[806] This position was affirmed by *Mamidoil v. Albania*[807] and *Toto v. Lebanon*.[808]

598. Just as in those cases, Claimant made its so-called investment precisely at a moment where the political regime and economy in Bolivia were in the midst of a period of transition. The Sánchez de Lozada government had fallen. The MAS party, with its very different political and economic policies, was on the ascendency and was likely to take the presidency in the next election. Claimant should have predicted that Bolivia would address regulatory issues differently in the immediate future than it had in the past.

599. To avoid the inconvenient fact that it invested at a moment of political change when it already had notice of the grounds for the reversions, Claimant cites to *Gold Reserve*. But *Gold Reserve* is straightforwardly inapposite. *Gold Reserve* concerns a situation where the state had ulterior motives for its actions. To see this, we need not look further than Claimant's own characterization of the *Gold Reserve* award: "*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.'*"[809] Claimant has not proven, much less provided any evidence, that Bolivia had reasons for the reversions other than those stated in the official decrees.

600. Thus, Claimant has failed to make out, much less prove, its allegations that Bolivia breached due process and transparency and predictability.

6.3.3 Bolivia Acted In Good Faith When Intervening At The Colquiri Mine And When Issuing The Reversion

601. Claimant alleges that Bolivia breached the FET provision because "*the nationalization of Colquiri was the result of Bolivia's inaction and bad faith.*"[810] In support of this conclusory

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805 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, **RLA-83**, ¶ 335, also ¶¶ 327-338.

806 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, **RLA-83**, ¶ 335, also ¶¶ 327-338.

807 *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award of 30 March 2015, **RLA-74**, ¶ 623.

808 *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award of 7 June 2012, **RLA-76**, ¶ 245.

809 Statement of Claim, ¶ 207.

810 Statement of Claim, ¶ 219.

allegation, it advances two arguments, both of which are redundant, and neither of which explains why Bolivia's conduct would have amounted to bad faith.[811]

602. As an initial matter, Claimant does not attempt to explain how its allegations, even if true, would evidence behaviour contrary to good faith. It does not even propose a legal standard of good faith. This is because, as the ICJ has repeatedly held, good faith "*is not in itself a source of obligation where none would otherwise exist.*"[812] Thus, Claimant's claim for breach of good faith must be summarily rejected.

603. However, even if it were not, Claimant is unable to show that Bolivia acted in bad faith through either of the two repetitive arguments it advances.

604. *First*, Claimant asserts that "*Bolivia first failed to respond to Glencore Bermuda's requests for assistance, thus failing to protect the Colquiri Mine from the unlawful and violent interference of the cooperativistas […].*"[813] This is nothing more than yet another repackaging of Claimant's allegation about an FPS breach, which Bolivia has already rebutted at length.[814] In short, Bolivia took all the measures that were legal and reasonable under the difficult circumstances of the Colquiri Mine dispute.

605. *Second*, Claimant asserts that "*once the conflict with the cooperatives was resolved, Bolivia still decided to nationalize the Colquiri Mine.*"[815] This repackages Claimant's allegations about the need for the expropriation, allegations that Bolivia has also already debunked in detail.[816] Simply put, 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.

606. No matter how much Claimant wishes it were so, adding together two erroneous arguments does not equal a sound argument for bad faith. Claimant's bad faith allegations should be rejected.

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811 Statement of Claim, ¶¶ 219-220.

812 *Case concerning border and transborder armed actions (Nicaragua v. Honduras)*, ICJ, Jurisdiction of the Court and Admissibility of the Application, Judgment of 20 December 1988, **RLA-87**, ¶ 94. See also *Case concerning the land and maritime boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, ICJ, Preliminary Objections, Judgment of 11 June 1998, **RLA-88**, ¶ 59.

813 Statement of Claim, ¶ 219.

814 Section 6.2 above.

815 Statement of Claim, ¶ 219.

816 Section 6.1 above.

6.3.4 Claimant's Allegation Of Administrative Negligence And Inconsistency Is Legally And Factually Vacuous

607. Claimant argues that "*Bolivia's handling of the negotiations with Glencore Bermuda since 2007 evidences 'serious administrative negligence and inconsistency,' since it subjected Glencore Bermuda to a 'roller-coaster' ride.*"[817] Of course, Glencore Bermuda never negotiated with Bolivia, only Glencore International did. And Claimant proposes that the applicable legal standard for those negotiations is a "*roller-coaster ride.*" The Tribunal should not find a breach of international law on account of a so-called "*roller-coaster ride.*" This is not a serious claim and should be dismissed out of hand.

608. Nor do the facts support the existence of any Treaty breach. Following the reversions, Bolivia carried out the difficult negotiations appropriately and consistently. Claimant's own decision to wait almost ten years after the Tin Smelter reversion and almost five years after the Colquiri Mine Lease reversion to file this arbitration attest to that fact. In fact, Claimant's primary complaint about the negotiations is that Bolivia did not give it what it wanted, nothing more.[818] But this is an unremarkable feature of any unsuccessful negotiation. So, although Claimant may have been unsatisfied with the outcome of the negotiations, that dissatisfaction is not a fair and equitable treatment breach.

609. And these facts bear no resemblance to those underlying the *PSEG v. Turkey* decision, on which Claimant places primary reliance for this claim.[819] As the *PSEG* tribunal concluded, the breach consisted of "*continuing legislative claims [such as] the requirements relating, in law or practice, to the continuous change in the conditions governing the corporate status of the Project, and the constant alternation between private law status and administrative concessions that went back and forth.*"[820] The negotiations between Claimant and Bolivia did not take place against a background of constant legal change, rendering the conclusions of the *PSEG* tribunal entirely irrelevant.

610. Nor would this change had Claimant invoked *Saluka* in connection to the negotiations (although it only mentions it as relevant to transparency).[821] The *Saluka* tribunal held that "*[t]he Czech Government failed to deal with IPB and its shareholder Saluka/Nomura, on the*

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817 Statement of Claim, ¶ 221.

818 Statement of Claim, ¶ 221.

819 Statement of Claim, ¶ 221.

820 *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award of 19 January 2007, **CLA-66**, ¶ 250.

821 Statement of Claim, ¶ 202.

one hand, and CSOB, on the other hand, in an unbiased and even-handed way […]."[822] Building on this holding, the tribunal concluded that the bias against the investor manifested itself in a lack of transparency and a refusal of adequate communication.[823] By contrast, Claimant has not alleged bias or a lack of even-handedness, and it cannot: in whose favor would Bolivia have been biased? Thus, *Saluka* too is irrelevant to this dispute.

611. In short, Claimant's allegation of an FET breach connected to the negotiations goes nowhere. It is based on a farcical legal standard, lacks factual support, and is contrary to the authorities that Claimant invokes to support it.

7. IF THE TRIBUNAL WERE TO CONSIDER THAT IT HAS JURISDICTION OVER THIS DISPUTE AND THAT BOLIVIA BREACHED THE TREATY (*QUOD NON*), IT SHOULD, NONETHELESS, FIND THAT CLAIMANT'S CLAIMED DAMAGES ARE HIGHLY SPECULATIVE AND UNCERTAIN AND THAT, IN ANY EVENT, ITS VALUATIONS ARE HYPOTHETICAL AND FLAWED

612. Claimant's case on quantum appears to rest on the hope that, by inflating its damages claim to an outrageous US$ 675.7 million (including interest), it will somehow lay the groundwork for the Tribunal to compromise on a slightly lesser, yet still grossly inflated damages award. This approach makes a mockery of the relevant standards of compensation and damages under the Treaty and international law.

613. Claimant's mockery of the relevant standards of compensation leads to a grossly inflated damages claim. Claimant is aware of this, as shown by the fact that, in March 2005, it implicitly valued all of the Assets (*i.e.*, the Mine, the Tin Smelter and the Antimony Smelter) at US$ 9,900,990.[824] Indeed, in March 2005, Glencore International purchased from CDC Group Plc. 24.34% of Colquiri's shares[825] (Colquiri was the owner of all the Assets at the time) for US$ 2,410,581.70.[826] Simple mathematics show that, to Glencore International, the implicit value of 100% of Colquiri's shares was US$ 9,900,990. This is 40 times less than what Claimant is claiming for the same Assets in this arbitration (excluding the Tin Stock and interests).[827]

614. In calculating the lost value of the operating Assets, Claimant has not calculated their fair market value ("**FMV**") and has misrepresented the impact of the relevant variables. Claimant

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822 *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award of 17 March 2006, **CLA-62**, ¶ 407.

823 *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award of 17 March 2006, **CLA-62**, ¶¶ 420-432.

824 Econ One, ¶ 16.

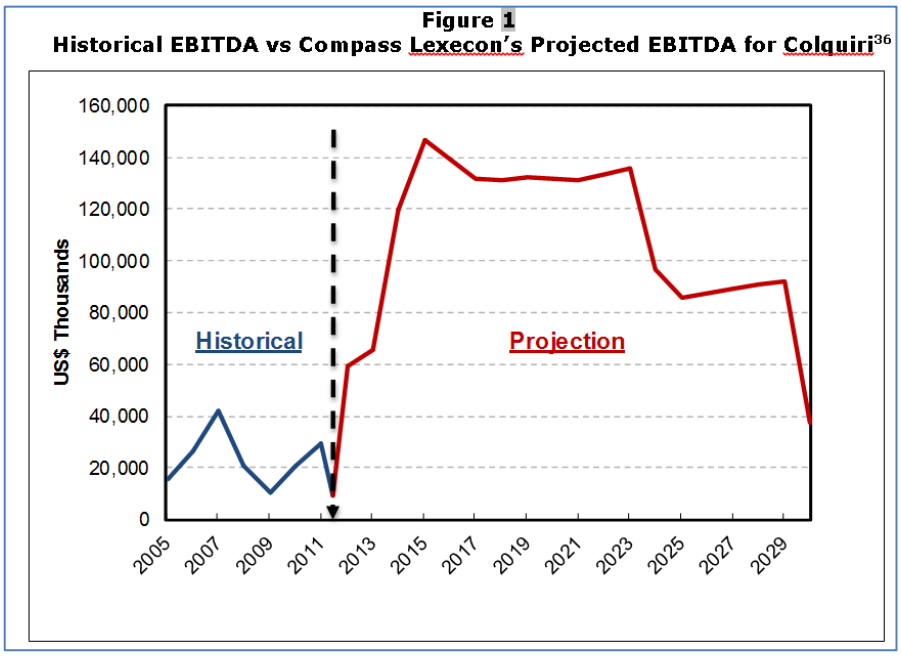
825 Share register of Colquiri SA, **C-17**, p. 4.

826 Put and Call Agreement between CDC and Glencore International of 15 March 2005, **C-65**.

827 Statement of Claim, ¶ 295; Econ One, Footnote 10.

adopts exaggerated and implausible scenarios for each of the variables of its discounted cash flow ("**DCF**") method valuations. It suffices to consider the historical operating performance of the operating Assets to see how arbitrary and speculative Claimant's valuations are. In the case of the Mine, while during the seven years leading up to the valuation date its *Earnings Before Interest Taxes Depreciation and Amortization* ("**EBITDA**") ranged between US$ 10 million to US$ 42 million, Claimant's damages claim assumes that such EBIDTA would have been approximately 5 times higher during the next 18 years (2012 – 2030):[828]

Figure 1
Historical EBITDA vs Compass Lexecon's Projected EBITDA for Colquiri[36]

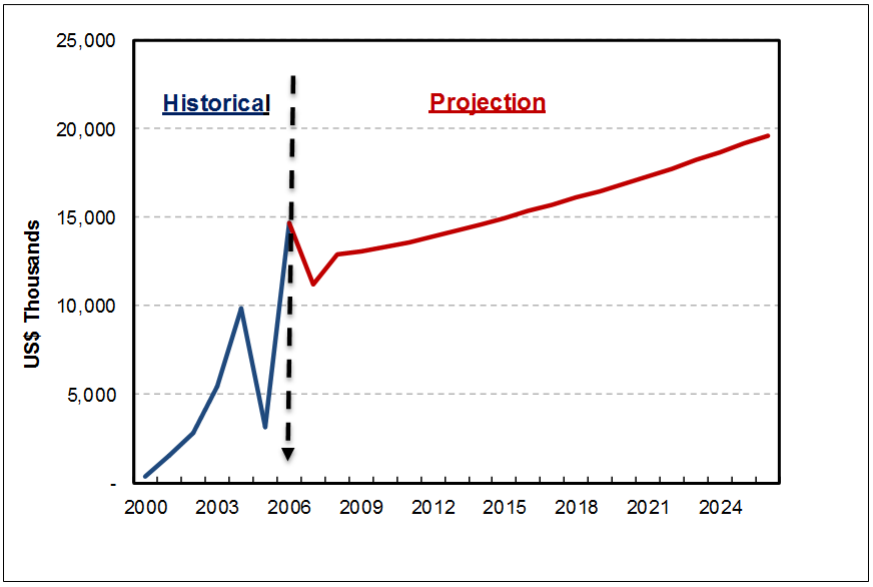


615. Similarly, in the case of the Tin Smelter, while its EBIDTA ranged between US$ 0.4 million to US$ 14.7 million for the 7 years leading up to the valuation date, Claimant's damages claim assumes that such EBIDTA would have been approximately 3 times higher during the next 20 years (2007 – 2026):[829]

828 Econ One, Figure 1.

829 Econ One, Figure 7.

Figure 7
Historical EBITDA vs Compass Lexecon's Projected EBITDA for Vinto[155]



616. Claimant's valuations are entirely speculative and fail to establish any damage sufficiently certain to warrant compensation under international law (**Section 7.1**). Even if the damages sought by Claimant for the Mine and the Tin Smelter were certain (*quod non*), those damages were not caused by Bolivia but rather by Claimant's own acts (**Section 7.2**). Claimant's valuations are flawed and grossly inflated (**Section 7.3**), and so its interest claim (**Section 7.4**). Were the Tribunal to award damages to Claimant for the Mine and the Tin Smelter (*quod non*), it must take into account Claimant's contribution to its loss to substantially reduce any recovery (**Section 7.5**).

7.1 Claimant's Valuations Are So Speculative That Claimant Has Failed To Establish Any Damage Sufficiently Certain To Warrant Compensation Under International Law

617. It is a settled principle of international law that Claimant bears the burden of proving the certainty of its alleged damages (**Section 7.1.1**). But because Claimant's alleged damages are premised on mere (and abusive) speculation, they are not certain enough to be compensated under international law (**Section 7.1.2**).

7.1.1 Under International Law, It Is Claimant's Burden To Prove Its Damages With Certainty

618. Although Claimant purports to lay out the "*applicable standards for the assessment of compensation,*"[830] it simply ignores the most basic standards of all. It does not explain that it is Claimant's burden to prove that its claimed damages are compensable and it does not explain that only damages that are *certain* merit compensation. And it certainly does not

830 Statement of Claim, ¶ 227.

explain that this standard of proof rules out compensation for future projects that have no record of profits.

619. It is a well-established principle that a claimant bears the burden of proving the damages it claims, regarding both the fact and the amount of the loss.[831] The *Crystallex* tribunal recently confirmed the consensus view that, "*as a general matter, it is clear that it is the Claimant that bears the burden of proof in relation to the fact and the amount of loss.*"[832] Similarly, the *Gold Reserve* tribunal concluded that "*Claimant bears the burden of proving its claimed damages*."[833]

620. Restating customary international law, the International Law Commission's Articles on State Responsibility establish that compensation for losses must be proven with "*sufficient certainty to be compensable.*"[834] The Articles on State Responsibility further recognize, for any damages claim, that "*[t]ribunals have been reluctant to provide compensation for claims with inherently speculative elements*."[835]

621. Unsurprisingly, almost all tribunals to pronounce on the issue have followed the Articles on State Responsibility in demanding that losses be demonstrated with reasonable or sufficient certainty.[836] *Amoco* speaks for these tribunals when it reports that "*[o]ne of the best settled*

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831 S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008 (extract), **RLA-89**, p. 162 ("*In the damages context, it is always the claimant who alleges that it has suffered a loss as a result of the respondent's conduct; therefore, the claimant bears the burden of proof in relation to the fact and the amount of loss*") (emphasis added).

832 *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award of 4 April 2016, **CLA-130**, ¶ 864;

833 *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award of 22 September 2014, **CLA-123**, ¶ 685.

834 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. 36, comment 27 ("*In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable.*"); M. Whiteman, *Damages in International Law*, vol. III (1943), **RLA-90**, p. 1837; UNIDROIT Principles of International Commercial Contracts (2010), **RLA-91**, Art. 7.4.3(1), **CA-513**; United Nations Compensation Commission, *Governing Council Decision 9* of 6 March 1992, **RLA-92** ¶¶ 8, 19.

835 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. 36, comment 27.

836 *Amoco International Finance Corporation v Government of the Islamic Republic of Iran and others*, Partial Award (1987-Volume 15) Iran-US Claims Tribunal Report, **CLA-10**, ¶ 238; *Ioan Micula and others v Romania* (ICSID Case No ARB/05/20) Award of 11 December 2013, **CLA-119**, ¶ 1008; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (ICSID Case No ARB/97/3) Award of 20 August 2007, **CLA-70**, ¶ 8.3.4; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum of 22 May 2012, **RLA-93**, ¶ 438; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award of 11 November 2002, **RLA-94**, ¶¶ 285-286; *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 of 16 June 2010, **CLA-98**, ¶¶ 12-56, 13-91; *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award of 19 January 2007, **CLA-66**, ¶ 310; *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award of 2 March 2015, **RLA-95**, ¶ 514; *AIG Capital Partners, Inc and CJSC*

rules on international responsibility of States is that no reparation for speculative or uncertain damages can be awarded. This holds true for the existence of the damage and of its effect as well."[837]

622. For the avoidance of doubt, Bolivia is not suggesting that Claimant's burden includes establishing with a 100% certainty the *exact amount* of damages claimed. However, Claimant must establish the existence of damages with reasonable certainty.[838] The well-known Chorzow decision established that "*reparation must (…) reestablish the situation which would, in all probability, have existed if that act had not been committed*"[839].

623. In this context, as the *Mohammad Ammar Al-Bahloul* tribunal rightly held, for an award of future profits the claimant must prove that each condition on which its claim is premised would more likely than not be fulfilled[840]; damages cannot be based on conjectures ("*(…) the assessment of damages cannot be based on conjecture or speculation. A persuasive factual basis for the assessment must be shown*").[841]

624. In this respect, Claimant's case grossly fails. Its entire damages case rests on a series of *assumptions* about future operations that are highly speculative and unrealistic, thus resulting in damages that are arbitrary and uncertain. A good example of this is Claimant's valuation of the Old Tailings Reprocessing Project, which represents over 30% of the damages claimed by Claimant for Colquiri (*i.e.*, more than US$ 100 million). Although no one has ever operated this Project, Claimant's experts' value it based on the DCF method and assuming it is a going concern with a proven record of profitability. Needless to say, this results in an arbitrary and highly speculative valuation (all of the inputs used in the DCF valuation are unsupported and were arbitrarily-chosen). As explained by the *Caratube* tribunal, "*the DCF method is widely accepted as an appropriate method to assess the lost profits of going*

Tema Real Estate Company v Republic of Kazakhstan (ICSID Case No ARB/01/6) Award of 7 October 2003, **CLA-45**, ¶ 12.1.10. Cf., *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd v. The Republic of Kazakhstan*, SCC Case No. V116/2010, Award of 19 December 2013, **RLA-96**, ¶ 1688 (requiring a "*high standard of proof*"); *Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela* (ICSID Case No ARB/00/5) Award of 23 September 2003, **CLA-44**, ¶ 351.

837 *Amoco International Finance Corporation v Government of the Islamic Republic of Iran and others*, Partial Award (1987-Volume 15) Iran-US Claims Tribunal Report, **CLA-10**, ¶ 238.

838 This is conceded by Glencore. In footnote 492 of its Statement of Claim, Glencore defines "going concern" as "*an enterprise consisting of income-producing assets which has been in operation for a sufficient period of time to generate the data required for the calculation of future income and which could have been expected with reasonable certainty (…)*" (emphasis added).

839 *Case Concerning the Factory at Chorzów* (*Germany/Poland)* (Merits) [1928] PCIJ Series A, No 17, **CLA-2** (emphasis added).

840 *Mohammad Ammar Al-Bahloul vs. Republic of Tajikistan*, SCC Arbitration No. V(064/2008), Final Award, 8 June 2010, **RLA-97**, ¶ 78.

841 *Mohammad Ammar Al-Bahloul vs. Republic of Tajikistan*, SCC Arbitration No. V(064/2008), Final Award, 8 June 2010, **RLA-97**, ¶ 39.

concerns with a proven record of profitability […]."[842] Econ One further explains that "*[t]he purpose of requiring historical data for the implementation of a DCF analysis is to provide a more reliable source of information for projecting future cash flows, than speculative plans for operations that had never existed […].*"[843]

625. There was not even certainty that Claimant would ever invest in the Old Tailings Reprocessing Project (in fact, as discussed below, evidence suggests the opposite), which confirms why the Tribunal should dismiss Claimant's damages claim for this Project. A similar situation arose in the *Micula* case, where claimants sought compensation for the lost profits they would have derived from certain investments that were not made, allegedly, as a result of Romania's breach. The tribunal rejected the claim given that the facilities needed to generate the revenues did not exist in their "*complete, revenue-generating form*" at the time of Romania's breach (and even though, in that case, claimants had submitted proof of their intention to complete those facilities). The *Micula* tribunal concluded that "*Claimants have failed to prove with sufficient certainty that they would have indeed implemented the Incremental Investments that serve as the basis for this lost profits claim.*"[844] In the present case, no facilities were built by Claimant for the development of the Old Tailings Reprocessing Project, and there is no evidence that Claimant would have implemented this Project.

626. The Tribunal cannot compensate Claimant for lost future profits which are based on unsubstantiated assumptions (and thus speculative). As the *Murphy* tribunal explained, "*[to award uncertain profits] would not place Claimant in the position that it would have been in but-for the wrongful act. Such a ruling would replace what was an uncertain future with a particular outcome too far removed from the 'but-for' hypothetical.*"[845]

627. Thus, it is Claimant's burden to prove with certainty all elements of the alleged losses underpinning its damages claims.

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842 *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/3, Award of 27 September 2017, **RLA-98**, ¶ 1094 (emphasis added).

843 Econ One, ¶ 47.

844 *Ioan Micula and others v Romania* (ICSID Case No ARB/05/20) Award of 11 December 2013, **CLA-119**, ¶ 1065.

845 *Murphy Exploration and Production Company International v. Republic of Ecuador [II]*, PCA Case No. 2012-16, Partial Final Award of 6 May 2016, **RLA-99**, ¶ 485-487. The *Murphy* tribunal further recalled that "*the general requirement for awarding damages for violations of international obligations [is] that any compensable damage must not be too speculative, remote, or uncertain.*"

7.1.2 Through Its Highly Speculative And Unrealistic Valuation, Claimant Has Not Proven Its Damages Claims With Certainty

628. Claimant's valuations of the Mine (**Section 7.1.2.1**), the Tin Smelter (**Section 7.1.2.2**) and the Antimony Smelter (**Section 7.1.2.3**) are all premised on mere speculation and defy common sense.

7.1.2.1 Compass Lexecon's Valuation Of the Mine Is Premised On Mere Speculation

629. It is not uncommon for parties to international arbitration to disagree on how best to estimate the exact FMV of an investment and, almost inevitably, the parties' experts will submit different views to tribunals. However, this case is not common in how far the Claimant's experts have gone into making assumptions (most likely on instruction from Claimant) that are so far removed from reality that they appear to be valuing a "magical mine."

630. Compass Lexecon's valuation of the Mine relies on RPA's analysis for the key value drivers, namely production (key premise to calculate revenues) and costs.[846] Yet, these parameters are based on pure speculation and mere aspirations found on a single document dated July 2011, *i.e.*, almost a year before the Mine reverted to the State (the "**Triennial Plan**"),[847] without any other documentary support. Moreover, as the facts between July 2011 and mid-2012 demonstrate, said Triennial Plan was never even implemented.

631. A careful review of RPA's analysis and Compass Lexecon's valuation shows, at least, that:

632. *First*, their models are solely based on the Triennial Plan, without an independent assessment of whether it was realistic, even less so whether a willing buyer would have taken it at face value, which RPA and Compass Lexecon do.

633. Said Triennial Plan was nothing more than an unsupported conjecture and aspiration, as demonstrated by the lack of any internal assessment of its economic viability (much less investment approval), and was not even approved by Colquiri's management. In fact, Eng Moreira (the Mine's Superintendent as of July 2011, when the Plan was allegedly prepared) had not even seen the Triennial Plan relied upon by Claimant before this arbitration.[848] Claimant's submission is notably missing any internal approvals, any investment authorizations, any authorization for expenditures, etc., in the more than 10 months that

846 Compass Lexecon Expert Report, ¶ 52.

847 2012-2014 Colquiri Mine Three-year Plan, **C-108**.

848 Moreira, ¶ 19.

followed before the Mine Lease was reverted. What happened with this Plan after July 2011 is a mystery.

634. *Second*, Claimant's experts' valuations result in a "magical mine" where:

- Mineral resources are delineated and mineral reserves replenish without any need for the operator to invest in exploration; they just "magically" appear. Per the last reserves/resources estimate (as of 31 December 2011),[849] allegedly performed prior to the reversion of the Mine Lease (in mid-2012), all reserves and resources would have been produced in 13.6 years with the then production levels.[850] Yet RPA has no qualms in projecting that, without any need to invest in exploration, the Mine would have continued operating for another 20 years;[851]

- The processing plant's production doubles in three years (from 289,888 tons in 2011 to 550,579 tons in 2014),[852] and remains at that level until 2030[853] (despite there not being enough water or electricity to sustain such enormous production); and

- The Mine's total production (*i.e.*, production from Colquiri's current processing plant and from the new old tailings plant) moves from 1,000 tons per day (in 2012) to 5,000 tons per day (in 2014), *i.e.*, the Mine's production grows by a multiple of 5 in three years[854] (even though this is technically unfeasible and inconsistent with the chronic lack of investment at Colquiri).

635. The combination of such an extraordinary and unrealistic increase in production with no exploration investment grossly inflates Claimant's claim.

636. In addition, in Claimant's "magical mine":

- Projects that take years to complete at a significant cost (such as a 2,500 m underground ramp or a new plant) are approved, built and in operation in half a year during 2012 (to justify the phenomenal production increases in the early years of the Compass Lexecon model, so as to front-load the model) at very low or no cost;

849 Glencore Annual Report 2011, **R-252**, p. 72.

850 Econ One, ¶ 36.

851 RPA FBD Glencore v Bolivia Expert Report, ¶ 86.

852 RPA FBD Glencore v Bolivia Expert Report, ¶ 113, Table 3; Compass Lexecon Colquiri Valuation, **CLEX-4**, "Revenues".

853 RPA FBD Glencore v Bolivia Expert Report, ¶ 113. Compass Lexecon Colquiri Valuation, **CLEX-4**, "Revenues".

854 Moreira, ¶ 18.

- The additional tailings (resulting from increased production) "disappear" so that there is no need to build a very costly and large new dam;

- The January-June 2012 production is achieved both before and after the reversion of the Mine Lease[855] (since RPA and Compass Lexecon make no allocation for production already achieved by Colquiri in such months);

- Per Claimant's experts, the Mine becomes a much more profitable venture from the very moment the Mine Lease was reverted by the State (*i.e.*, mid-2012) and for the next 17 ½ years. For instance:

    - Despite having to mine deeper and deeper,[856] production costs become lower in the future (because Colquiri would allegedly benefit from economies of scale).[857] Yet, Colquiri has not benefited from economies of scale in its entire history, including during Sinchi Wayra's operation;[858] and

    - Despite the fact that, in 2011 and the first half of 2012, metallurgical recoveries at Colquiri were around 60% or less for both zinc and tin,[859] Claimant's experts assume that metallurgical recoveries will average "*72% for tin and 76% for zinc*" per year from 2012 until 2030.[860] This is inconsistent with Colquiri's operating history and, more importantly, ignores the reality of the Mine (an underground mine whose metallurgical recoveries will progressively decrease as mining moves deeper into more sulfurous areas of the Mine and head grades decrease).[861]

637. *Third*, Claimant's experts also assume that an Old Tailings Reprocessing Project (which contributes over US$ 100 million to Colquiri's value in their model) would have been implemented shortly after the reversion of the Mine Lease (after having been abandoned for 8 years, *i.e.*, since 2004). Yet, the economic viability of this Project is uncertain at best,[862] and thus any value attributed to it is entirely speculative.

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855 SRK, ¶ 54; Econ One, ¶ 19.

856 SRK, ¶¶ 14, 44.

857 RPA FBD Glencore v Bolivia Expert Report, ¶ 179.

858 Econ One, ¶ 75.

859 SRK, ¶ 48, Table 2.

860 RPA FBD Glencore v Bolivia Expert Report, ¶ 48.

861 Villavicencio, ¶ 69.

862 SRK, Section 8.2, ¶ 85; Moreira, ¶ 24.

638. Such degree of speculation in RPA's analysis and Compass Lexecon's valuation are so far from meeting the standard of proof for Claimant's damages to be sufficiently certain that the Tribunal should not hesitate in denying any compensation on this basis alone.

639. One, Claimant's experts' analysis is entirely premised on the Triennial Plan, without any critical analysis or independent review (contrary to what a willing buyer would have done).[863] This Plan, dated July 2011, forecasts a significant production increase both at the Mine and the plant resulting from several future projects (such as the expansion of Colquiri's processing plant or a new main ramp). Aside from the fact that, as discussed in section 7.3.4.2 below, this Plan's assumptions and resulting forecasts are flawed, the Triennial Plan appears to be nothing more than unsupported conjecture and aspiration. Indeed:

- There are no internal approvals of the Triennial Plan, no investment authorizations, no authorization for expenditures, etc., in the more than 10 months between the date in which the Plan was allegedly prepared (July 2011) and the date in which the Mine Lease was reverted (June 2012). There is no engineering for the projects forecasted in the Plan either. What happened with this Plan after July 2011 is a mystery, yet Claimant's experts' analysis is entirely premised on it;

- As explained by Eng Moreira (the Mine's Superintendent as of July 2011, when the Triennial Plan was allegedly prepared), in August / September 2011 he met in La Paz with Ms Maria Eugenia Aramayo to discuss and prepare Sinchi Wayra's budget for 2012.[864] At no point during these meetings they discussed about the Triennial Plan, much less about the investments / projects forecasted in that Plan.[865] Had the Triennial Plan been approved or, as Claimant contends, had Colquiri been in the process of implementing it, it would have been discussed at these meetings and considered in Sinchi Wayra's 2012 budget;[866]

- As explained by Eng Moreira, until his involvement in this arbitration, he had never seen or heard about the Triennial Plan submitted by Claimant.[867] Had the Triennial Plan been something serious, more than a mere aspiration, Eng Moreira would have definitely been aware of its existence;

863 RPA FBD Glencore v Bolivia Expert Report, ¶ 13; Compass Lexecon Expert Report, ¶ 51.

864 Moreira, ¶ 24.

865 Moreira, ¶ 24.

866 *Compañía Minera Colquiri* Annual Budget for 2012, **R-33**.

867 Moreira, ¶ 19.

- The investments, purchases, etc., that, per the Triennial Plan, were supposed to have been made between July 2011 (the Triennial Plan's date) and 20 June 2012 (when the Mine Lease was reverted) were never carried out.[868] Neither Claimant nor its witnesses have submitted any evidence to the contrary; and

- The Triennial Plan contains no economic, social or environmental analyses.[869] Had this Plan been seriously considered at Colquiri or, as Claimant contends, had Colquiri been in the process of implementing it, these analyses would have been undertaken. It is simply not possible to conceive that a Plan of these characteristics, which forecasts that Colquiri's production will grow by a multiple of 5 (from 1,000 tons per day, in 2012, to 5,000 tons per day, in 2014 (including production from both Colquiri's current processing plant and the new plant for old tailings) as a result of various investments), would not have an internal assessment of its economic viability, nor any social or environmental analyses supporting its implementation.

640. A valuation solely based on the Triennial Plan (such as Compass Lexecon's, which takes the Triennial Plan at face value) is speculative at best. The hypothetical and unrealistic nature of Claimant's damages claim is obvious when comparing Colquiri's historical financial performance with Compass Lexecon's forecasts. For instance, while Colquiri's historical Earnings before EBITDA ranged from approximately US$ 10 million to US$ 42 million during the seven years leading up to June 2012, the earnings projected by Compass Lexecon for the next 20 years are about five times higher.[870]

641. The speculative nature of Compass Lexecon's valuation is all the more apparent when the Triennial Plan of July 2011 is compared to Claimant's March 2012 investment plan (the "**March 2012 Investment Plan**")[871] (which is neither mentioned nor submitted by Claimant). The March 2012 Investment Plan, submitted by Sinchi Wayra to COMIBOL on April 2012, contains significantly different (more conservative) projections and investments from those reflected in the Triennial Plan. For instance, while the Triennial Plan anticipated a 2-year ramp up period to attain the annual production of 550,579 MT, the March 2012 Investment Plan contemplated a 4-year ramp up period to reach the lower annual production of 470,000 MT. Likewise, the March 2012 Investment Plan projected the need for US$ 12.3 million more

868 Moreira, ¶ 21.

869 Moreira, ¶ 29.

870 Econ One, ¶¶ 33-34.

871 March 2012 Investment Plan, **EO-7**.

in CAPEX as compared to the Triennial Plan. Thus, the March 2012 Investment Plan confirms that Claimant's experts' valuation is untethered from reality and speculative, and that Claimant's sole objective in relying on the Triennial Plan is to inflate its damages claim.[872]

642. Two, Claimant's experts assume that a number of infrastructure projects and equipment purchases (required to increase production) were in progress as of 20 June 2012, when the Mine Lease was reverted. However, aside from the witness statement of Mr Eduardo Lazcano, Claimant has not submitted any evidence in support of these assumptions. Furthermore, to justify its exaggerated and unrealistic production increases, Compass Lexecon assumes that most of these projects would have been built between June and December 2012, which is unrealistic and unfeasible.[873] Claimant's experts are valuing a *magical* mine.

643. Mr Lazcano's witness statement refers to four projects, namely:[874]

- The Expansion of Colquiri's Processing Plant. At paragraph 23, Mr. Lazcano says there were ongoing works for the expansion of the processing plant, and that new equipment had been purchased for this purpose. However, Mr Lazcano has not provided any evidence supporting this.

- The Old Tailings Plant. At paragraph 33, Mr Lazcano says that several studies and detailed engineering had been carried out for the construction of the Old Tailings Plant. However, Mr Lazcano has not provided any evidence supporting this.

- The New Tailings Dam. At paragraph 34, Mr Lazcano says that, by 2012, Sinchi Wayra had already identified the land on which the new tailings dam would be built and agreed on the purchase terms with the local community. However, neither Claimant, its experts nor Mr Lazcano have provided any evidence of this. Furthermore, after reviewing Colquiri's internal files, Eng Moreira has not found "*rastro de acuerdo alguno para la compra de terrenos para la construcción de un nuevo dique […].*"[875]

872 Econ One, ¶ 52.

873 Moreira, ¶ 64.

874 Lazcano, ¶ 21.

875 Moreira, ¶ 62 (Unofficial translation: "*any trace of any agreement for the purchase of land for the construction of a new dam*").

- Infrastructure works. At paragraph 30, Mr Lazcano also indicates that the construction of the main ramp was ongoing. Yet, Mr Lazcano glosses over the fact that, as of 20 June 2012, only 30 meters of the main ramp (out of 2,500) had been built, that such limited works could have no impact whatsoever on production levels[876] and that building the entire ramp would take, at least, 3 additional years[877] (yet Compass Lexecon assumes that, by 2014, the processing plant's production would have doubled by benefiting from a fully operational 2,500 m ramp)[878].

644. Had these projects been carried out in reality (or, at least, begun in 2012), some documents should exist. Neither Claimant nor its witnesses have submitted any of these documents (despite the fact that, as explained by Eng Moreira, Sinchi Wayra took the computers and files when the Mine Lease was reverted).[879]

645. Three, Claimant's experts assume that "*the history of replacement [of mineral resources and ore reserves] will continue and that a valuation of the Mine should include mineralization that is not yet included in Mineral Resources […].*"[880] Put differently, RPA (and thus Compass Lexecon's valuation) assume that mineral resources will be *magically* delineated and reserves will *magically* replenish during the next 17 ½ years (*i.e.*, from mid-2012 until 2030). This is entirely speculative. There is no exploration work supporting these assumptions nor any investment in exploration factored in by Compass Lexecon.[881] As of 31 December 2011, pursuant to the *Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves* (the "**JORC Code**"),[882] resources at Colquiri were estimated at 4,181 MT and reserves at 1.55 MT,[883] which – at the Mine's production level at the time – would have been produced in 13.6 years.[884] By assuming the existence of 7.9 MT additional tons of *magical* resources and reserves, and without any need to invest capital in exploration, RPA arbitrarily concludes that Colquiri would have had resources and reserves to continue operating until 2030 (*i.e.*, 6 years more – at a higher production rate – than based

876 Moreira, ¶¶ 47-48.

877 Moreira, ¶ 48.

878 Compass Lexecon Colquiri Valuation, **CLEX-4**, "Revenues".

879 Moreira, ¶ 13.

880 RPA FBD Glencore v Bolivia Expert Report, ¶ 18.

881 SRK, ¶¶ 43-45.

882 Reserves & Resources, Glencore <http://www.glencore.com/investors/reports-and-results/reserves-and-resources/ > last visited 2 December 2017, **R-254**.

883 RPA FBD Glencore v Bolivia Expert Report, ¶ Table 1.

884 Econ One, ¶ 36.

on the reported resources and reserves). The JORC Code precisely prohibits reporting resources that are not supported by geological exploration:

> *The term 'Mineral Resource' covers mineralisation, including dumps and tailings, which has been identified and estimated through exploration and sampling and within which Ore Reserves may be defined by the consideration and application of the Modifying Factors*.[885]
>
> *Geological evidence and knowledge required for the estimation of Mineral Resources must include sampling data of a type, and at spacings, appropriate to the geological, chemical, physical, and mineralogical complexity of the mineral occurrence, for all classifications of Inferred, Indicated and Measured Mineral Resources. A Mineral Resource cannot be estimated in the absence of sampling information*.[886]

646. RPA's assumption of resources and reserves is necessary for it to justify how Colquiri's processing plant production could have increased from 289,888 tons in 2011 to 550,579 in 2014 (*i.e.*, by a factor of 190%!) and then would remain at that phenomenal level until 2030.[887] Needless to say, RPA's assumptions grossly inflate Claimant's claim.

647. Four, Claimant's experts assume that production at Colquiri would double as of 2014, but overlook that vast amounts of additional water and electricity would be needed to sustain such production levels, and that they do not exist in the Colquiri area. As explained by Eng Moreira:

> *En estos momentos, con una capacidad de tratamiento en planta de 1.300 tpd, ya tenemos muchos problemas de agua – es, simplemente, imposible encontrar suficiente agua en la zona para tratar el tonelaje que prevé ese Plan Trienal*.[888]

648. In spite of this, Claimant's experts assume that the water and electricity needed would *magically* appear. Claimant's experts unrealistic production estimates also overlook the impact that population growth (throughout time and, in particular, resulting from the Mine and plant employment demands) would have on water supply.

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885 Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (The JORC Code) 2012 Edition, **R-255**, p. 12; JORC Code, 2004, Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves, **RPA-32**, p.7.

886 Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (The JORC Code) 2012 Edition, **R-255**, p. 11. JORC Code, 2004, Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves, **RPA-32**, p.7.

887 RPA FBD Glencore v Bolivia Expert Report, ¶ 113; Compass Lexecon Colquiri Valuation, **CLEX-4**, "Revenues".

888 Moreira, ¶ 36 (Unofficial translation: "*For the time being, with the plant's treatment capacity of 1,300 tons per day we already have water issues – it is simply impossible to find sufficient water in the area to treat the tonnage provided in that Triennial Plan*").

649. Five, although they assume increased production (coming both from the expansion of Colquiri's processing plant and the Old Tailings Reprocessing Project),[889] Claimant's experts underestimate (not to say almost ignore) the need to build a very costly new dam. Indeed, the Triennial Plan – on which Claimant's experts rely – only considers an investment of US$ 5 million for the construction of a new tailings dam.[890] This is clearly insufficient, as evidenced by the fact that the Huanuni mine recently built a new tailings dam at a cost of US$ 9.5 million for the first phase (in addition to the cost of the land).[891] By underestimating this cost, Claimant's experts assume that the tailings resulting from the increased production will *magically* disappear.

650. Six, Claimant's experts assume that (i) unrealistically high mineral grades (ii) will remain constant throughout the life of the mine.[892] *On the one hand*, as explained by Eng Moreira, Claimant's experts ignore the degeneration in grades that results from the passage of time.[893] Furthermore, because future mining at the Mine will require going deeper, mineral grades are expected to be negatively impacted (which will result in grades lower than those estimated by RPA).[894] *On the other hand*, given that deep exploration had not been undertaken as of June 2012, it is not possible to predict grade continuity through the mineral deposit.[895] Claimant's experts ignore this, grossly inflating Claimant's claim.

651. Seven, Claimant's experts assume that, as of June 2012, (i) unrealistically high metallurgical recovery rates will (ii) remain constant throughout the life of the mine.[896] As explained by Eng Moreira, this is inconsistent with Colquiri's historical operating performance, which reflects a decreasing trend in metallurgical recoveries throughout time.[897] Recovery rates are expected to continue decreasing in time because they are correlated to grades (which, as explained above, are expected to decrease due to the passage of time and because mining will progressively move deeper into the Mine). Claimant's experts' assumption that metallurgical recoveries at Colquiri will *magically* reach its historical peak as of June 2012 (and remain constant during the next 17 ½ years) is thus entirely unsupported. As explained by Prof.

889 RPA FBD Glencore v Bolivia Expert Report, ¶¶ 113, 135; Compass Lexecon Colquiri Valuation, **CLEX-4**.

890 2012-2014 Colquiri Mine Three-year Plan, **C-108**, p. 202.

891 Moreira, ¶ 63.

892 RPA FBD Glencore v Bolivia Expert Report, ¶¶ 18, 48.

893 Moreira, ¶ 70 et seq.

894 SRK, 4, 63.

895 SRK, ¶¶ 15, 64.

896 RPA FBD Glencore v Bolivia Expert Report, ¶ 48.

897 Moreira, ¶¶ 71-73.

Rigby, Claimant's experts have not carried out analytical testwork or pilot plant studies that support their assumptions.[898]

652. Eight, Claimant's experts have failed to deduct Colquiri's production between January and May 2012 from their damages DCF valuation (made as of 29 May 2012), thus assuming that, *magically*, Colquiri would have achieved such production both before and after the reversion of the Mine Lease. As explained by Econ One, "*Compass Lexecon, relying on the production forecast from Colquiri's Plan Trienal 2012-2014 (the "Triennial Plan"), includes the full amount of 360,113 MT of ore hoped to be produced in 2012 [in its valuation]. […] I have apportioned the 2012 cash flow to take into account only the period starting 19 June 2012.*"[899] In fact, "*Correcting Compass Lexecon's model only to include the six and a half months of operation from late May 2012 through the end of the year decreases its valuation by US$ 9.2 million.*"[900]

653. Nine, Claimant's experts assume that the Old Tailings Reprocessing Project (which they value at more than US$ 100 million) would have been implemented shortly after the reversion of the Mine Lease (*i.e.*, mid-2012). This is speculative. Indeed, this Project has been evaluated several times over the last four decades (*e.g.*, by Minproc in 1988 and PAH in 2004[901]) and, still, no one has invested on it. Sinchi Wayra itself had more than 7 ½ years to implement this Project (from March 2005, when Claimant alleges having acquired control of Colquiri, until June 2012, when the Mine Lease was reverted) and did not do so. It is undisputed, therefore, that there is no going concern involving the old tailings. It is thus extremely speculative to assume that this Project would have been implemented shortly after the reversion of the Mine Lease (Compass Lexecon's model assumes investments on this Project as of 2013)[902] and, even more so, to attribute more than US$ 100 million in value to this Project on the basis of a DCF model (which cannot be used to value non-going concerns). If Claimant has not invested in this Project is because its economic viability is uncertain.[903] As explained by Eng Moreira, "*el reprocesamiento de las colas requiere inyectar una cantidad importante de capital para permitir el tratamiento de las colas y su viabilidad no es segura […].*"[904]

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898 SRK, 66.

899 Econ One, footnote 18.

900 Econ One, ¶ 19.

901 RPA FBD Glencore v Bolivia Expert Report, ¶ 128.

902 Compass Lexecon Colquiri Valuation, **CLEX-4**, Tab "CAPEX".

903 SRK, Section 8.2, ¶ 85.

904 Moreira, ¶ 83 (Unofficial translation: "*reprocessing the tailings requires to inject a significant amount of capital to permit the treatment of tailings and its viability is not certain*").

654. For all these reasons, Compass Lexecon's valuation of Colquiri is based on mere speculation and should be rejected.

7.1.2.2 Compass Lexecon's Valuation Of The Tin Smelter Is Premised On Mere Speculation

655. Claimant claims an astounding US$ 65.9 million in damages for the Tin Smelter as of 8 February 2007.[905] This claim is premised on mere speculation for, at least, five reasons.

656. *First*, Claimant's experts assume that the Tin Smelter would *magically* produce 14,000 annual tons of tin ingots starting on 2008 and for the next 18 years (*i.e.*, until 2026, when Claimant's experts estimate the production life of the Tin Smelter will end).[906] These projections disregard the state of the Tin Smelter's furnaces and machinery as February 2007, and unreasonably assume those same furnaces (which dated from the 70s and were obsolete[907]) would operate for the next 18 years (which is technically unfeasible).

657. The state of disrepair of the Tin Smelter's machinery as of 8 February 2007 was described in Decree No. 29658 as follows:

> *[S]e ha evidenciado la deplorable situación del horno eléctrico, hornos reverberos No. 3 y 4 y demás equipos y maquinarias, que no fueron objeto de un mantenimiento adecuado y renovación permanente por parte de la empresa privada, por lo que es de suma importancia que la Empresa Metalúrgica Vinto efectúe la modernización y mejora de la planta de fundición de estaño, lo que representa una inversión económica*
>
> *[…]*
>
> *[L]a tecnología actual […] data desde hace treinta y cinco (35) años atrás y los hornos, equipos y maquinarias, presentan un desgaste natural. Por cuanto es necesario e indispensable la actualización de su tecnología que implique la modernización de la Empresa Metalúrgica Vinto.*[908]

658. Yet neither RPA nor Compass Lexecon include in their models the costs of new furnaces.

659. Moreover, Claimant's experts ignore that the Tin Smelter has not reached a production level of 14,000 annual tons of ingots even after investing US$ 39 million to acquire and install the

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905 Statement of Claim, ¶ 295.

906 Compass Lexecon Vinto Valuation, **CLEX-2**, Tab "Production".

907 Villavicencio, ¶¶ 45-46.

908 Supreme Decree No. 29.658 of 30 July 2008, **R-256** (emphasis added) (Unofficial translation: "*[T]he deplorable situation of the electric furnace, the reverberatory furnaces No. 3 and 4 and other equipment and machinery has become obvious. They were not correctly maintained or regularly updated by the private company, therefore, it is of the utmost importance for Empresa Metalúrgica Vinto to modernize and improve the Tin Smelter plant, which represents an economic investment. [T]he current technology […] dates from thirty-five (35) years ago and the furnaces, equipment and machinery have naturally deteriorated. This is why, it is necessary and crucial to update its technology and thus to modernize Empresa Metalúrgica Vinto*").

Ausmelt Furnace from 2009 to 2015.[909] As explained by Eng Villavicencio (EMV's current General Manager and Director of its Engineering and Projects Department as of 2006):

> *la producción desde el año 1998 (periodo de rehabilitación), tiene un promedio de 10.500 TMF anuales y, durante la privatización, un promedio de 11.500 TMF. En la etapa después de la reversión y antes del Horno Ausmelt mantuvimos un promedio de 11.500 TMF de estaño producido. En la actualidad, con la inversión en el Ausmelt, tenemos una capacidad de producción instalada de 18.000 TMF y hemos llegado a alrededor de las 13.000 TMF (no obstante, Compass Lexecon proyecta hasta 13.974 TMF anuales de producción cuando, si no se hubiera realizado la inversión en el Ausmelt, en ningún momento hubiésemos excedido la producción de 12.000 TMF anuales).*[910]

660. *Second*, Claimant's experts assume that the Tin Smelter would process 30,000 annual tons of concentrates to produce 14,000 annual tons of ingots as of 2008, but overlook that there are not sufficient concentrates in Bolivia to justify such tremendous production (much less during an 18-year period). As explained by Mr Villavicencio:

> *[Compass Lexecon ignores] que, desde 1998, no se registran volúmenes de tratamiento de concentrados cercanos o superiores a las 30.000 TMS (inclusive hoy teniendo el Horno Ausmelt) ya que las minas en Bolivia no producen suficientes concentrados (los proyectos de Huanuni y Colquiri recién van a funcionar en 2019)*[911]

661. However, Claimant's experts assume that mines in Bolivia will *magically* start producing more concentrates so as to sustain the tremendous production they have estimated for the Tin Smelter.

662. *Third*, Claimant's experts assume that unduly high concentrates grades (48.75% Sn) – the main input for the production of tin ingots – would remain constant over an 18-year period.[912] This, again, is unrealistic and speculative. *On the one hand*, the Tin Smelter's historical operational performance shows that, from 1987 to date, concentrates grades have been in

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909 Villavicencio, ¶¶ 65-66.

910 Villavicencio, ¶ 66 (emphasis added) (Unofficial translation: "*since 1998 (the rehabilitation period), production has been at an average of 10,500 fine metric tons annual and during the privatization at an average of 11,500 fine metric tons. After the reversion and before the Ausmelt Furnace we maintained an average production of 11, 500 fine metric tons of tin. Since the Ausmelt investment, our current installed capacity of production amounts to 18,000 fine metric tons and we have attained around 13,000 fine metric tons (however, Compass Lexecon estimates an annual production of 13,974 fine metric tons, if the Ausmelt investment had not been made, the annual production would have never exceeded 12,000 fine metric tons)*").

911 Villavicencio, ¶ 64 (emphasis added) (Unofficial translation: "*[Compass Lexecon ignores] that since 1998 there are no records showing concentrate being treated in volumes near or exceeding 30,000 fine metric tons (not even today with the Ausmelt Furnace) given that Bolivian mines do not produce enough concentrate (the Huanuni and Colquiri projects will just begin to operate in 2019)*").

912 RPA FBD Glencore v Bolivia Expert Report, ¶ 194; Compass Lexecon Vinto Valuation, **CLEX-2**, Tab "Production".

steady decline (*e.g.*, 50.25% in 1990, 48.74% around 2009, 46.77% in 2015 and so forth).[913] *On the other hand*, given that, as explained by Eng Moreira,[914] a mine's mineral grades are expected to decrease in time as the mine grows older (and, in this case, also as mining moves deeper into the Mine), the grades of the concentrates acquired by the Tin Smelter (from the Huanuni mine, the Mine and *cooperativistas*) are also expected to decrease.[915]

663. *Fourth*, Claimant's experts likewise assume that metallurgical recovery rates at the Tin Smelter will remain constant and unduly high (at 95.6% Sn).[916] This is, again, speculative. Given that concentrates grades are expected to be lower, so are metallurgical recoveries. As explained by Eng Villavicencio, Claimant's experts' assumptions are "*contrari[as] a una regla de oro de la metalurgia: a mayor ley, mayor recuperación y viceversa […].*"[917]

664. *Fifth*, Claimant's experts have failed to deduct the Tin Smelter's production between 1 January and 8 February 2012, thus assuming that the Tin Smelter would have achieved such production both before and after the reversion.[918] Claimant's experts' error has an impact of US$ 0.6 million.

7.1.2.3 Claimant's Valuation Ignores That The Antimony Smelter Was A Liability, Not An Asset

665. Based on the valuation performed by Ms Russo, Claimant claims an astounding US$ 1.9 million in damages for the Antimony Smelter, an asset it recognizes has been inoperative since the 1990s and which was only "*occasionally used as a storage facility for the Colquiri Mine […].*"[919]

666. The valuation of Ms Russo is far removed from reality and speculative (at best) because it ignores the reality of the Antimony Smelter (an obsolete asset) as well as its environmental liability (significant closure and remediation costs would be needed to restore the site before the land can be given a residential use, as suggested by Ms Russo).

667. *First*, as of 1 May 2010, when the Antimony Smelter reverted to the State, its infrastructure was obsolete. As explained by Eng Villavicencio, "*la Fundidora de Antimonio estaba en*

913 Villavicencio, ¶ 70.

914 Moreira, ¶¶ 70-75.

915 Villavicencio, ¶¶ 68-70.

916 RPA FBD Glencore v Bolivia Expert Report, ¶ 196.

917 Villavicencio, ¶ 72 (Unofficial translation: "*contrary to a golden rule in metallurgy: the higher the grade, the higher recovery, and vice versa*").

918 Econ One, ¶ 20.

919 Statement of Claim, ¶ 59.

condiciones muy precarias a la fecha de la reversión en 2010, por lo que, al contrario de lo que indica la Arq. Russo, no valía nada. Las edificaciones estaban en avanzado estado de deterioro […]."[920]

668. *Second*, the Antimony Smelter is a non-operative asset with a significant environmental burden. This burden results from (i) past operations of the Antimony Smelter,[921] and (ii) the ongoing operations of the Tin Smelter (active since 1971 and located within meters of the Antimony Smelter), which produce harmful gasses. As explained by Eng Villavicencio, "*la Fundidora de Antimonio está en el área de influencia directa del complejo metalúrgico de Vinto, por lo que recibe constantemente la pluma de arsénico y azufre generada por los procesos de tostación de la Fundidora de Vinto (que seguirá en operaciones, por más que la Fundidora de Antimonio cierre y llegue a transformarse en un área urbanizable) […].*"[922]

669. *Third*, as a result of the above, the environmental burden existing at the Antimony Smelter will need to be remediated by any potential buyer at a significant cost before any residential use can even be envisaged.[923]

670. *Fourth*, the 40-plus-year-old infrastructure and buildings existent at the Antimony Smelter will need to be dismantled, which will also represent a significant cost that would outweigh any revenue from scrap material.[924]

671. Bolivia has retained Architect Diego Mirones to perform a proper valuation of the Antimony Smelter. Mr Mirones holds a Degree in Architecture from the *Facultad de Arquitectura, Universidad de San Andrés*, in Bolivia, and has over 30 years of experience as a real estate appraiser. Mr Mirones has vast experience performing independent valuations of real estate, having worked for the private sector and for well-known Bolivian banks throughout his career.[925]

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920 Villavicencio, ¶ 111 (Unofficial translation: "*at the time of the Antimony Smelter's reversion, the latter was very poor condition, therefore, contrary to what Arc. Russo states, it was worth nothing. The buildings were in an advanced state of deterioration […]*").

921 Villavicencio, ¶ 92.

922 Villavicencio, ¶ 109 (emphasis in original) (Unofficial translation: "*the Antimony Smelter is located in the area which is directly influenced by the metallurgic plant of Vinto. As a result, it constantly receives an arsenic and sulfur plume generated by the roasting processes of the Vinto Smelter (which will continue to operate, even if the Antimony Smelter closes and becomes a developable area)*").

923 Mirones, ¶ 117.

924 Mirones, ¶ 112; Econ One, ¶ 128.

925 Mirones, ¶¶ 1-3.

672. Mr Mirones has performed a valuation of the Antimony Smelter. He visited the land and inspected the Antimony Smelter's infrastructure.[926] After considering, among others, the state of the Antimony Smelter's infrastructure, its environmental burden and the closure, remediation and dismantling costs that would need to be incurred by any potential buyer of the Antimony Smelter (all ignored by Ms Russo), Mr Mirones has concluded that the Antimony Smelter has no positive value.[927]

673. Indeed, as explained in section 7.3.6 below, the abovementioned costs are higher than the limited value of the obsolete Antimony Smelter (estimated by Mr Mirones at US$ 664,393.59),[928] thus making this asset a liability. Consequently, the damages claimed by Claimant for the Antimony Smelter are speculative (at best) and should be denied.

674. For the above reasons, the Tribunal should conclude that the damages claimed by Claimant in this arbitration are speculative and, as a result, cannot be compensated under international law.

7.2 Even If The Damages Claimed For The Mine Lease Reversion Were Certain (*Quod Non*), They Were Not Caused By Bolivia But Rather By Claimant's Own Acts

675. Causation is one of the cornerstones of liability under international law. A State can only be held liable for damages it has caused.

676. Pursuant to Article 31 of the Articles on State Responsibility, the responsible State is "*under an obligation to make full reparation for the injury caused by the internationally wrongful act. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.*"[929]

677. In addition, the commentary to Article 31 specifies that only the injury caused by the internationally wrongful act of a State can be the object of full reparation:

> *It is only '[i]njury […] caused by the internationally wrongful act of a State' for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and*

926 Mirones, Section 3.

927 Mirones, ¶ 117.

928 Mirones, ¶ 105.

929 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**, Article 31, p. 91 (emphasis added).

> *ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act*.[930]

678. Accordingly, a causal relationship must be established between the internationally wrongful act and the harm allegedly suffered. As the tribunal in the *BG Group* case held, "*[t]he damage, nonetheless, must be the consequence or proximate cause of the wrongful act.*" [931] The same view was espoused by the *S.D. Myers* tribunal "*the economic losses claimed by [the claimant] must be proved to be those that have arisen from a breach of the [treaty], and not from other causes.*"[932] Thus, when the claimant fails to establish the causal link, compensation must be denied.

679. The analysis of causation also involves identifying the dominant cause of the damages sought. When such dominant cause is attributable to the conduct of the party seeking damages, the causal link is severed and no compensation is therefore due. As the ICJ put it in the *ELSI* case:

> *Furthermore, one feature of ELSI's position stands out: the uncertain and speculative character of the causal connection, on which the Applicant's case relies, between the requisition and the results attributed to it by the Applicant. There were several causes acting together that led to the disaster to ELSI. No doubt the effects of the requisition might have been one of the factors involved. But the underlying cause was ELSI's headlong course towards insolvency; which state of affairs it seems to have attained even prior to the requisition*.[933]

680. Commenting on the *ELSI* decision, the *Biwater* tribunal stated that:

> *In that case, the ICJ held that the primary cause of the claimant's difficulties lay in its own mismanagement over a period of years, and not the act of requisition imposed by the governmental authorities.*[934]

681. It is thus a settled principle of international law that the claimant bears the burden of proving the existence of a sufficient – and dominant – causal link between the State's allegedly

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930 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**, Article 31, p. 92, comment 9 (emphasis added).

931 *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award of 24 April 2007, **RLA-100**, ¶ 428.

932 *S.D. Myers, Inc. v. Government of Canada*, NAFTA-UNCITRAL, Partial Award of 13 November 2000, **RLA-101**, ¶ 316. See also S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008 (extract), **RLA-89**, p. 114, quoting C. Egleton, *Measure of Damages in International Law*, Yale Law Journal, 1929-1930.

933 *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment of 20 July 1989, **RLA-72**, ¶ 101 (emphasis added).

934 *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (ICSID Case No ARB/05/22) Award of 24 July 2008, **CLA-78**, ¶ 786 (emphasis added).

unlawful conduct and the harm suffered.[935] More recently, in the *Blusun* case, the tribunal denied compensation precisely because the claimant had failed to discharge its burden of proving such causation:

> *The Claimants ha[d] not discharged the onus of proof of establishing that the Italian state's measures were the operative cause of the Puglia Project's failure.*[936]

682. In the present case, Claimant has failed to prove that the damages claimed in connection with the reversion of the Mine Lease were dominantly caused by Bolivia's alleged unlawful acts. Quite the opposite, as explained in section 2.6.3 above, Claimant's mismanagement and aggravation of the social conflicts at the Mine forced the State to intervene and revert the Mine Lease in June 2012.

683. *First*, Claimant inherited the social tensions created by Comsur's poor management of the relations between the Mine's workers and the *cooperativistas* operating at the Mine. These tensions were boosted by the political transformations in Bolivia following Sánchez de Lozada's resignation in 2003, in which the *cooperativas*, as new and fundamental social actors, played a crucial role.[937]

684. After acquiring control over the Mine, Claimant never sought to properly redress this situation. Instead, as explained by Mr Cachi (a former *cooperativista*), "*[c]on Sinchi Wayra [i.e., Glencore International's subsidiary], la seguridad de la Mina decreció aún más y la aprobación del trabajo de los cooperativistas por parte de la empresa fue mayor. Esto causó que el descontento de los trabajadores se tornara, en algunos casos, violento, sobre todo al interior de la Mina, cuando los trabajadores y los cooperativistas se encontraban en la misma área. Los enfrentamientos entre trabajadores y cooperativistas se hicieron más y más frecuentes*."[938] The record shows that, under Sinchi Wayra's control, the *cooperativistas* (and,

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935 *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (ICSID Case No ARB/05/22) Award of 24 July 2008, **CLA-78**, ¶ 787 ("*The Arbitral Tribunal considers that in order to succeed in its claim for compensation, BGT has to prove that the value of its investment was diminished or eliminated, and that the actions BGT complains of were the actual and proximate cause of such diminution in, or elimination of, value*"); S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008 (extract), **RLA-89**, p. 162 ("*In the damages context, it is always the claimant who alleges that it has suffered a loss as a result of the respondent's conduct; therefore, the claimant bears the burden of proof in relation to the fact and the amount of loss, as well as to the causal link between the respondent's conduct and the loss*").

936 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award of 27 December 2016, **RLA-102**, ¶ 394 (emphasis added).

937 See section 2.5.2 above.

938 Cachi, ¶ 24 (Unofficial translation: "*[u]nder Sinchi Wayra, security in the Mine diminished even more and the approval of the cooperativistas' work by the company was more significant. This led, in some cases, to the workers' discontent becoming violent, in particular within the Mine, when workers and cooperativistas met in the same area. Confrontations between workers and cooperativistas became more and more frequent*").

in particular, the *Cooperativa 26 de Febrero*) gradually came to control larger and deeper areas of the Mine,[939] to the point that, "*[p]ara finales de 2011, los cooperativistas teníamos prácticamente el control de la Mina*."[940]

685. *Second*, Sinchi Wayra requested the intervention of the State at the eleventh hour, making it impossible for COMIBOL to resolve a social conflict which had been brewing for over a year (as a result of yielding to the *cooperativas*' interests in occupying the Mine). In fact, it was Colquiri's own admission that "*[d]ichas perturbaciones al desenvolvimiento de la operación minera señalada, han sido atendidas en gran medida y hasta el momento por nuestra empresa*"[941] – that is to say, intentionally without involving the State's institutions before April 2012. As explained above, it was impossible for COMIBOL to resolve a structural problem this deep in a matter of days.

686. *Third*, Sinchi Wayra's own employees deeply distrusted the company's ability to solve the tensions it had caused and encouraged with the *cooperativistas* over the years. Such distrust explains their decision to support the reversion of the Mine Lease. In Mr Mamani's words, the workers advised the directors of Sinchi Wayra "*nuestras preocupaciones (sobre todo, por la forma como la empresa había venido cediendo y entregando áreas de la Mina desde hacía mucho tiempo a los cooperativistas) y que en esos momentos críticos no solamente se estaba jugando la estabilidad laboral de nuestros trabajadores, sino el futuro mismo de la Mina. Para nosotros, ya era claro que Sinchi Wayra había perdido el control de la Mina y la confianza de sus propios trabajadores*."[942]

687. *Fourth*, being fully aware of the Government's efforts to resolve the conflict provoked by the occupation of the Mine by the *cooperativistas* on 30 May 2012, Sinchi Wayra promoted

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939 See, for instance, Public Deed No. 0215/2009, amendment to the lease agreement between COMIBOL and the *Cooperativa 26 de Febrero* of 21 October 2009, **R-210**; Colquiri internal report concerning ore bought and/or transported for the *Cooperativa 26 de Febrero* of 15 December 2007, **R-198**; Colquiri internal report concerning ore bought and/or transported for the *Cooperativa 26 de Febrero* of 21 April 2008, **R-199**; Colquiri internal report concerning ore bought and/or transported for the *Cooperativa 26 de Febrero* of 17 April 2007, **R-200**; Proof of payment for the transport of ore for the *Cooperativa 26 de Febrero* of 21 October 2007, **R-201**; Proof of payment for the transport of ore for the *Cooperativa 26 de Febrero* of 20 November 2007, **R-202**; Proof of payment for the transport of ore for the *Cooperativa 26 de Febrero* of 7 January 2008, **R-203**; Colquiri internal report concerning ore transported for the *Cooperativa 26 de Febrero* of 25 May 2008, **R-204**; Colquiri internal report concerning ore transported for the *Cooperativa 26 de Febrero* of 29 June 2008, **R-205**.

940 Cachi, ¶ 31 (Unofficial translation: "*[b]y the end of 2011, we the cooperativistas practically controlled the Mine*").

941 Letter from Colquiri SA (Mr Capriles Tejada) to Comibol (Mr Córdova Eguivar) of 3 April 2012, **C-30**, p. 1. (Unofficial translation: "*[t]hose disturbances to the performance of this mining operation have been so far, to a large extent, taken care of by our company*").

942 Mamani, ¶ 37 (Unofficial translation: "*our concerns (in particular, regarding the manner in which the company had been assigning and relinquishing areas of the Mine gradually and for a long time) and that during those critical moments, the employment stability of our workers as well as the future of the Mine itself were at stake. In our opinion, there was no doubt that Sinchi Wayra had lost control over the Mine and the trust of its own workers*").

inconsistent agreements with national leaders of the *cooperativas* and a fraction of the *Cooperativa 26 de Febrero* opposing a potential reversion of the Mine Lease. Concretely, on 7 June 2012, at the same time the *Gran Cabildo* approved the reversion of the Mine Lease at Colquiri,[943] Sinchi Wayra executed the Rosario Agreement.[944]

688. Sinchi Wayra's actions escalated the conflict to unprecedented levels of violence, and left the State with no other option but to terminate the Mine Lease. As explained by Minister Romero, the Rosario Agreement was an almost unsurmountable obstacle to the resolution of the social conflict at Colquiri (caused by Sinchi Wayra itself), and even sparked waves of violence in Colquiri in September 2012, after the State had issued the Mine Lease Reversion Decree. This made a new intervention by the State necessary.[945]

689. Consequently, even assuming the damages claimed by Claimant for Colquiri were certain (which Bolivia denies), Claimant would be the sole responsible for such damages. Accordingly, Claimant's claim for compensation must be dismissed.

7.3 Even If The Damages Claimed Were Certain (*Quod Non*), Claimant's Valuations Are Flawed And Grossly Inflated

690. The Treaty establishes the applicable principles of compensation (**Section 7.3.1**). Claimant's proposed valuation dates for Colquiri and the Antimony Smelter are inconsistent with Art. V of the Treaty (**Section 7.3.2**). In addition, given that Compass Lexecon's valuations ignore key premises for the valuation of mining assets (**Section 7.3.3**), its FMV estimates of Colquiri (**Section 7.3.4**) and the Tin Smelter (**Section 7.3.5**) are flawed. Compass Lexecon's valuation of the Antimony Smelter is also flawed as it is based on the valuation prepared by Ms Russo,

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943 Operative vote of the *Gran Cabildo de Colquiri* of 7 June 2012, **R-17**.

944 Agreement between Colquiri SA, Fedecomin, Fencomin, Central Local de Cooperativas Mineras de Colquiri, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, and Cooperativa 26 de Febrero, **C-35**.

945 Romero, ¶¶ 19-21 ("*Poco tiempo después de suscribir el Acta de Acuerdo en junio de 2012, y de la promulgación del Decreto Supremo de Reversión, se dieron nuevos enfrentamientos entre cooperativistas y trabajadores de la Empresa Minera Colquiri (ahora controlada por COMIBOL). Según estos reportes, y a pesar de lo negociado en junio de 2012, los trabajadores seguían disconformes en que la veta Rosario -la más atractiva de la Mina- estuviese casi en su totalidad en manos de los cooperativistas. Los cooperativistas, por su parte, continuaban expresando que tenían derecho a la referida veta, por el acuerdo obtenido con Sinchi Wayra y que además existía un acuerdo firmado con los trabajadores con visto bueno del Estado […]. Las tensiones volvieron a degenerar rápidamente en actos violentos en septiembre de 2012, lo que hizo necesaria nuevamente la intervención del Ministerio a mi cargo*") (Unofficial translation: "*Shortly after we concluded the minutes of agreement in June 2012 and that the Reversion Supreme Decree was enacted, new confrontations between cooperativistas and employees of Empresa Minera Colquiri (now controlled by COMIBOL) took place. Following these reports, and despite the June 2012 negotiations, workers were still not satisfied with the fact that almost the totality of the Rosario vein, the most attractive in the Mine, was under the cooperativistas' control. As for the cooperativistas, they continued to contend that they were entitled to that vein pursuant to the agreement signed with Sinchi Wayra and that furthermore, there was an agreement signed with the workers that had the State's green light […]. Tensions rapidly degenerated again in violent acts in September 2012, and this required again the intervention of the Ministry under my responsibility*").

which incurs in several methodological errors (**Section 7.3.6**). Compass Lexecon's valuation of the Tin Stock (**Section 7.3.7**).

7.3.1 The Plain Terms Of The Treaty Establish The Applicable Principles Of Compensation

691. Claimant maintains that the Treaty does not specify "*the relevant standard of the compensation owed to Glencore Bermuda*", and so that compensation "*must be assessed by the Tribunal with reference to applicable principles of customary international law.*"[946] Claimant is wrong. The Treaty explicitly establishes that the compensation to be paid is equivalent to the FMV of the investment immediately prior to the date when the expropriation occurred or became public knowledge.

692. As Claimant admits,[947] the Treaty provides the measure of compensation for a lawful expropriation (and is equally applicable to unlawful expropriations). That measure of compensation is the market value of the expropriated asset on the valuation date. The Treaty sets the valuation date as the date immediately before (i) the expropriation occurred or (ii) became public knowledge, whichever is earlier. Article V of the Treaty provides:

> *Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "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. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party, until the date of payment, shall be made without delay, be effectively realizable and be freely transferable.*[948]

693. Under international law, the market value of an asset is assessed by reference to the concept of fair market value or FMV. The FMV of an asset is determined based on an objective standard, understood as the price a hypothetical willing and able buyer would pay to a willing seller for the asset at a given time.

694. Arbitral tribunals consistently look at "*the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his*

946 Statement of Claim, ¶ 230.

947 Statement of Claim, ¶ 229.

948 Treaty, **C-1**, Article V (emphasis added).

financial gain, and neither was under duress or threat."[949] As the *SPP v. Egypt* tribunal recognized, "*the purchase and sale of an asset between a willing buyer and a willing seller should, in principle, be the best indication of the value of the asset*."[950]

695. In the context of going concerns, the tribunal will look to the investment's "*earning capacity during the remainder of its life […] for assessing its 'market value.*"[951] In other words, the Tribunal should consider the revenue stream that a willing buyer would have factored to value the Assets.

696. In doing so, the Tribunal should consider all risks affecting the future revenue stream that a willing buyer would have factored into its valuation. Indeed, "*[w]here tribunals have measured compensation by reference to the fair market value of an investment, i.e. the amount a hypothetical willing buyer would pay for the investment, they have tended to take account for the impact of business risks on fair market value*."[952]

697. Thus, the very essence of FMV (on which Claimant purportedly based its claims) is the objective approach of a hypothetical transaction between a willing buyer and a willing seller, not Claimant's subjective valuation. As noted by commentators, "*the reference to a 'hypothetical buyer' makes it clear that the value of the property is not to be determined from*

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949 *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Award of 6 February 2007, **CLA-67**, ¶ 325, citing *Starrett Housing Corporation and others v Government of the Islamic Republic of Iran*, Final Award (1987-Volume 16) Iran-US Claims Tribunal Report, **CLA-11**, ¶ 277. See also, *Enron Corporation and Ponderosa Assets LP v Argentine Republic* (ICSID Case No ARB/01/3) Award of 22 May 2007, **CLA-68**, ¶ 361; *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (ICSID Case No ARB/96/1) Final Award of 17 February 2000, **CLA-25**, ¶ 73 ("*there is no dispute between the parties as to the applicability of the principle of full compensation for the fair market value of the Property, i.e., what a willing buyer would pay to a willing seller*."); *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No ARB/84/3) Award on the Merits of 20 May 1992, **CLA-18**, ¶ 197 ("*[i]n the Tribunal's view, the purchase and sale of an asset between a willing buyer and a willing seller should, in principle, be the best indication of the value of the asset*"); *Sempra Energy International v Argentine Republic* (ICSID Case No ARB/02/16) Award of 28 September 2007, **CLA-71**, ¶ 405; *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12) Award of 14 July 2006, **CLA-63**, ¶ 424; *CME Czech Republic BV v Czech Republic* (UNCITRAL) Final Award of 14 March 2003, **CLA-42**, ¶ 140 ("*[o]ne of the best possible indicators of an enterprise's fair market value is what an actual buyer thinks it is worth.*").

950 *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No ARB/84/3) Award on the Merits of 20 May 1992, **CLA-18**, ¶ 197.

951 *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt* (ICSID Case No ARB/99/6) Award of 12 April 2002, **CLA-34**, ¶ 127; G. Arangio-Ruiz, *Second Report on State Responsibility*, Yearbook of the International Law Commission, 1 (1989), **RLA-103** II(1), ¶ 23 ("*[c]ompensation by equivalent is thus intended to substitute, for the injured State, for the property, the use, the enjoyment, the fruits and the profits of any object, material or non-material, of which the injured party was totally or partly deprived as a consequence of the internationally wrongful act.*").

952 S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008 (extract), **RLA-89**, p. 334. See also, *id*., p. 336 ("*[w]hen determining the fair market value of the investment lost, tribunals have often approximated the impact a particular risk would play on the amount a hypothetical willing buyer would be prepared to pay for the investment*.").

a subjective perspective, be it that of the former owner or that of the expropriating State, but from the perspective of a third person who is not directly involved in the transaction."[953]

698. The hypothetical willing buyers and sellers used to determine the objective fair market value of an asset are assumed to be knowledgeable and prudent. As the *Vestey Group* tribunal explained, the determination of FMV "*is primarily an economic exercise, which involves identifying the price at which the asset would change hands between a willing buyer and a willing seller in an arm's length transaction where the parties each act knowledgeably, prudently, and without coercion*."[954]

699. Consistent with the above, the Iran-U.S. Claims Tribunal stressed the need to ensure that all of the inputs in the valuation of an income–producing asset are accurate, reliable, and realistic in deciding the price a reasonable buyer would pay for the asset.[955] For example, the *Starrett Housing* decision specified that the methods employed and approach to each stage of the fair market valuation should be "*logical and appropriate*,"[956] as well as based on assumptions and premises that are "*reasonable*,"[957] "*reasonably and fairly determined*,"[958] "*reliable*,"[959] and "*realistic*."[960]

700. As explained in sections 7.3.4.1 and 7.3.5.1 below, Compass Lexecon's valuations are not premised on a reasonable, well-informed, knowledgeable and prudent willing buyer. Rather, they assume, for example, a negligent buyer who accepts at face value the Triennial Plan (which does not even amount to a business plan, was never approved or implemented, and is based on flawed assumptions) and premises its entire valuation of the Assets on it. This is contrary to the Treaty and warrants the full dismissal of Compass Lexecon's valuations.

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953 I. Marboe, *Compensation and Damages in International Law: the Limits of "Fair Market Value"*, TDM, Vol. 4, Issue 6, November 2007, **RLA-104**, p. 735.

954 *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award of 15 April 2016, **RLA-5** ¶ 402 (emphasis added).

955 *Phillips Petroleum Company Iran v Islamic Republic of Iran and the National Iranian Oil Company*, Award (1989-Volume 21) Iran-US Claims Tribunal Report, **CLA-12**, ¶¶ 111-116, 154-58.

956 *Starrett Housing Corporation and others v Government of the Islamic Republic of Iran*, Final Award (1987-Volume 16) Iran-US Claims Tribunal Report, **CLA-11**, ¶ 280.

957 *Starrett Housing Corporation and others v Government of the Islamic Republic of Iran*, Final Award (1987-Volume 16) Iran-US Claims Tribunal Report, **CLA-11**, ¶¶ 278, 285, 287, 308, 319, 334.

958 *Starrett Housing Corporation and others v Government of the Islamic Republic of Iran*, Final Award (1987-Volume 16) Iran-US Claims Tribunal Report, **CLA-11**, ¶ 287.

959 *Starrett Housing Corporation and others v Government of the Islamic Republic of Iran*, Final Award (1987-Volume 16) Iran-US Claims Tribunal Report, **CLA-11**, ¶ 326.

960 *Starrett Housing Corporation and others v Government of the Islamic Republic of Iran*, Final Award (1987-Volume 16) Iran-US Claims Tribunal Report, **CLA-11**, ¶¶ 311, 326.

7.3.2 Claimant Adopts Incorrect Valuation Dates For The Mine Lease And The Antimony Smelter

701. Article V of the Treaty provides that, in case of expropriation, compensation must be based on the "*market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier […].*"[961] Accordingly, the Tribunal should value Colquiri as of 19 June 2012 (the day before the Mine Lease Reversion Decree) (**Section 7.3.2.1**), and should value the Antimony Smelter as of 30 April 2010 (the day before it reverted to the State) (**Section 7.3.2.2**).

7.3.2.1 The Fair Market Value Of The Mine Lease Must Be Assessed As Of 19 June 2012

702. Claimant argues that the "*appropriate date for determining the FMV*" of the Mine Lease is 29 May 2012, that is, "*the day prior to the moment in which Glencore Bermuda finally and irrevocably lost control of its investment […].*"[962] It denies that the FMV should be assessed on the day prior to the Mine Lease Reversion Decree, 19 June 2012.

703. Claimant's attempt to use the earlier 29 May 2012 valuation date is not innocent. Claimant instructs its experts to use such date so as to include in their damages assessment potential revenues from the Rosario vein (which, RPA acknowledges, is a "*principal*" vein of the Mine)[963] and thereby avoid the consequences of the 7 June 2012 Rosario Agreement, in which Claimant willingly assigned the Rosario vein to the *Cooperativa 26 de Febrero*. When the proper valuation date for Colquiri is applied (19 June 2012), any potential revenues from the Rosario vein are excluded. Indeed, no willing buyer would have agreed to pay value for a vein surrendered to the *cooperativas*.

704. Despite this attempt to escape from the consequences of its own actions, Claimant admits that the date for valuation of an expropriation is no earlier than the date at which the investor "*finally and irrevocably lost control*" of its investment.[964] Thus, it is Claimant's burden to prove that it finally and irrevocably lost control of the Mine as of 30 May 2012. Claimant is entirely unable to meet this burden.

705. *First*, Claimant retained control of the Mine until 20 June 2012 when the Mine Lease was reverted. Bolivia understands that production of minerals from the Mine continued until 20

961 Treaty, **C-1**, Article V (emphasis added).

962 Statement of Claim, ¶ 255(iii).

963 RPA FBD Glencore v Bolivia Expert Report, ¶ 82.

964 Statement of Claim, ¶ 255(iii).

June 2012,[965] revealing that Claimant had not "*finally and irrevocably lost control of its investment […].*" Moreover, as Claimant itself alleges, it entered into the Rosario Agreement on 7 June 2012 with *cooperativistas* in which it agreed to turn over the Rosario vein of the Mine.[966] Although this action had the disastrous effects (of which Claimant now complains), [967] it conclusively demonstrates that Claimant remained in control of the Mine. In Claimant's words, the Rosario Agreement resulted in a "*truce*" that resulted in "*the cooperatives [lifting] their blockade*"[968] after 7 June 2009. One cannot offer something irrevocably lost.

706. *Second*, Glencore International's own statements also confirm it had not "*finally and irrevocably lost control of its investment*" as of 30 May 2012. In particular, Mr Eskdale (one of Claimant's witnesses), referring to the status of the negotiations as of 8 June 2012 (*i.e.*, 9 days after allegedly losing control), states "*[w]e were relieved that the conflict was over. We had done our best to engage with the various stakeholders in order to reach a compromise* ***that would have allowed us to resume production****, protect the safety of our workers,* ***and still be able to market the minerals extracted from the mine****. For the first time in days we breathed and slept […].*"[969] So, as of 30 May 2012, nothing was final or irrevocable.

707. The 2012 Annual Report for Glencore International admits that "*[t]he Colquiri mine was nationalised on 22 June 2012 and is no longer reported in Sinchi Wayra's reserves and resources.*"[970] Had Claimant really "*finally and irrevocably lost control of its investment*" in May 2012, the Glencore group would have been required – pursuant to its reporting obligations as a listed company – to inform the public. However, it was not until 22 June 2012 that, for the very first time, Glencore International reported that it had been deprived of its investment in Colquiri:

> *Glencore International plc ("Glencore") today received a signed Supreme Decree from the Government of Bolivia, nationalising the Colquiri mine in the Bolivian province of La Paz, with immediate effect. […].*[971]

708. *Third*, the occupation of the Mine on 30 May 2012 by the *cooperativistas* could not have been an expropriation by Bolivia. It is undisputed that the actions of the *cooperativas* are not

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965 Statement of Claim, ¶ 220; Eskdale, ¶ 94.

966 Statement of Claim, ¶ 184(j).

967 *Mineros de Colquiri bloquean conani exigiendo la emisión del D.S. de Nacionalización*, Video (2012), **R-224**; La Prensa, *Colquiri se convierte en un campo de batalla*, press article of 15 June 2012, **C-142**.

968 Statement of Claim, ¶ 220.

969 Eskdale, ¶ 94 (emphasis added).

970 Glencore Annual Report 2012, **R-257**, p. 71, note 2.

971 Glencore International's response to the nationalization of the Colquiri mine in Bolivia, press release of 22 June 2012, **R-258**.

attributable to Bolivia. The *cooperativistas* are, obviously, not part of the Bolivian sState nor affiliated with it in any way. *Cooperativistas* are workers in the informal mining sector who have organized themselves into independent labor organizations. In fact, Claimant has not even alleged that they are part of the State. Thus, even if Claimant lost control of the Mine due to actions of the *cooperativistas*, it could not legally amount to an expropriation by Bolivia.

709. By contrast, Bolivia never had control of the Mine prior to 20 June 2012. This point is not in dispute between the Parties. To the contrary, Claimant repeated complains about Bolivia's *lack* of control of the Mine before that date (and falsely alleges that this lack of control amounted to an FPS breach). As Claimant states, "*policemen posted at the site failed to defuse the situation and were unable to enter the mine*" from "*30 May 2012 until the formal nationalization of the Colquiri Mine on 20 June 2012 […].*"[972] It is impossible that Bolivia could have deprived Claimant of control of the Mine when Bolivia allegedly lacked control over the situation.

710. Implicitly recognizing that the actions of the *cooperativistas* cannot constitute an expropriation by Bolivia, Claimant adds the argument that Bolivia should have expelled the *cooperativistas* from the Mine and the failure to do so breached the Treaty.[973] However, as extensively argued above,[974] Bolivia took all available actions to defuse the situation at the Mine that were legal and reasonable under the circumstances.

711. One, shortly after the occupation of the Mine by the *Cooperativa 26 de Febrero*, the State engaged in negotiations with the workers and *cooperativistas* in an attempt to ensure Sinchi Wayra's operation of the Mine. As explained in section 2.6.3.2 above, it is undisputed that, over the days that followed the occupation of the Mine, the Government sought Sinchi Wayra's and the unions' support to work on a proposal to assign the San Antonio Vein to the *Cooperativa 26 de Febrero*, and prepared up to 5 different offers which were then submitted to the *cooperativistas*.[975] Had Bolivia expropriated the Mine on 30 May 2012 (as Claimant alleges), it would have not engaged in negotiations thereafter.

712. Two, Sinchi Wayra prompted the escalation of the violence in Colquiri with the execution of the Rosario Agreement on 7 June 2012. Bolivia continued seeking a solution to the conflict

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972 Statement of Claim, ¶ 184(g).

973 Statement of Claim, ¶ 255(iii).

974 See Section 2.6.3 above.

975 La Razón, *Minería hace 5 ofertas, pero aun no convence a los cooperativistas*, press article of 5 June 2012, **R-215**.

created by Sinchi Wayra in the forthcoming days. This effort to resolve the conflict, however, is not tantamount to a taking of the Mine by the State.

713. Three, while the Government's proposal to revert the Mine Lease was on the table since early June 2012, it is undisputed that the Reversion was only—and could have only been—implemented on 20 June 2012.[976] Indeed, Minister Romero confirms that the Mine Lease Reversion Decree is the result of the agreements the Government had reached with *cooperativistas* and the Mine workers the day before it was issued[977] (that is, on 19 June 2012[978]).

714. For the foregoing reasons, Colquiri must be valued as of 19 June 2012 (*i.e.*, the day before the reversion of the Mine Lease).

7.3.2.2 The Antimony Smelter Should Be Valued As Of 30 April 2010 (Ex Ante)

715. Claimant claims that the Tribunal should value the Antimony Smelter as of the date of the award.[979] According to Claimant, "*where the value of an investment has increased following expropriation, full reparation may require […] the valuation date to be fixed at the date of the award.*"[980] In effect, Claimant denies that the Treaty determines that the valuation date for expropriation is the date prior to when the expropriation occurred or became public, whichever is earlier.

716. However, Claimant's sole argument to avoid the clear authority of the Treaty is to assert that the Treaty's plain terms for compensation do not apply to the alleged expropriations of the Tin Smelter, Antimony Smelter, and Mine Lease because they were unlawful.[981]

717. Claimant's sole argument rests on flawed foundations. Even if the Antimony Smelter reversion was an expropriation (*quod non*), it was lawful. As fully explained in section 6.1.2, Bolivia satisfied all Treaty obligations that would have applied to the reversion even if (*quod non*) it was an expropriation. The Treaty obligation to provide compensation was not breached because this arbitration will determine what compensation, if any, Bolivia owes to Claimant. And a breach of the compensation provision of the Treaty would not, in any event,

976 Supreme Decree No 1.264 of 20 June 2012, **C-39**.

977 Romero, ¶¶ 13-18.

978 Agreement between the Government of Bolivia, COB, Fencomin, FEDECOMIN-LP, FSTMB, Central de Cooperativas de Colquiri, and Sindicato Mixto de Trabajadores Mineros de Colquiri of 19 June 2012, **R-18**.

979 Statement of Claim, ¶ 255 (iv).

980 Statement of Claim, ¶ 254.

981 Statement of Claim, ¶ 229.

render an expropriation unlawful within the meaning of that term in international law. Nor was the Treaty obligation to provide due process breached, as the Treaty is explicit that this requires nothing more than the opportunity to bring a posterior challenge to an expropriation, which Claimant never even attempted.

718. *Ex abundante cautela*, even supposing that the Antimony Smelter's reversion was unlawful (*quod non*), Claimant errs when it asserts that the Treaty specifies no standard of compensation in the Article V provision.[982] It plainly does.

719. *First*, the State parties to the Treaty clearly and explicitly accepted a compensation provision that is general in scope and that admits of no limitation to cases of lawful expropriation. As the *British Caribbean Bank* tribunal insightfully noted, "*at no point does the [Belize-United Kingdom BIT], being a lex specialis, distinguish between lawful and unlawful expropriation*," and concluded that the legality distinction is irrelevant.[983] The Belize-United Kingdom BIT, effectively identical to the Treaty in that neither distinguishes between lawful and unlawful expropriation, states that:

> *Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party and against just and equitable compensation.*[984]

720. The weight of authority from investment tribunals shows that, even absent such decisive text, the treaty's *lex specialis* on compensation applies to an expropriation contrary to the treaty's requirements.[985] As Audley Sheppard observed, "*the standard of compensation contained in the investment protection treaty would appear to be a lex specialis that supersedes the lex*

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982 Statement of Claim, ¶ 229.

983 *British Caribbean Bank Ltd. v. Belize*, PCA Case No. 2010-18, Award of 19 December 2014, **RLA-105**, ¶ 260.

984 Agreement Between the Government of the Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments of 30 April 1982, **RLA-106**, Article 5.

985 The *Flughafen* tribunal, for example, found that the expropriation had illegally violated due process but nonetheless applied the treaty provision on compensation. *Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award of 18 November 2014, **RLA-107**, ¶¶ 739-747. Many other cases consider expropriations that apparently are inherently unlawful but nevertheless apply the BIT provisions as *lex specialis* and value the loss at the time of expropriation. See, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, **RLA-68**, ¶¶ 101, 118, 125; *CME Czech Republic BV v Czech Republic* (UNCITRAL) Partial Award of 13 September 2001, **CLA-32**, ¶¶ 603, 611, 615-618; *Técnicas Medioambientales Tecmed SA v United Mexican States* (ICSID Case No ARB(AF)/00/2) Award of 29 May 2003, **CLA-43**, ¶¶ 149, 187-192; *Abengoa, S.A. and COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award of 18 April 2013, **RLA-66**, ¶¶ 623, 681, 694.

generalis of customary international law, and should apply in all cases of expropriation, whether the conduct requirements have been complied with or not."[986]

721. In short, the Treaty establishes that, if the Antimony Smelter reversion were an expropriation (*quod non*), compensation must be assessed on the date the Antimony Smelter reversion occurred or became public knowledge, whichever is earlier.

722. *Second*, the valuation date from the Treaty's compensation provision applies to the Antimony Smelter valuation for at least two additional reasons:

723. One, the Treaty's compensation provision specifies the standard of full compensation applicable for an expropriation. The parties to the Treaty agreed that valuation of the loss immediately prior to the expropriation (or when it became public) would be sufficient to provide full compensation. This is what constitutes full reparation for the purpose of a dispute under the Treaty. There can be no reason to deviate from the will of the Treaty parties, as expressed in Article V(1) of the Treaty when determining compensation.[987]

724. Two, unlike the valuation date established in the Treaty, the date of the award has no connection to the breach and loss suffered; it is arbitrary.[988] The compensation should not vary just because a tribunal takes more or less time to arrive at an award. Moreover, using the date of the award would allow investors to time litigation strategically and abusively in order to maximize compensation. The only natural valuation date is immediately prior to the expropriation.

725. *Finally*, Claimant argues that the loss should be valued as of the award date because there is a lack of available information from the time of the expropriation (*i.e.*, as of 30 April 2010, the day before the reversion) to assign a value to the Antimony Smelter.[989] This argument is flawed.

726. There was official and reliable contemporaneous information (as of 2010) about the Antimony Smelter's land and buildings, which Ms Russo could have referred to (as Mr Mirones did[990]).

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986 A. Sheppard, "The distinction between lawful and unlawful expropriation" in *Investment Arbitration and the Energy Charter Treaty*, JurisNet LLC, 2006, **RLA-64**, pp. 196-197.

987 Treaty, **C-1**, Article V(1). According to Article V(1), compensation shall "*amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is earlier […]*".

988 Markham Ball, Assessing Damages in Claims by Investors against States, 16 ICSID Review Foreign Investment Law Journal 408, 2001, **RLA-108**, p. 417.

989 Statement of Claim, ¶ 255(iv); Informe de Avalúo - Gina Russo of 15 August 2017, ¶ 1.5.

990 Mirones, ¶¶ 11-13.

Ms Russo could have accessed the public cadastre to obtain the cadastre value of the land, and topographic maps, obtain tax related information on the Antimony Smelter as of 2010, among others. As Mr Mirones explains:

> *[l]a información catastral en Bolivia tiene carácter público.*
>
> *[…] el catastro de Oruro cuenta con información (oficial y muy relevante) sobre el Terreno (entre otros, su valor catastral). La Arq. Russo ignoró esta información, a pesar de estar disponible al 1 de mayo de 2010. También estaba disponible – a esta misma fecha – información proveniente del Registro Público, de las autoridades tributarias, etc.*[991]

727. Yet, Ms Russo ignored these reliable sources as part of its valuation exercise and chose to privilege the highly speculative information provided by real estate agents as well as a local newspaper[992] (far from specialized on real estate).[993]

728. For the above reasons, the Antimony Smelter should be valued as of 30 April 2010 (*i.e.*, the day immediately before it reverted to the State).

7.3.3 Compass Lexecon's Valuations Ignore Key Premises For The Valuation Of Mining Assets

729. Compass Lexecon relies on the DCF method[994] to calculate the FMV of Colquiri, including the Old Tailings Reprocessing Project[995] (which is not a going concern) (as of 29 May 2012) and of the Tin Smelter (as of 8 February 2007).

730. The DCF method projects future cash flows (expected until the end of the life of a project) and then discounts them to the valuation date to obtain their net present value. The yearly operating cash flows are calculated by subtracting the expenses (mainly capital expenses, or "**CAPEX**", and operating expenses, or "**OPEX**") from the revenues (the product of production volumes and price) that the enterprise valued is expected to generate during the valuation period.[996] Although the DCF valuation method is commonly used to value going

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991 Mirones, ¶¶ 25-26 (Unofficial translation: "*[c]adastral information is public in Bolivia. […] the Oruro cadastre contains (official and very important) information on the Plot (amongst others, its cadastral value). Arc. Russo ignored this information even though it was available on 1 May 2010. By the same date, information from the Public Registry, from the tax authorities, etc. was also available*").

992 Econ One, ¶ 134.

993 Mirones, ¶ 45.

994 Compass Lexecon Expert Report, p. 7, Table 1.

995 Compass Lexecon Expert Report, Section V.1.1.b; Compass Lexecon Colquiri Valuation, **CLEX-4**, "Production".

996 Econ One, ¶ 11.

concerns, the accuracy of its results is highly dependent on the inputs used in the valuation model.[997]

731. A key value driver in any DCF analysis of a mineral-producing asset are the reserves and resources estimated to be produced in the future. Because of their impact on valuations and to protect investors, mining companies are bound to report exploration results, mineral resources and ore reserves by international standards and guidelines. Glencore International reports its resources and reserves in accordance with (i) the JORC Code, (ii) the South African Code for Reporting of Mineral Resources and Mineral Reserves (the "**SAMREC Code**"), and (iii) the Canadian Institute of Mining, Metallurgy and Petroleum ("**CIM**") Standards on Mineral Resources and Reserves.[998]

732. In addition, there are well-known industry standards for the valuation and assessment of mining assets, such as the Australasian Code for the Public Reporting of Technical Assessments and Valuations of Mineral Assets ("**VALMIN Code**"), which, as stated by Claimant, "*provides a set of fundamental principles, minimum requirements and supporting recommendations to assist in the assessment and valuation of mineral properties […].*"[999]

733. According to the VALMIN Code, the valuation and technical assessment of mining assets must be guided by the reasonableness principle.[1000] Pursuant to this principle, a valuation must be based on assumptions that are "*impartial, rational, realistic and logical in its treatment of the inputs […] to the extent that another Practitioner with the same information would make a similar Technical Assessment or Valuation […].*"[1001]

734. The inputs considered in a DCF valuation of a mining asset generally include: technical or physical factors (e.g., resource and reserves tonnages, metal grades and recovery rates), economic factors (e.g., price of minerals, production costs), and political and regulatory

997 C. Lattanzi, "Discounted Cash Flow Analysis. Inputs Parameters and Sensitivity", **R-259**, p. 1.

998 Reserves & Resources, Glencore <http://www.glencore.com/investors/reports-and-results/reserves-and-resources/ > last visited 2 December 2017, **R-254**.

999 Statement of Claim, ¶ 245.

1000 The VALMIN Code - Australasian Code For Public Reporting of Technical Assessments and Valuations of Mineral Assets, **R-260**, Section 4.1; VALMIN Code 2005 - Australasian Code For Public Reporting of Technical Assessments and Valuations of Mineral Assets, **R-261**, p. 22.

1001 The VALMIN Code - Australasian Code For Public Reporting of Technical Assessments and Valuations of Mineral Assets, **R-260**, Section 4.1. (emphasis added); VALMIN Code 2005 - Australasian Code For Public Reporting of Technical Assessments and Valuations of Mineral Assets, **R-261**, p. 22.

factors (e.g., taxes, environmental regulations).[1002] The realistic and rational treatment of these inputs determine the economic viability of a mining project.

735. These factors are never constant during the life of a mine.[1003]

736. Bolivia agrees with Claimant in that the DCF method is appropriate to value the Mine (except for the Old Tailings Reprocessing Project, which is not a going concern) and the Tin Smelter. However, Bolivia disagrees with Claimant's experts' grossly inflated valuation of these assets, which results from their speculative and overly optimistic analysis.

737. Before setting out the specific criticisms to RPA's analysis and Compass Lexecon's valuations, it is important to understand how each of the key factors mentioned above impacts the valuation. We briefly address each of them below, beginning with mineral resources and reserves (**Section 7.3.3.1**), grades or mineral concentration (**Section 7.3.3.2**), metallurgical recovery rates (**Section 7.3.3.3**), production forecasts (**Section 7.3.3.4**), prices (**Section 7.3.3.5**), and operating and capital expenses (**Section 7.3.3.6**).

7.3.3.1 Mineral Reserves and Resources

738. A mineral resource is "*a concentration or occurrence of solid material of economic interest in or on the Earth's crust in such form, grade (or quality), and quantity that there are reasonable prospects for eventual economic extraction*",[1004] *i.e.*, its economic viability is yet to be established (which calls into question whether any value should be attributed to them for damages calculations). Also, "*[t]he location, quantity, grade (or quality), continuity and other geological characteristics of a Mineral Resource are known, estimated or interpreted from specific geological evidence and knowledge, including sampling.*"[1005]

1002 M. Samis, "Using Dynamic DCF and Real Option Methods for Economic Analysis in NI43-101 Technical Reports", **R-262**, p. 7.

1003 M. Samis, "Using Dynamic DCF and Real Option Methods for Economic Analysis in NI43-101 Technical Reports", **R-262**, p. 7.

1004 Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (The JORC Code) 2012 Edition, **R-255**, p. 11, ¶ 20; JORC Code, 2004, Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves, **RPA-32**, p. 7; CIM Definition Standards For Mineral Resources and Mineral Reserves of 10 May 2014, **R-263**, p. 3; CIM Definition Standards For Mineral Resources and Mineral Reserves of 27 November 2010, **R-264**, p. 4.

1005 Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (The JORC Code) 2012 Edition, **R-255**, p. 11, ¶ 20; JORC Code, 2004, Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves, **RPA-32**, p. 7; CIM Definition Standards For Mineral Resources and Mineral Reserves of 10 May 2014, **R-263**, p. 3; CIM Definition Standards For Mineral Resources and Mineral Reserves of 27 November 2010, **R-264**, p. 4.

739. Pursuant to recognized industry standards,[1006] mineral resources are classified, in order of decreasing geological confidence, as either "measured", "indicated" or "inferred."

740. A "measured" mineral resource has the highest level of geological confidence:

> *[Its] grade (or quality), densities, shape, and physical characteristics are estimated with confidence sufficient to allow the application of Modifying Factors to support detailed mine planning and final evaluation of the economic viability of the deposit. Geological evidence is derived from detailed and reliable exploration, sampling and testing and is sufficient to confirm geological and grade or quality continuity between points of observation […]. A Measured Mineral Resource has a higher level of confidence than that applying to either an Indicated Mineral Resource or an Inferred Mineral Resource. It may be converted to a Proven [Mineral] Reserve or under certain circumstances to a Probable Ore Reserve.*[1007]

741. An "indicated" mineral resource presents a lower level of geological confidence than a "measured" mineral resource, but a higher level of confidence than an "inferred" mineral resource:[1008]

> *An Indicated Mineral Resource is that part of a Mineral Resource for which quantity, grade (or quality), densities, shape and physical characteristics are estimated with sufficient confidence to allow the application of Modifying Factors in sufficient detail to support mine planning and evaluation of the economic viability of the deposit. Geological evidence is derived from adequately detailed and reliable exploration, sampling and testing and is sufficient to assume geological and grade (or quality) continuity between points of observation. An Indicated Mineral Resource has a lower level of confidence than that applying to a Measured Mineral Resource and may only be converted to a Probable Ore Reserve.*[1009]
>
> *An Inferred Mineral Resource is that part of a Mineral Resource for which quantity and grade (or quality) are estimated on the basis of limited geological evidence and sampling. Geological evidence is sufficient to imply but not to verify geological and grade (or quality) continuity. It is based on exploration, sampling and testing information gathered through appropriate techniques from locations such as outcrops, trenches, pits, workings and drill holes. An Inferred Mineral Resource has*

1006 These standards include, among others: Australasian Code for Reporting of Mineral Resources and Ore Reserves (prepared by the Joint Ore Reserve Committee (JORC)); Canadian National Instrument 43-101 ("NI 43-101"); U.S. Securities & Exchange Commission Industry Guide 7; and, the SME Guide for Reporting Exploration Results, Mineral Resources and Mineral Reserves.

1007 Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (The JORC Code) 2012 Edition, **R-255**, p. 13, ¶ 23 (emphasis added); JORC Code, 2004, Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves, **RPA-32**, p. 7; See also, CIM Definition Standards For Mineral Resources and Mineral Reserves of 10 May 2014, **R-263**, pp. 4-5; CIM Definition Standards For Mineral Resources and Mineral Reserves of 27 November 2010, **R-264**, p. 5.

1008 CIM Definition Standards For Mineral Resources and Mineral Reserves of 10 May 2014, **R-263**, p. 4; CIM Definition Standards For Mineral Resources and Mineral Reserves of 27 November 2010, **R-264**, p. 5.

1009 Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (The JORC Code) 2012 Edition, **R-255**, p. 13, ¶ 22 (emphasis added); JORC Code, 2004, Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves, **RPA-32**, p. 7. See also, CIM Definition Standards For Mineral Resources and Mineral Reserves of 10 May 2014, **R-263**, p. 4; CIM Definition Standards For Mineral Resources and Mineral Reserves of 27 November 2010, **R-264**, p. 5.

> *a lower level of confidence than that applying to an Indicated Mineral Resource and must not be converted to an Ore Reserve*.[1010]

742. Only "measured" and "indicated" resources are relevant for the determination of mineral reserves. Indeed, due to their uncertainty, mining codes require the exclusion of "inferred" resources from mining project feasibility and economic studies.[1011] Similarly, well-known industry regulations "*prohibit[] the disclosure of the results of an economic analysis that includes or is based on inferred mineral resources […]*."[1012] As explained below, Claimant and its experts have deviated from this.

743. In particular, it bears emphasizing that, per the industry standards cited above, mineral resources may only be delineated based on geological data gathered through "*exploration, sampling and testing*" activities (depending on how detailed exploration is, resources, if any, may then be classified as "measured", "indicated" or "inferred").

744. A mineral reserve is "*the economically mineable part of a Measured and/or Indicated Mineral Resource […]*."[1013] Mineral reserves can only be determined by pre-feasibility and/or feasibility studies, which consider all of the relevant "modifying factors" (*i.e.*, mining, metallurgical, economics, marketing, legal, environmental, social and governmental factors)[1014] before determining whether mining extraction is technically and economically feasible or not. Modifying factors play a key role in assessing mining viability and, hence, in valuations. As explained in the VALMIN Code, a life-of-mine plan is a study of a mining operation where:

> *All modifying factors have been considered in sufficient detail to demonstrate at the time of reporting that extraction is reasonably justified. Such a study*

1010 Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (The JORC Code) 2012 Edition, **R-255**, p. 12, ¶ 21 (emphasis added); JORC Code, 2004, Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves, **RPA-32**, p. 7; See also, CIM Definition Standards For Mineral Resources and Mineral Reserves of 10 May 2014, **R-263**, p. 4. CIM Definition Standards For Mineral Resources and Mineral Reserves of 27 November 2010, **R-264**, p. 5.

1011 Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (The JORC Code) 2012 Edition, **R-255**, pp. 12-13 (emphasis added); JORC Code, 2004, Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves, **RPA-32**, p. 7; See also, CIM Definition Standards For Mineral Resources and Mineral Reserves of 10 May 2014, **R-263**, p. 4; CIM Definition Standards For Mineral Resources and Mineral Reserves of 27 November 2010, **R-264**, p. 5.

1012 NI 43-101 Standards of Disclosure for Mining, **R-265**, Section 2.3(1) (emphasis added).

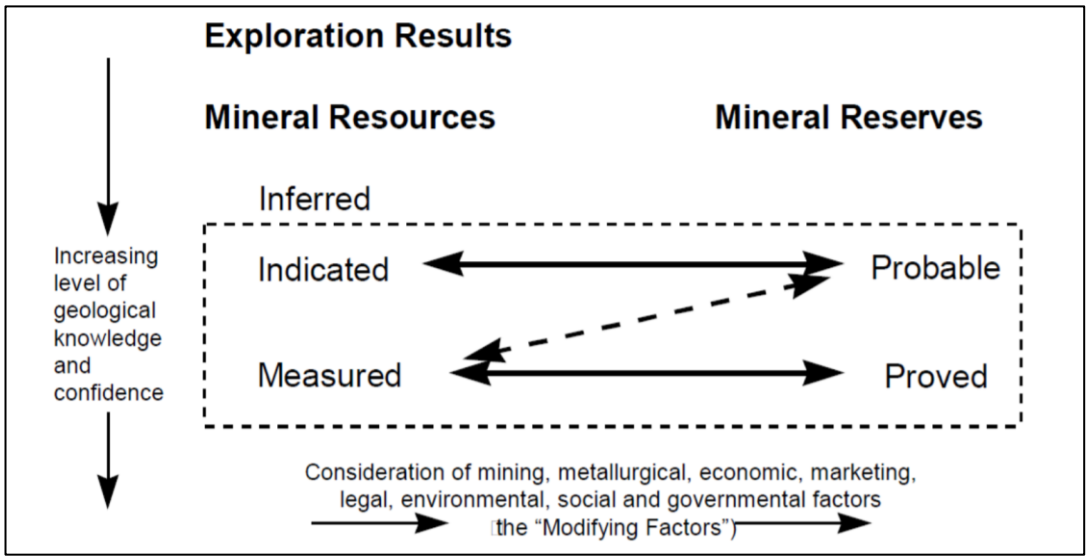
1013 CIM Definition Standards For Mineral Resources and Mineral Reserves of 10 May 2014, **R-263**, p. 5 (emphasis added); CIM Definition Standards For Mineral Resources and Mineral Reserves of 27 November 2010, **R-264**, p. 5.

1014 SRK, footnote 37.

should be inclusive of all development and mining activities proposed through to the effective closure of the existing or proposed mining operation.[1015]

745. Reserves are classified into "proven" and "probable." A proven mineral reserve is "*the economically mineable part of a Measured Mineral Resource*"[1016] (which, consequently, has the highest degree of geological and economic certainty), and a probable mineral reserve is "*the economically mineable part of an Indicated, and in some circumstances, a Measured Mineral Resource.*"[1017]

746. The increasing level of geological confidence between the different types of mineral resources and reserves, and the relevance of the modifying factors to assess the technical and economic viability of a mining project, are illustrated in the following diagram:[1018]



747. Claimant's experts, however, disregard these fundamental industry standards and practices and value a "magical mine." In Claimant's "magical mine," resources are delineated and reserves replenish "magically" without the need for exploration,[1019] and 100% of such reserves and resources are mined (including inferred resources,[1020] which international standards

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1015 The VALMIN Code - Australasian Code For Public Reporting of Technical Assessments and Valuations of Mineral Assets, **R-260**, p. 41, Glossary – Life-of-Mine Plan (emphasis added). See also VALMIN Code 2005 - Australasian Code For Public Reporting of Technical Assessments and Valuations of Mineral Assets, **R-261**.

1016 CIM Definition Standards For Mineral Resources and Mineral Reserves of 10 May 2014, **R-263**, p. 6; CIM Definition Standards For Mineral Resources and Mineral Reserves of 27 November 2010, **R-264**, p. 5.

1017 CIM Definition Standards For Mineral Resources and Mineral Reserves of 10 May 2014, **R-263**, p. 6; CIM Definition Standards For Mineral Resources and Mineral Reserves of 27 November 2010, **R-264**, p. 5.

1018 Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (The JORC Code) 2012 Edition, **R-255**, p. 9; JORC Code, 2004, Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves, **RPA-32**, p. 6.

1019 RPA FBD Glencore v Bolivia Expert Report, ¶¶ 46-54.

1020 SRK, Table 1.

consider to be *geologically uncertain*). As a result, Claimant's experts' valuation is grossly inflated and should be dismissed by the Tribunal.

7.3.3.2 Grade Or Mineral Concentration

748. The grade is the concentration of metal in a ton of mineralized material. The grade (calculated in grams/ton) is the basis for determining how much revenue can be obtained from the mineralized material and, hence – once all costs are considered – for determining whether it would be economical to mine such material. Thus, in the valuation of mineral deposits, the estimation of average grade is more significant than the estimation of tonnage.[1021]

749. There is a certain grade below which it is not economically viable to mine and process, even though metal is present in the ore.[1022] This is known as the cut-off grade. The cut-off grade reflects the minimum concentration of metal that is required to exist in a ton of mineralized material so that revenue equals the costs necessary to produce said metal *(i.e.*, to breakeven). In addition, for the purposes of valuing Colquiri and the Tin Smelter, two additional notions are also relevant: (i) the head grade or concentration of metal in the ore extracted from the mine as delivered to the metallurgical plant for the production of concentrates, and (ii) the grade of the resulting concentrates that will then go through the smelting process.

750. Much like in the estimation of reserves, the average grade is estimated through sampling. However, average grade estimates carry a larger margin of error than the estimation of reserves mainly for two reasons.[1023] *First*, the grade may exhibit considerable variation throughout a deposit (*e.g.*, in underground mines, such as Colquiri, *ceteris paribus*, grade is expected to decrease as extraction moves deeper into the Mine). *Second*, waste material is expected to be mined with the ore (dilution). Due to dilution, the grade of ore, as mined, will necessarily be lower than the grade of ore present in the mine.[1024] This, in turn, increases costs and reduces revenue (for every ton of mineral mined, less grade of metal will be processed). It is, therefore, fundamental that any DCF valuation appropriately reflect the level of dilution.[1025] As explained by Prof. Rigby, with respect to Colquiri, "*Due to dilution, the grade of the ore, as mined, will necessarily be lower than the in situ grade of the ore present in the mine. This is clearly demonstrated by comparing the proven and probable reserve grades with*

1021 C. Lattanzi, "Discounted Cash Flow Analysis. Inputs Parameters and Sensitivity", **R-259**, p. 4.

1022 SRK, ¶ 45, Section 7.3.6.

1023 C. Lattanzi, "Discounted Cash Flow Analysis. Inputs Parameters and Sensitivity", **R-259**, p. 4.

1024 C. Lattanzi, "Discounted Cash Flow Analysis. Inputs Parameters and Sensitivity", **R-259**, p. 4.

1025 C. Lattanzi, "Discounted Cash Flow Analysis. Inputs Parameters and Sensitivity", **R-259**, p. 5.

the actual mined grades over the years (Figure 2 and Figure 3), which are generally materially lower for both tin and zinc."[1026]

751. Yet, despite the fact that no real deep exploration drilling had been undertaken and little (if any knowledge) existed, in 2012, as to grade continuity for tin and zinc in Colquiri, Claimant's experts assume unreasonably high and constant head grades as part of their valuation. Indeed, the head grades for both tin (1.29%) and zinc (7.52%) projected by RPA (which would allegedly remain constant from 2014 until 2030) fail to account for dilution and are, thus, too elevated. Likewise, for the Tin Smelter, Claimant's experts adopt optimistic, constant concentrate grades, disregarding the fact that, as mining moves deeper into the mines where the concentrates are sourced from (underground mines, such as Colquiri and Huanuni), grades are expected to decrease.

7.3.3.3 Metallurgical Recovery Rates

752. The metallurgical recovery rate refers to the valuable metal recovered from a ton of mineral through metallurgical treatment. When estimating this rate, there are two important aspects to consider:

753. *First*, because the characteristics of minerals (including its grade) will usually vary throughout the mine, the metallurgical recovery rate is not expected to remain constant throughout the life of the mine. As explained by Prof. Rigby, "*[t]here is often a relationship between the head or feed grade to a process plant and the resulting metallurgical recovery. The higher the head grade, the higher the metallurgical recovery and vice versa […]*."[1027] Therefore, among others, metallurgical recoveries will be affected by the variance of grade present throughout the ore.

754. *Second*, metallurgical recovery is generally said to be a function of the fragmentation size of ore. The smaller the size of fragmentation, better recovery, and vice versa. Because these two variables have a direct impact on processing costs and plant productivity, a higher recovery rate will bring along higher costs and slower production rates (a basic rule that Claimant's experts disregard).

755. Consequently, metallurgical recovery has a major impact in the economics of a mining project. Accordingly, the application of reasonable recovery rates (which Claimant's experts

[1026] SRK, ¶ 60.

[1027] SRK, ¶ 92.

have failed to do for Colquiri and the Tin Smelter) in a DCF valuation is as important as the application of proper grades.

7.3.3.4 Production Forecasts

756. The ore production forecast is based on the scale of the mineral reserve (tonnages) and the market's ability to absorb the final product.[1028] Historical operating experience can be generally used to forecast reliably production rates.[1029] However, because there is only a limited amount of valuable mineral in a mine, historical operating rates will not necessarily be the driving proxy for the entire life of the mine.

757. Once the annual rate of ore production has been established, the rate of production for the saleable mineral may be determined. The production schedule should be determined considering, among others, the ore production forecast, the grade of the mined ore (*i.e.*, the cut-off grade and dilution factor), and metallurgical recovery. Essentially, these factors will reduce the quantity of the saleable mineral which will be produced from the ore, making the rate of production of saleable mineral lower than the rate of ore production.[1030]

758. In addition to those mentioned above, when estimating the production rate of the saleable mineral, a DCF valuation should also consider (i) the cost of producing a ton of saleable mineral (*i.e.*, cost of mining, cost of processing a ton of material and overhead costs), and (ii) market prices.

759. In the case of Colquiri, there is a significant number of operating factors limiting the production,[1031] including the plant's treatment capacity, the availability of water and electricity in the Colquiri area, and the dam's capacity. As explained by Eng. Moreira:

> *Es fundamental tener presente que la operación de la mina Colquiri es un proceso continuo, es decir, para que la producción pueda aumentar no basta con encontrar más recursos o reservas minerales; hay que tener equipos con suficiente capacidad de extracción, recursos humanos e insumos (como aire, agua, energía eléctrica) para luego poder procesarlos en la planta concentradora y tener espacio donde depositar la colas que se generan.*[1032]

1028 C. Lattanzi, "Discounted Cash Flow Analysis. Inputs Parameters and Sensitivity", **R-259**, p. 5.

1029 C. Lattanzi, "Discounted Cash Flow Analysis. Inputs Parameters and Sensitivity", **R-259**, p. 5.

1030 C. Lattanzi, "Discounted Cash Flow Analysis. Inputs Parameters and Sensitivity", **R-259**, p. 7.

1031 SRK, ¶ 26.

1032 Moreira, ¶ 31 (Unofficial translation: "*It is crucial to bear in mind that the operation of the Colquiri mine is an ongoing process, that is, in order to increase production, it is not sufficient to find more resources or mineral reserves; it is necessary to have equipment with sufficient capacity for extraction, human resources and consumables (like air, water, electric energy) in order to process them in the concentrating plant and space to deposit the tailings that are generated*").

760. Claimant's experts gloss over these limitations.

761. In the case of the Tin Smelter, Claimant's experts' production estimates disregard the poor state of the Smelter's infrastructure and production units (those that were operative) at the time of the reversion, projecting unjustifiably high production rates that are (even) inconsistent with the Tin Smelter's historical operating performance.

7.3.3.5 Prices

762. The forecasted annual revenues of a mining asset are the product of the annual production of saleable mineral and market prices.

763. Prices are one of the main determinants of value.[1033] The VALMIN Code establishes that any report that includes a forecast of revenue "*must set out a reasonable basis for price-related assumptions applying to any product(s) derived from the Mineral Asset […].*"[1034] Price related assumptions include, among others: current and forecasted market conditions, forecast product prices, sales volumes, and smelter treatment and refinery charges.

764. As stated in the VALMIN Code, future economic conditions may greatly influence the economic viability and value (if any) of a mineral asset.[1035] Therefore, a valuation should include accurate and reliable forecasts with supporting evidence.[1036]

7.3.3.6 Operating And Capital Expenses

765. In any DFC valuation, once revenues are estimated, they are subtracted by the estimated expenses in order to obtain the projected annual operating free cash flows of the valued asset. In the case of Colquiri[1037] and the Tin Smelter, this requires reasonably projecting mining and processing costs, smelting costs, other operating costs, capital costs and closure costs – which Claimant's experts have failed to do.

1033 M. Samis, "Using Dynamic DCF and Real Option Methods for Economic Analysis in NI43-101 Technical Reports", **R-262**, p. 7.

1034 The VALMIN Code - Australasian Code For Public Reporting of Technical Assessments and Valuations of Mineral Assets, **R-260**, Section 7.6(a) (emphasis added); VALMIN Code 2005 - Australasian Code For Public Reporting of Technical Assessments and Valuations of Mineral Assets, **R-261**, p.16.

1035 The VALMIN Code - Australasian Code For Public Reporting of Technical Assessments and Valuations of Mineral Assets, **R-260**, Section 9.4; VALMIN Code 2005 - Australasian Code For Public Reporting of Technical Assessments and Valuations of Mineral Assets, **R-261**, p. 17.

1036 The VALMIN Code - Australasian Code For Public Reporting of Technical Assessments and Valuations of Mineral Assets, **R-260**, Section 9.4; VALMIN Code 2005 - Australasian Code For Public Reporting of Technical Assessments and Valuations of Mineral Assets, **R-261**, p.16.

1037 SRK, ¶¶ 40-41.

766. The VALMIN Code establishes that the valuator "*should review and describe the actual and forecast capital and operating costs for the estimated productive life of the Mineral Assets […].*" Furthermore, it provides that "*capital and operating costs should take into account any likely changes with time in factors such as work practices and productivity, and […] assess whether they are realistic and achievable […].*"[1038]

767. A fundamental principle of mine economics is that costs are determined by the amount of mined and processed minerals, while revenues are determined by the amount of metal produced.[1039] As explained above, as the dilution in a tonnage of mine material increases, the grade of mineral in the tonnage decreases.[1040] This increases costs, and decreases revenue. Therefore, the costs of a project depend largely on the grade of the ore. A company with a lower grade of ore will have to process more rock at a greater cost, in order to obtain the same amount of economically valuable material than a company with a higher grade of ore.[1041] It is, therefore, paramount to the valuation of a mining asset to account for the variance of grade during the life of the mine as an element of cost.

768. Changes in capital and operating costs should also be considered. Equipment used in the mine and process plant will have to undergo maintenance, overhauls, be rebuilt and, ultimately, be replaced during the mine life, a new dam may be required, etc.

769. Additionally, costs specific to the mining operation at hand should be factored into the valuation. For underground mining, it is key to consider that, as the mining operations move deeper into the mine, the thickness and, consequently, weight of the over-lying rock increases, inevitably increasing costs. Likewise, production expansions will usually be preceded by important investments in studies and equipment.

770. *Finally*, any valuation should include appropriate mine closure and reclamation costs.

771. This phase may last several years. Closure costs include remediation and rehabilitation, which shall be considered in accordance with the environmental regulations in force at the mine location and may take several years. These costs largely depend on the particular circumstances of the mine and ore characteristics, existence of tailings and waste materials, and post closure water quality. Closure and remediation are typically defined by a mine

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1038 The VALMIN Code - Australasian Code For Public Reporting of Technical Assessments and Valuations of Mineral Assets, **R-260**, Section 7.5 (emphasis added); VALMIN Code 2005 - Australasian Code For Public Reporting of Technical Assessments and Valuations of Mineral Assets, **R-261**, p. 16.

1039 C. Lattanzi, "Discounted Cash Flow Analysis. Inputs Parameters and Sensitivity", **R-259**, p. 5.

1040 C. Lattanzi, "Discounted Cash Flow Analysis. Inputs Parameters and Sensitivity", **R-259**, p. 5.

1041 C. Lattanzi, "Discounted Cash Flow Analysis. Inputs Parameters and Sensitivity", **R-259**, p. 5.

closure plan with costs allocated to remediation and refined throughout the life cycle of the mine. Reclamation costs are the costs incurred for all the physical facilities to be decommissioned, dismantled and removed from the site.

772. Claimant's experts ignore or underestimate the Assets' operating and capital expenses. For instance, in the case of Colquiri, they ignore the increased costs that come with moving deeper into the mine, and also those that result from dilution. In the case of the Tin Smelter, Claimant's experts ignore the need to make significant capital investments to increase production (they assume that very-old furnaces, dating back to the 70s, will continue to operate during the next 20 years). Glencore's experts also ignore or underestimate the closure, remediation and reclamation costs for all of the Assets, thus inflating their values.

7.3.4 Compass Lexecon's Valuation Of Colquiri Is Flawed As It Is Based On Unrealistic And Incorrect Assumptions Concerning Key Value Drivers

773. Claimant claims US$ 443.1 million as the FMV of Colquiri as of 29 May 2012,[1042] in which the Old Tailings Reprocessing Project represents 26% of the amount claimed, that is, over US$ 100 million.[1043]

774. Compass Lexecon's valuation is premised on a negligent, unreasonable and misinformed willing buyer (**Section 7.3.4.1**). In addition, Compass Lexecon's DCF model is based on unrealistic and incorrect inputs, including an unduly low discount rate (**Section 7.3.4.4**), which result in inflated values for the Mine Lease (**Section 7.3.4.2**) and the Old Tailings Reprocessing Project (**Section 7.3.4.3**).

7.3.4.1 Compass Lexecon's Valuation Is Premised On A Negligent And Misinformed Willing Buyer

775. The FMV standard requires that any valuation be premised on a reasonable, well-informed, knowledgeable and prudent willing buyer and seller. This is not the case of Compass Lexecon's willing buyer.

776. Indeed, while Compass Lexecon acknowledges that the cornerstone of its valuation is the Triennial Plan,[1044] it ignores that a willing buyer would have realized or done, at least, *three* things:

1042 Statement of Claim, ¶ 276.

1043 Econ One, ¶ 46, footnote 73.

1044 Compass Lexecon Expert Report, ¶52.

777. *First*, it would have realized (i) that the Triennial Plan is simply aspirational (*i.e.*, it is an internal document that was never seriously assessed (much less approved) by Colquiri's management), (ii) that the Triennial Plan does not include any economic, social or environmental analyses (all of which are fundamental to assess the viability of a plan of this nature), and (iii) that the investments, purchases, etc., that, per the Triennial Plan, were supposed to be undertaken between July 2011 (the Triennial Plan's date) and 20 June 2012 (the day in which the Mine Lease was reverted) were not carried out,[1045] and thus dismiss this Plan.

778. *Second*, it would have audited the Triennial Plan, realized its assumptions are overly optimistic and dismissed it. Indeed, as explained by Bolivia's experts, among others, the Triennial Plan assumes (i) the existence of *magical* resources and reserves whose existence is not supported by any exploration (and, in fact, where the operator will never need to invest in exploration), (ii) that the processing plant's production will almost double in a two-year period,[1046] which "*tests all credibility*",[1047] and (iii) that the Mine's operation costs will decrease over time as a result of economies of scale, which is inconsistent with Colquiri's historical performance (Colquiri has never benefited from economies of scale and, in fact, has a track record for underestimating costs).[1048]

779. Claimant's experts aggravate this situation. Aside from assuming – without any independent critical analysis – that all of the Triennial Plan's aspirations would materialize, they further assume that the Plan's 2014 aspirations would remain constant throughout the life of the mine (*i.e.*, for 17 ½ years, until 2030). Notably, this is what RPA does in relation to head grades (*i.e.*, 7.52% zinc and 1.29% tin) and metallurgical recoveries (*i.e.*, 76% zinc and 72% tin). Needless to say, as this is contrary to basic industry knowledge, any willing buyer would have dismissed these assumptions.

780. *Third*, it would have realized that the Triennial Plan makes no reference to the Old Tailings Reprocessing Project and, given its economic uncertainty and the fact that it had been neglected since 2004 by the operator, not assign any value to it.

781. Compass Lexecon's willing buyer ignores all of these considerations.

1045 Claimant has not submitted any authorizations for expenditures (AFEs), which are typically required before making these types of investments or incurring in these types of expenditures.

1046 2012-2014 Colquiri Mine Three-year Plan, **C-108**, p. 88.

1047 SRK, ¶ 57.

1048 Econ One, ¶¶ 74-75.

782. Even assuming, *arguendo*, that a willing buyer could have given some credit to the Triennial Plan, such buyer would have considered, at the very least, that (i) the Triennial Plan's projections would need to be revised in light of the social conflicts that arose at the Mine after July 2011 (the Triennial Plan's date), and, (ii) in any case, that the Triennial Plan's implementation would take much longer than estimated in that Plan. Again, Compass Lexecon's willing buyer does none of this.

783. Beyond the Triennial Plan, Compass Lexecon ignores that, when assessing the FMV of Colquiri, any willing buyer would have considered, at least, three things:

784. *First*, the shared-risk agreement that Claimant was negotiating with the State (pursuant to the requirements of the 2009 Constitution) when the Mine Lease was reverted. The Rosario Agreement, signed on 7 June 2012, already acknowledged that "*COLQUIRI S.A. se encuentra en proceso de migración del contrato de arrendamiento a un contrato de asociación con COMIBOL […].*"[1049] Similarly, Glencore International's press release of 22 June 2012 states that "*[t]he nationalisation of the Colquiri mine was announced just as Glencore was finalising the renegotiation of its mining contracts with the Government of Bolivia. The new agreement would have provided for a State participation of up to 55% of the profits (increasing the total Government take to 77-79%) […].*"[1050] Such negotiation, per Glencore International's own admission, would have resulted in the State receiving a larger share of the value of Colquiri's operations that under the Mine Lease. Accordingly, no reasonable buyer would have paid value for the Mine Lease without discounting the renegotiation, which is what Compass Lexecon does.

785. *Second*, the Rosario Agreement, signed on 7 June 2012, whereby Glencore International (through Sinchi Wayra and Colquiri) willingly assigned the Rosario vein to the *Cooperativa 26 de Febrero*.

786. *Third*, the social conflicts and violence existing in the Colquiri area (described in section 2.6.3 above), and the resulting risk of State intervention.

[1049] Agreement between Colquiri SA, Fedecomin, Fencomin, Central Local de Cooperativas Mineras de Colquiri, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, and Cooperativa 26 de Febrero, **C-35**, Clause Eight, p. 2 (Unofficial translation: "*COLQUIRI S.A. is currently in process of migration from the lease contract to an association contract with COMIBOL*").

[1050] Glencore International's response to the nationalization of the Colquiri mine in Bolivia, press release of 22 June 2012, **R-258**.

787. Although each one of these situations has a direct impact in Colquiri's FMV, none were considered by Compass Lexecon. This suffices to dismiss its valuation as highly speculative and exagerated.

7.3.4.2 Compass Lexecon's Valuation Of The Mine Lease Is Inflated

788. Compass Lexecon's valuation of the Mine Lease rests entirely on the Triennial Plan (adopted by RPA at face value). This plan, among other flaws, assumes that, by 2014, (i) production at Colquiri would have almost doubled, and (ii) there would be "*reserves of 2,353,000 tonnes and resources of 5,529,000 tonnes […].*"[1051] Then, based on RPA's analysis, which forecasts another 17 ½ years of production at Colquiri on the unsupported basis that it "*fully expect[s] that the history of [mineral resource and ore reserve] replacement will continue*",[1052] Compass Lexecon estimates the NPV of the Mine Lease as of 29 May 2012 at US$ 443.1.

789. Section V.1 of Compass Lexecon's report describes the different variables considered in its valuation. These include (i) reserves and resources, (ii) production and processing schedule, (iii) grades and metallurgical recovery rates, (v) zinc and tin prices, (vi) operating and capital expenses (to process ore into tin concentrate), and (vi) discount rate.[1053] Because Compass Lexecon relies on unsupported, speculative or simply exaggerated variables, its valuation cannot be relied upon. Indeed, "*[a] model is only as good as the assumptions it uses. Faulty assumptions or bad data result in faulty output*"[1054] (garbage in, garbage out). Bolivia addresses these variables below.

a) Compass Lexecon assumes, with no support, the *magic* delineation of resources and replenishment of reserves at the Mine

790. Compass Lexecon's valuation is premised *"on RPA's opinion that the life of the mine could be extended beyond the resources and reserves registered [i.e., reported to the public] given the mine operator's long history of replenishing the reserves and resources […].*"[1055] Based on this, Compass Lexecon projects *"production until the end of the Colquiri Lease in 2030 […].*"[1056]

1051 Compass Lexecon Expert Report, ¶ 51.

1052 RPA FBD Glencore v Bolivia Expert Report, ¶ 86.

1053 Statement of Claim, ¶ 267.

1054 M. Maher, C. Stickney, R. Weil, *Managerial Accounting. An Introduction to Concepts, Methods and Uses*, 10th ed., 2008, **R-266**, p. 184.

1055 Compass Lexecon Expert Report, ¶ 52 b).

1056 Compass Lexecon Expert Report, ¶ 52 b).

791. Needless to say, the *magic* delineation of resources and replenishment of reserves (which results in an estimate of 10.7MT of mineable material until 2030[1057]) has a key impact on Compass Lexecon's valuation.

792. Bolivia has appointed Prof. Neal Rigby as its mining expert in this arbitration. Prof. Rigby holds a PhD from the University of Wales, where he was the Industrial Research Director in Mining and Minerals Engineering (Department of Mining) for seven years. Prof. Rigby is also a founding partner of SRK (UK), a leading international consulting firm that provides advice in the mining and metals industry. SRK has more than 1,400 professionals internationally in over 45 offices in 6 continents, and Prof. Rigby has served as its Global Group Chairman for 15 years. In his more than 40 years of experience in the mining industry, Prof. Rigby has performed independent assessments of resources and mineral reserves, project evaluations and audits, feasibility studies, among many other matters of great relevance in this arbitration.

793. As explained by Prof. Rigby, "*there is no basis in fact for the 10.7Mt of mineable material assumed by RPA […].*"[1058] As of Claimant's valuation date (29 May 2012), these resources and reserves "*had not yet been found by exploration […].*"[1059] This is confirmed by Glencore International's 2011 Annual Report, which shows that, as of 31 December 2011, there were only 4.181[1060] MT of resources (excluding inferred resources, which are too speculative geologically to be considered[1061]) and 1.55 MT of reserves at Colquiri.[1062]

794. Furthermore, Compass Lexecon's valuation assumes that 100% of these resources and reserves would be mined.[1063] Had Claimant's experts visited the Mine and met with Colquiri's management (including Eng Moreira), they would have known that, historically, only 60% of resources and 90% of reserves have been mined.[1064] Indeed:

1057 RPA FBD Glencore v Bolivia Expert Report, ¶ 175.

1058 SRK, ¶ 55.

1059 SRK, ¶ 77.

1060 RPA FBD Glencore v Bolivia Expert Report, p. 20, Table 1.

1061 Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (The JORC Code) 2012 Edition, **R-255**, pg. 12; JORC Code, 2004, Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves, **RPA-32**, p. 7; See also, CIM Definition Standards For Mineral Resources and Mineral Reserves of 10 May 2014, **R-263**, pg. 4; CIM Definition Standards For Mineral Resources and Mineral Reserves of 27 November 2010, **R-264**, p. 5.

1062 Glencore Annual Report 2011, **R-252**, p. 72.

1063 SRK, ¶ 55.

1064 Moreira, ¶¶ 12, 66-67.

> *En la mina Colquiri, el promedio de reservas que llegan a producción es solamente de 90%. El 10% restante se deja en el interior de la mina por factores de seguridad como pilares (cuando hacemos voladuras) y puentes de 5 metros para mantener el nivel superior de la galería. Si voláramos toda la parte superior, nos quedaríamos sin piso por donde caminar.*
>
> *Por otro lado, no todo recurso necesariamente se convierte en reserva. En la mina Colquiri existe una probabilidad de, más o menos, 60% de que los recursos se conviertan en reservas […].*[1065]

795. After making the necessary adjustments, as of June 2012, Prof. Rigby concludes that a willing buyer would have only given value to 2.5 MT of resources (4.181 x 0.6) and 1.4 MT of reserves (1.555 x 0.9) as reported by Colquiri.

b) Compass Lexecon's production and plant processing forecasts are unduly high

796. It is exclusively on the basis of the Triennial Plan that RPA and Compass Lexecon's valuation assumes a "*[p]roduction rate of 360 ktpa in 2012 increasing to 551 ktpa in 2014 […].*"[1066] Then, based on RPA's analysis, Compass Lexecon goes on to assume that the production forecasted for 2014 (*i.e.*, 550,579 MT) would remain constant until 2030.[1067] This production forecast is wrong for, at least, five reasons.

797. *First*, as explained above, the Triennial Plan is merely an aspirational document that was never seriously assessed (much less approved) by Colquiri's management. Eng Moreira, Colquiri's Mine Superintendent at the time the Triennial Plan was prepared (July 2011), was not aware of its existence until this arbitration. The investments, purchases, etc., that, per the Triennial Plan, were supposed to be made from July 2011 (the Plan's date) to 20 June 2012 (when the Mine Lease was reverted) were never carried out. What happened with this Plan is a mystery. Consequently, it is not reasonable to assume – as Compass Lexecon's valuation does – that the 2014 Triennial Plan's production forecasts would be achieved.

798. *Second*, RPA's production estimates (throughout the life of the Mine) are based on resources and reserves which "*had not yet been found by exploration*"[1068] neither as of Claimant's

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1065 Moreira, ¶ 66, (Unofficial translation: "*In the Colquiri mine, the average reserves that reach production is only 90%. The remaining 10% is left in the mine interior for safety reasons as pillars (when we carry out blasting) and 5-metre long bridges to maintain the raised floor level of the gallery. If we blast the entire raised section, there wouldn't be a floor on which to walk*").

1066 RPA FBD Glencore v Bolivia Expert Report, ¶ 47.

1067 Compass Lexecon Expert Report, ¶ 52(b); RPA FBD Glencore v Bolivia Expert Report, ¶¶ 90-95.

1068 SRK, ¶¶ 66, 77.

valuation date (29 May 2012) nor as of Bolivia's valuation date (19 June 2012). Thus, those resources and reserves cannot be considered for forecasting production, as RPA does.

799. *Third*, even if, *arguendo*, the abovementioned reserves and resources existed, it would not be feasible for a mine like Colquiri to reach RPA's production forecasts. As explained by Prof. Rigby, *"[f]or a mine with the operational constraints that Colquiri has, I do not believe that it would be technically and practically feasible to double the production rate. Even more, to suggest that this would happen over a period of two years as projected by RPA tests all credibility*".[1069] Also, as explained by Eng Moreira, even after investing US$ 77 million in Colquiri's processing plant, production will still come below 320,000 MT (far less than projected by RPA) because of the existence of several constraints. Indeed, Eng Moreira explains that "*[e]n la actualidad, seguimos operando con el mismo equipo en el Cuadro Victoria con las mismas limitantes en cuanto a la capacidad de extracción*"[1070] and "*tenemos muchos problemas de agua […]. En cuanto a la energía, hemos tenido que incluir, como parte de la contratación de la nueva planta que vamos a construir, […] un nuevo transformador […]. [E]l transformador [existente] estaba trabajando [ya] a su capacidad máxima […].*"[1071]

800. *Fourth*, RPA's production forecasts include production from the Rosario vein, which was assigned to the *cooperativas* before the alleged expropriation.[1072] Claimant cannot pretend to be compensated for production that belongs, per its own agreement, to someone else. And, in any event, no willing buyer would accept to pay value for reserves/resources from a vein transferred by the mine operator to a third party.

801. *Fifth*, RPA's production estimates are inconsistent with Colquiri's own internal estimates. As explained by Econ One, *"in 2012 alone, Compass Lexecon's expected production is 21.2% higher than the production amount forecasted in the Colquiri management reports for 2012, [and] 19.5% higher than the amount that could have been expected based on the actual levels of ore processed in first part of 2012, prior to the Claimant's valuation date*".[1073] This same

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1069 SRK, ¶ 57.

1070 Moreira, ¶ 43, (Unofficial translation: "*[c]urrently, we continue to operate with the same equipment in the Victoria Block with the same limitations on extraction capacity*).

1071 Moreira, ¶¶ 36-37 (Unofficial translation: "*we have many problems with water […]. Concerning energy, we had to include, as part of the new plant that we are going to construct, […] a new transformer. […] [T]he [existing] transformer was [already] working at its maximum capacity*").

1072 Agreement between Colquiri SA, Fedecomin, Fencomin, Central Local de Cooperativas Mineras de Colquiri, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, and Cooperativa 26 de Febrero, **C-35**.

1073 Econ One, footnote 54.

exaggeration is reflected in Compass Lexecon's estimates until the end of its estimated life of the mine.

c) Compass Lexecon assumes that unduly high head grades will remain constant throughout the life of the mine, contrary to the reality of the Mine and industry practice

802. Compass Lexecon's valuation further assumes that the Mine has a "*[t]otal mineable resource of 10.7 Mt grading 1.29% Sn and 7.52% Zn based on a mine life of 20 years*".[1074] These grades estimates are unduly high (and the assumption that they will remain constant over time is wrong) for, at least, three reasons.

803. *First*, the head grades estimated by RPA do not account for the substantial waste dilution that is incurred during the mining process. As explained by Prof. Rigby, "*[a] higher waste dilution increases costs and reduces revenues because, for every ton of mineral mined, less grade of metal may be processed. RPA's analysis does not take this into consideration, thus projecting too elevated head grades for tin and zinc*".[1075]

804. *Second*, Claimant's experts have not undertaken any deep exploration that would allow them to predict grade continuity through the mineral deposit.[1076] Furthermore, this assumption is inconsistent with the reality of Colquiri. As explained by Prof. Rigby, future mining will require going deeper into the Mine, which will negatively impact grades.[1077]

805. *Third*, RPA's estimated head grades (of 1.29% Sn and 7.52% Zn) are inconsistent with Colquiri's reality. For instance, Colquiri's head grades for zinc were at 6,83% as of June 2012[1078], and yet Compass Lexecon assumes – with no justification whatsoever – that such head grades will increase by almost 1% only 6 months later (by the end of 2012), and remain constant during the next 20 years of mine life.[1079]

d) Compass Lexecon assumes that unduly high metallurgical recoveries will remain constant throughout the life of the mine, contrary to the reality of the Mine and industry practice

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1074 Compass Lexecon Colquiri Valuation, **CLEX-4**; RPA FBD Glencore v Bolivia Expert Report, ¶ 46 (emphasis added).

1075 SRK, ¶ 61 (emphasis added).

1076 SRK, ¶ 62.

1077 SRK, ¶ 63.

1078 Compass Lexecon Colquiri Valuation, **CLEX-4**, "Historical Data", "Revenues".

1079 Compass Lexecon Colquiri Valuation, **CLEX-4**, "Revenues".

806. Compass Lexecon assumes "*[m]etallurgical recoveries of 72% for tin and 76% for zinc*" from 2012 until the end of the Mine life.[1080] These recovery estimates are unduly high (and the assumption that they will remain constant in time is simply wrong) for, at least, three reasons.

807. *First*, RPA's recovery rates are inconsistent with Colquiri's historical performance. RPA projects recoveries "*of 72% for tin and 76% for zinc*" from 2012 until 2030 (*i.e.*, for a 17 ½ year period) even though, in 2011 and the first half of 2012, metallurgical recoveries at Colquiri were around 60% or less for both tin and zinc.[1081] More generally, as explained by Econ One, "*the historical average rate of recovery for zinc was 69.6%, which RPA and Compass Lexecon assume will increase to 76.0%. Historically tin was recovered at a rate of 65.5%, compared with RPA and Compass Lexecon's assumption 72.0%*"[1082]. Colquiri's actual recovery rates (after 2012) confirm the exaggeration of RPA's estimates (after 2012, "*metallurgical recoveries for both zinc and tin continued to remain substantially below those projected by RPA […]*").[1083]

808. *Second*, there is no analysis or testwork that supports the metallurgical recoveries assumed by RPA. As explained by Prof. Rigby, "*There is simply no rigorous analytical or testwork support for these improvements [i.e., of 72% for tin and 76% for zinc] and <u>certainly not in the long term for ore which has not yet been found by exploration</u>. Typical testwork would have included, for example, <u>bench scale, locked cycle tests, pilot plant and metallurgical simulation analysis.</u>*"[1084]

809. *Third*, it is wrong to assume that metallurgical recoveries will remain constant in time. Given that, as explained above, head grades are expected to decrease over time because mining will move deeper into more sulfurous areas of the Mine, metallurgical recoveries would also be expected to decrease. As explained by Prof. Rigby, "*there is often a relationship between the head or feed grade to a process plant and the resulting metallurgical recovery. The higher the head grade, the higher the metallurgical recovery and vice versa*".[1085] Indeed, as Eng

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1080 Compass Lexecon Colquiri Valuation, **CLEX-4**, "Revenues".

1081 SRK, ¶ 66. Average recoveries between 2007 and 2012 were 63.62% for tin and 68.21% for zinc, thus remaining substantially below RPA's estimates. SRK, ¶ 66.

1082 Econ One, ¶ 41.

1083 SRK, Table 2, ¶ 49.

1084 SRK, ¶ 66.

1085 SRK, ¶ 92.

Villaviencio eloquently explains, there is "*una regla de oro de la metalurgia: a mayor ley, mayor recuperación y viceversa*."[1086]

810. The unduly high (and unrealistic) processing forecasts, head grades and metallurgical recoveries estimated by Claimant's experts (discussed in the previous subsections) result in exaggerated production estimates.[1087]

e) Compass Lexecon's valuation relies on non-verified sales prices

811. As discussed above, metal prices are one of the key inputs to estimate future revenues, thus having a direct impact on the NPV of the Mine Lease. In order to forecast its concentrates' sales prices, Compass Lexecon (i) first, forecasts tin and zinc ingot prices (based on publicly available forecasts) and then, (ii) adjusts those prices based on the terms of contracts signed by Colquiri and Glencore International.[1088] Econ One has expressed a number of reservations with Compass Lexecon's sales prices estimates.

812. In relation to tin and zinc ingot prices, Compass Lexecon has not relied on any internal price forecasts from Colquiri, Sinchi Wayra S.A. or Glencore International even though such forecasts most likely exist (mining companies such as Glencore International will usually use such forecasts to inform its revenue expectations).[1089]

813. In relation to concentrate prices, Compass Lexecon relies on contracts signed by Colquiri and Glencore International, which, per Claimant's account, were related companies at the time.[1090] Consequently, these contracts may not reflect arm length terms, yet Compass Lexecon has not made any comparisons or analyses to validate the reasonability of such terms. Moreover, although some of these contracts date back to 2007, Compass Lexecon has not made "*any revisions to reflect changing market dynamics from 2007 to its valuation date in 2012*".[1091]

f) Compass Lexecon underestimates capital and operating expenses

814. The capital expenditures and operating costs considered by Compass Lexecon are unduly low for, at least, seven reasons.

1086 Villavicencio, ¶ 72 (Unofficial translation: "*a golden rule of metallurgy: the higher the grade, the greater the recovery and vice versa*").

1087 Econ One, ¶ 43.

1088 Econ One, ¶ 53.

1089 Econ One, ¶ 55.

1090 Statement of Claim, ¶ 36.

1091 Econ One, ¶ 62.

CAPEX

815. Although Compass Lexecon's valuation assumes that production would increase to 551,000 MT by 2014[1092] (which is technically unfeasible), it underestimates the investments that would be (theoretically) needed to support such production increase.

816. *First*, Compass Lexecon considers an investment of US$ 27.3 million to build a new processing plant at Colquiri (the existing processing plant had been working at full capacity for several years by the valuation date).[1093] This amount is clearly insufficient, as demonstrated by the fact that, currently, Colquiri is building a new processing plant at a cost of US$ 77 million.[1094]

817. *Second*, Compass Lexecon considers an investment of US$ 5 million (Phase I) to build a new tailings dam at Colquiri[1095] (given that the existing dam was soon to reach its maximum capacity as of the valuation date, a new dam would be needed to dispose of the additional tailings resulting from the increased production). The amount considered by Compass Lexecon is, however, unduly low, as further expansions of the dam would be expected. As explained by Prof. Rigby, "*[w]hile the Triennial Expansion Plan makes reference to US$ 5 million for increased tailings capacity, this is totally inadequate for the fivefold increase in tailings production [coming from the processing plant's expansion and the Old Tailings Project] as proposed by RPA.*"[1096] Furthermore, the Tribunal should note that the Huanuni mine recently built a new tailings dam at a cost of US$ 9.5 million for the first phase (plus the cost of the land and contingent expenses).[1097]

818. *Third*, Compass Lexecon estimated reclamation and closure costs for Colquiri at US$ 3.3 million.[1098] This unduly low estimate ignores Colquiri's long operating history (which results in higher environmental damages that will need to be remediated) and its very-old infrastructure (which will need to be dismantled). As explained by Prof. Rigby, "*[i]n my opinion and, having visited the site, [Compass Lexecon's reclamation and closure costs estimate] is inadequate for a site with such a long operating history (as indicated in Section*

1092 Compass Lexecon Colquiri Valuation, **CLEX-4**; RPA FBD Glencore v Bolivia Expert Report, ¶ 176.

1093 Colquiri, Triennial Plan 2012-2014, July 2011, **CLEX-7**, p. 119; RPA FBD Glencore v Bolivia Expert Report, ¶ 181.

1094 Moreira, ¶ 35.

1095 Colquiri, Triennial Plan 2012-2014, July 2011, **CLEX-7**, p. 202.

1096 SRK, ¶ 85.

1097 Moreira, ¶ 63.

1098 Compass Lexecon Colquiri Valuation, **CLEX-4**; RPA FBD Glencore v Bolivia Expert Report, ¶ 53.

5 above, the Colquiri mine was in operation since Colonial times) and such extensive and largely ageing facilities and infrastructure".[1099]

OPEX

819. Compass Lexecon's valuation also underestimates the OPEX required by its assumed increased production.

820. *First*, Compass Lexecon's valuation ignores that, as a result of its increased production forecasts, more energy will be needed to sustain operations. As indicated by Eng Moreira, "*el costo de energía eléctrica no tiene lógica en su proyección, ya que si se tiene previsto el incremento de la producción también debería incrementar el gasto por energía en similar magnitud a partir de una nueva planta*."[1100] To date, producing far less than forecasted by Compass Lexecon, Colquiri had to acquire a new energy transformer, given that "*[…] el transformador [existente] estaba trabajando [ya] a su capacidad máxima*".[1101]

821. *Second*, in order to justify its low OPEX figures, RPA and Compass Lexecon assumes that, as a result of its increased production, Colquiri will benefit from economies of scale and thus reduced costs. As explained by Econ One, "*[e]conomies of scale are present whenever operating costs increase less than proportionately with production, in this case ore processed*".[1102] Compass Lexecon's assumption is contradicted by Colquiri's own operating history, which any willing buyer would review as part of its due diligence. Indeed, even though its production increased over time, Colquiri was never able to benefit from economies of scale. For instance, from 2006 to 2007, Colquiri processed 8% more ore but its operating costs increased by 22%.[1103]

822. *Third*, mining at Colquiri (in the future) will be in deeper levels of the Mine. As a result, mining operations will become more remote from the central infrastructure, which will result in higher operating costs. Compass Lexecon's valuation ignores these higher costs, and how they will be (even) higher as a resulted of its increased production estimates.

1099 SRK, ¶ 72.

1100 Moreira, ¶ 79 (Unofficial translation: "*the estimated cost of electric power is illogical since, if an increase in production is foreseen, energy expenditures should be increased proportionally for a new plant*").

1101 Moreira, ¶¶ 36-37 (Unofficial translation: "*the [existing] transformer was [already] working at its maximum capacity*").

1102 Econ One, ¶ 68.

1103 Econ One, ¶ 68.

823. *Fourth*, Compass Lexecon includes general and administrative costs of US$ 2 million per year based on Colquiri's historical costs.[1104] Compass Lexecon underestimates overall costs by cherry-picking between the management reports and the audited financial statements for its estimates.[1105] Indeed, had However, the management reports relied upon by Compass Lexecon show that, historically, Colquiri's general and administrative costs were much higher. As explained by Econ One,

824. For the above reasons, the Tribunal should conclude that Compass Lexecon's valuation of the Mine Lease is inflated, and dismiss it outright.

7.3.4.3 The Old Tailings Reprocessing Project Was Not A Going Concern, Or, In Any Event, Economically Viable As Of Claimant's Or Bolivia's Valuation Date, And It Is Not So Today Either

825. Claimant maintains it would have invested on the Old Tailings Reprocessing Project on the basis of a Feasibility Study prepared in 2004 (*i.e.*, 8 ½ years before the Mine Lease was reverted), and that this Project would have allowed it "*to recover approximately 10 million tonnes of old tin and zinc tailings located next to the Colquiri Mine Operations*".[1106] Based on this, and RPA's analysis, Compass Lexecon estimates the NPV of the Old Tailings Reprocessing Project at more than US$ 100 million.[1107]

826. Claimant's claim is baseless and speculative.

827. *In limine*, Claimant's valuation of the Old Tailings Reprocessing Project (which represents more than US$ 100 million of the damages claimed by Claimant for Colquiri) is inherently speculative. Although no one has ever operated this Project, Claimant's experts' value it based on the DCF method and assuming it is a going concern with a proven record of profitability. Needless to say, this results in an arbitrary and highly speculative valuation (all of the inputs used in the DCF valuation are unsupported and were arbitrarily-chosen).

828. Moreover, there are, at least, ten reasons why this Project would not have been implemented and, in any case, why this Project would not have resulted in any positive NPV to Claimant.

1104 Compass Lexecon Expert Report, ¶ 55.

1105 Econ One, ¶¶ 55-56, 76-77.

1106 Statement of Claim, ¶ 271.

1107 Econ One, ¶¶ 45-47.

829. *First*, any willing buyer would have placed significant weight in the fact that Sinchi Wayra never developed this project. Under Claimant's account, it purportedly acquired control of the Colquiri Mine in March 2005, thus having 7 ½ years (*i.e.*, between March 2005 and June 2012, when the Mine Lease was reverted) to develop this project.[1108] It did not do so and neither RPA nor Compass Lexecon explain why. The only reasonable assumption a willing buyer would have made in 2012 is that the Project's economic viability was not enough to meet Claimant's hurdle rate. Indeed, this Project was the subject of several feasibility studies in the 1980s and early 2000s (studies prepared by Minproc in 1988 and by PAH in 2004) and, still, to date, no mine operator has invested on it. As explained by Eng Moreira:

> *lo que el Ing. Lazcano no se pregunta es por qué si este proyecto era tan atractivo, no fue puesto en marcha durante la administración privada (ni en la actualidad). Muy sencillo, además de las limitaciones físicas que ya expliqué, el reprocesamiento de las colas requiere inyectar una cantidad importante de capital para permitir el tratamiento de las colas y su viabilidad no es segura.*[1109]

830. *Second*, RPA's estimated head grades for the tailings are unduly high, and its assumption that they will remain constant throughout the life of the mine is mistaken. For instance, RPA estimates head grades for zinc at 4.21% even though the feasibility study on which RPA relies (to conclude that Colquiri would have implemented the Old Tailings Reprocessing Project) estimates zinc head grades at only 3.74%.[1110] Furthermore, RPA's assumption regarding constant grades ignores that the more recent tailings in the shallow part of the dam – which would be reprocessed first – have a lower grade than the older tailings – which are deposited deeper in the dam – because they result from the use of newer processing technologies (which can extract more metal than older technologies).[1111]

831. *Third*, RPA's estimated metallurgical recovery rates are unduly high (65% for zinc and 50% for tin), and the assumption that they will remain constant throughout the life of the mine is likewise mistaken. As explained by Prof. Rigby, "*[t]here is often a relationship between the head or feed grade to a process plant and the resulting metallurgical recovery. The higher the head grade, the higher the metallurgical recovery and vice versa*".[1112] Given that, as

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1108 Statement of Claim, ¶ 36.

1109 Moreira, ¶ 83 (emphasis added) (Unofficial translation: "*what Eng. Lazcano does not question is why if the project was so attractive, it was never commissioned during the private administration (or today). Very simply, in addition to the physical limitations that I already mentioned, reprocessing tailings requires spending an important amount of capital to allow the treatment of tailings and its viability is not certain*").

1110 Colquiri Tailings Feasibility Study, 2004, **CLEX-13**, p. 13; RPA FBD Glencore v Bolivia Expert Report, ¶ 55.

1111 Moreira, ¶ 87.

1112 SRK, ¶ 93.

explained above, old tailings' head grades will be variable and lower than estimated by RPA, so will be metallurgical recoveries.

832. *Fourth*, because it adopted the Triennial Plan at face value, Compass Lexecon has only considered an investment of US$ 5 million for the construction of a new tailings dam. This is clearly insufficient, given that (i) the existing dam has almost reached full capacity, and (ii) the increased production estimated by RPA (*i.e.*, 550,579 MT from the Mine's processing plant every year (since 2014) combined with the new tailings from the Old Tailings Project) will result in a vast amount of additional tailings that will need to be disposed of (as explained by Eng Moreira "*implica multiplicar por 500% nuestra producción*."[1113]). The Huanuni mine recently built a new tailings dam (Phase I) at a cost of US$ 9.5 million (plus the cost of purchasing the land).[1114] Consequently, Compass Lexecon should have estimated a much larger investment for the construction of the tailings dam.

833. *Fifth*, RPA considers an investment of US$ 30.5 million for the construction of a new tailings reprocessing plant,[1115] which is clearly insufficient.

834. *Sixth*, the operating costs estimated by RPA for the Old Tailings Reprocessing Project are unduly low. As explained by Prof. Rigby, there is only a small difference between the regular ore treatment process and the old tailings reprocessing ("*[g]iven the fact that the old tailings have already been processed once, the proposed new process flowsheet (for the old tailing) essentially only eliminated the frontend crushing stage from the existing flowsheet (used in the regular operations of the Colquiri plant)*)"[1116]. Consequently, operating costs for the old tailings reprocessing (estimated at US$ 13.16 / ton by RPA) are expected to be substantially higher and, in any case, closer to the regular ore treatment costs (US$ 20.20[1117]).

835. *Seventh*, while Compass Lexecon estimated capital and operating costs based on the 2004 feasibility study,[1118] it has not adjusted those costs for inflation or to reflect other changes resulting from the passage of time.

1113 Moreira, ¶ 18.

1114 Moreira, ¶ 63.

1115 RPA estimates capital costs "*at $46.5 million over the project life, including $30.5 million for initial plant construction and $15 million for sustaining capital*." See RPA FBD Glencore v Bolivia Expert Report, ¶ 61.

1116 SRK, ¶ 88.

1117 RPA FBD Glencore v Bolivia Expert Report, ¶ 23

1118 Compass Lexecon Expert Report, ¶ 56.

836. *Eight*, RPA and Compass Lexecon assume that there would be sufficient water in the Colquiri area to sustain their increased levels of production, and that operating costs would not be affected. However, this is not the case. As explained by Eng Moreira, "*habría que hacer maravillas para poder operar estas dos plantas [expanded processing plant and Old Tailings Project], en particular por la falta de agua y energía. En estos momentos, con una capacidad de tratamiento en planta de 1.300 tpd, ya tenemos muchos problemas de agua – es, simplemente, imposible encontrar suficiente agua en la zona*".[1119]

837. *Ninth*, RPA and Compass Lexecon ignore that the *cooperativistas* were already exploiting the old tailings.[1120] Therefore, given the social implications, the implementation of the Old Tailings Reprocessing Project would not be as straightforward and short-term as Eng Lazcano now pretends.[1121] As Eng Moreira explains:

> *Difícilmente íbamos a poder iniciar la explotación de las colas cuando ya estaban siendo explotadas por la Cooperativa 21 de Diciembre, que incluso había abierto túneles y bocaminas en la ladera del dique.*[1122]

838. *Tenth*, RPA estimates reclamation and closure costs for the Old Tailings Reprocessing Project at US$ 1 million.[1123] As explained by Prof. Rigby, this estimate is unduly low. Prof. Rigby expects the total reclamation and closure costs of Colquiri (*i.e.*, for the Mine and the Old Tailings Reprocessing Project) to be around US$ 8 million.[1124]

839. For the above reasons, the Tribunal should conclude that the Old Tailings Reprocessing Project would not have been implemented and, even assuming, *arguendo*, it had been, that this project would not have resulted in a positive NPV as of the valuation date. Consequently, the Tribunal should dismiss Claimant's damages claim.

1119 Moreira, ¶ 36 (Unofficial translation: "*[…] miracles would be needed to operate these two plants, especially due to the lack of water and energy. At the time, with the plant's treatment capacity of 1,300 tons per day we already have water issues – it is simply impossible to find sufficient water in the area*").

1120 Public deed of sublease of tailings, subscribed by Compañía Minera Colquiri S.A. and the Cooperativa "21 de Diciembre Colquiri LTDA" of 10 March 2006, **R-39**.

1121 Lazcano, ¶ 33.

1122 Moreira, ¶ 58 (Unofficial translation: "*It would have been difficult to start exploiting the tailings when they were being exploited by the Cooperativa 21 de Diciembre, which had even opened tunnels and mine entrances in the dam's side*").

1123 RPA FBD Glencore v Bolivia Expert Report, ¶ 62.

1124 SRK, ¶ 71.

7.3.4.4 The Discount Rate Used By Compass Lexecon To Estimate The NPV Of Colquiri's Future Cash Flows Is Unrealistically Low

840. Compass Lexecon discounts the projected cash flows of Colquiri (*i.e.*, resulting from the Mine Lease and the Old Tailings Reprocessing Project) at a rate equivalent to Colquiri's WACC as of 29 May 2012, which Compass Lexecon estimates at 12.3%.[1125]

841. Compass Lexecon's discount rate is unduly low. Bolivia will not repeat here the criticisms developed by Econ One in its report; rather, Bolivia will only make two general comments that reflect the arbitrariness of Compass Lexecon's discount rate calculation:

- Compass Lexecon has estimated a country risk premium that only reflects Bolivia's sovereign default risk. However, as explained by Econ One, "*the calculation of the country default spread is only the first step in the calculation of the country risk premium, since it only measures the risk of default on sovereign debt. The second step is to apply an adjustment to take into account the additional risks inherent in the equity market of a particular country that are not captured in the yield spread [i.e., equity risk premium]*".[1126] Had Compass Lexecon considered Bolivia's equity risk premium, it would have obtained a much higher country risk premium; and

- Compass Lexecon has not considered an illiquidity/size premium in its calculations. When calculating the WACC (based on the *Capital Asset Pricing Model* – CAPM) of smaller firms, as in the present case (Colquiri is a small firm), an illiquidity/size premium must be applied to better reflect their cost of capital. This is the case because, as explained by Econ One, most of the inputs used to calculate CAPM refer to large companies (much larger than Colquiri). Since an investment in a smaller firm is more volatile than an investment in a larger firm, calculating the CAPM without considering the size of the company would underestimate its true cost of capital. Furthermore, the CAPM measures the cost of capital for large publicly-traded companies which are considered to be very liquid assets, and this is not the case of Colquiri (an illiquid physical asset).

842. After correcting for these (and other) flaws, Econ One estimates Colquiri's discount rate as of 19 June 2012 at 22.13%.[1127]

1125 Compass Lexecon Expert Report, ¶ 74.

1126 Econ One, ¶ 167 (emphasis added).

1127 Econ One, ¶ 92.

843. For the above reasons, the Tribunal should conclude that Compass Lexecon's valuation of Colquiri is inflated, and dismiss it outright. Were the Tribunal to consider that Claimant has suffered damages that are certain and should be compensated (*quod non*), such compensation should be limited to US$ 39.7 million.[1128] However, this compensation must be adjusted to reflect (i) Claimant's contribution to its own loss (section 7.5) and (ii) the compensation already received by Claimant from its insurer (sections 2.5.4 and 2.6.1).

7.3.5 Compass Lexecon's Valuation Of The Tin Smelter Is Flawed As It Is Based On Unrealistic And Incorrect Assumptions

844. According to Compass Lexecon, the FMV of the Tin Smelter as of 8 February 2007 would be US$ 65.9 million.[1129] As in the case of Colquiri, Compass Lexecon projects the Tin Smelter's future cash flows (until 2026, when RPA estimates the Tin Smelter's production life will end), and then discounts them to obtain its NPV as of the valuation date.

845. *In limine*, Compass Lexecon's (inflated and unrealistic) valuation is inconsistent with the statements made by Claimant after the reversion of the Tin Smelter, where it expressed that it had suffered no material losses as a result of the reversion. Claimant's 2011 IPO prospectus states that:

> *[I]n 2007, the Bolivian government nationalised a smelter owned by a subsidiary of Glencore. However, in that instance, no material losses were sustained and Glencore continues to do business in Bolivia.*[1130]

846. Similarly, as explained above, Compass Lexecon's valuation is inconsistent with Colquiri's operating history. As explained by Econ One, while the Tin Smelter's EBIDTA ranged between US$ 0.4 million to US$ 14.7 million for the 7 years leading up to the valuation date, Compass Lexecon's valuation assumes that such EBIDTA would have been approximately 3 times higher during the next 20 years.[1131]

847. Compass Lexecon's valuation of the Tin Smelter is premised on a negligent, unreasonable and misinformed willing buyer (**Section 7.3.5.1**). Furthermore, it relies on unduly high production forecasts (**Section 7.3.5.2**), unduly high revenue forecasts (**Section 7.3.5.3**), underestimates operating and capital expenses (**Section 7.3.5.4**), and applies an unduly low discount rate (**Section 7.3.5.5**). These flaws are discussed below.

1128 Econ One, Table 1.

1129 Statement of Claim, ¶¶ 258-265.

1130 Prospectus of Glencore International plc of 3 May 2011, **R-193**, p. 13 (emphasis added).

1131 Econ One, ¶¶ 100-101.

7.3.5.1 Compass Lexecon's Valuation Of The Tin Smelter Is Premised On A Negligent, Unreasonable And Misinformed Willing Buyer

848. Compass Lexecon appears to ignore that the FMV standard requires that the Tin Smelter's valuation be premised on a reasonable, well-informed, knowledgeable and prudent willing buyer.

849. As explained in section 2.5.4 above, as of 2005, it was already publicly known that the State was considering regaining ownership of the Tin Smelter. Indeed, "*[t]he press reported that members of the Bolivian Parliament, including MAS members, had requested 'una reversión de la empresa metalúrgica Vinto, a favor del Estado' (a request backed by cooperativistas from Huanuni, also controlled at the time by RGB).*"[1132]

850. Any willing buyer in 2007 would have, therefore, factored in this risk when estimating the FMV of the Tin Smelter. As explained by the *Venezuela Holdings* tribunal:

> *Article 6(c) of the BIT requires that the compensation due in case of expropriation represent "the market value of the investments affected before the measures are taken or the impending measures became public knowledge, whichever is earlier". This means that the compensation must correspond to the amount that a willing buyer would have been ready to pay to a willing seller in order to acquire his interests but for the expropriation, that is, at a time before the expropriation had occurred or before it had become public that it would occur. The Tribunal finds that, it is precisely at the time before an expropriation (or the public knowledge of an impending expropriation) that the risk of a potential expropriation would exist, and this hypothetical buyer would take it into account when determining the amount he would be willing to pay in that moment.*[1133]

851. *Compass* Lexecon's willing buyer, however, ignores this risk, which results in an inflated valuation of the Tin Smelter.

852. A reasonable, well-informed, knowledgeable and prudent willing buyer would consider all available information about the asset before making its decision and take an active approach. In conducting a due diligence of the Tin Smelter, a willing buyer would find that the production units were old (*i.e.*, had been in operations for more than 30 years) and obsolete, and that some units were out of service. Any willing buyer would have thus concluded that

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1132 See section 2.5.4.

1133 *Venezuela Holdings, B.V., 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 of 9 October 2014, **RLA-65**, ¶ 365 (emphasis added).

significant refurbishment and modernization. Indeed, as Eng Villavicencio explains when describing the state of the production units:

> *era indispensable modernizar la operación (para reducir costos y mantener la producción). De lo contrario, en 5 años habríamos comenzado a operar a pérdida.*[1134]

> *No reparar y renovar los equipos y maquinaria productiva, que tenían más de 30 años de operaciones, habría significado que nos quedásemos a la zaga de la economía mundial en cuanto a la producción de estaño metálico, soportando costos de producción más altos que otras fundidoras. Invertir en nuevos equipos y tecnología resultaba imperativo para mantener la producción. De hecho, en 2008 tuvimos una fuerte pérdida en la empresa debido a la falta de disponibilidad de reverberos.*[1135]

7.3.5.1 Claimant's Valuation Of The Tin Smelter Is Inflated

853. Section V.2 of Compas Lexecon's report describes the different variables considered in its DCF valuation of the Tin Smelter. These are (i) production schedule, (ii) grades recoveries and prices, (iii) operating and capital expenses, and (iv) the Tin Smelter's discount rate (calculated based on the WAAC).[1136] Given that the inputs used in Compass Lexecon's model are mistaken, so is its valuation.

a) Compass Lexecon relies on unduly high production forecasts

854. Claimant maintains that "*[b]ased on the smelter's capacity, its historical performance and RPA's analysis, Compass Lexecon projects that, but-for the expropriation, Vinto's Tin Smelter would have processed 30,000 tonnes of tin concentrate annually from 2008, with a tin recovered yield of 46.6 percent*."[1137] This is wrong for, at least, three reasons.

855. *First*, RPA's production estimates are inconsistent with the Tin Smelter's historical performance. As explained by Econ One, the processing capacity of the Tin Smelter remained below 20,000 MT up through 1999, and then remained at or below 25,000 MT between 2003 and 2006.[1138] Thus, it is not reasonable to assume, as RPA does, that (i) the Tin Smelter will

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1134 Villavicencio, ¶ 47 (Unofficial translation: "*it was crucial to modernize the operation (in order to reduce costs and maintain production). Otherwise, in 5 years we would have started to operate at a loss*").

1135 Villavicencio, ¶ 49 (Unofficial translation: "*If we didn't repair and update the equipment and production machinery, which had been operating for more than 30 years, we would have remained behind the world economy regarding the production of metallic tin and thus we would have borne higher production costs than other smelters. Investing in new equipment and technology was crucial to maintain production. For instance, in 2008 we faced an important loss in the company due to the lack of availability of reverberatory furnaces*").

1136 Compass Lexecon Expert Report, ¶ 77.

1137 Statement of Claim, ¶ 259.

1138 Econ One, ¶¶ 103-108

process 30,000 MT per year, and (ii) that such production rate will remain constant throughout the life of the Smelter.

856. *Second*, RPA's projections ignore the reality of the Tin Smelter. As explained by Eng Villavicencio, when it reverted to the State in February 2007, "*[l]os hornos y demás unidades de producción [de la Fundidora de Estaño] se encontraban en estado obsoleto*."[1139] In these circumstances, it is not reasonable to assume that the Tin Smelter would reach its highest historical production as of the year following the reversion (*i.e.*, as of 2008). Quite the opposite. Eng Villavicencio explains that "*[d]e hecho, en 2008 tuvimos una fuerte pérdida en la empresa debido a la falta de disponibilidad de reverberos*."[1140] The production levels projected by RPA have not even been attained even after the US$ 39 million investment made by the Tin Smelter in the Ausmelt Furnace (*i.e.*, the latest smelting technology), which neither RPA nor Compass Lexecon consider.[1141]

857. RPA's sole justification for its increased production estimates is the so-called "investments" made in the Tin Smelter between 2002 and 2006, which would, allegedly, contribute to increased production. But this is highly misleading. As explained by Eng Villavicencio, EMV's General Manager, all of the so-called "investments" listed by RPA are nothing more than operating expenses aimed at sustaining the continuity of operations.[1142] Among these operating expenses are "*construcción de duchas y vestuarios adecuados para los trabajadores*", "*[c]ambios en el material de los filtros empleados en el sistema de filtración de emisiones gaseosas*", and "*[i]nstalación de un sistema neumático para el golpeado mecánico del horno.*"[1143] They have no bearing on production.

858. *Third*, Claimant's experts' production forecasts are also untethered from the reality of the tin market in Bolivia. Indeed, Claimant's experts assume that the Tin Smelter would process 30.000 annual tons of concentrates to produce 14.000 annual tons of ingots as of 2008 for 18 years, but ignores the fact that there is a lack of sufficient tin concentrates in the Bolivian market. As Eng Villavicencio explains:

1139 Villavicencio, ¶ 46 (Unofficial translation: "*[t]he furnaces and other production equipment [in the Tin Smelter] were obsolete*").

1140 Villavicencio, ¶ 49 (Unofficial translation: "*[f]or instance, in 2008 we faced an important loss in the company due to the lack of availability of reverberatory furnaces*").

1141 Villavicencio, ¶ 64.

1142 Villavicencio, ¶ 39.

1143 Villavicencio, ¶¶ 77, 83-84 (Unofficial translation: "*construction of appropriate showers and changing rooms for workers", "[c]hanges in the filter material used in the gas emission filtration system" "[i]nstallation of a pneumatic system for the mechanic tapping of the furnace"*").

proyecta la producción de la Fundidora de Vinto (por un período de 20 años) "asumiendo" que procesaría 30.000 TMS y que habría un porcentaje de estaño recuperado constante de 46.6%, sin considerar, especialmente, la falta de disponibilidad de concentrados en Bolivia.[1144]

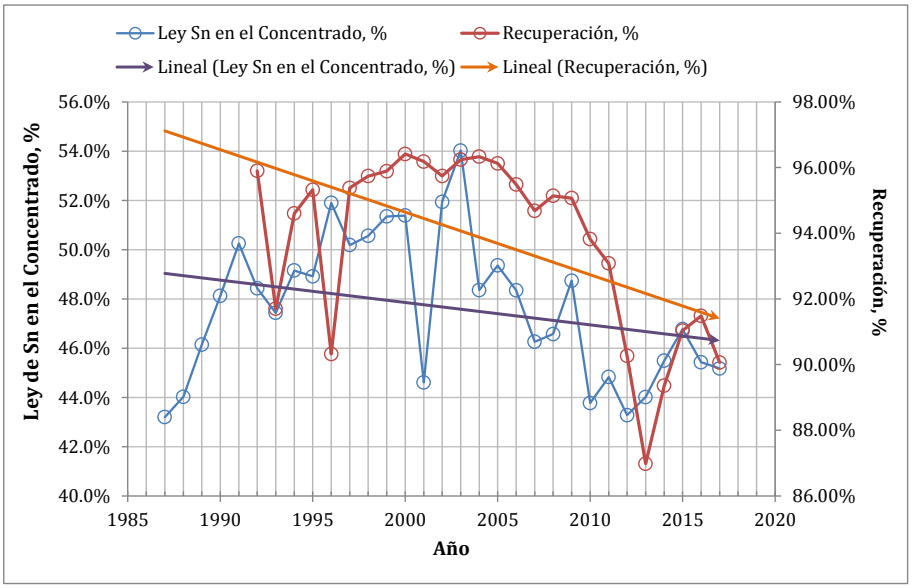
859. Claimant's experts' production forecasts are, therefore, unrealistic.

b) Compass Lexecon estimates unduly high grades, recoveries and prices

860. Compass Lexecon considers tin ingot sales prices and applies it to the estimated production of ingots (which, in turn, depend on the grades in the concentrates processed by the Smelter and the metallurgical recovery achieved during the smelting process) to calculate the Tin Smelter's revenues.

861. Compass Lexecon's estimates are wrong for, at least, four reasons.

862. *First*, RPA assumes that unduly high concentrates grades (48.75% Sn) would remain constant throughout the Tin Smelter's production life. This is wrong. *On the one hand*, the Tin Smelter's historical operating performance shows that, from 1987 to date, concentrate grades have been in steady decline (*e.g.*, 50.25% in 1990, 48.74% around 2009, 46.77% in 2015 and so on).[1145]



863. There is no reason to expect this trend will change. *On the other hand*, as acknowledged by Compass Lexecon, "*[t]he Tin Smelter processes various concentrates from not only the*

[1144] Villavicencio, ¶ 63 (emphasis in original) (Unofficial translation: "*estimates the production of the Vinto Smelter (for a 20-year period) 'assuming' that it would process 30,000 metric tons and that there would be a consistent percentage of recovered tin of 46.6%, without considering in particular, the lack of availability of concentrates in Bolivia*").

[1145] Villavicencio, ¶ 70.

Colquiri Mine, but also from other mines and cooperatives; <u>each of these mines typically produces concentrate at different grade</u>".[1146] Because the Tin Smelter acquires concentrates from different sources and with different grades, it is wrong to assume that grades will remain constant in time.

864. *Second*, RPA assumes "*[m]etallurgical recoveries of 95.6% for Sn resulting in a 99.95% pure Sn bullion product*",[1147] which would remain constant in time until 2026. This is mistaken. Given that, as explained above, concentrate grades are expected to be lower than estimated by RPA (and also variable), so will be metallurgical recovery.

865. *Third*, Compass Lexecon has not corroborated its tin ingot price forecasts "*with any internal business plans or price forecasts from Colquiri, Sinchi Wayra S.A., Glencore International or any other related party*",[1148] even though there is reason to believe that such internal price forecasts exist.[1149] This is not to say that the willing seller's subjective views about future prices are controlling. However, in estimating a reasonable future price scenario, a willing buyer would have sought to collect as many data points about pricing as possible, including the price projections generated in the ordinary course of business by the relevant players in the tin market in Bolivia and worldwide (such as Colquiri – a tin producer; Sinchi Wayra – former shareholder of the Tin Smelter; and Glencore International – one of the largest worldwide traders of tin).

866. *Fourth*, Compass Lexecon's premium estimate (which results in adding between US$ 203 to US$ 289 per tonne to tin ingot sales prices) is based on a single contract signed by the Tin Smelter and Soft Metals in 2006 for the supply of 14 tonnes with a 3% over LME price premium.[1150] This is not representative. <u>One</u>, a single contract entered into in February 2006, *i.e.*, almost a year before the valuation date does not provide a sufficiently reliable basis to project premia for contracts to be entered in the following 20 years. <u>Two</u>, even Glencore International's own short-term purchase contracts with the Tin Smelter shortly after the valuation date confirm that Compass Lexecon price projections are way off the mark.[1151] For example, as Eng Villavicencio explains, "*los contratos entre Glencore y Vinto de 19 de julio de 2007 (que fija un premio de USD 120), de 17 de septiembre de 2007 (con premio de USD*

1146 Compass Lexecon Expert Report, ¶ 79 (emphasis added).

1147 RPA FBD Glencore v Bolivia Expert Report, ¶ 66.

1148 Econ One, ¶ 116.

1149 Econ One, ¶¶ 115-116.

1150 Vinto SA-Soft Metals Ltda - Purchase Contract 03 - 20.02.06, **CLEX-32**.

1151 Econ One, ¶ 117.

75), de 18 de octubre de 2007 (que establece un premio de USD 35) y el de 12 de noviembre de 2008 (que establece un premio de USD 146). Desde 2009, los premios han oscilado entre USD 50 y 300 sobre el precio del mercado."[1152] Three, recently Glencore made an offer to purchase tin ingots without a premium, as confirmed by Eng Villavicencio.[1153] Four, Compass Lexecon includes a 3% constant premium over tin prices while, as explained by Eng Villavicencio, no direct correlation can be established between premia and tin market prices:

> *indexar el premio a largo plazo como un porcentaje del precio de estaño, como hace Compass Lexecon, no es habitual. El precio del estaño fluctúa según la demanda del mercado, por lo que basar el premio a largo plazo en esa cotización no tendría sentido por su imprevisibilidad. No existe relación directa entre el premio y el precio, más bien, el premio depende de la calidad del producto (como en nuestro caso, que producimos lingotes con un muy bajo contenido de plomo – 17g/TM de plomo frente a los 50kg/TM habituales en el mercado).*[1154]

867. Considering a broader sample of contracts, as Econ One does, demonstrates that the average premium is substantially lower than that applied by Compass Lexecon.[1155]

c) Compass Lexecon ignores or underestimates necessary operating and capital expenses

868. In order to further exaggerate the FMV of the Tin Smelter, Compass Lexecon omits to include significant costs in its model, despite projecting a significant increase in production. To arrive at this result, RPA and Compass Lexecon assume that *"economies of scale [would] come with the increase in concentrate feed*" and, on that basis, proceed to estimate the *"smelting, quality control, maintenance, and other indirect expenses*" at US$ 9.3 million.[1156] Compass Lexecon further considers US$ 300,000 for general and administrative costs, and US$ 800,000 for sustaining capital expenditures annually.[1157]

1152 Villavicencio, ¶ 87 (Unofficial translation: "*the contracts between Glencore and Vinto of 19 July 2007 (that fixes a price premium of USD 120), of 17 September 2007 (with a price premium of USD 75), of 18 October 2007 (that establishes a price premium of USD 35) and of 12 November 2008 (that establishes a price premium of USD 146). Since 2009, price premiums have oscillated between USD 50 and 300 over the market price.*").

1153 Villavicencio, ¶ 87; Econ One, ¶ 118. See also, Purchase offer for 200 TMN of Metallic Tin from Glencore of 19 September 2017, **R-83**.

1154 Villavicencio, ¶ 88 (Unofficial translation: "*indexing the price premium in the long term as a percentage of the price of tin, as done by Compass Lexecon, is un usual. The price of tin fluctuates following the market demand, therefore, basing the price premium in the long term on that price makes no sense due to its unpredictability. There is no direct relation between the price premium and the price, rather, the price premium depends on the product's quality (as in our case where we produce ingots with a very low lead content - 17g/metric ton of lead versus the usual 50kg/metric ton in the market)*").

1155 Econ One, ¶¶ 117-120.

1156 Compass Lexecon Expert Report, ¶ 85.

1157 Compass Lexecon Expert Report, ¶ 85.

869. Compass Lexecon's model ignores or underestimates necessary capital investments and operating costs for, at least, five reasons.

CAPEX

870. *First*, while Compass Lexecon assumes that the Tin Smelter's production would reach its historical maximum as of 2008 (*i.e.*, only a year after reversion), it conveniently forgets to consider the significant CAPEX investment that would be needed to achieve the stated production level.[1158] Indeed, as of February 2007, the main furnaces and production units were working at maximum capacity with a limited life-span of 3 to 5 months (after which overhauls would be necessary), while other units had been put out of service. Eng Villavicencio explains that:

> *Las 5 unidades principales de producción (hornos reverberos 3 y 4, horno eléctrico, y hornos volatilizadores 2 y 4) tenían, a partir del 31 de enero de 2007, una vida útil de 3 a 5 meses, mientras las otras unidades de producción estaban fuera de servicio y paralizadas.*[1159]

871. This is far from unexpected given that most of the production units were commissioned in the 1970s (when the Tin Smelter began operations) and had not been refurbished. In fact, Eng Villavicencio confirms that "*[l]a privada había operado hasta el límite la maquinaria, agotando su vida útil sin hacer los mantenimientos mayores (overhauls) necesarios. Los hornos y demás unidades de producción se encontraban en estado obsoleto dado que la empresa privada no había realizado inversiones importantes*."[1160]

872. It is, hence, not reasonable to assume that the Tin Smelter would reach "*maximum historical production levels*" (using the old furnaces existing as February 2007) when it has not even been able to do so with the Ausmelt Furnace (which required a US$ 39 million investment).[1161]

873. *Second*, Compass Lexecon estimates that only US$ 800,000 per year will be spent, as sustaining capital,[1162] in the Tin Smelter. This amount is clearly insufficient. As explained by Eng Villavicencio:

1158 Compass Lexecon Expert Report, ¶ 79-85 and Table 6; RPA FBD Glencore v Bolivia Expert Report, ¶¶ 195, 202.

1159 Villavicencio, ¶ 47(a) (Unofficial translation: "*the 5 main units of production (reverbaratory furnaces 3 and 4, electric furnace, volatilization furnaces 2 and 4) had, from 31 January 2007, a useful life of between 3 and 5 months, while the other production units were out of service and paralyzed*").

1160 Villavicencio, ¶ 46 (Unofficial translation: "*[t]he private company had operated the machinery until its limit, consuming its useful life without carrying out the necessary maintenance (overhauls). The furnaces and other units of production were obsolete given that the private company did not make important investments*").

1161 Villavicencio, ¶ 66.

1162 Compass Lexecon Expert Report, ¶ 85.

Esto es insuficiente. Para mantener un nivel de procesamiento de 30.000 TMS, como proyectan RPA y Compass Lexecon – asumiendo que se tuviese la maquinaria necesaria – se deben hacer inversiones importantes para mantener los equipos en condiciones óptimas de producción (acortando los lapsos de los mantenimientos y overhauls preventivos, por ejemplo).[1163]

OPEX

874. *First*, Compass Lexecon assumes that, as a result of the Tin Smelter's increased production, it would automatically benefit from economies of scale and thus would have lower operating costs per tonne in 2007-2013 (*i.e.*, the first years of the model) than in 2006. Compass Lexecon's assumption is unsupported. As explained by Econ One, "*Compass Lexecon relies on the RPA Report to support these supposed economies of scale, but the reference Compass Lexecon makes is a quote regarding operations at Colquiri*".[1164]

875. *Second*, Compass Lexecon's tin concentrate purchase price estimate is also based on a single contract signed by the Tin Smelter and Colquiri in 2007. As for the ingot sales, it is unreasonable to project purchase prices for the next 20 years on the basis of a single contract. It is even more unreasonable to do so when, as in the present case, the Tin Smelter acquired most of its concentrates (60%) from the Huanuni mine (and not Colquiri).[1165]

876. *Third*, Compass Lexecon estimates that the Tin Smelter's general and administrative costs will only amount to US$ 300,000 per year (during the next 20 years). This is wrong on many counts. Compass Lexecon's estimate is arbitrarily based on the amount of G&A incurred in 2006 (US$ 264,395) and ignores that, in the previous year (*i.e.*, 2005), G&A costs amounted to US$ 751,243 (*i.e.*, almost three times G&A costs for 2006). As explained by Econ One, "*it is more appropriate to assume that G&A in the future would be equal to the average incurred in 2005 and 2006, or US$ 507,819, instead of Compass Lexecon's assumption that the lowest of two very different values is the most appropriate*".[1166]

d) The discount rate used by Compass Lexecon is unduly low

[1163] Villavicencio, ¶ 86 (Unofficial translation: "*This is insufficient. To maintain a processing level of 30.000 metric tons, as RPA and Compass Lexecon project – assuming that one has the necessary machinery – one has to make important investments in order to maintain the equipment in optimal condition for production (limiting the intervals between maintenance and preventative overhauls, for example)*").

[1164] Econ One, ¶ 110.

[1165] This is acknowledged by Compass Lexecon (see Compass Lexecon Expert Report, ¶ 79) and confirmed by Eng Villavicencio (see Villavicencio, ¶ 16).

[1166] Econ One, ¶ 111.

877. Compass Lexecon discounts the projected cash flows of the Tin Smelter at a rate equivalent to the Tin Smelter's WAAC as of 8 February 2007, which Compass Lexecon estimates at 15.7%.[1167]

878. Compass Lexecon's discount rate is unduly low. Bolivia will not repeat here the criticisms developed by Econ One in its report; rather, Bolivia will only make three general comments that reflect the arbitrariness of Compass Lexecon's discount rate calculation.

879. *First*, following the adjudication of the sales contract to Allied Deals, local organizations and unions in Oruro[1168], as well as members of the Bolivian Parliament,[1169] called for investigations to be carried out prior to the conclusion of the sale purchase agreement. Indeed, by early 2005, "*[t]he overthrow of the main champion of neo-liberal economics in 2003, the rise of Evo Morales, the palpable shift of politics to the left throughout the country and the decline of the traditional party structure ha[d] left the business environment clouded with uncertainty*."[1170] Fully aware of the risk that this Asset might be reverted to the State in the near future, Glencore International still acquired the Tin Smelter.

880. *Second*, the significant risks of investing in the mining sector in Bolivia were being reported as of February 2007. Such that any willing buyer would have taken into consideration the

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1167 Compass Lexecon Expert Report, Section V.2.6, ¶¶ 89-90.

1168 Statement of the Oruro Civic Committee, **R-122** ("*TERCERO.- Solicitar al Gobierno la inmediata realización de gestiones para que el daño económico infringido al Departamento de Oruro sea revertido, recuperándose el valor total de los materiales y concentrados obsequiados al Consorcio ALLIED DEALS.*") (Unofficial translation: "*THIRD.- Request the Government to immediately take the necessary measures so that the economic damage caused to the Department of Oruro can be reverted, thus recovering the total value of materials and concentrate gifted to the Consortium ALLIED DEALS*").. See, also, Letter from the Oruro Central Obrera to President Banzer Suárez of 23 May 2001, **R-126** ("*la clase trabajadora y lodos los sectores del pueblo de Oruro, nos encontramos agobiados por el hambre y la miseria que reina en nuestro sociedad debido a que nuestro patrimonio y que constituía FUENTE DE TRABAJO, ha sido enajenado ilegalmente y en un monto absolutamente exiguo constituyendo un engaño en la venta del Complejo Metalúrgico de Vinto a la Empresa [Allied Deals]*") (Unofficial translation: "*the working class and all sectors of the people of Oruro are overwhelmed by the hunger and misery that reigns in our society given that our asset, which constituted a SOURCE OF WORK, has been transferred illegally and for a completely inadequate amount, which amounts to fraud in the sale of Complejo Metalúrgico de Vinto to the company [Allied Deals]*").

1169 Letter from Representative Pedro Rubín de Celis to the *Contralor General de la República* of 10 May 2001, **R-124**, p. 2 ("*En el numeral 5 del documento denominado 'acta de Entendimiento' en fecha de 2 de marzo de 2000 por los Presidentes de Vinto y COMIBOL, por una parte, y por el representante de ALLIED DEALS PLC dice textualmente: 'la vendedora depositará, a la brevedad posible en sus almacenes – estaño e incluir estaño metálico dentro de los ítems ofertados en la venta de la Fundidora'. De esta manera, los compradores obtuvieron en forma fraudulenta el dinero para comprar la propia fundición en forma de estaño en circuito, en concentrados y en metálico por un valor de [US$ 11,477,539]. A ello habrá que añadir las 500 toneladas de estaño metálico entregadas a favor de la compradora como respaldo al valor ajustado del material en circuito y al valor ajustado de los activos fijos*") (Unofficial translation: "*Item 5 of the document named 'minutes of Understanding' of 2 March 2000 [executed] by the Presidents of Vinto and COMIBOL, on the one hand, and by the representative of ALLIED DEALS PLC, literally says: 'the seller will deposit shortly in its warehouses – tin and include metallic tin within the items offered in the sale of the Smelter. This way, the buyers obtained fraudulently the money to buy the smelter itself in the form of pipeline tin, in concentrates and metal for the amount of [US$ 11,477,539]. To this must be added 500 tons of metallic tin delivered in favor of the buyer as a guarantee of the adjusted value of the pipeline material and the adjusted value of fixed assets*"). See, also, Formal complaint by Representative Pedro Rubín de Celis against Minister Carlos Saavedra Bruno, **R-125**.

1170 Business Monitor International, *Risk Summary - Bolivia*, 14 January 2005, **R-171**.

"*little potential for significant improvement in the investment climate in Bolivia […] government remains keen to nationalise the mining industry*".[1171] In spite of this, Compass Lexecon has estimated a country risk premium that only reflects Bolivia's sovereign default risk. However, as explained by Econ One, "*the calculation of the country default spread is only the first step in the calculation of the country risk premium, since it only measures the risk of default on sovereign debt. The second step is to apply an adjustment to take into account the additional risks inherent in the equity market of a particular country that are not captured in the yield spread [i.e., equity risk premium]*".[1172] Had Compass Lexecon considered Bolivia's equity risk premium, it would have obtained a much higher country risk premium.

881. *Third*, Compass Lexecon has not considered an illiquidity/size premium in its calculations. When calculating the WACC (based on the CAPM) of smaller firms, as in the present case (the Tin Smelter is a small firm), an illiquidity/size premium must be applied to better reflect their cost of capital. This is the case because, as explained by Econ One, most of the inputs used to calculate CAPM refer to large companies (much larger than the Tin Smelter). Since an investment in a smaller firm is more volatile than an investment in a larger firm, calculating the CAPM without considering the size of the company would underestimate its true cost of capital. Furthermore, the CAPM measures the cost of capital for large publicly-traded companies which are considered to be very liquid assets, and this is not the case of the Tin Smelter (considered an illiquid physical asset).

882. After correcting for these (and other) flaws, Econ One estimates the Tin Smelter's discount rate as of 8 February 2007 at 28.48%.

883. For the above reasons, the Tribunal should conclude that Compass Lexecon's valuation of the Tin Smelter is inflated, and dismiss it outright. Were the Tribunal to consider that Claimant has suffered damages that are certain and should be compensated (*quod non*), such compensation should be limited to US$ 12.1 million.[1173] However, this compensation must be adjusted to reflect (i) Claimant's contribution to its own loss (section 7.5) and (ii) the compensation already received by Claimant from its insurer (sections 2.5.4 and 2.6.1).

7.3.6 Compass Lexecon's Estimate Of The FMV Of The Antimony Smelter Is Incorrect Because It Is Based On A Valuation (Performed By Ms Russo) Which Is

[1171] BMI Report - Bolivia Risk Ratings Report of 8 February 2007, **R-267**.

[1172] Econ One, ¶ 167 (emphasis added).

[1173] Econ One, ¶ Table 4.

Methodologically Flawed And Disregards Key Variables That Make This Asset Valueless

884. It is undisputed that the Antimony Smelter was only "*occasionally*" used as a mere storage facility.[1174] Furthermore, as explained by Eng Villavicencio, at the time it reverted to the State (*i.e.*, in 1 May 2010), the Antimony Smelter was a dismantled facility (with copper having been even stripped from the electrical wiring).[1175]

885. Despite this, Claimant claims an astounding US$ 2.2 million as "*the FMV of the Antimony Smelter*", which, it asserts, "*is equivalent to the sum of the value of its individual components [i.e., land, buildings and improvements]*."[1176] Claimant claims this amount based on the valuation performed by Ms Russo, which follows the asset-based approach and values the asset as of 15 August 2017 (*i.e.*, *ex post*).[1177]

886. *In limine*, as explained in section 7.3.2, the Treaty specifies the standard of compensation applicable to an expropriation. The parties to the Treaty agreed that "[…] *compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier* […]."[1178] This constitutes, per the will of the parties to the Treaty, full reparation for the purpose of a dispute under the Treaty. Accordingly, the Antimony Smelter should be valued as of 30 April 2010 (*i.e.*, the day immediately before it reverted to the State).

887. Aside from ignoring the reality of the Antimony Smelter, which is an obsolete asset, Ms Russo's valuation incurs in, at least, five methodological flaws that invalidate her valuation.

888. *First*, Ms Russo values the Land assuming it could have a residential use in the future. A minimum knowledge of the Antimony Smelter and its history and the context in Oruro belie this assumption. Indeed, Ms Russo's analysis overlooks (i) that the Land is located right next to the Tin Smelter, which has been operative since 1971[1179] and produces harmful gas emissions,[1180] and (ii) while operative, the Antimony Smelter also generated contaminated waste that remained in the soil and the environment (to date, the Antimony Smelter has not

1174 Statement of Claim, ¶ 59.

1175 Villavicencio, ¶¶ 95, 98.

1176 Statement of Claim, ¶ 251.

1177 Informe de Avalúo - Gina Russo of 15 August 2017, Section 3.

1178 Treaty, **C-1**, Article 5(1).

1179 Villavicencio, ¶¶ 14, 103.

1180 Villavicencio, ¶ 109.

been remediated).[1181] In this context, it is evident that the Land cannot serve a residential purpose (now or in the future). Had Ms Russo visited the Antimony Smelter this much would have been apparent to her.

889. Moreover, as Eng Villavicencio:

> *tenemos dos ejemplos de terrenos de las fundidoras Metabol y Operaciones Metalúrgicas S.A. (OMSA) de plomo y estaño, respectivamente, en Oruro que cerraron en los años 90 y que hoy, lejos de haber sido urbanizados, han quedado vacantes. Y esto pese a que están dentro del radio urbano, en la zona sur de Oruro (mientras que la Fundidora de Antimonio está a las afueras). Aunque los alrededores de dichas fundidoras sí han visto un gran crecimiento urbanístico, sus terrenos no han sido edificados*.[1182]

890. *Second*, contrary to Article V of the Treaty, Ms Russo's valuation is premised on a negligent and misinformed willing buyer. Although she (i) acknowledges that the Land's use is "*mostly industrial*" and (ii) assumes that the Land could be used for residential purposes, her valuation ignores several fundamental costs that would be considered by any willing buyer (*e.g.*, the closure, remediation and dismantling costs that would need to be incurred to remediate the environment and dismantle the 40-plus-year-old infrastructure).[1183]

891. *Third*, Ms Russo's valuation incurs in a number of contradictions aimed at inflating the value of the Antimony Smelter. Although her valuation assumes that the Land would serve a residential purpose, she goes on to emphasize the "*mostly industrial*" use of the Land to avoid applying factors that would otherwise reduce its value. For instance:

- Size factor: Because of the Land's "*predominantemente industrial*" use, Ms Russo concludes that "*los conceptos de recreación y equipamiento [como factores] no son asimilables*" and thus should not be applied to reduce the area that could be valued.[1184]

- Shape factor: "*[S]i bien la forma del terreno de la Fundición de Antimonio podría considerarse irregular [y por ende dan lugar a la aplicación del coeficiente de*

1181 Villavicencio, ¶¶ 107-108.

1182 Villavicencio, ¶ 104 (Unofficial translation: "*we have two examples of the land from the Metabol and Operaciones Metalúrgicas S.A. (OMSA) lead and tin smelters, respectively, in Oruro, which closed during the 90s and today, far from being developable areas, have remained vacant. This, despite the fact that they are located inside the urban area, in the south of Oruro (while the Antimony Smelter is located in the outskirts). Although the areas surrounding those smelters have been experience important urban growth, the land has not been developed*").

1183 Mirones, Section 9.

1184 Informe de Avalúo - Gina Russo of 15 August 2017, ¶ 5.14.3 (Unofficial translation: "*predominantly industrial*"; "*the concepts of recreation and public facilities [as factors] are inapplicable*").

forma], su extenso tamaño y su uso industrial hacen irrelevante la aplicación de este factor […]."[1185] Yet, Ms Russo insists on applying residential use values to the Land.

892. *Fourth*, although Ms Russo assumes that the Land could serve a residential purpose, it grants value to the industrial structures currently existing at the Antimony Smelter (*e.g.* sheds, offices, storage rooms, guardhouse, etc.). Rather than giving value to outdated structures and buildings, Ms Russo should have considered demolition costs consistent with its intended residential use.

893. *Fifth*, Ms Russo did not visit the Antimony Smelter, go to the cadaster or perform any formal studies to determine, among others, the exact area of the Land and state of structures. This is contrary to the minimum diligence required from a real estate valuator.

894. Indeed, Ms Russo's valuation of the infrastructure does not reflect the poor state of the buildings, which, as can be clearly seen in the photos taken during the 3 May 2010 inspection following the asset's reversion to the State,[1186] were far from being in the generous "*regular*"[1187] state qualified by Ms Russo:

DETERIORO EN NAVE DE CONCENTRADOS

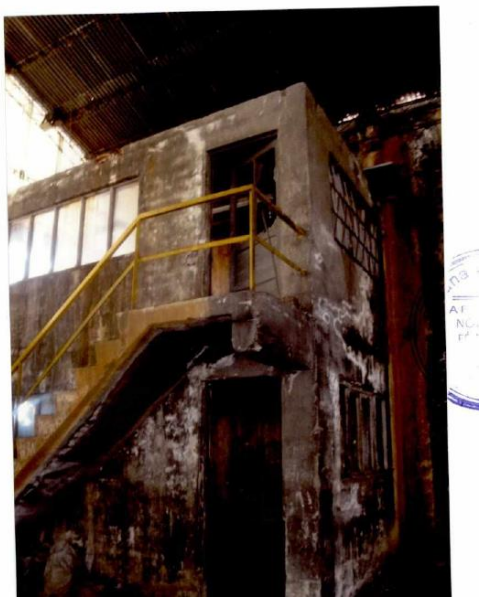
DETERIORO DE AMBIENTES PREPARACION DE CARGA

1185 Informe de Avalúo - Gina Russo of 15 August 2017, ¶ 5.14.4 (emphasis added) (Unofficial translation: "*[E]ven though the shape of the Antimony Smelter's land might be considered irregular [and thus give rise to the application of the size factor], its large size and industrial use render the application of this factor irrelevant*").

1186 Notarized Inventory of the Antimony Smelter as of 1 May 2010, **R-84**.

1187 Informe de Avalúo - Gina Russo of 15 August 2017, Table 17.

DETERIORO DE AMBIENTES



895. Moreover, Ms Russo's desktop exercise is also apparent in her valuation of all the buildings as if they were all concrete structures with a concrete base.[1188] Save for "*la nave principal, los almacenes y la estructura del transformador*" (as explained by Eng Villavicencio),[1189] the buildings are precarious wooden or brick structures (as can be seen in the May 2010 photos below).[1190]

OFICINAS VACIAS VERIFICADAS POR NOTARIA DE FE PÚBLICA

INGRESO A OFICINAS PARA INVENTARIO EN PRESENCIA DE NOTARIA DE FE PÚBLICA

896. As explained by Eng Villavicencio, neither did Ms Russo inspect the Antimony Smelter's infrastructure before valuing it.[1191] Ms Russo could have requested access to the Antimony

1188 Informe de Avalúo - Gina Russo of 15 August 2017, Table 12.

1189 Villavicencio, ¶ 112 (Unofficial translation: "*the main industrial unit, the warehouses and the transformer building*").

1190 Notarized Inventory of the Antimony Smelter as of 1 May 2010, **R-84**.

1191 Villavicencio, ¶ 12.

Smelter to inspect its infrastructure, but chose not to do so. It is not reasonable to base the valuation of 40-plus-year-old infrastructure on satellite images.[1192]

897. These methodological flaws render Ms Russo's valuation grossly unreliable as a basis for an award of damages. In fact, the Antimony Smelter is a liability and not an asset.

898. *On the one hand*, the building structures of the Antimony Smelter will need to be demolished given their dire state. Eng Villavicencio has attested as to the state of the buildings (many of which were built out of precarious, recycled materials) as of the May 2010 reversion. Indeed, "*las edificaciones (salvo por aquellas que nosotros hemos rehabilitado desde 2010 para auxiliar las actividades de fundición de estaño de Vinto) no tienen ninguna utilidad, y deben ser desmanteladas y demolidas, lo cual representa un coste superior al de las estructuras mismas*."[1193]

899. *On the other hand*, the Antimony Smelter is also an environmental liability. The Antimony Smelter was in production until the late 90s and then again for a few months in 2002. During this time, it generated contaminated industrial waste (*"desechos resultantes de las operaciones metalúrgicas, como escoria con óxidos de hierro y de calcio (un material particularmente duro y difícil de retirar) y […] desechos de arsénico en una piscina ubicada al este del terreno*" [1194]) that has not been remediated to date. Moreover, the Antimony Smelter is within the direct area of influence of the operating Tin Smelter.[1195] As explained by Eng Villavicencio, the Tin Smelter produces "*<u>constantemente</u> la pluma de arsénico y azufre generada por los procesos de tostación de la Fundidora*."[1196] These environmental liabilities derive in significant remediation costs that any willing buyer would take into consideration.

1192 Informe de Avalúo - Gina Russo of 15 August 2017, ¶ 4.6.

1193 Villavicencio, ¶ 117 (Unofficial translation: "*the buildings (except for those that we rehabilitated since 2010 to assist Vinto's tin smelting) do not have any use and must be dismantled and demolished, which represents a higher cost than that of the structure itself*").

1194 Villavicencio, ¶ 107 (Unofficial translation: "*waste resulting from metallurgic operations, such as slag with iron and calcium oxide (a particular tough material and difficult to remove) and […] arsenic waste in a pool located to the east of the land*").

1195 Villavicencio, ¶ 103.

1196 Villavicencio, ¶ 109 (emphasis in original) (Unofficial translation: "*a constant plume of arsenic and sulfur generated by the smelting processes of the Smelter*").

900. Alternatively, even if the Tribunal were to disregard the environmental liabilities and costs of demolition, and accept that the Land could be residential, it should still conclude that Ms Russo's valuation lacks rigor:[1197]

> *Como he explicado, la metodología aplicada por la Arq. Russo para realizar su avalúo de la Fundidora de Antimonio no es la correcta. Por ejemplo, no es correcto partir de la premisa de que podría darse un uso residencial a los Terrenos en el futuro. Además, los datos en que se basa su valuación no son certeros, demostrables ni provienen de fuentes oficiales o confiables. Por ello, los valores obtenidos son meramente especulativos.*[1198]

901. Bolivia has instructed Mr Mirones to perform a valuation of the Antimony Smelter under those assumptions. Mr Mirones' valuation is based on visits to the subject property and his knowledge of the Oruro area, where he practices.[1199]

902. As explained by Mr Mirones, although the comparables method is commonly used in the real estate industry,[1200] it cannot be used in this case to value the land:

> *A pesar de que existe información sobre compraventas en el área de Oruro, no he considerado dichas transacciones en mi valuación por cuanto no involucran inmuebles comparables al Terreno. Como ya he mencionado, las características del Terreno son muy particulares, al punto de hacerlo prácticamente único.*[1201]

903. Indeed, the Antimony Smelter's characteristics (e.g., size of the land, location, irregular shape, lack of direct access to access roads, absence of direct access to utilities – which derive from the Tin Smelter, and the environmental liabilities of the land – including an open arsenic mud pit, etc.) render it "almost unique" in the area. As put by Mr Mirones "*Si bien es cierto que para aplicar el "método de comparables" no es necesario encontrar un bien idéntico, en este caso, no he encontrado ningún inmueble de características siquiera similares*."[1202]

904. In light of the above, to calculate the FMV of the Land, Mr Mirones has considered its cadaster value as a first step. To do so, Mr Mirones located and inspected the land, corroborating the

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1197 Mirones, Sections 4, 9.

1198 Mirones, ¶ 106 (Unofficial translation: "*As I explained, the methodology applied by Arc. Russo to carry out the valuation of the Antimony Smelter, is not the correct one. For instance, it is not correct to start from the premise that the land could be put to residential use in the future. Furthermore, the data on which he bases his valuation are not accurate, demonstrable and do not come from official or reliable sources. Because of this, the resulting values are merely speculative*").

1199 Mirones, Sections 2 and 3.

1200 Mirones, ¶ 40.

1201 Mirones, ¶ 41 (Unofficial translation: "*Although there is information on sales in the area of Oruro, I have not considered those transactions in my valuation since they do not involve real estate comparable to the Land. As I already mentioned, the Land's characteristics are very peculiar, to the point of rendering it almost unique*").

1202 Mirones, ¶ 42 (Unofficial translation: "*Although it is true that in order to apply the 'comparable method' it is not necessary to find an identical asset, in this case, I have not even found any property even with similar characteristics*").

information provided by the Oruro cadaster.[1203] Then, based on the maps and information provided by the Civil Works Unit of the Tin Smelter,[1204] Mr Mirones applied the cadastre value per square meter to the area of the land as of 2010.[1205]

905. At a second stage, in accordance with the National Cadastre Regulation,[1206] Mr Mirones applied a number of corrective factors based on the characteristics of the land, in order to obtain the FMV of the land:[1207]

VALORES	
SUPERFICE M2 DE ACUERDO A LEVANTAMIENTO	87.496.40 M^2
PRECIO UNITARIO $ /M^2 INICIAL	4.80
VALOR INICIAL TERRENO	**US $ 419.982,72**

FACTORES DE HOMOGENIZACIÓN DEL TERRENO	
COEFICIENTE DE VÍA	1,1
COEFICIENTE DE FORMA	0,8
COEFICIENTE DE SERVICIOS	0,8
COEFICIENTE TOPOGRÁFICO	1,0
COEFICIENTE A APLICAR	**0,7**

VALOR FINAL DEL TERRENO	
VALOR INICIAL TERRENO	US $ 419.982,72
COEFICIENTE DE AJUSTE	0,7
VALOR FINAL TERRENO	**US $ 293.987,90**

906. Mr Mirones then estimated the residual value of the buildings in the Antimony Smelter employing the replacement cost method.[1208] First, Mr Mirones classified the structures in 5 categories (which coincide with Ms Russo's classification),[1209] to then calculate their area based on topographical maps[1210] and his *in situ* inspections in November and December 2017. Mr Mirones then estimated the square meter cost of the structures:

> *Para determinar el valor inicial, realicé una comparación con los costos de construcción por m2 vigentes en el mercado local de construcciones basado en la calidad de los materiales y estado de conservación de las Edificaciones. El valor inicial es el resultado del producto del área por el precio en dólares por m2 determinado.*[1211]

1203 Urban Cadastre Report of 15 November 2017, **DM-4**.

1204 Technical Planimetry Report of the Antimony Smelter of 29 November 2017, **DM-2**.

1205 Mirones, ¶¶ 49-51.

1206 Reglamento Nacional de Catastro Urbano, Decreto Supremo No. 22902 of 19 September 1991, **GR-9**.

1207 Mirones, ¶¶ 51-70.

1208 Theoretical Framework, **DM-15**.

1209 Mirones, ¶ 72.

1210 Technical Planimetry Report of the Antimony Smelter of 29 November 2017, **DM-2**.

1211 Mirones, ¶ 90 (Unofficial translation: "*In order to determine the initial value, I carried out a comparison with the construction costs per square meter in effect in the local market for construction based on the quality of materials and the state of conservation of the Buildings. The initial value results from the area multiplied by the price in dollars per square meter*").

907. The initial value of the each building category was then adjusted based on their specific characteristics and state – such as obsolescence, state of conservation, and use[1212] – on the basis of his inspections to the Antimony Smelter.[1213] On the basis of this, Mr Mirones estimated the residual value of the buildings in the Antimony Smelter at:[1214]

VALOR DE LAS EDIFICACIONES DE LA FUNDIDORA DE ANTIMONIO					
	AREA 1	AREA 2	AREA 3	AREA 4	AREA5
ÁREA CUBIERTA EN M2	6.285,00	242,00	246,00	196,10	1.815,00
PRECIO EN US$/M2	160,00	140,00	180,00	210,00	38,00
VALOR INICIAL	US $ 1.005,600	US $ 33.880,00	US $ 44.280,00	US $ 41.181,00	US $ 68.970,00
FACTOR OBSOLESCENSIA	0,65	0,65	0,65	0,65	0,65
FACTOR DE ESTADO	0,56	0,56	0,75	0,75	0,60
COEFICIENTE DE USO	0,80	1,20	1,00	0,80	1,00
COEFICIENTE ACUMULADOS	0,29	0,43	0,48	0,39	0,39
VALOR FINAL US$	US $ 291.624,00	US $ 14.568,40	US $ 21.254,40	US $ 16.060,59	US $ 26.898,30
VALOR TOTAL					US $ 370.405,69

908. Mr Mirones then explains that a willing buyer would consider the closure and remediation costs that would need to be incurred (irrespective of the use given to the land); and the costs of dismantling the Antimony Smelter's 40-plus-year-old infrastructure (which would outweigh any revenue from scrap material). As a result, any willing buyer would conclude that the Antimony Smelter is a liability more than anything.

909. Based on the above, Mr Mirones has concluded that the Antimony Smelter has no positive value.[1215]

7.3.7 Compass Lexecon's Valuation Of The Tin Stock

910. Claimant maintains that, on 1 May 2010, Bolivia seized 161 tons of Tin Stock stored in the Antimony Smelter. Relying on a simple letter sent by Colquiri to the Ministry of Mining in May 2010,[1216] Compass Lexecon values this Tin Stock at US$ 707,821 as of 30 April 2010.[1217]

911. Compass Lexecon's valuation is exaggerated. An inspection was carried out shortly after the reversion of the Antimony Smelter (by a notary and a chemical expert) to inspect the Tin

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1212 Reglamento Nacional de Catastro Urbano, Decreto Supremo No. 22902 of 19 September 1991, **GR-9**, p. 23, 2.1.3.1.

1213 Mirones, ¶¶ 94-103.

1214 Mirones, ¶ 104.

1215 Mirones, ¶ 117.

1216 Letter from Colquiri SA (Mr Capriles Tejada) to Ministry of Mining (Mr Pimentel Castillo) of 3 May 2010, **C-28**.

1217 Compass Lexecon Expert Report, ¶ 101.

Stock and certify its quantity. The audit report issued on 23 September 2010 (as a result of this inspection) determined that there were 157.6 metric tons of Tin Stock stored at the Antimony Smelter. Based on this report, Econ One has estimated the value of the Tin Stock at US$ 606,264.[1218]

* * * * *

912. For all the foregoing reasons, after making the necessary corrections and adjustments, Econ One has estimated the value of (i) Colquiri at US$ 39.7 million (as of 19 June 2012), (ii) the Tin Smelter at US$ 12.1 million (as of 8 February 2007), (iii) the Antimony Smelter at US$ 0 (as of 30 April 2010), and (iv) the Tin Stock at US$ 606,264 (as of 30 April 2010).

7.4 Claimant's Claim For Interest Is Grossly Inflated

913. While Claimant alleges that it "*should receive pre and post award interest at a rate that ensures 'full reparation,'*"[1219] in reality it is seeking much more than that. In effect, Claimant's claim for interest would result – were it to be accepted (*quod non*) – in its unjust enrichment and in punitive damages being awarded against the State, as evidenced by the fact that interest accounts for US$ 227.7 million, *i.e.* almost 34% of the total damages claimed.

914. Claimant also alleges that it is seeking payment of "*interest rate at a normal commercial rate applicable in Bolivia as provided in Article 5 of the Treaty*."[1220] Upon its instruction, Compass Lexecon has calculated these interest rates at (i) 8.6% as of 8 February 2007 (for the Tin Smelter), (ii) at 6.1% as of 30 April 2010 (for the Tin Stock), and (iii) at 6.4% as of 29 May 2012 (for Colquiri).[1221] Claimant also requests the Tribunal to calculate interest compounded (annually), which further inflates its already exorbitant interest claim.[1222]

915. For the reasons further developed below, were the Tribunal inclined to award interest to Claimant, it should apply a risk-free interest rate (**Section 7.4.1**) and award simple interest (**Section 7.4.2**).

1218 Econ One, ¶ 140.

1219 Statement of Claim, Section VI.C.1.

1220 Statement of Claim, ¶ 290.

1221 Compass Lexecon Expert Report, ¶ 101.

1222 Statement of Claim, ¶ 291.

7.4.1 Were The Tribunal To Award Interest To Claimant (*Quod Non*), It Should Apply A Risk-Free Interest Rate To Avoid Overcompensation

916. Should the Tribunal award interest to Claimant (*quod non*), only interest at the risk-free rate would prevent Claimant's unjust enrichment since it did not bear any operating risk in relation to the Assets following their transfer to the State (**Section 7.4.2.1**). If the Tribunal were, however, to conclude that interest should also compensate Claimant for some undefined risk, the Tribunal should use at most the US LIBOR + 1% spread (**Section 7.4.2.2**). As will have become apparent to the Tribunal from its analysis of Claimant's valuation, in relation to interest Compass Lexecon's inputs are also exaggerated and ignore, *inter alia*, Claimant and Glencore International's credit ratings and leverage to obtain cheap financing (**Section 7.4.2.3**).

7.4.1.1 Interest In This Case Should Be At The Risk-Free Rate To Avoid Claimant's Unjust Enrichment

917. By definition, ongoing investments are expected to yield more than risk-free rates. Indeed, investors require return for bearing the risk of their investment.

918. In the present case, Claimant was relieved of its investment risk in the Assets from the very moment they were reverted to the State. Any interest covering the period of time thereafter, accordingly, should be at the risk-free rate. Otherwise, Claimant would be rewarded for an operating risk it did not bear and, hence, it would be overcompensated. This is explained in the often-cited piece by Fisher and Romaine excerpted below:

> *The violation took place at a single point of time, time 0. It involved the destruction of an asset whose value at that time is clearly known as Y. Hence, had damages been assessed at time 0, an award of Y would have made the plaintiff whole. Unfortunately, however, the processes of justice take time, and the award is to be made at time t > 0. How (if at all) should the plaintiff be compensated for this fact?*
>
> *At first glance, it may seem that the plaintiff is entitled to interest at its opportunity cost of capital, r. After all, had the plaintiff received Y at time 0 [the time of the event], it would have invested the funds, receiving presumably its average rate of return (…)*
>
> *The fallacy here (in either version) has to do with risk. The plaintiff's opportunity cost of capital includes a return that compensates the plaintiff for the average risk it bears. <u>But, in depriving the plaintiff of an asset worth Y at time 0, the defendant also relieved it of the risks associated with investment in that asset. The plaintiff is thus entitled to interest compensating it for the time value of money, but it is not also entitled to compensation for the risks it did</u>*

> *not bear. Hence prejudgment interest should be awarded at the risk-free interest rate (…).*[1223]

919. Several international arbitral tribunals have, following the rationale above, awarded interest at risk-free rates where the investor no longer operated the allegedly expropriated asset.

920. The *Murphy* tribunal found, in this connection, that "*there [had been] an industrial risk that applied to Murphy's investment up until it sold its investment in March 2009*."[1224] Thereafter, there was no justification for the application of an interest rate which remunerated any sort of operating risk, which the claimant had ceased to bear. Accordingly, the tribunal applied a risk-free rate.[1225]

921. Likewise, the *Burlington* tribunal rejected the actualization rate proposed by the claimant (which was equivalent to Burlington's weighted average cost of capital or "**WACC**"). The tribunal applied instead "*a reasonable risk-free commercial rate*,"[1226] seeing as though WACC "*contain[ed] an element of reward for risk that [was] inappropriate [there] because Burlington no longer [bore] the risk of operation.*"[1227]

922. The *Burlington* tribunal held that a risk-free interest rate applied on the basis of the following language in the bilateral investment treaty between Ecuador and the United States:

> *Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a comercially reasonable rate from the date of expropriation; be fully realizable and be freely transferable.*[1228]

923. This provision is essentially identical to the Treaty provision regarding compensation, which reads as follows:

> *Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became*

1223 Econ One, ¶ 193.

1224 *Murphy Exploration and Production Company International v. Republic of Ecuador [II]*, PCA Case No. 2012-16, Partial Final Award of 6 May 2016, **RLA-99**, ¶ 450.

1225 *Murphy Exploration and Production Company International v. Republic of Ecuador [II]*, PCA Case No. 2012-16, Partial Final Award of 6 May 2016, **RLA-99**, ¶ 516.

1226 *Burlington Resources, Inc v Republic of Ecuador* (ICSID Case No ARB/08/5) Decision on Reconsideration and Award of 7 February 2017, **CLA-134**, ¶¶ 533-535.

1227 *Burlington Resources, Inc v Republic of Ecuador* (ICSID Case No ARB/08/5) Decision on Reconsideration and Award of 7 February 2017, **CLA-134**, ¶ 533.

1228 Treaty between the United States and Ecuador concerning the Encouragement and Reciprocal Protection of Investments, signed in Washington, D.C on August 27, 1993, entered in force May 11, 1997 (Treaty), **R-268**, Article III.1 (emphasis added).

> *lublic knowledge, whichever is the earlier, shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party, until the date of payment, shall be made without delay, be effectively realizable and be freely transferable.*[1229]

924. For similar considerations, the tribunal in *Vestey Group Limited* adopted the the six-month US Treasury bond rate as a reasonable risk-free rate applicable in circumstances where the claimant had ceased to bear the operating risk:

> *In conclusion, the Tribunal will resort to a risk free rate applicable to US currency debt, i.e. the six-month US Treasury bond rate. The practice of international tribunals confirms this conclusion.*[1230]

925. The *Yukos* tribunal adopted the same approach and awarded interest at a rate based on ten-year U.S. Treasury bond rates:

> *The Tribunal observes that many investor-state tribunals have adopted this "investment alternatives approach," using rates of U.S. debt instruments even when the claimant was not* a U.S. investor. *The Tribunal, in the exercise of its discretion, has concluded that it would be appropriate to award to Claimants interest on a rate based on ten-year U.S. Treasury bond rates.*[1231]

926. Doctrine has confirmed this view. For example, in Prof Kantor's words:

> *Historic earnings must be "brought forward" to the valuation date by means of an interest rate, while future earnings are discounted back to the valuation date by means of a discount rate. The interest rate used for bringing historical amounts forward will clearly not contain the same risk factors as the discount rate used to present value future amounts. As a practical matter, the interest rate used for the historical amount is often a "risk-free" rate (such as the rate for US Treasuries) or a statutory rate for pre-judgment interest.*[1232]

927. The interest rates that Claimant advocates for in respect of each of the Assets should be discarded for, at least, two reasons.

928. *First*, as noted above, the Treaty mandates the application of interest at a commercially reasonable rate. Such a rate is the six-month or the one-year U.S. Treasury bill rate. From an economic perspective, the term commercial interest rate includes the rates that are regularly available to investors.[1233] As Econ One explains, each specific rate "*will depend on the risk*

1229 Treaty, **C-1**, Article 5(1) (emphasis added).

1230 *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award of 15 April 2016, **RLA-5**, ¶ 446.

1231 *Yukos Universal Limited (Isle of Man) v Russian Federation* (PCA Case No AA 227) Final Award of 18 July 2014, **CLA-122**, ¶ 1684-1685.

1232 Econ One, ¶ 195 (emphasis added).

1233 Econ One, ¶ 196.

profile of the financial product generating the interest payments."[1234] Given that the amount to be granted by an arbitral award is not exposed to risk, the applicable interest rate should compensate Claimant exclusively for the time value of money.[1235] This is achieved through a risk-free interest rate.

929. *Second*, Compass Lexecon calculated the commercial interest rate based on "*rates for loans granted from commercial banks to businesses in Bolivia, as published by the Central Bank of Bolivia as a proxy.*"[1236] As explained by Econ One, lenders to businesses in Bolivia require a spread over the risk free rate to compensate for the *ex-ante* risk of default of the debtor. Since, "[*c*]*laimant's award of compensation is not exposed to the ex-ante risks involved in lending to Bolivian companies*", using Compass Lexecon's proposed rates would lead to Claimant's unjust enrichment.

930. For the foregoing reasons, interest in the present case should be calculated based on the six-month or the one-year U.S. Treasury bill rates.[1237]

7.4.1.2 If The Tribunal Were To Decide That Interest Should Compensate Also For Non-Existent Risk (Quod Non), It Should At Most Award Interest At The US LIBOR + 1% Rate

931. International banks and, more generally, international markets most often set lending rates by reference to the LIBOR rate for the given currency plus a small margin (spread) to account for risk. It is not in dispute that Claimant is a multinational corporation with access to international financing. As Glencore International's Annual Reports show, in the last few years, it has secured billions of dollars in financing at an average rate of US LIBOR + 1% rates or less. For instance:[1238]

- Glencore International's 2016 Annual Report shows that, in 2016, it obtained over US$ 14 billion in revolving credit facilities at LIBOR plus 0.50 to 0.60; and
- Glencore International's 2011 Annual Report shows that, in 2011, it obtained over US$ 8 billion in revolving credit facilities at LIBOR plus 1.10 to 1.75.

[1234] Econ One, ¶ 196.

[1235] Econ One, ¶ 193.

[1236] Compass Lexecon Expert Report, ¶ 101.

[1237] Econ One, ¶ 196.

[1238] Econ One, ¶ 198.

932. The average of the above four rates is LIBOR + 0.9875% (*i.e.*, 0.50% + 0.60% + 1.10% + 1.75% ÷ 4 = 0.9875%). Thus, there is no justification for awarding Claimant interest at a rate higher than LIBOR + 1%.

933. Investment tribunals regularly use LIBOR plus a small margin as "commercial interest" rates. For example, the *SGS* tribunal concluded "*that it would be appropriate to apply the LIBOR rate plus one percentage point*."[1239] Likewise, the *Deutsche Bank* tribunal awarded interest at the LIBOR +1.12%:

> The *interest rate to be applied shall be based on a nine-month Libor rate as of 9 December 2008, the Early Termination Date, plus a market-based funding spread based on credit risks associated with Deutsche Bank, based on Deutsche Bank's one year credit default swap rate, of 1.12%. Interest will run until full payment.*[1240]

934. The widespread use of LIBOR plus a small margin has been acknowledged by several arbitral tribunals, including in the *Burlington v. Ecuador*, *Lemire v. Ukraine*, *PSEG Global v. Turkey*, *Sempra v. Argentina*, *Enron v. Argentina*, *Continental Casualty v. Argentina*, *El Paso v. Argentina*, *National Grid v. Argentina*, *RDC v. Guatemala* and *Rumeli v. Kazakhstan* cases,[1241] as well as by commentators.[1242]

935. For the foregoing reasons, if the Tribunal were to decide that interest should also compensate for risk (*quod non*), in line with Claimant's and Glencore International's average borrowing rates and investment case law, the Tribunal should use US LIBOR + 1% as interest rate in this case.

1239 *SGS Societe Generale De Suveillance S.A. and the Republic of Paraguay*, ICSID Case No. ARB/07/29, Award of 10 February 2012, **RLA-109**, ¶ 188.

1240 *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award of 31 October 2012, **RLA-110**, ¶ 575.

1241 *Burlington Resources, Inc v Republic of Ecuador* (ICSID Case No ARB/08/5) Decision on Reconsideration and Award of 7 February 2017, **CLA-134**, ¶ 535; *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18) Award of 28 March 2011, **CLA-104**, ¶ 352, 356; *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award of 19 January 2007, **CLA-66**, ¶¶ 345-348; *Sempra Energy International v Argentine Republic* (ICSID Case No ARB/02/16) Award of 28 September 2007, **CLA-71**, ¶ 486; *Enron Corporation and Ponderosa Assets LP v Argentine Republic* (ICSID Case No ARB/01/3) Award of 22 May 2007, **CLA-68**, ¶ 452; *Continental Casualty Company v Argentine Republic* (ICSID Case No ARB/03/9) Award of 5 September 2008, **CLA-81**, ¶ 314; *El Paso Energy International Company v Argentine Republic* (ICSID Case No ARB/03/15) Award of 31 October 2011, **CLA-106**, ¶ 745; *National Grid plc v Argentine Republic* (UNCITRAL) Award of 3 November 2008, **CLA-82**, ¶ 294; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award of 29 June 2012, **RLA-111**, ¶¶ 278-279; *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, **RLA-112**, ¶ 769.

1242 S. Ripinsky and K. Williams, Damages in International Investment Law (British Institute of International and Comparative Law, 2008), **RLA-113**, p. 370.

7.4.1.3 The Interest Rates Calculated By Compass Lexecon Are Exaggerated And Ignore Claimant's and Glencore International's High Credit Ratings And Leverage To Obtain Cheap Financing

936. Compass Lexecon maintains that, in this case, "*normal commercial interest*" rates would be (i) 8.6% as of 8 February 2007 (for the Tin Smelter), (ii) 6.1% as of 30 April 2010 (for the Tin Stock) and (iii) 6.4% as of 29 May 2012 (for Colquiri).[1243]

937. However, Compass Lexecon's proposed rates are unduly high because they reflect the interest rates applicable to *average* loans to *average* businesses in Bolivia. Neither of these self-serving premises apply in the case of Claimant. Indeed, (i) Claimant does not request *average* loans but rather multi-billion dollar loans, and (ii) Claimant is not an *average* business in Bolivia but rather a multinational corporation with very high credit ratings, leverage and access to international financing. For these reasons, Claimant is able to obtain financing at very low cost. As explained by Econ One:

> *Even if interest in this Arbitration were to include ex ante risks (as explained above, it should not), the rates chosen by Compass Lexecon still would be incorrect, since they reflect the rates applicable to average loans to average businesses in Bolivia. Although Compass Lexecon does not provide information in that regard, it is reasonable to conclude that (i) the average commercial loan in Bolivia is for a relatively small amount and (ii) the average commercial borrower in Bolivia does not have very high credit ratings. These two factors explain why the average interest rates used by Compass Lexecon are so high. Businesses with higher credit ratings borrowing larger amounts are able to do so at lower rates. Glencore itself is able to borrow billions of dollars at rates around LIBOR + 1%.*[1244]

938. For these reasons, the interest rates proposed by Compass Lexecon should be dismissed for being too high.

7.4.2 Claimant Can, At Most, Claim Simple Interest

939. Claimant asserts that "*[t]he only way to fully compensate Glencore Bermuda for Bolivia's unlawful conduct is to compound the pre-award interest rate on an annual basis*."[1245] In addition, Clamant also purports to be entitled to "*compound interest accruing from the date of the award until payment is made in full.*"[1246] This is incorrect.

[1243] Compass Lexecon Expert Report, ¶ 101.

[1244] Econ One, ¶ 198 (emphasis added).

[1245] Statement of Claim, ¶ 291.

[1246] Statement of Claim, ¶ 292.

940. *First*, as indicated by the *CME* tribunal, *"[i]n respect of international law, arbitral tribunals in the past awarded compound interest infrequently*."[1247] The Commentary to the International Law Commission's Articles on State Responsibility in fact notes that simple interest should be awarded under to international law:

> *The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest*.[1248]

941. Even though, more recently, some arbitral tribunals have awarded compound interest in some cases, other tribunals have refused to award compound interest, favouring simple interest instead. This has, for instance, been the view espoused by the tribunals in the *Arif v. Moldova*[1249] or the *Yukos*[1250] cases.

942. In fact, as explained by Prof. Gotanda, whose work Claimant itself relies on,[1251] arbitral tribunals have only moved away in some cases from the standard practice of awarding simple interests.[1252] This is corroborated by an ICSID study which found that, out of 24 ICSID awards rendered between 2008 and 2014, in which interest was awarded, the tribunal in roughly one third awarded simple interest.[1253] In the words of the *Rosinvest* tribunal, the practice of awarding compound interest to claimants "*is by no means unanimous. If, as above, the Tribunal finds it should award interest at a normal commercial rate, this does not mean the Tribunal is bound to award compound interest*."[1254]

1247 *CME Czech Republic BV v Czech Republic* (UNCITRAL) Final Award of 14 March 2003, **CLA-42**, ¶ 644. See also Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No. ARB(AF)/04/05, Award of 21 November 2007, **RLA-114**, ¶ 296 ("*no uniform rule of law ha[s] emerged in international arbitral practice as to the applicability of simple or compound interest in any given case.*").

1248 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**, p. 108, point (8) ("*An aspect of the question of interest is the possible award of compound interest. The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest. For example, the Iran-United States Claims Tribunal has consistently denied claims for compound interest, including in cases where the claimant suffered losses through compound interest charges on indebtedness associated with the claim.*").

1249 *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award of 8 April 2013, **RLA-69**, ¶ 619 ("*Claimant has not justified compound interest, and given the nature of the damages in this case, the Tribunal considers simple interest is more appropriate*").

1250 *Yukos Universal Limited (Isle of Man) v Russian Federation* (PCA Case No AA 227) Final Award of 18 July 2014, **CLA-122**, ¶ 1689.

1251 Statement of Claim, ¶¶ 291-292.

1252 J. Y. Gotanda, "Compound Interest in International Disputes", *Law & Policy in International Business*, Vol. 34, Issue 2, 2003, **RLA-115**, p. 2.

1253 T. Hart, "Study of Damages in International Center for the Settlement of Investment Disputes Cases" in Transnational Dispute Management, Vol. 11, Issue 3, June 2014, **RLA-116**, pp. 18-19.

1254 *Rosinvestco UK Ltd. v. The Russian Federation*, SCC Arbitration V (079/2005), Final Award of 12 September 2010, **RLA-117**, ¶ 689.

943. In this connection, arbitral tribunals have held that compound interest should only be awarded in appropriate circumstances, which is not the case here.[1255] As explained by the *Santa Elena* tribunal:

> *No uniform rule of law has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case. Rather, the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness which must form part of the law to be applied by this Tribunal.*[1256]

944. Claimant has not made any specific allegations regarding any circumstances of this particular case that would support its claim for compound interest. To the contrary, Claimant commenced this arbitration in July 2016, *i.e.*, some ten years following the reversion of the Tin Smelter, six years following the reversion of the Antimony Smelter and five years following the reversion of the Mine Lease. In such circumstances, if interest were to be awarded (*quod non*), it should be simple.

945. *Second*, Bolivian law prohibits compound interest in Articles 412 and 413 of the Civil Code.[1257]

946. Reference to local laws for purposes of awarding interest is common. For example, in *Desert Line v. Yemen*, the State submitted that simple interest had to apply, consistent with international law and the prohibition of compound interest under Yemenite law. The tribunal in that case applied a simple interest rate.[1258] Likewise, the tribunal in *Aucoven v. Venezuela* reached the same conclusion on the basis that Venezuelan law did not allow compound interest.[1259] Finally, the tribunal in *Duke Energy v. Ecuador* held that the prohibition of

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1255 *CME Czech Republic BV v Czech Republic* (UNCITRAL) Final Award of 14 March 2003, **CLA-42**, ¶ 647 ("*The Tribunal does not find particular circumstances in this case justifying the award of compound interest*"). See also *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award of 8 April 2013, **RLA-69**, ¶¶ 616-620; *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (ICSID Case No ARB/96/1) Final Award of 17 February 2000, **CLA-25**, ¶¶ 103-104.

1256 *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (ICSID Case No ARB/96/1) Final Award of 17 February 2000, **CLA-25**, ¶¶ 103 (emphasis added).

1257 Civil Code of the Plurinational State of Bolivia, **RLA-118**, Articles 412 and 413 ("*Artículo 412 - Están prohibidos el anatocismo y toda otra forma de capitalización de los intereses. Las convenciones en contrario son nulas. Artigo 413 - El cobro de intereses convencionales en tasa superior a la máxima legalmente permitida, así como de intereses capitalizados, constituye usura y se halla sujeto a restitución, sin perjuicio de las sanciones penales*") (Unofficial translation: "*Article 412 - Anatocism and all other forms of capitalization of interests are prohibited. Agreements to the contrary are void. Article 413 - Charging conventional interests at a higher rate than the maximum legally permitted, as well as of capitalized interests, constitutes usury and is subject to restitution, regardless of criminal sanctions*").

1258 *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award of 6 February 2008, **RLA-119**, ¶¶ 294-295.

1259 *Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela* (ICSID Case No ARB/00/5) Award of 23 September 2003, **CLA-44**, ¶ 396.

compound interest in Ecuadorian law had to be enforced.[1260] As a result, the tribunal awarded simple interest.

7.5 Any Damages Awarded To Claimant For Colquiri And The Tin Smelter (*Quod Non*) Must Be Significantly Reduced To Reflect Claimant's Contribution To Its Own Losses

947. As developed in sections 7.1 and 7.2 above, Claimant has failed to prove the certainty of the damages claimed and, in any case, that they were caused by Bolivia. If, notwithstanding the foregoing, the Tribunal were to award compensation to Claimant for Colquiri and the Tin Smelter (*quod non*), it should reduce such compensation to account for Claimant's contribution to its own losses.

948. As a matter of law, compensation shall be significantly reduced where the victim contributes to its losses (**Section 7.5.1**). As explained above, there can be no doubt that Claimant, at the very least, materially contributed to its alleged losses in relation to Colquiri and the Tin Smelter (**Section 7.5.2**).

7.5.1 As A Matter Of Law, Compensation Shall Be Significantly Reduced Where The Alleged Victim Contributed To Its Own Losses

949. It is a settled principle of international law that any compensation for an internationally wrongful act must be reduced or eliminated on account of any intentional, reckless or negligent conduct of the injured party that contributed to the losses in question.

950. In this connection, Article 39 of the Articles on State Responsibility provides that:

> *In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.*[1261]

951. The Commentary to Article 39 explains that when "*the injured State, or the individual victim of the breach, has materially contributed to the damage by some <u>wilful or negligent</u> act or omission [that] should be taken into account in assessing the form and extent of reparation*".[1262]

1260 *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award of 18 August 2008, **RLA-120**, ¶ 457.

1261 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**, Article 39, p. 109.

1262 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**, Article 39, pp. 109-110, point (1).

952. This principle is also recognized by the vast majority of legal systems, including Bolivian law.[1263] Contributory negligence has also been upheld in the jurisprudence of international investment tribunals,[1264] and many scholars have acknowledged and endorsed this line of authority.[1265]

953. The principle of contributory negligence has been recognized not only in cases where the claimant had carried out an unlawful or prohibited act, but also in cases where the claimant's behavior was merely "*negligent or imprudent*."[1266]

954. Contributory negligence reduces any compensation due specifically when a state commits an internationally wrongful act. Indeed, logic dictates that contributory negligence presupposes

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1263 Civil Code of the Plurinational State of Bolivia, **RLA-118**, Articles 995 to 998.

1264 See, for instance, *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* (ICSID Case No ARB/01/7) Award of 25 May 2004, **CLA-49**; *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12) Award of 14 July 2006, **CLA-63**; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award of 12 September 2010, **RLA-121**; *Antoine Goetz & others and S.A. Affinage des Metaux v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award of 19 February 1999, **RLA-122**; *Occidental Exploration and Production Company v Republic of Ecuador* (LCIA Case No UN 3467) Final Award of 1 July 2004, **CLA-50**; *Ioan Micula and others v Romania* (ICSID Case No ARB/05/20) Award of 11 December 2013, **CLA-119**; *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 of 16 June 2010, **CLA-98**; *CME Czech Republic BV v Czech Republic* (UNCITRAL) Partial Award of 13 September 2001, **CLA-32**; *Enron Corporation and Ponderosa Assets LP v Argentine Republic* (ICSID Case No ARB/01/3) Award of 22 May 2007, **CLA-68**; *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd v. The Republic of Kazakhstan*, SCC Case No. V116/2010, Award of 19 December 2013, **RLA-96**.

1265 A. Moutier-Lopet, "Contribution to the Injury", in J. Crawford, A. Pellet, S. Olleson, *The Law of International Responsibility*, 2010 (extract), **RLA-123**, pp. 642-643; I. Marboe, *Calculation of Compensation and Damages in International Investment Law*, 2017 (extract), **RLA-124**, pp. 121-122; S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008 (extract), **RLA-89**, pp. 314-319; S. Ripinsky, "Assessing Damages in Investment Disputes: Practice in Search of Perfect", *Journal of World Investment & Trade*, Vol. 10, No. 1, 2009, **RLA-125**, pp. 19-21; Th. Wälde and B. Sabahi, "Compensation, Damages and Valuation", in *International Investment Law*, Vol. 4, Issue 6, 2007, **RLA-126**, p. 38; B. Bollecker-Stern, "Le Préjudice dans la Théorie de la Responsabilité Internationale", *Publications de la Revue Générale de Droit International Public*, No. 22, 1973 (extract), **RLA-127**, p. 310 ("*[…] taking into account in the evaluation of the amount of the compensation the gravity of the fault [of the injured party] irrespective of its link to the damage, or eventually taking into account the causal role of the faulty conduct to determine the amount of the indemnity granted: this is the idea of 'contributory negligence'*") (Unofficial translation: "*[…] tenir compte dans l'évaluation du montant de la reparation de la gravité de la faute quelle que soit sa relation avec le dommage, soit enfin tenir compte du role causal de la conduite fautive pour determiner le montant de l'indemnité allouée: c'est l'idée de la 'contributory negligence'*"); M. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international*, Thesis, Paris, Sirey, 1938 ("*unanimous case law diminishes or excludes compensation in cases where the aggrieved party contributed, by his action or by his omission, to provoke or to increase the damage suffered, or that he hasn't been sufficiently diligent to prevent the extension of the damage*.") (Unofficial translation of: "*[u]ne jurisprudence unanime diminue ou exclut la réparation dans le cas où le lésé a contribué, par son acte ou par son omission, à provoquer ou à augmenter le dommage subi, ou bien qu'il n'a pas deployé toute diligence nécessaire en vue de prevenir l'extension dudit dommage*."), as quoted in B. Bollecker-Stern, "Le Préjudice dans la Théorie de la Responsabilité Internationale", *Publications de la Revue Générale de Droit International Public*, No. 22, 1973 (extract), **RLA-127**, p. 311, footnote 855; G. Salvioli, "La responsabilité des Etats et la fixation des dommages et intérêts par les tribunaux internationaux", *Recueil des Cours de l'Académie de Droit International de La Haye*, 1929/III (extract), **RLA-128**, p. 266; B. Graefrath, "Responsibility and Damages Caused", *Recueil des Cours de l'Académie de Droit International de La Haye*, 1984/II (extract), **RLA-129**, p. 95 ("*Concurrent causation by third parties or the injured party himself may entail diminution of the duty to compensation*"); J. Crawford, *State Responsibility: The General Part*, 2013 (extract), **RLA-130**, pp. 500-503.

1266 S. Ripinsky, "Assessing Damages in Investment Disputes: Practice in Search of Perfect", *Journal of World Investment & Trade*, Vol. 10, No. 1, 2009, **RLA-125**, p. 20; *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* (ICSID Case No ARB/01/7) Award of 25 May 2004, **CLA-49**, ¶¶ 242-243; *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award of 15 March 2016, **RLA-8**, ¶¶ 6.91-6.102.

the existence of an obligation to compensate and that the latter should be premised on a finding of responsibility for the commission of an international wrongful act.[1267] Therefore, even if Bolivia had breached its obligations pursuant to the Treaty (*quod non*), Claimant's compensation must be reduced or eliminated on account of its own negligence behavior.[1268]

955. As explained below, Claimant materially contributed to its alleged losses with respect to the Mine and the Tin Smelter.

7.5.2 As A Matter Of Fact, Claimant's Behavior Materially Contributed To Its Alleged Losses In Relation To Colquiri And The Tin Smelter

956. Should the Tribunal consider that Claimant is not the only party responsible for the reversion of the Mine Lease (*quod non*), it must, find, in any event, that Claimant significantly contributed to the reversion of the Mine Lease. As explained in sections 2.6.3.1 through 2.6.3.3 above, Claimant mismanaged and aggravated the social conflicts at the Mine, forcing the State to intervene and terminate the Mine Lease in June 2012:

- Claimant inherited the social tensions created by Comsur's poor management of the relations between the workers of Colquiri and the *cooperativistas* operating at the Mine. Instead of properly redressing this situation, under Claimant's control, the *cooperativistas* (and, in particular, the *Cooperativa 26 de Febrero*) gradually controlled larger and deeper areas of the Mine,[1269] to the point that, "*[p]ara finales de 2011, los cooperativistas teníamos prácticamente el control de la Mina*."[1270]

- Claimant requested the intervention of the State at the eleventh hour, making impossible for COMIBOL to resolve a social conflict that had evolved over years. As explained above, in the circumstances, it was impossible for COMIBOL to resolve a

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1267 See, e.g., A. Moutier-Lopet, "Contribution to the Injury", in J. Crawford, A. Pellet, S. Olleson, *The Law of International Responsibility*, 2010 (extract), **RLA-123**, p. 639.

1268 *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award of 12 September 2010, **RLA-121**, ¶ 635 ("*[w]hile these contributions of Yukos to its own demise do not change the conclusion that Respondent breached the IPPA with regard to Claimant's shares, they may be relevant in the consideration later in this Award of the quantum of any damage due to Claimant which will be examined hereafter in this award*").

1269 See, for instance, Public Deed No. 0215/2009, amendment to the lease agreement between COMIBOL and the *Cooperativa 26 de Febrero* of 21 October 2009, **R-210**; Colquiri internal report concerning ore bought and/or transported for the *Cooperativa 26 de Febrero* of 15 December 2007, **R-198**; Colquiri internal report concerning ore bought and/or transported for the *Cooperativa 26 de Febrero* of 21 April 2008, **R-199**; Colquiri internal report concerning ore bought and/or transported for the *Cooperativa 26 de Febrero* of 17 April 2007, **R-200**; Proof of payment for the transport of ore for the *Cooperativa 26 de Febrero* of 21 October 2007, **R-201**; Proof of payment for the transport of ore for the *Cooperativa 26 de Febrero* of 20 November 2007, **R-202**; Proof of payment for the transport of ore for the *Cooperativa 26 de Febrero* of 7 January 2008, **R-203**; Colquiri internal report concerning ore transported for the *Cooperativa 26 de Febrero* of 25 May 2008, **R-204**; Colquiri internal report concerning ore transported for the *Cooperativa 26 de Febrero* of 29 June 2008, **R-205**.

1270 Cachi, ¶ 31.

structural problem and ensure the rights of Sinchi Wayra over the Mine Lease in a matter of days.

- Sinchi Wayra's own employees deeply distrusted its ability to solve the tensions with the *cooperativistas* that it had caused and encouraged over the years. Such distrust explains their decision to Support the reversion of the Mine Lease.

- Being fully aware of the Government's efforts to resolve the conflict provoked by the taking of the Mine by the *cooperativistas* on 30 May 2012, Sinchi Wayra entered into the Rosario Agreement with national leaders of the *cooperativas* and a fraction of the *Cooperativa 26 de Febrero* opposing a potential reversion of the Mine Lease. By executing the Rosario Agreement, Sinchi Wayra engaged in inconsistent escalated the conflict to unprecedented levels of violence, and left the State with no other option but to revert the Mine Lease.

957. Similarly, as explained in section 2.5.4 above, Claimant also contributed to its own losses in relation to the Tin Smelter.

958. By early 2005, "*[t]he overthrow of the main champion of neo-liberal economics in 2003, the rise of Evo Morales, the palpable shift of politics to the left throughout the country and the decline of the traditional party structure ha[d] left the business environment clouded with uncertainty*."[1271] This was particularly the case for the Tin Smelter, given the ample publicity surrounding its irregular privatization since 2001. As discussed in section 2.4 above, following the adjudication of the sales contract to Allied Deals, local organizations and unions in Oruro[1272] as well as members of the Bolivian Parliament[1273] called for investigations to be

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1271 Business Monitor International, *Risk Summary - Bolivia*, 14 January 2005, **R-171**.

1272 Statement of the Oruro Civic Committee, **R-122** ("*TERCERO.- Solicitar al Gobierno la inmediata realización de gestiones para que el daño económico infringido al Departamento de Oruro sea revertido, recuperándose el valor total de los materiales y concentrados obsequiados al Consorcio ALLIED DEALS.*") (Unofficial translation: "*THIRD.- Request the Government to immediately take the necessary measures so that the economic damage caused to the Department of Oruro can be reverted, thus recovering the total value of materials and concentrate gifted to the Consortium ALLIED DEALS*"). See, also, Letter from the Oruro Central Obrera to President Banzer Suárez of 23 May 2001, **R-126** ("*la clase trabajadora y lodos los sectores del pueblo de Oruro, nos encontramos agobiados por el hambre y la miseria que reina en nuestro sociedad debido a que nuestro patrimonio y que constituía FUENTE DE TRABAJO, ha sido enajenado ilegalmente y en un monto absolutamente exiguo constituyendo un engaño en la venta del Complejo Metalúrgico de Vinto a la Empresa Allied Deals*") (Unofficial translation: "*the working class and all sectors of the people of Oruro are overwhelmed by the hunger and misery that reigns in our society given that our asset, which constituted a SOURCE OF WORK, has been transferred illegally and for a completely inadequate amount, which amounts to fraud in the sale of Complejo Metalúrgico de Vinto to the company [Allied Deals]*").

1273 Letter from Representative Pedro Rubín de Celis to the *Contralor General de la República* of 10 May 2001, **R-124**, p. 2 ("*En el numeral 5 del documento denominado 'acta de Entendimiento' en fecha de 2 de marzo de 2000 por los Presidentes de Vinto y COMIBOL, por una parte, y por el representante de ALLIED DEALS PLC dice textualmente: 'la vendedora depositará, a la brevedad posible en sus almacenes – estaño e incluir estaño metálico dentro de los ítems ofertados en la venta de la Fundidora'. De esta manera, los compradores obtuvieron en forma fraudulenta el dinero para comprar la propia fundición en forma de estaño en circuito, en concentrados y en metálico por un valor de*

carried out prior to the conclusion of the sale purchase agreement. But the Banzer Suárez administration paid no mind to such calls for investigation and proceeded to validate the tender process and conclude the sale.

959. Glencore International decided to acquire the Tin Smelter from fleeing president Sánchez de Lozada nonetheless, being fully aware of the risk that this Asset might be reverted to the State in the near future. In fact, it is our understanding that it cashed out a political risk insurance policy held by several international financial institutions, receiving at least US$ 110-120 million in the process.

960. For these reasons, if the Tribunal were to award compensation to Claimant for Colquiri and the Tin Smelter, it should reduce that compensation by 75% and, at least, 50% to reflect Claimant's contribution to its own damages. Also, as explained in sections 2.5.4 and 2.6.1 above, any such compensation should also be reduced given that Claimant has already received compensation from its insurer (for the same underlying facts). This amount should be offset from any compensation awarded to Claimant.

8. PRAYER FOR RELIEF

961. In light of all the above, and reserving its rights to complement, develop or modify its position at a further, appropriate stage of these proceedings, Bolivia respectfully requests the Tribunal:

8.1 On The Forthcoming Procedural Steps

962. To convene a hearing on Bolivia's request for bifurcation;[1274] and

963. Following such hearing, to order the bifurcation of the proceedings, in order to decide upon Bolivia's objections to jurisdiction and admissibility as a preliminary matter.

8.2 On Jurisdiction And Admissibility

964. To declare:

a. That it lacks jurisdiction over Claimant's claims; and

[US$ 11,477,539]. A ello habrá que añadir las 500 toneladas de estaño metálico entregadas a favor de la compradora como respaldo al valor ajustado del material en circuito y al valor ajustado de los activos fijos") (Unofficial translation: "*Item 5 of the document named 'minutes of Understanding' of 2 March 2000 [executed] by the Presidents of Vinto and COMIBOL, on the one hand, and by the representative of ALLIED DEALS PLC, literally says: 'the seller will deposit shortly in its warehouses – tin and include metallic tin within the items offered in the sale of the Smelter. This way, the buyers obtained fraudulently the money to buy the smelter itself in the form of pipeline tin, in concentrates and metal for the amount of [US$ 11,477,539]. To this must be added 500 tons of metallic tin delivered in favor of the buyer as a guarantee of the adjusted value of the pipeline material and the adjusted value of fixed assets*"). See, also, Formal complaint by Representative Pedro Rubín de Celis against Minister Carlos Saavedra Bruno, **R-125**.

[1274] See Bolivia's letter to the Tribunal of 18 December 2017.

b. That Claimant's claims are, in any event, inadmissible; and

965. To order:

a. Claimant to reimburse Bolivia for all the costs and expenses incurred in this arbitration, including with interest due and payable from the date Bolivia incurred such costs until the date of full payment; and

b. Such other relief as the Tribunal may consider appropriate.

8.3 On The Merits

966. If, *par impossible*, the Tribunal were to find that it has jurisdiction over Claimant's claims and/or that such claims are admissible, to declare:

a. That Bolivia complied with its international obligations under the Treaty and international law;

b. That all of Claimant's claims are thus dismissed; and

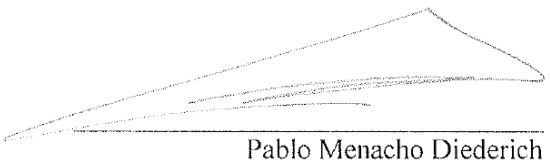
c. That, in any event, Claimant materially contributed to their alleged losses, and that any amounts the Tribunal may award to Claimant are to be reduced accordingly; and

967. To order:

a. Claimants to reimburse Bolivia for all the costs and expenses incurred in this arbitration, including with interest due and payable from the date Bolivia incurred such costs until the date of full payment; and

b. Such other relief as the Tribunal may consider appropriate.

Respectfully submitted this 18th day of December 2017



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