

PCA Case No. 2016-39

**IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN THE
GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN
IRELAND AND THE GOVERNMENT OF THE REPUBLIC OF BOLIVIA FOR THE
PROMOTION AND PROTECTION OF INVESTMENTS, SIGNED ON 24 MAY 1988**

- and –

**THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
ARBITRATION RULES, AS REVISED IN 2010**

- between –

**GLENCORE FINANCE (BERMUDA) LTD
(the “Claimant”)**

- and –

THE PLURINATIONAL STATE OF BOLIVIA

(the “Respondent”, and together with the Claimant, the “Parties”)

AWARD

Tribunal

Prof. Ricardo Ramírez Hernández (Presiding Arbitrator)
Prof. John Y. Gotanda
Prof. Philippe Sands

Secretary to the Tribunal
Martin Doe Rodríguez

8 September 2023

page left intentionally blank

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
1.	Parties to the Arbitration	1
2.	Overview of the Dispute.....	1
II.	PROCEDURAL BACKGROUND	2
1.	Commencement of the Arbitration	2
2.	Constitution of the Tribunal	3
3.	Initial Procedural Steps	3
4.	Written Submissions.....	4
5.	Hearing on Jurisdiction and Merits	5
6.	Further Procedural Steps After the Hearing on Jurisdiction and Merits	7
7.	Quantum Phase.....	7
8.	Hearing on Quantum	9
III.	FACTUAL BACKGROUND OF THE DISPUTE.....	12
1.	Legal Framework	12
2.	Brief Description of the Assets	14
	A. The Tin Smelter	14
	B. The Antimony Smelter	14
	C. The Colquiri Mine	15
3.	The Economic Situation in Bolivia Between 1970 and 1990.....	18
4.	The Tender Process	19
5.	Acquisition of the Assets.....	23
6.	Reversions	26
	A. The Tin Smelter	26
	B. The Antimony Smelter and the Tin Stock	27
	C. The Colquiri Mine	28
IV.	APPLICABLE LAW TO THE DISPUTE.....	33
V.	OBJECTIONS TO JURISDICTION	35
1.	Whether The Claimant Qualifies as an Investor Under the Treaty	35
	A. Analysis by the Tribunal.....	36
2.	Whether the Corporate Veil must be Pierced and, in the alternative, if Indirect Investment Claims are Allowed	39
	A. Analysis by the Tribunal.....	40
3.	Whether the Claimant Abused the Process	43
	A. Analysis by the Tribunal.....	44
	i. Determination of the Applicable Standard.....	44

ii. Whether the Dispute was Foreseeable	44
a. The Tin Smelter.....	46
b. The Antimony Smelter	47
c. The Colquiri Mine.....	48
4. Whether the Tribunal is Precluded From Hearing the Case on Account of the Illegality of the Privatizations and the Unclean Hands Principle.....	52
A. Analysis by the Tribunal.....	52
i. The Relevant Time for Assessment of Illegality.....	53
ii. Seriousness of the Illegality	54
5. Whether the Tribunal Lacks Jurisdiction Due to the ICC Arbitration Clause.....	57
A. Analysis by the Tribunal.....	58
6. Whether the Tribunal Lacks Jurisdiction Over the Tin Stock Claims.....	59
A. Analysis by the Tribunal.....	59
VI. MERITS OF THE DISPUTE.....	61
1. Expropriation Claim.....	61
A. The Expropriation Standard Under Article 5 of the Treaty	61
B. Whether Bolivia's Reversions Breach Article 5 of the Treaty	64
i. Supreme Decree No. 29,026 (The Tin Smelter Reversion Decree).....	64
a. Whether the Nature of the Measure is an Expropriation.....	64
b. The Legality of the Expropriation	66
ii. Supreme Decree No. 499 (The Antimony Smelter Reversion Decree)	67
a. Whether the Nature of the Measure is an Expropriation.....	67
b. The Legality of the Expropriation	69
iii. Supreme Decree No. 1,264 (The Colquiri Mine Reversion Decree)	70
a. Whether the Measure is in Nature an Expropriation	70
b. The Legality of the Expropriation	72
iv. Conclusion on Bolivia's Reversions	73
2. Full Protection and Security	73
A. The Full Protection and Security Standard Under Article 2(2) of the Treaty.....	74
B. Whether Bolivia Breached Article 2(2) of the Treaty	76
3. Fair and Equitable Treatment Standard.....	79
A. The Fair and Equitable Treatment Standard Under Article 2(2) of the Treaty.....	80
B. Whether Bolivia Breached Article 2(2) of the Treaty	81
VII. QUANTIFICATION OF DAMAGES.....	84
1. Preliminary Matters.....	84
A. Burden and Standard of Proof	84
i. Analysis by the Tribunal	87

B.	Standard of Compensation.....	90
i.	Expropriation Claim.....	90
ii.	Analysis by the Tribunal.....	92
C.	Causation and Contributory Fault.....	95
i.	Causation	96
ii.	Contributory Fault.....	96
a.	The Colquiri Mine Lease	97
b.	The Tin Smelter	98
c.	The Antimony Smelter.....	98
iii.	Analysis by the Tribunal.....	98
2.	The Colquiri Mine	102
A.	Valuation Date	102
i.	Analysis by the Tribunal.....	104
B.	Valuation Basis.....	105
i.	Triennial Plan.....	105
a.	Analysis by the Tribunal	106
ii.	March 2012 Investment Plan	108
a.	Analysis by the Tribunal	108
iii.	Non-Expansion Scenario	109
a.	Mineral Reserves and Resources.....	110
b.	The Mine and Replenish Method.....	111
c.	Analysis by the Tribunal	113
C.	Production.....	115
i.	Expanding Extraction Capacity: Main Ramp	116
a.	Capacity.....	117
b.	Bottle Necks.....	117
c.	Victoria Winze	118
d.	San José Winze	119
e.	Concentrator Plant.....	120
f.	New Tailings Storage Facility	122
ii.	Other Problems	122
a.	Water	122
b.	Electricity.....	123
iii.	Analysis by the Tribunal.....	124
D.	Grade or Mineral Concentration.....	126
i.	Analysis by the Tribunal.....	127

E.	Metallurgical Recovery Rates.....	128
i.	Analysis by the Tribunal.....	128
F.	Operating Expenses (OPEX).....	128
i.	Analysis by the Tribunal.....	129
G.	Capital Expenditures (CAPEX).....	130
i.	Analysis by the Tribunal.....	130
H.	General & Administrative Costs.....	131
i.	Analysis by the Tribunal.....	132
I.	First Year Apportionment of Cash Flows.....	132
i.	Analysis by the Tribunal.....	133
J.	The Rosario Agreement.....	133
i.	Analysis by the Tribunal.....	133
K.	Colquiri's Tailings Plant.....	134
i.	Analysis by the Tribunal.....	138
3.	The Tin Smelter.....	138
A.	Valuation Date.....	139
B.	DCF Methodology.....	139
i.	Tin Smelter Output.....	140
a.	Tin Concentrates.....	140
b.	Tin Ingot Production.....	142
c.	Investment in the Tin Smelter.....	143
d.	Analysis by the Tribunal.....	146
ii.	Price Premium.....	147
a.	Analysis by the Tribunal.....	148
iii.	OPEX.....	148
a.	Analysis by the Tribunal.....	149
iv.	G&A Expenses.....	149
v.	Remediation and Closure Costs.....	150
a.	Analysis by the Tribunal.....	150
vi.	Working Capital.....	151
vii.	Other Arguments.....	151

i.

ii.		
D.	Discount Rates	159
i.	Risk Free Rate.....	159
ii.	Country Risk Premium (CRP)	159
a.	1.5 Multiplier.....	160
b.	Ibbotson/Morningstar's Country Risk Rating Model	161
c.	Illiquidity.....	162
d.	Further Questions Posed by the Tribunal to the Parties.....	164
e.	Analysis by the Tribunal	167
4.	The Antimony Smelter	168
A.	Valuation Date	168
i.	Analysis by the Tribunal	169
B.	Valuation of the Antimony Smelter.....	170
i.	Analysis by the Tribunal	171
C.	The 3% Transaction Tax.....	173
i.	Analysis by the Tribunal	173
5.	The Tin Stock	174
A.	Analysis by the Tribunal.....	174
6.	Claims on Interest.....	175
A.	Applicable Rate	175
i.	Analysis by the Tribunal	180
B.	Fixed or Variable Interest	181
i.	Analysis by the Tribunal	182
C.	Simple or Compound.....	183
i.	Analysis by the Tribunal	184
D.	Overall Conclusion on Interest	186
7.	Claims on Taxes	187
A.	Analysis by the Tribunal.....	189
VIII.	COSTS	189
A.	Claimant's Submission on Costs	189
B.	Respondent's Submission on Costs	189
C.	Fixing the Costs of the Arbitration	190
D.	Apportionment of the Costs of the Arbitration.....	190
IX.	DECISION.....	191

GLOSSARY OF DEFINED TERMS AND ABBREVIATIONS

Allied Deals	Allied Deals plc (later renamed as RBG Resources plc)
Antimony Smelter	Antimony Smelter located near the city of Oruro, Bolivia
Antimony Smelter Reversion Decree	Supreme Decree No. 499, 1 May 2010
Assets	Together, the Tin Smelter, the Antimony Smelter, and the Colquiri Mine
BIT	Bilateral Investment Treaty
Bolivia's Post-Hearing Brief	Bolivia's Post-Hearing Brief, 18 November 2021
Bolivia's Rejoinder	Bolivia's Reply on Preliminary Objections and Rejoinder on the Merits, 24 October 2018
Bolivia's Reply Post-Hearing Brief	Bolivia's Reply Post-Hearing Brief, 13 December 2021
Bolivia's Statement of Defence	Bolivia's Preliminary Objections, Statement of Defence, and Reply on Bifurcation, 18 December 2017
CAPEX	Capital expenditures
Capitalization Law	Law No. 1,544 enacted by Bolivia, 21 March 1994
CAPM	Capital Asset Pricing Model
CDC	Commonwealth Development Corporation
Claimant	Glencore Finance (Bermuda) Ltd
Claimant's Reply	Claimant's Reply on the Merits and Counter-Memorial on Jurisdictional Objections, 22 June 2018
Claimant's Post-Hearing Brief	Claimant's Post-Hearing Brief, 18 November 2021

Claimant's Post-Hearing Reply	Claimant's Post-Hearing Reply, 13 December 2021
Colquiri Mine Lease	Colquiri Lease, 27 April 2000
Colquiri Mine	Mine in Colquiri, Bolivia
Colquiri Mine Reversion Decree	Supreme Decree No 1,264, 20 June 2012
Colquiri	Compañía Minera Colquiri S.A.
COMIBOL	Corporación Minera de Bolivia
Comsur	Compañía Minera del Sur S.A, later renamed Sinchi Wayra
Concentrator Plant	The plant at Colquiri Mine that separates tin from other minerals to produce tin concentrate
Consortium	Consortium composed by CDC and Comsur
CRP	Country Risk Premium
DCF	Discounted Cash Flow
DMT	Dry metric tonnes
EMBI	Emerging Markets Bond Index
EMV	Empresa Metalúrgica Vinto
ENAF	Empresa Nacional de Fundiciones
FEDECOMIN	Federación Departamental de Cooperativas Mineras
FENCOMIN	Federación Nacional de Cooperativas Mineras
FET	Fair and equitable treatment
FMV	Fair Market Value
FPS	Full protection and security
FSTMB	Federación Sindical de Trabajadores Mineros de Bolivia
G&A	General & Administrative costs

Glencore Bermuda	Glencore Finance (Bermuda) Ltd
Glencore International	Glencore International AG
Hearing on Jurisdiction and Merits	Hearing on Jurisdiction and Merits of 20 to 23 May 2019
Hearing on Quantum	Hearing on Quantum of 28 March to 1 April 2021
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
Investment Law	Law No 1,182 enacted by Bolivia, 17 September 1990
Iris	Iris Mines and Metals SA
Kempsey	Kempsey S.A
LIBOR	London Inter-bank Offered Rate
LME	London Metal Exchange
LOM	Life of Mine
March 2012 Investment Plan	March 2012 Investment Plan, 4 April 2012
MAS	Movimiento al Socialismo
Mining Code	Law No 1,777 enacted by Bolivia, 17 March 1997
Ministry of Mining	Ministry of Mining and Metallurgy of the Plurinational State of Bolivia
Mr. Córdova	Mr. Héctor Córdova Eguivar, a witness presented by the Plurinational State of Bolivia in this arbitration
Mr. Eskdale	Mr. Christopher Eskdale, a witness presented by Glencore Finance (Bermuda) Ltd in this arbitration

Mr. Lazcano	Mr. Eduardo Lazcano, a witness presented by Glencore Finance (Bermuda) Ltd in this arbitration
Mr. Mamani	Mr. Joaquín Mamani Chambi, a witness presented by the Plurinational State of Bolivia in this arbitration
Eng. Moreira	Eng. David Alejandro Moreira Velásquez, a witness presented by the Plurinational State of Bolivia in this arbitration
Mr. Sánchez de Lozada	Former President of Bolivia, Mr. Gonzalo Sánchez de Lozada y Sánchez Bustamante
Mr. Villavicencio	Mr. Ramiro Villavicencio Niño de Guzmán, a witness presented by the Plurinational State of Bolivia in this arbitration
MT	Metric tonne
MROR	Mineral Resources and Ore Reserves
OPEX	Operating expenditures
PAH	Pincock Allen and Holt
Panamanian Companies	Iris, Shattuck and Kempsey
Paribas	Investment Bank Paribas, consultant employed by Bolivia during the privatization process
Parties	The Claimant and the Respondent, jointly
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
Privatization Law	Law No. 1,330 enacted by Bolivia, 24 April 1992
Qualifying Commission	A committee appointed by the Ministry of External Commerce and Investment
RBG	RBG Resources plc (formerly known as Allied Deals)

Rejoinder on Quantum	Respondent's Rejoinder on Quantum, 8 June 2020,
Reply on Quantum	Claimant's Reply on Quantum, 22 January 2020
Respondent	Plurinational State of Bolivia or Bolivia
Rosario Agreement	Agreement between Colquiri, FEDECOMIN La Paz, FENCOMIN, Central Local de Cooperativas Mineras de Colquiri, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, Cooperativa 26 de Febrero and the Vice Minister of Cooperatives of the Ministry of Mining, 7 June 2012
RPA	Roscoe Postle Associates Inc
Section 1782 Application	Application for discovery filed by Bolivia pursuant to section 1782 of the United States Code, Title 28 in the United States District Court for the Eastern District of Virginia [REDACTED] [REDACTED] [REDACTED]
[REDACTED]	[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
Shattuck	Shattuck Trading Co Inc
Sinchi Wayra	Sinchi Wayra S.A. (formerly known as Comsur)
SRK	SRK Consulting, Inc
Statement of Claim	Statement of Claim, 15 August 2017
Switzerland-Bolivia BIT	Agreement between the Swiss Confederation and the Republic of Bolivia on the Reciprocal

	Promotion and Protection of Investments, signed on 6 November 1987
Tailings Plant	A projected plant to recover the tin and zinc from the old tailings left in the Colquiri Mine
Tin Smelter	Tin Smelter located near the city of Oruro, Bolivia
Tin Smelter Reversion Decree	Supreme Decree No. 29,026, 7 February 2007, published in the <i>Gaceta Oficial</i> No. 2,969 on 9 February 2007
Tin Stock	Tin concentrates from the Colquiri Mine stored at the Antimony Smelter at the moment of issuance of the Antimony Smelter Reversion Decree
Triennial Plan	Colquiri Mine Three Year Plan 2012-2014, July 2011
TSF	New Tailings Storage Facility
UK-Bolivia Treaty or Treaty	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments, signed on 24 May 1988 and extended to Bermuda on 9 December 1992
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules, as revised in 2010
VCLT or Vienna Convention	Vienna Convention on the Law of Treaties, United Nations, 23 May 1969
Vinto	Complejo Metalúrgico Vinto S.A., formerly RBG-Estaño Vinto S.A and Allied Deals Estaño Vinto S.A
WACC	Weighted Average Cost of Capital

I. INTRODUCTION

1. PARTIES TO THE ARBITRATION

1. The Claimant in this proceeding is Glencore Finance (Bermuda) Ltd (“**Glencore Bermuda**”), a company established under the laws in force in the United Kingdom overseas territory of Bermuda. The Claimant is represented by:

Noiana Marigo
Nigel Blackaby KC
Thomas Walsh
Natalia Zibibbo
Santiago Gatica
Diego Rueda

Freshfields Bruckhaus Deringer US LLP
601 Lexington Avenue 31st Floor
New York, New York 10022
United States of America

Sandra González
Diego Villaroel
Martin Rosati

Ferrere Abogados
Avenida San Martín, 3er y 4to anillo
Edificio Manzana 40, Torre 2 – Of. 2003, Piso 20
Santa Cruz de la Sierra
Bolivia

2. The Respondent in this arbitration is the Plurinational State of Bolivia (“**Bolivia**”). The Respondent is represented by:

César Adalid Siles Bazán
Patricia Guzmán Meneses
Javier Gonzalo Zabálaga
Willy Angulo Díaz

Procuraduría General del Estado
Calle Martín Cárdenas No. 109
Zona Ferropetrol, Ciudad de El Alto
Estado Plurinacional de Bolivia

Eduardo Silva Romero
José Manuel García Represa
Javier Echeverri Díaz
Ruxandra Irina Esanu

Dechert (Paris) LLP
22 rue Bayard
75008 Paris, France

2. OVERVIEW OF THE DISPUTE

3. The present dispute arises out of the reversion decrees enacted by the government of Bolivia in 2007, 2010 and 2012 whereby the investments made by the Claimant were reverted to the State’s domain. The dispute concerns the Tin Smelter, the Antimony Smelter, the Tin Stock and the Colquiri Mine Lease, as described below.¹

¹ See Sections III.2 to III.6.B below.

4. The Claimant contends that the measures taken by Bolivia breach certain obligations under the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments (the “**UK-Bolivia Treaty**” or “**Treaty**”).

II. PROCEDURAL BACKGROUND

1. COMMENCEMENT OF THE ARBITRATION

5. By **Notice of Arbitration** dated 19 July 2016, the Claimant initiated this arbitration pursuant to the United Nations Commission on International Trade Law Arbitration Rules as revised in 2010 (the “**UNCITRAL Rules**”), and Article 8 of the Treaty, which provides as follows:

ARTICLE 8

Settlement of Disputes between an Investor and a Host State

(1) 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.

(2) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) the Court of Arbitration of the International Chamber of Commerce

(c) an international arbitrator or *ad hoc* arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of six months from written notification of the claim there is no agreement to an alternative procedure, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.²

6. In its Notice of Arbitration, the Claimant proposed that the Secretary-General of the Permanent Court of Arbitration (the “**PCA**”) act as appointing authority in this arbitration.

² UK-Bolivia Treaty, 24 May 1988, Article 8 (footnotes omitted), **C-1**.

7. On 18 August 2016, the Respondent submitted its **Response to the Notice of Arbitration**, which included a request for bifurcation of the proceedings. The Respondent accepted the designation of the Secretary-General of the PCA as appointing authority.

2. CONSTITUTION OF THE TRIBUNAL

8. On 15 September 2016, the Claimant appointed Prof. John Y. Gotanda as its party-appointed arbitrator.
9. On 24 October 2016, the Respondent appointed Prof. Philippe Sands as its party-appointed arbitrator.
10. The Parties agreed on a procedure to select the presiding arbitrator. Despite the Parties' efforts, they were unable to agree on a presiding arbitrator.
11. On 28 February 2017, the Secretary-General of the PCA appointed Prof. Ricardo Ramírez Hernández as presiding arbitrator.

3. INITIAL PROCEDURAL STEPS

12. On 8 March 2017, the PCA circulated on behalf of the Tribunal draft Terms of Appointment and a draft Procedural Order No. 1, and invited the Parties to submit their comments thereon.
13. The **Terms of Appointment**, dated 29 March 2017, were signed by each member of the Tribunal and by the Parties. In them, the Parties agreed that the members of the Tribunal had been validly appointed in accordance with the Treaty and the UNCITRAL Rules, and that the PCA would act as registry and administering institution for the arbitration.
14. On 15 May 2017, a **First Procedural Meeting** was held by conference-call between the Tribunal and the Parties.
15. On 31 May 2017, the Tribunal issued **Procedural Order No. 1**, in which it fixed the languages of this arbitration as English and Spanish and the place of arbitration at Paris, France.
16. In Procedural Order No. 1, the Tribunal also decided that it would only rule on the Respondent's request for bifurcation after the receipt of the Claimant's Statement of Claim and the Respondent's Statement of Defence, and holding, potentially, a hearing on bifurcation.

4. WRITTEN SUBMISSIONS

17. On 15 August 2017, the Claimant filed its Statement of Claim including the Claimant's response to the Respondent's request for bifurcation ("**Statement of Claim**").
18. By letter dated 11 December 2017, the PCA informed the Parties that the Tribunal had decided not to hold a hearing on bifurcation.
19. By letter dated 18 December 2017, the Claimant informed the Tribunal of the Respondent's filing of an application for discovery pursuant to section 1782 of the United States Code before a United States District Court seeking testimony and documents from [REDACTED] [REDACTED] third party to this arbitrati [REDACTED] [REDACTED] the "**Section 1782 Application**"). The Claimant requested that the Tribunal issue an order requiring the Respondent to withdraw or alternatively stay its Section 1782 Application until after it exhausted the document production process agreed by the Parties and ordered by the Tribunal in this arbitration, and declaring inadmissible any evidence obtained outside of these proceedings without the Tribunal's prior authorization.
20. On 18 December 2017, the Respondent filed its Statement of Defence including all objections to the Tribunal's jurisdiction ("**Bolivia's Statement of Defence**").
21. On 18 January 2018, the Tribunal informed the Parties that it had decided to hear the Parties' submissions regarding jurisdiction and admissibility together with their submissions on the merits, while bifurcating the proceedings with regard to quantum to a later phase of the proceedings, if any. The Tribunal also informed the Parties that it had decided to dismiss the Claimant's request regarding the Section 1782 Application, and advised the Parties that the reasoning for these decisions would follow in procedural orders to be issued in the following days.
22. On 31 January 2018, the Tribunal issued **Procedural Order No. 2**, containing its decision on bifurcation, and **Procedural Order No. 3**, regarding the Claimant's request on the Section 1782 Application.
23. On 16 March 2018, the Parties submitted their respective requests for document production.
24. On 27 March 2018, the Tribunal issued **Procedural Order No. 4**, ruling on the Parties' document production requests.
25. On 22 June 2018, the Claimant submitted its Counter-Memorial on Jurisdiction and Reply on Merits ("**Claimant's Reply**").

26. On 24 October 2018, the Respondent submitted its Reply on Jurisdiction and Rejoinder on Merits (“**Bolivia’s Rejoinder**”).
27. On 2 January 2019, the Parties were provided with a draft version of Procedural Order No. 5, regarding the hearing on jurisdiction and merits, and were invited to consult and attempt to agree on the matters addressed therein.
28. On 22 January 2019, the Claimant submitted its Rejoinder on Jurisdiction (“**Claimant’s Rejoinder**”).
29. On 5 February 2019, the Parties simultaneously submitted their notifications of the witnesses which they intended to cross-examine at the hearing on jurisdiction and merits.
30. On 6 March 2019, the Parties and the Tribunal held a pre-hearing conference call.
31. On 19 March 2019, the Tribunal issued **Procedural Order No. 5**, convening the hearing on jurisdiction and merits and addressing certain logistical and other hearing arrangements.

5. HEARING ON JURISDICTION AND MERITS

32. From 20 May to 23 May 2019, the Parties and the Tribunal held the hearing on jurisdiction and merits (the “**Hearing on Jurisdiction and Merits**”) at the facilities of the International Chamber of Commerce (the “**ICC**”) in Paris, France.
33. The following persons were present at the Hearing on Jurisdiction and Merits:

Tribunal

Prof. Ricardo Ramírez Hernández, Presiding Arbitrator

Prof. John Y. Gotanda

Prof. Philippe Sands

Claimant

Mr. Adam Luckie, Legal Counsel, Glencore

Mr. Carlos Francisco Fernández, Glencore

Mr. Nicolas Albrecht, Asset Manager, Glencore

Mr. Nigel Blackaby, Freshfields Bruckhaus Deringer

Ms. Noiana Marigo, Freshfields Bruckhaus Deringer

Ms. Natalia Zibibbo, Freshfields Bruckhaus Deringer

Ms. Guadalupe López, Freshfields Bruckhaus Deringer

Ms. Paula Henin, Freshfields Bruckhaus Deringer

Mr. Santiago Gatica, Freshfields Bruckhaus Deringer

Mr. Diego Rueda, Freshfields Bruckhaus Deringer

Ms. Allison Kowalski, Freshfields Bruckhaus Deringer

Ms. Allie Bian, Freshfields Bruckhaus Deringer

Ms. Yesica Crespo, Freshfields Bruckhaus Deringer

Ms. Cassia Cheung, Freshfields Bruckhaus Deringer

Ms. Jean Helal, Freshfields Bruckhaus Deringer

Ms. Lindsay Sykes, Ferrere Abogados

Respondent

Mr. Héctor Arce Zaconeta, Minister for Justice and Institutional Transparency

Mr. Félix César Navarro Miranda, Minister for Mining and Metallurgy

Mr. Carlos Romero Bonifaz, Minister of Government

Mr. Pablo Menacho Diederich, State's General Attorney, Attorney General's Office

Mr. Ernesto Rossell Arteaga, Deputy Procurator for Defence and State's Legal Representation,
Attorney General's Office

Mr. Marco Antonio Ergueta Flores, Attorney General's Office

Ms. Paola Valeria Bonadona Quiroga, Attorney General's Office

Mr. José Ariel Mauricio Aguilar, Attorney General's Office

Mr. Franz Zubieta Mariscal, Attorney General's Office

Prof. Eduardo Silva Romero, Dechert

Mr. José Manuel García Represa, Dechert

Mr. Javier Echeverri Díaz, Dechert

Ms. Ruxandra Irina Esanu, Dechert

Ms. Juliana Pondé Fonseca, Dechert

Mr. Panos Theodoropoulos, Dechert

Mr. Marcelo Fernández, Dechert

Ms. Judith Alves, Dechert

Ms. Melina Mirambeaux Hernández, Dechert

Mr. Ricardo Montalvo, Dechert

Mr. Matías Zambrano, Dechert

Ms. Maria Claudia Procopiak, Dechert

Mr. Juan Felipe Merizalde, Dechert

Registry

Mr. Martín Doe Rodríguez, Senior Legal Counsel, Permanent Court of Arbitration

Ms. Elena Laura Álvarez Ortega, Assistant Legal Counsel, Permanent Court of Arbitration

34. The following witnesses were examined at the Hearing on Jurisdiction and Merits:

Christopher Eskdale

Eduardo Lazcano

Héctor Córdova Eguivar

Carlos Romero Bonifaz

Andrés Cachi Quispe

Joaquín Mamani Chambi

David Alejandro Moreira Velásquez

6. FURTHER PROCEDURAL STEPS AFTER THE HEARING ON JURISDICTION AND MERITS

35. On 31 May 2019, the Tribunal issued **Procedural Order No. 6**, wherein it requested certain additional documents from the Claimant [REDACTED] and invited the Parties to complete their submissions on quantum notwithstanding its earlier decision to bifurcate issues of quantum to a later phase of the proceedings with a view to holding a hearing on quantum in December 2019.
36. After receiving the Parties' comments, the Tribunal informed the Parties by letter dated 4 July 2019 that it had reserved the dates of 7-10 July 2020 for a hearing on quantum.

7. QUANTUM PHASE

37. On 23 July 2019, the Parties submitted to the Tribunal an agreed joint proposal of procedural calendar for the quantum phase.
38. On 29 July 2019, the Tribunal issued **Procedural Order No. 7**, whereby the Tribunal adopted a procedural calendar for the quantum phase of these proceedings.
39. By letter dated 13 August 2019, the Respondent requested the Tribunal to order the Claimant to complete its document production pursuant to Procedural Order No. 6.
40. On 5 September 2019, the Tribunal issued **Procedural Order No. 8**, deciding on certain applications in respect of the documents produced in accordance with Procedural Order No. 6.

41. On 20 September 2019, the Parties simultaneously submitted their respective requests for an order on production of documents.
42. On 30 September 2019, the Tribunal issued **Procedural Order No. 9**, deciding on the Parties' document production requests.
43. On 20 January 2020, the Tribunal issued **Procedural Order No. 10**, deciding on an application by the Claimant in respect of the document production ordered under Procedural Order No. 9.
44. On 22 January 2020, the Claimant submitted its Reply on Quantum ("**Reply on Quantum**").
45. On 6 March 2020, the Respondent requested an extension until 1 June 2020 of the deadline to submit its rejoinder on quantum.
46. By letter dated 7 March 2020, the Tribunal invited the Claimant's comments on the Respondent's extension request.
47. By letter dated 11 March 2020, the Claimant provided its comments on the Respondent's request.
48. By letter dated 14 March 2020, the Tribunal decided to extend the deadline for the submission of the Respondent's rejoinder on quantum until 18 May 2020.
49. By letter dated 27 March 2020, the Tribunal asked the Parties for their availability during certain dates in the fall to be reserved as back-up hearing dates.
50. Following several exchanges of correspondence, on 14 April 2020, the Parties conveyed their availability to attend a hearing on 5-9 October 2020, and requested the Tribunal to amend the hearing dates accordingly and to reserve back-up dates during the following spring.
51. By letter dated 16 April 2020, the Tribunal confirmed the amendment requested by the Parties and provisionally reserved 29 March to 1 April 2021 as back-up hearing dates.
52. By letter dated 23 April 2020, the Respondent requested the Tribunal to suspend these proceedings due to the effect of the COVID-19 pandemic, and requested an eight-week extension of the deadline for the submission of its rejoinder on quantum.
53. By letter dated 24 April 2020, the Tribunal invited the Claimant's comments on the Respondent's request, which were provided by letters dated 27 and 30 April 2020.

54. On 5 May 2020, the Tribunal issued **Procedural Order No. 11**, rejecting a request to suspend the proceedings but extending the deadline for the Respondent to submit the Rejoinder on Quantum.
55. On 4 June 2020, the Parties conveyed their agreement to further extend the deadline for the Respondent to submit the rejoinder on quantum. On the following day, the Tribunal ratified such agreement and issued a revised procedural calendar.
56. On 8 June 2020, the Respondent submitted its Rejoinder on Quantum (“**Rejoinder on Quantum**”).
57. By respective e-mails of 16 July 2020, the Parties agreed to postpone the hearing on quantum to the backup dates of 29 March – 1 April 2021 and further agreed that the hearing on quantum would take place, if necessary, by videoconference.
58. On 3 February 2021, the Tribunal issued **Procedural Order No. 12**, admitting certain new documents into the record of the proceedings.
59. On 18 December 2020, the Parties notified the Tribunal of the witnesses and experts they respectively intended to call to testify at the hearing on quantum.
60. On 9 February 2021, given that the hearing on quantum would necessarily take place by videoconference as a result of the COVID-19 pandemic, the Parties jointly requested the Tribunal to extend the hearing to include 28 March 2021.
61. On 26 February 2021, the Parties and the Tribunal held a pre-hearing meeting by videoconference.
62. On 8 March 2021, the Tribunal issued **Procedural Order No. 13**, fixing the dates for the hearing on quantum and addressing certain logistical and other hearing arrangements.

8. HEARING ON QUANTUM

63. From 28 March to 1 April 2021, the Parties and the Tribunal held the hearing on quantum (the “**Hearing on Quantum**”) by videoconference.
64. The following persons were present at the Hearing on Quantum:

Tribunal

Prof. Ricardo Ramírez Hernández, Presiding Arbitrator

Prof. John Y. Gotanda

Prof. Philippe Sands

Claimant

Mr. Adam Luckie, Glencore

Mr. Carlos Francisco Fernández, Glencore

Mr. Luis Herrera, Glencore

Mr. Nigel Blackaby, Freshfields Bruckhaus Deringer

Ms. Noiana Marigo, Freshfields Bruckhaus Deringer

Mr. Thomas Walsh, Freshfields Bruckhaus Deringer

Ms. Natalia Zibibbo, Freshfields Bruckhaus Deringer

Mr. Santiago Gatica, Freshfields Bruckhaus Deringer

Mr. Diego Rueda, Freshfields Bruckhaus Deringer

Mr. Alexandre Alonso, Freshfields Bruckhaus Deringer

Ms. Allie Bian, Freshfields Bruckhaus Deringer

Mr. Rodrigo Millán, Freshfields Bruckhaus Deringer

Ms. Melina de Bona, Freshfields Bruckhaus Deringer

Ms. Yesica Crespo, Freshfields Bruckhaus Deringer

Ms. Cassia Cheung, Freshfields Bruckhaus Deringer

Ms Natalia Dalenz, Ferrere Abogados

Respondent

Mr. Wilfredo Franz Chávez Serrano, State's Attorney General

Ms. Patricia Guzmán Meneses, Attorney General's Office

Mr. Luis Guillermo Chura Flores, Attorney General's Office

Mr. Ramiro Humberto Melendres Argote, Attorney General's Office

Mr. Juan Alvaro Raznatovic Cruz, Attorney General's Office

Mr. Nicanor Huanca, Attorney General's Office

Prof. Eduardo Silva Romero, Dechert

Mr. José Manuel García Represa, Dechert

Ms. Gabriela González Giráldez, Dechert

Mr. Luis Miguel Velarde Saffer, Dechert
Mr. Federico Arata, Dechert
Mr. Gabriel Otoy Henao, Dechert
Ms. Ruxandra Irina Esanu, Dechert
Mr. Panos Theodoropoulos, Dechert
Ms. Melina Mirambeaux Hernández, Dechert
Ms. Anne Driscoll, Dechert
Ms. Ana Cuartero de Vidiella, Dechert
Mr. Matías Zambrano, Dechert
Ms. Sofía Gaspari, Dechert
Mr. Loïc Cropage, Dechert
Mr. Jean-Philippe Nguyen, Dechert

Registry

Mr. Martin Doe Rodríguez, Senior Legal Counsel, Permanent Court of Arbitration
Mr. Markel Eguiluz, Assistant Legal Counsel, Permanent Court of Arbitration
Ms. Alejandra Martinovic, Case Manager, Permanent Court of Arbitration

65. The following witnesses were examined at the Hearing on Quantum:

Christopher Eskdale
Eduardo Lazcano
Ramiro Villavicencio Niño de Guzmán
Graham Clow
Richard Lambert
Neal Rigby
Manuel A. Abdala
Carla Chavich

66. On 22 September 2021, the Tribunal submitted a list of questions and other matters for the Parties to address in post-hearing submissions. On 5 October 2021, the Tribunal provided certain clarifications to its questions and directions on post-hearing submissions.
67. On 18 November 2021, the Parties submitted their first round of post-hearing submissions together with their joint expert valuation models (“**Claimant’s Post-Hearing Brief**” and “**Bolivia’s Post-Hearing Brief**”, respectively).

68. On 13 December 2021, the Parties submitted their respective reply post-hearing submissions (“**Claimant’s Post-Hearing Reply**” and “**Bolivia’s Reply Post-Hearing**”, respectively).
69. On 17 December 2021, the Parties submitted their respective statements of costs.

III. FACTUAL BACKGROUND OF THE DISPUTE

1. LEGAL FRAMEWORK

70. On 16 February 1990, the UK-Bolivia Treaty entered into force.³ On 9 December 1992, it was extended to Bermuda and entered into force the same day.⁴
71. In September 1990, Bolivia enacted Law No 1,182 (the “**Investment Law**”),⁵ with the purpose of “stimulat[ing]” and “guarantee[ing]” domestic and foreign investments in Bolivia.⁶
72. In April 1992, Bolivia enacted Law No. 1,330 (the “**Privatization Law**”). Under that law, public entities, institutions, and companies were authorized to transfer their assets, shares and property rights to natural individuals or collective entities, whether domestic or foreign, or to participate with them in new “mixed” entities.⁷
73. Law No. 1,544 of 21 March 1994 (the “**Capitalization Law**”), allowed an increase in the participation of private investment, domestic or foreign, in public-private partnerships. Pursuant to Article 2, Empresa Metalúrgica Vinto (“**EMV**”), among other entities, was to be converted into a public-private partnership.⁸
74. Through Law No. 1,615 Bolivia approved in February 1995 a reformed text of its Constitution. Article 138 indicated that nationalized mining groups belonged to the national patrimony and could not “*be transferred or adjudicated to the property of private companies by any TITLE. The*

³ UK-Bolivia Treaty, 24 May 1988, **C-1**.

⁴ Exchange of Notes, 3 December 1992 and 9 December 1992, pursuant to which the Treaty was extended to Bermuda and other territories, **C-2**.

⁵ Investment Law, *Gaceta Oficial* No. 1662, 17 September 1990, Art. 1, **C-4**.

⁶ Investment Law, *Gaceta Oficial* No. 1662, 17 September 1990, Art. 1, **C-4** (unofficial translation).

⁷ Privatization Law, *Gaceta Oficial* No. 1,735, 24 April 1992, Art. 1, **C-58**. One of the ways in which Art. 4 of the same law provided that such transfers would be made was through public tender.

⁸ Capitalization Law, 21 March 1994, Arts. 1-4, **R-8**. The Tribunal maintains the unofficial translation of the term “*sociedades de economía mixta*” as provided by Respondent.

*superior management and administration of the State mining industry will be the responsibility of an autarchic entity the attributions of which shall be determined by law”.*⁹

75. Supreme Decree No. 23,991 of 10 April 1995 provided for all public companies and entities to undergo “reorganization processes”.¹⁰ Reorganization was for the purpose of “increasing 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 [...]”.¹¹
76. In May 1997, Bolivia enacted Law No 1,777 (the “**Mining Code**”).¹² Under that statute, the State could grant mining concessions to national or foreign individuals or collective entities.¹³ The mining rights were given status of real property rights and could be freely transferred and mortgaged.¹⁴ In accordance with Article 138 of the Constitution, an independent entity was created: Corporación Minera de Bolivia (“**COMIBOL**”).¹⁵ Under Article 94, COMIBOL was required to transfer by way of international public tender the mining concessions which were not subject to risk-sharing or leasing contracts.¹⁶

⁹ Constitution of Bolivia, 1967 (emphasis added), **R-3** (unofficial translation).

¹⁰ Supreme Decree No. 23,991, 10 April 1995, Art. 1, **R-100** (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 [...]” emphasis added).

¹¹ Supreme Decree No. 23,991, 10 April 1995, Art. 2, **R-100**.

¹² Mining Code, 17 March 1997, **R-4**.

¹³ Mining Code, 17 March 1997, Art. 2, **R-4**.

¹⁴ Mining Code, 17 March 1997, Art. 4, **R-4**.

¹⁵ “[COMIBOL] is a public company, self-governed and dependent on the National Secretary of Mining, it is in charge of the high management and administration of State mining. This entity manages and administers, without directly carrying out any mining activities, only through shared risk, services, or lease agreements”. Mining Code, 17 March 1997, Art. 91, **R-4** (unofficial translation).

¹⁶ Resolution No. 139/99, 24 June 1999, p. 1, **C-59**; and Resolution No. 1753/99, 25 June 1999, p. 1, **C-60**, providing for the publishing of the calls for tender and approval of terms relating to the assets of EMV (Tin and Antimony) as well as for the transfer of “Centro Minero de Colquiri” by way of leasing contract.

77. In 1999 and in accordance with this framework, Bolivia issued the public terms for the sale of: 1) the Tin Smelter,¹⁷ 2) the Antimony Smelter,¹⁸ and 3) the rights to operate and exploit the Colquiri Mine.¹⁹

2. BRIEF DESCRIPTION OF THE ASSETS

78. The Tin Smelter, the Antimony Smelter (together with the Tin Stock), and the Colquiri Mine (“**Assets**”) which the Claimant contends constitute a covered investment under the Treaty can be briefly described as follows.

A. The Tin Smelter

79. The Tin Smelter (“**Tin Smelter**”) was built between 1968 and 1970 near the city of Oruro by the State company *Empresa Nacional de Fundiciones* (“**ENAF**”).²⁰ It began operations in 1971 and produces primarily “high-grade metallic tin”.²¹ It is the largest smelter in Bolivia and “processes minerals from various mining operations, including the Colquiri Mine and Huanuni mine.”²²

B. The Antimony Smelter

80. “The Antimony Smelter was located adjacent to the Tin Smelter” and was built to produce metallic antimony ingots from materials originating in the Tupiza region of Bolivia (“**Antimony Smelter**”).²³ It was inaugurated in 1976 and was operative during the late 1970s and the end of 1980s, until its closure in 1985. Operations began again in 1990 pursuant to a toll contract held

¹⁷ The Tin Smelter has a surface area of approximately 61 Ha. It is located in Bolivia, 7.5 km east of the city of Oruro and approximately 230 km southeast of La Paz. Paribas, Privatisation of Bolivian mining assets, Confidential Information Memorandum, 16 September 1999, p. 25, **RPA-04**. “The smelting process consists of roasting tin concentrate (raw material produced from mineral ore) at temperatures of 1,300-1,400 degrees Celsius, while injecting coal to act as a reducing agent to remove impurities. The resulting product, a tin ingot, is a semi-finished product with a variety of applications, including but not limited to, electronics, food products, and home appliances.” Statement of Claim, ¶ 41.

¹⁸ The Antimony Smelter has a surface area of approximately 9 Ha. It is located in Bolivia, 7.5 km northeast of the city of Oruro and approximately 230 km southeast of La Paz. Paribas, Privatisation of Bolivian mining assets, Confidential Information Memorandum, 16 September 1999, p. 59, **RPA-04**.

¹⁹ The Colquiri Mine has exploited silver (Ag) and Lead (Pb) since Spanish Colonial times (before 1825). The exploitation of Tin (Sn) and Zinc (Zn), on a small scale, dates from the mid twentieth century. In 1952, Empresa Minera Colquiri became part of COMIBOL, turning into the second most important producer in the country of tin and zinc. SRK Consulting, Inc. (“**SRK**”), First Expert Report, ¶¶ 32-33.

²⁰ Bolivia’s Statement of Defence, ¶ 40.

²¹ Statement of Claim, ¶ 40; Roscoe Postle Associates Inc (“**RPA**”) First Expert Report, 15 August 2017, ¶ 42.

²² Statement of Claim, ¶ 27; RPA First Expert Report, ¶ 42.

²³ Statement of Claim, ¶¶ 59, 27.

by the private United States (“US” or “U.S.”) company Laurel Industries Inc. Upon expiration of the toll contract in August 1998 it ceased operations.²⁴ The Antimony Smelter was used “occasionally” as a storage facility for the Colquiri Mine.²⁵

C. The Colquiri Mine

81. Located in the Province of Inquisivi—Department of La Paz—226 km from La Paz and 70 km from Oruro, the Colquiri Mine has been active since the 1850s²⁶ and it is the second largest tin/zinc producer in Bolivia (the “Colquiri Mine”).²⁷



Statement of Claim, ¶ 46.

²⁴ Privatisation of Bolivian mining assets, Confidential Information Memorandum, 16 September 1999, p. 60, **RPA-04**; Claimant’s Reply, ¶ 27.

²⁵ Statement of Claim, ¶ 59. Respondent also indicates as “undisputed” that the Antimony Smelter was used “occasionally” as a storage facility. Bolivia’s Statement of Defence, ¶ 884.

²⁶ Bolivia’s Statement of Defence, ¶ 30.

²⁷ Statement of Claim, ¶¶ 46-47.



Bolivia's Statement of Defence, ¶ 31.

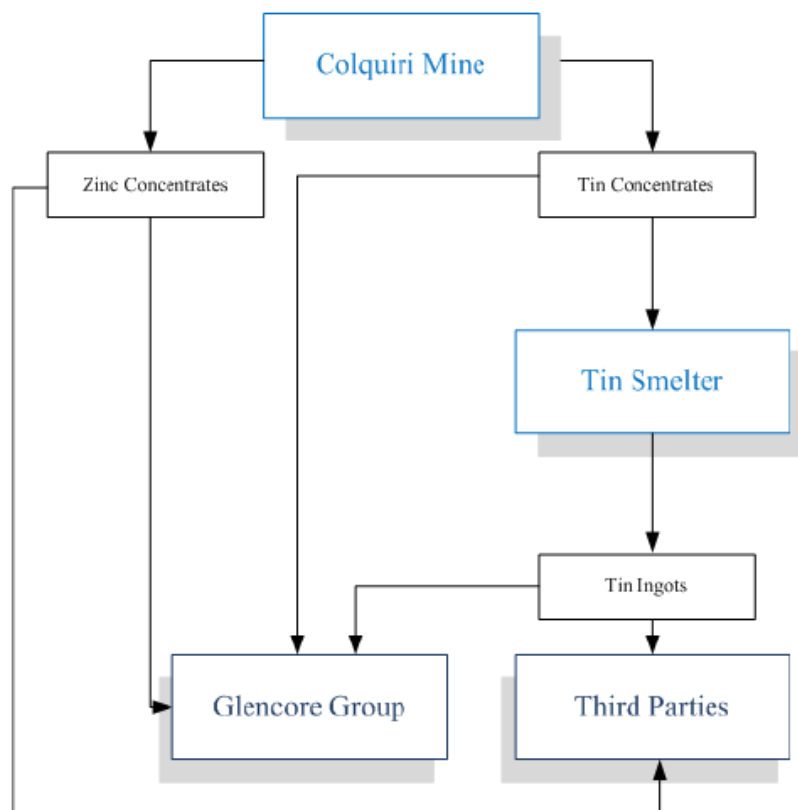
82. The Colquiri Mine “is an integrated operation consisting of a high-altitude underground mine, a mill and concentrator, as well as ancillary facilities such as maintenance shops, warehouses and offices. The Colquiri Mine deposit consists of four veins: Blanca, Rosario, San Antonio and San Carlos.”²⁸ A vein “is a distinct sheet-like body of crystallized minerals within a rock”.²⁹
83. The Colquiri Mine adopted the underground mining method known as sub-level stopping.³⁰ The extracted ore at the Colquiri Mine consisted of a mixture of zinc and tin, small quantities of other

²⁸ Statement of Claim, ¶ 47. RPA First Expert Report, ¶ 82, referring to the principal veins.

²⁹ Statement of Claim, fn. 73.

³⁰ Statement of Claim, ¶ 48; RPA First Expert Report, ¶¶ 97-98. This “involves digging large-scale horizontal tunnels which follow a vein at different levels of elevation, as well as a vertical tunnel connecting the different sub-levels. Once this basic structure is in place, a number of holes are drilled into the roof of a low-elevation drift and then filled with explosives. When the explosives detonate, loose rocks fall down the ore pass to a lower level of the mine, a “gallery,” where they are gathered and transported to an underground crusher. The crushed ore is then transported to the surface through a vertical shaft. This process is repeated until the roof of the drift is so high that it cannot be reached by the drills anymore. At this point in time, a drill located in the next-highest drift will be used to intersect the underground excavation area. Once the entire relevant area has been excavated, the excavation area is filled back up with a mixture of cement and backfill materials such as tailings or sand and rocks”. Statement of Claim, fn. 74.

elements and additional minerals that were not commercially viable.³¹ The ore was processed in the mill and concentrator plant, where the various minerals were separated from each other and from the sterile rock through a series of processes.³² The concentrator plant separated tin from other minerals to produce tin concentrate (“**Concentrator Plant**”).³³ The valuable minerals that resulted from the separation process — mainly tin and zinc, were subsequently sold in concentrate form to either Glencore International AG (“**Glencore International**”), Complejo Metalúrgico Vinto S.A. (“**Vinto**”), or third parties.³⁴



*Glencore's operations chain.*³⁵

³¹ Statement of Claim, ¶ 49. Lazcano First Witness Statement, ¶¶ 11, 15.

³² Statement of Claim, ¶ 49. Lazcano First Witness Statement, ¶ 19.

³³ Statement of Claim, ¶ 53.

³⁴ Statement of Claim, ¶ 49. Lazcano First Witness Statement, ¶ 20.

³⁵ Statement of Claim, p. 27; Eskdale First Witness Statement, ¶ 30. See also: “[a]round the turn of the century, Colquiri’s silver extraction was predominantly replaced by zinc and several decades later tin extraction became economically viable [...] The Vinto Smelter [...] was constructed during the period from 1968 to 1970 to process tin concentrates received from local mines, including from the Colquiri Mine [...] the revenues from Vinto are derived through the processing of tin concentrate to produce tin ingots. The ingots are sold to third parties and form the base for Vinto’s revenues.” Flores First Expert Report, ¶¶ 21, 95 and

3. THE ECONOMIC SITUATION IN BOLIVIA BETWEEN 1970 AND 1990

84. According to the Claimant, the Bolivian economy was mainly based on mining until the beginning of the 20th century.³⁶ The Claimant asserts that, at the beginning of the 1980s, “Bolivia was severely hit by the decrease in international commodity prices, a lack of access to international financing and the high interest rates applicable to its debts.”³⁷ This crisis was aggravated in 1985 due to the steep fall in tin prices following the International Tin Council’s collapse.³⁸
85. In August 1985, the Paz Estenssoro administration of Bolivia enacted Supreme Decree No. 21,060,³⁹ which provided for a broad stabilization and privatization program of Bolivia’s industrial sector.⁴⁰ Mr. Sánchez de Lozada, as Minister for Planning and Coordination, was responsible for the implementation of this Supreme Decree.⁴¹ This decree provided, among other things, for the “decentralization of the [COMIBOL]”,⁴² a State-owned corporation created in 1952 “with the specific purpose of managing the mining industry, directly assuming the exploration, exploitation, benefit and commercialization of minerals”.⁴³

96. “The tin ingots produced by Vinto [...] were essentially sold by Glencore International”. SRK First Expert Report, ¶ 99.

³⁶ Statement of Claim, ¶ 19; referring to “Country Profile: Bolivia 1987-88,” Economist Intelligence Unit, September 1987, p. 7, **C-54**; JA Morales and JD Sachs, “Bolivia’s Economic Crisis” in: JD Sachs (ed), *Developing Country Debt and the World Economy*, 1989, pp 5-6, **C-56**.

³⁷ Statement of Claim, ¶ 20; referring to “Country Profile: Bolivia 1987-88,” Economist Intelligence Unit, September 1987, pp. 5, 10, **C-54**. See also, Claimant’s Reply, ¶ 18.

³⁸ See “Country Profile: Bolivia 1987-88,” Economist Intelligence Unit, September 1987, p. 11, **C-54**. See also, Statement of Claim, ¶ 20; Bolivia’s Statement of Defence, ¶¶ 34, 41; Claimant’s Reply, ¶ 19.

³⁹ Statement of Claim, ¶ 22; Bolivia’s Statement of Defence, ¶ 47; referring to Supreme Decree No. 21,060, August 29, 1985, **R-2**.

⁴⁰ Statement of Claim, ¶ 22; referring to JD Sachs, “The Bolivian Hyperinflation and Stabilization,” AEA Papers and Proceedings, May 1987, p. 3, **C-53**. See also, Bolivia’s Statement of Defence, ¶ 47; Claimant’s Reply, ¶ 20.

⁴¹ Bolivia’s Statement of Defence, ¶ 47.

⁴² Bolivia’s Statement of Defence, ¶ 47; referring to Supreme Decree No. 21,060, August 29, 1985, Art. 102, **R-2**.

⁴³ Statement of Claim, fn. 21; referring to Supreme Decree No. 3,196, *Gaceta Oficial* No. GOB-61, 2 October 1952, Art. 1, **C-51** “and law dated 29 October 1956, which passed Supreme Decree No. 3,196 into law.”

4. THE TENDER PROCESS

86. Prior to the privatization of the Assets, they were operated by COMIBOL and its affiliates.⁴⁴ Between June and August 1999, the Respondent issued a public tender for the sale of the Tin and Antimony Smelters, and the rights to operate and exploit the Colquiri Mine (the “**Colquiri Mine Lease**”).⁴⁵
87. In accordance with the terms of reference, the bidders had to compete on technical and economic criteria. The approved bidders’ financial proposals would be assessed⁴⁶ by a Qualifying Commission (the “**Qualifying Commission**”).⁴⁷ This Qualifying Commission would issue a recommendation to the Trade and Investment Ministry which would then be submitted to the President and the Cabinet. If approved, the tender was awarded by Supreme Decree. The terms of reference provided that any bidder could challenge the award within 5 working days from its notification.⁴⁸
88. Investment Bank Paribas (“**Paribas**”) was retained as advisor to Bolivia during this process and would “submit an envelope to the Government on the bidding day, with its own recommendation of a minimum price for the adjudication. If no offer is superior to the minimum price

⁴⁴ Bolivia’s Statement of Defence, ¶ 28 and Bolivia’s Rejoinder, ¶ 23.

⁴⁵ See Terms of Reference for the Public Tender for the Colquiri Mine Lease, 24 June 1999, **R-104**; Terms of Reference for the Second Public Tender for the Antimony Smelter, 31 July 2000, **R-109**; Terms of Reference for the Public Tender for the Tin Smelter, 24 June 1999, **R-118**. See also, Statement of Claim, ¶ 27.

⁴⁶ Terms of Reference for the Public Tender for the Colquiri Mine Lease, 24 June 1999, Sections 2.1, 2.2, 4 and 5, **R-104**; Terms of Reference for the Second Public Tender for the Antimony Smelter, 31 July 2000, Sections 2.1, 2.2, 4 and 5, **R-109**; Terms of Reference for the Public Tender for the Tin Smelter, Sections 2.1, 2.2, 4 and 5, 24 June 1999, **R-118**. See also Amendment No 6 to the Terms of Reference to the Tin Smelter Tender, 2 December 1999, pp. 1-3, **R-119**.

⁴⁷ “The Qualifying Commission was a committee appointed by the Ministry of External Commerce and Investment. Its members included the Trade Minister, the General Director of Metallurgy of the Ministry of Economic Development, the President of EMV and the President of Comibol.” Claimant’s Reply, fn. 68. Additionally, the Executive Director and the Legal Consultant of the Reordering Unit were part of such Commission. See Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease, 21 December 1999, p. 8, **R-108**.

⁴⁸ Terms of Reference for the Public Tender for the Colquiri Mine Lease, 24 June 1999, Sections 5.5.2, 5.5.3 and 5.6, **R-104**; Terms of Reference for the Second Public Tender for the Antimony Smelter, 31 July 2000, Sections 5.5.2, 5.5.3 and 5.6, **R-109**; Terms of Reference for the Public Tender for the Tin Smelter, 24 June 1999, Sections 5.6, 5.8.2, 5.8.3 and 5.9, **R-118**.

recommended, the process can be terminated. The Government, though, is not obliged to follow this recommendation and can adjudicate at a lower price.”⁴⁹

89. In the case of the Colquiri Mine Lease, two entities participated in the tender and bidding process, Parapanema S.A. and a consortium formed by the UK-based Commonwealth Development Corporation (“**CDC**”) and the Bolivia-based Compañía Minera del Sur S.A. (Comsur) (the “**Consortium**”).⁵⁰ The Qualifying Commission considered that the Consortium met the criteria published in the Terms of Reference and recommended that the Colquiri Mine Lease be awarded to the Consortium.⁵¹ The Qualifying Commission also considered that the price offered was “convenient” for Bolivian interests and indicated that Paribas did not recommend any minimum price.⁵² The Bolivian Government awarded the lease of the Colquiri Mine to the Consortium.⁵³ The lease was formalized by Compañía Minera Colquiri S.A. (“**Colquiri**”) (owned 51% by Comsur and 49% by CDC) on 27 April 2000.⁵⁴ The terms of the lease were as follows:

- Duration of 30 years; and
- Colquiri would pay a royalty equivalent to 3.5% of its net revenues and make an investment commitment of a US\$1.20 million for the first year and US\$800,000 for the second year.⁵⁵

90. Decree 25,631 pursuant to which the Colquiri Mine Lease was awarded, also declared that the public bid for the Antimony Smelter was vacated.⁵⁶ A second bidding process for the Antimony

⁴⁹ “The Bolivian Government will remain free to follow Paribas’ recommendation or not”. See Paribas, Privatisation of Bolivian mining assets, Confidential Information Memorandum, 16 September 1999, pp. 11, 15, 54 and 51, **RPA-04**.

⁵⁰ Bolivia’s Statement of Defence, ¶ 57; Claimant’s Reply, ¶ 36; Minutes of the opening of Envelope A proposals (Colquiri), 20 December 1999, p. 2, **R-105**.

⁵¹ Bolivia’s Statement of Defence, ¶ 57; Claimant’s Reply, ¶ 36; Minutes of the opening of Envelope B proposals (Tin Smelter, Antimony Smelter, Colquiri Mine Lease), 20 December 1999, p. 6, **R-107**; Notarized minutes of the opening of the Envelope A proposals (Tin Smelter, Colquiri), 21 December 1999, pp. 4-5, **R-116**; Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease, 21 December 1999, pp. 6 and 7, **R-108**.

⁵² Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease, 21 December 1999, p. 6, **R-108** (unofficial translation).

⁵³ Supreme Decree No 25,631, *Gaceta Oficial* No 2,192, 24 December 1999, Art. 2, **C-6**.

⁵⁴ Colquiri Mine Lease, 27 April 2000, **C-11**.

⁵⁵ Supreme Decree No 25,631, *Gaceta Oficial* No 2, 192, 24 December 1999, Art. 2, **C-6**; Colquiri Mine Lease, 27 April 2000, clauses 2.7, 3, 5.1 and 7, **C-11**.

⁵⁶ Supreme Decree No 25,631, *Gaceta Oficial* No 2, 192, 24 December 1999, Art. 4, **C-6**.

Smelter took place in August 2000.⁵⁷ Paribas set a minimum price for this asset at US\$100,000.⁵⁸ Two proposals were submitted by Colquiri and Allied Deals PLC; however, Allied Deals PLC was disqualified. The Antimony Smelter was awarded for US\$1,100,000 to Colquiri.⁵⁹ Following this decision, there were two letters addressed to the President of Bolivia by a Parliamentary Group and a Senator, and one by the Foreign Trade and Investment Minister to the Minister of the Presidency complaining about the minimum price, requesting explanations on the bidding process and the suspension of the privatization process to establish an investigating commission.⁶⁰ On 5 January 2002, the tender was awarded and the sale was finalized on 11 January 2002.⁶¹

91. For the Tin Smelter, the Qualifying Commission considered a bid from UK-based Allied Deals PLC for US\$14 million and an offer from the Consortium. Paribas recommended US\$10 million as the minimum price for the smelter. In December 1999, the Qualifying Commission recommended that the Tin Smelter be awarded to Allied Deals PLC, as its bid was the highest bidding price.⁶²
92. On 24 December 1999, the Tin Smelter was awarded to Allied Deals PLC by Supreme Decree No. 25,631.⁶³ The price paid was US\$14,751,349. In November 2000, the sale was formalized between the Trade Ministry and a subsidiary created by Allied Deals PLC, Allied Deals Estaño Vinto SA.⁶⁴ Allied Deals changed its name to RBG Estaño Vinto SA on 5 October 2001, which later (30 August 2002) changed its name to Complejo Metalúrgico Vinto SA.⁶⁵

⁵⁷ Terms of Reference for the Second Public Tender for the Antimony Smelter, 31 July 2000, **R-109**.

⁵⁸ Bolivia's Statement of Defence, ¶ 65.

⁵⁹ Report No. 001/2000 of the Qualifying Commission of the second public tender for the sale of the Antimony Smelter, 20 November 2000, pp. 2, 3, **R-112**.

⁶⁰ Letter from the Oruro Parliamentary Group to President Bánzer Suárez, 27 November 2000, **R-110**; Letter from Leopoldo Fernández Ferreira to President Hugo Bánzer Suárez, 5 December 2000, **R-113**; Letter from Humberto Bohrt Artieda to Walter Guiteras Denis, 8 December 2000, **R-114**.

⁶¹ Supreme Decree No 26,042, *Gaceta Oficial* No 2,282, 9 January 2001, **C-8**; 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, 11 January 2002, **C-9**.

⁶² Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease, 21 December 1999, pp. 4-7, **R-108**.

⁶³ Supreme Decree No 25,631, *Gaceta Oficial* No 2,192, 24 December 1999, Art 1, **C-6**.

⁶⁴ 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**.

⁶⁵ Notarization of the change of name of Complejo Vinto, 30 August 2002, **C-45**.

93. On 30 January 2002, PriceWaterhouseCoopers resigned from being the auditor of RBG Resources plc (“**RBG**”), formerly known as Allied Deals, giving as its reason that six of RBG’s trades were questionable. This led to investigations which revealed that “bogus trades were used to raise money”.⁶⁶ “Authorities of the United States and the UK investigated Allied Deals in connection with certain fraudulent practices against its investors, including submitting falsified documents to collect loans from a large consortium of banks across the United States, the UK, Belgium, Germany and China, among others”.⁶⁷ On 3 May 2002, the High Court of Justice in London appointed Grant Thornton provisional liquidators to RBG.⁶⁸
94. The Claimant alleges, and the Respondent does not contest, “that none of the accusations raised during the RBG Resources investigation involved activities in Bolivia or were in any way related to the privatization of the Tin Smelter, or its subsequent operation”.⁶⁹ On 28 May 2002, the liquidators informed the Bolivian Government that an agreement was reached to sell “all the outstanding share stock of RBG Estañó Vinto S.A. [...] to a Bolivian company funded by CDC Group plc, subject to final English Court ratification.”⁷⁰ The sale was authorized to Comsur by the State and COMIBOL.⁷¹ Allegedly the sale price was US\$6 million.⁷²
95. In August 2002, Sánchez de Lozada assumes (for a second term) the Presidency. In October 2003, there were demonstrations (demanding the rejection of the natural gas export project and the President’s resignation) and violent confrontations between demonstrators and the police. On 17 October 2003, President Sánchez de Lozada resigned from office.⁷³

⁶⁶ *RBG Resources Plc (In liquidation) v. Rastogi*, ADR.L.R. 05/24, Judgment, 24 May 2005, ¶ 5, **R-127**.

⁶⁷ Claimant’s Reply, fn. 151; *RBG Resources Plc (In liquidation) v. Rastogi*, ADR LR 05/24, Judgment, 24 May 2005, ¶ 2, **R-127**.

⁶⁸ Letter from Mike Jervis (Grant Thornton) to Juan Carlos Valdívía Crespo (RBG Estañó Vinto), 15 May 2002, **R-132**.

⁶⁹ Claimant’s Reply, ¶ 53.

⁷⁰ Letter from Grant Thornton (Mr. Shierson) to Ministry of Economic Development (Mr. Kempff) and Comibol (Mr. Córdova), 28 May 2002, **C-180**.

⁷¹ Letter from Trade Ministry (Mr. Mansilla), Ministry of Economic Development (Mr. Kempff) and Comibol (Mr. Córdova) to Grant Thornton (Mr. Shierson), 29 May 2002, **C-181**; Comibol Board of Directors’ Resolution No 2574/2002, 10 July 2002, **C-183**; Letter from EMV (Mr. Morales) to Comibol (Mr. Córdova) and attached Legal Report G-AL 80/2002, 10 July 2002, **C-184**; Letter from Grant Thornton to the Minister of Economic Development, 7 June 2002, **R-148**.

⁷² *La Patria*, *Liquidador de Allied Deals pidió \$US 6 millones por Vinto y Huanuni*, 2 June 2002, **R-149**; *La Prensa*, *Comsur será operadora de Vinto, es dueña del 51% de las acciones*, 6 June 2002, **R-150**.

⁷³ Bolivia’s Statement of Defence, ¶¶ 108-109; BBC Mundo, *La guerra del gas se cobra otra vida*, 11 October 2003, **R-160**.

5. ACQUISITION OF THE ASSETS

96. On 30 April 2004, Argent Partners (an advisory firm acting on behalf of a Panamanian company, Minera S.A., which owned in full –through three other Panamanian companies⁷⁴– the shares in Comsur), sought bids for its subsidiaries and affiliates. In turn, Comsur owned 51% of the shares of Colquiri, the company which controlled Vinto. The Assets that are the object of the present dispute were owned by Comsur, which was later renamed Sinchi Wayra.⁷⁵
97. On 5 October 2004, Argent Partners requested Glencore International to submit a conditional definitive offer to purchase the shares of its Panamanian Companies. On 22 October 2004, Glencore International submitted such a proposal. In November 2004, Glencore International was granted exclusivity of negotiations.⁷⁶
98. On 17 January 2005, the Vice Minister of Mining wrote to Glencore stating that the Ministry was “*favourable to new investments being made in the mining sector*”, but “*the mining tax regime*” was an issue being examined.⁷⁷ On February 16, 2005, COMIBOL wrote to Comsur raising “alarm and concern” with regard to press reports stating that all of Comsur’s shares had been transferred to Glencore. It indicated that pursuant to the lease agreement, Comsur was obliged to consult and seek approval for any modification or transaction of the rights derived from that agreement.⁷⁸
99. On 17 February 2005, Comsur replied that: (i) the press reports referred to transactions carried out abroad regarding foreign companies and did not affect Comsur or its contractual relations, (ii) Comsur’s shares had not been transferred and its legal status, shareholding structure, and contractual relationship with COMIBOL remained unaltered, (iii) Comsur’s current share-holders were still foreign companies, and iv) Colquiri had not transferred its rights nor its obligations

⁷⁴ The Panamanian companies are Iris Mines and Metals SA (“**Iris**”), Shattuck Trading Co Inc. (“**Shattuck**”) and Kempsey SA (“**Kempsey**”) (together the “**Panamanian Companies**”).

⁷⁵ Bolivia’s Statement of Defence, ¶¶ 120-123; Claimant’s Reply, ¶ 56; Letter from Argent Partners (Mr. Simkin) to Glencore International (Mr. Eskdale), 30 April 2004, **C-62**.

⁷⁶ Letter from Argent Partners to Glencore International (redacted), 5 October 2004, **R-314**; Letter from Glencore International to Argent Partners (Mr. Simkin), 22 October 2004, **C-197**; and Letter from Argent Partners to Glencore International, 2 November 2004, **R-315**.

⁷⁷ Letter from the Vice Minister of Mining to Glencore, 17 January 2005, p. 1 (emphasis added), **C-63** (unofficial translation).

⁷⁸ Letter from COMIBOL to Comsur (Sinchi Wayra), 16 February 2005, **R-188** (unofficial translation).

pursuant to clause 10 of the lease agreement, therefore there had been no violation of the contract.⁷⁹ On 3 March 2005, this was restated in a letter from Comsur to COMIBOL.⁸⁰

100. Between 30 January and 2 March 2005, Glencore International purchased the Panamanian Companies. These Panamanian Companies controlled 100% of Comsur (which in turn, held 51% of Colquiri). At the same time, Glencore International acquired from CDC the remaining (49%) shares of Colquiri.⁸¹ Glencore International gained *full* indirect ownership of the Colquiri Mine and the smelters by March 2, 2005.⁸² The consideration paid by Glencore Bermuda for this transaction was US\$313.8 million.⁸³ On 7 March 2005, Glencore International assigned the Assets to Glencore Bermuda.⁸⁴

⁷⁹ Letter from Comsur (Sinchi Wayra) to COMIBOL, 17 February 2005, **R-189**.

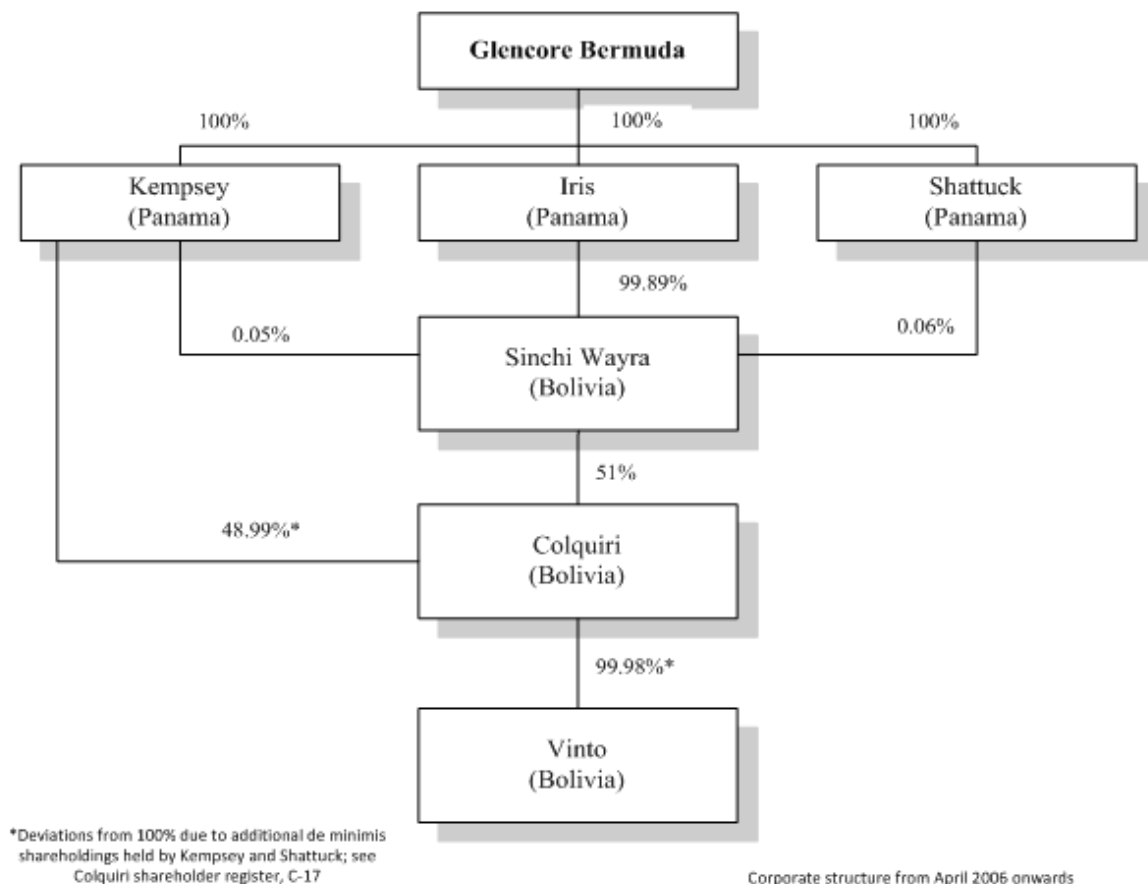
⁸⁰ Letter from Comsur (Mr. Urjel) to Comibol (Mr. Tamayo), 3 March 2005, **C-206**. This letter indicated that Glencore International had acquired the foreign companies that owned Comsur's shares and that no shareholding modification of Comsur had been made.

⁸¹ Share register of Colquiri, undated, **C-17**. Glencore and CDC agreed to have the latter remain as a shareholder of Colquiri during a specified transition period, subject to a put and call option agreement. The put and call option agreement provided that Glencore could call the shares (*i.e.*, the purchase of the shares) at any time up to April 30, 2006, while CDC had the put option of its shares (*i.e.*, require the purchase) by Glencore between 1 March 2006 and April 2006. See Put and Call Agreement between CDC and Glencore International, 15 March 2005, **C-65**. The Put option was exercised by CDC in March 2006. See Put Notice from Actis (on behalf of CDC) to Glencore International, 21 March 2006, **C-67**. The shares were transferred to Glencore Bermuda's subsidiary, Kempsey, in accordance with the put and call option agreement. See Statement of Claim, ¶¶ 36-38, and Eskdale First Witness Statement, ¶¶ 19-21.

⁸² Statement of Claim, ¶ 36; Eskdale First Witness Statement, ¶ 19.

⁸³ Email from Glencore (Mr. Eskdale) to Curtis, Mallet-Prevost, Colt & Mosle LLP (Mr. Vega), 2 March 2005, **C-205**; Eskdale Second Witness Statement, ¶ 16; Claimant's Reply, ¶¶ 62, 262.

⁸⁴ Assignment and Assumption Agreement between Glencore International and Glencore Bermuda, 7 March 2005, **C-64**.



Investment structure from April 2006.⁸⁵

101. On 23 March 2005, Comsur and COMIBOL started renegotiating their lease contract. The result of such negotiation was the increase in royalties from 3.5% to 8%.⁸⁶ On 19 December 2005, Evo Morales was elected President of Bolivia.⁸⁷
102. On 30 November 2006, a Bolivian Senator who was chair of the Committee on Gender Affairs made the following requests to the Minister of Foreign Affairs: (i) relevant documentation showing that Glencore International A.G. is a privately-held company incorporated in the Republic of Switzerland and (ii) a report on “whether Mr. Gonzalo Sánchez de Lozada is currently a shareholder of Glencore International A.G.,” as well as Glencore’s main activities.⁸⁸

⁸⁵ Statement of Claim, ¶ 38. See also Bolivia’s Statement of Defence, ¶¶ 122-123, referring to the ownership chain at the time of Glencore International’s acquisition.

⁸⁶ Letter from Comsur (Mr. Urjel) to Comibol (Mr. Tamayo), 23 March 2005, **C-210**; Minutes of the conclusion of the meetings held between COMIBOL, COMSUR and Compañía Minera Colquiri SA, 11 October 2005, **R-190**, Addendum to the Colquiri Lease, 11 November 2005, pp 3-4, **C-12**.

⁸⁷ Bolivia’s Statement of Defence, ¶ 113.

⁸⁸ Request for written report from Senator Velásquez, 30 November 2006, **C-68** (unofficial translation).

103. According to the Claimant, on 10 January 2007, Glencore International responded with a confirmation from the Register of Commerce of the Canton of Zug dated 30 August 2006 and a declaration, notarized and legalized by the Chancellery of State of the Canton of Zurich and super-legalized by the Consul of Bolivia in Basel, Switzerland. According to this response, the documents submitted confirmed the current shareholders of Glencore and indicated that Mr. Gonzalo Sánchez de Lozada was not and had never been directly or indirectly a shareholder of Glencore.⁸⁹ Glencore International also submitted a director's certificate of Glencore Finance (Bermuda) notarized and legalized by the Embassy of Bolivia in London regarding Glencore Finance Bermuda's shareholding and copies of director's certificates in Spanish, notarized by the Ministry of Foreign Relations of Panama and legalized by the Consulate of Bolivia in Panama, regarding the shareholding of Glencore Finance (Bermuda) Ltd. in Iris, Mines and Metals S.A., Shattuck Trading Co. Inc. and Kempsey S.A. Finally, Glencore submitted a summary in Spanish of its main activities.⁹⁰

6. REVERSIONS

A. The Tin Smelter

104. On 9 February 2007, Bolivia issued Supreme Decree No. 29,026 reverting the property of Complejo Metalúrgico Vinto and all of its assets to the Bolivian State and assuming immediate direct control of such asset.⁹¹ The preamble of the decree indicated that the transfer of such asset was illegal and caused "evident prejudice" to the patrimony of the Bolivian State. The stated reasons were as follows:

- the low value paid for the Tin Smelter – it was valued at US\$140 million but sold for US\$14 million;
- the sale price did not consider an inventory worth US\$16 million;
- Allied Deals breached the obligation in clause 7.2 of the sales contract which stipulated that it could not transfer the asset to third parties before three years;

⁸⁹ Claimant's Reply, fn. 213; Letter from Pestalozzi Lachenal Patry (Mr. Pestalozzi) to Senate of Bolivia (Ms. Velásquez), 10 January 2007, **C-225**.

⁹⁰ Claimant's Reply, fn. 213; Letter from Pestalozzi Lachenal Patry (Mr. Pestalozzi) to Senate of Bolivia (Ms. Velásquez), 10 January 2007, **C-225**.

⁹¹ Supreme Decree No. 29,026 (the "**Tin Smelter Reversion Decree**"), *Gaceta Oficial* No. 2,969 on 9 February 2007, **C-20** (unofficial translation).

- the sale contravened Article 59 of the Bolivian Constitution since the transfer of the asset was not approved by Congress.

105. On 11 December 2007, Glencore Bermuda notified Bolivia of the existence of a dispute under the Treaty.⁹²
106. In February 2009, a new Constitution came into effect.⁹³ Clause 8 of the transition provisions specified that the mining concessions granted to national and foreign companies before the entry into force of the Constitution would have to be adjusted, within a year, through mining contracts. The same clause indicated that the State recognized and respected the pre-constituted rights of the *cooperativas mineras* because they contribute to the economic and social development of the country.⁹⁴
107. On 21 October 2009, COMIBOL and Cooperativa Minera 26 de Febrero signed an addendum to a lease contract, stipulating that since level -325 of the Colquiri Mine was not in production, these working areas were assigned to the mining cooperative.⁹⁵

B. The Antimony Smelter and the Tin Stock

108. On 1 May 2010, Bolivia reverted the Antimony Smelter to the Bolivian State, including all of its assets.⁹⁶ The preamble of the decree begins by quoting paragraph IV of Article 369 of the Bolivian Constitution and provides that:

[T]he State shall exert control and oversight over the entire mining production chain and over the activities performed by the holders of mining rights, mining contracts, or pre-existing rights. [...] in recent years, the productive inactivity of the Metallurgic Smelter Vinto Antimonio has become evident, as well as its dismantling, notwithstanding that the terms of reference provided for the obligation to invest in and strengthen Empresa Metalúrgica Vinto Antimonio with economic, financial and technical capacity, that would allow the inflow of capital, technology, commercial practices and private management, allowing the Smelter to continue production, becoming a source of employment, taxes and externalities, in support of the mining activity of exploitation and concentration of antimony in the country.

⁹² Letter from Glencore Bermuda (Mr. Kalmin and Mr. Hubmann) to Ministry of the Presidency (Mr. Quintana), 11 December 2007, **C-25**.

⁹³ Constitution of Bolivia, 7 February 2009, **C-95**.

⁹⁴ Constitution of Bolivia, 7 February 2009, **C-95** (unofficial translation).

⁹⁵ Public Deed No 0215/2009, amendment to the lease agreement between COMIBOL and the Cooperativa 26 de Febrero, 21 October 2009, **R-210**.

⁹⁶ Supreme Decree No. 499 (the “**Antimony Smelter Reversion Decree**”), *Gaceta Oficial* No 127NEC, 1 May 2010, **C-26** (unofficial translation).

109. The decree also mentioned that the Vinto Tin Smelter “was transferred in violation of various legal statutes and regulations” (unofficial translation) and referred to the 2007 decree which reverted the Tin Smelter.
110. On 3 May 2010, Colquiri informed the Ministry of Mining and Metallurgy (“**Ministry of Mining**”) that the 161 tonnes of tin concentrates stored in the smelter (the “**Tin Stock**”) were not assets of the Vinto Antimonio Smelter, and requested for them to be returned.⁹⁷ On 14 May 2010, Glencore notified the existence of a dispute and requested amicable consultations. In June of the same year, consultations were requested once more and in July they resumed.⁹⁸

C. The Colquiri Mine

111. On March 13, 2012, “in order to verify the work areas offered by Sinchi Wayra S.A. [formerly, Comsur] to the mining cooperative members,” Engineer Héctor Córdova, Executive President of COMIBOL, and Isaac Meneses Guzmán, Vice Minister of Mining Cooperatives, visited the Colquiri Mine. The conclusion of the visit was that: “*the areas offered by the Colquiri Group [to the Cooperativistas] are mineralized and have several drifts developed.*”⁹⁹
112. On 3 April 2012, Eduardo Capriles, Executive President of Colquiri, sent a letter to Héctor Córdova, Executive President of COMIBOL, informing that: for some time, there had been “serious disturbances” to the peaceful use of the mining rights in Colquiri. However, “criminal activity of unprecedented intensity” had taken place on 1 April 2012, such as the “massive entry of hundreds of people”, most of whom had been identified into “working areas of the company”. According to the letter, these people did not only commit theft of material, but also “verbally assaulted” the workers and “expelled them from their working areas”, indicating their intention to take control of the mine. That very morning on 3 April, a new contingent of people had been caught by a supervisor, who had received “death threats”. Mr. Capriles also stated that, although the disturbances had been attended, to a large extent, by the company, “the current situation previously set out ha[d] become unsustainable, to the point where the Colquiri Workers’ Union ha[d] expressed [...] its concern about the physical integrity of its members.” In light of this, he

⁹⁷ Letter from Colquiri (Mr. Capriles) to Ministry of Mining (Mr. Pimentel), 3 May 2010, **C-28**.

⁹⁸ 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**; Letter from Sinchi Wayra (Mr. Capriles) to the Minister of Legal Defense (Ms. Arismendi), 22 June 2010, **C-103**; Letter from the Minister of Legal Defense (Ms. Arismendi) to Sinchi Wayra (Mr. Capriles), 28 June 2010, **C-104**; Letter from the Minister of Legal Defense (Ms. Arismendi) to Sinchi Wayra (Mr. Capriles), 20 July 2010, **C-105**.

⁹⁹ Internal Documents (Ministry of Mining) on the Visit to the Colquiri Mine in March 2012 (emphasis added), **R-343** (unofficial translation).

requested COMIBOL to “take the measures necessary to preserve peaceful possession and public order in the Colquiri mining district, as required by clause 12.2.1 of the lease agreement.”¹⁰⁰

113. On 26 April 2012, the Vice Minister of Mining Policy requested information about the thefts in order to “measure the degree of economic damage caused” as well as information on the operation and production of the mine.¹⁰¹
114. On 10 May 2012, Bolivia’s Vice President, Bolivia’s Economy and Finances Minister and Bolivia’s Mining Minister signed an agreement with the *Central Obrera Boliviana*, the *Federación Sindical de Trabajadores Mineros de Bolivia* and the Huanuni Union to “summon Colquiri’s workers’ union for a conclusive meeting to execute the nationalization of the Colquiri Mine, pursuant to the Document of the Potosi Mining Congress.”¹⁰²
115. On 11 May 2012, the Vice Minister of Mining Development informed Sinchi Wayra that in order “to solve the problems created by the cooperative sector in Colquiri”, “a technical commission consisting of approximately eight (8) experts from SERGEOTECMIN, COMIBOL, and the Ministry of Mining and Metallurgy [would] visit the Colquiri Mining District starting 15 May [...]”¹⁰³
116. On 23 May 2012, a meeting was held between Sinchi Wayra officials and leaders of the Bolívar, Colquiri and Porco Union. In this meeting the workers generally expressed their concern regarding an eventual joint venture between Sinchi Wayra and the Government. The workers conveyed its desire to maintain the labor stability and *conquistas sociales* of all the workers of the three groups and raised concerns over the creation of new job posts in light of the joint venture. They also agreed to continue working together with the company to achieve these goals.¹⁰⁴

¹⁰⁰ Letter from Colquiri (Mr. Capriles) to Comibol (Mr. Córdova), 3 April 2012, **C-30** (unofficial translation).

¹⁰¹ Letter from the Ministry of Mining (Mr. Villca) to Sinchi Wayra (Mr. Capriles), 26 April 2012, **C-254**. Sinchi Wayra replied to this letter on 3 May 2012. Letter from Sinchi Wayra (Mr. Capriles) to the Vice Minister of Mining Policy, Regulation and Auditing (Mr. Villca), 3 May 2012, **C-255** (unofficial translation).

¹⁰² 10 May 2012 Agreement, 10 May 2012, **C-256** (unofficial translation).

¹⁰³ Letter from the Ministry of Mining (Mr. Beltrán) to Sinchi Wayra (Mr. Capriles), 11 May 2012, **C-257** (unofficial translation).

¹⁰⁴ Meeting minutes between Sinchi Wayra and the leaders of the Bolivar, Colquiri, and Porco Unions, 23 May 2012, **C-284**.

117. On 30 May 2012, around one thousand Cooperativistas from Cooperativa 26 de Febrero took control of the mine by force.¹⁰⁵ On the same day, Colquiri¹⁰⁶ and the Colquiri Mining Union asked the Government to intervene.¹⁰⁷
118. On 3 June 2012, the Ministry of Mining, the Ministry of Labor, Employment and Social Security, COMIBOL, the Colquiri Mining Workers' Union and the Federal Union of Bolivian Mining Workers met in Oruro to find a solution to the occupation. The main agreements were that the Ministry of Mining, the Ministry of Labor, Employment and Social Security and COMIBOL, pursuant to Article 369 paragraph IV of the Political Constitution of Bolivia, "shall have all mining contracts with pre-existing rights in the mining district of Colquiri enforced, as well as all mining operations within the national territory". The understanding also reiterates that "the State has a duty to protect work and employment stability."¹⁰⁸
119. On 5 June 2012, in order to solve the problem, Colquiri wrote a letter to the Minister of Mining informing of an agreement reached with the Colquiri Mining Workers' Union to immediately create 200 new job posts. Furthermore, it expressed its agreement to grant the San Antonio Vein to the workers of the Cooperativa 26 de Febrero.¹⁰⁹ Another letter was addressed to the Minister of Mining and the President of COMIBOL, conveying its willingness to finance Cooperativa 26 de Febrero with up to one million dollars and to provide technical assistance to construct a plant with capacity to treat up to 100 tonnes of tin and zinc mineral per day.¹¹⁰ On 6 June 2012, the Ministry of Mining sent these proposals to the President of the Cooperativa 26 de Febrero but the

¹⁰⁵ Claimant's Reply, ¶ 124; Bolivia's Rejoinder, ¶ 295.

¹⁰⁶ "We demand prompt official action in this regard to protect our workers, employees and other individuals whose life, personal security, possessions and employment are seriously compromised. We understand that any failure to act which could later give rise to or prevent circumstances which no one desires, will be the responsibility of those whose very obligation it is to preserve the fundamental rights of individuals." Letter from Colquiri (Mr. Capriles) to Comibol (Mr. Córdova), 30 May 2012, **C-31** (unofficial translation).

¹⁰⁷ "The Colquiri mining union stands firm in defense of our source of employment and job stability in the current salaried system; as Bolivians, we believe we have a duty to contribute to the national treasury in exchange for the exploitation of our natural resources, and for the benefit of the Bolivian people as a whole." "We give 24 hours to the central government and the [M]inistry of [M]ining to provide an immediate solution to the conflict in Colquiri, as this problem could have worse lethal consequences for our Colquiri mining family." Letters from the Colquiri Union to the President of Bolivia (Mr. Morales), the Ministry of Mining (Mr. Virreira), and Comibol (Mr. Córdova), 30 May 2012, **C-111** (unofficial translation).

¹⁰⁸ Minutes of understanding with the Colquiri Union and the FSTMB, 3 June 2012, **C-115** (unofficial translation).

¹⁰⁹ Letter from Colquiri (Mr. Capriles) to the Minister of Mining (Mr. Virreira) and Comibol (Mr. Córdova), 5 June 2012, **C-120**.

¹¹⁰ Letter from Colquiri (Mr. Capriles) to the Minister of Mining (Mr. Virreira) and Comibol (Mr. Córdova), 5 June 2012, **C-119**.

proposals were not accepted.¹¹¹ From this point forward, Glencore was not involved in the negotiations.¹¹²

120. In the morning of 7 June 2012, Colquiri workers and the villagers of Colquiri convened a meeting near the main mouth of the mine (still under control of the *cooperativistas*), which evolved into a “great general open council (*Gran Cabildo*)” to discuss the social conflict.¹¹³ In that meeting the Bolivian Government submitted a proposal along the following lines:

All the area under the lease agreement with Compañía Minera Colquiri is to be nationalized in favor of the State [...] COMIBOL will “maintain the work positions of each and every one of the employees [...] and [...] incorporate the former [*cooperativistas*] into the workforce of COMIBOL”. [...] Immediately after the enactment of the reversion and nationalization decree, the Bolivian Armed Forces will protect the areas of operation and guarantee the security and continuity of the operations, both in the interior of the mine and on the surface of the COMIBOL worksite.¹¹⁴

121. On the same day, the Colquiri workers present at the *Cabildo* and the villagers favored the reversion of the Colquiri Mine Lease.¹¹⁵ Also on the same day, Colquiri, the Vice Minister of Cooperatives from the Ministry of Mining, together with representatives of the Central Local de Cooperativas Mineras de Colquiri, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, Cooperativa 26 de Febrero, FEDECOMIN La Paz and FENCOMIN, met in the city of La Paz and signed the Rosario Agreement (the “**Rosario Agreement**”). According to that agreement, Cooperativa 26 de Febrero would be allowed to perform mining activities in all the depth of Colquiri’s Rosario vein, contingent upon delivery and sale to Colquiri of all the raw material extracted by the cooperative. For its part, the cooperative agreed “to immediately put a stop to all pressure measures in the Mining District of Colquiri and allow Colquiri to resume production in the area allocated to the company.”¹¹⁶
122. On 8 June 2012, the Executive President of Colquiri informed the President of COMIBOL of the agreements reached the previous day.¹¹⁷ On that same day the Minister of the Presidency, the Minister of Mining, the President of COMIBOL, and the representatives of *Federación Sindical de Trabajadores Mineros de Bolivia* (“**FSTMB**”), COB, the Colquiri Mining Workers Mixed

¹¹¹ Letter from the Ministry of Mining to the Cooperativa 26 de Febrero, 6 June 2012, **R-216**; Bolivia’s Statement of Defence, ¶ 201.

¹¹² Bolivia’s Statement of Defence, ¶ 208.

¹¹³ Bolivia’s Statement of Defence, ¶ 209.

¹¹⁴ Proposal from the Government to the *Cabildo* of Colquiri, **R-27** (unofficial translation).

¹¹⁵ Operative vote of the *Gran Cabildo* de Colquiri, 7 June 2012, **R-17**.

¹¹⁶ Rosario Agreement, 7 June 2012, **C-35** (unofficial translation).

¹¹⁷ Letter from Colquiri (Mr. Capriles) to Comibol (Mr. Córdova), 8 June 2012, **C-125**.

Union, the Chojña and the San Carlos sections of Cooperativa Minera 26 de Febrero Ltda, among others, agreed to the “nationalization” of “all the mining area granted to Colquiri under lease” and the “nationalization of the areas leased to Cooperativa Minera 26 de Febrero Ltda, subject to the prior acceptance and consent of the majority of the mine workers of such cooperative.”¹¹⁸

123. On 12 June 2012, COMIBOL, the Minister of Mining and the Vice Minister of Mining entered into an agreement with FENCOMIN, FEDECOMIN La Paz and various local cooperatives, stipulating that COMIBOL would assume direct control over the Colquiri (nationalized) deposit, except for the areas granted to the Cooperativa 26 de Febrero under the lease agreement, including the Rosario vein, “in all its depth and extension.”¹¹⁹
124. On 13 June 2012, the Director - Zinc and Lead of Glencore International wrote to the President of Bolivia to express “surprise and concern” regarding the decision to “nationalize Colquiri.”¹²⁰ On 14 and 15 June 2012, violent confrontations broke out between miners and *cooperativistas*.¹²¹
125. On 19 June 2012, the Vice Minister of Productive Metallurgic Mining Development wrote to the President of Sinchi Wayra to convene a meeting for 20 June 2012, in order to address the latest developments affecting the operation of the Colquiri Mine, as well as other issues concerning the operation of the mine.¹²² On the same day, a meeting took place between the Minister of Government, the Minister of Mining, the Vice Minister of Interior and Police, the COB, FENCOMIN, FEDECOMIN La Paz, FSTMB, Central de Cooperativas de Colquiri and the Colquiri Mining Workers Mixed Union, whereby an agreement was reached “[t]o ratify the agreed-upon claim to recover the mining areas leased to [Colquiri] for the benefit of the Bolivian population in its entirety and of Colquiri in particular.”¹²³

¹¹⁸ Minutes of Agreement between COMIBOL, FSTMB, Central Obrera Boliviana, Cooperativa 26 de Febrero and authorities of Colquiri, 8 June 2012, **R-345** (unofficial translation).

¹¹⁹ Minutes of Agreement among FENCOMIN, FEDECOMIN La Paz, Cencomincol, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, Cooperativa 26 de Febrero, the Minister of Mining, the Vice Minister of Productive Mining, Comibol, and the Legal Director of the Ministry of Mining, 12 June 2012, **C-129** (unofficial translation).

¹²⁰ Letter from Glencore International (Mr. Maté) to the President of Bolivia (Mr. Morales), 13 June 2012, **C-38bis** (unofficial translation).

¹²¹ Bolivia’s Statement of Defence, ¶ 217; La Prensa, *Colquiri se convierte en un campo de batalla*, 15 June 2012, **C-142**.

¹²² Letter from the Ministry of Mining (Mr. Beltrán) to Sinchi Wayra (Mr. Capriles), 19 June 2012, **C-144**.

¹²³ Agreement between the Government of Bolivia, COB, FENCOMIN, FEDECOMIN La Paz, FSTMB, Central de Cooperativas de Colquiri and Sindicato Mixto de Trabajadores Mineros de Colquiri, 19 June 2012, **R-18** (unofficial translation).

126. On 20 June 2012, Decree 1,264 (the “**Colquiri Mine Reversion Decree**”) was enacted, providing that COMIBOL would assume control of the Colquiri Mine, as well as the direction and control of the mining sites granted under lease. COMIBOL would also “directly carry out the mining activities” and lease the Rosario vein (except its southern part) to the Cooperativa 26 de Febrero. Additionally, “machinery, equipment and supplies” were also nationalized.¹²⁴ The preamble of the decree starts by mentioning Article 369 of the Bolivian Constitution which provides that: “the State is responsible for the mineral wealth”; “the natural resources [...] which are strategic for the country”; “the State is in charge of the mining and metallurgy policy”; and “the State controls and audits all the mining production chain and the activities developed by holders of mining rights, mining agreements or pre-constituted rights.” The preamble concludes by indicating that the function of the State is “to administer and control strategic economic sectors [...] in order to achieve economic and social development”, thus, “it is necessary for the Government of the Plurinational State to issue the Supreme Decree in order to boost the development of the mining activity for the benefit of the Bolivian people.”¹²⁵
127. After the decree was signed, *cooperativistas* and workers were still not satisfied, new confrontations broke out and massive demonstrations in La Paz were announced.¹²⁶ Thus, on 3 October 2012, a new decree was issued with a new delimitation of the Rosario vein.¹²⁷
128. Bolivia denounced the Treaty with effect from May 2014.¹²⁸

IV. APPLICABLE LAW TO THE DISPUTE

129. The Parties have presented differing views as to what should be the applicable law in the dispute. The Claimant argues that the Treaty “as *lex specialis*” is “the primary source of law governing the dispute” and that the Treaty is to be supplemented by customary international law to the extent

¹²⁴ Supreme Decree No 1,264, *Gaceta Oficial* No 384NEC, 20 June 2012, **C-39**. The decree instructed COMIBOL to pay for the machinery, equipment and supplies in accordance with a valuation process that would be performed by an independent company retained by COMIBOL in a maximum period of 120 working days from the publication of the decree. See Articles 1 and 2. The decree also provided for the creation of “Empresa Minera Colquiri” as a production company under the direction of COMIBOL, guaranteed continuity and the rights of Colquiri’s workers that would now continue with COMIBOL and subsequently with the newly created company, and finally, indicated that COMIBOL would hire cooperativistas from Cooperativa 26 de Febrero that had voluntarily decided to join by 19 June 2012. See Supreme Decree No 1,264, *Gaceta Oficial* No 384NEC, 20 June 2012, Arts. 1-3, **C-39**.

¹²⁵ Supreme Decree No 1,264, *Gaceta Oficial* No 384NEC, 20 June 2012, **C-39** (Unofficial translation).

¹²⁶ Bolivia’s Statement of Defence, ¶¶ 223-227.

¹²⁷ Supreme Decree No. 1,368, 3 October 2012, **R-32**.

¹²⁸ Statement of Claim, ¶ 125.

required.¹²⁹ In the Claimant's view, Bolivian law "informs the content of Glencore Bermuda's rights and obligations within the domestic legal and regulatory framework and Bolivia's commitments under that [] framework";¹³⁰ however, its role "is limited", it "is relevant as evidence of Glencore Bermuda's investments" but "it is international law that applies to the substance of the dispute".¹³¹

130. On the other hand, the Respondent indicates that "[t]he appropriate law to apply includes the Treaty, but also international human rights treaties and Bolivian law."¹³² According to the Respondent, "the Treaty provides the legal basis for Claimant's claims, nothing more [...] it does not address any substantive legal issues except the general legal protections to which an investor is entitled"¹³³ and "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 [(**"ICCPR"**)] and the American Convention on Human Rights."¹³⁴ As to its domestic law, in the Respondent's view, it "also applies to the dispute because that law defines the legal rights to the Assets that were held in Bolivia."¹³⁵

131. Although the Treaty does not contain a specific provision designating the applicable law, Articles 8 and 9 leave no doubt on the applicability of the Treaty to the *substance* of the dispute at hand. Those provisions are the cornerstone to enforce the investment protections granted by this agreement. In particular, Article 8 refers the dispute to arbitration under the UNCITRAL Rules. Article 35(1) of the said rules provide:

The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal *shall apply the law which it determines to be appropriate*. (emphasis added).

132. In the present case, there has been no designation by the Parties. While there is no contention on the applicability of the Treaty, the main disagreement between the Parties seems to be as to the

¹²⁹ Statement of Claim, ¶¶ 119, 121; Claimant's Reply, ¶ 178.

¹³⁰ Statement of Claim, ¶ 123; Claimant's Reply, ¶ 178.

¹³¹ Claimant's Reply, ¶¶ 182-183.

¹³² Bolivia's Statement of Defence, ¶ 247; Bolivia's Rejoinder, ¶ 377.

¹³³ Bolivia's Statement of Defence, ¶ 250. "[T]he Treaty is nothing more than a part of the substantive law applicable in the dispute. The text of the Treaty's dispute resolution clause, although it indeed establishes that the Treaty is part of the applicable law, does not say that the Treaty is the only applicable law." Bolivia's Rejoinder, ¶ 363. See also, ¶ 364.

¹³⁴ Bolivia's Statement of Defence, ¶ 252. "[I]nternational human rights law is part of the law applicable to the present dispute." Bolivia's Rejoinder, ¶ 369.

¹³⁵ Bolivia's Statement of Defence, ¶ 253. See also Bolivia's Rejoinder, ¶ 376.

role of other international rules and Bolivian law. Respondent has indicated that “the Treaty provisions cannot displace, and are limited by, Bolivia’s obligations” under other agreements. More specifically, Respondent has argued that “[t]he appropriate law to apply *includes the Treaty, but also* international human rights treaties and Bolivian law”¹³⁶ (emphasis added).

133. The Tribunal agrees with Respondent that the Treaty is not the only applicable law to the dispute. In this regard and pursuant to Article 35(1) of the UNCITRAL Rules, we consider the appropriate applicable law to be the Treaty, as well as Bolivian Law. The Tribunal does not disregard the possibility that there may be other relevant provisions of international law that may shed light on the interpretation of the Treaty’s substantive provisions. However, the Tribunal is not convinced by Bolivia’s general argument that the Treaty provisions are restricted by its obligations to respect and protect human rights. To the extent relevant, such obligations may be considered by the Tribunal when analyzing if there has been a breach of Bolivia’s commitments under the Treaty; however, it does not follow that the substantive provisions of the Treaty are limited in any specific way. The text does not indicate such an intention by the Parties. Moreover, both sets of obligations are applicable in their respective spheres to Bolivia and are not necessarily mutually exclusive.

V. OBJECTIONS TO JURISDICTION

1. WHETHER THE CLAIMANT QUALIFIES AS AN INVESTOR UNDER THE TREATY

134. The Respondent contends that the scope of the treaty extends jurisdiction only to companies which “actively” invested in Bolivia,¹³⁷ that is: “by directing the contribution of resources.”¹³⁸ According to the Respondent, Glencore Bermuda never actively participated or was involved in: 1) the process leading up to Glencore International’s acquisition of the relevant Assets;¹³⁹ 2) the stock purchase of the companies controlling the relevant Assets;¹⁴⁰ and 3) in the development, management or operation of the relevant Assets.¹⁴¹
135. The Claimant argues that the Treaty does not impose an active investment requirement, that it only “requires a company to be ‘incorporated or constituted’ in the territory of one of the State

¹³⁶ Bolivia’s Statement of Defence, ¶ 247.

¹³⁷ Bolivia’s Statement of Defence, ¶¶ 265-292; Bolivia’s Rejoinder, ¶¶ 430-460.

¹³⁸ Bolivia’s Rejoinder, ¶ 449.

¹³⁹ Bolivia’s Rejoinder, ¶ 454; Bolivia’s Statement of Defence, ¶¶ 280-281.

¹⁴⁰ Bolivia’s Rejoinder, ¶ 455; Bolivia’s Statement of Defence, ¶ 282.

¹⁴¹ Bolivia’s Rejoinder, ¶ 456; Bolivia’s Statement of Defence, ¶¶ 283-288.

parties” and that it does not prescribe any other “requirement, such as having [...] ‘seat’ or material business presence in the State.”¹⁴²

A. Analysis by the Tribunal

136. We begin our analysis with the text of the Treaty, bearing in mind the general rule of interpretation provided in Article 31 of the Vienna Convention on the Law of Treaties (“**VCLT**” or “**Vienna Convention**”),¹⁴³ *i.e.*, “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” (emphasis added). Article 1 of the Treaty provides the definition, as agreed by the Parties, of two elements that are central to the current dispute: “*investment*” and “*company*”.

For the purposes of this Agreement;

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

[...]

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

[...]

A change in the form in which assets are invested *does not affect their characters* as investments. Investments made before the date of entry into force as well as those after entry into force shall benefit from the provisions of this Agreement;

[...]

(emphasis added)

137. On the other hand, the term “companies” is defined as:

(i) in respect of the United Kingdom: corporations, firms and associations *incorporated or constituted* under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 11;

(ii) in respect of the Republic of Bolivia: corporations, firms and associations *incorporated or constituted* under the law in force in any part of the Republic of Bolivia.

(emphasis added)

138. We first note that the definition of “investment” in Article 1 is expansive. The precise phrase refers to “every kind of asset.” Clearly, this statement broadens the definition of an investment –

¹⁴² Statement of Claim, ¶ 311. See also on whether there is an active investment requirement: Claimant’s Reply, ¶¶ 248-264 and Claimant’s Rejoinder, ¶¶ 136-148.

¹⁴³ Vienna Convention, United Nations Treaty Series, Vol. 1155, p. 331, May 23, 1969, **CLA-6**.

the definition is satisfied so long as one criterion is met, namely that the asset is “capable of providing returns.” In addition, Article 1 specifies that the listed assets are not exhaustive. Therefore, if an asset is capable of satisfying this condition, it will fall under the definition. Particularly with regard to shares and stocks, the addition of “any other form of participation in a corporation” confirms the expansive nature of the concept.

139. The Respondent has pointed to other articles in the Treaty in support of its contention that an active investment is required, in particular: Articles 8(1) and 13 which use the language “investment of” and “investments made” respectively.¹⁴⁴ Article 8 provides for dispute settlement regarding “an investment of [a national or company of one Contracting Party]” and Article 13 governs the duration and termination “of investments made whilst the Agreement is in force”. Bolivia also refers to other articles in support of the argument that “across multiple provisions” the Treaty “presume[s] that an active relationship must exist between a protected investor and its investment”.¹⁴⁵ The preamble refers to the desire to “create favourable conditions for greater investment by [...] companies”; Article 1 refers to “investments made before” and “those made after entry into force”; and Article 2(1) refers to “create favourable conditions for [...] companies [...] to invest capital in its territory”.¹⁴⁶
140. Although Bolivia considers that such a requirement “follows straightforwardly” from an interpretation in accordance with Article 31(1) of the Vienna Convention,¹⁴⁷ the Tribunal is not convinced this is the case. Article 31(1) of the Vienna Convention provides for an interpretation “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*” (emphasis added). To the Tribunal, the word “made” cannot be read in isolation without the term “investment” (and its definition included in the Treaty).¹⁴⁸ This word can convey the meaning of something that is “artificially produced” or “put together”.¹⁴⁹ Its use in Article 1 would seem to indicate that protection under the Treaty extends to an “asset capable of producing returns” that must exist or that was “produced” before or after the date of entry into force.

¹⁴⁴ Bolivia’s Rejoinder, ¶¶ 432-451 and Bolivia’s Statement of Defence, ¶¶ 265-278.

¹⁴⁵ Bolivia’s Statement of Defence, ¶ 273.

¹⁴⁶ UK-Bolivia Treaty, 24 May 1988, C-1.

¹⁴⁷ Bolivia’s Statement of Defence, ¶ 265.

¹⁴⁸ In the same vein, the terms “invest or invested” used across several provisions can’t be detached either from the Treaty definition of investment.

¹⁴⁹ “[M]ade”. *Merriam-Webster.com*. 2023. <https://www.merriam-webster.com/dictionary/made> 14 January 2023.

141. On the other hand, the preposition “of” can have several meanings depending on how it is used – it can indicate “a point of reckoning”, “origin or derivation”, “cause, motive or reason” as well as “belonging or a possessive relationship.”¹⁵⁰ The Tribunal considers that the manner in which this preposition is used more likely indicates possession and thus agrees with the Claimant “that this merely suggests that the investment must belong to the investor—such investor may be passive or active [...]”.¹⁵¹
142. We likewise do not interpret the plain language of the preamble or the word “by” employed therein as implying or presuming anything about the type of involvement required by the investor in order to have standing under the Treaty. The Tribunal notes that, while context and object assist in determining the ordinary meaning of a specific term, the Tribunal is not persuaded that the articles cited by Bolivia effectively supersede the plain language used by the Parties in defining “investment,” nor do they impose additional requirements on such definition relating to the mode of acquisition, the degree of involvement in the purchase, or the management and operation of the assets. In this regard, the Tribunal cannot read an “active investment” requirement into the text of Article 1.¹⁵²
143. In the present case, it is undisputed that Glencore Bermuda is a UK “company”¹⁵³ who owns 100 percent of the “shares” of three Panamanian¹⁵⁴ Companies which, in turn, own the relevant Assets.¹⁵⁵ It is also uncontested that Glencore Bermuda made a contribution of US\$313.8 million (which was the purchase price) for the holding companies of the Assets (and the remaining shares of Colquiri) and the controlling shares of these companies were assigned to it by Glencore

¹⁵⁰ “[O]f”. *Merriam-Webster.com*. 2023. <https://www.merriam-webster.com/dictionary/of> 14 January 2023.

¹⁵¹ Claimant’s Rejoinder, ¶ 137.

¹⁵² It is worth noting that the tribunal in *Rurelec* was tasked with interpreting Article 1 of this Treaty. In its decision, that tribunal also considered the provision to contain “a very broad definition of ‘investment’”. *Guaracachi America, Inc and Rurelec Plc v. Plurinational State of Bolivia*, UNCITRAL, Award, 31 January 2014, ¶¶ 352-355, **CLA-120**.

¹⁵³ Certificate of incorporation of Glencore Bermuda (as Sandon Ltd), 23 December 1993, **C-42**; Certificate of incorporation on change of name of Glencore Bermuda (from Sandon Ltd to Glencore Finance (Bermuda) Ltd.), 30 December 1994, **C-43**; and Bye-Laws of Glencore Bermuda, 12 December 2012, **C-44**.

¹⁵⁴ Certificate of the Secretary of Kempsey, 19 May 2011, **C-13**; Certificate of the Secretary of Iris, 19 May 2011, **C-14**; and Certificate of the Secretary of Shattuck, 1 February 2012, **C-15**.

¹⁵⁵ Share register of Sinchi Wayra, **C-16**. Shattuck, Kempsey and Sinchi Wayra, together, wholly own Colquiri. Share register of Colquiri SA, **C-17**. Kempsey, Shattuck and Colquiri together, wholly own Vinto. Share register of Vinto SA, **C-18**.

International.¹⁵⁶ The *capacity* of the Assets to produce returns has not been challenged. Accordingly, Glencore Bermuda made an “investment” which qualifies as such under Article 1 of the Treaty.

144. Finally, this Tribunal concurs with the decision in *Rurelec* that “the definition of protected investment, at least in non-ICSID arbitrations, is to be obtained only from the (very broad) definition contained in the BIT concluded by Bolivia and the United Kingdom.”¹⁵⁷ In view of the foregoing, the Tribunal rejects the Respondent’s objection that the Claimant did not make a Treaty-protected investment.

2. WHETHER THE CORPORATE VEIL MUST BE PIERCED AND, IN THE ALTERNATIVE, IF INDIRECT INVESTMENT CLAIMS ARE ALLOWED

145. The Respondent denies that formal incorporation in Bermuda suffices to establish jurisdiction, given that the investors “are purely Swiss in substantive reality”.¹⁵⁸ According to the Respondent, the Treaty excludes jurisdiction asserted based on corporate formalities when the real party in interest is not protected. Bolivia also argues that Glencore Bermuda is “nothing more than a shell company [...] with no activity in Bermuda [...] no employees or staff of its own”.¹⁵⁹ Based on the “Paradise Papers,”¹⁶⁰ the Respondent contends that “investments routed through Glencore Bermuda have been implicated in illegal activities throughout the world”¹⁶¹ and this company’s “investment structure was [...] a tax dodge.”¹⁶² According to the Respondent, the Claimant “must

¹⁵⁶ Assignment and Assumption Agreements between Glencore International and Glencore Bermuda, 7 March 2005, **C-64**; Email from Glencore (Mr. Eskdale) to Curtis, Mallet-Prevost, Colt & Mosle LLP (Mr. Vega), 2 March 2005, **C-205**; Email from Curtis, Mallet-Prevost, Colt & Mosle LLP (Mr. Sowah) to Curtis, Mallet-Prevost, Colt & Mosle LLP (Mr. Vega), 3 March 2005, **C-208**. *Cf.* In its Statement of Defence, Respondent argued that “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)” (emphasis added). Bolivia’s Statement of Defence, ¶ 282. In its Rejoinder, Respondent contends that, *despite* the payment, Glencore Bermuda’s participation “was purely passive”. Bolivia’s Rejoinder, ¶ 458.

¹⁵⁷ *Guaracachi America, Inc and Rurelec Plc v. Plurinational State of Bolivia*, UNCITRAL, Award, 31 January 2014, ¶ 364, **CLA-120**.

¹⁵⁸ Bolivia’s Statement of Defence, ¶ 349. See also ¶¶ 348-359.

¹⁵⁹ Bolivia’s Rejoinder, ¶ 476.

¹⁶⁰ Bolivia’s Statement of Defence, ¶¶ 363-369, quoting International Consortium of Investigative Journalists, *Room of Secrets Reveals Glencore’s Mysteries*, 5 November 2017, pp. 1-7, **R-243**. Bolivia’s Rejoinder, ¶¶ 480-486.

¹⁶¹ Bolivia’s Rejoinder, ¶ 477.

¹⁶² Bolivia’s Rejoinder, ¶ 479.

demonstrate that the use of the Glencore Bermuda entity was legitimate in light of Bolivia's evidence to the contrary."¹⁶³

146. If the Claimant's corporate veil cannot be pierced, the Respondent then, in the alternative, argues that the Claimant should not be allowed to submit claims based on the indirectly held rights of its subsidiaries.¹⁶⁴ The Respondent contends that, in contrast to other contemporaneous investment treaties (such as the Switzerland-Bolivia BIT) which extend jurisdiction to indirect investments, the UK-Bolivia Treaty does not make an exception to the otherwise applicable customary rule pursuant to which a shareholder may not substitute itself for the company in which it holds shares.¹⁶⁵ Bolivia's argument "is that rules of customary international law excluding indirect claims must apply, either directly or through the interpretation of the Treaty, unless the Treaty made manifest the intent to opt out of those rules."¹⁶⁶
147. Conversely, the Claimant contends that Bolivia's argument has no foundation in the facts or in the text of the Treaty and that Glencore Bermuda has submitted sufficient evidence to demonstrate that it is a company incorporated under the laws of Bermuda (one of the United Kingdom's overseas territories to which the Treaty was expressly extended) with "investments" protected under the Treaty.¹⁶⁷ The Claimant also argues that "being an investment vehicle does not constitute a misuse of corporate form that would justify the use of the corporate veil doctrine", that Glencore Bermuda is not "attempting to avoid any type of liability" and that Bolivia's allegations of "misdeeds" are based "solely on press reports".¹⁶⁸

A. Analysis by the Tribunal

148. The Tribunal starts by noting that Article 1 of the Treaty does not include any additional requirement for a company, aside from the requirement of incorporation in accordance with the laws of the Contracting Parties, nor does it grant power to tribunals to look beyond a company's corporate structure. According to the Respondent, such power derives from "a basic rule of

¹⁶³ Bolivia's Rejoinder, ¶ 474.

¹⁶⁴ Bolivia's Statement of Defence, ¶¶ 351, 370-371.

¹⁶⁵ Bolivia's Statement of Defence, ¶¶ 372-384.

¹⁶⁶ Bolivia's Rejoinder, ¶ 500.

¹⁶⁷ Claimant's Reply, ¶¶ 189-210; Claimant's Rejoinder, ¶¶ 18-53.

¹⁶⁸ Claimant's Reply, ¶¶ 201, 203 and 207.

international law that a company cannot misuse corporate formalities to establish international jurisdiction over its claims.”¹⁶⁹

149. The Tribunal finds no support for looking beyond the express requirement of the Treaty to determine whether an entity qualifies as a company under the Treaty.¹⁷⁰ In the present case, it is uncontested that Glencore Bermuda is a UK company, under the terms of the Treaty. Even if the Tribunal could find a basis under customary international law, the tribunals that have previously examined this issue have characterized this recourse as “exceptional”¹⁷¹ and “cautiously applied.”¹⁷² Furthermore, this exception has been deemed applicable “to prevent the misuse of privileges of legal personality, as in certain cases of *fraud or malfeasance* [...] or to prevent the evasion of legal requirements or of obligations”¹⁷³ (emphasis added). For instance, the tribunal in *Pac Rim* stated clearly that “there must be specific factors or compelling reasons that call for an inquiry into the company’s actual ownership and control”.¹⁷⁴ Thus, in order to even entertain a

¹⁶⁹ Bolivia’s Rejoinder, ¶ 464.

¹⁷⁰ “As the matter of nationality is settled unambiguously by the Convention and the BIT, there is no scope for consideration of customary law principles of nationality, as reflected in *Barcelona Traction*, which in any event are no different. In either case inquiry stops upon establishment of the State of incorporation, and considerations of whence comes the company’s capital and whose nationals, if not Cypriot, control it are irrelevant” (emphasis added). *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006, ¶ 357, **CLA-64**.

¹⁷¹ *Barcelona Traction, Light and Power Company, Limited* (Belgium/Spain), 1970, ICJ Reports 3, ¶¶ 57-58, **CLA-7**. In a similar sense: “it might in some circumstances be permissible for a tribunal to look behind the corporate structures” (emphasis added). *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 230, **CLA-62**.

¹⁷² “[T]his principle only applies to situations where the real beneficiary of the business misused corporate formalities in order to disguise its true identity and therefore to avoid liability.” *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006, ¶ 358, **CLA-64**. The Tribunal fails to understand the basis for Respondent’s statement that the “bar is low for the misuse of corporate form to justify piercing the corporate veil”. Bolivia’s Rejoinder, ¶ 472. This statement comes after discussing the *Loewen* tribunal’s decision in ¶ 471 of Bolivia’s Rejoinder, where Respondent indicates: “[i]n fact, the *Loewen* tribunal did pierce the corporate veil, on facts that were much less egregious than those surrounding Glencore Bermuda.” However, the issue of piercing the corporate veil was not addressed by the tribunal in that case, rather the tribunal expressed it saw “no need to enter into that thicket. The question is whether there is any remaining Canadian entity capable of pursuing the NAFTA claim.” *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)98/3, Award, 26 June 2003, ¶ 237, **RLA-28**. The main contention among the parties in that case was whether there was a *continuous nationality* requirement under the NAFTA.

¹⁷³ *Barcelona Traction, Light and Power Company, Limited* (Belgium/Spain), 1970, ICJ Reports 3, ¶ 56, **CLA-7**.

¹⁷⁴ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No ARB/09/12, Award, 14 October 2016, ¶ 5.58, **CLA-224**.

request to pierce the corporate veil this Tribunal would have to find specific factors or compelling reasons that would justify a finding of fraud, malfeasance or evasion.

150. Based on the facts and evidence presented, the Tribunal concludes that this high threshold has not been met. First, as indicated by the Claimant, there is no evidence that “Glencore Bermuda abused its corporate form and committed fraud and/or malfeasance by invoking the advantages of its corporate nationality in this arbitration.”¹⁷⁵ The Tribunal cannot find Glencore Bermuda at fault of fraud or malfeasance based solely on a journalistic investigation, especially since none of the allegations pertain to the Assets at issue in this arbitration. Insofar as any of these allegations have any connection or relevance to the Respondent’s claim of abuse of process, the Tribunal addresses this in the following section.
151. As its an alternative claim, the Respondent asserts that there is a “customary international law rule against bringing claims based on the rights of subsidiary companies”, but acknowledges that “a treaty, such as an investment treaty or a friendship, commerce, and navigation treaty, can vary the basic rule.”¹⁷⁶ Before expressing an opinion or discussing the existence or limits of such a rule, the Tribunal will determine whether the Treaty permits claims based on “indirect investments.”
152. As stated previously, the definition of investment is so broad that it encompasses “every kind of asset [...] capable of producing returns” and is non-exhaustive, allowing for other types of investments not specifically listed. In the case of shares and stock, the text specifies “and any other form of company participation.” The Tribunal finds no distinction between “direct and indirect” investments in the language of the Treaty. Accordingly, it would appear that the text of the Treaty permits any type of investment so long as it complies with this language. Regarding the intent and purpose of the BIT, we concur with the *Rurelec* tribunal that:

[G]iven that the purpose of the BIT is to promote and protect foreign investment, the Tribunal considers that the BIT would require clear language in order to exclude coverage of indirect investments—language that the BIT does not contain. [...]

The mere absence of an explicit mention of the different categories of investment (direct and indirect) cannot be interpreted as narrowing the definition of investment under the BIT to only direct investment.

The Tribunal therefore agrees with the Claimants and concludes that terms employed in the UK-Bolivia BIT are broad enough on their own to include indirect investments, even without

¹⁷⁵ Claimant’s Rejoinder, ¶ 34.

¹⁷⁶ Bolivia’s Statement of Defence, ¶ 376.

employing further qualifications that would only reinforce what is already clear from the text of the BIT.¹⁷⁷

153. Thus, nothing can be read into the fact that the Treaty “does not include in the category of investments rights that are indirectly held.”¹⁷⁸ For all these reasons, the Tribunal finds that the language of the UK-Bolivia Treaty permits bringing “indirect investment” claims and sees no need to determine whether there is a rule of customary international law which precludes claims brought “based on the rights of subsidiary companies.”¹⁷⁹
154. Consequently, the Tribunal finds that the Respondent’s objections on the basis of piercing the corporate veil and indirect investments are unfounded.

3. WHETHER THE CLAIMANT ABUSED THE PROCESS

155. The Respondent claims that “[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”.¹⁸⁰ The Respondent contends that the Tribunal lacks jurisdiction because Glencore Bermuda committed an abuse of process by structuring an investment in order to obtain standing. Bolivia argues that Glencore International “rerouted” its investment through Bermuda when a dispute with Bolivia was foreseeable.¹⁸¹ Conversely, the Claimant argues that Glencore Bermuda’s “acquisition of its investments in Bolivia was not a ‘restructuring’ with the purpose of providing treaty protection.”¹⁸² Moreover, even if that was the purpose, the Claimant argues that “it is a perfectly legitimate practice to restructure an investment to obtain treaty protection for future disputes”,¹⁸³ evidence of abuse has been found “in very exceptional circumstances”, taking into account “all the circumstances of the case” and when “the purpose of the restructuring was exclusively obtaining treaty protection.”¹⁸⁴

¹⁷⁷ *Guaracachi America, Inc and Rurelec Plc v. Plurinational State of Bolivia*, UNCITRAL, Award, 31 January 2014, ¶¶ 353-355, **CLA-120**.

¹⁷⁸ Bolivia’s Statement of Defence, ¶ 380; Bolivia’s Rejoinder, ¶ 494. See *Guaracachi America, Inc and Rurelec Plc v. Plurinational State of Bolivia*, UNCITRAL, Award, 31 January 2014, ¶ 354, **CLA-120**.

¹⁷⁹ Bolivia’s Statement of Defence, ¶ 376.

¹⁸⁰ Bolivia’s Statement of Defence, ¶ 294. In this regard see Bolivia’s Statement of Defence, ¶¶ 293-304.

¹⁸¹ Bolivia’s Statement of Defence, ¶¶ 305-324. Bolivia’s Rejoinder, ¶¶ 389-429.

¹⁸² Statement of Claim, ¶ 317.

¹⁸³ Claimant’s Reply, ¶ 215.

¹⁸⁴ Statement of Claim ¶ 318 and Claimant’s Reply, ¶¶ 214-221.

A. Analysis by the Tribunal

i. *Determination of the Applicable Standard*

156. Abuse of process occurs when an investment is structured in order to obtain standing. Both Parties have alluded to the *Philip Morris* award when elaborating on the applicable standard.¹⁸⁵ As a starting point, that tribunal considered to be clearly established by prior decisions that “the mere fact of restructuring an investment to obtain BIT benefits is not *per se* illegitimate,”¹⁸⁶ that the threshold for a finding of abuse of process is “high”, that such a finding involves an objective analysis (based on the circumstances of the case), and that it does not require a “showing of bad faith”.¹⁸⁷

157. Furthermore, the Tribunal agrees that the legal test revolves “around the concept of foreseeability” and that this core concept means “when there is a reasonable prospect [...] that a measure which may give rise to a treaty claim will materialise.”¹⁸⁸ We do not see any reason for deviating from this standard. Thus, our task is to determine whether Glencore International “changed its corporate structure [by assigning the rights on the relevant assets to its subsidiary Glencore Bermuda] to gain the protection of [the Treaty] at a point in time when a specific dispute was foreseeable.”¹⁸⁹

ii. *Whether the Dispute was Foreseeable*

158. The *Philip Morris* tribunal considered that “it would not normally be an abuse of right to bring a BIT claim in the wake of a corporate restructuring, if the restructuring was justified independently

¹⁸⁵ Bolivia’s Rejoinder, ¶¶ 395-397; Claimant’s Reply, ¶¶ 225 and 228; Claimant’s Rejoinder, ¶¶ 68, 74, 81-82.

¹⁸⁶ *Philip Morris Asia Limited v. Commonwealth of Australia*, UNCITRAL, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 540, **CLA-129**.

¹⁸⁷ *Philip Morris Asia Limited v. Commonwealth of Australia*, UNCITRAL, Award on Jurisdiction and Admissibility, 17 December 2015, ¶¶ 539, 550 and 552, **CLA-129**.

¹⁸⁸ *Philip Morris Asia Limited v. Commonwealth of Australia*, UNCITRAL, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 554, **CLA-129**. The Parties disagree as to whether a tribunal should focus on the “specific dispute which is subject to the arbitration” or on “a reasonable prospect of the dispute arising”, which according to Respondent “may be one of several”. See Claimant’s Reply, ¶ 225; Claimant’s Rejoinder, ¶ 72; and Bolivia’s Rejoinder, ¶¶ 401 and 408. The Tribunal observes that both decisions in *Philip Morris* and *Pac Rim* referred to *specific* disputes. We do not consider this argument would affect the analysis of foreseeability in the present case, particularly since, as the Tribunal understands it, the current dispute that ultimately both Parties refer to is in connection to the same relevant assets and the facts that led to those assets being “reverted” by Bolivia.

¹⁸⁹ *Philip Morris Asia Limited v. Commonwealth of Australia*, UNCITRAL, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 554, **CLA-129**.

of the possibility of bringing such a claim.”¹⁹⁰ It followed a two-pronged analysis, first determining whether the dispute was foreseeable and then evaluating the evidence regarding the alternative reasons for restructuring.

159. The Respondent’s first argument is that the investor should have foreseen the “wave of political change” in Bolivia that made the dispute “likely to arise”.¹⁹¹ Bolivia puts forward statements by former President Carlos Mesa,¹⁹² as well as the political agenda of the MAS party which made calls to “*end poverty [through] the recovery of strategic companies and natural resources*”.¹⁹³ These statements were made two or three years before Glencore International’s acquisition and assignment to Glencore Bermuda. In the Tribunal’s view, they are too remote to be considered as a circumstance which triggered the alleged restructuring; moreover, the disagreement or dispute between the Parties must concern “rights, not merely about policy”.¹⁹⁴ The Respondent alleges that by 2005 it was foreseeable that “Bolivia would be less indulgent of private mining interests”¹⁹⁵ since Evo Morales was posed to assume the presidency. The Claimant argues that at the time of the acquisition the MAS party was not in power and Mr. Morales was not a candidate to the presidency.¹⁹⁶ The Tribunal observes that Bolivia does not dispute these facts.¹⁹⁷ In any event, it cannot be reasonably expected that a change of governmental policy would, in and of itself and absent a palpable measure to point to, result in a violation of a foreign investor’s rights.¹⁹⁸

¹⁹⁰ *Philip Morris Asia Limited v. Commonwealth of Australia*, UNCITRAL, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 570, **CLA-129**.

¹⁹¹ Bolivia’s Rejoinder, ¶ 414. See also Bolivia’s Rejoinder, ¶¶ 410-414.

¹⁹² Speech of Mr Carlos Mesa Gibert before the Bolivian Congress, 17 October 2003, p. 3, **R-162**.

¹⁹³ Fundación Boliviana para la Capacitación Democrática y la Investigación, “*Opiniones y análisis sobre las elecciones presidenciales de 2002*,” 2002, p. 57, **R-163** (unofficial translation, emphasis added).

¹⁹⁴ *Philip Morris Asia Limited v. Commonwealth of Australia*, UNCITRAL, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 566, **CLA-129**.

¹⁹⁵ Bolivia’s Statement of Defence, ¶ 308.

¹⁹⁶ Claimant’s Reply, ¶ 232; Eskdale Second Witness Statement, ¶ 65.

¹⁹⁷ Rather, Respondent characterizes this argument as “simplistic” and responds that “the MAS’ political platform was not contingent on Mr. Morales’ specific political programme for the 2005 elections”. See Bolivia’s Rejoinder, ¶¶ 155, 148-157.

¹⁹⁸ The Tribunal notes that the Political Program of MAS also referred in section “1.3.3 Foreign Companies” that “Legal security is guaranteed to foreign companies that submit to the Political Constitution of the State and Bolivian laws”. Section “Mining” references a “new taxing regime” and section 1.9 “International Economic Relations, Integration and Foreign Trade” indicates that “international economic relations will be maintained under mutual respect and national sovereignty.” (Unofficial translation). Political Program of *Movimiento Al Socialismo*, November 2005, pp. 13, 19, 36, **R-166**. Therefore, it is not evident for the Tribunal that the possible change of policy would indicate a dispute affecting the relevant assets.

160. The Respondent further contends that the circumstances in which Glencore International acquired the Assets should have indicated the prospect of a dispute. According to Bolivia, the sale of the Assets “was prompted by the events of October 2003, and the ensuing investigations and legal action against [former President Sánchez de Lozada] personally.”¹⁹⁹ The Tribunal notes that the Respondent places special emphasis on the fact that this transaction was “covered by very strict confidentiality rules” and “concluded in an expeditious manner.”²⁰⁰ [REDACTED]

161. Regarding the circumstances surrounding the sale of the Assets, the Tribunal is unable to draw any conclusions merely based on the fact that a transaction was concluded swiftly or with great secrecy. Particularly, the record does not indicate that such transaction had been challenged domestically; in fact, a few days prior to the acquisition by Glencore International, the Government of Bolivia, through its Vice Minister of Mining, stated in a letter to the company that the Bolivian government “was favorable to new investments being made in the mining sector.”²⁰² [REDACTED]

a. The Tin Smelter

162. With respect to the Tin Smelter, the Respondent argues that the Claimant should have reasonably foreseen that the privatization of the Tin Smelter would be challenged, since the asset “was

¹⁹⁹ Bolivia’s Rejoinder, ¶ 415.

²⁰⁰ Bolivia’s Rejoinder, ¶ 415.

²⁰¹ Bolivia’s Rejoinder, ¶ 416.

²⁰² “[...] and in the spirit of adequately configuring the mining policy context that the Bolivian Government is currently carrying out, I must inform you that one of the issues that is being analyzed and that will surely lead to adjustments is the mining tax regime” (unofficial translation). Letter from the Vice Minister of Mining to Glencore, 17 January 2005, p. 1, **C-63**. According to the record, the acquisition process took place between January and March 2005. Beginning with the stock purchase agreement of two companies and finalizing with the stock purchase agreement of the third company and CDC’s shares in Colquiri. See Second Amended and Restated Stock Purchase Agreement between Minera and Glencore International (Iris shares), 30 January 2005, **C-198**; Stock Purchase Agreement between Minera and Glencore International (Shattuck shares), 30 January 2005, **C-199**; Stock Purchase Agreement between Minera and Glencore International (Kempsey shares), 2 March 2005, **C-204**; Stock Purchase Agreement between CDC and Compañía Minera Concepción SA (Colquiri shares), 2 March 2005, **C-202**.

²⁰³ [REDACTED]

privatized in a process fraught with irregularities.”²⁰⁴ The Respondent contends that such irregularities were raised by civic organizations²⁰⁵ and, afterwards, in the bankruptcy process of the company which originally acquired the assets.²⁰⁶

163. The Tribunal begins by noting that neither Glencore Bermuda nor Glencore International participated in the privatization process of the Tin Smelter. In addition, the Tribunal believes that none of these allegations constitute sufficient evidence that such process was fraught with irregularities, especially given that no formal administrative or judicial proceeding was brought against the Tin Smelter privatization procedure. The concerns were raised by a civic organization in 2001 and the press clippings detailing the corruption allegation were published in 2002, two years before Glencore International acquired the Assets. Bolivia argues that the “Claimant cannot seriously assert that, at the time of the acquisition, it required a formal pronouncement of illegality of the privatization of the Tin Smelter in order to foresee that the State would take action against it.”²⁰⁷ However, the Tribunal finds it difficult to comprehend how the Claimant could have viewed these events as reasonable prospects of a future dispute given the absence of a statement of illegality of any prior act (to which the Claimant was not a party and which at the time appeared to have been carried out in accordance with the applicable legal framework). Such a statement could have only been made by Bolivian governmental authorities.

b. The Antimony Smelter

164. With respect to the Antimony Smelter, Bolivia contends that the Claimant should have reasonably foreseen that the Antimony Smelter could have been reverted “for lack of production.”²⁰⁸ According to the Claimant, although the terms of reference for the public tender indicated the transfer to a company “with certain capacities that would permit the smelter to continue production,” there was no contractual obligation in the purchase agreement, and Bolivia’s

²⁰⁴ Bolivia’s Statement of Defence, ¶ 71; Bolivia’s Rejoinder, ¶¶ 417-419.

²⁰⁵ Letter from the President of the Oruro Civic Committee to the *Contralor General de la República*, 21 February 2001, **R-123**; Letter from Representative Pedro Rubín de Celis to the *Contralor General de la República*, 10 May 2001, **R-124**; Letter from the Oruro Central Obrera to President Banzer Suárez, 23 May 2001, **R-126**.

²⁰⁶ La Razón Digital, *El MAS pide la renuncia del Canciller Saavedra*, 8 November 2002, **R-134**; El Diario, *MAS pide la renuncia del Canciller de la República*, 4 December 2002, **R-135**; El Mundo, *MAS presentó las pruebas de corrupción contra Canciller*, 4 December 2002, **R-136**; Bolivia’s Statement of Defence, ¶ 85.

²⁰⁷ Bolivia’s Rejoinder, ¶ 420.

²⁰⁸ Bolivia’s Rejoinder, ¶¶ 421-423. See also Terms of Reference for the Second Public Tender for the Antimony Smelter, 31 July 2000, p. 9, **R-109**.

technical advisers had indicated that the operation of the Antimony Smelter had not been commercially viable since 1999.²⁰⁹

165. At the outset, the Tribunal again notes that neither Glencore International nor Glencore Bermuda participated in the process of privatization of the Antimony Smelter. When Glencore International acquired the Antimony Smelter it was already inactive.²¹⁰ The Respondent only raised this issue in the reversion decree of 2010.²¹¹ Thus, it could not have been reasonably foreseeable that a dispute would arise on that basis. Moreover, the issue of whether the Claimant had a contractual obligation to put the smelter into production is something disputed among the Parties;²¹² this relates to a purely contractual dispute which could, in any case, have been addressed pursuant to the dispute settlement provisions provided for in the purchase agreement,²¹³ which are also the dispute settlement provisions invoked as grounds for dismissal in the present case.

c. The Colquiri Mine

166. As to the Colquiri Mine Lease, the Respondent contends that Glencore International was “aware that there was a reasonable prospect Bolivia would have to intervene in the growing dispute with *cooperativistas* at the Colquiri [M]ine.”²¹⁴ According to the Respondent, “the magnitude and the violence of the 2012 social conflicts that led to the reversion of the [Colquiri] Mine Lease were a by-product of Sinchi Wayra’s and Comsur’s defective management of the relations with the *cooperativistas*.”²¹⁵ The Respondent attributes the problems to two primary causes, the layoff of mine workers when the company was privatized and the fact that the Claimant “had an unfortunate

²⁰⁹ Claimant’s Reply, ¶¶ 237 and 238; Antimony Smelter Purchase Agreement, 11 January 2002, Clause 4, “Object,” C-9; Paribas, Privatisation of Bolivian mining assets, Confidential Information Memorandum, 16 August 1999, p. 60, RPA-4.

²¹⁰ See Villavicencio First Witness Statement, ¶ 94, indicating “[e]xcept for three months in 2002 [...] the plant was out of operations (as the low price of antimony generated a shortage of raw material necessary for the smelting).”

²¹¹ Supreme Decree No. 499, *Gaceta Oficial* No 127NEC, 1 May 2010, p. 2, C-26. The Tribunal notes that besides lack of production, another reason stated for reversion was that the privatization process of the Tin Smelter had breached several legal provisions.

²¹² On one hand, Claimant argues that “the Antimony Smelter Purchase Agreement provided for the unconditional transfer of property in exchange for consideration; thus, all obligations were extinguished upon closing.” Claimant’s Rejoinder, ¶ 115. On the other hand, Bolivia argues that “the Contract, read together with the Terms of Reference incorporated therein, clearly specified that the purpose and object of the privatization was to ensure that the Antimony Smelter would be put into production for the economic benefit of the country.” Bolivia’s Rejoinder, ¶ 422.

²¹³ Antimony Smelter Purchase Agreement, 11 January 2002, Clause 15, C-9. See Bolivia’s Statement of Defence, ¶¶ 385-388.

²¹⁴ Bolivia’s Statement of Defence, ¶ 317.

²¹⁵ Bolivia’s Rejoinder, ¶ 425.

policy of giving in to all of the *cooperativas*' demands for working areas, and a poor record of ensuring the security of the [Colquiri] Mine."²¹⁶ We recall that our inquiry is limited to the events occurring on or before March 2005. As a result of the privatization of COMIBOL in 2000,²¹⁷ COMIBOL laid off its employees. The lease agreement did not require Comsur, the private company, to rehire former employees. No contemporaneous document reveals or identifies a problem with the number of employees at the mine when Glencore International acquired it in 2005.

167. In addition, for the purposes of this claim, it is difficult to draw any conclusions from any policy adopted by Glencore International, which had just taken control of the mine, *i.e.*, early 2005, or in March 2005, when the restructuring occurred. Concerning whether the problems with *cooperativistas* could have been anticipated, as the Respondent stated “[i]ndependent 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.”²¹⁸ Thus, problems with *cooperativistas* were common, and Glencore International specifically identified them during its own due diligence.²¹⁹ The Claimant indicates that it considered itself to have the “tools and expertise to continue productive dialogue” as had been previously done.²²⁰ Moreover, the working areas and matters related to *cooperativistas* were not issues that only the company had to deal with; they had to be dealt with also by the government, in particular COMIBOL.²²¹ Since the company was privatized in 2000, areas of the mine have been assigned

²¹⁶ Bolivia's Rejoinder, ¶ 425.

²¹⁷ Bolivia's Rejoinder, ¶ 139; Paribas, Privatisation of Bolivian mining assets, Confidential Information Memorandum, 16 August 1999, p. 118, **RPA-4**.

²¹⁸ Bolivia's Statement of Defence, ¶ 33.

²¹⁹ “They have a big issue with ‘cooperativistas’ who are working in the same veins but in the upper part of the mine. At any time the cooperativistas can be take over [sic] the mine and stop activities. It's very important maintain [sic] a good relationship with them to work without any difficulty. In the last twelve month [sic] they have caused labour strikes totaling [sic] 30 days in which the mine is closed down”, Glencore Internal Memo, 2004, p. 6, **R-302**. Bolivia's Rejoinder, ¶ 137.

²²⁰ “We have known the current management of Minera for many years and believe them to be highly competent. Operating costs of the mines are some of the lowest our technicians have encountered at similar size operations in South America. There is no history of labour relations problems within the company. Relations with the surrounding communities and cooperative miners continue to be a delicate issue throughout the region, but are handled extremely well by management.” Glencore inter office correspondence from Mr. Eskdale to Mr. Strothotte and Mr. Glasenberg, 20 October 2004, p. 4, **C-196**. Claimant's Rejoinder, ¶¶ 119 and 120.

²²¹ Letter from Colquiri (Mr. Mirabal) to Comibol (Mr. Manzano), 19 December 2003, **R-303**. See also, Internal Memorandum from COMIBOL to the Ministry of Mines, 23 January 2004, p. 4, **R-152**, listing certain agreements to address an imminent conflict at Colquiri entered into by COMIBOL with the Mine workers and cooperativistas “without compromising anything that the Government could not comply with.”

to *cooperativistas*, and all of these assignments have been authorized by the Government.²²² Thus, at least until Glencore Bermuda acquired the Colquiri Mine Lease, the company and the Bolivian government appeared to have handled *cooperativistas* issues satisfactorily.

168. For the reasons stated above, the Tribunal finds that Glencore International could not have foreseen a dispute regarding the relevant Assets at the time of the restructuring. According to the standard established by the *Philip Morris* tribunal, if a dispute could have been anticipated at the time of restructuring, an investigation into the reasons for restructuring is required. While such an investigation is not needed here, the Tribunal believes that two particular aspects of the reorganization demonstrate the absence of an abuse of process.
169. *First*, the Parties disagree as to whether Glencore International could have also invoked the bilateral investment treaty between Bolivia and Switzerland.²²³ The Respondent asserts that Glencore International lacks standing under this bilateral investment treaty because the interests of “Glencore International are not substantially Swiss, but instead a range of global funds primarily from the United States.”²²⁴ In contrast, the Claimant alleges that “at the time of acquisition, Glencore International was not only incorporated in Switzerland, but was held in its entirety by two other Swiss companies (Glencore Holding AG and Glencore LTE AG). Glencore International therefore had a substantial Swiss interest, making it a qualified investor under Article 1(b) [*sic*] the Swiss-Bolivia BIT.”²²⁵ It is not within our mandate to determine whether Glencore International would have had standing under the Switzerland-Bolivia bilateral investment treaty. In fact, in this case, the Respondent is also arguing that the Claimant can’t bring

²²² Colquiri Mine Lease, 27 April 2000, Clause 12.1.6, **C-11**; Public Deed No 131/2000, lease agreement between Comibol and the Cooperativa 26 de Febrero, 13 October 2000, p. 5, **R-94**; Delivery Certificate of an Expanded Working Area from Colquiri to Cooperativa 26 de Febrero, 15 June 2002, **C-182**; Agreement between Fedecomín Oruro, Cooperativa 26 de Febrero, and Colquiri to Expand Working Areas, 19 November 2003, **C-188**; Letter from Comibol (Mr. Manzano) to Colquiri (Mr. Mirabal), 20 February 2004, **C-189**; Agreement between FENCOMIN, FEDECOMIN La Paz, Fedecomín Oruro, Workers of the Cooperativas 26 de Febrero and 21 de Diciembre, Colquiri, the Vice Ministry of Mining, and Comibol, 21 May 2004, **C-193**; Preliminary Agreement between Comibol and Colquiri to Authorize Mining Works in an Area of Level 325 of the Colquiri Mine, 13 January 2009, **C-237**; Letter from Sinchi Wayra (Mr. Capriles) to Comibol (Mr. Miranda), 15 April 2009, **C-238**; Memorandum of Definitive Understanding between Comibol, Cooperativa 21 de Diciembre, Colquiri, Fencomín and Fedecomín La Paz, 15 June 2005, **C-212**; Letter from Comibol Technical Manager to the President of Comibol, 20 April 2005, **R-153**; Public deed of sublease of tailings, subscribed by Compañía Minera Colquiri SA and the Cooperativa 21 de Diciembre Colquiri LTDA, 10 March 2006, **R-39**.

²²³ Bolivia’s Rejoinder, ¶ 390; Claimant’s Reply, ¶ 212 and Claimant’s Rejoinder, ¶ 61.

²²⁴ Bolivia’s Rejoinder, ¶ 390.

²²⁵ Claimant’s Reply, fn. 561.

claims under the Treaty.²²⁶ Notwithstanding this, the fact that the Switzerland-Bolivia bilateral investment treaty may have been an option for Glencore International to challenge the underlying measures undermines the Respondent's claim that the restructuring was performed to gain protection under the Treaty.

170. *Second*, as to the reasons for restructuring, the Claimant argues that it was done in order “to maximize cash-flows while taking advantage of significant financing benefits received by companies incorporated in Bermuda”, that Glencore Bermuda “has historically been the holding company for the vast majority of Glencore International’s investments, including those in Latin America”²²⁷ and that it “was the designated vehicle used by the Glencore group at the time for issuing senior notes to US institutional investors.”²²⁸ On the contrary, the Respondent argues that Glencore Bermuda was used “as a vehicle for the transfer of the purchase price to Glencore International’s legal counsel in the transaction.”²²⁹
171. It is uncontested that the restructuring involved a corporate decision by Glencore International. What is not clear from the record is that obtaining standing was one of the underlying motives for the restructuring. Further, the creation of Glencore Bermuda was not contemporaneous with the relevant date (*i.e.*, March 2005) and the relevant Assets are not the only ones held by Glencore Bermuda.²³⁰ These facts also undermine the Respondent’s argument.
172. In light of the above, the Tribunal rejects the Respondent’s objections on abuse of process.

²²⁶ We note as well that this would seem to contradict the first statements made by Bolivia as to the investors being: “purely swiss in substantive reality” under the “[p]iercing the veil” claim. Bolivia’s Statement of Defence, ¶ 349.

²²⁷ Eskdale Second Witness Statement, ¶ 17; Claimant’s Reply, ¶ 62.

²²⁸ Eskdale Second Witness Statement, ¶ 17; 2007-2008 Glencore Bermuda Financial Statements, 31 December 2008, **C-94**; Glencore Bermuda’s Financial Statements for the years ending December 31, 2011 and 2010, 31 December 2011, **C-246**.

²²⁹ Bolivia’s Rejoinder, ¶ 428.

²³⁰ “[S]ince its incorporation in 1993, Glencore Bermuda was and continues to be an entity that manages a diverse, multi-billion dollar portfolio of operations and investments around the world for the entire Glencore group and secures financing for that portfolio. In fact, Glencore Bermuda continues to hold mining investments in Bolivia (which are not part of this arbitration) for these very same reasons.” Eskdale Second Witness Statement, ¶ 18. By way of example, Claimant refers to its Financial Statements for 2007, indicating investments worth approximately US\$3.28 billion and total assets held worth US\$9.72 billion. 2007-2008 Glencore Bermuda Financial Statements, 31 December 2008, **C-94**. See also Glencore Bermuda’s Financial Statements for the years ending 31 December 2011 and 2010, 31 December 2011, **C-246**.

4. WHETHER THE TRIBUNAL IS PRECLUDED FROM HEARING THE CASE ON ACCOUNT OF THE ILLEGALITY OF THE PRIVATIZATIONS AND THE UNCLEAN HANDS PRINCIPLE

173. The Respondent alleges that “[t]he privatization process for the Assets was riddled with illegalities”²³¹ and the “circumstances surrounding the privatization [...] were contrary to basic requirements of transparency and good faith.”²³² Particularly, Bolivia alleges that “[t]he 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” and “the prices received in the privatizations were inexplicably low.”²³³ On this basis, Bolivia claims that, pursuant to the “clean hands” principle, the “Claimant cannot present for adjudication before this Tribunal claims tainted by an illegality which Claimant was aware of when it received the Assets.”²³⁴
174. On the other hand, the Claimant counters that it “did not commit any illegal act in making its investment”, that “privatization was carried out in a transparent process that required good faith participation by each bidder, and prices were determined in accordance with the legal framework then in place”, and that “the unclean hands doctrine does not exist as a general principle of international law.”²³⁵

A. Analysis by the Tribunal

175. We begin by observing that the Treaty contains no “illegality clause”. The Tribunal is also aware that different tribunals have characterized this “principle” as “unclean hands,”²³⁶ “good faith,”²³⁷

²³¹ Bolivia’s Statement of Defence, ¶ 326.

²³² Bolivia’s Statement of Defence, ¶ 337; Bolivia’s Rejoinder, ¶ 504. Bolivia indicates this was done disregarding the “principle that public patrimony must be protected”. See also Bolivia’s Rejoinder, ¶¶ 99, 330.

²³³ Bolivia’s Statement of Defence, ¶ 326. In the case of the Colquiri Mine Lease, Respondent indicates that it was awarded “for free, and only in exchange for a small investment commitment during the first two years of operations.” See Bolivia’s Statement of Defence, ¶ 335.

²³⁴ Bolivia’s Statement of Defence, ¶ 338.

²³⁵ Claimant’s Reply, ¶¶ 273, 280, 287.

²³⁶ *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, ¶ 493, **RLA-25**.

²³⁷ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 109, **RLA-15**.

“*Nemo Auditur Propiam Turpitudinem Allegans*”²³⁸ or “*ex turpi causa non.*”²³⁹ Tribunals have also made clear that it only applies in “particularly serious cases”²⁴⁰ or where there is a “serious violation of the legal order”²⁴¹ and when it is “evident that its act had a fraudulent origin.”²⁴² As stated in our bifurcation decision, the Tribunal would not only have to accept this principle and determine its status (absent an express provision in the Treaty²⁴³), but also lay out its contours. Before doing so, the Tribunal must determine whether the investment was made through illegal, fraudulent, or corrupt means, which could render the investment illegal.

i. The Relevant Time for Assessment of Illegality

176. The Claimant contends that the relevant time for assessment is when the investment was made, namely March 2005.²⁴⁴ The Respondent, on the other hand, alleges that examination “is not limited to the time of the acquisition of the Assets by Glencore International”.²⁴⁵ The Respondent alleges “that 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.”²⁴⁶ The Tribunal considers it useful to adopt the Respondent’s approach to determine whether the “Claimant’s claims are tainted with illegality and thus fall outside the scope of the Tribunal’s jurisdiction.”²⁴⁷ Regarding the analysis of the facts, we consider the approach of the *Churchill Mining* tribunal to be helpful and will therefore examine first “the *seriousness* of the fraud [illegality], next the *role*

²³⁸ *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, ¶¶ 240-242, **RLA-26**.

²³⁹ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶¶ 142, 146, **RLA-27**.

²⁴⁰ *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, ¶ 493, **RLA-25**.

²⁴¹ *SAUR International SA v. The Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, ¶ 308, **RLA-82** (unofficial translation).

²⁴² *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, ¶ 242, **RLA-26**.

²⁴³ *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2016-39, 31 January 2018, Procedural Order No. 2, Decision on Bifurcation, ¶ 47.

²⁴⁴ Claimant’s Reply, ¶ 277.

²⁴⁵ Bolivia’s Rejoinder, ¶ 514. See also Bolivia’s Rejoinder, ¶ 510.

²⁴⁶ Bolivia’s Statement of Defence, ¶ 346.

²⁴⁷ Bolivia’s Rejoinder, ¶ 533.

of the disputing parties or third parties in relation to the fraud, then the *nexus* between the fraud and the claims, and finally, the *time* when the fraud was committed.”²⁴⁸

ii. *Seriousness of the Illegality*

177. According to the Respondent, former President Sánchez de Lozada, acted with bias and partially “by taking 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.”²⁴⁹ The Respondent basically argues that there is an ethical violation by the former President when he allegedly established a framework from which he would later gain a benefit. Bolivia does not contend that such behavior constituted an *illegal conduct* but rather that it was “highly inappropriate”²⁵⁰ and disregarded “*the collective interest*”.²⁵¹
178. In this regard, even if a “highly inappropriate” and unethical behavior could rise to a level of illegality, the evidence on the record does not support a finding of such type of conduct. The Assets were privatized through a general legal framework applicable to all industries,²⁵² which also involved the legislative branch, as the Claimant correctly notes. In fact, it is uncontested that former President Sánchez de Lozada was neither in office when the Assets were privatized,²⁵³ nor was he involved in the Assets acquisition [REDACTED]²⁵⁴ In addition, the Bolivian Public Servants Liability Regulation stipulates a comprehensive investigation procedure when allegations of violation are made, such as requiring an opinion from the *Contralor General de la República* in the case of civil responsibility and an accusation from government officials with knowledge of the illegal acts in the case of criminal responsibility.²⁵⁵

²⁴⁸ *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, ¶ 494, **RLA-25**.

²⁴⁹ Bolivia’s Statement of Defence, ¶ 328. See also Bolivia’s Rejoinder, ¶ 527.

²⁵⁰ Bolivia’s Rejoinder, ¶ 70.

²⁵¹ Constitution of Bolivia of 1967, Art. 43, **R-3** (unofficial translation). See Bolivia’s Statement of Defence, ¶ 327.

²⁵² Claimant’s Reply, ¶ 279.

²⁵³ Claimant’s Reply, ¶ 279 and Claimant’s Rejoinder, ¶ 192.

²⁵⁴ [REDACTED]

²⁵⁵ Supreme Decree No. 2.3318-A, 3 November 1992, Art. 50-62, **R-237**.

There is neither an allegation nor a proceeding brought pursuant to this statute against ex-president Sánchez de Lozada.

179. With respect to the Assets, according to the Respondent those “were also privatized contrary to the basic requirements of transparency and good faith, without regard to the protection of the public patrimony, and disregarding the basic principle of administrative law according to which the administration acts in the best interest of the State.”²⁵⁶ The Respondent contests the terms and conditions of the Colquiri Mine Lease, as well as the amounts paid for the Tin and Antimony Smelters. Lastly, it alleges that “the Assets were privatized without seeking congressional approval pursuant to Article 59(5) of the 1967 Constitution.”²⁵⁷
180. The Tribunal has difficulty grappling with Bolivia’s claims because it is being asked to make a finding on “principles” of “transparency and good faith”, “protection of the public patrimony of the State” or “efficiency”²⁵⁸ that are not attached to any concrete legal obligation. Moreover, in this instance, all legal steps and formalities were observed in the bidding processes and there is no evidence of an administrative or judicial determination by Bolivian authorities that such procedures were in fact illegal.
181. The Tribunal faces the same problem when trying to address the allegations that the acquisition of the mine lease was “irregular” and “under very favourable conditions”²⁵⁹ or that the Smelters were sold at an “inexplicably low price”.²⁶⁰ Since the allegations relate directly to the terms or conditions under which the Assets were awarded, the fact that the bidding processes complied with the applicable legal framework (including the fact that the sale contracts were sanctioned by Bolivian State agencies) and the fact that no aspect related to or in connection with these processes has been challenged before any court or tribunal mean that the allegations that these processes were irregular or awarded under very questionable terms and conditions are without merit. The same holds true for the allegation of a violation of Article 59(5) of the Bolivian Constitution for failing to seek approval from the legislature. The Tribunal recognizes that this point is debatable from a legal standpoint, but even if it were true, we do not see how this would amount to a finding of illegality for all bidding processes, especially since this issue was not raised until this

²⁵⁶ Bolivia’s Rejoinder, ¶ 528.

²⁵⁷ Bolivia’s Rejoinder, ¶ 530.

²⁵⁸ Bolivia’s Statement of Defence, ¶¶ 330 and 332.

²⁵⁹ Bolivia’s Rejoinder, ¶¶ 74 and 78.

²⁶⁰ Bolivia’s Statement of Defence, ¶ 326 and Bolivia’s Rejoinder, ¶ 659.

arbitration.²⁶¹ It is important to note that the purchase agreements and the Colquiri Mine Lease expressly indicated that: “all measures and formalities required in the Republic of Bolivia have been adopted and fulfilled” and “[t]he [seller] has obtained the contractually and legally required authorizations to transfer to the [purchaser] the [assets and rights].”²⁶² For all of the above reasons, we fail to see any basis that would support an irregularity finding in the bidding processes of the Assets.

182. Even if the Tribunal were to find illegality in any of the bidding processes, the Respondent is not arguing that the Claimant committed any wrongdoing when acquiring the Assets, but rather that “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.”²⁶³ This assertion is supported by the fact that “a minimum of due diligence”²⁶⁴ would have revealed this. The Tribunal is once again puzzled by the fact that the Respondent places the burden on the Claimant to “demonstrate that Bolivia gave it any assurances regarding the validity or legality of the privatizations.”²⁶⁵ Nevertheless, given that the bidding processes were conducted in accordance with the applicable law, that no challenge to such processes was filed for at least 3 years after the privatization of the Assets, and that it was Bolivian Government officials who allegedly committed the irregular acts, it was for the Respondent to produce some evidence indicating that the Claimant should have been aware of these irregularities regarding the privatization of the Assets.
183. When acquiring an asset, it could be the case that an investor was either aware of or should have been aware of the wrongdoing of a third party. In *Anderson v. Costa Rica*, for instance, the courts of Costa Rica found “after a lengthy and extensive legal process” that the third party involved

²⁶¹ “[A]uthorize and approve [...] contracts concerning the exploitation of national resources” (unofficial translation). 1967 Constitution, Art. 59(5), **R-3**. Bolivia’s Rejoinder, ¶¶ 85-96. On the other hand, Claimant argues that “no additional Congressional approval was required” and the Constitution granted COMIBOL powers to manage its assets according to articles 138 and 144. Claimant’s Reply, ¶¶ 38-39.

²⁶² Claimant’s Reply, ¶ 38. See also Tin Smelter Purchase Agreement, 17 July 2001 and 4 July 2001, **C-7**, Clause 7.3 (“The Ministry [...] has fulfilled all necessary procedures to carry out the bidding and the signature of the contract”) (Unofficial translation) and clauses 7.4, 13.2 and 13.3; Notarization of the sale and purchase agreement of the Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Colquiri and Comsur, 11 January 2002, Clauses 7.3, 7.4, 13.2, 13.3, **C-9**; Colquiri Mine Lease, 27 April 2000, Clauses 6.3, 12.1.9, 12.1.10, **C-11**.

²⁶³ Bolivia’s Statement of Defence, ¶ 346.

²⁶⁴ Bolivia’s Statement of Defence, ¶ 346. Claimant argues that it carried out “thorough due diligence conducted by technical, financial and multi-jurisdictional legal teams to cover all relevant aspects of the transaction.” Claimant’s Reply, ¶ 295.

²⁶⁵ Bolivia’s Rejoinder, ¶ 521.

“committed aggravated fraud and illegal financial intermediation”²⁶⁶ or in *Churchill Mining* the third party and the investor “were closely associated and [] they liaised regularly during the relevant time.”²⁶⁷ On the basis of the record, the Tribunal is unable to agree with the Respondent that the Claimant knew or “should have known” of any alleged irregularity in the bidding processes.

184. In light of these findings, we do not believe it necessary to discuss whether and on what basis the principle of illegality would apply to the Treaty. Even if, for completion’s sake, this Tribunal were to address the rest of the elements under the analysis set out by the *Churchill Mining* tribunal, the Tribunal is not convinced that any of the other elements would be able to compensate this elemental flaw, considering in particular the participation of Bolivian government officials in the bidding processes, the non-participation of the Claimant and the timing of the bidding processes, all of which have already been discussed.

5. WHETHER THE TRIBUNAL LACKS JURISDICTION DUE TO THE ICC ARBITRATION CLAUSE

185. The Respondent argues that the Tribunal lacks jurisdiction to hear the claims since they “ultimately arise out of and concern the validity, compliance with, and fulfilment of the contracts [concerning the Assets],”²⁶⁸ and these contracts contain specific provisions ensuring that “any dispute” related “directly or indirectly” to the contracts will be submitted to arbitration administered by the ICC while precluding recourse to other kinds of dispute resolution.²⁶⁹ The Respondent also claims that the provisions “displace” the Treaty’s dispute resolution provisions.
186. In general terms, the Respondent considers that the reversion of the Tin Smelter was based on the fact that the contract was affected by illegalities, that the reversion of the Antimony Smelter was based on a contractual breach by the Claimant’s inactivity and that the issue concerning the Colquiri Mine Lease is whether Bolivia complied with its contractual obligations.²⁷⁰ The Claimant on the other hand contends that it has not raised “claims of contractual breach”, that “Bolivia cannot seek to avoid its international obligations under the Treaty by labelling this dispute as contractual” and that “[i]f Bolivia truly believed that the instant disputes were governed

²⁶⁶ *Alsadair Ross Anderson v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, ¶ 55, **RLA-147**.

²⁶⁷ *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No ARB/12/14 and 12/40, Award, 6 December 2016, ¶ 474, **RLA-25**.

²⁶⁸ Bolivia’s Statement of Defence, ¶ 385.

²⁶⁹ Bolivia’s Statement of Defence, ¶¶ 386, 387; Bolivia’s Rejoinder, ¶¶ 568 and 569.

²⁷⁰ Bolivia’s Statement of Defence, ¶¶ 396-399; Bolivia’s Rejoinder, ¶ 567.

by mandatory ICC arbitration clauses it should have challenged any purported acts or omissions of Glencore Bermuda's subsidiaries in accordance to the [c]ontracts".²⁷¹

A. Analysis by the Tribunal

187. We begin our analysis by recalling the text of Article 8 of the Treaty on dispute settlement, which establishes the following:

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. [...]

188. The Tribunal is satisfied that this provision forms the basis of our mandate. Moreover, we believe that the allegations raised by the Claimant since the Notice of Arbitration pertain to "obligations" under this Treaty, in particular, under Articles 2(2) and 5. In this sense, while there may have been disagreements between Glencore Bermuda and Bolivia regarding the terms of the contracts governing the Assets, this is not a concern of ours;²⁷² *this* arbitration concerns specific obligations regarding an *investment* in respect of a treaty claim. Whether the investment was made pursuant to a contract or not has no bearing on the dispute's status as a treaty dispute, regardless of whether the contract stipulated another forum for dispute resolution or renounced a specific forum.
189. In addition, it is well established in investment case law that a contractual provision on forum selection cannot as such deprive a tribunal of jurisdiction over a treaty claim.²⁷³ For these reasons,

²⁷¹ Claimant's Reply, ¶¶ 320, 329-330. See also Claimant's Rejoinder, ¶ 249.

²⁷² In this regard, we agree with the opinions expressed in *SGS v. Pakistan* and *Impregilo v. Pakistan* that: "[a]s a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders". *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No ARB/01/13. Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, ¶ 147, **CLA-151**; and "[C]ontrary to Pakistan's approach in this case, the fact that a breach may give rise to a contract claim does not mean that it cannot also – and separately – give rise to a treaty claim. Even if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries." *Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶ 258, **CLA-159**.

²⁷³ *SGS Société Générale de Surveillance SA v. Republic of Paraguay*, ICSID Case No ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶ 138, **CLA-187**; *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. Argentine Republic* and *AWG Group Ltd v. Argentine Republic*, ICSID Case No ARB/03/19, Decision on Jurisdiction, 3 August 2006, ¶¶ 44, 45, **CLA-167**; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ¶¶ 70-76, **CLA-150**; *Compañía de Aguas del Aconquija SA and Vivendi Universal* (formerly *Compagnie Générale des Eaux*) *v. Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, ¶ 101, **CLA-37**; *Siemens AG v. Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, ¶ 180, **CLA-51**.

we reject Respondent's argument that the Tribunal lacks jurisdiction due to the ICC arbitration clause.

6. WHETHER THE TRIBUNAL LACKS JURISDICTION OVER THE TIN STOCK CLAIMS

190. The Respondent argues that the Claimant did not notify it as to the potential claims over the Tin Stock pursuant to Article 8(1) of the Treaty, making it impossible for the State to “seek amicable resolution or to provide redress”.²⁷⁴ According to the Respondent, none of the notices “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”.²⁷⁵ On the other hand, the Claimant alleges that Bolivia was “fully on notice of the Tin Stock claims six years prior to the filing of the Notice of Arbitration”, that it “has had ample opportunity to settle all of these claims” and that “forcing Glencore Bermuda back into amicable settlement talks would be an absurd outcome”.²⁷⁶

A. Analysis by the Tribunal

191. Article 8(1) of the Treaty provides: “[d]isputes between a national or company of one Contracting Party and the other Contracting Party [...] 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 [...]” (emphasis added). The Treaty contains no further obligation or indication as to the notification except stipulating the form (written) and the need for communication of a *claim*.
192. The purpose of this provision and notice requirements in investment treaties in general “is to allow negotiations between the parties which may lead to a settlement.”²⁷⁷ In the present case, the Antimony Smelter Reversion Decree was published on 1 May 2010 ordering the reversion of the Antimony Smelter and “all of its assets”.²⁷⁸ The record indicates that on 3 May 2010, Colquiri informed the Ministry of Mining that the Tin Stock stored in the Antimony Smelter was not included in the assets and requested its delivery.²⁷⁹ Two days later, the Ministry of Mining recognized the stock was not part of the “assets” and requested to EMV to return it.²⁸⁰

²⁷⁴ Bolivia's Statement of Defence, ¶¶ 400 and 402.

²⁷⁵ Bolivia's Statement of Defence, 408. See generally Bolivia's Statement of Defence, ¶¶ 400-411.

²⁷⁶ Claimant's Reply, ¶¶ 312, 319.

²⁷⁷ *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶ 98, **CLA-60**.

²⁷⁸ Supreme Decree No 499, *Gaceta Oficial* No 127NEC, 1 May 2010, **C-26**.

²⁷⁹ Letter from Colquiri SA (Mr. Capriles) to Minister of Mining (Mr. Pimentel), 3 May 2010, **C-28**.

²⁸⁰ Letter from Ministry of Mining (Mr. Pimentel) to EMV (Mr. Villavicencio), 5 May 2010, **C-29**. The record contains another letter from Colquiri to the Ministry of Mining indicating that EMV had not complied with

193. On 19 May 2010, Colquiri once again requested EMV to return the Tin Stock and indicated that “any act of disposition or use not consented by our company of the tin concentrates [...] may give rise to additional legal responsibilities. Such concentrates were not affected by the nationalization”.²⁸¹ On 7 June 2010, Colquiri sent a letter to the Ministry of Mining requesting once more restitution of the Tin Stock and indicated the following:

Our intention has been [...] to mitigate or avoid damages to [Colquiri], that would subsequently have to be repaired by the Bolivian State. [...] We want to inform you that we have also brought the case to the attention of our lawyers, local and foreign, so that they can advise us on the best legal measures to follow.²⁸²

194. Finally, on 8 June 2010, the State company EMV informed Colquiri that the Tin Stock was:

[C]onsidered as an asset of the antimony smelter as it was located on its premises at the time of nationalization. Concentrates that will surely not be disposed of in any way until the negotiations that must be carried out between the State and the Company you represent are concluded.²⁸³

195. The Tribunal is not able to agree with the Respondent that it was not notified of a dispute involving the Tin Stock. Even though the letters were from Colquiri, the Tribunal finds it hard to believe that Bolivia was unaware of the corporate structure including Colquiri and Glencore Bermuda, especially in light of the Assets’ reversions made by the State. After nine years of negotiations, we find it even more difficult to believe that the Respondent is oblivious of the scope of the potential dispute.²⁸⁴ Furthermore, this Tribunal cannot disregard the fact that EMV considered the Tin Stock to be an asset of the Antimony Smelter and included it within the scope of “negotiations”.
196. In light of the above, we reject the Respondent’s objection that the Tribunal lacks jurisdiction over the Tin Stock claims.

the instruction to return the Tin Stock. Letter from Colquiri (Mr. Capriles) to the Minister of Mining (Mr. Pimentel), 10 May 2010, **C-99**.

²⁸¹ Letter from Colquiri (Mr. Capriles) to EMV (Mr. Villavicencio), 19 May 2010, **C-100** (unofficial translation).

²⁸² Letter from Colquiri (Mr. Capriles) to the Minister of Mining (Mr. Pimentel), 7 June 2010, **C-101** (unofficial translation). The Tribunal notes this letter expresses “willingness to discuss in the meetings” (Unofficial translation) that the Minister would arrange between the Parties.

²⁸³ Letter from EMV (Mr. Villavicencio) to Colquiri (Mr. Capriles), 8 June 2010, p. 2, **C-102**.

²⁸⁴ We disagree with Respondent’s assertion that: “Claimant had some five years to submit a notice of a dispute concerning *an entirely different asset* from those of its other claims, but elected not to do so” (emphasis added). Bolivia’s Rejoinder, ¶ 620.

VI. MERITS OF THE DISPUTE

1. EXPROPRIATION CLAIM

197. We turn now to the merits of the dispute. The Claimant argues that “Bolivia deprived Glencore Bermuda of title, ownership and control over the Tin Smelter, the Antimony Smelter, the Tin Stock and the Colquiri [Mine] Lease” and therefore, “completely destroyed the value of Glencore Bermuda’s shares in Vinto and Colquiri [...] depriving Glencore Bermuda of the value of its investments”. The Claimant contends that “through its measures Bolivia effected a direct and an indirect expropriation of [its] investments”.²⁸⁵ According to the Claimant, Bolivia breached Article 5 of the Treaty by: (i) not paying just and effective compensation, promptly and without delay and (ii) expropriating without due process of law.²⁸⁶

198. The Respondent on the other hand, contends that “[t]he reversions were not expropriations but legitimate exercises of police powers in the public interest,”²⁸⁷ “taken to enforce law, public order, and safety within its territory”.²⁸⁸ As to the Assets which are the object of this dispute, Bolivia alleges the following: (i) the Tin Smelter “was reverted because it was *illegally privatized*”, (ii) the Antimony Smelter was reverted “because of a breach of the basic *contractual commitment* to put the Smelter into production”, and (iii) the Colquiri Mine Lease was reverted “in order to restore *public order and safety* following a massive conflict”.²⁸⁹ Finally, the Respondent argues that even if its reversions were to be considered expropriations, they are lawful, as “the provision is breached only for failure to pay upon conclusion of negotiations and this arbitration”.²⁹⁰ It is clear from the Parties’ submissions that they disagree not only on the nature of the act but on whether such act breached the Treaty. We will address both issues below.

A. The Expropriation Standard Under Article 5 of the Treaty

199. We begin our analysis with the text of the provision at issue. Article 5 of the Treaty contains two paragraphs which provide as follows:

- (1) 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*

²⁸⁵ Claimant’s Reply, ¶ 344. See also Statement of Claim, ¶ 148.

²⁸⁶ Statement of Claim, ¶¶ 150-176.

²⁸⁷ Bolivia’s Rejoinder, ¶ 634.

²⁸⁸ Bolivia’s Statement of Defence, ¶ 444.

²⁸⁹ Bolivia’s Statement of Defence, ¶ 444 (emphasis added).

²⁹⁰ Bolivia’s Statement of Defence, ¶ 481.

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.* The 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.

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

(emphasis added)

200. From the outset, the language “*shall not*” imposes a clear obligation not to expropriate investments. Moreover, the text clearly seeks to encompass different measures that a State may take such as nationalizations, expropriations or measures having an *effect equivalent* to those categories, *i.e.*, indirect expropriations. Therefore, regardless of how a measure is labeled, it is covered by this provision and equated to “expropriation”. Unlike other treaties, the Treaty in this case does not contain language referring to the State’s right to exercise its police powers. Nevertheless, the existence of the police powers doctrine in customary international law is now widely accepted and plays an important role to ensure that possible findings of indirect deprivations of property do not prevent host States from adopting legitimate and general regulatory measures. Measures which fall within the scope of the police powers doctrine are therefore understood not to be expropriatory in nature, with the result that there is no need to consider the conditions of legality.²⁹¹
201. Article 5 also includes criteria which must be met in order for any expropriation to be legal: the expropriation is taken for a “*public purpose*” and for a “*social benefit*” related to the internal needs of the State,²⁹² and is accompanied by “just and effective compensation”. Only if these

²⁹¹ As explained in *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, ¶ 295, **RLA-43**. This position has also been accepted by a number of other tribunals *e.g.* *Methanex Corporation v. USA*, NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter D, ¶ 7, **RLA-45**.

²⁹² As to the compensation, Article 5 imposes other obligations that must be observed. [It] “shall amount to the market value of the investment expropriated”, it “shall include interest at a normal commercial or legal rate”, [it] “shall be made without delay”, “be effectively realizable and be freely transferable”. UK-Bolivia Treaty, 24 May 1988 (emphasis added), **C-1**.

legality requirements are not met is there a breach of Article 5. We do not consider it necessary to address the right to establish promptly by due process of law the legality of the expropriation or the amount of the compensation.²⁹³ There is a clear overlap between the police powers doctrine and the “public purpose” condition of legality in Article 5 of the Treaty, but the two are not identical. For instance, a measure that is specific rather than general in nature may fall outside of the police powers doctrine, but still meet the “public purpose and social benefit” requirement of legality in Article 5. Further, the two issues fall to be considered at different stages of the analysis. Whereas the police powers doctrine is relevant when determining whether an expropriation has taken place, the “public purpose” criterion in Article 5 is relevant at the later stage of assessing the legality of any identified expropriation.

202. In light of this, the Tribunal agrees with the argument advanced by the Respondent that a finding that the relevant measures fell within the scope of the police powers doctrine would lead to the conclusion that the Respondent’s actions are not contrary to Article 5 of the Treaty and do not give rise to an obligation to pay compensation. In other words, if the measures do fall within the scope of the doctrine, no expropriation has occurred and so no issue of compensation arises.
203. The Tribunal will first consider whether an expropriation has occurred. The analysis depends on two distinct issues. *First*, the Tribunal will assess whether the Respondent has deprived the Claimant of its rights relating to the investment. *Second*, the Tribunal will determine whether the relevant act or measure falls within the scope of the police powers doctrine. If any measure falls outside the scope of the doctrine, the Tribunal will then consider the requirements of legality in Article 5 of the Treaty, namely (i) whether the expropriation was carried out “for a public purpose and for a social benefit related to the internal needs” of Bolivia, and (ii) whether Bolivia paid “just and effective compensation”, defined in the Treaty as “the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier”.

²⁹³ While we do not take further our analysis, the Tribunal does point out that the text of Article 5(1) does not mention whether the process should be prior. It only establishes as conditions to expropriate that the measure is for: (i) *a public purpose and social benefit* and, (ii) *against just and effective compensation*. While Claimant relies on *ADC v. Hungary*, we note that in that case, Article 4 of the BIT precisely provided that “the measures are taken in the public interest *and under due process of law*” (emphasis added). The tribunal in *Rurelec*, also indicated that the UK-Bolivia BIT (unlike the US-Bolivia BIT which contains a similar provision to the one in *ADC v. Hungary*) “does not explicitly establish due process as a precondition for the expropriation of an investment.” *Guaracachi America, Inc and Rurelec Plc v. Plurinational State of Bolivia*, UNCITRAL, Award, 31 January 2014, ¶ 439, **CLA-120**.

B. Whether Bolivia's Reversions Breach Article 5 of the Treaty

204. In order to analyze Bolivia's reversions, we must examine the specific documents they stem from and determine whether they comply with the legal standard aforementioned. These decrees are the source and main foundation of the acts (*i.e.*, the reversions).

i. *Supreme Decree No. 29,026 (The Tin Smelter Reversion Decree)*²⁹⁴

a. Whether the Nature of the Measure is an Expropriation

205. As a starting point, we observe that the Tin Smelter Reversion Decree does not define "reversion", nor does it provide a specific legal basis for it.²⁹⁵ The preamble begins by affirming the right of self-determination and the right to freely dispose of natural resources, and continues to explain that the neoliberal model imposed in Bolivia resulted in the liquidation of State-owned companies. Later on, it indicates that the smelter is the result of a long "struggle for the economic independence of the country" and that the government, while exercising a popular mandate on the recovery of natural resources, is "under the obligation to revert [the smelter] to the State's domain".²⁹⁶

206. The decree contains only one Article that mandates: "Complejo Metalúrgico Vinto *is reverted* to the *domain* of the Bolivian State, with *all its current assets*, providing that [the State company EMV] *immediately takes* administrative, technical, legal and financial *control* [...]"²⁹⁷ (emphasis added). The text of the decree leaves no doubt as to the effects of the measure. There was an *effective taking* of Complejo Metalúrgico Vinto and its assets that left the Claimant without any type of control or right to dispose of it. As explained in *AES v. Hungary*, "[f]or an expropriation to occur, it is necessary for the investor to be *deprived*, in whole or significant part, *of the property*

²⁹⁴ Supreme Decree No. 29,026 (the "**Tin Smelter Reversion Decree**"), 7 February 2007, published in the *Gaceta Oficial* No. 2,969 on 9 February 2007, **C-20**.

²⁹⁵ The Tribunal notes that the Bolivian Constitution applicable at that time makes no reference to that term. *See* Constitution of Bolivia, 1967, **R-3**. Additionally, while the Bolivian Mining Code refers to "reversion", such concept seems to be related to mining concessions and specific situations that produce that effect. Article 65 indicates: "*Caducidad* [...]" produces the *reversion* of the mining concession to the original domain of the State". Article 67: "[i]f the concession was declared void ex officio or at the request of a third party, it will *revert* to the original domain of the State." Article 86: "The responsibilities of the concessionaire or mining operator for damage to the environment subsist even after the *reversion* of the mining concession to the original domain of the State." Article 95: "[...] the mining concessions subject of the bidding will *revert* by rule of law to the original domain of the State" (unofficial translation, emphasis added). Bolivian Mining Code, Law 1,777, 17 March 1997, Arts 65, 67, 95, 155, **R-4**.

²⁹⁶ Supreme Decree No. 29,026, 7 February 2007, published in the *Gaceta Oficial* No. 2,969 on 9 February 2007, **C-20** (unofficial translation).

²⁹⁷ Supreme Decree No. 29,026, 7 February 2007, published in the *Gaceta Oficial* No. 2,969 on 9 February 2007, **C-20** (unofficial translation).

in *or effective control* of its investment [...]”²⁹⁸ (emphasis added). We consider the decree to be an outright seizure, a “formal deprivation” of the legal title, “possession or access to the benefit and economic use of [the] property”.²⁹⁹

207. Moreover, the Tribunal cannot be blind to the fact that the day the government took physical possession of Vinto, a banner reading “nationalized” was affixed on the entrance³⁰⁰ and that former President Morales stated publicly that the decree would “nationalize Vinto”.³⁰¹ We concur with Bolivia that “the fact that a non-lawyer would confuse legal terminology is hardly surprising.”³⁰² Nonetheless, the opinion of a head of State or a high-ranking government official should carry some weight. In any event, we recall that Article 5 encompasses nationalizations, expropriations and measures with equivalent effect; thus, regardless of the appellation used by the Respondent, the act should be characterized as an expropriation.
208. The Tribunal takes the view that the Tin Smelter Reversion Decree is not a legitimate exercise of the Respondent’s police powers. Most obviously, the Tin Smelter Reversion Decree is not characterized as a general regulatory measure, or part of a broader regulatory regime; it affects only the Tin Smelter owned by the Claimant.
209. In any case, the Respondent has not furnished the Tribunal with sufficient evidence to conclude that the decree was carried out in pursuit of a legitimate public policy interest. The decree states that the privatization process had violated different rules and legal provisions, that Allied Deals transferred the asset with “clear fraudulent intent against public interest” and later on, that there

²⁹⁸ *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. Republic of Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010, ¶ 14.3.1, **CLA-100**.

²⁹⁹ “While assumption of control over property by a government does not automatically and immediately justify a conclusion that the *property has been taken by the government*, thus requiring compensation under international law, *such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral*” (emphasis added). *Tippetts, Abbott, McCarthy, and Stratton v. TAMS-AFFA Consulting Engineers of Iran and others*, Award, 1984, Vol. 6, Iran-US Claims Tribunal Report, 22 June 1984, p. 4, **CLA-9**: “[a]s is well known, there is a wide spectrum of measures that a state may take in asserting control over property, extending from limited regulation of its use *to a complete and formal deprivation of the owner’s legal title*.” [...] “There is ample authority for the proposition that *a property has been expropriated* when the *effect* of the measures taken by the state has been to *deprive the owner of title, possession or access to the benefit and economic use of his property*” (emphasis added). *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case No ARB/96/1, Final Award, 17 February 2000, ¶¶ 76 and 77, **CLA-25**.

³⁰⁰ Photos of the Tin Smelter Nationalization, 9 February 2017, pp. 8-9, **C-70**.

³⁰¹ El País, *Anuncian la nacionalización de la fundición de Vinto*, 9 February 2007, **C-226**.

³⁰² Bolivia’s Rejoinder, ¶ 653.

was a popular mandate to recover natural resources.³⁰³ The decree also mentions the price at which the asset was transferred was low in comparison with its previous value.

210. Mere assertion alone, however, cannot be sufficient. There is no indication beyond the word “reverted” of precisely what power Bolivia was exercising. As previously stated, the decree contains neither a legal basis for the act nor a stated purpose that could be associated with the exercise of police powers. We only have Bolivia’s contention in this proceeding that it was something other than an expropriation. No contemporaneous material has been put before us to point to a different purpose. In addition, the justification for the decree is the illegal privatization of the asset, in spite of the lack of a formal declaration of illegality from any Bolivian administrative or judicial authority to date. We recall that the privatization procedure was carried out in accordance with Bolivian law and with the participation of numerous Bolivian officials, such as a Qualifying Commission. In addition, the government was free to accept or reject the minimum price recommendation of its advisor Paribas.³⁰⁴
211. Regarding this, the Tribunal is not persuaded by the Respondent’s contention that “court proceedings were unnecessary because the matter was resolved by the reversion and [because of] the collapse of Allied Deals.”³⁰⁵ A claim of illegality, whether made by a government or an investor, must be supported by evidence and not mere allegations. In this instance, the evidence before the Tribunal does not support the conclusion that the decree was intended to be, or was, a valid exercise of police powers.
212. It follows that the Tin Smelter Reversion Decree is expropriatory in nature. The Tribunal will therefore proceed to determine whether the requirement of legality set out in Article 5 of the Treaty has been met.

b. The Legality of the Expropriation

213. The first issue for the Tribunal here is to assess whether the expropriation was carried out for “a public purpose and for a social benefit”. The Respondent has advanced the same argument here as it did in relation to the police powers doctrine, namely that the decree was necessary to remedy illegalities in the initial privatization process. The considerations outlined above in paragraphs

³⁰³ Supreme Decree No. 29,026, 7 February 2007, published in the *Gaceta Oficial* No. 2,969 on 9 February 2007, **C-20** (unofficial translation). See also Bolivia’s Statement of Defence, ¶¶ 444 and 458.

³⁰⁴ Paribas, Privatisation of Bolivian mining assets, Confidential Information Memorandum, 16 August 1999, pp. 15 and 54, **RPA-04**. “The Bolivian Government will remain free to follow Paribas’ Recommendation or not”; See also pp. 11 and 51, **RPA-04**.

³⁰⁵ Bolivia’s Rejoinder, ¶ 657.

208-212 therefore apply with equal force here. In the absence of substantive evidence that the initial privatization process was illegal, the Respondent's argument that the Tin Smelter Reversion Decree pursues a public purpose and social benefit will be difficult to sustain.

214. This alone is enough for the Tribunal to conclude that the Tin Smelter Reversion Decree breaches Article 5 of the Treaty. However, for the sake of completeness, it should be recognized that, to date, the Respondent has paid no compensation in respect of the Tin Smelter Reversion Decree.
215. The Tribunal therefore concludes that the Tin Smelter Reversion Decree is an unlawful expropriation which breaches Article 5 of the Treaty.

ii. *Supreme Decree No. 499 (The Antimony Smelter Reversion Decree)*³⁰⁶

a. Whether the Nature of the Measure is an Expropriation

216. As with the Tin Smelter Reversion Decree, the Antimony Smelter Reversion Decree neither defines nor provides a specific legal basis for "reversion". The preamble begins by quoting Article 369, paragraph IV of the Bolivian Constitution, which states that "[t]he State shall exert control and oversight over the entire mining production chain and over the activities performed by the holders of mining rights, mining contracts, or pre-existing rights".³⁰⁷ It then proceeds to indicate that, in accordance with a "policy for the recovery of natural resources [...] as well as the restitution of the metallurgic mining industry [...] as one of the fundamental pillars for economic and social development",³⁰⁸ EMV is a Strategic Nacional Public Company. The decree concludes by discussing the Tin Smelter's production inactivity and the illegality of its privatization.
217. The decree contains only one Article pursuant to which the Vinto Antimony Smelter "*is reverted to the domain of the Plurinational State of Bolivia, with all its current assets, providing that [the State company EMV] immediately takes administrative, technical, legal and financial control*". In the same way as the Tin Smelter Reversion Decree, the text of the Antimony Smelter Reversion

³⁰⁶ Supreme Decree No. 499, *Gaceta Oficial* No 127NEC, 1 May 2010, **C-26** (unofficial translation).

³⁰⁷ Constitution of Bolivia, 7 February 2009, Art 369, IV, **C-95** (unofficial Translation). The Tribunal notes that Articles 358 and 401 mention "reversion" regarding the use and exploitation of natural resources and social economic function, however, these Articles do not form a basis for the decree and Bolivia has not put forward these provisions as basis for the decree either.

³⁰⁸ Supreme Decree No. 499, *Gaceta Oficial* No 127NEC, 1 May 2010, **C-26** (unofficial translation).

Decree constitutes an *effective taking* of the smelter that left the Claimant without any type of control or right to dispose of it. We thus consider both decrees to share the same nature.³⁰⁹

218. In addition, we also note that in a letter from the State company EMV to the Executive President of Colquiri dated 8 June 2010 regarding the tin concentrates stored in the Antimony Smelter, there are multiple references to “before the nationalization”, “as consequence of the nationalization”, “at the time of the nationalization”, and “regarding the nationalization” of the Antimony Smelter.³¹⁰ This confirms, in our view, that even though the measure is termed “reversion,” it is in fact an expropriation as defined by Article 5 of the Treaty.
219. Regarding the tin concentrates stored in the Antimony Smelter at the time of the reversion, we recall that these concentrates were initially ordered to be returned. In the same letter from the State company EMV to the Executive President of Colquiri, the position taken was that the tin concentrates were “considered as an asset of the [A]ntimony [S]melter” because they were “located on its premises at the time of nationalization.” Such concentrates would not be disposed of prior to the conclusion of negotiations between the State and the investor.³¹¹ As a result, for the purposes of this claim and with regard to the effects of the decree on the Antimony Smelter and the Tin Stock stored there, the tin concentrates must be considered “assets” of the smelter which were taken from the Claimant.
220. Similar to its argument regarding the Tin Smelter, the Respondent seeks to argue that the Antimony Smelter Reversion Decree falls within the scope of its police powers, and that it was adopted to address the alleged illegalities in the privatization process. However, the Respondent has again failed to provide sufficient evidence of such illegalities, such as complaints raised and brought before a domestic court for judgment.
221. The Tribunal also fails to see how the Respondent could claim that it was exercising police powers when the main justification given in the decree itself was the inactivity of the smelter.³¹² The

³⁰⁹ See *Tippetts, Abbett, McCarthy, and Stratton v. TAMS-AFFA Consulting Engineers of Iran and others*, Award, 1984, Vol. 6, Iran-US Claims Tribunal Report, 22 June 1984, p. 4, **CLA-9**; *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case No ARB/96/1, Final Award, 17 February 2000, ¶¶ 76 and 77, **CLA-25**; *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. Republic of Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010, ¶ 14.3.1, **CLA-100**.

³¹⁰ Letter from EMV (Mr. Villavicencio) to Colquiri (Mr. Capriles), 8 June 2010, **C-102** (unofficial Translation).

³¹¹ Letter from EMV (Mr. Villavicencio) to Colquiri (Mr. Capriles), 8 June 2010, **C-102** (unofficial translation).

³¹² Supreme Decree No. 499, *Gaceta Oficial* No 127NEC, 1 May 2010, **C-26** (unofficial translation).

Respondent argues, regarding the Tin Smelter, that “the plain text of the Tin Smelter Reversion Decree setting forth the purpose for the reversion, as an official document, is entitled to a presumption of veracity.”³¹³ While the Tribunal makes no pronouncement on the effect of such a presumption, we do note that the privatization of the Tin Smelter is mentioned in the Antimony Smelter Reversion Decree, meaning that it was also considered a basis for the decision to revert the Antimony Smelter, there otherwise being no discernible reason for its inclusion in the preamble of another decree regarding a different asset.

222. Consequently, the Antimony Smelter Reversion Decree is expropriatory in nature.

b. The Legality of the Expropriation

223. As the Respondent’s argument in relation to the “public purpose” criterion of legality is identical to its argument on police powers, the same considerations apply here. Without any substantive evidence of a public purpose or social benefit objective, the Tribunal can only conclude that this criterion has not been met. Nor is there any suggestion that compensation has been paid. The decree was published in 2010. It contains only one article, which does not provide for any compensation, and it is uncontested that, to date (13 years later), no compensation has been provided for the taking of *Planta de Vinto Antimonio* and its assets.

224. We also recall that 161 tonnes of tin concentrates stored in the smelter were seized. Colquiri informed the Minister of Mining³¹⁴ of the situation on multiple occasions and requested the return of the stock. According to the record, although the Minister of Mining initially instructed the State company EMV to return the concentrates,³¹⁵ the stock was not returned and was ultimately considered part of the Antimony Smelter’s assets.³¹⁶ It is not contested that no compensation has been provided for the Tin Stock.

225. In light of this, the Tribunal concludes that the Antimony Smelter Reversion Decree was also an unlawful expropriation which breached Article 5 of the Treaty.

³¹³ Bolivia’s Rejoinder, ¶ 656.

³¹⁴ Letter from Colquiri (Mr. Capriles) to Ministry of Mining (Mr. Pimentel), 3 May 2010, **C-28**; Letter from Colquiri (Mr. Hartmann) to the Minister of Mining (Mr. Pimentel), 5 May 2010, **C-98**; Letter from Colquiri (Mr. Capriles) to the Minister of Mining (Mr. Pimentel), 10 May 2010, **C-99**; Letter from Colquiri (Mr. Capriles) to EMV (Mr. Villavicencio), 19 May 2010, **C-100**; Letter from Colquiri (Mr. Capriles) to the Minister of Mining (Mr. Pimentel), 7 June 2010, **C-101**.

³¹⁵ Letter from Ministry of Mining (Mr. Pimentel) to EMV (Mr. Villavicencio), 5 May 2010, **C-29**.

³¹⁶ Letter from EMV (Mr. Villavicencio) to Colquiri (Mr. Capriles), 8 June 2010, **C-102**.

iii. *Supreme Decree No. 1,264 (The Colquiri Mine Reversion Decree)*³¹⁷

a. Whether the Measure is in Nature an Expropriation

226. Unlike the other two decrees, the Colquiri Mine Reversion Decree does not mention the word “reversion”. However, similar to the two other decrees, no specific legal basis is identified. The preamble references three constitutional provisions. The first one is Article 369, which is similarly referenced in the Antimony Smelter Reversion Decree. In the Colquiri Mine Reversion Decree, it mentions all four paragraphs of the Article which, generally speaking, provide that “[t]he State will be responsible for the mineralogic wealth,” that “non-metallic natural resources [...] are of a strategic nature for the country”, that “[t]he State will be responsible for the direction of the mining and metallurgical policy, as well as for the encouragement, promotion and control of the mining activity”, and that “[t]he State shall exert control and oversight over the entire mining production chain and over the activities performed by the holders of mining rights, mining contracts, or pre-existing rights”.³¹⁸ The second provision referred to is paragraph I of Article 349, which establishes that “[n]atural resources are property of and within the direct, indivisible and imprescriptible domain of the Bolivian people, and their administration will correspond to the State [...]”.³¹⁹ The last provision, Article 380, concerns to the economic social function of mining contracts.³²⁰
227. The decree contains 4 Articles. Articles 1 and 2 provide respectively: “[a]s of the publication of this Supreme Decree [...] COMIBOL [...] *assumes control* over Centro Minero Colquiri, as well as *management and direct administration* of the deposits granted by lease agreement”, and “COMIBOL will *directly carry out the mining activities* in the deposits granted by lease contract to [Colquiri]”.³²¹ Paragraph III of Article 1 expressly provides that machinery, equipment and supplies of Colquiri are “*nationalized*” in favor of COMIBOL. According to Articles 3 and 4, human resources and workers would form part of COMIBOL and the newly created company under its direction. We observe that in the meetings on 8 June 2012 between the Ministry of Mining, the Ministry of Presidency, COMIBOL, Colquiri Workers Union and sections of Cooperative 26 de Febrero, amongst others, an agreement was reached to “nationalize”

³¹⁷ Supreme Decree No 1,264, *Gaceta Oficial* No 384NEC, 20 June 2012, **C-39**.

³¹⁸ Constitution of Bolivia, 7 February 2009, Art 369, **C-95** (unofficial Translation).

³¹⁹ Constitution of Bolivia, 7 February 2009, Art 349, **C-95** (unofficial Translation).

³²⁰ Constitution of Bolivia, 7 February 2009, Art 370, **C-95** (unofficial Translation).

³²¹ Supreme Decree No 1,264, *Gaceta Oficial* No 384NEC, 20 June 2012, **C-39** (unofficial translation).

Colquiri.³²² As in the other instances, the term “nationalize” was used within this context by government officials, which does not seem consistent with Bolivia’s argument about reversions.

228. The Tribunal is of the view that by virtue of this decree, the Respondent deprived the Claimant of the “effective control of its investment” in favor of COMIBOL in the sense described by the *AES v. Hungary* tribunal.³²³ We recall that the tribunal in *Middle East Cement v. Egypt* indicated that “[w]hen measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment [...] the measures are often referred to as [...] ‘indirect’ expropriation [...] As a matter of fact, the investor is deprived by such measures of parts of the value of his investment.”³²⁴ In *Santa Elena v. Costa Rica*, in the context of determining the relevant date of expropriation, the tribunal expressed that:

What has to be identified is the extent to which the measures taken have *deprived* the owner of the *normal control* of his property. A decree which heralds a process of administrative and judicial consideration of the issue in a manner that effectively *freezes or blights the possibility* for the owner reasonably *to exploit the economic potential* of the property, can, if the process thus triggered is not carried out within a reasonable time, properly be identified as the actual act of taking. [...] The expropriated property is to be evaluated as of the date on which the governmental “interference” has *deprived the owner of his rights* or *has made those rights practically useless*.³²⁵

(emphasis added)

229. The tribunal in *Pope & Talbot v. Canada* also considered that “whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property *has been ‘taken’ from the owner*.”³²⁶ In this case, the decree deprived the Claimant of the rights granted by Clauses 4 and 8 of the lease agreement, *i.e.*, the rights of use and possession of the assets and the activities of prospecting, exploration, exploitation and commercialization of products, which were the very *object* of the agreement.³²⁷ In the words of the tribunal in *Compañía de Aguas del Aconquija SA*

³²² Minutes of Agreement between COMIBOL, FSTMB, Central Obrera Boliviana, Cooperativa 26 de Febrero and authorities of Colquiri, 8 June 2012, **R-345**.

³²³ *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. Republic of Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010, ¶ 14.3.1, **CLA-100**.

³²⁴ *Middle East Cement Shipping and Handling Co SA v. Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award, 12 April 2002, ¶ 107, **CLA-34**. “[T]he effect of the measure on the investor, not the state’s intent, is the critical factor”. *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, ¶ 7.5.20, **CLA-70**.

³²⁵ *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case No ARB/96/1, Final Award, 17 February 2000, ¶¶ 76 and 78, **CLA-25**.

³²⁶ *Pope & Talbot Inc v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, ¶ 102, **CLA-26**.

³²⁷ Colquiri Mine Lease, 27 April 2000, Clauses 4 and 8, **C-11**.

and *Vivendi v. Argentina*, this “struck at the economic heart of, and crippled, Claimants’ investment”.³²⁸

230. The Respondent has argued that the Colquiri Mine Reversion Decree was necessary in order to “restore public order and safety following a massive conflict”³²⁹ and that it was a “response to a public safety crisis”.³³⁰ Those might be perfectly sound objectives if there was evidence to support them, but there is none before us to suggest that this was done as part of such a program. Further, the decree makes no mention whatsoever of a public safety crisis nor the need to restore public order. In the Tribunal’s view, any other motive or rationale for this measure provided by Bolivia after the issuance of the decree would be an *ex post facto* rationalization of the object and purpose of the decree.
231. In addition, the decree makes references to the responsibility the State bears for mineralogy wealth, the control it exerts on the mining production chain, and the activities of the holders of mining rights. It also highlights the State’s function in the administration and control of strategic sectors for the economy. In other words, the preamble does not suggest at all that the measure is an exercise of police powers for the maintenance of public order; rather, it points in another direction. Even more so, the decree mentions that the State’s administration of those sectors has the “purpose of achieving the economic and social development of the country, within the framework of public interest and social benefit”. Thus, it seems that the decree’s objective was to take control of the mine for a purely economic purpose. Finally, in the case of Colquiri’s machinery, equipment and supplies, the decree indicates outright their “nationalization” for “public interest and social benefit”, although it does not precisely indicate which public purpose.
232. Consequently, the Tribunal finds the Colquiri Mine Reversion Decree is in its nature an expropriation.

b. The Legality of the Expropriation

233. The Respondent’s arguments relating to the criterion of “public purpose and social benefit” are identical to its arguments on the police powers doctrine. The Tribunal’s conclusion that the Respondent failed to present sufficient evidence of a public order crisis applies with equal force here.

³²⁸ *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, ¶ 7.5.25, **CLA-70**.

³²⁹ Bolivia’s Statement of Defence, ¶¶ 444 and 471.

³³⁰ Bolivia’s Statement of Defence, ¶ 472.

234. For the sake of completeness, the Tribunal will also consider whether the Colquiri Mine Reversion Decree was made “against just and effective compensation”. The decree was published in 2012. It contains four articles and one final provision. None of these provide for compensation on the taking of the rights derived from the Colquiri Mine Lease agreement and its immediate assumption by COMIBOL. It is not contested that no compensation has been provided to date (after 11 years). Paragraph IV of Article 1 provides compensation for the nationalization of Colquiri’s machinery, equipment and supplies. According to this paragraph, “Comibol is instructed to pay the amount [...] whose value will be established as result of a valuation process to be carried out by an independent company hired by COMIBOL within a maximum period of [120] working days”.³³¹ Notwithstanding the above, it is also not contested that no such payment was made.
235. Accordingly, the Tribunal concludes that Bolivia failed to provide any just and effective compensation for the expropriation of the Colquiri Mine Lease.

iv. *Conclusion on Bolivia’s Reversions*

236. In light of the foregoing, the Tribunal concludes that the Tin Smelter Reversion Decree, the Antimony Smelter Reversion Decree (including the Tin Stock seizure), and the Colquiri Mine Reversion Decree were expropriatory acts that did not fall within the scope of the Respondent’s police powers. The Tribunal also finds that these expropriations were not carried out for a public purpose or a social benefit, and were not accompanied by just and effective compensation. Each decree therefore constitutes a breach of Article 5 of the Treaty.

2. FULL PROTECTION AND SECURITY

237. As to the second claim on merits, the overall position of the Parties is summarized as follows. The Claimant argues that “Bolivia failed to grant full protection and security [“FPS”] to Glencore Bermuda’s investments” and additionally, that it “also breached its obligation under the Colquiri [Mine] Lease to protect the Colquiri Mine against usurpations by third parties, in breach of the Treaty’s umbrella clause”.³³² According to the Claimant, despite informing COMIBOL, the Ministry of Mining and the Ministry of Government of the situation and requesting official intervention, the government did not intervene.³³³ The Respondent, on the other hand, argues that

³³¹ Supreme Decree No 1,264 *Gaceta Oficial* No 384NEC, 20 June 2012, **C-39** (unofficial translation).

³³² Statement of Claim, ¶ 183.

³³³ Statement of Claim, ¶ 184.

“Bolivia took all legal actions available to it under the circumstances”³³⁴ and that “any forcible police action at Colquiri would have risked violating Bolivia’s human rights obligations under the ICCPR and the American Convention”.³³⁵

A. The Full Protection and Security Standard Under Article 2(2) of the Treaty

238. We begin our analysis with the text of the provision at issue. Article 2(2) of the Treaty contains two obligations, both of which form part of Glencore Bermuda’s claim. We focus now on the second obligation and will address the first one later. According to Article 2(2):

[i]nvestments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall, in any way, impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

(emphasis added)

239. At first sight, we observe that Article 2 does not define “protection and security”. However, it does describe the kind of measures that are prohibited, *i.e.*, those that are unreasonable or discriminatory. The verb form of the word “protection” – “protect” – means “to cover or shield from exposure, injury, damage, or destruction”; “to maintain the status or integrity of especially through financial or legal guarantees”.³³⁶ The word “security” references “the quality or state of being secure”, which in turn means “free from danger”, “affording safety”, and “free from risk of loss”.³³⁷

240. Article 2, on the other hand, is entitled “Promotion and Protection of Investment” and its first paragraph reveals the intention of the parties to encourage “favourable conditions” for companies to invest capital in the territory of the other Contracting Party. The intention is to bring about an environment that fosters investment. Moreover, there is no textual support for restricting the applicability of this provision to physical protection and security. It would be difficult to encourage investment in a setting where investors’ assets are not protected and secured both

³³⁴ Bolivia’s Statement of Defence, ¶ 538.

³³⁵ Bolivia’s Statement of Defence, ¶ 542.

³³⁶ “[P]rotect”. *Merriam-Webster.com*. 2023. <https://www.merriam-webster.com/dictionary/protect> 31 January 2023.

³³⁷ “[S]ecurity”. *Merriam-Webster.com*. 2023. <https://www.merriam-webster.com/dictionary/security>; “secure” <https://www.merriam-webster.com/dictionary/secure> 31 January 2023.

physically and legally. We find support in the opinion of the tribunal in *Frontier Petroleum Services v. Czech Republic*:

It is not disputed that the standard of full protection and security relates to the *investor's physical safety* [...] In a number of cases tribunals have suggested that the standard of full protection and security applies *exclusively or preponderantly to physical security* [...] But, there are also authorities which show that the principle of full protection and security *extends beyond protection against physical violence to legal protection for the investor*. [...] it is apparent that the duty of protection and security extends to providing a *legal framework that offers legal protection to investors* – including both *substantive provisions* to protect investments and *appropriate procedures* that *enable investors to vindicate their rights*.³³⁸

(emphasis added)

241. Other tribunals that have interpreted this obligation found, in the context of different treaties with some textual variations,³³⁹ that it imposes an objective standard of “vigilance”³⁴⁰ or “due diligence”³⁴¹ and, more specifically, that it does not impose “strict liability” on the State.³⁴² These tribunals have also considered this due diligence obligation to require the adoption of “measures of precaution”, “active measures”, “reasonable action” or “reasonable measures”.³⁴³

³³⁸ *Frontier Petroleum Services Ltd v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, ¶¶ 262 and 263, **CLA-102**.

³³⁹ “It is generally accepted that the variation of language between the formulation “*protection*” and “*full protection and security*” does not make a significant difference in the level of protection a host State is to provide.” *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, ¶ 354, **RLA 83**.

³⁴⁰ *American Manufacturing & Trading Inc v. Republic of Zaire*, ICSID Case No ARB/93/1, Award, 21 February 1997, ¶ 6.05, **CLA-20**.

³⁴¹ *Frontier Petroleum Services Ltd v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, ¶ 270, **CLA-102**; *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award of 30 March 2015, ¶ 82, **RLA-741**.

³⁴² *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award, 27 June 1990, ¶ 49, **CLA-14**; *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award of 10 March 2014, ¶ 430, **RLA-75**.

³⁴³ *American Manufacturing & Trading, Inc v. Republic of Zaire* (ICSID Case No ARB/93/1) Award, 21 February 1997, ¶ 6.05, **CLA-20**; *Frontier Petroleum Services Ltd v. Czech Republic* (UNCITRAL) Final Award, 12 November 2010, ¶ 261, **CLA-102**; *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award, 27 June 2016, ¶ 244, **RLA-73**; *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 484, **CLA-62**.

242. We also concur with the tribunals in *Mamidoil v. Albania*³⁴⁴ and *Tulip v. Turkey* that “due diligence does not oblige the State to ‘prevent each and every injury’” and that the analysis of this standard is “one of fact and degree, responsive to the circumstances of the particular case”.³⁴⁵
243. Thus, our examination must consider the conduct of Bolivia under the specific circumstances, and the reasonableness of such conduct.

B. Whether Bolivia Breached Article 2(2) of the Treaty

244. The protection and security claim of the Claimant pertains to the Colquiri Mine and, more specifically, the violent incidents that occurred in April and May of 2012 prior to the reversion of the lease agreement. We recall that, on 3 April 2012, Colquiri informed COMIBOL in a letter that there had been “serious disturbances” to the peaceful use of the mining rights in the Colquiri Mine for some time and that “criminal activity of unprecedented intensity” had taken place on 1 April 2012, such as the “massive entry of hundreds of people”. According to the letter, these individuals did not stop at material theft; they also “verbally assaulted” the employees and “expelled them from their working areas.” That very morning (3 April 2012), a new contingent of people had been caught by a supervisor, who had received “death threats”. Colquiri’s Executive President also mentioned that, although the disturbances had been attended to, to a large extent, by the company, “the current situation previously set out ha[d] become unsustainable, to the point where the Colquiri Workers’ Union ha[d] expressed [...] its concern about the physical integrity of its members”, and requested COMIBOL to “take the measures necessary to preserve peaceful possession and public order [...] as required by clause 12.2.1 of the lease agreement.”³⁴⁶ On 30 May, the Colquiri Mine was “violently taken over by more than one thousand members of a local cooperative known as Cooperativa 26 de Febrero.”³⁴⁷ The same day, Colquiri informed COMIBOL, the Ministry of Mining, the Ministry of Presidency and the Ministry of Government of the situation, demanding “immediate official action.” The Colquiri Workers’ Union also wrote to the President of Bolivia, the Ministry of Mining and COMIBOL.³⁴⁸

³⁴⁴ The Tribunal in *Mamidoil* expressed it concurred with *Electrabel v. Hungary* in this opinion. In turn, the tribunal in *Electrabel* agreed with the *El Paso* award.

³⁴⁵ *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award of 10 March 2014, ¶ 430, **RLA-75**.

³⁴⁶ Letter from Colquiri (Mr. Capriles) to Comibol (Mr. Córdova), 3 April 2012, **C-30** (unofficial translation). See also Eskdale First Witness Statement, ¶¶ 74-75.

³⁴⁷ Statement of Claim, ¶ 184 e).

³⁴⁸ Letter from Colquiri (Mr. Capriles) to Comibol (Mr. Córdova), 30 May 2012, **C-31** (unofficial translation). See also Eskdale First Witness Statement, ¶¶ 80-81 and Letters from the Sindicato Mixto de Trabajadores

245. As to the events that took place in April, the Respondent contends that they “were over so quickly that no response was reasonably feasible,”³⁴⁹ that COMIBOL “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” and that “Colquiri was asking COMIBOL to resolve a structural problem in a matter of days.”³⁵⁰ According to the former President of COMIBOL, at that time, he “was in regular contact with the executives of Sinchi Wayra, trade union and cooperative leaders” and he received information that “the operations in the [Colquiri] Mine continued as usual [...and] Sinchi Wayra had filed a complaint against the *cooperativistas* who were stealing in the areas exploited by the company.”³⁵¹ On 20 April 2012, COMIBOL informed Colquiri that it would cooperate in the complaint filed by Colquiri and requested information in order to punish those responsible.³⁵²
246. In the Tribunal’s view, nothing in the evidence presented suggests that these events were different from other contentious situations between *cooperativistas* and workers, that the government was alerted to the fact that the situation was different, that the operation of the mine had been affected or that the response by COMIBOL offering to cooperate in the complaint was somehow ineffective.
247. As to the May events, there is no dispute between the Parties that the mine was taken over violently by a significant number of individuals. From the evidence presented by Bolivia, the Tribunal can deduce the following: the takeover was described as “unanticipated” or “sudden”;³⁵³ police were dispatched to the site; government officials were also sent; the government called for

Mineros Colquiri to the President of Bolivia (Mr. Morales), the Ministry of Mining (Mr. Virreira), and Comibol (Mr. Córdova), 30 May 2012, **C-111**.

³⁴⁹ Bolivia’s Statement of Defence, ¶ 545.

³⁵⁰ Bolivia’s Statement of Defence, ¶ 191.

³⁵¹ Córdova Witness Statement, ¶ 50.

³⁵² Letter from Comibol (Mr. Córdova) to Sinchi Wayra (Mr. Capriles), 20 April 2012, **C-253** (unofficial translation). In a subsequent letter petitioning information on the operation of the Colquiri Mine, the Ministry of Mining requested information as to the quantity and value of the economic damages to Colquiri. Letter from the Ministry of Mines (Mr. Villca) to Sinchi Wayra (Mr. Capriles), 26 April 2012, **C-254**.

³⁵³ “[I]ntempestivamente” (Unofficial translation). Página Siete, *Toma de mina Colquiri dejó 15 heridos*, 31 May 2012, **R-16**; La Razón, *El Gobierno envía más policías a Colquiri para evitar conflicto*, 1 June 2012, **R-213**.

dialogue;³⁵⁴ and measures were taken to cut electricity in the mine and halt the sale of minerals from the Colquiri Mine.³⁵⁵ Additionally, there were negotiation attempts between the parties.³⁵⁶

248. On the basis of the evidence before the Tribunal, it is not possible to determine whether the mine was protected “from criminal conduct by a particular sector of the population for political reasons”³⁵⁷ or whether the Claimant “implies that Bolivia should have repressed the conflict at the Mine at gunpoint”.³⁵⁸ The Tribunal also bears in mind the view expressed in *Pantechniki v. Albania* that the standard of due diligence is “that of a host state in the circumstances and with the resources of the state in question”³⁵⁹ as well as the view expressed in *ELSI* that “‘constant protection and security’ cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed”.³⁶⁰
249. Bolivia claims that it “had limited capacity to control violent outbursts [...] that could rapidly expand to include thousands of individuals”,³⁶¹ and that “the use of force in police action is only permitted as a last resort”.³⁶² In view of the Tribunal, these claims are reasonable. According to the evidence, the government was not inactive; rather, it took the measures it deemed appropriate

³⁵⁴ La Patria, *Cooperativistas toman mina en Colquiri y hieren a siete mineros*, press article of 31 May 2012, **R-21**; La Razón, *El Gobierno envía más policías a Colquiri para evitar conflicto*, press article of 1 June 2012, **R-213**; Video Bolivia, *Enfrentamiento en Mina Colquiri. Hay Heridos*, June 2012 (Video); Cachi First Witness Statement, ¶ 34.

³⁵⁵ Página Siete, *Gobierno impide salida de mineral de Colquiri*, 1 June 2012, **R-214**; Mamani Witness Statement, ¶ 27.

³⁵⁶ Mamani Witness Statement, ¶¶ 30-34; Minutes of understanding with the Sindicato de Trabajadores Mineros de Colquiri and the Federación Sindical de Trabajadores Mineros de Bolivia, 3 June 2012, **C-115**; La Patria, *En suspenso acuerdo entre Gobierno y mineros sindicalizados y cooperativistas*, press article, 4 June 2012, **C-117**; La Razón, *Minería hace 5 ofertas, pero aun no convence a los cooperativistas*, press article, 5 June 2012, **R-215**; Letter from Colquiri (Mr. Capriles) to the Minister of Mining (Mr. Virreira) and Comibol (Mr. Córdova), 5 June 2012, **C-120**; Letter from the Ministry of Mining to the Cooperativa 26 de Febrero, 6 June 2012, **R-216**; La Patria, *Colquiri: Mineros suspenden labores y cooperativistas no aceptan veta*, 5 June 2012, **C-118**; Letter from COMIBOL and the Ministry of Mining to the Cooperativa 26 de Febrero, 3 June 2012, **R-344**; Minutes of Agreement between COMIBOL, FSTMB, Central Obrera Boliviana, Cooperativa 26 de Febrero and authorities of Colquiri, 8 June 2012, **R-345**; Report from the Vice Minister of Cooperativas (Mr. Meneses) to the Minister of Mining (Mr. Virreira), 8 June 2012; **R-347**.

³⁵⁷ Claimant’s Reply, ¶ 441.

³⁵⁸ Bolivia’s Statement of Defence, ¶ 538.

³⁵⁹ Adopting the conclusion of Newcombe and Paradell referred in *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, ¶ 81, **RLA-77**.

³⁶⁰ *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment, 20 July 1989, ¶ 108, **RLA-72**.

³⁶¹ Bolivia’s Statement of Defence, ¶ 544.

³⁶² Bolivia’s Rejoinder, ¶ 777.

for the circumstances, in particular, the prevention of the commercialization of the mineral and negotiations with the parties involved.

250. The Tribunal does not consider such measures to be inappropriate, and it does not find unreasonable the specific circumstances expressed by the former President of COMIBOL, that “the *cooperativistas* were inside the [Colquiri] Mine and were part of its operation and of the community [...] were armed with dynamite and could hide in the air ducts and other access ways to the [Colquiri] Mine. As is well known in Bolivia, for the police it is practically impossible to enter inside a mine, guaranteeing the safety of the operation [...] A police operation in Colquiri [Mine], like those carried out in Sayaquira, could have ended in a human and social catastrophe”.³⁶³
251. Thus, the Tribunal concludes that neither the Respondent’s measures nor its actions in response to the events were unreasonable. Nor could Bolivia have responded differently to the specific circumstances surrounding the takeover of the Colquiri Mine such that its chosen response would constitute a violation of Article 2(2) of the Treaty. The Tribunal does not deem it necessary to address Glencore Bermuda’s claim under the lease agreement and the umbrella clause in light of this conclusion, the evidence presented, and the similarity in the obligations to protect against usurpations by third parties under the lease agreement.

3. FAIR AND EQUITABLE TREATMENT STANDARD

252. In general, the Claimant argues that the Respondent breached the fair and equitable treatment (“FET”) standard when nationalizing its investments “without compensation”,³⁶⁴ 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 that the Respondent would “comply with all other requirements under domestic law and basic principles of due process.”³⁶⁵ The Claimant also contends that it had a legitimate expectation under the Colquiri Mine Lease agreement that its investment would be protected by COMIBOL “against usurpations by third parties”.³⁶⁶

³⁶³ Córdova Witness Statement, ¶ 86. We also bear in mind the specific context in which police repression by has caused human losses years before. La Patria, *La masacre de “Navidad”, Amayapampa y Capasirca*, 19 March 2014, **R-219**; 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, p. 87, **R-159**.

³⁶⁴ Statement of Claim, ¶ 213.

³⁶⁵ Statement of Claim, ¶¶ 214-215 and 222.

³⁶⁶ Statement of Claim, ¶ 216.

253. In a further submission, the Claimant clarifies that Bolivia: (i) “failed to provide a transparent legal framework by conducting arbitrary and pretextual nationalizations, unsupported by fact or law and implemented in bad faith”; (ii) “violated Glencore Bermuda’s legitimate expectations by taking the Assets without complying with due process and without providing any compensation, in breach of its international and domestic legal obligations, as well as its commitments under the Colquiri [Mine] Lease”; and (iii) “did not engage in good faith negotiations”.³⁶⁷
254. On the other hand, Bolivia alleges that there is no evidence that the Claimant “held any expectations”,³⁶⁸ that “[a] breach of due process requires a complete lack of any opportunity to present evidence”, that the Claimant “does not develop the legal standard applicable to allegations of arbitrariness”, and that “Bolivia engaged in good faith negotiations to resolve the dispute amicably.”³⁶⁹

A. The Fair and Equitable Treatment Standard Under Article 2(2) of the Treaty

255. Now we turn to the other obligation established in Article 2(2) of the Treaty, *i.e.*, that “[i]nvestments of nationals or companies of each Contracting Party *shall at all times* be accorded *fair and equitable treatment*.”³⁷⁰ In a similar way to FPS, the Treaty does not define “fair” and “equitable”. Ordinarily, “fair” refers to: “impartiality and honesty: free from self-interest, prejudice, or favoritism; conforming with the established rules: allowed”³⁷¹, “equitable” means “having or exhibiting equity: dealing fairly and equally with all concerned,”³⁷² and “equity” means: “justice according to natural law or right; specifically: freedom from bias or favoritism”.³⁷³
256. These dictionary definitions are in line with the ordinary meaning attributed to the term “fair and equitable” by other tribunals: “‘just’, ‘even-handed’, ‘unbiased’, ‘legitimate’.”³⁷⁴ Additionally, we note that both paragraph 1 of Article 2 and the preamble of the Treaty refer to creating

³⁶⁷ Claimant’s Reply, ¶ 461.

³⁶⁸ Bolivia’s Statement of Defence, ¶ 562.

³⁶⁹ Bolivia’s Rejoinder, ¶¶ 804, 806, 854.

³⁷⁰ UK-Bolivia Treaty, 24 May 1988, C-1 (emphasis added).

³⁷¹ “[F]air.” *Merriam-Webster.com*. 2023. <https://www.merriam-webster.com/dictionary/fair>, 03 February 2023.

³⁷² “[E]quitable.” *Merriam-Webster.com*. 2023. <https://www.merriam-webster.com/dictionary/equitable>, 03 February 2023.

³⁷³ “[E]quity.” *Merriam-Webster.com*. 2023. <https://www.merriam-webster.com/dictionary/equity>, 03 February 2023.

³⁷⁴ *Azurix Corp. v. Argentine Republic*, ICSID Case No ARB/01/12, Award, 14 July 2006, ¶ 360, **CLA-63**. See also *MTD v. Chile*, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, ¶ 538, **CLA-130**.

“*favourable conditions*” for investment. The preamble also recognizes that “encouragement and reciprocal protection [...] will be conducive to the stimulation” of business and will “increase prosperity”. Thus, the intent of the States expressed in the objective, as well as the context, confirms that investments are expected to be subject to an environment that is just, conforming to the rules, even-handed, unbiased, free from prejudice. The Tribunal also observes that the obligation is qualified by the words “*at all times*”. This, in our opinion, highlights the significance of the treatment that contracting States must accord to investors.

257. Although there is no one-size-fits-all definition, several tribunals have outlined the behavior that would breach this obligation and have generally understood that “[a]ny measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.”³⁷⁵ We concur with the tribunal in *Rumeli v. Kazakhstan* that according to this standard:

[T]he State’s conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; - the State must respect procedural propriety and due process. The case law also confirms that to comply with the standard, the State must respect the investor’s reasonable and legitimate expectations.³⁷⁶

258. We agree with other tribunals that this is an objective standard that does not depend on whether the Respondent acted in good faith or not,³⁷⁷ as well as on the need for case-by-case analysis of the circumstances.³⁷⁸ Finally, as the provision does not refer to the standard under customary international law, we do not deem necessary to address the discussion of whether it is an autonomous standard or the discussion on the degree of protection.

B. Whether Bolivia Breached Article 2(2) of the Treaty

259. The Tribunal begins by noting that several of the Claimant’s arguments are quite general and do not specify how the standard has been violated, merely repeating that the Respondent’s conduct

³⁷⁵ *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005, ¶ 290, **CLA-57**.

³⁷⁶ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award, 29 July 2008, ¶ 609, **CLA-79**. “Arbitrary conduct as a violation of the fair and equitable treatment standard under the BIT is that which is *not in accordance with law, justice or reason*, but is *based on caprice*. In this sense, it is not enough to allege that the State erroneously applied the national regulatory framework or that its authorities made questionable decisions in accordance with local law, it must be established that there has been a deliberate repudiation of the goals and objectives of a State policy. This is what differentiates arbitrary conduct from merely *illegal conduct*” (unofficial translation, emphasis added). *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017, ¶ 527, **RLA-183**.

³⁷⁷ *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No UN 3467, Final Award, 1 July 2004, ¶ 186, **CLA-50**.

³⁷⁸ *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award, 22 September 2014, ¶ 566, **CLA-123**.

was not “fair and equitable”. Its arguments are not elaborated upon. The Claimant’s first concrete allegation is that the Tin and Antimony Smelters were nationalized. The Claimant appears to be focusing on the breach caused by the absence of prior notice and, consequently, due process. It argued that Glencore Bermuda was unable to object, and that no compensation was provided. Even though the Claimant is making this argument in the context of the FET provision, and while a single measure can certainly violate multiple provisions, the argument is closely related to Bolivia’s Article 5 obligations.

260. Article 5 of the Treaty, unlike provisions in other BITs, does not condition expropriation on due process. Rather, the provision specifies that the investor “shall have the right to promptly establish by due process” the legality of the expropriation and the amount of compensation. There is no indication that such a procedure must be provided prior to the act, such that the Tribunal cannot infer this requirement from the text. In addition, the Tribunal is not persuaded by the Claimant’s arguments that it was unable to object to the measure; as far as the Tribunal is aware, the Claimant could have utilized domestic channels but chose not to do so. Regarding the lack of compensation, the Claimant fails to explain how this omission constitutes an FET violation.
261. The Claimant asserts, within its claim regarding due process, that the nationalizations of the Tin and Antimony Smelters were conducted in an “arbitrary” and “non-transparent” fashion.³⁷⁹ The Claimant contends that the nationalizations were made “under the pretext of unsubstantiated illegalities” in the privatization process in which Glencore Bermuda was not involved, that the decrees were not “founded in law or fact”,³⁸⁰ “that no preliminary diligence was carried out to investigate or substantiate the basis for the ‘reversions’”,³⁸¹ and that “[w]ith respect to the allegations of illegalities or contractual breaches, Bolivia’s own claims confirm that, to this day, no Government authority has made any official determination of any wrongdoing or contractual breach”.³⁸²
262. The Tribunal understands arbitrariness to be a ground embedded in the FET standard. We recall that the Tin Smelter Reversion Decree does not define “reversion” and does not provide a specific legal basis for it. The preamble indicates that the neoliberal model resulted in the privatization of strategic state-owned companies, such as Empresa Metalúrgica Vinto. It goes on to state that “from the analysis” of the privatization process, it is “evident” that the transfer was made in

³⁷⁹ Claimant’s Reply, ¶¶ 482-483; Statement of Claim, ¶ 217.

³⁸⁰ Claimant’s Reply, ¶ 476.

³⁸¹ Claimant’s Reply, ¶ 479.

³⁸² Claimant’s Reply, ¶ 482.

violation of different rules and legal provisions; it identifies as an issue the price of the transfer, the “illegal handover” of tin concentrates and other materials, a breach of contract by Allied Deals, and the fact that Congress did not approve the transfer; finally, it states the decision to “revert” the smelter.³⁸³

263. The Tribunal recognizes an element of arbitrariness in the nationalization of the Tin Smelter. Not only does there seem to be no legal basis justifying the “reversion”, but also and more specifically, the underlying and fundamental reason for reverting the asset—*i.e.*, the “illegality” of the privatization process—is not supported by evidence. To date, such illegality remains a mere assertion, since, as the Claimant asserts and the Respondent has not demonstrated otherwise, no government authority has officially determined the legality or illegality of the procedure. The tribunal in *Crystallex v. Venezuela* understood an arbitrary measure as one “not based on legal standards but on excess of discretion, prejudice or personal preference”.³⁸⁴ In *Lauder v. Czech Republic* a measure was deemed arbitrary “because it was not founded on reason or fact”.³⁸⁵ In this case, the Tribunal finds it difficult to grapple with the absence of evidence to support the alleged illegality. Thus, in our view, that is an element of arbitrariness.
264. Regarding the Colquiri Mine, the Claimant contends that Bolivia acted in a non-transparent manner by abandoning efforts to reach a negotiated solution that would preserve its rights “only six days after the [...] invasion” and by negotiating the nationalization “behind Glencore Bermuda’s back”.³⁸⁶ We do not see how Bolivia’s actions constitute an act of bad faith or lack of transparency. The Claimant also contends that it had a legitimate expectation that its investments would not be taken: (i) contrary to due process, (ii) without just and effective compensation, (iii) against Bolivia’s domestic law, and (iv) consequent upon a breach of Bolivia’s duty to protect the Colquiri Mine as provided in the lease agreement.³⁸⁷ When developing this argument, the Claimant briefly refers to the framework it relied on when acquiring the assets, such as the Investment Law, the Treaty, Bolivia’s internal law and the dispute resolution clauses in the agreements, all of which provide guarantees.³⁸⁸ Nevertheless, the Claimant has not identified which specific representation made by Bolivia was frustrated. The Tribunal finds the Claimant’s

³⁸³ Supreme Decree No. 29,026, 7 February 2007, published in the *Gaceta Oficial* No. 2,969 on 9 February 2007, **C-20** (unofficial translation).

³⁸⁴ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, ¶ 578, **CLA-130**.

³⁸⁵ *Ronald S Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 232, **CLA-147**.

³⁸⁶ Claimant’s Reply, ¶ 487.

³⁸⁷ Claimant’s Reply, ¶ 493.

³⁸⁸ Claimant’s Reply, ¶¶ 494-495.

argument general and circular, premised on an expectation that Bolivia will comply with its obligations, but without establishing how Bolivia's actions violate the FET standard. Arguing a breach of other obligations is insufficient to establish a breach of this standard.

265. The Claimant's final argument is that Bolivia did not negotiate in good faith. According to the Claimant, "Bolivia repeatedly failed to offer Glencore Bermuda just and effective compensation, despite Glencore Bermuda's many attempts to initiate and engage in good faith negotiations over the last ten years." The Claimant also contends that "the Government delayed and cancelled meetings, continued 'reverting' the Assets" and even offered a negative valuation.³⁸⁹ The Tribunal is aware that, in *PSEG v. Turkey*, the tribunal found that there had been "evident negligence on the part of the administration in the handling of the negotiations with the [c]laimants".³⁹⁰ In this case, it is abundantly clear that the ten years of negotiations were ineffective. However, the Claimant mainly relies on a witness statement for its claim, and there is no additional evidence regarding whether Bolivia consistently canceled the meetings, how long it took to reschedule, or anything else that would confirm Bolivia's systematic disregard for its obligations. In this regard, the Tribunal is unable to agree with the Claimant that it experienced a "roller-coaster ride".
266. For the reasons indicated above at paragraph 263, the Tribunal finds that the Respondent breached the FET standard under Article 2(2) with respect to the Tin Smelter Reversion Decree.

VII. QUANTIFICATION OF DAMAGES

1. PRELIMINARY MATTERS

A. Burden and Standard of Proof

267. The Respondent maintains that "a claimant bears the burden of proving the damages it claims, regarding both the fact and the amount of the loss. The *Crystallex v. Venezuela* tribunal recently confirmed the consensus view that "*as a general matter, it is clear that it is the [c]laimant that bears the burden of proof in relation to the fact and the amount of loss*". Similarly, the *Gold Reserve v. Venezuela* tribunal concluded that the "[c]laimant bears the burden of proving its claimed damages".³⁹¹

³⁸⁹ Claimant's Reply, ¶ 509.

³⁹⁰ *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No ARB/02/5, Award, 19 January 2007, ¶ 246, **CLA-66**.

³⁹¹ Bolivia's Statement of Defence, ¶ 619.

268. The Claimant “accepts that it bears the burden of proving the damage that it has suffered as a result of Bolivia’s wrongful conduct”. However, it also indicates that “Bolivia bears the burden of proving all facts underlying its defenses to Glencore Bermuda’s claim for compensation”, and that “[a]s a commentary on which Bolivia itself relies states, ‘the burden of proof will rest with the respondent if the latter asserts facts (or, in procedural terms, raises a defense) implying full or partial rejection of the claim for compensation’.”³⁹² The Tribunal considers that the allocation of the burden of proof has been clearly addressed in investment case law, “it is the Claimant that bears the *burden* of proof in relation to the fact and the amount of loss.”³⁹³ Additionally, it is established that the respondent bears the burden of proving any allegation or defense it raises.³⁹⁴
269. The views of the Parties do not differ as to where the burden of proof lies. It is with respect to the standard of proof that they present opposing views. According to the Claimant, “[t]he standard of proof is not seriously disputed in this case. The Parties agree that the standard of proof does not entail ‘establishing with 100% certainty the *exact amount* of damages claimed’.”³⁹⁵ The Claimant submits that “the standard of proof is a ‘balance of probabilities’. In the damages context, this standard has been defined to mean that the evidence of damages ‘is enough for the judge to be able to admit with *sufficient probability* the existence and extent of the damage’.” The Claimant indicates that “[p]roving the amount of damages ‘is not therefore an exercise in certainty, as such, but [...] an exercise in ‘sufficient certainty’.’ As a result, a respondent State cannot ‘invoke the

³⁹² Claimant’s Reply on Quantum, ¶ 24.

³⁹³ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, ¶ 864, **CLA-130**. Similarly *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award, 22 September 2014, ¶ 685, **CLA-123**; *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No ARB/14/21, Award, 30 November 2017, ¶ 598, **CLA-229**; *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No 2013-15, Award, 22 November 2018, ¶ 824, **CLA-252**.

³⁹⁴ “The Tribunal is here concerned only with reparation in the form of compensation, as described in Article 36 of the ILC’s Articles. It is for the Claimants, as claimants alleging an entitlement to such compensation, to establish the amount of that compensation: the principle *actori incumbit probatio* is ‘the broad basic rule to the allocation of the burden of proof in international procedure’. This burden does not rest on a respondent, at least not initially” (emphasis added). *Gemplus SA and others v. United Mexican States, and Talsud SA v. United Mexican States*, ICSID Case Nos ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010, ¶¶ 13-80, **CLA-98**. “[T]he Tribunal agrees with [c]laimants that the burden then may shift to the state to prove that an intervening event – such as a factor attributable to the victim or a third party – caused the damage alleged, unless, as the tribunal in *CME v. Czech Republic* explained, the injury can be shown to be severable in causal terms from that attributed to the state” (emphasis added). *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. The Republic of Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013, ¶ 1332, **RLA-96**.

³⁹⁵ Claimant’s Reply on Quantum, ¶ 25. Respondent contests that the standard is not disputed, since it alleges that Claimant conflates two standards, one being higher than the other. See Bolivia’s Rejoinder on Quantum, ¶¶ 118-120.

burden of proof as to the amount of compensation for such loss to the extent that it would compound the respondent's wrongs and unfairly defeat the claimant's claim for compensation'."³⁹⁶

270. Furthermore, the Claimant rejects Bolivia's view that the "standard of proof rules out compensation for future projects that have no record of profits." As an example of such a project, Bolivia refers to Colquiri's planned Tailings Plant. According to the Claimant, Bolivia's position that such projects cannot give rise to damages for lost profits is wrong. In the Claimant's view, the only requirement is that "*future profitability* can be established (*the fact of profitability* as opposed to the *amount*) with some level of certainty." The Claimant contends that it has provided "more than ample evidence of the future profits of the Tailings Plant and Colquiri as a whole—profits that Glencore Bermuda lost as a result of Bolivia's breaches of the Treaty".³⁹⁷
271. The Respondent argues that the alleged damages must be proven with "certainty". In this respect, it relies on the International Law Commission ("ILC") Articles on State Responsibility, which establish that compensation for losses must be proven with "*sufficient certainty to be compensable*."³⁹⁸ It contends that the Claimant's "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".³⁹⁹
272. In the Respondent's view, the Claimant conflates two different standards, the standard to prove the existence of damages and the standard for the quantification of the amount. It submits that the former "is both distinct from and higher than the one for proving [the] amount. A showing of 'sufficient probability' may be enough to establish the amount of damages sought, but before that, the very existence of damages must be proven with certainty."⁴⁰⁰ According to the Respondent, Claimant's own authority, *Crystallex v. Venezuela*, confirms this and disproves the Claimant's position. The tribunal in that case clarified that:

³⁹⁶ Claimant's Reply on Quantum, ¶ 26.

³⁹⁷ Claimant's Reply on Quantum, ¶ 27.

³⁹⁸ Bolivia's Statement of Defence, ¶¶ 617 and 620. "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." See Bolivia's Statement of Defence, ¶ 622.

³⁹⁹ Bolivia's Statement of Defence, ¶ 624. See also Bolivia's Statement of Defence, ¶¶ 628-674 and Bolivia's Rejoinder on Quantum, ¶¶ 129-208.

⁴⁰⁰ Bolivia's Rejoinder on Quantum, ¶¶ 117 and 121.

First, the fact (*i.e.*, the existence) of the damage needs to be proven with certainty. [...] Second, once the fact of damage has been established, a claimant should not be required to prove its exact quantification with the same degree of certainty.⁴⁰¹

273. Accordingly, the Respondent contends that “the requirement that the existence of damages must be proven with certainty effectively rules out compensation for projects yet unbuilt, as it makes the related claims inherently speculative”. It explains that this point is “particularly relevant in relation to [the] Claimant’s speculative compensation request for the [Tailings Plant] – a project not even approved or financed, let alone built, by [the] Claimant but which nonetheless represents almost 25% of the damages [...] in relation to Colquiri.”⁴⁰²
274. Finally, the Respondent concludes that “the ‘balance of probabilities’ standard may apply to the quantification of damages, but not to establish their existence. It is not sufficient that the existence of damages is more likely than not – it must be certain” and the “Claimant’s valuations come nowhere near this necessary threshold of certainty”.⁴⁰³

i. Analysis by the Tribunal

275. At the outset, the Tribunal recalls the distinction between the allocation of the burden of proof and the standard of proof. The differing views of the Parties lie within the latter. Regarding the standard of proof, the tribunal in *Crystallex v. Venezuela* stated: “[t]he issue of the *standard* of proof, by contrast, relates to the degree of proof required for the Claimant to discharge its burden of proof.”⁴⁰⁴ Regarding the burden of proof for the *existence of damages* (including future profits) *vis-à-vis* the quantification of damages, the Tribunal finds the award in *Crystallex v. Venezuela* to be instructive. In that case, the tribunal considered:

First, the fact (*i.e.*, the existence) of the damage needs to be proven with certainty. In that sense, there is no reason to apply any different standard of proof than that which is applied to any other issue of merits (e.g., liability).

Second, once the fact of damage has been established, a claimant should not be required to prove its exact *quantification* with the same degree of certainty. This is because any future damage is inherently difficult to prove.⁴⁰⁵ [...]

⁴⁰¹ Bolivia’s Rejoinder on Quantum, ¶ 121, quoting *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 865-876, **CLA-130**.

⁴⁰² Bolivia’s Rejoinder on Quantum, ¶ 127.

⁴⁰³ Bolivia’s Rejoinder on Quantum, ¶ 128.

⁴⁰⁴ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, ¶ 865, **CLA-130**.

⁴⁰⁵ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 867-868, **CLA-130**.

Arbitral tribunals have been prepared to award compensation on the basis of a reasonable approximation of the loss, where they felt confident about the fact of the loss itself.⁴⁰⁶

(emphasis added)

276. Future profits have a characteristic nature; regarding loss of profits the tribunal in *Crystallex v. Venezuela* also considered that:

These principles should also be applied with regard to the proof of loss of profits, which is the crucial issue in this case as far as the determination of quantum is concerned. [...]

Furthermore, according to an oft-cited authority, ‘in order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were reasonably anticipated; and that the profits anticipated were probable and not merely possible’. The same idea was expressed by the tribunal in *ADM v. Mexico* which held that ‘lost profits are allowable insofar as the Claimants prove that the alleged damage is not speculative or uncertain – *i.e.*, that the profits anticipated were probable or reasonably anticipated and not merely possible’. Furthermore, the *Vivendi v. Argentina* tribunal noted that ‘compensation for lost profits is generally awarded only where future profitability can be established (the fact of profitability as opposed to the amount) with some level of certainty’.

In the Tribunal’s view, all these authorities show that, once the *fact* of future profitability is established and is not essentially of speculative nature, the amount of such profits need not be proven with the same degree of certainty. In other words, the Claimant must prove that it has been deprived of profits that would have actually been earned. This requires proving that there is sufficient certainty that it had engaged or *would have engaged* in a profitmaking activity but for the Respondent’s wrongful act, and that such activity would have indeed been profitable.⁴⁰⁷

(emphasis added)

277. The Tribunal agrees that the existence of damages must be demonstrated with a reasonable degree of certainty; it cannot be speculative. This, however, does not seem to require a higher standard than for proving liability.⁴⁰⁸ Future profits, on the other hand, would not entail the same degree of certainty by definition; however, their existence must also be sufficiently established by

⁴⁰⁶ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, ¶ 871, **CLA-130**.

⁴⁰⁷ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 872, 874, 875, **CLA-130**.

⁴⁰⁸ “The Tribunal finds no support for the conclusion that the standard of proof for damages should be higher than for proving merits, and therefore is satisfied that the appropriate standard of proof is the balance of probabilities. This, of course, means that damages cannot be speculative or merely “possible”, as both Parties acknowledge. In the Tribunal’s view, all of the authorities cited by the Parties – including by Respondent in relation to its claim that a degree of certainty is required – accord with the principle that the balance of probabilities applies, even if some tribunals phrase the standard slightly differently. In particular, those cases that discuss the requirement for “certainty” do so in the context of distinguishing “proven” damages from speculative damages, rather than suggesting that a higher degree of proof is applied to damages than to liability” (emphasis added). *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award, 22 September 2014, ¶ 685, **CLA-123**.

demonstrating they were “reasonably anticipated”, not “too speculative or uncertain”, and “probable” rather than “possible”.⁴⁰⁹ Quantification in either circumstance would not necessitate the same level of certainty as establishing the existence of damage or profitability respectively.⁴¹⁰

In the words of the tribunal in *Lemire v. Ukraine*:

While the existence of damage is certain, calculating the precise amount of the compensation is fraught with much more difficulty, inherent in the very nature of the “but for” hypothesis. Valuation is not an exact science. The Tribunal has no crystal ball and cannot claim to know what would have happened under a hypothesis of no breach; the best any tribunal can do is to make an informed and conscientious evaluation, taking into account all the relevant circumstances of the case, not unlike that made by anyone who assesses the value of a business on the basis of its likely future earnings.⁴¹¹

(emphasis added)

278. Having addressed this, the Tribunal is not convinced that the Respondent’s arguments that the Claimant has not established the existence of damages with sufficient certainty⁴¹² are appropriate for the standard of proof regarding the existence of damages; rather, these arguments seem to be appropriate when analyzing the amount of damages that should be awarded, based on the “but-for scenario”. In determining the amount to be awarded, the Tribunal will assess both the arguments and the scenarios presented by the Parties.

⁴⁰⁹ See also *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No 2013-15, Award, 22 November 2018, ¶¶ 824-825, **CLA-252**; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, ¶¶ 8.3.3-8.3.4, **CLA-70**.

⁴¹⁰ “The Tribunal agrees that it is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty; the level of certainty is unlikely, however, to be the same with respect to the conclusion that damages have been caused, and the precise quantification of such damages. Once causation has been established, and it has been proven that the *in bonis* party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss” (emphasis added). *Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Award, 28 March 2011, ¶ 246, **CLA-104**.

⁴¹¹ *Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Award of 28 March 2011, ¶ 248, **CLA-104**. “[T]he assessment of damages is often a difficult exercise and it is seldom that damages in an investment situation will be able to be established with scientific certainty. This is because such assessments will usually involve some degree of estimation and the weighing of competing (but equally legitimate) facts, valuation methods and opinions, which does not of itself mean that the burden of proof has not been satisfied. Because of this element of imprecision, it is accepted that tribunals retain a certain amount of discretion or a “margin of appreciation” when assessing damages, which will necessarily involve some approximation”. *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award, 22 September 2014, ¶ 686, **CLA-123**.

⁴¹² Bolivia’s Statement of Defence, ¶¶ 628-674.

B. Standard of Compensation

279. The Claimant alleges that it is entitled to “full reparation” under customary international law.⁴¹³ On the other hand, the Respondent considers that the “Claimant’s expropriation claims must be assessed per the standard that the Contracting Parties established as applicable to expropriation claims under the Treaty”,⁴¹⁴ *i.e.*, under Article 5 of the BIT. Additionally, the Respondent states that “regarding [the] Claimant’s FET and FPS claims, it is undisputed that the customary ‘full reparation’ standard applies to the determination of any compensation allegedly due. The debate here is not whether the full reparation standard applies but the fact that Claimant has not actually applied [the] said standard to its FET and FPS claims”.⁴¹⁵
280. The Respondent is not challenging the application of the customary reparation standard to the Claimant’s FET and FPS claims. We therefore proceed to analyze whether the standard for compensation under the expropriation claim should be in accordance with Article 5 of the Treaty or under customary international law. In this regard, we wish to note that the Respondent has argued that “in cases of expropriation, the standards of compensation under a treaty or customary international law effectively yield the same valuation results.”⁴¹⁶

i. Expropriation Claim

281. According to the Claimant, “in the absence of an applicable *lex specialis*, the relevant standard for the determination of the compensation owed to Glencore Bermuda must be assessed by the Tribunal with reference to applicable principles of customary international law.”⁴¹⁷ The Claimant points to *Chorzów Factory*, where the Permanent Court of International Justice (“**PCIJ**”) indicated that:

The *essential principle contained in the actual notion of an illegal act*—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that *reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed*.⁴¹⁸

⁴¹³ Claimant’s Reply on Quantum, ¶¶ 14-23.

⁴¹⁴ Bolivia’s Rejoinder on Quantum, ¶ 24.

⁴¹⁵ Bolivia’s Rejoinder on Quantum, ¶ 36.

⁴¹⁶ Bolivia’s Rejoinder on Quantum, ¶ 43.

⁴¹⁷ Statement of Claim, ¶ 230.

⁴¹⁸ *Case Concerning the Factory at Chorzów (Germany v. Poland)*, PCIJ Series A, No 17, 1928, p. 47, **CLA-2**; see also ILC, “Draft articles on Responsibility of States for Internationally Wrongful Acts with commentary” [2001-II(2)] Yearbook of the International Law Commission, art. 34, **CLA-30** (“[f]ull

(emphasis added)

282. The Claimant submits that where there has been a treaty breach as in this case, “customary international law governs the standard of compensation owed by the State to the investor” and that such standard “is ‘full reparation’ of the losses suffered”.⁴¹⁹ Furthermore, the Claimant contends that in cases where an investor has been deprived of the entirety of its investment by virtue of the State’s wrongful conduct, “full reparation must include the [Fair Market Value (“**FMV**”)] of the claimant’s entire investment and any other compensation needed to reinstate the investor to the financial situation it would be in had the unlawful act not been committed.”⁴²⁰ The Claimant indicates that it “does not seek damages other than the FMVs of its [i]nvestments, pre- and post-award interest in accordance with the Treaty standard, and the costs of this arbitration.”⁴²¹
283. The Respondent rejects the Claimant’s position. For the Respondent, “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.”⁴²² According to the Respondent, “the very essence of FMV [...] is the objective approach of a hypothetical transaction between a willing buyer and a willing seller, not [the] Claimant’s subjective valuation.” Bolivia indicates that, “*the reference to a ‘hypothetical buyer’ makes it clear that the value of the property is not to be determined from 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.*”⁴²³

reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination”).

⁴¹⁹ Claimant’s Reply on Quantum, ¶ 14. “‘Full reparation’ means that ‘reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed’.” See ¶ 15 quoting *Case Concerning the Factory at Chorzów (Germany v. Poland)*, PCIJ Series A, No 17, 1928, p. 47, **CLA-2**.

⁴²⁰ Claimant’s Reply on Quantum, ¶ 15.

⁴²¹ Claimant’s Reply on Quantum, ¶ 16. Claimant asks as well that the Tribunal “exercise[s] its discretion to calculate the FMVs of the Investments as of dates other than the dates on which Bolivia’s unlawful conduct permanently deprived Glencore Bermuda of the Investments if—as is the case with the Antimony Smelter—a valuation as of another date would result in a higher FMV for the [i]nvestment. [...] The Tribunal should also allow for annually compounded pre- and post-award interest.”

⁴²² Bolivia’s Statement of Defence, ¶ 691.

⁴²³ Bolivia’s Statement of Defence, ¶ 697, quoting I. Marboe, *Compensation and Damages in International Law: the Limits of “Fair Market Value”*, TDM, Vol. 4, Issue 6, November 2007, p. 735, **RLA-104**.

284. Furthermore, it submits that the Treaty establishes the measure of compensation applicable to a lawful or unlawful expropriation in Article 5 of the Treaty.⁴²⁴ In Bolivia's view, "the Contracting Parties chose to include in their Treaty a compensation provision that is general in scope and for which an expropriation's legality is irrelevant".⁴²⁵ Finally, Bolivia contends that there are tribunals who have awarded an investment's fair market value at the time of dispossession even in cases of illegal expropriation⁴²⁶ and that "the practical results of applying the Treaty's compensation standards or the customary international law standard of full reparation to the valuation of the expropriations alleged in the present case should be the same: the awarding of the Assets' [FMV] at the date of dispossession."⁴²⁷

ii. *Analysis by the Tribunal*

285. Article 5(1) of the Treaty provides the following:

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.

286. On the other hand, Article 31(1) of the ILC Articles on State Responsibility states:

The responsible State is under an obligation to make *full reparation* for the injury caused by the internationally wrongful act.

(emphasis added)

287. Article 34 of the ILC Articles on State Responsibility states:

Full reparation for the injury caused by the *internationally wrongful act* shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

(emphasis added)

⁴²⁴ Claimant disagrees with this view as "Bolivia seeks to limit its liability for Glencore Bermuda's damages to the FMVs of the Investments as of the dates 'immediately before' Bolivia formally issued decrees expropriating each of them" and "Bolivia's position is contrary to the plain text of the Treaty". Claimant's Reply on Quantum, ¶¶ 18 and 19.

⁴²⁵ Bolivia's Rejoinder on Quantum, ¶¶ 23-34.

⁴²⁶ Bolivia's Rejoinder on Quantum, ¶ 44.

⁴²⁷ Bolivia's Rejoinder on Quantum, ¶ 47.

288. Article 36 of the ILC Articles on State Responsibility states:

1. The State responsible for an internationally wrongful act is under an obligation to *compensate for the damage* caused thereby, insofar as such damage is *not made good by restitution*.
2. The compensation shall cover *any financially assessable damage including loss of profits* insofar as it is established.

(emphasis added)

289. Under the BIT standard, compensation shall amount to the “market value”. Article 36 of the ILC Articles on State Responsibility mandates that compensation shall cover “any financially assessable damage”; however, according to commentary (22) of said provision, “[c]ompensation reflecting the *capital value* of property taken or destroyed as the result of an internationally wrongful act *is generally assessed on the basis of the ‘fair market value’ of the property lost*” (emphasis added).

290. At the outset, the Tribunal observes that ultimately both Parties refer to the FMV⁴²⁸ for the valuation of the damages. The disagreement appears to be on whether the Tribunal should value the damages at the date of dispossession or at a different date. We address the dates of valuation separately.

291. As to the compensation standard, the Tribunal does not deem it necessary to discuss whether Article 5 of the Treaty provides a compensation standard applicable to both lawful and unlawful expropriations and whether the Treaty standard would be more appropriate than the customary international law standard. In this case, we have found that Article 5 has been breached and thus compensation must follow. Since both Parties refer to the FMV, we agree with the Respondent’s argument that in practical terms, the result of applying one standard or the other should be the same. The Tribunal notes that other investment cases have followed a similar approach. For example, in *Santa Elena v. Costa Rica*, the tribunal stated that it would not enter into a doctrinal discussion of the standard of compensation since “there [was] no dispute between the parties as to the applicability of the principle of *full compensation for the [FMV] of the Property, i.e., what*

⁴²⁸ “[F]ull reparation must include the FMV of the claimant’s entire investment [...]” Claimant’s Reply on Quantum, ¶ 15. “[T]he practical results of applying the Treaty’s compensation standards or the customary international law standard of full reparation to the valuation of the expropriations alleged in the present case should be the same: the awarding of the Assets’ fair market value at the date of dispossession.” “[F]or Claimant’s expropriation claims, the valuation result should be the same, as if the Tribunal had applied the Treaty’s standard”. Bolivia’s Rejoinder on Quantum, ¶¶ 47 and 48.

a willing buyer would pay to a willing seller”.⁴²⁹ In *Flughafen v. Venezuela*, the tribunal also considered:

In the Tribunal’s view, both Treaties require compensation to be effective and adequate; and for compensation to meet these requirements, its amount will necessarily be equivalent to the *market value of the expropriated property*, calculated on the date immediately prior to the date on which the expropriation was carried out (or was made public knowledge). In practical terms, the compensation regulation contained in both Treaties leads to the same results. [...]

Results that would also be reached if the general principles of international law were applied. [...]

It is a firm principle of customary international law that the victim of a wrongful act perpetrated by a State is entitled to receive full reparation, as if the wrongful act had not occurred. [...]

And in an expropriation, full reparation is equivalent to the market value of the expropriated property, a value that the owner could have obtained, if he had disposed of it just before the date on which the State carried out the dispossession, or on which the will of expropriation transcended the public (reducing the market value of the property) [...].⁴³⁰

⁴²⁹ *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case No ARB/96/1, Final Award, 17 February 2000, ¶¶ 70 and 73, **CLA-25**.

⁴³⁰ *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014, ¶¶ 744-747, **RLA-107** (unofficial translation). Spanish original: “744. En opinión del Tribunal, ambos Tratados exigen que la compensación sea efectiva y adecuada; y para que una compensación cumpla con estos requisitos, su cuantía necesariamente equivaldrá al valor de mercado del bien expropiado, calculado en la fecha inmediatamente anterior a aquélla en que se realizó la expropiación (o ésta se hizo de público conocimiento). En términos prácticos, la regulación de la compensación contenida en ambos Tratados lleva a los mismos resultados. 745. Resultados a los que también se llegaría, si se aplicaran los principios generales del Derecho internacional. 746. Es un principio firme del Derecho internacional consuetudinario que la víctima de un acto ilícito perpetrado por un Estado tiene derecho a recibir una reparación íntegra, como si el acto ilícito no hubiera ocurrido. 747. Y en una expropiación la reparación íntegra equivale al valor de mercado del bien expropiado, valor que el titular podría haber obtenido, si lo hubiera enajenado justo antes de la fecha en que el Estado realizó la desposesión, o en la que la voluntad de expropiación trascendió al público (reduciendo el valor de mercado del bien)” See also: “It is an indisputable principle of customary international law that the victim of an unlawful act perpetrated by a State has the right to receive full reparation, as if the wrongful act had not occurred. *In cases of expropriation, the full reparation is equivalent to the market value of the expropriated property*, understood as the value that the owner could have obtained, if he had disposed of it on a date immediately prior to that on which the State dispossessed him, or on the date that the will to expropriate became publicly known (reducing the market value of the property). Therefore, *in practical terms, the regulation of the compensation contained in the BITs leads to the same results as if the general principles of international law were applied.*” *Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/23, Award, 12 December 2016, ¶¶ 396 and 397, **CLA-133** (unofficial translation, emphasis added). Spanish original: “396. Es un principio indiscutido del Derecho internacional consuetudinario que la víctima de un acto ilícito perpetrado por un Estado tiene derecho a recibir una reparación íntegra, como si el acto ilícito no hubiera ocurrido. En casos de expropiación, la reparación íntegra equivale al valor de mercado del bien expropiado, entendido como el valor que el titular podría haber obtenido, si lo hubiera enajenado en una fecha inmediatamente anterior a aquella en la que el Estado le desposeyó, o en la que la voluntad de expropiación trascendió al público

(emphasis added)

292. Consequently, we will calculate the damages based on the investment's FMV and examine the Parties' arguments regarding the correct valuation date in the sections that follow.

C. Causation and Contributory Fault

293. Bolivia alleges that the "Claimant has never identified which specific damages allegedly arise out of the distinct actions of Bolivia that form the basis for its supplementary FPS claim for Colquiri [Mine] or its alternative FET claims for all three reverted Assets, and that [the] Claimant has not even addressed causation between any of these alleged breaches and the separate heads of damages that they supposedly resulted in".⁴³¹ In this regard, the Respondent contends that damages should not be awarded since there is no causal link or, in the alternative, damages should be reduced, because Bolivia's actions resulted from the Claimant's own conduct.⁴³²
294. The Respondent also submits that "[i]n the present case, where [the] Claimant's prior conduct and Bolivia's response thereto are the cumulative causes leading to each head of damages, the causal analysis cannot only post-date the alleged breach. The chain of causation must be traced back to include [the] Claimant's prior conduct which, as a matter of '*antériorité causale*,' triggered Bolivia's response and thus, also the damages allegedly resulting therefrom."⁴³³
295. The Respondent finds support in the analysis by the *Burlington* tribunal on causation and contributory fault. In that case, the tribunal assessed "whether the investor's conduct was '*the triggering [...], [l]or the decisive factor*' in '*the chain of events that eventually culminated*' in the State's unlawful act, in order to decide if it had '*sever[ed] the chain of causation between the wrongful conduct and the injury*,' or if it had '*contribute[d] to the magnitude of the loss*' suffered by the investor."⁴³⁴ According to the Respondent, "[c]ausation and contributory fault are interrelated concepts", and under this integrated approach, *i.e.*, addressing causation and contributory fault, tribunals have considered whether the causal chain leading to the harm suffered

(reduciendo el valor de mercado del bien). 397. Por tanto, en términos prácticos, la regulación de la compensación contenida en los APPRI lleva a los mismos resultados que si se aplicaran los principios generales del Derecho internacional."

⁴³¹ Bolivia's Rejoinder on Quantum, ¶ 37. See also Bolivia's Rejoinder on Quantum, ¶¶ 220 and 223.

⁴³² Bolivia's Rejoinder on Quantum, ¶¶ 209-216.

⁴³³ Bolivia's Rejoinder on Quantum, ¶ 226.

⁴³⁴ Respondent clarifies that "[w]hile the majority in *Burlington* found for neither proposition based on the specific facts of that case, its legal analysis supports Bolivia's position that the investor's prior conduct can be the triggering factor of the State's response and may thus sever the chain of causation". Bolivia's Rejoinder on Quantum, ¶ 231.

by the investor can be traced back to the investor's conduct, which triggered the State's response. Depending on the conduct's intensity, "*a claimant's conduct may justify an exclusion or reduction of damages if it has contributed to the injury.*"⁴³⁵

i. *Causation*

296. According to the Respondent, the "Claimant has only advanced a single valuation and causation analysis based on an expropriation scenario, which assumes the entire loss of Colquiri's value. [The] Claimant has never specified which part of its claimed damages was specifically caused by Bolivia's alleged FPS or FET breaches".⁴³⁶ Regarding the Claimant's FET claim, it alleges that the FET allegations "have no temporal connection with [the] Claimant's 29 May 2012 valuation date".⁴³⁷ The Respondent also submits that "there currently exists no causation analysis, nor a workable valuation model to support [the] Claimant's FET or FPS claims to begin with – let alone one justifying a 29 May 2012 valuation date for Colquiri."⁴³⁸

297. In the Claimant's view, Bolivia has not denied "that its Treaty breaches were the proximate cause of Glencore Bermuda's losses with respect to three of the four [i]nvestments—the Vinto Tin Smelter, the Antimony Smelter and the Tin Stock."⁴³⁹ As to Colquiri, the Claimant submits that in order to establish proximate cause, it only needs to show that "its loss of Colquiri was the objectively foreseeable outcome of Bolivia's expropriation of the Colquiri [Mine] Lease" and that this is the case since "the *complete* loss of Claimant's investment is the objectively foreseeable result of the *complete* taking of the investment by the State."⁴⁴⁰

ii. *Contributory Fault*

298. As to the threshold for finding contributory fault, the Claimant submits it is high and that in the rare instances where tribunals have reduced the amount of damages on the grounds of contributory fault, the investor has typically committed "serious wrongdoing, such as breaching the laws of the host state", whereas "when the investor engages in common business practices and the

⁴³⁵ Bolivia's Rejoinder on Quantum, ¶¶ 213 and 214, quoting also *Burlington Resources, Inc v. Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶ 572, **CLA-134**.

⁴³⁶ Bolivia's Rejoinder on Quantum, ¶ 70.

⁴³⁷ Bolivia's Rejoinder on Quantum, ¶ 73.

⁴³⁸ Bolivia's Rejoinder on Quantum, ¶ 74.

⁴³⁹ Claimant's Reply on Quantum, ¶ 28. This assertion is contested by Respondent. See Bolivia's Rejoinder on Quantum, ¶ 219.

⁴⁴⁰ Claimant's Reply on Quantum, ¶ 29.

respondent's measures are the primary cause of the investor's injury, damages should not be reduced".⁴⁴¹

299. According to the Respondent, "as long as any conduct of the investor has a sufficient causal link to the damages, said conduct is capable of reducing the amount of damages, and is, as such, material to the examination of contributory fault. The significance of this material contribution is then reflected [in] the percentage of reduction to the damages that the tribunal considers justified, based on the conduct's degree of contribution to the damages and the case's factual context".⁴⁴² In the Respondent's view, there is no high threshold for contributory negligence, and "as long as the investor's conduct is causally linked to the ensuing damages, it is both material and significant to the tribunal's assessment of contributory fault." In this case, the Respondent maintains that the Claimant's prior conduct provoked the acts that are allegedly unlawful; therefore, "the chain of causation clearly connects [the] Claimant's conduct, the [r]eversions, and the compensation claimed".⁴⁴³ Finally, the Respondent contends that the reduction of compensation is not rare or restricted to cases of illegal conduct by investors.⁴⁴⁴

a. The Colquiri Mine Lease

300. The Respondent submits that the Claimant's mismanagement of relations between the workers and *cooperativistas* "triggered a chain of events that led to the reversion of the [Colquiri] Mine Lease as the only possibility to put an end to the violence." In its view, this mismanagement was the decisive factor that caused the Claimant's damages and, consequently, "the chain of causation is '*fatally sever[ed]*' and Bolivia should not be held responsible for these damages". In the alternative, the Respondent submits that if the Tribunal were to find that Bolivia was partially responsible for the damages, it must also find that the "Claimant's own conduct was the predominant factor causing Bolivia's response to the social conflict at the Colquiri Mine". Therefore, the damages suffered should be reduced by at least 75% to reflect the Claimant's contributory fault.⁴⁴⁵
301. The Claimant, on the other hand, maintains that "Bolivia's taking of Colquiri in its entirety was the sole cause of Glencore Bermuda's losses in relation to Colquiri" and that "Bolivia's allegation

⁴⁴¹ Claimant's Reply on Quantum, ¶¶ 197 and 199.

⁴⁴² Bolivia's Rejoinder on Quantum, ¶ 245.

⁴⁴³ Bolivia's Rejoinder on Quantum, ¶ 247.

⁴⁴⁴ Bolivia's Rejoinder on Quantum, ¶¶ 248-253.

⁴⁴⁵ Bolivia's Rejoinder on Quantum, ¶ 287. See also Bolivia's Rejoinder on Quantum, ¶¶ 258-286.

that Glencore Bermuda caused its own losses in part by ‘forcing’ Bolivia to take Colquiri has no merit and should be rejected”.⁴⁴⁶

b. The Tin Smelter⁴⁴⁷

302. The Respondent alleges that the “Claimant’s own bad business decision to acquire an asset whose privatisation was tainted by irregularities was the very factor that caused [the] Claimant’s damages following the Tin Smelter’s reversion, or that, at the very least, materially and significantly contributed to said damages”. In the Respondent’s view, the Tribunal must find either that the causal chain has been fatally severed and not award any compensation for Vinto, or reduce any compensation by 50%, to reflect the Claimant’s contributory fault.⁴⁴⁸

c. The Antimony Smelter

303. The Respondent contends that the Claimant was aware of the contractual obligation to keep the plant in production but chose not to do so, that it was unwilling to invest in the Assets – much less in the Antimony Smelter and, in consequence, the “Claimant’s own conduct – its decision not to activate the plant – was the triggering and decisive factor for the Antimony Smelter’s reversion, or, at least, it was the predominant triggering factor for the reversion, materially and significantly contributing to the damages sought”. In the Respondent’s view, damages should be reduced by 75% to reflect the Claimant’s contributory fault.⁴⁴⁹

iii. *Analysis by the Tribunal*

304. The Tribunal begin our analysis by addressing causation. In the words of the tribunal in *Biwater v. Tanzania*, “[c]ompensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained”.⁴⁵⁰ The tribunal in that case considered that “[t]he requirement of causation comprises a number of different elements, including (inter alia) (a) a *sufficient link between the wrongful act and the damage* in question,

⁴⁴⁶ Claimant’s Reply on Quantum, ¶¶ 30 and 31.

⁴⁴⁷ As to the Tin Smelter, the Antimony Smelter and the Tin Stock, Claimant alleges that “Bolivia does not deny that its Treaty breaches were the proximate cause of Glencore Bermuda’s losses with respect to three of the four Investments—the Vinto Tin Smelter, the Antimony Smelter and the Tin Stock.” Claimant’s Reply on Quantum, ¶ 28.

⁴⁴⁸ Bolivia’s Rejoinder on Quantum, ¶ 299. See also Bolivia’s Rejoinder on Quantum, ¶¶ 288-298.

⁴⁴⁹ Bolivia’s Rejoinder on Quantum, ¶ 307. See also Bolivia’s Rejoinder on Quantum, ¶¶ 300-306.

⁴⁵⁰ *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008, ¶ 779, **CLA-78**.

and (b) a threshold beyond which damage, albeit linked to the wrongful act, is considered *too indirect or remote*.”⁴⁵¹

305. The Tribunal recalls that the Claimant’s claims in relation to FPS were dismissed. Turning to the arguments on causation regarding the FET claims, the Tribunal also recalls its finding that there was an element of arbitrariness in the nationalization of the Tin Smelter, in particular the fact that there appeared to be no legal basis justifying the “reversion” and that the fundamental reason for “reverting” the asset was an illegality that, to date, has not been established by any Bolivian authority. Therefore, the Tribunal found a breach of the FET standard contained in Article 2(2).⁴⁵² As indicated above, the Tin Smelter Reversion Decree expressly provided for the taking of the smelter: it “reverted [the smelter] to the domain of the Bolivian State, with all its current assets, providing that [the State Company EMV] immediately takes administrative, technical, legal and financial control”.⁴⁵³ The enactment of this decree is what changed the situation for the Tin Smelter, unlike other cases where there may be other causes acting together, in this case, the record shows that the decree alone is what resulted in the Claimant’s loss of the Tin Smelter. In consequence, the Tribunal does see a causal link between the Tin Smelter Reversion Decree and the damage resulting from the loss of the Tin Smelter.
306. Regarding the Colquiri Mine, we also recall our finding that the Respondent’s reversion constituted an expropriation within the meaning of Article 5 and that the Respondent violated this provision of the Treaty because it was neither for a public purpose nor in exchange for just and effective compensation.⁴⁵⁴ The Tribunal concludes that there is a causal link between the Colquiri Mine Reversion Decree and the damage resulting from the expropriation, given that the Claimant lost use and possession rights granted under the lease agreement, which were transferred to COMIBOL and the newly formed company as a result of the decree.
307. Notwithstanding this finding, the Respondent has advanced arguments on contributory fault in respect of the Colquiri Mine, as well as the Tin and Antimony Smelters. We turn to analyze

⁴⁵¹ *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008, ¶ 785, **CLA-78**.

⁴⁵² See Section VI.3.B above.

⁴⁵³ Supreme Decree No. 29,026, 7 February 2007, published in the *Gaceta Oficial* No. 2,969 on 9 February 2007, **C-20** (unofficial translation).

⁴⁵⁴ See Section VI.1.B.iv above.

whether the Claimant's actions contributed to the damages sought and whether compensation should be reduced or eliminated on this ground.⁴⁵⁵

308. Article 39 of the ILC Draft Articles on State Responsibility states:

In the determination of reparation, account shall be taken of the *contribution to the injury by wilful or negligent action or omission* of the injured State or any person or entity in relation to whom reparation is sought.⁴⁵⁶

(emphasis added)

309. Commentary 1 to this Article indicates that it deals with situations “where the injured State, or the individual victim of the breach, has *materially* contributed to the damage by some wilful or negligent act or omission” (emphasis added). As to the type of actions or omissions, Commentary 5 states:

Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather, article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights. While the notion of a negligent action or omission is not qualified, e.g. by a requirement that the negligence should have reached the level of being “serious” or “gross”, the relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case. The phrase “account shall be taken” indicates that the article deals with factors that are capable of affecting the form or reducing the amount of reparation in an appropriate case.

310. Accordingly, our task is to determine if the Claimant's actions “manifest a lack of due care” and if it “materially contributed to the damage”. The tribunal in *Occidental v. Ecuador* also expressed this view: “[t]he Tribunal notes that it is not any contribution by the injured party to the damage which it has suffered which will trigger a finding of contributory negligence. The contribution must be material and significant. In this regard, the Tribunal has a wide margin of discretion in apportioning fault.”⁴⁵⁷

⁴⁵⁵ “It is undisputed that a claimant's conduct may justify an exclusion or reduction of damages if it has contributed to the injury.” *Burlington Resources, Inc v. Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶ 572, **CLA-134**.

⁴⁵⁶ See also commentary 13 to Article 31: “It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct.” ILC, “Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentary” [2001-II(2)], Yearbook of the International Law Commission, **CLA-30**.

⁴⁵⁷ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No ARB/06/11, Award, ¶ 670, **CLA-254**.

311. Regarding the Colquiri Mine Lease, Bolivia attributes its response to the social conflict to the Claimant's mismanagement of relations with *cooperativistas*, its failure to involve Bolivia in a timely manner in resolving conflicts, the failure to protect its workers and the promotion of inconsistent agreements (the Rosario Agreement). The Tribunal considers that the record before it does not support these allegations. Regarding the Claimant's alleged mismanagement of relations and the failure to involve Bolivia, the Tribunal notes that, as recognized by Bolivia, *cooperativistas* "are a common fixture in the Bolivian mining sector"⁴⁵⁸ and the management of relations was shared with Bolivia. For example, it was COMIBOL who sanctioned the assignment of mining areas and COMIBOL formed part of negotiations with *cooperativistas* as is shown by the negotiations carried out prior to the Colquiri Mine's expropriation. Whether the involvement was timely or not, we recall that the Claimant notified Bolivia prior to the events to request support and during that time the President of COMIBOL was in regular contact with Sinchi Wayra, the trade union and the cooperative leaders. This would suggest that matters related to *cooperativistas* required a joint effort between the government and the Claimant's company, and what the record shows is that the government was not seeking out a solution but rather administrating the conflict.⁴⁵⁹ Regarding the Rosario Agreement, a government representative was part of that negotiation.⁴⁶⁰ Moreover, it seems that what the workers really wanted was job security, regardless of who had control of the Colquiri Mine.⁴⁶¹ In the Tribunal's view, this does not reflect a manifest lack of due care on the Claimant's part.
312. Regarding the Tin Smelter, the Respondent attributes the damage to the Claimant's "bad business decision to acquire an asset whose privatisation was tainted by irregularities".⁴⁶² However, as mentioned above, such "irregularity", at that moment and to date, remains a mere assertion by Bolivia: there has been no legal determination to that effect by any Bolivian authority and there is insufficient evidence to support that claim. In this regard, the Tribunal has difficulty understanding how this demonstrates the Claimant's lack of care.

⁴⁵⁸ Bolivia's Statement of Defence, ¶ 33.

⁴⁵⁹ Transcript, Hearing on Jurisdiction and Merits, Day 2, p. 520, line 12-p. 524, line 10 (Mr. Córdoba).

⁴⁶⁰ Letter from the Minister of Mining (Mr. Virreira) to Cooperativa 26 de Febrero (Mr. Lima), 30 May 2012, **C-259**.

⁴⁶¹ "What we demanded was a definitive solution [...] So, in 2012, the situation was very serious. So we wanted Sinchi Wayra, or the Government, we wanted to solve this problem in a definitive manner. What the workers had was not only a labor conflict; this impacted society also, and the community. So we wanted to provide a definitive solution." Transcript, Hearing on Jurisdiction and Merits, Day 3, p. 745, lines 1-2 and p. 746, lines 20-25 (Mr. Mamani).

⁴⁶² Bolivia's Rejoinder on Quantum, ¶ 299.

313. Lastly, the Respondent asserts that by failing to engage in operation at the Antimony Smelter, it contributed to the reversion and, by extension, the claimed damages. We observe that the Parties disagree as to whether there was an actual contractual obligation to put the Antimony Smelter into operation. In this regard, we once again recall that, to date, no Bolivian court or administrative body has been asked to determine whether or not there was a breach of contract. Similar to the Tin Smelter case, this allegation remains an assertion that is not supported by adequate evidence.⁴⁶³

314. For these reasons, the Tribunal dismisses the Respondent's allegations on causation and contributory fault.

2. THE COLQUIRI MINE

A. Valuation Date

315. Originally, the Claimant proposed 29 May 2012 as the valuation date, *i.e.*, "the day prior to the moment in which Glencore Bermuda finally and irrevocably lost control of its investment due to Bolivia's breach of its obligations to afford full protection and security and fair and equitable treatment." According to the Claimant, Bolivia's internationally wrongful conduct, including its threats of nationalization and the exclusion of Colquiri from the negotiations regarding the shared-risk contracts and the subsequent lack of protection of the mine, allowed the cooperatives to invade and remain in the mine, Colquiri's only remaining productive asset. As consequence of this breach, from 30 May 2012 the Colquiri Mine remained entirely inaccessible to Glencore Bermuda, thus requiring a valuation on the previous day, 29 May 2012.⁴⁶⁴ In the alternative, the Claimant contends that the appropriate valuation date for Colquiri is, at the very latest, 4 June 2012 (the day before Bolivia publicly announced the impending nationalization of the Colquiri Mine, which is the latest possible valuation date under the Treaty).⁴⁶⁵

316. The Respondent's position is that Colquiri shall be valued as of 19 June 2012, the date before the alleged expropriation took place⁴⁶⁶ and alleges that Glencore Bermuda was able to temporarily restore operations until 20 June 2012.⁴⁶⁷ In response, the Claimant argues that the evidence at the

⁴⁶³ Bolivia's Rejoinder on Quantum, ¶ 300.

⁴⁶⁴ Statement of Claim, ¶ 255.

⁴⁶⁵ Claimant's Reply on Quantum, ¶ 57.

⁴⁶⁶ Bolivia's Rejoinder on Quantum, ¶ 61.

⁴⁶⁷ Bolivia's Statement of Defence, ¶¶ 705-707. In the Respondent's view, the Claimant acknowledges that it entered into the Rosario Agreement on 7 June 2012 with the *cooperativistas*, whereby it agreed to turn over the Rosario vein of the [Colquiri] Mine, therefore, this action "conclusively demonstrates that Claimant remained in control of the [Colquiri] Mine", ¶ 705.

Hearing on Jurisdiction and Merits established that Glencore Bermuda never regained operations (including production) at the Colquiri Mine after 30 May 2012. It submits that Bolivia's own witness, Eng. Moreira, a manager at the Colquiri Mine in 2012, testified that "after 30 May 2012, he did not return to his job at the Mine, because there were no operations left to supervise after that date." Furthermore, "the fact that Glencore Bermuda had the legal authority to enter into the Rosario Agreement on 8 June 2012 does not mean that Glencore Bermuda could operate the [Colquiri] Mine on that date [...] [a]ll it shows is that Glencore Bermuda behaved *as though it still had legal rights under the Colquiri Lease* even though it had lost operational control of the [Colquiri] Mine on 30 May 2012"⁴⁶⁸ (emphasis added).

317. The Respondent rejects this assertion and posits that the "Claimant could simply not have been negotiating over something already lost. Neither would the *cooperativistas* have accepted to negotiate with [the] Claimant, nor would the Rosario Agreement have resulted in a 'workable solution' and a 'truce' that lifted the blockade, if [the] Claimant had indeed '*irretrievably lost*' the Mine a week earlier, to the very party that it negotiated and concluded the Rosario Agreement with."⁴⁶⁹
318. The Respondent submits that the Claimant's one-size-fits-all approach is at odds with contemporary arbitral practice. In this regard, it points out that, "in cases such as this, where no allegations of creeping expropriation have been made, a 'layered' approach has been adopted by other tribunals to separately value each treaty breach at the time of its occurrence."⁴⁷⁰ This holds, according to the Respondent, all the more true in the present case, where the Claimant has not argued a creeping expropriation of Colquiri but is now seeking similar valuation results by "improperly merging together its expropriation, FPS and FET claims".⁴⁷¹ Additionally, it contends that the Claimant's information provided to the market in 2012 confirms as well that Glencore did not consider that it had suffered an "*irretrievable loss*" of its rights and control over the Colquiri Mine before 20 June 2012.⁴⁷² Thus, based on its own actions at the time, the Claimant

⁴⁶⁸ Claimant's Reply on Quantum, ¶ 59.

⁴⁶⁹ Bolivia's Rejoinder on Quantum, ¶ 67.

⁴⁷⁰ Bolivia's Rejoinder on Quantum, ¶ 57.

⁴⁷¹ Bolivia's Rejoinder on Quantum, ¶ 58.

⁴⁷² Bolivia's Rejoinder on Quantum, ¶ 67; Glencore International's response to the nationalization of the Colquiri Mine in Bolivia, 22 June 2012, **R-258**; Glencore Annual Report 2012, pp. 53 and 71, **R-257**.

retained in full its legal rights over Colquiri after 30 May 2012 and until 20 June 2012, when its rights over the Mine were “*irretrievably lost*” and reverted to Bolivia.⁴⁷³

319. Finally, the Respondent indicates that “the alleged facts that the Claimant takes issue with are unrelated to the Claimant’s valuation date of 29 May 2012 in terms of timing. The Claimant’s FET allegations target acts that Bolivia supposedly took either at the beginning of May 2012 or after the reversion of Colquiri. Thus, even if they were well-founded (*quod non*) they simply have no temporal connection with the Claimant’s 29 May 2012 valuation date.”⁴⁷⁴
320. In relation to the Claimant’s proposed 4 June 2012 date of valuation, the Respondent contends that at that time, the Bolivian Government was only “exploring the possibility of reverting the [Colquiri] Mine as one among various alternatives, and only as the ‘last solution’ in an ‘extreme scenario,’ were it to become necessary so as to prevent further violence. But as of 5 June 2012, nothing was yet finally decided – let alone publicly announced – by Bolivia.”⁴⁷⁵ It also takes the view that “[h]ad Glencore really known that Colquiri’s Reversion was already decided, it would not have entered into the negotiations that led to the Rosario Agreement. Nor would its counterparty, the *cooperativistas*, have any reason to negotiate with Glencore, since, per [the] Claimant’s position, by 5 June 2012, it would have been public knowledge that the [Colquiri] Mine would be reverted to the State. However, the Rosario Agreement was nonetheless negotiated and concluded on 7 June 2012, *i.e.*, two days after the alleged news of Colquiri’s reversion – showing that [the] Claimant’s new position is logically incoherent.”⁴⁷⁶

i. *Analysis by the Tribunal*

321. The decree reverting the Colquiri Mine to the government was published on 20 June 2012. Thus, the Claimant bears the burden of demonstrating that a different date is more appropriate for valuation purposes. The Tribunal finds it difficult to accept either of the dates proposed by the Claimant. Whilst it is true that on 30 May 2012 Glencore Bermuda lost possession of the Colquiri Mine, the Claimant continued to make decisions “as if it had rights and control of the [Colquiri] Mine” and acted accordingly in front of workers, *cooperativistas*, and its own shareholders.⁴⁷⁷

⁴⁷³ Bolivia’s Rejoinder on Quantum, ¶ 68.

⁴⁷⁴ Bolivia’s Rejoinder on Quantum, ¶ 73.

⁴⁷⁵ Bolivia’s Rejoinder on Quantum, ¶ 79.

⁴⁷⁶ Bolivia’s Rejoinder on Quantum, ¶ 86.

⁴⁷⁷ “The Colquiri [M]ine was nationalised on 22 June 2012 and is no longer reported in Sinchi Wayra’s reserves and resources”. Glencore Annual Report 2012, p. 71, **R-257**. As Mr. Eskdale stated in his First Witness Statement, referring to the status of the Rosario Agreement negotiations as of 7 June 2012: “[w]e were relieved that the conflict was over. We had done our best to engage with the various stakeholders in order

We interpret the Rosario Agreement as an effort to bring an end to the conflict and maintain the mine's normal operations. We conclude that the appropriate valuation date is 19 June 2012.

322. Relatedly, with respect to the claims presented, aside from the expropriation claim, the Tribunal does see a disconnection between the dates proposed by the Claimant and the claims. However, considering our findings in Sections VI.3.B and VII.1.C.iii, we do not consider that this impacts our damages calculation in any material way.

B. Valuation Basis

323. The Claimant puts forward its valuation based on two expansion plans: (i) the Triennial Plan (“**Triennial Plan**”) and (ii) the March 2012 Investment Plan (“**March 2012 Investment Plan**”). First, a description of these plans is in order.

i. *Triennial Plan*⁴⁷⁸

324. The Claimant's Colquiri valuation is hinged on the Triennial Plan, “a three-year business plan that Glencore Bermuda approved in 2011.”⁴⁷⁹ The Claimant argues that “but-for Bolivia's wrongful conduct, Colquiri would have completed the expansion plans that were underway at that time”, increased the amount of ore that the Colquiri Mine and the Concentrator Plant would have extracted and processed, and begun operating the Tailings Plant.⁴⁸⁰ The latter was a planned project to build a plant to recover the tin and zinc from the old tailings left during approximately 60 years of operations of the Colquiri Mine (the “**Tailings Plant**”).⁴⁸¹ In support, the Claimant presents its expert's projections based on the Triennial Plan, and as to the Tailings Plant, it relied on a 2004 Feasibility Study “that Glencore Bermuda adopted in 2005”.⁴⁸² Colquiri maintains that “the Colquiri expansion plans were not technically complex by the standards of the mining industry”, that “[t]o increase the rate at which ore could be extracted from the Colquiri Mine, Glencore Bermuda was simply building a new ramp within the mine” (a low-tech solution that would have doubled the rate at which ore could be extracted), and that “after taking over the

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.” Eskdale First Witness Statement, ¶ 94 (emphasis added). See also, Glencore International's response to the nationalization of the Colquiri Mine in Bolivia, 22 June 2012, **R-258**.

⁴⁷⁸ Colquiri Mine Three Year Plan 2012-2014, July 2011, **C-108**.

⁴⁷⁹ Claimant's Reply on Quantum, ¶ 67.

⁴⁸⁰ Claimant's Reply on Quantum, ¶ 61. See also ¶¶ 76, 80.

⁴⁸¹ Claimant's Statement of Claim, ¶ 52.

⁴⁸² Feasibility Study of the Colquiri Tailings Project, December 2003, **C-61**; Colquiri, Colquiri Old Tailings Project, Business Plan, March 2004, **RPA-49**; Old Tailings Colquiri Project, 2005, **C-161**.

[Colquiri] Mine in 2012, [COMIBOL] decided to complete the construction of the same ramp in order to expand the output of the Mine (just as Glencore Bermuda planned)".⁴⁸³ As to the Concentrator Plant, the Claimant alleges that it had "planned to replace the Concentrator Plant's mill (for grinding the ore)[,] [...] already purchased new 'flotation cells' for separating tin and zinc from the ore, and had budgeted to purchase 'thickening tanks' to manage the water used in the concentrating process".⁴⁸⁴

325. On the other hand, the Respondent contests the use of the Triennial Plan as a basis for damages calculation for the following reasons: it is simply aspirational (*i.e.*, it is an internal document that was never seriously assessed (much less approved) by Colquiri's management); it does not include any economic,⁴⁸⁵ social or environmental analyses (all of which are fundamental to assess the viability of a plan of this nature), and 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 on which the Colquiri Mine Lease was reverted) were not carried out.⁴⁸⁶ The Respondent also raises some inconsistencies between the Triennial Plan and contemporaneous documents such as *Colquiri's 2012 Production Budget*,⁴⁸⁷ *Sinchi Wayra's 2012 Production Budget*,⁴⁸⁸ and *Capital Expenditure ("CAPEX") and Projects Statement*.⁴⁸⁹

a. Analysis by the Tribunal

326. The Tribunal cannot accept the Triennial Plan as a basis for the damages valuation. Given the Triennial Plan's projections for substantial expansion in terms of exploitation and production, substantial interactions within the company and consistency or alignment among budgets and

⁴⁸³ Claimant's Reply on Quantum, ¶¶ 94, 95 and 97.

⁴⁸⁴ Claimant's Reply on Quantum, ¶ 98. "Similarly, the Triennial Plan provided for the installation of an additional 2.3 megawatts of power generating capacity, which would have increased Colquiri's aggregate power which would have been sufficient power to process over 5,300 tonnes of ore and tailings a day". See Claimant's Reply on Quantum, ¶ 100.

⁴⁸⁵ "As SRK noted in its first expert report, "[t]he Triennial Expansion Plan allegedly prepared by Colquiri in 2011 was a sort of "Vision", but the document does not have an economics section (to justify the high capital investment required) nor any analysis of investment returns." Bolivia's Rejoinder on Quantum, ¶ 137 quoting SRK First Expert Report, ¶ 58.

⁴⁸⁶ Bolivia's Statement of Defence, ¶ 777.

⁴⁸⁷ *Compañía Minera Colquiri* Annual Budget for 2012, **R-33**, tab "Planta", cells O24, O26. See, Bolivia's Rejoinder on Quantum, ¶ 159.

⁴⁸⁸ Regarding the estimated ore processing rates, capital expenditures, annual operating costs and unitary cost per tonne. See Sinchi Wayra S.A. 2012 Budget, GB014019, tab "Colquiri", cell O14, tab "CAPEX", cell O150, tab "Colquiri", rows 38 to 45, **R-431**. See Bolivia's Rejoinder on Quantum, ¶ 162.

⁴⁸⁹ Colquiri CAPEX and Projects Statement, February 2012, GB014123, tab "COLQUIRI", row 372, **R-432**. See Bolivia's Rejoinder on Quantum, ¶ 163.

projects were expected to be required to achieve the Triennial Plan's objectives. Moreover, one would expect supporting documents elaborating on the plan,⁴⁹⁰ but information on the plan is not in any material way made available as part of the evidentiary record. In addition, the plan was neither formally sanctioned by the company⁴⁹¹ nor are clear intentions to implement its objectives before the mine was expropriated confirmed by contemporaneous evidence. For instance, the contemporaneous evidence shows no clear economic plan to achieve its objectives but instead the inconsistency between the plan and concurrent budgets or plans.⁴⁹² Although some works for the expansion of the Colquiri Mine, such as the main ramp, were performed, it would be highly speculative to extrapolate or use that fact as a basis to accept all the goals or projections mentioned in the Triennial Plan, especially since there is no clear causal linkage between the contents of the Triennial Plan and the works performed.⁴⁹³

⁴⁹⁰ Documents produced by Claimant for Request 1, **R-423**; Documents produced by Claimant for Request 3, **R-420**; Documents produced by Claimant for Request 4, **R-424**. Several documents were provided, some were part of the Triennial Plan, others contained information on the expansion, alternatives envisioned, technical aspects, costs, a consultant's report, management reports, a contract for the excavation towards the ramp, a contract as project manager; however, while documents show prospecting work on these plans, we cannot find a basis of how those documents were elaborated and the analysis or evaluations that were made in order to form a solid evidentiary foundation of such project.

⁴⁹¹ See Documents produced by Claimant for Request 3, **R-420**; Documents produced by Claimant for Request 4, **R-424**. Claimant presented several documents but among them, the Tribunal does not find a formal approval or documents reflecting an effective implementation of the Triennial Plan. Claimant indicates: "[l]ater in 2011, the Triennial Plan was approved by Sinchi Wayra management in La Paz, and then presented the corresponding investment plan to Mr. Eskdale in his then role as Glencore's Senior Asset Manager for Global Operations. Mr. Eskdale approved the Triennial Plan and necessary capital expenditures in 2011" (Claimant's Reply on Quantum, ¶ 73). However, these assertions find support on two witness statements rather than on specific documents of internal management, budget planning or capital expenses that would be expected for such a project. The Tribunal is not fully convinced that a "partial approval" would suffice to render all of the Triennial Plan and the projections based on it as a solid basis for damages calculation.

⁴⁹² See Bolivia's Reply Post-Hearing Brief on Quantum, ¶¶ 23-26, 35-38. In particular, inconsistencies between the Triennial Plan and Sinchi Wayra's 2012 Budget. For ore processing: Colquiri Mine Three Year Plan 2012-2014, July 2011, p. 36, **C-108** and *Compañía Minera Colquiri* Annual Budget for 2012, "Planta" tab, cells O24, O26, **R-33**; for ore processing rates, capital expenditures, unit cost per tonne: Colquiri Mine Three Year Plan 2012-2014, July 2011, pp. 36, 109, 119, **C-108** and Sinchi Wayra S.A. 2012 Budget, GB014019, "Colquiri" tab, cells O14, O150 and rows 38 to 45, **R-431**; for expansion capital: Colquiri CAPEX and Projects Statement, February 2012, GB014123, "Colquiri" tab, row 372, **R-432**, and Colquiri Mine Three Year Plan 2012-2014, July 2011, p. 119, **C-108**.

⁴⁹³ See Bolivia's Reply Post-Hearing Brief on Quantum, ¶ 30; March 2012 Investment Plan, April 4, 2012, p. 16, **EO-07**.

327. Lastly, it is important to note that despite the fact that the Tribunal rejects the plan as an overall basis or starting point for the valuation, it is possible that certain variables contained within the plan have a sufficient evidentiary foundation for valuation purposes.

ii. *March 2012 Investment Plan*⁴⁹⁴

328. In March 2012 (8 months after the Triennial Plan), Sinchi Wayra submitted to COMIBOL a new plan (the “**March 2012 Investment Plan**”) which, in comparison to the Triennial Plan, was “less ambitious”.⁴⁹⁵ In its post-hearing briefs, the Claimant indicated that the valuation should, “at the very minimum,” be based on this plan.⁴⁹⁶ In this regard, it seemed to depart from its previous view that the March 2012 Investment Plan would not be appropriate. According to the Claimant’s expert, “even if more recent to the date of valuation, the March 2012 [Investment] Plan does not appear to be a plan that Colquiri or Sinchi Wayra would have implemented if operating under a purely private-company model”.⁴⁹⁷ On the other hand, although the Respondent’s expert considered it a “good starting point”, he made it clear that further adjustments were warranted.⁴⁹⁸

a. Analysis by the Tribunal

329. As a basis for the valuation, the March 2012 Investment Plan is also problematic in the Tribunal’s view. *First*, there are almost no supporting documents for the 7-page document.⁴⁹⁹ *Second*, there is no evidence that the Triennial Plan was ever approved or seriously considered as a basis for future plans by Glencore in the Colquiri Mine.⁵⁰⁰ It seems more like a working document that

⁴⁹⁴ March 2012 Investment Plan, 4 April 2012, **EO-07**.

⁴⁹⁵ Claimant’s Post-Hearing Brief, ¶ 12.

⁴⁹⁶ “In the alternative”. Claimant’s Post-Hearing Brief, ¶ 30. “Bolivia cannot assert that Colquiri was not expanding by May 2012 at least pursuant to the March 2012 Plan. Bolivia’s mining *and* damages experts, Dr. Rigby and Dr. Flores, both testified that the March 2012 Plan is a ‘good starting point’ for valuing Colquiri”. Claimant’s Post-Hearing Reply, ¶ 15.

⁴⁹⁷ Compass Lexecon Second Expert Report, 22 January 2019, ¶ 22. See also “*Q: And, Mr. Clow, why did you base your opinions on the Triennial Plan instead of relying on the 2012 Colquiri budget or the March 2012 Investment Plan*). A: [...] we relied on the Triennial Plan because it has the most detail behind it [...] **we had nothing behind the other two of any consequence**” (Transcript, Hearing on Quantum, Day 4, p. 523, lines 9-16 (Mr. Clow)). Bolivia’s Post-Hearing Brief, ¶ 25 and Bolivia’s Reply Post-Hearing Brief on Quantum, ¶ 40.

⁴⁹⁸ Dr. Flores response to Arbitrator Gotanda (Transcript, Hearing on Quantum, Day 5, p. 875, line 8-p. 876, lines 5-15) (Dr. Flores). Bolivia’s Reply Post-Hearing Brief on Quantum, ¶ 44. See also, SRK Second Expert Report, 8 June 2020, ¶ 48; Flores Second Expert Report, 8 June 2020, ¶ 216.

⁴⁹⁹ March 2012 Investment Plan, 4 April 2012, **EO-07**; Sinchi Wayra S.A., Investments, March 2012, GB013973, **R-454**.

⁵⁰⁰ Claimant indicates that: “although Bolivia’s experts prefer the March 2012 Investment Plan, Glencore Bermuda did not develop that plan until March 2012 (as the name implies), and though Glencore Bermuda had presented the plan to Bolivia in the context of negotiations, there is no evidence that the March 2012

was updated regularly; for example, an updated version of this plan was produced in April. *Lastly*, the Claimant's last-minute support for this plan appears inconsistent with its own expert's opinion that the plan was not a valid valuation reference. Consequently, the Tribunal concludes that the March 2012 Investment Plan cannot serve as a suitable basis for Colquiri's valuation.

iii. *Non-Expansion Scenario*

330. After the Hearing on Quantum, the Tribunal requested the Parties' experts to agree, and in the alternative, each to present an estimate of mineable material (including replenishment) based on the historical performance and the operating expenditures ("**OPEX**") without regard to the Triennial Plan. Additionally, the Tribunal requested a joint valuation model that included several variables, such as resources, reserves, production, head grades, recovery, concentrate grades, the Tailings Plant (production and CAPEX), OPEX, General & Administrative expenses ("**G&A**"), the Rosario Vein, Working Capital, First Year Apportionment and Life of the Mine ("**LOM**"). The model would include each Party's projection, estimates in accordance with certain variables of the March 2012 Investment Plan, as well as the Tribunal's requested estimates, *i.e.*, the non-expansion scenario.⁵⁰¹
331. Having rejected both plans, the Tribunal finds that this is the most likely scenario that a willing buyer would consider, and for this reason, it shall serve as the primary basis for the Tribunal's damages evaluation. On the basis of this joint model, the Tribunal will evaluate each variable and the areas of disagreement among the experts.

Plan had been approved by Glencore Bermuda as a replacement for the Triennial Plan which it was already implementing in early 2012 around the same time that the March 2012 [Investment] Plan was completed." Claimant's Post-Hearing Brief, ¶ 22. "I have reviewed this document and can confirm that it is an investment plan that Sinchi Wayra prepared in March 2012 at the request of Comibol in the context of the forced renegotiations of the mining contracts". Eskdale Third Witness Statement, ¶ 49.

⁵⁰¹ Letter to the Parties, 22 September 2021, Annex.

a. Mineral Reserves and Resources

332. A mineral reserve is “the economically mineable part of a Measured and/or Indicated Mineral Resource⁵⁰² [...]”⁵⁰³ Additionally, “[r]eserves represent the quantity of ore that can be economically extracted over the life of the mine with a reasonable level of certainty based on the known and expected technical parameters and economic environment at the time of the estimate. Resources include the ore making up the reserves estimate, but include additional ore for which the level of confidence for economic extraction is less than that of the ore making up the reserves estimate.”⁵⁰⁴ The “mine and replenish practice”, according to the Claimant, “is customary practice in the mining industry, in the case of mines with large mineral deposits and a high degree of success in discovering new Mineral Resources and in converting Mineral Resources to Ore Reserves to carry only a portion of the mineralization as Ore Reserves. This is normally done in cases where the deposit has been demonstrated to be large and the conversion rate has been demonstrated to be consistent over time”.⁵⁰⁵
333. As of 31 December 2011, the total mineral resources for the Colquiri Mine estimated by Glencore were 4.2 metric tonnes (“**MT**”) consisting of 1.82% tin and 9.17% zinc, inclusive of Ore Reserves of 1.6 Mt consisting of 1.40% tin and 8.07% zinc.⁵⁰⁶ The Claimant explains that its valuation is based on 9.78 million tonnes of ore projected to be extracted from the Colquiri Mine between 2012 and the expiration of the Colquiri Mine Lease in 2030. The Claimant submits that the values could be achieved based on the “mine and replenish” method.⁵⁰⁷ On the other hand, the Respondent contends that the mineable material should be 4.16 Mt after applying the discounts,

⁵⁰² “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.” “*Mineral Resources are sub-divided, in order of increasing geological confidence, into Inferred, Indicated and Measured categories. An Inferred Mineral Resource has a lower level of confidence than that applied to an Indicated Mineral Resource. An Indicated Mineral Resource has a higher level of confidence than an Inferred Mineral Resource but has a lower level of confidence than a Measured Mineral Resource*”. CIM Definition Standards for Mineral Resources and Mineral Reserves, 10 May 2014, p. 3, **R-263**.

⁵⁰³ CIM Definition Standards for Mineral Resources and Mineral Reserves, 10 May 2014, p. 5, **R-263**. See also, Bolivia’s Statement of Defence, ¶ 744.

⁵⁰⁴ Flores First Expert Report, ¶ 26.

⁵⁰⁵ RPA First Expert Report, ¶ 90.

⁵⁰⁶ RPA Second Expert Report, ¶ 30.

⁵⁰⁷ Claimant’s Reply on Quantum, ¶¶ 81, 85 and 86.

subtracting the reserves depleted during 2012 (which results in 3.785 Mt of mineable material) and adding a 10% due to “dilution at zero grade”.⁵⁰⁸ We will address both projections.

b. The Mine and Replenish Method

334. According to the Claimant, the mine and replenish method “is customary practice in the mining industry, in the case of mines with large mineral deposits and a high degree of success in discovering new Mineral Resources and in converting Mineral Resources to Ore Reserves to carry only a portion of the mineralization as Ore Reserves. This is normally done in cases where the deposit has been demonstrated to be large and the conversion rate has been demonstrated to be consistent over time”.⁵⁰⁹ The Claimant posits that “[o]ver the fourteen-year period from 2005 to 2018, Ore Reserves were replaced annually and it is reasonable to assume that this system of ‘mine and replenish’ would continue.”⁵¹⁰
335. Glencore Bermuda’s witness, Mr. Lazcano, confirms that “Colquiri’s geological characteristics (large, continuous veins of minerals) and long track record of identifying new ore pursuant to the ‘mine and replenish’ method made Sinchi Wayra confident that the [Colquiri] Mine had more than sufficient amounts of ore to sustain the extraction levels projected in the Triennial Plan through the expiration of the Colquiri [Mine] Lease in 2030”.⁵¹¹ Claimant’s expert also contends that “the practice of willing buyers paying for un-delineated minerals ‘represents both the previous practice and the current reality’ in the mining industry.”⁵¹²
336. The Claimant further submits that “[i]n 2014, [COMIBOL] published a document stating that [the] total Reserves and Resources at that time was 5,141,000 tonnes, providing a potential mine life of approximately 17 years at the production rate at that time of approximately 300,000 tonnes per year. This is an increase to the MROR estimate at the Mine Valuation Date [29 May 2012] of approximately 960,000 tonnes, despite the extraction that was carried out in the intervening period in the order of 900,000 tonnes of ore. The replacement during the period 2011 to 2014 was therefore approximately two million tonnes”.⁵¹³ Moreover, the Claimant points to a statement made after the valuation date by Bolivia’s witness, then General Manager of Empresa Minera Colquiri, “confirm[ing] that the [Colquiri] Mine had sufficient ore to operate for another 15 years

⁵⁰⁸ Bolivia’s Post-Hearing Brief, ¶¶ 34-43.

⁵⁰⁹ RPA First Expert Report, ¶ 90.

⁵¹⁰ RPA Second Expert Report, ¶ 34.

⁵¹¹ Claimant’s Reply on Quantum, ¶ 86.

⁵¹² Claimant’s Post-Hearing Brief, ¶ 28.

⁵¹³ RPA First Expert Report, ¶ 93.

(i.e., until 2030), and that [the then General Manager] expected that time horizon to increase to 40 years based on exploration studies then underway.”⁵¹⁴

337. Bolivia contends that in the Claimant’s valuation “resources are delineated and reserves replenish ‘magically’ without the need for exploration, and 100% of such reserves and resources are mined (including inferred resources, which international standards consider to be *geologically uncertain*).”⁵¹⁵ The Respondent further contends that “[h]istorically, this is indeed correct, but there can be no guarantee that this would have continued for a further 20 years post 2012”.⁵¹⁶ The Respondent also alleges that it is contrary to common sense to assume that Colquiri “would maintain the same levels of reserves and resources forever”⁵¹⁷ and relies on the 2003 Standards and Guidelines for Valuation of Mineral Projects of the Special Committee on the Valuation on Mineral Projects (CIMVAL), which provide that: “[i]t is not acceptable to use, in the *Income Approach* [i.e., DCF], ‘potential resources’, ‘hypothetical resources’ and other such categories that do not conform to the definitions of Mineral Reserves and Mineral Resources”.⁵¹⁸ The Respondent contends that examples where “the purchasers departed from the industry standards and paid for undiscovered and unmeasured resources” are not comparable to the Colquiri’s lease.⁵¹⁹ Finally, the Respondent’s expert, Dr. Rigby of SRK, concedes that there was replenishment but that it is taken into account “by converting a substantial portion of the Resources available to be mineable. I’ve actually overstepped my boundary by including Inferred Resources. So, I have given a lot of credit for ongoing exploration and replenishment.”⁵²⁰

⁵¹⁴ Claimant’s Reply on Quantum, ¶ 88. See also “Empresa Minera Colquiri proyecta 40 años de vida útil,” *Minería Noticias*, June 2006, p. 2, **C-312**. Eng. Moreira confirmed this statement in 2017. RPA Second Expert Report, ¶ 40; Ministry of Mining and Metallurgy, “Colquiri descubre tres nuevas vetas de minerales”, 14 June 2017, p. 2, **RPA-42**.

⁵¹⁵ Bolivia’s Statement of Defence, ¶ 747.

⁵¹⁶ SRK First Expert Report, ¶ 43.

⁵¹⁷ Bolivia’s Rejoinder on Quantum, ¶ 169.

⁵¹⁸ CIMVAL Standards and Guidelines for Valuation of Mineral Properties, February 2003, p. 25, G4.9 (emphasis added), **RPA-73**; The CIMVAL Code for the Valuation of Mineral Properties, 2019, **R-435** provides similarly, in Section 3.4.3, that “[i]n the *Income Approach*, it is **generally** not acceptable to use in a Valuation any mineralization categories (such as potential quantity and grade, potential resource, exploration potential, exploration target, potential deposit, or target for further exploration) that do not conform to the definitions of Mineral Reserves and Mineral Resources.”).

⁵¹⁹ Bolivia’s Reply Post-Hearing Brief on Quantum, ¶ 66.

⁵²⁰ Transcript, Hearing on Quantum, Day 4, p. 606, lines 19-15 (Dr. Rigby). See also Bolivia’s Reply Post-Hearing Brief on Quantum, ¶ 53.

c. Analysis by the Tribunal

338. The Tribunal notes that historically there has been replenishment of the mineable material. The Tribunal understands that, considering the replenishment history of the mine, the issue at hand is one of how much mineable material would likely be available for extraction over time. The Claimant contends that Colquiri would have continued to replenish after May 2012 the reserves and resources that had been identified at the Colquiri Mine,⁵²¹ and thus, replenishment would have allowed for the expansion plans provided by the Triennial Plan or the March 2012 Investment Plan. However, based on the lack of supporting evidence, it would be highly speculative to anticipate that the replenishment would be of such magnitude as to reach the amount of mineable material needed to meet the ore production targets set by the Triennial Plan.
339. On the other hand, the Respondent alleges that replenishment has already been taken into account in its calculation. We will now address this issue.
340. Based on the testimony of Eng. Moreira, the Respondent's experts applied a 10% discount to reserves. According to Eng. Moreira, “*not everything that qualifies as a reserve reaches production*’ (only 90% reaches production) because 10% of the reserves are left inside the mine as pillars for stability and safety reasons.”⁵²² Dr. Rigby explained at the Hearing on Quantum that this is consistent with Colquiri's practice of reporting reserves without applying a mining recovery factor and only applying such factor when planning production, as noted by Glencore in its due diligence. He stated that he “*applied a 10 percent deduction for sill and collection drive pillars because [...] at the Reserve estimation stage those pillars are not accounted for. They're only accounted for by mine planning*”.⁵²³ The Claimant's due diligence report for the Colquiri Mine stated that “[t]he reserve has not factored in a mine recovery; however, a [mining] recovery of 85% is used by the planning department”. That is, Glencore applied a mining recovery discount of 15% to Colquiri's reserves when it acquired the Colquiri Mine Lease (higher than the 10% discount proposed by Dr. Rigby).⁵²⁴ The Claimant contends that under the Australian Joint Ore Reserves Committee Code [the JORC Code], the reductions that the Respondent's expert proposes for ore reserves are already accounted for in the calculation of ore reserves, and

⁵²¹ Claimant's Post-Hearing Brief, ¶ 24; Claimant's Post-Hearing Reply, ¶¶ 4 and 20.

⁵²² SRK First Expert Report, ¶ 52.

⁵²³ Bolivia's Post-Hearing Brief, ¶ 41 and Transcript, Hearing on Quantum, Day 4, p. 549, lines 12-15 (Dr. Rigby). See also Colquiri Updated Due Diligence, p. 2, **SRK-42**.

⁵²⁴ Bolivia's Post-Hearing Brief, ¶ 41.

therefore, further reductions would result in double reductions and be improper pursuant to that code.⁵²⁵

341. With respect to resources, the Respondent's expert in its first report, based on the advice of Eng. Moreira, indicated that "[r]esources must be factored by 60% as experienced by Colquiri operating history."⁵²⁶ In its second report, the Respondent's expert alleged that the basis for this 40% discount "is the operating experience at Colquiri Mine over many years. According to Colquiri's resource and reserve statements in 2012, approximately 70% of the delineated mineral resources is in the [i]nferred category, implying a low level of geological certainty".⁵²⁷ The Respondent also contends that "if anything, [its expert] SRK's analysis is conservative"⁵²⁸ and "neither Claimant nor its experts have rebutted Eng. Moreira's technical explanation that, historically, only 60% of the Colquiri resources become reserves."⁵²⁹ During the Hearing on Quantum, the Respondent's expert put forward another explanation for the 40% discount. Dr. Rigby explained that he took into account a "15% discount that accounts for the geological uncertainty of resources"⁵³⁰ and a "25% mining recovery discount to resources resulting from (i) a 15% deduction for 'inter stope rib pillars left in place to ensure stope stability' (i.e., vertical pillars), and (ii) a 10% deduction for 'sill and collection drive pillars left in place' (i.e., horizontal pillars)"⁵³¹ (emphasis added). Conversely, the Claimant argues that "while some mineral resources may not be converted to ore reserves, SRK (the Respondent's expert) provides no support for the low conversion rate that would result from a 40% reduction in mineral resources, and that [the] high rate of reduction is contrary to Colquiri's long history of replenishing MROR."⁵³²

342. The Tribunal finds that the discounts proposed by the Respondent lack support. Both discounts were based on the testimony of Eng. Moreira. He did not attend the Hearing on Quantum and, consequently, could not be cross-examined on this issue. Moreover, in the case of reserves and resources, the Respondent's expert provides no solid basis for the 10% and 40% discounts.⁵³³

⁵²⁵ RPA Second Expert Report, ¶¶ 20 (b)(i) and 48. See also Claimant's Reply on Quantum, ¶ 83.

⁵²⁶ SRK First Expert Report, ¶ 53.

⁵²⁷ SRK Second Expert Report, ¶ 33.

⁵²⁸ Bolivia's Rejoinder on Quantum, ¶ 395.

⁵²⁹ Bolivia's Rejoinder on Quantum, ¶ 391.

⁵³⁰ Bolivia's Post-Hearing Brief, ¶ 36.

⁵³¹ Bolivia's Post-Hearing Brief, ¶ 38. Transcript, Hearing on Quantum, Day 4, p. 548, line 23-p. 550, line 16 (Dr. Rigby).

⁵³² Claimant's Reply on Quantum, ¶ 83.

⁵³³ Claimant's Post-Hearing Reply, ¶¶ 21 and 22. SRK Second Expert Report, ¶¶ 32 and 33.

Finally with respect to resources, the new argument put forward by the Respondent's expert also lacks evidentiary support.⁵³⁴

343. For all the above reasons, the Tribunal finds that it is reasonable to take the 1,555 tonnes of reserves and 4,181 tonnes of resources as the starting point of the valuation. In addition, given the replenishment history of the Colquiri Mine, the Tribunal also finds that the mineable material would be sufficient to maintain historic extraction levels (*i.e.*, 307,000 tonnes per year).

C. Production

344. For its Discounted Cash Flow (“**DCF**”) model, the Claimant's expert used the latest Triennial Plan as a basis along with other inputs. According to the Claimant, “[i]n the Colquiri Triennial Plan prepared on July 2011, Colquiri envisioned an increase in ore production to 550,579 tonnes per year by 2014.”⁵³⁵ The plan also envisioned doubling the ore processing. “The existing capacity of the Colquiri Mine Concentrator as of the Mine Valuation Date [29 May 2012] was 1,000 tpd of ore processed”. The Claimant submits that one of the key objectives of the Triennial Plan was to increase the processing rates of the Colquiri Mine to approximately 2,000 tpd (550 ktpa) of ore extracted and 2,000 tpd of ore processed by the end of 2014.⁵³⁶ According to the Claimant, the expansion was intended to allow Glencore Bermuda to take advantage of then high mineral prices and to commercialize the large quantity of minerals present in the Colquiri Mine and the old tailings. Glencore Bermuda's expansion plans were four-fold:⁵³⁷

- Expanding Colquiri's *capacity* to extract ore from the Colquiri Mine;
- Expanding the capacity of the existing Concentrator Plant to process *additional* ore;
- Building a *new concentrator plant to reprocess* the minerals retained in the Colquiri Mine's old tailings; and
- Expanding its tailings *storage facilities*.

345. The Claimant also points to the fact that COMIBOL recently announced “it[s] plans to construct a new concentrator to process the old tailings, just as Glencore Bermuda planned to do, confirming

⁵³⁴ Claimant's Post-Hearing Reply, ¶ 22.

⁵³⁵ Compass Lexecon First Expert Report, 15 August 2017, ¶ 51.

⁵³⁶ RPA Second Expert Report, ¶ 52.

⁵³⁷ Claimant's Reply on Quantum, ¶ 38.

that, contrary to SRK’s assertions, Bolivia itself believes that it makes sense economically to reprocess Colquiri’s old tailings.”⁵³⁸

346. Conversely, the Respondent takes issue with the expansion of extraction and ore processing. Bolivia contends that “despite all the investments made *ex post* by State-owned Colquiri to increase the [p]lant’s ore processing levels (with an investment of US \$ 2 M approx.), between 2013 and 2019 the [p]lant has only processed an annual average of 369,960 MT [...] *i.e.*, 30% less than the annual average of 527,686 MT assumed by [the] Claimant during this same period”.⁵³⁹

i. *Expanding Extraction Capacity: Main Ramp*

347. According to the Claimant, to expand the Colquiri Mine, “Colquiri had dug deeper into the Colquiri deposit, creating work areas at different depths and expanding the width of those work areas”. In order to extract 550,500 tonnes of ore per year as forecasted in the Triennial Plan, Colquiri planned to build a “new ramp within the [Colquiri] Mine by which trucks would transport ore out of lower levels of the [Colquiri] Mine”. By May 2012, Colquiri had begun constructing the new ramp, as confirmed by Bolivia’s own witness Eng. Moreira. The contract to build the ramp provided that it would be completed by July 2013—*i.e.*, five months before the Colquiri Mine was projected to have begun to extract 550,500 tonnes of ore per year.⁵⁴⁰ According to the Claimant’s witness, Mr. Lazcano, the construction of the main ramp would have taken 15 months.⁵⁴¹ To the Respondent this is “unrealistic”.⁵⁴² It contends that Glencore’s own contemporaneous documents show longer timeframes⁵⁴³ and that the construction of the main

⁵³⁸ Claimant’s Reply on Quantum, ¶ 89.

⁵³⁹ Bolivia’s Rejoinder on Quantum, ¶ 444.

⁵⁴⁰ Claimant’s Reply on Quantum, ¶ 75(b).

⁵⁴¹ Lazcano Third Witness Statement, fn. 56; Construction contract between Colquiri and Arcal Mineros, 14 March 2012, p. 1, **C-325**.

⁵⁴² Bolivia’s Rejoinder on Quantum, ¶ 437 and Bolivia’s Post-Hearing Brief, ¶ 60.

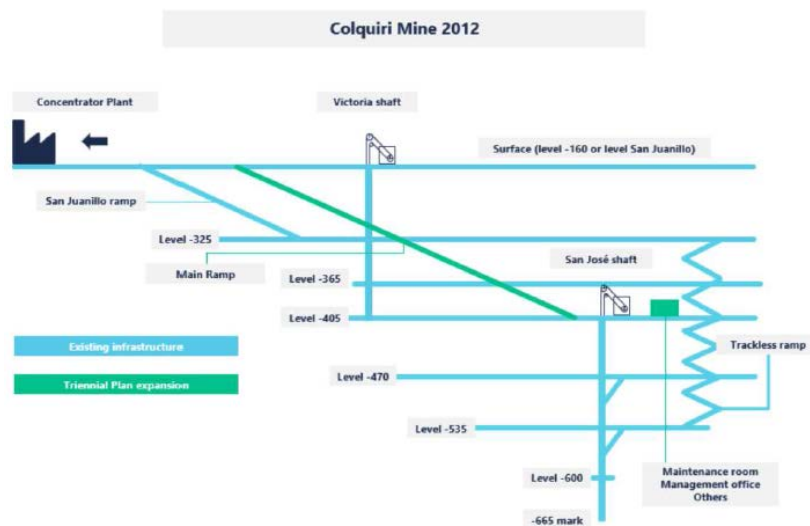
⁵⁴³ “The time determined by the Company is 20 months.” (Unofficial translation). Spanish original: “*El tiempo determinado por la [c]ompañía es 20 meses*” Colquiri Mine Expansion Project, p. 7, **C-324**.

ramp took, in reality, several years.⁵⁴⁴ The main ramp was built in 2017 at a cost of US\$11.6 million, as opposed to the US\$4.2 million considered in the Claimant's valuation.⁵⁴⁵

a. Capacity

348. According to the Claimant, until the ramp was completed in 2014, "the Colquiri Mine's existing infrastructure would have been sufficient to support the extraction levels projected in the Triennial Plan".⁵⁴⁶ According to the Respondent, "[i]f, as Mr. Lazcano now says, there was no need for the Main Ramp to increase production and tin prices reached a record high in 2011, why did Glencore never produce[] more than 356,178 MT before reversion? Simply because the [Colquiri] Mine could not produce more. In the 2005-2011 period, Colquiri's actual extraction levels have always been below [the] Claimant's forecasts (and Glencore was even forecasting a decrease in extraction levels since 2009)".⁵⁴⁷

b. Bottle Necks



Claimant's Reply on Quantum, p. 58; SRK Second Expert Report, p. 19.

⁵⁴⁴ "Tras la reversion, Arcal retomó los trabajos de la rampa, pero a finales de 2012 sólo había avanzado 300 metros dado que no tenían ni la capacidad ni la experiencia para llevar a cabo un proyecto como éste. Finalizar esta rampa nos tomó 3 años [...] y una inversión de 80.120.718,09 Bolivianos" (unofficial Translation: "After the reversion, Arcal resumed the works of the ramp, but at the end of 2012 they had only advanced 300 meters since they did not have the capacity or the experience to carry out a project like this. Finishing this ramp took us 3 years [...] and an investment of 80,120,718.09 Bolivianos"). First Moreira Witness Statement, ¶ 48.

⁵⁴⁵ Bolivia's Rejoinder on Quantum, ¶ 438.

⁵⁴⁶ Claimant's Reply on Quantum, ¶ 95.

⁵⁴⁷ Bolivia's Rejoinder on Quantum, ¶ 411.

349. The Respondent posits that the main ramp *would not solve* the problems posed by the Colquiri Mine's bottlenecks. It points out that, "given that the main ramp only connects level -405 to the surface, the capacity constraints to the transportation of ore from levels below -405 to level -405 (through the San José winze) remain, which in turn, limits the amount of ore that reaches the Concentrator Plant, affecting its processing levels and making it impossible to achieve the Claimant's production forecasts".⁵⁴⁸ In this vein, Bolivia alleges that the Claimant ignores that the San José and Victoria winzes "are bottlenecks that make it impossible to transport the 550,579 MT of mineralized material per year that its valuation assumes",⁵⁴⁹ and "[a]ny increase in extraction levels was subject to the capacity and limitations of these winzes", which are bottlenecks that make it physically impossible to reach the Claimant's projected extraction levels and, in consequence, its projected production levels.⁵⁵⁰

c. Victoria Winze

350. The Victoria winze "is a main ore hoisting facility as well as the service and man entry for the lower mine levels".⁵⁵¹ According to the Respondent, Glencore argues that (i) the Victoria winze could transport more than 390,000 MT per year, thus it would have been able to sustain the extraction levels assumed by the Claimant's valuation for 2012 (360,000 TM) and 2013 (390,000 TM), and (ii) that, by 2014, the main ramp connecting level -405 to the Colquiri Mine surface would have been built, allowing the increase of transport capacity to 550,500 MT per year.⁵⁵²

351. According to the Respondent, the alleged capacity of the Victoria winze is unsupported,⁵⁵³ for the following reasons: Glencore's contemporaneous documents confirm that, before the reversion, the Victoria winze was already working at full capacity. A Sinchi Wayra report prepared in 2010, when Colquiri's annual extraction levels averaged 278,678 MT (*i.e.*, 77% of the extraction level assumed by the Claimant in 2012, 71% compared to 2013 and 50% compared to 2014), states that: "[t]he mine is ready to increase its production, the main problem why these goals cannot be accomplished is because the infrastructure of the Victoria winze does not allow it, it is currently

⁵⁴⁸ Bolivia's Rejoinder on Quantum, ¶ 176.

⁵⁴⁹ Bolivia's Rejoinder on Quantum, ¶ 175.

⁵⁵⁰ Bolivia's Rejoinder on Quantum, ¶ 410.

⁵⁵¹ RPA First Expert Report, ¶ 101.

⁵⁵² Bolivia's Rejoinder on Quantum, ¶ 427.

⁵⁵³ Bolivia's Rejoinder on Quantum, ¶ 428.

at its maximum capacity”.⁵⁵⁴ In the Respondent’s view, the Claimant cannot seriously contend that the Victoria winze could support by itself – *i.e.*, without the main ramp – “an annual extraction rate of 390,000 MT; a new shaft would be needed to increase extraction levels”. It alleges that “Compass Lexecon’s valuation ignores the need for this new shaft; the valuation does not consider the cost of building the shaft or the time that this would have taken”.⁵⁵⁵

352. Finally, Mr. Lazcano’s analysis assumes that the Victoria winze works seamlessly and uninterruptedly at full nominal capacity “at least 14 hours per day”.⁵⁵⁶ This is false. Historically, the bearings, skips, etc. of the Victoria winze have experienced, and continue to experience, recurrent mechanical and electrical failures, which limit the winze’s working hours and the amount of material it can transport.⁵⁵⁷

d. San José Winze

353. According to the Respondent, it is undisputed that, under the Claimant’s expansion plans, most of the additional mineralized material would come from levels below -405. Any production from these levels would have to be transported to the surface first through the San José winze (which connects levels below -405 to level -405) and, thereafter, through the Victoria winze (which connects levels -405 to the surface).⁵⁵⁸ The Respondent indicates that “[t]he [Colquiri] Mine’s extraction rate would have been effectively capped by the San Jose winze’s extraction capacity, as happens in reality”⁵⁵⁹ and that the due diligence report prepared by Glencore in 2004 describes the San José winze as a “possible bottle neck.”⁵⁶⁰
354. According to the Claimant, the San José winze would not have been a bottleneck because it had the capacity to transport, at least, 900 tpd.⁵⁶¹ In this regard, Bolivia contends that the exhibit referenced only shows certain characteristics of the winze. As explained by Eng. Moreira, the

⁵⁵⁴ Colquiri S.A. Mine Evaluation and Projections Report, September 2009-January 2010, GB006663, 8 September 2009, p. 7, **R-436** (unofficial translation). Spanish original: “La mina se encuentra preparada para poder incrementar su producción, el problema principal por el cual no se puede lograr estas metas es porque la infraestructura del cuadro Victoria no lo permite, actualmente el cuadro se encuentra en su máxima capacidad [...]”. See also Bolivia’s Rejoinder on Quantum, ¶ 431.

⁵⁵⁵ Bolivia’s Rejoinder on Quantum, ¶ 432.

⁵⁵⁶ Lazcano Third Witness Statement, fn. 46.

⁵⁵⁷ Bolivia’s Rejoinder on Quantum, ¶ 434.

⁵⁵⁸ Bolivia’s Rejoinder on Quantum, ¶ 174.

⁵⁵⁹ Bolivia’s Rejoinder on Quantum, ¶ 439. See also Bolivia’s Rejoinder on Quantum, ¶ 413.

⁵⁶⁰ Bolivia’s Rejoinder on Quantum, ¶ 414. Glencore Internal Memo, 2004, p. 6, **R-302**.

⁵⁶¹ Lazcano Third Witness Statement, ¶ 37; Technical characteristics of the San Jose and Victoria winches, 11 December 2017, pp. 1-2, **R-37**.

winze's maximum capacity was around 300 tpd.⁵⁶² The Claimant also alleges that the San José winze capacity could be expanded by: replacing the existent winze by another one with more power, and adding another *skip* to it.⁵⁶³ According to the Respondent, even if this was accurate, it still does not address or explain how the San José winze could have extracted the 2,000 tpd assumed by the Claimant's valuation (*i.e.*, more than double the 900 tpd calculated by Mr. Lazcano).⁵⁶⁴

355. The Claimant also contends that "Colquiri had approved a US\$1.2 million investment to increase its extraction capacity during the ramp-up period."⁵⁶⁵ The Respondent replies that this is just "a 'stay in business' investment in the winze of US \$1.2 M (as opposed to an 'expansion investment')". In its view, exhibit **R-34** confirms that "[w]hile it was planned to make an investment in that winch, it was only to replace the engine and improve its reliability. Not to increase production",⁵⁶⁶ and this is consistent with contemporaneous Colquiri reports showing that the winze's engine was old and was experiencing technical problems on a regular basis.⁵⁶⁷ Finally, the Respondent alleges that historically, the San José winze has experienced, and continues to experience, mechanical problems, which limit the winze's working hours and the amount of material it can car⁵⁶⁸

e. Concentrator Plant

356. "[T]he Triennial Plan provided for the expansion of the processing capacity of the Concentrator Plant from 1,000 to 2,000 tonnes of ore per day to be able to process the 550,500 tonnes of ore that would be extracted from the Colquiri Mine each year beginning in 2014. A Colquiri report from the first quarter of 2012 stated that these expansion plans for the Plant were on 'average' 20.7% complete". "In its report dated August 2011, Holland & Holland concluded that the expansion plan was feasible, observed that the Concentrator Plant was already being improved, and provided recommendations for the expansion".⁵⁶⁹

⁵⁶² Bolivia's Rejoinder on Quantum, ¶ 417.

⁵⁶³ Bolivia's Rejoinder on Quantum, ¶ 415.

⁵⁶⁴ Bolivia's Rejoinder on Quantum, ¶ 416.

⁵⁶⁵ Claimant's Post-Hearing Reply, ¶ 29.

⁵⁶⁶ Moreira First Witness Statement, ¶ 47.

⁵⁶⁷ Bolivia's Rejoinder on Quantum, ¶ 418.

⁵⁶⁸ Bolivia's Rejoinder on Quantum, ¶ 421.

⁵⁶⁹ Claimant's Reply on Quantum, ¶ 75(c); Colquiri first quarter analysis, April 2012, pp. 28-33, **C-326**; Report on the expansion of Colquiri and Bolivar Concentrator Operations of Sinchi Wayra SA, Holland and Holland Consultants, August 2011, pp. 12-15, **C-323**.

357. According to the Respondent, “the Claimant’s assumption that, but for the reversion, the Plant would have been processing 2.000 tpd already by 2014 is disproved by other documents submitted by the Claimant in this arbitration. For instance, a report prepared, at the Claimant’s request, by consultants from Holland and Holland in September 2011 shows that an expansion of the Plant would have taken, at least, “*a nominal 3-4 year period [...]*.” Therefore, in the Respondent’s view, “even assuming *arguendo* that the Plant’s expansion works started in 2012, these works could only have been completed by 2015-2016 (and this is a nominal period, so most likely to be extended)”.⁵⁷⁰ The report states that “[t]he [P]lant expansion from 1000 tpd to 2,000 tpd will take place over a nominal 3-4 year period and will be based upon a staged approach of 1200, 1500, and ultimately 2,000 tpd. [...] It is known that the present equipment is not capable of the ultimate 2,000 tpd plant. However as and when the limit of the present equipment is achieved, the expansion to 2000 tpd will be reviewed. This step change to 2,000 tpd will require a considerable change to the process equipment and overall flowsheet, with appropriate capital expenditures. (Depending upon the expansion programme for Bolivar)”.⁵⁷¹
358. Additionally, the Respondent contends that the March 2012 Investment Plan “referred to by Mr. Lazcano indicates only that the flotation cells had been *budgeted for* (not that Sinchi Wayra had already obtained them)” and that it groups these and other related investments as part of the “[p]roject that will increase the capacity of the Concentrator Plant from 1,000 dry metric tonnes (“**DMT**”) to 1,300 DMT.” Therefore, there is no evidence that, as of the reversion date, Glencore had planned to increase the Plant’s processing capacity to 2,000 tpd (needed by the Claimant to support its valuation) or that such increase could be achieved in reality.⁵⁷²
359. Finally, the Claimant argues that COMIBOL recently announced its plans to construct a new concentrator to process the old tailings (just as Glencore Bermuda planned to do) “confirming that, contrary to SRK’s assertions, Bolivia itself believes that it makes sense economically to reprocess Colquiri’s old tailings”.⁵⁷³ On the other hand, the Respondent replies that, contrary to Glencore’s contention, the new concentrator plant that Colquiri has recently approved for construction does not assist the Claimant’s case because it will replace the existing plant to process ore obtained from the Colquiri Mine, therefore, “[i]t is not intended, nor will it have, the capacity to reprocess old tailings”. The “*Formulario de Nivel de Categorización Ambiental*” for

⁵⁷⁰ Bolivia’s Rejoinder on Quantum, ¶ 450.

⁵⁷¹ Report on the expansion of Colquiri and Bolivar Concentrator Operations of Sinchi Wayra SA, Holland and Holland Consultants, pp. 12-13, **C-323**.

⁵⁷² Bolivia’s Rejoinder on Quantum, ¶ 449 (unofficial Translation).

⁵⁷³ Claimant’s Reply on Quantum, ¶ 89.

the new concentrator plant shows that the “the current [plant will] paralyze its functioning when the new one starts operating,” which would render the Claimant’s argument inaccurate.⁵⁷⁴

f. New Tailings Storage Facility

360. To store the tailings that would have been produced by the Tailings Plant and the expanded Concentrator Plant, Colquiri had prepared engineering plans to expand the storage capacity of an existing tailings storage facility and purchased an easement over land where it planned to build a new tailings storage facility (the “**TSF**”).⁵⁷⁵

361. The Respondent contests RPA’s statement that the creation of storage capacity would be required until 2024, when the old tailings facility will be mined out and can be filled with new tailings.⁵⁷⁶ According to the Respondent’s expert, “even if this project was implemented and the old tailings mined out, it would only provide a possible site for the disposal of new tailings.” The Respondent’s expert points out that the old tailings dam is over 60 years old and was constructed at a time when design criteria and engineering standards were different from what they are today, indicating that this site “would still have to undergo extensive site preparation and engineering works and would likely require the placement of a geomembrane liner in view of the pyrite content and sulfidic nature of the future new tailings”.⁵⁷⁷

ii. Other Problems

362. The Claimant’s expert submits that the Triennial Plan’s provisions for power (Section 5.5) and water consumption (Section 8.2) “were more than enough to supply both the expanded Mine and [the] [m]ine [c]oncentrator, and the Tailings [Plant]” and that the section on power (Section 5.5) “specifically references the ability to meet the needs of future ore processing capacity of up to 5,300 tpd of ore processed”.⁵⁷⁸

a. Water

363. The Claimant alleges that it did consider the water and electricity needed for the expansion. It explains that the Triennial Plan and 2004 Feasibility Study accounted for the water that would be consumed by the expanded Concentrator Plant and the Tailings Plant. In this regard, “the water

⁵⁷⁴ Bolivia’s Rejoinder on Quantum, ¶ 535 (unofficial Translation). Colquiri, Environmental Categorization Level Form for the New Concentrator Plant, 12 June 2018, p. 3, **R-501**.

⁵⁷⁵ Claimant’s Reply on Quantum, ¶75(d).

⁵⁷⁶ RPA Second Expert Report, ¶ 172.

⁵⁷⁷ SRK Second Expert Report, ¶ 69.

⁵⁷⁸ RPA Second Expert Report, ¶ 170.

was to be sourced from Colquiri's tailings storage facilities (as was the practice as of May 2012), and the installation of [...] thickening tanks would have recycled water used in the concentrating process".⁵⁷⁹

364. According to the Respondent, the Claimant and its experts fail to consider the vast amounts of energy and water supply that would be needed to sustain production levels almost twice as high as the ones in 2011. The Respondent points out that this is all the more so under the Claimant's assumption that the Tailings Plant would have been developed, as processing levels would increase to a staggering 5,000 tpd.⁵⁸⁰ Finally, in the Respondent's view, the Claimant ignores the water shortage problems that also affect Colquiri's operations on a regular basis, and which are described in several Colquiri reports:⁵⁸¹

- "[t]he quality of the tin and zinc concentrates were below budget due to lack of water for process [...]";
- "[...] The lack of water for the process is affecting the metallurgical performance";
- "The activities of mine production were not normal, because of [...] lack of water and air during the month".⁵⁸²

b. Electricity

365. According to the Claimant, the Triennial Plan provided for the installation of an additional 2.3 megawatts of power generating capacity, which would have increased Colquiri's aggregate power and would have been sufficient to process over 5,300 tonnes of ore and tailings a day (at least 300 tonnes more material than the amount that would have been processed by the expanded Concentrator Plant and the Tailings Plant combined). The Claimant also submits that its expert reviewed these plans and agreed there would have been enough water and electricity, and that it would have been technically feasible to operate the expanded Colquiri Mine, the Concentrator Plant and the Tailings Plant.⁵⁸³

⁵⁷⁹ Claimant's Reply on Quantum, ¶ 99.

⁵⁸⁰ Bolivia's Rejoinder on Quantum, ¶ 177.

⁵⁸¹ Bolivia's Rejoinder on Quantum, ¶ 462.

⁵⁸² Sinchi Wayra S.A. Monthly Report, October 2007, GB010482, p. 2, **R-493**; Sinchi Wayra S.A. Monthly Report, October 2011, GB012867, p. 2, **R-464**; Colquiri Executive Operations Report, May 2017, p. 2, **R-494** (unofficial Translation).

⁵⁸³ Claimant's Reply on Quantum, ¶ 100 and RPA Second Expert Report, ¶ 171.

366. For its part, the Respondent alleges “that the Claimant ignores the electrical shortages and power cuts that affect the Colquiri Mine and plant operations on a regular basis, as recounted in several Colquiri reports prepared both before and after the reversion”:⁵⁸⁴

- “plant treated [...] below budget due to lost hours for electrical shortages [...]”;
- “During the month of May, the plant treated 19,870 tonnes of ore, 24% below budget due to lost hours for electrical shortages [...], which created almost one week lost of operations”;
- “Mine production was below budget because of [...] external power cuts due to bad weather (winds and snowfall)”;
- “[...] due to the constant and sudden energy cuts coming from the National Integrated System (SIN) affecting the metallurgic process and the horizontal and vertical extraction systems”.⁵⁸⁵

iii. *Analysis by the Tribunal*

367. The Claimant asserts that, in accordance with the Triennial Plan, ore extraction and processing would need to be doubled in three years. The Tribunal has already determined that we do not consider the Triennial Plan to be a realistic basis for the mine valuation and that it would be speculative to assume that the replenishment would be sufficient to meet the Triennial Plan’s extraction target. Nonetheless, the Tribunal will revisit the expansion plans to determine whether a willing buyer would have valued the Colquiri Mine based on the projections for ore extraction and processing contained in the Triennial Plan.

368. With respect to the main ramp, both Parties concur that this is a project that will increase extraction capacity. However, the rate and scale at which this would have occurred are unknown. The estimated cost and duration for this project’s construction in the Triennial Plan were unrealistic. Regarding the Claimant’s assertion that the existing Colquiri Mine infrastructure would suffice to achieve the Triennial Plan levels until the ramp was completed, we believe there is insufficient evidence to support such a substantial increase compared to historic extraction levels. In addition, there is no evidence as to how the “bottlenecks” (Victoria and San José winzes)

⁵⁸⁴ Bolivia’s Rejoinder on Quantum, ¶ 461.

⁵⁸⁵ Sinchi Wayra S.A. Monthly Report, April 2006, GB007498, p. 66, **R-490**; Sinchi Wayra S.A. Monthly Report, May 2006, GB007754, p. 69, **R-491**; Sinchi Wayra S.A. Monthly Report, July 2009, GB011360, p. 2, **R-488**; Colquiri Executive Operations Report, January 2013, p. 1, **R-492** (unofficial Translation).

would allow the substantial increase in capacity from historical levels and, in particular, how problems with their operation identified by the Respondent would be resolved.

369. In the case of the Concentrator Plant, contemporaneous documents indicating that it would require considerable change in equipment⁵⁸⁶ and that the desired increase in capacity is more modest cast doubt on the plant's capacity and increase in capacity (1,300 TMS as opposed to 2,000 TMS). Regarding the TSF, the Tribunal is not persuaded that the Claimant has addressed the viability of this project using the same site and how this project aligns with the Triennial Plan projections. According to Mr. Lazcano, "[b]oth projects were relatively simple tasks that are carried out regularly as part of any ordinary mining operation [extending the existing tailings dam and constructing the new tailings dam]"⁵⁸⁷.
370. The Claimant's expert indicated that "[i]ncreasing tailings storage capacity is a continuous practice in mining operations and is something that mining companies do in their ordinary course of business and it only depends on land and funds, both of which were available at Colquiri", and that "a new TSF (TSF #4) was planned to receive tailings from the expanded [m]ine Concentrator [Plant] and the Tailings [Plant] [c]oncentrator. [...] In relation to the construction of TSF #4, we have assumed that the additional 2.0 million tonnes of storage capacity would cost approximately US\$2.0 million, based on prorating the construction costs used in the Triennial Plan".⁵⁸⁸ However, for the Tribunal, concerns pointed out by the Respondent's expert that "the Triennial Plan's construction costs relate to the expansion of an existing tailings dam by simply extending the height of the wall [...] [and] [r]aising the embankment height of an existing dam is very different to constructing the initial embankment for a new dam [with the] construction [of the latter being] much more expensive as it involves much more engineering and foundation placement and site preparation"⁵⁸⁹ remain unanswered. The viability and simplicity of the Triennial Plan remains unclear for the Tribunal.

⁵⁸⁶ Lazcano Third Witness Statement, ¶ 18; Colquiri Mine Three Year Plan 2012-2014, July 2011, **C-108**; Colquiri Tailings Project, 2008, **C-91**.

⁵⁸⁷ Lazcano Third Witness Statement, ¶ 55. "[A]t the time of nationalization we had already identified the land where the New Tailings Dam would be built, and we had agreed with its owner the terms under which we would obtain the relevant mining easement" [...] "The Triennial Plan established that, after having secured access to the necessary land, the design of the New Tailings Dam would be produced in 2012, which is why we had not yet created it by the time of nationalization". Lazcano Third Witness Statement, ¶¶ 57 and 58.

⁵⁸⁸ RPA Second Expert Report, ¶¶ 177, 178 and 179. "RPA has added this capital expenditure of US\$5.9 million (US\$3.9 million for raise to 4,000 masl and US\$2.0 million for TSF #4) to its revised cash flow model." ¶ 180.

⁵⁸⁹ SRK Second Expert Report, ¶ 85.

371. Finally, the Respondent has identified current and future problems with water and electricity that would result from the expansion. The Triennial Plan in fact addresses both issues. However, it is unclear how these issues would be tackled considering not only the substantial increase of extraction and production, but also the current water and electricity problems identified by the Respondent.
372. In light of the above, the Tribunal is not able to proceed on the basis that extraction and ore processing at the Colquiri Mine would be performed at the pace and scale provided for in the Triennial Plan.

D. Grade or Mineral Concentration

373. “The grade is the concentration of metal in a ton of mineralized material” and is consequently fundamental to determine the revenue from mineralized material.⁵⁹⁰ Although metal may be present in ore, “[t]here is a certain grade below which it is not economically viable to mine and process”.⁵⁹¹ The head grade is “the quantity of a given metal, in this case expressed as a percent, in a given quantity of material.”⁵⁹²
374. The Claimant argues that “RPA reviewed the head grades for the Colquiri Mine that are projected in the Triennial Plan (1.29% tin and 7.52% zinc) and confirmed that they are reasonable because, among other reasons, they are consistent with the actual head grades of the ore that the Concentrator Plant processed from 2006 to 2012.” In its view, the Respondent’s expert assertion that “projected head grades should be reduced to bring them in line with the historical difference between the Colquiri Mine’s reserve grades and actual mined head grades” is misplaced. While the Claimant agrees that Colquiri’s actual mined head grades were approximately 7% lower than its reserve grades, it indicates that the head grades estimated in the Triennial Plan already include this 7% discount, so no additional discount should be applied.⁵⁹³
375. The Respondent disputes that Claimant’s valuation on the basis that it assumes “unreasonably high and constant head grades”. Particularly, it indicates that “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.”⁵⁹⁴ According to the Respondent, the

⁵⁹⁰ Bolivia’s Statement of Defence, ¶ 748.

⁵⁹¹ SRK First Expert Report, ¶ 45.

⁵⁹² RPA Second Expert Report, ¶ 66.

⁵⁹³ Claimant’s Reply on Quantum, ¶ 90.

⁵⁹⁴ Bolivia’s Statement of Defence, ¶ 751.

head grades estimated by the Claimant's expert RPA do not account for the substantial waste dilution that is incurred during the mining process.⁵⁹⁵ Moreover, the "Claimant's experts have not undertaken any deep exploration that would allow them to predict grade continuity through the mineral deposit and this assumption is inconsistent with the reality of Colquiri." As explained by the Respondent's expert, "future mining [...] will negatively impact grades".⁵⁹⁶

376. Conversely, the Claimant contends that "SRK's assertion that RPA's projections should be reduced because of an alleged downward trend in Colquiri head grades over time, based solely on 'a personal discussion with [Bolivia's witness] Engineer Moreira,' misconstrues the facts. The Colquiri Mine's head grades have varied over time, but are not trending downward. From 2005 to May 2012, the Colquiri Mine's average tin grade has remained consistent and average zinc grade has increased slightly. Further, ore grade has been demonstrated to increase with depth at Colquiri, and, as a result, it is reasonably likely that average head grades would have increased over the life of the Colquiri Lease as the Mine expanded to new depths."⁵⁹⁷

i. *Analysis by the Tribunal*

377. Despite being drawn from the Triennial Plan, the grades proposed by the Claimant are based on a methodology grounded on the difference between the historic mined and reserved grades. The Respondent contends that these grades do not account for dilution and are not based on deep exploration. However, the Respondent fails to explain the basis for its figures when the historical trend had not shown: (i) a substantial decrease in head grades;⁵⁹⁸ and (ii) that there is a correlation between depth and grade decrease.⁵⁹⁹ Furthermore, some of the figures seem to be based on Eng. Moreira's testimony, which could not be subject to cross-examination.⁶⁰⁰ For these reasons, the Tribunal finds that the grades proposed by the Claimant are more appropriate for valuation purposes.⁶⁰¹

⁵⁹⁵ Bolivia's Statement of Defence, ¶ 803.

⁵⁹⁶ Bolivia's Statement of Defence, ¶ 804.

⁵⁹⁷ Claimant's Reply on Quantum, ¶ 91.

⁵⁹⁸ RPA Second Expert Report, ¶ 76; Claimant's Post-Hearing Reply, ¶ 31.

⁵⁹⁹ RPA Second Expert Report, ¶ 77; Claimant's Post-Hearing Reply, ¶ 32.

⁶⁰⁰ SRK First Expert Report, ¶ 62.

⁶⁰¹ Experts' letter to the Tribunal, 18 November 2021, p. 5.

E. Metallurgical Recovery Rates

378. The metallurgical recovery rate refers to “the valuable metal recovered from a ton of mineral through metallurgical treatment”.⁶⁰² The metallurgical recovery “is the percentage of metal that is contained in the final saleable product (the mineral concentrate) after the mined material has been treated in the concentrator, and prior to smelting. For example, a head grade of 1.29% tin in one tonne of ore would contain 12.9 kg of tin. If the metallurgical recovery is 72%, the overall metal recovery will be 9.3 kg of tin.”⁶⁰³
379. Based on the projections for the Triennial Plan, the Claimant’s expert “projected average metallurgical recoveries of 72% for tin and 76% for zinc for the LOM (*i.e.*, until 2031), which would result in producing 24,224 tonnes of tin concentrate and 252,735 tonnes of zinc concentrate with grades of 50% for tin and 47% zinc”.⁶⁰⁴ According to the Respondent, average metallurgical recoveries between 2007 and 2012 were 68.21% for zinc and 63.62% for tin, which would confirm that the metallurgical recoveries in the Claimant’s expert report are overstated.⁶⁰⁵ Bolivia also indicates that “[h]istorical recovery rates for tin and zinc averaged 64.07% and 69.24%, respectively, between 2007 and 2011, but [the] Claimant assumes – relying solely on the Triennial Plan – that they would have reached historical maximums ‘of 72% for tin and 76% for zinc’ in 2012, and would have remained constant ever after”. It is Bolivia’s contention that this runs contrary to common sense.⁶⁰⁶

i. *Analysis by the Tribunal*

380. Based on the non-expansion scenario, the Parties’ experts agreed that the recovery rate would be 69% for zinc and 65.8% for tin.⁶⁰⁷ The numbers are based on the actual average for 2005-2012. Consequently, the Tribunal deems this rate appropriate for the valuation.

F. Operating Expenses (OPEX)

381. According to the Claimant, “[t]he operating costs of Colquiri are driven by the mine site cash costs, which include mine, concentrator, maintenance, and indirect expenses. Operating costs per tonne of ore mined and processed averaged US\$ 48.5 per tonne between 2006 and 2011 and were

⁶⁰² Bolivia’s Statement of Defence, ¶ 752.

⁶⁰³ RPA Second Expert Report, ¶ 79.

⁶⁰⁴ RPA Second Expert Report, ¶ 80.

⁶⁰⁵ SRK First Expert Report, ¶ 66.

⁶⁰⁶ Bolivia’s Rejoinder on Quantum, ¶¶ 477 and 476.

⁶⁰⁷ Experts’ letter to the Tribunal, 18 November 2021, p. 3; Bolivia’s Post-Hearing Brief, ¶ 77.

at US\$ 61.5 per tonne for the first months of 2012.” As for the Triennial Plan, operating costs per unit of ore processed are estimated to stabilize at US\$47.7 per tonne in 2014. The Claimant indicates that “the increase in production drives the reduction in unitary costs due to economies of scale”.⁶⁰⁸

382. On the other hand, the Respondent proposes US\$71.09 per MT for OPEX. For this, its expert report “relies on the 2011 forecast of operating costs included in the Triennial Plan, US\$ 57.63 per MT, subject to a 23% mark-up that is the average difference between budgeted operating costs and actual operating costs during the period from 2005 to 2010. This results in operating costs of US\$ 71.09 per MT.” The report indicates that replacing the operating cost estimates from the Triennial Plan with US\$ 71.09 per MT reduces [the] Claimant’s valuation by US\$ 51.8 million, or 13.4%.⁶⁰⁹
383. According to the Respondent’s expert, the 2012 data is covers only up until May (five months) and may have to include catch-up costs for the full year. The 2011 operating costs of US\$70 are flatlined, which is appropriate, since the DCF model is a real terms model with no future escalation. The Claimant’s expert also flatlined the operating cost projections but at a much lower level of US\$47.67/t, which the Respondent’s expert considers “far too optimistic and [...] unrealistic”.⁶¹⁰ The Respondent points as well to a due diligence report prepared by Glencore in 2004 (before acquiring the Assets), which “acknowledges that *‘as the mine gets deeper it will be difficult to maintain the same costs for the next 5 years, we estimated an increase value each 2 years of 5% in mine cost and 2% in maintenance by deeper exploration’*”, i.e., an expectation of OPEX to increase as mining went deeper. In light of this, Bolivia argues that “[t]here is no explanation for why this trend would not have continued after the reversion of the [Colquiri] Mine Lease”.⁶¹¹

i. *Analysis by the Tribunal*

384. The Claimant’s expert proposes US\$61.5 per tonne under the non-expansion scenario, based on actual costs from January to May 2012, adjusted annually for inflation. On the other hand, the Respondent’s expert proposes US\$69.9 per tonne, which is based on the actual costs from January to December 2011, as well as annual inflation adjustments. The Tribunal believes it is more appropriate to utilize the most recent figure, as it would be the most pertinent for a willing buyer.

⁶⁰⁸ Compass Lexecon First Expert Report, ¶ 54.

⁶⁰⁹ Flores First Expert Report, ¶ 75.

⁶¹⁰ SRK Second Expert Report, ¶ 63.

⁶¹¹ Bolivia’s Rejoinder on Quantum, ¶ 501.

Thus, it deems US\$61.5 per tonne, as proposed by the Claimant's expert, to be more appropriate.⁶¹²

G. Capital Expenditures (CAPEX)

385. The Claimant projects that Colquiri would have had CAPEX of US\$181.7 million between 2012 and the end of the Colquiri Mine Lease in 2030 (US\$43.8 millions in expansion capital and US\$137.9 million in sustaining capital through May 2030).⁶¹³ Instead of relying on the Triennial Plan, the Respondent's expert made its own estimates for the CAPEX required to run the Colquiri Mine. It includes US\$5 million as the annual sustaining CAPEX, as well as an extra US\$25 million of CAPEX needed to make up for under investment, spread over five years. The Respondent notes that the implementation of both the Triennial Plan and the Tailings Plant would have required a new tailings dam, which the Claimant's experts do not consider.⁶¹⁴

386. According to the Claimant's expert, it is not clear what Bolivia means by "catch up" capital. It opines that "as of 2012, the mine concentrator was operating at the design capacity of 1,000 tpd of ore processed; consequently, there was no reason for additional capital expenditures except for those made to expand the capacity". The Claimant's expert argues as well that the purpose of this capital is not identified, and that the Respondent simply chooses an arbitrary number without providing any supporting information. The Claimant contends that its expert has reviewed the detailed capital cost allocations in the Triennial Plan and has forecast capital expenditures based on these estimates. Since the Respondent ignores the expansion plans, it does not assign any expansion capital. However, it does not dispute the Claimant's capital expenditure forecasts for the Colquiri Mine expansion. The Respondent's total capital estimate over the 20-year mine life is US\$133.0 million.⁶¹⁵

i. Analysis by the Tribunal

387. In the non-expansion scenario, the Parties' experts agreed on a sustaining CAPEX of US\$4.84 million per year.⁶¹⁶ However, disagreement remains on what the Respondent characterizes as

⁶¹² Experts' letter to the Tribunal, 18 November 2021, p. 5; Claimant's Post-Hearing Reply, ¶¶ 35 and 36.

⁶¹³ Claimant's Reply on Quantum, ¶ 104.

⁶¹⁴ Flores First Expert Report, ¶ 44.

⁶¹⁵ RPA Second Expert Report, ¶ 103.

⁶¹⁶ Bolivia's Post-Hearing Brief, ¶ 88.

“catch up”⁶¹⁷ capital.⁶¹⁸ In this regard, the Tribunal finds that there is no sufficient evidentiary foundation to take into account such capital, and it would be speculative to include it for valuation purposes.

H. General & Administrative Costs

388. In its valuation the Claimant also includes US\$2.0 million of G&A costs per year, based on the historical costs of Colquiri adjusted by annual inflation. The Claimant’s expert calculates these costs based on Colquiri’s financial statements and Sinchi Wayra’s monthly reports.⁶¹⁹ Conversely, the Respondent calculates that the G&A costs would be over US\$19 million a year.⁶²⁰ The Claimant contends that the Respondent’s expert’s 11.2% assumption “significantly deviates from the historical G&A costs; it involves double counting of royalties, which are accounted for under a separate category of costs; and it artificially inflates G&A costs by linking them to revenues (*i.e.*, variable costs), when G&A expenses involve mainly fixed costs.” The Claimant’s expert maintains that US\$2.0 million per year for G&A expenses is in line with both the G&A

⁶¹⁷ “[A]n increase in production rate from the 5-year average 277,309 tpy to 307,000 tpy would require some catch-up investment, at least of US\$ 25 million during 2012-2017”. Bolivia’s Post-Hearing Brief, ¶ 86. See also Bolivia’s Post-Hearing Brief, ¶ 87.

⁶¹⁸ At the Hearing on Quantum, Respondent’s expert did not explain how the 25 million figure was calculated, why it would have been necessary for Colquiri’s operation or how it would have been spent: “Q. Dr. Flores, what counsel wants and we also want clarifications is we try to understand where the 25 million come from. A. Yeah. Q. And the question was more of whether you verify where the 25,000--25 million came up from. That is the thrust of what you have been asked. A. Yes, correct. And the short answer is no, I did not verify that because I just took that as an input from Dr. Rigby. [...] A. Again, I cannot be--I’m not in a position to answer because I do not know the extent where the \$25 million came from. Dr. Rigby is the one that could be able to help you with that.” Transcript, Hearing on Quantum, Day 5, p. 830, lines 5-15, 21-24 (Dr. Flores). In his direct presentation, Dr. Rigby addressed the costs as follows: “What I did include was basically 5 million per annum sustaining capital, and 5 million per annum of catch-up capital in the first five years [...] And what I thought was, well, what feels like a right number? And I thought, I’m talking to 70, I’ll apply \$20 a ton for all-in sustaining costs that. That works out at the production rate of I’m projecting of about 4.3 million. I simply rounded that up to 5 million, and that explains my 5 million per annum sustaining capital in my life of mine. [...] I then felt, because I was conscious reading the Sinchi Wayra reports, Annual Reports and everything, where consistently capital was significantly or substantially below budget. So, what we say in the industry, this Asset wasn’t loved if it was starved of capital, and I thought that it was appropriate to apply maybe five years of captured capital to redress the undercapitalization that mine had experienced basically under Glencore ownership, so hopefully that explains my Capital Cost assumptions.” Transcript, Hearing on Quantum, Day 4, p. 558, lines 16-18, p. 559, lines 2-8 and 12-20 (Dr. Rigby).

⁶¹⁹ Compass Lexecon First Expert Report, ¶ 55; Claimant’s Reply on Quantum, ¶ 119; Compass Lexecon Second Expert Report, ¶ 45.

⁶²⁰ Claimant’s Reply on Quantum, ¶ 119; Flores First Expert Report, ¶ 77, fn. 131; Flores Second Expert Report, ¶¶ 61-65.

expenses reported in Colquiri's financial statements (averaging US\$1.4 million between 2007 and 2011) and Sinchi Wayra Monthly Reports (averaging US\$1.7 million between 2007 and 2011).⁶²¹

389. On the other hand, the Respondent's expert contends that the Claimant did not explain how it arrived at the US\$2.0 million figure. Based on the equivalent line item from the management reports that Compass Lexecon used for Vinto to estimate G&A expenses for Colquiri, it "conclude[s] that future G&A expenses for Colquiri should be estimated as 11.2% of forecasted annual revenues", that "[i]n order for the ratio of G&A expenses to net revenues observed in the [m]anagement [r]eports to be comparable to the ratio applied to Compass Lexecon's model, the historical ratio should also include selling costs in the calculation of net revenues" and that the Claimant "fails to consider the implications of its own model, which expects to implement two different expansion projects, increasing the amount of ore mined by 99% and ramping up processing of ore from tailings from zero to 1,000,000 MT". The Respondent indicates as well that it is "unreasonable to assume that G&A expenses would remain constant at the historical levels under this scenario, as [the Claimant's expert] does."⁶²²

i. *Analysis by the Tribunal*

390. On the basis of the non-expansion scenario, the Parties' experts agreed on an annual G&A budget of \$2,310,000 (adjusted for inflation).⁶²³ Therefore, the Tribunal will apply this amount to the valuation.

I. First Year Apportionment of Cash Flows

391. The Claimant's second expert valuation adjusts 2012 cash flows to exclude cash flows generated between January and May 2012. According to the Claimant: "[i]n our [f]irst [r]eport, we made the simplifying assumption of including full-year 2012 cash flows in our valuation given that cash was not removed from Colquiri in 2012 and the limited information we had on the working capital as of the valuation date".⁶²⁴ The Respondent's second expert report takes issue with this since, even though it suggested excluding cash flows prior to the valuation date, the Claimant updated its model by "removing the actual January through June 2012 data from projected annual estimates."⁶²⁵

⁶²¹ Compass Lexecon Second Expert Report, ¶ 47.

⁶²² Flores Second Expert Report, ¶¶ 61-64.

⁶²³ Experts' letter to the Tribunal, 18 November 2021, p. 3.

⁶²⁴ Compass Lexecon Second Expert Report, ¶ 133 a).

⁶²⁵ Flores Second Expert Report, ¶ 80.

392. According to the Respondent's expert, "[t]his is an incorrect way to apportion the 2012 cash flows, because the cash flows in the model are a projection for the entire year, from January through December. [The] Claimant's performance during the first five to six months of 2012 was not factored into the projection of 2012 cash flows and, therefore, Compass Lexecon is mixing *ex ante* projections with historical results." The Respondent's expert indicates that "the proper approach is to prorate the annual estimated cash flows based on the portion of the year remaining as of the Colquiri valuation date".⁶²⁶

i. *Analysis by the Tribunal*

393. The Tribunal believes that dividing the estimated annual cash flows by the portion of the year remaining from the date of valuation is an appropriate method to avoid mixing projections with historical data.

J. The Rosario Agreement

394. We recall that the Rosario Agreement was signed on 7 June 2012 by Colquiri, whereby the Rosario vein was willingly assigned to certain cooperatives.⁶²⁷

395. To assess the "market price" of the unprocessed ore sold by the *cooperativa* to Colquiri, the Claimant's experts recommend a price based on Colquiri's mining cost plus a premium. In addition, they state that a percentage of profits from concentrate sales could be included to incentivize the *cooperativa* to mine higher-grade material, and that 2% of profits would be reasonable.⁶²⁸ On the other hand, the Respondent contends that "[a]ny realistic compensation scheme has to reflect that the Colquiri Mine would have to provide compensation to the cooperatives recognizing their bargaining power. Not meeting compensation levels required by the cooperatives could provoke disruptions and compromise the stable operation of the mine. This economic reality cannot be ignored in an analysis of the impact of the Rosario Agreement on the valuation of the Colquiri Lease."⁶²⁹

i. *Analysis by the Tribunal*

396. Regarding the impact of the Rosario Agreement on valuation, there are two issues. The first question is whether it should be considered at all for valuation purposes. In such a case, both

⁶²⁶ Flores Second Expert Report, ¶ 80.

⁶²⁷ Agreement between Colquiri, FEDECOMIN, FENCOMIN, Central Local de Cooperativas Mineras de Colquiri, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, Cooperativa 26 de Febrero and the Ministry of Mining, 7 June 2012, C-35.

⁶²⁸ Compass Lexecon Second Expert Report, ¶ 152.

⁶²⁹ Flores Second Expert Report, ¶ 84.

experts offer alternative approaches to such an evaluation. Initially, the Tribunal is of the opinion that the Claimant was willing to renounce the Rosario vein in order to resolve the cooperatives issue and end the conflict at the Colquiri Mine. We have determined that the valuation date is 19 June 2012. Consequently, prior to the expropriation, any willing buyer pretending to acquire the Colquiri Mine Lease would have been required to account for the impact of the Rosario Agreement. In this regard, we believe that the Rosario Agreement should be considered for purposes of valuation.

397. The second concern is the impact of the Rosario Agreement on the valuation. Both sides' experts offer alternative approaches to this valuation. Regarding the Respondent's alternative, the Tribunal is of the opinion that the cooperatives' "bargaining power" brings a subjective element to the valuation. Thus, since the alternative proposed by the Claimant is directly based on the impact of price and profits, the Tribunal deems this alternative to be more appropriate.

K. Colquiri's Tailings Plant

398. "The Colquiri Tailings [Plant] is situated in the immediate vicinity of the active Colquiri operation," and its purpose is to recover "zinc and tin from old tailings left by [COMIBOL] and other past operators".⁶³⁰ The plan was to recover approximately 10 million tonnes of old tailings, at a grade of 0.51% tin and 4.21% zinc.⁶³¹ The Claimant's valuation expert, Compass Lexecon, explains that a non-operating asset may be valued pursuant to the DCF method when, as is the case for the Tailings Plant, there is "sufficient information regarding the asset to forecast lost profits".⁶³²
399. The Respondent replies that the Claimant's valuation of the Tailings Plant (representing more than US\$100 million of the damages claimed for Colquiri) is "inherently speculative" and that "[a]lthough no one has ever operated this [p]roject, [the] Claimant's experts' value" is based on the DCF method, "assuming it is a going concern with a proven record of profitability", which "results in an arbitrary and highly speculative valuation."⁶³³
400. The Respondent also posits that "any willing buyer would have placed significant weight in the fact that Sinchi Wayra never developed this project. Under [the] 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 [Colquiri] Mine Lease was reverted) to develop

⁶³⁰ "The Colquiri tailings were nationalized along with the [Colquiri] Mine." RPA First Expert Report, ¶ 127.

⁶³¹ Compass Lexecon First Expert Report, ¶ 56.

⁶³² Claimant's Reply on Quantum, ¶ 53; Compass Lexecon Second Expert Report, fn. 5.

⁶³³ Bolivia's Statement of Defence, ¶ 827.

this project. 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 [p]roject's economic viability was not enough to meet [the] Claimant's hurdle rate. Indeed, this [p]roject 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 [in] it.”⁶³⁴

401. Moreover, according to the Respondent, “neither the Triennial Plan nor the March 2012 Investment Plan” (prepared 9 and 2 months prior to Colquiri's reversion, respectively) mention the Tailings Plant.⁶³⁵ It places emphasis as well on the fact that, during the document production phase, “Bolivia requested (and the Tribunal ordered) [the] Claimant to produce ‘[d]ocuments and [c]ommunications prepared and/or reviewed by Colquiri and/or Sinchi Wayra and/or the Glencore Group during the period 2004-2012 that refer to the assessment and/or feasibility of the [Tailings Plant] [...]’”, but the “Claimant failed to produce any documents showing that it had taken steps to approve or implement the [Tailings Plant]”. On the contrary, [the] Claimant produced one contemporary document (the February 2012 Capital Expenditures and Projects Statement) which shows that capital expenses were neither budgeted nor approved for this project in 2010, 2011 or 2012, thus confirming that [the] Claimant had not approved this project nor had any plans of implementing it”.⁶³⁶
402. The projections by the Claimant's expert “for the construction and operation of the Tailings Plant are based on the 2004 Feasibility Study—a feasibility study of the Plant that the prior owner of Colquiri, Comsur, had approved in 2004 and that Glencore Bermuda adopted in 2005”.⁶³⁷ According to the Claimant, the Respondent's expert admitted during the Hearing on Quantum that the Tailings Plant was “technically feasible.”⁶³⁸ The Respondent contests this assertion and clarifies that despite being “technically viable” its expert confirmed that the project was not “really feasible.”⁶³⁹

⁶³⁴ Bolivia's Statement of Defence, ¶ 829.

⁶³⁵ Bolivia's Rejoinder on Quantum, ¶ 512. Bolivia's Post-Hearing Brief, ¶ 92.

⁶³⁶ Bolivia's Rejoinder on Quantum, ¶ 182. Bolivia's Post-Hearing Brief, ¶ 94.

⁶³⁷ Claimant's Reply on Quantum, ¶ 67.

⁶³⁸ Claimant's Post-Hearing Brief, ¶ 31.

⁶³⁹ “I would—first of all, ‘feasible.’ What is it? Technically feasible? Yeah, we can do it. Physically, we can do it. But is it economically viable? That’s why I never, when I’m doing reports, when we’re doing studies like these, the final conclusion is the results of the work, our work confirm that this project is both technically feasible—i.e., we can do it technically and practically—and economically viable; i.e., we can get an acceptable return on the capital investment from the [p]roject. That’s a difference. That’s maybe

403. Moreover, the Claimant argues that “the Tailings [Plant] [p]roject was also listed in Glencore’s May 2011 IPO prospectus, showing investors that Glencore had plans to develop the Tailings [Plant] [p]roject, contrary to Dr. Rigby’s negative economic viability opinion.”⁶⁴⁰ The exact text of the IPO is: “the plan is currently being considered further by management, but such a plan is expected to include a project to reprocess old tailings containing significant levels of zinc and tin at the Colquiri mine, together with works to remove processing and hoisting bottlenecks.”⁶⁴¹
404. Bolivia argues that the Claimant relies exclusively on the preliminary sampling conducted by COMIBOL in 1978, 1982 and 1990, which is 22 to 34 years prior to the reversion, to show that the project was valuable. However, as the Respondent’s expert explains, “[COMIBOL] had sampled only the centre of the old tailings dam, but not the periphery.” The Pincock report reached the same conclusion.⁶⁴² In Bolivia’s view, “[h]ad [the] Claimant seriously considered the [p]roject, it would have completed the preliminary sampling conducted by [COMIBOL] between 1978 and 1990 to determine with a reasonable degree of certainty the quantity of available mineral and its head grade” but it did not.⁶⁴³
405. Conversely, the Claimant contends that “in 2006 and 2007, [it] invested approximately US\$1.2 million building the platform on which the Tailings Plant was to be constructed and purchasing related materials.”⁶⁴⁴ The Claimant also alleges that in the period between 2011 and May 2012 it advanced its plans to construct the Tailings Plant as well as the expansion of the Colquiri Mine and the Concentrator Plant. In particular, it argues that it “[c]onducted a new study to confirm the stability of the platform (constructed in 2007) where the Tailings Plant was to be built and reached an agreement with the Cooperativa 21 de Diciembre, which had been mining an area in Colquiri’s old tailings storage facility (equal to approximately 5% of the facility’s surface area), to abandon the tailings so that Colquiri could mine them.”⁶⁴⁵

how things have changed”. Transcript, Hearing on Quantum, Day 4, p. 626, lines 4-15 (Dr. Rigby). Bolivia’s Post-Hearing Reply, ¶ 77.

⁶⁴⁰ Compass Lexecon Second Expert Report, ¶ 40, referring to Glencore IPO Prospectus, May 2011, p. 87, **CLEX-15**.

⁶⁴¹ Glencore IPO Prospectus, May 2011, p. 87, **CLEX-15**. Respondent contends that such evidence shows that the project was “nothing but a plan ‘*currently being considered further by management*’”. Bolivia’s Post-Hearing Brief, ¶ 96, Bolivia’s Post-Hearing Reply, ¶ 81, Transcript, Hearing on Quantum, Day 4, p. 635, lines 7-8 (Mr. Walsh).

⁶⁴² Bolivia’s Rejoinder on Quantum, ¶ 528.

⁶⁴³ Bolivia’s Rejoinder on Quantum, ¶ 529.

⁶⁴⁴ Claimant’s Reply on Quantum, ¶ 70; Claimant’s Post-Hearing Reply, ¶ 40.

⁶⁴⁵ Claimant’s Reply on Quantum, ¶ 75 (a).

406. In its Post-Hearing Reply, whilst the Respondent indicates that “Dr. Rigby acknowledged that a document prepared [...] states that Sinchi Wayra had spent US\$ 1.2 million on the [p]roject in ‘*preparatory works and drilling*’”, it mentions that “Dr. Rigby also noted that the amount spent ‘*was a tiny fraction of the Capital Costs to implement the [p]roject*’ [...]”, which the same document puts at US\$ 26 million”.⁶⁴⁶ The Respondent also alleges that “Sinchi Wayra’s January 2007 monthly report notes that the US\$ 1.2 million ‘*includes all costs which occurred from October 2004 until [...] February 2007*’ [...] (that is, it includes investments by Sinchi Wayra *before* being acquired by Glencore in March 2005). For what we know, it may even include the costs of the 2004 Feasibility Study”.⁶⁴⁷ Finally, the Respondent posits that the “Claimant has not produced any evidence showing that it invested any more capital in the [p]roject after January 2007 (*i.e.*, 5 years prior to the date of valuation), which a willing buyer would see as a red flag”.⁶⁴⁸
407. In its Post-Hearing Brief, the Claimant contends for the first time that at the hearing “Glencore Bermuda proved that the Tailings Plant had value when Bolivia took Colquiri. Glencore Bermuda paid US\$31.8 million in 2005 for the rights to build and operate the Tailings Plant, and it had invested over one million dollars in the development of the Plant prior to its taking in May 2012”.⁶⁴⁹ In light of this, it requested “[a]t a minimum, [to be] awarded the price that it paid in March 2005 for the right to the Tailings Plant (US\$31.8 million) indexed for inflation to the date of taking in May 2012 for a total of US\$38.3 million.”⁶⁵⁰ The Respondent replies that this request “constitutes a belated new claim (which is inadmissible at this late stage of the proceedings) and for which, in any event, [the] Claimant has provided no legal basis. As a result, it must be dismissed outright by the Tribunal”.⁶⁵¹
408. Finally, the Respondent argues that “if purchase price were of any relevance to a willing buyer (*quod non*), it is not surprising that [the] Claimant did not refer in its [post-hearing brief] to the price it allegedly paid for the [Colquiri] Mine Lease. [The] Claimant states that it paid US\$ 61.7 million for the [Colquiri] Mine Lease in 2005. Yet, as of the valuation date (with 8 less years remaining in the [Colquiri] Mine Lease, after exploiting the [Colquiri] Mine for 8 years and

⁶⁴⁶ Transcript, Hearing on Quantum, Day 4, p. 629, lines 8-19 (Dr. Rigby). Bolivia’s Post-Hearing Reply, ¶ 78, referring to “Colquiri Tailings Project,” Sinchi Wayra presentation, August 2007, p. 3, **C-315**.

⁶⁴⁷ Bolivia’s Post-Hearing Reply, ¶ 78, referring to Documents produced by Claimant for Request 13, p. 11, **R-428-5**.

⁶⁴⁸ Bolivia’s Post-Hearing Reply, ¶ 80.

⁶⁴⁹ Claimant’s Post-Hearing Brief, ¶ 33.

⁶⁵⁰ Claimant’s Post-Hearing Brief, ¶ 35.

⁶⁵¹ Bolivia’s Post-Hearing Reply, ¶ 84.

having assigned the Rosario [v]ein to the *cooperativistas*, and after Bolivia passed in 2007 a new income (of 12.5%) for the mining industry), [the] Claimant disingenuously pretends that the [Colquiri] Mine Lease would be worth 3.5 times more than what it allegedly paid [...].”⁶⁵²

i. *Analysis by the Tribunal*

409. The Tribunal has difficulty accepting that a willing buyer would use the Claimant’s valuation as the basis for valuing the Tailings Plant. *First*, from the evidence presented it is not possible to say with any degree of certainty that the project, as detailed by the Claimant, would ever have been brought to fruition. *Second*, even if we accept the Claimant’s feasibility studies at face value, it is highly speculative that a willing buyer would consider a project that was “dormant” for at least five years. *Thirdly*, neither the Triennial Plan nor the March 2012 Investment Plan indicate an intent to approve or implement this project, and no such documentation was produced during document production. *Fourth*, the 2011 IPO makes no definitive decision regarding the realization of the project when it states that “[t]he plan is currently being considered further by management.”⁶⁵³ *Fifth*, it is difficult to acknowledge the realization of a project for which only US\$1.2 million dollars were invested between 2004 and 2007 (when the Claimant argues that the value of the project is more than US\$100 million). For these reasons, we reject the Claimant’s valuation of the Tailings Plant.
410. In its final submission, the Claimant puts forward an alternative method for calculating the value of the plant based on the price of acquisition. However, the Tribunal agrees with the Respondent that this is a new claim that has not been fully briefed or substantiated and, for that reason, we must reject it.

3. THE TIN SMELTER

411. The Tin Smelter is located in Vinto, Bolivia, in the Oruro Department. It started operations in 1971 and is the largest smelter in Bolivia. The tin concentrate treated by the Tin Smelter is sourced largely from Bolivian mine sources. The Tin Smelter is primarily engaged in the production of high-grade metallic tin ingots, also known as bullion; it processes concentrates produced from various mining operations in Bolivia, including the Colquiri Mine and Huanuni Mine (Bolivia’s two largest tin mines).⁶⁵⁴ A particular attribute of the Tin Smelter is that “it produces high-quality tin ingots with a purity of 99.95% tin. It enjoys the quality seal of ENAF on the London Metal

⁶⁵² Bolivia’s Post-Hearing Reply, ¶ 89.

⁶⁵³ Prospectus of Glencore International plc, 3 May 2011, p. 87, **R-193**.

⁶⁵⁴ RPA First Expert Report, ¶ 42.

Exchange (“LME”). Upon privatization, it was acquired on November 2000 by Allied Deals and subsequently, Glencore International gained full indirect ownership by March 2005.⁶⁵⁵ The Tin Smelter was reverted to the State in February 2007. According to Vinto management, Allied Deals acquired the Tin Smelter for US\$14.7 million but the Respondent contests that this included tin inventory, consumables and supplies, producing essentially a negative acquisition cost.⁶⁵⁶

412. Before moving to our analysis, the Tribunal recalls our previous finding that the Tin Smelter Reversion Decree constituted an expropriation within the meaning of Article 5 of Treaty and that the Respondent breached this provision since the reversion was neither made for a public purpose nor against just and effective compensation.⁶⁵⁷

A. Valuation Date

413. Both parties agree that the proper valuation date is 8 February 2007 (the day before Bolivia issued the Tin Smelter Reversion Decree).⁶⁵⁸

B. DCF Methodology

414. The Parties also agree that the DCF methodology is an appropriate method by which to calculate Vinto’s FMV. The Parties further agree that the Claimant’s expert has identified the correct variables in its DCF model.⁶⁵⁹ However, the Parties disagree as to the value of each variable and the resulting FMV. The Parties’ key differences concern: (i) production forecasts of tin ingots and concentrate grades, (ii) revenue forecasts and price estimates, (iii) operating and capital expenses, and (iv) the discount rate.⁶⁶⁰
415. The Claimant 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.⁶⁶¹ Conversely, Bolivia projects a production rate of 11,720 tonnes of tin ingots per year,⁶⁶² which it

⁶⁵⁵ SRK First Expert Report, ¶¶ 19, 96; Statement of Claim, ¶ 36.

⁶⁵⁶ SRK First Expert Report, ¶ 96.

⁶⁵⁷ See Section VI.1.B.iv above.

⁶⁵⁸ Statement of Claim, ¶ 255(i); Bolivia’s Rejoinder on Quantum, ¶ 49.

⁶⁵⁹ Claimant’s Reply on Quantum, ¶ 122; Bolivia’s Statement of Defence, ¶ 736; Econ One, ¶ 96.

⁶⁶⁰ Claimant’s Reply on Quantum, ¶ 122; Bolivia’s Statement of Defence, ¶ 847; Bolivia’s Rejoinder on Quantum, ¶ 606.

⁶⁶¹ Statement of Claim, ¶ 259.

⁶⁶² Bolivia’s Rejoinder on Quantum, ¶ 641.

alleges is consistent with the smelter's historical tin ingot production (assuming no significant investments and that the productive units remained as they were in February 2007).⁶⁶³

416. The Claimant's expert calculates the FMV of Vinto to be US\$56 million as of 8 February 2007 using the DCF method. Since Glencore Bermuda held 100% of the equity in Vinto and, in turn, Vinto did not have any outstanding debt, the Claimant argues that the FMV of Vinto represents the value that Glencore Bermuda lost when Bolivia seized the smelter.⁶⁶⁴
417. On the other hand, the Respondent contends that the Claimant's valuation is inflated. In particular, it argues that the Claimant relies on: (i) extremely high tin ingot production forecasts; (ii) unduly high and implausibly constant average concentrate grades; (iii) unduly high and implausibly constant recovery rates; (iv) unsupported high tin ingot sale price estimates and (v) implausibly low operating and capital expenditures.⁶⁶⁵

i. *Tin Smelter Output*

a. Tin Concentrates

418. The Claimant projects that, but for the expropriation, "Vinto would have modestly increased the Tin Smelter's processing rate from 25,161 tonnes of tin concentrate in 2006 to 27,500 tonnes in 2007, and from 2008 onwards the Tin Smelter would have processed 30,000 tonnes of tin concentrate a year".⁶⁶⁶ Furthermore, "[s]melting these volumes of tin concentrate would have resulted in the production of 12,800 tonnes of tin metal in 2007 (from 11,720 tonnes in 2006), and 14,000 tonnes of tin metal a year thereafter, pursuant to the Claimant's expert's projections that, on average, the tin concentrates that Vinto would have acquired for processing would have had a grade of 48.75% ([i.e.], percentage of tin in the concentrate acquired), and the smelting process would have had a recovery rate of 95.6% ([i.e.], percentage of the tin in the concentrate converted into tin metal)".⁶⁶⁷ The Respondent contends that the processing rate would not go beyond historic levels, that is, at most, 25,161 tonnes of tin concentrate.⁶⁶⁸
419. As the Respondent puts it, "the key value driver for the Tin Smelter's revenues is the tin ingot production rate (*i.e.*, the final result of the smelting process measured in metric tonnes of fine

⁶⁶³ Bolivia's Rejoinder on Quantum, ¶ 642.

⁶⁶⁴ Claimant's Reply on Quantum, ¶ 121.

⁶⁶⁵ Bolivia's Rejoinder on Quantum, ¶ 606.

⁶⁶⁶ Claimant's Reply on Quantum, ¶ 123.

⁶⁶⁷ Claimant's Reply on Quantum, ¶ 123.

⁶⁶⁸ Bolivia's Post-Hearing Brief, ¶ 114.

metal in the form of ingots for sale), which should not be confused with the [s]melter's processing capacity (*i.e.*, the amount of tin concentrates fed into the furnaces along with additives for smelting, measured both in dry metric tonnes and net metric tonnes). While both the processing capacity and the production rate are considered in the analysis of the Tin Smelter's performance, only the production rate is a key variable for the Tin Smelter's DCF model (as [the] Claimant itself recognizes)".⁶⁶⁹ In other words, to achieve the desired amount of tin metal, the Claimant would need to process at least 30,000 tonnes of concentrates. The Respondent contends that "[s]uch a large supply of high-grade tin concentrates per year is no longer available in Bolivia".⁶⁷⁰

420. The Respondent also mentions that "Colquiri's tin concentrate production between 2007 and 2012 [...] was neither large enough to provide sufficient concentrates to achieve the production rates projected by [the] Claimant for the Tin Smelter nor of sufficient purity (*i.e.*, high-grade) to support [the] Claimant's projected high average grade."⁶⁷¹ According to the Claimant, Vinto was and continues to be "the only commercial scale tin smelter in Bolivia and the natural buyer for all tin concentrate produced" therein. Therefore, as of February 2007, there was no reason for a willing buyer to believe that Vinto would experience a shortage of supply, as Bolivia argues. The Claimant also contends that as of 2007, the production of tin concentrates in Bolivia was increasing steadily and forecasted to sustain this upward trend. Furthermore, Glencore Bermuda controlled and intended to increase output at the Colquiri Mine (the second largest tin mine in Bolivia).⁶⁷²
421. Bolivia refutes the Claimant's expert report and points to the fact that it does not consider that "after 2011, the Tin Smelter had to begin processing larger quantities of lower-grade concentrates because of the lack of high-grade concentrates in the country – and this only to maintain production (until 2015, when production increased due to the commissioning of the Ausmelt furnace)".⁶⁷³ According to the Respondent, the Claimant could have only provided 19% of the concentrates needed to reach its projected production of 14,000 tonnes of tin ingots, since in 2007 (its year of largest production) Colquiri produced only 5,278 DMT of concentrates and in 2012

⁶⁶⁹ Respondent Rejoinder on Quantum, ¶ 608; Bolivia's Post-Hearing Brief, ¶ 105.

⁶⁷⁰ Bolivia's Rejoinder on Quantum, ¶ 640.

⁶⁷¹ Bolivia's Rejoinder on Quantum, ¶¶ 648; 649. Bolivia's Post-Hearing Brief, ¶¶ 104 and 110, 122.

⁶⁷² Claimant's Reply on Quantum, ¶ 129.

⁶⁷³ "The processing of lower-grade concentrates explains the lower recovery rates in 2010-2017." Bolivia's Rejoinder on Quantum, ¶ 666.

(its year of lowest production) it produced 2,352 DMT, which are respectively 5.6 and 12.7 times less than the Claimant's estimated 30,000 DMT of concentrates needed.⁶⁷⁴

422. Moreover, Bolivia contests that even though the Claimant's expert maintains that Colquiri's tin concentrates are "*higher grade tin concentrates*," "the average grade of the concentrates produced at Colquiri between 2007 and 2012 (when the [Colquiri] Mine was still being operated by [the] Claimant) was 48.2%, *i.e.*, below [the] Claimant's estimated average grade of 48.75%." Therefore, "even if all tin concentrates produced by Colquiri had been sold to the Tin Smelter, they could not [] have elevated the average grade of the concentrates processed to 48.75%" and "there would not have been enough high grade concentrates to achieve [the] Claimant's expected production rate."⁶⁷⁵

b. Tin Ingot Production

423. The tin ingot production rate is "the final result of the smelting process measured in metric tonnes of fine metal in the form of ingots for sale" and is different from the smelter's processing capacity. It is "the amount of tin concentrates fed into the furnaces along with additives for smelting, measured both in dry metric tonnes and net metric tonnes".⁶⁷⁶
424. Regarding the Tin Smelter's capacity, the Claimant notes that the three smelting furnaces that Vinto was operating as of February 2007 each had the capacity to process 40 to 50 tonnes of tin concentrates a day or approximately 10,200 to 12,750 tonnes of tin concentrate a year. On that basis, the Claimant argues that the Tin Smelter's three furnaces would have had an aggregate processing capacity of 30,600 to 38,250 tonnes of tin concentrate a year (28% more than what the Claimant's expert projected).⁶⁷⁷
425. The Respondent's expert argues that documents relied on by the Claimant's experts, Compass Lexecon and RPA, do not support its projections. In particular, the CRU Monitor report indicates that from 2003 to 2006, Vinto was producing less than 12,000 MT of tin ingots (15% less than the 14,000 MT estimate Compass Lexecon uses for its DCF model). In its view, this report implies

⁶⁷⁴ Bolivia's Rejoinder on Quantum, ¶ 650.

⁶⁷⁵ Bolivia's Rejoinder on Quantum, ¶ 651.

⁶⁷⁶ Bolivia's Rejoinder on Quantum, ¶ 608.

⁶⁷⁷ Claimant's Reply on Quantum, ¶ 126.

that normal tin concentrate processing levels were closer to 25,000 MT, as opposed to the 30,000 MT anticipated by Compass Lexecon.⁶⁷⁸

426. The Respondent alleges that during the Claimant's operation of the Tin Smelter, the available furnaces were working at maximum capacity. It points out that the 2006 and January 2007 *Balances Metalúrgicos* show that "although [the] Claimant purchased large quantities of high-grade concentrates, production remained steady (around 11,400 tonnes of ingots per year). In fact, the (poor) condition of the furnaces was such that [the] Claimant was not able to even process all the purchased concentrates and excess material consistently remained in the pipeline (referred to as "*circuito*")." In this regard, it mentions that "in May 2006, Sinchi Wayra processed 3,159 DMT of concentrates of a very high grade (50.53%, which means that the tin processed corresponds to 1,596 tonnes of fine metal). Yet, the Tin Smelter only produced 1,157 tonnes of tin ingots that month, despite a reported recovery rate of 95%, thus, leaving 366 tonnes of fine metal in the pipeline."⁶⁷⁹ Furthermore, the Respondent's expert contests Compass Lexecon's analysis of *ex post* data indicating that for the 19 years from 1998 through 2016, including those during which Vinto purchased more than 30,000 MT, actual tin ingot production was below Compass Lexecon's forecast.⁶⁸⁰

c. Investment in the Tin Smelter

427. The Claimant alleges that from 2002 to 2006, several projects and works were executed at the Vinto Metallurgical Complex to optimize the process.⁶⁸¹ Bolivia contests that those optimization

⁶⁷⁸ Flores First Expert Report, ¶ 105. See also Bolivia's Post-Hearing Brief, ¶¶ 112-117 and Bolivia's Post-Hearing Reply, ¶ 114.

⁶⁷⁹ Bolivia's Rejoinder on Quantum, ¶ 620.

⁶⁸⁰ Flores Second Expert Report, ¶ 101.

⁶⁸¹ "Improvements to work environments in refining: rehabilitation of ventilation system and roof; cover over refining pots to reduce dust emissions; Capture of fugitive emissions in electric furnace operation; Capture of fugitive emissions in reverberatory furnace operation; Installation of new steam condensers for cooling of Reverberatory Furnace 3 and 4; Installation of stand by exhaust fan system for Reverberatory Furnace 3 and 4; Improvements in instrumentation and process control for weighing in the pelletizing area; Use of pyrrhotite instead of pyrite for sulfidization of tin slag in fuming; Changes in filter fabric material used in off-gas filtration system; Installation of a sintering furnace for treatment of copper ashes (by-product); Use of more durable refractory brick in refractory furnaces; Installation of a pneumatic system for mechanical rapping of furnace; Construction of proper showers and change rooms for workers; Installation of a condensation chamber and two washing towers for capture and control of arsenic in emissions; Installation of variable speed drives for the bridge crane for Reverberatory Furnace 3 and 4; Installation of efficient exhaust fan motors for Reverberatory Furnace 3 and 4; Installation of a new Atlas Copco compressor for Volatilization Furnace 4; Installation of an Ingersoll Rand compressor to supply compressed air; Installation of water level control in main water supply tank to boilers for Reverberatory Furnaces 3 and 4; Installation

processes served to mitigate production losses and to improve safety and environmental conditions, which are different from increasing production. The “*optimization processes*” carried out by Comsur and the Claimant in the Tin Smelter between 2002 and 2006 do not, when duly understood, increase production capacity.⁶⁸²

428. According to the Respondent, contemporaneous evidence demonstrates that 10 out of the 16 Tin Smelter’s original furnaces had been decommissioned or dismantled as of the reversion date and that, of the 6 remaining furnaces, only 3 were “actual ingot producing units”. The Respondent indicates that the “Claimant simply asserts that ‘*optimization processes*’ would have ‘*boost[ed] output by enabling Vinto to operate the three smelting furnaces more efficiently, with less down time*’,” but it has not proved that such processes would result in the 21.8% increase in production forecasted by RPA, or in general how they would have increased production.⁶⁸³ Moreover in its Post-Hearing Reply, the Respondent recalls that Eng. Villavicencio confirmed at the Hearing on Quantum that “*definitely there was no plan or budget [by Glencore] to increase the production of metal*”.⁶⁸⁴ Furthermore, the Respondent also contends that the Claimant’s expert “admitted on cross-examination that the optimization projects had already been implemented before 2006 [...] and only increased production in 2006 by 0.578%.”⁶⁸⁵
429. In support of its projections, the Claimant alleges that even after Bolivia’s nationalization of Vinto, “the Tin Smelter’s operations have demonstrated that there would have been sufficient tin concentrates available to Vinto to meet RPA’s projections”. Specifically, it points out that “since 2015, Vinto has consistently processed over 29,000 tonnes of tin concentrates a year, including more than 30,000 tonnes of tin concentrates in 2016”.⁶⁸⁶ In the Claimant’s view, there is no reason to claim that RPA’s capacity estimates are not achievable since Bolivia’s own data shows that

of an ARC 1360 XRF (X-ray fluorescence) analyzer for metallurgical analysis of samples; Laboratory received ISO 17025 certification.” RPA First Expert Report, ¶ 161.

⁶⁸² Bolivia’s Rejoinder on Quantum, ¶¶ 190 and 633. Respondent replies that “Claimant has only submitted a single document entitled “*Proyectos y trabajos ejecutados en Complejo Metalurgico de Vinto periodo 2002-2006*” describing the processes undertaken between 2002 and 2006 with no indication of when these processes were exactly implemented in the 4-year period.” See also Bolivia’s Rejoinder on Quantum, ¶ 634.

⁶⁸³ Bolivia’s Rejoinder on Quantum, ¶ 190. See also Bolivia’s Post-Hearing Brief, ¶¶ 108 -109.

⁶⁸⁴ Bolivia’s Post-Hearing Reply, ¶ 115 and Transcript, Hearing on Quantum, Day 3, p. 416, lines 19-20 (Eng. Villavicencio).

⁶⁸⁵ Bolivia’s Post-Hearing Reply, ¶ 115, referring to Glencore, undated, *Proyectos y Trabajos Ejecutados en Complejo Metalurgico de Vinto Periodo 2002-2006*, **RPA-53**; Transcript, Hearing on Quantum, Day 4, p. 518, lines 15-19 (Mr. Lambert).

⁶⁸⁶ Claimant’s Reply on Quantum, ¶ 130.

from 2012 through 2014, EMV reached processing levels similar to those forecasted by Glencore Bermuda.⁶⁸⁷ To this particular argument, the Respondent replies that the Claimant is mistaken for the following reasons:

- a. *First*, the Claimant does not refer to the Tin Smelter's tin ingot production rates after the reversion, it focuses on the quantity of concentrates processed, ignoring their average grade and the ensuing production. "While the Tin Smelter did process over 28,000 DMT of concentrate per year between 2012 and 2014, this increased feed did not generate an equivalent increase in the amount of produced ingots. During these three years, the Tin Smelter produced an average of 11,521 tonnes of ingots (that is, a production rate comparable to [the] Claimant's 2005-2006 production)." ⁶⁸⁸
- b. *Second*, while the new Ausmelt furnace (an investment of US\$39 million) was under construction, Bolivia invested approximately US\$1 million in 2011 to repurpose the furnaces of the Antimony Smelter to process tin concentrates in order to increase the quantities of low-grade tin concentrates that could be processed by EMV. "Even with this investment to expand existing infrastructure, the Tin Smelter was only able to maintain its production levels [...], the operation without the Ausmelt was not sustainable in the long run, as the costs of processing low grade concentrates were too high." ⁶⁸⁹
- c. *Third*, "[a]t the time of the reversion, the production units remained in sufferable condition due to [the] Claimant's lack of investment and had to undergo intensive overhauls post-reversion to process larger quantities of (low-grade) concentrates. By 2012, Bolivia had already completed the necessary overhauls, and the operating conditions were very different from the ones prevailing during [the] Claimant's operation." ⁶⁹⁰

⁶⁸⁷ "[P]rocessing on average 29,500 tonnes of concentrate per year during this period without expanding the existing infrastructure and using the same smelting furnaces that were operational as of February 2007". Claimant's Reply on Quantum, ¶ 126.

⁶⁸⁸ Bolivia's Rejoinder on Quantum, ¶ 621. In relation to the increased feed, Bolivia explains that to "compensate for the lower grade of concentrates since 2008", "the Tin Smelter had to increase the quantity of processed concentrate only to maintain production levels."

⁶⁸⁹ Bolivia's Rejoinder on Quantum, ¶ 621. See also of Villavicencio Third Witness Statement, ¶ 59.

⁶⁹⁰ Bolivia's Rejoinder on Quantum, ¶ 621.

d. Analysis by the Tribunal

430. The Tribunal is not convinced that the evidence presented by the Claimant supports the increase in production of tin ingots from 11,400 to 14,000 tonnes per year.⁶⁹¹ As mentioned before, to reach such levels, there would need to be not only enough concentrates but the concentrates need to be of adequate grade. In addition, the Tin Smelter must be able to increase its historical output of tin ingots.
431. The Tribunal cannot find sufficient evidence in the record to support an increase in concentrates levels. Moreover, even if we were to accept the Claimant's contention that there would be a significant increase in tin concentrates, we would have to agree that such concentrates (whether from Bolivian mines or imported) would be of sufficient quality throughout the Tin Smelter's production life (*i.e.*, until 2026) in order to reach the quantity of tin ingots proposed by the Claimant. This seems highly speculative to us.
432. Finally, even if the Tribunal were to find that there were sufficient concentrates with the appropriate grade to feed into the Tin Smelter, we are not convinced that the Tin Smelter's output would reach the amount of tin ingots anticipated by the Claimant. Since 2000, and particularly during the Claimant's operation of the Tin Smelter, the projected level of tin ingots has not been met, despite the fact that the Tin Smelter has been in operation for more than 30 years.⁶⁹² While the Claimant has advanced arguments on so called "optimization processes", the evidence provided to the Tribunal does not demonstrate an impact to increase production capacity; rather, it shows that the Tin Smelter has undergone regular maintenance and preservation works. It is also unclear whether such projects would merely mitigate production losses, as claimed by the Respondent, or whether an actual production increase would be realized.⁶⁹³

⁶⁹¹ RPA I, Table 10; Compass Lexecon Second Expert Report, ¶ 62.

⁶⁹² See Bolivia's Rejoinder on Quantum, ¶¶ 613 and 615; Bolivia's Post-Hearing Brief, ¶¶ 110 and 111.

⁶⁹³ When discussing this issue at the Hearing on Quantum, it was clear that there was no straight link between these projects and an increase in production: "Q. [a]re you saying that these projects 2002 or 2000 to 2006 would collectively lead to increases in production? "Yes" or "no." A. I don't believe that's what we said. [...] A. The key part here is the more efficient use of the existing capacity, so what we're trying to do is get the production, maintain the production at the existing capacity. [...] Q. Okay. So, your testimony, therefore, is these projects, in and of themselves, would not lead to more production. You need to have more feed coming in the Plant in order to have more production; correct? A. And I clarify that because it's not just more feed. It's more feed at the right grade. Q. Exactly. Exactly. You need to have appropriate grade, and I'm not going to qualify that so that we don't enter into a debate. Good. A. Yes. Q. Now, assuming there was enough feed of appropriate grade by 2006, and that these projects were in place by 2006, would you agree with me that we would see those effects in 2006? A. I believe so, yes." (Transcript, Hearing on Quantum, Day 4, p. 515, line 25, p. 516, lines 1-4, 14-17 and p. 518, lines 5-19) (Mr. Lambert).

433. Thus, we find that the evidence presented falls short of demonstrating that the Tin Smelter could achieve the Claimant's proposed increase in production. Additionally, it is not apparent either whether capital was invested on improving the performance of the smelter in 2005-2006 or whether there were projected investments in 2007 for that purpose.⁶⁹⁴ For all these reasons, we find that the Tin Smelter would be unable to increase its tin ingot production levels above historical production levels.⁶⁹⁵

ii. *Price Premium*

434. The Claimant includes in its valuation a *premium*. Vinto charged a premium over the tin ingot price, which is often "a fixed dollar amount added to the final LME price or a percentage premium over the tin ingots price."⁶⁹⁶ The latest ingot sale contracts signed by Vinto prior to the expropriation were undertaken on 13 September 2005 and 20 February 2006. These contracts included premiums of US\$280 per tonne and 3% of the ingot price. Additionally, the Claimant argues that CRU shows that large scale suppliers (such as Vinto) reached price premiums over US\$400 per tonne for shipments to the U.S., to which many of the Tin Smelter's tin ingots were shipped in early 2007. Thus, the Claimant projects a 3% premium.⁶⁹⁷

435. On the other hand, Bolivia's expert adopts Compass Lexecon's use of analyst projections as the baseline for ingot sale prices and agrees that a premium must be added. However, it advocates for the use of a premium of 1.68%, rather than the 3% premium proposed by the Claimant taking into account 18 contracts for ingot with quality of 99.9% tin instead of one contract.⁶⁹⁸ In contrast, in the Claimant's view, this premium should not be applied since it is based "on the average premiums of 18 short-term sales contracts signed by Vinto dating from 2002 through 2005" (and

⁶⁹⁴ "Q. But all of these projects are just maintenance investments or operating expenses; correct? That's your testimony? A. Yes." Transcript, Hearing on Quantum, Day 3, p. 417, lines 19-22 (Eng. Villavicencio).

⁶⁹⁵ With respect to grade concentrates, Claimant assumes that the average grade of the tin concentrates would remain constant at a high-grade of 48.75%. Respondent also assumes the same figure for valuation purposes. With respect to metallurgical recovery rates, "the recovery rate is dependent on the grade of the processed concentrates. The higher the quality/purity of the concentrate, the better the recovery rate, and vice versa". Bolivia's Rejoinder on Quantum, ¶¶ 660, 662 and 663; Villavicencio I, ¶ 70. Claimant proposes that the metallurgical recovery rates at the Tin Smelter will remain constant at 95.6%. RPA Second Expert Report, ¶ 209. Bolivia's Post-Hearing Brief, ¶ 106.

⁶⁹⁶ Compass Lexecon First Expert Report, ¶ 84. As indicated by Claimant's expert, this premium usually increases when prices rise and there are also geographic variations between the premiums that are added to the final price. "*This premium applies on top of the average LME tin ingot price over the quotation period, which is often a period of approximately one week near the date of sale, although this period can vary depending on the contract.*" See also Compass Lexecon I, fn. 96.

⁶⁹⁷ Compass Lexecon First Expert Report, ¶ 84.

⁶⁹⁸ Flores First Expert Report, ¶¶ 117-119. Bolivia's Post-Hearing Brief, ¶¶ 124-125.

are thus not representative of sale price premiums for tin ingots in 2007), whereas its proposed premium is based on the last sales contract signed by Vinto prior to the 2007 nationalization.⁶⁹⁹

436. The Respondent further replies that, according to the dynamics of tin market prices and premiums – “[a]s tin prices increase or decrease, so do the premiums”⁷⁰⁰ – the historically observed contract premiums were positively correlated with tin prices, and that Compass Lexecon recognized that tin prices were expected to fall. Therefore, it argues that it is reasonable to expect a premium lower than the 3%.⁷⁰¹

a. Analysis by the Tribunal

437. While the Tribunal recognizes the Claimant’s argument as to the proximity of the dates in the contracts, it is not persuaded that one contract of 2007 can be used as a proxy for the premium. Of the contracts presented by the Respondent, some do not contemplate a premium and, as to the others, there is a range that varies between 1% to 3%. In consequence, the Tribunal is inclined towards the Respondent’s proposed premium which reflects an average premium.

iii. *OPEX*

438. To produce at its forecasted levels, the Claimant projects that, beginning in 2008, Vinto would have incurred OPEX of US\$316 per tonne of concentrate processed. This projection is based on Vinto’s actual operating costs for 2006 (US\$368.79 per tonne of concentrate processed). The Claimant indicates that, to be conservative, Compass Lexecon elected to use the 2006 OPEX rather than the average OPEX for 2005 and 2006. Therefore, “[t]o calculate OPEX of US\$316 per tonne of concentrate processed, Compass Lexecon adjusts Vinto’s 2006 OPEX amount to account for the economies of scale that Vinto would have gained as production increased between 2006 and 2008”.⁷⁰² The Claimant thus calculates OPEX to be US\$368.8 per tonne of concentrate processed, which would decrease to US\$315.3 per tonne of concentrate starting in 2008 due to economies of scale, adjusted yearly for inflation.⁷⁰³

⁶⁹⁹ Claimant’s Reply on Quantum, ¶¶ 139 and 140.

⁷⁰⁰ Bolivia’s Rejoinder on Quantum, ¶ 677.

⁷⁰¹ Flores Second Expert Report, ¶¶ 114-116. Bolivia’s Rejoinder on Quantum, ¶ 678.

⁷⁰² Claimant’s Reply on Quantum, ¶ 137; Compass Lexecon Second Expert Report, ¶ 66.

⁷⁰³ According to Claimant’s expert, “operating costs are based on 2006 actuals with adjustments made for economies of scale. These were applied to the fixed costs. The operating costs at the Tin Smelter consist of the following categories: concentrate purchases, smelting, quality control, maintenance, and indirect costs. The production costs, or total smelter site costs, consist of smelting, quality control, maintenance, and

439. The Respondent also calculates the operating costs per MT of concentrate processed, based on the data provided in the 2006 management report, adjusted for inflation.⁷⁰⁴ However, it takes issue with the fact 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 than in 2006".⁷⁰⁵ Expanding on this, the Respondent's expert shows, on the basis of the 2006 operating data submitted by RPA, that OPEX actually increased due to the surge in the quantities of concentrates processed.⁷⁰⁶ Bolivia points out that, even if the Claimant's assumption was correct, it ignores other factors that would increase OPEX costs, such as the lower average concentrate grade that increases the cost per unit of recovered tin, the environmental costs, and impurity levels.⁷⁰⁷

a. Analysis by the Tribunal

440. The OPEX calculations made by both Parties are based on 2006 data. On the argument whether the calculation should be adjusted for economies of scale, we note that it is closely related to the Claimant's expected increase in production. As mentioned above, the Tribunal found that the Claimant's evidence does not support its case for an increase to 14,000 tonnes and historical data also does not indicate that the smelter's production has reached levels near those projected. We do not see how economies of scale would apply under the circumstances. Accordingly, the Tribunal agrees with the Respondent that the calculation of operating costs per MT of concentrate processed should be based on the data provided in the 2006 management report, adjusted for inflation.

iv. *G&A Expenses*

441. The Parties' experts have agreed that the Tin Smelter's general and administrative costs will amount to US\$481,500 per year, adjusted yearly for inflation.⁷⁰⁸

indirect costs." Claimant's expert also indicates that "[a]pproximately 90% of the production costs are fixed and would benefit from economies of scale". RPA Second Expert Report, ¶ 225.

⁷⁰⁴ Flores Second Expert Report, ¶ 104.

⁷⁰⁵ Bolivia's Statement of Defence, ¶ 874; Bolivia's Post-Hearing Brief, ¶¶ 128-133.

⁷⁰⁶ Bolivia's Rejoinder on Quantum, ¶ 694.

⁷⁰⁷ Bolivia's Rejoinder on Quantum, ¶ 696.

⁷⁰⁸ Bolivia's Post-Hearing Brief, ¶ 137; Letter to the Tribunal, 18 November 2021, p. 6.

v. *Remediation and Closure Costs*

442. The Respondent estimates that remediation and closure costs at Vinto would be at least US\$23.2 million as of 2026.⁷⁰⁹ According to the Respondent, the Claimant has failed to account for remediation and closure costs for the Tin Smelter, even though it does so for its valuation of the Colquiri Mine Lease. It argues that the Claimant recognized in its due diligence, prior to the acquisition of the asset, a “significant soil pollution”⁷¹⁰ and such factor should be taken into account in the valuation.⁷¹¹ Furthermore, it indicates that Vinto’s 2007 audited financial statements mention “that the ‘provision for restoration and closure costs [...] is composed of all the costs estimated that will be incurred for environmental remediation’.”⁷¹² Based on those statements, the Claimant estimated the remediation and closure costs at US\$5.5 million.⁷¹³ Bolivia’s expert, SRK, considered this amount to be “insufficient to cover all costs associated with demolition, removal and disposal of all plant and equipment, removal and disposal of substantial quantities of slag and the remediation of soil pollution over a substantial area.”⁷¹⁴

a. Analysis by the Tribunal

443. The Tribunal considers that the estimate proposed by the Respondent lacks an evidentiary basis. At the Hearing on Quantum, the Respondent’s number seemed to be based on the opinion of the Respondent’s expert rather than on any specific foundation:

And remediating smelters is not a cheap matter. We’ve got it under Antimony, but we researched, we looked at case histories. I discussed it with colleagues, and look, *there is nothing definitive*, there is no contract that says we will pay a contractor \$10 per-square meter to basically undertake the remediation of this land. This was just a number that *I felt was reasonable* given what’s happening elsewhere with smelter closure and remediation. [...] And *I felt* the 5.5 million, given what’s going on elsewhere with smelters was pitifully light. [...] Q. You keep referencing elsewhere, what’s going on elsewhere. Where are you referring to? A. No, I have been involved, and we’ve researched it, I have actually been involved with smelters in different parts of the world being closed, and we’ve researched costs, estimates, I think we used--gave a couple of examples in either Canada or the U.S. These are difficult sites to remediate, and they are expensive sites to remediate, but I felt it was important to

⁷⁰⁹ Bolivia’s Post-Hearing Brief, ¶ 135. “SRK has estimated that remediation costs for Vinto would exceed US\$20 million”. See Bolivia’s Rejoinder on Quantum, ¶ 709.

⁷¹⁰ Glencore interoffice report from Mr. Vix to Mr. Eskdale, 21 November 2004, p. 6, **C-310**.

⁷¹¹ Bolivia’s Post-Hearing Brief, ¶¶ 134-136; Bolivia’s Post-Hearing Reply, ¶ 118.

⁷¹² Flores Second Expert Report, ¶ 121; Vinto Financial Statements, 2007, pp. 6, 11 (notes 2.3 and 2.8) and 16 of the pdf, **CLEX-16**.

⁷¹³ “Claimant instructed its experts shortly before the Hearing [on Quantum] to include US\$ 5.5 million as of 2007 in remediation and closure costs based on Vinto’s 2007 Financial Statements, without regard to the actual condition of the smelter that Claimant’s experts did not visit [...]”. Bolivia’s Post-Hearing Brief, ¶ 136.

⁷¹⁴ SRK Second Expert Report, ¶ 104; Bolivia’s Rejoinder on Quantum, ¶ 709; Flores Second Expert Report, ¶ 121.

give an opinion on what a potential closure, restoration, rehabilitation, restoration cost might be, but I was shocked to find that the impact on the value or valuation in 2007 was so small [...].⁷¹⁵

(emphasis added)

444. As a consequence, the Tribunal considers it appropriate to apply the estimated cost based on Vinto's audited financial statements for 2007.

vi. *Working Capital*

445. The Parties' experts agreed on 113 days of revenues for accounts receivables and inventories, 39 days of costs for accounts payable and 28 days of concentrate purchases plus smelter site costs for VAT.⁷¹⁶ The Tribunal will apply those figures to the valuation.

vii. *Other Arguments*

446. The Claimant has presented additional arguments regarding the reasonability of its valuation based on the price it paid for the Tin Smelter in 2005,⁷¹⁷ the increase in metal prices⁷¹⁸ and the profitability of the Tin Smelter during the Claimant's operation.⁷¹⁹ The relevance of these arguments have been contested by the Respondent.⁷²⁰ However, since the Parties agreed on the DCF method of valuation for this asset, the Tribunal's focus will only be on addressing the arguments and data pertinent for this method of valuation.

⁷¹⁵ Transcript, Hearing on Quantum, Day 4, p. 640, lines 5-12, p. 641, lines 9-11, and p. 642, lines 1-2 (Dr. Rigby).

⁷¹⁶ Bolivia's Post-Hearing Brief, ¶ 138.

⁷¹⁷ "Glencore Bermuda paid US\$51.6 million for the Tin Smelter in March 2005. This figure is closely aligned with the Compass Lexecon experts' proposed valuation of US\$53.3 million as of February 2007." Claimant's Post-Hearing Brief, ¶ 37 a).

⁷¹⁸ Claimant's Post-Hearing Brief, ¶ 37 b). "[...] tin prices increased from US\$9,190 per tonne on 1 October 2004 to US\$12,270 per tonne on 8 February 2007". See also Claimant's Post-Hearing Brief, fn. 56.

⁷¹⁹ "Vinto generated profits of approximately US\$18 million." [...] "Bolivia was unable to provide any credible reasons that would justify reducing Vinto's value between 2005 and 2007, much less reducing it to US\$17.2 million" [...] "it is not credible that in February 2007, a willing seller would have sold Vinto for only US\$17.2 million as Bolivia asserts". Claimant's Post-Hearing Brief, ¶ 37 b), c) and d).

⁷²⁰ "Claimant bears the burden of proving the price it paid (and has all the information to do so). Yet, Claimant has withheld such evidence"; "[...] no diligent and informed willing buyer would take the 2005 purchase price at face value to determine its offer price in 2007 (that is, 2 years later, during which Vinto was operated with the same equipment and without any capital investment, exhausting the equipment to the point it could not even process all the acquired concentrates, and under very different economic and political conditions)"; "[t]he fluctuation of tin prices is a *non sequitur* for valuing a smelter, because tin is both an output and an input to the smelting business (unlike for a tin mine)"; "[...] it is undisputed that the FMV using a DCF model is based on future cash-flow projections and not on the accounting principles that guide an isolated past financial statement." Bolivia's Post-Hearing Reply, ¶¶ 100-113.

[REDACTED]

i. [REDACTED]

447. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

448. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

449. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

450. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

721 [REDACTED]
722 [REDACTED]
723 [REDACTED]
724 [REDACTED]
725 [REDACTED]

[REDACTED]

451.

[REDACTED]

a.

[REDACTED]

452.

[REDACTED]

726

[REDACTED]

727

[REDACTED]

728

[REDACTED]

729

[REDACTED]

[REDACTED]

453. [REDACTED]

454. [REDACTED]

b. [REDACTED]

455. [REDACTED]

730 [REDACTED]
731 [REDACTED]
732 [REDACTED]
733 [REDACTED]
734 [REDACTED]

c. [REDACTED]

456. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

457. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

ii. [REDACTED]

458. [REDACTED]
[REDACTED]
[REDACTED]

459. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

735 [REDACTED]

736 [REDACTED]

737 [REDACTED]
[REDACTED]

738 [REDACTED]

739 [REDACTED]

460. [REDACTED]
[REDACTED]
[REDACTED]

461. [REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]

462. [REDACTED]
[REDACTED] [REDACTED]

463. [REDACTED]
[REDACTED]
[REDACTED]

464. [REDACTED]
[REDACTED]
[REDACTED]

740 [REDACTED]

741 [REDACTED]

[REDACTED]

465. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

466. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

467. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

742 [REDACTED]

743 [REDACTED]
[REDACTED]
[REDACTED]

744 [REDACTED]
[REDACTED]

[REDACTED]

468.

[REDACTED]

469.

[REDACTED]

470.

[REDACTED]

745

[REDACTED]

746

[REDACTED]



D. Discount Rates

471. The Parties agree that the DCF methodology is the appropriate method to calculate Colquiri's FMV (except with regard to the future profits of the Tailings Plant). The Parties also agree that Compass Lexecon identified the correct variables in its DCF model.⁷⁴⁷ While the Claimant proposes discount rates of 12.3% and 15.7% for Colquiri and Vinto, the Respondent proposes 22.1% and 28.5% respectively. The main differences are discussed in the following sections.

i. *Risk Free Rate*

472. Both experts agreed to use the rates proposed by the Respondent which are based on a 10-year U.S. governmental bond. The only area of difference is that the Claimant uses a one-year average and the Respondent the spot rate. According to Bolivia, the "Claimant's experts' opportunistic decision to use Dr. Flores' rates, absent agreement on other variables, actually increases its valuation for Colquiri, driving the valuations of the experts further apart (as Dr. Flores' risk free rate was lower than Compass Lexecon's). [...] [The] Claimant's proposal for the risk-free rates is thus disingenuous as it creates no more than a veneer of cooperation, when in fact [the] Claimant is simply cherry picking the rate that maximizes its claims".⁷⁴⁸ The Claimant replies that "Bolivia fails to mention that the experts' compromise reduces Vinto's valuation. Further, the Compass Lexecon experts' compromise achieves the desired goal of reducing the number of differences between the parties' valuations".⁷⁴⁹

473. Since the rate proposed by the Respondent is more aligned with the valuation date, we find this rate to be more appropriate for our valuation.

ii. *Country Risk Premium (CRP)*

474. The Claimant's expert indicates that "[t]he purpose of the country-risk premium is to account for the incremental political, regulatory, and macroeconomic risks that the assets might be exposed to due to its location being in Bolivia as opposed to a more developed and more stable jurisdiction like the US".⁷⁵⁰ The Parties agree on the "first step" (country default spread) to determine the

⁷⁴⁷ Claimant's Reply on Quantum, ¶ 50; Bolivia's Statement of Defence, ¶ 736.

⁷⁴⁸ Bolivia's Post-Hearing Brief, ¶ 150.

⁷⁴⁹ Claimant's Post-Hearing Reply, ¶ 51.

⁷⁵⁰ Compass Lexecon Second Expert Report, ¶ 85.

applicable CRP. The Claimant's expert calculates general exposure to Bolivia's country risk using the method of applying Bolivia's sovereign default risk.⁷⁵¹ Using the EMBI proxy methodology, the Claimant obtains a country risk premium of 5.21% as of the February 2007 valuation date for Vinto and 3.7% as of the May 2012 valuation date for Colquiri.⁷⁵²

475. In its first report, Bolivia's expert indicated that "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" (emphasis added).⁷⁵³ Bolivia initially referred to that second step as an "equity risk premium"⁷⁵⁴ although in subsequent submissions it referred to it as a "corrective application" and a "corrective factor."⁷⁵⁵ Its adjustment entails averaging two approaches: (i) applying a 1.5 multiplier to Bolivia's sovereign debt spread and (ii) the Ibbotson/Morningstar's Country Risk Rating Model. By doing so, it obtains premiums of 13.13% and 10.52% for the valuation dates of February 2007 and June 2012, for Vinto and Colquiri respectively.⁷⁵⁶

a. 1.5 Multiplier

476. With respect to the 1.5 volatility multiplier, the Claimant alleges that this multiplier is only appropriate for valuations of short-term investments (*i.e.*, for investments in stock that an investor expects to hold only for a few days, weeks or months), which is not the case for the valuation of Colquiri and Vinto.⁷⁵⁷ The Claimant also points out that the Respondent's position was rejected by the tribunal in *Rurelec v. Bolivia*, which applied the same Treaty.⁷⁵⁸ On the other hand, the Respondent replies that Prof. Damodaran never rejected the application of a multiplier for long-term investments. To the contrary, he uses the 1.5 multiplier when computing discount rates for long-term equity investments and in the spreadsheet that Compass Lexecon cited, the 1.5

⁷⁵¹ Claimant's Reply on Quantum, ¶ 144. "The sovereign debt approach is calculated as the difference between the yield of the U.S. government bond and the yield of the government bond (denominated in U.S. dollars) of the target country (Bolivia in this case). The sovereign debt for developing countries such as Bolivia is usually measured through emerging market bond indices, such as the Emerging Market Bond Index ("EMBI") [...] [t]hose indices are not available for Bolivia, so Compass Lexecon calculates the country risk premium in Bolivia with: an EMBI proxy [...]." Flores First Expert Report, ¶ 164.

⁷⁵² Flores First Expert Report, ¶ 165.

⁷⁵³ Flores First Expert Report, ¶ 167.

⁷⁵⁴ Bolivia's Statement of Defence, ¶ 880.

⁷⁵⁵ Bolivia's Rejoinder on Quantum, ¶ 831; Bolivia's Post-Hearing Brief, ¶ 153.

⁷⁵⁶ Flores First Expert Report, ¶¶ 167-169. See also Flores Second Expert Report, Figures 19 and 20.

⁷⁵⁷ Claimant's Reply on Quantum, ¶ 145. See also Claimant's Post-Hearing Reply, ¶ 56.

⁷⁵⁸ Claimant's Reply on Quantum, ¶ 145.

multiplier was applied to the CRP estimate for Bolivia, and all other developing countries.⁷⁵⁹ Moreover, the Respondent alleges that the use of the 1.5 multiplier is justified and is a necessary correction to the Claimant's estimate, so that the sovereign default spread can be adjusted to capture the risk of an equity investment in Bolivia, and thus be used for calculating a discount rate on equity investments.⁷⁶⁰

477. Finally, in its Post-Hearing Brief, the Respondent indicated that the "1.5 multiplier is *not* a size/illiquidity premium or an additional premium: it is a correcting factor applied to Compass Lexecon's proxy EMBI to adjust a measure of sovereign debt risk to a measure applicable to equity risks such as those facing Glencore's business operations in Bolivia."⁷⁶¹

b. Ibbotson/Morningstar's Country Risk Rating Model

478. With respect to the country-risk premium based on the Ibbotson/Morningstar Country-Risk Model, the Claimant also contends that this model is not reliable and results in an "overestimation" of the country-risk premium. According to the Claimant's expert, the model is not transparent in its sources and applies data from developed countries to emerging markets. Furthermore, "the fact that Bolivia may default on its debt does not mean that a company located in Bolivia will necessarily default on its debt—particularly when most of that company's revenues are dependent on exports and US dollars, like Colquiri's and Vinto's were". The Claimant's expert also indicates that if it had accounted in its but-for scenario for Colquiri's and Vinto's international customer base, the country-risk rate would have been lower than the general exposure measured by the sovereign debt approach, and since it did not account for this, "[its] country-risk premium is conservative."⁷⁶²
479. Conversely, the Respondent contends that the Ibbotson/Morningstar Country Risk Model is a "widely-employed and thorough study based on country credit risk rating, which presents notable advantages compared to other models, including that it (i) covers many countries, (ii) consistently produces reasonable results, and (iii) produces stable results over time". The Respondent's expert considers the allegations as to "lack of transparency of this model or a bias toward specific world regions as unfounded".⁷⁶³

⁷⁵⁹ Bolivia's Rejoinder on Quantum, ¶ 834.

⁷⁶⁰ Bolivia's Rejoinder on Quantum, ¶ 835.

⁷⁶¹ Bolivia's Post-Hearing Brief, ¶ 153.

⁷⁶² Claimant's Reply on Quantum, ¶ 146.

⁷⁶³ Bolivia's Rejoinder on Quantum, ¶ 836.

480. Finally, in response to the allegation that the Respondent's expert took the average of two "unconnected methodologies that yield highly dissonant estimates," the Respondent explains that the methodologies it employed are widely-recognized for generating reasonable and stable results, and that it is common practice to employ multiple methodologies to gauge a general consensus, especially when performing valuations where the hypothetical willing buyer and its preferred method of estimating country risk are unknown. It also points out that Compass Lexecon has done the same when forecasting commodity prices.⁷⁶⁴

c. Illiquidity

481. Bolivia's expert adds an "illiquidity/size premium" of 3.95% and 3.89% for Vinto and Colquiri respectively.⁷⁶⁵ According to the Respondent, when calculating the Weighted Average Cost of Capital ("WACC") (based on the *Capital Asset Pricing Model* – CAPM) of smaller firms, as in the present case, an illiquidity/size premium must be applied to better reflect their cost of capital. The Respondent's expert explains that most of the inputs used to calculate CAPM refer to large companies (much larger than Colquiri) and 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, it argues that the CAPM measures the cost of capital for large publicly-traded companies which are considered to be very liquid assets, which is not the case of Colquiri (an illiquid physical asset).⁷⁶⁶ The Claimant's expert has not considered an illiquidity/size premium in its calculations.

482. According to the Claimant, there is no justification for an illiquidity or size premium. It argues that the use of such a premium is not "standard practice in international finance", because it is incorrect to apply the US-based size premium proposed by the Respondent's expert to companies in an emerging market like Bolivia. It also points out that the tribunal in *Rurelec* rejected the same arguments brought by Bolivia's same expert. The Claimant also alleges that it is duplicative to assert that Colquiri and Vinto bear additional risk because they are small relative to the US market (through the size premium), and that they bear additional risk because they are located in Bolivia and not in the US (through the country-risk premium). In its view, even if this "size premium" were to apply in emerging markets, Colquiri and Vinto are classified as large companies in Bolivia, thus, there is no reason to reduce their value to account for their size.⁷⁶⁷

⁷⁶⁴ Bolivia's Rejoinder on Quantum, ¶ 830; Bolivia's Post Hearing Brief, ¶ 154.

⁷⁶⁵ Flores Second Expert Report, ¶ 146.

⁷⁶⁶ Bolivia's Statement of Defence, ¶ 841.

⁷⁶⁷ Claimant's Reply on Quantum, ¶ 150.

483. The Respondent replies that it is wrong to conflate the CRP and the additional illiquidity/size premium and to assume an overlap between them since they perform entirely different functions. It explains that the CRP does not account for a company's individual characteristics, which is what the additional risk premium does.⁷⁶⁸ The Respondent also contends that, despite often labelled a "size premium", the rationale behind it "*is broader than this label suggests*," as it also makes up for other "[c]onsiderations such as measurement limitations with the CAPM, illiquidity, diversification, and indirect costs," which the CAPM fails to properly account for.⁷⁶⁹ As to *Rurelec*, the Respondent argues that in that case the tribunal also found that "there [were] compelling reasons to add an additional risk premium of 4.5% to EGSA's required cost of equity, which, while similar in its effects to [Dr. Flores'] 'size premium', might be more appropriately called an 'illiquidity premium', or better yet an 'additional risk premium', as it also encompasses some aspects that the Tribunal considers relevant among those discussed by the Parties when addressing the multiplier issue."⁷⁷⁰ In that case, the Tribunal's task was to estimate the FMV of the largest private energy generation company in Bolivia.⁷⁷¹
484. The Claimant has also argued that the application of an illiquidity premium is contrary to the calculation of the investments' FMVs. According to the Respondent's expert, Colquiri's and Vinto's cash flows should be discounted more heavily using an "illiquidity premium" since it would be difficult to find potential buyers for Colquiri and Vinto, given that these companies are not publicly-traded. It also claims that Glencore Bermuda would have been compelled to divest these assets and to accept higher exit transaction costs. The Claimant's expert takes issue with this, indicating that the use of an "illiquidity premium" runs contrary to the FMV principle

⁷⁶⁸ "The inclusion of the CRP simply does not account for the company-specific characteristics of Vinto and Colquiri that make them different from the large publicly-traded companies targeted by the CAPM." Bolivia's Rejoinder on Quantum, ¶ 855.

⁷⁶⁹ Bolivia's Rejoinder on Quantum, ¶ 851.

⁷⁷⁰ *Guaracachi America, Inc and Rurelec Plc v. Plurinational State of Bolivia*, UNCITRAL, Award, 31 January 2014, ¶ 594, **CLA-120**. Bolivia's Rejoinder on Quantum, ¶ 852 and Bolivia's Post-Hearing Brief, ¶ 157.

⁷⁷¹ Respondent mentions that the *Rurelec* tribunal adopted Prof. Damodaran's solution to: "[a]dd a constant illiquidity premium to the discount rate for all illiquid assets to reflect the higher returns earned historically by less liquid (but still traded) investments, relative to the rest of the market. This is akin to another very common adjustment made to discount rates in practice, which is the small stock premium. The costs of equity for smaller companies are often augmented by 3-3.5% reflecting the excess returns earned by smaller cap companies over very long periods. [...] Practitioners attribute all or a significant portion of the small stock premium reported by Ibbotson Associates to illiquidity and add it on as an illiquidity premium". Bolivia's Rejoinder, ¶ 853, referring to *Guaracachi America, Inc and Rurelec Plc v. Plurinational State of Bolivia*, UNCITRAL, Award, 31 January 2014, ¶¶ 599-600, **CLA-120**; Aswath Damodaran, "Comatose Markets: What If Liquidity Is Not The Norm?", Stern School of Business, December 2010, p. 55, **R-526**.

because under this principle the value should be measured pursuant to the standard of a willing buyer and a willing seller *with no compulsion to sell*.⁷⁷²

485. Conversely, the Respondent contends that the Claimant's position conflates the impact of illiquidity on value with that of a distressed sale. It explains that "[t]he illiquidity premium does not measure the value lost in a rushed sale, but the additional risks inherent with the sale of a privately-held Bolivian smelter or mine compared to the sale of a hypothetical identical publicly-traded Bolivian smelter or mine. Thus, applying an illiquidity premium to Vinto and Colquiri would not assume a distressed sale of the Assets, but would only capture the illiquidity risks inherent in these two physical and non-publicly traded Assets, which the CAPM fails to account for".⁷⁷³

486. Finally, according to the Claimant, the Respondent's assumption that it would be difficult to find potential buyers for Colquiri and Vinto is also disproven by the evidence on the record, given that in five years—from 2000 to 2005—the Colquiri Lease and Tin Smelter changed hands two and three times respectively.⁷⁷⁴ In reply, the Respondent alleges that these transactions "were far from the FMV benchmark of 'an arm's length transaction between a willing and informed buyer and a willing seller with no compulsion to sell'".⁷⁷⁵

d. Further Questions Posed by the Tribunal to the Parties

487. With respect to the CRP, the Tribunal requested a precedent where "*a tribunal has calculated a country risk premium in the same way as the Respondent proposes for this case*". Bolivia's response was that "there is none because one of the methods used in the average was created by

⁷⁷² Claimant's Reply on Quantum, ¶ 151. See also Claimant's Post-Hearing Reply, ¶ 68.

⁷⁷³ Bolivia's Rejoinder on Quantum, ¶ 858; Bolivia's Post-Hearing Brief, ¶ 156.

⁷⁷⁴ Claimant's Reply on Quantum, ¶ 151.

⁷⁷⁵ Bolivia's Rejoinder on Quantum, ¶ 859. See also: "[t]he first of the three transactions that Claimant counts for Vinto was its privatization and sale to Allied Deals in 1999-2000. [...] Allied Deals only paid US\$ 14 million and ended up also receiving items not calculated in Vinto's purchase price, which, on their own, were worth more than US\$ 16 million – meaning that Allied Deals ended up being paid to acquire Vinto." "The second transaction counted by Claimant for Vinto is its 2002 sale from Allied Deals to Sánchez de Lozada's COMSUR for US\$ 6 million. However, in Mr. Eskdale's own words at the Hearing, the sale of 'the Asset, the 6 million number, was in the context of a forced liquidation of the Company [Allied Deals] that we talked about earlier, so that brings with it distressed Seller connotations [...]', and thus is nowhere close to an FMV sale proving Vinto's liquidity". "The third transaction that Claimant counts for Vinto, and the second for Colquiri, is Glencore's 2005 acquisition of the two Assets from Sánchez de Lozada. This transaction was also conducted under irregular, highly secretive and non-transparent circumstances, while Sánchez de Lozada had by then fled Bolivia. This sale of the Assets to Glencore does not serve as proof that it would not 'be difficult to find potential buyers for Colquiri and Vinto,' as Claimant now posits". Bolivia's Rejoinder on Quantum, ¶¶ 860-862.

[the] Claimant exclusively for this case and cannot be found in any published source. The Tribunal should rather ask itself whether a tribunal has calculated a CRP in the same way as the Claimant's experts propose for this case. We are aware of none. Had Dr. Flores relied solely on the Country Risk Rating Model by Ibbotson/Morningstar (which would have led to a higher CRP of 18.45% for 2007 and 15.51% for 2012), then the Tribunal's question would be answered in the positive: it is the same publication relied on by the *Tidewater* tribunal to account for the risk of doing business in Venezuela."⁷⁷⁶

488. Regarding its method to calculate the CRP, the Claimant replies that "[t]he *Rurelec* tribunal used this approach for calculating Bolivia's sovereign default risk, and Dr Flores accepts that this EMBI proxy methodology is appropriate for developing Bolivia's sovereign default risk. Therefore, Bolivia's assertion in its Post-Hearing Brief that there is no precedent of a tribunal accepting a country risk premium calculated pursuant to the EMBI proxy methodology is false. The EMBI proxy methodology also is consistent with Professor Damodaran's recommendations for calculating country risk premia for countries like Bolivia on the Valuation Dates that lack direct EMBI data."⁷⁷⁷
489. With respect to Bolivia's CRP, the Claimant recalls that Bolivia admitted that "there is no[] [precedent for such calculation]" and submits that "[t]his is because Dr Flores's proposed 1.5 multiplier is only appropriate for valuations of short-term investments. In fact, to try to justify this multiple, Bolivia relied at the Hearing on Quantum on examples proposed by Professor Damodaran for a five-year valuation. The Compass Lexecon experts objected to Bolivia's characterizations of these examples, and testified that they are inapplicable here because the parties are valuing Colquiri and Vinto as long-term (20-year), not short-term investments. Dr Flores also proposed the 1.5 multiplier in the *Rurelec* arbitration, and that tribunal rejected Quadrant's argument because 'Professor Damodaran is on the record favouring [the] multiplier ... only for short term valuations.'"⁷⁷⁸ Finally regarding the use of the Ibbotson indicator the Claimant stated that "Bolivia's reliance on *Tidewater* is misplaced".⁷⁷⁹ According to the Claimant, "[t]he tribunal in *Tidewater* relied on Ibbotson as the country risk premium. It did that because the tribunal (i) rejected the claimants' unreasonably low country risk premium of 1.5%, which it called unrealistic; and (ii) the tribunal found the Ibbotson risk premium to be consistent with the country risk premia for Venezuela adopted by other tribunals. Here, Dr Flores did not demonstrate

⁷⁷⁶ Bolivia's Post Hearing Brief, ¶ 155.

⁷⁷⁷ Claimant's Post-Hearing Reply, ¶ 55.

⁷⁷⁸ Claimant's Post-Hearing Reply, ¶ 59.

⁷⁷⁹ Claimant's Post-Hearing Reply, ¶ 62.

that Bolivia's Ibbotson country risk premium is consistent with any other source. On the contrary, Dr Flores's two calculations of country risk lead to widely divergent results: 18.45% for 2007 and 15.51% for 2012 under Ibbotson, and 7.81% for 2007 and 5.54% for 2012 under the EMBI proxy with the 1.5 multiplier. [Dr. Flores] then averages them in a transparent attempt to increase the country risk premium".⁷⁸⁰

490. The Tribunal also posed a question regarding whether there is an example where "[a] tribunal has used [Ibbotson] as a basis to determine a [CRP]." According to the Claimant "there is no precedent of a tribunal that has relied on Ibbotson in the manner that Dr Flores recommends here."⁷⁸¹ The Claimant further contends that "Ibbotson is not a market-based measure of country risk. It is a subjective assessment based on the opinions of a limited number of bankers. This methodology has flaws and drawbacks that have been thoroughly identified in the financial literature. Other tribunals that have had to consider Dr Flores's proposed methodology have rejected doing so. In *Quiborax*, the tribunal noted that both valuation experts agreed on the starting point for calculating sovereign debt risk—there, Professor Damodaran's estimate; here, the EMBI proxy—and it decided to rely on the agreed starting point and did not adopt Dr Flores's recommendation to average Professor Damodaran's estimate with Ibbotson's country risk premium".⁷⁸²
491. According to Bolivia, "[t]he size/illiquidity premium should not be confused with the 1.5 multiplier that corrects [the] Claimant's synthetic reconstructed EMBI proxy. Accordingly, in response to the Tribunal's Question No. 3(c), there is no need for Bolivia to provide a precedent where '*a tribunal has included in a DCF model both a size/illiquidity premium together with an additional size premium,*' as Dr Flores has not included in his DCF model a size/illiquidity premium together with an additional size premium."⁷⁸³
492. The Claimant replied that "Bolivia did not respond to this question because the answer, which is no, demonstrates that its proposed application of those two factors is unprecedented, unsound and should be denied".⁷⁸⁴ According to the Claimant, "[t]he evidence presented at the Hearing, proved that the use of a *size premium* is not standard practice in international finance. Other tribunals have also rejected the application of additional premia for size or illiquidity. As Dr Abdala testified, it is incorrect to apply a US-based size premium to a company in an emerging market

⁷⁸⁰ Claimant's Post-Hearing Reply, ¶ 63.

⁷⁸¹ Claimant's Post-Hearing Reply, ¶ 60.

⁷⁸² Claimant's Post-Hearing Reply, ¶ 61.

⁷⁸³ Bolivia's Post Hearing Brief, ¶ 158.

⁷⁸⁴ Claimant's Post-Hearing Reply, ¶ 65.

(like Colquiri and Vinto)”.⁷⁸⁵ The Claimant adds that according to its experts “it is inappropriate to include an illiquidity premium in the discount rates for the valuations of Colquiri and Vinto because selling all of the shares of a company has the same prospective selling time (*i.e.*, illiquidity) whether the company is publicly traded or not.”⁷⁸⁶

e. Analysis by the Tribunal

493. As a starting point, the Claimant proposes the use of an EMBI proxy to calculate the CRP through the sovereign debt approach.⁷⁸⁷ This indicator was also used in *Rurelec*, another case involving Bolivia.⁷⁸⁸ Bolivia contends that there needs to be “a correcting factor applied to Compass Lexecon’s proxy EMBI to adjust a measure of sovereign debt risk to a measure applicable to equity risks such as those facing Glencore’s business operations in Bolivia”.⁷⁸⁹ Such correcting factor is the result of averaging Bolivia’s sovereign debt spread scaled up using Prof. Damodaran’s 1.5 global average equity multiplier with the Ibbotson/Morningstar’s Country Risk Rating Model.
494. The Tribunal finds it difficult to accept this correction. There is no clear justification or foundation for the use of these two specific indicators and, more importantly, for averaging them. The Respondent has failed to articulate why these two methodologies are connected or why they are appropriate for this particular valuation. Since the Tribunal is not able to discern the rationale for the methodology or the relationship between the variables, it is also difficult to accept each of them separately. Finally, the Tribunal notes that this particular methodology has not been used in any other valuation. For all these reasons, the Tribunal rejects this correction.
495. With respect to the illiquidity/size premium, once more the Tribunal finds it difficult to accept this premium. The rationale for applying a U.S.-based indicator to an emerging market is not clear. Even if the indicator was applicable in this case, the Tribunal struggles with how this indicator is applicable to companies of the size of Vinto in the Bolivian market and also how this adjustment is pertinent to addressing other indicators such as measurement limitations of the CAPM, diversification, and indirect costs of this particular company on the Bolivian market. For all these reasons, the Tribunal also rejects the inclusion of this premium in the DCF Model.

⁷⁸⁵ Claimant’s Post-Hearing Reply, ¶ 66.

⁷⁸⁶ Claimant’s Post-Hearing Reply, ¶ 67.

⁷⁸⁷ Compass Lexecon Second Expert Report, ¶¶ 117-120.

⁷⁸⁸ *Guaracachi America, Inc and Rurelec Plc v. Plurinational State of Bolivia*, UNCITRAL, Award, 31 January 2014, ¶ 559-560, **CLA-120**.

⁷⁸⁹ Bolivia’s Post Hearing Brief, ¶ 153.

4. THE ANTIMONY SMELTER

496. The Claimant has indicated that the Antimony Smelter was only operational for a short period of time and by the time it was privatized, it had been inoperative for a few years. The Claimant explains that “[a] combination of limited domestic supply and low international antimony prices meant that the Antimony Smelter remained out of service after it was acquired by Glencore Bermuda in 2006”.⁷⁹⁰ The Claimant’s expert indicates that “as a non-operating asset at the time of its expropriation (and with no plans to make it operational), the most appropriate valuation methodology to establish the FMV of the Antimony Smelter is the asset-based approach. Under this approach, the FMV of the Antimony Smelter is equivalent to the sum of the value of its individual components.”⁷⁹¹

497. The Parties agree that an asset-based methodology is appropriate; however, they disagree on the date of valuation and the value of the Antimony Smelter’s assets.⁷⁹²

A. Valuation Date

498. The Claimant argues that “[...] the valuation date must reflect the situation that would have existed *but-for* the State’s wrongful conduct”⁷⁹³ and that “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’.”⁷⁹⁴ According to the Claimant, the valuation should be made as of the date of the award. As a proxy, the Claimant’s expert presents a valuation as of 22 January 2020, the date of the Reply on Quantum.⁷⁹⁵ Based on Article 5 of the Treaty, the Respondent contends that the appropriate date for valuation is the date immediately before it was reverted to the State, *i.e.*, 30 April 2010.⁷⁹⁶

499. The Claimant argues that the Antimony Smelter has “appreciated in value” since its nationalization, “at least in part because it is located outside of a city (named Oruro) that has

⁷⁹⁰ Statement of Claim, ¶ 251.

⁷⁹¹ Statement of Claim, ¶ 251.

⁷⁹² Claimant’s Reply on Quantum, ¶ 157. Bolivia’s Post-Hearing Brief, ¶ 140.

⁷⁹³ Statement of Claim, ¶ 253.

⁷⁹⁴ Statement of Claim, ¶ 254.

⁷⁹⁵ Claimant’s Reply on Quantum, ¶ 156.

⁷⁹⁶ Bolivia’s Statement of Defence, ¶ 701. “[T]he 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 [...] 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.” ¶¶ 719 and 721.

grown over the last decade causing land values in the city and surrounding areas to increase” and that calculating the FMV as of April 2010 “would allow Bolivia, rather than [the] Claimant, to retain the increase in the [s]melter’s value, thereby rewarding Bolivia for breaching the Treaty”.⁷⁹⁷ In contrast, Bolivia argues that Article 5 of the Treaty provides for the standard of “full compensation”, which is satisfied by valuating the loss immediately prior to the expropriation or when it became public, that the date of the award has no connection to the breach and loss suffered since the date of the award is arbitrary, that using that day would “allow investors to time litigation strategically and abusively in order to maximize compensation,” and that “[t]here was official and reliable contemporaneous information (as of 2010) about the Antimony Smelter’s land and buildings”.⁷⁹⁸

i. *Analysis by the Tribunal*

500. The Tribunal has determined that the Respondent breached Article 5 of the Treaty by expropriating the Antimony Smelter. Such expropriation was not made for a public purpose nor against just and effective compensation.⁷⁹⁹ Article 5 of the Treaty indicates 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 earlier”.
501. The text of this provision establishes the parameters for compensation and effectively mandates, through the use of the word “shall”, what the FMV in cases of expropriation must be. While the Tribunal is aware of the investment case law cited by the Claimant, we do not consider in this case it would be appropriate to calculate the FMV of the Antimony Smelter by reference to the date of the award. The purpose of Article 5 is to ensure that compensation is given when an expropriation takes place, and such compensation entails calculating what the FMV would be if the investor had sold to a willing buyer the investment “but-for” the Respondent’s breach, which is, in this case, what the FMV of the Antimony Smelter had been if not for the Reversion Decree that effectively took away the property and control of the Antimony Smelter in 2010.
502. We consider that the time that has passed from the taking until now, *i.e.*, 13 years, must be taken into account. The Tribunal considers it necessary to balance on one hand the Claimant’s

⁷⁹⁷ Claimant’s Reply on Quantum, ¶¶ 159 and 160.

⁷⁹⁸ Bolivia’s Statement of Defence, ¶¶ 723-726. See also Bolivia’s Rejoinder on Quantum, ¶¶ 89-116.

⁷⁹⁹ See Section VI.1.B.iv above.

entitlement to compensation without necessarily punishing the Respondent for the lapsed time. In consequence, we consider that the appropriate date of valuation would be 30 April 2010.

B. Valuation of the Antimony Smelter

503. According to the Claimant, “the value of the Antimony Smelter consists of the value of the land on which it is located, and the replacement value of the buildings and improvements to the land.”⁸⁰⁰ The Claimant’s expert adopted the value for the buildings proposed by Bolivia’s expert for her second report and updated it for inflation up to 22 January 2020. As to the value of the land, the Claimant’s expert applied “a two-step market-based approach that resulted in the updated value of approximately US\$3 million as of 22 January 2020.”⁸⁰¹
504. The Claimant contends that the fiscal value used by Bolivia’s expert is inappropriate since it “grossly undervalues the land”. In this regard, it indicates that the fiscal value is “calculated by the State for taxation purposes and is not intended to represent the FMV of the land”.⁸⁰² It submits as well that the market-based approach is precisely designed to value distinct properties, that “the growth of the city of Oruro over the last decade has increased the demand for land around the city”, that the Claimant’s expert valued the land as industrial land, and that since “Bolivia does not have an official registry of real estate transactions, property appraisers in Bolivia typically rely [...] on realtors, land valuation experts and real estate publications as sources for land prices.”⁸⁰³ In order to adjust the land value, the Claimant’s expert accounted for the specific characteristics of the land, such as access to roads, utilities, topography and size.⁸⁰⁴
505. As to pollution, the Claimant alleges that the Respondent has not proved that pollution was caused by Glencore Bermuda or that any pollution has prevented the industrial use of the land or the land of the neighboring Vinto Smelter; therefore, the Claimant considers that any pollution would not affect the continued industrial use. Finally, the Claimant considers that the purchase price of the smelter corroborates its valuation: updating the purchase price (US\$1.1 million) for inflation to

⁸⁰⁰ Claimant’s Reply on Quantum, ¶ 161.

⁸⁰¹ Claimant’s Reply on Quantum, ¶ 162. “To calculate this amount, Ms. Russo first determined the current average value of land (per square meter) comparable to the land where the Antimony Smelter is located, and then adjusted that average value downward to reflect the specific characteristics of the land on which the Antimony Smelter is located—[i.e.], road access, the relative flatness of the land, availability of utilities such as water and electricity, and the size and industrial use of the land.”

⁸⁰² Claimant’s Reply on Quantum, ¶ 165.

⁸⁰³ Claimant’s Reply on Quantum, ¶¶ 166-168.

⁸⁰⁴ Claimant’s expert does not apply a discount for utilities since “the land title includes easements for access to water, sewage and electricity services through the property of the neighboring Vinto Tin Smelter”. Claimant’s Reply on Quantum, ¶ 169.

the date of the Claimant's Reply on Quantum would produce a value of US\$2.6 million, and this value did not even account for the rise in land values.⁸⁰⁵

506. On the other hand, the Respondent opposes the Claimant's valuation arguing that it "does not submit any evidence of what the [l]and's value would have been in 2010 or even the slightest indication of what the rate of appreciation would have been for industrial land with similar characteristics", that "the [l]and could not have appreciated as it is earmarked for industrial use in an area where the development of new industrial activity is (i) opposed by residents; and (ii) prohibited by regulation", that the smelter is a liability, that the Claimant's valuation "ignores the real condition of the [l]and and the remediation and clean-up costs that it requires, which would be higher than the price of the [l]and itself", and that "given that the buildings are abandoned and in a state of ruins [...] they would have to be demolished and dismantled".⁸⁰⁶ In the Respondent's view, the Claimant is unable to establish that it suffered damages due to the reversion of the "abandoned, deteriorated and significantly polluted Antimony Smelter".⁸⁰⁷

i. *Analysis by the Tribunal*

507. At the request of the Tribunal, the Parties presented a joint valuation model. The difference between them is the Claimant's expert valuation (US\$1.9 million) and the Respondent's expert valuation (US\$0 million).⁸⁰⁸ At the outset, the Tribunal is not convinced by the Respondent's argument that "no willing buyer would assign any value to the Antimony Smelter".⁸⁰⁹ The Tribunal understands that the Respondent assigns zero value since it considers that remediation costs would be greater than any value of the land. However, even though the Respondent's expert referred to the estimated cost of Asarco Everett Smelter's cleanup, it is not clear why this cost would be an appropriate parameter. The Tribunal does not have further information with which to estimate the remediation costs for the Antimony Smelter and as far as we understand, no estimation can be based on any subsequent remediation since Bolivia has also not incurred those expenses; therefore, taking into account such costs would be speculative.

⁸⁰⁵ Claimant's Reply on Quantum, ¶ 172.

⁸⁰⁶ Bolivia's Rejoinder on Quantum, ¶¶ 201-207. Bolivia's Post-Hearing Brief, ¶141.

⁸⁰⁷ Bolivia's Rejoinder on Quantum, ¶ 208.

⁸⁰⁸ Respondent's expert indicates that "[r]egarding the [l]and, as of 30 April 2010, it would have had a maximum market value of US\$ 293,987.90. However, a potential buyer of the Antimony Smelter would take into account the costs of environmental remediation. I estimate that, in the circumstances, these costs would exceed the value of the [l]and. Therefore, I confirm that the [l]and does not have a positive commercial value". Diego Mirones, Second Expert Report, 5 June 2020, ¶ 126.

⁸⁰⁹ Bolivia's Post-Hearing Reply, ¶ 120.

508. For the Tribunal, it is somewhat confusing as well that the Antimony Smelter is labeled as “abandoned, deteriorated and significantly polluted” by the Respondent, since this somehow highlights the Claimant’s argument of why it was occasionally used as storage and not put into production *vis-à-vis* Bolivia’s justification for reverting the asset. Regardless of its characterization, the Tribunal considers that even if it was considered a deteriorated asset, the land still holds value.
509. For its valuation, the Claimant’s expert determined first the “initial value of the land”.⁸¹⁰ According to its second expert report, the market-based approach used “value comparables or benchmarks as of the date of [the] Updated Valuation Report” and then those values were adjusted to account for specific characteristics. The Claimant’s expert used information from publications dated August 2019.⁸¹¹ However, as the Tribunal determined, the relevant date of valuation is 2010. The Claimant’s valuation does not provide information as to what would have been the value of the land in 2010 nor does it adjust the calculations based on current information to bring the value to that date. The Respondent’s expert takes as a starting point the cadastral value and also adjusts the value using some factors applied as well by the Claimant’s expert, such as road access, relative flatness of the land and availability of utilities. The information used by the Respondent’s expert is from 2010.⁸¹²
510. Since the Respondent’s expert valuation is based on information and indicators that allow us to establish the Antimony Smelter’s value as of 30 April 2010, the Tribunal considers that this would be the most appropriate valuation.⁸¹³
511. Regarding the value of the buildings, the Claimant’s expert initially calculated the FMV applying a methodology based on their replacement cost in new condition and then discounted the value of different categories of buildings and improvements.⁸¹⁴ The Tribunal notes that the valuation of the buildings and improvements was also based on current values.⁸¹⁵ On the other hand, the Respondent’s expert indicated that “a well-informed buyer will not pay more for an asset than the amount of money needed to rebuild or manufacture a new one that is equal to that which is being

⁸¹⁰ Gina Russo First Expert Report, ¶ 70.

⁸¹¹ Gina Russo Second Expert Report, 22 January 2020, ¶¶ 4.1, 4.2; Claimant’s Reply on Quantum, ¶ 162.

⁸¹² Mirones Second Expert Report, ¶ 105; Claimant’s Reply on Quantum, ¶ 163.

⁸¹³ Mirones Second Expert Report, ¶ 107.

⁸¹⁴ Statement of Claim, ¶ 283; Gina Russo First Expert Report, ¶¶ 6.1-7.1.

⁸¹⁵ Statement of Claim, ¶ 281. “To determine the value of the Antimony Smelter’s buildings and improvements, I considered their description and presumed state of repair as of the date of this Valuation”. Gina Russo First Expert Report, ¶ 6.1. See also Gina Russo First Expert Report, ¶ 6.2.

valued” and that in 2010 the buildings were (and continue to be) abandoned and deteriorated. As a starting point for its valuation, the Respondent’s expert used 2010 average market values calculated based on the price paid by Bolivia for the construction of the plant and applied coefficients to obtain a residual value, which as of 30 April 2010, amounted to US\$370,405.69.⁸¹⁶

512. The Tribunal notes that the Claimant’s expert adopted in its second report the values proposed by the Respondent’s expert and adjusted them for inflation up to 2020.⁸¹⁷ As in the case of the valuation of the land, the Tribunal considers that it is not appropriate to calculate the valuation of the assets based on information that does not correspond to the value of the assets as of the valuation date, *i.e.*, April 2010 and neither its update to 2020. In consequence, we consider that the appropriate valuation for the buildings is the one proposed by the Respondent’s expert.

C. The 3% Transaction Tax

513. The Respondent originally argued that the valuation by the Claimant’s expert was inflated since it did not take into account a 3% municipal tax applicable to real estate transactions.⁸¹⁸ In its Post-Hearing Brief, the Claimant submitted that this tax was inapplicable to the valuation of the Antimony Smelter since it applied to individuals and not corporations. However, it indicated that it “acknowledges that the sale of the Antimony Smelter could be subject to a 3% tax on transactions (*‘impuesto a las transacciones’*)”.⁸¹⁹ Moreover, in its Post-Hearing Reply, the Claimant further clarified that “[t]he parties agreed to include the 3% tax in the Joint Model for the Antimony Smelter, and Glencore Bermuda has already explained that the disagreement with respect to the 3% tax no longer exists. The parties therefore have agreed on all applicable existing Bolivian taxes, and the valuations in the Joint Models are net of all existing Bolivian taxes.”⁸²⁰

i. Analysis by the Tribunal

514. The Tribunal observes that according to the relevant provision, “[t]he Tax on Transactions [...] is levied on the sale of real estate and motor vehicles made within its business by commercial houses, importers and manufacturers [...]”.⁸²¹ This provision distinguishes between this tax and

⁸¹⁶ Mirones Second Expert Report, ¶¶ 108-112.

⁸¹⁷ Gina Russo Second Expert Report, ¶ 1.4 b).

⁸¹⁸ Bolivia’s Rejoinder on Quantum, ¶ 796.

⁸¹⁹ Claimant’s Post-Hearing Brief, fn. 87.

⁸²⁰ Claimant’s Post-Hearing Reply, ¶ 80.

⁸²¹ Law No. 843 and Regulatory Decrees, Art. 107, **R-525** (unofficial translation). Spanish original: “*Artículo 107: Se establece que el Impuesto a las Transacciones que grava las transferencias eventuales de inmuebles y vehículos automotores es de Dominio Tributario Municipal, pasando a denominarse Impuesto Municipal a las Transferencias de Inmuebles y Vehículos Automotores, que se aplicará bajo las mismas*

the municipal tax. In accordance with the text of the provision and by the Claimant's admission on the applicability of the tax on transactions, the Tribunal considers it appropriate to include this tax in the valuation as agreed in the joint model.

5. THE TIN STOCK

515. The Tribunal recalls *first* that when the Antimony Smelter was nationalized, there were tin concentrates stored that were not returned to the Claimant despite its requests to Bolivia. Such concentrates were considered afterwards as part of the Antimony Smelter's assets, and *second*, we recall our finding that the Antimony Smelter Reversion Decree (including the tin stock seizure) constituted an expropriation not made for a public purpose nor against just and effective compensation.⁸²² The Parties do not disagree on the valuation date or the method for the valuation of the Tin Stock.⁸²³ However, there is disagreement as to the number of tonnes. While the Claimant considers the Tin Stock to be comprised of 161 tonnes, the Respondent considers it to be comprised of 157.6 tonnes.

A. Analysis by the Tribunal

516. The Claimant bases its position on communications between Colquiri, the Ministry of Mining and EMV. Those communications are from 2010, specifically between 3 May 2010 (two days after the Antimony Smelter Reversion Decree) and 8 June 2010. The first letter indicates the number of tin concentrates, *i.e.*, 161 tonnes.⁸²⁴ Through this letter, the Executive President of Colquiri requested the return of the stock. On 5 May 2010, the Minister of Mining requested EMV to return the concentrates and informed EMV that "[a]ttached you will find a copy of the letter that [Colquiri] has sent us claiming 161 tonnes of tin concentrates".⁸²⁵ On 8 June 2010, EMV, who was in possession of the concentrates, replied that the concentrates were "considered as an asset of the [A]ntimony [S]melter as they were located on its premises at the time of nationalization" and they would "surely not be disposed of in any way until the *negotiations* that must be carried

normas establecidas en el Título VI de la Ley N° 843 (Texto Ordenado Vigente) y sus reglamentos. No pertenecen al Dominio Tributario Municipal el Impuesto a las Transacciones que grava la venta de inmuebles y vehículos automotores efectuada dentro de su giro por casas comerciales, importadoras y fabricantes."

⁸²² See Section VI.1.B.iv above.

⁸²³ Claimant's Reply on Quantum, ¶ 173; Bolivia's Rejoinder on Quantum, ¶ 811.

⁸²⁴ Letter from Colquiri (Mr. Capriles Tejada) to Ministry of Mining (Mr. Pimentel Castillo), 3 May 2010, C-28.

⁸²⁵ Letter from Ministry of Mining (Mr. Pimentel Castillo) to EMV (Mr. Ramiro Villavicencio), 5 May 2010, C-29 (unofficial translation).

out *between the State and the Company* you represent are concluded” (emphasis added).⁸²⁶ On the other hand, the Respondent presents a notarized report of 23 September 2010 indicating that the concentrates verified were 157,638.00 kg.⁸²⁷

517. The Tribunal considers that the Respondent’s report accurately reflects the amount of concentrates found in the Tin Smelter as of September 2010, *i.e.*, 4 months *after* the Tin Smelter Reversion Decree. While the Respondent’s witness testified that the Respondent “*did not use the Tin Stock [...and] the September 2010 notarized audit of the concentrates reflects the existing stock at the time of the reversion*” (emphasis added)⁸²⁸ and the Tribunal certainly does not doubt that statement, the Tribunal has also no reason to doubt the contemporaneous documents presented by the Claimant. In this regard, the document that more accurately reflects the amount of concentrates as of the reversion date is the letter from Colquiri to the Ministry of Mining of 3 May 2010. Moreover, while the Minister of Mining could have merely referred to the amount of concentrates claimed by Colquiri, we observe that the company that was in possession of the concentrates did not object to the quantity claimed by Glencore Bermuda. In consequence, the Tribunal determines that the Tin Stock is comprised of 161 tonnes for the purposes of the present valuation.

6. CLAIMS ON INTEREST

518. Three issues arise regarding the applicable interest in this dispute. The *first* is the applicable rate of interest, the *second* is whether that interest rate should be fixed or variable and finally, the *third* is whether the interest should be simple or compound. We address these issues below.

A. Applicable Rate

519. The Respondent has indicated that the “applicability of Article V of the Treaty to [the] Claimant’s interest claim is not in dispute between the Parties.”⁸²⁹ However, the Parties disagree on the interest rate that should be applied by the Tribunal and that is consistent with the Treaty provision. According to the Claimant, “the interest rates published by the Central Bank of Bolivia for commercial loans denominated in US dollars are indicative of ‘normal commercial rates’ in

⁸²⁶ Letter from EMV (Mr. Villavicencio) to Colquiri (Mr. Capriles), 8 June 2010, p. 2, **C-102** (unofficial translation).

⁸²⁷ Certificate of Verification of Tin Concentrates Deposited in the Warehouse of the Plant of the Vinto Metallurgical Company, **EO-17**.

⁸²⁸ Villavicencio Third Witness Statement, ¶ 88.

⁸²⁹ Bolivia’s Rejoinder on Quantum, ¶ 879.

Bolivia as mandated by the Treaty.”⁸³⁰ In support of its argument, the Claimant points to *South American Silver v. Bolivia* and *Rurelec v. Bolivia*, where Article V of the Treaty was applied and where the rates published by the Central Bank of Bolivia were relied on by the tribunal.⁸³¹ The Claimant argues that those rates are based on data collected by the Central Bank regarding the actual rates of commercial loans in Bolivia and therefore measure “normal” commercial interest rates in Bolivia as required by the Treaty.⁸³² The relevant rates published by the Central Bank of Bolivia, as provided by Compass Lexecon and relied on by the Claimant, are (i) 8.6% as of February 2007 (for Vinto), (ii) 6.1% as of April 2010 (for the Tin Stock), (iii) 6.4% as of May 2012 (for Colquiri), and (iv) 6.7% as of 2019 (as a proxy for the date of the award, which is the valuation date for the Antimony Smelter).⁸³³

520. Bolivia contends that the Claimant was relieved of its investment risk in the Assets from the very moment they were reverted to the State, therefore, any interest covering the period of time thereafter should be at the risk-free rate. Otherwise, the Claimant would be rewarded for an operating risk it did not bear and would be overcompensated.⁸³⁴ The Respondent dismisses the interest rates proposed by the Claimant on account that the Treaty mandates the application of interest at a “commercially reasonable rate”, which would be the six-month or the one-year U.S. Treasury bill rate.⁸³⁵ It argues that “[f]rom an economic perspective, the term commercial interest rate includes the rates that are regularly available to investors”⁸³⁶ and that since “the amount to be granted by an arbitral award is not exposed to risk, the applicable interest rate should compensate the Claimant exclusively for the time value of money” through a risk-free interest rate. According to the Respondent, Compass Lexecon’s proposed rates are unduly high because they reflect “the interest rates applicable to *average* loans to *average* businesses in Bolivia” and the Claimant: (i) does not request average loans (rather, it requests for multi-billion dollar loans), and (ii) is not an average business in Bolivia but a multinational corporation with high credit

⁸³⁰ Claimant’s Reply on Quantum, ¶ 180.

⁸³¹ Claimant’s Post-Hearing Reply, ¶ 73.

⁸³² Claimant’s Reply on Quantum, ¶ 180.

⁸³³ Statement of Claim, ¶ 290; Claimant’s Reply on Quantum, ¶ 178.

⁸³⁴ Bolivia’s Statement of Defence, ¶ 918.

⁸³⁵ Bolivia’s Post-Hearing Brief, ¶ 164.

⁸³⁶ Bolivia’s Statement of Defence, ¶ 928. As Dr. Flores explains, each specific rate “will depend on the risk profile of the financial product generating the interest payments.” Flores First Expert Report, ¶ 196.

ratings, leverage and access to international financing which allows it to obtain financing at very low cost.⁸³⁷

521. As to the arbitration cases put forward by the Claimant, the Respondent argues that the Tribunal is not bound by the decisions and that “[i]t does not suffice that other tribunals may have decided to apply the interest rate on commercial loans in Bolivia to different claimants for this Tribunal’s decision on interest to go in the same direction.” The Respondent alleges that the Claimant bears the burden of analyzing the text of Article V and demonstrating that such Article “prescribes the application of [...] ‘rates published by the Central Bank of Bolivia for commercial loans denominated in US dollars granted by banks to corporations in Bolivia’”, a burden that has not been discharged.⁸³⁸ Furthermore, the Respondent also posits that it would be inappropriate to follow the *South American Silver* and *Rurelec* decisions since in those cases the arbitration commenced months after the relevant facts took place and the pre-award interest claims spanned 3.5 and 6 years respectively, whereas in this case the Parties engaged in good faith negotiations for ten years before the arbitration commenced and the pre-award interest claim spans over 14 years. In Bolivia’s view, it would be deeply unfair to be penalized for engaging in good faith negotiations by applying an unjustifiably high interest rate.⁸³⁹
522. The Claimant replies that its proposed rates are rates mandated by the Treaty and that the interest rates published by the Central Bank are lower than the rates at which Bolivia could have borrowed funds if it had promptly compensated Glencore Bermuda.⁸⁴⁰ Furthermore, on Bolivia’s assertion that a risk-free or US LIBOR-based interest rate are not indicative of “normal commercial” rates in Bolivia, it argues that the risk-free rate relies on US Treasury bill rates and the US LIBOR rate relies on the borrowing rate of the Claimant’s Swiss parent company, Glencore International. The Claimant also argues that the risk-free rate is inappropriate since it is based on rates for short-term debt (the six-month or one-year US Treasury bill rates) (which garners lower interest rates than long-term debt), highlighting the fact that Bolivia has owed Glencore Bermuda compensation for over a decade and that Bolivia’s similar proposed interest rates were rejected in *South American Silver* and *Rurelec*.⁸⁴¹ This is contradicted by Bolivia, which states that “whether a rate reflects short or long-term debt is irrelevant for pre-award interest. The only relevant factor to determine

⁸³⁷ Bolivia’s Statement of Defence, ¶¶ 928 and 937.

⁸³⁸ Bolivia’s Rejoinder on Quantum, ¶ 885.

⁸³⁹ Bolivia’s Rejoinder on Quantum, ¶ 892.

⁸⁴⁰ Claimant’s Reply on Quantum, ¶ 181. See also, Claimant’s Post-Hearing Reply, ¶ 72.

⁸⁴¹ Claimant’s Reply on Quantum, ¶ 184.

pre-award interest rate is risk, and the U.S. Treasury bills rates are applicable because they are risk-free.”⁸⁴²

523. With respect to Bolivia’s alternative proposal that the Tribunal peg the interest rate to US LIBOR plus 1%, the Claimant argues that it “ignores the reality that businesses typically invest in opportunities that have a significantly greater amount of risk than [...] LIBOR rates”, and that “[t]he interest rate mandated by the Treaty does not hinge on whether Bolivia will pay an award; the Treaty rate is a proxy for an investor’s expected return on its investment in Bolivia, and those returns are not risk free.” The Claimant relies on Profs. Sénéchal and Gotanda’s explanation that “above all, businesses do exist to generate shareholder value and positive net present values (NPVs) for investors. Therefore, it is not correct to assume that the claimant is not compensated for the returns generated in a consistent manner over the years. As such, interest should not be awarded at the risk-free interest rate. As a result, an investor is right in asking for a rate above the risk-free rate”.⁸⁴³ In the Claimant’s view, a LIBOR-based rate “would not reflect Glencore Bermuda’s true loss”, additionally, Glencore International’s borrowing rate has no bearing on the interest rate that should be applied under the Treaty since “the Treaty rate is a proxy for *Glencore Bermuda’s* expected return on *its investments* in Bolivia” (emphasis added).⁸⁴⁴
524. As to these arguments, the Respondent replies that the Claimant has provided no evidence to support the notion that the Treaty rate would be a proxy for an investor’s return on its investment⁸⁴⁵ and that the Treaty establishes “the rate at which interest should accrue on compensation for expropriation, so that the owner of the expropriated property may be adequately compensated for any delay in the payment of such compensation”. Bolivia contends that interest “compensates for the time value of money, and nothing else”.⁸⁴⁶ The Respondent also argues that the “Claimant fails to comment on the extensive case law cited by Bolivia, demonstrating the application by numerous international tribunals of the LIBOR rate plus a small margin as a normal commercial interest rate” and on the fact that Profs. Gotanda and Sénéchal “also recognize that

⁸⁴² Bolivia’s Rejoinder on Quantum, ¶ 912.

⁸⁴³ Claimant’s Reply on Quantum, ¶ 185.

⁸⁴⁴ Claimant’s Reply on Quantum, ¶ 186.

⁸⁴⁵ According to Bolivia, “[t]his assertion suggests that either (i) all foreign investors in Bolivia would have the same expected rate of return on their investments, irrespective of the sector and industry in which they operate and of the specific risk profiles of each investor or (ii) different rates of interest apply under the Treaty, to different investors, depending on their specific circumstances. Neither proposition is tenable, the former because it is incorrect from an economic standpoint, and the latter because it would run counter the function of interest (compensating the investor for the time value of money)”. Bolivia’s Rejoinder on Quantum, ¶ 895.

⁸⁴⁶ Bolivia’s Rejoinder on Quantum, ¶ 894.

the approach taken by investment tribunals is to award interest at a market rate such as the U.S. Treasury bills or LIBOR rates”.⁸⁴⁷

525. In its Post-Hearing Brief, Bolivia contends that the “Claimant’s rate is based on statistics reported by Bolivian banks to the Central Bank of Bolivia regarding loans granted in foreign currency and [the] Claimant does not know whether such statistics are representative of the rate the Tribunal should apply. For instance, [the] Claimant’s experts did not know (i) if the loans were denominated in US dollars or in other foreign currencies, such as Euro[];⁸⁴⁸ (ii) the number of loans reflected in the statistics[],⁸⁴⁹ which is relevant since a small number of loans means that the interest rate of a single loan could skew the data set; and (iii) the delinquency ratio of the borrowers.”⁸⁵⁰ In reply, the Claimant alleges that its expert “testified at the Hearing that ‘[a] normal commercial rate is a rate at which regular business can obtain financing, and we relied on the [i]nterest [r]ate for loans granted from banks to corporations in Bolivia [...] as published by the Central Bank of Bolivia,’” and that “the Central Bank rates represent an average of all commercial rates that Bolivian banks report to the Central Bank. For its part, Bolivia has failed to offer any evidence that the interest rates published by the Bolivian Central Bank are not representative of a ‘normal commercial [...] rate’ in Bolivia.”⁸⁵¹
526. Finally, the Tribunal posed a question on this issue to Bolivia as to the consistency of applying a risk-free interest rate with an interpretation of the text of Article 5 of the Treaty based on the Vienna Convention. Bolivia’s response was that “[i]nterpreting Article V of the Treaty as demanding rates only available to Bolivian companies running business in Bolivia, as [the] Claimant suggests (despite the shortcomings of its proposed rate, discussed *supra*), would lead to ‘manifestly absurd or unreasonable results,’ which would call for ‘recourse to supplementary means of interpretation’, in the terms of Article 32 of the VCLT. In [the] Claimant’s interpretation, the Treaty would authorize the application of a rate that is wholly unrelated to [the] Claimant (which borrows at a much lower rate and does not seek funding from Bolivian banks) and the risks it bore, going beyond compensating [the] Claimant for the time value of money.”⁸⁵² In reply, the Claimant contends that “there is no evidence to support that a risk-free interest rate

⁸⁴⁷ Bolivia’s Rejoinder on Quantum, ¶ 921.

⁸⁴⁸ Transcript, Hearing on Quantum, Day 5, p. 749, line 21-p. 750, line 14 (Ms. Chavich).

⁸⁴⁹ Transcript, Hearing on Quantum, Day 5, p. 750, lines 15-25 (Ms. Chavich).

⁸⁵⁰ Bolivia’s Post-Hearing Brief, ¶ 163.

⁸⁵¹ Claimant’s Post-Hearing Reply, ¶ 71.

⁸⁵² Bolivia’s Post-Hearing Brief, ¶ 165.

is a ‘normal commercial’ rate in Bolivia as Article 5 requires.”⁸⁵³ Regarding the fact that accepting rates only available for Bolivian companies in Bolivia would lead to “manifestly absurd or unreasonable results” which would require “recourse to supplementary means of interpretation” under Article 32 of the VCLT, the Claimant responds that “Bolivia does not [...] identify what these ‘supplementary means’ would be, but it further argues that these unidentified means justify an interest rate of US LIBOR +1%”.⁸⁵⁴ Finally, the Claimant contends that “there is no evidence to suggest that US LIBOR-based interest rate is consistent with ‘normal commercial’ rates in Bolivia as Article 5 requires” because according to its expert the rates proposed by the Respondent’s expert “do [] not reflect the cost of financing of companies in Bolivia [...] and [they do not] represent the cost of financing of Latin America[n] corporations.”⁸⁵⁵

i. *Analysis by the Tribunal*

527. We begin with the text of Article 5 of the Treaty, which states:

(1) [...] Such compensation [...] 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, [...]

(emphasis added)

528. This provision clearly states that not only must the interest be at a “normal commercial rate”, it has to be *applicable* in the territory of the expropriating Party, *i.e.*, in the territory of Bolivia. However, it does not define the term at issue. Interpreting the term in accordance with Article 31(1) of the Vienna Convention, the ordinary meaning of the word “normal” is “conforming to a type, standard, or regular pattern: characterized by that which is considered usual, typical, or routine; according with, constituting, or not deviating from a norm, rule, procedure, or principle; occurring naturally; approximating the statistical average or norm”.⁸⁵⁶ For the Tribunal, this word conveys a meaning of something that is “usual”. On the other hand, while the word “commercial” may have several connotations, ordinarily it describes something that is related to commerce, profit and business activities.⁸⁵⁷ As employed in Article 5, it would indicate that the applicable interest rate is that which is “usually or regularly” employed commercially in Bolivia.

⁸⁵³ Claimant’s Post-Hearing Reply, ¶ 74.

⁸⁵⁴ Claimant’s Post-Hearing Reply, ¶ 75.

⁸⁵⁵ Claimant’s Post-Hearing Reply, ¶ 76.

⁸⁵⁶ “[N]ormal”. *Merriam-Webster.com*. 2023. <https://www.merriam-webster.com/dictionary/normal> 24 April 2023.

⁸⁵⁷ “[O]ccupied with or engaged in commerce or work intended for commerce; of or relating to commerce; characteristic of commerce; viewed with regard to profit; designed for a large market; emphasizing skills

529. The Respondent has failed to engage with the core legal interpretation at issue: it failed to answer why a rate provided for by the Central Bank of Bolivia would not be a “normal commercial rate” in the expropriating country.⁸⁵⁸ To the Tribunal, the value of the rate *vis-à-vis* other rates or whether the rate would have a larger impact because of the passage of time is not relevant to the correct interpretation of the relevant provision.
530. The interest rate mandated by the Treaty is an interest rate that is a normal commercial rate in the expropriating country and the Respondent has failed to articulate why a rate available to “Bolivian companies running business in Bolivia” would not qualify as a normal commercial rate and why it would require resorting to supplementary means of interpretation under the VCLT. In its Post Hearing Brief, the Respondent attempts to challenge the Claimant’s position that the Bolivian Central Bank rate is “representative of the rate the Tribunal should apply”, but as the Claimant correctly points out, it was for Bolivia to submit evidence that the rates established by its Central Bank are not “normal commercial rates” in the Bolivian market. In consequence, the Tribunal cannot agree with the Respondent’s allegations.

B. Fixed or Variable Interest

531. According to the Claimant, “[i]nternational investment tribunals regularly apply fixed interest rates for the entire period during which interest accrues even when variable rates are available”.⁸⁵⁹ According to the Claimant, “it is more appropriate to award a fixed rate of interest as of the Valuation Dates for the Assets for three reasons. *First*, the interest rates as of the Valuation Dates are the best indicator of commercial rates available as of those Dates, consistent with the *ex-ante* approach used in the valuation of the Assets.”⁸⁶⁰ *Second*, “it is consistent with economic reality as Bolivia generally borrows money in the international capital markets at a fixed rate and usually for a period of ten years or more”,⁸⁶¹ and *third*, “as the differences in the rates show, averaging the rates from the Valuation Dates with the lower interest rates applicable in more recent years

and subjects useful in business”. “[C]ommercial”. *Merriam-Webster.com*. 2023. <https://www.merriam-webster.com/dictionary/commercial> 24 April 2023.

⁸⁵⁸ The tribunal in *South American Silver v. Bolivia*, a dispute under the UK-Bolivia Treaty, indicated that this rate is not established by the bank, but rather it is certified or published by the bank “taking into account various interest rates used by various financial players” and considered that “given that these are the rates for commercial and financial operations in Bolivia, they are a normal commercial rate in the territory of the Respondent.” *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No 2013-15, Award, 22 November 2018, ¶ 891, **CLA-252**. See also *Guaracachi America, Inc and Rurelec Plc v. Plurinational State of Bolivia*, UNCITRAL, Award, 31 January 2014, ¶ 615, **CLA-120**.

⁸⁵⁹ Claimant’s Post-Hearing Brief, ¶ 47.

⁸⁶⁰ Claimant’s Post-Hearing Brief, ¶ 49.

⁸⁶¹ Claimant’s Post-Hearing Brief, ¶ 49.

rewards Bolivia for its decade-long delay in compensating Glencore Bermuda and disincentivizes Bolivia to pay the Tribunal's award."⁸⁶²

532. Replying to the first two reasons put forth by the Claimant, the Respondent argues that “the financial product generating any interest payments in this case would be the Tribunal’s award. Accordingly, the interest rate is necessarily applied *ex post* to bring a past value to the award payment’s date”.⁸⁶³ The Respondent further argues that the Claimant’s position “is inconsistent with the principle that, under international law, compensation should repair the harm actually suffered by *the victim*, which is unrelated to the perpetrator of the allegedly wrongful act [...] compensatory interest should not be equated to a State’s borrowing rate”, and that the “Claimant’s proposed comparison would lead to the award on interest being totally dissociated from [the] Claimant’s alleged loss.”⁸⁶⁴

533. As to the third reason put forward by the Claimant, Bolivia indicates this “consequential argument is disingenuous as it fails to consider that both Parties engaged in good faith negotiations for ten years before this [a]rbitration commenced [...]. [The] Claimant’s interest claim, in fact, asks the Tribunal to penalize Bolivia for engaging in these negotiations through the application of unjustifiably high interest rates.”⁸⁶⁵

i. *Analysis by the Tribunal*

534. The Tribunal notes that the Treaty does not explicitly provide for a fixed or variable rate of interest. We consider it more appropriate under the circumstances to award interest at fixed rates from the valuation dates for the Assets, as the interest rates as of the valuation dates are the best indicator of the normal commercial rates available as of those dates.⁸⁶⁶ We agree with the Claimant that under the circumstances a party would have obtained long-term loans at fixed interest rates, when it was deprived of the use of its assets, as opposed to taking out yearly loans.

⁸⁶² Claimant’s Post-Hearing Brief, ¶ 49.

⁸⁶³ Bolivia’s Post-Hearing Reply, ¶ 131.

⁸⁶⁴ Bolivia’s Post-Hearing Reply, ¶ 132. See also, Bolivia’s Rejoinder on Quantum, ¶ 905.

⁸⁶⁵ Bolivia’s Post-Hearing Reply, ¶ 133. See also, Bolivia’s Rejoinder on Quantum, ¶ 892.

⁸⁶⁶ See *Guaracachi America, Inc. and Rurelec Plc v. Plurinational State of Bolivia*, UNCITRAL, Award, 31 January 2014, ¶ 615, **CLA-120**; *South American Silver Limited (Bermuda) v. Plurinational State of Bolivia*, PCA Case No 2013-15, Award, 22 November 2018, ¶¶ 897, 938(h), **CLA-252**.

C. Simple or Compound

535. According to the Claimant, the only way to fully compensate Glencore Bermuda is “to compound the pre-award interest rate on an annual basis”. The Claimant argues that tribunals have frequently noted that compound interest best gives effect to the rule of full reparation, that compound interest ensures that a respondent State is not given a windfall as a result of its breach since it recognizes the time value of a claimant’s losses, and that it also “reflects economic reality in modern times” where “[t]he time value of money in free market economies is measured in compound interest.”⁸⁶⁷
536. Conversely, the Respondent contests that although some tribunals have awarded compound interest recently, other tribunals have refused to do the same, favoring simple interest. Bolivia indicates that tribunals are not unanimous in awarding compound interest and such interest should only be granted in specific circumstances.⁸⁶⁸ On this point, it alleges that the Claimant has not made any specific allegations regarding any circumstances that would support its claim for compound interest. The Respondent submits that if interest were to be awarded, it should be simple.⁸⁶⁹ Bolivia claims that the only circumstance that the Claimant could invoke is its own financial betterment since the claims relate to events that took place between 5 and 10 years ago and that “[t]he self-serving nature of [the] Claimant’s compound interest claim is evidenced by the substantial difference between the value of such claim and the amount of interest that would accrue using simple interest.”⁸⁷⁰
537. Additionally, Bolivia contends that compound interests are prohibited by Articles 412 and 413 of its Civil Code.⁸⁷¹ It indicates that international law allows the Tribunal to refer to domestic law regarding interests and in this regard, it relies on *Desert Line v. Yemen*, *Aucoven v. Venezuela* and *Duke Energy v. Ecuador* where local prohibitions of compound interest were enforced and simple interest was applied.⁸⁷² On this point, the Claimant replies that “[t]his is an international dispute in which Glencore Bermuda seeks compensation for the violations of its rights under international law. The law governing damages is customary international law, not Bolivian law”.⁸⁷³ The Claimant draws attention to the fact that Bolivia has made this argument under other disputes and

⁸⁶⁷ Statement of Claim, ¶ 291.

⁸⁶⁸ Bolivia’s Rejoinder on Quantum, ¶¶ 925 and 926.

⁸⁶⁹ Bolivia’s Statement of Defence, ¶ 934.

⁸⁷⁰ US\$ 338.6 million (as of 22 January 2020). Bolivia’s Rejoinder on Quantum, ¶ 927.

⁸⁷¹ Bolivia’s Statement of Defence, ¶ 945; Bolivia’s Post-Hearing Brief, ¶ 170.

⁸⁷² Bolivia’s Rejoinder on Quantum, ¶ 928.

⁸⁷³ Claimant’s Reply on Quantum, ¶ 190.

such argument was rejected by those tribunals.⁸⁷⁴ It also mentions that two of those tribunals held that Bolivian law would allow the award of compound interest in commercial matters according to Article 800⁸⁷⁵ of the Bolivian Commercial Code.⁸⁷⁶

538. As to this last argument, the Respondent replies that the Bolivian Commercial Code is only applicable to legal relationships related to commercial activity and the hypothesis of compensation for expropriation is not contemplated in the definition of commercial activity established by Article 6 of the Commercial Code.⁸⁷⁷ It alleges that even if the State was acting as a private entity, Article 800 would still not be applicable to this case, as the conditions for its application are not satisfied. In Bolivia's view, the choice made by the Claimant not to commence this arbitration for almost ten years contributed to the amount of time that will elapse between the reversions and any payment pursuant to this Tribunal's final award.⁸⁷⁸

539. The Claimant further relies on *Autopista Concesionada de Venezuela v. Venezuela* to indicate that "[t]he purpose of post-award interest is 'to compensate the additional loss incurred from the date of the award to the date of final payment'." It thus takes the view that any delays in the payment of a damages award should be reflected and accounted for through the determination of post-award interest.⁸⁷⁹

i. *Analysis by the Tribunal*

540. The first source to determine whether a simple or compound interest is applicable, according to the Vienna Convention, is the text of the relevant Treaty. Therefore, we shall focus on the specific provision at issue, which states:

⁸⁷⁴ Claimant's Reply on Quantum, ¶ 191, referring to *Quiborax v. Bolivia* ICSID Case No ARB/06/2, Award, 16 September 2015, **CLA-127**; *South American Silver Limited (Bermuda) v. Bolivia*, PCA Case No 2013-15, Award, 22 November 2018, **CLA-252** and *Guaracachi America, Inc. and Rurelec Plc v. Plurinational State of Bolivia*, UNCITRAL, Award, 31 January 2014, **CLA-120**.

⁸⁷⁵ "Art. 800.- (COMPOUND INTEREST). *Accrued and unpaid interest cannot be compounded, unless this has been agreed after the execution of the contract or when the creditor judicially demands its payment. However, in any of these cases, the following circumstances must be met: 1) The interest is due for more than one year; and 2) The delay in the payment of principal and interest is not attributable to the creditor. The agreement is void against the provisions of this article.*" (unofficial translation, emphasis added). See Bolivia's Rejoinder on Quantum, ¶ 929, fn. 1376.

⁸⁷⁶ Claimant's Reply on Quantum, ¶ 192.

⁸⁷⁷ Bolivia's Rejoinder on Quantum, ¶ 931.

⁸⁷⁸ "Under Article 800, compound interest can be applied exceptionally, provided that (i) interest has accrued for over a year; and (ii) the delay in the payment of the principal and corresponding interest is not attributable to the creditor." Bolivia's Rejoinder on Quantum, ¶ 932. See also Bolivia's Rejoinder on Quantum, ¶ 933.

⁸⁷⁹ Statement of Claim, ¶ 292.

(1) [...] Such compensation [...] 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, [...]

(emphasis added)

541. Article 5 mandates that the interest at a normal commercial rate “is *applicable in the territory of the expropriating Contracting Party*,” in this case, in the territory of Bolivia. The Tribunal notes that the Claimant has not argued that the rate provided by the Central Bank of Bolivia regarding loans granted in foreign currency is a compound interest rate. The Tribunal further observes that the application of compound interests is forbidden in certain instances and applied exceptionally in others. Articles 412 and 413 of the Bolivian Civil Code provides:

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.⁸⁸⁰

542. Article 800 of the Bolivian Commercial Code also prohibits compound interest, with an exception:

Art. 800.- COMPOUND INTEREST. Accrued and unpaid interest *cannot be compounded, unless this has been agreed after the execution of the contract or when the creditor judicially demands its payment*. However, in any of these cases, the following circumstances must be met: 1) The interest is *due for more than one year*; and 2) The delay in the payment of principal and interest is *not attributable to the creditor*. The agreement is void against the provisions of this article.⁸⁸¹

(emphasis added)

543. Thus, under the law of the expropriating contracting Party, compound interest are generally prohibited and only applicable in exceptional circumstances.
544. While compound interest has become the norm in recent years, tribunals have recognized that where the applicable treaty provides for a rate under domestic law that prohibits the payment of compound interest, tribunals have given effect to such provision and declined to award compound interest. In this regard, we note that in *Duke Energy v. Ecuador*, a prohibition in Ecuadorian law of compound interests was taken into account by the tribunal and simple interest was awarded.⁸⁸²

⁸⁸⁰ Civil Code of the Plurinational State of Bolivia, Arts. 412 and 413, **RLA-118** (unofficial translation).

⁸⁸¹ Bolivian Commerce Code, 25 February 1977, **C-307** (unofficial translation).

⁸⁸² “The Tribunal must further decide whether simple or compound interest should be awarded. It agrees with the Respondent’s argument in favor of simple interest. Indeed, Ecuadorian law prohibits compound interest in the present case. Specifically, Article 244 of the Ecuadorian Constitution prohibits compound interest in

Similarly, in *Autopista Concesionada de Venezuela*, the tribunal, “[h]aving concluded that the applicable Venezuelan law combined with the pertinent contract provision does not allow compound interest and that international law does not require it”, held that it “can dispense with making a determination on whether the specific circumstances of the case prevent an award of compound interest in the present arbitration.”⁸⁸³

545. As noted, the Treaty clearly provides that interest shall be awarded at “a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party”. Here, Bolivian law does not permit the payment of compound interest except in certain circumstances. The Claimant has not provided evidence that the Central Bank of Bolivia rate for loans granted in foreign currency is a compound interest rate. Having not done so and in light of Bolivian law’s prohibition on compound interest (except in certain circumstances that do not exist in this case), the Tribunal must conclude that the Central Bank interest rate for loans granted in foreign currency does not carry compound interest. To be sure, commercial loans in Bolivia may call for the payment of compound interest, but the circumstances under which such interest may be paid are limited and the Claimant has not provided sufficient evidence that any of the exceptions apply; thus, the simple interest default rule under Bolivian law should govern.

D. Overall Conclusion on Interest

546. In light of the above, the Tribunal finds that simple interest shall be paid on damages awarded for the Colquiri Mine, the Tin Smelter, the Antimony Smelter and the Tin Stock at fixed rates established by the Central Bank of Bolivia for commercial loans denominated in US dollars as of the valuation dates for the Assets and up to the date of payment.⁸⁸⁴

the context of credits. Similarly, Article 2140 of the Civil Code provides that “*it is prohibited to stipulate interest on interest*” (Spanish original, Tribunal’s translation). The same prohibition is contained in the Code of Commerce [...].” *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 457, **RLA-120**. We recognize that the tribunals in *Rurelec* and *South American Silver* decided to award compound interest on the ground that the issue was not governed by the UK-Bolivia BIT and that Bolivian law did not prohibit compound interest in the cases of commercial loans. We disagree. In our view, the language of the Treaty is clear on the application of Bolivian law to the payment of interest: “Such compensation [...] shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party [...]” In addition, as explained above, the evidence presented in this case shows that Bolivian law does not permit the payment of compound interest except in certain circumstances that do not apply here.

⁸⁸³ *Autopista Concesionada de Venezuela, CA v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/00/5, Award, 23 September 2003, ¶ 396, **CLA-44**.

⁸⁸⁴

7. CLAIMS ON TAXES

547. In its Statement of Claim, the Claimant requested “that the Tribunal declare that: (i) its Award is made net of all applicable Bolivian taxes; and (ii) Bolivia may not tax or attempt to tax the Award.”⁸⁸⁵ The Respondent on the other hand opposes the request. Bolivia alleges that the Claimant “has failed to establish that Bolivian taxes would be expropriatory or in breach of international law”.⁸⁸⁶

548. Among the questions posed by the Tribunal to the Parties, the Claimant was requested to provide its comment on Bolivia’s statement as to the request for tax exemption. The Claimant was also required to comment on the following statement by the *Crystallex v. Venezuela* tribunal:

With regard to the Claimant’s request that the Tribunal declare that any award be made net of all applicable Venezuelan taxes and Venezuela may not tax or attempt to tax the award, the Tribunal takes note that the Claimant’s experts have indicated that their quantum calculations have been prepared net of Venezuelan tax. Faced with a similar request, the tribunal in *Occidental v. Ecuador* deemed such request “speculative and premature”. This Tribunal likewise considers such request to be premature and thus denies the Claimant’s request.⁸⁸⁷

549. According to the Claimant, “[t]he parties and their respective experts have agreed on *all* of the taxes that would have been applicable to the income that Glencore Bermuda would have generated from the Assets had Bolivia not taken them, and had Glencore Bermuda sold the Assets to a third party, and deducted all of those taxes from the [j]oint [m]odels, reducing the valuation of the Assets by tens of millions of dollars”.⁸⁸⁸ The Respondent contends that “while [the] Claimant’s DCF models for Colquiri and Vinto considered the effects of *some* Bolivian taxes (such as taxes on revenues, royalties, and remittance taxes), [the] Claimant’s valuations have not accounted for *all* taxes. For instance, [the] Claimant avoided accounting for a 3% tax applicable to real estate transactions, which would be due in the event [the] Claimant receives compensation for the Antimony Smelter (*quod non*)”.⁸⁸⁹ The Respondent also clarifies that “the fact that the Parties have agreed on the impact of the taxes included in the DCF calculations for Colquiri and Vinto

⁸⁸⁵ Statement of Claim, ¶ 294.

⁸⁸⁶ Bolivia’s Post-Hearing Brief, ¶ 172.

⁸⁸⁷ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, ¶ 946, **CLA-130**.

⁸⁸⁸ Claimant’s Post-Hearing Brief, ¶ 51.

⁸⁸⁹ Bolivia’s Post-Hearing Brief, ¶ 173.

only emphasizes the speculative character of [the] Claimant's request. [The] Claimant is seeking compensation for future hypothetical damages that may not materialize, and such claim is barred by international law".⁸⁹⁰

550. According to the Claimant, "[t]ribunals have regularly found that, having taken into account all applicable taxes in their assessment of damages, the imposition of any additional taxes by the host State would run against the full reparation principle."⁸⁹¹ The Respondent contends that these precedents are "comprised of awards issued against Venezuela in circumstances that are particular to the Venezuelan political context", lack "reasoning regarding the tax exemption", or are "disingenuously misquoted by [the] Claimant".⁸⁹² For its part, Bolivia also refers to awards "which have rejected requests similar to [the] Claimant's due to their speculative and premature character".⁸⁹³
551. Finally, the Claimant requests "that it be exempted from any attempt by Bolivia to use the guise of 'taxation' to collaterally attack the Tribunal's award and the damages that the Tribunal determines Glencore Bermuda is owed".⁸⁹⁴ In the Claimant's view, this is not a "speculative" request but a protection in case "Bolivia were to seek to deduct taxes from the award in addition to the existing taxes already deducted from damages".⁸⁹⁵ Thus, "Glencore Bermuda requests that the award be net of taxes to reflect the fact that the [j]oint [v]aluations are net of taxes, and to protect the finality and efficacy of the award because any further taxation would disallow the full reparations to which it is entitled under international law. This is Glencore Bermuda's only opportunity to request that the Tribunal ensure the integrity of its award by declaring it net of taxes."⁸⁹⁶ Alternatively, "Glencore Bermuda requests that the Tribunal order Bolivia to gross-up the amount of compensation paid so that the net compensation received by Glencore Bermuda corresponds to the damages awarded by this Tribunal."⁸⁹⁷
552. In the Respondent's view, the fact that the request by the Claimant "to gross up the amount of compensation paid so that the net compensation received by Glencore Bermuda corresponds to the damages awarded by this Tribunal" was presented to the Tribunal for the first time in its Post-

⁸⁹⁰ Bolivia's Post-Hearing Reply, ¶ 135.

⁸⁹¹ Claimant's Post-Hearing Brief, ¶ 55.

⁸⁹² Bolivia's Post-Hearing Reply, ¶ 136.

⁸⁹³ Bolivia's Post-Hearing Reply, ¶ 138.

⁸⁹⁴ Claimant's Post-Hearing Brief, ¶ 60.

⁸⁹⁵ Claimant's Post-Hearing Brief, ¶ 61.

⁸⁹⁶ Claimant's Post-Hearing Reply, ¶ 81.

⁸⁹⁷ Claimant's Post-Hearing Brief, ¶ 63.

Hearing Brief demonstrates that the “Claimant has developed this specific claim only at the end of these proceedings”.⁸⁹⁸ Bolivia points out as well “that taxation is an essential attribute of sovereignty, and that the Tribunal cannot prevent the State from levying lawful taxes over amounts awarded to [the] Claimant consistent with its own laws of general application. For instance, an award exempt of all taxes could facilitate tax evasion, considering that it would prevent Bolivia from collecting any taxes, including those that may be currently owed by [the] Claimant (and its group of companies) to the State and which have not been considered in the Parties’ submissions nor in the joint models.”⁸⁹⁹

A. Analysis by the Tribunal

553. Having considered the position of the Parties, the Tribunal finds that the amounts obtained in this Award are net of taxes, and, accordingly, Bolivia may not impose or attempt to impose these taxes on the Award. Notwithstanding, the Tribunal is of the view that a general instruction or order that “Bolivia may not tax or attempt to tax the Award” would be out of its jurisdiction.

VIII. COSTS

A. Claimant’s Submission on Costs

554. The Claimant requests that the Tribunal order Bolivia to bear the Claimant’s costs in its entirety. As indicated in its Statement of Costs, the Claimant seeks reimbursement of the costs incurred for: (i) advances paid for the fees and expenses of the members of the Tribunal and the administrative fees of the PCA; (ii) fees and costs of legal representation, independent experts, fact witnesses and service providers, and (iii) travel costs and expenses of party representatives.
555. The Claimant states that it has incurred a total of US\$33,310,256.11, comprised of: (i) US\$32,394,017.55 for legal representation and experts; (ii) US\$602,139.00 for Tribunal and PCA costs; and (iii) US\$314,099.57 for other costs.⁹⁰⁰

B. Respondent’s Submission on Costs

556. The Respondent requests the Tribunal to order reimbursement by the Claimant of all fees, costs and expenses incurred in the arbitration by Bolivia, in the amount of US\$7,882,794.49 and to

⁸⁹⁸ Bolivia’s Post-Hearing Reply, ¶ 139

⁸⁹⁹ Bolivia’s Post-Hearing Reply, ¶ 140.

⁹⁰⁰ Amended Statement of Costs, pp. 1-3.

order such amounts carry interest at a normal commercial rate, due and payable from the date those costs and expenses were incurred until the date of full payment.

557. The Respondent states that its total costs are comprised of: (i) US\$6,808,096.74 for legal and expert fees; (ii) US\$600,000.00 for administrative costs; and (iii) US\$474,697.75 for other costs.⁹⁰¹

C. Fixing the Costs of the Arbitration

558. Pursuant to Article 40(1) of the UNCITRAL Rules, the Tribunal proceeds now to “fix the costs of arbitration in the final award”. In addition to the Parties’ own costs set forth above, these costs include (i) the fees of the arbitral tribunal; (ii) the reasonable travel and other expenses incurred by the arbitrators; and (iii) the fees and expenses of the PCA for the administration of the arbitration and serving as appointing authority. The Parties each made deposits of US\$600,000.00 to cover the abovementioned costs of the arbitration, for a total amount of US\$1,200,000.00. The costs of arbitration covered from such deposits, taking into account the Terms of Appointment agreed upon by the Parties, the Tribunal, and the PCA, are as follows:

TRIBUNAL	US\$607,079.35
PCA	US\$119,415.87
OTHER EXPENSES (including court reporting, catering, Courier expenses, IT/AV support, hearing facilities, interpretation, translation, travel, VAT, etc.)	US\$332,925.49
<u>TOTAL</u>	US\$1,059,420.71

559. Following the issuance of this Award, the PCA shall issue a statement of account for the costs covered from the deposit and return the unexpended balance to the Parties in equal shares in accordance with Article 43(5) of the UNCITRAL Rules.

D. Apportionment of the Costs of the Arbitration

560. Article 42(1) of the UNCITRAL Rules provides that: “[t]he costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may

⁹⁰¹ Bolivia’s Cost Certificate, pp. 2-4.

apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case”.

561. In this case, all of the Respondent’s objections to jurisdiction have been dismissed and the Claimant has prevailed on the expropriation claim in respect of all of the Assets as well as in the FET claim over the Tin Smelter. The Claimant’s other claims have been dismissed. While the Claimant did prevail on two claims, in the Tribunal’s view, both Parties were to some extent unsuccessful.
562. The Tribunal considers that both Parties have conducted themselves with the decorum and professionalism required in a procedure of this type and that, even though there is no Party that prevailed in all of its claims or defenses, the arguments presented on both ends of this very complicated matter were meritorious. In the Tribunal’s view, the circumstances of this case made it complex due to the nature of the allegations, the time elapsed, the volume of the record, the number of allegations involved, as well as the differing views on the calculation of damages.
563. In light of the above and pursuant to the discretion granted by Article 42(1) on the apportionment of costs, the Tribunal finds reasonable that each Party bears its own legal costs and expenses and that the common costs of the arbitration are borne in equal shares.

IX. DECISION

564. For the reasons stated in this Award, the Tribunal decides as follows:

Objections to Jurisdiction

- a) The Respondent’s objections to jurisdiction on the basis of the Claimant’s qualification as an investor, piercing of the corporate veil, indirect investment, abuse of process, the unclean hands principle, and the ICC arbitration clause are dismissed.
- b) The Tribunal has jurisdiction over the Tin Stock claims.

Merits of the Dispute

- c) The Respondent breached Article 5 of the Treaty when expropriating the Tin Smelter, the Antimony Smelter (including the Tin Stock) and the Colquiri Mine without a public purpose and without just and effective compensation.
- d) The Respondent’s actions in response to the Colquiri events do not constitute a breach to Article 2(2) of the Treaty.

- e) The Respondent breached Article 2(2) of the Treaty as to the Tin Smelter Reversion Decree.
- f) As a result of the Respondent's breaches, Bolivia shall pay to the Claimant damages amounting to US\$253,591,796 (including pre-award interest up to and including 8 September 2023), consisting of the following elements:
 - 1. Colquiri Mine: US\$235,800,000;
 - 2. Tin Smelter: US\$15,970,000;
 - 3. Antimony Smelter: US\$694,960; and
 - 4. Tin Stock: US\$1,126,836.
- g) The Respondent shall also pay simple interest on the damages awarded for the Colquiri Mine, the Tin Smelter, the Antimony Smelter and the Tin Stock at fixed rates established by the Central Bank of Bolivia for commercial loans denominated in US dollars from the date of the award and up to the date of payment.
- h) The amounts awarded are net of taxes imposed by the Plurinational State of Bolivia.
- i) Each Party is ordered to bear its own legal costs and expenses incurred in the arbitration. The common costs of the arbitration shall be borne in equal shares by both Parties.

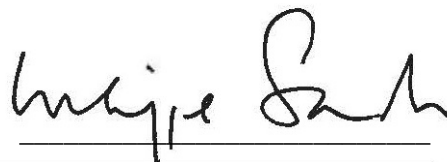
Place of arbitration: Paris, France

Date: 8 September 2023

A handwritten signature in black ink, consisting of a large, stylized 'G' followed by 'otanda'.

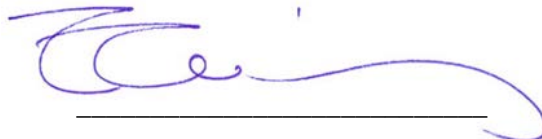
Prof. John Y. Gotanda

(Arbitrator)

A handwritten signature in black ink, consisting of 'Philippe' followed by a stylized 'Sands'.

Prof. Philippe Sands

(Arbitrator)

A handwritten signature in purple ink, consisting of a stylized 'R' followed by 'amírez Hernández'.

Prof. Ricardo Ramírez Hernández

(Presiding Arbitrator)