International Centre for Settlement of Investment Disputes

Quiborax S.A., Non Metallic Minerals S.A.

and Allan Fosk Kaplún

The Claimants

v.

Plurinational State of Bolivia

The Respondent

ICSID Case No. ARB/06/2

DECISION ON JURISDICTION

Rendered by an Arbitral Tribunal composed of

Prof. Gabrielle Kaufmann-Kohler, President
Hon. Marc Lalonde, P.C., O.C., Q.C., Arbitrator
Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal
Natalí Sequeira

Assistant to the Tribunal
Gustavo Laborde

Date: 27 September 2012

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TABLE OF ABBREVIATIONS

Allan Fosk	Mr. Allan Henry Isaac Fosk Kaplún ("Allan Fosk")
Articles	International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1
BCC	Bolivian Commercial Code
BIT or Treaty	Bilateral Investment Treaty; specifically "Agreement between the Republic of Bolivia and the Republic of Chile on the Encouragement and Reciprocal Protection of Investments", signed on 22 September 1994 and in force since 21 July 1999
CDJ	Claimants' Request for Declaratory Judgment of 27 May 2011
Claimants	Quiborax S.A. ("Quiborax"), Mr. Allan Henry Isaac Fosk Kaplún ("Allan Fosk"), and Non-Metallic Minerals S.A. ("NMM")
CM	Claimants' Counter-Memorial on Jurisdiction of 29 October 2010
DPM	Decision on Provisional Measures of 26 February 2010
Exh. CD-	Claimants' Exhibits
Exh. CL-	Claimants' Legal Exhibits
Exh CPM-	Claimants' Exhibits – Provisional Measures
COSS	Claimants' Opening Statement Slides for the hearing on jurisdiction of 12-13 May 2011
Exh. R-	Respondent's Exhibits
Exh. RL-	Respondent's Legal Exhibits
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
Mem.	Claimants' Memorial of 14 September 2009
MFS	Minutes of the First Session of 17 February 2009
OJ	Respondent's Objections to Jurisdiction of 30 July 2010
NMM	Non-Metallic Minerals S.A.
NoA	Claimants' Notice of Arbitration of 4 October 2005
PO	Procedural Order
Quiborax	Quiborax S.A.
RDJ	Respondent's Reply to Claimants' Request for Declaratory Judgment of 10 June 2011
Reply	Respondent's Reply on Jurisdiction of 13 January 2011
Rep. PM	Claimants' Reply to Respondent's Opposition to Provisional Measures of 21 October 2009
Respondent	Plurinational State of Bolivia ("Bolivia").
RFA	Request for Arbitration of 4 October 2005
Rej.	Claimants' Rejoinder on Jurisdiction of 1 April 2011
Río Grande or RIGSSA	Compañía Minera Río Grande Sur S.A. ("Río Grande" or "RIGSSA")
ROSS	Respondent's Opening Statement Slides for the hearing on jurisdiction of 12-13 May 2011
Tr. [page:line]	Transcript of the hearing on jurisdiction of 12-13 May 2011
n.	Footnote
p.	Page
¶	Paragraph
§	Section

I. INTRODUCTION

A. THE PARTIES

1. The Claimants

1. The Claimants are Quiborax S.A. ("Quiborax"), a Chilean mining company, Mr. Allan Henry Isaac Fosk Kaplún ("Allan Fosk"), a Chilean national, and Non-Metallic Minerals S.A. ("NMM"), a Bolivian mining company (collectively, the "Claimants").

2. Quiborax, a corporation created under the laws of Chile, is a mining company dedicated in particular to the extraction of ulexite, a non metallic mineral, and to the manufacture of products derived from this mineral, including boric acid. It operates in the northern part of Chile, near the border with Bolivia, and it is mostly owned by members of the Fosk family. Allan Fosk is the Chief Financial Officer of Quiborax. NMM, a corporation created under the laws of Bolivia, is a mining company that operates in the Río Grande Delta in Bolivia. Who actually owns NMM is one of the issues lying at the heart of this jurisdictional dispute.

3. The Claimants are represented in this arbitration by Andrés Jana, Jorge Bofill, Johanna Klein Kranenberg, Ximena Fuentes, Rodrigo Gil, and Constanza Onetto of BOFILL MIR & ALVAREZ JANA.

2. The Respondent

4. The Respondent is the Plurinational State of Bolivia ("Bolivia" or the "Respondent").

5. The Respondent is represented in this arbitration by Mr. Hugo Montero, Attorney General of Bolivia; Ms. Elizabeth Arismendi Chumacero, Minister of Legal Defense of the State; Mr. Danny Javier López Solis, General Director of Investment Arbitration Defense (Attorney General's Office); and by Mr. Pierre Mayer, Mr. Eduardo Silva Romero, Mr. José Manuel García Represa, Ms. Ana Carolina Simões E Silva, Mr. Francisco Paredes-Balladares, Ms. Anna Valdés Pascal, and Mr. Pacôme Ziegler of DECHERT (PARIS) LLP.

II. THE FACTS

6. This Section summarizes the facts of this dispute insofar as they bear relevance to rule on Bolivia's objections to jurisdiction.

7. Quiborax is the largest supplier of borates in South America. Borates are minerals which contain boron, a semi-metallic element which is always combined with oxygen and other chemical compounds, such as arsenic and chloride. Few of the two hundred existing borates are commercially relevant: ulexite, the borate that the Claimants exploit, is one of them. Borates are used for a variety of products and manufacturing processes, such as the production of fibreglass, detergents, cleaning products, and fertilizers.[1]

8. Quiborax was created in Chile in the 1980s by the Fosk and Fux families. Co-claimant Allan Fosk is the Chief Financial Officer of Quiborax. The company's operations were centred in the North of Chile, with its headquarters in the city of Arica. From its inception, Quiborax obtained its boron from a boron mine located in a dry salt lake in the Salar de Surire, Chile. Deposits of boron minerals are very rare, as they are formed only in extremely dry regions. In point of fact, most commercially relevant boron deposits are located in a handful of countries: Turkey and the United States concentrate over half of the world boron reserves[2], followed by Russia, China, Chile, Peru, and Bolivia. As a result, the borates market is naturally oligopolistic.[3]

9. The borates market appears to have the greatest potential for growth in the production of fertilizers for agricultural uses. Pursuing an expansion strategy from the mid-1990s, Quiborax resolved to diversify borate production in order to enter the borate market for agricultural uses. The ulexite resources from the Salar de Surire, however, proved insufficient to meet Quiborax's growing boron demands resulting from this expansion strategy. Eventually, searching for additional sources of ulexite, Quiborax turned its attention to neighbouring Bolivia, where the ulexite-rich Salar de Uyuni is located.[4]

10. The Salar de Uyuni, in Bolivia, is the largest dry salt lake in the world. It contains about 9.5 million tons of ulexite of admittedly outstanding quality, *i.e.* high boron concentration and low content of impurities such as arsenic. The highest concentration

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1 Mem., ¶¶ 25-26, 29, 36.

2 As a matter of fact, the Turkish state-owned company Eti Mine and the American privately-owned company Río Tinto are the main suppliers of borates worldwide (Mem., ¶ 34).

3 Mem., ¶¶ 18, 20, 22-23, 33-34, 36.

4 *Id*., at ¶¶ 30, 40, 44.

of minerals in the Salar de Uyuni is located in the Río Grande area. At the time Quiborax became interested in acquiring ulexite from Bolivia in 1999-2000, Bolivian company Compañía Minera Río Grande Sur S.A. ("Río Grande" or "RIGSSA"[5]) owned the mining concessions that authorized the exploitation of the boron deposits in the Salar de Uyuni. [6]

11. Río Grande is a mining company that was incorporated under the laws of Bolivia in December 1997. When Río Grande and Quiborax first came into contact, the shareholders of Río Grande were David Moscoso, a Bolivian national (50% of shares); Edsal Finance Inc., a corporation created under the laws of Panama and represented by Alvaro Ugalde, a Bolivian national (49.5%); and Gonzalo Ugalde, a Bolivian national and brother of Alvaro Ugalde (0.5%).[7]

12. It is common ground between the Parties that in 2001 Quiborax made commercial arrangements with Río Grande in order to secure for itself the supply of ulexite from the Salar de Uyuni. The precise nature of those arrangements, though, is vigorously contested by the Parties and constitutes the key factual issue in dispute in this arbitration. Part and parcel of this factual issue is the role played by the third and last co-claimant in this arbitration: Non-Metallic Minerals S.A. ("NMM"). NMM is a corporation created under the laws of Bolivia on 25 July 2001, and has its legal domicile in La Paz. The Parties' conflicting factual accounts are recounted below.

13. According to the Claimants, Quiborax and Allan Fosk became shareholders of NMM in 2001. Whereas in January 2001 Quiborax and Río Grande initially entered into an exclusive contract whereby Río Grande would supply ulexite to Quiborax (the "Exclusive Supply Contract"), this contract was soon left without effect because the Ugalde brothers offered to sell their 50% shareholding in Río Grande to Quiborax in March of that same year. Quiborax, however, was solely interested in the mining concessions, not in the shares of Río Grande. Thus, it was agreed that Río Grande would transfer its mining concessions into a new vehicle corporation of which Quiborax would become a shareholder.[8]

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5 The Claimants refer to this company as "RIGSSA"; the Respondent as "Río Grande."

6 Mem., ¶¶ 45, 47.

7 *Id.*, at ¶ 46, n.72.

8 *Id.*, at ¶¶ 55-62. The Claimants note that this Exclusive Supply Contract already provided (i) that Quiborax had a right of first refusal to acquire Río Grande's mining concessions should Río Grande decide to sell them, and (ii) that Quiborax had the right to purchase the mining concessions in case the Exclusive Supply Contract was breached by Río Grande.

14. The Claimants allege that the Ugalde brothers agreed to sell their 50% interest in the mining concessions to Quiborax for USD 400,000. By August 2001, Quiborax paid the full purchase price. In the meantime, on 25 July 2001, Non Metallic Minerals S.A. ("NMM") a new vehicle corporation was founded under Bolivian law. The original shareholders of NMM were Mr. Fernando Rojas (58 shares), Ms. Dolly Paredes (1 share) and Ms. Gilka Salas (1 share). Fernando Rojas was Quiborax's counsel in Bolivia. Dolly Paredes and Gilka Salas were members of the administrative staff of Mr. Rojas's law firm.[9]

15. The Claimants further maintain that the following transfers took place in August and September of 2001. On 3 August 2001, Río Grande transferred its mining concessions to NMM, receiving NMM shares in return (26,680 shares). On 17 August 2001, Río Grande transferred the totality of its NMM shares to Quiborax (26,680 shares). On 4 September 2001, Quiborax in turn transferred 50% of the total NMM shares to David Moscoso (13,370 shares).[10] Also on 4 September 2001, following an agreement that Quiborax would be the majority shareholder of NMM, David Moscoso sold 1% of its NMM shares (267 shares) to Quiborax for USD 9,985. Finally, on 10 September 2001, Fernando Rojas and Dolly Paredes transferred their shares to Quiborax (59 shares), and Gilka Salas transferred her one share to Allan Fosk.[11] As a result, according to the Claimants, the shareholders of NMM are Quiborax (50.995%), David Moscoso (49%), Allan Fosk (0.005%).[12]

16. In contrast, the Respondent contends that Quiborax and Allan Fosk *never* became shareholders of NMM. Instead, Quiborax and Río Grande had merely an exclusive distribution relationship, as reflected in the Exclusive Supply Contract. Once this dispute arose between the Claimants and the Respondent, the Claimants fabricated evidence purporting to show that Quiborax and Allan Fosk were shareholders of NMM solely to gain access to ICSID arbitration under the Chile-Bolivia BIT (the "Treaty"). In reality, however, the shareholders of NMM were Bolivian nationals at all relevant times.

17. In 2002 and 2003, NMM secured four additional mining concessions for a boron deposit adjacent to the original concession area. Therefore, by August 2003, NMM

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9 *Id.*, at ¶¶ 63-64.

10 NMM issued a total of 26,740 shares: 60 original shares issued to Fernando Rojas, Dolly Paredes and Gilka Salas, and 26,680 shares issued to Río Grande following the contribution of the seven mining concessions.

11 The Claimants argue that this one share was transferred to Allan Fosk in order to comply with Bolivian law requirement that a corporation must have at least three shareholders.

12 Mem., ¶¶ 65-66.

held eleven mining concessions in the Salar de Uyuni.[13] The rate of NMM sales grew substantially between 2001 and mid-2004. On 23 June 2004, Bolivia revoked NMM's eleven mining concessions. In July 2004, the Claimants requested the initiation of friendly consultations with Bolivia under Article X of the Bolivia-Chile BIT. As these consultations did not prosper, the Claimants initiated these arbitration proceedings against Bolivia in October 2005.

18. In December 2008, Bolivia initiated criminal proceedings against Allan Fosk, David Moscoso and others on the ground that the accused allegedly fabricated evidence that allowed the Claimants to establish jurisdiction in this arbitration (the "domestic criminal case" or the "domestic criminal proceedings").[14] As explained in the Procedural History below, the criminal case prompted the Claimants to file a request for provisional measures and a request for a "temporary restraining order." In August 2009, Mr. Moscoso pleaded guilty of the criminal charges and admitted that the minutes of 13 September 2001 were fabricated.[15]

III. PROCEDURAL HISTORY

A. INITIAL PHASE

19. On 4 October 2005, the Claimants filed a Notice of Arbitration with the International Centre for Settlement of Investment Disputes ("ICSID") pursuant to Article 36 of the ICSID Convention and the Bolivia-Chile BIT. In the Notice of Arbitration, the Claimants requested the following relief:

> "a) Declare that Bolivia breached Article III of the Bolivia-Chile BIT by failing to protect the Claimants' investments on Bolivian soil;
>
> b) Declare that Bolivia breached Article III of the Bolivia-Chile BIT by adopting measures that impaired [...] Claimants' investments on Bolivian soil, and that such impairment was carried out by means of arbitrary and discriminatory measures;
>
> c) Declare that Bolivia has breached Article IV of the Bolivia-Chile BIT by failing to accord fair and equitable treatment to Claimants' investments;

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13 *Id.*, at ¶ 76.

14 Exh. CD-82.

15 Exh. R-76, Exh. CPM-20.

d) Declare that Bolivia has breached Article IV of the Bolivia-Chile BIT by directly or indirectly depriving Claimants of their investments on Bolivian soil;

e) Order Bolivia to compensate the Claimants for all the damages sustained by each of them as a consequence of the violations committed by Bolivia, including payment of appropriate interests;

f) Order Bolivia to bear the full costs of these arbitral proceedings, as well as all those costs that have been incurred as a result of Bolivia's violations (Tribunal's translation)."[16]

20. Despite the commencement of the arbitration, the Parties continued to hold settlement negotiations, without however reaching an agreement. Thus, on 21 November 2006, the Claimants appointed as arbitrator Hon. Marc Lalonde, a Canadian national. On 6 April 2007, the Respondent appointed as arbitrator Prof. Brigitte Stern, a French national. On 18 December 2007, the Chairman of the ICSID Administrative Council appointed Prof. Gabrielle Kaufmann-Kohler, a Swiss national, as President of the Tribunal, in accordance with Article 38 of the ICSID Convention. All three arbitrators accepted their appointments. Further, the Centre designated Ms. Natalí Sequeira as Secretary of the Tribunal. Thus, the Arbitral Tribunal was constituted and the proceedings commenced in late December 2007.

21. On 20 March 2008, the Tribunal and the Parties held a first procedural session at the World Bank's office in Paris. At the beginning of the first session, the Parties informed the Tribunal that they had reached a "preliminary oral settlement agreement"[17] and that they expected to set it in writing within the next fifteen days.[18] Nevertheless, the Parties decided to conduct the first session as scheduled lest a final agreement were ultimately not reached. Thus, the Parties and the Tribunal discussed and agreed on a number of procedural issues. Thereafter, the arbitration proceedings were suspended pending the conclusion of the settlement agreement between the Parties.

22. The Parties requested multiple time extensions to finalize the settlement agreement. Eventually, on 13 January 2009, the Claimants requested that the arbitration be resumed on the alleged ground that the Respondent's conduct was "inconsistent" with settlement negotiations. As a result, on 17 February 2009, the Tribunal issued the final minutes of the first session, attaching a draft timetable upon which the Parties would be able to comment. On 5 March 2009, the Tribunal issued Procedural Order No. 1,

16 NoA, ¶ 74.

17 MFS, p. 2.

18 *Id*.

including a final timetable of the proceedings. This timetable was amended on various occasions at the request of both Parties.

B. WRITTEN PHASE ON JURISDICTION

23. On 14 September 2009, the Claimants filed their Memorial, enclosing ninety-nine exhibits[19] and thirty-two legal exhibits.[20] In the Statement of Claim, the Claimants requested the following relief:

> "(1) Declaring that Bolivia violated its obligations under Article VI of the BIT by expropriating Claimants' investment in Bolivia, in an unlawful manner and not in accordance with the requirements of Article VI;
>
> (2) Declaring that Bolivia violated its obligations under Article IV of the BIT by failing to accord Claimants fair and equitable treatment, by unlawfully expropriating Claimants' investment in Bolivia;
>
> (3) Declaring that Bolivia violated its obligations under Article III of the BIT by failing to protect Claimants' investment in Bolivia […] by unreasonable and discriminatory measures consisting of the unlawful expropriation of Claimants' investment in Bolivia;
>
> (4) Declaring that Bolivia violated its obligations under international law by aggravating the dispute between the parties, by submitting Claimants to acts of harassment intended to obstruct Claimants' rights under the BIT;
>
> (5) Declaring that Bolivia violated its obligations under Article IV of the BIT by failing to accord Claimants fair and equitable treatment, by submitting Claimants to acts of harassment intended to obstruct Claimants' rights under the BIT;
>
> (6) Declaring that Bolivia violated its obligations under Article III of the BIT by submitting Claimants to unreasonable and discriminatory measures, consisting of acts of harassment intended to obstruct Claimants' rights under the BIT;
>
> (7) Declaring that Bolivia violated its obligations under Art. 26 of the ICSID Convention by initiating parallel criminal proceedings in Bolivia;
>
> (8) Ordering Bolivia to pay Claimants full compensation in an amount not less than US$ 61,481,461 as of 1 August 2009 for damages suffered due to the loss of their investment in Bolivia, plus compound interest at the commercial rate on such amount from such date until the date of actual payment;
>
> (9) Ordering Bolivia to pay compensation in an amount not less than US$ 5,000,000 for moral damages suffered by Claimants due to

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19 Exhs. CD-1 to CD-99.

20 Exhs. CL-1 to CL-32.

> the unlawful acts of harassment by Bolivia, subsequent to the loss of Claimants' investment in Bolivia;
>
> (10) Ordering Bolivia to pay all costs, fees and expenses incurred by Claimants as a result of Bolivia's violations of the BIT, including all cost, fees and expenses of these arbitration proceedings."[21]

24. Together with the Memorial, the Claimants also submitted a request for provisional measures, asking that the Respondent refrain from engaging in any conduct that could aggravate the dispute and requesting that the Bolivian criminal proceedings be discontinued. On 2 October 2009, the Claimants requested a "temporary restraining order" with immediate effect, asking that the Respondent discontinue the Bolivian criminal proceedings pending the Tribunal's decision on the request for provisional measures. The Respondent opposed this request on 5 October 2009. The Tribunal denied the Claimants' request for a "temporary restraining order."

25. On 13 and 29 October 2009, Bolivia filed briefs opposing the Claimants' request for provisional measures. On 21 October 2009, the Claimants submitted a second brief in support of their request for provisional measures. On 24 November 2009, the Tribunal and the Parties held a conference call to address the request for provisional measures. On 26 February 2010, the Tribunal issued its Decision on Provisional Measures, according to which the Respondent was to "take all appropriate measures to suspend"[22] the Bolivian criminal proceedings against Allan Fosk, David Moscoso and others, and "refrain from initiating"[23] new criminal proceedings which could "jeopardize the procedural integrity of this arbitration."[24]

26. On 7 April 2010, the Respondent filed a proposal to disqualify the Tribunal (the "Proposal"), the effect of which was to temporarily suspend the proceedings. On 19 April 2010, the Claimants submitted observations opposing the Respondent's Proposal. Each Party then presented an additional brief in support of its position. On 6 July 2010, the Secretary-General of ICSID dismissed the Respondent's Proposal. The proceedings resumed shortly thereafter and the procedural calendar was amended accordingly.

27. On 12 July 2010, the Respondent informed that it would file objections to the jurisdiction of the Tribunal by no later than 30 July 2010. At the same time, the Respondent requested an order from the Tribunal directing the Claimants to produce

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21 Mem., § X.

22 DPM, p. 46.

23 *Id*.

24 *Id*.

the documents identified in the Redfern schedule dated 28 May 2010. On 19 July 2010, the Claimants presented objections to the Respondent's requests for document production. On 26 July 2010, the Tribunal issued Procedural Order No. 2, partially granting the Respondent's requests for document production, as specified in the Redfern schedule attached to the order.

28. On 30 July 2010, the Respondent filed Objections to the Jurisdiction of the Tribunal, together with ninety-eight exhibits[25] and the expert report of Prof. Iván Salame. In the Objections to Jurisdiction, the Respondent requested that the Tribunal:

> "a. Declare that it has no *ratione personae* jurisdiction over the Claimants;
>
> b. Declare that it has no *ratione materiae* jurisdiction over the claims brought by the Claimants;
>
> c. Declare that Claimants' claims are inadmissible;
>
> d. Order, in any event, the Claimants to fully reimburse the State for the costs it has incurred in the defense of its interests in the present arbitration, together with interests at a commercially reasonable rate in the view of the Tribunal, from the time the State incurred those costs until the time of effective payment (Tribunal's translation)."[26]

29. On 29 October 2010, the Claimants submitted a Counter-Memorial on Jurisdiction, enclosing forty-two exhibits[27], eleven legal exhibits[28], the expert report of Carlos Rosenkrantz, and the report of Juan Pablo de Luca. In the Counter-Memorial on Jurisdiction, the Claimants requested that the Tribunal:

> "(1) Dismiss the Respondent's Objections to Jurisdiction;
>
> (2) Declare it has jurisdiction to hear Claimants' claims;
>
> (3) Proceed to the merits phase of the proceeding;
>
> (4) Order the Respondent to pay all costs, fees and expenses incurred by Claimants as a result of the Respondent's presentation of Objections to Jurisdiction."[29]

30. On 13 January 2011, the Respondent submitted its Reply on Jurisdiction, together with thirty-five exhibits[30] and the second expert report of Prof. Iván Salame. In the Reply on

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25 Exhs. R-84 to R-181.

26 OJ, ¶ 274.

27 Exhs. CD-100 to CD-141.

28 Exhs. CL-33 to CL-43.

29 CM, § IX.

30 Exhs. R-182 to R-216.

Jurisdiction, the Respondent reiterated the requests made in the Objections to Jurisdiction, and requested in addition that the Tribunal "declare inadmissible the De Luca Report" and "order the Claimants to submit the original share certificates of NMM in order that they may be inspected by an expert, under the supervision of the Tribunal, for purposes of determining their authenticity and date."[31]

31. In the Reply on Jurisdiction and a letter of 4 February 2011, the Respondent requested the Claimants to produce the original share certificates Nos. 1 to 11 of Non Metallic Minerals S.A. (the "original share certificates") for inspection by an expert under the supervision of the Tribunal in order to determine their authenticity and date. On 25 January 2011, the Claimants objected to the Respondent's request for document inspection, but stated that they would make the original share certificates available if the Tribunal deemed it necessary.

32. On 8 February 2011, the Tribunal issued Procedural Order No. 3, granting Respondent's request for document inspection and ordering the Claimants to make the original share certificates available for inspection. Since the Parties failed to agree on the practicalities of the inspection, the Tribunal issued Procedural Order No. 4 on 10 March 2011, providing specific directions on the time, place and logistics of the inspection and setting a timetable for the submission of expert reports. In accordance with this timetable, the Respondent submitted its expert report on the document inspection on 8 April 2011 and the Claimants on 22 April 2011.

33. On 1 April 2011, the Claimants filed their Rejoinder on Jurisdiction, together with eighteen exhibits[32], five legal exhibits[33], the second expert report of Carlos Rosenkrantz, and the second report of Juan Pablo de Luca. In the Rejoinder on Jurisdiction, the Claimants reiterated the requests made in the Counter-Memorial on Jurisdiction, and requested in addition that the Tribunal "[r]eject the Respondent's request to declare the De Luca Report inadmissible."[34]

34. On 12 April 2011, the Tribunal and the Parties held an audio-recorded, pre-hearing conference call. Two days later, the Tribunal issued Procedural Order No. 5, containing directions for the hearing. By letter of 15 April 2011, the Respondent made a request to cross-examine Mr. Allan Fosk and Mr. Ricardo Ramos at the hearing on

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31 Reply, ¶ 259 (Tribunal's translation).

32 Exhs. CD-142 to CD-159.

33 Exhs. CL-44 to CL-48.

34 Rej., § XI, p. 99.

jurisdiction. By letter of 19 April 2011, the Claimants opposed Respondent's request. In Procedural Order No. 6, the Tribunal declared, *inter alia*, the admissibility of the De Luca Report, granted the Respondent's request to cross-examine Mr. Allan Fosk and reserved its decision on the admissibility of Mr. Ramos's witness statement. As stated in that order, the Tribunal does not consider that Mr. Ramos's evidence is relevant for purposes of jurisdiction and will thus not rely on it in this decision; at the same time, it does not perceive any good reason to declare the witness statement of Mr. Ramos inadmissible should this arbitration proceed to the merits phase. In Procedural Order No. 7, the Tribunal issued hearing directions on pending procedural logistical matters.

C. HEARING ON JURISDICTION

35. On 12-13 May 2011, the Arbitral Tribunal held a hearing on jurisdiction in Paris. In attendance at the hearing were the members of the Arbitral Tribunal, the Secretary and the Assistant, and the following party representatives, witnesses and experts:

(i) On behalf of the Claimants

- Mr. Andrés Jana, Bofill Mir & Alvarez Jana
- Mr. Jorge Bofill, Bofill Mir & Alvarez Jana
- Ms. Johanna Klein Kranenberg, Bofill Mir & Alvarez Jana
- Mr. Rodrigo Gil, Bofill Mir & Alvarez Jana
- Ms. Ximena Fuentes, Bofill Mir & Alvarez Jana
- Ms. Constanza Onetto, Bofill Mir & Alvarez Jana

Claimant's Witness:

- Mr. Allan Henry Isaac Fosk Kaplún

Claimant's Experts:

- Mr. Albert Lyter III
- Mr. Carlos Rosencrantz

(ii) On behalf of the Respondent

- Mr. Hugo Montero Lara, Attorney General of the State
- Ms. Elizabeth Arismendi Chumacero, Deputy Attorney General of Legal Defense and Representation of the State
- Mr. Danny Javier López Soliz, General Director of the Jurisdictional and Arbitral Defense of Investments (Attorney General's Office)

- Mr. Pierre Mayer, Dechert (Paris) LLP
- Mr. Eduardo Silva Romero, Dechert (Paris) LLP
- Mr. José Manuel García Represa, Dechert (Paris) LLP
- Ms. Ana Carolina Simões E Silva, Dechert (Paris) LLP
- Mr. Francisco Paredes-Balladares, Dechert (Paris) LLP
- Ms. Anna Valdés Pascal, Dechert (Paris) LLP
- Mr. Pacôme Ziegler, Dechert (Paris) LLP

Respondent's Expert:

- Mr. Iván Salame González-Aramayo

36. Mr. Andrés Jana and Ms. Johanna Klein Kranenberg presented oral arguments on behalf of the Claimants; Mr. Hugo Montero Lara, Prof. Pierre Mayer, Mr. Eduardo Silva Romero and Mr. José Manuel García Represa, in turn, presented oral arguments on behalf of the Respondent.

37. The hearing was sound and video recorded. A *verbatim* transcript of the hearing on jurisdiction was produced and subsequently distributed to the Parties. After the hearing, the Tribunal issued Procedural Order No. 8, confirming, as discussed at the end of the hearing, that there would be no post-hearing briefs and setting a calendar for the filing of submissions regarding the Claimants' request that the Tribunal issue a declaration pursuant to Article 37 of the Articles on State Responsibility. The Claimants filed these submissions on 27 May 2011, and the Respondent filed its reply on 10 June 2011.

* * *

38. The Tribunal, having deliberated and carefully considered the arguments presented by the Parties in their written and oral submissions, renders the present decision on jurisdiction. The Tribunal will first briefly summarize the positions of the Parties (Section IV), then analyze the arguments in support of those positions (Section V), and finally render a decision on jurisdiction (Section VI).

IV. POSITIONS OF THE PARTIES

A. THE RESPONDENT'S POSITION

39. In its written and oral submissions, Bolivia has raised the following objections:

> (i) The Claimants are not "investors" within the meaning of the Treaty. The Claimants have committed a serious breach of the principle of good faith by fabricating evidence showing that Quiborax and Allan Fosk are shareholders of NMM for the sole purpose of gaining access to ICSID arbitration.
>
> (ii) The Claimants did not make an "investment" within the meaning of Article 25(1) of the ICSID Convention because the Claimants (a) made no contribution in the territory of Bolivia, and (b) the alleged investment has not contributed to the economic development of the area.
>
> (iii) In the alternative, the Claimants' alleged investment was made in breach of Bolivian laws and regulations.
>
> (iv) In the further alternative, Claimants' claims are inadmissible because Quiborax and Allan Fosk concealed their participation in NMM, thereby committing an abuse of nationality contrary to the principle of good faith.

40. For these reasons, Bolivia requests that the Tribunal:

> "a. Declare that it has no *ratione personae* jurisdiction over the Claimants;
> b. Declare that it has no *ratione materiae* jurisdiction over the claims brought by the Claimants;
> c. Declare that Claimants' claims are inadmissible;
> d. In any event, order the Claimants to fully reimburse the State for the costs it has incurred in the defense of its interests in the present arbitration, together with interests at a commercially reasonable rate in the view of the Tribunal, from the time the State incurred those costs until the time of effective payment."[35]

B. THE CLAIMANTS' POSITION

41. In their written and oral submissions, the Claimants have replied to Bolivia's objections as follows:

> (i) All three Claimants are "investors" within the meaning of the Treaty.

[35] OJ, ¶ 274 (Tribunal's translation).

(ii) The Claimants acted at all times in good faith and did not fabricate evidence showing that Quiborax and Allan Fosk were shareholders of NMM in order to gain access to ICSID arbitration.

(iii) The Claimants made an "investment" in Bolivia, consisting of shares and eleven mining concessions in the Río Grande area, within the meaning of the Treaty and the ICSID Convention.

(iv) The Claimants' investment was made "in accordance with the laws of the host State" as required by the Treaty.

(v) Quiborax and Allan Fosk did not conceal their condition of shareholders in NMM prior to Respondent's expropriation.

(vi) The Respondent's objections to jurisdiction constitute an abuse of process and must be declared inadmissible.

42. For these reasons, the Claimants request the Tribunal to:

> "(1) Dismiss the Respondent's Objections to Jurisdiction;
> (2) Declare it has jurisdiction to hear Claimants' claims;
> (3) Proceed to the merits phase of the proceeding;
> (4) Order the Respondent to pay all costs, fees and expenses incurred by Claimants as a result of the Respondent's presentation of Objections to Jurisdiction."[36]

43. The Tribunal will expand on the Parties' positions and arguments in the course of its analysis.

V. ANALYSIS

A. THRESHOLD MATTERS

44. Prior to entering the merits of the Parties' positions, the Tribunal will address the following threshold matters: the relevance of previous decisions or awards (1); the law applicable to the jurisdiction of the Tribunal (2); matters that are undisputed by the Parties (3); and the test for establishing jurisdiction (4).

1. The Relevance of Previous Decisions or Awards

45. Both Parties have relied on previous decisions or awards in support of their positions, either to conclude that the same solution should be adopted in the present case, or in an effort to explain why this Tribunal should depart from that solution.

[36] CM, § IX.

46. The Tribunal considers that it is not bound by previous decisions.[37] At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. Specifically, it deems that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It further deems that, subject to the specifics of the Treaty and of the circumstances of the actual case, it has a duty to contribute to the harmonious development of investment law, with a view to meeting the legitimate expectations of the community of States and investors towards the certainty of the rule of law. Arbitrator Stern does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend.

2. Law Applicable to the Jurisdiction of the Tribunal

47. Both Parties agree, and rightly so, that the Tribunal's jurisdiction is governed by the ICSID Convention, by the Bolivia-Chile BIT (the "Treaty" or the "BIT") and, to the extent the latter refers to it, by Bolivian law. It is equally common ground between the Parties that the interpretation of both the ICSID Convention and the Treaty is governed by customary international law as codified by the Vienna Convention on the Law of Treaties. The relevant provisions of the ICSID Convention and the BIT are quoted below.

48. Jurisdiction under the ICSID Convention is governed by Article 25(1), which reads as follows:

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

49. In accordance with the terms of Article II of the Bolivia-Chile BIT, the dispute must fall within the Treaty's scope of application, *ratione personae*, *ratione materiae* and *ratione temporis*:

> "The present Agreement shall apply to investments made before and after its entry into force by investors of a Contracting Party, in accordance with the legal provisions of the other Contracting Party, in

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[37] *See e.g.*, *Saipem S.p.A. v. the People's Republic of Bangladesh* (hereafter "*Saipem*"), Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶ 67; *AES Corporation v. Argentine Republic* (hereafter "*AES*"), Decision on Jurisdiction, 13 July 2005, ¶ 30-32.

> the territory of the latter. However, it shall not apply to disputes or controversies that would have arisen before its entry into force."[38]

50. In the event that a dispute arises between a Contracting Party and an investor of the other Contracting Party, Article X provides for the following dispute settlement mechanism:

> "1. Disputes arising within the scope of this Treaty between one of the Contracting Parties and an investor of the other Contracting Party who has made investments in the territory of the former shall, to the extent possible, be settled through friendly consultations.
>
> 2. If a solution was not reached through those consultations within a period of six months from the date when the request for settlement was made, the investor may submit the dispute:
>
> a) to the competent court of the Contracting Party on whose territory the investment was made; or
>
> b) to international arbitration under the International Centre for Settlement of Investment Disputes (ICSID), created by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, signed in Washington on 18 March 18 1965."[39]

51. Under Article I(2) of the Bolivia-Chile BIT, "investment" is defined as "any kind of assets or rights related to as "investment" made in accordance with the "laws and regulations" of the host State, which includes shares in corporations:

> "For purposes of this Agreement:
>
> [...]
>
> 2. The term "investment" means any kind of assets or rights related to an investment as long as this has been made in accordance with the laws and regulations of the Contracting Party in whose territory the investment was made, and shall comprise in particular, albeit not exclusively:
>
> [....]

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38 Exh. CL-1 (Tribunal's translation).

39 *Id*. (Tribunal's translation). The original in Spanish reads as follows:

"1. Las controversias que surjan en el ámbito de este Acuerdo, entre una de las Partes Contratantes y un inversionista de la otra Parte Contratante que haya realizado inversiones en el territorio de la primera, serán, en la medida de lo posible, solucionadas por medio de consultas amistosas.

2. Si mediante dichas consultas no se llegare a una solución dentro del plazo de seis meses a contar de la fecha de solicitud de arreglo, el inversionista podrá remitir la controversia:

(a) al tribunal competente de la Parte Contratante en cuyo territorio se efectuó la inversión; o

(b) a arbitraje internacional del Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), creado por la Convención para el Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados, firmada en Washington el 18 de marzo de 1965."

b) Shares, debentures, and any other kind of participation in corporations" (emphasis added)."[40]

52. Therefore, Bolivian law applies to determine (i) whether Quiborax and Allan Fosk were shareholders of NMM at the time the dispute arose in June 2004, and (ii) whether the Claimants' purported investment was made "in accordance with the laws and regulations" and the "legal provisions" of Bolivia (henceforth, "in accordance with Bolivian law" or "the legality requirement"). Both Parties agree that these issues are governed by Bolivian law.[41]

3. Undisputed Facts

53. The following facts are undisputed: (i) NMM was constituted under Bolivian law[42]; (ii) Río Grande contributed seven mining concessions to NMM and became the majority shareholder of NMM[43]; (iii) NMM subsequently acquired four additional mining concessions.[44]

4. Test for Establishing Jurisdiction

54. At the jurisdictional stage, the Claimants must establish (i) that the jurisdictional requirements of Article 25 of the ICSID Convention and of the Treaty are met, which includes proving the facts necessary to meet these requirements, and (ii) that they have a *prima facie* cause of action under the Treaty, that is, that the facts they allege are susceptible of constituting a breach of the Treaty *if* they are ultimately proven.[45] The Tribunal finds that this test strikes a proper balance between a more exacting standard which would call for examination of the merits at the jurisdictional stage, and a less exacting standard which would confer excessive weight to the Claimants' own characterization of their claims.

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40 *Id.* (Tribunal's translation).

41 OJ, ¶ 58; CM, § II(2).

42 *Id.*, at ¶ 6; CM, ¶ 34.

43 *Id.*, at ¶ 6; CM, ¶¶ 40-43.

44 *Id.*, at ¶ 6; Rej., ¶¶ 2, 78, 187.

45 On the *prima facie* test of treaty breach for purposes of jurisdiction, *see* among others *United Parcel Services (UPS) v. Government of Canada*, UNCITRAL (NAFTA), Award on Jurisdiction, 22 November 2002**,** ¶¶ 33-37; *Siemens v. Argentine Republic*, Decision on Jurisdiction, 3 August 2004, ¶ 180; *Plama Consortium Limited v. Republic of Bulgaria*, (hereafter "*Plama*"), Decision on Jurisdiction, 8 February 2005, ¶¶ 118-120, 132; *Bayindir Insaat Turizm Ticaret VeSanayi A.S. v. Islamic Republic of Pakistan* (hereafter *"Bayindir"*), Decision on Jurisdiction, ¶¶ 185-200; *El Paso International Company v. Argentine Republic*, (hereafter "*El Paso*"), Decision on Jurisdiction, 27 April 2006, ¶¶ 40-45, 109; *Jan de Nul and Dredging International N.V. v. Arab Republic of Egypt*, (hereafter *"Jan de Nul"*), Decision on Jurisdiction, 16 June 2006, ¶¶ 69-71; *Telenor Mobile Communications AS v. Hungary* (hereafter *"Telenor"*), Award, 13 September 2006, ¶¶ 34, 53, 68, 80; *Phoenix Action Ltd. v. Czech Republic*, Award, 15 April 2009, ¶¶ 60-64.

B. ADMISSIBILITY OF THE OBJECTIONS TO JURISDICTION AND EVIDENCE

1. The Claimants' Position

55. According to the Claimants, the Tribunal must declare the objections to jurisdiction inadmissible on account of Respondent's conduct in this arbitration. In addition, the Tribunal must declare the inadmissibility of any evidence obtained in violation of international law, *i.e.* through the conviction of David Moscoso. This is because Respondent's objections to jurisdiction constitute an abuse of process, and because Respondent should not be able to profit from its own wrongful conduct (*nemo auditur propriam turpitudinem allegans*). The Tribunal has the inherent power to dismiss Respondent's objections in order to preserve the integrity of the proceedings.[46]

56. First, the Respondent created a case on jurisdiction. Second, it has harmed the integrity of this arbitration by initiating criminal proceedings against persons involved in this matter. As a result, key fact witnesses for the Claimants are unwilling to testify, and no Bolivian attorney is willing to give evidence on behalf of the Claimants. Third, in continuing to pursue the criminal claims despite the Tribunal's Decision on Provisional Measures, the Respondent has breached international law. Fourth, the Respondent, whilst availing itself of different procedural opportunities, has failed to pay its share of the advance on costs, in an effort to discourage the Claimants from pursuing this arbitration. For these reasons, the Respondent has forfeited its right to object to the Tribunal's jurisdiction.[47]

2. Bolivia's Position

57. According to Bolivia, the Claimants' request that its objections to jurisdiction be dismissed without consideration is stunning and preposterous for the following five reasons.[48]

58. First, the Respondent's objections are sound in fact and in law. Second, the Claimants have failed to explain why the Respondent's pursuance of the criminal case in Bolivia and its failure to comply with the recommended provisional measures should result in the forfeiture of its right to present objections to jurisdiction. Third, the *Kompetenz-Kompetenz* principle prevails over any inherent power of the Tribunal to dismiss a

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46 CM, ¶¶ 199, 218, 222-223; Rej., § IX.

47 CM, ¶¶ 200-221; Rej., ¶¶ 244-255.

48 Reply, ¶¶ 247-250.

party's objection to jurisdiction when such party commits an abuse of process. In any event, the Respondent committed no abuse of process.[49]

59. Fourth, the Claimants' reliance on the *nemo auditur* principle is inapposite as the Respondent's right to object to the jurisdiction of the Tribunal arises from the Treaty. Fifth, evidence arising from the Bolivian criminal proceedings, on which the Claimants themselves rely, should not be declared inadmissible. Disregarding this evidence would not only constitute a misapplication of the *nemo auditur* principle, but would also be contrary to the principle that the Tribunal has full discretion to assess the evidence under Arbitration Rule 34(1). The real purpose of this request is to confer jurisdiction where there is none.[50]

3. Analysis

3.1. Admissibility of jurisdictional objections

60. The Claimants request that the Respondent's objections to jurisdiction be declared inadmissible, as the Respondent has forfeited its right to object to jurisdiction through its conduct in the arbitration. The Respondent opposes this request.

61. Jurisdiction in ICSID treaty arbitration depends on a number of objective requirements (nationality, legal dispute, investment) which are set forth in Article 25 of the ICSID Convention and in the relevant BIT and on one subjective requirement, consent, which is required under Article 25(1) and generally given by the State in the BIT and by the investor through filing a request for arbitration.

62. Article 41(1) of the ICSID Convention provides that "[t]he Tribunal shall be the judge of its own competence." In other words, it is up to the Tribunal to determine whether the jurisdictional requirements set in the treaties are met or not.

63. This is an expression of the well-established principle of *Kompetenz-Kompetenz*.[51] That principle implies the power to rule on one's jurisdiction as well as the duty to do so. As a consequence, the Tribunal cannot abdicate the task of ascertaining whether the jurisdictional requirements are met.

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49 *Id.*, at ¶¶ 251-253.

50 *Id.*, at ¶¶ 254-258.

51 *Sociedad Anónima Eduardo Viera v. Republic of Chile,* (hereafter *"Pey"*), Award, 21 August 2007, ¶ 203 (Tribunal's translation).

64. The Claimants rely on the International Court of Justice's ("ICJ") judgment in the *Nuclear Tests* case to argue that the Tribunal has the inherent power to preserve the integrity of the proceedings.[52] That is certainly right. Yet, the ICJ expressly stated that the purpose of this inherent power was to "ensure that the exercise of its jurisdiction, *if and when established*, shall not be frustrated"[53] (emphasis added). In other words, such inherent power does not allow a tribunal to dispense with establishing whether it has jurisdiction. This confirms this Tribunal's duty to review whether the treaty requirements for jurisdiction are met, irrespective of the procedural conduct of the Respondent. Thus, the Tribunal cannot but deny the Claimants' request that the Respondent's objections to jurisdiction be declared inadmissible.

3.2. Admissibility of evidence

65. The Parties also disagree on whether evidence emanating from the Bolivian criminal proceedings should be admitted or not. The Claimants request that evidence arising from the Bolivian criminal proceedings be declared inadmissible. The Respondent opposes this request.

66. Arbitration Rule 34(1) reads as follows:

> "The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."

67. Under this Rule, the Tribunal has ample discretion to rule on the admissibility of any evidence adduced. The Tribunal does not consider that declaring the evidence gathered in the Bolivian proceedings admissible would give the Respondent an undue advantage. Neither does it believe that admitting this evidence would harm the integrity of this arbitration. If and when it will have to consider any such evidence, the Tribunal will weigh its probative value taking into account other evidences on record as well as the circumstances surrounding this very evidence. In the exercise of its discretion under Arbitration Rule 34(I), it will then give this evidence more or less weight, or no weight at all.

68. Therefore, the Tribunal concludes that the evidence from the Bolivian proceedings is admissible, being specified that its probative value will be addressed if and when necessary for the resolution of the issues before the Tribunal.

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52 *Nuclear Tests case (New Zealand v. France)*, 15 June 1962, ICJ Reports 1974, p. 457.

53 *Id*.

C. OBJECTIONS TO JURISDICTION

69. Bolivia objects to the jurisdiction of the Tribunal on the following three grounds:

(i) The Tribunal lacks *ratione personae* jurisdiction over the Claimants;

(ii) The Tribunal lacks *ratione materiae* jurisdiction over the dispute;

(iii) In the alternative, the Tribunal lacks jurisdiction because the Claimants' alleged investment was made in breach of Bolivian laws and regulations.

70. There is no dispute between the Parties regarding the other requirements for jurisdiction under the ICSID Convention and the BIT. Specifically, it is not disputed that Bolivia was an ICSID Contracting State at the relevant time, that Quiborax and Allan Fosk are nationals of Chile – another ICSID Contracting State – and that there is a legal dispute. Likewise, there is no dispute that Bolivia consented to submit to arbitration disputes falling within the framework of application of the BIT. The Tribunal agrees that these requirements are met, and will next examine those requirements which are disputed.

1. First Objection: The Tribunal Lacks *Ratione Personae* Jurisdiction Over the Claimants

1.1. Bolivia's Position

71. Bolivia contends that the Tribunal lacks jurisdiction because Quiborax and Allan Fosk are not "investors" and NMM is not a Chilean national within the meaning of the Treaty. At the time the dispute arose in June 2004, Quiborax and Allan Fosk were not shareholders of NMM[54], and NMM, not being under the control of Chilean investors, was accordingly not a Chilean national under the ICSID Convention and the Treaty.[55] Hence, the Tribunal lacks *ratione personae* jurisdiction over Quiborax, Allan Fosk, and NMM.

72. In actuality, the Claimants have fabricated evidence in order to create the impression that NMM was under the control of Chilean nationals Quiborax and Allan Fosk. In so

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54 OJ, ¶ 14.

55 *Id.*, at ¶ 19.

doing, the Claimants have unduly sought to avail themselves of the Bolivia-Chile BIT. This improper conduct constitutes a serious breach of the principle of good faith.[56]

73. The facts and documents preceding the revocation of the mining concessions show that Quiborax and Allan Fosk were *not* shareholders of NMM at the time the dispute arose in June 2004 (1.1.1 below). The only documents submitted by the Claimants showing that Quiborax and Allan Fosk were shareholders of NMM are post-June 2004 internal documents without any probative value (1.1.2 below).[57]

1.1.1. The facts and documents preceding the revocation of the mining concessions show that Quiborax and Allan Fosk were not shareholders of NMM

74. The Claimants' account of how Quiborax and Allan Fosk became shareholders of NMM lacks credibility and logic. On the same date, Quiborax sold to and bought from David Moscoso 267 NMM shares and David Moscoso would have paid USD 9,985 for 267 NMM shares, the same price Allan Fosk would have paid for only one share of NMM.[58]

75. Although the Claimants bear the burden of proof, they have submitted no evidence predating the dispute to show that Quiborax and Allan Fosk acquired shares of NMM in August and September 2001.[59] They have failed to submit the most elemental proof of their allegations, such as the contract/s for the purchase and proof of payment of the shares.[60]

76. The Claimants' account of events lacks evidentiary support. The transfer of the shares must have left some physical trace, *i.e.* an endorsement of the original share certificates and explanatory entries in the shareholders registry or a contract for the sale of shares. Further, in order for Quiborax to have validly acquired shares of NMM, the power of attorney of the agent acting on its behalf should have been registered in the Commercial Register. However, there is no evidence that Quiborax registered any power of attorney. Moreover, the bylaws of NMM require that the shares be offered to its own shareholders before they are offered to third parties. There is no evidence on record that this procedure was followed. There is no evidence either that Quiborax and Allan Fosk filed tax returns or made tax payments, which they should have done if they had received dividends from NMM. What is more, the 2003 balance sheet of Río

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56 Reply, ¶¶ 133-136.

57 OJ, ¶¶ 27-29.

58 *Id.*, at ¶ 33.

59 *Id.*, at ¶¶ 39-46.

60 *Id.*, at ¶¶ 47-57.

Grande, which was filed with the Commercial Register, shows that Río Grande was still the owner of NMM's shares.[61] Lastly, if, as it appears, Río Grande transferred its NMM shares to Quiborax for free, there should be evidence of payment of the tax on gratuitous transfers.[62] There are no such records. Similarly, if this transfer entailed most of Río Grande's capital, Río Grande's capital reduction should have been recorded in the Commercial Register. However, there is no record of any such registration.[63]

77. In contrast, the documents that do exist and predate the dispute show that Quiborax and Allan Fosk did not acquire shares of NMM in August and September 2001. Río Grande could not have transferred to Quiborax shares of NMM on 17 August 2001, because on that date Río Grande did not own any shares of NMM. Under Bolivian law, a corporation increases its capital by issuing new shares only after obtaining approval from the Commercial Register. In this case, the Commercial Register approved NMM's capital increase only on 28 August 2001 – 11 days *after* Río Grande's alleged transfer of NMM shares to Quiborax. And *before* the Commercial Registry's approval, Río Grande should have entered the transfer of its seven mining concessions to NMM in the Mining Register and in the Real Property Register, which was not done until December 2001. In sum, Quiborax could not have acquired shares of NMM from Río Grande on 17 August 2001.[64]

78. In addition, NMM's bylaws prohibited the sale of shares to a competing company such as Quiborax. Therefore, Quiborax could not acquire NMM shares without breaching NMM's bylaws. Further, the 2001 balance sheet of NMM and the 2003 balance sheet of Río Grande show that the shareholders of NMM were exclusively Bolivian – and that Río Grande was one of them. Similarly, the powers of attorney to represent NMM, which were registered in the Commercial Register, show that the shareholders of NMM were exclusively Bolivian and that one of them was Río Grande.[65]

1.1.2. The internal documents submitted by the Claimants to show that Quiborax and Allan Fosk were shareholders of NMM have no probative value

79. Bolivia first notes that Claimants acted in bad faith in producing evidence of their alleged "investment" in a piecemeal and fragmented fashion. In any event, attaching

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61 *Id.*, at ¶¶ 58-70; Reply, ¶¶ 48-49.

62 Reply, ¶ 206; Tr. 67:16:68:14.

63 Reply, ¶ 49.

64 OJ, ¶¶ 73-83; Reply, ¶¶ 43-45.

65 OJ, ¶¶ 84-98; Reply, ¶¶ 39-42, 46-47.

probative value to these internal documents, composed of simple private documents, would violate the principle according to which no party may procure its own evidence. The Claimants in this case have failed to produce the key document on which its entire case is based: the contract for the sale of shares between Río Grande and Quiborax.[66]

80. The existence of the internal documents on which the Claimants rely became apparent only after the dispute arose in June 2004. Only on 22 July 2004 did Bolivia learn, for the first time and to its great surprise, that NMM would have Chilean shareholders. On 13 August 2004, Bolivia requested Allan Fosk to provide evidence that Quiborax and Allan Fosk himself were shareholders of NMM. As Allan Fosk's response was insufficient, Bolivia decided to look into the matter.[67]

81. The Claimants rely on three types of internal documents, all of which fail to support the Claimants' allegations: (i) the shareholders registry, (ii) the share certificates of NMM, and (iii) the minutes of the shareholders' meetings of 17 August and 13 September 2001.

82. In the first place, the Claimants allege that shareholder status is to be proven exclusively by reference to the shareholders registry. For the Respondent, this proposition is untenable as a matter of Bolivian law. As Prof. Salame notes, the shareholders registry merely creates a presumption of shareholder status, which may be rebutted by any evidence that shows who the real shareholders are.[68] This is consistent with previous ICSID decisions, which take into account various elements of proof when it comes to determining shareholder status. In the case of nominative or registered shares – which is the case of NMM's shares – the appropriate proof is proof of purchase by endorsement and proof of payment.[69]

83. NMM's shareholders registry presents multiple irregularities: (i) there are blank spaces, which are proscribed; (ii) information is missing, *e.g.* regarding the issuance of new shares; and (iii) there are inconsistencies in the manner in which the transfer of shares is reported.[70]

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66 Reply, ¶¶ 72-78.

67 OJ, ¶¶ 105-119.

68 This is why Bolivia argues that the conclusions that *Superintendencia* reached in February 2005 are to be disregarded: the *Superintendencia* only took into account the shareholders registry.

69 OJ, ¶¶ 120-123, 127-128.

70 *Id.*, at ¶ 124.

84. Contrary to what the Claimants argue, registration in the shareholders registry is not the essential prerequisite to acquire shareholder status. In so arguing, the Claimants improperly rely on Article 251 of the Commercial Code, which governs the relationship between the corporation and its shareholders, when they should rely on Article 254 of the Commercial Code, which governs the relationship between shareholders and third parties. Under Article 254 of the Commercial Code, the prerequisite to become a shareholder is the transfer of the shares by endorsement. The shareholders registry only serves to give notice of that status to third parties.[71]

85. Moreover, the Claimants confuse the *legal effects* of the registration in the shareholders registry with the issue of its *probative value*. Even assuming for a moment that registration in the shareholders registry were the essential prerequisite to become shareholder, this would not mean that such registration would constitute irrebuttable proof of shareholder status. Otherwise the holder of the shareholders registry would turn into a notary public. Moreover, such irrebuttable presumption would facilitate fraud by denying any value to other evidence which would indicate that fraud is afoot. It would be contrary to the Tribunal's power to assess the evidence under Arbitration Rule 34. It would equally go against Bolivian law for which the shareholders registry does not constitute irrebuttable evidence of shareholder status, being noted that on this point Bolivian law is in accord with the laws of other countries such as Spain, England, and Argentina. Finally, the Respondent's interpretation would not jeopardize the certainty of legal transactions.[72]

86. In the second place, the share certificates produced by the Claimants have scant, if any, probative value for the following seven reasons. First, it is remarkable that the share certificates were newly issued when they could have been transferred simply by endorsement, and that share certificates 1-7 are missing.[73] Second, there is no evidence that the share certificates existed before the dispute arose. Indeed, share certificates 1-7 were first produced after the dispute had arisen. Third, these are merely internal documents. Fourth, the documents produced are not the originals.[74]

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71 Reply, ¶¶ 87-96.

72 *Id.*, at ¶¶ 82, 85; ¶¶ 97-111.

73 It should be noted that the Respondent made this argument in the Objections to Jurisdiction, at a time when the Claimants had only produced copies of share certificates Nos. 8-11. Subsequently, however, the Claimants did produce share certificates Nos. 1-3, 5 and 7. Therefore, this argument appears to be moot except for share certificates Nos. 4 and 6.

74 The Claimants did produce the original of the share certificates, except for share certificates Nos. 4 and 6. These originals were the subject of a document inspection in Paris, following which each Party submitted expert reports (Mr. Lyter, on behalf of the Claimants, and Mr.

Fifth, it is absurd that share certificates 1-5 were transferred by endorsement, and then were, on the same day, voided and reissued. Sixth, the sequence of transactions between Quiborax and David Moscoso is equally absurd: Quiborax transferred to David Moscoso two different batches of NMM shares (one of 267 shares and another of 13,103 shares); and whereas David Moscoso did not pay anything for these shares, he received USD 9,985 when he returned the batch of 267 shares to Quiborax on the same date. Seventh and last, Dolly Paredes' signature on these certificates is different from her signature on other documents.[75]

87. In the third place, the minutes of the shareholders' meetings of 17 August and 13 September 2001 were forged. By 17 August 2001, NMM had not yet requested the approval to increase its capital from the Commercial Register. Therefore, Río Grande could not have participated in a shareholders' meeting of NMM, and the sale of NMM shares to Quiborax could not have been approved. Furthermore, the minutes of the 17 August meeting were not registered in the notary's record book and in the Commercial Register until *after* the dispute arose in 2004. This is specially suspicious when one considers that the minutes of the shareholder*s'* meeting of NMM of 3 August 2001 were registered in the notary's record book and in the Commercial Register within a few weeks. Finally, NMM's minute book contains serious irregularities insofar as it consists of loose pages being affixed to the book. Within the context of the criminal trial taking place in Bolivia, the authenticity expert concluded that the minutes of 17 August 2001 are not the ones originally included in NMM's minute book.[76]

88. The Claimants also fabricated the minutes of the shareholders' meeting of 13 September 2001. This becomes clear when one takes into account the following observations.

89. First, the minutes of 13 September 2001, which list Quiborax and Allan Fosk as shareholders of NMM, are inconsistent with the minutes of 11 September 2001, which do not list them. Whilst the minutes of 11 September 2001 were registered in the Commercial Register in 2001, the minutes of 13 September 2001 were never registered and were first sent to the *Superintendencia* in January 2005 after this dispute arose. Second, Allan Fosk, whose presence is mentioned in the minutes, was not in Bolivia on 13 September 2001 and therefore could not have been in attendance.

Clément, on behalf of the Respondent). Thus, except for share certificates Nos. 4 and 6, this argument appears to be moot.

75 OJ, ¶¶ 129-135; Reply, ¶¶ 112-122.

76 OJ, ¶¶ 136-147.

Third, Mr. David Moscoso admitted that the minutes of 13 September 2001 were fabricated. Fourth, Dolly Paredes' signature on these minutes is different from her signature on other documents. Fifth, the authenticity expert also concluded that the minutes of 13 September 2001 are not the ones originally included in NMM's minute book. Sixth, the minutes of 13 September 2001, signed by Allan Fosk, refer to Quiborax "S.A.". However, the corporate name is Quiborax "Ltd."; surprisingly, Allan Fosk did not notice this mistake at the time he signed the minutes.[77]

90. The Claimants have also submitted three certificates issued by Chilean authorities. These certificates, however, do not predate the dispute and were indeed expressly issued for purposes of this arbitration. These certificates merely demonstrate that Quiborax declared to have invested in NMM to the Chilean authorities.[78]

1.1.3. NMM has solely Bolivian shareholders and thus it is not a Chilean national under the ICSID Convention and the Treaty

91. NMM is owned solely by Bolivian shareholders. It follows that NMM may not be considered a Chilean national either under Article 25(2)(b) of the ICSID Convention or under Article X(4) of the the Bolivia-Chile BIT.[79] Therefore, as is the case with respect to Quiborax and Allan Fosk, NMM is not an "investor" within the meaning of the Treaty.[80]

1.1.4. Claimants' evidence suggests that Quiborax acquired 50% of the shares of Río Grande, not NMM

92. In the Reply, Bolivia asserted for the first time that the Claimant's evidence, in particular the registered contract for the purchase of Río Grande (the "Río Grande Contract"[81]), and the payments to Alvaro Ugalde and Edsal Finance[82], suggests that what Quiborax purchased in reality was 50% of the shares of Río Grande – not of NMM. While the Claimants argue that the Río Grande Contract was left without effect by the Leonardo Fosk-David Moscoso contract (the "Fosk-Moscoso Contract"), this contract is not valid

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77 OJ, ¶¶ 148-159; Reply, ¶¶ 123-129.

78 Reply, ¶¶ 51-52.

79 Article X of the Bolivia-Chile BIT is entitled "Settlement of Disputes Between a Contracting Party and an investor of the Other Contracting Party." Article X(4) in turn provides: "For purposes of this Article, any legal person constituted under the laws of one of the Contracting Parties and whose shares, before the time the dispute arises, are majority-owned by an investor of the other Contracting Party, shall be considered as a legal person of the other Contracting Party, pursuant to Article 25 2) b) of the aforementioned Washington Convention" (Tribunal's translation; Exh. CL-1).

80 OJ, ¶¶ 161-186; Reply, ¶¶ 130-132.

81 Exh. CD-17.

82 Exh. CD-116.

because: (i) the parties to this contract are different from the parties to the Río Grande Contract; (ii) the Fosk-Moscoso Contract was not registered in a notary's record book unlike the Rio Grande Contract; (iii) the Fosk-Moscoso Contract is of dubious authenticity because it falsely states in its third clause that the Río Grande Contract "was not executed by the parties"; (iv) payments were indeed made in accordance with the Río Grande Contract; and (v) the Fosk-Moscoso Contract was only produced with the Counter-Memorial on Jurisdiction.[83]

93. Nevertheless, even if the Fosk-Moscoso Contract were valid, this would not confirm Claimants' version of the facts because under this contract Quiborax would acquire 50% of Río Grande's *mining concessions*, not of NMM; further, under the Fosk-Moscoso Contract, the parties considered the possibility of creating a corporation where each contracting party would own 50% of the shares, not one where Quiborax would be the majority shareholder.[84]

1.2. The Claimants' Position

94. The Claimants argue that they have made a protected "investment", and therefore all three Claimants are "investors" within the meaning of both the Treaty and the ICSID Convention. They contend that Chilean nationals Quiborax and Allan Fosk acquired mining concessions in Bolivia, that Quiborax and Allan Fosk are shareholders of NMM as a matter of Bolivian law, and that NMM is deemed to hold Chilean nationality because it is controlled by Chileans.[85] The Respondent has never questioned that NMM is the 100% owner of eleven mining concessions in the Río Grande area, but claims that Quiborax and Allan Fosk never became shareholders of NMM.[86]

1.2.1. Chilean nationals Quiborax and Allan Fosk acquired mining concessions in Bolivia

95. In 1999, David Moscoso and Alvaro Ugalde, owners of Río Grande, contacted Quiborax with a proposal to jointly develop a project concerning seven mining concessions in the Río Grande area. The shareholders of Río Grande were Moscoso (50%); Edsal Finance Inc. ("Edsal Finance"), a company incorporated under the laws of Panama and represented by Alvaro Ugalde (49.5%); and Gonzalo Ugalde, brother of Alvaro Ugalde (0.5%). Río Grande's only assets were the seven mining concessions.

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83 Reply, ¶¶ 59-64.

84 Reply, ¶¶ 65-69.

85 CM, §§ II, V.

86 Rej., ¶ 2.

Messrs. Moscoso and Ugalde were looking for a strategic partner that would provide know-how and capital to develop their business.[87]

96. After examining the viability of the project and the investor-friendly Bolivian legislation, Quiborax accepted to negotiate. Thus, Quiborax, on the one hand, and Messrs. Moscoso and Ugalde, on the other, began to explore ways in which to structure their cooperation. Proposals for a joint venture and a lease were discussed and eventually discarded. In the end, on 12 January 2001, Río Grande and Quiborax entered into an exclusive supply contract for a period of 15 years (the "Exclusive Supply Contract"). Under the Exclusive Supply Contract, Quiborax had a right of first refusal over Río Grande's mining concessions, and a right to purchase the mining concessions in the event that an arbitrator found that Río Grande had breached the contract.[88]

97. A month after the Exclusive Supply Contract was executed, Alvaro and Gonzalo Ugalde offered to sell their 50% shareholding in Río Grande to Quiborax because Alvaro Ugalde was looking to raise capital for other projects. Quiborax accepted the offer. On 12 March 2001, Quiborax, on the one hand, and Edsal and Gonzalo Ugalde, on the other, entered into an agreement whereby Edsal and Gonzalo Ugalde would sell their combined shares in Río Grande (50%) to Quiborax (the "Share Transfer Agreement"). The agreed purchase price was USD 400,000, to be paid in six instalments.[89]

98. Eventually, to avoid the risks inherent to an existing corporation, Quiborax decided to structure the operation through a new company, rather than as shareholders of Río Grande. For this reason, on 12 May 2001, Leonardo Fosk, on behalf of Quiborax, and David Moscoso, on behalf of Río Grande, annulled the Share Transfer Agreement and entered into a new agreement to create either a joint venture or a new corporation (the "Fosk-Moscoso Contract"). Quiborax retained Fernando Rojas, of C.R. & F. Rojas Abogados (the "Rojas law firm"), as its local counsel to implement the Fosk-Moscoso Contract.[90]

99. The Rojas law firm devised a scheme to implement the Fosk-Moscoso Contract in three steps. First, Mr. Moscoso and the Ugalde brothers would contribute the Río Grande mining concessions to a new corporation. Second, Quiborax would replace the

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87 CM, ¶¶ 14-15.

88 CM, ¶¶ 16-24.

89 *Id.*, at ¶¶ 25-27.

90 *Id.*, at ¶¶ 27-31.

Ugalde brothers as shareholders of the new corporation. Third, Quiborax would acquire an additional 1% share capital from Mr. Moscoso to secure control of the new corporation, and Allan Fosk would receive one share to comply with the Bolivian law requirement that there be a minimum of three shareholders.[91]

100. On 25 July 2001, the Rojas law firm incorporated NMM. The founding shareholders of NMM were Fernando Rojas (with 58 shares), Ms. Dolly Paredes (1 share) and Ms. Gilka Salas (1 share). Ms. Paredes and Ms. Salas are secretaries at the Rojas law firm. NMM was registered with the Internal Revenue Service and with the Commercial Register. On 3 August 2001, after Río Grande's and NMM's approvals, Río Grande transferred its seven mining concessions to NMM. On 8 August 2001, Alvaro Ugalde received the last payment for the sale of his 50% interest in the mining concessions, thereby completing payment of the USD 400,000 total purchase price.[92]

101. On 17 August 2001, Río Grande received 26,680 NMM shares in exchange for the seven mining concessions it had transferred to NMM. On that very day, Río Grande transferred all of its NMM shares (26,680) to Quiborax by endorsement, as reflected in share certificate No. 4. Whilst Mr. Moscoso was entitled to 50% of these shares, Quiborax and Mr. Moscoso had agreed that Quiborax would own 51% of the shares of NMM and Mr. Moscoso 49%. Therefore, on 4 September 2001, Quiborax transferred 50% of the NMM shares to Mr. Moscoso in two batches: a batch of 13,013 shares (equal to 49% of the shares of NMM) and a batch of 267 shares (equal to 1% of the shares of NMM). On the same day, Mr. Moscoso sold the batch of 267 shares to Quiborax for USD 9,985. These transfers are reflected in share certificates 4, 5, and 6, 10 and 11. Finally, on 10 September 2001, the founding shareholders transferred their shares to Quiborax and Allan Fosk: Fernando Rojas and Dolly Paredes transferred their shares to Quiborax, while Gilka Salas transferred her one share to Allan Fosk. These transfers are documented in share certificates Nos. 8 and 9.[93]

102. As a result, the shareholder composition of NMM as of 10 September 2001 was the following: Quiborax held 50.995% of the shares; David Moscoso held 49%; and Allan Fosk held 0.005%. Thus, Chilean national Quiborax became the majority shareholder of NMM as of that date.[94]

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91 *Id.*, at ¶¶ 32-34.

92 *Id.*, at ¶¶ 35-42, 44.

93 *Id.*, at ¶¶ 43-55.

94 *Id.*, at ¶¶ 56-57.

103. In the Reply on Jurisdiction, the Respondent has alleged for the first time that the evidence would show that Quiborax acquired 50% of the shares of Río Grande, and not 50% of the shares of NMM. The Respondent acknowledges that Río Grande owned 99% of the shares of NMM. Thus, even if Respondent's theory were true, Quiborax would own 49.5% of the shares of NMM, only 1.5% less of the 51% it has always claimed to own. This would suffice to confer standing on Quiborax to bring this arbitration.[95]

1.2.2. Quiborax and Allan Fosk are shareholders of NMM as a matter of Bolivian law

104. Under Bolivian law, in particular Articles 251 and 268 of the Commercial Code ("CC"), shareholder status is proven exclusively by the shareholders registry.[96] Otherwise stated, those appearing in the shareholders registry *are* the shareholders of the company. Quiborax and Allan Fosk are registered in the NMM shareholders registry. Therefore, the Claimants have met the only requirement they need to meet to prove their shareholder status under Bolivian law.[97]

105. Contrary to what the Respondent and Prof. Salame assert, registration in the shareholders registry does not merely give rise to a rebuttable presumption of shareholder status. Rather, registration itself creates the status of shareholder. This has been confirmed by a legal commentator, by expert Prof. Rosenkrantz, and by the Bolivian government itself. Prof. Salame simply misinterprets or ignores Art. 268 CC.[98]

106. At any rate, there is plenty of additional evidence showing that Quiborax and Allan Fosk are shareholders of NMM: the certificates from the Chilean authorities; Quiborax's financial statements audited by PricewaterhouseCoopers in Chile; all the minutes of shareholders' meeting of NMM celebrated from September 2001; the field study of Mr. Juan Pablo de Luca and the expert report of Prof. Rosenkrantz.[99]

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95 Rej., ¶ 40.

96 *Id.*, at ¶ 46.

97 CM, ¶¶ 58-70.

98 *Id.*, at ¶¶ 62-74; Rej. ¶¶ 149-152.

99 CM, ¶¶ 75-82.

1.2.3. NMM is to be deemed a Chilean national because it is under Chilean control

107. Since Quiborax is the majority shareholder of NMM, NMM is a Chilean national for purposes of the Treaty. As a Chilean national, NMM has standing to act as a claimant in this arbitration.[100]

1.3. Analysis

108. The Tribunal must determine whether Quiborax, Allan Fosk and NMM are "investors" within the meaning of the Treaty. In order to reach this determination, the Tribunal must ascertain (1.3.1) whether Quiborax and Allan Fosk were shareholders of NMM at the time when the dispute between the Parties arose in June 2004; and, if so, (1.3.2) whether NMM was to be considered a Chilean national at the time as a result of its being majority-owned by Chilean nationals Quiborax and Allan Fosk.

1.3.1. Were Quiborax and Allan Fosk shareholders of NMM at the time the dispute arose in June 2004?

109. For the purpose of ascertaining whether Quiborax and Allan Fosk were shareholders of NMM at the time the dispute arose in June 2004, the Tribunal will examine (i) what party bears the burden of proof with respect to the various allegations put forward; (ii) how shareholder status is to be established under Bolivian law; (iii) the Claimants' account and evidence of the events; and (iv) the Respondent's account and evidence of the events. On the basis of the preceding analysis, (v) the Tribunal will then state its conclusion.

(i) Burden of proof

110. The main issue in this jurisdictional dispute is whether Quiborax and Allan Fosk were shareholders of NMM in June 2004. The Claimants allege that Quiborax and Allan Fosk collectively acquired 51% of the shares of NMM in August and September 2001, and have been the majority shareholders of NMM ever since. The Respondent, on the other hand, argues that the Claimants fabricated evidence showing that Quiborax and Allan Fosk were shareholders of NMM at the time the dispute arose solely to gain access to ICSID jurisdiction.

111. It is common ground between the Parties, and rightly so, that the burden of proving that Quiborax and Allan Fosk acquired shares of NMM in August and September 2001 rests upon the Claimants. At the hearing, Counsel for the Respondent stated that in order

[100] *Id.*, at ¶¶ 159-166.

"to establish the jurisdiction of the tribunal, [the Claimants] have to discharge a certain burden of proof. They have to establish that, first, they are investors and, second, that there is an investment."[101] Counsel for the Claimants concurred: "We accept, as we always did, that the burden of proof regarding the proof of investment is on [the Claimants]."[102]

112. Yet, there is no common ground with respect to the Respondent's allegations that the Claimants fabricated evidence to initiate this arbitration. At the hearing, Counsel for the Respondent argued: "Although we think that the Tribunal will be fully convinced [...] that Quiborax and Mr. Fosk have not acquired these shares, we would say that even if we only had raised a doubt, that should suffice because they are [the] Claimants, they bear the burden of proof, and when there is room for doubt, the burden is not discharged. [I]n *Cementownia v. Turkey,* [...] the tribunal conclude[d] that the transaction which would have constituted the investment [...] 'never took place' and 'the claim is a sham.' And that's what we think. The claim here is a sham."[103] In other words, the Respondent does not consider that it must prove its allegations of fraud; it is enough if those allegations "raise[] a doubt."[104]

113. By contrast, the Claimants maintain that the Respondent bears the burden of proving its allegations of fraud. During oral argument, counsel for the Claimants submitted that while "the burden of proof regarding the proof of investment is on [the Claimants], [...] the burden of proof on the fraud allegation is on the Respondent, and […] they have never accepted that. That's the difference. It is not sufficient [...] just to create doubts on the Tribunal."[105] Counsel for the Claimants further stated that the "Respondent has not just the burden of proof, but also the responsibility and [...] the duty to proceed to prove their accusations, and these accusations and the evidence produced shall be subject to a strict standard of proof."[106]

114. The question which the Tribunal must answer is whether the Claimants are "investors" under the Treaty and, more specifically, whether Quiborax and Allan Fosk became majority shareholders of NMM in August and September 2001. Thus, it will first

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101 Tr. 19:11-13.

102 *Id.*, at 535:20-22.

103 *Id.*, at 21:7-14, 22:15-20.

104 *Id.*, at 21:11; *see also* Reply, p. 10, n. 23: "it is not necessary for the State to prove that the Claimants have fraudulently fabricated their condition of investors for the Tribunal to find that it has no jurisdiction; it is enough if it [the Tribunal] deems that the evidence submitted is insufficient."

105 Tr., 533:21-534:5.

106 *Id.*, at 113:20-114:3.

examine whether the Claimants have discharged their burden of proving that they are "investors". Assuming the answer is positive, it will then review whether the Respondent has disproven or raised sufficient doubts on the Claimants' allegations that they are "investors". Finally, on the basis of this overall analysis, it will conclude whether or not the Claimants are "investors".

(ii) Proof of shareholder status under Bolivian law

115. The Parties disagree on what needs to be proven to show shareholder status under Bolivian law. According to the Claimants, shareholders status under Bolivian law is proven solely by reference to the shareholders registry:

> "The only and sufficient proof of the condition of shareholder is […] the Shareholders Registry.[107] Given that Quiborax and Allan Fosk are registered in the NMM Shareholders Registry, it is undisputable that, according to Bolivian law, Quiborax and Allan Fosk are shareholders of NMM [...]. For this reason, any additional evidence the Respondent has requested is immaterial and serves no purpose."[108]

116. The Respondent, by contrast, contends that the shareholders registry merely creates a presumption of shareholder status, which can be rebutted by "any means which allows to establish who the real shareholder is."[109] Thus, the Claimants are wrong to argue that the shareholders registry gives rise to an irrebuttable presumption (*presumptio iuris et de iure*). Even if it were true, that registration in the shareholders registry is an essential requirement to acquire shareholder status, *quod non*, this would still not mean that the evidentiary value of the shareholders registry is unquestionable.[110]

117. The relevant provisions of the Bolivian Commercial Code ("BCC") reads as follows:

> Art. 251
>
> "The corporation deems as owner of the shares whoever is registered as such in the certificates and in the shareholders registry."[111]
>
> Art. 268
>
> "It has shareholder status whoever is registered in the corporation's shareholders registry, if the shares are nominative; and whoever is the holder, if the shares are bearer shares."[112]

118. On the basis of these provisions, the Tribunal is not convinced that proof of shareholder status is established exclusively on the basis of the shareholders registry.

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107 Rep. PM, ¶ 5.

108 CM, ¶¶ 65, 73.

109 OJ, ¶ 121 (Tribunal's translation).

110 Rej., ¶¶ 85, 97-111.

111 CM, p. 28, n. 76; missing from Annex CD-1 (Tribunal's translation).

112 Annex CD-1.

First, Article 251 refers not only to the shareholders registry but also to the share certificates. Even if this provision focuses on the relationship between the corporation and its shareholders[113], its plain terms appear to defeat any claim that the shareholders registry is the sole source by which to ascertain shareholder status.

119. Second, it is true that Article 268 of the BCC, on which the Claimants chiefly rely, provides that "whoever is registered in the corporation's shareholders registry" is a shareholder.[114] However, it does not necessarily follow that the shareholders registry is the *sole* source of evidence to determine who enjoys shareholder status. Article 268 of the BCC does not exclude other means to establish shareholder status. The Tribunal therefore agrees with the Respondent's legal expert, Prof. Salame, that the shareholders registry "merely creates a rebuttable presumption [...] in favour of the person therein registered"[115], and "does not exhaust the discussion over who really is the shareholder of the corporation."[116]

120. Third, the legal effects of registration in the shareholders registry must be distinguished from the probative value of the registry. Even assuming *arguendo* that registration in the shareholders registry for nominative shares were a requirement to acquire shareholder status, it would not imply that the facts recorded in the registry are not open to challenge. To this extent, the Tribunal agrees with Prof. Salame, who explains that:

> "The legal effect of registration in the shareholders registry and its probative value [are] two different issues [...]. Whereas in the first scenario we are situated on a legal plane, in the second scenario we are situated on a plane of facts and presumptions.
>
> Even if [...] registration in the shareholders registry serves a constitutive function, this does not mean that the facts recorded in such a registry cannot be disproven by other evidence [...]."[117]

121. Fourth, as the Claimants acknowledge, the "shareholders registry reflects the ownership of the shares; it cannot change it."[118] Yet, as the Claimants further concede, this "reflection" may be inaccurate: there could be a "discrepancy between the [share] titles and the registry"[119] – in short, between the registry and reality. Perhaps for this reason, the Claimants accept that the shareholders registry would have no effect "in

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113 CM, ¶¶ 147, 149.

114 *Supra*, at ¶ 117.

115 Salame ER I, ¶ 75 (Tribunal's translation).

116 *Id*., at ¶ 81.

117 Salame ER II, ¶¶ 9, 13 (Tribunal's translation).

118 Rej., ¶ 151.

119 *Id*., at ¶ 141 (Tribunal's translation).

case of fraud, force, deceit or any other cause of annulment of legal acts."[120] In this case, Bolivia is precisely alleging fraud. In these circumstances, it is difficult to see why Quiborax and Allan Fosk's shareholders status would need to be ascertained exclusively on the basis of the registry.

122. For the foregoing reasons, the Tribunal will examine whether Quiborax and Allan Fosk became shareholders of NMM not only on the basis of the shareholders registry, but on the basis of the entire record before it.

(iii) The Claimants' account and evidence of the events

123. In this sub-section, the Tribunal will examine the Claimants' statements of facts and supporting documentation.

124. According to the Claimants, in 1999, David Moscoso and Alvaro Ugalde, owners of Río Grande, approached Quiborax "to develop a business project involving [Río Grande's] seven mining concessions"[121] in Bolivia. The first documented contact between Quiborax and Río Grande is allegedly a letter from David Moscoso and Alvaro Ugalde to Eng. Carlos Shuffer of Quiborax, dated 26 January 2000 but seemingly faxed on the following day from Bolivia to Chile:

> "Dear Sirs,
>
> Ratifying the terms of the recent telephone conversations, we hereby confirm our interest in participating with you in the development, exploitation and sale of our ulexite deposit in Río Grande, executing an association or joint venture contract, by which Quiborax could assume the management and 50% or more of the shares and rights in our Company in exchange for the economic and financial resources required to implement and set in motion [the] project [...].
>
> Taking into account that our mining concessions are more than 50 kilometres away from the border, there is no restriction of any kind preventing a foreign company from acquiring the entirety of those concessions, or eventually 100% of the shares of our Company.
>
> We look forward to your comments. Very truly yours,
>
> David Moscoso Ruiz Alvaro Ugalde Canedo" (emphasis added).[122]

125. At that time, Quiborax and Río Grande were purportedly in the process of exploring "different alternatives"[123] to give form to their plans for the joint exploitation of the ulexite deposits in the Río Grande area. As part of that process, David Moscoso sent a

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120 *Id*., at ¶ 144 (Tribunal's translation).

121 CM, ¶ 15.

122 Exh. CD-9 (Tribunal's translation).

123 CM, ¶ 19.

letter to Allan Fosk and Eng. Shuffer, dated 29 March 2000 and seemingly faxed on the same day from Bolivia:

> "Dear Sirs,
>
> In the first place, we would like to express our satisfaction for the fruitful and worthy exchange of opinions with the esteemed Alan Fosk and Carlos Shuffer in relation to the exploitation of the Río Grande deposit owned by our Company.
>
> Our agreement was, in principle, that the most suitable procedure to reach an agreement for the exploitation of the ulexite would be a property lease with a purchase option within a three-year period at a pre-determined price. Following a discussion and review between partners [...], we have agreed to submit the following proposal to you: [...].
>
> We look forward to your useful comments. Truly yours,
>
> David Moscoso" (emphasis added).[124]

126. However, the proposal for a lease and purchase option did not prosper. Eventually, on 12 January 2001, Quiborax and Río Grande finally reached an agreement, formalized in a notarized contract, whereby Quiborax would acquire ulexite from Río Grande on an exclusive basis (the "Exclusive Supply Contract").[125] Under the Exclusive Supply Contract, Quiborax, the "buyer", committed to buy specified quantities of ulexite from Río Grande, the "seller" or "supplier", on an exclusive basis for a 15-year period beginning in January 2001.[126]

127. The Exclusive Supply Contract is significant because its terms are not disputed by the Parties. The Claimants and the Respondent accept that Quiborax and Río Grande entered into this contract in early 2001. It is only from that point onwards that their disagreement begins to emerge. According to the Claimants, the Exclusive Supply Contract was terminated "shortly thereafter"[127] because it had "lost its purpose".[128] According to the Respondent, however, this contract "was never terminated"[129], as "there is no document in the record that shows that."[130]

128. The uncontested, notarized Exclusive Supply Contract contained the following relevant provisions for purposes of this dispute:

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124 Exh. CD-103 (Tribunal's translation).

125 Exh. CD-16.

126 *Id.*, at clause 1, "Definitions"; clause 5, "Contract Term."

127 Tr. 127:6-7.

128 *Id.*, *at* 561:20.

129 *Id.*, at 105:17-18.

130 *Id.*, at 28:19-20.

> "Clause nineteenth – Covenants: [...] In case this contract were rescinded on account of the supplier's [Río Grande's] breach of its obligations, as declared in an award issued by the arbitrator appointed in accordance with clause sixteen, such an award shall provide that RIGSSA [Río Grande] grants to Quiborax, for a 60-day period, an exclusive and irrevocable option to purchase all the mining concessions specified in clause three of this instrument [...].
>
> Clause twentieth – Sale Prohibition and Right of First Refusal: The supplier may not transfer the mining concessions it owns and which are specified in clause three. After five years have elapsed from this date, RIGSSA [Río Grande] may offer such concessions for sale, but in that case, should there be a definite purchase offer, the supplier shall refer to Quiborax said offer [...]. Quiborax will have a 90-day period to match the offer referred by RIGSSA [Río Grande] and in this case the latter [Río Grande] irrevocably commits to sell and transfer to the former [Quiborax] the concessions with priority over any other potential buyer" (emphasis added).[131]

129. In sum, the Exclusive Supply Contract contemplated two different scenarios under which Quiborax would enjoy an exclusive option to acquire Río Grande's mining concessions: (i) in the event that an arbitral tribunal constituted under the arbitration clause in the contract were to "rescind" the contract for a breach by Río Grande, and (ii) in the event that Río Grande decided to sell the mining concessions after a five-year period. In other words, the possibility that Quiborax could acquire a participation in the mining concessions was envisaged as early as 2001. This undisputed provisions lend credence to the previous correspondence of 26 January and 29 March 2000, where this possibility appears to have been discussed as well.

130. According to the Claimants, a "month after signing"[132] the Exclusive Supply Contract, the Ugalde brothers "offered to sell their 50 percent participation"[133] in Río Grande, with Mr. Moscoso keeping his participation. Quiborax accepted this offer and, on 12 March 2001, exactly two months after concluding the Exclusive Supply Contract, entered into a Share Purchase Agreement ("SPA") with Edsal Finance Inc. – represented by Alvaro Ugalde – and Gonzalo Ugalde in order to acquire 50% of the shares of Río Grande.[134] The SPA is consistent with the already-entertained possibility that Quiborax could acquire an interest in the mining concessions. Under the SPA, Quiborax would acquire such an interest by purchasing shares in Río Grande.

131. The SPA is documented in a notarized contract.[135] It was signed by Alvaro Ugalde, on behalf of both Edsal Finance Inc. and Gonzalo Ugalde, and by Leonardo Fosk, father

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131 Exh. CD-16, clauses 19 and 20 (Tribunal's translation).

132 Mem., ¶ 59.

133 *Id*.

134 Exh. CD-17, p. 1.

135 *Id*.

of Allan[136], on behalf of Quiborax.[137] As collateral to ensure payment of the purchase price and also seemingly to secure the transfer of the shares, the shares were pledged for the benefit of both parties to the transaction.[138] Quiborax agreed to pay USD 400,000 for 50% of the shares of Río Grande in accordance with the following payment schedule:

Date	Payment
Execution SPA	USD 90,000
21 March 2001	USD 110,000
21 April 2001	USD 50,000
21 May 2001	USD 50,000
21 June 2001	USD 50,000
21 July 2001	USD 50,000

132. Quiborax seems to have made the first payment under the SPA by issuing two checks in favor of Edsal Finance Inc. on 9 March 2001: a check for USD 50,000 and another check for USD 40,000, totaling USD 90,000.[139] Indeed, the 9 March 2001 checks tally in timing and amount with the first scheduled payment under the SPA, stipulated to occur at the time of the execution of the SPA. This suggests that Quiborax did make these payments. Nevertheless, according to the Claimants, "the transfer was never performed and Quiborax never became a shareholder in RIGSSA [Río Grande]"[140] because "Quiborax preferred to avoid the risk of participating in an existing company and started exploring alternatives to structure its investment."[141] These alternatives would presumably change the legal form but not the substance of the transaction.[142]

133. At one point, Bolivia appears to have alleged that the SPA was evidence that Quiborax acquired shares of Río Grande, as opposed to NMM.[143] However, at the hearing,

136 Tr. 32:10-11.

137 Exh. CD-17, pp. 2, 4.

138 Rej., ¶ 85; Exh. CD-17, clause 5, p. 3; Exh. CD-101, pp. 8-11.

139 Exh. CD-116, p. 1.

140 Mem., ¶ 60.

141 CM, ¶ 27.

142 Rej., ¶ 77.

143 Reply, § 3.1.3, p. 19 ("The evidence submitted by the Claimants suggests that what Quiborax acquired in reality was 50% of the shares in Río Grande") (Tribunal's translation).

Counsel for the Respondent clarified that "Bolivia does not accept" that Quiborax acquired a "50 percent shareholding in Río Grande."[144] Thus, Bolivia agrees with the Claimants that the SPA was never implemented and that Quiborax never became a shareholder of Río Grande, albeit for different reasons. Whereas for the Claimants the SPA was not implemented in order to change the "legal form", but not the substance, of the transaction, for Bolivia the SPA was not implemented because the Exclusive Supply Contract was and remained in force.[145]

134. At this juncture, the Parties' diverging factual accounts take diametrically opposed paths. According to the Claimants, on 10 May 2001, nearly two months after the execution of the SPA, Quiborax, again represented by Leonardo Fosk, and Río Grande, this time represented by David Moscoso, entered into a new contract (the "May 2001 Contract"). This contract was intended to "substitute and replace" the SPA.[146] The May 2001 Contract, which unlike the SPA was not notarized, stipulated the following in its relevant parts:

> "**Third.-** [...] [I]t was agreed to sell and transfer all of the shares that EDSAL FINANCE, represented by Mr. Alvaro Ugalde, and Mr. Gonzalo Ugalde hold in [Río Grande] to Quiborax. The price agreed is US$ 400,000, of which the buyer has already paid to the sellers the sum of USD 250,000 [...]. The [SPA] has not yet been executed between the parties.
>
> **Fourth**.- [...] It was agreed to substitute and replace the [SPA] referred in clause 3 with another one by virtue of which [Río Grande] sells and transfers to Quiborax 50% of all the perfected mining concessions, and of any other that is in the process of being awarded, under the same economic terms and conditions provided for in the substituted agreement [the SPA].
>
> **Fifth.-** For its part [Río Grande] shall transfer 50% of the same perfected mining concessions or in the process of being awarded to Mr. David Moscoso Ruiz.
>
> **Sixth.-** The goal of the transactions specified in the last two preceding clauses is to facilitate the creation of a corporation or a joint venture contract [...] in order to associate both owners in the mining exploitation and commercial development of this property" (emphasis added)."[147]

135. It thus appears that whilst the May 2001 Contract was intended to "substitute and replace" the SPA, the "economic terms and conditions" of the SPA would remain unchanged.[148] Indeed, the payments made until the time of the execution of the May

144 Tr. 30:8-11.

145 Tr. 105:17-18 (The Exclusive Supply Contract "was never terminated").

146 Exh. CD-104, clauses third and fourth, pp. 1-2.

147 *Id*., at clauses third to sixth, pp. 1-2.

148 *Id*., at clause fourth, p. 2.

2001 Contract again tally with the schedule of payments under the SPA: (i) two 9 March 2001 checks payable to Edsal Finance for a total of USD 90,000[149] (tallying with the first SPA installment); (ii) two 27 March 2001 checks – one of which had the word "Quiborax" printed on it − and one 29 March 2001 check, all payable to Edsal Finance, for a total of USD 110,000[150] (tallying with the second SPA installment[151]); and lastly, (iii) two 20 April 2001 checks payable to Edsal Finance Inc. for a total of USD 50,000[152] (tallying with the third SPA installment).

136. Hence, it appears that, by the time the May 2001 Contract was executed, Quiborax had already made payments to Edsal Finance Inc. for a total of USD 250,000. This accords not only with the terms of the SPA, but also with the plain terms of the May 2001 Contract, which specifies in its third clause that Quiborax had already paid "the sum of USD 250,000"[153] to Edsal Finance Inc. and Gonzalo Ugalde. On the other hand, although the "economic terms and conditions" of the May 2001 Contract were no different from those of the SPA, the legal terms and the form of the transaction were different.

137. Clause No. 4 of the May 2001 Contract stipulates that Río Grande would "sell[] and transfer[] to Quiborax 50% of all [the] mining concessions."[154] But contrary to the impression this clause read in isolation might convey, this contract is not a mere asset purchase. Rather, the fourth clause must be read in conjunction with the sixth clause, according to which the goal of the transfers stipulated in the fourth and fifth clauses "is to facilitate the creation of a corporation or a joint venture contract."[155] It thus seems that the substance of both the SPA and the May 2001 Contract was the same and consisted in the transfer of 50% of the mining concessions to Quiborax. What would change was the structure of the transaction: under the SPA, the transfer of the mining concessions was to take place through the purchase of shares in Río Grande; under the May 2001 Contract, by contrast, the transfer would be effected through the creation of a new "corporation or a joint venture contract."

149 Exh. CD-116, p. 1.

150 *Id*., at pp. 2-3.

151 With a few days of delay, as the second installment was due on 21 March 2001.

152 *Id*., at p. 4.

153 Exh. CD-104, pp.1-2.

154 *Id*.

155 *Id*., at clause sixth, p. 2.

138. In this regard, it should be noted that, although Alvaro Ugalde did not execute the May 2001 Contract[156], clause eleven stipulates that its terms "bind Alvaro Ugalde in all of its parts"[157], as they were "previously agreed"[158] with him. On 14 May 2001, only four days after the execution of the May 2001 Contract, it appears that Alvaro Ugalde wrote the following to Quiborax, Leonardo Fosk, David Fux "and others"[159] with regard to the "[t]ransfer of the Río Grande shares"[160]:

> "Dear friends
>
> […]
>
> In accordance with the commitments undertaken with Quiborax, I have previously faxed the certificates showing the transfer of shares of EDSAL FINANCE INC. and Gonzalo Ugalde Canedo in favor of Quiborax. The originals have been sent to Santiago via Courier.
>
> If your decision is to become shareholders of RIGSSA [Río Grande], you should complete the "definitive registration" in the shareholders registry […]
>
> If your decision is *not* to become shareholders of RIGSSA [Río Grande], you should create a new corporation […].
>
> Truly yours,
>
> Alvaro Ugalde" (emphasis added).[161]

139. On 17 May 2001, Alvaro Ugalde again wrote to the addressees of his preceding letter:

> "Dear friends
>
> As I am still unaware of the decision you have made with respect to the type of company that will devote itself to the exploitation of ulexite in Río Grande, I attach a report […] describing that the share transfer is perfected, being only required that it be registered in the corporate books for it to become valid as against the corporation and third-parties.
>
> Regards,
>
> Alvaro Ugalde [Report attached]" (emphasis added).[162]

140. These two letters tend to suggest that Alvaro Ugalde was aware of and in agreement with the terms of the May 2001 Contract. Just as important, the letters suggest that Mr. Ugalde was not concerned about the particular legal structure or form the transaction would adopt, but was on the contrary willing to let Quiborax make that decision ("[i]f

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156 Alvaro Ugalde did, however, execute the SPA on behalf of both Edsal Finance Inc. and Gonzalo Ugalde (*see* Exh. CD-17, p. 4).

157 *Id*., at clause eleventh, p. 5.

158 *Id*.

159 Exh. CD-18.

160 *Id*.

161 *Id*. (Tribunal's translation).

162 Exh. CD-144 (Tribunal's translation).

your decision is to become shareholders of RIGSSA [Río Grande] […] [i]f your decision is *not* to become shareholders of RIGSSA [Río Grande]"[163]). The letters also appear to reveal that the terms of the SPA were close to being fully performed ("the share transfer is perfected, being only required that […]"[164]).

141. Consistent with one of the options envisioned in the May 2001 Contract, it appears that Quiborax opted for the "creation of a [new] corporation" as the vehicle through which to accomplish the transfer of the mining concessions. In June 2001, the Claimants allege that they retained Fernando Rojas, "a reputed and well known lawyer within and outside Bolivia"[165] and partner of the Rojas law firm, to structure this operation.[166] The plan was allegedly to create a new company, to which the mining concessions would be transferred, and to replace the Ugalde brothers – or, more precisely, Edsal Finance and Gonzalo Ugalde – with Quiborax. Allan Fosk would, in turn, receive one share "in order to comply with the minimum three shareholders' requirement under Bolivian corporate law."[167]

142. Presumably also on the advice of Mr. Rojas, Quiborax would also acquire an additional 1% of the shares from Mr. Moscoso to secure "control of the new company."[168] For jurisdictional purposes, this additional 1% participation is fundamental insofar as NMM can only act as claimant in this arbitration if it is majority-owned by Quiborax. This additional step would also entail an amendment of the May 2001 Contract, which provided that Quiborax and Mr. Moscoso would each own a "50%" participation in the new corporation.[169] On examination from the Tribunal, Allan Fosk offered the following reason as to why it was decided that Quiborax would become the majority shareholder of the new corporation:

> **"[Tribunal]**: It is unclear from the record […] why at some point it was decided that Quiborax would have 51 percent of the shares of NMM when before that there are documents that say it would be shared 50/50 [the May 2001 Contract], and there is no document […] [or] explanation for the change to 51. Can you explain this?
>
> **[Allan Fosk]**: Yes […]. At first, what we agreed was 50 percent for Quiborax and 50 percent for Moscoso, but we came to realize over the months that that could give rise to […] corporate governance problems over time […]. [T]herefore […] we came to an agreement

163 Exh. CD-18.

164 Exh. CD-144.

165 Mem., ¶ 62.

166 *Id.*, at ¶ 62; CM, ¶ 31.

167 CM, ¶ 34.

168 Rej., ¶ 92(e).

169 Exh. CD-104, clause seventh, p. 3.

> that he was willing to sell us the 1 percent of the shares at a price of $ 9,985, and then we […] transferr[ed] the shares and ma[de] the corresponding payment" (emphasis added).[170]

143. The Tribunal finds this explanation plausible. It is well-known and easy to understand that 50-50 joint ventures are a source of difficulties. Moreover, the change from a 50-50 to a 51-49 joint venture ("the 51/49 agreement") was but the latest of a series of changes in the contractual arrangements between Quiborax, Río Grande and Río Grande's shareholders. Originally, after exploring different collaborative schemes[171], Quiborax and Río Grande concluded the Exclusive Supply Contract in January 2001.[172] Two months later, the Exclusive Supply Contract would have given way to the SPA[173], which in turn was soon replaced by the May 2001 Contract.[174] Thus, this additional change appears to have been unexceptional in light of the preceding chain of events.

144. In any event, it is undisputed that, on 25 July 2001, Fernando Rojas, Dole Paredes and Gilka Salas constituted NMM.[175] This was the "new corporation" referred to in the May 2001 Contract, created to complete the transfer of 51% of the mining concessions to Quiborax. The timing of the incorporation of NMM, about two and a half months after the execution of the May 2001 Contract and the two letters from Alvaro Ugalde, is consistent with the Claimants' preceding account of the facts. On the same day, NMM was registered with the Bolivian Internal Revenue Service.[176] As of 27 July 2001, NMM was also registered with the Commercial Registry (the "*Senarec*" at the time).[177]

145. The Claimants allege that Dole Paredes and Gilka Salas were staff members of the Rojas law firm, and that they acted as founding shareholders of NMM together with Fernando Rojas in order to spare Quiborax "the trouble of dealing with the necessary administrative formalities."[178] The records issued by the Commercial Registry (currently "*Fundempresa*"), showing the multiple corporations with which Fernando Rojas, Dole Paredes and Gilka Salas have had "commercial links" as shareholders, tend to bolster this allegation.[179] Fernando Rojas would have received 58 shares, and

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170 Tr. 238:9-239:7.

171 Exhs. CD-9 and CD-103.

172 Exh. CD-16.

173 Exh. CD-17.

174 Exh. CD-104.

175 Exh. CD-23; CM, ¶ 35; Rej., ¶ 93.

176 Exh. R-137; CM, ¶ 37; Rej., ¶ 93.

177 Exh. R-139.

178 CM, ¶ 36.

179 Exh. CD-130 (1 to 3). The Tribunal notes that whilst Prof. Salame testified that having lawyers incorporate companies for the clients was not "common practice", he did not argue that this was

Dolly Paredes and Gilka Salas would each have received one share, presumably to comply with the Bolivian law requirement that the corporation be composed of at least three shareholders.

146. The initial shares issued to Fernando Rojas, Dole Paredes and Gilka Salas are documented both in the shareholders registry[180], which seems to have been formally opened on 27 July 2001, and on the NMM share certificates Nos. 1 to 3 of the same date. Thus, the dates of the shareholders registry and the NMM share certificates Nos. 1 to 3 tally with each other, with the date of incorporation of NMM and, more generally, with the previous sequence of events. In the meantime, Quiborax continued making payments under the May 2001 Contract, whose "economic terms and conditions" reproduced those of the SPA; by the time NMM was constituted on 25 July 2001, Quiborax had disbursed USD 380,000 of the total USD 400,000 purchase price.

147. As of May 2001, Quiborax ceased making payment for the balance of the USD 400,000 purchase price to Edsal Finance, and instead began to issue payments in favor of Alvaro Ugalde. This is one of the reasons why the Respondent took "issue […] with these checks."[181] Indeed, Quiborax made payments to Edsal Finance for a total of USD 250,000, whereas it paid the balance of USD 150,000 to Alvaro Ugalde.[182] The Tribunal sees no issue here because, first and foremost, the key point is that Quiborax continued making the payments due under the May 2001 Contract for the purpose of acquiring the mining concessions that would be transferred to a new corporation. To whom exactly Quiborax made the payments is not relevant so long as it is clear that the payments were made pursuant to the May 2001 Contract.

148. Additionally, there appears to be no contradiction between the change of payee and the evidence on record. In fact, Edsal Finance was a party to the SPA, but not to the May 2001 Contract. Alvaro Ugalde was not a party to the SPA, but was bound by the terms of the May 2001 Contract.[183] This may well explain why all the payments made after the 10 May 2001 Contract were made to Alvaro Ugalde and not to Edsal Finance. It is true that under the May 2001 Contract the seller was Río Grande, not Alvaro

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unheard of, merely limiting himself to declare that "out of personal ethics, [he] wouldn't do that [but i]f Dr. Rojas or any other lawyer does so, that is their opinion, and that requires no comment on my part" (Tr. 326:10-20, 327:12-18).

180 Exh. CD-24, pp. 1, 3 and 5.

181 Tr. 29:20-30:6.

182 Exh. CD-116, payments to Edsal Finance Inc. (pp. 1-4) and payments to Alvaro Ugalde (pp. 5-9).

183 Exh. CD-104, clause eleventh, p. 5.

Ugalde.[184] However, the record suggests that Alvaro Ugalde was the ultimate seller and thus the ultimate beneficiary of the payments – except for the 0.5% of shares held by his brother Gonzalo.[185]

149. Between 2 and 17 August 2001, Río Grande and NMM supposedly adopted the corporate steps necessary to complete the transfer of the mining concessions to Quiborax, in accordance with the terms of the May 2001 Contract as modified by the 51/49 agreement. Specifically, on 2 August 2001, Río Grande approved the transfer of its seven mining concessions to NMM, as shown by the minutes and a notarized version of the concessions.[186] On that same day in the afternoon, Río Grande allegedly "decided to sell and transfer in favor of [Quiborax] the share certificates to be issued by [NMM] in favor of [Río Grande] as a result of the latter's contribution of seven mining concessions."[187]

150. On 3 August 2001, NMM approved Río Grande's contribution of the seven mining concessions and authorized a capital increase of 26,680 shares, as evidenced by both a copy and a notarized version of the minutes.[188] This brought the total number of NMM shares to 26,740 – 60 original shares plus the approved 26,680 shares. In the

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184 *Id.*, at clause fourth, p. 2.

185 There appears to be ample evidence on record that Alvaro Ugalde was the ultimate seller and the person with whom Quiborax dealt throughout the transaction. Alvaro Ugalde signed the letter that constitutes the first documented contact between Río Grande and Quiborax (letter of 26 January 2000). It was also him who executed both the Exclusive Supply Agreement of 12 January 2001 – on behalf of Río Grande – (Exh. CD-16) and the SPA of 12 March 2001 – this time on behalf of Edsal Finance Inc. and of his brother Gonzalo (Exh. CD-17). Although not a signatory of the May 2001 Contract, clause eleventh provides that its terms "bind Alvaro Ugalde in all of its parts" (Exh. CD-104). Within days of the execution of the May 2001 Contract, Alvaro Ugalde wrote to Quiborax to follow up on the terms of the new contract and with the apparent goal of completing the transaction. The fact that Alvaro Ugalde, rather than Edsal Finance Inc., began to receive Quiborax payments for the balance of the purchase price as of May 2001 is but one additional piece of evidence corroborating that he was the ultimate seller and beneficiary of the sale of the mining concessions to Quiborax. It also appears that Alvaro Ugalde received payment from Quiborax on behalf of his brother Gonzalo, who owned 0.5% of the shares of Río Grande.

186 Exhs. CD-107 and CD-108.

187 Exh. CD-109. There seems to be a contradiction between the May 2001 Contract (as modified by the 51-49 Agreement) and Río Grande's minutes of 2 August 2001 (14:30 PM) (Exh. CD-109). Indeed, under the May 2001 Contract, Río Grande would "sell[] and transfer[] to Quiborax 50% of all […] mining concessions." Yet, the minutes of 2 August 2001(14:30 PM) suggest that Río Grande would "sell and transfer" to Quiborax virtually 100% of the mining concessions, as Quiborax would receive, as it eventually did, all "the share certificates to be issued by [NMM] in favor of [Río Grande]", representing nearly 100% of the NMM shares (26,680 out of a total of 26,740 shares). However, the contradiction is apparent only: whilst Quiborax would receive nearly 100% of the NMM shares, it eventually redistributed them in a way that was consistent with the terms of the May 2001 Contract, as modified by the 51-49 Agreement. The Tribunal does not consider that this is in any way an indication that Quiborax or Allan Fosk fabricated their status as shareholders of NMM.

188 Exhs. CD-110 and CD-25.

meantime, on 8 August 2001, less than a week after Río Grande approved the sale of its NMM shares to Quiborax, Quiborax would have made the last payment of the total USD 400,000 purchase price stipulated in the May 2001 Contract.[189] Again, the timing of this payment tallies with the Claimants' general account of the facts.[190]

151. On 15 August 2001, the minutes show that NMM issued 26,680 shares in favor of Río Grande.[191] As a result, on 17 August 2001, Río Grande received 26,680 shares of NMM, a transfer reflected in both the shareholders registry[192] and on share certificate No. 4.[193] It is not in dispute that Río Grande received 26,680 shares of NMM. On the contrary, the Respondent's position is that Río Grande *did* receive those NMM shares[194], but that those shares were never transferred to Quiborax – an allegation which by implication challenges the veracity of Río Grande's decision taken in the afternoon of 2 August to "sell and transfer" the NMM shares to Quiborax.

152. As soon as Río Grande received the newly issued shares from NMM, it purportedly transferred them in their entirety to Quiborax on the same day, as documented in the minutes of the extraordinary shareholders' meeting of NMM dated 17 August 2001, the shareholders registry, and the endorsement on share certificate No. 4 in favor of "Química e Industrial del Bórax Ltd."[195] The Respondent has questioned the authenticity of all three documents: the NMM minutes of 17 August 2001[196], the shareholders registry[197] and the share certificates.[198] These allegations of fraud will be examined later in greater detail.

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189 Exh. CD-116, p. 9.

190 Indeed, this last payment took place after Río Grande's 2 August afternoon approval of the sale of its NMM shares to Quiborax, but before that transfer materialized on 17 August 2001. While the last payment for USD 20,000 on 8 August (preceded by a USD 30,000 payment on 18 July) was not exactly in accordance with the payment schedule reflected in the SPA and later adopted in the May 2001 Contract, which would have called for a USD 50,000 payment on 21 July, this change in the payment schedule appears to be of no consequence; indeed none of the Parties has raised any issue with it.

191 Exh. CD-111.

192 Exh. CD-24.

193 Exh. CD-105. This is one of the share certificates for which only a copy is available.

194 This is presumably the reason why the Respondent has contended that the 2001 balance sheet of NMM and the 2003 balance sheet of Río Grande, which would show that Río Grande still holds all these NMM shares even after the alleged transfer to Quiborax, "have considerable probative value" (Reply, ¶ 39).

195 Exh. CD-105, p. 7.

196 OJ, ¶ 141.

197 Reply, ¶ 100.

198 *Id*., at ¶ 122.

153. On 21 August 2001, NMM applied to the Commercial Registry – *Senarec* at the time – to obtain approval for the capital increase following Río Grande's contribution of the seven mining concessions.[199] The *Senarec* approved NMM's capital increase as well as "the admission as new shareholder of Río Grande."[200] The Respondent claims that Quiborax should have been mentioned in NMM's application because, by that time, Río Grande's shares had supposedly been transferred to Quiborax.[201] The Tribunal cannot agree. The purpose of NMM's application to the *Senarec* was to request approval of its capital increase, not of Río Grande's share transfer to Quiborax.[202] Thus, there was no reason for NMM to mention Quiborax in its application to the *Senarec*.

154. On 4 September 2001, Quiborax allegedly transferred to David Moscoso 50% of the total NMM shares (26,740 shares) in two sets: one set of 267 shares (1% of the total NMM shares) and one set of 13,103 shares (49% of the total). These transfers are documented in two endorsements on share certificate No. 4, and in the issuance of new certificates Nos. 5 (for 267 shares) and 6 (for 13,103 shares). On the same day, Mr. Moscoso would have transferred the set of 267 shares back to Quiborax in exchange for USD 9,985, as reflected in the endorsement of share certificate No. 5 and in a check dated 27 September 2001. Allan Fosk, on behalf of Quiborax, apparently attached this check to the following letter addressed to Mr. Moscoso on 28 September 2001:

> "Dear Mr. Moscoso,
>
> We hereby enclose [a] check […] in the amount of USD 9,985.00 to pay the balance [for] endorsement of shares of [NMM].
>
> Allan Fosk
>
> [Quiborax]."[203]

155. The Respondent has referred to this series of operations as "absurd" because Quiborax first transferred two sets of shares to Mr. Moscoso for free, only for Mr. Moscoso to transfer the set of 267 shares back to Quiborax for a fee of USD 9,985. The Tribunal cannot agree. These operations are consistent with both the May 2001 Contract and the 51/49 agreement. Under the May 2001 Contract, Río Grande was to

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199 NMM's application stated that "it was resolved to increase the capital of [NMM] with the contribution of seven mining concessions […] by the new shareholder [Río Grande]" (Exh. R-125).

200 Exh. R-126.

201 OJ, ¶ 80; Reply, ¶ 44.

202 In fact, the share transfer between Río Grande and Quiborax was a private transaction for which no government approval appeared to be required.

203 Exh. CD-117.

transfer 50% of the mining concessions to David Moscoso[204] – as it turned out, via the shares of a newly-created corporation.[205] Thus, Mr. Moscoso was entitled to receive 50% of the shares of NMM, that is, 13,370 shares – the exact amount of shares he received from Quiborax combining the two sets.[206] By the same token, Quiborax had no right to keep those NMM shares. Thus, it does not appear that the Claimants' version of the facts is absurd or even inconsistent on this point.

156. On the other hand, under the 51/49 agreement, Quiborax was to acquire an additional 1% from Mr. Moscoso to become the majority shareholder of NMM. This would explain why Quiborax transferred the NMM shares to David Moscoso in two sets: the 1% set of shares was presumably "earmarked" for purposes of completing the 51/49 agreement. One may wonder why Río Grande transferred all of its NMM shares to Quiborax rather than allocating 50% of them directly to David Moscoso. This question, however, bears no relevance for purposes of ascertaining the key issue under examination: whether Quiborax and Allan Fosk acquired shares in NMM. In sum, the Tribunal finds that the series of share transfers between Quiborax and Moscoso are consistent with the Claimants' account of events and the evidentiary record.

157. On 10 September 2001, the final steps in the shareholding configuration of NMM took place, with five new share certificates – 7 to 11 – being issued on that day. The new certificate No. 7 appears to have been issued to Quiborax for a total of 13,577 shares.[207] In addition, Gilka Salas endorsed her one share to Allan Fosk, as shown in new share certificate No. 8[208] (1 share), whereas Fernando Rojas (58 shares) and Teresa Paredes (1 share) endorsed their NMM shares to Quiborax, as shown in new certificate No. 9 (59 shares). The new share certificate No. 7 was then cancelled and

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204 Exh. CD-104, fifth clause, p. 2.

205 As previously analyzed, the May 2001 Contract contemplated that ownership over the mining concessions would be transferred via a new corporation or a joint venture contract (Exh. CD-104, clause sixth).

206 CM, ¶¶ 47-48.

207 This figure was presumably the sum of two different transfers: one from Río Grande (endorsement of 13,310 shares) and one from David Moscoso (endorsement of 267 shares). As share certificate No. 4 shows, Río Grande endorsed 26,680 shares to Quiborax, which in turn endorsed 13,103 shares (49%) and 267 (1%) to David Moscoso, keeping for itself the balance of 13,310 shares (resulting from the following arithmetical operation: 26,680 – 13,103 – 267 = 13,310).

208 Whilst the Claimants stated in their letter to ICSID of 5 January 2006 that Allan Fosk had paid USD 9,985 for his one and only NMM share, the Claimants later clarified that this was the sum Quiborax paid to David Moscoso for 1% of the shares in NMM. Allan Fosk, by contrast, does not appear to have made any payment to receive his one share in NMM (Exh. R-93; CM, p. 22, n. 70).

replaced by two new share certificates: share certificates No. 10 (for 13,310 shares) and No. 11 (for 267 shares).[209]

158. Therefore, the Claimants allege that the final shareholding composition of NMM as of 10 September 2001 was the following: Quiborax held 16,636 shares (50,995% of NMM shares); David Moscoso held 13,103 shares (49%); and Allan Fosk held 1 share (0.005%).[210] Thus, Quiborax and Allan Fosk would collectively have become majority shareholders of NMM. It would appear that, contrary to the Respondent's allegation, the Claimants present one – not three[211] – versions of the facts: that Quiborax purchased shares in NMM, and Allan Fosk received one share in NMM, in order to obtain, as shareholders of NMM, a participation in Río Grande's mining concessions.

159. In October 2001, Quiborax declared to the Chilean Internal Revenue Service (the "Chilean IRS") its "investments" in Bolivia.[212] The Chilean IRS issued a certificate, dated 27 October 2010, stating that "on 29 October 2001"[213] Quiborax advised of its "investments in the company [NMM] […] located in [Bolivia]."[214] These "investments" correspond exactly, in both dates and amounts, with the previously examined checks that Quiborax issued in favor of Edsal Finance, Alvaro Ugalde and David Moscoso.[215] On 13 December 2001, Río Grande's transfer of its seven mining concessions to NMM

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209 The Respondent submitted that cancelling new share certificate No. 7 in order to issue two new share certificates – 10 and 11 – is "one of a number of irregularities" that would call into question the authenticity of the NMM share certificates (Tr. 55:13-16). It is unclear why exactly share certificate No. 7 was cancelled and two new share certificates issued instead. It could be that it was to "earmark" the one percent set of shares that would confer a majority position to Quiborax, as happened with the transfers between Quiborax and David Moscoso. At any rate, in the absence of additional evidence, the Tribunal is not persuaded that this is a sign that the share certificates are not authentic. This issue, however, will be examined at greater length in the section dealing with Respondent's account of events.

210 CM, ¶ 56.

211 According to the Respondent, "[t]he Claimants' pleadings include up to three different factual accounts": (i) Quiborax acquired NMM shares from Río Grande, (ii) Quiborax acquired shares in Río Grande, and (iii) Quiborax acquired 50% of the mining concessions (Reply, ¶ 9). The Claimants' account is in fact a mixture of (i) and (iii): Quiborax acquired shares in NMM from Río Grande in order to secure an ownership interest in the mining concessions – its ultimate goal. The Respondent's suggestion that the evidence would show that Quiborax acquired shares in Río Grande seems to disregard evidence that this transaction was subsequently left without effect (Exhs. CD-145, CD-146, CD-105, CD-18, CD-144).

212 Exh. CD-141. The Claimants allege that at the time Quiborax would also have registered its investment with the Central Bank of Chile (Exh. CD-138; CM, ¶ 76). However, because the Central Bank's certificate does not state *when* Quiborax provided the information reflected in that certificate, it is not possible to determine whether it is contemporaneous or post-dispute evidence, which considerably reduces its probative value.

213 *Id*.

214 *Id*.

215 Exhs. CD-116, CD-117 and CD-141.

was registered with the Mining Registry[216] and on 19 December 2001 with the Real Property Registry.[217]

160. On the basis of this examination, the Tribunal cannot but observe that the Claimants' account of events and evidence appear consistent and plausible. Having reached this preliminary assessment, it will now turn to review Bolivia's understanding of the facts and related evidence before reaching a definitive conclusion.

(iv) Respondent's account and evidence of the events

161. Bolivia argues that the Claimants' account of events is a "sham" and that, as in *Cementownia v. Turkey*, the transaction which allegedly constituted the investment "never took place."[218] In other words, Quiborax and Allan Fosk did not become shareholders of NMM in August and September 2001, were not shareholders of NMM at the time the dispute arose in June 2004, and are thus not "investors" under the Treaty. Instead, the Claimants fabricated evidence purporting to show that Quiborax and Allan Fosk became shareholders of NMM in 2001 in order to fraudulently create the conditions to gain access to ICSID jurisdiction.[219]

162. The Respondent argues (i) that there is no evidence that Quiborax and Allan Fosk acquired the majority of NMM shares in August and September 2001[220]; (ii) that the facts and documents that predate the origin of the dispute in June 2004 show that Quiborax and Allan Fosk did not become majority shareholders of NMM in August and September of 2001[221]; and (iii) that the evidence upon which the Claimants rely has no probative value because it consists of internal documents that were fabricated after the dispute arose.[222] The Claimants have, in short, failed to shoulder their burden of proving that they are "investors" under the Treaty.

163. In the first place, Bolivia asserts that the Claimants have failed to submit evidence that Quiborax and Allan Fosk acquired shares in NMM. In particular, there is no evidence of "registrations, declarations and payments that should have been produced, had

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216 Salame ER I, Annex 12.
217 Exh. R-181.
218 Tr. 22:16-20.
219 OJ, ¶ 14; Reply, ¶ 13.
220 OJ, §§ 2.1.1.2 – 2.1.1.3.
221 *Id.*, at § 2.1.2.
222 *Id.*, at § 2.2.

Quiborax and Allan Fosk really acquired the majority of the shares of NMM in August and September of 2001."[223]

164. The Respondent maintains that there is no "physical trace" of the share transfers, either in the form of endorsements of the original share certificates or of registrations and explanatory annotations in the shareholders registry.[224] However, the Tribunal notes that the Claimants have submitted copies of the shareholders registry[225] and, since Bolivia filed its objections to jurisdiction, both copies[226] and originals of the endorsed and new NMM share certificates. Hence, it appears that the Claimants have submitted evidence and "physical traces" of the process by which Quiborax and Allan Fosk would have acquired the NMM shares.

165. Bolivia further argues that Quiborax should have registered the power of attorney of its legal representative with the Commercial Registry in order to validly acquire shares in NMM, but that there is no evidence that it did so.[227] In the Tribunal's view, whilst this issue could be relevant to determine whether Quiborax made its investment in accordance with Bolivian law, it is indifferent to determine whether Quiborax *as a matter of fact* acquired shares in NMM.

166. Bolivia also contends that there is no evidence that the Claimants complied with the bylaws of NMM. According to these bylaws, NMM shares must first be offered in writing to its own shareholders before being sold to third parties such as Quiborax or Allan Fosk; yet, there is no evidence that this procedure was followed. The Respondent appears to rely on Article 14 of NMM's bylaws.[228] In the Tribunal's view, the application of this right of first refusal to a transaction that both predated the bylaws[229] and constituted the very purpose for the creation of NMM would make little sense.[230] In addition, whether the procedure for a right of first refusal was followed or

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223 *Id.*, at § 2.1.1.3, p. 19 (Tribunal's translation).

224 *Id.*, at ¶ 60.

225 Exh. CD-24.

226 Exh. CD-105.

227 OJ, ¶¶ 61-62.

228 RFA, Exh. C-9, Art. 14, p. 13.

229 The May 2001 Contract (Exh. CD-104) was executed before the date on which NMM was incorporated and its bylaws passed on 25 July 2001 (RFA, Exh. C-9).

230 The same considerations would apply with respect to Bolivia's argument that Río Grande's transfer of NMM shares to Quiborax would also have breached Article 14 of NMM's bylaws because it was a sale to a third-party with a "competing activity" (RFA, Exh. C-9, Art. 14, p. 15.). Since the purpose of NMM would have been precisely to enable Quiborax to become the majority shareholder as a result of a pre-existing agreement, this internal rule would have no effect on Río Grande's transfer to Quiborax.

not has no impact on the question of whether Quiborax and Allan Fosk as a matter of fact acquired shares in NMM.

167. As a further argument, the Respondent maintains that there is no evidence that the Claimants paid the taxes to which they would have been subject had Quiborax and Allan Fosk become shareholders of NMM in 2001. Specifically, Quiborax and Allan Fosk should have paid taxes on any dividends received from NMM, but there is no evidence of these payments.[231] The record, however, shows otherwise. NMM first declared dividends on 3 December 2003.[232] Taxes on dividends distributed to Quiborax appear to have been paid on 21 July and 21 October 2004, and taxes on dividends distributed to Allan Fosk appear to have been paid on 21 July 2004.[233] Hence, these allegations do not tend to disprove that Quiborax and Allan Fosk acquired shares of NMM in 2001.[234]

168. In the second place, the Respondent states that the facts and documents that predate the origin of the dispute in June 2004 show that Quiborax and Allan Fosk did not become majority shareholders of NMM in August and September of 2001.

169. Bolivia alleges that NMM could only have issued new shares to Río Grande after the transfer of the mining concessions to NMM had been registered with the Mining Registry and the Real Property Registry, and after NMM's capital increase had been authorized by the Commercial Registry.[235] However, because none of these steps had taken place by 17 August 2001, Río Grande's transfer of NMM shares to Quiborax was "legally" and "materially impossible."[236] In the Tribunal's opinion, the legal effects of these requirements might be relevant in the context of the illegality objection. They are by contrast not relevant for the purpose of ascertaining whether Quiborax and Allan

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231 OJ, ¶¶ 64-68.

232 Exh. CD-118.2; Rej., ¶¶ 37(o), 62, 121-122.

233 Exh. CD-149, attaching form F-54 dated 21 July 2004; Exh. CD-150, attaching form F-54 dated 21 October 2004. On a letter to Quiborax dated 18 August 2004, PricewaterhouseCoopers noted that the F-54 form of 21 July 2004 included the taxes on dividends of both Quiborax and "A. Fosk" (Exh. CD-149).

234 The Respondent further asserts that, had Río Grande transferred its shares in NMM to Quiborax for free, there should be a record of the payment of the Free Transfer Tax – but there is no such record (Reply, ¶ 49). The Tribunal does not understand the Claimants to be alleging that Río Grande transferred its shares in NMM for free, but rather for a price of USD 400,000 (Exh. CD-17 and CD-104). Since the transfer was for a price, this would dispose of the Respondent's argument that a free transfer would amount to fraud to Río Grande's creditors (Reply, p. 20; Tr. 39:8-15). At any rate, the Tribunal considers that any allegation that the Claimants failed to pay taxes or committed fraud may be relevant for the analysis of the legality requirement, but not to determine whether in actuality Quiborax and Allan Fosk acquired shares in NMM.

235 OJ, ¶¶ 74-83.

236 *Id.*, at ¶¶ 79, 83.

Fosk acquired shares in NMM or whether these transactions were fraudulently fabricated after the dispute arose.[237]

170. Bolivia also points out that NMM's audited balance sheet for the year 2001, as well as Río Grande's audited balance sheet of September 2003, show that Río Grande still owned the NMM shares that it was supposed to have transferred to Quiborax on 17 August 2001.[238] In Bolivia's submissions, this disproves that Quiborax and Allan Fosk acquired shares of NMM in 2001. The Claimants retort that this was "just a mistake."[239] The record also shows that Quiborax's financial statements for 2001[240], 2002[241], 2003[242] and 2004[243], audited by PricewaterhouseCoopers, indicate that Quiborax held a 50.99% participation in NMM. More specifically, Quiborax's 2001 and 2002 financial statements expressly note that it "acquired 50.99% of Bolivian corporation [NMM]" during the fiscal year 2001.[244] This would suggest that NMM's and Río Grande's balance sheets were simply mistaken. The Tribunal will for the time being flag this issue and only reach a definitive conclusion at the end of its analysis.

171. Bolivia posits that NMM's two powers of attorney registered with the Commercial Registry between 2001 and 2003 show that NMM only had Bolivian shareholders.[245] The reason would be that these powers of attorney incorporate the minutes of NMM's ordinary shareholders' meeting of 11 September 2001, where Río Grande – and not Quiborax or Allan Fosk – appears as shareholder of NMM. Nevertheless, those very

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237 The Respondent has argued that, on account of these alleged registration and approval deficiencies, Quiborax acquired "inexistent shares" (OJ, ¶ 79). This raises the issue whether the shares that Quiborax acquired from Río Grande have *legal* existence, *i.e*. whether the legal effects of this transaction are recognized under Bolivian law. This is different from the factual and antecedent question of whether the parties in actuality entered into such a transaction – which is disputed by the Respondent and is the gist of its fraud allegation. This is a *factual* inquiry: whether Quiborax genuinely entered into the May 2001 Contract with Río Grande, subsequently into the 51/49 Agreement, issued checks in favor of Edsal Finance Inc., Alvaro Ugalde and David Moscoso, and received endorsed and new share certificates of NMM – in short, whether Quiborax and Allan Fosk acquired shares in NMM.

238 Exhs. R-124, R-127; OJ, ¶¶ 69-70, 88-91.

239 At the hearing, Counsel for the Claimants stated that they bore no responsibility for Río Grande's mistake, as the Claimants neither controlled nor managed Río Grande (Tr. 538:6-12; CM, p. 22, n. 67). With respect to NMM's alleged mistake, Counsel argued that the balance sheets recorded the capital increase, but not the change in shareholding composition (Tr. 538:13-18), and that the "purpose of financial statements is not to reflect" who the shareholders are (Rej., ¶ 63).

240 Navigant Report, Annex NCI-30.

241 *Id*., at Annex NCI-31.

242 *Id*., at Annex NCI-32.

243 *Id*., at Annex NCI-33.

244 *Id*., at Annexes NCI-30 and NCI-31.

245 Exhs. R-129 and R-130.

same powers of attorney lend substantial support to the Claimants' version that Quiborax and Allan Fosk acquired shares of NMM in 2001. The first power of attorney of 27 September 2001 is in favor of Allan Fosk[246]; the second power of attorney of 1 July 2002 is in favor of Omar León[247], a Chilean national and employee of Quiborax.[248] Again, the Tribunal flags this matter and will return to it at the end of its analysis.

172. Third, Bolivia contends that the evidence upon which the Claimants rely has no probative value because it consists of purely internal documents that only became known after the dispute arose. The Claimants fabricated this evidence after the dispute arose in order to fraudulently manufacture the conditions for ICSID jurisdiction.

173. Despite the Respondent's allegations to the contrary, the Tribunal notes that the Claimants do rely on public evidence predating the origin of the dispute in June 2004. On 15 April 2004, NMM updated its registration file with the Commercial Register, and the updated file shows Allan Fosk as legal representative of NMM.[249] On 31 May 2004, NMM registered with the Commercial Registry a power of attorney which incorporates the minutes of a shareholders' meeting of 27 January 2003 where Quiborax, Allan Fosk and David Moscoso feature as the shareholders of NMM.[250] In addition, the notarized version of this power of attorney bears a stamp of the Commercial Register dated 2 June 2004.[251]

174. The Respondent maintains that the shareholders registry does not constitute the only means of proving shareholder status[252] – an argument the Tribunal has already accepted. Specifically, it alleges that the NMM shareholders registry is a purely internal document that did not become known until 31 January 2005 and whose only "authenticated" version was issued by Isaac Frenkel, a shareholder of Quiborax and the Fosk family lawyer, on 27 January 2009.[253] Moreover, the shareholders registry presents "various irregularities": blank spaces, missing information, and inconsistent

246 Exh. R-129, pp. 7-9.

247 Exh. R-130, pp. 2-4.

248 Exh. CD-27 shows that Omar León has a "Chilean passport"; Exh. CD-59 demonstrates that Omar León has indeed acted on behalf of NMM. The Respondent has not otherwise denied the Claimants' allegation that Omar León was an employee of Quiborax.

249 Exh. CD-119.

250 Exh. CD-158 and CD-118.1. While it may be that Allan Fosk was not physically present in Bolivia on 27 January 2003 as the minutes represent, the essential point is that there is a public record, predating the dispute where Quiborax and Allan Fosk are mentioned as the shareholders of NMM.

251 Exh. CD-120, p. 6.

252 OJ, ¶ 123; Reply, ¶¶ 97-99, 102-111.

253 OJ, ¶ 122.

entries.[254] Finally, the *Superintendencia's* conclusion that Quiborax and Allan Fosk were shareholders of NMM is wrong because its analysis was based exclusively on the faulty shareholders registry.[255]

175. In the Tribunal's view, the probative value of the NMM shareholders registry is equivocal. On the one hand, Bolivia's own *Superintendencia* concluded that the NMM shareholders registry "complies with all the requirements provided for in Article 250 of the Commercial Code."[256] On the other hand, it is true that the NMM shareholders registry is an intra-corporate document over whose content the Claimants had unfettered control, at least until the onset of the criminal case. Furthermore, the originals of this registry have never been produced and its whereabouts appear to be unknown.[257] Lastly, the shareholders registry has not been certified by an independent third-party, but by Isaac Frenkel, a "minority shareholder of Quiborax and the Fosk family lawyer" according to the Claimants' own description.[258]

176. Taking these considerations into account, the Tribunal will attach limited intrinsic probative value to the NMM shareholders registry. At the same time, it considers that it remains a piece of evidence that may serve to confirm or disprove the other evidence on record. From this perspective, the Tribunal considers that the NMM shareholders registry generally tallies with the Claimants' account of events and evidence and, in particular, with the May 2001 Contract, the 51/49 agreement, the checks issued to Edsal Finance, Alvaro Ugalde, and David Moscoso, and the NMM share certificates. On the whole, the Tribunal deems that the NMM's shareholders registry tends to confirm the Claimants' thesis.

177. Likewise, Bolivia disputes the veracity of the NMM share certificates, which were subject to document inspection upon its request, on a number of grounds.[259] Bolivia

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254 *Id*., at ¶ 124; Reply, ¶¶ 100-101.

255 OJ, ¶ 126.

256 Exh. CD-72, p. 3.

257 The Claimants have alleged that Bolivia is in possession of NMM shareholders registry (Tr. 299:8-14, 301:10-16); Respondent "dispute[d] that" allegation (Tr. 301:5-8). Whilst the record would suggest that the shareholders registry is part of the Bolivian criminal case, it is ultimately unnecessary to determine who currently holds the shareholders registry in order to decide the issues before the Tribunal.

258 Rej., ¶ 37(e). This does not mean that the Claimants were required to have the shareholders registry certified by an independent third party, but only that the "in-house" certification of a document over which they had full control did not bolster its probative value.

259 With respect to the share certificates, Bolivia also argued (i) that it was telling that the Claimants had not submitted the original share certificates Nos. 1-7, and (ii) that it was similarly telling that Quiborax and Allan Fosk had acquired the shares via new share certificates when they could have acquired them by endorsement (OJ, ¶¶ 131-132). Since then, however, the Claimants

supports its allegation on the following grounds: (i) there is no evidence that the share certificates were created before the dispute arose in June 2004[260]; (ii) the share certificates are purely internal documents[261]; (iii) the signature of Dolly Paredes does not tally with her signature on other documents – a "sign of fraud"[262]; (iv) oddly enough, the share certificates were first endorsed, and then cancelled and reissued on the same day[263]; (v) finally, it is perplexing that Quiborax transferred two sets of shares (267 and 13,103 shares) to David Moscoso for free, only for Mr. Moscoso to then transfer the set of 267 shares back to Quiborax for a price of USD 9,985.[264]

178. Upon the Respondent's request, the NMM share certificates were subject to inspection by document experts in order to ascertain their authenticity and date. With respect to the authenticity of the paper, Jean-Louis Clément, the Respondent's own document expert, concluded that the "authenticity of the paper of the [NMM] share certificates is unquestionable."[265] In consonance with this conclusion, Albert Lyter III, the Claimants' document expert, concluded that "[n]o evidence was found that the paper [of the share certificates] had been altered, manipulated, erased or in any way fabricated among all of the examined documents."[266]

179. With respect to the ink entries on the share certificates, Mr. Clément deemed that the signature of the secretary, Dolly Paredes, was not the result of the emulation of an "authentic signature", a finding that tends to exclude the Respondent's forgery hypothesis.[267] At the same time, he found that Dolly Paredes used "three different pens" to sign share certificates Nos. 7 to 11 on the same day, "which would seem unlikely."[268] It should be noted that although the Respondent also had the share

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have submitted share certificates Nos. 1-7, which show that Quiborax and Allan Fosk initially acquired their share by endorsement. Thus, the Tribunal considers that this argument has become moot.

260 OJ, ¶ 133. Bolivia objected that the original share certificates had not been submitted (Reply, ¶ 118). Since then, however, the Claimants submitted the original share certificates of NMM – except for share certificates Nos. 4 and 6. The Claimants explained that they did not submit the originals of share certificates Nos. 4 and 6 because they did not "have possession, control or custody" of these certificates (Claimants' letter to ICSID of 17 February 2011). Considering that the Claimants produced the originals of the other nine share certificates, and that share certificates Nos. 4 and 6 were issued in the name of Río Grande and David Moscoso, respectively, the Tribunal finds this explanation acceptable and Bolivia's objection moot.

261 Reply, ¶ 117.

262 OJ, ¶ 134; Reply, ¶ 121.

263 Reply, ¶ 119.

264 *Id.*, at ¶ 120.

265 Clément, § 2.3 (Tribunal's translation).

266 Lyter ER, § 2.2, pp. 4-5.

267 Clément ER, § 3.2.1, p. 3.

268 *Id.*, at § 3.3, p. 5.

certificates examined by handwriting expert Christine Jouishomme, her expert report was not filed into the record.

180. Albert Lyter III in turn concluded that the "ink formulations" on the share certificates "compare with a high degree of identity to standard ink formulations that were commercially available at the dates appearing on the documents, *i.e.* 2001."[269] Mr. Lyter countered that Mr. Clément's assertion to the effect that it "would seem unlikely" that the secretary would sign share certificates Nos. 7-11 on the same day using three different pens, "is not based upon any scientific examinations, but on [his] personal assessment."[270] Finally, Linda James, the Claimants' handwriting expert, concluded with "the highest degree of confidence expressed by document examiners" that the signatures of Fernando Rojas, Dolly Paredes, Gilka Salas and David Moscoso on the NMM share certificates were authentic.[271]

181. With respect to the date on which the share certificates were created, Mr. Clément concluded that "it is impossible to date them" because, being no more than 10 years old at most, "they are too recent" to ascertain that information.[272] For his part, Mr. Lyter testified that there was no evidence that the NMM share certificates were not prepared in 2001[273], nor evidence suggesting they are inauthentic.[274] Specifically, based on the commercial availability of ink formulations and the degree of dryness of the ink on the share certificates at the time of the examination[275], Mr. Lyter testified that the share certificates could have been created anywhere between 2001 and 2006, but that they were "probably" created in 2001:

> **[Mr. Bofill]**: Mr. Silva Romero [Counsel for the Respondent] asked you whether it was possible that these shareholder titles were prepared in 2006 rather than in 2001, and your answer was that it was possible but not probable. What do you mean by that?

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269 Lyter ER, § 4.2, p. 11. On cross-examination, Mr. Lyter admitted that these ink formulations were commercially available "at any point after" 2001, which would thus not exclude the possibility that the share certificates could have been fabricated after the dispute arose in June 2004 (Tr. 475:1-7). This piece of evidence is thus only relevant if examined in context.

270 *Id.*, at § 4.3, p. 12.

271 James ER, p. 42.

272 Clément ER, § 4.2, p. 6.

273 Tr. 479:13-16.

274 *Id.*, at 487:13-16.

275 Since the ink formulations on the share certificates present a "high degree of identity" with standard ink formulations commercially available in 2001, that appears to be the earliest time in which the share certificates could have been created (Lyter ER, § 4.2, p. 11). Moreover, Mr. Lyter testified that a "five-year time span" would be the appropriate span to determine the dryness of the ink formulations on the NMM share certificates (Tr. 473:3-10). As the ink on the share certificates was fully dry by the date of their examination on 21 March 2011, this would mean that the share certificates could have been created at any time before 21 March 2006.

> **[Mr. Lyter]**: As an expert, we deal in probabilities [...] in asking the question is it possible these documents were prepared in 2006, the short answer is yes, that's possible [...] [b]ut we deal in probabilities, and the more appropriate question would be is it probable that these documents were prepared in 2006? And my answer to that would be no, it is not probable that they were done in 2006, based on all of the examination results [...].
>
> **[Mr. Bofill]**: Would this also be your answer if I ask you whether these documents were prepared in any year after 2001?
>
> **[Mr. Lyter]**: The answer would be yes, giving attention to the fact that the documents state on their face that they were done in 2001 [...] the inks, their formulas, their "dryness" [...] the pattern by which the various authors used ink formulations from one document to the next [...]" (emphasis added).[276]

182. Thus, the Tribunal is satisfied that the expert inspection of the NMM share certificates has established (i) that the paper of the share certificates is authentic; (ii) that the signatures of Fernando Rojas, Dolly Paredes, Gilka Salas and David Moscoso are authentic with the highest degree of confidence expressed by document examiners; (iii) that they were probably created in 2001 and that there is no evidence suggesting otherwise; and (iv) that there is no evidence suggesting that the share certificates are spurious, as the finding that Dolly Paredes used three different ink formulations to sign the share certificates is insufficient to overcome the probative merits of the previous evidence. In sum, the weight of the expert evidence suggests that the NMM share certificates are authentic.

183. Accordingly, contrary to what Bolivia argues, the expert evidence suggests that the NMM share certificates have probative value even though they are not public documents, in the sense of documents available in a public registry or database. In addition, as previously observed, Quiborax's transfer of shares to David Moscoso in two sets and Mr. Moscoso's transfer back to Quiborax of one of the set of 267 shares was consistent with the 51/49 agreement between them. Finally, although it may appear unnecessary to issue new share certificate No. 7, only to then cancel it and re-issue two new share certificates in its stead (new share certificates Nos. 10 and 11), it is difficult to apprehend why this would be evidence of fraud, especially where all three share certificates were issued in favour of Quiborax.

184. Furthermore, the Respondent claims that the minutes of the extraordinary shareholders' meeting of 17 August 2001, which would reflect the sale of Río Grande's shares in NMM to Quiborax, were fabricated for the following reasons[277]: (i) because NMM's capital increase had not been approved by that date, it was "materially

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276 Tr. 480:2-481:13.

277 OJ, ¶ 143.

impossible" for Río Grande to transfer its shares in NMM to Quiborax[278]; (ii) unlike the minutes where Río Grande was accepted as a new shareholder, notarized within two weeks from the date of their preparation[279], the 17 August 2001 minutes were only notarized and registered in the Commercial Registry years later, once the Parties were in dispute[280]; (iii) and lastly, both the *Superintendencia*[281] and the document expert in the Bolivian criminal proceedings[282] found "serious irregularities"[283] in NMM's minute book.

185. In the first place, as the Tribunal previously remarked, what is relevant for purposes of this objection is whether Río Grande transferred shares to Quiborax, not whether that transfer was legally valid. In the second place, it is unclear to the Tribunal why having the minutes of 17 August 2001 notarized after the dispute arose would signal fraud, especially when the notarized copy itself does not purport to mislead in any way about the date on which those minutes were actually notarized. Finally, whilst the *Superintendencia* and the document expert in the Bolivian criminal proceedings found that NMM had mishandled the minute books, because individual pages had been torn out and glued, this is by far insufficient to prove fraud. All in all, the Tribunal is unconvinced that the minutes of 17 August 2001 were fabricated.[284]

186. Similarly, the Respondent argues that the minutes of the ordinary shareholders' meeting of 13 September 2001 were fabricated because[285]: (i) these minutes do not tally with the minutes of 11 September 2001, which only lists Bolivian shareholders and was registered with the Commercial Register in 2001[286]; (ii) the records of the Chilean immigration authorities show that Allan Fosk was not in Bolivia on 13 September 2001 and thus could not have participated in that meeting[287]; (iii) Mr. Moscoso himself confessed in the Bolivian criminal case that these minutes were fabricated[288]; (iv) the signature of Dolly Paredes would appear to be forged; (v) Allan Fosk signed on behalf

278 *Id*., at ¶ 144.

279 Exh. CD-25.

280 Exhs. R-140 and R-141; OJ, ¶¶ 145-146.

281 Exhs. CD-72 and R-143; OJ, ¶ 147.

282 Exh. R-146.

283 OJ, ¶ 147.

284 As Bolivia conceded, the *Superintendencia* declined to penalize NMM for the mishandling of its minutes book, which would suggest that the irregularities committed were not so serious that they could not be rectified (Exh. R-143, p. 7; OJ, ¶ 147(b)).

285 OJ, ¶ 148.

286 *Id*., at ¶¶ 150-153.

287 *Id*., at ¶ 154.

288 Exh. R-76; OJ, ¶ 155.

of Quiborax "S.A." when it should have read "Ltda."[289]; (vi) and finally, the document expert in the Bolivian case concluded that the minutes of 13 September 2001 did not tally with the document that was originally affixed to the minute book.[290]

187. The Tribunal initially notes that, while the 11 September 2001 minutes include Río Grande rather than Quiborax as shareholder, the purpose of that meeting was to appoint the directors and trustees of NMM. Tellingly, the 11 September 2001 minutes show that two out of the three directors appointed to serve on the board of directors were directly related to Quiborax: Allan Fosk[291] and Isaac Frenkel.[292] Likewise, the substitute director, Carlos Shuffer, is also directly related to Quiborax.[293] The only director who was *not* related to Quiborax was David Moscoso. This is consistent with the Claimants' factual account and would suggest that the mention of Río Grande as shareholder was merely a mistake, not the product of a fraudulent scheme.

188. On the other hand, whilst Allan Fosk appears not to have been in Bolivia on 13 September 2001 according to the report of the Chilean immigration authorities, he was in Bolivia before, on 6-7 September, and thereafter, on 1-3 October, according to that same report.[294] Mr. Fosk testified that "perhaps [that] wasn't the precise date [13 September], but at some point in that period was when all the documentation was presented."[295] Thus, although the minutes of 13 September were possibly misdated, the Tribunal does not believe this indicates fraud. Moreover, handwriting expert Linda James concluded that Dolly Paredes' signature was "executed swiftly [...] which is a sign of genuineness"[296], and that her signature on these minutes presented "common patterns"[297] with her other signatures on the NMM share certificates, which were found to be authentic "with the highest degree of confidence expressed by document examiners."[298]

189. Similarly, the Tribunal accepts that the document expert in the Bolivian criminal proceedings may be right in stating that some pages of NMM's minutes books were

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289 OJ, ¶¶ 156, 158.

290 *Id.*, at ¶ 157.

291 Allan Fosk is the "Chief Financial Officer of Quiborax" and part of one of the two families that founded Quiborax (Mem., ¶¶ 20, 22).

292 Isaac Frenkel "is minority shareholder of Quiborax and the Fosk family lawyer" (Rej., 37(e)).

293 Carlos Shuffer is "Manager of the Agrochemical Division at Quiborax" (Shuffer WS, ¶ 1).

294 Exh. R-20.

295 Tr. 222:4-7.

296 James ER, pp. 31, 33.

297 *Id*.

298 *Id*., at p. 42.

torn and that the 13 September minutes were glued. Yet, he does not consider that this in itself proves fraud. Nor does the Tribunal believe that the reference in the minutes to Quiborax "S.A." as opposed to "Ltda." suggests fraud. All these apparent or real deficiencies in the documents seem to reflect a somewhat careless but not unusual handling of documents, rather than a deliberate scheme to perpetrate fraud.

190. In addition, it is true that David Moscoso confessed that the minutes of 13 September were fabricated. However, considering the circumstances of this confession and the fact that Mr. Moscoso did not appear as a witness in this arbitration for cross-examination, the Tribunal considers that this confession carries little, if any, probative weight, especially when the other elements on record so solidly support the Claimants' account of events. All in all, the Tribunal is unconvinced that the minutes of 13 September 2001 were fabricated.

191. Finally, in its Objections to Jurisdiction, the Respondent asserted that "the appropriate evidence" was the "endorsement of the NMM shares and the resulting payment"[299]: the Tribunal is satisfied that the Claimants have submitted adequate evidence of both. On the one hand, the NMM share certificates, which the weight of the expert evidence has shown to be authentic, provide adequate proof of the endorsements to Quiborax and Allan Fosk.[300] On the other hand, the checks issued to Edsal Finance, Alvaro Ugalde and David Moscoso[301], which match with the Claimants' factual account and evidence, constitute adequate proof of Quiborax's payment of the NMM shares.[302]

(v) Conclusion

192. On the basis of its review of the entire record, the Tribunal finds that the Claimants' account of facts is consistent and well-documented. Whilst there are some documentary discrepancies – primarily the NNM's and Río Grande's balance sheets of 2001 and 2003, respectively, and the 11 September 2001 minutes –, these do not prove fraud nor suffice to overcome the plentiful evidence in support of the Claimants' case. For these reasons, the Tribunal is persuaded that Quiborax acquired and Allan

299 OJ, ¶ 123.

300 Exh. CD-105.

301 Exh. CD-116.

302 In the Reply, the Respondent also stated that the Claimants had failed to submit the "fundamental document" on which their entire factual account is based: the share purchase agreement between Río Grande and Quiborax (Reply, ¶ 78). This appears to be inconsistent with its position in the Objections to Jurisdiction, where the Respondent advanced the proposition that the "appropriate evidence" was the endorsements and the payments. Be this as it may, the Tribunal believes that the May 2001 Contract (Exh. CD-104), the endorsements (Exh. CD-105) and the payments (Exh. CD-116) provide adequate documentary proof for the transfer of NMM shares from Río Grande to Quiborax on 17 August 2001.

Fosk received, respectively, 13,636 shares (50.995%) and 1 share (0.005%) of NMM in August and September of 2001, and that they did not engage in fraud or fabricate evidence to gain access to ICSID arbitration.

1.3.2. Was NMM a Chilean national by reason of foreign control at the time the dispute arose in June 2004?

193. The Tribunal must now address whether NMM, which was incorporated in Bolivia, was a Chilean national at the time the dispute arose in June 2004. In accordance with Article 25(1) of the Convention, ICSID tribunals have jurisdiction over investment disputes between a Contracting State and "a national of another Contracting State." Article 25(2) in turn provides that a "national of another Contracting State" includes:

> "[A]ny juridical person which had the nationality of the Contracting State party to the dispute on that date [the date on which the parties consented to submit the dispute to arbitration] and which, because of foreign control, the parties have agreed should be treated as national of another Contracting State for the purposes of this Convention."

194. The Parties agree that Article X(4) of the Treaty further specifies who is a "national of another Contracting State" in the sense of Article 25(2) of the ICSID Convention. Article X(4) of the Treaty provides:

> "For purposes of this Article, any legal person created in accordance with the laws of one of the Contracting Parties, and whose shares are majority-owned by investors of the other Contracting Party, shall be regarded, in accordance with Article 25.2).b) of the [ICSID] Convention, as a legal person of the other Contracting Party."

195. Hence, NMM shall be regarded as a Chilean national provided that it was majority-owned by Chilean investors at the time the dispute arose and at the time the parties consented to submit the dispute to arbitration. As the Tribunal previously concluded, Chilean nationals Quiborax and Allan Fosk collectively acquired 51% of the shares of NMM in August and September 2001 and still own these shares. Since a majority of the shares in NMM was held by Chilean investors at all relevant times, NMM must be deemed to be a Chilean national for jurisdictional purposes. Accordingly, NMM may act as a claimant in this arbitration.

196. For the foregoing reasons, the Tribunal has *ratione personae* jurisdiction over all three Claimants: Quiborax, Allan Fosk and NMM.

2. Second Objection: The Tribunal Lacks *Ratione Materiae* Jurisdiction Over the Dispute

2.1 Bolivia's Position

2.1.1 The definition of "investment" under Article 25(1) of the ICSID Convention

197. The Respondent submits that the Tribunal has no jurisdiction over the dispute because the Claimants have not made an "investment" in Bolivia within the meaning of Article 25(1) of the ICSID Convention.[303]

198. The meaning of the term "investment" is to be found in the BIT and the ICSID Convention.[304] Thus, the definition of "investment" is subject to a double-test. The ICSID tribunals in *Salini v. Morocco*, *Saba Fakes v. Turkey* and *Global Trading v. Ukraine* have all endorsed the double-test.[305] At any rate, "the 'double test' issue is a false issue"[306] because "there must be an objective definition of 'investment'"[307] in the field of international investment law. The rationale for an objective definition of "investment" is rooted in the need for legal certainty: "[s]imply put, investors and […] States need to know what investment means."[308] In *Saba Fakes*, *GEA Group v. Ukraine*, *Romak v. Uzbekistan* and *Alps Finance v. Slovak Republic*, the tribunals endorsed an objective definition of "investment."[309]

199. In accordance with the Vienna Convention, this objective definition of "investment" is composed of the following six elements: (i) a contribution in money or other assets; (ii) duration; (iii) risk; (iv) a contribution to the economic development of the host State or an operation made in order to develop an economic activity in the host State; (v) made in accordance with the laws of the host State; and (vi) in good faith. All six elements must be cumulatively met.[310] The elements of this objective definition derive from the decisions of ICSID tribunals in *Salini v. Morocco*, *Jan de Nul v. Arab Republic of Egypt* and *Phoenix v. Czech Republic*.[311]

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303 Reply, § 5.

304 ROSS, p. 93.

305 *Id*., at pp. 94-96.

306 Tr. 78:7-8.

307 *Id.*, at 78:5-6.

308 *Id.*, at 78:13-14.

309 ROSS, pp. 100-104.

310 *Id*., at p. 109.

311 *Id*., at pp. 106-108.

2.1.2 The Claimants have not made an "investment" within the meaning of Article 25(1) of the ICSID Convention

200. The Claimants have not met any of the six elements of the definition of investment. In particular, the Claimants have failed to prove that (i) they have made a contribution in money or assets, and that (ii) they have contributed to the economic development of the host State or an operation to develop an economic activity in the host State. Since the Respondent alleges that the Claimants did not make any contribution in Bolivia, "the elements of duration and risk are indirectly also put into question."[312] Finally, the Respondent also alleges that the Claimants have failed to comply with the laws of Bolivia and that they have acted in bad faith.[313]

201. Specifically, the Claimants did not prove that they have made a contribution of money or assets in the territory of Bolivia – an element which both Parties agree is part of the objective definition of "investment."[314] The record is devoid of evidence that either Quiborax or Allan Fosk paid for the NMM shares they allegedly own. Similarly, there is no evidence that the Claimants contributed either know-how of the borate mining industry or a commercial network. As a matter of fact, a "forensic analysis" of the documents upon which the Claimants have relied shows that none of those documents establish a contribution of money or assets.[315]

202. Additionally, the Claimants have not proven that they contributed to the economic development of the area – an element which most ICSID tribunals recognize as part of the objective definition of "investment."[316] The video evidence and the "forensic analysis" show (i) that the Claimants made no investment in infrastructure and means of production; (ii) that the workers had no employment contracts, were employed on a temporary basis, often failed to receive salary payments, and used their own working tools; (iii) that the methods of operation were rudimentary; and (iv) that there was no contribution to the development of the community of Salar de Uyuni.[317]

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312 Tr. 85:4-7.

313 OJ, § 4.1; Reply, § 6; Tr. 85:17-19.

314 At the hearing, Counsel for the Respondent stated that "it is common ground between the Parties that a contribution in money or other assets is an element of the objective definition of 'investment'" (Tr. 85:12-16).

315 Tr. 87:17-94:20.

316 OJ, ¶ 229.

317 *Id.*, at ¶ 230; Reply, ¶¶190-191; Tr. 100:10-105:9.

2.2 The Claimants' Position

2.2.1 Article 25(1) of the ICSID Convention does not create a double-test and, at any rate, its meaning is not the one Respondent alleges

203. The Claimants disagree with the Respondent's interpretation of Article 25(1) of the ICSID Convention, but argue that they meet the definition of "investment" in any event under both the BIT and the ICSID Convention.

204. The Claimants posit that the "investment" test turns solely on the BIT. By contrast, Article 25(1) of the ICSID Convention establishes no requirements "over and above" those of the BIT – there is no additional or double test.[318] In the overwhelming majority of cases, the definition of "investment" in BITs will lie within the boundaries set by the ICSID Convention.[319] Accordingly, the term "investment" in Article 25(1) provides at most a minimum threshold to determine whether the definition of "investment" in the BIT is "so off the chart" as to escape a common sense understanding of that term.[320] In short, the definition of "investment" under the ICSID Convention defers to the BIT's definition of that term.[321]

205. In the alternative, if the Tribunal considers that the ICSID Convention establishes an additional test, the Claimants argue that this test consists of only three elements: contribution in money or other assets, duration and risk.[322] Specifically, the contribution to the economic development of the host State is not an element of the definition of "investment" under Article 25(1) of the ICSID Convention. The recent case-law and scholarly writings show that this element is increasingly omitted from the *Salini* test.[323] The decisions in *Saba Fakes* and *LESI v. Algeria,* for instance, disregarded this requirement, while focusing on the other three elements of the *Salini* test.[324]

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318 CM, § III(2).

319 Rej., ¶ 174.

320 *Id*., at ¶¶ 165, 173.

321 CM, ¶ 109.

322 Rej., ¶ 186.

323 *Id*., at ¶¶ 177-178.

324 *Id*., at ¶¶ 181-182.

2.2.2 The Claimants have made an "investment" within the meaning of the Treaty and of the ICSID Convention

206. In any event, even if Article 25(1) of the ICSID Convention contains an independent test, the Claimants argue that they have made an investment both under the BIT and under the ICSID Convention.[325]

207. First, the Claimants have made an investment under the BIT. Under Article I(2)(b) of the Treaty, Quiborax's and Allan Fosk's shares in NMM constitute an "investment." Likewise, under Article I(2)(e) of the Treaty, the mining concessions owned by NMM, also constitute an investment.[326] The Respondent does not dispute these conclusions – rather, it disputes the premise that Quiborax and Allan Fosk own shares in NMM or the mining concessions.[327] Hence, Quiborax's and Allan Fosk's shares in NMM and the mining concessions owned by NMM, are an investment within the meaning of the BIT.[328]

208. Second. the Claimants have also made an "investment" under the ICSID Convention. As an initial matter, the Claimants made a contribution of money and assets: they purchased the initial seven mining concessions, subsequently obtained four additional concessions, committed resources and personnel to exploit these concessions, contributed their know-how of the borate mining industry and a global sales network.[329] Furthermore, the Claimants' investment also met the elements of duration and risk. The Claimants exploited the mining concessions for three years and, had it not been for Bolivia's intervention, they would have exploited them for a forty-year period. As with any mining project, this project ran the risk of not being profitable.[330]

209. Finally, the Claimants' investment also made a contribution to the development of the Río Grande area. It provided the area with an economic activity that resulted in the creation of stable jobs with regular pay, the execution of local transportation contracts, and the exploitation and exportation of natural resources.[331] Even Respondent's video evidence shows that NMM provided employment opportunities.[332] Further, the Claimants purchased a granulation plant, which they would have installed had it not

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325 CM, ¶ 122; Rej., ¶ 186.

326 CM, ¶ 94.

327 *Id*., at ¶ 95.

328 *Id*.

329 CM, ¶ 115; Rej., ¶¶ 187-190.

330 CM, ¶¶ 116-117; Rej., ¶ 191.

331 CM, ¶ 119; Rej., ¶ 197.

332 CM, ¶ 119.

been for Bolivia's intervention.[333] NMM was also committed to establish good relations with the local community; it for instance helped to renovate the village church.[334] In brief, the Claimants were committed to improve the standards of living of the workers and their families.[335]

2.3 Analysis

210. Bolivia does not contest that the Claimants have made an "investment" within the meaning of the BIT. Accordingly, the Tribunal must determine (i) whether Article 25(1) of the ICSID Convention includes an investment test independent from, and thus additional to, the investment test of the BIT (2.3.1); (ii) in the affirmative, what the elements of the "investment" test of the ICSID Convention are (2.3.2); and finally, (iii) whether the Claimants meet the elements of this test (2.3.3).

2.3.1 Does Article 25(1) of the ICSID Convention include an investment test independent from, and thus additional to, the investment test of the BIT?

211. Since it is not disputed that the Claimants made an "investment" within the meaning of the BIT, the Tribunal must only ascertain whether Article 25(1) of the ICSID Convention contains a definition of "investment" that is independent from and thus additional to the definition of "investment" in the BIT. For the following three reasons, the Tribunal's conclusion is that the ICSID Convention contains an objective definition of "investment", which must be met regardless of whether that same test is also inherent to the term "investment" used in the BIT or whether it is additional to the BIT definition.

212. First, as both Parties accept, the ICSID Convention must be construed in accordance with the Vienna Convention on the Law of Treaties. The Claimants note that the drafting history of the Convention shows that "[n]o attempt was made to define the term 'investment'."[336] Yet, as the Respondent correctly points out, this does not mean that this term has no meaning. Rather, in the Tribunal's view, it means that the Contracting States to the ICSID Convention intended to give to the term "investment" an "ordinary

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333 Rej., ¶ 197.

334 *Id.*, at ¶ 202.

335 *Id.*, at ¶ 203.

336 *Id.*, at ¶ 166.

meaning" as opposed to a "special meaning."[337] This ordinary meaning is an objective one – an observation that finds support in the *Saba Fakes* award.[338]

213. Second, the Claimants' own position implicitly accepts that the ICSID Convention contains a definition of investment. The Claimants concede that ICSID tribunals must review whether the definition of investment in the BIT is "so off the chart that [it] cannot reasonably be considered an investment under Art. 25 of the Convention."[339] Yet, to ascertain whether the BIT's definition of investment is "off the chart", it is necessary to determine what the chart is in the first place. The objective definition of investment in Article 25(1) provides that chart.

214. Third, investor-state cases have indeed given substance and content to an objective meaning of "investment". Past awards have considered that this objective meaning was independent from those contained in BITs. This is illustrated, for instance, by the award in *Global Trading v. Ukraine* ("*Global Trading*"), where the tribunal made the following statement:

> "[F]or the Tribunal, it is now beyond argument that there are two independent parameters that must both be satisfied [to establish that there is an "investment"]: what the parties have given their consent to, as the foundation for submission to arbitration, and what the Convention establishes as the framework for the competence of any tribunal set up under its provisions. The Tribunal need do no more than refer in this connection to a long line of previous decisions starting with *Alcoa Minerals v. Jamaica* in 1975 through *Salini* […] *v*. […] *Morocco* (and the various subsequent cases in which tribunals have discussed [...] the so called *Salini* test [...]), and culminating most recently in *Saba Fakes v*. […] *Turkey*" (emphasis added).[340]

215. More recent decisions have considered that the objective meaning was inherent to the term investment, irrespective of the application of the ICSID Convention. This inherent meaning was addressed in the *GEA v. Ukraine* case in the following terms:

> "However, it is not so much the term "investment" in the ICSID Convention than the term "investment" *per se* that is often considered

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337 "A special meaning shall be given to a term if it is established that the parties so intended." Vienna Convention on the Law of Treaties ("VCLT"), Article 31(4). This "special meaning" stands in contrast to the "ordinary meaning" referred to in Article 31(1) of the VCLT.

338 The *Saba Fakes* tribunal reached the following conclusion: "The Tribunal believes that an *objective definition* of the notion of investment was contemplated within the framework of the ICSID Convention [...]" (emphasis added), *Saba Fakes v. Republic of Turkey* (hereafter "*Saba Fakes*"), Award, 14 July 2010, ¶ 108.

339 Rej., ¶ 173.

340 *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, (hereafter *"Global Trading"*), Award, 1 December 2010, ¶ 43.

> as having an objective meaning in itself, whether it is mentioned in the ICSID Convention or in a BIT." [341]

216. The tribunal in *Romak v. Uzbekistan*, an arbitration conducted under the UNCITRAL Rules in which the ICSID Convention had no application, also held in favour of an objective meaning of the term investment:

> "The term 'investment' has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT. . . . . The Arbitral Tribunal therefore considers that the term 'investments' under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk [...]. By their nature, asset types enumerated in the BIT's non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of 'investment', the fact that it falls within one of the categories listed in Article 1 does not transform it into an 'investment'" (emphasis added). [342]

217. Whether the objective test under the ICSID Convention is independent from and additional to the definition found in the BIT, or whether the same objective test is inherent to the term investment used in the BIT, the Tribunal must in any event review the elements of the objective definition to ascertain the existence of an investment. These elements are found in ICSID cases interpreting Article 25(1) of the ICSID Convention. In sum, the Claimants must show that they have made an "investment" under the objective definition developed in the framework of the ICSID Convention in order to establish that the Tribunal has *ratione materiae* jurisdiction over the dispute.

2.3.2 What are the elements of the investment test of Article 25(1) of the ICSID Convention?

218. According to the Claimants, there are three elements to the definition of investment under Article 25(1): a contribution of money or assets, risk and duration. According to the Respondent, there are six elements: in addition to the three just referred to, a contribution to the economic development of the host State or an operation made in order to develop an economic activity in the host State, conformity to the laws of the host State, and good faith.

219. The Tribunal agrees with the Parties that a contribution of money or assets (that is, a commitment of resources), risk and duration are all three part of the ordinary definition of investment. It understands risk to include the expectation of a commercial return.

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341 *GEA Group Aktiengesellschaft v. Ukraine* (hereafter *"GEA"*), Award , 31 March 2011, ¶ 141.

342 *Romak S.A. v. The Republic of Uzbekistan*, Award, 9 November 2009, ¶ 207. The Tribunal also finds mention of an objective definition of investment existing equally under the ICSID Convention and BITs in *Abaclat and Others* (formerly, *Giovanna Beccara and Others*) *v. The Argentine Republic*, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 371.

By contrast, the Tribunal is of the view that the additional elements upon which the Respondent relies are not part of such definition.

220. The Tribunal appreciates that the element of contribution to the development of the host State is generally regarded as part of the well-known four-prong *Salini* test. Yet, such contribution may well be the consequence of a successful investment; it does not appear as a requirement. If the investment fails, it may end up having made no contribution to the host State development. This does not mean that it is not an investment. For this reason and others, tribunals have excluded this element from the definition of investment. This evolution is illustrated by the following four decisions.

221. In July 2006, the tribunal in *LESI v. Algeria* held that there was an investment within the meaning of the ICSID Convention when the first three components of the *Salini* test were met, namely, contribution of money or assets, duration and risk. It further stated that it did not appear necessary to also meet the element of contribution to the economic development of the country, "a requirement that is any event difficult to establish and implicitly covered by the other elements reviewed."[343]

222. Similarly, in May 2008, the tribunal in *Victor Pey Casado v. Chile* ("*Pey Casado*") held that the contribution to the development of the host State was not an element of the definition of investment. The contribution to the economic development of the host State was an expected consequence of an investment – and not the other way around:

> "It is true that the Preamble to the ICSID Convention mentions contribution to the economic development of the host State. However, this reference is presented as a consequence and not as a condition of the investment: by protecting investments, the Convention facilitates the development of the host State. This does not mean that the development of the host State becomes a constitutive element of the concept of investment." (emphasis added).[344]

223. In April 2009, the tribunal in *Phoenix Action v. Czech Republic* adopted a similar view, according to which what matters is the contribution to the *economy* of the host State, a contribution subsumed in the other three elements of the *Salini* test:

> "[T]he contribution of an international investment to the development of the host State is impossible to ascertain. A less ambitious approach should therefore be adopted, centered on the contribution of an international investment to the economy of the host State, which is indeed normally inherent in the mere concept of investment as shaped

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343 *LESI Spa et Astaldi S.p.A. v. People's Democratic Republic of Algeria* (hereafter "*LESI*"), Decision on Jurisdiction, 12 July 2006, ¶ 72.

344 *Víctor Pey Casado and President Allende Foundation v. Republic of Chile* (hereafter *"Pey")*, Award, 8 May 2008, ¶ 232.

> by elements of contribution/duration/risk, and should therefore in principle be presumed" (emphasis in original).[345]

224. Finally, in July 2010, the tribunal in *Saba Fakes v. Turkey* held in unequivocal terms that the element of contribution to the economic development of the host State was not part of the definition of investment pursuant to the ICSID Convention:

> "[T]he present Tribunal considers that the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both [sic] necessary and sufficient to define an investment within the framework of the ICSID Convention […]. The Tribunal is not convinced, on the other hand, that a contribution to the host State's economic development constitutes a criterion of an investment within the framework of the ICSID Convention […] [W]hile the economic development of a host State is one of the proclaimed objectives of the ICSID Convention, this objective is not in and of itself an independent criterion for the definition of an investment" (emphasis added).[346]

225. In line with this trend, the Tribunal considers that a contribution to the economic development of the host State or an operation made in order to develop an economic activity in the host State is not an element of the objective definition of investment.

226. Likewise, the Tribunal is of the view that neither conformity to the laws of the host State nor respect of good faith are elements of the definition of investment. The Contracting Parties to the BIT have limited the protections of the treaty to investments made in accordance with the law of the host State. This limitation may be a bar to jurisdiction, *i.e.* to the procedural protections under the Treaty, or to the application of the substantive treaty guarantees as a matter of merits. In addition, recourse to treaty arbitration and substantive treaty protections may in certain circumstances breach the prohibition of abuse of rights which is an emanation of the principle of good faith. That does not mean that these elements are part of the *definition* of investment. An illegal or bad faith investment remains an investment. It may not be a protected investment, *i.e.* deserve protection in the sense that access to treaty arbitration and/or substantive treaty guarantees may not be granted, but that is a different matter.

227. In sum, for the previous reasons, the Tribunal concludes that the objective definition of investment under Article 25(1) of the ICSID Convention comprises the elements of contribution of money or assets, risk and duration.

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345 *Phoenix Action Ltd. v. Czech Republic* (hereafter *"Phoenix")*, Decision on Jurisdiction, 15 April 2009, ¶ 85.

346 *Saba Fakes*, at ¶¶ 110-111.

2.3.3 Does the Claimants' investment meet the objective test of Article 25(1) of the ICSID Convention?

228. The Tribunal must examine whether the Claimants meet the definition of investment of Article 25(1) of the ICSID Convention. The Claimants maintain that they meet all the elements of this definition, including – despite not being part of the definition – the element of contribution to the economic development of the host State; the Respondent denies that the Claimants meet any of these elements. The Tribunal will address each of these elements in turn.

229. First, the Respondent alleges that none of the Claimants has made a contribution of money or assets. However, as the Tribunal previously concluded, the evidence shows that Quiborax paid for 51% of the shares of NMM.[347] Regardless of where payment was made, this qualifies as a contribution of money because the object of the payment and *raison d'être* of the transaction – the mining concessions – were located in Bolivia. In addition, whereas NMM did not strictly speaking "purchase" the original seven mining concessions, as the Claimants have alleged[348], the record shows that it did issue 26,680 shares in exchange for them. Accordingly, Quiborax made a monetary contribution and NMM a contribution of assets.

230. The Respondent further argues that the Claimants did not make a contribution to obtain the four additional mining concessions in 2002, since no such payment was required under Bolivian law.[349] The Claimants, in turn, assert that these mining concessions are "titles to property" for which "NMM paid a yearly license [...] in accordance with Article 10 of the Mining Code."[350] The Tribunal finds evidence that NMM paid the corresponding mining license fees for these four concessions, as shown in the title deeds "Pococho"[351], "La Negra"[352]; "Cancha I"[353] and "Cancha II."[354]

231. Apart from these initial contributions, Quiborax's financial statements for 2002-2004[355] and NMM's financial statements for 2002-2003[356] show that additional contributions

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347 *See supra*, §§ 1.3.1(iii) and (iv), and ¶ 192.

348 "Claimants purchased their initial seven mining concessions from Bolivian company [Río Grande]" (Rej., ¶ 187).

349 "[T]he fact that NMM received these mining concessions does not mean that there was a contribution in any manner" (Tr. 92:14-16).

350 Tr. 569:6-9.

351 Exh. CD-31.

352 Exh. CD-32.

353 Exh. CD-36.

354 Exh. CD-37.

355 Exh. NCI-31, NCI-32 and NCI-33.

were made in order to operate the mining concessions. In the aggregate, the Tribunal is satisfied that Quiborax's and NMM's original and subsequent contributions meet the contribution requirement for the "investment" test of Article 25(1) of the ICSID Convention.

232. By contrast, there is no evidence that Allan Fosk made a contribution of money or assets. As the Claimants have readily conceded, Allan Fosk did not pay for his one share but rather "received"[357] it "in order to comply with the minimum three shareholders requirement under Bolivian corporate law."[358] There is thus no evidence of an original contribution. Nor is there evidence that he personally made a subsequent contribution to exploit the mining concessions. In short, it is not established that Mr. Fosk made any contribution whatsoever. While on one occasion Mr. Fosk received dividends for his one share[359], this only demonstrates that he benefited from the investment, not that he made a contribution.

233. According to Bolivia, a distinction should be made between the objects of an investment, "such as shares or concessions [...] and the action of investing."[360] The Tribunal agrees. While shares or other securities or title may be the legal materialization of an investment, mere ownership of a share is, in and of itself, insufficient to prove a contribution of money or assets. In the present case, the record shows that Mr. Fosk received a share to comply with a formality under Bolivian corporate law, and that at no point did he make a personal contribution to the investment. In the circumstances, the Tribunal finds that Mr. Fosk does not hold an investment under Article 25(1).

234. Second, Bolivia submits that, to the extent it has argued "that Claimants didn't do anything in Bolivia, the elements of duration and risk are indirectly also put into question."[361] Yet, the Tribunal found that Quiborax and NMM did make a contribution of money and assets. Thus, this indirect objection, contingent upon a finding that no contribution was made, does not apply to them. At any rate, Quiborax's and NMM's contributions did meet the elements of duration and risk. Quiborax's and NMM's contributions and operations in Río Grande ran from 2001 to June 2004. Had it not been for the onset of the dispute, there is no reason to consider that these operations

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356 Exh. NCI-53.

357 CM, ¶ 48, n. 70.

358 *Id.*, at ¶ 34; *see also* Mem., ¶ 63.

359 Exh. CD-149.

360 Tr. 79:1-8.

361 *Id.*, at 85:4-7.

would not have extended beyond that date. It is also apparent that these operations were subject to risks, including market, financial and political risks. Furthermore, it is not disputed that Quiborax and NMM made their contributions with the expectation of receiving a commercial return. Conversely, the objection does apply to Allan Fosk, who made no contribution. Nevertheless, since Allan Fosk has failed to meet the element of contribution, it is unnecessary to examine whether he has also failed the investment test of Article 25(1) on additional grounds.

235. Third, Bolivia claims that the Claimants did not meet the element of contribution to the economic development of the host State or an operation made in order to develop an economic activity in the host State. The Claimants maintain that the opposite is true. As previously explained, the Tribunal considers that this element is not part of the definition of "investment" under Article 25(1), but rather an aspiration informing the system of international investment protection. In any event, the Tribunal deems that Quiborax and NMM have met this aspiration in this case.

236. The evidence shows that the exploitation of the mining concessions generated a growing level of economic activity that only came to an end with this dispute. Specifically, NMM's sales of ulexite experienced a growth rate of 250% between 2002 and 2003[362]; this growth necessarily increases the economic activities that make those sales possible in the first place – labour, transportation, logistics. Further, NMM sold around 64,000 tons of ulexite to Quiborax in 2003 and 2004 combined.[363] The Respondent's video evidence is insufficient to rebut evidence of this contribution.[364] Thus, the Tribunal considers that Quiborax and NMM met the aspiration that their investment should contribute to the economic development of Bolivia.

237. For these reasons, the Tribunal finds that Quiborax and NMM made an investment in the objective sense developed under Article 25(1) of the ICSID Convention. The same is not true of Allan Fosk. Accordingly, the Tribunal does not have *ratione materiae* jurisdiction over Allan Fosk's claim. Hence, the "Claimants" shall henceforth refer only to Quiborax and NMM, to the exclusion of Mr. Fosk. On the other hand, in order for the

362 Exh. NCI-53; Navigant ER, ¶ 73 n. 129.

363 Exh. NCI-62; Navigant ER, ¶ 111 n. 155. This evidence shows that Quiborax's and NMM's exploitation generated real economic activity, to the benefit of the Río Grande area. In its Reply on Jurisdiction, however, the Respondent noted that it was enough for the investor to "potentially" contribute to the economic development of the host State (Reply, ¶ 176). Since the Tribunal considers that Quiborax's and NMM's investment as a matter of fact contributed to the economic development of the host State, it is all the more clear that Quiborax and NMM met this lower standard.

364 Exh. R-169.

Tribunal to conclusively ascertain whether or not it has *ratione materiae* jurisdiction over Quiborax and NMM, it must examine Bolivia's next objection.

3. Third Objection: The Tribunal Lacks Jurisdiction Because Claimants' Alleged Investment Was Made in Breach of Bolivian Laws and Regulations

3.1. The Respondent's Position

238. According to Bolivia, the Tribunal has no *ratione materiae* jurisdiction because the Claimants' investment was made in breach of the Treaty's legality requirement.[365] The Treaty's scope is indeed limited to investments "made in accordance with the laws and regulations"[366] of the host State. ICSID case law shows that the legality requirement is an element of *ratione materiae* jurisdiction. Thus, if this requirement is not met, the Tribunal has no jurisdiction over the dispute, a proposition endorsed in *Inceysa v. El Salvador, Saba Fakes v. Turkey* and *Alasdair Ross Anderson v. Costa Rica*.

239. Bolivia specifically submits that (i) the legality requirement covers any breach of Bolivian law, regardless of its seriousness and regardless of when the breach is committed; (ii) at any rate, the Claimants violated "fundamental provisions of Bolivian laws and regulations, including tax and criminal laws"[367]; and (iii) it is not *estopped* from raising the illegality of the Claimants' investment. Each of these submissions is expanded below.

240. First, the legality requirements covers any breach of Bolivian law regardless of its seriousness. The Treaty does not draw a distinction between serious and non-serious breaches of the laws; it covers both alike.[368] The very use of the terms "laws and regulations" shows that the legality requirement covers the entire Bolivian legal order, without regard to the significance of the rule breached.[369] This broad construction of the legality requirement is consistent with the Treaty's broad definition of "investment." The broader the definition of "investment", the greater is the need for investors to comply with the legal order of the host State.[370]

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365 OJ, ¶¶ 194-195.

366 Article II of the Treaty. By the same token, Article I(2) of the Treaty defines "investment" as "any kind of assets or rights related to an investment so long as the latter has been made in accordance with the laws and regulations" of the host State (Tribunal's translation). The legality requirement is again reiterated in Article III(2) of the Treaty. Thus, the legality requirement is included "in no less than three provisions of the Treaty" (Tr. 63:8-9).

367 ROSS, p. 80.

368 Reply, ¶¶ 199, 201-205.

369 *Id*.

370 *Id*., at ¶ 200.

241. Additionally, the legality requirement covers any breach of Bolivian law regardless of when the breach occurred, *i.e.* regardless of whether the breach is committed at the time of the establishment of the investment or thereafter. Unlike the situation in *Saba Fakes*, this Treaty requires that the investments "be effected" in conformity with the legal order of the host State. This language covers breaches committed at the time of the establishment of the investment and during its performance.[371] In any event, the Claimants breached Bolivian law at the time when they established their investment. Specifically, on account of these breaches, Quiborax and Allan Fosk could not validly become shareholders of NMM.[372]

242. Second, regardless of whether the legality requirement covers only serious breaches, the Claimants violated "fundamental provisions of Bolivian laws and regulations, including tax and criminal laws."[373] The Respondent alleges that the transfer of NMM shares from Río Grande to Quiborax on 17 August 2001 "was in breach of Bolivian law for no less than six reasons"[374]: (i) NMM made a capital increase without obtaining the prior approval of the Commercial Registry in breach of the Commercial Code[375]; (ii) the Claimants committed fraud against Río Grande's creditors, as Río Grande received no payment for the transfer[376]; (iii) if the transfer was a gift, Quiborax should have paid a tax on gratuitous transfers and recorded the gift in a notarized document[377]; (iv) if the transfer was not a gift, Quiborax and Allan Fosk should have paid the transfer tax[378]; (v) Quiborax failed to register a duly empowered legal representative[379]; and (vi) Río Grande failed to reduce its capital as required by the Commercial Code.[380]

243. These six violations also apply to the transfer of NMM shares of 4 and 10 September 2001.[381] In addition, Bolivia submits that the Claimants committed the following four breaches of Bolivian law (the numbering continues that of the preceding paragraph): (vii) Mr. Fosk misrepresented that he was in La Paz in the minutes of 27 January

371 *Id*., at ¶ 209.
372 *Id*., at ¶ 210.
373 ROSS, p. 80.
374 Tr. 66:4-6.
375 OJ, ¶ 203; Tr. 66:7-67:3.
376 OJ, ¶ 203; Tr. 67:4-15.
377 Reply, ¶ 206; Tr. 67:16:68:14.
378 Tr. 68:15-21.
379 OJ, ¶ 203; Tr. 68:22-69:3.
380 Tr. 69:4-10.
381 *Id.*, at 69:14-17.

2003[382]; (viii) the Claimants failed to pay the corporate income tax for foreign beneficiaries[383]; (ix) the Claimants breached the rules concerning the registration of mining concessions[384]; (x) they also breached the rules concerning the accuracy of financial statements[385], and (xi) the rules concerning the contents of the shareholders registry.[386]

244. Third, Bolivia maintains that it is not *estopped* from objecting to the legality of the Claimants' investment. The Bolivian authorities never accepted that the Claimants' investment was legal. While the *Superintendencia* concluded that Quiborax and Allan Fosk were shareholders of NMM, this conclusion was based on the shareholders registry, not on a thorough analysis of the record. Moreover, the fact that the Parties entered into settlement negotiations does not mean that Bolivia accepted the Claimants' allegations. Contrary to what the Claimants allege, the decisions in *SwemBalt v. Latvia* and *Kardassopoulos v. Georgia* do not support their position.

245. In sum, Bolivia submits that, because the Claimants' investment "was tainted with illegality under Bolivian laws and regulations"[387], the Tribunal has no *ratione materiae* jurisdiction over this dispute.

3.2. The Claimants' Position

246. According to the Claimants, their investment was made "in accordance with the laws and regulations" of Bolivia and the Respondent's allegations to the contrary are unfounded.[388] The Claimants specifically submit that (i) the legality requirement has a limited scope: it applies only to violations of the host State's fundamental principles or investment regime, and only at the time the investment is established[389]; (ii) they did not breach the legality requirement because the alleged violations of Bolivian law either did not occur or fall outside the scope of this requirement[390]; and (iii) the Respondent is *estopped* from raising the illegality of the Claimants' investment.[391]

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382 *Id.,* at 529:16-22.

383 OJ, ¶ 203.

384 *Id*.

385 *Id*.

386 *Id*.

387 Tr. 70:4-5 and 8-9.

388 CM, ¶ 123.

389 *Id.*, at ¶¶ 125-131, 136-137; Rej., ¶¶ 205, 209-210, 214-220.

390 CM, ¶¶ 132-137; Rej., ¶¶ 104-124, 206.

391 CM, ¶¶ 148-158; Rej., ¶¶ 222-229.

247. First, with respect to the scope of the legality requirement, Bolivia has cited no precedent or doctrine that supports its broad interpretation of the legality requirement[392]; on the contrary, the precedents on which it relies support a narrow interpretation of this requirement.[393] In sum, host States should not be able to invoke the legality requirement as an excuse to avoid their international responsibility.[394] With respect to the burden of proof, any act which is alleged to be legally flawed remains valid until it is voided by a court decision at the request of an interested party.[395]

248. On the substantive scope of the legality requirement, the tribunal in *Saba Fakes v. Turkey* stated that it was "not convinced"[396] by the State's position "that any violation of any of the host State's laws would result in the illegality of the investment [...] and preclude such investment from"[397] BIT protection. In *Tokios Tokelés v. Ukraine*, the tribunal held that it would be "inconsistent with the object and purpose of the Treaty"[398] to deny protection to an investment on the basis of "minor errors"[399] or other formal irregularities.[400] Similarly, the tribunal in *Desert Line v. Yemen* held that the legality requirement excludes "investments made in breach of fundamental principles of the host State's law."[401] The decisions in *Phoenix Action*, *World Duty Free*, *Inceysa*, *Alasdair Ross Anderson* and *Fraport* also support a limited reading of the legality requirement.[402]

249. On the time-aspect of the legality requirement, the tribunal in *Hamester v. Ghana* stated that a distinction had to be "drawn between (1) legality as at the *initiation* of the investment ("made") and (2) legality *during the performance* of the investment"[403] (emphasis in the original). Pursuant to this distinction based on the Treaty language, the *Hamester* tribunal held that the legality requirement only applied to the "initiation of

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392 Rej., ¶ 205.

393 *Id*., at ¶¶ 209-210.

394 CM, ¶¶ 130-131.

395 Rej., ¶ 207.

396 *Saba Fakes*, at ¶ 119.

397 *Id*.

398 *Tokios Tokelés v. Ukraine* (hereafter *"Tokios Tokelés")*, Decision on Jurisdiction, 29 April 2004, ¶ 86.

399 *Id*.

400 CM, ¶ 128.

401 *Desert Line Projects LLC v. Republic of Yemen* (hereafter *"Desert Line")*, Award, 6 February 2008, ¶ 104.

402 Rej, ¶ 210, n. 321.

403 *Gustav Hamester GmbH & Co. KG v. Republic of Ghana* (hereafter "*Hamester*"), Award, 18 June 2010, ¶ 127.

the investment."[404] Likewise, the *Saba Fakes* tribunal held that the legality requirement governed the "admission of the investment in the host State."[405] The same conclusion should be reached in this case, as the Bolivia-Chile BIT employs the past tense in connection with the legality requirement, *i.e.* investments "made" in accordance with the laws and regulations of the host State.[406]

250. Second, the Claimants did not breach the legality requirement because the alleged violations of Bolivian law either did not occur or fall outside the scope of this requirement. In response to Bolivia's specific allegations[407], the Claimants argue that: (i) NMM was not required to obtain *prior* approval from the Commercial Registry to make a capital increase, and the subsequent approval sufficed[408]; (ii) "[a]ll of the accusations of fraud are false"[409], including the allegation of fraud against Río Grande's creditors; (iii) the transfer of NMM shares from Río Grande to Quiborax was not a gift and thus no gift tax was due[410]; (iv) there is no tax evasion as a result of these transfers because the Commercial Registry itself – the *Senarec* – certified that the "legal and tax requirements" of the transfer were met.[411]

251. The Claimants further maintain that (v) Quiborax had no obligation to register a legal representative in Bolivia[412]; (vi) Mr. Fosk's signature of the minutes of 27 January 2003 on a date different than the one represented in the minutes "is normal corporate practice"[413]; (vii) the Claimants paid the income tax for foreign beneficiaries[414]; (viii) the belated registration of the mining concessions did not affect the validity of the transfer, but only delayed its effects vis-à-vis third-parties[415]; (ix) there is no provision under Bolivian law whereby errors in the financial statements are illegal[416]; (x) the

404 *Id*.

405 *Saba Fakes*, at ¶ 119.

406 Rej., ¶¶ 217-218.

407 The Claimants did not specifically respond to Bolivia's allegation that they did not meet the legality requirement because Río Grande failed to reduce its capital, as would have been required by the Commercial Code, following the transfer of NMM shares to Quiborax – an allegation first made at the hearing (Tr. 69:4-10).

408 Tr. 544:5-17.

409 *Id.*, at 113:17.

410 Rej., ¶¶ 123-124.

411 Tr. 542:8-12.

412 Rej., ¶¶ 111-118.

413 Tr. 560:18-19.

414 CM, ¶ 135; Rej., ¶¶ 121-122.

415 Rej., ¶¶ 104-110.

416 *Id*., at ¶¶ 119-120.

shareholders registry complied with the requirements of Bolivian law, as the *Superintendencia* concluded in its report dated 11 February 2005.[417]

252. On the other hand, if there has been any formal breach of Bolivian law, this only shows the Claimants' good faith.[418] Indeed, none of these breaches helped the Claimants to secure the investment – as was the case in *Plama*, *World Duty Free* and *Inceysa* – or made the investment more profitable.[419] Likewise, no attempt was made to cover up these alleged breaches of Bolivian law: when the Claimants discovered, for instance, that the minutes of 11 September 2001 – which wrongly listed Fernando Rojas, Dolly Paredes and Gilka Salas as still being shareholders of NMM – had been incorporated into other documents, the NMM Board of Directors took formal notice of the mistake and issued new documents to rectify the mistake.[420]

253. Third, the Respondent is *estopped* from disputing the legality of Claimants' investment. As a matter of fact, the Respondent has engaged the Claimants in negotiations for almost three years and, in the context of those negotiations, has had the opportunity to examine the relevant documentation on multiple occasions.[421] At no point, however, did Bolivia call into question the legality of the Claimants' investment; as the *Superintendencia* report shows, the opposite was the case.[422] In these circumstances, the Respondent is *estopped* from raising objections on the ground that the Claimants' investment fails to meet the legality requirement. The decisions in *Swembelt v. Latvia* and *Kardassopoulos v. Georgia* lend support to this conclusion.[423]

254. For these reasons, the Claimants submit that they met the legality requirement and that the Tribunal has thus jurisdiction over this dispute.

3.3. Analysis

255. The Parties are in dispute as to whether the Claimants have met the Treaty's legality requirement. Article II of the Bolivia-Chile BIT limits its scope of application to investments made "in accordance with the legal provisions" of the host State.[424] Similarly, Article I(2) of the Treaty defines "investment" as one that was made "in

417 Tr. 555:5-559:17.
418 CM, ¶¶ 138-147.
419 *Id*., at ¶¶ 140-141.
420 *Id*., at ¶¶ 142-143.
421 *Id*., at ¶¶ 148-149, 152-153.
422 *Id*., at ¶¶ 154-155.
423 *Id*., at ¶¶ 150-151; Rej., ¶¶ 228-229.
424 Exh. CL-1, Art. II.

accordance with the laws and regulations"[425] of the host State. The definition of investment is relevant to determine the scope of the Contracting Parties' – and thus Bolivia's – consent to arbitration under Article X of the Treaty. Hence, under the Bolivia-Chile BIT, the legality requirement is relevant to determine both the Treaty's scope of application and the scope of Bolivia's consent to arbitration.

256. To rule on Bolivia's jurisdictional objection, the Tribunal must determine (i) whether the Respondent is *estopped* from contesting the legality of Claimants' investment under the Treaty; if the Respondent is not so *estopped*, the Tribunal must ascertain (ii) the burden of proof concerning alleged violations of the legality requirement, (iii) the scope of the legality requirement, and (iv) whether the Claimants have breached the legality requirement.

3.3.1 Is Bolivia *estopped* from contesting the legality of Claimants' investment under the Treaty on account of its previous conduct?

257. The Claimants allege that Bolivia is *estopped* from contesting the legality of their investment on account of its previous conduct. The Tribunal is not convinced that this is the case. As Bolivia's apposite reliance on *Vieira v. Chile*[426] suggests, the fact that the Parties have entertained prolonged settlement discussions, extending well beyond the initiation of this arbitration, does not mean by itself that Bolivia has accepted the Claimants' jurisdictional allegations, at least not absent specific evidence to the contrary. A different conclusion could have a chilling effect on the host State's willingness to entertain settlement negotiations. In this case, neither the *Superintendencia* report nor the remaining evidence shows that Bolivia accepted that the Claimants' investment complied with the legality requirement.[427]

258. Thus, the Tribunal is duty-bound to conclude that Bolivia is not *estopped* from contesting the legality of the Claimants' investment.

3.3.2 What party bears the burden of proof concerning alleged violations of the legality requirement?

259. While the Parties have not explicitly addressed this issue, the Tribunal considers that the party alleging a breach of the legality requirement, *i.e.* the host State, bears the

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425 *Id*., at Art. I(2).

426 *Sociedad Anónima Eduardo Vieira v. Republic of Chile* (hereafter "*Vieira*"), Award, 21 August 2007, ¶ 200.

427 The *Superintendencia* report concluded that further inquiries and studies were necessary to "structure the defense of the Bolivian State in the face of potential ICSID proceedings" (Exh. CD-72, p. 6). Thus, by its own terms, the *Superintendencia* report was neither comprehensive nor exhaustive.

burden of proof. The contrary proposition would be unrealistic: the investor would have to somehow prove that it has complied with the myriad laws and regulations of the host State. Hence, the burden of proof must naturally rest with the party alleging a breach of the legality requirement. This view is confirmed by the cases, doctrine, and Respondent's own position.

260. In *Desert Line*, the tribunal held that the respondent had "not come close to satisfying [it] that the Claimant['s] investment […] was inconsistent with Yemeni laws or regulations."[428] In *Saba Fakes*, the tribunal held that the respondent's allegation that the investment was illegal could fall within the scope of the legality requirement "if demonstrated."[429] And in *Hamester*, the tribunal held that the respondent did "not fully discharge its burden of proof" regarding its allegation that the claimant's investment was illegal.[430] Likewise, Zachary Douglas has written that the host State's allegation that "the claimant has violated its law in the acquisition of its investment [...] must be fatal" to jurisdiction "[i]f that allegation is substantiated before the investment treaty tribunal."[431]

261. In line with these authorities, the Respondent appeared to concede that, although the Claimants bear the burden of proving the primordial jurisdictional facts, it bears the burden of proving breaches of the legality requirement:

> "The first comment on evidence [...] We say to you that we have established, for instance, that, if any, the investment made by Claimants is illegal [...] but regarding the questions of the existence of investors and the question of existence of an investment, this is something that has to be established by Claimants" (emphasis added).[432]

262. Contrary to what the Claimants assert, this does not mean that their investment can only be declared to have breached the law "by court decision"[433], *i.e.* by the decision of a Bolivian court in this case. It is the Tribunal's duty to determine whether it has jurisdiction over the dispute and, to that end, to examine whether the legality requirement is met. But it does mean that the Respondent must prove to the satisfaction of the Tribunal that the Claimants' investment breached the legality requirement.

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428 *Desert Line*, at ¶ 105.

429 *Saba Fakes*, at ¶ 120.

430 *Hamester*, at ¶ 132.

431 Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press 2009, p. 53, ¶ 106.

432 Tr. 497:14-498:2.

433 Rej., ¶ 207.

3.3.3 What is the scope of the legality requirement?

263. The Parties disagree about the scope of the legality requirement. The Claimants advocate a narrow reading of this requirement limited to breaches of fundamental legal principles or of the investment regime. The Respondent opposes an expansive construction encompassing any breach of its legal order irrespective of its seriousness or timing. The Tribunal is of the opinion that neither interpretation is entirely correct, the interpretation of the Claimants being too narrow and that of the Respondent too broad. The Claimants' interpretation goes beyond the terms of the BIT, in an attempt to further the investor's protection without due regard for the State's interests. By contrast, the Respondent's expansive view neglects the investor's interests with the result that an investment could be deprived of any treaty protection for any breach of the host State's legal order – however slight – committed at any time. This approach would create deleterious incentives, as host States would be in a position to strip investors of treaty protection by finding any minor breach at any time.

264. Neither view is consistent with the objectives of the BIT, the Preamble of which states that the Parties "recogniz[e] the need to promote and protect foreign investments in order to support the economic prosperity of both States" and "wish[] to strengthen the economic cooperation to benefit both States."[434] Accordingly, within the limits set by the applicable treaty interpretation rules, the Tribunal favours a balanced interpretation that takes account of the need to protect foreign investments, on the one hand, and of the State's other responsibilities, on the other. Or in the words of the *El Paso* tribunal:

> "This Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow."[435]

265. Bearing this in mind, construction of the legality requirement calls for a line-drawing exercise in which the Tribunal must determine what violations are covered by the legality requirement. Or, differently stated, what violations of the legality requirement exclude the investment from the scope of the Treaty and the jurisdiction of the Tribunal. Other tribunals have already grappled with the question of the scope of similarly- or identically-worded legality requirements. The Tribunal will draw guidance from these cases, which, while still in a relatively emerging state, already outline the contours of the legality requirement.

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434 Exh. CL-1 (Tribunal's translation).

435 *El Paso*, at ¶ 70.

266. The Tribunal considers that the BIT's legality requirement has both subject-matter and temporal limitations. The subject-matter scope of the legality requirement is limited to (i) non-trivial violations of the host State's legal order (*Tokios Tokelés*[436], *LESI*[437] and *Desert Line*[438]), (ii) violations of the host State's foreign investment regime (*Saba Fakes*[439]), and (iii) fraud – for instance, to secure the investment (*Inceysa*[440], *Plama*[441], *Hamester*[442]) or profits (*Fraport*[443]). Additionally, under this BIT, the temporal scope of the legality requirement is limited to the establishment of the investment; it does not extend to the subsequent performance. Indeed, the Treaty refers to the legality requirement in the past tense by using the words investments "made" in accordance with the laws and regulations of the host State and, in Spanish, "haya efectuado"[444] (*Fraport*[445], *Hamester*[446], *Saba Fakes*[447]).

267. Accordingly, the Tribunal finds that the legality requirement has both subject-matter and temporal limitations.

3.3.4 Did the Claimants breach the legality requirement?

268. The Tribunal will examine each of Bolivia's allegations that the Claimants breached the legality requirement, taking into account the foregoing considerations regarding the burden of proof and the limited scope of the legality requirement.

269. First, Bolivia alleges that one of the "main illegalities"[448] is that NMM's capital increase of August 2001 was made without the prior approval of the Commercial Registry, in breach of Articles 343 and 131 of the Bolivian Commercial Code (the "Commercial Code").[449] According to Respondent's expert, Prof. Salame, this results in the "absolute

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436 *Tokios Tokelés*, at ¶ 86.

437 *LESI*, at ¶ 83(iii).

438 *Desert Line*, at ¶ 104.

439 *Saba Fakes*, at ¶ 119.

440 *Inceysa Vallisoletana v. Republic of El Salvador* (hereafter "*Inceysa*"), Award, 2 August 2006, ¶¶ 236-238.

441 *Plama*, at ¶¶ 133-135.

442 *Hamester*, at ¶¶ 129, 135.

443 *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines* (hereafter "*Fraport*"), Award, 16 August 2007, ¶ 396.

444 Art. I(2) and Art. II (in Spanish "efectuadas").

445 *Fraport*, at ¶ 345.

446 *Hamester*, at ¶ 127.

447 *Saba Fakes*, at ¶ 119.

448 Tr. 528:5.

449 *Id.*, at 66:7-67:3.

nullity"[450] of the NMM shares issued pursuant to said capital increase. The Tribunal is not convinced that this is the case. Neither Article 343 nor 131 of the Commercial Code provides that the Commercial Registry's approval of a capital increase must be given "prior" to said increase – nor is there any authority in support of this interpretation. Therefore, it does not appear that the Commercial Registry's *prior* approval is an essential element for the validity of the capital increase.[451]

270. On the contrary, the Commercial Registry provided authoritative confirmation that *prior* approval is not essential: it approved NMM's capital increase on 28 August 2001 despite having full knowledge that NMM had increased its capital *before* obtaining its – the Commercial Registry's – approval to do so.[452] Indeed, Resolution No. 1174/2001 refers explicitly to the minutes of 3 August 2001 and to public deed 210/2001, both of which plainly show that NMM had already increased its capital.[453] Had the Commercial Registry considered that *prior* approval was an essential requirement for the capital increase, it would have refused NMM's request for approval.[454]

271. Second, Bolivia alleges that another main illegality[455] is that the Claimants committed fraud against Río Grande's creditors, as Río Grande received no payment for the transfer of its shares in NMM. However, there is no evidence to support this allegation. In its second Expert Report, Prof. Salame stated that this transfer "could"[456] amount to fraud to creditors "if"[457] its purpose was to avoid paying off Río Grande's debts; however, he noted that he did not have "sufficient information"[458] to determine whether there was fraud under the facts of this case. No such evidence has, indeed, been submitted. It is even a matter of speculation whether Río Grande had creditors in the first place.[459]

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450 *Id.*, at 341:12.

451 In light of this conclusion, there is no need to have recourse to Article 822 of the Commercial Code and to Article 549 of the Civil Code, as Prof. Salame has argued (Tr. 341:14-342:8).

452 Exh. R-126.

453 Exhs. CD-25 and CD-110.

454 In accordance with Article 131 of the Commercial Code, the Commercial Registry had the power to "approve or deny" the request for a capital increase. If the request is denied, the Commercial Registry must provide reasons so that the applicant may correct any deficiencies.

455 Tr. 528:11-20.

456 Salame ER II, ¶ 44 (4th bullet point).

457 *Id*.

458 *Id*.

459 In its Second Report, Prof. Salame professed that he "ignor[ed]" whether Río Grande "had debts at the time of the events" (Tribunal's translation) (Salame ER II, ¶ 44 (4th bullet point)). Furthermore, at the hearing, Counsel for the Respondent stated that: "[T]here were *apparently*

272. Third, Bolivia alleges that, if the transfer was a gift, Quiborax should have paid the tax on gratuitous transfer pursuant to Article 99 of Law No. 843, and recorded the gift in a notarized document.[460] Yet, as the Tribunal previously concluded, Quiborax did not receive the NMM shares gratuitously but rather for a fee.[461] Since the condition upon which the Respondent's allegation is predicated is not met, the Tribunal finds no illegality here.

273. Fourth, Bolivia argues in the alternative that, if the transfer was *not* a gift, Quiborax and Allan Fosk should have paid the transaction tax. However, the point is moot with respect to Allan Fosk, over whom the Tribunal has already concluded that it has no jurisdiction, and there is no evidence that Quiborax was subject to this tax. At the hearing, the Respondent relied on Article 72 of Law No. 843, which provides that certain economic activities and gratuitous transfers are "subject to the [transaction] tax [...] under the conditions provided for in the following Articles."[462] But no evidence was submitted that the transfer of NMM shares to Quiborax met those "conditions" and was subject to the transaction tax. Thus, the Respondent has not substantiated this allegation.

274. Fifth, the Respondent alleges that Quiborax failed to register a duly empowered legal representative to act in Bolivia, in breach of Article 420 of the Commercial Code. The Respondent's argument is that this failure rendered the *transfer* of the shares invalid. However, as Respondent's own legal expert acknowledged, Quiborax was not required to register a legal representative to acquire shares in Bolivia.[463] Whether Quiborax was, on the other hand, required to register a legal representative in order to exercise its rights as a shareholder is a question that lies outside the temporal scope of the legality requirement, as this is a question which concerns a period of time subsequent to that in which the investment was made. Thus, the Tribunal finds no relevant illegality here.

275. Sixth, the Respondent alleges that Río Grande failed to reduce its capital following the transfer of the NMM shares in breach of Article 354 of the Commercial Code.[464]

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concerns about liabilities of Río Grande. That's why *apparently* they [the Claimants] did not want to buy shares in Río Grande" (emphasis added)(Tr. 528:15-18).

460 Tr. 67:16-68:14; ROSS, pp. 85-87.

461 *See supra*, §§ 1.3.1(iii) and (iv), and Tribunal's conclusion at ¶ 192.

462 Salame ER I, Annex 22, Art. 72.

463 On the issue of whether Quiborax was required to be registered with the Commercial Registry, Prof. Salame "agree[d] that the answer was in the negative" (Salame ER II, ¶ 66).

464 Tr. 69:4-10; Salame ER II, ¶ 44 (3rd bullet point).

However, any such breach would have been Río Grande's breach, not the Claimants'. Hence, no breach of the legality requirement is found here.

276. As a result, none of the six reasons the Respondent has advanced shows that the transfer of NMM shares from Río Grande to Quiborax on 17 August 2001 was in breach of Bolivian law. By the same token, none of these reasons shows that the transfers of NMM shares dated 4 and 10 September 2001 were in breach of Bolivian law. The Tribunal will examine the Respondent's additional illegality allegations.

277. Seventh, the Respondent alleges that Mr. Fosk misrepresented that he was in La Paz in the minutes of 27 January 2003. The Respondent has not explained what rule this misrepresentation would have breached. In addition, any such breach would lie outside the temporal scope of the legality requirement, as it would have been committed *after* the investment was established. Lastly, this allegation is moot because the Tribunal already concluded that it has no jurisdiction over Allan Fosk.

278. Eighth, the Respondent alleges that the Claimants failed to pay the corporate income tax for foreign beneficiaries. However, the evidence disproves this allegation. As a matter of fact, the evidence shows that NMM first declared dividends on 3 December 2003[465], and subsequently paid the applicable corporate income tax for foreign beneficiaries – Quiborax and Allan Fosk – upon distribution of those dividends in 2004.[466] Therefore, the evidence negates any allegation of illegality in this respect.

279. Ninth, the Respondent alleges that the Claimants breached the rules concerning the registration of mining concessions. Yet, the Claimants did register the mining concessions with the Mining Registry and the Real Property Registry in December 2001[467], and there is no evidence that pre-transfer registration is required. On the contrary, the Tribunal agrees with Claimants' legal expert, Prof. Rosenkrantz, that, pursuant to Article 823 of the Commercial Code[468], registration of the mining concessions is not required for the validity of the transfer, but only to ensure its third-party effects, *i.e.* that third parties have notice of the transfer.[469] In other words, failure to register the transfer in advance breaches no rule, but merely deprives the transfer of third-party effects as long as it is not effected. Accordingly, no illegality is found here.

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465 Exh. CD-118.2.

466 Exhs. CD-149 and CD-150, attaching the completed F-54 tax forms.

467 Salame ER I, ¶ 68.

468 In line with Prof. Rosenkrantz's evidence, Prof. Salame also declared that Article 823 of the Commercial Code governs the issue of the third-party effects of registration (Salame ER I, ¶ 63).

469 Tr. 430:20:431:1, 434:2-5.

280. Tenth, the Respondent alleges that the Claimants breached the rules concerning the accuracy of Río Grande's and NMM's financial statements. The Respondent has failed to explain what provision of Bolivian law the Claimants would have breached in this regard, and thus to substantiate this allegation. In addition, the Claimants were not responsible for the financial statements of Río Grande, and thus for any mistake contained therein. Finally, while the Claimants admitted that NMM's financial statement for 2001 contained a mistake[470], the evidence suggests that this mistake was not deliberate but rather the product of inadvertence. Hence, the Tribunal deems that, to the extent that such mistake had still constituted a breach of Bolivian law, it would have been a trivial one and thus outside the subject-matter scope of the legality requirement.

281. Eleventh and lastly, the Respondent alleges that the Claimants would have breached rules concerning the contents of the shareholders' registry. The Respondent has alleged for instance that, in addition to the secretary, NMM's chairman should also have signed each entry in the shareholders' registry. On the basis of Article 9 of the NMM bylaws[471], the Tribunal believes that only the secretary's signature was required. More importantly, however, the Tribunal believes that, even if the Claimants had breached a rule concerning the handling of the shareholders' registry, an admittedly internal document with scant intrinsic probative value, any such breach would have been trivial and thus beyond the subject matter scope of the legality requirement.

282. For the foregoing reasons, the Tribunal concludes that Bolivia has not established that the Claimants breached the legality requirement. Accordingly, the Tribunal has *ratione materiae* jurisdiction over the Claimants' investment.

D. OBJECTION TO ADMISSIBILITY

283. In addition to the jurisdictional objections, the Respondent also objects to the admissibility of the Claimants' claims on the ground that Quiborax and Allan Fosk concealed their participation in NMM, which it submits it is an abuse of nationality contrary to the principle of good faith. The Claimants deny that Quiborax and Allan Fosk concealed their condition of shareholders in NMM prior to the revocation of the mining concessions. The positions of the Parties are expanded upon below.

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470 *Id*., at 538:13-18.

471 Exh. R-12, Article 9. The Tribunal does not consider that Article 46 of NMM's bylaws provides otherwise.

1. The Respondent's Position

284. Even if the Tribunal found *par impossible* that it has jurisdiction over the Claimants' claims, these claims are nonetheless inadmissible because the Claimants breached the principle of good faith in two different ways. First, the Claimants engaged in an abuse of nationality because they concealed that NMM's controlling shareholders – Quiborax and Allan Fosk – were Chilean. Second, the Claimants engaged in an abuse of process because they fabricated the conditions to establish ICSID jurisdiction. Since both abuses are contrary to the principle of good faith, the Claimants' claims are inadmissible.[472]

285. In connection with the first argument, the Claimants had a duty under international law to disclose the Chilean nationality of NMM's shareholders.[473] Nevertheless, the Claimants concealed Quiborax's and Allan Fosk's controlling participation in NMM. The newspaper articles upon which the Claimants rely do not disprove the allegations of concealment because these articles merely refer to "connections" between Quiborax and NMM not to shares or participation in the company. Notably, the absence of any evidence from the public registries that Quiborax and Allan Fosk were shareholders of NMM confirms that the Claimants concealed their nationality.[474]

286. Because the Claimants concealed their nationality, they have lost the ability to rely on the Treaty for three reasons. First, international tribunals have consistently held that, when nationality is a requirement to bring an international claim, abuse of such nationality leads to the inadmissibility of the claims (*Flegenheimer v. The Italian Republic*). Second, ICSID tribunals have acknowledged that concealing one's nationality is contrary to good faith (*Desert Line v. Yemen*). Third, because of Claimants' concealment, the Respondent was unable to adapt its conduct to the disciplines of the Treaty (*Aucoven v. Venezuela*, *Saluka v. Czech Republic* and *Burlington v. Ecuador*).[475]

287. Second, the claims are inadmissible because Claimants engaged in an abuse of process. On the one hand, the Claimants fabricated evidence in order to be able to invoke the protections of the Treaty. These actions constitute fraud to the Treaty. On the other hand, the Claimants abused the ICSID system by concealing the participation of Quiborax and Allan Fosk in NMM, by revealing this participation only after the

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472 OJ, ¶¶ 231-237.

473 Reply, ¶¶ 238-246.

474 *Id.*, at ¶¶ 232-237.

475 OJ, ¶¶ 238-252; Reply, ¶¶ 243-244.

dispute arose, and by failing to show that they made any contribution whatsoever in NMM. In brief, the Claimants abused the system of ICSID arbitration.[476] As a result, the claims must be declared inadmissible.

2. The Claimants' Position

288. Contrary to the Respondent's allegations, the Claimants had no international law obligation to inform the Respondent that NMM shareholders Quiborax and Allan Fosk were Chilean. In any event, the evidence shows that the Claimants did not conceal the Chilean nationality of NMM's majority shareholders. Remarkably, the Respondent's assertion is directly contrary to the theory that led to David Moscoso's criminal conviction in Bolivia.[477] Moreover, the Claimants have not fabricated the conditions to gain access to ICSID arbitration.[478] It therefore follows that the claims are admissible.

289. First, the Claimants had no obligation under international law to inform Bolivia that Quiborax and Allan Fosk were Chilean nationals.[479] The Claimants acquired their investments through a series of private transactions. As such, the Respondent's approval or intervention was not required and the Claimants had "no occasion or obligation"[480] to inform the Respondent of the nationality of NMM's majority shareholders. The *Aucoven* and *Saluka* cases upon which the Respondent relies are inapposite because in those cases the investment depended on conditions set by the host State. This is not the case here.

290. At any rate, the facts show that the Claimants did not conceal the Chilean nationality of NMM's majority shareholders. It was widely known that Chilean nationals held a participation in NMM, as attested by numerous newspaper articles published in the Bolivian press. The Claimants further registered their investment in Chile, both with the Central Bank and with the Internal Revenue Service. Lastly, far from being unknown, the Chilean involvement was well known as Bolivia expropriated the Claimants' investment precisely because NMM had Chilean shareholders.[481] Therefore, the cases

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476 OJ, ¶¶ 253-271.

477 CM, ¶¶ 168, 180. The Claimants state that Mr. Moscoso's conviction was based on the theory that Quiborax and Allan Fosk *were not* shareholders of NMM and that they had fabricated evidence to create the opposite impression; by contrast, Respondent's allegation of concealment is based on the polar opposite factual premise: that Quiborax and Allan Fosk *were* shareholders of NMM.

478 *Id.*, at ¶¶ 167-168.

479 Rej., ¶ 65.

480 *Id*., at ¶ 66.

481 CM, ¶¶ 169-171.

on which the Respondent relies (*Flegenheimer*, *Desert Line*) are inapposite because the Claimants did not conceal their nationality.[482]

291. Second, the Claimants did no fabricate the conditions to gain access to international investment arbitration. The Claimants could only have fabricated the conditions to gain access to ICSID jurisdiction by acting in connivance with the Chilean Central Bank, the Chilean tax authorities, PricewaterhouseCoopers, Bolivian public notaries, attorneys and administrative personnel of Rojas law firm, Quiborax's employees, Río Grande, the Ugalde brothers, and David Moscoso. This is just implausible.[483] No less implausible is Respondent's strategy to call into question and find fault with any document showing that Quiborax and Allan Fosk are shareholders of NMM, *e.g.* the NMM's shareholders registry, the NMM share certificates and the minutes of 17 August and 13 September 2001.[484]

3. Analysis

292. The Tribunal must determine whether the Claimants' claims are inadmissible on the alleged ground that they breached the principle of good faith by committing an abuse of nationality and an abuse of process.

293. First, Bolivia alleges that Claimants engaged in an abuse of nationality because they breached their international law obligation to disclose the Chilean nationality of NMM's majority shareholders, Quiborax and Allan Fosk. In support of this allegation, it relies on *Flegenheimer v. The Italian Republic*[485], a decision on which both Parties have focused, and where the Italy-United States Conciliation Commission stated:

> "In international jurisprudence one finds decisions […] allow[ing] a Respondent State to object to the admissibility of a legal action directed against it by the national State of the allegedly injured party, when the latter has neglected to indicate his true nationality, or has concealed it, or has invoked another nationality at the time the fact giving rise to the dispute occurred […]" (emphasis added).[486]

294. The Tribunal is not convinced that this statement supports the proposition that an investor has a positive obligation to inform the host State of its nationality before – and thus regardless of whether – a dispute arises. It supports the view that an investor should not misrepresent its nationality ("neglect[] to indicate his true nationality") or

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482 *Id.*, at ¶¶ 174-176.

483 Rej., ¶ 38.

484 CM, ¶¶ 181-193.

485 *Albert Flegenheimer v. The Italian Republic*, Decision, 20 September 1958, pp. 378-379.

486 *Id*., at p. 378.

take active steps to hide it ("conceal[] it"). This does not mean that the investor has a positive duty to advise the host State of its nationality. In addition, the statement focuses on "the time [when] the fact giving rise to the dispute occurred."[487]

295. The Respondent's reliance on *Burlington v. Ecuador* is likewise inapposite. In *Burlington*, the tribunal held that, once a dispute arises, the specificities of the Treaty required the investor to inform the host State of any allegations of Treaty breach before submitting the dispute to international arbitration, in order to afford the State an opportunity to take remedial action to avoid potential international responsibility.[488] This holding presupposed a "dispute" between the parties.[489] Bolivia's allegation that the investor should as a matter of principle inform the host State of its nationality even before a dispute arises, and regardless of the specific wording of the Treaty, finds no support in the considerably narrower *Burlington* holding. Moreover, the Claimants in this case did make allegations of Treaty breach as soon as the dispute arose, thereby affording Bolivia an opportunity to take remedial action and avoid potential international responsibility.[490]

296. At any rate, there is no evidence that the Claimants concealed Quiborax's or Allan Fosk's participation in NMM. As previously noted, the Claimants have submitted evidence predating the origin of the dispute from Bolivia's Commercial Register. This publicly-available record includes a file showing Allan Fosk as the legal representative of NMM[491], and minutes of a shareholders' meeting featuring Quiborax, Allan Fosk and David Moscoso as shareholders of NMM.[492] Furthermore, the Bolivian press articles of June 2004 suggest a degree of public awareness of the close connection between Quiborax and NMM, as shown by the references to "Chilean capital", "Chilean shareholders" and "Chilean partners."[493]

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487 *Id*.

488 *Burlington Resources Inc. v. Republic of Ecuador*, Decision on Jurisdiction, 2 June 2010, ¶¶ 335, 338.

489 *Id.*, at ¶ 331.

490 Allan Fosk's letter to Bolivia's President (Exh. CD-58).

491 Exh. CD-119.

492 Exhs. CD-158 and CD-118.1.

493 The Bolivian press articles referred to the relationship between NMM and Quiborax or Chile in the following terms: the "alliance between company [NMM] and Chilean company [Quiborax]"; "[NMM] has Chilean capital"; "the representative of [NMM] is Chilean Allan Henry Isaac Fosk Kaplun, whilst the board of directors was appointed in a meeting carried out in the offices of Chilean corporation [Quiborax]"; "Chilean company Non Metallic"; NMM is a Bolivian corporation "even though it has Chilean minority shareholders related to the company Quiborax"; NMM operates with "Chilean and Bolivian partners" (Exh. CD-148).

297. Second, Bolivia alleges that the Claimants engaged in an abuse of process because they fabricated the conditions to establish ICSID jurisdiction. In Section V(C)(1), the Tribunal already concluded that the Claimants did not fabricate evidence or engage in fraud for the purpose of gaining access to ICSID arbitration. Since Bolivia relies on the same facts and evidence to support its allegation in the context of this objection, the analysis of Section V(C)(1) applies here as well. Thus, in conformity with the its earlier conclusion, the Tribunal is satisfied that the Claimants did *not* abuse the ICSID investment arbitration system.

298. In conclusion, the Tribunal holds that the Claimants did not engage in either an abuse of nationality or an abuse of process. Accordingly, the Claimants did not breach the principle of good faith and their claims are thus admissible.

E. THE REQUEST FOR A DECLARATORY JUDGMENT PURSUANT TO ARTICLE 37 OF THE ARTICLES ON STATE RESPONSIBILITY

1. The Claimants' Position

299. The Claimants request the Tribunal to formally declare, pursuant to Article 37 of the Articles on State Responsibility (the "Articles"), that "Respondent's conduct in the present arbitration violates its obligations under the [ICSID Convention] as well as its general obligation under international law to arbitrate fairly and in good faith."[494] This is a permissible form of satisfaction under Article 37 of the Articles, and one that also lies within the Tribunal's inherent powers.

300. The request is based on the following facts: (i) the Respondent's failure to suspend the criminal case in Bolivia; (ii) the Respondent's use of the criminal case to its own advantage in this arbitration; (iii) the Respondent's refusal to pay its share of the arbitration costs; and (iv) the Respondent's false accusations that the Claimants engaged in fraud.[495]

301. The Respondent has committed an internationally wrongful act within the meaning of Article 2 of the Articles. That provision requires that (i) the act be attributable to the State, and (ii) the act constitute a breach of an international obligation of the State. Both elements are met in this case. First, the acts of the Respondent in this arbitration are attributable to the State of Bolivia. Second, Bolivia has breached its international obligations under the ICSID Convention and its obligation to arbitrate fairly and in good

494 CDJ, ¶ 1.

495 *Id.*, at § II.

faith.[496] Thus, the Claimants are entitled to full reparation for the injury caused under Articles 31 and 34 of the Articles.

302. Full reparation shall take the form of either restitution, compensation or satisfaction. However, restitution and compensation are not appropriate remedies in this case. Rather, the proper remedy is satisfaction in the form of a declaration that Bolivia's conduct in this arbitration constitutes an internationally wrongful act. As a result of this declaration, the Respondent would have to cease its unlawful conduct.[497] At the same time, because the arbitration is still ongoing, amidst other circumstances, the Claimants "accept that it is for the Tribunal to determine whether it shall decide on Claimants' request for a declaratory judgment as part of its Decision on Jurisdiction, or as part of its final Award."[498]

303. In sum, the Claimants request the Tribunal to declare that "Respondent's conduct in the present arbitration is in breach of its international obligations under the ICSID Convention and its duty to arbitrate fairly and in good faith."[499]

2. The Respondent's Position

304. Bolivia argues that the Claimants' request for a declaration under Article 37 of the Articles is premature. The Tribunal cannot entertain the Claimants' request "before an award on the merits."[500] In addition, because the Tribunal only granted the Claimants leave to make submissions under Article 37 of the Articles, any request for relief exceeding the scope of Article 37 is inadmissible.[501]

305. Furthermore, even if the Tribunal entertained the Claimants' request at this juncture, it should conclude that (i) it lacks the power to grant the punitive relief requested by the Claimants, and (ii) relief under Article 37 is not available to investors.[502]

306. At any rate, the Claimants' request is unsupported by the evidence. Specifically, the Claimants have failed to demonstrate that the criminal proceedings in Bolivia somehow breached Article 47 of the ICSID Convention, prevented the Claimants from accessing potential witnesses or were unlawfully used by Bolivia to produce evidence for this

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496 *Id.*, at ¶¶ 63-65.
497 *Id.*, at ¶¶ 66-90.
498 *Id.*, at ¶ 91.
499 *Id.*, at ¶ 92.
500 RDJ, ¶ 21.
501 *Id.*, at ¶¶ 24-28.
502 *Id.*, at § 3.

arbitration. Neither did they substantiate that Bolivia's non-payment of part of the advance on arbitration costs breaches the ICSID Convention and that Bolivia's jurisdictional objections breach its duty of good faith.[503]

307. In sum, the Claimants' request (i) is premature and (ii) inadmissible to the extent that it exceeds the scope of satisfaction under Article 37 of the Articles. In the alternative, (iii) the Tribunal does not have the power to grant this punitive relief, and (iv) investors have no access to satisfaction under Article 37 of the Articles In the further alternative, (v) the evidence fails to support the Claimants' request, and (vi) Bolivia has not breached any international obligation, nor caused any damage to the Claimant that would not be compensable though monetary relief.[504]

3. Analysis

308. The Claimants accept that "it is for the Tribunal to determine whether it shall decide on Claimants' request for a declaratory judgment as part of its Decision on Jurisdiction, or as part of its final Award."[505] The Respondent in turn maintains that entertaining this request "before an award on the merits"[506] would be premature. Since this arbitration will proceed to the merits phase, and taking into account the Parties' positions on the matter, the Tribunal finds that it would indeed be more appropriate to entertain the Claimants' request for a declaratory judgment pursuant to Article 37 of the Articles in the final award.

503 *Id.*, at § 4.

504 *Id.*, at ¶ 157.

505 CDJ, ¶ 91.

506 RDJ, ¶ 21.

VI. DECISION ON JURISDICTION

309. For the reasons set forth above, the Arbitral Tribunal:

A. On jurisdiction:

1. Declares that it has jurisdiction over the claims of Quiborax and NMM;

2. Declares that it has no jurisdiction over Allan Fosk's claims;

B. On admissibility:

1. Declares that the witness statement of Ricardo Ramos is admissible;

2. Declares that Bolivia's objections to jurisdiction and the evidence arising from the Bolivian criminal proceedings are admissible;

3. Declares that the claims of Quiborax and NMM are admissible;

C. On further procedural steps:

1. Will take the necessary steps for the continuation of the proceedings toward the merits phase by way of a procedural order to be issued after consultation with the Parties;

2. Defers consideration of the Claimants' request for a declaratory judgment pursuant to Article 37 of the Articles on State Responsibility for subsequent adjudication;

3. Reserves the decision on costs for subsequent decision.

Marc Lalonde

Hon. Marc Lalonde
Arbitrator

Date: 3 September 2012

Brigitte Stern.

Prof. Brigitte Stern
Arbitrator

Date: 28 August 2012

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal

Date: 27 August 2012