

PCA CASE N° 2016-39/AA641

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

GLENCORE FINANCE (BERMUDA) LTD

Claimant

-v-

PLURINATIONAL STATE OF BOLIVIA

Respondent

CLAIMANT'S POST-HEARING BRIEF



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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	GLENCORE BERMUDA’S VALUATIONS OF THE ASSETS ARE SUPPORTED BY THE PREPONDERANCE OF THE EVIDENCE.....	3
	A. COLQUIRI.....	3
	1. Glencore Bermuda was already expanding pursuant to the Triennial Plan when Bolivia took the Colquiri Mine	5
	2. Colquiri would have replenished mineral Reserves through the end of the Colquiri Lease.....	10
	3. The Tribunal must give value to the Tailings Plant.....	14
	B. VINTO.....	17
	C. ANTIMONY SMELTER AND TIN STOCK	20
III.	TRIBUNAL QUESTIONS.....	21
	A. TRIBUNAL QUESTION NO 1: FIXED AND VARIABLE INTEREST RATE.....	21
	B. TRIBUNAL’S QUESTION NO 2: AWARD NET OF TAXES	24
IV.	THE JOINT MODELS.....	29
V.	REQUEST FOR RELIEF	29

1. Glencore Finance (Bermuda) Ltd (*Claimant* or *Glencore Bermuda*) submits this Post-Hearing Brief pursuant to the Tribunal's letter dated 22 September 2021 and its Annex.¹ Accompanying this Post-Hearing Brief are the joint models with the parties' valuations of: (i) Compañía Minera Colquiri SA (*Colquiri*); (ii) Complejo Metalúrgico Vinto SA (*Vinto*); (iii) the Antimony Smelter; and (iv) the Tin Stock (collectively, the *Joint Models*).

I. INTRODUCTION

2. International law requires that the Plurinational State of Bolivia (*Respondent* or *Bolivia*) provide Glencore Bermuda with full reparation for the losses of its investments in Colquiri and Vinto due to Bolivia's conduct in breach of the Treaty. In addition to its indirect shareholdings in Colquiri and Vinto, Glencore Bermuda's investments also included the (i) Colquiri Lease, which included rights to operate the Colquiri Mine and Tailings Plant; (ii) the Vinto Tin Smelter; (iii) the Antimony Smelter; and (iv) the Tin Stock (collectively, the *Assets*).
3. In their pre-hearing submissions, the parties offered different calculations of the fair market values of the Assets that Bolivia must pay Glencore Bermuda to achieve full reparation. At the quantum hearing (the *Hearing*), the parties' witnesses and experts offered testimony that narrowed the differences in the parties' positions on the fair market values of the Assets.
4. The parties' experts agreed, for example, that at the time of the taking, the Colquiri Mine was expanding, and that it was reasonably likely that Glencore Bermuda would have completed an expansion but for Bolivia's measures. They were not able to agree, however, on whether Glencore Bermuda was expanding the Colquiri Mine pursuant to the three-year investment plan known as the *Triennial Plan* (the view of Glencore Bermuda's witnesses and experts) or another plan such as the five-year investment plan known as the *March 2012 Plan* (which was put into the record by Bolivia's experts and corresponds to a plan that the parties were negotiating in early

¹ Capitalized terms not specifically defined in this Post-Hearing Brief are as defined in the Claimant's Reply on Quantum dated 22 January 2020 (the *Reply on Quantum*).

2012). The parties' respective mining experts also agreed at the Hearing that, by the time of the taking, Glencore Bermuda had begun to develop the project known as the *Tailings Plant*. Although Bolivia's experts give no value to the Tailings Plant in their written reports, Bolivia's mining expert, Dr Rigby, acknowledged that in reality it had "some value" at the Hearing.

5. Similarly, Dr Rigby recognized at the Hearing that the Vinto Tin Smelter was a valuable Asset, generating profits of at least US\$7 million a year at the time of taking—a profit level that is consistent with Glencore Bermuda's valuation of Vinto (US\$53.1 million) but not Bolivia's valuation (US\$17 million). As to the Antimony Smelter, it is undisputed that the land where it is built has value. The parties' key dispute with regard to the Antimony Smelter is whether Glencore Bermuda could have sold it without assuming remediation costs that would wipe out the Smelter's value, but Bolivia provided no evidence of these alleged remediation obligations and costs.
6. Pursuant to the Tribunal's instructions in its letter of 22 September 2021 and its Annex, the parties conferred and have further narrowed some of their differences. As the Tribunal requested, the parties also prepared a production profile for Colquiri that provides for the replenishment of mineral Reserves but no expansion of the Mine's production capacity, though this no-expansion scenario is contrary to the evidentiary record, which shows that Colquiri was expanding under the Triennial Plan at the time it was taken. These additional points of agreement and the no-expansion scenario requested by the Tribunal are reflected in the Joint Models submitted by the parties with their Post-Hearing Briefs.
7. This submission is structured as follows: Section II summarizes the evidence presented at the Hearing and why that evidence supports the valuations of the Assets in the Joint Models that were prepared by Glencore Bermuda's experts; Section III answers the Tribunal's questions to Claimant; Section IV provides information on the content and use of the Joint Models; and Section V sets out Glencore Bermuda's Request for Relief.

II. GLENCORE BERMUDA'S VALUATIONS OF THE ASSETS ARE SUPPORTED BY THE PREPONDERANCE OF THE EVIDENCE

8. The following sections summarize the key evidence presented at the Hearing in relation to the fair market values of Colquiri, including the Colquiri Mine and Tailings Plant (Section II.A), the Vinto Tin Smelter (Section II.B), and the Antimony Smelter and the Tin Stock (Section II.C), and why that evidence overwhelmingly supports the valuations of the Assets that Glencore Bermuda presents in the Joint Models.

A. COLQUIRI

9. As the Tribunal requested in the Annex to its letter of 22 September 2021, the Joint Model for Colquiri includes four general options for calculating the fair market value of the Colquiri Mine, two of which include competing sub-options presented by Glencore Bermuda's damages experts from Compass Lexecon, and Bolivia's damages expert from Quadrant. These valuation options "but for" Bolivia's actions are:

- (a) the valuation recommended by Compass Lexecon's experts, and supported by the preponderance of the evidence in the record, that provides that Glencore Bermuda would have expanded the Mine pursuant to the Triennial Plan (US\$381.1 million);²
- (b) the alternative valuation prepared by Compass Lexecon's experts that assumes that Glencore Bermuda would have expanded the Colquiri Mine pursuant to the March 2012 Plan (US\$301.5 million), a valuation recommended by Quadrant, that applies a sensitivity with variations such as the sustaining capital expenditures and the operating expenses distinguishing the experts' valuations under this plan (US\$212.0 million);³

² Joint Model for Colquiri, "Control Panel" tab, "Abdala-Chavich" macros button, cell F16. *See* Second Expert Report of Compass Lexecon, paras 18-21; Triennial Plan, July 2011, **C-108**. *See also* Second Expert Report of RPA, paras 24-28.

³ Joint Model for Colquiri, "Control Panel" tab, "Abdala-Chavich" macros button, adjusted per "March 2012 Plan Abdala-Chavich" buttons at cells D28 and E30-31, "March 2012 Investment Plan" buttons

- (c) as requested by the Tribunal, valuations from (i) Compass Lexecon’s experts (US\$243.9 million)⁴ and (ii) Quadrant (US\$42.5 million)⁵ that assume that Glencore Bermuda would have continued to operate the Colquiri Mine consistent with historic operational metrics including historic production levels and the practice of mineral replenishment, again with variations in factors such as the amount of mineable material and operating expenses distinguishing the experts’ valuations under this “no expansion” scenario; and
- (d) the valuation recommended by Quadrant (US\$40.7 million) that assumes that Glencore Bermuda would not have expanded the Mine or continued to explore for additional mineable minerals, and that Mine operations would become less efficient than historic operations.⁶
10. The Joint Model for Colquiri also includes two options for calculating the fair market value of the Tailings Plant: (i) the valuation recommended by Compass Lexecon’s experts (US\$99.0 million) that assumes that, but for Bolivia’s actions, Glencore Bermuda would have completed the construction of the Tailings Plant; and (ii) the valuation recommended by Quadrant (US\$0 million) that assumes that Glencore Bermuda would not have constructed the Plant.⁷ The Colquiri Joint Model does not link the valuation options for the Colquiri Mine and the Tailings Plant, so the

at cells F39, F43, F47 and F51 or F53, “Joint Expert Agreement” buttons at cells M26, M33 and L45, and the “Mineable Material (Mine)” buttons at cells D-F36. *See* Second Expert Report of Compass Lexecon, Appendix C; March 2012 Investment Plan, 4 April 2012, **EO-7**, pp 1, 15-22. *See also* Second Expert Report of RPA, paras 114-17.

⁴ Joint Model for Colquiri, “Control Panel” tab, “Abdala-Chavich” macros button, adjusted per “Joint Expert Agreement (No Expansion)” at cells D32, D45, D49, L43, “Joint Expert Agreement” buttons at cells M26, M33 and L45, and “Abdala-Chavich (No Expansion)” buttons at cells D41, D53.

⁵ Joint Model for Colquiri, “Control Panel” tab, “Flores” macros button, adjusted per “Joint Expert Agreement (No Expansion)” at cells D32, D45, D49, L43, “Joint Expert Agreement” buttons at cells M26, M33 and L45, and “Flores (No Expansion)” buttons at cells F41, E53.

⁶ Joint Model for Colquiri, “Control Panel” tab, “Flores” macros button, cell F16. *See* Second Expert Report of Daniel Flores (Quadrant), paras 17, 19-20, 26, 42-43; Second Expert Report of RPA, paras 72-73, 82-83.

⁷ Joint Model for Colquiri, “Control Panel” tab, adjusted per “Tailings” buttons at cells J-L9. *See* Second Expert Report of Compass Lexecon, para 38; Second Expert Report of Daniel Flores (Quadrant), paras 59-60.

Tribunal may choose the valuation that it determines to be supported by the evidentiary record without it affecting the Mine valuation.

11. The evidence that the parties presented at the Hearing demonstrates that the fair market value of Colquiri is equal to the valuation based on the Triennial Plan, the plan that Glencore Bermuda was implementing as of May 2012, and that the fair market value of the Tailings Plant is equal to the Compass Lexecon experts' valuation that assumes completion of the Plant. Within the page limits of this Post-Hearing Brief, Glencore Bermuda cannot identify all of the evidence adduced at the Hearing that supports these valuations. The key evidence is highlighted below.

1. **Glencore Bermuda was already expanding pursuant to the Triennial Plan when Bolivia took the Colquiri Mine**

12. The testimony of Bolivia's witness and experts prove that the question before the Tribunal is not whether Glencore Bermuda would have expanded the Colquiri Mine but for Bolivia's Treaty breaches. Rather, the question is whether Glencore Bermuda was expanding pursuant to the Triennial Plan or a less ambitious plan, such as the March 2012 Plan.
13. The Tribunal will recall that the Triennial Plan comprised two key projects: the construction of a Main Ramp to increase extraction capacity, and the expansion of the Concentrator Plant to increase processing capacity, both to 2,000 tonnes of ore per day.⁸ The documents in the record and the testimony of Bolivia's witness, [REDACTED], and mining expert, Dr Rigby, confirm that by May 2012 the Colquiri expansion was well underway with the construction of the Main Ramp and the expansion of the Concentrator Plant in progress, though Bolivia's witnesses were not willing to admit

⁸ See Claimant's Opening Statement, Day 1, Tr (Eng), 23:2-23, 24:17-24; Reply on Quantum, paras 75(b)-(c); Triennial Plan, July 2011, **C-108**, Section 8; Alternatives for the expansion of the Colquiri Mine, Sinchi Wayra, July 2011, **C-321**, pp 1-2, 6-16, 40, 43.

that the expansion was pursuant to the Triennial Plan.⁹ For example, in relation to the Concentrator Plant, Dr Rigby admitted the following:

[Q]: So, your testimony is *that the expansion of the Concentrator Plant was evidence of Colquiri expanding*, just not necessarily under the Triennial Plan?

[Dr Rigby]: *Yes*, I believe so.¹⁰

[Dr Rigby]: ... [E]very one of those projects [listed in **Exhibit C-326**, p 32] has a, let's call it, "percent complete," where they've averaged all of those percentages and basically saying, overall, the expansion [of the Concentrator Plant] is--that expansion for which these projects are applied is 20.7 percent.¹¹

[Dr Rigby]: [T]he two things [*ie*, the construction of the Main Ramp and the expansion of the Concentrator Plant] are linked because you're trying to say that everything shows that it's confirmation of the implementation of the Triennial Plan. *What I'm saying is [these works are] confirmation of the--from tandem implementation of an Expansion Plan*. In other words, [Glencore Bermuda was] trying to--trying to increase the production level at [the] Colquiri [Mine]."¹²

14. Dr Rigby also admitted that the construction of the Main Ramp had begun prior to taking:

[Dr Rigby]: [T]he creation of the ramp was a great idea ... a great idea, but it's only just been start [by the Valuation Date].¹³

⁹ Cross Examination of Dr N Rigby, Day 4, Tr (Eng), 579:14-18, 583:13-17, 585:14-17; Colquiri first quarter analysis, April 2012, **C-326**, pp 32-34; First Witness Statement [REDACTED], para 45; Construction contract between Colquiri and Arcal Mineros, 14 March 2012, **C-325**.

¹⁰ Cross Examination of Dr N Rigby, Day 4, Tr (Eng), 585:14-17 (emphases added).

¹¹ Cross Examination of Dr N Rigby, Day 4, Tr (Eng), 583:13-17.

¹² Cross Examination of Dr N Rigby, Day 4, Tr (Eng), 585:3-9. Dr Rigby only questioned whether the expansion "could also be appropriate for other plans" than the Triennial Plan. Cross Examination of Dr N Rigby, Day 4, Tr (Eng), 580:10-15.

¹³ Direct Presentation of Dr Rigby, Day 4, Tr (Eng), 556:17-20. *See also* Cross examination of Dr. Rigby, Trt Day 4 (Eng), 576:16 – 577:12 (noting that the Main Ramp "was a good move," and that the document in which the project was selected over other alternatives confirms that "the objective was ... to get from 1,000 to 2,000 dry metric tons a day").

15. The Tribunal may recall that in his written testimony, Bolivia's witness, [REDACTED], also acknowledged that "this ramp was already under construction in [May] 2012."¹⁴
16. Likewise, Dr Rigby confirmed that it is reasonable to conclude that Glencore Bermuda would have completed the construction of the Main Ramp and the expansion of the Concentrator Plant that was already underway at the time of the taking:

[Q]: [H]aving initiated the construction of the Main Ramp in early 2012, is it reasonable to conclude that, but for the taking, Glencore Bermuda would have completed the construction of the Main Ramp?

[Dr Rigby]: *It's a reasonable expectation*, provided the funding was available.¹⁵

[Q]: If Comibol was able to increase the Concentrator Plant's capacity from 1,000 to 1300 tons a day, presumably Glencore Bermuda could have done the same; correct?

[Dr Rigby]: *I would expect so, yes.*¹⁶

17. Dr Rigby's recognition of Glencore Bermuda's expansion of the Colquiri Mine prior to taking is consistent with the testimony of Bolivia's damages expert, Dr Flores of Quadrant, who testified that "all the Plans that I have seen have some forward-looking aspirations to increase production [at the Colquiri Mine]."¹⁷
18. Instead of agreeing that the expansion was pursuant to the Triennial Plan, Bolivia's experts suggested that the expanded Colquiri Mine should be valued pursuant to the March 2012 Plan. For example, in his First Expert Report, Dr Flores introduced the March 2012 Plan as an alternative to the Triennial Plan, and in his Second Expert Report, Dr Rigby wrote that the March 2012 Plan would be a "good starting point"

¹⁴ First Witness Statement of [REDACTED], para 45.

¹⁵ Cross Examination of Dr N Rigby, Day 4, Tr (Eng), 581:1-6 (emphasis added).

¹⁶ Cross examination of Dr N Rigby, Day 4, Tr (Eng), 588:3-6 (emphasis added).

¹⁷ Cross Examination of Dr D Flores, Day 5, Tr (Eng), 795:18 – 796:5.

to value the expanded Mine.¹⁸ During the Hearing, Dr Flores also called the March 2012 Plan “a good starting point” to value Colquiri.¹⁹

19. While Bolivia’s experts prefer to attribute the pre-taking expansion to the March 2012 Plan, rather than the Triennial Plan, Dr Rigby did admit that this expansion could be considered proof of “partial approval” of the Triennial Plan.²⁰
20. The admissions of Bolivia’s experts that the Colquiri Mine was expanding before it was taken corroborate the testimony of Glencore Bermuda’s witnesses and experts. At the Hearing, Mr Eskdale, Glencore’s Senior Asset Manager for Global Operations at the time that the Triennial Plan was approved, testified that the Colquiri Mine was expanding pursuant to the Triennial Plan, and that he had personally approved the budget for the expansion.²¹
21. Likewise, Mr. Lazcano, Colquiri’s former General Manager of Colquiri, testified that Colquiri was in the process of expanding the Mine and Concentrator Plant under the Triennial Plan at the time of taking.²² Glencore Bermuda’s mining expert, Mr Clow

¹⁸ First Expert Report of Daniel Flores (Econ One), paras 48-49 (introducing the March 2012 Plan to the record, and suggesting that it would be the appropriate investment plan to value Colquiri because it “is closer to the valuation date.”); Second Expert Report of Neal Rigby, para 48.

¹⁹ Questions from President Ramírez and Arbitrator Gotanda to Dr D Flores, Day 5, Tr (Eng), 875:11 – 876:25.

²⁰ Cross Examination of Dr N Rigby, Day 4, Tr (Eng), 574:6-10. *See also ibid*, 574:11-22.

²¹ *See* Third Witness Statement of Christopher Eskdale, paras 45-47; Sinchi Wayra SA, Budget 2012, November 2011, **R-430-16-GB013733**, p 139; Cross Examination of Mr C Eskdale, Day 2, Tr (Eng), 206:16-22 (confirming that Glencore’s executives, including Mr Eskdale, would have approved the Triennial Plan’s budget in late 2011); Redirect Examination of Mr C Eskdale, Day 2, Tr (Eng), 251:16, 254:8-18 (confirming that the **R-430-16-GB013733** “is the financials of the Triennial Plan. ... [T]his is the Triennial Plan turned into the budget and the Project forecast for Glencore to use going forward, and for the Mine to be judged by going forward. So, this is--these are the financials of the [Triennial] plan, as far as Glencore is concerned.”); Cross Examination of Mr C Eskdale, Day 2, Tr (Eng), 203:18-23 (“The three-year plan and the expansion was--is not designed simply to address a bottleneck. It goes the other way around. One sees potential in the Mine, one sees opportunity to expand, and make more money in the end; and, therefore, the Triennial Plan is the working document that outlines how that will come about.”), 204:4-6 (“The Triennial Plan is the plan for increasing production; that’s as simple as that.”), 209:19-20 (“[T]he approval that was given [by Glencore] was for the budget [of the Triennial Plan].”).

²² Third Witness Statement of Eduardo Lazcano, paras 30, 39-40, 46, 48; Redirect Examination of Mr E Lazcano, Day 3, Tr (Eng), 359:20 – 360:14 (confirming that exploration activities in 2012 were performed pursuant to the Triennial Plan), 362:7 – 364:1 (confirming that the works being performed in the Concentrator Plant in 2012 correspond to the Triennial Plan).

of *RPA*, similarly testified that in his opinion, having reviewed the information in the record, Glencore Bermuda's pre-taking expansion was pursuant to the Triennial Plan.²³ Mr Clow also testified that it was reasonable to conclude that, but for Bolivia's measures, Glencore Bermuda would have completed the expansion under the Triennial Plan because the Plan was not technically complex, and it was reasonable in light of the Colquiri Mine's history of replenishment, among other reasons.²⁴

22. The testimony and documentary evidence proving that Glencore Bermuda was expanding Colquiri pursuant to the Triennial Plan in early 2012 is consistent with the evidence that the Triennial Plan was developed and approved by 2011, and therefore ready to be implemented in 2012. In contrast, although Bolivia's experts prefer the March 2012 Plan, Glencore Bermuda did not develop that plan until March 2012 (as the name implies), and though Glencore Bermuda had presented the plan to Bolivia in the context of negotiations, there is no evidence that the March 2012 Plan had been approved by Glencore Bermuda as a replacement for the Triennial Plan which it was already implementing in early 2012 around the same time that the March 2012 Plan was completed.
23. The preponderance of the evidence therefore proves that at the time of the taking, Glencore Bermuda was expanding the Mine, and that it was doing so pursuant to the Triennial Plan. At the very minimum, Glencore Bermuda was expanding under the

²³ See Cross Examination of Mr G Clow, Day 3, Tr (Eng), 472:3-20 (noting that they relied on the Triennial Plan because the documents on the record confirm "the overall objective of going to 2000 [tonnes of ore processed] a day"). See also Direct Presentation of Messers G Clow and R Lambert, Day 3, Tr (Eng), 437:3-9.

²⁴ See Direct Presentation of Messers G Clow and R Lambert, Tr Day 3 (Eng) 432:24 – 433:3 (noting that a scenario under the Triennial Plan is "the best implementation of the way Glencore would have operated the [Colquiri Mine]" but for Bolivia's measures), 435:21 – 436:4 (noting that the Triennial Plan proposed projects that were "really quite simpl[e]" and "very straightforward and standard improvements"); Cross Examination of Mr G Clow, Day 3, Tr (Eng), 474:12-17 (noting that RPA assessed the Triennial Plan "in relation to historical experience ... adjusted for what [RPA] understood as operating conditions ... in terms of expenditures and costs, and then [RPA] got comfortable that the numbers in the [Triennial] Plan were reasonable, and so [RPA] used them."), 469:12-14 (noting that the Claimant's model is reasonable "based on the long historical practice of adding to Reserves and resources and replenishing.").

March 2012 Plan, as Bolivia's experts have suggested in both their written and oral testimony.

2. Colquiri would have replenished Reserves through the end of the Colquiri Lease

24. The testimony of the parties' witnesses and experts also proves that Colquiri would have replenished sufficient Reserves to sustain the forecasted production levels through the end of the Colquiri Lease in May 2031. Contrary to Bolivia's assertion that Colquiri would not have identified a single additional ounce of mineable material after May 2012, its mining expert, Dr Rigby, repeatedly admitted at the Hearing that Colquiri would likely continue to replenish minerals after May 2012, just as it had over a hundred years prior to May 2012. Dr Rigby testified, for example, that:

[Q]: Now, we were just discussing a second ago that the 4.16 million tons that you're discussing, in your opinion, would be mined out by 2025, and so my question for you is: In light of the history of replenishment at Colquiri, *isn't it reasonable to conclude that Glencore Bermuda would have continued to identify new Reserves after 2025 as well?*

[Dr Rigby]: It--it's--it's possible, and *it's likely*.²⁵

[Q]: So, it seems that we're in agreement that *there would be some replenishment of Mineral Reserves after 2025*.

[Dr Rigby]: *It's possible*. And as I said--and as I said in my Report, it is possible²⁶

[Dr Rigby]: [T]he fact -- the facts of the matter are that yes, *Colquiri has a long-standing history of replacing depleted Resources*. In other words, what you mine one year you replace, and that is good, *that's very good*. They also have what I would call a nominal increase to the

²⁵ Cross Examination of Dr N Rigby, Day 4, Tr (Eng), 606:16-23 (emphases added). *See also ibid*, 608:15-19 (confirming that it is reasonable to conclude that Comibol is completing the expansion of Colquiri because it is confident that the Colquiri Mine will identify sufficient new minerals to process 2,000 tonnes of ore per day).

²⁶ Cross Examination of Dr N Rigby, Day 4, Tr (Eng), 607:8-12 (emphases added).

Resource over and above what you mine each year, and that is fine, and *that is good, and that is very much the nature of the geometry of the mineralization at Colquiri.*²⁷

25. Furthermore, contrary to the assertion in his Second Expert Report,²⁸ Dr Rigby conceded that willing buyers pay for minerals that have not yet been characterized as Resources or Reserves and that Colquiri, an operating mine with a track record of replenishment, would present a relatively low level of risk for a willing buyer.²⁹ For example, Dr Rigby testified that:

[Q]: So, these Transactions [in **Demonstrative 4**] demonstrate that, contrary to your assertions, that these companies pay for Potential Resources; right?

[Dr Rigby]: ... [W]hat I'm saying, I mean, you take Pierina, for example, you know, and Arequipa Resources, that ended up a huge Project, but at the time it was acquired, *there was no Resource.*³⁰

[Q]: [E]arlier today you acknowledged that Colquiri has a history of replenishment as an operating mine; correct?

[Dr Rigby]: Yes.

[Q]: So, we're talking about an operating mine, which [acquisition] would be lower risk than a non-operating mine; correct?

[Dr Rigby]: Correct.

[Q]: And we're talking about a mine that has a history of replenishment, which [acquisition] would be lower risk than a mine that does not have a history of replenishment like all of these Assets [in **Demonstrative 4**]; correct?

[Dr Rigby]: Correct³¹

²⁷ Redirect Examination of Dr N Rigby, Day 4, Tr (Eng), 651:3-11 (emphases added).

²⁸ *See, eg*, Second Expert Report of Neal Rigby, paras 30, 36-40.

²⁹ Rebutting Dr Rigby's argument that CIMVAL Guidelines require that un-delineated minerals be excluded from a valuation, the Hearing confirmed that CIMVAL are non-binding guidelines. For example, Dr Rigby confirmed at the Hearing that his own valuation assumes replenishment beyond the recommendations of CIMVAL. Question from Arbitrator Sands to Dr Rigby (complementing Dr Flores's response), Day 5, Tr (Eng), 874:15-22.

³⁰ Cross Examination of Dr N Rigby, Day 4, Tr (Eng), 617:12-24 (emphasis added).

³¹ Cross Examination of Dr N Rigby, Day 4, Tr (Eng), 619:17 – 620:3.

26. The concessions by Bolivia’s mining expert that Colquiri was “likely” to continue to replenish minerals after May 2012, just as it had historically, not only rebutted Bolivia’s position. It also corroborates the testimony of Glencore Bermuda’s mining expert, Mr Clow, who testified at the Hearing that Colquiri was “a world-class deposit and well-established in terms of the potential” to replenish Reserves.³² Mr Clow thus concluded that it was more likely than not that Colquiri’s historic replenishment of Reserves would have continued after May 2012 in the but-for scenario.³³
27. Mr Clow testified in detail that the results of Colquiri’s exploration activities conducted as of 2012 evidenced that it is likely that abundant minerals exist in the deeper levels of the Colquiri Mine that were yet to be exploited and would support future replenishment.³⁴ In addition to Mr Clow, Mr Lazcano, Colquiri’s former General Manager, also confirmed that the investment plans in the record demonstrate that Glencore Bermuda had approved significant budgets for exploration activities at Colquiri that would have identified the minerals needed to continue the historic replenishment.³⁵ The costs of the exploration are accounted for in Compass Lexecon experts’ valuations of Colquiri.³⁶

³² Direct Presentation of Messers G Clow and R Lambert, Day 3, Tr (Eng), 446:5-6.

³³ Direct Presentation of Messers G Clow and R Lambert, Day 3, Tr (Eng), 438:21 – 439:2, 440:2-20, 441:5-8; 444:20-22, 445:22 – 446:6; Cross Examination of Mr G Clow, Day 3, Tr (Eng), 469:12-14, 493:2-18.

³⁴ Direct Presentation of Messers G Clow and R Lambert, Day 3, Tr (Eng), 437:24 – 439:2; *ibid*, slide 23. *See also* Second Expert Report of RPA, paras 32 (“[E]xploration drilling has identified that the orebody continues deeper down in levels that have not yet been exploited”) (citing Triennial Plan, July 2011, **C-108**, p 24), 36 (“Exploration drilling has identified that the orebody continues deeper down in levels that have not yet been exploited (795 Level – approximately 260 metres below the lowest level of Ore Reserves as of 2012). This further confirms that the technical data supports the conclusion that Glencore would have been able to keep replenishing reserves.”). *See also* Cross Examination of Mr G Clow, Day 3, Tr (Eng), 491:17 – 494:7 (explaining that Messers Clow’s and Lambert’s model assumes that exploration activities would have been performed in the but-for scenario).

³⁵ Triennial Plan, July 2011, **C-108**, pp 26-29, 115, 119, 128-34 (jointly, estimating a US\$1.2 million budget for exploration for 2012 and 2013, and a US\$1.5 million budget for exploration for 2014, as well as a detailed exploration drilling plan by vein and level); Sinchi Wayra SA, Budget 2012, November 2011, **R-430-16-GB013733**, p 139 (evidencing the approval of a US\$800,000 budget for exploration for 2012, of US\$1.1 million for 2013, and of US\$1.5 million for 2014). *See also* Redirect Examination of Mr G Clow, Day 4, Tr (Eng), 526:12-19 (confirming that the Triennial Plan included

28. At the Hearing, Mr Clow confirmed that, as Dr Rigby admitted, the practice of willing buyers paying for un-delineated minerals “represents both the previous practice and the current reality” in the mining industry.³⁷ Similarly, Mr Eskdale testified that this is precisely what Glencore Bermuda did when it purchased Colquiri—it paid for un-delineated resources.³⁸
29. Finally, the parties presented data at the Hearing regarding Colquiri’s post-May 2012 operations that proves that it is reasonable that Colquiri would have continued to replenish minerals through 2031 but for Bolivia’s measures. As Mr Clow explained, the Colquiri Mine has added an average of 800,000 tonnes of Reserves per year between 2012 and 2020.³⁹ At this rate, Colquiri would have been able to sustain increased production levels through 2031. This explains why [REDACTED]
[REDACTED]
[REDACTED] Bolivia’s witness in this arbitration, publicly stated in 2016 that the Colquiri Mine had at least 40 more years of life⁴⁰ (*ie*, that the Mine has sufficient minerals to support operations for not only until 2031 but also for over 20 years beyond the period in dispute in this arbitration).
30. Accordingly, the evidentiary record, including the testimony of both parties’ mining experts, demonstrates that it is more likely than not that Colquiri would have

a budget for exploration); Redirect Examination of Mr E Lazcano, Day 3, Tr (Eng), 359:20 – 360:14 (confirming that exploration activities in 2012 were performed pursuant to the Triennial Plan).

³⁶ See Second Expert Report of Compass Lexecon, para 29.

³⁷ Cross Examination of Mr G Clow, Day 3, Tr (Eng), 461:13-17. See also *ibid*, 498:16-19 (noting that it “is common practice in the industry” to attribute value to material that is neither a Reserve or a Resource.). Direct Presentation of Messers G Clow and R Lambert, Day 3, Tr (Eng), 445:22 – 447:14; *ibid*, slide 26. See also Cross Examination of Mr G Clow, Day 3, Tr (Eng), 494:13-21 (highlighting that slide 26 of the Direct Presentation of Messers G Clow and R Lambert is a “chart that [shows] people investing capital in companies and buying companies when there were no Resources.”).

³⁸ Cross Examination of Mr C Eskdale, Day 1, Tr (Eng), 167:14-25 (stating that, when purchasing Colquiri, Glencore attributed value to the potential replenishment of Reserves), 172:6 – 173:7 (same).

³⁹ Direct Presentation of Messers G Clow and R Lambert, Day 3, Tr (Eng), 438:21 – 439:2; *ibid*, slides 20-22. See also Second Expert Report of RPA, para 34, Table 1, Figure 1, paras 39-40; Claimant’s Opening Statement, Day 1, Tr (Eng), 27:2-11; Claimant’s Opening Presentation, slide 39.

⁴⁰ “Empresa Minera Colquiri proyecta 40 años de vida útil,” *Minería Noticias*, June 2016, **C-312**, p 2. [REDACTED] ratified this statement in 2017. Ministry of Mining and Metallurgy, “Colquiri descubre tres nuevas vetas de minerales”, 14 June 2017, **RPA-42**, p 2.

continued to replenish minerals through the expiration of the Colquiri Lease in 2031. This further supports the valuation of Colquiri on the basis of the Triennial Plan. Unlike Bolivia's valuations that assume Colquiri would have stopped exploring on 1 January 2012, the valuation under the Triennial Plan accounts for this evidence that Colquiri would continue its historical practice of replenishment after May 2012. In the alternative, if the Tribunal elects to value Colquiri under the March 2012 Plan, it should apply the Compass Lexecon experts' valuation under that March 2012 Plan because their valuation accounts for replenishment and lower unitary costs due to economies of scale, while Quadrant's valuation wrongly assumes no replenishment and no economies of scale.

3. The Tribunal must give value to the Tailings Plant

31. In contradiction of his Second Expert Report, Bolivia's mining expert, Dr Rigby, also admitted at the Hearing that the plan for the development of the Tailings Plant known as the *2004 Feasibility Study* had determined that the Tailings Plant was technically feasible, and that Glencore Bermuda had begun to develop the Tailings Plant before Bolivia took Colquiri in May 2012. Dr Rigby testified, for example, that:

[Q]: [T]he document [**Exhibit R-42 / SRK-22**] then says they consider the Project to be feasible; correct?

[Dr Rigby]: ... *Technically feasible? Yeah, we can do it. Physically, we can do it.*⁴¹

[Q]: So, this document [**Exhibit R-428-05**] is dated January 2007. So, as of January 2007, Colquiri is actually implementing the Tailings [Plant] Project and taking measures to "speed it up"; correct?

[Dr Rigby]: Well, they spent 1.2 million dollars on the Project. Let's call it preparatory works and drilling.⁴²

⁴¹ Cross Examination of Dr N Rigby, Day 4, Tr (Eng), 626:1-6 (emphasis added).

⁴² Cross Examination of Dr N Rigby, Day 4, Tr (Eng), 629:8-13. Sinchi Wayra Monthly Report, January 2007, **R-428-05-GB009188**, p 11.

[Q]: [A]s I understand it, this page [7] of this document [**Exhibit C-315**] is describing activities performed in relation to the Tailings Project, and it says: “The site’s preparation was completed in April 2007.” Do you see that?

[Dr Rigby]: Basically, yes, the site was prepared.

[Q]: And a geotechnical study had been completed on the Tailings Dam’s stability; correct?

[Dr Rigby]: ... AMEC, a well-respected engineering company [performed] a geotechnical study on the Tailings Dam stability I don’t dispute that this work was done.⁴³

32. Critically, Dr Rigby also admitted that the Tailings Plant had economic value at the time of the taking. Though Bolivia still maintains that the Tribunal should not assign any value to the Tailings Plant, its own mining expert testified that the Tailings Plant should be given “some value.”⁴⁴
33. Dr Rigby’s admissions again corroborated the Compass Lexecon experts’ inclusion of this asset in Colquiri’s valuation. At the Hearing, Glencore Bermuda proved that the Tailings Plant had value when Bolivia took Colquiri. Glencore Bermuda paid US\$31.8 million in 2005 for the rights to build and operate the Tailings Plant, and it had invested over one million dollars in the development of the Plant prior to its taking in May 2012.⁴⁵ Glencore Bermuda did so on the basis of the 2004 Feasibility Study, and reports, including by an independent consultant, that confirmed that the tailings contained approximately ten million tonnes of mineral Reserves that could be readily extracted.⁴⁶

⁴³ Cross Examination of Dr N Rigby, Day 4, Tr (Eng), 631:4 – 632:14; “Colquiri Tailings Project,” Sinchi Wayra presentation, August 2007, **C-315**, pp 7-8.

⁴⁴ Cross Examination of Dr N Rigby, Day 4, Tr (Eng), 621:24 – 622:2. *See also* Cross Examination of Dr N Rigby, Day 4, Tr (Eng), 621:19-20 (“I didn’t state in any of my Reports that the Project had zero value.”), 636:2-11 (stating that Glencore PLC would not have mentioned the Tailings Plant in its Initial Public Offering Prospectus had it not been considering completing it). *See also* Prospectus of Glencore International plc, 3 May 2011, **R-193**, p 90.

⁴⁵ Second Amended and Restated Stock Purchase Agreement between Minera and Glencore International (Iris shares), 30 January 2005, **C-198**, p 48; Stock Purchase Agreement between CDC and Compañía Minera Concepción SA (Colquiri shares), 2 March 2005, **C-202**, p 44. *See also* Claimant’s Opening Statement, Day 1, Tr (Eng), 29:10-16; Third Witness Statement of Christopher Eskdale, para 24, n35.

⁴⁶ 2004 Feasibility Study, December 2003, **C-61**, pp 2-3.

34. Glencore Bermuda's mining expert, Mr Lambert of RPA, testified at the Hearing that the Feasibility Study was a comprehensive feasibility study that proved that the Plant was a viable project.⁴⁷ As Mr Lambert stated, "[t]he Tailings Project is viable. It's been demonstrated both from the [2004 Feasibility Study] as well as RPA and CLEX have both demonstrated it with the cash-flow statements."⁴⁸ The Tribunal will recall that the Tailings Plant was a technically simple project with no exploration or extraction risk, because mineral Reserves had been determined with certainty and the Reserves were easily accessible in the Tailings Dam.⁴⁹ Consistent with these conclusions, Glencore Bermuda had begun to develop the Tailings Plant prior to May 2012 as explained above.⁵⁰
35. Therefore, in light of evidence in the record, including Dr Rigby's admission that the Tailings Project had "some value," the question before this Tribunal is not whether Bolivia must pay compensation for the taking of the Tailings Plant project. The question is *how much*. At a minimum, Glencore Bermuda should be awarded the price that it paid in March 2005 for the right to the Tailings Plant (US\$31.8 million) indexed for inflation to the date of taking in May 2012 for a total of US\$38.3 million.⁵¹ The more appropriate valuation, however, is the DCF valuation in the Joint

⁴⁷ 2004 Feasibility Study, December 2003, **C-61**. See also Direct Presentation of Messers G Clow and R Lambert, Day 3, Tr (Eng), 453:13-19.

⁴⁸ Direct Presentation of Messers G Clow and R Lambert, Day 3, Tr (Eng), 453:13-16.

⁴⁹ See Second Expert Report of RPA, paras 121 (noting that the process is simpler as compared to exploiting raw ore), 141-43 (noting that the Reserves had been determined with certainty); Direct Presentation of Messers G Clow and R Lambert, Day 3, Tr (Eng), 452:6-8 (noting that the reserves had been confirmed by the independent consultant Pincock Allen & Holt), 452:15-16 (explaining that "quite a good bit of test work and good information" had been performed with respect to the Tailings Plant's reserves and production profiles); See also Claimant's Opening Statement, Day 1, Tr (Eng), 28:19 – 29:9; 2004 Feasibility Study, December 2003, **C-61**, pp 2-3.

⁵⁰ Direct Presentation of Messers G Clow and R Lambert, Day 3, Tr (Eng), 453:16 – 454:7; Cross Examination of Dr D Flores, Day 5, Tr (Eng), 848:6 – 849:4 (confirming that Colquiri had started implementing and investing on the Tailings Plant project by 2007), 852:4-10 (confirming that at the time of the taking "some works had been developed" in the Tailings Plant); Cross Examination of Dr N Rigby, Day 4, Tr (Eng), 629:8-19 (confirming that by 2007 Colquiri had "spent 1.2 million dollars on the [Tailings Plant] project. Let's call it preparatory works and drilling."), 631:4-20 (confirming that Colquiri had completed the earth works of the Tailings Plant), 632:1-4 (confirming that the site's preparation for building the Tailings Plant was completed in April 2007); Sinchi Wayra Monthly Report, January 2007, **R-428-05-GB009188**, p 11; "Colquiri Tailings Project," Sinchi Wayra presentation, August 2007, **C-315**, pp 7-8.

⁵¹ US\$38.3 million = US\$31.8 million × US CPI as of May 2012 (229.815) / US CPI as of October 2004 (190.9). Between October 2004 and May 2012, prices increased 20% in the United States. We note

Model for Colquiri prepared by Compass Lexecon's experts. That DCF valuation is consistent with the evidence that shows that it was reasonably certain that, but for the taking, Glencore Bermuda would have completed the Tailings Plant and made a profit processing the ten million tonnes of mineral Reserves that were confirmed to be present in the tailings and readily accessible.

B. VINTO

36. The Joint Model for the Vinto Tin Smelter includes two valuation options. They are:

- (a) the valuation recommended by Compass Lexecon's experts (US\$53.3 million) that assumes that Glencore Bermuda would have increased output at the Tin Smelter from approximately 11,500 to 14,000 tonnes of tin metal per year;⁵² and
- (b) the valuation recommended by Quadrant (US\$17.2 million) that assumes that the Smelter's output would not have increased and that operations would have become *more* inefficient.⁵³

37. The evidence adduced at the Hearing confirms that the fair market value of Vinto is equal to the valuation recommended by Compass Lexecon's experts. The key evidence supporting that conclusion includes the following:

- (a) Glencore Bermuda paid US\$51.6 million for the Tin Smelter in March 2005.⁵⁴ This figure is closely aligned with the Compass Lexecon experts' proposed valuation of US\$53.3 million as of February 2007.⁵⁵

however, that tin prices increased 119% over the same period, from US\$9,190 per tonne on 1 October 2004 to US\$20,212 per tonne on 29 May 2012. See CPI available at <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202110.pdf>; Compass Lexecon Interest Calculation, **CLEX-42**, "CPI. 12-month percent" tab. See also Compass Lexecon Price Forecasts, Undated, **CLEX-30**, "Historical" tab. Claimant's Opening Presentation, slide 43.

⁵² Joint Model for Vinto, "Control Panel" tab, "Abdala-Chavich" macros button, cell G15. See Second Expert Report of Compass Lexecon, para 62.

⁵³ Joint Model for Vinto, "Control Panel" tab, "Flores" macros button, cell G15. See Second Expert Report of Compass Lexecon, paras 62-65.

⁵⁴ Second Amended and Restated Stock Purchase Agreement between Minera and Glencore International (Iris shares), 30 January 2005, **C-198**, p 48; Stock Purchase Agreement between CDC

- (b) Between Glencore Bermuda’s purchase of Vinto in 2005 and the valuation date in 2007, there were only two developments that would materially affect the value of Vinto, and both would have increased its value. *First*, tin prices increased between 2005 and 2007, meaning that Vinto would be able to sell the tin it produced at higher prices.⁵⁶ *Second*, Glencore Bermuda increased Vinto’s profitability, such that over 2006 and part of 2007 (prior to nationalization), Vinto generated profits of approximately US\$18 million.⁵⁷ Both of these developments justify a modest increase in the value of Vinto from the purchase price of US\$51.6 million, as Compass Lexecon’s experts recommend.
- (c) During the Hearing, Bolivia was unable to provide any credible reasons that would justify reducing Vinto’s value between 2005 and 2007, much less reducing it to US\$17.2 million as Bolivia proposes, even after Arbitrator Gotanda twice asked for any such reasons.⁵⁸
- (d) As described above, over 2006 and part of 2007, Vinto generated profits of approximately US\$18.0 million.⁵⁹ As discussed at the Hearing, it is not

and Compañía Minera Concepción SA (Colquiri shares), 2 March 2005, **C-202**, p 44. *See also* Claimant’s Opening Statement, Day 1, Tr (Eng), 39:7-10.

⁵⁵ Direct Presentation of Dr M Abdala and Ms C Chavich, slides 4, 30.

⁵⁶ *See* Claimant’s Opening Statement, Day 1, Tr (Eng), 39:7-10; Claimant’s Opening Presentation slide 66 (noting that tin prices increased from US\$9,190 per tonne on 1 October 2004 to US\$12,270 per tonne on 8 February 2007); Compass Lexecon Price Forecasts, Undated, **CLEX-30**, “Historical” tab, cells D1709 (for 1 Oct 2004 price) and D2569 (for 8 Feb 2007 price).

⁵⁷ First Expert Report of Neal Rigby, para 106, Table 6; Vinto Financial Statement, 2006-2007, **CLEX-16-8**, pp 7, 11 (showing that Vinto generated profits of US\$10.4 million in fiscal year 2006 and of US\$7.6 million in fiscal year 2007). *See also* Claimant’s Opening Statement, Day 1, Tr (Eng), 39:11-19; Claimant’s Opening Presentation, slide 67.

⁵⁸ *See* Questions from Arbitrator Gotanda to Respondent’s Counsel, Day 5, Tr (Eng), 898:23 – 900:22 (Bolivia asserted that “the value that Glencore paid is [not] necessarily useful to assess the value several years later because, of course, circumstances change,” but it failed to identify specific circumstances that would justify the decrease in value).

⁵⁹ First Expert Report of Neal Rigby, para 106, Table 6; Vinto Financial Statement, 2006-2007, **CLEX-16-8**, pp 7, 11 (showing that Vinto generated profits of US\$10.4 million in fiscal year 2006 and of US\$7.6 million in fiscal year 2007). *See also* Claimant’s Opening Statement, Day 1, Tr (Eng), 39:11-19; Claimant’s Opening Presentation, slide 67.

credible that in February 2007, a willing seller would have sold Vinto for only US\$17.2 million as Bolivia asserts.⁶⁰

(e) Bolivia nationalized Vinto precisely because it was highly profitable. As discussed at the Hearing, in a report prepared ten days prior to Vinto's valuation date that Bolivia labeled in this arbitration as the "technical justification" for Vinto's nationalization, Comibol stated that "a net profit of USD 7,130,000 per year is expected" from Vinto.⁶¹

38. This evidence is in addition to the testimony of Glencore Bermuda's mining expert, Mr Lambert, who confirmed the projections on which the Compass Lexecon experts' valuation is based. Specifically, Mr Lambert explained, relying on contemporaneous documents, that in 2007 Vinto (i) had the capacity to produce 14,000 tonnes of tin metal per year, and (ii) that at the time of nationalization it was in the process of improving its operations to achieve that output.⁶² Indeed, Glencore Bermuda showed at the Hearing that, by the date of the taking, it had approved a US\$2.3 million budget for 2007 to complete projects to improve the Tin Smelter and increase its output.⁶³

39. The arbitration record therefore overwhelmingly supports an award of compensation based on the Compass Lexecon experts' valuation of Vinto.

⁶⁰ Claimant's Opening Statement, Day 1, Tr (Eng), 39:5-21.

⁶¹ COMIBOL, Report on the reversion of the Complejo Metalúrgico Vinto to the Bolivian State, 29 January 2007, **R-247**, p 8 (Claimant's translation of the Spanish original) (emphasis omitted).

⁶² Cross Examination of Mr R Lambert, Day 4, Tr (Eng), 515:10-12 (noting that the projects performed at the Tin Smelter between 2002 and 2006 "were to maintain the capacity at 30,000 [tonnes] per year of [tin concentrate] feed and [a] production [capacity] of 14,000 [tonnes] of tin a year."), 516:14-15 (noting that said projects were aimed at a "more efficient use of the existing capacity").

⁶³ Claimant's Opening Statement, Day 1, Tr (Eng), 42:11 – 43:7; Sinchi Wayra Management Report, January 2007, **QE-72**, p 84. *See also* Vinto, Projects and works executed in Vinto 2002-2006 Period, Undated, **RPA-53**.

C. ANTIMONY SMELTER AND TIN STOCK

40. The Joint Models for the Antimony Smelter and the Tin Stock include two options for calculating the fair market value of each Asset, one recommended by each party's valuation experts.
41. With respect to the Antimony Smelter, the key difference between the Compass Lexecon experts' valuation (US\$1.9 million) and Quadrant's valuation (US\$0 million) is that Quadrant reduces its valuation to zero on account of purported remediation costs for the land on which the Smelter is built.⁶⁴ At the Hearing, however, Bolivia failed to present *any* evidence of the need for remediation costs or the amount of those costs.⁶⁵ The preponderance of the evidence in the record therefore supports a valuation of the Antimony Smelter without remediation costs,⁶⁶ as recommended by Compass Lexecon's experts.
42. With respect to the Compass Lexecon experts' valuation of the Tin Stock (US\$619,343) and Quadrant's valuation (US\$606,264), Glencore Bermuda respectfully refers the Tribunal to the Joint Model and the briefing in its Reply on Quantum.⁶⁷

* * *

43. For the foregoing reasons, the preponderance of the evidence supports the valuations of the Assets recommended by Compass Lexecon's experts.

⁶⁴ Compare Joint Model for Antimony Smelter, "Control Panel" tab, "Abdala-Chavich" macros button, cell F20 with *ibid*, "Flores" macros button, cells F13, F15 and F20; see also *ibid*, "Remediation and Demolition Costs" buttons at rows I-K19. See Reply on Quantum, paras 162-64, 170-71; Rejoinder on Quantum, paras 709, 740, 784, 792.

⁶⁵ See Claimant's Opening Statement, Day 1, Tr (Eng), 48:12-20. See also Reply on Quantum, para 171.

⁶⁶ Bolivia has not offered *any* evidence that Glencore Bermuda would have been obligated to pay remediation costs for the Antimony Smelter, the need for remediation, or the costs of any remediation work. See Direct Presentation of Dr N Rigby, Day 4, Tr (Eng), 567:12 – 568:4 (noting that he "*felt ... the costs of this [remediation] work was likely to be greater than the value of the land ...*") (emphasis added).

⁶⁷ Reply on Quantum, paras 173-75. Compare Joint Model for Tin Stock, "Control Panel" tab, "Abdala-Chavich" macros button, cell F14 with *ibid*, "Flores" macros button, cell F14.

III. TRIBUNAL QUESTIONS

44. In the following paragraphs, Glencore Bermuda addresses the two questions from the Tribunal’s letter of 22 September 2021 that were addressed to Claimant. Claimant reserves the right to address the questions in the Tribunal’s letter that were directed to Respondent in Claimant’s reply submission.

A. TRIBUNAL QUESTION NO 1: FIXED OR VARIABLE INTEREST RATE

45. The Tribunal requested that Claimant “elaborate on the rationale for the claimed sensitivity on the use of the same Bolivian Central Bank interest rate for each subsequent year.”⁶⁸ It also requested that Claimant “present a projection using the particular Bolivian Central Bank interest rate for the relevant year.”⁶⁹

46. As requested, the Joint Models for the Assets all contain switches that enable the Tribunal to calculate pre- and post-award interest at the rates provided by the Central Bank of Bolivia using either (i) the rates as of the Assets’ Valuation Dates as fixed rates⁷⁰ or (ii) the average of the rates applicable from the Valuation Dates to the latest available data as of the date of this Brief (*ie*, 16 November 2021).⁷¹

47. In its Expert Reports, Compass Lexecon’s experts propose that the Tribunal calculate pre- and post-award interest using the rates published by the Central Bank as of the

⁶⁸ Tribunal’s Question No 1.

⁶⁹ Tribunal’s Question No 1.

⁷⁰ The applicable interest rates are: (i) 8.6% as of 8 February 2007 (for Vinto); (ii) 6.1% as of 30 April 2010 (for the Tin Stock); (iii) 6.4% as of 29 May 2012 (for Colquiri); and (iv) 6.7% as of 22 January 2020 (as a proxy for the date of the award) (for the Antimony Smelter). Second Expert Report of Compass Lexecon, paras 120-22, n218. With respect to the Antimony Smelter, which should be valued as of the date of the award, only post-award interest would apply, unless the Tribunal fixes an earlier valuation date. If the latter, Claimant is entitled to pre-award and post-award interest on the damages awarded in compensation for the taking of the Antimony Smelter. Second Expert Report of Compass Lexecon, para 122, n218.

⁷¹ Second Expert Report of Compass Lexecon, para 145, n262. The average applicable interest rates as published by the Central Bank of Bolivia until December 2020 are: (i) 7.09% from February 2007 (for Vinto); (ii) 6.65% from April 2010 (for the Tin Stock); (iii) 6.80% from May 2012 (for Colquiri); and (iv) 7.38% for 2021 (as a proxy for the date of the award, which is the valuation date for the Antimony Smelter).

Assets' Valuation Dates as fixed rates.⁷² International investment tribunals regularly apply fixed interest rates for the entire period during which interest accrues even when variable rates are available.⁷³ Among the tribunals that have adopted this approach was the tribunal in *Rurelec*, which is one of the two other arbitral tribunals that have awarded damages against Bolivia under Article V of the Treaty. In *Rurelec*, the tribunal calculated interest using the rate published by the Bolivian Central Bank for the month of the valuation date and applied that same rate through the date of payment.⁷⁴ The other arbitral tribunal that has awarded damages against Bolivia under Article V of the Treaty, the tribunal in *South American Silver*, also appears to have applied Bolivia's Central Bank rate as of the date of valuation as a fixed rate, though this is not entirely clear from the text of the award.⁷⁵

48. As the Tribunal is aware, in their Second Expert Report, Compass Lexecon's experts calculated the amount of interest owed on damages if the Tribunal applies fixed rates as of the Valuation Dates and included a sensitivity that calculated interest using average rates from the Valuation Dates to the date of the award.⁷⁶ The difference

⁷² Second Expert Report of Compass Lexecon, para 145. For an explanation of why the interest rates published by Bolivia's Central Bank are the appropriate rates for pre- and post-award interest, see Second Expert Report of Compass Lexecon, paras 117-18; Direct Presentation of Dr M Abdala and Ms C Chavich, Day 4, Tr (Eng), 689:16 – 691:3.

⁷³ See, eg, *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (ICSID Case No ARB/97/3) Award, 20 August 2007, **CLA-70**, para 9.2.8; *OKO Pankki Oyj and others v. Republic of Estonia*, ICSID Case No. ARB/04/6, Award, 19 November 2007, **RLA-79**, para 355. See also *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 521.

⁷⁴ See *Guaracachi America, Inc and Rurelec Plc v Plurinational State of Bolivia* (UNCITRAL) Award, 31 January 2014, **CLA-120**, para 615.

⁷⁵ See *South American Silver Limited (Bermuda) v The Plurinational State of Bolivia* (PCA Case No 2013-15) Award, Dissenting Opinion, and Separate Opinion, 22 November 2018, **CLA-252**, paras 892, 938(h). In *South American Silver*, the language of the Tribunal's reasoning and *dispositif* suggest that it calculated interest at a fixed rate as of the date of valuation. This is further supported by the fact that the *South American Silver* tribunal relied on the decision in *Rurelec*. Yet, the *South American Silver* tribunal granted the then claimant's petition for interest, which appears to have mentioned a range of applicable rates.

⁷⁶ Second Expert Report of Compass Lexecon, para 145. Compass Lexecon's experts also explained at the Hearing that the fixed rate assumes that the borrower obtains a long-term loan at a fixed interest rate at a given moment in time, while the flexible rate assumes that the borrower obtains a one-year loan every year, with a fixed rate per year. Cross Examination of Ms C Chavich, Day 5, Transcript (English), 752:21 – 753:8 (“[T]hese are loans that are not short-term loans; right? These are loans from the bank, so yes, we froze them at that rate [at the Valuation Date]. ... We present the sensitivity

between the two calculations was US\$15.5 million as of January 2020, because interest rates had declined between the Valuation Dates and 2019.⁷⁷ As of the date of this Brief, the difference is now US\$8.1 million because the interest rates published by Bolivia’s Central Bank have increased in 2020 and through 16 November 2021.⁷⁸

49. In this arbitration, it is more appropriate to award a fixed rate of interest as of the Valuation Dates for the Assets for three reasons. *First*, the interest rates as of the Valuation Dates are be the best indicator of commercial rates available as of those Dates, consistent with the *ex-ante* approach used in the valuation of the Assets.⁷⁹ *Second*, it is consistent with economic reality as Bolivia generally borrows money in the international capital markets at a fixed rate and usually for a period of ten years or more.⁸⁰ *Third*, as the differences in the rates show, averaging the rates from the Valuation Dates with the lower interest rates applicable in more recent years rewards Bolivia for its decade-long delay in compensating Glencore Bermuda and disincentivizes Bolivia to pay the Tribunal’s award.⁸¹

of using each year ... [W]e have a sensitivity using each year instead of assuming that you get the 13-year loan, you get one loan each year”).

⁷⁷ Second Expert Report of Compass Lexecon, para 145, n262.

⁷⁸ See Joint Models for Colquiri and Vinto, “Control Panel” tab, “Calculation period” buttons at cells I-K16; Joint Model for Antimony Smelter, “Control Panel” tab, “Calculation period” buttons at cells I-K24; Joint Model for Tin Stock, “Control Panel” tab, “Calculation period” buttons at cells I-K20.

⁷⁹ See Cross Examination of Ms C Chavich, Day 5, Tr (Eng), 750:20-22 (explaining that they have relied on the interest rates of “loans that banks in Bolivia give to corporations in Bolivia, and they report to the Central Bank” during a given month); Direct Presentation of Dr M Abdala and Ms C Chavich, Day 4, Tr (Eng), 668:16 (noting that both valuation experts “agree on using an ex ante approach” to value the Assets).

⁸⁰ It is well known that sovereign States borrow money at fixed rates. See, eg, Damodaran, A. “What is the risk-free rate? A Search for the Basic Building Block”, December 2008, **CLEX-66**, pp 10-12 (listing the fixed borrowing rates of ten-year bonds of 20 countries across America, Europe, Asia and Oceania). For Bolivia, the information is available at <https://www.state.gov/reports/2020-investment-climate-statements/bolivia/>, Section 6 (recording that sovereign bonds sold by Bolivia in international markets have been ten-year bonds subject to a fixed rate).

⁸¹ See Joint Models (all), “Banco Central – 2001-2020” tab, cells K12, K17, K22, K27, K32, K37, K42, K47, K52, K57, O66, O71, O76, O81, O86, O91, O96, O101, O106, O111; Compass Lexecon Interest Calculation, **CLEX-42**, “Banco Central – 2001-2019” tab. See also Direct Presentation of Dr M Abdala and Ms C Chavich, Day 4, Tr (Eng), 690:16-19 (explaining that “Dr. Flores’s proposed rate also implied a windfall for Bolivia. The rate proposed is lower than the cost of financing of Bolivia, implying a below-market rate belonging to Bolivia.”); Second Expert Report of Compass Lexecon, para 123, n220.

B. TRIBUNAL’S QUESTION NO 2: AWARD NET OF TAXES

50. The Tribunal requested that Claimant “comment on Bolivia’s statement regarding your request for exemption of taxes.”⁸² It also requested that Claimant comment on a statement from the *Crystallex* tribunal rejecting a request for an award net of taxes.⁸³
51. The parties and their respective experts have agreed on *all* of the taxes that would have been applicable to the income that Glencore Bermuda would have generated from the Assets had Bolivia not taken them, and had Glencore Bermuda sold the Assets to a third party, and deducted all of those taxes from the Joint Models, reducing the valuation of the Assets by tens of millions of dollars.⁸⁴ Pursuant to the parties’ agreement on the applicable taxes, the Joint Models reduce the fair market values of the Assets with the following agreed taxes:
- (a) **Colquiri:** 25% regular income tax; 12.5% remittance tax; 12.5% income tax for mining operations; royalties for 5% of gross value of concentrate sold; lease payments for 8% of net sales.⁸⁵
 - (b) **Vinto:** 25% regular income tax; 12.5% remittance tax.⁸⁶

⁸² Tribunal’s Question No 2.

⁸³ Tribunal’s Question No 2. The statement from the *Crystallex* tribunal is as follows: “With regard to the Claimant’s request that the Tribunal declare that any award be made net of all applicable Venezuelan taxes and Venezuela may not tax or attempt to tax the award, the Tribunal takes note that the Claimant’s experts have indicated that their quantum calculations have been prepared net of Venezuelan tax. Faced with a similar request, the tribunal in *Occidental v. Ecuador* deemed such request ‘speculative and premature’. This Tribunal likewise considers such request to be premature and thus denies the Claimant’s request.” *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award, 4 April 2016, **CLA-130**, para 946.

⁸⁴ In Compass Lexecon’s experts’ valuation of the Assets, total taxes amount to US\$785.9 million excluding royalties or lease payments, and to US\$1,275.1 million including such royalties or lease payments. The parties’ experts disagreed on the application of a 3% tax to the valuation of the Antimony Smelter. Today, the amount of the tax is undisputed. The disagreement that persists is whether the applicable tax is a municipal tax on transfers (Respondent’s position) or to a tax on transactions (Claimant’s position). The discussion is academic.

⁸⁵ See Second Expert Report of Compass Lexecon, para 58; First Expert Report of Compass Lexecon, paras 66, 69-70; First Expert Report of Daniel Flores (Econ One), paras 87-88; Second Expert Report of Daniel Flores (Quadrant), para 16.

⁸⁶ See Second Expert Report of Compass Lexecon, para 77; First Expert Report of Compass Lexecon, para 86; First Expert Report of Daniel Flores (Econ One), para 121; Second Expert Report of Daniel Flores (Quadrant), para 92.

- (c) **Antimony Smelter:** 25% regular income tax; 12.5% remittance tax; and a 3% tax applicable to transfers of real estate.⁸⁷
- (d) **Tin Stock:** 25% regular income tax; 12.5% remittance tax; 12.5% income tax for mining operations; royalties for 5% of gross value of concentrate sold, lease payments for 8% of net sales.⁸⁸

52. The parties' agreement on applicable Bolivian taxes and their deduction from damages in the Joint Models means that the Tribunal's award will as a matter of fact be an award net of *existing* taxes in Bolivia. Glencore Bermuda requests that the Tribunal declare the award net of Bolivian taxes in recognition of that fact.⁸⁹

53. Glencore Bermuda also requests that the award be net of Bolivian taxes to protect the finality and efficacy of the award. Because Glencore Bermuda's valuations were prepared net of existing Bolivian taxes, any further taxation under those taxes would result in Glencore Bermuda paying the same taxes twice, disallowing the full reparations to which it is entitled under international law.⁹⁰ Therefore, at a minimum, the award should be net of the existing taxes agreed by the parties to ensure that double taxation is not allowed.

54. Glencore Bermuda also requests that the award be net of any taxes in addition to the existing taxes agreed by the parties. This should not be controversial because Bolivia has not asserted that any taxes that should be deducted from the award have not been

⁸⁷ See First Expert Report of Compass Lexecon, para 97; Second Expert Report of Daniel Flores (Quadrant), para 135. Prior to this Post Hearing Submission, the parties' experts disagreed on the application of a 3% municipal tax, which Bolivia submitted was applicable to real estate transactions. See Rejoinder on Quantum, para 796. The Claimant submits that this tax is inapplicable to the valuation of the Antimony Smelter because it applies only to individuals, not corporations. However, the Claimant acknowledges that the sale of the Antimony Smelter could be subject to a 3% tax on transactions ("*impuesto a las transacciones*"). See Law No. 843 and Regulatory Decrees, undated, **R-525**, Art 107. In the spirit of cooperation and to reduce the number of issues at dispute between the parties, Claimant has requested that Compass Lexecon's experts include an option that would allow the Tribunal to compute this tax in their valuation of the Antimony Smelter.

⁸⁸ See First Expert Report of Compass Lexecon, paras 66, 69-70, 99; First Expert Report of Daniel Flores (Econ One), para 140.

⁸⁹ See Statement of Claim, paras 293-94.

⁹⁰ See Reply on Quantum, para 194.

deducted. Furthermore, it is a simple and sensible precaution to ensure the finality and efficacy of the award.

55. Tribunals have regularly found that, having taken into account all applicable taxes in their assessment of damages, the imposition of any additional taxes by the host State would run against the full reparation principle.⁹¹ For example, the tribunal in *ConocoPhillips* explained that:

The Tribunal has carefully evaluated and applied to the assessment of costs and expenses of the Claimants' claims in a but-for scenario all applicable taxation measures. Therefore, applying the same or further taxes to the amount awarded would undermine the principle of full compensation, and, at least in part, double taxation. The Tribunal therefore grants the Claimants' request to declare the Award net of taxes.⁹²

56. Likewise, the tribunal in *Tenaris II* explained that:

If compensation were subject to taxation in [the Respondent State], and [Respondent] intended to levy a tax over that compensation, the compensation actually paid would be less than that established in this Award and the [Respondent] would be in breach of the obligations assumed in the [applicable treaty]. The causal chain is fulfilled: the patrimonial reduction that Claimants would suffer would be solely attributable to acts of [Respondent], since [Respondent] would be the beneficiary of the tax that reduces the compensation awarded.⁹³

57. One of the most illustrative decisions on this matter came from the tribunal in *Rusoro*, which held as follows:

The BIT specifies that the compensation for expropriation must be “prompt, adequate and effective” and “shall be paid without delay and shall be effectively realizable and freely transferable”.

⁹¹ See, eg, *Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal LDA v Bolivarian Republic of Venezuela* (ICSID Case No ARB/12/23) Award, 12 December 2016, **CLA-133**, paras 788-92; *ConocoPhillips Petrozuata B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Award, 8 March 2019, **RLA-203**, para 957.

⁹² *ConocoPhillips Petrozuata B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Award, 8 March 2019, **RLA-203**, para 957.

⁹³ *Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal LDA v Bolivarian Republic of Venezuela* (ICSID Case No ARB/12/23) Award, 12 December 2016, **CLA-133**, para 789 (unofficial translation of Spanish original).

These rules support [Claimant’s] position [on an award net of taxes]. The [Respondent] is a sovereign State that can tax any assets or payments located in or originating from its territory. If the [Respondent] were to impose a tax on [Claimant’s] award, [Respondent] could reduce the compensation “effectively” received by [Claimant]. A *reductio ad absurdum* proves the point: [Respondent] could practically avoid the obligation to pay [Claimant] the compensation awarded by fixing a 99% tax rate on income derived from compensations issued by international tribunals, thereby ensuring that [Claimant] would only effectively receive a compensation of 1% of the amount granted.

...

In conclusion, the Tribunal declares that the compensation, damages and interest granted in this Award are net of any taxes imposed by the [Respondent] and orders the [Respondent] to indemnify [Claimant] with respect to any Venezuelan taxes imposed on such amounts.⁹⁴

58. Many more tribunals have reached the same decision, awarding damages net of taxes in order to uphold international law and the efficacy of their awards.⁹⁵ In other words, Glencore Bermuda’s approach is in line with a consistent practice of international investment tribunals.

⁹⁴ *Rusoro Mining Limited v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/12/5) Award, 22 August 2016, **CLA-131**, paras 852-55. See also *Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata BV v Petróleos de Venezuela SA* (ICC Case No 16848/JRF/CA) Final Award, 17 September 2012, **CLA-113**, paras 313, 333(1)(vii); *Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal LDA v Bolivarian Republic of Venezuela* (ICSID Case No ARB/12/23) Award, 12 December 2016, **CLA-133**, paras 788-92.

⁹⁵ *Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014, **RLA-65**, para 389 (“Regarding taxation by Venezuela, the Tribunal recalls that the compensation awarded to the Claimants has been calculated taking into account all taxes to be paid to the Venezuelan authorities. As a consequence, that compensation should be paid net of any Venezuelan tax.”); *Burlington Resources, Inc v Republic of Ecuador* (ICSID Case No ARB/08/5) Decision on Reconsideration and Award, 7 February 2017, **CLA-134**, para 547 (“It is undisputed that the cash flows have been computed net of income and labor participation tax. As a result, the Tribunal agrees that the amounts awarded to [Claimant] in this Award are net of income and labor participation taxes, and that [Respondent] may not impose or attempt to impose these taxes on the Award.”); *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Award, 6 February 2007, **CLA-67**, para 403.11 (awarding compensation net of taxes).

59. Bolivia's objection to an award net of taxes is evidence that such an award is necessary.⁹⁶ *First*, Bolivia's objection was untimely. Throughout the written phase of the proceedings, Bolivia never objected to Glencore Bermuda's request for an award net of Bolivian taxes.⁹⁷ Instead, Bolivia waited until its opening statement at the Hearing to raise an objection.
60. *Second*, Bolivia's objection is misplaced. Glencore Bermuda has not asked for a "blank check" or to be "exempted from lawful taxes" as Bolivia alleges. To the contrary, the parties have agreed on the applicable *existing* Bolivian taxes and deducted them from damages as described above. Glencore Bermuda simply asks that it be exempted from any attempt by Bolivia to use the guise of "taxation" to collaterally attack the Tribunal's award and the damages that the Tribunal determines Glencore Bermuda is owed.
61. *Finally*, Glencore Bermuda's request is not "speculative." If Bolivia were to seek to deduct taxes from the award in addition to the existing taxes already deducted from damages, it would necessarily mean that Bolivia would be denying Glencore Bermuda the full reparation that the Tribunal determines is owed. This would constitute an additional breach of its obligations under the Treaty and international law, but because the Tribunal will cease to be constituted upon the issuance of its award, Glencore Bermuda would not then be able to request that the Tribunal take measures to ensure the integrity of its award. Glencore Bermuda's current request therefore is not premature; this is Glencore Bermuda's only opportunity to request that the Tribunal ensure the integrity of its award by declaring it net of taxes.
62. Glencore Bermuda acknowledges that the decisions of the tribunals in *Occidental* and *Crystallex* referred to by the Tribunal in Question No 2 are contrary to its

⁹⁶ Bolivia's Opening Statement, Day 1, Tr (Eng), 137:22 – 138:5 ("[T]he third and final comment is that taxation is an essential attribute of sovereignty. Claimant cannot ask you for a blank check declaring that Bolivia may not exercise its taxation powers. Claimant has not established that any Bolivian tax is expropriatory or in breach of international law. And in any event, any possible taxation of the Award is pure speculation at this stage. We, therefore, oppose Claimants' request to be exempted from lawful taxes in Bolivia.").

⁹⁷ As explained, prior to this Post-Hearing Brief the parties only disagreed on the application of a 3% tax to the valuation of the Antimony Smelter. That disagreement no longer exists.

position and to that of the other tribunals referenced above. However, for the reasons stated above, Glencore Bermuda respectfully disagrees with the conclusions in those awards that requests of an award net of taxes are speculative.

63. Glencore Bermuda therefore maintains its request that the Tribunal declare that the award is net of all applicable existing Bolivian taxes, and that Bolivia may not levy further taxes on the award. Alternatively, Glencore Bermuda requests that the Tribunal order Bolivia to gross-up the amount of compensation paid so that the net compensation received by Glencore Bermuda corresponds to the damages awarded by this Tribunal.⁹⁸

IV. THE JOINT MODELS

64. The parties and their respective damages and mining experts conferred pursuant to the Tribunal's requests in paragraphs 5-10 of the Annex to its letter of 22 September 2021 and eliminated their differences on some valuation variables, and agreed to the Joint Models for the Assets. The parties' damages experts also agreed to a joint letter that identifies the variables in the Joint Models for which there is agreement, and provides information on how the Models function. In the joint letter, Bolivia's expert, Dr Flores, has included argument that at times is presented as statements of fact, though those "facts" are contested. The Compass Lexecon experts have refrained from this conduct.

V. REQUEST FOR RELIEF

65. On the basis of the foregoing, Glencore Bermuda respectfully requests that the Tribunal:

- (a) ORDER Bolivia to compensate Glencore Bermuda for its losses resulting from Bolivia's breaches of the Treaty and international law for an amount of

⁹⁸ *Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal LDA v Bolivarian Republic of Venezuela* (ICSID Case No ARB/12/23) Award, 12 December 2016, **CLA-133**, para 791 ("In sum, should [the Respondent] levy a tax over the compensation which, once paid, reduces the flow to be deposited in Claimants' patrimony, [the Respondent] shall have the obligation to increase the amount of compensation, so that the net sum after payment (or compensation) of taxes, amounts to [the sum awarded in the arbitration in concept of damages] plus accrued interest and award on costs.") (unofficial translation of Spanish original).

US\$436.9 million, which includes the sums of US\$381.1 million in respect of Colquiri, US\$53.3 million in respect of Vinto, US\$1.9 million in respect of the Antimony Smelter, and US\$0.6 million in respect of the Tin Stock.

- (b) ORDER Bolivia to pay pre-award interest on (a) above in the sum of US\$432.1 million, which includes for Colquiri, interest at a rate of 6.4% compounded annually from its date of valuation, 29 May 2012, until 16 November 2021; for Vinto, interest at a rate of 8.6% compounded annually from its date of valuation, 8 February 2007, until 22 January 2020; and for the Tin Stock, interest at a rate of 6.1% compounded annually from its date of valuation, 30 April 2010, until 22 January 2020, and pre- and post-award interest after the date of 22 January 2020 at the previously stated rates compounded annually for Colquiri, Vinto and the Tin Stock; and the rate of 6.7% compounded annually for the Antimony Smelter, or at such other rate and compounding period as the Tribunal determines will ensure full reparation;
- (c) DECLARE that: (i) the award of damages and interest in (a) and (b) is made net of all Bolivian taxes; and (ii) Bolivia may not deduct taxes in respect of the payment of the award of damages and interest in (a) and (b).

In the alternative, if the Tribunal awards damages on an after-tax basis, ORDER Bolivia to gross-up the amount of compensation paid so that Glencore Bermuda receives a net amount equivalent to the Tribunal's award;

- (d) ORDER Bolivia to pay all of the costs and expenses of these arbitration proceedings;
- (e) ORDER Bolivia to pay all costs incurred by Glencore Bermuda resulting from the Section 1782 proceedings brought by Bolivia in the United States District Court for the Eastern District of Virginia; and
- (f) ORDER such other relief as the Tribunal considers appropriate.

Respectfully submitted on behalf of the Claimant on 18 November 2021





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FERRERE

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