

**PCA CASE N° 2016-39/AA641**

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

**GLENCORE FINANCE (BERMUDA) LTD**

Claimant

**-v-**

**PLURINATIONAL STATE OF BOLIVIA**

Respondent

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**STATEMENT OF CLAIM**

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1. This Statement of Claim is submitted on behalf of Glencore Finance (Bermuda) Ltd (*Claimant* or *Glencore Bermuda*), a company incorporated under the laws in force in the United Kingdom overseas territory of Bermuda (*Bermuda*), pursuant to the Tribunal's Procedural Order No 1 dated 31 May 2017.<sup>1</sup> It sets out the factual and substantive legal grounds upon which Glencore Bermuda bases its claim for compensation for the Plurinational State of Bolivia's (*Bolivia* or *Respondent*) breaches of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland (the *UK*) and the Government of Bolivia for the Promotion and Protection of Investments, which entered into force on 16 February 1990 (the *Treaty*).<sup>2</sup> This Statement of Claim also contains Claimant's response to Bolivia's request for Bifurcation (the *Request for Bifurcation*).
2. Accompanying this Statement of Claim are: (i) the Witness Statement of Christopher Eskdale, Head of Global Zinc Operations for Glencore International AG; (ii) the Witness Statement of Eduardo Lazcano, former General Manager of the Colquiri Mine for Sinchi Wayra; (iii) the expert report on damages prepared by Mr Manuel Abdala and Ms Carla Chavich of the economic consulting firm Compass Lexecon; (iv) the expert report prepared by Messrs Graham Clow and Richard Lambert, mining experts of the firm Roscoe Postle Associates Inc; and (v) the expert report prepared by Ms Gina Russo, real estate valuation expert in Bolivia. Also submitted with this Statement of Claim are Claimant's new factual exhibits numbered C-49 to C-161, and legal authorities numbered CLA-1 to CLA 134.

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<sup>1</sup> See Power of Attorney from Glencore Bermuda, 26 April 2016, **C-3**.

<sup>2</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments (the *Treaty*), 24 May 1988, **C-1**. The Treaty was extended to the UK overseas territory of Bermuda and the crown dependency of Jersey on 9 December 1992. Exchange of Notes, 3 December 1992 and 9 December 1992, pursuant to which the Treaty was extended to Bermuda, Jersey and other territories attached as **C-2**.

## I. EXECUTIVE SUMMARY

3. Glencore Bermuda has initiated these proceedings in order to obtain full compensation for the damage caused by Bolivia's unlawful conduct in breach of the Treaty in relation to Glencore Bermuda's investments in Compañía Minera Colquiri SA (*Colquiri*) and Complejo Metalúrgico Vinto SA (*Vinto*).
4. Glencore Bermuda's investment in Bolivia consisted of a 100 percent indirect shareholding in Colquiri, which owned: (i) the exclusive right to explore, exploit, and market the mineral products from the Colquiri mine, the second largest tin mine in Bolivia (the *Colquiri Mine*); (ii) a non-producing antimony smelter (the *Antimony Smelter*); and (iii) 100 percent shareholding in Vinto, which owned the Vinto tin smelter—the largest tin smelter in Bolivia (the *Tin Smelter*). As described in detail in this Statement of Claim, Bolivia's unlawful measures destroyed the value of these investments.
5. *First*, on 9 February 2007, Bolivia nationalized Vinto through Supreme Decree No 29,026 (the *Tin Smelter Nationalization Decree*), which ordered the immediate “reversion” of Vinto and all of its assets, including the Tin Smelter, to the State. From that moment, through the State-owned enterprise Empresa Metalúrgica Vinto (*EMV*), the government took permanent control of the Tin Smelter together with all of its assets and inventory. The Tin Smelter Nationalization Decree justified the nationalization on the basis of purported illegalities in the privatization of the asset. However, Glencore Bermuda had not been a part of this process and, in any event, no support was offered for this allegation, nor was any formal investigation ever conducted. In addition, the Tin Smelter Nationalization Decree did not provide for compensation to be paid to Glencore Bermuda or any of its affiliates. No payment of compensation was ever made by Bolivia.
6. *Second*, on 1 May 2010, Bolivia abruptly nationalized the Antimony Smelter. By Supreme Decree No 499 (the *Antimony Smelter Nationalization Decree*), the

government ordered the immediate “reversion” of the Antimony Smelter to the State. The Antimony Smelter Nationalization Decree again referenced alleged illegalities in the privatization process and purported to justify the reversion on the Antimony Smelter’s non-production, even though the government was well aware that the plant had been inactive for years and had never requested that it be brought back to production. Like the Tin Smelter Nationalization Decree, the Antimony Smelter Nationalization Decree did not provide for the payment of compensation. In addition, that same day Bolivia also seized 161 tonnes of tin concentrates from the Colquiri Mine that were being temporarily stored at the Antimony Smelter (the *Tin Stock*). This was the property of Colquiri and did not form part of the Antimony Smelter’s inventory, nor was it included in the Antimony Smelter Nationalization Decree. Despite recognizing that the Tin Stock did not fall within the scope of the nationalization, the Minister of Mining failed to secure its return to Glencore Bermuda or any of its affiliates.

7. At the request of the State-owned Corporación Minera de Bolivia (*Comibol*), Glencore Bermuda engaged in discussions over the migration of its existing agreements concerning the rights to the Colquiri Mine and other mines it operated. Bolivia demanded that the State’s participation in these agreements (through Comibol) increase to at least 50 percent through the signing of shared-risk contracts for each mining concession. However, Comibol refused to compensate Glencore for the fair market value of that participation (which would have to reflect the net present value of the future lost cash flows).
8. *Third*, in early May 2012, in the midst of talks regarding the conclusion of the shared-risk contracts, the government suddenly requested that Colquiri be excluded from the new contractual framework, suggesting that the government was considering taking over control of the Colquiri Mine.
9. Fueled by the uncertainty over the fate of Colquiri, in the early hours of 30 May 2012, about one thousand members of a local cooperative known as Cooperativa 26 de Febrero violently invaded the Colquiri Mine. The *cooperativistas*—as

- members of these private groups of miners are known—sought full control of the Colquiri deposit. This was not a surprise; just weeks earlier, Glencore Bermuda had requested that the government and Comibol take action to protect the Colquiri Mine against invasions by members of the local cooperatives. The government, however, had taken no such steps.
10. From 30 May 2012 onwards, the Colquiri Mine remained inaccessible to Glencore Bermuda. Violent confrontations broke out among Colquiri’s salaried workers and the occupying cooperatives. Again, Glencore Bermuda sought the government’s intervention. Bolivia, however, failed to respond to Glencore Bermuda’s pleas for protection, first allowing the *cooperativistas* to invade the Colquiri Mine and subsequently failing to secure the return of the mine operation to Glencore Bermuda.
  11. Indeed, Bolivia’s conduct served to encourage rather than defuse the conflict. Glencore Bermuda, on the other hand, did everything within its power to address the growing tensions, including accepting to cede part of the mine—the Rosario vein—to the *cooperativistas*. Soon after this agreement was reached, however, Bolivia engaged in separate and inconsistent meetings with the union workers and the cooperatives, promising to each what the other wanted and inevitably reigniting violent clashes amongst the competing factions of miners. In particular, the government promised the salaried workers the nationalization of the Colquiri Mine, yet separately assured the cooperatives that they would be able to exploit the Rosario vein. Glencore, in the meantime, had been excluded from all talks by the government.
  12. Eventually, on 20 June 2012 Bolivia issued Supreme Decree No 1,264 ordering Comibol to take over control of the Colquiri Mine (the ***Colquiri Mine Nationalization Decree***). The machinery, equipment and supplies of Colquiri located at the Colquiri Mine were also nationalized, in favor of a new company to be created called Empresa Minera Colquiri. The Colquiri Mine Nationalization

- Decree only provided for limited compensation covering the deposit's machinery, equipment and supplies. Yet, no payment was ever made.
13. Glencore Bermuda attempted to engage in negotiations with the government over the amount of compensation due for these nationalizations for more than ten years. Bolivia, however, never presented a concrete payment proposal. The lack of good faith in its process is patent. Bolivia went as far as presenting a negative valuation suggesting that Glencore Bermuda was to pay the government for the honor of having had its investments nationalized.
  14. Bolivia's conduct is in breach of the provisions of the Treaty prohibiting expropriation without just, effective and prompt compensation, as well as the provisions requiring Bolivia to afford fair and equitable treatment, full protection and security and respect of the obligations assumed towards Glencore Bermuda's investments. These Treaty breaches caused direct and substantial harm to Glencore Bermuda.
  15. In accordance with well-settled principles of international law, Glencore Bermuda seeks full reparation for the losses resulting from Bolivia's violations of the Treaty and international law, in the form of monetary compensation sufficient to wipe out the consequences of Bolivia's wrongful acts.
  16. That compensation must reflect the fair market value of Glencore Bermuda's investments but-for Bolivia's unlawful conduct. The fair market value of Vinto and Colquiri has been calculated by Compass Lexecon on the basis of the income approach through a discounted cash flow (*DCF*) method. With respect to the Antimony Smelter, the asset's fair market value is reflected in the current real estate value of land, buildings and improvements. The Tin Stock is valued at its market value as of April 2010. Compass Lexecon's assessment of the damages suffered by Glencore Bermuda is as follows: US\$387.7 million as of May 2012 in relation to the expropriation of Colquiri; US\$57.7 million as of February 2007 in relation to the expropriation of Vinto; US\$1.9 million for the current value of

land, buildings and improvements of the Antimony Smelter; and US\$0.6 million in relation to the value of the Tin Stock as of April 2010.

17. In order for Glencore Bermuda to receive full reparation for the losses caused by Bolivia’s wrongful conduct, the quantum of damages suffered must include pre-judgment interest accruing from each valuation date until the date of the award. Compass Lexecon has updated the above figures to include pre-judgment interest as of the date of this Statement of Claim at a normal commercial rate, as referenced in Article 5 of the Treaty, compounded annually. As summarized in the table below, total damages to Glencore Bermuda amount to US\$ 675.7 million as of 15 August 2017.

<i>US\$ Million</i>	<b>Colquiri</b>	<b>Vinto</b>	<b>Antimony Smelter</b>	<b>Tin Stock</b>	<b>Total</b>
	<i>May 29, 2012</i>	<i>February 8, 2007</i>	<i>August 15, 2017</i>	<i>April 30, 2010</i>	
Fair Market Value	443.1	65.9	2.2	0.7	
- Remittance Tax	55.4	8.2	0.3	0.1	
<b>Damages to Claimant (as of Date of Valuation)</b>	<b>387.7</b>	<b>57.7</b>	<b>1.9</b>	<b>0.6</b>	
+ Interest	148.1	79.3	0.0	0.3	
<b>Damages to Claimant (as of August 15, 2017)</b>	<b>535.8</b>	<b>137.0</b>	<b>1.9</b>	<b>1.0</b>	<b>675.7</b>

18. This Statement of Claim is structured as follows. Section II describes the relevant facts of the dispute, including Glencore Bermuda’s investments in Bolivia and their nationalization by Bolivia without compensation. Section III sets out the law applicable to this dispute. Section IV addresses the basis of the Tribunal’s jurisdiction over these claims. Section V provides an analysis of the obligations incumbent upon Bolivia through the Treaty, and how Bolivia’s actions are in breach of these obligations. Section VI describes the damages suffered by the Claimant. Section VII contains Glencore Bermuda’s response to the Request for Bifurcation and Section VIII sets out Glencore Bermuda’s request for relief.

## II. THE FACTS RELEVANT TO THE DISPUTE

### A. BOLIVIA'S LEGAL FRAMEWORK IN THE EARLY 1990S WAS DESIGNED TO ATTRACT FOREIGN INVESTMENT IN STRATEGIC SECTORS

19. From the time of Spanish colonization until the beginning of the 20th century, the Bolivian economy was based mainly on mining, transitioning from silver in the 19th century to tin in the 20th century. The income generated by the export of these minerals thus financed much of the infrastructure needed for the country's development.<sup>3</sup>
20. Still being highly dependent on mining exports, at the beginning of the 1980s, Bolivia was severely hit by the decrease in international commodity prices, a lack of access to international financing and the high interest rates applicable to its debts.<sup>4</sup> The crisis in Bolivia was aggravated further when, in late 1985, the international price of tin fell steeply after the collapse of the International Tin Council—the organization that ensured that tin prices remained stable. This fall in prices meant that Bolivian mines became uneconomic, which in turn resulted in a significant reduction in the State's income coming from the mining sector. Within three years, from 1983 to 1986, the importance of the mining sector decreased from 10 percent of Bolivia's gross domestic product (*GDP*) to a mere 4.3 percent of *GDP*.<sup>5</sup>
21. Bolivia's hyperinflation surged to an annualized rate of 60,000 percent at this point, making Bolivia's rate of inflation one of the highest in world history.<sup>6</sup> Bolivia's external debt at the end of 1985 was over five times its annual exports of goods and services, resulting in debt service payments of up to 35 percent of

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<sup>3</sup> "Country Profile: Bolivia 1987-88," Economist Intelligence Unit, September 1987, **C-54**, p 7; JA Morales and JD Sachs, "Bolivia's Economic Crisis" in: JD Sachs (ed), *Developing Country Debt and the World Economy* (1989) 57, **C-56**, pp 5-6.

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

<sup>5</sup> *Ibid*, p 7.

<sup>6</sup> JD Sachs, "The Bolivian Hyperinflation and Stabilization," AEA Papers and Proceedings, **C-53**, p 1.

the country's total exports.<sup>7</sup> As noted by international lending institutions at the time, Bolivia had a plentiful energy resource base but limited financial resources, such that reforms to ensure the efficient allocation of capital were key to its recovery.<sup>8</sup>

22. Against this backdrop, in August 1985, Bolivia enacted Supreme Decree No 21,060,<sup>9</sup> providing for a comprehensive economic stabilization program.<sup>10</sup> This program was highly successful, allowing Bolivia to enter the 1990s with a newly stabilized economy enjoying low but sustained levels of growth.<sup>11</sup> This led to early signs of increasing interest in Bolivia—in particular in its mining and hydrocarbons sectors—among foreign investors.<sup>12</sup> To further encourage foreign investment across the major industrial and services sectors, Bolivia issued a set of new laws and regulations throughout the 1990s.
23. In September 1990, Bolivia enacted Law No 1,182 (the *Investment Law*), with the purpose of “stimulat[ing]” and “guarantee[ing]” domestic and foreign investments in Bolivia.<sup>13</sup> The Investment Law provided certain guarantees to prospective investors, including in relation to property rights, imports and exports, production and marketing and investment insurance.<sup>14</sup> More importantly, the Investment Law provided that these guarantees would, in turn, be backed up by

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<sup>7</sup> Joint UNDP/World Bank Energy Sector Management Assistance Program, “Bolivia: Issues and Options in the Energy Sector,” Report No 4213-BO, November 1987, **C-55**, p 12; 24.

<sup>8</sup> *Ibid.*

<sup>9</sup> Supreme Decree No 21,060, August 29, 1985, published on August 29, 1985, **R-2**.

<sup>10</sup> JD Sachs, “The Bolivian Hyperinflation and Stabilization,” AEA Papers and Proceedings, **C-53**, p 3.

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

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

<sup>13</sup> Article 1 of the Investment Law noted the need “to promote the growth and economic and social development of Bolivia, with a regulatory system that governs both domestic and foreign investments.” Investment Law, 17 September 1990, published in the *Gaceta Oficial* No 1662 on 17 September 1990, **C-4**, Art 1 (unofficial English translation from Spanish original). The Investment Law remained in effect for almost 24 years, being repealed only in April 2014.

<sup>14</sup> Investment Law, 17 September 1990, **C-4**, Arts 4-9.

any bilateral or multilateral instruments to be entered into by Bolivia with other nations or international organizations. The Investment Law stated this in the following terms:<sup>15</sup>

The guarantees for foreign investment established in this legal provision shall be backed by bilateral or multilateral instruments that the Government of Bolivia has agreed or will agree with other nations and international organizations.<sup>16</sup>

24. In compliance with the Investment Law, over the following ten years, Bolivia negotiated and ratified over twenty bilateral investment treaties, including the Treaty.<sup>17</sup> Those treaties guaranteed foreign investors that their investments would be treated fairly and equitably, would be guaranteed full protection and legal security and would not be expropriated without prompt, adequate and effective compensation. Should Bolivia breach any of these protections, foreign investors would have the right to bring an arbitral claim against Bolivia before a neutral forum.
25. Finally, Bolivia issued a variety of laws and regulations to facilitate the privatization of State-owned entities across the major industrial and services sectors. The two principal laws governing the process were the following:
  - (a) Law No 1,330 (the ***Privatization Law***), enacted in April 1992, which authorized the transfer of public assets to private investors;<sup>18</sup> and
  - (b) Law No 1,544 (the ***Capitalization Law***), enacted in March 1994, which provided for the transfer of public assets to new “mixed” companies, in

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<sup>15</sup> *Ibid*, Art 7.

<sup>16</sup> *Ibid*, Art 7 (unofficial English translation from Spanish original).

<sup>17</sup> During the late 1980s-1990s, Bolivia signed a large number of bilateral investment treaties, including, among others, treaties with Argentina, Austria, Belgium and Luxembourg, Chile, China, Cuba, Denmark, Ecuador, France, Germany, Italy, the Republic of Korea, the Netherlands, Peru, Romania, Spain, Sweden, Switzerland, the United Kingdom and the United States of America.

<sup>18</sup> Law No 1,330, 24 April 1992, published in the *Gaceta Oficial* No 1,735 (the ***Privatization Law***), 24 April 1992, C-58.

which the State would share ownership with private investors who contributed capital by purchasing shares through an international public bidding process.<sup>19</sup>

26. With respect to the mining sector, which had been identified as a critical industry in need of private investment,<sup>20</sup> in March 1997, Bolivia enacted Law No 1,777 (the *Mining Code*) authorizing the government to, *inter alia*, grant mining rights to private parties in return for an annual payment. The mining rights were given the status of real property rights and could be freely transferred and mortgaged. Furthermore, the State-owned Comibol,<sup>21</sup> was required to transfer by way of public tender some of its mining concessions,<sup>22</sup> the Tin and Antimony Smelters, and leasing rights in the Colquiri Mine.<sup>23</sup>

**B. THE PUBLIC TENDER PROCESSES FOR THE SALE OF THE SMELTERS AND THE LEASE OF THE COLQUIRI MINE**

27. On the basis of the legal framework described above, between June and August 1999 Bolivia issued public tender terms for the sale of:

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<sup>19</sup> Capitalization Law, 21 March 1994, **R-8**. Similar to the Investment Law, both the Privatization Law and the Capitalization Law remained in effect for over 20 years, being repealed only in April 2014.

<sup>20</sup> In early 1992, then Minister of Energy, Herbert Muller highlighted the need for private investment in the Bolivian mining sector, stating: “We need to attract more foreign investment to make this economy grow. The most promising areas are mining and hydrocarbons. But so far there hasn’t been enough investment [...] If it doesn’t happen soon, there will be increased social tension and political instability.” (emphasis added); “Bolivians Pray to Mine God For Jobs,” *Chicago Tribune*, 22 March 1992, **C-5**, p 2.

<sup>21</sup> Comibol had been created by Bolivia in 1952 with the specific purpose of managing the mining industry, directly assuming the exploration, exploitation, benefit and commercialization of minerals. See Supreme Decree No 3,196, 2 October 1952, published in the *Gaceta Oficial* No GOB-61, 2 October 1952, **C-51**, Art 1 and law dated 29 October 1956, which passed Supreme Decree No 3,196 into law.

In 1997 Comibol became a “public, autarchic company dependent on the National Secretariat of Mining.” As such Comibol is subject to State control and has authority to direct and manage the mining industry. See Mining Code, 17 March 1997, **R-4**, Art 91; Supreme Decree No 29,894, 7 February 2009, published in the *Gaceta Oficial* No 116, 7 February 2009, **C-96**, Art 75(h); Constitution of Bolivia, 7 February 2009, **C-95**, Art 372(II).

<sup>22</sup> The Mining Code, 17 March 1997, **R-4**, Arts 93, 94.

<sup>23</sup> Resolution No 139/99, 24 June 1999, **C-59**; Resolution No 1753/99, 25 June 1999, **C-60**.

- (a) the Tin Smelter—the largest smelter in Bolivia, which had been operated by Comibol and processed minerals from various mining operations, including the Colquiri Mine and Huanuni mine;
  - (b) the Antimony Smelter—built to produce metallic antimony ingots by processing materials from the Tupiza region in southern Bolivia; and
  - (c) rights to operate and exploit the Colquiri Mine—Bolivia’s second largest tin and zinc mine located approximately 160 kilometers south-east of the city of La Paz; which had been operated by Comibol since its nationalization in 1952.
28. Potential bidders were required to satisfy certain financial and technical/operational requirements, such as specific levels of revenue in mining operations as set out in the tender terms.
29. In December 1999, by Supreme Decree No 25,631 the tender for the Tin Smelter was awarded to UK-based Allied Deals plc.<sup>24</sup> The sale and purchase agreement was signed in November 2000 between the Ministry of Foreign Trade and Investment (*Trade Ministry*), Comibol, the State-owned company EMV, and a subsidiary of Allied Deals plc created to purchase the Tin Smelter, Allied Deals Estaño Vinto SA<sup>25</sup>—which later changed its name to Complejo Metalúrgico Vinto SA<sup>26</sup>
30. By virtue of the same Supreme Decree, the tender for the Colquiri Mine was awarded by Bolivia to a consortium formed by the UK-based Commonwealth Development Corporation (*CDC*) and the Bolivia-based Compañía Minera del

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

<sup>25</sup> Notarizations of the sale and purchase agreement of the Tin Smelter between the Ministry of External Trade and Investment, Comibol, EMV and Allied Deals Estaño Vinto SA, 21 November 2000, as supplemented on 4 July 2001, **C-7**.

<sup>26</sup> Notarization of the change of name of Complejo Vinto, 30 August 2002, **C-45**.

Sur SA (*Comsur*).<sup>27</sup> Subsequently, CDC and Comsur incorporated Colquiri,<sup>28</sup> which on 27 April 2000 signed (as lessee) a lease agreement with the Trade Ministry, Comibol (as lessor) and Comsur (as operator) to exploit, explore and commercialize minerals from the Colquiri Mine for an initial term of 30 years (the *Colquiri Lease*).<sup>29</sup> In exchange for those rights, Colquiri would pay a royalty equivalent to 3.5 percent of its net revenues.<sup>30</sup> This royalty later increased to a range of up to 8 percent depending on metal prices.<sup>31</sup>

31. After an unsuccessful attempt to sell the Antimony Smelter, a new tender process took place in August 2000, by which in January 2001 the Antimony Smelter was also awarded to Colquiri. In January 2002 the sale and purchase agreement for the transfer of the Antimony Smelter was signed.<sup>32</sup> Finally, in June 2002, Colquiri acquired Vinto, and thereby, the Tin Smelter.<sup>33</sup>

#### **C. GLENCORE BERMUDA'S ACQUISITION OF THE SMELTERS AND THE COLQUIRI LEASE**

32. The Glencore group (Glencore Plc, Glencore International AG (*Glencore International*), Glencore Bermuda and its local subsidiaries, together *Glencore*), is a diversified natural resource commodity group, producing and trading more than 90 commodities. It was established in 1974<sup>34</sup> as a company focused on the

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<sup>27</sup> Supreme Decree No 25,631, 24 December 1999, published in the *Gaceta Oficial* No 2,192 on 24 December 1999, **C-6**, Art 2.

<sup>28</sup> Comsur was a 51 percent shareholder, while CDC held the remaining 49 percent of Colquiri.

<sup>29</sup> Colquiri Lease, 27 April 2000, **C-11**, clause 7.

<sup>30</sup> *Ibid*, clauses 2.7, 5.1.

<sup>31</sup> Addendum to the Colquiri Lease, 11 November 2005, **C-12**, clause 3.

<sup>32</sup> Sale and purchase agreement between Colquiri (as buyer), Comsur, Comibol (as seller) and the Trade Ministry. Supreme Decree No 26,042, 5 January 2001, published in the *Gaceta Oficial* No 2,282 on 9 January 2001, **C-8**. Notarization of the sale and purchase agreement of the Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Colquiri and Comsur, 11 January 2002, **C-9**.

<sup>33</sup> Sale and purchase agreement of Vinto between RGB Resources PLC, its provisional liquidators, and Colquiri, 1 June 2002, **C-46**. The purchase was concluded following the liquidation of Allied Deals.

<sup>34</sup> Glencore was initially established as Marc Rich + Co AG.

- physical marketing of metals, minerals and oil. Over the following decades, the company quickly grew across highly strategic global markets and expanded its business activities by acquiring diversified interests in mining, smelting, processing and trading of metals and minerals, agriculture and logistics (such as oil infrastructure, port facilities, storage and technology), both in established and emerging resource markets.<sup>35</sup> Glencore Plc is primarily listed on the London Stock Exchange and has secondary listings on the Hong Kong and Johannesburg Stock Exchanges.<sup>36</sup>
33. Glencore has been operating in Latin America since 1988.<sup>37</sup> Following successful initial investments in Peru<sup>38</sup> and Colombia,<sup>39</sup> in the mid-2000s Glencore sought new opportunities in the region that would strengthen its core trading activities.<sup>40</sup>
34. In April 2004 Glencore International was invited by Argent Partners—one of the leading international advisory firms specializing in the mining and metals processing sector<sup>41</sup>—to participate in an auction to acquire mining assets in Bolivia and Argentina.<sup>42</sup> Those assets included, among others, the Smelters and the Colquiri Lease. As explained by Mr Eskdale, Glencore’s Asset Manager for Latin America at the time, these assets fit well with Glencore’s expansion

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<sup>35</sup> Witness Statement of Christopher Eskdale, para 11.

<sup>36</sup> *Ibid.*

<sup>37</sup> Prior to its operating activities starting in 1988, Glencore had carried out trading activities throughout the region for several years.

<sup>38</sup> Witness Statement of Christopher Eskdale, para 12. Glencore acquired a significant interest in a Peruvian zinc/lead mining operation known as Perubar in 1988. Additionally, Glencore later acquired shares in the Yauliyacu (zinc/lead/silver) mine and in the Iscaycruz (zinc/lead) mine. All of these operations were subsequently merged into the Los Quenuales vehicle.

<sup>39</sup> Witness Statement of Christopher Eskdale, para 12. In 1995, Glencore acquired Prodeco mining company (owner of, among others, the Calenturitas (open pit coal) mine as well as an interest in the Cerrejón (coal) mine).

<sup>40</sup> Witness Statement of Christopher Eskdale, para 12.

<sup>41</sup> Process Letter from Argent Partners (Mr Simkin) to Glencore International (Mr Eskdale), 30 April 2004, **C-62**.

<sup>42</sup> Witness Statement of Christopher Eskdale, para 13. Argent Partners was acting on behalf of a Panamanian company named Minera S.A.

- strategy, allowing it to “create synergies and strengthen [its] core trading activities” within the region.<sup>43</sup> Notably, by this time, Bolivia had become the fourth largest producer of tin in the world and zinc had long dominated the Bolivian mining industry.<sup>44</sup>
35. Following a competitive bidding process, Glencore International’s bid for the Bolivian and Argentine assets was selected in November 2004.<sup>45</sup> Subsequently, Glencore International initiated its due diligence process, which included meetings with government officials, in which they received encouragement to make investments in the country.<sup>46</sup> In particular, the Ministry of Mining and Metallurgy (the *Ministry of Mining*) expressly wrote to Glencore’s representatives to express its “favorable predisposition towards the development of new investments in the mining sector.”<sup>47</sup>
36. Following a few months of negotiations, Glencore International concluded the purchase of the holding companies of the Assets, Iris Mines and Metals SA (*Iris*), Shattuck Trading Co Inc (*Shattuck*), and Kempsey SA (*Kempsey*) (together, the *Panamanian Companies*), between 30 January and 2 March 2005.<sup>48</sup> Together, the Panamanian Companies controlled 100 percent of Comsur, which held in turn 51 percent of Colquiri.<sup>49</sup> In parallel, Glencore International entered into a separate

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<sup>43</sup> Witness Statement of Christopher Eskdale, paras 12 and 14.

<sup>44</sup> See Witness Statement of Christopher Eskdale, para 14; ITRI, “Historical trends in tin production,” ITRI Briefing, 2011, **C-106**, pp 3-4.

<sup>45</sup> Witness Statement of Christopher Eskdale, paras 17-18.

<sup>46</sup> *Ibid*, para 18.

<sup>47</sup> Letter from the Vice Minister of Mining (Mr Gutiérrez) to Glencore (Mr Capriles), 17 January 2005, **C-63** (unofficial English translation from Spanish original).

<sup>48</sup> Witness Statement of Christopher Eskdale, para 19; see also Assignment and Assumption Agreements between Glencore International and Glencore Bermuda, 7 March 2005, **C-64**, pp 1, 3. As explained by Mr Eskdale, although the purchase agreements were signed on 30 January 2005 and 2 March 2005, the parties agreed that they would have an economic effective date of October 2004.

<sup>49</sup> Share register of Sinchi Wayra, undated, **C-16**; Share register of Colquiri, undated, **C-17**; Share register of Vinto, undated, **C-18**.

- agreement with CDC to acquire the remaining shares in Colquiri.<sup>50</sup> As a result of these transactions, Glencore International gained full indirect ownership of the Colquiri Mine and the Smelters by 2 March 2005.<sup>51</sup>
37. Glencore International subsequently assigned all of the rights, titles and interests acquired from the purchase to its wholly-owned subsidiary Glencore Bermuda.<sup>52</sup> As explained by Mr Eskdale, Glencore Bermuda had been incorporated in Bermuda in 1993 and had since then “served as one of the primary holding companies for Glencore’s investments worldwide and as such held at the time the vast majority of Glencore’s investments in the Americas.”<sup>53</sup> In addition to housing Glencore’s investments in the Americas, Glencore Bermuda also served as a primary financing entity and, to this day, continues to manage a considerable portfolio for the entire Glencore group.<sup>54</sup>
38. To help with the transition and continuity of operations—and in light of its long-standing reputation and business experience in Bolivia, as well as its UK-government backing—Glencore and CDC agreed to have the latter remain as a shareholder of Colquiri during a specified transition period, subject to a put and call option agreement.<sup>55</sup> As a result of this arrangement, CDC remained a

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<sup>50</sup> CDC’s (197,223) shares were acquired through a subsidiary, Compañía Minera de Concepción S.A. (*Comco*) and transferred to Kempsey. *See* Assignment and Assumption Agreements between Glencore International and Glencore Bermuda, 7 March 2005, **C-64**; Share register of Colquiri, undated, **C-17**.

<sup>51</sup> Witness Statement of Christopher Eskdale, para 19; *see also* Assignment and Assumption Agreements between Glencore International and Glencore Bermuda, 7 March 2005, **C-64**.

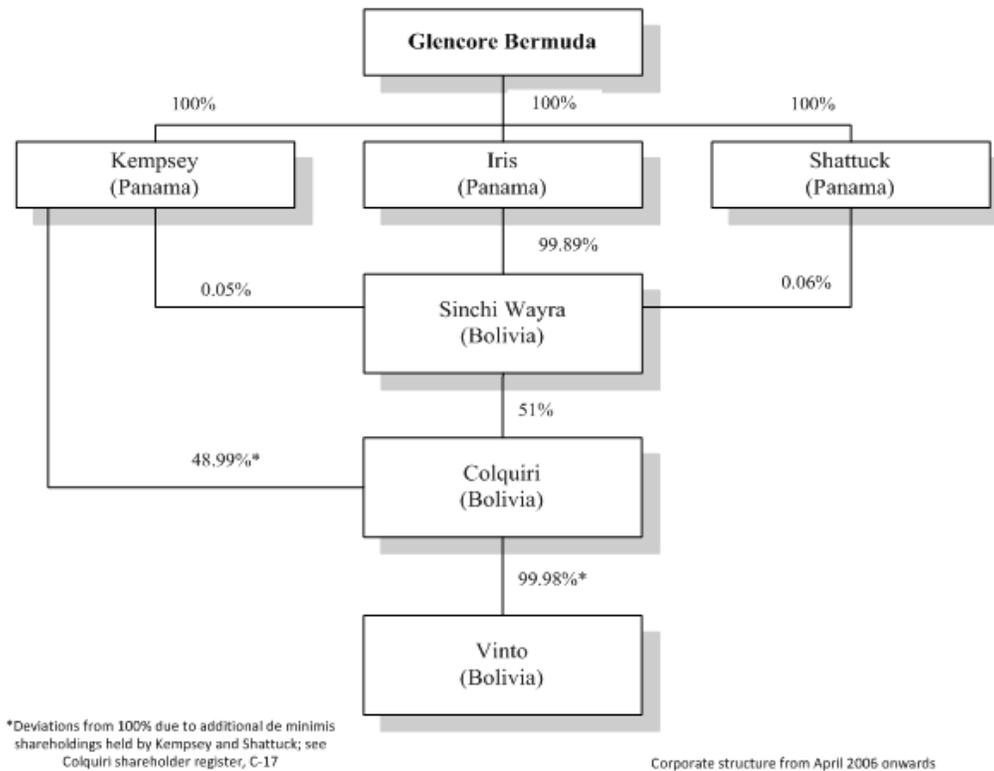
<sup>52</sup> Assignment and Assumption Agreements between Glencore International and Glencore Bermuda, 7 March 2005, **C-64**; *see also* Witness Statement of Christopher Eskdale, para 20.

<sup>53</sup> Witness Statement of Christopher Eskdale, para 20. At year-end 2007, Glencore Bermuda’s investments were worth approximately US\$3.28 billion and it held total assets worth US\$9.72 billion. 2007-2008 Glencore Bermuda Financial Statements, 31 December 2008, **C-94**.

<sup>54</sup> Witness Statement of Christopher Eskdale, para 20. Glencore International provided notice of the assignment to all of the original transacting parties, including CDC, in May 2005. *See, eg*, Notice of Assignment from Glencore International to CDC, 23 May 2005, **C-66**.

<sup>55</sup> The put and call option agreement provided that Glencore could call the shares at any time up to 30 April 2006, while CDC could put its shares to Glencore between 1 March 2006 and 30 April 2006. Put and Call Agreement between CDC and Glencore International, 15 March 2005, **C-65**. As explained by Mr Eskdale, an existing loan that CDC had with Colquiri was capitalized, which

shareholder of Colquiri for about another year until it exercised its put option in March 2006.<sup>56</sup> As a result, Glencore Bermuda (through Kempsey) re-acquired 100 percent of Colquiri's shares by April 2006.<sup>57</sup> The investment structure at the time was as follows:<sup>58</sup>



allowed CDC to re-acquire a minority interest in Colquiri through the issuance of 194,775 shares, which were subject to the put and call option agreement. Witness Statement of Christopher Eskdale, para 21. *See* Share register of Colquiri, undated, **C-17**.

<sup>56</sup> Put Notice from Actis (on behalf of CDC) to Glencore International, 21 March 2006, **C-67**.

<sup>57</sup> The shares were transferred to Glencore Bermuda's subsidiary, Kempsey, in accordance with the put and call option agreement. *See* Put and Call Agreement between CDC and Glencore International, 15 March 2005, **C-65**; Share register of Colquiri, undated, **C-17**.

<sup>58</sup> *See* Certificate of the Secretary of Kempsey, 19 May 2011, **C-13**; Certificate of the Secretary of Iris, 20 May 2011, **C-14**; Certificate of the Secretary of Shattuck, 20 May 2011, **C-15**; Share register of Sinchi Wayra, undated, **C-16**; Share register of Colquiri SA, undated, **C-17**; Share register of Vinto, undated, **C-18**.

**D. GLENCORE BERMUDA'S OPERATIONS OF THE COLQUIRI MINE AND THE SMELTERS**

39. Through the acquisitions described in the section above, Glencore Bermuda indirectly owned and operated the Colquiri Mine and the Smelters as of early 2005.

**1. The Tin Smelter**

40. The Tin Smelter is located near the city of Oruro, in the Cercado Province of the Oruro Department, approximately 200 kilometers south of the city of La Paz. It commenced operations in 1971 and produces primarily high-grade metallic tin ingots.<sup>59</sup>

41. The smelting process consists of roasting tin concentrate (raw material produced from mineral ore) at temperatures of 1,300-1,400 degrees Celsius, while injecting coal to act as a reducing agent to remove impurities.<sup>60</sup> The resulting product, a tin ingot (see below), is a semi-finished product with a variety of applications, including but not limited to, electronics, food products, and home appliances.<sup>61</sup>



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<sup>59</sup> Expert Report of RPA, para 42.

<sup>60</sup> *Ibid*, para 167; Witness Statement of Christopher Eskdale, para 33.

<sup>61</sup> *See* Witness Statement of Christopher Eskdale, para 33.

42. At the time of Glencore's operations, the Tin Smelter processed tin concentrates produced by several mining operations in Bolivia, including the Colquiri Mine, the Huanuni Mine, cooperatives, marketers and small mines.<sup>62</sup> Those concentrates were processed in three gas reverberatory furnaces and one electric reverberatory furnace.<sup>63</sup>
43. The Tin Smelter was, and remains, the largest tin smelter in Bolivia—and one of a handful of high-grade tin ingot producers in the world<sup>64</sup>—with a capacity to produce approximately 12,000 tonnes of tin metal ingots annually.<sup>65</sup> In 2006, the Tin Smelter produced 11,473 tonnes of tin ingots,<sup>66</sup> resulting in an average utilization rate of approximately 96 percent.
44. The output of the Tin Smelter was sold to Glencore or third parties<sup>67</sup>—including Toyota, Trafigura, and Soft Metals—through short-term contracts based on market prices.<sup>68</sup> As explained by Mr Eskdale,<sup>69</sup> the increase in London Metal Exchange (LME) tin prices, which had reached a peak in early 2007, aided the Tin Smelter's overall performance:

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<sup>62</sup> Expert Report of RPA, para 158.

<sup>63</sup> The electric furnace was typically used to process lower-grade concentrate. Witness Statement of Christopher Eskdale, para 33; Expert Report of RPA, paras 167 and 171.

<sup>64</sup> Witness Statement of Christopher Eskdale, para 32.

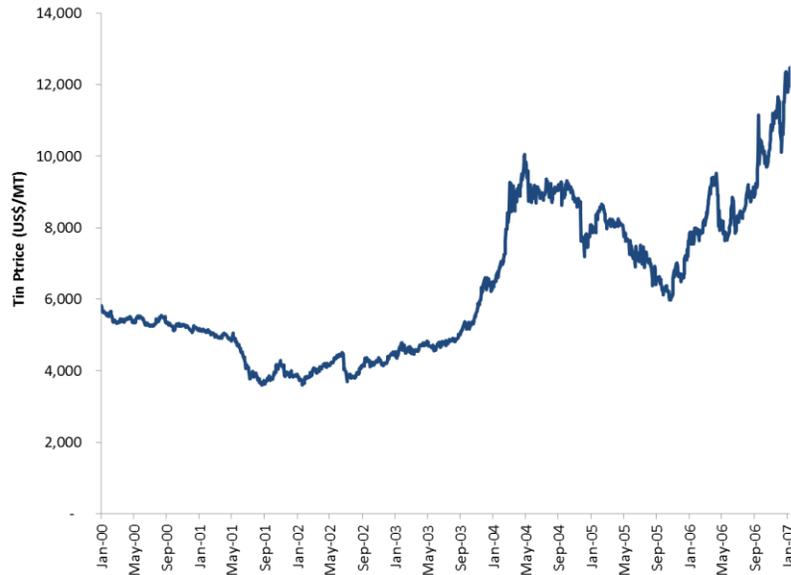
<sup>65</sup> CRU and ITRI, "Tin," CRU Monitor, February 2007, **C-69**, p 4. *See* Witness Statement of Christopher Eskdale, para 32.

<sup>66</sup> Expert Report of Compass Lexecon, para 78.

<sup>67</sup> Witness Statement of Christopher Eskdale, para 29.

<sup>68</sup> Expert Report of Compass Lexecon, section V.2.2.c.

<sup>69</sup> Witness Statement of Christopher Eskdale, para 36; *see also* Expert Report of Compass Lexecon, section V.2.2.c.



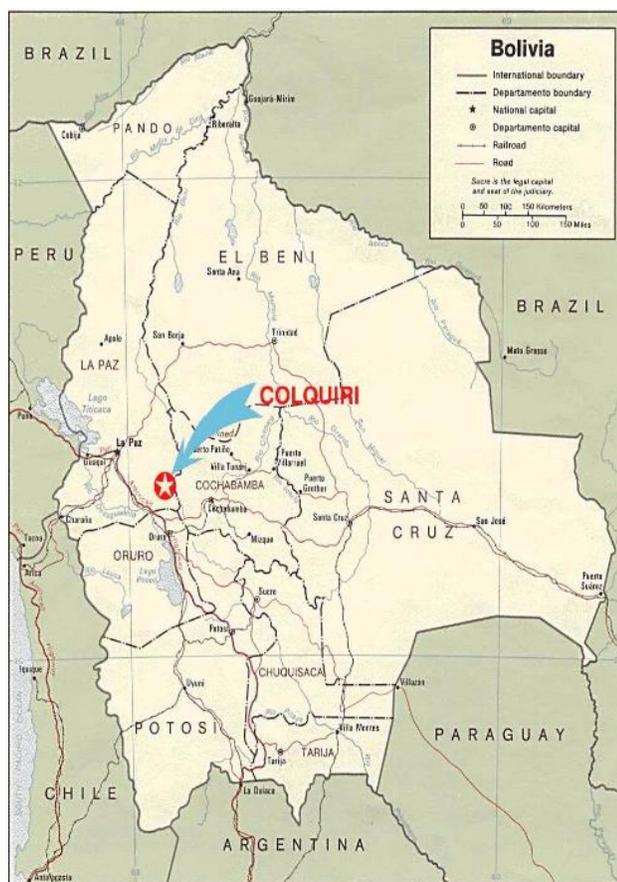
45. Against this backdrop of rising prices, steady production and high utilization, the economic outlook for the Tin Smelter was very promising in early 2007.<sup>70</sup>

## 2. The Colquiri Mine

46. The Colquiri Mine is located in the western part of Bolivia, in the Central Andean Cordillera, in the Province of Inquisivi, 80 kilometers northeast of Oruro, as shown in the following map:

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<sup>70</sup> Witness Statement of Christopher Eskdale, para 37.



47. It was, and remains, the second largest tin/zinc producer in Bolivia.<sup>71</sup> The Colquiri Mine is an integrated operation consisting of a high-altitude underground mine, a mill and concentrator, as well as ancillary facilities such as maintenance shops, warehouses and offices.<sup>72</sup> The Colquiri deposit consists of four veins: Blanca, Rosario, San Antonio and San Carlos.<sup>73</sup>
48. From an operational standpoint, the Colquiri Mine adopted a commonly used underground mining method known in the industry as sub-level stoping.<sup>74</sup> Using

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<sup>71</sup> Expert Report of RPA, para 77; Witness Statement of Eduardo Lazcano, para 10.

<sup>72</sup> Expert Report of RPA, para 74.

<sup>73</sup> *Ibid*, para 82, figure 2; Witness Statement of Eduardo Lazcano, para 12. A vein is a distinct sheet-like body of crystallized minerals within a rock.

<sup>74</sup> Expert Report of RPA, paras 97-98, figure 4. This mining technique involves digging large-scale horizontal tunnels which follow a vein at different levels of elevation, as well as a vertical tunnel connecting the different sub-levels. Once this basic structure is in place, a number of holes are

this method, the Colquiri Mine was mined through a series of horizontal tunnels called sub-levels located at 40 to 65 meter intervals, as shown below and explained in greater detail by Mr Eduardo Lazcano.<sup>75</sup>



49. The extracted ore<sup>76</sup> at Colquiri consisted of a mixture of zinc and tin, small quantities of other elements and additional minerals that were not commercially viable.<sup>77</sup> The ore was processed in the mill and concentrator plant, where the various minerals were separated from each other and from the sterile rock through a series of processes.<sup>78</sup> The valuable minerals that resulted from this process—mainly tin and zinc, pictured below—were subsequently sold in concentrate form to either Glencore International, Vinto, or third parties.<sup>79</sup>
50. When Glencore acquired the Colquiri Mine its mining activity had been focused in the top levels of the mine,<sup>80</sup> with two of the four veins barely explored. With

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drilled into the roof of a low-elevation drift and then filled with explosives. When the explosives detonate, loose rocks fall down the ore pass to a lower level of the mine, a “gallery,” where they are gathered and transported to an underground crusher. The crushed ore is then transported to the surface through a vertical shaft. This process is repeated until the roof of the drift is so high that it cannot be reached by the drills anymore. At this point in time, a drill located in the next-highest drift will be used to intersect the underground excavation area. Once the entire relevant area has been excavated, the excavation area is filled back up with a mixture of cement and backfill materials such as tailings or sand and rocks.

<sup>75</sup> Witness Statement of Eduardo Lazcano, paras 17-18.

<sup>76</sup> In simple terms ore is a type of rock that contains metals that can be economically extracted from it. Witness Statement of Christopher Eskdale, para 25.

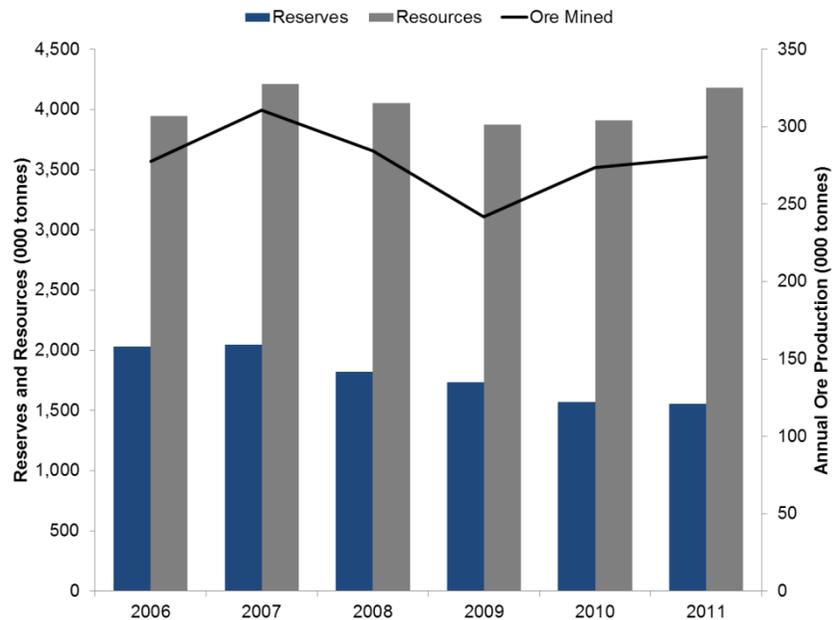
<sup>77</sup> Witness Statement of Eduardo Lazcano, paras 11, 15.

<sup>78</sup> *Ibid*, para 19.

<sup>79</sup> *Ibid*, para 20; *see also* Expert Report of Compass Lexecon, section V.1.1.c.

<sup>80</sup> 2012-2014 Colquiri Mine Three-year Plan, July 2011, **C-108**, pp 13-21.

this in mind, and to maximize the potential of the mine, Glencore Bermuda, through Colquiri, made investments in infrastructure, machinery and equipment to boost the efficiency of exploration and production activities. As a result, between 2006 and 2011 the Colquiri Mine operated on average at rate of 93 percent of its capacity, producing an average of 278,119 tonnes of ore per year, as illustrated below:<sup>81</sup>



51. In addition, by 2012, Colquiri designed and initiated four major projects aimed at expanding the capacity and the life of the mine. These projects are described in detail below.

*a. The Tailings Plant*

52. On the basis of the feasibility study approved in 2004<sup>82</sup> and rights granted pursuant to the Colquiri Lease,<sup>83</sup> Colquiri worked on constructing a new tailings

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<sup>81</sup> See Expert Report of Compass Lexecon, para 25, figure 2.

<sup>82</sup> Old Tailings Colquiri Project, **C-161**; Feasibility Study of the Colquiri Tailings Project, December 2003, **C-61**.

<sup>83</sup> As explained by Mr Eskdale, the Tailings Plant was a significant component of the assets acquired by Glencore. Witness Statement of Christopher Eskdale, para 16(b).

plant near the existing mill. The goal was to recover the tin and zinc from the old tailings left during approximately 60 years of operations of the Colquiri Mine (the *Tailings Plant*).<sup>84</sup> The processing of old tailings is a common practice in old mines where new technology and metallurgical advances allow valuable minerals to be recuperated from former waste material.<sup>85</sup> This activity is considered attractive given the absence of exploratory risk typically associated with mining projects. As explained by Mr Eskdale, through a relatively low investment, the Tailings Plant would have allowed Colquiri to process approximately 10 million tonnes of tailings in addition to its normal operations.<sup>86</sup> At a rate of 1 million tonnes per year (or approximately 3,000 tonnes per day), it would have taken Colquiri between ten and eleven years to deplete the old tailings deposit.<sup>87</sup> By 2012, Colquiri had already conducted the technical studies and earthworks required for the construction of the tailings plant itself.<sup>88</sup> Given the magnitude of its impact on production, the Tailings Plant was considered one of Colquiri's key investments and initiatives.<sup>89</sup>

***b. The Concentrator Plant***

53. Colquiri planned on doubling the capacity of the concentrator plant of the Colquiri Mine, which separated the tin from the other minerals to produce tin concentrate (the *Concentrator Plant*). This US\$27.5 million expansion would

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<sup>84</sup> Witness Statement of Eduardo Lazcano, para 31; Witness Statement of Christopher Eskdale, para 39; Colquiri Lease, 27 April 2000, **C-11**, Clause 8.1.8. *See also* Feasibility Study of the Colquiri Tailings Project, December 2003, **C-61**; Colquiri Tailings Project, 2008, **C-91**, p 3.

<sup>85</sup> Witness Statement of Christopher Eskdale, para 16(b).

<sup>86</sup> *Ibid.* *See also* Expert Report of RPA, para 30.

<sup>87</sup> Expert Report of RPA, para 157.

<sup>88</sup> Witness Statement of Eduardo Lazcano, para 33; Colquiri Tailings Project, 2008, **C-91**.

<sup>89</sup> Glencore-Xstrata IPO Offering Document, 4 May 2011, **C-107**, p 93. *See also* Witness Statement of Christopher Eskdale, paras 16(b) and 39.

have allowed an increase in processing capacity from its original nominal capacity of 1,000 to 2,000 tonnes per day.<sup>90</sup>

*c. The Main Ramp and infrastructure expansions*

54. Colquiri also invested in the expansion of existing infrastructure along with the development of new facilities that aimed to improve operational efficiencies both underground and on the surface. As explained by Mr Lazcano, by 2012, the Colquiri Mine had reached a processing capacity of 1,200 tonnes per day by improving efficiencies in the transportation of broken ore to surface level.<sup>91</sup> This included, in part, an increase in operating hours.<sup>92</sup>
55. To further increase capacity, Colquiri designed a principal access ramp that would connect the surface level to a new wider gallery at 405 meters below the surface that would provide easier access to all of the veins. It would also allow the simultaneous transportation of large-scale equipment, personnel and minerals (the *Main Ramp*).<sup>93</sup> Colquiri also prepared the designs and engineering plans to relocate and centralize all underground operations. This included the construction of a new underground office, showers and locker rooms, a warehouse for the maintenance of vehicles, a new generator and a new ventilation system. This would boost production by centralizing operations underground, and by allowing the ore to be extracted and to reach the surface faster and more efficiently, as illustrated in the image below.<sup>94</sup>

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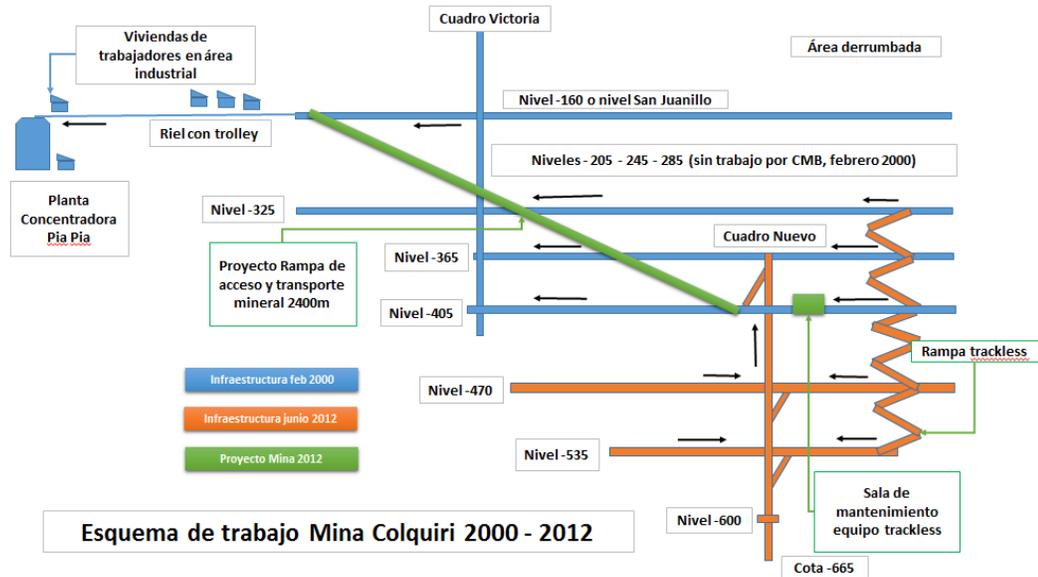
<sup>90</sup> 2012-2014 Colquiri Mine Three-year Plan, July 2011, **C-108**, pp 102-104; *see also* Witness Statement of Eduardo Lazcano, para 22.

<sup>91</sup> Witness Statement of Eduardo Lazcano, para 26. Colquiri Informes Semanales, 14 de marzo de 2012, **C-109**.

<sup>92</sup> Witness Statement of Eduardo Lazcano, para 26.

<sup>93</sup> *Ibid*, paras 27-29; 2012-2014 Colquiri Mine Three-year Plan, July 2011, **C-108**, pp 12, 39.

<sup>94</sup> *See* Witness Statement of Eduardo Lazcano, para 29. In particular, the Main Ramp would have allowed trucks to haul the ore up the ramp in addition to being hoisted via the Victoria winze, which at the time was the principal means by which ore was being extracted.



56. Work on the Main Ramp and underground infrastructure started in early 2012,<sup>95</sup> including civil work for the new warehouses and the acquisition of part of the materials to construct the improved underground infrastructure.<sup>96</sup>

*d. The New Tailings Dam*

57. Colquiri sought to construct a new tailings dam (the *New Tailings Dam*) to be able to accommodate Colquiri's increased production resulting from the investments noted above.<sup>97</sup> The New Tailings Dam would have had the capacity to receive the tailings from both the Concentrator Plant and the Tailings Plant.<sup>98</sup> With the New Tailings Dam, Colquiri would have also minimized the environmental impact of the expanded production by allowing it to purify larger volumes of industrially treated water. As explained by Mr Lazcano, by 2012 Colquiri had already agreed to purchase the land required to build the dam.<sup>99</sup>

<sup>95</sup> Witness Statement of Eduardo Lazcano, para 30.

<sup>96</sup> *Ibid*, para 30.

<sup>97</sup> *Ibid*, para 34.

<sup>98</sup> *Ibid*.

<sup>99</sup> *Ibid*.

58. With the Concentrator Plant and the Access Ramp, the Colquiri Mine's production would have increased to 550,500 tonnes per year by 2014.<sup>100</sup> Additionally, through the construction and operation of the Tailings Plant, Colquiri would have been able to process almost 10 million tonnes of old tailings starting at an annual rate of 300,000 tonnes in 2013, ramping up to 1 million tonnes in 2016.<sup>101</sup>

### 3. Antimony Smelter

59. The Antimony Smelter was located adjacent to the Tin Smelter. It had been inaugurated in 1976 but it had only been operative during the late 1970s and the 1980s.<sup>102</sup> A combination of limited domestic supply and low international antimony prices meant that the smelter remained out of service after it was privatized and later when it was acquired by Glencore Bermuda.<sup>103</sup> The Antimony Smelter was therefore occasionally used as a storage facility for the Colquiri Mine.<sup>104</sup>

\* \* \*

60. With the Colquiri Mine and the Smelters, and the acquisition of their production by Glencore's subsidiaries, Glencore's operations covered the entire productive chain all the way from extraction to trading, as illustrated in the operating flowchart below:<sup>105</sup>

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<sup>100</sup> Expert Report of RPA, paras 113, 123; Witness Statement of Eduardo Lazcano, para 25; 2012-2014 Colquiri Mine Three-year Plan, July 2011, **C-108**, p 11.

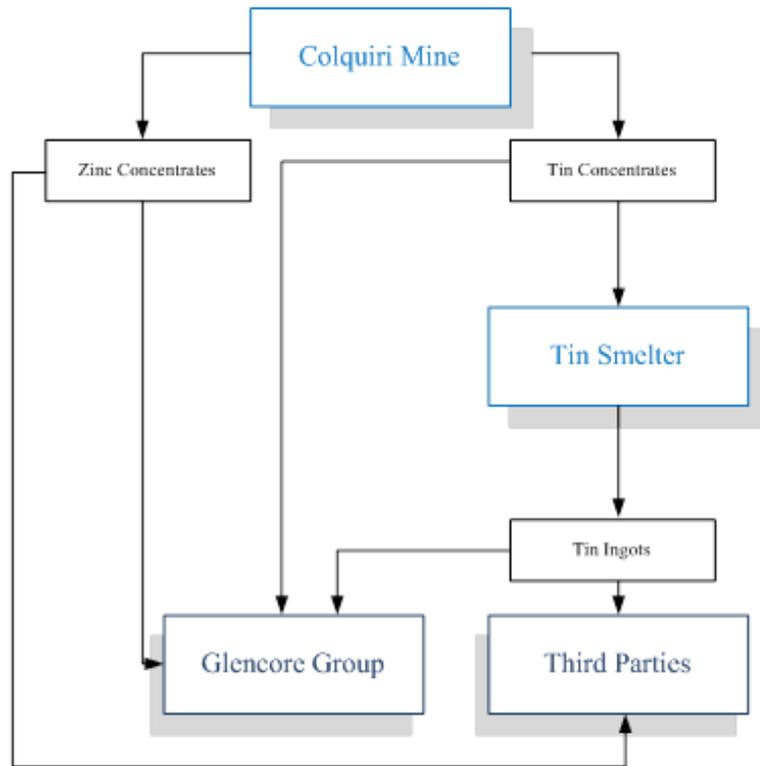
<sup>101</sup> Expert Report of RPA, para 157; Feasibility Study of the Colquiri Tailings Project, December 2003, **C-61**; Colquiri Tailings Project, 2008, **C-91**, p 3; *see also* Witness Statement of Christopher Eskdale, para 39.

<sup>102</sup> Expert Report of Gina Russo, paras 1.4, 4.6.

<sup>103</sup> Witness Statement of Christopher Eskdale, paras 38, 63.

<sup>104</sup> *Ibid*, para 38.

<sup>105</sup> *Ibid*, para 30.



#### 4. Glencore made substantial contributions to Bolivia

61. Glencore made significant contributions to the Bolivian economy—including contributions to the local communities and the payment of taxes and royalties—both during and after its operation of the assets. Glencore directly employed over 3,500 people who were given highly competitive salaries and indirectly generated jobs for more than 5,000 people.<sup>106</sup> To help with historically high rates of unemployment in the areas surrounding the Colquiri Mine and the Smelters, Glencore, through its local subsidiaries, prioritized hiring local workers and using local companies as suppliers.<sup>107</sup> As explained by Mr Lazcano, Glencore’s

<sup>106</sup> Sinchi Wayra, “Social Responsibility and Environment,” C-160.

<sup>107</sup> Witness Statement of Eduardo Lazcano, para 43; Sinchi Wayra, “Social Responsibility and Environment,” C-160.

- subsidiaries have directly invested in a diverse range of social initiatives, including housing, water systems, education, and technical training projects.<sup>108</sup>
62. By the end of 2012, Glencore had paid royalties, taxes and fees to Bolivia of over US\$300 million and had invested close to US\$250 million in the Bolivian mining industry and wider economy,<sup>109</sup> providing the local community with jobs, education, access to healthcare and improved infrastructure. These investments have had a positive direct and indirect impact on approximately 30,000 people living in the six municipalities and 60 communities surrounding Glencore’s operations.<sup>110</sup>

**E. BOLIVIA NATIONALIZED GLENCORE BERMUDA’S INVESTMENTS WITHOUT PROVIDING COMPENSATION**

**1. Bolivia nationalized Glencore Bermuda’s Tin Smelter in February 2007**

63. Almost two years after Glencore Bermuda’s investment in the country, on 30 November 2006, Glencore International received an unexpected written request from the Bolivian Senate seeking information on Glencore International’s identity and activities, including whether the former President Sánchez de Lozada was one of the company’s shareholders.<sup>111</sup> This came as a surprise since, as already mentioned, public entities (*ie*, the government and Comibol) had been aware of Glencore International’s acquisition since before the transaction was completed and the government had expressly “welcomed” Glencore’s investment in the country.<sup>112</sup>

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<sup>108</sup> Witness Statement of Eduardo Lazcano, paras 41-42.

<sup>109</sup> Letters from Glencore International PLC (Mr Maté) to the President of Bolivia (Mr Morales), 27 June 2012, **C-40**, p 2.

<sup>110</sup> Sinchi Wayra, “Social Responsibility and Environment,” **C-160**, p 1.

<sup>111</sup> *See* Request for written report from Senator Velásquez, 30 November 2006, **C-68**.

<sup>112</sup> *See* Letter from the Vice Minister of Mining (Mr Gutiérrez) to Glencore (Mr Capriles), 17 January 2005, **C-63**; and para 35 above.

64. Glencore International, nonetheless, responded to the request for information and submitted materials disclosing its shareholding in Sinchi Wayra SA (*Sinchi Wayra*) and demonstrating that Sánchez de Lozada was not, and had never been, a shareholder of Glencore. It also provided details on the shareholding in Glencore Bermuda and its interest in the Panamanian Companies.<sup>113</sup> No further requests were made by the government thereafter, nor were any concerns raised.<sup>114</sup>
65. On 22 January 2007, however, in a speech to the Bolivian National Congress, President Evo Morales announced the nationalization of the Tin Smelter because it had belonged to former President Sánchez de Lozada and had been purportedly “fraudulently” acquired in the late nineties.<sup>115</sup>
66. On 9 February 2007, the Bolivian armed forces and police broke through the Tin Smelter’s locked gates.<sup>116</sup> Following a confrontation with the workers, who firmly opposed the nationalization, the government forces took physical control of the plant.<sup>117</sup> A banner with the word “*nacionalizado*” was immediately affixed over the main entrance of the Tin Smelter as shown below:<sup>118</sup>

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<sup>113</sup> Witness Statement of Christopher Eskdale, para 41.

<sup>114</sup> *Ibid.*

<sup>115</sup> “Evo Morales anuncia más nacionalizaciones para este año en Bolivia,” *ABC*, 22 January 2007, **C-19**. Witness Statement of Christopher Eskdale, para 42.

<sup>116</sup> Photos of the Tin Smelter Nationalization, 9 February 2017, **C-70**, pp 3-6.

<sup>117</sup> *Ibid.*, p 2.

<sup>118</sup> *Ibid.*, p 9.



67. President Evo Morales then arrived at the Tin Smelter to publicly announce its nationalization.<sup>119</sup> The Tin Smelter Nationalization Decree was read out loud, ordering the immediate “reversion” of Vinto and all of its assets, including the Tin Smelter, to the State, on the basis of alleged illegalities related to the privatization of the assets.<sup>120</sup> Yet, no evidence was provided to support these allegations, nor was any formal investigation subsequently initiated.
68. From that moment, through the State-owned enterprise EMV, the government took permanent control of the plant together with all of its assets and inventory. This included the tin that was in the production pipeline at the time, as well as a number of tax refund certificates issued in favor of Vinto, neither of which were ever returned to Glencore Bermuda or any of its subsidiaries.<sup>121</sup> In addition, the Tin Smelter Nationalization Decree did not provide for the payment of compensation to Glencore Bermuda or any of its affiliates, as required under the Treaty as well as international and Bolivian law.

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<sup>119</sup> *Ibid*, pp 10-11; Video of the Tin Smelter Nationalization, *Unitel*, 9 February 2007, **C-71**.

<sup>120</sup> Supreme Decree No. 29,026 (the *Tin Smelter Nationalization Decree*), 7 February 2007, published in the *Gaceta Oficial* No. 2,969 on 9 February 2007, **C-20**.

<sup>121</sup> Letter from Vinto (Mr Capriles) to Minister of Mining and Metallurgy (Mr Echazú), 7 December 2007, **C-48**.

69. On 22 February 2007, Glencore International wrote to President Evo Morales.<sup>122</sup> Again, it emphasized that it had not been involved in the privatization process, which had occurred years prior to its acquisition of the Tin Smelter. Further, Glencore International, in representation of its subsidiaries, requested a meeting to commence talks over the amount of compensation due for the taking.<sup>123</sup> Despite several follow up letters, however, negotiations did not start until May.<sup>124</sup>
70. In the meantime, Glencore Bermuda, through Colquiri, focused on ensuring the continued operation of the Colquiri Mine, as well as of the other mines it operated in Bolivia. Prior to the nationalization, most of the Colquiri Mine's production of tin concentrates was sold to the Tin Smelter. In April 2007, Sinchi Wayra—as operator of the Colquiri Mine—reached an agreement with EMV to continue supplying tin concentrates to the now government-controlled Tin Smelter.<sup>125</sup> However, shortly thereafter, EMV failed to purchase and pay for the quantities specified in the contract.<sup>126</sup> Sinchi Wayra then agreed to sell to Glencore International the excess tin concentrate production not sold locally.<sup>127</sup> Eventually, Sinchi Wayra had to terminate its contractual relationship with EMV when the State-owned company continued to breach its payment obligations.<sup>128</sup>

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<sup>122</sup> Letter from Glencore International (Mr Strothotte) to the President of Bolivia (Mr Morales), 22 February 2007, **C-21**.

<sup>123</sup> *Ibid.*

<sup>124</sup> *See, eg*, Letter from Freshfields Bruckhaus Deringer (Mr Blackaby) to Ministry of the Presidency (Mr Quintana), 19 March 2007, **C-22**; Letter from Freshfields Bruckhaus Deringer (Mr Blackaby) to Ministry of the Presidency (Mr Quintana), 4 April 2007, **C-23**; Letter from Freshfields Bruckhaus Deringer (Mr Blackaby) to Ministry of the Presidency (Mr Quintana), 3 May 2007, **C-24**.

<sup>125</sup> *See, eg*, Letter from Colquiri (Mr Iriarte) to EMV (Mr Infantes), 28 March 2007, **C-73**; Letter from Colquiri (Mr Capriles) to EMV (Mr Infantes), 16 April 2007, **C-74**.

<sup>126</sup> *See, eg*, Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Echazú), 8 August 2007, **C-85**; Letter from Colquiri (Mr Capriles) to EMV (Mr Infantes), 19 September 2007, **C-87**.

<sup>127</sup> Contract No 201-07-18560-P for the sale of tin concentrates between Colquiri and Glencore International, 13 August 2007, **C-86**.

<sup>128</sup> *See* Witness Statement of Christopher Eskdale, para 49.

71. It was not until May 2007, nearly three months after the Tin Smelter was nationalized, that an initial meeting eventually took place between Glencore<sup>129</sup> and officials from the government.<sup>130</sup> Several further meetings and exchanges followed. However, deep divergences in the parties' positions were apparent from the outset.
72. *First*, the government seemed only interested in seeking information related to Glencore's identity and the acquisition of its Bolivian assets. Between May and June 2007<sup>131</sup> and then again several times throughout the negotiations,<sup>132</sup> the government requested this information, despite the fact that it had already been provided by Glencore prior to the nationalization. Yet, Glencore duly responded to the government's inquiries.
73. *Second*, the government refused to recognize its obligation to pay the fair market value of the expropriated asset. It first sought to limit any compensation offer to the amounts invested by Glencore, through Vinto, in the Tin Smelter since the acquisition.<sup>133</sup> This offer was rejected, since the company's sunk costs did not reflect the value of the nationalized asset.<sup>134</sup> The government then argued that it would not be politically feasible for the State to pay more than what the State had

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<sup>129</sup> See Letter from Sinchi Wayra (Mr Capriles) to the Ministry of the Presidency (Mr Arce), 11 May 2007, **C-76**. Glencore representatives in the negotiations included representatives from Glencore International, Power of Attorney from Glencore Bermuda, 11 December 2007, **C-90**.

<sup>130</sup> See, eg, Letter from the Ministry of Mining (Mr Castañón) to Sinchi Wayra (Mr Capriles), 14 May 2007, **C-77**; see also Letter from Sinchi Wayra (Mr Capriles) to the Ministry of Mining (Mr Castañón), 16 May 2007, **C-78**.

<sup>131</sup> See, eg, Letter from the Minister of Mining (Mr Echazú) to Sinchi Wayra (Mr Capriles), 21 May 2007, **C-79**; Letter from the Minister of Mining (Mr Echazú) to Glencore International (Mr Capriles), 4 June 2007, **C-82**; Letter from the Minister of Mining (Mr Echazú) to Glencore International (Mr Capriles), 4 June 2007, **C-81**.

<sup>132</sup> See, eg, Letter from Comibol (Mr Quintanilla) to Comsur (Mr Capriles), 27 July 2007, **C-84**.

<sup>133</sup> See Witness Statement of Christopher Eskdale, para 55.

<sup>134</sup> See eg, Letter from Sinchi Wayra (Mr Capriles) to the Minister of Mining (Mr Echazú), 20 June 2007, **C-83** (noting that just compensation for Vinto required an assessment of its fair market value prior to the nationalization).

- received for the Tin Smelter when it was privatized.<sup>135</sup> This was of course also rejected by Glencore as bearing no relationship to its market value.
74. *Third*, Comibol demanded that Glencore negotiate the potential migration of the Colquiri and Porco lease agreements to shared-risk contracts.<sup>136</sup> Even though Glencore had agreed in November 2005 to increase the royalty payments to up to 8 percent from an original 3.5 percent (depending on the market price of zinc and tin),<sup>137</sup> Comibol now requested a minimum 50 percent participation in the contracts. While Glencore did not oppose the concept of a transition to a shared-risk contract, such transition would have to compensate Glencore for the market value of what it would cede, including the net present value of its lost future cash flows and the residual value of its investment.<sup>138</sup> In this context, a technical agreement reached in March 2008<sup>139</sup> could not be advanced as the government continued to refuse to offer Glencore compensation for the increased participation it would transfer to the State.<sup>140</sup> In addition, in order to finalize its construction and start producing, Glencore proposed executing a separate contract for the Colquiri Tailings Plant.<sup>141</sup> Yet, no agreement was reached with the government on this issue.<sup>142</sup>
75. By the end of 2007, the negotiations had not resulted in an understanding on either of the outstanding issues. On 11 December 2007, Glencore Bermuda

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<sup>135</sup> See Witness Statement of Christopher Eskdale, para 55.

<sup>136</sup> Letter from Sinchi Wayra (Mr Hartmann) to Comibol (Mr Vargas), 9 May 2007, **C-75**; Letter from Sinchi Wayra (Mr Capriles) to Comibol (Mr Miranda), 25 May 2007, **C-80**. The contract for the Bolivar mining concession, although already a shared-risk agreement, was also subject to renegotiation.

<sup>137</sup> Addendum to the Colquiri Lease, 11 November 2005, **C-12**, pp 3-4.

<sup>138</sup> Letter from Sinchi Wayra (Mr Capriles) to Comibol (Mr Vargas), 11 October 2007, **C-89**.

<sup>139</sup> See Letter from Sinchi Wayra (Mr Capriles) to Comibol (Mr Vargas), 15 April 2008, **C-93**.

<sup>140</sup> See Witness Statement of Christopher Eskdale, para 58.

<sup>141</sup> Letter from Sinchi Wayra (Mr Capriles) to Comibol (Mr Vargas), 11 October 2007, **C-89**.

<sup>142</sup> Witness Statement of Christopher Eskdale, para 59.

notified Bolivia of the existence of a dispute under the Treaty.<sup>143</sup> Talks proceeded, without success, throughout 2008. It was clear that the fate of the Tin Smelter compensation was linked to a successful renegotiation of Glencore Bermuda's mining contracts—the government did not want to finalize the mining agreements yet have to defend itself against an international claim over the nationalization of the Tin Smelter.<sup>144</sup>

76. A new Constitution came into effect in February 2009 (the **2009 Constitution**),<sup>145</sup> mandating the renegotiation of existing mining concessions. However, the Constitution did not specify the terms to be included in the new contractual arrangements—these would be delineated in a new mining law to be passed by the Bolivian Congress.<sup>146</sup> With presidential elections on the horizon in late 2009 and falling metal prices, negotiations over the contracts and the Tin Smelter compensation came to a halt in 2009.<sup>147</sup>

## **2. Bolivia nationalized Glencore Bermuda's Antimony Smelter in May 2010**

77. On 1 May 2010, in the midst of the Workers' Day celebration, and without any prior warning, President Evo Morales abruptly nationalized the Antimony Smelter. Through the Antimony Smelter Nationalization Decree, he ordered the immediate reversion of the Antimony Smelter to the State. Like the Tin Smelter Nationalization Decree, the Antimony Smelter Nationalization Decree referenced purported illegalities in the privatization process.<sup>148</sup> It also justified the

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<sup>143</sup> Letter from Glencore Bermuda (Mr Kalmin and Mr Hubmann) to Ministry of the Presidency (Mr Quintana), 11 December 2007, **C-25**.

<sup>144</sup> Witness Statement of Christopher Eskdale, para 59.

<sup>145</sup> Constitution of Bolivia, 7 February 2009, **C-95**.

<sup>146</sup> Mining Law No. 535 came into force on 28 May 2014. Between February 2009 and May 2014 there was no legal provision setting forth the criteria and requirements for the renegotiation of contracts pertaining to the exploitation of natural resources.

<sup>147</sup> See Witness Statement of Christopher Eskdale, para 60.

<sup>148</sup> See Supreme Decree No. 499 (the **Antimony Smelter Nationalization Decree**), 1 May 2010, published in the *Gaceta Oficial* No 127NEC on 1 May 2010, **C-26**.

- nationalization on the basis of the Antimony Smelter’s “productive inactivity” over the “last years.”<sup>149</sup> Yet, as Bolivia was well aware, the Antimony Smelter had been inactive prior to Glencore Bermuda acquiring it and the government had not requested that Glencore Bermuda, or any of its affiliates, bring it to production.<sup>150</sup> As in the case of the Tin Smelter, the Antimony Smelter Nationalization Decree did not include any reference to compensation for the taking.<sup>151</sup>
78. On 2 May 2010, the then Minister of the Presidency, Oscar Coca, publicly announced the nationalization of the Antimony Smelter in a press conference. Immediately thereafter, the Minister of Mining, José Pimentel, read out the Antimony Smelter Nationalization Decree and took control of the premises.
79. At the time of nationalization, 161 tonnes of tin concentrates from the Colquiri Mine were being temporarily stored at the Antimony Smelter.<sup>152</sup> The Tin Stock was the property of Colquiri—it did not form part of the Antimony Smelter’s inventory nor was it included in the Antimony Smelter Nationalization Decree. Nonetheless, when the government took over control of the facilities it also seized the supply of concentrates that was temporarily held there.<sup>153</sup>
80. This was, perhaps, not surprising. EMV had been experiencing severe shortages of tin concentrates since it began operating the Tin Smelter in 2007, due to its inability to pay its suppliers. While Colquiri sold concentrates to EMV for some

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<sup>149</sup> *Ibid.*

<sup>150</sup> *See, eg,* Paribas, Privatisation of Bolivian mining assets, Confidential Information Memorandum, August 16, 1999, **RPA-04**, pp 62-69; Witness Statement of Christopher Eskdale, para 63.

<sup>151</sup> *See* Antimony Smelter Nationalization Decree, 1 May 2010, **C-26**.

<sup>152</sup> Letter from Colquiri (Mr Capriles) to Ministry of Mining (Mr Pimentel), 3 May 2010, **C-28**.

<sup>153</sup> *See, eg,* Letter from Colquiri (Mr Capriles) to Ministry of Mining (Mr Pimentel), 3 May 2010, **C-28**; Letter from Colquiri (Mr Hartmann) to the Minister of Mining (Mr Pimentel), 5 May 2010, **C-98**; and Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel), 10 May 2010, **C-99**.

- time following the Tin Smelter's nationalization, as already explained, it eventually had to stop deliveries due to EMV's repeated non-payment.<sup>154</sup>
81. Although at first the Ministry of Mining acknowledged that the Tin Stock did not fall within the reach of the Antimony Smelter Nationalization Decree and had to be returned to Colquiri,<sup>155</sup> this never happened. Despite repeated requests from Glencore Bermuda's local subsidiaries to Minister Pimentel, the minister failed to secure the return of the Tin Stock.<sup>156</sup>
82. Bolivia had now expropriated both Smelters and the Tin Stock without providing any compensation. On 14 May 2010 Glencore notified the Bolivian government of the existence of a dispute under the Treaty and requested negotiations in order to reach an amicable resolution.<sup>157</sup> Since no response was initially provided, in June 2010, Glencore insisted that the talks resume.<sup>158</sup>
83. In July 2010, the consultations finally restarted.<sup>159</sup> The focus this time was on reaching a "package" deal, comprising: (i) compensation for the two nationalized Smelters; (ii) migration of the mining contracts to shared-risk agreements; and

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<sup>154</sup> See Witness Statement of Christopher Eskdale, para 49.

<sup>155</sup> See Letter from Ministry of Mining (Mr Pimentel) to EMV (Mr Villavicencio), 5 May 2010, **C-29**.

<sup>156</sup> See Letter from Colquiri (Mr Capriles) to Ministry of Mining (Mr Pimentel), 3 May 2010, **C-28**; Letter from Colquiri (Mr Hartmann) to the Minister of Mining (Mr Pimentel), 5 May 2010, **C-98**; Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel), 10 May 2010, **C-99**; Letter from Colquiri (Mr Capriles) to EMV (Mr Villavicencio), 19 May 2010, **C-100**; Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel), 7 June 2010, **C-101**. Letter from EMV (Mr Villavicencio) to Colquiri (Mr Capriles), 8 June 2010, **C-102**.

<sup>157</sup> Letters from Glencore International PLC (Mr Maté and Mr Glasenberg) to the President of Bolivia (Mr Morales) and the Ministry of Mining (Mr Pimentel), 14 May 2010, **C-27**.

<sup>158</sup> Letter from Sinchi Wayra (Mr Capriles) to the Minister of Legal Defense (Ms Arismendi), 22 June 2010, **C-103**.

<sup>159</sup> See, eg, Letter from the Minister of Legal Defense (Ms Arismendi) to Sinchi Wayra (Mr Capriles), 28 June 2010, **C-104**; Letter from the Minister of Legal Defense (Ms Arismendi) to Sinchi Wayra (Mr Capriles), 20 July 2010, **C-105**.

- (iii) return of the tax refund certificates and the Tin Stock held at the time of nationalization at the Tin and Antimony Smelters, respectively.<sup>160</sup>
84. A committee and sub-committee were formed in late August 2010. Representatives of Glencore (through Sinchi Wayra), the Ministry of Mining and Comibol were to focus on the mining contracts, with the mediation of the Ministry of Legal Defense. Separate talks over the compensation owed for the two Smelters were to be held among Glencore (again through its Sinchi Wayra representatives) and the Ministry of Mining. Despite several meetings, however, no agreement was reached during 2010.<sup>161</sup>
85. In parallel with the negotiations, Glencore Bermuda continued focusing on maintaining operations at the Colquiri Mine. By 2010 production levels had increased again, thanks to rising metal prices and better overall economic conditions and Colquiri began designing new infrastructure, including the Main Ramp that, as already explained, would have facilitated the transport of minerals to the surface, thereby increasing production.
86. Throughout 2010 and 2011, Glencore Bermuda and its subsidiaries concentrated their efforts on the renegotiation of the shared-risk agreements. Within this framework, they planned to invest an additional US\$161 million in the Bolivian assets.<sup>162</sup> However, as described below, these plans were truncated in early 2012.

### **3. Bolivia nationalized the Colquiri Mine**

87. On 1 April 2012, a group of about one hundred local independent miners, known as *cooperativistas*, unlawfully entered the Colquiri Mine and stole minerals as well as mining equipment.<sup>163</sup> *Cooperativistas* are members of local private groups

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<sup>160</sup> Witness Statement of Christopher Eskdale, para 69.

<sup>161</sup> *Ibid*, para 70.

<sup>162</sup> Letter from Glencore International (Mr Maté) to the President of Bolivia (Mr Morales), 13 June 2012, **C-38bis**.

<sup>163</sup> *See* Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdoba), 3 April 2012, **C-30**.

of miners who carry out mining activities for their own benefit in the area. Largely unregulated, their interests are represented by various umbrella organizations, the main two being the National Federation of Mining Cooperatives (known as *Fencomin*) and the Mining Cooperatives Federation (known as *Fedecomín*). The invading *cooperativistas* confronted the workers, verbally harassing them and threatening them with violence.<sup>164</sup>

88. On 3 April 2012, a new group of people entered the Colquiri Mine. When spotted by a supervisor, they threatened to take his life should he report their unauthorized presence in the mine.<sup>165</sup> In light of the gravity of the incidents, Colquiri immediately informed Comibol and the relevant government ministries of the situation. In a letter addressed to Héctor Córdova, Comibol’s Executive President—with copies sent to the Ministry of Mining and the Ministry of Government—Colquiri requested that Comibol guarantee the peaceful possession and use of the mine. Colquiri reminded Comibol of its contractual obligation to “defend, protect guarantee and reclaim rights against incursions and usurpations and other interferences by third parties during the life of the contract [ . . . ]”<sup>166</sup> and requested its swift intervention. As Colquiri put it, the situation was “unsustainable.”<sup>167</sup>

These interferences with the development of the aforementioned mining operation, have so far and for the most part been dealt with by our company. Nonetheless, the current situation previously set out has become unsustainable, to the point where the Colquiri Workers’ Union has expressed to us its concern about the physical integrity of its members.

For this reason, we ask that your organization take the measures necessary to preserve peaceful possession and

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<sup>164</sup> See Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 3 April 2012, **C-30**.

<sup>165</sup> *Ibid.*

<sup>166</sup> Colquiri Lease, 27 April 2000, **C-11**, Clause 12.2.1.

<sup>167</sup> Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 3 April 2012, **C-30** (unofficial English translation from Spanish original).

public order in the Colquiri mining district, as required by the lease agreement.<sup>168</sup>

89. At this time, Glencore understood it was close to reaching a final agreement with the government concerning the new shared-risk contracts for Colquiri, Bolivar and Porco. However, in May 2012 Glencore representatives began hearing through their local contacts within the Colquiri Workers' Union, as well as the *Federación Sindical de Trabajadores Mineros de Bolivia (FSTMB)*, that the government was actually going to exclude Colquiri from the new contractual framework, because it intended to nationalize the mine in order to secure a supply of tin concentrates for the struggling Tin Smelter.<sup>169</sup>
90. In a meeting held on or around 12 May 2012 and attended by Glencore representatives, Comibol, Minister Pimentel and a delegation of the Colquiri Workers' Union, the government indeed suggested that Colquiri be excluded from the new contractual framework, a proposal which Glencore rejected outright.<sup>170</sup> As Mr Eskdale explained "in light of the 2009 Constitution which mandated the renegotiation of all mining contracts, such an exclusion meant nationalization."<sup>171</sup>
91. The possibility of a nationalization of Colquiri intensified the tension between Colquiri's workers and the *cooperativistas*. On the one hand, the workers pressed the government to finalize the pending mining contracts, including the one for

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<sup>168</sup> Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdoba), 3 April 2012, **C-30** (unofficial English translation from Spanish original).

<sup>169</sup> See Witness Statement of Christopher Eskdale, para 76; Email from Glencore International (Mr Hartmann) to Glencore International (Mr Eskdale) and Sinchi Wayra (Mr Capriles), 22 May 2012, **C-110**.

<sup>170</sup> See, eg, Email from Glencore International (Mr Hartmann) to Glencore International (Mr Eskdale) and Sinchi Wayra (Mr Capriles), 22 May 2012, **C-110**; see also Witness Statement of Christopher Eskdale, para 77.

<sup>171</sup> Witness Statement of Christopher Eskdale, para 77.

- Colquiri, in order to protect their benefits and guard against further disruptions from the cooperatives.<sup>172</sup>
92. On the other hand, the cooperatives were emboldened by the growing uncertainty over the future of Colquiri and increased their interferences in an attempt to gain access to additional mining areas within the deposit. The government did not intervene. Although the regular local police was there, no other appropriate means for protecting the Colquiri Mine or its workers were employed.<sup>173</sup>
93. It is against this backdrop that, around 4:30 am of 30 May 2012, about one thousand members of a local cooperative known as Cooperativa 26 de Febrero returned to the Colquiri Mine. They detonated dynamite in order to gain control of the deposit and blocked its entrance. Several workers were injured, as reported by local news sources:

[M]embers of the cooperativa 26 de Febrero have been, unexpectedly and violently, in control of the working areas of Empresa Minera Colquiri, operated by Sinchi [W]ayra. This move has left about 15 unionized miners injured. Speaking to Radio Fides, the former leader of the Colquiri Workers' Union, Crescencio Pinaya, said that a significant number of *cooperativistas* entered the mine as about 80 Sinchi Wayra workers were leaving following the first shift. He said the attackers drunkenly detonated sticks of dynamite to intimidate their outnumbered opponents. In this situation, about 15 individuals ended up being hurt the most by the aggressive behavior of the *cooperativistas*. He added that the members of the other shifts could not enter the inner part of the mine, which is completely blocked off

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<sup>172</sup> Witness Statement of Christopher Eskdale, para 78; *see also* Email from Glencore International (Mr Hartmann) to Glencore International (Mr Eskdale) and Sinchi Wayra (Mr Capriles), 22 May 2012, **C-110**.

<sup>173</sup> Witness Statement of Christopher Eskdale, para 79; *see also* Email from Glencore International (Mr Hartmann) to Glencore International (Mr Eskdale) and Sinchi Wayra (Mr Capriles), 22 May 2012, **C-110**.

by about one thousand members of the Cooperativa Minera  
26 de Febrero.<sup>174</sup>

94. On 30 May 2012, Colquiri again put Comibol—as well as the Ministry of Mining, the Ministry of the Presidency and the Ministry of Government—on notice that the safety of its employees was in serious danger and urgent official action was required:<sup>175</sup>

We demand prompt official action in this regard which protects our workers, employees and other individuals whose life, personal security, possessions and employment are seriously compromised. We understand that any failure to act which could later give rise to or prevent circumstances which no one desires, will be the responsibility of those whose very obligation it is to preserve the fundamental rights of individuals.<sup>176</sup>

95. Once more, Colquiri reminded Comibol of its contractual obligation, requesting compliance as a matter of urgency:

We demand, therefore, that this obligation be complied with immediately, as is appropriate, with full diligence, given the serious liabilities which this can entail for COMIBOL itself. We also require as a matter of urgency that COMIBOL initiate the appropriate actions as is the obligation of public servants in the face of knowledge about acts of this nature [ . . . ] We make the urgent requests set out in this letter in the confidence that the laws of the Plurinational State of Bolivia genuinely protect the life and security of individuals, as well as honorable work which the country really needs to promote.<sup>177</sup>

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<sup>174</sup> See “Cooperativistas mineros toman mina Colquiri,” *El Potosí*, 31 May 2012, **C-112** (unofficial English translation from Spanish original).

<sup>175</sup> See Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdoba), 30 May 2012, **C-31**.

<sup>176</sup> *Ibid* (unofficial English translation from Spanish original).

<sup>177</sup> *Ibid* (unofficial English translation from Spanish original).

96. On 30 May 2012, the Colquiri Workers' Union also contacted the government to seek its prompt intervention.<sup>178</sup> In three separate letters addressed to President Evo Morales, the then Minister of Mining, Mario Virreira Iporre, and the head of Comibol, the workers shared their resolution to provide the government with 24 hours within which to resolve the conflict.<sup>179</sup> They warned that, should the government fail to intervene, the union workers would be ready to retake the mine and the government would be to blame for any consequences of its inaction:

**THIRDLY.** – In the absence of a favorable response to the salaried mining workers we will be forced to retake our sources of employment and in case any regrettable event occurs, be it human or material loss, we will hold responsible the current government and the key actors which supported the misappropriation of our sources of employment without respecting the political constitution of our state.<sup>180</sup>

97. Despite these urgent pleas for intervention from both Colquiri and its workers, the government failed to intervene. The local police force sent to the mine was wholly inadequate and ineffective in managing the situation.<sup>181</sup>
98. As Albino García, the head of Fencomin, explained, the actions of the *cooperativistas* were a direct reaction to the government's lack of response to their demands. Mr García stated that “the occupation on the part of the Cooperativa 26 de Febrero is the responsibility of the Government, due to the fact that it has not given [the cooperative] working areas, as requested on various occasions.”<sup>182</sup>

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<sup>178</sup> Letters from the Sindicato Mixto de Trabajadores Mineros Colquiri to the President of Bolivia (Mr Morales), the Ministry of Mining (Mr Virreira), and Comibol (Mr Córdova), 30 May 2012, **C-111**.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid* (unofficial English translation from Spanish original).

<sup>181</sup> *See, eg*, “La Federación de Mineros prepara la retoma de Colquiri,” *La Prensa*, 1 June 2012, **C-114**.

<sup>182</sup> *Ibid* (unofficial English translation from Spanish original).

99. As the situation remained unresolved, union workers also complained of the government's lack of interest in resolving the Colquiri conflict. They called for an indefinite general strike and any other actions necessary to retake the mine.<sup>183</sup> As explained by Miguel Pérez, head of the FSTMB:

The Government is not willing to implement definitive solutions with respect to the abuses, nor is it prepared to re-take the Colquiri mine using public force, which is why a meeting was scheduled for 9 am on the same day, where it was decided to carry out an indefinite general strike, without discarding other options such as a blockade and even the mining workers re-taking the mine.<sup>184</sup>

100. Following these demands, on 3 June 2012, the Colquiri Workers' Union and FSTMB reached an Act of Understanding with Comibol, the Ministry of Mining and the Ministry of Labor.<sup>185</sup> Neither Glencore nor Colquiri were, however, included in the discussions or the negotiations. In the agreement, the government officials undertook to ensure compliance with the agreements in force at the time involving mining rights at Colquiri and to finalize the migration of the Colquiri, Porco and Bolivar contracts once the conflict was settled.<sup>186</sup>
101. Following the announcement of the agreement by the government, Glencore worked with the government, the unions and the cooperatives to find a workable solution. After considering several areas, Colquiri accepted ceding the San Antonio vein to the cooperatives.<sup>187</sup> Through Colquiri, the company also undertook to create 200 additional jobs and to provide the Cooperativa 26 de

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<sup>183</sup> "Mineros decretan paro general desde mañana por avasallamientos," *La Patria*, 3 June 2012, **C-116**.

<sup>184</sup> *Ibid* (unofficial English translation from Spanish original).

<sup>185</sup> Minutes of understanding with the Sindicato de Trabajadores Mineros de Colquiri and the Federación Sindical de Trabajadores Mineros de Bolivia, 3 June 2012, **C-115**.

<sup>186</sup> *Ibid*.

<sup>187</sup> "En suspenso acuerdo entre Gobierno y mineros sindicalizados y cooperativistas," *La Patria*, 4 June 2012, **C-117**; Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Virreira) and Comibol (Mr Córdova), 5 June 2012, **C-120**.

Febrero with financing, as well as with the necessary technical support to exploit the San Antonio vein.<sup>188</sup>

102. This proposal was not, however, accepted by the *cooperativistas*.<sup>189</sup> The head of Fencomin, Albino García, explained that because the government had failed to respond to their requests in a timely manner, the cooperatives were now seeking full control of the Colquiri Mine rather than simply additional working areas.<sup>190</sup> This exacerbated the stand-off with the union workers who were, by now, ready to recuperate the mine by force. As explained by a local news source at the time:

Albino García said that, in the beginning, the extension of the working areas was requested, however, because the Government took too long to respond to the proposal, it was decided to request the removal of the company Sinchi Wayra. The salaried workers, meanwhile, are preparing to re-take the deposit by force.<sup>191</sup>

103. In the absence of an agreement, and frustrated with the government's inability to break the impasse, FSTMB announced a general strike.<sup>192</sup>
104. On or around 6 June 2012, the Minister of Mining publicly raised nationalization as a possible way out of the impasse.<sup>193</sup> The *cooperativistas*, however, opposed nationalization and continued demanding full control of the mine.<sup>194</sup>

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<sup>188</sup> See Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Virreira) and Comibol (Mr Córdova), 5 June 2012, **C-120**; Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Virreira) and Comibol (Mr Córdova), 5 June 2012, **C-119**.

<sup>189</sup> "Conflicto minero se agrava tras fracasar diálogo," *Los Tiempos*, 5 June 2012, **C-122**.

<sup>190</sup> "Colquiri: Mineros suspenden labores y cooperativistas no aceptan veta," *La Patria*, 5 June 2012, **C-118**; "La Fstmb se prepara para recuperar la mina Colquiri," *El Potosí*, 5 June 2012, **C-121**.

<sup>191</sup> "La Fstmb se prepara para recuperar la mina Colquiri," *El Potosí*, 5 June 2012, **C-121** (unofficial English translation from Spanish original).

<sup>192</sup> "Mineros decretan paro general desde mañana por avasallamientos," *La Patria*, 3 June 2012, **C-116**.

<sup>193</sup> "Gobierno plantea nacionalizar Colquiri para poner fin al conflicto minero," *La Patria*, 6 June 2012, **C-123**.

<sup>194</sup> See "Mineros de Colquiri exigen al Gobierno nacionalizar la mina," *La Razón*, 6 June 2012, **C-124**.

105. On 7 June 2012, in an urgent effort to avoid losing the mine entirely and put an end to the escalating violence, Colquiri did not object to an agreement with three local cooperatives, Fedecomin, Fencomin and the Deputy Minister of the Ministry of Mining whereby the Rosario vein would be ceded to the cooperatives (the *Rosario Agreement*).<sup>195</sup> In order to mitigate its impact on Colquiri, the ceding of the Rosario vein was expressly made conditional on the cooperatives selling all of their raw material production to Colquiri.<sup>196</sup> Colquiri would then blend it, turn it into concentrates, and commercialize it to third parties.<sup>197</sup> Pursuant to the Rosario Agreement, Colquiri was also to provide the cooperatives with technical assistance and supervision of their mining activities.<sup>198</sup> The cooperatives, on their part, undertook to immediately cease the occupation of the mine and allow Colquiri to resume work at the deposit.<sup>199</sup>
106. On 8 June 2012, the *cooperativistas* decided to lift their blockade.<sup>200</sup> Glencore Bermuda and Colquiri thought that operations would resume. What they did not know, however, was that, within days of executing the Rosario Agreement, the government would reach a separate and inconsistent agreement with the salaried workers' unions, providing for the nationalization of the Colquiri Mine—both the areas operated by Sinchi Wayra and the Rosario vein.<sup>201</sup>

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<sup>195</sup> Agreement between Colquiri, Fedecomin, Fencomin, Central Local de Cooperativas Mineras de Colquiri, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, Cooperativa 26 de Febrero and the Ministry of Mining (*Rosario Agreement*), 7 June 2012, **C-35**, art 1. The ceding of the Rosario vein was done with the “approval of [Comibol], as the administrator of the mining rights in the Colquiri mine, on behalf of the Bolivian State, and without objection from Colquiri S.A. as lessee of said mine.” See also Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 8 June 2012, **C-125**.

<sup>196</sup> Rosario Agreement, 7 June 2012, **C-35**, Art 2.

<sup>197</sup> Witness Statement of Christopher Eskdale, para 93.

<sup>198</sup> Rosario Agreement, 7 June 2012, **C-35**, Art 2.

<sup>199</sup> *Ibid*, Art 5.

<sup>200</sup> “Sinchi Wayra entrega veta Rosario a tres cooperativas,” *La Razón*, 9 June 2012, **C-36**.

<sup>201</sup> See “Rechazan preacuerdo para nacionalización de la mina Colquiri,” *El Potosí*, 10 June 2012, **C-127**; “Mineros retomarán Colquiri y bloquearán los caminos,” *Página Siete*, 10 June 2012, **C-126**; “Revertirán concesiones si no hay inversión,” *La Razón*, 12 June 2012, **C-131**.

107. When the news about the nationalization broke, it enraged the *cooperativistas*, who threatened a nationwide blockade and occupation of mines across the country.<sup>202</sup> Clashes again broke out between the members of the cooperatives and the salaried miners.<sup>203</sup>
108. On or around 12 June 2012, Comibol, the Minister of Mining and the Vice Ministry of Mining and Metallurgic Productive Development entered into yet another separate agreement regarding the Colquiri Mine—this time with Fencomin, Fedecomín and various local cooperatives.<sup>204</sup> Glencore was again not invited to these negotiations nor was it a party to the agreement. The agreement provided that Comibol would assume direct control over the Colquiri (nationalized) deposit<sup>205</sup> and the Cooperativa 26 de Febrero was going to be granted the right to exploit the Rosario vein.<sup>206</sup> Yet, Glencore only learned of this agreement through public declarations made by government officials.<sup>207</sup>
109. Faced with this unacceptable and unfair treatment, on 13 June 2012, in a letter addressed to President Evo Morales, Glencore requested a meeting with the

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<sup>202</sup> See “Cooperativistas rechazan acuerdo por la mina Colquiri,” *La Razón*, 10 June 2012, **C-128**; “Cooperativistas de Colquiri inician presiones y dialogan con Gobierno,” *Los Tiempos*, 12 June 2012, **C-132**.

<sup>203</sup> See “Mineros bloquean Conani exigiendo nacionalizar el 100% de mina Colquiri,” *La Patria*, 13 June 2012, **C-134**.

<sup>204</sup> Minutes of Agreement among Fencomin, Fedecomín, Central Local de Cooperativas Mineras de Colquiri, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, Cooperativa 26 de Febrero, the Minister of Mining, the Vice Minister of Productive Mining and Metallurgic Development, Comibol, and the Legal Director of the Ministry of Mining, 12 June 2012, **C-129**; see also “Mediante acuerdo mineros obtienen nuevos parajes en Colquiri,” *El Diario*, 13 June 2012, **C-137**; “Acuerdan nacionalizar sólo a Glencore,” *Los Tiempos*, 13 June 2012, **C-136**.

<sup>205</sup> Minutes of Agreement among Fencomin, Fedecomín, Central Local de Cooperativas Mineras de Colquiri, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, Cooperativa 26 de Febrero, the Minister of Mining, the Vice Minister of Productive Mining and Metallurgic Development, Comibol, and the Legal Director of the Ministry of Mining, 12 June 2012, **C-129**.

<sup>206</sup> Minutes of Agreement among Fencomin, Fedecomín, Central Local de Cooperativas Mineras de Colquiri, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, Cooperativa 26 de Febrero, the Minister of Mining, the Vice Minister of Productive Mining and Metallurgic Development, Comibol, and the Legal Director of the Ministry of Mining, 12 June 2012, **C-129**.

<sup>207</sup> Letter from Glencore International (Mr Maté) to the President of Bolivia (Mr Morales), 13 June 2012, **C-38bis**.

government to discuss the situation at the Colquiri Mine, noting how “surprised and concerned” it was with government officials’ recent declarations mentioning a possible nationalization of Colquiri in light of the agreement reached between all parties on 7 June 2012:

Given the advanced stage of the negotiation process between Comibol and Glencore and the commitments to be made by the latter, Glencore is particularly surprised and concerned by the statements of members of the Government, in particular, the statement of 11 June 2012 of the Minister of the Presidency of Bolivia, Mr. Juan Ramón Quintana, with respect to an alleged “pre-agreement” with the mining unions to nationalize Colquiri and the statement of 12 June 2012 of the Vice-President of Bolivia, Álvaro García Linera, which announced the decision of the Government to nationalize Colquiri.

These statements are even more unexpected given the fact that last Thursday, 7 June 2012, Colquiri signed an agreement with the mining cooperatives and the Ministry of Mining and Metallurgy which has the express approval of the Government which signed the agreement via Mr. Isaac Meneses Guzmán, Vice-Minister of Mining Cooperatives of the Ministry of Mining and Metallurgy [ . . . ] The intention was to avoid further violence, mitigate the damages and avoid any threat of nationalization. At the same time, it sought to ensure long-term social stability in the area surrounding the Colquiri mine by guaranteeing the continued employment of the salaried miners, as well as greater opportunities for the members of the mining cooperatives and by respecting the continuity of the mining operations in accordance with the terms of the negotiations with Comibol.<sup>208</sup>

110. The government, however, only replied on 19 June 2012.<sup>209</sup> In the meantime, the conflict had continued to escalate. The government had promised the salaried workers the nationalization of the Colquiri Mine, yet had separately assured the

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<sup>208</sup> Letter from Glencore International (Mr Maté) to the President of Bolivia (Mr Morales), 13 June 2012, **C-38bis**.

<sup>209</sup> Letter from the Ministry of Mining (Mr Beltrán) to Sinchi Wayra (Mr Capriles), 19 June 2012, **C-144**.

- cooperatives that they would have control over the exploitation of the Rosario vein.<sup>210</sup> The union workers opposed ceding working areas to the cooperatives and the cooperatives were not willing to lose what they had just gained through the Rosario Agreement.<sup>211</sup> While the workers vowed to forcibly retake the Rosario vein, the *cooperativistas* set up roadblocks.<sup>212</sup> Glencore, in the meantime, had been excluded from all talks by the government and could do nothing. Despite some hopes following the 7 June 2012 agreement, the Colquiri Mine continued to be inaccessible to Glencore since it was first violently taken on 30 May 2012.<sup>213</sup>
111. Government officials continued holding meetings with the union workers and the cooperatives regarding the fate of the Colquiri Mine, without involving Glencore in the process.<sup>214</sup> While Freddy R. Beltrán Robles, Vice Minister of Productive Mining Development, had initially invited Glencore to join a meeting with the head of Comibol, that meeting was subsequently cancelled by the government.<sup>215</sup>
112. Finally, on 20 June 2012—without more—the government issued the Colquiri Mine Nationalization Decree ordering Comibol to take over control of the Colquiri Mine.<sup>216</sup> The machinery, equipment and supplies of Colquiri located at the Colquiri Mine were also nationalized, in favor of a new company to be created called Empresa Minera Colquiri. The Colquiri Mine Nationalization Decree only

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<sup>210</sup> See, eg, “Responsabilizan a Linera y Virreira por el conflicto,” *El Potosí*, 15 June 2012, **C-140**.

<sup>211</sup> See, eg, “Asalariados y cooperativistas enfrentados por mina Colquiri,” *Los Tiempos*, 15 June 2012, **C-138**; Witness Statement of Christopher Eskdale, para 102.

<sup>212</sup> “Los asalariados retoman Colquiri y reavivan el conflicto minero,” *La Razón*, 15 June 2012, **C-141**; “Colquiri se convierte en un campo de batalla,” *La Prensa*, 15 June 2012, **C-142**.

<sup>213</sup> See, eg, “Estalla conflicto minero en Colquiri y se reportan las primeras bajas,” *La Patria*, 15 June 2012, **C-139**; “Reanudan producción de estaño en Colquiri,” *El Potosí*, 6 July 2012, **C-146**.

<sup>214</sup> See “Acuerdo depende de redistribuir vetas,” *La Razón*, 17 June 2012, **C-143**.

<sup>215</sup> Witness Statement of Christopher Eskdale, para 104.

<sup>216</sup> Supreme Decree No 1,264 (the *Colquiri Mine Nationalization Decree*), 20 June 2012, published in the *Gaceta Oficial* No 384NEC on 20 June 2012, **C-39**.

- provided for limited compensation covering the machinery, equipment and supplies present at the Colquiri Mine.<sup>217</sup> Yet, no payment was ever made.
113. On 27 June 2012, Glencore sent another communication to the government of Bolivia notifying it of a dispute under the Treaty.<sup>218</sup> This time, the third one.
- 4. Despite infinite attempts, Glencore did not receive any compensation for the expropriation of its investments**
114. Following the nationalization of Colquiri, Glencore went back to the negotiating table.<sup>219</sup> Two working groups were formed in 2012, one tasked with finalizing the Bolivar and Porco contracts and one with assessing the value of the nationalized assets.<sup>220</sup> Concerned with the risk of further nationalizations Glencore concluded new shared-risk agreements for the Porco and Bolivar mining concessions.<sup>221</sup> Negotiations on the compensation for the nationalization of the Smelters and Colquiri, however, largely stalled.<sup>222</sup>
115. On 20 May 2015, Mr Eskdale wrote to Héctor Arce, Bolivia’s Attorney General, pointing out that, despite eight years of negotiations, no compensation had been paid by Bolivia for the nationalizations of Glencore Bermuda’s assets.<sup>223</sup> Complaining of the government’s failure to engage in negotiations, Mr Eskdale noted that it was “imperative” that discussions resume in order to solve the

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<sup>217</sup> Colquiri Mine Nationalization Decree, 20 June 2012, **C-39**, art 1.IV.

<sup>218</sup> See Letters from Glencore International PLC (Mr Maté) to the President of Bolivia (Mr Morales), 27 June 2012, **C-40**.

<sup>219</sup> See, eg, Letter from Glencore PLC (Mr Capriles) to the Minister of Mining (Mr Virreira), 3 July 2012, **C-145**.

<sup>220</sup> Witness Statement of Christopher Eskdale, para 107.

<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid.*, para 108.

<sup>223</sup> Letters from Glencore International (Mr Eskdale) to the Attorney General (Mr Arce), the President of Bolivia (Mr Morales), the Vice President of Bolivia (Mr García), the Ministry of the Presidency (Mr Quintana), the Minister of Mining (Mr Navarro), and the President of Comibol (Mr Quispe), 20 May 2015, **C-148**.

- pending issues.<sup>224</sup> Meetings were eventually scheduled in June 2015.<sup>225</sup> At this time, Glencore presented the Attorney General and the Minister of Mining with the results of valuations of Vinto and Colquiri carried out by independent experts. The government rejected these entirely.<sup>226</sup>
116. Between August and September 2015, several commissions were again set up to analyze the “technical aspects” of the Tin Smelter, Antimony Smelter and Colquiri nationalizations.<sup>227</sup> However, it was clear that Bolivia was not intent on actually reaching an agreement—the government delayed and cancelled meetings, even when Glencore representatives had purposely travelled to Bolivia from Europe to participate in consultations.<sup>228</sup>
117. Despite several technical working groups being set up, Bolivia never presented a concrete proposal regarding the proper amount of compensation.<sup>229</sup> Instead, although it eventually accepted the appropriateness of using a DCF methodology to calculate the fair market value of the assets, in a clear demonstration of its lack of good faith, the government actually offered a negative valuation<sup>230</sup>—

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<sup>224</sup> Letters from Glencore International (Mr Eskdale) to the Attorney General (Mr Arce), the President of Bolivia (Mr Morales), the Vice President of Bolivia (Mr García), the Ministry of the Presidency (Mr Quintana), the Minister of Mining (Mr Navarro), and the President of Comibol (Mr Quispe), 20 May 2015, **C-148**.

<sup>225</sup> Witness Statement of Christopher Eskdale, para 112; *see also* Letter from Glencore International (Mr Eskdale) to the Minister of Mining (Mr Navarro), 1 July 2015, **C-149**; Letter from Glencore International (Mr Eskdale) to the Attorney General (Mr Arce), 1 July 2015, **C-150**.

<sup>226</sup> Witness Statement of Christopher Eskdale, para 113.

<sup>227</sup> *See* Letter from the Minister of Mining (Mr Navarro) to Glencore International (Mr Eskdale), 23 September 2015, **C-153**; *see also* Letter from Glencore International (Mr Eskdale) to the Attorney General (Mr Arce), 30 September 2015, **C-154**.

<sup>228</sup> *See, eg.* Letter from Glencore International (Mr Eskdale) to the Minister of Mining (Mr Navarro), 29 October 2015, **C-156**; Letter from Glencore International (Mr Eskdale) to the Attorney General (Mr Arce), 12 October 2015, **C-155**; Letter from Glencore International (Mr Eskdale) to the Attorney General (Mr Arce), 4 November 2015, **C-158**; Letter from the Attorney General (Mr Arce) to Glencore International (Mr Eskdale), 3 November 2015, **C-157**; Letter from Glencore International (Mr Eskdale) to the Minister of Mining (Mr Navarro), 12 August 2015, **C-152**.

<sup>229</sup> Witness Statement of Christopher Eskdale, para 117.

<sup>230</sup> *Ibid.*, para 116.

suggesting that Glencore should be grateful to the government for having nationalized the assets.

118. As explained by Mr Eskdale, Glencore Bermuda was left with no option but to initiate arbitration proceedings in order to obtain compensation for the expropriation of its investments.<sup>231</sup>

### III. THE LAW APPLICABLE TO THIS DISPUTE

119. Glencore Bermuda's claims arise from Bolivia's obligations as set out in the Treaty. International jurisprudence is clear that the Treaty itself, as a *lex specialis*, is the primary source of law governing the dispute. To the extent it is required, customary international law supplements and informs the Treaty's provisions.<sup>232</sup>
120. The application of the substantive provisions of the Treaty, as *lex specialis*, is incontestable. Bilateral Investment Treaties (*BITs*) grant foreign investors direct access to arbitration so that investors may invoke the substantive protections of the BIT, and hold host States to the independent international standard enshrined in the BIT. As explained by the *CME v Czech Republic* tribunal:

A purpose of an international investment treaty is to grant arbitral recourse outside the host country's domestic legal system. The clear purpose is to grant independent judicial remedies on the basis of an international, accepted legal standard in order to protect foreign investments.<sup>233</sup>

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<sup>231</sup> *Ibid*, para 119.

<sup>232</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic* (ICSID Case No ARB/97/3) Decision on Annulment, 3 July 2002, **CLA-37**, para 102 ('the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law'); *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (ICSID Case No ARB/87/3) Final Award, 27 June 1990, **CLA-14**, paras 20-21; *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt* (ICSID Case No ARB/99/6) Award, 12 April 2002, **CLA-34**, paras 85-87.

<sup>233</sup> *CME Czech Republic BV v Czech Republic* (UNCITRAL) Partial Award, 13 September 2001, **CLA-32**, para 417.

121. The Treaty is to be supplemented by other rules of international law since, as the Vienna Convention provides, treaties are “governed by international law” and must be interpreted in the light of “any relevant rules of international law applicable.”<sup>234</sup> Thus, apart from the Treaty, applicable rules of international law include customary international law as well as the “general principles of law recognized by civilized nations” referred to in Article 38 of the Statute of the International Court of Justice.<sup>235</sup>
122. Glencore Bermuda will cite to the decisions of previous international tribunals and authoritative commentators on the issues presented within this Statement of Claim. Although not binding on the present Tribunal, those previous decisions and commentary identify relevant rules of international law applicable in this case and may provide persuasive guidance for the legal issues presented in this arbitration.
123. With regard to the role of Bolivian law, it informs the content of Glencore Bermuda’s rights and obligations within the domestic legal and regulatory framework and Bolivia’s commitments under that same framework, including those which Glencore Bermuda considers to have been violated by the Bolivian government.<sup>236</sup> However, it is international law that applies to a dispute under the Treaty; a State may not invoke domestic law to excuse or preclude a claim under the Treaty. As explained in the International Law Commission’s Articles on Responsibility of States for Intentionally Wrongful Acts:

The characterization of an act of a State as internationally wrongful is governed by international law. Such

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<sup>234</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, **CLA-6**, Arts 2(1)(a) and 31(3)(c).

<sup>235</sup> *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award, 22 September 2014, **CLA-123**, para 575.

<sup>236</sup> *Ibid*, paras 534-535.

characterization is not affected by the characterization of the same act as lawful by internal law.<sup>237</sup>

124. The Tribunal must therefore apply the provisions of the Treaty, informed and supplemented as necessary by customary international law.

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

##### **A. THE TRIBUNAL HAS JURISDICTION *RATIONAE TEMPORIS***

125. The Treaty was signed on 24 May 1988,<sup>238</sup> and entered into force on 16 February 1990. It was extended to the United Kingdom overseas territory of Bermuda on 9 December 1992 pursuant to an exchange of notes.<sup>239</sup> Bolivia denounced the Treaty with effect from May 2014. Nevertheless, in accordance with Article 13 of the Treaty, investments made prior to Bolivia's denunciation of the Treaty continue to benefit from its protection for a period of twenty years.<sup>240</sup>
126. As explained at Section II.C above, Glencore Bermuda acquired its interest in Vinto and Colquiri—and with that its interest in the Smelters and the Colquiri Lease—between March 2005 and April 2006.<sup>241</sup> Therefore, all of Glencore Bermuda's investments were made whilst the Treaty was in force and prior to Bolivia's first Treaty breach—the nationalization of the Tin Smelter on 9

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<sup>237</sup> See J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (1st edn 2002) (Extract) (2002), **CLA-33**, p 3.

<sup>238</sup> Treaty, **C-1**.

<sup>239</sup> Exchange of Notes, 3 December 1992 and 9 December 1992, pursuant to which the Treaty was extended to Bermuda and other territories attached as **C-2**.

<sup>240</sup> Treaty, **C-1**, Art 13.

<sup>241</sup> Witness Statement of Christopher Eskdale, paras 19-22; See Assignment and Assumption Agreements between Glencore International and Glencore Bermuda, 7 March 2005, **C-64**. Put and Call Agreement between CDC and Glencore International, 15 March 2005, **C-65**; Put Notice from Actis (on behalf of CDC) to Glencore International, 21 March 2006, **C-67**.

February 2007.<sup>242</sup> Accordingly, there is no doubt that this Tribunal has jurisdiction *ratione temporis* over the present dispute.

**B. GLENCORE BERMUDA IS A PROTECTED INVESTOR UNDER THE TREATY**

127. The protections of the Treaty apply to companies incorporated or constituted under the laws of the United Kingdom or in any territory to which the Treaty has been extended.<sup>243</sup> Article 1(d) of the Treaty defines “companies,” in respect of the United Kingdom or any of its territories as follows:

[C]orporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 11.<sup>244</sup>

128. Glencore Bermuda is a company incorporated and constituted under the laws in force in Bermuda.<sup>245</sup> The Treaty has been extended to Bermuda in accordance with its Article 11, through an exchange of notes between the Contracting Parties, as noted above. Glencore Bermuda is therefore a qualifying company under Article 1(d) and hence a protected investor under the Treaty.

**C. GLENCORE BERMUDA HAS MADE INVESTMENTS IN BOLIVIA PROTECTED UNDER THE TREATY**

129. Article 1(a) of the Treaty defines an investment qualifying for protection in broad terms, as follows:

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<sup>242</sup> See Section II.C above. On that date the armed forces forcibly entered the premises of Complejo Vinto and took control of Vinto and the Tin Smelter. See Certificate of the Secretary of Kempsey, 19 May 2011, C-13; Certificate of the Secretary of Iris, 19 May 2011, C-14; Certificate of the Secretary of Shattuck, 1 February 2012, C-15; Share register of Sinchi Wayra, C-16; Share register of Colquiri C-17; Share register of Vinto, C-18.

<sup>243</sup> Treaty, C-1, Art 1 (d)(i).

<sup>244</sup> *Ibid.*

<sup>245</sup> Certificate of incorporation of Glencore Bermuda (as Sandon Ltd), 23 December 1993, C-42; Certificate of incorporation on change of name of Glencore Bermuda (from Sandon Ltd), 30 December 1994, C-43; and By-Laws of Glencore Bermuda, 12 December 2012, C-44.

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

- (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
- (ii) shares in and stock and debentures of a company and any other form of participation in a company;
- (iii) claims to money or to any performance under contract having a financial value;
- (iv) intellectual property rights and goodwill;
- (v) any business concessions granted by the Contracting Parties in accordance with their respective laws, including concessions to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their characters as investments. [...]<sup>246</sup>

130. As has been recognized previously by tribunals construing similarly-worded provisions, this is a broad definition of investment. In *Bayindir v Pakistan*, the tribunal observed that “[o]n a comparative basis, it has been suggested that the reference to ‘every kind of asset’ is ‘[p]ossibly the broadest’ among similar general definitions contained in BITs.”<sup>247</sup> According to one UNCTAD study, a treaty that defines “investment” to include “every kind of asset” suggests that “the term embraces everything of economic value, virtually without limitation.”<sup>248</sup>
131. Both by reference to the broad general definition and the specific illustrative categories of “investment” in the Treaty, Glencore Bermuda has made qualifying

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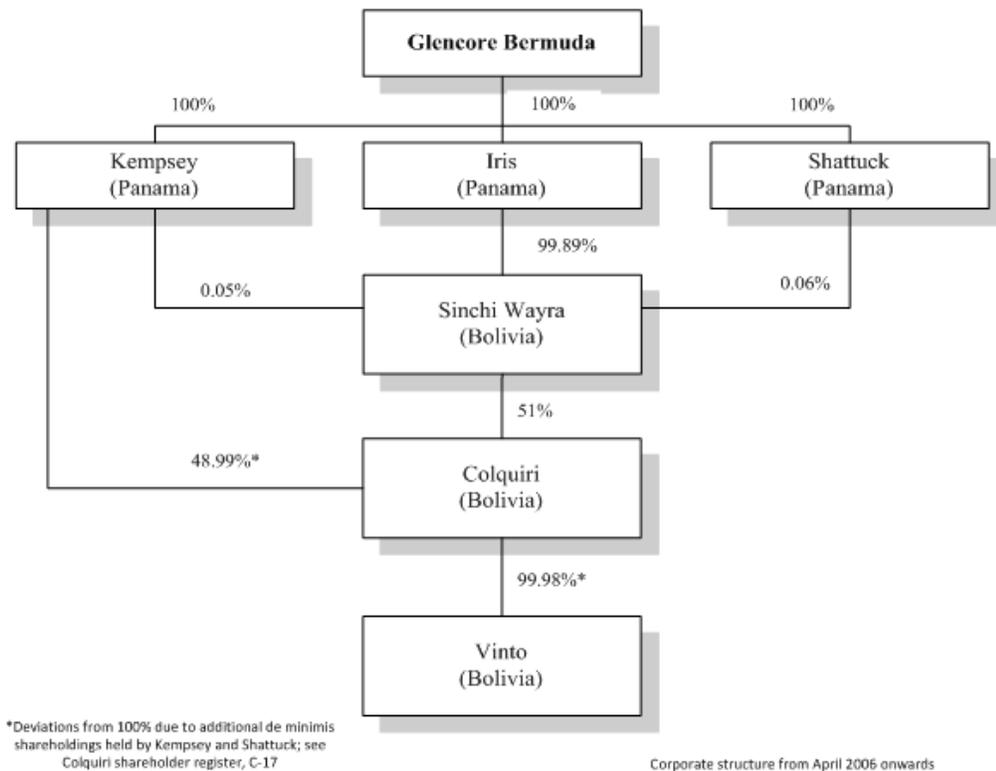
<sup>246</sup> Treaty, C-1, Art 1(a).

<sup>247</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Decision on Jurisdiction, 14 November 2005, **CLA-60**, para 113.

<sup>248</sup> UNCTAD, “International Investment Agreements: Key Issues” (2004) I UNCTAD/ITE/IIT/2004/10, **CLA-47**, p 143.

investments in Bolivia. Glencore Bermuda's investments qualifying for protection under Article 1 of the Treaty include:

- (a) its 100 percent indirect shareholding in Vinto and Colquiri, both Bolivian companies,<sup>249</sup> as shown in the structure below; and



- (b) its indirect stake in the assets of Vinto and Colquiri, including any movable and immovable property, rights and claims to money having a

<sup>249</sup> See Section II.C above. Glencore wholly owns the Panamanian Companies. Certificate of the Secretary of Kempsey, 19 May 2011, C-13; Certificate of the Secretary of Iris, 19 May 2011, C-14; and Certificate of the Secretary of Shattuck, 1 February 2012, C-15.

The Panamanian Companies, in turn, together wholly own Sinchi Wayra. Share register of Sinchi Wayra, C-16. Shattuck, Kempsey and Sinchi Wayra, together, wholly own Colquiri. Share register of Colquiri SA, C-17. Kempsey, Shattuck and Colquiri together, wholly own Vinto. Share register of Vinto, C-18.

financial value, such as rights under the Colquiri Lease, the Smelters, and the Tin Stock.<sup>250</sup>

132. The Treaty protects such indirect investments in the same manner as it would protect direct investments. This is evident from the text of the Treaty, which expressly extends coverage to “any” property rights (Article 1(a)(i)) and “any” form of participation in a company (Article 1(a)(ii)). Moreover, Article 5(2) of the Treaty specifically provides that the expropriated assets of any Bolivian company owned by a foreign company (such as Glencore Bermuda) are to be treated for compensation purposes as if they were owned by the foreign shareholder.<sup>251</sup> Finally, arbitral tribunals have held that indirect investments (such as Glencore Bermuda’s indirect shareholding in Colquiri and Vinto, and Glencore Bermuda’s indirect interest in the Smelters and the Colquiri Lease) qualify as protected investments under treaties with broad definitions of the term “investment,” such as the present Treaty, even though those treaties do not explicitly mention indirect investments.<sup>252</sup>

**D. THE PARTIES HAVE CONSENTED TO ARBITRATION AND ALL REQUIREMENTS UNDER THE TREATY AND THE UNCITRAL RULES HAVE BEEN MET**

133. Bolivia expressly and unequivocally consented to resolve investment disputes with UK investors through international arbitration by way of Article 8 of the Treaty, which provides:

(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not

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<sup>250</sup> See Section II.C, above.

<sup>251</sup> Treaty, **C-1**, Art 5(2).

<sup>252</sup> *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Decision on Jurisdiction, 3 August 2004, **CLA-51**, para 137; *Ioannis Kardassopoulos v Georgia* (ICSID Case No ARB/05/18) Decision on Jurisdiction, 6 July 2007, **CLA-69**, paras 122-124; and *Mobil Corporation, Venezuela Holdings BV, and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27) Decision on Jurisdiction, 10 June 2010, **CLA-97**, para 165.

been legally and amicably settled shall after a period of six months from written notification of a claim be submitted to international arbitration if either party to the dispute so wishes.

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

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

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

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

If after a period of six months from written notification of the claim there is no agreement to an alternative procedure, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.<sup>253</sup>

134. Article 8 of the Treaty establishes a number of requirements for jurisdiction and admissibility. All of these requirements are satisfied in this case:

(a) a dispute exists between Glencore Bermuda (as a national of one Contracting Party) and Bolivia (the other Contracting Party) concerning

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<sup>253</sup> Treaty, C-1, Art 8 (emphasis added).

the obligations of Bolivia under the Treaty in relation to investments made by Glencore Bermuda in Bolivia;

- (b) in its written notices dated 11 December 2007, 14 May 2010 and 27 June 2012 Glencore Bermuda formally notified Bolivia of the existence of the dispute, pursuant to Article 8 of the Treaty;<sup>254</sup>
- (c) Glencore Bermuda repeatedly sought to resolve the dispute amicably. However, no satisfactory response was ever received from the Bolivian government;<sup>255</sup> and
- (d) more than six months have now elapsed since Glencore Bermuda notified Bolivia of the existence of the dispute in relation to each of the nationalizations, and the dispute remains existent.

- 135. Bolivia has consented to arbitration pursuant to Article 8 of the Treaty.
- 136. Glencore Bermuda has provided its consent to arbitration in the Notice of Arbitration, dated 19 July 2016. The dispute was therefore duly submitted to arbitration under the UNCITRAL Rules pursuant to Article 8(2), final paragraph, of the Treaty.
- 137. The parties are free to agree on the procedural rules applicable to this arbitration. In Article 8(2), the Treaty provides for the use of the UNCITRAL Rules in force as the default procedure if the parties do not agree on an alternative within six

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<sup>254</sup> Letter from Glencore Bermuda (Mr Kalmin and Mr Hubmann) to Ministry of the Presidency (Mr Quintana), 11 December 2007, **C-25**; Letters from Glencore International PLC (Mr Maté and Mr Glasenberg) to the President of Bolivia (Mr Morales) and the Ministry of Mining (Mr Pimentel), 14 May 2010, **C-27**; and Letters from Glencore International PLC (Mr Maté) to the President of Bolivia (Mr Morales), 27 June 2012, **C-40**. *See also* Letter from Glencore International (Mr Strothotte) to the President of Bolivia (Mr Morales), 22 February 2007, **C-21**.

<sup>255</sup> *See* Section II.E, above.

months of the written notifications of the claim. Glencore Bermuda and Bolivia have agreed that the 2010 UNCITRAL Rules apply to these proceedings.<sup>256</sup>

## V. **BOLIVIA BREACHED ITS OBLIGATIONS UNDER THE TREATY AND INTERNATIONAL LAW**

138. Bolivia has breached its obligations under the Treaty through a series of omissions and measures taken by its central government and other State authorities, including the Ministry of Mining, Ministry of the Presidency, Ministry of Government, Ministry of Finance, Ministry of Legal Defense, and Comibol. The actions of these State organs are attributable to Bolivia.<sup>257</sup>

139. In summary:

- (a) as described in Section V.A below, Bolivia seized the Smelters, the Tin Stock and the Colquiri Lease, and in so doing it destroyed all the value of Glencore Bermuda's shareholding in Colquiri and Vinto. Bolivia has refused to compensate Glencore Bermuda for these takings. Each expropriation was unlawful and in violation of Article 5 of the Treaty due to a lack of prompt compensation and due process; and
- (b) as described in Sections V.B and V.C below, the way the Smelters, the Tin Stock and the Colquiri Lease were seized also amounts to breaches by Bolivia of Article 2(2) of the Treaty, in particular:

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<sup>256</sup> Terms of Appointment, 29 March 2017, para 3.1.

<sup>257</sup> International Law Commission, "Draft articles on Responsibility of States for Internationally Wrongful Acts with commentary" [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, arts 4 and 5; *see also* Section V.B.3, below. Comibol is a "public, autarchic company dependent on the National Secretariat of Mining" and subject to State control. Mining Code, 17 March 1997, **R-4**, Art 91; Supreme Decree No 29,894, 7 February 2009, published in the *Gaceta Oficial* No 116, **C-96**, Art 75(h) ("The functions of the Ministry of Mining and Metallurgy, with respect to the competences assigned at the central level by the Political Constitution of the State, are the following: [...] h. Exercise tuition over the national autarchic mining and metallurgical company, smelting companies, metallurgical companies, iron and steel works companies and entities providing services and assistance for the mining sector.") (unofficial English translation from Spanish original).

- i. Bolivia failed to accord Glencore Bermuda's investments full protection and security, including by breaching its obligations to Glencore Bermuda pursuant to the Treaty's umbrella clause; and
- ii. Bolivia failed to accord Glencore Bermuda's investments fair and equitable treatment, and to protect it from arbitrary and discriminatory measures.

140. We address each of these claims in detail in the sections below.

**A. BOLIVIA EXPROPRIATED GLENCORE BERMUDA'S INVESTMENTS IN BREACH OF ITS OBLIGATIONS UNDER ARTICLE 5 OF THE TREATY**

**1. The expropriation standard**

141. Article 5 of the Treaty provides that neither Contracting Party shall expropriate investments of nationals of the other Contracting Party, except under certain conditions:

(1) Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose and for a social benefit related to the internal needs of that Party and against just and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party, until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have the right to establish promptly by due process of law in the territory of the Contracting Party making the expropriation the legality of the expropriation and the amount of the compensation in accordance with the principle set out in this paragraph.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares.<sup>258</sup>

142. These provisions encapsulate the general principle of international law that expropriation may occur directly, through formal acts of outright seizure or transfer of property to the State, or indirectly, when the State's measures in respect of a foreign national's property or investment have the same practical effect as a direct expropriation—namely, the substantial deprivation of the use or economic benefit of property.<sup>259</sup> As the tribunal in *Metalclad v Mexico* explained:

[E]xpropriation [...] includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.<sup>260</sup>

143. In the case of indirect expropriations, the critical factor in determining whether a government measure constitutes an expropriation is the effect that the measure has on the asset in question, *ie* its use, value or economic benefit for the investor. As held by the tribunal in *Compañía del Desarrollo de Santa Elena v Costa Rica*:

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<sup>258</sup> Treaty, **C-1**, Art 5 (emphasis added).

<sup>259</sup> *Metalclad Corporation v United Mexican States* (ICSID Case No ARB(AF)/97/1) Award, 30 August 2000, **CLA-27**, para 103. *See also, eg, Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt* (ICSID Case No ARB/99/6) Award, 12 April 2002, **CLA-34**, para 107; *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (ICSID Case No ARB/96/1) Final Award, 17 February 2000, **CLA-25**, para 77.

<sup>260</sup> *Metalclad Corporation v United Mexican States* (ICSID Case No ARB(AF)/97/1) Award, 30 August 2000, **CLA-27**, para 103.

There is ample authority for the proposition that a property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property.<sup>261</sup>

144. Similarly, in *AES v Hungary*, the tribunal held that an expropriation occurs when the investor is “deprived, in whole or significant part, of the property in or effective control of its investment: or for its investment to be deprived, in whole or significant part, of its value.”<sup>262</sup>
145. Neither the State’s intent, nor its subjective motives, nor the form of the action, constitute relevant criteria for finding whether a measure is expropriatory.<sup>263</sup> As explained by the Iran-US Claims Tribunal:

While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.<sup>264</sup>

146. Short of a physical taking, expropriatory measures can also include conduct which deprives the investor of its ability to manage, use or control its property in a

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<sup>261</sup> *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (ICSID Case No ARB/96/1) Final Award, 17 February 2000, **CLA-25**, para 77 (emphasis added).

<sup>262</sup> *AES Summit Generation Limited and AES-Tisza Erőmű Kft v Republic of Hungary* (ICSID Case No ARB/07/22) Award, 23 September 2010, **CLA-100**, para 14.3.1.

<sup>263</sup> See, eg, *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (ICSID Case No ARB/96/1) Final Award, 17 February 2000, **CLA-25**, para 77; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (ICSID Case No ARB/97/3) Award, 20 August 2007, **CLA-70**, para 7.5.20.

<sup>264</sup> *Tippetts, Abbett, McCarthy, and Stratton v TAMS-AFFA Consulting Engineers of Iran and others*, Award (1984-Volume 6) Iran-US Claims Tribunal Report, 22 June 1984, **CLA-9**, p 4 (emphasis added).

meaningful way.<sup>265</sup> For example, in *Tecmed v Mexico*, the tribunal stated that an expropriation occurs when the investor is “radically deprived of the economical use and enjoyment of its investments.”<sup>266</sup> Similarly, in *Pope & Talbot v Canada*, the tribunal explained that “the test is whether [the State’s] interference is sufficiently restrictive to support a conclusion that the property has been ‘taken’ from the owner.”<sup>267</sup>

147. In sum, the question of whether a measure constitutes an expropriation depends upon the actual effect of the measures on the investor’s property. A physical occupation, dispossession or assumption of substantial control that is not merely ephemeral and that deprives an investor of the use or enjoyment of its investment, including the deprivation of all or a significant part of the economic benefit of its property, is expropriatory. If the measures at stake have these effects, there is no need to inquire into the motives, intentions or form of the measures in order to conclude that an expropriation has occurred.

## **2. Bolivia has expropriated Glencore Bermuda’s investment in Colquiri and Vinto**

148. Bolivia does not contest that it has nationalized, through an outright taking, the assets of Colquiri and Vinto (*ie*, the Tin Smelter, the Antimony Smelter, the Colquiri Lease and the Tin Stock).<sup>268</sup> In so doing, Bolivia also fully destroyed the value of Glencore Bermuda’s shares in Vinto and Colquiri, thus indirectly expropriating these investments.

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<sup>265</sup> UNCTAD, “Expropriation: A Sequel, UNCTAD Series on Issues in International Investment Agreements II” (2012) UNCTAD/DIAE/IA/2011/7, **CLA-107**, p 21.

<sup>266</sup> *Técnicas Medioambientales Tecmed SA v United Mexican States* (ICSID Case No ARB(AF)/00/2) Award, 29 May 2003, **CLA-43**, para 115.

<sup>267</sup> *Pope & Talbot Inc v Government of Canada* (UNCITRAL) Interim Award, 26 June 2000, **CLA-26**, para 102.

<sup>268</sup> See Response to Notice of Arbitration, 18 August 2016, paras 29, 31, 54 (arguing that Bolivia purportedly “satisfied all constitutional and legal requirements, as well as those provided in investment treaties and international law, to revert the tin and antimony smelting plants, and assume control, through COMIBOL, of the Colquiri Mining Center”) (unofficial English translation from Spanish original), 61; Letter from EMV (Mr Villavicencio) to Colquiri (Mr Capriles), 8 June 2010, **C-102**.

### 3. Bolivia's expropriation of Glencore Bermuda's investment was unlawful

149. In order for Bolivia to carry out a lawful expropriation, it must comply with the requirements set out in Article 5 of the Treaty. In particular, an expropriation must comply with each of the cumulative conditions set out therein. If it fails to comply with any one of them, then the expropriation is by definition unlawful.

150. As explained in detail below, in the present case Bolivia failed to comply with the following requirements for a lawful expropriation:

- (a) Bolivia did not pay just and effective compensation, defined as the fair market value of the investments, promptly and without delay; and
- (b) Bolivia did not expropriate Glencore's investments in accordance with due process of law.

151. A party's failure to comply with any one of these conditions constitutes a violation of Article 5 of the Treaty.<sup>269</sup> We consider each in turn.

*a. Bolivia failed to pay just and effective compensation promptly and without delay*

152. The Treaty requires compensation to be "just and effective."<sup>270</sup> Tribunals have affirmed that just compensation refers to full compensation for the value of the expropriated assets.<sup>271</sup> As noted in *CME v Czech Republic*:

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<sup>269</sup> See also *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (ICSID Case No ARB/05/15) Award, 1 June 2009, **CLA-89**, para 428; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (ICSID Case No ARB/97/3) Award, 20 August 2007, **CLA-70**, para 7.5.21; *OI European Group BV v Bolivarian Republic of Venezuela* (ICSID Case No ARB/11/25) Award, 10 March 2015, **CLA-125**, para 362; *Bernhard von Pezold and others v Republic of Zimbabwe* (ICSID Case No ARB/10/15) Award, 28 July 2015, **CLA-126**, para 496.

<sup>270</sup> Treaty, **C-1**, Art 5(1).

<sup>271</sup> *Amoco International Finance Corporation v Government of the Islamic Republic of Iran and others*, Partial Award (1987-Volume 15) Iran-US Claims Tribunal Report, 14 July 1987, **CLA-10**, para 209 (providing that "just compensation" has generally been understood as a compensation equal to the full value of the expropriated assets).

Today these treaties are truly universal in their reach and essential provisions. They concordantly provide for payment of ‘just compensation’, representing the ‘genuine’ or ‘fair market’ value of the property taken. Some treaties provide for prompt, adequate and effective compensation amounting to the market value of the investment expropriated immediately before the expropriation or before the intention to embark thereon become public knowledge. Others provide that compensation shall represent the equivalent of the investment affected. These concordant provisions are variations on an agreed, essential theme, namely, that when a State takes foreign property, full compensation must be paid.<sup>272</sup>

153. The Treaty in the instant case expressly defines just and effective compensation as “the market value of the investment.”<sup>273</sup> Tribunals have repeatedly recognized that, pursuant to international law, just compensation requires the claimant receiving the fair market value of the expropriated asset.<sup>274</sup> Article 5 of the Treaty thereby codifies the general international law principle that compensation must be equivalent to the full value of the asset taken.
154. The State’s offer of compensation is inadequate, and the nationalization is consequently unlawful, if it falls below the fair market value of the investment. The tribunal in *Rurelec v Bolivia* explained that “any State which carries out an expropriation is expected to accurately and professionally assess the true value of the expropriated assets.”<sup>275</sup> The tribunal further noted that:

Bolivia did not actually compensate (or intend to compensate) Rurelec as it did not make an accurate

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<sup>272</sup> *CME Czech Republic BV v Czech Republic* (UNCITRAL) Final Award, 14 March 2003, **CLA-42**, para 497 (emphasis added).

<sup>273</sup> Treaty, **C-1**, Art 5(1).

<sup>274</sup> See, eg, *Amoco International Finance Co v Islamic Republic of Iran* (Iran-US Claims Tribunal), Award, 14 July 1987, **CLA-10**, para 209; *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability and Award on Damages and Costs, in (1994) 95 *International Law Reports* 184 (Extract), **CLA-15**, pp 210-211.

<sup>275</sup> *Guaracachi America, Inc and Rurelec Plc v Plurinational State of Bolivia* (UNCITRAL) Award, 31 January 2014, **CLA-120**, para 441.

assessment of EGSA's value at the time. In fact, it did quite the opposite, and if the Tribunal finds the valuation to be "manifestly inadequate", this is Bolivia's responsibility. As will be explained further below, this is in fact the case and the expropriation was therefore illegal.<sup>276</sup>

155. Likewise, the tribunal in *Rumeli v Kazakhstan* explained:

[T]he valuation placed on Claimants' shares was manifestly and grossly inadequate compared to the compensation which the Tribunal there holds to be necessary in order to afford adequate compensation under the BIT and the FIL. The Tribunal accordingly holds that the expropriation by the Presidium was unlawful.<sup>277</sup>

156. The Treaty also requires that compensation be "prompt"<sup>278</sup> and "made without delay."<sup>279</sup> Delayed compensation has been found to violate treaty provisions on prompt compensation as well as customary international law.<sup>280</sup> For example, the tribunal in *Goldenberg* explained:

[A]lthough international law authorizes the State to make an exception to the principle of respect for the private property of aliens when the public interest so requires, it does so on the condition sine qua non that fair payment shall be made for the expropriated or requisitioned property as quickly as possible.<sup>281</sup>

157. Promptness requires that the State pay compensation at the time of the expropriation or as soon as possible thereafter. In the *Norwegian Shipowners' Claims*, for instance, the tribunal concluded that the claimants had a right to

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<sup>276</sup> *Ibid.*

<sup>277</sup> *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan* (ICSID Case No ARB/05/16) Award, 29 July 2008, **CLA-79**, para 706.

<sup>278</sup> Treaty, **C-1**, Art 5(2).

<sup>279</sup> *Ibid.*, Art 5(1).

<sup>280</sup> *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (ICSID Case No ARB/05/15) Award, 1 June 2009, **CLA-89**, paras 434-435.

<sup>281</sup> *Goldenberg case (Germany/Romania)* Award, **CLA-3**, p 10 (unofficial English translation from French original) (emphasis added).

“immediate” compensation which should have been paid “at the latest on the day of the effective taking.”<sup>282</sup>

158. When the State has not offered acceptable compensation prior to or at the time of the taking, the State is obligated to at least “engage in good faith negotiations to fix the compensation in terms of the standard” established by the governing treaty.<sup>283</sup> Offers which fail to apply the relevant compensation standard—in this case, fair market value—reflect a lack of good faith and a failure to comply with the obligation to provide compensation promptly.<sup>284</sup>
159. Importantly, the principle that compensation be prompt and made without delay is fully consistent with the even more stringent requirements under Bolivian law, which provide that just compensation must be assessed and paid prior to the taking. The requirement of prior compensation is enshrined in Bolivia’s 1967 Constitution,<sup>285</sup> in the 2009 Constitution,<sup>286</sup> as well as in Bolivia’s Civil Code<sup>287</sup> and Expropriation Law.<sup>288</sup> For example, *Ciro Félix Trigo*, a Bolivian constitutionalist, has explained that, except in the case of war, payment must “precede” the occupation of the property:

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<sup>282</sup> See, eg, *Norwegian Shipowners’ Claims (Norway/USA)* Award, 13 October 1922, **CLA-1**, p 37 (concluding that “full compensation should have been paid, including loss of progress payments, etc., at the latest on the day of the effective taking”).

<sup>283</sup> *ConocoPhillips Petrozuata BV and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/30) Decision on Jurisdiction and the Merits, 3 September 2013, **CLA-117**, para 362.

<sup>284</sup> *Ibid*, paras 362 and 394.

<sup>285</sup> 1967 Constitution of the Plurinational State of Bolivia, 2 February 1967, **R-03**, Art 22 (“The expropriation is imposed by reason of public purpose or when the property does not fulfill a social purpose, in accordance with the law and after prior just compensation” (emphasis added). (unofficial English translation from Spanish original).

<sup>286</sup> Constitution of Bolivia, 7 February 2009, **C-95**, Art 57 (“The expropriation shall be imposed by reason of public purpose or need, in accordance with the law and after prior and just compensation”) (emphasis added) (unofficial English translation of Spanish original).

<sup>287</sup> Civil Code of Bolivia, 2 April 1976, **C-52**, Art 108 (providing that “[t]he expropriation only proceeds with the payment of a prior and just compensation”) (emphasis added) (unofficial English translation of Spanish original).

<sup>288</sup> Law of Expropriation due to Public Utility, 30 December 1884, **C-49**, Arts 1, 8 and 11-25.

The payment of the indemnification necessarily has to occur prior to the occupation of the asset. Only in case of war; in other legislation the use of private property will be authorized, if the public good so requires, the right to subsequent indemnification being guaranteed.<sup>289</sup>

160. In the present case, Bolivia nationalized Glencore Bermuda's investments without providing any compensation for its takings. Bolivia has also persistently failed to offer Glencore Bermuda just and effective compensation in accordance with its obligations under the Treaty and international law—despite Glencore's many attempts to negotiate an amicable solution over the last ten years. By way of summary:

*Vinto*

161. On 9 February 2007, Bolivia assumed full administrative, technical, legal and financial control of Vinto (including all of its assets) and issued the Tin Smelter Nationalization Decree, which did not provide for compensation. Bolivia made no offer of payment to Glencore Bermuda.<sup>290</sup> Notably, the Tin Smelter Nationalization Decree ordered a “reversion”<sup>291</sup> in an attempt to avoid the requirement of prior compensation established under Bolivia's Constitution and Expropriation Law. It is noteworthy that at the time of the expropriation Bolivian law did not even provide for such reversions. In fact, reversions were only applicable to mining concessions in cases of default in payment obligations, which was clearly not the case for Vinto.<sup>292</sup>

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<sup>289</sup> CF Trigo, *Derecho Constitucional Boliviano*, Fondo Editorial de la Biblioteca y Archivo Histórico del Honorable Congreso Nacional de Bolivia, 1952, **C-50**, p 410 (unofficial English translation from Spanish original).

<sup>290</sup> See Tin Smelter Nationalization Decree, 7 February 2007, **C-20**.

<sup>291</sup> *Ibid.*

<sup>292</sup> Mining Code, 17 March 1997, **R-4**, Arts 65 and 155.

162. Following the nationalization, it was Glencore Bermuda that sought to initiate negotiations with the Bolivian government.<sup>293</sup> However, discussions only began in May 2007, three months after the nationalization.<sup>294</sup>
163. Even after the discussions began, Bolivia failed to engage in good faith negotiations over the amount of compensation due to Glencore Bermuda. Bolivia refused to accept its obligation to pay Glencore Bermuda the fair market value of what had been taken, seeking first to limit any compensation to the amount Glencore Bermuda invested in the asset since its acquisition and then to the amount that the State had received at the time of the asset's privatization.<sup>295</sup>

*The Antimony Smelter and the Tin Stock*

164. On 1 May 2010, Bolivia issued the Antimony Smelter Nationalization Decree, thereby seizing the Antimony Smelter and the Tin Stock.<sup>296</sup> The Antimony Smelter Nationalization Decree did not provide for the payment of compensation and Bolivia made no offer of payment to Glencore Bermuda.<sup>297</sup> As in the case of the Tin Smelter Nationalization Decree, with the Antimony Smelter

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<sup>293</sup> See Letter from Glencore International (Mr Strothotte) to the President of Bolivia (Mr Morales), 22 February 2007, **C-21**; Letter from Freshfields Bruckhaus Deringer (Mr Blackaby) to Ministry of the Presidency (Mr Quintana), 19 March 2007, **C-22**; Letter from Freshfields Bruckhaus Deringer (Mr Blackaby) to Ministry of the Presidency (Mr Quintana), 4 April 2007, **C-23**; Letter from Freshfields Bruckhaus Deringer (Mr Blackaby) to Ministry of the Presidency (Mr Quintana), 3 May 2007, **C-24**.

<sup>294</sup> See, eg, Letter from Freshfields Bruckhaus Deringer (Mr Blackaby) to Ministry of the Presidency (Mr Quintana), 3 May 2007, **C-24**; see also Letter from Sinchi Wayra (Mr Capriles) to the Ministry of the Presidency (Mr Arce), 11 May 2007, **C-76**; and Letter from the Ministry of Mining (Mr Castañón) to Sinchi Wayra (Mr Capriles), 14 May 2007, **C-77**.

<sup>295</sup> See Section II.E.1 above and Witness Statement of Christopher Eskdale, para 55.

<sup>296</sup> Antimony Smelter Nationalization Decree, 1 May 2010, published in the *Gaceta Oficial* No 127NEC on 1 May 2010, **C-26**; see Letters from Glencore International PLC (Mr Maté and Mr Glasenberg) to the President of Bolivia (Mr Morales) and the Ministry of Mining (Mr Pimentel), 14 May 2010, **C-27**. On 2 May 2010 the Minister of the Presidency, Oscar Coca, announced the nationalization of the Antimony Smelter in a press conference. On that same day, José Pimentel, the Minister of Mining went to the Antimony Smelter to read out the nationalization decree. Witness Statement of Christopher Eskdale, para 64.

<sup>297</sup> Antimony Smelter Nationalization Decree, 1 May 2010, **C-26**; Witness Statement of Christopher Eskdale, para 61.

Nationalization Decree Bolivia ordered a “reversion”<sup>298</sup> in order to seek to circumvent the local requirement of prior compensation.<sup>299</sup>

165. Further, although the Bolivian government recognized that the Tin Stock was not subject to the Antimony Smelter Nationalization Decree,<sup>300</sup> it failed to secure its return to Colquiri.<sup>301</sup> As of today, Glencore Bermuda has not received any compensation for the Antimony Smelter or for the Tin Stock.

### *Colquiri*

166. On 20 June 2012, after the Colquiri Mine had been inaccessible since 30 May 2012 due to the government’s failure to protect Glencore Bermuda’s investments,<sup>302</sup> Bolivia issued the Colquiri Mine Nationalization Decree.<sup>303</sup> The Colquiri Mine Nationalization Decree provided that Comibol was to take control of the Colquiri Mine as well as the “direction and direct management of the deposits granted under the [Colquiri Lease].”<sup>304</sup> It also nationalized the machinery, equipment and supplies of Colquiri located at the Colquiri Mine in favor of a new company to be created called Empresa Minera Colquiri.<sup>305</sup> The Colquiri Mine Nationalization Decree, however, only provided for compensation for the machinery, equipment, and supplies located at the Colquiri Mine—not for the fair market value of the Colquiri Lease.<sup>306</sup> Even so, no such payment was ever made to Glencore Bermuda or any of its affiliates. Neither the Colquiri Mine

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<sup>298</sup> Antimony Smelter Nationalization Decree, 1 May 2010, **C-26**.

<sup>299</sup> Mining Code, 17 March 1997, **R-4**, Arts 65 and 155; *see* Section II.E.2, above.

<sup>300</sup> *See* Letter from Ministry of Mining (Mr Pimentel) to EMV (Mr Villavicencio), 5 May 2010, **C-29**.

<sup>301</sup> *See* Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel), 10 May 2010, **C-99**; Letter from Colquiri (Mr Capriles) to EMV (Mr Villavicencio), 19 May 2010, **C-100**; Letter from EMV (Mr Villavicencio) to Colquiri (Mr Capriles), 8 June 2010, **C-102**.

<sup>302</sup> *See* Section II.E.3, above.

<sup>303</sup> Colquiri Mine Nationalization Decree, 20 June 2012, published in the *Gaceta Oficial* No 384NEC on 20 June 2012, **C-39**.

<sup>304</sup> *Ibid*, Art 1 (unofficial English translation from Spanish original).

<sup>305</sup> *Ibid*, Arts 1 and 3.

<sup>306</sup> *Ibid*, Art 1.

Nationalization Decree nor the Bolivian government purported to offer compensation for the fair market value of Colquiri.<sup>307</sup>

167. Once more, Glencore Bermuda repeatedly reached out to Bolivia to engage in negotiations over the amount of compensation due.<sup>308</sup> However, in years of discussions, the government never presented a concrete proposal regarding the amount of compensation payable to Glencore Bermuda.<sup>309</sup> Indeed, Bolivia went so far as to present a negative value as compensation for the nationalization of Vinto and Colquiri.<sup>310</sup>
168. In sum, Bolivia has failed to pay Glencore Bermuda just, effective and prompt compensation for the taking of the Tin Smelter, the Antimony Smelter, the Tin Stock and the Colquiri Lease. No payment was made before or at the time of the expropriations, nor promptly thereafter. Bolivia then delayed negotiations, and never recognized its obligation to pay Glencore Bermuda the fair market value of what had been taken. Bolivia's failure to promptly pay Glencore Bermuda the fair market value of the nationalized investments renders the expropriations unlawful under both international and domestic law.

***b. Bolivia did not expropriate in accordance with due process of law***

169. In the absence of compensation, any expropriation is by definition unlawful. It is therefore unnecessary for the Tribunal to look any further. However, Bolivia's conduct was also devoid of any respect for due process, in breach of another key requirement for lawfulness under international law.

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<sup>307</sup> Witness Statement of Christopher Eskdale, paras 108-118; *see also* Colquiri Mine Nationalization Decree, 20 June 2012, **C-39**, Art 1.

<sup>308</sup> *See* Letters from Glencore International PLC (Mr Maté) to the President of Bolivia (Mr Morales), 27 June 2012, **C-40**; Letter from Glencore PLC (Mr Capriles) to the Minister of Mining (Mr Virreira), 3 July 2012, **C-145**.

<sup>309</sup> Witness Statement of Christopher Eskdale, sections IV-V.

<sup>310</sup> *Ibid*, para 116.

170. Due process requires, at the very least, compliance with local law. Breaches of local law constitute *prima facie* breaches of due process.<sup>311</sup> As explained by the tribunal in *AIG v Kazakhstan*:

Expropriation of alien property is not itself contrary to international law provided certain conditions are met, and perhaps the most clearly established condition is that expropriation must not be arbitrary (i.e., must not be contrary to “the due process of law”) and must be based on the application of duly adopted laws.<sup>312</sup>

171. Similarly, the tribunal in *Al-Bahloul v Tajikistan* explained the components of due process in relation to expropriation as follows: “[t]he obligation to provide due process has several facets, some of which overlap: The obligation to notify an investor of hearings and not to decide about a claim in his absence or in gross violation of procedural rules. Breaches may also exist if the procedure is delayed, [...]. The obligation not to maliciously misapply the substantive law. [...] The obligation not to use powers for improper purposes, i.e. purposes not covered by the law authorizing the powers. [...] The obligation not to act intentionally against the investor to harm his investment. [...]”<sup>313</sup> The *ADC v Hungary* tribunal in turn indicated that due process includes “[s]ome basic mechanisms, such as reasonable advance notice.”<sup>314</sup>

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<sup>311</sup> A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (1st edn 2009) (Extract), **CLA-84**, p 4; *OI European Group BV v Bolivarian Republic of Venezuela* (ICSID Case No ARB/11/25) Award, 10 March 2015, **CLA-125**, para 386.

<sup>312</sup> *AIG Capital Partners, Inc and CJSC Tema Real Estate Company v Republic of Kazakhstan* (ICSID Case No ARB/01/6) Award, 7 October 2003, **CLA-45**, para 10.5.1.

<sup>313</sup> *Mohammad Ammar Al-Bahloul v Republic of Tajikistan* (SCC Case No V (064/2008)) Partial Award on Jurisdiction and Liability, 2 September 2009, **CLA-91**, para 221.

<sup>314</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 435. *See also Quiborax SA and Non Metallic Minerals SA v Plurinational State of Bolivia* (ICSID Case No ARB/06/2) Award, 16 September 2015, **CLA-127**, para 221; *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award, 4 April 2016, **CLA-130**, para 713; *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15) Award, 3 March 2010, **CLA-96**, paras 395-396.

172. In the present case, Bolivia did not nationalize in compliance with due process: it did not provide Glencore Bermuda with advance notice of any of the nationalizations, it misapplied and ignored its substantive law and it applied an unnecessary display of force during the takeovers. Bolivia also violated due process as it invoked invalid reasons for the nationalizations and intentionally delayed the negotiation process in order to avoid paying compensation.
173. *First*, with respect to Vinto, Bolivia provided no advance notice to Glencore Bermuda before the army and police forcibly entered the premises and seized all of its assets.<sup>315</sup> Glencore Bermuda had no opportunity to arrange for the transfer of documents or employee files. Vinto’s workers were needlessly threatened by armed police and the army.<sup>316</sup> Further, as explained above, Bolivia inappropriately ordered a “reversion” of Vinto when it was clear that such legal concept did not apply in the specific case. Moreover, not only did Bolivia invoke unsubstantiated accusations of illegality to justify the nationalization, but it subsequently purposely delayed negotiations in order not to pay compensation.<sup>317</sup>
174. *Second*, with respect to the Antimony Smelter, Bolivian officials again announced the “reversion” and read out the Antimony Smelter Nationalization Decree without providing Glencore Bermuda any advance notice.<sup>318</sup> Notably, the Antimony Smelter Nationalization Decree referenced the “productive inactivity” of the Antimony Smelter as one of the reasons justifying its taking.<sup>319</sup> However, the plant had been inactive prior to Glencore Bermuda’s acquisition.<sup>320</sup> The

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<sup>315</sup> Witness Statement of Christopher Eskdale, paras 43-47.

<sup>316</sup> See Photos of the Tin Smelter Nationalization, 9 February 2007, **C-70**, pp 4-5.

<sup>317</sup> See Section II.E.1, above.

<sup>318</sup> Antimony Smelter Nationalization Decree, 1 May 2010, **C-26**; Witness Statement of Christopher Eskdale, paras 61-62.

<sup>319</sup> Antimony Smelter Nationalization Decree, 1 May 2010, **C-26**.

<sup>320</sup> See Paribas, Privatisation of Bolivian mining assets, Confidential Information Memorandum, August 16, 1999, **RPA-04**, pp 61-66.

government had not requested that Glencore Bermuda bring it to production.<sup>321</sup> Yet, under this pretext, government forces once again came into the Antimony Smelter without allowing Glencore Bermuda the chance to transfer any property. In fact, at the time of the Antimony Smelter's takeover, Bolivia also seized the Tin Stock, which was the property of Colquiri and was not part of the Antimony Smelter's inventory. Despite the fact that the Minister of Mining recognized that the Tin Stock should not have been taken,<sup>322</sup> the government failed to return it to Colquiri, or to provide proper payment for the unauthorized taking.<sup>323</sup> As in the case of Vinto, Bolivia also unnecessarily delayed the negotiations regarding the payment of compensation.

175. With respect to Colquiri, the formal nationalization came after the government had already indicated its intent to take over the Colquiri Mine<sup>324</sup> and repeatedly failed to involve Glencore Bermuda or any of its affiliates in the negotiating process it was conducting with the cooperatives and the unions, as explained in further detail below.<sup>325</sup> Instead, Glencore Bermuda was misled by the government when it accepted to cede the Rosario vein to the cooperatives in the hope of preventing further violence and avoiding a complete nationalization of the mine.<sup>326</sup> Indeed, within days of the Rosario Agreement, the government publicly announced that the nationalization of the Colquiri Mine had been “already

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<sup>321</sup> Witness Statement of Christopher Eskdale, para 63.

<sup>322</sup> See Letter from Ministry of Mining (Mr Pimentel) to EMV (Mr Villavicencio), 5 May 2010, **C-29**.

<sup>323</sup> See Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel), 10 May 2010, **C-99**; Letter from Colquiri (Mr Capriles) to EMV (Mr Villavicencio), 19 May 2010, **C-100**; Letter from EMV (Mr Villavicencio) to Colquiri (Mr Capriles), 8 June 2010, **C-102**.

<sup>324</sup> See Witness Statement of Christopher Eskdale, paras 77, 91; “Gobierno plantea nacionalizar Colquiri para poner fin al conflicto minero,” *La Patria*, 6 June 2012, **C-123**.

<sup>325</sup> See Section II.E.3, above; see also Witness Statement of Christopher Eskdale, paras 85, 95, 96, 100, 103.

<sup>326</sup> See Rosario Agreement, 7 June 2012, **C-35**; Letter from Glencore International (Mr Maté) to the President of Bolivia (Mr Morales), 13 June 2012, **C-38bis**; see also Witness Statement of Christopher Eskdale, paras 91-93.

decided.”<sup>327</sup> Bolivia, without informing Glencore Bermuda or any of its affiliates, had in fact promised Colquiri’s nationalization to the union workers, thereby inciting further violent confrontations between the union workers and the cooperatives.<sup>328</sup> The issuance of the Colquiri Mine Nationalization Decree merely formalized a decision the government had already taken.<sup>329</sup>

176. *Finally*, Bolivia failed to comply with the basic formalities required by Bolivian law for an expropriation to be considered lawful. In addition to the requirements explained above,<sup>330</sup> pursuant to the Bolivian Civil Code, Bolivia must include in the expropriating decree the specific conditions and proceeding to be followed in order to execute the expropriation<sup>331</sup>—including details as to how to determine the value of the expropriated asset and which government entity is responsible for the payment for such asset. Yet, Bolivia failed to specify in each of the three nationalization decrees the conditions and the proceeding to be followed for each of the expropriations.<sup>332</sup> Instead, Bolivia simply seized all of Vinto’s and Colquiri’s assets, leaving the targeted companies with no way to generate income to pay their liabilities, and therefore rendering Glencore Bermuda’s shares in Vinto and Colquiri valueless.

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<sup>327</sup> “Sinchi Wayra entrega veta Rosario a tres cooperativas,” *La Razón*, 9 June 2012, **C-36**; *see also* Witness Statement of Christopher Eskdale, para 95.

<sup>328</sup> *See* “Rechazan preacuerdo para nacionalización de la mina Colquiri,” *El Potosí*, 10 June 2012, **C-127**; “Mineros retomarán Colquiri y bloquearán los caminos,” *Página Siete*, 10 June 2012, **C-126**; “Revertirán concesiones si no hay inversión,” *La Razón*, 12 June 2012, **C-131**.

<sup>329</sup> *See* “Gobierno plantea nacionalizar Colquiri para poner fin al conflicto minero,” *La Patria*, 6 June 2012, **C-123**.

<sup>330</sup> As explained in Section IV.A.3.a above, the Bolivian Constitution, the Civil Code and the Expropriation Law require the assessment and payment of compensation prior to a taking.

<sup>331</sup> Civil Code of Bolivia, 2 April 1976, **C-52**, Art 108 para II (“The public purpose and breach of the social purpose shall be determined in accordance with special laws, which shall regulate the conditions and proceeding for the expropriation”) (unofficial English translation of Spanish original).

<sup>332</sup> The Colquiri Mine Nationalization Decree provided that Comibol was to pay Colquiri and/or Sinchi Wayra for the nationalized machinery, equipment and supplies. The value of this payment was to be assessed within 120 days of the decree’s publication through a valuation carried out by an independent firm contracted by Comibol. However, this process was never carried out.

**B. BOLIVIA HAS FAILED TO PROVIDE FULL PROTECTION AND SECURITY AND TO OBSERVE ITS OBLIGATIONS UNDER THE COLQUIRI LEASE, IN BREACH OF THE TREATY**

**1. The full protection and security and umbrella clause standards**

177. Pursuant to Article 2(2) of the Treaty, Bolivia is required to afford “full protection and security” to Glencore Bermuda’s investments.<sup>333</sup>
178. The full protection and security standard is one of vigilance and due diligence. The tribunal in *AAPL v Sri Lanka*, for example, found that the duty to ensure the protection and security of an investment embodies an “‘objective’ standard of vigilance” which is violated by the “‘mere lack or want of diligence’, without any need to establish malice or negligence.”<sup>334</sup> In that case, the tribunal found that Sri Lanka could have taken precautionary measures “that could be reasonably expected to prevent” the investor’s loss, in particular considering that “such measures fall within the normal exercise of governmental inherent powers.”<sup>335</sup>
179. The *AMT v Zaire* tribunal also interpreted the full protection and security standard as requiring the host State to actively take “all measure of precaution to protect the investments.”<sup>336</sup> In that case the tribunal specified that it was of little or no consequence whether the acts complained of had been committed by a member of the Zairian armed forces or a common burglar, because Zaire had an “obligation of vigilance.”<sup>337</sup> Under this standard, the host State must actively prevent the occurrence of loss. Or, as explained in *Frontier Petroleum Services v Czech Republic*, “the wording of these full protection and security clauses suggests that

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<sup>333</sup> Treaty, **C-1**, Art 2(2).

<sup>334</sup> *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (ICSID Case No ARB/87/3) Final Award, 27 June 1990, **CLA-14**, para 77.

<sup>335</sup> *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (ICSID Case No ARB/87/3) Final Award, 27 June 1990, **CLA-14**, para 85(b).

<sup>336</sup> *American Manufacturing & Trading Inc v Republic of Zaire* (ICSID Case No ARB/93/1) Award, 21 February 1997, **CLA-20**, para 6.05.

<sup>337</sup> *Ibid*, para 6.13.

the host state is under an obligation to take active measures to protect [an] investment from adverse effects that stem from private parties or from the host state and its organs.”<sup>338</sup> Importantly, the standard is breached when an expropriation occurs by force in the face of pleas for protection.<sup>339</sup>

180. It is clear that the full protection and security standard concerns the investor’s physical safety and instances “when the foreign investment has been affected by civil strife and physical violence.”<sup>340</sup> Furthermore, the provision requires that the State offer a stable and secure investment environment.<sup>341</sup>
181. In addition to providing investors with full protection and security, under Article 2(2) Bolivia was to “observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.”<sup>342</sup> Pursuant to this clause, any contractual obligations Bolivia has entered into with respect to Glencore Bermuda’s or its local affiliates’ investments also amount to obligations under the Treaty.<sup>343</sup> As stated by the *Lemire v Ukraine* tribunal:

The Tribunal agrees with Claimant’s submission that Article II.3 (c) of the BIT brings the Settlement Agreement into the ambit of the BIT, so that any violation of the private law agreement becomes ipso iure a violation of the international law BIT.<sup>344</sup>

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<sup>338</sup> *Frontier Petroleum Services Ltd v Czech Republic* (UNCITRAL) Final Award, 12 November 2010, **CLA-102**, para 261. See also R Dolzer and C Schreuer, *Principles of International Investment Law* (1st edn 2008) (Extract), **CLA-73**, p 3.

<sup>339</sup> *Waguïh Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (ICSID Case No ARB/05/15) Award, 1 June 2009, **CLA-89**, para 447.

<sup>340</sup> *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, para 483.

<sup>341</sup> *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12) Award, 14 July 2006, **CLA-63**, para 408.

<sup>342</sup> Treaty, **C-1**, Art 2(2).

<sup>343</sup> *Oxus Gold v Republic of Uzbekistan* (UNCITRAL) Final Award, 17 December 2015, **CLA-128**, para 365 (“Through an umbrella clause, the State assumes on the international level contractual obligations it might have entered into with a foreign investor.”).

<sup>344</sup> *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18) Decision on Jurisdiction and Liability, 14 January 2010, **CLA-95**, para 498. Similarly, the *Noble Ventures v Romania* tribunal

182. In other words, pursuant to Article 2(2), any breach by Bolivia of a contractual obligation entered into with Glencore Bermuda or its local affiliates amounts to a breach of its obligations under the Treaty. This principle is reinforced by Article 5 of the Treaty which provides that when Bolivia expropriates the assets of an investor's local subsidiary, it has the obligation to afford that local subsidiary the same treatment afforded to its parent company.<sup>345</sup>

**2. Bolivia failed to afford Glencore Bermuda full protection and security and failed to observe its obligations under the Colquiri Lease, in breach of the Treaty's umbrella clause**

183. Bolivia failed to grant full protection and security to Glencore Bermuda's investments. Bolivia also breached its obligation under the Colquiri Lease to protect the Colquiri Mine against usurpations by third parties, in breach of the Treaty's umbrella clause.

184. Specifically, Bolivia failed to physically protect Glencore Bermuda's investment, Colquiri, against violent interference from the local cooperatives:

(a) On 1 April 2012, about one hundred members of a local cooperative violently entered the Colquiri Mine. They stole minerals and mining equipment and threatened the workers with violence.<sup>346</sup> The *cooperativistas* again unlawfully entered the Colquiri Mine on 3 April 2012.<sup>347</sup>

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observed: “[w]here the acts of a governmental agency are to be attributed to the State for the purposes of applying an umbrella clause, such as Art. II(2)(c) of the BIT, breaches of a contract into which the State has entered are capable of constituting a breach of international law by virtue of the breach of the umbrella clause.” *Noble Ventures Inc v Romania* (ICSID Case No ARB/01/11) Award, 12 October 2005, **CLA-59**, para 85 (emphasis in the original).

<sup>345</sup> Treaty, **C-1**, Art 5(2).

<sup>346</sup> Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 3 April 2012, **C-30**.

<sup>347</sup> *Ibid.*

- (b) Colquiri immediately wrote to Comibol, requesting prompt intervention.<sup>348</sup> In its communication, Colquiri expressly referenced Comibol's obligation under the Colquiri Lease to guarantee safe conditions and, in particular, to protect against interferences from third parties like the *cooperativistas*.<sup>349</sup> Comibol, however, did not intervene.<sup>350</sup>
- (c) Colquiri sent copies of its 3 April 2012 letter to Comibol also to the Ministry of Mining and the Ministry of Government, thereby placing the government on notice of the precarious situation at the Colquiri Mine.<sup>351</sup>
- (d) Despite Colquiri's requests, the government did not intervene. Instead, it contributed to the growing instability by requesting that Colquiri be excluded from the new shared-risk agreements that were about to be finalized, thereby indicating that the government was contemplating the nationalization of the Colquiri Mine.<sup>352</sup>
- (e) The resulting uncertainty over the fate of Colquiri intensified the conflict between the unions and the cooperatives.<sup>353</sup> Despite being aware of these growing tensions, the government failed to take the appropriate measures to protect the Colquiri Mine. The local police force on site was wholly inadequate.<sup>354</sup> On 30 May 2012, the Colquiri Mine was violently taken over by more than one thousand members of a local cooperative known as Cooperativa 26 de Febrero.<sup>355</sup> The *cooperativistas* detonated dynamite, injuring a number of Colquiri's employees and blocking access to the

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<sup>348</sup> *Ibid.*

<sup>349</sup> Colquiri Lease, 27 April 2000, **C-11**, Clause 12.2.1.

<sup>350</sup> *See* Witness Statement of Christopher Eskdale, para 75.

<sup>351</sup> Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 3 April 2012, **C-30**.

<sup>352</sup> *See* Witness Statement of Christopher Eskdale, paras 76-77.

<sup>353</sup> *Ibid.*, paras 78-79.

<sup>354</sup> *Ibid.*, para 79.

<sup>355</sup> *See* Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 30 May 2012, **C-31**; Witness Statement of Christopher Eskdale, para 80.

deposit.<sup>356</sup> Still, the government failed to, in the words of the *AMT v Zaire* tribunal, actively take “all measure of precaution to protect the investments.”<sup>357</sup>

- (f) On 30 May 2012, Colquiri again wrote to Comibol demanding official intervention in accordance with Comibol’s express contractual obligations.<sup>358</sup> Again, Comibol failed to intervene.<sup>359</sup>
- (g) Copies of the 30 May 2012 letter were also sent to the Ministry of Mining, the Ministry of the Presidency and the Ministry of Government.<sup>360</sup> Again, the government failed to intervene. From 30 May 2012 until the formal nationalization of the Colquiri Mine on 20 June 2012, the deposit remained inaccessible. The few policemen posted at the site failed to defuse the situation and were unable to enter the mine.<sup>361</sup>
- (h) Both the unions and the occupying *cooperativistas* laid the blame for the growing conflict on the government’s inaction.<sup>362</sup> The union workers lamented the government’s lack of interest in finding a resolution.<sup>363</sup> The

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<sup>356</sup> See, eg, “Cooperativistas mineros toman mina Colquiri,” *El Potosí*, 31 May 2012, **C-112**; Witness Statement of Christopher Eskdale, para 80.

<sup>357</sup> *American Manufacturing & Trading Inc v Republic of Zaire* (ICSID Case No ARB/93/1) Award, 21 February 1997, **CLA-20**, para 6.05.

<sup>358</sup> See Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 30 May 2012, **C-31**.

<sup>359</sup> See Witness Statement of Christopher Eskdale, para 83.

<sup>360</sup> See Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 30 May 2012, **C-31**.

<sup>361</sup> See Witness Statement of Christopher Eskdale, para 83.

<sup>362</sup> See, eg, Letters from the Sindicato Mixto de Trabajadores Mineros Colquiri to the President of Bolivia (Mr Morales), the Ministry of Mining (Mr Virreira), and Comibol (Mr Córdova), 30 May 2012, **C-111**; Witness Statement of Christopher Eskdale, paras 82, 85-89.

<sup>363</sup> “Mineros decretan paro general desde mañana por avasallamientos,” *La Patria*, 3 June 2012, **C-115**.

cooperatives justified the taking based on the fact that the government had failed to provide them with new working areas as promised.<sup>364</sup>

- (i) On or around 6 June 2012, the Minister of Mining proposed the nationalization of the Colquiri Mine.<sup>365</sup>
- (j) On 7 June 2012, in the hope of de-escalating the conflict and avoiding nationalization, Colquiri entered into the Rosario Agreement with the cooperatives themselves, the entities representing them, as well as the Vice Minister of Cooperatives from the Ministry of Mining.<sup>366</sup> Pursuant to the Rosario Agreement, the cooperatives were granted the right to exploit the Rosario vein, subject to them selling all of the extracted raw materials to Colquiri.<sup>367</sup>
- (k) Yet, the government had reached a separate and inconsistent agreement with the unions that provided for the nationalization of the Colquiri Mine.<sup>368</sup> On 9 June 2012, the Minister of Mining announced at a press conference that the nationalization of the Colquiri Mine had been “already decided.”<sup>369</sup>
- (l) On 12 June 2012, Vice President Álvaro García Linera announced the government’s decision to nationalize the Colquiri Mine on national

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<sup>364</sup> See, eg, “Sindicato de mineros amenaza retomar mina de Colquiri,” *Los Tiempos*, 1 June 2012, **C-113**; “La Federación de Mineros prepara la retoma de Colquiri,” *La Prensa*, 1 June 2012, **C-114**.

<sup>365</sup> “Gobierno plantea nacionalizar Colquiri para poner fin al conflicto minero,” *La Patria*, 6 June 2012, **C-123**.

<sup>366</sup> Rosario Agreement, **C-35**, Clauses 1 and 5; see also Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 8 June 2012, **C-125**; Witness Statement of Christopher Eskdale, paras 92-93.

<sup>367</sup> Rosario Agreement, 7 June 2012, **C-35**; see also Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 8 June 2012, **C-125**; Witness Statement of Christopher Eskdale, para 93.

<sup>368</sup> See “Rechazan preacuerdo para nacionalización de la mina Colquiri,” *El Potosí*, 10 June 2012, **C-127**; “Mineros retomarán Colquiri y bloquearán los caminos,” *Página Siete*, 10 June 2012, **C-126**; “Revertirán concesiones si no hay inversión,” *La Razón*, 12 June 2012, **C-131**.

<sup>369</sup> “Sinchi Wayra entrega veta Rosario a tres cooperativas,” *La Razón*, 9 June 2012, **C-36**.

television.<sup>370</sup> Conflicts erupted once more between the union workers and the cooperatives following the government's announcement, blocking access to the Colquiri Mine.<sup>371</sup>

- (m) In the days that followed, the government continued to hold separate meetings with both the union workers—to whom it promised nationalization of the mine—and the cooperatives—to whom it assured access to the Rosario vein.<sup>372</sup>
- (n) Rather than appease the opposing parties, the government's exclusive dealings reignited the conflict amongst the workers and the *cooperativistas*. The Colquiri Mine continued to be inaccessible and operations were paralyzed.<sup>373</sup>
- (o) On 13 June 2012, Glencore Bermuda wrote to President Evo Morales requesting a meeting with the government to discuss the situation at the Colquiri Mine, noting how “surprised and concerned” it was with government officials' recent declarations mentioning a possible nationalization of Colquiri, in light of the agreement reached between all parties on 7 June 2012.<sup>374</sup>

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<sup>370</sup> Transcript of “Bolivia nacionalizará minera Colquiri: García Linera”, video prepared by *TeleSUR Noticias*, 12 June 2012, **C-37**. See also Letter from Glencore International (Mr Maté) to the President of Bolivia (Mr Morales), 13 June 2012, **C-38bis**.

<sup>371</sup> See “Mineros bloquean Conani exigiendo nacionalizar el 100% de mina Colquiri,” *La Patria*, 13 June 2012, **C-134**.

<sup>372</sup> Minutes of Agreement among Fencomin, Fedecomín, Central Local de Cooperativas Mineras de Colquiri, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, Cooperativa 26 de Febrero, the Minister of Mining, the Vice Minister of Productive Mining and Metallurgic Development, Comibol, and the Legal Director of the Ministry of Mining, 12 June 2012, **C-129**; “Responsabilizan a Linera y Virreira por el conflicto,” *El Potosí*, 15 June 2012, **C-140**; Witness Statement of Christopher Eskdale, paras 95-99, 102.

<sup>373</sup> See, eg, “Estalla conflicto minero en Colquiri y se reportan las primeras bajas,” *La Patria*, 15 June 2012, **C-139**; “Colquiri se convierte en un campo de batalla,” *La Prensa*, 15 June 2012, **C-142**; Witness Statement of Christopher Eskdale, para 102.

<sup>374</sup> Letter from Glencore International (Mr Maté) to the President of Bolivia (Mr Morales), 13 June 2012, **C-38bis**.

- (p) The government ultimately cancelled the meeting scheduled with Glencore Bermuda in response to the latter's 13 June 2012 letter.<sup>375</sup>
- (q) Finally, the government issued the Colquiri Mine Nationalization Decree on 20 June 2012 formalizing its takeover of Colquiri from Glencore Bermuda.
185. In sum, Bolivia breached its obligation to afford Glencore Bermuda's investments full protection and security under Article 2(2) of the Treaty when it failed to respond to Glencore Bermuda's repeated requests for assistance in preventing and controlling a situation which posed an ongoing serious risk to the physical security of Glencore Bermuda's workers as well as the integrity of the Colquiri Mine.<sup>376</sup> As in the case of *Waguih Elie George Siag v Egypt*,<sup>377</sup> Glencore Bermuda specifically requested the intervention of Comibol and the government to protect the Colquiri Mine.<sup>378</sup> However, neither Comibol nor the government took the necessary steps to prevent, and then to resolve, the invasion of the deposit. Because of Bolivia's inaction, the Colquiri Mine was violently taken over by more than one thousand *cooperativistas* and remained inaccessible to Glencore Bermuda.<sup>379</sup> Rather than responding to Glencore Bermuda's pleas for protection, Bolivia escalated the conflict by engaging in separate and exclusive dealings with the entities in conflict and by leaving Glencore Bermuda out of the process altogether.<sup>380</sup> As recognized by the tribunal in *Waguih Elie George Siag v Egypt*, Bolivia's conduct fell below the standard of protection Glencore Bermuda could reasonably have expected when Bolivia failed to respond to Glencore Bermuda's

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<sup>375</sup> Witness Statement of Christopher Eskdale, para 104.

<sup>376</sup> See *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (ICSID Case No ARB/05/15) Award, 1 June 2009, **CLA-89**, para 447; see also Section II.E, above.

<sup>377</sup> *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (ICSID Case No ARB/05/15) Award, 1 June 2009, **CLA-89**, para 446.

<sup>378</sup> Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 3 April 2012, **C-30**; Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 30 May 2012, **C-31**.

<sup>379</sup> See Section II.E, above.

<sup>380</sup> See Witness Statement of Christopher Eskdale, paras 96-100, 102-103.

- pleas for protection, first allowing the *cooperativistas* to invade the Colquiri Mine and subsequently failing to secure the deposit's return.<sup>381</sup>
186. Finally, by not protecting the Colquiri Mine, Bolivia also failed to observe its obligations under the Colquiri Lease, in breach of the Treaty's umbrella clause. Article 2(2) of the Treaty states, in relevant part, that "[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."<sup>382</sup> As described above, the Colquiri Lease was directly negotiated with the Ministry of External Trade and Investment and a Bolivian governmental entity, Comibol. Under the terms of the Colquiri Lease, Bolivia was under the obligation to "not interfere or limit the operations of the lessee," Colquiri.<sup>383</sup> Bolivia also guaranteed "the peaceful possession and use of the mining center," and committed itself to "defend, protect, guarantee and reclaim rights against incursions, usurpations, and other disturbances by third parties," for the duration of the lease.<sup>384</sup> The Colquiri Lease was in force when Bolivia nationalized the Colquiri Mine and terminated the lease agreement. Bolivia plainly violated the terms of the Colquiri Lease when it failed to protect the Colquiri Mine.<sup>385</sup> Bolivia also failed to comply with the terms of the Rosario Agreement.
187. Because of Bolivia's failure to provide adequate protection and security as well as its non-compliance with its contractual obligations, the Colquiri Mine was invaded by *cooperativistas* and remained inaccessible to Glencore Bermuda and its affiliates until it was formally nationalized on 20 June 2012. Bolivia's inaction

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<sup>381</sup> See *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (ICSID Case No ARB/05/15) Award, 1 June 2009, **CLA-89**, para 448.

<sup>382</sup> Treaty, **C-1**, Art 2(2).

<sup>383</sup> Colquiri Lease, 27 April 2000, **C-11**, Clause 9.2.1 (unofficial English translation from Spanish original).

<sup>384</sup> *Ibid*, Clause 12.2.1 (unofficial English translation from Spanish original).

<sup>385</sup> The Rosario Agreement noted that Comibol acted on behalf of the Bolivian State with respect to the Colquiri Lease. See Rosario Agreement, 7 June 2012, **C-35**, Clause 1.

and subsequent conduct escalated the conflict and ultimately led to the unlawful taking of Glencore Bermuda's investment.

**3. Comibol's failure to protect the Colquiri Mine in accordance with the terms of the Colquiri Lease is attributable to Bolivia**

188. Under the customary law rules of international attribution, the conduct of Comibol (in particular, Comibol's failure to protect the Colquiri Mine against interferences from third parties like the *cooperativistas*) is attributable to the State. Under Article 4 of the ILC Articles on State Responsibility,<sup>386</sup> the reference to a "State organ" covers all the individual or collective entities which make up the organization of the State and act on its behalf.<sup>387</sup> To determine whether an entity is a State organ one must first look to domestic law.<sup>388</sup>
189. In 2012 Comibol was under the control of the Ministry of Mining<sup>389</sup> and all of its seven directors were appointed by Bolivia's President.<sup>390</sup> Additionally, in 2008, Comibol was named as a strategic national public company<sup>391</sup> and in 2014 Law No 535 (the *Mining Law*) included Comibol within the structure of the Bolivian

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<sup>386</sup> International Law Commission, "Draft articles on Responsibility of States for Internationally Wrongful Acts with commentary" [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, Art 4 ("1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the state").

<sup>387</sup> International Law Commission, "Draft articles on Responsibility of States for Internationally Wrongful Acts with commentary" [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, Commentary to Art 4 para (1).

<sup>388</sup> *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No ARB/04/13) Award, 6 November 2008, **CLA-83**, para 160.

<sup>389</sup> The Mining Code was still in force at that time and Article 75 paragraph (h) of Supreme Decree No 29,894 enacted in 2009 included among the powers of the Minister of Mining to "exercise tutition over the national autarchic mining and metallurgical company." Supreme Decree No 29,894, 7 February 2009, published in the *Gaceta Oficial* No 116, 7 February 2009, **C-96**, Art 75 paragraph (h) (unofficial English translation from Spanish original).

<sup>390</sup> Supreme Decree No 29,295, 3 October 2007, published in the *Gaceta Oficial* No 3,030, 3 October 2007, **C-88**, Sole Article.

<sup>391</sup> Supreme Decree No 29,474, 12 March 2008, published in the *Gaceta Oficial* No 3,074, 12 March 2008, **C-92**, Sole Article.

- State.<sup>392</sup> Comibol even acknowledges that its Annual Operative Programs are prepared under the guidelines and instructions of the Executive Branch.<sup>393</sup> As a result, Comibol can be considered an organ of the Bolivian State under Bolivia’s domestic law.
190. Even if Comibol were not considered an organ of the Bolivian State, its conduct is attributable to Bolivia under Article 5 of the International Law Commission’s Articles on State Responsibility. Comibol “is empowered by the law of that State to exercise elements of governmental authority” and was “acting in that capacity in the particular instance.”<sup>394</sup> The central feature of Article 5 is whether the entity in question is empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.<sup>395</sup> To determine whether specific acts or omissions are essentially governmental rather than commercial in nature or vice versa, one must adopt a functional test.<sup>396</sup>
191. Here, Bolivia’s own Constitution and Mining Code expressly grant Comibol the governmental authority of directing and managing the mining industry, including the Colquiri Mine. Comibol entered into the Colquiri Lease with Colquiri and

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<sup>392</sup> The Mining Law provides that Comibol (*i*) is a public mining company within the structure of the State mining sector (Art. 36), (*ii*) is responsible for the direction and administration of the State mining industry (Art. 61) and (*iii*) shall exercise, on behalf of the State and the Bolivian people, the right to conduct the activities of prospection, exploration, exploitation, etc. of minerals (Art. 61).

<sup>393</sup> Comibol’s Annual Operative Program and Institutional Budget for the year 2017 states that such document was prepared in compliance with the Directives issued by the Ministry of Economy and Public Finances and in the context of the Basic Norms of the System of Operations’ Programming, the National System of Public Investment, the Patriotic Agenda 2025, the Economic and Social Development Plan (2016-2017), Sectorial Plans and Comibol’s Strategic Corporate Plan. Comibol’s Annual Operation Plan, 2017, **C-159**, p 1.

<sup>394</sup> International Law Commission, “Draft articles on Responsibility of States for Internationally Wrongful Acts with commentary” [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, Art 5.

<sup>395</sup> *Ibid*, Commentary to Art 5 para (3).

<sup>396</sup> *Maffezini v Kingdom of Spain* (ICSID Case No ARB/97/7) Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, **CLA-24**, para 79; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No ARB/04/13) Award, 6 November 2008, **CLA-83**, para 168.

Comsur exercising its governmental authority to manage the Colquiri Mine. Therefore, Comibol’s conduct (including its failure to protect the Colquiri Mine) in relation to the Colquiri Lease can be attributed to the Bolivian State in the particular circumstances. Comibol’s nature as an instrumentality of the Bolivian State is also evidenced by the fact that its Executive Presidents and Directors are usually government officials, for example, former officials of the Ministry of Mining.<sup>397</sup>

**C. BOLIVIA TREATED GLENCORE BERMUDA’S INVESTMENTS UNFAIRLY AND INEQUITABLY, IMPAIRING THEM THROUGH UNREASONABLE MEASURES**

192. Pursuant to Article 2(2) of the Treaty, Bolivia is required to accord Glencore Bermuda’s investments “fair and equitable treatment.”<sup>398</sup> Bolivia is also required to refrain from impairing the management, maintenance, use, enjoyment or disposal of investments by “unreasonable or discriminatory measures.”<sup>399</sup> These obligations are reinforced by the Treaty’s Preamble, which recognizes that the Treaty seeks “to create favourable conditions for greater investment,”<sup>400</sup> and informs the interpretation of the Treaty’s fair and equitable treatment clause.<sup>401</sup>
193. Both protections are analyzed together, since the fair and equitable treatment standard comprises the protection against unreasonable measures.

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<sup>397</sup> For example, Comibol’s Executive President at the time of the invasion of the Colquiri Mine was Héctor Córdova, who had served as Vice Minister of Mining from 2010 to 2011 until he was appointed to head Comibol. Another example is José Antonio Pimentel Castillo, who was a representative of Potosí in the Plurinational Legislative Assembly of Bolivia from 2006 to 2010 and Minister of Mining from 2010 to 2012 (as noted in Section II.E.2, above, during his time as Minister he travelled to the site of the Antimony Smelter and read out the Antimony Smelter Nationalization Decree).

<sup>398</sup> Treaty, **C-1**, Art 2(2) (“Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment”) (emphasis added). Insofar as this Tribunal finds that Bolivia has breached its obligations under Article 5 and Article 2(2), as described above, it does not need to decide on this ground as well.

<sup>399</sup> *Ibid.*

<sup>400</sup> *Ibid.*, Preamble.

<sup>401</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, **CLA-6**, Art 31(1); *See also Total SA v Argentine Republic* (ICSID Case No ARB/04/1) Decision on Liability, 27 December 2010, **CLA-103**, para 116.

## 1. The fair and equitable treatment standard

194. The Treaty does not define what constitutes “fair and equitable treatment” and it is generally accepted that this standard of conduct cannot be summarized in a precise statement of legal obligation.<sup>402</sup> According to Article 31(1) of the Vienna Convention, Article 2(2) of the Treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of the object and purpose of the Treaty.<sup>403</sup>
195. The fair and equitable treatment standard is an open-textured standard, the application of which is ultimately specific to the facts of any given case. The purpose of the provision is to effectuate the intent of the relevant treaty—*ie*, to encourage and protect investments—and its content must be interpreted accordingly. For example, it has been noted that:

[T]he purpose of the [fair and equitable treatment] clause as used in BIT practice is to fill gaps which may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaties.<sup>404</sup>

196. Neither bad faith nor malicious intent are required for there to be a violation of the fair and equitable treatment standard. Unreasonable actions, even if taken in good faith, may violate an fair and equitable treatment obligation. As explained by the *Azurix v Argentina* tribunal:

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<sup>402</sup> C Schreuer, “Fair and Equitable Treatment in Arbitral Practice” (2005) Vol 6(3) The Journal of World Investment & Trade 357, **CLA-52**, p 11 (“[t]his lack of precision may be a virtue rather than a shortcoming. In actual practice, it is impossible to anticipate in the abstract the range of possible types of infringements upon the investor’s legal position. The principle of fair and equitable treatment allows for independent and objective third-party determination of this type of behavior on the basis of a flexible standard”).

<sup>403</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, **CLA-6**, Art 31(1).

<sup>404</sup> R Dolzer, “Fair and Equitable Treatment: A Key Standard in Investment Treaties” (2005) Vol 39(1) The International Lawyer 87, **CLA-54**, p 6. *See also* S Vasciannie, “The Fair and Equitable Treatment Standard in International Investment Law and Practice” (1999) Vol 70 British Year Book of International Law 99, **CLA-114**, p 66.

The standards of conduct agreed by the parties to a BIT presuppose a favorable disposition towards foreign investment, in fact, a pro-active behavior of the State to encourage and protect it. To encourage and protect investment is the purpose of the BIT. It would be incoherent with such purpose and the expectations created by such a document to consider that a party to the BIT has breached the obligation of fair and equitable treatment only when it has acted in bad faith or its conduct can be qualified as outrageous or egregious.<sup>405</sup>

197. Furthermore, the fair and equitable treatment standard requires the host State to protect an investor's investment proactively:

[I]n terms of the BIT, fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement - "to promote", "to create", "to stimulate"- rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors.<sup>406</sup>

198. The fair and equitable treatment standard is to be interpreted in accordance with the plain meaning of the terms "fair" and "equitable," understood "in their context and in light of [the Treaty's] object and purpose."<sup>407</sup> As one leading commentator explains:

Under this approach, treatment is fair when it is 'free from bias, fraud or injustice; equitable, legitimate [...] not taking undue advantage; disposed to concede every reasonable

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<sup>405</sup> *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12) Award, 14 July 2006, **CLA-63**, para 372. See also *CMS Gas Transmission Company v Republic of Argentina* (ICSID Case No ARB/01/8) Award, 12 May 2005, **CLA-57**, para 280; *Occidental Exploration and Production Company v Republic of Ecuador* (LCIA Case No UN 3467) Final Award, 1 July 2004, **CLA-50**, para 186; *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award, 4 April 2016, **CLA-130**, para 543; *Mondev International Ltd v United States of America* (ICSID Case No ARB(AF)/99/2) Award, 11 October 2002, **CLA-38**, para 116.

<sup>406</sup> *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* (ICSID Case No ARB/01/7) Award, 25 May 2004, **CLA-49**, para 113.

<sup>407</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, **CLA-6**, Art 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

claim’; and, by the same token, equitable treatment is that which is ‘characterized by equity or fairness [...] fair, just, reasonable.’<sup>408</sup>

199. Situations or types of conduct that constitute unfair and inequitable treatment can be identified from the practice of prior investment treaty tribunals.<sup>409</sup> These include, in particular but not exclusively:
- (a) the frustration of the investor’s legitimate expectations,<sup>410</sup> particularly in relation to the expectation that a State will provide “a stable and predictable legal framework” for foreign investment;<sup>411</sup>
  - (b) violations of due process<sup>412</sup> and the “absence of transparency in the legal procedure or in the actions of the State;”<sup>413</sup> and
  - (c) measures which are arbitrary or discriminatory.<sup>414</sup>

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<sup>408</sup> S Vasciannie, “The Fair and Equitable Treatment Standard in International Investment Law and Practice” (1999) Vol 70 British Year Book of International Law 99, **CLA-114**, p 6.

<sup>409</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Award, 27 August 2009, **CLA-90**, para 178.

<sup>410</sup> *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan* (ICSID Case No ARB/05/16) Award, 29 July 2008, **CLA-79**, para 609; *see also Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (ICSID Case No ARB/05/22) Award, 24 July 2008, **CLA-78**, para 602.

<sup>411</sup> *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18) Decision on Jurisdiction and Liability, 14 January 2010, **CLA-95**, para 284; *See also Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador* (ICSID Case No ARB/04/19) Award, 18 August 2008, **CLA-80**, para 339; *CMS Gas Transmission Company v Republic of Argentina* (ICSID Case No ARB/01/8) Award, 12 May 2005, **CLA-57**, para 284; *Técnicas Medioambientales Tecmed SA v United Mexican States* (ICSID Case No ARB(AF)/00/2) Award, 29 May 2003, **CLA-43**, para 154; *Occidental Exploration and Production Company v Republic of Ecuador* (LCIA Case No UN 3467) Final Award, 1 July 2004, **CLA-50**, para 196.

<sup>412</sup> *Mohammad Ammar Al-Bahloul v Republic of Tajikistan* (SCC Case No V (064/2008)) Partial Award on Jurisdiction and Liability, 2 September 2009, **CLA-91**, para 221.

<sup>413</sup> *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18) Decision on Jurisdiction and Liability, 14 January 2010, **CLA-95**, para 284; *See also Occidental Exploration and Production Company v Republic of Ecuador* (LCIA Case No UN 3467) Final Award, 1 July 2004, **CLA-50**, paras 183 and 185.

<sup>414</sup> *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award, 19 January 2007, **CLA-66**, para 253; *CMS Gas Transmission*

*a. Legitimate expectations of a stable business and legal environment*

200. A cornerstone of the fair and equitable treatment standard is the requirement that investors be accorded a stable and predictable investment environment.<sup>415</sup> Specifically, fair and equitable treatment includes the “obligation to treat foreign investors so as to avoid the frustration of investors’ legitimate and reasonable expectations.”<sup>416</sup> In *Bayindir v Pakistan*, the tribunal articulated this idea succinctly:

The Tribunal agrees with *Bayindir* when it identifies the different factors which emerge from decisions of investment tribunals as forming part of the [fair and equitable treatment] standard. These comprise the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising coercion or from frustrating the investor’s reasonable expectations [...].<sup>417</sup>

201. The seminal award in *Tecmed v Mexico* offers a particularly clear articulation in this regard:

The Arbitral Tribunal considers that this provision of the Agreement [FET], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally

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*Company v Republic of Argentina* (ICSID Case No ARB/01/8) Award, 12 May 2005, **CLA-57**, para 290.

<sup>415</sup> See, eg, *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan* (ICSID Case No ARB/05/16) Award, 29 July 2008, **CLA-79**, para 609.

<sup>416</sup> *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, para 302.

<sup>417</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Award, 27 August 2009, **CLA-90**, para 178 (emphasis added). See also *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18) Decision on Jurisdiction and Liability, 14 January 2010, **CLA-95**, para 284; *Occidental Exploration and Production Company v Republic of Ecuador* (LCIA Case No UN 3467) Final Award, 1 July 2004, **CLA-50**, paras 183 and 186.

transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments [...] The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions [...] that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.<sup>418</sup>

202. An investor may legitimately expect that a State will “conduct itself vis-à-vis his investment in a manner that [is] reasonably justifiable and [does] not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination.”<sup>419</sup> Likewise, in *Saluka v Czech Republic*, the tribunal held that a foreign investor “is entitled to expect that the [host State] will not act in a way that is manifestly inconsistent, non-transparent, unreasonable.”<sup>420</sup>
203. It is precisely on this basis that the tribunal in *CME v Czech Republic* found that the Czech Republic’s legislative and regulatory changes had unlawfully harmed CME’s investment by altering the country’s investment framework, “by evisceration of the arrangements in reliance upon [which] the foreign investor was induced to invest.”<sup>421</sup>
204. A series of tribunals has recognized the central importance of a predictable and transparent business environment:

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<sup>418</sup> *Técnicas Medioambientales Tecmed SA v United Mexican States* (ICSID Case No ARB(AF)/00/2) Award, 29 May 2003, **CLA-43**, para 154 (emphasis added).

<sup>419</sup> *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15) Award, 3 March 2010, **CLA-96**, para 441.

<sup>420</sup> *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, para 309.

<sup>421</sup> *CME Czech Republic BV v Czech Republic* (UNCITRAL) Partial Award, 13 September 2001, **CLA-32**, para 611.

- (a) In *Duke Energy v Peru*, the tribunal noted that “a stable and predictable legal and business environment is considered an essential element of the fair and equitable treatment standard.”<sup>422</sup>
- (b) In *Tecmed v Mexico*, the tribunal emphasized the importance of States acting consistently and transparently so that investors can plan their investment and comply with relevant regulations.<sup>423</sup>
- (c) In *Occidental v Ecuador*, emphasis was similarly placed on the State’s failure to provide a certain and predictable legal and business environment as constituting a breach of the fair and equitable treatment standard.<sup>424</sup>
205. At the very least, therefore, an investor can have the legitimate expectation that the conduct of the host State will be fair and equitable in the sense that it will not fundamentally contradict basic principles of its own laws and regulations. This includes, as noted by the tribunal in *Alpha v Ukraine*, a legitimate expectation that a State will not act “beyond its authority.”<sup>425</sup>

***b. Transparency and due process***

206. Transparency and due process are also fundamental elements of the fair and equitable treatment obligation. While they merit separate consideration as a subset of this standard, they are inextricably linked with the investor’s legitimate expectation of a stable and predictable legal framework. The focus under this limb of the standard is, however, more on how the government implements its measures against the investor rather than on the measures themselves.

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<sup>422</sup> *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador* (ICSID Case No ARB/04/19) Award, 18 August 2008, **CLA-80**, para 339.

<sup>423</sup> *Técnicas Medioambientales Tecmed SA v United Mexican States* (ICSID Case No ARB(AF)/00/2) Award, 29 May 2003, **CLA-43**, para 154.

<sup>424</sup> *Occidental Exploration and Production Company v Republic of Ecuador* (LCIA Case No UN 3467) Final Award, 1 July 2004, **CLA-50**, para 196.

<sup>425</sup> *Alpha Projektholding GmbH v Ukraine* (ICSID Case No ARB/07/16) Award, 8 November 2010, **CLA-101**, para 422.

207. The recent case of *Gold Reserve v Venezuela* is instructive in this regard, since it involved measures taken by the Venezuelan government against a foreign investor in the mining sector, in the form of the cancellation of certain mining rights. The tribunal in that case found that Venezuela’s measures had breached the fair and equitable treatment guarantee by “failing to ensure a transparent and predictable framework for [the investor’s] business planning and investment.”<sup>426</sup> The tribunal noted its belief that the reasons for the cancellation were not limited to those officially stated by the Ministry, but, rather, were to be found in “the change of political priorities of the Administration [...] taken regarding mining of mineral reserves starting in late 2007 by the highest levels of authority.”<sup>427</sup> The tribunal specifically noted the State’s violation of the investor’s due process rights in terminating the concessions, by “deliberately avoiding any dialogue with Claimant aimed at solving outstanding problems.”<sup>428</sup>
208. In *Saluka v Czech Republic*, the respondent State’s conduct “lacked sufficient transparency” because, in the exchange of views with the investor on possible solutions to the dispute, it failed “to allow [the claimant] to understand exactly what the Government’s preconditions for an acceptable solution were;” “[t]he Government failed to respond in any constructive way” and generally acted inconsistently “[i]nstead of engaging in meaningful negotiations.”<sup>429</sup>
209. The duty to ensure transparency and due process may manifest itself in a variety of contexts but most typically includes the duty to forewarn an investor of an intended measure and allow the investor reasonable legislative or procedural

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<sup>426</sup> *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award, 22 September 2014, **CLA-123**, para 609.

<sup>427</sup> *Ibid*, para 580. The official reason conveyed by the Ministry of Mining for the cancellation of the mining rights was that the investor had not complied with certain obligations under the concessions. However, the tribunal noted that the allegations of non-compliance had never before been raised by the State and indeed contradicted years of written certifications issued by the same Ministry, suggesting that the investor had complied sufficiently with those obligations.

<sup>428</sup> *Ibid*, para 601.

<sup>429</sup> *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, paras 420, 423 and 430.

recourse to contest it. The tribunal in *Kardassopoulos and Fuchs v Georgia* stressed the need to give an investor a reasonable chance (within a reasonable timeframe) to claim its legitimate rights and have its claims heard.<sup>430</sup>

210. In the same vein, in *PSEG v Turkey*, the tribunal found a breach of the fair and equitable treatment standard in the face of “an evident negligence on the part of the administration in the handling of the negotiations with the Claimants” and “serious administrative negligence and inconsistency,” and thus concluded that “the fair and equitable treatment obligation was seriously breached by what has been described [...] as the ‘roller-coaster’ effect” referring to continuous legal changes and inconsistencies in the administration’s practices.<sup>431</sup>

*c. Unreasonable and discriminatory measures*

211. In addition to the general fair and equitable standard, Article 2(2) of the Treaty includes a standalone provision requiring Bolivia to refrain from unreasonable and discriminatory conduct:

Neither Contracting Party shall, in any way, impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party.<sup>432</sup>

212. As with fair and equitable treatment, the standard of reasonableness of State conduct imposed under BITs is flexible and broad, to be determined in light of all the circumstances of the case. In the words of the tribunal in *CME v Czech Republic*:

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<sup>430</sup> *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15) Award, 3 March 2010, **CLA-96**, para 396; *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 435.

<sup>431</sup> *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award, 19 January 2007, **CLA-66**, paras 246 and 250.

<sup>432</sup> Treaty, **C-1**, Art 2(2).

As with the fair and equitable standard, the determination of reasonableness is in its essence a matter for the arbitrator's judgment. That judgment must be exercised within the context of asking what the parties to bilateral investment treaties should jointly anticipate, in advance of a challenged action, to be appropriate behaviour in light of the goals of the Treaty.<sup>433</sup>

## 2. **Bolivia expropriated Glencore Bermuda's investment in violation of the fair and equitable treatment standard**

213. Bolivia's nationalization of Glencore Bermuda's investments without compensation, in addition to constituting an unlawful expropriation and a violation of the full protection and security standard and the Treaty's umbrella clause, also amounts to a breach of the fair and equitable treatment standard. Indeed, cases of unlawful expropriation often result in a breach of the fair and equitable treatment standard. As the tribunal in *Owens-Illinois v Venezuela* noted, after finding that Venezuela's expropriation in the case had been illegal: "it is difficult to imagine a direct illegal expropriation that would not implicate a violation of [the fair and equitable treatment] standard."<sup>434</sup>
214. Glencore Bermuda had a legitimate expectation that, should Bolivia wish to take over its investments, it would provide Glencore Bermuda with just compensation. As explained above, this expectation is rooted in Bolivia's obligations under the Treaty, international law, as well as its own domestic law. In particular, under Bolivian law just compensation must be assessed and paid "prior" to the taking.<sup>435</sup> To cite the tribunal in *Tecmed v Mexico*, it is a basic pillar of the fair and equitable treatment standard that the investor can expect the State "not to deprive

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<sup>433</sup> *CME Czech Republic BV v Czech Republic* (UNCITRAL) Partial Award, 13 September 2001, **CLA-32**, para 158.

<sup>434</sup> *OI European Group BV v Bolivarian Republic of Venezuela* (ICSID Case No ARB/11/25) Award, 10 March 2015, **CLA-125**, para 501 (unofficial English translation from Spanish original).

<sup>435</sup> The requirement of prior compensation is enshrined in Bolivia's 1967 Constitution, in the 2009 Constitution, in Bolivia's Civil Code and in the Expropriation Law. 1967 Constitution of the Plurinational State of Bolivia, 2 February 1967, **R-03**, Art 22; 2009 Constitution of Bolivia, 7 February 2009, **C-95**, Art 57; Civil Code of Bolivia, 2 April 1976, **C-52**, Art 108; Law of Expropriation due to Public Utility, 30 December 1884, **C-49**, Arts 1 and 8.

the investor of its investment without the required compensation.”<sup>436</sup> Further, Glencore Bermuda also had a legitimate expectation that in expropriating its assets, Bolivia would comply with all other requirements under domestic law and basic principles of due process. As already explained, Bolivia failed to do so.<sup>437</sup>

215. Moreover, Glencore Bermuda’s investment was further based on a legal framework which provided for basic guarantees to foreign investors, consisting of, *inter alia*, the Investment Law—which was in force until 2014—and had been enacted with the purpose of “stimulat[ing]” and “guarantee[ing]” domestic and foreign investments in Bolivia.<sup>438</sup> As explained above, the Investment Law provided certain guarantees to prospective investors, including in relation to property rights, imports and exports, production and marketing and investment insurance.<sup>439</sup> Furthermore, the Investment Law provided that these guarantees would, in turn, be backed up by any bilateral or multilateral instruments to be entered into by Bolivia with other nations or international organizations.<sup>440</sup> Glencore Bermuda had a legitimate expectation that any measures adopted by Bolivia would be in respect of this legal framework.
216. In addition, Glencore Bermuda’s legitimate expectations were derived from the Colquiri Lease, which had been negotiated directly by Bolivia (through the Trade Ministry) and a Bolivian governmental entity, Comibol. As already explained, under the Colquiri Lease, Comibol had the obligation to protect the Colquiri Mine against usurpations by third parties.<sup>441</sup> However, Bolivia violated those

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<sup>436</sup> *Técnicas Medioambientales Tecmed SA v United Mexican States* (ICSID Case No ARB(AF)/00/2) Award, 29 May 2003, **CLA-43**, para 154.

<sup>437</sup> See Section V.A.3.b, above.

<sup>438</sup> Article 1 of the Investment Law noted the need “to promote the growth and economic and social development of Bolivia, with a regulatory system that governs both domestic and foreign investments.” Investment Law, 17 September 1990, published in the *Gaceta Oficial* No 1662 on 17 September 1990, **C-4**, Art 1 (unofficial English translation from Spanish original).

<sup>439</sup> Investment Law, 17 September 1990, **C-4**, Arts 4 and 7-9.

<sup>440</sup> *Ibid*, Art 7.

<sup>441</sup> Colquiri Lease, 27 April 2000, **C-11**, Clause 12.2.1.

- expectations when it failed to protect the Colquiri Mine from the invasion of the *cooperativistas*, despite Glencore Bermuda's repeated requests for assistance.<sup>442</sup>
217. Bolivia also failed to provide a transparent and predictable framework to Glencore Bermuda and its investments, violating Glencore Bermuda's due process rights. For example, as already explained, the Tin Smelter and Antimony Smelter nationalizations were carried out under the pretext of alleged illegalities related to the assets' privatization,<sup>443</sup> despite the fact that Glencore Bermuda had not been involved in the assets' privatization and had provided the government with extensive information regarding the ownership and acquisition of its investments.<sup>444</sup> Bolivia's allegations of illegality were wholly unsupported. In fact, the government never carried out a formal investigation of Glencore Bermuda's acquisition of the assets and no determination of illegality was ever made.<sup>445</sup>
218. Furthermore, the Antimony Smelter Nationalization Decree provided that the expropriation was carried out because of the "productive inactivity" of the asset,<sup>446</sup> even though the Antimony Smelter had been inactive prior to Glencore Bermuda acquiring it and the government had not requested that Glencore Bermuda bring it back to production.<sup>447</sup> The government also exceeded the scope of the Antimony Smelter Nationalization Decree when it seized the Tin Stock. As noted above, the Tin Stock was not part of the Antimony Smelter's inventory, a fact which was recognized by the Minister of Mining.<sup>448</sup> It was nonetheless taken

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<sup>442</sup> See Section II.E.3, above; Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 3 April 2012, **C-30**; Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 30 May 2012, **C-31**; see also Witness Statement of Christopher Eskdale, paras 75, 79.

<sup>443</sup> See Section II.E.1 and II.E.2.

<sup>444</sup> See Witness Statement of Christopher Eskdale, paras 41, 52.

<sup>445</sup> *Ibid.*, paras 41, 46.

<sup>446</sup> Antimony Smelter Nationalization Decree, 1 May 2010, **C-26**.

<sup>447</sup> See Witness Statement of Christopher Eskdale, para 63; Paribas, Privatization of Bolivian mining assets, Confidential Information Memorandum, August 16, 1999, **RPA-04**, pp 61-66.

<sup>448</sup> Letter from Ministry of Mining (Mr Pimentel) to EMV (Mr Villavicencio), 5 May 2010, **C-29**.

- by the government on 1 May 2010 and never returned to Glencore Bermuda or any of its affiliates.<sup>449</sup> The Tin Stock's taking thereby exceeded the scope of the Antimony Smelter Nationalization Decree, in violation of Bolivian law, including the constitutional right to private property.<sup>450</sup>
219. Most notably, the nationalization of Colquiri was the result of Bolivia's inaction and bad faith.<sup>451</sup> Specifically, as explained in greater detail above, Bolivia *first* failed to respond to Glencore Bermuda's requests for assistance, thus failing to protect the Colquiri Mine from the unlawful and violent interference of the *cooperativistas*.<sup>452</sup> And *second*, once the conflict with the cooperatives was resolved, Bolivia still decided to nationalize the Colquiri Mine. Notably, in order to avoid a further nationalization, resume mining activities and, most importantly, prevent any casualties, Glencore Bermuda did not object to some areas (*ie*, the Rosario vein) being ceded to the cooperatives.<sup>453</sup> Yet, just days later, Bolivia engaged in separate meetings with the cooperatives and the union workers, promising to each what the other wanted and inevitably reigniting violent clashes amongst the competing factions of miners.<sup>454</sup>
220. In particular, on or around 9 June 2012—just days after the Rosario Agreement was finalized and the cooperatives had lifted their blockade—the government reached a separate agreement with the unions that provided for the nationalization of the Colquiri Mine.<sup>455</sup> Glencore Bermuda learned of this agreement, and of the

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<sup>449</sup> Letter from EMV (Mr Villavicencio) to Colquiri (Mr Capriles), 8 June 2010, **C-102**; Witness Statement of Christopher Eskdale, paras 66-67.

<sup>450</sup> 2009 Constitution of Bolivia, 7 February 2009, **C-95**, Art 56.

<sup>451</sup> *See* Section II.E, above.

<sup>452</sup> *See* Section II.E.3, above.

<sup>453</sup> Witness Statement of Christopher Eskdale, para 93; Rosario Agreement, 7 June 2012, **C-35**; *See also* Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 8 June 2012, **C-125**.

<sup>454</sup> *See* Sections II.E.3, above.

<sup>455</sup> Witness Statement of Christopher Eskdale, para 96.

planned nationalization, through the government's public announcements.<sup>456</sup> Neither Glencore Bermuda nor its Bolivian affiliates were consulted by Bolivia. As explained above, the government's announcements disturbed the truce that had been reached with the cooperatives. Clashes between the salaried miners and the *cooperativistas* broke out again. The government's response was to enter into yet another separate agreement—this time with the cooperatives.<sup>457</sup> The agreement provided that Colquiri would be nationalized, but that the cooperatives would be allowed to exploit the Rosario vein.<sup>458</sup> The takeover was ultimately codified in the Colquiri Mine Nationalization Decree issued on 20 June 2012.<sup>459</sup> Yet, Glencore Bermuda and its affiliates were completely excluded from this process.

221. Lastly, as in *PSEG v Turkey*, Bolivia's handling of the negotiations with Glencore Bermuda since 2007 evidences "serious administrative negligence and inconsistency," since it subjected Glencore Bermuda to a "roller-coaster" ride.<sup>460</sup> As described above, despite Glencore Bermuda's many attempts to initiate and engage in good faith negotiations over the last ten years, Bolivia persistently failed to offer Glencore Bermuda just and effective compensation.
222. In conclusion, Glencore Bermuda had a legitimate expectation that, should Bolivia wish to take over Glencore Bermuda's assets, it would compensate Glencore Bermuda and respect its due process rights, in accordance with applicable Bolivian norms and international law. In seizing Glencore Bermuda's

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<sup>456</sup> Letter from Glencore International (Mr Maté) to the President of Bolivia (Mr Morales), 13 June 2012, **C-38bis**; Transcript of "Bolivia nacionalizará minera Colquiri: García Linera", video prepared by *TeleSUR Noticias*, 12 June 2012, **C-37**.

<sup>457</sup> See Witness Statement of Christopher Eskdale, para 99.

<sup>458</sup> Minutes of Agreement among Fencomin, Fedecomín, Central Local de Cooperativas Mineras de Colquiri, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, Cooperativa 26 de Febrero, the Minister of Mining, the Vice Minister of Productive Mining and Metallurgic Development, Comibol, and the Legal Director of the Ministry of Mining, 12 June 2012, **C-129**; see also "Mediante acuerdo mineros obtienen nuevos parajes en Colquiri," *El Diario*, 13 June 2012, **C-137**; "Acuerdan nacionalizar sólo a Glencore," *Los Tiempos*, 13 June 2012, **C-136**.

<sup>459</sup> Colquiri Mine Nationalization Decree, 20 June 2012, **C-39**.

<sup>460</sup> *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award, 19 January 2007, **CLA-66**, paras 246, 250.

assets, Bolivia acted in bad faith and failed to compensate Glencore Bermuda and to respect its rights to transparency and due process, as guaranteed by the Treaty.

## **VI. GLENCORE BERMUDA IS ENTITLED TO COMPENSATION**

223. As demonstrated in Section V above, Bolivia breached the provisions of the Treaty prohibiting expropriation without just, effective and prompt compensation, as well as the provisions requiring Bolivia to afford fair and equitable treatment and full protection and security and to respect the obligations assumed towards Glencore Bermuda's investments. These Treaty breaches caused direct and substantial harm to Glencore Bermuda.
224. In accordance with well-settled principles of international law, Glencore Bermuda seeks full reparation for the losses resulting from Bolivia's violations of the Treaty and international law, in the form of monetary compensation sufficient to wipe out the consequences of Bolivia's wrongful acts.<sup>461</sup>
225. Glencore Bermuda's claim for damages relating to Vinto, Colquiri, the Tin Stock and the Antimony Smelter is explained and quantified in the Compass Lexecon Report submitted with this Statement of Claim by economists Manuel A. Abdala and Carla Chavich, both experts with extensive experience in the valuation and quantification of damages, including in relation to mineral properties (the *Compass Lexecon Report*). The Compass Lexecon Report relies on the fair market value of Glencore Bermuda's participation in Colquiri and Vinto, as well as the fair market value of the Tin Stock and the Antimony Smelter. Compass Lexecon has analyzed the production and cost inputs provided by renowned mining engineers Graham Clow and Richard Lambert from Roscoe Postle Associates Inc, with 43 and 37 years, respectively, of experience in the mining

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<sup>461</sup> International Law Commission, "Draft articles on Responsibility of States for Internationally Wrongful Acts with commentary" [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, art 31.

industry, including in assessing projects in Latin America (the *RPA Report*).<sup>462</sup> Finally, with respect to the calculation of damages relating to the Antimony Smelter, the Compass Lexecon Report relies on the real estate appraisal opinion of Ms Gina Russo, an architect and valuator with over 30 years of experience in the field of real estate valuation in Bolivia (the *Russo Report*).

226. On the basis of the Compass Lexecon, RPA and Russo Reports, Glencore Bermuda estimates the damages caused by Bolivia’s breaches at US\$ 675.7 million, as of 15 August 2017, as summarized in the table below:<sup>463</sup>

<i>US\$ Million</i>	Colquiri	Vinto	Antimony Smelter	Tin Stock	Total
	<i>May 29, 2012</i>	<i>February 8, 2007</i>	<i>August 15, 2017</i>	<i>April 30, 2010</i>	
Fair Market Value	443.1	65.9	2.2	0.7	
- Remittance Tax	55.4	8.2	0.3	0.1	
<b>Damages to Claimant (as of Date of Valuation)</b>	<b>387.7</b>	<b>57.7</b>	<b>1.9</b>	<b>0.6</b>	
+ Interest	148.1	79.3	0.0	0.3	
<b>Damages to Claimant (as of August 15, 2017)</b>	<b>535.8</b>	<b>137.0</b>	<b>1.9</b>	<b>1.0</b>	<b>675.7</b>

227. In the following sections, Glencore Bermuda addresses: (i) the applicable standards for the assessment of compensation; (ii) the quantum of compensation owed to Glencore Bermuda for each of the expropriated assets; (iii) interest; and (iv) tax.

## A. APPLICABLE PRINCIPLES AND METHODOLOGY

### 1. Full compensation is the appropriate standard of reparation

228. It is a well-established principle of international law that a State must afford “full reparation for the injury caused by [its] internationally wrongful act.”<sup>464</sup> Reparation may take the form of restitution, compensation or satisfaction,

<sup>462</sup> See Expert Report of RPA, Annex 2.

<sup>463</sup> Expert Report of Compass Lexecon, Table 1.

<sup>464</sup> International Law Commission, “Draft articles on Responsibility of States for Internationally Wrongful Acts with commentary” [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, art 31(1).

- either individually or in combination.<sup>465</sup> Here, restitution in kind is neither possible nor practical.<sup>466</sup> It follows that the appropriate remedy is monetary compensation sufficient to efface the consequences of Bolivia's internationally wrongful conduct.
229. The Treaty does not address the standard of compensation owed for a breach of any of its terms. It does, however, specify in Article 5 the steps necessary to render an expropriation legal. This regime requires "just and effective compensation," reflecting the market value of the property lost as a result of the government action.<sup>467</sup> This provision is inapplicable to the assessment of damages in the case at hand where, as explained in Section II.E above, no compensation has ever been paid, and thus Bolivia's expropriation is unlawful.
230. In the absence of an applicable *lex specialis*, the relevant standard for the determination of the compensation owed to Glencore Bermuda must be assessed by the Tribunal with reference to applicable principles of customary international law.<sup>468</sup>
231. It is firmly established that the customary international law principle governing recovery from injury for internationally wrongful acts is that of "full

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<sup>465</sup> *Ibid*, art 34.

<sup>466</sup> *See, eg, CMS Gas Transmission Company v Republic of Argentina* (ICSID Case No ARB/01/8) Award, 12 May 2005, **CLA-57**, para 406.

<sup>467</sup> Treaty, **C-1**, art 5(1); *see also* Section V.A, above.

<sup>468</sup> *See Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award, 4 April 2016, **CLA-130**, para 846; *Burlington Resources, Inc v Republic of Ecuador* (ICSID Case No ARB/08/5) Decision on Reconsideration and Award, 7 February 2017, **CLA-134**, para 160; *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, paras 481, 483; *Amoco International Finance Corporation v Government of the Islamic Republic of Iran and others, Partial Award* (1987-Volume 15) Iran-US Claims Tribunal Report, 14 July 1987, **CLA-10**, paras 189, 191-93; M Sornarajah, *The International Law on Foreign Investment* (3rd edn 2010), **CLA-93**, pp 3-4; *Nykomb Synergetics Technology Holding AB v Republic of Latvia* (SCC) Arbitral Award, 16 December 2003, **CLA-46**, section 5.1.

reparation.”<sup>469</sup> As established in *Chorzów Factory* by the Permanent Court of International Justice (*PCIJ*) in 1928:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.<sup>470</sup>

232. The obligation to provide full reparation is also reflected in the International Law Commission’s Articles on State Responsibility,<sup>471</sup> which provide that a State “responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby” and that such compensation “shall cover any financially assessable damage including loss of profits insofar as it is established.”<sup>472</sup>

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<sup>469</sup> International Law Commission, “Draft articles on Responsibility of States for Internationally Wrongful Acts with commentary” [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, art 31 (“1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”).

<sup>470</sup> *Case Concerning the Factory at Chorzów (Germany/Poland)* (Merits) [1928] PCIJ Series A, No 17, **CLA-2**, p 46 (emphasis added); see also International Law Commission, “Draft articles on Responsibility of States for Internationally Wrongful Acts with commentary” [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, art 34 (“Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination”).

<sup>471</sup> The International Law Commission’s Articles on State Responsibility, and in particular Article 36, have frequently been invoked in investment treaty decisions in relation to compensation issues. See, eg, *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Award, 6 February 2007, **CLA-67**, para 352; *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 8.2.6; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc v United Mexican States* (ICSID Case No ARB(AF)/04/05) Award, 21 November 2007, **CLA-72**, paras 280-281; *Gemplus SA and others v United Mexican States, and Talsud SA v United Mexican States* (ICSID Case Nos ARB(AF)/04/3 and ARB(AF)/04/4) Award, 16 June 2010, **CLA-98**, paras 13.79-13.81; *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18) Award, 28 March 2011, **CLA-104**, paras 151, 245; *El Paso Energy International Company v Argentine Republic* (ICSID Case No ARB/03/15) Award, 31 October 2011, **CLA-106**, para 710.

<sup>472</sup> International Law Commission, “Draft articles on Responsibility of States for Internationally Wrongful Acts with commentary” [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, art 36.

233. Tribunals have repeatedly espoused the “full reparation” principle set out above as the international law standard applicable to the compensation owed for breaches of BITs.<sup>473</sup> As explained recently in *Gold Reserve v Venezuela*:

[I]t is well accepted in international investment law that the principles espoused in the *Chorzow Factory* case, even if initially established in a State-to-State context, are the relevant principles of international law to apply when considering compensation for breach of a BIT. It is these well-established principles that represent customary international law, including for breaches of international obligations under BITs, that the Tribunal is bound to apply.<sup>474</sup>

234. Thus, any monetary award must put Glencore Bermuda in the economic position that it would have been in had the internationally wrongful act not occurred at all.<sup>475</sup> As the tribunal in *Vivendi v Argentina II* stated:

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<sup>473</sup> See *CMS Gas Transmission Company v Republic of Argentina* (ICSID Case No ARB/01/8) Award, 12 May 2005, **CLA-57**, para 400. For examples of more recent cases, see *Sempra Energy International v Argentine Republic* (ICSID Case No ARB/02/16) Award, 28 September 2007, **CLA-71**, para 400; *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**, paras 8.2.4-8.2.5; *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador* (ICSID Case No ARB/04/19) Award, 18 August 2008, **CLA-80**, para 468; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (ICSID Case No ARB/05/22) Award, 24 July 2008, **CLA-78**, paras 776-777; *National Grid plc v Argentine Republic* (UNCITRAL) Award, 3 November 2008, **CLA-82**, para 270; *Impregilo SpA v Argentine Republic* (ICSID Case No ARB/07/17) Award, 21 June 2011, **CLA-105**, para 361; *El Paso Energy International Company v Argentine Republic* (ICSID Case No ARB/03/15) Award, 31 October 2011, **CLA-106**, para 700; *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award, 22 September 2014, **CLA-123**, para 678; *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award, 4 April 2016, **CLA-130**, paras 847-848.

<sup>474</sup> *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award, 22 September 2014, **CLA-123**, para 678.

<sup>475</sup> *Case Concerning the Factory at Chorzów (Germany/Poland)* (Merits) [1928] PCIJ Series A, No 17, **CLA-2**, p 46; *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award, 4 April 2016, **CLA-130**, paras 847-849; *Petrobart Limited v Kyrgyz Republic* (SCC Case No 126/2003) Arbitral Award, 29 March 2005, **CLA-56**, pp 78-79 (“The Arbitral Tribunal agrees that, insofar as it appears that Petrobart has suffered damage as a result of the Republic’s breaches of the Treaty, Petrobart shall so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred.”); *Sapphire International Petroleum Ltd v National Iranian Oil Company*, Arbitral Award, 15 March 1963, **CLA-5**, pp 26-27.

Based on these principles [of international law], and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action.<sup>476</sup>

235. The standard described above represents a different standard of compensation than that applicable to lawful expropriations under the Treaty. The practical effect of this distinction is that, for lawful expropriations, the focus is on finding the neutral or objective “value of the property concerned” prior to the date of expropriation and promptly compensating the investor accordingly.<sup>477</sup> For unlawful expropriations and other treaty breaches, as in the present case, the focus is on establishing the subjective value that will reinstate the injured party to the “financial situation [it] would be in if the unlawful act had not been committed.”<sup>478</sup>

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<sup>476</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (ICSID Case No ARB/97/3) Award, 20 August 2007, **CLA-70**, para 8.2.7 (emphasis added).

<sup>477</sup> I Marboe, *Calculation of Compensation and Damages in International Investment Law* (1st edn 2009), **CLA-86**, para 2.97.

<sup>478</sup> *Ibid.*, para 2.101. See also *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award, 22 September 2014, **CLA-123**, para 681 (“reparation should wipe-out the consequences of the breach and re-establish the situation as it is likely to have been absent the breach. As the consequence of the serious breach in the present situation was to deprive the investor totally of its investment, the Tribunal considers it appropriate that the remedy that would wipe-out the consequences of the breach is to assess damages using a fair market value methodology.”); *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12) Award, 14 July 2006, **CLA-63**, paras 423-424, 438; *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 8.2.7 (“Based on these principles [of customary international law], and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state’s action.”); *Ioan Micula and others v Romania* (ICSID Case No ARB/05/20) Award, 11 December 2013, **CLA-119**, para 917 (“the claimant must be placed back in the position it would have been ‘in all probability’ but for the international wrong.”).

236. Investment tribunals applying the “full reparation” standard have focused on making the investor “whole” by a variety of means.<sup>479</sup> These means have included: (i) pushing back the date of valuation from the date of seizure to the date of the award, to ensure that the investor rather than the State benefits from any increase in value of the expropriated asset (as decided in *ConocoPhillips v Venezuela*);<sup>480</sup> (ii) awarding consequential damages (as held in *Siemens v Argentina*);<sup>481</sup> and (iii) awarding “disturbance” damages for the disruption caused by an unlawful seizure (as ruled in *Funnekotter v Zimbabwe*).<sup>482</sup> These cases clearly show that the principle of full reparation is well-established and has to be ensured by all possible means.

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<sup>479</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (ICSID Case No ARB/97/3) Award, 20 August 2007, **CLA-70**, para 8.2.5 (“It is also clear that [the customary international law] standard permits, if the facts so require, a higher rate of recovery than that prescribed in Article 5(2) for *lawful* expropriations.”).

<sup>480</sup> *ConocoPhillips Petrozuata BV and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/30) Decision on Jurisdiction and the Merits, 3 September 2013, **CLA-117**, paras 342-343. The ICSID tribunal noted the unlawful nature of the expropriation and, rather than apply the standard of compensation set out in the applicable treaty (which required the “fair market value” of the investment to be assessed immediately before the expropriation), applied the *Chorzów Factory* test to establish that full compensation required the investment to be valued at the date of the award. *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**, paras 496-497.

<sup>481</sup> *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Award, 6 February 2007, **CLA-67**, para 352. The tribunal noted that “[t]he key difference between compensation under the Draft Articles and the *Factory at Chorzow* case formula, and Article 4(2) of the Treaty is that under the former, compensation must take into account ‘all financially assessable damage’ or ‘wipe out all the consequences of the illegal act’ as opposed to compensation ‘equivalent to the value of the expropriated investment’ under the Treaty. Under customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages.” (emphasis added).

<sup>482</sup> *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe* (ICSID Case No ARB/05/6) Award, 22 April 2009, **CLA-88**, para 138. The Tribunal concluded that “the Claimants must obtain reparation for the disturbances resulting from the taking over of their farms and for the necessity for them to start a new life often in another country.”

## 2. Compensation must be equal to fair market value

237. The proper method for calculating damages is by determining the fair market value (*FMV*) of each of the assets, as outlined in further detail below.<sup>483</sup>
238. The 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment are clear in this regard, providing that compensation for expropriation “will be deemed ‘adequate’ if it is based on the fair market value of the taken asset.”<sup>484</sup> Similarly, according to the International Law Commission’s Articles on State Responsibility, “[c]ompensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the ‘fair market value’ of the property lost.”<sup>485</sup>
239. The Iran-US Claims Tribunal has defined FMV as “the price that a willing buyer would pay to a willing seller in circumstances in which each had good

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<sup>483</sup> J Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (1st edn 2002), **CLA-33**, p 3 (stating that “[c]ompensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the ‘fair market value’ of the property lost.”); CN Brower and JD Brueschke, *The Iran-United States Claims Tribunal* (1st edn 1998), **CLA-22**, p 3 (stating that “market price is the most reliable indicator of the actual value of an asset at a determined date”); *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (ICSID Case No ARB/96/1) Final Award, 17 February 2000, **CLA-25**, paras 69-70; *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**, paras 8.2.9-8.2.11.

<sup>484</sup> World Bank Group, “Guidelines on the Treatment of Foreign Direct Investment” (1992) Vol 7(2) ICSID Review–Foreign Investment Law Journal 297, **CLA-17**, p 297. *See also* J Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (1st edn 2002), **CLA-33**, p 3.

<sup>485</sup> International Law Commission, “Draft articles on Responsibility of States for Internationally Wrongful Acts with commentary” [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, art 36, Commentary para 22. *See also* CN Brower and JD Brueschke, *The Iran-United States Claims Tribunal* (1st edn 1998), **CLA-22**, p 3 (“[M]arket price is the most reliable indicator of the actual value of an asset at a determined date.”); *Sempra Energy International v Argentine Republic* (ICSID Case No ARB/02/16) Award, 28 September 2007, **CLA-71**, para 404; *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 499.

information, each desired to maximize his financial gain, and neither was under duress or threat.<sup>486</sup>

240. As recently recognized by the tribunal in *Crystallex v Venezuela*, proper assessment of an investment's FMV ensures that the injured party is restored to the situation it would have been in *but-for* the internationally wrongful acts:

[I]t is well-accepted that reparation should reflect the “fair market value” of the investment. Appraising the investment in accordance with the fair market value methodology indeed ensures that the consequences of the breach are wiped out and that the situation which would, in all probability, have existed if the wrongful acts had not been committed is reestablished.<sup>487</sup>

241. International tribunals have regularly applied the FMV standard in cases involving both breaches of the fair and equitable treatment<sup>488</sup> and expropriation<sup>489</sup> clauses of bilateral investment treaties. Notably, the standard for calculating

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<sup>486</sup> *Starrett Housing Corporation and others v Government of the Islamic Republic of Iran*, Final Award (1987-Volume 16) Iran-US Claims Tribunal Report, **CLA-11**, para 277.

<sup>487</sup> *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award, 4 April 2016, **CLA-130**, para 850. *See also Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award, 22 September 2014, **CLA-123**, para 681 (“As the consequence of the serious breach in the present situation was to deprive the investor totally of its investment, the Tribunal considers it appropriate that the remedy that would wipe-out the consequences of the breach is to assess damages using a fair market value methodology.”); *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 8.2.10.

<sup>488</sup> *See, eg, CMS Gas Transmission Company v Republic of Argentina* (ICSID Case No ARB/01/8) Award, 12 May 2005, **CLA-57**, para 410; *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12) Award, 14 July 2006, **CLA-63**, para 424; *Enron Corporation and Ponderosa Assets LP v Argentine Republic* (ICSID Case No ARB/01/3) Award, 22 May 2007, **CLA-68**, paras 359-363; *Sempra Energy International v Argentine Republic* (ICSID Case No ARB/02/16) Award, 28 September 2007, **CLA-71**, pars 403-404; *El Paso Energy International Company v Argentine Republic* (ICSID Case No ARB/03/15) Award, 31 October 2011, **CLA-106**, para 703.

<sup>489</sup> *See, eg, Metalclad Corporation v United Mexican States* (ICSID Case No ARB(AF)/97/1) Award, 30 August 2000, **CLA-27**, para 118; *CME Czech Republic BV v Czech Republic* (UNCITRAL) Final Award, 14 March 2003, **CLA-42**, paras 496-499; *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe* (ICSID Case No ARB/05/6) Award, 22 April 2009, **CLA-88**, para 124.

compensation for Bolivia's expropriation would be the same even if determined in accordance with Article 5(1) of the Treaty, as described above.<sup>490</sup>

### 3. Methodologies to assess the FMV

242. The relevant method for the assessment of the FMV of an asset depends on the circumstances and characteristics of each individual case. In *Crystallex v Venezuela*, the tribunal explained as follows:

Tribunals may consider any techniques or methods of valuation that are generally acceptable in the financial community, and whether a particular method is appropriate to utilize is based on the circumstances of each individual case. A tribunal will thus select the appropriate method basing its decision on the circumstances of each individual case [...].<sup>491</sup>

243. In accordance with these observations, in order to reliably assess the quantum of damages it is owed, Glencore Bermuda has carefully considered the individual characteristics of each asset as well as the applicable financial and industry standards.

***a. FMV of going concerns like Vinto and Colquiri must take future profitability into account***

244. Where the investment is a “going concern,”<sup>492</sup> the assessment of its FMV must take future profitability into consideration in order to provide full compensation,

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<sup>490</sup> See Section V.A, above.

<sup>491</sup> *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award, 4 April 2016, **CLA-130**, para 886.

<sup>492</sup> For a definition of a “going concern,” see World Bank Group, “Guidelines on the Treatment of Foreign Direct Investment” (1992) Vol 7(2) ICSID Review–Foreign Investment Law Journal 297, **CLA-17**, p 11: “[A]n enterprise consisting of income-producing assets which has been in operation for a sufficient period of time to generate the data required for the calculation of future income and which could have been expected with reasonable certainty, if the taking had not occurred, to continue producing legitimate income over the course of its economic life in the general circumstances following the taking by the State.”

because this is how market participants estimate the value of such businesses.<sup>493</sup> Indeed in *Chorzów Factory*, the PCIJ specifically noted that “future prospects,” “probable profit” and future “financial results” were factors material to the valuation.<sup>494</sup> Similarly, in the case of *Phillips Petroleum v Iran* the Iran-US Claims Tribunal explained that:

[A]nalysis of a revenue-producing asset... must involve a careful and realistic appraisal of the revenue-producing potential of the asset over the duration of its term, which requires appraisal of the level of production that reasonably may be expected, the costs of operation, including taxes and other liabilities, and the revenue such production would be expected to yield, which, in turn, requires a determination of the price estimates for sales of the future production that a reasonable buyer would use in deciding upon the price it would be willing to pay to acquire the asset.<sup>495</sup>

245. The Australasian Code for the Public Reporting of Technical Assessments and Valuations of Mineral Assets (the *VALMIN Code*) provides a set of fundamental principles, minimum requirements and supporting recommendations to assist in the assessment and valuation of mineral properties.<sup>496</sup> Pursuant to these standards, which are based on international good practice, mines and processing plants that have been commissioned and are in production are considered “production properties.”<sup>497</sup> The VALMIN Code indicates that income and market approaches should be used to assess their value.

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<sup>493</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (ICSID Case No ARB/97/3) Award, 20 August 2007, **CLA-70**, para 8.3.3.

<sup>494</sup> *Case Concerning the Factory at Chorzów (Germany/Poland)* (Merits) [1928] PCIJ Series A, No 17, **CLA-2**, pp 50-51.

<sup>495</sup> *Phillips Petroleum Company Iran v Islamic Republic of Iran and the National Iranian Oil Company*, Award (1989-Volume 21) Iran-US Claims Tribunal Report, **CLA-12**, para 111 (emphasis added).

<sup>496</sup> Expert Report of RPA, Annex 3.

<sup>497</sup> *Ibid*, Annex 3.

246. Both Vinto and Colquiri were “going concerns” or “in production properties” at the time of Bolivia’s measures. Therefore, their FMV must take into account the value of the future cash flows that each investment would have generated in the absence of Bolivia’s unlawful conduct.
247. The most appropriate way to determine the FMV of going concerns like Vinto and Colquiri is the DCF method. Favored in both international finance and international law,<sup>498</sup> the DCF method projects the future cash flows that a company would have generated for equity-holders in the absence of wrongful government conduct, and then discounts them back to the valuation date at a rate that accounts for the risk associated with those cash flows.<sup>499</sup> The discount rate most frequently adopted is the weighted average cost of capital (*WACC*)—*ie*, the average at market value of all financing sources (cost of debt, equity and ratio debt/equity) in the going concern’s capital structure. The *WACC* is carefully constructed to reflect the risk that future cash flows will not materialize as projected. In this way, the DCF methodology reflects the transaction price at which willing buyers and sellers in the marketplace would transfer an equity stake in the company to be valued. The DCF method has been widely endorsed and applied by international arbitral tribunals to determine the appropriate

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<sup>498</sup> See, eg, World Bank Group, “Guidelines on the Treatment of Foreign Direct Investment” (1992) Vol 7(2) ICSID Review–Foreign Investment Law Journal 297, **CLA-17**, pp 10-11; N Rubins and NS Kinsella, *International Investment, Political Risk and Dispute Resolution: A Practitioner’s Guide* (1st edn 2005), **CLA-53**, pp 3-4; PD Friedland and E Wong, “Measuring Damages for the Deprivation of Income-Producing Assets: ICSID Case Studies” (1991) Vol 6(2) ICSID Review–Foreign Investment Law Journal 400, **CLA-16**, p 10; WC Lieblich, “Determinations by International Tribunals of the Economic Value of Expropriated Enterprises” (1990) Vol 7(1) Journal of International Arbitration 37, **CLA-13**, p 2; *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award, 22 September 2014, **CLA-123**, para 831.

<sup>499</sup> World Bank Group, “Guidelines on the Treatment of Foreign Direct Investment” (1992) Vol 7(2) ICSID Review–Foreign Investment Law Journal 297, **CLA-17**, pp 11 (defining DCF as “the cash receipts realistically expected from the enterprise in each future year of its economic life as reasonably projected minus that year’s expected cash expenditure, after discounting this net cash flow for each year by a factor which reflects the time value of money, expected inflation, and the risk associated with such cash flow under realistic circumstances.”).

compensation due as a result of expropriation, as well as other breaches of investment treaties.<sup>500</sup>

248. In order to reflect the *Chorzów Factory* “full reparation” principle, the valuer normally creates two DCF models, one projecting future cash flows assuming the offending measures are in place (the “actual” model), and one assuming that the government had never breached the treaty (the “but-for” model). The difference in the value of the claimant’s equity interest in the company in the “but-for” and the “actual” model then provides the primary measure of damages. In the present case, the full expropriation of Glencore Bermuda’s investment in Vinto and Colquiri means that the “actual” value of these investments is necessarily zero—in other words, Bolivia’s wrongful conduct caused Glencore Bermuda to lose the full value of its investment in Vinto and Colquiri.
249. For the reasons set out above, the DCF method is the appropriate method to assess the FMV of Glencore Bermuda’s expropriated investments in Vinto and Colquiri, and is the methodology that has been adopted in the Compass Lexecon Report.

***b. Non-ongoing concerns as the Antimony Smelter must be valued under the asset-based approach***

250. The Antimony Smelter was owned by Colquiri and was expropriated in 2010, two years prior to Colquiri’s expropriation. Thus, the value of Colquiri at the date of its expropriation does not take into account the loss related to the expropriation of the Antimony Smelter. The damages resulting from the expropriation of the Antimony Smelter therefore need to be calculated separately.

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<sup>500</sup> See, eg, *CMS Gas Transmission Company v Republic of Argentina* (ICSID Case No ARB/01/8) Award, 12 May 2005, **CLA-57**, paras 411-417; *Enron Corporation and Ponderosa Assets LP v Argentine Republic* (ICSID Case No ARB/01/3) Award, 22 May 2007, **CLA-68**, para 385; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (ICSID Case No ARB/05/22) Award, 24 July 2008, **CLA-78**, para 793; *National Grid plc v Argentine Republic* (UNCITRAL) Award, 3 November 2008, **CLA-82**, para 275; *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18) Award, 28 March 2011, **CLA-104**, para 254.

251. The Antimony Smelter was inaugurated in 1976 and was only operational for a short period during the late 1970s and the 1980s. By the time it was privatized in 2002 it had been inoperative for a few years.<sup>501</sup> A combination of limited domestic supply and low international antimony prices meant that the Antimony Smelter remained out of service after it was acquired by Glencore Bermuda in 2006.<sup>502</sup> As explained in the Compass Lexecon Report, as a non-operating asset at the time of its expropriation (and with no plans to make it operational), the most appropriate valuation methodology to establish the FMV of the Antimony Smelter is the asset-based approach. Under this approach, the FMV of the Antimony Smelter is equivalent to the sum of the value of its individual components.<sup>503</sup>

#### 4. The valuation date

252. Pursuant to the full reparation principle, the injured claimant must be made whole, and the consequences of the State's internationally wrongful conduct must be entirely wiped out. This standard of full reparation is the guiding principle affecting all aspects of the valuation analysis—including the appropriate date of valuation.<sup>504</sup>

253. Determination of the appropriate valuation date therefore requires the tribunal “precisely to ensure full reparation and to avoid any diminution of value attributable to the State’s conduct leading up to the expropriation.”<sup>505</sup> In other

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<sup>501</sup> Paribas, Privatisation of Bolivian mining assets, Confidential Information Memorandum, August 16, 1999, **RPA-04**, pp 62-69.

<sup>502</sup> See Witness Statement of Christopher Eskdale, section II.

<sup>503</sup> Expert Report of Compass Lexecon, paras 93-94.

<sup>504</sup> Article 5(1) of the Treaty requires Bolivia to provide just and effective compensation either “immediately before the expropriation or before the impending expropriation became public knowledge, whichever is earlier.” Treaty, **C-1**, Art 5(1). As outlined above, however, Article 5(1) does not address the compensation owed for unlawful expropriations or for violations of other Treaty provisions, including Bolivia’s obligations to provide fair and equitable treatment and full protection and security. The proper valuation date, therefore, is a question of fact for the Tribunal and must be determined in accordance with the customary international law principle of full reparation.

<sup>505</sup> *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15) Award, 3 March 2010, **CLA-96**, para 517.

words, the valuation date must reflect the situation that would have existed *but-for* the State’s wrongful conduct. As set out by the tribunal in *Santa Elena v Costa Rica*:

The expropriated property is to be evaluated as of the date on which the governmental ‘interference’ has deprived the owner of his rights or has made those rights practically useless. This is a matter of fact for the Tribunal to assess in the light of the circumstances of the case.<sup>506</sup>

254. Further, where the value of an investment has increased following expropriation, “full reparation may require [...] the valuation date to be fixed at the date of the award.”<sup>507</sup> This was the conclusion reached by the tribunal in the *ADC v Hungary* case, which explained that, in cases in which the value of an investment actually increases following an expropriation, “the *Chorzów Factory* standard requires that the date of valuation should be the date of the Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed.”<sup>508</sup> The same reasoning has been repeatedly applied by other tribunals.<sup>509</sup> As the *Quiborax v Bolivia*

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<sup>506</sup> *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (ICSID Case No ARB/96/1) Final Award, 17 February 2000, **CLA-25**, para 78.

<sup>507</sup> *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award, 4 April 2016, **CLA-130**, para 843. *See also Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15) Award, 3 March 2010, **CLA-96**, para 514 (“full reparation for an unlawful expropriation will require damages to be awarded as of the date of the arbitral Award.”); G Schwarzenberger, *International Law as Applied by International Courts and Tribunals: Volume I*, 1957, **CLA-4**, p 660 (“[T]he value of the property at the time of the indemnification, rather than that of the seizure, may constitute a more appropriate substitute for restitution.”).

<sup>508</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 497; *see also Yukos Universal Limited (Isle of Man) v Russian Federation* (PCA Case No AA 227) Final Award, 18 July 2014, **CLA-122**, paras 1767-1769.

<sup>509</sup> *See, eg, Bernhard von Pezold and others v Republic of Zimbabwe* (ICSID Case No ARB/10/15) Award, 28 July 2015, **CLA-126**, para 764; *ConocoPhillips Petrozuata BV and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/30) Decision on Jurisdiction and the Merits, 3 September 2013, **CLA-117**, paras 342-43, 401; *El Paso Energy International Company v Argentine Republic* (ICSID Case No ARB/03/15) Award, 31 October 2011, **CLA-106**, para 706; *Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica* (ICSID Case Nos ARB/08/1 and ARB/09/20) Award, 23 May 2012, **CLA-108**, para 307; *Burlington Resources, Inc v Republic*

tribunal noted, this approach reflects the fact that “what must be repaired is the actual harm done, as opposed to the value of the asset when taken.”<sup>510</sup>

255. It follows from these principles that the appropriate dates for determining the FMV of Glencore Bermuda’s investments are:

- (i) for Vinto: 8 February 2007, the day before Bolivia issued the Tin Smelter Nationalization Decree and Glencore Bermuda effectively lost control of the Tin Smelter, Vinto’s sole productive asset;
- (ii) for the Tin Stock: 30 April 2010, the day before Bolivia seized Colquiri’s tin concentrates stored at the Antimony Smelter;
- (iii) for Colquiri: 29 May 2012, the day prior to the moment in which Glencore Bermuda finally and irrevocably lost control of its investment due to Bolivia’s breach of its obligations to afford full protection and security and fair and equitable treatment. As explained in Section II.E above, Bolivia’s internationally wrongful conduct, including its threats of nationalization and the exclusion of Colquiri from the negotiations regarding the shared-risk contracts and the subsequent lack of protection of the mine,<sup>511</sup> allowed the cooperatives to invade and remain in the mine, Colquiri’s only remaining productive asset. From 30 May 2012, due to Bolivia’s breaches of its Treaty obligations, the Colquiri Mine remained entirely inaccessible to Glencore Bermuda, thus requiring a valuation on the previous day, 29 May 2012. Further, under the full reparation principle, any diminution in value attributable to Bolivia’s wrongful conduct in the period leading up to the total loss of control over the

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*of Ecuador* (ICSID Case No ARB/08/5) Decision on Reconsideration and Award, 7 February 2017, **CLA-134**, paras 326-330.

<sup>510</sup> *Quiborax SA and Non Metallic Minerals SA v Plurinational State of Bolivia* (ICSID Case No ARB/06/2) Award, 16 September 2015, **CLA-127**, para 377.

<sup>511</sup> Witness Statement of Christopher Eskdale, paras 77-79.

Colquiri Mine should not form part of the *but-for* scenario pursuant to which Glencore Bermuda's damages are assessed;

- (iv) for the Antimony Smelter: August 15, 2012, the date of this Statement of Claim. Given that the value of the assets composing the Antimony Smelter (*ie* the land, the buildings and improvements) has increased since its expropriation and taking into consideration the lack of available contemporaneous information,<sup>512</sup> under the principle of full reparation, the valuation should be made as of the date of the award. This is to ensure that Glencore Bermuda benefits from any increase in value rather than Bolivia and to exclude any adverse effect of Bolivia's unlawful acts on the value of the investment. As a proxy, Glencore Bermuda presents its valuation as of the date of this Statement of Claim.

## **B. CALCULATION OF THE FMV OF GLENCORE BERMUDA'S INVESTMENTS**

### **1. The application of the DCF method to Vinto and Colquiri**

256. In order to assess the full compensation due to Glencore Bermuda in relation to its investments in Vinto and Colquiri, Compass Lexecon calculates the FMV of those investments as of 8 February 2007 and 29 May 2012 respectively, using the DCF method.<sup>513</sup> In so doing, they compute the projected revenues and costs of Vinto and Colquiri as they would have been but-for Bolivia's unlawful conduct as of those respective dates. Given that the companies did not have any outstanding debt and that Glencore Bermuda held 100 percent of the equity in those companies, the FMV of Vinto and Colquiri as of those dates represents Glencore Bermuda's equity losses at those dates.

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<sup>512</sup> Expert Report of Gina Russo, para 1.5.

<sup>513</sup> Compass Lexecon considered other valuation approaches, such as the book value, the replacement cost value, the liquidation value, the net capital contribution and the historical values of capital contributions. They rejected them as inappropriate methods of valuation for the reasons described in the Compass Lexecon Report, para 42.

257. In particular, Compass Lexecon's assessment of Glencore Bermuda's damages in relation to the expropriation of its interest in Vinto (as of 8 February 2007) and Colquiri (as of 29 May 2012) involves the following:
- (i) determining the production levels that Vinto and Colquiri would have achieved absent Bolivia's measures;
  - (ii) determining the future revenues of Vinto and Colquiri based on expected production levels and expected prices;
  - (iii) calculating the cash flows for Vinto and Colquiri by subtracting from these revenues the expected operating costs and capital expenditures associated with the expected production levels;
  - (iv) determining the net present value of these cash flows by discounting them using the discount rate of Vinto and Colquiri; and
  - (v) determining the fair market value of the equity by subtracting from this net present value any financial debt incurred by Vinto and Colquiri.

*a. Vinto*

258. Compass Lexecon values Vinto on the basis of the Tin Smelter's expected processing schedule for tin concentrates. The Tin Smelter paid miners for the tin content in concentrates minus a treatment charge and other deductions. The Tin Smelter converted the concentrate into high-grade tin metal ingots and recovered more in revenue than what it paid for the concentrate. Vinto's gross margin was thus based on the difference between the price paid for the concentrates and the price at which ingots were sold.
2. The key assumptions forming the basis of Compass Lexecon's damages model for Vinto therefore are: (i) the Tin Smelter's expected production volumes of tin ingots; (ii) Vinto's purchase and sale prices; (iii) Vinto's smelting and other costs;

and (iv) the risk adjusted discount rate appropriate to convert future amounts to a present value (Vinto's WACC).

*i The Tin Smelter's expected production volume of tin ingots*

259. As the largest smelter in Bolivia, at the date of expropriation, the Tin Smelter had a capacity to process 30,000 tonnes of tin concentrate and produce approximately 12,000 tonnes of tin metal ingots annually.<sup>514</sup> Based on the smelter's capacity, its historical performance and RPA's analysis, Compass Lexecon projects that, but-for the expropriation, Vinto's Tin Smelter would have processed 30,000 tonnes of tin concentrate annually from 2008, with a tin recovered yield of 46.6 percent.<sup>515</sup>

*ii Vinto's purchase and sales prices*

260. To determine Vinto's revenues, Compass Lexecon forecasts tin ingot prices as of the date of valuation based on a survey of publicly available reports from industry analysts as these prices define the purchase price for tin concentrates and the sales price for the tin ingots.<sup>516</sup> It then calculates Vinto's revenues in a two-step process. First, Compass Lexecon projects Vinto's purchase costs for the tin concentrate on the basis of Vinto's purchase contracts.<sup>517</sup> Second, Compass Lexecon models sales prices by projecting the term of Vinto's sales contracts with Glencore Bermuda and third parties on the basis of the forecasted tin ingot prices.<sup>518</sup>

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<sup>514</sup> Expert Report of RPA, para 159.

<sup>515</sup> Expert Report of Compass Lexecon, para 79. For 2007 Compass Lexecon projected a concentrate intake of 27,500 tonnes of tin concentrate. *See ibid*, Table 6.

<sup>516</sup> *Ibid*, para 81.

<sup>517</sup> *Ibid*, para 82.

<sup>518</sup> *Ibid*, paras 83-84.

*iii Vinto's smelting and other costs*

261. Based on RPA's analysis, Compass Lexecon models Vinto's smelting and other operating costs<sup>519</sup> based on Vinto's historical costs of 2006 adjusting them to take into account economies of scale derived from the projected increase in concentrate feed.<sup>520</sup> Additionally, Compass Lexecon projects that Vinto's capital expenditures will remain at US\$800,000 per year, based on RPA's analysis.<sup>521</sup>

*iv Vinto's WACC (discount rate)*

262. In accordance with accepted principles of corporate finance, Compass Lexecon has undertaken a DCF analysis by discounting projected cash flows to the valuation date at a rate equivalent to the WACC.<sup>522</sup> The WACC quantifies the risks associated with Vinto, on the basis of the rate of return that shareholders and lenders expect to receive on their capital investment.<sup>523</sup> This is a simulation of the analysis that would have been undertaken by willing buyers and willing sellers with a long-term investment perspective, consistent with the "fair market value" standard.

263. As Compass Lexecon explains,<sup>524</sup> the WACC is comprised of three main components: (i) the cost of debt; (ii) the cost of equity; and (iii) the relative weight between debt and equity. Using these three components, the WACC takes into account the rate of return required by both shareholders and lenders, and thus captures the implicit risk associated with the expected future cash flows of Vinto.

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<sup>519</sup> These include quality control, maintenance and other indirect expenses. *Ibid*, para 85.

<sup>520</sup> *Ibid*.

<sup>521</sup> *Ibid*.

<sup>522</sup> *Ibid* paras 89-90.

<sup>523</sup> *Ibid*.

<sup>524</sup> *Ibid*, paras 104-105.

264. As described in detail in Appendix B to the Compass Lexecon Report, to calculate the cost of equity, Compass Lexecon used the Capital Asset Pricing Model,<sup>525</sup> and included a premium for Vinto's exposure to Bolivian country risk.<sup>526</sup> The relevant cost of debt was calculated based on the risk-free rate,<sup>527</sup> the country risk and the industry risk faced by lenders with debt stakes in companies such as Vinto.<sup>528</sup> The cost of equity and the cost of debt were then averaged based upon the average leverage for the industry. The weighted average at which Compass Lexecon then arrives, 15.7 percent, represents Vinto's cost of capital as of 8 February 2007.<sup>529</sup>
265. On the basis of the above assumptions, Compass Lexecon assesses the damages related to Vinto at US\$57.7 million as of 8 February 2007.

***b. Colquiri***

266. Compass Lexecon values Colquiri based on the expected production of tin and zinc concentrates of the Colquiri Mine. As explained in the Compass Lexecon Report, the Colquiri Mine has been in production for over a hundred years<sup>530</sup> and the key variables required for a DCF model can be estimated with a reasonable degree of certainty.<sup>531</sup> In fact, before its expropriation, the Colquiri Mine was a tin and zinc underground mine with demonstrated average ore production of 278,119

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<sup>525</sup> *Ibid*, paras 106-107.

<sup>526</sup> Vinto's cost of equity was estimated to be 18.24 percent. *See ibid*, paras 107, 117-120 and Table 11.

<sup>527</sup> *Ibid*, paras 121-124.

<sup>528</sup> Vinto's cost of debt was estimated to be 10.97 percent before tax (8.23 percent after tax). *See ibid*, paras 121-124 and Table 11.

<sup>529</sup> *Ibid*, paras 90, 126 and Table 11.

<sup>530</sup> *Ibid*, para 22.

<sup>531</sup> *Ibid*, section IV.2.1.

tonnes per year between 2006 and 2011,<sup>532</sup> operating on average at 93 percent of its capacity.

267. With this in mind, the key assumptions used in the DCF valuation of Compass Lexecon's are: (i) Colquiri's production and processing schedule; (ii) the yield of saleable tin and zinc per tonne of raw ore; (iii) forecasted zinc and tin sale prices; (iv) the sustaining capital expenses and operating expenses necessary to process the ore into tin concentrate; and (v) the risk-adjusted discount rate appropriate to convert future amounts to a present value (Colquiri's WACC).
268. To construct its DCF, Compass Lexecon has analyzed the following inputs: (i) the latest triennial plan for the Colquiri Mine prepared by Colquiri's management in 2011 (the *Triennial Plan*); and (ii) a the feasibility study for the Tailings Plant approved in 2004 (the *Feasibility Study*); and (iii) the production and cost inputs provided by RPA. Those main inputs can be summarized as follows:

*i Colquiri Mine*

269. Many of the key variables required to conduct a DCF analysis are contained in Colquiri's Triennial Plan. The Triennial Plan estimated that the Colquiri Mine would increase its annual production to 550,000 tonnes in 2014.
270. As described in detail in the RPA Report, RPA analyzed the assumptions and projections contained in the Triennial Plan, in particular those relating to the estimated resources and reserves, tin and zinc recovery rates, production scheduling, processing, operating costs and capital costs. Following a detailed review of the Triennial Plan as well other operating documents made available, RPA confirmed that the inputs in the Triennial Plan were reasonable, subject to some adjustments,<sup>533</sup> including:

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<sup>532</sup> *Ibid*, para 25.

<sup>533</sup> Expert Report of RPA, para 174.

- (i) updating the evaluation of reserves and resources at the Colquiri Mine such that it reflects the mine operators' long history of replenishing the reserves and resources.<sup>534</sup> RPA did so because a hypothetical buyer would have looked at the successful conversion of new mineralization experienced by the Colquiri Mine and previous mine operators;<sup>535</sup>
- (ii) modelling operating costs to cover the updated life of the mine;<sup>536</sup>
- (iii) modelling capital costs to cover the updated life of the mine,<sup>537</sup> and
- (iv) for the sake of completeness, including reclamation costs to cover the unlikely case that the mine closes after 20 years.<sup>538</sup>

*ii Colquiri Mine - The Tailings Plant*

271. As explained above, one of Colquiri's key initiatives was the Tailings Plant. The reason for this is simple. On the basis of the Feasibility Study<sup>539</sup> and the rights granted pursuant to the Colquiri Lease, the Tailings Plant would have allowed Colquiri to recover approximately 10 million tonnes of old tin and zinc tailings located next to the Colquiri Mine operations. According to the Feasibility Study, a new concentrator plant would process 1 million tonnes per year of tailings after a capital investment of US\$19 million. On the basis of the Feasibility Study, RPA forecasts an initial annual processing rate of 300,000 tonnes in 2014, which

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<sup>534</sup> See *ibid*, para 175.

<sup>535</sup> *Ibid*, para 90. Furthermore, the total level of reserves and resources expected by the Triennial Plan for 2014 was confirmed by Comibol in 2014, which estimated it at 5,141,000 tonnes, providing a potential mine life of approximately 17 years. In 2016, the General Manager of the Colquiri Mine confirmed that the performance of the mine since nationalization indicates a mine life of more than 40 years. See *ibid* paras 93-94.

<sup>536</sup> *Ibid*, para 179.

<sup>537</sup> *Ibid*, paras 181.

<sup>538</sup> *Ibid*, paras 182.

<sup>539</sup> Old Tailings Colquiri Project, **C-161**; Feasibility Study of the Colquiri Tailings Project, December 2003, **C-61**.

increases to 1 million tonnes in 2016.<sup>540</sup> To support that production, RPA increases the capital expenditures from US\$19 million to US\$30.5 million,<sup>541</sup> and the operating costs from US\$7.2 per tonne to US\$13.2 per tonne.<sup>542</sup>

272. After analyzing the Triennial Plan, the Feasibility Study and the production and cost inputs provided by RPA, Compass Lexecon calculates Colquiri's FMV by:

- (i) calculating Colquiri's revenues for the concentrates through a two-step process. First, Compass Lexecon forecasts the tin and zinc ingot prices based on a survey of publicly available reports from industry analysts and consultants available close to the chosen date of valuation (ie May 2012).<sup>543</sup> Second, Compass Lexecon models the value of the concentrate's metal based on the ingot reference price and Colquiri's existing sales contracts;<sup>544</sup>
- (ii) calculating the royalties, canon and taxes that Colquiri had to pay;<sup>545</sup>
- (iii) projecting the operating and capital costs that Colquiri had to incur to produce the concentrates;<sup>546</sup> and
- (iv) as discussed further below, independently deriving and applying a risk-adjusted discount rate to the future cash flows to convert those future amounts into a present value as at the valuation date.<sup>547</sup>

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<sup>540</sup> Expert Report of RPA, para 157.

<sup>541</sup> *Ibid*, para 153.

<sup>542</sup> *Ibid*, paras 147, 151.

<sup>543</sup> Expert Report of Compass Lexecon, paras 59-61.

<sup>544</sup> *Ibid*, paras 62-64.

<sup>545</sup> *Ibid*, paras 65-70.

<sup>546</sup> *Ibid*, paras 53-55, 57, 71-72.

<sup>547</sup> *Ibid*, paras 73-74.

*iii Colquiri's WACC (discount rate)*

273. In accordance with accepted principles of corporate finance, Compass Lexecon has undertaken a DCF analysis by discounting projected cash flows to the valuation date at a rate equivalent to the WACC.<sup>548</sup> The WACC quantifies the risks associated with Colquiri,<sup>549</sup> on the basis of the rate of return that shareholders and lenders expect to receive on their capital investment. This is a simulation of the analysis that would have been undertaken by willing buyers and willing sellers with a long-term investment perspective, consistent with the “fair market value” standard.
274. As Compass Lexecon explains,<sup>550</sup> the WACC is comprised of three main components: (i) the cost of debt; (ii) the cost of equity; and (iii) the relative weight between debt and equity. Using these three components, the WACC takes into account the rate of return required by both shareholders and lenders, and thus captures the implicit risk associated with the expected future cash flows of Colquiri.
275. As described in detail in Appendix B to the Compass Lexecon Report, to calculate the cost of equity, Compass Lexecon used the Capital Asset Pricing Model,<sup>551</sup> and included a premium for Colquiri's exposure to Bolivian country risk.<sup>552</sup> The relevant cost of debt was calculated based on the risk-free rate,<sup>553</sup> the country risk and the industry risk faced by lenders with debt stakes in companies such as Colquiri.<sup>554</sup> The cost of equity and the cost of debt were

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<sup>548</sup> *Ibid*, paras 73-74.

<sup>549</sup> *Ibid*, paras 73-74.

<sup>550</sup> *Ibid*, paras 104-105.

<sup>551</sup> *Ibid*, paras 106-107.

<sup>552</sup> Colquiri's cost of equity was estimated to be 13.53 percent. *See ibid*, paras 107 and 117-120 and Table 11.

<sup>553</sup> *Ibid*, paras 121-124.

<sup>554</sup> Colquiri's cost of debt was estimated to be 7.54 percent before tax (4.71 percent after tax). *See ibid*, paras 121-124 and Table 11.

then averaged based upon the average leverage for the industry. The weighted average at which Compass Lexecon then arrives, 12.3 percent, represents Colquiri's cost of capital as of 29 May 2012.<sup>555</sup>

276. On the basis of the above assumptions, Compass Lexecon assesses damages related to Colquiri at US\$387.7 million as of 29 May 2012.

## **2. The market multiples methodology corroborates Vinto's and Colquiri's DCF**

277. Compass Lexecon corroborated damages under another methodology, the "market multiples approach," a standard valuation technique that derives a measure of value for a company subject to valuation by inference from the value of peer companies.<sup>556</sup>

278. In the case of Vinto, Compass Lexecon has found that the implied EV/EBITDA value multiple of their DCF analysis of 7.2x lies below the median multiple of the sample of tradable smelting and refining of diversified materials companies, which is 8.7x (as of 8 February 2007).<sup>557</sup>

279. In the case of Colquiri, Compass Lexecon has found that the implied EV/EBITDA value multiple of their DCF analysis of 5.6x is in line with the median multiple of a large sample of tradable diversified metals and mining companies, which is 5.8x (as of 29 May 2012).<sup>558</sup>

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<sup>555</sup> *Ibid*, paras 74, 126 and Table 11.

<sup>556</sup> *Ibid*, paras 7, 127-130. This approach was validated in the *CME Czech Republic BV v Czech Republic* (UNCITRAL) Final Award, 14 March 2003, **CLA-42**, paras 563-620.

<sup>557</sup> Expert Report of Compass Lexecon, paras 92, 130.

<sup>558</sup> *Ibid*, paras 76, 129.

### 3. The asset valuation of the Antimony Smelter

280. The Compass Lexecon Report presents the damages related to the Antimony Smelter based on the Russo Report.<sup>559</sup>
281. Ms Russo has valued: (i) the land on which the Antimony Smelter is located; and (ii) the replacement cost of the buildings on the site and the improvements to the land of the site.<sup>560</sup> Ms Russo's valuation of the land, buildings and improvements of the Antimony Smelter is based on current values as of 15 August 2017.<sup>561</sup>
282. Ms Russo values the land of the Antimony Smelter by applying a market approach methodology which is based on current market values of land of comparable characteristics in the surrounding area of the Antimony Smelter. To this effect, Ms Russo has gathered information on land values from Bolivian realtors, land valuation experts and real estate publications.<sup>562</sup> Relying on this information, Ms Russo first determines an average value per square metre of the comparable land, and then adjusts it to reflect the specific characteristics of the land of the Antimony Smelter.<sup>563</sup>
283. The Russo Report values separately the replacement cost of the buildings and improvements on the site of the Antimony Smelter. The buildings include depots, a smelting hall, a concentrates hall, administrative offices, storage rooms, surveillance booths, and an electrical substation.<sup>564</sup> The improvements to the land include the extensive fencing of the Antimony Smelter.<sup>565</sup> In order to establish the FMV of the buildings and improvements, Ms Russo applies a methodology based

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<sup>559</sup> *Ibid*, para 93.

<sup>560</sup> Expert Report of Gina Russo, paras 1.3-1.4.

<sup>561</sup> *Ibid*, para 1.5.

<sup>562</sup> *Ibid*, paras 5.4-5.11.

<sup>563</sup> *Ibid*, paras 5.11-5.15.

<sup>564</sup> *Ibid*, paras 4.5-4.9.

<sup>565</sup> *Ibid*, para 4.10.

on their replacement cost in new condition.<sup>566</sup> She then applies a coefficient which discounts the value of the different categories of buildings and improvements to account for their age, physical deterioration and purpose.<sup>567</sup>

284. The following table summarizes the FMV of the land, buildings and improvements of the Antimony Smelter as of 15 August 2017, as established in the Russo Report:<sup>568</sup>

<b>VALOR JUSTO DE MERCADO DE LA FUNDICIÓN DE ANTIMONIO AL 15 DE AGOSTO DE 2017</b>	
Total Terreno (Tabla 10)	US\$ 2.724.576,95
Total Edificaciones y Mejoras (Tabla 19)	US\$ 756.658,66
<b>Total</b>	<b>US\$ 3.481.235,61</b>

285. Compass Lexecon then deducts the income tax, the special income tax for mining operations, and the remittance tax that Colquiri would have paid had it sold the land, buildings and improvements of the Antimony Smelter to a willing buyer. On this basis, Compass Lexecon calculates the damages related to those assets at US\$1.9 million.<sup>569</sup>

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<sup>566</sup> *Ibid*, paras 6.1-6.5.

<sup>567</sup> *Ibid*, paras 6.6-6.7.

<sup>568</sup> *Ibid*, Table 20.

<sup>569</sup> Expert Report of Compass Lexecon, para 97 and Table 8.

#### 4. The Tin Stock

286. Compass Lexecon has valued the 161 tonnes of Colquiri's Tin Stock stored at the Antimony Smelter based on its fair market price as of April 2010.<sup>570</sup> Compass Lexecon then deducted the royalties, canon, income, and remittance tax that Colquiri would have paid had it sold the Tin Stock to a willing buyer. Hence, Compass Lexecon calculated the damage related to the Tin Stock at US\$0.6 million as of 30 April 2010.<sup>571</sup>

#### C. FULL REPARATION REQUIRES GLENCORE BERMUDA TO BE AWARDED COMPOUND INTEREST AT A COMMERCIALY REASONABLE RATE

##### 1. Glencore Bermuda should receive pre- and post-award interest at a rate that ensures "full reparation"

287. Interest is an integral component of full compensation under customary international law.<sup>572</sup> A State's duty to make reparation arises immediately after its unlawful actions cause harm, and to the extent that payment is delayed, the claimant loses the opportunity to invest the compensation.<sup>573</sup> As the International Law Commission's Articles on State Responsibility make clear, when interest is

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<sup>570</sup> *Ibid*, paras 98-99.

<sup>571</sup> *Ibid*, paras 98-99 and Table 9.

<sup>572</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (ICSID Case No ARB/97/3) Award, 20 August 2007, **CLA-70**, para 9.2.1 ("the liability to pay interest is now an accepted legal principle"); International Law Commission, "Draft articles on Responsibility of States for Internationally Wrongful Acts with commentary" [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, art 38, para 2 ("As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgment or award concerning, the claim and to the extent that it is necessary to ensure full reparation."); JY Gotanda, "Awarding Interest in International Arbitration" (1996) Vol 90 *The American Journal of International Law* 40, **CLA-19**, p 18; *Maffezini v Kingdom of Spain* (ICSID Case No ARB/97/7) Award, 13 November 2000, **CLA-29**, para 96; *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (ICSID Case No ARB/96/1) Final Award, 17 February 2000, **CLA-25**, paras 96-97. *See also* *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Award, 6 February 2007, **CLA-67**, para 395.

<sup>573</sup> *Metalclad Corporation v United Mexican States* (ICSID Case No ARB(AF)/97/1) Award, 30 August 2000, **CLA-27**, para 128. *See also* *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 9.2.3.

awarded it should run “from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.”<sup>574</sup> This encompasses both pre- and post-award interest. As Ripinsky and Williams explain:

In most cases, tribunals have not considered post-award interest separately from pre-award interest, and have simply granted it until the date of full payment of the award. This automatically turns pre-award interest into post-award, and there is no change in the rate and mode of calculation.<sup>575</sup>

288. Since the payment of interest is an integral element of reparation, the purpose of an award of interest is the same as that of an award of damages for breach of an international obligation: the interest awarded should place the victim in the economic position it would have occupied had the State not acted wrongfully.<sup>576</sup> On this basis, international arbitral tribunals accept that interest is not an award *in addition* to reparation; rather, it is a component of, and should give effect to, the

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<sup>574</sup> International Law Commission, “Draft articles on Responsibility of States for Internationally Wrongful Acts with commentary” [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, art 38(2).

<sup>575</sup> S Ripinsky and K Williams, *Damages in International Investment Law* (1st edn 2008), **CLA-74**, pp 4-5, citing: *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 11.1; *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award, 19 January 2007, **CLA-66**, paras 348, 351; *Petrobart Limited v Kyrgyz Republic* (SCC Case No 126/2003) Arbitral Award, 29 March 2005, **CLA-56**, pp 88-89; *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* (ICSID Case No ARB/01/7) Award, 25 May 2004, **CLA-49**, paras 247, 253; *Nykomb Synergetics Technology Holding AB v Republic of Latvia* (SCC) Arbitral Award, 16 December 2003, **CLA-46**, para 5.3; *Técnicas Medioambientales Tecmed SA v United Mexican States* (ICSID Case No ARB(AF)/00/2) Award, 29 May 2003, **CLA-43**, paras 197, 201; *Marvin Feldman v Mexico* (ICSID Case No ARB(AF)/99/1) Award, 16 December 2002, **CLA-40**, paras 205, 211; *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt* (ICSID Case No ARB/99/6) Award, 12 April 2002, **CLA-34**, paras 174-175, 178; *Pope & Talbot Inc v Government of Canada* (UNCITRAL) Award in Respect of Damages, 31 May 2002, **CLA-36**, paras 90-91; *SD Myers Inc v Government of Canada* (UNCITRAL) Second Partial Award, 21 October 2002, **CLA-39**, paras 303, 306, 312; *SwemBalt AB v Republic of Latvia* (UNCITRAL) Decision by the Court of Arbitration, 23 October 2000, **CLA-28**, para 47; *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No ARB/84/3) Award on the Merits, 20 May 1992, **CLA-18**, paras 232-236, 257.

<sup>576</sup> International Law Commission, “Draft articles on Responsibility of States for Internationally Wrongful Acts with commentary” [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, Art 38(1) (“Interest on any principal sum due... shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.”).

- principle of full reparation.<sup>577</sup> The requirement of full reparation must therefore inform all aspects of an interest award, including the appropriate rate of interest, whether interest should be simple or compound and the periodicity of compounding.<sup>578</sup>
289. As a result, Glencore Bermuda is entitled to receive interest until Bolivia effectively pays the Award at a rate that reflects the damage that Glencore Bermuda suffered for not having received the sums Bolivia owes to them for the breaches of the Treaty. At the same time, the interest rate should prevent Bolivia's enrichment and incentivize the payment of the compensation to which Glencore Bermuda is entitled.
290. Glencore Bermuda requests in this case an interest rate at a normal commercial rate applicable in Bolivia as provided in Article 5 of the Treaty.<sup>579</sup> The interest rates on loans to businesses in Bolivia are a good representation of such normal commercial rates. Compass Lexecon has provided those rates which are at each valuation date as follows: (i) 8.6 percent as of February 2007;<sup>580</sup> (ii) 6.1 percent as of April 2010<sup>581</sup>; and (iii) 6.4 percent as of May 2012.<sup>582</sup>

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<sup>577</sup> See *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (ICSID Case No ARB/87/3) Final Award, 27 June 1990, **CLA-14**, para 114 (“the case-law elaborated by international arbitral tribunals strongly suggests that in assessing the liability due for losses incurred the interest becomes an integral part of the compensation itself”); *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt* (ICSID Case No ARB/99/6) Award, 12 April 2002, **CLA-34**, para 174 (“Regarding such claims for expropriation, international jurisprudence and literature have recently, after detailed consideration, concluded that interest is an integral part of the compensation due”). See also JY Gotanda, “Awarding Interest in International Arbitration” (1996) Vol 90 *The American Journal of International Law* 40, **CLA-19**, pp 2-3, 18, 21-22; JY Gotanda, “A Study of Interest” (2007) Villanova Law Working Paper Series, **CLA-65**, pp 4-5 and 26-29.

<sup>578</sup> Compounding periodicity is the regularity with which interest accrued is added to the underlying capital amount. Capital growth increases when the compounding period is shortened. See JY Gotanda, “A Study of Interest” (2007) Villanova Law Working Paper Series, **CLA-65**, p 5.

<sup>579</sup> Treaty, **C-1**, Art 5, establishing that compensation “shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contract Party.”

<sup>580</sup> Expert Report of Compass Lexecon, para 101.

<sup>581</sup> *Ibid.*

<sup>582</sup> *Ibid.*

## 2. Interest should be compounded annually

291. The only way to fully compensate Glencore Bermuda for Bolivia's unlawful conduct is to compound the pre-award interest rate on an annual basis.<sup>583</sup> Tribunals have frequently noted that compound interest best gives effect to the rule of full reparation.<sup>584</sup> Compound interest ensures that a respondent State is not given a windfall as a result of its breach, as compounding recognizes the time value of the claimant's losses.<sup>585</sup> It also "reflects economic reality in modern times" where "[t]he time value of money in free market economies is measured in compound interest."<sup>586</sup> On this basis, interest awarded to Glencore Bermuda should be subject to reasonable compounding. The appropriate periodicity of the compounding is annual.

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<sup>583</sup> See JY Gotanda, "A Study of Interest" (2007) Villanova Law Working Paper Series, **CLA-65**, p 35 ("[T]he opportunity cost in a commercial enterprise is a forgone investment opportunity. Thus, awarding compound interest at the claimant's opportunity cost would be the most appropriate way to compensate it for the loss of the use of its money."); 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 522 ("[T]ribunals in investor-State arbitrations in recent times have recognized economic reality by awarding compound interest").

<sup>584</sup> See, eg, *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12) Award, 14 July 2006, **CLA-63**, para 440; *Víctor Pey Casado and President Allende Foundation v Republic of Chile* (ICSID Case No ARB/98/2) Award, 8 May 2008, **CLA-77**, paras 709, 712; *Continental Casualty Company v Argentine Republic* (ICSID Case No ARB/03/9) Award, 5 September 2008, **CLA-81**, paras 308-313; *National Grid plc v Argentine Republic* (UNCITRAL) Award, 3 November 2008, **CLA-82**, para 294; *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe* (ICSID Case No ARB/05/6) Award, 22 April 2009, **CLA-88**, para 146; *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (ICSID Case No ARB/05/15) Award, 1 June 2009, **CLA-89**, paras 595-598; *Alpha Projektholding GmbH v Ukraine* (ICSID Case No ARB/07/16) Award, 8 November 2010, **CLA-101**, para 514; *Impregilo SpA v Argentine Republic* (ICSID Case No ARB/07/17) Award, 21 June 2011, **CLA-105**, para 382; *El Paso Energy International Company v Argentine Republic* (ICSID Case No ARB/03/15) Award, 31 October 2011, **CLA-106**, para 746. See also *Marion Unglaube and Reinhard Unglaube v Republic of Costa Rica* (ICSID Case Nos ARB/08/1 and ARB/09/20) Award, 23 May 2012, **CLA-108**, para 325; *Quasar de Valores SICAV SA and others v Russian Federation* (SCC Case No 24/2007) Award, 20 July 2012, **CLA-112**, para 226.

<sup>585</sup> TJ Sénéchal and JY Gotanda, "Interest as Damages" (2008-2009) Vol 47 Columbia Journal of Transnational Law 491, **CLA-75**, p 43. See also AX Fellmeth, "Below-market Interest in International Claims Against States" (2010) Vol 13(2) Journal of International Economic Law 423, **CLA-92**, p 20.

<sup>586</sup> *Continental Casualty Company v Argentine Republic* (ICSID Case No ARB/03/9) Award, 5 September 2008, **CLA-81**, para 309.

### 3. Glencore Bermuda is entitled to pre- and post-award interest

292. Moreover, to the extent Bolivia does not promptly remit payment for awarded damages, Glencore Bermuda is entitled to compound interest accruing from the date of the award until payment is made in full. The purpose of post-award interest is “to compensate the additional loss incurred from the date of the award to the date of final payment.”<sup>587</sup> Any delays in payment of a damages award should therefore be reflected and accounted for through the determination of post-award interest.

#### D. TAX

293. The valuations set out in the Compass Lexecon Report have been prepared net of Bolivian tax. Consequently any taxation by Bolivia of the eventual Award in this arbitration would result in Glencore Bermuda being effectively taxed twice for the same income, thereby undermining the very purpose of the Award—*ie*, place Glencore Bermuda in the financial position in which it would have been had Bolivia not breached its obligations under the Treaty. This principle has been confirmed by the tribunal in *Rusoro v Venezuela* in the following terms:

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”.... If the Bolivarian Republic were to impose a tax on Rusoro’s award, Venezuela could reduce the compensation “effectively” received by Rusoro. A *reductio ad absurdum* proves the point: Venezuela could practically avoid the obligation to pay Rusoro the compensation awarded by fixing a 99% tax rate on income derived from compensations issued by international tribunals, thereby ensuring that Rusoro 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

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<sup>587</sup> *Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela* (ICSID Case No ARB/00/5) Award, 23 September 2003, **CLA-44**, para 380.

are net of any taxes imposed by the Bolivarian Republic and orders the Bolivarian Republic to indemnify Rusoro with respect to any Venezuelan taxes imposed on such amounts.<sup>588</sup>

294. To secure the finality of the Tribunal’s Award in this arbitration, Glencore Bermuda requests that the Tribunal declare that:

- (i) its Award is made net of all applicable Bolivian taxes; and
- (ii) Bolivia may not tax or attempt to tax the Award.

**E. SUMMARY OF DAMAGES**

295. Glencore Bermuda is entitled to full compensation for Bolivia’s breaches of the Treaty in relation to: (i) Vinto; (ii) Colquiri; (iii) the Antimony Smelter; and (iv) the Tin Stock, as at their respective valuation dates. Such compensation amounts to a total figure of US\$675.7 million as of 15 August 2017, as summarized below.<sup>589</sup>

US\$ Million	Colquiri	Vinto	Antimony Smelter	Tin Stock	Total
	May 29, 2012	February 8, 2007	August 15, 2017	April 30, 2010	
Fair Market Value	443.1	65.9	2.2	0.7	
- Remittance Tax	55.4	8.2	0.3	0.1	
<b>Damages to Claimant (as of Date of Valuation)</b>	<b>387.7</b>	<b>57.7</b>	<b>1.9</b>	<b>0.6</b>	
+ Interest	148.1	79.3	0.0	0.3	
<b>Damages to Claimant (as of August 15, 2017)</b>	<b>535.8</b>	<b>137.0</b>	<b>1.9</b>	<b>1.0</b>	<b>675.7</b>

296. Glencore Bermuda’s compensation should be paid without delay, be effectively realizable and be freely transferable, and bear interest at a compound rate sufficient fully to compensate Glencore Bermuda for the loss of the use of its

<sup>588</sup> *Rusoro Mining Limited v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/12/5) Award, 22 August 2016, **CLA-131**, paras 852-855. 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 788-792.

<sup>589</sup> Expert Report of Compass Lexecon, Table 1.

capital as at the respective dates of valuation for each of its investments. The award of damages and interest should be made net of all Bolivian taxes; Bolivia should not tax, or attempt to tax, the payment of the Award.

## **VII. BOLIVIA’S REQUEST FOR BIFURCATION SHOULD BE REJECTED**

297. Pursuant to Procedural Order No 1, Glencore Bermuda provides in this Section a response to Bolivia’s Request for Bifurcation submitted on 3 April 2017.<sup>590</sup> The present submission is submitted for the sole purpose of responding to that request and Glencore Bermuda reserves all rights to address Bolivia’s jurisdictional objections in full at the appropriate stage in the proceedings.

298. Bolivia requests that the Tribunal hear its objections to jurisdiction on a preliminary basis. Those objections are as follows:

- (i) Glencore Bermuda is not a protected investor under the Treaty as it is a “shell” company which is not the “true owner of the investment,” the true owners being Swiss companies and individuals not protected under the Treaty;<sup>591</sup>
- (ii) Glencore Bermuda abused the investment protection system as it acquired its investments at a time when it was clear that the government would revert natural resources to the State, for the sole purpose of “unlawfully” extending the protections of the Treaty to investments made by Bolivian investors;<sup>592</sup> and

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<sup>590</sup> Bolivia’s letter of April 3, 2017, paras 14-24; Response to Notice of Arbitration, paras 51-53.

<sup>591</sup> Bolivia’s letter of April 3, 2017, para 18; Response to Notice of Arbitration, para 42.

<sup>592</sup> Bolivia’s letter of April 3, 2017, para 18; Response to Notice of Arbitration, paras 47, 48.

- (iii) Glencore Bermuda does not have a protected investment under the Treaty as its investments had initially been acquired “unlawfully” by former President Sánchez de Lozada.<sup>593</sup>

299. As explained in this Section, the essential interest at stake in a request to bifurcate arbitration proceedings is efficiency. Irrespective of the merit of Bolivia’s objections—which, as demonstrated below, are wholly unsupported—bifurcation is only appropriate if it increases procedural efficiency and judicial economy in the proceedings. Yet, Bolivia’s objections do not increase procedural efficiency and are so closely intertwined with the merits of the case that no efficiencies would be achieved through bifurcation. Thus, Bolivia’s Request for Bifurcation should be rejected.

**A. BIFURCATION MUST BE GRANTED ONLY IF IT ACHIEVES EFFICIENCY AND ECONOMY**

**1. Contrary to Bolivia’s allegations, bifurcation is not favored under the applicable UNCITRAL Rules nor is it the general practice of international tribunals**

300. The 2010 UNCITRAL Rules, which apply to this case, eliminated any presumption that might have existed under the 1976 UNCITRAL Rules in favor of hearing jurisdictional objections as a preliminary question.<sup>594</sup> In particular, Article 23(3) of the 2010 UNCITRAL Rules replaced Article 21(4) of the 1976 UNCITRAL Rules, which provided that “[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question.”<sup>595</sup> Article 23(3) of the 2010 UNCITRAL Rules instead reads: “[t]he arbitral tribunal may rule on a plea [as to its jurisdiction] either as a preliminary question or in an

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<sup>593</sup> Bolivia’s letter of April 3, 2017, para 18.

<sup>594</sup> UNCITRAL Arbitration Rules, 1976, **CLA-8**, Article 21(4); UNCITRAL Arbitration Rules, 2010, **CLA-94**, Article 23(3). *See also Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Procedural Order No 8, 14 April 2014, **CLA-121**, para 101.

<sup>595</sup> UNCITRAL Arbitration Rules, 1976, **CLA-8**, Article 21(4) (emphasis added).

award on the merits.”<sup>596</sup> With respect to this change in the rules the *van Zyl v Lesotho* tribunal:

Article 23(3) of the current UNCITRAL Rules, which this Tribunal must apply, does not appear to contemplate any presumption, leaving the Tribunal with an even discretion to decide whether to bifurcate proceedings or not [...] this Tribunal takes the view that its discretion should be guided evenly by the overarching procedural imperatives of efficiency and fairness.<sup>597</sup>

301. The ICSID Rules evolved in the same direction. The 2006 version of the ICSID Rules eliminated the language in the prior Rules that provided for an automatic suspension of the merits of the case while a tribunal decided whether objections to jurisdiction would be heard as a preliminary question or together with the merits.<sup>598</sup> The tribunal in *Crystallex v Venezuela* explained:

In the Tribunal’s view, the change in the drafting of the rule confirms that the Arbitration Rules do not enshrine a pro-bifurcation policy, but rather an efficiency concern (procedural economy) and grant the Tribunal full discretion to determine in each arbitration proceeding whether objections to jurisdiction should be heard as preliminary questions or joined to the merits of the dispute.<sup>599</sup>

302. This evolution in the rules of the main arbitration institutions for investment arbitration follows the general practice adopted by international tribunals. To be clear, bifurcation is not the “general practice of international tribunals” as Bolivia asserts.<sup>600</sup> As Professor Pierre Lalive explained:

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<sup>596</sup> UNCITRAL Arbitration Rules, 2010, **CLA-94**, Article 23(3) (emphasis added).

<sup>597</sup> *Josias van Zyl, The Josias van Zyl Family Trust and The Burmilla Trust v The Kingdom of Lesotho* (UNCITRAL) Procedural Order No 1, 3 November 2016, **CLA-132**, paras 44, 46 (emphasis added).

<sup>598</sup> ICSID Convention, Regulations and Rules, January 2003, **CLA-40**, Rule 41(3); ICSID Convention, Regulations and Rules, April 2006, **CLA-61**, Rule 41(3).

<sup>599</sup> *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Decision on Bifurcation, 23 May 2012, **CLA-109**, para 41 (emphasis added).

<sup>600</sup> Bolivia’s letter of 3 April 2017, para 20.

[T]he number of cases in which an objection to jurisdiction has been joined to the merits, either by the International Court or by an international arbitral tribunal is too significant to allow the opinion, (mistakenly expressed by some writers and one or two judges) that the decision to join is exceptional.<sup>601</sup>

303. On the contrary, as Professors William Park and Jan Paulsson have explained, there is a preference towards deciding all issues in a single award. The potential delays related to the bifurcation of the proceedings should only be imposed upon the parties if justified under the circumstances:

Ordinarily, it is desirable to determine all issues and decide all claims in a single award. [...] Where there is no clear agreement by the parties on the matter, the arbitrator should decide whether a preliminary award will aid or impede the administration of arbitral justice, and particularly take into account whether the making of such an award will delay the overall conduct of the proceedings, and if so, whether such delay is justified.<sup>602</sup>

304. It is noteworthy that the few decisions that Bolivia cites in support of its contention that bifurcation is a general practice are selective, dated, and rendered under the 1976 UNCITRAL Rules, which are not applicable to this case. And in any event, bifurcation must be decided taking into consideration the specific circumstances of the case. As explained by the tribunal in the *Philip Morris v Australia* case:

The Tribunal has taken note of the Parties' references to decisions of other courts and tribunals regarding bifurcation. While the Tribunal agrees that taking into account such other jurisprudence is indeed helpful and appropriate, and will do so in its considerations, the present procedure must be examined in light of its own specific factual and legal circumstances which differ in various

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<sup>601</sup> P Lalive, "Some Objections to Jurisdiction in Investor-State Arbitration," Transcript of Presentation to the 16th ICCA Congress, London, May 2002, **CLA-35**, p 8.

<sup>602</sup> WL Craig, WW Park, and J Paulsson, *International Chamber of Commerce Arbitration* (3rd edn 2000) (Extract), **CLA-23**, pp 3, 5 (emphasis added).

ways from the cases addressed by other courts and tribunals.<sup>603</sup>

305. This Tribunal should thus decide bifurcation in light of the specific circumstances of this case and only grant it if it would lead to efficiency.

**2. Bifurcation is only appropriate if the objections are substantial and are not intertwined with the merits of the case**

306. It is undisputed between the parties that bifurcation is only appropriate if it advances procedural efficiency.<sup>604</sup> As the tribunal in *Glamis Gold* held, a tribunal should decline to bifurcate proceedings:

[...] when doing so is unlikely to bring about increased efficiency in the proceedings. Considerations relevant to this analysis include, *inter alia*, (1) whether the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding; and [...] whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost.<sup>605</sup>

307. Thus, in order to decide whether this proceeding should be bifurcated, this Tribunal should consider:

- (i) the likelihood of success of the jurisdictional objections; and
- (ii) its ability to decide the jurisdictional objections without examining the merits of the case.

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<sup>603</sup> *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Procedural Order No 8, 14 April 2014, **CLA-121**, para 103. *See also Apotex Holdings Inc and Apotex Inc v United States of America* (ICSID Case No ARB(AF)/12/1) Procedural Order Deciding Bifurcation and Non-Bifurcation, 25 January 2013, **CLA-115**, paras 5, 7-10.

<sup>604</sup> Bolivia's letter of 3 April 2017, para 20.

<sup>605</sup> *Glamis Gold Ltd v United States* (UNCITRAL) Procedural Order No 2, 31 May 2005, **CLA-58**, para 12(c) (emphasis added).

308. As explained in detail below, there are no considerations of efficiency or judicial economy that would render bifurcation appropriate in the present case.

**B. BIFURCATION IN THIS CASE WOULD NOT LEAD TO EFFICIENCY**

309. Bolivia’s objections to jurisdiction are in the words of the *Glamis Gold* tribunal “frivolous” and not “substantial,” and/or are closely intertwined with the facts of the case. Bifurcation would thus only lead to an unnecessary delay in the proceedings and, with that, a material increase in costs.

**1. Glencore Bermuda is a protected investor with standing to bring this arbitration proceeding against Bolivia**

310. Bolivia argues that Glencore Bermuda is a “shell” company which is not the “true owner of the investment,” the true owners being Swiss companies and individuals.<sup>606</sup> Thus, according to Bolivia, Glencore Bermuda is not a protected investor under the Treaty.

311. Bolivia’s argument has no foundation in the facts or in the text of the Treaty. To be a protected investor, the Treaty requires a company to be “incorporated or constituted” in the territory of one of the State parties.<sup>607</sup> The Treaty makes no mention of any other requirement, such as having its “seat” or material business presence in the State, nor does it contain a “denial of benefits clause.” In addition, the Treaty requires that the investor own a protected investment, which can take the form of shares in companies, moveable and immoveable property and contracts having a financial value, among others.<sup>608</sup> As Bolivia itself admits, for this Tribunal to have jurisdiction, there must be evidence that the claimant meets the definition of an investor under the Treaty and that the claim concerns assets which meet the definition of an investment under the Treaty. In this case

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<sup>606</sup> Response to Notice of Arbitration, para 42; Bolivia’s letter of 3 April 2017, para 18.

<sup>607</sup> Treaty, **C-1**, Art 1(d) (“[C]orporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 11”).

<sup>608</sup> *Ibid*, Art 1(a)(i), (iii), (iv) and (v).

(although not necessary, as explained below), the investment also fulfills the additional criteria proposed by Bolivia that the investor seeking the protection of the Treaty has contributed to the host State's development, assumed potential risks, and has an interest in the case.<sup>609</sup>

312. Glencore Bermuda has submitted sufficient evidence with its Notice of Arbitration and the present Statement of Claim to establish that it is a company incorporated under the laws of Bermuda (one of the United Kingdom overseas territories to which the Treaty was expressly extended) with “investments” protected under the Treaty.<sup>610</sup> As Professor Schreuer notes, the obligation to be incorporated is a “formal requirement.”<sup>611</sup> Glencore has duly demonstrated its compliance with this requirement by submitting its Certificate of Incorporation and its By-Laws showing it is incorporated and constituted under the laws in force in Bermuda.<sup>612</sup> The Treaty requires nothing else—neither ultimate control, nor economic activity.<sup>613</sup> And as numerous arbitral tribunals have held, the parties

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<sup>609</sup> Response to Notice of Arbitration, para 43.

<sup>610</sup> Prior to Bolivia's measures, Glencore Bermuda indirectly owned a 100 percent shareholding in each of Vinto and Colquiri, companies established under the laws of Bolivia. Moreover, Glencore Bermuda also indirectly held assets such as moveable and immoveable property and other property rights, claims to money or to any performance under contract having a financial value, intellectual property rights and goodwill, and a concession to extract and exploit minerals, all of which fall within the definition of investments under Article 1(a)(i), (iii), (iv) and (v) of the Treaty, respectively. *See* Sections IV.B and IV.C, above.

<sup>611</sup> C Schreuer, “Nationality of Investors: Legitimate Restrictions vs Business Interests” (2009) Vol 24(2) ICSID Review–Foreign Investment Law Journal 521, **CLA-85**, p 2.

<sup>612</sup> Certificate of incorporation of Glencore Bermuda (as Sandon Ltd), 23 December 1993, **C-42**; Certificate of incorporation on change of name of Glencore Bermuda (from Sandon Ltd), 30 December 1994, **C-43**; By-Laws of Glencore Bermuda, 12 December 2012, **C-44**.

<sup>613</sup> *See Tokios Tokelès v Ukraine* (ICSID Case No ARB/02/18) Decision on Jurisdiction, 29 April 2004, **CLA-48**, para 43. Likewise, in *Barcelona Traction, Light and Power Company, Limited*, the International Court of Justice (*ICJ*) held that only the Government of Canada could assert diplomatic protection over the company, despite the fact that Barcelona Traction was “a holding company” incorporated in Canada with its “head office” in Toronto, with 88% of its shareholders being Belgian and its day-to-day activities being the supply of power in Catalonia, Spain. The *ICJ* stated: “In the present case, it is not disputed that the company was incorporated in Canada and has its registered office in that country. [...] It has maintained in Canada its registered office, its accounts and its share registers. Thus a close and permanent connection has been established [...] This connection is in no way weakened by the fact that the company engaged from the very outset in commercial activities outside of Canada [...] Barcelona Traction's links with Canada are thus

cannot invoke requirements that they did not expressly include in the text of the Treaty.<sup>614</sup>

313. Importantly, arbitral tribunals have universally rejected similar jurisdictional objections based on allegations that the claimant was a “shell company” where the applicable BIT merely required the claimant to be “incorporated” or “constituted” in a territory to be considered a protected investor.<sup>615</sup> Notably, the International Court of Justice and several investment tribunals have held that piercing the corporate veil can only take place under exceptional circumstances.<sup>616</sup>

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

<sup>614</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 359; *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, para 241; *The Rompetrol Group NV v Romania* (ICSID Case No ARB/06/3) Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, **CLA-76**, para 85; *KT Asia Investment Group BV v Republic of Kazakhstan* (ICSID Case No ARB/09/8) Award, 17 October 2013, **CLA-118**, para 123.

<sup>615</sup> For example, the tribunal in *Saluka v Czech Republic* held that Saluka was a Dutch investor protected under the Czech Republic-Netherlands BIT because it had been incorporated in the Netherlands, rejecting the respondent’s objection that Saluka was merely a shell company with no connection with the Netherlands and was controlled by its Japanese owners. *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, paras 229, 241. The tribunal in *ADC v Hungary* also recognized the claimants’ Cypriot nationality under the Cyprus-Hungary BIT because they had been incorporated in Cyprus, rejecting the respondent’s objection that the disputed investments should not have been deemed to have been made by Cypriot nationals, but by Canadian companies—the claimants were nothing but shell companies. *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, paras 352-362. Similarly, the tribunal in *Rompetrol v Romania* also rejected corporate control, effective seat and origin of the capital as criteria for nationality because the Romania-Netherlands BIT adopted the criterion of incorporation. *The Rompetrol Group NV v Romania* (ICSID Case No ARB/06/3) Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, **CLA-76**, paras 83, 110. Furthermore, the tribunal in *Fedax NV v Republic of Venezuela*, when considering the nationality of an investor in respect of a claim brought under the Venezuela-Netherlands BIT, determined that the claimant satisfied the nationality requirement simply by confirming the place of incorporation. *Fedax NV v Republic of Venezuela* (ICSID Case No ARB/96/3) Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, **CLA-21**, para 17.

<sup>616</sup> *Barcelona Traction, Light and Power Company, Limited* (Belgium/Spain) [1970] ICJ Reports 3, 5 February 1970, **CLA-7**, paras 56-58; *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 358; *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, para 452; *The Rompetrol Group NV v Romania* (ICSID Case No

314. In any event, even if it were relevant—which it is not—Glencore Bermuda is not a shell company nor did it structure its investment to take advantage of the Treaty.<sup>617</sup> Indeed, as explained by Mr Eskdale, current Head of Glencore International’s Global Zinc Operations, Glencore Bermuda is the company that has historically been the holding company for the vast majority of Glencore’s international investments, including those in Latin America.<sup>618</sup> That is why once the investments were acquired by Glencore International, they were immediately transferred to Glencore Bermuda.<sup>619</sup> Importantly, Glencore International also benefits from the protection of an investment treaty, the Switzerland-Bolivia Treaty.<sup>620</sup> Any suggestion by Bolivia that there was a restructuring aimed at acquiring international law protection is thus unsupported. It is noteworthy that since the acquisition of its Bolivian assets, Glencore Bermuda, through its affiliates, has invested hundreds of millions of dollars in Bolivia and its economy, providing jobs as well as access to education and healthcare to the local communities. This is clearly not a case where the investor “ha[d] no intention of performing any economic activity in the host State,” as Bolivia suggests.<sup>621</sup>
315. Given the clear text of the Treaty, the concrete evidence submitted by Glencore Bermuda and the abundant jurisprudence which has rejected similar jurisdictional

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ARB/06/3) Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, **CLA-76**, para 83.

<sup>617</sup> By 2007, Glencore Bermuda’s investments were worth approximately US\$3.28 billion and it held total assets worth US\$9.72 billion. Furthermore, Glencore Bermuda has also served as an essential financing vehicle for the Glencore group for over 20 years, which is an integral part of Glencore’s business model. Witness Statement of Christopher Eskdale, para 20; 2007-2008 Glencore Bermuda Financial Statements, 31 December 2008, **C-94**.

<sup>618</sup> Witness Statement of Christopher Eskdale, para 20.

<sup>619</sup> *Ibid.*

<sup>620</sup> Letter from Glencore International (Mr Strothotte) to the President of Bolivia (Mr Morales), 22 February 2007, **C-21**; Letters from Glencore International PLC (Mr Maté and Mr Glasenberg) to the President of Bolivia (Mr Morales) and the Ministry of Mining (Mr Pimentel), 14 May 2010, **C-27**; Letters from Glencore International PLC (Mr Maté) to the President of Bolivia (Mr Morales), 27 June 2012, **C-40**.

<sup>621</sup> *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **CLA-129**, para 536.

objections in the past, it is most probable that Bolivia’s objections will fail. Bifurcating the proceedings on the basis of these objections would therefore lead to unjustified delays and costs. Further, if this Tribunal considered that Glencore Bermuda’s evidence of incorporation in Bermuda was not sufficient, this Tribunal would need to hear extensive witness testimony—including that of Mr Eskdale, who participated in the structuring of the investment at the time of acquisition and can also speak as to the activities and purposes of Glencore Bermuda and Glencore International.<sup>622</sup> Given that Mr Eskdale also addresses questions relevant to the merits in his witness statement, if this Tribunal were to bifurcate the proceedings, it would have to hear Mr Eskdale’s testimony at the hearing on jurisdiction and again at the hearing on the merits. This duplication would clearly lead to inefficiencies and unnecessary costs.

**2. Bolivia’s measures were not reasonably foreseeable when Glencore Bermuda acquired its investments**

316. Bolivia further argues that Glencore Bermuda abused the investment protection system as it acquired its investments when “the process of recovery of natural resources and strategic companies to the state had already commenced or it was evident that it would commence,” for the sole purpose of “unlawfully” extending the Treaty protections to investments made by Bolivian investors.<sup>623</sup> Bolivia’s arguments are patently flawed.

317. *First*, and foremost, Glencore Bermuda’s acquisition of its investments in Bolivia was not a “restructuring” with the purpose of providing treaty protection to investments held by Bolivian nationals, as Bolivia alleges. As explained by Mr Eskdale, Glencore International acquired its investments in Bolivia through a competitive international bidding process, organized by Argent Partners, a reputable firm specializing in transactions in the mining sector.<sup>624</sup> More

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<sup>622</sup> Witness Statement of Christopher Eskdale, para 20.

<sup>623</sup> Bolivia’s letter of April 3, 2017, para 18; Response to Notice of Arbitration, para 48.

<sup>624</sup> Witness Statement of Christopher Eskdale, paras 13-18.

- importantly, the assets were held by the Panamanian Companies and CDC, a development finance institution wholly owned by the UK government.<sup>625</sup> Finally, the purpose of the transaction was not only to acquire Bolivian assets but also assets located in Argentina.<sup>626</sup>
318. *Second*, even if it were true that the true nature of the transaction was a “restructuring” with the aim of obtaining treaty protection (which we deny), restructuring an investment in order to obtain treaty protection *per se* does not amount to an abuse.<sup>627</sup> In fact, tribunals have found evidence of abuse only “in very exceptional circumstances,” after taking into account “all the circumstances of the case,”<sup>628</sup> and finding that the purpose of the restructuring was exclusively obtaining treaty protection.<sup>629</sup>
319. *Third*, and most importantly, Glencore Bermuda’s acquisition started in March 2005, before President Evo Morales was elected and clearly prior to any of the challenged measures.<sup>630</sup> In fact, Glencore as a group had decided to make this acquisition by late 2004, after having met with government officials who indicated that they welcomed Glencore’s investment.<sup>631</sup> It was not until February 2007 that the first breach of the Treaty occurred, when Vinto was nationalized

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<sup>625</sup> Witness Statement of Christopher Eskdale, para 15.

<sup>626</sup> *Ibid*, para 13.

<sup>627</sup> *See, eg, Tidewater Inc and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Decision on Jurisdiction, 8 February 2013, **CLA-116**, para 184; *Mobil Corporation, Venezuela Holdings BV, and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27) Decision on Jurisdiction, 10 June 2010, **CLA-97**, para 204; *Renée Rose Levy and Gremcitel SA v Republic of Peru* (ICSID Case No ARB/11/17) Award, 9 January 2015, **CLA-124**, para 184; *Millicom International Operations BV and Sentel GSM SA v Republic of Senegal* (ICSID Case No ARB/08/20) Decision on Jurisdiction of the Arbitral Tribunal, 16 July 2010, **CLA-99**, para 84.

<sup>628</sup> *Renée Rose Levy and Gremcitel SA v Republic of Peru* (ICSID Case No ARB/11/17) Award, 9 January 2015, **CLA-124**, para 186; *see also Mobil Corporation, Venezuela Holdings BV, and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27) Decision on Jurisdiction, 10 June 2010, **CLA-97**, para 177.

<sup>629</sup> *Renée Rose Levy and Gremcitel SA v Republic of Peru* (ICSID Case No ARB/11/17) Award, 9 January 2015, **CLA-124**, para 192.

<sup>630</sup> Section II.C, above; Witness Statement of Christopher Eskdale, para 19.

<sup>631</sup> Section II.C, above; Witness Statement of Christopher Eskdale, para 18.

without compensation.<sup>632</sup> International tribunals have emphasized that for there to be an abuse of process, a claimant must have restructured its investment to gain treaty protection over a pre-existing or reasonably foreseeable dispute.<sup>633</sup> As stated by the tribunal in *Pac Rim v El Salvador*:

[T]he dividing-line [between legitimate restructuring and an abuse of rights] occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy.<sup>634</sup>

320. In the present case, it is clear that Glencore Bermuda could not foresee “an actual dispute” or “a very high probability of a specific future dispute” at the time of acquisition. Bolivia argues that the acquisition took place when “the process of recovery of natural resources and strategic companies by the state had already commenced or it was evident that it would commence.”<sup>635</sup> It is not clear when Bolivia places this event. Moreover, it is noteworthy that nationalizing companies or retaking control of strategic sectors would not *per se* constitute breaches of the Treaty—such actions would only breach the Treaty if done without complying with international law obligations. Bolivia’s first violation of the Treaty only occurred with the nationalization of Vinto in February 2007—long after Glencore Bermuda had acquired its investments in Bolivia—when the assets were taken in violation of due process of law and without any compensation.

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<sup>632</sup> Tin Smelter Nationalization Decree, 7 February 2007, **C-20**; Section II.E.1 above; Witness Statement of Christopher Eskdale, paras 43-47.

<sup>633</sup> *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **CLA-129**, para 536 (“The case law indicates that an abuse of right can be found where a corporate restructuring is motivated wholly or partly by a desire to gain access to treaty protection in order to bring a claim in respect of a specific dispute that, at the time of the restructuring, exists or is foreseeable. In these circumstances, the restructuring is intended to create an unfair advantage for the foreign investor because the investor has no intention of performing any economic activity in the host State.”) (emphasis added); *Tidewater Inc and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Decision on Jurisdiction, 8 February 2013, **CLA-116**, para 184.

<sup>634</sup> *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, **CLA-110**, para 2.99; *see also Alapli Elektrik BV v Republic of Turkey* (ICSID Case No ARB/08/13) Award, 16 July 2012, **CLA-111**, para 403.

<sup>635</sup> Response to Notice of Arbitration, para 48.

321. In accordance with the above, it is evident that Bolivia’s jurisdictional objection cannot succeed. But more importantly, if the Tribunal were to address these issues, it would have to hear witness evidence, including that of Mr Eskdale, on the issues of: (i) acquisition of the investment; (ii) conduct of the government pre- and post-investment; (iii) timing of the announcement of the measures; and (iv) the actual measures, among others. All of these issues are clearly closely intertwined with the merits. Hearing them on a preliminary basis would be vastly inefficient and unnecessarily expensive.

### **3. Glencore Bermuda’s investments are protected under the Treaty**

322. Bolivia also objects to the Tribunal’s jurisdiction on the basis that Glencore Bermuda’s investments do not qualify for Treaty protection as they had previously been “unlawfully” acquired by former President Sánchez de Lozada.<sup>636</sup> Among other arguments, Bolivia alleges that the transfer of the Smelters and the execution of the Colquiri Lease should have been approved by law.<sup>637</sup>

323. Not only does Bolivia not provide any support for its statements concerning illegality, but its allegations are patently inconsistent with contemporaneous evidence. As explained in Section II.A above, the privatization of the Smelters and the execution of the Colquiri Lease were approved by the Bolivian National Assembly via the Mining Code and Law No 1,982. Then the assets were lawfully awarded to private investors through public tender processes. Furthermore, as already mentioned, Glencore Bermuda met with government officials before the acquisition, who made clear that they welcomed Glencore Bermuda’s investment.<sup>638</sup> Allegations of illegality were not raised for years—until it became

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<sup>636</sup> Bolivia’s letter of April 3, 2017, para 18.

<sup>637</sup> Response to Notice of Arbitration, paras 27, 56.

<sup>638</sup> Letter from the Vice Minister of Mining (Mr Gutiérrez) to Glencore (Mr Capriles), 17 January 2005, C-63.

politically expedient for Bolivia to do so.<sup>639</sup> Even then, Glencore provided all of the evidence requested by the government.<sup>640</sup> No further investigation, formal accusation or judicial proceeding (criminal or other) was ever brought against Glencore or any of its subsidiaries, including the Claimant, regarding the alleged illegality of the investment.

324. It is clear that this is merely an opportunistic attempt by Bolivia to avoid its international obligations and has no merit. More importantly, findings relating to the legality of the investments are clearly so linked to the merits that treating them separately would lead to avoidable inefficiencies.

**C. THIS TRIBUNAL SHOULD NOT BIFURCATE THE PROCEEDINGS**

325. In accordance with the above, it is evident that Bolivia's Request for Bifurcation is simply a means to introduce delay into these proceedings. Bolivia's jurisdictional objections are inherently factual and cannot be divorced from the merits of the dispute. In addressing these submissions, the Tribunal will have to investigate many of the same facts and legal arguments from the same witnesses that the parties will develop in relation to their substantive claims and defenses. In particular, in order to appreciate the context and timing of Glencore's acquisition of the nationalized assets, the Tribunal will have to consider the facts, circumstances and the legal framework on which Glencore Bermuda relied when investing in Bolivia.<sup>641</sup> As a result, adjudicating issues of jurisdiction on a preliminary basis will relieve neither the parties nor the Tribunal from addressing substantive issues.

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<sup>639</sup> No such allegation was made to Glencore Bermuda (or its parent company Glencore International) from the time of the acquisitions in 2005 until Bolivia decided to nationalize the Tin Smelter in 2007. In particular, Bolivia could have raised any concerns about the legality of the investments during the discussions leading to Glencore International's investment in 2004.

<sup>640</sup> Section II.E, above; Witness Statement of Christopher Eskdale, paras 40-41, 52.

<sup>641</sup> In fact, Bolivia invoked alleged illegalities in the privatization process as a basis for nationalization. Tin Smelter Nationalization Decree, 7 February 2007, **C-20**, preamble ("from analyzing the privatization process it is evident that the Vinto Tin Smelter was transferred in violation of different legal norms and provisions").

326. As already explained, unless there is a high probability that preliminary adjudication of jurisdictional objections will allow the Tribunal to dispose of the case, there is no justification for bifurcating proceedings. As demonstrated above, Bolivia's chances of prevailing are minimal. Bifurcation will therefore lead only to unwarranted delay and expense. In this regard, it is noteworthy that academic commentary on this issue "directs the tribunal to compare the cost of a unitary proceeding to that of bifurcated proceedings, weighted for the tribunal's preliminary assessment of the likelihood of the claimant's success, and to select the procedure that would result in the lowest overall cost."<sup>642</sup> Whether the Tribunal applies this formula or the *Glamis Gold* criteria to this case, both lead to the conclusion that Bolivia's Request for Bifurcation should be dismissed.
327. In addition, should the proceedings be bifurcated, either party may be motivated to challenge the resulting decision on jurisdiction before the domestic courts at the seat of the arbitration. Such recourse is generally available in Paris, the agreed-upon seat of the instant arbitration,<sup>643</sup> where annulment proceedings may be brought once an arbitral tribunal issues a decision on jurisdiction. It follows that, in the event that bifurcation is granted and the Tribunal rejects Bolivia's jurisdictional objections, potential challenges to the Tribunal's decision may give rise to costly and time-consuming parallel proceedings.
328. Finally, in deciding this issue, the Tribunal must address the ever-growing concern of the investment arbitration community that respondent States use jurisdictional objections simply to postpone an inevitable decision on the merits, delaying justice for the claimants. In the present case, Glencore Bermuda claims full compensation for Treaty violations for undenied expropriations that took place five to ten years ago. There is no dispute that Bolivia owes compensation

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<sup>642</sup> JY Gotanda, "An Efficient Method for Determining Jurisdiction in International Arbitrations" (2001-2002) 40 *Columbia Journal of Transnational Law* 11, **CLA-31**, p 32.

<sup>643</sup> *See* Procedural Order No 1, 31 May 2017, section 2.1.

under the Treaty to Glencore Bermuda; the only question is the amount.<sup>644</sup> Asking Glencore to wait 15 to 18 additional months for the Tribunal to hear meritless objections to jurisdiction would be unreasonably burdensome, and ultimately, a futile exercise. Bolivia's Request for Bifurcation should thus be denied.

## **VIII. GLENCORE BERMUDA'S REQUEST FOR RELIEF**

329. On the basis of the foregoing, without limitation and reserving Glencore Bermuda's right to supplement these prayers for relief, including without limitation in the light of further action which may be taken by Bolivia, Glencore Bermuda respectfully requests that the Tribunal:

- (i) DECLARE that Bolivia has breached Articles 2(2) and 5 of the Treaty;
- (ii) ORDER Bolivia to compensate Glencore Bermuda for its losses resulting from Bolivia's breaches of the Treaty and international law for an amount of US\$ 675.7 million as of 15 August 2017 plus interest until payment at a normal commercial rate applicable in Bolivia, compounded annually;
- (iii) DECLARE that: (a) the award of damages and interest in (ii) be made net of all Bolivian taxes; and (b) Bolivia may not deduct taxes in respect of the payment of the award of damages and interest in (ii);
- (iv) DENY Bolivia's Request for Bifurcation;
- (v) AWARD such other relief as the Tribunal considers appropriate; and
- (vi) ORDER Bolivia to pay all of the costs and expenses of these arbitration proceedings.

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<sup>644</sup> Section VI, above.

Respectfully submitted on 15 August 2017



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