PCA Case No. 2016-39/AA641

Glencore Finance (Bermuda) Ltd.
(Claimant)

- VS -

The Plurinational State of Bolivia
(Respondent)

BOLIVIA'S REPLY ON PRELIMINARY OBJECTIONS AND REJOINDER ON THE MERITS

24 October 2018

Members of the Tribunal:

Prof. Ricardo Ramírez Hernández

Prof. John Y. Gotanda

Prof. Philippe Sands

ESTADO PLURINACIONAL DE BOLIVIA
Procuraduría General del Estado

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1. Pursuant to the Procedural Calendar adopted in this matter, the Plurinational State of Bolivia ("**Bolivia**" or the "**State**")[1] hereby submits its Reply on Preliminary Objections and Rejoinder on the Merits (the "**Rejoinder**") in response to the Counter-Memorial on Jurisdiction and Reply on the Merits submitted on 22 June 2018 (the "**Reply**") by Glencore Finance (Bermuda) ("**Claimant**" or "**Glencore Bermuda**").

2. Bolivia submits together with its Rejoinder:

- Factual exhibits **R-239(bis)** and **R-273** to **R-362**, together with a consolidated list of authorities;
- Legal authorities **RLA-124(bis)** and **RLA-137** to **RLA-200**, together with a consolidated list of authorities;
- The second witness statement of Mr Andrés Cachi ("**Cachi II**");
- The second witness statement of Mr Joaquín Mamani ("**Mamani II**");
- The second witness statement of Eng Ramiro Villavicencio Niño de Guzmán ("**Villavicencio II**");
- The second witness statement of Eng David Alejandro Moreira ("**Moreira II**"); and
- The witness statement of Eng Héctor Córdova, former president of the *Corporación Minera de Bolivia* ("**Córdova**").

1. INTRODUCTION

3. **A simple truth**. Despite Claimant's attempts, the Reply made clear the opportunistic nature of its claims. Claimant wants the Tribunal to believe that this is a simple case, in which Bolivia seized the Vinto tin smelter (the "**Tin Smelter**"), the Vinto antimony smelter (the "**Antimony Smelter**"), and the Colquiri mine (the "**Colquiri Mine**" or the "**Mine**") lease (the "**Lease**") (jointly referred to as the "**Assets**"), depriving Glencore Bermuda of the value of its investment without compensation. Claimant's description of the facts is a cookie cutter example of clichéd investment arbitration rhetoric – that of an investor welcomed with open arms, who ends up misled and mistreated by the host State. This hackneyed story has no place

[1] Unless otherwise indicated, the definitions adopted in Bolivia's previous submissions, including, in particular, its Preliminary Objections, Statement of Defence and Reply on Bifurcation (the "**Statement of Defence**"), apply throughout this Rejoinder.

in this case. The simple truth is that Claimant is using this investment arbitration as an insurance policy against its own reckless and opportunistic behaviour.

4. **The Swiss Job**. Glencore International AG ("**Glencore International**"), not Claimant, invested in Bolivia in early 2005. Glencore International negotiated and concluded the share purchase agreements for the acquisition of the Assets – Claimant's only involvement was to provide the bank account from which payment was drawn, at the order of Mr Eskdale, who has no relationship with Glencore Bermuda. Glencore International managed the Assets – Mr Eskdale, the manager of the Assets, worked for Glencore International, and was never affiliated with Glencore Bermuda in any capacity. Glencore International negotiated with Bolivia when the Assets were reverted – Glencore Bermuda was never once mentioned in these negotiations until Glencore International elected to pursue this arbitration. In a blatant abuse of the international system for the protection of investments, Glencore Bermuda's only role in Glencore International's entire scheme was to act as claimant in this arbitration.

5. **Reckless three times over**. Glencore International has made a series of reckless decisions, contrary to the requirement that an international business operator must act as (and is deemed to be) a competent professional. Glencore International was reckless when it acquired the Assets, it was reckless when it operated the Assets, and it was reckless when it intervened in the negotiations between the State and the *cooperativistas*, destroying any chance of a negotiated solution for the Colquiri Mine conflict. But this careless *modus operandi* was by no means inadvertent. [redacted]

6. **Reckless the first time around: Glencore International made its investment knowing of the highly irregular privatization process**. When Glencore International acquired the Assets in 2005, it was fully aware (as shown by its own due diligence documents) that it was acquiring the Assets from disgraced former President Gonzalo Sánchez de Lozada y Sánchez de Bustamante, familiarly known in Bolivia as "Goni" ("**Sánchez de Lozada**"). He in turn had obtained the Assets as the result of a privatization process from 1999-2001 that remained highly controversial (and publicly criticized) due to its irregularities. Glencore International, however, chose to wilfully disregard the results of this due diligence and go ahead with the investment, knowing full well all of the risks that this decision involved.

7. **Reckless the second time around: Glencore International management of the Assets led to their reversion**. When it acquired the Assets, Glencore International knew of the

likelihood of severe social conflict at the Colquiri Mine, and the importance of maintaining a good relationship with the *cooperativistas* and its own employees, as confirmed by its pre-acquisition due diligence. Yet, its operation of the Mine – constantly ceding to demands of the *cooperativistas* for greater working areas in the Colquiri Mine while laying off formal workers and doing nothing to resolve the escalating friction between the two groups – led to the 2012 conflict at the root of the Colquiri Mine Lease reversion. As to the Antimony Smelter, Glencore International ignored the plain terms of the privatization agreement requiring it to be put to productive use, giving rise to the reversion.

8. **Reckless the third time around: Glencore International deliberately subverted Bolivia's efforts to put an end to the Colquiri Mine conflict**. When the violence at the Colquiri Mine arose, Bolivia acted immediately and managed to negotiate an agreement with the different actors involved that promised to end the conflict. However, when that agreement was about to be finalised, Glencore International offered the Rosario vein (the richest vein of the Colquiri Mine) to one sector of *cooperativistas*. This had disastrous effects. It ruined the chances of a compromise since the *cooperativas* were no longer willing to settle for less than control of the Rosario vein, and the workers were equally adamant that they would not cede it. As a result, Bolivia was forced to act fast to stop the violent confrontation that ensued. The irregular circumstances in which the Assets were privatized and Glencore International's wrongdoings left the State with no choice but to revert them (**Section 2**).

9. **The utmost display of bad faith**. In these circumstances, the portrayal of Glencore International as a good-faith investor committed to work for the mining industry in Bolivia is pure fiction. The reality is that an irresponsible and calculating investor transferred the Assets to a Bermudan holding company so that it could claim investment treaty protection when the foreseeable risks identified in its due diligence materialised. [redacted] And that same investor has had no qualms about breaching confidentiality obligations covering its negotiations with the State (the "**Negotiations**"), and claiming that the State did not negotiate in good faith even though the Negotiations lasted for more than nine years. One is left to wonder why Glencore International would have waited so long to commence this arbitration had Bolivia failed to engage in meaningful discussions.

10. **The Tribunal lacks jurisdiction to hear Claimant's claims**. Glencore International's abuse of Claimant's legal personality in order to obtain the protection of the UK-Bolivia Bilateral Investment Treaty (the "**Treaty**") cannot be condoned. As a result, and on the basis of the

law applicable to this dispute (**Section 3**), the Tribunal must conclude that it lacks jurisdiction over Claimant's claims, which are, in any event, inadmissible (**Section 4**).

11. **Bolivia's foreseeable and legitimate reaction**. In the alternative, Claimant's claims fail on the merits (**Section 5**). Bolivia's decision to revert the Assets did not breach any of its international obligations. On the contrary, the reversion of the Assets was the appropriate response to (i) the irregular privatization of the Tin Smelter, (ii) the inactivity of the Antimony Smelter for years, and (iii) the social conflict created at Colquiri.

12. **Claimant's claims should be dismissed**. For all these reasons, the Tribunal should reject Claimant's claims and order Claimant to reimburse the costs incurred by Bolivia in this arbitration (**Section 6**).

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

13. Claimant's Reply perpetuates the incomplete and often untruthful narrative that Claimant has been presenting to the Tribunal since the start of this arbitration, of a good-faith investor whose voluntary contribution to the development of its host State would have been mistreated for political reasons and opportunistic economic gain. On the basis of such narrative, Claimant would have this Tribunal gloss over the history of the Assets, the crucial developments that took place in the Bolivian mining sector and public life since 2003, and its own appetite for patently risky acquisitions, while transferring the risks it knowingly assumed in one such acquisition to the Bolivian State. It would also hold itself free from the strict confidentiality of the Negotiations it undertook with the State, and at liberty to disclose related confidential information in order to cast the State in a negative light. A narrative so skewed is contradicted by the evidentiary record of this case and cannot be accepted by this Tribunal.

14. Prior to their transfer to the private sector, the Assets were operated peacefully and profitably. Claimant does not dispute that the Bolivian Mining Corporation (*Corporación Minera de Bolivia* or "**COMIBOL**") operated the Colquiri Mine smoothly, and maintained good relations with the independent mining workers in the region. Further, and contrary to what Claimant would have the Tribunal believe, the State's investments in the Tin Smelter and Antimony Smelter (together, the "**Smelters**") in the 1970s-1990s enabled the former to gain international recognition for the high quality of its product, and the latter to actively process locally-produced raw material (**Section 2.1**).

15. It was thus not out of necessity, but rather pursuant to a deliberate Government policy that the Assets were put up for privatization in the late 1990s. Sánchez de Lozada, one of the main

drivers of economic neoliberalism in Bolivia, conceived and helped put in place the legal framework for the mass privatization of State assets, in particular in the mining sector, where he was also active as a businessman. The relevant norms were crafted during his time as Senator, Minister for Planning and Coordination, and ultimately President (1993-1997), and had a significant impact on COMIBOL, the powers and role of which were substantially limited (**Section 2.2**).

16. After the end of his first term in office, Sánchez de Lozada proceeded to take full advantage of the privatization that he had made possible. As a result, he bid for and acquired the Colquiri Mine Lease and the Antimony Smelter in irregular circumstances (**Section 2.3**).

17. Following the acquisition of the Tin Smelter by UK-based Allied Deals plc ("**Allied Deals**") in a similarly irregular privatization process, Sánchez de Lozada was presented with an opportunity to also acquire this Asset. Allied Deals was embroiled in a massive fraud scandal, and went bankrupt, which allowed the former President to secure the Tin Smelter for a substantially lower price than that for which it had been privatized, just shortly before taking office for the second and last time (**Section 2.4**).

18. Sánchez de Lozada resigned, and fled to the US following the dramatic events of October 2003. By that time, tensions between the workers and *cooperativistas* had increased significantly at the Colquiri Mine, and were likely to continue increasing. This, together with the recent history of the Tin Smelter and the still inactive status of the Antimony Smelter, against a backdrop of profound change in Bolivia, made it plainly foreseeable that the State would take action against the Assets.

19. Yet despite these circumstances, Glencore International acquired the Assets from the fleeing former President, and assigned them to Claimant (**Section 2.5**). Having obtained the Assets, Claimant proceeded to hold them, without making any significant investments in them until they were reverted to the State (**Section 2.6**).

20. Claimant's ownership of the Assets came to its entirely foreseeable end when the State reverted the Tin Smelter in February 2007 (in light of its illegal privatization), the Antimony Smelter in May 2010 (in light of its inactivity), and the Colquiri Mine Lease in June 2012 (to defuse the serious social conflict inherited from Compañía Minera del Sur ("**Comsur**") and aggravated by Glencore International's subsidiary, Sinchi Wayra) (**Section 2.7**).

21. Negotiations followed between Glencore International and the Bolivian State, with the aim of reaching an amicable solution to the dispute. Disregarding the State's good faith in the

Negotiations, and the strict confidentiality agreements, Claimant has revealed confidential information related to such Negotiations, displaying the utmost bad faith (**Section 2.8**).

22. Following the reversions, Bolivia has made significant investments in the Assets, and has expended considerable efforts to manage the social relations at the Mine (**Section 2.9**).

2.1 Prior To The Privatization, Bolivia Successfully Operated The Smelters And Mine Lease Through COMIBOL And Its Affiliates

23. As Bolivia proved in its Statement of Defence, the Assets relevant to this dispute were operated successfully by COMIBOL and its affiliates prior to the implementation of the New Economic Policy by former President Sánchez de Lozada.[2] Not only was the operation successful, but, in particular, it ensured peaceful and mutually beneficial relationships at the Mine between the COMIBOL employees and the independent mining workers present at the Colquiri Mine.

24. In an attempt to somehow justify the irregularities that surrounded the privatization of the Assets, Claimant portrays the Assets as unsuccessful business ventures undertaken by the State. This is incorrect, and only seeks to induce this Tribunal to believe that the privatization of the Assets was a necessary – rather than a deliberate – governmental decision made by Sánchez de Lozada's administration.

25. In fact, and contrary to what Claimant contends, COMIBOL operated the Colquiri Mine smoothly before the privatization, and maintained consistent production levels of tin and zinc concentrates over the years. In addition, Claimant fails to disprove that the measures taken by COMIBOL in order to handle its relationship with the independent mining workers would have been unsuccessful (**Section 2.1.1**). Likewise, thanks to significant investments made by the State prior to their privatization, the Antimony Smelter was fully operational and the Tin Smelter – which produced world-class refined tin – was a profitable business (**Section 2.1.2**).

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2 Statement of Defence, Section 2.1.

2.1.1 Claimant Does Not Dispute That COMIBOL Smoothly Operated The Colquiri Mine And Maintained Good Relations With The Independent Mining Workers Of The Region

26. According to Claimant, the Colquiri Mine was operating at "*a substantial loss*"[3] in the 1990s. This circumstance – rather than Sanchez de Lozada's interest in seeking an undue benefit from the State's divesting in the mining sector[4] – would have led the State to privatize it.[5] Such portrayal of the facts is not, however, an accurate account of the Mine's situation prior to its privatization.

27. *First*, Claimant's assertion that the State needed to promptly divest the Colquiri Mine in light of the "substantial losses" generated by its operations relies on a report prepared by the consultant firm Behre Dolbear & Company (the "**Behre Dolbear Report**") in 1995, that is, 6 years prior to the privatization.[6] Such report cannot accurately represent the Mine's financial and economic outlook as at the time it was privatized in 2000.[7]

28. Furthermore, Claimant cannot seriously rely on the Behre Dolbear Report to justify the privatization of the Colquiri Mine, as the assumptions of such Report differ greatly from the terms of the privatization in 2000. In particular, in the opinion of Behre Dolbear, for the privatization of the Mine to be beneficial to the State (as at 1995), it needed to receive at least US$ 16 million in investments related to the implementation of a new trackless infrastructure and the modernization of the concentrator.[8] It is undisputed that the Mine was never modernised – under either Comsur's or Sichi Wayra's administration – as recommended by Behre Dolbear. Nor were US$ 16 million invested in this Asset during the 7 years prior to the reversion.

29. In any event, the Behre Dolbear Report clarified that, as of 1994, and despite the depressed international tin market, the Colquiri Mine's course of business remained steady and was generating a positive cash flow.[9]

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3 Reply, ¶ 28.

4 See Section 2.2 below.

5 Reply, ¶ 31.

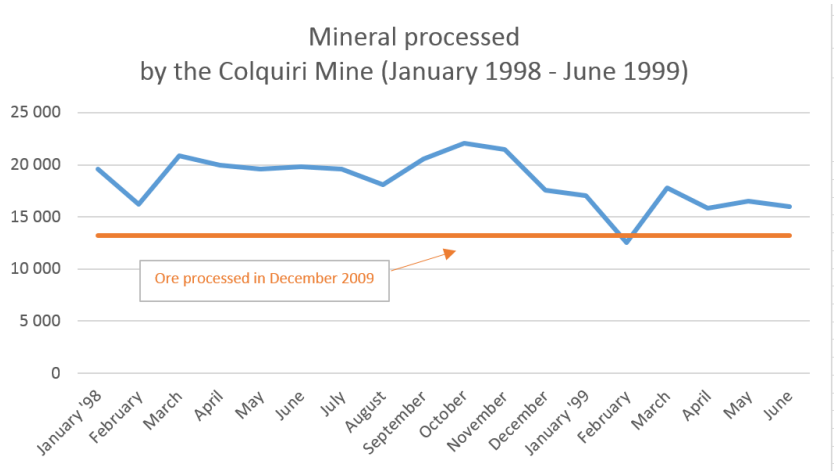
6 Reply, ¶ 28; Behre Dolbear & Company, Inc., Technical Financial Study for the Capitalization of EMV and Transfer of Operative Responsibilities of Comibol to the Private Initiative, Part II, Vol. A, **C-166**.

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

8 Reply, ¶ 28 and footnote 51.

9 Behre Dolbear & Company, Inc., Technical Financial Study for the Capitalization of EMV and Transfer of Operative Responsibilities of Comibol to the Private Initiative, Part II, Vol. A, **C-166**, p. 5 [p. 13 of the PDF].

30. *Second*, contrary to Claimant's suggestion, the record shows that, over the years prior to the privatization of the Colquiri Mine, its mineral processing levels remained stable (about 17,000 tons of tin ore processed per month). This performance is similar – and, in some instances, superior – to the one reported by the Colquiri Mine under Sinchi Wayra's administration. For instance, in December 2009, 13.021 tons of ore were mined,[10] while, in December 1998, COMIBOL mined 17.540 tons of ore.[11]



Colquiri Mine levels of mineral processing prior to the privatization. In orange, processing levels at the Mine in December 2009.[12]

31. It is undisputed that COMIBOL secured these levels of steady performance prior to the privatization thanks to the good relationship it maintained with the independent mining workers present in the Mine. As explained in the Statement of Defence, prior to the privatization of the Mine, COMIBOL worked closely with informal mining workers, then known as *subsidiarios* or *arrendatarios*, who worked in surface areas of the Mine under the State's strict supervision.[13]

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10 Compañia Minera Colquiri S.A., 2008-2012 Colquiri Group Production Reports (Extracts), **RPA-48**, p. 2.

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

12 See Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, pp. 130-131; Compañia Minera Colquiri S.A., 2008-2012 Colquiri Group Production Reports (Extracts), **RPA-48**, p. 45 [2 of the PDF].

13 Statement of Defence, ¶¶ 36. See alsoPublic Deed No. 50/98, Lease Agreement between COMIBOL and the *subsidiarios* of the Colquiri Mine of 10 July 1998, **R-92**, Clause 3 (Unofficial translation: "*the lease of mineral deposits for their exploration, recognition, development, exploitation, benefit and sale of the existing ore […]*"). See alsoPublic Deed No. 003/2000, Amendment to the Lease Agreement between COMIBOL and the *subsidiarios* of the Colquiri Mine of 5 January 2000, **R-93**.

32. One of the key factors to COMIBOL's success in handling its relationship with the independent mining workers was the employment of a significant workforce at the Colquiri Mine.[14] As at the time it was privatized, COMIBOL employed no less than 670 people at the Mine,[15] and the ratio of employees to *subsidiarios* was around 3 to 1.[16]

33. *Third*, whether COMIBOL remained or not "*the leading tin producer [...] in 1999*"[17] is irrelevant and does not speak to the Colquiri Mine's financial and economic outlook as at the time of the privatization. Rather, COMIBOL's less prominent position in the mining industry in the 1990s was already the result of the implementation of the New Economic Policy by the Paz Estenssoro government since 1985.

34. In addition, "*Supreme Decree 21060, designed by Goni and promulgated by Estenssoro, linked Bolivian currency to the U.S. dollar and made labor strikes of any kind illegal, while simultaneously shuttering hundreds of nationalized mines and leaving the vast majority of miners unemployed.*"[18] Contrary to Claimant's suggestion,[19] the result of the implementation of the New Economic Policy accentuated the mining crisis of the 1980s by leaving thousands of miners in State-run mines jobless.

35. The measures taken by Paz Estenssoro's Government (which were implemented by Sánchez de Lozada as Minister for Planning and Coordination) set the stage for the appearance of the independent mining workers (later known as *cooperativistas*) as a powerful and unique

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14 Mamani I, ¶ 8 ("*Como anticipé, antes de comenzar a trabajar para Comsur en el año 2002, trabajé en la Mina como subsidiario por más de diez años. Para entonces, la COMIBOL controlaba de cerca las áreas operadas por los subsidiarios gracias a su alto número de empleados que podían vigilar el perímetro estas áreas. Recuerdo que, antes de la privatización de la Mina, la COMIBOL alcanzó a tener unos 600 empleados*") (Unofficial translation: "*As mentioned above, before starting to work for Comsur in 2002, I worked in the Mine as a subsidiario for more than ten years. By then, COMIBOL closely controlled the areas operated by subsidiarios through a high number of employees who could survey the perimeter of these areas. I remember that, before the privatization of the Mine, COMIBOL had up to 600 workers*"). See also Cachi I, ¶ 10.

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

16 Mamani I, ¶ 14.

17 Reply, ¶ 28.

18 NACLA, *Goni on trial*, press article of 22 March 2018, **R-284**, p. 2.

19 Reply, ¶ 19.

feature[20] of the Bolivian mining sector.[21] This social phenomenon was particularly intensified after 1997, when the new mining code was enacted, and COMIBOL was forbidden from undertaking any direct mining activity.[22]

36. In sum, Claimant's characterization of the Colquiri Mine is inaccurate and does not account for the important role of COMIBOL in maintaining good relationships with its own workers, as well as with the *subsidiarios* (later known as *cooperativistas*).

2.1.2 Claimant Mischaracterizes The Investments That Bolivia Made In The Smelters During The 1970-1990s

37. As Bolivia explained in its Statement of Defence,[23] the Tin Smelter was built between 1968 and 1970 near the city of Oruro by the State company *Empresa Nacional de Fundiciones* ("**ENAF**"). The Antimony Smelter was also built by ENAF in 1976 right next to the Tin Smelter. Prior to the privatization of these two Assets, the State made significant investments which (i) ensured ENAF's reputation as a world-class metallic tin producer, and (ii) installed capacity for the local antimony production.

38. In its Reply, Claimant suggests that, as of the time of the privatization of the Smelters, the State's Empresa Metalúrgica **V**into ("**EMV**") was "*on the verge of closing its operations.*"[24] This is both disingenuous and incorrect.

39. *First*, Claimant relies on a partial quote of EMV's Annual Report for 1993 and 1994 concerning the levels of production between 1983 and 1987. It expressly omits, however, that, after 1987, ENAF designed and carried out a successful reactivation plan. ENAF

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20 J. Michard, "Cooperativas mineras en Bolivia," CEDIB, 2008, **R-90**, p. 8 ("*Una característica de la minería boliviana, que sólo se encuentra en este país, es la importancia del sector cooperativista dentro del sector minero en su totalidad. Así, el número de cooperativistas, que se estima actualmente, llega aproximadamente a 60.000 personas, representando el 90% del empleo minero nacional*") (emphasis added) (Unofficial translation: "*one characteristic of Bolivian mining, which can only be found in this country, is the preponderance of the cooperatives within the mining sector. Thus, the estimated current number of cooperativistas amounts to some 60,000 people, which represents 90% of the national mining workforce*").

21 After dismissing the miners, in a process later called "*relocalización minera,*" the government then authorized COMIBOL to lease some of the mines to *sociedades cooperativas* formed by former COMIBOL workers. Colquiri was one of these mines, alongside Catavi, Colquechaca, Chorolque and others. See Supreme Decree No. 21.377 of 25 August 1986, **R-97**, Article 24 ("*Se autoriza a la Corporación Minera de Bolivia a suscribir contratos de arrendamiento con sociedades cooperativas que se conformen prioritariamente por los actuales trabajadores de COMIBOL*") (Unofficial translation: "*The Bolivian Mining Company is authorised to enter into lease agreements with cooperatives constituted primarily of current COMIBOL workers*").

22 Statement of Defence, ¶ 34; Bolivian Mining Code, Law 1.777 of 17 March 1997, **R-4**.

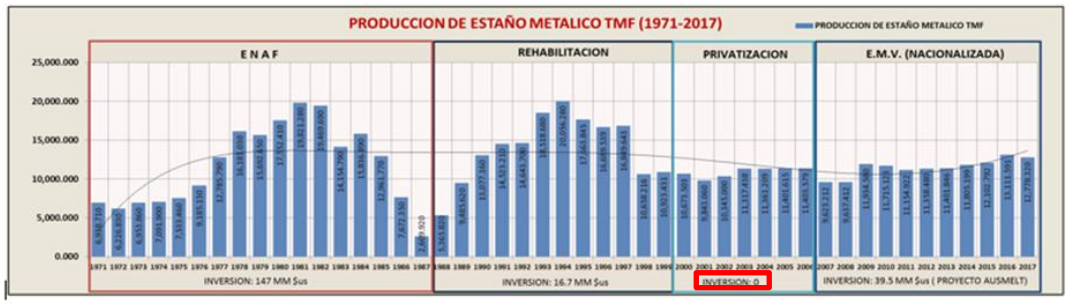
23 Statement of Defence, Section 2.1.2.

24 Reply, ¶ 26.

invested, during this period, over US$ 17 million in the Tin Smelter.[25] According to the same report cited by Claimant:

> *Empresa Metalúrgica Vinto is one of the enterprises within the mining-metallurgical sector that was reactivated at the fastest pace, and it may also be considered one of the few profitable enterprises that maintains a sustained rate of growth. A tell-tale index is the constant increase of profitable tin production, which in 1988 (first year of application of the reactivation policy) was 106% higher than in 1987. Throughout the following years this tendency continued and by 1992 the 1987 production was surpassed by 461%, in 1993 it was 610%, and finally in 1994 it registered 668% above the 1987 production […].*[26]

40. The extraordinary increase in production of the Tin Smelter allowed EMV to reach maximum historical production levels in 1994.[27] This performance was never replicated during the time the Smelter was operated by either Comsur or Sinchi Wayra.



Production levels of the Tin Smelter (1971-2017).[28] No investments were made during the time this Asset was privatized.

41. *Second*, according to Claimant, EMV's production decreased "*markedly*" in 1998. This circumstance, it contends, made the privatization of the Smelters "*inevitable*."[29] This contention would only make sense if production would have increased as a result of the privatization of the Assets. However, as the chart above shows, EMV's production levels as

25 Villavicencio I, ¶ 32.

26 Empresa Metalúrgica Vinto Annual Report 1993-1994, **R-43**, p. 39 [27 of the PDF] (emphasis added).

27 Statement of Defence, ¶ 42.

28 See Villavicencio I, ¶ 42.

29 Reply, ¶ 26.

of 1998 are virtually equal to the Tin Smelter's yearly production under Comsur and Sinchi Wayra's operation.

42. Likewise, Claimant insinuates that the privatization was a necessary measure, as "*US$ 17 million of investment was needed for improvements to the Tin Smelter.*"[30] However, after the privatization and until the reversion, no such investments were made. In the words of Mr Villavicencio, a former employee at Sinchi Wayra, and current general manager of EMV:

> *[C]omo expliqué en mi Primera Declaración Testimonial, durante la administración privada, EMV no realizó inversiones de expansión para incrementar el tratamiento o la producción de estaño metálico sino se limitó a realizar inversiones operativas de, aproximadamente, USD 750.000 anuales. Estas inversiones tenían por objeto mantener estable los índices de producción. Si, como entiendo, Glencore sólo operó Sinchi Wayra por algo más de dos años hasta la reversión de la fundición de estaño en febrero de 2007, en ese período, Glencore habría invertido, como máximo, alrededor de USD 3 millones en gastos que, en mi opinión, tienen más la connotación de gastos operativos (OPEX) que inversiones de capital.*[31]

43. As explained below,[32] it was only after the reversion that the State invested over US$ 39 million in order to increase the installed capacity and modernise the Tin Smelter.

44. *Third*, with regard to the Antimony Smelter, Claimant falsely asserts in its Statement of Claim that this Smelter would have been completely inactive during the 1990s and prior to its privatization.[33] In its Reply, Claimant acknowledges that, during the 1990s, the Asset was operational,[34] and does not deny that EMV had "*carried out a new technological design for the production of trioxide of antimony from sulphurous concentrates, with the repairing of rotating furnace and the construction of new continuous feeding systems for the furnace and equipment to gather gases and other emissions.*"[35] In this connection, the Behre Dolbear

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30 Reply, ¶ 26.

31 Villavicencio II, ¶ 7 (Unofficial translation: "*[A]s I explained in my first Witness Statement, during the private administration, EMV did not make expansion investments to increase the treatment or production of metallic tin, but merely made operating investments of approximately USD 750,000 per year. These investments were aimed at maintaining production. If, as I understand it, Glencore only operated Sinchi Wayra for just over two years until the reversion of the Tin Smelter in February 2007, during that period, Glencore would have invested, at most, around USD 3 million in expenses that, in my opinion, more so have the connotation of operating expenses (OPEX) than capital investments*").

32 See Section 2.9 below.

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

34 Reply, ¶ 27.

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

Report noted that the operation of the Antimony Smelter was, as of 1995, commercially successful:

> *En 1989 se reconstruyó esta planta utilizando el conocimiento proporcionado por Laurel Industrias, Inc. de los Estados Unidos. Con este proceso nuevo, el trióxido de antimonio se produce volatilizando los concentrados en hornos rotatorios. Este producto es de suficiente pureza como para ser aceptado por Laurel como alimentación para su proceso de refinación, elaborando productos para el mercado de retardantes de fuego. La planta empezó en 1990 y, salvo por ese año inicial, ha operado lucrativamente desde entonces.*[36]

45. Faced with these facts, Claimant now claims that the Antimony Smelter could only operate because of a toll contract with Laurel Industries Inc. ("**Laurel**"), and suggests that the end of this contract would have marked the end of the activity of the Antimony Smelter.[37] Such contention is inapposite. The toll contract with Laurel does not obviate the fact that this was a fully functional Asset as of the moment it was privatized.

46. Moreover, following the termination of the toll contract with Laurel, the Antimony Smelter kept refining antimony concentrates throughout 1999 under contracts EMV had entered into with *Empresa Minera Unificada S.A.* and the *Comité Boliviano de Productores de Antimonio*.[38]

47. In any event, as explained below, it is undisputed that neither Comsur nor Sinchi Wayra sought to keep the Antimony Smelter operating, despite their contractual and constitutional duty to do so. Instead, as of the time of the reversion in May 2010, the State's EMV found out that the Smelter had been completely dismantled by Sinchi Wayra.[39]

48. In sum, with the aim to make this Tribunal believe that the privatization was inevitable, Claimant deliberately distorts the condition and economic outlook of both Smelters as at the time they were privatized. Bolivia, however, successfully operated these Assets right until before the privatization.

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36 Behre Dolbear & Company, Inc., Technical Financial Study for the Capitalization of EMV and Transfer of Operative Responsibilities of Comibol to the Private Initiative, Part II, Vol. A, **C-166**, Resumen p. 1-2 [pp. 127-128 of the PDF] (emphasis added) (Unofficial translation: "*In 1989 this plant was rebuilt using the knowledge provided by Laurel Industries, Inc. of the United States. With this new process, antimony trioxide is produced by volatilizing the concentrates in rotary furnaces. This product is of sufficient purity to be accepted by Laurel as feed for its refining process, producing products for the fire retardant market. The plant started in 1990 and, with the exception of that initial year, has operated lucratively ever since*").

37 Reply, ¶ 27.

38 Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, p. 65.

39 See Section 2.7.2 below.

2.2 It Is Undisputed That, Between 1994 and 1997, Former President Sánchez De Lozada Played A Key Role In Paving The Way For The Privatization Of The Assets

49. The Colquiri Mine Lease, the Tin and the Antimony Smelters were transferred to the private sector in the late 1990s and early 2000s as a consequence of the neoliberal policies implemented by successive governments as of 1985.[40] Former President Sánchez de Lozada was a key architect of these policies from their very beginning, and also one of the main beneficiaries of their effects.[41]

50. Claimant contests Sánchez de Lozada's key role in the improper transfer of the Assets to the private sector, and describes Bolivia's position in this regard as "*baseless.*"[42] Yet Claimant does not object to the basic premise that self-dealing on the part of a former (and future) President plainly goes against public interest and contradicts the duties and functions of the highest office in a State. What Claimant instead disputes, in a nutshell, is that Sánchez de Lozada himself engaged in such self-dealing.

51. Claimant's objections are unavailing, for at least the three reasons described below.

52. *First*, the measures elaborated and implemented by Sánchez de Lozada had an effect on the Bolivian mining sector that cannot be understated. His New Economic Policy signalled the start of Bolivia's neoliberal years,[43] and was preserved, applied and supplemented by subsequent administrations. The New Economic Policy had a very significant impact on COMIBOL in particular, the status and functions of which were altered beyond recognition, transforming it from a central actor of a command economy into a virtually passive observer of the mining sector's new market economy. In practice, Sánchez de Lozada's measures made it possible for numerous mining State-owned assets to be transferred to the private sector.

53. The following four circumstances explain this state of affairs.

54. One, Sánchez de Lozada's political career spanned more than two decades, and took him time and again to Congress, and twice to the presidency (from August 1993 to August 1997, and

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40 Statement of Defence, Section 2.2.

41 Statement of Defence, ¶ 46.

42 Reply, ¶¶ 22-24.

43 As a matter of fact, Sánchez de Lozada is widely credited as the architect of Bolivian neoliberalism. See B. Kohl, "Challenges to Neoliberal Hegemony in Bolivia," 38(2) *Antipode* 304 (2006), **R-98**, p. 305 ("*Bolivia's neoliberal restructuring was the most radical in Latin America after Chile, and as Waisman (1999:45) points out, undertaking market liberalization at the same time as political democratization steeply increases the inherent tensions and difficulties of both. The other notable characteristic in Bolivia is that, due to the vision of its primary architect, Gonzalo Sanchez de Lozada [...], Bolivian neoliberalism has been among the most innovative in the world, introducing programs later adopted elsewhere*").

again from August 2002 to October 2003[44]). His career began in 1979, when he won the seat for the Cochabamba department in the Chamber of Representatives, on behalf of the National Revolutionary Movement party (*Movimiento Nacionalista Revolucionario* or "**MNR**").[45] Also on behalf of the MNR, he went on to serve as senator, as of 1985, and eventually as president of the Senate.[46] In addition, starting in 1986, Sánchez de Lozada served as Minister of Planning and Coordination in the government of Victor Paz Estenssoro.[47] This ministry was in charge of implementing the New Economic Policy.

55. Two, what Claimant refers to as the "*initial step towards the privatization process*"[48] – in the execution of which it argues Sánchez de Lozada did not participate – was the enactment, by the administration of centrist President Paz Estenssoro (MNR), of Supreme Decree No. 21.060 of 29 August 1985.[49]

56. Even though he was the president of the Senate at the time, Sánchez de Lozada played the pivotal role. [redacted] Thereafter, as Minister for Planning and Coordination, Sánchez de Lozada oversaw the implementation of this Supreme Decree.[52]

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44 "La extensa carrera política y empresarial de Goni," Bolivia.com of 6 August 2002, **C-185**, p. 1.

45 "La extensa carrera política y empresarial de Goni," Bolivia.com of 6 August 2002, **C-185**, p. 1; [redacted]

46 "La extensa carrera política y empresarial de Goni," Bolivia.com of 6 August 2002, **C-185**, p. 1.

47 "La extensa carrera política y empresarial de Goni," Bolivia.com of 6 August 2002, **C-185**, p. 1; Barcelona Centre for International Affairs, "Gonzalo Sánchez de Lozada," updated 17 February 2016, **R-95**, p. 3.

48 Reply, ¶ 23.

49 Statement of Defence, ¶ 47. By way of background, a central tenet in Paz Estenssoro's liberal economic programme was the redefinition of the role of the public sector, which was to withdraw from certain productive sector activities, and instead focus on the provision of essential public goods (infrastructure, social services, and environmental protection). See World Bank, "Bolivia – From Stabilization to Sustained Growth," Report No 9763-BO, **C-57**, p. 31.

50 [redacted]

51 [redacted]

52 Statement of Defence, ¶ 47. [redacted] Barcelona Centre for International Affairs, "Gonzalo Sánchez de Lozada," updated 17 February 2016, **R-95**, p. 3 ("*El 22 de enero de 1986 el presidente reclutó a*

57. Supreme Decree No. 21.060 provided, *inter alia*, for the "*descentralización de la Corporación Minera de Bolivia*" through the creation of four affiliated companies, each having "*personalidad jurídica propia, autonomía de gestión en sus operaciones industriales, régimen administrativo con facultad para la comercialización de minerales y metales, adquisición e importación de equipos e insumos y, en general para realizar todas sus operaciones y actividades empresariales.*"[53] COMIBOL's assets and inventory were transferred to the affiliated companies, but it preserved the liabilities.[54]

58. In practice, Supreme Decree No. 21.060 transferred EMV to one of the four COMIBOL affiliates, after having pronounced the dissolution of its former holder, ENAF.[55] It also eliminated the Tin Smelter's monopoly on tin refining.[56] Thus, Supreme Decree No. 21.060 was the first step towards limiting the mining activity of COMIBOL.

59. Three, the Paz Estenssoro administration's next step in this direction was taken during Sánchez de Lozada's tenure as Minister for Planning and Coordination. The administration enacted Supreme Decree No. 21.377 of 25 August 1986, which further modified the structure and limited the functions of COMIBOL, with the stated aim of ensuring the continuity and

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Sánchez para el Ejecutivo nombrándole ministro de Planeamiento y Coordinación. El avezado industrial minero tomó bajo su responsabilidad la tarea central, más compleja y más controvertida del Gobierno de Paz Estenssoro: la ejecución del programa de ajuste estructural y estabilización monetaria y financiera, más conocido como la Nueva Política Económica (NPE)") (Unofficial translation: "*On January 22, 1986, the president recruited Sánchez for the Executive, appointing him Minister of Planning and Coordination. The seasoned mining industrialist took under his responsibility the central, most complex and most controversial task of the Government of Paz Estenssoro: executing the program for structural adjustment and monetary and financial stabilization, better known as the New Economic Policy (NPE)*").

53 Supreme Decree No. 21.060 of 29 August 1985, **R-2**, Article 102 (Unofficial translation: "*[own] legal personality, management autonomy in their industrial operations, an administrative regime equipped to sell minerals and metals, to acquire and import equipment and supplies, and generally, to perform all operations and business activities*").

54 Supreme Decree No. 21.060 of 29 August 1985, **R-2**, Articles 105, 106 ("*Artículo 105.- Los activos e inventarios de los centros mineros de la Corporación Minera de Bolivia (COMIBOL) quedan transferidos, en calidad de aporte, a las nuevas empresas creadas por el presente Decreto, así como el personal de empleados y obreros cuyo traspaso se efectuará de acuerdo a lo dispuesto por el Artículo 11 de la Ley General del Trabajo. Artículo 106.- Los pasivos, con excepción de las reservas para beneficios sociales que absorberá cada una de las empresas por el personal que le corresponde, quedan como obligaciones de COMIBOL y serán pagados, después de su reprogramación, con los excedentes que generen las subsidiarias*") (Unofficial translation: "*Article 105.- The assets and inventories of the mining centers of the Bolivian Mining Corporation (COMIBOL) are transferred, as a contribution, to the new companies created by this Decree, as well as the personnel of employees and workers whose transfer will be carried out in accordance with the provisions of Article 11 of the General Labour Law. Article 106.- The liabilities, with the exception of reserves for social benefits that each company will absorb for its corresponding personnel, will remain as COMIBOL obligations and shall be paid, after their reprogramming, with the surpluses generated by the subsidiary companies*").

55 Supreme Decree No. 21.060 of 29 August 1985, **R-2**, Articles 110, 111.

56 Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, p. 26.

profitability of its operations.[57] Sánchez de Lozada was one of the main drivers of this Supreme Decree.[58] Pursuant to Article 2 thereof:

> *Las operaciones de la Corporación Minera de Bolivia se efectuarán únicamente mediante unidades descentralizadas con autonomía de gestión, de acuerdo a las siguientes formas de administración: a) Gestión directa de empresas subsidiarias de minería y metalurgia; b) Contratos de arrendamiento con sociedades cooperativas conformadas preferentemente por trabajadores de la Corporación Minera de Bolivia; c) Otro tipo de contratos establecidos en la legislación minera vigente, preservando el patrimonio de la Corporación Minera de Bolivia y la propiedad estatal sobre los grupos mineros nacionalizados.*[59]

60. Four, subsequent governments perpetuated Sánchez de Lozada's neoliberal policies of the mid-1980s.[60] Though such policies affected the entirety of the public sector, they had a notable impact on COMIBOL, the activity and powers of which continued to be limited. This paved the way for an ever-increasing role of private actors in the Bolivian mining sector.

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[57] Supreme Decree No. 21.377 of 25 August 1986, **R-97**, Article 1. At this time, Sánchez de Lozada had been Minister for Planning and Coordination since January 1986. See Barcelona Centre for International Affairs, "Gonzalo Sánchez de Lozada," updated 17 February 2016, **R-95**, p. 3.

[58] Supreme Decree No. 21.377 of 25 August 1986, **R-97**, p. 13 ("*[FIRMADO] VICTOR PAZ ESTENSSORO, Guillermo Bedregal G., Gonzalo Sánchez de Lozada*") (Unofficial translation: "[SIGNED] *VICTOR PAZ ESTENSSORO, Guillermo Bedregal G., Gonzalo Sánchez de Lozada*").

[59] Supreme Decree No. 21.377 of 25 August 1986, **R-97**, Article 2 (emphasis added) (Unofficial translation: "*[t]he operations of the Bolivian Mining Corporation shall be carried out exclusively through decentralized units with management autonomy, in accordance with the following types of administration: a) Direct management of mining and metallurgic affiliated companies; b) Lease agreements with cooperative companies formed preferably by workers of the Bolivian Mining Corporation; c) Other types of contracts established pursuant tp the mining legislation in force, preserving the assets of the Bolivian Mining Corporation and State ownership of the nationalized mining groups.*"). Supreme Decree No. 21.377 also transformed EMV into an "*empresa metalúrgica subsidiaria de gestión directa*," which had legal personality and would be administered by COMIBOL "*con plena autonomía de gestión en sus operaciones industriales, régimen administrativo, financiero, adquisiciones, comercialización y todas las otras operaciones y actividades correspondientes.*" (Unofficial translation: "*subsidiary metallurgical company of direct management*" "*with full management autonomy in its industrial operations, administrative regime, financial [regime], acquisitions, sales and all other corresponding activities*"). See Supreme Decree No. 21.377 of 25 August 1986, **R-97**, Articles 18, 21. By increasing EMV's independence from COMIBOL, this facilitated its subsequent privatization.

[60] Statement of Defence, ¶¶ 49-52.

61. The Paz Zamora administration[61] (1989-1993) enacted Law No. 1.330 of 24 April 1992 (the "**Privatization Law**"), authorising the sale of assets of public sector companies or their contribution to mixed companies.[62]

62. Thereafter, the first Sánchez de Lozada administration enacted Law No. 1.544 of 21 March 1994 (the "**Capitalization Law**"), aimed at converting EMV (amongst other State-owned companies) into a "*sociedad [] de economía mixta.*"[63] However, following an unsuccessful attempt at capitalisation in 1994,[64] EMV was eliminated from the scope of the Capitalization Law by the Banzer Suárez administration.[65]

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61 During his campaign, Jaime Paz Zamora had alluded that he would alter the New Economic Policy implemented by the previous administration. However, once elected, Paz Zamora enacted Supreme Decree No. 22.407, which in fact furthered the same neoliberal policies of Sánchez de Lozada and Paz Estenssoro. See Supreme Decree No. 22.407 of 11 January 1990, **R-286**; J.A. Morales, "Cambios y consejos neoliberales en Bolivia," *Nueva Sociedad*, No. 121, September-October 1992, **R-287**, pp. 2 ("*En un giro inesperado Paz Zamora, proveniente de la izquierda, revigorizó el contenido neoliberal de la NPE. Los temas centrales en la agenda de las reformas de su gobierno han sido el de la privatización y el de apertura de los recursos naturales al capital extranjero*"), 4 ("*Durante la campaña electoral Paz Zamora había prometido, aunque muy vagamente, que cambiaría la NPE. Sin embargo, a los pocos meses de haber sido electo anunció con otro decreto supremo (el D.S. 22407 del 11 de enero de 1990) que continuaría y profundizaría las reformas liberales. Es así como ha adoptado políticas más ortodoxas que las de su predecesor. Paz Zamora volvió a los fundamentos del D.S. 21060 de 1985, después de la revisión que se había hecho de éste en la segunda mitad del gobierno de Paz Estenssoro*") (Unofficial translation: "*In an unexpected turn, Paz Zamora, coming from the left, reinvigorated the neoliberal content of the NEP. The central issues on his government's agenda of reforms have been the privatization and opening of natural resources to foreign capital*" "*During the electoral campaign, Paz Zamora had promised, albeit very vaguely, that he would change the NEP. However, a few months after being elected he announced with another supreme decree (D.S. 22407 of 11 January 1990) that he would continue and deepen the liberal reforms. This is how he adopted more orthodox policies than those of its predecessor. Paz Zamora returned to the foundations of the D.S. 21060 of 1985, after the revision that had been made of this in the second half of the government of Paz Estenssoro*"). [redacted]

62 Law No 1,330, 24 April 1992, published in the *Gaceta Oficial* No 1,735, **C-58**, Article 1 ("*autoriza a las instituciones, entidades y empresas del sector público enajenar los bienes, valores, acciones y derechos de su propiedad y transferirlos a personas naturales y colectivas nacionales o extranjeras, o aportar los mismos a la constitución de nuevas sociedades anónimas mixtas*") (emphasis added) (Unofficial translation: "*authorizes the institutions, entities and companies of the public sector to transfer the property, assets, shares and ownership rights and to transfer them to natural or legal, national or foreign persons, or to use them as contribution to the constitution of new private-public partnerships*"). Though the political views of Paz Zamora and his leftist party (*Movimiento de la Izquierda Revolucionaria* or "**MIR**") were not neoliberal, they adhered to, and implemented neoliberal policies in an attempt to "*sacar al MIR de la marginalidad política en que lo encerraba una posición izquierdista.*" (Unofficial translation: "*take the MIR out of the political fringe to which it was condemned by its leftist position*"). For this reason, President Paz Zamora ultimately "*dio a las privatizaciones y a la legislación de tratamiento al capital extranjero (las leyes de minería y de hidrocarburos) la más alta prioridad en su agenda de reformas.*" See J.A. Morales, "Cambios y consejos neoliberales en Bolivia," *Nueva Sociedad*, No. 121, September-October 1992, **R-287**, pp. 138-139.

63 Law No. 1.544 of 21 March 1994, **R-8**, Article 2.

64 As explained in the Statement of Defence, the reason behind the unsuccessful attempt to capitalize EMV was the labour and social opposition to the process. [redacted] Claimant is thus wrong to seek other reasons for this, as it purports to do at footnote 54 of the Reply.

65 Law No. 1.982 of 17 June 1999, **R-9**, Article 1. Pursuant to Article 2, the executive would subsequently determine "*las estratégias y mecanismos para la transferencia de la Empresa Metalúrgica Vinto al sector privado.*" (Unofficial translation: "*the strategies and mechanisms for the transfer of [EMV] to the private sector*").

63. In parallel, the first Sánchez de Lozada administration also enacted Supreme Decree No. 23.991 of 10 April 1995, regulating and effectively expanding the scope of the Privatization Law. Pursuant to Article 1 of such Decree, "*[t]odas las empresas y demás entidades públicas, propietarias de unidades económicas, activos, bienes, valores, acciones y derechos, se someten, a partir de la promulgación del presente decreto supremo, a procesos de reordenamiento*."[66]

64. The first Sánchez de Lozada administration also enacted Law No. 1.777 of 17 March 1997 (the "**Mining Code**"), pursuant to which COMIBOL was to cease all direct participation in mining activities (thus being compelled to transfer its mining activities to the private sector, assuming only a passive role):

> *La Corporación Minera de Bolivia es una empresa pública, autárquica, dependiente de la Secretaría Nacional de Minería, encargada de la dirección y administración superiores de la minería estatal.*
>
> *Esta entidad dirige y administra, sin realizar directamente actividades mineras, y solo mediante contratos de riesgo compartido, prestación de servicios o arrendamiento: a) Los grupos mineros nacionalizados por Decreto Supremo No. 3223 de 31 de octubre de 1952, elevado a rango de Ley el 29 de octubre de 1956; b) Las demás concesiones mineras obtenidas o adquiridas a cualquier título; c) Los residuos minero -metalúrgicos provenientes de las concesiones mineras*

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66 Supreme Decree No. 23.991 of 10 April 1995, **R-100**, Article 1 (emphasis added) (Unofficial translation: "*[a]ll companies and other public entities, owners of economic units, assets, property, shares and rights, shall submit themselves as of the enactment of the present supreme decree, to reorganization processes*"). Pursuant to Article 2, the stated objective of such reorganisation was "*incrementar la competitividad y eficiencia de la economía nacional, mediante: a) La transferencia al sector privado, a título oneroso y en forma transparente, de actividades productivas que puedan ser realizadas por este de manera más eficiente; b) La reducción del déficit del sector público y la reasignación de recursos de dicho sector a actividades relacionadas con proyectos de inversión e infraestructura económica y social; c) La promoción de inversiones y la captación de recursos financieros, tecnológicos y gerenciales, de origen interno y externo, para aumentar la producción, las exportaciones, el empleo y la productividad.*" (Unofficial translation: "*increase the competitiveness and efficiency of the national economy, by: a) The transfer to the private sector, for a price and in a transparent manner, of production activities that may be carried out in a more efficient manner; b) The reduction of the public sector deficit and the reallocation of resources from that sector to activities related to investment projects, and economic and social infrastructure; c) The promotion of investments and the capture of financial, technological and managerial resources, of internal and external origin, to increase production, exports, employment and productivity*"). Pursuant to Article 3, the reorganisation was to be carried out through one or more of the following methods: "*a) La venta a personas individuales o colectivas constituidas de conformidad a los tipos societarios establecidos en el Código de Comercio, de los activos, bienes, valores y derechos que componen sus unidades económicas y/o la venta de acciones, cuotas o participaciones que éstas posean en sociedades que, a los efectos del presente decreto supremo, serán denominados 'BIENES'; b) La disolución de las empresas y posterior venta de sus BIENES, a personas individuales o colectivas constituidas de conformidad a los tipos societarios establecidos en el Código de Comercio; c) El aporte total o parcial de los BIENES para la constitución de sociedades de economía mixta, en virtud a la autorización prevista en el artículo 1 de la Ley N° 1330.*" (Unofficial translation: "*a) The sale to individual or collective persons constituted according to the corporate forms established by the Commercial Code, of the assets, goods, values and rights that make up their economic units and/or the sale of shares, quotas or interest that these possess in companies that, for the purposes of this supreme decree, will be called 'ASSETS'; b) The dissolution of the companies and subsequent sale of their ASSETS, to individual or collective persons constituted in accordance with the corporate forms established in the Commercial Code; c) The total or partial contribution of the ASSETS to the constitution of mixed economy companies, by virtue of the authorisation provided in article 1 of Law No. 1330*")

mencionadas en los incisos anteriores; d) Las plantas de concentración, volatilización, fundición, refinación, plantas hidroeléctricas y otras de su propiedad; y e) El Cerro Rico de Potosí, sus bocaminas, desmontes, colas, escorias, relaves, pallacos y terrenos francos del mismo, respetando derechos preconstituidos.[67]

65. There can be no doubt that Sánchez de Lozada paved the way that allowed him to take hold of the Assets.

66. *Second*, in this context, the transfer of the Assets to the private sector was improper, insofar as they were acquired by Sánchez de Lozada himself, in his capacity as a private businessman, through his company Comsur, between his first and (shortly before) his second presidential mandate.[68]

67. [redacted] Sánchez de Lozada had been exploiting gold, silver, tin and lead for many years, in mining sites all over the country and, progressively, throughout the South American continent.[70] His business endeavours had been so successful that, by the end of the 1970s, he had become one of the most powerful businessmen in the Bolivian mining sector, heading a complex empire of domestic and foreign companies (including in Argentina and Panama).[71]

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67 Bolivian Mining Code, Law 1.777 of 17 March 1997, **R-4**, Article 91 (emphasis added) (Unofficial translation: "*The Bolivian Mining Corporation is a public company self-governed and dependent on the National Security of Mining, in charge of the high management and administration of State mining. This entity manages and administers, without directly carrying out any mining activities, and only through shared risk, services, or lease agreements: a) The mining groups nationalized by Supreme Decree No. 3223 of 31 October 1952, given the status of law on 29 October 1956; b) The other mining concessions obtained or acquired under any title; c) The mining – metallurgic waste coming from the aforementioned mining concessions; d) Concentration, volatilization, smelting, refining, hydroelectric plants and others of its ownership; and e) El Cerro Rico de Potosí, its mine mouths, cuttings, tailings, slag, concentrate and loam fields of the same, observing pre-existing rights*").

68 Sánchez de Lozada's first presidential mandate came to an end on 6 August 1997, whilst his second commenced on 6 August 2002. The Assets were privatized between 1999 and 2001.

69 [redacted]

70 Los Tiempos, *De Trump a Goni: cuando los millonarios llegan el poder*, press article of 6 March 2017, **R-96**. [redacted]

71 Barcelona Centre for International Affairs, "Gonzalo Sánchez de Lozada," updated 17 February 2016, **R-95**, p. 2. [redacted]

68. [redacted] As a result of the policies which he had helped craft and put in place throughout his political career, Sánchez de Lozada acquired the Colquiri Mine Lease (in April 2000), the Antimony Smelter (in January 2001) and the Tin Smelter (in June 2002, after its original privatization to Allied Deals in November 2000), thus expanding his business operations further.[73] Tellingly, these acquisitions were carried out precisely in-between presidential mandates, which allowed Sánchez de Lozada to avoid the prohibition contained in the Privatization Law against the participation in this process of members of the executive, legislative or judicial branches of the State.[74]

69. *Third*, Claimant's suggestion that the regulatory changes which led to the privatization of the Assets "*were consistent with the recommendations of international organizations [...] and similar reforms taking place in other Latin American states around this same time*"[75] is irrelevant and misses the point of Bolivia's argument.

70. It is not Bolivia's position that, as a whole, the regulatory framework which permitted the privatization of the Assets was in itself illegal. Instead, as explained above, it is Bolivia's position that the Assets were unduly transferred into the hands of former President Sánchez de Lozada, who, as a mining businessman, profited from policies he had helped set up while in office. Thus, irrespective of whether the regulatory framework in question was consistent with measures applied in neighbouring States, the fact remains that the way in which it was used by the former President is highly inappropriate. By contrast, no other Latin American President benefitted from privatizations as did Sánchez de Lozada.

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72 [redacted] The corporate structure through which Sánchez de Lozada held his interest in Comsur is set out under paragraph 123 of the Statement of Defence.

73 [redacted]

74 Law No 1,330, 24 April 1992, published in the *Gaceta Oficial* No 1,735, **C-58**, Article 5 ("*Los Presidentes, Gerentes, Directores, Asesores de empresas públicas, como también el personal jerárquico del Poder Ejecutivo, Legislativo y Judicial, del poder central o descentralizado, no podrán participar, directa o indirectamente por interpósita persona en la adjudicación de parte o de toda una empresa pública*") (Unofficial translation: "*Presidents, Managers, Directors, Advisors of public companies, as well as the members of the hierarchy of the Executive, legislative and Judicial [branches], of the central or decentralised administration, shall not participate, directly or through a proxy in the adjudication of a part or the entirety of a public company.*").

75 Reply, ¶ 24.

71. This state of affairs was well-known to Glencore International at the time it acquired the Assets. Glencore International should have known (and, in fact, knew – as shown by the evidence on the record) that there existed a risk that the history of the Assets would catch up with them.

2.3 Claimant Fails To Disprove That Sánchez De Lozada Took Advantage Of Policies Put In Place While In Office In Order To Acquire The Colquiri Mine Lease And The Antimony Smelter

72. Between his first and second terms in office, Sánchez de Lozada successfully participated in the process initiated by the Banzer Suárez administration for the transfer to the private sector of the Colquiri Mine Lease and the Antimony Smelter. Thus, the former President unduly benefitted from the legal framework he had helped conceive and put in place, in order to further expand his mining operations.

73. Sánchez de Lozada's company, Comsur, participated in the tender process for the Colquiri Mine Lease, which it acquired in 1999-2000 (**Section 2.3.1**). Thereafter, Comsur's newly-incorporated subsidiary, Colquiri S.A. ("**Colquiri**")[76] participated in the second tender process for the privatization of the Antimony Smelter, which it acquired in 2000-2001 (**Section 2.3.2**).

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

74. Former President Sánchez de Lozada participated in the tender process for the Colquiri Mine Lease through a consortium made up of his company Comsur and the Commonwealth Development Corporation[77] ("**CDC**") (together, the "**Consortium**"). Further to such process, Comsur acquired the asset under very favourable conditions on 27 April 2000.[78]

75. [redacted]

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76 As explained in the Statement of Defence, Colquiri was incorporated by Comsur and its consortium partner, the Commonwealth Development Corporation ("**CDC**") following the successful tender for the Colquiri Mine Lease. Initially, Comsur held 68% of Colquiri's shares, and CDC the remaining 32%. As of July 2001, CDC's ownership increased to 49%. See Statement of Defence, ¶ 60.

77 Statement of Defence, Section 2.3.1.

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

79 [redacted]

[redacted]

76. Immediately following the acquisition of the Colquiri Mine Lease, the Consortium incorporated a local company, Colquiri S.A. ("**Colquiri**"), which would hold the Lease, and in time would come to acquire the Antimony and Tin Smelter. As of July 2001, Comsur held the controlling interest (51%) in Colquiri, whereas CDC held the remaining 49%.[80]

77. [redacted]

78. The privatization of the Colquiri Mine Lease was irregular, for, at least, three reasons. Sánchez de Lozada had been the primary architect of the policies that permitted the Colquiri Mine Lease to be transferred to the private sector,[81] and was now profiting, in a private capacity, from them. In addition, the Colquiri Mine was leased to Comsur without due regard for the proper constitutional requirements for the execution of such a contract.[82] Finally, the financial conditions under which Comsur acquired the Mine Lease were very favourable to it, to the detriment of the public interest.[83]

79. Claimant disputes the irregularities highlighted by Bolivia, which it describes as "*baseless.*"[84] Claimant asserts instead that "*the public tender and sale of the Assets were carried out in accordance with Bolivia's legal framework,*"[85] for the four incorrect reasons below.

80. *First*, Claimant contends that "*Bolivia never challenged or disputed the legal framework or the rules applicable to the privatization of the Assets during the course of their operations.*"[86] This misses the point of Bolivia's position: the Colquiri Mine Lease was not transferred to the

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[redacted]

80 See Share register of Colquiri SA, **C-17**, pp. 3-4; Statement of Claim, footnote 28.

81 See Section 2.2 above.

82 See Section 4.5.1.2 below; Statement of Defence, Section 4.3.1.

83 See Statement of Defence, Sections 2.3.1, 4.3.1.

84 Reply, ¶ 37.

85 Reply, Section II.B.

86 Reply, ¶¶ 33, 38, 47.

private sector under a *per se* illegal framework. Instead, its privatization involved a number of irregularities, as described in the Statement of Defence.[87] Bolivia had no reason to and does not challenge the legal framework applied to the privatization of the Assets.

81. *Second*, Claimant further contends that no Bolivian court has pronounced on the illegality of the Colquiri Mine Lease privatization.[88] Claimant's position is misguided.

82. Both at the time of the tenders and thereafter, the dominant political forces in Bolivia generally shared the same neoliberal persuasion as Sánchez de Lozada's MNR. Thus, the economic policies that had been inaugurated by his Supreme Decree No. 21.060 (including the systematic privatization of State-owned assets) were pursued until 2005.[89] As one commentator explains, the governments that followed that of President Paz Estenssoro maintained the course implemented by his administration:

> *El éxito que tuvo el programa de estabilización en frenar el proceso hiperinflacionario y reducir el abultado déficit fiscal generó la percepción de que no había otro camino y que el proceso de reformas debía profundizarse independientemente del partido que se encontrara en el poder. Las medidas de reforma estructural de la economía incluyeron la privatización y capitalización de las empresas públicas, la reforma del sistema de pensiones y la consolidación de la apertura comercial y financiera a través de diversas leyes sectoriales (ley de inversiones, de exportaciones, de hidrocarburos, de electricidad, de telecomunicaciones, de bancos y entidades financieras, etc.) dirigidas principalmente a atraer inversión extranjera. Todos los gobiernos posteriores al de Paz Estenssoro mantuvieron el rumbo de la política económica sin oposición efectiva.*[90]

83. In this context, irregularities such as the ones which occurred in the privatization of the Colquiri Mine (and the other two Assets) did not represent a material concern for the administration. Given that its end goal was the transfer of State assets to the private sector,

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87 Statement of Defence, Section 2.4.1.

88 Reply, ¶ 47.

89 Since MAS came to power in 2005, several inquiries have been conducted in connection with the privatization of State assets between 1985 and 2005, some of which have led to criminal investigations, including against Sánchez de Lozada. An inquiry by a mixed commission of the *Asamblea Plurinacional* into the privatization of COMIBOL's assets (including the Colquiri Mine Lease, the Tin and Antimony Smelters) is currently pending. See Página Siete, *La Fiscalía presenta acusación formal contra Goni por la capitalización de ENFE*, press article of 19 September 2018, **R-289**; L. Mendoza, *Tres grupos de poder y 55 actores participaron en la privatización en Bolivia*, press article of 22 October 2017, **R-99**.

90 M. Torrico Terán, "Qué ocurrió realmente en Bolivia?," *Perfiles Latinoamericanos*, Vol. 28, July-December 2006, **R-290**, p. 234 (emphasis added) (Unofficial translation: "*The success of the stabilization program in curbing hyperinflation and reducing the large fiscal deficit generated the perception that there was no other way and that the reform process needed to be deepened regardless of the party that was in power. The measures for structural reform of the economy included the privatization and capitalization of public companies, the reform of the pension system and the consolidation of the commercial and financial openness through various sectoral laws (investment law, exports law, hydrocarbons law, electricity law, telecommunications law, banks and financial entities law, etc.) aimed mainly at attracting foreign investment. All the governments following that of Paz Estenssoro maintained the course of economic policy without effective opposition*").

and, in particular, the urgent transfer of COMIBOL's mining assets to private ownership,[91] the regularity of the privatization through which this was achieved was of secondary importance.

84. The irregularities affecting the privatization of the Colquiri Mine Lease were even less likely to prompt the incumbent administration to halt it, or the subsequent administration to challenge it. The Lease was acquired by Sánchez de Lozada shortly before he took office for the second time, as a result of the privatization of COMIBOL's assets. This was only one of several transactions that benefitted his vast mining operations.[92] No reasonable person could have expected President Sánchez de Lozada (or indeed his Vice-President thereafter[93]) to call into question the award of this asset to his own company.

85. *Third*, Claimant disputes Bolivia's explanation that the Colquiri Mine Lease was privatized without due regard to the applicable constitutional requirements, alleging that the notion that the Mine Lease would not have secured congressional approval pursuant to Article 59(5) of the 1967 Constitution is "*a clear red herring.*"[94] Claimant is wrong for three reasons:

86. One, Claimant asserts that no congressional approval would have been required, as COMIBOL had the constitutional "*power to manage its assets, including mining rights.*"[95] Further, the Privatization Law and the Mining Code "*provided the necessary legal authorisation for the execution of the sale of the Smelters and the Colquiri Lease.*"[96] This is incorrect.

87. The Bolivian Constitution is the *lex superior* in that legal order. Pursuant to Article 59(5) of the 1967 Constitution, it falls to the legislative branch "*[a]utorizar y aprobar la contratación*

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91 Since the passing of the Mining Code in March 1997, COMIBOL was prohibited from directly carrying out mining operations. See Bolivian Mining Code, Law 1.777 of 17 March 1997, **R-4**, Article 91.

92 As explained in Sections 2.3.2 and 2.4 below, Sánchez de Lozada subsequently acquired the Antimony Smelter and the Tin Smelter.

93 Carlos Mesa Gisbert was Sánchez de Lozada's politically-unaffiliated Vice-President. Following Sánchez de Lozada's resignation in October 2003, Mr Mesa assumed the constitutional succession. Politically independent, Mr Mesa could not count on a stable congressional majority, which meant that his freedom to act was circumscribed in the typical ways in which the freedom of a transitional government is limited. Mr Mesa himself openly described his economic policy as that of continuity with that of precedent administrations. The continuity that had characterised Bolivian policy-making since 1985 thus showed the first signs of exhaustion as of 2003, but nevertheless endured under the election of MAS leader Evo Morales. Mr Mesa was only in office until May 2005, when he was forced to resign amid pervasive popular unrest. At that time, the presidency was taken up by Eduardo Rodríguez Veltze, chief justice of the Bolivian Supreme Court. See Statement of Defence, ¶¶ 112-116; C. Mesa, Mi gobierno (2003-2005), <https://carlosdmesa.com/2011/01/14/mi-gobierno-2003-2005/> last visited 31 August 2018, **R-291**, pp. 3-5.

94 Reply, ¶ 38.

95 Reply, ¶ 39.

96 Reply, ¶ 39.

de empréstitos que comprometan las rentas generales del Estado, así como los contratos relativos a la explotación de las riquezas nacionales."[97] Neither the Privatization Law, the Mining Code nor any other law dispensed with this constitutional requirement or created an exception thereto. Nor could they have done so: *lex superior derogat legi inferiori*.

88. The "*authorization for the execution of the sale of the Smelters and the Colquiri Lease*"[98] granted by the Privatization Law, and to which Claimant refers, is nothing more than that: a general authorisation "*a las instituciones, entidades y empresas del sector público [para] enajenar los bienes, valores, acciones y derechos de su propiedad y transferirlos a personas naturales y colectivas nacionales o extranjeras, o aportar los mismos a la constitución de nuevas sociedades anónimas mixtas*."[99] It is not an authorisation to infringe or circumvent the 1967 Constitution.

89. Claimant's reliance on COMIBOL's "*power to manage its assets, including mining rights*"[100] under Articles 138 and 144 of the 1967 Constitution does not advance its position any further. Article 138 grants "*[l]a dirección y administración de la industria minera estatal*"[101] to COMIBOL, but does not explicitly exempt such management from seeking congressional approval required under Article 59(5). Nor does Claimant explain how such an exemption could be implicit in the text of the Article. Article 144,[102] in contrast, is entirely inapposite to Claimant's argument.

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97 Constitution of Bolivia of 1967, **R-3**, Article 59(3) (emphasis added) (Unofficial translation: "*to authorize and approve the borrowing of loans that engage the State's general income; as well as contracts concerning the exploitation of national resources.*"). Claimant has not disputed that a lease agreement for the exploration and exploitation of the State's mineral resources falls within the scope of this constitutional provision.

98 Reply, ¶ 39.

99 Law No 1,330, 24 April 1992, published in the *Gaceta Oficial* No 1,735, **C-58**, Article 1; Bolivian Mining Code, Law 1.777 of 17 March 1997, **R-4**, Article 94 (Unofficial translation: "*authorizes the institutions, entities and companies of the public sector to transfer the property, assets, shares and ownership rights and to transfer them to natural or legal, national or foreign persons, or to use them as contribution to the constitution of new private-public partnerships.*"). Contrary to Claimant's suggestion (Reply, ¶ 39), Article 91 of the Mining Code does not refer to any authorization to execute the sale of the Tin and Antimony Smelter and the Colquiri Mine Lease.

100 Reply, ¶ 39.

101 Constitution of Bolivia of 1967, **R-3**, Article 138 ("*Pertenecen al patrimonio de la Nación los grupos mineros nacionalizados como una de las bases para el desarrollo y diversificación de la economía del país, no pudiendo aquellos ser transferidos o adjudicados en propiedad a empresas privadas por ningún TITULO. La dirección y administración superiores de la industria minero estatal estarán a cargo de una entidad autárquica con las atribuciones que determina la ley*") (Unofficial translation: "*The nationalized mining groups belong to the national patrimony as one of the bases for the development and diversification of the country's economy, and cannot be transferred or adjudicated to the property of private companies by any TITLE. The superior management and administration of the State mining industry will be the responsibility of an autarchic entity the attributions of which shall be determined by law*").

102 Constitution of Bolivia of 1967, **R-3**, Article 144 ("*I. La programación del desarrollo económico del país se realizará en ejercicio y procura de la soberanía nacional. El Estado formulará periódicamente el plan general de desarrollo económico y social de la República, cuya ejecución será obligatoria. Este planeamiento comprenderá los sectores estatal, mixto y privado de la economía nacional. II. La iniciativa privada recibirá el estímulo y la cooperación del Estado cuando contribuya al mejoramiento de la economía nacional*") (Unofficial translation: "*I. The programming of*

90. Two, the fact that the Colquiri Lease (as well as the privatization contracts of the Smelters) (the "**Contracts**") provided that the contracting parties had complied with all necessary requirements under Bolivian law to lease the Mine, (or sell the Smelters), does not override the constitutional requirement for congressional approval, as alleged by Claimant.[103] As Claimant itself acknowledges, all the Contracts say is that "*the Trade Ministry, Comibol and the State-owned company EMV, had complied with all necessary requirements under Bolivian law to sell the Smelters and sign the lease for the Colquiri Mine*,"[104] *i.e.*, legal requirements necessary for them to enter into the Contracts. It says nothing about the legal requirement of congressional approval necessary once the Contracts had been signed.

91. Three, Claimant's allegation that the State Comptroller reviewed the executed contract within five days of its finalisation, and did not challenge it,[105] which confirm the legality of the Colquiri Mine Lease, is also wrong.

92. Contrary to what Claimant argues, the State Comptroller is not "*tasked with ensuring the independence and impartiality with respect to the administration of the State.*"[106] This is simply Claimant's misleading reading of Article 41 of Law No. 1.178 of 20 July 1990 for Governmental Administration and Control,[107] which is inapposite.

93. In any event, and more importantly, the State Comptroller at the time was unlikely to bring any challenge, even if he could, as, between 1992 and 2002, this office was held by Marcelo

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the economic development of the country will be carried out in the exercise of and for national sovereignty. The State will periodically formulate the general plan of economic and social development for the Republic, the execution of which will be mandatory. This planning will include the state, mixed and private sectors of the national economy. II. The private initiative will receive the encouragement and cooperation of the State when it contributes to the improvement of the national economy").

103 Reply, ¶ 38.

104 Reply, ¶ 38.

105 Reply, ¶ 39.

106 Reply, ¶ 39.

107 Law No. 1.178 for Governmental Administration and Control of 20 July 1990, **R-292**, Article 41 ("*La Contraloría General de la República ejercerá el Control Externo Posterior con autonomía operativa, técnica y administrativa. A fin de asegurar su independencia e imparcialidad respecto a la administración del Estado, el presupuesto de la Contraloría, elaborado por ésta y sustentado en su programación de operaciones, será incorporado sin modificación por el Ministerio de Finanzas al proyecto de Presupuesto General de la Nación, para su consideración por el Congreso Nacional. Una vez aprobado, el Ministerio de Finanzas efectuará los desembolsos que requiera la Contraloría de conformidad con los programas de caja elaborados por la misma*") (emphasis added) (Unofficial translation: "*The Office of the Comptroller General of the Republic will exercise the External Subsequent Control with operational, technical and administrative autonomy. In order to ensure its independence and impartiality with respect to the administration of the State, the budget of the Comptroller's Office, drawn up by it on the basis of its operations programme, will be incorporated without modification by the Ministry of Finance into the draft General Budget of the Nation, for consideration by the National Congress. Once approved, the Ministry of Finance will make the disbursements required by the Comptroller's Office in accordance with the cash programmes prepared by the latter*").

Zalles Barriga,[108] Sánchez de Lozada's brother-in-law.[109] In 2011, Mr Zalles Barriga was reportedly criminally charged for "*legitimación de ganancias ilícitas e incumplimiento de deberes*"[110] during his time as State Comptroller. It is believed that, during that time, Mr Zalles Barriga's fortune would have increased in a manner inconsistent with his formal remuneration.[111]

94. *Fourth*, Claimant contends that "*Bolivia's arguments regarding the supposed 'low sale prices' of the Assets are contradicted by all the evidence on the record.*"[112] Claimant also argues that "*all the information used by Paribas (and therefore the Qualifying Commission) to determine the selling price was provided and approved by the State*"[113] prior to the opening of the bidding process. Claimant's arguments are misguided.

95. Bolivia does not challenge the information it made available to Paribas and the bidders for the Colquiri Mine Lease. Nor is Bolivia seeking to conceal the fact that Paribas did not recommend a minimum price for such Lease.[114] The Qualifying Commission noted as much in its report.[115] Instead, Bolivia's position is that the financial conditions offered by the Consortium and accepted by the Qualifying Commission[116] were unduly low (which could only be explained by the will of those in power to execute their aggressive privatization

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108 Supreme Decree No. 23.329 of 18 November 1992, **R-293**. Pursuant to Article 154 of the 1967 Constitution, the State Comptroller was appointed by the President from a list of names approved by two thirds of the Senate, and for a period of ten years. See Constitution of Bolivia of 1967, **R-3**, Article 154.

109 Cambio, *Gastos reservados: "Botín de guerra" de los gobiernos neoliberales*, press article of 19 November 2016, **R-294**; La Razón, *Contraloría, antes y ahora*, press article of 17 April 2016, **R-295**.

110 HoyBolivia.com, *Gastos reservados: imputan a Marcelo Zalles y exculpan a Mesa y Rodríguez*, press article of 25 May 2011, **R-296** (Unofficial translation: "*legitimising illicit profits and non-fulfilment of duties*").

111 HoyBolivia.com, *Gastos reservados: imputan a Marcelo Zalles y exculpan a Mesa y Rodríguez*, press article of 25 May 2011, **R-296**.

112 Reply, ¶ 40.

113 Reply, ¶ 41. See also Reply, ¶ 46.

114 The Paribas Information Memorandum regarding the privatization of the Tin and Antimony Smelters, the Colquiri Mine Lease and the Huanuni joint venture (*riesgo compartido*) (Unofficial translation: "*shared risk*") provides that Paribas will only submit minimum prices for the former two assets. See Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, p. 15, 54.

115 Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease of 21 December 1999, **R-108**, p. 6 ("*El precio ofertado por el Consorcio COMSUR – CDC resulta conveniente para los intereses del Estado Boliviano y al no existir un precio mínimo según el informe del Banco de Inversión puede considerarse como una propuesta positiva*") (emphasis added) (Unofficial translation: "*The price offered by the COMSUR – CDC Consortium is convenient for the Bolivian State's interests and as there is no minimum price pursuant to the Investment Bank's report, it can be considered to be a positive proposal*"). In support of its misguided position, Claimant relies on a portion of the Qualifying Commission's report that refers only to the minimum prices recommended by Paribas for the Smelters and the Oruro industrial plant. See Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease of 21 December 1999, **R-108**, p. 4.

116 The Consortium offered an investment commitment of only US$ 2 million over the first two years of operations, and a royalty corresponding to 3.5% of the Mine's net revenue. See Statement of Defence, ¶ 58.

process at all costs). Indeed, the Colquiri Mine was operational, had, at the time, proven reserves of some 855,799 metric tons,[117] and was put up for privatization under a lease for a term of 30 years. The Consortium's successful bid offered only a modest investment commitment (US$ 2 million for the first two years) and a very low royalty rate (3.5%) but no upfront payment to the State at all. By contrast, on account of the purported expropriation of the Mine, in this arbitration Claimant seeks damages of some US$ 443.1 million as of 29 May 2012[118] (*i.e.*, when there were only two thirds of the lease term left).

96. Having acquired the Colquiri Mine Lease in very advantageous conditions, Sánchez de Lozada proceeded to acquire the Antimony Smelter, which it secured in January 2001.

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

97. As explained in the Statement of Defence, after acquiring the Colquiri Mine Lease, Sánchez de Lozada continued to profit from the privatization programme. Through the newly-incorporated Colquiri, Comsur and CDC submitted a successful bid to acquire the Antimony Smelter during the second tender process organised for this Asset.[119]

98. Colquiri's only competition was Allied Deals, which was disqualified before its economic proposal was even opened, for failure to submit supporting documentation.[120] As a result, Colquiri's US$ 1.1 million bid was accepted.[121] This very low amount and the even lower minimum price recommended by the investment bank Paribas (only US$ 100,000) provoked numerous negative reactions from the public, together with calls to suspend the privatization,

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117 Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, p. 124. Probable reserves were estimated at 838,178 metric tons, and inferred reserves as 4,305,687 metric tons.

118 Statement of Claim, ¶ 276. As explained by Econ One, Claimant's valuation is overinflated, and the real value of the mine is rather of US$ 39.7 million as of 19 June 2012. Both figures are substantially higher than the amount the Consortium offered when the lease had a full 30 years to term, as compared to the 20 years remaining in 2012. See Statement of Defence, ¶ 336.

119 Statement of Defence, Section 2.3.2.

120 Report No. 001/2000 of the Qualifying Commission of the second public tender for the sale of the Antimony Smelter of 20 November 2000, **R-112**, pp. 2-3; Statement of Defence, ¶ 64. Allied Deals submitted only legalised copies of certain documents, dated more than 90 days before the date of the submission, and omitted to file certain supporting information, including evidence of a satisfactory environmental record. Allied Deals failed to cure the deficiencies in its bid within the time allotted to it, which led to its disqualification.

121 Report No. 001/2000 of the Qualifying Commission of the second public tender for the sale of the Antimony Smelter of 20 November 2000, **R-112**; Supreme Decree No 26.042, 5 January 2001, published in the *Gaceta Oficial* No 2.282, **C-8**.

pending an investigation.[122] The administration of President Banzer Suarez ignored such calls, and proceeded to execute the sale contract on 11 May 2001.[123]

99. The privatization was irregular. It allowed former President Sánchez de Lozada to further expand his business operations thanks to the policies he had helped put in place. Insofar as it was executed for a shockingly low consideration, and without a prior investigation into the justification for such consideration, the privatization was also contrary to the constitutional requirements of transparency and good faith, and disregarded the legal principle that the public patrimony must be protected.[124]

100. Claimant again disputes what it considers to be "*baseless*"[125] assertions of irregularities made by Bolivia. In support of its position, Claimant relies on the same arguments as the ones it opposes to the irregularities of the Colquiri Mine Lease privatization, namely that (i) no court or tribunal would have pronounced the illegality of the Antimony Smelter privatization, and (ii) the privatization of the Antimony Smelter would have upheld all applicable norms. For the same reasons set out in Section 2.3.1 above, Claimant's position is incorrect.

101. Claimant further asserts that the sale price for the Antimony Smelter would have been "*adequate, and for that reason accepted by the Qualifying Commission.*"[126] In support of this assertion, Claimant relies on four incorrect propositions.

102. *First*, in a pattern identified throughout the Reply, Claimant responds to arguments not made by Bolivia. For example, Claimant asserts that "*Bolivia is wrong in claiming that [the Antimony Smelter] was sold at an undervalue [...] because Colquiri was the only offeror.*"[127] Bolivia never argued that the low price offered by Colquiri (and accepted by the Qualifying Commission) was somehow caused by or related to Allied Deals' disqualification from the bidding process. This proposition is a *non sequitur*. Bolivia's point is simply that the

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122 Letter from the Oruro Parliamentary Group to President Bánzer Suárez of 27 November 2000, **R-110**; Letter from Leopoldo Fernández Ferreira to President Hugo Bánzer Suárez of 5 December 2000, **R-113**; Letter from Humberto Bohrt Artieda to Walter Guiteras Denis of 8 December 2000, **R-114**. See also Statement of Defence, ¶¶ 66-68.

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

124 Statement of Defence, Section 4.3.1.

125 Reply, ¶ 36.

126 Reply, ¶ 42.

127 Reply, ¶ 44.

disqualification of Allied Deals' bid for the Antimony Smelter meant that the price it was prepared to offer for this Asset was never revealed.[128]

103. *Second*, Claimant notes that "*the US$1.1 million sales price the Qualifying Commission accepted for the Antimony Smelter was in fact ten times higher than the minimum price recommended by Paribas.*"[129] But this is irrelevant. Given the low minimum price recommended by Paribas, multiplying that low value by 10 does not preclude an undervaluation of the asset. As Bolivia explained, this is all the more so in light of the important investments made by the State in the Antimony Smelter prior to its sale, which were not reflected in the minimum price.[130]

104. *Third*, Claimant seeks to justify the low sale price by arguing that "*the fair market value of an asset is generally determined by the potential cash-flows that such an asset is able to generate and not by past investments [...]. This is particularly true when such an investment is a non-yielding asset such as the Antimony Smelter. The truth is, the Antimony Smelter had been deemed valueless even by 1995.*"[131] However, not even Claimant agrees with this proposition. Claimant argues the exact opposite when it asserts that the fair market value of the Antimony Smelter for quantum purposes "*is equivalent to the sum of the value of its individual components*,"[132] and amounts to US$ 1.9 million as at 15 August 2017.

105. *Fourth*, Claimant seeks to discredit the calls for investigation into the privatization of this Asset due to the very low price, and argues that such calls "*were clearly not credible, as the government failed to take action in response.*"[133] This is incorrect.

106. The very low sale price offered by Colquiri (US$ 1.1 million) and the even lower minimum price established by Paribas (US$ 100,000) were heavily contested by members of Congress. The Oruro Parliamentary Group (*Brigada Parlamentaria de Oruro*),[134] the president of the

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128 See Statement of Defence, ¶ 64.

129 Reply, ¶ 44.

130 Statement of Defence, ¶ 68.

131 Reply, ¶ 44.

132 Statement of Claim, ¶ 251.

133 Reply, ¶ 45. Claimant further asserts that the lack of credibility of the complaints "*was likely due to the fact that [they] ignored the fact that the bidding process had begun over a year earlier and was subject to strict tender rules, qualifications and timelines.*" This is misleading. The complaints in question arose in light of the very low minimum price unveiled by Paribas on the same day as, and only shortly before Colquiri's economic proposal was known. In that context, concerns were raised as to (i) the ability of and opportunity given to other potential bidders (or lack thereof) to submit their proposals, and (ii) the way in which Paribas calculated the minimum price beneath which it did not recommend the sale of the Antimony Smelter.

134 Letter from the Oruro Parliamentary Group to President Bánzer Suárez of 27 November 2000, **R-110** ("*Consideramos erróneas el proceso de fijación del precio base en $us 100.000 (Cien Mil 00/100 Dólares), por cuanto el Estado boliviano invirtió $us. 12.000.000 (Doce Millones 00/100 Dólares), para el inicio de su funcionamiento a principios de*

Senate,[135] and the president of the Chamber of Representatives[136] each conveyed to the Executive grave concerns regarding the tender process for the Antimony Smelter, and called for such process to be suspended pending investigation.[137] If anything, these multiple and consistent complaints are an indication that an investigation would have been warranted, together with the suspension of the privatization of the Smelter.

107. If the Banzer Suárez administration ignored such complaints, it was for the political reasons described above, and not because they were not credible. The administrative and political cost of a failure of this second attempt[138] to privatize the Antimony Smelter undoubtedly would have been high. In any event, the administration would have been unwilling to pay such a price (even if it was the correct course of action for an administration acting in the benefit and for the protection of the public interest). Shortly after the sale to Colquiri had been executed, Sánchez de Lozada took office for the second time. Of course, he was highly unlikely to instruct an investigation into the circumstances of the privatization of the Antimony Smelter in favour of his own company.

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la década de los setenta") (Unofficial translation: "*We consider erroneous the process of determining the base price at $US 100.000 Dollars), given that the Bolivian State invested $US 12.000.000 (Twelve million 00/100 Dollars), for it to commence functioning at the beginning of the seventies*"); Statement of Defence, ¶ 66.

135 Letter from Leopoldo Fernández Ferreira to President Hugo Bánzer Suárez of 5 December 2000, **R-113**; Statement of Defence, ¶ 67. Through this letter, the president of the Senate conveyed to President Banzer Suárez a series of questions posed by Senator José Sánchez Aguilar, a member of the President's party, the ADN. Senator Sánchez Aguilar was not a member of the opposition, as Claimant incorrectly seeks to portray him in order to downplay the importance of this document. See La Razón, *José Sánchez Aguilar: De socialista a adenista*, press article of 28 December 2015, **R-297**; Reply, ¶ 45.

136 Letter from Humberto Bohrt Artieda to Walter Guiteras Denis of 8 December 2000, **R-114**; Statement of Defence, ¶ 67. Claimant seeks again to portray this document as being authored by a member of the opposition – incorrectly so. The author, Dr Melgar Mustafa, was a member of the Solidarity Civic Unity party (*Unidad Cívica Solidaridad*), which benefitted from the support of President Banzer Suárez's party (ADN) by virtue of an electoral alliance dating back to 1997. See Plurinational Electoral Body, Bolivia's Electoral Atlas, volume I (1997, 2002, 2005), **R-298**, p. 177.

137 See for example Letter from Humberto Bohrt Artieda to Walter Guiteras Denis of 8 December 2000, **R-114** ("*Dígase al Poder Ejecutivo, que el proceso de privatización de la Fundición de Antimonio debe suspenderse, entretanto se forme una comisión en la que participe el Gobierno (Ministerio de Comercio Exterior, la Comisión de Desarrollo Económico (Comité de Minería y Metalurgia) de la H. Cámara de Diputados y la Brigada Parlamentaria de Oruro a propósito de explicar por parte de Banco de Inversiones Paribas la determinación del ridículo precio base de 100.000 $us, para la venta de la fundición de antimonio. Al mismo tiempo revisar toda la documentación del proceso de la Licitación Pública Nacional e Internacional*") (emphasis added) (Unofficial translation: "*Instruct the Executive to suspend the privatization process of the Antimony Smelter, while a commission is formed which includes the participation of the Government (Ministry of Foreign Trade, the Economic Development Commission (Committee of Mining and Metallurgy) of the Chamber of Representatives and the Oruro Parliamentary Brigade to explain the establishment of the ridiculous minimum price of US $ 100,000 by the Investment Bank Paribas for the sale of the antimony smelter. At the same time review all the documentation of the National and International Public Tender process*") (emphasis added).

138 Following a failed attempt at capitalisation in 1995-1997, a first tender for the privatization of the Antimony Smelter was organised in 1999. See Statement of Defence, ¶ 62; Supreme Decree No 25,631, 24 December 1999, published in the *Gaceta Oficial* No 2, 192, **C-6**, Article 4; Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease of 21 December 1999, **R-108**, p. 8.

108. By early 2001, Sánchez de Lozada had acquired the Colquiri Mine Lease and the Antimony Smelter, and, together with CDC, held them through his company Colquiri. Thereafter, in 2002, Sánchez de Lozada proceeded to acquire the Tin Smelter.

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

109. Sánchez de Lozada submitted a bid for the Tin Smelter in the 1999-2000 tender process, through Comsur. The unsuccessful bid (**Section 2.4.1**) only delayed his acquisition of the third asset until 2002, when its original owner, Allied Deals, underwent bankruptcy (**Section 2.4.2**).

2.4.1 Allied Deals Acquired The Tin Smelter In Highly Irregular Circumstances

110. Within the framework of the privatization process, the Tin Smelter was initially acquired by UK-based company Allied Deals in 1999-2000, in an irregular and highly contested process.

111. As explained in the Statement of Defence,[139] even before the privatization was properly underway, there were reports of "*contactos no transparentes entre la gerencia de COMIBOL y los directores de Allied Deals.*"[140] Subsequently, Allied Deals' deficient bid was approved by the Qualifying Commission,[141] which disregarded the lack of any evidence of, *inter alia*, Allied Deals' purportedly sterling environmental record.[142] Further, both the price offered by Allied Deals (some US$ 14 million) and the minimum price proposed by Paribas (US$ 10 million) were unduly low, all the more so since the Smelter was ultimately sold together with valuable inventory. Put differently, Allied Deals was in fact paid around US$ 2 million in order to take possession of a valuable going concern.[143] This prompted numerous calls for investigation, resignation of public officials and even the reversion of the asset.[144]

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139 Statement of Defence, Section 2.4.1.

140 Letter from Foreign Trade and Investment Minister to the Executive President of COMIBOL of 18 February 1999, **R-115**; Statement of Defence, ¶ 72. In this connection, Claimant asserts that "*Bolivia's allegations are false*," insofar as the "*contactos no transparentes*" referred to in this letter would have taken place "*months before the tender even commenced.*" Claimant glosses over the very clear text of the letter, which places it squarely within the framework of the transfer of EMV to the private sector, and thus makes it entirely relevant to the ultimate privatization of this Asset. See Reply, ¶ 43 and footnote 105; Letter from Foreign Trade and Investment Minister to the Executive President of COMIBOL of 18 February 1999, **R-115**.

141 Statement of Defence, ¶ 73.

142 Statement of Defence, footnote 78.

143 Statement of Defence, ¶ 77.

144 See Statement of the Oruro Civic Committee, **R-122**; Letter from the President of the Oruro Civic Committee to the *Contralor General de la República* of 21 February 2001, **R-123**; Letter from Representative Pedro Rubín de Celis to the *Contralor General de la República* of 10 May 2001, **R-124**; Letter from the Oruro Central Obrera to President Banzer Suárez of 23 May 2001, **R-126**; Statement of Defence, ¶¶ 78-81.

Notwithstanding such calls, the Banzer Suárez administration took no action in connection with the privatization of the Tin Smelter.

112. Claimant again disputes what it considers to be Bolivia's "*baseless*"[145] assertions of irregularities. In support of its position, Claimant relies on the same arguments as the ones it opposes to the irregularities of the Colquiri Mine Lease and the Antimony Smelter privatizations, namely that (i) no court or tribunal would have pronounced the illegality of the Tin Smelter privatization, and (ii) the privatization of the Tin Smelter would have upheld all applicable norms. For the same reasons set out in Section 2.3.1 above, Claimant's position is incorrect.

113. Claimant further defends the alleged legality of the Tin Smelter privatization by making three additional, yet incorrect arguments.

114. *First*, on Claimant's case, Allied Deals' bid, which the Qualifying Commission accepted, was not deficient. Instead, "*while the original documents submitted by Allied Deals and the Consortium did not meet the Requirements of the Terms of Reference, both parties promptly amended their proposal at the request of the Qualifying Commission and were thus subsequently qualified for the bid.*"[146] Claimant's position is incorrect, insofar as all the deficiencies affecting Allied Deals' bid were not cured, and such bid, accordingly, remained non-compliant with the Terms of Reference.

115. As recorded in the Qualifying Commission's report, Allied Deals was requested to supplement its bid for the Tin Smelter with additional necessary documentation.[147] But the Qualifying Commission disregarded two other material deficiencies affecting Allied Deals' bid: it had not submitted evidence (i) that its turnover was derived from "*ventas brutas provenientes de la actividad de comercialización de minerales, concentrados y/o metálicos en general*" or (ii) of "*alta seguridad y record ambiental satisfactorio.*"[148] It is evident that the Qualifying

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145 Reply, ¶ 37.

146 Reply, ¶ 43.

147 Report of the Qualifying Commission of the public tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease of 20 December 1999, **R-117**, p. 1 ("*a. Una carta de presentación con la referencia MCEI/COMIBOL-EMV/ESTAÑO/UR/LIC/005/99. b. Una boleta de garantía para la licitación MCEI/COMIBOL-EMV/ESTAÑO/UR/LIC/005/99*") (Unofficial translation: "*a. A cover letter with the reference MCEI/COMIBOL-EMV/TIN/UR/LIC/005/99. b. A guarantee slip for the tender MCEI/ COMIBOL-EMV/TIN/UR/LIC/005/99*").

148 Terms of Reference for the Public Tender for the Tin Smelter of 24 June 1999, **R-118**, Articles 2.1.2, 4.5; Amendment No. 6 to the Terms of Reference to the Tin Smelter Tender of 2 December 1999, **R-119**, p. 2; Envelope A proposal submitted by Allied Deals for the tender of the Tin Smelter of 20 December 1999, **R-120**, p. 116, 139, 163, 185, 188; Statement of Defence, footnote 78. (Unofficial translation:"*gross sales from the commercialization of minerals, concentrates and/or metals in general*") (Unofficial translation: "*high safety and satisfactory environmental record*").

Commission made every effort to ensure that the tender process was successfully concluded, overlooking the deficiencies in the bids it received.

116. *Second*, Claimant seeks to discredit the calls for investigation into the very low price, and argues that it would be telling that "*[Bolivia's] own State officials considered these complaints not worthy of further investigation.*"[149]

117. As explained above, Claimant is misguided to dispute the credibility of the various actors – "*(i) a congressman, (ii) a union, and (iii) a civic committee*"[150] – which denounced the sale and called for investigations in this connection.[151] If anything, these complaints show that an investigation was warranted, yet was not carried out, in violation of the constitutional principles of transparency, good faith, and protection of the public patrimony.[152] Less than two years after the sale had been executed, Sánchez de Lozada's Comsur bought the Tin Smelter from a bankrupt Allied Deals. Thereafter, Sánchez de Lozada took office for the second time. Of all, he was the least likely to instruct that the circumstances of the privatization of the Antimony Smelter be investigated.

118. *Third*, Claimant asserts that the price for which Allied Deals acquired the Smelter would have been adequate, insofar as "*any discrepancies in the inventory listed in the Terms of reference and received by Allied Deals were ultimately settled by way of mediation in 2004.*"[153] This is wrong. What Claimant refers to as a "*mediation*" was in fact a reconciliation of inventory between EMV and Allied Deals (subsequently *Complejo Metalúrgico Vinto*, "**CMV**") regarding certain assets not included in the inventory when the Tin Smelter was transferred to Allied Deals. This reconciliation did not cover the "*estaño metálico en circuito, concentrados, materiales y repuestos*" mentioned in the decree ordering the reversion of the Tin Smelter (the "**Tin Smelter Reversion Decree**")[154] and has nothing to do with the fact that

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149 Reply, ¶ 43.

150 Reply, ¶ 43.

151 See Section 2.3.2 above.

152 See Section 4.5.1 below.

153 Reply, ¶ 43.

154 Supreme Decree No 29.026 of 7 February 2007, **C-20**, p. 2. Thus, the conciliation did not "*ultimately settle*" these issues. Instead, as recorded in the summary of conclusions of the mediation, executed by EMV and CMV, this mediation covered a list of 15 categories of items transferred to Allied Deals without having been included in the Contract. See Summary of Conclusions Regarding the Internal Audit Reports and Supporting Information executed by EMV and CMV of 26 February 2003, **R-299**, pp. 2-7 (listing, *inter alia*, equipment and machinery of the Smelter, installations for the environmental sanitation project, tools and fixtures, furniture and supplies, materials in warehouse, COMIBOL materials, assets acquired by EMV after August 1999, missing equipment, insurance, rent of premises and equipment, the valuation of a fuel pump, trucks, the costs incurred by EMV as a result of Allied Deals' breach of a contract for the sale and purchase of tin in EMV's possession).

Allied Deals received assets worth US$ 16 million when it only paid US$ 14 million for the Tin Smelter.

119. As explained in the Statement of Defence, Allied Deals would soon turn out to have been a bad choice for the privatization of the Tin Smelter. The company became bankrupt and was involved in a massive fraud scandal in early 2002. It was wound up by the London High Court-appointed liquidator Grant Thornton, paving the way for Sánchez de Lozada's Colquiri to acquire the asset.

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

120. After two years of poor management of the Tin Smelter, Allied Deals – which had changed its name to RBG Resources plc ("**RBG**") in 2001[155] – was embroiled in a massive fraud scandal and became bankrupt.[156]

121. In this context, the matter of the illegal privatization of the Tin Smelter again took the centre stage, and calls for the resignation of public servants and the reversion of the Asset to the State were renewed.[157] The situation was all the more tense since the bankruptcy of RBG posed a grave socio-economic problem, given that it was the main source of employment ensuring the livelihood of over 30,000 people.[158] Certain *cooperativistas* even threatened to take possession of the Tin Smelter and the Huanuni mine if they were not paid their salaries due to RBG's bankruptcy.[159] It is in these circumstances that Sánchez de Lozada acquired the Tin Smelter, in June 2002 (*i.e.*, only two months before assuming the presidency again).[160]

122. Claimant does not dispute the facts described by Bolivia. Instead, it once again mischaracterises Bolivia's position, and responds to statements that Bolivia did not make.

123. *First*, Claimant asserts that "*none of the accusations raised during the RBG Resources investigation involved activities in Bolivia or were in any way related to the privatization of the Tin Smelter, or its subsequent operation.*"[161] This is not only irrelevant, but also not what

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

156 Statement of Defence, ¶ 84.

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

158 Statement of Defence, ¶ 86.

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

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

161 Reply, ¶ 53.

Bolivia argued. Bolivia's point, as previously explained, is that the RBG scandal opened the door to renewed criticism of the irregular Tin Smelter privatization.[162]

124. And it is in this context, amid bankruptcy proceedings and a fraud scandal involving a company that had already been publicly accused by State officials of irregularly acquiring the Tin Smelter, prompting calls for investigation, that the soon-to-be President bought this Asset.

125. *Second*, Claimant asserts that "*Bolivia also questions the validity of [the acquisition of the Tin Smelter by Sánchez de Lozada's Colquiri] by claiming that the purchase price was half the price of the original privatisation.*"[163] Bolivia does no such thing. Bolivia's point is that Sánchez de Lozada was able to directly profit from the framework that he conceived and implemented while in office in order not only to finally secure the Tin Smelter, but also to do so at a price significantly lower than the one Comsur offered in its bid (some US$ 6 million,[164] as compared to US$ 10 million).

126. [redacted]

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162 Statement of Defence, ¶ 85.

163 Reply, ¶ 54.

164 Claimant has not disputed the transaction price reported by the press. See La Patria, *Liquidador de Allied Deals pidió $US 6 millones por Vinto y Huanuni*, press article of 2 June 2002, **R-149**; La Prensa, *Comsur será operadora de Vinto, es dueña del 51% de las acciones*, press article of 6 June 2002, **R-150**; Statement of Defence, ¶ 90. [redacted]

165 [redacted]

166 As of July 2001, CDC's interest in Colquiri amounted to 49%, whilst Comsur's was of 51%. See Share register of Colquiri SA, **C-17**, pp. 3-4; Statement of Claim, footnote 28.

167 [redacted]

127. *Third*, Claimant states that "*Bolivia suggests that the sale of the Tin Smelter to Comsur was not in the interest of the State and should have been prevented.*"[168] Once again, this is not an argument that Bolivia has made.

128. Bolivia's position, as set out in the paragraph of the Statement of Defence on which Claimant misleadingly relies,[169] is that the Quiroga administration allowed the Tin Smelter to pass into the property of Sánchez de Lozada, despite (i) calls to revert the Asset to the State,[170] (ii) the administration's own promise to guarantee the social stability and safeguard the patrimony of Oruro,[171] and (iii) notwithstanding the fact that another offer had been received from the private sector for the Tin Smelter.[172] The acquisition of the Tin Smelter by Comsur was, in fact, concealed by members of the Sánchez de Lozada administration, who maintained, in September 2002 (some three months following the purchase of the Tin Smelter and over a year and a half after that of the Antimony Smelter) that Comsur had not acquired EMV.[173]

129. If anything, this situation should have put any prospective buyer of the Assets on high alert regarding the high likelihood that the Tin Smelter's controversial history would catch up with it – as it ultimately did.

2.5 Claimant Is Unable To Rebut That, In 2005, When Glencore International Acquired The Assets From Sánchez De Lozada, Their Reversion Was Foreseeable

130. In its Reply, Claimant goes to great pains to show that, at the time Glencore International acquired the Assets, the State's measures against them were not foreseeable. Claimant's arguments are not corroborated by the evidentiary record of this case.

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168 Reply, ¶ 55.

169 Statement of Defence, ¶ 89 ("*But the Quiroga administration did not intervene at Vinto, despite its promises to guarantee the social stability and safeguard the patrimony of Oruro. Instead, the administration accepted the sale of the Tin Smelter to a private buyer 107 and was kept apprised of the liquidators' efforts towards such transaction, as shown by an internal report dated 15 May 2002*"); RBG Case Report to the Minister of Economic Development and the President of COMIBOL of 15 May 2002, **R-145**; La Patria, *Hasta el fin de mes se definirá futuro de Fundición de Vinto y mina Huanuni,* press article of 18 May 2002, **R-146**.

170 Statement of Defence, ¶ 88.

171 Statement of Defence, ¶ 89.

172 Statement of Defence, ¶ 90.

173 The question of whether EMV had been acquired by Comsur was posed by a member of the Chamber of Representatives to Sánchez de Lozada's Minister for Economic Development. In response thereto, the Minister denied that this would have been the case. Without addressing the fate of the Antimony Smelter, the Minister explained that the Tin Smelter had been acquired by Allied Deals in the privatization process. The Minister also acknowledged that the Government had accepted to allow the sale of the Tin Smelter by Allied Deals thereafter. Nonetheless, though Comsur had indirectly held the Tin Smelter for some three months, and the Antimony Smelter for over a year and a half, the Minister stated that "*[n]o es cierto que la Empresa Metalúrgica Vinto fue transferida a la Empresa Minera Privada COMSUR.*" (Unofficial translation: "*it is not true that [EMV] was transferred to the Private Mining Company COMSUR*"). See Letter from Carlos Mesa Gisbert (Presidency of the Congress) to Guido Añez Moscoso (Presidency of the Chamber of Representatives) of 7 October 2002, **R-300**, p. 4; Letter from Maria Teresa Paz Prudencio (Presidency of the Chamber of Representatives) to Gonzalo Sánchez de Lozada (Presidency) of 12 September 2002, **R-301**.

131. Indeed, Comsur's deficient management of the social relations at the Colquiri Mine had already generated significant tensions between *cooperativistas* and workers (**Section 2.5.1**), a situation that Glencore International was fully aware of prior to its acquisition of the Assets, as recorded in its own due diligence reports.

132. Moreover, Glencore International must also have been fully aware of the political transformations following Sánchez de Lozada's resignation in October 2003, which are crucial to understand the context in which the acquisition took place (**Section 2.5.2**). Claimant avoids engaging directly with this political context, which, however, clearly showed that the movements, politicians, and the economic policies they had implemented and promoted since the mid-1980s were now openly rejected by Bolivians.

133. Contrary to what it would have this Tribunal believe, Claimant was fully aware of the clear risks inherent in acquiring the Assets in 2004-2005. The evidence, including Glencore International's own due diligence documents, shows that it had identified such risks and sought to implement specific palliative measures (**Section 2.5.3**), including the assignment of the Assets, immediately after their acquisition, to its Bermudan subsidiary, Claimant (**Section 2.5.4**).

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

134. Bolivia proved in its Statement of Defence that, by the time Glencore International acquired the Mine Lease from Sánchez de Lozada, Comsur's poor management of social relations at Colquiri had already created tensions between the *subsidiarios* (now organized as *cooperativistas*) and the workers of the company.[174]

135. In its Reply, Claimant fails to address Bolivia's account of this crucial period of time (2000-2005). The Tribunal will notice that, save for very specific instances (addressed below), Claimant can only provide a very limited account of Comsur's actions in order to manage its relationship with the *cooperativistas*. This is in great part due to the fact that Claimant's only witness testifying about these facts, Mr Lazcano, was not present at the Mine between July 2001 and September 2008. As Mr Mamani, worker at the Colquiri Mine since it was controlled by Comsur, recalls:

> *No recuerdo que el Sr. Lazcano haya estado al frente de las operaciones de la Mina en la época en que su razón social era Comsur. El Sr. Lazcano regresó a la Mina*

[174] Statement of Defence, Section 2.5.1.

hacia el año 2008 y, como explico más adelante, ya para esa época, los cooperativistas habían tomado el control de una parte significativa de la Mina.[175]

136. In light of the above, Claimant does not dispute that, over this period:

- Comsur failed to hire all the former COMIBOL employees who had been working at the Mine, which compelled these former miners to join the ranks of the *subsidiarios*, who, by then, had decided to organize themselves in *cooperativas*;[176]

- Comsur was keen to work with the recently formed *cooperativas* in order to carry out specific tasks at the Mine at a lower price than hiring formal employees. This situation enabled the *cooperativistas* to better understand the operations of the company at the lower levels of the Mine and compromised the good relationship with its employees;[177]

- The poorly-managed community relations at Colquiri led to rising tensions between the *cooperativas* and the mining workers;[178] and

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175 Mamani II, ¶ 8 (Unofficial translation: "*I do not remember that Mr Lazcano was in charge of the operations of the Mine at the time when its corporate name was Comsur. Mr Lazcano returned to the mine around 2008 and, as I explain later, by that time, the cooperativista members had taken control of a significant part of the mine*").

176 Statement of Defence, ¶ 97; Cachi I, ¶¶ 13-14 ("*Como consecuencia de este despido masivo, la mayoría de los trabajadores que no fueron contratados por Comsur pasaron a engrosar las filas de los subsidiarios. Esto alteró la proporción de los trabajadores de la Mina. Si antes de la privatización había 1 subsidiario por cada 3 trabajadores, la proporción ahora era la inversa. Ante este crecimiento, y para organizarnos colectivamente, decidimos formar la Cooperativa 26 de Febrero. Hacia el año 2004, la Cooperativa ya contaba con más de 600 socios. En el 2009, ya contábamos con 940 socios.*") (Unofficial translation: "*As a result of this massive lay-off, the majority of workers not hired by Comsur joined the lines of the subsidiarios. This altered the proportion of workers of the Mine. If before the privatization there was 1 subsidiario for every 3 workers, the proportion was now reversed. Given this increase, and in order to organize ourselves collectively, we decided to create the Cooperativa 26 de Febrero. Around 2004, the Cooperativa comprised more than 600 partners. In 2009, we had 940 partners*").

177 Statement of Defence, ¶ 98; Mamani I, ¶ 12 ("*Por otra parte, y para evitar el pago de cargas laborales, Comsur decidió realizar trabajos temporales de rehabilitación con los cooperativistas en los niveles inferiores de la Mina que eran explotados al mismo tiempo por los trabajadores de la empresa. Esto fue un error. Por un lado, al permitirles explotar al mismo tiempo un mismo nivel, generó choques entre cooperativistas y empleados. Por otro lado, consentir la entrada de personas ajenas a la empresa a los niveles inferiores de la Mina permitió a los cooperativistas conocer en detalle su estructura e identificar los turnos del personal de vigilancia y los horarios en los cuales no habría empleados (normalmente entre los distintos turnos, cuando se realizan las explosiones). Los cooperativistas también pudieron identificar accesos clandestinos a los niveles inferiores (sobre todo a través de los ductos de ventilación.*") (Unofficial translation: "*On the other hand, and in order to avoid paying employment costs, Comsur decided to carry out temporary rehabilitation works with the cooperativistas in the inferior levels of the Mine, exploited at the same time by the company's workers. This was a mistake. On the one hand, by allowing them to exploit at the same time the same level, clashes were generated between cooperativistas and employees. On the other hand, consenting to the entrance of persons outside the company to the lower levels of the Mine permitted the cooperativistas to learn its structure in detail and identify the shifts of the surveillance personnel and the times at which there would be no employees (normally between the shifts, when explosions are detonated). The cooperativistas could also identify clandestine access ways to the lower levels (particularly through ventilation conducts.*").

178 See, for instance, Internal Memorandum from COMIBOL to the Ministry of Mines of 23 January 2004, **R-152** (On 14 January 2004, officers from the Ministry of Mines and COMIBOL visited Colquiri "*ante el inminente conflicto de enfrentamiento entre trabajadores mineros de la Empresa Minera Colquiri y los Extrabajadores de la misma Empresa Relocalizados y los trabajadores de la Cooperativa Virgen del Carmen [i.e., a recently and non-registered cooperativa].*") (Unofficial translation: "*in light of the imminent confrontation between mining workers of Empresa*

- Not having the proper workforce to keep the *cooperativas* in check, controlling the Mine gradually became more difficult for Comsur over the years.[179]

137. Glencore International was fully aware of the challenges that represented the *cooperativistas* for the operation of the Mine, and considered their relationship with Comsur problematic. [redacted]

[redacted]

138. Unable to disprove the fact that the policies put in place by Comsur gradually increased the tensions between the *cooperativistas* and the workers, Claimant purports to shift the blame of this situation to COMIBOL. Claimant's attempt, however, is unsuccessful in light of, at least, three circumstances:

139. *First*, while it is true that COMIBOL "*fir[ed] most of its workforce prior to the privatization of the Colquiri Mine*,"[181] this was a necessary measure taken following the privatization. The labour contracts with COMIBOL workers needed to be terminated as those workers would no longer be employed by the State (but by Comsur, a private party). In addition, as is common in this kind of operations (and was noted by Paribas[182]), terminating all the employment contracts ensured that no labour liabilities were transferred to the new operator of the Mine.

Minera Colquiri and Former Relocated Workers of the same company and workers of the Cooperativa Virgen del Carmen").

179 Mamani II, ¶ 10 ("*[L]a decisión de operar la Mina con tan pocos trabajadores tuvo un efecto perverso. Los entonces subsidiarios crecieron en número y organización (pasando a conformar ahora la Cooperativa 26 de Febrero) y tomaron control de muchas más áreas del interior de la Mina. Dada la diferencia en número de empleados y cooperativistas, la empresa tenía dificultades para controlarlos, algo que no ocurría con COMIBOL.*") (Unofficial translation: "*[T]he decision to operate the mine with so few workers had a perverse effect. The then subsidiaries grew in number and organization (now forming the Cooperativa 26 de Febrero) and took control of many more areas of the interior of the Mine Given the difference in number of employees and cooperativista members, the company had difficulty controlling them, something that did not happen with COMIBOL*").

180 [redacted]

181 Reply, ¶ 149.

182 Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, p. 118 ("*The Colquiri Lease will not entail the transfer of any employment contracts. All of the current employees of COMIBOL (on long-term or short-term agreement, or on service contracts) will be dismissed on the eve of the transfer to the winning bidders. Their pending salaries, social benefits and bonuses will be paid by COMIBOL*").

140. The foregoing did not mean that COMIBOL's workers did not have the expectation of being hired again by Comsur. As Mr Mamani recalls, "*luego de que Comsur inició sus operaciones en la Mina en el año 2001, comenzó a crearse un descontento generalizado en el pueblo de Colquiri tras la decisión de la empresa de no contratar a los antiguos empleados de la Corporación Minera de Bolivia. Si bien es cierto que los contratos de trabajo de dichos empleados fueron terminados por COMIBOL, en su momento nos indicaron que la idea era que la empresa privada los contratara nuevamente. Pero esto no ocurrió.*"[183]

141. Likewise, the fact that COMIBOL terminated all the employment contracts did not mean that Comsur would be able to keep the *cooperativistas* in check without the same workforce employed by the State prior to the privatization of the Mine. As the *cooperativas* were "*a common and important fixture in the Bolivian mining sector since the 1980s*,"[184] Comsur must have known that if it did not apply similar policies as those applied by COMIBOL prior to the privatization of the Mine, the number of *cooperativistas* would inevitably increase. In Mr Mamani's words:

> *[L]a decisión [de Comsur] de operar la Mina con tan pocos trabajadores tuvo un efecto perverso. Los entonces subsidiarios crecieron en número y organización (pasando a conformar ahora la Cooperativa 26 de Febrero) y tomaron control de muchas más áreas del interior de la Mina. Dada la diferencia en número de empleados y cooperativistas, la empresa tenía dificultades para controlarlos, algo que no ocurría con COMIBOL. Es más, el sentimiento que teníamos los trabajadores era que la empresa quería trabajar con los cooperativistas a la par que avanzaban sus operaciones. La preferencia de Comsur de trabajar con cooperativistas en el interior de la Mina aumentó con el paso de los años.*[185]

142. It bears noting that the worker's unrest was not only caused by the fact that Comsur (and later, Sinchi Wayra) assigned areas of the Mine to the *cooperativas*. It was also the by-product of the fact that these areas had been specifically prepared by the workers of the company and were ready for exploitation. According to Mr Mamani, "*el sentimiento de los trabajadores era que nosotros hacíamos todo el trabajo pesado de adecuar las áreas para que, luego, los*

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183 Mamani II, ¶ 9 (Unofficial translation: "*After Comsur started operations at the Mine in 2001, widespread discontent began to develop in the village of Colquiri following the company's decision not to hire the former employees of the Mining Corporation of Bolivia. While it is true that the employment contracts of these employees were terminated by COMIBOL, at the time they told us that the idea was for the private company to hire them again. But this did not happen*").

184 Reply, ¶ 149. As explained in Section 2.1.1 above, the implementation of the New Economic Policy in the 1980s boosted the rise of independent mining workers, later organised in *cooperativas mineras*.

185 Mamani II, ¶ 10 (Unofficial translation: "*[T]he decision to operate the mine with so few workers had a perverse effect. The then subsidiaries grew in number and organization (now forming the Cooperativa 26 de Febrero) and took control of many more areas of the Mine's interior. Given the difference in number of employees and cooperativistas, the company had difficulty controlling them, something that did not happen with COMIBOL. What's more, the feeling that we, the workers, had was that the company wanted to work with the cooperativistas as their operations progressed. Comsur's preference to work with cooperativistas inside the Mine increased over the years*").

cooperativistas pudiesen explotarlas."[186] Moreover, the "*cooperativistas*" would usually hire minors living and studying in the Colquiri village to work as *makuncos* carrying the zinc out of the mine.[187] These minors were often members of the families of Colquiri's workers.[188]

143. *Second*, whether or not COMIBOL officially granted areas to the *cooperativistas* is irrelevant. Both Mr Cachi (former *cooperativista* and current employee at the State's *Empresa Minera Colquiri*) and Mr Mamani confirm that these official assignments of areas of the Mine were preceded by agreements between Comsur (and Sinchi Wayra), on the one hand, and the *cooperativas*, on the other,[189] which is further supported by the documents on the record.[190] In addition, as Mr Córdova, former president of COMIBOL, explains, "*[l]o anterior no significa [...] que COMIBOL tuviese un rol activo en la relación con las cooperativas de Colquiri o la negociación de estas cesiones. Por el contrario, las relaciones con estas cooperativas eran gestionadas casi exclusivamente por Sinchi Wayra. Según fui informado, desde poco tiempo después de mi posesión, en la mayoría de ocasiones, las cooperativas sólo venían a ver a COMIBOL para formalizar acuerdos que ya habían alcanzado con la empresa.*"[191]

144. *Third*, as further discussed below, Sinchi Wayra was unable to redress the social tensions with the *cooperativas*, which continued increasing over the years.[192] The political and social transformations that took place in Bolivia after 2003 further empowered the independent mining workers as a political force in the country. As Mr Moreira confirms, "*las cooperativas presentes en la Mina (y en especial, las Cooperativas 26 de Febrero y 21 de Diciembre) están afiliadas a las federaciones de cooperativas nacionales (como la Federación Nacional de Cooperativas Mineras – FENCOMIN) y departamentales (Federación Departamental de Cooperativas Mineras de La Paz – FEDECOMIN-LP) y son un gremio muy poderoso en*

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186 Mamani II, ¶ 18 (Unofficial translation: "*The feeling of the workers was that we did all the heavy lifting to adapt the areas so that, later, the cooperativistas could exploit them*").

187 Cachi II, ¶ 11.

188 Cachi II, ¶ 11.

189 Cachi I, ¶ 25; Mamani I, ¶ 20.

190 See, for instance, Letter from Compañía Minera Colquiri S.A. to COMIBOL of 19 December 2003, **R-303**; Letter from Compañía Minera Colquiri S.A. to COMIBOL of 17 March 2005, **R-304**; Letter from Compañía Minera Colquiri S.A. to COMIBOL of 21 April 2008, **R-305**; Preliminary Agreement between Comibol and Colquiri to Authorize Mining Works in an Area of Level 325 of the Colquiri Mine of 13 January 2009, **C-237**.

191 Córdova, ¶ 45 (Unofficial translation: "*[T]his does not mean [...] that COMIBOL had an active role in the relationship with the Colquirí cooperatives or in the negotiation of these assignments. On the contrary, relations with these cooperatives were managed almost exclusively by Sinchi Wayra. As I was informed, as of shortly after I took office, on most occasions the cooperatives only came to see COMIBOL to formalize agreements they had already reached with the company*"). See also Section 2.7.3 below.

192 See Section 2.7.3.1 below.

Bolivia (en especial, luego de los cambios políticos que siguieron al sector minero luego de la Guerra del Gas en octubre de 2003)."[193]

145. In sum, Claimant has been unable to disprove that Comsur's relationship with the unions and the *cooperativas* at Colquiri was tense. As discussed below, Sinchi Wayra inherited these social tensions, which deepened further as a result of the political transformations of the country after 2003.[194]

2.5.2 Claimant's Portrayal Of The Facts Intentionally Omits The Historic Social Changes That Made The Reversions Foreseeable

146. In its Statement of Defence, Bolivia also demonstrated that, contrary to what Claimant suggests, by October 2004 (*i.e.*, the effective date of the acquisition of the Assets by Glencore International),[195] the Bolivian society had been undergoing profound changes since, at least, late 2003.[196] These events are critical and material to understanding why, as of the time Glencore International carried out its due diligence prior to the acquisition of the Assets, the reversion of such Assets was already foreseeable.

147. Claimant does not engage in a serious debate concerning these events. Rather, it seeks to rebut Bolivia's argument by stating that Glencore International could not foresee a dispute as Evo Morales and his party, *Movimiento al Socialismo* ("**MAS**"), had not yet launched his presidential campaign.[197] However, at least four circumstances show that Claimant's position grossly oversimplifies the relevant events of Bolivian politics following the re-election of Sánchez de Lozada in 2002.

148. *First*, as the second most prominent political force in Bolivia by the time of the elections of 2002,[198] the MAS' political platform was not contingent on Mr Morales' specific political programme for the 2005 elections. According to a study on the presidential election of 2002:

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193 Moreira II, ¶ 12 (Unofficial translation: "*the cooperatives present in the Mine (and in particular, the Cooperativas 26 de Febrero and 21 de Diciembre) are affiliated to the national federations of cooperatives (such as the Federación Nacional de Cooperativas Mineras - FENCOMIN) and departmental (Federación Departamental de Cooperativas Mineras de La Paz - FEDECOMIN-LP) and they are a very powerful syndicate in Bolivia (especially after the political changes in the mining sector after the Guerra del Gas in October 2003)*").

194 See Sections 2.5.2 and 2.7.3 below.

195 Second Amended and Restated Stock Purchase Agreement between Minera and Glencore International (Iris shares) of 30 January 2005, **C-198**, Recitals (f); Stock Purchase Agreement between Minera and Glencore International (Shattuck shares) of 30 January 2005, **C-199**, Section 5.7; Stock Purchase Agreement between CDC and Compañía Minera Concepción SA (Colquiri shares) of 2 March 2005, **C-202**, Recitals (d).

196 Statement of Defence, ¶¶ 105-119.

197 Reply, ¶ 232.

198 See Georgetown University, Results of the 2002 Bolivian Presidential Election (*undated*), <http://pdba.georgetown.edu/Elecdata/Bolivia/pres02.html> last visited 4 October 2018, **R-306**.

> *Sin embargo, las elecciones del 2002 han modificado sustancialmente la composición de este sistema de partidos. En primer lugar, han revelado la presencia de dos nuevas fuerzas políticas importantes como el Movimiento al Socialismo (MAS) y la Nueva Fuerza Republicana (NFR) que obtuvieron el segundo y tercer lugar en la preferencia electoral. [...]. [E]l MAS ha logrado interpelar la votación del descontento con el modelo económico y político vigentes y particularmente, la 'bronca' contra los partidos y una élite política que ya había acumulado actitudes de rechazo de la población. Así, el MAS logró una importante votación que ha trascendido los límites de su contexto original que fue el Trópico y la región cochabambina [...].*[199]

149. The MAS' core values as a political party were already expressed in its political platform for the 2002 presidential elections. By that time, it was already the MAS' agenda to "*plantea[r] una serie de propuestas para acabar con la pobreza como la recuperación de las empresas estratégicas y los recursos naturales, aplicar el concepto de la economía selectiva y la creación y fomento de empresas sociales de producción manejadas por los propios trabajadores, recuperar el territorio haciendo prevalecer el derecho consuetudinario de propiedad de las naciones originarias y consolidar las comunidades.*"[200] The 2002 elections were the first general elections in which the MAS participated and, without forming any alliances, the party was the second in number of seats in both the Chamber of Representatives and the Senate.[201] Mr Morales, who had been the most voted *diputado* in the previous elections, was the second most voted candidate for the presidency.[202] That was three years before Glencore International invested in Bolivia.

150. *Second*, Claimant does not dispute the importance of the events of October 2003 that led to Sánchez de Lozada's resignation and their incidents in domestic politics. Countrywide social unrest and protests (especially, in La Paz) against Sánchez de Lozada's agenda on natural

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199 Fundación Boliviana para la Capacitación Democrática y la Investigación, "*Opiniones y análisis sobre las elecciones presidenciales de 2002*," 2002, **R-163**, pp. 49, 52 (emphasis added) (Unofficial translation: "*However, the 2002 elections have substantially modified the composition of this party system. First, they revealed the presence of two new important political forces such as the Movement towards Socialism (MAS) and the New Republican Force (NFR) which obtained the second and third place in the electoral preference. [...] [T]he MAS has succeeded in channeling the vote of discontent with the current economic and political model and particularly, the 'anger' against the parties and a political elite which had already accumulated attitudes of rejection from the population. Thus, the MAS secured an important vote that has transcended the limits of its original context, the Tropic and the Cochabamba region [...]*").

200 Fundación Boliviana para la Capacitación Democrática y la Investigación, "*Opiniones y análisis sobre las elecciones presidenciales de 2002*," 2002, **R-163**, p. 57 (Unofficial translation: "*present a series of proposals to end poverty such as the recovery of strategic companies and natural resources, applying the concept of the selective economy and the creation and promotion of social production companies managed by the workers themselves, territorial recovery by enforcing customary property law of the indigenous communities and consolidating communities*").

201 Plurinational Electoral Body, Bolivia's Electoral Atlas, volume I (1997, 2002, 2005), **R-298**, pp. 67-70.

202 In fact, Evo Morales could have been president in 2002, had MAS, as second most voted party, opted to make an alliance. Plurinational Electoral Body, Bolivia's Electoral Atlas, volume I (1997, 2002, 2005), **R-298**, pp. 7 and 68.

resources "*came as little surprise.*"[203] The brutal governmental repression[204] of opponents to these measures (very similar to the ones ordered when Sánchez de Lozada attempted to divest State assets during his first presidential term[205]) quickly evolved in major protests throughout the country in what would later be known as *La Guerra del Gas*.[206]

151. Likewise, Claimant does not deny that the unions and workers of the mining industry and the *cooperativas* (alongside with indigenous communities and political parties like the MAS[207]) were crucial actors in the protests against Sánchez de Lozada's agenda. Nor can it. As academic studies have shown, "*[l]a presencia en El Alto de La Paz de los 800 mineros de Huanuni y de más de 3.000 cooperativistas mineros, fue altamente significativa en momentos decisivos de la insurrección popular que se desató en octubre de 2003 contra el gobierno de Gonzalo Sánchez de Lozada y que tuvo su epicentro en esa ciudad del departamento de La Paz.*"[208]

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

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

205 Barcelona Centre for International Affairs, "Gonzalo Sánchez de Lozada," updated 17 February 2016, **R-95**, p. 6 ("*[L]a enajenación de los activos estatales concitó duras recriminaciones en sectores nacionalistas e izquierdistas, que acusaron a Sánchez de 'vender a la patria' y, de paso, de adjudicar las contratas con favoritismo e incluso nepotismo, al resultar Comsur una de las licitadoras más beneficiadas por la reconversión del Comibol. [...] La dura oposición a la reforma estructural de la minería planteada por la Central Obrera Boliviana (COB), de larga tradición combativa, empujó al presidente a ordenar el arresto de 300 de sus afiliados y dirigentes y a declarar el estado de urgencia por noventa días el 19 de abril de 1995 [...]. Las medidas represivas no acallaron, empero, a la agrupación sindical, que en marzo de 1996 decretó una huelga general que duró 36 días seguida de otro paro general de 24 horas el 25 de febrero de 1997*") (Unofficial translation: "*[T]he sale of state assets led to harsh recriminations in nationalist and leftist sectors, which accused Sánchez of 'selling the fatherland' and, in passing, of awarding contracts with favoritism and even nepotism, Comsur being one of the bidders that benefited the most from the reconversion of the Comibol. [...] The harsh opposition to the structural reform of the mining sector of the Bolivian Workers' Union (COB), with a long fighting tradition, pushed the president to order the arrest of 300 of its members and leaders and declare the state of emergency for ninety days on 19 April 1995. [...] The repressive measures however did not silence the union, which decreed a general strike in March 1996 that lasted 36 days followed by another 24 hour general strike on 25 February 1997*").

[redacted]

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

207 The Economist, *Highly Flammable*, press article of 11 September 2003, **R-155** ("*Thousands of marchers tramped for seven days to La Paz, Bolivia's capital, this week to 'declare war' on a range of government policies. From September 19th, things will get worse: a countrywide series of strikes, marches and road blocks, orchestrated by Evo Morales and his Movimiento al Socialismo (MAS) party. The protesters' targets include new free-trade initiatives and new tax rules. Top of the list, however, are plans to sell natural gas via Chile to Mexico and the United States*") (emphasis added).

208 M. Cajías de la Vega, "Crisis, Diáspora y Reconstitución de la Memoria Histórica de los Mineros Bolivianos" in *Revista de Estudios Transfronterizos*, Vol. X, No. 2 (2010), **R-159**, p. 87 (Unofficial translation: "*The presence in El Alto and*

152. *Third*, it is undisputed that *la Guerra del Gas*, which left 64 dead and over 300 wounded, prompted Sánchez de Lozada's resignation and flight to the United States in October 2003 (that is, barely a year after he had taken office since the last election).[209] Put differently, the political parties (the MNR), politicians (Sánchez de Lozada), and the New Economic Policy they had implemented and promoted since the mid-1980s were openly rejected by Bolivians. Such a message was promptly conveyed to the general public (including investors like Glencore International) by Carlos Mesa in his inaugural speech on 17 October 2003:

> *Una Asamblea Constituyente ahora, quiere decir que vamos a discutir qué país queremos y cuáles son las reglas del juego sobre las que este país va a funcionar una vez que ese proceso se lleve adelante. Esto quiere decir que todos y cada uno de nosotros, debemos llevar a la Asamblea Constituyente elementos centrales de forma y de fondo que definirán temas esenciales sobre nuestros recursos naturales, sobre la tierra, sobre la concepción de la participación democrática ciudadana, sobre la estructura del funcionamiento de un mecanismo de representación como es el Congreso Nacional, sobre todos los temas que nos importan.*[210]

153. This same view was shared by firms assessing the business climate in Bolivia following Sánchez de Lozada's resignation and throughout Mr Mesa's interim government. As put by Business International, one of the leading consultants providing macroeconomic, industry and financial market analysis in Latin America, by the end of 2004:

> *The overthrow of the main champion of neo-liberal economics in 2003, the rise of Evo Morales, the palpable shift of politics to the left throughout the country and the decline of the traditional party structure has left the business environment clouded with uncertainty.*[211]

154. It was in this context of great uncertainty that Sánchez de Lozada took the decision to sell the Assets, and Glencore International to acquire them from a fugitive former President in exile in the United States.[212] [redacted]

La Paz of 800 miners of Huanuni and more than 3,000 mining cooperativistas was very significant in decisive moments of the popular uprising triggered in October 2003 against the government of Gonzalo Sánchez de Lozada and the epicentre of which was in that city of the department of La Paz").

209 El Clarín, *Bolivia: renunció el presidente Sánchez de Lozada*, press article of 17 October 2003, **R-161**.

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

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

212 A complaint against Sánchez de Lozada had been presented by several representatives shortly after his resignation and flight to the United States. First Request for the Opening of Criminal Responsibility Proceedings Against Sánchez de Lozada and Others from National Representatives of 20 October 2003, **R-307**.

[redacted]

155. *Fourth*, the foregoing explains why it is simplistic to claim – as Claimant does, that Glencore International could not foresee a dispute concerning the Assets because Mr Morales' political platform was published in late 2005.[214] Mr Morales' platform (as any political agenda following those terms) was the entirely predictable result of political transformations that had been underway since, at least, 2003.

156. On the one hand, the efforts to call for a constitutional assembly date back to, at least, April 2004 (that is, before Glencore International acquired the Assets). At that time, "*Carlos Mesa logra que el Parlamento introduzca reformas a la Constitución Política del Estado, entre ellas el reconocimiento de la Asamblea Constituyente como forma de representación y participación del pueblo y como único mecanismo de reforma total de la Constitución.*"[215] One of the central topics of discussion was the definition on "*temas esenciales sobre nuestros recursos naturales.*"[216] However, the interim nature of Mr Mesa's Government made it necessary to postpone the election of the Constituent Assembly until after the election of the new President of Bolivia.[217]

213 [redacted]

214 Reply, ¶ 232.

215 I. Carrasco Alurralde and X. Albó, "Cronología de la Asamblea Constituyente," *Scientific Electronic Library Online*, Fundação de Amparo à Pesquisa do Estado de São Paulo (*undated*), **R-308**, p. 1 (Unofficial translation: "*Carlos Mesa manages to get Parliament to introduce reforms to the Political Constitution of the State, among them the recognition of the Constitutional Assembly as a form of representation and participation of the people and as the only mechanism of total reform of the Constitution*").

216 Speech of Mr Carlos Mesa Gibert before the Bolivian Congress of 17 October 2003, **R-162**, p. 3 (Unofficial translation: "*essential issues regarding our natural resources*").

217 See, for instance, El País, *El presidente de Bolivia convoca elecciones a la Asamblea Constituyente*, press article of 4 June 2005, **R-309** ("*Mesa advirtió de que Bolivia está viviendo un momento de extrema urgencia y una situación de confrontación de altísimo riesgo. 'Creo que no podemos esperar hasta el martes porque el país está sometido a presiones y tensiones que lo pueden hacer estallar', dijo el presidente, que confía en que el decreto permita al Congreso la definición y discusión de leyes y sus mecanismos para acabar con la incertidumbre. Mesa expresó su esperanza en que con este decreto los movimientos sociales levanten las medidas que paralizan el país. Sus adversarios consideraron su determinación como una buena intención que, sin embargo, no resuelve la crisis política. El diputado Evo Morales, del Movimiento al Socialismo, señaló que la medida positiva llegó demasiado tarde. El movimiento social exige la renuncia de Mesa*") (Unofficial translation: "*Mesa warned that Bolivia is experiencing a moment of extreme urgency and a confrontational situation of high risk. 'I think we cannot wait until Tuesday because the country is subject to pressures and tensions that can make it explode,' said the president, who is confident that the decree will allow Congress to define and discuss laws and mechanisms to end uncertainty. Mesa expressed hope that with this decree the social movements will lift the measures that paralyse the country. His opponents considered his determination as a good faith intention that, however, does not resolve the political crisis. Representative Evo Morales, of the Move towards Socialism, pointed out that the positive measure came too late. The social movement demands Mesa's resignation*"); El Mundo, *Presidente de Bolivia presenta su renuncia ante su incapacidad para contener la ola de protestas*, press article of 7 June 2005, **R-165**.

157. On the other hand, in all probability, the new President would continue to implement the political transformations prompted by Sánchez de Lozada's resignation in 2003. This is what Evo Morales did after being elected in December 2005 with an overwhelming majority of votes.[218] Mr Córdova recalls that:

> *Como es sabido, desde la elaboración de nuestros planes de gobierno en el MAS en el año 2005, uno de los principales objetivos era que COMIBOL, en su calidad de empresa minera estatal, recuperara un papel de relevancia en el sector minero boliviano, más allá de ser un titular pasivo de participaciones estatales, tal como estaba previsto en el código minero de 1997 elaborado por el gobierno del Presidente Sánchez de Lozada. La idea del Presidente Morales y de su Partido era que esta entidad pasase, de ser un simple arrendador o concedente de derechos mineros a ser un socio estratégico de los inversionistas privados.*[219]

158. In addition, as explained in the Statement of Defence, the new Bolivian Government:

- Published a national development plan that stressed the importance of giving the State a major role in the Economy and[220] putting an end to the effects of the privatization in the country;[221]

- Enacted the national development plan as Supreme Decree 29.272 of 2007, thus confirming the new "*rol activo del Estado*" in the mining sector and the promotion of "*una actividad minera [...] en la que participen de manera armónica e integral el sector público, pueblos indígenas, originarios, comunidades campesinas y los otros subsectores: grande, mediano, chico y cooperativo*;"[222] and

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218 BBC Mundo, *Morales se declara ganador*, press article of 19 December 2005, **R-167**.

219 Córdova, ¶ 21 (Unofficial translation: "*As is known, since the elaboration of our government plans in the MAS in 2005, one of the main objectives was for COMIBOL, as the State mining company, to recover a material role in the Bolivian mining sector, beyond that of a passive holder of State participation, as provided in the 1997 mining code prepared by the government of President Sánchez de Lozada. The idea of President Morales and his Party was that this entity should pass, from being a simple lessor or grantor of mining rights, to being a strategic partner of private investors*").

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

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

222 Supreme Decree No. 29.272 of 12 September 2007, **R-169**, p. 160 (emphasis added) (Unofficial translation: "*[t]he State's active role [in the mining sector and the promotion of] a mining activity which is planned, rational, inclusive, modern, systemised and socially acceptable, in which may participate in a harminosed and wholesome manner the public sector, indigenous communities, rural communities and other subsectors: large, medium, small and cooperative*").

- Called for elections of a Constituent Assembly,[223] which enacted the new Constitution on 7 February 2009.[224]

159. In this connection, it bears repeating that the new Constitution envisioned the State, through COMIBOL, as assuming "*el control y la dirección sobre la exploración, explotación, industrialización, transporte y comercialización de los recursos naturales estratégicos a través de entidades públicas, cooperativas o comunitarias*."[225] As Mr Córdova explains (and is undisputed by Claimant), the new Constitution mandated the renegotiation of the terms in which private parties would continue to participate in the mining sector.[226]

160. In sum, the political transformations following Sánchez de Lozada's resignation in October 2003 are crucial to understand the context in which Glencore International acquired the Assets. These transformations explain why it was foreseeable that Bolivia would take action against them. As discussed below, Glencore International acquired the Assets nonetheless.

2.5.3 The Reply Confirms That Glencore International (Not Claimant) Purchased The Assets From Sánchez De Lozada When It Was Highly Likely That The State Would Take Action Against The Assets

161. Following his resignation from office and flight from Bolivia in October 2003, Sánchez de Lozada took refuge in the United States. [redacted] Sánchez de Lozada sought to divest some of the assets he held through Comsur.

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

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

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

226 Córdova, ¶ 23 ("*Recuerdo, igualmente, que, a partir de 2009, las negociaciones de los nuevos derechos de COMIBOL bajo los contratos mineros debieron adaptarse a los lineamientos que estableció la Constitución Política del Estado que entró en vigencia ese año. Estos cambios constitucionales implicaron que todos los derechos mineros pre-constituidos en Bolivia se transformasen, en 2010, en Autorizaciones Transitorias Especiales a la espera de (i) la promulgación de un Nuevo Código de Minería (que en ese momento negociábamos con todos los actores del sector) y (ii) el resultado de las negociaciones con los actores privados*") (Unofficial translation: "*I also remember that, starting in 2009, the negotiations of COMIBOL's new rights under the mining contracts had to adapt to the guidelines established by the Political Constitution of the State that came into force that year. These constitutional changes implied that all the pre-constituted mining rights in Bolivia would transform, in 2010, into Special Transitory Authorizations pending (i) the promulgation of a New Mining Code (which we were negotiating with all the stakeholders of the sector at that time) and (ii) the result of negotiations with private actors in the sector*").

227 [redacted] Proceedings against Sánchez de Lozada started

162. It is in this context that Glencore International (and not Claimant) acquired the Assets. Mr Eskdale, for Glencore International, was contacted by Argent Partners limited ("**Argent Partners**") and invited to participate in a private bidding process to acquire the subsidiaries and affiliates of Panamanian company Andean Resources S.A. ("**ARSA**").[228] [redacted]

163. [redacted] Throughout the summer of 2004, Glencore International carried out due diligence on the assets to be acquired.[232]

164. [redacted]

immediately after he fled Bolivia. These proceedings are still pending, and Bolivia has sought, without success, Sánchez de Lozada's extradiction so that they can be concluded. See First Request for the Opening of Criminal Responsibility Proceedings Against Sánchez de Lozada and Others from National Representatives of 20 October 2003, **R-307**; H. National Congress of the Republic of Bolivia, Resolution No. 004/04-05 of 14 October 2004, **R-11**; Constitutional Court of Bolivia, Decision No. 019/2005 (full bench) of 2 March 2005, **R-311** ("*Que el Congreso Nacional [...] a través de la Resolución Congresal N°004/04-05 de 14 de octubre de 2004, resolvió autorizar el juicio de responsabilidades contra el ex Presidente de la República Gonzalo Sánchez de Lozada y sus Ministros de Estado, entre ellos algunos Senadores y Diputados en ejercicio.*") (Unofficial translation: "*That the National Congress through Congressional Resolution No. 004/04-05 of 14 October 2004, authorised the liability trial against the former President of the Republic Gonzalo Sánchez de Lozada and his Ministers of State, including some Senators and Representatives in office*"). See also Página Siete, *Un juez autoriza proceso contra Goni y Sánchez Berzaín en EEUU*, press article of 22 May 2014, **R-312**, p. 2.

228 Process Letter from Argent Partners (Mr Simkin) to Glencore International (Mr Eskdale) of 30 April 2004, **C-62**; Argent Partners Opportunity Overview, **C-191**; Reply, ¶ 56. ARSA fully owned Minera S.A. ("**Minera**"). In turn, Minera fully owned Panamanian companies Iris Mines and Metals S.A. ("**Iris**"), Shattuck Trading & Co. Inc. ("**Shattuck**") and Kempsey S.A. ("**Kempsey**") (together, the "**Panamanian Companies**"), which, together, held 100% of Comsur's shares. Comsur held 51% of the shares of Colquiri, whilst the latter company owned the Colquiri Mine Lease and the Antimony Smelter, and held a 99.97% interest in Vinto, which owned in turn the Tin Smelter. See Statement of Defence, ¶¶ 122-123.

229 [redacted]

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231 [redacted]

232 Reply, ¶ 57; Eskdale II, ¶ 10; Glencore inter office correspondence from Mr Eskdale to Mr Strothotte and Mr Glasenberg of 20 October 2004, **C-196**.

165. [redacted]

166. [redacted]

167. [redacted]

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233 [redacted]

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168. [redacted]

169. [redacted]

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171. [redacted]

241 [redacted]

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172. [redacted]

173. *Second*, Mr Eskdale asserts that the reversion of the Antimony Smelter would not have been foreseeable at the time of the acquisition, as "*[n]ot only was there no obligation to reactivate the Antimony Smelter, but as I understood, Bolivia was aware that it had been out of commission for years before our purchase and had raised no concern with its prior owner. We did not believe the State would take a different view after Glencore took over.*"[251]

174. Mr Eskdale's comment glosses over the fundamental socio-political changes that Bolivia underwent following Sánchez de Lozada's resignation in October 2003.[252] Such changes made a fundamental contribution to the increased likelihood of State action against the Assets.

175. Since 2002, Evo Morales addressed the objective of combating poverty through "*la recuperación de las empresas estratégicas y los recursos naturales.*"[253] The MAS' 2005 political agenda was drafted along the same lines, and called for "*[r]efundar la Corporación Minera de Bolivia (COMIBOL), como empresa estatal con autonomía de gestión y de derecho público, con capacidad para convertirse en actor principal en la actividad productiva del sector.*"[254]

176. In this sense, Mr Eskdale is wrong to assert that "*the changes to the mining sector proposed by [Mr Morales'] political party were the very same ones that the Bolivian government informed us about when we met with them prior to making our investment: adjustments to the*

248 [redacted]

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251 Eskdale II, ¶ 62.

252 See Section 2.5.2 above; Statement of Defence, Section 2.5.2.

253 Fundación Boliviana para la Capacitación Democrática y la Investigación, "*Opiniones y análisis sobre las elecciones presidenciales de 2002*," 2002, **R-163**, p. 57 (Unofficial translation: "*recovery of strategic companies and natural resources*").

254 Political Program of *Movimiento Al Socialismo* of November 2005, **R-166**, p. 19 (Unofficial translation: "*[r]eestablish the Bolivian Mining Corporation (COMIBOL), as a State company with management and public law autonomy, with the capacity to become a major player in the productive activity of the sector*").

mining tax regime and to the royalties under the Colquiri Lease."[255] If anything, Mr Eskdale's statement is evidence of negligence and inadequate diligence prior to acquiring the Assets.

177. *Third*, Mr Eskdale contends that Glencore International could not foresee that the social unrest caused by the conflicts between the miners and *cooperativistas* in the Colquiri Mine was a risk factor to the success of its investment. He disingenuously asserts that it was "*understood that Comsur and Comibol had, until [Glencore's] investment, duly handled relations with the cooperativistas.*"[256] [redacted]

178. Mr Eskdale further states that Glencore International could not foresee that "*Bolivia would fail to protect our interest in the Colquiri Lease against invasion by the cooperativistas.*"[258] Mr Eskdale seems to imply that Bolivia was to be fully responsible for solving the conflicts between the miners and *cooperativistas*, when the decisions taken by both companies in this regard were determinative of the level of agitation at the mine. The magnitude and the violence of the 2012 conflicts were, thus, a product of Sinchi Wayra's management. Five years have passed since the last significant invasion or violent episode in the Colquiri Mine,[259] and this is thanks to COMIBOL's administration. Bolivia had no means to tend to everyday relations at Colquiri and prevent conflicts.

179. In these circumstances, Claimant's assertion that "*[t]he Government was involved in, and supportive of, Glencore's acquisition of the Assets*"[260] is misleading.

180. One, as explained in the Statement of Defence, the correspondence from the Vice Minister of Mining to Glencore International of January 2005 cannot be construed as the warm welcome that Claimant would have this Tribunal believe it was. Instead, the two letters only conveyed

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255 Eskdale II, ¶ 65.

256 Eskdale II, ¶ 63.

257 [redacted]

258 Eskdale II, ¶ 63.

259 Mamani II, ¶ 63.

260 Reply, ¶ 59; Eskdale II, ¶ 11; Eskdale I, ¶ 18.

to Glencore International that the administration was considering modifications to (i) the fiscal regime applicable to the mining sector and (ii) the Bolivar, Porco and Colquiri contracts.[261]

181. Two, Claimant's mention of a purported meeting between Glencore International and State representatives in early February – in the course of which Glencore International would have received encouragement to invest in the country – is uncorroborated. Mr Eskdale testifies to the purported content of a meeting which he did not attend, and which was reported to him by Mr Capriles, a person who has not submitted testimony in this arbitration despite being a current employee of the Glencore group in Bolivia.[262] Mr Eskdale provides no documentary support to corroborate his description of the content of this meeting.

182. In any event, by early February 2005, when this meeting suppposedly took place, according to Mr Eskdale, Glencore International had already concluded binding contracts to acquire the shares of Iris and Shattuck,[263] and thus 99.95% of Comsur.[264]

183. [redacted]

184. Indeed, as a first precautionary measure, Glencore International retained "*key members of the management*:"[266] Jorge Szasz Pianta and Jaime Urjel Dalence remained on the boards of Comsur, Colquiri and CMV further to the acquisition.[267] Likewise, CDC remained a shareholder of Colquiri until March 2006.[268]

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261 Statement of Defence, ¶¶ 133-134; Letter from the Vice Minister of Mining to Glencore of 17 January 2005, **C-63**.

262 LinkedIn page of Eduardo Capriles, <https://www.linkedin.com/in/eduardo-capriles-aab20975/?originalSubdomain=bo> last visited on 19 October 2018, **R-317** (listing Mr Capriles as general manager of Glencore in Bolivia). See also Power of Attorney from Glencore Bermuda of 11 December 2007, **C-90** (giving Mr Capriles a power of attorney to represent Glencore Internaional in the negotiations with the State).

263 Second Amended and Restated Stock Purchase Agreement between Minera and Glencore International (Iris shares) of 30 January 2005, **C-198**; Stock Purchase Agreement between Minera and Glencore International (Shattuck shares) of 30 January 2005, **C-199**.

264 See Reply, ¶ 63.

265 [redacted]

266 Reply, ¶ 64.

267 Statement of Defence, ¶¶ 126, 130.

268 Put Notice from Actis (on behalf of CDC) to Glencore International of 21 March 2006, **C-67**.

185. [redacted]

186. [redacted]

187. [redacted]

188. Glencore International's third precautionary measure was to ensure that the State remained in the dark regarding the acquisition of the Assets. Notwithstanding Claimant's assertion that, during the purported meeting of February 2005, Glencore International discussed "*the details of the transaction*"[273] with representatives of the Government, Bolivia in fact subsequently sought information in that regard on numerous occasions. Glencore International was not forthcoming.

189. Following the request for information of January 2005[274] – to which Claimant acknowledges Glencore International responded in 2007[275] – COMIBOL sent another letter to Comsur in February 2005.[276] This time, Comsur replied one day later, dismissing the request for information:

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269 [redacted]

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273 Reply, ¶ 60.

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

275 Claimant explains that Glencore International provided all the required information in January 2007. Reply, ¶ 83; Letter from Pestalozzi Lachenal Patry (Mr Pestalozzi) to Senate of Bolivia (Ms Velásquez) of 10 January 2007, **C-225**.

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

> *El comunicado publicado en la prensa por Glencore International AG en fecha 5 de febrero pasado, explica con claridad la índole jurídica de las transacciones realizadas en el exterior sobre empresas extranjeras, las que no afectan de manera alguna a Comsur o sus relaciones contractuales [...]. [L]as acciones de Comsur S.A., sea en parte o en su totalidad, no han sido transferidas a ninguna persona individual o colectiva.*[277]

190. Glencore International did not disclose the fact that, whereas Comsur's shareholders had not changed, Colquiri's had. Claimant then sent another letter, repeating that Comsur's and Minera's shareholders had not changed with the purchase by Glencore International in March 2005.[278]

191. Taken together, these communications show Glencore International's dismissive attitude to the Government's inquiries, and its stubborn attempt to conceal both the involvement of Sánchez de Lozada in the transaction and the modifications in the ownership of Colquiri, which should have been notified to COMIBOL.[279] These modifications had not been authorized by COMIBOL and were in breach of the terms of the Colquiri Mine Lease.

192. The same reluctance to disclose material information regarding the acquisition and structure of the investment characterises Claimant in these proceedings. Tellingly, with the Statement of Claim, it submitted as proof of the investment share certificates and share registries, but no documents regarding the transaction. Further, Claimant resisted producing transaction-related documents in disclosure,[280] and only proceeded to do so once the Tribunal had ordered it.[281]

193. For all these reasons, it was clear, at the time of the acquisitions, that acquiring the Assets entailed important risks, in light of their history and previous ownership. Glencore International was entirely aware of such risks, and, as explained below, immediately after acquiring the Assets, it assigned them to Claimant.

2.5.4 Immediately After It Had Acquired The Assets, Glencore International Assigned Them To Glencore Bermuda

194. It was clear, at the time of Glencore International's acquisition of the Assets from Sánchez de Lozada, that their long and troubled history would prompt the State to take action against

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277 Letter from Comsur (Sinchi Wayra) to COMIBOL of 17 February 2005, **R-189** (emphasis added) (Unofficial translation: "*The statement published in the press by Glencore International AG on the past 5 February clearly explains the legal nature of transactions carried out abroad regarding foreign companies, which do not, in any way, affect Comsur or its contractual relations [...]. [T]he shares of Comsur SA, whether in part or in their entirety, have not been transferred to any individual or collective*").

278 Letter from Comsur (Mr Urjel) to Comibol (Mr Tamayo of 3 March 2005, **C-206**.

279 Mr Eskdale himself acknowledges this obligation. See Eskdale II, ¶ 12.

280 See for instance Annex 2 to Procedural Order No. 4 of 27 March 2018, pp. 1-6.

281 Annex 2 to Procedural Order No. 4 of 27 March 2018, pp. 1-17.

them.[282] This possibility was very clearly contemplated by Glencore International, which took all possible measures to protect the Assets. Specifically, though it was the one which actively participated in the acquisition of the Assets and made all the decisions relevant to this process, Glencore International assigned such Assets to its affiliate, Claimant, shortly after the closing of the transaction. [redacted]

195. *First*, Glencore International (not Claimant) was the party which acquired the Assets. Subsequently, Glencore International assigned them to Claimant.

196. Claimant disputes this, and contends that "*Glencore Bermuda acquired the Assets in an arms-length transaction*"[283] and, further, that Claimant was the intended owner of the Assets from the outset.[284] In so doing, however, Claimant ignores the fact that its own participation in the acquisition of the Assets was almost non-existent. It makes little sense for the intended owner of the Assets to remain at all times so entirely removed from their acquisition, including from milestones as important to their future ownership and operation as the due diligence process.[285]

197. Argent Partners contacted Glencore International – not Claimant – in connection with the opportunity to acquire ARSA's assets.[286] Subsequently, it was Glencore International – not Claimant – that participated in the transaction.[287] Notably, it was Glencore International that manifested to Argent Partners its own interest (and not that of any subsidiaries or affiliates) in participating in the transaction.[288] It was also Glencore International that submitted a conditional definitive offer for the shares of Iris, Shattuck, and a third company,[289] [redacted]

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282 Statement of Defence, Section 2.5.4.

283 Reply, Section II.C.

284 Reply, ¶ 62.

285 It was Glencore International – and not Claimant – that carried out the pre-acquisition due diligence. Claimant's witness, Mr Eskdale, describes such due diligence in the following terms: "*As part of this process, I travelled to Bolivia during the summer of 2004 with other colleagues, including a technical team from Peru, to conduct an initial diligence over the assets. We were joined by Glencore's representatives in Bolivia, Eduardo Capriles (then Head of Glencore Bolivia Limitada, but would later become President of Comsur).*" Eskdale II, ¶ 10. Mr Eskdale – himself an employee of Glencore International – does not mention any colleagues attending such due diligence visits on the part of Claimant, presumably because no such persons attended these visits. See Eskdale II, ¶¶ 8, 10.

286 Process Letter from Argent Partners (Mr Simkin) to Glencore International (Mr Eskdale) of 30 April 2004, **C-62**.

287 Reply, ¶ 57. It bears recalling that all the correspondence produced by Claimant in the disclosure phase was exchanged between Argent Partners and Glencore International, not Claimant.

288 Eskdale II, ¶ 8.

289 Eskdale II, ¶ 10; Letter from Glencore International to Argent Partners (Mr Simkin) of 22 October 2004, **C-197**.

[redacted] Finally, it was Glencore International that negotiated and signed the share purchase agreements.[291]

198. The one time Claimant did intervene in the acquisition, it did so merely as an instrument of Glencore International, facilitating the transfer of the sum intended for the payment of the purchase price to Glencore International's counsel in the transaction.

199. Indeed, the payment for the Assets was instructed by Mr Eskdale, acting for Glencore International. For this purpose, Mr Eskdale sent a communication from an email address recorded as "*Chris Eskdale/baar/glen*"[292] (recalling the company's headquarters in Baar, Switzerland) to another Glencore International employee, Stefan Peter,[293] requesting that a transfer of some US$ 313 million be ordered from Claimant into the account of counsel assisting Glencore International in the transaction:

> *In order to help with the administration of the Minera closing, we have agreed to make an initial single transfer of funds from Glencore into our lawyers' (Curtis-Mallet) client account. Once we have all the closing documents in place and agreed (which will probably be after European banking close of business) we will then authorise the onward transfers from the lawyers' account to Minera in order to compete the transaction.*
>
> *Please could you therefore arrange to make a transfer of $313,780,000 from Glencore Finance Bermuda to the following account, value 3 March 2005.*[294]

200. The fact that Claimant served only as an instrument for Glencore International in the transaction is not surprising. In fact, it is fully consistent with Claimant's status as a shell company, which Glencore International simply uses to strategically structure certain transactions, as explicitly recognized by Claimant.[295]

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290 Eskdale II, ¶ 10; [redacted]

291 See Stock Purchase Agreement between Minera and Glencore International (Shattuck shares) of 30 January 2005, **C-199**; Second Amended and Restated Stock Purchase Agreement between Minera and Glencore International (Iris shares) of 30 January 2005, **C-198**. The acquisition of the shares of Colquiri from CDC was executed through Glencore International's subsidiary, Compañía Minera Concepción, which subsequently assigned them to Glencore International. See Stock Purchase Agreement between CDC and Compañía Minera Concepción SA (Colquiri shares) of 2 March 2005, **C-202**; CDC/Glencore Assignment and Assumption Agreement, concluded between Comco and Glencore International of 2 March 2005, **R-316**.

292 Email from Glencore (Mr Eskdale) to Curtis, Mallet-Prevost, Colt & Mosle LLP (Mr Vega) of 2 March 2005, **C-205**. Though Claimant also refers to an additional (allegedly relevant) communication (Email from Glencore (Mr Eskdale) to Glencore (Mr Peter) of 3 March 2005, **C-207**), such communication is in fact the same as **C-205**.

293 Email from Glencore (Mr Eskdale) to Curtis, Mallet-Prevost, Colt & Mosle LLP (Mr Vega) of 2 March 2005, **C-205**. Mr Peter's email address is recorded as "*Stefan Peter/baar/glen@glencore.*"

294 Email from Glencore (Mr Eskdale) to Curtis, Mallet-Prevost, Colt & Mosle LLP (Mr Vega) of 2 March 2005, **C-205**; Eskdale II, ¶ 17.

295 Eskdale II, ¶ 17 ("*This structuring through appropriate subsidiaries was (and continues to be) a typical aspect of the Glencore group's operating strategy.*").

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207. In sum, in light of the particular socio-political context in which Glencore Bermuda obtained the Assets from Glencore International, it was reasonably foreseeable that the State would

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take action against such Assets. Claimant and Glencore International were – or at least must have been – fully aware of this fact.

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

208. In its Statement of Defence, Bolivia explained that Glencore International merely held indirect ownership in the companies that controlled the Assets. As a result, neither Glencore International nor Claimant made significant investments in Bolivia prior to the reversion of the Assets.[308] Claimant simply responds to Bolivia's allegation in a generic fashion, stating that it had invested "*US$250 million in the Bolivian mining industry.*"[309]

209. Claimant's naked and generic assertion is plainly false. At least four circumstances show that Glencore never made any significant investment in Bolivia:

210. *First*, Mr Villavicencio confirms that neither Comsur nor Glencore made any significant investments in the Tin Smelter. On the contrary, the only amounts disbursed in connection with this Asset were aimed exclusively at maintaining the production levels. They do not constitute an investment. In Mr Villavicencio's words:

> *[C]omo expliqué en mi Primera Declaración Testimonial, durante la administración privada, EMV no realizó inversiones de expansión para incrementar el tratamiento o la producción de estaño metálico sino se limitó a realizar inversiones operativas de, aproximadamente, USD 750.000 anuales. Estas inversiones tenían por objeto mantener estable los índices de producción. Si, como entiendo, Glencore sólo operó Sinchi Wayra por algo más de dos años hasta la reversión de la fundidora de estaño en febrero de 2007, en ese período, Glencore habría invertido, como máximo, alrededor de USD 3 millones en gastos que, en mi opinión, tienen más la connotación de gastos operativos (OPEX) que de inversiones de capital.*[310]

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308 Statement of Defence, ¶¶ 151-154.

309 Reply, ¶ 263.

310 Villavicencio II, ¶ 7 (Unofficial translation: "*[A]s I explained in my first Witness Statement, during the private administration, EMV did not make expansion investments to increase the treatment or production of metallic tin, but merely made operating investments of approximately USD 750,000 per year. These investments were aimed at maintaining production. If, as I understand it, Glencore only operated Sinchi Wayra for just over two years until the reversion of the Tin Smelter in February 2007, during that period, Glencore would have invested, at most, around USD 3 million in expenses that, in my opinion, more so have the connotation of operating expenses (OPEX) than capital investments*"). See also RPA Expert Report, ¶ 202.

211. As discussed above,[311] Mr Villavicencio's opinion is further confirmed by the fact that, between 2000 and 2007, the production levels of high grade tin remained the same as what Claimant refers to as the "*markedly*" reduced production of 1999.[312]

212. What is more, following the reversion of the Tin Smelter in February 2007, the State could confirm that "*la empresa privada operó hasta el límite la maquinaria, agotando su vida útil sin hacer los mantenimientos o inversiones mayores necesarios*."[313] In addition, "*durante la operación privada dejaron fuera de servicio ciertas unidades, como los reverberos 1 y 2 y hornos volatilizadores 1 y 3, reduciendo así la capacidad instalada de la planta de 20.000 a 12.000 [toneladas métricas finas]*."[314]

Ladrillo y chapa metálica del interior del horno rotatorio 3 deteriorado.

Calderín de los hornos reverberos 3 y 4, deteriorado, tras 37 años de funcionamiento.

Sistema de válvulas deterioradas por los años de servicio.

Sistema de bombeo y conductos de refrigeración de agua tratada del horno reverbero 3, con bastantes fugas por corrosión.

311 See Section 2.1.2 above.

312 Reply, ¶ 26.

313 Villavicencio II, ¶ 9 (Unofficial translation: "*the private company operated the machinery to the limit, exhausting its useful life without carrying out the necessary maintenance or major investments*").

314 Villavicencio I, ¶ 41 (Unofficial translation: "*during the private operation, certain units, such as reverberators 1 and 2 and volatilization furnaces 1 and 3 were taken out of service, thus reducing the installed capacity of the plant from 20,000 to 12,000 FMT.*").

Conditions of the equipment of the Tin Smelter as of the reversion of the Asset in February 2007[315]

213. *Second*, it is undisputed that Glencore used the Antimony Smelter only "*as a storage facility*"[316] and never sought to reactivate production or make any investments in this Asset. In addition, as Mr Villavicencio recalls:

> *[C]omo pudimos constatar luego de la reversión de mayo de 2010, EMV utilizaba las partes usadas de los hornos y equipo de la Fundidora para reemplazar partes de los equipos de la Fundidora de Estaño. Como explico en mi Primera Declaración Testimonial, luego de la reversión, levantamos un acta de constatación notarial en la que se evidencia que, para esa época, la Fundidora de Antimonio estaba prácticamente desmantelada. Sinchi Wayra se había llevado hasta el cobre de los cables de los equipos y transformadores de la planta*.[317]

214. The pictures taken in the notarized inventory carried out after the reversion of the Antimony Smelter confirm the deplorable condition of this Asset in May 2010.

DETERIORO EN CUBIERTA DE NAVE DE MATERIAS PRIMAS 	TALLER MECÁNICO DESMANTELADO 

315 Villavicencio I, ¶ 46.

316 Statement of Claim, ¶ 59.

317 Villavicencio II, ¶ 12 (Unofficial translation: "*[a]s we could see after the reversion of May 2010, EMV employed the used parts of the furnaces and equipment of the Smelter to replace parts of the Tin Smelter equipment. As I explain in my First Witness Statement, after the reversionl, we prepared a notary verification in which it is recorded that, at that time, the Antimony Smelter was practically dismantled. Sinchi Wayra had even taken the copper cables from the equipment and transformers of the plant.*").

DETERIORO DE AMBIENTES 	DETERIORO DE AMBIENTES PREPARACION DE CARGA 
Condition of the Antimony Smelter as at 1 May 2010[318]	

215. In short, with regard to the Smelters, it is undisputable that, as Comsur before it, Glencore merely benefitted from investments made by ENAF in the 1990s.

216. *Third*, Claimant fails to identify the significant investments it allegedly made in the Colquiri Mine. Contrary to what Claimant would have this Tribunal believe, those investments were limited and very specific, and amounted to approximately US$ 7 million[319] (*i.e.*, US$ 1 million per year from 2005 to 2012).

217. In addition, as Bolivia already explained, none of the projects listed as investments by Claimant in its Statement of Claim was even started, much less completed, as of the time of the reversion. If Colquiri indeed "*worked on constructing a new tailings plant*"[320] and "*sought to construct a new tailings dam*,"[321] the fact of the matter is that such plant and dam were never built. If Colquiri indeed "*planned on doubling the capacity of the concentrator plant*,"[322] such project was, in reality, never carried out. And if Colquiri did "*design[] a*

318 Notarized Inventory of the Antimony Smelter as of 1 May 2010, **R-84**, pp. 25, 29, 32, 70.

319 Glencore International invested around US$ 2.28 million in the Blanca ramp, US$ 1.36 million in scoops and US$ 4.15 million in equipment. See Moreira, ¶ 26.

320 Statement of Claim, ¶ 52.

321 Statement of Claim, ¶ 57.

322 Statement of Claim, ¶ 53.

principal access ramp that would connect the surface level to a new wider gallery,"[323] the fact is that such project was less ambitious than presented today and had barely started in 2012.[324]

218. *Lastly*, Claimant also contends that its investments would have provided the local community with "*jobs, education, access to healthcare and improved infrastructure.*"[325] In order to support this assertion, it submits documents from 2008, 2010, and 2011,[326] reflecting that Colquiri S.A. barely invested around US$ 48,000 in social programmes over the course of those years (*i.e.*, less than US$ 17,000 per year).[327] With regard to infrastructure projects:

- Claimant submits documents that show that the most significant project ever carried out by Colquiri was the construction of a sports stadium, which amounted to US$ 185,130 dollars in expenditures;[328]

- The company financed the studies preceding the construction of a paved road between the villages of Caracollo and Colquiri, for which it disbursed approximately US$ 43,000[329] (these studies were carried out mainly because the project would have directly benefitted Colquiri's activity, but Colquiri never paved this road);

- Sinchi Wayra provided some limited assistance to the community (including refurbishing a public square in the village of Colquiri and donating an x-ray room to the local hospital), and refurbished the local landfill in exchange for the authorisation to use it as part of its activities of the Mine;[330] and

- Sinchi Wayra only invested approximately US$ 44,000 over 7 years in infrastructure improvement for indigenous communities in the area of influence of the Mine.[331]

219. In short, Sinchi Wayra's community relations programme did not surpass US$ 370,000 invested in 7 years (that is, US$ 52,000 on average per year). These investments amount to a

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323 Statement of Claim, ¶ 55.

324 Moreira, ¶ 46.

325 Reply, ¶¶ 173, 263.

326 Record of Delivering Social Works of 18 November 2008, **C-235**; Authorization for Expenditures for mining training programs for local women of 3 May 2010, **C-241**; Data of Colquiri's Social Impact of 19 November 2011, **C-244**.

327 The approximate conversions to US dollars were based on the Central Bank of Bolivia's historical exchange rates. Historical Exchange Rates from the Central Bank of Bolivia, **R-337**.

328 "Colquiri ya recibió un coliseo, sala de computación y rayos X," *La Patria* of 19 March 2007, **C-72**, p. 2.

329 Examples of Sinchi Wayra's investments in local infrastructure projects, **C-278**, p. 10.

330 Examples of Sinchi Wayra's investments in local infrastructure projects, **C-278**, p. 13; "Colquiri ya recibió un coliseo, sala de computación y rayos X," *La Patria* of 19 March 2007, **C-72**, p. 2.

331 Examples of Sinchi Wayra's investments in local infrastructure projects, **C-278**, pp. 14-17.

quarter of the US$ 1.5 million invested by COMIBOL in community relations in 2014 alone.[332] As explained below,[333] it is therefore unsurprising that, by the time the *cooperativistas* took over the Mine, Sinchi Wayra had practically lost its social license to operate the Mine with the community of Colquiri.

2.7 Contrary to Claimant's Assertion, Bolivia Reverted The Assets For Public Purposes

220. As Bolivia explained in its Statement of Defence, it was foreseeable since, at least, 2003, that the State would revert the Assets. In fact:

- In February 2007, the State reverted the Tin Smelter due to the irregularities which had affected its privatization (**Section 2.7.1**);
- In May 2010, due to its inactivity, the State reverted the Antimony Smelter (**Section 2.7.2**); and
- In June 2012, in order to solve the serious social conflict created at the Colquiri Mine by Glencore International's subsidiary, Sinchi Wayra, the State reverted the Mine Lease (**Section 2.7.3**).

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

221. As explained in the Statement of Defence,[334] the new political context in Bolivia after the *Guerra del Gas* and Sánchez de Lozada's resignation led the State to take further actions concerning the Assets. This was unsurprising, since, as discussed above, the ownership of the Assets had been a sensitive matter in Bolivia from the very moment they were privatized.[335]

222. In this context, and following several inquiries from different State authorities, on 7 February 2007, the State issued the Tin Smelter Reversion Decree,[336] taking into account the irregularities of the privatization discussed in Section 2.4 above.

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332 Colquiri Annual Operations Report for 2015, **R-338**, p. 69; Empresa Minera Colquiri, Minería Responsable y Sustentable, 2017, **R-234**, p. 11.

333 See Section 2.7.3 below.

334 Statement of Defence, ¶¶ 107-119, 156 *et seq.*

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

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

223. [redacted]

224. In the Reply, Claimant contends that the true reason for the reversion of the Tin Smelter was to gain control over the tin supply chain in Bolivia,[338] and that the motives invoked by the State in the Tin Smelter Reversion Decree were devoid of substance.[339] Claimant's argument, however, is based on a mischaracterization of the facts.

225. *First*, as explained in Section 2.4 above, the privatization of the Tin Smelter in the 1990s was conducted in far from regular circumstances. In fact, the Tin Smelter was acquired by Allied Deals, a company accused of having "*contactos no transparentes [con] la gerencia de COMIBOL.*"[340] In addition, not only was Allied Deal's bid non-compliant with the Terms of Reference, but also, as noted by the Tin Smelter Reversion Decree,[341] both the price offered by Allied Deals (some US$ 14 million) and the minimum price proposed by Paribas (US$ 10 million) were unduly low, all the more so since the Smelter was sold together with valuable inventory (worth over US$ 16 million).[342] Lastly, as explained in Section 2.4.1 above, the privatization of the Tin Smelter was carried out without observing constitutional requirements.

226. In addition to the foregoing, it is undisputed that, following the irregular privatization of the Tin Smelter, this Asset was acquired by Comsur (then controlled by Sánchez de Lozada). Since then, there have been calls for reversion of the Tin Smelter because of its irregular privatization.[343] That the Government would likely attend to these calls became clearer following Sánchez de Lozada's resignation in October 2003. [redacted]

337 [redacted]

338 Reply, ¶ 84.

339 Reply, ¶ 81.

340 Letter from Foreign Trade and Investment Minister to the Executive President of COMIBOL of 18 February 1999, **R-115**; Statement of Defence, ¶ 72 (Unofficial translation: "*non-transparent contacts [with] the management of COMIBOL*").

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

342 Statement of Defence, ¶¶ 76-77.

343 Statement of Defence, ¶ 85. See also Section 2.4 above.

344 [redacted]

227. *Second*, Claimant suggests that Sinchi Wayra's cooperation in providing information to Bolivian authorities regarding the acquisition of Comsur by Glencore International would have made the reversion unwarranted.[345] Claimant's contention misses the point. Sinchi Wayra's reluctance to provide the Government with relevant information shows that Glencore International knew of the risks inherent to the acquisition of this Asset (including reversion).

228. As explained above,[346] the record shows that Sinchi Wayra was reluctant to provide the Bolivian authorities with proper information about Sánchez de Lozada's participation in the sale of the Assets. These requests did not come only "*from a single [...] senator.*"[347] Rather, they came as early as January 2005 from COMIBOL and the Ministry of Mining, who learned through the media that Sánchez de Lozada had sold (or was to sell) the Assets controlled by Comsur.[348] Sinchi Wayra's responses to the Government's request were vague ("*a chart [...] showing the shareholding of Glencore [International] in Sinchi Wayra*"[349]), formalistic ("*[l]as acciones de Comsur S.A., sea en parte o en su totalidad, no han sido transferidas a ninguna persona individual o colectiva*"[350]), and never explained to the government any details of the transaction pursuant to which Comsur was acquired from Sánchez de Lozada. In addition, as discussed above, Claimant has failed to produce any witnesses or documentary evidence of the meeting Glencore International would have supposedly held with the Government after it had acquired the Assets from Sánchez de Lozada.[351]

229. In short, Sinchi Wayra's reluctance to explain the details of the transaction to different Bolivian authorities shows that Glencore International was perfectly aware of the risks inherent in the acquisition of the Assets and of the measures the Government could take against them. As Glencore International's internal documents show, it knew that "*there [was] clearly a risk that Goni's personal issues might have a bearing on the group's sale.*"[352]

[redacted].

345 Reply, ¶ 83.

346 See Section 2.5.3 above.

347 Reply, ¶ 83.

348 Letter from the Vice Minister of Mining to Glencore of 17 January 2005, **C-63**; Letter from Comsur (Sinchi Wayra) to COMIBOL of 17 February 2005, **R-189**.

349 Letter from Pestalozzi Lachenal Patry (Mr Pestalozzi) to Senate of Bolivia (Ms Velásquez) of 10 January 2007, **C-225**.

350 Letter from Comsur (Mr Urjel) to Comibol (Mr Tamayo of 3 March 2005, **C-206** (Unofficial translation: "*[t]he shares of Comsur S.A., either in part or in their entirety, have not been transferred to any individual or collective*").

351 See Section 2.5.3 above.

352 Glencore inter office correspondence from Mr Eskdale to Mr Strothotte and Mr Glasenberg of 20 October 2004, **C-196**.

230. *Third*, to claim that the State reverted the Tin Smelter because it would be a "*profitable*"[353] action is also inaccurate.

231. One, it is true that, prior to the reversion, the State assessed in a technical report the benefits that could be derived from the Tin Smelter.[354] There is nothing wrong with this, as the report cited by Claimant is nothing else but the "*justificación técnica de la reversión*"[355] (not the *justificación jurídica*, described above).

232. Two, Claimant omits that, in its report, COMIBOL noted that "*las diferentes empresas que han usufructuado la planta de Vinto, no han realizado ninguna inversión que pueda ser mencionada, por lo que la reversión deberá en primer lugar realizar un análisis sobre el estado de toda la maquinaria, vale decir se debe realizar una auditoría técnica.*"[356] Any potential benefit derived from the reversion (including by purportedly taking advantage of a peak in the international prices) would be curbed by the investments that, in all probability, the State would be required to make (and that neither Comsur nor Sinchy Wayra ever made).

233. As discussed above, as of the time of the reversion, "*la empresa privada operó hasta el límite la maquinaria, agotando su vida útil sin hacer los mantenimientos o inversiones mayores necesarios.*"[357] In addition, "*durante la operación privada dejaron fuera de servicio ciertas unidades, como los reverberos 1 y 2 y hornos volatilizadores 1 y 3, reduciendo así la capacidad instalada de la planta de 20.000 a 12.000 [toneladas métricas finas].*"[358] After the privatization, the State invested over US$ 39 million in overhauling existing equipment and modernising the Tin Smelter to ensure that it was a world class producer of high grade tin.[359]

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353 Reply, ¶ 84.

354 COMIBOL, Report on the reversion of the Complejo Metalúrgico Vinto to the Bolivian State of 29 January 2007, **R-247**.

355 COMIBOL, Report on the reversion of the Complejo Metalúrgico Vinto to the Bolivian State of 29 January 2007, **R-247**, p. 2 (Unofficial translation: "*technical justification for the reversion*").

356 COMIBOL, Report on the reversion of the Complejo Metalúrgico Vinto to the Bolivian State of 29 January 2007, **R-247**, p. 2 (emphasis added) (Unofficial translation: "*the different companies that have used the Vinto plant have not made any investment worth mentioning, so the reversion must first carry out an analysis on the state of all machinery, that is to say, a technical audit must be conducted.*").

357 Villavicencio II, ¶ 9 (Unofficial translation: "*the private company operated the machinery to the limit, exhausting its useful life without making the major maintenance or investments necessary*").

358 Villavicencio I, ¶ 41. (Unofficial translation: "*during the private operation, certain units, such as reverberators 1 and 2 and volatilization furnaces 1 and 3 were taken out of service, thus reducing the installed capacity of the plant from 20,000 to 12,000 FMT.*").

359 Villavicencio I, ¶ 48.

234. In short, it is hard to believe that the State saw the reversion of the Tin Smelter as a "*profitable*" measure, since, for it to be "*profitable*," it had to invest over 10 times[360] what Sinchi Wayra had invested during the years it controlled this Asset.

235. *Fourth*, while it is true that police and military were present during the ceremony for the enactment of the Tin Smelter Reversion Decree, Claimant's suggestions of abusive conduct by the Bolivian public force[361] are misplaced. As explained in the Statement of Defence, the public force ensured the peaceful transition of control over the Tin Smelter (as it indeed occurred).[362] This is all the more so since, as Mr Villavicencio explains, the activity of the Tin Smelter was not interrupted because of the reversion.[363]

236. *Lastly*, Claimants suggest that the State would not pay compensation for the reversion of the Tin Smelter because the Reversion Decree did not foresee a specific provision in this regard.[364] While, as explained below,[365] Bolivia is bound by a strict confidentiality obligation (and cannot disclose the contents of any discussions it had with Glencore International), it is undisputed that the Negotiations to reach an amicable solution to this dispute (including compensation) lasted almost 10 years. Had Bolivia's intention been not to pay any compensation for the Tin Smelter, Glencore International would not have waited such a long period of time before commencing these proceedings.

2.7.2 Bolivia Reverted The Antimony Smelter Due To Its Inactivity

237. It is undisputed that, in spite of the fact that "*la producción, las exportaciones, el empleo y la productividad*"[366] were established as goals to be achieved in the norms for the privatization, neither Comsur nor Sinchi Wayra sought to reactivate production at the Antimony Smelter.[367]

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360 Villavicencio II, ¶ 7 ("*Si, como entiendo, Glencore sólo operó Sinchi Wayra por algo más de dos años hasta la reversión de la fundidora de estaño en febrero de 2007, en ese período, Glencore habría invertido, como máximo, alrededor de USD 3 millones en gastos que, en mi opinión, tienen más la connotación de gastos operativos (OPEX) que de inversiones de capital*") (Unofficial translation: "*If, as I understand it, Glencore only operated Sinchi Wayra for just over two years until the reversion of the Tin Smelter in February 2007, during that period, Glencore would have invested, at most, around USD 3 million in expenses that, in my opinion, have more the connotation of operating expenses (OPEX) than capital investments.*").

361 Reply, ¶ 76.

362 Statement of Defence, ¶ 160.

363 Villavicencio II, ¶ 10 ("*[M]e consta que la Fundidora de Estaño no paralizó sus operaciones (ni siquiera luego de la reversión) y que la transición hacia la operación por el estado no tuvo contratiempos notorios*") (Unofficial translation: "*I know for a fact that the Tin Smelter did not stop its operations (not even after the reversion) and that the transition to the operation by the State did not experiences any noticeable setbacks*").

364 Reply, ¶ 87.

365 See Section 2.8 below.

366 Supreme Decree No. 23.991 of 10 April 1995, **R-100**, Article 2(c) (Unofficial translation: "*production, exports, employment and productivity*").

367 Reply, ¶¶ 97-98.

Other than occasionally using it as a storage facility, Claimant never attempted to use this Asset in any meaningful way (*i.e.*, by adapting its facilities to process tin concentrates or by developing any other activity related to the thriving metallurgical industry of Oruro).

238. It is also undisputed that, as stated in Section 2.5.2 above, Bolivia enacted a new Constitution. Pursuant to Article 396 thereof, the State is "*responsable de las riquezas mineralógicas que se encuentren en el suelo y subsuelo cualquiera sea su origen y su aplicación será regulada por la ley*" and "*ejercerá control y fiscalización en toda la cadena productiva minera.*"[368] These new principles governing the activity of the State in the mining sector were also supported by the Government's development plan.[369]

239. Given that the inactivity of the Antimony Smelter was unacceptable under both the principles of the privatization and the constitutional framework (in both the previous and the new Constitutions), on 1 May 2010, Bolivia issued a decree reverting the Antimony Smelter (the "**Antimony Smelter Reversion Decree**"), noting the Asset's inactive status despite the acquirer's commitments to reactivate it.[370]

240. In its Reply, Claimant contests Bolivia's position, alleging that the Antimony Smelter contract (the "**Antimony Smelter Contract**") contained no obligation to reactivate production at the Smelter,[371] and that the "*true reason*" for the reversion instead related to the State's

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

369 Supreme Decree No. 29.272 of 12 September 2007, **R-169**, p. 160 ("*La intervención del Estado en el desarrollo minero será con facultades de control, fiscalización y promoción en todo el circuito productivo, desde la otorgación de concesiones mineras hasta la industrialización, restituyendo a COMIBOL su rol productivo y mejorando la participación del Estado en los beneficios de la actividad minera vía régimen impositivo. Asimismo, la intervención del Estado se manifestará en control y participación en la implementación de medidas que contribuyan a un mejor desempeño ambiental sostenible de los operadores mineros*") (Unofficial translation: "*The State's intervention in mining development shall be with the functions of control, audit and promotion in any production process, from the granting of mining concessions until industrialization, restoring to COMIBOL its productive role and improving the State's participation in the mining activity through the tax regime. Similarly, the State's intervention will reflect in the control of and participation in the implementation of measures that contribute to a sustainable environmental performance of mining operators*").

370 Supreme Decree No 499 of 1 May 2010, **C-26**, recitals ("*Que en los últimos años se evidenció la inactividad productiva de la Planta Metalúrgica Vinto Antimonio, así como su desmantelamiento, no obstante haberse estipulado en el pliego de condiciones las obligaciones de invertir y fortalecer la Empresa Metalúrgica Vinto Antimonio con capacidad económica, financiera y técnica, que permita el ingreso de capital, tecnología, prácticas comerciales y de gestión privada, posibilitando a la Fundición continuar la producción, constituyéndose en una fuente de generación de empleo, tributos y de externalidades, en apoyo a la actividad minera de explotación y concentración de antimonio en el país*") (Unofficial translation: "*In recent years, the inactivity of the Metallurgical Company Vinto Antimonio became obvious, as well as its dismantling, notwithstanding that the terms of reference provided for the obligation to invest in and reinforce the Metallurgical Company Vinto Antimonio with economic, financial and technical capacity, that would allow the inflow of capital, technology, commercial practices and private management, permitting the Smelter to continue production, becoming a source for the generation of employment and tax, in support of the mining activity of exploitation and concentration of antimony in the country*").

371 Reply, ¶ 101.

commercial interest in gaining access to the 161 tonnes of tin stored at this facility (the "**Tin Stock**").[372] Claimant's allegations are simply unsupported.

241. *First*, Claimant cannot seriously contend that no contractual obligation to activate the Antimony Smelter existed.[373] Pursuant to Article 2.7 of the Antimony Smelter Contract, "*El PLIEGO establece en su numeral 1.4 que tiene por objeto la transferencia a título oneroso de la FUNDICIÓN, a favor de una empresa especializada con capacidad económica, financiera y técnica, que permita el ingreso de capital, tecnología, prácticas comerciales y de gestión privada, posibilitando a la FUNDICIÓN continuar la producción constituyéndose en una fuente de generación de empleo y tributos, en apoyo a la actividad minera de explotación y concentración de antimonio u otros minerales en el país.*"[374]

242. Article 23.1 of the Terms of Reference further provides that "*[f]orma parte integrante e indivisible de este CONTRATO el PLIEGO. Todo lo que no fuere contemplado en el contrato será complementado por el PLIEGO.*"[375] Thus, the obligations set out in the Antimony Smelter Contract must be construed in accordance with (not independently from) the provisions of the Terms of Reference.

243. Claimant suggests that the lack of parameters to measure the performance of the Smelter and the production of antimony shows that no such obligation to bring it into production exists. Claimant does not provide any support for this purported interpretation of Bolivian law. To the contrary, Claimant's interpretation of the Antimony Smelter Contract is contrary to Article 520 of the Bolivian Civil Code, according to which a contract "*debe ser ejecutado de buena fe y obliga no sólo a lo que se ha expresado en él, sino también a todos los efectos que deriven conforme a su naturaleza, según la ley, o a falta de ésta según los usos y la equidad.*"[376]

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372 Reply, ¶ 104.

373 Reply, ¶ 102.

374 Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**, Article 2.7 (emphasis added).

375 Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**, Article 23.1 (emphasis added) (Unofficial translation: "*[F]orm an integral and indivisible part of this CONTRACT the TERMS OF REFERENCE. Everything that is not contemplated in the contract will be complemented by the TERMS OF REFERENCE*").

376 Civil Code of Bolivia of 2 April 1976, **C-52**, Article 52 (Unofficial translation: "*must be executed in good faith and binds not only to what has been expressed within, but also to all the effects deriving from its nature, according to the law, or in its the absence according to usages and equity*").

244. *Second*, to suggest, as Claimant does, that the State reverted the Antimony Smelter because it needed to gain access to a steady flow of tin concentrates for the Tin Smelter is preposterous.

245. One, it is undisputed that, prior to the reversion, the State had no oversight whatsoever over Sinchi Wayra's activities at the Antimony Smelter (in fact, as explained above,[377] it only discovered that Sinchi Wayra had dismantled this Asset after the enactment of the Antimony Smelter Reversion Decree). Thus, the State was unaware of the existence of the Tin Stock prior to accessing the Smelter on 1 May 2010.[378]

246. Two, as Mr Villavicencio explains, as of 2010, the Tin Smelter was not running short on tin concentrates, as the Huanuni mine had been providing the Tin Smelter with around 16,600 million tons of concentrates per year since 2008.[379] In Mr Villavicencio's words, "*los concentrados de Huanuni (alrededor de 1383 toneladas por mes en la época), sumados a las reservas acumuladas, eran más que suficientes para abastecer a EMV al momento de la reversión de la Fundidora de Antimonio.*"[380]

247. In this connection, Mr Villavicencio explains that the true reason why EMV stopped purchasing tin concentrates from Sinchi Wayra was not alleged financial difficulties.[381] Rather, EMV took this decision because the supply agreement it had concluded with Sinchi Wayra was extremely onerous.[382] Other suppliers from the market were more suitable to the operation and finances of the Tin Smelter.[383]

248. Three, the Tin Stock – which comprised only 160 tons of tin concentrates – could never palliate an alleged shortage of tin concentrates. As Mr Villavicencio explains, that amount of concentrate would have allowed the Tin Smelter to run for a total of four days only.[384]

249. *Third*, Claimant takes the view that the Tin Stock "*did not form part of the assets of the Antimony Smelter*,"[385] yet when Glencore International sent a letter to the Bolivian President

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377 See Section 2.6 above.

378 Villavicencio II, ¶ 15.

379 Tin concentrates purchased from the Huanuni mine (2008-2010), **R-281**, p. 1.

380 Villavicencio II, ¶ 18 (Unofficial translation: "*the Huanuni concentrates (around 1383 tons per month at the time), added to the accumulated reserves, were more than enough to supply EMV at the time of the reversal of the Antimony Smelter*").

381 Villavicencio II, ¶¶ 21-24.

382 Villavicencio II, ¶ 22.

383 Villavicencio II, ¶ 23.

384 The Tin Smelter could process more than 25,161 tons of tin concentrates per year. Villavicencio II, ¶ 16; Complejo Metalúrgico Vinto S.A., 2006, Vinto S.A. December 2006 Report (Extracts), **RPA-21**, p. 3.

385 Reply, ¶ 106.

complaining about the "*nacionalización de la fundición de antimonio*,"[386] it did not refer to the Tin Stock. In the eyes of Glencore International itself, the Tin Stock was not part of the dispute it was to negotiate with the State. Furthermore, it is undisputed that it was Colquiri, not Glencore International, who sent several letters to the Bolivian authorities requesting the Tin Stock to be returned.[387]

250. *Fourth,* Claimant's contention regarding the "*limited domestic supply and low international antimony prices*" is irrelevant to its obligation to put the Antimony Smelter into production.[388] Article 2.7 of the Antimony Smelter Contract clearly established the possibility of using the plant to process other minerals, since the smelter should be in production "*en apoyo a la actividad minera de explotación y concentración de antimonio u otros minerales en el país.*"[389] In fact, [redacted][391] Claimant, therefore, simply decided not to put the Antimony Smelter into production violating its contractual obligations.

251. *Fifth*, as explained below, it is equally disingenuous to suggest that Bolivia did not negotiate in good faith, when the Negotiations to seek an amicable solution of the dispute concerning the Antimony Smelter lasted no less than 6 years.[392]

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

252. The social tensions between the official workers of Colquiri and the *cooperativas* increased over the years following Glencore International's acquisition of the Mine Lease. Under Sinchi

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

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

388 Reply, ¶ 97.

389 Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**, Article 2.7 (emphasis added) (Unofficial translation: "*in support of the mining exploitation and concentration of antimony or other minerals in the country*").

390 [redacted]

391 US Geological Survey Minerals Yearbook 2000, "The Mineral Industry of Bolivia", **C-177**, p. 3.4 ("*According to industry sources, conversion of the existing smelting facility to treat other metals, such as zinc or tin, lay behind the recent interest from Allied and Comsur to acquire the assets. Having failed to purchase Vinto's tin smelter, CDC may well seek to add value to its earlier purchase of the Colquiri Mine by converting the antimony plant to treat tin*").

392 See Section 2.8 below.

Wayra's administration, these tensions translated in mid-2012 into an unmanageable conflict, which left the State with no other option but to revert the Mine Lease.[393]

253. Confronted with these facts, Claimant's Reply now raises new – yet equally unavailing – arguments. According to Claimant, the State would have:

- Agreed with the Colquiri workers to revert the Mine Lease in May 2012;[394]
- Excluded Colquiri from the negotiation of the new joint venture agreement that also comprised Sinchi Wayra's mining rights over the mines of Porco and Bolívar (still operated by Glencore until today);[395] and
- Exacerbated the tensions between the *cooperativas* and the workers of Colquiri in order to gain control over the Mine.[396]

254. Claimant's allegations are utterly unsupported and contradicted by the record. Sinchi Wayra's mismanagement of its relations with the *cooperativas* (**Section 2.7.3.1**) made the intervention of the government to revert the Colquiri Mine Lease inevitable. It is therefore disingenuous to claim, as Claimant does, that Bolivia would have already decided to revert the Mine Lease prior to the social conflict that took place in May and June 2012 (**Section 2.7.3.2**).

255. In addition to creating an unprecedented conflict at the Mine in 2012, Sinchi Wayra entered into contradictory agreements with the *Cooperativa 26 de Febrero* – most notably, the Rosario Agreement of 7 June 2012 (the "**Rosario Agreement**") (**Section 2.7.3.3**). These agreements made it even more challenging for the State to find a solution to the conflict that could be acceptable to both the Colquiri union leaders and the *cooperativistas*, and prolonged the conflict for several months after the reversion of the Mine Lease (**Section 2.7.3.4**).

256. Lastly, Claimant incorrectly contends that the Government's actions to put an end to the social conflict at Colquiri were ineffective. No violent events (and, certainly, no events comparable to those provoked by Sinchi Wayra in 2012) have taken place in Colquiri ever since (**Section 2.7.3.5**).

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393 Statement of Defence, ¶¶ 169 *et seq.*

394 Reply, ¶ 119.

395 Reply, ¶ 118.

396 Reply, ¶ 167.

2.7.3.1 Claimant Is Unable To Disprove That, During The Time Glencore International Controlled The Colquiri Mine, The Tensions Between Cooperativistas And Workers Increased

257. Bolivia demonstrated in its Statement of Defence that Glencore International inherited the problems created by Comsur's mismanagement of the social conflicts at the Colquiri Mine, as explained in Section 2.5.1 above. These problems were not resolved in the following years. On the contrary, under Sinchi Wayra's administration, and in the new political context developing in Bolivia since 2003, the *cooperativistas*' ambitions to take over new parts of the Mine gradually increased, whilst conflicts with the workers of the company worsened.[397]

258. In its Reply, Claimant attempts to contradict Bolivia's arguments by suggesting that (i) COMIBOL would have had an active role in the management of the relationship between the Cooperativas and the social areas assignment of areas in the Mine, and (ii) Sinchi Wayra implemented effective measures to keep the *cooperativas* in check. Claimant's description of Sinchi Wayra's relationship with the *cooperativas* – and the role played by COMIBOL in this connection – is, however, simplistic and inaccurate.

259. *First*, while COMIBOL "*held the authority to cede working areas to the cooperativas*,"[398] it did not carry out an active role in managing the relationship between these independent mining workers and Sinchi Wayra. As Mr Córdova, former President of COMIBOL recalls:

> *El área que había sido cedida más recientemente [a mi llegada a la presidencia de COMIBOL] correspondía al nivel -325 de la Mina, autorizada en octubre de 2009. En este acuerdo, como en otros anteriores, COMIBOL intervino como titular de los recursos naturales para cederlos a la Cooperativa 26 de Febrero después de que Sinchi Wayra accedió a ello.*
>
> *Lo anterior no significa, sin embargo, que COMIBOL tuviese un rol activo en la relación con las cooperativas de Colquiri o la negociación de estas cesiones. Por el contrario, las relaciones con estas cooperativas eran gestionadas casi exclusivamente por Sinchi Wayra. Según fui informado, desde poco tiempo después de mi posesión, en la mayoría de ocasiones, las cooperativas sólo venían a ver a COMIBOL para formalizar acuerdos que ya habían alcanzado con la empresa.*[399]

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397 Cachi I, ¶¶ 24-30.

398 Reply, ¶ 151.

399 Córdova, ¶¶ 44-45 (Unofficial translation: "*The area that had been ceded most recently [on my accession to the presidency of COMIBOL] corresponded to level -325 of the Mine, authorized in October 2009. In this agreement, as in previous ones, COMIBOL intervened as the owner of the natural resources to cede them to the Cooperativa 26 de Febrero after Sinchi Wayra had agreed to it. This does not mean, however, that COMIBOL had an active role in the relationship with the Colquiri cooperatives or in the negotiation of these assignments. On the contrary, relations with these cooperatives were managed almost exclusively by Sinchi Wayra. As I was informed, as of shortly after taking office, in most cases, the cooperatives only came to see COMIBOL to formalize agreements that had already reached with the company.*").

260. The documents adduced by Claimant further support Mr Córdova's statement. As a matter of fact, the assignment of level -325 to the *cooperativas* in 2009 was preceded by a request made directly by the *Cooperativa 26 de Febrero* to Colquiri.[400] Following that request, Colquiri and the *cooperativistas* reached an "*acuerdo preliminar*"[401] without COMIBOL's involvement (as discussed above, this practice had already been established by Comsur[402]). In addition, at Sinchi Wayra's suggestion, the technical assessment for the viability of the assignment and the exploitation of level -325 was to be carried out between the company and the *Cooperativa 26 de Febrero* exclusively.[403]

261. In light of this, it was up to Sinchi Wayra to alert COMIBOL if the proposed course of action for managing its relations with the *cooperativas* was threatening the viability of the Mine's operations. However, as discussed below, Sinchi Wayra only did so when a conflict of major proportions was already inevitable.

262. *Second*, contrary to Claimant's contention,[404] the formal agreements entered into by COMIBOL, Colquiri, and the *cooperativas* were not properly enforced. As Mr Mamani recalls:

> *[E]l Señor Lazcano afirma que no es cierto que todos los años Sinchi Wayra cediese a la Cooperativa 26 de Febrero nuevas áreas en el interior de la Mina. Puede que estos acuerdos no se hayan formalizado con la COMIBOL, como hizo Sinchi Wayra en ciertas ocasiones. Sin embargo, todos los años encontrábamos a cooperativistas en niveles cada vez más profundos, con mayor frecuencia y con la aceptación de Sinchi Wayra. Si la presencia de los cooperativistas en estas áreas no era*

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400 Preliminary Agreement between Comibol and Colquiri to Authorize Mining Works in an Area of Level 325 of the Colquiri Mine of 13 January 2009, **C-237**, p. 1 ("*La COOPERATIVA ha solicitado a COLQUIRI, sobre la base de un convenio suscrito entre ambas partes el 21 de mayo de 2004, la posibilidad de trabajar en un área del Nivel 325 del Centro Minero Colquiri*") (Unofficial translation: "*The COOPERATIVE requested from COLQUIRI, on the basis of an agreement executed by both parties on 21 May 2004, the possibility to work in an area of Level 325 of the Colquiri Mining Centre*").

401 Letter from Compañía Minera Colquiri S.A. to COMIBOL of 14 January 2009, **R-339** (Unofficial translation: "*preliminary agreement*").

402 See Section 2.5.1 above. See also Letter from Compañía Minera Colquiri S.A. to COMIBOL of 19 December 2003, **R-303**; Letter from Compañía Minera Colquiri S.A. to COMIBOL of 17 March 2005, **R-304**.

403 Letter from COMIBOL to Compañía Minera Colquiri of 26 March 2009, **R-340**, ("*[L]as sugerencias de la Compañía Minera Colquiri de conformar una comisión técnica conjunta Cooperativa-Compañía con la finalidad de evaluar el total de reservas existentes tanto en niveles, cabeceras, bocaminas, identificando de esta manera las reservas que podrían ser explotadas y distribuidas a los socios, cuya información estaría plasmada en un informe técnico circunstanciado*") (Unofficial translation: "*[T]he suggestions of the Colquiri Mining Company to créate a joint technical commission between the cooperativa and Colquiri with the aim of evaluating the existing reserves on the levels, mains, mine mouths, thus identifying the reserves that could be exploited and distributed to Partners, information which would be recorded in a detailed technical report*").

404 In its Reply, (¶ 158) Claimant suggest that Sinchi Wayra had put in place an effective policy (i) to establish security areas in order to restrict the *cooperativistas* access to certain areas of the Mine, (ii) to prohibit the use of the Company's same access routes, and (iii) to even void the agreements in case they were breached by the *cooperativistas*.

autorizada, en cualquier caso, ninguna medida tomada por Sinchi Wayra era efectiva para controlarlos.[405]

263. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

405 Mamani II, ¶ 17 (Unofficial translation: "*Mr Lazcano affirms that it is not true that every year Sinchi Wayra transferred new areas inside the Mine to the Cooperativa 26 de Febrero. These agreements may not have been formalized before COMIBOL, as Sinchi Wayra did on certain occasions. However, every year we found cooperativistas at increasingly deeper levels, more often and with the acceptance of Sinchi Wayra. In any case, if the presence of cooperativistas in these areas was not authorized, no action taken by Sinchi Wayra was effective to control them*").

406 Reply, ¶ 157.

407 Cachi II, ¶¶ 8-9.

408 [redacted]

409 [redacted]

[redacted]

264. In addition, as Mr Mamani explains, "*el descontento de los trabajadores con Sinchi Wayra no solamente venía de la cesión de áreas. Una de las principales causas de nuestro descontento era que las áreas que Sinchi Wayra cedía eran, generalmente, zonas que venían de ser adecuadas por los trabajadores y que estaban listas para la explotación. En otras palabras, el sentimiento de los trabajadores era que nosotros hacíamos todo el trabajo pesado de adecuar las áreas para que, luego, los cooperativistas pudiesen explotarlas con la aceptación de Sinchi Wayra*."[412]

265. It is therefore unsurprising that Colquiri (under Sinchi Wayra's administration) often recorded tensions and "*presiones de parte de las dos cooperativas que trabajan, una en la mina y, la otra en las colas antiguas*"[413] as material facts in its annual reports.[414]

[redacted]

410 Cachi II, ¶ 11. See also Colquiri internal report concerning ore bought and/or transported for the *Cooperativa 26 de Febrero* of 15 December 2007, **R-198**; Colquiri internal report concerning ore bought and/or transported for the *Cooperativa 26 de Febrero* of 21 April 2008, **R-199**; Colquiri internal report concerning ore bought and/or transported for the *Cooperativa 26 de Febrero* of 17 April 2007, **R-200**; Proof of payment for the transport of ore for the *Cooperativa 26 de Febrero* of 21 October 2007, **R-201**; Proof of payment for the transport of ore for the *Cooperativa 26 de Febrero* of 20 November 2007, **R-202**; Proof of payment for the transport of ore for the *Cooperativa 26 de Febrero* of 7 January 2008, **R-203**; Colquiri internal report concerning ore transported for the *Cooperativa 26 de Febrero* of 25 May 2008, **R-204**; Colquiri internal report concerning ore transported for the *Cooperativa 26 de Febrero* of 29 June 2008, **R-205**.

411 Cachi II, ¶ 10.

412 Mamani II, ¶ 18 (emphasis added) (Unofficial translation: "*the discontent of the workers with Sinchi Wayra did not only come from the cession of areas. One of the main causes of our discontent was that the areas that Sinchi Wayra yielded were, generally, areas that had been prepared by the workers and that were ready for exploitation. In other words, the feeling of the workers was that we did all the heavy lifting to adapt the areas so that, later, the cooperativistas could exploit them with Sinchi Wayra's acceptance*").

413 Colquiri S.A. Annual Report for 2005, November 2005, **R-194**, p. 1 (emphasis added) (Unofficial translation: "*pressure from the two cooperatives which work, one in the mine and the other one at the old tailings dam*").

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

266. *Third*, Claimant cannot claim that it would have had the generalized "*support*"[415] of Colquiri's *Sindicato Mixto de Trabajadores Mineros de Colquiri* (the "**SMTC**" or the "**Colquiri Union**") resulting from a "*diálogo fluido y cordial con las autoridades del Sindicato.*"[416] In Mr Mamani's opinion, "*siempre dejamos claro a Sinchi Wayra que nuestro apoyo a su permanencia en la Mina estaba condicionado a que ésta garantizara nuestra seguridad laboral. Por ejemplo, fue por nuestras amenazas de huelga y presiones como organización (y no por una supuesta relación cordial con la empresa) que Sinchi Wayra no realizó despidos masivos en 2009, cuando los precios del estaño estaban deprimidos.*"[417]

267. [redacted]

268. [redacted]

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dam."). See also Colquiri S.A., Annual Report for 2008 of 22 January 2009, **R-209**, p. 2 ("*las cooperativas mineras del sector siguen demandando a la empresa que se les entregue más áreas de trabajo*") (Unofficial translation: "*the mining cooperatives in the sector continue to request that the company award them more working areas*").

415 Reply, ¶ 122.

416 Lazcano II, ¶ 18.

417 Mamani II, ¶ 13 (Unofficial translation: "*We always made it clear to Sinchi Wayra that our support for its stay at the mine was conditioned on it guaranteeing our job security. For example, it was because of our strike threats and pressure as an organization (and not because of a supposedly friendly relationship with the company) that Sinchi Wayra did not pursue mass layoffs in 2009, when tin prices were low.*"). See also Press release of the *Federación Sindical de Trabajadores Mineros de Bolivia* of 9 January 2009, **R-20**.

418 [redacted]

419 [redacted]

420 [redacted]

269. [redacted]

270. In sum, under Sinchi Wayra's administration, Colquiri's consistent and considerable leniency with the *cooperativas* over the years aggravated tensions with the mining workers, and encouraged them to request and take over new areas at the Mine. Claimant has been unable to disprove these facts. As discussed below, Colquiri's conduct progressively made operating the Mine considerably more difficult. This would encourage the *cooperativistas* to take over the Mine in 2012.

2.7.3.2 The State Had Not Decided to Revert The Mine Lease Prior to the Social Conflict Created By Sinchi Wayra

271. Unable to prove that Sinchi Wayra properly managed social relations at the Colquiri Mine, Claimant now concocts an entirely new theory: "*by [May 2012], the Government had already decided to nationalize the Colquiri Lease*."[422] This would allegedly be further confirmed by the fact that the Government would have decided to exclude the Colquiri Mine from the negotiations of the joint venture agreement that, at that time, Sinchi Wayra was negotiating with the State. Claimant's allegations in this regard are utterly unsupported.

272. *First*, Claimant relies on minutes of a meeting between the Government and union workers at Huanuni of 10 May 2012 (the "**May 2012 Minutes**") to suggest that the State decided to revert the Mine Lease during that meeting.[423] This is another mischaracterisation of the facts.

273. One, as Mr Córdova explains, pursuant to the new constitutional framework, COMIBOL was to have a more important role in the mining sector. This, however, did not mean that the State

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421 [redacted]

422 Reply, ¶ 119.

423 Agreement of 10 May 2012, **C-256**.

would disregard private operators' pre-existing rights or nationalise all the mines they were operating. In Mr Córdova's words:

> *[E]s cierto que muchas voces en los grupos sindicales y, en particular, una sección de la Federación Sindical de Trabajadores Mineros de Bolivia ('FSTMB') había solicitado recurrentemente al Gobierno nacionalizar los yacimientos mineros en aplicación de las nuevas políticas del Estado. Sin embargo, el Gobierno condicionó esta propuesta a la aceptación de la misma por parte de los sindicatos de las empresas privadas. Ello explica que, hoy por hoy, siga habiendo operaciones mineras privadas, del Estado y del sector cooperativista de manera exitosa. Así es el caso de las minas Porco y Bolívar (operadas por Sinchi Wayra, del Grupo Glencore) o la mina San Vicente (operada por la canadiense Pan American Silver). También es el caso de la mina San Cristóbal, un yacimiento de minerales complejos de zinc, plomo y plata a cielo abierto de clase mundial operado por la compañía Sumitomo en el departamento de Potosí que extrae cada día 150.000 toneladas de mineral y comercializa concentrado cuyo valor sobrepasó los mil millones de dólares anuales el año pasado.*[424]

274. Two, the May 2012 Minutes reflect a meeting between the Government and the Union of Huanuni (not Colquiri). It would simple not make any sense for the Government to agree on the reversion of the Mine Lease without seeking support from the unions of that very Mine. Mr Mamani notes that "*el acta a la que se refiere la Demandante no es un acuerdo entre el sindicato de Colquiri y el Gobierno nacional. Por ello, no puede expresar la voluntad ni el acuerdo de nacionalizar la Mina. Como mencioné anteriormente, el Gobierno suele tener reuniones para discutir la política minera con representantes sindicales de todo el sector pero las decisiones específicas que afectan a una mina en particular deben ser discutidas y aprobadas por sus trabajadores y no por las organizaciones sindicales nacionales.*"[425]

275. Three, Claimant also omits that the May 2012 Minutes were made within the framework of the Mining Unions Congress convened by the *Federación Sindical de Trabajadores Mineros de Bolivia* (the "**FSTMB**"). That congress took place in the city of Potosí in September

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[424] Córdova, ¶¶ 35-36 (Unofficial translation: "*[I]t is true that many voices in the trade union groups and, in particular, a section of the Federación Sindical de Trabajadores Mineros de Bolivia ('FSTMB') had repeatedly requested the Government to nationalize the mining deposits in application of the new State policies. However, the Government conditioned this proposal to its acceptance by the unions of private companies. This explains why, today, private, State and cooperative sector mining operations continue to be carried out successfully. This is the case, for example, of the Porco and Bolivar mines (operated by Sinci Wayra of the Glencore group) or of the San Vicente mine (operated by the Canadian [company] Pan American Silver. It is also the case of the San Cristóbal mine, a complex world-class open-pit deposit of zinc, lead and silver operated by the Sumitomo company in the Potosí department, which extracts 150,000 tons of ore every day and commercializes concentrate the value of which surpassed one billion dollars per year last year*").

[425] Mamani II, ¶ 28 (Unofficial translation: "*the act referred to by the Claimant is not an agreement between the Colquirí union and the national Government. Therefore, it can not express the will nor the agreement to nationalize the Mine. As I mentioned earlier, the government usually has meetings to discuss mining policy with union representatives from across the sector but the specific decisions that affect a particular mine should be discussed and approved by their workers and not by national union organizations*").

2011.[426] As can be seen in the "*documento político*" that was approved by the FSTMB, the unions of Bolivia demanded "*[l]a nacionalización de las minas*" (*i.e.*, all Bolivian mines and not only Colquiri) as "*una reivindicación elemental que debe materializarse sin indemnización alguna y bajo control social de los trabajadores.*"[427] The FSTMB itself noted, however, that, "*[a]l actual planteamiento de nacionalización de las minas, el gobierno del M.A.S. ha respondido que no porque los propios trabajadores de las minas privadas se oponen.*"[428] This is consistent with both Mr Córdova's[429] and Mr Mamani's[430] statements.

276. Hence, as Mr Mamani notes, "*[s]i el Gobierno hubiese verdaderamente acordado la nacionalización con los sindicatos a nivel nacional, Sinchi Wayra no seguiría hoy operando minas en Bolivia, como, en efecto, lo hace.*"[431]

277. *Second*, it is equally wrong to suggest that, in implementing the decision to revert the Mine Lease (allegedly reflected in the May 2012 Minutes), the Government would have excluded

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426 Mamani II, ¶ 29 ("*[E]l acta a la que se refiere la Demandante tiene como antecedente el Congreso Minero realizado en el Departamento de Potosí en septiembre de 2011. En dicho Congreso, los empleados pidieron al Gobierno la nacionalización de todas las minas de Bolivia (y no solamente Colquiri)*") (Unofficial translation: "*[T]he act referred to by the Claimant has as background the Mining Congress held in the Department of Potosí in September 2011. In said Congress, the employees asked the Government to nationalize all the mines in Bolivia (and not only Colquiri)*"). The 10 May 2012 Minutes (Agreement of 10 May 2012, **C-256**) expressly refers to the "*Congreso Minero de Potosí.*"

427 Federation of Mining Workers Unions in Bolivia, *Political Document approved in the XXXI National Mining Congress* of 3 September 2011, **R-277**, p. 92 (Unofficial translation:"*[t]he nationalisation of the mines [...] an elementary claim that must materialise without any compensation and under the social control of the workers*").

428 Federation of Mining Workers Unions in Bolivia, *Political Document approved in the XXXI National Mining Congress* of 3 September 2011, **R-277**, p. 92 (emphasis added) (Unofficial translation: "*to the current plans for nationalisation of the mines, the government of the M.A.S. has said no because the workers of the private mines themselves are against [it]*").

429 Córdova, ¶ 35 ("*el Gobierno condicionó esta propuesta a la aceptación de la misma por parte de los sindicatos de las empresas privadas*") (Unofficial translation: "*the Government conditioned this proposal to its acceptance by the unions of private companies*").

430 Mamani II, ¶¶ 14-15 ("*muchos sindicatos en Bolivia, respaldados por la Federación Sindical de Trabajadores Mineros de Bolivia (la 'FSTMB'), promovieron la nacionalización de las minas para que éstas pasaran de nuevo a manos de la [COMIBOL]. Para discutir esta propuesta, fuimos invitados por el Presidente Evo Morales al Palacio de Gobierno en La Paz. En ese entonces, yo era secretario general del SMTC. En esta reunión, el Presidente nos explicó que, en la nueva política del Estado, habría espacio para los sectores público, privado y cooperativo. Por este motivo, la COMIBOL no se haría cargo de las minas en manos de empresa privadas sino se negociarían nuevos contratos de riesgo compartido bajo condiciones más justas para el sector público. De esta forma, explicaba el Presidente Morales, podrían co-existir los intereses públicos, privados y cooperativistas de manera armónica en un sector fundamental para la economía de nuestro país*") (Unofficial translation: "*Many unions in Bolivia, backed by the Federation of Mining Workers Unions in Bolivia (the 'FSTMB'), promoted nationalization of the mines so that they could be transferred back to [COMIBOL]. To discuss this proposal, we were invited by President Evo Morales to the Government Palace in La Paz. At that time, I was General Secretary of the SMTC. In this meeting, the President explained that, under the new State policy, there would be space for the public, private and cooperative sectors. For this reason, COMIBOL would not take the mines from private companies but woud instead negotiate new joint venture agreements with fairer conditions for the public sector. In this way, President Morales explained, public, private and cooperative interests could coexist harmoniously in a fundamental sector for the economy of our country*").

431 Mamani II, ¶ 29 (Unofficial translation: "*[I] f the Government had truly agreed with the national unions on the nationalization, Sinchi Wayra would not still operate mines in Bolivia as it does today*").

the Colquiri Mine Lease from the negotiations of the new joint venture agreements that, at the time, were still ongoing.[432]

278. One, as discussed above, the new State's agenda for the mining sector envisioned a prominent role of COMIBOL alongside the *cooperativas* and private operators pursuant to pre-existing mining rights.[433]

279. Two, as Mr Córdova explains, while the nature of the task represented in itself a difficult endeavour,[434] the State had no interest in stalling or delaying the closing of the new joint venture agreements. Rather, only Sinchi Wayra could reap benefits from such delay. Concretely, "*[e]n el caso de Colquiri (en donde los ingresos estatales por concepto de canon de arrendamiento no superaban los 5 millones de dólares al año), los beneficios de cerrar la negociación rápidamente eran evidentes. Retrasarla, por el contrario, no tenía ningún sentido para el Estado.*"[435]

280. As a matter of fact, in the joint venture contract executed for the Porco and Bolivar mines on 8 August 2012, the parties agreed that the effect of this new contract would be retroactively applied as of 1 October 2011.[436] This clause was inserted at COMIBOL's request to pressure Sinchi Wayra to conclude the negotiations as promptly as possible.[437]

281. Three, Mr Córdova further explains that the Government expressly confirmed to the Colquiri Union that it was committed to close the joint venture agreement as soon as practicable.[438] Sinchi Wayra's internal communications show that this was, in fact, the Government's intention:

> *Con relación a la gestión del contrato en COMIBOL, esta tarde tuve una reunión con el Dr. Kremensberger [of COMIBOL] para continuar negociando los cambios/mejoras al Contrato a partir de la versión compartida el viernes 18 de mayo. En la reunión el Dr. K. me sorprendió con la noticia que a pedido/exigencia de Cordova esta mañana él tuvo que mandar un informe con el borrador de contrato (versión 18 de mayo) a la Presidencia de COMIBOL para que dicho documento*

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432 Sinchi Wayra's own minutes of a meeting that took place on 22 May 2012 demonstrate that negotiations were ongoing. Email from Glencore International (Mr Hartmann) to Glencore International (Mr Eskdale) and Sinchi Wayra (Mr Capriles) of 22 May 2012, **C-110**, p.3.

433 See Section 2.5.2 above. See also Córdova, ¶¶ 21, 34.

434 Córdova, ¶ 29.

435 Córdova, ¶ 29 (Unofficial translation: "*[I]n the case of Colquiri (where the State revenues corresponding to the lease did not exceed US$ 5 million per year), the benefits of closing the negotiations quickly were evident. Delaying it, on the other hand, did not make any sense to the State*").

436 First Version of the Joint Venture Agreement between COMIBOL and Illapa S.A. for the Porco and Bolivar Mines, **R-342**, Clause 4(18).

437 Córdova, ¶ 32.

438 Córdova, ¶ 39.

pase a ser revisados por las Gerencias Técnica y Administrativa, y que una vez recibidos sus comentarios pasaría al Directorio de COMIBOL para pedir autorización para la firma del Contrato con nosotros. El pedido de Cordova se debió a que esta tarde él tenía reunión con los 3 sindicatos y necesitaba mostrar a los Sindicatos que se había avanzado en este contrato desde la semana pasada, cuando tuvimos la reunión con Eduardo y el Sindicato de Colquiri.

Dr. K. piensa que después de la reunión de esta tarde, Córdova lo presionará para sacar una versión final hasta la próxima semana, que incorpore los comentarios de las Gerencias Técnica y Administrativa de Comibol. Le pedí a Dr. K. que en el proceso de redacción final del Contrato, analicemos detenidamente las sugerencias que emanen en las Gerencias y que introduzcamos los ajustes/correcciones que nosotros tenemos de la versión del Viernes a la de hoy, además de consensuar la redacción de la cláusula de solución de controversias, ya que ellos quisieran mantener el texto del Contrato Jindal para facilitar su aprobación en el Directorio de COMIBOL y posteriormente en la Asamblea Legislativa.[439]

282. Four, if, as of May 2012, there were "*rumors*"[440] that the Mine Lease would be excluded from the negotiations of the new joint venture agreement, these came, in all probability, from the *cooperativas*. As Mr Mamani explains, "*[l]os cooperativistas [...] no tenían el mismo entusiasmo por la firma de los contratos de riesgo compartido. Por el contrario, se rumoraba que las cooperativas temían perder áreas de la Mina o, incluso, ser expulsados de la misma luego de que se firmaran los contratos.*"[441]

283. *Third*, Claimant attempts to link a visit from the Ministry of Mining of March 2012 and several requests for information from various Bolivian authorities to the alleged intention of the State to take control of the Mine. Claimant's speculations do not withstand scrutiny.

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439 Email from Glencore International (Mr Hartmann) to Glencore International (Mr Eskdale) and Sinchi Wayra (Mr Capriles) of 22 May 2012, **C-110**, p. 2 (emphasis added) (Unofficial translation: "*Regarding the management of the contract in COMIBOL, this afternoon I had a meeting with Dr. Kremensberger [of COMIBOL] to continue negotiating the changes/improvements to the Contract from the version shared on Friday 18 May. At the meeting Dr. K. surprised me with the news that at Cordova's request/demand this morning he had to send a report with the draft contract (version 18 May) to the COMIBOL Presidency so that said document could be passed on for review to the Technical and Administrative Directorates, and that once their comments were received he would go to the Board of COMIBOL to request authorisation to sign the Contract with us. Cordova's request was because this afternoon he had a meeting with the 3 unions and needed to show the Unions that this contract had been advanced since last week, when we had the meeting with Eduardo and the Colquiri Union. Dr. K. thinks that after the meeting this afternoon, Córdova will press him to get a final version until next week, which incorporates the comments of the Technical and Administrative Directorates of Comibol. I asked Dr. K. that in the final drafting process of the Contract, we carefully analyse the suggestions that come from the Directorates and that we introduce the adjustments/corrections that we have from the Friday version to today's [version], in addition to agreeing on the drafting of the dispute resolution clause, as they would like to keep the text of the Jindal Contract to facilitate its approval in the Board of COMIBOL and later in the Legislative Assembly*)".

440 Reply, ¶ 118.

441 Mamani II, ¶ 31 (Unofficial translation: "*[T]he cooperativistas [...] did not have the same enthusiasm for the signing of the joint venture contracts. On the contrary, it was rumored that the cooperatives were afraid of losing areas of the mine or even being expelled after the contracts were signed*").

284. It is not true that the Ministry of Mines visited the Mine to request "*details about its reserves and the investments made by Sinchi Wayra.*"[442] As both Mr Moreira[443] and contemporaneous documents confirm, Minister Virreira visited the Mine following a request from Colquiri and the *cooperativas*.[444] The purpose of the visit was not, as Claimant implies, to gather information about the operatorship of the Mine.

285. If anything, the Minister's visit confirmed the political influence of these independent mining workers in Bolivia. As Mr Moreira explains, "*las cooperativas presentes en la Mina (y en especial, las Cooperativas 26 de Febrero y 21 de Diciembre) están afiliadas a las federaciones de cooperativas nacionales (como la Federación Nacional de Cooperativas Mineras – FENCOMIN) y departamentales (Federación Departamental de Cooperativas Mineras de La Paz – FEDECOMIN-LP) y son un gremio muy poderoso en Bolivia (en especial, luego de los cambios políticos que siguieron al sector minero luego de la Guerra del Gas en octubre de 2003).*"[445]

286. In sum, Claimant's allegations that the State set the stage for the reversion before the social conflict that erupted at Colquiri in May and June 2012 (discussed below) are simply unsupported. As discussed below, the reversion of the Mine Lease was the result of Sinchi Wayra's improper management of the social conflicts at Colquiri and, in particular, of the contradictory agreements it executed with the *cooperativas*.

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442 Reply, ¶ 111.

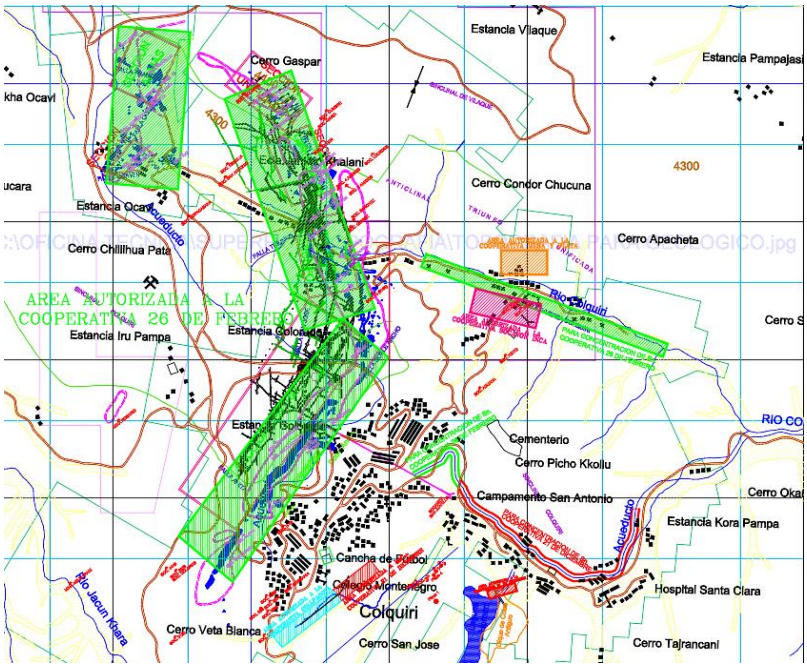
443 Moreira II, ¶ 13 ("*Prueba del poder político de las cooperativas es que, como menciona el Sr. Lazcano, en marzo de 2012, el Ministro de Minería y Metalurgia haya visitado la Mina. Recuerdo que esta visita surgió tras un ofrecimiento de la empresa Colquiri a la Cooperativa 26 de Febrero para cederles una sección adicional de la Veta Blanca. Ante esta posibilidad, el Ministro y su Viceministro de Cooperativas visitaron la Mina. Durante esta visita, coordiné con el Sr. Lazcano el descenso al nivel -325. El ministro estuvo en el interior de la Mina por varias horas y verificó el estado de los puentes en esta área (esto es, las zonas que, a pesar de que contienen mineral, no son explotadas para garantizar la estabilidad y el tránsito seguro al interior de la Mina)*") (Unofficial translation: "*Proof of the political power of the cooperatives is that, as Mr Lazcano mentions, in March 2012 the Minister of Mining and Metallurgy visited the Mine. I remember that this visit took place following an offer by the Colquiri mining company to the Cooperativa 26 de Febrero to give the latter an additional section of the Blanca vein. Faced with this possibility, the Minister and his Vice Minister of Cooperatives visited the Mine. During this visit, I coordinated with Mr Lanzcano the descent to level -325. The Minister spent several hours inside the Mine and verified the state of the bridges in this area (that is, the zones which, even though they contain mineral, are not exploited in order to guarantee stability and safe transit to the inside of the Mine)*").

444 Internal Documents (Mining Ministry) on the Visit to the Colquiri Mine in March 2012, **R-343**, p. 7 ("*En cumplimiento del memorándum DS-0134-VCM-026/2012 de fecha del presente en el que instruye constituirme en el Centro Minero de Colquiri, a objeto de verificar las áreas de trabajo que ofreció la Empresa Minera Sinchi Wayra S.A. a los cooperativistas mineros del mencionado Centro Minero[…]*") (Unofficial translation: "*In accordance with the memorandum DS-0134-VCM-026/2012 of the present date which instructed a visit at the Colquiri Mining Centre, in order to verify the work areas offered by Sinchi Wayra S.A. to the mining cooperative members of the mentioned Mining Centre […]*").

445 Moreira II, ¶ 12 (Unofficial translation: "*the cooperatives present in the Mine (and in particular, the Cooperativas 26 de Febrero and 21 de Diciembre) are affiliated to the national federations of cooperatives (such as the Federación Nacional de Cooperativas Mineras - FENCOMIN) and departmental (Federación Departamental de Cooperativas Mineras de La Paz - FEDECOMIN-LP) and they are a very powerful syndicate in Bolivia (especially after the political changes in the mining sector after the Guerra del Gas in October 2003)*").

2.7.3.3 Glencore's Actions At Colquiri Caused The Violent Confrontation At The Colquiri Mine In 2012, And Prompted The Intervention Of The Government In The Mining Conflict Created By The Rosario Agreement

287. By the end of 2011, the tensions between the *cooperativas* and the workers at the Colquiri Mine were increasing at an alarming pace. As discussed above, the ever-increasing presence of the *Cooperativa 26 de Febrero* (which, since 2008, covered areas in almost every corner of the Mine) was ineffectively controlled by Colquiri.



Plan of the Colquiri Mine – In green, areas in which the company authorized the presence of the *Cooperativa 26 de Febrero*.[446]

288. In addition to a surge in invasions and thefts by the *cooperativas* around these dates (which Claimant does not deny[447]), the *cooperativistas* started to recruit minors in the village of Colquiri to expand their activities in the interior of the Mine. As Mr Mamani recalls:

> *[P]ara esa época, el número de cooperativistas aumentaba considerablemente y los juqueos se multiplicaban. Al mismo tiempo, los directivos de la cooperativa, que se entendían muy bien con los de Sinchi Wayra, comenzaron a contratar a menores de*

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

447 Reply, ¶ 113.

edad de Colquiri como cargadores adentro de la Mina, poniendo en grave peligro a nuestros jóvenes.[448]

289. In light of this critical situation, on or around 17 December 2011, the authorities of Colquiri convened a meeting with all the municipal authorities (*reunión interinstitucional*).[449] Contrary to Mr Lazcano's suggestion,[450] the 17 December 2011 meeting did not mean that the community endorsed the way in which Colquiri (under Sinchi Wayra's control) was handling relations between the community, the workers and the *cooperativistas*. Instead, as Mr Mamani explains, this meeting was largely seen as a last opportunity for Colquiri to redress the situation at the Mine.[451]

290. The situation, however, worsened, as the *cooperativistas* were emboldened and determined to take over the Mine. It is undisputed that, towards the end of March and the beginning of April 2012, groups of *cooperativistas* entered the Mine and stole minerals and mine equipment. The evidence shows that, faced with such acts, Sinchi Wayra did not know whether to request the intervention of the State.

291. At the time these violent events took place, Sinchi Wayra's representatives were in regular contact with COMIBOL, in light of the ongoing negotiations for the migration of the company's mining rights (including Colquiri[452]) to a joint venture scheme. As Mr Córdova recalls, Sinchi Wayra executives did not request any specific action from the Government other than that which COMIBOL suggested (*i.e.*, to contribute in the criminal complaint the company had filed with the authorities). In Mr Córdova's words:

Por esos días, yo me encontraba en contacto regular con los directivos de Sinchi Wayra, dirigentes sindicales y de las cooperativas, ya que seguíamos negociando la firma de los contratos de riesgo compartido y esto tendría un impacto para todos los sectores. En estas reuniones, recuerdo haber tenido la oportunidad de conversar con ellos sobre estos eventos de violencia. Sin embargo, la información que recibía

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448 Mamani II, ¶ 20 (Unofficial translation: "*In that period, the number of cooperativistas had increased considerably and the number of juqueos had multiplied. At the same time, the directors of the cooperativa, who got on with the Sinchi Wayra people, began to hire Colquiri's minors as porters inside the Mine, putting our young people in grave danger*").

449 Mamani II, ¶ 19.

450 Lazcano II, ¶ 29.

451 Mamani II, ¶ 21 ("*[C]onvocamos una reunión de una comisión interinstitucional. En esta reunión acordamos que: Los cooperativistas respetarían nuestras áreas de trabajo para que podamos garantizar nuestra estabilidad laboral; No habría contratación de menores de edad; y Las partes se comprometerían a mantener la paz social en el poblado. El éxito de este acuerdo dependía, en gran medida, de Sinchi Wayra, pues ésta era quien tenía los medios para que los cooperativistas cumplieran sus obligaciones*") (Unofficial translation: "*We convened a meeting of an interinstitutional commission. In this meeting we agreed that: The cooperativistas would respect our working areas to guarantee our work stability; There would be no recruitment of minors; and The parties would commit to maintaining social peace in the village. The success of this agreement depended, to a great extent, on Sinchi Wayra, since it was the one who had the means for [securing] the cooperativistas would fulfill their obligations*").

452 See Section 2.7.3.2 above.

> *era que las operaciones en la Mina seguían con normalidad y que, además, Sinchi Wayra había interpuesto una denuncia contra los cooperativistas que estaban juqueando en las zonas explotadas por la compañía. En vista de ello, decidimos coadyuvar esta denuncia como autoridad minera, de modo que las autoridades penales y policiales dieran un trámite célere a esta investigación.*[453]

292. Sinchi Wayra's internal documents show that the company was hesitant to seek further involvement from the Government. In a 22 May 2012 internal email thread, Felipe Hartmann of Glencore International advised other Glencore International and Sinchi Wayra executives that undertaking additional legal actions against the *cooperativistas* was, in his opinion, not suitable, as "*esto generaría más conflictos con las cooperativas.*"[454]

293. COMIBOL, nonetheless, attended to the workers' concerns in meetings that also took place in the context of the negotiations of the joint venture agreement. As Mr Mamani explains, "*el Estado se encontraba negociando contratos de riesgo compartido e iba aumentar su participación en el manejo de la Mina. En el sindicato, estábamos convencidos de que, con mayor presencia del Estado, aumentaría el número de trabajadores formales de la empresa y disminuiría el trabajo informal de los cooperativistas.*"[455]

294. However, Sinchi Wayra's interest in stalling these negotiations as long as possible (discussed above[456]) made it so that the tensions with the *cooperativistas* inevitably spiralled out of control.

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453 Córdova, ¶ 50 (Unofficial translation: "*In those days, I was in regular contact with the executives of Sinchi Wayra, trade union and cooperative leaders, since we were still negotiating the signing of the joint-venture contracts and this would have an impact on all sectors. In these meetings, I remember having the opportunity to talk with them about these violent events. However, the information I received was that the operations in the Mine continued as usual and that, in addition, Sinchi Wayra had filed a complaint against the cooperativistas who were stealing in the areas exploited by the company. In light of this, we decided to contribute in this complaint as a mining authority, so that the criminal and police authorities could process this investigation swiftly*").

454 Email from Glencore International (Mr Hartmann) to Glencore International (Mr Eskdale) and Sinchi Wayra (Mr Capriles) of 22 May 2012, **C-110** (Unofficial translation: "*this would generated more conflict with the cooperatives*").

455 Mamani II, ¶ 30 (Unofficial translation: "*The State was negotiating joint venture contracts and was going to increase its participation in the management of the Mine. In the union, we were convinced that, with greater State presence, the number of formal workers in the company would increase and the informal work of the cooperativistas would decrease*"). See also Córdova, ¶ 51 ("*El 22 de mayo de 2012, recibí la visita de una delegación de trabajadores mineros: dirigentes de la Federación Sindical de Trabajadores Mineros de Bolivia, representantes de los sindicatos de Colquiri, Porco y Bolívar para conversar sobre el contrato de asociación que firmaríamos con Sinchi Wayra. La preocupación de los trabajadores se centraba en incluir en el contrato puntos referidos a las conquistas conseguidas en negociaciones con las administraciones privadas y la generación de empleos. Como expliqué anteriormente, en esta reunión nos comprometimos a tratar de cerrar la negociación de los contratos de riesgo compartido lo más pronto posible*") (Unofficial translation: "*On May 22, 2012, I was visited by a delegation of mining workers: leaders of the Federación Sindical de Trabajadores Mineros de Bolivia, representatives of the Colquiri, Porco and Bolívar unions to discuss the association contract we would sign with Sinchi Wayra. The workers' concern was to include in the contract elements referring to the achievements obtained in negotiations with the private administrations and the creation of jobs. As I explained earlier, in this meeting we committed to close the negotiation of the joint venture contracts as soon as possible*"). See also, Meeting Minutes between COMIBOL, FSTMB and the Colquiri, Porco and Bolívar Unions of 22 May 2012, **R-276**.

456 See Section 2.7.3.2 above.

295. It is undisputed that, on 30 May 2012, approximately one thousand *cooperativistas* from the *Cooperativa 26 de Febrero* violently took control over the Colquiri Mine, which they accessed through the main old mouth of the Mine (Sanjuanillo), and other old mouths located near and around the village.[457] The violence of the confrontation and the tragic result of 15 wounded[458] prompted a strong reaction from the company's workers, who gave the Government an ultimatum to solve the conflict in less than 24 hours.[459]

296. Claimant does not dispute that, on that same day, police squads arrived in Colquiri,[460] and COMIBOL's president, Mr Héctor Córdova, took measures to prevent the commercialization of the *Cooperativa 26 de Febrero*'s production in the country.[461] It questions, however, why

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457 [redacted]

458 La Patria, *Cooperativistas toman mina en Colquiri y hieren a siete mineros*, press article of 31 May 2012, **R-21**; La Razón, *El Gobierno envía más policías a Colquiri para evitar conflicto*, press article of 1 June 2012, **R-213**.

459 Letters from the Sindicato Mixto de Trabajadores Mineros Colquiri to the President of Bolivia (Mr Morales), the Ministry of Mining (Mr Virreira), and Comibol (Mr Córdova) of 30 May 2012, **C-111** ("*Damos un plazo de 24 hrs. al gobierno central y al ministerio de minería para que dé la solución inmediata al problema ocurrido en Colquiri ya que este problema puede traer mayores consecuencias fatales a la familia minera en Colquiri. [D]e no tener una respuesta favorable hacia los trabajadores mineros asalariados nos veremos obligados a retomar nuestras fuentes de trabajo y de darse cualquier hecho lamentable ya sea con pérdidas humanas y materiales responsabilizaremos al gobierno actual y a los actores principales quienes promovieron el avasallamiento de nuestras fuentes de trabajo sin respetar nuestra constitución política del estado.*") (Unofficial translation: "*We give a delay of 24h to the central government and the ministry of mines to provide an immediate solution to the problem occurring in Colquiri, given that this problem may bring major fatal consequences to the mining family in Colquiri. [A]bsent a favourable answer to the mining workers we will be forced to take control over our work sources and, should any unfortunate event occur, be it human or material losses, we will hold responsible the current government as well as the leading actors who fostered the subjugation of our work sources without respecting the political constitution of our State.*").

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

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

the government did not send a larger number of policemen, thus suggesting that Bolivia should have forcefully retaken control over the Mine.[462]

297. Claimant's suggestion further confirms that Sinchi Wayra had a limited and incorrect understanding of the particular features of the Colquiri Mine. As Mr Mamani explains, "*[l]a Mina es una mina muy antigua que tiene varias bocaminas y accesos a través de ductos de ventilación en todas partes en el pueblo de Colquiri. Traer a la policía para hacer una intervención forzada no es recomendable en estos contextos.*"[463]

298. As Bolivia explained in its Statement of Defence (and Claimant does not dispute), retaking control of mining assets by force had proven disastrous in the past. In fact, in 1996, during Sánchez de Lozada's first term in office, the military intervened at the Amayapampa project (in the Potosí department) in order to protect the mining concessions of the Canadian company Da Capo Resources. This action was prompted by the uprising of the mining workers and local communities of the region against that private investor. However, this course of action simply provoked a violent confrontation with the local population, which led to the tragic result of 8 dead, about 100 wounded, and the suspension of the project.[464]

299. Likewise, contrary to Claimant's suggestion, military intervention to retake a mine is only effective in unique cases (like the Sayaquira Mine). That conflict (to which Claimant refers in its Reply[465]) is, however, not comparable to the social conflict and operations at the Colquiri Mine. As Mr Córdova explains, the *cooperativistas* who invaded Sayaquira in March 2012 were foreigners and did not have any support rooted in the communities surrounding this Mine. Thus, "*[e]n la práctica, este avasallamiento no tenía la misma connotación de conflicto social que tenía Colquiri, sino que constituía, más bien, una invasión.*"[466] However,

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cooperativistas took control over the mine compound. Electricity was also cut in the area to prevent the machinery from functioning"). See also Córdova, ¶ 54.

462 Reply, ¶ 124.

463 Mamani II, ¶ 36 (Unofficial translation: "*The Mine is a very old mine that has several mouths and points of access through ventilation ducts [located] all over the town of Colquiri. Bringing the police to intervene forcefully is not recommended in these contexts*").

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

465 Reply, ¶ 447.

466 Córdova, ¶ 81 (Unofficial translation: "*In practice, this encroachment did not have the same social conflict connotation that Colquiri had, but instead constituted an invasion*").

"*[n]ada de ello habría podido darse en Colquiri. En Colquiri, los cooperativistas estaban al interior de la Mina y hacían parte de su operación y de la comunidad.*"[467]

300. On 3 June 2012, the Minister of Mines, the Minister of Labour, and COMIBOL officials met with the SMTC and the FSTMB in Caracollo, a village near Colquiri. By then, the unions had set up blockades on the only road connecting Colquiri to the rest of the country, as a counter-measure against the *cooperativistas*.[468] It is undisputed that, at the end of this meeting, the Government executed with the unions a memorandum of understanding, and committed to find a way in which Colquiri could continue to operate the Mine, that is, "*ha[cer] respetar los contratos mineros con derechos preconstituidos del distrito minero de Colquiri*" and "*proteger el ejercicio del trabajo y la estabilidad laboral.*"[469]

301. Claimant also does not dispute that, over the following days, in an attempt to solve the conflict, the Government sought Sinchi Wayra's and the unions' support to work on a proposal that would maintain the labour stability of the workers and respect the terms of the Mine Lease, and prepared up to five different offers which were then submitted to the *cooperativistas*.[470] These efforts confirm that there had been no previous decision to reverse the mine, as Claimant insists. Instead, over the course of these negotiations, the Government made very clear to the *Cooperativa 26 de Febrero* that it was impossible "*entrega[r] total[mente] [e]l yacimiento [...] dado que la Constitución Política del Estado reconoce los tres actores en el sector minero y la empresa Sinchi Wayra viene operando en Bolivia [...] al amparo de la misma Constitución.*"[471]

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467 Córdova, ¶ 86 (emphasis added) (Unofficial translation: "[n]one of this could have happened in Colquiri. In Colquiri, the cooperativistas were inside the Mine and were part of its operation and of the community").

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

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

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

471 Letter from COMIBOL and the Ministry of Mines to the Cooperativa 26 de Febrero of 3 June 2012, **R-344** (emphasis added) (Unofficial translation: "*entire[ly] deliver the deposit [...] given that the Political Consitution of the State recognizes the actors in the mining sector and the company Sinchi Wayra has been operating in Bolivia [...] under the protection of the same Consitution*").

302. As Mr Córdova recalls, it was virtually impossible to reach an agreement with the *cooperativistas* given their demand to control at least half of the Mine.[472] It is undisputed that, in this context, on or around 5 June 2012, the Minister of Mines made a last offer to the *Cooperativa 26 de Febrero* to cede the San Antonio vein, on the basis of the workers'[473] and Colquiri's commitments.[474] This proposal was accepted by the leaders of the *Cooperativa 26 de Febrero*, subject to confirmation of the rest of its members.

303. The potential for the *cooperativas* to take over the entirety of the Mine made it impossible to reach an agreement with them. As the press reported at that time, "*los trabajadores cooperativistas, que se reunieron en el distrito minero de Colquiri, determinaron no aceptar la oferta de acceder a la veta 'San Antonio' en su totalidad y continúan con su exigencia de 'sacar' a la empresa de aquella localidad minera*."[475]

304. As Claimant admits, the rejection of the San Antonio proposal caused great confusion among the workers.[476] The *cooperativas*' inflexibility made any further negotiation effort virtually impossible. This was in great part due to the fact that the workers of the Mine would not accept a proposal that could compromise the viability of the operations of the company (and, hence, their jobs). In Mr Mamani's words, "*para nosotros como trabajadores, la cesión de la veta San Antonio (la segunda más rica en mineral) estaba al límite de lo que podíamos aceptar. Si los cooperativistas se quedaban con más o mejores vetas, la necesidad de*

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472 Córdova, ¶¶ 62, 70.

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

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

475 La Patria, *Colquiri: Mineros suspenden labores y cooperativistas no aceptan veta*, press article of 5 June 2012, **C-118** (emphasis added) (Unofficial translation: "*[T]he cooperativistas who held meetings in the mining district of Colquiri, decided not to accept the offer of the 'San Antonio' vein in its entirety and continue to require the company's 'exit' from the mining town*").

476 Reply, ¶ 127.

trabajadores en el interior de la Mina iba a reducirse y, por lo tanto, nuestra estabilidad laboral se vería en riesgo."[477]

305. The foregoing explains why it no longer made sense for the Government to seek to involve Sinchi Wayra in the negotiations to solve the dispute. In particular, as Mr Mamani also explains, "*era evidente que Sinchi Wayra trataría de ceder a los cooperativistas zonas de la Mina fundamentales y de gran interés económico. Los trabajadores nunca aceptaríamos esta situación y esto es algo de lo que era consciente Sinchi Wayra.*"[478] In addition, in its presentation of the facts, Claimant omits to mention that the *cooperativistas* were adamant regarding the removal of the company from the Mine, and were ready to keep negotiating only "*con los trabajadores asalariados y las autoridades del rubro.*"[479]

306. Furthermore, as Mr Córdova explains, reversion became a possible solution as "*el Estado podría contratar como trabajadores a una gran parte de los cooperativistas, de modo que éstos no solamente accedieran a beneficios sociales, sino que la relación de fuerza trabajadores/cooperativistas se invirtiese. Mientras la Mina estuviese bajo control de Sinchi Wayra, esto no podría suceder.*"[480]

307. In light of the conflict that had erupted, and since "*significant divisions remains amongst the various stakeholders,*"[481] a negotiated solution had yet to be found by the Government.

308. Claimant does not dispute that, in the morning of 7 June 2012,[482] the Colquiri workers and the villagers of Colquiri convened a meeting in a square only 2 km away from the main mouth of the Mine (still under control of the *cooperativistas*). This meeting quickly evolved into a great general open council (*Gran Cabildo*) where the social conflict at the Colquiri Mine was discussed.[483] Claimant also does not dispute that this *Cabildo* studied a *proposal* made by the

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477 Mamani II, ¶ 42 (Unofficial translation: "*For us workers, the grant of the San Antonio vein (the second richest in mineral) was the limit of what we could accept. If the cooperativistas stayed with more or better veins, the need for workers inside the mine would be reduced and, therefore, our job stability would be at risk*").

478 Mamani II, ¶ 43 (Unofficial translation: "*It was evident that Sinchi Wayra would try to cede to the cooperativistas the Mine's fundamental areas [which were] the ones of great economic interest. The workers would never accept this situation and this is something that Sinchi Wayra was aware of*").

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

480 Córdova, ¶ 61 (Unofficial translation: "*The State could hire a large part of the cooperativistas as workers, so that not only would they have aceess to social benefits, but the worker/cooperative dynamic was reversed. While the Mine was under the control of Sinchi Wayra, this could not happen*"). See also Proposal from the Government to the *Cabildo* of Colquiri, **R-27**.

481 Reply, ¶ 129.

482 Córdova, ¶ 63.

483 Mamani I, ¶ 39 ("*Entretanto, los miembros del STMC y la FSTMB nos desplazamos nuevamente hasta la población de Colquiri, donde iniciamos una reunión en Cabildo con una masiva participación de los pobladores e instituciones vivas*

Government in order to determine whether the reversion of the Mine Lease could be acceptable to all of the authorities.[484] Claimant cannot obscure this fact by playing with the words of the minutes recording the *Cabildo* decision.[485]

309. As explained in the Statement of Defence,[486] a significant portion of the *cooperativistas*, which were gathered at the main mouth of the Mine, decided to take part in the *Gran Cabildo* in order to decide on the future of the Mine and favoured the reversion of the Mine Lease.[487]

310. Claimant does not deny this fact but simply notes that this resolution was only endorsed by the "*more radical Chojña section of the Cooperativa 26 de Febrero, which represented a small fraction of the cooperativa without the power or authority to bind it.*"[488] Claimant's contention in this regard is inapposite. As Mr Mamani explains:

> *En el gran cabildo de Colquiri del 7 de junio participaron cooperativistas del sector San Carlos y del sector Chojña (que, a diferencia de lo que dice la Demandante, se compone de un gran número de personas). Ello correspondía a alrededor del 60 por ciento de los miembros de la Cooperativa. Creo conveniente aclarar que la participación de estos cooperativistas no era sorprendente para ninguno de los presentes en el cabildo. Es sabido que, en las cooperativas mineras, sólo los dirigentes tienen ingresos importantes y la mayoría de sus asociados trabajan en condiciones indignas.*[489]

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del poblado (juntas vecinales, autoridades indígenas originarias, gremios, transportistas, etc.). Nuestra reunión se instaló en la Plaza 6 de Agosto, a unos 2km de la bocamina Sanjuanillo, donde las bases de la Cooperativa 26 de Febrero se encontraban reunidas con la presencia de algunos dirigentes que querían desvirtuar la propuesta de nacionalización.") (Unofficial translation: "*Meanwhile, we the members of STMC and FSTMB travelled again to the village of Colquiri, where we initiated a Council meeting attended by a great number of the village population and central institutions of the village (neighbourhood council, authorities of indigineous communities, guilds, transporters, etc.) Our meeting was set up in the Plaza 6 de Agosto, some 2 km from the Sanjuanillo mine mouth, where the bases of the Cooperativa 26 de Febrero were assembled, together with some leaders who wanted to subvert the nationalisation proposal.*").

484 Proposal from the Government to the *Cabildo* of Colquiri, **R-27**.

485 Reply, ¶ 129. See alsoOperative vote of the *Gran Cabildo de Colquiri* of 7 June 2012, **R-17**.

486 Statement of Defence, ¶ 209.

487 Operative vote of the *Gran Cabildo de Colquiri* of 7 June 2012, **R-17**; La Patria, *Mineros asalariados y cooperativistas aceptan rescisión de contrato en Colquiri*, press article of 8 June 2012, **R-223** ("*mineros asalariados y cooperativistas determinaron [...] aceptar la rescisión del contrato de arrendamiento de Colquiri [...] para evitar enfrentamientos por la explotación de minerales y demanda de fuentes de empleo [...].Ese pronunciamiento surgió un día después que el Gobierno pidió a ambos sectores un 'acuerdo social' para terminar con el conflicto que desataron los cooperativistas, el 30 de mayo reciente, cuando tomaron esa mina en demanda de nuevas áreas de explotación*") (Unofficial translation: "*mining employees and cooperativistas determined [...] to accept the termination of the Colquiri lease agreement [...] to prevent confrontations due to ore exploitation and the demand for work sources [...]. This statement intervened one day after the Government requested from both sectors a 'social agreement' to end the conflict triggered by the cooperativistas on 30 May when they took control over that mine, requesting additional exploitation areas*").

488 Reply, ¶ 130.

489 Mamani II, ¶ 47 (Unofficial translation: "*Cooperativistas from the San Carlos and the Chojña sections participated in the Gran cabildo of Colquiri on June 7 ([the Chojña section], unlike what the Claimant says, consists of a large number of people). This corresponded to around 60 percent of the Cooperativa's members. I think it is suitable to clarify that the participation of these cooperativistas was not surprising for any of those present in the cabildo. It is known that,*

311. Mr Mamani's statement is further confirmed by the fact that, following the reversion of the Mine Lease, COMIBOL hired over 620 former *cooperativistas*.[490] This figure represents roughly 60% of the members of the *Cooperativa 26 de Febrero* at the time of the conflict.

312. Though it was aware of the Government's efforts to find a negotiated solution to the conflict, Sinchi Wayra entered into inconsistent agreements with the *cooperativas*. It is undisputed that, at around 11 PM on 7 June 2012,[491] being fully aware of the wide support for the reversion of the Mine (as Mr Eskdale confirms),[492] Glencore International, through Sinchi Wayra and Colquiri, executed in La Paz an agreement to assign to the *cooperativas* the Rosario vein at the Mine, *i.e.*, the Rosario Agreement.[493]

313. [redacted]

314. In addition, Sinchi Wayra knew that, at that time of the day, there was little chance that other government officials could promptly react to whatever was decided in the meeting. Further, at that time, Sinchi Wayra knew that the Minister of Mines was out of reach, as he was

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among the mining cooperativas, only the leaders have good incomes and the majority of their associates work in undignified conditions").

490 COMIBOL, List of Former *Cooperativistas* Currently Employed by COMIBOL, 2012-2013, **R-273**.

491 Córdova, ¶¶ 64-67.

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

493 Agreement between Colquiri SA, Fedecomin, Fencomin, Central Local de Cooperativas Mineras de Colquiri, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, and Cooperativa 26 de Febrero of 7 June 2012, **C-35**.

494 [redacted]

495 [redacted]

travelling to the community of Mallku Khota to mediate another social conflict involving a mining project.[496]

315. As Claimant itself admits, "*on 8 June 2012, the cooperativistas decided to lift their blockade [...]. The workers, however, did not resume operations. Although they initially opposed nationalization and favored an understanding with the cooperativas (as evidenced by their backing of the San Antonio Proposal), they now opposed any compromise.*"[497] This is unsurprising. As discussed above, giving away the Rosario vein would never be acceptable to the workers.[498]

316. Claimant omits, however, that, also on 8 June 2012, the Government convened a new meeting in La Paz. Authorities from the *cooperativas*, union leaders and other local authorities from Colquiri (who also rejected the presence and constant violent acts of the *cooperativas* at the Mine[499]) confirmed their request that the Government revert the Mine Lease. In order to bring all parties in dispute back to the negotiation table as a sign of rejection of the Rosario

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496 Córdova, ¶ 66 ("*En paralelo, decidí alertar al Ministro de lo que estaba sucediendo. Sin embargo, esto resultó imposible ya que el Ministro se encontraba viajando a la localidad de Mallku Khota, situada en una zona lejana en el departamento de Potosí, donde también había un conflicto entre las comunidades originarias indígenas de la zona y una empresa canadiense que tenía previsto desarrollar un proyecto minero, y en la cual no hay señal de celular*") (Unofficial translation: "*In parallel, I decided to alert the Minister to what was happening. However, this proved impossible since the Minister was traveling to the village of Mallku Khota, located in a remote area in the department of Potosí, where there was also a conflict between the indigenous communities of the area and a Canadian company that was planning to develop a mining project, and in which there is no cell signal*").

497 Reply, ¶ 137.

498 See Mamani II, ¶¶ 42, 48.

499 Mamani II, ¶ 49 ("*los pobladores del Distrito de Colquiri también vieron en el Acuerdo de Rosario como una traición de Sinchi Wayra y una muestra de su preferencia a trabajar con los cooperativistas. Como prueba de ello, el 8 de junio de 2012, representantes de todas las organizaciones vivas de Colquiri (incluidos miembros de ambas secciones de la Cooperativa 26 de Febrero) se reunieron con el Ministro de Minería y el Presidente de COMIBOL en la ciudad de la Paz y confirmaron su intención de que la Mina fuera revertida. En esa misma reunión, acordamos un cuarto intermedio con el Gobierno con el fin de tratar de reducir las tensiones con los cooperativistas que se oponían a estas medidas. Este acta la suscribió, a nombre de la Cooperativa 26 de Febrero, el Sr. Eleuterio Mamani, uno de los directivos de esta organización*") (Unofficial translation: "*the people of the Colquiri District also saw the Rosario Agreement as a betrayal of Sinchi Wayra and a sample of their preference to work with the cooperativistas. As proof of this, on June 8, 2012, representatives of all living organizations of Colquiri (including members of both sections of the Cooperativa 26 de Febrero) met with the Minister of Mining and the President of COMIBOL in the city of La Paz and confirmed their intention that the Mine [should be] reversed. In that same meeting, we agreed a recess with the Government to reduce tensions with cooperativistas who opposed these measures. This act was signed by Mr Eleuterio Mamani, one of the directors of this organization, on behalf of the Cooperativa 26 de Febrero*").

Agreement,[500] the participants to this meeting also agreed to cease the hostilities and to remain in a permanent meeting (*vigilia*) until the Supreme Decree was finally enacted.[501]

317. In spite of the Government's efforts, the expectations that the Rosario Agreement created in a fraction of the *Cooperativa 26 de Febrero* (backed by the national leaders of FENCOMIN) inevitably led to a violent confrontation. As the press reported, on 9 June 2012, the leaders of FENCOMIN and other *cooperativistas* announced blockades and threatened to take over the Mine if the Government sought to implement the reversion. The *cooperativistas*' goal was not to enforce the Rosario Agreement, but rather "*el sector ahora pretende la 'cooperativización', con la toma, de todo Colquiri y que no se descarta similar medida en otras minas del Estado.*"[502]

318. In an attempt to seek a compromise between the parties in dispute, on 12 June 2012, the Government sought to assign the Rosario vein to the *cooperativistas*.[503] However, in light of the Colquiri Union's position, this solution was doomed to fail. In Mr Córdova's words, "*el Acuerdo de Rosario complicó irremediablemente cualquier negociación con las partes en conflicto. Las cooperativas, en particular, no querrían tener zonas menos atractivas en la Mina y los trabajadores no aceptarían que la mejor veta de la Mina fuese entregada al sector cooperativo.*"[504]

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500 Córdova, ¶ 68 ("*La noticia de la firma del Acuerdo de Rosario fue muy mal recibida por los sindicatos y trabajadores de Sinchi Wayra. Dadas las condiciones de la negociación en ese momento, era obvio que un acuerdo de esta naturaleza sería visto por los trabajadores como una traición. Así nos lo hizo saber el sindicato de Colquiri, la Federación de Mineros y varios representantes de la Cooperativa 26 de Febrero en una reunión que llevamos a cabo en la Paz el 8 de junio de 2012. En esta reunión (en la que participaron otros representantes del poblado de Colquiri), los presentes reiteraron su intención de revertir la Mina como señal de rechazo al Acuerdo de Rosario*") (Unofficial translation: "*The news of the signing of the Rosario Agreement was very badly received by the unions and workers of Sinchi Wayra. Given the conditions of the negotiations at that time, it was obvious that an agreement of this nature would be viewed by the workers as a betrayal. The Colquiri union, the Federación de Mineros and several representatives of the Cooperativa 26 de Febrero told us as much in a meeting we held in La Paz on 8 June 2012. At this meeting (in which other representatives of the village of Colquiri participated), those present reiterated their intention to revert the Mine as a sign of rejection of the Rosario Agreement*").

501 Minutes of Agreement between COMIBOL, Federación Sindical de Trabajadores Mineros de Bolivia, Central Obrera Boliviana, Cooperativa 26 de Febrero and authorities of Colquiri of 8 June 2012, **R-345**.

502 "Mineros retomarán Colquiri y bloquearán los caminos," *Página Siete*, press article of 10 June 2012, **C-126** (emphasis added). (Unofficial translation: "*the sector now intends the 'cooperativisation', with the takeover of all Colquiri and similar measures in other State mines are not excluded*").

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

504 Córdova, ¶ 70 (Unofficial translation: "*the Rosario Agreement hopelessly complicated any negotiation with the parties in conflict. The cooperativas, in particular, would not want to have less attractive areas in the Mine and the workers accept that the best vein in the Mine be given to the cooperative sector*").

319. In the meantime, as Claimant admits,[505] Sinchi Wayra attempted to counteract the Government's efforts by creating division between the Colquiri Union leaders, offering bonuses to buy their support to the Rosario Agreement. Mr Capriles – who, despite being under Claimant's control, is not a witness in this arbitration – even suggested to take all the "*acciones que se requieran a fin de que sindicato (sic) cambio de opinion.*"[506]

320. Sinchi Wayra's attempts only led to more violence at Colquiri. Claimant does not dispute that, on 13 June 2012, around a thousand mining workers blocked routes,[507] and requested from the Government a clear statement, in light of the contradictory information published by the press following the Rosario Agreement.[508] The miners' protest quickly evolved into a violent confrontation on 14 and 15 June 2012.[509]

2.7.3.4 In Order To Resolve The Violent Conflict Caused By The Rosario Agreement, The Government Negotiated With The Cooperativistas And The Union Leaders And Reverted the Mine Lease

321. It is undisputed that, on 17 June 2012, following the violent confrontation with the *cooperativistas* at Colquiri, the company's mining workers sent a letter to the Bolivian Vice President, ratifying their intention to honour the *Gran Cabildo* resolution. In their letter, the union leaders requested (i) a decree ordering the reversion of the Mine Lease, and (ii)

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505 Reply, ¶ 141.

506 Email from Sinchi Wayra (Mr Capriles) to Colquiri (Mr Hartmann et al) of 13 June 2012, **C-269** (Unofficial translation: "*actions that are required in order for [the] union (sic) change its opinion*").

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

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

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

measures against "*el grupo minoritario que quedó en la coop. 26 de febrero*,"[510] which was attempting to forcibly implement the Rosario Agreement.

322. The Government responded to this request by convening a meeting between the parties in La Paz, which took place on 19 June 2012. After a long and difficult discussion, the parties reached an agreement pursuant to which:

- The State would "*recuperar las áreas mineras otorgadas en contrato de arrendamiento a la Compañía Minera Colquiri S.A. para beneficio de la población boliviana en su conjunto y de Colquiri en particular*;"
- A significant portion of "*[l]a veta Rosario en forma vertical queda en poder de la Cooperativa 26 de Febrero Ltda [...]*" in exchange for the rest of the areas of the Mine in which this *cooperativa* was operating; and
- Measures against the theft of ore and materials at the Mine would be implemented.[511]

323. The text of the agreement also stressed that "*[l]a viabilización de estos acuerdos exige a ambas partes la deposición de actitudes de confrontación y la inmediata pacificación del Distrito Minero de Colquiri*."[512]

324. The agreement executed under the aegis of the Government Ministry laid the foundation for the reversion of the Mining Lease. On 20 June 2012, the Government issued Supreme Decree No. 1.264 (the "**Mine Lease Reversion Decree**"),[513] pursuant to which the Mine Lease was reverted to the State.

325. Lastly, as explained in the Statement of Defence, given "*la determinación de los representantes de los cooperativistas de no ceder la veta Rosario*"[514] (a consequence of the Rosario Agreement negotiated by Glencore), the Government had to face a new confrontation

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

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

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

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

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

between the *cooperativistas* and the workers. The actions of Sinchi Wayra were still an obstacle to the resolution of the social conflict, even after the reversion of the Mine Lease.[515]

326. It is further undisputed that, on 30 September 2012, the Government announced that a new agreement had been reached regarding the Rosario vein. This new agreement provided for a new partition of the vein.[516] On 3 October 2012, as was the case with the Mine Lease Reversion Decree, the government gave this new agreement legal standing through Supreme Decree 1.368 of 2012.[517]

327. In its Reply, Claimant attemps to discredit the Government's actions to resolve the social conflict by stating that the reversion of the Mine Lease was "*unnecessary*" and that it "*failed to prevent bloodshed.*"[518] This is incorrect.

328. *First*, it is disingenuous to claim, as Claimant does, that all these significant efforts to resolve the mining conflict created by Sinchi Wayra's Rosario Agreement are a "*mere excuse*" to revert the Mine.[519] As discussed above,[520] Claimant's contention relies on the unsuported premise that the Government had the intention to revert the Mine prior to the violent conflict Sinchi Wayra created in May and June 2012.

329. *Second*, it is innacurate to claim that the Rosario Agreement was the result of the coordinated efforts of Sinchi Wayra and the Government.[521] [redacted]

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515 Romero, ¶¶ 19-21 ("*Poco tiempo después de suscribir el Acta de Acuerdo en junio de 2012, y de la promulgación del Decreto Supremo de Reversión, se dieron nuevos enfrentamientos entre cooperativistas y trabajadores de la Empresa Minera Colquiri (ahora controlada por COMIBOL). Según estos reportes, y a pesar de lo negociado en junio de 2012, los trabajadores seguían disconformes en que la veta Rosario -la más atractiva de la Mina- estuviese casi en su totalidad en manos de los cooperativistas. Los cooperativistas, por su parte, continuaban expresando que tenían derecho a la referida veta, por el acuerdo obtenido con Sinchi Wayra y que además existía un acuerdo firmado con los trabajadores con visto bueno del Estado [...]. Las tensiones volvieron a degenerar rápidamente en actos violentos en septiembre de 2012, lo que hizo necesaria nuevamente la intervención del Ministerio a mi cargo.*") (Unofficial translation: "*Shortly after we concluded the minutes of agreement in June 2012 and that the Reversion Supreme Decree was enacted, new confrontations between cooperativistas and employees of Empresa Minera Colquiri (now controlled by COMIBOL) took place. Following these reports, and despite the June 2012 negotiations, workers were still not satisfied with the fact that almost the totality of the Rosario vein, the most attractive in the Mine, was under the cooperativistas' control. As for the cooperativistas, they continued to contend that they were entitled to that vein pursuant to the agreement signed with Sinchi Wayra and that furthermore, there was an agreement signed with the workers that had the State's green light [...]. Tensions rapidly degenerated again into violent acts in September 2012, and this required again the intervention of the Ministry under my responsibility*").

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

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

518 Reply, ¶¶ 162-166.

519 Reply, ¶ 164.

520 See Section 2.7.3.2 above.

521 Reply, ¶ 165.

[redacted]

[redacted]Furthermore, Claimant is unable to explain how, being aware of the decision of the *Gran Cabildo* that took place in Colquiri on 7 June 2012, it went on and executed, in the middle of the night, an openly contradictory agreement with the *Cooperativa 26 de Febrero* and the national leaders of FENCOMIN.[523]

330. Put differently, the *cooperativistas*' "*insistence on their right to exploit the Rosario vein*"[524] – which prompted a violent confrontation at Colquiri – was the result of Sinchi Wayra's actions.

331. *Third*, as discussed below, the reversion of the Mine Lease did, in fact, prevent blodsheed. Following the reversion, COMIBOL and the new Empresa Minera Colquiri have taken measures that have effectively put an end to the serious social conflict created by Colquiri, under Sinchi Wayra's administration. Since the Mine passed to the operatorship of COMIBOL, neither tensions nor violence of the magnitude of the events in 2012 have resurfaced. This has been the case even though a part of the Mine remains under the control of the *cooperativistas*.

2.7.3.5 Following The Reversion Of The Mine Lease, No Violent Events Like The Ones Provoked By Sinchi Wayra In 2012 Have Resurfaced

332. In spite of the almost unsurmountable impasse of the Rosario Agreement, the Government managed to reach a durable and acceptable solution for both workers and *cooperativistas* in late September 2012. As Minister Romero recalls:

> *A pesar de las dificultades generadas por el acuerdo suscrito entre Sinchi Wayra y los cooperativistas sobre la veta Rosario, el posterior acuerdo alcanzado, en septiembre de 2012, logró finalmente poner punto final a la grave confrontación que vivió la población de Colquiri ese año. A partir de entonces, y a pesar de que ha habido algunas tensiones en la zona propias del sector minero boliviano y de las minas en las que hay presencia de cooperativas, no se han vuelto a producir eventos como los del año 2012.*[525]

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522 [redacted].

523 [redacted] Internal Memoranda (Mining Ministry) on the Participation at the Gran Cabildo of 6 June 2012, **R-346**; Report from the Vice Minister of *Cooperativas* (Mr Meneses) to the Minister of Mining (Mr Virreira) of 8 June 2012, **R-347**, pp. 5-13.

524 Reply, ¶ 166.

525 Romero, ¶¶ 27-28 (Unofficial translation: "*Despite the difficulties generated by the agreement concluded between Sinchi Wayra and the cooperativistas on the Rosario vein, the subsequent agreement reached in September 2012 finally put an end to the serious confrontation that the Colquiri population experienced that year. Since then, and despite the fact that there have been some tensions in the area typical of the Bolivian mining sector and of mines in which cooperativas are present, events such as those of 2012 have not occurred again*").

333. Success in keeping the social conflicts at the Colquiri Mine in check is not only due to the Government's efforts to reach the agreement of September 2012. At least two measures taken by COMIBOL at the Mine now (which Sinchi Wayra never considered to implement) are critical to maintaining good relations:

334. *First*, as Mr Moreira explains, following the reversion, COMIBOL hired a significant number of former *cooperativistas*. Today, Colquiri has more than 1,240 employees, of which 621 are former *cooperativistas.*[526] Having more than two miners per *cooperativista* working at the Mine makes social tensions easier to manage.[527]

335. It bears noting that this measure is anything but an innovation. As discussed in Section 2.1.1 above, having an important number of mining workers was one of the measures that allowed COMIBOL to preserve good social relations at the Mine before the privatization.

336. *Second*, COMIBOL hired a group of workers known as the "*policía minera*," whose sole responsibility is to ensure the security of the Mine.[528] In addition, Mr Moreira notes, "*[m]ás de la mitad de ellos son antiguos cooperativistas, lo que permite a la 'policía minera' tener un conocimiento de primera mano de las áreas que explotan los cooperativistas, así como sus rutas de ingreso al interior de la Mina.*"[529]

337. Claimant disingenuously questions the effectiveness of the Government's measures by claiming that the conflict of 2012 "*resumed*" in 2013, 2014 and 2015.[530] Claimant's contention is unsupported.

338. The conflict at Colquiri did not "*resume*" in 2013. The article cited by Claimant mentions an incident involving three *cooperativistas* that were injured when attempting to access the areas of the Mine operated by COMIBOL. Mr Mamani recalls that, thanks to the actions of the "*policía minera*," they were unable to reach their target.[531]

339. Neither did the conflict "*resume*" in 2014 or 2015. Rather, throughout these years, some tensions arose as the *cooperativistas* sought to renegotiate the partition of the Rosario vein.

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526 COMIBOL, List of Former *Cooperativistas* Currently Employed by COMIBOL, 2012-2013, **R-273**.

527 Moreira II, ¶ 15.

528 Moreira II, ¶ 16.

529 Moreira II, ¶ 16 (Unofficial translation: "*[M]ore than half of them are former cooperativistas, which allows the 'mining police' to have first-hand knowledge of the areas exploited by the cooperativistas, as well as of their routes of entry into the Mine*").

530 Reply, ¶ 170.

531 Mamani II, ¶ 61.

In spite of the fact that Sinchi Wayra's Rosario Agreement kept creating tensions at the Colquiri Mine, no violent incidents were reported.

340. In sum, to use Mr Mamani's words, "*llevamos, al menos, cinco años en los que no ha habido invasiones ni violencia significativa que interfieran en la operación de la Mina.*"[532] This was possible thanks to the measures taken by COMIBOL since the reversion.

2.8 After The Reversions, Bolivia Has Negotiated With Glencore International In Good Faith

341. As explained in the Statement of Defence,[533] over the course of the Negotiations that followed the reversion of the Assets, Bolivia negotiated with Glencore International in good faith, and with the aim of reaching an amicable solution to this dispute. The Negotiations took place at Glencore International's request, following the reversion of each of the Assets. In fact, it is undisputed that after each reversion, Glencore International sent letters to Bolivia complaining about the measures and requesting that negotiations take place.[534]

342. In its Reply, Claimant insists that it was Claimant (not Glencore International) who participated in the Negotiations.[535] In addition, Claimant continues to breach its confidentiality obligations to claim that Bolivia did not conduct these Negotiations in good faith.[536]

343. Claimant's allegations and description of the Negotiations are misguided, and should be dismissed by the Tribunal both as a matter of law and as a matter of fact.

344. *First*, there is no factual basis for the allegation that Claimant (not Glencore International) was the party involved in the Negotiations. As explained in the Statement of Defence,[537] Claimant is a shell company with no payroll, executives, offices, or operations of its own. In fact, Glencore Bermuda exists only in a nearly empty room that "*held a filing cabinet, a*

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532 Mamani II, ¶ 63 (Unofficial translation: "*there have been, at least, five years in which there were no invasions or significant violence that interfere in the operation of the Mine.*").

533 Statement of Defence, ¶¶ 230 *et seq.*

534 Letter from Freshfields Bruckhaus Deringer (Mr Blackaby) to Ministry of the Presidency (Mr Quintana Taborga) of 4 April 2007, **C-23**. Letters from Glencore (Mr Mate and Mr Glasenberg) to the President of Bolivia (Mr Morales Ayma) and the Ministry of Mining (Mr Pimentel Castillo) of 14 May 2010, **C-27**. Letter from Glencore International PLC (Mr Capriles) to the Minister of Mining (Mr Virreira) of 3 July 2012, **C-145**.

535 Reply, ¶ 88.

536 Reply, ¶ 172.

537 Statement of Defence, ¶ 231.

computer, a telephone, a fax machine and a checkbook" and apparently nothing more.[538] This room is located within the offices of Appleby, the Glencore group's Bermudan law firm.[539]

345. The record, on the contrary, confirms that it was Glencore International (not Claimant) who participated in the Negotiations. As explained above, Glencore International sent several letters to Bolivia over the course of the last decade, requesting Negotiations.[540] Glencore International invoked to that effect the bilateral investment treaty between Switzerland and Bolivia (the "**Swiss-Bolivia BIT**"), under which Claimant has no standing.[541] In addition, Mr Eskdale, who claims to have participated in the Negotiations, is affiliated with Glencore International only (not with Claimant).[542]

346. *Second*, Claimant does not dispute that the Negotiations are confidential, and that the Parties are bound by a confidentiality agreement. It contends however, that it would not have breached its confidentiality obligations because it did not "*reveal confidential documents, nor did it disclose specific details*," and because it was "*essential*" that this Tribunal be informed of the context of the Negotiations.[543]

347. Claimant's Reply confirms that it has openly breached its confidentiality obligations.

348. On the one hand, Claimant is silent as to the scope and extent of the confidentiality covering the Negotiations. This is not an innocent omission. Since 2008, Glencore International has confirmed to the State that any information exchanged or discussions taking place during the Negotiations would not be revealed in the context of any subsequent arbitration proceedings. As a matter of fact:

- On 6 October 2008, Bolivia and Sinchi Wayra executed minutes of agreement pursuant to which "*ninguna de las Partes podrá difundir, hacer uso de la*

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538 International Consortium of Investigative Journalists, *Room of Secrets Reveals Glencore's Mysteries*, press article of 5 November 2017, **R-243**, p. 1.

539 International Consortium of Investigative Journalists, *Room of Secrets Reveals Glencore's Mysteries*, press article of 5 November 2017, **R-243**, pp. 1, 9.

540 Letter from Glencore International AG (Mr Strothotte) to the President of Bolivia (Mr Morales Ayma) of 22 February 2007, **C-21**; Letter from Glencore (Mr Kalmin and Mr Hubmann) to Ministry of the Presidency (Mr Quintana Taborga) of 11 December 2007, **C-25**; Letters from Glencore (Mr Mate and Mr Glasenberg) to the President of Bolivia (Mr Morales Ayma) and the Ministry of Mining (Mr Pimentel Castillo) of 14 May 2010, **C-27**; Letter from Glencore International PLC (Mr Capriles) to the Minister of Mining (Mr Virreira) of 3 July 2012, **C-145**.

541 Letter from Glencore International AG (Mr Strothotte) to the President of Bolivia (Mr Morales Ayma) of 22 February 2007, **C-21**, p. 2; Letter from Glencore (Mr Kalmin and Mr Hubmann) to Ministry of the Presidency (Mr Quintana Taborga) of 11 December 2007, **C-25**.

542 Mr Eskdale started working for Glencore International in 1996, was the Asset Manager for Latin America from 2008 to 2013 and since then has been the head of Glencore's Global Zinc Operations. Eskdale I, ¶¶ 4-9.

543 Reply, ¶ 175.

información generada durante el proceso de negociación, ante cualquier instancia judicial o extra judicial de la República o cualquier otro país o tribunal de arbitraje internacional o jurisdiccional. Las Partes dejan expresa constancia que en caso de que la información llegara a ser presentada ante cualquier foro de arbitraje o tribunal jurisdiccional, nacional o extranjero, no se le reconocerá mérito alguno a dichos antecedentes en el proceso, aún en el caso que sea presentada por terceros;"[544] and

- Over the course of the following years, Glencore International repeatedly confirmed that any participation of Glencore in the Negotiations "*está sujeta al entendimiento acordado de que toda discusión e información intercambiada entre las Partes (Glencore y Bolivia) será mantenida en estricta confidencialidad y no podrá ser utilizada en ningún ámbito o foro, sea judicial o arbitral, relacionado con la solución de controversias o demandas sobre inversiones o semejantes*."[545]

349. Claimant cannot now deprive Glencore International's affirmations in these agreements and communications of any meaning. Confidentiality over "*discusiones*" covers any exchange of

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

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

views of the parties to the Negotiations, and not only "*specific details*" or "*confidential documents*," as Claimant baselessly contends.

350. On the other hand, Claimant cannot seriously claim that it disclosed confidential information because it was "*essential*" to inform this Tribunal of the context of the Negotiations.[546] All the agreements and declarations made by Glencore cited above expressly mention that no discussion of information shall be used before "*ningún ámbito o foro, sea judicial o arbitral*"[547] and that "*no se le reconocerá mérito alguno a dichos antecedentes en el proceso*."[548]

351. In light of the foregoing, the Tribunal must disregard all the information disclosed by Glencore in violation of its confidentiality obligation. Bolivia must again reserve all of its rights in this regard.

352. *Third*, it is, in any event, absurd to suggest that Bolivia did not conduct the Negotiations in good faith. As explained in the Statement of Defence,[549] (and taking into account that, most often, negotiations before bringing a claim commonly last for some 6 months[550]), Bolivia and Glencore negotiated:

- For almost 10 years (*i.e.*, 20 times the average negotiation period) following the issuance of the Tin Smelter Reversion Decree;
- For over 7 years (*i.e.*, 14 times the average negotiation period) following the issuance of the Antimony Smelter Reversion Decree; and
- For over 5 years (*i.e.*, 10 times the average negotiation period) following the issuance of the Mine Lease Reversion Decree.

353. Had Bolivia not engaged in a meaningful discussion with Glencore (such as by offering negative valuations or no compensation for the Assets), Claimant would not have waited for so long before commencing these proceedings. As Glencore International noted, for instance,

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546 Reply, ¶ 175.

547 Letter from Glencore International (Mr Eskdale) to the Attorney General (Mr Arce) of 30 September 2015, **C-154** (emphasis added) (Unofficial translation: "*no circumstances or forum, whether judicial or arbitral*").

548 Minutes of First Meeting of Negotiations between Bolivia and Sinchi Wayra S.A of 6 October 2008, **R-231**, p. 2 (emphasis added) (Unofficial translation: "*no merit whatsoever shall be recognised to said elements in the process*").

549 Statement of Defence, ¶¶ 232.

550 Organisation for Economic Co-operation and Development Investment Division, *Dispute settlement provisions in international investment agreements: A large sample survey*, 2002, **RLA-137**, ¶¶ 38-39.

in these Negotiations "*se avanzó mucho y falta poco para lograr un acuerdo amistoso definitivo, libre de presiones y litigios*."[551]

354. In sum, the State negotiated in good faith with Glencore International for almost 10 years. Over the course of these Negotiations, Bolivia made several offers and engaged in good faith attempts to resolve the present dispute.

2.9 Claimant Does Not Dispute That The State Made Significant Investments After The Reversion Of The Smelters And The Mine Lease

355. Claimant does not dispute that, following the reversion of the Assets, the State made significant investments in the Tin Smelter and the Mine.

356. As explained in the Statement of Defence,[552] after years of private operation with no substantial investments in the Tin Smelter, the State had to lay out a new strategy in order to modernise and ensure the viability of this Asset. Claimant does not dispute that, at the time of the privatization, large investments and overhaul of equipment were an urgent necessity.

357. In these circumstances, to date, the State has invested around US$ 39 million in the Tin Smelter. Most of these funds were destined to the acquisition of a vertical pit furnace for processing tin concentrates (the "**Ausmelt Furnace**"), in addition to US$ 3 to 4 million on sustaining investment.[553]

358. Likewise, the State-owned *Empresa Minera Colquiri*, now under COMIBOL's control, has implemented new exploration programmes and made significant investments, which have yielded impressive results. The most important of these were the Blanca vein's refurbishment, in which the State has invested US$ 11.5 million, and the construction of a new concentrator plant, which requires US$ 75.8 million in planned investments.[554]

359. In parallel, as discussed above,[555] preserving the social license to operate from the community of Colquiri is crucial for the operation of the Mine. This explains why, between 2013 and 2017, COMIBOL has invested approximately US$ 4 million in community relationship

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

552 Statement of Defence, ¶¶ 239 *et seq.* See also Section 2.6 above.

553 Villavicencio I, ¶ 53.

554 Colquiri Annual Operations Report for 2017, **R-233**, pp. 24-25.

555 See Section 2.7.3 above.

programmes.[556] These investments (in addition of more than US$ 3 million in investments for reinforcing security[557] and the labour liabilities arising out of the hiring of former *cooperativistas*) are key in maintaining good relationships at the Mine.

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360. Claimant's attempt to showcase the reversion of the Smelters and the Colquiri Mine as the unforeseeable and unjustifiable act of a capricious State falls flat. For all the reasons above, the reversions were carried out for a public purpose, and entirely foreseeable as at the time of Glencore International's acquisition of the Assets. In the case of the Colquiri Mine, the risk of adverse State action was compounded by Sinchi Wayra's deficient management of the relationship with the *cooperativistas*, and the ensuing violent conflict. Claimant thus has no basis to assert that Bolivia's conduct towards it would, at any point, have violated any of Bolivia's obligations under international law, as will be explained in detail below.

3. THE LAW APPLICABLE TO THE DISPUTE

361. Claimant argues that (i) the Treaty is the sole substantive applicable law to the dispute except insofar as it is supplemented by general principles of international law or customary international law,[558] (ii) Bolivia's "*obligations under other international legal instruments [...] cannot, and do not, limit Bolivia's obligations under the Treaty*,"[559] and (iii) Bolivian law is irrelevant to how Claimant's Assets "*are protected under the Treaty [...].*"[560]

362. All three of these propositions are incorrect.

363. *First*, the Treaty is nothing more than a part of the substantive law applicable in the dispute. The text of the Treaty's dispute resolution clause, although it indeed establishes that the Treaty is part of the applicable law, does not say that the Treaty is the only applicable law.

364. It could not. The Treaty addresses only a very limited number of legal issues, primarily the obligations incumbent on states. Indeed, the *Georges Pinson* tribunal observed that "*[e]very*

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556 Colquiri Annual Operations Report for 2015, **R-338**, p. 69; Colquiri Annual Operations Report for 2016, **R-348**, p. 67; Colquiri Annual Operations Report for 2017, **R-233**, p. 59. Over US$ 3 million were invested on a nationwide educational programme (*Bono Juancito Pinto*), Empresa Minera Colquiri, Minería Responsable y Sustentable, 2017, **R-234**, p. 11.

557 The "*policia minera*" staff costs Bs 367,380 per month, which amounts to some US$ 630,000 per year. Mine Security Staff Payroll of August 2018, **R-275**.

558 Reply, ¶ 180.

559 Reply, ¶ 181.

560 Reply, ¶ 183.

international convention must be deemed to refer tacitly to general international law, for all the questions that it does not itself resolve in express terms and in a different way."[561]

365. Nevertheless, Claimant argues that the Treaty's dispute resolution clause somehow excludes any applicable law other than the Treaty itself.[562] This argument confuses a question of jurisdiction *ratione materiae* with a question of applicable law. Jurisdiction *ratione materie* determines what disputes are subject to jurisdiction pursuant to the Treaty, while applicable law determines what bodies of law might be employed to resolve that dispute.

366. And, of course, not even Claimant believes that the Treaty is the only law applicable to this dispute. It admits that the applicable law includes both general principles of international law as well as customary international law.[563] What is more, Claimant itself cites to conventional international law other than the Treaty in support of its case; most notably, it places key reliance on the Vienna Convention.[564]

367. Thus, Claimant cannot consistently maintain that all international law other than the Treaty is excluded through the functioning of the Treaty's dispute resolution provision.

368. None of Claimant's supposed authorities for the proposition that the Treaty is the exclusive applicable law in fact support that proposition.[565] To the contrary, they all confirm that the law applicable to this dispute is not limited to the Treaty (but, of course, includes the Treaty):

- *Quiborax*: "*Except for the undisputed application of the BIT, the Parties have not agreed on the rules of law that govern the merits of this dispute. Consequently, the Tribunal shall apply Bolivian law and international law when appropriate.*"[566]

- *Rompetrol*: "*The category of materials for the assessment in particular of fair and equitable treatment is not a closed one, and may include, in appropriate*

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561 *Georges Pinson (France) v. United Mexican States*, UNRIAA, volume 5, Decision No. 1 of 19 October 1928, **RLA-138**, p. 422 (Unoffical translation) (Original text: "*Toute convention internationale doit être réputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon différente*").

562 Reply, ¶ 180.

563 Reply, ¶ 180.

564 See, *e.g.*, Reply, ¶ 260.

565 Reply, footnote 486.

566 *Quiborax SA and Non Metallic Minerals SA v Plurinational State of Bolivia* (ICSID Case No ARB/06/2) Award of 16 September 2015, **CLA-127**, ¶ 91.

circumstances, the consideration of common standards under other international regimes (including those in the area of human rights.)"[567]

- *Chevron*: "*The substantive law to be applied by the Tribunal consists of the substantive provisions of the BIT and any relevant provisions of other sources of international law.*"[568] (Claimant omits to quote the underlined text)

369. *Second*, contrary to Claimant's suggestion,[569] international human rights law is part of the law applicable to the present dispute. The very rules and principles of international law on which Claimant itself relies establish that human rights law is applicable. According to the Vienna Convention on the Law of Treaties, relied upon by Claimant, human rights law is relevant in two different ways.[570]

370. One, Article 31(3)(c) of the Vienna Convention establishes that human rights law is a parameter of interpretation for the Treaty. It states that, "*[t]here shall be taken into account, together with the context: [...] (c) Any relevant rules of international law applicable in the relations between the parties.*"[571] Although the Vienna Convention is a self-validating source of authority, this rule is confirmed by, *inter alia*, the *Urbaser* tribunal, the *Tulip* Ad-Hoc Committee, and the *Philip Morris* tribunal.[572]

371. In fact, the idea that a treaty must be interpreted in its normative environment is widely recognized among the authorities on general international law.[573] The International Court of Justice ("**ICJ**") in its *Right of Passage* judgment held that "*[i]t is a rule of interpretation that*

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567 *The Rompetrol Group NV v Romania* (ICSID Case No ARB/06/3) Award of 6 May 2013, **CLA-209**, ¶ 172(iii).

568 *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador* (UNCITRAL) Partial Award on the Merits of 30 March 2010, **CLA-189**, ¶ 159 (emphasis added).

569 Reply, ¶ 181.

570 Vienna Convention on the Law of Treaties, 1155 UNTS 331 of 23 May 1969, **CLA-6**, Article 31 (referenced in Reply, ¶ 289).

571 Vienna Convention on the Law of Treaties, 1155 UNTS 331 of 23 May 1969, **CLA-6**, Article 31(3)(c).

572 *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment of 30 December 2015, **RLA-139**, ¶¶ 86-92 (citing United Nations International Law Commission, *Report of a Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682, 13 April 2006, **RLA-1**, ¶¶ 410-480); *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, **RLA-86**, ¶ 1200; *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, **RLA-43**, ¶ 290.

573 R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, Vol. 1, Oxford, 9th ed. 2008, **RLA-140**, p. 1275 ("*Account is taken of any relevant rules of international law not only as constituting the background against which the treaty's provisions must be viewed, but in the presumption that the parties intend something not inconsistent with generally recognised principles of international law, or with previous treaty obligations towards third states.*").

a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it."[574]

372. Two, pursuant to Article 41 of the Vienna Convention, in case of a conflict between a human rights treaty and a subsequent investment treaty, the human rights obligation must prevail. Article 41 encodes the basic rule that two states cannot bilaterally alter the treaty rights of a third party by concluding a subsequent treaty.[575]

373. Pursuant to this rule, an investment treaty may not modify a prior human rights treaty. The modification would affect the enjoyment by the other parties of their rights under the treaty, as human rights treaties establish obligations *erga omnes partes* as well as rights held by third parties (*i.e.*, private individuals). As such, it would interfere with the effective execution of the object and purpose of the treaty as a whole, which is to ensure that third parties enjoy an enumerated set of rights. This is confirmed, albeit in a different context, by the ICJ's Advisory Opinion on Reservations to the Genocide Convention.[576]

374. Thus, human rights treaties – such as the International Covenant on Civil and Political Rights and the American Convention on Human Rights – prevail over the subsequent Treaty in case of a conflict.

375. Three, contrary to Claimant's argument, the principle of *lex specialis* does not alter the results from applying Articles 31 and 41 of the Vienna Convention. As Bolivia explained, "*a treaty applies as lex specialis only when it addresses the same subject matter as another rule of international law and does so with more specificity.*"[577] Human rights treaties and investment treaties address different subject-matters, namely the rights of investors and the rights of

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574 *Case concerning Right of Passage Over Indian Territory (Portugal v. India)*, ICJ, Judgment of 26 November 1957, **RLA-141**, p. 142.

575 Vienna Convention on the Law of Treaties, 1155 UNTS 331 of 23 May 1969, **CLA-6**, Article 41 ("*[t]wo or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: [...] (b) The modification in question is not prohibited by the treaty and: (i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.*").

576 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ, Advisory Opinion of 28 May 1951, **RLA-142**, pp. 21-22 ("*[A] multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and raison d'être of the convention. [...] In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention.*").

577 Statement of Defence, ¶ 249 (citing United Nations International Law Commission, *Report of a Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682, 13 April 2006, **RLA-1**, ¶ 56).

individuals. Investment treaties have nothing to say about the human rights of individuals and so cannot be *lex specialis* to a human rights instrument when those issues arise in a dispute.

376. *Third*, Bolivian law applies in the dispute to questions of whether and when rights exist under Bolivian law. Claimant in fact concedes that "*Bolivian law is relevant as evidence of Glencore Bermuda's investments (ie, whether particular assets or rights constituting the alleged investments exist, their scope and in whom they vest) [...].*"[578] As Zachary Douglas explained, "*[t]he law applicable to an issue relating to the existence or scope of property rights comprising the investment is the municipal law of the host state, including its rules of private international law.*"[579] This principle was recently confirmed by, among others, *Vestey Group*[580] and *Emmis*.[581]

377. In sum, the applicable law to the present dispute includes, among others, the Treaty, international human rights instruments, and Bolivian law.

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

378. In its Statement of Defence, Bolivia demonstrated that the claims are not subject to jurisdiction and are, in any event, inadmissible. Claimant maintains in its Reply that Bolivia is mistaken.

379. Claimant's view remains incorrect. It is Claimant's burden to prove that there is jurisdiction and that its claims are admissible (**Section 4.1**). It has not done so. To the contrary, this Tribunal lacks jurisdiction and the claims are inadmissible in their entirety because Claimant committed an abuse of process (**Section 4.2**), Claimant never actively invested in Bolivia (**Section 4.3**), Claimant is, in reality, a Swiss corporation advancing claims for indirect rights (**Section 4.4**), the Assets underlying the dispute were illegally privatized (**Section 4.5**), and the dispute is subject to mandatory ICC arbitration (**Section 4.6**). In addition, the Tribunal lacks jurisdiction over the Tin Stock claim because Claimant never notified that claim to Bolivia (**Section 4.7**) and [redacted]

578 Reply, ¶ 183.

579 Z. Douglas, *The International Law of Investment Claims*, 2009, **RLA-4**, p. 52.

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

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

4.1 Claimant Failed To Prove That Its Claims Are Subject To Jurisdiction And Are Admissible

380. In the Statement of Defence, Bolivia demonstrated that "*[i]t is for Claimant to prove with sufficient certainty (and not for Bolivia to prove the contrary) that each and every one of the conditions for admissibility and jurisdiction have been met, including the consent of the Parties.*"[582]

381. Claimant admits in the Reply that it indeed "*has the burden to prove that its claims are subject to the jurisdiction of the Tribunal.*"[583] However, it argues that, because it has put forth sufficient evidence, "*the onus has shifted and the burden falls on Bolivia to prove that Glencore Bermuda and its investments do not meet the requirements for protection under the Treaty.*"[584]

382. *First*, this is incorrect as a matter of law. The burden remains on Claimant to demonstrate that its claims are subject to jurisdiction and are admissible regardless of the evidence it has put forward.

383. This is the position of the vast majority of the investment tribunals to have addressed the question. For example, the *National Gas* tribunal held that, "*[a]lthough it is the Respondent which has here raised specific jurisdictional objections, it is not for the Respondent to disprove this Tribunal's jurisdiction.*"[585] Other tribunals to confirm this holding include *Caratube and Hourani v. Kazakhstan*, *Blue Bank v. Venezuela*, *Ampal-American v. Egypt*, *Abaclat v. Argentina*, and *Saipem v. Bangladesh*.[586]

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582 Statement of Defence, ¶ 256.

583 Reply, ¶ 184.

584 Reply, ¶ 186.

585 *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award of 3 April 2014, **RLA-143**, ¶ 118.

586 *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/3, Award of 27 September 2017, **RLA-98**, ¶ 310; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award of 26 April 2017, **RLA-144**, ¶ 66 ("*The Claimant bears the burden of proving the facts required to establish jurisdiction, insofar as they are contested by the Respondent.*"); *Ampal-American Israel Corporation and Others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction of 1 February 2016, **RLA-145**, ¶ 216 ("*Accordingly, the burden of proof to establish the Tribunal's jurisdiction over, in this instance, the Claimant David Fischer rests upon David Fischer. The proposition that he who asserts must prove is applicable in investment treaty arbitration.*"); *Abaclat and Others v Argentine Republic* (ICSID Case No ARB/07/5) Decision on Jurisdiction and Admissibility of 4 August 2011, **CLA-197**, ¶ 678 ("*Indeed, it is Claimants who bear the burden to prove that all conditions for the Tribunal's jurisdiction and for the granting of the substantive claims are met.*"); *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue of 5 March 2013, **RLA-39**, ¶ 48 ("*As a party bears the burden of proving the facts it asserts, it is for Claimant to satisfy the burden of proof required at the jurisdictional phase.*"); *Saipem SpA v The People's Republic of Bangladesh* (ICSID Case No ARB/05/07) Decision on jurisdiction and recommendation on provisional measures of 21 March 2007, **CLA-172**, ¶ 83.

384. These tribunals have soundly rejected attempts, like that of Claimant, to shift the burden of proof on jurisdiction to the respondent. To take but one example, *Caratube and Hourani v. Kazakhstan* recently rejected such an attempt, on the grounds that there was "*no persuasive reason that would justify shifting to the Respondent the burden of proving this Tribunal's jurisdiction.*"[587] Another comes from the *Tulip v. Turkey* tribunal, which held that, "*whilst the Article 8(2) Objection was raised by Respondent, the onus remains on Claimant to establish that the requirements of Article 8(2) have been satisfied, and that the Tribunal has jurisdiction.*"[588]

385. This refusal to shift the burden of proof is consistent with the fundamental principle of international adjudication that no State may be required to defend itself before a tribunal lacking jurisdiction. As Professor Rosenne affirms, "*[a] basic rule of international law and a principle of international relations [provides] that a State is not obliged [to] give an account of itself on issues of merits before an international tribunal which lacks jurisdiction or whose jurisdiction has not been established.*"[589] It is for the claimant to establish that such jurisdiction exists.

386. In response to Bolivia's position, Claimant cherry-picks a few non-representative cases[590] in an attempt to force Bolivia to disprove jurisdiction and admissibility. However, these cases confirm that it now bears the burden of proof. Even had the burden of proof shifted to Bolivia (which is denied), Claimant would have to rebut the *prima facie* case that Bolivia has set out for each of its objections. Indeed, *Philip Morris v. Australia*, invoked by Claimant on the burden of proof,[591] confirms as much. *Philip Morris* states in full:

> *Specifically, it is for the Claimant to allege and prove facts establishing the conditions for jurisdiction under the Treaty; for the Respondent to allege and prove*

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587 *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/3, Award of 27 September 2017, **RLA-98**, ¶¶ 310, 314.

588 See, *e.g.*, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue of 5 March 2013, **RLA-39**, ¶ 48 ("*Here, the Parties agree that whilst the Article 8(2) Objection was raised by Respondent, the onus remains on Claimant to establish that the requirements of Article 8(2) have been satisfied, and that the Tribunal has jurisdiction.*").

589 S. Rosenne, *The World Court: What it is and how it works*, 5th ed., 1995, **RLA-40**, p. 99; H. Thirlway, "Preliminary Objections" in *Max Planck Encyclopedia of Public International Law*, August 2006, **RLA-41**, ¶ 4.

590 Reply, ¶ 186 (citing *Limited Liability Company Amto v Ukraine* (SCC Case No 080/2005) Final Award of 26 March 2008, **CLA-175**, ¶ 64; *Bernhard von Pezold and others v Republic of Zimbabwe* (ICSID Case No ARB/10/15) Award of 28 July 2015, **CLA-126**, ¶¶ 174, 176; *Vito G Gallo v Canada* (PCA Case No 55798) Award (Redacted) of 15 September 2011, **CLA-199**, ¶ 277; *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Decision on the Respondent's Jurisdictional Objections of 1 June 2012, **CLA-110**, ¶ 2.11).

591 Reply, ¶ 186.

the facts on which its objections are based; and, to the extent that the Respondent has established a prima facie case, for the Claimant to rebut this evidence.[592]

387. *Second*, even were Claimant correct that the burden of proof could in principle shift to Bolivia upon submission of sufficient evidence (which is denied), Claimant has failed to submit meaningful evidence to establish jurisdiction. It is Claimant's position that this material would include evidence of its incorporation in Bermuda and of its ownership of Sinchi Wayra, Colquiri, and Vinto.[593] However, as the subsequent sections will show, Claimant has failed to meet its burden of proof for these propositions and on the remaining key proposition needed to substantiate this Tribunal's jurisdiction.

388. In short, it is for Claimant to demonstrate that this Tribunal may hear its claims.

4.2 The Tribunal Lacks Jurisdiction Because Claimant Has Failed To Show That Its Acquisition Of The Assets Was Not An Abuse Of Process

389. In the Statement of Defence, Bolivia demonstrated that the Tribunal may not hear the claims because Claimant committed an abuse of process by transferring the Assets to Glencore Bermuda when the dispute was foreseeable. Claimant, in its Reply, does not contest the basic legal proposition that an abuse of process should lead to the rejection of its claims, but instead tries to narrow the scope of abuse of process and argue that it did not commit any such abuse.

390. Its lead argument is that it did not restructure the investment to obtain Treaty protection because it was already covered by the Switzerland-Bolivia BIT.[594] The supposition of this argument is simply false. As Bolivia already explained, that BIT does not cover a company incorporated in Switzerland unless its indirect ownership structure has a substantial Swiss interest.[595] The interests behind Glencore International are not substantially Swiss, but instead a range of global funds primarily from the United States.[596] Thus, Claimant's argument is a

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592 *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility of 17 December 2015, **CLA-129**, ¶ 495 (emphasis added).

593 Reply, ¶ 187.

594 Reply, ¶ 212.

595 Statement of Defence, ¶ 323 (citing Agreement between the Swiss Confederation and the Republic of Bolivia on the reciprocal promotion and protection of investments, English translation, **RLA-19**, Article 1(b)(aa)).

596 Statement of Defence, ¶ 323 (citing Morningstar, Glencore PLC Major Shareholders, **R-236**). Claimant argues in a footnote that Glencore International is directly owned by two other Swiss holding companies. But the Switzerland-Bolivia BIT looks to whether the indirect interest is ultimately Swiss. Indeed, the *Mondev* tribunal, citing this very provision of the Switzerland-Bolivia BIT, observed that "*NAFTA does not adopt the device commonly used in bilateral investment treaties ('BITs') [i.e. the Switzerland-Bolivia BIT] to deal with the foreign investment interests held in local holding companies, namely, that of deeming the local company to have the nationality of the foreign investor which owns or controls it.*" *Mondev International Ltd v United States of America* (ICSID Case No ARB(AF)/99/2) Award of 11 October 2002, **CLA-38**, ¶ 79.

The mere fact of controversy over the meaning and coverage of the Switzerland-Bolivia BIT confirms why Claimant's sought the coverage of the Treaty. But it is equally an abuse of process to seek the coverage of a more favorable treaty when the dispute is foreseeable if not otherwise entitled to its protection.

red herring. It perfectly well could have (and did) restructure its investment to obtain Treaty protection (or to avoid controversy regarding the Switzerland-Bolivia BIT).

391. Despite these efforts, the Tribunal must reject Claimant's claims for abuse of process. It is *per se* an abuse of process to restructure an investment when a dispute is reasonably foreseeable (**Section 4.2.1**). Claimant engaged in precisely such an abuse when it assigned the Assets from Glencore International to Glencore Bermuda in light of the perfectly foreseeable disputes that arose (**Section 4.2.2**).

4.2.1 Structuring An Investment To Obtain Treaty Protection When A Dispute Is Foreseeable Constitutes An Abuse of Process

392. As Bolivia established in its Statement of Defence, it is a clear rule of investment law that restructuring an investment to obtain treaty protection when a future dispute is reasonably foreseeable is *per se* an abuse of process.[597] This abuse requires an investment tribunal to dismiss the claims.

393. Although Bolivia clearly laid out this legal position, Claimant largely chose not to respond.

394. Instead, Claimant devotes the lion's share of its discussion to attacking a position that Bolivia did not put forth and that has nothing to do with Bolivia's objection: that it is illegitimate to structure an investment to obtain treaty protection *regardless* of whether a dispute is foreseeable.[598] This pointless rebuttal to a position never advanced is developed over the course of some eight paragraphs in a separate section of the Reply.[599] The Tribunal can safely ignore this argumentation.

395. Instead, the relevant analysis is whether a dispute was *reasonably foreseeable* at the time when the investment was made. The lead precedent is *Philip Morris v. Australia*. As it restated the law, "*the initiation of a treaty-based investor-State arbitration constitutes an abuse of right (or abuse of process [...]) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time where a dispute was foreseeable.*"[600]

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597 Statemnet of Defence, ¶¶ 295-296.

598 Reply, ¶¶ 214-221.

599 Reply, ¶¶ 214-221.

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

396. Claimant largely admits that the *Philip Morris* tribunal's analysis of abuse of process is correct. It does not contest the following propositions that Bolivia established in its Statement of Defence.

397. *First*, Claimant does not deny that *Philip Morris* effectively restated the law on abuse of process. It does not deny that *Philip Morris* undertook a systematic review of the prior awards on this issue prior to setting forth the applicable legal principles.[601] It does not deny that *Philip Morris*, indeed, also reflects international law beyond the sphere of investment arbitration.[602]

398. *Second*, Claimant does not contest Bolivia's argument that "*a change of ownership structure can be abusive even when obtaining treaty protection is only one of its purposes.*"[603] This point must be deemed conceded in light of the failure to respond.

399. *Third*, Claimant does not contest Bolivia's argument that no exceptional circumstances are needed for an abuse of process but, instead, "*it is, by itself, an abuse of process to restructure the investment to obtain treaty protection in view of a foreseeable dispute.*"[604] It does not contest Bolivia's explanation (i) that the *Philip Morris* tribunal confirmed it is *per se* abusive to restructure when a dispute is foreseeable, and (ii) that no tribunal has subsequently rejected that conclusion of the *Philip Morris* tribunal.[605] All of these points are conceded.

400. Instead of contesting any of these key propositions, Claimant responds to Bolivia only on the narrowest of grounds. In this regard, it makes two incorrect arguments.

401. *First*, Claimant argues that, "*when analyzing the timing of a restructuring to determine if there has been an abuse of process, tribunals should focus on the specific dispute which is subject of the arbitration.*"[606] This proposition is false. The dispute subject of the arbitration may be only one of several disputes that were foreseeable at the time of restructuring.

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601 Statement of Defence, ¶ 297.

602 Statement of Defence, ¶ 299 (citing *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WTO, AB-1998-4, Report of the Appellate Body of 8 October 1998, **RLA-16**, ¶ 158).

603 Statement of Defence, ¶ 302.

604 Indeed, the closest Claimant comes is to addressing that argument is to assert that it is not abusive to restructure when no dispute is foreseeable. It sets out in support *Chevron*, *Venezuela Holdings*, and *Levy*. Reply, ¶ 219 (It cheekily suggests that Bolivia invoked those tribunals, when Bolivia did nothing more than observe that Philip Morris had considered them before authoritatively restating the applicable legal principles). Reply, ¶ 219 (citing Statemnet of Defence, ¶ 297, where Bolivia stated that "*The Philip Morris tribunal reached this conclusion on a thorough review of the prior arbitral jurisprudence. It analyzed in detail the decisions in Tidewater v. Venezuela, Mobil v. Venezuela, Pac Rim v. El Salvador, Gremcitel v. Peru, Lao Holdings v. Laos, and Chevron v. Ecuador.*").

605 Statemnet of Defence, ¶ 303.

606 Reply, ¶ 225 (emphasis omitted).

402. Claimant invokes the *Tidewater* and *Philip Morris* tribunals in support of its position.[607] But neither of those tribunals makes a single mention of any such requirement (and in fact Claimant cites to recitations of party argument in *Philip Morris*).[608] Claimant then invokes the *Pac Rim* tribunal, which does ask whether the investor can "*foresee a specific future dispute*," but instead makes clear that it is possible for multiple specific future disputes to be foreseeable.[609]

403. In any event, the precise meaning that Claimant would attach to the word "specific" is far from obvious. Claimant seems to suggest, relying on *Maffezini* and "*ICJ rulings,*" that the dispute must be foreseeable in every one of its legal and factual detail.[610] This is plainly false.

404. The reason why it is false follows directly from the investment awards that Claimant puts forth in support. Those awards do not address abuse of process nor whether the dispute was foreseeable. Instead, they exclusively address whether a dispute had *already* arisen at a particular moment.[611] But that issue arises only for the question of jurisdiction *ratione temporis*, which, as *Philip Morris* made clear, is a matter distinct from abuse of process.[612] And, obviously, the characteristics of a dispute that has supposedly already arisen can be subject to a much more probing analysis than one that is merely foreseeable.

405. Indeed, this misguided argument is of a piece with Claimant's suggestion – contrary to the case law that it has introduced and relied on[613] – that the dispute must actually have arisen at the time of restructuring for there to be an abuse of process. This is why Claimant cites to materials regarding when the dispute actually arose. But the suggestion that the dispute must

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607 Reply, ¶ 225.

608 *See Tidewater Inc and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Decision on Jurisdiction of 8 February 2013, **CLA-116**, ¶¶ 145, 147, 197, 198; *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility of 17 December 2015, **CLA-129**, ¶¶ 550-554.

609 *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Decision on the Respondent's Jurisdictional Objections of 1 June 2012, **CLA-110**, ¶ 2.99.

610 Reply, ¶ 225:

611 Reply, ¶ 225 (citing *Maffezini v Kingdom of Spain* (ICSID Case No ARB/97/7) Decision of the Tribunal on Objections to Jurisdiction of 25 January 2000, **CLA-24**, ¶ 94; *Impregilo SpA v Islamic Republic of Pakistan* (ICSID Case No ARB/03/3) Decision on Jurisdiction of 22 April 2005, **CLA-159**, ¶¶ 301-303; *Helnan International Hotels A/S v Arab Republic of Egypt* (ICSID Case No ARB/05/19) Decision of the Tribunal on Objection to Jurisdiction of 17 October 2006, **CLA-170**, ¶ 52).

612 *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility of 17 December 2015, **CLA-129**, ¶¶ 527-529.

613 Reply, ¶ 225 (citing *Maffezini v Kingdom of Spain* (ICSID Case No ARB/97/7) Decision of the Tribunal on Objections to Jurisdiction of 25 January 2000, **CLA-24**, ¶ 94; *Impregilo SpA v Islamic Republic of Pakistan* (ICSID Case No ARB/03/3) Decision on Jurisdiction of 22 April 2005, **CLA-159**, ¶¶ 301-303; *Helnan International Hotels A/S v Arab Republic of Egypt* (ICSID Case No ARB/05/19) Decision of the Tribunal on Objection to Jurisdiction of 17 October 2006, **CLA-170**, ¶ 52).

have arisen for there to be an abuse of process is entirely unsupported, including by Claimant's citations to *Gold Reserve*,[614] *Isolux*,[615] and *Pey Casado*.[616] *Gold Reserve* and *Isolux* did not concern allegations of restructuring in the face of a foreseeable dispute, while *Pey Casado* rejected the allegations for lack of an improper purpose (unrelated to timing).

406. *Second*, Claimant insists that the dispute must have "*high foreseeability*" to give rise to an abuse of process.[617] This too is false.

407. Claimant relies for this argument on the proposition that *Philip Morris* supposedly endorsed a high threshold of foreseeability. This is wrong. Indeed, the very text from *Philip Morris* that Claimant chose to exhibit demonstrates as much. That text says the threshold "*rest[ed] between the two extremes posited by the tribunal in Pac Rim v El Salvador—'a very high probability and not merely a possible controversy.'*"[618] So *Philip Morris* did not endorse a high threshold, but instead held that "*[a] dispute is foreseeable when there is a reasonable prospect that a measure that may give rise to a treaty claim will materialise.*"[619]

408. In sum, it is an abuse of process to restructure an investment in order to obtain investment treaty protection when there is a reasonable prospect of the dispute arising. The foreseeable dispute may be one of several and it need not be highly foreseeable.

4.2.2 Glencore International Rerouted Its Investment Through Bermuda When A Dispute With Bolivia Was Foreseeable

409. As explained in Section 2.5.3 above, Glencore International (not Claimant) acquired the Assets from former President Sánchez de Lozada at a time when it was highly likely that the State would take action against them. Fully aware of the risks inherent in those Assets, Glencore International sought to protect them through every means possible, including by assigning them to Glencore Bermuda. Four reasons confirm this proposition:

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614 *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award of 22 September 2014, **CLA-123**, ¶ 252.

615 *Isolux Infrastructure Netherlands, BV v. Kingdom of Spain*, SCC Case No. V2013/153, Award of 12 July 2016, **RLA-10**, ¶¶ 701, 703.

616 *Víctor Pey Casado and President Allende Foundation v Republic of Chile* (ICSID Case No ARB/98/2) Award of 8 May 2008, **CLA-77**, ¶¶ 522, 529-530, 548, 550.

617 Reply, ¶ 228.

618 Reply, ¶ 228 (citing *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility of 17 December 2015, **CLA-129**, ¶¶ 550-554).

619 *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility of 17 December 2015, **CLA-129**, ¶ 585; *Tidewater Inc and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Decision on Jurisdiction of 8 February 2013, **CLA-116**, ¶ 194.

410. *First*, Glencore International acquired the Assets at a moment when it was not only foreseeable but likely that they would be the subject of dispute. [redacted] As of that time, Bolivia underwent profound social, political, and economic change, signalling the end of 20 years of neoliberal policies, and affecting the mining sector particularly.

411. As early as 2003, the statements of Sánchez de Lozada's successor, Carlos Mesa, already foreshadowed a material change of the role of the State, through COMIBOL, in the Bolivian mining sector. In his inaugural speech, Mesa announced that Bolivia would redefine, by way of an *Asamblea Constituyente*, "*elementos centrales de forma y de fondo que definirán temas esenciales sobre nuestros recursos naturales.*"[621] This was a political imperative at that moment in Bolivia because sovereignty over natural resources was precisely the core issue that ultimately led to Sánchez de Lozada's resignation.

412. This theme became central to the political agenda of the MAS as well – and had been so since its participation in the 2002 presidential election. The MAS platform was clear in its call to "*acabar con la pobreza [a través de] la recuperación de las empresas estratégicas y los recursos naturales, aplicar el concepto de la economía selectiva y la creación y fomento de empresas sociales de producción manejadas por los propios trabajadores, recuperar el territorio haciendo prevalecer el derecho consuetudinario de propiedad de las naciones originarias y consolidar las comunidades.*"[622] As explained in Section 2.5.2, this platform was not contingent on Evo Morales' specific political programme for the 2005 election.[623]

413. Claimant is thus wrong to assert that "*it was plainly impossible for Glencore to foresee a dispute based on Mr Evo Morales' political platform since neither MAS nor Mr Morales were*

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620 [redacted] See also Section 2.5.3 above.

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

622 Fundación Boliviana para la Capacitación Democrática y la Investigación, "*Opiniones y análisis sobre las elecciones presidenciales de 2002*," 2002, **R-163**, p. 57 (emphasis added) (Unofficial translation: "*end poverty [through] the recovery of strategic companies and natural resources, applying the concept of selective economy and the creation and promotion of social production companies managed by the workers themselves, territorial recovery by enforcing customary property law of the indigenous communities and consolidating the communities*").

623 See Fundación Boliviana para la Capacitación Democrática y la Investigación, "*Opiniones y análisis sobre las elecciones presidenciales de 2002*," 2002, **R-163**, pp. 49-50; Section 2.5.2 above.

in power"[624] at the time of the acquisition. Claimant's position is even more tenuous considering its own assertion that Glencore International was "*familiar with the Bolivian mining industry well before its acquisition of the Assets.*"[625] Glencore International could not be both "*familiar*" with the sector and completely ignorant of its upheaval at the time it was acquiring Assets in it – especially not since Claimant now contends that a "*thorough*" pre-acquisition due diligence would have been carried out.[626]

414. *Second*, if the wave of political change did not indicate that a dispute was likely to arise, the particular circumstances in which Glencore International made the acquisition should have.

415. Glencore International was invited to bid for the Assets in April 2004,[627] shortly after Sánchez de Lozada had resigned and fled Bolivia. [redacted] In this context, the transaction was intended to be concluded in an expeditious manner,Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4** [redacted]

416. Indeed, it is clear that Glencore International was well aware of the highly precarious circumstances into which it invested. [redacted]

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624 Reply, ¶ 232.

625 Reply, ¶ 57 and footnote 159.

626 Eskdale II, ¶ 57. [redacted]

627 Process Letter from Argent Partners (Mr Simkin) to Glencore International (Mr Eskdale) of 30 April 2004, **C-62**.

628 [redacted] See also First Request for the Opening of Criminal Responsibility Proceedings Against Sánchez de Lozada and Others from National Representatives of 20 October 2003, **R-307**.

629 [redacted]

630 [redacted]

631 [redacted]

[redacted]

417. *Third*, Claimant also argues it could not have foreseen that the State would take action against the Assets. This assertion is no more credible.

418. One, Claimant argues that it could not have reasonably foreseen that the privatization of the Tin Smelter would be subject to challenge. In Claimant's eyes, the "*isolated, unproven allegations of illegality*"[633] in the privatization of that Asset were no basis for such a concern.

419. But the accusations of illegality in the privatization of the Smelter were anything but isolated. At the time of its transfer to Allied Deals, such accusations had been made by one of Oruro's core civic organizations, and echoed by a member of Congress, and the *Central Obrera Departamental* of Oruro, the regional branch of the *Central Obrera Boliviana*, the largest labour union in Bolivia.[634] These accusations resurfaced less than two years later, in the context of the bankruptcy and fraud scandal in which RBG (formerly Allied Deals) was involved.[635] At this time, the State was called to intervene at the Tin Smelter and the Huanuni mine, and serious consideration was given to the reversion of the Smelter to the State.[636] This did not occur, and instead the Asset was acquired by Sánchez de Lozada only two months prior to him taking office for the second time.[637]

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632 [redacted]

633 Reply, ¶¶ 234-235.

634 Letter from the President of the Oruro Civic Committee to the *Contralor General de la República* of 21 February 2001, **R-123**; Letter from Representative Pedro Rubín de Celis to the *Contralor General de la República* of 10 May 2001, **R-124**; Letter from the Oruro Central Obrera to President Banzer Suárez of 23 May 2001, **R-126**; Section 2.4 above. See also Chamber of Representatives, *Supraestatales rinden homenaje a la COB por su 66 aniversario*, press release of 17 April 2018, **R-349**.

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

636 Statement of Defence, Section 2.4.2; *DDHH pide que el Estado intervenga*, *Brigada Parlamentaria pide preservar fuentes de trabajo*, press article, **R-137**; La Patria, *Gobierno: Vinto tiene que seguir funcionando,* press article of 18 May 2002, **R-138**; La Patria, *Cooperativistas amenazan con la toma de la empresa*, press article, **R-139**; Letter from the *Federación Regional de Cooperativas Mineras de Huanuni* to President Quiroga Ramírez of 20 May 2002, **R-142**.

637 Letter from Grant Thornton to the Minister of Economic Development of 7 June 2002, **R-148**; Statement of Defence, ¶ 90.

420. In these circumstances, Claimant cannot seriously assert that, at the time of the acquisition, it required a formal pronouncement of illegality of the privatization of the Tin Smelter in order to foresee that the State would take action against it.[638]

421. Two, Claimant argues that it could not have reasonably foreseen that the Antimony Smelter could have been reverted for lack of production. This is because, according to Claimant, "*there was no contractual obligation to put the Antimony Smelter back into production.*"[639]

422. Claimant simply refuses to acknowledge the plain terms of the Contract. As explained in Section 2.7.2 above, the Contract, read together with the Terms of Reference incorporated therein,[640] clearly specified that the purpose and object of the privatization was to ensure that the Antimony Smelter would be put into production for the economic benefit of the country.[641] Indeed, Claimant disregards the importance that such contractual terms had in the context of the economic, social and political changes described above. The concept of a State active in the mining sector through COMIBOL was simply incompatible with the notion of an inactive Antimony Smelter in the hands of private investors.

423. The fact that the Smelter was inactive at the time of the privatization, like its commercial viability (or lack thereof) can have no bearing on the clear stipulations of the Contract, contrary to what Claimant would have this Tribunal believe. Such inactivity did not preclude its reactivation or that any alternative uses be given to it. [redacted]

424. Three, Claimant argues that it could not foresee that "*Bolivia would fabricate a conflict between the cooperativas and the Colquiri Mine workers in order to have a pretext to nationalize the Colquiri Mine.*"[643] Claimant's assertion is wholly unsupported by the record.

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638 Reply, ¶ 235.

639 Reply, ¶ 237.

640 Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**, Article 2.3.1.

641 Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**, Article 2.7 (emphasis added).

642 [redacted]

643 Reply, ¶ 241.

425. [redacted][644] As explained in Section 2.7.3 above, the magnitude and the violence of the 2012 social conflicts that led to the reversion of the Mine Lease were a by-product of Sinchi Wayra's and Comsur's defective management of the relations with the *cooperativistas*. It bears recalling that:

- Both before the privatization of the Mine Lease and after the reversion, COMIBOL's operation of the Mine was and remains peaceful, without any incidents of the nature of the ones leading to the reversion;[645]

- Though COMIBOL laid off all the mine workers prior to the privatization (in accordance with its policy of transferring to the private sector assets unencumbered by labour liabilities[646]), it was Comsur's decision not to rehire such workers. As a consequence, the ranks of the *cooperativistas* swelled, and Comsur could not rely on the same workforce to keep them in check;[647] and

- Both Comsur and Sinchi Wayra had an unfortunate policy of giving in to all of the *cooperativas*' demands for working areas,[648] and a poor record of ensuring the security of the Mine.[649] This emboldened the *cooperativistas* (in a social and political context of political empowerment, due to the MAS' rise to power) and created tensions between them and the workers.

426. For all these reasons, it lies ill in Claimant's mouth now to contend that it would not have been foreseeable, at the time of the acquisition of the Assets, that the State would take action against them. This is all the more so since Claimant is emphatic regarding Glencore International's familiarity with the Bolivian mining industry in general,[650] and with the Assets

644 [redacted]

645 See Sections 2.1.1, 2.7.3.5 above.

646 See Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-4**, p. 118. See also Section 2.5.1 above.

647 See Section 2.5.1 above; Mamani II, ¶ 10.

648 See Sections 2.5.1 and 2.7.3.1 above; Mamani I, ¶ 15; Mamani II, ¶ 17.

649 See Sections 2.5.1 and 2.7.3.1 above.

650 Reply, ¶ 57 and footnote 159 (referring to "*long-standing commercial contracts with Bolivian producers, including Comsur. It was therefore familiar with the Bolivian mining industry well before its acquisition of the Assets*").

in particular,[651] as well as regarding the "*thorough*" pre-acquisition due diligence it carried out.

427. *Fourth*, Glencore International was well aware of the developments in Bolivia at the time. Armed with the knowledge that a dispute with the State was highly likely, after acquiring the Assets, Glencore International elected to ensure that the Assets would receive protection from the Treaty. On 7 March 2005, Glencore International assigned the Assets to Claimant.[652]

428. Claimant argues that "*it was always envisioned that [Glencore Bermuda] would be the ultimate owner of the investment.*"[653] But this is contradicted by the record of this case. As explained above, Glencore Bermuda played no part whatsoever in the negotiations or the due diligence leading up to the transaction. Indeed, no transactional documents mention Glencore Bermuda's name. Claimant only acted as a vehicle for the transfer of the purchase price to Glencore International's legal counsel in the transaction, at the instruction of Mr Eskdale (also of Glencore International, not Glencore Bermuda).[654]

429. For all of the above reasons, it is clear that Glencore International rerouted its investment through Bermuda when a dispute with Bolivia was highly foreseeable.

4.3 The Tribunal Lacks Jurisdiction Because Claimant Has Failed To Show That It Actively Invested In Bolivia

430. As Bolivia explained in its Statement of Defence, there is no jurisdiction because Claimant never actively invested in Bolivia. Claimant denies in its Reply that it must make an active investment to be a protected investor under the Treaty.[655] It also asserts that it is an active investor, despite having played no role in the direction or management of the Assets.[656]

431. Claimant is wrong on all counts. The Treaty requires that an entity actively invest in order to receive its protection (**Section 4.3.1**), and Glencore Bermuda, as a wholly passive shell, obviously did not actively invest (**Section 4.3.2**).

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651 Eskdale II, ¶ 8 ("*We were familiar with the Assets as we had been purchasing and trading Comsur's minerals for many years, represented by our local trading office Glencore Bolivia Limitada*").

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

653 Reply, ¶ 206.

654 Email from Glencore (Mr Eskdale) to Curtis, Mallet-Prevost, Colt & Mosle LLP (Mr Vega) of 2 March 2005, **C-205**; Eskdale II, ¶ 17.

655 Reply, ¶ 250.

656 Reply, ¶ 262.

4.3.1 The Treaty Extends Protection Only To Companies That Actively Invest

432. As Bolivia argued in the Statement of Defence, the Tribunal has jurisdiction only over the claims of a claimant who actively invests, in that the claimant must do "*something as part of the investing process, either directly or through an agent or entity under the investor's direction.*"[657] Claimant denies in its Reply that there is any such jurisdictional requirement, and instead proposes that merely holding legal title to an asset is sufficient to qualify as an investor for the purposes of Treaty protection.[658]

433. Claimant is wrong. It indeed must do something as part of the investing process in order to qualify for this Tribunal's jurisdiction. Remarkably, Claimant does not even attempt to refute Bolivia's main arguments to demonstrate that the Treaty demands active investment. The legal validity of these arguments is conceded in three ways:

434. *First*, Claimant has no response to Bolivia's analysis of the "*ordinary meaning to be given to*" the Treaty's requirement in Article 8 that the jurisdiction extends only to the investment of the investor.[659] The ordinary meaning of the Treaty text, taken in context, demonstrates that an investment is of an investor only when the investor actively invests.[660]

435. *Second*, Claimant has no response to Bolivia's analysis of the "*ordinary meaning to be given to*" the Treaty's requirement in Article 13 that jurisdiction extends only to investments made while the Treaty was in force.[661] The ordinary meaning of this text, taken in context, similarly demonstrates that an investment is made only when the investor actively invests.[662]

436. *Third*, Claimant has no response to Bolivia's demonstration that the Treaty's object and purpose confirm the interpretation of these textual requirements.[663] The preamble of the Treaty makes clear that it is designed to promote active investment by nationals or companies of the UK or Bolivia in the territory of the other.[664]

437. The fact that Claimant is unable to respond to Bolivia's lead arguments should be decisive. It has conceded that the Treaty's text, in context and in light of its object and purpose, demands

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657 Statement of Defence, ¶ 259.

658 Reply, ¶ 249.

659 Statement of Defence, ¶¶ 265, 268-273.

660 Statement of Defence, ¶¶ 265, 268-273.

661 Statement of Defence, ¶ 267.

662 Statement of Defence, ¶¶ 267-273.

663 Statement of Defence, ¶¶ 274-278.

664 Statement of Defence, ¶¶ 274-278.

that a company actively invest in order to receive Treaty protection. But Article 31 of the Vienna Convention instructs that the Treaty must be given the interpretation established by its text, considered in context and in light of its object and purpose.[665] Thus, the only possible conclusion is that the Treaty establishes an active investment requirement for jurisdiction.

438. Although no further analysis is necessary, this conclusion is underscored by the extensive case law that Bolivia set out in its Statement of Defence. Claimant has failed to put forth any meaningful explanation of why it should not be followed, instead relying largely on misrepresentations. This simply confirms the authority of these materials:

439. *First*, Bolivia observed in its Statement of Defence that Claimant's own authority on the requirement, the *Bayindir* tribunal, in fact confirms that a company must actively invest to receive treaty protection.[666] Claimant does not dispute that.

440. *Second*, Bolivia observed in its Statement of Defence that the *Standard Chartered Bank*, *Orascom TMT*, *Vestey Group*, and *KT Asia* tribunals all concluded that a company must actively invest in order to qualify for investment tribunal jurisdiction.[667] The *Alapli* tribunal can be added to this list.[668] These tribunals provide decisive confirmation that the dominant case law imposes an active investment requirement.

441. Incredibly, Claimant's response to this clear arbitral authority is to assert that "*they were analyzing whether or not the investment satisfied Article 25 of the ICSID Convention, which is inapplicable in an UNCITRAL case, such as this one.*"[669] This is blatantly false, and easily disproven by reading the text of those decisions. It also lies ill in mouth given that Claimant also cites cases that are actually interpreting the ICSID Convention and not the BIT.[670] The fact that Claimant puts forth such a transparently false assertion demonstrates that there is no defensible ground for distinguishing the following authority relied on by Bolivia:

- *Standard Chartered Bank*: "*As discussed above, the Tribunal has concluded that protection of the UK-Tanzania BIT requires an investment made by, not simply held*

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

666 Statement of Defence, ¶ 262.

667 Statement of Defence, ¶¶ 259-260.

668 *Alapli Elektrik BV v Republic of Turkey* (ICSID Case No ARB/08/13) Award of 16 July 2012, **CLA-111**, ¶¶ 337-382.

669 Reply, ¶ 259 (citation omitted).

670 *Fedax NV v Republic of Venezuela* (ICSID Case No ARB/96/3) Decision of the Tribunal on Objections to Jurisdiction of 11 July 1997, **CLA-21**, ¶ 18.

by, an investor. To be considered to have made an investment, SCB must have contributed actively to the investment;"[671]

- *Orascom TMT*: "*The Tribunal considers that this 'objective' or 'inherent' meaning is also present in a bilateral investment treaty's definition of 'investment' [...]*;"[672]

- *Vestey Group*: "*In line with a series of more recent decisions, the Tribunal is of the opinion that the BIT notion of investment implies that the asset falling within the list be the result of an allocation of resources made by the investor*;"[673]

- *KT Asia*: "*Without such a commitment of resources, the asset belonging to the claimant cannot constitute an investment within the meaning of the ICSID Convention and the BIT*."[674]

442. *Third*, Bolivia observed in its Statement of Defence that the *Isolux*, *Alps Finance*, and *Romak* tribunals provide still further confirmation for the active investment requirement.[675] Claimant's attempt to rebut these authorities is unavailing for two reasons:

443. One, Claimant attempts to rebut the legal principles set out in *Isolux* alleging that it held that "*it is irrelevant whether the investor made any financial contribution [...]*."[676] But this is not true. *Isolux* clearly and directly confirmed that a financial contribution is necessary for an investment to exist.[677] However, it did allow that a *subsequent* owner need not make a financial contribution to the host State, as opposed to a financial contribution to the prior owner. It is consistent with an active investment requirement for jurisdiction.

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671 *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award of 2 November 2012, **RLA-8**, ¶ 257 (emphasis added).

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

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

674 *KT Asia Investment Group BV v Republic of Kazakhstan* (ICSID Case No ARB/09/8) Award of 17 October 2013, **CLA-118**, ¶¶ 164-168 (emphasis added).

675 *Isolux Infrastructure Netherlands, BV v. Kingdom of Spain*, SCC Case No. V2013/153, Award of 12 July 2016, **RLA-10**, ¶ 686; *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award [Redacted] of 5 March 2011, **RLA-11**, ¶¶ 231-236. No response other than to say it is a minority view. Claimant says this without putting forth any significant evidence and by simply ignoring the extensive case law identified above. *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award of 26 November 2009, **RLA-12**, ¶¶ 180, 207.

676 Reply, ¶ 260.

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

444. Two, Claimant, remarkably, makes no attempt to rebut the legal principles set out in *Alps Finance* and *Romak*. It concedes that those decisions stand for the proposition that an investment must be active in order for jurisdiction to exist and that those tribunals "*looked beyond the treaty definition of 'investment' [...].*"[678]

445. Instead of attempting rebuttal to these legal principles, Claimant tries to distinguish *Alps Finance* and *Romak* on factual grounds. It suggests that those tribunals only considered whether the asset "*was an 'investment' within the common sense meaning of the word*" because of the particular facts of those cases.[679] This is wrongheaded. The particular facts cannot affect whether an investment treaty should be interpreted in light of its common sense meaning. Either it should or it should not. And, of course, Article 31 of the Vienna Convention decisively confirms that it should.[680]

446. Apart from these irrelevant factual distinctions, Claimant argues that *Romak* "*does not stand for the proposition that 'investment' requires a 'capital contribution in the territory of the host State'*"[681] and that "*if one were to apply the criteria identified by the Romak tribunal as argued by Bolivia, ie a contribution made for a certain duration and involving some risk, Glencore Bermuda's investment would easily satisfy this criteria.*"[682]

447. This is a naked attempt to misattribute an argument to Bolivia that Claimant (wrongly) believes it can rebut. Bolivia made only two citations to *Romak*, neither of which were for these propositions.[683] This is because Bolivia's position is not that an investment requires "*a contribution made for a certain duration and involving some risk [...].*"[684] Bolivia's position is that, per *Standard Chartered Bank*, the investor must actively invest, meaning that it must direct a contribution of resources (such as funds, know-how, equipment, or personnel).

448. Thus, Claimant's critique of Bolivia's legal argument in the Statement of Defence amounts to very little.

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678 Reply, ¶ 260.

679 Reply, ¶ 260.

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

681 Reply, ¶ 261.

682 Reply, ¶ 262.

683 Statement of Defence, ¶ 260 ("*an allocation of resources made by the investor.*") (emphasis added); Statement of Defence, ¶ 260 (arguing that the "*active investment requirement is a manifestation of the concept of investment underlying investment treaties.*").

684 Reply, ¶ 262.

449. However, Claimant's positive argument amounts to equally little. Claimant argues that "*the position proposed by Bolivia that the investment has to be made in the host State, would generate an absurd situation where only 'direct' and 'original' or 'initial' investments would be protected by the Treaty.*"[685] This is wrong. The claimant must actively invest by directing the contribution of resources. A subsequent investor can perfectly well direct the contribution of resources. In the instant case, Glencore Bermuda could have directed the acquisition of the Assets (but did not). Instead it stood passively by while Glencore International directed the investment.

450. In addition to this false argument, Claimant submits a series of irrelevant arguments:

- Claimant argues that "*Article 5(2) of the Treaty expressly protects indirectly held assets from expropriation [...].*"[686] But, even if Article 5(2) does so, it says nothing about whether those assets constitute an investment and still less about the requirements "*to invest*" pursuant to the Treaty. A foreign investor could perfectly well *actively* invest in a local company that in turn holds assets;

- Claimant cites to a number of cases that allegedly exclude an origin of capital requirement.[687] These cases are irrelevant. Bolivia is not arguing for an origin of capital requirement. Instead, Bolivia has argued that a claimant must have actively invested by directing a contribution of resources, regardless of origin;

- Claimant cites *Levy v. Peru* and *Fedax v. Venezuela* to deny that there is a contribution of capital requirement.[688] These cases do not address the activity of the investor. There is no evidence in either that the investor was anything but active;[689]

- Claimant argues that *Gold Reserve* rejected Bolivia's position: "*If such a condition were inferred it would mean that an existing investment in Venezuela, owned or controlled by a non-Venezuelan entity, would not be protected by the BIT if it were acquired by a third party, with cash or other consideration being paid outside*

685 Reply, ¶ 255.

686 Reply, ¶ 252.

687 Reply, ¶¶ 253-254.

688 Reply, ¶¶ 256-257.

689 Instead, in *Levy*, the issue was whether the claimant had to be the initial investor, not whether a subsequent owner must actively invest. *Renée Rose Levy de Levi v Republic of Peru* (ICSID Case No ARB/10/17) Award of 26 February 2014, **CLA-215**, ¶ 151. In *Fedex*, interpreting the ICSID Convention, the issue was whether a promissory note purchased outside the territory of the respondent State constitutes an investment. *Fedax NV v Republic of Venezuela* (ICSID Case No ARB/96/3) Decision of the Tribunal on Objections to Jurisdiction of 11 July 1997, **CLA-21**, ¶¶ 18-19.

Venezuela, even if the acquiring party then invested funds into Venezuela to finance the activity of the acquired business."[690] However, Bolivia is not objecting that the investor must pay cash (or other contribution) within Bolivia's territory (although it must) but instead that the investor must be the one to actively invest by actually directing the payment of the cash (or other contribution); and

- Claimant invokes *Saluka*.[691] But *Saluka* was decided long before the emergence of the *jurisprudence constante* that Bolivia has cited above. This includes *Standard Chartered Bank*, *Orascom TMT*, *Vestey Group*, *KT Asia*, and *Alapli*.[692] *Saluka* is of no assistance or, indeed, relevance, in light of those subsequent developments.

451. In sum, the plain text of the Treaty interpreted pursuant to the Vienna Convention as well as a consolidated jurisprudence demonstrate that a foreign entity must actively invest in order to be an investor pursuant to the Treaty.

4.3.2 Glencore Bermuda Made No Active Investment In Bolivia

452. As Bolivia demonstrated in its Statement of Defence, Glencore Bermuda was entirely passive in the acquisition of the Assets and, indeed, in their subsequent operation. Indeed, "*Glencore Bermuda in fact lacked the capacity to make an active investment, as it was no more than an empty shell company that apparently did not even have executives.*"[693]

453. Claimant attempts to dispute this. But the evidence has only grown that Glencore Bermuda has never directed any activity related to its so-called investment, as the following three reasons demonstrate:

454. *First*, it remains uncontested that Glencore Bermuda was entirely uninvolved in the process leading up to Glencore International's acquisition of the Tin Smelter, Antimony Smelter, and Colquiri Mine Lease. Indeed, Claimant openly admits that Glencore International was exclusively involved in these processes:

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690 *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award of 22 September 2014, **CLA-123**, ¶ 262.

691 Reply, ¶ 251.

692 *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award of 2 November 2012, **RLA-8**, ¶ 257; *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award of 31 May 2017, **RLA-9**, ¶ 371; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award of 15 April 2016, **RLA-5**, ¶ 192; *KT Asia Investment Group BV v Republic of Kazakhstan* (ICSID Case No ARB/09/8) Award of 17 October 2013, **CLA-118**, ¶¶ 164-168; *Alapli Elektrik BV v Republic of Turkey* (ICSID Case No ARB/08/13) Award of 16 July 2012, **CLA-111**, ¶¶ 337-382.

693 Statement of Defence, ¶ 279.

- "*Glencore International was invited by Argent Partners [...] to participate in an auction*" for the Assets;[694]

- "*As part of the bidding process, Glencore International and its Peruvian subsidiary, IRSA, participated in a series of negotiations [...];*"[695] and

- "*Glencore International engaged outside consultants to advise on the deal [...].*"[696]

455. *Second*, it is equally uncontested that Glencore International alone entered into the stock purchase agreements with Minera for control of the Tin Smelter, Antimony Smelter, and Colquiri Mine Lease. Claimant openly admits that "*on 30 January 2005, Glencore International concluded stock purchase agreements that would allow it to secure control of Comsur and all of its assets once all of the closing conditions were met.*"[697] Indeed, Claimant has no choice but to make this admission, as the stock purchase agreements produced in document production exclusively bear the name Glencore International.[698] Glencore Bermuda was not a party or participant in these agreements. The deal was struck with nary a mention of Glencore Bermuda, let alone its involvement.

456. *Third*, it is uncontested that Glencore Bermuda was entirely absent from the "*the management and operation of the Tin Smelter, Antimony Smelter, and Colquiri Mine [...].*"[699] This is, indeed, incontestable.

- It is uncontested that Mr Eskdale, the manager of the Assets, worked for Glencore International, but has never been an employee or director of Glencore Bermuda;[700]

- It is uncontested that no one affiliated with Glencore Bermuda ever had any involvement with the Assets;[701]

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

695 Statement of Claim, ¶ 57(emphasis added).

696 Statement of Claim, ¶ 58(emphasis added).

697 Statement of Claim, ¶ 58.

698 See, *e.g.*, Second Amended and Restated Stock Purchase Agreement between Minera and Glencore International (Iris shares) of 30 January 2005, **C-198**; Stock Purchase Agreement between Minera and Glencore International (Shattuck shares) of 30 January 2005, **C-199**; Stock Purchase Agreement between Minera and Glencore International (Kempsey shares) of 2 March 2005, **C-204**; Stock Purchase Agreement between CDC and Compañía Minera Concepción SA (Colquiri shares) of 2 March 2005, **C-202**.

699 Statement of Defence, ¶ 286.

700 Statement of Defence, ¶ 287.

701 Statement of Defence, ¶ 287.

- It is uncontested that Glencore International and not Glencore Bermuda issued financial reporting for Sinchi Wayra, Colquiri, and Vinto;[702]

- It is uncontested that Sinchi Wayra, Colquiri, and Vinto did not mention Glencore Bermuda as their owner in negotiations until planning this arbitration.[703]

457. In response to this overwhelming evidence that Glencore Bermuda was entirely passive, Claimant does not identify any indicators of activity. Instead, it makes two points:

458. One, Claimant argues that "*Glencore Bermuda paid a purchase price thirteen years ago of US$313.8 million, plus related acquisition costs, to acquire its investments in Bolivia which, in turn, included Colquiri and Vinto.*"[704] But Claimant's own supporting evidence (an email from Mr Eskdale instructing that a transfer be made from Glencore Bermuda to the lawyer's account to close the deal[705]) confirms that this involvement too was purely passive. Claimant admits that this occurred on 3 March 2005,[706] after all of the share purchase agreements had been concluded. This was the first mention of Glencore Bermuda in the entire transaction. And the instruction that the payment be made (through Glencore Bermuda), came from a director of Glencore International, Mr Eskdale,[707] who has no relationship with Glencore Bermuda. All that Glencore Bermuda is in this case is a bank account.

459. Two, Claimant argues that, "*[i]n addition to the payment for its shares in Colquiri and Vinto, Glencore Bermuda, through its subsidiaries, has made significant contributions to the Bolivian economy [...].*"[708] This is false. In making this argument, Claimant relies exclusively on citations to its Statement of Claim and the very same supposed evidence presented there. But Bolivia already observed that this evidence does not even show a payment from Glencore

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702 Statement of Defence, ¶ 288 (citing Vinto S.A. - December 2005, **CLEX-11-1**; Vinto S.A. - Monthly Report December - 2005, **CLEX-11-2**; Vinto S.A. - December 2006, **CLEX-11-3**; Colquiri S.A. - December 2006, **CLEX-11-4**; Colquiri S.A. - December 2008, **CLEX-11-5**; Colquiri S.A. - December 2009, **CLEX-11-6**; Colquiri S.A. - December 2010, **CLEX-11-7**; Colquiri S.A. - December 2011, **CLEX-11-8**; Colquiri S.A. - December 2012, **CLEX-11-9**; SW Consolidated - Management Report December 2006, **CLEX-11-10**; Colquiri Profit and Production 2008 2010, **CLEX-11-11**; SW Monthly Report - December 2011, **CLEX-11-12**; SW Monthly Report - December 2012, **CLEX-11-13**).

703 Statement of Defence, ¶ 289-290 (citing Letter from Sinchi Wayra (Mr Capriles) to the Minister of Mining (Mr Echazú) of 20 June 2007, **C-83**; Letter from Colquiri (Mr Capriles) to EMV (Mr Infantes) of 16 April 2007, **C-74**; Letter from Complejo Vinto (Mr Capriles Tejada) to Minister of Mining and Metallurgy (Mr Luis Alberto Echazú A) of 7 December 2007, **C-48** (Vinto)).

704 Reply, 262 (emphasis omitted).

705 See Email from Glencore (Mr Eskdale) to Curtis, Mallet-Prevost, Colt & Mosle LLP (Mr Vega) of 2 March 2005, **C-205**.

706 Reply, ¶ 62.

707 Email from Glencore (Mr Eskdale) to Curtis, Mallet-Prevost, Colt & Mosle LLP (Mr Vega) of 2 March 2005, **C-205**; Email from Curtis, Mallet-Prevost, Colt & Mosle LLP (Mr Sowah) to Curtis, Mallet-Prevost, Colt & Mosle LLP (Mr Vega) of 3 March 2005, **C-208**.

708 Reply, ¶ 263.

Bermuda towards its supposed initiatives in Bolivia, and still less any indication that it directed its supposed significant contributions to the Bolivian economy.[709] Claimant does not respond. Thus, these facts must be deemed admitted.

460. In conclusion, there can be no jurisdiction over the present dispute. The Treaty requires that the claimant have actively invested and Glencore Bermuda did not.

4.4 The Tribunal Lacks Jurisdiction Because The Claimant Is, In Reality, A Swiss Company Not Subject To Treaty Protection And, Alternatively, Because It Cannot Bring Claims Based On Indirectly Held Rights

461. In its Statement of Defence, Bolivia demonstrated that there is no jurisdiction because Claimant's corporate veil must be pierced to reveal Glencore International and, in any event, because the Treaty does not permit claims for indirect rights. The Claimant, in the Reply, insists that it can arbitrarily and through the abuse of corporate formalities control where in the corporate ownership chain this Tribunal must look to evaluate its jurisdiction.

462. The fact is that international law requires the Tribunal to pierce the corporate veil when that veil has been misused (**Section 4.4.1**), and Claimant has egregiously misused its corporate veil in perpetrating illicit acts through Glencore Bermuda (**Section 4.4.2**). Alternatively, if the Tribunal were not to look to the ultimate owner, it must look to the direct holder of the rights at stake in accordance with customary international law (**Section 4.4.3**).

4.4.1 The Treaty Excludes Jurisdiction Asserted On The Basis Of Corporate Formalities When The Real Party In Interest Is Not Protected

463. In its Statement of Defence, Bolivia demonstrated that the corporate veil must be pierced when used to evade legal requirements or to harm third parties.[710] In its Reply, Claimant insists that the corporate veil cannot be pierced unless used to avoid liability.[711]

464. Claimant is wrong. It is a basic rule of international law that a company cannot misuse corporate formalities to establish international jurisdiction over its claims. Instead, the corporate veil must be pierced to reveal the true party in interest. Any other rule would allow a foreign entity to unilaterally control the jurisdiction of an investment tribunal, by forcing a tribunal to look only at the point in the corporate chain that the entity prefers.

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709 Reply, ¶ 283.

710 Statement of Defence, ¶ 354.

711 Reply, ¶ 203.

465. Claimant argues, recognizing the possibility of veil piercing, that "*this doctrine is inapplicable to the present case, as Glencore Bermuda is merely exercising its right under international law and not attempting to avoid any type of liability.*"[712] This argumentative ploy should not be countenanced. Claimant attempts to use the admitted fact that the veil may be pierced when used to avoid liability in order to argue that it may not be pierced for any other reason. This position is entirely unsupported by the jurisprudence:

466. *First*, as the cases Bolivia cited in its Statement of Defence establish, it is widely recognized that veil piercing indeed applies in cases where corporate formalities are misused.[713] Claimant does not deny that these cases say as much. It cannot, because it is plain in the following text:

- *Barcelona Traction*: "*In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law*;"[714]

- *Loewen*: "*[T]he Tribunal unanimously decides [...] [t]hat it lacks jurisdiction to determine TLGI's claims under NAFTA concerning the decisions of United States courts in consequence of TLGI's assignment of those claims to a Canadian corporation owned and controlled by a United States corporation*;"[715] and

- *Saluka*: it is "*permissible for a tribunal to look behind the corporate structures of companies involved in proceedings before it*" in some circumstances.[716]

467. *Second*, the ICJ in *Barcelona Traction* identified, albeit without precluding others, precise circumstances in which the corporate veil should be pierced, including in cases of fraud or malfeasance, to protect third parties, and to prevent the evasion of legal requirements:

> *The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third*

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712 Reply, ¶ 203.

713 Statement of Defence, ¶¶ 353-359.

714 *Barcelona Traction, Light and Power Company, Limited* (Belgium/Spain) [1970] ICJ Reports 3, **CLA-7**, ¶¶ 57-58.

715 *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB/AF/98/3, Award of 26 June 2003, **RLA-28**, Orders, ¶ 1.

716 *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award of 17 March 2006, **CLA-62**, ¶ 230.

persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.[717]

468. These circumstances in which the veil should be pierced have been reaffirmed in the investment context by the *Tokios Tokelés* tribunal, on a rare point of unanimity between the majority and Prosper Weil's dissenting opinion.[718]

469. *Third*, Claimant is unable to identify a single investment tribunal that *forbids* piercing the corporate veil or that denies that international law endorses veil piercing. Claimant attempts to fill this hole in its argument by citing *Pac Rim* for the proposition that "*being an investment vehicle does not constitute a misuse of corporate form that would justify the use of the corporate veil doctrine.*"[719] But the *Pac Rim* tribunal clearly recognizes that the corporate veil of an empty investment vehicle may be pierced when there are "*specific factors or compelling reasons that call for an inquiry into the company's actual ownership and control.*"[720] These factors and reasons would appear to be precisely those set out by *Barcelona Traction* and *Tokios Tokelés*.

470. *Fourth*, Claimant's argument that veil piercing is forbidden primarily consists of citations to decisions allegedly concluding that the veil should not be pierced. It refers in this regard to *Saluka*, *ADC*, and *Barcelona Traction*.[721] But none of those cases involved the degree of misuse of corporate formalities that are present in the instant case. The facts of the present case would have, on the stated views of those tribunals (explained above), demanded piercing the corporate veil.

471. In fact, the *Loewen* tribunal did pierce the corporate veil, on facts that were much less egregious than those surrounding Glencore Bermuda. The Canadian claimant, Loewen, was forced into bankruptcy on account of the adverse court decision, described as a miscarriage of justice, underlying its NAFTA claim.[722] The result was that, during the pendency of the arbitration, the NAFTA claim was transferred to a Canadian holding company owned by a

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717 *Barcelona Traction, Light and Power Company, Limited* (Belgium/Spain) [1970] ICJ Reports 3, **CLA-7**, ¶ 56 (confirmed by *Tokios Tokelės v Ukraine* (ICSID Case No ARB/02/18) Decision on Jurisdiction of 29 April 2004, **CLA-48**, ¶ 55).

718 *Tokios Tokelės v Ukraine* (ICSID Case No ARB/02/18) Decision on Jurisdiction of 29 April 2004, **CLA-48**, ¶ 55; *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion of Prosper Weil of 29 April 2004, **RLA-146**, ¶ 21.

719 Reply, ¶ 201.

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

721 Reply, ¶ 196.

722 *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB/AF/98/3, Award of 26 June 2003, **RLA-28**, ¶¶ 54, 234.

U.S. company.[723] Despite the unobjectionable sequence of events leading to this new ownership structure, the *Loewen* tribunal elected to set aside the corporate form of the Canadian holding company to reveal the U.S. owner.[724] Because the tribunal then applied the continuous nationality rule to that unveiled U.S. nationality, it rejected the claims.[725]

472. Thus, the bar is low for the misuse of corporate form to justify piercing the corporate veil in the context of an investment arbitration jurisdictional analysis. As the next section explains, the facts of the present dispute more than satisfy the applicable requirements.

4.4.2 The Corporate Veil Must Be Pierced Because Glencore Bermuda Is A Shell Company Hiding The True Party In Interest

473. The corporate shell that is Glencore Bermuda is used precisely to engage in the activities that the wealth of international authority confirms would require piercing the corporate veil: the perpetration of fraud and malfeasance and the evasion of legal requirements and obligations.[726]

474. As Claimant bears the burden of proof on jurisdiction, explained above, it must demonstrate that the use of the Glencore Bermuda entity was legitimate in light of Bolivia's evidence to the contrary.[727]

475. It cannot. As Bolivia demonstrated in the Statement of Defence, "*Glencore Bermuda is a shell company used to conceal the Glencore Group's misdeeds around the globe.*"[728] This is so for the following four reasons:

476. *First*, Claimant does not contest that Glencore Bermuda is nothing more than a shell company. It does not deny that it has no activity in Bermuda. It does not deny that it has no employees or staff of its own.[729] It does not deny that its physical existence is limited to a room in the

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723 *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB/AF/98/3, Award of 26 June 2003, **RLA-28**, ¶ 220.

724 *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB/AF/98/3, Award of 26 June 2003, **RLA-28**, ¶¶ 223-224.

725 *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB/AF/98/3, Award of 26 June 2003, **RLA-28**, ¶ 225.

726 *Barcelona Traction, Light and Power Company, Limited* (Belgium/Spain) [1970] ICJ Reports 3, **CLA-7**, ¶ 56 (confirmed by *Tokios Tokelės v Ukraine* (ICSID Case No ARB/02/18) Decision on Jurisdiction of 29 April 2004, **CLA-48**, ¶ 55).

727 Thus, Bolivia denies Claimant's suggestion that it must prove Claimant is not entitled to jurisdiction to a "*high standard of proof [...].*" Reply, ¶ 203.

728 Statement of Defence, ¶ 369.

729 Statement of Defence, ¶ 366.

offices of its Bermudan law firm.[730] And it does not deny that it has no shareholder or board meetings.[731] In short, it is admitted that Glencore Bermuda is empty and could not have been the true party in interest because it had no interests beyond those that Glencore International used it for.

477. *Second*, Glencore Bermuda was used to hold, as Bolivia explained, "*subsidiaries engaged in questionable activities or whose activities they would prefer to conceal.*"[732] In fact, Claimant recognizes that it has been subject to multiple accusations that investments routed through Glencore Bermuda have been implicated in illegal activities throughout the world.[733]

478. Claimant tries to deflect attention from this issue by alleging that "*Glencore Bermuda has never tried to disguise the identity of its parent company [...].*"[734] But the real issue is whether Glencore Bermuda has been used to shield its parent company from its illicit activities to such a degree that it cannot benefit from that corporate structure.

479. Indeed, even the purported reason Claimant gives for routing the investment through Glencore Bermuda would confirm that the corporate veil should be pierced. As Mr Eskdale alleges, "*Glencore Bermuda acquired the shares in the Assets to maximize cash-flows while taking advantage of significant financing benefits*" because "*there was no withholding of taxes on interest payments in Bermuda [...].*"[735] In other words, Claimant's defence is that the investment structure was a tax dodge. And that is all.

480. *Third*, the truth about what was happening in Bermuda is worse still. Glencore Bermuda was set up to protect its parent company against liability for serious misdeeds around the globe.

481. Claimant argues that "*Bolivia's allegations of 'misdeeds' are based solely on press reports allegedly stemming from the 'Paradise Papers*.'"[736] This seriously misstates the significance of these press reports. The Paradise Papers consist of "*[c]opies of 6.8 million of files documenting decades of activity inside the Bermuda main office and other offices [of Appleby's] [that] were obtained by German newspaper Süddeutsche Zeitung and shared with*

730 Statement of Defence, ¶ 365.

731 Statement of Defence, ¶ 364.

732 Statement of Defence, ¶ 363.

733 Reply, ¶¶ 207, 209.

734 Reply, ¶ 204.

735 Eskdale II, ¶ 17.

736 Reply, ¶ 207.

the International Consortium of Investigative Journalists and 94 media partners."[737] The Paradise Papers reporting is not in any way speculative; it is based on Glencore Bermuda's own internal records held by its Bermudan law firm.

482. These internal records confirm that Glencore Bermuda is a key shell company that Glencore International has used, as Foreign Policy magazine observed, to profit "*by working in the globe's most marginal business regions and often, investigators have found, at the margins of what is legal.*"[738] This reporting, issued long before the Paradise Papers provided confirmation, revealed that Glencore International thrived by "*operating in countries where many multinationals fear to tread; building walls made of shell corporations [like Glencore Bermuda], complex partnerships, and offshore accounts to obscure transactions; and working with shady intermediaries who help the company gain access to resources and curry favor with the corrupt, resource-rich regimes that have made Glencore so fabulously wealthy.*"[739]

483. Indeed, the Paradise Papers reporting identifies numerous illegal actions that Glencore International has carried out through Glencore Bermuda.

484. [redacted]

737 International Consortium of Investigative Journalists, *Corporate Titans: Room of Secrets Reveals Glencore's Mysteries*, press article of 5 November 2017, <https://www.icij.org/investigations/paradise-papers/room-of-secrets-reveals-mysteries-of-glencore/> last visited 15 October 2018, **R-350**, p. 3.

738 Foreign Policy, *Investigation: A Giant Among Giants*, press article of 23 April 2012, <https://foreignpolicy.com/2012/04/23/a-giant-among-giants/> last visited 15 October 2018, **R-351**, p. 3.

739 Foreign Policy, *Investigation: A Giant Among Giants*, press article of 23 April 2012, <https://foreignpolicy.com/2012/04/23/a-giant-among-giants/> last visited 15 October 2018, **R-351**, p. 3 (emphasis added).

740 [redacted]

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485. It is against this backdrop that Claimant alleges, without evidence, that "*Glencore never funnelled loans for corrupt payments*"[743] through its Bermudan operations. This unsupported denial is not credible.

486. Nor is the wrongdoing in the Democratic Republic of Congo, Venezuela, and Nigeria isolated. As Bolivia explained, Glencore Bermuda is implicated in other illicit actions, which Claimant similarly denies without evidence. SwissMarine concealed shipping subsidiary, supported by loans non-commercial interest rates.[744] Nantau Mining, a subsidiary in Burkina Faso, abused tax loopholes including through fictitious charges to offshore entities and suppressed protests (regarding "*slavery like [working] conditions*") from the communities surrounding the Perkoa zinc mine.[745]

487. *Fourth*, Claimant says that "*none of these allegations refer to the Assets.*"[746] This is true but irrelevant. If these particular actions implicated the Assets directly, there would be no need to pierce the veil because then there would be no jurisdiction due to illegality. The point here is that Claimant's corporate form is being used to perpetrate fraud on a global level and cannot be respected.

488. In sum, if the corporate veil is not pierced, it wil aid and abet Claimant's misuse of the shell company that is Glencore Bermuda to perpetrate illicit actions. Such a shell cannot conceal the true party in interest in this arbitration, Glencore International.

4.4.3 Even If (Quod Non) The Corporate Veil Protects Glencore Bermuda, International Law Does Not Allow It To Bring Claims For Its Indirect Investment

489. As Bolivia argued in its Statement of Defence, "*[i]nternational law prohibits Glencore Bermuda from bringing claims based on alleged violations of the rights of a subsidiary when its own rights were untouched.*"[747] Glencore denies that this is so in its Reply.[748]

October 2018, **R-355**; BusinessDay, *Is the reign of Glencore's billionaire copper king over?*, press article of 9 October 2018 <https://www.businesslive.co.za/bd/companies/mining/2018-10-09-is-the-reign-of-glencores-billionaire-copper-king-over/> last visited 15 October 2018, **R-356**.

743 Reply, ¶ 209(c).

744 Statement of Defence, ¶ 368 (citing International Consortium of Investigative Journalists, *The Ships Glencore Wanted to Keep 'Hush Hush'*, press article of 9 November 2017, **R-244**, p. 2).

745 International Consortium of Investigative Journalists, *Development Dreams Stand Still While Mining Money Moves Offshore*, press article of 8 November 2017, **R-245**, pp. 1-2.

746 Reply, ¶ 208.

747 Statement of Defence, ¶ 370.

748 Reply, ¶ 265.

490. Nevertheless, it is not possible to bring claims for violations of indirect rights. As the ILC Articles on Diplomatic Protection confirm, customary international law only allows a foreign investor to bring claims for violations of its rights, not for the rights of companies in which it holds shares.[749] This rule – confirmed by the ICJ in *Diallo*[750] and *Barcelona Traction*[751] – is the background against which an investment treaty must be interpreted. It is both as the default rule and part of the context for interpretation pursuant to Article 31(3)(c) of the Vienna Convention.[752]

491. While the State parties to the Treaty could in principle have varied this rule of customary international law, they elected not to do so. As is clear from the plain text of Article 8(1) of the Treaty, they made no attempt to alter this rule or even to indicate a wish to do so. This would be necessary if jurisdiction were to extend to indirect investments:

> *Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been legally and amicably settled shall after a period of six months from written notification of a claim be submitted to international arbitration if either party to the dispute so wishes.*[753]

492. Thus, the Treaty does not permit an investor to bring claims for alleged violations of indirectly held rights.

493. Claimant largely abdicates any defence against this conclusion.

494. *First*, Claimant does not so much as attempt to demonstrate that the Treaty parties had any intention to displace the customary international law rule. Instead, Claimant merely repeats its allegation from the Statement of Claim that "*the explicit wording of the Treaty [...] covers 'every kind of asset,' and 'any kind of participation' without exceptions [...].*"[754] It provides no response to Bolivia's point, made in the Statement of Defence, that the Treaty definition of investment – to which Claimant refers with that recitation – "*does not include in the category of investments rights that are indirectly held, such as the property rights of a*

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749 Statement of Defence, ¶¶ 372-373 (citing International Law Commission, *Draft Articles on Diplomatic Protection*, 2006, **RLA-30**).

750 *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ, Judgment of 24 May 2007, **RLA-31**, ¶ 89.

751 *Barcelona Traction, Light and Power Company, Limited* (Belgium/Spain) [1970] ICJ Reports 3, **CLA-7**, ¶ 46.

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

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

754 Reply, ¶ 271.

subsidiary."[755] Indeed, the Treaty makes no mention at all of indirect rights.[756] Claimant's failure to respond should be with prejudice.

495. *Second*, Claimant asserts that "*international law does recognize claims by shareholders against measures damaging their subsidiaries and their investments.*"[757]

496. Let us examine Claimant's argument for that proposition. Claimant places crucial reliance on *CMS*, which Claimant considers to show that Bolivia's position is "*not reflective of the current state of customary international law on the matter of shareholder's rights.*"[758] On this ground alone, it then concludes that "*Bolivia's reliance on ICJ cases, including Barcelona Traction, ELSI and Diallo is thus clearly inapposite.*"[759]

497. However, Claimant ignores the very inconvenient fact that the ICJ reaffirmed the rule of customary international law prohibiting claims for indirect rights in its *Diallo* judgment. The *Diallo* judgment was rendered *after* the *CMS* award. In that subsequent *Diallo* judgment, as Bolivia reported in its Statement of Defence (and as Claimant ignored),[760] the ICJ held that "*[t]he Court, having carefully examined State practice and decisions of international courts and tribunals in respect of diplomatic protection of associés and shareholders, is of the opinion that these do not reveal — at least at the present time — an exception in customary international law allowing for protection by substitution, such as is relied on by Guinea.*"[761] The *Diallo* judgment was issued in 2010 and is still the final word on this issue.

498. Thus, Claimant's entire legal position depends on the assumption that the *CMS* tribunal, roundly criticized by the *CMS* Annulment Committee, is somehow more authoritative on customary international law than the ICJ.[762] Simply put, Claimant has no response to the impact that the plain rules of international law must have on the interpretation of the Treaty.

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755 Reply, ¶ 380.

756 Treaty, **C-1**, Article 1(a).

757 Reply, ¶ 268.

758 Reply, ¶ 269.

759 Reply, ¶ 269 footnote 705.

760 Reply, ¶ 374.

761 *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ, Judgment of 24 May 2007, **RLA-31**, ¶ 89.

762 The same could be said for Claimants' citation to Professor Schreuer in support of the same proposition about customary international law. Apart from the fact that Professor Schreuer is not more authoritative than the ICJ on the content of customary international law, he was not even characterizing customary international law or commenting on the argument has herein raised.

499. Instead of putting forth a defensible rebuttal of Bolivia's position, Claimant, once again, attempts to attribute to Bolivia an argument it has not made. Claimant says that Bolivia "*argues that the word 'of' [...] in the dispute resolution clause of the Treaty (Article 8(1)), suggests that investments must be held directly by such nationals and companies to be protected.*"[763] Claimant thus attempts to rewrite Bolivia's argument so that it may rebut it on the basis of arbitral authority that does not address Bolivia's actual argument.

500. In fact, none of the tribunals that Claimant cites had before them the argument that Bolivia makes here. The argument is that rules of customary international law excluding indirect claims must apply, either directly or through the interpretation of the Treaty, unless the Treaty made manifest the intent to opt out of those rules. Those tribunals, such as the *Rurelec* tribunal, principally faced the argument that Claimants' report, that the use of the word "*of*" excludes indirect investments *by itself.*[764]

4.5 The Tribunal Lacks Jurisdiction Because The Assets Subject To Dispute Were Illegally Privatized

501. It is a generally accepted principle of investment arbitration that claims tainted with illegality or brought by a claimant with unclean hands cannot be heard by an arbitral tribunal. This is the case of Claimant's claims, in light of the illegality tainting the transfer of the Assets to the private sector, as explained in Sections 2.2 through 2.4 above.

502. *In limine*, Bolivia strongly objects to Claimant's accusations that it is raising the illegalities in the privatization of the Assets "*because it is against the privatization of State assets and other liberal policies implemented by prior governments,*"[765] and that it was only "*when it was politically convenient and metal prices were rising, that Bolivia asserted that the original privatization was unlawful.*"[766] These are nothing more than unsubstantiated and empty allegations aimed at distracting the Tribunal from the real issues at stake.

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763 Reply, ¶ 265.

764 Reply, ¶ 265 (citing *Cemex Caracas Investments BV and Cemex Caracas II* 30 December 2010 *Investments BV v Bolivarian Republic of Venezuela* (ICSID Case No ARB/08/15) Decision on Jurisdiction, **CLA-192**, ¶ 157; *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Decision on Jurisdiction of 3 August 2004, **CLA-51**, ¶ 137; *Mobil Corporation, Venezuela Holdings BV, and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27) Decision on Jurisdiction of 10 June 2010, **CLA-97**, ¶¶ 164-165; *Mr Tza Yap Shum v Republic of Peru* (ICSID Case No ARB/07/6) Decision on Jurisdiction and Competence of 19 June 2009, **CLA-180**, ¶¶ 105-106; *Ioannis Kardassopoulos v Georgia* (ICSID Case No ARB/05/18) Decision on Jurisdiction of 6 July 2007, **CLA-69**, ¶¶ 122-124 ("*The BIT is silent on whether the investor is required to directly own shares in a company investing in Georgia in order to qualify as an 'investment' under the treaty.*").

765 Reply, ¶ 279.

766 Reply, ¶ 299.

503. In any event, Claimant's attempt to cast doubt on the applicable legal standards for illegality (**Section 4.5.1**) and clean hands (**Section 4.5.2**), and the gravity of the factual matrix underpinning Bolivia's objections in this case fall flat.

4.5.1 The Privatization Of The Assets Was Illegal Under Bolivian Law And Contrary To International Public Policy

504. As Bolivia explained in the Statement of Defence, none of Claimant's claims can be heard in this arbitration. The acquisition of the Assets by former President Sánchez de Lozada was carried out through a process riddled with illegalities, including an illegal lack of transparency and good faith, and blatant disregard for the principle that public servants must act in the public interest and not for their own personal benefit.[767]

505. Claimant disputes Bolivia's position, and employs three different strategies to contradict the illegality objection. Claimant *first* argues that the illegality doctrine is inapposite in this case, in light of the terms of the Treaty (**Section 4.5.1.1**). *Second*, Claimant disputes the substance of Bolivia's objection (**Section 4.5.1.2**). *Third* and finally, Claimant contends that Bolivia is precluded from raising this objection on the basis of the doctrine of estoppel (**Section 4.5.1.3**). Claimant's arguments are unavailing.

4.5.1.1 The Illegality Doctrine Is Applicable Even In The Absence Of An Explicit Treaty Provision, And The Assessment Of Such Illegality Is Not Limited To The Time Of The Making Of The Investment

506. Claimant's first attempt to avoid the dismissal of its claims for lack of jurisdiction is based on the allegation that the illegality of the investment is irrelevant because the Treaty has no explicit legality clause,[768] and the illegality took place prior to its acquisition of the Assets.[769]

507. Claimant's position is incorrect, for, at least, two reasons.

508. *First*, contrary to Claimant's assertion, irrespective of whether or not there is an explicit legality clause, the Tribunal may not exercise jurisdiction over an illegal investment. The requirement that a claimant may seek the protection of an investment treaty only for legal investments is implicit in the system of investment treaty arbitration.[770] The implicit legality

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767 Statement of Defence, Section 4.3.1.

768 Reply, ¶ 286.

769 Reply, ¶ 277.

770 *SAUR International SA v. The Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability of 6 June 2012, **RLA-82**, ¶ 308 ("*El Tribunal entiende que la finalidad del sistema de arbitraje de inversión radica en proteger únicamente inversiones legales y bona fide. El hecho de que el APRI entre Francia y la Argentina mencione o deje de mencionar la exigencia de que el inversor haya actuado en conformidad con la legislación interna, no constituye un factor relevante. El requisito de no haber incurrido en una violación grave del ordenamiento jurídico es una condición tácita, ínsita en todo APRI, pues no se puede entender en ningún caso que un Estado esté ofreciendo el*

requirement is "*a well-established principle of international law*"[771] that has been recognized by numerous tribunals.[772]

509. Claimant's suggestion that the legality of an investment is not a *sine qua non* jurisdictional prerequisite is simply wrong. In support of its position, Claimant relies on a paper published in 2011, which espouses the (incorrect and superseded) view that "*the legality of the investment is not a jurisdictional requirement*"[773] in cases where the investment treaty does not contain a legality clause. Claimant does not cite any recent case law that supports its position – nor can it, as this is not the accepted view in international investment arbitration today.

510. *Second*, Claimant suggests that the only relevant timing for the assessment of illegality would be the time of the making of the investment.[774] This is incorrect, for at least the following three reasons:

511. One, absent an explicit legality clause (as Claimant contends), nothing constrains the Tribunal to assess the illegal conduct only at the time of the making of the investment. In fact, of the four cases on which Claimant relies for this proposition – *Inceysa*, *Phoenix Action*, *Plama* and *World Duty Free* –, two involved investment treaties with a legality clause expressly limited to the time of the making of the investment,[775] as Claimant itself acknowledges.[776] In the other two cases, *World Duty Free v. Kenya* and *Plama v. Bulgaria*, the illegal act was a singular

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beneficio de la protección mediante arbitraje de inversión, cuando el inversor, para alcanzar esa protección, haya incurrido en una actuación antijurídica.") (Unofficial translation: "*The Tribunal understands that the purpose of the investment arbitration system is to protect only legal and bona fide investments. The fact that the APRI between France and Argentina indicates or fails to indicate the requirement that the investor has acted in accordance with domestic legislation is not a relevant factor. The requirement of not having committed a serious violation of the legal order is a tacit condition, in the APRI, because it can not be understood in any case that a State is offering the benefit of protection through investment arbitration, when the investor, to get such protection, has committed an unlawful act.*").

771 *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss of 21 February 2017, **RLA-61**, ¶ 301 ("*It is a well-established principle of international law that a tribunal constituted on the basis of an investment treaty has no jurisdiction over a claimant's investment which was made illegally in violation of the laws and regulations of the Contracting State*").

772 See, for instance, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award of 18 November 2014, **RLA-107**, ¶ 132; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, **RLA-15**, ¶ 101; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008, **RLA-27**, ¶¶ 138-139.

773 R. Moloo and A. Khachaturian, "The Compliance with the Law Requirement in International Law," 34(6) *Fordham International Law Journal* 1473, 2011, **RLA-24**, pp. 1482-1483; Reply, ¶ 286.

774 Reply, ¶ 277.

775 *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award of 2 August 2006, **RLA-26**, ¶ 201; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, **RLA-15**, ¶¶ 101, 103.

776 Reply, ¶ 286.

event occurring at the time the investment was made – the one-shot payment of a bribe,[777] and fraudulent misrepresentations by the claimant in order to gain consent to acquire the investment, respectively – and therefore the parties did not disagree as to the relevant timing.

512. Two, as acknowledged by the tribunal in the *Anderson v. Costa Rica* case, illegalities that contaminate an investment and pre-date a claimant's acquisition place that investment outside the scope of a treaty tribunal's jurisdiction. In that case, the claimants had acquired the investment from persons who had engaged in financial intermediation without the authorisation of the Central Bank of Costa Rica or any other government body, as prescribed by Costa Rican law.[778] The tribunal found that it could not assert jurisdiction over the investment, as it had been "contaminated" by the illegal conduct of its prior owner.[779]

513. Three, limiting the scope of the legality assessment to the time of the making of the investment must also be rejected for policy reasons. If this assessment were so limited, it would suffice for an illegally-acquired investment to be transferred legally to a new owner for the illegality to be "cured" for jurisdictional purposes, thus extending the protection of investment treaties to investments which were never intended to be promoted, much less protected.[780] This point is all the more salient in the instant case, since Glencore International knew (or should have known) that the Assets had been irregularly privatized. Their mere acquisition and opportunistic assignment to Claimant cannot do away with the original illegalities.

514. For all these reasons, the Tribunal must assess the legality of Claimant's investment, irrespective of the absence of an explicit legality clause in the Treaty. The scope of such assessment is not limited to the time of the acquisition of the Assets by Glencore International.

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777 *World Duty Free Company Limited v The Republic of Kenya* (ICSID Case No ARB/00/7) Award of 4 October 2006, **CLA-169**, ¶ 135.

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

779 *Alsadair Ross Anderson v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award of 19 May 2010, **RLA-147**, ¶¶ 55, 57 ("*In order to determine whether the ownership of a property is in accordance with the law of a particular country, one must of necessity examine how the possession or ownership of that property was acquired and in particular whether the process by which that possession or ownership was acquired complied with all of the prevailing laws. In the present case, it is clear that the transaction by which the Claimants obtained ownership of their assets (i.e. their claim to be paid interest and principal by Enrique Villalobos) did not comply with the requirements of the Organic Law of the Central Bank of Costa Rica and that therefore the Claimants did not own their investment in accordance with the laws of Costa Rica.*") (emphasis added).

780 See *SAUR International SA v. The Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability of 6 June 2012, **RLA-82**, ¶ 308 (holding that States cannot be understood as having intended to offer treaty protection to illegal investments).

4.5.1.2 *As The Assets Were Privatized Illegally And In A Manner Contrary To International Public Policy, Claimant May Not Seek the Protection Of The Treaty For Such Assets*

515. The Assets were privatized illegally, such that the Tribunal is precluded from exercising jurisdiction over the claims submitted by Claimant in relation thereto.[781] Bolivia has explained that it was not the legal framework pursuant to which privatizations were carried out in the 1980s and 1990s that was illegal as a whole, but rather that the transfer to the private sector of each of the three Assets was highly irregular.[782]

516. Seeking to avoid the dismissal of its claims for lack of jurisdiction, Claimant disputes Bolivia's illegality objection both on the law and on its merit for three reasons, each of which is incorrect.

517. *First*, Claimant contends that Bolivia's illegality objection would fail insofar as it would be based on its own State officials' improper conduct.[783] Claimant's position is incorrect, for the following five reasons:

518. One, Sánchez de Lozada acquired the Assets following his first and immediately prior to his second term in office, profiting from the framework he had set up as a senator, minister and President. He obtained the Assets acting in a private capacity, through his companies Comsur and Colquiri, and not acting as a Bolivian State official. Likewise, Allied Deals, the entity which irregularly acquired the Tin Smelter in the privatization, was a wholly private company.

519. Two, international tribunals regularly look beyond the conduct of the investor in order to assess the legality of the investment. For example, as noted above, the *Anderson v. Costa Rica* tribunal assessed the lawfulness of the conduct of the persons from whom the claimants had acquired the investment. As such conduct did not comply with the law of Costa Rica, the investment was considered illegal.[784] Likewise, in the *Churchill Mining v. Indonesia* case, the tribunal dismissed the claimant's claims on the basis of illegal conduct that had not been that of the investor itself, but of a "*closely associated*" company.[785]

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781 Statement of Defence, Section 4.3.1. See also Sections 2.2, 2.3, 2.4 above.

782 See Sections 2.3, 2.4 above; Statement of Defence, Sections 2.3, 2.4.

783 Reply, ¶ 289.

784 *Alsadair Ross Anderson v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award of 19 May 2010, **RLA-147**, ¶¶ 55, 57.

785 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, **RLA-25**, ¶¶ 473-474.

520. Three, in support of its position, Claimant mainly relies on the tribunal's decision in *Kardassopoulos v. Georgia*.[786] In that case, Georgia argued that the agreements establishing the investment would have been void *ab initio* as (i) the State-owned oil company was not empowered to conclude them, and (ii) the investor had failed to register the resulting joint venture.[787] But the claimant's investment did not involve formerly State-owned assets privatized in breach of mandatory constitutional requirements by a former (and future) President. *Kardassopoulos* thus has no bearing here.

521. When Glencore International bought the Assets from Sánchez de Lozada, it knew (or should have known, as a result of its "*thorough*"[788] due diligence) that they had been illegally transferred to the private sector. Contrary to its repeated (yet baseless) assertions, Claimant has failed to demonstrate that Bolivia gave it any assurances regarding the validity or legality of the privatizations. If anything, the numerous calls for investigation in connection, for example, with the sale of the Tin Smelter,[789] sent the opposite message. Simply because Claimant chose not to pay any heed to these warnings, it cannot now seek to reallocate to Bolivia the risk it took when acquiring the Assets.

522. Four, Claimant also relies on "*the principle of international law, as reflected in Article 3 of the International Law Commission's articles on State responsibility [...] that '[a] State may not invoke its own illegal act to diminish its own liability.*"[790] But Article 3 of the Articles on State Responsibility goes to the characterisation of an act of a State as internationally wrongful, and is thus unrelated to matters of jurisdiction of a court or tribunal over such act.[791]

523. Five, Claimant's position must be rejected as a matter of policy. Espousing Claimant's view that "*any requirement that an investment be made in accordance with host State law could only relate to the investor's conduct*"[792] would make it impossible for States to ever invoke

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786 Reply, ¶ 290 (citing *Ioannis Kardassopoulos v Georgia* (ICSID Case No ARB/05/18) Decision on Jurisdiction of 6 July 2007, **CLA-69**, ¶ 179).

787 *Ioannis Kardassopoulos v Georgia* (ICSID Case No ARB/05/18) Decision on Jurisdiction of 6 July 2007, **CLA-69**, ¶¶ 149, 158.

788 Eskdale II, ¶ 57.

789 See Section 2.4 above.

790 Reply, ¶ 289.

791 See International Law Commission, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentary" [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, Article 3, Commentary (1). Article 3 is concerned with the "*[c]haracterization of an act of a State as internationally wrongful*" and posits that such characterisation "*is independent of its characterization as lawful under the internal law of the State concerned.*"

792 Reply, ¶ 289 (emphasis added).

the corruption defence, insofar as, by definition, it implies improper conduct on the part of State officials.

524. *Second*, Claimant argues that Bolivia's illegality objection does not meet the threshold that other tribunals have required for a positive finding of illegality. According to Claimant, "*only significant and intended violations of applicable laws (as opposed to omissions) may serve as grounds for challenging jurisdiction.*"[793]

525. But the facts described by Bolivia are in no way "*insignificant*" or "*unintentional.*" The illegal privatization of three important State assets, to the benefit of a former (and future) President, in breach of constitutional requirements of transparency, good faith and protection of the public patrimony, is not "*an illegality due to omissions*," but precisely the kind of violation that places an investment outside the scope of a tribunal's jurisdiction. It is entirely comparable to the illegalities in the four cases on which Claimant relies[794] – *Churchill Mining* (forgery of documents),[795] *Inceysa* (the deliberate presentation of false information during a bidding process),[796] *Plama* (fraudulent misrepresentation as to the ownership of an investment),[797] and *Phoenix Action* (the breach of the international principle of good faith).[798]

526. *Third*, far from being "*devoid of any substance*,"[799] as Claimant alleges, Bolivia's illegality objection is supported by the evidentiary record of this arbitration in relation to each of the three Assets.

527. One, the three privatizations were carried out pursuant to a legal framework put in place by Sánchez de Lozada during his time in office, as senator, minister and President.[800] As explained above, between his first and (immediately prior to his) second terms as President, Sánchez de Lozada took undue advantage of this legal framework, and acquired the Assets to further expand his mining operations. Once in office for the second time, he ignored, to his own benefit, the irregularities that had been raised by various public actors, and did not order

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793 Reply, ¶ 293.

794 Reply, ¶ 293. Claimant also purports to rely on the *Energoalians v. Moldova* case (**CLA-211**). However, this award is in Russian and Claimant has not provided a translation into either of the languages of the arbitration.

795 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, **RLA-25**, ¶¶ 507-508.

796 *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award of 2 August 2006, **RLA-26**, ¶ 236.

797 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008, **RLA-27**, ¶¶ 143-146.

798 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, **RLA-15**, ¶ 142.

799 Reply, Section IV.D.1.

800 See Section 2.2 above.

any investigation in connection with the privatizations. His conduct contravened the basic obligation of public servants to act in the public interest, free from bias and partiality.[801]

528. Two, the Assets were also privatized contrary to the basic requirements of transparency and good faith,[802] without regard to the protection of the public patrimony,[803] and disregarding the basic principle of administrative law according to which the administration acts in the best interest of the State.[804] Specifically, as explained in Sections 2.3 and 2.4 above:

- The Colquiri Mine was leased in exchange for a very small investment commitment during the first two years of operations (US$ 2 million) and a royalty rate of 3.5% of the "*ingreso neto de fundición.*"[805] The royalty rate was so low that, upon acquiring the Assets, Glencore International willingly initiated negotiations with COMIBOL and accepted that such rate be increased up to 8%.[806]

- The Tin Smelter was sold to Allied Deals for some US$ 14 million, together with undervalued assets.[807] Coupled with the very low minimum price recommended by

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801 Constitution of Bolivia of 1967, **R-3**, Article 43; Supreme Decree No. 2.3318-A of 3 November 1992, **R-237**, Articles 3, 4. See also Statement of Defence, ¶¶ 327-328.

802 The principles of transparency and good faith govern public tender processes (including the processes pursuant to which the Assets were privatized) by virtue of various Bolivian legal norms. See, for instance, Supreme Resolution No. 215.475 of 20 March 1995, **R-238**, Article 2; Supreme Decree No. 25.964 of 21 October 2010, **R-239(bis)**, Article 4(a) ("*La aplicación de las presentes Normas Básicas esta orientada bajo los siguientes principios: [...] a) Principio de Transparencia y Publicidad [...] e) Principio de Buena Fe*") (Unofficial translation: "*The application of these Basic Standards is guided by the following principles: [...] a) Principle of Transparency and Publicity [...] e) Principle of Good Faith*"); Law No 1,330, 24 April 1992, published in the *Gaceta Oficial* No 1,735, **C-58**, Article 4 ("*Las transferencias a que se refiere la presente Ley, se efectuarán necesariamente mediante licitaciones públicas, subasta o puja abierta, o a través de las bolsas de valores, proporcionando para ello la información adecuada que permita una amplia participación de los interesados y que se asegure la [sic] transferencia e idoneidad del proceso*") (Unofficial translation: "*The transfers referred to in this Law will necessarily be carried out through public bidding, auction or open bid, or through stock exchanges, providing adequate information that allows broad participation of interested parties and ensuring the transfer and suitability of the process*"); Supreme Decree No. 23.991 of 10 April 1995, **R-100**, Article 2(a), 16 ("*El reordenamiento de las empresas y demás entidades públicas tiene como objetivo incrementar la competitividad y eficiencia de la economía nacional, mediante: a) La transferencia al sector privado, a título oneroso y en forma transparente, de actividades productivas que puedan ser realizadas por este de manera más eficiente*") (Unofficial translation: "*The reorganization of companies and other public entities aims to increase competitiveness and efficiency of the national economy through: a) The transfer to the private sector, for consideration and on transparent basis, of productive activities that can be carried out most efficiently by the private sector*").

803 See Constitution of Bolivia of 1967, **R-3**, Article 137.

804 See E. García Enterría, *Curso de derecho administrativo (volume I)*, 16th ed. 2013 (extracts), **RLA-148**, p. 784 (explaining that administrative law contracts have "*una idea esencialmente finalista, que preside necesariamente todo su desarrollo. Lo que se persigue con estos contratos es satisfacer de la mejor manera posible el interés público*") (Unofficial translation: "*an essentially goal-oriented nature, directs their evolution. What it sought with such contracts is to satisfy to the highest degree possible the public interest.*").

805 Lease Agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**, Articles 2.7, 4.1, 4.4, 5.1, 7.1, 8.1.2; Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease of 21 December 1999, **R-108**, p. 5.

806 Reply, ¶ 71; Statement of Defence, ¶ 132.

807 See Section 2.4.1 above.

Paribas, this prompted numerous calls for investigation, for the resignation of public officials involved in the privatization and ultimately for the reversion of the Asset. These calls were left unanswered and the Banzer Suárez administration simply proceeded with the sale of the Asset.

- The Antimony Smelter was sold to Colquiri for US$ 1.1 million. As in the case of the Tin Smelter, this prompted calls for investigation and for the suspension of the process. These calls were also left unanswered, in breach of the good faith and transparency requirements. The Quiroga government also provided no explanation for disregarding such calls and simply proceeded to perfect the sale of the Antimony Smelter to Colquiri.

529. Claimant's assertion that "*the sales prices for each Asset were accepted by the Qualifying Commission in accordance with Bolivian law*"[808] is unavailing. As explained in Section 2.3.2 above, the Qualifying Commission's approval does not cure the irregularity of the Assets' heavily contested sales prices.

530. Three, as explained in Section 2.3.1 above, the Assets were privatized without seeking congressional approval pursuant to Article 59(5) of the 1967 Constitution.[809]

531. In response, relying on Law 2.341 of 23 April 2002 and Law 1.178 of 20 July 1990, Claimant asserts that "*the presumption of legality of the Supreme Decrees remains intact*"[810] since no Bolivian court pronounced on the illegality of the privatizations. On the one hand, Law 2.341 in not applicable, as it was enacted in April 2002,[811] after all three Assets had been privatized. On the other hand, Law 1.178 does not aid Claimant: Article 28(b) of Law 1.178 provides that "*[s]e presume la licitud de las operaciones y actividades realizadas por todo servidor público, mientras no se demuestre lo contrario.*"[812] This norm thus accepts the reversal of the legality

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808 Reply, ¶ 282.

809 Constitution of Bolivia of 1967, **R-3**, Article 59(5) ("*Son atribuciones del Poder Legislativo [...] Autorizar y aprobar la contratación de empréstitos que comprometan las rentas generales del Estado, así como los contratos relativos a la explotación de las riquezas nacionales*") (Unofficial translation: "*The Legislature has the power to [...] Authorize and approve the contracting of loans that compromise the general income of the State, as well as contracts related to the exploitation of national wealth.*"). See Reply, footnote 728.

810 Reply, ¶ 283.

811 Law No. 2.341 of 23 April 2002, **R-250**, Article 4(g). See Reply, footnote 728.

812 Law No. 1.178 of 20 July 1990, **R-241**, Article 28(b) (emphasis added) (Unofficial translation: "*the lawfulness of the operations and activities carried out by any public servant is presumed unless proven otherwise*").

presumption through a demonstration that the impugned acts of Bolivian public servants are in fact illegal.[813] Bolivia had demonstrated as much.

532. Finally, and as explained in Section 2.3.1 above, Claimant cannot validly rely on the absence of a challenge by the Comptroller of the validity of the privatization contracts, as the scope of the review it carried out was limited and not concerned with "*ensur[ing] the independence and impartiality with respect to the administration of the State.*"[814]

533. For all these reasons, it is Bolivia's position that Claimant's claims are tainted with illegality and thus fall outside the scope of the Tribunal's jurisdiction.

4.5.1.3 Bolivia Is Not Precluded From Invoking The Illegality Of The Investment As A Bar To The Tribunal's Jurisdiction

534. In a final effort to avoid the dismissal of its claims for lack of jurisdiction, Claimant argues that "*Bolivia is now estopped from objecting to the jurisdiction of the Tribunal.*"[815] Claimant's estoppel defence is threefold, as described below. It fails both on the law and on the facts of this case, and should accordingly be dismissed.

535. *First*, Claimant justifies the applicability of the doctrine of estoppel by defining it as "*an established principle of international law, recognized and applied by investment treaty tribunals.*"[816]

536. However, under international law, the doctrine of estoppel is applicable only when: (i) a clear, consistent[817] and unambiguous[818] representation made by one party (ii) caused the other party

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813 Law 1.178 – unlike Law 2.341 – does not require an express judicial decision in order to reverse the legality presumption. See Law No. 2.341 of 23 April 2002, **R-250**, Article 4(g) ("*Principio de legalidad y presunción de legitimidad: Las actuaciones de la Administración Pública por estar sometidas plenamente a la Ley, se presumen legítimas, salvo expresa declaración judicial en contrario*") (emphasis added) (Unofficial translation: "*Principle of legality and presumption of legitimacy: The actions of the Public Administration, as they are fully subject to the Law, are presumed to be legitimate, unless judicially declared otherwise*").

814 Reply, ¶ 39.

815 Reply, ¶ 300.

816 Reply, ¶ 300.

817 *Yukos Universal Limited (Isle of Man) v Russian* 30 November 2009 *Federation* (PCA Case No AA 227) Interim Award on Jurisdiction, **CLA-185**, ¶ 288 (the *Yukos* tribunal dismissed the claimant's estoppel argument on the basis that Russia's "*support for provisional application of the ECT [...] even if it could be considered 'consistent,' never 'clearly' excluded the possibility that [Respondent understood the provisional application of the ETC to be limited or excluded]*") (emphasis added); *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections*, ICJ, Judgment of 11 June 1998, **RLA-149**, ¶ 57.

818 See, for instance, *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Award of 14 October 2016, **CLA-224**, ¶ 8.47; *Pope & Talbot Inc v Government of Canada* (UNCITRAL) Interim Award of 26 June 2000, **CLA-26**, ¶ 111; J. Crawford, *Brownlie's Principles of Public International Law*, 2012, **RLA-150**, pp. 420-421. Mere inaction does not suffice, as held by the *Mamidoil* tribunal. See *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award of 30 March 2015, **RLA-74**, ¶ 469 ("*Estoppel may be found when a party demonstrates by its conduct that it will not exercise a right and a counter-party legitimately*

legitimately and in good faith to rely on it[819] (iii) to its own detriment.[820] This is confirmed by a constant line of both decisions of the ICJ (starting with Judge Spender's opinion in the *Temple of Preah Vihear*,[821] and the judgment in the *North Sea Continental Shelf* case[822]), and holdings of international investment tribunals.[823] It is also consistent with the cases on which Claimant itself relies.[824]

537. The conditions of estoppel are not fulfilled in the present case.

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relies on this conduct. Mere inactivity, as opposed to an act, is not enough") (emphasis added). See also *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award of 27 November 2000, **RLA-151**, ¶¶ 20.2-20.4.

819 *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Award of 14 October 2016, **CLA-224**, ¶ 8.47 ("*two essential elements of estoppel under international law include, first, 'a statement of fact which is clear and unambiguous' and, second, reliance 'in good faith' by the representee. The Tribunal would only add, by way of explanation, that reliance in good faith includes reasonableness*"); *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award of 30 March 2015, **RLA-74**, ¶ 469; J. Crawford, *Brownlie's Principles of Public International Law*, 2012, **RLA-150**, p. 421.

820 *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13 and *BP America Production Company and Others v. The Argentine Republic*, Case No. ARB/04/8, Decision on Preliminary Objections of 27 July 2006, **RLA-152**, ¶¶ 159-160 ("*Of essence to the principle of estoppel is detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party*").

821 See *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Dissenting Opinion of Sir Percy Spender to the Judgment on Merits of 26 May 1961, **RLA-153**, pp. 143-144.

822 *North Sea Continental Shelf (Germany v. Denmark; Germany v. Netherlands)*, ICJ, Judgment of 20 February 1969, **RLA-154**, ¶ 30 ("*Having regard to these considerations of principle, it appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to this contention,-that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there is no evidence whatever in the present case*").

823 See, for instance, *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador* (UNCITRAL) Partial Award on the Merits of 30 March 2010, **CLA-189**, ¶¶ 351-352 ("*the representation upon which estoppel is based has to be 'clear and unequivocal' and there must be actual, justified reliance by the other party*"); *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela* (UNCITRAL), Award on Jurisdiction of 22 April 2010, **RLA-155**, ¶¶ 142-143; *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Award of 14 October 2016, **CLA-224**, ¶ 8.47; *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award of 30 March 2015, **RLA-74**, ¶ 469; *Yukos Universal Limited (Isle of Man) v Russian* 30 November 2009 *Federation* (PCA Case No AA 227) Interim Award on Jurisdiction, **CLA-185**, ¶¶ 287-288; *Pope & Talbot Inc v Government of Canada* (UNCITRAL) Interim Award of 26 June 2000, **CLA-26**, ¶ 111; J. Crawford, *Brownlie's Principles of Public International Law*, 2012, **RLA-150**, p. 421 ("*Bowett has stated the essentials of estoppel to be: (a) an unambiguous statement of fact; (b) which is voluntary, unconditional, and authorized; and (c) which is relied on in good faith to the detriment of the other party or to the advantage of the party making the statement*").

824 *The Shufeldt Claim (US v Guatemala)* (24 July 1930) 2 RIAA 1079, **CLA-135**, p. 17 (listing positive action on the part of the Government,which recognized and treated the contract as legal); *Duke Energy International Peru Investments No 1, Ltd v Republic of Peru* (ICSID Case No ARB/03/28) Award of 18 August 2008, **CLA-177**, ¶ 246 (recognizing that "*a declaration, representation or conduct which has in fact induced reasonable reliance*" is necessary for the purposes of estoppel); *Fraport v Philippines* (ICSID Case No ARB/03/25) Award of 16 August 2007, **CLA-174**, ¶ 346 (endorsing esoppel when the government has positively endorsed the purported illegal investment); R. Moloo and A. Khachaturian, "The Compliance with the Law Requirement in International Law," 34(6) *Fordham International Law Journal* 1473, 2011, **RLA-24**, p. 28 (citing *Alpha Projektholding v. Ukraine* (**CLA-101**) referring explicitly to affirmative action by the government ratifying the investor's investment).

538. According to Claimant, Bolivia would have encouraged it to invest in the country in 2005, "*instead of raising concerns about the illegality of [the privatization of the Assets].*"[825] But Claimant does not put forth any evidence of representations by Bolivia, let alone clear, consistent and unambiguous representations.

539. Instead, Claimant relies on Mr Eskdale's testimony to demonstrate that Bolivia would have encouraged Glencore International to invest.[826] However, as explained in Section 2.5.3 above, Mr Eskdale testifies to the content of a meeting which he did not attend, and which was reported to him by Mr Capriles, a person who has not submitted testimony in this arbitration despite being an employee of the Glencore group.[827] Mr Eskdale provides no documentary support to corroborate his description of the content of this meeting.

540. What is more, the meeting to which Mr Eskdale refers is described in the Reply as taking place "*in early February 2005.*"[828] By this time, however, Glencore International had already concluded binding contracts to acquire the shares of Iris and Shattuck,[829] and thus 99.95% of Comsur (thereafter, Sinchi Wayra).[830] Claimant cannot seriously suggest that a meeting which took place after the contracts had been signed would have induced Glencore International to sign such contracts.

541. If Glencore International acquired the Assets, and subsequently suffered harm (*quod non*), this was the result of its own decision, made independently of and not in reliance upon any representations made by Bolivia.

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825 Reply, ¶ 299.

826 Reply, ¶ 299; Eskdale I, ¶ 18; Eskdale II, ¶¶ 11-12, 61.

827 See LinkedIn page of Eduardo Capriles, <https://www.linkedin.com/in/eduardo-capriles-aab20975/?originalSubdomain=bo> last visited on 19 October 2018, **R-317** (listing Mr Capriles as general manager of Glencore in Bolivia). See also Power of Attorney from Glencore Bermuda of 11 December 2007, **C-90** (giving Mr Capriles a power of attorney to represent Glencore Internaional in the negotiations with the State).

828 Reply, ¶ 60. Elsewhere in the Reply, Claimant disingenuously suggests that "*Bolivia could have raised any concerns about the legality of the investments during the discussions leading to Glencore International's investment in 2004.*" See Reply, footnote 730. This is incorrect, as Bolivia was not made aware of the transaction until 2005. Claimant forgets the stringent confidentiality obligations it was bound by, which prohibited it from engaging in "*any form of communication, disclosure or discussion in relation to the Transaction with COMIBOL, any member of the Government of Bolivia, or any Representative (as defined in the Confidentiality Agreement) in Bolivia, of Bolivian citizenship, or with contacts in Bolivia ('Bolivian Representative') is strictly prohibited unless the Company has previously consented to such communication.*" See Letter from Argent Partners to Glencore International (redacted) of 5 October 2004, **R-314**, pp. 1-2 (emphasis added). The "*Company*" is Andean Resources S.A.

829 Second Amended and Restated Stock Purchase Agreement between Minera and Glencore International (Iris shares) of 30 January 2005, **C-198**; Stock Purchase Agreement between Minera and Glencore International (Shattuck shares) of 30 January 2005, **C-199**.

830 See Reply, ¶ 63.

542. Claimant also fails to explain how, in the context prevalent in 2005, it could possibly have legitimately relied on a representation by Bolivia that the Assets had been legally privatized (assuming, *par impossible*, that such a clear, unambiguous and consistent representation would have been made to it). As explained in Section 2.5.3 above, it was entirely foreseeable, at the time, that the State would take action against the Assets, in light of their turbulent and controversial history.[831]

543. Finally, on Claimant's own case, Bolivia would have made representations to Glencore International, and not to Claimant. Claimant has not explained how the doctrine of estoppel could be applicable to a third party.

544. *Second*, Claimant argues that Bolivia's illegality objection should be dismissed on the basis of prior decisions by international investment tribunals "*prevent[ing] respondent States from challenging the legality of an investment by reference to previous unidentified violations of their own law.*"[832] Claimant is mistaken.

545. One, the cases on which Claimant relies for this proposition[833] are easily distinguishable from the factual matrix underlying this dispute, insofar as they did not involve (i) highly controversial assets, (ii) privatized illegally and to the benefit of a former and future President, immediately prior to his second term in office, and (iii) acquired in circumstances in which it was entirely foreseeable that the State would take action against them.[834] Bolivia has already

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831 See Sections 2.3, 2.4 above.

832 Reply, ¶ 302.

833 Reply, ¶¶ 303-305 (citing *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal of 2 October 2006, **CLA-64**, ¶ 475; *Fraport v Philippines* (ICSID Case No ARB/03/25) Award of 16 August 2007, **CLA-174**, ¶ 346; *Gustav F W Hamester GmbH & Co KG v. The Republic of Ghana*, ICSID Case No. ARB/07/24, Award of 18 June 2010, **RLA-84**, ¶ 127; *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award of 6 February 2008, **RLA-119**, ¶ 104; *Metalpar SA y Buen Aire SA v Argentine Republic* (ICSID Case No ARB/03/5) Decision on Jurisdiction of 27 April 2006, **CLA-164**, ¶ 84; *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award of 19 December 2008, **RLA-29**, ¶ 173; *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No ARB/84/3) Award on the Merits of 20 May 1992, **CLA-18**, ¶ 81; *Customs and Tax Consultancy LLC (CTC) (United States) v Democratic Republic of Congo* (ICC Case No 19515/MCP) Partial Award of 22 July 2015, **CLA-219**, ¶ 109).

834 See, generally, *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal of 2 October 2006, **CLA-64** (arising out of a contract for the renovation, construction and operation of airport terminals); *Gustav F W Hamester GmbH & Co KG v. The Republic of Ghana*, ICSID Case No. ARB/07/24, Award of 18 June 2010, **RLA-84** (arising out of a joint venture between the investor and a State-owned company to modernise a factory); *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award of 6 February 2008, **RLA-119** (involving road construction contracts concluded with the Government); *Metalpar SA y Buen Aire SA v Argentine Republic* (ICSID Case No ARB/03/5) Decision on Jurisdiction of 27 April 2006, **CLA-164** (involving leasing agreements the value of which had been affected by the 2001 Argentinian crisis); *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award of 19 December 2008, **RLA-29** (arising out of a telecoms concession contract); *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No ARB/84/3) Award on the Merits of 20 May 1992, **CLA-18** (involving the development of international tourist complexes); *Customs and Tax Consultancy LLC (CTC) (United States) v Democratic Republic of Congo* (ICC Case No 19515/MCP) Partial Award of 22 July 2015, **CLA-219** (arising out of an agreement for technical assistance in the modernisation of the customs administration).

explained the history of the Assets and the irregularity of their privatization. Bolivia also reiterates that it did not endorse nor encourage Claimant's investment in the country in 2005, much less by way of "*affirmations*," as Claimant misleadingly asserts.[835]

546. Two, Claimant asserts that, "*even if the State officials are acting ultra vires*,"[836] their conduct remains binding on Bolivia, thus purportedly obviating Bolivia's objection. But Claimant's reliance on Article 7 of the Articles on State Responsibility[837] for this proposition is unavailing.

547. As explained by Professor Crawford, Article 7 of the Articles on State Responsibility may only apply "*if the organ, person or entity acts in that capacity [i.e., exercising elements of the governmental authority].*"[838] In the present case, notwithstanding the calls for the suspension of the process, and for investigations into the matter of the low prices,[839] the privatization was allowed to proceed. Subsequently, the administration of Sánchez de Lozada did not instruct any investigations in this connection, given that the Assets had been acquired by the then-President himself, immediately prior to taking office. There is little doubt that Sánchez de Lozada's conduct was dictated by his private capacity, rather than by his office, and such conduct cannot be attributed to the State.

548. Three, Claimant is misguided to assert that Bolivia's conduct would have given rise to legitimate expectations on its part that its investment would be legal.[840] In particular, Claimant has submitted no evidence in support of any purported legitimate expectation on its part.

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835 Black's Law Dictionary defines an affirmation as "*[a] solemn pledge equivalent to an oath but without reference to a supreme being or to swearing; a solemn declaration made under penalty of perjury, but without an oath.*" *Black's Law Dictionary*, 10th ed. 2014 (extract), **RLA-156**. Positive acts by the Bolivian government would have thus been required, as corroborated by Claimant's own authority, *SPP v. Egypt*. In that case, the investment was made in reliance upon positive acts of Egyptian officials, including a presidential decree, which Egypt later argued would have been illegal under Egyptian law and thus "*absolutely null and void.*" *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No ARB/84/3) Award on the Merits of 20 May 1992, **CLA-18**, ¶ 81. In the present case, Claimant does not even try to identify the Government representatives attending the February 2005 meeting or to attribute the affirmation to any one specific public official. Claimant could not have derived any legitimate expectations from a single meeting with the Government, of which it provides no direct witnesses and no documentary record. In any event, Bolivia did not make such a pledge to Claimant.

836 Reply, ¶ 306.

837 International Law Commission, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentary" [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, Article 7 ("*The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions*"); Reply, footnote 772.

838 B. Greenwald, "The Viability of Corruption Defenses in Investment Arbitration When the State Does not Prosecute," *Blog of the European Journal of International Law* of 15 April 2015, **RLA-157**, p. 2 (citing International Law Commission, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentary" [2001-II(2)] Yearbook of the International Law Commission, **CLA-30**, Article 7, Commentary 7).

839 See Sections 2.3, 2.4 above.

840 Reply, ¶¶ 304, 307.

Claimant also does not explain how a shell company with no employees can develop any sort of legitimate expectations. For this reason, Claimant's argument must fail.

549. *Third*, Claimant relies on the Bolivian law principle *venire contra factum proprium*, which it asserts would yield the same result as the doctrine of estoppel if applied in this case: Bolivia would not be permitted to rely on the illegality of the investment to challenge the jurisdiction of the Tribunal, as such conduct would be inconsistent with its prior behaviour towards Claimant.[841] In this context, Claimant cites a decision of the Plurinational Constitutional Tribunal to argue that actions of the administration having generated legal consequences cannot subsequently be ignored by the same administration.[842]

550. However, the *venire contra factum proprium* rule requires – as the Constitutional Tribunal noted in the decision in question – a positive *factum proprium* that the same administration's subsequent behaviour contradicts.[843] As mentioned, Claimant provides no serious evidence of any such positive act by Bolivia that it would contradict by its illegality objection.

551. For all the above reasons, Bolivia is not precluded from arguing that the illegality marring the privatization of the Assets is a bar to the Tribunal's jurisdiction in the present case.

4.5.2 Claimant Brings Its Claims With Unclean Hands Because The Privatizations Were Illegal

552. As explained in the Statement of Defence, Claimant cannot present for adjudication before this Tribunal claims tainted by an illegality of which Claimant was fully aware when it received the Assets.[844] Put differently, the claims fall outside the scope of the Tribunal's jurisdiction, pursuant to the principle of clean hands.

553. Claimant seeks to escape the dismissal of its claims on this basis by disputing the existence and the applicability in this case of the clean hands doctrine. For the two reasons explained below, Claimant's position is incorrect.

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841 Reply, footnote 766.

842 Reply, footnote 766; Constitutional Tribunal, Constitutional Decision No 0116/2015-S3 of 20 February 2015, **C-270**.

843 In the decision of the Constitutional Tribunal cited by Claimant, the administration "*reconoció a los accionantes un paso de 2,50 m, tanto a personas como vehículos, pero que luego, ese acto administrativo firme, fue desconocido por el propio Municipio.*" (Unofficial translation: "gave the petinioners a 250m path, for both people and vehicles, but thereafter that firm administrative act was disregarded by the Municipality itself"). See Constitutional Tribunal, Constitutional Decision No 0116/2015-S3 of 20 February 2015, **C-270**, p. 10.

844 Statement of Defence, Section 4.3.2.

554. *First*, it is false that "*the unclean hands doctrine does not exist as a general principle of international law*,"[845] as Claimant states. Clean hands is recognised widely in civil and common law jurisdictions as "*a general principle of law that should be applicable in all cases.*"[846] By way of example, clean hands is recognised in UK,[847] US,[848] German,[849] French,[850] and Colombian law,[851] and thus constitutes a "*general principle of law recognised by civilised nations*" pursuant to Article 38(1)(c) of the Statute of the ICJ.[852] Further, the clean hands principle was recognised and applied in the *Churchill Mining*[853] and *Al Warraq*[854] cases, where both tribunals relied on it to dismiss the claimants' respective claims.

555. In support of its position, Claimant relies mainly on the *Yukos* case, which, it argues, "*emphatically closed the door to the application of the unclean hands principle.*"[855] But what

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845 Reply, ¶ 287.

846 R. Moloo and A. Khachaturian, "The Compliance with the Law Requirement in International Law," 34(6) *Fordham International Law Journal* 1473, 2011, **RLA-24**, p. 1485. See also Statement of Defence, Section 4.3.2.

847 The earliest known application of clean hands was in the 1669 case *Jones v. Lenthal*. In its *ex turpi causa non oritur actio* form, clean hands was also applied, for example, by the House of Lords in *Stone & Rolls v. Moore Stephens* (barring a company from bringing a claim against its auditor for failing to detect a fraud committed by the exclusive owner and controller of that company) and by the Court of Appeals in *Safeway Stores v. Twigger* (barring the claimant companies from requiring the defendants, their former employees and directors, to contribute to the payment of a fine imposed on said companies). See *Jones v. Lenthal* (1669) 1 Ch. Ca. 154, **RLA-158**; *Stone & Rolls Ltd (in liquidation) v. Moore Stephens (a firm)* [2009] UKHL [2009] 1 AC, **RLA-159**; *Safeway Stores Ltd. And ors v. Twigger and ors.* [2010] EWCA Civ 1472, **RLA-160**.

848 J. N. Pomeroy, *A Treatise on Equity Jurisprudence*, Bancroft-Whitney, 5th ed. 1941, **RLA-161**, ¶ 397.

849 The clean hands principle is recognized in German law and recorded in the Bürgerliches Gesetzbuch, the German Civil Code. As noted by one commentator, "*[t]his principle developed from the principle* exceptio *doli specialis seu prateriti of Roman and Common law. It corresponds to the 'unclean hands' defense known in Anglo-American law.*" See R. Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine," in K. Hobér et al. (eds.), *Between East and West: Essays in Honour of Ulf Frank*, Juris Publishing, 2010, **RLA-162**, p. 318.

850 The French legal system recognizes the principle *nemo auditur propriam turpitudinem allegans*, as well as the principle that a claimant may not base its claim on its own wrongful conduct. See French Court of Cassation, 2nd civil chamber, n° 09-11.464, decision of 4 February 2010, **RLA-163**; French Court of Cassation, 2nd civil chamber, n° 99-16.576, decision of 24 January 2002, **RLA-164**.

851 Colombian Constitutional Court, Decision T-213 of 28 February 2008, **RLA-165**, pp. 13-14 (recognizing the principle that no one may rely on their own fault to their own benefit); G. A. Blanco Zúñiga, "Los principios generales del derecho en la Constitución del 91", *Revista de derecho Universidad del Norte*, volume 17 (2002), **RLA-166**, p. 256.

852 P. Dumberry and G. Dumas-Aubin, "The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law," 10(1) *Transnational Dispute Management* 2013, **RLA-167**, p. 3.

853 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, **RLA-25**, ¶ 493. See also *Rusoro Mining Limited v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/12/5) Award of 22 August 2016, **CLA-131**, ¶ 492 ("*it is undisputed that claimants with 'dirty hands' have no standing in investment arbitration*").

854 *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, Final Award of 15 December 2014, **RLA-168**, ¶ 646.

855 Reply, ¶ 288; *Yukos Universal Limited (Isle of Man) v Russian Federation* (PCA Case No AA 227) Final Award of 18 July 2014, **CLA-122**, ¶ 1363; *Hulley Enterprises Limited (Cyprus) v The Russian Federation* (UNCITRAL) Final Award of 18 July 2014, **CLA-156**, ¶ 1363; *Veteran Petroleum Limited (Cyprus) v The Russian Federation* (UNCITRAL) Final Award of 18 July 2014, **CLA-157**, ¶ 1363. Claimant also cites the *Niko v. Bangladesh* decision in a footnote. This decision does not support its position, insofar as that tribunal did not dispute the existence and applicability of the clean hands principle, but simply dismissed the respondent State's clean hands defence on the facts. In any event, the *Niko* decision pre-dates the *Churchill* and *Al Warraq* cases and thus is no longer good law with respect to clean hands. See

Claimant ignores is that (i) subsequent decisions, such as in the *Churchill Mining* and *Al Warraq* cases mentioned above, have recognised and applied the principle of clean hands in order to dismiss claims based on improper conduct (giving no authority to *Yukos* on this issue), and (ii) the *Yukos* award has been set aside at the seat of the arbitration. As such, *Yukos* is simply no longer good law with respect to clean hands.

556. *Second*, it is not true that the clean hands doctrine, as applied in the *Churchill Mining* case, would be inapposite to the case at hand, as Claimant implies.[856] As explained in detail in the Statement of Defence, the *Churchill Mining* tribunal definitively established that illegal or fraudulent conduct connected to the basis of a claim renders the claim inadmissible, even if such conduct was not that of the investor itself.[857] It suffices that the claimants did not exercise a reasonable level of due diligence in making its investment.[858]

557. Claimant seeks to distinguish *Churchill Mining*, arguing that, in contrast, here the illegal conduct would belong to "*an entirely unelated third party, or a State official.*"[859] Moreover, Claimant contends that Glencore International would have carried out "*a thorough due diligence conducted by technical, financial and multi-jurisdictional legal teams to cover all relevant aspects of the transaction,*"[860] unlike the claimants in that case.[861]

558. Claimant's attempted distinguishing rings hollow, for two reasons:

559. One, the illegalities that bar this Tribunal's jurisdiction occurred in the privatization of the Assets. Sánchez de Lozada's illegal acquisition of the Assets is just as relevant as the illegal conduct of Churchill Mining's business partner. Indeed, the *Churchill Mining* tribunal expressly noted that "*[o]ther cases denied protection to investments tainted by the fraud of a third party,*"[862] without limiting in any way the relationship tying the claimant to such third party. For this proposition, the tribunal cited the *Anderson v. Costa Rica* case, where the

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Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla") (ICSID Case No ARB/10/18) Decision on Jurisdiction of 19 August 2013, **CLA-210**, ¶ 483.

856 See Reply, ¶ 294.

857 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, **RLA-25**, ¶¶ 506, 518. See Statement of Defence, ¶¶ 340-345.

858 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, **RLA-25**, ¶¶ 506, 518.

859 Reply, ¶ 294.

860 Reply, ¶ 295.

861 Reply, ¶¶ 294-295.

862 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, **RLA-25**, ¶ 505.

illegality lay in the conduct of the persons from which the claimants had acquired their investment (as in the present case).[863]

560. Two, Claimant contends that Glencore International would have relied on "*a thorough due diligence conducted by technical, financial and multi-jurisdictional legal teams to cover all relevant aspects of the transaction*."[864] Such due diligence would allegedly have "*raised no concerns.*"[865] In any event, Claimant asserts, "*even if there was a mistake or oversight in the due diligence process [...] it was made in good faith.*"[866]

561. But, in light of the facts described in Section 2 above, Claimant's position cannot be correct. Either Glencore International carried out extensive and exhaustive due diligence, and subsequently chose to wilfully disregard its results (as did the claimants in *Churchill Mining*) or it did not carry out adequate due diligence[867] and thus was unfamiliar with the circumstances of its investment (and took the risk of investing in any event). There is no other reasonable explanation for Glencore International's alleged failure to take into account the turbulent, controversial and very public history of the Assets.

562. In the *Churchill Mining* case, the tribunal dismissed the claimants' similar position.[868] Notably, the tribunal found that "*the Claimants were aware of the risks involved in investing in the coal mining industry in Indonesia*,"[869] but that they had not been "*particularly diligent in investigating the circumstances of [the] investment.*"[870]

563. In conclusion, Claimant knew (or should have known) at the time it acquired the Assets that they had passed from the public to the private domain through highly irregular privatization

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863 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, **RLA-25**, ¶ 505 (citing *Alsadair Ross Anderson v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award of 19 May 2010, **RLA-147**, ¶¶ 26, 55, 59).

864 Reply, ¶ 295.

865 Reply, ¶ 295; Eskdale II, ¶ 57.

866 Reply, ¶ 296.

867 For the *Churchill Mining* tribunal, adequate due diligence includes "*ensuring that a proposed investment complies with local laws, as well as investigating the reliability of a business partner and that partner's representations before deciding to invest.*" See *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, **RLA-25**, ¶ 508.

868 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, **RLA-25**, ¶ 508.

869 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, **RLA-25**, ¶ 517.

870 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, **RLA-25**, ¶¶ 518, 519.

processes. As a result, Claimant comes before the Tribunal with unclean hands, and its claims should be dismissed entirely.

4.6 The Tribunal Lacks Jurisdiction Because, As Claimant Cannot Reasonably Deny, The Dispute Relates Directly Or Indirectly To Contracts Requiring Mandatory ICC Arbitration

564. Claimant's claims all fall within the scope of the mandatory arbitration clauses included in the Contracts.[871] Accordingly, the Tribunal does not have jurisdiction to hear those claims, which must be adjudicated in an arbitration under the rules of the International Chamber of Commerce ("**ICC**").

565. Claimant seeks to escape the dismissal of its claims by arguing that it brings Treaty claims (*i.e.*, claims which have the Treaty as their fundamental basis) and not Contract claims. As such, it argues, no contractual forum selection clause may place such claims outside the scope of the Tribunal's jurisdiction.

566. Claimant's position is incorrect, for the following four reasons:

567. *First*, the claims submitted by Claimant in this arbitration concern, directly or indirectly, the validity, compliance with and fulfilment of the terms of the Contracts. The rights asserted by Claimant, which, it argues, were violated by Bolivia, derive and do not have an independent existence from the Contracts through which the Assets passed into Sánchez de Lozada's ownership:[872]

- As the foundation of its Tin Smelter claim, Claimant alleges that the Tin Smelter reversion was not justified by the illegality of its privatization. The question of whether or not such privatization was justified is ultimately a matter of validity of the corresponding Contract;

- As to the Antimony Smelter, the basis of Claimant's claim is that the reversion was not justified by the inactivity of that Smelter, since Claimant had no contractual obligation to put it into production. This is a matter falling squarely into to the scope of obligations under the corresponding Contract and the fulfilment of these obligations; and

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871 Statement of Defence, Section 4.5.

872 Statement of Defence, ¶ 394.

- In relation to the Colquiri Mine, Claimant specifically alleges that Bolivia breached its contractual obligations under the Mine Lease, to "*no interferir ni limitar las operaciones del ARRENDATARIO*,"[873] pursuant to Article 9.2.1, and to guarantee "*la pacifica posesión uso y goce del CENTRO MINERO, debiendo defender, proteger garantizar y reivindicar derechos contra incursiones, usurpaciones y otras perturbaciones de terceros durante la vigencia del CONTRATO*"[874] pursuant to Article 12.2.1. Claimant's case is thus precisely about Bolivia's fulfilment of the Contract.

568. All questions relating directly or indirectly to these contractual rights are captured by the arbitration clauses in the Contracts. This is because the parties to those Contracts agreed to submit "*[t]odos los desacuerdos, conflictos, disputas, controversias y/o diferencias [...] que tengan relación directa o indirecta con la validez, interpretación, alcance y/o cumplimiento del CONTRATO*"[875] to the jurisdiction of an ICC tribunal.

569. Moreover, the parties also stipulated that any recourse to dispute resolution under international law is precluded:

> *La ARRENDADORA, el ARRENDATARIO y la OPERADORA, en virtud del CONTRATO, hacen expresa renuncia a todo reclamo por la vía diplomática en cuanto se refiere a la interpretación y ejecución del CONTRATO.*[876]

570. Claimant describes its claims as directly relying on the Treaty provisions regarding expropriation, fair and equitable treatment, full protection and security, and the observance of

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873 Lease Agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**, Article 9.2.1 (Unofficial translation: "*not interfere or limit the operations of the LESSEE*").

874 Lease Agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**, Article 12.2.1 (Unofficial translation: "*the peaceful possession, use and enjoyment of the MINING CENTER, must defend, protect, guarantee and claim rights against incursions, usurpations and other disturbances of third parties during the term of the CONTRACT*").

875 Notarizations of the sale and purchase agreement of the Tin Smelter between the Ministry of External Trade and Investment, Corporación Minera de Bolivia, Empresa Metalúrgica Vinto and Allied Deals Estaño Vinto SA, **C-7**, Article 15 (emphasis added) (Unofficial translation: "*[a]ll disagreements, conflicts, disputes, controversies and / or differences [...] directly or indirectly related to the validity, interpretation, scope and/or compliance of the CONTRACT*"); Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**, Article 15; Lease Agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**, Article 17.3.

876 Notarizations of the sale and purchase agreement of the Tin Smelter between the Ministry of External Trade and Investment, Corporación Minera de Bolivia, Empresa Metalúrgica Vinto and Allied Deals Estaño Vinto SA, **C-7**, Article 18 (Unofficial translation: "*The LESSOR, the LESSEE and the OPERATOR, under the CONTRACT, expressly waive all claims through diplomatic channels as regards the interpretation and execution of the CONTRACT*"); Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**, Article 18; Lease Agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**, Article 19.

undertakings.[877] However, to the extent that deciding such claims would require that the Tribunal engage directly or indirectly with the validity, interpretation, scope and/or fulfilment of the Contracts, it would not be permitted to do so by virtue of the above clauses. The Tribunal could only proceed to do so to the extent it relied on definitive findings regarding the relevant facts, made by an ICC tribunal constituted in accordance with the forum selection clause.

571. *Second*, contrary to Claimant's contention, a forum selection clause in a contract may in fact deprive a treaty tribunal of jurisdiction over a dispute presented to it.[878] A consistent line of cases supports this proposition.

572. The *SGS v. Philippines* case stands for the proposition that a tribunal "*should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively.*"[879] The tribunal's decision was based on two main considerations: on the one hand, the maxim *generalia specialibus non derogant*, pursuant to which the treaty could not derogate from specific forum selection clauses in a contract;[880] on the other hand, the notion that treaties are negotiated to "*support and supplement, not to override or replace, the actually negotiated investment arrangement.*"[881]

573. Claimant notes that the *SGS* tribunal found it had jurisdiction over claims of fair and equitable treatment and breach of the umbrella clause.[882] This is correct. However, the tribunal stayed the proceedings pending a decision of the contractually-agreed forum on facts relevant to those claims.[883]

574. Claimant's attempt to distinguish the *BIVAC v. Paraguay* award fails for the same reason. The *BIVAC* tribunal asserted jurisdiction over claims that did not involve or rely on any factual matters that could only be decided upon within the contractually-agreed forum.[884]

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877 Reply, ¶ 329.

878 See Reply, ¶ 322; Statement of Defence, Section 4.5.1.

879 *SGS Société Générale de Surveillance S.A. v. The Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction of 29 January 2004, **RLA-32**, ¶ 155.

880 *SGS Société Générale de Surveillance S.A. v. The Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction of 29 January 2004, **RLA-32**, ¶ 141.

881 *SGS Société Générale de Surveillance S.A. v. The Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction of 29 January 2004, **RLA-32**, 141.

882 Reply, ¶ 324.

883 *SGS Société Générale de Surveillance S.A. v. The Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction of 29 January 2004, **RLA-32**, ¶¶ 162-163.

884 *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Objections to Jurisdiction of 29 May 2009, **RLA-36**, ¶¶ 122-125 (noting that Paraguay did

575. The proposition that a forum selection clause may deprive an investment treaty tribunal of jurisdiction is all the stronger in the presence of a clause waiving recourse to remedies under international law. This was confirmed by decisions of the US-Mexico claims commission in the *Woodruff* and *Dredging* cases.

576. In *Dredging*, the mixed claims commission gave full effect to the contractual clause which confined any claims arising out of the underlying contract to the Mexican courts.[885] The commission noted that the claimant could only have a claim under international law "*if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law.*"[886] The same approach was espoused by the *Woodruff* umpire.[887] Claimant's attempted distinguishing of these cases does not address this crucial point, and is thus ineffective.[888]

577. *Third*, the decisions in the cases on which Claimant relies to assert that "*tribunals have held that an exclusive forum selection clause in a contract cannot deprive an investment treaty tribunal of its jurisdiction over treaty claims*" are circumscribed to the specific circumstances of those cases. The conclusions of those tribunals cannot and should not guide this Tribunal's decision in the present case.

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not challenge the amounts alleged to be outstanding by the claimant and thus there was no issue to be put before the contractual forum).

885 General Claims Commission, *North American Dredging Company of Texas (U.S.A.) v. United Mexican States*, Decision of 31 March 1926, UNRIAA, volume IV, **RLA-34**, pp. 30-31.

886 General Claims Commission, *North American Dredging Company of Texas (U.S.A.) v. United Mexican States*, Decision of 31 March 1926, UNRIAA, volume IV, **RLA-34**, pp. 30-31 (The forum selection clause "*did not take from [the claimant] his undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law. In such a case the claimant's complaint would be not that his contract was violated but that he had been denied justice. The basis of his appeal would be not a construction of his contract, save perchance in an incidental way, but rather an internationally illegal act. [...] But [the claimant] did frankly and unreservedly agree that in consideration of the Government of Mexico awarding him this contract, he did not need and would not invoke or accept the assistance of his Government with respect to the fulfilment and interpretation of his contract and the execution of his work thereunder*").

887 American-Venezuelan Commission, *Woodruff Case*, Decision of 1903-1905, UNRIAA, volume IX, **RLA-35**, pp. 222-223.

888 Reply, ¶ 326.

578. One, in *Azurix*, *AWG*, *CMS*,[889] *Eureko*,[890] *Impregilo*,[891] *Vivendi*,[892] *SGS*,[893] *Siemens*,[894] and *Jan de Nul*,[895] the forum selection clauses did not contain any provisions excluding the recourse to diplomatic protection under international law, as do the Contracts. In addition, the dispute resolution clauses in those cases were narrow in scope, unlike those in the Contracts.

579. For example, in *Azurix*, the clause referred "*disputes under the terms of the document concerned and between the parties to that particular document*" to the jurisdiction of Argentinian courts.[896] Likewise, in *AWG*, the forum selection clause applied only to "*controversies arising out of the concession contract.*"[897]

580. Two, in *SGS v. Pakistan*, the tribunal noted that the contract including the forum selection clause preceded the signature of the treaty, and thus it could not have been the intention of the parties to vest an arbitrator of the contract with jurisdiction over a BIT "*which was then still hidden in the future*,"[898] as Pakistan had argued. The opposite is true in the present case, as the Treaty entered into force on 16 February 1990,[899] whilst the Contracts were executed in 2000-2001.[900]

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889 *CMS Gas Transmission Company v Republic of Argentina* (ICSID Case No ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction of 17 July 2003, **CLA-150**, ¶¶ 70, 76. The forum selection clauses at issue referred only "*certain kinds of disputes*" to local courts. Argentina's argument that this entailed "*an express renunciation to any other forum or jurisdiction*" was therefore dismissed.

890 *Eureko BV v Republic of Poland* (Ad Hoc) Partial Award and Dissenting Opinion of 19 August 2005, **CLA-161**, ¶ 93.

891 *Impregilo SpA v Islamic Republic of Pakistan* (ICSID Case No ARB/03/3) Decision on Jurisdiction of 22 April 2005, **CLA-159**, ¶¶ 20, 262, 289 (given the dispute resolution clause, holding that treaty and contract claims could overlap and be considered by different fora).

892 *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 of 3 July 2002, **CLA-37**, ¶ 14(d).

893 *SGS Société Générale de Surveillance SA v Republic of* 12 February 2010 *Paraguay* (ICSID Case No ARB/07/29) Decision on Jurisdiction, **CLA-187**, ¶ 126.

894 *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Decision on Jurisdiction of 3 August 2004, **CLA-51**, ¶ 174.

895 *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No ARB/04/13) Decision on Jurisdiction of 16 June 2006, **CLA-165**, ¶ 132.

896 *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12) Decision on Jurisdiction of 8 December 2003, **CLA-153**, ¶¶ 76; 77, 85.

897 *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentine Republic and AWG Group Ltd v Argentine Republic* (ICSID Case No ARB/03/19) Decision on Jurisdiction of 3 August 2006, **CLA-167**, ¶ 43. The forum selection clause "*ma[de] no mention of Claimants' [...] right to seek recourse in international arbitration for violation of [its rights under the treaties concluded by Argentina with France, Spain and the UK].*" It was only the execution of a dispute settlement clause "*like the one in the [...] concession contract*" that "*could not support any inference that such dispute resolution clause is a waiver of the investor's rights under a BIT.*"

898 *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (ICSID Case No ARB/01/13) Decision of the Tribunal on Objections to Jurisdiction of 6 August 2003, **CLA-151**, ¶ 153.

899 Treaty, **C-1**, p. 1.

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

581. *Lastly*, Claimant highlights what it purports to be a contradiction in Bolivia's position, *i.e.*, that it would be arguing its actions are sovereign actions covered by the police powers doctrine whilst also claiming they are subject to ICC arbitration clauses.[901] This is misleading.

582. On the one hand, Bolivia's arguments on the merits of Claimant's claims are made in the alternative, presupposing that this Tribunal were to dismiss Bolivia's objection and assert jurisdiction over the dispute. There is no contradiction there.

583. On the other hand, the plain language of the ICC arbitration clauses in the Contracts does not limit mandatory arbitration based on whether the action is sovereign or not. Any claim relating directly or indirectly to the Contracts is subject to mandatory ICC arbitration.

584. For all these reasons, the claims brought by Claimant, insofar as they relate directly or indirectly to the Contracts, fall within the scope of the forum selection clauses therein. Accordingly, this Tribunal is barred from exercising jurisdiction over them

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585. [redacted]

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Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**; Lease Agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**.

901 Reply, ¶ 330.

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588. [redacted]

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4.8 The Tribunal Lacks Jurisdiction Over The Tin Stock Claim Because Claimant Is Unable To Show It Was Ever Notified To Bolivia

610. In its Statement of Defence, Bolivia explained that the Treaty requires the formal notification of a claim to Bolivia before it can be subject to the jurisdiction of an arbitral tribunal. Claimant failed to comply with this basic requirement for the Tin Stock claim. This is for two reasons: (i) it never notified Bolivia of a claim regarding the Tin Stock with Glencore Bermuda (or with Glencore International), and (ii) it never notified Bolivia of a claim under the Treaty (or under any other investment treaty).

611. Claimant, in its Reply, insists that the Tribunal has jurisdiction over the Tin Stock claim.

612. Nevertheless, Claimant concedes that it was required to provide written notice of the claim to Bolivia prior to commencing arbitration.[921] It has little choice. The Treaty text in Article 8(1) is explicit:

> *Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been legally and amicably settled shall after a period of six months from written notification of a claim be submitted to international arbitration if either party to the dispute so wishes.*[922]

613. Only the notification of a claim under the Treaty by a national or company of the other Contracting Party could satisfy the notice provision. Only such a claim can be submitted to arbitration pursuant to Article 8(1) of the Treaty. Thus, notification of any other sort of claim would not put the State on notice of the potential investment arbitration.

614. The *Burlington* and *Tulip* tribunals confirmed that the investor must notify the State of a claim under the investment treaty. This entails notification that there is a claim by an investor of the other State (not at issue in *Burlington*), or else there would be no claim under the

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921 Reply, ¶ 310.

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

investment treaty. Only such notification puts the State on notice of the consequences should negotiation fail:

> *Article VI simply requires the investor to inform the host State that it faces allegations of Treaty breach which could eventually engage the host State's international responsibility before an international tribunal. In other words, it requires the investor to apprize the host State of the likely consequences that would follow should the negotiation process break down.*[923]

615. Despite putting forth a mishmash of citations to cases, Claimant does not actually deny that it was required, in principle, to notify that there was a claim by Glencore Bermuda and that the claim was under the Treaty. Claimant admits as much when invoking *Tulip*, regarding which it asserts that "*the tribunal in Tulip retained jurisdiction [...] because 'what is required by [the relevant treaty] is to apprize the host State of the dispute as arising under the BIT and that the likely consequences if negotiation processes break down are proceedings before an international tribunal pursuant to the BIT.*'"[924]

616. Instead of denying the requirement to notify that there was a claim under the Treaty by Glencore Bermuda, Claimant puts forth three defences:

617. *First*, Claimant attempts to change the subject. It argues that the "*efforts to consult and express its willingness to find an amicable solution with Bolivia exceeded that of many claimants that have been found by tribunals to satisfy this standard with lesser efforts.*"[925] This is beside the point. Bolivia is not (here) challenging the efforts that Claimant may have made regarding the Antimony Smelter. It is challenging whether Claimant made any effort to provide notice of a claim by Glencore Bermuda under the Treaty regarding the Tin Stock.

618. The legal authorities that Claimant puts forward address how much effort the investor must make toward settlement, not whether that effort must include providing notice of the claim submitted to arbitration. For example, *Alps Finance* and *Bayindir*, in the cited passages, address the amount of forewarning that is necessary to provide "*the opportunity [...] to redress the dispute*"[926] or to "*allow negotiations between the parties which may lead to a settlement.*"[927] Neither addresses whether the investor must notify the State of the actual

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923 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction of 2 June 2010, **RLA-38**, ¶ 338; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue of 5 March 2013, **RLA-39**, ¶ 67.

924 Reply, ¶ 313 (emphasis added).

925 Reply, ¶ 313.

926 *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award [Redacted] of 5 March 2011, **RLA-11**, ¶ 205.

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

dispute or claim that is eventually submitted to arbitration. Indeed, none of the other authorities Claimant has put forward on this matter deny that adequate notice must at least identify the potential claimant and the applicable investment Treaty.[928]

619. *Second*, Claimant argues that "*[s]everal tribunals have held that where disputes are related, separate notice of dispute is not required for each of them.*"[929] However, *Burlington* and *Rurelec* are clear that each claim requires notice, as Bolivia explained in its Statement of Defence.

620. Claimant attempts to distinguish *Burlington* and *Rurelec* based on the fact that the disputes here are, supposedly, closely related,[930] referencing several cases that supposedly confirm the relevance of this distinction. But those citations show the opposite. In every one of the cases Claimant cites, the claims regarded a single sequence of State measures taken regarding one and the same asset, with some measures taken before and some after the commencement of arbitration.[931] This of course is distinct from the instant case, where Claimant had some five years to submit a notice of a dispute concerning an entirely different asset from those of its other claims, but elected not to do so.

621. Trying to shore up its "*related claim defense,*" Claimant invokes Article 22 of the UNCITRAL Rules. It suggests that this UNCITRAL provision allowing for ancillary claims overrides the Treaty notice provision.[932] This is wrong, and necessarily so. The UNCITRAL Rules cannot override a provision of the Treaty that is a prerequisite for UNCITRAL arbitration of a claim. Article 22 of the UNCITRAL Rules makes it explicit: "a *claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the*

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928 *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco* (ICSID Case No ARB/00/4) Decision on Jurisdiction of 23 July 2001, **CLA-145**, ¶ 20.

929 Reply, ¶ 317.

930 Reply, ¶¶ 315-316.

931 *Teinver SA, Transportes de Cercanías SA and Autobuses* 21 December 2012 *Urbanos del Sur SA v Argentine Republic* (ICSID Case No ARB/09/1) Decision on Jurisdiction, **CLA-206**, ¶ 125 ("*the formal expropriation alleged does indeed appear to be closely related to, and follow, what the Claimants characterize as 'only the culmination of a creeping expropriation' that began in October 2004*"); *CMS Gas Transmission Company v Republic of Argentina* (ICSID Case No ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction of 17 July 2003, **CLA-150**, ¶¶ 24, 125, 118 ("*Such breaches relate, in the Claimant's view, to the interference of organs of the Argentine State with the tariff regime applicable to TGN*"); *Swisslion DOO Skopje v Former Yugoslav Republic of Macedonia* (ICSID Case No ARB/09/16) Award of 6 July 2012, **CLA-203**, ¶ 138 (as Claimant explains, "*the [Swisslion] claimant challenged judgments rendered subsequent to the filing of its request for arbitration that related to its expropriation claim.*" Reply, footnote 812).

932 Reply, ¶ 317.

jurisdiction of the arbitral tribunal."[933] Thus, satisfying the Treaty requirements is a prerequisite for invoking Article 22 of the UNCITRAL Rules.

622. *Third*, Claimant argues that "*the majority of tribunals that have considered the question do not believe that the failure to notify divests an investment treaty tribunal of its jurisdiction.*"[934] However, Claimant's cited awards do not support that proposition at all. The vast majority of these awards observe that consultation periods, as opposed to notice requirements, do not need to be fully observed when doing so would be obviously futile.[935] One of Claimant's cited awards did not even address that issue because the objection had been withdrawn.[936]

623. By contrast, the more recent *Burlington, Rurelec*, and *Tulip* tribunals have concluded that investment treaties mean exactly what they say with their notice provisions: that a dispute may not be submitted to the tribunal until after that dispute has been notified to the other party.[937] As *Rurelec* held, "*[t]he explicit wording requiring a written notification and the expiry of a period of six months from that notification leads the Tribunal to consider that the 'cooling off period' narrows the consent given by the Contracting Parties to international arbitration.*"[938] International jurisdiction is by consent only, and investment treaties condition that consent on notice.

624. In sum, a claim is subject to the jurisdiction of this Tribunal only if a dispute with an investor of the other Treaty party under the Treaty was notified to Bolivia.

625. The facts confirm that no dispute with Glencore Bermuda under the Treaty was ever notified to Bolivia.

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933 UNCITRAL Arbitration Rules, **CLA-94**, Article 22.

934 Reply, ¶ 318.

935 *Abaclat and Others v Argentine Republic* (ICSID Case No ARB/07/5) Decision on Jurisdiction and Admissibility of 4 August 2011, **CLA-197**, ¶¶ 564-565; *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award [Redacted] of 5 March 2011, **RLA-11**, ¶¶ 204, 207; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (ICSID Case No ARB/05/22) Award of 24 July 2008, **CLA-78**, ¶ 343; *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (ICSID Case No ARB/01/13) Decision of the Tribunal on Objections to Jurisdiction of 6 August 2003, **CLA-151**, ¶ 184; *Link-Trading Joint Stock Company v Department for Customs Control of Republic of Moldova* (UNCITRAL) Award on Jurisdiction of 16 February 2001, **CLA-144**, pp. 5-6; *Ronald S Lauder v Czech Republic* (UNCITRAL) Final Award of 3 September 2001, **CLA-147**, ¶ 189.

936 *Franz J Sedelmayer v Russian Federation* (SCC) Arbitration Award of 7 July 1998, **CLA-141**, pp. 86-87.

937 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction of 2 June 2010, **RLA-38**, ¶¶ 335-340; *Guaracachi America, Inc and Rurelec Plc v Plurinational State of Bolivia* (UNCITRAL) Award of 31 January 2014, **CLA-120**, ¶¶ 388-390; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue of 5 March 2013, **RLA-39**, ¶¶ 67, 72, 117.

938 *Guaracachi America, Inc and Rurelec Plc v Plurinational State of Bolivia* (UNCITRAL) Award of 31 January 2014, **CLA-120**, ¶ 388.

626. Claimant's Reply confirms that the dispute was never notified to Bolivia. If Claimant had notified the dispute, it would be a simple matter to produce the evidence, a single letter or even a single statement. Instead, Claimant writes a three-page chronology that never identifies a single statement containing any notification of the dispute. [939] This chronology is plainly designed to conceal the fact that Bolivia was never once informed of a dispute regarding the Tin Stock with Glencore Bermuda under the Treaty.

627. In this three-page chronology, Claimant cites evidence that amply confirms that no notice of dispute was ever submitted to Bolivia.[940] It identifies as evidence eight letters in total (plus a newspaper article and Eskdale's first witness statement, neither of which could possibly constitute notice of a dispute).

628. Seven of the letters are from Colquiri, Sinchi Wayra, or EMV (the other is from the Bolivian Ministry of Mines). However, not a single one of the seven letters makes any mention of the Glencore group, the protection of any investment treaty, or any dispute under an investment treaty.[941] The letters certainly make no mention of Glencore Bermuda or any dispute under the Treaty.

629. Nor does Claimant contest Bolivia's observation that it did not subsequently notify the Tin Stock dispute. Crucially, it does not contest that "*none of its formal notices of dispute make even a single reference to the Tin Stock, much less to Claimant's intention to bring claims regarding the reversion of the Tin Stock.*"[942] The formal notices of dispute are precisely where Claimant should have notified Bolivia (but did not) of the dispute concerning the Tin Stock.

630. Claimant has now had two shots at this and cannot identify the alleged notice. The long and short is that Claimant did not notify Bolivia of a dispute concerning the Tin Stock with Glencore Bermuda under the Treaty.

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939 Reply, ¶ 311.

940 Reply, ¶ 311.

941 Letter from Colquiri SA (Mr Capriles Tejada) to Ministry of Mining (Mr Pimentel Castillo) of 3 May 2010, **C-28**; Letter from Colquiri (Mr Hartmann) to the Minister of Mining (Mr Pimentel) of 5 May 2010, **C-98**; Letter from Ministry of Mining (Mr Pimentel Castillo) to EMV (Mr Ramiro Villavicencio) of 5 May 2010, **C-29**; Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel) of 10 May 2010, **C-99**; Letter from Colquiri (Mr Capriles) to EMV (Mr Villavicencio) of 19 May 2010, **C-100**; Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel) of 7 June 2010, **C-101**; Letter from EMV (Mr Villavicencio) to Colquiri (Mr Capriles) of 8 June 2010, **C-102**.

942 Reply, ¶ 408.

5. BOLIVIA'S CONDUCT WAS CONSISTENT WITH THE TREATY AND INTERNATIONAL LAW

631. As Bolivia showed in its Statement of Defence, the reversions of the Tin Smelter, Antimony Smelter, and Colquiri Mine Lease were consistent with all applicable international obligations. Claimant denies this in its Reply.

632. Nevertheless, Bolivia complied with its obligations under the Treaty's expropriation, full protection and security, and fair and equitable treatment provisions. The reversions of the Assets were legitimate exercises of State police powers and not unlawful expropriations (**Section 5.1**). The Colquiri Mine received full protection and security throughout the conflict between the workers and the *cooperativistas* (**Section 5.2**). Bolivia acted fairly and equitably throughout the reversions and the subsequent Negotiations (**Section 5.3**).

5.1 Bolivia Did Not Unlawfully Expropriate The Assets But Instead Exercised Its Police Powers

633. In its Statement of Defence, Bolivia demonstrated that it did not expropriate the Assets at all, much less unlawfully or in breach of the Treaty, because the reversions were legitimate exercises of police powers. Claimant in the Reply maintains that the reversions were unlawful expropriations.

634. Claimant's position is incorrect. The reversions were not expropriations but legitimate exercises of police powers in the public interest (**Section 5.1.1**). But even if they were expropriations (*quod non*), they were lawful (**Section 5.1.2**).

5.1.1 Claimant Has Not Disproven That The Reversions Were Legitimate Exercises Of Police Powers

635. The reversions were not expropriations pursuant to international law and so could not be contrary to the Treaty. International law recognizes that legitimate exercises of State police powers in the public interest are not expropriatory (**Section 5.1.1.1**). The reversions were each undertaken in the public interest to enforce compliance with Bolivian law and to maintain public order and security (**Section 5.1.1.2**).

5.1.1.1 Legitimate Exercises Of Police Powers, As Claimant Concedes, Are Not Expropriatory

636. In its Statement of Defence, Bolivia demonstrated that "*an exercise of a state's police powers in the public interest is not an expropriation.*"[943] In fact, Claimant does not dispute the existence of the police powers doctrine. This is confirmed in two different ways.

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943 Reply, ¶ 449.

637. *First*, Claimant admits that an exercise of a State's police powers in the public interest is not an expropriation. As it concedes, "*a State may not incur responsibility for the legitimate and bona fide exercise of its sovereign police powers, if employed in a manner that is proportional, non-arbitrary and respectful of due process.*"[944]

638. *Second*, Claimant does not contest the fact that, as Bolivia explained, "*the police powers doctrine assigns claimant the burden of proof to establish that actions allegedly constituting expropriation were not an exercise of police powers.*"[945] Thus, Claimant must be deemed to have admitted that it bears the burden of proof on the issue of police powers.

639. Instead of denying the basic contours of the police powers doctrine, Claimant puts forth two arguments to limit the doctrine.

640. *First*, Claimant argues, without support, that the exercise of police powers does not excuse the State from its obligation to provide compensation. This is obviously false.

641. One, Claimant's position would deprive the police powers doctrine of any effect or purpose. It is undisputed that police powers must be exercised for a public purpose, and it is Claimant's view that any exercise of police powers must be "*proportional, non-arbitrary and respectful of due process.*"[946] An exercise of police powers would thus satisfy the Treaty requirements for the proper conduct of expropriation, on any view of those requirements.[947] If compensation nevertheless had to be paid, what point would the police powers doctrine have?

642. Two, it is undisputed that the police powers doctrine is intended to preserve a regulatory and enforcement space for the State, in exercise of its sovereign powers. This space covers, *inter alia*, "*the execution of the tax laws; [...] the maintenance of public order, health or morality; or [actions] otherwise incidental to the normal operation of the laws of the State.*"[948] It makes no sense to preserve a space to execute State tax laws but then to have to provide compensation for their fiscal impact. Nor is it consistent with maintaining regulatory space for the State to pay for its regulatory actions; that would effectively eliminate the regulatory space.

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944 Reply, ¶ 346.

945 Statement of Defence, ¶ 455.

946 Reply, ¶ 346.

947 The Treaty says merely that it must be for "*a public purpose and for a social benefit related to the internal needs of that Party*," while Claimant adds that it must also be taken following prior due process. Treaty, **C-1**, Article 5.

948 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, 55 *American Journal of International Law* 548, 1961, **RLA-44**, Article 10(5).

643. Three, Claimant's proposition is inconsistent with the case law and doctrine, including that put forth by Bolivia to which Claimant offers no rebuttal,[949] concerning the police powers doctrine. Claimant is simply making up a rule out of whole cloth for the sake of its convenience. For example, *Philip Morris* is clear that "*the measures taken for that purpose should not be considered as expropriatory,*"[950] while the Harvard Draft confirms that "*[a]n uncompensated taking [pursuant to the doctrine] shall not be considered wrongful.*"[951] Bolivia cited numerous other investment tribunals that confirm this view.[952]

644. Given these obvious problems, what is Claimant's supposed support for this position?

645. Claimant cites *Bear Creek*, *Santa Elena*, and *Vivendi II* for the proposition that the State must provide compensation when it exercises police powers.[953] But *Bear Creek* does not address the police powers doctrine; it applies a general exceptions provision in the U.S.-Peru FTA. Indeed, it confirms that "*[t]here is, thus, no need to enter into the discussion between the Parties regarding the jurisprudence concerning any police power exception for measures addressed to investments.*"[954] *Santa Elena* and *Vivendi II* do not even consider exceptions to the relevant investment treaties, and still less the police powers doctrine. Claimant's citations to these cases demonstrate that its position is baseless.

646. *Second*, Claimant argues that "*this defense generally concerns general regulations enacted to protect public health and the environment, execute tax laws, or prevent economic collapse—and not specific measures effecting a full taking of a targeted investment, as is the case here.*"[955]

647. One, as Bolivia explained in its Statement of Defence, "*the confiscation of illegally acquired assets is a public purpose falling within the scope of the police powers doctrine.*"[956] In this regard, Bolivia observed that it is commonplace in many, if not most, legal systems to allow for property tainted by illegality to be confiscated without compensation, including in various

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949 See Statement of Defence, ¶¶ 449, 453, 454.

950 *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, **RLA-43**, ¶ 295.

951 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, 55 *American Journal of International Law* 548, 1961, **RLA-44**, Article 10(5).

952 See Statement of Defence, ¶ 454.

953 Reply, ¶ 347.

954 *Bear Creek Mining Corporation v Republic of Peru* (ICSID Case No ARB/14/2) Award of 30 November 2017, **CLA-229**, ¶ 474.

955 Reply, ¶ 348.

956 Reply, ¶ 462.

parts of the U.S., Colombia, and Mexico.[957] These confiscations are clearly valid exercises of police powers, as shown by comparative practice. Claimant does not respond to these arguments, so they are conceded.

648. Two, as Bolivia explained in its Statement of Defence, the social function doctrine provides that "*[n]on-productive property performs no social function and should not receive protection from the state apparatus, with the result that there is no right to property.*"[958] This doctrine is widely recognized, including by Colombia, Chile, and Brazil, as well as Germany, Italy, and Spain.[959] Claimant does not deny this, so it is conceded. But in accordance with the social function doctrine, the State may take enforcement actions concerning assets for which there are no property rights. These enforcement actions are legitimate exercises of police powers.

649. Three, Claimant does not dispute the classic definition of the police powers doctrine, according to which actions for the "*the maintenance of public order, health or morality*"[960] are core exercises of police powers. To the contrary, Claimant openly admits that actions to "*protect public health and the environment*"[961] are within the scope of State police powers (although carefully omitting to mention public order). Thus, actions for the public order do indeed constitute the exercise of police powers.

650. And it is clearly the case that such actions may be in the form of general regulations as well as specific measures. For example, Claimant itself admits that the actions to "*execute tax laws*" fall within police powers.[962] But such actions are by their nature individual, regarding individual taxes. The same is true for the confiscation of assets tainted by illegality or the maintenance of public order; these are, by their nature, specific measures.

651. In sum, State measures taken in the public interest pursuant to the police powers doctrine are not expropriatory and do not give rise to mandatory compensation. The burden of proof is on

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957 Reply, ¶ 462.

958 Statement of Defence, ¶ 466.

959 Statement of Defence, ¶ 466 (citing Political Constitution of Colombia, **RLA-21**, Article 58; Political Constitution of the Republic of Chile, **RLA-56**, Article 24; Constitution of the Federative Republic of Brazil, **RLA-57**, Article 5(XXIII); Basic Law for the Federal Republic of Germany, **RLA-58**, Article 14(2); Basic Law for the Federal Republic of Germany, **RLA-58**, Article 42; Spanish Constitution, **RLA-20**, Article 33).

960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, 55 *American Journal of International Law* 548, 1961, **RLA-44**, Article 10(5).

961 Reply, ¶ 348.

962 Reply, ¶ 348. See also Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, 55 *American Journal of International Law* 548, 1961, **RLA-44**, Article 10(5).

the investor to demonstrate that a given measure in the public interest is not a valid exercise of police powers.

5.1.1.2 The Assets Were Reverted To Enforce The Law And To Maintain Public Safety

652. As Bolivia showed in its Statement of Defence, the Tin Smelter, Antimony Smelter, and Colquiri Mine Lease reversions were all valid exercises of its police powers. It explained that "*[t]he Tin Smelter was reverted due to illegality, the Antimony Smelter due to productive inactivity, and the Colquiri Mine Lease due to violent conflict at the Mine.*"[963]

653. Claimant disputes in the Reply that these were valid exercises of police powers, primarily on the grounds of certain legally imprecise statements by public officials.[964] However, the fact that a non-lawyer would confuse legal terminology is hardly surprising, and still less relevant to the legal categorization of the reversions under both domestic and international law.

654. Claimant also disputes that the reversions were valid exercises of police powers for three equally fallacious reasons.

655. *First*, Claimant denies in its Reply that the "'"*reversions were taken for public purposes—protecting public health and safety and confiscating goods unlawfully obtained.*"'"[965] It sets forth distinct arguments for each of the Assets, but Claimant's underlying assumption is that the burden of proof lies on Bolivia, and not on Claimant. But, regardless of where that burden lies, Claimant's arguments fail.

656. One, regarding the Tin Smelter, Claimant alleges that the "'"*reversions' were not 'to combat illegalities that had tainted the privatization.*"'"[966] Yet, the plain text of the Tin Smelter Reversion Decree setting forth the purpose for the reversion, as an official document, is entitled to a presumption of veracity.[967] (Indeed, Bolivian law similarly establishes a presumption of legality for such decrees.[968])

657. Claimant's argument to rebut this presumption is that there were no court proceedings regarding the illegalities.[969] However, court proceedings were unnecessary because the matter

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963 Statement of Defence, ¶ 457.

964 Reply, ¶ 350.

965 Reply, ¶ 350.

966 Reply, ¶ 356.

967 Civil Code of Bolivia of 2 April 1976, **C-52**, Article 1290.

968 Law No. 2.341 of 23 April 2002, **R-250**, Article 4.

969 Reply, ¶ 356.

was resolved by the reversion and the collapse of Allied Deals. To the contrary, if Claimant truly believed that there were no illegalities affecting the privatization of the Tin Smelter, it would have challenged the reversion before the Bolivia courts. It is undisputed that it did not.

658. Claimant adds that Bolivia "*should have 'reverted' the Tin Smelter, Antimony Smelter and Colquiri Lease at the same time and for the same reasons.*"[970] This is mistaken.

659. One the one hand, Claimant bases this allegation on the idea that all three Assets "*were subject to the same privatization process*,"[971] which is not true. The processes for the Tin Smelter and the Colquiri Mine Lease happened in parallel, but each process had its own criteria and separate bidders.[972] The Antimony Smelter was actually privatized almost a year later.[973] The three processes were separate, having the unduly low price paid for the Assets as their only common feature.[974]

660. On the other hand, the Assets were reverted for different reasons, so there is no reason why they should have been reverted at the same time. The Tin Smelter was reverted due to the irregularities in its privatization processes,[975] while the Antimony Smelter was reverted due to Glencore's violation of the contractual obligation to put the plant into production.[976] Lastly, the reversion of the Colquiri Mine resulted from the June 2012 conflicts between the miners and the *cooperativistas*, which had been critically mismanaged by Sinchi Wayra.[977]

661. Claimant's argument also ignores the fact that the irregularities in the privatization of the Tin Smelter were well-known to the public, given that the press amply covered the Allied Deals/RBG Resources fraud scandal and bankruptcy, and it renewed attention to the fact that the company had significantly underpaid for the Smelter.[978] Paribas had already established a very low figure for the minimum price in the bidding process, and the Asset was sold with an inventory that was worth more than the amount Bolivia received in the transaction (the

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970 Reply, ¶ 356.

971 Reply, ¶ 356.

972 See Sections 2.3 and 2.4 above.

973 See Section 2.3.2 above.

974 Some US$ 14 million for the Tin Smelter, US$ 1.1 million for the Antimony Smelter, and only 3% of the net income in royalties for the Colquire Mine lease (plus the commitment of investing only US$ 2 million in the mine).

975 See Section 2.7.1 above.

976 See Section 2.7.2 above.

977 See Section 2.7.3 above.

978 La Razón Digital, *El MAS pide la renuncia del Canciller Saavedra*, press article of 8 November 2002, **R-134**; El Diario, *MAS pide la renuncia del Canciller de la Republica*, press article of 4 December 2002, **R-135**; El Mundo, *MAS presentó las pruebas de corrupción contra Canciller*, press article of 4 December 2002, **R-136**. See Section 2.4.2.

State suffered US$ 2 million in losses considering the transaction alone).[979] In the midst of the scandal, the Tin Smelter was sold to Sánchez de Lozada's Comsur, which raised further doubts both over the privatization and the latest transaction.[980]

662. Two, regarding the Antimony Smelter, Claimant denies that Bolivia "*legitimately 'reverted' the Antimony Smelter due to productive inactivity [...].*"[981] But the text of the Antimony Smelter Reversion Decree confirms precisely that motive for the reversion. It must be presumed that the reversion was undertaken for that purpose. It is for Claimant to demonstrate otherwise, and it failed to do so.

663. As Bolivia explained in the Statement of Defence, Claimant had an unfulfilled obligation under the Bolivian Constitution and the Antimony Smelter Contract to put the Smelter into production. The Bolivian Constitution "*adopts the social function doctrine: private property is only a right when the property performs a social function.*"[982] This constitutional requirement was reflected in the regulatory framework for the privatization process.[983] Indeed, the Terms of Reference, incorporated into the final Antimony Smelter Contract,[984] establish that the core object and purpose of the privatization contract was to ensure that the Antimony Smelter would be put into production.[985] This is undenied.

664. What is more, given demand for smelter capacity in Bolivia at the time of the privatization, it was openly contemplated that the Antimony Smelter would be put into production, following its conversion into an additional tin smelter.[986] [redacted]

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979 Paribas suggested US$ 10 million as the minimum price, and Allied Deals paid US$ 14 million. The inventory alone was worth US$ 16 million.

980 La Patria, *Liquidador de Allied Deals pidió $US 6 millones por Vinto y Huanuni*, press article of 2 June 2002, **R-149**; La Prensa, *Comsur será operadora de Vinto, es dueña del 51% de las acciones*, press article of 6 June 2002, **R-150**; Statement of Defence, ¶ 90. See Section 2.4.2.

981 Reply, ¶ 360.

982 Statement of Defence, ¶ 466 (citing Constitution of Bolivia of 7 February 2009, **C-95**, Article 5; Bolivian Constitution, Law of 13 April 2004, **R-235**, Article 7(i)).

983 Statement of Defence, ¶ 467 (citing Supreme Decree No. 23.991 of 10 April 1995, **R-100**, Article 2(c)).

984 Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**, Articles 23.1.

985 Statement of Defence, ¶ 467 (citing Terms of Reference for the Second Public Tender for the Antimony Smelter of 31 July 2000, **R-109**, p. 9).

986 US Geological Survey Minerals Yearbook 2000, "The Mineral Industry of Bolivia", **C-177**, p. 3.4 ("*According to industry sources, conversion of the existing smelting facility to treat other metals, such as zinc or tin, lay behind the recent interest from Allied and Comsur to acquire the assets. Having failed to purchase Vinto's tin smelter, CDC may well seek to add value to its earlier purchase of the Colquiri Mine by converting the antimony plant to treat tin*").

[redacted]

665. Instead of providing evidence to the contrary, Claimant traffics in unsupported conspiracy theories. It asserts that "*the real reason for the State's 'reversion' was, as already explained, to gain access to the Tin Stock, given the supply shortages that the EMV-controlled Tin Smelter was facing at the time.*"[988] But there is no documentary evidence backing this theory, and Claimant wrongfully supposes that Bolivia had knowledge of the Tin Stock prior to the reversion, when it had no oversight over the activities carried out at the plant.[989] The theory also fails to consider that the 160 tons of tin that comprised the stock could be processed at the Tin Smelter in only four days (*i.e.*, it would not solve any shortage problem, should one exist).[990]

666. In sum, Claimant does not deny that the Antimony Smelter was never in production during the five years that Claimant held it. Nor does it deny that the very object and purpose of the Antimony Smelter privatization was to ensure that it would be put back into production. Nor can it be contested that such resumed production was contemplated by potential purchasers at the time of privatization.

667. Instead, Claimant blames Bolivia for not asking it one last time to put the plant into production before carrying out the reversion.[991] But the obligation to put the smelter into production was spelled out in Bolivian constitutional law as well as in the Antimony Smelter Contract. Bolivia had no need to inform a sophisticated party to comply with its legal and contractual obligations.

668. Three, regarding the Colquiri Mine Lease, Claimant denies that "*the Colquiri Lease was legitimately 'reverted' due to violent conflict at the Colquiri Mine.*"[992]

669. Claimant's lead argument is that the Colquiri Mine Lease Reversion Decree "*specifies that the equipment of Colquiri and Sinchi Wayra was to be nationalized and provides for the*

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987 [redacted]

988 Reply, ¶ 362.

989 Villavicencio II, ¶ 15.

990 Villavicencio II, ¶ 16.

991 Reply, ¶ 363.

992 Reply, ¶ 366.

(limited) payment of compensation."[993] However, by omission, Claimant concedes that the Decree does not nationalize the Colquiri Mine Lease itself. This makes sense in light of the basis for the lease reversion: the maintenance of public safety and order. Given the character of the violent conflict at the mine, it was necessary to revert the mine to defuse the clashes between the miners and the *cooperativistas* (as explained above).[994]

670. The Mine Lease Reversion Decree demonstrates that the social conflict was the reason for the reversion. Contrary to what Claimant alleges,[995] the fact that the Decree does not mention a threat to public order does not invalidate its purpose. The Decree provides that the Colquiri Mine was reverted for "*interés publico y beneficio social*" and its final provisions are specifically dedicated to resolving the main issues behind the conflict: Article 4 guaranteed the labor rights of all miners employed by Colquiri S.A., and the Decree's final provision allowed the *cooperativistas* to join the permanently employed workforce if they wished to do so.[996]

671. In terms of context, the Mine Lease Reversion Decree was an emergency measure tailored to the Colquiri conflict. Claimant, however, insists that the reversion was premeditated,[997] basing its arguments on minutes of a meeting with the Huanuni Union on 10 May 2012, during which the State allegedly decided to revert the Mine Lease.[998] However, despite the Union's demand for the nationalization of all Bolivian mines, the Government was negotiating new joint venture contracts with the private investors (as constitutionally mandated), and had already responded that the private mines' workers opposed the broad nationalization strategy.[999] Furthermore, there is evidence that COMIBOL was fully engaged in the renegotiations with Sinchi Wayra on 22 May 2012.[1000] Thus, the Government clearly did not decided to "nationalize" the Colquiri Mine, let alone all Bolivian mines, at that meeting.

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993 Reply, ¶ 367.

994 See Section 2.7.3.

995 Reply, ¶ 368.

996 Supreme Decree No 1.264 of 20 June 2012, **C-39**, pp. 3-4 (Unofficial translation: "*public interest and social benefit*").

997 Reply, ¶ 369.

998 Agreement of 10 May 2012, **C-256**.

999 Federation of Mining Workers Unions in Bolivia, *Political Document approved in the XXXI National Mining Congress* of 3 September 2011, **R-277**, p. 92.

1000 Email from Glencore International (Mr Hartmann) to Glencore International (Mr Eskdale) and Sinchi Wayra (Mr Capriles) of 22 May 2012, **C-110**.

672. As for Claimant's assertions that the reversion was not proportionate to or effective regarding the violent conflict,[1001] they are baseless. The conflict escalated after Sinchi Wayra clumsily negotiated the Rosario Agreement with the *cooperativistas.*[1002] The *cooperativistas* refused to accept any other proposal after being offered the richest vein in Colquiri (Rosario), while the miners completely rejected this arrangement. Claimant's purported alternative solution to the conflict had disastrous effects, forcing the government to act immediately to stop the violent confrontation that ensued.[1003] Since Bolivia's intervention, there have been no incidents of this magnitude in Colquiri and violent confrontation has been prevented for years.[1004] Claimant's press articles fail to demonstrate there has been any sort of bloodshed in Colquiri in the past years.[1005]

673. *Second*, Claimant argues that "*Bolivia cannot cite to one relevant provision of its own law in support of its purported right to 'revert' the asset*" and that "*Bolivia refers generally to 'the inherent powers of the executive under the Bolivian constitution, including to enforce the laws and ensure security and order.* "'[1006] This argument is both confused and wrong, in addition to misrepresenting Bolivia's Statement of Defence.

674. As an initial matter, Claimant confuses two different issues: Bolivia's right to revert the Assets and the executive's authority to effect that reversion.

675. One, Bolivian constitutional law has recognized, at least since the 1967 Constitution, a distinction between two forms of limitations on property rights.

676. On the one hand, private property rights are subject to absolute limitations, beyond which the property right ceases to exist.[1007] In this regard, the 2009 Constitution provides that, "*[s]e garantiza la propiedad privada siempre que el uso que se haga de ella no sea perjudicial al interés colectivo.*"[1008] When property is reverted, it is taken without compensation on the

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1001 Reply, ¶ 370.

1002 Mamani II, ¶¶ 42, 48-49; Agreement between Colquiri SA, Fedecomin, Fencomin, Central Local de Cooperativas Mineras de Colquiri, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca, and Cooperativa 26 de Febrero of 7 June 2012, **C-35**.

1003 "Mineros retomarán Colquiri y bloquearán los caminos," *Página Siete*, press article of 10 June 2012, **C-126** (emphasis added).

1004 Mamani II, ¶ 63.

1005 The articles mention one incident in which trespassing cooperativistas were injured in 2003 and attempts to renegotiate the Rosario Agreement in 2014 and 2015, with no indication of violent confrontation. See Section 2.7.3.5.

1006 Reply, ¶ 354.

1007 Constitution of Bolivia of 1967, **R-3**, Article 22(I).

1008 Constitution of Bolivia of 7 February 2009, **C-95**, Article 56(II) (Unofficial translation: "*private property is guaranteed as long as use of the same is not detrimental to social interest.*").

grounds that the private property right ceased to exist, such as when the property use is harming the collective interest.[1009]

677. On the other hand, private property rights are also subject to relative limitations, when the right itself does not cease but may be infringed for a legitimate and superior reason.[1010] In this regard, the 2009 Constitution provides that "*[l]a expropiación se impondrá por causa de necesidad o utilidad pública, calificada conforme con la ley y previa indemnización justa.*"[1011] When property is expropriated, it is not taken on the grounds that the property right has ceased altogether but instead on the grounds that the public need overrides the private property right.[1012]

678. This distinction between reversion and expropriation has been regularly used in Bolivian legal practice.[1013]

679. Two, as Bolivia previously established, the 1967 and 2009 Bolivian Constitutions grant the executive branch broad enumerated powers, among them "*to enforce the laws and to ensure security and order.*"[1014] These powers are explicit in both Constitutions. It is also explicit that the president has the constitutional power to exercise its powers via the promulgation of Supreme Decrees.[1015] Claimant puts forth no response except to deny, falsely and without basis, that Bolivia has identified any legal provision authorizing the president to issue the Supreme Decrees at stake in the present dispute.[1016] This failure to respond is a concession of Bolivia's position.

680. *Third*, Claimant argues that "*Bolivia's 'reversion' did not meet minimum due process guarantees as established under international and Bolivian law.*"[1017] Bolivia explains below why every one of Claimant's arguments on due process is frivolous, when the same arguments

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1009 See, *e.g.*, Supreme Decree No. 19.378 of 31 January 1983, **R-358**, Article 2(b); Supreme Decree No. 27.572 of 17 June 2004, **R-359**, Article 36(II).

1010 Constitution of Bolivia of 1967, **R-3**, Article 22(I).

1011 Constitution of Bolivia of 7 February 2009, **C-95**, Article 57 (Unofficial translation: "*expropriation shall be imposed due to public need and utility, qualified in accordance with the law and after fair compensation*").

1012 Constitution of Bolivia of 7 February 2009, **C-95**, Article 57.

1013 See, *e.g.*, Law No. 1.122 of 16 November 1989, **R-360**, Articles 4, 5, 7; Law No. 2.742 of 28 May 2004, **R-361**, Article 1; Supreme Decree No. 19.378 of 31 January 1983, **R-358**, Article 2(b); Supreme Decree No. 27.572 of 17 June 2004, **R-359**, Article 36(II); Decree Law of 2 August 1953, **R-362**, Article 67.

1014 Statement of Defence, ¶ 516 (citing Constitution of Bolivia of 1967, **R-3**, Articles 96(1), (18); Constitution of Bolivia of 7 February 2009, **C-95**, Articles 172(1), (16)).

1015 Constitution of Bolivia of 1967, **R-3**, Article 96(1); Constitution of Bolivia of 7 February 2009, **C-95**, Article 172(8).

1016 Statement of Defence, ¶ 361.

1017 Reply, ¶ 358. See also Reply, ¶¶ 365, 372.

are raised in connection to the lawfulness of the expropriation.[1018] The short version is that Bolivia made available extensive posterior remedies through actions before the domestic courts, avenues that Claimant never once pursued to challenge what it now says are illegal actions. Claimant's actions speak for themselves.

681. In an attempt to avoid the consequences of its own failure to pursue available remedies, Claimant attempts to suggest that the *Quiborax* tribunal held that a reversion was necessarily not an exercise of police powers "*because: (i) they were not justified under Bolivian law; (ii) they were not supported by the facts; and (iii) they had been carried out in a manner that violated minimum standards of due process under both international and Bolivian law.*"[1019]

682. This is false. The *Quiborax* tribunal did not hold that, in general, a reversion was not an exercise of police powers. Instead, the *Quiborax* tribunal held that, under the specific circumstances of that dispute, the revocation was not an exercise of police powers. This was because, as is clear from the very passage to which Claimant cites, the revocation was at odds with the very terms of Law 2,564 on which it was supposed to be based (a law that is irrelevant in the current arbitration).[1020] As the *Quiborax* tribunal explains, "*the Claimants were not notified and thus could not participate in the audits mandated by Law 2,564 [on which the revocation was based],*" and "*Law 2,564 did not provide a blanket authorization to the Executive to annul concessions if the audits verified the existence of any breaches of Bolivian law.*"[1021] What is more, the remarks on due process to which Claimant refers are precisely those concerning due process in the audit proceeding (which are also irrelevant in the current arbitration), not to due process in the issuance of the revocation itself.[1022]

683. Beyond the irrelevance of the *Quiborax* award, Bolivia must take issue with Claimant's suggestion that Bolivia is currently investigating public servants that rendered the allegedly unlawful revocation decree in that case.[1023] It is fundamentally unfair to use Bolivia's

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1018 See Section 5.1.2.2 below.

1019 Reply, ¶ 359.

1020 Reply, ¶ 359 (citing *Quiborax SA and Non Metallic Minerals SA v Plurinational State of Bolivia* (ICSID Case No ARB/06/2) Award of 16 September 2015, **CLA-127**, ¶¶ 212 ("*the Respondent has not directed the Tribunal to a single provision of Bolivian law that could justify the revocation of the concessions on such grounds*"), 214 ("*As the Revocation Decree determines the termination of the concessions for alleged violations of Bolivian law that do not appear to be sanctioned with termination under that law [...] the Tribunal cannot but conclude that the Revocation Decree finds no justification in Bolivian law.*")).

1021 *Quiborax SA and Non Metallic Minerals SA v Plurinational State of Bolivia* (ICSID Case No ARB/06/2) Award of 16 September 2015, **CLA-127**, ¶¶ 210, 214.

1022 Reply, ¶ 359 (citing Quiborax SA and Non Metallic Minerals SA v Plurinational State of Bolivia (ICSID Case No ARB/06/2) Award, 16 September 2015, CLA-127, ¶¶ 221-226)).

1023 Reply, ¶ 359.

compliance with the *Quiborax* award's (limited) holding on the legality of that revocation against Bolivia in this arbitration. Such tactics counterproductively dissuade States from taking corrective actions in response to international arbitral awards.

684. In conclusion, the reversions of the Assets in the present dispute were all fully legitimate exercises of Bolivia's police powers. Claimant's has failed to prove the contrary.

5.1.2 If The Reversions Were Expropriations (*Quod Non*), They Were Lawful

685. As Bolivia showed in the Statement of Defence, "*even if the reversions were (quod non) expropriations, they were lawful expropriations in compliance with the terms of the Treaty.*"[1024] Nevertheless, Claimant maintains the view that, "*in order for Bolivia to carry out a lawful expropriation, it must comply with each of the cumulative conditions set out in Article 5(1) of the Treaty.*"[1025]

686. The simple fact is that the reversions, if they were expropriatory (*quod non*), were lawful. Bolivia did not breach the Treaty or unlawfully expropriate the Assets on account of any failure to pay compensation (**Section 5.1.2.1**). Nor did Bolivia breach the Treaty or unlawfully expropriate the Assets when it afforded Claimant every opportunity to obtain posterior due process following the reversions (**Section 5.1.2.1**).

5.1.2.1 Bolivia Satisfied The Compensation Requirement By Participating In Lengthy Negotiations And In This Arbitration

687. Bolivia fully complied with the Treaty compensation provision by participating in Negotiations and then this arbitration to determine whether compensation is due (**Section 5.1.2.1(a)**). However, even if it had breached the compensation provision, the alleged expropriations would not thereby be unlawful (**Section 5.1.2.1(b)**).

a) Bolivia Did Not Breach The Compensation Provision

688. It was established in the Statement of Defence that "*the Treaty's compensation provision in Article 5 assumes that a dispute regarding an alleged expropriation or compensation due might have to be submitted to the courts or to arbitration.*"[1026] However, Claimant responds in its Reply that it "*is untenable under the applicable law and defies common sense*" for

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[1024] Statement of Defence, ¶ 479.

[1025] Reply, ¶ 374.

[1026] Statement of Defence, ¶ 481.

compensation to be due only "*upon conclusion of negotiations and this arbitration*"[1027] (*i.e.*, when the validity of the claims and the amount of compensation due has been established).

689. In other words, it is Claimant's position that Bolivia must pay it compensation *even when* Bolivia disputes Claimant's legal right to any compensation and *even though* Bolivia would have no means to claw back unwarranted compensation, or indeed to seek a legal determination on that issue. Obviously, Claimant's position cannot be correct, for three reasons.

690. *First*, as Bolivia previously explained, the Treaty recognizes in Article 5 that adjudication may be necessary to determine the entitlement to compensation or the amount of compensation.[1028] Claimant does not contest this. Indeed, the Treaty explicitly provides for arbitration – as an alternative to the domestic courts – to determine whether an expropriation occurred and how much compensation is due.[1029] And, as Bolivia further explained, the World Bank Guidelines confirm that adjudication "*by a tribunal or another body designated by the parties*"[1030] may be necessary to fix the amount of compensation payable following expropriation, or, indeed, the need for compensation.[1031]

691. Surprisingly, Claimant responds to the World Bank Guidelines with the improbable allegation that "*the World Bank Guidelines outline the limited instances in which compensation may be determined through international arbitration*" and that "*[s]uch conditions are absent in the present case.*"[1032] Obviously, Claimant does not agree with its own argument, in light of the present arbitration. Claimant further alleges that the Guidelines provide that compensation must be paid without delay "*in normal circumstances [...].*"[1033] It does so even though the relevant provision is silent about the proper timing of payment when there is disagreement as to whether payment is due or as to the amount of the payment. It also does so even though

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1027 Reply, ¶ 379.

1028 Treaty, **C-1**, Article 5(1) ("*[t]he national or company affected shall have the right to establish promptly by due process of law in the territory of the Contracting Party making the expropriation the legality of the expropriation and the amount of the compensation in accordance with the principle set out in this paragraph.*").

1029 Treaty, **C-1**, Article 8.

1030 World Bank. 1992. Guidelines on the Treatment of Foreign Direct Investment. Foreign Investment Law Journal, Chapter IV Expropriation and unilateral alterations or termination of contracts, **CLEX-18**, Guideline IV(4).

1031 Statement of Deference, ¶ 486.

1032 Reply, ¶¶ 386-387.

1033 Reply, ¶ 385 (citing World Bank. 1992. Guidelines on the Treatment of Foreign Direct Investment. Foreign Investment Law Journal, Chapter IV Expropriation and unilateral alterations or termination of contracts, **CLEX-18**, Guideline IV(8) ("*Compensation will be deemed to be 'prompt' in normal circumstances if paid without delay*")).

the provision is silent about the proper timing of payment when negotiations or arbitration are ongoing as a result of those disagreements.[1034]

692. *Second*, the Treaty and the World Bank Guidelines are not alone in confirming that the failure to pay compensation does not breach the compensation provision of an investment treaty. *Tidewater* also confirms that this is so, because the investment tribunal itself will determine whether and what compensation must be paid:

> *It follows that such a tribunal must have an opportunity to make its determination as to compensation. Where such a tribunal has done so (and assuming that the other conditions are met) the expropriation will not be illegal. [...] An expropriation only wanting fair compensation has to be considered as a provisionally lawful expropriation, precisely because the tribunal dealing with the case will determine and award such compensation.*[1035]

693. Claimant seeks to distinguish *Tidewater* on the grounds that the present case concerns a direct expropriation.[1036] But Bolivia disputes that there was an expropriation at all in the present case. And the point of *Tidewater* is that, when the nature of the act or even the amount of compensation is disputed, compensation cannot yet be due. In the present case, Claimant is seeking almost $700 million in damages for the loss of assets privatized for a payment of $15 million only a few years earlier. There is obviously a huge dispute as to whether compensation is due and, if so, how much.

694. Indeed, Claimant makes the same fallacious argument that the reversions were direct expropriations when it seeks support from Bolivia's domestic law.[1037] But, even supposing that law requires prior compensation, how could Bolivia be expected to pay when it denies that the reversions were expropriations and denies Claimant's quantification of the compensation due? It could not.

695. *Third*, *Tidewater* does not stand alone for the proposition that compensation was not yet due under such circumstances. *Ampal-American* reached the same conclusion:

> *By these terms, Article III(1) creates an international obligation on the part of the State to pay compensation for the expropriation of an investor's property. This Tribunal is empowered to enforce that obligation, calculating the amount of compensation due according to the standard prescribed in the Treaty, in the event that the State fails to pay such compensation. This does not require the Tribunal to*

1034 World Bank. 1992. Guidelines on the Treatment of Foreign Direct Investment. Foreign Investment Law Journal, Chapter IV Expropriation and unilateral alterations or termination of contracts, **CLEX-18**, Guideline IV(8).

1035 *Tidewater Investment SRL and Tidewater Caribe, C.A. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award of 13 March 2015, **RLA-60**, ¶¶ 140-141.

1036 Reply, ¶¶ 388-389.

1037 Reply, ¶ 384.

find that the expropriation in question was unlawful, as may be the case in the event that the taking was not done for a public purpose or was discriminatory.[1038]

696. In an attempt to rebut the emerging consensus represented by *Ampal-American*, Claimant argues that "*the tribunal specifically noted that its role was to enforce the State's obligation to pay compensation for an expropriation in the event that the State failed to comply with such an obligation.*"[1039] But this is false. The *Ampal-American* tribunal concluded that the failure to pay compensation did not make the expropriation unlawful because the Tribunal would enforce the obligation to pay compensation.[1040] That is plain from the text.

697. In conclusion, an investment treaty does not require a State to pay disputed compensation. This is basic logic. This is also the emerging consensus in the arbitral jurisprudence.

698. Claimant does not respond by identifying contemporary arbitral authority to the contrary. Instead, it sets out three fallacious arguments.

699. *First*, Claimant relies on the same *Goldenberg* and *Norwegian Shipowners* cases as in its Statement of Claim.[1041] The most recent of these was rendered 90 years ago.[1042] Indeed, in trotting out these cases for another run, Claimant has no response to Bolivia's point that "*[n]either of these dated awards address the interpretation of a treaty expropriation provision, let alone one contained in an investment treaty.*"[1043] In fact, Claimant is unable to identify a single investment treaty arbitration that has followed either of these cases to conclude that failure to pay compensation would be, under the circumstances of the present dispute, a breach of an investment treaty compensation provision.[1044]

700. *Second*, Claimant also argues that "*Bolivia mischaracterizes Siag v Egypt, alleging that the tribunal's conclusions on prompt compensation are mere dictum limited to a single paragraph.*"[1045] This is false. The *Siag* tribunal's comments on compensation are *dictum*

1038 *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss of 21 February 2017, **RLA-61**, ¶ 186.

1039 Reply, ¶ 390.

1040 *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss of 21 February 2017, **RLA-61**, ¶ 186.

1041 Reply, ¶¶ 380-381. See also Statement of Claim, ¶¶ 156-157.

1042 *Goldenberg case (Germany/Romania)* Award of 27 September 1928, **CLA-3**; *Norwegian Shipowners' Claims (Norway/USA)* Award of 13 October 1922, **CLA-1**.

1043 Statement of Defence, ¶ 483.

1044 Claimant, doing its utmost to rehabilitate its reliance on effectively irrelevant authority, alleges that "*Bolivia attempts to minimize the relevance of these cases without, however, citing a single source in support of its position.*" Reply, ¶ 381. This too is false. Among the authorities that Bolivia cites (and were cited in its Statement of Defence) are the very recent awards in Tidewater and Ampal-American.

1045 Reply, ¶ 382.

because they had no effect on that tribunal's conclusion that the expropriation was unlawful; the tribunal had already concluded that the expropriation violated the public purpose requirement.[1046] The *Siag* tribunal's comments are in a single paragraph because, in short, its analysis lasts no more than a single paragraph (the following paragraph simply states its conclusion).[1047]

701. *Third*, Claimant finally argues that "*[i]n Rurelec v Bolivia [...] the tribunal [...] confirmed that 'any State which carries out an expropriation is expected to accurately and professionally assess the true value of the expropriated assets'.*"[1048] But Claimant concedes, by omission, Bolivia's observation that the *Rurelec* tribunal "*simply ordered compensation in accordance with the treaty terms*," and drew no other legal consequences from its findings on compensation.[1049]

702. But, regardless of the legal standards, the plain facts show that Bolivia negotiated with Glencore International in good faith following the reversions.

703. [redacted]

704. Nevertheless, Bolivia negotiated in good faith with Glencore International for almost 10 years, attempting to resolve the dispute and to reach an agreement regarding compensation. It did so even though it considered its actions to be non-compensable reversions and even though, unbeknownst to Bolivia, Claimant had already received full compensation for the Tin Smelter. It is simply wrong to argue that Bolivia did not do everything it could to resolve this dispute.

705. Indeed, Claimant cannot deny that Negotiations were carried out in good faith, because it persistently participated in them for almost 10 years following the issuance of the Tin Smelter Reversion Decree, for over 7 years after the Antimony Smelter Reversion Decree, and for

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1046 Statement of Defence, ¶ 439.

1047 Statement of Defence, ¶ 439.

1048 Reply, ¶ 384.

1049 Statement of Defence, ¶ 498.

1050 [redacted]

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over 5 years after the Mine Lease Reversion Decree.[1052] Its own behaviour (as well as the express assertions it made to Bolivian officials[1053]) confirms that it considered the Negotiations to be worthwhile, even if they ultimately did not succeed in satisfying Claimant's pretentions.

b) Failure To Compensate Does Not Make An Expropriation Inherently Unlawful

706. Although Bolivia explained why the failure to pay compensation is insufficient to make an expropriation inherently unlawful,[1054] Claimant argues that "*Bolivia's acknowledged failure to pay prompt and effective compensation renders the expropriations unlawful.*"[1055] Of course, it is blatantly false that Bolivia acknowledges any failure to pay "*prompt and effective*" compensation. And it is equally false that the failure would make the expropriation inherently or *per se* unlawful.

707. As Bolivia explained, the term "unlawful" has a technical meaning when applied to expropriation.[1056] Claimant simply ignores this meaning. An expropriation is unlawful only when the expropriation cannot be made compliant with the Treaty terms through the payment of compensation, and so the expropriation was intrinsically contrary to the Treaty.

708. This is the position of *Chorzow Factory* (Claimant's own authority on this issue). Claimant, in an attempt to distinguish its own authority, accidentally admits precisely that "*the taking at issue was not an expropriation which could have been rendered lawful by the payment of compensation, but a seizure of property contrary to the 1922 Geneva Convention—in other words, the taking was unlawful whether or not compensation was paid.*"[1057] This is exactly the point. An expropriation is unlawful when it cannot be rendered compliant with the applicable treaty through the payment of compensation (*i.e.*, following the award of a tribunal).

709. Claimant's attempts to distinguish Bolivia's additional authorities are similarly mistaken and dependent on sleights of hand, rather than argument.[1058] These authorities do nothing more

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1052 See Section 2.8 above.

1053 Letters from Glencore (Mr Mate and Mr Glasenberg) to the President of Bolivia (Mr Morales Ayma) and the Ministry of Mining (Mr Pimentel Castillo) of 14 May 2010, **C-27**, p. 1 ("*[el proceso de negociación] avanzó mucho y falta poco para lograr un acuerdo amistoso definitivo, libre de presiones y litigious*") (Unofficial translation: "*major progress was made and little remains to be done in order to reach an amicable and final agreement, free of pressure and disputes*").

1054 Statement of Defence, ¶ 495 et seq.

1055 Reply, Section V(A)(2)(a)(ii).

1056 Statement of Defence, ¶ 496 et seq.

1057 Reply, ¶ 401.

1058 Reply, ¶ 402.

than confirm the conventional understanding of *Chorzow Factory*. For example, Mohebi is absolutely clear that "*the non-payment of compensation does not, as such, make a taking ipso facto wrongful [...].*"[1059] Crawford is equally clear in the text not quoted by Claimant that there are "*practical distinctions between expropriation unlawful sub modo and expropriation unlawful per se [...].*"[1060] And Sheppard explicitly refers "*to the situation where all of the conduct requirements have been met, but compensation has not been paid, as 'provisionally lawful expropriation.* "[1061]

710. As Bolivia explained previously, "*no investment tribunal has ever drawn any legal consequence from an expropriation found unlawful only for the lack of compensation.*"[1062] Claimant denies that this is true.[1063] If Claimant were right, it should be a simple matter to name a case, identify where the tribunal concluded that the expropriation was inherently unlawful only for the lack of compensation, and then identify the legal consequence that followed (*i.e.*, on the compensation due). It identifies no such consequences, and certainly none of any relevance to the present dispute, in any arbitral award.

711. As Bolivia also explained previously, "*the overwhelming majority of tribunals confronting failures to pay compensation nevertheless declined to hold the expropriation to be unlawful.*"[1064] Claimant has not a word to say about *Metalclad v. Mexico*, *Tecmed v. Mexico*, *Abengoa v. Mexico*, *Sistem v. Kyrgyz Republic*, *Wena v. Egypt*, and *Middle East Cement v. Egypt*,[1065] all of which were identified in Bolivia's Statement of Defence.[1066] It does say something about *Venezuela Holdings v. Venezuela*, *Santa Elena v. Costa Rica*, *Tidewater v.*

1059 M. Mohebi, *The International Law Character of the Iran-United States Claims Tribunal*, 1999, **RLA-62**, p. 289.

1060 J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. 2012, **RLA-63**, p. 10.

1061 A. Sheppard, "The distinction between lawful and unlawful expropriation" in *Investment Arbitration and the Energy Charter Treaty*, JurisNet, 2006, **RLA-64**, p. 171.

1062 Statement of Defence, ¶ 498.

1063 Reply, ¶ 403.

1064 Statement of Defence, ¶ 498.

1065 *Metalclad Corporation v United Mexican States* (ICSID Case No ARB(AF)/97/1) Award of 30 August 2000, **CLA-27**, ¶ 118; *Técnicas Medioambientales Tecmed SA v United Mexican States* (ICSID Case No ARB(AF)/00/2) Award of 29 May 2003, **CLA-43**, ¶ 187; *Abengoa, S.A. and COFIDES, S.A. v. United Mexican States,* ICSID Case No. ARB(AF)/09/2, Award of 18 April 2013, **RLA-66**, ¶ 681; *Sistem Mühendislik Inşaat Sanayi ve Ticaret A. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award of 9 September 2009, **RLA-67**, ¶¶ 119 and 156; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, **RLA-68**, ¶¶ 101, 118 and 125; *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt* (ICSID Case No ARB/99/6) Award of 12 April 2002, **CLA-34**, ¶¶ 143-151.

1066 Statement of Defence, ¶ 498.

Venezuela,[1067] but does not (and indeed cannot) deny that they too failed to find the expropriation, unlawful even though no compensation had been paid. [1068]

712. Claimant's final word on this issue is that "*[t]he Treaty's plain language is clear*" and "*Article 5 sets out the requirements for a State to carry out a lawful expropriation.*"[1069] This is incorrect. If the plain language were so clear, how is it possible that it never once refers to lawful or unlawful expropriations?[1070]

713. In sum, Bolivia's failure to pay compensation, given the dispute over whether compensation is due and, if so, how much, did not breach the Treaty, and certainly did not make the alleged expropriations unlawful.

5.1.2.2 Although Due Process Is Not A Requirement For Expropriation, Bolivia Observed Due Process Of Law By Making Available Posterior Remedies

714. As Bolivia explained in the Statement of Defence, "*due process in prior proceedings is [not] a condition for expropriation under the Treaty.*"[1071] The Treaty establishes a separate requirement – and not as a condition for expropriation – that the State must make available posterior remedies to challenge the expropriation.

715. Claimant insists in the Reply that it was entitled to prior due process under the Treaty, and that this prior due process was denied. It alleges that prior due process was denied because (i) the reversions were not justified, (ii) they did not comply with domestic law, (iii) it received no advance notice of the reversions, (iv) the police and military were present at the reversions, and (v) posterior remedies were insufficient.[1072]

716. But Claimant is wrong. It had no entitlement to prior due process and still less so as a condition for expropriation.

717. This is plain in the text of the Treaty. The Treaty establishes two, and only two, requirements for expropriation: (i) a public purpose and social benefit related to the internal needs of that

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1067 Reply, ¶ 404.

1068 *Venezuela Holdings, B.V. and Others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award of 9 October 2014, **RLA-65**, ¶¶ 306-307; *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* (ICSID Case No ARB/96/1) Final Award of 17 February 2000, **CLA-25**, ¶ 101; *Tidewater Investment SRL and Tidewater Caribe, C.A. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award of 13 March 2015, **RLA-60**, ¶ 146.

1069 Reply, ¶ 399.

1070 Treaty, **C-1**, Article 5(1).

1071 Statement of Defence, ¶ 501. See also Statement of Defence, ¶¶ 501-505.

1072 Reply, ¶ 419.

Party and (ii) just and effective compensation. It says nothing about due process as a requirement for expropriation:

> *Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for a public purpose and for a social benefit related to the internal needs of that Party and against just and effective compensation.*[1073]

718. The Treaty *then goes on* to establish a separate obligation to provide posterior due process. After an expropriation, the investor is entitled to establish the legality of the expropriation and amount of compensation through due process of law:

> *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.*[1074]

719. Thus, this Treaty obligation is satisfied so long as the investor had the right to access the domestic courts to challenge the expropriation. However, even if it were not satisfied, it could not affect the legality of the expropriation itself, because this obligation is not a condition of the State's right to expropriate. This is confirmed by the fact that it is specifically a right to confirm the legality of the expropriation, meaning it must be independent of that legality (as well as posterior to the expropriation).

720. Claimant does not deny that the Bolivian courts were open to it and it chose not to avail itself of them. Nor does it deny that it chose instead to receive due process of law before this Tribunal. Instead, it sets out two false arguments as to why it nevertheless should have received prior due process in addition to posterior due process.

721. *First*, Claimant argues that "*[t]he Treaty itself plainly requires a State to expropriate in accordance with due process*"[1075] because "*the use of the term 'prompt' in the above Treaty provision indicates that an investor's right to challenge the legality of the expropriation is not limited to after the taking has already occurred.*"[1076]

722. This argument is false on its face. It is not possible to challenge (or "*establish*") the legality of an expropriation that has not yet occurred, nor does a requirement to allow a prompt

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[1073] Treaty, **C-1**, Article 5(1) (emphasis added).

[1074] Treaty, **C-1**, Article 5(1).

[1075] Reply, ¶ 411.

[1076] Reply, ¶ 412.

challenge suggest that the challenge must be prior to the expropriation. By contrast, the Energy Charter Treaty (underlying two of the cases that Claimant previously cited but now abandons[1077]) provides that expropriation must be "*carried out under due process of law.*"[1078] The Treaty did not adopt any such requirement.

723. Because the Treaty text does not require, or even imply, an obligation of prior due process, Claimant adds that its argument regarding the text of the Treaty "*is further supported by Bolivia's own Expropriation Law.*"[1079] This makes no sense. Bolivia's Expropriation Law has no bearing on the meaning of the supposedly "*plain*" language of the Treaty. The fact that Claimant would invoke Bolivian law to establish the supposed "*plain*" meaning of the Treaty confirms that the "*plain*" meaning does not support Claimant's case.

724. Even apart from its mistaken interpretation of the Treaty, Claimant is wrong on the applicability of the Expropriation Law. One, the Expropriation Law applies only to expropriations for public works (*obras de utilidad pública*), not to expropriations for other purposes.[1080] The reversions (which were not expropriations) were not for public works. Two, Bolivia did not expropriate the Assets, but instead reverted them. As explained above, reversion is a separate legal category from expropriation under the Bolivian Constitution and Bolivian law, not addressed by the Expropriation Law.[1081] Even were the Tribunal to conclude that the reversions are expropriations under international law, Bolivia can hardly be faulted for not applying requirements that it believed were inapplicable (and indeed are inapplicable as a matter of Bolivian law).

725. *Second*, Claimant argues that "*a requirement that expropriations be carried out in accordance with due process [...] is embedded in customary international law.*"[1082] Although Claimant elsewhere decries reading requirements into the Treaty that are not in its text, here it would make one up out of whole cloth that is not supported, either explicitly or implicitly, by the Treaty.

1077 *Mohammad Ammar Al-Bahloul v Republic of Tajikistan* (SCC Case No V (064/2008)) Partial Award on Jurisdiction and Liability of 2 September 2009, **CLA-91**, p. 33; *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15) Award of 3 March 2010, **CLA-96**, ¶ 386.

1078 The Energy Charter Treaty and Related Documents, 2004, **RLA-180**, Article 13(c).

1079 Reply, ¶ 412.

1080 Law of Expropriation due to Public Utility of 30 December 1884, **C-49**, Arts. 1-2.

1081 See Section 5.1.1.2 above.

1082 Reply, ¶ 413.

726. In defence of Claimant's supposed requirement of customary international law, Claimant references Profs. Dolzer and Schreuer.[1083] However, Profs. Dolzer and Schreuer do not address the issue before this tribunal, which is whether there is an obligation to provide any particular form of procedure prior to expropriation, as opposed to afterwards.[1084] They do, however, tentatively confirm that due process under customary international law would not "*add an independent requirement for the legality of the expropriation.*"[1085] Instead, it would be a separate obligation imposed on the State without bearing on the legality of the expropriation.

727. What is more, even if the supposed customary international law requirement of prior due process existed, it would not override the specific schema for due process in the Treaty. The Treaty contains a specific provision on due process in connection to expropriation.[1086] That provision establishes that the State has an independent obligation to provide for posterior due process. It is both *lex specialis* and *lex posterior*, because it speaks specifically to the due process obligations in connection to expropriations under Article 5 of this Treaty and because it is posterior to customary international law on the general issue of due process for expropriations.[1087]

728. In the last gasp of an argument, Claimant once again brings out its go-to citation to the 95-year old *Norwegian Shipowners' Claims*.[1088] Once again, it provides no evidence that this case is any longer representative of international law, or that it ever was. But that issue aside, this case, as with all of Claimant's other authorities, does not actually address the issue of whether there is an entitlement to prior due process.

1083 Reply, ¶ 413.

1084 R Dolzer and C Schreuer, *Principles of International Investment Law* (2nd edn 2012) (Extract), **CLA-202**, p. 5 (Claimant apparently mistakenly cites to p. 14 which does not address this issue, while the quoted text is on page 5).

1085 R Dolzer and C Schreuer, *Principles of International Investment Law* (2nd edn 2012) (Extract), **CLA-202**, p. 5.

1086 Treaty, **C-1**, Article 5(1).

1087 Claimant recognizes that *lex specialis* determines the governing law (but wrongly attempts to generalize it to situations where there are not actually overlapping norms). Reply, ¶ 178.

1088 Reply, ¶ 414.

729. *Third*, as Bolivia explained, "*any breach of due process would require 'a manifest disrespect of due process that [offends] a sense of judicial propriety'.*"[1089] This is confirmed by *Arif v. Moldova* and *AES v. Hungary*,[1090] as well as numerous other international authorities.[1091]

730. Claimant denies that this is so.[1092] Its argumentative strategy is to propose that there are different due process standards for denial of justice, for fair and equitable treatment, for expropriation, and for who knows what else.[1093] But this cannot be. Instead, the standard for a breach of international due process indeed requires manifest disrespect, regardless of the particular context in which it applies. The State cannot be subject to varying due process requirements depending on the standard of protection that happens to be applied. State parties to investment treaties are entitled to basic predictability in relation to their treaty obligations, a predictability that would be shattered if the standard were fragmented as Claimant proposes.

731. Although Claimant attempts to distinguish the cases Bolivia cited for the due process standard on the flawed grounds that they concern denial of justice,[1094] this goes nowhere. Additional authorities confirm that the same high standard applies whether or not reference is made to

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1089 Statement of Defence, ¶ 507.

1090 *Mr Franck Charles Arif v. Republic of Moldova,* ICSID Case No. ARB/11/23, Award of 8 April 2013, **RLA-69**, ¶ 447; *AES Summit Generation Limited and AES-Tisza Erömü Kft v Republic of Hungary* (ICSID Case No ARB/07/22) Award of 23 September 2010, **CLA-100**, ¶ 9.3.40.

1091 Statement of Defence, ¶ 507.

1092 Reply, ¶ 415 et seq.

1093 See Reply, ¶ 415 and footnote 1006.

1094 Reply, ¶ 415. Claimants' argument is conceptually flawed. This is because a denial of justice is nothing more than the breach of FET relating to denial of due process. *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011, **RLA-181**, ¶ 315 ("*Denial of justice - that is, a failure of due process - constitutes a violation of the Fair and Equitable Treatment standard.*"); OECD, "Fair and Equitable Treatment Standard in International Investment Law," *OECD Working Papers on International Investment*, 2004/03, OECD Publishing, **RLA-182**, p. 41; C. McLachlan et al., *International Investment Arbitration: Substantive Principles*, 2nd ed. 2017, **RLA-71**, ¶ 7.128. If it were otherwise, the special legal requirements to claim for denial of justice would be without effect, because any denial of justice claim could be simply relabelled as a due process claim. This is not permissible. See *Mr Franck Charles Arif v. Republic of Moldova,* ICSID Case No. ARB/11/23, Award of 8 April 2013, **RLA-69**, ¶ 444; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No ARB/04/13) Award of 6 November 2008, **CLA-83**, ¶ 187; *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic*, PCA Case No. 2010-5, Award of 19 September 2013, **RLA-85**, ¶ 4.805.

denial of justice, including *Jan de Nul*,[1095] *Cervin*[1096] and *Deutsche Bank*,[1097] *Tokios Tokeles*,[1098] and *Waste Management II*.[1099]

732. Now, it is true that Claimant submits a few cases of its own to insist that an expropriation is illegal unless *prior* due process is afforded.[1100] In doing so, Claimant is largely citing to precisely the same cases – notably *ADC* – that it did in its Statement of Claim,[1101] cases which, as Bolivia already explained, address "*investment treaties that do make due process a condition for expropriation.*"[1102] To these repeat citations, it adds *OI European* and *Siag*, both of which also address investment treaties where prior due process is an explicit condition for expropriation.[1103] The fact that Claimant offers no response to this obvious flaw is conclusive: these cases are irrelevant to interpreting a treaty that provides only for posterior due process.

733. Indeed, Claimant cites the *Von Pezold* tribunals to buttress its insistence that the Treaty requires prior due process.[1104] But the *Von Pezold* tribunals did not comment on whether there was any entitlement to prior due process. They did not have to. The reason they did not have to is because, as the *Von Pezold* tribunals explain, "*[t]he 2005 Constitutional Amendment not only transferred legal title to the above-mentioned properties [...], it expressly denied the Claimants access to due process by removing the ability of landowners to challenge the*

1095 *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No ARB/04/13) Award of 6 November 2008, **CLA-83**, ¶ 187.

1096 *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award of 7 March 2017, **RLA-183**, ¶ 655 ("*El Tribunal Arbitral considera que una ausencia de debido proceso es efectivamente aquella que lleva a 'un resultado que ofende la discrecionalidad judicial, como podría ocurrir con un fracaso manifiesto de la justicia natural en los procedimientos judiciales.'*") (Unofficial translation: "*The Arbitral Tribunal considers that an absence of due process is effectively that which leads to 'a result that offends judicial discretion, as could occur with a manifest failure of natural justice in judicial proceedings.'*").

1097 *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award of 31 October 2012, **RLA-110**, ¶ 420.

1098 *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award of 26 July 2007, **RLA-70**, ¶ 133 (a criminal case, where due process is particularly demanding).

1099 *Waste Management, Inc v United Mexican States* (ICSID Case No ARB(AF)/00/3) Award of 30 April 2004, **CLA-155**, ¶ 98.

1100 Reply, ¶¶ 416-417.

1101 Statement of Claim, ¶ 171.

1102 Statement of Defence ¶ 503. *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal of 2 October 2006, **CLA-64**, ¶ 368 (quoting Article 4 of the Cyprus-Hungary BIT); *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15) Award of 3 March 2010, **CLA-96**, ¶ 386 (quoting Article 13 of the ECT).

1103 *OI European Group BV v Bolivarian Republic of Venezuela* (ICSID Case No ARB/11/25) Award of 10 March 2015, **CLA-125**, ¶¶ 385-386 (quoting the provision of Article 6(a) of the Venezuela-Netherlands BIT on due process); *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (ICSID Case No ARB/05/15) Award of 1 June 2009, **CLA-89**, ¶ 442 (making explicit reference to due process established in Article 5 of the Egypt-Italy BIT).

1104 Reply, ¶ 412.

acquisition of their land [...]."[1105] It was precisely such a deprivation of posterior remedies that the due process clause of the Treaty was designed to prevent.

734. The simple fact is that Bolivia fully afforded Claimant due process in accordance with the plain terms of the Treaty, contrary to Claimant's complaints about the due process it was afforded. This is for five reasons.

735. *First*, Claimant had multiple avenues to challenge the reversions, both through actions under the Administrative Procedure Law or under the 1967 or 2009 Constitutions. Bolivia explained these avenues in its Statement of Defence. One, Claimant could have challenged the reversions before the authority that enacted them, and then before the Supreme Court of Justice.[1106] Two, Claimant could have challenged the constitutionality of the reversions before the courts, under both the 1967 and the 2009 Constitutions.[1107]

736. Although Bolivia made these precise points in its Statement of Defence, Claimant has not offered so much as a denial, let alone a response. It is admitted that these posterior remedies were indeed available. The simple fact is that Claimant chose not to avail itself of the multiple avenues of due process available in Bolivia. It cannot now be heard to complain about a breach of due process when Bolivia afforded it precisely the due process that the Treaty requires, and Claimant freely chose to pursue arbitration instead.

737. Now, Claimant insists that "*the availability of ex post avenues to challenge the legality of the State's measures [...] does not relieve the State from its ex ante obligation [...].*"[1108] Claimant then invokes its same trick of citing a case applying a treaty that lacks the Treaty's explicit requirement of posterior due process. This time, the case is *Quiborax*.[1109] Thus, it is entirely unsupported that the Treaty, requiring only posterior due process, is breached for lack of due process when precisely that posterior due process is provided.

738. *Second*, the reversion fully complied with the requirements of Bolivian law, contrary to Claimant's arguments.[1110] As explained above, Bolivian law, and Bolivian constitutional law,

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[1105] *Bernhard von Pezold and others v Republic of Zimbabwe* (ICSID Case No ARB/10/15) Award of 28 July 2015, **CLA-126**, ¶ 499.

[1106] See Statement of Defence, ¶ 509 (citing Law No. 2.341 of 23 April 2002, **R-250**, Articles 64, 70).

[1107] Statement of Defence, ¶¶ 510-511 (citing Constitution of Bolivia of 1967, **R-3**, Article 19; Constitution of Bolivia of 7 February 2009, **C-95**, Articles 128, 132 and 134).

[1108] Reply, ¶ 428.

[1109] *Quiborax SA and Non Metallic Minerals SA v Plurinational State of Bolivia* (ICSID Case No ARB/06/2) Award of 16 September 2015, **CLA-127**, ¶ 226.

[1110] Reply, ¶ 421.

distinguish between reversion and expropriation, with the former applicable when property rights are extinguished by law or Constitution and the later applicable when the public interest simply prevails over the property right.[1111] The executive, in turn, is empowered by the Constitution to issue supreme decrees regarding reversion when within the scope of the other enumerated executive powers.[1112]

739. The reversions, taken to enforce the law and preserve public order, were well within these constitutional parameters. They were taken to combat illegality in the Tin Smelter privatization, to enforce the contractual and constitutional obligation to put the Antimony Smelter into production, and to restore public order and safety at the Colquiri Mine.[1113]

740. Nevertheless, Claimant argues that "*Bolivia's 'reversions' did not comply with the provisions of its own domestic law*"[1114] because they did not comply with legal and constitutional requirements for expropriation.[1115] This argument is flawed. The reversions were not expropriations and so any such requirements would not have applied to them. However, if Bolivia were mistaken about that fact (it is not), the posterior remedies made available, but never invoked, were more than sufficient to remedy any alleged mistake.

741. Claimant adds the allegation that the reversions did not comply with the Administrative Procedure Law which supposedly "*required a prior administrative process [...].*"[1116] However, Claimant does not cite to the general requirements for an administrative action, but instead the provisions for an administrative sanction.[1117] A reversion is not a sanction. A reversion is the action that applies when the property rights to a given asset legally cease to exist.[1118] The requirements for a normal administrative act do not require prior notice or hearing to the affected party.[1119]

742. *Third*, contrary to Claimant's assertions,[1120] each of Bolivia's reversions was fully justified.

1111 See Section 5.1.1.2.

1112 See Section 5.1.1.2.

1113 See Sections 2.7.1, 2.7.2 and 2.7.3, respectively.

1114 Reply, ¶ 421.

1115 Reply, ¶¶ 421-424.

1116 Reply, ¶ 425.

1117 Reply, ¶ 425 (citing Law No. 2.341 of 23 April 2002, **R-250**, Articles 80-84).

1118 See Section 5.1.1.2 above.

1119 An administrative act requires no notice and are presumed valid, enforceable and executable from its publication. Law No. 2.341 of 23 April 2002, **R-250**, Articles 28 and 32.

1120 Reply, ¶ 420.

743. One, the Tin Smelter was reverted due to the irregularities in its privatization process, not because it would be "*profitable*." At the time of the reversion, the plant required over US$ 39 million in investments to renovate the machinery that had been operated to exhaustion, without proper maintenance or necessary renovations.[1121] Bolivia had to invest over 10 times what Sinchi Wayra had invested for the Smelter to be "*profitable*."[1122]

744. Two, the Antimony Smelter was reverted due to Glencore International's violation of its contractual obligation to put the plant into production, not to "*gain access to the Tin Stock*," of which Bolivia did not know and could not know.[1123] Claimant's assertions regarding the Tin Stock make no sense, given that there was no shortage of tin, since the Tin Smelter had received 16,600 tons of concentrates from the Huanuni mine. But, even if there was a shortage, the amount of tin concentrate found in the abandoned plant could be processed in only four days (which was obviously not enough to solve any purported shortage).[1124]

745. Three, the Colquiri Mine Lease was reverted due to the conflict between the workers and the *cooperativistas* in the Colquiri Mine, and not because of the mine's "*successful operations*."[1125] Bolivia had to invest over US$ 75 million in Colquiri after the reversion, since all the alleged expansion projects mentioned by Claimant in its Statement of Claim had never been executed.[1126]

746. *Fourth*, contrary to Claimant's assertions,[1127] Bolivia provided more than adequate notice of the reversions according the applicable requirements. As Bolivia explained, "*President Morales announced the Tin Smelter reversion on 22 January 2007, and the reversion itself did not occur until 7 February 2007*," and "*President Morales announced the Antimony Smelter reversion on 1 May [2010] but the reversion did not occur until 2 May [2010].*"[1128] As the Colquiri Mine Lease reversion was an emergency measure, there was no advanced notice.[1129] Claimant complains that this notice did not give it sufficient "*opportunity to challenge the State's measure or assert its rights.*"[1130] But this complaint rests on the false

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1121 Villavicencio I, ¶ 48. See Section 2.9 above.

1122 Villavicencio I, ¶¶ 39, 48-50, 59.

1123 Villavicencio II, ¶ 15. See Section 2.7.2.

1124 Villavicencio II, ¶ 16.

1125 Reply, ¶ 487.

1126 See Section 2.9.

1127 Reply, ¶ 426.

1128 Statement of Defence, ¶ 514.

1129 The mine was reversed on 20 June 2012. See Supreme Decree No 1.264 of 20 June 2012, **C-39**.

1130 Reply, ¶ 426.

assumption that Claimant had the right to prior due process. It did not, for the reasons already explained at length. It had more than sufficient opportunity to bring posterior challenges to all three reversions (an opportunity which it voluntarily elected not to pursue).

747. *Fifth*, the presence of security personnel at the reversions was a prudent measure and certainly not a breach of due process.[1131] Indeed, this would not be a violation of due process even if it were unnecessary. The police and military took no part in the reversions, but were present to ensure a peaceful transition of control for all three Assets. In the case of the Tin Smelter, their presence assured that the plant's operation was not interrupted due to the reversion,[1132] and in the Colquiri Mine, they guaranteed the security of both miners and *cooperativistas* after the June 2012 violent conflicts.[1133] Claimant effectively alleges that the mere presence of police and the military is contrary to international law. It is not. And it is still less contrary to international due process.

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748. In sum, Bolivia did not breach the Treaty's compensation or due process requirements through the reversions (even assuming, falsely, that they were expropriations). It did not unlawfully expropriate the Assets.

5.2 Bolivia Provided Full Protection And Security To The Colquiri Mine At All Times

749. As Bolivia explained in its Statement of Defence, it fully complied with the full protection and security provision of the Treaty by attempting to defuse the Colquri Mine conflict through peaceful means, given that the use of force would have been impracticable and in violation of its human rights obligations under the circumstances.[1134] Claimant, in its Reply, continues to insist that Bolivia did not provide full protection and security, first and foremost because it refused to use force against the *cooperativistas*.[1135]

750. Claimant's position continues to be wrong. Full protection and security requires State measures of protection only in specific and limited circusmtances, and certainly does not require the violation of human rights obligations (**Section 5.2.1**). Bolivia took all reasonable

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1131 Reply, ¶ 427.

1132 Villavicencio II, ¶ 10 ("*[M]e consta que la Fundidora de Estaño no paralizó sus operaciones (ni siquiera luego de la reversión) y que la transición hacia la operación por el estado no tuvo contratiempos notorios*") (Unofficial translation: "*To my understanding the Tin Smelter did not stop its operations (even right after the reversion) and that the transition to the operation by the State did not have any noticeable setbacks*"). See Section 2.7.1 above.

1133 See Section 2.7.3 above.

1134 Statement of Defence, ¶ 519.

1135 Reply, ¶¶ 430, 445.

and available measures to protect the Colquiri Mine from the *cooperativistas* (**Section 5.2.2**). The Colquiri Mine Lease did not require any further measures of protection (**Section 5.2.3**).

5.2.1 Claimant Cannot Coherently Deny That Full Protection And Security Requires Only Lawful And Reasonable Measures

751. In the Statement of Defence, Bolivia demonstrated that the full protection and security standard is violated for failure to take a potential measure of protection only when (i) there is a threat of permanent impairment to physical integrity of the investment, (ii) a potential measure to prevent permanent impairment is lawful, and (iii) the potential measure is reasonable under the circumstances.[1136]

752. In its Reply, Claimant disagrees.[1137] Nevertheless, Claimant admits that "*the Treaty does not create an obligation of strict liability*" but instead "*is one of vigilance and due diligence.*"[1138] Strangely, it insists that a lack of due diligence is sufficient to violate the standard, without any need for negligence.[1139]

753. As Bolivia previously explained, the ICJ's *ELSI* judgment is the lead authority on full protection and security. It remains widely regarded as authoritative by investment tribunals. That judgement famously concludes that "'*constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed.*"[1140]

754. To ensure that full protection does not become a warranty against any disturbance to property, it is breached only when three requirements are jointly satisfied.

755. *First*, a State's duty to protect only arises when there is a threat of permanent impairment to the physical integrity of the investment.[1141] Claimant denies this.[1142] But it does not offer any authority at all in support of its position that the State's duty to protect extends further. Its argument is wholly critical, even though Claimant bears the burden of proof for its claim on full protection and security.

1136 Statement of Defence, ¶ 523.

1137 Reply, ¶ 437.

1138 Reply, footnote 1050, ¶ 436.

1139 Reply, ¶ 436.

1140 *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment of 20 July 1989, **RLA-72**, ¶ 108.

1141 See Statement of Defence, ¶ 524.

1142 Reply, ¶ 438.

756. Claimant's critical argument fails. It seeks to distinguish *ELSI*, *Toto*, and *Noble Ventures* on the ground that the third party actions "*did not materially affect the claimants' investments*" and supposes by contrast that its investment was physically threatened.[1143] But this is not a denial of the legal principle that a physical threat is needed; it is an argument that the requirement was, as a matter of fact, satisfied in the instant case. As explained below, this is false. The physical integrity of the mine was never threatened. (It is pretty hard to damage a mine.)

757. *Second*, a State's duty to protect applies only to measures that are permissible under the applicable international and municipal law.[1144] This is obvious. *Tecmed* explained that any alleged omission must be evaluated "*in accordance with the parameters inherent in a democratic state.*"[1145] This must be deemed conceded by Claimant's failure to respond.

758. *Third*, a State's duty to protect applies only when the measures are reasonable under the circumstances. This is confirmed by the *Toto v. Lebanon*, *Mamidoil v. Albania*, and *Tulip v. Turkey* tribunals.[1146] Claimant does not take issue with this general rule, which is therefore conceded by omission.

759. Instead, Claimant takes issue with how the *Pantechniki* tribunal developed this requirement, and specifically the proposition that what is reasonable depends on the resources and circumstances of a particular State.[1147] It attempts to distinguish *Pantechniki* on the grounds that the circumstances it analysed in Albania were much more severe than those in the instant dispute. But this distinction makes no sense. *Pantechniki* confirms that the reasonable measures of protection take into account the resources and circumstances of a given State. It does not say that a specific standard of protection, developed in the context of Albania, applies to all other states.

760. If this were not enough, *Pantechniki* is not even the origin of this standard. It comes from Newcombe and Paradell's well-regarded treatise, which developed the standard

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1143 Reply, ¶ 438.

1144 Statement of Defence, ¶ 526.

1145 *Técnicas Medioambientales Tecmed SA v United Mexican States* (ICSID Case No ARB(AF)/00/2) Award of 29 May 2003, **CLA-43**, ¶ 177.

1146 *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award of 7 June 2012, **RLA-76**, ¶ 229; *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award of 30 March 2015, **RLA-74**, ¶ 821; *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award of 10 March 2014, **RLA-75**, ¶ 430.

1147 Reply, ¶ 440.

independently of any specific factual context. *Pantechniki* simply endorses the standard by quoting it in full:

> *Although the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified objective standard - the host state must exercise the level of due diligence of a host state in its particular circumstances.*[1148]

761. *Pantechniki* then further quotes Newcombe and Paradell on this standard, making the common sense point that due diligence depends on the State's level of development and stability:

> *In practice, tribunals will likely consider the state's level of development and stability as relevant circumstance in determining whether there has been due diligence. An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo.*[1149]

762. In sum, the full protection and security standard provides a real measure of protection but subject to these three limitations to ensure that it does not become, in the words of the ICJ's *ELSI* judgment, "*a warranty that property shall never in any circumstances be occupied or disturbed.*"[1150]

763. Nevertheless, it is Claimant's view that the ICJ's *ELSI* judgment should be ignored in favor of the *AMT v. Zaire* and *AAPL v. Sri Lanka* awards.[1151] It asserts this view even though the ICJ is clearly more authoritative than the members of the *AMT* or *AAPL* tribunals. It also asserts this even though those tribunals have been long superseded by later investment awards consistent in letter and spirit with *ELSI*.[1152] It asserts this because it considers that the *AMT*

[1148] *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009, **RLA-77**, ¶ 81 (quoting A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, 1st ed. 2009, **RLA-184**, p. 310).

[1149] *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009, **RLA-77**, ¶ 81 (quoting A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, 1st ed. 2009, **RLA-184**, p. 310).

[1150] *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment of 20 July 1989, **RLA-72**, ¶ 108.

[1151] Reply, ¶ 436.

[1152] Reply, ¶ 439 n 1059. Claimant buries a series of case citations in footnote 1059 of its Reply. However, this footnote confirms Bolivia's position that *Toto* sets the appropriate standard for the present case. *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award of 7 June 2012, **RLA-76**, ¶¶ 228-229. Its citation to *Saluka* further confims that "*the standard obliges the host State to adopt all reasonable measures to [...] protect more specifically the physical integrity of an investment against interference by use of force.*" *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award of 17 March 2006, **CLA-62**, ¶ 484. The remaining citations, apart from being outdated, are largely irrelevant. One group of cases has no analysis because the full protection and security claims were nothing more than makeweight even though the facts were irrelevant to the standard. See *El Paso Energy International Company v Argentine Republic* (ICSID Case No ARB/03/15) Award of 31 October 2011, **CLA-106**, ¶¶ 522-525; *Sergei Paushok, CJSC Golden East Company, and CJSC Vostokneftegaz Company v Government of Mongolia,* Award on Jurisdiction and Liability of 28 April 2011, **CLA-194**, ¶ 327; *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award of 24 December 2007, **RLA-100**, ¶ 327; *Noble Ventures Inc v Romania* (ICSID Case No ARB/01/11)

or *AAPL* tribunals suggest greater restrictions on the State, not because it believes they are more authoritative.

764. But even taken on their own terms, *AMT* and *AAPL* are irrelevant to the present dispute. As Bolivia previously explained, these cases concern actions by State actors and so are unreliable as a guide for protection against non-State actors.[1153] Nevertheless, Claimant adds further citations to *Biwater* and *Wena*, also concerning actions by State actors.[1154] But when the action involves State actors, there would have been a breach regardless of full protection and security. Any tribunal evaluating such circumstances is likely to impose a much more demanding standard of full protection and security than when non-State actors are involved.

765. In fact, recognizing that Bolivia has made this point before, Claimant sets up a strawman argument in order to have something to refute. It mischaracterizes Bolivia as arguing that, because the *cooperativistas* were not State actors, Bolivia could not have breached full protection and security.[1155] Bolivia, of course, does not make that argument. Instead, it simply observes that the standard of protection applicable against actions of State actors is naturally higher than that against third parties.

766. In sum, full protection and security requires that the State take only those measures that are lawful and reasonable in order to protect against a threat to the physical integrity of an investment.

5.2.2 Contrary To Claimant's Argument, Bolivia Took All Actions That Were Reasonably Available In Light Of The Severe Social Conflict And Constraints From Human Rights Law

767. Bolivia explained in its Statement of Defence that Claimant had not demonstrated that it satisfied even one, let alone all three, of the necessary requirements for a full protection and

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Award of 12 October 2005, **CLA-59**, ¶ 166; *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan* (ICSID Case No ARB/05/16) Award of 29 July 2008, **CLA-79**, ¶ 669. One case found a breach automatically because the underlying actions were by State actors. *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (ICSID Case No ARB/05/22) Award of 24 July 2008, **CLA-78**, ¶ 731. Similarly, *Wena* concluded that "*Egypt was aware of EHC's intentions [...].*" See *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, **RLA-68**, ¶ 85.

1153 *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (ICSID Case No ARB/87/3) Final Award of 27 June 1990, **CLA-14**, ¶ 85(b); *American Manufacturing & Trading Inc v Republic of Zaire* (ICSID Case No ARB/93/1) Award of 21 February 1997, **CLA-20**, ¶ 3.04.

1154 Reply, ¶ 435.

1155 Reply, ¶ 439.

security claim. In response, Claimant continues to insist that it has lodged a valid claim for a breach of this standard.[1156]

768. However, Claimant's full protection and security claim remains fatally flawed for three reasons.

769. *First*, the Colquiri Mine was *never* in danger of suffering any permanent impairment to its physical integrity. Claimant does not put forth any evidence that the physical integrity of the mine was at risk, instead trying to substitute evidence regarding the conflict between *cooperativistas* and the workers (neither of whom are Claimant's investment).[1157] It must be concluded that there is no such evidence and that the Mine was never in danger, which is hardly surprising given that the conflict was over access to that very Mine. The *cooperativistas* wanted to take over the entire mine in order to exploit it, not to destroy it.[1158] The miners, on their turn, resisted the *cooperativistas* pretension so they would not lose their jobs.[1159]

770. *Second*, Bolivia took all actions that were consistent with the legal restrictions incumbent upon it in resolving the large-scale conflict at the Colquiri Mine. In light of Claimant's efforts to enflame the Colquiri conflict and Bolivia's ultimate peaceful resolution of that conflict, it is simply untrue when Claimant says that "*Bolivia was expected to mobilize adequate resources and diligently protect lives and the integrity of its investment.*"[1160]

771. What Claimant is really arguing is that Bolivia should have taken forcible police or military action in response to the situation at the mine. Although Bolivia already responded that it was restricted by its human rights obligations, Claimant now insists that Bolivia "*fails to articulate what obligations under such human rights treaties would have prevented it from intervening*" and that "*none of the human rights provisions referred to by Bolivia are even remotely applicable to the present dispute.*"[1161] However, these arguments evince a basic misunderstanding of human rights law and a failure to consider the direct explanation in Bolivia's Statement of Defence.

1156 Reply, ¶¶ 441-442.

1157 Reply, ¶ 438.

1158 La Patria, *Colquiri: Mineros suspenden labores y cooperativistas no aceptan veta*, press article of 5 June 2012, **C-118**.

1159 Mamani II, ¶¶ 39-43, 48-49.

1160 Reply, ¶ 445.

1161 Reply, ¶ 446.

772. In its Statement of Defence, Bolivia identified the specific provisions of the International Covenant on Civil and Political Rights and the American Convention on Human Rights that restricted the measures it could take against the conflict.[1162] These are the provisions that establish the right to life and the right to physical integrity.[1163] It is a violation of these human rights to unnecessarily or disproportionately imperil the life or bodily integrity in a security action.[1164] This is plainly established by the authorities Bolivia already cited.[1165] The fact that Claimant feigns a lack of understanding of these principles should be understood as an admission that human rights indeed establish these demands on State action.

773. The Colquiri conflict was also more complex than other incidents that took place in other Bolivian mines. Although Claimant attempts to compare the situation at Colquiri with the events that happened in the Sayaquira mine,[1166] the two cases were strikingly different.

774. In Sayaquira, *cooperativistas* from another part of the country invaded the mine site. They had no ties with the community and were, indeed, interlopers who had no support from the local population. The police easily diffused the conflict, and managed to get the interlopers

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1162 Statement of Defence, ¶ 542.

1163 American Convention on Human Rights of 22 November 1969, **RLA-3**, Articles 4, 5; International Covenant on Civil and Political Rights of 16 December 1966, **RLA-2**, Articles 6, 7.

1164 *Case of the Landaeta Mejías Brothers et al. v. Venezuela*, Inter-American Court of Human Rights, Judgment of 27 August 2014, **RLA-185**, ¶¶ 134-136; Inter-American Commission on Human Rights, *Country Report, Nicaragua: Gross Human Rights Violations in the Context of Social Protests in Nicaragua*, OEA/Ser.L/V/II, Doc. 86 of 21 June 2018, **RLA-186**, ¶¶ 84, 95-98; Inter-American Commission on Human Rights, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II, Doc. 57 of 31 December 2009, **RLA-187**, ¶ 133; *Finca "La Exacta" v. Guatemala*, Inter-American Commission on Human Rights, Case 11.382, Report No. 57/02 (Merits) of 21 October 2002, <http://cidh.org/annualrep/2002eng/Guatemala.11382.htm> last visited 23 October 2018, **RLA-188**, ¶¶ 40-41; Inter-American Commission on Human Rights, *Fifth Report on the Situation of Human Rights in Guatemala*, Ch. V (The Right to Life), OEA/Ser.L/V/II.111, Doc. 21 rev. of 6 April 2001, <http://www.cidh.org/countryrep/Guate01eng/chap.5.htm> last visited 23 October 2018, **RLA-189**, ¶¶ 13, 50; United Nations Human Rights Committee, *Concluding observations on the fifth periodic report of Iraq*, U.N. Doc. CCPR/C/IRQ/CO/5 of 6 November 2015, **RLA-190**, ¶¶ 41-42; United Nations Committee Against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Second periodic reports of The Netherlands (Addendum)*, U.N. Doc. CAT/C/25/Add.1 of 20 June 1994, **RLA-191**, ¶ 39.

1165 *Nadege Dorzema et al. v. Dominican Republic*, Inter-American Court of Human Rights, Judgment of 24 October 2012, **RLA-78**, ¶ 85. See also United Nations High Commissioner for Human Rights, *Code of Conduct for Law Enforcement Officials* of 17 December 1979, **RLA-192**, Article 3(b) ("*In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.*"); United Nations High Commissioner for Human Rights, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 1990, **RLA-193**, Articles 4 ("*Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.*") and 5 ("*Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; (b) Minimize damage and injury, and respect and preserve human life; (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment; (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.*"); United Nations High Commissioner for Human Rights, *Human Rights Standards and Practice for the Police*, HR/P/PT/5/Add.3, 2004, **RLA-194**, p. 2 ("*All police action shall respect the principles of legality, necessity, non-discrimination, proportionality and humanity*").

1166 Reply, ¶ 447.

out of the mine without the use of force or chemical agents (such as tear gas). Since they were not from the region, most of them left the mine and immediately headed to Oruro or Potosí, where they had originally come from.[1167]

775. By contrast, at Colquiri, the *cooperativistas* were part of the Mine's operations and members of the community. They knew the Mine's structure and its multiple accesses very well, and could easily gain control of the Mine – as they did. In this context, a police intervention would have been disastrous.[1168] Moreover, the two conflicts were of completely different scales. Around 300 invaders attempted to take control of Sayaquira,[1169] while Colquiri was occupied by 1,200 *cooperativistas* on 30 May 2012.[1170] Claimant's comparison of the two incidents is misleading.

776. Indeed, Claimant does not dispute that the use of force against occupations of mines had proven to be disasterous in the past. For example, in 1996, during Sánchez de Lozada's first term in office, the military intervened in the Amayapampa project to protect the mining concession of a Canadian company against the uprising of the mining workers and the local community against the investor. The operation resulted in a violent confrontation that left 7 dead and about 100 injured and led to the suspension of the project.[1171]

777. Regardless, it is truly incredible that Claimant finally argues that these obligations would not "*excuse Bolivia from its obligations under the Treaty*" even were they applicable.[1172] Claimant is arguing that Bolivia should have used force as a first resort to quell the conflict regardless of whether that would violate the right to life and right to physical integrity of the *cooperativistas* and the workers. But the use of force in police action is only permitted as a last resort. As the United Nations Basic Principles on the Use of Force and Firearms by Law

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1167 "El Gobierno recupera la mina Sayaquira," *Los Tiempos*, press article of 24 March 2012, **C-250**, p. 1 ("*El desalojo, según un reporte de la Cadena A, se produjo la tarde de ayer, sin el uso de la fuerza ni agentes químicos. Los cooperativistas dejaron la mina casi de manera voluntaria y dijeron que retornarían a sus lugares de origen (Oruro y Potosí)*") (Unofficial translation: "*The eviction, according to a report from Cadena A, occurred yesterday afternoon, without use of force or chemical agents. The cooperativistas left the mine almost voluntarily and said they would return to their places of origin (Oruro and Potosí)*").

1168 Córdova, ¶ 86; Mamani II, ¶ 36.

1169 "El Gobierno recupera la mina Sayaquira," *Los Tiempos*, press article of 24 March 2012, **C-250**.

1170 Cachi I, ¶¶ 32-33.

1171 See, for instance, La Razón, *Amayapampa, un proyecto 'fantasma'*, press article of 4 April 2016, **R-218**; La Patria, *La masacre de "Navidad", Amayapampa y Capasirca*, press article of 19 March 2014, **R-219**.

1172 Reply, ¶ 446.

Enforcement provide, "*[law enforcement officials]may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.*"[1173]

778. *Third*, the measures of protection that Bolivia took, already described, were entirely reasonable given its particular social and cultural circumstances. As Bolivia explained, mine workers and *cooperativistas* have an outsized power in Bolivia that the State cannot fully control, often engaging in mass demonstrations or even conflicts.[1174] These included the mass demonstrations that toppled the government of Sánchez de Lozada, from whom Glencore International subsequently acquired the Assets.[1175]

779. Against this, Claimant states that "*Bolivia would not protect the mining activities from criminal conduct by a particular sector of the population for political reasons.*"[1176] This is not a response to Bolivia's argument. Bolivia argues that it has often proved impossible to control the *cooperativistas* and forceable attempts to do so, as just explained, have proven to be utterly counterproductive. Bolivia does not argue that it chooses not to protect for "*political reasons.*" Instead of using force, Bolivia reasonably sought to resolve the dispute through negotiation and pacific means, precisely as required by its human rights obligations.[1177]

780. Despite Claimant's assertion that the government did not take any measures to prevent the *cooperativas*' takeover of the mine on 30 May 2012,[1178] the State acted reasonably according to the information it received from Sinchi Wayra. Before the violent events commenced, COMIBOL was regularly in contact with Sinchi Wayra's representatives due to the negotiations for the migration to a joint venture scheme.[1179] The company hesitated to seek further involvement from the government, even as COMIBOL regularly addressed the issue in their meetings.[1180]

1173 United Nations High Commissioner for Human Rights, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 1990, **RLA-193**, Article 4.

1174 Reply, ¶ 544 (citing La Patria, *La masacre de "Navidad", Amayapampa y Capasirca*, press article of 19 March 2014, **R-219**; El Día, *Se reactiva el conflicto minero en Mallku Khota*, press release of 3 October 2012, **R-251**; M. Cajías de la Vega, "Crisis, Diáspora y Reconstitución de la Memoria Histórica de los Mineros Bolivianos" in *Revista de Estudios Transfronterizos*, Vol. X, No. 2 (2010), **R-159**, p. 87).

1175 Reply, ¶ 544 (citing M. Cajías de la Vega, "Crisis, Diáspora y Reconstitución de la Memoria Histórica de los Mineros Bolivianos" in *Revista de Estudios Transfronterizos*, Vol. X, No. 2 (2010), **R-159**, p. 87).

1176 Reply, ¶ 441.

1177 United Nations High Commissioner for Human Rights, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 1990, **RLA-193**, Article 4.

1178 Reply, ¶ 443.

1179 Córdova, ¶ 50.

1180 When finally informed that Sinchi Wayra had presented a complaint that the *cooperativistas* were responsible for the "*juqueos*", COMIBOL contributed to said complaint. See Section 2.7.3.3 above and Córdova, ¶ 50.

781. On 30 May 2012, when the *cooperativistas* invaded the mine and caused a violent confrontation that left 15 people wounded, police squads arrived to attempt to control the situation.[1181] The situation was very delicate, since Colquiri is an old mine, with many different mouths and access points throughout Colquiri village.[1182] Intervention by force had the potential to result in violence and multiple victims, as it has happened in the past.[1183]

782. Instead, COMIBOL first took the necessary measures to stop the commercialization of *Cooperativa 26 de Febrero's* production.[1184] Then, on 3 June 2012, the Minister of Mines, the Minister of Labour and COMIBOL officials met with the SMTC and FSTMB, and reached a memorandum of understanding, in which the government committed to find a way in which Colquiri could continue to operate the mine.[1185] In the following days, the government prepared up to five different offers to be submitted to *cooperativistas*, while reinforcing the commitment expressed in the memorandum.[1186] All offers were refused, including the proposal that assigned the San Antonio vein, the second richest vein in Colquiri, to the *cooperativas.*[1187]

783. Claimant's allegedly "successful" negotiation with the *cooperativas*, the Rosario Agreement, assigned the richest vein of the mine to them, and this arrangement was fiercely opposed by the miners.[1188] The execution of the agreement only made the negotiations with the *cooperativistas* more difficult, since they refused to take any other offer,[1189] and even considered taking over the entire Mine.[1190] Sinchi Wayra's action provoked a violent response from the workers. On 13 June 2012, around a thousand mining workers blocked routes and

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1181 La Razón, *El Gobierno envía más policías a Colquiri para evitar conflicto*, press article of 1 June 2012, **R-213**.

1182 Mamani II, ¶ 36.

1183 La Razón, *Amayapampa, un proyecto 'fantasma'*, press article of 4 April 2016, **R-218**; La Patria, *La masacre de "Navidad", Amayapampa y Capasirca*, press article of 19 March 2014, **R-219**.

1184 Página Siete, *Gobierno impide salida de mineral de Colquiri*, press article of 1 June 2012, **R-214**.

1185 Minutes of understanding with the Sindicato de Trabajadores Mineros de Colquiri and the Federación Sindical de Trabajadores Mineros de Bolivia of 3 June 2012, **C-115**.

1186 La Razón, *Minería hace 5 ofertas, pero aun no convence a los cooperativistas*, press article of 5 June 2012, **R-215**; Letter from COMIBOL and the Ministry of Mines to the Cooperativa 26 de Febrero of 3 June 2012, **R-344**.

1187 La Patria, *Colquiri: Mineros suspenden labores y cooperativistas no aceptan veta*, press article of 5 June 2012, **C-118**.

1188 Córdova, ¶ 68.

1189 Córdova, ¶ 70.

1190 "Mineros retomarán Colquiri y bloquearán los caminos," *Página Siete*, press article of 10 June 2012, **C-126**.

requested an explanation on the agreement from the government.[1191] These protests escalated into violent confrontations that lasted for two days.[1192]

784. The government only decided to revert the mine as a last resort, after Sinchi Wayra negotiated the harmful Rosario Agreement.[1193] The agreement ruined the chances of a compromise, since the *cooperativas* would not take less than the vein that the workers were not willing to cede. Bolivia took all possible measures to protect Glencore's investment, and was committed to maintaining Colquiri S.A. in control of the Mine, until its own conduct invalidated the government's efforts. Then Bolivia's only option was reversion.

785. Since the reversion, Bolivia has taken further reasonable actions to improve security and eliminate conflict at the Mine. Sinchi Wayra failed to take these or similar actions:

- As Claimant asserts, COMIBOL has indeed contracted the services of the military to improve the security at Colquiri;[1194]
- COMIBOL increased the number of formal employees in Colquiri by hiring former *cooperativistas*. While Sinchi Wayra had 548 workers, COMIBOL added 621 *cooperativistas* to their ranks, increasing the number of formal workers to 1240. Where there were four *cooperativistas* for each employee before the reversion, there was only one *cooperativista* for each employee afterward; and
- COMIBOL also employed a private police group (*policía minera*) composed of 54 men. These men work in three shifts, assuring the security of the Mine. Half of the members of the *policía minera* are former *cooperativistas* and, as such, have unique knowledge of the Mine.

786. Claimant finally argues that "*Bolivia took no steps to punish the individuals responsible for the violent acts of 30 May 2012 or the ensuing confrontations.*"[1195] This argument adds nothing to Claimant's case. Punishing the responsible individuals after the conflict at the

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1191 *Mineros de Colquiri bloquean conani exigiendo la emisión del D.S. de Nacionalización*, Video (2012), **R-224**; La Patria, Mineros bloquean Conani exigiendo nacionalizar el 100% de mina Colquiri, *press article* of 13 June 2012, **C-134**.

1192 La Prensa, *Colquiri se convierte en un campo de batalla*, press article of 15 June 2012, **C-142** ("*Mineros asalariados y afiliados a la cooperativa 26 de Febrero se enfrentaron ayer con dinamita y palos por el control de la mina Colquiri, mientras el Gobierno volvió a convocarlos para dialogar en procura de encontrar una solución al conflicto que ya lleva dos semanas.*") (Unofficial translation: "*Mining employees and affiliates to the cooperativa 26 de Febrero clashed yesterday, [using] dynamite and sticks, over control of the Colquiri mine, while the Government again summoned them to discuss with a viewt to find a solution to the conflict that has already lasted two weeks.*").

1193 Mamani II, ¶¶ 49-52.

1194 Reply, ¶ 449.

1195 Reply, ¶ 453.

Mine was resolved would not change the course of the events that occurred during that conflict ending in the reversion, nor the fact that Bolivia's actions in those events were fully consistent with its obligations. It also would make no sense whatsoever if the objective was to restore peace among the local communities; as confirmed by Glencore International itself,[1196] punishment would simply rekindle the conflict. In any event, Claimant seeks no remedy in this arbitration for the alleged failure to punish.

787. In sum, Bolivia took all reasonable actions available to it to resolve the conflict at the Colquiri Mine. The use of force against the *cooperativistas*, on which Claimant insists, was neither reasonable nor legal. Bolivia complied with the full protection and security obligation.

5.2.3 Claimant Effectively Concedes That The Colquiri Mine Lease Adds Nothing To The Full Protection And Security Standard

788. Bolivia explained in its Statement of Defence that the Colquiri Mine Lease adds nothing to the protection Claimant was entitled to receive.[1197] Claimant argues in its Reply that "*[t]he obligations contained in the Colquiri Lease, specifically assumed by the State towards Glencore Bermuda's investment, buttress Bolivia's obligations under the Treaty to provide protection and security.*"[1198]

789. Although it officially submits a denial of Bolivia's position, Claimant effectively concedes that Bolivia was correct. It devotes no more than a page and a half to its allegation and does not respond to a single one of Bolivia's arguments.[1199] Instead, it simple rehashes its citations to Articles 9.2.1 and 12.2.1 of the Colquiri Mine Lease.[1200]

790. This is because Bolivia's arguments in its Statement of Defence demonstrated the following:

- Article 9.2.1 establishes an obligation of non-interference and not an obligation of protection against third-party actions;[1201]
- Any obligation of protection in Article 12.2.1 is identical to that of the Treaty because that Article explicitly states the applicable obligations are those from the

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1196 Email from Glencore International (Mr Hartmann) to Glencore International (Mr Eskdale) and Sinchi Wayra (Mr Capriles) of 22 May 2012, **C-110**, p. 2 See Section 2.7.3.3.

1197 Statement of Defence, ¶ 550.

1198 Reply, ¶ 456.

1199 Reply, ¶¶ 455-459.

1200 Reply, ¶ 457.

1201 Statement of Defence, ¶ 551.

legal provisions in force (and Claimant has not argued that Bolivian law establishes different obligations);[1202]

- If Article 12.2.1 establishes an independent standard, it could not be any more demanding than the Treaty standard because the mine lessor cannot be expected to act as an absolute guarantor against any third-party interference;[1203] and

- Claimant has not identified or demonstrated any actions that COMIBOL should have taken in response to the conflict at the Colquiri Mine.[1204]

791. Thus, Claimant's arguments regarding protection under the Colquiri Mine Lease should be summarily dismissed.

5.3 Although Its Allegations Are Redundant, Claimant Is Unable To Demonstrate That Bolivia Denied It Fair And Equitable Treatment At Any Times

792. The Statement of Defence established that Claimant's fair and equitable treatment and impairment clause claims are nothing but a repetition of its expropriation and full protection and security claims and should be dismissed outright.[1205] It also established that the allegations of fair and equitable treatment and impairment breaches are ultimately vacuous.

793. Claimant, in its Reply, defends and partly restates its fair and equitable treatment and impairment clause claims, now emphasizing the allegation that Bolivia acted in bad faith, rather than the allegation that Bolivia frustrated its legitimate expectations. (It does, however, effectively concede that the fair and equitable treatment claims are simply repetitions of its prior claims.[1206])

1202 Statement of Defence, ¶ 553 (citing Lease Agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**, Article 12.2.1).

1203 Reply, ¶ 554.

1204 Statement of Defence, ¶ 555. Indeed, Article 12.2.1 requires measures of protection against legal incursions, such as legal claims from third parties, not the physical disturbances at issue in the present dispute. It is clear that the applicable obligations are those from the legal provisions in force. In this regard, the Bolivian Civil Code confirms that, "*[e]l arrendador debe asumir defensa cuando un tercero pretende, judicial o extrajudicialmente, derechos sobre la cosa arrendada,*" as well as that "*[e]l arrendador no está obligado por molestias de tercero que no pretendan derechos, quedando a salvo la acción del arrendatario para actuar a nombre propio.*" Civil Code of Bolivia of 2 April 1976, **C-52**, Articles 694, 696. Article 9.1.3 of the Colquiri Mine Lease further confirms that responsibility for physical disturbances remained with Colquiri, as Colquiri was obligated to have insurance against, inter alia, damage and theft. Lease Agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**, Article 9.1.3.

1205 Statement of Defence, ¶ 557 et seq.

1206 Reply, ¶ 469 ("*Arbitral tribunals have consistently recognized that the same measures can constitute breaches of distinct obligations under a treaty.*").

794. Nevertheless, Claimant's fair and equitable treatment and impairment claims remain empty. Bolivia's conduct throughout the events at issue in this arbitration was in good faith, transparent and afforded due process (**Section 5.3.1**). Bolivia also respected Claimant's alleged legitimate expectations during these events (**Section 5.3.2**). Bolivia then carried out its Negotiations with Claimant in good faith (**Section 5.3.3**). Bolivia notes that Claimant gave no separate treatment to the impairment claims, and Bolivia similarly addresses them together with fair and equitable treatment.

5.3.1 Bolivia Acted In Good Faith, Transparently, And With Respect For Due Process During The Reversions

795. Claimant argues in the Reply that Bolivia's actions breached "*the obligation to act in good faith, in a manner that is non-arbitrary and transparent, and complies with the basic guarantees of due process.*"[1207] In this new formulation of its claim, Claimant now places central emphasis on good faith and Bolivia's alleged lack thereof, and only subsequently addresses transparency and due process.

796. Claimant's new articulation of this fair and equitable treatment claim is as wrong as the prior versions. The applicable standards of good faith, transparency and due process, and non-arbirary treatment are high and difficult to breach (**Section 5.3.1.1**). In any event, Bolivia acted consistently with these standards on any articulation of their contents (**Section 5.3.1.2**).

5.3.1.1 The Applicable Legal Standards Are Difficult To Breach

797. Although Bolivia clearly laid out the contents of the legal standards in its Statement of Defence, Claimant continues to misstate the standards for good faith, transparency and due process, and arbitrariness.

798. *First*, Claimant argues that, "*[w]hile it is not necessary that a State act in bad faith to trigger its international responsibility under the fair and equitable treatment provision, a State is obligated to act in good faith.*"[1208] Just sentences later, it argues that "*the obligation to act in good faith is at the heart of the concept of fair and equitable treatment.*"[1209] It is unclear why Claimant believes that good faith would be the heart of fair and equitable treatment if a violation of that standard does not require bad faith.

[1207] Reply, ¶ 471.

[1208] Reply, ¶ 472.

[1209] Reply, ¶ 472 (internal quotation marks omitted).

799. Regardless, Bolivia previously explained why Claimant cannot look to good faith as an independent source of obligation.[1210]

800. It is *jurisprudence constante* that the principle of good faith is not an independent source of obligation, but instead governs the creation and performance of independent obligations. The ICJ has repeatedly confirmed this fact, including in its *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *Border And Transborder Armed Actions (Nicaragua v. Honduras)*, and *Nuclear Tests (Australia/New Zealand v. France)* cases.[1211] In *Border and Transborder Armed Actions*, the ICJ held:

> *The principle of good faith is, as the Court has observed, 'one of the basic principles governing the creation and performance of legal obligations' (Nuclear Tests, I.C.J. Reports 1974, p. 268, para. 46; p. 473, para. 49); it is not in itself a source of obligation where none would otherwise exist.*[1212]

801. This holding, that good faith is not an independent source of obligations, was recently confirmed in the investment arbitration context by the *Mobil v. Canada* tribunal.[1213] Unsurprisingly, none of Claimant's cited cases suggest otherwise, either by reaching a decision purely on the basis of good faith or by otherwise confirming that good faith is an independent source of obligation.[1214] (Even if they did not, the jurisprudence constante of the ICJ is more authoritative.)

802. *Second*, Claimant adds on another iteration of its allegations about transparency and due process, asserting that the "*duty to ensure transparency and due process generally includes an obligation to forewarn an investor of an intended measure so as to allow the investor*

1210 Statement of Defence, ¶ 602.

1211 *Case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction of the Court and Admissibility of the Application*, ICJ, Judgment of 20 December 1988, **RLA-87**, ¶ 94; *Case concerning the land and maritime boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections*, ICJ, Judgment of 11 June 1998, **RLA-88**, ¶ 59; *Nuclear Tests Case (Australia v. France)*, ICJ, Judgment of 20 December 1974, **RLA-195**, ¶ 46; *Nuclear Tests Case (New Zealand v. France)*, ICJ, Judgment of 20 December 1974, **RLA-196**, ¶ 49.

1212 *Case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction of the Court and Admissibility of the Application*, ICJ, Judgment of 20 December 1988, **RLA-87**, ¶ 94.

1213 *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility of 13 July 2018, **RLA-197**, ¶ 168.

1214 See Reply, ¶¶ 471-472 (citing *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan* (ICSID Case No ARB/05/16) Award of 29 July 2008, **CLA-79**, ¶ 609; *Total SA v Argentine Republic* (ICSID Case No ARB/04/1) Decision on Liability of 27 December 2010, **CLA-103**, ¶¶ 109-110; *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18) Decision on Jurisdiction and Liability of 14 January 2010, **CLA-95**, ¶¶ 284-285; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (ICSID Case No ARB/05/22) Award of 24 July 2008, **CLA-78**, ¶ 602; *Sempra Energy International v Argentine Republic* (ICSID Case No ARB/02/16) Award of 28 September 2007, **CLA-71**, ¶ 298; *Waste Management, Inc v United Mexican States* (ICSID Case No ARB(AF)/00/3) Award of 30 April 2004, **CLA-155**, ¶ 138).

reasonable procedural recourse to contest it."[1215] Claimant's arguments about transparency are apparently folded into its due process discussion, as they are not independently addressed.

803. But Claimant relies once again, exclusively, on the same tribunals that interpret expropriation provisions requiring due process as a condition of expropriation.[1216] These irrelevant tribunals include the *Quiborax* tribunal (which, in addition, was not even addressing due process for the alleged expropriation in the cited text, but instead due process during a prior audit).[1217] By contrast, the Treaty contains no such requirement and instead establishes a separate obligation of posterior due process.[1218] Bolivia explained this in detail above.[1219] Thus, Claimant has no relevant authority in support of its allegations about due process.

804. A breach of due process requires a complete lack of any opportunity to present evidence. The *Genin* tribunal in fact found no breach of administrative due process despite the lack of any opportunity to be heard: "*no representative of EIB was invited to the session of the Bank of Estonia's Council that dealt with the revocation [of banking licenses] to respond to the charges brought by the Governor [...].*"[1220] The very recent *UAB* tribunal confirmed that even the denial of a hearing does not itself necessarily breach due process.[1221]

805. Claimant seeks support from *Gold Reserve* for its supposed entitlement to prior due process.[1222] However, the *Gold Reserve* tribunal did not address or decide the key issue in the present dispute: whether the *availability* of posterior due process, *i.e.*, "*an opportunity to be heard,*" satisfies the fair and equitable treatment standard. This issue was not put to the *Gold Reserve* tribunal.[1223] And the issue was certainly not put to that tribunal in a case lacking proof of ulterior motives for the reversion.[1224]

1215 Reply, ¶ 474.

1216 Reply, ¶ 474 (citing *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15) Award of 3 March 2010, **CLA-96**, ¶ 396; *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal of 2 October 2006, **CLA-64**, ¶ 435).

1217 Reply, ¶ 480 (citing *Quiborax SA and Non Metallic Minerals SA v Plurinational State of Bolivia* (ICSID Case No ARB/06/2) Award of 16 September 2015, **CLA-127**, ¶ 226).

1218 Treaty, **C-1**, Article 5(1).

1219 See Section 5.1.2.2.

1220 *Alex Genin and Others v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award of 25 June 2001, **RLA-198**, ¶ 364.

1221 *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award of 22 December 2017, **RLA-199**, ¶ 915.

1222 Reply, ¶ 481.

1223 The only issue put to the Gold Reserve tribunal was the claimant's alleged failure to seek recourse, not the availability of that recourse. *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award of 22 September 2014, **CLA-123**, ¶ 601.

1224 See Statement of Defence, ¶ 599.

806. *Third*, Claimant makes the allegation in passing that Bolivia's actions were arbitrary. However, it does not develop the legal standard applicable to allegations of arbitrariness. This is because the legal standard is difficult to satisfy. In fact, the high standard for arbitrary action is plain from Claimants' own legal authorities.[1225] The *Lemire v. Ukraine* tribunal specified that "*the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law.*"[1226] Thus, to make out their case, Claimants cannot merely apply the word "*arbitrary*" as a conclusory label, but must instead prove that the actions at issue involved prejudice, preference, or bias.

807. Meeting this burden is difficult. The substitution of prejudice, preference or bias for the rule of law must shock or surprise a sense of juridical propriety. As Claimant's own authority *Siemens* affirms, "*the definition in ELSI is the most authoritative interpretation of international law.*"[1227] The famous conclusion of the ICJ's *ELSI* judgment, as quoted in *Crystallex*, was that "*[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. […] It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.*"[1228]

808. Satisfying this burden is still more difficult when it comes to second-guessing legitimate State legal, regulatory, or control measures. As the *S.D. Myers* tribunal concluded, the determination "*must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.*"[1229] The *Cargill* tribunal added that, "*an actionable finding of arbitrariness must not be based simply on a tribunal's determination that a domestic agency or legislature incorrectly weighed the various factors, made legitimate compromises between disputing*

1225 Reply, ¶ 467(a) (citing *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18) Decision on Jurisdiction and Liability of 14 January 2010, **CLA-95**, ¶ 284).

1226 *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18) Decision on Jurisdiction and Liability of 14 January 2010, **CLA-95**, ¶ 263.

1227 *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Award of 6 February 2007, **CLA-67**, ¶ 318.

1228 *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award of 4 April 2016, **CLA-130**, ¶ 577 (citing *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment of 20 July 1989, **RLA-72**, ¶ 128).

1229 *S.D. Myers, Inc. v. Government of Canada*, NAFTA-UNCITRAL, Partial Award of 13 November 2000, **RLA-101**, ¶ 263 (emphasis added). See also *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award of 24 March 2016, **RLA-200**, ¶ 553 (citing *S.D. Myers, Inc. v. Government of Canada*, NAFTA-UNCITRAL, Partial Award of 13 November 2000, **RLA-101**); C. McLachlan et al., *International Investment Arbitration: Substantive Principles*, 2nd ed. 2017, **RLA-71**, ¶ 7.212.

constituencies, or applied social or economic reasoning in a manner that the tribunal criticizes."[1230]

809. In this regard, Claimant seems to allege that it is arbitrary to "*exercis[e] a right or us[e] a legal instrument for reasons other than those for which the right or the legal instrument was created.*"[1231] But none of its cited authorities contest the very high standard for making out such an allegation. Three of the cited authorities did not address the difficulty of meeting the standard[1232] and one did not even analyse an alleged misuse of a legal right or instrument.[1233] Indeed, the only one of the cited authorities to address the issue, *Siemens*, confirms that the *ELSI* standard applies to such allegations.[1234]

5.3.1.2 Bolivia Complied With The Good Faith, Transparency, and Due Process Standards

810. Claimant is equally incorrect that Bolivia acted contrary to good faith, transparency, and due process (or any other element of the fair and equitable treatment standard).[1235] It proposes that the reversions were contrary to due process and transparency for failure of prior notice and hearing and they were contrary to transparency and good faith because the stated justifications were pretexts.

811. *First*, Bolivia afforded Claimant all the process that was due by making posterior remedies available before its courts. As explained above, Claimant could have pursued administrative remedies or various constitutional actions before the courts if it considered its rights had been violated.[1236] This is precisely what the Treaty required that Bolivia provide. However, Claimant never availed itself of these remedies but instead elected, after waiting almost 10 years, to have its complaints heard by this Tribunal. And, given that the process afforded was consistent with the plain terms of the Treaty, Bolivia was fully transparent. It cannot be a breach of transparency to act on the express terms of an investment treaty.

1230 *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Award of 29 February 2008, **RLA-80**, ¶ 292 (emphasis added).

1231 Reply, ¶ 473.

1232 Reply, ¶ 473 (citing *Saipem SpA v The People's Republic of Bangladesh* (ICSID Case No ARB/05/7) Award of 30 June 2009, **CLA-182**, ¶ 160; *Flemingo DutyFree Shop Private Limited v Poland* (UNCITRAL) Award (Redacted) of 12 August 2016, **CLA-223**, ¶¶ 549-560; *Ronald S Lauder v Czech Republic* (UNCITRAL) Final Award of 3 September 2001, **CLA-147**, ¶ 232).

1233 *Frontier Petroleum Services Ltd v Czech Republic* (UNCITRAL) Final Award of 12 November 2010, **CLA-102**, ¶ 300.

1234 *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Award of 6 February 2007, **CLA-67**, ¶ 318.

1235 Reply, ¶¶ 476 and 482.

1236 See Section 5.1.2.2.

812. *Second*, Bolivia acted transparently and in good faith, as the justifications for the three reversions were not pretexts.

813. One, the Tin Smelter was reverted due to the irregularities in its privatization process. Allied Deals acquired the smelter through a bid that violated the Terms of Reference and for an unduly low price. Not only Paribas had set a low minimum price for the tender, but the Asset was also sold with an inventory that was worth US$ 2 million more than Allied Deal's offer.[1237] After Comsur, controlled by Sánchez de Lozada, acquired the Smelter, the calls for its reversion due to these irregularities increased, [redacted] Glencore International was aware of the risk,[1239] and was reluctant to disclose information on the transaction, both to Bolivia and in these proceedings.[1240] As discussed above, Claimant's contention that the Smelter was reverted for profit completely disregards that the plant needed urgent investments, never carried out by Sinchi Wayra.

814. Two, the Antimony Smelter was reverted due to Glencore International's violation of the contractual obligation to put the plant into production, established both in the Contract and in the Terms of Reference of the tender process.[1241] Claimant's assertions that the plant was reversed because of the Tin Stock is preposterous, given that Bolivia had no way of knowing the stock existed, there was no tin shortage, and the amount of concentrates in the stock would never remedy an alleged shortage.[1242]

815. Three, the Colquiri Mine Lease was reverted due to the conflict between the workers and the *cooperativistas* in the Colquiri Mine. Bolivia negotiated in good faith with both the workers

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1237 See Section 2.4.1; Statement of Defence, ¶ 77. As explained in Section 2.4.1 above, the conciliation carried out between EMV and CMV did not address the "*estaño metálico en circuito, concentrados, materiales y repuestos*" transferred to Allied Deals. See Supreme Decree No 29.026 of 7 February 2007, **C-20**, p. 5 (Unofficial translation: "*metallic tin in the pipeline, concentrate, materials and parts*").

1238 [redacted].

1239 Glencore inter office correspondence from Mr Eskdale to Mr Strothotte and Mr Glasenberg of 20 October 2004, **C-196**, p. 5.

1240 See Section 2.5.3.

1241 Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**, Articles 2.3.1 and 2.7. See Section 2.7.2.

1242 Villavicencio II, ¶ 16.

and the *cooperativistas* on behalf of Glencore International's interests, but its efforts were frustrated by the company's own actions.[1243]

816. Sinchi Wayra executed the Rosario Agreement, assigning the richest vein in Colquiri to the *cooperativistas.* Contrary to what Claimant affirms,[1244] the Agreement could not solve the conflict, since the miners would have opposed (as they oppose today, whenever the *cooperativistas* attempt to renegotiate and gain access to more areas of the mine) being excluded from the Colquiri Mine's most profitable vein.[1245] Instead, the agreement led to more violent confrontations and complicated the negotiations with the *cooperativistas*, who would not take another offer and even considered demanding the entire mine.[1246] It was at this point that the government stepped in to negotiate with both miners and *cooperativas* and the executed agreement was the foundation of the Mine Lease Reversion Decree.[1247]

817. In this regard, the *Urbaser* tribunal explains that "*[t]he investor is and must be aware of the State's commitment to deal with situations and problems that may emerge over the time and were impossible to anticipate [...].*"[1248] This decisively confirms that the reversion of the Colquiri Mine Lease was consistent with fair and equitable treatment.

818. Claimant wrongfully affirms that Bolivia had already planned to reverse the mine before the conflicts escalated, specifically during the 10 May 2012 meeting with the Huanuni union.[1249] As discussed above, the minutes of that meeting confirm that it was not related to the Colquiri Mine, and that the MAS government had already stated that it would not revert any mines due to the employed miners' opposition.[1250] Bolivia intervened to put an end to the violence at Colquiri, and succeeded in doing so: there has been no violent conflicts at the mine since 2012.[1251]

1243 See Section 2.7.3.4.

1244 Reply, ¶ 487.

1245 Córdova, ¶ 70.

1246 As Claimant itself admits. Reply, ¶ 137.

1247 Agreement between the Government of Bolivia, COB, Fencomin, FEDECOMIN-LP, FSTMB, Central de Cooperativas de Colquiri, and Sindicato Mixto de Trabajadores Mineros de Colquiri of 19 June 2012, **R-18**; Supreme Decree No 1.264 of 20 June 2012, **C-39**.

1248 *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, **RLA-86**, ¶ 628.

1249 Reply, ¶ 489.

1250 See Section 2.7.3.2.

1251 Mamani II, ¶ 63.

819. In conclusion, Bolivia's actions regarding the Assets were in full compliance with the Treaty requirements of good faith, transparency, and due process (as well as any other protection standard).

5.3.2 Bolivia Satisfied Glencore Bermuda's Legitimate Expectations At All Times

820. Claimant argues that Bolivia frustrated its "*legitimate expectation that (i) its investments would not be taken by the State in a manner that was in violation of basic due process guarantees; (ii) its investments would not be taken by the State without the provision of just, effective, and prompt compensation; (iii) should Bolivia decide to take over its investments, it would do so in compliance with domestic law; and (iv) Bolivia would protect the Colquiri Mine from the violent invasion of the cooperativistas, as provided in the Colquiri Lease.*"[1252]

821. But, even if Claimant had the expectations it now alleges, they would not have been legitimate. This is for three reasons.

822. *First*, the *Minnotte* tribunal observed that "*an international business operator*" such as Claimant must be "*deemed to be a competent professional [...].*"[1253] As even the *Total* tribunal—Claimants' proffered authority on legitimate expectations—held, "*[i]n making its investment Total properly considered (or should have considered) the totality of the relevant legal regime as it existed in 2001 [...].*"[1254] The *ECE* tribunal emphasized that "*the expectations of a given investor, however legitimate, do not exist in isolation, and removed from the factual circumstances of the specific situation.*"[1255] Claimant had no response to these commonsense points.

823. Claimant purchased the Assets from Sánchez de Lozada, the former president of Bolivia who had put in place highly unpopular neoliberal policies, including privatizations. He had acquired the previously State-owned Assets between his two terms in office, and paid unreasonably low prices for the three of them: some US$ 6 million for the Tin Smelter,[1256]

1252 Reply, ¶ 493.

1253 *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award of 16 May 2014, **RLA-17**, ¶ 194.

1254 *Total SA v Argentine Republic* (ICSID Case No ARB/04/1) Decision on Liability of 27 December 2010, **CLA-103**, ¶ 149.

1255 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic*, PCA Case No. 2010-5, Award of 19 September 2013, **RLA-855**, ¶ 4.765.

1256 Claimant has not disputed the transaction price reported by the press. See La Patria, *Liquidador de Allied Deals pidió $US 6 millones por Vinto y Huanuni*, press article of 2 June 2002, **R-149**; La Prensa, *Comsur será operadora de Vinto, es dueña del 51% de las acciones*, press article of 6 June 2002, **R-150**. [redacted]

US$ 1.1 million for the Antimony Smelter,[1257] and only 3% of the net income in royalties for the Colquiri Mine Lease (plus the commitment of investing only US$ 2 million dollars in the Mine).[1258]

824. During his second term in office, Sánchez de Lozada attempted to quash protests against neoliberal policies implemented by his Government. The confrontation between the army and the protesters left over 60 dead and 300 injured.[1259] Claimant acquired these Assets barely a year after Sánchez de Lozada had renounced the presidency and fled the country in disgrace, and when legal proceedings against him (which included efforts to seize his assets) had already been initiated.[1260]

825. Claimant also purchased the Assets when Bolivia was in the midst of profound social and political transformations.[1261] The country had undergone significant changes starting in October 2003, when the protests that forced Sánchez de Lozada's resignation took place. Evo Morales' MAS had been a rising political force in the country for some years, opposing the neoliberal policies that were at the core of the privatizations,[1262] and a new constituent assembly had been suggested by the interim president Carlos Mesa, who specifically pointed out the need to debate the fate of Bolivian natural resources.[1263]

826. Claimant was aware of these risks, and took several measures to prevent them. [redacted] The Assets were transferred to Glencore Bermuda to secure treaty protection.[1266] Finally, Claimant was reluctant to provide proper information to the Bolivian authorities on Sánchez de Lozada's

[redacted]

1257 Notarization of the sale and purchase agreement of the Vinto Antimony Smelter between the Ministry of External Trade and Investment, Comibol, Empresa Minera Colquiri and Compañía Minera Del Sur SA of 11 January 2002, **C-9**.

1258 Lease Agreement for the Colquiri Mine between the Ministry of External Trade and Investment, Comibol, Colquiri SA and Comsur of 27 April 2000, **C-11**.

1259 BBC Mundo, *La guerra del gas se cobra otra vida*, press article of 11 October 2003, **R-160**.

1260 Constitutional Court of Bolivia, Decision No. 019/2005 (full bench) of 2 March 2005, **R-311**.

1261 See Section 2.5.2.

1262 Fundación Boliviana para la Capacitación Democrática y la Investigación, "*Opiniones y análisis sobre las elecciones presidenciales de 2002*," 2002, **R-163**, pp. 49-50.

1263 Speech of Mr Carlos Mesa Gibert before the Bolivian Congress of 17 October 2003, **R-162**, p. 3.

1264 See Section 2.5.3.

1265 [redacted]

1266 See Section 2.5.4.

participation in the sale of the Assets, and showed the same reluctance to disclose in these proceedings.[1267]

827. Under these circumstances, no expectation that Claimant might have had regarding the future treatment of the Assets would have been legitimate.

828. *Second*, as Bolivia explained, it is a well-established rule that the investor can have no legitimate expectations unless it had expectations that it relied upon to make the investment.[1268] The *Crystallex* tribunal restated the rule: "*[a] legitimate expectation may arise in cases where the Administration has made a promise or representation to an investor as to a substantive benefit, on which the investor has relied in making its investment, and which later was frustrated by the conduct of the Administration.*"[1269]

829. Bolivia also observed that Claimant has submitted no evidence, testimonial or documentary, confirming that it held any of these expectations.[1270] Mr Eskdale's testimony is of no support because he has never been affiliated with Glencore Bermuda, either as employee or director. (It would be the apex of unfairness not to pierce Glencore Bermuda's corporate veil for nationality purposes but to do so for the purpose of legitimate expectations.) Thus, Claimant has failed entirely to substantiate its supposed legitimate expectations.

830. It is surprising, to say the least, that Claimant puts forth no response to this problem, clearly identified in Bolivia's Statement of Defence. This is because there is no response. Claimant concedes that its legitimate expectations claims are manifestly unfounded.

831. *Third*, Claimant could not have acquired any legitimate expectations either from contracts or from the law in force at the time of its investment. Thus, the Tin Smelter Contract, the Antimony Smelter Contract, the Colquiri Mine Lease, the Investment Law, the Expropriation Law, the 1967 and 2009 Constitution, and the Adminsitrative Procedure Law, the alleged

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1267 See Section 2.5.3.

1268 Statement of Defence ¶ 566 (citing *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award of 4 April 2016, **CLA-130**, ¶ 547; *OKO Pankki Oyj and Others v. Republic of Estonia*, ICSID Case No. ARB/04/6, Award of 19 November 2007, **RLA-79**, ¶ 247; *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Award of 29 February 2008, **RLA-80**, ¶ 459; *Ioan Micula and others v Romania* (ICSID Case No ARB/05/20) Award of 11 December 2013, **CLA-119**, ¶ 672).

1269 *Crystallex International Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/2) Award of 4 April 2016, **CLA-130**, ¶ 547 (emphasis added).

1270 Statement of Defence, ¶¶ 562, 567.

sources of Claimant's expectations in its Reply,[1271] could not have actually given rise to legitimate expectations.

832. *In limine*, even if these instruments could give rise to legitimate expectations, those expectations would not have been breached for the reasons already stated above in detail.[1272] Claimant does not advance any new or separate grounds for why Bolivia's conduct would be contrary to the expectations arising from those instruments.

833. One, Bolivia explained that contracts, such as the Colquiri Mine Lease, do not and cannot give rise to legitimate expectations, lest the fair and equitable treatment clause would become a broad umbrella clause.[1273] As Professor Schreuer put it, "*the FET standard would be nothing less than a broadly interpreted umbrella clause. [...] It cannot be assumed that the umbrella clause adds nothing to the FET standard.*"[1274] This position is confirmed by *Parkerings*, *Hamester*, *Bayindir*, and *Impregilo*, and *SAUR*, among others.[1275]

834. The very manner in which Claimant attempts to argue away this authority underscores that Bolivia is correct.

835. Claimant once again does violence to the words of Professor Schreuer through two selective quotations.[1276] The first quotation Claimant puts forward is his characterisation of an argument that he then criticises in the above passage. This is the equivalent of taking a tribunal's characterization of a party's argument and passing it off as the words of the tribunal:

> *Taken to its logical conclusion this argument would put all agreements between the investor and the host State under the protection of the FET standard. If this position*

1271 Reply, ¶¶ 494-495.

1272 Regarding the alleged obligation under the Constitution and Expropriation to provide prior compensation, see Section 5.1.2.1(a) above. Regarding the alleged obligation under the Administrative Disputes Law, see Section 5.1.2.2 above. Regarding the alleged expectation that Bolivia would submit the disputes to ICC arbitration, see Section 4.6 above. Regarding the alleged expectation that Bolivia would provide protection pursuant to the Colquiri Mine Lease, see Section 5.2.3 above.

1273 Statement of Defence, ¶¶ 572-576.

1274 C. Schreuer, "Fair and Equitable Treatment (FET): Interactions with Other Standards," in C. Ribeiro (ed.), *Investment Protection and the Energy Charter Treaty*, 2008, **RLA-81**, p. 90.

1275 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, **RLA-83**, ¶ 344; *Gustav F W Hamester GmbH & Co KG v. The Republic of Ghana*, ICSID Case No. ARB/07/24, Award of 18 June 2010, **RLA-84**, ¶¶ 334-337; *Bayindir Insaat Turizm Ticaret Ve Sayani AŞ v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Award of 27 August 2009, **CLA-90**, ¶ 180; *Impregilo SpA v Argentine Republic* (ICSID Case No ARB/07/17) Award of 21 June 2011, **CLA-105**, ¶¶ 293-294; *SAUR International SA v. The Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability of 6 June 2012, **RLA-82**, ¶ 483.

1276 Reply, ¶ 505.

were to be accepted, the FET standard would be nothing less than a broadly interpreted umbrella clause.[1277]

836. In deploying the second quotation from Professor Schreuer, Claimant omits the very next sentence following the one quoted (underlined in the below), changing entirely the meaning of Professor Schreuer's words:

> *A look at practice shows that tribunals seem to agree that a failure to perform a contract may amount to a violation of the FET standard. But it is doubtful whether any violation of a contractual obligation by a host State or one of its entities automatically amounts to a violation of the FET standard.*[1278]

837. Claimant's quotation from *Noble Venture* is similarly misleading.[1279] That tribunal is simply making the (unusual) argument that fair and equitable treatment is nothing more than the sum of several specific obligations listed in the same article of the investment treaty, including the treaty's umbrella clause:

> *Considering the place of the fair and equitable treatment standard at the very beginning of Art. II(2), one can consider this to be a more general standard which finds its specific application in inter alia the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor. As demonstrated above, none of those obligations or standards has been breached.*[1280]

838. Claimant then attempts a series of conceptual critiques of Bolivia's position that are obviously flawed. For the sake of good order, here are Bolivia's responses:

- Claimant says that "*while Bolivia itself recognizes that the agreements included a number of specific guarantees, it now claims—contradicting its own position—that the specific guarantees provided in a contract cannot constitute legitimate expectations.*"[1281] But there is quite obviously nothing inconsistent in distinguishing between contractual commitments and non-contractual assurances;

- Claimant says that "*it is clear that Bolivia confuses the principle of legitimate expectations with the issue of whether a mere contractual breach can constitute a*

1277 C. Schreuer, "Fair and Equitable Treatment (FET): Interactions with Other Standards," in C. Ribeiro (ed.), *Investment Protection and the Energy Charter Treaty*, 2008, **RLA-81**, p. 89-90.

1278 C. Schreuer, "Fair and Equitable Treatment (FET): Interactions with Other Standards," in C. Ribeiro (ed.), *Investment Protection and the Energy Charter Treaty*, 2008, **RLA-81**, p. 90 (emphasis added).

1279 Reply, ¶ 506.

1280 *Noble Ventures Inc v Romania* (ICSID Case No ARB/01/11) Award of 12 October 2005, **CLA-59**, ¶ 182 (emphasis added).

1281 Reply, ¶ 505.

treaty breach."[1282] Of course Bolivia does not. If contractual provisions by themselves could give rise to legitimate expectations, then every breach of a contract would be a breach of a treaty.

839. Finally, Claimant attempts to rebut Bolivia's arbitral authority on the grounds that the cited cases "*discuss whether the violations of the contracts can constitute violations of treaties*"[1283] (and find that the mere breach of a contract does not *ipso facto* result in a treaty breach). But this is precisely what is at stake here. If a contract gives rise to legitimate expectations, then the breach of that contract will automatically establish a breach of the treaty. Bolivia's cases are on point.

840. Thus, Claimant could have no legitimate expectations on the basis of the Colquiri Mine Lease. It has no claim for a breach of legitimate expectations on this basis.

841. Two, as Bolivia previously argued, no legitimate expectation can arise from general legislation such as the investment law or other parts of the legal framework.[1284] The *PSEG* tribunal put it bluntly: "*[l]egitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed.*"[1285] This rule is further confirmed by, *inter alia*, the *ECE* and *Philip Morris* tribunals.[1286]

842. Indeed, if legitimate expectations could arise from the contents of general legislation or regulation or the broader legal and business framework, they would impermissibly impinge on the sovereign right to legislate and regulate as well as to amend that legislation and regulation.[1287] This right has been consistently recognized by tribunals, including *AES*,[1288]

1282 Reply, ¶ 506.

1283 Reply, ¶ 507.

1284 Statement of Defence, ¶ 580.

1285 Statement of Defence, ¶ 580 (citing *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award of 19 January 2007, **CLA-66**, ¶ 241).

1286 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic*, PCA Case No. 2010-5, Award of 19 September 2013, **RLA-85**, ¶ 4.762; *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, **RLA-43**, ¶ 426.

1287 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, **RLA-102**, ¶¶ 367, 371; See also *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, **RLA-43**, ¶ 426.

1288 *AES Summit Generation Limited and AES-Tisza Erömü Kft v Republic of Hungary* (ICSID Case No ARB/07/22) Award of 23 September 2010, **CLA-100**, ¶ 9.3.29 ("*[a] legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts.*").

Rusoro,[1289] and *Lemire*,[1290] as well as *Micula*,[1291] *EDF*,[1292] *Parkerings*,[1293] *Philip Morris*,[1294] *Total*,[1295] and *UAB*.[1296]

843. Claimant's strategy to respond to this jurisprudence is to confuse the sources from which legitimate expectations can arise with the sorts of actions that can frustrate legitimate expectations. This is obviously a flawed argument. A State could, of course, promise not to change general legislation, as it would through a promise of stabilisation.

844. Thus, while the *ECE* tribunal clearly confirms that legitimate expectations must "*normally be based on specific assurances,*" it concludes that the "*operation of the State's administrative and legal system as a whole*" may frustrate those expectations from specific assurances.[1297] *Philip Morris* confirms that "*legitimate expectations depend on specific undertakings and representations made by the host State,*"[1298] a fact Claimant tries to distinguish on the grounds that *Philip Morris* held that an "*enactment of a general public regulation*" did not frustrate those expectations.[1299] And of course expectations from the promises required in *PSEG* could perfectly well be frustrated by "*inconsistent State action, arbitrary modification of the regulatory framework or endless normative changes [...].*"[1300]

845. Claimant argues that "*general guarantees incorporated in the domestic legislation can constitute a promise to foreign investors as a class.*"[1301] In support, it cites three cases from

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1289 *Rusoro Mining Limited v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/12/5) Award of 22 August 2016, **CLA-131**, ¶ 525.

1290 *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18) Award of 28 March 2011, **CLA-104**, ¶ 285.

1291 *Ioan Micula and others v Romania* (ICSID Case No ARB/05/20) Award of 11 December 2013, **CLA-119**, ¶ 666.

1292 *EDF (Services) Limited v Romania* (ICSID Case No ARB/05/13) Award of 8 October 2009, **CLA-184**, ¶ 218

1293 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, **RLA-83**, ¶ 332.

1294 *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, **RLA-43**, ¶ 422.

1295 *Total SA v Argentine Republic* (ICSID Case No ARB/04/1) Decision on Liability of 27 December 2010, **CLA-103**, ¶ 115.

1296 *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award of 22 December 2017, **RLA-199**, ¶ 836.

1297 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic*, PCA Case No. 2010-5, Award of 19 September 2013, **RLA-85**, ¶¶ 4.762, 4.764.

1298 *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, **RLA-43**, ¶ 426.

1299 Reply, ¶ 504 (citing *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, **RLA-43**, ¶ 418).

1300 Reply, footnote 1219 (citing *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award of 19 January 2007, **CLA-66**, ¶¶ 240, 246-256).

1301 Reply, ¶ 500.

the Argentine financial crisis where Argentina had done its utmost to induce expectations in foreign investors.[1302] As the *Enron* tribunal observed, "*[g]iven the scope of Argentina's privatization process, its international marketing, and the statutory enshrinement of the tariff regime, Enron had reasonable grounds to rely on such conditions.*"[1303] They also cite *Binder*. However, *Binder* does not refer to the potential sources of legitimate expectations in Claimant's cited passage, but instead to the actions that can breach them;[1304] that tribunal's view is that protected expectations must arise from the State's "*written or oral representations, undertakings or other acts [...].*"[1305]

846. The list of documents in *Frontier Petroleum* as being capable of founding a legitimate expectation – "*legislation, treaties, decrees, licenses, and contracts*" – upon which Claimant relies,[1306] is *obiter dictum* subject to no meaningful analysis by the tribunal in that case, which engages in a discussion of legitimate expectations, principally, to establish that they are generated at the time of the investment.[1307]

847. In a last attempt to shore up its argument, Claimant cites to the following passage from an book chapter by Prof. Schreuer. But it carefully omits a key qualification that effectively undercuts Claimant's entire reliance on the passage (showing that, if anything the passage supports Bolivia's position).[1308] The underlined part of the passage is what Claimant omitted:

> *Compliance with domestic law would be the primary responsibility of domestic enforcement mechanisms and not a matter for international adjudication. On the*

1302 *Enron Corporation and Ponderosa Assets LP v Argentine Republic* (ICSID Case No ARB/01/3) Award of 22 May 2007, **CLA-68**, ¶ 265; *Total SA v Argentine Republic* (ICSID Case No ARB/04/1) Decision on Liability of 27 December 2010, **CLA-103**, ¶ 333; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability of 30 July 2010, **RLA-47**, ¶ 227 ("*In the instant cases, it should be emphasized that the expectations of the Claimants with respect to their investment in the water and sewage system of Buenos Aires did not suddenly and surprisingly come into their minds the way Athena sprang from the head of Zeus. Argentina through its laws, the treaties it signed, its government statements, and especially the elaborate legal framework which it designed and enacted, deliberately and actively sought to create those expectations in the Claimants and other potential investors in order to obtain the capital and technology that it needed to revitalize and expand the Buenos Aires water and sewage system.*").

1303 *Enron Corporation and Ponderosa Assets LP v Argentine Republic* (ICSID Case No ARB/01/3) Award of 22 May 2007, **CLA-68**, ¶ 265.

1304 Reply, ¶ 500 (citing *Binder v Czech Republic* (UNCITRAL) Final Award of 15 July 2011, **CLA-196**, ¶ 443).

1305 *Binder v Czech Republic* (UNCITRAL) Final Award of 15 July 2011, **CLA-196**, ¶ 444.

1306 Reply, ¶ 501.

1307 *Frontier Petroleum Services Ltd v Czech Republic* (UNCITRAL) Final Award of 12 November 2010, **CLA-102**, ¶¶ 285-288.

1308 The same is true for the cases cited in footnote 1214 of Claimant's Reply. See *GAMI Investments, Inc v The Government of the United Mexican States* (UNCITRAL) Final Award of 15 November 2004, **CLA-158**, ¶ 97 ("*A failure to satisfy requirements of national law does not necessarily violate international law.*"); *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award of 19 January 2007, **CLA-66**, ¶ 249 (not even suggesting that a breach of domestic law is *ipso facto* a breach of international law: "*Such inconsistent acts might be unlawful under Turkish law, but in light of the provisions of the Treaty they are also in breach of the standard of fair and equitable treatment.*").

> *other hand, non-observance of important aspects of domestic law may well affect the transparency and stability of the investment's regulatory framework and may therefore be contrary to the FET standard.*[1309]

848. Thus, Claimant has failed to rebut that it could have any legitimate expectations from the regulatory framework, including the Investment Law. This part of its legitimate expectations claim fails for this reason as well.

849. Three, Claimant finally argues that "*an investor is entitled to expect that a State will act consistently, i.e. without arbitrarily revoking any preexisting decisions, that it will properly apply any relevant legal instruments in conformity with the function usually assigned to them and not expropriate the investor's property without adequate compensation.*"[1310] This is wrong.

850. Claimant's references to *Tecmed* and *ADC* do not support this position, even on their face. Those authorities make nothing more than the somewhat circular point that Claimant had a legitimate expectation to conduct consistent with the other investment treaty requirements (*i.e.*, non-arbitrariness, transparency, fair treatment, etc.). And, of course, Bolivia has complied with those requirements, as explained in detail above. This makes the argument an irrelevant restatement of the remainder of Claimant's case.

5.3.3 Bolivia Acted In Good Faith During the Negotiations Following The Reversions

851. In its Statement of Defence, Bolivia demonstrated that the Negotiations following the reversions were neither negligent nor inconsistent. Claimant does not respond. Instead, Claimant now puts forth the new claim that "*Bolivia did not negotiate in good faith a fair standard of compensation for the expropriated Assets [...].*"[1311] Because the reliance on a breach of good faith regarding the standard of compensation is a new argument, it should be summarily rejected.

852. However, it is now Claimant's view that international law requires good faith negotiations following expropriation.[1312] However, there is no international obligation to negotiate following reversions (or following the exercise of police powers). This is for the obvious

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[1309] C. Schreuer, "Fair and Equitable Treatment (FET): Interactions with Other Standards," in C. Ribeiro (ed.), *Investment Protection and the Energy Charter Treaty*, 2008, **RLA-81**, p. 31 (emphasis added).

[1310] Reply, ¶ 499 (internal quotations omitted).

[1311] Reply, Section V.C.4.

[1312] Reply, ¶ 509.

reason that negotiations are aimed at providing compensation, and no compensation is due following measures other than expropriation.

853. Claimant insists that it is not proposing that the standard for unfair negotiations is whether or not they were a "*roller-coaster ride*."[1313] However, it is unable to articulate any other concrete standard for when negotiations breach the Treaty. Instead, it simply relies on the abstractions that the negotiations must be "*undertaken in good faith, fairly, even-handedly, and transparently.*"[1314]

854. Nevertheless, Bolivia engaged in good faith negotiations to resolve the dispute amicably. Indeed, Claimant negotiated with Bolivia for almost 10 years following the issuance of the Tin Smelter Reversion Decree, for over 7 years after the Antimony Smelter Reversion Decree, and for over 5 years after the Colquiri Mine Lease Reversion Decree.[1315] Claimant's contention that Bolivia did not negotiate in good faith is, therefore, absurd.

855. Due to the lack of credibility of these allegations, Claimant has opted to breach the confidentiality agreement[1316] that protected the Parties' negotiations in an attempt to justify its assertions. Despite Claimant's conduct, Bolivia is still bound by strict confidentiality obligations and cannot disclose details of the discussions held with Glencore International. In any case, it is hardly credible that Negotiations that lasted almost 10 years were carried out in bad faith.

856. Negotiations cannot breach the Treaty under such circumstances. Claimant's authorities are consistent. In neither *Saluka* nor *PSEG* did the investor's actions demonstrate that the negotiations were carried out in good faith through 10 years of participation in negotiations.[1317] This fact speaks for itself. Nor did the investor in either of those cases selectively breach the confidentiality of settlement negotiations in an opportunistic attempt to characterize the course of the negotiations.[1318]

1313 Reply, ¶ 510.

1314 Reply, ¶ 510.

1315 See Section 2.8 above.

1316 Minutes of First Meeting of Negotiations between Bolivia and Sinchi Wayra S.A of 6 October 2008, **R-231**, Section (c).

1317 See generally *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award of 17 March 2006, **CLA-62**; *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award of 19 January 2007, **CLA-66**.

1318 See generally *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award of 17 March 2006, **CLA-62**; *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award of 19 January 2007, **CLA-66**.

857. In any event, *Saluka* and *PSEG* are equally inapplicable for the reasons set forth in the Statement of Defence. Claimant does not even attempt to rehabilitate *Saluka* following Bolivia's observation in the Statement of Defence that "*the [Saluka] tribunal concluded that the bias against the investor manifested itself in a lack of transparency and a refusal of adequate communication.*"[1319]

858. In its attempt to rehabilitate *PSEG*, Claimant suggests that Bolivia did not cite to the right part of the award when it argued that the background of constant legislative changes was essential to the *PSEG* tribunal's conclusions on negotiations.[1320] But the *PSEG* tribunal identifies this essential background of constant legislative changes in the very passage from which Claimant draws its "*roller-coaster*" standard for negotiations.[1321] And the *PSEG* tribunal makes it clear that the negotiations were negligent specifically because "*the administration again failed to address the consequences of such [legislative] changes in the negotiations [...].*"[1322]

859. In sum, the Tribunal cannot rely on Claimant's selective breach of confidentiatility to conclude that Bolivia subjected it to a "*roller-coaster*" ride and hence a breach of fair and equitable treatment. There was no "*roller-coaster*" ride and no fair and equitable treatment breach.

6. REQUEST FOR RELIEF

860. In light of the above, and reserving its right to complement, develop or modify its position at a further, appropriate stage of these proceedings, Bolivia respectfully requests that the Tribunal declare:

a. That it lacks jurisdiction over Claimant's claims; and

b. That Claimant's claims are, in any event, inadmissible; and

861. Order:

a. Claimant to reimburse Bolivia for all the costs and expenses incurred in this arbitration, including with interest due and payable from the date Bolivia incurred such costs until the date of full payment; and

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1319 Statement of Defence, ¶ 610 (citing *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award of 17 March 2006, **CLA-62**, ¶¶ 407, 420-422).

1320 Reply, ¶ 512.

1321 *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award of 19 January 2007, **CLA-66**, ¶ 250.

1322 *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey* (ICSID Case No ARB/02/5) Award of 19 January 2007, **CLA-66**, ¶ 251.

b. Such other relief as the Tribunal may consider appropriate.

862. If, *par impossible*, the Tribunal were to find that it has jurisdiction over Claimant's claims and that such claims are admissible, Bolivia respectfully requests that the Tribunal declare:

a. That Bolivia complied with its international obligations under the Treaty and international law;

b. That all of Claimant's claims are thus dismissed; and

863. Order:

a. Claimants to reimburse Bolivia for all the costs and expenses incurred in this arbitration, including with interest due and payable from the date Bolivia incurred such costs until the date of full payment; and

b. Such other relief as the Tribunal may consider appropriate.

Respectfully submitted this 24th day of October 2018

Pablo Menacho Diederich
Procuraduría General del Estado

Dechert (Paris) LLP

Dechert (Paris) LLP