

PCA CASE N° 2016-39/AA641

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

GLENCORE FINANCE (BERMUDA) LTD

Claimant

-v-

PLURINATIONAL STATE OF BOLIVIA

Respondent

**CLAIMANT’S REJOINDER ON JURISDICTIONAL
OBJECTIONS**



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GLOSSARY

Term	Definition
<i>10 May 2012 Agreement</i>	Agreement between the COB, the FSTMB, the Huanuni Union, the Vice President of Bolivia, the Minister of Mining and the Minister of Economy, 10 May 2012
<i>1967 Constitution</i>	Political Constitution of the State of Bolivia, 2 February 1967, as amended in 1994 and 2004
<i>2009 Constitution</i>	Political Constitution of the Plurinational State of Bolivia, 7 February 2009
<i>Administrative Procedure Law</i>	Law No 2,341, 23 April 2002
<i>Antimony Smelter</i>	Vinto antimony smelter
<i>Antimony Smelter Nationalization Decree</i>	Supreme Decree No 499, 1 May 2010
<i>Antimony Smelter Purchase Agreement</i>	Sale and purchase agreement of the Antimony Smelter between the Trade Ministry, Comibol, Colquiri and Comsur, 11 January 2002
<i>Assets</i>	Collectively, the Tin Smelter, the Antimony Smelter and the rights in the Colquiri Lease
<i>BITs</i>	Bilateral investment treaties, including treaties for the promotion and protection of investments and the like
<i>Bolivia / Respondent</i>	Plurinational State of Bolivia
<i>Colquiri Mine Nationalization Decree</i>	Supreme Decree No 1,264, 20 June 2012
<i>Capitalization Law</i>	Law No 1,544, 21 March 1994
<i>Cencomincol</i>	Central Local de Cooperativas Mineras de Colquiri
<i>CDC</i>	Commonwealth Development Corporation
<i>COB</i>	Central Obrera Boliviana
<i>Colquiri</i>	Compañía Minera Colquiri SA
<i>Colquiri Lease</i>	Lease agreement for the Colquiri Mine between the Trade Ministry, Comibol, Colquiri and Comsur, 27 April 2000
<i>Colquiri Mine</i>	Tin and zinc mine in Colquiri
<i>Colquiri Union</i>	Sindicato Mixto de Trabajadores Mineros de Colquiri
<i>Comibol</i>	State-owned Corporación Minera de Bolivia
<i>Comsur</i>	Compañía Minera del Sur SA
<i>Concentrator Plant</i>	The concentrator plant of the Colquiri Mine
<i>Cooperativa 21 de Diciembre</i>	Cooperativa Minera 21 de Diciembre Ltda

Term	Definition
<i>Cooperativa 26 de Febrero</i>	Cooperativa Minera 26 de Febrero Ltda
<i>ECT</i>	The Energy Charter Treaty
<i>EMV</i>	Empresa Metalúrgica Vinto
<i>ENAF</i>	State-owned Empresa Nacional de Fundiciones
<i>Expropriation Law</i>	Law of Expropriation due to Public Utility, 30 December 1884
<i>Fedecomín La Paz</i>	Federación Departamental de Cooperativas Mineras de La Paz
<i>Fencomin</i>	Federación Nacional de Cooperativas Mineras
<i>FSTMB</i>	Federación Sindical de Trabajadores Mineros de Bolivia
<i>GDP</i>	Gross Domestic Product
<i>Glencore</i>	Together, Glencore plc, Glencore International, Glencore Bermuda and its local subsidiaries
<i>Glencore Bermuda / Claimant</i>	Glencore Finance (Bermuda) Ltd
<i>Glencore International</i>	Glencore International AG
<i>Glencore plc</i>	Glencore International plc
<i>Huanuni Mine</i>	The tin mine in Huanuni
<i>Huanuni Union</i>	Sindicato Mixto de Trabajadores Mineros de Huanuni
<i>ICC</i>	International Chamber of Commerce
<i>ICJ</i>	International Court of Justice
<i>IFC</i>	International Finance Corporation
<i>ILC</i>	International Law Commission
<i>Investment Law</i>	Law No 1,182, 17 September 1990
<i>Investment Promotion Law</i>	Law No 516, 4 April 2014
<i>Iris</i>	Iris Mines & Metals SA
<i>JV Contracts</i>	Joint venture contracts for the Bolívar, Porco and Colquiri mines
	
<i>Kempsey</i>	Kempsey SA
<i>Main Ramp</i>	Principal access ramp under construction in the Colquiri Mine, to connect the surface to the -405 level
<i>MAS</i>	Movement for Socialism (<i>Movimiento al Socialismo</i>) political party
<i>MAS Political Program</i>	Official agenda published by MAS in November 2005

Term	Definition
<i>Minera</i>	Minera SA
<i>Mining Code</i>	Law No 1,777, 17 March 1997
<i>Mining Law</i>	Law No 535, 24 May 2014
<i>Ministry of Economy</i>	Ministry of Economy and Public Finances
<i>Ministry of Mining</i>	Ministry of Mining and Metallurgy of Bolivia
<i>Notice of Arbitration</i>	Claimant’s Notice of Arbitration
<i>New Economic Policy</i>	The comprehensive stabilization program “ <i>Nueva Política Económica</i> ,” August 1985
<i>New Tailings Dam</i>	A new dam to be constructed in the Colquiri Mine to accommodate the tin and zinc tailings
<i>Panamanian Companies</i>	Together, Iris, Kempsey and Shattuck
<i>PCA</i>	Permanent Court of Arbitration
<i>PCIJ</i>	Permanent Court of International Justice
<i>Privatization Law</i>	Law No 1,330, 24 April 1992
<i>Rejoinder</i>	Bolivia’s Reply on Preliminary Objections and Rejoinder on the Merits, 24 October 2018
<i>Reply</i>	Claimant’s Reply on the Merits and Counter-Memorial on Jurisdictional Objections, 22 June 2018
<i>Rosario Agreement</i>	Minute of agreement entered into by Colquiri, Fedecomín La Paz, Fencomín, Cencomínol, Cooperativa 26 de Febrero, Cooperativa Minera Collpa Cota, Cooperativa Minera Socavón Inca and the Ministry of Mining, 7 June 2012
<i>San Antonio Proposal</i>	Sinchi Wayra’s proposal to cede the exploitation of the San Antonio vein of the Colquiri Mine to the Cooperativa 26 de Febrero, 5 June 2012
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
<i>Shattuck</i>	Shattuck Trading Co Inc

Term	Definition
<i>Sinchi Wayra</i>	Sinchi Wayra SA
<i>Smelters</i>	Together, the Tin Smelter and the Antimony Smelter
<i>Statement of Claim</i>	Claimant’s Statement of Claim, 15 August 2017
<i>Statement of Defense</i>	Bolivia’s Preliminary Objections, Statement of Defence, and Reply on Bifurcation, 18 December 2017
<i>Swiss-Bolivia BIT</i>	Agreement between the Swiss Confederation and the Republic of Bolivia on the Reciprocal Promotion and Protection of Investments
<i>Tailings Plant</i>	Plant to exploit the old tailings of the Colquiri Mine
<i>Tin Smelter</i>	Vinto tin smelter
<i>Tin Smelter Nationalization Decree</i>	Supreme Decree No 29,026, 9 February 2007
<i>Tin Smelter Purchase Agreement</i>	The sale and purchase agreement of the Tin Smelter between the Trade Ministry, Comibol, EMV and Allied Deals Estañó Vinto SA, 17 July 2001 and 4 July 2001
<i>Tin Stock</i>	161 tonnes of tin concentrates belonging to Colquiri stored at the Antimony Smelter
<i>Trade Ministry</i>	Ministry of Foreign Trade and Investment of Bolivia
<i>Treaty</i>	Agreement for the Promotion and Protection of Investments between the United Kingdom of Great Britain and Northern Ireland and Bolivia, 16 February 1990
<i>UK</i>	United Kingdom of Great Britain and Northern Ireland
<i>UNCITRAL Rules</i>	Arbitration Rules of the United Nations Commission on International Trade Law, as revised in 2010
<i>Vienna Convention</i>	Vienna Convention on the Law of Treaties
<i>Vinto</i>	Complejo Metalúrgico Vinto SA

1. This Rejoinder on Jurisdictional Objections (*Rejoinder on Jurisdiction*) is submitted on behalf of Glencore Finance (Bermuda) Ltd (*Claimant* or *Glencore Bermuda*), a company incorporated under the laws in force in the UK overseas territory of Bermuda (*Bermuda*), pursuant to the Tribunal’s Revised Procedural Calendar dated 15 June 2018.

I. INTRODUCTION AND EXECUTIVE SUMMARY

2. At this point in the proceedings, Bolivia continues to admit that it seized: (i) the Tin Smelter¹—the largest tin smelter in Bolivia and one of a handful of high-grade tin ingot producers in the world; (ii) the non-producing Antimony Smelter and the Tin Stock stored therein; and (iii) the exclusive rights to explore, exploit, and market the mineral products from the Colquiri Mine—the second largest tin mine and one of the most competitive mines in Bolivia. These seizures deprived Glencore Bermuda of the value of its shares in Colquiri and Vinto, causing Claimant damages valued by Glencore Bermuda’s experts at US\$675.7 million as of 15 August 2017. As Bolivia openly admits, despite Claimant’s unsuccessful attempts to negotiate this dispute for over nine years prior to the commencement of this arbitration, to this day, Bolivia has not paid a single cent of compensation for these takings.
3. In light of these clear facts, Bolivia has sought to escape the Tribunal’s scrutiny by invoking in its Statement of Defense six baseless jurisdictional and admissibility objections. In its Rejoinder, Bolivia largely reiterates these objections. In summary:
 - (a) *First*, recognizing that Glencore Bermuda’s incorporation in Bermuda qualifies it as a protected investor under the Treaty, Bolivia requests that the Tribunal pierce Glencore Bermuda’s corporate veil to reveal its “true Swiss nationality.”

¹ Capitalized terms have the meaning set forth in the Glossary.

- (b) *Second*, Bolivia alleges that the acquisition of the Assets was structured through Glencore Bermuda solely to obtain Treaty protection at a time when the dispute was reasonably foreseeable, which it argued constitutes an abuse of process.
- (c) *Third*, Bolivia alleges that Glencore Bermuda’s investments fell outside the Treaty’s protections because: (i) Glencore Bermuda did not “actively” invest; and (ii) it held its investment indirectly.
- (d) *Fourth*, Bolivia claims that the privatization of the Assets was illegal because its own State officials developed a legal framework to allow its former President Sánchez de Lozada to acquire the three Assets in dispute in this arbitration, long before Glencore Bermuda acquired them.
- (e) *Fifth*, Bolivia argues that it was not properly notified of the Tin Stock dispute and it was “deprived” of an opportunity to “reach an amicable resolution” of that claim.
- (f) *Sixth*, Bolivia argues that the ICC arbitration clauses in the Tin Smelter Purchase Agreement, Antimony Smelter Purchase Agreement, and Colquiri Lease preclude this Tribunal’s jurisdiction over the present dispute.

4. In addition, grasping at straws, Bolivia now also raises a new objection, [REDACTED]
[REDACTED]
[REDACTED]. According to Bolivia, the Tribunal lacks jurisdiction over the Tin Smelter claims [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

5. Not one of these arguments withstands scrutiny. Bolivia’s objections are, for the most part, no more than a plea for this Tribunal to ignore the express text of the

Treaty and incorporate additional jurisdictional requirements not contemplated therein. The remaining objections were fabricated through a convenient misrepresentation of the facts and law. As Glencore Bermuda demonstrated in its Reply, and as it further explains at length in this Rejoinder on Jurisdiction, the Tribunal unquestionably has jurisdiction over all of Glencore Bermuda's claims in this arbitration, all of which are also admissible. Bolivia's arguments in its Rejoinder do nothing to change this unavoidable conclusion.

6. *First*, the corporate veil doctrine is inapplicable in the present context, ie, the determination of an investment treaty claimant's nationality for purposes of jurisdiction *ratione personae*. This is because the Treaty itself expressly and unambiguously provides the criteria that determine the nationality of an investor, and therefore excludes the application of the customary law of nationality. In any event, the present case is far removed from the circumstances that would justify resorting to veil piercing where it is available. Indeed, Glencore Bermuda is merely exercising its right under international law and the Treaty; it is not attempting to avoid any type of liability towards third parties as a result of fraud or malfeasance. Even assuming veil piercing had any application in the present context (which it does not), veil piercing would require Bolivia to establish, through evidence meeting a high burden of proof, that Claimant has misused its corporate form to commit fraud or malfeasance in accessing the Tribunal's jurisdiction. Although Bolivia appears to concede, in the midst of its confused description of the law in the Rejoinder, that this is the applicable legal test, it neither alleges nor proves facts that establish that this test is met. Instead, Bolivia desperately attempts to smear Glencore Bermuda by making irrelevant, inflammatory and unsubstantiated allegations that affiliates of the Glencore group have committed "misdeeds around the globe," which, as Bolivia itself admits, have no connection to the Assets, or to the present dispute. The Tribunal's authority to determine its jurisdiction does not extend to such allegations. Simply put, the Tribunal is not a global court of general jurisdiction.

7. *Second*, there has been no abuse of process. Because there was no restructuring in this case, the Tribunal’s analysis could end here. However, even assuming that there was a restructuring, Bolivia now concedes that this is not sufficient to establish an abuse of process. Bolivia acknowledges that the key to determining whether an abuse of process has occurred is the foreseeability of the dispute at the time of the purported restructuring. However, Bolivia continues to misstate the degree of foreseeability required. For it to constitute an abuse of process, any restructuring must have been carried out to obtain treaty protection at a time when the specific dispute subject to the arbitration was highly foreseeable. Here, the facts clearly demonstrate that: (i) Glencore Bermuda did not restructure its investment in Bolivia; (ii) even if one were to consider the assignment of the Assets to Glencore Bermuda as a restructuring before the closing of the transaction (which it was not), it was not done to obtain Treaty protection; and (iii) in any event, at the time of the purported restructuring, the disputes subject to the present arbitration were neither highly nor reasonably foreseeable.

8. *Third*, there is no basis, either in the text of the Treaty or in the arbitral jurisprudence, for Bolivia’s arguments that Glencore Bermuda’s investments are not protected by the Treaty because: (i) they were not “active” investments, as that term is understood by Bolivia; and (ii) they were indirectly held by Claimant. The Treaty’s definition of “investment” protects “every kind of asset,” including “any other form of participation in a company.” Its plain meaning encompasses Glencore Bermuda’s investment in Vinto, Colquiri, and thereby its indirect stake in their Assets, including any movable and immovable property, rights and claims to money having a financial value. In the first incarnation of Bolivia’s “active investment” theory (in the Statement of Defense), Bolivia argued that Claimant needed to have made an “active investment,” in the sense of an active contribution, in order to qualify for protection under the Treaty. When Claimant established, in its Reply, not only that the Treaty does not provide such a requirement, but also that, contrary to Bolivia’s assertions, Claimant did make an active contribution in the form of a cash payment of over US\$313.8 million,

Bolivia needed to refocus its argument. In the Rejoinder, it now insists that its extra-textual “active investment” criterion requires, more specifically, that Claimant directly and actively direct the acquisition, management and/or operations of the Assets. Bolivia then argues that Glencore Bermuda did not actively direct such activities, alleging that, instead, “it stood passively by while Glencore International directed the investment.” There is no support for this position. Nor is there any basis for Bolivia’s continued insistence, in its Rejoinder, that the customary law of diplomatic protection contains a rule barring claims for violations of indirect rights, which is supposedly applicable in the present case. Even if Bolivia were right regarding both the relevance and the content of diplomatic protection law (which it is not), it is evident from the Treaty that, contrary to Bolivia’s contention, the Contracting Parties intended to protect indirectly held investments. As Claimant argued in its Reply, and as supported by the weight of arbitral jurisprudence, “the terms employed in the UK-Bolivia BIT [ie, the Treaty] are broad enough on their own to include indirect investments, even without employing further qualifications that would only reinforce what is already clear from the text of the BIT.”

9. *Fourth*, Bolivia’s “illegality” objection is similarly groundless. Bolivia has not even alleged, much less proven, that Glencore Bermuda engaged in any fraudulent or deceitful conduct in acquiring the Assets. At most, Bolivia argues that Glencore Bermuda “should have known” that the prior privatization was illegal. This is legally and factually wrong. The test for establishing that the Tribunal has no jurisdiction in a case of purported illegality is a strict one, which requires the party making these allegations to meet a high standard of proof. Bolivia must show that “serious violations” were carried out at the time in which the investment was made. Bolivia has not come close to carrying its burden of proof. In its Reply, Claimant unequivocally demonstrated that the privatization of the Assets was carried out in a transparent manner pursuant to the legal framework then in place. Now acknowledging in its Rejoinder that there was nothing illegal about the regulatory framework pursuant to which the Assets were privatized,

Bolivia is left claiming that the way in which such framework was used by the former President was highly “inappropriate.” This does not come close to meeting the “illegality” test. Despite dedicating over 80 paragraphs to its illegality argument in its Statement of Defense and Rejoinder memorials, Bolivia still cannot articulate what specific provisions of Bolivian law would have been breached and by whom. And, more importantly, no local court has found any “irregularity”—and much less “illegality” with respect to the privatization of the Assets. Having failed to demonstrate any illegality in the privatization process, Bolivia’s related “unclean hands” argument—which necessarily rests on an illegality finding—must also fail. In any event, the “unclean hands” doctrine does not exist as a general principle of international law and cannot be invoked to deny Glencore Bermuda the Treaty’s protections when the challenged actions are those of Bolivia’s own State officials and Bolivia itself authorized Glencore Bermuda’s investment.

10. *Fifth*, as already demonstrated by Glencore Bermuda, the Treaty’s minimal notice requirement cannot be divorced from its ultimate purpose—ie, providing the parties with a reasonable opportunity to settle the dispute amicably. Tellingly, in the Rejoinder, Bolivia no longer argues that it did not have a meaningful opportunity to negotiate. Rather, Bolivia now claims that, although it was aware of the dispute over the Tin Stock, it was never notified that such dispute was with Glencore Bermuda and that it concerned violations of the Treaty. However, the facts uncontrovertibly demonstrate that Bolivia had actual notice of the Tin Stock claim six years prior to the commencement of the present arbitration proceedings and, despite engaging in negotiations with Glencore Bermuda, nonetheless failed to amicably resolve the dispute. It was Bolivia itself that took the position that the Tin Stock formed part of the Antimony Smelter’s inventory and had to be discussed in the context of negotiations over compensation for that nationalization. Bolivia was well-aware that Glencore Bermuda’s representatives were participating in such negotiations, and was repeatedly reminded over the years that Bolivia’s actions in relation to the Antimony Smelter—including the

taking of the Tin Stock—raised claims under the Treaty. Even if—despite all the evidence to the contrary—the Tribunal were to find that Bolivia did not receive notice of the Tin Stock claims (which it did), this would not bar it from asserting jurisdiction, because: (i) separate notice of each dispute is not necessary in instances where the disputes are related; and (ii) in any event, a failure to notify does not divest an investment treaty tribunal of its jurisdiction.

11. *Sixth*, as Claimant explained in its Reply, the ICC arbitration clauses included in the Antimony Smelter Purchase Agreement, the Tin Smelter Purchase Agreement and the Colquiri Lease cannot deprive this Tribunal of jurisdiction over Claimant’s Treaty claims. This is true even if, as Bolivia argues, those contracts “waive[d] all claims through diplomatic channels” in relation to the interpretation and execution of the contracts. Here, Glencore Bermuda has established that it has presented claims under the Treaty. Glencore Bermuda has not raised any breach of contract claims. Bolivia’s arguments to the contrary have no merit. Bolivia cannot simultaneously argue that: (i) the disputes were commercial, in order to avoid this Tribunal’s jurisdiction; while stating that (ii) its actions were valid exercises of its sovereign authority, in order to escape liability. The fact that it has chosen to do so underscores the fundamental lack of credibility of its objection which should, therefore, be dismissed.

12. *Seventh*, Bolivia’s new preliminary objection [REDACTED] is not only untimely but also meritless. As investment tribunals have found, Bolivia’s arguments on double recovery cannot affect the jurisdiction of the Tribunal, the admissibility of the Tin Smelter claims, or its right to collect compensation from Bolivia. Moreover, it is patently wrong to suggest, as Bolivia does, that Claimant has lost its standing to bring its Tin Smelter claims in this arbitration [REDACTED] [REDACTED] [REDACTED] [REDACTED] Contrary to Bolivia’s assertions, Claimant did not assign its Tin Smelter

claims against Bolivia [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

* * *

13. This Rejoinder on Jurisdiction is structured as follows. Section II explains why this Tribunal should reject all of Bolivia's preliminary objections. Section III sets out Glencore Bermuda's request for relief. Accompanying this Reply are Glencore Bermuda's new factual exhibits numbered **C-285** to **C-299**, and legal authorities numbered **CLA-230** to **CLA-251**.

II. THE TRIBUNAL HAS JURISDICTION OVER GLENCORE BERMUDA'S CLAIMS

A. BOLIVIA BEARS THE BURDEN TO PROVE ITS OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

14. Claimant has always accepted that it bears the burden of establishing the jurisdiction of this Tribunal.² Glencore Bermuda has submitted proof that it is validly incorporated in Bermuda, a territory covered by the Treaty, and that it owns a 100 percent interest in the Assets.³ Nothing further is required to satisfy the Treaty's jurisdictional requirements.
15. Bolivia has raised purported jurisdictional and admissibility defenses. Bolivia therefore has the burden of proving those objections.⁴ This flows from the foundational principle of *onus probandi*, as reflected in Article 27 of the

² Statement of Defense, para 256.

³ Reply, para 187. Certificate of incorporation of Glencore Bermuda (as Sandon Ltd), 23 December 1993, **C-42**; Certificate of incorporation on change of name of Glencore (from Sandon Ltd), 30 December 1994, **C-43**; By-Laws of Glencore, 12 December 2012, **C-44**; Assignment and Assumption Agreements between Glencore International and Glencore Bermuda, 7 March 2005, **C-64**, pp 1, 3; Share register of Sinchi Wayra, undated, **C-16**; Share register of Colquiri, undated, **C-17**; Share register of Vinto, undated, **C-18**.

⁴ Reply, para 185.

UNCITRAL Rules: “[e]ach party shall have the burden of proving the facts relied on to support its claim or defence.”⁵ This should not be a controversial point.

16. Given that Claimant has always accepted that it bears the burden of establishing jurisdiction, there is only one real issue in dispute between the parties: whether Bolivia, in turn, bears the burden of proving its jurisdictional and admissibility objections. Bolivia obviously does so, yet it refuses to recognize so fundamental a principle of law—instead accusing Claimant of attempting to “shift the burden of proof on jurisdiction to the respondent” and “to force Bolivia to disprove jurisdiction and admissibility.”⁶ But Claimant has never sought to do so. The only party seeking to avoid its burden of proof—the only party that rejects the premise that it must actually prove the allegations it makes—is Bolivia.
17. In the following sections, Claimant addresses each of Bolivia’s jurisdiction and admissibility objections. For each objection, the Tribunal must resolve one question: Has Bolivia proven its allegation? The answer, each time, is no.

B. GLENCORE BERMUDA IS A PROTECTED INVESTOR UNDER THE TREATY

18. Claimant has established,⁷ and Respondent does not deny,⁸ that Glencore Bermuda is a company incorporated in Bermuda, a territory covered under the

⁵ UNCITRAL Rules, Art 27(1). *See also* Reply, para 186 (and the cases cited therein); *Ampal-American Israel Corp and others v Arab Republic of Egypt* (ICSID Case No ARB/12/11) Decision on Jurisdiction, 1 February 2016, **RLA-145**, paras 216 (“The proposition that he who asserts must prove is applicable in investment treaty arbitration.”), 306 (finding that the respondent had failed to discharge its burden of proving that the claimant had procured its investment illegally); *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, **CLA-110**, para 2.11 (“Of course, if there are positive objections to jurisdiction, the burden lies on the Party presenting those objections, in other words, here the Respondent.”); *Bernhard von Pezold and others v Republic of Zimbabwe* (ICSID Case No ARB/10/15) Award, 28 July 2015, **CLA-126**, paras 174, 176 (“The general rule is that the party asserting the claim bears the burden of establishing it by proof. [...] The Respondent in this case therefore bears the burden of proving its objections. [...] [T]he general principle applies to require the Respondent to produce sufficient evidence to establish its objections to jurisdiction.”).

⁶ Rejoinder, paras 384, 386.

⁷ Statement of Claim, para 128

⁸ Statement of Defense, para 137.

Treaty.⁹ The plain text of the Treaty does not impose any additional requirements for an investor to qualify for treaty protections.¹⁰ Despite the clear treaty language, Bolivia continues to challenge the Tribunal’s jurisdiction *ratione personae* on the grounds that: (i) Claimant is a “shell company” and the Tribunal should pierce its corporate veil to reveal the “true party in interest;”¹¹ and (ii) Claimant committed an abuse of process by restructuring its investment when a dispute was foreseeable.¹² As explained below, both of these objections are meritless and should be dismissed.

1. Glencore Bermuda is a protected investor pursuant to Article 1 of the Treaty, and there are no grounds to disregard its nationality

19. As Claimant established in its Statement of Claim, Glencore Bermuda is a protected investor under the plain text of the Treaty.¹³ The Treaty extends the Tribunal’s jurisdiction to “companies” of the UK, which are defined to mean:

[C]orporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 11.¹⁴

20. Claimant has established,¹⁵ and Respondent does not deny,¹⁶ that Glencore Bermuda is a company incorporated and constituted under the laws of Bermuda, a territory covered by the Treaty pursuant to Article 11. It thus qualifies as a protected investor.

⁹ Treaty, **C-1**, Art 11.

¹⁰ *Ibid*, Art 1 (d)(i).

¹¹ Rejoinder, Section 4.4.

¹² *Ibid*, Section 4.2.

¹³ Statement of Claim, Section IV.B.

¹⁴ Treaty, **C-1**, Art 1 (d)(i). *See also* Statement of Claim, para 128. Exchange of Notes, 3 December 1992 and 9 December 1992, **C-2**.

¹⁵ Statement of Claim, para 128.

¹⁶ Statement of Defense, para 137.

21. In its Statement of Defense, however, Bolivia submitted that the Tribunal should take the extraordinary step of piercing Glencore Bermuda’s corporate veil to reveal the nationality of the “true claimant”¹⁷ or “real party in interest”¹⁸ in this arbitration: Glencore International, a Swiss company not covered by the Treaty. Bolivia’s primary argument was that “formal ownership structures are insufficient to establish jurisdiction when the investors are purely Swiss in substantive reality.”¹⁹ Cognizant of the weakness of this argument, Bolivia sought to resort to the doctrine of veil piercing, which it argued is available in international law. Bolivia’s position on the applicable legal test for purposes of veil piercing was (and remains) confused. In its Statement of Defense, Bolivia argued that “[p]iercing the corporate veil allows international legal decisions to be made on the basis of substantive realities and not corporate formalities;”²⁰ that “[t]he veil must be pierced when the nominal investor is the *alter ego* of the beneficial investor, as shown by misuse of the corporate form;”²¹ and that “the veil may be pierced and corporate formalities cast aside specifically to protect the interests of third parties or to prevent [the] evasion of legal requirements.”²²
22. Seeking to apply this nebulous legal theory, Bolivia went on to argue that:

[T]he corporate veil must be pierced in the present case to prevent Claimant from evading the clear jurisdictional requirement of the Treaty: the investor must be from a State that is a party to the Treaty. Failure to pierce the veil would seriously prejudice Bolivia, a third party that is now in risk of being subject to lengthy and expensive litigation through Claimant’s abuse of corporate formalities.²³

¹⁷ *Ibid*, para 350.

¹⁸ *Ibid*, Section 4.4.2.

¹⁹ *Ibid*, para 349.

²⁰ *Ibid*, para 354.

²¹ *Ibid*, para 358.

²² *Ibid*, para 356.

²³ *Ibid*, para 359.

23. Apparently unconvinced by its own preliminary conclusion, Bolivia further argued that veil piercing is warranted because “Glencore Bermuda is nothing more than a shell company in Bermuda where Glencore International or Glencore International Plc parked subsidiaries engaged in questionable activities or whose activities they would prefer to conceal.”²⁴ Based on these unsupported assertions, Bolivia concluded that the Tribunal should decline jurisdiction *ratione personae*.
24. Claimant refuted these arguments in its Reply. *First*, as the tribunals in *ADC v Hungary*, *Rompetrol v Romania*, and *Saluka v Czech Republic* (among others²⁵) have held, where, as here, the express treaty language requires only that a legal person be incorporated or constituted in a Contracting State, there is no basis for reading into the treaty further restrictions such as a requirement that claimant have “substantial activities” or “real economic activities” in its home State.²⁶ The lack of such requirements in the Treaty, especially in comparison with other treaties signed by Bolivia that expressly contain such restrictions, evidences the Contracting Parties’ intent not to impose a higher threshold on investors.²⁷
25. *Second*, Claimant explained that the legal authorities invoked by Bolivia in its discussion of veil piercing either support Claimant’s case or are inapposite.²⁸ *Barcelona Traction* discussed the customary law principles of nationality in the

²⁴ *Ibid*, para 363.

²⁵ See Reply, para 195, footnote 521 (citing *KT Asia Investment Group BV v Republic of Kazakhstan* (ICSID Case No ARB/09/8) Award, 17 October 2013, **CLA-118**, paras 113-128; *Yukos Universal Limited (Isle of Man) v Russian Federation* (PCA Case No AA 227) Interim Award on Jurisdiction, 30 November 2009, **CLA-185**, paras 411-415; *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan* (ICSID Case No ARB/05/16) Award, 29 July 2008, **RLA-112**, para 313; *Tokios Tokelès v Ukraine* (ICSID Case No ARB/02/18) Decision on Jurisdiction, 29 April 2004, **CLA-48**, para 44).

²⁶ Reply, paras 192-193 (citing *The Rompetrol Group NV v Romania* (ICSID Case No ARB/06/3) Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, **CLA-76**, paras 62, 85; *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 359; *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, para 241).

²⁷ Reply, paras 192-93.

²⁸ *Ibid*, paras 197-200.

context of diplomatic protection; it is inapposite in the investment treaty context, and in any event supports applying the place of incorporation criterion to determine a company's nationality.²⁹ *TSA Spectrum* addressed the interpretation and application of Article 25(2)(b) of the ICSID Convention, which plainly does not apply here, and of a BIT provision, not present in the Treaty, which required a company to have its "effective management" in its "home" contracting party in order to qualify as a protected investor.³⁰ *Loewen* dealt with the continuous nationality rule and concerned a set of facts that bear no resemblance to the present case.³¹ Finally, the tribunals in *Saluka v Czech Republic* and *ADC v Hungary* both rejected the respective respondent states' request to pierce claimant's corporate veil in the context of analyzing the latter's nationality for purposes of jurisdiction *ratione personae*.³² As the *ADC* tribunal stated:

As the matter of nationality is settled unambiguously by the Convention and the BIT, there is no scope for consideration of customary law principles of nationality, as reflected in *Barcelona Traction*, which in any event are no different. In either case inquiry stops upon establishment of the State of incorporation, and considerations of whence comes the company's capital and whose nationals, if not Cypriot, control it are irrelevant.³³

26. *Third*, Claimant demonstrated that, aside from not being applicable in the context of determining a claimant investor's nationality in investment treaty arbitration, the doctrine of corporate veil piercing is also inapplicable for the additional, independent reason that it applies only "where the corporate structure ha[s] been

²⁹ *Ibid*, para 198. *See also* Tribunal's Procedural Order No 2: Decision on Bifurcation, 31 January 2018, para 49.

³⁰ Reply, para 199. *See* Tribunal's Procedural Order No 2: Decision on Bifurcation, 31 January 2018, para 49.

³¹ Reply, para 200.

³² *Ibid*, para 196 (citing *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, paras 229-230, 240-241; *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, paras 357-358).

³³ *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 357.

utilized to perpetrate fraud or malfeasance,”³⁴ in “situations where the real beneficiary of the business misused corporate formalities in order to disguise its true identity and therefore to avoid liability.”³⁵ Here, Claimant is only exercising its rights under the Treaty to bring its claims against Bolivia before this Tribunal; it is not attempting to avoid any type of liability.³⁶ Furthermore, Bolivia has failed to meet the high standard of proof³⁷ to demonstrate that Glencore Bermuda committed any kind of fraud or malfeasance.³⁸

27. In its Rejoinder, Bolivia grossly mischaracterizes Claimant’s position, referring to “Claimant’s argument that veil piercing is forbidden,”³⁹ and arguing that “Claimant is unable to identify a single investment tribunal that *forbids* piercing the corporate veil or that denies that international law endorses veil piercing.”⁴⁰ These arguments are non-responsive. Claimant’s position is not that veil piercing

³⁴ Reply, para 202 (quoting *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, para 230).

³⁵ *Ibid*, para 202 (citing *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 358). *See also* *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v, Republic of Kazakhstan* (ICSID Case No ARB/05/16) Award, 29 July 2008, **CLA-79**, para 328.

As Claimant further explained, it is in a shareholder’s attempt to avoid liability that the true origins of the corporate veil doctrine were founded in municipal legal systems. Reply, para 203 (citing Y Kryvoi, “Piercing the Corporate Veil in International Arbitration” (2011) Vol 1 Global Business Law Review, **CLA-193**, p 5: “A typical corporate veil piercing case involves a controlling shareholder who sets up an undercapitalized corporation to incur obligations to a third party. When the debt is due, the corporation does not have enough assets to repay it, and the controlling shareholder relies on the concept of limited liability to avoid personal liability. The result is that the third party ends up bearing the risk of the nonpayment of the debt. In such situations, the court or tribunal may intervene to prevent such injustice and pierce the corporate veil by holding the controlling shareholder liable” (emphasis added)).

³⁶ Reply, para 203.

³⁷ *Ibid*, paras 202-203, footnote 541 (citing, *eg*, *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt* (ICSID Case No ARB/05/15) Award, 1 June 2009, **CLA-89**, paras 325-326 (raising the standard for allegations of fraudulent acquisition of nationality by a natural investor); *EDF (Services) Limited v Romania* (ICSID Case No ARB/05/13) Award, 8 October 2009, **CLA-184**, para 221 (raising the standard for allegations of corruption); *Mr Saba Fakes v Republic of Turkey* (ICSID Case No ARB/07/20) Award, 14 July 2010, **CLA-190**, para 131, (raising the standard for allegations of forgery)).

³⁸ Reply, paras 204-210.

³⁹ Rejoinder, para 470.

⁴⁰ *Ibid*, para 469.

does not exist in international law, or that it is forbidden in investment treaty arbitration. As explained in the Reply and above, Claimant’s position is that veil piercing is inapplicable in the present context, ie, the determination of an investment treaty claimant’s nationality for purposes of jurisdiction *ratione personae*. This is because the Treaty itself provides the criteria that apply to determine the nationality of an investor, and therefore excludes the application of the customary law of nationality.⁴¹

28. Aside from responding to arguments Claimant never made, Bolivia continues to argue, incorrectly, that “the bar is low for the misuse of corporate form to justify piercing the corporate veil.”⁴² According to Bolivia, “international law requires the Tribunal to pierce the corporate veil when[ever] that veil has been misused,”⁴³ including not only in “cases of fraud or malfeasance,”⁴⁴ but also where piercing the corporate veil is apparently necessary “to protect third parties, and to prevent the evasion of legal requirements,”⁴⁵ and also potentially in other, undefined, situations.⁴⁶ In making this argument, Bolivia continues to rely largely on the cases that Claimant has already shown are either inapposite or unhelpful to Bolivia’s position.⁴⁷ Bolivia then reiterates its argument that the Tribunal should pierce Claimant’s corporate veil in this case because, Bolivia falsely alleges: (i) Claimant is a shell company;⁴⁸ (ii) Claimant “has been subject to multiple

⁴¹ Reply, paras 195-203.

⁴² Rejoinder, para 472.

⁴³ Rejoinder, para 462. *See also ibid*, para 466.

⁴⁴ *Ibid*, para 467.

⁴⁵ *Ibid*, para 467.

⁴⁶ *Ibid*, paras 465-467.

⁴⁷ *Ibid*, paras 466-467, 470-471 (relying on *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) [1970] ICJ Reports 3, **CLA-7**; *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**; *Loewen Group Inc and Raymond L Loewen v United States of America* (ICSID Case No ARB/AF/98/3) Award, 26 June 2003, **RLA-28**). Claimant has already shown that Bolivia’s reliance on these cases is misplaced. Reply, paras 196-200.

⁴⁸ Rejoinder, para 476.

accusations that investments routed through Glencore Bermuda have been implicated in illegal activities throughout the world;”⁴⁹ and (iii) “Glencore Bermuda was set up to protect its parent company against liability for serious misdeeds around the globe.”⁵⁰

29. As explained below, Bolivia’s arguments have no legal or factual basis.

a. The doctrine of veil piercing does not apply in the present case and, in any event, requires the satisfaction of strict conditions that are not met here

30. *First*, as Claimant explained in its Reply, veil piercing is inapplicable in the present context, ie, the determination of an investment treaty claimant’s nationality for purposes of jurisdiction *ratione personae*. This is because the Treaty expressly and unambiguously provides the criteria that apply to determine the nationality of an investor. Accordingly, the Treaty’s criteria govern the present analysis, to the exclusion of the customary law of nationality that applies in the context of diplomatic protection.⁵¹

31. *Second*, even where veil piercing is available (ie, in certain national legal systems and, possibly, in customary international law), it only applies in exceptional circumstances, where the strict conditions for its application are established through evidence meeting a high burden of proof.⁵² There is no basis for Bolivia’s bold statement that “the bar is low for the misuse of corporate form to justify piercing the corporate veil.”⁵³ As Claimant explained in its Reply, veil piercing may only apply in limited circumstances involving a party’s attempt to avoid liability through fraud and/or malfeasance.⁵⁴ Bolivia now argues that those

⁴⁹ *Ibid*, para 477.

⁵⁰ *Ibid*, para 480.

⁵¹ Reply, paras 195-203.

⁵² *Ibid*, paras 201-203.

⁵³ Rejoinder, para 472.

⁵⁴ Reply, paras 202-203.

circumstances are not exclusive, and that allegations of “misuse” of corporate formalities, understood broadly, are sufficient to justify veil piercing in the context of investment disputes.⁵⁵ Bolivia has provided no support for this proposed lax standard.⁵⁶ There is none. As the proponent of veil piercing in this case, Bolivia bears burden of establishing that the conditions for its application are present.⁵⁷ Bolivia wrongly suggests otherwise.⁵⁸ Bolivia’s attempt to shift the burden of proof to Claimant, while entirely baseless, is unsurprising; Bolivia has come nowhere close to meeting its burden.⁵⁹

32. *Third*, there is a deep inconsistency at the heart of Bolivia’s veil piercing case. On the one hand, Bolivia recognizes, correctly, the need for a nexus between the claims before the Tribunal and the alleged misuse of the corporate form in order to resort to veil piercing in the jurisdictional context.⁶⁰ Yet, Bolivia then contends that it is sufficient that there be *any* misuse of the corporate form—of whatever nature and however removed from the investment dispute and Claimant’s status as a qualifying investor under the Treaty—for the Tribunal to disregard Claimant’s corporate personality in this case.⁶¹ This is incorrect.
33. The Tribunal’s jurisdiction is limited to “[d]isputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under [the Treaty] in relation to an investment of the

⁵⁵ Rejoinder, paras 466-467.

⁵⁶ As Claimant has already shown in its Reply, Bolivia’s reliance on *Barcelona Traction*, *Loewen* and *Saluka* is misplaced. Reply, paras 196-200.

⁵⁷ *See ibid*, Section IV.A; *see* Section II.A, above.

⁵⁸ Rejoinder, para 474 (“As Claimant bears the burden of proof on jurisdiction, [...] it must demonstrate that the use of the Glencore Bermuda entity was legitimate in light of Bolivia’s evidence to the contrary.”).

⁵⁹ *See* Section II.B.1.b.

⁶⁰ Rejoinder, para 464 (“It is a basic rule of international law that a company cannot misuse corporate formalities to establish international jurisdiction over its claims.”) (emphasis added).

⁶¹ Rejoinder, Sections 4.4.1 and 4.4.2.

former.”⁶² These limits also inform the scope of the Tribunal’s authority to determine its jurisdiction. Accordingly, tribunals may only consider allegations of misuse of the corporate form when there is a close nexus between the alleged wrongdoing and the claimant’s access to treaty-based jurisdiction.⁶³

34. Bolivia states that “[t]he[] 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.”⁶⁴ But *Tokios Tokelés* confirms that the relevant inquiry, where veil piercing is raised in an attempt to discredit the claimant’s nationality for the purpose of establishing an investment treaty tribunal’s jurisdiction, is whether “the Claimant’s conduct with respect to its status as an entity of [a Contracting Party]

⁶² Treaty, **C-1**, Art 8(1).

⁶³ Tellingly, Bolivia did not (because it cannot) refer to any jurisprudence supporting the broad use of the veil piercing doctrine it is now advocating. The only four cases cited by Bolivia—*Barcelona Traction, Tokios Tokelés, Loewen*, and *Saluka*—together demonstrate that veil piercing is only applicable in situations where the claimant commits fraud or malfeasance by manipulating its legal nationality to access to arbitration, not when there are general allegations of corporate misconduct. See *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) [1970] ICJ Reports 3, **CLA-7**, paras 83, 92-93, 102 (declining to pierce the corporate veil in the interest of the Belgian shareholders of a Canadian company in the context of Belgium’s attempt to exercise diplomatic protection on behalf of the Belgian shareholders; Spain’s allegations of fraud and malfeasance had no connection to the ICJ’s jurisdiction in the case, and the ICJ therefore declined to act upon those allegations); *Tokios Tokelés v Ukraine* (ICSID Case No ARB/02/18) Decision on Jurisdiction, 29 April 2004, **CLA-48**, para 56 (observing, in declining to pierce the corporate veil, that “none of the Claimant’s conduct with respect to its status as an entity of Lithuania constitute[d] an abuse of legal personality” and noting, in particular, that “[t]he Claimant made no attempt whatever to conceal its national identity from the Respondent” and “[t]he Claimant manifestly did not create Tokios Tokelés for the purpose of gaining access to ICSID arbitration under the BIT against Ukraine”); *Loewen Group Inc and Raymond L Loewen v United States of America* (ICSID Case No ARB/AF/98/3) Award, 26 June 2003, **RLA-28**, para 237 (declining to opine on the issue of veil piercing and limiting its discussion of the facts to the claimant’s corporate reorganization as relevant to the separate issue of continuous nationality); *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, paras 228-230 (finding that the parties had made “no attempt to conceal, either from the Tribunal or, in the Claimant’s case, from the Czech authorities[,] the closeness of the relationship between Nomura and Saluka,” and consequently rejecting the respondent’s allegations of fraud and misconduct and its veil piercing arguments).

In none of these cases did the tribunal opine on the general desirability of the claimant’s business practices. In each of the four cases, the tribunal only based its decision on actions by the claimant that directly affected its legal nationality, and consequently, its access to international jurisdiction.

⁶⁴ Rejoinder, para 468.

constitutes an abuse of legal personality.”⁶⁵ In other words, even if veil piercing were available in investment treaty arbitration, this doctrine could only apply if Bolivia demonstrates that Glencore Bermuda abused its corporate form and committed fraud and/or malfeasance in invoking the benefits of its corporate nationality in this arbitration.⁶⁶ Bolivia has neither alleged nor proven (because it cannot) that Claimant’s use of its corporate nationality falls into any of these scenarios. As in *Tokios Tokelès*, Claimant has “made no attempt whatever to conceal its national identity from the Respondent” and, “there is no evidence in the record that the Claimant used its formal legal nationality for any improper purpose.”⁶⁷ This should be the end of the matter.

35. In reality, Bolivia’s sole justification for piercing the corporate veil liberally and routinely “to reveal the true party in interest”⁶⁸ is that “[a]ny 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.”⁶⁹ But that is precisely the state of the law, and what the Treaty (which Bolivia itself negotiated and concluded) provides. As the *Orascom* tribunal recently stated:

⁶⁵ *Tokios Tokelès v Ukraine* (ICSID Case No ARB/02/18) Decision on Jurisdiction, 29 April 2004, **CLA-48**, para 56 (emphasis added).

⁶⁶ Indeed, what Bolivia must show is that “Claimant has used its status as a juridical entity of [the Treaty’s other Contracting Party] to perpetrate fraud or engage in malfeasance;” that “Claimant’s veil must be pierced and jurisdiction denied in order to protect third persons;” or that “Claimant used its corporate nationality to evade applicable legal requirements or obligations.” *Tokios Tokelès v Ukraine* (ICSID Case No ARB/02/18) Decision on Jurisdiction, 29 April 2004, **CLA-48**, para 55 (emphases added). See also *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award, 22 September 2014, **CLA-123**, paras 232, 252-255 (rejecting the respondent’s argument that the tribunal should ‘lift[] the corporate veil to prevent misuse of the privileges of legal personality,’ on the basis that the type of ‘abuse’ that would warrant such a remedy is limited to when ‘the company has been incorporated in a given State after the dispute arose so as to take advantage of a treaty concluded by that State.’).

⁶⁷ *Tokios Tokelès v Ukraine* (ICSID Case No ARB/02/18) Decision on Jurisdiction, 29 April 2004, **CLA-48**, para 56 (emphasis added). In addition, as we further explain below, there is simply no basis for the Tribunal to conclude that Claimant has committed an abuse of process. See Section II.B.2.

⁶⁸ Rejoinder, para 464.

⁶⁹ *Ibid*, para 464.

In the field of investment treaties, the existence of a vertical corporate chain and of treaty protection covering ‘indirect’ investments implies that several entities in the chain may claim treaty protection, especially where a host state has entered into several investment treaties. In other words, several corporate entities in the chain may be in a position to bring an arbitration against the host state in relation to the same investment.⁷⁰

Indeed, as the tribunal in *Flemingo DutyFree* noted, even “the possibility of parallel claims, emanating from two different indirect investors at different levels of the investment structure, follows from the investment law itself and has been confirmed by several awards.”⁷¹ Had Bolivia wished to restrict the availability of such claims, it could have put those restrictions in the Treaty. It did not.

36. The only restriction on a group of companies’ decision to bring claims against a host State based on one or more investment treaties is the abuse of process doctrine. That doctrine regulates investment restructuring effected for the sole purpose of gaining access to international jurisdiction at a time in which a specific dispute has either already arisen or is highly foreseeable. It does not prohibit treaty planning, which in any event did not occur in this case, as we demonstrate below.⁷²
37. *Lastly*, even assuming that veil piercing could apply in the present context (which it does not) and Bolivia had shown, through evidence meeting a high burden of proof, that the conditions of its applications are present (which it has not), veil piercing is an equitable doctrine that is used sparingly, and the adjudicator always has discretion to decline to apply it.⁷³ It is therefore wrong to suggest, as Bolivia

⁷⁰ *Orascom TMT Investments Sàrl v People’s Democratic Republic of Algeria* (ICSID Case No ARB/12/35) Award, 31 May 2017, **RLA-9**, para 542.

⁷¹ *Flemingo DutyFree Shop Private Limited v Republic of Poland* (UNCITRAL) Award, 12 August 2016, **CLA-223**, para 347.

⁷² See Section II.B.2.a.

⁷³ *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, para 230 (“The Respondent acknowledges that [the corporate veil doctrine] presents itself as an equitable remedy where corporate structures had been utilised to perpetrate fraud or other malfeasance, but, in the present case, the Tribunal finds that the alleged fraud and malfeasance

does, that “international law requires the Tribunal to pierce the corporate veil when that veil has been misused.”⁷⁴ Not only is the Tribunal not required to pierce the corporate veil in this case, it also has no basis for doing so.

b. Bolivia has failed to produce any evidence that would justify piercing Claimant’s corporate veil to deny it the benefits of its corporate nationality under the Treaty

38. In addition to being wrong on the law, Bolivia’s veil piercing arguments also fail on the facts. Bolivia’s factual arguments against Glencore Bermuda center around its allegations that Glencore Bermuda is merely a “shell company,”⁷⁵ used by Glencore International to commit what Bolivia calls general “misdeeds around the globe.”⁷⁶ Claimant, in its Reply, has shown that the allegations are both irrelevant and on the whole wrong.⁷⁷ Yet, in its Rejoinder, Bolivia continues to insist, baselessly, that the Tribunal should ignore Claimant’s legal personality because, “if the corporate veil is not pierced, it will aid and abet Claimant’s misuse of the shell company that is Glencore Bermuda to perpetrate illicit actions.”⁷⁸
39. Having established that the relevant inquiry for piercing the corporate veil is whether there is fraud or malfeasance in gaining access to the Tribunal’s jurisdiction, Bolivia’s allegations should be dismissed because: (i) they concern supposed wrongdoing in business operations outside of Bolivia; they have no connection to the subject matter of this dispute or Claimant’s access to this arbitration; and, in any event, they lack any evidentiary basis; and (ii) the sole remaining allegation, that Glencore Bermuda is a holding company with

have been insufficiently made out to justify recourse to a remedy which, being equitable, is discretionary.”) (emphasis added).

⁷⁴ Rejoinder, para 462 (emphasis added).

⁷⁵ Rejoinder, para 476.

⁷⁶ *Ibid*, paras 475, 480.

⁷⁷ Reply, paras 208-209.

⁷⁸ Rejoinder, para 488.

insufficient physical presence or activities in Bermuda, is patently irrelevant and insufficient for piercing the corporate veil.

i Allegations of Glencore’s wrongdoing in business operations in other countries have no bearing on this Tribunal’s determination of jurisdiction

40. Bolivia does not even attempt to argue (nor could it) that Glencore is fraudulently or illegally using Claimant’s corporate form in order to access the Tribunal’s jurisdiction. Instead, Bolivia refers to unsubstantiated “accusations,” relayed in the press, “that investments routed through Glencore Bermuda have been implicated in illegal activities throughout the world.”⁷⁹ All of these allegations relate to supposed misconduct taking place outside of, and not implicating, Bolivia. From these bare assertions, Bolivia concludes that “Claimant’s corporate form is being used to perpetrate fraud on a global level.”⁸⁰
41. Bolivia is mistaking the Tribunal’s jurisdiction for that of a global enforcement agency or a world court of general jurisdiction. The Tribunal’s mandate is limited to deciding the present investment dispute; its jurisdictional inquiry is accordingly limited to an assessment of the facts and law relevant to this dispute. The Tribunal should not allow Bolivia to turn this arbitration into a series of mini trials concerning Bolivia’s dislike of, or simple ideological disagreement with, Claimant’s global business practices, however disconnected they are from the present dispute.
42. There is simply no connection between Bolivia’s allegations and Claimant’s reliance on its place of incorporation to access the jurisdiction of this Tribunal.

[REDACTED]

⁷⁹ *Ibid*, para 477.

⁸⁰ *Ibid*, para 487.

⁸¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Nor has Bolivia shown that there exists any other connection between those allegations and Glencore Bermuda. As Bolivia admits,⁸³ none of its allegations implicate the Assets, which are the subject matter of the present dispute; nor do they have any connection to, or impact on, Bolivia, Vinto, Colquiri or the present investment dispute. Quite simply, there is no nexus between the alleged misuse of Claimant’s corporate form, even if proven (which it is not), and this arbitration. Therefore, these allegations are entirely irrelevant to this Tribunal’s jurisdiction.

43. In its Reply, Claimant showed that Bolivia had failed to adduce any evidence in its Statement of Defense in support of its inflammatory accusations.⁸⁴ This remains true after Bolivia’s latest submission. Bolivia contends that Glencore Bermuda “was set up to protect its parent company against liability for serious misdeeds around the globe.”⁸⁵ Bolivia, however, does not specify how Glencore Bermuda’s corporate form is allegedly being used to defraud third parties to whom Glencore International is supposedly liable. Bolivia also does not attempt to explain (because it could not) how Glencore Bermuda may have been set up, in 1993, for the purpose of avoiding liability from third parties.⁸⁶ Bolivia’s case, therefore, rests on general and unsubstantiated accusations.
44. The hallmarks of fraud and malfeasance—ie, efforts to disguise one’s true identity and attempts to avoid liability⁸⁷—are clearly lacking in this case. The

82 [REDACTED]

83 Rejoinder, para 487.

84 Reply, paras 204-210.

85 Rejoinder, para 480. *See also ibid* para 478.

86 Reply, para 205.

87 *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 358; *Tokios Tokelès v Ukraine* (ICSID Case No ARB/02/18) Decision on Jurisdiction, 29 April 2004, **CLA-48**, para

uncontroverted facts are that: (i) Bolivia does not allege with any particularity, let alone establish, that denying Claimant’s access to this Tribunal’s jurisdiction is necessary (or even, that it would serve) to protect third parties against an attempt by Glencore International to use Claimant’s corporate form or formal nationality to escape liabilities (there has been no such attempt, and Bolivia does not refer to any established liabilities to third parties); (ii) Glencore International has never attempted to conceal its existence, identity or involvement in the Bolivian investments, so that it could be named as a party to any hypothetical action having a connection with those investments;⁸⁸ (iii) Glencore Bermuda’s affiliation with Glencore International is a publically available fact;⁸⁹ and (iv) in any event, Glencore Bermuda would be able to satisfy any hypothetical liability vis-à-vis third parties. Far from being an undercapitalized entity, opaquely interposed between Glencore International and its creditors for the specific purpose of avoiding unspecified and hypothetical liabilities vis-à-vis third parties, Glencore Bermuda has historically been “one of the primary holding companies for Glencore’s investments worldwide” and a primary financing entity for the Glencore group, and it continues to manage a considerable portfolio for the entire Glencore group.⁹⁰

45.

[REDACTED]

56; *Millicom International Operations BV and Sentel GSM SA v Republic of Senegal* (ICSID Case No ARB/08/20) Decision on Jurisdiction of the Arbitral Tribunal, 16 July 2010, **CLA-99**, para 84.

⁸⁸ Reply, para 204.

⁸⁹ *See, eg*, Glencore Annual Report, 2011, **R-252**, p 154.

⁹⁰ Statement of Claim, para 37; First Witness Statement of Christopher Eskdale, para 20. *See also* Reply, para 62; Second Witness Statement of Christopher Eskdale, para 17.

91

[REDACTED]

[REDACTED]

46. In sum, Bolivia’s attempt to discredit Claimant’s legitimacy, besides being irrelevant to the Tribunal’s jurisdiction in this case, fails for lack of evidence.

ii The mere fact that Glencore Bermuda is a holding company is insufficient for piercing the corporate veil

47. In addition to seeking to impugn the legitimacy of the Glencore group’s business operations around the globe (which is both irrelevant and unsupported by the evidence), Bolivia suggests that the following allegations are sufficient for the Tribunal to disregard the nationality of Glencore Bermuda: (i) Glencore Bermuda has limited physical presence in Bermuda;⁹⁴ (ii) it acts as a holding company for various businesses held by the Glencore group around the globe, with investments structured with a view to maximizing cash-flows while taking advantage of significant financing and tax benefits.⁹⁵ These are perfectly legitimate business practices, and certainly do not justify ignoring Claimant’s nationality for the

92 [REDACTED]

93 [REDACTED]

94 Rejoinder, para 476.

95 *Ibid*, paras 477-479.

purpose of accessing the Treaty's protections where, as here, the Treaty expressly extends such protection to Glencore Bermuda.

48. *First*, as the Tribunal correctly noted in its Procedural Order No 2 on Bifurcation, there is “no clear textual support in the applicable BIT [ie, the Treaty] for the proposition that this agreement requires material or active presence for a company to qualify as investor.”⁹⁶ This being the case, the Tribunal should refuse to read in additional requirements to the Treaty definition of “investor.”⁹⁷ Bolivia itself effectively admitted, in its Statement of Defense, that Claimant is a qualifying investor under the Treaty.⁹⁸
49. In any event, it is wrong to suggest, as Bolivia does, that Glencore Bermuda is an “empty” shell.⁹⁹ Even if this were relevant for purposes of the incorporation test (which it is clearly not), it is not disputed that Glencore Bermuda has significant holding activities in Bermuda.¹⁰⁰ As Mr Eskdale has explained, Glencore Bermuda secures financing for and manages a diverse, multi-billion dollar portfolio of operations and investments around the world.¹⁰¹ These are precisely the types of activities that the *Tenaris* tribunal found to be sufficient to inform the separate and more demanding ‘seat’ (*‘siège social’* or *‘sede’*) requirement, which was applied in addition to the incorporation test in the *Tenaris* case, but does not apply here under the Treaty.¹⁰²

⁹⁶ Tribunal’s Procedural Order No 2: Decision on Bifurcation, 31 January 2018, para 49.

⁹⁷ Reply, paras 192-193. *See Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, paras 240-242.

⁹⁸ Statement of Defense, para 310 (stating, in making its abuse of process argument, that “an abuse of process arises not when a group acquires an asset, but when the group transfers the asset to a particular subsidiary that is protected by an investment Treaty”) (emphasis added).

⁹⁹ Rejoinder, para 476.

¹⁰⁰ Statement of Claim, para 37; Reply, para 62.

¹⁰¹ First Witness Statement of Christopher Eskdale, para 20; Second Witness Statement of Christopher Eskdale, para 17.

¹⁰² *Tenaris SA and Talta-Trading E Marketing Sociedade Unipessoal LDA v Bolivarian Republic of Venezuela* (ICSID Case No ARB/11/26) Award, 29 January 2016, **CLA-220**, paras 197-227.

50. *Secondly*, notwithstanding Bolivia’s ideological opposition to it, there is nothing illegitimate in structuring investments through wholly-owned and controlled holding companies, with a view to benefitting from advantageous financial and tax regulations in their States of incorporation. As the *Saluka* tribunal noted, such practices are “commonplace in the world of commerce.”¹⁰³ In the words of the *Aguas del Tunari* tribunal, “[h]olding companies [...] owning substantial assets [...] are [...] both a common and legal device for corporate organization and face the same legal obligations of corporations generally.”¹⁰⁴ Additionally:

[I]t is not uncommon in practice, and – absent a particular limitation – not illegal to locate one’s operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.¹⁰⁵

51. Similarly, the tribunal in *Orascom v Algeria* stated:

It goes without saying that structuring an investment through several layers of corporate entities in different states is not

In particular, the tribunal stated:

In so far as either entity is no more than a holding company, or a company with little or no day-to-day operational activities, its day-to-day ‘management’ will necessarily be very limited, and so will its physical links with its corporate seat. Put another way, it would be entirely unreasonable to expect a mere holding company, or a company with little or no operational responsibility, to maintain extensive offices or workforce, or to be able to provide evidence of extensive activities, at its corporate location. And yet holding companies, and companies with little or no operational responsibility, have ‘management’, and are certainly not excluded from the Treaties in this case. Indeed, countries such as Luxembourg and Portugal clearly consider it to their respective benefit to attract such companies, and to maintain a corporate regulatory regime that allows for them.

Ibid, para 199.

¹⁰³ *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, para 228.

¹⁰⁴ *Aguas del Tunari, SA v Republic of Bolivia* (ICSID Case No ARB/02/3) Decision on Jurisdiction, 21 October 2005, **CLA-162**, para 245.

¹⁰⁵ *Ibid*, para 330(d).

illegitimate. Indeed, the structure may well pursue legitimate corporate, tax, or pre-dispute BIT nationality planning purposes.¹⁰⁶

52. As explained above,¹⁰⁷ even assuming the veil piercing doctrine could apply in the context of assessing jurisdiction in investment treaty arbitration (which it does not), the only relevant inquiry is whether Glencore International has used Glencore Bermuda's separate legal personality to commit fraud or malfeasance in gaining access to the Tribunal's jurisdiction. Bolivia does not allege that this is the case; nor could it. And as the following section demonstrates, its allegations of abuse of process take it nowhere.
53. In sum, there is no basis for the Tribunal to pierce the corporate veil in order to ignore Glencore Bermuda's nationality for the purpose of accessing this Tribunal's jurisdiction. All the Treaty requires is incorporation in a covered territory. It is undisputed that Glencore Bermuda was incorporated in Bermuda in 1993, and that Bermuda is a covered territory. This should be the end of the Tribunal's inquiry.

2. There is no abuse of process in this case

54. In its Statement of Defense, Bolivia misconstrued both the law and the facts in an attempt to set forth a claim for abuse of process. Specifically, Bolivia argued that the Tribunal lacks jurisdiction over Glencore Bermuda's claims because Glencore Bermuda committed an abuse of process by receiving the investment when a dispute was foreseeable.¹⁰⁸ Bolivia incorrectly argued that restructuring an investment to gain treaty protection is "*per se* abusive"¹⁰⁹ and that a dispute need not be "highly foreseeable" at the time of the restructuring.¹¹⁰ Rather, according to

¹⁰⁶ *Orascom TMT Investments Sàrl v People's Democratic Republic of Algeria* (ICSID Case No ARB/12/35) Award, 31 May 2017, **RLA-9**, para 542.

¹⁰⁷ See Section II.B.1.a, above.

¹⁰⁸ Statement of Defense, Section 4.2.

¹⁰⁹ *Ibid*, para 295.

¹¹⁰ *Ibid*, para 301.

Bolivia, “reasonable foreseeability” suffices.¹¹¹ Alleging that the “only plausible purpose” for Glencore International’s transfer of the Assets to Glencore Bermuda was to avail itself of the Treaty’s protection,¹¹² Bolivia argues that a dispute was foreseeable at the time the Assets were transferred to Glencore Bermuda because, by early 2005: (i) Bolivia was emerging from a period of political crisis;¹¹³ (ii) Evo Morales was posed to assume the presidency and his political platform promised a different attitude towards the mining sector;¹¹⁴ [REDACTED] and thus (iv) it was clear that “Bolivia would be less indulgent of private mining interests”¹¹⁶ as there was a “growing public sentiment for renationalization of the mining industry.”¹¹⁷

55. In its Reply, Glencore Bermuda explained why Bolivia’s abuse of process claim fails on the law and on the facts.¹¹⁸ *First* and foremost, there was simply no restructuring in this case since: (i) Glencore Bermuda was the company that acquired and paid for the Assets;¹¹⁹ (ii) in any event, there would have been no need to restructure for the purpose of obtaining Treaty protection, since any investments of Glencore International would have been protected under the Swiss-Bolivia BIT;¹²⁰ and (iii) Glencore Bermuda was the intended owner of the Assets due to a number of commercial and financial considerations, as explained by Mr Eskdale.¹²¹ *Second*, even if the Tribunal were to determine that the

¹¹¹ *Ibid*, para 301.

¹¹² *Ibid*, para 294.

¹¹³ *Ibid*, para 308.

¹¹⁴ *Ibid*, para 308.

¹¹⁵ [REDACTED]

¹¹⁶ *Ibid*, para 308.

¹¹⁷ Statement of Defense, para 309 (citing Steven ST Anderson, *U.S. Geological Survey Minerals Yearbook*, “The Mineral Industry of Bolivia,” 2004, **RLA-18**, p 3.14).

¹¹⁸ Reply, Section IV.B.3.

¹¹⁹ *See ibid*, para 212, Section II.C.

¹²⁰ *Ibid*, para 212.

¹²¹ *Ibid*, para 212.

investment was structured through Glencore Bermuda to obtain Treaty protection (which it was not), this would not constitute an abuse of process.¹²² Tribunals and commentators alike confirm that it is a perfectly legitimate practice to restructure an investment to obtain treaty protection for future disputes.¹²³ *Third*, Bolivia misrepresented the applicable foreseeability standard. Rather than focusing, as Bolivia did, on the existence of a potential dispute, tribunals have specified that the abuse of process analysis should center on the foreseeability of the specific dispute which is the subject of the arbitration.¹²⁴ Contrary to Bolivia's assertions, the specific dispute must be highly foreseeable at the time of the supposed restructuring to give rise to an abuse of process.¹²⁵ *Finally*, in the present case, it was not highly foreseeable at the time Glencore Bermuda made its investment that Bolivia would breach the Treaty provisions by expropriating the Assets without providing compensation and without following basic due process guarantees.

56. In its Rejoinder, Bolivia now concedes that restructuring an investment to obtain treaty protection is not *per se* abusive.¹²⁶ It acknowledges that the key to

¹²² *Ibid*, paras 214-221.

¹²³ *See, eg*, C Schreuer, "Nationality Planning in Contemporary Issues In International Arbitration And Mediation" (2013) The Fordham Papers 2012, **CLA-201**, pp 19, 26. *See also* U Topcan, "Abuse of the Right to Access ICSID Arbitration" (2014) Vol 29 ICSID Review 3, **CLA-214**, pp 632-633; Z Douglas, *The International Law of Investment Claims* (1st edn 2009) (Extract), 2009, **CLA-179**, para 864; *Phoenix Action Ltd v The Czech Republic* (ICSID Case No ARB/06/5) Award, 15 April 2009, **RLA-15**, paras 94-95; *Mobil Corporation, Venezuela Holdings BV, and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27) Decision on Jurisdiction, 10 June 2010, **CLA-97**, para 204; *Tidewater Inc and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Decision on Jurisdiction, 8 February 2013, **CLA-116**, para 184; *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **CLA-129**, para 540; *Renée Rose Levy and Gremcitel SA v Republic of Peru* (ICSID Case No ARB/11/17) Award, 9 January 2015, **CLA-124**, para 184.

¹²⁴ Reply, paras 225-227; *Tidewater Inc and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Decision on Jurisdiction, 8 February 2013, **CLA-116**, paras 145, 147, 197, 198; *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Decision on the Respondent's Jurisdictional Objections, 1 June 2012, **CLA-110**, para 2.99; *Alapli Elektrik BV v Republic of Turkey* (ICSID Case No ARB/08/13) Award, 16 July 2012, **CLA-111**, para 403; *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **CLA-129**, paras 545-554.

¹²⁵ Reply, para 228; *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **CLA-129**, para 550.

¹²⁶ Rejoinder, para 394; Reply, paras 214-221; Statement of Defense, para 295.

determining whether an abuse of process has occurred is the foreseeability of the dispute at the time of the purported restructuring.¹²⁷ However, Bolivia continues to misstate the degree of foreseeability required and either mischaracterizes or ignores Glencore Bermuda's position and relevant jurisprudence in an effort to argue that Glencore International purposely rerouted its investment through Glencore Bermuda to obtain Treaty protection when a dispute with Bolivia was foreseeable.

57. For the reasons stated below, Bolivia's claim remains unsupported by the facts and the law.

a. Glencore Bermuda did not restructure its investment to obtain Treaty protection

58. In its Reply, Glencore Bermuda established that: (i) it did not restructure its investment; and (ii) even if its acquisition of the Assets were considered a restructuring (which it was not), it was not done for the purpose of obtaining Treaty protection.¹²⁸ In its Rejoinder, Bolivia failed to set forth any evidence to the contrary.¹²⁹

59. *First*, unable to challenge the evidence submitted by Claimant to prove that Glencore Bermuda was the company that acquired and paid for the Assets in March 2005,¹³⁰ Bolivia now argues in its Rejoinder that Glencore Bermuda merely "acted as a vehicle" in the acquisition and did not participate in the "negotiations or the due diligence leading up to the transaction."¹³¹ Bolivia, however, fails to articulate how, if at all, this would impact the abuse of process analysis. Claimant already addressed the reasons why Glencore International

¹²⁷ Rejoinder, para 395 (arguing that "the relevant analysis is whether a dispute was reasonably foreseeable at the time when the investment was made").

¹²⁸ Reply, paras 212-213; Section II.C.

¹²⁹ See Rejoinder, paras 428, 390.

¹³⁰ Reply, paras 62, 212.

¹³¹ Rejoinder, para 428.

- (rather than Glencore Bermuda) negotiated the sale of the Assets, as well as the fact that it was always understood that Glencore Bermuda would be their ultimate owner, in accordance with the company's established corporate practice.¹³²
60. *Second*, according to Bolivia, Glencore Bermuda does not contest that a change of ownership can be abusive even when obtaining treaty protection is only one of its purposes.¹³³ Bolivia's statement, however, is entirely irrelevant to the Tribunal's analysis because obtaining treaty protection was not even one of the reasons for the assignment of the Assets to Glencore Bermuda. As explained by Mr Eskdale, Glencore Bermuda had historically been the holding company for the vast majority of Glencore International's investments, including those in Latin America,¹³⁴ and was the intended owner of the Assets due to a number of commercial and financial considerations.¹³⁵
61. In addition, Glencore Bermuda already demonstrated that, even assuming for the sake of argument that there was a "restructuring" (which there was not), it could not have been motivated by the desire to obtain treaty protection since Glencore International independently enjoyed the protection of the Swiss-Bolivia BIT.¹³⁶ In its Rejoinder, Bolivia continues to argue that Glencore International is not protected under such treaty because its indirect shareholders are "a range of global funds primarily from the United States."¹³⁷ To do so, Bolivia refers to a

¹³² Second Witness Statement of Christopher Eskdale, paras 5, 8,16,17; First Witness Statement of Christopher Eskdale, para 20; Email from Glencore (Mr Eskdale) to Curtis, Mallet-Prevost, Colt & Mosle LLP (Mr Vega), 2 March 2005, **C-205**; *see also* Reply, paras 205-206.

¹³³ Rejoinder, para 398.

¹³⁴ Second Witness Statement of Christopher Eskdale, para 17; First Witness Statement of Christopher Eskdale, para 20; 2007-2008 Glencore Bermuda Financial Statements, 31 December 2008, **C-94**.

¹³⁵ Second Witness Statement of Christopher Eskdale, para 17.

¹³⁶ Reply, para 212. *See* Agreement between the Swiss Confederation and the Republic of Bolivia on the reciprocal promotion and protection of investments, **RLA-19**, Art 1(b)(aa), provides that "companies" means "legal entities or associations without legal status but able to possess property, in which, directly or indirectly, there is a substantial Swiss interest."

¹³⁷ Rejoinder, para 390.

Morningstar report listing Glencore plc's shareholders as of 2017¹³⁸—*six years after* the company was created and went public on both the London and Hong Kong Stock Exchanges (opening it up to investment by non-Swiss shareholders) and *twelve years after* the investment was made.¹³⁹ But Glencore International's shareholding as of 2017 is irrelevant to determine whether it acquired the Assets through Glencore Bermuda in order to obtain treaty protection. As demonstrated by the contemporaneous evidence submitted with Claimant's Reply, at the relevant time—that is, at the time of the acquisition—Glencore International was not only itself incorporated in Switzerland, but was held in its entirety by two other Swiss legal entities (Glencore Holding AG and Glencore LTE AG).¹⁴⁰ Glencore International therefore had a “substantial Swiss interest,” making it a qualified investor under Article 1(b) the Swiss-Bolivia BIT.¹⁴¹

62. In any event, even assuming that Glencore Bermuda was merely “a vehicle” used by Glencore International to obtain Treaty protection or other benefits, this would not amount to an abuse of process. The tribunal in *Aguas del Tunari v Bolivia* rejected the very argument that Bolivia is now raising again, stating:

[I]t is not uncommon in practice and – absent a particular limitation – not illegal to locate one's operation in a jurisdiction perceived to provide a beneficial regulatory and legal environment

¹³⁸ Glencore PLC Major Shareholders, *Morningstar*, **R-236**.

¹³⁹ See Prospectus of Glencore International plc, 3 May 2011, **R-193**.

¹⁴⁰ See Second Witness Statement of Christopher Eskdale, para 17; Glencore International Share Ledger, 9 June 2008, **C-233**; Letter from Sinchi Wayra (Mr Capriles) to the Minister of Mining (Mr Echazú), 1 June 2007, **C-228**, pp 11-14, 18 (attaching previous correspondence with the Bolivian National Congress regarding Glencore group's corporate structure). See also Letter from Glencore International (Mr Strothotte) to the President of Bolivia (Mr Morales), 22 February 2007, **C-21**; Letters from Glencore International plc (Mr Maté and Mr Glasenberg) to the President of Bolivia (Mr Morales) and the Ministry of Mining (Mr Pimentel), 14 May 2010, **C-27**; Letters from Glencore International plc (Mr Maté) to the President of Bolivia (Mr Morales), 27 June 2012, **C-40**.

¹⁴¹ It is worth reiterating that Bolivia's statement is contradicted by its own repeated allegations that Claimant is “purely Swiss in substantive reality,” and that its investment is “Swiss in its origins and remains Swiss in its ultimate ownership.” Statement of Defense, para 349 (emphasis added). See also *ibid*, paras 24, 257, 350, 369, 435.

in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.¹⁴²

63. Similarly, in the words of the *Phoenix Action* tribunal, investors may “choos[e] freely the vehicle through which they perform their investment.”¹⁴³
64. It follows that the Glencore group’s decision to structure the transaction through Glencore Bermuda was a legitimate commercial endeavor and cannot be used to deny Claimant protection under the Treaty.

b. Tribunals have set a high threshold for a finding of abuse of process

65. Bolivia incorrectly claims that Claimant does not contest: (i) “Bolivia’s argument that no exceptional circumstances are needed for an abuse of process;”¹⁴⁴ (ii) Bolivia’s argument “that the *Philip Morris* tribunal confirmed it is *per se* abusive to restructure when a dispute is foreseeable;” and (iii) that “no tribunal has

¹⁴² *Aguas del Tunari SA v Republic of Bolivia* (ICSID Case No ARB/02/3) Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, **CLA-162**, para 330; *see also Mobil Corporation, Venezuela Holdings BV, and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27) Decision on Jurisdiction, 10 June 2010, **CLA-97**, para 204 (“As stated by the Claimants, the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.”) *Tidewater Inc and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Decision on Jurisdiction, 8 February 2013, **CLA-116**, para 184; *MNSS BV and Recupero Credito Acciaio NV v Montenegro* (ICSID Case No ARB (AF)/12/8) Award, 4 May 2016, **CLA-222**, para 182; *Sanum Investments Limited v Lao People’s Democratic Republic* (PCA Case No 2013-13) Award on Jurisdiction, 13 December 2013, **CLA-212**, para 309 (“The search for a convenient place of incorporation is common practice whether for fiscal reasons or for the network of investment treaties a country may have concluded. There is nothing wrong *per se* in this search.”); *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Republic of Paraguay* (ICSID Case No ARB/07/9) Further Decision on Objections to Jurisdiction, 9 October 2012, **CLA-205**, para 94.

¹⁴³ *Phoenix Action Ltd v The Czech Republic* (ICSID Case No ARB/06/5) Award, 15 April 2009, **RLA-15**, paras 94-95 (“International investors can of course structure upstream their investments, which meet the requirement of participating in the economy of the host State, in a manner that best fits their need for international protection, in choosing freely the vehicle through which they perform their investment.”) (emphasis added).

¹⁴⁴ Rejoinder, para 399.

subsequently rejected that conclusion of the *Philip Morris* tribunal.”¹⁴⁵ These assertions are false.

66. In its Reply,¹⁴⁶ Glencore Bermuda specifically submitted that tribunals have found evidence of abuse only “in very exceptional circumstances,”¹⁴⁷ after taking into account “all the circumstances of the case.”¹⁴⁸ The investment awards cited by Glencore Bermuda—and not challenged by Bolivia—are clear in this regard. For example, in *Chevron*, the tribunal observed that:

[I]t has further to be noted that in all legal systems, the doctrines of abuse of rights, estoppel and waiver are subject to a high threshold. Any right leads normally and automatically to a claim for its holder. It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim. The high threshold also results from the seriousness of a charge of bad faith amounting to abuse of process. As Judge Higgins stated in her 2003 Separate Opinion in the *Oil Platforms* case, there is “a general agreement that the graver the charge the more confidence must there be in the evidence relied on.”¹⁴⁹

67. Similarly, in *Levy v Peru* the tribunal held that:

[T]he threshold for a finding of abuse of process is high, as a court or tribunal will obviously not presume abuse, and will affirm the evidence of an abuse only “in very exceptional circumstances.”¹⁵⁰

68. Indeed, these findings were affirmed by the *Philip Morris* tribunal, which emphasized that “it is clear, and recognised by all earlier decisions that the

¹⁴⁵ *Ibid*, para 399.

¹⁴⁶ Reply, para 219.

¹⁴⁷ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador* (PCA Case No 34877) Interim Award, 1 December 2008, **RLA-14**, para 143 (emphasis added).

¹⁴⁸ *Mobil Corporation, Venezuela Holdings BV, and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27) Decision on Jurisdiction, 10 June 2010, **CLA-97**, para 177 (emphasis added).

¹⁴⁹ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador* (PCA Case No 34877) Interim Award, 1 December 2008, **RLA-14**, para 143 (emphasis added).

¹⁵⁰ *Renée Rose Levy and Gremcitel SA v Republic of Peru* (ICSID Case No ARB/11/17) Award, 9 January 2015, **CLA-124**, para 186 (emphasis added) (internal citation omitted).

threshold for finding an abusive initiation of an investment claim is high.¹⁵¹ The tribunal in that case went on to observe that:

While they admit that, under certain circumstances, a restructuring may constitute an abuse, investor-State tribunals have set a high threshold for finding an abuse of process, requiring proof of the foreseeability of the claim and depending on the particular circumstances of each case.¹⁵²

69. It follows that there is no merit to Bolivia's argument that Glencore Bermuda purportedly "conceded" that no exceptional circumstances are needed for a finding of abuse of process, or that this was supposedly confirmed by the *Philip Morris* tribunal.¹⁵³
70. As already explained by Glencore Bermuda, Bolivia has not come close to meeting the "high threshold" required for a finding of abuse of process.

c. Bolivia continues to misstate the relevant foreseeability standard

71. Bolivia now acknowledges that foreseeability is at the heart of the abuse of process analysis.¹⁵⁴ It is not enough for a claimant to have restructured its investment; restructuring investments to obtain treaty protection is, as conceded by Bolivia and repeatedly recognized by investment treaty tribunals, a perfectly legitimate exercise.¹⁵⁵ Despite recognizing that foreseeability is required for an

¹⁵¹ *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **CLA-129**, para 539.

¹⁵² *Ibid*, para 550 (emphasis added) (citing *Tidewater Inc and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Decision on Jurisdiction, 8 February 2013, **CLA-116**). See also *Tidewater Inc and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Decision on Jurisdiction, 8 February 2013, **CLA-116**, para 147; *Mobil Corporation, Venezuela Holdings BV, and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27) Decision on Jurisdiction, 10 June 2010, **CLA-97**, para 177; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador* (PCA Case No 34877) Interim Award, 1 December 2008, **RLA-14**, para 143; *Renée Rose Levy and Grencitel SA v Republic of Peru* (ICSID Case No ARB/11/17) Award, 9 January 2015, **CLA-124**, para 186.

¹⁵³ Rejoinder, para 399.

¹⁵⁴ *Ibid*, para 392.

¹⁵⁵ *Ibid*, para 394; *Phoenix Action Ltd v The Czech Republic* (ICSID Case No ARB/06/5) Award, 15 April 2009, **RLA-15**, paras 94-95; *Mobil Corporation, Venezuela Holdings BV, and others v*

abuse of process claim, Bolivia continues to deny that: (i) it is the specific dispute subject to the arbitration which (ii) must have been highly foreseeable at the time in which the investor made his investment. As established by Glencore Bermuda, both of these requirements must be met for an abuse of process claim to succeed.

i The focus of the abuse of process analysis must be on the specific dispute subject to the arbitration

72. Tribunals have emphasized that, when analyzing the timing of a restructuring to determine whether an abuse of process has occurred, the focus must be on the specific dispute that is the subject of the arbitration.¹⁵⁶ Notably, while Bolivia claims that this statement is “false,”¹⁵⁷ Bolivia does not actually contest it. Rather, Bolivia argues that “[t]he dispute subject of the arbitration may be only one of several disputes that were foreseeable at the time of restructuring.”¹⁵⁸ But this takes nothing away from the fact that, regardless of how many disputes may have

Bolivarian Republic of Venezuela (ICSID Case No ARB/07/27) Decision on Jurisdiction, 10 June 2010, **CLA-97**, para 204; *Tidewater Inc and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Decision on Jurisdiction, 8 February 2013, **CLA-116**, para 184; *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **CLA-129**, para 540; *Renée Rose Levy and Gremcotel SA v Republic of Peru* (ICSID Case No ARB/11/17) Award, 9 January 2015, **CLA-124**, para 184.

¹⁵⁶ Reply, para 225; *Tidewater Inc and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Decision on Jurisdiction, 8 February 2013, **CLA-116**, paras 145, 147, 197-198; *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, **CLA-110**, para 2.99; *Alapli Elektrik BV v Republic of Turkey* (ICSID Case No ARB/08/13) Award, 16 July 2012, **CLA-111**, para 403; *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **CLA-129**, paras 545-554. *See also* *Lao Holdings NV v Lao People’s Democratic Republic* (ICSID Case No ARB/AF/12/6) Decision on Jurisdiction, 21 February 2014, **RLA-13**, para 70 (“The Tribunal considers that it is clearly an abuse for an investor to manipulate the nationality of a company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration. In particular, abuse of process must preclude unacceptable manipulations by a claimant acting in bad faith who is fully aware prior to the change in nationality of the ‘legal dispute,’ as submitted by the Respondent.”); *MNSS BV and Recupero Credito Acciaio NV v Montenegro* (ICSID Case No ARB (AF)/12/8) Award, 4 May 2016, **CLA-222**, para 182 (“Tribunals have found that an investor would not qualify for the protection of the BIT concerned only if the nationality is changed after the dispute has arisen or ‘when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy.’”) (emphasis added).

¹⁵⁷ Rejoinder, para 401.

¹⁵⁸ *Ibid.*, para 401.

been foreseeable, the specific dispute subject of the arbitration must have been one of them.

73. Not surprisingly then, Bolivia’s attempt to distinguish the case law relied upon by Glencore Bermuda goes nowhere. According to Bolivia, the *Tidewater* and *Philip Morris* tribunals do not support the requirement that the specific dispute subject to the arbitration must have been foreseeable.¹⁵⁹ But this is plainly incorrect. The tribunal in *Tidewater* explained that “[a]t the heart” of Venezuela’s jurisdictional objection “is a question of fact as to the nature of the dispute between the parties, and a question of timing as to when the dispute that is the subject of the present proceedings arose or could reasonably have been foreseen.”¹⁶⁰ The tribunal in that case went on to observe that:

Since ‘[u]nder general international law as well as under ICSID case law, abuse of right is to be determined in each case, taking into account all the circumstances of the case’ it is necessary for the Tribunal to carefully analyse the events of 2008 and 2009 in order to determine the nature of any disputes, the parties to them and when they arose or were reasonably in contemplation.¹⁶¹

74. Likewise, in *Philip Morris*—the principle case relied upon by Bolivia—the tribunal explained that:

Under the case law, the abuse is subject to an objective test and is seen in the fact that an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute.¹⁶²

¹⁵⁹ *Ibid*, para 402.

¹⁶⁰ *Tidewater Inc and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/5) Decision on Jurisdiction, 8 February 2013, **CLA-116**, para 145 (emphasis added).

¹⁶¹ *Ibid*, para 147 (emphasis added) (internal citation omitted).

¹⁶² *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **CLA-129**, para 539 (emphasis added). Bolivia claims that, in the Reply, Glencore Bermuda relied on portions of *Philip Morris* that amounted to recitations of the parties’ arguments in that case. See Rejoinder, para 402. Bolivia is incorrect. Claimant cited sections of the *Philip Morris* case in which the tribunal set out its reasoning and described prior case law addressing the abuse of process standard. See Reply, para 225 (citing *Philip Morris Asia*

75. Bolivia fares no better in its response to *Pac Rim*. In *Pac Rim*, the tribunal observed that “the dividing-line” between a legitimate restructuring and one which amounts to an abuse of process ensues “when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy.”¹⁶³ Bolivia recognizes that this reasoning “makes clear that it is possible for multiple specific future disputes to be foreseeable.”¹⁶⁴ Even accepting that multiple disputes may be foreseeable, the *Pac Rim* tribunal is clear—as acknowledged by Bolivia—that an abuse of process exists only when the nationality change is a reaction to a specific future dispute.¹⁶⁵
76. Unable to rebut Glencore Bermuda’s argument, Bolivia next mistakenly claims that Claimant: (i) has not set out the meaning of the word “specific;” (ii) inappropriately relies on *Maffezini* and rulings of the ICJ to argue that “the dispute must be foreseeable in every one of its legal and factual detail;” and (iii) incorrectly suggests that “the dispute must actually have arisen at the time of restructuring for there to be an abuse of process.”¹⁶⁶ Once again, Bolivia misconstrues Glencore Bermuda’s position.

Limited v Commonwealth of Australia (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **CLA-129**, paras 540-554).

¹⁶³ *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, **CLA-110**, para 2.99 (emphasis added).

¹⁶⁴ Rejoinder, para 402.

¹⁶⁵ The *Pac Rim* tribunal’s conclusion was subsequently adopted in *Levy v Peru* where the tribunal explained that:

However, a restructuring carried out with the intention to invoke the treaty’s protections at a time when the dispute is foreseeable may constitute an abuse of process depending on the circumstances. In this respect, the Tribunal agrees with the test suggested in *Pac Rim* whereby “a specific future dispute” must be “foresee[able] [...] as a very high probability and not merely as a possible controversy”. In the Tribunal’s view, this test strikes a fair balance between the need to safeguard an investor’s right to invoke a BIT’s protection in the context of a legitimate corporate restructuring and the need to deny protection to abusive conduct.

Renée Rose Levy and Gremcitel SA v Republic of Peru (ICSID Case No ARB/11/17) Award, 9 January 2015, **CLA-124**, para 185 (internal citations omitted).

¹⁶⁶ Rejoinder, paras 403-405.

77. As set out in Claimant’s Reply, a tribunal tasked with determining whether there has been an abuse of process must assess whether, at the time of the purported restructuring, the specific dispute subject to the arbitration was highly foreseeable. This entails first determining when the specific disputes underlying the arbitration occurred and, second, whether these were highly foreseeable at the time the claimant acquired its investment.¹⁶⁷ Glencore Bermuda’s reliance on *Maffezini* and rulings of the ICJ is to assist the Tribunal with the first part of the above analysis—that is, determining when the specific dispute subject to the arbitration crystallized—and not to argue that a specific dispute must actually have arisen at the time of the alleged restructuring.¹⁶⁸ Understanding what amounts to a specific dispute is necessary in order to determine whether one was foreseeable at the time of the alleged restructuring. In this sense, the analysis of the *Maffezini* tribunal, based on prior rulings of the ICJ, offers helpful guidance:

The International Court of Justice has defined a dispute on various occasions by declaring that it is “a disagreement on a point of law or fact, a conflict of legal views or interests between parties.” It has been rightly commented in this respect that the “dispute must relate to clearly identified issues between the parties and must not be merely academic [...]. The dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim.”¹⁶⁹

78. Bolivia’s criticism of Glencore Bermuda’s reliance on *Gold Reserve*, *Isolux* and *Pey Casado* is similarly misplaced. Bolivia claims that these cases do not support

¹⁶⁷ Reply, para 229.

¹⁶⁸ See *ibid*, paras 225, 229.

¹⁶⁹ *Maffezini v Kingdom of Spain* (ICSID Case No ARB/97/7) Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, **CLA-24**, para 94 (internal citations omitted). Glencore Bermuda similarly relied on *Impregilo* and *Helnan* for the tribunals’ analysis of the definition of “disputes” in order to assess whether one was foreseeable at the time of Glencore Bermuda’s acquisition of the Assets—and not, as Bolivia suggests, to argue that a dispute must have actually arisen. See *Impregilo SpA v Islamic Republic of Pakistan* (ICSID Case No ARB/03/3) Decision on Jurisdiction, 22 April 2005, **CLA-159**, paras 301-304 (addressing relevant case law outlining the definition of “disputes” in international law); *Helnan International Hotels A/S v Arab Republic of Egypt* (ICSID Case No ARB/05/19) Decision of the Tribunal on Objection to Jurisdiction, 17 October 2006, **CLA-170**, para 52 (describing the difference between a mere “divergence” and a “dispute”).

the suggestion that a dispute must have actually arisen for there to be an abuse of process. Yet, this is exactly the position adopted by each of these tribunals:

- (a) In *Gold Reserve*, Venezuela had argued that the claimant had committed an abuse of rights by creating an alleged “shell company” in order to benefit from the Canada-Venezuela BIT and have access to the ICSID dispute resolution mechanism.¹⁷⁰ The tribunal rejected this argument, specifying that an abuse of rights “might be found where the company has been incorporated in a given State after the dispute arose so as to take advantage of a treaty concluded by that State.”¹⁷¹ It went on to explain that this scenario did not apply to the dispute before it, specifying that “[n]one of the cases referred to by Respondent indicates that the plain meaning of the nationality test should not be applied in situations where incorporation in Canada occurred before the dispute arose, for legitimate purposes.”¹⁷²
- (b) In *Isolux*, the tribunal determined that the claimant’s restructuring amounted to nothing other than “legitimate corporate planning,” noting that it would have reached a different conclusion if, at the time of the restructuring, the conflict had already arisen.¹⁷³
- (c) In *Pey Casado*, the tribunal similarly rejected Chile’s argument that Mr Pey Casado’s transfer of the majority of its investment to the Spanish claimant for purposes of obtaining treaty protection was an abuse of process, given that the transfer occurred before the dispute arose.¹⁷⁴

¹⁷⁰ *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB (AF)/09/1) Award, 22 September 2014, **CLA-123**, paras 223, 232, 251.

¹⁷¹ *Ibid*, para 252.

¹⁷² *Ibid* (emphasis added).

¹⁷³ *Isolux Infrastructure Netherlands BV v Kingdom of Spain* (SCC Case No V2013/153) Award, 12 July 2016, **RLA-10**, paras 701, 703.

¹⁷⁴ *Victor Pey Casado and President Allende Foundation v Republic of Chile* (ICSID Case No ARB/98/2) Award, 8 May 2008, **CLA-77**, paras 524, 529-530.

79. Most notably, Bolivia mischaracterizes Glencore Bermuda’s position in relation to the above jurisprudence. Glencore Bermuda did not cite the above decisions to indicate that an abuse of process claim requires that a restructuring occur after a dispute has arisen. Rather, Glencore Bermuda referred to the above cases to demonstrate that tribunals have consistently found restructuring of an investment to be a legitimate exercise, with some tribunals even finding such a practice to be legitimate so long as the restructuring took place before the dispute arose.¹⁷⁵
80. In conclusion, Bolivia has failed to rebut the requirement, clearly spelled out by Claimant, that the specific dispute subject to the arbitration be highly foreseeable at the time of the alleged restructuring for there to be an abuse of process.
- ii The specific dispute subject to the arbitration must have been “highly foreseeable” at the time of the alleged restructuring*
81. Next, Bolivia denies that the *Philip Morris* tribunal “endorsed a high threshold of foreseeability.”¹⁷⁶ This is incorrect. In that case, the tribunal acknowledged and confirmed that “investor-State tribunals have set a high threshold for finding an abuse of process, requiring proof of the foreseeability of the claim and depending on the particular circumstances of each case.”¹⁷⁷ It explained that the relevant foreseeability standard “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’.”¹⁷⁸
82. Bolivia is incorrect in claiming that the above language indicates that nothing more than “reasonable foreseeability” of a future dispute is required.¹⁷⁹ The tribunal in *Philip Morris* emphasized that the threshold for establishing an abuse

¹⁷⁵ Reply, paras 217-218.

¹⁷⁶ Rejoinder, para 407.

¹⁷⁷ *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **CLA-129**, para 550.

¹⁷⁸ *Ibid*, para 554.

¹⁷⁹ See Statement of Defense, para 301; Rejoinder, paras 395, 406-408.

of process is “high,”¹⁸⁰ specifying that the relevant degree of foreseeability requires more than “a possible controversy,”¹⁸¹ and what needs to be foreseeable is “a specific dispute”—ie, “a measure which may give rise to a treaty claim.”¹⁸²

83. In addition, Bolivia’s claim that the *Philip Morris* decision is the only word on the subject of abuse of process is plainly incorrect.¹⁸³ The *Philip Morris* award is but one decision. Other tribunals have similarly upheld the need for a high standard of foreseeability. For example, in *Levy v Peru* the tribunal explained as follows:

[T]he Tribunal agrees with the test suggested in *Pac Rim* whereby “a specific future dispute” must be “foresee[able] [...] as a very high probability and not merely as a possible controversy”. In the Tribunal’s view, this test strikes a fair balance between the need to safeguard an investor’s right to invoke a BIT’s protection in the context of a legitimate corporate restructuring and the need to deny protection to abusive conduct.¹⁸⁴

84. In *Lao Holdings*, the tribunal similarly observed that “if a company changes its nationality in order to gain ICSID jurisdiction at a moment when things have started to deteriorate so that a dispute is highly probable, it can be considered an abuse of process.”¹⁸⁵

85. Notably, the award in *MNSS v Montenegro*—rendered after the *Philip Morris* decision—followed the high standard set out in *Pac Rim*:

¹⁸⁰ *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **CLA-129**, para 550.

¹⁸¹ *Ibid*, para 554.

¹⁸² *Ibid*.

¹⁸³ *See* Rejoinder, para 397.

¹⁸⁴ *Renée Rose Levy and Gremcitel SA v Republic of Peru* (ICSID Case No ARB/11/17) Award, 9 January 2015, **CLA-124**, para 185 (citing *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, **CLA-110**, para 2.99).

¹⁸⁵ *Lao Holdings NV v Lao People’s Democratic Republic* (ICSID Case No ARB/AF/12/6) Decision on Jurisdiction, 21 February 2014, **RLA-13**, para 76 (emphasis added).

Tribunals have found that an investor would not qualify for the protection of the BIT concerned only if the nationality is changed after the dispute has arisen or “when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy.”¹⁸⁶

d. The specific dispute subject to the arbitration did not exist and was neither highly nor reasonably foreseeable at the time of Glencore Bermuda’s acquisition of the Assets

86. In any event, Bolivia’s abuse of process claim fails, since the specific disputes subject to the instant proceedings were neither “reasonably” nor “highly” foreseeable at the time when Glencore Bermuda acquired the Assets. Bolivia can only refer to a remote possibility of a generic controversy, which does not come close to satisfying the “high threshold” required in order to find a restructuring illegitimate.¹⁸⁷
87. As explained in the Reply, the specific disputes at the heart of the present proceedings arose when Bolivia breached the Treaty provisions by: (i) nationalizing the Tin Smelter without compensation and adequate due process on 9 February 2007; (ii) nationalizing the Antimony Smelter without compensation and adequate due process, as publicly announced on 2 May 2010; (iii) seizing the Tin Stock on 2 May 2010; and (iv) nationalizing the Colquiri Mine without compensation and adequate due process, as publicly announced on 6 June 2012, after it had been inaccessible since 30 May 2012 due to Bolivia’s failure to provide protection and security.¹⁸⁸
88. In its Rejoinder, Bolivia adds no specificity to its allegations and, in fact, blatantly ignores the evidence put forth by Glencore Bermuda. In particular, Bolivia continues to argue that Glencore International “acquired the Assets from former

¹⁸⁶ *MNSS BV and Recupero Credito Acciaio NV v Montenegro* (ICSID Case No ARB (AF)/12/8) Award, 4 May 2016, **CLA-222**, para 182 (citing *Pac Rim Cayman LLC v Republic of El Salvador* (ICSID Case No ARB/09/12) Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, **CLA-110**, para 2.99).

¹⁸⁷ Reply, footnote 594.

¹⁸⁸ *Ibid*, para 230.

President Sánchez de Lozada at a time when it was highly likely that the State would take action against them.”¹⁸⁹ According to Bolivia, Glencore International was “[f]ully aware of the risks inherent in those Assets”¹⁹⁰ because of: (i) the political changes in the country [REDACTED] [REDACTED]¹⁹¹ (ii) the circumstances surrounding the acquisition of the Assets;¹⁹² and (iii) the purportedly “tense” relationship between Comsur and the *cooperativas*.¹⁹³ As explained in detail below, Bolivia’s claim for abuse of process remains entirely unsupported and should, therefore, be dismissed.

i The political changes in Bolivia following Mr Sánchez de Lozada’s resignation did not indicate that the State would nationalize the Assets without providing compensation and in breach of due process

89. According to Bolivia, a dispute related to the Assets “was not only foreseeable but likely” at the time of Glencore Bermuda’s acquisition because of the political and social change that the country was experiencing [REDACTED]

[REDACTED]¹⁹⁴.

90. In particular, Bolivia claims that Glencore Bermuda should have known that Bolivia would “take action against the Assets” because sovereignty over natural resources was the central theme of the MAS political agenda and the party’s platform called for “ending poverty through the recovery of strategic companies and natural resources.”¹⁹⁵

¹⁸⁹ Rejoinder, para 409 (emphasis added).

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*, Section 2.5.2 and paras 410-413.

¹⁹² *Ibid.*, Section 2.5.3 and paras 414-416.

¹⁹³ *Ibid.*, Section 2.5.1 and paras 424-425.

¹⁹⁴ *Ibid.*, paras 410-413; *see also ibid.*, paras 146-160.

¹⁹⁵ *Ibid.*, para 412; *see also ibid.*, paras 148-149.

91. However, at the time of Glencore Bermuda’s acquisition, neither the MAS nor Mr Morales were in power.¹⁹⁶ While Bolivia attempts to dismiss this as irrelevant, it does not explain how the mere fact that the MAS participated in elections in 2002 indicates that Glencore Bermuda should have foreseen that the State would subsequently expropriate the Assets on the basis of that party’s agenda—and much less that it would expropriate without providing compensation or basic due process guarantees. Indeed, the MAS went on to lose the 2002 elections. Moreover, Bolivia cannot point to any specific indication in the MAS’s platform that would support a finding that the expropriations were foreseeable. In fact, the 2002 report cited by Bolivia does not include any mention of nationalizing privately held mining assets and specifically notes that the MAS’s proposal was aspirational and did not necessarily include “concrete plans:”

In truth, the political proposal of this party represents more of a combination of objectives that they aspire to achieve rather than a structured proposal in the strict sense of the word. [...] Nor can they put forth concrete plans for each proposed objective. [...] The candidate for this party [Mr Morales], signaled that [the party’s] program had been an adaptation to the standards demanded by the court and not precisely what they thought. During his campaign speech, there was a tendency for generalizations and improvisation, which demonstrated that they did not anticipate the possibility of actually gaining power.¹⁹⁷

92. By the time of the 2005 election, the MAS political platform specifically provided guarantees to foreign investments.¹⁹⁸ Even after his election, Mr Morales publicly reiterated his commitment to protect foreign investment, promising that his

¹⁹⁶ Second Witness Statement of Christopher Eskdale, para 65.

¹⁹⁷ Fundación Boliviana para la Capacitación Democrática y la Investigación, “*Opiniones y análisis sobre las elecciones presidenciales de 2002*,” 2002, **R-163**, p 10 (unofficial English translation from Spanish original).

¹⁹⁸ MAS Political Program, November 2005, **R-166**, p 13.

Government would “never extort money from anyone who wants to invest in our country.”¹⁹⁹

93. Bolivia does not deny this. Instead, it claims that Glencore Bermuda should have foreseen the expropriation of the Assets because the administrations that followed President Sánchez de Lozada’s administration envisioned a potentially greater role for the State in the country’s economy.²⁰⁰ But this argument leads nowhere.

94. *First*, Bolivia refers to the inaugural speech of Carlos Mesa, Mr Sánchez de Lozada’s successor.²⁰¹ According to Bolivia, Mr Mesa’s words indicated that his administration would “redefine” themes relating to the country’s natural resources. But “natural resources” was only one among many of the topics mentioned by the former President. In his own words:

[E]ach and every one of us must bring to the Constituent Assembly central elements of form and substance that will define essential themes about our natural resources, about the land, about the concept of democratic citizen participation, about the structure of the operations of a representative mechanism such as the National Congress, on all the issues that matter to us.²⁰²

95. *Second*, with respect to Mr Morales, Bolivia argues that “in all probability, the new President would continue to implement the political transformations prompted by Mr Sánchez de Lozada’s resignation in 2003.”²⁰³ However, the evidence it relies upon does not support its claim. According to Bolivia’s National Development Plan of 2006, the State was to “guarantee[] the development of

¹⁹⁹ “Morales se declara ganador,” *BBC Mundo*, 19 December 2005, **R-167**, p 2; *see also* Second Witness Statement of Christopher Eskdale, para 65.

²⁰⁰ Rejoinder, paras 158; Bolivia’s National Development Plan, 2006, **R-168**, p 103; Supreme Decree No 29,272, 12 September 2007, **R-169**, p 176.

²⁰¹ Rejoinder, para 411 (citing Speech of Mr Carlos Mesa Gibert before the Bolivian Congress, 17 October 2003, **R-162**, p 3).

²⁰² Speech of Mr Carlos Mesa Gibert before the Bolivian Congress, 17 October 2003, **R-162**, p 3 (unofficial English translation from Spanish original).

²⁰³ Rejoinder, para 157.

private initiative.”²⁰⁴ As explained by Bolivia’s own witness, Mr Héctor Córdova, Comibol was expected to act as “a strategic partner of private investors.”²⁰⁵ Contrary to Bolivia’s assertions, in no way do these statements indicate that the State would take adverse action against private mining assets.²⁰⁶

96. Indeed, although Bolivia attempts to imply that the events known as the *Gas Wars*, which resulted in Mr Sánchez de Lozada’s resignation, were somehow indicative of the approach the Government would take with respect to natural resources in general,²⁰⁷ Mr Córdova himself explains otherwise, admitting that the MAS agenda did not actually envision the nationalization of mining assets:

[T]he policy of the MAS did not foresee the recovery of the mining assets by the State or a policy of nationalization of mineral deposits (as was the case, for example, in the hydrocarbon sector). As I explained earlier, the philosophy of the MAS for the mining sector was based on the coexistence of the public, private and cooperative sectors.²⁰⁸

97. Likewise, Mr Mamani, also one of Bolivia’s witnesses in this arbitration, observes that “[t]he Government, however, has been emphatic with the unions [...] that, together with COMIBOL, both private entities and *cooperativistas* would participate in the mining sector.”²⁰⁹

²⁰⁴ Bolivia’s National Development Plan, 2006, **R-168**, p 103.

²⁰⁵ Witness Statement of Héctor Córdova, para 21.

²⁰⁶ In any event, Bolivia’s references to the State’s National Development Plan of 2006, the 2007 Supreme Decree through which it was enacted and the 2009 Constitution, are not relevant to determine what was foreseeable to Glencore Bermuda at the time it carried out its acquisition of the Assets, which was a process that spanned several months between 2004 and early 2005. *See* Rejoinder, paras 158-159 (citing, *inter alia*, Bolivia’s National Development Plan, 2006, **R-168**, Supreme Decree No 29,272, 12 September 2007, **R-169** and 2009 Constitution, 7 February 2009, **C-95**).

²⁰⁷ *See, eg*, Rejoinder, paras 150-154.

²⁰⁸ Witness Statement of Héctor Córdova, para 34 (emphasis added).

²⁰⁹ Second Witness Statement of Joaquín Mamani, para 27.

98. Far from “foreshadow[ing] a material change in the role of the State [...] in the Bolivian mining sector,”²¹⁰ as Bolivia argues, Mr Mesa’s words and the MAS political platform did not make the State’s expropriation of the Assets (carried out without compensation and contrary to due process) either “reasonably” or “highly” foreseeable.

ii The circumstances in which Glencore Bermuda acquired the Assets did not indicate that the State would nationalize them without providing just compensation or due process

99. Bolivia argues that “the particular circumstances” in which Glencore Bermuda acquired the Assets should have indicated that “a dispute was likely to arise.”²¹¹ In support of this statement, Bolivia points to the confidential nature of the sale and [REDACTED]
[REDACTED]
[REDACTED] Bolivia’s characterization, however, is incorrect.

100. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²¹⁰ Rejoinder, para 411.

²¹¹ *Ibid.*, paras 414-416.

²¹² [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²¹³ [REDACTED]

²¹⁴ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

101. *Second*, Glencore Bermuda has already demonstrated that it acquired the Assets through an arm's length transaction after performing extensive due diligence in a competitive bidding process.²¹⁵ As explained by Mr Eskdale, Glencore relied on the advice of technical, financial and legal advisors. In addition, the fact that the State's privatization of the Assets had never been challenged and that UK government institution CDC and the IFC had invested in the Assets further indicated that their legitimacy was not in question.²¹⁶

102. Bolivia now claims that Glencore's internal due diligence documents would indicate otherwise.²¹⁷ But this is incorrect. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²¹⁵ Reply, paras 57-62; Second Witness Statement of Christopher Eskdale, paras 8-16; First Witness Statement of Christopher Eskdale, para 17.

²¹⁶ Second Witness Statement of Christopher Eskdale, paras 57-58.

²¹⁷ Rejoinder, para 170 (citing Glencore inter office correspondence from Mr Eskdale to Mr Strothotte and Mr Glasenberg, 20 October 2004, C-196, p 5).

²¹⁸ [REDACTED]

[REDACTED]

[REDACTED]

103. *Third*, contrary to Bolivia’s allegations,²²⁰ neither the confidential nature of the sale nor the parties’ intention to conclude it swiftly indicated anything improper about the transaction. [REDACTED]

[REDACTED]

219 [REDACTED]

220 Rejoinder, paras 164-165.

221 [REDACTED]

222 [REDACTED]

104. *Fourth*, there is no merit in Bolivia’s allegations that Glencore Bermuda attempted to shield the acquisition from the Bolivian authorities.²²³ Rather, as the evidence on the record shows, Glencore International and Comsur repeatedly shared details of the transaction with Government officials, who welcomed the company’s investment in the country prior to the completion of the acquisition in March 2005.²²⁴
105. Similarly, Bolivia’s claim that Glencore Bermuda has not been willing “to disclose material information regarding the acquisition and structure of the investment” in the context of the present proceedings is preposterous.²²⁵ According to Bolivia, it is somehow “[t]elling[.]” that Glencore Bermuda submitted share certificates and share registries with its Statement of Claim “but

²²³ Rejoinder, paras 188-192.

²²⁴ In response to a January 2005 letter from the then Vice Minister of Mining, Glencore International made special arrangements in order to be able to share relevant information with Bolivia without running afoul of its confidentiality obligations. *See* Letter from the Vice Minister of Mining (Mr Gutiérrez) to Glencore (Mr Capriles), 17 January 2005, **C-63**; Side letter between Glencore International and Minera regarding Meetings in Bolivia, 1 February 2005, **C-289** (expressing Glencore representatives’ intent to meet with Bolivian government officials in response to a communication received from the Bolivian Government regarding the acquisition on 17 January 2005); Letter from Minera (Mr Sánchez de Lozada) to Glencore International (Mr Eskdale), 4 February 2005, **C-200**; “Goni vendió COMSUR,” *Bolivia.com*, 5 February 2005, **R-14**, p 2. Contrary to Bolivia’s assertions, Comsur also responded to Comibol’s requests for information. Letter from Comsur (Mr Urjel) to Comibol (Mr Tamayo), 17 February 2005, **R-189**; Letter from Comsur (Mr Urjel) to Comibol (Mr Tamayo), 3 March 2005, **C-206**; *see also* Minutes of the conclusion of the meetings held between Comibol, Comsur and Colquiri, 11 October 2005, **R-190**, pp 1-2.

In addition, Bolivia claims that Glencore International responded to a January 2005 request for information from Comibol in 2007. *See* Rejoinder, para 189. This is blatantly false. The information provided in January 2007 was in response to a request for information submitted by a Bolivian Senator in November 2006. *See* Reply, paras 73-74; Request for written report from Senator Velásquez, 30 November 2006, **C-68**; Letter from Pestalozzi Lachenal Patry (Mr Pestalozzi) to Senate of Bolivia (Ms Velásquez), 10 January 2007, **C-225**. Rather than being “vague” in its response, as argued by Bolivia (Rejoinder, para 228), Glencore International and Sinchi Wayra repeatedly provided the Government with detailed information about the transaction. *See ibid*; Letter from Sinchi Wayra (Mr Capriles) to the Minister of Mining (Mr Echazú), 1 June 2007, **C-228**.

Bolivia also claims that “Glencore International did not disclose the fact that, whereas Comsur’s shareholders had not changed, Colquiri’s had.” *See* Rejoinder, para 190. Comsur, however, was under no obligation to disclose such information, which Bolivia did not request. The Colquiri Lease did not require that Comibol approve—or even be notified of—any such change.

²²⁵ Rejoinder, para 192.

no documents regarding the transaction.”²²⁶ But these are precisely the only requirements for Glencore Bermuda to meet its burden of establishing this Tribunal’s jurisdiction under the Treaty.²²⁷

106. In any event, Bolivia ignores that Glencore Bermuda has addressed its acquisition of the Assets in great detail both in the Statement of Claim²²⁸ and in the Reply,²²⁹ submitting extensive documentary evidence on this issue.²³⁰ In addition, during the document production phase of the instant proceedings, Glencore Bermuda voluntarily disclosed to Bolivia all the purchase agreements executed for the acquisition of the Assets²³¹ and subsequently produced their drafts and other non-privileged due diligence documents as well. It is clear, therefore, that Bolivia’s argument evinces nothing but bad faith on its part.

²²⁶ *Ibid.*

²²⁷ As stated in the Reply, neither the details of a transaction between private parties nor the acquisition price are relevant for purposes of this arbitration. *See* Reply, para 66.

²²⁸ Statement of Claim, Section II.C.

²²⁹ Reply, Section II.C.

²³⁰ *See, eg.* Process Letter from Argent Partners (Mr Simkin) to Glencore International (Mr Eskdale), 30 April 2004, **C-62**; Letter from Argent Partners (Mr Simkin) to Glencore International (Mr Eskdale), 2 June 2004, **C-194**; Share register of Sinchi Wayra, undated, **C-16**; Share register of Colquiri, undated, **C-17**; Share register of Vinto, undated, **C-18**; Assignment and Assumption Agreements between Glencore International and Glencore Bermuda, 7 March 2005, **C-64**; Put and Call Agreement between CDC and Glencore International, 15 March 2005, **C-65**; Notice of Assignment from Glencore International to CDC, 23 May 2005, **C-66**; Put Notice from Actis (on behalf of CDC) to Glencore International, 21 March 2006, **C-67**; Second Amended and Restated Stock Purchase Agreement between Minera and Glencore International (Iris shares), 30 January 2005, **C-198**; Stock Purchase Agreement between Minera and Glencore International (Shattuck shares), 30 January 2005, **C-199**; Stock Purchase Agreement between Minera and Glencore International (Kempsey shares), 2 March 2005, **C-204**; Stock Purchase Agreement between CDC and Compañía Minera Concepción SA (Colquiri shares), 2 March 2005, **C-202**.

²³¹ Glencore Bermuda produced these documents as part of Claimant’s Voluntary Production of Documents on 2 March 2018 as well as Claimant’s Production of Documents of 23 April 2018 pursuant to the Tribunal’s Decision on Document Production set out in Procedural Order No 4 of 27 March 2018. *See* Second Amended and Restated Stock Purchase Agreement between Minera and Glencore International (Iris shares), 30 January 2005, **C-198**; Stock Purchase Agreement between Minera and Glencore International (Shattuck shares), 30 January 2005, **C-199**; Stock Purchase Agreement between Minera and Glencore International (Kempsey shares), 2 March 2005, **C-204**; Stock Purchase Agreement between CDC and Compañía Minera Concepción SA (Colquiri shares), 2 March 2005, **C-202**.

107. *Finally*, Bolivia continues to argue [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
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[REDACTED]

108. [REDACTED]
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[REDACTED]

109. In sum, Bolivia’s vague and unsupported assertions that Glencore Bermuda supposedly knew that “acquiring the Assets entailed important risks”²⁴⁰ do not advance its abuse of process claim. Nothing in Bolivia’s allegations indicates that, at the time of the acquisition, Glencore Bermuda could or should have foreseen that the State would expropriate the Assets without providing just compensation or due process, in violation of its Treaty obligations.

iii Glencore Bermuda could not have foreseen that Bolivia would expropriate the Assets without providing due process or just compensation

110. Bolivia’s attempt to argue that Glencore Bermuda could have foreseen Bolivia’s “reversion” of each of the Assets²⁴¹ lacks credibility and support. As explained in further detail below in relation to each Asset, Bolivia has chosen to ignore Glencore Bermuda’s evidence. Its allegations remain entirely unsupported.

111. ***The expropriation of the Tin Smelter was not foreseeable.*** According to Bolivia, Glencore Bermuda should have been able to foresee the State’s expropriation of the Tin Smelter based on allegations of illegalities raised in 2001 by “a” civic organization in Oruro, “a” member of the National Congress, and “a” local labor union,²⁴² which allegedly “resurfaced” in 2002 during RBG Resources’s bankruptcy proceedings.²⁴³ While Bolivia admits that, at the time Glencore Bermuda acquired the Assets, no authority had found any irregularities in the

²⁴⁰ Rejoinder, para 193.

²⁴¹ *Ibid*, paras 417-426.

²⁴² *Ibid*, para 419 (citing Letter from the President of the Oruro Civic Committee to the Contralor General de la República, 21 February 2001, **R-123**; Letter from Representative Pedro Rubín de Celis to the Contralor General de la República, 10 May 2001, **R-124**; Letter from the Oruro Central Obrera to President Banzer Suárez, 23 May 2001, **R-126**).

²⁴³ Rejoinder, para 419. Both parties agree that the purported “illegalities” concerned the alleged transfer of additional inventory worth \$2 million found at the Tin Smelter at the time of its privatization. Reply, para 43; Rejoinder para 111.

- privatization process or questioned the applicability of the relevant legal framework, it claims that a “formal pronouncement of illegality” was unnecessary to Glencore Bermuda’s ability to foresee subsequent adverse State action.²⁴⁴
112. Bolivia’s argument is, once again, without any merit. The fact that no Bolivian authority decided to credit these allegations—either at the time they were made or thereafter²⁴⁵—indicates that Bolivia’s own State officials did not find them worthy of investigation. In addition, contrary to Bolivia’s assertion that such allegations “resurfaced” in 2002 during RBG Resources’s bankruptcy proceedings,²⁴⁶ the press articles relied upon by Bolivia do not refer to the purported illegalities alleged by Bolivia in this arbitration with respect to the Tin Smelter.²⁴⁷ Rather, the articles explain that, by late 2002, the parliamentary opposition was complaining about certain irregularities in the transfer of the Tin Smelter and the Huanuni Mine because: (i) Allied Deals had been incorporated after the transfer, and (ii) the then Minister of Foreign Affairs Carlos Saavedra had an alleged interest in Allied Deals.²⁴⁸ In any event, Bolivia itself (fatally) admits that, despite the fact that “the State was called to intervene at the Tin Smelter” and “serious consideration was given to the reversion of the Smelter to the State” at that time, the Government took no action.²⁴⁹
113. *The expropriation of the Antimony Smelter was not foreseeable.* In its Rejoinder, Bolivia recites again the argument from its Statement of Defense—that the Terms of Reference for the Antimony Smelter tender envisioned the smelter to

²⁴⁴ See *ibid*, para 420 (“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.”).

²⁴⁵ See Statement of Defense, para 81; Reply, para 43.

²⁴⁶ Rejoinder, para 419.

²⁴⁷ *Ibid*, paras 121, 419, 661.

²⁴⁸ See “El MAS pide la renuncia del Canciller Saavedra,” *La Razón Digital*, 8 November 2002, **R-134**; “MAS pide la renuncia del Canciller de la Republica,” *El Diario*, 4 December 2002, **R-135**; “MAS presentó las pruebas de corrupción contra Canciller,” *El Mundo*, 4 December 2002, **R-136**.

²⁴⁹ Rejoinder, para 419.

- be productive and that the “reversion” was to fulfil this objective.²⁵⁰ Bolivia is still unable to rebut Claimant’s argument that any such terms were aspirational in nature, and did not impose any contractual obligations on Claimant.²⁵¹
114. Indeed, in its Rejoinder, Bolivia once again argues that the expropriation should have been foreseen because the Antimony Smelter Purchase Agreement required the Antimony Smelter to be reactivated,²⁵² despite acknowledging that, in the several years in which the Asset was not operating, no government official ever requested that it be brought back to production.²⁵³
115. Bolivia’s arguments are, once more, without merit. Bolivia does not explain how an alleged contractual obligation to reactivate the Antimony Smelter could exist or be enforced in the absence of any timeframes, investment characteristics, or achievement milestones against which the aspirational future production mentioned in the Terms of Reference could have been measured.²⁵⁴ Rather, as explained by Glencore Bermuda, the Antimony Smelter Purchase Agreement provided for the unconditional transfer of property in exchange for consideration; thus, all obligations were extinguished upon closing.²⁵⁵
116. Bolivia also willfully ignores the fact that the plain terms of the contract required the party alleging a breach to first give the counter party notice of that breach and

²⁵⁰ *Ibid*, paras 421-423; Statement of Defense, paras 314-316.

²⁵¹ Reply, paras 237-238.

²⁵² Rejoinder, para 422.

²⁵³ *Ibid*, para 423.

²⁵⁴ Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**.

²⁵⁵ See Supreme Decree No 25,964, 21 October 2000, published in the *Gaceta Oficial* on 12 January 2001, **C-178**, Art 198; Supreme Decree No 181, 28 June 2009, published in the *Gaceta Oficial* No 122 on 29 June 2009, **C-239**, Art 224. In the Rejoinder, Bolivia argues that “Claimant’s interpretation of the Antimony Smelter Contract is contrary to Article 520 of the Bolivian Civil Code.” See Rejoinder, para 243. Even if one were to apply the Civil Code to the Antimony Smelter Purchase Agreement, Bolivia’s argument still fails. Under the Bolivian Civil Code, a sale purchase agreement only requires the payment of a price and transfer of a good. It does not require that a purchaser use a good in a certain way (or at all) after the sale closes. See Civil Code of Bolivia, 2 April 1976, **C-52**, Arts 636-640.

an opportunity to remedy it.²⁵⁶ Pursuant to Article 15 of the Antimony Smelter Purchase Agreement, in the event of a dispute related to a breach of the agreement, Comibol agreed to first negotiate and, if that failed, initiate conciliation and, if that failed, resort to ICC arbitration.²⁵⁷ It is undisputed that Comibol took none of these steps. Indeed, Bolivia admits that, despite the fact that the Antimony Smelter had been inactive for years prior to Glencore Bermuda's acquisition, the State had never raised any concerns.²⁵⁸ As stated by Mr Eskdale, Glencore Bermuda had no reason to believe that "the State would take a different view after Glencore took over."²⁵⁹

117. *The expropriation of the Colquiri Lease was not foreseeable.* Again, Bolivia repeats its arguments from the Statement of Defense—that it was foreseeable that purported tensions between the unions and *cooperativas* would result in the expropriation of the Colquiri Lease.²⁶⁰ Specifically, Bolivia again claims that, because the relations between Comsur, the Colquiri Union and *cooperativas* operating at the Colquiri Mine were purportedly "tense," Glencore Bermuda should have foreseen that the State would subsequently expropriate the Colquiri Lease without providing compensation or due process.²⁶¹ According to Bolivia, the "reversion" of the Colquiri Lease was due to "Sinchi Wayra's and Comsur's defective management of the relations with the *cooperativas*" because: (i) Comsur did not rehire the workers that Comibol fired, increasing the number of *cooperativistas* in the region; (ii) Comsur and Sinchi Wayra had a "policy" of

²⁵⁶ Reply, para 239. Bolivia completely ignores this argument in its Rejoinder.

²⁵⁷ Antimony Smelter Purchase Agreement, 11 January 2002, C-9, Art 15.

²⁵⁸ See generally Rejoinder, Section 2.7.2 (failing to identify even a single occasion when Bolivia raised the issue of the inactivity of the Antimony Smelter with Glencore or its subsidiaries. Indeed, Bolivia acknowledged that the Antimony Smelter had been out of production since 2000. See First Witness Statement of Ramiro Villavicencio, paras 94-95).

²⁵⁹ Second Witness Statement of Christopher Eskdale, para 62. Mr Eskdale also explained that resuming production at the Antimony Smelter was not commercially viable. See also First Witness Statement of Christopher Eskdale, para 38.

²⁶⁰ Rejoinder, paras 424-425; Statement of Defense, paras 317-319.

²⁶¹ Rejoinder, paras 134-145, 424-425.

giving in to the *cooperativas*' demands for working areas; and (iii) Comsur and Sinchi Wayra had "a poor record of ensuring the security of the Mine."²⁶² For the reasons stated below, Bolivia's claim decisively fails.

118. *First*, Bolivia now recognizes—contrary to its initial allegations²⁶³—that it was in fact Comibol that laid off the Colquiri Mine's workers prior to the privatization.²⁶⁴ Forced to admit this, Bolivia now changes its argument to allege that Comsur was supposedly expected to rehire the employees that Comibol had fired.²⁶⁵ However, Bolivia cannot point to any document to evidence this expectation. Its sole support is a statement by Bolivia's witness, Mr Mamani, who implies that it was actually Comibol who made empty promises to the workers it fired: "[w]hile 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."²⁶⁶ In fact, Comsur was free to make its own hiring decisions. The Colquiri Lease did not include any obligation with respect to the hiring or rehiring of former Comibol employees. Bolivia itself acknowledges that Comibol terminated the workers' contracts without transferring any related labor responsibilities to Comsur.²⁶⁷ Similarly, there was no provision of Bolivian law that required Comsur to rehire the employees laid off by Comibol.²⁶⁸ In any event,

²⁶² *Ibid*, para 425.

²⁶³ Initially, Bolivia had argued that Comsur was responsible for the presence of the *cooperativas* at the Colquiri Mine because Comsur had supposedly fired most of the workers. Statement of Defense, paras 317-319.

²⁶⁴ Rejoinder, paras 139, 141, 425; *see also* Reply, paras 149, 242; Second Witness Statement of Eduardo Lazcano, para 8.

²⁶⁵ Rejoinder, paras 139-140, 425.

²⁶⁶ Second Witness Statement of Joaquín Mamani, para 9 (emphasis added).

²⁶⁷ Rejoinder, para 139 ("In addition, as is common in this kind of operations (and was noted by Paribas), terminating all the employment contracts ensured that no labour liabilities were transferred to the new operator of the Mine.") (internal citation omitted).

²⁶⁸ Indeed, Article 55 of Supreme Decree No 21,060 established that: "The companies and entities of the public and private sectors may freely agree to or rescind labor contracts in strict compliance with the General Labor Law and its regulatory Decree." (unofficial English translation from Spanish original Comsur's obligations were thus limited to those established in the Labor Law, which did not require mandatory rehiring of Comibol workers. Supreme Decree No 21,060, 29 August 1985, **R-2**, Article 55.

as explained by Mr Lazcano, just four months after the Colquiri Lease was signed, Comsur had hired approximately 130 workers, with that number increasing to approximately 330 by the end of that year.²⁶⁹

119. *Second*, Mr Eskdale explained that, at the time of the acquisition, Glencore had carried out extensive due diligence [REDACTED]

[REDACTED]

[REDACTED] Bolivia's attempt to argue otherwise is unavailing.²⁷¹ The evidence demonstrates that Glencore paid close attention to the fact that *cooperativistas* operated at the Colquiri Mine.²⁷² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁶⁹ Second Witness Statement of Eduardo Lazcano, para 9; Labor sheets of Colquiri, various dates, **C-279**, pp 30, 90. In addition, while Bolivia claims that it resolved the conflict at the Colquiri Mine by hiring over 600 former *cooperativistas*, this strained operations through overstaffing and increased costs. *See, eg*, "Minera Colquiri requiere solo 900 trabajadores y tiene 1.249," *Eju!*, 7 July 2015, **C-296**, pp 1-3.

²⁷⁰ [REDACTED]

²⁷¹ *See, eg*, Rejoinder, para 425.

²⁷² Indeed, as admitted by Bolivia, *subsidiarios* and *arrendatarios* (present day *cooperativistas*) have been a significant social group in all large mines in Bolivia and have worked in the Colquiri Mine under Comibol's supervision since the 1980s. *See* Rejoinder, para 141; Reply, para 242; Statement of Defense, paras 32, 34. *See also* First Witness Statement of Andrés Cachi, paras 8-9; First Witness Statement of Joaquín Mamani, para 8.

²⁷³ [REDACTED]

²⁷⁴ [REDACTED]

120. As stated by Mr Eskdale, Glencore determined it had the tools and expertise to continue the productive dialogue with the *cooperativas* alongside Comibol, as had been done previously by Comsur.²⁷⁵ In fact, the Colquiri Lease itself acknowledged that Comibol had already granted the *cooperativas* working areas in the Colquiri Mine,²⁷⁶ and placed upon Comibol the obligation to “defend, protect, guarantee and reclaim rights against incursions, usurpations, and other disturbances by third parties.”²⁷⁷
121. *Third*, Glencore Bermuda has already demonstrated that neither Comsur nor Sinchi Wayra had a “policy” of giving in to the *cooperativas*’ demands for working areas and that the agreements that were reached with the *cooperativistas* were negotiated and finalized under Comibol’s supervision, after carefully considering the viability of each request.²⁷⁸
122. Bolivia is now forced to admit that Comibol did in fact officially approve such agreements—under both Comsur’s and Sinchi Wayra’s management of the Colquiri Mine.²⁷⁹ It nonetheless argues that this is supposedly “irrelevant” because Comibol’s official assignments were “preceded” by agreements between the private companies and the *cooperativas*.²⁸⁰

²⁷⁵ Second Witness Statement of Christopher Eskdale, para 63.

²⁷⁶ Colquiri Lease, 27 April 2000, **C-11**, Clause 12.1.6.

²⁷⁷ *Ibid*, Clause 12.2.1 (unofficial English translation from Spanish original).

²⁷⁸ See Reply paras 151-161; Second Witness Statement of Eduardo Lazcano, paras 22-23 (“[Sinchi Wayra’s] policy was to consider only the assignment of separate working areas, or working areas that could be separated from the areas exploited by Sinchi Wayra, so that the presence of *cooperativistas* would not interfere with the workers’ tasks, minimizing interruptions to the company’s operations. If they requested areas that were already being exploited by Sinchi Wayra or that were going to be exploited in the near future and could not be separated, their requests were systematically rejected”).

²⁷⁹ See, eg, Rejoinder, paras 143, 259. See also Reply, para 151; Second Witness Statement of Eduardo Lazcano, paras 10-11, 22.

²⁸⁰ Rejoinder, para 143; see also *ibid*, paras 259-261; Witness Statement of Héctor Córdova, paras 44-45.

123. Bolivia’s position, however, is both immaterial to its abuse of process claim and substantively misleading. Whether Sinchi Wayra allegedly mishandled relations with the *cooperativas* (which it did not) has no bearing on the question of whether Glencore Bermuda acquired its interest in the Colquiri Lease in March 2005 knowing that it was very likely that it would subsequently be expropriated by Bolivia—without compensation and without due process.
124. Besides, the evidence demonstrates that Bolivia’s claim is factually incorrect. Comibol was regularly and actively involved in managing the relationship between the *cooperativas* and both Comsur and Sinchi Wayra.²⁸¹ By way of example, Bolivia refers to the assignment of level -325 of the Colquiri Mine to the *cooperativas*, claiming that Colquiri and the *cooperativas* reached a preliminary agreement “without COMIBOL’s involvement” and that 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.”²⁸² The evidence, however, clearly indicates that Comibol was involved at every step of the process. In particular:

²⁸¹ Reply, paras 150-153. In fact, Bolivia’s own evidence demonstrates as much. *See, eg*, Letter from Colquiri (Mr Mirabal) to Comibol (Mr. Manzano), 19 December 2003, **R-303** (sharing with Comibol updates regarding negotiations with the *cooperativistas* and noting that Comibol’s approval was “indispensable for the conclusion of the agreement); Letter from Colquiri (Mr Mirabal) to Comibol (Mr Tamayo), 17 March 2005, **R-304** (noting that the area to be leased to the *Cooperativa 21 de Diciembre* was to be defined via a technical commission formed by Comibol, the *cooperativa* and Colquiri and requesting that Comibol set up such a commission); Letter from Colquiri (Mr Mirabal) to Comibol (Mr Tamayo), 17 March 2005, **R-304** (following up on a request for working areas that the *cooperativas* had presented directly to Comibol). Agreement between Fencomin, Fedecomín La Paz, Fedecomín Oruro, Workers of the Cooperativas 26 de Febrero and 21 de Diciembre, Colquiri, the Vice Ministry of Mining, and Comibol, 21 May 2004, **C-193**; Memorandum of Definitive Understanding between Comibol, *Cooperativa 21 de Diciembre*, Colquiri, Fencomin and Fedecomín La Paz, 15 June 2005, **C-212**; Letter from COMIBOL Technical Manager to the President of COMIBOL, 20 April 2005, **R-153**; Public deed of sublease of tailings, subscribed by *Compañía Minera Colquiri SA* and the *Cooperativa 21 de Diciembre Colquiri LTDA*, 10 March 2006, **R-39**.

²⁸² Rejoinder, para 260.

- (a) Comibol approved Colquiri’s request to conduct a technical inspection to identify and define working areas in the -325 level to be assigned to the Cooperativa 26 de Febrero.²⁸³
- (b) Colquiri sent Comibol a copy of the agreement reached with the Cooperativa 26 de Febrero in order to obtain Comibol’s authorization.²⁸⁴ Colquiri also shared the technical inspection report with Comibol, noting that the parties were waiting on Comibol’s formal approval to proceed with the agreements.²⁸⁵
- (c) Comibol acknowledged receipt of the agreement and requested, “[w]ith the objective of facilitating the attention to the Cooperativa Minera 26 de Febrero’s requests,” that Colquiri submit a letter confirming its renunciation to the areas in which the *cooperativa* would be allowed to work.²⁸⁶ Colquiri duly complied.²⁸⁷
125. Bolivia’s claim that Comsur and Sinchi Wayra only involved Comibol “when a conflict of major proportions was already inevitable”²⁸⁸ is, therefore, without basis.²⁸⁹

²⁸³ Letter from Colquiri (Mr Hartmann) to Comibol (Mr Miranda), 14 January 2009, **R-339**; Letter from Comibol (Mr Miranda) to Colquiri (Mr Hartmann), 16 January 2009, **C-291**.

²⁸⁴ See Agreement to obtain Comibol’s authorization for the performance of mining works by Cooperativa 26 de Febrero in an area within level -325 of the Colquiri Mine, 6 March 2009, **C-292**.

²⁸⁵ Letter from Colquiri (Mr Hartmann) to Comibol (Mr Miranda), 26 March 2009, **C-294**. See also Letter from Comibol (Mr Miranda) to Cooperativa 26 de Febrero (Mr Cochi and Mr Mamani), 26 March 2009, **R-340** (Comibol informs the *cooperativa* that it received the technical inspection report and proposes that the *cooperativa* establish a joint technical commission with Colquiri in order to evaluate the existing reserves in the levels assigned to the *cooperativa*).

²⁸⁶ Letter from Comibol (Mr Miranda) to Colquiri (Mr Hartmann), 24 March 2009, **C-293** (unofficial English translation from Spanish original).

²⁸⁷ Letter from Sinchi Wayra (Mr Capriles) to Comibol (Mr Miranda), 15 April 2009, **C-238**.

²⁸⁸ Rejoinder, para 261.

²⁸⁹ Indeed, the record indicates that the *cooperativistas* often addressed their requests for working areas directly to Comibol, who then interceded with Sinchi Wayra or Colquiri in order to satisfy the *cooperativas*’ demands. See Reply, para 151; Letter from Comibol (Mr Córdoba) to Comsur

126. *Fourth*, Bolivia argues that Comsur and Sinchi Wayra had a “poor record of ensuring the security of the Mine” and were supposedly unable to address the increasing social tensions with the *cooperativas* because, amongst other things: (i) the *cooperativistas* disregarded the security areas put in place by the company; (ii) the *cooperativistas* bribed Sinchi Wayra’s employees to gain access to the Mine; and (iii) Sinchi Wayra never sought to void the agreements with the *cooperativistas*.²⁹⁰ Once again, even if these statements were true (which they are not) they are entirely irrelevant to the question of whether Glencore Bermuda could have foreseen the State’s expropriation of the Colquiri Lease at the time it acquired its interest in the Asset in March 2005.
127. As explained by Mr Lazcano, mineral thefts by *cooperativistas*, commonly known as *juqueos*, are “a common feature” across Bolivian mines.²⁹¹ And “[i]n the case of the Colquiri Mine, the *juqueos* were limited to sporadic thefts of minerals, mainly in areas where Comsur was not producing.”²⁹² Bolivia has not demonstrated otherwise.
128. Contrary to Bolivia’s assertions, what the evidence instead shows is that both Comsur and Sinchi Wayra employed meaningful measures to address the *juqueos* and any related tensions with the *cooperativistas*. These included, for example,

(Mr Urjel), 5 October 2005, **C-216**; Letter from Cooperativa Multiactiva Mesa y Plata Ltda (Mr Solares and Mr Agne) to Comibol (Mr Miranda), 22 March 2007, **C-227**; Letter from Cooperativa 26 de Febrero (Mr Coñaja et al) to Comibol (Mr Miranda), 26 July 2007, **C-229**; Letter from Cooperativa 21 de Diciembre (Mr Quipe) to Comibol (Mr Revollo), 18 May 2006, **C-290** (also asking Comibol to take action against illegal miners in area, asking that “the corresponding legal rights are exercised to defend the property rights of COMIBOL” (unofficial English translation from Spanish original). Bolivia also explains that the Minister of Mining himself visited the Colquiri Mine in March 2012 together with the Vice Minister of Cooperatives and Comibol’s Executive President Héctor Córdova in order to assess the *Cooperativa 26 de Febrero*’s request for additional working areas; a request which both the Minister of Mining and Comibol ultimately approved. Rejoinder, paras 284-285; Second Witness Statement of David Alejandro Moreira, para 13; Internal Note of the Ministry of Mining on the Visit to the Colquiri Mine, 12 March 2012, **R-343**.

²⁹⁰ Rejoinder, paras 144, 425 and Section 2.7.3.1.

²⁹¹ Second Witness Statement of Eduardo Lazcano, paras 14, 24.

²⁹² *Ibid*, para 14.

increasing the number of security officers present at the Colquiri Mine, filing appropriate criminal reports and requesting assistance from Comibol pursuant to the Colquiri Lease.²⁹³ Bolivia itself recognizes that Sinchi Wayra put in place security areas within the Colquiri Mine and employed security personnel to protect against unauthorized access by the *cooperativistas*.²⁹⁴

129. *Finally*, the evidence on the record clearly demonstrates that the present dispute arose from Bolivia’s premeditated decision to fabricate a conflict between the *cooperativas* and the Colquiri Union in order to have a pretext to nationalize the Colquiri Lease.²⁹⁵ On 10 May 2012 (seven years after the acquisition of the Colquiri Lease), the Government and representatives of the COB, the FSTMB and the Huanuni Union agreed to “summon Colquiri’s workers’ union for a definitive meeting to execute the Nationalization of the Colquiri Mine.”²⁹⁶ As explained by Mr Eskdale, Claimant could not have foreseen this specific dispute at the time it acquired its interest in the Colquiri Lease.²⁹⁷

²⁹³ *Ibid*, paras 25, 36 (explaining how in March 2012, “in order to stop the invasions” Mr Lazcano “decided to physically block the Triunfo access gate, in the northern part of the mine, flood its ramp and cut power, water and air to the lower levels”), 40. *See also* Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 3 April 2012, **C-30**; Letter from Colquiri (Mr Capriles) to Comibol (Mr Córdova), 30 May 2012, **C-31**; Letter from Colquiri (Mr Lazcano et al) to Sinchi Wayra (Mr Hartmann), 29 March 2012, **C-252**; Letter from Comibol (Mr Córdova) to Sinchi Wayra (Mr Capriles), 20 April 2012, **C-253**.

²⁹⁴ Rejoinder, para 263.

²⁹⁵ Reply, para 241.

²⁹⁶ 10 May 2012 Agreement, 10 May 2012, **C-256** (unofficial English translation from Spanish original). Bolivia claims that the 10 May 2012 Agreement could not have been an agreement to nationalize the Colquiri Mine because “[i]t would simpl[y] 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.” Rejoinder, para 274 (citing Second Witness Statement of Joaquín Mamani, para 28). But this is exactly what Bolivia agreed to do—secure the Colquiri’s workers’ support for its decision to nationalize the mine. At that point in time, the workers supported Colquiri because it guaranteed their labor stability. *See, eg*, Political Document approved in the XXXI National Mining Congress of the FSTMB, 3 September 2011, **R-277**, p 8. Bolivia used the May 2012 conflict to convince the workers that their labor stability was in jeopardy in order to secure their support for the nationalization. *See* Second Witness Statement of Lazcano, paras 54, 70, 73.

²⁹⁷ Second Witness Statement of Christopher Eskdale, para 63.

130. In sum, it is clear from the evidence on the record that Glencore Bermuda is a protected investor under the Treaty. Bolivia’s baseless allegations relating to veil piercing and abuse of process should be dismissed.

C. GLENCORE BERMUDA MADE A QUALIFYING INVESTMENT UNDER THE TREATY

131. As Claimant has previously explained, Article 1 of the Treaty defines “investment” broadly, to cover “every kind of asset,” including “movable and immovable property and any other property rights” and “shares in and stock and debentures of a company and any other form of participation in a company.”²⁹⁸ It is undisputed that: (i) Glencore Bermuda indirectly holds 100 percent of the shares in Vinto and Colquiri, the Bolivian companies controlling the Assets; and (ii) Glencore Bermuda thereby also has an indirect stake in the Assets, including any movable and immovable property, rights and claims to money having a financial value. Glencore Bermuda’s interests in Vinto, Colquiri and the Assets thus qualify as a protected investment under the Treaty.²⁹⁹

132. In its Statement of Defense, Bolivia attempted to import into the Treaty two additional, extra-textual, jurisdictional requirements. First, Bolivia argued that the Treaty requires that the claimant investor make an “active” investment.³⁰⁰ Second, Bolivia contended that the Treaty only protects “direct” investments, to the exclusion of “indirect” investments.³⁰¹ Bolivia based these arguments on the presence of the words “made,” “of,” and “invest” in various clauses in the Treaty—none of which appear in the context of defining a qualifying investment—and on a supposed customary international law “prohibition” on claims brought by indirect investors.³⁰² Bolivia then argued that Glencore Bermuda’s investment did not fulfil these additional criteria because, it stated,

²⁹⁸ Treaty, **C-1**, Art 1(a)(i)-(ii).

²⁹⁹ Statement of Claim, Section IV.C; Reply, Section IV.C.

³⁰⁰ Statement of Defense, Section 4.1.1.

³⁰¹ *Ibid*, Section 4.1.2.

³⁰² *Ibid*, Section 4.1.1.

- Claimant received the Assets without consideration (which is incorrect) and failed to take an active role in the management and operation of the Assets, which it owns indirectly.³⁰³
133. In its Procedural Order No 2, the Tribunal held that Bolivia’s objections based on these two supposed requirements were not “sufficiently serious and substantial as to justify bifurcation” because (*inter alia*) they both lacked textual support.³⁰⁴
134. In its Reply, Claimant demonstrated that the Treaty does not require an “active” investment, and that its protections extend to indirect investments.³⁰⁵ Claimant established that the weight of the relevant case law rejects attempts to import non-textual jurisdictional requirements into BITs.³⁰⁶ Furthermore, Claimant showed that, even if Bolivia’s position were accepted on the law (which it should not be), Claimant’s investment meets even the more restrictive definition of “investment” advocated by Bolivia.³⁰⁷
135. Bolivia now surprisingly—and misleadingly—contends that Claimant, in its Reply, “conceded” the validity of Bolivia’s arguments concerning the existence of an additional, non-textual, jurisdictional requirement that the investment be “active.”³⁰⁸ Claimant made no such concession. As Claimant already demonstrated in its Reply,³⁰⁹ there is no basis for Bolivia’s extra-textual theory regarding the Treaty’s definition of investment, or for Bolivia’s factual assessment that Claimant did not make a qualifying investment. This remains true after Bolivia’s latest written submission, as we demonstrate in Section 1 below. Aside from seeking to import an “active investment” requirement into the Treaty,

³⁰³ *Ibid*, Sections 4.1.2 and 4.4.3.

³⁰⁴ Tribunal’s Procedural Order No 2: Decision on Bifurcation, 31 January 2018, paras 42, 51.

³⁰⁵ Reply, Section IV.C.

³⁰⁶ *Ibid*, paras 251-260.

³⁰⁷ *Ibid*, paras 261-264.

³⁰⁸ Rejoinder, paras 433-437.

³⁰⁹ Reply, Section IV.C.

Bolivia reprises the argument, which has been rejected over and over again, that a claimant cannot “bring claims for violations of indirect rights.”³¹⁰ As we explain in Section 2 below, Bolivia is mistaken.

1. The Tribunal should reject Bolivia’s objection based on its “active” investment theory

a. There is no legal basis for Bolivia’s “active” investment requirement

136. Ignoring Claimant’s arguments in its Reply, Bolivia contends that Claimant “does not even attempt to refute Bolivia’s main arguments to demonstrate that the Treaty demands active investment.”³¹¹ More specifically, Bolivia incorrectly argues that Claimant has “no response” to Bolivia’s invocation of: (i) the ordinary meaning to be given to the words “of” and “made” in Articles 8 and 13 of the Treaty, respectively;³¹² and (ii) the Treaty’s object and purpose, which supposedly confirm Bolivia’s interpretation “of these textual requirements.”³¹³ This is wrong.

137. As Claimant already explained in its Reply, nothing in the use of the words “of” or “made,” read according to their ordinary meaning and in their context, suggests that the investment must be “active”—particularly not in the way Bolivia defines that term, ie, as requiring the investor’s direct involvement in the acquisition, management and/or operation of the Assets—in order to receive the protection of the Treaty.³¹⁴

(a) Bolivia places much weight on the use of the preposition “of” in the phrase “an investor of [a national or company of one Contracting Party],” which appears in Article 8 of the Treaty (“Settlement of Disputes between an Investor and a Host State”). Bolivia’s arguments in this respect are

³¹⁰ Rejoinder, para 490.

³¹¹ *Ibid*, para 433.

³¹² *Ibid*, paras 434-435.

³¹³ *Ibid*, para 436.

³¹⁴ Reply, paras 250-257.

difficult to follow. It is unclear why the passive investment “of” an investor would not be considered an investment “of” an investor. The ordinary meaning of the possessive “of” merely suggests that the investment must belong to the investor—such investor may be passive or active, and the investment may belong to it directly or indirectly. The only requirement is that there be some link (whether direct or indirect) between the claimant investor and the investment.³¹⁵ And there is clearly such a link here.

- (b) Equally, the use of the word “made” in Article 13 of the Treaty (the Treaty’s sunset clause) does not suggest that the investor must be and remain “active” in the sense of being directly involved in the acquisition, management and/or operations of assets forming part of the investment for the latter to qualify for treaty protection. Article 1(a) of the Treaty (which defines the term “investment”) is clear that “[a] change in the form in which assets are invested does not affect their characters as investments.”³¹⁶ Furthermore, looking at the context of the word “made” in Article 13 of the Treaty (as Article 31 of the Vienna Convention requires), it is clear that this language is in no way used as a qualifier for the term “investment,” which is defined twelve articles before. As Claimant has already noted,³¹⁷ other tribunals—including the tribunal in

³¹⁵ It is in this sense that Arbitrator Park in the plurality decision in *Alapli* stated that “reference to the investment ‘of’ an investor must connote [sic] active contribution of some sort.” *Alapli Elektrik BV v Republic of Turkey* (ICSID Case No ARB/08/13) Award, 16 July 2012, **CLA-111**, para 359. He added: “Put differently, the treaty language implicates not just the abstract existence of some piece of property, whether stock or otherwise, but also the activity of investing. The Tribunal must find an action transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to another.” *Ibid*, para 360. Such transfer of value occurred in this case in the form of a significant cash contribution. Nothing in Arbitrator Park’s decision suggests that active involvement in the acquisition, management or operation of the Assets is required.

³¹⁶ Treaty, **C-1**, Art 1(a).

³¹⁷ Reply, paras 255-256, footnotes 665-666 (citing *Flemingo DutyFree Shop Private Limited v Poland* (UNCITRAL) Award (Redacted), 12 August 2016, **CLA-223**, paras 306-308; *Saluka Investments BV v Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, **CLA-62**, paras 209-211; *Fedax NV v Republic of Venezuela* (ICSID Case No ARB/96/3) Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, **CLA-21**, para 18.)

Gold Reserve—have already rejected the exact arguments Bolivia is now making.³¹⁸

138. Bolivia’s arguments therefore do nothing to displace the Contracting Parties’ intentions, expressly reflected in Article 1(a) the Treaty, to extend the Treaty’s protections to “every kind of asset which is capable of producing returns.”³¹⁹
139. In the same way that Bolivia cannot rewrite the provisions of the Treaty, Bolivia’s strained theory regarding the Treaty’s object and purpose³²⁰ cannot serve to import a non-existent requirement of management “activity” on the part of the investor. The inclusion of “passive” investments within the ambit of the Treaty’s protections is entirely consistent with the preamble’s stated objectives of “creat[ing] favourable conditions for greater investment by nationals and companies of one State in the territory of the other State” in a manner “conducive to the stimulation of individual business initiative” that “will increase prosperity

³¹⁸ *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award, 22 September 2014, **CLA-123**, para 260 (rejecting the following arguments submitted by Venezuela on the meaning of the verb “to make”: “[T]he Parties have debated at length whether the process leading to the indirect share ownership by Claimant of a local subsidiary and, through the latter, to the holding of title to mining rights and concessions satisfies the condition of ‘making’ an investment in the territory of Venezuela. The dispute is whether the Canadian company can be said to have ‘made’ the investment, given that the mining rights had already been granted to the Venezuelan subsidiary before the restructure through which Gold Reserve Inc., the Canadian company, acquired Gold Reserve Corp, the US company. Venezuela argued that, as the investment already existed before the Canadian company was even incorporated, the Canadian company cannot be said to have made that investment.”). *See ibid*, para 261 (“According to the ordinary meaning of the words, ‘making an investment in the territory of Venezuela’ does not require that there must be a movement of capital or other values across Venezuelan borders.”).

³¹⁹ *See also Mytilineos Holdings SA v The State Union of Serbia & Montenegro and Republic of Serbia* (UNCITRAL) Partial Award on Jurisdiction, 8 September 2006, **CLA-237**, para 129 (“Respondents’ interpretation would, however, unduly restrict and unpredictably limit the meaning of an otherwise clear and straightforward investment definition. The Tribunal finds that the core of the definition lies in the characterization of ‘every kind of asset’ as an ‘investment.’ The examples of assets added in an illustrative fashion to this definition in Article 1(1)(a) – (e) of the BIT and the verb ‘invested’ do not add to it. Rather, the verb ‘invested’ appears necessary for the further qualification that the investments must be made ‘in accordance with the [host State’s] legislation.”). *See also ibid*, para 133 (“Even if, for the sake of the argument, one would accept Respondents’ assertion that assets have to be ‘invested’ in order to constitute an ‘investment’ under the BIT, one may doubt whether this requirement would add a truly restrictive meaning to the broad investment definition of the BIT.”).

³²⁰ *See* Statement of Defense, paras 274-277.

- in both States.”³²¹ Active and passive investments alike are capable of fulfilling these objectives, and there is no principled basis for drawing a distinction between them.
140. Bolivia’s interpretation of the Treaty is inconsistent with the jurisprudence. After claiming that “no further analysis is necessary”³²² beyond a plain reading of the Treaty’s text, Bolivia spends ten paragraphs in its latest submission desperately trying to “confirm the authority”³²³ of the case law it invoked in its Statement of Defense.³²⁴ Bolivia irresponsibly accuses Claimant of having “rel[ie]d largely on misrepresentation” in its Reply, when showing that the case law invoked by Bolivia does not support its theory.³²⁵ But as the following paragraphs show (to a level of detail that is unfortunately necessitated by Bolivia’s misdirection), there is only one party that is mischaracterizing the authorities here, and it is not Claimant.
141. In its Rejoinder, Bolivia insists that the tribunals in *Standard Chartered Bank*, *Orascom*, *Vestey*, *KT Asia*, *Alapli* and *Bayindir* all concluded that an active investment is required in order to receive the protection of any BIT, regardless of whether Article 25 of the ICSID Convention applies.³²⁶ Bolivia further argues that *Isolux*, *Alps Finance* and *Romak* provide “further confirmation for the active investment requirement.”³²⁷ These cases emphatically do not stand for this proposition:

³²¹ Treaty, C-1, preamble. We note that Bolivia seems to have abandoned its argument that the use of the word “by” in the preamble of the Treaty, specifically, provides support for its “active investment” theory. Compare Statement of Defense, para 275 with Rejoinder, para 436.

³²² Rejoinder, para 438.

³²³ *Ibid.*

³²⁴ *Ibid.*, paras 438-448.

³²⁵ *Ibid.*, para 438.

³²⁶ *Ibid.*, paras 439-440.

³²⁷ *Ibid.*, para 442.

- (a) While the awards in *Orascom*, *Vestey* and *KT Asia* did suggest, contrary to other eminent authorities,³²⁸ that there exists an intrinsic definition of “investment” that applies independently of the ICSID Convention,³²⁹ none of these decisions hold that active and direct management on the part of the investor is a requirement:
- (i) The *Orascom* tribunal specifically and expressly rejected Algeria’s argument that an investment must be active to qualify for protection: “No ‘active’ involvement is required under the BIT, which protects both ‘minority or indirect’ shareholding. Nor is there such a requirement under the ICSID Convention.”³³⁰
- (ii) The *Vestey* tribunal emphasized that the “jurisdictional enquiry [is limited] to the ownership of the shares.”³³¹ It does not extend to an assessment of the degree to which the investor was involved in the day-to-day management and affairs of the business.³³²

³²⁸ Reply, para 259 (citing International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention of the Settlement of Investment Disputes Between States and Nationals of Other States (1965)*, April 2006, **CLA-61**, Section V.27; *White Industries Australia Limited v Republic of India* (UNCITRAL) Final Award, 30 November 2011, **CLA-200**, paras 7.4.8–7.4.9). See also *Mytilineos Holdings SA v The State Union of Serbia & Montenegro and Republic of Serbia* (UNCITRAL) Partial Award on Jurisdiction, 8 September 2006, **CLA-237**, paras 117-118.

³²⁹ *KT Asia Investment Group BV v Republic of Kazakhstan* (ICSID Case No ARB/09/8) Award, 17 October 2013, **CLA-118**, paras 165-166; *Orascom TMT Investments Sàrl v People’s Democratic Republic of Algeria* (ICSID Case No ARB/12/35) Award, 31 May 2017, **RLA-9**, para 371; *Vestey Group Ltd v Bolivarian Republic of Venezuela* (ICSID Case No ARB/06/4) Award, 15 April 2016, **RLA-5**, para 192.

³³⁰ *Orascom TMT Investments Sàrl v People’s Democratic Republic of Algeria* (ICSID Case No ARB/12/35) Award, 31 May 2017, **RLA-9**, para 384.

³³¹ *Vestey Group Ltd v Bolivarian Republic of Venezuela* (ICSID Case No ARB/06/4) Award, 15 April 2016, **RLA-5**, para 199.

³³² In that case, the tribunal explained: “[T]o conclude that the present dispute arises directly out of an investment of an investor, it is sufficient to find that Vestey held title to the shares in Agroflora,” the Venezuelan entity holding the assets of Vestey’s cattle farming business in Venezuela. Indeed, the tribunal found that, through its shareholding, “Vestey contributed substantial economic resources into its Venezuelan cattle farming business” – and thus concluded that it had jurisdiction *ratione materiae*. *Vestey Group Ltd v Bolivarian Republic of Venezuela* (ICSID Case No ARB/06/4) Award, 15 April 2016, **RLA-5**, paras 192, 198.

- (iii) In *KT Asia*, the tribunal declined jurisdiction, not because a supposed requirement of “activity” was unfulfilled, but because *none* of the criteria of an “investment” (contribution, duration and risk) were met.³³³ The contribution to the investment came, not from the claimant, but from a third party (a natural person) who had no legal title over the claimant; the claimant held—and was intended to hold—the putative investment (the nominal title to shares) only for a very limited duration (a few weeks) and took no risk.³³⁴ Those facts bear no resemblance to the facts of the present case.
- (b) The other decisions on which Bolivia relies similarly do not provide any support for its active investment theory. With the exception of *Standard Chartered Bank* (which is an isolated and distinguishable case, as explained below), these decisions do not address the question of whether an investment must be “active” in order to qualify for treaty protection. In fact, they provide additional support for Claimant’s case:
- (i) In its latest submission, Bolivia states that Claimant “concede[d]” that *Alps Finance* and *Romak* “stand for the proposition that an investment must be active in order for jurisdiction to exist,”³³⁵ and merely distinguished these cases from the present one “on factual grounds.”³³⁶ Bolivia is mistaken. On the law, these two cases only support drawing a conceptual distinction between “investments,” on the one hand, and “purely commercial transactions”³³⁷ such as a

³³³ *KT Asia Investment Group BV v Republic of Kazakhstan* (ICSID Case No ARB/09/8) Award, 17 October 2013, **CLA-118**, paras 206, 216, 221-222.

³³⁴ *Ibid.*

³³⁵ Rejoinder, para 444.

³³⁶ *Ibid.*, para 445.

³³⁷ *Romak SA (Switzerland) v The Republic of Uzbekistan* (UNCITRAL) (PCA Case No AA280) Award, 26 November 2009, **RLA-12**, para 185. *See also ibid.*, para 189.

“one-off sales transaction,”³³⁸ on the other. Such a distinction is entirely separate from, and says nothing about, Bolivia’s “active” investment theory. Of course, those cases are also distinguishable on their facts.³³⁹ Unlike the claimants in *Romak* and *Alps Finance*, Claimant made a long-term investment; the transaction at issue in this case could not possibly be described as a “one-off” commercial transaction.³⁴⁰

- (ii) Similarly, *Isolux* says nothing about any supposed “active” investment requirement. While the *Isolux* award admittedly supports the existence of an objective definition of “investment,”³⁴¹ it does not suggest that active and direct management on the part of the investor is a relevant criterion under such definition; nor does it use the word “active” at all in that context.
- (iii) According to Bolivia, Claimant also “d[id] not dispute” that the *Bayindir* tribunal confirmed “that a company must actively invest to receive treaty protection.”³⁴² This is again false. Nothing in the *Bayindir* award suggests that there exists an “active” investment

³³⁸ *Ibid*, para 187. See also *Alps Finance and Trade AG v Slovak Republic* (UNCITRAL) Award [Redacted], 5 March 2011, **RLA-11**, para 245 (“The constant jurisprudential trend has led the most prominent doctrine to exclude in categorical terms that a mere one-off sale transaction might qualify as an investment. The Tribunal cannot ignore the general consensus formed around the above doctrine.”).

³³⁹ The *Romak* tribunal found that Romak had not made an investment because “Romak’s rights were embodied in and ar[o]se out of a sales contract, a one-off commercial transaction pursuant to which Romak undertook to deliver wheat against a price to be paid by the Uzbek parties.” *Romak SA (Switzerland) v The Republic of Uzbekistan* (UNCITRAL) (PCA Case No AA280) Award, 26 November 2009, **RLA-12**, para 242. The *Alps Finance* tribunal similarly found that the purported investment was in fact “a mere purchase-sale contract” for the “acquisition of receivables,” from which transaction the respondent State “was completely extraneous.” *Alps Finance and Trade AG v Slovak Republic* (UNCITRAL) Award [Redacted], 5 March 2011, **RLA-11**, paras 229, 232, 235.

³⁴⁰ See Reply, para 260.

³⁴¹ *Isolux Infrastructure Netherlands BV v Kingdom of Spain* (SCC Case No V2013/153) Award, 12 July 2016, **RLA-10**, para 686 (cited in Rejoinder, para 443). *But see* Reply, para 259 and para 141(a) above.

³⁴² Rejoinder, para 439.

requirement.³⁴³ Instead, the paragraphs cited by Bolivia simply discussed, and rejected, Pakistan’s argument that Bayindir had not made “any significant injections of funds that could be considered as an investment.”³⁴⁴ In fact, the tribunal noted that “the general definition of investment” in the BIT—which uses similar language as the Treaty in all material respects—was “very broad,”³⁴⁵ and that any kind of assets would qualify as an investment under the BIT.³⁴⁶ This supports Claimant’s—rather than Bolivia’s—position.

- (iv) Bolivia’s reliance on *Alapli* is equally misplaced. In the *Alapli* award, which is a plurality decision, Arbitrator Park examined whether there was a sufficient link between the claimant as purported investor and the investment.³⁴⁷ Contrary to the other decisions cited by Bolivia, Arbitrator Park did use the word “active” in connection with “investment” in that award.³⁴⁸ However, he did so in a context entirely different from the present case, while analyzing whether it could be said that the claimant had in fact made a “contribution” to the purported investment and

³⁴³ Statement of Defense, para 262 (citing *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Decision on Jurisdiction, 14 November 2005, **CLA-60**, paras 118-121).

³⁴⁴ *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Decision on Jurisdiction, 14 November 2005, **CLA-60**, para 118.

³⁴⁵ *Ibid*, para 113.

³⁴⁶ The tribunal expressly left open the question whether “investment” has independent meaning under the BIT as well as the ICSID Convention. *Ibid*, para 122.

³⁴⁷ *Alapli Elektrik BV v Republic of Turkey* (ICSID Case No ARB/08/13) Award, 16 July 2012, **CLA-111**, paras 382-384, 389. As explained in Section II.C.1.a above, the issue in that case was whether there was a sufficient link between the purported investor (the arbitration claimant) and the investment, so that it could be said that the claimant had invested in the host State in the sense of having made a qualifying contribution over sufficient duration, while bearing some risk. Arbitrator Park concluded that the claimant had “played no meaningful role contributing to the relevant host state project, whether by way of money, concession rights or technology.” *Ibid*, para 389. This, as we further explain in Section II.C.1.b, below, is of course distinguishable from the present case.

³⁴⁸ *Ibid*, para 350.

undertaken some risk in doing so. Arbitrator Park found that “Claimant neither made any contribution nor took any risk [and] [a]ll relevant contributions to the Project came from someone other than [c]laimant.”³⁴⁹ Thus, “on the unique facts of th[at] case,”³⁵⁰ the claimant was not an investor that had made a qualifying investment in Turkey under the relevant BIT.³⁵¹ That bears no resemblance to the present case, because Claimant itself made an economic contribution, in the form of a cash payment of over US\$313.8 million, in exchange for a long-term investment.

- (v) The importance of a link between the investor and investment was similarly underscored by the *KT Asia* tribunal.³⁵² On the facts of the case, the tribunal found that the claimant had made no contribution (and had neither taken a risk nor met the duration requirement):

because its involvement was limited to receiving a transfer of nominal title to the shares, for no consideration, in order to hold the shares for a few weeks in accordance with Mr Ablyazov’s [a natural person with no formal legal connection to claimant] instructions before their placement with private investors.³⁵³

Key to the tribunal’s conclusion was its finding that there was no “corporate group” encompassing the claimant and the real contributor to the investment (Mr Ablyazov), such that Mr

³⁴⁹ *Ibid*, para 347.

³⁵⁰ *Ibid*, para 349.

³⁵¹ Arbitrator Park also took care to distinguish the case before him from “the situation of one person stepping into the shoes of another which had already made a qualifying contribution.” *Ibid*, para 351.

³⁵² *KT Asia Investment Group BV v Republic of Kazakhstan* (ICSID Case No ARB/09/8) Award, 17 October 2013, **CLA-118**, paras 192-198, 206.

³⁵³ *Ibid*, para 188.

Ablyazov's contribution to the purported investment could not be attributed to the claimant.³⁵⁴

There was no holding company and no single individual shareholder directly or indirectly connecting all the companies of which Mr Ablyazov was the beneficial owner. Neither was there a single economic unity, not to speak of consolidation for financial reporting or tax purposes.³⁵⁵

Thus, like in *Alapli*, the link between the investor and the investment was missing entirely.

- (c) Finally, *Standard Chartered Bank* is an isolated decision, which turned on very specific facts and applicable treaty language. Crucially, that case concerned loans and not shares. As already explained in the Reply, the claimant had purchased debt indirectly, through a subsidiary in which it did not even hold a controlling majority. Considering the nature of the purported investment in that case, as well as the wording of the applicable BIT (which is narrower than the wording of the Treaty), the tribunal required a showing of the claimant's control over the purported investments or, alternatively, over the subsidiary that had subscribed those loans. This requirement not being met, the Tribunal declined jurisdiction.³⁵⁶ This case is inapposite where, as here, the investments at issue are shares (not debt), and where Claimant has full control over the subsidiaries through which it held the Assets.

142. Given the lack of jurisprudential support for Bolivia's "active investment" theory, its suggestion that *Saluka* should be disregarded because it "was decided long

³⁵⁴ *Ibid*, paras 192-198.

³⁵⁵ *KT Asia Investment Group BV v Republic of Kazakhstan* (ICSID Case No ARB/09/8) Award, 17 October 2013, **CLA-118**, para 197.

³⁵⁶ *Standard Chartered Bank v The United Republic of Tanzania* (ICSID Case No ARB/10/12) Award, 2 November 2012, **RLA-8**, paras 200, 259, 261, 266. See Reply, footnote 671.

before the emergence of the *jurisprudence constante* that Bolivia [cites]”³⁵⁷ is misguided. As demonstrated above, there is no *jurisprudence constante* supporting Bolivia’s position. In contrast, *Saluka* falls squarely in line with the vast majority of arbitral decisions that reject—expressly or impliedly—the existence of an “active” investment requirement in investment treaty law.³⁵⁸

b. Claimant made a qualifying investment

143. Claimant demonstrated in its previous pleadings (and again above) that its investment meets all the criteria of a qualifying “investment.”³⁵⁹ Thus, even assuming that the term “investment” has any “inherent” meaning separate from the definition provided in the Treaty (which it does not³⁶⁰), Claimant’s 100 percent indirect shareholding in Vinto and Colquiri, as well as its indirect stake in the assets of these companies, are qualifying “investments” under the Treaty. Claimant’s for-consideration purchase of a 100 percent indirect shareholding in Vinto and Colquiri was, in itself, a sufficient contribution; it was made for a certain duration; and it carried the risk “inherent in holding shares, namely the risk that the value of the shares may decline.”³⁶¹ All arguments by Bolivia relating to the lack of direct and active involvement by Glencore Bermuda in the acquisition, management and/or operation of the Assets are entirely irrelevant, as explained above.³⁶²

³⁵⁷ Rejoinder, para 450.

³⁵⁸ Claimant takes note of Bolivia’s clarification that it does not argue for the existence of either an “origin of capital” or a “contribution of capital” requirement, nor is it “objecting that the investor must pay cash (or other contribution) within Bolivia’s territory.” Rejoinder, para 450. Claimant’s position on these issues remains as set forth in its Reply. *See* Reply, paras 252-257.

³⁵⁹ Statement of Claim, paras 129-132; Reply, paras 262-264.

³⁶⁰ Reply, para 259.

³⁶¹ *Orascom TMT Investments Sàrl v People’s Democratic Republic of Algeria* (ICSID Case No ARB/12/35) Award, 31 May 2017, **RLA-9**, para 379. *See generally, ibid*, paras 378-80 (holding that Claimant’s for-consideration acquisition of an indirect interest in OTA via the purchase of shares of Weather Investments was sufficient contribution; that it met the requirement of duration; and that it carried sufficient risk to qualify as an investment).

³⁶² *See* Rejoinder, paras 452-456. In addition, Bolivia’s suggestion that Glencore Bermuda’s interest in Vinto, Colquiri and the Assets was in any way concealed from Bolivia is disproven by the

144. Bolivia no longer disputes the fact that Claimant did pay consideration in exchange for its investments—Glencore Bermuda paid over US\$313.8 million for its indirect shareholding in the Bolivian companies, which in turn held the Assets. Instead, Bolivia now argues that such a payment is insufficient as it was “purely passive” and occurred “on 3 March 2005, after all of the share purchase agreements had been concluded.”³⁶³ How someone “passively” makes a payment of over US\$ 313.8 million is not clear to Claimant; nor is Bolivia’s suggestion that such a payment, which was a condition precedent to the closing of the assignment of the Assets to Claimant, could be a “passive” part of that transaction. As the case law establishes, the acquisition of the possession or control of an existing business (eg, through shareholding, either direct or indirect) suffices to qualify as an investment; nothing more is required.³⁶⁴
145. Additionally, even if the Treaty required an “active investment” (which it does not), Vinto and Colquiri were, in an economic sense, “active investments” of Claimant: not only were they fully operating so as to obtain a return on the initial purchase price, but they were also making continuous financial contributions on new capital expenditures. From Claimant’s perspective, therefore, they were “active investments,” as that term is understood in economic theory.
146. Bolivia’s arguments regarding Glencore International’s involvement in the Bolivian investments also overlook the fact that Glencore Bermuda is part of the

evidence. Glencore Bermuda’s interest in Vinto, Colquiri and the Assets was notified to Bolivia, at the latest, in January 2007, in response to the request for information Bolivia sent in November 2006. In any event, Bolivia’s allegations to the contrary are irrelevant to the present inquiry, and do not change the fact that Glencore Bermuda made a qualifying investment. Letter from Pestalozzi Lachenal Patry (Mr Peter Pestalozzi) to Senate of Bolivia (Ms Carmen Velásquez), 10 January 2007, **C-225**, p 2.

³⁶³ Rejoinder, para 458.

³⁶⁴ See *Isolux Infrastructure Netherlands BV v Kingdom of Spain* (SCC Case No V2013/153) Award, 12 July 2016, **RLA-10**, para 689 (“The realization of a new investment by the person who acquires the possession or control of a previously existing investment is not necessary.”) (unofficial English translation from Spanish original). See also *Orascom TMT Investments Sàrl v People’s Democratic Republic of Algeria* (ICSID Case No ARB/12/35) Award, 31 May 2017, **RLA-9**, para 378; *Renée Rose Levy de Levi v Republic of Peru* (ICSID Case No ARB/10/17) Award, 26 February 2014, **CLA-215**, para 148.

same group of companies as Glencore International.³⁶⁵ Thus, in contrast to *KT Asia*, in which the involvement of a third party outside the claimant’s corporate group led the tribunal to conclude that the claimant had failed to make any contribution, Glencore International’s involvement alongside Claimant cannot detract from Claimant’s substantial contribution towards its Bolivian investments.³⁶⁶ This is not a case where a third party to the relevant corporate group, rather than the claimant, has made all of the contribution and undertaken all the risk of an investment.

147. Lastly, Bolivia denies that Claimant has made significant contributions, through its subsidiaries, to the Bolivian economy.³⁶⁷ As a threshold matter, Claimant notes that Bolivia does not argue (nor could it) that jurisdiction is conditioned on the existence of such contributions. This argument is therefore entirely irrelevant. In any event, contrary to Bolivia’s suggestion, the evidentiary record demonstrates

³⁶⁵ The Glencore group meets the definition of “group of companies” provided in *KT Asia*, on which Bolivia relies:

[A] group of companies [...] exists when two or more corporations are under common corporate ownership or control. [...] Although composed of separate legal entities, which must comply with the legal and regulatory requirements applicable to them, groups generally operate as a single economic entity with a common objective and strategy and a group management. In such a case, the group may report its financial results on a consolidated basis; its group status may be taken into account for tax purposes (subject to dealing at arm’s length); and national law may impose certain liabilities to sanction any misuse of the group structure.

KT Asia Investment Group BV v Republic of Kazakhstan (ICSID Case No ARB/09/8) Award, 17 October 2013, **CLA-118**, para 195.

³⁶⁶ *Ibid*, para 197 (“Consequently, there was no holding company and no single individual shareholder directly or indirectly connecting all the companies of which Mr Ablyzov was the beneficial owner.”). *Hassan Awdi Enterprise Business Consultants Inc and Alfa El Corporation v Romania* (ICSID Case No ARB/10/13) Award, 2 March 2015, **RLA-95**, paras 200-201 (“The Tribunal holds that the term ‘contribution,’ as used sometime by the Parties in the context of investment, concerns the requirement that the investor commits a certain amount of resources, economic or otherwise. The Tribunal is satisfied that Claimants Hassan Awdi and EBC have made indirectly investments covered by the BIT via notably share purchases and monetary injections in Rodipet through Magnar since 12 February 2004 and in Casa Bucur through Claimant Alfa El Corporation’s control of Alfa El Romania [...] and through Hassan Awdi’s control of Mona Lisa [...] This economic link between Claimants and the investments is sufficient for purposes of jurisdiction.”).

³⁶⁷ Rejoinder, para 459.

that Claimant, through its subsidiaries, contributed significantly to the Bolivian economy, including through contributions to the local communities and the payment of taxes and royalties.³⁶⁸ Bolivia argues that the evidence submitted by Claimant “does not even show a payment from Glencore Bermuda towards its supposed initiatives in Bolivia.”³⁶⁹ But as Claimant explained in its Reply,³⁷⁰ and as Bolivia has expressly recognized,³⁷¹ there is no basis (in the Treaty or elsewhere) for imposing an origin of capital requirement or any other specifications as to what capital must be used to finance local investments. Thus, whether the payments contributing to the Bolivian economy come from Glencore Bermuda or its affiliates is entirely irrelevant to the present inquiry.³⁷²

148. In sum, Bolivia’s objection based on the allegation that Claimant was not actively involved in the acquisition, management and/or operations of the Assets, which it held indirectly, should be rejected. Neither the Treaty nor international law

³⁶⁸ In addition to the direct and indirect creation of jobs and the payment of over US\$ 300 million in royalties, taxes and fees to Bolivia, Glencore’s subsidiaries have invested in a diverse range of social initiatives, including the construction of new and/or improved housing; infrastructure (including roads, water systems, a mobile telecommunication network); healthcare, educational, cultural and sporting facilities; and the financing of educational and technical training projects. Reply, para 263; Statement of Claim, paras 61-62.

See First Witness Statement of Eduardo Lazcano, paras 41-45; “Colquiri ya recibió un coliseo, sala computación y rayos X,” *La Patria*, 19 March 2007, **C-72**; Sinchi Wayra, “Social Responsibility and Environment,” undated, **C-160**; Record of Delivering Social Works, 18 November 2008, **C-235**; Authorization for Expenditures for mining training programs for local women, 3 May 2010, **C-241**; Colquiri’s Triennial Plan for Corporate Social Responsibility, 27 July 2011, **C-243**; Data of Colquiri’s Social Impact, 19 November 2011, **C-244**; Interinstitutional Agreements Financing Fund for Technical Assistance, Environmental Management and Productive Investment with Mining Cooperatives in Areas of Influence of Sinchi Wayra’s Mining Operations, various dates, **C-277**; Examples of Sinchi Wayra’s investments in local infrastructure projects, various dates, **C-278**; Examples of Sinchi Wayra’s investments in the provision of housing, various dates, **C-280**; Letter from Colquiri (Mr Hartmann) to the Oruro Department Autonomous Government (Mr Villca), 7 August 2012, **C-295**; Overview of Colquiri’s social contributions in various communities, undated, **C-298**.

³⁶⁹ Rejoinder, para 459.

³⁷⁰ Reply, paras 252-255.

³⁷¹ Rejoinder, para 450 (“Bolivia is not arguing for an origin of capital requirement.”).

³⁷² *See, eg, Mr Franck Charles Arif v Republic of Moldova* (ICSID Case No ARB/11/23) Award, 8 April 2013, **RLA-69**, para 383 (“Whether investments are made from imported capital, from profits made locally, from payments received locally or from loans raised locally, makes no difference to the degree of protection enjoyed.”).

contains a requirement that an investment be “active” (as that term is used by Bolivia) in order to qualify for the protection of the Treaty.

2. Contrary to Bolivia’s contentions, the Treaty does protect indirect investments

149. In its Statement of Defense, Bolivia argued that Claimant’s claims are “barred” because “[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.”³⁷³ While conceding that “a treaty, such as an investment treaty or a friendship, commerce, and navigation treaty, can vary [that supposed] basic rule,”³⁷⁴ Bolivia argued that “the Treaty applicable in the present dispute in no way alters the rule of customary international law [...] [because it] does not extend jurisdiction to indirect investments of a company.”³⁷⁵ Bolivia based this conclusion on the use of the word “of” in the dispute resolution clause of Article 8(1) of the Treaty and on the definition of “investment” in Article 1(a), which it argued excludes “the category of investment rights that are indirectly held”³⁷⁶ from the scope of the Treaty’s protection.³⁷⁷
150. As Claimant demonstrated in its Reply, Bolivia is wrong, in three respects: (i) it misinterprets the Treaty; (ii) it incorrectly describes the current state of the customary law of diplomatic protection; and (iii) it wrongly presumes that the rules of diplomatic protection apply in this case.³⁷⁸ *First*, as the *Rurelec* tribunal held while unequivocally rejecting the very arguments Bolivia is now making again in this arbitration, the “terms employed in the UK-Bolivia BIT [ie, the Treaty] are broad enough on their own to include indirect investments, even

³⁷³ Statement of Defense, para 370.

³⁷⁴ *Ibid*, para 376.

³⁷⁵ *Ibid*, paras 377-378.

³⁷⁶ *Ibid*, para 380.

³⁷⁷ *Ibid*, paras 377-382.

³⁷⁸ Reply, Section IV.C.2.

without employing further qualifications.”³⁷⁹ This is the correct interpretation of the Treaty, as confirmed by several other tribunals that have interpreted similar language in other BITs.³⁸⁰ *Second*, in any event, Bolivia’s description of the law of diplomatic protection is not reflective of the current state of international law on the matter of shareholders’ rights, as confirmed by *CMS v Argentine Republic*.³⁸¹ There is no rule of international law prohibiting shareholders’ claims.³⁸² *Third*, even if customary international law were as described by Bolivia, it is both inapplicable and irrelevant to the present discussion.³⁸³ Indeed, as the ICJ itself stated that,

[I]n the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States even more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements. [...] Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures [...].³⁸⁴

³⁷⁹ *Ibid*, para 265 (citing *Guaracachi America, Inc and Rurelec Plc v Plurinational State of Bolivia* (UNCITRAL) Award, 31 January 2014, **CLA-120**, para 355).

³⁸⁰ Reply, paras 266-267 (discussing *Cemex Caracas Investments BV and Cemex Caracas II Investments BV v Bolivarian Republic of Venezuela* (ICSID Case No ARB/08/15) Decision on Jurisdiction, 30 December 2010, **CLA-192**; *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Decision on Jurisdiction, 3 August 2004, **CLA-51**; *Mobil Corporation, Venezuela Holdings BV, and others v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27) Decision on Jurisdiction, 10 June 2010, **CLA-97**; *Mr Tza Yap Shum v Republic of Peru* (ICSID Case No ARB/07/6) Decision on Jurisdiction and Competence, 19 June 2009, **CLA-180** and *Ioannis Kardassopoulos v Georgia* (ICSID Case No ARB/05/18) Decision on Jurisdiction, 6 July 2007, **CLA-69**). *See also ibid*, footnote 701 (discussing *Inmaris Perestroika Sailing Maritime Services GMBH and others v Ukraine* (ICSID Case No ARB/08/8) Decision on Jurisdiction, 8 March 2010, **CLA-188**).

³⁸¹ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, **CLA-150**, paras 43-48.

³⁸² Reply, paras 268-269.

³⁸³ *Ibid*, paras 270-271.

³⁸⁴ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) [1970] ICJ Reports 3, **CLA-7**, para 90.

151. In its latest submission, Bolivia largely reiterates its earlier arguments, and optimistically, but wrongly, accuses Claimant of having “abdicate[d] any defence.”³⁸⁵ Bolivia continues to argue that there exists a customary rule of diplomatic protection that bars claims for violations of indirect rights.³⁸⁶ It contends that this presumed rule is applicable in the present case “both as the default rule and part of the context for interpretation pursuant to Article 31(3)(c) of the Vienna Convention.”³⁸⁷ Bolivia further argues that the Contracting Parties to the Treaty “made no attempt to alter this rule or even to indicate a wish to do so,”³⁸⁸ and concludes that “the Treaty does not permit an investor to bring claims for alleged violations of indirectly held rights.”³⁸⁹ Bolivia’s position is wholly incorrect.
152. *First*, even assuming the rule invoked by Bolivia exists in contemporary customary international law, it is not applicable, either as a “default rule” or as “part of the context for interpretation pursuant to Article 31(3)(c) of the Vienna Convention.”³⁹⁰
153. The supposed rule relates to the availability of diplomatic protection for shareholders seeking redress for injuries to the rights of the company in which they hold a stake (the theory of protection by substitution). It could not possibly apply as a default rule in the context of treaty-based investor-State arbitration, because: (i) as explained in the Reply, the Treaty, as *lex specialis*, is the primary source of law governing the dispute;³⁹¹ and (ii) the supposed rule regulates a

³⁸⁵ Rejoinder, para 493.

³⁸⁶ *Ibid*, para 490.

³⁸⁷ *Ibid*.

³⁸⁸ *Ibid*, para 491.

³⁸⁹ *Ibid*, para 492.

³⁹⁰ *Ibid*, para 490.

³⁹¹ Reply, Section III. Customary international law only applies to the extent it is required to supplement and inform the Treaty’s provision. For example, customary international law may serve to give content to the terms used in the Treaty. *Ibid*, paras 178-180 (citing, *inter alia*, *Quiborax SA and Non Metallic Minerals SA v Plurinational State of Bolivia* (ICSID Case No

different subject-matter, applicable only to relations among States: the espousal by States of the claims of their nationals against other States.

154. For the same reasons, the supposed rule also cannot be taken into account pursuant to Article 31(3)(c): it is not a “relevant” rule of international law, let alone one that is “applicable in the relations between the parties” to this dispute between an investor and a State. In any event, even assuming the rules of diplomatic protection could fall within the scope of Article 31(3)(c), they could not possibly serve to displace, or preclude the application of, the express terms of the Treaty. The rules to be taken into account pursuant to Article 31(3)(c) can only aid the interpretation of the Treaty, not serve to rewrite it.³⁹²
155. The ICJ was very clear in *Diallo*, on which Bolivia relies only selectively and misleadingly:

The Court is bound to note that, in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments [...]. In that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative. It is in this particular and relatively limited context that the question of protection by substitution might be raised. The theory of protection by substitution seeks indeed to offer protection to the foreign shareholders of a company who could not rely on the benefit of an international treaty and to whom no other remedy is available, the allegedly unlawful acts having

ARB/06/2) Award, 16 September 2015, **CLA-127**, para 90; *The Rompetrol Group NV v Romania* (ICSID Case No ARB/06/3) Award, 6 May 2013, **CLA-209**, para 170; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador* (UNCITRAL) Partial Award on the Merits, 30 March 2010, **CLA-189**, para 159). Under no circumstance, however, may customary international law be relied upon in order to rewrite or ignore the terms of the Treaty.

³⁹² R Gardiner, *Treaty Interpretation* (2nd edn 2017), **CLA-247**, p 320 (“Located in its immediate context of treaty interpretation, article 31(3)(c) implicitly invites the interpreter to draw a distinction between using rules of international law as part of the apparatus of treaty interpretation and applying the rules of international law directly to the facts in the context of which the treaty is being considered. The former is within the scope of the Vienna rules, the latter not.”).

been committed against the company by the State of its nationality.³⁹³

156. This, of course, is not the case here: Claimant holds rights as a shareholder under the Treaty, and it is bringing claims for breach of those rights in its capacity as a shareholder, pursuant to the Treaty's arbitration clause.
157. *Second*, even assuming the law of diplomatic protection were applicable, it would not bar Claimant from asserting a claim under the Treaty as an indirect shareholder in Vinto and Colquiri. Contrary to Bolivia's contention, there is no *prohibition* on shareholder claims (whether brought by a direct or indirect shareholder) in customary international law. Quite the opposite: customary international law *provides* that diplomatic protection is available where, as here, a legal or natural person has suffered injury to its rights as a shareholder (regardless of whether it is a direct or indirect shareholder).
158. Bolivia's description of the ILC's Draft Articles on Diplomatic Protection and the *Diallo* case is conveniently incomplete. As codified in Article 12 of the ILC Draft Articles on Diplomatic Protection:

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.³⁹⁴

159. The ICJ endorsed this rule in *Diallo*:

[T]he Court finds that Guinea does indeed have standing in this case in so far as its action involves a person of its nationality, Mr Diallo, and is directed against the allegedly unlawful acts of the

³⁹³ *Ahmadou Sadio Diallo (Republic of Guinea/Democratic Republic of the Congo)* Preliminary Objections [2007] ICJ Reports 582, 24 May 2007, **RLA-31**, para 88 (emphases added).

³⁹⁴ International Law Commission, "Draft Articles on Diplomatic Protection" (2006), **RLA-30**, Art 12 (emphasis added).

DRC which are said to have infringed his rights, particularly his direct rights as *associé* of the two [relevant] companies.³⁹⁵

160. By contrast, the ICJ held that customary international law does not generally allow for protection by substitution, except in the limited cases envisaged in Article 11 of the ILC's Draft Articles on Diplomatic Protection (on which Bolivia relies without acknowledging its context).³⁹⁶
161. Thus, even assuming that the rules of diplomatic protection are at all relevant here (which is not the case), these rules would provide for diplomatic protection in a case like the instant one, which relates to an injury to Claimant's rights as a shareholder in Vinto and Colquiri (regardless of whether the shares are held directly or indirectly).
162. Claimant's position on both the inapplicability and the content of the customary rules of diplomatic protection was confirmed by the annulment committee in *EDF v Argentina*:

The Committee does not consider that the line of decisions of the International Court of Justice, beginning with *Barcelona Traction*, lays down a general principle of international law which precludes investors like the Claimants from maintaining a claim under the terms of a BIT if those terms are wide enough to permit them to do so. [...]

The *Barcelona Traction* and *Diallo* judgments establish that there is no right under customary international law for a State to exercise diplomatic protection in respect of a wrong done to a company on the basis that the shareholders of the company are its nationals. They in no way preclude the possibility that States may agree by treaty to grant such a right to a State (as the Court found was the case in *ELSI*) or to the shareholders themselves. Whether

³⁹⁵ *Ahmadou Sadio Diallo (Republic of Guinea/Democratic Republic of the Congo)* Preliminary Objections [2007] ICJ Reports 582, 24 May 2007, **RLA-31**, para 65.

³⁹⁶ *Ibid*, paras 89, 91.

they are considered to have done so will depend upon the terms of the treaty, which in this case are clear.³⁹⁷

163. *Third*, and most critically, even if Bolivia were right regarding both the relevance and the content of customary rules of diplomatic protection (which it is not), there is no basis to state, as Bolivia does, that the Contracting Parties did not intend to displace those rules. Instead, it is evident from both the very existence of the Treaty and its text that the Contracting Parties intended: (i) to create a special treaty regime for the protection of foreign investments, separate and distinct from the customary law of diplomatic protection; and (ii) to protect indirectly held investments.
164. As Claimant argued in its Reply (and again above), and as supported by the weight of arbitral jurisprudence, the terms of the Treaty are broad enough to include indirect investments.³⁹⁸ Contrary to what Bolivia suggests,³⁹⁹ the *Rurelec* tribunal reached this conclusion following an examination of (*inter alia*) Article 1 of the Treaty,⁴⁰⁰ and not only based on the arguments of the parties regarding the use of the word “of” in Article 8(1) of the Treaty.⁴⁰¹
165. The fact that indirect rights are not expressly singled out in the Treaty definition of “investment” cannot change that conclusion.⁴⁰² “The mere absence of an

³⁹⁷ *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic* (ICSID Case No ARB/03/23) Decision on Annulment, 5 February 2016, **CLA-244**, para 256 (emphases added). This annulment decision was rendered after the *Diallo* judgment, and expressly discusses that judgment. This observation, along with the demonstration that Bolivia incompletely and misleadingly describes the *Diallo* judgment, suffices to answer Bolivia’s desperate attempt to minimize the importance of the *CMS* award. *See* Rejoinder, paras 496-498.

³⁹⁸ Reply, paras 265-267.

³⁹⁹ Rejoinder, para 500.

⁴⁰⁰ *Guaracachi America, Inc and Rurelec Plc v Plurinational State of Bolivia* (UNCITRAL) Award, 31 January 2014, **CLA-120**, para 352.

⁴⁰¹ *Ibid.*, para 365. The other cases cited in Claimant’s Reply were also based (among others) on the relevant treaties’ definitions of “investment.” *See* Reply, para 267.

⁴⁰² Bolivia misleadingly states that Claimant failed to respond to its argument that the Treaty definition of investment does not expressly include indirect rights, and that the Treaty does not mention those rights. *See* Rejoinder, para 494. This is plainly false. *See* Reply, paras 265-267.

explicit mention of the different categories of investment (direct and indirect) cannot be interpreted as narrowing the definition of investment under the BIT to only direct investment.”⁴⁰³ Indeed, as the *Rurelec* tribunal considered, “given that the purpose of the BIT is to promote and protect foreign investment, [...] the BIT would require clear language in order to exclude coverage of indirect investments—language that the BIT does not contain.”⁴⁰⁴

166. In addition, the text of Article 5(2) of the Treaty evidences the Contracting Parties’ intention to protect indirect shareholders, expressly providing for compensation in the event of expropriation, “[w]here a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares.”⁴⁰⁵
167. In short, Bolivia’s objection relating to the indirect nature of Claimant’s shareholding in Vinto and Colquiri is based on an inaccurate description of a body of law that is not relevant (let alone applicable) to this dispute, and on a misreading of the Treaty.

168. It follows that Bolivia’s objections to the Tribunal’s jurisdiction *ratione materiae* are baseless and should be dismissed.

D. BOLIVIA’S ALLEGATIONS OF ILLEGALITY ARE FALSE AND UNSUBSTANTIATED

169. In its Statement of Defense, Bolivia did not challenge the legality of Glencore Bermuda’s acquisition of the Assets. It is in fact undisputed that Glencore

⁴⁰³ *Guaracachi America, Inc and Rurelec Plc v Plurinational State of Bolivia* (UNCITRAL) Award, 31 January 2014, **CLA-120**, para 354.

⁴⁰⁴ *Ibid*, para 353.

⁴⁰⁵ Treaty, **C-1**, Art 5(2).

- Bermuda acquired the Assets at fair market value, through a good faith arm's length transaction, and in accordance with Bolivian law.⁴⁰⁶
170. Instead, Bolivia took issue with the prior privatization of the Assets—a government-led effort that took place years before Glencore Bermuda's acquisition and in which Glencore Bermuda played no part. Specifically, Bolivia argued that the Assets “were all illegitimately and illegally privatized” and that, pursuant to the doctrine of unclean hands, the Tribunal could not assert jurisdiction over the present dispute, since Glencore Bermuda knew or should have known of such illegalities.⁴⁰⁷ According to Bolivia: (i) the privatization of the Colquiri Lease and Antimony Smelter violated the constitutional requirement that State officials act in the public interest,⁴⁰⁸ and (ii) the privatization of the Colquiri Lease, Tin Smelter and Antimony Smelter was contrary to the Bolivian law requirements of transparency and good faith and the legal principle that the public patrimony must be protected.⁴⁰⁹
171. In its Reply, Glencore Bermuda demonstrated that Bolivia failed to establish the existence of any breaches of Bolivian law during the privatization process. Specifically: (i) there was nothing “illegal” or “irregular” about Supreme Decree No 23,991 (implementing the Privatization Law)—the Assets were privatized pursuant to a legal framework applicable to all of Bolivia's industrial sectors, which was developed by the executive and legislative branches of five different administrations over a period of 15 years between 1985 and 2000;⁴¹⁰ (ii) the

⁴⁰⁶ Statement of Claim, paras 35-38; Reply, Section II.C.

⁴⁰⁷ Statement of Defense, Section 4.3.

⁴⁰⁸ *Ibid*, paras 327-329.

⁴⁰⁹ *Ibid*, paras 330-337.

⁴¹⁰ Reply, paras 278-279; Statement of Defense, para 46 (admitting that the economic policies underpinning the privatization had been in place across multiple administrations). The Privatization Law had been passed by Bolivia's National Congress and enacted by the prior President, Paz Zamora. Bolivia failed to show anything unlawful about the fact that Bolivia's former President Sánchez de Lozada (along with the entire Presidential Cabinet) signed the decree implementing the previously passed Privatization Law. The Mining Code was similarly passed by

privatization was carried out through a transparent process that required good faith participation by each bidder, where the sales prices for each Asset were determined by Bolivia's own international advisers,⁴¹¹ pursuant to the legal framework then in place,⁴¹² and accepted by the Qualifying Commission in accordance with Bolivian law;⁴¹³ and (iii) to date, almost twenty years following the privatization (thirteen under the current MAS Government in Bolivia), no Bolivian court has been asked to examine the legality of the privatizations, and no court has determined that the privatizations were in any way illegal.

172. In addition, Glencore Bermuda explained that Bolivia cannot rely on the alleged improper conduct of its own State officials to deprive Glencore Bermuda of protection under the Treaty and that, even if Bolivia's allegations of misconduct by former State officials were true (which they are not), they would not render Glencore Bermuda's investment unlawful. Glencore Bermuda also showed that, in any event, Bolivia is estopped from objecting to this Tribunal's jurisdiction on the basis of illegal acts supposedly conducted by its own State officials, since Bolivia knew about Glencore Bermuda's acquisition of the Assets and did not object to it. Rather, Bolivia encouraged Claimant's investment⁴¹⁴ and allowed Claimant to keep investing in the country for seven more years.⁴¹⁵

Bolivia's National Congress prior to being signed by former President Sánchez de Lozada. *See* Reply, Section II.A.

⁴¹¹ Paribas Letter to Jaime Urjel Re: Privatisation programme in the Bolivian mining sector, 17 September 1999, **RPA-04**.

⁴¹² The Terms of Reference were approved by the Trade Minister and Comibol in exercise of their constitutional and legal powers. Such Terms of Reference provided for a two-step bidding process aimed at assessing the qualifications and financial offers made by the interested bidders. *See* Reply, Section II.B.1.

⁴¹³ *Ibid*, paras 281-282.

⁴¹⁴ "Goni vendió COMSUR," *Bolivia.com*, 5 February 2005, **R-14**; Second Witness Statement of Christopher Eskdale, paras 12-13.

⁴¹⁵ That is, until the final nationalization of the Colquiri Lease in June 2012.

173. In its Rejoinder, Bolivia continues to argue that the Tribunal lacks jurisdiction because the Assets were allegedly “illegally privatized.”⁴¹⁶ At the same time, however, Bolivia clarifies that it is not in fact challenging the legality of the privatization framework,⁴¹⁷ nor is it challenging the legality of the sale of the Tin Smelter from Allied Deals to Comsur.⁴¹⁸ Rather, Bolivia merely argues that former President Sánchez de Lozada’s acquisition of the Assets was “irregular.”⁴¹⁹
174. Bolivia then contends that, pursuant to the doctrine of “unclean hands,” Glencore Bermuda cannot benefit from the Treaty’s protections, since the claims it has presented for adjudication are allegedly “tainted by an illegality of which Claimant was fully aware when it received the Assets.”⁴²⁰
175. But this argument again rests on a finding that Bolivia has actually proven illegality—a finding that cannot be made given the factual and legal flaws in Bolivia’s argument.

1. Bolivia has not met the high threshold required for a finding of illegality

176. Glencore Bermuda has already established the lack of legal basis for Bolivia’s illegality claim.⁴²¹ Tribunals have noted that the burden on the party seeking to

⁴¹⁶ Rejoinder, Section 4.5.

⁴¹⁷ *See, eg, ibid*, paras 70, 80 (stating that “[i]t is not Bolivia’s position that, as a whole, the regulatory framework which permitted the privatization of the Assets was in itself illegal” and “Bolivia had no reason to and does not challenge the legal framework [that] applied to the privatization of the Assets.”).

⁴¹⁸ *See generally, ibid*, paras 515, 528, 661.

⁴¹⁹ *See, eg, ibid*, paras 78, 99, 110.

⁴²⁰ *Ibid*, para 552.

⁴²¹ Reply, Section IV.D.1.

establish a legality violation is “particularly high.”⁴²² The cases have, moreover, assessed illegality at the time at which the investment was made.

177. Bolivia disputes these points, arguing that the Tribunal must assess the legality of Glencore Bermuda’s investment regardless of the extent to which Bolivia has carried its burden⁴²³ and the time at which the alleged illegalities took place.⁴²⁴ For the reasons stated below, Bolivia’s position must be rejected.
178. *First*, tribunals have emphasized that the party raising an illegality objection faces a “particularly high” burden.⁴²⁵ In *Africa Holding Company of America*, for example, the tribunal explained that it was “prepared to consider any corrupt practice as a very serious matter, but would require irrefutable proof of that practice, such as that resulting from criminal prosecutions in countries where corruption is a criminal offence.”⁴²⁶ It then determined that the respondent had founded its allegations on mere “general considerations,” such that the tribunal

⁴²² *African Holding Company of America, Inc and Société Africaine de Construction au Congo SARL v Democratic Republic of Congo* (ICSID Case No ARB/05/21) Decision on Objections to Jurisdiction and Admissibility, 29 July 2008, **CLA-240**, paras 55-56 (unofficial translation from French original).

⁴²³ Rejoinder, paras 524-525.

⁴²⁴ *Ibid*, paras 510-513.

⁴²⁵ *See, eg, African Holding Company of America, Inc and Société Africaine de Construction au Congo SARL v Democratic Republic of Congo* (ICSID Case No ARB/05/21) Decision on Objections to Jurisdiction and Admissibility, 29 July 2008, **CLA-240**, para 55 (unofficial translation from French original); *Mr Saba Fakes v Republic of Turkey* (ICSID Case No ARB/07/20) Award, 10 March 2004, **CLA-190**, para 131 (“The Tribunal considers that the burden of proof of any allegations of impropriety is particularly heavy.”); *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia* (ICSID Case No ARB/06/2) Decision on Jurisdiction, 27 September 2012, **CLA-204** para 262 (“[T]he Respondent must prove to the satisfaction of the Tribunal that the Claimants’ investment breached the legality requirement.”).

⁴²⁶ *African Holding Company of America, Inc and Société Africaine de Construction au Congo SARL v Democratic Republic of Congo* (ICSID Case No ARB/05/21) Decision on Objections to Jurisdiction and Admissibility, 29 July 2008, **CLA-240**, para 52 (unofficial English translation from French original).

could not “admit such an accusation nor accept that it affects in any way the legal relations between the parties.”⁴²⁷ Notably, the tribunal went on to explain that:

The Tribunal is concerned that a number of defendants in cases of international arbitration resort to allegations of corruption to prevent the court from declaring itself competent or to influence the decision on the merits, which is a further reason why the standard of proof must, in this respect, be particularly high.⁴²⁸

179. Similarly, in *Energoalians*, the tribunal held that “only significant and intentional violations by the investor of the legislation of the State receiving the investment can become the basis for the issuance of a decision about the lack of jurisdiction.”⁴²⁹ It explained that such “gross infringement[s]” of the host state’s or international law must be “duly proved and, in that regard, affirmed by the competent court judgments that come of legal force.”⁴³⁰
180. The cases relied upon by Bolivia to further its jurisdictional objection⁴³¹ confirm the high threshold required for a finding of illegality. In *SAUR*, for example, the tribunal recognized that the focus of the analysis into the legality of an investment must be on “serious violation[s] of the legal system” on the part of the investor.⁴³² In that case, the respondent had indeed raised such “serious violation[s],” accusing the claimant of misappropriating millions of dollars of government funds in violation of Argentine social, accounting, and corporate laws.⁴³³ Nonetheless, the tribunal concluded that the respondent had not carried its burden of proving

⁴²⁷ *Ibid*, para 53 (unofficial English translation from French original).

⁴²⁸ *Ibid*, para 55 (unofficial English translation from French original).

⁴²⁹ *Energoalians SARL v Republic of Moldova* (UNCITRAL) Award, 23 October 2013, **CLA-211bis**, para 261 (unofficial English translation from Russian original).

⁴³⁰ *Ibid* (unofficial English translation from Russian original).

⁴³¹ Rejoinder, para 508.

⁴³² *SAUR International SA v Argentine Republic* (ICSID Case No ARB/04/4) Decision on Jurisdiction and Liability, 6 June 2012, **RLA-82**, para 308 (unofficial English translation from Spanish original) (emphasis added).

⁴³³ *Ibid*, para 310.

such grave illegalities.⁴³⁴ In *Flughafen*, the tribunal likewise referred to the fact that the burden was on the respondent to prove “serious violation[s] of the legal system.”⁴³⁵ The tribunal concluded that the respondent had failed to meet its burden, since it had “limited itself to accusing investors of corrupt practices, without accompanying this assertion with a minimum attempt at probative activity.”⁴³⁶

181. In the present case, Bolivia is not asking the Tribunal to find that the privatization process was illegal. Nor have domestic courts made such a finding. Rather, Bolivia has only set forth unsubstantiated “general considerations”⁴³⁷ that do not establish the kind of unlawful conduct required for a finding of illegality. Bolivia states, without providing any support, that its claim “is entirely comparable to the illegalities in the four cases on which Claimant relies.”⁴³⁸ This, however, is plainly false. Firstly, the “four cases” cited by Claimant are among the principle ones relied upon by Bolivia to advance its illegality claim.⁴³⁹ Contrary to the present proceedings, however, each of these cases involved intended violations of applicable laws at the time at which the investments were made. In particular:

⁴³⁴ *Ibid*, paras 311-312 (“The Republic of Argentina has failed on its intent of proving the illegality of [claimant’s] behavior. [...] Without convincing evidence of an illegal action by the investor, the defense put forward by the Republic of Argentina concerning the tribunal’s lack of competence and ICSID’s lack of jurisdiction is hopelessly destined to fail.”) (unofficial English translation from Spanish original) (emphasis added).

⁴³⁵ *Flughafen Zürich AG and Gestión e Ingeniería IDC SA v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/19) Award, 18 November 2014, **RLA-107**, para 132 (unofficial English translation from Spanish original) (emphasis added).

⁴³⁶ *Ibid*, paras 154-155 (unofficial English translation from Spanish original).

⁴³⁷ *African Holding Company of America, Inc and Société Africaine de Construction au Congo SARL v Democratic Republic of Congo* (ICSID Case No ARB/05/21) Decision on Objections to Jurisdiction and Admissibility, 29 July 2008, **CLA-240**, para 53 (“The Tribunal cannot admit such an allegation, nor can it accept that this could affect in any way the legal relations between the parties; it therefore rejects these allegations.”) (unofficial translation from French original).

⁴³⁸ Rejoinder, para 525 (citing Reply, para 293).

⁴³⁹ See Statement of Defense, paras 340-345; Rejoinder, para 508-511

- (a) *Churchill Mining* addressed “a large scale fraudulent scheme”⁴⁴⁰ involving “repeated acts of forgery”⁴⁴¹ which had been “intentionally”⁴⁴² carried out by the claimant’s business partner in order to obtain mining concessions which formed the basis of the investment in that case. The tribunal concluded that the unlawfulness complained of was particularly egregious and that the claimant had not only failed to perform any diligence whatsoever, but had also failed to take any actions when it discovered the fraud and had instead proceeded to submit further forged documents in an effort to obtain the investment.⁴⁴³
- (b) In *Inceysa*, the tribunal determined that the claimant’s investment was made in violation of the principle of good faith because the claimant had deliberately presented false information and engaged in fraudulent activities during the bidding process.⁴⁴⁴ In that case, the tribunal observed that Inceysa’s conduct amounted to “an obvious violation of the principle of good faith” and observed that “these transgressions of this principle committed by Inceysa represent violations of the fundamental rules of the bid that made it possible for Inceysa to make the investment that generated the present dispute.”⁴⁴⁵

⁴⁴⁰ *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Case No ARB/12/14 and 12/40) Award, 6 December 2016, **RLA-25**, para 510.

⁴⁴¹ *Ibid*, para 511.

⁴⁴² *Ibid*, para 511.

⁴⁴³ *Ibid*, paras 509 (concluding that “the Tribunal is struck by the seriousness of the fraud that taints the entire [investment] and by the Claimants’ lack of diligence overseeing the licensing process and investigating allegations of forgery”), 515 (“[T]he acts of forgery brought to light in these proceedings are of a particularly serious nature in light of the number and nature of forged documents and of the aim pursued, namely to orchestrate, legitimize and perpetuate a fraudulent scheme to gain access to valuable mining rights.”).

⁴⁴⁴ *Inceysa Vallisoletana SL v El Salvador* (ICSID Case No ARB/03/26) Award, 2 August 2006, **RLA-26**, para 236.

⁴⁴⁵ *Ibid*, para 237.

- (c) In *Plama*, the tribunal found that, because the claimant had deliberately and fraudulently misrepresented the true ownership of its investment in order to appear as a more attractive investor with substantial resources, the “investment was obtained by deceitful conduct” in “flagrant violation” of domestic law.⁴⁴⁶
- (d) Lastly, *Phoenix Action* involved an investment which was made “for the sole purpose” of initiating an international arbitration.⁴⁴⁷ Again, the tribunal focused its analysis on the claimant’s deceitful conduct: “[t]he abuse here could be called a ‘*détournement de procédure*,’ consisting in the Claimant’s creation of a legal fiction in order to gain access to an international arbitration procedure to which it was not entitled.”⁴⁴⁸
182. None of these cases involve facts that are remotely comparable to the allegations that Bolivia has presented here without proof. Unlike the above cases, in the present proceedings Bolivia has not even alleged, much less proven, that Glencore Bermuda engaged in any fraudulent or deceitful conduct in acquiring the Assets.⁴⁴⁹ At most, Bolivia argues that Glencore Bermuda “should have known” that the prior privatization was “irregular.”⁴⁵⁰
183. *Second*, and crucially, what the above cases instead make clear is that, contrary to Bolivia’s assertions, the relevant time to assess any purported illegality is the time at which the investor made its investment.⁴⁵¹ However, Bolivia now claims that

⁴⁴⁶ *Plama Consortium Limited v Republic of Bulgaria* (ICSID Case No ARB/03/24) Award, 27 August 2008, **RLA-27**, paras 133-135, 137, 143.

⁴⁴⁷ *Phoenix Action Ltd v The Czech Republic* (ICSID Case No ARB/06/5) Award, 15 April 2009, **RLA-15**, para 142.

⁴⁴⁸ *Ibid*, para 143.

⁴⁴⁹ Rejoinder, paras 521, 525. Claimant has established the good faith and lawful nature of the acquisition, which remains unchallenged by Respondent. *See* Section II.B.2, above. *See also* Reply, Section II.C.

⁴⁵⁰ Rejoinder, para 521.

⁴⁵¹ Reply, para 277 (and cases cited therein). *See also* *Veteran Petroleum Limited (Cyprus) v The Russian Federation* (UNCITRAL) Final Award, 18 July 2014, **CLA-157**, paras 1352-1356;

“policy reasons” justify extending the scope of the legality assessment prior to the time of the acquisition.⁴⁵² Bolivia is wrong. The rationale behind focusing the enquiry on the time at which the investment was made is clear—the objective of the analysis is to protect access to the investment treaty system from abuse by investors seeking to invoke its protections. As stated by the tribunal in *Phoenix Action*, “States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws.”⁴⁵³ Likewise, the *SAUR* and *Flughafen* tribunals have emphasized that “it cannot be understood in any case that a State is offering the benefit of protection through investment arbitration, when the investor, to achieve that protection, has committed an unlawful act.”⁴⁵⁴

184. It follows that Bolivia’s statement that illegalities that pre-date a claimant’s acquisition “place that investment outside the scope of a treaty tribunal’s jurisdiction”⁴⁵⁵ is without basis. In fact, Bolivia cites to a single authority in apparent support of its claim, *Anderson v Costa Rica*,⁴⁵⁶ but that decision does not advance its position. In *Anderson*, the alleged illegality concerned the claimant’s acquisition of the asset. As stated by the tribunal in that case:

Bernhard von Pezold and others v Republic of Zimbabwe (ICSID Case No ARB/10/15) Award, 28 July 2015, **CLA-126**, para 420; *Georg Gavrilović and Gavrilović doo v Republic of Croatia* (ICSID Case No ARB/12/39) Award, 26 July 2018, **CLA-250**, para 303.

⁴⁵² Rejoinder, para 513.

⁴⁵³ *Phoenix Action Ltd v The Czech Republic* (ICSID Case No ARB/06/5) Award, 15 April 2009, **RLA-15**, paras 101, 103 (emphases added) (observing that “the analysis of the conformity of the investment with the host State’s laws has to be performed taking into account the laws in force at the moment of the establishment of the investment”).

⁴⁵⁴ *SAUR International SA v Argentine Republic* (ICSID Case No ARB/04/4) Decision on Jurisdiction and Liability, 6 June 2012, **RLA-82**, para 308 (unofficial English translation from Spanish original) (emphasis added); *Flughafen Zürich AG and Gestión e Ingeniería IDC SA v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/19) Award, 18 November 2014, **RLA-107**, para 132 (unofficial English translation from Spanish original) (emphasis added).

⁴⁵⁵ Rejoinder, para 512.

⁴⁵⁶ *Ibid* (citing *Alasdair Ross Anderson et al v Republic of Costa Rica* (ICSID Case No ARB(AF)/07/3) Award, 19 May 2010, **RLA-147**).

[T]he 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.⁴⁵⁷

185. Here, Bolivia has not alleged any illegalities connected with Claimant's acquisition of the Assets.

186. In sum, the threshold for establishing an illegality violation is a high one. Bolivia must show that "serious violations" were carried out at the time in which the investment was made. Because Bolivia has not come close to carrying its burden, its claim must be dismissed.

2. Bolivia failed to demonstrate that there was anything illegal in the privatization process

187. Since Bolivia has failed to demonstrate the existence of any violations at the time in which the investment was made, the discussion could end here. For the sake of completeness, however, Glencore Bermuda unequivocally demonstrated that the privatization of the Assets was carried out in a transparent manner pursuant to the legal framework then in place.⁴⁵⁸

188. Acknowledging in its Rejoinder that there was nothing illegal about the regulatory framework pursuant to which the Assets were privatized,⁴⁵⁹ Bolivia is left claiming that "the way in which [such framework] was used by the former President is highly inappropriate."⁴⁶⁰

⁴⁵⁷ *Alasdair Ross Anderson et al v Republic of Costa Rica* (ICSID Case No ARB(AF)/07/3) Award, 19 May 2010, **RLA-147**, para 57 (emphases added).

⁴⁵⁸ Reply, paras 278-283.

⁴⁵⁹ *See, eg*, Rejoinder, paras 70, 80, 515.

⁴⁶⁰ *Ibid*, para 70 (emphasis added). Tellingly, in its factual description of the allegedly improper transfer of the Assets to Mr Sánchez de Lozada—which forms the basis for its allegations of illegality—Bolivia refers to the privatization as "illegal" only once, describing instead the process as "irregular," or "highly inappropriate." *See ibid*, paras, 70-84, 121.

189. Ultimately, Bolivia’s allegations of “illegality” come down to the following: (i) by acquiring the Assets while not in office and by not ordering an investigation into the privatization during his second presidential term, Mr Sánchez de Lozada supposedly “contravened the basic obligation of public servants to act in the public interest, free from bias and partiality;”⁴⁶¹ (ii) because the Banzer Suárez and Quiroga administrations allowed the privatization of the Assets to proceed despite the allegedly low prices for which the Assets were sold, the privatization was “contrary to the basic requirements of transparency and good faith, without regard to the protection of the public patrimony, and disregarding the basic principle of administrative law according to which the administration acts in the best interest of the State;”⁴⁶² and (iii) the Assets were privatized without seeking congressional approval pursuant to Article 59(5) of the 1967 Constitution.⁴⁶³
190. Glencore Bermuda already demonstrated that Bolivia’s allegations are unsupported by the facts and the law,⁴⁶⁴ but some specific points are worth highlighting at this stage.
191. As a preliminary matter, Bolivia refers to “the measures elaborated and implemented by Sánchez de Lozada”⁴⁶⁵ or “Sánchez de Lozada’s measures”⁴⁶⁶ when describing the fifteen years of Government actions that led to the privatization of the Assets. However, Bolivia itself recognizes that the Assets were privatized pursuant to a legal framework that was applicable to all of

⁴⁶¹ *Ibid.*, para 527 (citing 1967 Constitution, **R-3** and Supreme Decree No 2,3318-A, 3 November 1992, **R-237**).

⁴⁶² Rejoinder, para 528 (internal citations omitted).

⁴⁶³ *Ibid.*, para 530 (internal citations omitted).

⁴⁶⁴ Reply, paras 278-283.

⁴⁶⁵ Rejoinder, para 52.

⁴⁶⁶ *Ibid.*

Bolivia's industrial sectors⁴⁶⁷ and which was developed by the executive and legislative branches of five different administrations between 1985 and 2000.⁴⁶⁸

192. Moreover, despite dedicating over 80 paragraphs to its illegality argument in its Statement of Defense and Rejoinder memorials, Bolivia cannot articulate what specific provisions of Bolivian law would have been breached and by whom. Indeed, Bolivia expressly acknowledges that Mr Sánchez de Lozada was not in office when Colquiri acquired the Assets.⁴⁶⁹ He therefore could not have breached norms applicable to Government officials.⁴⁷⁰ Not surprisingly then, Bolivia does not actually claim that Mr Sánchez de Lozada's acquisition of the Assets was illegal, but only refers to it as "highly inappropriate."⁴⁷¹ Yet, regardless of how the current Government may feel about the Assets' privatization, describing the process as "highly inappropriate" is certainly not sufficient to deny Glencore Bermuda, a subsequent purchaser, protection under the Treaty.⁴⁷² [REDACTED]

⁴⁶⁷ *Ibid*, para 60 (recognizing that "such policies affected the entirety of the public sector") (emphasis added).

⁴⁶⁸ *Ibid*, paras 54-68.

⁴⁶⁹ As explained in the Reply, Bolivia awarded the tender for the Colquiri Mine to Colquiri on 24 December 1999 via Supreme Decree 25,631 (Colquiri was the lessee of the Colquiri Lease and Comsur the operator); Bolivia awarded the Antimony Smelter Colquiri on 5 January 2001 via Supreme Decree 26,042; and Colquiri entered into a purchase agreement with RBG Resources for the purchase of the Tin Smelter on 28-29 May 2002. Supreme Decree No 25,631, 24 December 1999, published in the Gaceta Oficial No 2,192, **C-6**; Supreme Decree No 26,042, 5 January 2001, published in the Gaceta Oficial No 2,282, **C-8**; Sale and purchase agreement of Complejo Vinto between RBG Resources PLC, its provisional liquidators, and Colquiri, 1 June 2002, **C-46**.

⁴⁷⁰ Bolivia cites to Article 43 of the 1967 Constitution, which provides that: "Public servants must serve to the interests of the society with objectivity and impartiality, in accordance with the principles of legality, transparency and responsibility, their rights and duties will be established in the Public Official Statute." 1967 Constitution, **R-3**, Art 43 (unofficial English translation from Spanish original). Bolivia also cites to Articles 3 and 4 of Supreme Decree No 2,3318-A, which similarly apply to the duties, obligations and actions of public servants. Supreme Decree No 2,3318-A, 3 November 1992, **R-237**, Arts 3-4. *See* Rejoinder, para 527.

⁴⁷¹ Rejoinder, para 70.

⁴⁷² *See* Reply, paras 292-297.

[REDACTED]

193. Bolivia’s allegations specific to the Assets also fail:

- (a) With respect to the **Colquiri Lease**, Bolivia explicitly states that “the Colquiri Mine Lease was not transferred to the private sector under a *per se* illegal framework.”⁴⁷⁴ However, according to Bolivia, because Comsur acquired the Colquiri Lease under supposedly “very favourable

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[REDACTED]

[REDACTED]

474 Rejoinder, para 80 (emphasis added).

circumstances,” this was harmful to the public interest.⁴⁷⁵ In support of this statement Bolivia only argues, without further explanation, that the US\$2 million required investment commitment for the first two years of operation was “very small” and that the royalty rate of 3.5 percent was “low.”⁴⁷⁶ Such unsupported speculations cannot support a finding of illegality, particularly when there is ample evidence to the contrary. As Claimant explained in its Reply, Bolivia ignores the fact that by 1999, the Colquiri Mine had been operating at a loss for years and needed considerable investments in exploration before it could resume production.⁴⁷⁷ This coincided with a drop in international tin prices, which further deepened the crisis in the Bolivian mining sector.⁴⁷⁸ It was against this backdrop that the Qualifying Commission awarded the Colquiri Lease to the Consortium after finding it to be “convenient for the interest of the Bolivian State.”⁴⁷⁹

- (b) With respect to the **Antimony Smelter**, Bolivia claims that the privatization was “irregular” rather than illegal, because it was effected for “shockingly low consideration” and “without a prior investigation into the justification for such consideration.”⁴⁸⁰ Again, this claim is without merit. Far from being “shockingly low,” Colquiri’s offer price of US\$1.1 million

⁴⁷⁵ *Ibid*, para 78.

⁴⁷⁶ *Ibid*, para 528.

⁴⁷⁷ Reply, para 46 (citing 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, August 1995, **C-166**, pp 114-115; Behre Dolbear & Company, Inc, Technical Financial Study for the Capitalization of EMV and Transfer of Operative Responsibilities of Comibol to the Private Initiative, Part I, Vol B, September 1995, **C-167**, pp 5-6; US Geological Survey Minerals Yearbook 1999, “The Mineral Industry of Bolivia,” 1999, **C-174**, p 4.)

⁴⁷⁸ See CRU and ITRI, “Tin,” CRU Monitor, February 2007, **C-69**, p 2; US Geological Survey Minerals Yearbook 1999, “The Mineral Industry of Bolivia,” 1999, **C-174**, p 2.

⁴⁷⁹ Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease, 21 December 1999, **R-108**, p 6.

⁴⁸⁰ Rejoinder, para 99; see also *ibid*, para 528.

exceeded Paribas's minimum value of US\$100,000 by over ten times.⁴⁸¹ Bolivia's own advisors at the time recognized the limited commercial viability of the Antimony Smelter given the deterioration of antimony market conditions, insufficient supply of raw materials, and the plant's low capacity.⁴⁸²

- (c) With respect to the **Tin Smelter**, Bolivia similarly does not contest the legality of the privatization process but rather refers to it as "irregular."⁴⁸³ Specifically, Bolivia condemns the Qualifying Commission for approving an allegedly deficient bid from Allied Deals.⁴⁸⁴ According to Bolivia, Allied Deals' amended proposal did not cure such deficiencies and the fact that it was approved indicates that "the Qualifying Commission made every effort to ensure that the tender process was successfully concluded, overlooking the deficiencies in the bids it received."⁴⁸⁵ However, other than being entirely unsupported, this argument is simply irrelevant. Bolivia had established a legal framework for the privatization of the Assets and this is the framework that was followed at the time by the relevant State officials. Indeed, the US\$14 million purchase price paid by Allied Deals was 40 percent greater than the US\$10 million minimum

⁴⁸¹ Reply, para 35.

⁴⁸² Paribas, 1999, Privatisation of Bolivian mining assets, Confidential Information Memorandum of 16 August 1999, **RPA-04**, p 69. This was public knowledge in the Bolivian industry. US Geological Survey Minerals Yearbook 1999, "The Mineral Industry of Bolivia," 1999, **C-174**, p 3.

Bolivia also faults the Quiroga administration for not heeding calls to investigate and suspend the privatization process. Bolivia's allegation, however, is based on three letters sent between October and December 2000 by the *Brigada Parlamentaria de Oruro* and two opposition members of Bolivia's National Congress to various Bolivian officials requesting that the bidding deadlines be extended for a variety of reasons. The fact that the Government chose to ignore such unsubstantiated calls indicates that it did not find them credible. See Letter from the Oruro Parliamentary Group to President Bánzer Suárez, 27 November 2000, **R-110**; Letter from Leopoldo Fernández Ferreira to President Bánzer Suárez, 5 December 2000, **R-113**; Letter from Humberto Bohrt Artieda to Walter Guiteras Denis, 8 December 2000, **R-114**; Reply, para 45.

⁴⁸³ Rejoinder, para 110.

⁴⁸⁴ *Ibid*, para 115.

⁴⁸⁵ *Ibid*, para 115.

value recommended by Bolivia's adviser, Paribas.⁴⁸⁶ Bolivia does not dispute this.⁴⁸⁷ In addition, Bolivia has not alleged,⁴⁸⁸ much less identified, any illegality with respect to Colquiri's subsequent acquisition of the Tin Smelter from RBG Resources (previously Allied Deals) following the latter's bankruptcy.⁴⁸⁹ In fact, Bolivia acknowledges that the accusations raised during the RBG Resources investigation were not related to the privatization of the Tin Smelter.⁴⁹⁰

⁴⁸⁶ Recommendation Report of the Qualifying Commission of the Public Tender for the Tin and Antimony Smelters, the Oruro Industrial Plant, the Huanuni joint venture and Colquiri Mine Lease, 21 December 1999, **R-108**, p 6.

⁴⁸⁷ Statement of Defense, para 74.

⁴⁸⁸ Rejoinder, paras 127-129.

⁴⁸⁹ *Ibid*, paras 120-129. Bolivia that Comsur's acquisition of the Tin Smelter was supposedly concealed by members of the Sánchez de Lozada administration. *See* Rejoinder, para 128 (citing Letter from the President of the National Congress (Mr Mesa) to the President of the Chamber of Representatives (Mr Añez), 7 October 2002, **R-300**; Letter from the President of the Chamber of Representatives (Ms Paz) to the President (Mr Sánchez de Lozada), 12 September 2002, **R-301**). This claim is false. Bolivia cites a request for a written report presented by Congressman Alberto Luis Aguilar Calle to the Minister of Economic Development asking for a report regarding "if it is true that Empresa de Fundición Vinto [*sic*] was transferred to the Private Mining Company Comsur." The Minister responded that, according to the report from the Viceministry of Mining and Metallurgy, "the Empresa de Fundición Vinto" was not transferred to Comsur. *See* Letter from the President of the National Congress (Mr Mesa) to the President of the Chamber of Representatives (Mr Añez), 7 October 2002, **R-300**, p 3. This response was accurate because: (i) it was limited to explaining the transfer that occurred as a result of the public tender; and (ii) even following its sale to Allied Deals, EMV was not transferred to Comsur, but to Colquiri. Indeed, the response makes clear that the Minister interpreted the request for a written report as limited to inquiring as to whether EMV was transferred by the Bolivian state to Comsur as part of the privatization process. In any event, even if the request for a written report were interpreted to include a request for information regarding post-public tender sales of EMV (which it was not), the answer given by the Minister was still correct: the Ministry of Economic Development had been informed, by the Joint Provisional Liquidator by letter dated 7 June 2002, only that the lifting of the restriction on share sales had permitted "an efficient sale agreement to Compañía Minera Colquiri S.A." Letter from Grant Thornton to the Minister of Economic Development, 7 June 2002, **R-148**. In addition, Although the Minister of Economic Development was a "member[] of the Sánchez de Lozada administration," as Bolivia states, Oscar Farfan was selected by the Movimiento de Izquierda Revolucionario as part of the alliance formed between this party and the Movimiento Nacionalista Revolucionario (Sánchez de Lozada's party). *See* "Sánchez de Lozada crea cuatro ministerios al iniciar su gestión," *Agencia de Noticias Fides*, 7 August 2002, **C-288**. He was therefore not selected by Mr Sánchez de Lozada, or even a member of his political party.

⁴⁹⁰ According to Bolivia, the "RBG scandal" is relevant simply because it "opened the door to renewed criticism of the irregular Tin Smelter privatization." Rejoinder, para 123. As already explained by Claimant, Bolivia rests its assertion on a handful of press articles containing unfounded (and untrue) claims by the opposition party about alleged illegalities in the

194. *Finally*, and most importantly, no local court has ever found there to be any “irregularity”—and much less “illegality”—with respect to the privatization of the Assets.⁴⁹¹ Bolivia itself even admits that the State seriously considered the allegations raised following RBG Resources’s bankruptcy, but ultimately decided to take no action in response.⁴⁹² Notably, the statutes of limitations for finding administrative liability, civil liability, or criminal liability for acts related to the privatization have all expired.⁴⁹³ The fact that no “irregularities” were found despite there being a specific mechanism in place for this precise purpose once again demonstrates that Bolivia’s claims are without merit.⁴⁹⁴ The Tribunal should not decline jurisdiction in light of such vague and unsupported allegations.

privatization. Reply, para 53; “El MAS pide la renuncia del Canciller Saavedra,” *La Razón Digital*, 8 November 2002, **R-134**; “MAS pide la renuncia del Canciller de la Republica,” *El Diario*, 4 December 2002, **R-135**.

⁴⁹¹ Indeed, even members of the Bolivian National Congress have questioned the validity of Bolivia’s allegations of illegality during a recent summons to Bolivia’s Attorney General. *See* Summons from the National Congress (Mr Barral) to the Attorney General of Bolivia (Mr Menacho), undated, **C-299**, p 1 (noting that “Supreme Decrees Nos 29,026 [Tin Smelter], 499 [Antimony Smelter] and 1264 [Colquiri Mine] consider that the privatization and capitalization process was “fraudulent” and harmful for the Bolivian State, consequently, why was no formal investigation or process opened in order to identify those responsible and their actions and determine liabilities?”) (unofficial English translation from Spanish original).

⁴⁹² Rejoinder, para 419.

⁴⁹³ Supreme Decree No 2,3318-A, 3 November 1992, **R-237**, Arts 16, 37 (establishing 2-year statute of limitations for administrative responsibility); Law No 1,178, 20 July 1990, **R-241**, Art 40 (Establishing 10-year statute of limitations for civil liability deriving from administrative duties); Criminal Code, as amended by Law No 1,768 of 10 March 1997, published in the *Gaceta Oficial* No 1,984, 23 August 1972, **C-285** Art 101 (establishing maximum 8 year statute of limitations); Law No 1,970, Criminal Code of Procedure, published in the *Gaceta Oficial* No 2,129, 25 March 1999, **C-287**, Art 29 (confirming maximum 8 year statute of limitations).

⁴⁹⁴ The National Council of Economy and Planning (**CONEPLAN**) was responsible for auditing and safeguarding the State’s interests in the privatization process. Once the privatization process was completed, CONEPLAN had to submit a report to the State Comptroller, who then examined the entire process and issued an opinion in accordance with applicable law. In the event that the State Comptroller received an audit report indicating violations of administrative norms, it could issue an opinion on administrative responsibility. That opinion would then be remitted to the top executive of the relevant public entity, so to initiate the corresponding internal administrative process. *See* Law No 1,330, 24 April 1992, **C-58**, Art 3; Supreme Decree No 23,170, published in the *Gaceta Oficial* No 1,744, 5 June 1992, **C-286**, Art 9; Regulation of the Responsibility of the Public Function, approved by Supreme Decree No 2,3318-A, 3 November 1992, **R-237**, Art 17.

3. Bolivia’s allegations of “unclean hands” remain entirely unsupported

195. Despite the above, Bolivia insists that the Tribunal cannot hear Glencore Bermuda’s claims pursuant to the unclean hands doctrine. Without providing any evidence, Bolivia claims that this Tribunal should decline jurisdiction because Glencore International “was fully aware”⁴⁹⁵ when it acquired the Assets, five years after their privatization, that Bolivia’s own State officials had allegedly failed to protect the public patrimony by privatizing all of Bolivia’s industrial sectors⁴⁹⁶—a finding that, as already explained, no Bolivian court has made.⁴⁹⁷
196. Bolivia’s claim is without merit. Having failed to demonstrate any illegality in the privatization process, Bolivia’s related “unclean hands” argument—which necessarily rests on an illegality finding—must also fail. The Tribunal’s analysis could, therefore, end here.
197. However, for the sake of completeness, Glencore Bermuda addresses below Bolivia’s remaining allegations. Once again, Glencore Bermuda demonstrates that the “unclean hands” doctrine does not exist as a general principle of international law and cannot be invoked to deny Glencore Bermuda the Treaty’s protections, especially when the challenged actions are those of Bolivia’s own State officials and Bolivia itself authorized Glencore Bermuda’s investment.

a. “Unclean hands” does not exist as a general principle of international law

198. Contrary to Bolivia’s allegations, the unclean hands doctrine does not exist as a general principle of international law.⁴⁹⁸ Bolivia’s own authorities indicate as much. In particular, in support of its claim, Bolivia refers to a scholarly article which specifically indicates that, while certain states may have recognized it in

⁴⁹⁵ Rejoinder, para 552.

⁴⁹⁶ Statement of Defense, paras 346-347; Rejoinder, Section 4.5.2.

⁴⁹⁷ Reply, para 235.

⁴⁹⁸ *Ibid*, paras 287-288.

the context of their domestic legislation, “[t]he application of the ‘clean hands’ doctrine in international law is still controversial.”⁴⁹⁹ The same article notes that ILC Special Rapporteur James Crawford concluded that “it is not possible to consider the ‘clean hands’ theory as an institution of general customary law”⁵⁰⁰ and recognizes that “[i]nternational tribunals have so far been reluctant to recognize its existence.”⁵⁰¹

199. This was confirmed by the *Yukos* tribunal, which determined that “‘unclean hands’ does not exist as a general principle of international law which would bar a claim by an investor, such as the Claimants in this case.”⁵⁰² Contrary to Bolivia’s allegations, the fact that the *Yukos* award has been set aside at the seat is not sufficient to discredit the tribunal’s reasoning in that case, since it was set aside for reasons that do not call into question the tribunal’s finding with respect to the doctrine of unclean hands.⁵⁰³ In any event, a number of investment tribunals have

⁴⁹⁹ P Dumberry and G Dumas-Aubin, “The Doctrine of ‘Clean Hands’ and the Inadmissibility of Claims by Investors Breaching International Human Rights Law” (2013) Vol 10(1) Transnational Dispute Management p 1, **RLA-167**, p 1 (emphasis added).

⁵⁰⁰ *Ibid*, p 2 (citing James Crawford, Second Report on State Responsibility, (1999) Yearbook of the International Law Commission, vol. II (part 2), A/CN.4/SER.A/1999/Add.1 (Part 1), p 83, para 334); *see also* *Guyana v Suriname* (PCA Case No 2004-04) Award of the Arbitral Tribunal, 17 September 2007, **CLA-238**, para 421 (“The Tribunal holds that Guyana’s conduct does not satisfy the requirements for the application of the doctrine of clean hands, to the extent that such a doctrine may exist in international law.”) (emphasis added).

⁵⁰¹ P Dumberry and G Dumas-Aubin, “The Doctrine of ‘Clean Hands’ and the Inadmissibility of Claims by Investors Breaching International Human Rights Law” (2013) Vol 10(1) Transnational Dispute Management p 1, **RLA-167**, p 1.

⁵⁰² *Hulley Enterprises Limited (Cyprus) v The Russian Federation* (UNCITRAL) Final Award, 18 July 2014, **CLA-156**, para 1363; *Yukos Universal Limited (Isle of Man) v Russian Federation* (PCA Case No AA 227) Final Award, 18 July 2014, **CLA-122**, para 1363; *Veteran Petroleum Limited (Cyprus) v The Russian Federation* (UNCITRAL) Final Award, 18 July 2014, **CLA-157**, para 1363.

⁵⁰³ *Russian Federation v Veteran Petroleum Limited, Yukos Universal Limited and Hulley Enterprises Limited* (Cases C/09/477160/ HA ZA 15-1, 15-2, 15-112), Judgment of The Hague District Court, 20 April 2016, **CLA-245**, paras 5.95-5.96 (setting aside the *Yukos* arbitral awards on the ground that the Russian Federation was not bound by the provisional application of (the arbitration clause of) Article 26 ECT based on its signature of the ECT alone, and therefore had never made an unconditional offer to arbitrate disputes, within the meaning of Article 26 ECT).

- recognized that the unclean hands doctrine is not an established principle of international law.⁵⁰⁴
200. Confirming that the concept of “unclean hands” is one “rarely applied”⁵⁰⁵ by international tribunals, Bolivia can only cite to two cases—*Al Warraq* and *Churchill Mining*—neither one of which supports its position in the present case.
201. In *Al Warraq*, the tribunal concluded that the claimant was responsible for “six types of fraud”—including use of bank assets to obtain a private loan, failure to obtain loans and return collateral, replacing valuable assets for trash and failure to pay interest on securities—and thereby “breached the local laws and put the public interest at risk.”⁵⁰⁶ Here Bolivia has not alleged, let alone established, any breach of local law by Claimant.
202. With respect to *Churchill Mining*, according to Bolivia this case takes the position that a claim is inadmissible on the basis of illegal or fraudulent conduct carried out by a third party if “the claimants did not exercise a reasonable level of due

⁵⁰⁴ See, eg, *Guyana v Suriname* (PCA Case No 2004-04) Award of the Arbitral Tribunal, 17 September 2007, **CLA-238**, para 418 (“No generally accepted definition of the clean hands doctrine has been elaborated in international law. Indeed, the Commentaries to the ILC Draft Articles on State Responsibility acknowledge that the doctrine has been applied rarely and, when it has been invoked, its expression has come in many forms. The ICJ has on numerous occasions declined to consider the application of the doctrine and has never relied on it to bar admissibility of a claim or recovery. [...] [T]he use of the clean hands doctrine has been sparse, and its application in the instances in which it has been invoked has been inconsistent.”); *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, 19 August 2013, **CLA-210**, para 477 (observing that “[t]he question whether the principle [of clean hands] forms part of international law remains controversial and its precise content is ill defined”); *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Case No ARB/12/14 and 12/40) Award, 6 December 2016, **RLA-25**, para 493 (stating that the “status and exact contours” of the unclean hands doctrine “are subject to debate and have been approached differently by international tribunals”).

⁵⁰⁵ P Dumberry and G Dumas-Aubin, “The Doctrine of ‘Clean Hands’ and the Inadmissibility of Claims by Investors Breaching International Human Rights Law” (2013) Vol 10(1) Transnational Dispute Management p 1, **RLA-167**, p 2.

⁵⁰⁶ *Hesham Talaat M. Al-Warraq v The Republic of Indonesia* (UNCITRAL) Final Award, 15 December 2014, **RLA-168**, paras 634-645.

diligence in making its [*sic*] investment.”⁵⁰⁷ This, however, is plainly incorrect. In fact, the *Churchill Mining* tribunal actually specified that “claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible as a matter of international public policy.”⁵⁰⁸

203. In that case, the tribunal observed that a “large scale fraudulent scheme” had been “intentionally” perpetrated by the claimants’ own business partner in order to obtain the mining rights at issue.⁵⁰⁹ The tribunal was “struck” by the claimants’ complete lack of diligence both in making the investment and in investigating allegations of forgery.⁵¹⁰ Bolivia claims that these facts are comparable to the case at hand because: (i) “Sánchez de Lozada’s illegal acquisition of the Assets is just as relevant as the illegal conduct of Churchill Mining’s business partner;” and (ii) either Glencore International carried out appropriate due diligence and chose to ignore its results or it did not carry out adequate due diligence.⁵¹¹ Bolivia is wrong.
204. *First*, despite referring to “Sánchez de Lozada’s illegal acquisition of the Assets,”⁵¹² Bolivia has not actually claimed that Comsur’s acquisition of the Assets (through Colquiri) was illegal.⁵¹³ The only provisions of domestic law that Bolivia claims were breached are ones that relate to the conduct of State

⁵⁰⁷ Rejoinder, para 556.

⁵⁰⁸ *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Case No ARB/12/14 and 12/40) Award, 6 December 2016, **RLA-25**, para 508 (emphasis added).

⁵⁰⁹ *Ibid*, paras 473-474, 510-511.

⁵¹⁰ *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Case No ARB/12/14 and 12/40) Award, 6 December 2016, **RLA-25**, para 509 (concluding that “the Tribunal is struck by the seriousness of the fraud that taints the entire [investment] and by the Claimants’ lack of diligence overseeing the licensing process and investigating allegations of forgery.”).

⁵¹¹ Rejoinder, paras 559-561.

⁵¹² *Ibid*, para 559.

⁵¹³ Bolivia claims that the present case is comparable to *Anderson v Costa Rica*, “where the illegality lay in the conduct of the persons from which the claimants had acquired their investment (as in the present case).” Rejoinder, para 559. But this statement is incorrect. Bolivia has never claimed that Comsur—the entity from which Claimant acquired the Assets—engaged in any illegal activity.

officials⁵¹⁴ (which Bolivia admits Mr Sánchez de Lozada was not at the time of the acquisition) and for allegedly failing to investigate the privatization process.⁵¹⁵ In any event, Glencore Bermuda had no role in the privatization of the Assets, which occurred years prior to its acquisition. There is nothing in the present matter that is comparable to Churchill Mining engaging in business with a partner who had deliberately forged tens of documents in order to gain access over mining rights.

205. *Second*, Glencore Bermuda has already established that it carried out the appropriate due diligence prior to acquiring the Assets, which confirmed there was no reason to be concerned with their legality or legitimacy.⁵¹⁶ This included engaging technical, legal and financial experts, traveling to Bolivia, and meeting with Government officials.⁵¹⁷ More importantly, the diligence showed the lack of any local court decision questioning the legality of the privatization.
206. Indeed, as already explained by Glencore Bermuda and ignored by Bolivia, even if there had been a mistake or oversight in the due diligence process (which has not been proven in this case), it was made in good faith and cannot preclude Glencore Bermuda from benefiting from the Treaty's protection.⁵¹⁸

⁵¹⁴ According to Bolivia, former Presidents Sánchez de Lozada, Banzer Suárez and Quiroga failed to fulfill their duties when they did not investigate the privatization. As addressed above, such claims are entirely without merit. *See* Section II.B.2, above.

⁵¹⁵ Rejoinder, paras 72, 110 (acknowledging that the purchase of the Tin Smelter, the Antimony Smelter, and the Colquiri Lease took place while Mr Sánchez de Lozada was not in office).

⁵¹⁶ Reply, paras 57-62, 295; Second Witness Statement of Christopher Eskdale, paras 8-16, 57-58; Letter from Argent Partners (Mr Simkin) to Glencore International (Mr Eskdale), 2 June 2004, **C-194**; Glencore inter office correspondence from Mr Eskdale to Mr Strothotte and Mr Glasenberg, 20 October 2004, **C-196**; Letter from Glencore International to Argent Partners (Mr Simkin), 22 October 2004, **C-197**.

⁵¹⁷ Reply, para 295; Second Witness Statement of Christopher Eskdale, para 9; First Witness Statement of Christopher Eskdale, para 18.

⁵¹⁸ Reply, para 296. *See also* R Moloo and A Khachaturian, "The Compliance with the Law Requirement in International Law" (2011) Vol 34 Fordham International Law Journal 1473, **RLA-24**, pp 1495-1497.

207. This is consistent with decisions by past tribunals, which have held that investors only need to conduct “reasonable” due diligence before making an investment.⁵¹⁹

b. Bolivia cannot rely on the conduct of its own State officials to deprive Glencore Bermuda of the Treaty’s protections

208. Glencore Bermuda has already explained that Bolivia cannot use the conduct of its own State officials to deprive Glencore Bermuda of protection under the Treaty.⁵²⁰

209. Bolivia’s chief claim to the contrary is that the actions it complains of are not those of public officials since Mr Sánchez de Lozada “obtained the Assets acting in a private capacity”⁵²¹ and Allied Deals was “the entity which irregularly acquired the Tin Smelter in the privatization.”⁵²² But Bolivia has not identified any obligation breached by either Mr Sánchez de Lozada, Comsur, or Allied Deals. Instead, Bolivia only claims (without any support) that certain public officials should have heeded to calls to halt or investigate the privatization.⁵²³ Clearly, the only conduct that Bolivia complains of is that of its own State representatives. Glencore Bermuda cannot be denied Treaty protection on this basis.

210. It follows that Bolivia’s argument that “tribunals regularly look beyond the conduct of the investor in order to assess the legality of the investment”⁵²⁴ is not

⁵¹⁹ See, eg, *National Grid plc v Argentine Republic* (UNCITRAL) Award, 3 November 2008, **CLA-82**, paras 101, 105 (holding that the claimant’s efforts of hiring reputable law firms, an experienced investment bank, and a team of engineers satisfied its due diligence obligations); *Total SA v Argentine Republic* (ICSID Case No ARB/04/1) Individual Opinion of Henri Alvarez, 27 December 2010, **CLA-241**, paras 48-60 (characterizing the investor’s due diligence efforts of conducting internal research and hiring external advisors as “thorough and reasonable”); *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Case No ARB/12/14 and 12/40) Award, 6 December 2016, **RLA-25**, para 506.

⁵²⁰ Reply, paras 289-291.

⁵²¹ Rejoinder, para 518.

⁵²² *Ibid.*, para 518.

⁵²³ *Ibid.*, paras 98, 528.

⁵²⁴ *Ibid.*, para 519.

only unsupported, but also irrelevant in this instance. Indeed, Bolivia can only cite to *Churchill Mining* and *Anderson v Costa Rica*, which, as described above, do not advance its case. *Churchill Mining* dealt with the serious fraud perpetrated by the claimant’s close business associate,⁵²⁵ while the alleged illegality in *Anderson v Costa Rica* concerned the claimant’s acquisition of the asset.⁵²⁶ Here, none of this applies. Glencore Bermuda cannot be held responsible for the conduct of Bolivia’s own officials, which—even if unlawful (which it was not)—occurred years prior to Glencore Bermuda’s acquisition of the Assets. Rather, as stated emphatically by the tribunal in *Kardassopoulos*, a State’s ability to exert control over foreign investments “relates to the investor’s actions in making the investment. It does not allow a State to preclude an investor from seeking protection under the BIT on the ground that its own actions are illegal under its own laws.”⁵²⁷

211. Bolivia’s argument that the principle precluding a State from relying on its own wrongdoing to evade international responsibilities “must be rejected as a matter of policy”⁵²⁸ belies a fundamental misunderstanding of what it means. According to Bolivia, espousing this principle “would make it impossible for States to ever invoke the corruption defence, insofar as, by definition, it implies improper conduct on the part of State officials.”⁵²⁹ But Bolivia’s attempted critique misses

⁵²⁵ *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Case No ARB/12/14 and 12/40) Award, 6 December 2016, **RLA-25**, paras 508-511.

⁵²⁶ *Alasdair Ross Anderson et al v Republic of Costa Rica* (ICSID Case No ARB(AF)/07/3) Award, 19 May 2010, **RLA-147**, para 55 (“If the transaction by which the Villalobos acquired the deposit was illegal, it follows that the acquisition by each Claimant of the asset resulting from that transaction was also not in accordance with the law of Costa Rica.”) (emphasis added).

⁵²⁷ *Ioannis Kardassopoulos v Georgia* (ICSID Case No ARB/05/18) Decision on Jurisdiction, 6 July 2007, **CLA-69**, para 182. Bolivia’s attempt at distinguishing the *Kardassopoulos* on the ground that there the investment in that case did not allegedly “involve formerly State-owned assets privatized in breach of mandatory constitutional requirements by a former (and future) President” is conclusory and should not be credited.

⁵²⁸ Rejoinder, para 523.

⁵²⁹ *Ibid*, para 523.

the point. In cases of corruption, such as *World Duty Free*,⁵³⁰ the investor generally participates in the challenged unlawful acts. Here, on the other hand, the conduct contested by Bolivia only relates to the purported omissions of State officials which, as Bolivia admits, have never been found to be in any way illegitimate by any relevant adjudicating body.

212. Indeed, the principle that a State cannot oppose a claim on the basis of its own unlawful conduct has been recognized most recently in the case of *Gavrilović v Croatia*, where the tribunal determined that “irregularities” in the bankruptcy proceedings could not deprive the claimant of the BIT’s protection, since they had been sanctioned by the Croatian government.⁵³¹ In that case, the tribunal explained that a State may not invoke its own illegal acts to diminish its liability.⁵³²
213. Finally, as addressed above,⁵³³ Claimant had no reason to know at the time it acquired the Assets that they were tainted by any kind of illegality. This is clear from the fact that Bolivia itself has a hard time identifying the exact, supposed illegal conduct it complains of, as well as the responsible parties.⁵³⁴ Moreover, despite being fully aware of the acquisition, Bolivia failed to raise any concerns with either Glencore International or Glencore Bermuda representatives,

⁵³⁰ *World Duty Free Company Limited v The Republic of Kenya* (ICSID Case No ARB/00/7) Award, 4 October 2006, **CLA-169**, para 135 (describing how a corporate officer of Claimant paid a “personal donation” to the President to do business in Kenya).

⁵³¹ *Georg Gavrilović and Gavrilović doo v Republic of Croatia* (ICSID Case No ARB/12/39) Award, 26 July 2018, **CLA-250**, paras 325 (“In the absence of evidence that the scheme was initiated or orchestrated by [the claimant] and, moreover, in light of the evidence pointing to the State’s extensive involvement in the scheme [...] the Tribunal has difficulty accepting that the illegality is opposable to the First Claimant under international law”), 396-398 (rejecting the respondent’s illegality objections and noting that the tribunal’s decision “has been based on the evidence before it and on the legal conclusion that under international law the State cannot oppose a claim on grounds of illegality where the evidence shows that the State was involved with such illegality”).

⁵³² *Ibid.*, para 384.

⁵³³ See Section II.B.2.d, above.

⁵³⁴ See Section II.D.2, above.

expressing instead its “favorable predisposition towards the development of new investments in the mining sector.”⁵³⁵

c. Bolivia authorized Glencore Bermuda’s investment and should be precluded from invoking illegality as a defense

214. In any event, even if Glencore Bermuda would have known of any illegality (which is not the case), as explained in the Reply, Bolivia’s claims of illegality should be dismissed because Bolivia itself never raised any concerns.⁵³⁶ Therefore, Bolivia is now estopped from objecting to the jurisdiction of the Tribunal on the basis of illegal acts supposedly conducted by its own State officials.
215. In the Rejoinder, Bolivia attempts to narrow the relevant standard, arguing that Glencore Bermuda did not make its investment in reliance on any representations made by Bolivia.⁵³⁷ Bolivia’s arguments, however, should be dismissed.
216. *First*, as explained in the Reply, the principle of estoppel is an established principle of international law which has been repeatedly recognized and applied by investment treaty tribunals.⁵³⁸ It is an equitable principle.
217. The decisions cited by Glencore Bermuda demonstrate that investment tribunals have referred to the principle of estoppel in order to prevent respondent States from challenging the legality of an investment by reference to previous unidentified violations of their own law.⁵³⁹ Bolivia cannot credibly discard the

⁵³⁵ Letter from the Vice Minister of Mining (Mr Gutiérrez) to Glencore (Mr Capriles), 17 January 2005, **C-63** (unofficial English translation from Spanish original); *see also* Statement of Claim, para 35.

⁵³⁶ Reply, paras 298-307.

⁵³⁷ Rejoinder, paras 538-542.

⁵³⁸ Reply, para 300; *see also* *Copper Mesa Mining Corporation v Republic of Ecuador* (PCA Case No 2012-2) Award, 15 March 2016, **CLA-221**, paras 5.63-64; *Duke Energy International Peru Investments No 1, Ltd v Republic of Peru* (ICSID Case No ARB/03/28) Award, 18 August 2008, **CLA-177**, para 231.

⁵³⁹ Reply, paras 302-305.

relevance of these decisions simply by arguing that “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.”⁵⁴⁰ Bolivia’s argument is based on faulty and unsupported premises. It also does not address the core principle espoused by the relevant case law—that a State cannot “blow[] hot and cold,”⁵⁴¹ first affirming and then challenging its own actions to the investor’s detriment.⁵⁴²

218. *Second*, Bolivia misconstrues Glencore Bermuda’s argument. Glencore Bermuda is not claiming that Bolivia induced it to invest in the country in 2005 or to sign the contracts.⁵⁴³ Rather, Claimant’s position is that it was entitled to expect, on the basis of Bolivia’s conduct both before and after Glencore Bermuda’s acquisition of the Assets, that its investments were not tainted by any prior illegality.⁵⁴⁴ In particular, Glencore Bermuda was entitled to expect that the contracts for the sale of the Assets were valid based on the conduct of, among others:

⁵⁴⁰ Rejoinder, para 545.

⁵⁴¹ *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal, 2 October 2006, **CLA-64**, para 475.

⁵⁴² *See, eg, ibid* (“If any of the [agreements] were illegal or unenforceable under Hungarian law one might have expected the Hungarian Government or its entities to have declined to enter into such an agreement [...] it lies ill in the mouth of Hungary now to challenge the legality and/or enforceability of these [a]greements.”); *Fraport v Philippines* (ICSID Case No ARB/03/25) Award, 16 August 2007, **CLA-174**, para 346 (finding that the host State was not permitted to rely on breaches of local law to strike out the investor’s claim when “it knowingly overlooked them and endorsed an investment which was not in compliance with its law”); *Duke Energy International Peru Investments No 1, Ltd v Republic of Peru* (ICSID Case No ARB/03/28) Award, 18 August 2008, **CLA-177**, para 231 (describing the principle of estoppel as operating “to prohibit a State from taking actions or making representations which are contrary to or inconsistent with actions or representations it has taken previously to the detriment of another.”).

⁵⁴³ Rejoinder, paras 538-540.

⁵⁴⁴ Reply, paras 298-299, 306. Bolivia’s critique concerning the February 2005 meeting described by Mr Eskdale is to no avail. What this meeting demonstrates, as relayed in Bolivia’s own documentary evidence, is that—prior to Glencore Bermuda’s March 2005 acquisition of the Assets—the Government was aware of Glencore group’s investment and did not raise any concerns as to its illegality, but rather supported it. “Goni vendió COMSUR,” *Bolivia.com*, 5 February 2005, **R-14**; *see also* Side letter between Glencore International and Minera regarding Meetings in Bolivia, 1 February 2005, **C-289**.

- (a) The Vice Minister of Mining, who in January 2005 was aware of Glencore’s pending acquisition and expressed “a favorable predisposition to making new investments in the mining sector;”⁵⁴⁵
- (b) The State officials who executed the contracts for the privatization of the Assets,⁵⁴⁶ including the Trade Minister⁵⁴⁷ and the Executive President of Comibol,⁵⁴⁸ who were authorized and instructed to do so under Bolivian law; and
- (c) The Comibol representatives who negotiated increased royalties with Comsur following Glencore Bermuda’s acquisition of the Assets, during which time Comibol acknowledged that Comsur and Colquiri had complied with their investment and operational obligations.⁵⁴⁹
219. *Finally*, in the Reply, Glencore Bermuda established that the Bolivian law principle of *venire contra factum proprium* also precludes Bolivia from invoking the illegality of its own privatization process as a bar to this Tribunal’s

⁵⁴⁵ Letter from the Vice Minister of Mining (Mr Gutiérrez) to Glencore (Mr Capriles), **C-63** (unofficial English translation from Spanish original).

⁵⁴⁶ The sale and purchase agreement of the Tin Smelter was also signed by the President of the Board of EMV, who was duly authorized to do so. *See* Tin Smelter Purchase Agreement, 17 July 2001 and 4 July 2001, **C-7**, Clause 1.3.

⁵⁴⁷ The Trade Ministry was legally authorized to carry out all activities related to any privatization process of a public company and expressly authorized the privatization of the Assets. Law 1,788, 16 September 1997, published in the *Gaceta Oficial* No 2,034 on 16 September 1997, **C-170**, Art 11; Resolution No 139/99, 24 June 1999, **C-59**.

⁵⁴⁸ Comibol was constitutionally and legally authorized to manage the mining industry and privatize its assets. Its Board specifically authorized the privatization of the Assets and instructed its Executive President to sign each one of the contracts. 1967 Constitution, **R-3**, Art 138; Mining Code, 17 March 1997, **R-4**, Arts 91, 93, 94; Resolution No 1753/99, 25 June 1999, **C-60**; Colquiri Lease, 27 April 2000, **C-11**, Clause 1.2 (pp 47-51); Tin Smelter Purchase Agreement, 17 July 2001 and 4 July 2001, **C-7**, Clause 1.2; Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**, Clause 1.2.

⁵⁴⁹ Second Witness Statement of Christopher Eskdale, para 23; Minutes of the conclusion of the meetings held between Comibol, Comsur and Colquiri, 11 October 2005, **R-190**, p 1. *See also* Addendum to the Colquiri Lease, 11 November 2005, **C-12**, Clause 2.2.

jurisdiction.⁵⁵⁰ In its Rejoinder, Bolivia counters that this legal principle requires “a positive *factum proprium* that the same administration’s subsequent behavior contradicts.”⁵⁵¹ Bolivia is wrong. The *venire contra factum proprium* principle prohibits the public administration from arbitrarily disowning its own prior acts, leaving them without effect.⁵⁵² It applies to any administrative act, which is defined as:

[E]very declaration, order or decision of the Public Administration, with a general or individual scope, issued in the exercise of administrative, legal or discretionary authority, in compliance with the requirements and formalities established in this Law, which produces legal effects over a citizen. It is mandatory, binding and enforceable and is presumed to be legitimate.⁵⁵³

220. In the present case, examples of relevant administrative acts include:

- (a) The Colquiri Lease Amendment executed by Comibol, which recognized Glencore’s acquisition of Comsur’s shares (Clause 2(3)), increased royalty

⁵⁵⁰ Reply, para 300, footnote 766 (citing KH Böckstiegel, *Arbitration and State Enterprises, Survey on the National and International State of Law of Practice* (1984), **CLA-139**, para 5.6.1; Constitutional Tribunal, Constitutional Decision No 0116/2015-S3, 20 February 2015, **C-270**, p 12 (providing that “the acts [of the Administration] cannot be discretionally ignored and be given no effect by the same administration; this is, that situations that generated legal consequences are discretionally ignored by subsequent actions.”)) (unofficial English translation from Spanish original).

⁵⁵¹ Rejoinder, para 550 (citing Constitutional Tribunal, Constitutional Decision No 0116/2015-S3, **C-270**).

⁵⁵² Constitutional Tribunal, Constitutional Decision No 0116/2015-S3, 20 February 2015, **C-270**, p 12 (“In accordance with the jurisprudential development explained in the precedeing Legal Reasoning, the actions of the public administration are governed by the principles of legality, good faith and the presumption of legitimacy; axioms that mandate that such actions cannot be ignored and left without effect in a discretionary fashion by the same administration; that is to say, that discretionally ignoring prior situations that generated legal consequences through subsequent actions, would also have negative results for the peaceful coexistence that characterizes a Democratic State of Law, which governs our Unitary Social State of Law; in that citizens must have trust and certainty that the actions and resolutions of the public administration are not only defined within the scope of the legal system.”) (unofficial English translation from Spanish original).

⁵⁵³ Administrative Procedure Law, 23 April 2002, **R-250**, Art 27 (unofficial English translation from Spanish original).

payments from 3.5 percent to 8 percent (Clause 3), and ratified all parts of the Lease Agreement not subject to amendment (Clause 5).⁵⁵⁴

(b) Comibol's Board Resolution of 1 November 2005, authorizing Comibol's Executive President to execute the amendment to the Colquiri Lease.⁵⁵⁵

221. It follows that, through a series of administrative acts, Comibol affirmed the Colquiri Lease's continued validity following Glencore Bermuda's acquisition of Comsur.

222. In conclusion, it is clear that Bolivia's allegations of illegality lack any basis in fact or law and should be dismissed.

E. BOLIVIA WAS DULY NOTIFIED OF ALL DISPUTES AND WAS GIVEN THE OPPORTUNITY TO RESOLVE THEM AMICABLY

223. Bolivia argued in its Statement of Defence that the Tribunal lacks jurisdiction over Glencore Bermuda's Tin Stock claims because, under Article 8 of the Treaty, Bolivia never received notice, and was thus "depriv[ed] of the opportunity to reach an amicable solution of those claims."⁵⁵⁶

224. In the Reply, Glencore Bermuda established that Bolivia's argument is without merit. Specifically, Glencore Bermuda demonstrated that the Treaty's notice requirement imposes a minimal burden, its purpose being to "provide the State

⁵⁵⁴ Addendum to the Colquiri Lease, 11 November 2005, **C-12**. Notably, the Amendment also includes minutes from meetings between Comibol, Comsur and Colquiri, signed by Comibol representatives, which show that Comibol's legal department analyzed the Colquiri Lease, and concluded that it could be amended. *See also* Minutes of the conclusion of the meetings held between Comibol, Comsur and Colquiri, 11 October 2005, **R-190**, pp 1-2.

⁵⁵⁵ Addendum to the Colquiri Lease, 11 November 2005, **C-12** ("Canceling the fee for trading services of 2.75% of the net value of mineral sales established in Clause 12 of the aforementioned Contract and considering that COMSUR S.A. is now part of the Glencore International Group, the latter being specialist in this matter. All other provisions and clauses contained in the Shared Risk Agreement currently in force will remain unaltered.") (unofficial English translation from Spanish original) (emphasis added).

⁵⁵⁶ Statement of Defence, Section 4.6.

with an opportunity to redress the dispute,”⁵⁵⁷ and that Glencore Bermuda complied with any such requirement by: (i) sending multiple letters through its subsidiaries to Bolivia’s Minister of Mining demanding the return of the Tin Stock;⁵⁵⁸ and (ii) negotiating with Bolivia over compensation for, or return of, the Tin Stock in the context of discussions relating to the nationalization of the Antimony Smelter.⁵⁵⁹

225. In its Rejoinder, Bolivia does not dispute the relevant facts. Indeed, it remains uncontested that: (i) Glencore Bermuda’s subsidiaries demanded the return of the Tin Stock from the Minister of Mining and EMV; (ii) EMV ultimately took the position that the Tin Stock formed part of the Antimony Smelter’s inventory and that its return or payment was to be negotiated with the Government in the context of discussions over compensation for the Antimony Smelter’s nationalization; and (iii) such discussions did, in fact, take place. Tellingly, Bolivia no longer argues that it did not have a meaningful opportunity to negotiate.

226. Nonetheless, Bolivia continues to argue that this Tribunal cannot assert jurisdiction over Glencore Bermuda’s Tin Stock claim because Bolivia did not receive proper notice. In particular, Bolivia now claims that, although it was aware of the dispute over the Tin Stock,⁵⁶⁰ it was never notified that such dispute was with Glencore Bermuda and that it concerned violations of the Treaty.⁵⁶¹

⁵⁵⁷ Reply, para 310 (citing *Burlington Resources Inc v Republic of Ecuador* (ICSID Case No ARB/08/5) Decision on Jurisdiction, 2 June 2010, **RLA-38**, para 312).

⁵⁵⁸ *Ibid*, para 311; Letter from Colquiri (Mr Capriles) to Ministry of Mining (Mr Pimentel), 3 May 2010, **C-28**; Letter from Colquiri (Mr Hartmann) to the Minister of Mining (Mr Pimentel), 5 May 2010, **C-98**; Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel), 10 May 2010, **C-99**; Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel), 7 June 2010, **C-101**.

⁵⁵⁹ Reply, para 311.

⁵⁶⁰ Rejoinder, para 249 (acknowledging that Bolivian authorities received “several letters [] requesting the Tin Stock to be returned”); *see also* Letter from Colquiri (Mr Capriles) to Ministry of Mining (Mr Pimentel), 3 May 2010, **C-28**; Letter from Ministry of Mining (Mr Pimentel) to EMV (Mr Villavicencio), 5 May 2010, **C-29**; Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel), 10 May 2010, **C-99**; Letter from Colquiri (Mr Capriles) to EMV (Mr

227. Once again, Bolivia’s formalistic argument does not find support in the law or in the facts. As already demonstrated by Glencore Bermuda, the Treaty’s notice requirement cannot be divorced from its ultimate purpose—ie, providing the parties with a reasonable opportunity to settle the dispute amicably.⁵⁶² Here, the facts uncontrovertibly demonstrate that Bolivia had actual notice of the Tin Stock claim six years prior to the commencement of the present arbitration proceedings and, despite engaging in negotiations with Glencore Bermuda, nonetheless failed to amicably resolve the dispute.

1. The Treaty imposes a minimal notice requirement in order to give the parties a reasonable opportunity to amicably settle the dispute

228. It is undisputed that Article 8 of the Treaty requires “written notification of a claim.”⁵⁶³ However rather than being, as Bolivia would have it, a purely formalistic requirement, this provision has a straightforward purpose—“to provide the State with an opportunity to redress the dispute before the investor decides to submit the dispute to arbitration.”⁵⁶⁴ Multiple investment tribunals have recognized as much, including those relied upon by Bolivia.⁵⁶⁵

229. In the Rejoinder, Bolivia challenges the authorities put forth by Glencore Bermuda, arguing that they purportedly “address how much effort the investor must make toward settlement, not whether that effort must include providing

Villavicencio), 19 May 2010, **C-100**; Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel), 7 June 2010, **C-101**.

⁵⁶¹ Rejoinder, paras 610, 617.

⁵⁶² Reply, para 313.

⁵⁶³ *Ibid*, para 310; Treaty, **C-1**, Art 8(1).

⁵⁶⁴ Reply, para 310 (citing *Burlington Resources Inc v Republic of Ecuador* (ICSID Case No ARB/08/5) Decision on Jurisdiction, 2 June 2010, **RLA-38**, para 312).

⁵⁶⁵ *See Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco* (ICSID Case No ARB/00/4) Decision on Jurisdiction, 23 July 2001, **CLA-145**, paras 19-20; *Alps Finance and Trade AG v Slovak Republic* (UNCITRAL) Award [Redacted], 5 March 2011, **RLA-11**, para 205; *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Decision on Jurisdiction, 14 November 2005, **CLA-60**, para 98; *Tulip Real Estate and Development Netherlands BV v Republic of Turkey* (ICSID Case No ARB/11/28) Decision on Bifurcated Jurisdictional Issue, 5 March 2013, **RLA-39**, paras 118-121.

notice of the claim submitted to arbitration.”⁵⁶⁶ But Bolivia’s critique is misguided. What it actually underscores is that tribunals have repeatedly recognized that notice is but a vehicle to allow for settlement discussions—its purpose is to provide the State with a sufficient opportunity to address the controversy before formal proceedings are commenced, and it is in this context that its adequacy must be assessed.

230. In *Salini*, for example, the tribunal emphasized that its “mission” in determining whether proper notice had been given was not “to set strict rules that the Parties should have followed.”⁵⁶⁷ Rather, it observed that:

[T]he Tribunal is satisfied to determine if it is possible to deduce from the entirety of the Parties’ actions whether, while respecting the term of six months, the Claimants actually took the necessary and appropriate steps to contact the relevant authorities in view of reaching a settlement, thereby putting an end to their dispute. [...]

The Tribunal considers that the attempt to reach an amicable settlement should essentially include the existence of grounds for complaint and the desire to resolve these matters out-of-court. It need not be complete or detailed.⁵⁶⁸

231. The above approach was adopted by the tribunal in *Alps Finance*. There, too, the tribunal assessed the notice requirement with reference to its function, concluding that “[a]ll what is required is that consultations be at least attempted and that the six months lapse without any resulting solution.”⁵⁶⁹ The tribunal explained that the “rationale of the BIT requirement” was “avoiding that a State be brought

⁵⁶⁶ Rejoinder, para 618 (emphasis in original). Specifically, Bolivia claims that the *Alps Finance* and *Bayindir* decisions “address the amount of forewarning that is necessary to provide ‘the opportunity to redress the dispute’” instead of “whether the investor must notify the State of the actual dispute or claim that is eventually submitted to arbitration.”

⁵⁶⁷ *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco* (ICSID Case No ARB/00/4) Decision on Jurisdiction, 23 July 2001, **CLA-145**, para 19.

⁵⁶⁸ *Ibid.*, paras 19-20.

⁵⁶⁹ *Alps Finance and Trade AG v Slovak Republic* (UNCITRAL) Award [Redacted], 5 March 2011, **RLA-11**, para 207.

- before an international investment tribunal all of a sudden, without being given the opportunity to discuss the matter with the other party.”⁵⁷⁰
232. Similarly, in *Bayindir*, the tribunal expressly noted that “the purpose of the notice requirement is to allow negotiations between the parties which may lead to a settlement.”⁵⁷¹ Following the reasoning set forth in *Salini*, the tribunal refused to adopt “an overly formalistic approach which would not serve to protect any legitimate interests of the Parties” and concluded that “the notice requirement does not constitute a prerequisite to jurisdiction.”⁵⁷²
233. Bolivia’s statement that neither *Alps Finance* nor *Bayindir* “addresses whether the investor must notify the State of the actual dispute or claim that is eventually submitted to arbitration”⁵⁷³ is, therefore, simply incorrect. Both cases analyze the adequacy of the notice requirement, expressly refusing to adopt Bolivia’s “overly formalistic approach.”
234. Finally, as already explained by Glencore Bermuda, Bolivia’s reliance on *Tulip* and *Burlington* does not change the above analysis. In *Tulip*, the tribunal rejected a formalistic approach and determined that the notice requirement had been complied with despite the “obscure” and “confusing” nature of the relevant communications.⁵⁷⁴ Indeed, in that case, there was no single communication to the Republic of Turkey which specifically referred to a dispute under the relevant BIT. Instead, the tribunal analyzed the relevant facts “as a whole” and “in the

⁵⁷⁰ *Ibid*, para 209.

⁵⁷¹ *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Decision on Jurisdiction, 14 November 2005, **CLA-60**, para 98.

⁵⁷² *Ibid*, paras 98-102; see also *Mr Franck Charles Arif v Republic of Moldova* (ICSID Case No ARB/11/23) Award, 8 April 2013, **RLA-69**, para 339 (“Moreover, the Tribunal agrees with Claimant that the notice of a dispute need not be detailed or exhaustive. The Tribunal agrees with the *Salini* Tribunal’s finding that: ‘The Tribunal considers that the attempt to reach an amicable settlement should essentially include the existence of grounds for complaint and the desire to resolve these matters out-of-court. It need not be complete or detailed.’”).

⁵⁷³ Rejoinder, para 618.

⁵⁷⁴ *Tulip Real Estate and Development Netherlands BV v Republic of Turkey* (ICSID Case No ARB/11/28) Decision on Bifurcated Jurisdictional Issue, 5 March 2013, **RLA-39**, paras 120-121.

context of the deteriorating relationship” between the relevant entities and concluded that, although the claimant “did not employ the most perfect forms” it had indeed provided sufficient notice of the dispute to the respondent.⁵⁷⁵

235. In *Burlington*, the tribunal observed that the notice need not be overly detailed or specific, but sufficient to inform the State of the “likely consequences” should negotiations fail:

Article VI does not require the investor to spell out its legal case in detail during the initial negotiation process; Article VI does not even require the investor to invoke specific Treaty provisions at this stage. Rather, 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 appraise the host State of the likely consequences that would follow should the negotiation process break down.⁵⁷⁶

236. As explained in detail below, the facts clearly demonstrate that Glencore duly informed Bolivia of the dispute over the Tin Stock and the likely consequences of failure to reach an agreement.

2. Bolivia had actual notice of Glencore Bermuda’s Tin Stock claim years prior to the commencement of the present arbitration

237. Glencore Bermuda has established that Bolivia had actual notice of the Tin Stock claims and ample opportunity to resolve the dispute amicably.⁵⁷⁷

238. In the Rejoinder, Bolivia does not challenge that it was aware of the dispute over the Tin Stock,⁵⁷⁸ but instead claims that it was never notified that such dispute

⁵⁷⁵ *Ibid*, paras 120-121.

⁵⁷⁶ *Burlington Resources Inc v Republic of Ecuador* (ICSID Case No ARB/08/5) Decision on Jurisdiction, 2 June 2010, **RLA-38**, para 338.

⁵⁷⁷ Reply, paras 311-312.

⁵⁷⁸ Rejoinder, para 249 (acknowledging that Bolivian authorities received “several letters [] requesting the Tin Stock to be returned”); *see also* Letter from Colquiri (Mr Capriles) to Ministry of Mining (Mr Pimentel), 3 May 2010, **C-28**; Letter from Ministry of Mining (Mr Pimentel) to EMV (Mr Villavicencio), 5 May 2010, **C-29**; Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel), 10 May 2010, **C-99**; Letter from Colquiri (Mr Capriles) to EMV (Mr

was with Glencore Bermuda and that it concerned violations of the Treaty.⁵⁷⁹ This is simply untrue.

239. As explained at length by Glencore Bermuda, its local subsidiaries alerted Bolivia of the Tin Stock claims just days after the nationalization of the Antimony Smelter. Specifically, in letters sent to the Minister of Mining on 3 and 5 May 2010,⁵⁸⁰ Colquiri requested the return of the Tin Stock, as well as “a meeting as soon as possible” to address the controversy over the seized concentrates.⁵⁸¹ In addition, while attempting to resolve the dispute amicably, Colquiri expressly reserved its rights under Bolivian and international law, on behalf of itself as well as its shareholders, which include Glencore Bermuda.⁵⁸²
240. As explained by Mr Eskdale—a representative of both Glencore Bermuda and Glencore International in the negotiations with the Government⁵⁸³—and undisputed by Bolivia, the return of the Tin Stock was indeed subsequently discussed in the context of the negotiations with the Government concerning the nationalized Assets.⁵⁸⁴

Villavicencio), 19 May 2010, **C-100**; Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel), 7 June 2010, **C-101**.

⁵⁷⁹ Rejoinder, para 610.

⁵⁸⁰ Letter from Colquiri (Mr Capriles) to Minister of Mining (Mr Pimentel), 3 May 2010, **C-28**.

⁵⁸¹ Letter from Colquiri (Mr Hartmann) to the Minister of Mining (Mr Pimentel), 5 May 2010, **C-98** (unofficial English translation from Spanish original).

⁵⁸² Letter from Colquiri (Mr Capriles) to Minister of Mining (Mr Pimentel), 3 May 2010, **C-28**; Letter from Colquiri (Mr Capriles) to the Minister of Mining (Mr Pimentel), 7 June 2010, **C-101**; Letter from Sinchi Wayra (Mr Capriles) to the Minister of Legal Defense (Ms Arismendi), **C-103**.

⁵⁸³ Power of Attorney from Glencore Bermuda, 11 December 2007, **C-90**.

⁵⁸⁴ First Witness Statement of Christopher Eskdale, para 69 (“The talks resumed in July 2010 with the Ministry of Legal Defense essentially acting as a mediator in our conversations with Comibol and the Ministry of Mining. Again, the negotiations focused on reaching a “package” deal, now including: (i) compensation for the two nationalized Smelters; (ii) renegotiation of the mining contracts to shared-risk agreements; and (iii) return of the tax certificates held at the Tin Smelter and the tin concentrates held at the Antimony Smelter at the time of the respective nationalizations.”) (emphasis added).

241. It follows that Bolivia cannot credibly claim that it was not aware that the Tin Stock dispute was with (*inter alia*) Glencore Bermuda and that it concerned violations of the Treaty. It was Bolivia itself that took the position that the Tin Stock formed part of the Antimony Smelter’s inventory and had to be discussed in the context of negotiations over compensation for that nationalization.⁵⁸⁵ Bolivia was well-aware that Glencore Bermuda’s representatives were participating in such negotiations,⁵⁸⁶ and was repeatedly reminded over the years that Bolivia’s actions in relation to the Antimony Smelter—including the taking of the Tin Stock—raised claims under the Treaty.⁵⁸⁷

3. Even if the Tribunal were to determine that Bolivia did not receive notice of the Tin Stock claims (which it did), the lack of notice does not bar jurisdiction

242. Glencore Bermuda has explained that, in the event that the Tribunal were to find that Bolivia did not receive notice of the Tin Stock claims (which it did), this would not bar it from asserting jurisdiction.

243. *First*, additional notice of the Tin Stock claims was not required.⁵⁸⁸ Investment tribunals have indeed recognized that separate notice of each dispute is not necessary in instances where the disputes are related.⁵⁸⁹

⁵⁸⁵ Letter from EMV (Mr Villavicencio) to Colquiri (Mr Capriles), 8 June 2010, **C-102**.

⁵⁸⁶ *See* Reply, para 89; Power of Attorney from Glencore Bermuda, 11 December 2007, **C-90**.

⁵⁸⁷ *See, eg*, Letters from Glencore (Mr Maté and Mr Glasenberg) to the President of Bolivia (Mr Morales) and the Ministry of Mining (Mr Pimentel), 14 May 2010, **C-27**; Letters from Glencore International (Mr Eskdale) to the Attorney General (Mr Arce), the President of Bolivia (Mr Morales), the Vice President of Bolivia (Mr García), the Ministry of the Presidency (Mr Quintana), the Minister of Mining (Mr Navarro), and the President of Comibol (Mr Quispe), 20 May 2015, **C-148**; Letter from Glencore (Mr Eskdale) to the Solicitor General (Mr Arce) and the Minister of Mining and Metallurgy (Mr Navarro), 5 January 2016, **C-41**.

⁵⁸⁸ Reply, para 317.

⁵⁸⁹ *See, eg, Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentine Republic* (ICSID Case No ARB/09/1) Decision on Jurisdiction, 21 December 2012, **CLA-206**, para 125; *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, **CLA-150**, paras 24, 125; *Swisslion DOO Skopje v Former Yugoslav Republic of Macedonia* (ICSID Case No ARB/09/16) Award, 6 July 2012, **CLA-203**, para 138.

244. Bolivia does not dispute this premise, but rather states that the cases cited by Glencore Bermuda concerned “a single sequence of State measures taken regarding one and the same asset.”⁵⁹⁰ It argues that, in the present case, Glencore Bermuda failed to notify Bolivia of a dispute “concerning an entirely different asset from those of its other claims.”⁵⁹¹ This argument, however, fails on its face. Although distinct assets, the Antimony Smelter (an asset over which Bolivia concedes that it received notice) and the Tin Stock were seized at the same time and through the same Government measure. Indeed, over Claimant’s objection, Bolivia repeatedly took the position that the Tin Stock formed part of the Antimony Smelter’s inventory and that its return was subject to discussions over that asset’s nationalization. Bolivia cannot now adopt an entirely different position simply to skirt this Tribunal’s jurisdiction.⁵⁹²
245. *Second*, the majority of tribunals that have considered the adequacy of prior notice and consultation periods have held that the failure to notify does not divest an investment treaty tribunal of its jurisdiction.⁵⁹³ Bolivia’s assertion that such cases address consultation periods rather than notice requirements goes nowhere. As stated above, the requirement of notice is only relevant insofar as it allows for

⁵⁹⁰ Rejoinder, para 620.

⁵⁹¹ *Ibid* (emphasis in original).

⁵⁹² Bolivia’s continued reliance on *Burlington* and *Rurelec* goes nowhere since in both cases the claimants sought to include disputes arising out of a second set of facts. Reply, paras 314-316; *Burlington Resources Inc v Republic of Ecuador* (ICSID Case No ARB/08/5) Decision on Jurisdiction, 2 June 2010, **RLA-38**, paras 307-308, 316; *Guaracachi America, Inc and Rurelec Plc v Plurinational State of Bolivia* (UNCITRAL) Award, 31 January 2014, **CLA-120**, paras 391, 398.

⁵⁹³ *Abaclat and others v Argentine Republic* (ICSID Case No ARB/07/5) Decision on Jurisdiction and Admissibility, 4 August 2011, **CLA-197**, para 564–565; *Alps Finance and Trade AG v Slovak Republic* (UNCITRAL) Award [Redacted], 5 March 2011, **RLA-11**, para 204; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (ICSID Case No ARB/05/22) Award, 24 July 2008, **CLA-78**, para 343; *Bayindir Insaat Turizm Ticaret ve Sanayi AS v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Decision on Jurisdiction, 14 November 2005, **CLA-60**, para 100; *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (ICSID Case No ARB/01/13) Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, **CLA-151**, para 184; *Ronald S Lauder v Czech Republic* (UNCITRAL) Final Award, 3 September 2001, **CLA-147**, paras 187, 190–191; *Link-Trading Joint Stock Company v Department for Customs Control of Republic of Moldova* (UNCITRAL) Award on Jurisdiction, 16 February 2001, **CLA-144**, pp 5-6; *Franz J Sedelmayer v Russian Federation* (SCC) Arbitration Award, 7 July 1998, **CLA-141**, p 86.

consultation to take place.⁵⁹⁴ In any event, in the words of the *Bayindir* tribunal, “the notice requirement does not constitute a prerequisite to jurisdiction.”⁵⁹⁵ As explained by the tribunal in that case, “to require a formal notice would simply mean that [the claimant] would have to file a new request for arbitration and restart the whole proceeding, which would be to no-one’s advantage.”⁵⁹⁶ The same holds true in the present proceedings.

246. Indeed, the UNCITRAL Rules governing this arbitration support such a conclusion. As explained by Glencore Bermuda, Article 22 of the UNCITRAL Rules allows a party to “amend or supplement its claim.”⁵⁹⁷ Glencore Bermuda is not arguing, as Bolivia suggests, that this provision supplants any requirements under the Treaty. Rather, the UNCITRAL Rules further indicate that the notice requirement is not a formal prerequisite to jurisdiction but a practical consideration to be evaluated in light of the specific circumstances of the dispute.

⁵⁹⁴ See Section II.E.1, above.

⁵⁹⁵ *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan* (ICSID Case No ARB/03/29) Decision on Jurisdiction, 14 November 2005, **CLA-60**, para 100.

⁵⁹⁶ *Ibid*, para 100. See also *Alps Finance and Trade AG v Slovak Republic* (UNCITRAL) Award [Redacted], 5 March 2011, **RLA-11**, paras 200, 204; *Ronald S Lauder v Czech Republic* (UNCITRAL) Final Award, 3 September 2001, **CLA-147**, para 190 (“To insist that the arbitration proceedings cannot be commenced until 6 months after the 19 August 1999 Notice of Arbitration would, in the circumstances of this case, amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties.”); *Franz J Sedelmayer v Russian Federation* (SCC) Arbitration Award, 7 July 1998, **CLA-141**, p 86 (concluding that even if the treaty’s provisions regarding pre-arbitration procedure had “not been properly complied with, the consequence would, in the Tribunal’s opinion, be too far-reaching if, solely on this ground, the Tribunal would be prevented from examining the case”); *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (ICSID Case No ARB/01/13) Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, **CLA-151**, para 184 (“Finally, it does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant’s BIT claims to this Tribunal.”); C Schreuer, “Consent to Arbitration” in: P T Muchlinksi, F Ortino and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008) 830, **CLA-239**, p 846 (“It would seem that the question of whether a mandatory waiting period is jurisdictional or procedural is of secondary importance. What matters is whether or not there was a promising opportunity for a settlement. There would be little point in declining jurisdiction and sending the parties back to the negotiating table if these negotiations are obviously futile. Negotiations remain possible while the arbitration proceedings are pending. Even if the institution of arbitration was premature, compelling the claimant to start the proceedings anew would be a highly uneconomical solution.”).

⁵⁹⁷ UNCITRAL Rules, Art 22.

247. Here, Bolivia had actual and repeated notice of Glencore Bermuda’s claims related to the taking of the Tin Stock on 2 May 2010, yet failed to reach any kind of settlement—either in the several years before or following Glencore Bermuda’s Notice of Arbitration.⁵⁹⁸ Its attempt to evade this Tribunal’s jurisdiction should, therefore, be rejected. Forcing Glencore Bermuda back into amicable settlement talks for the Tin Stock claims would indeed be fundamentally at odds with a fair and efficient administration of the proceedings, and should be rejected by the Tribunal.⁵⁹⁹

F. GLENCORE BERMUDA’S CLAIMS ARE BASED ON THE TREATY AND NOT ON CONTRACT

248. In its Statement of Defense, Bolivia argued that the Tribunal lacks jurisdiction because the present dispute relates to claims that “arise out of and concern the validity, compliance with, and fulfilment of the Tin Smelter, Antimony Smelter and Colquiri Lease contracts”⁶⁰⁰ and, therefore, are subject to mandatory ICC arbitration clauses included in such contracts.⁶⁰¹

249. In response, Glencore Bermuda explained that an exclusive forum selection clause in a contract cannot deprive an investment treaty tribunal of jurisdiction over treaty claims.⁶⁰² In its Statement of Claim and Reply, Glencore Bermuda established that its claims directly relate to the Treaty’s provisions prohibiting expropriations without just, effective and prompt compensation,⁶⁰³ as well as the provisions requiring Bolivia to afford fair and equitable treatment,⁶⁰⁴ full

⁵⁹⁸ Glencore Bermuda’s Notice of Arbitration was filed on 19 July 2016.

⁵⁹⁹ UNCITRAL Rules, Art 17 (“The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.”).

⁶⁰⁰ Statement of Defense, para 321.

⁶⁰¹ *Ibid*, Section 4.5.

⁶⁰² Reply, para 322 (and cases cited therein).

⁶⁰³ Statement of Claim, Section V.A; Reply, Section V.A.

⁶⁰⁴ Statement of Claim, Section V.C; Reply, Section V.C.

protection and security and respect of the obligations assumed towards Glencore Bermuda's investments.⁶⁰⁵ Indeed, Bolivia's wrongful acts arise from its exercise of its sovereign power, as acknowledged by Bolivia itself.⁶⁰⁶ Bolivia cannot at the same time argue that its actions amounted to justified exercises of sovereign authority while also claiming that their validity is a contractual question subject to mandatory ICC arbitration.⁶⁰⁷ Bolivia's attempts to recast its internationally wrongful conduct as mere contractual breaches fall flat and must be dismissed by the Tribunal.

250. In its Rejoinder, Bolivia once again claims, albeit half-heartedly, that the dispute falls within the scope of the ICC arbitration clauses included in the Antimony Smelter, Tin Smelter and Colquiri Lease contracts.⁶⁰⁸ In particular, according to Bolivia: (i) a forum selection clause in a contract may deprive a treaty tribunal of jurisdiction over a dispute presented to it;⁶⁰⁹ (ii) the rights asserted by Glencore Bermuda "derive and do not have an independent existence from the Contracts through which the Assets passed into Sánchez de Lozada's ownership;"⁶¹⁰ (iii) the cases relied upon by Claimant are supposedly "circumscribed to the specific circumstances of those cases;"⁶¹¹ and (iv) there is purportedly no contradiction in Bolivia seeking dismissal of Claimant's claims on the basis of contractual arbitration clauses while simultaneously arguing that the actions challenged by Claimant were legitimate exercises of the State's police powers since "Bolivia's arguments on the merits [...] are made in the alternative, presupposing that this

⁶⁰⁵ Statement of Claim, Section V.B; Reply, Section V.B.

⁶⁰⁶ Statement of Defense, Sections 2.6, 6.1.1; Rejoinder, Sections 2.7, 5.1.1.

⁶⁰⁷ See Reply, para 330.

⁶⁰⁸ Rejoinder, Section 4.6.

⁶⁰⁹ *Ibid*, paras 571-576.

⁶¹⁰ *Ibid*, paras 567-570.

⁶¹¹ *Ibid*, paras 577-580.

Tribunal were to dismiss Bolivia’s objection and assert jurisdiction over the dispute.”⁶¹²

251. Bolivia’s arguments are meritless.

1. Contractual forum selection clauses cannot deprive the Tribunal of its jurisdiction over Glencore Bermuda’s treaty claims

252. As demonstrated by Glencore Bermuda, it is a well-established principle of investment law that forum selection clauses contained in contracts do not bar a tribunal’s jurisdiction to hear treaty claims.⁶¹³ Tribunals have repeatedly affirmed this principle.⁶¹⁴ The only pertinent question for purposes of jurisdiction is whether Glencore Bermuda’s allegations, if proved, would amount to a breach of the Treaty’s provisions.⁶¹⁵ And they clearly do.

⁶¹² *Ibid*, para 582.

⁶¹³ Reply para 322.

⁶¹⁴ *SGS Société Générale de Surveillance SA v Republic of Paraguay* (ICSID Case No ARB/07/29) Decision on Jurisdiction, 12 February 2010, **CLA-187**, para 128; *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentine Republic and AWG Group Ltd v Argentine Republic* (ICSID Case No ARB/03/19) Decision on Jurisdiction, 3 August 2006, **CLA-167**, paras 41-45; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No ARB/04/13) Decision on Jurisdiction, 16 June 2006, **CLA-165**, paras 132-133; *Eureko BV v Republic of Poland (Ad Hoc)* Partial Award and Dissenting Opinion, 19 August 2005, **CLA-161**, paras 92-114; *Impregilo SpA v Islamic Republic of Pakistan* (ICSID Case No ARB/03/3) Decision on Jurisdiction, 22 April 2005, **CLA-159**, paras 286-290; *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12) Decision on Jurisdiction, 8 December 2003, **CLA-153**, paras 75-85; *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (ICSID Case No ARB/01/13) Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, **CLA-151**, paras 146-155; *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, **CLA-150**, paras 70-76; *Compañía de Aguas del Aconquija SA and Vivendi Universal* (formerly *Compagnie Générale des Eaux*) *v Argentine Republic* (ICSID Case No ARB/97/3) Decision on Annulment, 3 July 2002, **CLA-37**, para 101; *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12) Decision on Jurisdiction, 8 December 2003, **CLA-153**, para 76; *Helnan International Hotels A/S v Arab Republic of Egypt* (ICSID Case No ARB/05/19) Award, 7 June 2008, **CLA-176**, paras 102-104; *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Decision on Jurisdiction, 3 August 2004, **CLA-51**, para 180.

⁶¹⁵ *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12) Decision on Jurisdiction, 8 December 2003, **CLA-153**, para 76; *Helnan International Hotels A/S v Arab Republic of Egypt* (ICSID Case No ARB/05/19) Award, 7 June 2008, **CLA-176**, paras 102-104; *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Decision on Jurisdiction, 3 August 2004, **CLA-51**, para 180; *SGS Société Générale de Surveillance SA v Republic of Paraguay* (ICSID Case No ARB/07/29) Decision on Jurisdiction, 12 February 2010, **CLA-187**, para 136 (“[T]he

253. Bolivia nonetheless argues that: (i) “a forum selection clause in a contract may in fact deprive a treaty tribunal of jurisdiction over a dispute;”⁶¹⁶ and (ii) that such a proposition is supposedly “stronger in the presence of a clause waiving recourse to remedies under international law.”⁶¹⁷ Bolivia’s claims are incorrect.
254. *First*, Bolivia has not provided any support for its claim that a contractual forum selection clause can bar a tribunal from hearing claims arising under a BIT. Indeed, the only two cases it relies upon—*SGS v Philippines*⁶¹⁸ and *BIVAC v Paraguay*⁶¹⁹—do not support its position.
255. In *SGS v Philippines*, the tribunal clearly distinguished between contractual claims (ie, disagreement over the amount of money owed under a contract) and treaty claims (ie, whether an allegedly unjustified refusal to pay sums owed under a contract violated the applicable BIT’s fair protection and security clause).⁶²⁰ As already explained by Glencore Bermuda⁶²¹ and acknowledged by Bolivia,⁶²² the tribunal in that case concluded that it did have jurisdiction over the latter, explaining that a forum selection clause in a contract could not preclude jurisdiction over treaty claims.⁶²³

threshold at the jurisdictional stage is whether the facts alleged by Claimant could, if proven, make out a claim under the Treaty.”).

⁶¹⁶ Rejoinder, para 571.

⁶¹⁷ *Ibid*, para 575.

⁶¹⁸ *Ibid*, paras 572-573 (citing *SGS Société Générale de Surveillance SA v The Republic of the Philippines* (ICSID Case No ARB/02/6) Decision on Objections to Jurisdiction, 29 January 2004, **RLA-32**).

⁶¹⁹ *Ibid*, para 574 (citing *Bureau Veritas Inspection Valuation Assessment and Control BIVAC BV v The Republic of Paraguay* (ICSID Case No ARB/07/9) Decision on Objections to Jurisdiction, 29 May 2009, **RLA-36**).

⁶²⁰ *SGS Société Générale de Surveillance SA v The Republic of the Philippines* (ICSID Case No ARB/02/6) Decision on Objections to Jurisdiction, 29 January 2004, **RLA-32**, paras 159-162.

⁶²¹ Reply, para 324.

⁶²² *Ibid*, para 324; Rejoinder, para 573.

⁶²³ *SGS Société Générale de Surveillance SA v The Republic of the Philippines* (ICSID Case No ARB/02/6) Decision on Objections to Jurisdiction, 29 January 2004, **RLA-32**, paras 154, 162-163.

256. Likewise, in *BIVAC*, the tribunal asserted jurisdiction over the treaty claims—including an umbrella clause claim—reaffirming that a contractual forum selection clause has no bearing on a tribunal’s authority to decide disputes brought under a treaty:

Paraguay has argued that the existence of an agreed forum for the resolution of disputes under Article 9 of the Contract means that it is to that forum that the dispute should go. We disagree. It is well established that there is a significant distinction to be drawn between a treaty claim and a contract claim, even if there may be a significant interplay between the underlying factual issues.⁶²⁴

257. Bolivia’s argument that “[t]he *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”⁶²⁵ goes nowhere. As explained in Section II.F.2 below, Glencore Bermuda’s claims are not contractual in nature and do not involve factual matters that can only be decided in an ICC arbitration. Rather, in the words of the *BIVAC* tribunal:

The fundamental basis of the claim under [Articles 2(2) and 5 of the Treaty], over which this Tribunal has jurisdiction, turns on the interpretation and application of that provision and alleged acts of [Bolivia] (as “*puissance publique*”), not on the interpretation and application of the Contract as such, although the Contract will necessarily be part of the overall factual and legal matrix.⁶²⁶

258. It follows that Claimant cannot be deemed to have waived the Tribunal’s jurisdiction over claims arising under the Treaty and related to Bolivia’s sovereign conduct by virtue of a contractual forum selection clause.

⁶²⁴ *Bureau Veritas Inspection Valuation Assessment and Control BIVAC BV v The Republic of Paraguay* (ICSID Case No ARB/07/9) Decision on Objections to Jurisdiction, 29 May 2009, **RLA-36**, para 127 (emphasis added) (stating that “[t]he issue of fair and equitable treatment, and related matters, was not one which the parties to the Contract agreed to refer to the exclusive jurisdiction of the [domestic courts]”).

⁶²⁵ Rejoinder, para 574.

⁶²⁶ *Bureau Veritas Inspection Valuation Assessment and Control BIVAC BV v The Republic of Paraguay* (ICSID Case No ARB/07/9) Decision on Objections to Jurisdiction, 29 May 2009, **RLA-36**, para 127.

259. *Second*, Bolivia argues that Glencore Bermuda would have waived its right to be protected under the Treaty because the parties to the contracts “waive[d] all claims through diplomatic channels” in relation to the interpretation and execution of the contracts.⁶²⁷ This argument is also without merit.
260. As an initial matter, Glencore Bermuda is not bringing a claim via diplomatic channels. Any waiver of diplomatic protection by the parties does not affect their rights under applicable investment treaties.⁶²⁸ Bolivia’s argument is therefore simply irrelevant.
261. Moreover, as already demonstrated by Glencore Bermuda, the only two cases Bolivia refers to in support of its position—*Woodruff* and *Dredging*—do not support its claim.⁶²⁹ As previously explained, *Woodruff* did not involve any claims against Venezuela for actions taken in its capacity as a sovereign state. Rather, the case turned on whether Venezuela, after acquiring a railroad company, assumed the company’s obligations to pay outstanding bonds.⁶³⁰ Similarly, in *Dredging*, a case from 1926, the central dispute concerned Mexico’s non-performance of a contract granting dredging rights of a port.⁶³¹ While the claims in *Woodruff* and *Dredging* were purely contractual, Claimant does not allege any contract claims in the present proceedings.⁶³² Most notably, Bolivia ignores that both cases

⁶²⁷ Rejoinder, para 569, footnote 876 (emphasis added) (citing Tin Smelter Purchase Agreement, 17 July 2001 and 4 July 2001, **C-7**, Art 18; Antimony Smelter Purchase Agreement, 11 January 2002, **C-9**, Art 18; Colquiri Lease, 27 April 2000, **C-11**, Art 19).

⁶²⁸ *See, eg, AES Corporation v Argentine Republic* (ICSID Case No ARB/02/17) Decision on Jurisdiction, 26 April 2005, **CLA-235**, paras 98-99; *Mondev International Ltd v United States of America* (ICSID Case No ARB(AF)/99/2) Award, 11 October 2002, **CLA-38**, para 74; *Eudoro Armando Olguín v Republic of Paraguay* (ICSID Case No ARB/98/5) Award, 26 July 2001, **CLA-146**, para 62.

⁶²⁹ Reply, para 326.

⁶³⁰ Opinion of American Commissioner, “Woodruff Case” [1903-1905-IX] Reports of International Arbitral Awards, **RLA-35**, pp 220-222; *See also* Reply, para 326.

⁶³¹ General Claims Commission, “North American Dredging Company of Texas (USA) v United Mexican States” [1926-IV] Reports of International Arbitral Awards, **RLA-34**, p 26.

⁶³² Reply, para 329.

emphasized that a forum selection clause in a contract could not prevent espousal of a claim under international law—which is not what Claimant seeks.⁶³³

262. *Finally*, Bolivia’s vague attempt at distinguishing the cases set forth by Glencore Bermuda⁶³⁴ is also unavailing. With respect to *AWG (Suez)*, *Azurix*, *CMS*, *Eureko*, *Impregilo*, *Vivendi*, *SGS v Paraguay*, *Siemens*, and *Jan de Nul*, Bolivia claims that they are inapposite to the proceedings at hand because the forum selection clauses in those cases were purportedly “narrow in scope” and “did not contain any provisions excluding the recourse to diplomatic protection under international law.”⁶³⁵ Bolivia is wrong. Each of the cases cited by Glencore Bermuda stands for the fundamental principle that a contractual forum selection clause cannot deprive a tribunal of jurisdiction over claims arising under a treaty. The scope of the clause, as well as the exclusion of diplomatic protection, are simply irrelevant to the jurisdictional analysis. In particular:

(a) In *Suez*, the relevant dispute resolution clause “cover[ed] all controversies arising out of the concession contract.”⁶³⁶ The tribunal nonetheless concluded that the clause’s existence did not mean that “the parties have waived ICSID or UNCITRAL jurisdiction” and did not “preclude the Claimants from bringing the present arbitration.”⁶³⁷

⁶³³ Opinion of American Commissioner, “Woodruff Case” [1903-1905-IX] Reports of International Arbitral Awards, **RLA-35**, p 222; General Claims Commission, “North American Dredging Company of Texas (USA) v United Mexican States” [1926-IV] Reports of International Arbitral Awards, **RLA-34**, paras 11, 14 (finding that a forum selection clause in a contract (ie, a Calvo clause) did not prevent claims for “internationally illegal act[s]”); *see also* *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic* (ICSID Case No ARB/97/3) Decision on Annulment, 3 July 2002, **CLA-37**, paras 101-103 (relying on *Woodruff* to state that the existence of an exclusive jurisdiction clause cannot bar application of the treaty when the treaty is the fundamental basis of the claim).

⁶³⁴ Rejoinder, paras 577-580.

⁶³⁵ *Ibid*, para 578.

⁶³⁶ *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentine Republic and AWG Group Ltd v Argentine Republic* (ICSID Case No ARB/03/19) Decision on Jurisdiction, 3 August 2006, **CLA-167**, para 43 (emphasis added).

⁶³⁷ *Ibid*, para 45.

- (b) In *Azurix*, the tribunal observed that, for “purposes of determining jurisdiction,” its task entailed “consider[ing] whether the dispute, as it has been presented by the Claimant, is *prima facie* a dispute arising under the BIT.”⁶³⁸
- (c) In *CMS*, the tribunal expressly held that the dispute resolution clauses were “not a bar to the assertion of jurisdiction by an ICSID tribunal under the Treaty, as the functions of these various instruments are different.”⁶³⁹
- (d) In *Eureko*, the relevant dispute resolution clause referred broadly to “[c]onflicts between Parties arising from the Agreement.”⁶⁴⁰ Again, the tribunal in this case concluded that the tribunal was “require[d]” to consider whether the acts complained of by the claimant amounted to violations of the relevant treaty, regardless of whether the same acts also amounted to contractual breaches.⁶⁴¹
- (e) In *Impregilo*, the tribunal explained that “the fact that a breach may give rise to a contract claim does not mean that it cannot also—and separately—give rise to a treaty claim. Even if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries.”⁶⁴² It went on to conclude that, although there may be “some

⁶³⁸ *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12) Decision on Jurisdiction, 8 December 2003, **CLA-153**, para 76.

⁶³⁹ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, **CLA-150**, para 76 (Bolivia fails to cite to the actual language of the dispute settlement clause in *CMS* (Rejoinder, para 578, footnote 889), and thus its characterization of the clause as narrower in scope than in the current case is baseless).

⁶⁴⁰ *Eureko BV v Republic of Poland (Ad Hoc)* Partial Award and Dissenting Opinion, 19 August 2005, **CLA-161**, para 93.

⁶⁴¹ *Ibid.*, paras 112-114.

⁶⁴² *Impregilo SpA v Islamic Republic of Pakistan* (ICSID Case No ARB/03/3) Decision on Jurisdiction, 22 April 2005, **CLA-159**, para 258.

overlap” between treaty and contract claims, “the two enquiries are fundamentally different.”⁶⁴³

- (f) With respect to *Vivendi*, Bolivia refers to the *ad hoc* committee’s summary of the tribunal’s findings on jurisdiction to argue that the contractual forum selection clause in that case is narrower than the ones at issue in the present dispute.⁶⁴⁴ Bolivia’s argument is not only incorrect, but as already explained by Glencore Bermuda, the committee in that case was clear in its conclusion that the existence of an exclusive jurisdiction clause cannot bar application of the treaty when the treaty is the fundamental basis of the claim.⁶⁴⁵
- (g) In *SGS v Paraguay*, the dispute resolution clause provided that “[a]ny conflict, controversy or claim deriving from or arising in connection with this Agreement, breach, termination or invalidity, shall be submitted to the [local courts].”⁶⁴⁶ The tribunal again referred to “the well-established jurisprudence regarding the distinction between contract claims and treaty claims”⁶⁴⁷ and determined that a contractual forum selection clause could not “divest th[e] Tribunal of its jurisdiction to hear claims for breach of the Treaty.”⁶⁴⁸
- (h) With respect to *Siemens*, Bolivia again attempts to characterize the dispute settlement clause in that case as narrower than the one in the present case,

⁶⁴³ *Ibid*, para 289.

⁶⁴⁴ Rejoinder, para 578, footnote 892 (citing *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic* (ICSID Case No ARB/97/3) Decision on Annulment, 3 July 2002, **CLA-37**, para 14(d)).

⁶⁴⁵ *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic* (ICSID Case No ARB/97/3) Decision on Annulment, 3 July 2002, **CLA-37**, paras 101-103.

⁶⁴⁶ *SGS Société Générale de Surveillance SA v Republic of Paraguay* (ICSID Case No ARB/07/29) Decision on Jurisdiction, 12 February 2010, **CLA-187**, para 34 (emphasis added).

⁶⁴⁷ *Ibid*, para 130.

⁶⁴⁸ *Ibid*, para 138.

without citing to the actual language of the provision.⁶⁴⁹ In any event, there too the tribunal agreed with established precedent and found that the existence of a dispute resolution clause did not bar its jurisdiction since the dispute arose under the treaty.⁶⁵⁰

- (i) With respect to *Jan de Nul*, the tribunal’s characterization of dispute settlement clause is extremely broad, subjecting “all disputes between the Claimants and the [Egyptian State entity]” to Egyptian administrative courts.⁶⁵¹ Nonetheless, the tribunal determined that “the claims brought in this arbitration are separate and juridically distinct from the contract claims asserted before the Egyptian courts” and concluded that they were therefore “not covered by the contract dispute settlement clause.”⁶⁵²
263. Finally, with respect to *SGS v Pakistan*, Bolivia points to the fact that, in that case, “the contract including the forum selection clause preceded the signature of the treaty.”⁶⁵³ However, Bolivia ignores that the tribunal ultimately found this to be irrelevant to its analysis. Indeed, the tribunal extensively addressed the difference between contract and treaty claims, concluding that it had jurisdiction over the latter.⁶⁵⁴

⁶⁴⁹ Rejoinder, para 578, footnote 894 (citing *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Decision on Jurisdiction, 3 August 2004, **CLA-51**, para 174).

⁶⁵⁰ *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) Decision on Jurisdiction, 3 August 2004, **CLA-51**, paras 180-183.

⁶⁵¹ *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* (ICSID Case No ARB/04/13) Decision on Jurisdiction, 16 June 2006, **CLA-165**, para 132.

⁶⁵² *Ibid*, para 133.

⁶⁵³ Rejoinder, para 580.

⁶⁵⁴ *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* (ICSID Case No ARB/01/13) Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, **CLA-151**, paras 146-155 (“We are not persuaded that SGS’s BIT claims against Pakistan are subject to the jurisdiction of the Islamabad arbitrator if only because such claims are based not on the PSI Agreement, but rather allege a cause of action under the BIT. Even if BIT claims were somehow brought before the PSI Agreement arbitrator, and the arbitrator were to take cognizance of them, such filing will not divest the Tribunal of its jurisdiction to determine the Claimant’s BIT claims. We conclude that the Tribunal has jurisdiction to pass upon and determine the claims of violation

2. Glencore Bermuda's claims clearly arise under the Treaty

264. In the present case, Glencore Bermuda has established claims under the Treaty. Specifically, Glencore Bermuda claims that Bolivia violated the Treaty by expropriating Glencore Bermuda's investments without providing due process or just compensation and by failing to afford its investments full protection and security and fair and equitable treatment. Glencore Bermuda has not raised any breach of contract claims.
265. Despite the above, Bolivia continues to argue that Claimant's claims "concern, directly or indirectly, the validity, compliance with and fulfilment of the terms of the Contracts"⁶⁵⁵ and that Claimant's rights supposedly "derive and do not have an independent existence from the Contracts."⁶⁵⁶ According to Bolivia, the Tribunal is not permitted to "engage directly or indirectly with the validity, interpretation, scope and/or fulfilment of the Contracts" and could instead only 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."⁶⁵⁷
266. Bolivia's position distorts Claimant's allegations as well as the applicable law.
267. It is apparent that Glencore Bermuda's claims have nothing to do with the performance or breach of the contracts. Rather, they relate exclusively to Bolivia's sovereign conduct. Indeed: (i) the expropriations were announced by President Morales,⁶⁵⁸ Presidency Minister Coca,⁶⁵⁹ and Vice President Álvaro García Linera;⁶⁶⁰ (ii) Bolivia took physical control of the Tin Smelter, the

of provisions of the Swiss-Pakistan BIT raised by the Claimant. We do not consider that that jurisdiction would to any degree be shared by the PSI Agreement arbitrator.").

⁶⁵⁵ Rejoinder, para 567.

⁶⁵⁶ *Ibid.*

⁶⁵⁷ *Ibid.*, para 570.

⁶⁵⁸ Statement of Claim, paras 65, 148; "Evo Morales anuncia más nacionalizaciones para este año en Bolivia," *ABC*, 22 January 2007, **C-19**; First Witness Statement of Christopher Eskdale, para 42.

⁶⁵⁹ Statement of Claim, paras 78-79.

⁶⁶⁰ First Witness Statement of Christopher Eskdale, para 98.

- Antimony Smelter and the Tin Stock through the use of its police and armed forces;⁶⁶¹ (iii) Bolivia issued three separate Supreme Decrees through which the Tin Smelter, the Antimony Smelter and the Colquiri Lease were nationalized;⁶⁶² and (iv) Bolivia itself has repeatedly referred to the “nationalization” of the Assets.⁶⁶³
268. Bolivia acknowledges as much. In arguing that its taking of Glencore Bermuda’s investments should not be deemed expropriatory, Bolivia describes its actions as legitimate “reversions” carried out for a public purpose and in “valid exercise[] of its police powers, taken to enforce law, public order, and safety within its territory.”⁶⁶⁴
269. The question before the Tribunal, therefore, is whether Bolivia’s exercise of its sovereign power was legitimate or whether it ran afoul of its obligations under the Treaty and international law, as argued by Claimant. To decide this question, the Tribunal need not “engage directly or indirectly with the validity, interpretation, scope and/or fulfilment of the Contracts,” as incorrectly argued by Bolivia.
270. Indeed, Bolivia does not identify any fact that would need to be exclusively determined by an ICC tribunal. Investment tribunals have repeatedly and consistently recognized that “even if there may be a significant interplay between the underlying factual issues,”⁶⁶⁵ there is a fundamental distinction between treaty and contract claims, such that an exclusive forum selection clause in a contract

⁶⁶¹ Photos of the Tin Smelter Nationalization, 9 February 2017, **C-70**, pp 2-6.

⁶⁶² Tin Smelter Nationalization Decree, 7 February 2007, **C-20**; Antimony Smelter Nationalization Decree, 1 May 2010, **C-26**; Colquiri Mine Nationalization Decree, 20 June 2012, **C-39**.

⁶⁶³ Reply, Sections II.D.1-II.D.2; *see also* “Anuncian la nacionalización de la fundición de Vinto,” *El País*, 9 February 2007, **C-226**; Colquiri Mine Nationalization Decree, 20 June 2012, **C-39**, Arts 1.III, 3.III.

⁶⁶⁴ *See, eg.*, Statement of Defense, para 444.

⁶⁶⁵ *Bureau Veritas Inspection Valuation Assessment and Control BIVAC BV v The Republic of Paraguay* (ICSID Case No ARB/07/9) Decision on Objections to Jurisdiction, 29 May 2009, **RLA-36**, para 127.

does not bar a tribunal’s jurisdiction over the former.⁶⁶⁶ In fact, tribunals can, and do, interpret contracts when necessary for a finding under the treaty, and they have the jurisdiction to do so.⁶⁶⁷

271. With respect to the Tin Smelter claim, Bolivia wrongly asserts that the present Tribunal is tasked with determining whether “the privatization was justified,” which concerns “the validity of the corresponding contract.”⁶⁶⁸ Contrary to Bolivia’s assertions, however, the question before the Tribunal is not whether the privatization was justified, but whether Bolivia’s sovereign decision to “revert” Glencore Bermuda’s asset was lawful. Notably, in defending its “reversion,” Bolivia itself does not put forth any contract-based arguments.
272. With regards to the Antimony Smelter and Colquiri Lease claims, again what is at issue is the legitimacy of Bolivia’s exercise of its sovereign authority, through

⁶⁶⁶ See, eg, *Impregilo SpA v Islamic Republic of Pakistan* (ICSID Case No ARB/03/3) Decision on Jurisdiction, 22 April 2005, **CLA-159**, para 289; *Eureko BV v Republic of Poland (Ad Hoc)* Partial Award and Dissenting Opinion, 19 August 2005, **CLA-161**, paras 112-114.

⁶⁶⁷ See, eg, *Georg Gavrilović and Gavrilović doo v Republic of Croatia* (ICSID Case No ARB/12/39) Award, 26 July 2018, **CLA-250**, paras 421-422.

If, in order to assess whether there was a treaty breach, the Tribunal must first determine whether or not the relevant contractual obligations have been observed, then the Tribunal may hear evidence and make that determination. That some of the facts underlying the umbrella clause claim could also be the basis for a separate breach of contract claim—in another forum, on another day—is immaterial. The Claimants’ umbrella clause claim requires a determination of whether the Respondent breached the BIT. Because that inquiry, in turn, requires a determination of whether or not the Respondent observed its contractual obligations, the Tribunal should and will proceed to make that determination.

While a contractual forum selection clause may refer contract disputes to another forum that will decide whether a breach of contract occurred, with the consequences that may follow under the applicable law, this Tribunal must decide whether or not contractual obligations have been observed and, as a consequence, whether or not there has been a violation of the umbrella clause. The Tribunal would not fulfil its mandate if it refused to do so.

See also *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (ICSID Case No ARB/97/3) Award, 20 August 2007, **CLA-70**, para 7.3.9; *Sempra Energy International v Argentine Republic* (ICSID Case No ARB/02/16) Decision on Objections to Jurisdiction, 11 May 2005, **CLA-236**, para 100; *Burlington Resources Inc v Republic of Ecuador* (ICSID Case No ARB/08/5) Decision on Jurisdiction, 2 June 2010, **RLA-38**, paras 181-189.

⁶⁶⁸ Rejoinder, para 567.

which it deprived Glencore Bermuda of the value of its investments. To the extent that these claims raise issues of contract—ie, whether a production obligation existed under the Antimony Smelter Purchase Agreement and Comibol’s duty to protect the Colquiri Mine from outside interference—these are ancillary to Glencore Bermuda’s claims under the Treaty, including under the Treaty’s umbrella clause,⁶⁶⁹ which the Tribunal has jurisdiction to address.

273. Lastly, Bolivia’s contention that it should be allowed to argue fundamentally inconsistent positions “in the alternative” belies the complete lack of basis to its claims. Bolivia cannot simultaneously argue that: (i) the disputes were commercial, in order to avoid this Tribunal’s jurisdiction; while stating that (ii) its actions were valid exercises of its sovereign authority, in order to escape liability. The fact that it has chosen to do so underscores the fundamental lack of credibility of its claims, which should, therefore, be dismissed.

G.

[REDACTED]

274. Notwithstanding the ample opportunity it has had to develop its preliminary objections to the jurisdiction of the Tribunal and the admissibility of Claimant’s claims in prior pleadings, Bolivia raises a new objection in its Rejoinder [REDACTED]

[REDACTED]

⁶⁶⁹ Treaty, C-1, Art 2(2) (stating that “Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.”).

⁶⁷⁰ [REDACTED]

⁶⁷¹ [REDACTED]

⁶⁷² [REDACTED]

[REDACTED]

275. As explained below, this new objection is not only untimely but also meritless.

1. Bolivia’s new objection is inadmissible because it is untimely

276. Article 23(2) of the UNCITRAL Rules is clear: “A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence [...] The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.” In this case, the Tribunal should reject Bolivia’s new preliminary objection because it was not raised as such in its Statement of Defense, and Bolivia has not provided a plausible justification for its delay in raising it.

277. [REDACTED]

278. Thus, Bolivia chose not to raise the preliminary objection it is now seeking to make. At a minimum, Bolivia knew enough, at the time of drafting its Statement of Defense, to expressly reserve its right to make this preliminary objection once

673 [REDACTED]
674 [REDACTED]
675 [REDACTED]
676 [REDACTED]

it received additional information or evidence. It did not. This should be the end of the matter—Bolivia’s new preliminary objection should be rejected without further examination.

2. [REDACTED]

279. Bolivia argues that [REDACTED]

280. This is: (i) irrelevant to the Tribunal’s jurisdiction and to the admissibility of Claimant’s claims; and (ii) incorrect, as a matter of both fact and law.

281. [REDACTED]

677 [REDACTED]

678 [REDACTED]

679 [REDACTED]

680 [REDACTED]

681 [REDACTED]

[REDACTED]

282. Unable to find any support for its position in the text of the Treaty, Bolivia argues

[REDACTED]

283. This reasoning is misguided. The Vienna Convention does not permit speculation on the presumed intentions of the treaty parties in the absence of an adequate textual basis evidencing such intention(s). As the tribunal in *Ping An* recalled:

Article 31 of the Vienna Convention reflects the primacy of the text as the basis for the interpretation of a treaty, while also giving a role to extrinsic evidence of the circumstances of its conclusion and to the objects and purposes of a treaty as a means of interpretation. [...]

The ordinary meaning approach has been adopted in many investor-State arbitrations to confirm that the presumed intentions of the parties should not be used to override the explicit language of a BIT or the override the agreed-upon framework, or be used as an independent basis of interpretation.⁶⁸⁶

682 [REDACTED]

683 [REDACTED]

684 [REDACTED]

685 [REDACTED]

686 *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v Kingdom of Belgium* (ICSID Case No ARB/12/29) Award, 30 April 2015, **CLA-242**, paras 165-166 (internal citations omitted, emphases added).

Thus, where the text of the Treaty does not provide any support for Bolivia's interpretation (as is clearly the case here), Bolivia's speculation regarding the presumed intentions of the Contracting Parties, which is devoid of any factual support, cannot serve as an independent basis of interpretation.

284. *Second*, it is in any event wrong, as a matter of law and fact, to suggest that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

285. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

286. [REDACTED]

687 [REDACTED]

688 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[Redacted]

287. [Redacted]

288. [Redacted]

689 [Redacted]

690 [Redacted]

691 [Redacted]

692 [Redacted]

[REDACTED]

3. [REDACTED]

289. Bolivia argues [REDACTED]

693 [REDACTED]

694 [REDACTED]

695 [REDACTED]

696 [REDACTED]

697 [REDACTED]

698 [REDACTED]

699 [REDACTED]

290. Bolivia's arguments are based on an incorrect understanding of the facts and legal principles at issue here.

291. [REDACTED]

292. [REDACTED]

700 [REDACTED]

701 [REDACTED]

702 [REDACTED]

703 [REDACTED]

704 [REDACTED]

[Redacted]

293.

[Redacted]

294.

[Redacted]

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[Redacted]

706

[Redacted]

[Redacted text block]

[Redacted text block]

295. [Redacted text line]

[Redacted text block]

296. [Redacted text line]

[Redacted text block]

297. [Redacted text line]

707 [Redacted text line]

708 [Redacted text line]

709 [Redacted text line]

298.

[REDACTED]

[REDACTED]

299.

[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED]

300. [REDACTED]

301. [REDACTED]

302. A *contrario* reasoning cannot cure the critical flaw in Bolivia’s theory: the absence of *any* textual support for Bolivia’s position in the Treaty. As Judge Abdulqawi Yusuf, the Vice-President of the ICJ, and his Associate Legal Officer, Daniel Peat, have explained in a recent article, *a contrario* reasoning:

[I]s always used as an auxiliary method of interpretation by the Court [the International Court of Justice] – it is never in and of itself determinative of a particular interpretation. Instead, the Court uses *a contrario* reasoning in one of two ways: either it confirms

716 [REDACTED]

717 [REDACTED]

718 [REDACTED]

719 [REDACTED]

an interpretation that is made on other grounds (such as ordinary meaning), or it is a factor that is taken into account alongside other considerations (such as context and or object and purpose) that advocate in favour of taking a certain approach.⁷²⁰

303. The Tribunal should reject Bolivia’s attempted departure from this international law principle of interpretation, as it places speculation at the core of treaty interpretation.

304. [REDACTED]

305. [REDACTED]

⁷²⁰ A Yusuf and D Peat, “A *Contrario* Interpretation in the Jurisprudence of the International Court of Justice,” (2017) 3(1) CJCCL 1, **CLA-246**, p 15. *See, eg, Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua/Colombia)* (Preliminary Objections) [2016] ICJ Reports 36, **CLA-243**, para 37 (“[A *contrario* interpretation] is only warranted, however, when it is appropriate in light of the text of the all the provisions concerned, their context and the object and purpose of the treaty. Moreover, even where an *a contrario* interpretation is justified, it is important to determine precisely what inference its application requires in any given case.”). *See also Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua/Colombia)* (Preliminary Objections) [2016] ICJ Reports 36, **CLA-243**, para 43 (“The Court has recognized that, in general, the interpretation of a treaty should seek to give effect to every term in that treaty and that no provision should be interpreted in a way that renders it devoid of purport or effect [...] There are occasions, however, when the parties to a treaty adopt a provision for the avoidance of doubt even if such a provision is not strictly necessary.”); *In re Interpretation and Application of the Provisions of Article 78, para 7, of the Peace Treaty to the Ethiopian Territory*, French-Italian Conciliation Commission, Decision No 201, XIII UNRIAA 636, 16 March 1956, XIII UNRIAA 636, **CLA-233**, pp 647, 649, 651.

721. [REDACTED]

722. [REDACTED]

723. [REDACTED]

724. [REDACTED]

[Redacted text block]

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[Redacted text block]

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[Redacted text block]

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[Redacted text block]

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[Redacted text block]

307. [REDACTED]

III. REQUEST FOR RELIEF

308. On the basis of the foregoing, without limitation and reserving Glencore Bermuda’s right to supplement these prayers for relief, including without limitation in the light of further action which may be taken by Bolivia, Glencore Bermuda respectfully requests that the Tribunal:

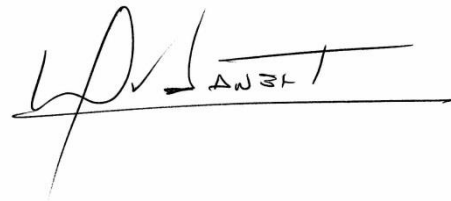
- (a) REJECT the jurisdictional and admissibility objections raised by Bolivia;
- (b) DECLARE that it has jurisdiction over the entirety of Glencore Bermuda’s claim, and that it is admissible;
- (c) GRANT any other relief it deems appropriate;
- (d) ORDER Bolivia to pay all costs resulting from the processing of its objections, including the fees and expenses of the Tribunal, the administrative costs of the PCA, as well as the fees and expenses related to the legal representation of Glencore Bermuda, including interest; and
- (e) ORDER Bolivia to pay all costs incurred by Glencore Bermuda resulting from the Section 1782 proceedings brought by Bolivia in the United States District Court for the Eastern District of Virginia.

Respectfully submitted on 22 January 2019



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FERRERE

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On behalf of the Claimant