International Centre for Settlement of Investment Disputes

Quiborax S.A.

and

Non Metallic Minerals S.A.

Claimants

v.

Plurinational State of Bolivia

Respondent

ICSID Case No. ARB/06/2

AWARD

Rendered by an Arbitral Tribunal composed of:

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

Secretary of the Tribunal
Natalí Sequeira

Assistant to the Tribunal
Leonor Díaz-Córdova

Date of Dispatch to the Parties: 16 September 2015

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

BIT or Treaty	Bilateral Investment Treaty; specifically "Agreement between the Republic of Bolivia and the Republic of Chile on the Encouragement and Reciprocal Protection of Investments," signed on 22 September 1994 and in force since 21 July 1999
CCSS	Claimants' Closing Statement Slides for the hearing on merits of 28-30 October 2013
CDJ	Claimants' Request for Declaratory Judgment of 27 May 2011
Claimants	Quiborax S.A. ("Quiborax") and Non-Metallic Minerals S.A. ("NMM")
COSS	Claimants' Opening Statement Slides for the hearing on merits of 28-30 October 2013
Counter-Mem.	Respondent's Counter-Memorial of 10 May 2013
Exh. CD-	Claimants' Exhibits
Exh. CL-	Claimants' Legal Exhibits
Exh. CPM-	Claimants' Exhibits – Provisional Measures
Exh. R-	Respondent's Exhibits
Exh. RL-	Respondent's Legal Exhibits
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC Articles	International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with comments*, November 2001, Supplement No. 10 (A/56/10), chap. IV.E.1
Mem.	Claimants' Memorial of 14 September 2009
MT	Metric tonnes
NMM	Non-Metallic Minerals S.A.
NoA	Claimants' Notice of Arbitration of 4 October 2005
PCIJ	Permanent Court of International Justice
PO	Procedural Order
Quiborax	Quiborax S.A.
RCSS	Respondent's Closing Statements Slides for the hearing on merits of 28-30 October 2013

RDJ	Respondent's Reply to Claimants' Request for Declaratory Judgment of 10 June 2011
Rejoinder	Respondent's Rejoinder on the Merits of 11 October 2013
Reply	Claimants' Reply on the Merits of 13 August 2013
Respondent	Plurinational State of Bolivia ("Bolivia")
Río Grande or RIGSSA	Compañía Minera Río Grande Sur S.A.
ROSS	Respondent's Opening Statement Slides for the hearing on merits of 28-30 October 2013
Tr. [page:line]	Transcript of the hearing on merits of 28-30 October 2013
n.	Footnote
p.	Page
¶	Paragraph
§	Section

I. INTRODUCTION

A. The Parties

1. The Claimants

1. The Claimants are Quiborax S.A. ("Quiborax"), a Chilean mining company, and Non-Metallic Minerals S.A. ("NMM"), a Bolivian mining company (collectively, the "Claimants").

2. Quiborax, a corporation created under the laws of Chile, is a mining company dedicated in particular to the extraction of ulexite, a non metallic mineral, and to the manufacture of products derived from this mineral, including boric acid. It operates in the northern part of Chile, near the border with Bolivia, and it is mostly owned by members of the Fosk family. NMM, a corporation created under the laws of Bolivia, is a mining company that operated in the Río Grande delta in Bolivia. Quiborax owns 50.995% of NMM.

3. The Claimants are represented in this arbitration by Mr. Andrés Jana, Ms. Johanna Klein Kranenberg and Mr. Rodrigo Gil of Bofill Mir & Alvarez Jana, whose contact details are as follows:

Mr. Andrés Jana Linerzky
Ms. Johanna Klein Kranenberg
Mr. Rodrigo Gil

Bofill Mir & Álvarez Jana
Av. Andrés Bello 2711, Piso 8
Torre Costanera – Las Condes
7550611 Santiago
Chile

Email: QUIBORAX-CIADI@bmaj.cl

2. The Respondent

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

5. By letter dated 3 April 2007, the Respondent designated Mr. Paul S. Reichler and the law firm Foley Hoag LLP as external counsel in these proceedings. By letter of 5 January 2010, Foley Hoag LLP announced that as of that date it would no longer

serve as counsel for the Respondent. By letter dated 18 March 2010, the Respondent informed the Tribunal that it appointed Prof. Pierre Mayer, Dr. Eduardo Silva Romero and Mr. José Manuel García Represa of the law firm Dechert (Paris) LLP, as external counsel in this case. On 7 December 2012, the Respondent updated the contact information of the government officials acting in this case and confirmed that Dechert (Paris) continued to act as external counsel. On 29 March 2013, Dechert updated the contact information of the government officials and Dechert's counsel (in Paris and Washington DC) representing the Respondent. On 12 September 2013, Dechert informed the Tribunal that in view that its contract expired on 30 June 2013, it would no longer serve as counsel for the Respondent. Dechert attached a letter of the same date from the then Attorney General, Mr. Hugo Raúl Montero Lara, authorizing Dechert's communication. By letter of September 30, 2013, the Respondent informed the Tribunal that it appointed Mr. Diego Brian Gosis of the law firm Gomm & Smith, P.A. (Miami) as its external counsel. By email of 23 October 2013, the Centre informed both parties that at the request of the Respondent, the email addresses of Bolivia's external counsel had been updated. Until 21 March 2014, the Respondent was represented in this arbitration by Mr. Hugo Raúl Montero Lara, Attorney General of Bolivia, Ms. Elizabeth Arismendi, Deputy Defense Attorney of Bolivia, Mr. Edgar Pozo, General Director of Investment Litigation and Arbitration Defense and Mr. Leonardo Anaya (Attorney General's office), and by Mr. Diego Gosis of Gomm & Smith P.A.

6. On 21 March 2014, Bolivia submitted a letter to ICSID informing that Dr. Héctor Arce Zaconeta and Dr. Pablo Menacho Diederich had been appointed Attorney General and Deputy Attorney of Defense and Legal Representation of the State, respectively. By emails of 3 and 4 June 2014, the Respondent updated the contact information of the government officials and its external counsel. On 13 March 2015 and 30 May 2015, counsel for the Respondent updated its contact information. On 8 June 2015 the Respondent submitted an email updating the contact information of the government officials acting in this case (further clarified on 16 June 2015). On 7 September 2015, the Respondent informed that as of that date all communications concerning these proceeding should be only notified to the following persons:

Dr. Hector Arce Zaconeta, Attorney General of Bolivia (*Procurador General del Estado Plurinacional de Bolivia*)
Dr. Pablo Menacho Diederich, Deputy Attorney for the Defense and Legal Representation of the State (*Sub-Procurador de Defensa y Representación Legal del Estado*)
Dr. Franz Zubieta Mariscal, General Director of Arbitral and Jurisdictional Defense (Director General de Defensa Arbitral y Jurisdiccional)
Dra. Angélica Rocha Ponce, General Director for Negotiation and Conciliation (*Directora General de Negociación y Conciliación*)

Procuraduría General del Estado
Calle Martín Cárdenas,
No. 109 entre Calles Noel Kenf y Calle 1
El Alto, La Paz
Bolivia

Emails: harce@procuraduria.gob.bo
pmenacho@procuraduria.gob.bo
fzubieta@procuraduria.gob.bo
arocha@procuraduria.gob.bo

II. THE FACTS[1]

7. The Salar de Uyuni (also referred to as the "Gran Salar de Uyuni") is the largest dry salt lake in the world. It is located in the Bolivian region of Potosí and is a fiscal reserve since 1965 (*Decreto Supremo*, "D.S." or "Decree" 7,150).[2] According to the Mining Code issued on the same year, mining operations in a fiscal reserve area could only be authorized through a special legal provision.[3]

8. In 1985, Law 719 created the *Complejo Industrial de los Recursos Evaporíticos del Salar de Uyuni* ("CIRESU"),[4] the only entity authorized to manage the operations of the mineral resources of the Salar de Uyuni's basin. On 3 April 1992, CIRESU entered into a mining concession lease agreement with *Sociedad Colectiva Minera Río Grande* ("SOCOMIRG"). An addendum was signed in 1997.[5]

[1] *See also* Decision on Jurisdiction of 27 September 2012 ("Decision on Jurisdiction"), ¶¶ 6-18.

[2] Exh. R-232. In 1986, Decree 21,260 declared the Salar de Uyuni's basin a fiscal reserve as well and established 13 coordinates for its delimitation (Exh. R-235).

[3] Article 20 (Exh. R-233).

[4] Exh. R-234.

[5] Mentioned in Decree 27,548 (Exh. CD-41).

9. In 1993, Italian companies Aquater S.p.a. and EniChem S.p.a., commissioned by the Bolivian government and sponsored by Italy, carried out a study of the mineral reserves of a part of the fiscal reserve of the Salar de Uyuni.[6] The results of this study were presented in a report to the Ministry of Mining in May 1993, under the title *Informe Final de Explotación de Minerales Metálicos y no Metálicos en el Sudoeste de Bolivia*.[7]

10. In 1998, Bolivia enacted Law 1.854 (also known as *Ley Valda*), which reduced the fiscal reserve area of the Salar de Uyuni. Its sole article reads as follows:

> The fiscal reserve of the *Gran Salar de Uyuni* is hereby declared, comprised within the perimeter that corresponds to the salt crust.[8]

11. The *Servicio Nacional de Geología y Minería* ("SERGEOMIN") determined the perimeter corresponding to the salt crust under a system of coordinates in 2002.[9]

12. As a result of the *Ley Valda*, 43 new mining concessions were requested between 1998 and 2004 in an area that had previously been a fiscal reserve. Seven of these concessions[10] were granted to the Bolivian company *Compañía Minera Río Grande Sur S.A*. ("RIGSSA"), owned by Bolivian businessmen (and former officials of the Ministry of Mining) Messrs. David Moscoso and Álvaro Ugalde.

13. The granting of these concessions caused discomfort to the local communities and in 2001 and 2003 Potosí representatives presented bills to Congress to reverse the *Ley Valda* and revert the mining concessions to the Bolivian State.[11]

14. In 1999, Messrs. David Moscoso and Álvaro Ugalde approached Mr. Carlos Shuffer at Quiborax to inform him of a business project involving mining concessions in the Río Grande area.[12] As a consequence of negotiations between Quiborax and RIGSSA, both companies entered into an Exclusive Supply Contract for fifteen years

---

[6] The sampled surface was 21.6 km.

[7] Exh. R-236. This report will be discussed in detail in Section VII below, when addressing the Claimants' claim for reparation and in particular the estimates of proven and probable reserves of the concessions.

[8] Exh. CD-7, Tribunal's translation. The original states: “Se declara la reserva fiscal del Gran Salar de Uyuni, comprendida en el perímetro que corresponde a la costra salina.”

[9] Decree 26,574 (Exh. R-239).

[10] Doña Juanita, Borateras de Cuevitas, Tete, Basilea, Inglaterra, Don David and Sur.

[11] Exhs. CD-28 and CD-38.

[12] Shuffer WS, ¶¶ 16, 18; Fosk WS, ¶ 31.

on 12 January 2001.[13] This contract gave Quiborax the right of first refusal regarding the concessions, should RIGSSA decide to sell them.

15. On 12 March 2001, Mr. Álvaro Ugalde, his brother Gonzalo Ugalde and Quiborax executed a stock purchase agreement regarding shares in RIGSSA.[14] The shares were, however, never transferred and, instead, Quiborax decided to create a new Bolivian company (Non-Metallic Minerals S.A., "NMM") that would act as its investment vehicle.

16. In June 2001, Quiborax contacted Mr. Fernando Rojas, a partner in the law firm C., R. & F. Rojas Abogados, who was retained as Quiborax's legal counsel in Bolivia shortly afterwards. A month later, NMM was constituted by Mr. Fernando Rojas and two of his employees, Ms. Dolly Paredes and Ms. Gilka Salas.[15]

17. On 3 August 2001, RIGSSA contributed seven mining concessions to NMM, with a resulting capital increase equivalent to 26,680 shares.[16] RIGSSA thus became the majority shareholder of NMM.

18. Later that month, RIGSSA transferred all of its newly acquired shares in NMM to Quiborax, 13,103 of which were transferred in turn by Quiborax to Mr. David Moscoso on 4 September 2001. On that same day, Quiborax transferred to Mr. David Moscoso an additional 267 shares, which were immediately sold back to Quiborax for US$ 9,985. On 10 September 2001, Mr. Fernando Rojas and Ms. Dolly Paredes transferred their shares in NMM (58 and one, respectively) to Quiborax, while Ms. Gilka Salas transferred her sole share to Mr. Allan Fosk. As a consequence, the definitive shareholder configuration of NMM was set.[17] Three days later, the NMM Board of Directors was elected, with Mr. David Moscoso as Chairman, Mr. Allan Fosk as Vice Chairman and Mr. Isaac Frenkel as Secretary.[18] The corporate structure of Quiborax's investment vehicle in Bolivia was therefore concluded by 13 September 2001, and did not change until the events giving rise to this dispute.[19] The

[13] Exh. CD-16.

[14] Exh. CD-17.

[15] Exh. CD-23.

[16] Exh. CD-25

[17] Exh. CD-24.

[18] Exh. CD-26.

[19] The Tribunal came to this conclusion during the jurisdictional phase. *See* Decision on Jurisdiction, ¶ 192.

shareholders of NMM are Quiborax (50.995%), Mr. David Moscoso (49%) and Mr. Allan Fosk (0.005%).

19. NMM obtained four additional mining concessions, two on 18 April 2002,[20] and two additional ones on 20 July 2003,[21] ultimately owning a total of eleven.[22]

20. On 9 December 2003, President Mesa issued Law 2.564, which abrogated the *Ley Valda* and Decree 26,574 (by which the perimeter established in the *Ley Valda* was determined) and redefined the perimeter of the fiscal reserve of the Salar de Uyuni.[23]

21. In addition, Article 3 of Law 2,564 enabled the Executive power to annul the mining concessions granted under the *Ley Valda*, as follows:

> The Executive Power is authorized, after the evaluation of audits, technical, legal, economic and financial, tax, social and labor legislation and environmental and ecological preservation, to declare null the concessionaires' mining rights that are liable to sanctions provided by the Laws and regulations in force, within a deadline of 60 days calculated from the enactment of this Law, with the consequent recovery of such concessions and non-metallic resources originally belonging to the State.[24]

22. The Parties dispute the political context in which these events unfolded. According to the Claimants, "Law 2,564 was adopted in the midst of intense social and political events that shook Bolivia during the years 2003 and 2004. The political instability in the country had been triggered by the Government's public energy policies and, in particular, the possibility to export Bolivian gas through Chilean pipelines."[25] The Claimants assert that the discussions regarding the construction of a pipeline to transport Bolivian gas over Chilean territory to a Chilean port was a highly controversial topic: "the possibility that Chile might benefit from the Bolivian gas reserves gave rise to heated protests" under the slogan "*gas por mar*," which referred

---

[20] Pococho and La Negra (Exhs. CD-32 and CD-31).

[21] Cancha I and Cancha II (Exhs. CD-36 and CD-37).

[22] Exhs. R-244 to R-254.

[23] Exh. CD-39.

[24] Exh. CD-39, Tribunal's translation. The original Spanish text reads as follows:

> Facultase al Poder Ejecutivo, luego de la evaluación de auditorías, técnica, jurídico legal, económico financiera, regalitario – tributaria, legislación sociolaboral y preservación ecológica y medioambiental, a declarar la nulidad de los derechos concesionarios mineros que, sean pasibles a sanciones establecidas por las Leyes y disposiciones vigentes, en un plazo perentorio de 60 días a computar a partir de la promulgación de la presente Ley, con la consiguiente recuperación de tales concesiones y recursos no metálicos a propiedad originaria del Estado.

[25] Reply, ¶ 123.

to the historical controversy between the two countries since Bolivia's landlocked situation following the Pacific War (*Guerra del Pacífico*) in the late nineteenth century.[26] As a consequence of the strong protests, on 18 October 2003, Bolivian President Sánchez de Losada was forced to resign and leave the country. Vice-President Carlos Mesa stepped into power and submitted the construction of the pipeline to a popular vote in July 2004.[27]

23. The Respondent contests the Claimants' version of the facts, alleging that it is fraught with chronological errors. According to Bolivia, both the protests deriving from the "*gas por mar*" movement and the referendum took place in July 2004, long after the abolition of the *Ley Valda*, which had given rise to protests since the end of the 90s.[28]

24. Following the promulgation of Law 2,564, Decree 27,326 specified the modalities of the audits mentioned in that law and ordered the corresponding national ministries and Potosí department to execute the audits.[29]

25. From February 2004 onwards, several audits of various mining concessions in the Salar de Uyuni took place, including the following:

    a. In February 2004, SERGEOMIN and the *Corporación Minera de Bolivia* ("COMIBOL") submitted their technical audit on a number of the concessions in the Río Grande delta, owned by companies Copla and NMM and mining cooperative Socomin. Their conclusions included the following:

> They do not have a Geological mining study and therefore [neither a] quantification of reserves that allows to plan an exploitation method in large volumes.
>
> There is no rational and systematic administration from a technical, economic and social standpoint by the operating companies.
>
> The exploitation method applied continues to be manual with a slight tendency towards semi-mechanization.
>
> The mining companies and cooperatives that are in the process of exploiting ulexite such as: Copla S.A., Non Metallic Minerals S.A. and the Mining Cooperative "Socomin" must work in a rational and systematic fashion in all their exploitation activities.[30]

[26] Reply, ¶ 124.

[27] Reply, ¶¶ 124-125.

[28] Counter-Mem., ¶ 47, footnote 46.

[29] Exh. CD-40.

[30] Exh. R-261, Tribunal's translation.

b. In March 2004, the Environmental Directorate of the Ministry of Sustainable Development finalized its environmental audit after an on site inspection of companies NMM, Copla, Tecno Química and Socomin. While the document submitted by the Respondent seems to be incomplete, the conclusions are available and read as follows:

> The referred companies at the time of the inspection are operating in the Río Grande Cantón Nor Lipez Province of the Department of Potosí without the approved environmental documentation as stipulated by Environmental Law No. 1333 and its Regulations.
>
> The operations of [NMM and other companies] at the time of inspection are operating, regardless of the Prefectural Resolution of the Department of Potosí that determines the suspension of operations.[31]

c. In April 2004, the Prefecture of the Department of Potosí completed its legal audit on the concessions granted under the *Ley Valda*. Again, the document submitted by the Respondent appears incomplete, but the last pages provide the following:

> In the case before us, Moscoso Ruiz or the Mining Company Rio Grande Sur S.A. have not complied with the mining obligation to pay the licenses, within the time limit of art. 133 and the extension of art. 134 of the Mining Code, losing its "mining priority," in other words, due to the imperative mandate of the cited articles, the applicant had a time limit to cancel the mining patents and consolidate its concession within 45 days from 15 November 1999 and ending on 30 December of the same year, without having complied with its mining obligation to pay the corresponding patents thereby causing the loss of its priority and the rejection of the application [...].
>
> RECOMMENDATION.- Request the same Superintendent to issue a specific resolution declaring the expiration due to the non-payment of the patents, with the consequent loss of priority and the resulting reversion to the original property of the State or alternatively request that the file is referred to the Potosí Mining Superintendent due to loss of competence.
>
> [...] [T]he proceedings should be terminated, with the cancellation of the filing fees and the loss of priority of the following mining requests: [among others, 7 of NMM's concessions: Doña Juanita, La Negra, Don David, Cancha I, Cancha II, Tete and Pococho].
>
> [...]
>
> DECIDES:
>
> FIRST.- The proceedings are terminated, with the cancellation of the filing fees and the loss of the priority of the mining request. For breach of Art. 134 of law 1777 in accordance with Administrative Resolution N° 18/03 […].
>
> SECOND.- To ensure that the mining regulations are no longer tampered with, nullifying the mining administrative process, the Tupiza and Tarija Regional Mining Superintendent, having lost its competence, is to send the

[31] Exh. R-267, Tribunal's translation.

> proceedings to the superintendent of the closest jurisdiction, in accordance with Art. 118 of the Mining Code.[32]

26. On 9 June 2004, the Ministry of Sustainable Development granted NMM's environmental license for the concession "Borateras de Cuevitas."[33] The granting of this environmental license triggered strong protests from civic organizations (in particular, the *Comité Cívico Potosinista*, "Comcipo") in Potosí and La Paz, as reflected by several press articles.[34] This "war to death"[35] included hunger strikes and the blockade of roads and railways between Uyuni and the city of Oruro. As a consequence of this popular reaction, the same Ministry first suspended all activities in "Borateras de Cuevitas" on 17 June 2004[36] and subsequently revoked NMM's license on 22 June.[37]

27. On 23 June 2004, the President of Bolivia issued Decree 27,589 (the "Revocation Decree"), revoking the Claimants' mining concessions in the following terms:

> WHEREAS:
>
> Mining Company Non Metallic Minerales (sic) S.A., which operates the mining concessions object of the present Supreme Decree, has systematically refused to provide information both to the National Tax Service and to the National Customs, thus preventing the audits mandated by Law No. 2,564 of 9 December 2003.
>
> It has been shown that the exports of ulexite minerals declared by the Mining Company Non Metallic Minerals S.A. do not match the cargo volumes transported by the National Railways Company – ENFE, as shown in the audit performed by SERGEOMIN and COMIBOL of February 2004 and the Preliminary Report of the Revenue Service.
>
> These facts evidence economic damage to the State, contravening, in addition, provisions of the Tax Code currently in force, in compliance with the provisions of the Law of the Public Reserve of the Gran Salar de Uyuni.
>
> THE CABINET COUNCIL
>
> DECREES:
>
> **SOLE ARTICLE.- I.** The revocation of the constitutive resolutions and loss of the mining concessions Cancha I, Doña Juanita, Tete, Borateras de Cuevitas, Basilea, Inglaterra, Don David, Sur, Pococho, La Negra, Cancha II, located at the Río Grande Delta of the Gran Salar de Uyuni, Nor Lipez Province of the Region of Potosí, is hereby ordered.

---

[32] Exh. R-240, Tribunal's translation.

[33] Exh. CD-42.

[34] Exhs. CD-43, CD-45, CD-46, CD-47, CD-48, CD-49, CD-52, CD-54, CD-55 and CD-57.

[35] Exh. CD-43.

[36] Exh. CD-44

[37] Exh. CD-173.

> **II.** Mining Company Non Metallic Minerales (sic) S.A., which operates the abovementioned concessions, is granted a period of thirty days to physically hand over the concessions to the Prefecture of the Potosí Region, without prejudice to the criminal and civil actions that may be appropriate.
>
> **III.** All provisions contrary to the present Supreme Decree are abrogated and derogated.[38]

28. On that same day, the President of Bolivia issued Decree 27,590 (the "Export Ban Decree"), banning the export of non metallic minerals, such as unprocessed boron and unprocessed or partly processed ulexite.[39] It came into force 90 days after its enactment (Article 7) and was revoked in October 2004 through Decree 27,799.[40]

29. On 22 July 2004, the Claimants requested initiation of friendly consultations under Article X of the BIT.[41]

---

[38] Exh. CD-50, Tribunal's translation. The Spanish original states:

> CONSIDERANDO:
>
> Que la Empresa Minera Non Metallic Minerales S.A., que explota las concesiones mineras materia del presente Decreto Supremo, se negó sistemáticamente a proporcionar información tanto al Servicio de Impuestos Nacionales como a la Aduana Nacional, impidiendo de esta manera las auditorias dispuestas por la Ley N° 2564 de 9 de diciembre de 2003.
>
> Que se ha evidenciado que las exportaciones de minerales de ulexita declaradas por la Empresa Minera Non Metallic Minerales S.A. no coinciden con los volúmenes de carga transportados por la Empresa Nacional de Ferrocarriles – ENFE, como lo demuestra la auditoría técnica realizada por SERGEOMIN y COMIBOL de febrero de 2004 y el informe Preliminar de Impuestos Internos.
>
> Que estos hechos evidencian daño económico al Estado, contraviniendo, además, las normas del Código Tributario en actual vigencia, en cumplimiento a lo dispuesto en la Ley de Reserva Fiscal del Gran Salar de Uyuni.
>
> EN CONSEJO DE GABINETE
>
> DECRETA:
>
> **ARTÍCULO ÚNICO.- I.** Se dispone la revocatoria de la resolución constitutiva y pérdida de las concesiones mineras Cancha I, Doña Juanita, Tete, Borateras de Cuevitas, Basilea, Inglaterra, Don David, Sur, Pococho, La Negra, Cancha II, ubicadas en el Delta del Río Grande del Gran Salar de Uyuni, Provincia Nor Lipez del Departamento de Potosí.
>
> **II.** Se otorga a la Empresa Minera Non Metallic Minerales S.A., que explota las concesiones detalladas en el Parágrafo anterior, el plazo de treinta días para la entrega física de las mismas a la Prefectura del Departamento de Potosí, sin perjuicio de las acciones penales y civiles que correspondan seguirse.
>
> **III.** Se abrogan y derogan todas las disposiciones contrarias al presente Decreto Supremo.

[39] Articles 1 and 2, Exh. CD-51.

[40] Exh. CD-195.

[41] Exh. CD-58.

30. On 23 July 2004, in compliance with the 30-day time limit fixed in the Revocation Decree, NMM handed over its eleven mining concessions to the Prefect of the Department of Potosí. The letter which accompanied the handover stated:

> […] [W]e hereby formally make physical handover of our concessions […] notwithstanding their physical handover […] [several thousand tons of different types of ulexite] that have been previously extracted and are the property of [NMM] are collected in those concessions, which we will remove shortly together with other goods of our property that are found there.[42]

31. On 26 September 2004, a member of the Bolivian National Parliament submitted a request of annulment for each of the eleven mining concessions to the Mining Superintendence.[43] Bolivia annulled the revoked concessions through writs of annulment on 28 October 2004, pursuant to Articles 126 and 128 of the Mining Code, on the grounds that there had been errors in the requests for concessions:

> The Potosí-Chuquisaca Regional Mining Superintendent […] **ANNULS** the mining concession named "**BASILEA**," for breach of Articles 126 and 128 of the Mining Code for lack of legal capacity of the principal and the agent.[44]

32. RIGSSA submitted an appeal regarding seven of the concessions, which was rejected on the ground that it was submitted outside the time limit.[45]

33. In December 2004, the Bolivian Minister of Foreign Affairs and Worship received a memorandum from technical teams of his Ministry and of the Ministry of Economic Development, the Ministry of Mining and the National Mining Technical Service, *Informe 025/2004*, addressing NMM's case under the BIT ("2004 Inter-Ministerial Memo"). The 2004 Inter-Ministerial Memo is an internal document which was included in the criminal file prepared by the *Superintendencia de Empresas* in December 2008.

---

[42] Exh, CD-59, Tribunal's translation. The Spanish original states:

> […] [P]or medio de la presente venimos formalmente a hacer entrega física de nuestras concesiones [….] sin perjuicio de la entrega física […] en ellas se encuentran acopiadas [varios miles de toneladas de distintos tipos de ulexita] todas de propiedad de [NMM] que se han extraído con anterioridad, las que se procederán a retirar próximamente junto con otros bienes de nuestra propiedad que allí se encuentran.

[43] Exh. R-271.

[44] Exh. R-276, Tribunal's translation. The Spanish original states: "El suscrito Superintendente Regional de Minas de Potosí-Chuquisaca en Suplencia legal de la Superintendencia Regional de Minas de Tupiza Tarija, con las atribuciones otorgadas por los Arts. 117 y 118 de la ley 1777 del 17 de Marzo de 1997 (Cód. de Minería) **ANULA** la concesión minera denominada "**BASILEA**," por incumplimiento de los Arts. 126 y 128 del Cód. de Minería por impersonería en el mandante y mandatario." Emphasis in original. The Tribunal notes that the wording is identical in all of the writs of annulment.

[45] Exh. R-277.

The scenarios envisaged by the memorandum and its main conclusions are the following:

> FIRST SCENARIO - The Bolivian Government may try to reach an amicable and mutually satisfactory agreement with the company. However it is clear that the only settlement possible with the company would be an indemnity or recovery of its concessions. For the Government, said option would involve a significant political cost and the generation of new social and regional conflicts in the Potosí Department.
>
> SECOND SCENARIO - The Bolivian Government may attempt to defend its decisions. Unfortunately, the Mining Code makes no provisions for the revocation of mining concessions. Therefore, this option has a great weakness. Another alternative would be to try to prove irregularities in the processing of the original mining concessions of Non Metallic Minerals S.A., so as to demonstrate that these are and always have been invalid. For the time being, this has been considered the best alternative.
>
> […]
>
> [CONCLUSIONS]
>
> 1. By means of Supreme Decree N° 27,589, of 23 June 2004, the revocation of the mining concessions granted in favor of the company Non Metallic Minerals S.A. was ordered. This Supreme Decree was enacted due to the social and political pressure exercised by the authorities of Potosí and, in particular, of the locality of Uyuni. [*This Supreme Decree*] suffers from serious legal problems.
>
> […]
>
> [NMM] has submitted documentation that supports that [Quiborax], incorporated under Chilean laws, has a direct participation higher than 50% of [NMM's capital] and therefore, in accordance with [the Bolivia-Chile BIT], has effective control of [NMM].
>
> […]
>
> 10. The Bolivian Government may try to reach an amicable and mutually satisfactory agreement with the company. However, this option would imply significant political costs and the creation of new conflicts in the Department of Potosí. On the other hand, the Bolivian Government may try to defend its decision to revoke the mining concessions or try to prove defects in the granting of the original concessions of [NMM].[46]

34. On 16 December 2005, Decree 27,589, (the Revocation Decree), was abrogated by Decree No. 28,527, which reads as follows:

> [The Revocation Decree] suffers from irreparable legal defects because the Mining Code does not provide in any of its legal provisions the revocation of mining concessions, but provides rather for the legal figures of *caducidad* or annulment of mining concessions after an administrative proceeding under the competence and jurisdiction of the Superintendence of Mines.[47]

[46] Exh. CD-68, Tribunal's translation.

[47] Exh. CD-74, Tribunal's translation.

35. In December 2008, Bolivia initiated criminal proceedings against Messrs. Allan Fosk, David Moscoso and others on the ground that these individuals allegedly fabricated evidence for the purpose of allowing the Claimants to establish jurisdiction in this arbitration.[48]

III. PROCEDURAL HISTORY

A. Initial phase

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

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

38. On 20 March 2008, the Tribunal and the Parties held a first procedural session in Paris. At the beginning of the first session, the Parties informed the Tribunal that they had orally reached a preliminary settlement and that they expected to put it in writing within the next fifteen days. Nevertheless, the Parties and the Tribunal decided to conduct the first session as scheduled in case a final agreement were ultimately not reached. Thus, the Parties and the Tribunal discussed and agreed on a number of procedural issues. Thereafter, the arbitration proceedings were suspended pending the conclusion of a settlement agreement between the Parties.

39. The Parties requested multiple time extensions to finalize the settlement agreement. Eventually, on 13 January 2009, the Claimants requested that the arbitration be

[48] Exh. CD-82. Criminal proceedings were brought against Messrs.Daniel Gottschalk, David Moscoso, Allan Fosk, Fernando Rojas, Gilka Salas, Dolly Paredes, Mónica Fernández, Yuri Espinoza, Ernesto Ossio and Tatiana Terán.

resumed on the alleged ground that the Respondent's conduct was "inconsistent" with settlement negotiations. As a result, on 17 February 2009, the Tribunal issued the final minutes of the first session, attaching a draft timetable upon which the Parties would be able to comment. On 5 March 2009, the Tribunal issued Procedural Order No. 1, including a final timetable of the proceedings. This timetable was amended on various occasions upon the request of both Parties.

B. Jurisdictional phase

40. On 14 September 2009, the Claimants filed their Memorial, together with expert reports of Behre Dolbear & Company (USA), Inc. and Navigant Consulting, Inc., as well as witness statements from Messrs. Allan Fosk, Carlos Shuffer, Ricardo Ramos and Osvaldo Astudillo. On the same date, the Claimants also submitted a request for provisional measures, asking that the Respondent refrain from engaging in any conduct that could aggravate the dispute and requesting that the Bolivian criminal proceedings against Messrs. Allan Fosk, David Moscoso and others be discontinued. On 2 October 2009, the Claimants requested a “temporary restraining order” with immediate effect, asking that the Respondent discontinue the Bolivian criminal proceedings pending the Tribunal’s decision on the request for provisional measures. The Respondent opposed this request on 5 October 2009. The Tribunal denied the Claimants' request for a "temporary restraining order" in a letter of the same date.

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

42. On 7 April 2010, Bolivia filed a proposal to disqualify the Tribunal, which suspended the proceedings. On 19 April 2010, the Claimants submitted observations opposing the Respondent's proposal. Each Party then presented an additional brief in support of its position. On 6 July 2010, the Chairman of the Administrative Council of the World Bank, conveying his decision through the Secretary-General of ICSID, dismissed the proposal for disqualification. The arbitration resumed shortly thereafter and the procedural calendar was amended accordingly.

43. On 12 July 2010, Bolivia informed that it would file objections to the jurisdiction of the Tribunal by no later than 30 July 2010. At the same time, the Respondent requested an order from the Tribunal directing the Claimants to produce the documents identified in the Redfern schedule dated 28 May 2010. On 19 July 2010, the Claimants presented objections to the Respondent's requests for document production. On 26 July 2010, the Tribunal issued Procedural Order No. 2, partially granting the Respondent's requests for document production, as specified in the Redfern schedule attached to the order.

44. The Respondent filed Objections to the Jurisdiction of the Tribunal on 30 July 2010, together with the expert report of Mr. Iván Salame. The Claimants submitted their Counter-Memorial on Jurisdiction on 29 October 2010, together with the expert report of Mr. Carlos Rosenkratz and the report of Mr. Juan Pablo de Luca. The Respondent submitted its Reply on Jurisdiction, together with the second expert report of Mr. Iván Salame, on 13 January 2011.

45. On 8 February 2011, the Tribunal issued Procedural Order No. 3, granting the Respondent's request for document inspection, contained in the Reply on Jurisdiction and a letter of 4 February 2011. The Tribunal ordered the Claimants to make the original share certificates Nos. 1 to 11 of NMM available for inspection and provided directions on the inspection in Procedural Order No. 4, dated 10 March 2011. In accordance with the timetable set in Procedural Order No. 4, the Respondent submitted its expert report on the document inspection on 8 April 2011 and the Claimants did the same on 22 April 2011.

46. The Claimants filed their Rejoinder on Jurisdiction on 1 April 2011, together with the second expert report of Mr. Carlos Rosenkratz and the second report of Juan Pablo de Luca.

47. Following the pre-hearing telephone conference held between the Tribunal and the Parties on 12 April 2011, the Tribunal issued Procedural Orders Nos. 5, 6 and 7 with directions for the hearing.

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

On behalf of the Claimants

Andrés Jana, Bofill Mir & Alvarez Jana

Jorge Bofill, Bofill Mir & Alvarez Jana

Johanna Klein Kranenberg, Bofill Mir & Alvarez Jana

Rodrigo Gil, Bofill Mir & Alvarez Jana

Ximena Fuentes, Bofill Mir & Alvarez Jana

Constanza Onetto, Bofill Mir & Alvarez Jana

Claimants' witness

Allan Fosk

Claimants' experts

Albert Lyter III

Carlos Rosencrantz

On behalf of the Respondent

Hugo Montero Lara, Attorney General of the State

Elizabeth Arismendi Chumacero, Deputy Attorney General

Danny Javier López Soliz, General Director of the Jurisdictional and Arbitral Defense of Investments (Attorney General's Office)

Pierre Mayer, Dechert (Paris) LLP

Eduardo Silva Romero, Dechert (Paris) LLP

José Manuel García Represa, Dechert (Paris) LLP

Ana Carolina Simões e Silva, Dechert (Paris) LLP

Francisco Paredes-Balladares, Dechert (Paris) LLP

Anna Valdés Pascal, Dechert (Paris) LLP

Pacôme Ziegler, Dechert (Paris) LLP

Respondent's expert

Iván Salame

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

50. After the hearing, the Tribunal issued Procedural Order No. 8 confirming, as discussed at the end of the hearing, that there would be no post-hearing briefs and setting a calendar for the filing of submissions regarding the Claimants' request that the Tribunal issue a declaration pursuant to Article 37 of the ILC Articles on State Responsibility. The Claimants filed these submissions on 27 May 2011 and the Respondent filed its reply on 10 June 2011.

51. The Tribunal issued its Decision on Jurisdiction on 27 September 2012, which forms an integral part of this Award. In its dispositive, the Tribunal declared and decided as follows:

> A. On jurisdiction:
>
> 1. Declares that it has jurisdiction over the claims of Quiborax and NMM;
>
> 2. Declares that it has no jurisdiction over Allan Fosk's claims;
>
> B. On admissibility:
>
> 1. Declares that the witness statement of Ricardo Ramos is admissible;
>
> 2. Declares that Bolivia's objections to jurisdiction and the evidence arising from the Bolivian criminal proceedings are admissible;
>
> 3. Declares that the claims of Quiborax and NMM are admissible;
>
> 4. On further procedural steps:
>
> 1. Will take the necessary steps for the continuation of the proceedings toward the merits phase by way of a procedural order to be issued after consultation with the Parties;
>
> 2. Defers consideration of the Claimants' request for a declaratory judgment pursuant to Article 37 of the Articles on State Responsibility for subsequent adjudication;
>
> 3. Reserves the decision on costs for subsequent decision.

52. Of note, in its Decision on Jurisdiction, the Tribunal found that the Respondent's claim that the Claimants or their employees or advisors had fabricated evidence in order to establish jurisdiction in this arbitration was unfounded:

> On the basis of the review of the entire record, the Tribunal finds that the Claimants' account of facts is consistent and well-documented. Whilst there are some documentary discrepancies […] these do not prove fraud nor suffice to overcome the plentiful evidence in support of the Claimants' case. For these reasons, the Tribunal is persuaded that […] [Quiborax] did not engage in fraud or fabricate evidence to gain access to ICSID arbitration.[49]

[49] Decision on Jurisdiction, ¶ 192.

C. Merits phase

53. On 9 November 2012, the Tribunal issued Procedural Order No. 9 regarding the merits phase and setting the corresponding calendar for written memorials. The calendar was amended by letter of the Tribunal dated 21 March 2013 and again in a letter of 5 April 2013, following the Parties' correspondence.

54. Accordingly, the Respondent filed its Counter-Memorial on 10 May 2013, together with the expert report of Econ One Research Inc.

55. The Claimants submitted their Reply on 13 August 2013, together with the second expert reports of Behre Dolbear Company (USA), Inc. and Navigant Consulting, Inc.

56. On 4 October 2013, the Parties submitted a list of the witnesses and experts they wished to examine at the hearing.

57. On 7 October 2013, the Parties and the Tribunal held a telephone conference to discuss the preparation of the hearing. Subsequently, the Tribunal issued Procedural Order No. 10, reflecting the agreements reached by the Parties with respect to the conduct of the hearing and the Tribunal's decision regarding those issues on which the Parties did not reach an agreement.

58. Following the Tribunal's letter of 18 September 2013 granting the Respondent an extension of the time limit to submit its Rejoinder, the Respondent filed its Rejoinder on 11 October 2013, together with the second expert report of Econ One Research Inc.

59. On 28, 29 and 30 October 2013, the Tribunal held a hearing on the merits in Paris. In attendance at the hearing were the members of the Arbitral Tribunal, the Secretary and the Assistant, Ms. Leonor Díaz-Córdova,[50] and the following party representatives, witnesses and experts:

On behalf of the Claimants

Andrés Jana, Bofill Mir & Alvarez Jana

Johanna Klein Kranenberg, Bofill Mir & Alvarez Jana

Rodrigo Gil, Bofill Mir & Alvarez Jana

Daniela Arrese, Bofill Mir & Alvarez Jana

[50] Ms. Leonor Díaz-Cordova replaced Mr. Gustavo Laborde as assistant to the Tribunal with the consent on the Parties prior to the hearing on the merits.

María Victoria Demarchi, Bofill Mir & Alvarez Jana

Diego Pérez, Bofill Mir & Alvarez Jana

Claudio Inostroza, Bofill Mir & Alvarez Jana

Jorge Luis Inchauste, Bofill Mir & Alvarez Jana

Claimants' witnesses

Allan Fosk

Carlos Shuffer

Ricardo Ramos

Claimants' experts

Bernard Guarnera, Behre Dolbear & Company (USA), Inc.

Brent Kaczmarek, Navigant Consulting, Inc.

On behalf of the Respondent

Hugo Montero Lara, Attorney General of the State

Elizabeth Arismendi Chumacero, Deputy Attorney General

Edgar Luis Pozo Goytia, General Director of the Jurisdictional and Arbitral Defense of Investments

Leonardo Alejandro Anaya Leigue (Attorney General's Office)

Diego Brian Gosis, Gomm & Smith, P.A.

Quinn Smith, Gomm & Smith, P.A.

Clovis Treviño, Gomm & Smith, P.A.

Bernardo Wayar Caballero, Wayar & von Borries Abogados, S.C.

Bernardo Wayar Ocampo, Wayar & von Borries Abogados, S.C.

Flavio Javier Loza Vargas, Wayar & von Borries Abogados, S.C.

Agustina Alvarez Olaizola, consultora de Gomm & Smith P.A.

Alfredo de Jesús O., consultor de Gomm & Smith P.A.

Respondent's experts

Daniel Flores, Econ One Research

Andrea Cardani, Econ One Research

Ivan Lopez, Econ One Research

60. Mr. Andrés Jana and Ms. Johanna Klein Kranenberg presented oral arguments on behalf of the Claimants; Mr. Hugo Montero Lara, Ms. Elisabeth Arismendi Chumacero and Mr. Diego Brian Gosis, in turn, presented oral arguments on behalf of the Respondent.

61. At the end of the hearing, the Tribunal and the Parties agreed that there would be no post-hearing briefs.

62. On 5 November 2013, in accordance with ICSID Arbitration Rule 28(2), the Tribunal invited the Parties to file statements of costs by 10 January 2014 and their comments on the other Party's statement by 24 January 2014. Following an extension requested by the Respondent and granted by the Tribunal, the statements of costs were circulated to the Tribunal on 3 February 2014. The Respondent's comments on the Claimants' statement of costs were submitted on 10 February 2014. The Claimants' comments on Bolivia's statement of cost were submitted on 13 February 2014.

63. On 21 March 2014, the Respondent submitted a letter to ICSID informing that Mr. Héctor Arce and Mr. Pablo Menacho had been appointed Attorney General and Deputy Defense Attorney of Bolivia, respectively.

64. On 23 May 2014, the Claimants wrote to the Tribunal to inform of recent developments in the criminal proceedings against Allan Fosk, David Moscoso and others in Bolivia. In particular, they informed of invitations sent by Bolivia to Mr. Allan Fosk and to Claimants' counsel for a "coordination meeting" scheduled for 22 May 2014 at the Bolivian Consulate in Chile, which they described as "an ambush to have Mr. Allan Fosk and his legal counsel attend at a formal taking of evidence in the criminal case."[51]

65. Following the Tribunal's invitation, on 2 June 2014, the Respondent replied to the Claimants' letter, stating that its actions had complied with diplomatic standards, international regulations and local legal proceedings.[52]

66. On 29 May 2015, the Claimants informed the Tribunal that Mr. Allan Fosk had been indicted on 11 November 2014, and that the Bolivian prosecutor had requested that he be declared in default and that an Interpol Red Notice be issued against him. The Claimants also noted that the prosecutor had summoned Mr. Moscoso and

[51] Claimants' letter of 23 May 2014, p. 3.

[52] Respondent's letter of 2 June 2014.

Claimants' counsel in Bolivia to testify as witnesses in the criminal case, and informed of measures taken against a Bolivian notary public in the context of the criminal proceedings.[53]

67. On 12 June 2015, the Respondent replied emphasizing Bolivian law prevented it from suspending the criminal proceedings, and asserted that all procedural actions taken in the context of these criminal proceedings complied with Bolivian law. The Respondent also noted that, although Mr. Fosk could make use of procedural guarantees in Bolivia to defend himself, he had chosen not to exercise them. The Respondent added that, in any event, Mr. Fosk was no longer a party to these proceedings.[54]

68. On 17 August 2015, ICSID declared the proceedings closed.

IV. OVERVIEW OF THE PARTIES' POSITIONS

69. The purpose of this Section is to provide an overview of the Parties' positions. The Parties' detailed positions with respect to each claim are described in Sections VI and VII below.

A. Overview of the Claimants' Position

70. The Claimants argue that Bolivia has violated its obligations under the BIT by the revocation and *ex post* annulment of the Claimants' mining concessions. They claim that the Revocation Decree unlawfully deprived them of their investment in Bolivia and characterize the revocation of their concessions as "unlawful, unreasonable, arbitrary and discriminatory."[55] The Claimants further contend that everything that occurred after the revocation of their concessions (in particular, the initiation of the criminal case in Bolivia) is part of Bolivia's defense strategy in this arbitration. According to the Claimants, the Respondent has tried to avoid a discussion on the merits of its own actions by launching unsubstantiated accusations against the Claimants and attempting to place the burden of proof upon the Claimants to establish that they did not indulge in fraud, corruption or trivial errors. However, when required to justify its own actions, the Respondent stands empty-handed. It has tried to find support in the auditing reports that allegedly prove the irregularity of the Claimants' investment. The Claimants argue they do not. Moreover, the Claimants

[53] Claimants' letter of 29 May 2015.

[54] Respondent's letter of 12 June 2015.

[55] Reply, ¶ 552.

contend that "the Respondent's defense on the merits is limited to its re-litigation of jurisdiction."[56]

71. The Claimants contend that Bolivia has breached Articles III, IV and VI of the Bolivia-Chile BIT as well as certain obligations under the ICSID Convention and international law. They claim, in particular, that:

a. The revocation of the Claimants' mining concessions constitutes an unlawful expropriation under Article VI of the BIT.

b. The revocation and *ex post* annulment of the Claimants' mining concessions and Bolivia's post-expropriation acts of harassment constitute unreasonable, arbitrary and discriminatory measures that breach the fair and equitable standard of Article IV of the BIT, as well as the prohibition to impair the free administration, maintenance, use, enjoyment, extension, transfer, sale and liquidation of their investments with unreasonable or discriminatory measures, contained in Article III of the BIT.

c. By refusing to suspend the criminal case, as directed in the Decision on Provisional Measures, and through its conduct in this arbitration, Bolivia has breached its treaty obligation to accord fair and equitable treatment to the Claimants' investments, as well as its procedural obligations under the ICSID Convention and under general principles of international law.

72. The Claimants' specific arguments with respect to the alleged treaty breaches are discussed in Sections VI (Claims for Violation of the BIT) and VII (Reparation) below.

73. In terms of reparation, the Claimants request "material and non-material" damages,[57] as well as a declaratory judgment, as explained in Section VII below. The Tribunal understands that, for each breach of the BIT or of international law that they allege, the Claimants request the following relief:

a. For the loss of their investments in Bolivia, whether such loss was caused by Bolivia's unlawful expropriation of those investments, by Bolivia's unfair and inequitable treatment or by its impairment of their investments through unreasonable or discriminatory measures, the Claimants request compensatory damages in an amount of US$ 146,848,827 as of 30 June 2013, plus compound

[56] Reply, ¶ 17.

[57] Reply, ¶ 555.

interest from that date. This claim for compensatory damages covers all of their financially assessable damage arising from the loss of their investments in Bolivia, regardless of the treaty breach that caused them.

b. For the consequences of Bolivia's post-expropriation acts of harassment, which the Claimants submit qualify as unfair and inequitable treatment by Bolivia, as well as an impairment of their investments by unreasonable and discriminatory measures,[58] the Claimants request moral damages in an amount of US$ 4 million. The Claimants also request a declaratory judgment in respect of these breaches.

c. For Bolivia's failure to comply with the Decision on Provisional Measures and its conduct in this arbitration, which the Claimants argue is in breach of Bolivia's obligation of fair and equitable treatment under the BIT, as well as its procedural obligations under the ICSID Convention and under general principles of international law, the Claimants request a declaratory judgment.

74. The Claimants also request the Tribunal to order Bolivia to pay all costs, fees and expenses incurred by the Claimants during the arbitration, given the manner in which the Respondent has conducted itself during the proceedings.

75. On the basis of the foregoing, in their Memorial the Claimants requested the following relief:

> […] Claimants request the Tribunal to render an award in favor of Claimants:
>
> (1) Declaring that Bolivia violated its obligations under Article VI of the BIT by expropriating Claimants' investment in Bolivia, in an unlawful manner and not in accordance with the requirements of Article VI;
>
> (2) Declaring that Bolivia violated its obligations under Article IV of the BIT by failing to accord Claimants fair and equitable treatment, by unlawfully expropriating Claimants' investment in Bolivia;
>
> (3) Declaring that Bolivia violated its obligations under Article III of the BIT by failing to protect Claimants' investment in Bolivia and obstructing its free administration, maintenance, use, enjoyment, extension, transfer, sale and liquidation, by unreasonable and discriminatory measures consisting of the unlawful expropriation of Claimants' investment in Bolivia;
>
> (4) Declaring that Bolivia violated its obligations under international law by aggravating the dispute between the parties, by submitting Claimants to acts of harassment intended to obstruct Claimants' rights under the BIT;

[58] Although in their Reply the Claimants link this request to Bolivia's expropriation of their concessions (Reply, Section IX(6), that link is not made in their arguments.

(5) Declaring that Bolivia violated its obligations under Article IV of the BIT by failing to accord Claimants fair and equitable treatment, by submitting Claimants to acts of harassment intended to obstruct Claimants' rights under the BIT;

(6) Declaring that Bolivia violated its obligations under Article III of the BIT by submitting Claimants to unreasonable and discriminatory measures, consisting of acts of harassment intended to obstruct Claimants' rights under the BIT;

(7) Declaring that Bolivia violated its obligations under Art. 26 of the ICSID Convention by initiating parallel criminal proceedings in Bolivia;

(8) Ordering Bolivia to pay Claimants full compensation in an amount not less than US$ 61,481,461 as of 1 August 2009 for damages suffered due to the loss of their investment in Bolivia, plus compound interest at the commercial rate on such amount from such date until the date of actual payment;

(9) Ordering Bolivia to pay compensation in an amount not less than US$ 5,000,000 for moral damages suffered by Claimants due to the unlawful acts of harassment by Bolivia, subsequent to the loss of Claimants' investment in Bolivia;

(10) Ordering Bolivia to pay all costs, fees and expenses incurred by Claimants as a result of Bolivia's violations of the BIT, including all cost, fees and expenses of these arbitration proceedings.[59]

76. In their Reply, the Claimants updated their relief (and in particular their claim for monetary damages) as follows:

> […] [T]he Claimants request the Tribunal to render an award in favor of the Claimants:
>
> (1) Declaring that Bolivia violated its obligations under Article VI of the BIT by expropriating Claimants' investment in Bolivia, in an unlawful manner and not in accordance with the requirements of Article VI;
>
> (2) Declaring that Bolivia violated its obligations under Article IV of the BIT by failing to accord Claimants' investment fair and equitable treatment by unlawfully expropriating Claimants' investment in Bolivia and by measures subsequent to the expropriation of the Claimants' investment;
>
> (3) Declaring that Bolivia violated its obligations under Article III of the BIT by failing to protect Claimants' investment in Bolivia and by impairing its free administration, maintenance, use, enjoyment, extension, transfer, sale and liquidation, by unreasonable and discriminatory measures consisting of the unlawful expropriation of Claimants' investment in Bolivia and by measures subsequent to the expropriation of the Claimants' investment;
>
> (4) Ordering Bolivia to pay the Claimants full compensation to an amount of US$ 146,848,827 as of 30 June 2013 for damages suffered due to the loss of their investment in Bolivia, plus compound interest at the commercial rate on that amount from such date until the date of actual payment;

[59] Mem., pp. 98-99.

(6) Ordering Bolivia to pay compensation to an amount of US$ 4,000,000 for moral damages for Quiborax due to the unlawful expropriation and acts of harassment by Bolivia, subsequent to the loss of Claimants' investment in Bolivia;

(7) Declaring that the Respondent's conduct in the present arbitration is in breach of its international obligations under the ICSID Convention and its duty to arbitrate fairly and in good faith;

(8) Ordering Bolivia to pay all costs, fees and expenses incurred by the Claimants as a result of Bolivia's violations of the BIT, including all costs, fees and expenses of these arbitration proceedings.

(9) Granting the Claimants any other relief the Tribunal considers adequate.[60]

B. Overview of the Respondent's Position

77. Bolivia rejects each of the Claimants' claims and contends that it has not violated its obligations under the BIT and international law.

78. According to Bolivia, "the mining concessions are the result of an abuse perpetrated by Mr. Álvaro Ugalde and Mr. David Moscoso who, having had access because of their public functions to a geological study carried out in 1993 that showed a wealth of minerals in a small area of the fiscal reserve, acquired concessions there and in all the surrounding areas."[61]

79. Subsequently, Messrs. Ugalde and Moscoso offered these concessions to the highest bidder. Quiborax paid US$ 400,000 in 2001 for over 50% of the mining concessions through NMM, of which Mr. Moscoso holds part of the remaining capital. From then on, the Claimants have not invested any additional capital.

80. The audits carried out by Bolivian authorities in 2004 of all mining concessions in the Gran Salar de Uyuni detected serious irregularities in the Claimants' concessions. This led to their revocation and annulment.

81. For the Respondent, since the Claimants have obtained their investment in violation of Bolivian law, they are not entitled to the protection of the BIT and international law. However, even if these protections were available, Bolivia submits that it has not breached any of its international obligations by revoking and annulling the mining concessions. In particular:

[60] Reply, p. 170. The Tribunal notes that there is no request No. 5 in the Claimant's request for relief.

[61] Counter-Mem., ¶ 7, Tribunal's translation.

a. The Respondent denies having expropriated the Claimants' investments. If the Tribunal were to find that there has been such an expropriation, it contends that that this expropriation has been lawful.

b. The Respondent denies having breached the fair and equitable treatment standard of the BIT.

82. The Respondent advances further arguments with respect to each of the Claimants' claims, which will be addressed in the specific analysis in Section VI.

83. As discussed in Section VII below, the Respondent also challenges the Claimants' case on quantum. Bolivia stresses that this claim bears no connection with reality. Following the Claimants' contention, an alleged investment of US$ 400,000 in 2001 would have produced a value of US$ 60 million only three years later, and over US$ 140,000,000 in 2013. The additional claim for moral damages is punitive and inadmissible under international law. In any event, the damage claimed is non-existent.

84. In conclusion, the Tribunal should confirm that the Claimants "abuse these proceedings to denigrate the State and attempt to unjustly enrich themselves."[62] The Tribunal should thus reject all the claims and order the Claimants to repair the harm its accusations have done to the Bolivian State.

85. For the foregoing reasons, in its Counter-Memorial the Respondent requested the following relief:

> […] Bolivia respectfully requests the Tribunal to:
>
> Declare:
>
> a. That the Treaty and international law do not protect the Claimant's investment because it was not carried out in accordance with the laws and regulations of Bolivia;
>
> b. Alternatively, that Bolivia's conduct was justified and that it has complied with each and every one of its obligations under the Treaty and international law;
>
> c. In the further alternative, if the Arbitral Tribunal found that Bolivia should pay any compensation to the Claimants, order the payment of no more than the Net Investment Realized by the Claimants, i.e. US$ 622,492;
>
> d. Alternatively, if the Tribunal decides to compensate the Claimants based on the DCF method, order the payment of no more than US$ 2.1 million; and

[62] Counter-Mem., ¶ 15, Tribunal's translation.

Order:

a. the Claimants to entirely reimburse Bolivia for the costs it has incurred to defend its interests in the present arbitration, together with interest at a reasonable commercial rate in the Tribunal's opinion from the moment in which the State incurred in said costs until the date of actual payment; and

b. any other compensation to the State that the Tribunal deems appropriate.[63]

86. In its Rejoinder, the Respondent updated its prayers for relief as follows:

> […] [T]he Plurinational State of Bolivia formally requests the Tribunal to:
>
> Reject all of the claims submitted by the Claimants under the Bolivia-Chile Bilateral Treaty, because the alleged investments are not protected under this Treaty since they were made or carried out in violation of the applicable norms, laws and regulations and, alternatively, because they lack merits and have not been proven;
>
> Reject all of the claims submitted by the Claimants under customary international law because these fall outside the competence of the Tribunal and, alternatively, because they lack merit and have not been proven;
>
> Reject all of the sums claimed as a consequence of the violations alleged by the Claimants, because they lack merit and have not been proven; and
>
> Order the Claimants to reimburse all costs and expenses incurred in defending Bolivia's interests in this proceeding, and to provide compensation

[63] Counter-Mem., ¶ 450-452, Tribunal's translation. The original Spanish text reads as follows:

> […] Bolivia solicita respetuosamente al Tribunal Arbitral que:
>
> Declare:
>
> a. Que el Tratado y el derecho internacional no protegen la inversión de las Demandantes por no haber sido realizada de conformidad con las leyes y reglamentos de Bolivia;
>
> b. Que, subsidiariamente, la conducta de Bolivia era justificada y ha cumplido todas y cada una de sus obligaciones bajo el Tratado y el derecho internacional;
>
> c. Que, a título subsidiario también, en caso de que el Tribunal Arbitral considere que Bolivia debe pagar alguna compensación a las Demandantes, ordene el pago de, como máximo, la Inversión Neta Realizada por las Demandantes, esto es US$ 622.492;
>
> d. Que, a título subsidiario, si el Tribunal Arbitral decidiera compensar a las Demandantes con base en el método FFD, ordene el pago de, como máximo, US$ 2,1 millones; y
>
> Ordene:
>
> a. a la Demandante reembolsarle íntegramente a Bolivia los costos en los que ha incurrido en la defensa de sus intereses en el presente arbitraje, junto con intereses a una tasa comercial razonable a juicio del Tribunal Arbitral desde el momento en que el Estado incurrió en dichas costas hasta la fecha de su pago efectivo; y
>
> b. cualquier otra medida de satisfacción al Estado que el Tribunal Arbitral estime oportuna.

> in the manner the Tribunal deems appropriate regarding the misconduct of the Claimants harmful to the Plurinational State of Bolivia.[64]

V. PRELIMINARY MATTERS

A. The Tribunal's task

87. The Tribunal's task is to resolve the investment dispute brought before it. Specifically, it must determine whether the Respondent breached the provisions of the Bolivia-Chile BIT in its treatment of the Claimants' investments, as alleged by the Claimants.

88. During the hearing on the merits, Bolivia's Attorney General, Mr. Montero Lara, addressed the Tribunal and explained that in 2006 Bolivia had started "a process of change," a "veritable transformation" that "no longer allowed for companies from other countries to define, control and command economic structures in Bolivia […] So we now say where investment goes, and why, how our natural resources are to be used."[65]

89. The Tribunal wishes to reassure the Government of Bolivia that by no means does it intend to interfere with the policies that Bolivia sets and implements as a sovereign State. The Tribunal agrees with the Respondent that the ICSID arbitration system "should not be used as a sword of Damocles to hang over [host States'] heads but as a means of ensuring everybody abides by their obligations."[66] The Tribunal is well

---

[64] Rejoinder, pp. 79-80, Tribunal's translation. The original Spanish text reads as follows:

> […] [E]l Estado Plurinacional de Bolivia formalmente solicita al Tribunal que:
>
> A. Rechace la totalidad de los reclamos presentados por las Demandantes bajo el Tratado Bilateral Bolivia-Chile, por carecer las inversiones pretendidas de protección bajo ese Tratado por haberse realizado o desarrollado en violación de las normas, leyes y reglamentos aplicables, y, en la alternativa, por carecer de mérito, y no haber sido probados;
>
> B. Rechace la totalidad de los reclamos presentados por las Demandantes bajo el derecho internacional consuetudinario, por caer fuera de la competencia de este Tribunal y, en la alternativa, por carecer de mérito y no haber sido probados;
>
> C. Rechace la totalidad de los montos reclamados como consecuencia de las pretendidas violaciones alegadas por las Demandantes, por carecer de mérito y no haber sido probados; y
>
> D. Ordene a las Demandantes a reembolsar la totalidad de los costos y gastos incurridos en la defensa de sus intereses en este proceso, y a prestar satisfacción del modo y con el tenor que el Tribunal entienda apropiado a las inconductas de las Demandantes dañosas para con el Estado Plurinacional de Bolivia.

[65] Tr., Day 1, 93:2-94:12.

[66] Tr., Day 1, 98:17-19.

aware that it is tasked solely with deciding whether those commitments which Bolivia in its sovereign power chose to undertake in the Bolivia-Chile BIT are respected in accordance with the rule of law.

B. Law applicable to the merits

90. The claims before the Tribunal are brought on the basis of the Bolivia-Chile BIT, which is the primary source of law for this Tribunal. With respect to matters not covered by the BIT, the latter contains no choice of law. The Tribunal must thus resort to Article 42(1) of the ICSID Convention, which reads as follows:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such an agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

91. Except for the undisputed application of the BIT, the Parties have not agreed on the rules of law that govern the merits of this dispute. Consequently, the Tribunal shall apply Bolivian law and international law when appropriate. The Tribunal is of the view that the second sentence of Article 42(1) of the ICSID Convention does not allocate matters to either law. It is thus for the Tribunal to determine whether an issue is subject to national or international law.[67]

92. When applying the law (whether national or international), the Tribunal is of the view that it is not bound by the arguments and sources invoked by the Parties. The principle *iura novit curia* – or better, *iura novit arbiter* – allows the Tribunal to form its own opinion of the meaning of the law, provided that it does not surprise the Parties with a legal theory that was not subject to debate and that the Parties could not anticipate. [68]

---

[67] *See, e.g.*, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 ("*Burlington v. Ecuador*"), Decision on Liability of 14 December 2012, ¶ 179.

[68] *See, e.g., Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment of 7 January 2015, ¶ 295 ("[…] an arbitral tribunal is not limited to referring to or relying upon only the authorities cited by the parties. It can, *sua sponte*, rely on other publicly available authorities, even if they have not been cited by the parties, provided that the issue has been raised before the tribunal and the parties were provided an opportunity to address it"). *See also Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland), Merits, Judgment of 25 July 1974, ¶ 18 ("[i]t being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the Parties, for the law lies within the judicial knowledge of the Court."); *Albert Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Case, Award of 23 April 2012, ¶ 141; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award of 4 October 2013, ¶ 287.

C. Witness statement of Mr. Osvaldo Astudillo

93. The Claimants informed the Tribunal in their letter of 21 August 2013 that Mr. Osvaldo Astudillo, whose witness statement had been submitted together with the Claimants' Memorial, had passed away in July 2011. The Claimants "respectfully request[ed] the Tribunal to grant Mr. Osvaldo Astudillo's witness statement of 10 August 2009 proper probative value, based on that statement's reliability and coherence with the other evidence presented by the Claimants."

94. The Respondent, in its letter of 2 September 2013, "reserve[d] its right to submit its argument on the inadmissibility of the testimony of Mr. Astudillo in its Rejoinder taking into account, among other aspects, Bolivia's right to cross-examine the witnesses put forward by its counter-party in accordance with Rule 34 of the Arbitration Rules" (Tribunal's translation). The Respondent did not address this matter in its Rejoinder, but explained at the hearing on the merits that "Bolivia opposed giving value of proof to Mr Astudillo's written documents in light of the fact that he would not be able to participate in the actual hearings."[69]

95. The Tribunal notes that Section 18 of the Minutes of the First Session provides the following:

> It was agreed that if a witness called by one party is not made available for examination at the oral hearing, his/her statement will remain on record and the Tribunal will assess the probative value of that statement taking into account the record and all relevant circumstances, including the fact that the statement was not confirmed orally and that the witness was not cross-examined.

96. This provision must be read together with Rule 34(1) of the ICSID Arbitration Rules:

> Evidence: General Principles
>
> The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

97. Taking these rules in consideration, the Tribunal shall attempt to rely on the remainder of the evidence presented by the Parties to reach its decision. Should the Tribunal need to rely on the evidence submitted by Mr. Astudillo when carrying out its analysis, it will clearly state so.

[69] Tr., Day 1, 150:4-7.

VI. THE CLAIMS FOR VIOLATIONS OF THE BIT

A. The expropriation claim

1. Overview of the Parties' positions

98. The Claimants argue that the revocation of its concessions through Decree 27589 (the Revocation Decree) constitutes an unlawful expropriation under Article VI of the BIT. They claim that "the expropriation is both direct and indirect, as it affected the concessions held by NMM and the shares of Quiborax [in NMM]."[70] Specifically, they submit that the expropriatory act is illegal and does not serve the public interest, and discriminated against NMM on the basis of the Chilean nationality of Quiborax, its majority shareholder. Further, the Claimants have received no compensation for this expropriation.

99. For its part, the Respondent denies that either the Revocation Decree or the subsequent writs of annulment of the concessions constitute an expropriation.

a. First, the Respondent contends that the Claimants' investments (specifically, their mining concessions) were illegal (and invalid) under Bolivian law from the outset, and thus were not entitled to the protection of the BIT or international law. The Respondent submits that the protection of the BIT is conditioned upon the validity of the Claimants' investments, not only as a matter of jurisdiction but also as a matter of merits. Specifically, in the context of expropriation, as the Claimants' concessions were illegally acquired and were thus null and void *ab initio*, they do not constitute rights that may be subject to expropriation.

b. Second, the Respondent contends that the revocation and subsequent annulment of the Claimants' concessions was a consequence of the Claimants' defective acquisition and administration of the concessions and does not amount to an expropriation. Bolivia's actions were a legitimate and proportionate response to the illegality of the concessions, and thus cannot be characterized as a violation of the BIT or international law. In the Respondent's view, there can be no substantive violation of the BIT when the host State takes measures in response to a situation of illegality of the investment.[71]

[70] Mem., ¶ 137.

[71] Counter-Mem., ¶ 131.

c. Third, the Respondent alleges that the claims have been presented prematurely and as a result cannot constitute an expropriation.

100. If the Tribunal were to find that the measures do amount to an expropriation, the Respondent argues that such expropriation is not unlawful either under the BIT or under international law.

101. In response to the Respondent's allegations, the Claimants contend that their claims are not premature and have been presented in accordance with Article X of the BIT. As regards the legality requirement on which Bolivia relies, the Claimants argue that the Respondent attempts to re-litigate issues that have already been resolved in the jurisdictional phase. In any event, they contend that the legality requirement does not apply regarding trivial breaches of domestic law.

102. The Tribunal will first address the Respondent's argument that the Claimants' investments were illegal and are thus not protected by the BIT (Section 2). It will then address the Respondent's argument that the Claimants' claims are premature (Section 3). The Tribunal will subsequently address whether the Respondent's actions constituted an expropriation of the Claimants' investments and, in the affirmative, whether that expropriation was unlawful (Section 4).

2. The Respondent's argument that the Claimants' investments were illegal

a. The Respondent's position

103. The Respondent argues that there were serious irregularities in the acquisition and administration of the Claimants' concessions, which are sufficient to deny the Claimants' investments the protection of the BIT and international law. These same illegalities justify the revocation and annulment of the Claimants' concessions.

104. The Respondent submits that the BIT and international law do not offer substantive protection to investments that were not made in conformity with the internal law of the host State. This rule is expressly set out in the BIT, in Articles I(2), II and III(2). Specifically, pursuant to Article I(2) of the BIT, only investments made in accordance with the laws and regulations of the host State qualify under the definition of investment. In turn, Article II of the BIT, which defines the scope of application of the BIT, limits it to investments made in conformity with the host State's law. Finally, Article III(2) of the BIT provides that each Contracting Party shall protect the

investments made in its territory in accordance with its laws and regulations. The effect of these provisions is to exclude from the substantive protection of the BIT investments that have not been made in accordance with the host State's laws.

105. Citing decisions of investment tribunals, the Respondent submits that the substantive protections of a treaty do not apply to an illegal investment (*World Duty Free v. Kenya*,[72] *Plama Consortium Ltd. v. Bulgaria*[73]) and that, consequently, the measures taken by a State in response to illegalities in an investor's investments cannot violate the substantive protections of a treaty (*Genin v. Estonia*,[74] *Thunderbird v. Mexico*[75]). The Respondent contends that, in this case, "the measures adopted by Bolivia were proportional and legitimate responses to the illegalities that vitiated the Mining Concessions from their origin and cannot, therefore, be characterized as violations of the Treaty or international law."[76]

106. The Respondent notes that, in its Decision on Jurisdiction, the Tribunal found that "under the Bolivia-Chile BIT, the legality requirement is relevant to determine both the Treaty's scope of application and the scope of Bolivia's consent to arbitration."[77] Other tribunals have confirmed that the legality of an investment is an element to be considered by the tribunal when applying the relevant treaty's substantive provisions (*i.e.*, at the time of a decision on the merits). Even if the legality requirement is not expressly included in the relevant treaty, tribunals have found it to be an implicit requirement deriving from the international law principle of good faith (*Plama*,[78] *Phoenix*[79]).

107. Thus, the validity of the investment under the law of the host State is an element that determines the substantive protection of investment treaties and concerns all

---

[72] *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7 ("*World Duty Free v. Kenya*"), Award of 4 October 2006.

[73] *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24 ("*Plama v. Bulgaria*"), Award of 27 August 2008.

[74] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Estonia*, ICSID Case No. ARB/99/2 ("*Genin v. Estonia*"), Award of 25 June 2001.

[75] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL Case ("*Thunderbird v. Mexico*"), Award of 26 January 2006.

[76] Counter-Mem., ¶ 131, Tribunal's translation.

[77] Decision on Jurisdiction, ¶ 255.

[78] *Plama v. Bulgaria*, Award of 27 August 2008.

[79] *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5 ("*Phoenix Action v. Czech Republic*"), Award of 15 April 2009.

substantive obligations of the State under the treaty with respect to the investment.[80] This applies irrespective of whether the illegalities were known to the State when taking certain measures in relation to the investment (*Genin*[81]).

108. In addition to this general legality requirement, the Respondent contends that the legality of the investment under the law of the host State is fundamental to characterize a State measure as an "expropriation" (*EnCana,*[82] *Generation Ukraine,*[83] *Thunderbird*[84]). Indeed, only property rights whose existence and validity are recognized by the law of the host State may be subject to expropriation.

109. In the present case, the Claimants' investments were illegal and invalid under Bolivian law from the start. Therefore, they do not constitute properly acquired property rights and cannot be subject to expropriation. The Tribunal should apply Bolivian law to these matters and conclude that the revocation and annulment of the Claimants' mining concessions is not an expropriation, and thus the State owes no compensation.

110. With respect to the nature of the alleged illegality, the Respondent argues that the Claimants' mining concessions were vitiated by two types of illegality: an "original illegality" and an "ongoing illegality." As summarized by the Respondent:

> [T]he illegality incurred by the Claimants in this case has two dimensions: original and ongoing. The illegality incurred in establishing the investment (original illegality) is an obstacle to the implementation of the substantive guarantees of the Treaty, while the illegality incurred by the Claimants in the subsequent administration and operation of the alleged investment (ongoing illegality) prevents the verification of the factual requirements of the alleged violations, and justifies the challenged measures.[85]

111. With respect to the alleged original illegality, the Respondent contends that RIGSSA and NMM, through Mr. David Moscoso, obtained the eleven mining concessions irregularly under Bolivian law, for the following reasons:[86]

---

[80] The Respondent also notes that the Tribunal is authorized to apply Bolivian law in accordance with the second sentence of Article 42(1) of the ICSID Convention, which provides that "[i]n the absence of [the parties' agreement on the applicable law], the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on conflict of laws) […]" (Counter-Mem., ¶ 130, Tribunal's translation).

[81] *Genin v. Estonia*, Award of 25 June 2001.

[82] *EnCana Corporation v. Ecuador*, LCIA, Award of 3 February 2006.

[83] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award of 16 September 2003.

[84] *Thunderbird v. Mexico*, Award of 26 January 2006.

[85] Rejoinder, ¶ 52, p. 19. Tribunal's translation.

[86] Exhs. R-244 to R-254.

a. The applications submitted by RIGSSA for seven of the concessions did not comply with the legal requirements regarding the legal status of the principal (RIGSSA) and the agent (Mr. Moscoso). This constitutes a violation of the procedure to obtain mining concessions established in Article 126 of the Mining Code,[87] as well as of the rules on capacity contained in Article 33 of the Code of Commerce.[88]

b. The four mining concessions obtained by NMM in 2002 were granted despite the fact that the applicant did not present proper authority to act in this procedure. In fact, the Tupiza and Tarija Regional Mining Superintendent, Ms. Pilar Vila Cortés, who was responsible for granting the concessions to NMM, was investigated and consequently removed from her post due to the serious irregularities in the granting of those concessions.[89]

c. The constitutive resolutions of some of those mining concessions were issued beyond the time limit established by Article 134 of the Mining Code.[90]

d. Neither RIGSSA nor NMM were registered with the Technical Mining Service (*Servicio Técnico de Minas*, "SETMIN"), as required by Article 122 of the Mining Code.

e. The Cancha I and Cancha II concession files were tampered with, because the date of the resolutions that granted the concessions predates the payment of the mining patents.[91] Bolivia also argues that since the Cancha I and Cancha II resolutions granted the concessions to Mr. David Moscoso instead of NMM, these administrative acts are invalid.[92]

112. The Respondent also suggests that Mr. Moscoso and Mr. Ugalde abused their former positions in the Ministry of Mining in order to push for the adoption of the *Ley Valda*, with the ultimate purpose of obtaining the concessions.[93]

---

[87] Exh. CD-6.

[88] Exh. R-255.

[89] Exh. R-259.

[90] Exh. CD-6.

[91] Rejoinder, ¶¶ 38-40.

[92] Rejoinder, ¶ 34.

[93] Counter-Mem., ¶¶ 36-51, 123.

113. With respect to the alleged ongoing illegality, Bolivia asserts that the audits carried out in accordance with Law 2,564 identified irregularities in the operation of some of the Claimants' concessions. Specifically, the Respondent asserts that the Claimants' concessions breached domestic law in matters of tax, customs, industrial safety, environment and labor.[94]

114. Moreover, the Respondent argues that the Claimants operated the mining concessions until 2004 without carrying out investments or prospects. According to the Respondent, during the two and a half years when NMM operated at the Salar de Uyuni, the Claimants made no investments to improve the production of ulexite and limited themselves to running the production fronts that already existed. The extraction, processing and transportation of the ulexite was artisanal, supported by the local means and did not involve any investment in infrastructure. In addition, Bolivia alleges that the Claimants did not carry out any of the investments mentioned in their economic expert's first report.[95] With respect to exploration, the Respondent argues that the Claimants failed to carry out any reserve prospecting or study. Instead, they based themselves exclusively on the Aquater-EniChem Report that Mr. Moscoso handed to them.

b. The Claimants' position

115. The Claimants contend that the Respondent's illegality arguments attempt to establish that the Claimants did not make an investment (or at least, an investment protected by the BIT) and that such arguments were already dismissed in the Decision on Jurisdiction. In any event, the Claimants reject the Respondent's allegations of illegality.

116. With respect to the Respondent's arguments of original illegality, the Claimants deny that the concessions were obtained through fraud, corruption or in breach of Bolivian law. The Respondent's accusations of fraud and corruption against Mr. Moscoso and Mr. Ugalde are false. First, Mr. Moscoso and Mr. Ugalde left public office long before setting up RIGGSA and obtaining an interest in the concessions. Second, the Respondent has not provided evidence of any connection between Mr. Moscoso and Mr. Ugalde and the adoption of the *Ley Valda*. Indeed, according to the Claimants, "the facts seem to indicate that the *Ley Valda* was adopted to facilitate the operation

[94] Counter-Mem., ¶ 84.

[95] Navigant First ER, ¶¶ 124-127.

of the giant San Cristóbal silver mine, located in the southern tip of the former fiscal reserve of the Salar de Uyuni."[96]

117. The Claimants also deny that they committed breaches of Bolivian law in the acquisition of the concessions that could render them null and void. Specifically:

a. Regarding the first seven concessions, the Claimants maintain that Mr. Moscoso and RIGGSA complied with all relevant legal requirements when they requested them before the Tupiza and Tarija Regional Mining Superintendent.[97] In particular, they claim that Mr. Moscoso presented all the necessary powers of attorney. Although they acknowledge that those powers of attorney were not registered in the Registry of Commerce at the time, they argue that their registration was not a requirement for the validity of the legal act, and in any event the powers of attorney were subsequently filed and registered before the Registry of Commerce. The Claimants also allege that Mr. Moscoso complied with the obligation to submit information related to the petitioner in accordance with Bolivian legal practice, and that the Superintendent of Mines was satisfied with the information provided. The requirements of Administrative Resolution 18/04 did not apply, as this resolution was issued four years after the concessions were granted. Finally, Article 33 of the Commercial Code creates an obligation for judges, not for administrative authorities nor for the Claimants.

b. With regard to the four concessions acquired directly by NMM, the Claimants argue that the power of attorney which Mr. Moscoso submitted for himself and for Mr. Omar León was sufficient.[98] As for the destitution of the Tupiza and Tarija Regional Mining Superintendent in connection with the granting of these concessions, they point out that any errors made by her are not attributable to the Claimants and stress that the Respondent "accuses its own administrative authorities of breaches of law and even fraud, in order to deny the legality of the Claimants' Concessions."[99] In any event, the Claimants argue that they "can also not be held accountable for possible errors in the administrative decisions by the Superintendent of Mines of Tupiza, the Respondent's own administrative authority."[100]

[96] Reply, ¶ 25.

[97] Reply, ¶¶ 52-61.

[98] Reply, ¶ 62; Exhs. R-251, R-252, R-253 and R-254.

[99] Reply, ¶ 66.

[100] Reply, ¶ 73.

c. Regarding the delay in the issuance of the constitutive resolutions of some of the concessions beyond the legal time limit, the Claimants allege that the delays were caused by the Director of the Technical Mining Service (SETMIN). In any case, Article 134 of the Mining Code imposes a 15-day time limit on the Superintendent of Mines, not on the applicants for a concession. Moreover, they argue that delays in the procedure and issuance of petitions for new concessions are very common and are not sanctioned with the nullity of the administrative act.[101]

d. Finally, the Claimants argue that the Respondent tries to mislead the Tribunal by asserting that neither RIGSSA nor NMM were registered before the SETMIN, in breach of Article 122 of the Mining Code. The Claimants explain that, pursuant to Article 122 of the Mining Code, the SETMIN must keep a register of mining concessions, mining acts and contracts, but does not register mining companies. Therefore, NMM and RIGSSA could not have been registered with the Mining Registry.[102]

118. The Claimants note in addition that the Revocation Decree revoked the concessions for reasons unrelated to the formal breaches which are now alleged. According to the Claimants, "these alleged 'irregularities' were first invoked in the *ex post* writs of annulment, as part of Bolivia's defense strategy."[103]

119. The Claimants also note that the Respondent did not refer to these alleged formal irregularities in its Objections to Jurisdiction. Bolivia "now attempts to use them to a double purpose: to deny the Tribunal's jurisdiction and to justify the *ex post* annulment of the Concessions. Both are moot points: the Tribunal has already confirmed its jurisdiction and the Concessions were revoked before they were annulled. Indeed, the Concessions could not have been 'revoked' if they were 'null and void' from the very beginning."[104]

120. In any event, the Claimants contend that, as the Tribunal found in its Decision on Jurisdiction, the BIT's legality requirement does not extend to trivial breaches of domestic law. In particular, the Claimants argue that these alleged irregularities

[101] Reply, ¶¶ 67-69, citing Article 36.III of the Law of Administrative Procedure.

[102] Reply, ¶ 65.

[103] Reply, ¶ 50.

[104] Reply, ¶ 51.

"could not possibly be indicative of a carefully planned attempt by the Claimants to circumvent the requirements of Bolivian law."[105]

121. As for the claims of ongoing illegality, the Claimants contend that "the alleged breaches of mining, commercial or administrative law are either non-existent or utterly trivial."[106] Regarding the alleged environmental breaches, the Claimants maintain that NMM complied "at all times with all environmental regulations"[107] and criticizes Bolivia's use of a circular argument, "[b]ecause the Respondent tried to persuade us and the Tribunal that the alleged non-existence of environmental licences would justify the expropriatory act when the environmental licence was illegally revoked by the same government the very same day of the expropriation."[108]

122. Finally, the Claimants reject Bolivia's assertion that they operated the mining concessions until 2004 without carrying out investments or prospects, as follows:

> The Tribunal declared itself "satisfied that Quiborax's and NMM's original and subsequent contributions meet the contribution requirement for the "investment" test of Article 25(1) of the ICSID Convention." The Tribunal's Decision on Jurisdiction leaves no room for doubt that the Claimants made an investment in Bolivia. There is also no room for the Respondent to, once again, argue to the contrary in its presentations on the merits.[109]

123. In sum, the Claimants submit that the Respondent's claims of illegality do not pass the threshold set by the Tribunal in its Decision on Jurisdiction,[110] nor do any of the cases cited by the Respondent interpret the legality requirement more broadly than the Decision on Jurisdiction. The trivial breaches of domestic law alleged by the Respondent should not therefore leave the Claimants without treaty protection nor justify an otherwise unlawful confiscation of their rights.

c. Analysis

124. The Respondent argues that the Claimants' investments were affected by two types of illegality: an illegality in connection with the establishment of the investment (*i.e.*, an original illegality) and an illegality in its subsequent administration and operation

[105] Reply, ¶ 73.

[106] Reply, ¶ 220, footnote omitted.

[107] Tr., Day 3, 18:1-2.

[108] Tr., Day 3, 22:2-7.

[109] Reply, ¶ 80.

[110] Decision on Jurisdiction, ¶ 237.

(*i.e.*, an ongoing illegality). The Tribunal understands that the Respondent's argument has three prongs:

a. First, the Claimants did not make and operate an investment in accordance with Bolivian law and, hence, cannot benefit from the substantive protections of the BIT.

b. Second, the acquisition of the Claimants' mining concessions was illegal and therefore the concessions were null and void *ab initio*. As a result, the Claimants had no right to those concessions that could be subject to expropriation.

c. Third, the revocation and subsequent annulment of the Claimants' concessions were justified by the Claimants' breaches of Bolivian law in the establishment and operation of these concessions. Such measures are therefore punitive measures applied in the legitimate exercise of the State's police powers, rather than expropriations.

125. The Tribunal will now address the first two arguments. It will address the third argument in the context of its analysis of whether there has been an expropriation (Section VI.A.4 below).

i. Bolivia's argument that the Claimants' investments are not protected by the BIT

126. The first prong of Bolivia's argument of illegality is that the Claimants' investments were not made nor operated in accordance with Bolivian law and that, as a result, they cannot benefit from the substantive protections of the BIT.

127. In the Tribunal's view, an investment may benefit from the substantive protections of the BIT if it qualifies as an investment under the BIT and under the ICSID Convention, if the investment meets the legality requirement of the BIT, and is not denied the benefits of the BIT as a result of a specific provisions in the BIT (by virtue of a "denial of benefits" clause). In the Decision on Jurisdiction, the Tribunal found that Quiborax's and NMM's investments qualified as investments both under the BIT[111] and under Article 25(1) of the ICSID Convention.[112] Bolivia did not invoke at that

[111] Decision on Jurisdiction, ¶¶ 210-211.

[112] Decision on Jurisdiction, ¶ 237.

stage (nor does it do so now) the denial of benefits clauses contained in Articles I.1.c and II of the Protocol to the Bolivia-Chile BIT.

128. With respect to the legality requirement, in the Decision on Jurisdiction, the Tribunal found that it had both subject-matter and temporal limitations, as follows:

> The subject-matter scope of the legality requirement is limited to (i) non-trivial violations of the host State's legal order […], (ii) violations of the host State's foreign investment regime […], and (iii) fraud – for instance, to secure the investment […] or profits […]. Additionally, under this BIT, the temporal scope of the legality requirement is limited to the establishment of the investment; it does not extend to the subsequent performance. Indeed, the Treaty refers to the legality requirement in the past tense by using the words investments "made" in accordance with the laws and regulations of the host State and, in Spanish, "haya efectuado" […].[113]

129. To the extent that the Respondent's allegations refer to the operation or performance of the investment (Bolivia's allegations of "ongoing illegality"), they are not relevant to the availability of the BIT's substantive protections. Instead, they are matters for the merits which the Tribunal will address when determining whether the Respondent breached its BIT obligations.[114] By contrast, to the extent that the Respondent's allegations of illegality refer to the establishment of the investment (Bolivia's allegations of "original illegality") they fall under the temporal scope of the BIT's legality requirement. However, these allegations seek to reopen an issue that was resolved during the jurisdictional phase

130. That the Tribunal's inquiry at that juncture was directed to establishing jurisdiction does not detract from the fact that the Tribunal ascertained that the Claimants' investments were made in accordance with Bolivian law. This conclusion also applies to the application of the substantive protections of the BIT. Only the allegation of an illegality that was unknown to Bolivia during the jurisdictional phase may justify reopening the matter at the merit stage.

131. Bolivia now argues that the Claimants' mining concessions were originally obtained by Mr. David Moscoso and Mr. Álvaro Ugalde through an abuse of their position as former officers of the Ministry of Mining. Specifically, Bolivia argues that the Claimants' concessions "were the result of an irregular process that unduly benefitted public officers that knew, due to their functions, the nature and precise location of the

[113] Decision on Jurisdiction, ¶ 266. Footnotes omitted.

[114] *See, e.g., Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction of 19 December 2012, ¶ 260. *See also Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction of 30 April 2010, ¶ 176.

Salar [de Uyuni]'s mineral wealth, Álvaro Ugalde and David Moscoso, who had been in office in the Ministry of Mining (Vice-minister and Legal Director, respectively)."[115] Indeed, Bolivia claims that the *Ley Valda* was adopted in dubious circumstances and suggests that Mr. Moscoso may have played a part in its adoption:

> The personal interest of senator Valda in redefining the extension of the Fiscal Reserve of the Gran Salar de Uyuni is unclear. We understand that senator Valda's sister was (or had been), Mr. David Moscoso's personal secretary, therefore he could have promoted the bill.[116]

132. Bolivia did not advance these arguments during the jurisdictional phase, although it had all the necessary elements to do so. As such, the objection could be rejected outright. Nevertheless, due to the gravity of the accusation, the Tribunal has considered the Respondent's allegation and has analyzed the evidence adduced to support it.

133. Having done so, the Tribunal finds that the evidence to which Bolivia refers in support of its contention[117] is inconclusive. Specifically:

a. Bolivia cites former senator Martín Quirós Alcalá's "Commentary on the Mining Code of 1997" to claim that "criminal hands" were behind the adoption of the *Ley Valda*. The document, however, simply mentions that part of the media argued that there had been a "criminal hand" behind the "adulteration" of Quiros's bill, which contained a different proposal from that finally adopted in the *Ley Valda*.[118] There is no mention of either Mr. Moscoso or Mr. Ugalde, nor any other indication of who this "criminal hand," if any, might be.

b. The Claimants have persuasively rebutted the existence of a connection between Mr. Moscoso and Senator Valda: Senator Valda's sister worked as a secretary at a gold mine company where Mr. Moscoso was a legal director between July 1994 and January 2001. However, they worked at offices located in different cities, she was never Mr. Moscoso's secretary, and it is not established that they worked at the company at the same time.[119]

c. It seems undisputed that Messrs. Moscoso and Ugalde left public office long before obtaining an interest in the concessions (1985 and 1979, respectively).

[115] Counter-Mem., ¶ 123, Tribunal's translation.

[116] Counter-Mem., ¶ 45, Tribunal's translation, footnote omitted.

[117] Exhs. R-227, CD-10, CD-28, CD-38, R-243, R-22 and R-240.

[118] Exh. R-227, p. 272.

[119] Reply, ¶ 37.

According to Articles 18 and 19 of the Mining Code,[120] the restrictions on public officials to obtain an interest in mining concessions are limited to the first three months after leaving public office.

134. For the foregoing reasons, the Tribunal cannot but dismiss the Respondent's argument that the Claimants' investments should be denied the substantive protection of the BIT because they were not made or operated in accordance with the law.

ii. Bolivia's argument that the Claimants' concessions were null and void *ab initio* and thus cannot be subject to expropriation

135. The second facet of the Respondent's illegality argument is that, because the Claimants' concessions were obtained irregularly, they are null and void *ab initio*. As a result, the Claimants did not hold a right that could be subject to expropriation. The Tribunal agrees with the Respondent that, in order for a right to be expropriated, it must first exist under the relevant domestic law (in this case, Bolivian law).

136. Here, the Tribunal stresses that it already held that the Claimants' investments were validly made under Bolivian law in the Decision on Jurisdiction. The Tribunal cannot but note that the Respondent did not make these allegations during the jurisdictional phase, when the legality of the Claimants investments was being discussed.

137. Be this as it may, the Tribunal cannot follow the Respondent's argument as a matter of merits. The alleged illegalities that the Respondent now brings to the Tribunal's attention were first raised in the writs of annulment of the concessions. Indeed, on 28 October 2004, the concessions were annulled for failure to comply with Articles 126 and 128 of the Mining Code, on the grounds of "*impersonería en el mandante y mandatario*" (*i.e.*, lack of legal capacity or sufficient representation of the principal and agent).[121] This annulment took place four months after the revocation of the concessions on different grounds. As the Claimants point out, had the concessions been improperly granted they would have been annulled or declared null and void in the first place, not revoked.

138. As discussed in Section VI.A.4 below, the annulment of the concessions on these formal grounds appears to have been a form of "damage control" by the Respondent in order to make the cancellation of the concessions definitive after the legality of the

[120] Exh. CD-6.

[121] Exh. R-276; *see* ¶ 31 *supra*.

Revocation Decree was questioned. Indeed, in the 2004 Inter-Ministerial Memo, members of the Bolivian Government were considering precisely this defense strategy in connection with the Claimants' BIT case:

> SECOND SCENARIO - The Bolivian Government may attempt to defend its decisions. Unfortunately, the Mining Code makes no provisions for the revocation of mining concessions. Therefore, this option has a great weakness. Another alternative would be to try to prove irregularities in the processing of the original mining concessions of Non Metallic Minerals S.A., so as to demonstrate that these are and always have been invalid. For the time being, this has been considered the best alternative.[122]

139. This strongly suggests that the annulment of the concessions on the formal grounds cited above was an *ex post* attempt to improve Bolivia's defense in this arbitration, not a *bona fide* exercise of Bolivia's police powers. It also suggests that the alleged irregularities were either fabricated or trivial breaches that would not normally justify the annulment of a concession. Although the 2004 Inter-Ministerial Memo postdates the writs of annulment, it confirms the course of action adopted by the Government by stating that "[f]or the time being, this has been considered the best alternative."[123]

140. In any event, the Tribunal finds that the Claimants have established that the flaws alleged by Bolivia are either non-existent or are not subject to the sanction of annulment of the concessions. They did so with respect to the first seven concessions obtained by RIGSSA as follows:

a. The Claimants have shown that the petitions for each concession all contain the powers of attorney from RIGSSA to Mr. Moscoso.[124]

b. The Claimants acknowledge that these powers of attorney were not registered in the Registry of Commerce. However, although Article 29(5) of the Commercial Code imposes the obligation to register "any acts that grant, modify, substitute or revoke the general or special authority to administer goods or businesses of the merchant,"[125] failure to do so is not sanctioned by the nullity of the power of attorney. Instead, Article 34 of the Commercial Code provides that failure to register acts and documents subject to registration is a fine imposed by the

[122] Exh. CD-68, Tribunal's translation.

[123] Exh. CD-68, Tribunal's translation.

[124] Exhs. R-244 to R-250.

[125] Tribunal's translation. The original Spanish text provides: "Art. 29.- (ACTOS Y CONTRATOS SUJETOS A INSCRIPCION). Deben inscribirse en el Registro de Comercio: […] 5) todo acto en virtud del cual se confiera, modifique, sustituya o revoque la facultad de administración general o especial de bienes o negocios del comerciante." Exh. R-255.

Registry.[126] Further, Article 31 provides that acts or documents subject to registration are effective *vis-à-vis* third parties only from the moment of their registration.[127]

c. The Claimants claim that Mr. Moscoso presented the powers of attorney, duly registered, to the Superintendent of Mines in January 2002.[128] The Tribunal notes that Exh. R-256, upon which the Claimants rely for this assertion, appears to be a request to add certain powers of attorney to the original concession files. However, the powers of attorney themselves are not attached, nor is a copy of their registration in the Commercial Registry, so the Tribunal cannot confirm the veracity of this statement. That said, as the failure to register is not sanctioned by the nullity of the power of attorney, the Tribunal does not find this fact determinative.

d. The Tribunal finds that the Claimants otherwise complied with the general practice at the Superintendence of Mines with respect to Article 126 of the Mining Code, which requires the applicant to submit general information regarding the law of the applicant ("*datos* […] *generales de ley del peticionario*"). The Respondent has not shown that this expression required specific documents, and the Superintendent of Mines could have requested further documents if it had considered that the documents submitted were insufficient. In addition, Administrative Resolution 18/04, which requires the submission of a company's certificate of incorporation, was passed in November 2004. In any event, that Administrative Resolution grants the applicant the opportunity to correct the omission within 15 days before archiving the petition.[129]

[126] The original Spanish text of Article 34 of the Bolivian Commercial Code provides: "Art. 34.- (SANCION). La persona que ejerza habitualmente el comercio sin estar matriculada en el Registro de Comercio, será sancionada con multa que impondrá este Registro, sin perjuicio de las demás sanciones legales. Igual sanción se aplicará cuando se omita la inscripción de los actos y documentos sujetos a registro" (Exh. R-255).

[127] Article 31 of the Bolivian Commercial Code provides: "Art. 31.- (EFECTOS DE LA MATRICULA E INSCRIPCION). La matrícula puede solicitarse al empezar el giro o dentro del mes que le siga, si el reglamento no fija un término para ello. Empero, los actos y documentos sujetos a inscripción no surten efectos contra terceros sino a partir de la fecha de su inscripción. Ninguna inscripción puede hacerse alterando el orden de su presentación" (Exh. R-255).

[128] Reply, ¶ 54.

[129] Exh. R-257.

e. Finally, although Article 33 of the Commercial Code provides that judges must require merchants to show their registration before the Registry of Commerce, this is an obligation imposed upon judges, not on the Claimants.[130]

141. Similarly, the record does not substantiate the defects alleged with regard to the four concessions acquired directly by NMM:

a. The Claimants have shown that Mr. Moscoso did submit a power of attorney for himself to act on behalf of NMM, which was granted by NMM's general manager, Mr. Omar León.[131] Although the power of attorney for Mr. Omar León is not attached, the notary before whom such power of attorney 631/2001 (Exh. R-251) was granted certified that Mr. León duly represented NMM on the basis of "General Management Power of Attorney" ("*Poder Especial de Administración*") No. 531/2001 issued on 2 October 2001 and granted at that same notary.[132] Given the notary public's role as certifying officer ("*ministro de fe*"), the Tribunal finds that this suffices to establish Mr. León's authority to represent NMM.

b. With respect to the destitution of the Tupiza and Tarija Regional Mining Superintendent, the Tribunal agrees with the Claimants that any errors made by her are not attributable to the Claimants.

142. Further, the Tribunal finds that the delay in the issuance of the constitutive resolutions of the concessions "Tete," "Pococho" and "La Negra" beyond the time limit set in Article 134 of the Mining Code cannot have the effect of rendering the concessions null and void for the following reasons:

---

[130] Article 33 of the Commercial Code provides: "Los jueces ante quienes ocurren los comerciantes deben exigir a éstos que acrediten previamente su matrícula del Registro de Comercio" (Exh. R-255).

[131] *See* Power of attorney 631/2001 of 19 November 2011, included in Exhs. R-251 (pp. 35-36), R-252 (pp. 34-35), R-253 (pp. 11-12) and R-254 (pp. 12-13).

[132] Power of attorney 631/2001 states that ""OMAR ANDRES LEON PEREZ […] en su condición de APODERADO ESPECIAL ESPECIAL [sic] de [NMM] […] y debidamente facultado para este acto en mérito a los incisos f) y h) del poder General de Administración N° 531/2001 de fecha 2 de Octubre de 2001 […] confiere PODER ESPECIAL Y SUFICIENTE, cual por derecho se requiere en favor del señor DAVID MOSCOSO RUIZ [...] para que en nombre y representación de [NMM] para su legal representación actúe con plena capacidad y poder para solicitar concesiones mineras conforme al Código de Minería vigente, a nombre de la sociedad mandante, ubicadas en la jurisdicción de la provincia Nor Lipez del departamento de Potosí […]."

a. The Law on General Administrative Procedure invoked by the Respondent dates from 23 April 2002 and entered into force twelve months later in 2003,[133] while the relevant concessions were granted in the years 2000 and 2002.[134]

b. Assuming *arguendo* that the provisions of this act were applicable to the situation at hand, the failure of the Superintendent of Mines to meet the time limit imposed in Article 134 of the Mining Code does not appear to trigger the nullity of the concession. While that provision states that if the Superintendent does not comply with the 15 day time limit to grant the concessions following the preparation of the definitive concession plan by the SETMIN, the Superintendent ceases to be competent,[135] the granting of the concessions is not automatically null and void. Pursuant to Article 35 of the Law on General Administrative Procedure, administrative acts issued by an incompetent administrative authority are only automatically null and void ("*nulos de pleno derecho*") if that incompetence relates to subject matter or territory.[136] Here, however, the defect stems from failure to meet a deadline, so the appropriate sanction is that provided in Article 36(III): "Performance of administrative acts outside of the established time limits shall be voidable when the nature of the term or deadline so imposes it."[137] Given that the time limit is imposed to accelerate the procedure to the benefit of the applicants, the Tribunal does not believe that the nature of the time limit vitiates the grant of the concession.

c. Even if the failure by the Superintendent to meet the time limit established in Article 134 of the Mining Code had arguably made the concessions voidable,

---

[133] Exh. R-258, Second Final Provision, p. 17.

[134] Exhs. R-244, R-251 and R-252.

[135] Article 134 of the Mining Code (Exh. CD-6) provides: "Once the requirement indicated in the preceding article has been complied with [the preparation of the definitive plan of the concession by the Technical Mining Service] and within a maximum period of fifteen calendar days from said compliance, subject to loss of competence, the Mining Superintendent […] will grant the mining concessions through an express constitutive resolution […]."[…]," Tribunal's translation. The original Spanish text reads as follows: "Cumplido el requisito señalado en el artículo precedente y en el plazo máximo de quince días calendario desde dicho cumplimiento, bajo sanción de pérdida de competencia, el Superintendente de Minas […] otorgará la concesión minera mediante resolución constitutiva expresa […]."

[136] The original Spanish text of Article 35(1) of the Law on General Administrative Procedure (Exh. R-258) provides: "Son nulos de pleno derecho los actos administrativos en los casos siguientes: a) Los que hubiesen sido dictados por autoridad administrativa sin competencia por razón de la materia o del territorio; […]"

[137] Exh. R-258, Tribunal's translation. The original Spanish text of Article 36(III) of the Law on General Administrative Procedure provides: "La realización de actuaciones administrativas fuera del tiempo establecido para ellas sólo dará lugar a la anulabilidad del acto cuando así lo imponga la naturaleza del término o plazo."

voidable acts ("*actos anulables*") as opposed to acts that are (automatically) null and void ("*actos nulos de pleno derecho*") may be validated by a subsequent act of the administrative authority.[138] The Tribunal considers that the fact that the Superintendent granted the concessions despite the expiration of the time limit constitutes such a validation.

d. Even assuming further that the concessions had remained voidable after having been granted by the Superintendent, voidable acts are deemed to be valid until they are declared void by a competent authority.[139] There is no dispute that the concessions were not declared null and void until October 2004 after their revocation in June 2004. Hence, the concessions were valid at the time when they were revoked.

143. Bolivia also claims that RIGSSA and NMM were not registered with the SETMIN and thus did not comply with Article 122 of the Mining Code. Article 122 of the Mining Code spells out SETMIN's responsibilities, including the responsibility to keep a national data base with all mining documentation (122(c)) and to manage a Mining Registry recording all mining acts and contracts.[140] Article 122 makes no specific reference to mining companies.

144. Finally, the Tribunal notes that one of the guiding principles of the General Law on Administrative Procedure is the principle of informality, whereby "failure by the applicant to comply with non-essential formal requirements that can be complied with in the future may be excused, and that circumstance shall not interrupt the administrative procedure" (Article 4(l)).[141] Although this text did not enter into force until after the concessions had been granted, it suggests that Bolivian administrative law is more flexible with breaches of formal requirements than what the Respondent argues. Based on this provision, the Tribunal cannot accept the Respondent's

[138] The original Spanish text of Article 37(I) of the Law on General Administrative Procedure (Exh. R-258) provides: "Los actos anulables pueden ser convalidados, saneados o rectificados por la misma autoridad administrativa que dictó el acto, subsanando los vicios de que adolezca."

[139] The original Spanish text of Article 36(IV) of the Law on General Administrative Procedure (Exh. R-258) provides that "[l]as anulabilidades podrán invocarse únicamente mediante la interposición de los recursos administrativos previstos en la presente Ley."

[140] Article 122(e) of the Mining Code (Exh. CD-6) provides that the SETMIN's responsibilities include "[o]rganizar y mantener el Registro Minero en el cual deberán inscribirse obligatoriamente todos los actos y contratos mineros."

[141] Article 4(I) of the General Law on Administrative Procedure (Exh. R-258) provides: "Principio de informalismo: La inobservancia de exigencias formales no esenciales por parte del administrado, que puedan ser cumplidas posteriormente, podrán ser excusadas y ello no interrumpirá el procedimiento administrativo."

argument that the Claimants could not subsequently correct the errors in the constitution of the concessions, because this is not allowed under Bolivian law ("*no existen en la legislación boliviana procedimientos correctivos de la naturaleza invocada por las Demandantes*").[142]

145. The Tribunal has also considered the Respondent's claim that the concession files for Cancha I and Cancha II had been tampered with.[143] Bolivia's argument is that the date of the resolutions that granted the concessions (10 July 2003[144]) predates the payment of the mining patents (25 July 2003[145]). However, the Tribunal notes that the title deeds for both concessions specify that the date of the resolutions is 30 July 2003. [146] In the absence of more compelling evidence, the Tribunal attaches more weight to the title deeds, which are documents issued before a public notary.

146. Bolivia also argues that since the Cancha I and Cancha II resolutions granted the concessions to Mr. David Moscoso instead of NMM, these administrative acts are invalid.[147] While the resolutions included at the end of Exhibits R-253 and R-254 indeed do not mention NMM, the same resolutions recorded in the relevant title deeds state that the concessions are granted to NMM (Exhs. CD-36 and CD-37). As Mr. Moscoso was acting on behalf of NMM, the discrepancy may be due to a clerical error which was subsequently corrected in the title deeds. As before, in its assessment of the evidence, the Tribunal considers that the official deeds carry more weight.

147. As a final matter in respect of Cancha I and Cancha II, the Tribunal observes that these concessions were drying fields not used to extract ulexite. Thus, even if the Claimant had not acquired these concessions validly, their damage claim would not be affected.

148. The Tribunal has also noted that the legal audit reported that the Claimants had not paid the compulsory mining fees.[148] As the Claimants have acknowledged, failure to pay the yearly mining fees ("*patentes*") is sanctioned with the expiry ("*caducidad*") of the concessions (Article 65 of the Mining Code). Having examined the legal audit

[142] Rejoinder, ¶ 30.

[143] Rejoinder, ¶¶ 38-40, with reference to Exhs. R-253 and R-254.

[144] Exhs. R-253 and R-254, pp. 39-40 of the original numbering of both files.

[145] *See* p. 36 of the original numbering of both files.

[146] Exhs. CD-36 and CD-37, p. 9 of the original numbering of both files.

[147] Rejoinder, ¶ 34.

[148] Exh. R-240, p. 11.

report,[149] the Tribunal notes that the Prefect of Potosí stated that the Claimants had failed to pay the required mining fees within the relevant time limit before the concessions were acquired.[150] However, the concession files submitted by the Respondent show that the Claimants did in fact pay the required mining fee when applying for the concessions, after which the concessions were granted.[151] A concession can only be sanctioned with expiry once it has been granted. As the flaw was corrected before the concessions were granted, the Tribunal considers that the sanction of expiry cannot apply in this case. The Claimants have alleged that they paid all yearly mining fees,[152] and the Respondent has not disputed this.

149. For the foregoing reasons, the Tribunal considers that the Respondent's allegations of illegality in the acquisition of the Claimants' concessions are not well-founded and that, at the time of the Revocation Decree, the Claimants had rights to the concessions which could be subject to expropriation.

3. The Respondent's argument that the Claimants' claims are premature

a. The Respondent's position

150. The Respondent argues that the Claimants have not made reasonable efforts to obtain the revocation of Bolivia's alleged breaches of the BIT before local courts, and that their claims are therefore premature. More specifically, Bolivia contends that the Claimants have failed to make reasonable efforts to obtain the revocation of the Revocation Decree, thereby depriving the State of an opportunity to remedy its allegedly wrongful conduct.[153]

151. According to the Respondent, such reasonable efforts are a constitutive element of a breach of treaty and international law. It specifies that "[t]his requirement cannot and should not be confused with a procedural requirement to exhaust local remedies before resorting to an international tribunal. On the contrary, it provides that an

[149] The Tribunal notes that this document appears to be incomplete and is only partially legible.

[150] Exh. R-240, p. 11.

[151] Exhs. R-244, p. 24; R-245, p. 38; R-246, p. 24; R-247, p. 24; R-248, p. 24; R-249, p. 30; R-250, p. 23; R-251, p. 56; R-252, p. 66; R-253, p. 59; R-254, p. 60.

[152] Reply, ¶ 183.

[153] Counter-Mem., ¶ 105.

international illicit act can only be established through a definitive decision of the State that affects the investor's rights."[154]

152. In this respect, the Respondent alleges that the Claimants notified the existence of a dispute under the BIT before the mining concessions had been returned to the State.[155] It claims that RIGSSA filed an appeal regarding seven of the concessions, which was dismissed because it was not timely.[156] Other than that, the Claimants made no attempt or reasonable effort to challenge the legislative and administrative acts which they now describe as violations of the BIT and international law. Consequently, so the Respondent submits, this Arbitral Tribunal must dismiss all of the Claimants' claims as premature.

b. The Claimants' position

153. The Claimants argue that their claims are not premature and were submitted in accordance with Article X of the Bolivia-Chile BIT.

154. In particular, the Claimants submit that they were "under no obligation under the BIT to seek redress in domestic courts"[157] before bringing a claim to international arbitration, and reject the notion of "a general obligation to seek redress in domestic courts before resorting to international arbitration" entertained by the Respondent.[158] On the contrary, in accordance with Article X of the Bolivia-Chile BIT, the Claimants may either pursue their claims in domestic proceedings or in international arbitration, but may not do both. Here, the Claimants argue that they chose to resort to ICSID arbitration because their experience in Bolivia and the social and political climate in the country at the time of the expropriation led them to believe that they could not obtain an impartial judgment in Bolivia. NMM's right to resort to domestic proceedings to challenge Decree 27589 is irrelevant for the Claimants' right to initiate international arbitration under the BIT.

155. The Claimants assert that Bolivia attempts to impose an obligation to exhaust local remedies, which may be a requirement for a claim of denial of justice, but not for one of expropriation. Moreover, under Article 26 of the ICSID Convention, Contracting

[154] Counter-Mem., ¶ 107, Tribunal's translation (emphasis in original).

[155] Exhs. CD-58 and CD-59.

[156] Exh. R-277.

[157] Reply, ¶ 201.

[158] Reply, ¶ 203.

States have waived the requirement of exhaustion of local remedies as a precondition to the submission of disputes to ICSID, unless otherwise stated. Bolivia has made no reservation under Article 26 and is thus fully bound by it.

c. Analysis

156. The Respondent argues that the Tribunal should dismiss all of the claims as premature because the Claimants made no reasonable efforts to obtain the revocation of the act complained of. The Claimants, in turn, deny that they should have sought redress in local courts prior to initiating international arbitration.

157. The Tribunal does not believe that the claims brought before it are premature. Indeed, the wording of Article X(4) of the Bolivia-Chile BIT is unambiguous:

> Once the investor has referred the dispute to the competent court of the Contracting Party on whose territory the investment was made or to the arbitral tribunal, the choice of one or other proceeding will be final.
>
> (Tribunal's translation)

158. This Article contains a fork-in-the-road provision that would have prevented the Claimants from bringing their case to an arbitral tribunal if they would have first gone through the local judicial channels.

159. Moreover, the Tribunal is not persuaded by the Respondent's argument that the alleged expropriatory measure, Decree 27589, was not a "definitive decision of the State." It was a Presidential Decree, issued by the State's highest executive authority, it was not, as the Claimants have pointed out, "an act of maladministration by some lower administrative authority."[159] In addition, its wording is clear: it revoked the Claimants' concessions and ordered them to be returned to the State within the next thirty days. To the Tribunal's mind, Decree 27589 was definitive enough.

160. Consequently, the Tribunal does not consider that the claims are premature.

4. Was there an unlawful expropriation of the Claimants' investments?

a. The Claimants' position

161. The Claimants contend that the Revocation Decree expropriated their investments in Bolivia (i), and that this expropriation was unlawful under the BIT (ii).

[159] Reply, ¶ 211.

i. Decree 27,589 expropriated the Claimants' investments

162. The Claimants submit that the Revocation Decree expropriated their investments in Bolivia. In their Memorial on the Merits, the Claimants argued that the expropriation was both direct and indirect:[160]

a. On the one hand, the Revocation Decree revoked NMM's concessions and ordered NMM to deliver them to the authorities of Potosí within a period of thirty days. The Claimants see this order as a case of a "formal or obligatory transfer of title in favour of the host State" in accordance with the definition of direct expropriation found in particular in *Metalclad Corp* v. *United Mexican States*.[161] In other words, there has been a direct expropriation of NMM's investments.

b. As a consequence of the expropriation of the concessions, Quiborax's shares in NMM became worthless overnight. Although Quiborax is still nominally the owner of 51% of NMM's shares, it has lost the economic use and enjoyment of its investments. Relying on *Metalclad*,[162] *Starret Housing Corporation v. Iran,*[163] and *Tecmed*,[164] the Claimants argue that the revocation of NMM's concessions has had the effect of depriving Quiborax of the benefits of its property in a manner equivalent to an expropriation. As a result, there has been an indirect expropriation of Quiborax's investments.

163. In their Reply and during the hearing, the Claimants focused solely on the direct expropriation of the NMM's investments, without seeking to establish the diminution in value of Quiborax's shares in NMM.

164. The Claimants add that, while it is not necessary for the State to benefit from the expropriation, in this case Bolivia has obtained important benefits from the confiscation of the concessions, as the related land contains valuable natural resources such as borates, potassium and lithium.[165]

---

[160] Mem., ¶ 137.

[161] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 ("*Metalclad v. Mexico*"), Award of 30 August 2000, ¶ 103.

[162] *Metalclad v. Mexico*, Award of 30 August 2000, ¶ 103.

[163] *Starrett Housing Corporation v. Islamic Republic of Iran* (1983) ("*Starrett Housing v. Iran*"), 1 Iran-US CTR 9.

[164] *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)00/2 ("*Tecmed v. Mexico*"), Award of 29 May 2003.

[165] Behre Dolbear, First ER, ¶ 111.

165. The Claimants submit that, despite the fact that the Revocation Decree does not present itself as an expropriation, it is expropriatory in nature. The Respondent's attempts to characterize it as an act of revocation do not detract from the unlawfulness of the deprivation of property suffered by the Claimants.

166. The Claimants further contend that the expropriatory act was the Revocation Decree, not the *ex post* writs of annulment of the concessions. According to the Claimants, "[t]he *ex post* annulment of the Concessions constitutes a breach of Bolivia's treaty obligations to provide fair and equitable treatment and refrain from taking arbitrary or discriminatory measures," but they "are not an expropriation. The Claimants had already been expropriated, directly and definitively, by DS 27,589 of 23 June 2004."[166]

167. Citing *Santa Elena*[167] and other authorities, the Claimants argue that the date of the expropriation is the date on which the owner has been deprived of its property rights or of their economic use. In this case, the Claimants contend that this occurred when the concessions were revoked on 23 June 2004, and when they were forced to return them to the Prefect of Potosí on 23 July 2004. After that date, they never operated the concessions again. The fact that NMM was able to export accumulated ulexite until 24 September 2004 does not alter this fact, as NMM's property right of previously extracted ulexite is separable from its entitlement to the concessions.[168]

168. The Claimants emphasize that they were victims of a direct expropriation through the revocation of the concessions by the Revocation Decree; they were not victims of a creeping expropriation that started on 23 June 2004 and became definitive on 28 October 2004, the date on which the writs of annulment were issued. The Claimants argue that the concepts of direct expropriation and creeping expropriation are mutually exclusive, and that there cannot be a "repeat" expropriation once the first expropriation has deprived the owner of its property. Citing *Burlington v. Ecuador*,[169] they argue that "there cannot be a creeping expropriation where there is direct expropriation," and that "later 'expropriatory' measures are irrelevant if they merely formalize an already existing state of affairs."[170] According to the Claimants, the

[166] Reply, ¶ 82.

[167] *Compañía del Desarrollo Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1 ("*Santa Elena v. Costa Rica*"), Final Award of 17 February 2000.

[168] Mem., ¶¶ 83, 86-95.

[169] *Burlington v. Ecuador*, Decision on Liability of 14 December 2012.

[170] Reply, ¶ 105.

revocation of their concessions was definitive, and the subsequent annulment of these concessions did not alter this state of affairs.[171]

169. Further, the Respondent cannot increase the burden of proof upon them, so say the Claimants, by having them defend themselves from two direct expropriations.[172]

170. Finally, the Claimants argue that the writs of annulment (as well as the subsequent revocation of the Revocation Decree) are part of the Respondent's defense strategy in this arbitration.[173]

ii. The expropriation was unlawful

171. The Claimants argue that Article VI prohibits all forms of deprivation of property, except by lawful expropriation under the following conditions: the expropriation must be (i) for a public purpose or in the national interest; (ii) in accordance with the law; (iii) non-discriminatory and (iv) accompanied by immediate, adequate and effective compensation. The Claimants contend that none of these conditions were met.

(a) The Revocation Decree was not issued in accordance with the law and did not serve the public interest

172. First, the Claimants assert that the Revocation Decree was not issued in accordance with the law and did not serve the public interest. Although it is allegedly founded on Law 2,564, this law was "targeted legislation and the first step in the *iter expropriatorio* that culminated in DS. 27,589 and the forced delivery of the concessions as ordered under the same Presidential Decree."[174] Indeed, according to the Claimants, Law 2,564 was "tailor made to annul the concessions in area of Rio Grande,"[175] was "adopted under pressure of political organizations of the Department of Potosi," and "was specifically designed to provide the Executive with the power to annul concessions in the Rio Grande area."[176]

[171] Reply, ¶¶ 95-105.

[172] Reply, ¶ 85.

[173] Reply, ¶¶ 85, 106-120.

[174] Mem., ¶ 143.

[175] Mem., ¶ 146.

[176] Mem., ¶ 143, Exh. CD-65.

173. The Claimants allege that Article 3 of Law 2,564 "created an extraordinary power, vested in the Executive, to annul previously constituted concessions."[177] They argue that this power to annul was "very broadly defined, under the only condition that the annulment must take place within a peremptory period of sixty days."[178]

174. According to the Claimants, Law 2,564 is unconstitutional and violates fundamental principles of international law, in particular because it overruled established procedures under administrative law and expanded the causes for annulment in the Mining Code retroactively. Specifically, the Claimants contend that Law 2,564 violates the principles of non-retroactivity and legal certainty set forth in Articles 33 and 7(a) the 1967 Bolivian Constitution, which was in force when Law 2,564 was enacted.[179]

175. More specifically, the Claimants argue that Law 2,564 and any annulments pronounced under it fail to meet the minimum requirements of due process of law under both international law and Bolivian law. Citing *ADC v. Hungary*,[180] the Claimants submit that "due process of law" requires an actual and substantive legal procedure, providing for certain basic procedural mechanisms such as advance notice and a fair hearing, in which the investor has a reasonable chance to claim its rights and be heard. [181]

176. Bolivian law also requires certain minimum standards of due process. Citing provisions of the Law of General Administrative Procedure[182] and of the Mining Code,[183] the Claimants submit that:

> Under Bolivian administrative law, the party affected by the annulment of an administrative act must be notified of the initiation of any procedure that may affect their [*sic*] interests or rights. The administrative act is considered lawful until established otherwise by a judge. The affected party must be given an opportunity to present evidence within a certain period of time or even at any time during the procedure. The administrative decision must state its reasons and legal cause. The affected party can challenge the administrative decision before the administrative authorities and in court.

[177] Mem., ¶ 147.

[178] Mem., ¶ 147.

[179] Mem., ¶¶ 147-149; Reply, ¶¶ 129-133; Exh. R-286.

[180] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic Hungary*, ICSID Case No. ARB/03/16 ("*ADC v. Hungary*"), Award of 2 October 2006.

[181] *ADC v. Hungary*, Award of 2 October 2006, ¶ 435, cited by the Claimants at Mem., ¶ 149.

[182] Exh. R-258.

[183] Exh. CD-6.

> Mining concessions particularly can only be annulled for the limited causes established under Articles 17 and 18 of the Mining Code.[184]

177. According to the Claimants, none of these procedural requirements was respected by either Law 2,564 or the Revocation Decree, as neither of these instruments provided for a notification of the initiation of the audits, an opportunity to present evidence or participate in the proceedings, or means to challenge the decisions. Nor did Law 2,564 explain what breaches would be serious enough to justify the annulment of the concessions.[185]

178. The Claimants assert that "they were never informed of any auditing procedures nor participated in any of them."[186] They claim that the first time that they were able to review the four audit reports submitted by the Respondent as evidence was in the context of this arbitration and, except for the SERGEOMIN-COMIBOL audit, until now they are not even in a position to confirm that these audits had actually occurred.[187]

179. In any event, the Claimants argue that the Revocation Decree was not issued in accordance with Law 2,564. First, the Revocation Decree was issued after the 60-day period set in Law 2,564. Nor were the audits (with the possible exception of the SERGEOMIN-COMIBIL audit) finalized within that 60-day period.

180. Second, although the revocation of the Claimants' concessions was allegedly based on the auditing procedures established by Law 2,564, the grounds invoked in the decree have no support in the auditing reports to which it refers. With the exception of the legal audit conducted by the Prefect of Potosí, all the audits made general recommendations that applied to all investigated companies. Specifically:

    a. The SERGEOMIN-COMIBOL report[188] is a document that describes the concessions in the Río Grande Delta and the operating companies in that area (NMM, SOCOMIRG and Copla) in general terms. It does not specify environmental damages, it only states that the environmental situation is deficient because of a lack of control and makes general observations applicable to all three companies. It makes no recommendations specific to NMM.

---

[184] Reply, ¶ 132 (footnotes omitted).

[185] Reply, ¶ 133 (footnotes omitted.

[186] Reply, ¶ 135.

[187] Reply, ¶ 136.

[188] Exh. R-261.

b. The report by the Ministry of Sustainable Development[189] concludes that all four investigated companies (Copla, NMM, Tecno Química and SOCOMIRG) were operating without proper environmental documentation. The Claimants assert that NMM had presented a request for an environmental license in January 2003, but that a decision was still pending one year later.[190] The Claimants argue that, pursuant to Article 107 of the Environmental Regulations for Mining Activities,[191] NMM was allowed to operate the concession pending the license request. In any event, NMM submitted an updated *Manifiesto Ambiental* for its concession Borateras de Cuevitas in May 2004[192] and received its environmental license on 9 June 2004.[193]

c. The report provided by the Customs Service[194] also referred to all companies in the area that exploited or exported minerals between 1998-2003, and likewise did not contain conclusions or recommendations specific to NMM.

d. Finally, the legal audit authored by Ms. Ludy Moscoso (a legal consultant of the Prefect of Potosí, unrelated to Mr. David Moscoso), recommends the annulment of thirty requests for concessions, only seven of which were the ones requested by Mr. David Moscoso. The four concessions granted to NMM are not included in that list.[195]

181. By contrast, the Revocation Decree refers to an alleged refusal to cooperate with the Bolivian Revenue and Customs Services and to discrepancies in the amounts of ulexite declared and cargo volumes transported in breach of provisions of the Tax Code.[196] The Claimants assert that NMM was never approached by the Customs Services or the Internal Revenue Service, nor was it requested to provide information for the purpose of an auditing procedure under Law 2,564. The Claimants also

[189] Exh. R-267.

[190] Exh. CCD-169.

[191] Exh. CD-191.

[192] Exh. CD-170.

[193] Exh. CD-42.

[194] Exh. R-270.

[195] The Claimants also emphasize that, contrary to the Respondent's suggestions, neither NMM nor Mr. Moscoso were notified of the legal audit conducted by the Prefect of Potosí. The signature on the notice performed by the Superintendence of Mines is not his but Ms. Ludy Moscoso's. In addition, nothing in the document indicates that it is a notification of an auditing procedure conducted by the Prefect of Potosí. The Claimants insist that they had no knowledge of this audit until the Respondent's presentation in its Counter-Memorial (Reply, ¶ 143).

[196] Exh. CD-50.

highlight that the SERGEOMIN-COMIBOL report does not refer to any alleged discrepancies between exported and declared amounts of ulexite; does not make any specific recommendation with respect to NMM; and that the Customs Service's report does not do so either. The Claimants assert that they were able to review these reports in order to verify the accuracy of this accusation for the very first time after the Respondent submitted them as evidence in this arbitration.[197] The Claimants also note that the National Railway Company (ENFE) mentioned in the Decree has not been operative since 1996 and could therefore not possibly have been involved in any transport of ulexite by NMM.

182. Finally, the Claimants argue that Bolivia itself recognizes that the revocation of the concessions was unlawful: the 2004 Inter-Ministerial Memo acknowledged that "the Mining Code makes no provisions for the revocation of mining concessions."[198] This is why President Rodríguez revoked the Revocation Decree in December 2005.[199]

(b) The Revocation Decree discriminated against the Claimants

183. The Claimants contend that the Revocation Decree and *ex post* annulment of the concessions discriminated NMM on the basis of the Chilean nationality of its majority shareholder, Quiborax, "at a time of resurfacing anti-Chilean sentiments."[200]

184. Other foreign investors operating within the Salar de Uyuni were spared from the effects of the Law 2546 and other concessionaires subjected to the same audit proceedings were not deprived of their investments. While they recognize that "[t]he auditing procedures in and of themselves did not discriminate against NMM,"[201] the Claimants argue that the Revocation Decree singled out NMM among all other mining companies similar to NMM, but for NMM's Chilean connection. Copla and Tecno Química, both Bolivian owned companies, exploited concessions in the Salar de Uyuni, as did NMM. Both were fined for alleged discrepancies in their customs declarations, as was NMM. Copla obtained and lost its environmental license, just like NMM. But only NMM lost its concessions.[202]

---

[197] Tr., Day 1, 39:7-17.

[198] Exh. CD-68, Tribunal's translation.

[199] Exh. CD-74.

[200] Mem., ¶ 175. The Tribunal has taken into account the Claimants' position on discrimination regarding both the expropriation and the FET claims.

[201] Reply, ¶ 174; Tr., Day 1, 39:22-23.

[202] *See* COSS, slides 35 and 36; Tr., Day 1, 40:9-41:24.

185. Contrary to Bolivia's contention, the Claimants argue that they are not required to prove that the contested measures were driven by a discriminatory intent. Nevertheless, the Claimants interpret the Bolivian government's analysis of possible defense strategies in the 2004 Inter-Ministerial Memo as sufficient proof of the State's intent to sacrifice the interests of the Claimants for political gain, showing that the actions of the central government against the Claimants were motivated by political calculation in the context of an internal regional conflict.[203]

186. Similarly, they claim that the *ex post* annulment of the concessions was motivated by the intent to avoid the application of the Bolivia-Chile BIT and the protection of the Claimants as Chilean investors.

(c) The Revocation Decree did not offer compensation

187. Finally, the Claimants note that the Revocation Decree did not provide immediate, adequate and effective compensation for the revocation of the concessions. According to the Claimants, "[t]his is not surprising, since DS 27,589 never pretended to be an expropriation but a 'sanction' for alleged breaches of law."[204]

b. The Respondent's position

188. The Respondent argues that its actions were legitimate and proportionate responses to the illegalities committed in relation to the mining concessions. In this context, it argues that "the revocation and annulment of the mining concessions that were not obtained in accordance with the laws and regulations of Bolivia cannot qualify as an expropriation under the Treaty or international law"[205] (i). If the Tribunal were to find that they do qualify as an expropriation, the Respondent argues that the expropriation does not violate the BIT or international law (ii).

i. Bolivia's measures were not an expropriation

189. Bolivia argues that the Revocation Decree was adopted on the basis of Law 2,564 and is not illegal. Both the Revocation Decree and the writs of annulment of the concessions "are part of the same reaction by the State. They are legitimate acts adopted in application of Bolivian law in response to the illegalities in the [Claimants']

[203] Exh. CD-68, p. 9.

[204] Reply, ¶ 232.

[205] Counter-Mem., ¶ 175, Tribunal's translation.

Mining Concessions."[206] It adds that "merely alleging that Bolivia has 'recognized' the illegality of DS 27,589 and that, as a consequence, this act is equivalent to an illicit expropriation of the mining concessions under the Treaty is insufficient to prove that Decree 27,589 is contrary to Bolivian law and to the BIT."[207]

190. The Respondent contends that the enactment of the *Ley Valda* was extremely controversial. In Bolivia's view, it undeservedly benefitted certain private interests (among others, those of Mr. Moscoso) to the detriment of the general interest of the Bolivian people. The concessions were thus questioned by Bolivia from the beginning, as shown by several bills which members introduced in the national Parliament to protect the Salar.[208] Law 2,564 was issued in this context.

191. The Respondent denies that the Revocation Decree qualifies as an unlawful expropriation of the Claimants' investments. Specifically, the Respondent argues:

a. That the Revocation Decree was issued on the basis of Law 2,564 is not in dispute. However, Law 2,564 is not illegal *per se* under international law, nor does it amount to a denial of justice. This law "does not revert, annul or revoke the concessions. On the contrary, it provides the execution of audits to verify the existence of illegalities and the adoption of the sanctions legally established. There is no 'extraordinary power, vested in the Executive', but a legislative mandate to inspect the concessions […] and, if appropriate, sanction the illegalities committed."[209]

b. It is not true that the Revocation Decree did not respect the time limit set in Law 2,564. The 60-day time period provided in Law 2,564 applies to the performance of the audits specified in said law, and is not related to the exercise of the power to declare the concessions null. It is undisputed that the audits began within this 60-day time period.

c. The Claimants submit no proof to support their accusation of alleged falsity in the recitals of the Revocation Decree. Bolivia has proved that (i) Mr. Moscoso was notified of the audits under Law 2,564;[210] (ii) these audits were carried

[206] Counter-Mem., ¶ 150, Tribunal's translation.

[207] Counter-Mem., ¶ 149, Tribunal's translation (emphasis in original).

[208] Counter-Mem., ¶ 151.

[209] Counter-Mem., ¶ 158, Tribunal's translation.

[210] Exh. R-266.

out,[211] and (iii) the audited companies were allowed to submit documentation and disclaimers before the audits were concluded.[212] The audits were not a mere pretext for annulment: other companies were audited under Law 2,564 and, when no significant breaches were found, their concessions were neither revoked nor annulled.

d. The Claimants' allegations of lack of due process are unsubstantiated. The Claimants have not proved that they did not have the opportunity to challenge the revocation before an impartial judge. Indeed, they recognize that they could have made use of their rights under Bolivian law. The fact that they did not do so shows that the claims are premature (*see* Section VI.A.3 above).

e. Under Bolivian law, the acts of the administration are presumed legal, unless an express judicial statement to the contrary is made.[213]

192. After their revocation, Bolivia declared the mining concessions null and void on legal grounds. The Claimants are wrong when they state that the annulment was irregular under Bolivian law because the grounds relied upon differ from those specified in the Mining Code. The fact that the Mining Code provides two grounds for annulment[214] does not exclude the application of the general regime on the annulment of administrative acts under Bolivian law and in particular the Law on General Administrative Procedure.[215] The grounds for which the concessions were annulled are grounds for the annulment of any administrative act under that law.

193. The Respondent denies that it has recognized the illegality of the Revocation Decree by revoking it through Decree 28,527 in 2005. The Respondent contends that Decree 28,527, issued during the government of President Rodríguez, is irrelevant. Decree 28,527 is exclusively based on the Mining Code and does not even mention Law 2,564, the only legal foundation of the Revocation Decree. When Decree 28,527 refers to irreparable legal errors contained in the Revocation Decree, the reference

[211] Exhs. R-261 and R-240.

[212] Informe Final de Fiscalización Aduanera Posterior a la empresa NMM del 18 de febrero de 2005 (Exh. R-270).

[213] Art. 4 of Law 2,341 (Exh. R-258), Tribunal's translation.

[214] Arts. 66, 17 and 18, Exh. CD-6. In accordance with Article 66 of the Mining Code, concessions can only be annulled for the causes contained in Articles 17 and 18. Article 17 of the Mining Code prohibits foreign individuals or companies from taking an economic interest in mining concessions within 50 kilometers of international frontiers. Article 18 prohibits certain public officials and their next of kin to take any kind of economic interest in mining concessions.

[215] Art. 4 g) (Exh. R-258).

aims at the inexistence of revocation grounds under the Mining Code; it does not consider Law 2,564, which has the same rank as the Decree. Thus, Decree 28,527 does not imply the illegality of the Revocation Decree under Bolivian law. Further, Decree 28,527 confirms the legality of the annulment of the mining concessions.[216]

194. Finally, the Respondent argues that, irrespective of the legality of the Revocation Decree, the Claimants' business model was not viable. Indeed, as a result of the export ban introduced by Decree 27,590 (the validity of which is not questioned by the Claimants), the Claimants' business model would have been substantially affected.[217]

ii. The requirements for an unlawful expropriation are not met

195. Bolivia submits that, even if, *par impossible*, the Tribunal were to conclude that there was an expropriation in the present case, the Claimants have not established that such expropriation was contrary to the BIT or international law. Article VI of the BIT only prohibits unlawful expropriations and the Claimants have not shown that the requirements for an unlawful expropriation are met. Specifically:

a. First, the revocation and annulment were measures taken for reasons of public or national interest and in accordance with the law, as required by the BIT. The objective of these measures was to recover the mining concessions illegally granted in the area of the fiscal reserve of the Gran Salar de Uyuni to the detriment of national interests.

b. Contrary to what the Claimants suggest, the unlawfulness of the deprivation of property is in dispute. Neither the recitals of Decree 28,527 nor the 2004 Inter-Ministerial Memo can be characterized as Bolivia's recognition of the alleged illegality of the revocation and annulment of the mining concessions. Like Decree 28,527, the 2004 Inter-Ministerial Memo is exclusively based on the Mining Code and makes no reference to Law 2,564.

c. Second, there was no discrimination.[218] According to Bolivia, the Claimants have failed to submit compelling evidence to support their claim that the revocation and annulment of the concessions was motivated by the investor's Chilean

[216] Recital No. 2 (Exh. CPM-7).

[217] Rejoinder, ¶¶ 73-75.

[218] The Tribunal has taken into account Bolivia's position on discrimination regarding both the expropriation and the FET claim.

nationality. In particular, the Claimants have failed to show that other similar cases were treated in a different way without a reasonable justification.[219] To the contrary, the record shows that the Claimants were treated in the same manner as the rest of the mining concessionaires in the Salar de Uyuni. All of the companies that were granted concessions under the *Ley Valda* were subject to the same auditing procedures in accordance with Article 3 of Law 2,564.[220] Additionally, no distinction was made in Law 2,564 between concessions owned by Chileans or by other foreigners. Likewise, the 2004 Inter-Ministerial Memo contains no indication that the revocation and annulment of the mining concessions were motivated by a desire to harm the investor by reason of its nationality. As summarized by the Respondent:

> Law 2,564 was applied to <u>all</u> of the concessions granted within the fiscal reserve area of the Salar de Uyuni. It was not, therefore, a measure "focused" on the Claimants or motivated by an alleged "anti-Chilean sentiment." If the revocation and annulment following the audits only affected the [Claimants'] Mining Concessions that is because their factual circumstances were unique.[221]

d. Finally, Bolivia has not breached the obligation to compensate for an expropriation under the Treaty, for two reasons (already discussed): (i) the concessions were obtained illegally, and (ii) the Claimants' claim is premature.

c. Analysis

196. Art. VI.1 of the BIT provides:

> 1. Neither of the Contracting Parties shall take measures depriving, directly or indirectly, an investor of the other Contracting Party of its investment unless the following conditions are met:
>
> a) the measures are taken for reasons of public purpose or national interest and in accordance with the law;
>
> b) the measures are not discriminatory;
>
> c) the measures are accompanied by provisions for payment of immediate, adequate and effective compensation.

[219] *Saluka Investments BV (Netherlands) v. Czech Republic*, UNCITRAL ("*Saluka v. Czech Republic*"), Partial Award of 17 March 2006, ¶ 313: "State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification" (Exh. R-176).

[220] Exh. CD-39.

[221] Counter-Mem., ¶ 184, Tribunal's translation (emphasis in original).

197. The Claimants contend that the Revocation Decree effected a direct expropriation of NMM's investments in Bolivia. Although they did not reassert this claim in the latter part of the proceedings (*see* paragraphs 162-163 above), they also argued that the Revocation Decree resulted in an indirect expropriation of Quiborax's investments in Bolivia.

198. According to the Claimants, it is the Revocation Decree that constituted the expropriatory act because that is the measure that deprived them permanently of their investments. The subsequent annulment of the concessions is not part of the *iter expropiatorio*, say the Claimants. Bolivia could not take a second time what it had already taken. Nor do the writs of annulment constitute the culmination of a creeping expropriation, when the Revocation Decree qualified as a direct expropriation. The Tribunal will therefore focus on whether the Revocation Decree was an expropriatory measure.

199. The Tribunal will first address whether the disputed measure qualifies as a direct expropriation of NMM's investments and/or as an indirect expropriation of Quiborax's investments. In the affirmative, it will assess whether such expropriation(s) were unlawful.

i. Was there a direct expropriation of the Claimants' investments?

200. The tribunal in *Burlington* which the Claimants cite, articulated the standard for a direct expropriation as follows: "a State measure constitutes expropriation under the Treaty if (i) the measure deprives the investor of its investment; (ii) the deprivation is permanent; and (iii) the deprivation finds no justification under the police powers doctrine."[222] This Tribunal agrees with this enunciation of the relevant standard. Tribunals dealing with direct expropriations have emphasized the need for a deprivation of property which must amount to a forcible taking or transfer to the State,[223] and its permanent nature.[224] Case law also insists on the fact that the taking

[222] *Burlington v. Ecuador*, Decision on Liability, ¶ 506.

[223] *See also LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1 ("*LG&E v. Argentina*"), Decision on Liability of 3 October 2006, ¶ 187; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 ("*Enron v. Argentina*"), Award of 22 May 2007, ¶ 243; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 ("*Sempra v. Argentina*"), Award of 28 September 2007, ¶ 280; *National Grid P.L.C. v. Argentina Republic*, UNCITRAL, Award of 3 November 2008, ¶ 145; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15 ("*El Paso v. Argentina*"), Award of 31 October 2011, ¶ 265; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1 ("*Roussalis v. Romania*"), Award of 1

must not qualify as the legitimate exercise of the State's police powers.[225] The Tribunal will start by reviewing the third component of this standard before addressing the other two.

(a) Does the deprivation find a justification under the police powers doctrine?

201. The Respondent argues that the Revocation Decree was a legitimate and proportionate response to the illegalities in the Claimants' concessions and therefore cannot qualify as an expropriation. The Respondent claims that "direct expropriation is a concept, revocation is another concept," and that "Decree 27,589 is clearly an act of revocation and it can in no way be deemed as an act of direct expropriation."[226] The Tribunal understands that the Respondent's argument is that the measures taken by Bolivia are sanctions imposed upon the Claimants in the legitimate exercise of the State's police powers, and as such are not a compensable taking under international law.

202. The Tribunal agrees with the Respondent that, if the Revocation Decree was the legitimate exercise of its sovereign right to sanction violations of the law in its territory, it would not qualify as a compensable taking. International law has generally understood that regulatory activity exercised under the so-called "police powers" of the State is not compensable. In this regard, Comment (g) to §712 of the American Law Institute's *Restatement (Third) of the Foreign Relations Law* provides:

> A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory, […] and is not designed to cause the alien to abandon the property to the state or sell it at a distress price.[227]

203. The Reporters' Note 6 to §712 of the *Restatement* adds:

December 2011, ¶ 327. *See also* R. Dolzer and C. Schreuer, Principles of International Investment Law (2008), p. 92 ("The difference between a direct and formal expropriation and an indirect expropriation turns on whether the legal title of the owner is affected by the measure in question.")

[224] Although the requirement of permanence has been addressed mostly in the context of indirect expropriations, its rationale also applies to direct expropriations. *See, e.g.*, *LG&E v. Argentina*, Decision on Liability of 3 October 2006, ¶ 193 ("Generally, the expropriation must be permanent, that is to say, it cannot have a temporary nature, unless the investment's successful development depends on the realization of certain activities at specific moments that may not endure variations"); *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award of 17 July 2006, ¶ 176(d) (holding that one of the elements of an expropriation is that "[t]he taking must be permanent, and not ephemeral or temporary").

[225] *See* Section (a) below.

[226] Tr., Day 1, 133:13-14 and 135:6-7; ROSS, slide 54.

[227] Restatement (Third) of The Foreign Relations Law (1986), § 712(g).

> "It is often necessary to determine, in the light of all the circumstances, whether an action by a state constitutes a taking and requires compensation under international law, or is a police power regulation or tax that does not give rise to an obligation to compensate, even though a foreign national suffers loss as a consequence.

204. The tribunal in *Tecmed* confirmed this approach by holding that

> [t]he principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable.[228]

205. Similarly, the tribunal in *CME v. Czech Republic* noted that "deprivation of property and/or rights must be distinguished from ordinary measures of the State and its agencies in proper execution of the law. Regulatory measures are common in all types of legal and economic systems in order to avoid use of private property contrary to the general welfare of the (host) State."[229]

206. This is particularly true in the case of rights of exploitation (such as licenses or concessions) that depend on the fulfillment of certain requirements by the foreign investor. If a State cancels a license or a concession because the investor has not fulfilled the necessary legal requirements to maintain that license or concession, or has breached the relevant laws and regulations that are sanctioned by the loss of those rights, such cancellation cannot be considered to be a taking by the State.[230]

207. The Tribunal must thus consider whether, in light of all the circumstances, the Revocation Decree was a legitimate cancellation of the Claimants' concessions in the exercise of Bolivia's sovereign power to sanction violations of Bolivian law and is therefore not a compensable taking or whether it is a veritable taking disguised as the exercise of the State's police powers. This will depend on whether (i) the Revocation Decree is based on actual violations of Bolivian law by the Claimants; (ii) whether those violations of Bolivian law are sanctioned with the termination of the concessions

---

[228] *Tecmed v. Mexico*, Award of 29 May 2003, ¶119.

[229] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award of 13 September 2001, ¶ 603.

[230] *See, e.g., Genin v. Estonia,* Award of 25 June 2001, ¶¶ 348-373 (holding that the cancellation of a banking license resulting from the legitimate exercise of the State's regulatory and supervisory functions cannot be regarded as a breach of the relevant treaty or international law). *See also Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award of 6 July 2012, ¶¶ 312-314 (holding that a court's confirmation that a contract had been legitimately terminated due to non-compliance by the investor was not an expropriation: "The internationally lawful termination of a contract between a State entity and an investor cannot be equated to an expropriation of contractual rights simply because the investor's rights have been terminated [...]").

(whether by revocation, cancellation, annulment or otherwise), and (iii) whether the revocation was carried out in accordance with due process.[231]

208. The Revocation Decree issued by the President of Bolivia, Mr. Carlos Mesa, reads as follows:

> WHEREAS:
>
> Mining Company Non Metallic Minerales [sic] S.A., which operates the mining concessions object of the present Supreme Decree, has systematically refused to provide information both to the National Tax Service and to the National Customs, thus preventing the audits mandated by Law No. 2,564 of 9 December 2003.
>
> It has been shown that the exports of ulexite minerals declared by Mining Company Non Metallic Minerales [sic] S.A. do not match the cargo volumes transported by the National Railways Company – ENFE, as shown in the audit performed by SERGEOMIN and COMIBOL of February 2004 and the Preliminary Report of the Revenue Service.
>
> These facts evidence economic damage to the State, contravening, in addition, provisions of the Tax Code currently in force, in compliance with the provisions of the Law of the Public Reserve of the *Gran Salar de Uyuni.*
>
> THE CABINET COUNCIL
>
> DECREES:
>
> SOLE ARTICLE.- I. The revocation of the constitutive resolutions and loss of the mining concessions Cancha I, Doña Juanita, Tete, Borateras de Cuevitas, Basilea, Inglaterra, Don David, Sur, Pococho, La Negra, Cancha II, located at the Río Grande Delta of the Gran Salar de Uyuni, Nor Lipez Province of the Region of Potosí, is hereby ordered.
>
> II. Mining Company Non Metallic Minerales [sic] S.A., which operates the abovementioned concessions, is granted a period of thirty days to physically hand over the concessions to the Prefecture of the Potosí Region, without prejudice to the criminal and civil actions that may be appropriate.
>
> III. All provisions contrary to the present Supreme Decree are abrogated and derogated.[232]

[231] *Metalclad v. Mexico,* Award of 30 August 2000, ¶¶ 106-107 ("[T]he Municipality's denial of the construction permit without any basis in the proposed physical construction or any defect in the site, and extended by its subsequent administrative and judicial actions regarding the Convenio, effectively and unlawfully prevented the Claimant's operation of the landfill. These measures, taken together with the representations of the Mexican federal government, on which Metalclad relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation").

[232] Exh. CD-50, Tribunal's translation (*see* note 38 for Spanish original).

209. Accordingly, the Revocation Decree is grounded on two alleged violations:

a. A systematic refusal to provide information to the National Tax Service and the National Customs Service, thus preventing the audits mandated by Law 2,564 of 9 December 2003;

b. Discrepancies in the amount of ulexite declared and actually transported in violation of the Tax Code.

210. With respect to (a), as discussed further below, the record shows that the Claimants were not notified and thus could not participate in the audits mandated by Law 2,564 before the revocation. There is one document that suggests that the Claimants participated in the customs audit, but this was six months after the revocation. The first ground invoked by the Revocation Decree is therefore not supported by the facts.

211. With respect to (b), neither the SERGEOMIN-COMIBOL report nor the report of the Customs Service concluded that there were discrepancies in the amount of ulexite declared and exported. Hence, the second ground invoked by the Revocation Decree is not supported by the facts either.

212. Even if NMM had failed to provide information to the tax and customs services and even if there had been discrepancies in the amounts of ulexite declared and exported, the Respondent has not directed the Tribunal to a single provision of Bolivian law that could justify the revocation of the concessions on such grounds.

213. It is true that the Respondent has relied on Law 2,564. However, such reliance appears misconceived. As the Respondent itself acknowledges, Law 2,564 "requires the performance of audits to verify the existence of illegalities and apply the sanctions provided by the law. There is no 'extraordinary power, vested in the Executive', but a legislative mandate to inspect the concessions […] and, ***if appropriate***, sanction any illegalities committed."[233] The text of Article 3 of Law 2,564 confirms this understanding:

[233] Counter-Mem., ¶ 158., Tribunal's translation (emphasis added by the Tribunal). The original Spanish text reads as follows: "El artículo 3 de la Ley 2564 no revierte, anula o revoca concesiones. Por el contrario, prevé la realización de auditorías para verificar la existencia de ilegalidades y adoptar las sanciones previstas legalmente. No se trata de un "*extraordinary power, vested in the Executive*," sino de un mandato legislativo para fiscalizar las concesiones (cuya regularidad fue, de hecho, cuestionada desde su origen) y, en su caso, sancionar las ilegalidades cometidas." Footnotes omitted.

> The Executive Power is authorized, after the evaluation of audits, technical, legal, economic and financial, tax, social and labor legislation and environmental and ecological preservation, to declare null the concessionaires' mining rights ***that are liable to sanctions provided by the Laws and regulations in force***, within a deadline of 60 days calculated from the enactment of this Law, with the subsequent recovery of such concessions and non-metallic resources originally belonging to the State.[234]

Or, in the original Spanish text:

> Facultase al Poder Ejecutivo, luego de la evaluación de auditorías, técnica, jurídico legal, económico financiera, regalitario – tributaria, legislación sociolaboral y preservación ecológica y medioambiental, a declarar la nulidad de los derechos concesionarios mineros que, ***sean pasibles a sanciones establecidas por las Leyes y disposiciones vigentes***, en un plazo perentorio de 60 días a computar a partir de la promulgación de la presente Ley, con la consiguiente recuperación de tales concesiones y recursos no metálicos a propiedad originaria del Estado.

214. In the Tribunal's understanding, Law 2,564 did not provide a blanket authorization to the Executive to annul concessions if the audits verified the existence of any breaches of Bolivian law. It only allowed the Executive to annul concessions if the audits established breaches that were sanctioned by nullity pursuant to the laws and regulations in force. As the Revocation Decree determines the termination of the concessions for alleged violations of Bolivian law that do not appear to be sanctioned with termination under that law (at least the Respondent has not proved that this was the case), the Tribunal cannot but conclude that the Revocation Decree finds no justification in Bolivian law.

215. Bolivian government officials appear to have shared this view. For instance, a report issued by Ministry of Mining made the following comment on the audits mandated by Law 2,564:

> It is necessary to clarify that all of the conclusions and recommendations reached by the abovementioned audits, will identify breaches that might have been committed by the mining concessionaires of the area in question, reparable breaches that do not necessarily identify grounds to annul the concessions.[235]

216. The government that took power after the issuance of the Revocation Decree also concluded that the latter did not comply with Bolivian law, although on more formal grounds. Indeed, on 16 December 2005, President Rodríguez issued Supreme Decree 28,527, which abrogated the Revocation Decree as a result of "irreparable

[234] Exh. CD-39, Tribunal's translation (emphasis added by the Tribunal).

[235] Exh. CD-65, Tribunal's translation.

legal defects," namely the fact that the Mining Code did not provide for the "revocation" of mining concessions, but rather their *caducidad* or annulment.[236]

217. Even if Law 2,564 did intend to provide a blanket authorization, the revocation of the concessions on the grounds cited in the Revocation Decree appears unjustified on the facts, for the reasons set out in paragraphs 210 and 211 above.

218. In addition, although the Tribunal does not attach decisive weight to this circumstance because of its formalistic nature, it notes that the Revocation Decree did not meet the time limit set in Law 2,564. Article 3 of Law 2,564 provided that the Executive was authorized to annul the concessions "within a deadline of 60 days calculated from the enactment of this Law" ("*en un plazo perentorio de 60 días a computar a partir de la promulgación de la presente Ley*"). It is undisputed that the Revocation Decree was issued on 23 July 2004, more than 60 days from the enactment of Law 2,564 on 9 December 2003.

219. Other than the tax and customs violations allegedly identified in the audits, which the Tribunal has addressed above, the Respondent has also submitted that the illegalities brought to light in the audits include breaches in matters of industrial safety, environment and labor, as well as a lack of mining certificates.[237] Bolivia relies on the technical audit report to support its allegation.[238] Having reviewed this report, the Tribunal concludes that the irregularities identified therein were minor breaches of law. Indeed, Bolivia has not pointed to any legislative or regulatory provision that would trigger the termination of concessions on these grounds. Thus, to the extent relevant at all in light of the reasons stated in the Revocation Decree,[239] the Tribunal finds that they could not have served as basis for the revocation of the concessions.

220. In addition, although the Claimants acknowledge that on the date of the revocation none of the concessions had environmental licenses, Bolivia has not established that a lack of environmental licenses would warrant the termination of the concessions. The concession of Borateras de Cuevitas had previously been granted an

---

[236] Exh. CD-74, *see* ¶ 34 above. ("[The Revocation Decree] suffers from irreparable legal defects because the Mining Code does not provide in any of its legal provisions for the revocation of mining concessions, but provides rather for the legal figures of *caducidad* or annulment of mining concessions after an administrative proceeding under the competence and jurisdiction of the Superintendence of Mines," Tribunal's translation)).

[237] Rejoinder, ¶ 58.

[238] Exh. R-261.

[239] The Tribunal notes that these non-compliances were not invoked in the Revocation Decree.

environmental license, but this license was revoked by an administrative resolution one day before the Revocation Decree was enacted;[240] that revocation seemed to respond to pressure of the local community rather than breaches of the law by NMM.[241]

221. Finally, the Tribunal finds that the revocation of the Claimants' concessions did not comply with minimum standards of due process, whether under international law or Bolivian law. The standard of due process under international law, and more specifically in the expropriation context, has been summarized in *ADC* v. *Hungary* as demanding "an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it."[242]

222. Bolivian law also establishes certain basic procedural guarantees that must be respected in judicial and administrative proceedings. In particular, Article 16 of the Law on General Administrative Procedure[243] establishes the right (i) to participate in an ongoing proceeding whenever the individual's legitimate interests are concerned; (ii) to be informed of the status of a proceeding to which he or she is a party; (iii) to submit allegations and evidence; (iv) to receive a reasoned response to any request or application; (v) to demand that the terms and time limits of the proceedings be respected; and (vi) to be treated with dignity, respect, equality and without discrimination.[244]

---

[240] Exh. CD-173.

[241] *See* Section iii.(b) below.

[242] *ADC v. Hungary*, Award of 2 October 2006, ¶ 435. The tribunal in *ADC* continues explaining:

> Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard.

See also Ioannis Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Award of 3 March 2010, ¶¶ 395, 396, 404). *See also AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award of 7 October 2003, ¶ 10.5.1 ("Expropriation of alien property is not itself contrary to international law provided certain conditions are met, and perhaps the most clearly established condition is that expropriation must not be arbitrary (*i.e.*, must not be contrary to "the due process of law") and must be based on the application of duly adopted laws. […] The requirement that expropriation should be in a non-discriminatory manner (*i.e.*, as between alien and national) and in accordance with due process is also widely accepted, and is relevant to the assessment whether the expropriation was or was not arbitrary and in furtherance of the public interest.").

[243] Exh. R-258.

[244] *See also* Arts. 4.g, 33, 46, 47, 54 and 70.

223. The auditing procedures that were the basis for the Revocation Decree failed many of these requirements. Although the final report of the customs authorities (*Informe Final de Fiscalización Aduanera Posterior a la empresa Non Metallic Minerals S.A.* of 18 February 2005[245]) suggests that NMM was notified of and participated in the customs audit, the report states that NMM was notified of the initiation of the audit on 22 June 2004 (*i.e.*, the day before the concessions were revoked).[246] The Claimants have denied that this notification took place, but even if it had, it would not have allowed the Claimants to participate in the audit prior to the revocation of the concessions. The final report also suggests that NMM was notified of the issuance of the Preliminary Report on 28 December 2004,[247] (six months *after* NMM's concessions were revoked), and that NMM's defense memorial ("*memorial de descargos*"[248]) was submitted on 28 January 2005, long after the concessions were revoked. As a result, NMM's alleged notification and participation in the audit does not show that due process was respected in the revocation of the concessions.

224. There is no other evidence in the record showing that the Claimants were notified of the audits. Relying on Exh. R-266, the Respondent, claims that Mr. David Moscoso was notified of the audits under Law 2,564. Having examined the notification contained in Exh. R-266, the Tribunal observes that it is a certificate issued by the Superintendence of Mines of Tupiza-Tarija that indicates that certain copies have been handed over to a Ms. Ludy Moscoso, a consultant of the Prefect of Potosí (unrelated to Mr. David Moscoso). There is no indication that the copies are meant for an audit, nor is the document signed by any person related to NMM.

225. The record also shows that the Claimants unsuccessfully attempted to obtain information on the audits. Exh. CD-56 contains several letters between mid-June to end of July 2004 from NMM to *Corporación Minera de Bolivia* (COMIBOL), *Servicio Geológico Minero* (SERGEOMIN), *Empresa Nacional de Ferrocarriles* (ENFE) and the National Customs of Bolivia. In those letters, NMM refers to the Revocation Decree and the audits carried out under Law 2,564 and requests that the reports be sent to NMM together with the legalized copies of the notifications informing NMM of the audits and requesting information.[249] Apart from a reply from COMIBOL directing

[245] Exh. R-270, pp. 56 et seq.

[246] Exh. R-270, p. 56.

[247] Exh. R-270, p. 58.

[248] Exh. R-270, p. 58.

[249] Exhs. CD-56-A, B, C, D and I.

NMM to the Vice Ministry of Mining[250] (from which the record contains no answer) there does not appear to have been any response to NMM's reiterated requests.

226. Once the audits were concluded, the Claimants contend that they were not given the opportunity to challenge their findings due to the fact that "Law 2,564 does not provide for any kind of appeal against the outcome of the audits or the annulment decision."[251] As the Respondent has noted, Bolivian law provides for several constitutional or administrative actions[252] that the Claimants may have attempted. That being said, the availability of domestic actions to challenge the Revocation Decree does not change the Tribunal's conclusion that the revocation did not comply with due process, the determinative factors being that the Claimants were not heard during the audits and that the revocation lacked valid reasons.

227. As a result, the Tribunal finds that the Revocation Decree was not a legitimate exercise of Bolivia's police powers. It will therefore proceed to review whether the remaining requirements for a direct expropriation are fulfilled, namely the Claimants are deprived of their investment (b), and whether the deprivation was permanent (c).

(b) Did the Revocation Decree deprive NMM of its investment?

228. As noted above, for a direct expropriation to occur, there must be a forcible taking or transfer of title to the State that deprives the investor of its investment.[253]

229. Here, it is undisputed that the Revocation Decree had the effect of transferring the title of NMM's mining concessions to the State. The Decree clearly orders ("*dispone*") the revocation of the constitutive resolutions of NMM's mining concessions, as well as their loss ("*pérdida*"), directing NMM to physically hand over the concessions to the Prefecture of the Potosí Region within thirty days.

230. In compliance with this clear order, issued by the President of Bolivia himself, it is undisputed that NMM returned its concessions to Bolivia on 23 July 2004. In the Tribunal's view, this amounts to a deprivation of NMM's investments in Bolivia.

231. The fact that NMM exported ulexite that had previously been extracted until 23 September 2004 does not change this conclusion. What gave value to the

[250] Exh. CD-56-H.

[251] Reply, ¶ 133.

[252] ROSS, slide 30.

[253] *See* ¶ 200 above.

investment were the concessions; without them, the investment was lost in its entirety. The fact that some product of the investment was still sold may reduce the damage, but cannot undo the economic deprivation of the investment.

232. Nor does the introduction of an export ban by Decree 27,590 on the day of the Revocation Decree change the fact of the deprivation. That export ban, which came into force 90 days after its enactment (*i.e.*, on 21 September 2004), did indeed prohibit exports of non metallic minerals, such as unprocessed boron and unprocessed or partly processed ulexite.[254] However, Decree 27,590 was revoked in October 2004 through Decree 27,799, as a result of which the export ban was lifted.[255] The Respondent argued during the hearing that Decree 27,799 was in turn revoked in 2008, but did not submit evidence to support this assertion.[256] In any event, the Claimants have shown that there were significant exports of ulexite from Bolivia to Brazil between 2003 and 2012,[257] which shows that there was no effective export ban in place during those years.

(c) Was the deprivation permanent?

233. Finally, the Tribunal must determine if the deprivation had permanent effects. It is undisputed that, after NMM returned the concessions to Bolivia on 23 July 2004, it never again exploited those concessions. Indeed, subsequent acts by Bolivia confirmed that deprivation. On 28 October 2004, the concessions that had already been "revoked" were also "annulled." Decree 28,527, which revoked the revocation about a year and a half thereafter in December 2005, did not undo the deprivation. To the contrary, Decree 28,527 expressly recognized that the concessions were annulled and the writs of annulment were definitive.[258]

234. Hence, the date on which NMM was deprived of the economic benefits of its concessions was 23 July 2004. In the Tribunal's view, this is the date of the expropriation, as this was the date on which due to the governmental interference the legal and economic use of the concessions was definitively lost.

---

[254] Articles 1 and 2, Exh. CD-51.

[255] Exh. CD-195.

[256] Tr., Day 1, 12-15.

[257] Exh. CD-196.

[258] Exh. CD-74 ("Considerando […] Que las Resoluciones Administrativas dictadas por la Superintendencia de Minas anulan las resoluciones constitutivas de las concesiones mineras de la Empresa Non Metallic Minerals S.A. y en la actualidad se encuentran ejecutoriadas y causan estado").

ii. Was there an indirect expropriation of Quiborax's investment?

235. In their Memorial, the Claimants argued that, as a consequence of the expropriation of NMM's concessions, Quiborax's shares in NMM became worthless overnight. As a result, although Quiborax is still nominally the owner of approximately 51% of NMM's shares, it has lost the economic use and enjoyment of its investments. For the Claimants, this had the effect of depriving Quiborax of its property in a manner equivalent to an expropriation, thus constituting an indirect expropriation.[259]

236. The Claimants did not repeat this claim in their Reply or during the hearing. As a result of this silence, the Respondent argued that the Claimants had not advanced a claim for indirect expropriation.[260] The Claimants did not rebut these assertions; neither did they expressly withdraw their indirect expropriation claim. At the hearing, they mentioned that their written submissions were reiterated even if not expressly repeated orally.[261] The Tribunal thus understands that the claim for indirect expropriation has not been withdrawn and will address it here.

237. It is undisputed that expropriation does not need refer solely to the overt taking of a physical asset or formal transfer of title (direct expropriation). Measures other than actual takings or formal transfers of title may amount to indirect expropriation or measures tantamount to expropriation. This is expressly recognized in Article VI of the BIT and has been accepted by numerous tribunals.[262]

238. For an indirect expropriation to exist, it is generally accepted that the State measure must have the effect of substantially depriving the investor of the economic value of its investment. For instance, the *Pope & Talbot* tribunal considered "whether [the State's] interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from its owner," adding that "under international law, expropriation requires a 'substantial deprivation."[263] Similarly, according to the first *Occidental*

---

[259] Mem., ¶¶ 137-141.

[260] Rejoinder, ¶¶ 71-72; Tr., Day 1, 131-132; Tr., Day 3, 88.

[261] Tr., Day 3, 51.

[262] *See, e.g.*, *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*, 6 Iran-US CTR, Award of 22 June 1984, at 225; *Starrett Housing v. Iran*, 16 Iran-US CTR, Award of 14 August 1987, p. 154; *Metalclad v. Mexico*, Award of 30 August 2000, ¶ 103; *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award of 8 June 2009, ¶ 355; *Tecmed v. Mexico*, Award of 29 May 2003, ¶¶ 113-114.

[263] *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award of 26 June 2000, ¶ 102.

tribunal, the question is whether there has been a "substantial deprivation" of "the use of reasonably expected economic benefit of the investment."[264] In addition, as noted in *Burlington*, the deprivation must be permanent and must not be justified by the police powers doctrine.[265]

239. Quiborax qualifying as an investor holding an investment under the BIT,[266] the question is thus whether the revocation of the concessions had the effect of substantially depriving Quiborax of the value of its investment in Bolivia, *i.e.*, of its shares in NMM. Although the Claimants have not submitted proof of that diminution in value, the Tribunal agrees that, in the absence of the concessions, which were NMM's *raison d'être*, the Claimants' investment in NMM was virtually worthless. Indeed, NMM has been repeatedly described by the Claimants as Quiborax's investment vehicle,[267] and appears to have no other business than the concessions.[268] The Tribunal has already determined that this deprivation was permanent and was not justified by the police powers doctrine. Accordingly, the Tribunal finds that the revocation of the concessions indirectly expropriated Quiborax of the value of its investments.

iii. Was the expropriation unlawful under the BIT?

240. Having concluded that Bolivia expropriated the NMM's investment, the Tribunal will now determine whether the expropriation complied with the requirements of Article IV(1) of the BIT or, in other words, whether it was a lawful or an unlawful expropriation. Article IV(1) of the BIT provides:

> Expropriation and compensation
>
> 1. Neither of the Contracting Parties will take measures that deprive, directly or indirectly, an investor of the other Contracting Party of its investment unless the following conditions are met:
>
> a. the measures are adopted for the public or national interest and in accordance with the law;

---

[264] *Occidental Exploration and Production Company v. The Republic of Ecuador ("Occidental v. Ecuador I"),* LCIA Case No. UN3467, Award of 1 July 2004, ¶ 89.

[265] *Burlington v. Ecuador*, Decision on Liability, ¶¶ 471-473.

[266] Decision on Jurisdiction, ¶¶ 192, 196, 210, 237, 282.

[267] Mem., ¶¶ 1, 67, 106, 109.

[268] *See* NMM's financial statements for the years 2003 and 2004 (Exh. NCI-62), which show that virtually all of NMM's assets related to the exploitation of the concessions.

b. the measures are not discriminatory;

c. the measures are accompanied by provisions for the payment of an immediate, sufficient and effective compensation.

(Tribunal's translation)

241. Or, in the original Spanish text:

Expropiación y compensación

1. Ninguna de las Partes Contratantes adoptará medidas que priven, directa o indirectamente, a un inversionista de la otra Parte Contratante, de su inversión, a menos que se cumplan los siguientes requisitos:

a. las medidas se adopten por causa de utilidad pública o interés nacional y de conformidad con la ley;

b. las medidas no sean discriminatorias;

c. las medidas vayan acompañadas de disposiciones para el pago de una compensación inmediata, suficiente y efectiva.

242. Accordingly, the Tribunal will assess whether the expropriation served the public or national interest and was in accordance with the law (a), whether the measure discriminated against NMM (b), and whether the expropriation was accompanied by the appropriate compensation (c). The Tribunal will then reach its conclusion on the legality of the expropriation (d).

(a) Did the expropriatory measure serve the public or national interest? Was it in accordance with the law?

243. The Tribunal has found that the Revocation Decree was not a legitimate exercise of Bolivia's police powers. That does not necessarily prevent the possibility that the motive for which it was issued was in the public or national interest.

244. Bolivia argues that the revocation and annulment of the concessions were measures adopted "for the public or national interest and in accordance with the law," as required by the BIT. Specifically, the purpose of these measures (which were in accordance with Bolivian law) was to recover concessions granted illegally in the Gran Salar de Uyuni Fiscal Reserve.[269] They were based on the national interest of the State to protect the Gran Salar de Uyuni Fiscal Reserve.[270]

245. The Tribunal defers to Bolivia's sovereign right to determine what is in the national and public interest. It accepts that Bolivia may have had a legitimate interest in

[269] Counter-Mem., ¶ 182, Tribunal's translation.

[270] Counter Mem., ¶ 98.

protecting the Gran Salar de Uyuni Fiscal Reserve. That being said, the Tribunal has already determined that the revocation was not carried out in accordance with Bolivian law, whether as a matter of substance or procedure (*see* Section (i) above). Hence, even if the expropriation was in the national or public interest, it was not carried out in accordance with the law, as Article IV of the BIT requires. The Tribunal cannot but conclude that the expropriation was unlawful in this regard.

(b) Was the expropriatory measure discriminatory?

246. The Claimants allege that the Revocation Decree discriminated NMM on the basis of the Chilean nationality of its majority shareholder, Quiborax. Bolivia claims that the Revocation Decree was not discriminatory and describes it as a fair, reasonable and proportional act, stressing that there is "no evidence to the contrary."[271]

247. To determine whether the Revocation Decree discriminated against NMM, the Tribunal will apply the three-pronged test formulated in *Saluka*, cited by the Respondent: "State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification."[272] As to the third element, the Tribunal agrees with *Parkerings* that there are situations that may justify differentiated treatment, a matter to be assessed under the specific circumstances of each case.[273]

---

[271] ROSS, slide 59; Tr., Day 1, 138:12-139:6.

[272] *Saluka v. Czech Republic*, Partial Award of 17 March 2006, ¶ 313. Other tribunals (whether dealing with the prohibition of discriminatory treatment, or with national treatment provisions, which prohibit nationality-based discrimination), have applied a similar standard. *See, e.g.*, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18 ("*Lemire v. Ukraine*"), Decision on Jurisdiction and Liability of 21 January 2010, ¶ 261 (footnotes omitted) ("Discrimination, in the words of pertinent precedents, requires more than different treatment. To amount to discrimination, a case must be treated differently from similar cases without justification; a measure must be "discriminatory and expose[s] the claimant to sectional or racial prejudice"; or a measure must "target[ed] [sic] Claimant's investments specifically as foreign investments"); *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award of 27 October 2006, ¶ 130 ("The national treatment obligation does not generally prohibit a State from adopting measures that constitute a difference in treatment. The obligation only prohibits a State from taking measures resulting in different treatment in like circumstances"); *Total S.A. v. Argentine Republic,* ICSID Case No. ARB/04/01 ("*Total v. Argentina*"), Decision on Liability of 27 December 2010, ¶ 344 ("This standard requires, as a rule, a comparison between the treatment of different investments, usually within a given sector, of different national origin or ownership […] The purpose is to ascertain whether the protected investments have been treated worse without any justification, specifically because of their foreign nationality. The similarity of the investments compared and of their operations is a precondition for a fruitful comparison.").

[273] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, ¶ 368 ("Discrimination is to be ascertained by looking at the circumstances of the individual cases. Discrimination involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues of fact where a State unduly treats differently investors who are in similar circumstances. Whether discrimination is objectionable does not in the opinion of this Tribunal depend on subjective requirements such as the bad faith or the malicious intent of the State: at least, Article IV of the Treaty does not include such requirements. However, to violate

In this case, other mining companies operating in the Río Grande Delta were audited under Law 2,564. Other mining companies, such as Copla and Tecno Química, were fined for alleged errors in their export declarations, like NMM.[274] Additionally, Copla obtained and lost its environmental license at the same time as NMM. However, NMM was the only one that lost its concessions. The record thus shows that NMM received different treatment than other companies in like circumstances.

248. In the Tribunal's view, there was no reasonable justification in Bolivian law for this different treatment. This is confirmed by compelling evidence on record of a discriminatory intent showing, in particular, that the Revocation Decree targeted NMM because of the Chilean nationality of its main shareholder, Quiborax.

249. It is undisputed that the promulgation of the *Ley Valda* in April 1998 was controversial. It is also clear from the record that the local population did not welcome concessions being granted in an area that had previously been a fiscal reserve. Although there was public opposition to all concessions, the focus of the hostility was on NMM as a consequence of the Chilean nationality of its main shareholder.

250. The public opposition escalated significantly when the Claimants were granted an environmental license on 9 June 2004 to operate the concession "Borateras de Cuevitas." The press articles included in the record bear witness to the upheaval caused by this license, which continued to mount until the issuance of the Revocation Decree in 23 June 2004.[275] In particular:

a. Comcipo (*Comité Cívico Potosinista*) had always been one of the more vocal critics of the *Ley Valda* and of the presence of Chilean companies operating in the Salar de Uyuni.[276] According to the press, as a reaction to the issuance of the environmental license, it declared "a war to death with the national authorities that make viable the exploitation of the Bolivians' natural resources

---

international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases. It would be necessary, in each case, to evaluate the exact circumstances and the context.").

[274] Exhs. R-268, R-269 and R-270.

[275] Exhs. CD-43, CD-45, CD-46, CD-47, CD-48, CD-49, CD-52 and CD-55.

[276] Exhs. R-241 and R-242.

for the benefit of the Chileans"[277] and demanded that an end be put to "the surrender of the Salar de Uyuni to Chilean interests."[278]

b. During several days in mid-June 2004, riots, hunger strikes and the blockade of roads and railways were the public's response to the perception that "David Moscoso and his Chilean partners" were looting the Salar while the State did nothing to prevent this.[279] The Prefect of Potosí publicly endorsed these protests and was quoted as questioning the government's benevolence towards "Chilean capital."[280]

c. Media also reported that the region was declared in state of emergency.[281]

251. On 23 June 2004, following the enactment of the Revocation Decree and the Export Ban Decree, the press reported that "the pressure has taken effect."[282] The revocation of the concessions was celebrated as an "historical measure" by which the national government "ended the looting of ulexite that up to that date was benefiting the Chileans."[283] Wilson Magne, a member of the Bolivian Parliament, was quoted as saying that "the *Potosino* people achieved an overwhelming victory against the looting of our sources of wealth by Chilean companies."[284]

252. Finally, the 2004 Inter-Ministerial Memo confirms that the Revocation Decree "was enacted because of the social and political pressure from the authorities in Potosí and, in particular, from the town of Uyuni."[285]

253. As stated above (*see* Section (a)), the Tribunal has no reason to doubt that Bolivia was motivated by the public or national interest. Yet, as stated in *Corn Products v. Mexico* "[d]iscrimination does not cease to be discrimination, nor to attract the international liability stemming therefrom, because it is undertaken to achieve a

[277] Exh. CD-43, Tribunal's translation.

[278] Exh. CD-47, Tribunal's translation.

[279] *See, e.g.*, Exhs. CD-43 and CD-45.

[280] Exh. CD-45.

[281] Exh. CD-45.

[282] Exh. CD-49.

[283] Exh. CD-55, Tribunal's translation.

[284] Exh. CD-55, Tribunal's translation.

[285] Exh. CD-68, Tribunal's translation.

laudable goal or because the achievement of that goal can be described as necessary."[286]

254. The Tribunal thus finds that the expropriation was discriminatory and thus failed to meet the condition of non-discrimination for a lawful expropriation.

iv. Was the expropriatory measure without compensation?

255. It is undisputed that Bolivia neither paid nor offered compensation to NMM for the revocation of its mining concessions. The Respondent asserts that no compensation was due because there was no expropriation. However, the Tribunal has found that NMM was indeed expropriated of its investment in Bolivia. Accordingly, the expropriation also fails to meet this requirement for legality.

v. Conclusion

256. As a consequence, the Tribunal concludes that NMM and Quiborax were unlawfully expropriated of their investments by the Respondent.

B. Fair and equitable treatment; impairment of investment

1. The Claimants' position

257. The Claimants submit that Bolivia breached its obligation to ensure fair and equitable treatment (FET) to their investment in Bolivia set out in Article IV.1 of the Bolivia-Chile BIT. They also claim that Bolivia breached Article III(2) of the BIT by impairing the Claimants' investments through unreasonable or discriminatory measures ("*medidas injustificadas o discriminatorias*").[287] Doing so, they note that the scope of the prohibition of unreasonable or discriminatory measures is similar to the scope of the fair and equitable treatment standard, stressing that Bolivia shares this understanding.[288] Indeed, the prohibition of unreasonable or discriminatory treatment of foreign investments is usually considered one of the components of the FET standard, often alongside the legitimate expectations component. As a result, the

[286] *Corn Products International Inc. v. United Mexican States*, Decision on Responsibility of 15 January 2008, ¶ 142.

[287] The Tribunal notes that the Claimants hold that the Spanish original "*injustificada*" and the terms "unreasonable" and "arbitrary" are similar in scope and have used both English terms to describe the Respondent's conduct.

[288] Counter-Mem., ¶ 208.

Claimants address Bolivia's alleged breaches of FET and of the prohibition of unreasonable or discriminatory measures jointly.

a. The scope of the FET standard

258. The Claimants argue that the FET standard must be interpreted in accordance with Article 31(1) of the Vienna Convention of the Law of Treaties ("VCLT"). They note that this standard is not a hard and fast rule and that it is not easy to define. Its constitutive elements "fair" and "equitable" require tribunals to engage in a subjective appreciation of the conduct of the host State taking all circumstances into consideration.[289] When seeking a more objective or quantifiable definition of the standard, tribunals have referred to legitimate expectations created by the host State which it is bound to respect.[290]

259. For the Claimants, there is no controversy that the obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty. The concept of an investor's "legitimate expectations" is a widely recognized notion that helps define the scope of the FET provision.[291]

260. In response to Bolivia's argument that an FET obligation cannot limit sovereign prerogatives, the Claimants maintain that none of the obligations under the BIT threaten sovereignty. In support, it refers to the 1923 judgment of the Permanent Court of International Justice in the case of the *S.S. Wimbledon* that obligations undertaken in treaties are not a limitation on state sovereignty, but rather a manifestation of it.[292]

261. The Claimants agree that their legitimate expectations, which are protected by the FET standard, do not render the legal system of the host state immutable. Their protection only ensures that Bolivia may not enact legislation or secure its compliance in a manner that violates its treaty obligations.[293]

---

[289] Reply, ¶ 244, citing *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 ("*Mondev v. USA*"), Award of 11 October 2002, ¶ 127, Exh. R-295.

[290] Reply, ¶ 245, citing *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability of 30 June 2010, ¶ 203.

[291] Reply, ¶ 245.

[292] Permanent Court of International Justice, Case of the *S.S. "Wimbledon*," United Kingdom, France, Italy & Japan v. Germany, Judgment of 17 August 1923, p. 25.

[293] *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award of 5 September 2008, ¶ 254.

262. The Claimants disagree with Bolivia's contention that the FET standard is equivalent to the minimum standard under international law. The Respondent relies on *Genin v. Estonia*[294] for this submission; however, "the factual circumstances of the *Genin* case cannot be compared to those that affected the Claimants' investments."[295] Further, "[f]rom a conceptual point of view, the *Genin* tribunal's assimilation of the FET standard to the minimum standard of treatment under international law is not convincing. The assimilation does not reflect contemporary development of international law and has been rejected by a number of arbitral tribunals."[296] Indeed, FET is not equivalent to the minimum treatment standard, on which the *Genin* tribunal relied, because "FET cannot be understood as synonymous to a limited and exceptional notion comprised within the minimum treatment standard as phrased in 1926. It is rather a basic and autonomous requirement that frames the integral treatment that should be accorded to foreign investment."[297]

263. That said, the Claimants contend that Bolivia's conduct breaches not only the broader FET standard but also the stricter one adopted by *Genin*, according to which unfair and inequitable treatment is "a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[298] The Claimants argue in this respect that (i) Bolivia's expropriation of the Claimants' concessions was openly illegal, (ii) Bolivia later revoked the revocation and "substituted" it by *ex post facto* writs of annulment and (iii) achieved this through a joint operation of the Ministry of Mining, the Ministry of Foreign Affairs and the Presidency.

---

294 *Genin v. Estonia*, Award of 25 June 2001.

295 Reply, ¶ 253.

296 Reply, ¶ 255, citing *Enron v. Argentina*, Award of 22 May 2007, ¶ 258; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 ("*Vivendi v. Argentina II*"), Award of 20 August 2007, ¶¶ 7.4.5-7.4.11 (Exh. R-310); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007, ¶ 302, (Exh. R-337); *OKO Pankki Oyj and others v. Republic of Estonia*, ICSID Case No. ARB/04/6, Award of 19 November 2007, ¶ 230*; Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 ("*Biwater Gauff v. Tanzania*"), Award of 24 July 2008, ¶ 591 (Exh. R-194); *Lemire v. Ukraine*, Decision on Jurisdiction and Liability of 21 January 2010, ¶ 253; *Total v. Argentina*, Decision on Liability of 27 December 2010, ¶ 125; *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Award of 1 March 2012, ¶ 265.

297 Reply, ¶ 260.

298 *Genin v. Estonia*, Award of 25 June 2001, ¶ 367 (Exh. R-287).

b. The Claimants' reasonable and legitimate expectations were defrauded by the Respondent

264. The Claimants submit that Bolivia instilled legitimate expectations in them that were protected under Article IV of the BIT and later violated them. Specifically, they allege that, at a presentation in Santiago de Chile in May 2002, officials at the Ministry of Mining expressed Bolivia's commitment to provide and maintain favorable conditions for investors in Bolivia, particularly in the mining sector in the Salar de Uyuni.[299] The presentation listed all the benefits of the legislation in force at that time, making special mention of the Mining Code, the Investment Law, and the investment treaties signed by Bolivia. In addition to the ICSID Convention, these included 25 BITs among which the BIT with Chile.

265. In the preceding decade between 1990 and 2002, Bolivia had signed more than 20 BITs with countries such as Spain and the United States. Bolivia had also adopted a new investment law in 1990[300] which imposed virtually no restrictions on foreign investment and contained all the common protections for investors, such as guarantees of national treatment, non-discrimination, fair and equitable treatment, and access to international arbitration. In 1997, Bolivia had further adopted a Mining Code which reinforced the rights of concessionaires and reduced the causes for annulment of concessions.[301]

266. Under these circumstances, the Claimants expected Bolivia to act consistently and transparently, not taking any arbitrary or discriminatory measures against investors and respecting acquired property rights. According to the Claimants:

a. "It is reasonable for an investor to expect that it is not going to be deprived of its investment by way of a legally non-existing procedure. It is legitimate to expect that if its investment were to be subjected to expropriation, the latter would occur in compliance with the international protection it enjoys."[302]

b. It is also reasonable for an investor to expect that concessions issued and granted by the appropriate Bolivian authority, *i.e.* the Tupiza and Tarija Regional Mining Superintendent, comply with Bolivian law. The alleged incompetence of

[299] Exh. CD-30.

[300] Law 1.182, Exh. CD-4.

[301] Exh. CD-6.

[302] Reply, ¶ 265.

that Superintendent or any formal errors incurred by her cannot be held against the Claimants nor be used to deprive them of their concessions.

c. It is further reasonable for an investor to expect that the host State's public authorities will not conspire to remedy an unlawful expropriation and give it an appearance of legality. The 2004 Inter-Ministerial Memo and the order of the Minister of Mining to annul the concessions demonstrate that this expectation was not honoured.

d. It is finally legitimate for an investor to expect that, after his concessions have been confiscated, they will not be annulled *ex post* on facts that do not exist and on legal grounds not provided in the applicable legislation.

c. The revocation and *ex post* annulment of the mining concessions were unreasonable and arbitrary measures

267. The Claimants contend that the "erratic revocation of [the *Ley Valda*] by Law 2.564, allowing for the annulment of Concessions acquired under the previous law," was in itself already unreasonable.[303] But more importantly, they claim that "the revocation and the annulment of the Concessions lacked legal grounds and were not based on a previous lawful investigation procedure, which renders them unreasonable and arbitrary."[304]

268. As set forth in the context of the expropriation claim, the Claimants contend that the revocation of the mining concessions was issued without foundation in Bolivian law, and that this was later acknowledged by the Bolivian authorities.[305] The non-observance of social, tax, environmental, technical or procedural laws noted in the audits were not causes for nullity of mining concessions under the existing pro-investment regime. Furthermore, any such non-observance could have been corrected had the Claimants been given an opportunity to be heard or to remedy any alleged irregularity.

269. According to the Claimants, the *ex post* annulment of the concessions also failed to comply with applicable substantive and procedural law. The formal and procedural causes invoked by the Mining Superintendent to annul NMM's concessions are not recognized by Bolivian law. Moreover, the Mining Superintendent abused the

[303] Reply, ¶ 284.

[304] Reply, ¶ 285.

[305] Decree 28.527, Exh. CD-74.

procedure and notified NMM of the resolution to annul the concessions in Tupiza instead of La Paz.[306] The Claimants' submission is that "[e]ach of these measures accounts for an unreasonable treatment of the Claimants' investment" and that "[v]iewed together their arbitrariness is even more undeniable."[307]

d. The revocation and *ex post* annulment of the concessions were also discriminatory

270. The Claimants' allegation that the revocation and *ex post* annulment of the concessions were discriminatory has been included in the Claimants position on discrimination regarding expropriation (Section VI.A.4.a.ii.(b) above).

e. The Respondent cannot rely upon its own unlawful conduct to the detriment of the Claimants

271. The Claimants contend that Bolivia tries to justify its misconduct by blaming the Claimants for faults that can only be attributed to Bolivia itself. Bolivia invokes its own inconsistent law-making, in particular its decision to first reduce the area of the fiscal reserve and later restore it. It also blames corrupt intervention in the Senate as the reason for the outcome of its own legislative processes. The Claimants argue that these facts have not been proven and in any event cannot be held against them.

272. Similarly, the Claimants emphasize that the alleged incompetence of the Regional Mining Superintendent and any errors made cannot be invoked to deprive them of their treaty rights. Errors in administrative proceedings committed by Bolivia's own authorities are the responsibility of the Respondent, not of the Claimants.

f. Post-expropriation acts of harassment

273. On 22 July 2004, one month after the Revocation Decree was issued and one day before the term established for the forced delivery of the concessions, the Claimants requested the initiation of negotiations under Art. X of the BIT.[308] According to the Claimants, from that moment on Bolivia began a harassment strategy to avoid international liability under the BIT and force the Claimants to give up their claim.

---

[306] According to the Claimants, the Superintendent of Mines notified RIGSSA and NMM of its resolution to annul the concessions at the offices of the Superintendent of Mines of Tupiza by posting the notice on the bulletin board of the secretary of the Superintendence (*see* Exh. R-275, regarding Pococho). The registered domiciles of RIGSSA and NMM, however, were not in Tupiza but in the city of La Paz.

[307] Reply, ¶ 288.

[308] Exh. CD-58.

274. The Claimants rely in particular on the 8 December 2004 Inter-Ministerial Memo, which was produced by an inter-ministerial task force set up to evaluate the merits of their claim.[309] They interpret the memorandum as a confirmation that the Revocation Decree had been issued under pressure from the Department of Potosí and that the revocation of the concessions was unlawful.

275. Specifically, the task force analyzed two different scenarios and identified a "best alternative" in the following terms:

> FIRST SCENARIO - The Bolivian Government may try to reach an amicable and mutually satisfactory agreement with the company. However it is clear that the only settlement possible with the company would be an indemnity or recovery of its concessions. For the Government, said option would involve a significant political cost and the generation of new social and regional conflicts with the Potosi Department.
>
> SECOND SCENARIO - The Bolivian Government may attempt to defend its decisions. Unfortunately, the Mining Code makes no provisions for the revocation of mining concessions. Therefore, this option has a great weakness. Another alternative would be to try to prove irregularities in the processing of the original mining concessions of Non Metallic Minerals S.A., so as to demonstrate that these are and always have been invalid. For the time being, this has been considered the best alternative.[310]

276. The Claimants believe that this "best alternative" had already been put into practice at the time when the 2004 Inter-Ministerial Memo was written. For them, Bolivia implemented a strategy to frustrate their rights under the BIT and thereby avoid international responsibility. Specifically, the Claimants allege that:

a. Bolivia carried out tax investigations against the Claimants from November 2004 to November 2007 approximately. In 2006, when President Evo Morales assumed office and following the registration of this case at the Centre, Bolivia invited the Claimants to participate in negotiations and agreed to suspend all tax proceedings,[311] only to resume them ten days later.[312]

b. While the Parties were discussing the implementation of the oral settlement reached as a result of these negotiations,[313] Bolivia prepared and initiated criminal actions against several persons related to the present arbitration, including Mr. Allan Fosk. The Claimants view these criminal proceedings as

[309] Exh. CD-68.

[310] Exh. CD-68, pp. 10-11. Claimants' translation.

[311] Exh. CD-76.

[312] Exh. CD-77.

[313] *See* Procedural History, Section III above.

merely instrumental to Bolivia's goals in this arbitration, *i.e.* (i) to deny the status of the Claimants as foreign investors under the BIT; (ii) to obtain, manipulate and fabricate evidence in support of Bolivia's defense, and (iii) to ultimately force the Claimants to give up their claims.

2. The Respondent's position

277. The Respondent denies that by revoking and annulling the Claimants' concessions it has breached its obligation to accord fair and equitable treatment to the Claimants' investments or impaired those investments with unjustified, arbitrary or discriminatory measures. It also denies having treated the Claimants unfairly or inequitably by subsequent acts.

a. Bolivia did not treat the Claimants' investment unfairly and inequitably by revoking and declaring the annulment of the mining concessions

278. Bolivia denies that it has breached its obligation to accord fair and equitable treatment to the Claimants' investments. In particular, it submits that, by revoking and declaring the annulment of the mining concessions, it did not breach any legitimate expectation of the Claimants protected by the BIT.

279. While the Respondent submits that the scope of the FET standard under the BIT is limited to the minimum standard of treatment under customary international law, it contends that, even under a broad interpretation of the FET standard, the Claimants' expectations would not be covered. In the Respondent's view, this standard only protects legitimate and reasonable expectations of foreign investors that have an objective and genuine connection with legally binding obligations. The FET standard does not guarantee the immutability of the legal framework applicable to the investment, nor does it prevent the State from legislating and guaranteeing the application and compliance with the law in its territory.

280. The Respondent contends that, under Bolivian law, the Claimants could not have legitimately expected the rights acquired under the Mining Code to be maintained, because (i) the mining concessions were granted to Mr. Moscoso in breach of several rules of Bolivian law, including the Mining Code, and (ii) these breaches amount to annulment grounds under Bolivian law, even if these grounds are not specified in the Mining Code. Thus, the revocation of the mining concessions could not have frustrated the Claimants' legitimate expectations.

281. Under the BIT and international law, Bolivia is entitled to exercise its State prerogatives to legislate and enforce the law in its territory. The mining concessions were defective from the start and their revocation and annulment was the consequence of these illegalities under Bolivian law. Therefore, those measures cannot constitute breaches of the FET standard.

282. Further, the assessment of the FET standard must take into account not only the State's conduct, but also the Claimants'. When the mining concessions were acquired, the Claimants were aware of the controversies that surrounded the granting of the concessions within the fiscal reserve of the Salar de Uyuni and of the illegalities that affected the concessions. More specifically:

a. The Claimants' witnesses, Messrs. Carlos Shuffer and Allan Fosk, have admitted that they knew that they were doing business with former civil servants of the Ministry of Mining;[314]

b. Quiborax knew that obtaining the concessions in the Río Grande deposit was only possible due to the reduction of the fiscal reserve of the Salar de Uyuni by the controversial *Ley Valda*. It also accepted to negotiate with Messrs. Moscoso and Ugalde as if they had title to the concessions, even though the resolutions constituting the concessions and their title deeds had not yet been issued by the Tupiza and Tarija Regional Mining Superintendent;[315]

c. In March 2000, Quiborax requested a legal opinion from Teddy Cuentas Bascopé (a Bolivian lawyer specialized in mining law) on the legitimacy and validity of RIGSSA's concessions, among other matters. The Claimants have submitted no evidence in this respect and do not even mention the conclusions of the opinion;

d. The opposition of the political class and representatives of the civil society to the *Ley Valda* was well known in Bolivia.

e. In this context, Bolivia insists that it never made any specific representation or guarantee to the Claimants with respect to the validity of the mining concessions.

[314] Shuffer WS, ¶¶ 17-18; Fosk WS, ¶ 31.

[315] Exh. CD-10.

b. Bolivia has not impaired the Claimants' investment with unjustified, arbitrary or discriminatory measures by revoking and declaring the annulment of the mining concessions

283. The Respondent claims that the revocation and annulment of the mining concessions were measures justified under the circumstances, as they were adopted to sanction the irregularities in the granting and administration of the mining concessions. It notes that international tribunals have found that the standard of Article III(2) of the BIT is practically identical to the FET standard,[316] and therefore, refers to its position in connection with that standard.

284. In addition, Bolivia submits that the revocation and annulment of the mining concessions were not arbitrary. According to the Respondent, the Claimants' argumentation is deficient as it does not specify (i) the legal basis for the arbitrariness standard (the BIT only refers to unjustified or discriminatory measures) and (ii) the reasons for the arbitrariness. In any event, this claim should be dismissed for the same reason as the other claims: the revocation and annulment of the mining concessions complied with Bolivian law and had a public interest justification.

285. Even if, *par impossible,* the Tribunal decided that the revocation and annulment were unlawful and motivated by local political pressure, this would not suffice to render them arbitrary. For that, the Claimants would have to prove that Bolivia's conduct was an intentional violation of due process, which it cannot.[317]

286. Moreover, the Respondent opposes the allegation of discriminatory treatment by reason of nationality, as has been set out in Section VI.A.4.b.ii above, when explaining Bolivia's position on discrimination regarding both the expropriation and the FET claim.

---

[316] *Saluka v. Czech Republic*, Partial Award of 17 March 2006, ¶ 461: "Insofar as the standard of conduct is concerned, a violation of the non-impairment requirement does not therefore differ substantially from a violation of the "fair and equitable treatment" standard. The non-impairment requirement merely identifies more specific effects of any such violation, namely with regard to the operation, management, maintenance, use, enjoyment or disposal of the investment by the investor," (Exh. R-297). *See also Roussalis v. Romania*, Award of 7 December 2011, ¶ 324 (Exh. R-298).

[317] *L. F. H. Neer and Pauline Neer (United States of America) v. Mexico*, Award of 15 October 1926, Arbitral Awards Reports, Vol. IV, pp. 60-66: "the propriety of governmental acts should be put to the test of international standards, […] the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency" (Exh. R-299).

c. Bolivia did not violate its obligations under the BIT through subsequent acts

287. Finally, the Respondent holds that the Claimants' claim arising from alleged post-expropriation acts of harassment is ill-founded for the following main reasons:

a. The Tribunal has already concluded that the alleged acts of harassment could not affect the Claimants' investment, since they ceased once the mining concessions were revoked;[318]

b. This claim is moot. The criminal proceedings followed up on allegations that documents were forged to prove that Quiborax and Mr. Allan Fosk were shareholders of NMM before 13 September 2001 and therefore qualified as investors under the Treaty. This matter has already been dealt with by the Tribunal in its Decision on Jurisdiction, in which it decided that Quiborax was an investor under the BIT and that it lacked jurisdiction over the claims submitted by Mr. Allan Fosk;[319]

c. The claim is based on an unreal and confusing reconstruction of the facts regarding the tax authorities' actions and the criminal proceedings ongoing in Bolivia.[320]

3. Analysis

288. Article III(2) of the BIT provides:

> Each Contracting Party shall protect within its territory the investments made in accordance with its laws and regulations, by the investors of the other Contracting Party and shall not impair the free administration, maintenance, use, enjoyment, extension, transfer, sale and liquidation of those investments through unreasonable or discriminatory measures.
>
> (Tribunal's translation).
>
> In the Spanish original:
>
> Cada Parte Contratante protegerá dentro de su territorio las inversiones efectuadas de conformidad con sus leyes y reglamentos, por los inversionistas de la otra Parte Contratante y no obstaculizará la libre administración, mantenimiento, uso, usufructo, extensión, transferencia, venta y liquidación de dichas inversiones a través de medidas injustificadas o discriminatorias.

[318] Counter-Mem., ¶ 231, citing the Decision on Provisional Measures, ¶ 138.

[319] Counter-Mem., ¶ 232, citing the Decision on Jurisdiction and Admissibility, ¶ 237.

[320] Counter-Mem., ¶ 233.

289. In turn, Article IV(1) of the BIT provides:

> Each Contracting Party shall guarantee fair and equitable treatment within its territory to the investments of investors of the other Contracting party and shall ensure that the exercise of the rights recognized in this Agreement is not impaired.
>
> (Tribunal's translation).
>
> In the Spanish original:
>
> Cada Parte Contratante deberá garantizar un tratamiento justo y equitativo dentro de su territorio a las inversiones de los inversionistas de la otra Parte Contratante y asegurará que el ejercicio de los derechos reconocidos en el presente Acuerdo no será obstaculizado.

290. The claims under Articles III and IV of the BIT arise out of (a) the revocation of the concessions; (b) their subsequent annulment; and (c) alleged post-expropriation acts of harassment.

a. Revocation of the concessions

291. The Tribunal considers it can be left open here whether the BIT's obligation to accord fair and equitable treatment can be equated with the minimum standard under international law. Indeed, the Tribunal finds that the revocation of the Claimants' concessions violates international law even under a more demanding standard. As noted by the *Waste Management II* tribunal:

> [T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.[321]

292. In the context of its analysis of the Claimants' expropriation claim, the Tribunal has already held that the revocation of the concessions was discriminatory and unjustified under Bolivian law. By the same token, it also violates the fair and equitable treatment standard, even if it were to be equated with the customary international law minimum standard of treatment.[322]

---

[321] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3 ("*Waste Management v. Mexico II")*, Award of 30 April 2004, ¶ 98.

[322] Several tribunals have also considered that discriminatory acts breach the fair and equitable treatment standard. *See, e.g.*, *Saluka v. Czech Republic*, Partial Award of 17 March 2006, ¶ 307 ("A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the

293. For the same reasons, the revocation of the concessions thus qualifies as an unjustified and discriminatory measure in the meaning of Article III(2) of the BIT. Indeed, the use, enjoyment, extension, transfer, sale and liquidation of the Claimants' investments was impaired through unjustified and discriminatory measures.

294. Accordingly, the Tribunal concludes that the revocation of the concessions was done in breach of Articles III and IV of the BIT.

295. This conclusion applies to NMM and Quiborax alike. By revoking the concessions in the way that it did, Bolivia treated both NMM's and Quiborax's investments in Bolivia unfairly and inequitably, and impaired their use, enjoyment, extension, transfer, sale and liquidation through unjustified and discriminatory measures. It is easily explained that the FET breach also affected Quiborax. Indeed, the Tribunal has found that the very reason for the discrimination was the nationality of NMM's main shareholder, Quiborax.

b. Annulment of the concessions

296. With respect to the annulment of the concessions, the Claimants contend that the termination of the investment cannot be confused with the termination of Bolivia's obligations under the BIT,[323] and that the Respondent should not be "freed from its BIT obligations once it has deprived Claimant[s] from their investment."[324]

297. The Tribunal shares this view, which was in particular expressed in *Mondev* in the following terms:

---

requirements of consistency, transparency, even-handedness and nondiscrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment"); *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2 ("*Pey Casado v. Chile*"), Award of 8 May 2008, ¶ 670 ("Il est constant dans la jurisprudence internationale et dans la doctrine qu'un traitement discriminatoire de la part d'autorités étatiques envers ses investisseurs étrangers constitue une violation de la garantie de traitement « *juste et équitable* » inclus dans des traités bilatéraux d'investissement"); *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8 ("*CMS v. Argentina*"), Award of 12 May 2005, ¶ 290 ("The standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.")

[323] *See* COSS, slides 68 and 69.

[324] Tr., Day 1, 59:5-6.

> [O]nce an investment exists, it remains protected by NAFTA even after the enterprise in question may have failed. This is obvious with respect to the protection offered by Article 1110 [expropriation]: […] a person remains an investor for the purposes of Articles 1116 and 1117 even if the whole investment has been definitively expropriated, so that all that remains is a claim for compensation. The point is underlined by the definition of an "investor" as someone who "seeks to make, is making or has made an investment." Even if an investment is expropriated, it remains true that the investor "has made" the investment.
>
> Similar considerations apply to Articles 1102 [national treatment] and 1105 [minimum standard of treatment]. Issues of orderly liquidation and the settlement of claims may still arise and require "fair and equitable treatment," "full protection and security" and the avoidance of invidious discrimination. […][325]

298. The same applies here. The BIT defines the term investor as someone who "has made investments" ("*haya[] efectuado inversiones*") in the territory of the host State.[326] Likewise, the scope of protection of the BIT extends to investments "made" ("*efectuadas*") in the territory of the host State.[327]

299. However, the Claimants have also noted that "[f]rom the point of view of the deprivation of property suffered by the Claimants, the annulments are irrelevant. The Claimants lost their entire investment in Bolivia due to [the Revocation Decree], followed by the forced return of the Bolivian concessions to the State on 23 July 2004. The subsequent annulments of these very same concessions are but an *ex post* intent to change the true course of events."[328] In other words, the Claimants recognize that the annulments did not deprive them of any property that they had not already lost through the revocation of the concessions. As a result, applying the principle of procedural economy, the Tribunal would not need to examine the Claimants' FET and Article III claims related to the subsequent annulment of the concessions. Indeed, with respect to their claims of deprivation of property, the Claimants would not be entitled to greater monetary relief even if the Tribunal were to establish a breach of these BIT protections.[329] Having said that, the Tribunal will address these claims for the sake of completeness.

---

[325] *Mondev v. USA*, Award of 11 October 2002, ¶¶ 80-81.

[326] BIT, Article I(1).

[327] BIT, Article II.

[328] Mem., ¶ 102. Footnote omitted.

[329] *See, e.g.*, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20 ("*Micula v. Romania*"), Award of 11 December 2013, ¶ 874. *See also* Chevron Corporation (U.S.A.) and *Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador* [I], PCA Case No. AA 277, Partial Award on the Merits of 30 March 2010, ¶ 275.

300. On 28 October 2004, Bolivia annulled the Claimants' already revoked concessions. The writs of annulment stated that the annulments were grounded on a lack of legal capacity or sufficient legal representation of the principal and the agent ("*impersonería en el mandante y mandatario*").[330]

301. The Tribunal has already found that the alleged grounds for the annulment of the concessions had no basis in the facts nor in the law (*see* Section VI.A.2 above). The Claimants have established that the flaws alleged by Bolivia were either non-existent or were not subject to the sanction of annulment. In particular, the Tribunal has concluded that the powers of attorney to represent RIGSSA and NMM in the acquisition of the concessions were valid, and that any flaws attached to them were not sanctioned by the nullity of the concessions (*see* paragraphs 140 to 142 above).

302. To the contrary, the record suggests that the annulment of the concessions was an *ex post* attempt to improve Bolivia's defense in this arbitration, not a *bona fide* exercise of Bolivia's police powers. Indeed, as discussed in Section VI.A.2 above, the annulment of the concessions appears to have been Bolivia's way of legalizing the extinction of the concessions after the legality of the Revocation Decree was questioned. The Tribunal cannot fail to note that the 2004 Inter-Ministerial Memo considered precisely this defense strategy in connection with the Claimants' BIT case:

> SECOND SCENARIO - The Bolivian Government may attempt to defend its decisions. Unfortunately, the Mining Code makes no provisions for the revocation of mining concessions. Therefore, this option has a great weakness. Another alternative would be to try to prove irregularities in the processing of the original mining concessions of Non Metallic Minerals S.A., so as to demonstrate that these are and always have been invalid. For the time being, this has been considered the best alternative.[331]

303. Although the 2004 Inter-Ministerial Memo postdates the writs of annulment, it confirms the course of action adopted by the Government. The annulment took place four months after the revocation of the concessions on different grounds. Had the concessions been improperly granted, they would have been annulled or declared null and void in the first place, not revoked for other reasons.

304. The Tribunal concludes that the annulment of the concessions was thus not a legitimate exercise of the Respondent's police powers; it was not consistent with Bolivia's obligation to accord fair and equitable treatment to the Claimants' investments. It is also an unjustified measure that impaired the Claimants' use,

[330] Exh. R-276; *See* ¶ 31 *supra*.

[331] Exh. CD-68, Tribunal's translation.

enjoyment, extension, transfer, sale and liquidation of their investments. Consequently, the Tribunal holds that by annulling the Claimants' concessions the Respondent has breached Articles IV(1) and III(2) of the BIT.

c. Post-expropriation acts of harassment

305. The Claimants also argue that Bolivia breached its obligation to accord their investments fair and equitable treatment and not to impair them by unreasonable or discriminatory measures through post-expropriation acts of harassment. In particular, the Claimants allege that, after the Claimants requested the initiation of negotiations under the BIT, Bolivia commenced a "harassment strategy" to avoid international liability under the BIT, consisting of audits and inspections directed to find flaws in the acquisition of NMM's concessions, tax investigations, and the initiation of criminal actions against persons related to the ICSID case, including former Claimant Allan Fosk.

306. The Tribunal understands that this claim arises from the same facts as the claims for a declaratory judgment and moral damages. As a result, it will address these claims jointly under Section VII.B below.

VII. REPARATION

307. Having held that the Respondent has breached the BIT, the Tribunal must now turn to the claims for reparation. The Tribunal will first address the claim for compensatory damages (A), before turning to the Claimants' request for moral damages and a declaratory judgment (B).

A. Compensatory Damages

308. Following on overview of the Parties' positions (1), the Tribunal will address the applicable standard of compensation (2). Thereafter, it will determine the appropriate valuation method (3) and, on that basis, it will quantify the Claimants' damages for the loss of ulexite reserves and resources (4). It will then deal with the claim for the loss of lithium resources (5). Finally, it will address the claim for interest on the damages awarded (6).

1. Overview of the Parties' positions

309. The Claimants contend that they are entitled to full reparation of the damage caused by the Respondent's breaches of the BIT, which can only be achieved by

compensatory damages equivalent to the fair market value (FMV) of their investment, assessed *ex post* (*i.e.* on the date of the Award, not at the time of the breach) and calculated in accordance with the discounted cash flow (DCF) method. Relying on the valuation performed by their expert Navigant, on the basis of ulexite reserves and resources in the concessions assessed by their expert Behre Dolbear, the Claimants contend that the FMV of their investment is equivalent to a maximum of US$ 146,112,442 and a minimum of US$ 140,459,669. The Claimants also request compensation for lithium resources in the concessions in an amount of US$ 736,385.

310. The Respondent, for its part, contends as a preliminary point that no reparation is possible given the illegalities that affect the mining concessions. If there were to be a reparation, there would be a shared responsibility of at least 50% which would reduce the value of the compensation proportionately.[332] Even if the Tribunal were to consider that Bolivia has breached its obligations under the BIT, the Respondent objects to the Claimants' compensation claim, arguing that the Claimants have inflated their damages by applying an improper valuation method and overestimating the existing reserves in the concessions. According to the Respondent, the amount claimed is astronomical compared to the actual damage which the Claimants might have suffered due to the loss of the mining concessions.

311. More specifically, the Respondent argues that the Claimants can only be compensated for damages that have been proven with certainty. On this basis, it rejects the Claimants' proposed DCF valuation method, arguing that it cannot be applied when future cash flows cannot be projected reliably. Instead, it proposes valuing the investment on the basis of investments effectively made and not recovered (following the "net investments" or "sunk costs" method set out in Article VI(2) of the BIT). Should the Tribunal choose to apply the DCF method, the Respondent argues that the valuation date should be that of the alleged expropriation, not of the Award, and that it should be calculated according to the variables proposed by its expert, Econ One.

2. Standard of compensation

a. The Claimants' position

312. The Claimants submit that the BIT does not address damages for violations of the BIT. Article VI only specifies the compensation to which the investor is entitled in the

[332] Counter-Mem., ¶ 248.

event of a lawful expropriation, stating that this compensation shall be "based on the market value of the affected investment immediately before the measure became public knowledge."[333]

313. In the absence of any *lex specialis*, the Claimants submit that the standard for damages is the customary international law principle of full reparation, as embodied in *Chorzów* and codified in the ILC Articles on Responsibility of States for Internationally Wrongful Acts (the "ILC Articles") (specifically, in Articles 31, 34 and 36.2). The Claimants argue that, in accordance with this principle, the standard of compensation for the confiscation of the concessions, whether understood as a violation of Articles III, IV or VI of the BIT, is that the Claimants must be fully restored to the position in which they would have been if the unlawful act had not occurred.[334]

314. The Claimants propose a valuation method based on the fair market value ("FMV") of the concessions, *i.e*., the price which a hypothetical buyer would be willing to pay for the concessions at a certain moment in time. They claim that FMV is the generally accepted standard for compensation in investment arbitration and customary international law, and allege that Quiborax is entitled to 51% of such value. The Claimants also clarify that "they have not suggested a valuation method based on the value of Quiborax as a company *but for* the confiscation of the Concession, but a valuation of the fair market value of the Bolivian Concessions […]."[335]

315. The Claimants agree with the Respondent that their damages must be "sufficiently certain." As to the degree of certainty required to comply with the burden of proof, it is the Claimants' position that future damages must be proven with *reasonable certainty*. The degree of certainty that Bolivia demands makes compensation for lost profits virtually impossible.

316. To achieve full reparation, the Claimants' damages must be valued on the date of the Award. Limiting the amount of damages to the value of the undertaking at the moment of the dispossession is not justified in the present case. Bolivia did not exercise its right to expropriate, but instead confiscated the concessions in violation of international law. Indeed, Bolivia's wrongful act did not consist merely in not having paid the Claimants' proper compensation (*see* further Section VII.A.4.c.i below).

[333] Claimants' translation, Mem., ¶ 181.

[334] Mem., ¶¶ 181-183.

[335] Reply, ¶ 312 (emphasis in original).

317. The Claimants contend that their damages can in any event not be less than the compensation warranted under Art. VI of the BIT, *i.e.* the FMV of the investment on the date of the expropriation, as the compensation due for a "lawful" expropriation should represent the lower limit.[336]

b. The Respondent's position

318. As a general matter, the Respondent submits that, under international law, damages are recoverable if the claimant proves the existence of damage and a causal relation between the conduct attributable to the State (in this case, a breach of the BIT) and the damage.[337]

319. The Respondent further contends that damages must be proved with a *sufficient or reasonable degree of certainty*.[338] This rule is especially relevant when the claimant seeks to be compensated for the loss of future revenues because "regarding future damages, the principle of non-reparation of hypothetical damage means that only losses that can be anticipated with certainty can be compensated."[339] Bolivia submits that the ulexite reserves used by the Claimants' expert to calculate damages are highly speculative.[340]

320. In this case, the Respondent submits that the appropriate standard of compensation is set out in Article VI of the BIT. [341] This provision requires that all expropriations be accompanied by the "payment of an immediate, sufficient and effective compensation,"[342] which shall be based on to the "market value of the affected investments on a date immediately prior to that in which the measure became public knowledge" […]."[343]

---

[336] *Case Concerning the Factory at Chorzów (Germany v. Poland)* Judgement of 13 September 1928, Claim for Indemnity (The Merits), P.C.I.J. Series A, No. 17 (1928), Exh. CL-6; Marboe, Irmgard, Compensation and Damages in International Law - The Limits of "Fair Market Value," in The Journal of World Investment & Trade (2006), Exh.CL-25.

[337] E.g., Exhs. R-302 and R-320.

[338] Counter-Mem., ¶¶ 250, 285, 295, 297, 309 and 320.

[339] Counter-Mem., ¶ 287, Tribunal's translation.

[340] Counter-Mem., ¶¶ 290, 297.

[341] Counter-Mem., ¶¶ 319-326.

[342] Article VI(1)(c) of the BIT, Tribunal's translation. The Spanish original reads: "las medidas vayan acompañadas de disposiciones para el pago de una compensación inmediata, suficiente y efectiva."

[343] Article VI(2) of the BIT, Tribunal's translation. The Spanish original reads: "La compensación se basará en el valor de mercado de las inversiones afectadas en una fecha inmediatamente anterior a aquella en que la medida llegó a conocimiento público. […]."

321. The Respondent recognizes that under this standard the Claimants are entitled to the FMV of their investments, but argues that, in this case, this is at most equivalent to the Claimants' unamortized investments (*i.e.*, their "sunk costs" or "Net Investment").[344]

322. While Bolivia acknowledges the existence of the full reparation standard under international law as articulated by the PCIJ in *Chorzów*, its position as to its applicability to this case is unclear. In its Counter-Memorial, the Respondent admits that, "in accordance with customary international law reflected in the *Chorzów* case, any unlawful act entails the obligation to repair the damage caused entirely," but submits that the standard set out in Article VI(2) of the BIT ensures full reparation of the Claimants' damages.[345] However, in its Rejoinder, the Respondent appears to question the standard of compensation set out in *Chorzów*, stating that, even assuming that this standard (or the standard set out in the ILC Articles) reflects customary international law adequately, its application in this case is questionable. Relying on the ILC Commentary to Article 34 of the ILC Articles, the *Claim against the USSR for Damage caused by Soviet Cosmos* and *Diallo*, the Respondent maintains that the full reparation principle should not be followed without due consideration to the principles of proportionality and reasonableness that arise from customary international law.[346] The Respondent further contends that this case must be distinguished from *Chorzów*: "while in that case Poland lacked any right to expropriate the investment at issue, in the present dispute it is undeniable that Bolivia possesses that prerogative and that its exercise is fully legitimate."[347]

323. Even if the full reparation principle did apply, the Respondent contends that the Claimants have failed to meet the standard of proof that this principle requires, *i.e.*:

a. There must be a proximate causal link between the damage and the violation of international law;

b. The compensation requested must be reasonable;

c. The damage must be certain and not hypothetical or indeterminate;

---

[344] The Respondent refers to it as "Inversión Neta Realizada," which the Claimants have translated as "Net Investment Realized." The Tribunal will refer to it as the "Net Investment" or "sunk costs" method.

[345] Counter-Mem., ¶ 338, Tribunal's translation.

[346] Rejoinder, ¶ 171.

[347] Counter-Mem., ¶¶ 349-350, Tribunal's translation.

d. There must be no risk of double-counting;

e. The investor must prove the causal link, the quantum of damages and that the damage is recoverable under the applicable law.[348]

324. Finally, the Respondent submits that, if the Tribunal were to accept the Claimants' valuation method, it should calculate the FMV of the concessions on the date of the alleged expropriation. There is no reason to justify a valuation date after the date of the alleged expropriation of the concessions (*see* further Section VII.A.4.c.i below).

c. Analysis

325. The Tribunal understands that the claim for compensatory damages covers all of the Claimants' financially assessable damage arising from the loss of their investments in Bolivia, whether such loss was caused by Bolivia's unlawful expropriation of those investments, by Bolivia's unfair and inequitable treatment or by its impairment of their investments through unreasonable or discriminatory measures.[349]

326. The Tribunal agrees with the Claimants that the BIT does not establish the standard of compensation for internationally wrongful acts. Article VI(2) of the BIT sets out the standard of compensation for lawful expropriations, possibly including expropriations that comply with all legality requirements but for the payment of compensation[350]. The treaty standard does not apply to unlawful expropriations, which are governed by the full reparation principle as articulated by the PCIJ in the *Chorzów* case and later expressed in the ILC Articles. Article VI(2) does not purport to establish a *lex specialis* for unlawful expropriations.[351]

---

[348] Rejoinder, ¶ 172.

[349] Mem., ¶¶ 181-183. The Claimants' requests for relief, cited in ¶ 75 above, specify that that Claimants request an award:

- "Ordering Bolivia to pay Claimants full compensation in an amount not less than US$ 61,481,461 as of 1 August 2009 for damages suffered due to the loss of their investment in Bolivia, plus compound interest at the commercial rate on such amount from such date until the date of actual payment" (Mem., Section X(8)).
- "Ordering Bolivia to pay the Claimants full compensation to an amount of US$ 146,848,827 as of 30 June 2013 for damages suffered due to the loss of their investment in Bolivia, plus compound interest at the commercial rate on that amount from such date until the date of actual payment" (Reply, Section IX(4)).

[350] Arbitrator Lalonde and the President note Arbitrator Stern's observation in her dissent, but deem it unnecessary to deal with a legal issue that does not arise here.

[351] *See, e.g., Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award of 1 June 2009 (Exh. R-348), ¶ 540 (holding that the provision on compensation for expropriation in the relevant BIT "does not purport to establish a *lex specialis*

327. It is a basic principle of international law that States incur responsibility for their internationally wrongful acts. This principle is set forth in ILC Article 1, which provides that "[e]very internationally wrongful act of a State entails the international responsibility of that State." The corollary to this principle, which was first articulated by the PCIJ in the often-quoted *Chorzów* case[352] is that the responsible State must repair the damage caused by its internationally wrongful act. As stated in ILC Article 31:

> Article 31
>
> Reparation
>
> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of the State.

328. This reparation must be "full," *i.e.*, it must eliminate all consequences of the internationally wrongful act and restore the injured party to the situation that would have existed if the act had not been committed.[353] If restitution in kind is impossible or not practicable, the compensation awarded must wipe out all of the consequences of the wrongful act. In this respect, ILC Article 36 provides that "[t]he State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution," adding that "compensation shall cover any financially assessable damage, including loss of profits insofar as it is established."

329. Here, the Tribunal has found that the Claimants' investments in Bolivia were subject to direct – as far as NMM is concerned – and indirect – as far as Quiborax is concerned – expropriation which did not comply with the requirements set out in the BIT for a lawful expropriation. Consequently, the Claimants are entitled to full reparation of the damages suffered.

330. That said, there is authority to suggest that, in certain cases, the State's obligation to make full reparation may be reduced after considering certain mitigating factors, such

---

governing the standards of compensation for wrongful or unlawful expropriations."). *See also Vivendi v. Argentina II*, Award of 20 August 2007 (Exh. R-310), ¶ 8.2.3, and *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award of 30 June 2009, ¶ 201.

[352] *Factory at Chorzów*, Jurisdiction, 1927, P.C.I.J., Series A, No. 9, p. 21.

[353] *Factory at Chorzów,* Merits, 1928, P.C.I.J., Series A, No. 17, p. 47.

as remoteness of the damage,[354] intervening or concurrent causes,[355] the existence of contributory negligence on the part of the investor,[356] or the application of the principle of proportionality.[357] However, in the circumstances of this expropriation, the Tribunal does not see any facts that could justify a reduction for any of these factors.

3. Valuation method

a. The Claimants' position

331. In the Claimants' view, the appropriate method for calculating the FMV of a profit generating enterprise is the DCF method. It notes that Bolivia acknowledges that this is the valuation method used "for a going concern with a proven record of profitability."[358]

332. The Claimants note that they operated the concessions between 2001 and 2004, and that both NMM and Quiborax were profit-generating companies during that time. According to the Claimants, their successful operation of the concessions during almost three years is sufficient to establish their performance history and generate the data required to calculate future income. Moreover, given the past success of the operation, future income could have been expected with reasonable certainty, but for the loss of the concessions. These three years of operation also demonstrate that the Claimants were going concerns.

333. According to the Claimants, the DCF method allows tribunals to assess the economic value of a company in a realistic manner. They claim that by applying the DCF

---

[354] *See, e.g.,* ILC Articles, Commentary to Article 31; *Micula v. Romania*, Award of 11 December 2013, ¶¶ 923-927. *See also* ¶ 381 *et seq*. below.

[355] *Micula v. Romania*, Award of 11 December 2013, ¶¶ 923-927; *see also Case Concerning Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, 20 July 1989, [1989] ICJ Reports 15, ¶¶ 100 and 101; *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award of 15 November 2004, ¶ 85; *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award of 3 September 2001, ¶¶ 234-235.

[356] *See, e.g.,* Brigitte Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973); *Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11 ("*Occidental v. Ecuador II*"), Award of 5 October 2012, ¶ 678; *Yukos Universal Limited (Isle of Man) v. The Russian Federation,* UNCITRAL, PCA Case No. AA 227 ("*Yukos v. Russia*"), Final Award of 18 July 2014, ¶¶ 1601-1606.

[357] *See, e.g.,* Ursula Kriebaum, "Regulatory Takings: Balancing the Interests of the Investor and the State," 8 The Journal of World Investment & Trade 5, October 2007, pp. 717-744.

[358] Counter-Mem., ¶ 294. Reference to World Bank Guidelines on the Treatment of Foreign Direct Investment (Guideline IV:6 (i), p. 6, Exh. CL-20).

method they will be "fully restored to the position they would have been in, had the unlawful act not occurred."[359]

334. In reply to the Respondent's objections to the DCF method, the Claimants contend that international tribunals have acknowledged its appropriateness in the assessment of going concerns, noting that the DCF has been rejected in cases without a proven track record of profitability, which is not the case here.

335. The Claimants object to Bolivia's proposed valuation on the basis of the net investment made or sunk costs. According to the Claimants, Bolivia's position is financially incorrect and contrary to established case law. Specifically:

a. First, the Claimants note that Article VI(2) of the BIT, upon which Bolivia relies, addresses situations "where [the market value] cannot be readily ascertained."[360] Here, the projected cash flows of the Claimants' business are not difficult to establish. The Claimants' history of profitability during almost three years provides sufficient data to make a reasonable projection.

b. Second, as already stated, the Claimants argue that the standard of compensation contained in Article VI of the BIT is not applicable to unlawful expropriations. Citing *ADC v. Hungary* and *Siag v. Egypt*, the Claimants contend that the BIT only sets the standard of compensation for lawful expropriations, which cannot be used to determine the damages payable in cases of unlawful expropriations.

c. Third, the Claimants contend that Bolivia's proposed valuation method does not assess the FMV of the investment nor does it restore the Claimants to the position they would have been in had the unlawful act not occurred. Citing Ripinsky and Williams, the Claimants submit that it is wrong to assume that the historic cost of an investment reflects its market value.[361] In addition, the sunk costs method is inappropriate because "it pretends to put the Claimants in the position they would have been in if the investment had never occurred. […] Yet the investment did take place, it did produce profits, and it would have continued on that path had it not been for Bolivia's wrongful acts."[362]

[359] Reply, ¶ 319.

[360] Claimants' translation.

[361] Reply, ¶ 363.

[362] Reply, ¶¶ 370-371.

d. The Claimants also reject Bolivia's contention that the sunk costs method has been accepted by international tribunals. According to the Claimants, in three out of the four cases cited by the Respondent (*Metalclad,*[363] *Tecmed,*[364] and *Wena*[365]), the tribunals acknowledged the appropriateness of the DCF method analysis for going concerns, but dismissed it on the specific facts. In the fourth case cited by the Respondent (*Azurix*[366]), the Claimant did not request the application of the DCF method.

e. In addition, the Claimants maintain that the gap between their monetary investment and the amount of damages claimed is not unreasonable. Large injections of capital do not necessarily render a business valuable, whereas there are "numerous examples of businesses being sold for a price much higher than the amount originally invested, particularly if the business proves successful."[367]

336. For these reasons, the Claimants reject the Respondent's proposed valuation method, arguing that "by requesting the Tribunal to award Claimants the net value of their investment, Bolivia is pretending that its unlawful behavior remains without consequence."[368]

b. The Respondent's position

337. The Respondent opposes the application of the DCF method to value the Claimants' investments. It argues that this method is unreliable, in particular because of the uncertainty of the assumptions necessary to project future cash flows. Some of the factors commonly recognized by arbitral jurisprudence to conclude that there is insufficient certainty are the lack of a track record of the activity and profitability of the asset or the unpredictability of the legal and socio-economic environment.

338. The Respondent submits that the present case involves numerous uncertainties. In particular, there is no track record of profitability of the concessions and the

[363] *Metalclad v. Mexico*, Award of 30 August 2000.

[364] *Tecmed v. Mexico*, Award of 29 May 2003.

[365] *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 ("*Wena v. Egypt*"), Award of 8 December 2000.

[366] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12 ("*Azurix v. Argentina")*, Award of 14 July 2006.

[367] S. Ripinsky and K. Williams, "Damages in International Investment Law," pp. 229-230, Exh. CL-58.

[368] Reply, ¶ 372.

assumptions necessary to forecast future cash flows are highly speculative, especially regarding the reserves of ulexite and their price.

339. Instead of the DCF method, the Respondent proposes calculating the FMV of the investments in accordance with the parameters set out in the second sentence of Article VI(2) of the BIT for cases in which such FMV is difficult to ascertain. These parameters include the invested capital, its depreciation, the repatriated capital and the replacement value of the investment, among other factors.[369]

340. The Respondent emphasizes that, for the second sentence of Article VI(2) of the BIT to apply, the establishment of the FMV must be merely difficult, not impossible. According to the Respondent, "by using the word 'difficult', the Treaty was precisely looking to include the current situation, where there is not enough certainty to project future flows."[370]

341. As a consequence, Bolivia proposes a valuation based on the Claimants' unamortized investments, *i.e.*, their sunk costs or net investment.[371] According to the Respondent, this valuation method has been accepted by many international tribunals (e.g., *Azurix v. Argentina,*[372] *Metalclad v. Mexico,*[373] *Tecmed v. Mexico,*[374] and *Wena Hotels v. Egypt*[375]) and scholars (e.g., Marboe,[376] Wells[377] and Ripinsky and

[369] Article VI(2) of the BIT provides: "The compensation shall be based on to the market value of the affected investments on a date immediately prior to that in which the measure became public knowledge. When such value is difficult to determine, the compensation may be fixed in accordance with valuation principles that are generally recognized as equitable, taking into consideration the invested capital, its depreciation, the capital repatriated to that date, its replacement value and other relevant factors," Tribunal's translation. (The Spanish original reads: "La compensación se basará en el valor de mercado de las inversiones afectadas en una fecha inmediatamente anterior a aquella en que la medida llegó a conocimiento público. Cuando resulte difícil determinar dicho valor, la compensación podrá ser fijada de acuerdo con los principios de avaluación generalmente reconocidos como equitativos, teniendo en cuenta el capital invertido, su depreciación, el capital repatriado hasta esa fecha, el valor de reposición y otros factores relevantes. […]").

[370] Counter-Mem., ¶ 320, Tribunal's translation.

[371] Counter-Mem., ¶¶ 319-321.

[372] *Azurix v. Argentina*, Award of 14 July 2006.

[373] *Metalclad v. Mexico*, Award of 30 August 2000.

[374] *Tecmed v. Mexico*, Award of 29 May 2003.

[375] *Wena v. Egypt*, Award of 8 December 2000

[376] I. Marboe, "Compensation and Damages in International Law-The Limits of 'Fair Market Value,'" *The Journal of World Investments and Trade*, p. 745 (Exh. CL-25).

[377] L.T. Wells, "Double Dipping in Arbitration Awards? An Economist Questions Damages Awarded to Karaha Bodas Company in Indonesia," *Arbitration International*, Kluwer Law International (2003) Vol. 19, Issue 4, p. 471-481 (Exh. R-342).

Williams[378]) to calculate the FMV of investments when there is insufficient certainty regarding future cash flows, for instance with respect to recently acquired assets or assets that have not started generating cash flows. Relying on *Wena* and *Tecmed*, the Respondent also submits that tribunals have rejected the DCF method when there is a significant disparity between the amount invested and the results of a DCF computation.[379]

342. As a result, the Respondent contends that the FMV of the concessions in June 2004 should be similar to the value that the Claimants paid for their acquisition in 2001, minus the depreciation of the invested capital and the capital repatriated as of that date, in accordance with Article VI(2) of the BIT.[380]

c. Analysis

343. The Tribunal has held that the appropriate standard of compensation is the customary international law principle of full reparation. According to that principle, the Claimants must be restored to the position they would have been in had the unlawful act not occurred. Both Parties agree that such reparation should reflect the FMV of the investment, but disagree on the methodology to calculate that FMV. They also diverge on the relevant valuation date, a matter that is addressed later (*see* Section VII.A.4.c.i below). The Claimants assert that the DCF analysis is the appropriate method to value the FMV of NMM, since it qualifies as a going concern with a proven track record of profitability.[381] The Respondent, by contrast, submits that the FMV of the concessions must be established by reference to the net amounts invested in accordance with Article VI(2) of the BIT.[382]

344. The Tribunal notes that the DCF method is widely accepted as the appropriate method to assess the FMV of going concerns with a proven record of profitability. The World Bank Guidelines on the Treatment of Foreign Direct Investment, cited by

---

[378] S. Ripinsky and K. Williams, Damages in International Investment Law, BIICL (2008), p. 227 (Exh. R-320).

[379] Counter-Mem., ¶¶ 331-333.

[380] Counter-Mem., ¶ 326.

[381] Reply, ¶ 343.

[382] "The compensation will be based on the market value of the affected investments on a date immediately prior to the date on which the measure reaches the general public. Where it is difficult to determine this value, the compensation may be set in accordance with the valuation principles generally recognized as fair, taking into account the capital invested, its depreciation, the capital repatriated to that date, the replacement value and other relevant factors. […]," Tribunal's translation.

both Parties,[383] suggest that the market value of an expropriated investment may be determined "for a going concern with a proven record of profitability, on the basis of the discounted cash flow value."[384] This approach has been endorsed by a large number of investment tribunals.[385]

345. By contrast, the method proposed by the Respondent is applicable only when it is difficult to establish the FMV of the expropriated investments.[386] As the Respondent's economic expert explained during the hearing on the merits, sunk costs are "generally used when alternative valuation methods are unreliable and/or highly speculative, for example due to the lack of enough historical information to project with a minimum of certainty the future evolution of the business that is being valued."[387] While a disparity between sunk costs and the future profitability of the investment may be one factor among others to reject the DCF method, there is no authority to suggest that damages should be quantified on the basis of sunk costs because of that disparity only.[388]

346. The Claimants contend that both NMM and Quiborax were going concerns at the time of the expropriation and therefore their FMV may be established on the basis of the DCF method.[389] The Tribunal notes however that the Claimants claim that there has been an expropriation of NMM's investments in Bolivia (*i.e.*, the mining concessions) and of Quiborax's investments in Bolivia (which the Tribunal understands to have been mainly its shares in NMM). Hence, Quiborax's FMV as such is irrelevant. The

---

[383] *See* Mem., ¶ 208; Counter-Mem., ¶ 294.

[384] World Bank, "Guidelines on the Treatment of Foreign Direct Investment," 2002 (Exh. CL-20), Guideline IV.6(i).

[385] *See, e.g. Merrill & Ring Forestry L. P. v. Government of Canada*, UNCITRAL, ICSID Administrated, Award of 31 March 2010, ¶ 264; *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award of 8 June 2010, ¶¶ 70-71; *Walter Bau v. Thailand*, Award of 1 July 2009, ¶ 14.22; *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award of 9 September 2009, ¶ 164; *CMS v. Argentina*, Award of 12 May 2005, ¶¶ 416-417; *Biwater Gauff v. Tanzania*, Award of 24 July 2008, ¶ 793.

[386] The Tribunal does not believe that the sunk costs should be disregarded completely simply because it is spelled out in Article VII(2) of the BIT, which sets out standard of compensation for lawful expropriations. Even in the absence of the second sentence of Article VII(2), the Tribunal could find it appropriate to resort to this method if the investments to be valued were not going concerns or did not have proven record of profitability.

[387] Econ One Presentation, slide 47, Tribunal's translation.

[388] In *Wena* and *Tecmed*, this disparity was only one of several factors considered by the tribunals to reject the DCF method, such as insufficient financing, short time of operation and lack of reliable information to perform a DCF calculation. *See Wena v. Egypt*, Award of 8 December 2000, ¶ 118; *Tecmed v. Mexico*, Award of 29 May 2003, ¶ 186). *See also Lemire v. Ukraine*, Award of 28 March 2011, ¶ 8.

[389] Reply, ¶¶ 342-343.

Claimants implicitly concede this, as they have not attempted to calculate Quiborax's FMV; rather, they have focused on the valuation of the concessions owned by NMM.[390] In the Tribunal's view, this suffices to establish the FMV of both NMM's and Quiborax's investments in Bolivia (as the concessions were NMM's primary asset and Quiborax's main assets in Bolivia were its shares in NMM). The Tribunal will thus focus on the FMV of NMM's concessions.

347. NMM was incorporated in July 2001 and became the owner of the concessions in August 2001 after RIGGSA's contribution (*see* Section II above). The record suggests that NMM commenced operating the concessions in late 2001 and commenced sales in 2002.[391] NMM thus operated the concessions for at least two full years, and was operating at the time of the expropriation. In the Tribunal's view, NMM's mining activity has a sufficient record of operations and prospective profitability to justify applying the DCF method to value the concessions. As discussed in detail below, there is sufficient evidence in the record to make a projection of the future cash flows that would have been generated by the concessions with reasonable certainty. In particular, there is sufficient evidence of the reserves found in the concessions, prospective future sales (arising from the Supply Contract between Quiborax and RIGSSA in 2001[392]) and sufficient information on prospective prices and costs to justify valuing the concessions on the basis of the DCF method.

4. Valuation of ulexite reserves and resources

a. The Claimants' position

348. According to the Claimants, but for Bolivia's expropriation of the concessions, they would have enjoyed the economic benefits of those concessions during at least forty further years. This duration is based on an estimate of the reserves and resources of ulexite in the mining concessions established by the Claimants' mining expert, Behre

[390] *See* Navigant, First ER, ¶¶ 2-4, describing the scope of the damages' valuation. *See also* Reply, ¶ 312, where the Claimants explain that "they have not suggested a valuation method based on the value of Quiborax as a company *but for* the confiscation of the Concession, but a valuation of the fair market value of the Bolivian Concessions [...]" (emphasis in original).

[391] Navigant, First ER, ¶ 70; Seraudit's Independent Audit Report of NMM at 30 September 2002, Exh. NCI-90.

[392] Exh. CD-16 and NCI-06.

Dolbear.[393] Indeed, the concessions were not granted for a limited number of years but for the exploitation of the available mining resources.[394]

349. The Claimants rebut the Respondent's criticisms regarding the valuation of the reserves, and in particular the argument that they did not differentiate between reserves and resources, of which only the former has economic value according to Bolivia. The Claimants submit that both reserves and resources should be taken into account in the evaluation of the concessions and that the assessment carried out by Navigant and Behre Dolbear is correct from both an economic and industry practice perspective.[395]

350. According to the projection provided by Behre Dolbear, proven and probable reserves and indicated resources (the latter factored downward by 50 percent) on the Doña Juanita, Borateras de Cuevitas and Basilea concessions totaled 5.02 million tonnes.[396] As for the remaining concessions (Inglaterra, Sur, Don David, Tete, La Negra and Pococho), Behre Dolbear came up with an estimate of 1.26 Mt inferred resources (factored downward by 75 percent).[397]

351. Navigant, the Claimants' economic expert, has attributed value to the reserves and resources in the mining concessions that have commercial value following Behre Dolbear's estimate. The Claimants contend that, to put them back in the position in which they would have been had the expropriation not occurred, this valuation must be calculated on the date of the Award, *i.e.*, under an *ex post* approach. Their claim is therefore calculated using 30 June 2013 as a proxy for the date of the Award. However, for comparative purposes, they also provide an *ex ante* calculation.[398]

---

[393] Behre Dolbear, First ER, ¶¶ 128-147.

[394] *See* Art. 10 of the Mining Code (Exh. CD-6): "The mining concession grants its titleholder, subject to the payment of mining fees, an exclusive right *in rem* to carry out for an indefinite time prospection, exploration, exploitation, concentration, smelting, refining and commercialization activities regarding all the mineral substances found it that concession," Tribunal's translation. The original reads: "La concesión minera otorga a su titular y con la condición del pago de patentes, el derecho real y exclusivo de realizar por tiempo indefinido actividades de prospección, exploración, explotación, concentración, fundición, refinación y comercialización de todas las substancias minerales que se encuentren en ella […]".

[395] Reply, ¶¶ 402-418.

[396] Behre Dolbear, First ER, ¶ 128-133; Second ER, ¶¶ 27, 65.

[397] Behre Dolbear First ER, ¶¶ 128-137; Second ER, ¶ 27. Although in its first report Behre Dolbear only refers to these as "resources," in its second report it clarifies that they are to be considered "Inferred Resources" (Behre Dolbear, Second ER, ¶¶ 27, 69-70).

[398] Navigant, First ER, ¶¶ 108-166; Navigant, Second ER, ¶¶ 155-156.

352. As explained by Navigant, total damages under the *ex post* approach are calculated under a four-step process:[399]

a. First, the foregone (*i.e.*, past) cash flows are calculated for years 2004 to 2013, using all information available as of 30 June 2013 (the valuation date). The lost cash flows for this period amount to US$ 57,709,382.[400]

b. Second, pre-award interest is added to these cash flows, "such that these cash flows can all be summed as of a single date."[401] As a result, all past cash flows are adjusted for pre-award interest to 30 June 2013. In accordance with Art. VI.2 of the BIT, which establishes that "interest will accumulate at a commercially established rate,"[402] Navigant proposes two alternative interest rates: the Bolivian sovereign debt rate and LIBOR + 2%, both on a compound basis. Applying these interest rates, the present value of the lost cash flows for years 2004 to 2013 amounts to either US$ 65,974,958 or US$ 60,322,185.[403]

c. Third, Navigant calculates projected cash flows from 2013-2037 (which reflects the time period following the Award during which the Claimants estimate the reserves in the concessions to last). It then applies a discount rate of 10.78% (equivalent to the 2013 Weighted Average Cost of Capital (WACC) as calculated by Navigant[404]), in order to bring the cash flows back to present value on 30 June 2013. The result of this calculation is US$ 80,137,484.[405]

d. Fourth, the sum of the present value of the past cash flows (b. above) is added to the net present value of cash flow projected after 30 June 2013 (c. above). Depending on the interest rate used to adjust past cash flows, the total amount of damages under the *ex post* method is calculated at US$ 146,112,442 or US$ 140,459,669 respectively.[406]

---

[399] Navigant, First ER, ¶¶ 167-216; Navigant, Second ER, ¶¶ 157-160.

[400] Navigant, Second ER, ¶ 157, table 9.

[401] Navigant, First ER, ¶ 1

[402] Claimants' translation.

[403] Navigant, Second ER, ¶¶ 158-159, tables 10 and 11.

[404] Navigant, Second ER, Exh. E.2 and F. [In its first report, Navigant calculated the 2009 WACC at 14.61%. *See* Navigant, First ER, ¶ 215).

[405] Navigant, First ER, ¶¶ 189-215; Navigant, Second ER, ¶ 160.

[406] Navigant, Second ER, ¶ 160, table 12.

353. While the Claimants admit that Behre Dolbear has not been able to confirm the exact amount of reserves and resources of the concessions, they submit that both Behre Dolbear's and Navigant's calculations are in line with acceptable industry standards.[407] More specifically, with respect to Navigant's DCF calculation, the Claimants maintain that:

a. The discount rate used by Navigant to bring the projected cash flows back to present value (equivalent to 10.78%) is reasonable, as it is based on the WACC of the Claimants' investments.

b. The currencies used are in accordance with standard practice. The Claimants note that the revenues related to the concessions are earned in U.S. dollars, but costs are predominantly incurred in Bolivian currency. Taking this into account, and since the valuation must be built into a single currency, Navigant has converted the forecast cash flows in Bolivianos (Bs), while the Respondent's expert chose to carry out the DCF analysis in U.S. dollars. Nevertheless, the Claimants point out that "the choice of currency is largely irrelevant, particularly if purchasing power parity ("PPP") is employed as suggested by Dr. Flores [of Econ One]."[408]

354. The Claimants also deny that Decree 27,590 had any effect on their *ex post* valuation. Although Decree 27,590, which was issued on the day of the expropriation and entered into force on 23 September 2004, did prohibit the export of non-industrialized non-metallic minerals, this Decree was abrogated by Decree 27,799 issued on 20 October 2004.[409]

355. For the purposes of comparison, the Claimants also submit the FMV of their investment using the *ex ante* valuation method with a result of US$ 61,681,329 or US$ 49,641,600, depending on which pre-award interest rate (Bolivian sovereign debt rate or LIBOR + 2%) is applied.[410]

[407] Reply, ¶ 411.

[408] Navigant, Second ER, ¶ 55.

[409] Tr., Day 1, 6-8; COSS, slide 27; Exh. CD-195.

[410] Navigant, Second ER, table 8.

b. The Respondent's position

i. Valuation under the sunk costs method

356. Applying the sunk costs method, the Respondent contends that the value of the mining concessions in June 2004 should be similar to the value which the Claimants invested in 2001, minus (as required by the BIT) the depreciation of the invested capital and the capital repatriated up to that date.

357. According to the Respondent's economic expert, Econ One, the Claimants invested amounts of US$ 800,000[411] and repatriated US$ 177,508.[412] Accordingly, the difference (US$ 622,492) is the Claimants' net investment and the maximum amount to which they are entitled in accordance with the Treaty and international law.

ii. Valuation under the DCF method

358. If the Tribunal were to favor the DCF method, the Respondent submits that the Claimants have applied it incorrectly, thus exaggerating their claim.

359. First, the Respondent argues that Quiborax is not the international player it claims to be and that the loss of concessions did not have a significant impact on its production. Contrary to what the Claimants allege, Quiborax is not and never has been the first producer of borates in South America, let alone the fourth producer worldwide. Quiborax also exaggerates when it claims that the loss of the concessions caused the loss of its agricultural business, because (i) Quiborax's main activity is not the sale of agrochemical products but the sale of boric acid; (ii) it did not have an important market for agrochemical products, and (iii) the loss of the mining concessions did not prevent Quiborax from continuing the production of agrochemical products. According to the Respondent, Quiborax did not depend exclusively on Bolivian resources and could continue its production of agrochemical products without them.

360. Second, the Respondent further contends that the Claimants and their economic expert have oversimplified their assessment of ulexite reserves and resources and inflated the levels of ulexite in the concessions as a consequence. For the

[411] Econ One, First ER, Section IV(B). This refers to the total value of the concessions. Econ One states that Quiborax's share is 50% of that value (Econ One, First ER, ¶¶ 159, 161). In fact, the Tribunal has established that Quiborax owns approximately 51% of NMM (*see* ¶ 18 above).

[412] Econ One, First ER, Section IV(C).

Respondent, Navigant ignores Behre Dolbear's distinction between reserves and resources and thus assigns economic value to alleged reserves that not even Behre Dolbear has included in its assessment. The value of the concessions should be calculated exclusively on the basis of proved and probable reserves based on Aquater-EniChem's field work and not on the basis of extrapolations that speculate on possible quantities of ulexite that remain unconfirmed.

361. Third, the Respondent and its expert Econ One also submit that the Claimants have inflated their revenue projections, due to the following flaws in Navigant's calculations:

a. Navigant has used the different currencies inconsistently, applying different exchange rates with the sole purpose of artificially inflating the FMV.

b. While Econ One agrees that the discount rate should be based on the WACC, it argues that Navigant has underestimated the WACC considerably. The discount rate should be 22.99%, as opposed to the rate proposed by Navigant, which Econ One characterizes as unreasonable.[413]

362. Finally, the Respondent contends that the investment should be valued on a date immediately prior to the expropriation, as set out in Article VI(2) of the BIT. As discussed in more detail below, there is no justification for moving the date of valuation to 2013. In addition, the Claimants' *ex post* valuation ignores the economic effects of Decree 27,590, which prohibited the export of non-industrialized non-metallic minerals.

363. Having corrected Navigant's conceptual errors, Econ One estimates that the FMV of the concessions on 22 June 2004 (*i.e.* one day before the alleged expropriation), applying the DCF method, is US$ 2.1 million.[414] In Bolivia's view, this sum is reasonable, considering the price (US$ 400,000) at which the Ugalde brothers sold 50% of their participation in the seven concessions that surround the area explored by Aquater-EniChem, and the resulting internal rate of return of 44%.

c. Analysis

364. Having found that DCF is the appropriate valuation method, the Tribunal will now determine the variables and assumptions to be used for purposes of the DCF computation. It will start with the valuation date (i), then review the projected cash

[413] Econ One, First ER, ¶¶ 121-149; Second ER, ¶¶ 133-200.

[414] Econ One, First ER, ¶ 153; Second ER, ¶ 201.

flows, taking into account the alleged reserves and resources (ii) and the Claimants' projected production profile (iii). It will then assess the forecast of ulexite prices and costs (iv) and determine the discount rate to be applied (v), before setting out its conclusions (vi). The Tribunal has reached its conclusions in this Section VII.A.4.c by majority, Arbitrator Stern dissenting in accordance with her Partially Dissenting Opinion. Hence, references to the Tribunal in this section must be understood as references to the majority.

i. Valuation date

365. The Claimants maintain that, in order to fully repair the damages which they suffered as a consequence of Bolivia's unlawful expropriation, the FMV of the investment should be established *ex post*, that is, on the date of the Award.

366. The Claimants argue that *ex post* valuation allows the Tribunal to calculate the damages actually suffered by them taking into account all available information. According to the Claimants, "if damages are the result of unlawful acts, as in the present case, the risk that the investment would have turned out more profitable than could have been foreseen at the time of expropriation, must be allocated to the wrongdoer, and not to the investor."[415] Relying on ICSID cases and scholarly writings, the Claimants argue that an *ex post* assessment is appropriate when the value of the expropriated undertaking has increased following the unlawful act.[416]

367. In addition, they submit that *ex post* valuation is more accurate since it requires projections of future cash flows over a shorter duration.[417] As a result, it addresses the Respondent's concern for the "reasonable certainty" of the Claimants' lost profits better than *ex ante* valuation.

368. The Claimants explain Navigant's *ex post* valuation as follows:

> Like the tribunal in *Amco*, Navigant divides the period of valuation in two: (i) from the date of the expropriation to the date of the award (or current date), and (ii) from the date of the award (or current date) until the end of the life of the Concessions. The value of the Concessions during the first (past) period is calculated *ex post*, using all information available as of current date. The second (future) period is valued as of [the] current date, using the DCF method. Hence, the *ex post* valuation combines two

[415] Mem., ¶ 195.

[416] Ripinsky Sergey, Williams, Kevin, Damages in International Investment Law, British Institute of International Law and Comparative Law (2008), pp. 242-259, Exh. CL-27.

[417] Mem., ¶ 198.

different valuation methods for two different time periods, marked by the date of the award.[418]

369. The Respondent, on the other hand, rejects an *ex post* valuation. It argues that, even if the Tribunal were to accept the valuation method postulated by the Claimants and "deem that Bolivia should compensate the Claimants for the equivalent of the FMV of the mining concessions," it should decide that "this value should be calculated at the date of the expropriation."[419] In the Respondent's view, there are no reasons to justify setting the valuation date after the date of the alleged expropriation of the concessions. To the contrary, it argues that the Claimants' *ex post* valuation should be dismissed for the following reasons:[420]

a. First, it is contrary to the BIT and to international case law. Article VI(2) of the BIT provides that the FMV of the investment shall be calculated on the date of the expropriation. The Respondent agrees with the Claimants that payment of compensation pursuant to Article VI(2) of the BIT is a condition for the lawfulness of the expropriation, but argues that this does not mean that it does not fully repair the damage suffered by the investor. The Respondent cites several international tribunals which held that the FMV on the date of the expropriation provided appropriate compensation for unlawful expropriation (e.g., *Wena Hotels v. Egypt*, *Middle East Cement v. Egypt*, *Sedelmayer v. Russia*, *Tecmed v. Mexico* and *Metalclad v. Mexico*).

b. Second, *ex post* valuation is arbitrary and speculative. The date of the award has nothing to do with the facts of the case. The date of expropriation is the only one that is objectively related to the dispute.

c. Third, the decisions cited by the Claimants are inapplicable to the present case. In *Phillips Petroleum v. Iran* and *Siemens v. Argentina*, the tribunals valued the investment on the date of the expropriation. In *ADC v. Hungary* and *Amco II*, the tribunals did indeed adopt an *ex post* valuation, but neither of these cases is applicable here.

---

[418] Reply, ¶ 392, referring to *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/8 ("*Amco II*"), Final Award of 5 June 1990, Yearbook of Commercial Arbitration XVII (1992), ¶¶ 96-105.

[419] Counter-Mem., ¶ 354, Tribunal's translation.

[420] Counter-Mem., ¶¶ 335-354.

d. Fourth, the Claimants' position lacks coherence. They accept that the compensation should be the equivalent of the FMV of the concessions, defined as the price that a hypothetical willing buyer and an able seller would have agreed. Hence, the FMV must necessarily be calculated on a certain date taking into account the information available on that date.

370. The Tribunal has already held that the standard of compensation in this case is not the one set forth in Article VI(2) of the BIT, but the full reparation principle under customary international law as enunciated by the PCIJ in *Chorzów* and restated in Article 31 of the ILC Articles, because it is faced with an expropriation that is unlawful not merely because compensation is lacking (*see* paragraphs 326-327 above). As explained in the following paragraphs, the majority of the Tribunal considers that this requires an *ex post* valuation, *i.e.*, valuing the damage on the date of the award and taking into consideration information available then.

371. The majority has arrived at this conclusion after carefully analyzing the PCIJ's reasoning in *Chorzów*. As is in the present case, *Chorzów* dealt with an expropriation where the wrongful act of the expropriating State was not limited to the lack of payment of compensation.[421] The Court held that the compensation to be awarded in these cases "is not necessarily limited to the value of the undertaking at the moment of the dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated."[422] According to the Court, a contrary conclusion would be "tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned."[423]

372. Rather, on the basis that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed,"[424] the Court concluded

[421] The PCIJ held that "[t]he action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation, save under the exceptional conditions fixed by Article 7 of the said Convention." *Factory at Chorzów*, Germany v. Polish Republic, PCIJ Series A, No. 17, Judgment on Merits, 13 September 1928, p. 46.

[422] *Loc. cit.,* p. 47.

[423] *Loc. cit.*

[424] *Loc. cit.*

that an unlawful expropriation[425] "involves the obligation to restore the undertaking and, if this be not possible, to pay its value *at the time of the indemnification*, which value is designed to take the place of restitution which has become impossible."[426]

373. When it came to determining "what sum must be awarded […] to place the dispossessed Companies as far as possible in the economic situation in which they would probably have been if the seizure had not taken place,"[427] the Court found itself dissatisfied with the data supplied by the parties. It thus ordered an expert inquiry. The questions the Court asked the expert are enlightening for present purposes: it asked for two valuations, one based on the asset value of the undertaking on the date of the taking plus any additional profits accrued until the date of the judgment (Question I),[428] and another based on the asset value of the undertaking on the date of the judgment (Question II).[429] The Court explained that the purpose of the first question was "to determine the monetary value, both of the object which should have been restored in kind and of the additional damage, on the basis of the estimated value of the undertaking including stocks at the moment of taking possession by the Polish Government, together with any probable profit that would have accrued to the

[425] The Court refers to "[t]he dispossession of an industrial undertaking – the expropriation of which is prohibited by the Geneva Convention – […]." *Loc. cit.*, pp. 47-48.

[426] *Loc. cit.*, p. 48 (emphasis added).

[427] *Loc. cit.*, p. 49.

[428] In Question I, the Court requested the expert to establish the value of the undertaking on the date of the expropriation on the basis of its assets, as well as the financial results (profits or losses) that would have accrued from the date of the taking to the date of the judgment. It did so in the following terms: "I.- A. What was the value, on July 3rd, 1922, expressed in Reichsmarks current at the present time, of the undertaking for the manufacture of nitrate products of which the factory was situated at Chorzow in Polish Upper Silesia, in the state in which that undertaking (including the lands, buildings, equipment, stocks and processes at its disposal, supply and delivery contracts, goodwill and future prospects) was, on the date indicated, in the hands of the Bayerische and Oberschlesische Stickstoffwerke?

B. What would have been the financial results, expressed in Reichsmarks current at the present time (profits or losses), which would probably have been given by the undertaking thus constituted from July 3rd, 1922, to the date of the present judgment, if it had been in the hands of the said Companies?"*Loc. cit*, p. 51.

[429] In Question II, the Court requested the expert to establish the value of the undertaking on the date of the judgment if that undertaking (considering all of its assets) had remained in the hands of the dispossessed companies and had either remained substantially as it had been on the date of the taking or had developed in a similar fashion as other undertakings of the same kind. It did so in the following terms: "II.- What would be the value at the date of the present judgment, expressed in Reichsmarks current at the present time, of the same undertaking (Chorzow) if that undertaking (including lands, buildings, equipment, stocks, available processes, supply and delivery contracts, goodwill and future prospects) had remained in the hands of the Bayerische and Oberschlesische Stickstoffwerke, and had either remained substantially as it was in 1922 or had been developed proportionately on lines similar to those applied in the case of other undertakings of the same kind, controlled by the Bayerische, for instance, the undertaking of which the factory is situated at Piesteritz?" *Loc. cit.,* pp. 51-52.

undertaking between the date of taking possession and that of the expert opinion."[430] The purpose of the second question, on the other hand, was to ascertain "the present value [of the undertaking] on the basis of the situation at the moment of the expert enquiry and leaving aside the situation presumed to exist in 1922."[431]

374. Both of these valuations have the same purpose: to establish the value of the losses suffered by the dispossessed companies on the date of the Court's judgment, either by (i) assessing the value of the undertaking on the date of the taking plus any lost profits accrued between the taking and the judgment, or (ii) assessing the value of the undertaking on the date of the judgment. Although the Court was using an asset-based valuation rather than a DCF method,[432] the purpose of the exercise is clear: either valuation would have allowed the Court to award the dispossessed companies the value of their losses on the date of the judgment.

375. Notably, the Court retained full discretion in determining the sum to be awarded. Indeed, after noting the difficulties raised by these two questions, "difficulties which are however inherent in the special case under consideration, and closely connected with the time that elapsed between the dispossession and the demand for compensation, and with the transformations of the factory and the progress made in the industry with which the factory is concerned,"[433] the Court adopted the following approach:

> In view of these difficulties, the Court considers it preferable to endeavor to ascertain the value to be estimated by several methods, in order to permit of a comparison and if necessary of completing the results of the one by those of the others. The Court, therefore, reserves every right to review the valuations referred to in the different formulae; basing itself on the results of the said valuations and of facts and documents submitted to it, it will then proceed to determine the sum to be awarded to the German Government, in conformity with the legal principles set out above.[434]

376. The *Chorzów* case settled after this judgment and history does not tell us how the Court would have assessed the two valuations and set the amount of damages. This being so, what matters here is, first, that the *Court envisaged two valuations, which were both aimed at establishing the damage* suffered by the dispossessed companies on the date of the judgment. What matters further is that the Court considered itself to

[430] Loc. cit., p. 52.

[431] Loc. cit., p. 52.

[432] Had the Court been using the DCF method rather than an asset-based method, it would have valued the undertaking on the basis of its future profit-making capacity.

[433] *Loc. cit.,* p. 53.

[434] *Loc. cit.,* p. 53-54.

have *full discretion* ("every right') *to assess the valuations* for purposes of determining the sum to be awarded,[435] with the obvious aim of implementing the general principle it had set out earlier in the same judgment, which is *to award full reparation* of the harm caused by the unlawful expropriation.

377. The Tribunal thus concludes by majority that, dealing with an expropriation that is unlawful not merely because compensation is lacking, its task is to quantify the losses suffered by the claimant on the date of the award (or on a proxy for that date). This is easily explained by a reference to restitution: damages stand in lieu of restitution which would take place just following the award or judgment. It is also easy to understand if one keeps in mind that what must be repaired is the actual harm done, as opposed to the value of the asset when taken.

378. Several investment arbitration tribunals,[436] other adjudicatory bodies (such as the European Court of Human Rights),[437] and scholars[438] have followed this approach.

---

[435] *Loc. cit.,* p. 53.

[436] *See, e.g.*, *ADC v. Hungary*, Award of 2 October 2006, ¶ 497; *ConocoPhillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits of 3 September 2013, ¶ 343; and *Yukos v. Russia*, Final Award of 18 July 2014, ¶¶ 1763-1769. In *Amco II*, although not a BIT case, an ICSID tribunal chaired by Rosalyn Higgins equated a denial of justice arising from the revocation of a license to an unlawful taking of contract rights and awarded damages valued on the date of the award (*see Amco II*, ¶¶ 94-105). *See also Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007, ¶¶ 352-353, where the tribunal endorsed the view that the principle of full reparation required awarding the value of the investment on the date of the award, but was ultimately guided by the claimant's request for relief, which sought the book value of the investment at the time of the expropriation plus lost profits and other consequential damages arisen thereafter (*see Siemens*, ¶¶ 322-389). The majority notes that this approach serves the same purpose as valuing the investment on the date of the award (*see* ¶ 374 supra).

[437] *See, e.g.*, *Amoco International Finance Corp. v. Iran*, Iran US Claims Tribunal, Award of 14 July 1987, ¶¶ 192-204. *Papamichalopoulos and others v. Greece*, 9 ECHR 118, Judgment of 31 October 1995, ¶ 36. *See also* I. Marboe, Compensation and Damages in International Law: The Limits of "Fair Market Value", Vol. 4, issue 6, November 2007, p. 752 (noting that the European Court of Human Rights "has repeatedly awarded amounts that took into account the increase in value of unlawfully expropriated property between the time of dispossession and the date of the judgment", and citing in this respect *Belvedere Alberghiera S.r.l. v. Italy*, ECHR No. 31524/96, 2000-VI, ¶ 35; *Motais de Narbonne v. France* (satisfaction équitable), ECHR No. 48161/99, 27 May 2003, ¶ 19; *Terazzi S.R.L. v. Italy* (satisfaction équitable), ECHR No. 27265/95, 26 October 2004, ¶ 37).

[438] *See, e.g.*, I. Marboe, "Calculation of Compensation and Damages in International Investment Law," ¶ 3.266 ("As unlawful expropriations represent violations of international law they entail the State's responsibility to fully repair the financial harm done to the former owner. The applicable differential method requires assessing the difference between the financial situation of the person affected and the financial situation he or she would be in, if the expropriation had not taken place. This comparison is made on the day of the judgment or award. It follows that the decisive valuation date is the date of the award.") *See also* M. Sorensen, Manual of Public International Law (St. Martin's Press, New York 1968) p. 567, ¶ 9.18 ("[s]ince monetary compensation must, as far as possible, resemble restitution, the value at the date when the indemnity is paid must be the criterion"); and G. Schwarzenberger, International Law as Applied by International Courts and Tribunals, Vol. 1 (Stevens & Sons Limited, London 1957), p. 666 ("[m]uch is to be said in favour of the date of the judgment as the operative date.

Some authorities also suggest that such valuation date only applies if the value of the asset increased after the taking, not when it decreased.[439] Here, this issue does not arise and hence can be left open. Indeed, as is explained below, the Claimants have shown that the value of their investments would have increased after expropriation.

379. In the majority's opinion, assessing the value of the investment on the date of the award (taking the date of the most recent valuation as a proxy) allows the Tribunal to take into consideration *ex post* data, *i.e.*, information available after the date of the expropriation. Its task is to compensate the Claimants' actual loss on the date of the award. What matters is that the victim of the harm is placed in the situation in which it would have been in real life, not more, not less. Using actual information is better suited for this purpose than projections based on information available on the date of the expropriation, as it allows to better reflect reality (including market fluctuations) when attempting to "re-establish the situation which would, in all probability, have existed if that act had not been committed."[440]

380. The distinction between damage computation for an unlawful taking as opposed to a lawful one was well put in *Amco II*:

> If the purpose of compensation is to put Amco in the position it would have been in had it received the benefits of the Profit-Sharing Agreement, then there is no reason of logic that requires that to be done by reference only to data that would have been known to a prudent businessman in 1980. It may, on one view, be the case that in a lawful taking, Amco would have been entitled to the fair market value of the contract at the moment of dispossession. In making such a valuation, a Tribunal in 1990 would necessarily exclude factors subsequent to 1980. But if Amco is to be placed as if the contract had remained in effect, then subsequent known factors bearing on that performance are to be reflected in the valuation technique. […]."[441]

381. It could be argued that *ex post* valuation or data should not be used because it was unforeseeable on the date of the breach. As the majority has asked itself this question

---

It is the judgment or award which establishes between the parties with binding force that reparation is due from one party to the other. If restitution in kind were possible, it would have to take place as soon as possible after the judgment or award. It, therefore, appears appropriate that the amount of any monetary substitute for actual restitution should be related to the same date.").

[439] *See, e.g.*, *Yukos v. Russia*, PCA Case No. AA 227, Final Award of 18 July 2014, ¶ 1768.

[440] *Factory at Chorzów*, Merits, 1928, P.C.I.J., Series A, No. 17, p. 47.

[441] *See Amco II*, ¶ 96. *See also* Marboe, Compensation and Damages in International Law The Limits of "Fair Market Value" Vol. 4, issue 6, November 2007, p. 753 ("It follows, thus, from the principle of full reparation as formulated by the PCIJ in *Chorzów Factory*, that the valuation is not normally limited to the perspective of the date of the illegal act or some other date in the past. An increase in value of the valuation object, consequential damage, subsequent events and information, at least up until the date of the judgment or award, must be taken into account in the evaluation of damages.").

and it is discussed in the dissenting opinion of Arbitrator Stern, it is briefly addressed here.

382. The harm for which reparation is sought must be caused by the wrongful act. It is generally accepted that factual causation is not sufficient. An additional element linked to the nature of the cause, sometimes called "cause in law"[442] or adequate causation[443] is required. It is in this context that foreseeability is sometimes resorted to. The Commentary to Article 31 to the ILC Articles expresses this additional requirement for an adequate cause as follows:

> [C]ausality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used, in others "foreseeability" or "proximity."[444]

383. In other words, a wrongful act may cause a particular damage as a matter of fact. However, if the factual link between the act and the damage is composed of an atypical chain of events that could objectively not have been foreseen to ensue from the act, the damage may not be recoverable. It can be left open here whether the requirement of legal causation limits only the categories of damages claimed, *e.g.* lost profits, or whether it also goes to the magnitude (certainly not the precise amount) of the loss within a given category.[445] What matters in any event is that the wrongful act was objectively capable of causing the damage incurred in the ordinary course of events. Subject possibly to special circumstances, the expropriation of a going concern appears objectively capable of causing the loss of future profits which may fluctuate according to the evolution of the economy and the market. If one focuses on foreseeability in this context, then it is equally clear that losses of future profits determined by the fluctuations of the market are objectively foreseeable. As a result, the majority is satisfied that the test of foreseeability (to the extent that it is deemed part of causation) is met in the circumstances before it.

---

[442] Vivienne Harpwood, Modern Tort Law, Cavendish Publishing 6th Edition, p. 157.

[443] *Lighthouses Arbitration*, France v. Greece, 24/27 July 1956, XII RIAA 155, p. 218 ("Tout lien adéquat de causalité fait défaut et dans ces conditions le chef de réclamation n° 19 doit être rejeté.")

[444] ILC Articles, Article 31, Commentary 10.

[445] *Amco II*, ¶ 174 ("[F]oreseeability goes to causation and damages, and normally not the quantum of profit. That the revocation of the license would cause Amco to be unable to secure its share of the profits under the Profit-Sharing Agreement was undoubtedly foreseeable. The principle of foreseeability does not require that the party causing the loss is at that moment of time able to foresee the precise quantum of the loss actually sustained.")

384. In this context, the Respondent argues that the Claimants' FMV calculation is impossible, as they "envision a hypothetical buyer at the date of the expropriation that would know the economic evolution following that date."[446] Yet, the task here is not to establish the FMV of the investment on the date of the expropriation, but rather to remedy the consequences of the unlawful act. For that purpose, the Tribunal considers by majority that the use of *ex post* data allows it to value the Claimants' loss with increased precision. At the same time, the Tribunal must value the loss with reasonable certainty.[447] If the available *ex post* data is not reasonably certain, then it will have no choice but to resort to appropriately adjusted *ex ante* data (*i.e.*, data available at the date of the expropriation).

385. Had the expropriation not occurred, the Claimants would still be in possession of their investment. Consequently, they would have collected cash flows for their mining activities until today, and would have had the right to continue collecting them until the depletion of the concessions. Since some cash flows lie in the past and others in the future, different computations apply to each category, as the Claimants' expert has done.[448] Past cash flows, *i.e.*, cash flows that would have accrued from the date of the expropriation to 30 June 2013 (which is the date of Navigant's latest calculations) must be brought forward to present value through the application of an interest rate. By contrast, future cash flows must be discounted back to net present value through the application of a discount rate.

386. The Tribunal will apply the principles so determined when quantifying the Claimants' damages, with the specifications set out in the following sections.

---

[446] Counter-Mem., ¶ 352, Tribunal's translation.

[447] Article 36(2) of the ILC Articles provides that "compensation shall cover any financially assessable damage including loss of profits insofar as it is established." *See also* M.M. Whiteman, Damages in International Law, Vol. 3 (1937), p. 1837 ("In order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were reasonably anticipated; and that the profits anticipated were probable and not merely possible. If the evidence shows that there is doubt that profits would have been realized if the wrongful act had not occurred, damages will be disallowed.") *See also*, *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award of 27 June 1990, ¶ 104; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award of 21 November 2007, ¶ 285; *Micula v. Romania*, Award of 11 December 2013, ¶¶ 1006-1008.

[448] Reply, ¶ 392, footnote omitted.

ii. Effects of Decree 27,590

387. The Respondent's expert maintains that the Claimants' *ex post* valuation should be denied all validity because it ignores the economic effects of Decree 27,590.[449] Decree 27,590, which was issued on the day of the expropriation, prohibited the export of non-industrialized non-metallic minerals after a transitory period of 90 days (*i.e.*, as of 24 September 2004). Econ One argues that, as the Claimants did not have plants or equipment in Bolivia allowing for the chemical industrialization of ulexite, they would have had to stop exporting ulexite from Bolivia after that date. Indeed, the Claimants have acknowledged that they stopped exporting ulexite on 24 September 2004.[450] For the Respondent, this renders the *ex post* valuation invalid.

388. The Claimants deny that Decree 27,590 had any effect on their *ex post* valuation. Although Decree 27,590, did prohibit the export of non-industrialized non-metallic minerals, it was abrogated by Decree 27,799 issued on 20 October 2004.[451]

389. Article 6(ii) of Decree 27,799 of 20 October 2004 clearly states that "Supreme Decree No. 27,590 of 23 June 2004 is abrogated."[452] The Decree does not specify a date, so the Tribunal understands that the abrogation was immediate. This means that the prohibition to export non-industrialized ulexite was in place from 21 September to 20 October 2004, *i.e.*, about one month. In the Tribunal's view, this has no effect on the Claimants' valuation method: the ulexite extracted during the period in which the prohibition was in place could be exported when that prohibition was lifted.

390. The Respondent argued during the hearing that Decree 27,799 was in turn revoked in 2008, but did not submit evidence to support this assertion.[453] In addition, the Claimants have shown that there were significant exports of ulexite from Bolivia to Brazil between 2003 and 2012,[454] which shows that there was no effective export ban in place during those years.

391. In view of the foregoing, the Tribunal finds that the enactment of Decree 27,590 does not invalidate the Claimants' damages claim.

---

[449] Exh. NCI-58.

[450] Reply, ¶ 94.

[451] Tr., Day 1, 6-8; COSS, slide 27; Exh. CD-195.

[452] Exh. CD-195.

[453] Tr., Day 1, 12-15.

[454] Exh. CD-196.

iii. Cash flows: reserves and resources

392. The duration of the concessions was not limited. Their useful life must therefore be determined by the quantity of exploitable minerals. Consequently, the Tribunal must assess such quantity. For that, it must determine which categories of mineral reserves and resources have an economic value and determine such value.

(a) Mining and financial standards

393. The Tribunal understands from the materials on record that the mining industry has developed uniform definitions of mineral reserves and resources.[455] The Tribunal has in particular considered the "Definition Standards for Mineral Resources and Mineral Reserves" prepared by the Canadian Institute of Mining, Metallurgy and Petroleum (CIM). These standards divide *mineral resources* into "inferred," "indicated," and "measured" in an increasing order of confidence in their estimation:

> Mineral Resources are sub-divided, in order of increasing geological confidence, into Inferred, Indicated and Measured categories. An Inferred Mineral Resource has a lower level of confidence than that applied to an Indicated Mineral Resource. An Indicated Mineral Resource has a higher level of confidence than an Inferred Mineral Resource but has a lower level of confidence than a Measured Mineral Resource.
>
> A Mineral Resource is a concentration or occurrence of diamonds, natural solid inorganic material, or natural solid fossilized organic material including base and precious metals, coal, and industrial minerals in or on the Earth's crust in such form and quantity and of such a grade or quality that it has reasonable prospects for economic extraction. The location, quantity, grade, geological characteristics and continuity of a Mineral Resource are known, estimated or interpreted from specific geological evidence and knowledge.
>
> […]
>
> An 'Inferred Mineral Resource' is that part of a Mineral Resource for which quantity and grade or quality can be estimated on the basis of geological evidence and limited sampling and reasonably assumed, but not verified, geological and grade continuity. The estimate is based on limited information and sampling gathered through appropriate techniques from locations such as outcrops, trenches, pits, workings and drill holes.
>
> […]
>
> An 'Indicated Mineral Resource' is that part of a Mineral Resource for which quantity, grade or quality, densities, shape and physical characteristics, can be estimated with a level of confidence sufficient to allow the appropriate application of technical and economic parameters, to support mine planning and evaluation of the economic viability of the deposit. The estimate is based on detailed and reliable exploration and testing information gathered through appropriate techniques from locations

[455] *See* Exhs. BD-8, BD-35, BD-36, BD-39 and R-375 to 385.

> such as outcrops, trenches, pits, workings and drill holes that are spaced closely enough for geological and grade continuity to be reasonably assumed.
>
> […]
>
> A 'Measured Mineral Resource' is that part of a Mineral Resource for which quantity, grade or quality, densities, shape, and physical characteristics are so well established that they can be estimated with confidence sufficient to allow the appropriate application of technical and economic parameters, to support production planning and evaluation of the economic viability of the deposit. The estimate is based on detailed and reliable exploration, sampling and testing information gathered through appropriate techniques from locations such as outcrops, trenches, pits, workings and drill holes that are spaced closely enough to confirm both geological and grade continuity.[456]

394. *Mineral reserves* as distinguished from resources are divided by the CIM between "probable" and "proven":

> Mineral Reserves are sub-divided in order of increasing confidence into Probable Mineral Reserves and Proven Mineral Reserves. A Probable Mineral Reserve has a lower level of confidence than a Proven Mineral Reserve.
>
> A Mineral Reserve is the economically mineable part of a Measured or Indicated Mineral Resource demonstrated by at least a Preliminary Feasibility Study. This Study must include adequate information on mining, processing, metallurgical, economic and other relevant factors that demonstrate, at the time of reporting, that economic extraction can be justified. A Mineral Reserve includes diluting materials and allowances for losses that may occur when the material is mined.
>
> […]
>
> The term 'Mineral Reserve' need not necessarily signify that extraction facilities are in place or operative or that all governmental approvals have been received. It does signify that there are reasonable expectations of such approvals.
>
> […]
>
> A 'Probable Mineral Reserve' is the economically mineable part of an Indicated and, in some circumstances, a Measured Mineral Resource demonstrated by at least a Preliminary Feasibility Study. This Study must include adequate information on mining, processing, metallurgical, economic, and other relevant factors that demonstrate, at the time of reporting, that economic extraction can be justified.
>
> […]
>
> A 'Proven Mineral Reserve' is the economically mineable part of a Measured Mineral Resource demonstrated by at least a Preliminary Feasibility Study. This Study must include adequate information on mining, processing, metallurgical, economic, and other relevant factors that

[456] Exh. BD-35, emphasis removed.

> demonstrate, at the time of reporting, that economic extraction is justified.[457]

395. Regarding reserves, the Claimants' industry expert, Behre Dolbear, relies on the standards set out by the United States Securities and Exchange Commission (SEC) Industry Guide 7 as follows:

> Reserve. That part of a mineral deposit which could be economically and legally extracted or produced at the time of the reserve determination.
>
> […]
>
> *Proven (Measured) Reserves*. Reserves for which (a) quantity is computed from dimensions revealed in outcrops, trenches, workings or drill holes; grade and/or quality are computed from the results of detailed sampling and (b) the sites for inspection, sampling and measurement are spaced so closely and the geologic character is so well defined that size, shape, depth and mineral content of reserves are well-established.
>
> *Probable (Indicated) Reserves*. Reserves for which quantity and grade and/or quality are computed from information similar to that used for proven (measure) reserves, but the sites for inspection, sampling, and measurement are farther apart or are otherwise less adequately spaced. The degree of assurance, although lower than that for proven (measured) reserves, is high enough to assume continuity between points of observation.[458]

396. The Parties' experts dispute whether all of the above categories can be assigned economic value. The Tribunal discusses below which of these categories can be considered to assess the value of the concessions.

(b) The Aquater-Enichem report

397. Both Parties' experts have relied on the findings of the Aquater-Enichem report for the quantification of ulexite reserves in the Claimants' concessions. As explained in Section II above, in 1993 Italian companies Aquater S.p.a. and EniChem S.p.a., commissioned by the Bolivian government and sponsored by Italy, performed a grid-based study of the mineral reserves of a part of the fiscal reserve of the Salar de Uyuni.[459] Three of the Claimants' concessions (Basilea, Borateras de Cuevitas and Doña Juanita) are partly located inside this grid.

---

[457] Exh. BD-35, emphasis removed.

[458] Exh. BD-8, emphasis in original.

[459] Exh. BD-4. This study was performed in two phases. In Phase 1, holes were drilled on a grid with 200 meters spacing within an area of 21.56 km2. In Phase 2, drilling was carried out on a closer-spaced grid (100 meters) in an area of 7.2 km2. The Tribunal understands that when the Parties refer to the "Aquater-Enichem grid," they refer to the grid used in Phase 1.

398. The Aquater-Enichem report came to the following results (Table 15 of the Aquater report, BD-4, p. 208):

VOLUMEN m cubicos	RESERVAS PROBADAS	RESERVAS PROBABLES	RESERVAS POSIBLES	TOTAL YACIMIENTO
TOUT-VENANT	2.708.590	2.655.107	10.855.936	16.219.633

TONELAJE t metricas	RESERVAS PROBADAS	RESERVAS PROBABLES	RESERVAS POSIBLES	TOTAL YACIMIENTO
TOUT-VENANT	3.867.866	3.791.493	15.502.277	23.161.636
AGUA DE IMBIBICION	1.646.584	1.725.324	6.994.020	10.365.928
TOUT-VENANT SECO	2.221.282	2.066.169	8.508.257	12.795.708
ULEXITA	1.723.271	1.453.301	6.303.768	9.480.340
B_2O_3	740.131	624.136	2.707.327	4.071.594

TAB. 15 - RESERVAS GEOLOGICAS

399. Aquater distinguished between the following types of mined material:

a. "*Tout-venant*" in cubic meters, which the Tribunal understands to correspond to "In Situ m3," defined by Behre Dolbear as "[c]ubic meter volume of material in place;"[460]

b. "*Tout-venant*" in metric tonnes, which the Tribunal understands to correspond to "In Situ tonnes," defined by Behre Dolbear as "[t]onne weight of in place material, of which approximately 45 percent is H20/moisture;"[461]

c. "*Agua de imbibición*," which the Tribunal understands to refer to the moisture present in the In Situ tonnes as defined by Behre Dolbear;

d. "*Tout-venant seco*," which the Tribunal understands to correspond to "Dry Tonnes," defined by Behre Dolbear as "[a]ir-dried material, out of which approximately 74 percent is ulexite and 26 percent is moisture and/or other impurities. It is almost equivalent to the sun-dried ulexite of approximately 30 percent B_2O_3 content;"[462]

[460] Behre Dolbear, First ER, ¶ 110, footnote omitted.

[461] Behre Dolbear, First ER, ¶ 110.

[462] Behre Dolbear, First ER, ¶ 110.

e. "*Ulexite*," defined by Behre Dolbear as "[p]ure ulexite, of 43.0 percent B_2O_3 content; 35.5 percent water; 13.8 percent lime and 7.7 percent soda;"[463] and

f. "*B_2O_3*," defined by Behre Dolbear as "[p]ure content of boron oxide in the reserves. Often used as a measure of purity when comparing various materials and products."[464]

400. Aquater's results are restated in English by Behre Dolbear at Table 4.1 of its First Report (Behre Dolbear, First ER, ¶ 33).

TABLE 4.1
GEOLOGICAL RESERVES (AQUATER-ENICHEM)[64]

		"Proven"	"Probable"	"Possible"
In-Situ m^3		2,708,590	2,655,107	10,855,936
In-Situ Tonnes		3,867,866	3,791,493	15,502,277
Dry Tonnes		2,221,282	2,066,169	8,508,257
Ulexite		1,723,271	1,453,301	6,303,768
B_2O_3		740,131	624,136	2,707,327

401. In other words, Aquater estimated that a total of 1,723,271 tonnes of ulexite (2,221,282 dry tonnes) could be classified as proven reserves, 1,453,301 tonnes of ulexite (2,066,169 dry tonnes) could be classified as probable reserves, and 6,303,768 tonnes of ulexite (8,508, 257 dry tons) could be classified as possible reserves.

(c) Behre Dolbear's estimate of reserves and resources

402. Only nine of NMM's concessions are relevant for the calculation of reserves and resources because the remaining two, Cancha I and Cancha II, were drying fields (*canchas de secado*). Within those nine, Behre Dolbear distinguishes two subsets:

a. Concessions located within the area studied in the Aquater-EniChem report[465] (Borateras de Cuevitas, Doña Juanita and Basilea), and

b. Concessions located outside that grid (Pococho, Tete, Inglaterra, Don David, Sur and La Negra).

403. Behre Dolbear estimates that the concessions inside the Aquater-Enichem grid (Borateras de Cuevitas, Doña Juanita and Basilea) "hosted 790,000 tonnes of Proven

[463] Behre Dolbear, First ER, ¶ 110.

[464] Behre Dolbear, First ER, ¶ 110, footnote omitted.

[465] Exh. BD-4.

Reserves of ulexite, 1,080,000 tonnes of Probable Reserves, and a factored 3,150,000 tonnes of Indicated Resources of ulexite[466] for a total of 5.02 [million tonnes]."[467] This is illustrated at table 4.10 (page 38) of their first report:

TABLE 4.10
RESOURCES AND RESERVES IN CONCESSIONS
DOÑA JUANITA, BORATERAS DE CUEVITAS, AND BASILEA

Category	Million Tonnes
Proven Reserves	0.79
Probable Reserves	1.08
Indicated Resources	3.15
Total Reserves/Resources	**5.02**

404. Behre Dolbear does not estimate any "possible reserves," because today no recognized code in the industry uses such a reserve classification.[468] Rather, in accordance with international standards, Behre Dolbear computes this tonnage as an indicated resource.[469]

405. Behre Dolbear also provides an estimate of inferred resources outside the Aquater-Enichem grid. Based on the sampling and drilling performed by Mr. Astudillo in 2000, interviews with Quiborax's personnel, and its own review of the thicknesses of borates in the drill holes around the boundary of the grid, Behre Dolbear believes that "a professional examination would delineate additional ulexite equal to that currently delineated on the three concessions within the 'grid,' *i.e.*, another 5.02 million tonnes."[470] Due to the uncertainty involved and in accordance with industry practice, Behre Dolbear "categorize[s] these resources as Inferred Resources (those with the highest degree of uncertainty) and would factor the estimated 5.02 [million tonnes] downward by 75% to 1.26 [million tonnes] of Inferred Resources."[471]

406. Behre Dolbear did not perform its own geological studies but relied on the existing reports (in particular, the Aquater-Enichem report) to arrive at this estimate. It

[466] For its estimation of indicated resources inside the Aquater grid, Behre Dolbear took Aquater's estimate of "possible reserves" (6.3 million tonnes of ulexite) and reduced it by 50% (*i.e.*, 31.15 million tonnes of ulexite).

[467] Behre Dolbear, Second ER, ¶ 65.

[468] Behre Dolbear, First ER, ¶¶ 9.

[469] Behre Dolbear, First ER, ¶¶ 131-133.

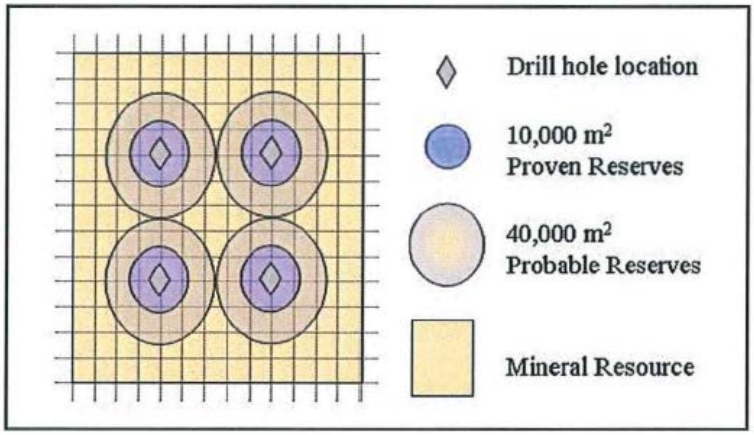
[470] Behre Dolbear, First ER, ¶ 135. *See also* Second ER, ¶ 69.

[471] Behre Dolbear, Second ER, ¶ 70.

explains that it "was not able to make a site visit under the circumstances of the dispute," but "[i]t considers that the data in the existing reports is sufficient for it to arrive at its estimates."[472]

407. After auditing Aquater-Enichem's methodology and arithmetic results,[473] Behre Dolbear extrapolated its findings from actual drill hole data from that report "using mining industry accepted techniques for bedded deposits of industrial minerals by extrapolating thicknesses from drill hole data and assigning, in this case for Phase 2 (Proven Reserves), 10,000m2 areas of influence around each hole in the 100m grid and 40,000m2 areas of influence around each hole in the case of the Phase 1 area (Probable Reserves)."[474] A simplified version of Behre Dolbear's methodology using Aquater's drill hole data is set out in figure 4.1 of its first report, as explained during the hearing:[475]

> The diamond in the middle of each circle represents the Aquater-EniChem drill hole. The blue radius of 10,000 square metres is basically a 100m radius around the hole, or 200m diameter […]. And that constitutes a proven reserve. The offshaded grey […] is then the probable reserve based upon a 400m diameter or 200m radius, from the centre of the drill hole, and that is considered a probable reserve. And then anything that is in between and elsewhere around based upon the categorisation of possible reserve we considered an indicated resource.[476]



[472] Behre Dolbear, First ER, ¶ 128.

[473] Tr., Day 2, 50:18-51:15; 53:23-55:12.

[474] Behre Dolbear, First ER, ¶ 129.

[475] Behre Dolbear, First ER, figure 4.1, p. 36.

[476] Tr. Day 2, 51:4-15.

408. The Respondent claims that "Behre Dolbear's reports rely on methods rejected by the mining industry."[477] It also argues that the value of the concessions should be calculated exclusively on the basis of the proved and probable reserves calculated by Aquater-Enichem, and should not include possible quantities of ulexite estimated on the basis of extrapolations and that remain unconfirmed.

(d) The Tribunal's assessment of reserves and resources

409. As noted above, Behre Dolbear's estimate covers reserves and resources in the following concessions:

a. **Reserves and resources** in the concessions located within the Aquater-Enichem grid (Borateras de Cuevitas, Doña Juanita and Basilea), and

b. **Resources** in the concessions located outside that grid (Pococho, Tete, Inglaterra, Don David, Sur and La Negra).

410. The Tribunal notes that Bolivia's criticisms focus on Behre Dolbear's calculation of resources (both inside and outside the Aquater-Enichem grid), not reserves. Indeed, Econ One has implicitly accepted Behre Dolbear's estimate of proven and probable reserves in the Doña Juanita, Borateras de Cuevitas and Basilea concessions and has relied on these figures to carry out its valuation: Mr. Flores of Econ One expressly stated that "[i]n my valuation, I have taken the reserves – proven and probable – estimated by Behre Dolbear, excluding the resources."[478]

411. The Tribunal will therefore use the **reserve** estimates prepared by Behre Dolbear regarding the Doña Juanita, Borateras de Cuevitas and Basilea concessions. Consequently, the value of the concessions will be assessed assuming proven reserves of 787,500 tonnes of ulexite (1,015,054 dry tonnes) and probable reserves of 1,081,900 tonnes of ulexite (1,394,571 dry tonnes), *i.e.*, total reserves of 1,869,400 tons (2,409,625 dry tonnes).[479]

412. With respect to **resources**, the Claimants distinguish between those inside the Aquater-Enichem grid and those outside:

[477] Rejoinder, ¶ 182, Tribunal's translation.

[478] Econ One, First ER, ¶ 57, Tribunal's translation. *See also* Econ One, Second ER, ¶ 63.

[479] Behre Dolbear, First ER, ¶ 129.

a. For the concessions located inside the grid (Doña Juanita, Borateras de Cuevitas and Basilea), Behre Dolbear has taken Aquater-Enichem's estimate of "possible reserves" and classified them as "indicated resources." In the expert's opinion, "the Aquater-EniChem category of Possible Reserves, while acceptable at the time their report was issued, would be considered an Indicated Resource under current reporting codes."[480] Behre Dolbear has thus taken Aquater-Enichem's "possible reserves" (6.3 million tonnes of ulexite) and reduced them by 50% (*i.e.*, 3.15 million tonnes of ulexite).[481] According to the expert, the 50% cut "is standard industry practice reflecting the probability that indicated resources upon further exploration and development will not convert in their entirety to a Reserve."[482]

b. With respect to the concessions located outside the Aquater-Enichem grid, Behre Dolbear estimates 1.26 million tonnes of inferred (rather than indicated) resources. As noted in paragraph 405, this figure is not based on Aquater's estimate of "possible reserves," but on the sampling and drilling performed by Mr. Astudillo in 2000, interviews with Quiborax's personnel, and the expert's own review of the thicknesses of borates in the drill holes around the boundary of the grid. On this basis, Behre Dolbear believes that the concessions outside the grid contain as much ulexite as those inside the grid, [483] but due to the uncertainty involved and in accordance with industry practice, it categorizes them as inferred resources and factors them downward by 75% (i.e., from 5.02 million tonnes to 1.26 million tonnes).[484]

413. As noted above, the Respondent opposes the inclusion of any resources in the calculation of the life of the concessions. Econ One states that "[t]he calculation of the FMV of the concessions can only include the exploitation of the estimated ulexite reserves. Including [resources] would be highly speculative."[485]

414. The record shows that it is standard mining practice to assign economic value to resources when valuing a mining operation. While it shares Bolivia's concern about including resources the presence of which may be speculative, the majority also finds

[480] Behre Dolbear, First ER, ¶ 118.

[481] Behre Dolbear, Second ER, ¶ 67.

[482] Behre Dolbear First ER, ¶ 132.

[483] Behre Dolbear, First ER, ¶ 135. *See also*, Second ER, ¶ 69.

[484] Behre Dolbear, Second ER, ¶ 70.

[485] Econ One, First ER, ¶ 55, Tribunal's translation.

that the record establishes the richness of boron in the area of the Claimants' concessions with sufficient certainty. Indeed, the Orstom-Risacher report carried out in 1989[486] described the Salar as containing "enormous reserves, practically inexhaustible, of lithium, potassium, magnesium and boron […] The area with the highest concentration of these elements is found in the superficial crust at the south of the salar, close to the Río Grande estuary,"[487] where the concessions are located. The high concentration of boron minerals in the areas where the concessions are located is further confirmed by the report drafted by Bolivia's *Servicio Nacional de Geología y Técnico de Minas* ("SERGEOTECMIN") in 2008.[488] In addition, the Aquater-Enichem study identified "possible reserves" of 6.3 million tonnes of ulexite in the entire deposit, which in today's terminology would be categorized as resources.[489] Although most of the quantification studies in the record were carried out inside the Aquater-Enichem grid and resources outside this grid were extrapolated, it would be unrealistic to think that the presence of resources stopped at the border of an artificially created area of exploration when other elements in the record confirm the presence of boron in the entire deposit.

415. Taking these various elements into consideration, the majority will assign a value to the resources identified by Aquater-Enichem as "possible reserves", factored down by 90%, without distinguishing whether they are inside or outside the Aquater-Enichem grid. Indeed, the majority is not persuaded by Behre Dolbear's distinction between resources inside and outside this grid, as it appears to contain an element of double-counting. Behre Dolbear's estimate of indicated resources *inside* the grid is based on Aquater-Enichem's estimate of "possible reserves" (6.3 million tonnes) factored down by 50%. Yet, that estimate applies to the area *outside* the grid or, at best, to the entire deposit (what Aquater refers to as "the remainder of the deposit").[490]

416. Accordingly, the majority will assign value to the resources identified by Aquater-Enichem, factored down by 90% (i.e., 630,777 tonnes of ulexite). It thus finds that the Claimants could have extracted 2.5 million tonnes of ulexite (the exact amount being 2,499,777 tonnes), including reserves and resources. That being said, on the date of

[486] Exh. BD-3.

[487] Exh. BD-3, p. 61, Tribunal's translation.

[488] Exh. BD-37.

[489] Exh. BD-4, p. 201. The exact amount of possible reserves identified by Aquater-Enichem is 6,303,768.

[490] In Spanish, el "resto del yacimiento" (BD-4, p. 201).

the expropriation the Claimants had already extracted part of these quantities. On the basis of the information in the record (in particular of the production profile set out in the 2001 Supply Contract between NMM and RIGSSA,[491] addressed in the next section[492]), the Tribunal estimates that between 2001 and July of 2004 the Claimants had extracted 179,845 tonnes of ulexite. Accordingly, for its cash flow projections the Tribunal will assign an economic value to 2,319,932 tonnes of ulexite.

iv. Cash flows: production profile and life of the concessions

(a) Production profile

417. For its *ex ante* valuation, the Claimants' economic expert, Navigant, has submitted a forecast of the concessions' production profile relying on the 1999 RIGSSA business plan and on the 2001 Quiborax-RIGSSA supply contract (the "2001 Supply Contract").[493] Navigant clarifies that its *ex ante* forecast is more in line with the sales estimated in the 2001 Supply Contract (which requires production of 25,000 MT of product in 2001 and ramps it up to 104,000 MT of product by 2006, remaining constant thereafter), although Navigant assumes that the ramp-up in sales occurs over a longer period of time (reaching 104,000 MT of product in 2009 instead of 2006).[494]

418. Navigant revises these contractual estimates "marginally upwards" to take into consideration the growth in the agricultural market for borates between 2001 and 2004 (which it forecasts at 5% between 2009-2014 and 1% from 2015 onwards), and because it believes that "Quiborax […] could have leveraged its mining and logistics expertise to ensure a more reliable and scalable supply of ulexite from the Bolivian Concessions."[495] Navigant's *ex ante* production profile forecasts product sales starting at 59,861 MT in 2004 and up to 171,022 MT in 2014.[496]

419. For its *ex post* valuation, Navigant assumes that "the Bolivian Concessions would have increased production to a higher level over a shorter time period than what was projected in the ex-ante valuation, based on the global economic boom (especially in

[491] Exhs. CD-16 and NCI-06.

[492] *See* in particular ¶ 429 below.

[493] Navigant, First ER, ¶¶ 114-117; Exhs. NCI-49, NCI-06, and CD-16.

[494] Navigant, First ER, ¶¶ 114-116.

[495] Navigant, First ER, ¶ 116.

[496] Navigant, Second ER, Exh. C.4.

emerging markets) between 2004 and 2008."[497] Specifically, Navigant states that, "based on market development it is reasonable to forecast production reaching 75 percent of the RIGSSA business plan objective of 200,000 tons over a 4-year period by 2008."[498] Thereafter, Navigant forecasts production on the basis of the expected growth rate of the agricultural market for borates which is zero for the years 2009-2010 and 4.6% from 2011 to 2019. [499] As a result of these assumptions, the updated *ex post* production profile submitted by Navigant in 2013 is thus slightly higher than its *ex ante* forecasts (starting at 65,386 MT in 2004 up to 224,145 MT in 2019). [500]

420. Bolivia and its economic expert, Econ One, object to the production profile used by Navigant. First, they object to the use of the 1999 RIGSSA business plan and point out that "NMM was not able to reach the production levels set out in the 2001 contract."[501] According to Econ One, "this indicated that the 2001 contract was too optimistic and has not taken into account adequately the factors on the demand and the supply side."[502] Econ One also criticizes the growth rates forecast by Navigant that exceed the Supply Contract requirements because they do not consider factors limiting supply and demand. With respect to limitations on supply, Econ One argues that Navigant did not consider whether there was sufficient work force to reach its estimates, or whether the manual processes used would have allowed that growth to materialize.[503] As to demand, Econ One criticizes Navigant's reliance on *The Economics of Boron* to forecast a 5% growth between 2010-2014, because (i) it was published in 2006 (two years after the valuation date that Econ One considers appropriate), (ii) the 2002 version did not forecast a 5% growth rate, and (iii) the 2006 version only forecasted growth up to 2010.[504]

---

[497] Navigant, Second ER, Exh. E.6.b, FN 1.

[498] Navigant, Second ER, Exh. E.6.b, FN 1.

[499] Navigant, Second ER, Exh. E.6.b, FN 1, relying on Roskill, The Economics of Boron, 11th ed. (2006) (Exh. NCI-63) and Oppenheimer & Co Inc., Initiating Coverage: Agricultural Fertilizers, February 2009 (Exh. NCI-77).

[500] Navigant, Second ER, Exh. E.5 and E.6.b. 2019 is the last year for which Navigant calculates an actual cash flow, as it then calculates the concessions' terminal value by calculating the value of a perpetuity beginning in 2019 minus the value of a perpetuity beginning in 2037, discounted back to 2019 (*See* Navigant, Second ER, Exh. E.2).

[501] Econ One, First ER, ¶ 87, Tribunal's translation.

[502] Econ One, First ER, ¶ 87, Tribunal's translation.

[503] Econ One, First ER, ¶¶ 74-79.

[504] Econ One, First ER, ¶¶ 80-86; Econ One's presentation at the hearing, slide18.

421. As a result, Econ One's production profile assumes that the concessions would have produced ulexite in accordance with the volumes foreseen in the 2001 Supply Contract with a one-year delay until the estimated depletion of the concessions, which Econ One calculates will take place in year 2029 at the proposed production rate, on the basis of the proven and probable reserves calculated by Behre Dolbear.[505] Econ One excludes the 50-56% ulexite mentioned in the 2001 Supply Contract, arguing that the production levels stated in the contract only reflect a maximum subject to the possibilities of production, and noting that neither Quiborax nor NMM sold this type of ulexite between 2001 and 2004.[506] According to Econ One's production profile, production would start at 64,000 MT in 2004, reach 68,000 MT in 2006 and remain constant until 2029.[507]

422. The Tribunal has determined by majority that *ex post* valuation is generally appropriate in this case, which entails assessing the value on the date of the Award, in principle using *ex post data*. However, where such data does not appear certain enough, it may be necessary to revert to *ex ante* input. What actually matters, as stated above, is that the valuation replicates the actual loss as closely as possible. Here, the Tribunal finds that Navigant's relying solely on market growth to forecast production is speculative. NMM was a going concern that operated for over two years prior to the expropriation, and in 2003 (its last full year of operation), it did not even reach the production levels forecast in the 2001 Supply Contract.[508] Likewise, the Tribunal is not persuaded that "the Bolivian Concessions would serve approximately one-third of the global agricultural market in 2009," as asserted by Navigant in its First Report.[509] Nor have the Claimants substantiated their projected growth sufficiently in terms of the limitations to supply and demand, in particular with respect to the workforce and manufacturing requirements needed to support that projected growth. In these circumstances, it would be speculative to conclude that the Claimant's production could sustain a 5% growth.

423. In addition, the Tribunal notes that Econ One criticizes Navigant for projecting sales between 2004-2012 that are much higher than the ulexite actually sold by Quiborax

[505] Econ One, First ER, ¶ 88.

[506] Econ One, First ER, ¶¶ 70-73.

[507] Econ One, First ER, Exh. EO-3, table 4.

[508] Navigant, First ER, ¶ 113; Econ One, First ER, ¶ 87.

[509] Navigant, First ER, ¶ 117. The Tribunal further notes that Mr. Fosk testified at the hearing that Quiborax did not aspire to capture 32% of the complete borates market; this aim was limited solely to the ulexite market. Tr., Day 1, 192:4-193:6.

during that period. For instance, Econ One notes that "Quiborax sold a total of 10,500 tons of ulexite plus between 2004 and 2012 [*i.e.*, an average of approximately 1,300 MT per year], while Navigant's *ex post* model projects sales of ulexite plus of at least 15,778 MT per year, reaching even 36,613 MT in 2012. Similarly, Quiborax only sold 3,200 to 5,800 of natural ulexite per year between 2009-2012, while Navigant's *ex post* model projects sales of natural ulexite for more than 105,285 MT per year during the same period."[510] Although Econ One's criticism is directed to Navigant's price projections,[511] the Tribunal finds it speculative to assume that NMM would have been able to sell ten times more ulexite plus and twenty times more natural ulexite than Quiborax during the same period. Although the absence of the concessions may account for Quiborax's lower figures, the Tribunal is not satisfied that the Claimants' projections are sufficiently supported.

424. The Tribunal will thus base its projections on the production profile that was contractually agreed by Quiborax and RIGSSA in the 2001 Supply Contract. It will use the 2001 Supply Contract rather than RIGSSA's 1999 business plan, considering that Bolivia opposes the use of the 1999 business plan and that Navigant has acknowledged that it was too optimistic.[512] The Tribunal also finds that it makes sense to use the most recent forecast.

425. The 2001 Supply Contract contemplated sales of three different ulexite products based on the B_2O_3 content of the ulexite:

> **CLAUSE SIX, PRODUCTS AND QUANTITIES**: During each contract year the seller undertakes to provide and sell to the buyer and the buyer agrees to buy the volumes listed below: **Ulexite thirty percent**. Two thousand one. Twenty-five thousand metric tons. Two thousand two onwards. Fifty thousand meters. **Ulexite forty percent**. Year two thousand one up to ten thousand meters. Year two thousand two twelve thousand meters. Year two thousand three fourteen thousand metric tons. Year two thousand four sixteen thousand meters. Year two thousand five eighteen thousand meters. Year two thousand six – two thousand fifteen eighteen thousand metric tons. **Ulexite fifty to fifty-six percent**. Year two thousand five – two thousand fifteen approximately up to thirty-six thousand metric tons / year. Compliance by both sides of the volumes of sale and purchase of forty percent ulexite and fifty to fifty-six percent ulexite is subject to the

[510] Econ One, Second ER, ¶ 219, Tribunal's translation, relying on Quiborax's Sales Database by Transaction 2001-2009 (Exh. NCI-40), and Quiborax's Granulex 24-9 B Borates Costs Report, 2009-2012 (Exh. NCI-171).

[511] Econ One argues that "[t]here is no certainty that Quiborax could have been able to sell twenty times more ulexite than the ulexite it actually sold at the same prices," and that "it is very possible that to sell that much larger quantity, Quiborax would have had to sell at lower prices," Econ One, Second Report, ¶ 219, Tribunal's translation.

[512] Navigant, First ER, ¶ 115. Indeed, Navigant's *ex ante* projection reaches only 75% of the 1999 RIGSSA business plan (Navigant, First ER, ¶ 115).

> production possibilities of the seller, the price agreement between the parties and the marketing conditions. The annual purchase and provision volumes set forth above may be subject to changes to be agreed in mandatory meetings between buyer and seller at the end of each contract year. To adopt the necessary decisions, market needs and requirements should be taken especially into consideration.[513]

426. These quantities are transcribed below:

Type of ulexite	Year	Metric tons
30% B_2O_3	2001	25,000
	2002 onwards	50,000
40% B_2O_3	2001	10,000
	2002	12,000
	2003	14,000
	2004	16,000
	2005-2015	18,000
50-56% B_2O_3	2005-2015	36,000

427. As noted above, Econ One argues that the production levels for 50-56% B_2O_3 ulexite only reflect a maximum subject to the possibilities of production, and notes that neither Quiborax nor NMM sold this type of ulexite between 2001 and 2004.[514] The production profile proposed by Econ One thus excludes the 36,000 MT per year attributable to this type of ulexite, reaching a maximum of 68,000 MT starting in 2006. Navigant acknowledges that the Claimants did not sell 50-56% B_2O_3 ulexite between 2001-2004,[515] but does not reduce the production profile for this reason. Rather, Navigant's *ex ante* production profile anticipates a different mix of ulexite products for a minimum of 106,000 MT of production starting in 2006.[516]

[513] Exhs. NCI-06, CD-16, pp. 5-6, Tribunal's translation. The Tribunal understands that when this clause refers to "meters" it refers to "metric tons."

[514] Econ One, First ER, ¶¶ 70-73.

[515] Navigant, First ER, footnote 167.

[516] Navigant, First ER, ¶¶ 114-116, footnote 167; Navigant, Second ER, Exh. C.4.

428. Again, the Tribunal finds it uncertain that a potential buyer would have produced and sold a type of ulexite that NMM did not previously sell. In addition, it notes that the Supply Contract provides that "[c]ompliance by both sides of the volumes of sale and purchase of forty percent ulexite and fifty to fifty-six percent ulexite is subject to the production possibilities of the seller, the price agreement between the parties and the marketing conditions,"[517] and does not contemplate production of 50-56% B_2O_3 ulexite before 2005. Given NMM's historical levels of production (discussed in the following paragraph), it would also be speculative to assume that the concessions would have produced an additional 36,000 MT of other types of ulexite. The Tribunal will therefore base its production profile on the volumes projected in the 2001 Supply Contract for 30% and 40% B_2O_3 ulexite, and will disregard the production volumes projected for 50-56% B_2O_3 ulexite.

429. Using the Supply Contract's projected volumes for 30% and 40% B_2O_3 ulexite as set out in paragraph 426 above, the concessions would have produced 64,000 MT of product in 2003, 66,000 MT in 2004, and 68,000 from 2005 onwards. However, it is undisputed that the Claimants did not reach the production level expected for year 2003 for 30% and 40% B_2O_3 ulexite (50,845 MT instead of 64,000 MT).[518] The Tribunal thus agrees with Bolivia that NMM's production from 2004 should be projected on the basis of the 2001 Supply Contract figures with a one-year delay. Consequently, the total ulexite production of 30% and 40% B_2O_3 ulexite from 2004 until 2015, with the one-year delay as suggested by Bolivia, would be as follows:

Year	**Metric tons**
2004	64,000
2005	66,000
2006-2015	68,000

430. The experts disagree on the growth rate from year 2015 until the depletion of the concessions. While Navigant takes "an assumed annual growth rate in production of 1 percent per year after 2014,"[519] Econ One submits that "the reasonable thing to assume […] is that at some future time production would stop growing and exploitation costs would rise."[520] Hence, Econ One's production profile assumes

[517] Clause 6 of the 2001 Supply Contract, Exhs. NCI-06 and CD-16, Tribunal's translation.

[518] Navigant, First ER, ¶ 113; Econ One, First ER, ¶ 87.

[519] Navigant, First ER, ¶ 121.

[520] Econ One, First ER, ¶ 79.

production levels of "68,000 MT in 2006, remaining stable at that level of 68,000 MT per year from 2007 until the depletion of the concessions' reserves, which would have happened in year 2029."[521]

431. In the absence of compelling evidence to the contrary, the Tribunal will assume that the production would have remained stable until the depletion of the concessions.

432. Finally, the Respondent has suggested that any valuation of the concessions must account for certain exploitation rights allegedly exercised by the SOCOMIRG mining community within the Claimants' concessions.[522] The Respondent alleges that there was an ongoing dispute between NMM and SOCOMIRG with respect to an exploitation contract between them and that Decree 27,548 of 3 June 2004[523] recognized some mining rights to SOCOMIRG. According to the Respondent, a willing buyer would have considered this information when assessing the value of the investments.

433. The Claimant has acknowledged that there was a dispute between NMM and SOCOMIRG regarding the latter's exploitation of certain areas of the Borateras de Cuevitas concession. According to the Claimants, SOCOMIRG had previously exploited two concessions in the Borateras de Cuevitas area, but those rights had expired in 2002.[524] The Claimants explain that NMM allowed SOCOMIRG to continue the exploitation of their former concessions to avoid conflicts with local miners, but always insisted that NMM was the rightful owner.[525] The Claimants also dispute the validity of Decree 27,548, arguing that SOCOMIRG's extinct rights over previous concessions could not be revived by means of a governmental decree.[526]

434. The Tribunal understands the Respondent to argue that the Claimants' production should be reduced because Decree 27,548 recognized exploitation rights to SOCOMIRG. Yet, the Respondent has not explained the impact of Decree 27,548: this decree merely states that its object is to establish the relationship between the

[521] Econ One, First ER, ¶ 88, Tribunal's translation, footnotes omitted.

[522] Rejoinder, ¶¶ 188-189.

[523] Exh. CD-41.

[524] Reply, ¶¶ 150-151, Exh. CD-194, 06, 167.

[525] Reply, ¶ 151, Exh. CD-171.

[526] Reply, ¶ 152, Exh. CD-171.

Bolivian State and SOCOMIRG,[527] recognizes the validity of the contracts entered into by the Bolivian State and SOCOMIRG,[528] requests two state agencies to advise and supervise SOCOMIRG's operations,[529] and establishes certain guidelines for the exploitation of ulexite by SOCOMIRG.[530] Even if this decree did have the effect of reviving SOCOMIRG's previous contracts (which is not established), those contracts are not on record and the Tribunal must conclude that SOCOMIRG's rights and possible impact on the Claimants' mining rights remain unproven.

435. As to SOCOMIRG's mining activities on the Claimants' concessions prior to the issuance of Decree 27,548, Mr. Ricardo Ramos explained at the hearing that whatever ulexite was extracted by SOCOMIRG was purchased by NMM.[531] In light of this explanation, which the Respondent did not rebut, the Tribunal sees no reason why the ulexite extracted by SOCOMIRG should not be included in the Claimants' production figures.

(b) Life of the concessions

436. During its presentation at the hearing on the merits, Behre Dolbear argued that the life of the concessions would reach 45 years, on the basis of their calculation of reserves and resources.[532] Navigant, who calculates cash flows on the basis of Behre Dolbear's calculation of reserves and resources, projects those cash flows until 2043 in its *ex ante* calculation,[533] and until 2037 in its *ex post* calculation.[534]

437. Bolivia's economic expert, on the other hand, argues that the depletion of the concessions' reserves would have taken place in 2029, considering Behre Dolbear's

---

[527] Exh. CD-41, Article 1 ("El presente Decreto Supremo tiene por objeto establecer la relación del Estado Boliviano y la empresa SOCOMIRG.")

[528] Exh. CD-41, Article 2 ("Se reconoce la validez de los contratos suscritos entre el Estado Boliviano y la empresa SOCOMIRG y, se instruye al Complejo Industrial de Recursos Evaporíticos del Salar de Uyuni – CIRESU la suscripción de un contrato adicional.")

[529] Exh. CD-41, Article 3 ("Se instruye al CIRESU y a la Corporación Minera de Bolivia – COMIBOL efectuar el asesoramiento, supervisión y control de las operaciones minero-industriales de la empresa SOCOMIRG.")

[530] Exh. CD- 41, Article 4 ("La ulexita comercializada por la empresa SOCOMIRG no podrá ser inferior al 32% (treinta y dos por ciento) de la ley de Óxido de Boro sobre base húmeda") and Articl 5 ("La explotación de la ulexita se efectuará bajo un Plan de Explotación racional y sistemática [sic] del yacimiento, en el marco de las leyes mineras y ambientales vigentes.")

[531] Tr., Day 2, 24:8-17.

[532] Behre Dolbear Presentation, slide 6.

[533] Navigant, Second ER, Exh. C.1, Note 5.

[534] Navigant, Second ER, Exh. E.2, Note 5.

estimates of proven and probable reserves and excluding resources.[535] Although Econ One does not expressly explain how it arrives at this figure, the Tribunal understands that it has calculated how many years it would have taken for the reserves to be depleted at the production rate Econ One proposes.[536]

438. The Tribunal has conducted its own calculation of the life of the concessions. At the rate of production determined in the preceding section, the reserves and resources found in the concessions on the date of the expropriation (which have been quantified above at 2,319,932 tonnes) would have been depleted by 2039.

439. In view of the Tribunal's findings in the preceding sub-sections, the Tribunal will calculate the concessions' cash flows taking into account ulexite reserves and resources quantified at 2,319,932 tonnes at a production rate of 64,000 MT in 2004, 66,000 MT in 2005, and 68,000 from 2006 onwards, until the depletion of the concessions in 2039.

v. Cash flows: ulexite products, prices and costs

440. The experts agree on the products that would have been sold by NMM, but disagree on the price and cost estimates to be applied to the cash flow projections. The Tribunal will refer first to the products to be sold (a), then to price estimates (b), and finally to cost estimates (c).

(a) Products to be sold

441. The Claimants' expert explains that "[t]he ulexite reserves within the Bolivian Concessions would enable the owner to manufacture three basic borate products […]: 1) sun-dried ulexite (commercial name: "Natural Ulexite"); 2) calcinated ulexite (commercial name "Ulexite Plus"); and 3) granulated ulexite (commercial name: "Granulex Plus"). The prices (and profits) of these products are influenced by the boron content and the processing required to produce the product. The prices and profits are highest for Granulex Plus, followed by Ulexite Plus and then Natural Ulexite."[537]

442. Navigant projects the annual production of these three products on the basis of Quiborax's sales mix between 2002 and 2004. Navigant notes that in 2003

[535] Econ One, First ER, ¶ 88.

[536] Econ One explained his methodology with examples during the hearing. *See* Tr., Day 2, 215-217.

[537] Navigant, First ER, ¶ 118 (footnotes omitted).

"approximately 60 percent of the sun-dried ulexite used to supply these products to the agricultural market was sold as Natural Ulexite, while approximately 30 percent and 10 percent of the sun-dried ulexite was processed and sold as Ulexite Plus and Granulex Plus, respectively."[538] Navigant assumes that this product mix would remain constant after the installment of on-site processing equipment in 2006.[539] Before 2006, production is limited to Ulexite Plus and Natural Ulexite because the granulation plant required to produce Granulex Plus would not be in place.[540]

443. Econ One applies the same assumptions with respect to the production of Natural Ulexite, Ulexite Plus and Granulex Plus,[541] so the Tribunal will use these assumptions (including the product mix) for its calculations.

(b) Price estimates

444. Navigant's *ex post* calculation considers actual prices for past cash flows and a projection of future prices on that basis.[542] According to Navigant, the actual price of ulexite in the period after 2009 increased significantly more than it had estimated in its first report, which had the effect of increasing the cash flows in its second report.[543] Navigant illustrates the rise in prices for Ulexite Plus in the following table:

	Actual Price	*Ex ante* First Report
2008	436.33	436.33
2009	480.93	344.14
2010	497.19	251.95
2011	525.63	259.62
2012	463.62	267.53

445. However, Navigant explains that "[g]iven the sharp increase in ulexite prices that has occurred, we do not believe it is reasonable to expect that these prices will continue to rise with inflation. Instead we believe that the four year average price levels are likely to be viewed as long-term prices. As such, we do not adjust these prices for

[538] Navigant, First ER, ¶ 119; Exh. C.

[539] Navigant, First ER, ¶ 119.

[540] Navigant, First ER, footnote 172.

[541] Econ One, First ER, ¶ 91; Second ER, ¶ 43.

[542] Navigant, Second ER, Exhs. E.4 and E.6.

[543] Navigant, Second ER, footnote 144, Exhs. E.4 and E.6.e.

inflation in our updated *ex post* model."[544] Indeed, the Tribunal notes that, from 2013 onwards, Navigant has projected prices on the basis of the average price between 2009-2012, without adjusting for inflation.[545]

446. Econ One objects to Navigant's *ex post* price estimates. Econ One notes that Navigant's prices are based on sales by Quiborax between 2005 and 2012 of ulexite mined from other deposits, not on the prices at which the ulexite from the concessions could have been sold. According to Econ One, using prices from other deposits is highly speculative: ulexite is not a commodity with standardized characteristics and prices and, as Behre Dolbear recognizes, the prices of ulexite products will vary depending on the chemical quality, type and level of impurities.[546] In addition, Econ One argues that the prices estimated by Navigant are not sustainable at the production rates proposed by Navigant. Econ One notes that the sales projected by Navigant for 2004-2012 are much higher than the ulexite actually sold by Quiborax during that period.[547] It therefore argues that "[t]here is no certainty that Quiborax could have been able to sell twenty times more ulexite than the ulexite it actually sold at the same prices," and that "it is very possible that to sell that much larger quantity, Quiborax would have had to sell at lower prices."[548]

447. Econ One thus projects prices on the basis of the 2004 actual price, adjusted for inflation. Econ One rejects the inflation rate used by Navigant in its *ex ante* valuation, where Navigant assumed that ulexite prices would grow at 3.1 percent annually, equal to the 20-year average U.S. inflation rate through 2003.[549] Econ One "agree[s] to index prices according to the U.S. inflation rate, but this indexation must be done on the basis of expected future inflation, not past inflation."[550] It relies on inflation projections from the Executive Office of the President of the United States, the Federal Reserve Bank of Philadelphia and the U.S. Energy Information

[544] Navigant, Second ER, footnote 144.

[545] Navigant, Second ER, Exh. E.6, Note 4 ("We believe that 2012 prices are unsustainable in the long run, therefore for 2013 our forecast is based on the average price for the period 2004-2011. After 2013 we hold prices constant and assume that this new price threshold will hold for the foreseeable future.")

[546] Econ One, Second ER, ¶ 218, citing Behre Dolbear, First ER, ¶ 16.

[547] Econ One, Second ER, ¶ 219, relying on Quiborax's Sales Database by Transaction 2001-2009 (Exh. NCI-40), and Quiborax's Granulex 24-9 B Borates Costs Report, 2009-2012 (Exh. NCI-171).

[548] Econ One, Second ER, ¶ 219, Tribunal's translation.

[549] Navigant, First ER, ¶ 123.

[550] Econ One, First ER, ¶ 94, Tribunal's translation.

Administration, among others,[551] and calculates that prices would increase from 2005 onwards at a rate of 2.5 percent per year.[552]

448. In line with the *ex post* valuation deemed appropriate here, the Tribunal considers that it must use actual prices to calculate the Claimants' loss (whether to calculate past cash flows or project future cash flows).

449. Because there is no price information for the ulexite mined from the concessions during the relevant time period, the Claimants have calculated their cash flows on the basis of the prices of Quiborax's ulexite from other deposits. Despite Econ One's objections, the Tribunal finds that this is reasonable. Indeed, it is not seriously disputed that the ulexite mined in the concessions was of very high quality and in any event of a higher quality that the ulexite mined by Quiborax in Chile.[553] Both NMM and Quiborax produced Natural Ulexite, Ulexite Plus and Granulex Plus under the same commercial names, so it is reasonable to assume that these are substantially the same products. Finally, the Tribunal is using Econ One's production profile to estimate cash flows, so Econ One's argument that Quiborax would not have been able to sustain those prices for larger amounts of ulexite is inapposite.

450. That said, the Tribunal notes that, in order to project prices from 2013 onwards, Navigant has used an average of the previous four years (2009-2012). While the Tribunal agrees that using an average is appropriate, it finds the choice of four years arbitrary. That choice coincides with the period of highest prices. The Tribunal finds it speculative to assume that prices will remain at such level throughout the life of the concessions. It will thus use an average of the entire post-expropriation period (2004-2012). The Tribunal will revert below on the effect of inflation.

[551] *See* Econ One, First ER, footnote 162.

[552] Econ One, First ER, ¶ 94.

[553] *See, e.g.,* Tr., Day 1, 210:10-211:18 (testimony of Mr. Allan Fosk); WS of Mr. Ricardo Ramos, ¶ 11, and his testimony at the hearing, Tr., Day 2, 3:20-6:1; 20:21-21:8. *See also* Aquater-Enichem report, Section 1.6.2, Exh. BD-4, p. 28.

(c) Costs

451. There is no disagreement on "selling, general and administrative costs" (SG&A costs). Navigant projected SG&A costs on a fixed basis "at 19.5 percent of revenues with marginal reductions of this percentage over time to reflect efficiencies of scale"[554] and Econ One agrees.[555]

452. The experts disagree, however, on the estimate of “mining and processing costs” and “transportation costs.” For its *ex ante* projections, Navigant estimates future costs concerning mining and processing on the basis of 2004 costs, and inflates them using the producer price index (PPI) for Bolivia. For its *ex post* calculations, Navigant included actual costs for water and fuel.[556] Navigant notes that the Bolivian PPI increased at a rate that was higher than its forecast, resulting in higher costs in the *ex post* valuation.[557]

453. With respect to transportation costs, in its *ex ante* valuation Navigant also started from 2004 figures using “actual freight costs incurred between the two locations (based on review of product invoices) in conjunction with the change in transportation/freight price indexes in Chile and Bolivia to project future freight costs in USD per MT."[558] For its *ex post* valuation, it used actual transportation indices to incorporate more accurate figures.[559]

454. Econ One, for its part, has taken 2004 costs and indexed them from 2005 onwards "with the long-term inflation rate expected in the United States at the valuation date, 2.5%."[560] Econ One also objects to Navigant’s costs in its adjusted e*x post* valuation, arguing that it relies on Quiborax’s operation costs in Chile and on transportation price indices between Chile and Bolivia, instead of observable prices.[561]

455. The majority must be consistent with the pricing rationale chosen. It considers that Navigant's use of actual costs, updated transportation price indices and an updated PPI are better suited to an *ex post* valuation than prices indexed for inflation. In the

[554] Navigant, First ER, ¶ 128.

[555] Econ One, First ER, ¶ 100.

[556] Navigant, First ER, ¶ 172.

[557] Navigant, First ER, ¶ 171.

[558] Navigant, First ER, ¶ 128. The detailed calculation can be found in Exh. C of the report.

[559] Navigant, First ER, ¶¶ 173, 197.

[560] Econ One First ER, ¶ 98, Tribunal's translation, footnote omitted.

[561] Econ One, Second ER, ¶ 222.

absence of a closer proxy, the Tribunal finds that the use of Quiborax's costs appears appropriate. In any event, Navigant's cost projections in its *ex post* valuation are higher than Econ One's projected *ex ante* costs, thus reducing profits.[562] It will therefore use Navigant's figures in this respect.

vi. Cash flows: other variables

456. The experts agree on the methodology to calculate depreciation, *i.e.*, they assume a 20-year useful life for fixed assets, resulting in a depreciation of 5% of the cost of fixed assets.[563] The experts also agree on the methodology used to calculate working capital.[564] The Tribunal will thus use the same methodology.

457. The experts disagree however on the amount of capital expenditures. Based on discussions with Quiborax and Behre Dolbear, Navigant has assumed that the buyer of the concessions would have made two capital investments to support the growth and expansion of the concessions:[565]

a. USD 2 million for a granulation plant to process sun-dried ulexite into dry granules, to be made between 2005-2006. This investment would have enabled NMM to sell Granulex Plus;

b. USD 2.5 million for a storage and packaging facility, to be made in 2005.

458. Econ One agrees with the granulation plant investment, but reduces the expenditure for the storage and packaging facility to USD 1,322 million, because its lower production profile would require a smaller facility.[566] As it has adopted Econ One's production profile, the Tribunal will use Econ One's capital expenditure figures.

459. Navigant also assumes that a buyer would incur replacement and maintenance capital expenditures every six years throughout the forecast period equal to the accumulated depreciation over this six year period, inflated by Bolivian PPI.[567] Econ One agrees with this approach, but notes that Navigant fails to include this in the

[562] Navigant, Second ER, Exh. E.6; Econ One, First ER, Exh. EO-3, Table 2.

[563] Navigant, First ER, ¶ 128; Second ER, ¶ 104; Econ One, First ER, ¶ 102; Second ER, ¶ 43..

[564] Navigant, First ER, ¶¶ Exh. C.2-C.7; Second ER, ¶ 105; Econ One, First ER, ¶ 108; Second ER, ¶ 43.

[565] Navigant, First ER, ¶¶ 124-126.

[566] Econ One, First ER, ¶¶ 113-114.

[567] Navigant, First ER, ¶ 127.

terminal value of the concessions. In its Second Report, Navigant corrects this error. The Tribunal has included this expenditure in its calculations, based on Econ One's depreciation figures, as the Tribunal has used Econ One's capital expenditure estimates.

460. The experts also disagree on the use of the exchange rate. Econ One argues that Navigant has used Bolivianos and U.S. dollars inconsistently, applying different exchange rates with the sole purpose of artificially inflating the FMV. According to Econ One, although prices are in U.S. dollars, Navigant converts them to Bolivianos, and carries out its calculation in Bolivianos, only to convert the results back into U.S. dollars. According to Econ One, this results in an incorrect "round-trip" which overestimates its valuation. Econ One also criticizes Navigant for not using purchasing power parity ("PPP") in its first report.

461. Navigant, on the other hand, argues that the currencies used are in accordance with standard practice. It explains that the revenues related to the concessions are earned in U.S. dollars, but costs are predominantly incurred in Bolivian currency. Taking this into account, and since the valuation must be built into a single currency, Navigant has converted the forecast cash flows in Bolivianos (Bs), while the Respondent's expert chose to carry out the DCF analysis in U.S. dollars. Nevertheless, Navigant argues that "the choice of currency is largely irrelevant, particularly if purchasing power parity ("PPP") is employed as suggested by Dr. Flores [of Econ One]."[568] Indeed, in its second report, Navigant applies PPP.

462. The Tribunal has carried out its calculations in U.S. dollars, thus taking into consideration Econ One's criticisms of Navigant's methodology. That said, it has needed to convert costs in Bolivianos into dollars. For that, it has used the exchange rates used by Navigant in its *ex post* valuation, to which Econ One does not appear to object. Indeed, Econ One argues that "the only data that is observable and more precise in Navigant's *ex post* model than in its *ex ante* model are the data on inflation and exchange rate between 2004 and 2013, which are published historical parameters."[569] The Tribunal has thus used these actual exchange rates in its calculation of past cash flows. As future cash flows are then calculated in dollars, it has not needed to use any exchange rate forecasts for that part of its calculations.

[568] Navigant, Second ER, ¶ 55.

[569] Econ One, Second ER, ¶ 217.

463. Finally, the Tribunal has adjusted the cash flows for inflation at a rate of 2.5% per year, which inflation rate was proposed by Econ One. Indeed, in light of the long duration until the depletion of the reserves and resources, it appears economically correct to make an adjustment for inflation.

vii. Discount rate

464. The Tribunal must discount future profits back to the date of valuation, *i.e.* 30 June 2013. For this it must select a discount rate appropriate for 2013.

465. The experts agree that the appropriate measure for the discount rate is the WACC.[570] They disagree, however, on five components of the WACC calculation: the risk free rate of return, the equity risk premium, the country risk premium, the micro-cap size premium (all four factors to calculate the cost of equity) and the cost of debt.[571] They also disagree on the date on which WACC should be calculated: Navigant uses 2013, which is the date of its latest *ex post* valuation, while Econ One uses 2004, which is the date of its *ex ante* valuation.

466. As a result of these differences, Econ One calculates the WACC of the Claimants' investments in 2004 at 22.99%, while Navigant in its *ex ante* valuation calculates the WACC in 2004 at 13.27% in its first report[572] and at 11.81% in its second report. [573] In its *ex post* valuation, Navigant calculates the WACC in 2013 at 14.61% in its first report[574] and at 10.78% in its second report.[575]

467. Navigant does not explain the reasoning for the variables chosen in its second report; it simply states that to update its *ex post* valuation it has "incorporated new information during this period of time with respect to […] variables required to calculate the cost of capital."[576] Econ One does not expressly object to the variables used by Navigant to calculate the WACC in its *ex post* valuation: Econ One's analysis is focused on Navigant's *ex ante* calculation of the WACC, although it objects to Navigant's *ex post* valuation for other reasons. For the analysis below, unless there

[570] *See, e.g.* Econ One First ER, ¶ 118.

[571] Econ One, First ER, table 7, p. 46.

[572] Navigant, First ER, ¶ 155, Exh. D.1.

[573] Navigant, Second ER, Exh. D.1.

[574] Navigant, First ER, ¶ 214, Exh. F.1.

[575] Navigant, Second ER, Exh. F.1.

[576] Navigant, Second ER, ¶ 157.

is evidence to the contrary, the Tribunal will assume that Navigant's updated figures are supported by the same justification and sources used in its first report and simply reflect the updated figure. It will also assume that Econ One's objections to Navigant's *ex ante* figures apply *mutatis mutandis* to its *ex post* figures.

(a) Risk free rate of return

468. Both Parties agree on using the yield to maturity on U.S. Treasury bonds as a proxy for a risk free interest rate, but disagree on the type of maturity to use.

469. Navigant uses a risk free rate in its cost of equity calculation equal to the 10-year U.S. Treasury bond. It submits that "there are many valuation practitioners that advocate for the use of the 10-year U.S. Treasury bond rather than the 20-year U.S. Treasury bond given that the duration of cash flows for many projects are closer to 10 years."[577] Navigant therefore rejects Econ One's choice of the 20-year U.S. Treasury bond and in particular its decision to match the duration of the risk free rate with the horizon of the cash flows.[578]

470. Navigant quotes in support Aswarth Damodaran, who advocates the "use of the 10-year treasury bond rate as the riskfree rate on all cash flows for most mature firms." Regarding "young firms," he notes that "an argument can be made that we should be using a 30-year treasury bond rate as the riskfree rate." However, he then concludes that "[g]iven that the difference between the 10-year and 30-year bond rates is small […] using the 10-year bond rate as the riskfree rate on all cash flows is good practice in valuation."[579]

471. Accordingly, in its first report Navigant uses a rate of 3.52%, which it asserts was the yield of the 10-year U.S. Treasury bond as of 1 August 2009,[580] while in its second report it uses 2.52%, which it asserts was the yield of that bond as of 30 June 2013.[581]

472. Econ One claims that the appropriate risk free rate corresponds to the yield of the 20-year U.S. Treasury bond at Econ One's valuation date of June 2004 (5.43%). It

[577] Navigant, Second ER, ¶¶ 114-117.

[578] Navigant, Second ER, ¶ 115.

[579] Exh. NCI-196, pp. 7-8, footnote omitted.

[580] Navigant, First ER, ¶ 204; Exh. F.2.

[581] Navigant, Second ER, Exh. F.2.

justifies this choice by stressing that the concessions' cash flows cover a period of more than 25 years:

> The use of the yield of the 20-year bonds is more consistent with Ibbotson's recommendation that the "[t]he horizon of the chosen Treasury security should match the horizon of whatever is being valued" than the use of yields of 10-year bonds, given that in this case we are projecting the concessions' cash flows for over 25 years (from June 2004 to December 2029).[582]

473. Regarding Navigant's criticism that Econ One matches the duration of the risk free rate with the horizon of the cash flows, Bolivia's expert replies as follows:

> Navigant never calculated the duration of the cash flows of the concessions. Navigant only bases its use of the yield of the 10-year bonds in trends and general data reported by financial literature […].
>
> Nevertheless, simple financial calculations prove that the duration of the concessions' cash flows in my model is approximately 17 years. This duration is even larger than the duration of the 20-year bonds, which is 12.7 years, and much larger than the duration of the 10-year bonds, which is 8.2 years.[583]

474. The Tribunal concludes that the 10 - and 20 - year U.S. Treasury bonds could both be justifiable choices to establish the risk free rate. Given that Navigant's latest proposal has a yield-to-maturity as of June 2013, while Econ One's alternative takes into account the yield-to-maturity as of June 2004, the Tribunal finds that the Claimants' choice of the 10-year U.S. Treasury bond provides the more appropriate risk free rate of return for purposes of the present valuation.

(b) Equity risk premium

475. The economic experts also disagree on the appropriate equity risk premium to apply in the cost of equity calculation.

476. Relying on the 2006 estimates by Dimson, Staunton and Marsh of the long term U.S. equity risk premium ("ERP") relative to U.S. Treasury Bonds[584] and on Prof. Damodaran's data comparing returns of the S&P 500 to U.S. Treasury Bonds,[585] Navigant has assumed an equity risk premium in 2009 of 5% for both of its *ex post* valuations.[586]

---

[582] Econ One, First ER, ¶ 121, Tribunal's translation, footnotes omitted. *See also* Exh. EO-16, p. 53.

[583] Econ One; Second ER, ¶¶ 142-143, Tribunal's translation, footnotes omitted. *See also* Exh. EO-24, tables 4A to 4C.

[584] Exh. NCI-70

[585] Exh. NCI-08

[586] Navigant, Second ER, exhibit F.2, note 2.

477. According to Navigant, "other reputable sources of data for the ERP" reveal that Econ One's equity risk premium "is at the very high end of the range of ERPs that many reliable sources consider to be appropriate."[587] Specifically, Navigant states:

> We note Professor Damodaran publishes ERP calculations of 5.79 percent using an arithmetic average and 4.10 percent using geometric average for the period 1928-2011. He also calculates a 3.36 and 2.35 arithmetic and geometric ERP for the shorter time period of 1962-2011. Professor Damodaran also presents a forward looking ERP of 6.04 percent as of 1 January 2012. Ibbotson/Morningstar publishes an ERP of 7.6 percent for 1928-2014 and 4.9 percent for 1962-2004. Dimson, Staunton & Marsh consider the ERP for 1900-2010 to be 4.4 percent. Finally, a survey of academics and practitioners presented by Shannon Pratt and Roger Grabowski in their book Cost of Capital Applications and Examples list a number of ERP calculations which average 4.9 percent.[588]

478. Econ One, on the other hand, takes the equity risk premium calculated by Ibbotson in March 2004 (7.2%) based on the yield of the 20-year U.S. Treasury bond. This is consistent with its calculation of the risk free rate.[589] In addition, Bolivia's expert claims that the sources cited by Navigant are not comparable because they were published after the valuation date (2004) and mix data of different periods.[590] Econ One also asserts that Ibbotson is not at the high end of the range of reasonable equity risk premiums, and the arithmetic average equity risk premium used by Econ One is the most appropriate when discounting future cash flows.[591]

479. The Tribunal notes Econ One's assertion that the definition of the equity risk premium must be consistent with the choice of the risk free interest rate.[592] This statement has not been contested by Navigant. Accordingly, for the sake of consistency with the risk free rate defined above, the Tribunal will take into account the Claimants' suggested equity risk premium of 5%. In addition, the Tribunal notes that Navigant's figures are more current than Econ One's, and thus more appropriate for an *ex post* valuation.

(c) Country risk premium

480. When measuring the country risk, the Claimants' expert highlighted that none of the products generated by the concessions were sold to the Bolivian market. As a

[587] Navigant, Second ER, ¶ 120.

[588] Navigant, Second ER, ¶ 119, footnotes omitted. *See also* Exhs. NCI-127, 128, 198 and 130.

[589] Econ One, First ER, ¶¶ 121, 125.

[590] Econ One, Second ER, ¶¶ 148-149 and Exh. EO-18.

[591] Econ One, Second ER, ¶¶ 150-151.

[592] Econ One, First ER, ¶ 121; Exh. EO-39, pp. 10-11: "[Y]ou must be consistent in how you define the risk free interest rate and how you define the estimated risk premium [.]"

consequence, "the Bolivian macro-economic and political risk factors have very limited (if any) impact on the sales and revenues generated from the Bolivian Concessions."[593] Country risk should therefore consider the key markets in which ulexite is sold: Brazil, U.S., China and India. Navigant formulated a composite risk premium that considers the individual country risk of these markets. For its first *ex post* valuation, it measured the country risk for 2009 at 4,24%[594] and then lowered it to 2.67% for 2013.[595]

481. Bolivia's expert submits that the appropriate country risk premium is the sovereign bond spread between Bolivian bonds denominated in U.S. dollars and U.S. treasury bonds. Accordingly, an appropriate assessment of country risk, averaging the data published in 2004 by Professor Damodaran (9.75%) and Ibbotson (17.91%) leads to applying 13.83%.[596]

482. Navigant criticizes Econ One's approach for two reasons: (i) it ignores the reality that not all commercial activities conducted within a country are equally affected by country risk and (ii) the spread between sovereign bonds issued by the host country and that of the United States is a poor measurement for the country risk faced by any commercial enterprise.[597]

483. The Tribunal notes that both experts have relied on Damodaran's article entitled "Measuring Company Exposure to Country Risk: Theory and Practice."[598] The Claimants' economic expert quotes Damodaran in support of its contention that not all companies within a country are equally affected by country risk:

> [N]ot all companies in an emerging market are equally exposed to country risk [...] we need to differentiate between firms. [...] [A] company's exposure to country risk comes not from where it incorporates and trades but from where it does its business.[599]

[593] Navigant, First ER, ¶ 147.

[594] Navigant, First ER, ¶ 208.

[595] Navigant, Second ER, exhibit F.4.

[596] Econ One, First ER, ¶ 140, Tribunal's translation, footnotes omitted. *See also* Exhs. EO-19 and EO-20.

[597] Navigant, Second ER, ¶¶ 125-138.

[598] Exh. NCI-131.

[599] Exh. NCI-131, p. 1.

484. Navigant also refers to Damodaran's "Lambda Approach," an adjustment of the bond spread to account for the different levels of country risks faced by different companies,[600] although it does not apply it.[601]

485. Bolivia's expert, on the other hand, relies on Damodaran to stress that local market risk is not to be understated, as it claims Navigant does:

> A company can be exposed to country risk, even if it derives no revenues from that country, if its production facilities are in that country. After all, political and economic turmoil in the country can throw off production schedules and affect the company's profits. Companies that can move their production facilities elsewhere can spread their risk across several countries, but the problem is exaggerated for those companies that cannot move their production facilities. Consider the case of mining companies. An African gold mining company may export all of its production but it will face substantial country risk exposure because its mines are not moveable.[602]

486. Econ One also quotes Damodaran's "Bludgeon Approach" to support using a general country risk premium:

> The simplest assumption to make when dealing with country risk, and the one that is most often made, is that all companies in a market are equally exposed to country risk.[603]

487. The Tribunal shares the Respondent's view on the relevance of the country risk of the host State of the investment. Indeed, even if the ulexite products generated by the mining concessions are not sold locally, the mining operations are located within Bolivia and cannot be delocalized. As a consequence, they are clearly subject to Bolivia's country risk. Therefore, the Tribunal will not resort to Navigant's proposed country risk premium.

488. Given both Parties' reliance on Prof. Damodaran's writings, the Tribunal is persuaded to use the country risk premium according to the data published by this source, *i.e.* 9.75%. The Tribunal is aware that this premium relates to 2004 and that the chosen *ex post* analysis calls for the use of a figure from 2013. However, the Parties have not pointed to the 2013 figure, and the Tribunal considers that the 2004 data better reflects actual risk than the low premium proposed by the Claimant's expert.

---

[600] Exh. NCI-131, p. 17.

[601] Navigant, Second ER, ¶ 134.

[602] Exh. NCI-131, p. 18.

[603] Exh. NCI-131, p. 16.

(d) Micro-cap size premium

489. The fourth area of divergence between the Parties' economic experts is Bolivia's inclusion of a micro-cap size premium of 4.01%.

490. Econ One explains that small firms tend to produce higher financial returns than bigger firms. This is because markets perceive that investing in small firms is riskier than investing in big firms; consequently, small firms need to offer potential investors higher returns to compensate for the higher risks.[604] Consequently, it has applied the size premium calculated by Ibbotson for micro-cap companies.[605]

491. Navigant disagrees with the inclusion of a small company risk premium essentially because the concessions "were able to produce a commodity with a global demand that was not dependent on the local market demand."[606]

492. While neither the Claimants nor Navigant dispute that NMM is a small firm, Navigant argues that this premium is only applicable to companies "with uncertain demand, a high risk of failure, and a high degree of competition," which was not the case here.[607] Yet, Navigant has not otherwise supported this assertion. Econ One, in contrast, has submitted financial authorities supporting the inclusion of a size premium,[608] notably Ibbotson's "Stocks, Bonds, Bills, and Inflation, SBBI Valuation Edition 2004 Yearbook," from which it takes the size premium for micro-cap companies.[609]

493. The lack of compelling counter-arguments on the Claimants' side, together with the undisputable fact that the Tribunal is valuing a small company, leads it to conclude that a micro-cap size premium of 4.01% should be factored into the discount rate. The Tribunal is aware that this premium relates to 2004 and that the chosen *ex post* analysis calls for the use of a figure from 2013. However, the 2013 figure is not in the record, and the Tribunal considers that the 2004 data is reasonable and thus may be applied in the present valuation.

---

[604] Econ One, First ER, ¶ 141.

[605] Exh. EO-16, p. 129.

[606] Navigant, Second ER, ¶ 139.

[607] Navigant, Second ER, ¶ 139.

[608] Exhs. EO-16, EO-21, EO-22, EO-47 and EO-48.

[609] Exh. EO-16, p. 129.

(e) Cost of debt

494. The Claimants' expert has relied on two sources of information to set the cost of debt: (i) the bond yields for Rio Tinto and Compass Minerals and (ii) the bank lending rates that reflect the cost of borrowing to finance the concessions, *i.e.* a commercial rate of LIBOR + 4%.[610] This premium "reflect[s] the additional risk of the Bolivian Concessions relative to short-term bank lending."[611]

495. Navigant adds that it "does not assume that [NMM] would have access to debt on the same terms as Rio Tinto or Compass Minerals. Rather we use these companies and LIBOR+4 as reference rates."[612]

496. Based on these sources, in its first expert report, Navigant calculates the cost of debt at 7.5% in U.S. dollars, and at 9.44% in Bolivianos to adjust for inflation (Navigant uses the latter for its discount formula, as its cash flows are in Bolivianos).[613] In its adjusted *ex post* calculation, Navigant estimates the cost of debt in U.S. dollars at 5.5% and at 7.44% in Bolivianos to adjust for inflation (again using the latter for purposes of its discount formula).[614]

497. For Econ One, Navigant's approach is not adequate and results in too low a cost of debt. It challenges the reference to multinational companies such as Rio Tinto and Compass Minerals which have different possibilities of issuing debt and accessing international financial markets.[615] It thus submits that the cost of debt should be 11.93%, the sum of the U.S. risk free rate and the risk premium for Bolivian bonds.[616]

498. Regarding the use of LIBOR + 4%,[617] Navigant explains that "[h]istorically, LIBOR+2 percent tracks the Prime rate of interest," which "is the rate that the banks charge their most trustworthy customers, and thus, […] is not widely available in the public market. As such, a 2 percent premium to the Prime rate [*i.e.*, LIBOR + 4%] reflects a rate that would be more broadly available to the public market" and is "fully

[610] Navigant, First ER, ¶¶ 211-212.

[611] Navigant, First ER, ¶ 152.

[612] Navigant, Second ER, ¶ 142.

[613] Navigant, First ER, ¶ 213; Exh. F.5.

[614] Navigant, Second ER, Exh. F.5

[615] Econ One, First ER, ¶ 147, Tribunal's translation.

[616] Econ One, First ER, ¶ 148 and table 7, Exh. EO-19.

[617] Equivalent to 5.52% in 2009 (date of Navigant's first *ex post* valuation, *see* Navigant, First ER, ¶ Table 20 at p. 83; Exh. F.5), and equivalent to 4.69% in 2013 (date of Navigant's adjusted *ex post* valuation, *see* Navigant, Second ER, ¶ Exh. F.5).

reasonable."[618] Navigant also asserts that LIBOR + 4% "adequately reflect[s] the additional risk of the Bolivian Concessions relative to short-term bank lending."[619]

499. Econ One contends that "it is illogical to assume that the concessions could incur debt at a cost of only LIBOR + 4%," because NMM is not comparable to Río Tinto and Compass Minerals. For instance, Compass Minerals is valued at US$ 591 million, *i.e.*, 18 times the value of the concessions according to Navigant's *ex ante*'s valuation, and nonetheless its cost of debt is 7.63%.[620]

500. The Tribunal does not understand Navigant to be proposing that the cost of debt be LIBOR + 4%. Navigant has taken this rate, together with Río Tinto's and Compass Minerals' cost of debt, as reference rates, and has concluded that the appropriate rate is 7.44%. The Tribunal finds this rate reasonable for 2013. By contrast, it finds Econ One's rate of 11.93% (which was calculated for 2004) inappropriate.

(f) Conclusions on the discount rate

501. Consequently, the Tribunal determines that the applicable discount rate, based on the WACC formula put forward by the Parties' experts, is 18.4%.

viii. Quantification

502. On the basis of the parameters set out in the preceding sections, the Tribunal has calculated the damages suffered by the Claimants on the basis of the cash flows that their ulexite reserves would have generated in the absence of the expropriation. It quantifies these damages at USD 48,619,578, broken down as follows:[621]

a. Past cash flows (*i.e.*, cash flows that would have accrued between the date of the expropriation and the date of the Award, using 30 June 2013 as proxy): USD 30,081,458. This amount includes pre-award interest, calculated as specified in Section VII.A.6 below.[622]

---

[618] Navigant, Second ER, ¶ 142.

[619] Navigant, First ER, ¶ 212.

[620] Econ One, Second ER, ¶ 197, Tribunal's translation.

[621] The Tribunal notes that, of the total amount awarded, USD 47,229,424 correspond to reserves that would have been depleted by 2029. The remaining USD 1,390,154 corresponds to resources that would have been depleted between 2030 and 2039. The relatively low value attributed to resources is explained by the increased effect of discounting cash flows that lie further in the future.

[622] According to the Tribunal's calculations, net past cash flows from 23 July 2004 to 30 June 2013 amount to USD 27,977,499. As discussed in Section 6 below, the Tribunal has applied an interest at

b. Future cash flows (projected from 1 July 2013 until the depletion of the concessions): USD 18,538,119.

5. The claim for the loss of lithium resources

a. The Claimants' position

503. In addition to the value of the ulexite reserves in the concession, the Claimants seek damages in the amount of US$ 736,385[623] for the loss of the lithium resources of the Inglaterra, Tete and part of Don David concessions.[624] According to the Claimants, this claim is supported by the findings of their mining expert[625] and by Bolivia's own governmental studies confirming the presence of lithium in the Río Grande area.[626]

504. In order to estimate the FMV of the lithium resources within the concessions, the Claimants' economic expert has implemented a comparable transactions approach. Navigant explained the various steps in this approach as follows:

> We first identified recent comparable transactions to arrive at a price per ton of lithium resources multiple. Next, using the data available in the Orstom study and the location of the Bolivian Concessions area, we estimated the area within the Bolivian Concessions that would likely contain lithium resources. Finally, we multiplied the estimated lithium resources within this subarea of the Bolivian Concession by the price per ton of lithium resource multiple to arrive at an estimate of fair market value of the lithium resources.[627]

b. The Respondent's position

505. The Respondent challenges this. While Bolivia has described the Salar as "the largest lithium mineral deposit" of the world,[628] Econ One contends that the Claimants' reliance on the Orstom-Risacher study is flawed,[629] that Navigant's estimate is far from conservative,[630] and that its comparable transaction approach is invalid.[631]

---

a rate of 1-year LIBOR + 2%, compounded annually, on these cash flows, which yields a total amount (interest included) of USD 30,081,458.

[623] Navigant, Second ER, ¶ 177, table 16 and the Claimants' request for relief in page 170 of their Reply.

[624] Navigant, Second ER, ¶ 176 and table 15.

[625] Behre Dolbear, Second ER, ¶ 87.

[626] SNG 2008 Report, Section II, pp. 5 and 7, Exh. BD-37.

[627] Navigant, Second ER, ¶ 170.

[628] Counter-Mem., ¶ 22, Tribunal's translation.

[629] Econ One, Second ER, ¶¶ 266-271.

[630] Econ One, Second ER, ¶¶ 278-286.

Moreover, it generally opines that "the estimation of the value of the concessions' lithium resources carried out by Navigant for US$ 736,385 is speculative, erroneous and not well-founded."[632]

c. Analysis

506. The Claimants and their expert Navigant have calculated the FMV of the lithium resources for three concessions: Inglaterra, Tete and part of Don David. The other concessions are not included because they are considered outside the lithium concentration area.

507. Both the report authored by Orstom-Risacher in 1989 (co-commissioned by state entity *Complejo Industrial de los Recursos Evaporíticos del Salar de Uyuni* ("CIRESU"), Bolivia's University of San Andrés and French research organization Orstom) and a 2008 report prepared by Bolivia's SERGEOTECMIN report the existence of lithium in the Salar de Uyuni in general and in the Río Grande estuary, where the concessions are located, in particular. The Orstom-Risacher report describes the Salar de Uyuni as the "world's first lithium reserve (8,9 million tons solely in the superficial crust)" and stresses that the "area with a higher concentration of these elements is located in the superficial crust at the south of the Salar, close to the Río Grande estuary."[633] The SERGEOTECMIN report considered it "undeniable that [the Salar de Uyuni] has an important lithium reserve at the global level."[634]

508. Although the existence of high levels of lithium in the Salar de Uyuni is undisputed, the Tribunal is nonetheless unconvinced by the claim for loss of lithium resources in three of the concessions. First, while the Claimants requested Behre Dolbear, their industry expert, to calculate boron reserves and resources, they have tasked Navigant, their economic expert, with estimating the lithium resources, without justifying this differentiation. As a consequence, Behre Dolbear vaguely refers to the "lithium potential" of the Claimants' concessions,[635] while Navigant carries out the detailed assessment of the lithium resources.[636] The Tribunal finds it difficult to rely on

---

631 Econ One, Second ER, ¶¶ 287-292.

632 Econ One, Second ER, ¶ 293, Tribunal's translation.

633 Exh. BD-3, p. 61, Tribunal's translation.

634 Exh. BD-37, Part II, p. 5, Tribunal's translation.

635 Behre Dolbear, Second ER, ¶ 88.

636 Navigant, Second ER, ¶¶ 170-181.

evidence from a financial expert to assess a geological fact, such as the existence and extent of presence of a mineral.

509. Second, the Claimants have not shown that they had any reasonably foreseeable plans to extract, exploit or market lithium. They have not established either that they had any expertise and experience in the lithium business and have not alleged that it was essentially identical to being active in borates industry and market. Their economic expert confirmed at the hearing that he was not aware that Quiborax was in the lithium business in 2004.[637]

510. As a result, the Tribunal dismisses the claim for damages arising from the loss of lithium resources.

6. Interest

a. The Claimants' position

511. The Claimants request pre- and post-award compound interest in accordance with customary international law and Article VI(2) of the BIT. Navigant has provided two alternative calculations of pre-award interest on the lost cash flows from 30 June 2004 to 30 June 2013, applying two alternative interest rates: LIBOR + 2%[638] and the Bolivian sovereign debt rate.[639] This interest has been incorporated into Navigant's calculation of past cash flows, from the date on which each cash flow was due on a yearly basis.[640] The same interest rates are proposed for the calculation of post-award interest, which would accrue from the date of the Award to the date of payment.

b. The Respondent's position

512. The Respondent opposes the Claimants' request for pre-award interest because "to the extent that the relief sought relates to future earnings, this concept is lost profits. […] If damages for lost profits were granted, these damages should not generate interest."[641] Therefore, if applicable, interest should be awarded from the date of the

[637] Tr., Day 2, 184:14-185:10.

[638] Navigant, Second ER, Exh. H.1.

[639] Navigant, Second ER, Exh. H.2.

[640] *See* Navigant, Second ER, Exh. H.

[641] Rejoinder, ¶ 206, Tribunal's translation.

valuation onwards.[642] Bolivia opposes compounding interest but agrees with the Claimants on using a rate of LIBOR + 2%.[643]

c. Analysis

513. The Tribunal finds that both pre- and post-award interest are due. With respect to pre-award interest, the Tribunal has already determined that, as part of an *ex post* valuation, past losses must be brought to present value through the application of an interest rate. Such interest compensates the fact that the Claimants were not in possession of the funds to which they were entitled and thus had either to borrow funds at a cost or were deprived of the opportunity of investing these funds at a profit. As to post-award interest, there is no dispute that it should apply in principle. Bolivia accepts that, if compensation is due, "it should be updated according to a simple risk free rate from the valuation date […]."[644] The Tribunal has established above (*see* Section VII.A.4.c.i) that the date of valuation is the date of the Award, using 30 June 2013, as a proxy.

514. The Tribunal is aware of the Respondent's concern about awarding interest to lost profits and its allegation of double counting. Indeed, according to the Commentary to ILC Article 38, "[w]here a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery," because "[a] capital sum cannot be earning interest and notionally employed in earning profits at one and the same time."[645] However, the ILC Commentary goes on to explain that "interest may be due on the profits which would have been earned but which have been withheld from the original owner." Consequently, if interest is applied to past net cash flows (*i.e.*, the cash flows that would have been earned between 23 July 2004 and 30 June 2013 but were withheld from the Claimants due to Bolivia's expropriatory measure) as of the date on which those cash flows were due, there is no double-counting. The Tribunal understands that this is what Navigant has done.[646]

515. Interest must be calculated from the date on which the loss was suffered. With respect to past cash flows, the loss was suffered whenever those cash flows were

[642] Rejoinder, ¶ 210.

[643] Rejoinder, ¶¶ 206 and 210.

[644] Rejoinder, ¶ 210, Tribunal's translation.

[645] Commentary to ILC Article 38, ¶ 11.

[646] Navigant, Second ER, table 12 and Exh. H.

due and not received, after the date on which the Claimants returned the concessions to Bolivia, *i.e.*, 23 July 2004. The Tribunal thus awards interest on NMM's past cash flows from 23 July 2004 to 30 June 2013, at the rate and on the terms described further below. This interest, which has accrued on those past cash flows as they became due, has already been included in the total value of past cash flows set out in paragraph 502.a above.[647]

516. Thereafter, interest shall accrue on the total amount awarded from 1 July 2013 until the Respondent fulfils its payment obligations. Interest accrues on the total amount awarded because the Tribunal has used 30 June 2013 as valuation date.

517. The Claimants propose two alternative interest rates for both pre- and post-award interest: either one year LIBOR + 2% or the Bolivian Sovereign Debt Rate.[648] Bolivia agrees with the Claimants on using LIBOR + 2% and rejects the alternative interest rate suggested.[649] The Tribunal will thus apply the rate considered appropriate by both Parties, one year LIBOR + 2%, which it deems a suitable rate for debts in U.S. currency owed outside the United States over the relevant periods.

518. The Claimants argue that "[b]oth pre-award and post-award interest must be calculated on a compound basis" since there is a "strong economic rationale for awarding compound interest, as the most appropriate way to account for the time-value of money."[650] They contend that the interest rate should be determined in accordance with international law, stressing that while "damages for breach of contract may be subject to limitations established by domestic law [, t]his is not true for expropriation cases, which are decided under international law."[651] The Respondent, on the other hand, claims that compound interest "must be strongly rejected insofar as it collides with Bolivian Law, which requires that the interest rate be simple."[652] In support, it quotes Article 412 of the Bolivian Civil Code, which reads as follows:

---

[647] *See* note 622 above.

[648] Reply, ¶ 460.

[649] Counter-Mem., ¶¶ 444-445; Rejoinder, ¶ 210.

[650] Mem., ¶ 217.

[651] Reply, ¶ 472.

[652] Counter-Mem., ¶ 446, Tribunal's translation.

> Anatocism and all other forms of capitalization of interests are prohibited. Agreements to the contrary are void.[653]

519. The Tribunal must in the first place determine whether it must apply Bolivian or international law to this issue. In the section on the law applicable to the merits of the dispute (Section V.B above), the Tribunal held that, absent a choice of law in the treaty and in application of Article 42 of the ICSID Convention, it was to allocate a given issue to municipal or international law.

520. The Tribunal is not persuaded that it is appropriate to apply national law to the issue of compound interest. Reparation for expropriation is governed by international law and full reparation includes interest for late payment. The application of national law may be appropriate for contract claims, but not for a claim of breaches of the BIT. This position is supported by the cases referred to by both Bolivia and the Claimants.

521. A case in point is *Duke Energy v. Ecuador,* on which Bolivia has relied to support its request for simple interest. *Duke Energy* involved a contract dispute and the tribunal thus "agree[d] with the Respondent's argument in favor of simple interest," adding that "Ecuadorian law prohibits compound interest in the present case."[654] However, that same award noted that "compound interest may be awarded for expropriation but not for contract claims."[655] Other arbitral tribunals, such as *Santa Elena v. Costa Rica*, have also drawn the distinction between cases involving treaty breaches and those involving contract breaches.[656]

522. The Tribunal finds that the remaining authorities relied upon by Bolivia in favor of simple interest are unhelpful. *Desert Line v. Yemen* was a contract dispute and the tribunal provided no reason for its decision to award simple interest.[657] *Aucoven v. Venezuela* awarded simple interest, but it also dealt with a contract claim governed primarily by Venezuelan law,[658] being specified that international law would prevail

---

[653] Exh. R-358, Tribunal's translation. The original text reads as follows: "Art. 412.- (PROHIBICION DEL ANATOCISMO). Están prohibidos el anatocismo y toda otra forma de capitalización de los intereses. Las convenciones en contrario son nulas."

[654] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19 ("*Duke Energy v. Ecuador*"), Award of 18 August 2008, ¶ 457.

[655] *Duke Energy v. Ecuador*, Award of 18 August 2008, ¶ 432.

[656] *Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/1, Award of 17 February 2000, ¶ 97. *See also Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5 ("*Aucoven v. Venezuela*"), Award of 23 September 2003, ¶ 394.

[657] *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17 ("*Desert Line v. Yemen*"), Award of 6 February 2008, ¶¶ 294-295.

[658] *Aucoven v. Venezuela*, Award of 23 September 2003, ¶ 105.

over conflicting national rules. The tribunal held that the applicable Venezuelan law combined with the pertinent contract provision did not allow the application of compound interest. It also concluded that international law did not require compound interest for contract cases with the result that no conflict arose.[659]

523. Accordingly, the Tribunal shall apply international law to determining interest. The applicable standard of compensation under customary international law is full reparation. Compound interest, which has become the standard to remunerate the use of money in modern finance, comes closer to achieving this purpose than simple interest. Indeed, being deprived of the use of the money to which it was entitled, a creditor may have to borrow funds or may forego investments, for which it would pay or earn compound interest.

524. The Tribunal is aware that the Commentary to ILC Article 38, which the Respondent also invokes, states that "[t]he general view of courts and tribunals has been against the award of compound interest."[660] Yet, a review of arbitral decisions shows that compound interest has been deemed to "better reflect[] contemporary financial practice"[661] and to constitute "the standard of international law in [] expropriation cases."[662] The view that compound interest better achieves full reparation has been adopted in a large number of decisions[663] and is shared by this Tribunal.

525. As to the periodicity, the Tribunal opts for compounding on a yearly basis.

526. For the reasons stated above, the Tribunal awards interest on the compensatory damages awarded, compounded annually, at the rate of one-year LIBOR plus two percent. Interest has been applied by the Tribunal to past cash flows as they became due from 23 July 2004 until 30 June 2013, and thus does not need to be added to the damages awarded. Given that the Tribunal has used 30 June 2013 as valuation date, interest shall accrue on the total amount awarded from 1 July 2013 until the date of payment.

---

[659] *Aucoven v. Venezuela*, Award of 23 September 2003, ¶¶ 394-395.

[660] Commentary to ILC Article 38, ¶ 8.

[661] *LG&E v. Argentina*, Award of 25 July 2007, ¶ 103.

[662] *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award of 12 April 2002, ¶ 174. *See also Occidental v. Ecuador II*, Award of 5 October 2012, ¶ 840.

[663] *See, e.g.*, *El Paso v. Argentina*, Award of 31 October 2011, ¶ 745; *Vivendi v. Argentina II*, ¶ 9.2.6; *Wena v. Egypt*, Award of 8 December 2000, ¶ 129.

B. Declaratory Judgment and Moral Damages

1. Overview

527. The Claimants allege that, by engaging in post-expropriation acts of harassment (in particular, the initiation of the criminal case in Bolivia), the Respondent has breached its obligation to accord fair and equitable treatment to their investments, as well as its obligation not to impair those investments through arbitrary and discriminatory measures. As relief, they request a declaratory judgment that those standards have been breached, as well as moral damages.[664]

528. The Claimants also allege that, through its procedural conduct in this arbitration (including through the initiation and continuation of the criminal case), the Respondent has breached other international law obligations under the ICSID Convention or general principles of law. As relief for these alleged breaches, the Claimants seek a declaratory judgment.

529. As some of these claims and arguments overlap, the Tribunal will address them jointly. It will first address the Claimants' request for a declaratory judgment, whether as a matter of FET, unreasonable or discriminatory measures, or other breaches of international law (Section 2 below). It will then turn to the Claimants' request for moral damages (Section 3 below).

2. Request for a declaratory judgment

530. The Claimants first requested the Tribunal to issue a declaratory judgment under Article 37 of the ILC Articles on State Responsibility at the hearing on jurisdiction.[665] Following the Tribunal's instructions in Procedural Order No. 8, the Claimants filed a Request for Declaratory Judgment on 27 May 2011. This request therefore complies with the temporal requirement set forth in Rule 40 of the ICSID Arbitration Rules. The Respondent filed a Reply to the Claimants' Request for Declaratory Judgment on 10 June 2011. In its Decision on Jurisdiction, the Tribunal decided that it would entertain the Claimants' request for a declaratory judgment pursuant to Article 37 of the ILC

[664] *See, e.g.*, Mem., pp. 98-100, Reply, p. 170, COSS, slide 78.

[665] The Tribunal notes that already in their Memorial the Claimants had requested an award declaring that Bolivia had breached its obligations under Articles III and IV of the BIT by submitting the Claimants to acts of harassment, in particular the initiation of criminal proceedings, although this request was not articulated under Article 37 of the ILC Articles.

Articles in the final Award.[666] Both Parties made additional submissions on this request in the second round of briefs on the merits.

a. The Claimants' position

531. As already described in the Decision on Jurisdiction,[667] the Claimants request the Tribunal to formally declare, pursuant to Article 37 of the ILC Articles, that "Respondent's conduct in the present arbitration violates its obligations under the [ICSID Convention] as well as its general obligation under international law to arbitrate fairly and in good faith."[668] In their Reply, the Claimants modified their request and called for the Tribunal to declare that the Respondent's conduct in this arbitration "constitute[s] breaches of the Respondent's obligation to provide fair and equitable treatment, not take arbitrary or discriminatory measures, and its general duty to arbitrate fairly and in good faith."[669] Specifically:

> The Claimants […] request the Tribunal to declare that the Respondent's conduct in the arbitration, in particular: (i) the Respondent's initiation of the criminal case in Bolivia and refusal to suspend that criminal case, [t]hus, knowingly and willfully harming the integrity of the arbitration proceeding, (ii) the Respondent's attempts to benefit from its own unlawful conduct in its written and oral submissions on jurisdiction, (iii) the Respondent's refusal to pay its share of the advance payments, and (iv) the Respondent's bad faith accusations of fraud, both in the jurisdictional and merits phase, all constitute breaches of the Respondent's obligation to provide fair and equitable treatment, not take arbitrary or discriminatory measures, and its general duty to arbitrate fairly and in good faith.[670]

532. As reformulated in their Reply, the Claimants' request is based on the following allegations:

a. The initiation of the criminal case by Bolivia was part of "an orchestrated campaign directed against the Claimants"[671] in order to avoid its international responsibility in this arbitration.[672]

---

[666] Decision on Jurisdiction, ¶ 308.

[667] Decision on Jurisdiction, ¶¶ 299-303.

[668] CDJ, ¶ 1.

[669] Reply, ¶ 550.

[670] Reply, ¶ 550.

[671] Reply, ¶ 519.

[672] This is not the first time that the Claimants contend that the initiation of the criminal proceedings violates their rights. As discussed in Section VI.B above, the Claimants argue that Bolivia's post-expropriation acts of harassment (notably the initiation of the criminal case) amounts to a breach by Bolivia of the FET standard as well as an arbitrary or discriminatory measure under Articles IV and III

b. Bolivia's conduct has been disrespectful towards the Tribunal, the Centre and the ICSID system as a whole, including by failing to comply with the Tribunal's Decision on Provisional Measures, challenging the entire Tribunal for alleged prejudgment of the case following that decision, and failing to pay its share of the advance costs of the arbitration.

c. By failing to suspend the criminal case as directed by the Tribunal in its Decision on Provisional Measures, the Respondent has harmed the integrity of the arbitration and aggravated the dispute.

d. The Respondent has used the criminal case to its own advantage in this arbitration, in particular by obstructing the Claimants' access to witnesses and using the criminal case to gather evidence for this arbitration.

e. The Respondent has falsely accused the Claimants and persons associated with them of fraud and corruption, with no regard for the consequences of those accusations for those involved, and advanced incompatible factual accounts intended to deny the Claimants' access to arbitration.

533. The Claimants contend that Bolivia's conduct amounts to an internationally wrongful act within the meaning of Article 2 of the ILC Articles. This provision requires for the act to (i) be attributable to the State and (ii) constitute a breach of an international obligation of the State. They submit that both requirements are met. First, the acts of the Respondent in this arbitration are attributable to the State of Bolivia. Second, through the acts described above, Bolivia has breached:

a. Its international obligations under the BIT (specifically, its obligations to provide fair and equitable treatment and not take arbitrary or discriminatory measures);[673]

b. Its international obligations under the ICSID Convention (in particular, Articles 47 and 61 of the ICSID Convention, Regulation 14 of the Administrative and Financial Regulations and the ICSID Arbitration Rules),[674] and

---

of the BIT, respectively. In their Request for Provisional Measures, the Claimants also invoked their (procedural) rights to the preservation of the *status quo* and non-aggravation of the dispute, the exclusivity of ICSID arbitration under Article 26 of the ICSID Convention, and the integrity of the arbitration proceedings.

[673] Reply, ¶¶ 515, 524.

[674] CDJ, ¶¶ 63-65; 88; Reply, ¶ 535.

c. Its general obligation to arbitrate fairly and in good faith.[675]

534. As a result, the Claimants argue that, pursuant to Articles 31 and 34 of the ILC Articles, they are entitled to full reparation for the injury caused.

535. The Claimants note that, pursuant to Article 34 of the ILC Articles, full reparation may take the form of either restitution, compensation or satisfaction. However, as restitution is not appropriate and compensation is not sufficient in this case, the Claimants seek satisfaction in the form of a declaration that Bolivia's conduct in this arbitration constitutes an internationally wrongful act. The Claimants submit that a declaratory judgment is a permissible form of satisfaction under Article 37 of the ILC Articles, and one that also lies within the Tribunal's inherent powers.

b. The Respondent's position

536. The Respondent's objections to the Claimants' request for a declaratory judgment have evolved. In its Reply to the Claimants' Request for a Declaratory Judgment, Bolivia submitted that the Claimants' request for a declaration under Article 37 of the ILC Articles was (i) premature and (ii) inadmissible to the extent that it exceeds the scope of the remedy of satisfaction under Article 37 of the Articles. The Respondent further submitted that (iii) the Tribunal lacks the power to grant the punitive relief requested by the Claimants, and (iv) relief under Article 37 is not available to investors. In the alternative, the Respondent argues that (v) the evidence fails to support the Claimants' request, and (vi) Bolivia has not breached any international obligation, nor caused any damage to the Claimant that would not be compensable though monetary relief.

537. In turn, in its Rejoinder and during the hearing on the merits, the Respondent raised certain jurisdictional objections that it had not previously raised. As in its Reply to the Claimants' Request for a Declaratory Judgment, Bolivia also argued that (i) the Tribunal lacks the power to rule on that request, but now appears to do so as a matter of jurisdiction. The Respondent also submits that (ii) the Tribunal lacks jurisdiction to rule on the Claimants' Request for a Declaratory Judgment because the Tribunal is only competent to decide claims arising directly out of an investment. The Respondent also appears to argue that (iii) the Claimants' request is inadmissible, but other than enunciating this objection in the title of the relevant section it does not

[675] CDJ, ¶¶ 63-65; 88; Reply, ¶ 550.

articulate this objection in the text of its Rejoinder.[676] Finally, the Respondent asserts that (iv) the Claimants have not proved their allegations of procedural misconduct. Separately, the Respondent (v) denies that it has breached the FET standard or subjected the Claimants to unreasonable or discriminatory measures through post-expropriation acts of harassment.

c. Analysis

i. Objections to jurisdiction

538. In its Rejoinder and during its closing arguments at the hearing on the merits, the Respondent raised certain jurisdictional objections to the Claimants' Request for a Declaratory Judgment that it had not previously raised.[677] First, Bolivia argued that the Tribunal lacks the power to rule on that request. Although Bolivia had already raised that argument in its Reply to the Claimants' Request for a Declaratory Judgment, it now appears to do so as a matter of jurisdiction. The Respondent's argument appears to be that, as neither the ICSID Convention, nor its Rules of Arbitration, nor the BIT (*i.e.*, the instruments setting out the contracting parties' consent) grant the Tribunal the power to issue a declaratory judgment or to order any other remedy that is not specifically envisaged therein to sanction the Parties' procedural conduct, the Tribunal lacks jurisdiction to rule on this claim.[678]

539. Second, the Respondent argues that the Tribunal lacks jurisdiction to rule on the Claimants' Request for a Declaratory Judgment because "the Tribunal is only competent to decide claims arising ***directly*** from an investment and not claims based on the actions of Bolivia's judicial branches, its procedural behavior or the alleged harassment the Claimants claim they are victims of."[679]

---

[676] *See* Rejoinder, Section V.B.3 entitled "The Claimants' request for a declaration under Article 37 of the Draft ILC Articles is inadmissible and legally incorrect", Tribunal's Translation, ("*La solicitud de las Demandantes de una declaración bajo el Artículo 37 del Proyecto de Artículos de la CDI es inadmisible y legalmente incorrecta*.")

[677] Rejoinder, ¶¶ 123, 154-155. *See also* Respondent's closing arguments during the hearing on the merits, Tr., Day 3, 93:3-16. Although in its Reply to Claimants' Request for a Declaratory Judgment the Respondent argued that "[o]bviously, the Arbitral Tribunal's lack of jurisdiction in this case extends to its jurisdiction to examine Claimants' Request" (RDJ, ¶ 3), it did not otherwise deny the Tribunal's jurisdiction to rule on that request for reasons specific to it.

[678] Rejoinder, ¶¶ 154-155, 157. The Respondent first articulated this jurisdictional objection in its Rejoinder. In its Reply to Claimant's Request for a Declaratory Judgment, the Respondent did argue that the Tribunal lacked the power to issue a declaratory judgment. However, it did not assert that as a result the Tribunal does not have jurisdiction, as it does now.

[679] Rejoinder, ¶ 125, Tribunal's translation (emphasis in original).

540. The Tribunal notes that the Claimants' Request for a Declaratory Judgment was made at the hearing on jurisdiction. Both Parties had the opportunity to submit their views on the request during the phase devoted to determining the Tribunal's jurisdiction. Yet, the Respondent chose not to raise jurisdictional objections at that stage.

541. The jurisdictional phase concluded with the Decision on Jurisdiction, in which the Tribunal established that it had jurisdiction over the claims of Quiborax and NMM. The Tribunal finds that there is no reason that can justify reopening the jurisdictional issues at this stage, assuming this were at all possible. It therefore denies the Respondent's new jurisdictional objections.

ii. Objections to admissibility

542. In its Reply to the Claimants' Request for a Declaratory Judgment, Bolivia submitted that the Claimants' request for a declaration under Article 37 of the Articles was premature, "because it would require the Arbitral Tribunal not only to sustain its jurisdiction, but also to prejudge the merits of Claimants' claims, assess the damages suffered by Claimants (if any) and determine whether the other forms of relief sought by Claimants (including the allocation of costs) are sufficient to compensate such damages."[680] The Tribunal understands that this objection has been rendered moot, as the Tribunal has decided to address the Claimants' request as a part of its Award on the merits and has already established its jurisdiction.

543. The Respondent further argues that, because the Tribunal only granted the Claimants leave to make submissions under Article 37 of the ILC Articles, any request for relief exceeding the scope of Article 37 (*i.e.*, relief other than satisfaction) is inadmissible. The Tribunal finds the Respondent's objection excessively formalistic. The Claimants' request for a declaratory judgment is not grounded solely in Article 37 of the ILC Articles. In their Memorial on the Merits, the Claimants had already requested an award declaring that Bolivia had breached its obligations under Articles III and IV of the BIT by submitting the Claimants to acts of harassment, in particular the initiation of the criminal proceedings.[681] To the extent that the Claimants' request

[680] RDJ, ¶ 18.

[681] In their Memorial, the Claimants requested an award:

"(5) Declaring that Bolivia violated its obligations under Article IV of the BIT by failing to accord Claimants fair and equitable treatment, by submitting Claimants to acts of harassment intended to obstruct Claimants' rights under the BIT;

rests on various legal bases, the Tribunal finds that it was admissible for the Claimants to elaborate on them in their subsequent submissions on the subject.

iii. Does the Tribunal have the power to grant the relief requested?

544. The Respondent contends that the Tribunal lacks the power to grant the relief requested by the Claimants. Although the Tribunal has dismissed this argument as a matter of jurisdiction, it must examine it as part of its analysis of the Claimants' request, be it a matter of admissibility or merits, an issue that can remain open.

545. First, the Respondent contends that the Tribunal lacks the power to grant punitive relief. It submits that "the Tribunal's powers are limited to those mentioned in the ICSID Convention and Arbitration Rules and in the Treaty, none of which include the power to grant *punitive* relief for an alleged breach of procedural duties."[682]

546. According to the Respondent, "[t]he only relief that could operate as a sanction admitted in ICSID arbitration for improper conduct during the proceedings is the award of costs against the party responsible for such conduct in the award."[683] This sanction is based on the Tribunal's power to allocate costs under Article 61(2) of the ICSID Convention and Rule 28 of the Arbitration Rules. [684] By contrast, there is no power to impose a penalty on a State for non-compliance with a provisional measure: the *travaux préparatoires* of the ICSID Convention show that a sanction was expressly refused by the Contracting States.[685]

547. Nor does the Tribunal have an inherent power to grant punitive relief for an alleged breach of procedural duties, the Respondent continues. Bolivia agrees with the Claimants that "it is within the authority of any tribunal to declare conduct by either party in a dispute unlawful, as an inevitable step in the settlement of any legal

---

(6) Declaring that Bolivia violated its obligations under Article III of the BIT by submitting Claimants to unreasonable and discriminatory measures, consisting of acts of harassment intended to obstruct Claimants' rights under the BIT[.]" Mem., pp. 99-100.

[682] RDJ, ¶ 30 (emphasis in original).

[683] RDJ, ¶ 40 (emphasis in original). *See also* Rejoinder, ¶ 156.

[684] RDJ, ¶ 40. *See also* Rejoinder, ¶ 156.

[685] RDJ, ¶ 39 (*citing* Aron Broches, Chairman of the Legal Committee, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States: Documents Concerning the Origin and the Formulation of the Convention, Volume II, Part 2, International Centre for Settlement of Investment Disputes (ed.), 1968, Exh. R-226, p. 815.

dispute."[686] However, the "Claimants have not demonstrated how or why a *'firm response'* by the Arbitral Tribunal, declaring Bolivia '*guilty*' of alleged procedural misconduct, is *'an inevitable step in the settlement of [the instant] legal dispute*."[687] The fact that the Claimants only made this request at the hearing on jurisdiction shows that it is not. Nor have the Claimants demonstrated that their claim for moral damages and costs cannot fully make good the injury allegedly caused by Bolivia.

548. According to the Respondent, none of the cases cited by the Claimants supports their request. In *Enron*, the tribunal did not decide that it had the power to grant punitive declaratory relief; rather, as the parties had agreed that the tribunal could make a declaratory statement, the tribunal only examined its power to order measures of performance and injunction.[688] In *Cementownia*, the tribunal rendered a declaratory judgment that was not based on Article 37 of the ILC Articles, granted that relief to the State, not the investor, and declared that the claimant had brought a fraudulent claim as part of its rationale for dismissing the claim.[689]

549. For the Respondent, the punitive nature of the requested relief is evident from the Claimants' statements. It thus argues that "[o]nly the punitive nature and purpose of the relief, by publicly presenting Bolivia as a rogue State (which it is not), could serve to compensate Claimants' purported damage."[690]

550. Second, the Respondent further contends that a declaratory judgment under Article 37 of the ILC Articles (*i.e.*, satisfaction) is not one of the remedies available to investors in the context of investor-State disputes. Relying on ICSID case law[691] and legal doctrine,[692] the Respondent submits that the ILC Articles are not fully transposable to investor-State disputes, and that "satisfaction is only available as a

---

[686] RDJ, ¶ 45, citing CDJ, ¶ 82.

[687] RDJ, ¶ 46, emphasis in original, footnotes omitted.

[688] RDJ, ¶ 49, citing *Enron v. Argentina*, Decision on Jurisdiction of 14 January 2004, ¶ 81, Exh. R-108.

[689] RDJ, ¶ 50, citing *Cementownia "Nowa Huta" S.A. v. Republic of Turkey,* ICSID Case No. ARB/06/2, Award of 17 September 2009, ¶ 158, Exh. R-186.

[690] RDJ, ¶ 35.

[691] Specifically, on *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award of 8 December 2008, ¶ 113, and *CMS v. Argentina*, Award of 12 May 2005, ¶ 399.

[692] Specifically, on S. Ripinsky, K. Williams, Damages in International Investment Law, British Institute of International and Comparative Law, 2008, p. 30, Exh. R-220 and Carole Malinvaud, *Non-pecuniary Remedies in Investment Treaty and Commercial Arbitration*, in: Albert Jan van den Berg (ed), 50 years of ICCA International Arbitration Conference, ICCA Congress Series, 2009 Dublin Volume 14, p. 225, Exh. R-221.

remedy to an injured State against a responsible State."[693] As the purpose of satisfaction is to reestablish the dignity, the honor or the sovereignty of the injured State," "satisfaction can only fulfill its role as reparation inasmuch as it expresses a certain degree of *punishment* of the responsible State."[694] The Respondent also argues that the *Corfu Channel* case does not support the Claimants' request.[695]

551. Even if the Tribunal were to consider that Article 37 of the ILC Articles is applicable in this case, the Respondent argues that the conditions for its application are not met. Under Article 37 of the ILC Articles, satisfaction is meant to repair an injury that cannot be made good by restitution or compensation. However, the Claimants have failed to demonstrate that they have suffered any injury, let alone an injury not reparable through monetary compensation.[696]

552. The Claimants, for their part, insist that satisfaction is an available remedy for investors. Pursuant to Article 37 of the ILC Articles, a State must provide satisfaction if its internationally wrongful act cannot be made good by restitution or compensation. However, they stress that satisfaction may take different forms and is not limited to the examples provided under Article 37. Indeed, one of the most common forms of satisfaction is a declaration of the wrongfulness of the act by the competent tribunal. The Claimants also argue that the Tribunal has the inherent power to issue a declaratory judgment, as it is within the authority of any tribunal to declare conduct by either party in a dispute unlawful, as an inevitable step in the settlement of any legal dispute.

553. The Claimants do not deny that a declaratory judgment would serve an exemplary role. Specifically, they submit that "[t]he cornerstone of an international arbitration system involving States is the fundamental assumption that States will comply with their international obligations, once undertaken voluntarily."[697] Consequently, "the Respondent's professed indifference towards non-compliance with its international obligations […] strikes at the heart of the ICSID arbitration system" and "renders

---

[693] RDJ, ¶ 62.

[694] RDJ, ¶ 63, *citing* E. Wyler, A. Papaux, "The Different Forms of Reparation: Satisfaction," in The Law of International Responsibility, ed. J. Crawford, A. Pellet, S. Olleson, OUP 2010, p. 623, Exh. R-222; the *Manouba* case (France v. Italy), Award of the Tribunal of 6 May 1913, Unofficial English Translation, p. 7; the *Rainbow Warrior* case, Decision of 30 April 1990, UNRIAA Vol. XX, 1990, p. 273.

[695] The *Corfu Channel* case (United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania), Judgment on merits of 9 April 1949, ICJ Reports 4, 1949, p. 35.

[696] RDJ, ¶ 67.

[697] Reply, ¶ 537.

unsustainable any court or arbitration proceeding involving private persons and States."[698] In the Claimants' view, "the Respondent's open defiance of the ICSID arbitration system during the arbitration cannot remain without consequence" and "requires a firm response from this Tribunal."[699] Hence, as in the *Corfu Channel* case, "a declaratory judgment by the Tribunal is necessary to ensure respect for the ICSID arbitration system, of which the Tribunal is the organ and to which the Respondent has voluntarily submitted this dispute in accordance with Article X of the BIT."[700]

554. The Tribunal agrees with the Respondent that some types of satisfaction are not a remedy available to investors in investor-State arbitrations. Article 34 of the ILC Articles includes satisfaction as a form of reparation,[701] such remedy being further advanced in Article 37 as follows:

> Satisfaction
>
> 1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
>
> 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
>
> 3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

555. However, it finds that some types of satisfaction as a remedy are not transposable to investor-State disputes. It must be remembered that Part Two of the ILC Articles, including the rules on reparation and in particular Article 37, "does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State."[702] That said, the ILC Articles restate customary international law and its rules on reparation have served as guidance to many tribunals in investor-State disputes.[703] In this Tribunal's view, the remedies outlined by the ILC Articles may apply in investor-state arbitration depending on the nature of the remedy and of the injury which it is meant to repair.

---

[698] Reply, ¶ 540.

[699] Reply, ¶ 541.

[700] Reply, ¶ 543.

[701] Article 34 of the ILC Articles (forms of reparation) provides that "[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."

[702] Commentary to the ILC Articles, Article 28, ¶ 3.

[703] *See, e.g.*, *Micula v. Romania*, Final Award of 11 December 2013, ¶ 916, Note 172.

556. The ILC's commentary explains that satisfaction "is not a standard form of reparation, in the sense that in many cases the injury caused by an internationally wrongful act of a State may be fully repaired by restitution and/or compensation."[704] It is an exceptional remedy, which is available only "insofar as [the injury] cannot be made good by restitution or compensation."[705]

557. International case law strongly suggests that some types of satisfaction are a remedy exclusively designed for States. For instance, the *Rainbow Warrior* tribunal stressed that satisfaction "relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities."[706] Indeed, the injuries that traditionally have been redressed through satisfaction relate to injuries that can only be suffered by States, such as violations of national sovereignty,[707] or "insults to the symbols of the State, such as the national flag, violations of […] territorial integrity, […] ill-treatment of or deliberate attacks on heads of State or Government or diplomatic or consular representatives or other protected persons and violations of the premises of embassies or consulates or of the residences of members of the mission."[708] Gaetano Arangio-Ruiz, Special Rapporteur of the ILC, further explains that "the 'moral' damage to the State […] is in fact distinct […] from the 'private' moral damage to nationals or agents of the State. This 'moral damage to the State' notably consists, on the one hand, in the infringement of the State's right per se and, on the other, in the injury to the State's dignity, honor or prestige."[709]

558. The traditional forms in which satisfaction has been expressed (such as an apology) are also better-suited to inter-State relations. Conversely, the injury caused to individuals as a result of harassment, threat or violence, as well as reputational harm, can be redressed through monetary compensation.[710] The practice of international

[704] Commentary to the ILC Articles, Article 37, ¶ 1.

[705] Commentary to the ILC Articles, Article 37, ¶ 1.

[706] *Case concerning the Rainbow Warrior Affair*, New Zealand v. France, Arbitral Award of 30 April 1990, ¶ 12.

[707] *Corfu Channel Case*, United Kingdom v. Albania; ICJ, Judgment on the Merits of 9 April 1949, p. 35 (where the ICJ awarded declaratory relief to Albania by stressing that "the action of the British Navy constituted a violation of Albanian sovereignty").

[708] Commentary to ILC Articles 2001, Article 37, ¶ 4, footnotes omitted.

[709] Gaetano Arangio-Ruiz, Special Rapporteur, Second Report on State Responsibility, Yearbook ILC, 1989, Vol II, part 1, ¶ 14, emphasis added.

[710] *Desert Line v. Yemen*, Award of 6 February 2008, ¶ 286. *See also* Opinion in the *Lusitania* Cases, US-Germany Mixed Claims Commission, 1923, UNRIAA, vol VII, p. 40;

human rights courts further shows that the harm resulting from an individual's suffering, distress or impairment of significant values can be compensated in monetary terms.[711]

559. Accordingly, the type of satisfaction which is meant to redress harm caused to the dignity, honor and prestige of a State, is not applicable in investor-State disputes. This position is shared by authors and tribunals alike. For instance, Ripinsky and Williams have found that "it is clear that certain rules, such as the one introducing satisfaction as a form of reparation, will be of value only in a State-State context."[712] Similarly, the tribunal in *CMS* held that, as it was not dealing with a case of reparation due to an injured State, satisfaction could be "ruled out at the outset." [713]

560. The fact that some types of satisfaction are not available does not mean that the Tribunal cannot make a declaratory judgment as a means of satisfaction under Article 37 of the ILC Articles, if appropriate. Moreover, this is also a power inherent to the Tribunal's mandate to resolve the dispute. The Parties agree – and rightly so – that "it is within the authority of any tribunal to declare conduct by either party in a dispute unlawful, as an inevitable step in the settlement of any legal dispute."[714] As the ILC commentary explains and the ICJ/PCIJ case law demonstrates,[715] such a declaration can or cannot be a form of satisfaction, depending on the circumstances:

> [W]hile the making of a declaration by a competent court or tribunal may be treated as a form of satisfaction in a given case, such declarations are not intrinsically associated with the remedy of satisfaction. Any court or tribunal which has jurisdiction over a dispute has the authority to determine the lawfulness of the conduct in question and to make a declaration of its findings, as a necessary part of the process of determining the case. Such

---

[711] *Vernava et al v. Turkey*, ECHR Application Nos. 16064/90, 16065/90 etc., Grand Chamber Judgment of 18 September 2009, ¶ 84; *Villagran Morales et al v. Guatemala*, Inter-American Court of Human Rights, Series C, No. 77, Judgment of 26 May 2001, ¶ 84.

[712] S. Ripinsky, K. Williams, Damages in International Investment Law, British Institute of International and Comparative Law, 2008, p. 30, Exh. R-220.

[713] *CMS v. Argentina*, Award of 12 May 2005, ¶ 399, footnote omitted.

[714] RDJ, ¶ 45, citing CDJ, ¶ 82.

[715] *See, e.g. Northern Cameroons Case*, Cameroon v. United Kingdom, Judgment of 2 December 1963, p. 37 ("That the Court may, in an appropriate case, make a declaratory judgment is indisputable"); *Case Concerning Certain German Interests in Polish Upper Silesia*, Germany v. Poland, PCIJ (Merits) 1926, p. 19 ("[T]here is nothing to prevent the Court's giving judgment on the question whether or not […] Poland is acting in conformity with its obligations towards Germany under the Geneva Convention"); *Haya de la Torre Case*, Colombia v. Peru, Judgment of 13 June 1951, p. 16; *Asylum Case*, Colombia v. Peru, Judgment of 20 November 1950, p. 18, 26 (where the Court stated that making a declaration with respect to an alleged breach of the Havana Convention was part of the Court's judicial duty to resolve the existing legal dispute between the Parties).

> a declaration may be a preliminary to a decision on any form of reparation, or it may be the only remedy sought.[716]

561. The Tribunal agrees with the Respondent that such a declaration could not be punitive in nature. The Tribunal's mandate is to resolve the dispute before it, not to punish the Parties. That said, as part of the process of settling the dispute, a declaration can be conceived in a manner that is not punitive.

562. With this legal framework in mind, the Tribunal will now address the Parties' arguments on the merits of the Claimants' request.

iv. Has the Respondent's conduct breached its international obligations?

563. The Claimants contend that the Respondent has breached essentially three categories of international obligations: (a) its substantive obligations under Articles III and IV of the BIT; (b) certain obligations under the ICSID Convention, and (c) its duty to arbitrate in good faith. The Tribunal will address each category separately.

(a) Has the Respondent's conduct breached its substantive obligations under the BIT?

564. The Claimants allege that, by engaging in post-expropriation acts of harassment (in particular, the initiation of the criminal case in Bolivia), the Respondent has breached its obligations to accord fair and equitable treatment to their investments and not to impair those investments through arbitrary and discriminatory measures (Articles IV and III of the BIT, respectively).

565. As described in Section VI.B above, the Claimants contend that, from the moment on which they filed their request for arbitration, the Respondent initiated a harassment strategy (which they describe as an "orchestrated campaign"[717]) to avoid international liability under the BIT and force the Claimants to give up their claim. This harassment strategy is evidenced by Bolivia's initiation of corporate audits against NMM and the criminal case against Allan Fosk, David Moscoso and other persons related to Quiborax and NMM's operation in Bolivia, as well by the 2004 Inter-Ministerial Memo in which Bolivia sets out its defense strategy with respect to the ICSID arbitration. Indeed, according to the Claimants, in its Decision on Provisional Measures the

[716] Commentary to the ILC Articles, Article 37, ¶ 6.

[717] Reply, ¶ 519.

Tribunal accepted that the criminal case was part of Bolivia's defense strategy with respect to this arbitration.[718]

566. The Claimants submit that Bolivia's conduct amounts to a violation of its obligations to accord fair and equitable treatment to their investments and not to impair those investments through arbitrary and discriminatory measures. Citing *Vivendi II*, the Claimants contend that measures aimed at frustrating investors' rights and punishing investors for exercising their right to arbitrate amounts to unfair and inequitable treatment.[719] Indeed, they submit that such measures are arbitrary by definition, as they lack any foundation in law.

567. The Claimants deny that their procedural complaints have been dealt with in the Tribunal's Decision on Provisional Measures. Although the Tribunal ordered Bolivia to suspend the criminal case for the duration of the arbitration in order to ensure its integrity, this does not render the Claimants' substantive complaints moot under the FET and the arbitrary or discriminatory measures standards. Likewise, the fact that the criminal case has not substantially affected the Claimants' rights in the arbitration does not disprove that the purpose of that case was to deny the Claimants their condition of foreign investors under the BIT.[720]

568. The Respondent denies that its conduct breaches its obligation of fair and equitable treatment. It contends that, because the alleged acts of harassment ceased once the mining concessions were revoked, they could not affect the Claimants' investment, arguing that the Tribunal concluded as much in its Decision on Provisional Measures.[721] It also argues that the claim is based on an unreal and confusing reconstruction of the facts regarding the tax authorities' actions and the criminal proceedings ongoing in Bolivia. Finally, the Respondent submits that the claim is moot, because the criminal proceedings followed up on allegations of forgery related to Quiborax's and Allan Fosk's status as shareholders in NMM and as investors under the BIT, a matter which has already been dealt with in the Tribunal's Decision on Jurisdiction.

569. In its Decision on Provisional Measures, the Tribunal did indeed find that "[s]een jointly with the 2004 Memo, the corporate audit and the criminal proceedings

[718] Reply, ¶¶ 521-523.

[719] Reply, ¶ 524, citing *Vivendi v. Argentina II*, Award of 20 August 2007, ¶ 7.4.45.

[720] Reply, ¶¶ 516-518.

[721] Decision on Provisional Measures, ¶ 138.

appear[ed] to be part of a defense strategy adopted by Bolivia with respect to the ICSID arbitration."[722] However, the Tribunal also found that whether such defense strategy amounted to harassment was unclear.[723] The Tribunal also found that, while it exacerbated the climate of hostility in which the dispute was unfolding, the initiation of the criminal case did not aggravate the dispute.[724] To reach that conclusion, the Tribunal took into account the fact that after the revocation of the mining concessions, the Claimants had no more activities or presence in Bolivia, and that Allan Fosk (the only Claimant implicated in the criminal proceedings) did not live in Bolivia. Under those circumstances, the Tribunal rejected the Claimants' contentions that the criminal proceedings placed "intolerable pressure" on them to drop their claims.[725]

570. The Claimants have not provided convincing evidence to alter these conclusions. The Tribunal is aware that Bolivia has not suspended the criminal proceedings and that it has taken various procedural steps in the context of those proceedings that involve Mr. Fosk, Mr. Moscoso, and other persons related to the Claimants.[726] While it acknowledges that those steps exacerbate the climate of hostility in which this arbitration has developed, the Tribunal is not persuaded that the criminal case or corporate audits initiated by the Respondent against the Claimants after the expropriation of their investments amount to a breach of fair and equitable treatment or to an impairment of their investments. This conclusion is reinforced by the fact that the Tribunal has declined jurisdiction over Allan Fosk.

571. In its Decision on Provisional Measures, the Tribunal stressed that "Bolivia has the sovereign power to prosecute conduct that may constitute a crime on its own territory, if it has sufficient elements justifying prosecution," as well as "the power to investigate whether Claimants have made their investments in Bolivia in accordance with Bolivian law and to present evidence in that respect," while emphasizing that "such powers must be exercised in good faith and respecting Claimants' rights, including their *prima facie* right to pursue this arbitration."[727] Although in its Decision on Jurisdiction, the Tribunal rejected the allegations of forgery that underlie the criminal proceedings initiated against Allan Fosk and others, it confirmed that certain discrepancies did

[722] Decision on Provisional Measures, ¶ 122.

[723] Decision on Provisional Measures, ¶ 123.

[724] Decision on Provisional Measures, ¶ 138.

[725] Decision on Provisional Measures, ¶ 138.

[726] *See* ¶¶ 64 and 66 above.

[727] Decision on Provisional Measures, ¶ 123.

indeed exist in NMM's corporate records.[728] Whether these discrepancies were sufficient to justify prosecution in Bolivia is not for the Tribunal to determine. However, they confirm the Tribunal's conclusion that Bolivia did not act unfairly and inequitably when it initiated the criminal proceedings or the corporate audits.

572. Accordingly, the Tribunal finds that the Claimants have not shown conduct amounting to a breach of Articles III or IV of the BIT resulting from an alleged harassment strategy following the Claimants' filing of their Request for Arbitration.

(b) Has the Respondent breached its obligations under the ICSID Convention?

573. The Claimants also allege that, through its procedural conduct in this arbitration (including through the initiation and continuation of the criminal case), the Respondent has breached obligations established by the ICSID Convention and has been disrespectful towards the Tribunal, the Centre and the ICSID system as a whole.[729] Specifically, the Claimants contend that:

a. By refusing to comply with the Tribunal's Decision on Provisional Measures, the Respondent breached Article 47 of the ICSID Convention.[730] Contrary to the Respondent's contentions, that Decision is not a mere "recommendation" but is binding on the Respondent.

b. By challenging the entire Tribunal for alleged prejudgment of the case following that decision, the Respondent has been disrespectful to the Tribunal and the ICSID system.

c. By failing to pay its share of the advance costs of the arbitration, it has violated Article 61 and Regulation 14 of the Administrative and Financial Regulations.

574. The Respondent denies contentions (a) and (c). Specifically, it argues that:

---

[728] Decision on Jurisdiction, ¶ 192 ("On the basis of its review of the entire record, the Tribunal finds that the Claimants' account of facts is consistent and well-documented. Whilst there are some documentary discrepancies – primarily the NMM's and Río Grande's balance sheets of 2001 and 2003, respectively, and the 11 September 2001 minutes –, these do not prove fraud nor suffice to overcome the plentiful evidence in support of the Claimants' case. For these reasons, the Tribunal is persuaded that Quiborax acquired and Allan Fosk received, respectively, 13,636 shares (50.995%) and 1 share (0.005%) of NMM in August and September of 2001, and that they did not engage in fraud or fabricate evidence to gain access to ICSID arbitration.")

[729] Reply, ¶¶ 533-534; 535(iii).

[730] Reply, ¶¶ 526, 535(i).

a. Non-compliance with the Tribunal's recommendation of provisional measures is not in breach of Article 47 of the ICSID Convention.[731] Citing the *travaux préparatoires* of the ICSID Convention and legal authority, the Respondent argues that provisional measures granted under the ICSID Convention are not binding and that there is no sanction for their non-compliance. The ICSID tribunals cited by the Claimants erred in adopting, without an independent analysis, the holding of *LaGrand* in relation to the binding nature of decisions on provisional measures by the ICJ.

b. Bolivia's non-payment of part of the advance on costs does not violate the ICSID Convention or Administrative and Financial Regulations, nor Bolivia's duty of good faith. Neither Article 61 of the ICSID Convention nor Article 14(3)(d) of the Administrative and Financial Regulations establish an obligation on the parties to an arbitration to pay the advance on costs. In any event, Bolivia did not breach its duty to arbitrate fairly and in good faith by merely not paying advances on costs.

575. The Tribunal will first address the Claimants' contention that the Respondent has breached Article 47 of the ICSID Convention (1). It will then turn to their allegation that the Respondent has breached the ICSID Convention by failing to pay advances on costs (2). As to the Claimants' allegation that, by challenging the entire Tribunal following the Decision on Provisional Measures, the Respondent has been disrespectful to the Tribunal and the ICSID system, the Claimants do not invoke the breach of a particular obligation under the ICSID Convention. The Tribunal understands this to be another alleged breach of the duty to arbitrate in good faith and will thus address it in the appropriate section.

(1) Did the Respondent breach Article 47 of the ICSID Convention?

576. The Claimants contend that, by failing to comply with the Decision on Provisional Measures, the Respondent has breached Article 47 of the ICSID Convention. It is undisputed that the Respondent did not comply with these provisional measures.[732]

[731] The Respondent has also argued that Bolivian law prevents it from suspending the criminal proceedings, as recommended by the Tribunal. *See, e.g.,* Bolivia's letters of 2 June 2014 and 12 June 2015.

[732] According to the Decision on Provisional Measures, the Respondent was to "take all appropriate measures to suspend the criminal proceedings identified as Case Nº 9394/08 […] and any other criminal proceedings directly related to the present arbitration, until this arbitration is completed or until reconsideration of this decision, whether at the request of a Party or of the Tribunal's own motion," and to "refrain from initiating any other criminal proceedings directly related to the present arbitration, or engaging in any other course of action which may jeopardize the procedural integrity of this

The question which thus arises is whether Article 47 of the ICSID Convention imposes upon the Respondent the obligation to comply with the provisional measures.

577. Article 47 of the ICSID Convention provides:

> Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

578. It is true that the ordinary meaning[733] of this provision, especially the terms "recommend"[734] and "should be taken" do not convey the notion of a binding order. The same can be said for the context; other provisions of the ICSID Convention use different language when referring to binding obligations.[735] Similarly, the *travaux préparatoires* of the ICSID Convention, to the extent relevant as supplementary means of interpretation,[736] show that an earlier draft using the word "prescribe" was then changed to "recommend." [737]

579. Despite this, ICSID tribunals have consistently found that they have the power to make binding orders for provisional measures.[738] The rationale is that these decisions derive their mandatory force from the function of provisional remedies, which is to

---

arbitration." (Decision on Provisional Measures, Section V). It is undisputed that the Respondent did not suspend the criminal proceedings identified as Case Nº 9394/08.

[733] In accordance with the rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties ("VCLT"), this provision must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Article 31(1) of the VCLT).

[734] Article 39(1) of the ICSID Arbitration Rules establishes the specific procedures for provisional measures. It also uses the term "recommend."

[735] For instance, Articles 53 and 54 of the ICSID Convention use the term "shall" in relation to awards.

[736] *See* Article 32 of the VCLT.

[737] History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume II, Part 2, Documents 44-146 (1969), SID/LC/SR/16 (30 Dec. 1964), Summary Proceedings of the Legal Committee Meeting, 8 December 1964, pp. 812-815.

[738] *See*, e.g, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 of 28 October 1999, ¶ 9; *Pey Casado v. Chile*, Decision on Provisional Measures of 25 September 2001, ¶¶ 17-25; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No 1 of 1 July 2003, ¶ 4; *Occidental v. Ecuador II*, Decision on Provisional Measures of 17 August 2007, ¶ 58; *City Oriente v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures of 19 November 2007, ¶¶ 51-53; *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures of 8 May 2009, ¶¶ 67-70; *Millicom International Operations B.V. and Sentel GSM S.A. v. Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on the Application of Provisional Measures of 9 December 2009, ¶ 49; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Claimant Request for Provisional Measures of 13 December 2012, ¶ 120.

secure the applicant's rights while the proceedings are pending. To use the words of the ICJ in *LaGrand*, "the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court."[739] While the wording and the context of Article 41 of the ICJ Statute are not strictly identical to those of the ICSID Convention ("indicate" instead of "recommend"),[740] the function of the measures is the same.

580. The European Court of Human Rights (the "ECtHR") justifies the binding force of its provisional measures on the same principles. For instance, in *Mamatkulov*, it stressed that interim measures ordered in accordance with Article 39 of the Rules of the ECtHR:

> […] play a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted. Accordingly, in these conditions a failure by a respondent State to comply with interim measures will undermine the effectiveness of the right of individual application guaranteed by Article 34 and the State's formal undertaking in Article 1 to protect the rights and freedoms set forth in the Convention.[741]

581. Essentially the same reasoning was adopted by the *City Oriente* tribunal, which noted that

> […] a teleological interpretation of [Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules] leads to the conclusion that the provisional measures recommended are necessarily binding. The Tribunal may only order such measures if their adoption is necessary to preserve the rights of the parties and guarantee that the award will fulfill its purpose of providing effective judicial protection. Such goals may only be reached if the measures are binding, and they share the exact same binding nature as the final arbitral award. Therefore, it is the Tribunal's conclusion that the word "recommend" is equal in value to the word "order."[742]

582. In light of these reasons, the Tribunal will follow this consistent line of cases and the evolution of international law evidenced in ICJ and ECtHR jurisprudence. It thus holds that the operative part of the Decision on Provisional Measures was binding

---

[739] *LaGrand*, Germany v. United States of America, ICJ Rep. 466, Judgment of 27 June 2001, ¶ 102.

[740] Article 41.1 of the ICJ Statute provides that "[t]he Court shall have the power to indicate […] any provisional measures," while Article 94.1 of the UN Charter expressly refers to the binding force of the decisions of the Court, just as does Article 53 of the ICSID Convention.

[741] *Mamatkulov and Askarov. v. Turkey*, Applications Nos. 46827/99 and 46951/99, ECHR, Judgment of 4 February 2005, ¶ 125, emphases added.

[742] *City Oriente v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures of 19 November 2007, ¶ 52.

upon the Respondent and was not merely an optional recommendation. It therefore concludes that, by failing to comply with those provisional measures, the Respondent has breached Article 47 of the ICSID Convention.

583. That being said, given the text of Article 47 and the relatively recent evolution of international law with respect to its interpretation, the Tribunal does not find that the Respondent's failure to comply with the Decision on Provisional Measures amounts to a breach of its duty to arbitrate in good faith. Bolivia may not have been aware of the binding nature of these provisional measures when it failed to comply with them. In addition, as discussed further below, the Tribunal finds that the underlying right that these measures sought to protect – the right to the procedural integrity of the arbitration proceedings – was ultimately not impaired. As a result, although the Respondent breached Article 47 by failing to comply with the provisional measures, under the facts of this case this breach did not entail a violation of the duty to arbitrate in good faith.[743]

(2) Did the Respondent breach Article 61 of the ICSID Convention and Article 14 of the Administrative and Financial Regulations?

584. The Claimants contend that Bolivia has breached Article 61 of the ICSID Convention and Article 14 of the Administrative and Financial Regulations by failing to pay its advances on costs.

585. Article 61 of the ICSID Convention only speaks of advances in the context of conciliation proceedings. It is silent about advances in arbitration. By contrast, Article 14 of the Administrative and Financial Regulations provides that the parties "shall make advance payments" to the Centre in equal shares.[744] That wording indeed expresses an obligation to make advance payments.

586. It is undisputed that the Respondent has failed to make the major part of the advance payments called by the Centre.[745] That said, such failure can be adequately remedied by an award of costs and a declaratory judgment is not necessary to resolve the dispute in this respect. The Tribunal therefore dismisses the request for a

[743] The Tribunal sees no contradiction in so holding. Because provisional measures issued under Article 47 are binding *per se*, a failure to comply with them will automatically entail a breach of Article 47. This does not necessarily give rise to a breach of the underlying right that the measures seek to preserve; whether those rights are harmed will depend on the facts of the case.

[744] Article 14 (3)(a) and (d).

[745] *See* Section VIII (Costs) below.

declaratory judgment relating to the advance payments and will take the failure into account in allocating the costs of the proceedings.

(c) Has the Respondent breached its duty to arbitrate in good faith?

587. Finally, the Claimants allege that the Respondent has breached a series of duties, which can all be understood to be a part of the duty to arbitrate in good faith. Specifically, the Claimants allege that:

a. The Respondent's failure to comply with the Decision on Provisional Measures not only breaches Article 47 of the ICSID Convention, but also "the underlying principle that parties shall refrain from any action that harms the integrity of the proceeding."[746] Indeed, the Claimants assert that the Tribunal held that the criminal case *ipso facto* harmed the integrity of the arbitration.

b. The Respondent's failure to suspend the criminal case constitutes a breach of its duty to refrain from aggravating the dispute.[747]

c. The Respondent has used the criminal case to its own advantage in this arbitration. Specifically, the Claimants allege that Bolivia has questioned the authenticity, veracity and correctness of NMM's corporate documents, while at the same time ensuring that the persons who prepared those documents (in particular Claimants' former counsel, Fernando Rojas) would not be available to testify at the hearing. They also allege that Bolivia has submitted "evidence" obtained in the criminal case to support its false accusations of fraud in this arbitration, notably David Moscoso's forced "confession." For the Claimants, this constitutes a breach of the principle *nemo auditur propriam turpitudinem allegans*.[748]

d. The Respondent has falsely accused the Claimants and persons associated with them of fraud and corruption, with no regard for the consequences of those accusations for those involved. Despite the fact that, in its Decision on Jurisdiction, the Tribunal found that the Claimants had not engaged in fraud or fabricated evidence to gain access to ICSID arbitration,[749] the Respondent continues to make unsubstantiated allegations of corruption and fraud in its

[746] Claimants' Request for Declaratory Judgment, ¶ 24.

[747] Claimants' Request for Declaratory Judgment, ¶ 24

[748] Reply, ¶¶ 527-529; 535(ii).

[749] Reply ¶ 531, citing Decision on Jurisdiction, ¶ 192.

Counter-Memorial. This time, the Respondent accuses Mr. Moscoso of having abused public office and bribed Bolivian senators to obtain RIGSSA's mining concessions, without submitting any evidence of these accusations and ensuring that Mr. Moscoso would not be able to testify.

e. The Respondent has advanced incompatible factual accounts intended to deny the Claimants' access to arbitration (in particular, by accusing the Claimants of fabricating their condition of shareholders after the expropriation, while at the same time accusing them of concealing their condition of shareholders before the expropriation). The Claimants argue that through the conduct described in (d) and (e), the Respondent has breached its duty to arbitrate fairly and in good faith.[750]

f. By challenging the entire Tribunal for alleged prejudgment of the case following the Decision on Provisional Measures (challenge that was rejected by the President of the World Bank), the Respondent has been disrespectful to the Tribunal and the ICSID system.

588. The Respondent denies the Claimants' allegations. Specifically, it argues that:

a. The continuation of the criminal proceedings in Bolivia does not harm *ipso facto* the integrity of the arbitration proceedings. In its Decision on Provisional Measures, the Tribunal only found that "Claimants have shown *the existence of a threat* to the procedural integrity of the ICSID proceedings, in particular with respect to their right to access to evidence through potential witnesses,"[751] it did not find that such threat had materialized. Indeed, the Claimants have failed to demonstrate that, on the facts, the criminal proceedings have prevented the Claimants from accessing potential witnesses or were unlawfully used by Bolivia to produce evidence for this arbitration. In particular, the Claimants have not proved that Mr. Fernando Rojas (Claimants' former counsel in Bolivia) was unavailable as a witness, nor have they explained what he would have testified about. The Claimants' assertion that the Ugalde brothers were unwilling to testify is irrelevant, as they are not part of the criminal case. As to Mr. Moscoso, the Respondent claims that the Claimants do not appear to consider his testimony relevant.

[750] Reply, ¶¶ 530-532; 535(iv).

[751] Decision on Provisional Measures, ¶ 148 (emphasis added).

b. Nor does the continuation of the criminal proceedings aggravate the dispute. Indeed, in its Decision on Provisional Measures, the Tribunal found that the criminal case did not aggravate the dispute nor change its *status quo*.[752]

c. The Claimants have failed to demonstrate that the criminal proceedings in Bolivia were unlawfully used by Bolivia to produce evidence for this arbitration. This allegation refers to three documents (specifically, Mr. Moscoso's *Declaración Jurada* (R-22) admitting that the minutes of NMM shareholders' meeting of 13 September 2001 were fabricated; the *Informe Documentológico* (R-146) showing that NMM's practice was to glue typed board and shareholders' meeting minutes over the book's pages where the minutes should have been handwritten, and a certification by the Bolivian *Registro de Comercio* showing, inter alia, that Quiborax was never registered in Bolivia (R-123). These documents were not obtained for the only purpose of being used in this arbitration. In any event, the fact that Bolivia obtained documents in domestic criminal proceedings that are relevant to the arbitration cannot, in and of itself, constitute a "wrongful act" or a violation of Bolivia's duty to arbitrate in good faith. The Claimants had an opportunity to contest this evidence, the Tribunal remains free to assess its probative value, and Bolivian officers would have risked personal liability if they had disregarded evidence arising during the criminal proceedings that could be relevant to dismiss the Tribunal's jurisdiction.

d. The Claimants have not proved that by pursuing the criminal proceedings Bolivia has violated its duty to arbitrate in good faith. That allegation "is absurd and an insult to Bolivia [;], [a]s any other country, Bolivia not only has a right, but a duty to investigate and prosecute serious crimes committed within its territory."[753]

e. The Claimants have failed to demonstrate that Bolivia's jurisdictional objections amount to bad faith conduct in breach of Bolivia's duty of good faith. Bolivia's arguments on jurisdiction are not contradictory, but consistent.

589. The Claimants' allegations refer to different facets of the duty to arbitrate in good faith. The existence of such a duty is undeniable. It arises out of Article 26 of the VCLT in connection with Article X of the BIT. Article 26 of the VCLT provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." As stated by the ICJ in the *Nuclear Tests* case, "[o]ne of the basic

[752] Decision on Provisional Measures, ¶ 138.

[753] RDJ, ¶¶ 117-118.

principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. […] the very rule of *pacta sunt servanda* in the law of treaties is based on good faith […]."[754]

590. In turn, Article X of the BIT contains the Contracting State's agreement with respect to the settlement of investor-state disputes, including the agreement to arbitrate under the ICSID Convention, to which an investor adheres by initiating arbitration proceedings.[755] This commitment to arbitrate must be complied with in good faith in accordance with Article 26 of the VCLT. In other words, the Parties must arbitrate in good faith.

591. The existence of the duty to arbitrate in good faith is recognized by international tribunals. For instance, the *Methanex* tribunal stressed that "the Disputing Parties each owed in this arbitration a *general legal duty* to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings."[756] Similarly, the *Libananco* tribunal held that "parties have an obligation to arbitrate fairly and in good faith; […] this principle applies in all arbitration, including investment arbitration, and to all parties, including States (even in the exercise of their sovereign powers)."[757]

592. The principle of good faith involves the duty not to perform any act that would defeat the object and purpose of the obligation that has been undertaken by the parties, even if the act itself is not expressly prohibited by the provisions of the treaty.[758] As emphasized by the ICJ in *Gabcikovo-Nagymaros*, "[t]he principle of good faith obliges the parties to apply [the obligation] in a reasonable way and in such a manner that its purpose can be realized."[759]

593. The Respondent's obligation to arbitrate provided by Article X of the BIT thus implies the duty not to act in a manner that will undermine or frustrate the arbitral process.

---

[754] *Nuclear Tests*, New Zealand v. France, ICJ Rep. 457, Judgment of 20 December 1974, ¶ 49.

[755] In its Decision on Jurisdiction, the Tribunal already determined that the Parties validly consented to arbitrate in accordance with the rules of the ICSID Convention, Respondent's consent being provided through Article X of the BIT (*see* Decision on Jurisdiction, ¶¶ 255, 309).

[756] *Methanex Corporation v. United States of America*, UNCITRAL Tribunal under NAFTA Chapter XXI, Final Award of 3 August 2005, Part II – Chapter I, ¶ 54, emphasis added.

[757] *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues of 23 June 2008, ¶ 78.

[758] Oliver Dorr, Kristen Schmalenbach (eds.), Vienna Convention on the Law of Treaties: A Commentary, Springer 2012, p. 446.

[759] *Gabcikovo-Nagymaros Project*, Hungary v. Slovakia, ICJ Rep. 7, Judgment of 25 September 1997, ¶ 149, emphasis added.

This includes, for instance, the duty to refrain from harming the procedural integrity of the arbitration or aggravating the dispute. Thus, actions directed against the efficient conduct of the arbitral proceedings may breach this duty even if such action is not prohibited by the express terms of the BIT or the ICSID Convention.

594. Under the circumstances, the Tribunal is not convinced that it should issue a declaration of breach of the duty to arbitrate in good faith. First, the Tribunal does not find that the Respondent breached its duty to arbitrate in good faith by initiating or failing to suspend the criminal proceedings. As the Tribunal has emphasized on several occasions, Bolivia has the sovereign prerogative to prosecute crimes on its territory, and such prerogative is not barred by the BIT or ICSID Convention. Given the existence of discrepancies in NMM's corporate records, the Tribunal cannot conclude that Bolivia's sole purpose in initiating the criminal proceedings was to frustrate the Claimants' rights in this arbitration. More importantly, the criminal proceedings did not cause actual harm to the Claimants' procedural rights. In the Decision on Provisional Measures, the Tribunal found that the criminal case had not aggravated the dispute or changed the *status quo*.[760] The Tribunal confirms this conclusion: while the criminal proceedings have undoubtedly increased the climate of hostility in which this arbitration unfolded, they have not rendered the solution to the dispute more difficult.[761] It is true that, in that Decision, the Tribunal found "the existence of a threat to the procedural integrity of the ICSID proceedings, in particular with respect to their right to access to evidence through potential witnesses."[762] It has not been shown, however, that this threat materialized. In spite of the fact that the Claimants could not call Messrs. Moscoso and Rojas as witnesses, they have presented evidence (including other witnesses) and have had the opportunity to rebut the evidence produced by the Respondent. In other words, the Claimants have had ample opportunity for their "claims and requests for relief in the arbitration [to be] fairly considered and decided by the arbitral tribunal."[763] The Claimants themselves seem to recognize this, as they acknowledge that "the criminal case has not substantially affected the Claimants' rights in the arbitration […]."[764]

---

[760] Decision on Provisional Measures, ¶ 138.

[761] *Amco Asia v. Indonesia*, Decision on request for provisional measures of 9 December 1983, ICSID Reports, 1993, p. 412.

[762] Decision on Provisional Measures, ¶ 148. The Tribunal did not hold that the continuation of the criminal case *ipso facto* harmed the integrity of the arbitration proceedings, as the Claimants have contended. It merely recognized the existence of a threat to such integrity.

[763] *Plama v. Bulgaria*, Order of 6 September 2005, ¶ 40.

[764] Reply, ¶ 518.

595. Similarly, the Tribunal does not find that the Respondent has breached the duty of good faith through its procedural conduct in this arbitration. It is the Respondent's right to submit the factual allegations and legal arguments of its choice, and it is the Tribunal's duty to accept or reject them on their merits. More particularly, the Tribunal has found the Respondent's allegations of fraud and corruption to be baseless, and has so stated in its Decision on Jurisdiction and in this Award. It regards this as sufficient relief for the Claimants. Similar considerations apply to the Respondent's right to challenge the members of the Tribunal. A party can exercise this right if it deems it justified under Article 14(1) of the Convention,[765] as long as it does not do so for sole purpose of frustrating the arbitral process. The Tribunal finds no indication in the record that this was the case.

596. For the foregoing reasons, the Tribunal does not grant the Claimants' request for a declaratory judgment.

3. Moral damages

597. The Tribunal now turns to the Claimants' request for moral damages. It will first address the Respondent's jurisdictional objections with respect to this request (a), before turning to its merits (b).

a. Objections to jurisdiction

598. In its Rejoinder and during its closing arguments at the hearing on the merits, the Respondent argued that the Tribunal lacks jurisdiction to rule on the Claimants' requests for moral damages.[766] As in the case of a declaratory judgment, Bolivia submits that "the Tribunal is only competent to decide claims arising ***directly*** from an investment and not claims based on the actions of Bolivia's judicial branches, its procedural behavior or the alleged harassment the Claimants claim they are victims of."[767]

599. The Tribunal notes that the Claimants' request for moral damages was made in its Memorial of 14 September 2009. During the phase of this arbitration which dealt with the Respondent's jurisdictional objections, Bolivia filed Objections to Jurisdiction and

[765] Article 57 of the ICSID Convention provides that "[a] party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14."

[766] Rejoinder, ¶ 123; Tr., Day 3, 93:3-16.

[767] Rejoinder, ¶ 125 (emphasis in the original).

a Reply on Jurisdiction (dated 30 July 2010 and 13 January 2011, respectively). Neither of those briefs argued that the Tribunal lacked jurisdiction regarding the request for moral damages, nor was this raised at the hearing on jurisdiction.

600. As a result, the Tribunal finds that the Respondent's new jurisdictional objections are extemporaneous and therefore denies them. This being so, had the Tribunal not held the objections to be extemporaneous, it would have denied them for the reasons set out below.

b. Merits

i. The Claimants' position

601. The Claimants allege that Quiborax has suffered a loss of credit and reputation resulting from the criminal prosecutions initiated in Bolivia against Alan Fosk, David Moscoso and persons related to NMM, as well as harm to their procedural rights before this Tribunal, as they have lost important witnesses for their case due to the criminal prosecution and intimidation carried out by Bolivia. In reparation, they claim an amount of US$ 4 million.[768]

602. The Claimants argue that they are entitled to damages because they have suffered moral harm "due to the criminal prosecution to which they have been submitted in Bolivia."[769] They claim that "[t]he purpose of the Claimants' request for moral damages is to, as far as possible, wipe out the non-material consequences of Bolivia's wrongful acts."[770] Contrary to the Respondent's contentions, the purpose is not to punish Bolivia.

603. According to the Claimants, it is a general principle of international law that States are under the obligation to make full reparation for the injury caused by an internationally wrongful act, including any damage, whether material or moral resulting from the wrongful act (Art. 31 of the ILC Articles on State Responsibility). The principle that reparation for wrongful acts includes moral damages is also widely recognized by

[768] Reply, Section IX(6). In the Memorial, the Claimants had requested US$ 5 million (*see* Mem., ¶ 275 and Section X(9).

[769] Mem., ¶ 266.

[770] Reply, ¶ 487.

national legal systems.[771] In the realm of international law, it was recognized in the *Lusitania* case and is equally established in investment case law.[772]

604. The Claimants submit that "[i]t is also clear that legal entities may suffer non-pecuniary damages."[773] In support of this assertion, they rely on the International Law Commission,[774] the European Court of Human Rights[775] and ICSID tribunals.[776]

605. Citing international investment awards,[777] the Claimants argue that the standard for awarding moral damages is a matter for the Tribunal's discretion. As a consequence, they challenge Bolivia's contention that the *Lemire v. Ukraine* three-prong test should apply,[778] requiring that (i) the State's actions amount to ill-treatment contravening the norms according to which civilized nations are expected to act; (ii) the State's actions cause loss of reputation, and (iii) both cause and effect are grave and substantial.

606. Nonetheless, if the Tribunal were to find that this test is indeed applicable, the Claimants are confident that their case meets these requirements:

a. "It is not accepted among civilized nations that Bolivia should have been willing to sacrifice Quiborax's reputation in order to avoid its international responsibility for its wrongful acts."[779]

b. Quiborax has suffered a loss of reputation, caused by Bolivia's wrongful acts. It has been discredited[780] and "will never again be able to set up business in

---

[771] Dinah Shelton, Remedies in International Human Rights Law, OUP (2005), p. 37, Exh. CL-29.

[772] *Lusitania (US v. Germany*), 1 November 1923, 7 UNRIAA p. 36, Exh. CL-19; *Benvenuti & Bonfant v. Congo*, ICSID Case No. ARB/77/2, Award of 8 August 1980, ¶ 4.96, Exh. CL-4; *Aucoven v. Venezuel*a, Award of 6 February 2008, ¶ 289.

[773] Mem., ¶ 269.

[774] James Crawford, The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries, Cambridge University Press (2002), Comment on Article 36(4), Exh. CL-23.

[775] *Comingersoll S.A. v. Portugal*, ECHR, Judgment of 6 April 2000 (Grand Chamber), ¶ 35, Exh. CL-9; *Freedom and Democracy Party (ÖZDEP) v. Turkey*, ECHR, Judgment of 8 December 1999 (Grand Chamber), ¶ 57, Exh. CL-10.

[776] Sergey Ripinsky, Damages in International Investment Law (2008), p. 310, referring to *Tecmed v. Mexico*, Award of 29 May 2003, ¶ 198, Exh. CL-27; *Yury Bogdanov v. Republic of Moldova,* SCC Arbitration No. V (114/2009), Award of 22 September 2005, Exh. CL-17.

[777] *The Rompetrol Group 548 N. V. v. Romania*, ICSID Case No. ARB/06/3 ("*Rompetrol v. Romania*"), Award of 6 May 2013, ¶ 289, Exh. R- 354; *Mr. Franck Charles Arif v. Republic of Moldova*, ICISD Case No. ARB/11/23 ("*Arif v. Moldova*"), Award of 8 April 2013, ¶ 591.

[778] *Lemire v. Ukraine*, Award of 28 March 2011, ¶ 333, Exh. R-350.

[779] Reply, ¶ 506.

[780] Reply, ¶ 498.

Bolivia due to the public accusations of fraud and corruption by the Respondent against the company." [781] They also insist on the causal relationship between Bolivia's unlawful conduct and the injury, as Quiborax's reputation in Bolivia would be intact but-for the Respondent's actions.[782]

c. The Claimants also argue that "[f]or Quiborax to be effectively excluded from its neighbouring country carries substantial financial costs" and the deprivation of important competitive advantages.[783]

607. As for the amount of US$ 4 million claimed, the Claimants submit that given that reputational damage "is very difficult to calculate […] [and] given the uncertainties [,] a conservative figure is appropriate."[784] They further claim that this sum "will assist in placing Quiborax in a position to receive redress for the international wrong. Moral damages are the only way to achieve this."[785]

ii. The Respondent's position

608. The Respondent denies that the Claimants suffered moral damages, and submits that in any case the sum claimed is disproportionate. According to the Respondent, "the Claimants' 'moral damages' claim is in reality a claim for punitive damages in disguise,"[786] seeking to impose on Bolivia an exemplary punishment.[787] In the Respondent's view, this type of claim is inadmissible in international law and must thus be dismissed.

609. Even if this Tribunal were to find that the claim for moral damages does not pursue a punitive objective, the Respondent claims that Quiborax does not have the right to receive compensation because none of the conditions set out by international case law are met. Citing *Lemire v. Ukraine*, the Respondent argues that moral damages can only be awarded in exceptional cases, when

> the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act; the State's actions

[781] Reply, ¶ 498.

[782] Reply, ¶ 502.

[783] Reply, ¶ 499.

[784] Reply, ¶¶ 510-511.

[785] Reply, ¶ 512.

[786] Counter-Mem., ¶ 415, Tribunal's translation.

[787] Counter-Mem., ¶ 415.

> cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and both cause and effect are grave or substantial.[788]

610. Consequently, so says the Respondent, the Claimants must prove that (i) the State has committed an unlawful act; (ii) the act must have caused damage; and (iii) both the act and the damage must be particularly serious.[789] For the Respondent, these three conditions, which must be met cumulatively, have been constantly confirmed by international tribunals.[790]

611. More specifically, the Respondent contends that:

a. Bolivia has not acted unlawfully.

b. Quiborax has not proven that it suffered moral damages. According to Bolivia, investment case law shows that tribunals have been very strict in demanding compelling evidence and numerous tribunals have dismissed requests for moral damages for lack of proof.

c. Quiborax has failed to show a causal link between Bolivia's allegedly unlawful acts and the alleged damage. Indeed, there is no evidence that "permits verification of economic losses, loss of credit or of clients."[791] Moreover, "the Claimants should show that said moral damage is not attributable to its own conduct."[792]

d. Neither the alleged acts nor their consequences are of a particularly grave nature. There are only two international investment cases in which moral damages were granted: *Benvenuti* and *Desert Line.* The former was decided *ex aequo et bono*, and thus has limited precedential value. The latter presented truly extreme circumstances, in which human lives were put at risk, and therefore cannot be compared to the case at hand.

612. Moreover, even if *par impossible* the Tribunal would consider that there was an unlawful international act and moral damages are due, the Respondent contends that

---

[788] *Lemire v. Ukraine*, Award of 28 March 2011, ¶ 333, Exh. R-350.

[789] Counter-Mem., ¶ 419.

[790] *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award of 7 July 2011, ¶ 282, Exh. R-351.

[791] Rejoinder, ¶ 141.

[792] Counter-Mem., ¶ 432, Tribunal's translation.

monetary compensation is not an available remedy, because "this type of damage, by definition, is not financially assessable."[793]

613. In any case, the Respondent argues that the amount claimed "is exaggerated and groundless"[794] and that the facts leading to an award of US$ 1 million in moral damages in *Desert Line* cannot be compared with the present ones.

614. Finally, Bolivia asserts that "in view of the Claimants' irregular conduct in obtaining and administrating the operations, this Tribunal should not move away from the venerable trend developed by recent tribunals, which have rejected claims for moral damages in similar contexts to this unjustified litigation."[795]

iii. Analysis

615. The Claimants seek moral damages in an amount of US$ 4 million,[796] to wipe out the non-material consequences of Bolivia's wrongful acts as far as possible. The Respondent opposes this request as a concealed claim for punitive damages, which cannot succeed under international law.

616. This request seeks relief for the moral injury allegedly caused to the Claimants by the post-expropriation acts of harassment that Bolivia allegedly inflicted on them and related persons. Specifically, the Claimants refer to the criminal proceedings against Allan Fosk, David Moscoso and others. Thus, the damage at issue does not stem from the loss of the Claimants' investments, but from acts allegedly committed after the expropriation.

617. The Tribunal understands that the legal basis for the Claimants' moral damages claim is Bolivia's alleged breach of Articles III and IV of the BIT as a result of these post-expropriation acts of harassment. While the Claimants have not expressly linked their claims under Articles III and IV of the BIT with their request for moral damages, the same criminal proceedings which constitute the basis for part of their FET and impairment claims are, according to the Claimants, the source of their loss of credit

[793] Rejoinder, ¶ 133, Tribunal's translation.

[794] Counter-Mem., ¶ 439, Tribunal's translation.

[795] Rejoinder, ¶ 144.

[796] Reply, Section IX(6). In the Memorial, the Claimants had requested US$ 5 million (*see* Mem., ¶ 275 and Section X(9)).

and reputation and of the impairment of their procedural rights in this arbitration.[797] The Tribunal thus understands that the purpose of the Claimants' request for moral damages is to repair the non-material damage caused by the alleged breaches of Articles III and IV resulting from these post-expropriation acts of harassment. The Tribunal has already held that the Respondent has not breached Articles III and IV of the BIT through post-expropriation acts of harassment. As a result, there can be no basis for a claim for reparation.

618. That said, had the Tribunal entertained this claim, it would in any event have denied it for lack of evidence of any specific moral injury. Indeed, the Tribunal agrees with Bolivia and *Lemire* that the threshold to award moral damages is high. It also shares Bolivia's view that the Claimants' case and the evidence on record do not meet the exacting criteria required in order to grant moral damages. In addition, the Tribunal shares the opinion of other tribunals according to which moral damages are an exceptional remedy.[798]

---

[797] In their requests for relief, the Claimants claim moral damages for Bolivia's post-expropriation acts of harassment, by requesting an award:

- "Ordering Bolivia to pay compensation in an amount not less than US$ 5,000,000 for moral damages suffered by Claimants ***due to the unlawful acts of harassment*** by Bolivia, subsequent to the loss of Claimants' investment in Bolivia." (Mem., Section X(9), emphasis added.)
- "Ordering Bolivia to pay compensation to an amount of US$ 4,000,000 for moral damages for Quiborax ***due to the unlawful expropriation and acts of harassment by Bolivia***, subsequent to the loss of Claimants' investment in Bolivia." (Reply, Section IX(6), emphasis added). Although the Claimants link this request to Bolivia's expropriation of their concessions, that link is not made in their arguments.

In turn, those same requests for relief characterize Bolivia's post-expropriation acts of harassment as breaches of fair and equitable treatment and the prohibition of impairment by unreasonable or discriminatory measures. Specifically, the Claimants request an award:

- "Declaring that Bolivia violated its obligations under Article IV of the BIT by failing to accord Claimants fair and equitable treatment, by unlawfully expropriating Claimants' investment in Bolivia ***and by measures subsequent to the expropriation of the Claimants' investment***." (Reply, Section IX(2); emphasis added). *See also* Mem., ¶ Section X(5), in which they request an award "[d]eclaring that Bolivia violated its obligations under Article IV of the BIT by failing to accord Claimants fair and equitable treatment, by submitting Claimants to acts of harassment intended to obstruct Claimants' rights under the BIT."
- "Declaring that Bolivia violated its obligations under Article III of the BIT by failing to protect Claimants' investment in Bolivia and obstructing its free administration, maintenance, use, enjoyment, extension, transfer, sale and liquidation, by unreasonable and discriminatory measures consisting of the unlawful expropriation of Claimants' investment in Bolivia ***and by measures subsequent to the expropriation of the Claimants' investment***." (Reply, Section IX(3); emphasis added). *See also* Mem., Section X(6), in which they request an award "[d]eclaring that Bolivia violated its obligations under Art. III of the BIT by submitting Claimants to unreasonable and discriminatory measures, consisting of acts of harassment intended to obstruct Claimants' rights under the BIT." Emphasis added.

[798] *Arif v. Moldova*, Award of 8 April 2013, ¶ 592: "The element of exceptionality must be acknowledged and respected. […] The Tribunal is therefore aligning itself to the majority of arbitral

619. Therefore, the claim for moral damages is dismissed.

VIII. COSTS

620. As explained in the Procedural History,[799] both sides seek an award of the entirety of the costs related to this arbitration, including the legal fees and expenses incurred in connection with these proceedings.

621. The Claimants' legal fees and expenses amount to USD 7,660,375. They have paid the non-refundable lodging fee of USD 25,000,000 and advanced USD 1,500,000 on account of the fees and expenses of the members of the Tribunal and the ICSID administrative fees and expenses, including the Respondent's second, third, fourth and fifth advance payments.[800]

622. The Respondent's legal fees and expenses amount to USD 1,844,051.57. It has advanced USD 150,000 to ICSID.[801]

623. The Parties have not disputed that the Tribunal has broad discretion to allocate the costs of the arbitration between the Parties, including legal fees and expenses as it deems appropriate pursuant to Article 61(2) of the ICSID Convention:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

624. The Tribunal has considered all of the circumstances of this case and observes in particular that the proceedings have been delayed on various occasions, with related consequences in terms of costs, as a result of (i) the Respondent's proposal to disqualify the Tribunal, which caused the suspension of the proceedings, (ii) its opposition to the Tribunal's jurisdiction and (iii) its request for document inspection of NMM's original share certificates, which took place in the World Bank Office in Paris.

---

decisions and holds that compensation for moral damages can only be awarded in exceptional cases, when both the conduct of the violator and the prejudice of the victim are grave and substantial"; *see also Rompetrol v. Romania*, Award of 6 May 2013, ¶¶ 289, 293.

[799] *See* Section III above.

[800] Specifically, the Claimants have paid to ICSID (i) the lodging fee of USD 25,000; (ii) their own share of the advance payments requested by ICSID, in an amount of USD 825,000, and (iii) the Respondent's share of the second, third, fourth and fifth advance payments requested by ICSID, in an amount of USD 675,000 (Claimants' Statement of Costs, ¶ 12 and Section 6.1).

[801] The Respondent has paid to ICSID only the first and sixth advance payment requested by ICSID.

Moreover, the Tribunal notes that the Claimants have prevailed on jurisdiction and have established breaches of Articles III, IV and VI of the BIT. In addition, given the Respondent's refusal, the Claimants have had to pay the Respondent's second, third, fourth and fifth advance payments to ICSID, amounting to USD 675,000.

625. In light of these factors and considering all the circumstances, the Tribunal concludes in its discretion that it is fair for the Respondent to bear its share of the costs of the arbitration, *i.e.* the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre, plus 50% of the Claimants' share of those costs. Specifically, the Respondent shall (i) reimburse the Claimants for the second, third, fourth and fifth advance payments to ICSID that the Claimants paid on behalf of the Respondent, for a total of USD 675,000, and (ii) pay the Claimants an additional amount equivalent to 50% of the Claimants' share of the actual costs of the arbitration which will be reflected in ICSID's final financial statement of the proceedings. This allocation does not include the lodging fee, which shall remain the burden of the Claimants. By majority, the Tribunal considers it fair for each Party to bear its own legal fees and other costs and expenses incurred in connection with the case.[802]

IX. DECISION

626. For the reasons stated in this Award, the Tribunal makes the following decision:

a. The Respondent has breached Article VI of the BIT by expropriating the Claimants' investments in Bolivia without complying with the requirements set out in that Article;

b. The Respondent has breached Article IV(1) of the BIT by failing to guarantee fair and equitable treatment within its territory to the Claimants' investments;

c. The Respondent has breached Article III(2) of the BIT by impairing the free administration, maintenance, use, enjoyment, extension, transfer, sale and liquidation of the Claimants' investments through unreasonable or discriminatory measures;

d. As a result of the Respondent's breaches of the BIT, the Respondent shall pay to the Claimants damages amounting to USD 48,619,578;

[802] Arbitrator Lalonde would have preferred that the Respondent bear 50% of the Claimant's legal representation costs and expenses.

e. The Respondent is ordered to pay interest on the amount specified in sub-paragraph (d) above at the rate of 1-year LIBOR + 2%, compounded annually, calculated from 1 July 2013 until payment in full;

f. The Respondent shall bear its share of the costs of the arbitration, as well as 50% of the Claimants' share of those costs. Consequently, the Respondent shall pay the Claimants USD 675,000 as well as an amount equivalent to 50% of the Claimant's share of the actual costs of the proceedings as reflected in ICSID's final financial statement of the proceedings.

g. Each Party shall bear the fees and expenses it incurred for the preparation and presentation of its case;

h. All other claims or prayers for relief are dismissed.

The Hon. Marc Lalonde, P.C., O.C., Q.C.
Arbitrator
Date: SEP 15 2015

Prof. Brigitte Stern
Arbitrator
Date: SEP 07 2015
Subject to her partially dissenting opinion

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: SEP 03 2015