PCA Case No. 2016-39

IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE REPUBLIC OF BOLIVIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS, SIGNED ON 24 MAY 1988

- and -

THE UNCITRAL ARBITRATION RULES 2010

- between -

GLENCORE FINANCE (BERMUDA) LIMITED

(the "Claimant")

- and -

THE PLURINATIONAL STATE OF BOLIVIA

(the "Respondent", and together with the Claimant, the "Parties")

PROCEDURAL ORDER NO. 2: DECISION ON BIFURCATION

Tribunal

Prof. Ricardo Ramírez Hernández (Presiding Arbitrator)
Prof. John Y. Gotanda
Prof. Philippe Sands

Registry

Permanent Court of Arbitration

31 January 2018

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I. PROCEDURAL BACKGROUND

1. By **Notice of Arbitration** dated 19 July 2016, the Claimant initiated this arbitration pursuant to the UNCITRAL Arbitration Rules and Article 8 of the Agreement between the Government of the United Kingdom of England and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments, signed on 24 May 1988 (the "**Treaty**").

2. On 18 August 2016, the Respondent submitted its **Response to the Notice of Arbitration**, which included a request for bifurcation of the proceedings.

3. By letter dated 8 March 2017, the PCA circulated on behalf of the Tribunal Draft Terms of Appointment and Draft Procedural Order No. 1, and invited the Parties to submit their comments thereon.

4. By e-mail of 24 March 2017, the Claimant submitted the Parties' comments on the Draft Terms of Appointment and Draft Procedural Order No. 1, as confirmed by the Respondent's e-mail of the same date. The Respondent included a request for bifurcation of the proceedings in its comments on the procedural calendar.

5. By letter dated 29 March 2017, the Tribunal issued the Terms of Appointment and invited the Parties to set out in more detail their positions regarding, *inter alia*, the question of the bifurcation of the proceedings.

6. On 3 and 14 April 2017, the Parties provided their further comments on the bifurcation of the proceedings. The Respondent argued that the Tribunal should already decide on its request for bifurcation, while the Claimant contended that only after the submissions of the Statement of Claim would the Tribunal be able to properly assess whether to bifurcate the proceedings.

7. On 15 May 2017, a **First Procedural Meeting** was held by conference-call, during which the Parties provided further comments on Draft Procedural Order No. 1.

8. On 31 May 2017, the Tribunal issued **Procedural Order No. 1**, including a timetable for the arbitration. In particular, the Tribunal decided that it would only rule on the Respondent's request for bifurcation after the receipt of the Statements of Claim and Defence and, potentially, a hearing on bifurcation.

9. On 15 August 2017, the Claimant filed its **Statement of Claim** including the **Claimant's Response to the Respondent's Request for Bifurcation**.

10. By letter dated 11 December 2017, the PCA informed the Parties that the Tribunal had decided not to hold a hearing on bifurcation.

11. On 18 December 2017, the Respondent filed its **Statement of Defence** including all objections to the Tribunal's jurisdiction, as well as the **Respondent's Reply on Bifurcation**. In the covering letter to its submission, the Respondent requested that the Tribunal reconsider its decision not to hold a hearing on bifurcation.

12. By letter dated 27 December 2017, the Claimant opposed the Respondent's request to hold a hearing on bifurcation.

II. RESPONDENT'S OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

A. CLAIMANT'S POSITION

1. Consent to arbitration

13. The Claimant asserts that Bolivia has expressly and unequivocally consented to resolve investment disputes with UK investors through international arbitration by way of Article 8 of the Treaty, which provides in relevant part as follows:

> If after a period of six months from written notification of the claim there is no agreement to an alternative procedure, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. [1]

14. The Claimant contends that all requirements in terms of jurisdiction and admissibility set out by Article 8 are met: (i) a dispute exists between Glencore Bermuda (a national of one Contracting Party) and Bolivia (the other Contracting Party) concerning the obligations of the latter under the Treaty in relation to investments made by Glencore Bermuda in Bolivia; (ii) in its written notices dated 11 December 2007, 14 May 2010, and 27 June 2012 Glencore Bermuda formally notified Bolivia of the existence of the dispute pursuant to Article 8 of the Treaty; (iii) Glencore Bermuda repeatedly sought to resolve the dispute amicably but no satisfactory response was ever received from the Bolivian Government; and (iv) more than six months have elapsed since Glencore Bermuda notified Bolivia of the existence of the dispute in relation to each of the nationalizations and the dispute remains. [2]

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[1] Statement of Claim ¶ 133; **C-1**, Treaty, Article 8.

[2] Statement of Claim ¶¶ 134-137.

2. Jurisdiction *ratione temporis*

15. The Claimant notes that the Treaty was signed on 24 May 1988, entered into force on 16 February 1990, and was extended to the United Kingdom overseas territory of Bermuda on 9 December 1992 pursuant to an exchange of notes. [3] While the Respondent denounced the Treaty with effect from May 2014, the Claimant asserts that all of its investments were made in prior to Bolivia's denunciation and therefore continue to benefit from its protection according to Article 13 of the Treaty. [4]

3. The Claimant's investments and their legality

16. The Claimant argues that its indirect shareholding in Vinto and Colquiri and stake in the Colquiri Lease, the Smelters, and the Tin Stock constitute protected investments under Articles 1(a)(i) and 1(a)(ii) of the Treaty.[5] The Claimant disputes that its investment must meet any additional requirements such as contribution to the host State's development, but argues that it meets such additional requirements in any event.[6]

17. The Claimant further argues that the Respondent's allegations that Glencore Bermuda's investments were "unlawfully" acquired is inconsistent with contemporaneous evidence.[7] The Claimant also notes that there was no further investigation, formal accusation, or judicial proceeding ever brought against Glencore regarding the alleged illegality of the investments.[8]

4. Abuse of process

18. In response to the Respondent's abuse of process objection, the Claimant affirms that the investments were acquired through a competitive international bidding process organized by a reputable firm specializing in the mining sector; the assets were held by Panamanian Companies and CDC (a development finance institution entirely owned by the UK government); and the transaction also involved assets located in Argentina.[9] Furthermore, even if the transaction were

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[3] Statement of Claim ¶ 125; Exchange of Notes, December 3, 1992, and December 9, 1992, pursuant to which the Treaty was extended to Bermuda and other territories, **C-2**.

[4] Statement of Claim ¶¶ 125-126.

[5] Statement of Claim ¶¶ 129-132, 311.

[6] Statement of Claim ¶ 311.

[7] Statement of Claim ¶¶ 322-324.

[8] Statement of Claim ¶ 323.

[9] Statement of Claim ¶¶ 316-317.

considered a "restructuring" with the aim of obtaining treaty protection, the Claimant argues that Glencore Bermuda's acquisitions took place in March 2005, before any of the challenged measures had occurred or were even foreseeable.[10]

5. The Claimant's Swiss ownership

19. According to the Claimant, in order to qualify as a protected investor, the Treaty requires only that a company be "incorporated or constituted" in the territory of one of the State parties, and it has shown that Glencore Bermuda is a company incorporated under the laws of Bermuda.[11] The Claimant maintains that arbitral tribunals "have universally rejected similar jurisdictional objections based on allegations that the claimant was a 'shell company' where the applicable BIT merely required the claimant to be 'incorporated' or 'constituted' in a territory to be considered a protected investor."[12]

20. The Claimant further argues that, even if it were relevant, Glencore Bermuda—which "has historically been the holding company for the vast majority of Glencore's international investments, including those in Latin America"—is not a shell company.[13] Furthermore, the Claimant asserts that Glencore International would have enjoyed protection under the Switzerland-Bolivia BIT, such that its restructuring was immaterial.[14]

B. RESPONDENT'S POSITION

1. The Claimant's alleged investments

21. The Respondent argues that an investor is entitled to protection under the Treaty only if it "actively invests" in the territory of a contracting party, and that Glencore Bermuda made no investment in Bolivia, but "merely held legal title to assets for which it made no payment and to which it made no further contribution."[15]

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[10] Statement of Claim ¶¶ 318-320.

[11] Statement of Claim ¶¶ 127-128, 310-312.

[12] Statement of Claim ¶ 313.

[13] Statement of Claim ¶ 314.

[14] Statement of Claim ¶ 314.

[15] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 258-292.

2. The legality of the Claimant's alleged investments

22. The Respondent argues that it is a generally accepted principle of investment arbitration that a tribunal cannot hear claims regarding an investment tainted by illegality.[16] The Respondent argues that the privatization process was riddled with illegalities as the legal framework for the privatization of the Colquiri Mine Lease and the Antimony Smelter was established by former President Sánchez de Lozada to benefit his own economic interests in breach of the Bolivian constitution.[17] In particular, the Respondent argues that the prices paid for the Smelters and the Colquiri Lease are inexplicably low.[18] According to the Respondent, the Claimant could not have been unaware of these facts when it acquired the Smelters and the Colquiri Lease.

3. Abuse of Process

23. The Respondent claims that "a change of ownership structure when there is a reasonable prospect of a dispute constitutes an abuse of process, requiring that claims be dismissed, whenever the change had a purpose of obtaining investment treaty protection".[19]

24. The Respondent affirms that the disputes were "clearly foreseeable, and in fact foreseen" in 2005 when Glencore International transferred the assets to Glencore Bermuda.[20] The Respondent recalls that Glencore International took out political risk insurance for the Smelters and Colquiri Lease to guard against exactly the sort of expropriation that it now claims to have suffered.[21] Moreover, the Respondent notes that, at the time of the acquisition in 2005, Evo Morales was posed to assume presidency and it was clearly foreseeable that he "would be less indulgent of private mining interests and would ensure complete respect for the law and the diverse social interests affected by the mining industry."[22] The Respondent also submits that the Claimant was aware that various actors had been publicly questioning the legality of the Tin Smelter privatization since 2002, that the failure to put the Antimony Smelter into operation in accordance

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[16] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 325, 338-345.

[17] See Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 326-329.

[18] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 330-337.

[19] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 293-304.

[20] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 306.

[21] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 307.

[22] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 308-310.

with the contractual terms would give rise to a dispute, and that the Respondent would likely have to intervene in the growing dispute with *cooperativistas* at the Colquiri mine.[23]

25. The Respondent adds that the Claimant has not provided any other justification for such transfer than to obtain Treaty protection, and that it is not true that Glencore International would benefit from protection under the Switzerland-Bolivia BIT given that treaty's requirement of "a substantial Swiss interest".[24] The Respondent argues that there is no substantial Swiss interest in the Glencore group, which has widely dispersed shareholding by a range of global funds.[25]

4. The Claimant's Swiss ownership

26. The Respondent denies that formal incorporation in Bermuda suffices to establish jurisdiction, given that the investors "are purely Swiss in substantive reality".[26] The Respondent refers to the released "Paradise Papers" which show that "Glencore Bermuda exists only in a nearly empty room that "held a filing cabinet, a computer, a telephone, a fax machine and a checkbook" at the Glencore Group's Bermudan law firm.[27]

27. On the other hand, if the Claimant's corporate veil cannot be pierced, the Respondent then argues that the Claimant should not be allowed to submit claims based on the indirectly held rights of its subsidiaries.[28] The Respondent argues that, in contrast to other contemporaneous investment treaties (such as the Switzerland-Bolivia BIT) which extend jurisdiction to indirect investments, the UK-Bolivia Treaty does not make an exception to the otherwise applicable customary rule pursuant to which a shareholder may not substitute itself for the company in which it holds shares.[29]

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[23] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 312-319.

[24] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 320-324; Agreement between the Swiss Confederation and the Republic of Bolivia on the reciprocal promotion and protection of investments, English translation, Article 1(b)(aa), **RLA-19**.

[25] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 323; Morningstar, Glencore PLC Major Shareholders, **R-236**.

[26] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 348-359.

[27] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 360-369, quoting International Consortium of Investigative Journalists, Room of Secrets Reveals Glencore's Mysteries, press article of 5 November 2017, **R-243**, pp. 1-7.

[28] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 351, 370-371.

[29] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 372-384.

5. The conflicting ICC arbitration clauses and waiver of diplomatic claims

28. The Respondent argues that Claimant's claims ultimately concern the Tin Smelter, Antinomy Smelter, and Colquiri Lease contracts (the "**Contracts**"), and are therefore subject to the mandatory ICC arbitration clauses and waivers of diplomatic remedies contained in those Contracts.[30] The Respondent points out that the Claimant itself invokes the Contracts in support of its claims.[31]

6. The Tin Stock claims were never notified to Bolivia

29. The Respondent asserts that the Claimant never notified Bolivia about the existence of potential claims concerning the Tin Stock as required under Article 8(1) of the Treaty.[32] The Respondent considers that the claims regarding the Tin Stock are distinct from the Claimant's other claims and that the absence of prior notification deprives the Tribunal of jurisdiction over these claims.[33]

III. RESPONDENT'S REQUEST FOR BIFURCATION

A. CLAIMANT'S POSITION

30. The Claimant contends that, contrary to the Respondent's allegations, bifurcation is not favoured under the UNCITRAL Rules, nor it is the general practice of international tribunals.[34] Rather, according to the Claimant, efficiency is the overarching basis for deciding on bifurcation requests.[35] In particular, the Claimant relies on *Glamis Gold* to argue that the relevant criteria are the likelihood of success of the jurisdictional objections and whether they can be decided without examining the merits of the case.[36]

31. As regards the first criterion, the Claimant argues that the chances of the Respondent's objections prevailing are minimal, such that bifurcation will only lead to unwarranted delay and expense.[37]

[30] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 385-392.

[31] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 393-399.

[32] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 400-404.

[33] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 405-411.

[34] Statement of Claim ¶¶ 300-305.

[35] Statement of Claim ¶¶ 299, 306.

[36] Statement of Claim ¶¶ 306-307; *Glamis Gold Ltd v United States* (UNCITRAL) Procedural Order No. 2, 31 May 2005, **CLA-58**, para 12(c).

[37] Statement of Claim ¶¶ 309, 325-328.

The Claimant adds that bifurcation may give rise to costly and time-consuming parallel proceedings if either party challenges a decision on jurisdiction before the Paris courts.[38]

32. As for the second criterion, the Claimant asserts that the Respondent's jurisdictional objections are "inherently factual and cannot be divided from the merits of the dispute".[39] According to the Claimant, in order to decide the Respondent's objections, the Tribunal will have to investigate many of the same facts and legal arguments from the same witnesses that the Parties will develop when discussing their substantive claims and defenses.[40] In particular, the Claimant argues that bifurcation of the Respondent's objection will require duplicative testimony from Mr. Eskdale on various issues.[41]

33. Accordingly, the Claimant requests that the Respondent's bifurcation request be dismissed.[42]

B. RESPONDENT'S POSITION

34. The Respondent submits that it is a well-established rule in international arbitration that, when jurisdictional objections are well-founded and may be separated from the merits of the dispute, the Tribunal should proceed to decide such objections as a preliminary matter.[43] The Respondent argues that "it is fundamentally unjust, and even contrary to fundamental legal principles, to demand that a state defend itself against the merits of a claim before a tribunal without jurisdiction or where that jurisdiction is in dispute."[44] According to the Respondent, efficiency is but an additional consideration that militates in favour of bifurcation.[45] The Respondent therefore argues that the Tribunal should apply the three criteria set out in *Philip Morris v. Australia*, namely (i) whether the objections are *prima facie* serious and substantial, (ii) whether the objection can be

[38] Statement of Claim ¶ 327.

[39] Statement of Claim ¶ 325.

[40] Statement of Claim ¶ 325.

[41] Statement of Claim ¶¶ 315, 321, 324.

[42] Statement of Claim ¶ 326.

[43] Response to the Notice of Arbitration ¶ 51.

[44] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 416-420.

[45] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 421-428.

examined without prejudging or entering the merits, and (iii) whether the objection, if successful, would dispose of all or an essential part of the claims raised.[46]

35. The Respondent argues that its preliminary objections clearly meet the *Philip Morris* criteria since, if any of them were granted (with the exception of the failure to notify the dispute over the Tin Stock), it would bring an immediate end to the entire arbitration proceeding.[47] They are also serious and substantial as they are backed by extensive legal authorities and factual exhibits, and they are entirely separable from the merits of the dispute: "the core facts for the objections extend only through when Glencore Bermuda received the Assets in 2005, while the core merits facts are from events in 2007, 2010, 2012, and beyond".[48]

36. The Respondent further contends that the Claimant does not explain why the Respondent's preliminary objections are said to be interlinked with the merits, and that the fact that Mr. Eskdale would testify both as to facts relevant to jurisdiction and facts relevant to the merits does not create such a linkage.[49]

37. Accordingly, the Respondent requests that its preliminary objections be decided in a bifurcated preliminary phase.[50]

IV. ANALYSIS OF THE TRIBUNAL

A. APPLICABLE STANDARD

38. The Tribunal begins its analysis by setting out the applicable standard in relation to the issue of application as raised in this case. Articles 17.1 and 23.3 of the UNCITRAL Rules give discretion to the Tribunal to decide jurisdictional objections. Neither of those provisions imposes a presumption in favor or against bifurcation. Thus, in accordance with Article 17.1, the overarching principle that shall guide the Tribunal's decision is procedural fairness and efficiency, having regard to the totality of circumstances.

[46] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 429 quoting **CLA-121**, *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Procedural Order No 8 of 14 April 2014 ¶ 109.

[47] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 431.

[48] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶¶ 431-436.

[49] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 438.

[50] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 440.

39. With this principle in mind, the Parties appear to agree that the proper factors or criteria to be taken into account are the ones used by the tribunals in *Philip Morris Asia Limited v Commonwealth of Australia*51 *and Glamis Gold Ltd v United States*[52]. Although framed somewhat differently, both Tribunals seemed to consider the same factors or criteria, *i.e.*:

a) *Whether the request is substantial* or *is the objection prima facie serious and substantial*?
b) *Whether the request, if granted, would lead to a material reduction in the proceedings at the next stage* or *could the objection, if successful, dispose of all or an essential part of the claims raised*?;
c) *Whether bifurcation is impractical in the sense that the issues are too intertwined with the merit that it is very unlikely that there will be any savings in time* or *cost or can the objection be examined without prejudging or entering the merits*?

40. With these criteria in mind, the Tribunal will now address each of the objections raised by the Respondent:

B. QUALIFICATION AS INVESTOR

41. The first allegation is that the Claimant made no investment in Bolivia. Bolivia is arguing that the scope of the treaty extends only to companies which "actively" invested in Bolivia. According to Respondent, given that Glencore Bermuda made no investment in Bolivia, the investor does not have a claim under the applicable BIT. On the other hand, Claimant argues that the treaty only "requires a company to be 'incorporated or constituted' in the territory of one of the State parties" and that it does not require any requirement of "seat or material business presence in the State"[53].

42. Before addressing the issue of whether the objection is serious and substantial, the Tribunal confirms that, at this stage of the proceedings, its task is not to decide on the merits. Turning to the objection, however, the Tribunal finds, on the basis of the material before it at this stage, no clear textual support in the applicable BIT for the proposition that this agreement requires material or active presence for a company to qualify as investor. Thus, although the Tribunal recognizes that the objection is not frivolous, and the contextual arguments posed by the Respondent in this regard are capable of being argued and worth exploring in depth, it is not convinced that this

[51] *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Procedural Order No 8, 14 April 2014.

[52] *Glamis Gold Ltd v. United States of America,* (UNCITRAL) (Procedural Order No.2 (Revised), May, 31, 2005.

[53] Statement of Claim ¶ 311.

objection is sufficiently serious and substantial as to justify bifurcation. In light of this view, the Tribunal will not address the other two criteria.

C. ABUSE OF PROCESS

43. The second allegation is that the Claimant committed abuse of process in bringing this arbitration. Respondent alleges that the Tribunal lacks jurisdiction because Glencore Bermuda committed an abuse of process by structuring an investment in order to obtain standing. Respondent argues that Glencore International "rerouted" its investment through Bermuda when a dispute with Bolivia was foreseeable. On the other hand, Claimant argues that Glencore Bermuda's "acquisition of its investments in Bolivia was not a 'restructuring' with the purpose of providing treaty protection"[54]. Moreover even if that was the purpose, the Claimant argues that there could only be abuse of process "in very exceptional circumstances", that is when "the purpose of the restructuring was exclusively obtaining treaty protection"[55].

44. The Tribunal notes that it is not disputed that Glencore International was the company that acquired/leased the disputed assets and that Glencore Bermuda acquisition started in March 2005. It is also not disputed that the first alleged breach occurred in February 2007 (Vinto's nationalization). Notwithstanding the time gap between the acquisition of the investment and the first alleged breach, valid questions arise as to the purpose of restructuring the investment as well as whether the investor could foresee that a dispute was going to arise. Based on this, the Tribunal finds that this exception is serious and substantial. As to the second element, it is clear that, if successful, these proceeding would be brought to an end. As to the third element, almost all the facts relevant for this claim predated February 2007, which is the date when the dispute presumably arose. Thus, it seems that the objection can be addressed without prejudging the merits.

D. CLEAN HANDS

45. The third objection deals with the allegation that the privatization of the assets underlying the claim was illegal under Bolivian law. The Respondent alleges that the acquisition of the Colquiri Mine Lease and the Antimony Smelter were contrary to the Bolivian Constitution. Bolivia also argues that the "circumstances surrounding the privatization of the Assets were contrary to basic

[54] Statement of Claim ¶ 317.

[55] Statement of Claim ¶ 318.

requirement of transparency and good faith."[56] Based on this, Bolivia claims that, in accordance with the "clean hands" principle, "Claimant cannot present for adjudication before this Tribunal claims tainted by the illegality which Claimant was aware of when it received the Assets"[57]. Claimant argues that "the assets were lawfully awarded to private investors through public tender processes."[58]

46. Regarding the "clean hands" principle, the Tribunal agrees with the tribunal in *Churchill Mining* who rightly pointed out that:

> The common law doctrine of unclean hands barring claims based on illegal conduct has also found expression at the international level, although its status and exact contours are subject to debate and have been approached differently by international tribunals.[59]

47. In reaching a decision on this objection, the Tribunal will not only have to accept this principle and determine its status, but also lay out its contours. Thus, it is difficult to come to a definitive view without a clear standard against which the substantiality and seriousness of this objection could be assessed. In this regard, the Tribunal has doubts as to whether a mere assertion of unlawful conduct could be enough to raise this objection above the required threshold. However, even accepting that the objection is serious and substantial, *quod non*, it is conceivable that the alleged illegalities would be part of the defense of the Respondent against breaches of the BIT. Thus, it seems that this objection cannot be addressed without touching on the merits of this dispute.

E. PIERCING THE CORPORATE VEIL AND INDIRECT INVESTMENT

48. The fourth jurisdiction objection relates to the claim that, in reality, the Claimant is a Swiss company and, therefore, not subject to the protection of the BIT. Respondent claims that the BIT excludes jurisdiction asserted based on corporate formalities when the real party in interest is not protected. Respondent requests to pierce the corporate veil because Glencore Bermuda is an "empty shell". In the alternative, the Respondent claims that, even if the corporate veil protects Glencore Bermuda, international law does not allow it to bring claims for its indirect investment.

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[56] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 337.

[57] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 338.

[58] Statement of Claim ¶ 323.

[59] *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia,* ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, ¶ 493.

Conversely, the Claimant argues that Bolivia's argument has no foundation in the facts or in the text of the Treaty and that Glencore Bermuda has submitted sufficient evidence that it is a company incorporated under the laws of Bermuda (one of the United Kingdom overseas territories to which the Treaty was expressly extended) with "investments" protected under the Treaty.

49. Turning to the first objection, the Tribunal finds also no clear textual support in the applicable BIT for the proposition that this agreement requires material or active presence for a company to qualify as investor. In addition, the Tribunal is not sure that the case quoted by the Respondent is applicable in this context since that case was dealing with the interpretation of "foreign control" set forth in Article 25(2)(b) of the ICSID Convention.[60] In fact, another of the cases cited by Respondent takes the opposing view:

> *As the matter of nationality is settled unambiguously by the Convention and the BIT, there is no scope for consideration of customary law principles of nationality, as reflected in Barcelona Traction, which in any event are no different. In either case inquiry stops upon establishment of the State of incorporation, and considerations of whence comes the company's capital and whose nationals, if not Cypriot, control it are irrelevant*.[61]

50. Thus, although the Tribunal recognizes that the objection is not frivolous, and the arguments posed by the Respondent in this regard are capable of being argued and worth exploring in depth, it is not convinced that this objection is sufficiently serious and substantial as to justify bifurcation.

51. Turning to the alternative objection, the Respondent argues that the ownership in the relevant assets is "indirect",[62] and therefore, since the BIT does not include indirect investment, Glencore Bermuda is precluded from bringing this case. Although the Respondent makes a valid argument that some investment treaties have traditionally distinguished between direct or indirect investment and in this case the applicable BIT does not include indirect investment, no textual basis or precedent is cited as to an investment tribunal who has made this distinction and dismissed a case on this ground. Thus, the Tribunal is not convinced that these objections are

[60] *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award of 19 December 2008.

[61] *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary* (ICSID Case No ARB/03/16) Award of the Tribunal of 2 October 2006, ¶ 357.

[62] Glencore Bermuda holds shares in Kempsey, Iris, and Shattuck, three Panamanian companies, which in turn own Colquiri through Sinchi Wayra. Colquiri directly owns the Assets (or Vinto, owned by Colquiri, in the case of the Tin Smelter).

sufficiently serious and substantial as to justify bifurcation. Considering this view, the Tribunal does not consider necessary to address the other two factors.

F. ICC Arbitration

52. The fifth objection relates to the claim that the Tribunal does not have jurisdiction over the contract claim. The Respondent argues that the Claimant ignored the arbitration clauses in the relevant contracts which required ICC arbitration adjudication. The Claimant responds that this dispute "concerns the propriety of actions taken by the State in its sovereign capacity—it does not, as Bolivia attempts to argue, concern contractual breaches."[63]

53. The Tribunal has difficulty understanding how the alleged breaches by Respondent are entirely contractual in nature. Moreover, even accepting that the objection is serious and substantial, the Tribunal believes that the facts related to this objection are too intertwined with the merits of the case and addressing this claim could touch on and prejudge the merits of the dispute.

G. Tin Stock

54. Finally, the Respondent argues that the Tribunal lacks jurisdiction over the Tin Stock claims because they were never notified to Bolivia. The Respondent alleges that "Claimant never provided Bolivia with written notification of its Tin Stock claims, depriving Bolivia of the opportunity to reach an amicable resolution of those claims"[64]. The Claimant argues that since 2010 Bolivia took the position that "Tin Stock formed part of the nationalized Antimony Smelter's inventory and its return would be addressed in the context of the negotiations to be held in relation to the nationalization"[65]

55. The Tribunal finds that this is an ancillary claim that cannot, of itself, justify bifurcation. Even Respondent concedes that, if successful, it would not bring the dispute to an end, nor dispose of an essential part of the claims raised, nor even lead to a material reduction in the proceedings at the next stage.[66] Therefore, the Tribunal dismisses this ground for bifurcation.

[63] Letter in response to concerns expressed by the Bolivia with respect to the Tribunal's decision to cancel the hearing on bifurcation. December 27, 2017. At page 4.

[64] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 404.

[65] Letter in response to concerns expressed by the Bolivia with respect to the Tribunal's decision to cancel the hearing on bifurcation. December 27, 2017. At page 8.

[66] Bolivia's Preliminary Objections, Statement of Defence and Reply on Bifurcation ¶ 431.

H. CONCLUSION

56. After reviewing each of the preliminary objections, the Tribunal's analysis reveals that the abuse of process objection, but only that objection, could justify the bifurcation of the proceedings. Nevertheless, the Tribunal recalls that the overarching principle is the fairness and efficiency of this process as a whole. With this principle in mind, the Tribunal considers that it would be more efficient to deal with all preliminary objections together with liability in a first phase, and leave issues of damages, if any, for determination in a second phase. This approach seems to the Tribunal more efficient in terms of time and costs than the alternative, which is to bifurcate just one issue but leave all other objections to a merits phase. Finally, the Tribunal wishes to stress that the ultimate outcome of the objections will be a factor that the Tribunal may take into account when awarding costs in this arbitration.

57. The Tribunal has considered the positions and preferences of the Parties with regards to the procedural timetable to follow in these proceedings. After deliberation, the Tribunal has adopted the procedural calendar attached to this order as **Annex 1**.

58. Pursuant to Procedural Order No. 1, document production requests submitted to the Tribunal for decision, together with objections and responses, must be in tabular form pursuant to the model appended to this Procedural Order as **Annex 2** (modified Redfern schedule). The Parties shall use the model format throughout their exchange of requests, objections, and responses.

V. DECISION

59. For these reasons, the Tribunal, decides to hear the Parties' submissions regarding jurisdiction and admissibility together with their submissions on the merits, while bifurcating the proceedings with regards to quantum to a later phase of proceedings, if the need for such a later phase arises.

60. The Tribunal establishes the procedural calendar attached to this order as **Annex 1**.

Prof. Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal

Annex 1: Procedural calendar

Event	Party	Date
Simultaneous Document Production Requests	Both	9 February 2018 (21 days)
Production of undisputed documents and Objections to production	Both	2 March 2018 (21 days from Document Production Requests)
Replies to Objections to production and reasoned applications for an order on Production of Documents in the form of a Redfern Schedule (**Annex 2**)	Both	16 March 2018 (14 days from Objections to Production)
Tribunal's decision on Document Production	Tribunal	26 March 2018 (10 days from submission of Redfern Schedule)
Production of the disputed documents pursuant to the Tribunal's decision	Both	16 April 2018 (21 days from the Tribunal's Decision on Document Production Requests)
Claimant's Reply on the Merits and Counter-Memorial on Jurisdictional Objections (if any)	Claimant	18 June 2018 (150 days from the Tribunal's Decision on Bifurcation and 63 days from the Tribunal's Decision on Document Production)
Respondent's Rejoinder on the Merits and Reply on Jurisdictional Objections (if any)	Respondent	16 October 2018 (120 days from the Claimant's Reply)
Claimant's Rejoinder on Jurisdiction (if any)	Claimant	14 January 2019 (90 days from the Respondent's Rejoinder)
Submissions of the Notifications to the witnesses and experts called to appear at Hearing	Both	28 January 2019 (14 days from the Claimant's Rejoinder)
Pre-Hearing Conference Call	All	Week of 4 February 2019
Hearing	All	One-week period, at some point between 11 March and 6 May 2019

Annex 2: Model Redfern Schedule for Document Requests

No.	Documents or category of documents requested (requesting Party)	Relevance and materiality, incl. references to submission (requesting Party)		Reasoned objections to document production request (objecting Party)	Response to objections to document production request (requesting Party)	Decision (Tribunal)
		References to Submissions, Exhibits, Witness Statements or Expert Reports	Comments			