



## PRESS RELEASE

### PCA CASE NO. 2018-39: 1. THE ESTATE OF JULIO MIGUEL ORLANDINI-AGREDA, 2. COMPAÑÍA MINERA ORLANDINI LTDA. V. THE PLURINATIONAL STATE OF BOLIVIA

THE HAGUE, DECEMBER 19, 2024

#### Arbitral Tribunal Renders Award

On November 2, 2023, the Tribunal constituted in the above-referenced matter under Article IX of the Treaty between the Government of the United States of America and the Government of the Republic of Bolivia concerning the Encouragement and Reciprocal Protection of Investment, signed on April 17, 1998 and entered into force on June 6, 2001 (Treaty) rendered its Award in respect of a dispute concerning a series of mining concessions in the Bolivian municipalities of Antequera and Pazña.

The Tribunal was composed of Dr. Stanimir A. Alexandrov (Presiding Arbitrator), Professor Dr. Guido Santiago Tawil, and Dr. José Antonio Moreno Rodríguez. The proceedings were conducted pursuant to the UNCITRAL Arbitration Rules, as revised in 2010 (with new Article 1, paragraph 4, as adopted in 2013). The Permanent Court of Arbitration (PCA) acted as the Registry in the proceedings.

In its Award, the Tribunal dismissed the Respondent's objections to the jurisdiction of the Tribunal and the admissibility of the Claimants' claims. The Tribunal, by majority, also dismissed the Claimants' claims that Respondent had breached the Treaty.

Professor Tawil issued a Dissenting Opinion, in which he opined that Respondent had violated the Treaty's fair and equitable treatment standard, as well as its obligation to provide full protection and security to the Claimants' investments in its territory under the Treaty. The Award was also accompanied by a Separate Opinion authored by Dr. Moreno, in which he noted his disagreement with certain aspects of the Tribunal majority's analysis on the question whether Mr. Julio Miguel Orlandini-Ágreda, when taken to be both a United States and a Bolivian national, was a protected investor under the Treaty.

#### Executive Summary of the Proceedings

Pursuant to paragraph e) of the Protocol on Confidentiality and Transparency enclosed with the Tribunal's Procedural Order No. 2, dated March 8, 2019, if the Parties do not agree on the publication of an award, the Tribunal may prepare and publish an executive summary of the proceedings, following consultations with the Parties.

The Parties failed to agree on the publication of the Award. Accordingly, the Tribunal has prepared an executive summary of the Award, the Dissenting Opinion, and the Separate Opinion in consultation with the Parties, which is enclosed with this press release.

Further information about the proceedings is available on the PCA Case Repository: <https://pca-cpa.org/en/cases/204/>.

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## **Background on the Permanent Court of Arbitration**

The PCA is an intergovernmental organization established by the 1899 Hague Convention on the Pacific Settlement of International Disputes. The PCA has 124 Contracting Parties. Headquartered at the Peace Palace in The Hague, the Netherlands, the PCA facilitates arbitration, conciliation, fact-finding, and other dispute resolution proceedings among various combinations of States, State entities, intergovernmental organizations, and private parties. The PCA's International Bureau is currently administering 7 inter-state arbitrations, 1 other inter-state proceeding, 95 arbitrations arising under bilateral or multilateral investment treaties or national investment laws, 109 arbitrations arising under contracts involving a State or other public entity, and 4 other proceedings. More information about the PCA can be found at [www.pca-cpa.org](http://www.pca-cpa.org).

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## EXECUTIVE SUMMARY

This is an executive summary of the Award issued on November 2, 2023 by the Tribunal in PCA Case No. 2018-39: 1. *The Estate of Julio Miguel Orlandini-Agreda*, 2. *Compañía Minera Orlandini Ltda. v. The Plurinational State of Bolivia* (the “**Award**”).

The Tribunal has prepared this summary in accordance with paragraph e) of the Protocol on Confidentiality and Transparency enclosed with the Tribunal’s Procedural Order No. 2, dated March 8, 2019.

### I. The Parties

Mr. Julio Miguel Orlandini-Ágreda (“**Mr. Orlandini**”) was born to Bolivian parents in 1945. He was a businessman actively involved in the Bolivian mining industry from at least the 1980s. Mr. Orlandini initiated this arbitration as the first claimant in early 2018, alongside Compañía Minera Orlandini Ltda., a company organized under the laws of Bolivia (“**CMO**”). He passed away on January 1, 2019, after the commencement of the arbitration.

Following Mr. Orlandini’s passing, on March 21, 2019 the Probate Division of the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County appointed Mr. Orlandini’s surviving spouse (“**Mrs. Orlandini**”) to serve as personal representative of Mr. Orlandini’s estate (the “**Estate**” and, together with CMO, the “**Claimants**”).

The respondent in the arbitration was the Plurinational State of Bolivia (“**Bolivia**” or the “**Respondent**” and, together with Claimants, the “**Parties**”).

### II. Background of the Dispute

The arbitration concerned the alleged expropriation of two of the Claimants’ mining concessions along the Antequera River in Bolivia, known as “Veneros San Juan” and “Pretoria” (the “**Antequera Concessions**”) as well as 46 other concessions located in the municipality of Pazña, within the Totoral area and, more broadly, within the Antequera mining district (the “**Totoral Concessions**” and, together with the Antequera Concessions, the “**Concessions**”). The dispute also involved other related properties in Bolivia, which Claimants alleged were affected by the actions of the Bolivian administrative mining authorities and certain private entities and individuals.

The Antequera mining district contains significant underground deposits of tin, zinc, lead, and silver. CMO’s Antequera Concessions were “sandwiched” in-between the Bolívar mine, which was operated by Bolivia’s State-owned mining company, known as *Corporación Minera de Bolivia* (“**COMIBOL**”) and a private Bolivian mining company, *Compañía Minera del Sur* (“**COMSUR**”). COMIBOL entered initially into a joint-venture agreement with COMSUR for the development and exploitation of the Bolívar mine. At a later stage, Glencore International AG (“**Glencore**”) acquired COMSUR and changed the company’s name to Sinchi Wayra, thus becoming the operator of the Bolívar mine.

The Totoral Concessions were also located within the Antequera mining district, southwest of the Antequera Concessions and the Bolívar mine, and similarly contained veins of tin, zinc, silver, and lead.

Claimants asserted that certain actions taken by the Respondent’s instrumentalities deprived CMO of its Concessions and related properties in Bolivia, allegedly to benefit COMIBOL and its joint venture partners. According to Claimants, these acts violated their rights under Bolivian law, international law, and the Treaty.

The Claimants’ claims were based on two distinct events, further described below, which they claimed negatively impacted their investment in Bolivia: (i) the so-called “easement proceedings” and the subsequent mining and alleged trespass under the Veneros San Juan riverbed by third parties; and (ii) the

*Martínez* Case enforcement proceedings, which Claimants allege were tainted by corruption and grave procedural irregularities, and which saw CMO's Concessions auctioned off at a price which, in the Claimants' submission, was significantly lower than their true value.

#### **A. Judicial Proceedings Pre-dating the Alleged Treaty Breaches**

***Intervention of CMO (1985–1986):*** In 1985, CMO was placed under receivership following worker complaints regarding certain irregularities within the company. While the Bolivian State ordered the reversion of CMO's assets in June 1985, the Supreme Court annulled this decree in December 1985. CMO nonetheless remained under receivership until November 1986.

***Attempted judicial auction of CMO's concessions (1992 and 2002):*** In 1992 and 2002, Banco de Crédito Oruro S.A. ("**Banco de Crédito**") and *Empresa Nacional de Electricidad* attempted to obtain the judicial auction of CMO's Totoral Concessions. Banco de Crédito initiated proceedings in 1982, resulting in a court order requiring Claimants to pay USD 3.2 million. A scheduled auction in 1992 was unsuccessful.

#### **B. Alleged Expropriation of CMO's Rights Beneath Veneros San Juan**

***CMO's rights beneath Veneros San Juan:*** The Antequera Concessions were surrounded by the concessions comprising the Bolívar mine, known as "Bolívar North" and "Bolívar South". COMIBOL and COMSUR built a mineral processing plant and a mine shaft north of the Veneros San Juan concession. Transporting minerals from Bolívar South to the processing plant could potentially require passing through the Antequera Concessions, making alternative routes costly and impractical.

In 1997, COMIBOL applied for and received the *Seguridad I* concession, which overlapped with the area covered by the Antequera Concessions. While the *Seguridad I* concession was granted on the condition that it would respect the areas corresponding to pre-existing concessions, the Veneros San Juan concession had not been yet registered. CMO registered Veneros San Juan on the last day allowed by the Bolivian Mining Code enacted by Law No. 1777 dated March 17, 1997.

The Parties disagreed on the scope of the Claimants' mining rights over the Veneros San Juan concession, i.e., whether they were limited to surficial rights or also encompassed subsurface rights.

***Easement proceedings:*** In January 1999, COMIBOL approached CMO to request the voluntary constitution of an easement for right of way through CMO's Antequera Concessions for purposes of COMSUR's operations in the Bolívar mine. CMO indicated that it was willing to accept COMIBOL's proposal if the easement was "reciprocal and equitable", meaning that CMO would also be able to use any access and exit routes in place or to be developed in the area for its own operations. COMIBOL rejected CMO's proposal, noting that in the absence of mining activity in the Antequera Concessions CMO could not legally constitute such easement.

After the negotiations failed, COMIBOL filed a petition before the *Superintendente Departamental de Minas* (the "**Superintendent**") in February 2000 to initiate an easement proceeding for the constitution of a right of way through the underground galleries and successive levels of CMO's Veneros San Juan concession. In April 2000, the Superintendent dismissed the easement request, but affirmed COMIBOL's underground rights by virtue of the *Seguridad I* concession (the "**2000 Resolution**"). CMO appealed, ultimately leading to the annulment of the 2000 Resolution in 2001 due to procedural violations. However, in September 2001, COMIBOL incorporated the *Seguridad I* concession as part of its contribution to the Bolívar mine joint-venture with COMSUR.

***Alleged trespassing and illegal mining in the Antequera Concessions:*** According to Claimants, COMIBOL and COMSUR began constructing underground mining galleries and illegally extracting minerals from CMO's Antequera Concessions in late 2001 or early 2002.

In 2004, when asked by CMO, COMIBOL denied that its works had any impact on the Antequera Concessions, citing a report which concluded that the works were over 80 meters below the relevant riverbed. Throughout 2005, COMIBOL held the position that CMO had not proven its legal rights to the Veneros San Juan concession and refused CMO's requests for access to the Bolívar mine. CMO escalated the matter to the Bolivian Senate and the Ministry of Mining, requesting an inspection.

In 2006, Glencore acquired COMSUR and changed its name to Sinchi Wayra, which then became the operator of the Bolívar mine. CMO and Sinchi Wayra initiated discussions regarding the alleged trespassing and mineral extraction. Sinchi Wayra purportedly asserted it would attempt to remedy any damages caused. However, the negotiations stalled, and no agreement was ultimately reached.

In December 2006, CMO instituted criminal proceedings against several Sinchi Wayra executives for illegal mining in the Antequera Concessions, leading to an investigation and requests for an on-site inspection. The prosecutor dismissed the complaint, concluding that the Veneros San Juan concession concerned only the exploitation of surficial deposits and that, accordingly, Sinchi Wayra was authorized to carry out works in the underground. CMO's subsequent objections were rejected and the district prosecutor subsequently upheld the dismissal, concluding that CMO had failed to substantiate its allegations.

**Revalidation Decision:** On May 8, 2007, COMIBOL submitted a request to the Superintendent to revalidate the 2000 Resolution. The following day, the Superintendent issued a resolution revalidating the 2000 Resolution (the "**Revalidation Decision**"). While COMIBOL received a formal notification of the Revalidation Decision on May 9, 2007, CMO claimed that it only learned of the Revalidation Decision five months thereafter, in the context of the criminal proceedings it initiated against certain Sinchi Wayra executives, at which point it could no longer challenge the ruling.

**May 2007 Certificate:** On May 7, 2007, at Sinchi Wayra's request, COMIBOL contacted the *Servicio Nacional de Geología y Técnico de Minas* ("**SERGEOTECMIN**") for a certification concerning the title and other technical details corresponding to the Veneros San Juan and *Seguridad I* concessions. On May 16, 2007, SERGEOTECMIN issued a certificate (the "**May 2007 Certificate**") stating that: (i) the only registered title for the Veneros San Juan concession was a title registered by a private individual in 1906 (the "**1906 VSJ Title**"); (ii) this title pertained to "superficial" tin in the Antequera riverbed; (iii) the *Seguridad I* concession extended in depth to the center of the earth while respecting any preexisting rights; and (iv) no opposition was filed during the process resulting in the grant of the *Seguridad I* concession to COMIBOL.

### C. The Judicial Transfer of CMO's Totoral and Veneros San Juan and Pretoria Concessions

On December 6, 1988, three former CMO workers filed a labor lawsuit against CMO demanding payment of various benefits (thus initiating the *Martínez* Case), ultimately leading to a series of enforcement proceedings, including the judicial auction of CMO's Concessions in April 2007 to Empresa San Lucas S.A. ("**Empresa San Lucas**") a subsidiary of Glencore and Sinchi Wayra (the "**2007 Auction**").

CMO challenged the 2007 Auction and the judge's conduct, resulting in the judge's suspension for four months in 2010 due to misconduct. CMO also filed multiple complaints with judicial and prosecutorial authorities regarding alleged unlawful actions by the judge and others involved in the auction process, but many of these complaints were dismissed or barred by statutes of limitations, thus culminating in the closure of related investigations by the Ministry of Anticorruption in 2016.

In addition to the judicial actions brought by CMO immediately following the 2007 Auction and the proceedings it initiated before the judicial council and criminal courts (including criminal proceedings against certain executives of Sinchi Wayra for the alleged trespass of the Antequera Concessions), CMO sought to overturn the effects of the judicial sale of the Concessions by filing a series of nullity petitions

with domestic courts and mining administrative authorities, including SERGEOTECMIN and the *Autoridad Jurisdiccional Administrativa Minera* (“AJAM”).

#### **D. Alleged Corruption Involving the Bolivian State**

Claimants asserted that their Concessions were seized through politically motivated, corrupt, discriminatory, and unlawful actions by Bolivian authorities and instrumentalities. Respondent denied these allegations, characterizing them as a “conspiracy theory”.

### **III. Scope of the Award**

By its Decision on the Respondent’s Application for Termination, Trifurcation and Security for Costs of 9 July 2019, the Tribunal bifurcated the proceedings into a stage of jurisdiction and liability to be followed, if necessary, by a stage on damages and quantum.

In its Award, the Tribunal was called upon to decide the Claimants’ following requests for relief:

- Reject all of Bolivia’s objections to the Tribunal’s jurisdiction.
- Declare that it has jurisdiction over both Claimants and their investments;
- Declare that Bolivia has breached its obligations under the Treaty and international law and, in particular, that Bolivia breached Treaty Articles III (Expropriation), II.3(a) (Fair and Equitable Treatment (“FET”) and Full Protection and Security (“FPS”)), II.3(b) (Unreasonable and Discriminatory Measures); II.4 (Effective Means), II.5 (Prompt Publication of Laws, Regulations, Administrative Practices and Procedures of General Application, and Adjudicatory Decisions that Pertain to or Affect Covered Investments), and IV (National Treatment and Most Favored Nation Treatment (“MFN”)); and that Bolivia has committed a denial of justice under the Treaty and customary international law;
- Order a quantum phase of the arbitration to determine appropriate compensation to Claimants for their losses, which should be no less than full reparation, including pre- and post-award interest; and
- Order Bolivia to pay all of the costs and expenses of the arbitration proceedings, plus interest at a reasonable rate from the date on which such costs were incurred to the date of payment.

In turn, Respondent requested the Tribunal to:

- Declare that it lacks jurisdiction over the Claimants’ claims and that, in any event, such claims are inadmissible;
- In the alternative, declare that Bolivia complied with its obligations under the Treaty and, accordingly, dismiss all of the Claimants’ claims; and
- Order Claimants to reimburse Bolivia for all the costs and expenses incurred in the arbitration, including with interest at a commercially reasonable date, due and payable from the date Bolivia incurred such costs until the date of full payment.

### **IV. The Tribunal’s Decision on Jurisdiction**

In its Award, the Tribunal considered and rejected the Respondent’s jurisdictional objections *ratione personae*, *ratione materiae*, *ratione temporis*, and *ratione voluntatis*.

## A. Jurisdiction *Ratione Personae*

The Tribunal considered first whether Mr. Orlandini, his Estate, and CMO qualified as protected investors under the Treaty.

### 1. Mr. Orlandini

Respondent raised three arguments to support its position that Mr. Orlandini was not a protected investor under the Treaty: (i) Claimants had failed to demonstrate that Mr. Orlandini was a U.S. national; (ii) even taking him to be a U.S. national, Mr. Orlandini was undisputedly a Bolivian national, and investors with dual U.S.-Bolivian nationality are not protected under the Treaty; and (iii) even taking the Treaty to allow claims against Bolivia by dual nationals, such right would be limited to investors with a dominant and effective U.S. nationality.

First, while Respondent accepted that Mr. Orlandini was a U.S. national for the purposes of U.S. law from 2012 onwards, it maintained that Mr. Orlandini's U.S. nationality during the times relevant to the dispute had not been established. The Tribunal determined that this question was governed by U.S. law for the purposes of the Treaty and referred in this respect to the 14th Amendment to the U.S. Constitution, pursuant to which "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside". The question, then, was whether Mr. Orlandini's father – a military attaché to Bolivia's diplomatic mission in the United States – enjoyed diplomatic status at the time of Mr. Orlandini's birth, thus excluding Mr. Orlandini from the jurisdiction of the United States. On the evidence, the Tribunal found that, at that time, Mr. Orlandini's father was not a "diplomatic officer" under either U.S. or Bolivian law. As such, the Tribunal concluded that Mr. Orlandini was born in the territory, and was subject to the jurisdiction, of the United States; accordingly, he enjoyed U.S. nationality at all times relevant to the dispute.

Second, Respondent asserted that U.S.-Bolivian nationals are excluded from protection under the Treaty. In deciding this question, the Tribunal determined that it was bound to follow the rules of treaty interpretation laid out in the 1969 Vienna Convention on the Law of Treaties (the "VCLT"). Turning first to the ordinary meaning of the terms of the Treaty as per Article 31(1) of the VCLT, the Tribunal established that (i) the definition of "national" of a Treaty party in Article I(c) of the Treaty covered any U.S. nationals, there being no exception or carve-out for U.S. nationals who are also nationals of Bolivia or an express prohibition of claims by dual nationals; and (ii) the ordinary meaning of the term "covered investment" in Treaty Article I(e), given the existence of a qualifying "investment" in the territory of Bolivia, implied that any natural person who is a national of the United States holding such investment would qualify for treaty protection.

Turning to an analysis of the object and purpose of the Treaty, as required under Article 31(1) of the VCLT, the Tribunal rejected the Respondent's argument that the choice of arbitration under the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") set out in Article IX(3)(a) of the Treaty required the Tribunal to transport the prohibition of claims by dual nationals found in Article 25(2)(a) of the ICSID Convention to the Treaty. In the Tribunal's view, the mere fact of the availability of another forum for investor-State dispute settlement cannot affect the scope of the Treaty's provision. In the same vein, the Tribunal considered that importing such rule would only serve to render the choice of forum in Article IX(3)(a) of the Treaty illusory, and would negate the modicum of party autonomy agreed to by the Treaty parties when drafting Article IX(3)(a) as they did.

Similarly, the Tribunal rejected the proposition that Treaty Article II(1) (on national treatment) and the preamble of the Treaty were indicative of an intention of the Treaty parties to exclude dual nationals from its scope. In respect of Article II(1), the Tribunal found that the Respondent's logic – i.e., that this provision requires dual nationals to be treated differently – would lead to discriminatory treatment, as U.S. nationals who are also nationals of Bolivia would be treated less favorably than all other U.S.

nationals. Regarding the preambular language relied upon by Respondent as enshrining the object and purpose of the Treaty (i.e., “to promote greater economic cooperation between [the Treaty parties]”) the Tribunal noted that the promotion of investment by dual nationals in either State would still squarely fit the criteria identified by Respondent in this recital.

Lastly, the Tribunal acknowledged that Article 31(3) of the VCLT allows for consideration of subsequent agreements of the parties, subsequent practice, and applicable rules of international law as between the treaty parties when interpreting the Treaty. However, the Tribunal disagreed that such provision required it to import what Respondent described as a customary international law prohibition on claims by dual nationals or, in the alternative, impose upon the investor a series of tests to determine his dominant and effective nationality, each derived from the law of diplomatic protection.

In this connection, the Tribunal agreed with the “sound” logic of the award on jurisdiction in *Serafin García Armas v. Venezuela* (PCA Case No. 2013-03), in which the tribunal firmly rejected the applicability of principles from the realm of diplomatic protection to an investment treaty which represented a complete and final agreement between the treaty parties, and in which the parties had decided not to exclude dual nationals from the definition of “investor”. The Tribunal further noted that it was reluctant to interpret the lack of a specific exclusion of dual nationals in the Treaty as a lacuna, which must be filled by importing rules from another area of international law (*viz.* diplomatic protection). This was particularly the case in circumstances where the ordinary meaning of the text of the Treaty, subject to the interpretative scrutiny prescribed by the VCLT, does not proscribe claims by dual nationals, nor impose limitations on such claims based on standards of effective nationality.

In his Separate Opinion, Dr. José Antonio Moreno Rodríguez noted his disagreement with the literal analysis of the relevant Treaty provisions performed by the Tribunal majority, which, in his opinion, did not lead to a proper understanding of what the Treaty parties intended. In his view, the interpretation of the terms of the Treaty requires a proper consideration of the context in which they were utilized, including their placement in the framework of international law, as required by Article 31(1) of the VCLT – and also by VCLT Article 32 when a literal interpretation raises “ambiguous or obscure” issues. Dr. Moreno concurred with the tribunal in *Fernando Fraiz Trapote v. Venezuela* (PCA Case No. 2019-11) in that, at the time of the signing of the Treaty in the 1990s, the protection of dual nationals was not envisaged in the general context of investment treaties. Dr. Moreno also rejected the majority’s reading of the preamble of the Treaty as evincing that its object and purpose encompasses the investment of dual nationals across both States. Finally, Dr. Moreno disagreed with the majority’s conclusion that any gaps in the Treaty should not be filled with other sources of international law, including those of a substantive nature that have been developed by customary international law, whose origin can be traced to proceedings brought under the scope of diplomatic protection.

## 2. The Estate

The crux of the Parties’ disagreement in respect of the Estate concerned the applicability of the principle of continuous nationality to the survival of Mr. Orlandini’s claims after his death.

First, absent any express Treaty provision to the contrary, the Tribunal determined that the critical date for the assessment of a claimant’s nationality is the date of the initiation of the proceeding, as is the general rule in the realm of investment treaty disputes. Accordingly, the Tribunal agreed with the analysis of the tribunal in *Siag v. Egypt* (ICSID Case No. ARB/05/15) that the claims of a deceased claimant survive her death and any sums payable to a deceased claimant would become payable to her estate, in the same way as a claim by a bankrupt corporate investor would pass on to that entity’s bankruptcy estate. A contrary reading may result in absurd outcomes, in the Tribunal’s view. As an example, the Tribunal noted that if the requirement of continuous nationality were to be accepted, a tribunal may be deprived of jurisdiction if an individual claimant passed away the day before the award was to be issued. Thus, the Tribunal concluded that the passing of Mr. Orlandini – a qualifying “investor” under the Treaty – after he brought his Treaty claim does not deprive the Tribunal of



jurisdiction or extinguish the claim; any proceeds would be paid to his Estate and disposed of accordingly.

Second, the Tribunal determined that the Estate was also a proper claimant in its own right. In the Tribunal's view, the fact that the Estate has no legal personality is immaterial, as the Treaty did not contain such requirement. Instead, the Treaty lists as covered by the definition of a "company" entities that do not possess a legal personality of their own, such as a branch. Similarly, the issue of the nationality of the beneficiaries of the Estate (e.g., Mrs. Orlandini, who is not a U.S. national), as with the identity of creditors in the context of a bankruptcy proceeding, was deemed irrelevant.

### 3. CMO

The Tribunal also rejected the Respondent's argument that CMO did not qualify as a protected investor under the Treaty.

At the outset, the Tribunal noted that the Parties agreed on the first two requirements for CMO, a Bolivian-incorporated company, to be considered a protected investor under Article IX(8) of the Treaty: (i) Mr. Orlandini must be a protected investor; and (ii) CMO must be recognized as an "investment" under the Treaty. The Parties disagreed, however, as to whether these conditions were met in fact, and as to whether a third condition existed, i.e., whether Mr. Orlandini had demonstrated control over CMO during the events leading to the dispute.

Since the Tribunal had established elsewhere in the Award that Mr. Orlandini was a protected investor (*see* Section IV.A.I *supra*) and that CMO was a covered investment under Article I(d) of the Treaty (*see* Section IV.B *infra*), the Tribunal concluded that the first two abovementioned requirements were met.

Regarding the third requirement – that of control – the Tribunal declined to revise the plain meaning of the term "owned *or* controlled" in Article I(d) of the Treaty to import a more stringent, cumulative "owned *and* controlled" requirement from Article 25 of the ICSID Convention. In any event, the Tribunal determined on the facts that Mr. Orlandini owned and controlled CMO at all relevant times, as he owned 95% of CMO's shares since 1992.

#### B. Jurisdiction *Ratione Materiae*

The Tribunal further considered whether (i) Mr. Orlandini's shares in CMO; (ii) CMO itself; (iii) CMO's mining concessions and their attendant rights; and (iv) other related property, qualified as a "covered investment" under Article I(d) and (e) of the Treaty.

First, the Tribunal rejected the Respondent's proposed definition of "investment" as inherently comprising the elements of (i) a contribution or allocation of resources; (ii) a duration; and (iii) a risk, which includes the expectation of a commercial return. Noting that this definition was notably similar to the *Salini* criteria developed in the context of understanding the meaning of the term as it appears in Article 25 of the ICSID Convention, the Tribunal determined that resort should be had instead to the definition of "investment" agreed by the Treaty parties. In the Tribunal's reading of Treaty Article I(d), the assets-based definition of "investment" is non-exhaustive and inclusive of all of the Claimants' assets; nothing in the context or the object and purpose of the Treaty contradicted such interpretation. The Tribunal declined to look beyond the ordinary meaning of the Treaty text in circumstances in which the ordinary meaning of Article I(d) was both unambiguous and would not lead to an absurd result, as such step would run counter to the interpretive canon of the VCLT.

In any event, the Tribunal was persuaded that the Claimants' investment included the elements of contribution, risk, and duration: (i) Mr. Orlandini owned 95% of CMO's shares since 1992 and committed managerial experience, expertise and technical knowledge over the lifespan of his investment; (ii) his investment involved all the risks inherent in the mining industry and had a duration of several decades; and (iii) over decades, CMO produced large quantities of tin, purchased equipment

and machinery from local manufacturers, paid for mining patents, and provided jobs, housing, and other facilities to the local community.

Second, the Tribunal rejected the Respondent's subsequent argument that the Claimants' assets did not constitute "covered" investments under the definition of Article I(e) of the Treaty, that is, they were not investments "of a national or company of a Party in the territory of the other Party". In the first place, the Tribunal recalled its finding that Mr. Orlandini qualified as a "national" and CMO as a "company" of the United States under the definition of these terms in Article I of the Treaty. In the second place, the Tribunal found that the term "of" in Article I(e) of the Treaty simply indicates that the investment must be possessed by the investor. The Tribunal found no support in the text of the Treaty for the Respondent's proposed requirements of an "origin of capital" and "active investment" requirements, noting that such interpretation would lead to an absurd result. Among other examples, the Tribunal noted that minority shareholders, who do not actively participate in the management of the underlying company, would be excluded from the scope of the Treaty under the Respondent's definition, in spite of the fact that Article I(d) explicitly refers to "shares, stock, and other forms of equity participation".

### **C. Jurisdiction *Ratione Temporis***

The Tribunal also rejected the Respondent's objection to its jurisdiction *ratione temporis*, which was based on the premise that Claimants had not discharged their burden of proving that all necessary jurisdictional conditions were met on the dates relevant to the Tribunal's jurisdiction. In the Tribunal's view, its previous findings on its jurisdiction *ratione personae* and *ratione materiae* confirmed that for all time periods relevant to the dispute (i) its jurisdiction extended over the person of Mr. Orlandini; and (ii) CMO held the status of a covered investor, as well as the status of a covered investment of a U.S. national.

### **D. Jurisdiction *Ratione Voluntatis***

Lastly, the Tribunal was called upon to decide two arguments raised by Respondent concerning the Tribunal's jurisdiction *ratione voluntatis*: (i) Bolivia did not consent to arbitration of claims by Bolivian nationals, even those with dual nationality; and (ii) the Claimants' specific claims were of a domestic nature, and as such did not constitute valid treaty claims under the Treaty.

The Tribunal observed that the Respondent's first argument simply stated in different terms the objection regarding Mr. Orlandini's nationality, of which the Tribunal had already disposed (*see* Section IV.A.I *supra*). Notwithstanding this, the Tribunal determined that the language in Article IX of the Treaty provided in clear terms that an "investment dispute" involves "a dispute between a Party and a national or company of the other party", without including any limitation on consent to arbitration of claims by dual nationals. The Tribunal rejected the Respondent's argument that this provision, by referring to the ICSID Convention, suggests that the rules preventing dual national claims in the ICSID Convention apply with equal force to an arbitration under the UNCITRAL Arbitration Rules. In the Tribunal's view, the Treaty parties would not have offered investors the choice of forum (ICSID or UNCITRAL) had they sought to incorporate all of the rules of Chapter II of the ICSID Convention by way of Article IX(4). The Tribunal concluded that the provision of Article IX granting a choice of forum for investment disputes is given full force by the Tribunal's plain reading of the text of Article IX(4). Accordingly, having already established that Mr. Orlandini was a national of the United States and that CMO qualified as a company of the United States under Article IX(8) of the Treaty, the Tribunal confirmed the Respondent's written consent to the submission of the Claimants' claims in the arbitration.

Regarding the Respondent's second argument, the Tribunal ruled that it could exercise jurisdiction over the claims presented by Claimants. In particular, the Tribunal applied a *prima facie* standard to assess whether the Claimants' allegations, as formulated, could constitute violations of the Treaty if proven. The Tribunal found that Claimants had provided more than enough evidence to establish that each of their claims arising out of the easement proceedings, the *Martínez* Case enforcement actions, or the Antequera Concessions met the threshold requirements for a claim under the Treaty.

While the Tribunal considered domestic law to be relevant to its analysis, it emphasized that the question whether whatever rights exist under Bolivian law had been interfered with in violation of the Treaty protections was a matter of international law and, thus, an international legal dispute properly before the Tribunal. In respect of the Claimants' claims arising out of certain decisions of Bolivian courts, the Tribunal clarified that in examining those claims it would not be acting as an appeals court, but simply fulfilling its mandate to consider whether the Respondent's actions violated the Treaty.

## **V. The Tribunal's Decision on Admissibility**

Respondent raised two separate objections to the admissibility of the Claimants' claims.

First, Respondent argued that the claims raised in relation to the *Martínez* Case were premature, given that the case was still pending, and Claimants could not have possibly suffered irreparable harm as a result. The Tribunal noted in this respect that the Treaty did not contain a requirement to exhaust local remedies as a precondition to bringing a claim, and also declined to read such requirement into the Treaty. In any event, the Tribunal noted that the Claimants' claims related to the *Martínez* Case were in fact ripe, as CMO had already been dispossessed of its Concessions, and the extraction of minerals within the Veneros San Juan area had already occurred under the sanction of Bolivian law. Whether or not such acts were legally justified, the Tribunal considered that the impact thereof had been adequately presented for adjudication.

Furthermore, citing to *Chevron v. Ecuador* (PCA Case No. 2007-02) and *White Industries v. India* (UNCITRAL) the Tribunal noted that an undue delay in judicial or administrative proceedings may well form the basis of a denial of justice or a denial of effective means claim. In this connection, the Tribunal considered that Respondent had failed to articulate any sound basis for the application of an "irreversible damage" requirement for such claims to be admissible, especially where the damage complained of had been effectuated already for a number of years.

Second, Respondent argued that the clean hands doctrine barred the Claimants' claims by referring, *inter alia*, to CMO's purported concealment of the scope of the 1906 VSJ Title (leading to the criminal complaint against certain Sinchi Wayra executives) as well as CMO's conduct leading directly to the auction of the Concessions. The Tribunal considered unnecessary to address whether the clean hands doctrine exists as a general principle of law or whether it applied as a residual rule of international law under Article X(1) of the Treaty as, in its judgment, Respondent had failed to adduce sufficient evidence to demonstrate that Claimants had brought their claims with unclean hands. Drawing a comparison with the application of such standard by the tribunal in *Al-Warrag v. Indonesia* (UNCITRAL), the Tribunal found that Respondent had failed to present sufficient evidence that CMO or Mr. Orlandini intentionally concealed the nature of their rights in the Veneros San Juan concession, or that they otherwise abused their rights, misled the State or their commercial partners, or participated in fraudulent or corrupt activities in the course of the business dealings underlying the Claimants' claims.

## **VI. The Tribunal's Decision on Liability**

Claimants claimed that Respondent had breached the Treaty's substantive protections by (i) unlawfully expropriating their investment; (ii) failing to afford FET to the investment; (iii) denying them access to justice and effective means of asserting claims and enforcing rights; (iv) denying the investment FPS; (v) failing to afford Claimants treatment in accordance with national treatment and MFN standards; and (vi) failing to publish or make public laws, regulations, and decisions relevant to the investment. In the Claimants' submission, under the international law of attribution, Respondent was liable for these violations for the actions and omissions of its organs and instrumentalities.

As more fully set out below, the Tribunal dismissed the Claimants' claims that Respondent had breached the Treaty. In his Dissenting Opinion, Prof. Tawil opined that Respondent had violated the Treaty's FET standard, as well as its obligation to provide FPS to the Claimants' investments in its territory under the Treaty.

## A. Attribution

While the Parties agreed that the conduct of Bolivia's State organs was attributable to Respondent for the purposes of responsibility under international law (including, among others, the Bolivian Judiciary, the Ministry of Mining, the Superintendent, SERGEOTECMIN, and the Bolivian prosecutorial apparatus) they disagreed as to whether the same was true for COMIBOL, COMSUR, Glencore and its subsidiaries.

Ultimately, however, the Tribunal determined that this question was immaterial for the disposition of the Claimants' claims, as each of those claims as articulated by Claimants had a direct nexus to acts or omissions of one or more of Bolivia's aforementioned public organs. Accordingly, the Tribunal was satisfied that it was empowered to consider fully each of the Claimants' claims in their context without resorting to the customary international rules of attribution.

## B. Expropriation

Claimants claimed that Bolivia both directly and indirectly expropriated their investments through a series of measures that dispossessed them of their concession rights and destroyed the value of Mr. Orlandini's shares in CMO. In their view, the expropriation was also unlawful, since Bolivia did not follow the conditions required for a lawful expropriation under the Treaty.

At the outset, the Tribunal determined that it was required to perform two analytical steps under Article III of the Treaty. First, the Tribunal was called upon to determine whether Respondent took any expropriatory measures with respect to Claimants and their investments: either directly, through formal acts of seizure or transfer of property to the State, or indirectly, through unreasonable interference with the use, enjoyment, or disposal of property. If the answer is that it did not, the analysis would go no further. If the Tribunal were to conclude that Respondent did take expropriatory measures, the Tribunal would then proceed to analyze whether the requirements set out in Article III of the Treaty for a lawful expropriation had been met – that is, whether the measure (i) had a legitimate public purpose; (ii) was effected in a non-discriminatory manner in accordance with due process of law; and (iii) was promptly, adequately, and effectively compensated. In the Tribunal's judgment, a failure to comply with any of these requirements would entail a violation of Treaty Article III.

Having set out the applicable standard, the Tribunal rejected, as a threshold issue, the Claimants' allegation that there was any corruption on the part of any Bolivian officials with respect to the Claimants' investments. First, the Tribunal found that the initial willingness of judge hearing the *Martínez* Case enforcement proceedings to promote herself as having advised Glencore, as shown during a covert interview conducted by the private intelligence firm Black Cube, demonstrated an unscrupulous character. However, the Tribunal found that this evidence was not sufficient (let alone conclusive) to prove that the judge had colluded to divest Claimants of their rights in their concessions or to consult Glencore or its subsidiaries on how to acquire those rights during her tenure in that case. Critically in this respect, the Tribunal found that the transcripts of the judge's interview actually demonstrated that she did not commit any illegalities in this process and that CMO failed to make use of the remedies available under Bolivian law. The only other evidence proffered by Claimants in this connection – a one-page letter concerning the judge's conduct in unrelated proceedings – was not deemed significant by the Tribunal. Second, the transcripts of another interview covertly conducted by Black Cube with a former SERGEOTECMIN official – which, in the Claimants' submission, evidenced that SERGEOTECMIN managers accepted bribes from Glencore in order to register CMO's concessions illegally in the name of Empresa San Lucas – were not deemed relevant, as the official referred to incidents which were alleged to have occurred before he was employed by that agency. Overall, the Tribunal found this evidence unpersuasive and unreliable and declined to infer any wrongdoing on the part of Bolivian officials.

The Tribunal then addressed two distinct events which Claimants claimed to have negatively impacted their investment in Bolivia: (i) the easement proceedings and the subsequent mining and alleged trespass

under the Veneros San Juan riverbed by third parties; and (ii) the *Martínez* Case enforcement proceedings, which Claimants alleged were tainted by corruption and grave procedural irregularities, and which saw CMO's assets auctioned off at a price that Claimants allege was significantly lower than their true value.

Regarding the easement proceedings, the Tribunal found that Claimants had not conclusively established under Bolivian law that they had subsurface rights in the Veneros San Juan and Pretoria concessions. In this respect, the Tribunal stressed, among other factors, that Claimants (i) never exploited the subsurface of these concessions; (ii) consistently paid the patent for only the surficial rights to these concessions; (iii) did not oppose the granting of the *Seguridad I* concession; and (iv) never made resort to Bolivian courts to submit the question of subsurface rights in Veneros San Juan to proper adjudication. Having failed to establish that the investment at issue existed under domestic law, the Tribunal concluded that Claimants had no rights that were capable of expropriation by the Bolivian authorities.

Second, the Tribunal found that while the *Martínez* Case enforcement proceedings saw numerous procedural, clerical, and administrative errors and irregularities, they did not amount to the substantial deprivation of property complained of by Claimants. The Tribunal's conclusion was supported by the following findings: (i) Claimants acknowledged their debt to the *Martínez* plaintiffs at all times, as well as their inability to pay them; (ii) Claimants failed to establish that the admission of a former business partner of CMO as a *coadyuvante* to provide evidence on the value of the Claimants' assets prior to the 2007 Auction was illegal under Bolivian law; (iii) the Tribunal was not persuaded that the value of the Concessions was materially reduced by the valuation ultimately used by the court, particularly in view of the fact that no alternative valuations were provided to the Tribunal placing the value of the Claimants' assets at a higher figure; and (iv) the Tribunal considered that the "complementation order" issued by the judge (the "**Complementation Order**"), which was used to swap and correct the *folio* number of CMO's auctioned assets from a parcel of land to the Totoral Concessions after the 2007 Auction took place, was an incident of baffling judicial and administrative incompetence, but was not influenced or motivated by corruption, particularly in view of the fact that it did not change the outcome of the 2007 Auction.

For these reasons, the Tribunal concluded that the administrative and judicial processes complained of by Claimants, though marred by procedural irregularities, errors and confusion, did not amount, individually or in the aggregate, to either a direct or an indirect expropriation under Article III of the Treaty.

### C. Fair and Equitable Treatment

Claimants argued that Respondent did not afford their investments FET because it failed to protect the Claimants' legitimate expectations and subjected their investments to arbitrary and discriminatory treatment as part of a conspiracy between Respondent and its private partners to profit from the exploitation of said investments.

The Tribunal began its analysis with the formulation of the FET standard in Article II(3)(a) of the Treaty. Applying the VCLT canon of treaty interpretation, the Tribunal found that while the Treaty prohibits treatment that is "less favorable than that required by international law", it also contains an autonomous and independent provision obligating the Treaty parties to provide foreign investors FET above and beyond the minimum standard of treatment (i.e., "Each Party shall at all times accord to covered investments fair and equitable treatment [...]"). Regardless of any distinction between these two standards, and even taking the Claimants' articulation of the FET standard as controlling, the Tribunal found that none of the five core obligations emanating from such standard was breached by the Respondent.

First, the Tribunal found that Respondent had not breached its obligation to respect and safeguard the Claimants' legitimate expectations. Reiterating its findings in respect of the Claimants' expropriation claim (*see* Section VI.B *supra*), the Tribunal recalled that (i) the Respondent's actions did not amount

to an expropriation; (ii) Claimants had not met their burden to prove that Claimants enjoyed any rights under Bolivian law in the subsurface of the Veneros San Juan and Pretoria concessions; and (iii) Claimants had failed to establish that any portion of the *Martínez* Case enforcement proceedings was marred by corruption, or that other actions undertaken in the course of the proceedings were patently illegal under Bolivian law. In this latter connection, the Tribunal found that while Claimants did have a legitimate expectation that Bolivian judicial proceedings would be conducted properly, non-arbitrarily or discriminatorily, and in accordance with due process of law and free of illegalities, they could not have had legitimate expectations that their Concessions would not be auctioned at the price that they were auctioned.

Second, in respect of the Respondent's obligation to refrain from unreasonable, arbitrary, and discriminatory measures, the Tribunal reiterated that Claimants had failed to establish conclusively that Respondent violated its own laws in the process of either the easement proceedings or the *Martínez* Case enforcement proceedings. The Tribunal also found that Claimants had failed to demonstrate that Respondent instituted any (i) measures that damaged the investment without serving any legitimate purpose; (ii) measures that were based on "discretion, prejudice, or personal preference" rather than any legal basis; or (iii) measures that were taken for reasons other than those articulated by the decision maker.

Third, the Tribunal found that Claimants had not established that Respondent harassed, coerced, or abused them or their investments during the easement proceedings or the *Martínez* Case enforcement proceedings. The Tribunal reiterated in this connection that the Claimants' allegations that Bolivian judicial and administrative agencies conspired against CMO's mining operations in the Totoral region were not properly substantiated by sufficient or reliable evidence.

Fourth, the Tribunal found no indication that Respondent had violated its obligation to act in good faith with respect to Claimants or their investments in Bolivia. In the Tribunal's view, its prior findings confirmed that Respondent had not engaged in any *mala fide* actions with regard to their investment such as those identified in a comparable setting by the *Frontier Petroleum v. Czech Republic* (UNCITRAL) tribunal, which include: (i) "the use of legal instruments for purposes other than those for which they were created"; (ii) "a conspiracy by state organs to inflict damage upon or to defeat the investment"; (iii) the "termination of the investment for reasons other than the one put forth by the government"; or (iv) the "expulsion of an investment based on local favouritism".

Fifth, and last, while the Tribunal agreed with Claimants that the obligation to provide due process and transparency was a standalone obligation under the FET standard, the Tribunal was unconvinced that the procedural irregularities arising throughout the *Martínez* Case enforcement proceedings were sufficient to constitute a violation of the Treaty. In the same vein, while the Tribunal accepted that government corruption impacting a covered investment would constitute a violation of the FET standard in Article II of the Treaty, the Tribunal reiterated that no such corruption had been proven on the part of the judge hearing the *Martínez* Case enforcement proceedings or the officials at SERGEOTECMIN.

#### **D. Denial of Justice**

Claimants submitted that Respondent had violated the prohibition against denial of justice because its judiciary, administrative organs, and prosecutorial authorities all failed to provide due process protections and otherwise acted unfairly, irregularly, or maliciously, leaving Claimants without recourse. In particular, Claimants alleged that they were denied justice in six proceedings: (i) the easement proceedings; (ii) the criminal proceedings against Sinchi Wayra; (iii) the judicial auction of the Concessions; (iv) the criminal proceedings against the judge hearing the *Martínez* Case enforcement proceedings; (v) the administrative proceedings before AJAM; and (vi) the SERGEOTECMIN administrative proceedings.

Denial of justice, the Tribunal found, may occur where there is a lack of due process in judicial or administrative proceedings that leads to an outcome which offends accepted notions of judicial

propriety. Quoting the *Mondev International Inc. v. United States* tribunal (ICSID Case No. ARB(AF)/99/2), the Tribunal formulated the test as an enquiry into whether there are “justified concerns as to the judicial propriety of the outcome” and whether “the impugned decision was clearly improper and discreditable”.

Applying this standard, the Tribunal found, first, that Respondent had not denied justice to Claimants in the easement proceedings. Firstly, Claimants had the opportunity to establish their superior right to mine the subsurface of the Veneros San Juan and Pretoria concessions utilizing the proper procedures under Bolivian law after the issuance of the Revalidation Decision, but decided not to do so. Secondly, Claimants had failed to establish that a revalidation decision, albeit being a novel or at least rare administrative procedure, is inconsistent with the principles of Bolivian law. Lastly, the Respondent’s failure to provide immediate notice of COMIBOL’s May 8, 2007 petition or the Revalidation Decision to Claimants could not amount to a denial of justice, as (i) such notice was not required under Bolivian law; (ii) no adversarial procedure was required because the procedure did not touch upon any rights which Claimants had established under Bolivian law; and (iii) Claimants failed to challenge the Revalidation Decision under the mechanisms foreseen under Bolivian law.

Second, the Tribunal rejected the Claimants’ allegations that Respondent dismissed CMO’s criminal complaints against the executives of Sinchi Wayra without proper investigation. As a preliminary matter, the Tribunal considered that it is typically only in relation to criminal proceedings against claimants themselves that a denial of justice claim may be asserted, as the standard applies to proceedings involving the determination of a claimant’s right and duties. Even taking the criminal complaints to impact the rights of Claimants, such that a denial of justice claim were appropriate, the Tribunal considered that the Prosecutor, as with any domestic authority considering evidence in the first instance, is entitled to a measure of discretion necessary to carry out its prosecutorial function. In circumstances where Claimants had failed to show any evidence indicating a gross lack of competence or dishonesty on the part of the Prosecutor when exercising such discretion, the Tribunal concluded that the refusal to continue criminal proceedings against the executives of Sinchi Wayra did not amount to a denial of justice.

Third, in the context of the 2007 Auction, the Tribunal reiterated that a denial of justice may be evident when judicial authorities refuse to entertain a suit, subject it to undue delay, administer justice in a seriously inadequate way, or clearly and maliciously misapply the law. Under this standard, the Tribunal rejected the Claimants’ allegations concerning multiple distinct instances in which Respondent denied them justice with respect to their investments in Bolivia. In particular, the Tribunal ruled that: (i) Claimants did not establish that admission of a *coadyuvante* in the *Martínez* Case enforcement proceedings was contrary to Bolivian law, and even if it were Claimants failed timely to challenge these decisions; (ii) it was unclear whether the admission of a *coadyuvante* had any material consequences for Claimants, as the court’s decision to rely on the valuation provided by the *coadyuvante* was conducted within the bounds of Bolivian law; (iii) the attachment order over the Concessions identified each concession by name, and there was a validly placed judicial lien on all of them; (iv) Claimants had failed to establish that mining concessions could not be auctioned under controlling Bolivian law; (v) the Complementation Order did not amount to a denial of justice, as the auction report and auction notice each defined the object of the judicial sale as encompassing the Concessions and such documents were also properly notified to CMO and all interested parties; (vi) Claimants had not established that the payments to the *coadyuvante* and other creditors of Claimants out of the proceeds of the 2007 Auction amounted to a denial of justice, as Bolivian law does not prohibit the payment of civil law claims within labor proceedings and the claims in question were acknowledged in a settlement agreement and other relevant documents; and (vii) recalling its prior rulings (*see* Section VI.B *supra*) the Tribunal reiterated that there was no substantial lack of proportionality between the assets auctioned in the *Martínez* Case enforcement proceedings and the debts owed by Claimants to their properly registered creditors.

Fourth, the Tribunal determined that Claimants were not denied justice in relation to the criminal proceedings against the judge hearing the *Martínez* Case enforcement proceedings, as (i) the proceedings did not constitute a determination of the rights or duties of Claimants; and (ii) in each

criminal complaint filed by CMO against the judge, the Prosecutor initiated an investigation and concluded within the bounds of his discretion that there was not enough evidence for a criminal case to be brought.

Fifth, the Tribunal ruled that the decision of the AJAM agencies to dismiss CMO's nullity petitions on the grounds of a lack of administrative competence did not constitute a denial of justice. In particular, the Tribunal noted that (i) these agencies based their decisions on a reasonable interpretation of Bolivian law; and (ii) CMO failed timely to avail itself of available remedies to collect the allegedly egregious errors under Bolivian law.

Lastly, the Tribunal rejected the Claimants' argument that they were denied justice in the proceedings before SERGEOTECMIN. Under this heading, the Tribunal recalled its finding that Claimants had failed to prove any of the serious corruption allegations they levied against SERGEOTECMIN officials. The Tribunal also noted that, as in the case of the proceedings before AJAM, Claimants had failed to provide sufficient evidence that SERGEOTECMIN had acted maliciously, arbitrarily, or with gross incompetence.

#### **E. Effective Means of Asserting Claims and Enforcing Rights**

Claimants further submitted that, in violation of the Treaty's effective means standard, Respondent failed to provide an effective system through which to assert claims and enforce rights.

In the Tribunal's view, Article II(4) of the Treaty enshrined a distinct and separate standard from that obligating a respondent to refrain from denying justice to foreign investors. The Tribunal reached this conclusion by applying the *effet utile* principle derived from VCLT Article 31(1) and taking due note that the Treaty parties decided to include the obligation to provide effective means as a separate obligation in Article II(4).

Furthermore, the Tribunal described the effective means standard as an affirmative obligation requiring that Respondent ensure that domestic law provides an effective means for the assertion of claims and includes mechanisms that allow for a meaningful and effective enforcement of rights. Accordingly, the Tribunal determined that the standard to determine whether the State has violated this obligation requires a two-step analysis: first, whether a system of laws exists and is available to investors to protect their rights; and second, whether such system of laws and institutions works effectively.

On the facts, the Tribunal determined that Claimants had not established that Respondent had failed to establish procedural mechanisms supporting the rule of law as just described. In this connection, the Tribunal recalled its rulings on the Claimants' expropriation and denial of justice claims (*see* Sections VI.B and VI.D *supra*) in respect of the specific instances in which Claimants alleged that Respondent had failed to provide effective means.

First, with regard to the easement proceedings, the Tribunal recalled that Claimants (i) had failed to demonstrate that such proceedings actually adjudicated the nature of the mining rights in the Veneros San Juan or Pretoria concessions; and (ii) had failed to avail themselves of the proper judicial avenue to establish that they had indisputable subsurface mining rights to protect.

Second, with regard to the criminal proceedings against Sinchi Wayra executives and the judge hearing the *Martínez* Case enforcement proceedings, the Tribunal recalled that Claimants had not demonstrated that (i) these proceedings had any bearing on their concession rights; (ii) the proceedings were handled so improperly and unjustifiably as to constitute a failure of the rule of law in Bolivia; and (iii) Claimants properly utilized the remedies available to them to counter any judicial or prosecutorial decisions which they found to be incorrect.

Lastly, the Tribunal determined that there was no failure on the part of Respondent to provide effective means in relation to the *Martínez* Case, nor in the subsequent administrative proceedings instigated by



Claimants seeking to unwind the consequences of the judicial sale of the Concessions to Empresa San Lucas (i.e., the registration of these concessions to Empresa San Lucas in the Oruro Property Registry and the rejection of CMO's nullity requests by AJAM and SERGEOTECMIN). The Tribunal recalled that Claimants had failed to demonstrate that, in the course of these proceedings (i) Respondent did not provide effective means to bring claims or enforce rights; and (ii) Claimants utilized the procedures available to them to challenge the alleged irregularities in these proceedings.

#### **F. Full Protection and Security**

Claimants argued that Bolivia failed to provide physical protection from Glencore's subsidiaries, which they claimed had trespassed and illegally exploited CMO's Veneros San Juan and Pretoria concessions. Claimants also submitted that Bolivia failed to provide legal protection from the Bolivian Judiciary, prosecutorial authorities, and administrative organs that targeted CMO.

At the outset, the Tribunal determined that the FPS standard set out in Article II(3)(a) of the Treaty encompasses the State's obligation to engage all due diligence in providing both physical and legal security to covered investments. This was so, in the Tribunal's judgment, because the language in the Treaty refers to "full" protection and security. Conversely, the Treaty contains no express limitation to physical security, nor does it limit its scope to actions undertaken only by third parties, as opposed to agents of the State itself.

Having set out the applicable standard, the Tribunal found that the mining and transportation of minerals through the underground of the Veneros San Juan and Pretoria concessions did not constitute a physical impairment of the Claimants' investment because, as the Tribunal had already found, Claimants failed to utilize the proper domestic legal avenues to establish that they had exclusive rights in the subsurface of these concessions (*see* Section VI.B *supra*).

The Tribunal also found that, under the full circumstances of the *Martínez* Case and the easement proceedings, it could not be said that Respondent failed to provide Claimants legal protection and security in contravention of the Treaty. While the Tribunal found that the Treaty's effective means standard (*see* Section VI.E *supra*) and the FPS standard are not coextensive, in this case the Tribunal deemed its reasoning regarding the application of the first standard to apply equally to the analysis under the present heading. Similarly, the Tribunal considered that CMO's failure to avail itself of the ample opportunity it had to request Bolivian courts to establish that it had subsurface mining rights in the Veneros San Juan and Pretoria concessions was not imputable to Respondent as a failure to afford FPS.

Overall, the Tribunal found that there was no level of illegality involved in the easement proceedings, the *Martínez* Case, or any of the subsequent criminal or administrative proceedings brought by Claimants attempting to unwind the results of the 2007 Auction, which could be considered as destabilizing the legal environment protecting the Claimants' investment in the territory of Bolivia.

#### **G. National Treatment and Most Favored Nation**

Claimants claimed that Respondent breached the national treatment and MFN standard in Article II(1) of the Treaty by affording COMIBOL and Glencore treatment more favorable than that afforded to CMO, without legitimate justification.

As a preliminary matter, the Tribunal found no requirement in the Treaty to demonstrate that discriminatory treatment *vis-à-vis* other foreign or domestic companies in like circumstances must be motivated by the foreign investor's nationality. Citing to *Bayindir v. Pakistan* (ICSID Case No. ARB/03/29), the Tribunal stated that reading such requirement into the Treaty would place an unrealistic burden on claimants to uncover the subjective intent of respondent States, "as that information may only be available to the government".

On the facts, while the Tribunal acknowledged that CMO, COMIBOL and Glencore were “in like situations” – i.e., all were companies managing mining concessions, competing in the mining sector in the same area of Bolivia, and subject to the same mining laws – it also found that Claimants had failed to demonstrate that COMIBOL, Glencore, or its subsidiaries actually received differential treatment in like situations. In particular, the Tribunal reiterated its finding that Claimants failed to utilize the proper avenues under Bolivian law to demonstrate that their rights to the subsurface of the Veneros San Juan and Pretoria concessions were superior to those of the participants in the Bolívar mining project (*see* Section VI.B *supra*). The Tribunal also found that Claimants had not demonstrated that, had these other companies been properly subject to enforcement proceedings for failure to pay their debts, they were or would have been treated differently than Claimants under the same judicial mechanism as in the *Martínez* Case.

## **H. The Publication Standard**

Claimants submitted that Respondent concealed pertinent adjudicatory decisions, in violation of the Treaty’s Publication Standard in Article II(5), which deprived them of their right to be heard and ultimately resulted in the expropriation of their rights to the Concessions.

The Tribunal interpreted Article II(5) of the Treaty to require a host State to publish and make publicly available measures of general application that pertain to or affect covered investments. In particular, the Tribunal found that the operative term in this provision – “adjudicatory decisions” – should be read in the context of the terms which precede it. In other words, the list of words preceding “adjudicatory decisions” (i.e., “laws, regulations, administrative practices and procedures of general application”) are all items of general application, and so should be “adjudicatory decisions”.

Similarly, under the *ejusdem generis* canon of construction, the Tribunal considered that “adjudicatory decisions” are part of the same genus as “laws, regulations, administrative practices and procedures of general application”. Accordingly, only decisions of the Bolivian courts that have value for the general interpretation and application of the law are subject to the requirement of publication.

While acknowledging that States must provide proper notice as part of their obligation to afford covered investors and their investments due process of law, the Tribunal clarified that this obligation should not be read as coextensive with the Publication Standard. In the Tribunal’s judgment, such standard is specific and narrowly defined and should not be read as encroaching upon the scope of other Treaty protections, such as FET and denial of justice.

The Tribunal emphasized that the Claimants’ assertion that Bolivia concealed adjudicatory decisions was deemed to overlap with earlier findings regarding FET and denial of justice claims. Therefore, the Tribunal concluded that there was no basis for a different outcome regarding the Claimants’ claims concerning the Publication Standard.

## **I. Claimants’ Contribution to their Own Alleged Harm**

Respondent denied any liability for the dispossession of the Claimants’ assets because, in its view, Claimants failed to prove causation. In particular, Respondent averred that the loss of the Claimants’ alleged investment was the result of their own negligence and, as such, Respondent did not owe any compensation for the ensuing loss.

The Tribunal determined that Respondent was required to meet a high burden to demonstrate that Claimants contributed to the harm alleged to have been visited upon their investment. In this connection, the Tribunal also determined that Respondent did not meet that burden, notwithstanding the argument that Claimants did not properly utilize the administrative and judicial remedies available to them. Ultimately, however, the Tribunal considered unnecessary to rule on this matter, as it had already decided that Respondent was not liable for a breach of the Treaty with respect to any of the Claimants’ claims.

## **J. Dissenting Opinion of Professor Dr. Guido Santiago Tawil**

In his Dissenting Opinion, Prof. Tawil noted that he agreed with the majority of the Tribunal on the questions of attribution, the applicable legal standards under the Treaty for expropriation, FET, denial of justice, the obligation to provide effective means to assert claims and enforce rights, FPS, national treatment and most favored nation treatment, and the publication requirement. He noted, however, that there was no consensus regarding the application of such legal standards to the facts of the case, particularly when examining (i) the *Martínez* Case enforcement proceedings; and (ii) the easement proceedings.

Concerning the *Martínez* Case, Prof. Tawil opined that even if Claimants had failed to establish that corruption took place, the actions of the judge hearing the enforcement proceedings ran very far apart from mere mistakes or the misapplication of legal principles or rules. In his view, the arbitrariness of the judge's acts and omissions appears so manifest and gross that it made it extremely difficult to understand her conduct in the access of a "personal interest" on her part and that of other related individuals. Prof. Tawil's opinion was reinforced by the fact that a key participant in most of those actions – the individual who was admitted as *coadyuvante* and collected significant proceeds from the 2007 Auction of the Concessions – decided not to appear for examination at the hearing at the very last minute after providing two written testimonies in the arbitration. Prof. Tawil considered this to be a sufficient basis for the Tribunal to infer that her oral testimony would not have supported the legality of the actions adopted in the *Martínez* Case.

In respect of the easement proceedings, Prof. Tawil opined that the way the Superintendent conducted both the original administrative proceedings in April 2000 and those that ended in the Revalidation Decision evidenced the presence of a number of concerted, arbitrary actions against CMO. Prof. Tawil recalled that while the 2000 Resolution was annulled in 2001, COMIBOL requested on May 8, 2007, in a page-and-a-half submission and without invoking the support of a single legal rule, the reinstatement of the annulled decision. The Superintendent granted such request the following day in the one-page Revalidation Decision, which contained no legal analysis. CMO was notified the decision by simply attaching it to the agency's board, avoiding in that way any possibility of real and effective knowledge of such decision by CMO. Prof. Tawil's view was reinforced by the unusual speed and sequence of these acts. Prof. Tawil also found telling that the events surrounding the Revalidation Decision took place shortly after CMO initiated criminal proceedings against Sinchi Wayra's top executives in December 2006 due to the trespass and looting of the Concessions. In Prof. Tawil's view, the Revalidation Decision conveniently legitimized the trespass with retroactive effect, depriving CMO's criminal action of any effect.

Prof. Tawil also found noteworthy that the Revalidation Decision and the judicial auction of the Concessions in the *Martínez* case crystallized in a period of less than 10 days, between April 30, 2007 (the date of the 2007 Auction) and May 9, 2007 (the date of the Revalidation Decision). Prof. Tawil considered that such coincidence raised additional questions about the sequence and concerted "efforts" behind such acts.

Prof. Tawil concluded that the above-described "arbitrary" actions of the Respondent's instrumentalities constitute clear violations of the FET standard and of the Respondent's obligation to provide FPS to the Claimants' investments in its territory under the Treaty.

## **VII. The Tribunal's Decision on Costs**

When deciding on the allocation of costs, the Tribunal recalled that it had been requested to rule upon a complex, multi-faceted dispute involving measures and conduct spanning decades. The Tribunal noted that, on the one hand, Claimants were ultimately unsuccessful as their claim for breach of the Treaty was dismissed. On the other hand, the Respondent's jurisdictional and admissibility objections failed; moreover, Respondent submitted numerous unsuccessful procedural applications, which caused delay

in the proceeding and added costs. On this basis, the Tribunal decided that each Party would bear its own costs and legal fees, and that each Party would bear 50% of the costs of the arbitration.

Noting that Respondent had declined to make deposit payments to cover its share of the costs of the arbitration after making the first two requested advance payments, the Tribunal ordered Respondent to reimburse Claimants for the cover payments they made, totaling USD 680,432.04.

Lastly, having taken note that Respondent had requested that Claimants be ordered to reimburse Bolivia for all costs and expenses incurred in the arbitration, including with interest at a commercially reasonable rate, the Tribunal determined it was fair that Claimants be reimbursed for their payment of the Respondent's share of the costs of arbitration with interest at a commercially reasonable rate. The Tribunal considered appropriate to apply the Bolivian Bank Lending Rate (the average rate of interest charged by Bolivian commercial banks on short term notes), compounded annually. The Tribunal determined that interest should run from the date Claimants paid the Respondent's share of the advance payments until the date of payment.

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