

**INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES**

**ICSID Case No. ARB(AF)/09/1**

**IN THE PROCEEDING BETWEEN:**

**Gold Reserve Inc.  
Claimant**

**- And -**

**Bolivarian Republic of Venezuela  
Respondent**

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**DECISION  
REGARDING THE CLAIMANT'S AND THE RESPONDENT'S REQUESTS  
FOR CORRECTIONS**

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*Issued by an Arbitral Tribunal composed of:*

Professor David Williams QC  
Professor Pierre-Marie Dupuy  
Professor Piero Bernardini, President

*Secretary of the Tribunal:*

Ann Catherine Kettlewell

Date: December 15, 2014

## **I. Procedure**

1. On 31 October 2014, the Respondent submitted a letter to the Secretary-General of ICSID requesting that, pursuant to Article 56 of the ICSID Arbitration (Additional Facility) Rules, she obtain from the Tribunal certain corrections to the Award issued on 22 September 2014 (“**The Respondent’s Request**”). On 3 November 2014, the Claimant submitted a letter opposing The Respondent’s Request on the basis that it had not been correctly particularized. On the same date, the Secretary-General acknowledged receipt of The Respondent’s Request for corrections and the Claimant’s letter and transmitted both to the Tribunal.
2. On 4 November 2014, the Claimant submitted a “Request for Correction of Award, dated September 22, 2014” (“**The Claimant’s Request**”). This request for correction was made pursuant to Article 56 of the ICSID Arbitration (Additional Facility) Rules. On the same date, the Secretary-General acknowledged receipt of The Claimant’s Request and transmitted the Request to the Tribunal.
3. On 5 November 2014, the Tribunal invited (i) the Respondent to elaborate further on its request indicating the specific grounds and corrections and (ii) the Claimant to submit a reply to the Respondent’s elaborated request. In its communication, the Tribunal reserved the right to decide on the admissibility and/or merits of The Respondent’s Request.
4. On the same date, the Respondent submitted a supplement to its 31 October 2014 letter entitled “Request for Corrections by the Bolivarian Republic of Venezuela”(“**The Respondent’s Supplemental Request**”).

5. On 6 November 2014, the Tribunal invited both Parties to submit replies to the other Party's request for corrections by 13 November 2014. Again, the Tribunal reserved the right to decide on the admissibility and/or merits of the Parties' requests.
6. On 13 November 2014, both Parties filed a reply to the other Party's request.

## **II. The Respondent's Request for Correction of the Award**

### **A. The Respondent's Request**

7. The Respondent submitted that the Tribunal appeared to have made significant clerical, arithmetical and similar errors in its Award. The Respondent's Request alleged that the Tribunal had made such errors in relation to: (i) the deduction for the value of silver; (ii) its use of the RBC Capital Markets Report as the source of a 4% country risk premium; (iii) its exclusion of the sovereign yield spread; (iv) its computation of the WACC; (v) failure to use the DCF model to calculate effects of new inputs; and (vi) other similar errors.<sup>1</sup>
8. The Respondent requested that the Secretary-General obtain from the Tribunal the corrections to the Award by scheduling, or having the Tribunal schedule, in consultation with the Parties, dates for submissions by the Parties with respect to its requests. It also reserved its right to supplement The Respondent's Request and to request a hearing in the subject.

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<sup>1</sup> The Respondent's Request, p. 1.

9. The Respondent further developed its arguments in the Respondent's Supplemental Request. The only "other similar error" specified in the Supplemental Request was the adoption of a one year delay period for operations under a new mine plan.
10. In relation to the silver value deduction, the Respondent noted that the Tribunal had used the Claimant's DCF calculation as the starting point for the valuation. Based on that, it argues that the Tribunal made a clerical error in using the US\$ 31 million figure from Dr. Burrows' table as a deduction for silver rather than US\$ 58 million used in Mr. Kaczmarek's table. Therefore, Venezuela requests that the amount of the Award in relation to silver should be adjusted by further US\$27 million.<sup>2</sup>
11. The Respondent also argues that the Tribunal made a clerical, arithmetical or similar error by using a 4% country risk premium based on the RBC Capital Markets Report. The aforementioned report, according to the Respondent, refers to a 5% country risk premium which results in a cost of equity of 12.92% and a WACC of 10.84%.<sup>3</sup> This would result in an adjustment of US\$ 182 million and not of US\$ 130 million as calculated by the Tribunal, subject to two further points developed below.
12. According to the Respondent, in addition to the 5% country risk premium and its impact on the cost of equity and the WACC, the Tribunal erroneously assumed a straight-line or linear correlation. With the correct curvilinear relationship and correct 5% country risk premium, the amount to be deducted would be US\$ 250 million and not US\$ 130 million.

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<sup>2</sup> The Respondent's Supplemental Request, paras. 9-13.

<sup>3</sup> *Id.*, paras. 14-22.

13. Regarding the sovereign yield, the Respondent states that the Tribunal's finding that the sovereign yield spread (6.7%) suggested by Dr. Burrows as a possible country risk premium included "an element reflective of the State policy to nationalise investments" was a clerical or similar error. This is because, according to the Respondent, the sovereign yield spread reflects political risk, but not expropriation risk. The Respondent suggested that both experts agreed on this, as well as the figure of 6.7%. The Respondent requests that the Tribunal apply a sovereign yield spread as of March 2008 as the measure for country risk. This would then result in a WACC of 12.11 and a reduction in damages of US\$ 346 million using the correct curvilinear computation instead of US\$ 130 million.<sup>4</sup>
14. The Respondent also argues that the Tribunal committed an arithmetic error by using rough approximations to estimate the effects on the value of the Brisas project of its adjustments to Mr. Kaczmarek's DCF model, agreed to and used by the Parties and their experts, instead of either running the model itself or requesting the Parties to run the model. The Respondent submits that the difference between the rough approximation approach as implemented by the Tribunal and the precise results calculated using the DCF model are well over US\$ 100 million.<sup>5</sup>
15. Finally, the Respondent claims that the Tribunal made a clerical or similar error in deciding that a one year delay was reasonable since it overlooked that the Parties agreed that a two year delay in the no-layback scenario was appropriate. This would have had an impact in the

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<sup>4</sup> *Id.*, paras. 30-38.

<sup>5</sup> *Id.*, para. 40.

DCF model resulting in (i) a \$104.5 million error if taking a 4% country risk premium, or (ii) a US\$ 178.4 million error if a 5% country risk premium; or (iii) a US\$ 288.5 million error if taking a 6.7% country risk premium.<sup>6</sup>

16. As a result, Venezuela requested a correction to the Award of damages by US\$ 361.4 million to the amount of US\$ 351.6 million or such amount as the Tribunal may determine based on the various correction of the clerical, arithmetical, and other similar errors indicated by Venezuela and using the computerized DCF model.

### **B. The Claimant's Reply**

17. On 13 November 2014, the Claimant filed its reply to the Respondent's request for correction of the Award ("**The Claimant's Reply**"). After addressing its arguments regarding the applicable standard for a correction of the Award under the ICSID Arbitration (Additional Facility) Rules, the Claimant continued to address each one of the corrections requested by the Respondent.<sup>7</sup>

18. On the alleged error in the silver value deduction, the Claimant argued that there is no basis for Respondent to characterize the US\$31 million deduction as an error. The Claimant also explains that as the experts indicated at the hearing, the magnitude of the deductions to be taken is impacted by the order in which other deductions are made and the Tribunal was

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<sup>6</sup> *Id.*, paras. 46-53.

<sup>7</sup> The Claimant's Reply, paras. 3-12.

mindful of that in the Award and proceeded to do an appropriate sequence and level for the silver deduction. The Claimant concludes that there is no error in the silver value deduction.<sup>8</sup>

19. In respect to the alleged error relating to the country risk premium, the Claimant points to the expert evidence in the record that analyzed the RBC Capital Markets report that the country risk premium was at most 4% (indeed the Respondent's expert, Dr. Burrows, said it was 3.2%). A review of the report as suggested by the Respondent would not constitute an error within the meaning of Article 56 of the ICSID Arbitration (Additional Facility) Rules.<sup>9</sup>

20. The Claimant indicates that this request for correction must be rejected as the Tribunal did not err in relying upon the expert evidence presented to it. In any event, Respondent's argument that the RBC Capital Markets Report supports a country risk premium of 5% is wrong. The RBC Capital Markets Report assumes a long term debt for Gold Reserve of US\$ 200 million, representing approximately 20% of Gold Reserve's assumed value. To derive Venezuela's country risk premium, the Claimant's says, from the RBC Capital Markets report as a component of the 80% cost of equity in its determination of the discount rate for Gold Reserve requires dividing 3.2% by 80%, which yields 4%. Therefore, the Claimant indicates that there is no basis for the Respondent's request that the Award be corrected to include a further deduction from the Claimant's DCF value to account for a 5% country risk premium.<sup>10</sup>

21. Similarly, the Claimant states that there is no basis to conclude that the Tribunal made an error by failing to use the curvilinear computational analysis that the Respondent alleges

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<sup>8</sup> *Id.*, paras. 13-17.

<sup>9</sup> *Id.*, paras. 18-22.

<sup>10</sup> *Id.*, paras. 23-25.

could yield a reasonable adjustment factor. The Respondent in reality is requesting that the Tribunal consider a more appropriate estimate, which in reality is not an error within the scope of Article 56 of the ICSID Arbitration (Additional Facility) Rules.<sup>11</sup>

22. In response to the alleged error in excluding the sovereign yield spread, the Claimant says that the Respondent's arguments are not a request to correct an error. Instead, the Respondent is requesting a reconsideration of the Tribunal's ruling on this issue and the Tribunal should, therefore, reject the request for correction. The Claimant further argues that the Tribunal was not mistaken in its analysis of this issue in the Award.<sup>12</sup>

23. The Claimant also requested that the Tribunal reject the Respondent's request for correction regarding the use of the Claimant's DCF valuation model since the Tribunal expressly acknowledged during the hearings and in the Award that the process by which the deductions were estimated was appropriate. There is no error since the Tribunal made the deliberate decision to base its award of damages on what it considered to be a rough, but fair and reasonable, level of compensation. The Claimant further states that the Tribunal has no authority to accept further evidentiary submissions as to alternative measures of damage or otherwise, and that there are no grounds to reconsider the Award since it is final and binding on the Parties.<sup>13</sup>

24. Regarding the alleged error in assuming one year delay, the Claimant also notes that this is not an error. The Tribunal's decision that a one year delay was reasonable was based on its

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<sup>11</sup> *Id.*, paras. 26-29.

<sup>12</sup> *Id.*, paras. 30-38.

<sup>13</sup> *Id.*, paras. 39-45.



assessment that the changes to the mine plan without layback, while important, were not so significant that they would have required extensive additional work to be approved. Moreover, the parties did not agree that a two year delay was reasonable as the Respondent suggests, based on a comment at the hearing by Mr. Kaczmarek. As to the Respondent's allegations that the one year delay was not argued by either party, the Claimant replies that this is not a basis for a correction under Article 56(1) of the ICSID Arbitration (Additional Facility) Rules. In any case, Article XII(9) of the BIT gives a wide discretion to a Tribunal when assessing damages for a breach of FET. Therefore, the Tribunal was authorized to exercise its discretion to use a one year delay.<sup>14</sup>

25. Finally, the Claimant requested that the Tribunal reject The Respondent's Request for further submissions and a hearing.<sup>15</sup>

### **III. The Claimant's Request for Correction of the Award**

#### **A. The Claimant's Request**

26. The Claimant requested a correction to the deduction in relation to the cost associated with stockpiles. In the Award, the Tribunal indicated that it was satisfied that no additional cost should be included for geomembrane liners, and therefore, rejected the Respondent's calculation relating to the geomembrane liner of US\$ 78.5 million. The Tribunal also rejected

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<sup>14</sup> *Id.*, paras. 46-50.

<sup>15</sup> *Id.*, paras. 51-52.

the US\$ 10 million cost associated with providing an ARD plant, since there was no evidence that suggested that ARD or oxidation would be an issue.<sup>16</sup>

27. The Claimant argues that these costs rejected by the Tribunal were undiscounted cost amounts (*i.e.*, before discounting and inflation adjustment). This calculation impacted the deduction in the total for the stockpile costs of US\$ 154 million.<sup>17</sup>

28. According to the Claimant, the undiscounted maximum amount in stockpile costs was US\$ 65.5 million which resulted from deducting US\$ 88.5 (the rejected costs) from US\$ 154 million (the total stockpile costs). The Claimant argues that the discounted present value and inflation adjusted total should have been US\$ 45.5 million and not US\$ 80 million as deducted by the Tribunal.<sup>18</sup>

29. On the alternative, the Claimant argues that if the Tribunal intended that US\$ 80 million was a mid-point calculation, such calculation inadvertently results in an over-deduction of US\$ 53 million. The Claimant calculates that such mid-point would be US\$ 27 million (*i.e.*, US\$ 80 million – US\$ 53 million).<sup>19</sup>

30. The Claimant requests that the Tribunal correct an arithmetic error in the US\$ 80 million deduction relating to stockpile costs which, depending on the reasoning of that the Tribunal intended, either should have been a deduction of US\$ 27 million or, at the most, a deduction

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<sup>16</sup> The Claimant's Request, paras. 9-10.

<sup>17</sup> *Id.*, para. 13.

<sup>18</sup> *Id.*, para. 14.

<sup>19</sup> *Id.*, paras 16-17.

of US\$ 45 million. Therefore, the Claimant requests that paragraphs 762, 848 and 863(ii) of the Award be corrected accordingly.

## **B. The Respondent's Reply**

31. On 13 November 2014, the Respondent filed a reply to The Claimant's Request for Correction of the Award ("**The Respondent's Reply**").

32. The Respondent alleges that the Claimant's calculation of the stockpiling costs excluding the geomembrane liner and ARD plant is based on erroneous data and a misunderstanding as to what the \$154 million figure included (the Respondent says it did not include the liner or ARD plant costs and in any case related to small stockpile costs – not large stockpiles).<sup>20</sup>

33. The Respondent says that the Claimant has not substantiated the basis for its correction and further requests that the Tribunal provide it with an opportunity to comment on the Claimant's Reply and to set a hearing date.<sup>21</sup>

## **IV. The Tribunal's Analysis**

### **1. The Legal Framework**

34. Both The Respondent's Request and The Claimant's Request characterize these requests as a "Request for Correction" of the Award under Article 56(1) of ICSID Additional Facility

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<sup>20</sup> The Respondent's Reply.

<sup>21</sup> *Id.*, paras. 10-11.

Rules.<sup>22</sup> It is convenient to examine the text of Article 56(1) in order to determine the precise scope of this provision. Article 56(1) provides:

Within 45 days after the date of the award, either party, with notice to the other party, may request the Secretary-General to obtain from the Tribunal a correction in the award of any clerical, arithmetical or similar errors. The Tribunal may within the same period make such corrections on its own initiative.

Article 56(2) is limited to mentioning that Articles 52 (dealing with “The Award”) and 53 (dealing with “Authentication of the Award; Certified Copies; Date”) “shall apply to such corrections”.

35. Article 56 is part of Chapter IX of the Additional Facility Rules entitled “The Award”. There are two other Articles in this Chapter providing for the Tribunal’s intervention following the rendering of the Award: Article 55, dealing with “Interpretation of the Award”, and Article 57, dealing with “Supplementary Decisions”. The three provisions represent exceptions to the principle, recognized by most national legal systems, according to which the arbitral tribunal is “*functus officio*” once it has rendered the award, meaning that it has no further power to revisit the award.

36. There are various policy reasons which underlie the *functus officio* principle, including the objective of achieving finality in the resolution of disputes<sup>23</sup> and the avoidance of continuous debate about the correctness, completeness and meaning of the award with resultant delay, uncertainty and cost. Specific exceptions to the principle are usually made in the governing

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<sup>22</sup> The Respondent’s letter dated 31 October 2014, p. 1; Request for Corrections by the Bolivarian Republic of Venezuela dated 5 November 2014, para. 1; The Claimant’s Request for Correction of the Award dated September 22, 2014, dated November 4, 2014, paras. 1-2.

<sup>23</sup> Under Article 52(4) of the Additional Facility Rules, “The award shall be final and binding on the parties”.

procedural law or in institutional arbitration rules which allow arbitrators to correct errors, clarify ambiguities or complete an award by deciding any questions that it has omitted to decide. This is the case of Articles 55, 56 and 57 of the ICSID Arbitration (Additional Facility) Rules.

37. Article 56(1) prescribes narrow circumstances under which a correction may be made and the provision should be interpreted in the light of the finality principle described above. The provision allows either party, with notice to the other party, to request a correction in the award of “any clerical, arithmetical or similar errors”. This formulation is similar to provisions found in most arbitral rules<sup>24</sup> and national arbitration legislation.<sup>25</sup> Article 56(1) addresses the situation where the arbitral tribunal has failed to write what was intended. As the rule is commonly interpreted, corrections cannot be used to revise a substantive decision, to enable the arbitrators to review the award on its merits, to decide whether their stated

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<sup>24</sup>Such as ICC Arbitration and ADR Rules (2012), Article 35(1)(2):

- (1) On its own initiative, the arbitral tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an award, provided such correction is submitted for approval to the Court within 30 days of the date of such award.
- (2) Any application of a party for the correction of an error of the kind referred to in Article 35(1), or for the interpretation of an award, must be made to the Secretariat within 30 days of the receipt of the award by such party, in a number of copies as stated in Article 3(1). After transmittal of the application to the arbitral tribunal, the latter shall grant the other party a short time limit, normally not exceeding 30 days, from the receipt of the application by that party, to submit any comments thereon. The arbitral tribunal shall submit its decision on the application in draft form to the Court not later than 30 days following the expiration of the time limit for the receipt of any comments from the other party or within such other period as the Court may decide.

<sup>25</sup> Such as Article 1485 of the French Code of Civil Procedure (“CPC”), which provides:

La sentence dessaisit le tribunal arbitral de la contestation qu’elle tranche. Toutefois, à la demande d’une partie, le tribunal arbitral peut interpréter la sentence, réparer les erreurs et omissions matérielles qui l’affectent ou la compléter lorsqu’il a omis de statuer sur un chef de demande. Il statue après avoir entendu les parties ou celles-ci appelées. Si le tribunal arbitral ne peut être à nouveau réuni et si les parties ne peuvent s’accorder pour le reconstituer, ce pouvoir appartient à la juridiction qui eût été compétente à défaut d’arbitrage.

English translation (from ICCA *Intl. Handbook on Comm. Arb.* Suppl. 64- May 2011): Once an award is made, the arbitral tribunal shall no longer be vested with the power to rule on the claims adjudicated in that award. However, on application of a party, the arbitral tribunal may interpret the award, rectify clerical errors and omissions, or make an additional award where it failed to rule on a claim. The arbitral tribunal shall rule after having heard the parties or having given them the opportunity to be heard. If the arbitral tribunal cannot be reconvened and if the parties cannot agree on the constitution of a new tribunal, this power shall vest in the court which would have had jurisdiction had there been no arbitration.

reasons were correct, or to review the evidence. Essentially, the rule cannot be used by the arbitral tribunal to reconsider its award, as confirmed by the official commentary of its rules by one arbitral institution<sup>26</sup> and an expert of French arbitration.<sup>27</sup>

38. The purpose of the correction exception to the *functus officio* principle is to correct obvious omissions or mistakes and avoid a consequence where a party finds itself bound by an award that orders relief the tribunal did not intend to grant. The purpose is therefore to ensure that the true intentions of the tribunal are given effect in the award, but not to alter those intentions, amend the legal analysis, modify reasoning or alter findings.<sup>28</sup> An authoritative commentary confirms that the correction facility found in most arbitral rules is to be used to correct miscalculation or unintended errors of expression and that “that remedy cannot be used to alter the meaning of the decision.”<sup>29</sup> Any purported correction that goes beyond the scope of the Tribunal’s limited mandate in this regard is likely to be subject to challenge.

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<sup>26</sup> The Secretariat’s Guide to ICC Arbitration (2012) states: “Purpose. Article 35(1) allows an arbitral tribunal to correct an award that has already been approved, signed and notified to the parties. The provision should be used only for mistakes that could alter the meaning of the award. It is rarely used in practice because most such mistakes by the arbitral tribunal can and should be identified during the Court’s scrutiny process (Article 33) and any remaining error is more likely to be spotted by a party when reviewing an award after receiving it and in this case will lead to an application under Article 35(2). The time limit of thirty days removes the risk of any persisting uncertainty over the finality of the award’s content” (p. 347).

<sup>27</sup> Jarrosson, *Juris-Classeur Commercial*, Fasc. 197, n. 117 :

« Réparation des erreurs et omissions matérielles. – Il est toujours possible qu’une sentence contienne quelque erreur de calcul, coquille typographique, ou que la dactylographie ait eu pour effet d’omettre une ligne, etc. Toujours dans le souci d’une bonne administration de la justice, il est préférable que ce soit l’arbitre lui-même qui effectue la réparation de l’erreur ou de l’omission matérielle. Son intervention doit se limiter strictement à la réparation visée. Il ne peut en profiter pour modifier le sens de la sentence précédemment rendue (v. Cass. civ. 1<sup>re</sup>, 16 juin 1976, 2 arrêts : *Rev. arb.*, 1977.269, note E. Mezger ; D. 1978.310, note Jean Robert ; *adde*, Cass. civ. 1<sup>re</sup>, 8 juillet 2009 ; *Rev. arb.* 2011.119, note L.-M Pillebout). L’intervention de l’arbitre prend la forme d’une sentence rectificative, car elle constitue une décision. L’arbitre intervient soit de lui-même, soit à la demande d’une partie, mais doit dans les deux cas respecter le principe de la contradiction (v. Paris, 1<sup>re</sup> Ch. C, 18 octobre 2001, D., 2001, IR 3327) et ne doit pas modifier le sens de la sentence (v. Cass. civ. 2<sup>e</sup>, 16 juin 1976, *Rev. arb.*, 1977, p. 268, 2<sup>e</sup> esp., note E. Mezger) ».

<sup>28</sup>Born, *International Commercial Arbitration* (2<sup>nd</sup> ed., 2014), pp. 3125, 3138-3139.

<sup>29</sup>Fouchard Gaillard Goldman on *International Commercial Arbitration* (1999), p. 778.

39. The limited nature of the corrections available under Article 56(1) is confirmed by the language of this provision when compared to the language of the other Articles of Section IX of the ICSID Arbitration (Additional Facility) Rules providing for the Tribunal's powers after the award is rendered. The three Articles in question provide for three distinct powers: the power to interpret (Article 55),<sup>30</sup> the power to correct (Article 56)<sup>31</sup> and the power to supplement (Article 57).<sup>32</sup> Although the language of the three articles is the same regarding time limit to file the relevant notice, the Secretary-General's intervention to obtain the requested decision from the Tribunal<sup>33</sup> and the application in all cases of Articles 52 and 53<sup>34</sup>, there is an important difference. Contrary to the other articles, Article 56(1) omits to provide that "[t]he Tribunal shall determine the procedure to be followed". The omission is significant. The purpose of Article 56(1) being limited to correct "clerical, arithmetical or similar errors", no need was perceived to have a "procedure" in place in order to reach what is considered to be an automatic result once the "error" is detected and made known to the

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<sup>30</sup> Article 55 (Interpretation of the Award):

- (1) Within 45 days after the date of the award either party, with notice to the other party, may request that the Secretary General obtain from the Tribunal an interpretation of the award.
- (2) The Tribunal shall determine the procedure to be followed
- (3) The interpretation shall form part of the award, and the provisions of Article 52 and 53 of these Rules shall apply.

<sup>31</sup> The text of Article 56(1) (Correction of the Award) is reproduced *supra*, para. 34.

<sup>32</sup> Article 57 (Supplementary Decisions):

- (1) Within 45 days after the date of the award either party, with notice to the other party, may request the Tribunal, through the Secretary-General, to decide any question which it had omitted to decide in the award.
- (2) The Tribunal shall determine the procedure to be followed.
- (3) The decision of the Tribunal shall become part of the award and the provisions of Article 52 and 53 of these Rules shall apply thereto.

<sup>33</sup> The Tribunal being "*functus officio*", the party's request may not be addressed directly to the Tribunal

<sup>34</sup> However, both Article 55(3) and Article 57(3) provide that the decision shall "form" or, respectively, "become" part of the award, these words being omitted by Article 56(2).

arbitral tribunal. It would have been beyond the limited scope of Article 56(1) to provide for further submissions by the Parties or even for a hearing.<sup>35</sup>

40. Despite the absence in Article 56(1) of the need “to determine the procedure to be followed”, the Tribunal has requested each Party to comment on the other Party’s request for correction in order to be better acquainted of the true scope of the respective requests. This was done also in view of the provision of Article 1485 of the French Code of Civil Procedure, according to which the arbitral tribunal “*statue après avoir entendu les parties ou celles-ci appelées*”.<sup>36</sup>

41. The Tribunal’s understanding of Article 56(1) is confirmed by reference to similar provisions in other institutional rules. For example, an analogy may be drawn with the UNCITRAL Arbitration Rules which similarly do not provide for any procedure under the Article 38 corrections regime. The leading commentary on the UNCITRAL Rules by David Caron and Lee Caplan notes that “...the party that requests correction must do so within 30 days of receiving the award and must notify all other disputing parties of the request. Implied in this requirement is the right of the non-requesting party to comment on or contest his opponent’s request.”<sup>37</sup> Thereafter, if justified, the Tribunal may make the correction. The same procedure is expressly provided for under Article 35(2) of the ICC Rules.<sup>38</sup> Therefore, as under the ICSID Arbitration (Additional Facility) Rules, there is no provision under the UNCITRAL or the ICC Rules – or indeed under any other rules the Tribunal is aware of – for a protracted

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<sup>35</sup> Further submissions and a hearing have been requested by the Respondent (letters of 31 October and 18 November 2014) and opposed by the Claimant (Reply, para. 51; letter of 18 November 2014).

<sup>36</sup> Article 1485 CCP is reproduced *supra*, footnote 25. The Tribunal notes that, as provided by the Minutes of the First Session dated April 23, 2010, Paris was confirmed to be the place of arbitration (point 7).

<sup>37</sup> Caron and Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2<sup>nd</sup> ed, 2013),p. 813.

<sup>38</sup> *Supra*, footnote 24.



submissions procedure or an oral hearing. Consequently, having provided both parties with an opportunity to comment on the respective Requests, by letter of 17 November 2014, the Tribunal informed the parties that it did not foresee any further steps in the procedure.

42. The limited scope of application of Article 56(1) is also confirmed by all publicly available decisions rendered under Article 56(1) and the corresponding provision in Article 49(2) of the ICSID Convention. Many of such decisions have been referred to by the Claimant,<sup>39</sup> all others are referred to hereafter by the Tribunal. In one case the Tribunal corrected a wrong identification of the payee in the award dispositif,<sup>40</sup> in another the word “employee” was substituted for the word “official”,<sup>41</sup> in two others the name of a counsel for the State that had been omitted was added.<sup>42</sup> In the other cases, the Tribunal has rejected requests for rectification since it was found that in reality they addressed substantive findings.<sup>43</sup>

43. The foregoing analysis permits the Tribunal to conclude for the limited scope of Article 56(1) as indicated above.<sup>44</sup> It is on this basis that the Tribunal shall now address the Parties’ requests for correction of the Award. It will consider first The Respondent’s Request, since it was filed prior to The Claimant’s Request.

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<sup>39</sup> The Claimant’s Reply, paras. 6-10.

<sup>40</sup> *Archer Daniels Midland Company and Tate & Lile Ingredients Americas Inc. v. United Mexican States*, cited to by Claimant’s Reply, para. 6. The Claimant has made reference also to another similar decision in the case *Feldman v. Mexico* (*ibid.*).

<sup>41</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, Rectification of the Award dated January 31, 2001, para. 21(1).

<sup>42</sup> *Noble Ventures Inc. v. Romania*, Rectification of Award dated May 19, 2006, paras. 2,7; *Hussein Nuaman Soufraki v. The United Arab Emirates*, Rectification of the Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki dated 13 August 2007, paras. 3,8.

<sup>43</sup> *Enron v. Argentina*, *Vivendi v. Argentina*, *RDC v. Guatemala*, cited to by the Claimant’s Reply, paras. 7-10. While all previous cases are under Article 56(1) of the Additional Facility Rules, these three cases are under Article 49(2) of the ICSID Convention.

<sup>44</sup> *Supra*, paras. 37-38.

## 2. The Respondent's Request for Correction of the Award

44. The Respondent's Request has regard to a certain number of alleged errors in the Award.

They shall be considered in turn hereafter.

(i) *The Alleged Error in Silver Value Deduction*

45. The Tribunal has deducted for silver the amount of US \$ 31 million, as indicated by the Respondent's expert, Dr. Burrows, from the Claimant's DCF valuation because that silver was not covered by the Claimant's mining title.<sup>45</sup> The decision to adopt Dr. Burrows' proposed silver deduction, rather than Mr. Kaczmarek's proposed silver deduction (US\$58 million) was a deliberate and considered decision by the Tribunal, not an inadvertent error. As indicated at paragraph 849 of the Award, the experts had explained to the Tribunal that the sequence or order of deductions would affect the amount to be deducted. The Tribunal was conscious to keep the order as close as possible to that used by said experts to minimize any impact in making adjustments.<sup>46</sup>

46. As such, a deduction of \$58 million (the Claimant's figure) would have been appropriate if no other deductions from the Claimant's DCF figure were being made – or if silver was the first deduction in the list. However, as the Tribunal had made a number of other deductions suggested by Dr. Burrows and the Respondent's other experts and had deliberately followed the Respondent's order when making these deductions, using the Respondent's figure being more appropriate.

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<sup>45</sup> Award, paras. 781 and 782 (*citing* Burrows II in footnote 628).

<sup>46</sup> Award, para. 849.

No clerical, arithmetical or similar errors having been made, the request for correction is denied.

(ii) *The Alleged RBC Country Risk Premium*

47. As stated at paragraph 842 of the Award, the Tribunal decided that it was appropriate to base the “country risk premium” component of the cost of equity calculation on the RBC Capital Markets Report, which was referred to and relied upon by both experts. As referenced in the Award, the Tribunal took the 4% figure from the Claimant’s expert, Mr. Kaczmarek, who opined that “given the political environment in Venezuela, which was hostile to foreign investment, however, RBC Capital Markets increases the country risk premium to 4%”.<sup>47</sup>

48. Given the Tribunal’s reliance on Mr. Kaczmarek’s analysis, the Tribunal has examined the relevant evidence in detail to determine whether Mr. Kaczmarek had indeed made a simple transcription error in referring to a 4% premium rather than a 5% premium that according to the Respondent was assumed by RBC Capital Markets report, or whether in fact Mr. Kaczmarek had deliberately analysed the figures and concluded that the appropriate country risk premium for insertion into the cost of equity calculation would be 4% under the RBC analysis.

49. After careful analysis, the Tribunal concluded that the use of the 4% country risk premium was indeed correct for the following reasons:

- i) The first component of the cost of equity calculation, as agreed by both experts, is the risk-free rate of return or US treasury yield (which is then adjusted to reflect risks

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<sup>47</sup> Award, para. 842, footnote 652 (*citing* Kaczmarek II).

associated with equity securities and the consequent premium required to compensate for this risk in the US). In the RBC Report, this equates to the general worldwide base rate of 5% plus a 1.8% risk premium for the US, i.e., 6.8%.

ii) The issue therefore is what the correct additional country risk premium should be to account for the fact that the investment is in Venezuela and not in the US. Mr Kaczmarek explained this in his First Expert Report as follows:<sup>48</sup>

“The fourth component of the CAPM formula is the country risk premium. As our three previous components of the CAPM have been developed using data from the US market, an additional risk premium must be considered to account for the incremental risks to be borne by operating the Brisas Project in Venezuela vis-à-vis the United States.”

iii) As the Respondent and its expert, Dr. Burrows, correctly surmised in the case of the RBC Capital Markets Report, the overall discount rate for Brisas was increased to 10% (i.e., by an additional 3.2%) on account of the fact that the investment was in Venezuela, not the US.

iv) It was the Tribunal’s understanding that it would have therefore been incorrect to add 3.2% to the 1.8% US country premium to give a total figure of 5% for the Venezuelan country risk premium, because in Mr. Kaczmarek’s and Dr. Burrows’ agreed methodology for calculating cost of equity, the 1.8% had already been taken into account in the first components of the calculation. To do so again would be double counting.

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<sup>48</sup> Kaczmarek I, para. 110.

v) The issue is therefore whether the correct country risk premium to be added for Venezuela is 3.2% or 4%.

vi) The Claimant has described clearly in its Reply to the Respondent's Supplemental Request why Mr. Kaczmarek referred to a 4% premium, rather than the lower 3.2% premium referenced by Dr. Burrows. The Tribunal is satisfied with this explanation which demonstrates that Mr. Kaczmarek had not made an arithmetical error in his expert report on which the Tribunal relied when calculating the amended risk premium.

50. Consequently, no clerical, arithmetical or similar errors have been made and the request for correction is denied.

*(iii) The Alleged Error in Performing Linear Computation*

51. Having adopted a country risk premium of 4%, a new discount rate had to be calculated, resulting in a rate 1.87% higher than the one used by the Claimant in its DCF valuation, i.e. a discount rate of 10.09%. The Tribunal estimated that a deduction of US\$130 million from the Claimant's DCF valuation would be appropriate to reflect this new discount rate. The Tribunal explained that this figure was derived from "Dr Burrows' use of a 16.5% discount rate [which] resulted in a \$575 million difference".<sup>49</sup>

52. There is no suggestion from either party that the Tribunal's linear computation as explained in its Award contained an arithmetical error. The allegation is rather that the Tribunal should not have used a linear calculation in the first place. It is clear from the Award, that the

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<sup>49</sup> Award, n.656 (p.218)

Tribunal understood that a linear computation would not yield a precise figure (which could only have been calculated by experts). Instead, the Tribunal derived its deduction figure using the information that was available to it. The Tribunal specifically stated that the calculation was based on a “rough” estimate giving an “approximate adjustment”. Using estimates and approximations for calculating the adjustment figures had been discussed at the hearing with the Respondent’s experts who agreed that the Tribunal could do a “back-of-the-envelope calculation and probably come up with a reasonable adjustment factor without having to actually rewind the model”.<sup>50</sup>

53. Consequently, the use of a linear computation to estimate an appropriate adjustment to reflect that amended discount was not an error by the Tribunal, but a deliberate and considered decision based on the expert evidence before it and its own independent judgment.

Consequently, there being no clerical, arithmetical or similar errors, the requested correction is denied.

*(iv) The Alleged Error in Excluding Sovereign Yield Spread*

54. The Respondent’s Request that the Tribunal adopt Dr. Burrow’s suggestion of using the sovereign yield spread (6.7%) as the country risk premium, rather than the 4% premium adopted by the Tribunal in the Award is clearly a request that the Tribunal revise its decision on this matter. It is not clerical error as suggested by the Respondent and is not within the

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<sup>50</sup> Award, para. 842.

scope of the Article 56(1) correction as explained above. For this reason alone, the Respondent's request must be rejected.

55. The Tribunal notes in any case that paragraphs 840 and 841 of the Award make it clear that the Tribunal had not misinterpreted the evidence, as suggested in The Respondent's Supplemental Request. The Tribunal rather, having weighed and balanced the arguments before it, decided to accept the evidence of the Claimant and its experts on this matter and agreed that the sovereign yield spread of 6.7% was too high as it reflected "the market's perception that a State might have a propensity to expropriate investments in breach of BIT obligations".<sup>51</sup> At the same time, it considered that the country risk premium adopted by Mr. Kaczmarek was too low since it took into account "only labour risks and not other genuine risks".<sup>52</sup> The Tribunal adopted therefore a country risk premium according to its best judgment. Consequently, even if the request were within the scope of Article 56, there is no error to correct.

The request for correction is accordingly denied.

(v) *The Alleged Error in not Using the Claimant's DCF Valuation Model*

56. According to the Respondent, the Tribunal should have run the model itself or should have requested the parties to run the model rather than making "rough adjustments" to the Claimant's DCF model. As noted above, the decision to use "rough approximations" to make adjustments to the Claimant's DCF model was taken by the Tribunal after discussing at the

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<sup>51</sup> Award, para. 841.

<sup>52</sup> *Ibid.*

hearing with the parties and their experts how best to make such adjustments.<sup>53</sup> There is no “error” to be corrected since the decision was deliberate, with reasons being given for such decision.

The request for correction is accordingly denied.

(vi) *The Alleged Error in Assuming One-Year Delay*

57. The decision to assume a one year delay in calculating the time needed for changes to the mine plan with no layback was taken by the Tribunal in the exercise of its best judgment regarding assessment of damages for breach of the BIT. Even if the experts of both Parties had agreed that a two year delay would be appropriate, as contended by the Respondent,<sup>54</sup> the Tribunal still retained freedom of judgment. Reasons were given for the Tribunal’s decision. Once again, the Tribunal notes that there has been no error of a clerical nature or otherwise. This was a deliberate and considered decision and does not fall within the scope of an Article 56(1) correction.

There being no error to be corrected, the request is denied.

58. In conclusion, none of the Respondent’s requests for correction of individual alleged errors in the Award having been accepted, The Respondent’s Request is dismissed in its entirety.

**3. The Claimant’s Request for Correction of the Award**

59. The Claimant’s Request concerns the Tribunal’s decision regarding the additional capital expenditures needed to manage stockpiles in the no layback scenario. The Claimant requests

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<sup>53</sup> Award, para. 842 (citing *transcript* hearing October 2013, Day 2, 227: 1-3).

<sup>54</sup> The Respondent’s Request, paras. 51-52.



the correction of the amount calculated to be deducted from the DCF calculation to reflect costs associated with stockpiles. The Claimant assumes that the amount deducted contains an arithmetical error, as described below.

60. The Claimant's Request sums up items of cost that the Tribunal has accepted and deducts those that the Tribunal rejected (such as the cost of a geomembrane liner and an ADR plant). However, in arriving at its overall deduction, the Tribunal has taken into account other items of cost that have a bearing in assessing the required additional capital expenditures, as shown by the following provisions of the Award.

61. After noting that the Claimant's experts' analysis of additional costs was limited, the Tribunal states that it "considers that the costs of operating such stockpiles could indeed be higher than the Claimant suggests".<sup>55</sup> It then states that the deduction of US \$ 80 million from the Claimant's DCF calculation "is fair and reasonable, taking into account any need to store higher grade ore in three of four different areas and general costs that will likely arise in establishing and managing such stockpiles".<sup>56</sup> According to the Tribunal, "[t]his deduction [i.e. the 80 million USD] would also take account of any increase in haulage time required if Claimant's preferred stockpile location is not possible".<sup>57</sup>

62. The additional items of cost considered by the Tribunal, as mentioned above, and the reference to the amount of US\$ 80 million as being "fair and reasonable" and as fixed "[o]n balance, looking at the issue overall"<sup>58</sup> evidence the fact that this amount is not the result of

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<sup>55</sup> Award, para. 761 (at the end).

<sup>56</sup> Award, para. 762 (at the end)

<sup>57</sup> Award, para. 763.

<sup>58</sup> Award, para. 762.

a purely “arithmetical” addition or deduction of quantified items of cost, a calculation that might have incurred in mistakes to be corrected under Article 56(1). The amount of the deduction is an “overall” estimate that has been adjusted to encompass other (unquantified) items of cost that may have a bearing in assessing the amount of required capital expenditures.

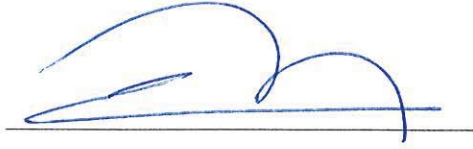
63. In conclusion, there are no arithmetical, computational or similar errors in the Tribunal’s assessment of additional capital expenditures required to managing stockpiles in the no-layback scenario. Such assessment was based on the Tribunal’s overall consideration of the various items of cost involved and was made according to its best judgment.

Accordingly, The Claimant’s Request is dismissed.

## **V. DECISION**

64. In view of the above considerations, the Tribunal decides to:

- (1) Reject The Respondent’s Request dated 31 October 2014 and 5 November 2014 for Correction of the Award dated 22 September 2014;
- (2) Reject The Claimant’s Request dated 4 November 2014 for Correction of the Award dated 22 September 2014;
- (3) Determine that each Party shall bear its own legal costs and pay one-half of the fees and expenses of the Centre and the Members of the Tribunal with the amount of such fees and expenses to be as determined by the Centre and notified to the Parties.



Professor Pierre-Marie Dupuy

Arbitrator


Date: 11 December 2014



Professor David A.R. Williams, Q.C.

Arbitrator

Date: 5 December 2014



Professor Piero Bernardini

President

Date: 11 December 2014