

PCA Case No. 2013-15

**IN THE MATTER OF AN ARBITRATION PURSUANT TO THE AGREEMENT BETWEEN  
THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND  
NORTHERN IRELAND AND THE PLURINATIONAL STATE OF BOLIVIA FOR THE  
PROMOTION AND PROTECTION OF INVESTMENTS, SIGNED 24 MAY 1988**

**- and -**

**THE UNCITRAL ARBITRATION RULES (AS REVISED IN 2010)**

**- between -**

**SOUTH AMERICAN SILVER LIMITED (BERMUDA)**

**(the “Claimant”)**

**- and -**

**THE PLURINATIONAL STATE OF BOLIVIA**

**(the “Respondent”, and together with the Claimant, the “Parties”)**

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**AWARD**

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*Arbitral Tribunal*

Dr. Eduardo Zuleta Jaramillo (Presiding Arbitrator)  
Prof. Francisco Orrego Vicuña  
Mr. Osvaldo César Guglielmino

*Secretary to the Tribunal*  
Martin Doe Rodriguez

*Communicated to the Parties:* November 22, 2018

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## TABLE OF CONTENTS

<b>I</b>	<b>INTRODUCTION .....</b>	<b>1</b>
<b>A.</b>	<b>The Parties .....</b>	<b>1</b>
<b>B.</b>	<b>Background to the Arbitration .....</b>	<b>2</b>
<b>C.</b>	<b>Arbitration Agreement .....</b>	<b>3</b>
<b>II</b>	<b>PROCEDURAL HISTORY .....</b>	<b>4</b>
<b>A.</b>	<b>Constitution of the Tribunal .....</b>	<b>4</b>
1.	Challenge to the arbitrator Osvaldo César Guglielmino.....	4
2.	Challenge to the arbitrator Francisco Orrego Vicuña .....	4
3.	Appointment of the Presiding Arbitrator .....	5
<b>B.</b>	<b>Development of the proceeding .....</b>	<b>5</b>
<b>C.</b>	<b>Hearing .....</b>	<b>12</b>
<b>D.</b>	<b>Post-Hearing Proceedings .....</b>	<b>14</b>
<b>E.</b>	<b>Closing of Hearings .....</b>	<b>15</b>
<b>III</b>	<b>FACTUAL BACKGROUND .....</b>	<b>16</b>
<b>IV</b>	<b>RELIEF SOUGHT.....</b>	<b>40</b>
<b>A.</b>	<b>The Claimant’s Relief.....</b>	<b>40</b>
<b>B.</b>	<b>The Respondent ‘s Relief .....</b>	<b>41</b>
<b>V</b>	<b>APPLICABLE LAW.....</b>	<b>42</b>
1.	The Claimant’s Position .....	42
2.	The Respondent’s Position .....	44
3.	The Tribunal’s Analysis .....	48
<b>VI</b>	<b>OBJECTIONS TO JURISDICTION AND ADMISSIBILITY .....</b>	<b>53</b>
<b>A.</b>	<b>The Tribunal lacks jurisdiction to decide any of the claims as SAS does not have a protected investment under the Treaty since it has failed to prove that it is the true owner of the Mining Concessions .....</b>	<b>53</b>
1.	The Respondent’s Position .....	53
2.	The Claimant’s Position .....	63
3.	The Tribunal’s Analysis .....	73
<b>B.</b>	<b>The claims as a whole are inadmissible since SAS did not have clean hands and did not satisfy the legality of the investment requirement .....</b>	<b>89</b>
1.	The Respondent’s Position .....	89
2.	The Claimant’s Position .....	102
3.	The Tribunal’s Analysis .....	114
<b>VII</b>	<b>MERITS .....</b>	<b>123</b>
<b>A.</b>	<b>Preliminary considerations of the Tribunal on the facts .....</b>	<b>123</b>
<b>B.</b>	<b>The claim for expropriation.....</b>	<b>133</b>
1.	The Claimant’s Position .....	133
2.	The Respondent’s Position .....	139

3.	The Tribunal's Analysis .....	144
<b>C.</b>	<b>The other claims of the Claimant .....</b>	<b>169</b>
1.	The claim for fair and equitable treatment .....	170
2.	The claims for full protection and security.....	182
3.	The claims for unreasonable or discriminatory measures .....	187
4.	The claims for less favourable treatment than Bolivian investors.....	191
<b>VIII</b>	<b>DAMAGES.....</b>	<b>194</b>
<b>A.</b>	<b>The Claimant's Position .....</b>	<b>194</b>
1.	Right to compensation.....	194
2.	Standard of compensation for an expropriation .....	198
3.	Standard of valuation for compensation.....	199
4.	Valuation Date .....	200
5.	Valuation method.....	201
6.	Compensation for other Treaty violations .....	208
7.	Interests .....	209
<b>B.</b>	<b>The Respondent's Position.....</b>	<b>209</b>
1.	Right to compensation.....	209
2.	Standard of compensation for an expropriation .....	216
3.	Standard of valuation for expropriation .....	216
4.	Valuation Date for the expropriation .....	217
5.	Valuation method for compensation.....	218
6.	Compensation for other violations of the Treaty .....	226
7.	Interests .....	227
<b>C.</b>	<b>The Tribunal's Analysis .....</b>	<b>228</b>
1.	The Project development stage at the date of expropriation.....	231
2.	The valuation methods presented by the Parties .....	235
<b>IX</b>	<b>COSTS .....</b>	<b>253</b>
<b>A.</b>	<b>The Claimant's Position .....</b>	<b>253</b>
<b>B.</b>	<b>The Respondent's Position.....</b>	<b>256</b>
<b>C.</b>	<b>The Tribunal's Analysis .....</b>	<b>260</b>
<b>X</b>	<b>DECISION.....</b>	<b>264</b>

## GLOSSARY OF TERMS

<b>ACHR</b>	American Convention on Human Rights of 1969
<b>Agreement with the Government</b>	Agreement between the Government of Potosi and the Community Members, dated May 9, 2012
<b>Angulo's First Witness Statement</b>	Mr. Santiago Angulo's Witness Statement of July 18, 2014
<b>Angulo's Second Witness Statement</b>	Mr. Santiago Angulo's Second or Rebuttal Witness Statement dated November 14, 2015
<b>BIT</b>	Bilateral investment treaty
<b>Bolivia</b>	Plurinational State of Bolivia
<b>Bolivia's Post-Hearing Brief</b>	Post-Hearing Brief from Bolivia dated October 31, 2016
<b>Brattle</b>	The Brattle Group, Inc.
<b>BSR</b>	Business for Corporate Responsibility
<b>Chajmi's Witness Statement</b>	Mr. Andrés Chajmi Rikusqnanta Willakuy's Witness Statement dated February 24, 2016
<b>Claimant</b>	South American Silver Limited
<b>Claimant's Costs Submission</b>	Claimant's Costs Submission dated November 28, 2016
<b>Claimant's Rejoinder Memorial on Jurisdiction</b>	Claimant's Rejoinder Memorial to Respondent's Objections to Jurisdiction and Admissibility dated May 2, 2016
<b>Claimant's Reply Memorial</b>	Claimant's Reply to Respondent's Counter-Memorial on the Merits and Response to Respondent's Objections to Jurisdiction and Admissibility dated November 30, 2015
<b>Claimant's Reply on Costs</b>	Claimant's Reply to the Respondent's Costs Submission dated December 12, 2016
<b>CMMK</b>	Compañía Minera Malku Khota
<b>COMIBOL</b>	Corporación Minera de Bolivia
<b>Company</b>	Compañía Minera Malku Khota
<b>CONAMAQ</b>	Council of Ayllus and Markas of Qullasuyu
<b>Cooper Report</b>	Mr. Barry Cooper's Expert Report dated November 22, 2015

<b>COTOA-6A</b>	<i>Coordinadora Territorial Originaria Autónoma de los Seis Ayllus</i>
<b>Counter-Memorial</b>	Respondent's Objection to Jurisdiction and Admissibility and Counter-Memorial on the Merits dated March 31, 2015
<b>Dreisinger's Witness Statement</b>	Mr. David B. Dreisinger's Witness Statement dated November 23, 2015
<b>FAOI-NP</b>	<i>Federación de Ayllus Originarios Indígenas del Norte de Potosí</i>
<b>First Brattle Report</b>	Brattle's First Expert Report dated March 30, 2015
<b>First Dagdelen Report</b>	Dr. Kadri Dagdelen's First Expert Report dated March 30, 2015
<b>First FTI Report</b>	FTI's First Expert Report dated September 23, 2014
<b>First RPA Report</b>	RPA's First Expert Report dated September 16, 2014
<b>Fitch's First Witness Statement</b>	Mr. Ralph G. Fitch's First Witness Statement dated September 16, 2014
<b>Fitch's Second Witness Statement</b>	Mr. Ralph G. Fitch's Second Witness Statement dated April 29, 2016
<b>FTI</b>	FTI Consulting Canada ULC
<b>General Minerals</b>	General Minerals Corporation Limited, the name under which SAS was established in 1994
<b>Gob. Gonzales' First Witness Statement</b>	Mr. Félix Gonzales Bernal's First Witness Statement dated March 26, 2015
<b>Gob. Gonzales' Second Witness Statement</b>	Mr. Félix Gonzales Bernal's Second Witness Statement dated February 22, 2016
<b>Gonzales Yutronic's First Witness Statement</b>	Mr. Xavier Gonzales Yutronic's First Witness Statement dated July 18, 2014
<b>Gonzales Yutronic's Second Witness Statement</b>	Mr. Xavier Gonzales Yutronic's Second Witness Statement dated November 13, 2015
<b>Gonzales Yutronic's Third Witness Statement</b>	Mr. Xavier Gonzales Yutronic's Third Witness Statement dated April 27, 2016
<b>Hearing</b>	Hearing on Jurisdiction and Merits held from July 11 to 22, 2016, except July 16 and 17, at the World Bank facilities in Washington D.C., U.S.A.
<b>IACHR</b>	Inter-American Court on Human Rights
<b>ICJ</b>	International Court of Justice
<b>ICSID</b>	International Centre for Settlement of Investment Disputes

<b>ICSID Convention</b>	Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States, signed on March 18, 1965
<b>ILC</b>	International Law Commission
<b>ILC Articles</b>	The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts
<b>ILO</b>	International Labour Organization
<b>Indigenous Communities</b>	Indigenous Communities living in the area of the Project, jointly
<b>Malbran's First Witness Statement</b>	Mr. Felipe Malbran's First Witness Statement dated September 18, 2014
<b>Malbran's Second Witness Statement</b>	Mr. Felipe Malbran's Second Witness Statement dated November 12, 2015
<b>Mallory's First Witness Statement</b>	Mr. W.J. Mallory's First Witness Statement dated September 12, 2014
<b>Mallory's Second Witness Statement</b>	Mr. W.J. Mallory's Second Witness Statement dated November 14, 2015
<b>Mallory's Third Witness Statement</b>	Mr. W.J. Mallory's Third Witness Statement dated April 29, 2016
<b>Medmin</b>	<i>Fundación Medmin</i>
<b>Memorandum of Understanding</b>	Agreement dated July 7, 2012 to pacify the area of the Project
<b>Metallurgical Process</b>	Metal extraction through a leaching of hydrochloric acid process
<b>Mining Concessions</b>	The ten mining concessions owned by CMMK in the area of Malku Khota, where the Mining Project was conducted (Cobra, Daniel, Takhuani, Alkasi, Jalsuri, Takhaua, Silluta, Antacuna, Norma and Viento)
<b>Minister Navarro's Witness Statement</b>	Mr. Félix César Navarro Miranda's Witness Statement dated February 23, 2016
<b>MTR</b>	Metal Transaction Ratio
<b>Notice of Arbitration</b>	Notice of Arbitration dated April 30, 2013
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>Parties</b>	Claimant and Respondent jointly
<b>PCA</b>	Permanent Court of Arbitration

<b>PCIJ</b>	Permanent Court of International Justice
<b>PEA</b>	Preliminary Economic Assessment
<b>PEA 2009</b>	Preliminary Economic Assessment Technical Report of the Malku Khota Project dated March 13, 2009
<b>PEA 2011</b>	Update of the Preliminary Economic Assessment Technical Report of the Malku Khota Project dated May 10, 2011
<b>Prof. Uño Report</b>	Mr. Liborio Uño Acebo's Expert Report dated March 26, 2015
<b>Project</b>	CMMK's mining project in Malku Khota
<b>Protected Information</b>	Highly confidential information, protected by the Protective Order annexed to the Procedural Order No. 3, described in Annex A of the Protective Order and in the Procedural Orders No. 8 and 9
<b>Protective Order</b>	Protective Order, Annex A of Procedural Order No. 3, issued on January 14, 2015
<b>Quality Report</b>	Quality Audit Consultores y Contadores Públicos S.R.L.'s Report dated June 27, 2014
<b>RCA</b>	Reciprocal Cooperation Agreements
<b>RDD</b>	Redfern Schedule for the Respondent
<b>RDT</b>	Redfern Schedule for the Claimant
<b>Respondent</b>	Plurinational State of Bolivia
<b>Respondent's Reply on Costs</b>	Respondent's Comments on Claimant's Costs Submission dated December 12, 2016
<b>Respondent's Costs Submission</b>	Respondent's Costs Submission dated November 28, 2016
<b>Respondent's Rejoinder</b>	Respondent's Rejoinder on the Merits and Reply to the Objections to Jurisdiction and Admissibility dated March 21, 2016
<b>Response to the Notice of Arbitration</b>	Response to the Notice of Arbitration dated June 28, 2013
<b>Reversal</b>	Supreme Decree No. 1308 issued on August 1, 2012, arranging the reversal of the Mining Concessions
<b>RPA</b>	Roscoe Postle and Associates, Inc.
<b>RPA Valuation Report</b>	Valuation Report of the Project, based on RPA's comparable transactions



<b>SAS</b>	South American Silver Limited
<b>SAS' Post-Hearing Brief</b>	Claimant's Post-Hearing Brief dated October 31, 2016
<b>SASC</b>	South American Silver Corporation
<b>Second Brattle Report</b>	Brattle's Second Expert Report dated March 21, 2016
<b>Second Dagdelen Report</b>	Dr. Kadri Dagdelen's Second Expert Report dated March 21, 2016
<b>Second FTI Report</b>	FTI's Second Expert Report dated November 30, 2015
<b>Second RPA Report</b>	RPA's Second Expert Report dated November 30, 2015
<b>Statement of Claim</b>	Claimant's Statement of Claim and Memorial dated September 24, 2014
<b>Reversal Decree</b>	Supreme Decree No. 1308 issued on August 1, 2012, arranging the reversal of the Mining Concessions
<b>Taylor Report</b>	Mr. Patrick R. Taylor's Expert Report dated March, 18 2016
<b>TMM</b>	TriMetals Mining Inc.
<b>Treaty</b>	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Plurinational State of Bolivia for the Promotion and Protection of Investments, signed May 24, 1988 and in force since February 16, 1990
<b>TriMetals</b>	TriMetals Mining Inc.
<b>UNCITRAL Rules</b>	UNCITRAL Arbitration Rules (as revised in 2010)
<b>Vienna Convention</b>	The Vienna Convention on the Law of Treaties adopted on May 23, 1969
<b>Witness X</b>	Witness, whose identity remains protected by the Protective Order, Annex A of the Procedural Order No. 14, issued April 1, 2016
<b>Witness X's Witness Statement</b>	Witness X's Witness Statement dated February 23, 2016

## I INTRODUCTION

### A. THE PARTIES

1. The Claimant in these arbitration proceedings is South American Silver Limited (previously, General Minerals Corporation Limited), a corporate entity established under the laws of the Bermuda (the “**Claimant**” or “**SAS**”). The Claimant’s place of business can be found in Jardine House, 33-35 Reid Street, Hamilton, Bermuda.

2. The Claimant is represented in these proceedings by the following persons:

Mr. Henry G. Burnett  
Mr. Fernando Rodríguez Cortina  
Ms. Verónica García  
Ms. Caline Mouawad  
Mr. Cedric Soule  
Ms. Eldy Roche  
**King & Spalding LLP**  
1185 Avenue of the Americas, Floor 34  
New York, NY 10036-2222  
United States of America

Mr. Roberto Aguirre Luzi  
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Mr. Ramiro Guevara  
Mr. Enrique Barrios  
**Guevara & Gutiérrez S.C.**  
Calle 15 No. 7715  
esquina Calle Sánchez Bustamante  
Ketal Tower, Floor 4 Office No. 2  
Mailbox (Casilla Postal) 9332  
La Paz  
Bolivia

3. The Respondent in the present arbitration proceedings is the Plurinational State of Bolivia (“**Bolivia**” or the “**Respondent**”, and together with the Claimant, the “**Parties**”).

4. The Respondent is represented in the present proceedings by the following persons:

Dr. Pablo Menacho Diederich, Procurador General del Estado  
Dr. Ernesto Rosell Arteaga, Subprocurador de Defensa y Representación Legal del Estado  
Dr. Waldo Alvarado Vasquez  
**Procuraduría General del Estado**  
Calle Martín Cárdenas No. 109  
Zona Ferropetrol  
El Alto, La Paz  
Bolivia

Mr. Eduardo Silva Romero  
Mr. José Manuel García Represa  
Ms. Erica Stein  
Mr. Álvaro Galindo  
Mr. Juan Felipe Merizalde  
**Dechert (Paris) LLP**  
32 Rue de Monceau  
Paris, 75008  
France

**B. BACKGROUND TO THE ARBITRATION**

5. According to the Claimant, a dispute arose between the Parties under the scope of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Plurinational State of Bolivia for the Promotion and Protection of Investments, signed May 24, 1988 and in force since February 16, 1990 (the “**Treaty**”), whose application was extended to Bermuda as of December 9, 1992 through an exchange of notes between Bolivia and the United Kingdom dated December 3 and 9, 1992.
6. The Claimant commenced the proceedings against the Respondent by Notice of Arbitration dated April 30, 2013 (“**Notice of Arbitration**”), pursuant to Article 8 of the Treaty and Article 3 of the 2010 version of the Arbitration Rules of the United Nations Commission on International Trade Law (the “**UNCITRAL Rules**”).
7. In accordance with Article 3(2) of the UNCITRAL Rules, the present arbitration proceedings commenced on April 30, 2013, when the Respondent received the Notice of Arbitration.

8. The Respondent received the Notice of Arbitration on the same date and, pursuant to the agreement of the Parties, Bolivia submitted its Response to the Notice of Arbitration on June 28, 2013 (“**Response to the Notice of Arbitration**”).<sup>1</sup>

**C. ARBITRATION AGREEMENT**

9. Article 8 of the Treaty provides:<sup>2</sup>

***Article VIII***

***Settlement of Disputes between an Investor and a Host State***

*(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been legally and amicably settled shall after a period of six months from written notification of a claim be submitted to international arbitration if either party to the dispute so wishes.*

*(2) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:*

- (a) The International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or*
- (b) The Court of Arbitration of the International Chamber of Commerce; or*
- (c) An international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.*

*After a period of six months from written notification of the claim there is no agreement on an alternative procedure, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.*

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<sup>1</sup> Accompanied with annexes R-1 to R-8.

<sup>2</sup> C-1, Treaty.

## **II PROCEDURAL HISTORY**

### **A. CONSTITUTION OF THE TRIBUNAL**

10. In its Notice of Arbitration, the Claimant appointed Prof. Francisco Orrego Vicuña as the first arbitrator.
11. By letter dated May 31, 2013, the Claimant informed the Permanent Court of Arbitration (the “PCA”) that the Parties had decided to designate the Secretary-General of the PCA as appointing authority in the arbitration and to have the PCA administrate the proceedings.
12. The Respondent appointed Mr. Osvaldo César Guglielmino as the second arbitrator in its Response to the Notice of Arbitration.

#### **1. Challenge to arbitrator Osvaldo César Guglielmino**

13. On July 12, 2013, the Claimant presented its Notice of Challenge to Osvaldo Cesar Guglielmino as Arbitrator. On July 26, 2013, the Respondent presented its Rejection of the Challenge to Osvaldo César Guglielmino as a Party-Appointed Arbitrator.
14. By letter dated August 7, 2013, the Claimant requested the Secretary-General of the PCA to decide on its challenge to Mr. Guglielmino under Article 13(4) of the UNCITRAL Rules. On October 30, 2013, following the Parties’ and Mr. Guglielmino’s comments in regards to the challenge, the Secretary-General of the PCA issued his decision rejecting the challenge to the arbitrator Osvaldo César Guglielmino.

#### **2. Challenge to arbitrator Francisco Orrego Vicuña**

15. On July 31, 2013, the Respondent presented its Notice of Challenge to Francisco Orrego Vicuña. On August 14, 2013, the Claimant presented its Rejection to the Challenge as Arbitrator to Francisco Orrego Vicuña.
16. By letter dated August 30, 2013, the Respondent requested the Secretary-General of the PCA to decide on its challenge to Mr. Francisco Orrego Vicuña under Article 13(4) of the UNCITRAL Rules. On October 30, 2013, following the Parties’ and Mr. Orrego Vicuña’s comments in regards to the challenge, the Secretary-General of the PCA issued his decision rejecting the challenge to the arbitrator Francisco Orrego Vicuña.

### **3. Appointment of the Presiding Arbitrator**

17. On December 5, 2013, the two co-arbitrators informed the Parties and the PCA that they had not reached an agreement concerning the appointment of the presiding arbitrator.
18. By the Appointment of the Presiding Arbitrator dated January 22, 2014, the Secretary-General of the PCA appointed Dr. Eduardo Zuleta Jaramillo as presiding arbitrator.
19. On January 22, 2014, Dr. Eduardo Zuleta Jaramillo accepted its appointment as arbitrator. On the same day, the Arbitral Tribunal was constituted.

### **B. DEVELOPMENT OF THE PROCEEDING**

20. Throughout the arbitration proceedings, the Arbitral Tribunal issued 23 Procedural Orders, which will be summarized here below. For the purpose of brevity, the Tribunal refers to the specific background that motivated each decision, as described in the respective procedural orders.
21. By letter of February 4, 2015, the Tribunal circulated to the Parties for comments drafts of the Terms of Appointment and Procedural Order No. 1.
22. The Parties and the Tribunal concluded the Terms of Appointment on March 4, 2014.
23. On May 13, 2014, the Parties and the Tribunal held the first procedural meeting in the facilities of the Centre of Arbitration and Conciliation of the Chamber of Commerce (*Centro de Arbitraje y Conciliación de la Cámara de Comercio*) of Bogotá, Colombia.
24. The following persons participated in the first procedural meeting on behalf of the Claimant: Mr. Ralph Fitch, President and Director of SAS, and Mr. Henry G. Burnett and Mr. Louis-Alexis Bret, both lawyers from King & Spalding, LLP. On behalf of the Respondent was Dr. Carmiña Llorente, General Director of Jurisdictional and Arbitration Investment Defense (*Director General de Defensa Jurisdiccional y Arbitral de Inversiones*), and Dr. Paola Valeria Bonadona Quiroga, lawyer, both from the Attorney General's Office (*Procuraduría General del Estado*).
25. At the end of the meeting, the audio recording of the meeting was distributed to the Parties. At a later time, by letter dated August 7, 2014, the PCA distributed the final versions of the transcripts of the meeting in English and Spanish.
26. On May 27, 2014, the Tribunal issued Procedural Order No. 1. *Inter alia*, the Procedural Order No. 1 fixed the place of arbitration at The Hague, The Netherlands and established a procedural calendar.

27. On September 24, 2014, the Claimant submitted its Statement of Claim and Memorial (“**Statement of Claim**”), along with the witness statements of Ralph G. Fitch (“**Fitch’s First Witness Statement**”), Felipe Malbran (“**Malbran’s First Witness Statement**”), W. J. Mallory (“**Mallory’s First Witness Statement**”), Xavier Gonzales Yutronic (“**Gonzales Yutronic’s First Witness Statement**”) and Santiago Angulo (“**Angulo’s First Witness Statement**”), the expert reports of FTI Consulting Canada ULC (“**FTI**”, its report “**First FTI Report**”, with annexes FTI-01 to FTI-55) and Roscoe Postle and Associates, Inc. (“**RPA**”, its report “**First RPA Report**”, with its reference annexes), annexes C-1 to C-94 and the legal authorities CLA-1 to CLA-94.
28. By Procedural Order No. 2, dated December 1, 2014, the Tribunal accepted the Claimant’s application to classify certain information used by RPA as “highly confidential” and classified the information at issue, described in Exhibit A to Annex A of that Procedural Order. Additionally, the Tribunal issued a Protective Order, included as Annex A of Procedural Order No. 2, regulating the access of the Respondent’s external counsel and independent experts to the information classified as “highly confidential”.
29. On December 9, 2014, the Respondent informed that it had hired Dechert (Paris) LLP as its external counsel.
30. On January 14, 2015, the Tribunal issued, by a majority vote, Procedural Order No. 3, that modified in its entirety the Protective Order attached to Procedural Order No. 2, replacing it with the Protective Order enclosed in Annex A of Procedural Order No. 3 (the “**Protective Order**”).
31. On January 26, 2015, the Tribunal issued Procedural Order No. 4 ordering the Claimant to submit to the Respondent some of the documents that the latter had requested. These documents were added to the record as annexes C-95 to C-100, by letter dated January 28, 2015.
32. On February 17, 2015, the Tribunal issued Procedural Order No. 5, by means of which the Respondent was granted an extension of the deadline to submit its Counter-Memorial until March 31, 2015.
33. On March 31, 2015, the Respondent submitted its Memorial of Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (“**Counter-Memorial**”), along with the witness statements of Félix Gonzales Bernal (“**Gob. Gonzales’ First Witness Statement**”), the expert report of Liborio Uño Acebo (“**Prof. Uño Report**”), Kadri Dagdelen (“**First Dagdelen Report**”, with its annexes DAG-0 to DAG-18) and The Brattle Group, Inc. (“**Brattle**”, with its “**First Brattle Report**”, with its annexes BR-01 to BR-73), annexes R-9 to R-146 and legal authorities RLA-1 to RLA-175.

34. On April 14, 2015, the Tribunal informed the Parties of the new dates on the procedural calendar resulting from the change in the date of the Counter-Memorial's submission.
35. On April 21, 2015, the Tribunal issued Procedural Order No. 6, deciding that there were no circumstances at that time that could justify a further change in the procedural calendar, without prejudice to the Tribunal's ability to amend it later in the proceedings if the circumstances so required.
36. On June 19, 2015, the Tribunal confirmed the changes in the Procedural Calendar agreed by the Parties.
37. On July 7, 2015, the Parties submitted their respective document production requests to the Tribunal for a decision. On July 21, 2015, the Tribunal issued Procedural Order No. 7, on Document Production, where it decided the pending requests in the *Redfern Schedules* of the Claimant (the "**RDT**") and the Respondent (the "**RDD**"). The Tribunal requested the Claimant to clarify certain details in relation to category 18 of the RDD and postponed the decision on the documents in this category until it had received such clarifications and the Respondent's comments on these.
38. By Procedural Order No. 8, dated August 26, 2015, the Tribunal: (i) classified as "highly confidential" one of the documents in category 18 of the RDD; (ii) confirmed that one of category 18's documents already belonged to Protected Information; (iii) rejected the request to classify as "highly confidential" the rest of the documents in category 18; and, (iv) ordered the Claimant to produce the information in category 18 that had not yet been produced. In regard to Bolivia's request concerning access to Protected Information, the Tribunal: (i) confirmed that the Respondent's experts could take notes of the Protected Information as they considered necessary in order to produce their expert reports; (ii) rejected the rest of the Respondent's requests; (iii) reiterated that, in case there were problems with access or differences arising between the Parties when receiving the Protected Information, these should be brought to the Tribunal during the course of such review and not afterwards;<sup>3</sup> and (iv) invited the Parties to decide on the venue for the *Data Room*.
39. On October 2 2015, the Tribunal issued Procedural Order No. 9 confirming all the points of Procedural Order No. 8. The Tribunal confirmed that certain documents requested were already

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<sup>3</sup> During the Hearing, the Respondent reiterated its rights reserved in regards to the access it had had to the documents classified as Protected Information. See Transcript of the Hearing, Day 1, 268:17 – 270:16 (Spanish).



included among the Protected Information but only insofar as they constituted summaries of reports expressly included in Annex A of the Protective Order.

40. On October 8, 2015, the Respondent submitted its request for *Cautio Judicatum Solvi* and Disclosure of Information, along with the annexes R-147 to R-154 and legal authorities RLA-176 to RLA-184. Pursuant to the Claimant's request, the deadline to reply to the Respondent's request was set for December 14, 2015.
41. On November 30, 2015, the Claimant submitted its Reply to Respondent's Counter-Memorial on the Merits and Response to Respondent's Objections to Jurisdiction and Admissibility ("**Claimant's Reply Memorial**"), along with the witness statement of David B. Dreisinger ("**Dreisinger's Witness Statement**") and the further witness statements of Santiago Angulo ("**Angulo's Second Witness Statement**"), Xavier Gonzales Yutronic ("**Gonzales Yutronic's Second Witness Statement**"), Felipe Malbran ("**Malbran's Second Witness Statement**") and W. J. Mallory ("**Mallory's Second Witness Statement**"), the expert reports of Barry Cooper ("**Cooper Report**"), FTI ("**Second FTI Report**", with its annexes con FTI-56 to FTI-71) and RPA ("**Second RPA Report**", with its annexes RPA-01 to RPA-15 and Other Sources), the annexes C-101 to C-296 and the legal authorities CLA-14 (updated) and CLA-095 to CLA-163.
42. On December 14, 2015, the Claimant submitted its Opposition to the Respondent's Request for *Cautio Judicatum Solvi* and Disclosure of Information, along with its annexes C-297 to C-299 and the legal authorities CLA-164 to CLA-178.
43. On January 11, 2016, the Tribunal issued Procedural Order No. 10: (i) rejecting Bolivia's request for *cautio judicatum solvi*; (ii) ordering the Claimant to provide to the Tribunal the names of the third parties that have provided financing to the Claimant in these arbitration proceedings; (iii) rejecting Bolivia's request to add to the record the Claimant's financing agreement between it and its third party funder.
44. By letter dated January 19, 2016, the Claimant informed the Tribunal the identity of the third financer, stating that such information is confidential.
45. By Procedural Order No. 11, dated January 28, 2016, the Tribunal, based on the requests of the Parties, granted Bolivia an extension until March 21, 2016 for the submission of its reply and ordered the Claimant to forward Bolivia a typewritten transcript of the notes requested by the Respondent.

46. By Procedural Order No. 12, dated March 8, 2016, the Tribunal, *inter alia*, partially rejected the Respondent's request for the Claimant to produce certain documents and confirm one category of information, as it considered the request untimely under Procedural Order No. 1.
47. On March 16, 2016, the Respondent submitted to the Tribunal a Protection Request, requesting safety measures for a witness that had asked for protection for fear of retaliation as a result of his or her witness statement ("**Witness X**"), which was opposed by the Claimant by letter dated March 17, 2016. By Procedural Order No. 13, dated March 21, 2016, the Tribunal requested the Respondent to submit by the date for the submission of its Rejoinder, a complete unredacted version of Witness X's witness statement solely to the Tribunal, and postponed its decision regarding the safety measure for Witness X, clarifying at the same that that this should not to be understood as an admission or acceptance of Witness X's witness statement or of its contents.
48. On March 21, 2016, the Respondent submitted its Rejoinder on the Merits and Reply to the Objections to Jurisdiction and Admissibility ("**Respondent's Rejoinder**"), along with the witness statements of Félix César Navarro Miranda ("**Minister Navarro's Witness Statement**"), Andrés Chajmi ("**Chajmi's Witness Statement**"), RWS-5, RWS-6 and Witness X ("**Witness X's Witness Statement**") and the additional witness statement of witness Félix Gonzales Bernal ("**Gob. Gonzales' Second Witness Statement**"), the additional expert reports of Kadri Dagdelen ("**Second Dagdelen Report**", with its annexes DAG-19 to DAG-23) and Brattle ("**Second Brattle Report**", with its annexes BR-74 to BR-122), and the expert report of Patrick R. Taylor ("**Taylor Report**", with its annexes TAY-0 to TAY-10), annexes R-155 to R-295 and legal authorities RLA-185 to RLA-280. In accordance with the Tribunal's instructions, Bolivia submitted unredacted versions of Witness X's witness statement only to the PCA and the Tribunal.
49. By letter dated March 23, 2016, the Claimant objected the admissibility of four witness statements submitted by the Respondent with its Rejoinder and requested a 45-day extension to submit its Rejoinder to the Respondent's Objections to Jurisdiction and Admissibility.
50. By Procedural Order No. 14, dated April 1, 2016, the Tribunal approved the protection of Witness X's identity and ordered the execution of a Protective Order (included as Annex A to the Procedural Order) before the Claimant, its agents, witnesses and experts could be provided with Witness X's identity and witness statement.
51. By Procedural Order No. 15, dated April 9, 2016, the Tribunal admitted into the record two of the four witness statements objected to by the Claimant (Minister Navarro's Witness Statement and Chajmi's Witness Statement) and excluded the other two (RWS-5 y RWS-6), and granted the Claimant an extension until May 2, 2016 to submit its Rejoinder to Respondent's Objections.

52. On April 22, 2016, by Procedural Order No. 16, the Tribunal rejected the Respondent's request to reconsider the decision in Procedural Order No. 15 and confirmed said decision in its entirety.
53. On April 29, 2016, by Procedural Order No. 17, the Tribunal rejected the Claimant's request to adopt a specific procedure for the examination of two witnesses whose witness statements the Claimant intended to submit with its Rejoinder on Jurisdiction.
54. On May 2, 2016, the Claimant submitted its Rejoinder Memorial to Respondent's Objections to Jurisdiction and Admissibility ("**Claimant's Rejoinder Memorial on Jurisdiction**"), along the redacted versions of the two aforementioned witness statements (CWS-14 y CWS-15), the further witness statement of Ralph Fitch ("**Fitch's Second Witness Statement**"), the third witness statements of W.J. Mallory ("**Mallory's Third Witness Statement**") and Xavier Gonzales Yutronic ("**Gonzales Yutronic's Third Witness Statement**"), annexes C-300 to C-335 and legal authorities CLA-129 (updated) and CLA-179 to CLA-200.
55. By Procedural Order No. 18, dated May 6, 2016, the Tribunal rejected the Claimant's request to adopt another special procedure to examine the two witnesses mentioned in Procedural Order No. 17.
56. By Procedural Order No. 19, dated May 17, 2016, the Tribunal excluded from the record the two witness statements under consideration (CWS-14 and CWS-15) and authorized the Secretary to the Tribunal to destroy the unredacted versions which had been submitted.
57. By letters dated May 26, 2016, the Parties communicated to the PCA and the Tribunal the list of witnesses and experts of their respective counterparties that each intended to summon to the Hearing. The PCA conveyed the lists of each Party to the other on May 27, 2016.
58. On June 1, 2016, the Tribunal issued Procedural Order No. 20, which excluded from the record the documents the Claimant had submitted in its Rejoinder on Jurisdiction and whose exclusion the Claimant had consented to, rejecting at the same time the Respondent's request to strike certain sections of the Rejoinder and other documents submitted with it.
59. On June 6, 2016, the Parties, the Tribunal and the PCA held a conference call to discuss the organization of the Hearing, which the Parties had already been able to discuss among themselves and agree in part. The following individuals participated in the conference call: (i) on behalf of the Claimant, Henry G. Burnett and Cedric Soule, both from King & Spalding, LLP, and (ii) on behalf of the Respondent, Carmiña Llorenti, Pablo Menacho, Marcelo Fernández and María Virginia Martínez, all from the Attorney General's Office (*Procuraduría General del Estado*), and Eduardo Silva Romero, José Manuel García Represa and Juan Felipe Merizalde, all from

Dechert LLP. By e-mail dated June 7, 2016, the PCA made the audio recording of the conference call available to the Parties on the PCA's website.

60. On June 9, 2016, the Tribunal issued Procedural Order No. 21 concerning the Hearing.
61. On June 30, 2016, the Tribunal issued Procedural Order No. 22 in which it rejected the Claimant's request to strike certain information from the record but admitted the incorporation into the record of the proposed legal authorities. Additionally, the Tribunal observed that the photographs of the blank pages were already in the record and declared that, if the objection to the authenticity of these pages was maintained, the issue of their inspection would be dealt at the close of the Hearing. The Tribunal partially rejected the admission of certain documents requested by the Respondent, admitting certain new documents into the record.
62. On June 28, 2016, the Respondent informed the Tribunal that it had received certain documents from the Canadian Government which might be relevant for the present arbitration proceedings. Bolivia had advised at the time of the submission of its Rejoinder that it had requested such documents and it had reserved its right to submit these documents once it received them. By letter dated June 28, 2016, Bolivia reiterated that it reserved its right to request the admission of such documents into the record.
63. By e-mail dated July 5, 2016, the Claimant requested the Tribunal to order the Respondent to submit some of the documents that had been admitted by the Tribunal in its Procedural Order No. 22 with "R-" exhibit numbering, or, alternatively, to allow the Claimant to submit them, labelled with "C-" exhibit numbering.
64. By letter dated July 6, 2016, the Tribunal, *inter alia*, invited the Claimant to submit the aforementioned documents that the Claimant had referred to in its prior e-mail, as exhibits with "C-" exhibit numbers. These documents were labelled as C-335 and C-336.
65. By letter dated July 8, 2016, the Respondent requested the Tribunal to order the Claimant to produce, under category 11 of the RRDD, the unredacted versions of five of the documents that the Canadian government had produced to the Respondent in redacted form, whose versions had been annexed to said letter.<sup>4</sup>

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<sup>4</sup> See *infra* para. 69.

**C. HEARING**

66. From July 11 to 22, 2016 (excluding July 16 and 17, 2016) the Parties and the Tribunal held the hearing on jurisdiction and merits of the arbitration (the “**Hearing**”), in the World Bank facilities in Washington D.C., U.S.A.

67. The following persons were present at the Hearing:

**Arbitral Tribunal**

Dr. Eduardo Zuleta Jaramillo, Presiding Arbitrator  
Prof. Francisco Orrego Vicuña  
Mr. Osvaldo César Guglielmino

**Claimant**

Mr. Ralph Fitch, South American Silver Ltd.  
Mr. Henry G. Burnett, King & Spalding, LLP  
Mr. Craig Miles, King & Spalding, LLP  
Mr. Fernando Rodríguez Cortina, King & Spalding, LLP  
Mr. Cedric Soule, King & Spalding, LLP  
Ms. Eldy Roche, King & Spalding, LLP  
Ms. Veronica García, King & Spalding, LLP  
Mr. Luis Alonso Navarro, King & Spalding, LLP  
Mr. Enrique Barrios, Guevara & Gutiérrez  
Mr. Rodrigo Rivera, Guevara & Gutiérrez  
Mr. Richard J. Lambert, RPA Inc.  
Ms. Katharine Masun, RPA Inc.  
Ms. Brenna Scholey, RPA Inc.  
Mr. Alexander Lee, FTI Consulting

**Respondent**

Mr. Héctor E. Arce Zaconeta, Procuraduría General del Estado  
Ms. Carmiña Llorenti Barrientos, Procuraduría General del Estado  
Mr. Pablo Menacho Diederich, Procuraduría General del Estado  
Ms. María Virginia Martínez Mansilla, Procuraduría General del Estado  
Ms. Mariana Daniela Arce Peñaloza, Procuraduría General del Estado  
Mr. Karel Chávez Uriona, Ministerio de Minería y Metalurgia  
Mr. Alejandro Balboa La Vieja, Bolivia’s Embassy in Washington D.C.  
Mr. Eduardo Silva Romero, Dechert LLP  
Mr. José Manuel García Represa, Dechert LLP  
Mr. Juan Felipe Merizalde, Dechert LLP  
Mr. Luis Miguel Velarde Saffer, Dechert LLP  
Ms. Catalina Echeverri Gallego, Dechert LLP  
Mr. Javier Echeverri Díaz, Dechert LLP

Ms. Ruxandra Esanu, Dechert LLP  
Mr. Francisco Paredes, Dechert LLP  
Ms. Madeline Tutman, Dechert LLP  
Mr. Nathaniel Morales, Dechert LLP  
Mr. Thomas Matthews, Gustavson & Associates  
Mr. Alexis Maniatis, The Brattle Group, Inc.

**Secretary: Permanent Court of Arbitration**

Ms. Hyun Jung Lee, Legal Counsel  
Ms. Julia Solana Álvarez, Assistant Legal Counsel

**Interpreter**

Ms. Silvia Colla  
Mr. Daniel Giglio

**Stenographers**

Mr. Dante Rinaldi (*Spanish*)  
Mr. Leandro Iezzi (*Spanish*)  
Mr. Dionisio Rinaldi (*Spanish*)  
Mr. David Kasdan (*English*)

68. The following witnesses and experts were examined at the Hearing:

**Fact witnesses**

Mr. Ralph Fitch  
Mr. William James Mallory  
Mr. Santiago Angulo  
Mr. Xavier Gonzales Yutronic  
Mr. Felipe Malbran  
Mr. David Dreisinger  
Mr. Félix César Navarro Miranda  
Mr. Félix Gonzales Bernal  
Mr. Andrés Chajmi Rikusqmanta  
Witness X

**Experts**

Dr. William E. Roscoe, RPA Inc.  
Mr. Graham G. Clow, RPA Inc.  
Dr. Kadri Dagdelen  
Mr. Patrick R. Taylor  
Mr. Howard N. Rosen, FTI Consulting  
Mr. Chris Milburn, FTI Consulting  
Mr. Barry Cooper  
Mr. Graham Davis, The Brattle Group, Inc.  
Mr. Florin A. Dorobantu, The Brattle Group, Inc.

69. On the second day of the Hearing, July 12, 2016, the Tribunal ordered the Claimant to exhibit, under category 11 of the RDD, the unredacted versions of the documents communicated by the Canadian government to the Respondent contained in annexes 2 to 6 of the Respondent's letter dated July 8, 2016 (see para. 65 *supra*).<sup>5</sup> Three of these annexes were partially included in the record, unredacted, labelled as R-299 to R-301.

**D. POST-HEARING PROCEEDINGS**

70. On August 11, 2016, the Tribunal issued Procedural Order No. 23, rejecting the Claimant's request to admit into the record a document concerning a valuation based on the stock value.
71. On September 19, 2016, the Parties informed the Tribunal that they had reached an agreement on revisions of the Hearing transcript and they recalled the agreement of the Parties to cite to transcripts in their original language.
72. On October 31, 2016, the Parties each submitted their Post-Hearing Briefs.
73. On November 28, 2016, the Parties each submitted their Costs Submissions.
74. On December 12, 2016, the Parties each submitted their respective comments on the Costs Submission of their counterpart.
75. On December 9, 2017, pursuant to a request from the Respondent which was not opposed by the Claimant, the Tribunal admitted into the record the award in *Bear Creek Mining Corporation v. Republic of Perú*.<sup>6</sup>

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<sup>5</sup> Transcript of the Hearing, Day 2, 418:3-15 (Spanish).

<sup>6</sup> *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21, Award, November 30, 2017.

**E. CLOSING OF HEARINGS**

76. By letter dated February 16, 2017, the Tribunal declared the hearings closed in this arbitration, pursuant to Article 31(1) of the UNCITRAL Rules.



### III FACTUAL BACKGROUND

77. On May 24, 1988, Bolivia and the United Kingdom signed the Treaty, which entered into force on February 16, 1990.<sup>7</sup> In September 1990, Bolivia passed the Investment Law Act No. 1182 (*Ley de Inversiones N° 1182*).<sup>8</sup> On December 9, 1992, the Treaty's effects were extended to Bermuda.<sup>9</sup>
78. In 1997, Bolivia carried out a reform of the legal framework of the mining sector through Law Act No. 1777 (*Ley N° 1777*), which – according to the Claimant – implemented several reforms to encourage investment in the mining sector.<sup>10</sup>

#### The Claimant's Corporate Structure

79. SAS was established in October 7, 1994, in Hamilton, Bermuda under the name General Minerals Corporation Limited (“**General Minerals**”).<sup>11</sup> According to the Claimant, the purpose of the company – created by a group of geologists, including Mr. Ralph Fitch, witness in this arbitration – was to identify, explore and develop mineral properties around the world, especially in South America.<sup>12</sup>
80. On November 7, 2003, Mr. Felipe Malbran, Mr. Fernando Rojas and Mr. Carlos Ferreira incorporated in La Paz, Bolivia, the company Compañía Minera Malku Khota (“**CMMK**” or the “**Company**”) “*for the purpose of exploring, developing, managing and exploiting the Malku Khota Mining Project*”.<sup>13</sup>
81. The shares of CMMK were subsequently transferred on December 12, 2003, to Malku Khota Ltd., on October 15, 2007, to Productora Ltd., and on October 16, 2007, to G.M. Campana Ltd.<sup>14</sup>

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<sup>7</sup> C-1, the Treaty.

<sup>8</sup> C-5, Ley de Inversiones N° 1182, published in the Gaceta Oficial No. 1662 on September 17, 1990.

<sup>9</sup> C-2, Statement by the UK on the Exchange of Notes at La Paz (dated December, 3 and 9, 1992) extending the Treaty to Bermuda.

<sup>10</sup> C-30, Bolivian Mining Code, Law Act No. 1777, published in Gaceta Oficial No. 1987, March 17, 1997. See also Statement of Claim, para. 19.

<sup>11</sup> C-10, Certificate of Incorporation of General Minerals Corporation Limited, Certificate of Incorporation on Change of Name certifying the change of name to South American Silver Limited, Register of Members and Certificate of Compliance of South American Silver Limited. The change of name took place on October 22, 2008 (see *infra* para. 84).

<sup>12</sup> Statement of Claim, para. 14.

<sup>13</sup> Statement of Claim, paras. 27, 29; C-11, Incorporation of Compañía Minera Malku Khota (CMMK), Public Deed No. 204/2003 and Public Deed No. 228/2003; CWS-2, Malbran's First Witness Statement, para. 31.

<sup>14</sup> C-9, Share Certificate issued by CMMK in favour of Productora Ltd., Malku Khota Ltd., and G.M., Campana Ltda. (Title 4); C-37, CMMK Shareholders' Registry for Productora Ltd., Malku Khota Ltd., and G.M., Campana Ltda; CWS-2, Malbran's First Witness Statement, para. 31.

- Malku Khota Ltd. was incorporated in Nassau, Bahamas, on October 27, 2003.<sup>15</sup> General Minerals (now SAS) owns 100% of its share capital, since October 27, 2003.<sup>16</sup>
  - Productora Ltd. was incorporated in Nassau, Bahamas, on October 10, 1994. Its share capital was allotted to General Minerals (now SAS), on December 19, 1995.<sup>17</sup>
  - G.M. Campana Ltd. was incorporated in Nassau, Bahamas, on September 8, 1994. Its share capital was allotted to General Minerals (now SAS), on October 10, 1994, December 31, 1994 and December 5, 2003, respectively.<sup>18</sup>
82. Thus, SAS is the owner of: (i) 100% of Malku Khota Ltd. and, so, it indirectly owns 96% of CMMK through that company;<sup>19</sup> (ii) 100% of Productora Ltd. and, consequently, it indirectly owns 2% of CMMK through it;<sup>20</sup> and (iii) 100% of G.M. Campana Ltd. and, so, it indirectly owns 2% of CMMK through G.M. Campana Ltd.<sup>21</sup> Consequently, SAS indirectly owns 100% of CMMK.
83. On September 28, 2006, four executives of General Minerals (now SAS) – Mr. Ralph Fitch, Mr. Felipe Malbran, Mr. William Filtness and Mr. Richard Doran – established South American Silver Corporation (“SASC”), a Canadian company focusing on the development and exploitation of silver mining projects in South America.<sup>22</sup> On February 7, 2007, SASC listed its shares on the Toronto Stock Exchange.<sup>23</sup>
84. On December 18, 2006, SASC acquired all the issued and outstanding common stock of General Minerals.<sup>24</sup> On October 22, 2008, General Minerals changed its name to South American Silver Limited.<sup>25</sup>

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<sup>15</sup> C-6, Certificate of Incorporation, Certificate of Good Standing and Register of Members of Malku Khota Ltd.

<sup>16</sup> C-6, Certificate of Incorporation, Certificate of Good Standing and Register of Members of Malku Khota Ltd.

<sup>17</sup> C-7, Certificate of Incorporation, Certificate of Good Standing and Register of Members of Productora Ltd, Stock Certificates.

<sup>18</sup> C-8, Certificate of Incorporation, Certificate of Good Standing and Register of Members of G.M. Campana Ltd.

<sup>19</sup> C-6, Certificate of Incorporation, Certificate of Good Standing and Register of Members of Malku Khota Ltd.

<sup>20</sup> C-9, Share Certificate issued by CMMK in favour of Productora Ltd. (Title 8).

<sup>21</sup> C-9, Share Certificate issued by CMMK in favour of Productora Ltd. (Title 8). See Transcript of the Hearing, Day 1, 173:12 – 174:11 (Spanish).

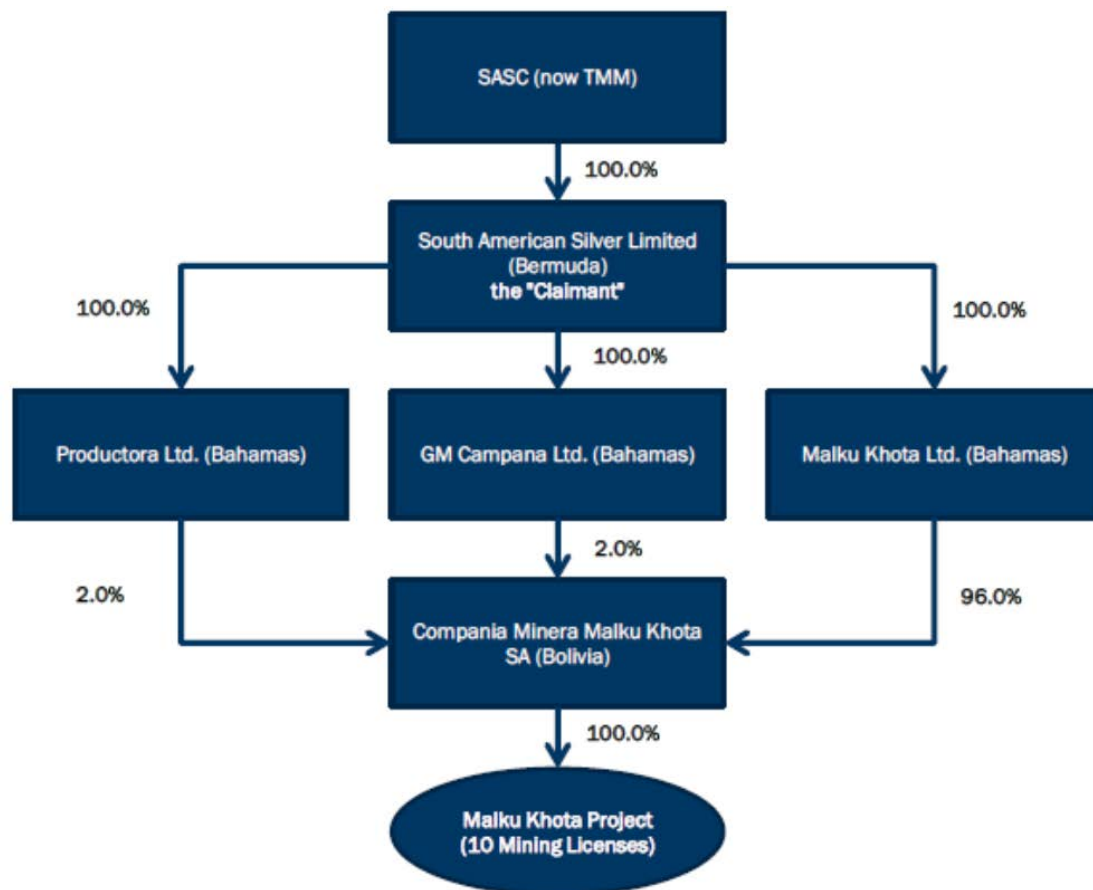
<sup>22</sup> Statement of Claim, para. 16; Claimant’s Reply Memorial, para. 18; CWS-2, Malbran’s First Witness Statement, para. 9; R-150, *Annual Information Form 2014* of TriMetals Mining Inc. of March 23, 2015.

<sup>23</sup> Statement of Claim, para. 16; R-150, *Annual Information Form 2014* of TriMetals of March 23, 2015.

<sup>24</sup> C-10, Certificate of Incorporation of General Minerals Corporation Limited, Certificate of Incorporation on Change of Name certifying the change of name to South American Silver Limited, Register of Members and Certificate of Compliance of South American Silver Limited.

<sup>25</sup> C-10, Certificate of Incorporation of General Minerals Corporation Limited, Certificate of Incorporation on Change of Name certifying the change of name to South American Silver Limited, Register of Members and Certificate of Compliance of South American Silver Limited; R-150, *Annual Information Form 2014* of TriMetals of March 23, 2015.

85. SAS' organizational chart, submitted by the Claimant, is reflected below:<sup>26</sup>



### Context

86. SAS has been in Bolivia since 1994.<sup>27</sup> According to the Claimant, over the years Bolivia's government encouraged it to invest in the country and to continue carrying out exploration projects in Bolivia, which had resulted in SAS' investments in Bolivia for 18 years.<sup>28</sup> Before Malku Khota, SAS had been involved in 5 large scale mining projects in Bolivia.<sup>29</sup>

<sup>26</sup> Statement of Claim, para. 33; CER-1, First FTI Report, September 23, 2014, Fig. 2, para. 5.11.

<sup>27</sup> Claimant's Reply Memorial, para. 17. See Statement of Claim, paras. 20-24.

<sup>28</sup> Claimant's Reply Memorial, para. 17. See Statement of Claim, paras. 51-53; CWS-1, Fitch's First Witness Statement, para. 17; CWS-2, Malbran's First Witness Statement, para. 26; CWS-9, Malbran's Second Witness Statement, para. 2. See Transcript of the Hearing, Day 1, 20:3-11 (English).

<sup>29</sup> Statement of Claim, paras. 20-24; CWS-1, Fitch's First Witness Statement, paras. 6-11; CWS-2, Malbran's First Witness Statement, paras. 14, 16-17, 20-23; C-31, Agreement between José Luis Velasco, Ralph G. Fitch, and Compañía Minera General Minerals (Bolivia) S.A., May 12, 1995.

87. On July 30, 2003, General Minerals Bolivia – one of the Company’s Bolivian subsidiaries – entered into a Unilateral Promise of Sale for the *Daniel* and *Cobra* mining concessions belonging to Patricia Urquiza de Kempff and Francisco Rolando Kempff Mercado, respectively.<sup>30</sup> Later, General Minerals Bolivia yielded the Unilateral Promise of Sale to CMMK, who acquired the concessions on March 30, 2007.<sup>31</sup>
88. On May 4, 2005, CMMK acquired the *Alkasi*, *Takhuani*, *Takhaua* and *Jalsuri* mining concessions from Mr. Malbran.<sup>32</sup> Later, on September 22, 2006, CMMK acquired the *Antacuna* and *Silluta* mining concessions from Silex Bolivia S.A.<sup>33</sup> Almost two years later, on April 22, 2008, CMMK acquired the *Norma* mining concession from Mr. Hugo Murillo Velazco.<sup>34</sup> Finally, on April 5, 2007, the Regional Superintendent of Mines Potosí-Chuquisaca (*Superintendencia Regional de Minería de Potosí-Chuquisaca*) granted the *Viento* mining concession to CMMK.<sup>35</sup>
89. These ten mining concessions (the “**Mining Concessions**”) constituted 219 mining blocks located in over 5,475 hectares and formed almost the whole area of the Malku Khota mining project (the “**Project**”).<sup>36</sup>
90. Between 2004 and 2005, CMMK conducted its first ground exploration campaign collecting and analyzing data.<sup>37</sup> Later, in 2005, CMMK partnered with Silex Bolivia, S.A., a mining services company, to complete a substantial program of ground and underground sampling.<sup>38</sup> These activities resulted in the identification of three aim areas: Limosna, Wara Wara and Sucre.<sup>39</sup>
91. On October 5, 2006, the former Governor of Potosí, Mario Virreira Iporre, granted CMMK the Dispensation Certificate for Mining Exploration Activities (*Certificado de Dispensación para las Actividades de Exploración Minera*).<sup>40</sup> Since 2005, CMMK has hired the Fundación Medmin

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<sup>30</sup> CWS-2, Malbran’s First Witness Statement, para. 29. See also Statement of Claim, paras. 25, 36; CWS-1, Fitch’s First Witness Statement, para. 12; C-32, Exercise of Unilateral Promise of Sale of Daniel and Cobra Mining Concessions between Francisco R. Kempff Mercado, Patricia Inéz Urquiza de Kempff, and Compañía Minera Malku Khota S.A., March 30, 2007.

<sup>31</sup> C-32, Exercise of Unilateral Promise of Sale of Daniel and Cobra Mining Concessions between Francisco R. Kempff Mercado, Patricia Inéz Urquiza de Kempff, and Compañía Minera Malku Khota S.A., March 30, 2007.

<sup>32</sup> C-33, Sale of Mining Concessions Alkasi, Jalsuri, Takhaua and Takhuani between Felipe B. Malbran Hourton and Compañía Minera Malku Khota S.A., May 4, 2005.

<sup>33</sup> C-36, Sale of Mining Concessions between Silex Bolivia S.A., and Compañía Minera Malku Khota, September 22, 2006.

<sup>34</sup> C-35, Public Deed of Purchase and Sale of Norma Mining Concession signed by Hugo Murillo Velazco and Compañía Minera Malku Khota S.A., April 22, 2008.

<sup>35</sup> C-34, Viento Mining Concession, June 5, 2007.

<sup>36</sup> C-4, Reversal Decree, August 1, 2012.

<sup>37</sup> Statement of Claim, para. 39; CER-2, First RPA Report, p. 8-1; C-13, *Preliminar Economic Assessment Technical Report* for the Malku Khota Project dated March 13, 2009.

<sup>38</sup> Statement of Claim, para. 40; CER-2, First RPA Report, p. 8-1.

<sup>39</sup> Statement of Claim, para. 40; CER-2, First RPA Report, p. 8-1.

<sup>40</sup> C-140, Certificado de Dispensación para Actividades de Exploración-Minera, suscrito por el Ing. Mario Virriera I., Prefecto y Comandante General del Departamento de Potosí, September 5, 2006.

(“**Medmin**”), a Bolivian environmental consultancy firm, to assist in the development of an environmental program and to secure an environmental license.<sup>41</sup> Between 2006 and 2012, Medmin carried out “*over eight environmental and socioeconomic studies, including compliance reports filed with the environmental department of the Government of Potosí*”.<sup>42</sup>

92. From May 2007 until December 2010, CMMK has conducted an underground exploration program.<sup>43</sup> On the basis of resource estimates as of November 2008, external mining consultants Pincock Allen & Holt completed a *Preliminary Economic Assessment* for the Malku Khota Project in March 2009 (the “**PEA 2009**”).<sup>44</sup>
93. On March 31, 2011, CMMK published the update results of the PEA by GeoVector and on May 10, 2011, it issued the corresponding completed technical report (the “**PEA 2011**”).<sup>45</sup> The PEA 2011 explained the additional recollected data and the company’s progress in the creation of a hydrometallurgical process to recover the different precious and other metals contained in the Malku Khota sandstone.<sup>46</sup>
94. In order to extract these diverse metals from the sandstone mined in Malku Khota, the Claimant and its parent – SASC – invented and patented an exclusive hydrometallurgical process.<sup>47</sup> For this purpose, SASC hired David Dreisinger, professor and Chair of Metallurgy at the University of British Columbia, as Vice President of Metallurgy.<sup>48</sup>
95. On April 26, 2011, the Government issued Resolution DGAJ-0073/2001 declaring the area surrounding the Claimant’s Mining Concessions as an “Immobilization Zone – Area of Interest of COMIBOL”, prohibiting the acquisition or concession of the zone to any other person.<sup>49</sup>

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<sup>41</sup> Claimant’s Reply Memorial, para. 23. See Transcript of the Hearing, Day 1, 33:4-17 (English).

<sup>42</sup> Claimant’s Reply Memorial, para. 23, referring to Annexes C-141 to C-148.

<sup>43</sup> Statement of Claim, para. 41; CER-2, First RPA Report, p. 8-1; C-14, Update of *Preliminary Economic Assessment Technical Report* for the Malku Khota Project dated May 10, 2011 (the “PEA 2011”). See Transcript of the Hearing, Day 1 14:9-13 (English); 197:7-16 (Spanish).

<sup>44</sup> C-13, *Preliminary Economic Assessment Technical Report* for the Malku Khota Project dated March 13, 2009. See Transcript of the Hearing, Day 1, 14:13-17 (English).

<sup>45</sup> Statement of Claim, para. 42; Transcript of the Hearing, Day 1, 49:23 – 50:2 (English). See C-14, PEA 2011; Transcript of the Hearing, Day 1, 20:12-17 (English).

<sup>46</sup> C-14, PEA 2011, section 1.2.

<sup>47</sup> Statement of Claim, para. 44; C-38, United States Patent No. US8, 585,991 B2, *Method for Recovering Indium, Silver, Gold and Rare, Precious and Base Metals from Complex Oxide and Sulfide Ores*, November 19, 2013. See Transcript of the Hearing, Day 1, 107:8 – 109:3 (English).

<sup>48</sup> Statement of Claim, para. 44; C-38, United States Patent No. US8, 585,991 B2, *Method for Recovering Indium, Silver, Gold and Rare, Precious and Base Metals from Complex Oxide and Sulfide Ores*, November 19, 2013.

<sup>49</sup> R-119, Resolution DGAJ-0073/2001 made by COMIBOL, April 26, 2011; Statement of Claim, para. 55; C-42, V. Díaz C., *La Vigencia de la Legislación en Minería*, PetroPress.

96. On July 23, 2011, the Company met with former Governor of Potosí, Félix Gonzales, to organize a meeting with the local communities of the Project's area.<sup>50</sup> According to the Claimant, at the meeting the participation of the Government in the Project was considered for the first time, which was later reiterated in subsequent meetings.<sup>51</sup>
97. According to the Claimant, on May 9, 2012, "*an individual refusing to give his name, but claiming to be employed at the Bolivian Attorney General's Office*" delivered an internal memorandum from the Environmental Administration Unit Director (*Directora de la Unidad de Gestión Ambiental*) of Potosí's Government to the Secretary of the Mother Earth Department of the Government of Potosí (*Secretario Departamento de la Madre Tierra del Gobierno de Potosí*), dated May 7, 2012, at the CMMK's offices in La Paz.<sup>52</sup> According to the Claimant, this memorandum stated that the Departmental Authority intended to revoke the environmental license on the basis of false arguments.<sup>53</sup>
98. On May 15, 2012, Mr. Mallory met with the Vice-Minister of Mining Policy (*Viceministro de Política Minera*) who, according to Mr. Mallory, had requested on several occasions that the Company submit to him highly confidential information related to CMMK's drilling and exploration works.<sup>54</sup>
99. According to the Claimant, on May 18, 2012, a congressman called CMMK's offices to advise that congressmen of President Morales' party had met on that day and had decided to support the opposition in nationalizing the Project and expelling the Claimant from Bolivia.<sup>55</sup>
100. According to Mr. Angulo's witness statement, Governor Gonzales organized a meeting between the community members that supported CMMK in or around May 23, 2012, to which CMMK was not invited, but which he nevertheless attended as a community member.<sup>56</sup> In that meeting, the Governor would have expressed that his government would never support a foreign company ("*expu[esto] a los presentes que su gobierno nunca apoyaría a una empresa extranjera*").<sup>57</sup>

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<sup>50</sup> Statement of Claim, paras. 58-59; R-32, Minutes of the Project outreach meeting, July 23, 2011; CWS-4, Gonzales Yutronic's First Witness Statement, paras. 8-9; CWS-3, Mallory's First Witness Statement, para. 19. See meeting dated July 23, 2011 *infra* para. 135. See Transcript of the Hearing, Day 1, 210:21 – 211:3; 218:18-25 (Spanish), Day 9, 1654:1 – 1655:9 (English).

<sup>51</sup> Statement of Claim, paras. 61-66. See Transcript of the Hearing, Day 1, 50:3-25 (English).

<sup>52</sup> Statement of Claim, para. 69; C-52, E-mail from Jim Mallory to Walker San Miguel and Danilo Bocángel, May 9, 2012.

<sup>53</sup> See C-53, Memorandum from Teresa B. Paredes to Wilfredo B. Alfaro, *Environmental License Report "Malku Khota Mining Exploration Project"*, May 7, 2012; Statement of Claim, para. 69.

<sup>54</sup> Statement of Claim, para. 70; CWS-3, Mallory's First Witness Statement, para. 34.

<sup>55</sup> Statement of Claim, para. 71; C-54, E-mail from Ariannet Morgado Ramos to Guillermo Funes, et al., May 18, 2012.

<sup>56</sup> Statement of Claim, para. 73; CWS-5, Angulo's First Witness Statement, paras. 10-17.

<sup>57</sup> CWS-5, Angulo's First Witness Statement, para. 10.

101. On May 28, 2012, a meeting took place between the Government's officials and the communities, in which the Company was not present, but which Mr. Angulo nevertheless attended as community member.<sup>58</sup> The meeting minutes record that CMMK would continue with its exploration activities and would resume the social programs in the communities.<sup>59</sup> However, according to Mr. Angulo, the Minister of Mining told the attending community members that the Vice-President of Bolivia had suggested to stop supporting the Project and request the Government's support in that respect.<sup>60</sup>
102. On June 12, 2012, the authorities that created the *Coordinadora Territorial Originaria Autónoma de los Seis Ayllus* ("COTOA-6A") met with Mr. Saúl Reque, Mr. Guillermo Funes and Mr. Xavier Gonzales to convey the demands of collaboration and assistance to the organization and of aid at ensuring the security of the area.<sup>61</sup>
103. On June 19, 2012, Xavier Gonzales met with the Vice-Minister of Mining (*Viceministro de Minería*), the Legal Director at the Ministry of Mining (*Director Legal Del Ministerio de Minería*) and the General Director of Environment at the Ministry of Mining (*Director General de Medioambiente del Ministerio de Minería*). According to Mr. Gonzales, at the meeting, they offered two options to overcome the opposition: either form a partnership with the Government or conduct a prior inquiry to the different parties interested ("[ellos] ofrecieron dos opciones para sobreponerse a [la] oposición: ya sea entrar en una asociación (*Contrato de Asociación*) con el Gobierno, o realizar una consulta previa a las diferentes partes interesadas").<sup>62</sup>

### **The Social Dimension of the Project**

104. The area where the Mining Concessions are located is principally inhabited by indigenous people, Aymara and Quechua, which are organized in communities, which in turn are grouped in *ayllus*.<sup>63</sup> This organization has an established form of leadership and decision-making policy, which is mainly through consensus.<sup>64</sup>

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<sup>58</sup> Statement of Claim, para. 75; CWS-5, Angulo's First Witness Statement, para. 17.

<sup>59</sup> C-15, Minutes of Meeting between Communities and Government Officials, May 28, 2012.

<sup>60</sup> CWS-5, Angulo's First Witness Statement, para. 17.

<sup>61</sup> C-57, Certificate of Guarantees of the COTOA-6A Organization, June 12, 2012.

<sup>62</sup> CWS-4, Gonzales Yutronic's First Witness Statement, para. 24.

<sup>63</sup> Statement of Claim, para. 45.

<sup>64</sup> RER-1, Prof. Uño Report, para. 53.

105. Since December 2003, the Company has hired workers coming from the Malku Khota, Ovejería and Kalachaca communities for the exploration phase of the Project.<sup>65</sup>
106. SAS claims that since 2007 it has established a public relations programme with the community.<sup>66</sup> Since then, the Company would have held several meetings with the communities, including those of Kalachaca and Malku Khota, to analyse the Project and its implications.<sup>67</sup>

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<sup>65</sup> Claimant's Reply Memorial, para. 30; CWS-2, Malbran's First Witness Statement, para. 32; CWS-9, Malbran's Second Witness Statement, para. 4. See, for example, C-184, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, May 2007; C-261, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, June 2008. See Transcript of the Hearing, Day 9, 1668:14-23 (English).

<sup>66</sup> Claimant's Reply Memorial, para. 21; CWS-7, Angulo's Second Witness Statement, November 14, 2015, para. 3; CWS-9, Malbran's Second Witness Statement, paras. 5-7. See Transcript of the Hearing, Day 1, 24:9-21 (English).

<sup>67</sup> Claimant's Reply Memorial, para. 32; CWS-9, Malbran's Second Witness Statement, para. 19; CWS-7, Angulo's Second Witness Statement, paras. 6-7, 18-21, 25-27; C-155, Memorandum de Santiago Angulo a Felipe Malbran, *Informe Mensual Proyecto Malku Khota*, May 2009; C-156, Memorandum de Santiago Angulo a Felipe Malbran, *Informe relacionen comunitarias Proyecto Malku Khota*, June 2009; C-157, Memorandum de Santiago Angulo a Felipe Malbran, *Informe Mensual Proyecto Malku Khota*, July 2009; C-158, Memorandum de Santiago Angulo a Fernando Cáceres, *Informe relacionen comunitarias Noviembre 2009*, November 2009; C-159, Memorandum de Santiago Angulo a Fernando Cáceres, *Informe relacionen comunitarias diciembre 2009*, December 2009; C-160, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, October 2010; C-161, Memorandum de Santiago Angulo a Fernando Cáceres, *Informe correspondiente al mes de noviembre de 2010*, December 2, 2010; C-162, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, November 2010; C-163, Memorandum de Santiago Angulo a Felipe Malbran, *Informe Mensual Proyecto Malku Khota*, March 2008; C-164, Memorandum de Santiago Angulo a Felipe Malbran, *Informe Mensual Proyecto Malku Khota*, February 2009. See Transcript of the Hearing, Day 1, 27:6 – 28:5 (English).



107. Between 2007 and 2011, the requests of the communities were written down in the “*Actas de Compromiso*”, which later were registered into the “*Actas de Cumplimiento*” o “*Actas de Entrega*” when fulfilled.<sup>68</sup> According to these minutes signed by the communities, SAS’ social projects would have included roadway improvements;<sup>69</sup> renovation, construction and, building and transport materials<sup>70</sup>; assistance to fishing<sup>71</sup> and scholarships.<sup>72</sup>
108. In 2008, CMMK hired Cumbre del Sajama S.A., a Bolivian firm specialized in consulting services in the mining industry to support the Company’s efforts in its public relations programme.<sup>73</sup> Part of the support entailed conducting workshops to “*educate the communities on the social, mining, and environmental aspects of mining and the Malku Khota Project*”.<sup>74</sup> The Claimant notes that 35 workshops were carried out with Cumbre del Sajama S.A. between July 2008 and September 2011.<sup>75</sup> These workshops included (i) Introduction to mining;<sup>76</sup> (ii) Mining development and community participation in the mine;<sup>77</sup> (iii) Environmental assessment of the Project and how to

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<sup>68</sup> Claimant’s Reply Memorial, para. 50. See, for example, C-171, *Actas de Compromiso, Entrega, Cumplimiento y Solicitudes* suscritas por la Compañía Minera Malku Khota con distintos Ayllus y Comunidades entre 2007 y 2011.

<sup>69</sup> C-173, *Acta de Entrega* entre el Ayllu Tacahuani de la Provincia Charcas del Municipio de San Pedro de Buena Vista del Departamento de Potosí y la Compañía Minera Malku Khota S.A., December 16, 2007; C-174, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, June 2007.

<sup>70</sup> C-175, *Acta de Cumplimiento* entre la comunidad Kalachaca de la Provincia Charcas del Departamento de Potosí y la Compañía Minera Malku Khota, SA., June 22, 2008; C-176, *Acta de Entrega* entre la comunidad Kalachaca de la Provincia Charcas del Departamento de Potosí y la Compañía Minera Malku Khota, May 6, 2007; C-177, *Acta de Entrega* entre la comunidad de Kalachaca de la Provincia Charcas del Departamento de Potosí y la Compañía Minera Malku Khota, November 30, 2007; C-178, *Letter from Comunidad Kalachaca to Compañía Minera Malku Khota*, July 31, 2007; C-179, *Acta de Cumplimiento* entre la comunidad de Kisiwillque de la Provincia Alonso de Ibáñez del Municipio de Sacaca del Departamento de Potosí y la Compañía Minera Malku Khota, August 15, 2007; C-180, *Acta de Cumplimiento* entre la comunidad de Kayestia de la Provincia Alonso de Ibáñez del Municipio de Sacaca del Departamento de Potosí y la Compañía Minera Malku Khota, September 26, 2007; C-181, *Acta de Cumplimiento* entre las comunidades Alpayeque, Escoma y Alcalaca del Ayllu Urinsaya de la Provincia Charcas, Departamento de Potosí y Compañía Minera Malku Khota SA., October 20, 2007; C-182, *Memorándum de Santiago Angulo a Felipe Malbran, Informe Mensual Proyecto Malku Khota*, April 2008; C-183, *Memorándum de Santiago Angulo a Felipe Malbran, Informe Mensual*, June 2008; C-156, *Memorándum de Santiago Angulo a Felipe Malbran, Informe relacionen comunitarias Proyecto Malku Khota*, June 2009; C-157, *Memorándum de Santiago Angulo a Felipe Malbran, Informe Mensual Proyecto Malku Khota*, July 2009; C-158, *Memorándum de Santiago Angulo a Fernando Cáceres, Informe relacionen comunitarias Noviembre 2009*, November 2009; C-159, *Memorándum de Santiago Angulo a Fernando Cáceres, Informe relaciones comunitarias - diciembre 2009*, December 2009; C-156, *Memorándum de Santiago Angulo a Felipe Malbran, Informe relacionen comunitarias Proyecto Malku Khota*, June 2009; C-185, *Acta de Cumplimiento* entre la comunidad de Kisiwillke de la Provincia Alonso de Ibáñez del Departamento de Potosí y la Compañía Minera Malku Khota, April 24, 2007; C-174, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, June 2007.

<sup>71</sup> C-185, *Acta de Cumplimiento* entre la comunidad de Kisiwillke de la Provincia Alonso de Ibáñez del Departamento de Potosí y la Compañía Minera Malku Khota SA., April 24, 2007; C-186, *Acta de Cumplimiento* entre la comunidad Ovejería del Ayllu Sulka Jilticani de la Provincia Alonso de Ibáñez del Departamento de Potosí y la Compañía Minera Malku Khota SA., March 29, 2008; C-187, *Acta de Cumplimiento* entre la comunidad Jantapalka de la Provincia Alonso de Ibáñez del Departamento de Potosí y la Compañía Minera Malku Khota S.A., October 20, 2007.

<sup>72</sup> C-194, SAS, *Operations Report* - March 2012.

<sup>73</sup> Claimant’s Reply Memorial, paras. 22, 34. See Transcript of the Hearing, Day 1, 24:12-13 (English).

<sup>74</sup> Claimant’s Reply Memorial, para. 34.

<sup>75</sup> Claimant’s Reply Memorial, paras. 34-37.

<sup>76</sup> C-139, SAS & Cumbre del Sajama S.A., *Informe Final, “Conociendo la Minería,”* 2008.

<sup>77</sup> C-165, Cumbre del Sajama S.A., *Talleres “Una Exploración Minera en Marcha Hacia el Futuro,”* February 2010.

protect the environment;<sup>78</sup> and (iv) Identifying the communities' needs and potential projects to develop.<sup>79</sup> The Claimant indicates that CMMK also organized other additional workshops.<sup>80</sup>

109. At the beginning of 2009, SASC hired *Business for Social Responsibility* (“BSR”), in order to evaluate its public relations programme and to support the Company at implementing programmes in the communities in the area of influence of the Project.<sup>81</sup>
110. On May 16, 2009, in a meeting between Mr. Angulo and the Kalachaca community, the community members would have proposed the creation of a regional commission to represent the different *ayllus* in the area of influence to communicate with CMMK as one entity. The Claimant indicates that this proposal was a forerunner to the creation of COTOA-6A.<sup>82</sup>
111. In May 2009, BSR issued a report evaluating the risks and social opportunities of the Project.<sup>83</sup> The report identified some shortcomings in CMMK's programmes and proposed guidelines to remedy them.<sup>84</sup>

#### ***Events in 2010***

112. In 2010, with the expansion of the exploration's and drilling's programmes, CMMK hired local members to work on site performing drilling activities.<sup>85</sup>
113. On February 6, 2010, a trade union to which some community members belonged to, reported environmental pollution in the communities' sacred places caused by CMMK's activities.<sup>86</sup>
114. On December 11, 2010, the Ayllus Sullka Jilatikani, Takahuani, Urinsaya y Samka approved a resolution vote indicating that CMMK should cease its mining activities, because, among other

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<sup>78</sup> C-166, SASC & Cumbre del Sajama S.A., Talleres “*Conociendo y Cuidando Nuestro Medio Ambiente Comunitario*”, May 2009.

<sup>79</sup> C-167, Cumbre del Sajama, Informe Taller “*Identificación y Priorización de Demandas / Proyectos de Desarrollo Comunitario*”, 2011.

<sup>80</sup> Claimant's Reply Memorial, para. 38. See C-168, Memorandum de Carmen Huanca a Felipe Malbran, *Informe correspondiente al mes de abril de 2010*, April 30, 2010.

<sup>81</sup> Claimant's Reply Memorial, paras. 22, 34. See Transcript of the Hearing, Day 1, 24:13-18 (English).

<sup>82</sup> Claimant's Reply Memorial, para. 33; C-155, Memorandum de Santiago Angulo a Felipe Malbran, *Informe Mensual Proyecto Malku Khota*, May 2009.

<sup>83</sup> C-154, BSR, *Social Risks and Opportunities for South American Silver Corporation's Malku Khota Project in Potosí*, May 2009.

<sup>84</sup> See, for example, C-154, BSR, *Social Risks and Opportunities for South American Silver Corporation's Malku Khota Project in Potosí*, May 2009, pp. 8, 15-16, 22-23.

<sup>85</sup> Claimant's Reply Memorial, para. 55. See C-195, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, May 2010; C-196, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, June 2010; C-197, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, July 2010; C-198, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, August 2010.

<sup>86</sup> See R-54, Resolution of the First Section of the Union Central of the Indigenous Peoples Workers of the San Pedro de Buenavista de Potosí dated February 6, 2010.

reasons, it had committed abuse of authority, contaminated, disrespected the indigenous authorities, deceived, threatened community members and it was responsible for the rape of women from the community.<sup>87</sup>

115. On December 19, 2010, a resolution of the Town Hall (*Cabildo*) of the Ayllus Sullka Jilatikani, Takahuani, Urinsaya and Samka was passed, which stated, *inter alia*, that CMMK's presence was illegal and it had violated the collective rights of the Indigenous Communities, that it would have had engaged in abuses, rapes and threats, and created division between the communities.<sup>88</sup>
116. On December 21, 2010, CMMK requested by letter, the Government of Potosí's intervention in regards to the resolutions.<sup>89</sup> The Claimant maintains that Governor Gonzales did not answer to the letter.
117. On December 22, 2010, CMMK's activities were suspended temporarily.<sup>90</sup>
118. On December 27, 2010, the Ayllu Jatun Urinsaya declared that *ayllu* authorities had been forced to sign the resolutions and also asked the regional and municipal Governments to take note of the situation.<sup>91</sup> A similar communication was sent on January 7, 2011 from Ayllu Qullana.<sup>92</sup>

### ***Events in 2011***

119. Since the beginning of 2011 and by CMMK's request, officials from the Government of Potosí visited the Project's zone to assess the seriousness of the conflict, as well as, possible alternatives for a solution.<sup>93</sup>
120. On January 11, 2011, representatives of the Government of Potosí participated in a meeting called by the *Federación de Ayllus Originarios Indígenas del Norte de Potosí* ("FAOI-NP") and Mr. Fitch informed SASC's directors that the Government continued to support the Company in its efforts to resolve the problem.<sup>94</sup>

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<sup>87</sup> R-46, Resolution vote of the Ayllus Sullka Jilatikani, Takahuani, Urinsaya and Samka dated December 11, 2010.

<sup>88</sup> R-49, Resolution of the Town Hall of the Ayllus Sullka Jilatikani, Takahuani, Urinsaya and Samka dated December 19, 2010.

<sup>89</sup> R-55, Letter of Xavier Gonzales Yutronic to the Governor of Potosí dated December 21, 2010. See Transcript of the Hearing, Day 1, 46:8-16 (English); 209:13 – 2010:1 (Spanish); 219:17-22 (Spanish).

<sup>90</sup> Claimant's Reply Memorial, para. 89.

<sup>91</sup> C-227, Statement issued by the authorities of Ayllu Jatun Urinsaya on December 27, 2010 rejecting CONAMAQ and FAOI's Resolutions of December 11 and 19, 2010.

<sup>92</sup> C-228, Statement issued by Ayllu Qullana, January 7, 2011.

<sup>93</sup> R-55, Letter of Xavier Gonzales Yutronic to the Governor of Potosí dated December 21, 2010, p. 4; RWS-1, Gob. Gonzales' First Witness Statement, para. 20.

<sup>94</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 116; R-170, SASC Board Minute dated January 12, 2011, p. 1.

121. On the same day, the FAOI-NP passed a resolution stating CMMK's presence was illegal and it had violated the community rights of the Indigenous Communities and it also had committed several other abuses.<sup>95</sup>
122. On January 26, 2011, CMMK requested the Mayor and the councilmen of Sacaca to: (a) mediate in the controversy arising with the Ayllus Sullka-Jilatikani and Tacahuani in order to find a prompt solution, since they had the support of Ayllus Urinsaya and Samca in the area; (b) to enforce the State's presence and the legal order that would guarantee the exploration activities of the owners of the mining concessions; and (c) allow CMMK to restart and continue with its mining activities in the mining concessions area, restoring its peaceful possession and the full exercise of its right to work.<sup>96</sup> Additionally, it wrote to the Ministries of Presidency, and Mining and Metallurgy.
123. On January 31, 2011, a similar communication was sent to the Minister of Mining and Metallurgy and to the Vice-Minister of Social Movements and Civil Society of the Ministry of Mining.<sup>97</sup>
124. By letter dated February 10, 2011, the Vice-Minister of Social Movements and Civil Society provided CMMK with a legal opinion that it was not within the Vice-Minister's competence to grant CMMK's request ("*no es competencia del [Viceministro], dar curso favorable al petitorio efectuado por el representante de [CMMK]*").<sup>98</sup>
125. On February 15, 2011, the Ayllu Sullka Jilakitani issued a resolution reiterating that CMMK should leave definitively, as it had caused violence, political divisions in the organization, abuses and rapes to women (whose name were included), it also did not consult with the *ayllus* and it was destroying "Mother Earth".<sup>99</sup>
126. Regarding the women who would have been victims of sexual violence, SAS claimed that it was "*only aware of incidents involving four of the eight women listed in the February 11, 2011 resolution*" and that, based on the information that was given to CMMK, these four cases were consensual relationships, with employees of the Bolivian contractors and with an employee of an electricity company.<sup>100</sup> According to the Claimant, in one of the cases related to a CMMK's

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<sup>95</sup> R-50, Resolution of FAOI-NP dated January 11, 2011.

<sup>96</sup> C-273, Letter from Xavier Gonzales Yutronic to the Mayor and the Councilman of the Municipality of Sacaca of January 26, 2011.

<sup>97</sup> C-229, Letter from Xavier Gonzales to Vice-Minister of Social Movements and Civil Society of the Ministry of Mines, received by the Ministry, Jan. 31, 2011. See Transcript of the Hearing, Day 1, 46:20-25 (English).

<sup>98</sup> C-230, Official Communication from Vice-Minister of Social Movements and Civil Society of the Ministry of Mines to CMMK dated February 10, 2011 and Legal Opinion issued on February 3, 2011 by the Vice Ministry's Head of Strategic Alliance, Mr. Alberto García Sandoval, p. 6.

<sup>99</sup> R-51, Resolution of the Ayllu Sullka Jilatikani dated February 15, 2011.

<sup>100</sup> Claimant's Reply Memorial, para. 126.

contractor's employees, they were having an extramarital affair which resulted in the woman getting pregnant.<sup>101</sup> In that occasion, the Claimant affirms that it reached out to the contractor's manager in order to address the situation. It claims that the employee was fired and that a written compensation agreement resolved the situation.<sup>102</sup>

127. On February 28, 2011, the FAOI-NP passed a resolution in similar terms to the resolution of January 11, 2011.<sup>103</sup>
128. In regards to CMMK's communication dated January 31, 2011, on March 16, 2011, the Ministry of Mining and Metallurgy sent CMMK a report written by its Public Consultation and Citizen Participation Unit, in relation to the resolutions of FAOI-NP and of the *Consejo Nacional de Ayllus y Markas del Qullasuyu* ("CONAMAQ") dated December 19, 2010 and January 11, 2011.<sup>104</sup>
129. As of April 2011, Jim Mallory became SASC's Operations and Social Responsibility Vice-President<sup>105</sup> and he increased the Project's area of influence from 2.5 to 15 km to include all six *ayllus* communities.<sup>106</sup>
130. According to the Claimant, "*Jim Mallory presented the Company's community relations program in May 2011 to the Communities and to the Director of Public Consultation of the Ministry of Mining and Metallurgy, Oscar Iturri*".<sup>107</sup>
131. On May 1, 2011, the Ayllu Sullka Jilatikani wrote to President Morales claiming that it had decided to not allow any companies, to perform any mining activities in their ancestral territory whatever the property title.<sup>108</sup>
132. On May 10, 2011, officials from the Government of Potosí visited the new area and met with the community members, who stated that they would not admit CMMK as it was contaminating.<sup>109</sup>

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<sup>101</sup> See also RWS-3, Chajmi's Witness Statement, para. 16.

<sup>102</sup> Claimant's Reply Memorial, para. 127 (footnotes omitted). See CWS-9, Malbran's Second Witness Statement, para. 31; CWS-7, Angulo's Second Witness Statement, para. 51; C-237, Carta de Entendimiento entre Alberto Mamani Ramos, Santusa Gabriel Chambi de Mendoza y Maximo Mendoza Chiri, March 19, 2008.

<sup>103</sup> R-52, Resolution of FAOI-NP dated February 28, 2011.

<sup>104</sup> C-231, Official Communication from the office of the Ministry of Mines and Metallurgy to CMMK dated March 16, 2011 and Report issued on February 11, 2011 by Mr. Oscar Iturri, Responsible of the Public Consultation and Citizen Participation Unit.

<sup>105</sup> CWS-3, Mallory's First Witness Statement, para. 1.

<sup>106</sup> CWS-3, Mallory's First Witness Statement, para. 11; Claimant's Reply Memorial, paras. 69-72.

<sup>107</sup> See Transcript of the Hearing, Day 1, 34:7-10 (English).

<sup>108</sup> R-60, Letter from the Ayllu Sullka Jilatikani to the President of the Republic dated May 1, 2011. See also R-61, Letter from Ayllu Sullka Jilatikani to the Ministry of Mining and Metallurgy dated May 1, 2011.

<sup>109</sup> R-59, Minutes of the visit of the Department Office of Mother Earth to the Mallku Khota Community dated May 10, 2011.

133. [REDACTED],<sup>110</sup>
134. During 2011, CMMK negotiated Reciprocal Cooperation Agreements (“RCA”), signing the first one with Ayllu Jatun Urinsaya on July 3, 2011<sup>111</sup> and other four before September of the same year.<sup>112</sup> In September 2011, the Company hired land developers as full-time employees in each one of the six *ayllus*.<sup>113</sup> In the RCA, the five *ayllus* expressed their support for the resumption of the Project and CMMK made commitments in human resources training, shift work, support in basic infrastructure projects, health and livestock, environmental training and support in education.<sup>114</sup>
135. On July 23, 2011, a meeting between CMMK, the Indigenous Communities and former Governor Gonzales took place in Toro Toro.<sup>115</sup> The minutes of the meeting reflect two proposals: (i) the establishment of an interinstitutional commission with the affected Indigenous Communities, the local, regional and national government and CMMK; and (ii) to form a corporation with Bolivia’s participation.<sup>116</sup> According to Governor Gonzales, the second proposal was the only one that had a partial acceptance by the Kalachaca and Malku Khota communities (“*contó con una aceptación parcial de las Comunidades de Calchaca [sic] y Mallku Khota*”),<sup>117</sup> the main objectors. At the meeting, it was decided to hold a second meeting.<sup>118</sup>
136. On August 31, 2011, the second socialization meeting took place in Toro Toro.<sup>119</sup> The Governor was represented by the Departamental Secretaries of Mining and Metallurgy, who prepared a

<sup>110</sup> [REDACTED]

[REDACTED] The Respondent claims that Witness X’s arrival allowed to confirm the poor management of CMMK’s public relations. See R-247, E-mail from Witness X to Fernando Cáceres of October 12, 2011; R-248, E-mail from Witness X to CMMK’s board directors dated December 7, 2011. See also Transcript of the Hearing, Day 1, 213:11 – 2014:23 (Spanish).

<sup>111</sup> C-206, Reciprocal Cooperation Agreement (“RCA”) between Ayllu Jatun Urinsaya and CMMK, July 3, 2011.

<sup>112</sup> Claimant’s Reply Memorial, paras. 44, 62-64. See C-207, RCA between Ayllu Samca and CMMK, July 30, 2011; C-208, RCA between Ayllu Sulka Jilatikani and CMMK, August 29, 2011; C-209, RCA between Ayllu Qullana and CMMK, August 10, 2011; C-210, RCA between Ayllu Tacahuani and CMMK, August 21, 2011. See also Transcript of the Hearing, Day 1 31:8 – 32:2 (English).

<sup>113</sup> Claimant’s Reply Memorial, para. 67; C-211, List of territorial promoters hired as of September 2011.

<sup>114</sup> See clause “Purpose of the Agreement” (“*Objetivos del Convenio*”) of the RCA.

<sup>115</sup> Statement of Claim, para. 59; Counter-Memorial, para. 131; Respondent’s Rejoinder, paras. 122-130. See Transcript of the Hearing, Day 1, 220:4-7 (Spanish).

<sup>116</sup> R-32, Minutes of the Project outreach meeting, July 23, 2011, pp. 5, 8.

<sup>117</sup> RWS-1, Gob. Gonzales’ First Witness Statement, para. 32.

<sup>118</sup> Respondent’s Rejoinder, para. 130; Claimant’s Reply Memorial, para. 105.

<sup>119</sup> Claimant’s Reply Memorial, paras. 105-107; Respondent’s Rejoinder, paras. 131-133. See Transcript of the Hearing, Day 1, 34:10-14, (English); 220:20 – 220:23 (Spanish). See R-63, Report on the second outreach meeting for the Malku Khota Project, September 6, 2011.

report of the meeting.<sup>120</sup> The Government of Potosí proposed meetings with smaller delegations in order to reconcile.<sup>121</sup>

137. On September 25, 2011, a council meeting (*cabildo*) convened by FAOI-NP took place.<sup>122</sup> The Mining and Development Director for the Government of Potosí drafted a report of the meeting in which he included the complaints of the Indigenous Communities before the FAOI-NP and the CONAMAQ in relation to CMMK's actions and its relation with the Indigenous Communities.<sup>123</sup>
138. At the beginning of October 2011, COTOA-6A appears as a new indigenous organization favorable to the Project that tries to make contact with the Government.<sup>124</sup> The Parties dispute the legitimacy of the organization.<sup>125</sup>
139. On November 17, 2011, another council meeting (*cabildo*) took place.<sup>126</sup> The Parties differ on the representativeness of the council meeting and thus do not ascribe the same importance to the lack of participation of Malku Khota and Kalachaca in the council meeting and of opposition to the Project.<sup>127</sup> This council meeting was presided by Vice-Minister for the Coordination of Social Movements and Civil Society, who requested the former Governor to coordinate the meeting with the leaders of the Malku Khota and Kalachaca communities.<sup>128</sup> The minutes were notarized.<sup>129</sup>
140. On November 24, 2011, a meeting took place between COTOA-6A, the Vice-Minister for the Coordination of Social Movements and Civil Society and the Vice-Minister of Mining Policy. At the meeting, COTOA-6A expressed its support to the resumption of the Project and the Vice-

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<sup>120</sup> R-63, Report on the second outreach meeting for the Malku Khota Project, September 6, 2011.

<sup>121</sup> Claimant's Reply Memorial, para. 107; Respondent's Rejoinder, para. 133. See Transcript of the Hearing, Day 1, 221:3 – 221:5 (Spanish).

<sup>122</sup> R-64, Summon to the Town Hall dated September 25, 2011.

<sup>123</sup> R-65, Minutes and report of the Cabildo dated September 25, 2011.

<sup>124</sup> C-233, Letter from COTOA-6A to President Evo Morales, Oct. 10, 2011; C-234, Letter from COTOA-6A to the Ministry of Mines, Oct. 10, 2011; R-66, Minutes of the meeting in the Government Palace in La Paz with COTOA-6 dated November 24, 2011.

<sup>125</sup> See, for example, Counter-Memorial, paras. 124-126; Respondent's Rejoinder, para. 104; Claimant's Reply Memorial, paras. 94-97.

<sup>126</sup> Claimant's Reply Memorial, paras. 107-108; Counter-Memorial, para. 134.

<sup>127</sup> Claimant's Reply Memorial, para. 109; Respondent's Rejoinder, para. 137. While the Claimant emphasizes in the existence of an overwhelming support ("*existía un apoyo abrumador al Proyecto*", see C-68, Meetings of the Minutes of the meeting between COTOA and the Ministry of Mining and Metallurgy, dated November 17, 2011), the Respondent stresses the fact that the main objectors, the communities Malku Khota and Kalachaca, and who can find the Project in its territory, did not participate in this meeting (see RWS-4, Gob. Gonzales' Second Witness Statement, para. 34; RWS-2, Minister Navarro's Witness Statement, paras. 33-34). See Transcript of the Hearing, Day 1, 218:18-25 (Spanish); 221:20 – 222:15 (Spanish); 48:7-12 (English).

<sup>128</sup> Claimant's Reply Memorial, para. 109; Respondent's Rejoinder, para. 138; R-133, Informe sobre el cabildo, dated November 21, 2011. See also R-68, Letter of the Vice-minister off Social Movement Coordination to the Governor of Potosí dated November 28, 2011.

<sup>129</sup> C-68, Meetings of the Minutes of the meeting between COTOA and the Ministry of Mining and Metallurgy, dated November 17, 2011.

Minister proposed that the Minister of Mining and the Government would call the two opposing communities in order to achieve conciliation and consensus (“*con el fin de conciliación y consenso*”).<sup>130</sup> The Claimant points out that in the minutes of the meeting it says that in FAOINP’s opinion the inquiry should only be made with the six *ayllus* (“*en el punto de la opinión de la FAOINP con respecto a la consulta solo se debe realizar a los seis Ayllus la dicha consulta*”).<sup>131</sup>

141. On December 13, 2011, in a Government Council resolution, CONAMAQ reported and demanded that the Company cease its divisive activities (“*deponer las acciones divisionistas a la empresa Mallku Qota*”).<sup>132</sup>
142. On December 15, 2011, a briefing took place in La Paz convened by the Vice-Minister of Productive Development, and chaired by the Vice-Minister of Mining Policy, the Director of Public Inquiry and the Director of Environment of the Minister of Mining and Metallurgy.<sup>133</sup> Although there were representatives of the Indigenous Communities, representatives of the Malku Khota and Kalachaca communities did not attend.<sup>134</sup>

### ***Events in 2012***

143. At the beginning of January 2012, CMMK’s officials held a meeting in La Paz. According to Witness X’s witness statement, the Respondent contends that in that meeting the existence of two plans was exposed: sell the exploration information to another mining company (‘Plan A’) or provoke the expropriation of the investment (‘Plan B’).<sup>135</sup> The Claimant denies the existence of Plan B, or even the discussion of such plans but rather asserts that the meeting concerned practical aspects of the Project.<sup>136</sup>

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<sup>130</sup> R-66, Minutes of the meeting in the Government Palace in La Paz with COTOA-6 dated November 24, 2011. See Transcript of the Hearing, Day 1, 38:17 – 39:4, 48:22 – 49:1 (English); Day 9, 1661:1 – 1661:3, 1670:5-23 (English). To confirm that Minister Navarro gave such instructions, Transcript of the Hearing, Day 3, 742:16:21 (Spanish); to confirm that the Governor received them, see Transcript of the Hearing, Day 4, 845:9 – 846:5 (Spanish).

<sup>131</sup> R-66, Minutes of the meeting in the Government Palace in La Paz with COTOA-6 dated November 24, 2011. See also R-261, E-mail from Witness X to CMMK, November 25, 2011.

<sup>132</sup> R-71, Resolution of the Government Council of CONAMAQ dated December 13, 2011.

<sup>133</sup> Claimant’s Reply Memorial, para. 110; Respondent’s Rejoinder, para. 138.

<sup>134</sup> Respondent’s Rejoinder, para. 138.

<sup>135</sup> RWS-7, Witness X’s Witness Statement, paras. 23, 35. See Transcript of the Hearing, Day 1, 174:19 – 175:16 (Spanish).

<sup>136</sup> Claimant’s Rejoinder Memorial on Jurisdiction, paras. 48-52; CWS-11, Mallory’s Third Witness Statement, paras. 17-18; CWS-12, Gonzales Yutronic’s Third Witness Statement, para. 22. See Transcript of the Hearing, Day 1 58:23 – 59:21 (English). The Claimant states that the best summary of the Company’s plans can be found in the corporate report of 2011, published in 2012 (C-300, South American Silver Corp., Corporate Report 2011, May 2, 2012). See also C-18, Letter from Felipe Malbran and Xavier Gonzales to Mario V. Iporre, July 21, 2012; C-133, SGS Canada Inc., An Investigation into Metal Recovery from Malku Khota Leach Liquors, August 19, 2013; C-134, SGS Canada Inc., An Investigation into Standard Soak Tests for Silver and Indium Extraction from the Malku Khota Deposit Samples 11-6 through 11-19, July 16, 2012.



144. During the first half of 2012, the Indigenous Communities participated in several meetings (for example, on February 14 and 16, 2012, March 28, 2012 and May 28, 2012);<sup>137</sup> the Parties do not agree on the description of the meetings.<sup>138</sup> While the Claimant states that these meetings “confirm the Government’s strategy to seize control of the Malku Khota Project”,<sup>139</sup> the Respondent contends that they “show that, in spite of the increasing tensions caused by CMMK and COTOA-6A’s actions, the Departmental Government continued having the intention of creating scenarios for dialogue”.<sup>140</sup>
145. On February 1, 2012, the authorities of the Ayllu Sullka Jilatikani requested CONAMAQ and FAOI-NP to intervene to decide the existence of false leaders (“falsos líderes [sic]”) regarding the CMMK.<sup>141</sup>
146. On February 22, 2012, the Company requested help from the Government, reporting illegal mining in the area of the Project.<sup>142</sup> According to the Claimant, the Government did not provide any significant support.<sup>143</sup>
147. On April 1, 2012, the community members supporting CMMK abducted Benedicto Gabriel, another community member who was trying to call for a meeting in Malku Khota in order to support the creation of a cooperative.<sup>144</sup> On the same day, members of the Malku Khota community took Saúl Reque, Coordinator of Community Relations, hostage.<sup>145</sup> Mr. Reque was released in the morning of April 2.<sup>146</sup> Benedicto Gabriel was released on April 3.<sup>147</sup>

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<sup>137</sup> C-15, Minutes of Meeting between Communities and Government Officials, May 28, 2012.

<sup>138</sup> Claimant’s Reply Memorial, para. 111; Respondent’s Rejoinder, para. 139.

<sup>139</sup> Claimant’s Reply Memorial, para. 111.

<sup>140</sup> Respondent’s Rejoinder, para. 139.

<sup>141</sup> R-72, Letter from the ayllu of Sullka Jilatikani to FAOI-NP, February 1, 2012.

<sup>142</sup> C-70, Letter from Jim Mallory and Xavier Gonzales to Governor Felix Gonzales, Feb. 22, 2012. See also the report on illegal mining in the area in C-46, Letter from the ayllu of Sullka Jilatokani to the Mayor of Sacaca requesting an “Ordenanza Municipal,” March 16, 2012, and C-48, Vote by the ayllus communities, May 27, 2012. See Transcript of the Hearing, Day 1, 49:2-11 (English).

<sup>143</sup> Claimant’s Reply Memorial, para. 83. See Transcript of the Hearing, Day 1, 49:12-15 (English).

<sup>144</sup> Claimant’s Reply Memorial, para. 133; Respondent’s Rejoinder, para. 149; R-70, Minutes of the statements of abuse suffered by members of the Indigenous Peoples, signing box. To see the support to Andrés Chajmi’s idea for a cooperative, C-169, E-mail from S. Angulo to F. Malbran, Dec. 11, 2007; C-216, E-mail from S. Angulo to X. Gonzales, Mar. 16, 2012. See also Transcript of the Hearing, Day 1, 226:2-8 (Spanish); Day 4, 922:4-22 (Spanish).

<sup>145</sup> CWS-10, Mallory’s Second Witness Statement, para. 42.

<sup>146</sup> CWS-10, Mallory’s Second Witness Statement, para. 43.

<sup>147</sup> R-70, Minutes of the statements of abuse suffered by members of the Indigenous Peoples, signing box.

148. On April 11, 2012, Mr. Xavier Gonzales, General Manager of CMMK, brought a criminal action against the persons that Mr. Reque identified as his captors, on behalf and at the request of Mr. Reque.<sup>148</sup> The case was closed on February 28, 2014.<sup>149</sup>
149. On April 18, 2012, a meeting took place between the COTOA-6A and the Director of the Public Consultation and Citizen Participation Unit of the Ministry of Mining and Metallurgy. In the minutes of the meeting, it was recorded that the aim of the meeting was to discuss issues related to the process of public consultation.<sup>150</sup>
150. In the early hours of May 5, 2012, community members and the police violently clashed in the area of the Project; two policemen were detained.<sup>151</sup> On the same day, officials of CMMK met the Ministry of Mining and Metallurgy. At the meeting, Mr. Gonzales Yutronic rejected the proposal of giving the exploration a three-month pause in light of the circumstances.<sup>152</sup> According to the Claimant, the tensions intensified on May 6, 2012, when Malku Khota community members attacked a drilling rig hired by the Company.<sup>153</sup>
151. On May 9, 2012, an agreement between the Government of Potosí and the community members was signed (“**Agreement with the Government**”), which facilitated the release of the policemen by the community members and called for a meeting in Acasio on May 18, 2012.<sup>154</sup>
152. On May 18, 2012, when the meeting was to be held in Acasio, violent clashes took place.<sup>155</sup> The Respondent blames CMMK for the clashes and alleges that the Claimant financially supported the transport of a great number of community members affiliated to COTOA-6A.<sup>156</sup> The Claimant contends that those who incited the violence were Malku Khota community members, including illegal mine workers, as well as outsiders, while CMMK had always acted peacefully.<sup>157</sup>

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<sup>148</sup> Claimant’s Reply Memorial, para. 135; CWS-8, Gonzales Yutronic’s Second Witness Statement, para. 47.

<sup>149</sup> R-75, Resolution on file for the complaint of Xavier Gonzales against members of the Indigenous Peoples dated February 28, 2014..

<sup>150</sup> C-314, Minutes of Meeting between Officials of the Ministry of Mines, Oscar Iturri and Emil Balcázar, with the ayllus of Alonso de Ibáñez Province, April 18, 2012.

<sup>151</sup> Respondent’s Rejoinder, para. 157; R-78, News release, El Potosí, *Confirmation of a hostage taking in Mallku Khota*, May 5, 2012; R-76, Complaint filed by the Indigenous Communities regarding police intervention, May 8, 2012. See Transcript of the Hearing, Day 1, 53:3-4 (English); 229:19 – 229:25 (Spanish).

<sup>152</sup> Respondent’s Rejoinder, para. 158; R-265, E-mail from Witness X to Jim Mallory of May 5, 2012.

<sup>153</sup> Statement of Claim, para. 67.

<sup>154</sup> C-51, Minutes of Meeting between the Government of Potosi and Community Members, May 9, 2012.

<sup>155</sup> R-174, Noticias Fides, *Confrontations in Mallku Qhuta*, video published May 18, 2012; R-80, Press release, *Pelea por Mallku Khota deja 10 heridos y 12 desaparecidos* (Fight over Mallku Khota results in 10 wounded and 12 missing) dated May 19, 2012.

<sup>156</sup> R-79, Payment receipts for the mobilization of communities to the meeting in Acasio dated May 9 and 10, 2012. See Transcript of the Hearing, Day 1, 232:6 – 233:23 (Spanish).

<sup>157</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 33; C-316, Report “*Situación de Conflicto Malku Khota - Informe de Acontecimientos*” (Conflict situation in Malku Khota – Report on the events), prepared by Witness X, May 19, 2012. See also

153. On May 21, 2012, the Kuraka Cancio Rojas was arrested for allegedly participating in the clashes of May 18.<sup>158</sup> At the time of his arrest, the Kuraka would have been detained by COTOA-6A community members in La Paz.<sup>159</sup>
154. On May 25, 2012, CONAMAQ called for a march by community members that reached La Paz on June 7, where forceful riots occurred.<sup>160</sup>
155. On May 28, 2012, a meeting was called by the Government of Potosí and the Ministry of Mining and Metallurgy in which the communities demonstrated strong great support for the Project. The communities who opposed the Project did not attend the meeting.
156. On June 8, 2012, what the Claimant calls a “*gran cabildo histórico*” took place, in which 800 families of 42 Indigenous Communities would have participated.<sup>161</sup>
157. On June 12, 2012, the objectors to the Project blocked the access road to the Project area and declared the place a “red zone” (“*zona roja*”), forbidding the access to CMMK employees and to those supporting the Project in the area.<sup>162</sup>
158. On June 13, 2012, the case against Kuraka Cancio Rojas was dismissed for insufficient evidence (“*en razón a que a la fecha del pronunciamiento del presente requerimiento las pruebas son insuficientes para fundamentar una acusación*”).<sup>163</sup>
159. On June 27, 2012, the Ministry of Mining and Metallurgy called for a meeting in Cochabamba for July 2, with the objective of finding a final solution to the conflict between the community members who agree and disagree on the Project developed by the Malku Khota Mining Company (“*encontrar definitivamente una solución al conflicto suscitado entre comunarios que están de*

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R-255, E-mail from Witness X to CMMK and SASC, May 6, 2012; See Transcript of the Hearing, Day 1, 53:25 – 55:19, 1667:14 – 1668:3 (English).

<sup>158</sup> Respondent’s Rejoinder, para. 171; R-83, Press release, El Potosí, *An Indigenous leader is accused on eight counts for the Mallku Khota case* dated May 23, 2012.

<sup>159</sup> RWS-7, Witness X’s Witness Statement, para. 32; R-257, Chain of responses in the e-mail from Witness X to executives of CMMK and SASC of May 26, 2012; R-247, E-mail from Witness X to Fernando Cáceres of October 12, 2011. See Transcript of the Hearing, Day 1, 170:1-16 (Spanish).

<sup>160</sup> R-86, Interview to Félix Becerra, CONAMAQ member, video, May 2012; R-85, Press release, Boris Bernal Mansilla, *The Mallku Khota demonstration arrives this Thursday to La Paz and they will not leave until their demands are met*, dated June 7, 2012; R-175, Página Siete, *Comunarios de Mallku Khota marcharán el lunes pidiendo la liberación de Cancio Rojas*, video published on May 24, 2012; R-176, Página Siete, *Community Members of Mallku Khota will protest Monday requesting the freedom of Cancio Rojas*, video published on May 24, 2012; R-89, CF Noticias, *Indigenous Peoples of Mallku Khota assaulted the policemen in La Paz*, video, on June 8, 2012,.

<sup>161</sup> Statement of Claim, para. 77.

<sup>162</sup> C-55, *Comunarios de Malku Khota toman un campamento minero*, Opinion.com.bo, June 13, 2012; C-56, *Comunarios toman un campamento minero*, La Razón, June 13, 2012.

<sup>163</sup> R-84, The not guilty resolution relating to the complaint submitted against Cancio Rojas dated June 13, 2012.

*acuerdo y desacuerdo con la actividad minera que desarrolla actualmente la Compañía Minera Malku Khota*”).<sup>164</sup>

160. On June 28, 2012, Mr. Agustín Cáceres and Mr. Fernando Fernández, both CMMK officials, were abducted by the Indigenous Communities.<sup>165</sup> The Respondent contends that at the time of the event they were trying to infiltrate the Indigenous Communities’ meetings,<sup>166</sup> while the Claimant denies those allegations and explains that they were in the area of the Project gathering information and taking pictures of the environmental contamination caused by the illegal mining (“*recolecta[ndo] información y toma[ndo] fotografías de la contaminación ambiental provocada por las actividades de minería ilegal*”).<sup>167</sup>
161. On July 2, 2012, the objectors to the Project looted one of CMMK’s drillings camps.<sup>168</sup> On the same day, the Ministry of Mining and Metallurgy had called for a meeting in which the opposing community members refused to participate at the last minute.<sup>169</sup>
162. On July 5 and 6, 2012 the police intervened in the Malku Khota area. This intervention triggered violent clashes in which Mr. José Mamani, a Malku Khota community member, died and 13 persons were injured.<sup>170</sup> In addition, three policemen were abducted and physically assaulted by the protestors.<sup>171</sup> The death of said community member led to the intervention of an interinstitutional commission of the Government which had been established in Chiro Qh’asa since July 4.<sup>172</sup>
163. On July 7, 2012, the interinstitutional commission of the Government established in Chiro Qh’asa and the Indigenous Communities came to an agreement to pacify the area. On July 8, 2012, the

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<sup>164</sup> R-92, Summon from the Ministry of Mining and Metallurgy dated June 27, 2012.

<sup>165</sup> C-241, Memorandum de Agustín Cárdenas y Fernando Fernández a Fernando Cáceres, *Informe Incidente del 28 de junio 2012*, July 25, 2012.

<sup>166</sup> Counter-Memorial, para. 168; R-17, Information and Documentation Centre of Bolivia, *Mallku Khota, Mining Land and Territory* of November, 2012, p. 4. See also Claimant’s Rejoinder Memorial on Jurisdiction, para. 183. See Transcript of the Hearing, Day 1, 238:25 – 239:16 (Spanish).

<sup>167</sup> Claimant’s Reply Memorial, para. 140; Claimant’s Rejoinder Memorial on Jurisdiction, para. 45; C-241, Memorandum de Agustín Cárdenas y Fernando Fernandez a Fernando Cáceres, *Informe Incidente del 28 de junio 2012*, July 25, 2012.

<sup>168</sup> C-60, *Compañía minera se pronuncia*, El Diario, July 4, 2012.

<sup>169</sup> R-93, Reply by the Indigenous Peoples to the Ministry of Mining and Metallurgy and to the Governor of Potosí dated July 1, 2012.

<sup>170</sup> See R-96, Noticias PAT, *1 muerto 8 heridos tras enfrentamiento en Mallku Khota (1 casualty, 8 wounded after clashes in Mallku Khota)*, video; R-97, Annual report by the United Nations High Commissioner for Human Rights about his activities in the Plurinational State of Bolivia in 2012, para. 67.

<sup>171</sup> R-97, Annual report by the United Nations High Commissioner for Human Rights about his activities in the Plurinational State of Bolivia in 2012, para. 67.

<sup>172</sup> Respondent’s Reply, para. 171; Respondent’s Rejoinder, para. 178; R-95, Press release, El Potosí, *Governmental committee will establish dialogue in the Chiro Kasha area* dated July 5, 2012. See Transcript of the Hearing, Day 1, 240:17-25 (Spanish).

corresponding agreement (the “**Memorandum of Understanding**”) was signed, which reflected an agreement to annul and revert the Mining Concessions.<sup>173</sup>

### **The Reversion**

164. The Memorandum of Understanding was made public on July 8, 2012.<sup>174</sup>

165. The Memorandum of Understanding was endorsed on July 10, 2012, with the following points:

*“A legal-technical committee will be constituted to draft the Supreme Decree for the reversal of all mining concessions registered in the name of Compañía Minera Malku Khota S.A. to the State; said committee will be made up of representatives of both sectors, representatives of the National Government, and representatives of the Government of Potosí.*

*All mineral exploration, prospecting and all forms of exploitation activities in this mineral field shall be suspended.*

*The State shall take over the entire production chain at the Mallku Qhota Mining Center.*

*Peaceful cohabitation, social peace, free transit between all communities, visitors and residents in the region are hereby guaranteed. Moreover, illegitimately occupied dwellings shall be returned to their lawful owners.*

*The Office of the Prosecutor shall, considering its specific duties, perform all relevant investigations on the events that took place in this region.*

*The prompt drafting and enactment of the Mining Law shall be promoted.”*<sup>175</sup>

166. On July 14, 2012, Mr. Malbran met with COMIBOL’s President, who would have expressed his surprise at the decision of the Bolivian President, would have suggested that it may be mere threats and would have reiterated the possibility of establishing an association between the Company, COMIBOL and the Indigenous Communities.<sup>176</sup>

167. On July 21, 2012, Mr. Malbran and Mr. Gonzales requested a meeting with Minister Virreira on behalf of CMMK allegedly in an attempt to prevent the nationalization (“*en un intento por impedir la nacionalización*”).<sup>177</sup>

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<sup>173</sup> C-16, Memorandum of Understanding July 7, 2012.

<sup>174</sup> C-61, *Morales confirma nacionalización de Malku Khota* (Morales confirms nationalization of Malku Khota), Agencia Boliviana de Información, July 8, 2012; C-62, *Gobierno firma acuerdo con dirigentes de Malku Khota y los últimos tres rehenes son liberados*, La Razón, July 8, 2012.

<sup>175</sup> C-17, Agreement, July 10, 2012.

<sup>176</sup> CWS-2, Malbran’s First Witness Statement, para. 63.

<sup>177</sup> Statement of Claim, para. 100; C-18, Letter from Felipe Malbran and Xavier Gonzales to Mario V. Iporre, July 21, 2012.

168. On July 31, 2012, Mr. Fitch and Mr. Johnson wrote a letter from SAS to the Vice-President of Bolivia requesting a meeting to discuss potential solutions to the situation (“*una reunión para discutir sobre una potencial resolución de la situación*”).<sup>178</sup>
169. On August 1, 2012, Bolivia issued the Supreme Decree No. 1308 (the “**Reversal Decree**” or the “**Reversion**”), which the Claimant characterizes as an “expropriation”.<sup>179</sup> The Reversal Decree provides:

*“Article 1. Effective upon publication of this Presidential Decree, the following Special Transitory mining Authorizations shall revert back to the original ownership of the State: [(b) “Jalsuri,” “Alkasi,” “Cobra,” “Viento,” “Takhuaní,” “Takhaua,” “Daniel,” “Antacuna,” “Norma,” And “Silluta,”] [...]*

*Article 2. I. Corporación Minera de Bolivia – COMIBOL shall take over the management and mining development of the [Mining Concessions] [...].*

*Article.3.-I. [...] COMIBOL shall perform the prospecting and exploration activities in coordination with SERGEOTECMIN [National Technical Mining and Geology Service] [...]*

*Article 4.-I. [...] COMIBOL shall hire the services of an independent firm to carry out a valuation of the investments made by [CMMK] [...], within a period not to exceed one hundred and twenty (120) business days.*

*II. Based on the findings of such valuation, COMIBOL shall define the amount and conditions under which the Government of Bolivia shall recognize the investments made by [CMMK] [...].”*<sup>180</sup>

170. On August 8, 2012, the press reported statements from COMIBOL’s President, declaring his intention to partner with a foreign mining company to develop the mine in Malku Khota.<sup>181</sup>
171. By letter dated August 24, 2012, which was received in the offices of CMMK on August 27, Mr. Córdova invited SAS’ representatives “*to a meeting on Tuesday, August 28, 2012 at 9:00 a.m. in*

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<sup>178</sup> Statement of Claim, para. 100; C-19, Letter from Ralph G. Fitch and Greg S. Johnson to Álvaro García Linera, July 31, 2012.

<sup>179</sup> C-4, Reversal Decree, August 1, 2012. See Transcript of the Hearing, Day 1, 23:11-19, 61:11-16, (English); Day 9, 1650:24-25 (English).

<sup>180</sup> C-4, Reversal Decree, August 1, 2012.

<sup>181</sup> Statement of Héctor Córdova reported by the press, see C-65, *Comibol busca apoyo técnico para explotar indio*, La Prensa, August 8, 2012. See also C-66, *Comibol busca que China asuma la exploración en Malku Khota*, Pagina Siete, August 12, 2012. SAS sustains that the Tribunal should draw adverse inferences regarding the contacts of Bolivia with Chinese companies, since SAS requested the documents related to them in the exhibition of documents stage and Bolivia answered that there were no documents. See Claimant’s Reply Memorial, para. 145; SAS’ Post-Hearing Brief, paras. 7, 107, footnote 10; Transcript of the Hearing, Day 3, 699:14 – 700:4 (Spanish); R-177, Letter from COMIBOL to the Attorney General of the State dated May 12, 2015 on categories No. 4, 5 and 6 of the Request of Exhibition of Documents of SAS; Letter from Eduardo Silva Romero and José Manuel García Represa, counsel of Bolivia, to Harry Burnett et al., counsels of SAS, June 5, 2015, Annex 1, 6(6).

*order for [CMMK] to hand-over of all relevant documents related to the development of the activities of [Malku Khota's] mining deposit.”*<sup>182</sup>

172. By letter dated September 4, 2012, SAS apologized for missing the meeting, stating that it was “*not practicable for [them] due to the short time frame proposed and the fact that SAS personnel are not resident in La Paz*”.<sup>183</sup> In addition, it requested COMIBOL to organize a meeting on a date in the near future that could be mutually acceptable for both parties in order to discuss the proposal.<sup>184</sup>
173. The Claimant contends that COMIBOL never replied to this communication.<sup>185</sup>
174. On October 22, 2012, SAS submitted its Notice of Dispute.
175. On December 9, 2012, COMIBOL published in the press an invitation to submit expressions of interest in order to hire an independent valuation company.<sup>186</sup> Between December 10 and 12, COMIBOL sent special invitations to nine companies for these to express interest.<sup>187</sup> Only one company responded to the invitation.<sup>188</sup>
176. On February 14, 2013, the Technical and Operations Management of COMIBOL received a new version of the Terms of Reference.<sup>189</sup> After producing an inventory of the assets that CMMK had left in the area,<sup>190</sup> COMIBOL issued a new invitation to receive offers, which was cancelled on March 31, 2013, due to technical errors that came up during the process of reformulating the terms of reference.<sup>191</sup>
177. The new terms of reference were sent directly to the companies Mineral Processing S.R.L. and Quality Audit Consultores y Contadores Públicos S.R.L, who submitted their proposals on April 7, 2014.<sup>192</sup> Following the analysis by the proposal evaluation committee,<sup>193</sup> on April 23, 2014, COMIBOL awarded the contract for the independent valuation of the investments to Quality

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<sup>182</sup> C-20, Letter from COMIBOL addressed to South American Silver, August 24, 2012.

<sup>183</sup> C-21, Letter from South American Silver to COMIBOL, September 4, 2012.

<sup>184</sup> C-21, Letter from South American Silver to COMIBOL, September 4, 2012.

<sup>185</sup> Statement of Claim, para. 104.

<sup>186</sup> R-98, Invitation to present interest expression published by COMIBOL in the press on December 9, 2012.

<sup>187</sup> R-99, Invitation to present interest expressions sent by COMIBOL in December 2012.

<sup>188</sup> R-100, Proposals recorded, December 14, 2012.

<sup>189</sup> R-102, Remission report of the corrected reference terms dated February 14, 2013.

<sup>190</sup> R-103, Inventory performed by COMIBOL in the Malku Khota area between February 19 and 28, 2013.

<sup>191</sup> Counter-Memorial, para. 183; R-104, Annulment resolution on the hiring procedure dated March 31, 2014.

<sup>192</sup> R-105, Minutes of the reception of offers dated April 7, 2014.

<sup>193</sup> R-106, Analysis from the proposal evaluation committee dated April 8, 2014.

Audit Consultores y Contadores Públicos S.R.L.<sup>194</sup> On May 8, 2014, this company and COMIBOL entered into a contract for the study and valuation of the investments made by the Malku Khota Mining Company and Exploraciones Santa Cruz LTDA. EMICRUZ LTDA. (“*el Estudio y Valuación de las Inversiones Efectuadas por la Compañía Minera Mallku Khota S.A. y Exploraciones Santa Cruz LTDA. – EMICRUZ LTDA*”).<sup>195</sup>

178. On June 27, 2014, Quality submitted its valuation report on the costs incurred by CMMK and EMICRUZ Ltda. until the date of the Reversion (the “**Quality Report**”), which estimates the value of the investment made at USD 17,047,190.01.<sup>196</sup>
179. A year later, on June 5, 2015, the Ministry of Mining of Bolivia published the preliminary “Sectoral Plan for Metallurgic Mining Development 2015–2019”,<sup>197</sup> which establishes that the Malku Khota Project is “*one of the largest undeveloped silver and indium reserves in the world*”.<sup>198</sup> Their conclusion is based on “*South American Silver’s ‘prospecting and exploration studies’, which ‘shed[] light on the massive scale of resources the deposit contains’*”.<sup>199</sup>
180. On October 2, 2015, Bolivia’s Geological Mineral Service (*Servicio Geológico Minero*) started the drilling of four holes in Malku Khota to verify the mineral reserves.<sup>200</sup>
181. Shortly afterwards, on October 27, 2015, at a promotional investment event in New York co-sponsored by Bolivia and the Financial Times, the Government of Bolivia promoted the Malku Khota Project to potential investors.<sup>201</sup>

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<sup>194</sup> R-107, Authorization resolution for the hiring of Quality dated April 23, 2014; R-108, Service order for the hiring of a consultant directed to Quality, April 25, 2014.

<sup>195</sup> R-109, Service Contract for the provision of investment valuation services for CMMK and EMICRUZ Ltda., May 8, 2014.

<sup>196</sup> R-110, Quality’s letter to COMIBOL dated June 27, 2014; R-111, Valuation report of the investments performed by the Malku Khota S.A. Mining Company dated June 2014, p. 18.

<sup>197</sup> C-150, Plan Sectorial de Desarrollo Minero Metalúrgico 2015–2019; C-151, *En debate documento preliminar de Plan Sectorial de Desarrollo Minero Metalúrgico 2015–2019*, Minería Noticias, June 5, 2015.

<sup>198</sup> C-151, *En debate documento preliminar de Plan Sectorial de Desarrollo Minero Metalúrgico 2015–2019*, Minería Noticias, June 5, 2015, p. 32.

<sup>199</sup> C-150, Plan Sectorial de Desarrollo Minero Metalúrgico 2015–2019; C-151, *En debate documento preliminar de Plan Sectorial de Desarrollo Minero Metalúrgico 2015–2019*, Minería Noticias, June 5, 2015, p. 56.

<sup>200</sup> C-249, *Segeomin iniciará perforación exploratoria en Mallku Khota*, Boliviaminera.blogspot.com, October 5, 2015.

<sup>201</sup> C-152, *Navarro busca atraer inversiones para la minería en Bolivia*, Ministerio de Minería y Metalurgia, Oct.26, 2015; C-153, *Gobierno ofertó mina Mallku Khota en Nueva York*, Erbol Digital, October 28, 2015.



#### IV RELIEF SOUGHT

##### A. THE CLAIMANT'S RELIEF

182. The Claimant requests in its Statement of Claim that the Tribunal grant the following relief:

- “(i) *A declaration that Bolivia has violated the Treaty;*
- (ii) *A declaration that Bolivia's actions and omissions at issue and those of its instrumentalities for which it is internationally responsible are unlawful, constitute a nationalization or expropriation or measures having effect equivalent to nationalization or expropriation without prompt, adequate and effective compensation, failed to treat South American Silver's investments fairly and equitably and to afford full protection and security to South American Silver's investments and impaired South American Silver's investments through unreasonable and discriminatory measures and treated South American Silver's investments less favourably than investments of its own investors;*
- (iii) *An award to South American Silver of full restitution or the monetary equivalent of all damages caused to its investments, including historical and consequential damages;*
- (iv) *An award to South American Silver for all costs of these proceedings, including attorney's fees; and*
- (v) *Post-award interest on all of the foregoing amounts, compounded quarterly, until Bolivia pays in full.”*<sup>202</sup>

183. In its Rejoinder Memorial on Jurisdiction, apart from repeating the relief included in the previous paragraph,<sup>203</sup> SAS requested an award granting the following:

- “(i) *A declaration that the dispute is within the jurisdiction of the Tribunal;*
- (ii) *A finding dismissing all of Bolivia's objections to the admissibility of the claims and the tribunal's jurisdiction”.*<sup>204</sup>

184. During the Hearing, the Claimant withdrew its claim for restitution.<sup>205</sup>

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<sup>202</sup> Statement of Claim, para. 230; Claimant's Reply Memorial, pp. 209-210. See also Claimant's Rejoinder Memorial on Jurisdiction, p. 86.

<sup>203</sup> Claimant's Rejoinder Memorial on Jurisdiction, p. 86.

<sup>204</sup> Claimant's Rejoinder Memorial on Jurisdiction, p. 85.

<sup>205</sup> Transcript of the Hearing, Day 1, 17:11-24, 117:9-11, 258:1-5 (English).

**B. THE RESPONDENT'S RELIEF**

185. In its Rejoinder, the Respondent requests that the Tribunal grants the following relief:<sup>206</sup>

*“9.1 On jurisdiction and admissibility*

*715. Declares:*

- a. That it lacks jurisdiction over all Claimant's claims, as SAS has no investment protected by the Treaty as it has not proven to be the actual proprietor of the Mining Concessions;*
- b. alternatively, that these claims are inadmissible as SAS does not have “clean hands” and does not comply with the requirement of legality of the investment; and,*

*716. Orders:*

- a. SAS to reimburse Bolivia entirely for the costs incurred in the defense of its interests in the current arbitration, along with the interests at the reasonable commercial rate in the Arbitral Tribunal's opinion from the moment the State incurred in such costs until the date of its effective payment; and*
- b. Any other satisfactory measure to the State as the Arbitral Tribunal deems appropriate.*

*9.2 On the Merits*

*717. If, par impossible, the Arbitral Tribunal decides that it has jurisdiction and the claims are admissible, declares:*

- a. that Bolivia has acted in accordance with the Treaty and the international law when declaring the Reversion;*
- b. that Bolivia has acted in accordance with its obligation of providing the investment a fair and equal treatment;*
- c. that Bolivia has acted in accordance with its obligation of not adopting arbitrary and discriminatory measures that impairs the use and benefit of the investment;*
- d. that Bolivia has acted in accordance with its obligation of not granting a less favorable treatment to the investments of SAS in regards to its own investors; and*
- e. that, in any case, SAS has contributed to the production of the damage that it claims and sets such contribution in, at least 75%, reducing in this sense the compensation that Arbitral Tribunal may provide; and*

*718. Orders:*

- a. SAS to entirely reimburse Bolivia for the costs incurred in the defense of its interests in the current arbitration, along with the interests at the reasonable commercial rate in the Arbitral Tribunal's opinion from the moment the State incurred in such costs until the date of its effective payment; and*
- b. Any other satisfactory measure to the State as the Arbitral Tribunal may deem appropriate.”*

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<sup>206</sup> Respondent's Rejoinder, paras. 715 – 718. In its Post-Hearing Brief, the Respondent requested the Tribunal to accept the relief sought by Bolivia in its Rejoinder (Bolivia's Post-Hearing Brief, para. 164).

## V APPLICABLE LAW

### 1. The Claimant's Position

186. The Claimant submits that its claims are based on Treaty provisions, as supplemented by international law.<sup>207</sup> SAS claims that the applicable law in an investment dispute is the Treaty itself, as primary source of law<sup>208</sup> and *lex specialis*, as supplemented by general principles of international law, as needed.<sup>209</sup> The Vienna Convention on the Law of Treaties (the “**Vienna Convention**”) provides that international law governs international treaties and prevails over domestic law in the area of international responsibility.<sup>210</sup>
187. The Claimant opposes the Respondent's argument that the Parties have not agreed on the law governing the dispute, as the Treaty, supplemented where appropriate by relevant principles of international law, was the law selected.<sup>211</sup> SAS argues that by consenting to arbitrate disputes relating to the Treaty, the Parties have effectively designated the Treaty as applicable law, which constitutes *lex specialis* governing the relationship between SAS and Bolivia.<sup>212</sup> Therefore, the Tribunal is not vested with broad discretion to determine the applicable law.<sup>213</sup>
188. Second, the Claimant believes that the scope of indigenous community rights in international law is unclear and cannot take precedence over the protections granted by the Treaty. SAS contends that Article 31 of the Vienna Convention contains a general rule of interpretation of treaties that reflects customary international law, and implies a holistic approach to elucidate the real meaning of the terms of the Treaty, considering together its text, its context and, the object and purpose of the Treaty.<sup>214</sup> The rule provided in Article 31(1) sets out the primary rule for the interpretation of treaties and, in that sense, Article 31(3)(c) is part of a larger interpretation process, resulting from considering first the plain meaning of the words in their context, and in the light of the object and purpose of the treaty.<sup>215</sup>
189. In any case, SAS agrees with the notion that treaties should be construed in harmony with international law, but submits that Bolivia failed to demonstrate how the application of the

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<sup>207</sup> Statement of Claim and Memorial, para. 116.

<sup>208</sup> Claimant's Reply Memorial, paras. 240, 261.

<sup>209</sup> Statement of Claim and Memorial, para. 116.

<sup>210</sup> Statement of Claim and Memorial, para. 117.

<sup>211</sup> Claimant's Reply Memorial, paras. 237-239.

<sup>212</sup> Claimant's Reply Memorial, para. 239.

<sup>213</sup> Claimant's Reply Memorial, para. 240.

<sup>214</sup> Claimant's Reply Memorial, paras. 154-155, 243.

<sup>215</sup> Claimant's Reply Memorial, para. 244.

systemic integration principle would effectively result in a reduction of the protections granted to SAS under the Treaty.<sup>216</sup> Moreover, Bolivia fails to explain how the specific instruments it would have the Tribunal take into consideration fall within the purview of a truly systemic integration of the Treaty with customary international law.<sup>217</sup> The Claimant asserts that there are three conditions that must be met for the application of other provisions under Article 31(3)(c) of the Vienna Convention: (i) that the human rights instrument constitutes a binding source of international law identified under Article 38 of the ICJ Statute (*sine qua non* condition); (ii) that this rule is relevant, and (iii) that it is also applicable in the relations between the Parties.<sup>218</sup>

190. The Claimant contends that three of the instruments relied upon by the Respondent are non-binding, *de lege ferenda*, and lack the State practice and *opinio juris* elements that would transform them into embodiments of customary international law.<sup>219</sup> Regarding the three conventions mentioned by the Respondent – the 1969 American Convention on Human Rights, the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, and the International Labor Organization Convention No. 169 – the Claimant argues that they can only be binding if the Parties were contracting parties to the treaties relied upon,<sup>220</sup> and the Claimant points to the fact that the United Kingdom is not a party to any of these three treaties.<sup>221</sup> The Claimant argues that as the abovementioned documents do not constitute customary international law or general principles of law, the Tribunal could not rely on them as proper “rules” of international law pursuant to Article 31(3)(c) of the Vienna Convention.<sup>222</sup>

191. The Claimant asserts that international arbitration tribunals have had an opportunity to make issues of indigenous peoples’ rights outcome-determinative, and have declined to do so.<sup>223</sup> In particular, SAS relies on *Grand River v. United States*, *Glamis Gold v. United States*, and *von Pezold v. Zimbabwe*.<sup>224</sup>

192. The Claimant concludes that the Respondent failed to meet its burden of proof that indigenous rights prevail over the protections granted to the Claimant under the Treaty in case of conflict.<sup>225</sup>

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<sup>216</sup> Claimant’s Reply Memorial, para. 245.

<sup>217</sup> Claimant’s Reply Memorial, para. 246.

<sup>218</sup> Claimant’s Reply Memorial, para. 246.

<sup>219</sup> Claimant’s Reply Memorial, para. 247, referring to the 2007 Declaration on the Rights of Indigenous Peoples, the United Nations Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises.

<sup>220</sup> Claimant’s Reply Memorial, para. 248.

<sup>221</sup> Claimant’s Reply Memorial, para. 249.

<sup>222</sup> Claimant’s Reply Memorial, para. 251.

<sup>223</sup> Claimant’s Reply Memorial, para. 252.

<sup>224</sup> Claimant’s Reply Memorial, paras. 252-256.

<sup>225</sup> Claimant’s Reply Memorial, para. 257.

According to the Claimant, the case law of the Inter-American Court on Human Rights relied upon by Bolivia is inapplicable here because the United Kingdom is not party to the 1969 American Convention on Human Rights,<sup>226</sup> and because the Respondent has not adduced any evidence establishing that *erga omnes* State obligations include the protection of indigenous rights.<sup>227</sup>

193. Finally, the Claimant argues that Bolivian law is of limited relevance for the dispute.<sup>228</sup> The Claimant does not dispute that Bolivian law may be relevant to certain limited areas of the dispute (such as the “legality doctrine”); but this does not mean that Bolivian law forms part of the law applicable to the merits of the arbitration proceeding.<sup>229</sup> The Tribunal should treat Bolivian law as a factual circumstance to be taken into consideration when assessing whether Bolivia breached its obligations under the Treaty, as has been done in other investment arbitration decisions.<sup>230</sup>

## **2. The Respondent’s Position**

194. The Respondent argues that given that the Treaty does not contain an “applicable law” clause, and there is no agreement between the Parties on this matter, the Tribunal is vested with broad discretion to determine the applicable law given the circumstances of the case. This power is envisaged in Article 35(1) of the UNCITRAL Arbitration Rules, and Article 1054 of the Netherlands Arbitration Act, the law of the seat of this arbitration.<sup>231</sup> While exercising this broad discretion, the Tribunal must conclude that it will be appropriate and necessary to interpret the Treaty in light of the sources of international and domestic law that guarantee protection of the rights of the Indigenous Communities that inhabit the area of the Project.<sup>232</sup>
195. First, the Respondent suggests a “systemic interpretation” of the Treaty based on Article 31(3)(c) of the Vienna Convention, interpreted broadly and not limited to rules that are binding for both Parties.<sup>233</sup> Systemic interpretation allows for the supplementation of the Treaty with other international law norms<sup>234</sup> and the application of a conflicts rule according to which the Treaty cannot breach the Parties’ international obligations; therefore, the Treaty must be interpreted

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<sup>226</sup> Claimant’s Reply Memorial, para. 258.

<sup>227</sup> Claimant’s Reply Memorial, para. 259.

<sup>228</sup> Claimant’s Reply Memorial, para. 261.

<sup>229</sup> Claimant’s Reply Memorial, para. 261.

<sup>230</sup> Claimant’s Reply Memorial, para. 261.

<sup>231</sup> Counter-Memorial, paras. 189-190.

<sup>232</sup> Counter-Memorial, para. 192.

<sup>233</sup> Counter-Memorial, para. 201.

<sup>234</sup> Counter-Memorial, paras. 193-195.

consistently with those obligations.<sup>235</sup> Consequently, according to the Respondent, the Tribunal should resort to the sources of law that protect the right of Indigenous Communities to provide content to certain concepts that are constantly evolving such as fair and equitable treatment, full protection and security, arbitrariness, and the legality or illegality of an expropriation.<sup>236</sup> Bolivia notes that SAS adopts an excessively formalistic view of Article 31(3)(c) of the Vienna Convention and that Article 31 does not establish a hierarchy for its subsections.<sup>237</sup>

196. In this connection, the Respondent, relying upon a case before the Inter-American Court of Human Rights and findings of the International Law Commission (“ILC”)<sup>238</sup>, asserts that in cases of conflict, when systemic interpretation cannot ensure harmony among norms, the Arbitral Tribunal must take into account that under public international law, obligations concerning the fundamental rights of the indigenous communities prevail over obligations concerning foreign investment protection.<sup>239</sup> This primacy is supported by two factors identified by the ILC: Article 103 of the United Nations Charter and the *erga omnes* characteristics of the principles and the norms concerning fundamental human rights.<sup>240</sup> In turn, respect for human rights implies respect for the fundamental rights of the indigenous peoples.<sup>241</sup>
197. The Respondent argues that, in addition to international law, the Tribunal must apply and consider Bolivian law in interpreting the scope of the rights and obligations provided for in the Treaty,<sup>242</sup> and asserts that this is particularly relevant in the absence of any inconsistency between international law and domestic law.<sup>243</sup> Bolivia refers to some decisions of international tribunals that have applied the domestic law of the host State of the investment for certain issues.<sup>244</sup>
198. According to the Respondent, Bolivia’s law is relevant to determine at least three fundamental issues of this case: (i) whether the obligation of providing fair and equitable treatment was complied with;<sup>245</sup> (ii) whether there exists a public purpose in case of expropriation,<sup>246</sup> and (iii)

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<sup>235</sup> Counter-Memorial, para. 197.

<sup>236</sup> Counter-Memorial, para. 199.

<sup>237</sup> Respondent’s Rejoinder, footnote 353 referring to Claimant’s Reply Memorial, para. 216.

<sup>238</sup> Counter-Memorial, paras. 202-206; Hearing Transcript, Day 1, 246:16 – 248:7 (Spanish).

<sup>239</sup> Counter-Memorial, para. 202.

<sup>240</sup> Counter-Memorial, paras. 204-206.

<sup>241</sup> Counter-Memorial, para. 208.

<sup>242</sup> Counter-Memorial, para. 210.

<sup>243</sup> Counter-Memorial, para. 211.

<sup>244</sup> RLA-26, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, para. 135; RLA-27, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/01, Award, September 22, 2014, paras. 534-535; RLA-28, *Asian Agricultural Products Ltd. (AAPL) v. Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, June 27, 1990, para. 22.

<sup>245</sup> Counter-Memorial, para. 213.

<sup>246</sup> Counter-Memorial, para. 214.

whether the investment was performed in accordance with the relevant rules under domestic law to establish the admissibility of SAS' claims.<sup>247</sup>

199. In order to guarantee the protection of the Indigenous Communities, the Tribunal must construe the Treaty in accordance with five Bolivian laws and international law instruments: (i) the 1969 American Convention on Human Rights;<sup>248</sup> (ii) the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women;<sup>249</sup> (iii) ILO Convention No. 169;<sup>250</sup> (iv) the 2007 United Nations Declaration on the Rights of Indigenous Peoples,<sup>251</sup> and (v) the Political Constitution of the Plurinational State of Bolivia.
200. Finally, the Respondent argues that, in the course of interpretation, the Tribunal should also take into consideration: (i) general principles of law, whose application is particularly important as the Treaty remains silent on the applicable law, including the principles of clean hands, good faith, and *nemo auditur propriam turpitudinem* and *nullus commodum capere de sua injuria propria*;<sup>252</sup> (ii) customary international law, which requires protection of the fundamental rights of the Indigenous Communities;<sup>253</sup> and (iii) within applicable customary business practices and as evidence of international public order, instruments such as the United Nations Guiding Principles on Business and Human Rights, and the Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises.<sup>254</sup>
201. In the Rejoinder, Bolivia addressed the arguments presented by the Claimant on the application of the provisions on human and indigenous rights to the present dispute.
202. First, the Respondent noted that such application was justified given the extraordinary nature of the factual circumstances underlying this dispute. Bolivian law, which must be applied to supplement the provisions under the Treaty, comprises, even under its highest-ranking instruments, the protection of Indigenous Communities and incorporates rules for the protection of human and indigenous rights which are binding on the State and on individuals; the State being

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<sup>247</sup> Counter-Memorial, para. 215.

<sup>248</sup> Ratified by Bolivia on January 20, 1979 and incorporated into the domestic legal and regulatory framework as National Law No. 1430 of 1993, which is a part of the constitutionality block. Counter-Memorial, para. 217(a).

<sup>249</sup> Ratified by Bolivia on November 12, 1994 and incorporated into the domestic legal and regulatory framework as National Law No. 1599, of June 12, 1996. Counter-Memorial, para. 217(b).

<sup>250</sup> Ratified by Bolivia and incorporated into the domestic legal and regulatory framework as National Law No. 1257 de 1991, which is also part of the constitutionality block and directly applicable to the mining sector based on Article 15 of the Mining Code of 1997. Counter-Memorial, para. 217(c).

<sup>251</sup> Incorporated into the Bolivian legal and regulatory framework as National Law No. 3760 of 2007, which is also part of the Bolivian constitutionality block. Counter-Memorial, para. 217(d).

<sup>252</sup> Counter-Memorial, para. 218.

<sup>253</sup> Counter-Memorial, para. 219.

<sup>254</sup> Counter-Memorial, para. 220.

legally responsible for reasonably preventing the violation of such rights.<sup>255</sup> These international instruments have constitutional status under domestic law.<sup>256</sup> Since 1967, the Bolivian legal and regulatory framework recognizes the autonomy and the right to self-government of indigenous peoples, and incorporates international treaties.<sup>257</sup>

203. The Respondent alleges that these provisions of Bolivian and international law must be applied as supplementary rules, rather than elements of fact.<sup>258</sup> In the cases cited by the Claimant, the tribunals did not have to analyze the applicability of these rules since the dispute was decided based on other legal arguments.<sup>259</sup> Moreover, some of the cases cited by SAS confirm that domestic legislation and international law are applicable to matters not governed by the Treaty, provided that they do not entail independent claims.<sup>260</sup>
204. At any rate, given the “*unique and serious facts of this case*,”<sup>261</sup> the rules on the protection of human and indigenous rights are essential for the resolution of the dispute because: (i) the cases cited by SAS confirm that domestic legislation and international law are applicable to matters not governed by the Treaty, provided that they do not involve independent claims;<sup>262</sup> (ii) it is beyond question that CMMK was obligated to comply with the law applicable to an extractive project in Bolivia, which includes rules on the protection of the communities;<sup>263</sup> (iii) the Tribunal must consider Bolivia’s obligations under the rules cited in order to decide that, *inter alia*, the Reversion was a legitimate exercise of public power, involving a valid public purpose, and consistent with the legitimate expectations protected under the Treaty,<sup>264</sup> and (iv) the Tribunal must endeavor to provide a harmonious interpretation of Bolivia’s international obligations.<sup>265</sup> In this regard, Bolivia notes that the Tribunal must endeavor to provide a harmonious interpretation of Bolivia’s international obligations, and, if it is impossible to do so, it must prioritize the obligations related to the protection of human rights. Bolivia notes that the Treaty itself makes

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<sup>255</sup> Respondent’s Rejoinder, paras. 207-209 and 238; this includes the application of the United Nations Declaration on the Rights of Indigenous Peoples, the International Covenant on Civil and Political Rights (also ratified by the United Kingdom), ILO Convention No. 169, and the American Convention on Human Rights.

<sup>256</sup> Respondent’s Rejoinder, para. 209; See also Hearing Transcript, Day 1, 246:2-15 (Spanish).

<sup>257</sup> Respondent’s Rejoinder, para. 209.

<sup>258</sup> Respondent’s Rejoinder, para. 211.

<sup>259</sup> Respondent’s Rejoinder, para. 212.

<sup>260</sup> Respondent’s Rejoinder, para. 213.

<sup>261</sup> Respondent’s Rejoinder, para. 212.

<sup>262</sup> Respondent’s Rejoinder, para. 213.

<sup>263</sup> Respondent’s Rejoinder, para. 214.

<sup>264</sup> Respondent’s Rejoinder, para. 215.

<sup>265</sup> Respondent’s Rejoinder, para. 216.



other sources of international law relevant in order to determine whether Bolivia effectively fulfilled its obligations, for example, when referring to the exercise of police powers.<sup>266</sup>

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

205. The Parties' arguments on the applicable law touch upon three issues which the Tribunal must address at the outset of its analysis, namely: (i) whether the Parties have selected the applicable law to the dispute; (ii) what is the scope of the treaty interpretation rules that the Tribunal must apply when construing the Treaty; (iii) what is the relevance and scope of Bolivian law and of the instruments for the protection of human and indigenous rights which are applicable to the present dispute. The Tribunal will examine each one of these issues in the order in which they were raised.
206. In the first place, the Parties disagree on whether they can determine the law applicable to the dispute. The Claimant contends that its claim are based on the Treaty, supplemented by the applicable law, and disagrees with Bolivia's position that there exists no agreement between the Parties on the law applicable to the dispute.<sup>267</sup> The Respondent, for its part, points out that in absence of an applicable law clause in the Treaty or an agreement of the Parties thereon, the Tribunal possesses broad discretion to decide on the applicable law, taking into account the special circumstances of this case, which militate in favor of interpreting the Treaty in light of the sources of international and domestic law that guarantee the protection of the Indigenous Communities' rights.<sup>268</sup>
207. Indeed, the Tribunal observes that the Treaty does not contain an express provision by which the Contracting Parties have decided on an applicable law to the disputes that may arise between them and nationals or companies of the other State. However, the Tribunal notes that, as the Claimant noted, the Parties agree that the starting point for the Tribunal is the Treaty.<sup>269</sup> The Parties gave their consent to submit to arbitration their differences "concerning an obligation of the latter [Contracting Party] under this Agreement".<sup>270</sup> For the Tribunal, the absence of an express choice of applicable law in the Treaty does not imply that the Contracting Parties have left it to the adjudicator to determine such law to the extent that it may cease to apply the Treaty or to give it priority as a primary source in order to apply other sources of law.

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<sup>266</sup> Respondent's Rejoinder, paras. 217-218.

<sup>267</sup> See *infra* 186 *et seq.*

<sup>268</sup> See *infra* 194 *et seq.*

<sup>269</sup> Claimant's Reply Memorial, para. 240; Counter-Memorial, paras. 189 – 192; Respondent's Rejoinder, para. 207.

<sup>270</sup> C-1, Treaty, Article 8(1). The Contracting Parties gave their consent in the Treaty, while SAS gave its consent when it submitted this dispute to arbitration.

208. Accordingly, the Tribunal finds that the Treaty is the principal instrument by which it must resolve the dispute between the Parties and on the basis of which it must decide (i) whether SAS is an investor protected under the Treaty; (ii) whether it has made an investment in Bolivia protected by the Treaty; (iii) whether SAS' claims are admissible; (iv) whether Bolivia has violated the Treaty, and (v) whether, as a result of the above, Bolivia has to pay compensation to SAS.
209. The claims of the Parties and the following issues show that the core of the dispute between the Parties on the applicable law does not focus on the application of the Treaty for the settlement of this dispute, but rather on the applicable rules of interpretation and the scope and relevance of Bolivian law and instruments of human and indigenous rights in these proceedings.
210. Indeed, the Parties agree that Article 31 of the Vienna Convention sets forth the rules of interpretation for the Treaty. The Respondent considers that these rules point towards a *systemic interpretation* which allows the integration and harmonization of other international and domestic obligations with the text of the Treaty, and in case of conflict, grants priority to the rules for the protection of human and indigenous rights.<sup>271</sup> The Claimant, for its part, argues that Article 31 of the Vienna Convention provides for an interpretative process in which the meaning of the language, understood in good faith and in the context of the treaty and in accordance with its object and purpose, must prevail.<sup>272</sup> The Claimant does not deny that a *systemic interpretation* shall be sought, but it contends that Bolivia did not manage to demonstrate that the rules of protection of human and indigenous rights actually had the alleged priority.<sup>273</sup>
211. Article 31 of the Vienna Convention contains the rule of interpretation of international treaties, which forms part of the rules of customary international law.<sup>274</sup> According to this provision, international treaties must be interpreted in good faith, according to the ordinary meaning of the language, in its context and in accordance with the object and purpose of the treaty.<sup>275</sup> Article 31(2) indicates what is to be understood as the context of an international treaty and Article 31(3) describes other elements to be taken into account together with the context, including "(c) [a]ny relevant rules of international law applicable in the relations between the parties". Article 31(4) refers to the special meaning to be given to the terms defined by the Parties.

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<sup>271</sup> See *infra* para. 195.

<sup>272</sup> See *infra* para. 188.

<sup>273</sup> See *infra* para. 189.

<sup>274</sup> RLA-8, C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 International and Comparative Law Quarterly, 2005, p. 293; RLA-14, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ case, Judgment, November 6, 2003, para. 41.

<sup>275</sup> Vienna Convention, Article 31(1).

212. The Tribunal finds that the different elements that Article 31 refers to are part of the same hermeneutic operation, which is in no way limited to defining in a literal manner the meaning of each of the words used in the treaty. As pointed out in the heading of Article 31 of the Vienna Convention, it is a single rule of treaty interpretation. In this sense, the Tribunal shares the Parties' understanding that *systemic interpretation* exists as a tool for treaty interpretation. This tool, however, is not limitless and must be applied with caution.
213. The Parties submitted articles by well-known authors that extolled the virtues of the systemic interpretation in order to harmonize rules of international law, but they at the same time remarked on some of the challenges and difficulties a tribunal may face when applying Article 31(3)(c) of the Vienna Convention.
214. In particular, the Parties referred to an article by a prominent author regarding the principle of systemic interpretation and Article 31(3)(c) of the Vienna Convention. In that article, the author points out a specific difference between the task of interpretation and the existence of rules for the settlement of disputes: in his opinion, the task of interpretation precedes the application of rules for the settlement of the dispute.<sup>276</sup> Thus, the interpretation approach adopted by Article 31(3)(c) of the Vienna Convention is not designed to settle autonomously conflicts between norms in international law,<sup>277</sup> notwithstanding that it may contribute to avoid conflicts and harmonize the rules of international law by way of interpretation.<sup>278</sup> This understanding seems to be shared by another author mentioned by the Parties, Judge Bruno Simma, who warned that systemic interpretation allows for harmonization through interpretation but it cannot be used to modify a treaty.<sup>279</sup>
215. Additionally, Bolivia referred expressively to the *Oil Platforms Case (Iran v. United States)*, in which the International Court of Justice used Article 31(3)(c) of the Vienna Convention to

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<sup>276</sup> RLA-8, C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 International and Comparative Law Quarterly, 2005, p. 286. ("Interpretation, on the other hand, precedes all of these techniques, since it is only by means of a process of interpretation that it is possible to determine whether there is in fact a true conflict of norms at all. By the same token, the application of a technique of interpretation that permits reference to other rules of international law offers the enticing prospect of averting conflict of norms, by enabling the harmonization of rules rather than the application of one norm to the exclusion of another. It is therefore to the process of interpretation that we must now turn.").

<sup>277</sup> RLA-8, C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 International and Comparative Law Quarterly, 2005, p. 318.

<sup>278</sup> RLA-8, C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 International and Comparative Law Quarterly, 2005, p. 318.

<sup>279</sup> RLA-18, B. Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 Int 'L and Comparative Law Quarterly 573, 584 (2011), CLA-136, B. Simma and T. Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in —International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer, Oxford University Press, 2009, p. 694.

interpret Treaty of Amity and bring in the provisions on the use of force in international law.<sup>280</sup> Some of the authors relied on by the Parties consider that this decision must be treated with caution<sup>281</sup> and, referring to some of the declarations, indicate some of the difficulties that may arise from applying Article 31(3)(c) of the Vienna Convention in matters of jurisdiction and normsative conflict. Indeed, the ICJ's jurisdiction cannot be extended to cover other treaties via Article 31(3)(c) of the Vienna Convention if the States have not consented to such jurisdiction, nor can they be brought in to the dispute "through the back door".<sup>282</sup> It is equally forbidden to alter the applicable law through rules of treaty interpretation.<sup>283</sup>

216. Based on the above, the Tribunal finds that the principle of systemic interpretation is part of the rules of interpretation of international treaties foreseen in Article 31 of the Vienna Convention. However, this principle must be applied in harmony with the rest of the provisions of the same article and cautiously, in order to prevent the tribunal from exceeding its jurisdiction and applying rules to the dispute which the Parties have not agreed to.
217. It is not disputed that Article 31(3)(c) of the Vienna Convention is a rule applicable to the interpretation of the Treaty. Based on this provision, Bolivia argues that the Tribunal must apply certain international rules on human rights protection. However, it has not justified why the Tribunal must apply in this particular case various rules that do not constitute customary law, nor has it shown that either of Bolivia or the United Kingdom are parties to the human rights treaties invoked. The Respondent also fails to explain how these rules conflict with the Treaty or why they should prevail over its provisions.
218. The final issue that the Tribunal must assess in regard to the applicable law is the scope to be given to Bolivian law. The Parties agree that Bolivian law may be relevant for certain issues in this arbitration (e.g., the decision on the legality of the investment).<sup>284</sup> There is no doubt for the

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<sup>280</sup> RLA-14, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Case, Judgment, November 6, 2003, para. 41. ("The Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty.")

<sup>281</sup> RLA-13, D. French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 *International and Comparative Law Quarterly*, 2006, p. 288.

<sup>282</sup> Referring to Judge Buergenthal's Separate Opinion, RLA-13, D. French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 *International and Comparative Law Quarterly*, 2006, pp. 286-287; RLA-8, C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 *International and Comparative Law Quarterly*, 2005, p. 307.

<sup>283</sup> Referring to Judge Higgins' Separate Opinion; RLA-13, D. French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 *International and Comparative Law Quarterly*, 2006, p. 288; RLA-8, C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 *International and Comparative Law Quarterly*, 2005, p. 308.

<sup>284</sup> Claimant's Reply Memorial, para. 261; Counter-Memorial, paras. 212-216.

Tribunal that Bolivian law – including those international treaties incorporated in it – is relevant to the analysis of certain issues in this arbitration, which will be discussed in the following sections of this award. However, the Tribunal does not find support for a general rule that the provisions of Bolivian law should always prevail over those of the Treaty.

## VI OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

219. The Respondent argues that the Tribunal lacks jurisdiction because the Claimant is not the owner of a protected investment under the Treaty (A). Likewise, the Respondent alleges that, even if the Tribunal decided that it has jurisdiction, the Claimant's lack of clean hands and the violation of the principle of legality would render the Claimant's claims inadmissible (B).

### A. THE TRIBUNAL LACKS JURISDICTION TO DECIDE ANY OF THE CLAIMS AS SAS DOES NOT HAVE A PROTECTED INVESTMENT UNDER THE TREATY SINCE IT HAS FAILED TO PROVE THAT IT IS THE TRUE OWNER OF THE MINING CONCESSIONS

220. The Parties do not dispute that the Claimant is a company according to the terms of Article 1(d) of the Treaty<sup>285</sup> and that the shares in CMMK and the Mining Concessions fit the definition of "investment" under the Treaty.<sup>286</sup> However, the Respondent argues that the Treaty does not protect SAS, and that SASC is the real entity that owns the investment, which is not protected by the Treaty since it is a Canadian entity. The Respondent argues that the Claimant is a mere shell company which is not protected under the Treaty. The Respondent bases its objection in particular on the text of Article 8(1) of the Treaty.

#### 1. The Respondent's Position

##### (a) Scope of Article 8(1) of the Treaty

221. The Respondent alleges that ownership is a *sine qua non* requirement for the jurisdiction of the Tribunal<sup>287</sup> and that the Claimant is not the real owner of the investment.<sup>288</sup>

222. Article 8(1) of the Treaty provides for international arbitration for the settlement of "*disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former*".<sup>289</sup> The Respondent argues that requirement of ownership is shown by the use of the

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<sup>285</sup> Statement of Claim and Memorial, paras. 107-108; Counter-Memorial, para. 224; C-1, Treaty, Article 1(d)(i): "(d) 'companies' means: (i) in respect of the United Kingdom: corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 11".

<sup>286</sup> Statement of Claim and Memorial, paras. 109-110; Counter-Memorial, para. 224; C-1, Treaty, Article 1(a): "(a) 'investment' means every kind of asset which is capable of producing returns and in particular, though not exclusively, includes: [...] (ii) shares in and stock and debentures of a company and any other form of participation in a company; [...] (v) any business concessions granted by the Contracting Parties in accordance with their respective laws, including concessions to search for, cultivate, extract or exploit natural resources."

<sup>287</sup> Counter-Memorial, para. 225.

<sup>288</sup> Counter-Memorial, para. 224; Bolivia's Post-Hearing Brief, para. 11.

<sup>289</sup> C-1, Treaty, Article 8(1).

preposition “*de*”, denoting ownership, in the Spanish phrase “*en relación con una inversión de la primera*” (“*concerning an investment of the former*”). The preposition “*of*”, in the English version of the Treaty also denotes ownership.<sup>290</sup> The Respondent claims that the prepositions “*de*” and “*of*” necessarily imply a direct connection between the investor and the investment.<sup>291</sup>

223. The Respondent argues that the Tribunal lacks jurisdiction as CMMK’s shareholders are Malku Khota Ltd., G.M. Campana Ltd. and Productora Ltd., all of which are companies incorporated in the Bahamas, and CMMK, holder of the Mining Concessions, is a company incorporated in Bolivia. None of these companies has protection under the Treaty since they are not incorporated in the United Kingdom. There is no direct link between the Claimant and the investment,<sup>292</sup> and it is not disputed that the direct owners of the investment in this case are companies that are not protected under the Treaty.<sup>293</sup>
224. The Respondent contends that a reading of Article 8(1) in accordance with the ordinary meaning to be given to the terms of the Treaty, under Article 31 of the Vienna Convention,<sup>294</sup> leads to the finding that a fundamental requirement for jurisdiction is the Claimant’s ownership of the investment<sup>295</sup> and that such ownership be direct.<sup>296</sup> Respondent contends that “*the text [of Article 31 of the Vienna Convention], coupled with Article 8(1) [...] confirms that the intention of the Contracting Parties to the Treaty was to protect direct investments. In claris non fit interpretatio.*”<sup>297</sup>
225. The Respondent understands that for the term “ownership” to include relatively modern concepts such as ownership through intermediary companies, using sophisticated corporate structures, the Treaty would need to make express reference to ‘indirect’ ownership.<sup>298</sup> Otherwise, it would

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<sup>290</sup> Counter-Memorial, para. 228.

<sup>291</sup> Respondent’s Rejoinder, para. 253.

<sup>292</sup> Counter-Memorial, para. 241.

<sup>293</sup> The Respondent notes also that Article V.2 of the Treaty provides: “*Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Parties own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares*” (emphasis added by Respondent).

<sup>294</sup> RLA-11, United Nations, *Vienna Convention on the Law of Treaties*, May 23, 1969, Article 31(1).

<sup>295</sup> Counter-Memorial, para. 228.

<sup>296</sup> Counter-Memorial, para. 231.

<sup>297</sup> Respondent’s Rejoinder, para. 253.

<sup>298</sup> Counter-Memorial, para. 232, footnote 343, indicating that international jurisprudence has confirmed the amending effect of the term “indirectly” and citing as an example the dissenting opinion of Judge Read in the *Anglo-Iranian Oil* case, who considered, in connection to the expression “direct and indirect” contained in Iran’s statement on the jurisdiction of the Tribunal that “[i]f the words ‘directly or indirectly’ had been omitted from the Declaration, it would have been possible to assume that the jurisdiction was restricted to situations or facts which related directly to treaties or conventions accepted by Persia” (RLA-50, *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, ICJ Case, Judgment, July 22, 1952, dissenting opinion of Judge Read).

imply rewriting the Treaty, as if it read “*concerning a [direct or indirect] investment of the former*”. The parties have included the terms they wanted to include and have agreed, and omitted the terms they did not wish to include and on which no agreement was reached.<sup>299</sup>

226. The Treaty does not mention indirect investments when establishing the Parties’ consent to arbitration; had Parties to the Treaty intended to grant such jurisdiction to a Tribunal, they would have done so expressly.<sup>300</sup> The Respondent argues that, contrary to the Claimant’s contention, “*the ICJ in ELSI made it clear that all of a Party’s claim must meet the requirements to be eligible for jurisdiction and be admissible, unless there is a manifest waiver.*”<sup>301</sup>
227. The Respondent alleges that, as a principle of customary international law, tribunals only have jurisdiction over disputes for which there is express consent<sup>302</sup> and, thus, following the reasoning of the ICJ in *ELSI*, the Tribunal could depart from applying this principle if there were “*words making clear and intention to do so*”, which is not the case.<sup>303</sup>
228. The Respondent suggests that even if the interpretation pursuant to the rules of the Vienna Convention did not clarify the meaning of the preposition “of”, by applying Article 32 of the Vienna Convention the same conclusion would be reached taking into consideration the circumstances under which the Treaty was concluded.<sup>304</sup> According to the Respondent, when Bolivia accepts to protect indirect ownership, it does so expressly as evidenced through the

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<sup>299</sup> Counter-Memorial, para. 232; in reference to RLA-51, *Brown v. Stott*, Private Council of the United Kingdom, judgment by Lord Bingham of Cornhill dated December 5, 2000, 1 AC 681, 2003, p. 703.

<sup>300</sup> Respondent’s Rejoinder, paras. 250-251; *Brown v. Stott*, Private Council of the United Kingdom, judgment of Lord Bingham of Cornhill dated December 5, 2000, 1 AC 681, 2003, p. 703.

<sup>301</sup> Respondent’s Rejoinder, para. 257. See RLA-17, *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, ICJ case, Judgment July 20, 1989, para. 50 (“*The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so*”).

<sup>302</sup> Respondent’s Rejoinder, para. 257.

<sup>303</sup> Respondent’s Rejoinder, para. 257.

<sup>304</sup> Counter-Memorial, paras. 233-234; Respondent’s Rejoinder, para. 258.



comparison of various contemporaneous treaties.<sup>305</sup> Such choice by the parties must have legal effects.<sup>306</sup>

229. The Respondent notes that, contrary to the Claimant's argument, the above-mentioned Article 32 of the Vienna Convention does not limit the sources to the *travaux préparatoires*, rather states that "*the circumstances of its conclusion*" be taken into consideration and, given the ambiguity of the Treaty text, as stated by the Claimant,<sup>307</sup> other contemporaneous treaties concluded by Bolivia would be relevant under the same rule of interpretation of the above-mentioned Article 32 of the Vienna Convention.<sup>308</sup>
230. Upon referring to the awards cited by the Claimant, the Respondent concludes that the Claimant cannot enjoy protection under the Treaty since CMMK, the direct owner of the Mining Concessions, is a Bolivian company<sup>309</sup> and the *direct* company owners of the alleged investment, i.e. CMMK's shareholders (Malku Khota Ltd., Productora Ltd., and GM Campana Ltd.),<sup>310</sup> are incorporated under the laws of the Bahamas,<sup>311</sup> a territory to which the Treaty does not apply.

**(b) On the protection of indirect investors under the Treaty**

231. The Respondent argues that the Tribunal would not have jurisdiction even if the Treaty afforded protection to indirect ownership (*quod non*), as in this case the real *indirect* owner of the alleged

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<sup>305</sup> Counter Memorial, paras. 234-235; Respondent's Rejoinder, para. 258. The Respondent cites as examples the investment protection treaties with Germany and Switzerland that Bolivia concluded in 1987, a year before the execution of the Treaty, whereby the former does not include the "direct or indirect" reference whereas the latter does. In the Treaty with Switzerland, Article 1(b)(aa) provides that "[t]he term 'company' means: (aa) in connection with the Swiss Confederation, legal entities or partnerships without legal personality, but capable to hold assets with a direct or indirect preponderant Swiss interest", RLA-52, Treaty between the Swiss Confederation and the Republic of Bolivia on the reciprocal promotion and protection of investments, concluded on November 6, 1987 and entered into force on May 17, 1991. See also RLA-212, Treaty between the Federal Republic of Germany and the Republic of Bolivia on the promotion and protection of investments, concluded on March 23, 1987, Art. 1. The Respondent also mentions the treaties with France (1989) and the Belgium-Luxembourg Economic Union (1990) as examples of treaties that confer protection to indirect ownership, and as examples of treaties that excluded it the ones concluded with Sweden (1990) and Italy (1990). See RLA-210, Treaty between the Belgium-Luxembourg Economic Union and the Republic of Bolivia on the reciprocal promotion and protection of investments, concluded on April 25, 1990, Art. 1.2; RLA-52, Treaty between the Swiss Confederation and the Republic of Bolivia on the reciprocal promotion and protection of investments, concluded on November 6, 1987, in force since May 17, 1991, Art. 1.b; RLA-211, Treaty between the Government of the Republic of France and the Government of the Republic of Bolivia on the reciprocal promotion and protection of investments, concluded on October 25, 1989, Art. 1.3; RLA-213, Treaty between the Republic of Italy and the Government of the Republic of Bolivia on the promotion and protection of investments, concluded on April 30, 1990, Art. 1.1; RLA-214, Treaty between the Kingdom of Sweden and the Republic of Bolivia on the promotion and protection of investments, concluded on September 20, 1990, Art. 1.1.

<sup>306</sup> Counter-Memorial, para. 236.

<sup>307</sup> See *infra* paras. 246-259.

<sup>308</sup> Respondent's Rejoinder, para. 262.

<sup>309</sup> Respondent's Rejoinder, para. 254; C-9, CMMK Share Certificates; C-11, CMMK Public Deed of Incorporation.

<sup>310</sup> Respondent's Rejoinder, para. 254; R-179, CMMK Shareholding Certificate.

<sup>311</sup> Respondent's Rejoinder, para. 254; C-7, Productora, Ltd Incorporation Certificate.; C-8, GM Campana, Ltd. Incorporation Certificate; C-6, Malku Khota, Ltd. Incorporation Certificate.

investment affected by the Reversion is a Canadian company.<sup>312</sup> The Respondent claims that SASC uses SAS – a company incorporated under the laws of Bermuda – to access Treaty protection and that this is a “*treaty shopping*” maneuver that ignores the text of the Treaty and should be rejected by the Tribunal.<sup>313</sup>

232. According to the Respondent, the ultimate owner is the one that can benefit from the treaties that protect indirect ownership.<sup>314</sup> The Respondent alleges that only then it would be justified that it is not relevant “*if the investor of one country owns [...] an investment [...] through one or more intermediary corporate entities*”, as stated by the Claimant. This mediate ownership relation presupposes the existence of intermediary entities being merely instrumental and with no free will of their own, and for that reason their existence does not affect the asset’s disposition by the indirect owner.<sup>315</sup>

233. The Respondent bases its argument on the following three premises:

- (a) First, the Respondent notes that the Tribunal is compelled to interpret the Treaty “*in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose*” (emphasis added by the Respondent)<sup>316</sup>, and that the object and purpose of the Treaty is to promote the flow of capital from the United Kingdom, and not from another country, to Bolivia.<sup>317</sup>
- (b) Second, the Respondent claims that when protecting indirect ownership, such ownership cannot be merely formal, as investment protection treaties seek to transfer value from a

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<sup>312</sup> Counter-Memorial, section 5.1.3; Respondent’s Rejoinder, para. 254. See *infra* paras. 235-238(a); R-180, SASC Summary of Properties; C-10, Certificates of incorporation and name change for SASC.

<sup>313</sup> Respondent’s Rejoinder, para. 255.

<sup>314</sup> Counter-Memorial, paras. 242, 243.

<sup>315</sup> Counter-Memorial, para. 245, quoting the Statement of Claim and Memorial, para. 110.

<sup>316</sup> Counter-Memorial, para. 247; RLA-11, United Nations, *Vienna Convention on the Law of Treaties*, May 23, 1969, Article 31.

<sup>317</sup> Counter-Memorial, para. 248, relying on RLA-59, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, June 5, 2012, para. 351: “*Article I(1)(a) of the BIT defines ‘investment’ from the perspective of assets, claims and rights to be protected (or accorded specific treatment, prescribed in the following provisions of the BIT). As one of the goals of the BIT is the stimulation of flow of private capital, BIT protection is not granted simply to any formally held asset, but to an asset which is the result of such a flow of capital. Thus, even though the BIT definition of ‘investment’ does not expressly qualify the contributions by way of which the investment is made, the existence of such a contribution as a prerequisite to the protection of the BIT is implied*” (emphasis added by Respondent), and in C-1, Treaty, preamble (“[d]esiring to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State”). See also Hearing Transcript, Day 1, 249:2 – 253-8 (Spanish).

State party to the Treaty to another, as acknowledged by the tribunal in the *Standard Chartered Bank v. Tanzania* case.<sup>318</sup>

- (c) Finally, the Respondent argues that the cases SAS relies on<sup>319</sup> demonstrate that when a Treaty protects indirect ownership, it solely protects the beneficiary or ultimate owner of the investment.<sup>320</sup> The *Siemens* tribunal conferred protection to the ultimate owner of the investment since the Treaty “[did] not require that there [were] not interposed companies between the investment and the ultimate owner of the company” (emphasis added by Respondent).<sup>321</sup> Relying on *Siemens*, the *Rurelec* and *Kardassopoulos* tribunals granted protection to the claimants in those cases as the ultimate owners of the investment.<sup>322</sup> Additionally, in the *BG Group v. Argentina* case, the tribunal granted protection to the claimant despite the fact that it was not directly linked to the investment as it was its ultimate owner.<sup>323</sup>

234. Thus, the indirect owner of the investment is not the Claimant but SASC, a Canadian company and, therefore, the Tribunal must decline its jurisdiction and dismiss the claim.<sup>324</sup> The Claimant must establish the convergence of the elements on which the jurisdiction of the Tribunal is based,<sup>325</sup> such as ownership.<sup>326</sup>
235. The Respondent insists that Article 8(1) of the Treaty confers jurisdiction only to investments “*of a company of one Contracting Party*” (emphasis added by Respondent)<sup>327</sup> and for an asset to constitute an investment *of a company*, that company must have an objective link with that asset: it must have been actively involved in the realization of the investment in the host State (emphasis added by Respondent).<sup>328</sup>

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<sup>318</sup> Hearing Transcript, Day 1, 249:14 – 251:20 (Spanish); Bolivia’s Post-Hearing Brief, para. 17; Counter-Memorial, para. 249, citing the *Standard Chartered Bank v. Tanzania* case, (RLA-60, *Standard Chartered Bank v. Republic of Tanzania*, ICSID Case No. ARB/10/12, Award of November 2, 2012, paras. 230-232).

<sup>319</sup> Counter-Memorial, para. 250, referring to the Statement of Claim and Memorial, footnotes 227 and 228.

<sup>320</sup> Counter-Memorial, para. 250.

<sup>321</sup> Counter-Memorial, para. 251.

<sup>322</sup> Counter-Memorial, paras. 252-253.

<sup>323</sup> Counter-Memorial, para. 254; CLA-4, *BG Group PLC v. Argentine Republic*, UNCITRAL Case, Final Award, December 24, 2007.

<sup>324</sup> Counter-Memorial, paras. 255-256.

<sup>325</sup> Counter-Memorial, para. 256.

<sup>326</sup> Counter-Memorial, para. 256.

<sup>327</sup> C-1, Treaty, Article 8(1).

<sup>328</sup> Respondent’s Rejoinder, para. 265; Bolivia’s Post-Hearing Brief, para. 17; Hearing Transcript, Day 1, 251:3 – 252:22 (Spanish), Day 9, 1865:6 – 1867:5 (Spanish).

236. Invoking the “*Salini* test”, the Respondent explains that the act of investing implies the verification of four elements: (i) the acquisition of the investment with a corresponding contribution of resources; (ii) the assumption of risks in order to obtain returns; (iii) a minimum time duration; and (iv) the contribution to the economic development of the host State.<sup>329</sup> The Respondent further contends that, in addition to these factors, the form an investment can take is established by the treaty itself, which is added as another requirement next to the ones listed in *Salini*.<sup>330</sup>
237. The Respondent relies on the decision in the *Quiborax* case to state that the mere holding of shares is insufficient to prove an investment in currency or in kind.<sup>331</sup> Moreover, it cites the *Caratube* and *Standard Chartered Bank* cases to underscore that the object and purpose of the investment treaties require that jurisdiction of the tribunals be limited to those assets that have contributed to the stimulation of capital flows between certain States, the signatories of the BIT in question.<sup>332</sup> Otherwise, one would be interpreting the Treaty against the principle of the relative effect of treaties.<sup>333</sup>
238. The Respondent argues that the only indirect owner of the investment is SASC, while the Claimant “*is simply one of the numerous instruments in the chain that leads to the actual indirect owner of the investment*”<sup>334</sup> since SAS is not the owner of an investment pursuant to the *Salini*<sup>335</sup> factors because.<sup>336</sup>

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<sup>329</sup> Respondent’s Rejoinder, para. 266; RLA-215, *Salini Costruttori S.P.A. and Italstrade S.P.A v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction July 23, 2001, para. 52.

<sup>330</sup> Respondent’s Rejoinder, para. 267.

<sup>331</sup> RLA-56, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, September 27, 2012, para. 233.

<sup>332</sup> Respondent’s Rejoinder, paras. 268-269; RLA-59, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, June 5, 2012, para. 351. The tribunal in *Caratube* observed that, “[a]s one of the goals of the BIT is the stimulation of flow of private capital, BIT protection is not granted simply to any formally held asset, but to an asset which is the result of such a flow of capital” and concluded that, “even though the BIT definition of ‘investment’ does not expressly qualify the contributions by way of which the investment is made, the existence of such a contribution as a prerequisite to the protection of the BIT is implied” (emphasis added by the Respondent). See also RLA-60, *Standard Chartered Bank v. Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, November 2, 2012, para. 232 (“for an investment to be ‘of’ an investor in the present context, some activity of investing is needed, which implicates the claimant’s control over the investment or an action of transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to the other”). See also Hearing Transcript, Day 9, 1867:6 – 1868:19 (Spanish).

<sup>333</sup> Respondent’s Rejoinder, paras. 268-269; RLA-59, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, June 5, 2012, para. 351; RLA-60, *Standard Chartered Bank v. Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, November 2, 2012, para. 232.

<sup>334</sup> Counter-Memorial, paras. 256-257.

<sup>335</sup> Respondent’s Rejoinder, para. 271.

<sup>336</sup> See also Hearing Transcript, Day 9, 1860:17-21, 1861:10-15, 1862:9 – 1864:11, 1864:15-24, 1865:10-22 (Spanish).

- (a) SAS did not make a financial contribution or provide know-how, contacts, or expertise,<sup>337</sup> or assume any of the risks associated with the investment,<sup>338</sup> such that it had no expectation of a return on investment. The risk and potential benefit accrued exclusively to SASC.<sup>339</sup>
- (b) FTI admits in its report that any amount invested in Bolivia has been contributed by Canadian SASC and not by the Claimant.<sup>340</sup> The President and CEO of SASC acknowledges that the share issuances of SASC allowed them to finance exploration activities in Malku Khota.<sup>341</sup> Moreover, SAS only communicated the interim consolidated financial statements for SASC but not their own, and these documents do not establish whether SAS is the source of the cash flows.<sup>342</sup>
- (c) The Claimant admits that SASC invented and patented the metallurgical process,<sup>343</sup> which belongs to SASC.<sup>344</sup> Thus, there is no evidence that such transfer of know-how would come from the United Kingdom.<sup>345</sup>
- (d) The Respondent also lists a series of contracts and arrangements entered into with various consulting firms for the development of the Project under which, according to the Respondent, SASC held rights for Malku Khota,<sup>346</sup> and it was SASC who entered into contracts, negotiated and agreed to consultancies.<sup>347</sup>
- (e) The Respondent further contends that the SASC Board of Directors made the key decisions on the Project<sup>348</sup> and SASC did not hesitate to describe the Project as a Canadian investment before Canadian authorities to request diplomatic protection.<sup>349</sup>

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<sup>337</sup> Respondent's Rejoinder, para. 272.

<sup>338</sup> Bolivia's Post-Hearing Brief, para. 14. Hearing Transcript, Day 3, 647:13-22 (Spanish), Day 2, 356:1-3 (English).

<sup>339</sup> Respondent's Rejoinder, para. 273.

<sup>340</sup> Counter-Memorial, para. 259.

<sup>341</sup> Counter-Memorial, para. 260.

<sup>342</sup> Counter-Memorial, para. 261; FTI-10, SASC Financial Statements, September 30, 2012.

<sup>343</sup> Counter-Memorial, para. 262, referring to the Statement of Claim and Memorial, para. 44.

<sup>344</sup> Counter-Memorial, para. 262; Bolivia's Post-Hearing Brief, para. 13; referring to C-38, United States Patent No. US8,585,991 B2, Method for Recovering Indium, Silver, Gold and Rare, Precious and Base Metals from Complex Oxide and Sulfide Ores, November 19, 2013.

<sup>345</sup> Counter-Memorial, para. 262.

<sup>346</sup> Respondent's Rejoinder, para. 272; Bolivia's Post-Hearing Brief, para. 12.

<sup>347</sup> Respondent's Rejoinder, para. 272.

<sup>348</sup> Respondent's Rejoinder, para. 272.

<sup>349</sup> Bolivia's Post-Hearing Brief, para. 15. See also Counter-Memorial, para. 263, referring to the Statement of Claim and Memorial, paras. 52-54.

- (f) The Respondent also contends that press releases show SASC as the ultimate owner of the investment<sup>350</sup> and that SASC is funding the costs of this arbitration.<sup>351</sup>
- (g) The Respondent concludes that any contribution to the economic development of Bolivia would have been made by SASC,<sup>352</sup> although it questions whether the Project should be considered as economic development given the negative impact it had on public order and the Indigenous Communities.<sup>353</sup>

239. Consequently, if the Tribunal would interpret the Treaty to confer protection to indirect ownership, SAS' claim must be dismissed due to lack of standing as SAS did not make the investment whose protection is claimed: neither does it hold the legal title, nor is it the beneficiary of the investment.<sup>354</sup> Otherwise, the Tribunal would be creating an investment protection treaty between Canada and Bolivia, which is "*illegal, absurd and unfair*."<sup>355</sup>

**(c) On whether SAS is an interested party in this dispute**

240. The Respondent argues that the object of jurisdiction in investment arbitration cannot be the protection of a shell company.<sup>356</sup> According to the Respondent, the Claimant does not deny being a shell company, nor has it refuted the evidence presented by the Respondent in this regard.<sup>357</sup>

241. First, the Respondent alleges that the dispute submitted by a shell company cannot be settled under the Treaty if there is no jurisdiction over the parent company.<sup>358</sup>

- (a) First, the Treaty grants jurisdiction only with respect to those companies whose interests are in dispute.<sup>359</sup> The Respondent argues that as shell companies do not exist as an independent economic reality, they have no interest in a dispute.<sup>360</sup> The Respondent asserts that this does not imply adding a jurisdictional requirement to the Treaty as stated by the

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<sup>350</sup> Counter-Memorial, para. 264.

<sup>351</sup> Counter-Memorial, para. 265.

<sup>352</sup> Respondent's Rejoinder, para. 274. Respondent argues that this is evidenced in the budget line items approved by SASC to be executed in Bolivia by CMMK.

<sup>353</sup> Respondent's Rejoinder, para. 274. See also Respondent's Rejoinder, section 3.2.

<sup>354</sup> Counter-Memorial, para. 266; Respondent's Rejoinder, para. 275.

<sup>355</sup> Counter-Memorial, para. 267.

<sup>356</sup> Respondent's Rejoinder, para. 276.

<sup>357</sup> Respondent's Rejoinder, para. 277; Counter-Memorial, paras. 258-265.

<sup>358</sup> Respondent's Rejoinder, para. 278.

<sup>359</sup> Respondent's Rejoinder, para. 279; C-1, Treaty, Article 8(1) ("[d]isputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former [...]").

<sup>360</sup> Respondent's Rejoinder, para. 280.

Claimant,<sup>361</sup> since the Treaty provides *verbatim* that the dispute must be between a company of a Contracting Party and the other Contracting State. Therefore, concluding that there is no jurisdiction is applying the text of the Treaty, since the dispute in this case is with a Canadian company, and not with one of the United Kingdom.<sup>362</sup>

- (b) Second, the Respondent argues that the object and purpose of the Treaty confirm this requirement as the promotion and protection of investments applies solely to investors from the United Kingdom and Bolivia. Based on Article 31 of the Vienna Convention, the object and purpose of a treaty are as relevant as its provisions for the interpretation of its meaning.<sup>363</sup> The Respondent argues that the object and purpose of the Treaty, as stated in the preamble, are not to provide investment protection and arbitral jurisdiction to any foreign company, and notes that Bolivia has not concluded an investment treaty with Canada to protect Canadian companies, such as SASC.<sup>364</sup> Thus, the Respondent concludes that to allow the use of a shell company to establish jurisdiction would violate the consent granted by Bolivia.<sup>365</sup>
- (c) Third, the Respondent notes that arbitral case law (the *Loewen*, *Venoklim Holding* and *TSA Spectrum* cases) has also confirmed that the content, object, and purpose of the Treaty preclude jurisdiction over a dispute raised by a shell company.<sup>366</sup> The Respondent refers to the *Loewen* case, wherein the claimant changed nationality while the arbitration was ongoing and the tribunal found that the party concerned was no longer protected by the treaty,<sup>367</sup> and the *Venoklim Holding* case, in which the tribunal pierced the corporate veil in order to ascertain the real party to the dispute, leading the tribunal to conclude that it lacked jurisdiction.<sup>368</sup> The Respondent further argues that, notwithstanding the fact that these are ICSID cases, it is relevant that these tribunals ordered the piercing of the corporate veil as the ICSID Convention contains a provision analogous to the one found in the Treaty.<sup>369</sup> The Respondent holds that SAS invokes decisions of tribunals that declared themselves

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<sup>361</sup> See *infra* paras. 266 *et seq.*

<sup>362</sup> Respondent's Rejoinder, para. 281.

<sup>363</sup> Respondent's Rejoinder, para. 282.

<sup>364</sup> Respondent's Rejoinder, para. 283. See Hearing Transcript, Day 2, 418:3-15 (Spanish).

<sup>365</sup> Respondent's Rejoinder, para. 283.

<sup>366</sup> Respondent's Rejoinder, para. 285.

<sup>367</sup> Respondent's Rejoinder, para. 286.

<sup>368</sup> Respondent's Rejoinder, para. 287.

<sup>369</sup> Respondent's Rejoinder, paras. 288-289.

competent; however, the cases cited do not support its position as they do not deal with the same legal issue to be resolved by the Tribunal in this case.<sup>370</sup>

242. Second, the Respondent alleges that the facts of this case demonstrate that the dispute is not with the Claimant (SAS), but with SASC, which has an economic interest *ab initio* in this arbitration and has sought and guaranteed funding agreements.<sup>371</sup> The Respondent further argues that SASC issued a special class of shares with returns dependent on the outcome of this arbitration.<sup>372</sup> The Respondent notes that based on the agreement with the third-party funder of the arbitration, this party could also have a direct interest in the decision of the Tribunal.<sup>373</sup>
243. The Respondent concludes that SASC is the only company that performed an alleged investment and the only one that has an interest in this arbitration. However, given that SASC is a Canadian company, it is not protected under the Treaty because it does not meet the nationality requirement provided for under the Treaty.<sup>374</sup>

## **2. The Claimant's Position**

### **(a) Scope of Article 8(1) of the Treaty**

244. The Claimant argues that the Treaty broadly defines an 'investment' and that international arbitration tribunals and legal authorities acknowledge that the notion of 'investments' in bilateral investment treaties extends to both direct and indirect investments.<sup>375</sup>
245. In the case of indirect investments through intermediary corporate entities incorporated under the legislation of the host State, the protected investment will consist of the investor's shares in the local company as well as the assets of that local company.<sup>376</sup>
246. The Claimant submits that Article 8(1) of the Treaty "*clearly applies to both the direct and indirect owners of a qualifying investment*".<sup>377</sup> The Claimant argues that the Respondent inaccurately applies the interpretative principles of the Vienna Convention "*relying exclusively upon dictionaries to inform its reading*" and looks into the text of Article 8(1) of the Treaty alone to

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<sup>370</sup> Respondent's Rejoinder, para. 290.

<sup>371</sup> Respondent's Rejoinder, paras. 291-292. See also Bolivia's Post-Hearing Brief, para. 16.

<sup>372</sup> Bolivia's Post-Hearing Brief, para. 16.

<sup>373</sup> Respondent's Rejoinder, para. 292.

<sup>374</sup> Respondent's Rejoinder, para. 293; Bolivia's Post-Hearing Brief, para. 18.

<sup>375</sup> Statement of Claim and Memorial, paras. 109-110.

<sup>376</sup> Statement of Claim and Memorial, para. 110.

<sup>377</sup> Claimant's Reply Memorial, para. 153.



address the question of “*which entities are entitled to treaty protection for covered ‘investments’*”.”<sup>378</sup> Citing the decision in *Aguas del Tunari v. Bolivia*, the Claimant submits that the proper interpretation of Article 8(1), taking full account of the different elements set forth in Article 31 of the Vienna Convention –text, context, and object and purpose– is that direct as well as indirect owners of qualifying investment are covered by the Treaty.<sup>379</sup>

247. The Claimant submits that direct ownership is not the only ordinary meaning of the phrase “investment of the former,”<sup>380</sup> and the phrase may equally be indicative of a contributory relationship between the claimant and the investment.<sup>381</sup> The Claimant argues that “[w]ithout further qualifying language, the phrase ‘investment of the former’ in Article 8(1) can be read as a purely textual matter requiring that the ownership link be either direct or indirect, as Bolivia itself acknowledges”.<sup>382</sup>

248. Citing *CEMEX v. Venezuela*, the Claimant argues that the language of the bilateral investment treaty applicable to this case was very similar to Article 8(1) of the Treaty and that the tribunal in that case noted:

*The Tribunal further notes that, when the BIT mentions investments ‘of’ nationals of the other Contracting Party, it means that those investments must belong to such nationals in order to be covered by the Treaty. But this does not imply that they must be directly owned by those nationals.*<sup>383</sup> (emphasis added by Claimant).

249. Similarly, citing *Rurelec*, the Claimant alleges that the tribunal, which applied the same treaty as the one applicable in this arbitration, affirmed the interpretation of the *CEMEX v. Venezuela* tribunal, finding that it had jurisdiction in respect of Rurelec’s indirect investments.<sup>384</sup>

250. The Claimant concludes that the ordinary meaning of the phrase “investment of the former” in Article 8(1) of the Treaty is that the investment in question may be owned whether directly or indirectly by the investor, and there is no textual reason for the restrictive interpretation suggested by the Respondent.<sup>385</sup>

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<sup>378</sup> Claimant’s Reply Memorial, para. 155.

<sup>379</sup> Claimant’s Reply Memorial, paras. 155-156.

<sup>380</sup> Claimant’s Reply Memorial, para. 157; RLA-60, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, November 2, 2012, para. 216. See also Claimant’s Rejoinder Memorial on Jurisdiction, para. 57.

<sup>381</sup> Claimant’s Reply Memorial, para. 157.

<sup>382</sup> Claimant’s Reply Memorial, para. 158, referring to Counter-Memorial, paras. 229, 231-232.

<sup>383</sup> CLA-100, *CEMEX Caracas Investments B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, November 30, 2010, para. 157.

<sup>384</sup> Claimant’s Reply Memorial, para. 161; CLA-1, *Guaracachi America, Inc. et al. v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, January 31, 2014, paras. 356, 365 and Chapter XII(c).

<sup>385</sup> Claimant’s Reply Memorial, para. 162; Hearing Transcript, Day 1, 121:18 – 122:16 (English).

251. The Claimant notes that the context, the object and purpose of the Treaty support the view that Article 8(1) applies equally to direct and indirect owners. Regarding the context, the Claimant argues that, following Article 31(2) of the Vienna Convention, the text of the entire Treaty, not only Article 8(1), is highly relevant, as it forms part of the context informing the proper interpretation of the phrase “investment of the former”.<sup>386</sup>
252. The Claimant submits that a first contextual element is Article 1(a) of the Treaty, and that is particularly instructive, as pursuant to it, ‘investments’ are interpreted very broadly, including necessarily, by virtue of the phrases “every kind of asset” and “any form of participation in a company”, indirect investments of the kind the Claimant made.<sup>387</sup>
253. The Claimant submits that a second contextual element that is relevant is the fact that there is no express exclusion of indirect investments in the Treaty.<sup>388</sup> According to the Claimant, the Respondent is wrong when concluding that the inclusion of a reference to indirect ownership would have been necessary if the intent was to include indirect investments.<sup>389</sup> The Claimant relies on the ICJ decision in the *ELSI* case<sup>390</sup>, the reasoning of the tribunal in *Tza Yap Shum v. Peru*,<sup>391</sup> and the *Rurelec* decision, which held as to the application of the Treaty that “*the BIT would require clear language in order to exclude coverage of indirect investments –language that the BIT does not include*”.<sup>392</sup> The Claimant argues that investment treaty tribunals have refused to exclude indirect investments from treaty provisions when there is no express language to that effect.<sup>393</sup>
254. The Claimant submits that in the absence of clear and specific exclusionary language, and in light of the broad definition of investments in Article 1(a) encompassing indirect investments, the more

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<sup>386</sup> Claimant’s Reply Memorial, para. 164.SAS’ Post-Hearing Brief

<sup>387</sup> Claimant’s Reply Memorial, para. 164; Claimant’s Rejoinder Memorial on Jurisdiction, para. 58; Hearing Transcript, Day 1, 122:13-25 (English).

<sup>388</sup> Claimant’s Reply Memorial, para. 168; Hearing Transcript, Day 1, 124:5-21 (English).

<sup>389</sup> Claimant’s Reply Memorial, para. 170. See *supra* para. 225.

<sup>390</sup> CLA-107, *Elettronica Sicula SpA. (ELSI)*, Judgment, ICJ Reports 1989, p. 15, para. 50.

<sup>391</sup> Claimant’s Reply Memorial, para. 169; Hearing Transcript, Day 1, 124:22 – 125:2 (English); CLA-104, *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction, June 19, 2009, paras. 106-107: “*el Tribunal no encuentra indicaciones en el APPRI que lo lleven por principio a excluir del ámbito de aplicación del Tratado las inversiones indirectas [...] particularmente cuando se prueba que ejercen la propiedad y el control sobre las mismas. El Tribunal esperaría que una limitación en este sentido hubiese sido plasmada de forma expresa en el APPRI. Por ejemplo, las Partes Contratantes al APPRI bien pudieron acordar un artículo por medio del cual le denegarían los beneficios del Tratado a aquellos inversionistas calificados bajo el mismo, pero con inversiones canalizadas a través de terceros países*”.

<sup>392</sup> Claimant’s Reply Memorial, para. 170; CLA-1, *Guaracachi America, Inc. et al. v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, January 31, 2014, para. 353.

<sup>393</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 59; CLA-1, *Guaracachi America, Inc. et al. v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, January 31, 2014, para. 353; CLA-104, *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction, June 19, 2009, paras. 106-107.

jurisprudentially-consistent interpretation of Article 8(1) is that it applies equally to direct and indirect owners of qualifying investments.<sup>394</sup>

255. The Claimant submits that, contrary to the Respondent's proposition,<sup>395</sup> it is not suggesting to ignore the principle that tribunals have jurisdiction over disputes for which there is express consent.<sup>396</sup> Rather, the Claimant submits that the parties to the Treaty "*have expressly consented to arbitration in relation to indirect investments because Article 8(1) refers to such investments*" (emphasis added by the Claimant).<sup>397</sup>
256. Next, the Claimant criticizes the relevance of those legal authorities relied upon by the Respondent to support its position.<sup>398</sup> As to Judge Read's dissent in *Anglo-Iranian Oil*, the Claimant argues that setting aside the fact that his individual opinion did not reflect the majority view of the ICJ, his discussion of the effect of omitting the terms "directly or indirectly" is speculative *obiter dicta* included in his dissent, which Claimant asserts "*is hardly persuasive evidence and should be disregarded*".<sup>399</sup>
257. In connection with the *Brown v. Scott* case, the Claimant submits that the Respondent conveniently cited the reasoning in that case, omitting that, according to the Claimant, it noted that the general assumption on which the Respondent relies "*does not mean that nothing can be implied into the [European Convention on Human Rights]. The language of the Convention is for the most part so general that some implication of terms is necessary, and the case law of the European court shows that the court has been willing to imply terms into the Convention when it was judged necessary or plainly right to do so.*"<sup>400</sup> The Claimant argues that, "*this concern of overbreadth simply does not exist in the case of bilateral investment treaties whose overt purpose is to protect foreign investment, and where an interpretation that the phrase 'investment of the former' as covering investments that are owned directly or indirectly by the investor is entirely consistent with the context of the Treaty*".<sup>401</sup>

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<sup>394</sup> Claimant's Reply Memorial, para. 171.

<sup>395</sup> See *supra* para. 227.

<sup>396</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 60. Claimant underscores that, at any rate, the legal authorities and case law cited by Bolivia to support its allegation refer to the most favored nation clause and, thus, they are irrelevant. See Respondent's Rejoinder, para. 257, footnote 419.

<sup>397</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 60.

<sup>398</sup> See *supra* para. 225, footnote 298, para. 227.

<sup>399</sup> Claimant's Reply Memorial, para. 172; RLA-50, *Anglo-Iranian Oil Co. case (jurisdiction)*, Judgment, July 22, 1952, ICJ Reports 1952, at 93, 145. Claimant submits that Respondent relies on the following statement in the Judge's dissenting opinion: "*If the words 'directly or indirectly' had been omitted from the Declaration, it would have been possible to assume that the jurisdiction was restricted to situations or facts which related directly to treaties or conventions accepted by Persia.*"

<sup>400</sup> Claimant's Reply Memorial, para. 173; RLA-51, *Brown v. Stott* [2003] 1 AC 681, 703.

<sup>401</sup> Claimant's Reply Memorial, para. 173.

258. Finally, the Claimant addresses Professor Douglas’ opinion that there must be a limitation on the tribunal’s *ratione personae* jurisdiction if the terms “direct or indirect” are not expressly included in a treaty.<sup>402</sup> According to the Claimant, the Respondent fails to square this view with Rule 33 of Douglas’ own treaty, which according to the Claimant’s assertion contains a more direct statement that “[i]f an investment treaty stipulates that the investment can be held directly or indirectly by the claimant, then it is immaterial that the investment is held through an intermediate legal entity with the nationality of a third state”.<sup>403</sup> The Claimant contends that it is telling that Professor Douglas does not include the converse as a rule, and further asserts that he refers to two cases where the tribunals held that they had jurisdiction over the claimants that indirectly owned qualifying investments, despite the fact that the underlying treaties did not contain the terms “direct or indirect”.<sup>404</sup> The Claimant asserts that there are many more cases in this respect, which are referred to above, than the opposite.<sup>405</sup>
259. The Claimant submits that the object and purpose of the Treaty also support the view that Article 8(1) applies equally to direct and indirect owners.<sup>406</sup> The Claimant refers to the title of the Treaty,<sup>407</sup> its preamble,<sup>408</sup> and Article 2(1)<sup>409</sup> to note that these provisions suggest that the parties to the Treaty wished to maximize the flow of investments which, according to the Claimant, would include indirect investments in the absence of language to the contrary.<sup>410</sup>
260. The Claimant concludes that its position regarding Article 8(1) “remains largely unchallenged” and that this should lead the Tribunal to conclude that it properly has jurisdiction over the claims in this arbitration.<sup>411</sup>

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<sup>402</sup> Claimant’s Reply Memorial, para. 174; RLA-53, Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, p. 311, para. 580.

<sup>403</sup> Claimant’s Reply Memorial, para. 174; RLA-53, Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, p. 310.

<sup>404</sup> Claimant’s Reply Memorial, para. 174; RLA-53, Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, p. 311, para. 580.

<sup>405</sup> Claimant’s Reply Memorial, para. 174; See also *supra* paras. 251-253.

<sup>406</sup> Claimant’s Reply Memorial, para. 175; Claimant’s Rejoinder Memorial on Jurisdiction, para. 58.

<sup>407</sup> C-1, Treaty (“Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments, signed on May 24, 1988, and entered into force on February 16, 1990”).

<sup>408</sup> C-1, Treaty. Claimant submits that the preamble underscores that it was designed to “create favourable conditions for greater investment by nationals or companies of one State in the territory of the other State”.

<sup>409</sup> C-1, Treaty, Article 2(1) (“[e]ach Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory ...”).

<sup>410</sup> Claimant’s Reply Memorial, para. 175.

<sup>411</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 61. Claimant notes that Bolivia failed to engage with SAS arguments regarding Judge Read’s dissenting opinion in *Anglo Iranian Oil* and the decision in *Brown v. Stott* (see *supra* paras. 256-257), in which Bolivia relies on the Counter-Memorial to support its objections to jurisdiction. Claimant further states that while Bolivia no longer relies on Judge Read’s dissenting opinion in its Rejoinder Memorial, Bolivia does cite again *Brown v. Stott* as if there were no inaccuracies (see *supra* para. 226).

261. The Claimant believes that the recourse to supplementary means to interpret the Treaty is unnecessary<sup>412</sup> in this case. Article 32 of the Vienna Convention does not refer to alternative or autonomous means of interpretation, but only an aid to the general interpretative rule.<sup>413</sup>
262. In this case, “*the general rule of interpretation (Article 31, Vienna Convention) yields a reading of Article 8(1) of the Treaty that applies to direct as well as indirect owners of qualifying investments, and there is simply no scope to argue that this reading is in any way ‘ambiguous or obscure’ or leads to ‘manifestly absurd or unreasonable’ results.*”<sup>414</sup> Thus, according to the Claimant, there is no reason to resort to supplementary means of interpretation.
263. But even if the Tribunal decided to rely upon supplementary means of interpretation, which would include “*the preparatory work of the treaty and the circumstances of its conclusion*” based on Article 32 of the Vienna Convention,<sup>415</sup> the treaties invoked by the Respondent are not part of such circumstances.<sup>416</sup> The circumstances referred to under the provision mentioned are contemporaneous circumstances “*and the historical context in which the treaty was concluded*”<sup>417</sup> and, thus, it cannot cover treaties concluded after the date the Treaty was signed.<sup>418</sup>
264. Regarding treaties signed before the conclusion of the Treaty, the Respondent has not established that they are part of these circumstances<sup>419</sup> since it has not demonstrated that the parties to the Treaty discussed the Bolivia-Switzerland and Bolivia-Germany bilateral investment treaties in their negotiations, or that the United Kingdom was aware (or should have been aware) of these two treaties. The Claimant considers telling that the Respondent has failed to submit the *travaux préparatoires*, despite the fact that the Claimant had already noted their absence in its Reply Memorial.<sup>420</sup>

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<sup>412</sup> Claimant’s Reply Memorial, para. 177. Claimant refers to and describes the argument posed by Respondent that the parties to the Treaty “*deliberately omitted protection of ‘indirect’ property*” because, in 1987, Bolivia entered into treaties with Germany and Switzerland, and the treaty with Germany did not include a reference to “direct or indirect”, whereas the treaty with Switzerland did include such a reference (see *supra* para. 228).

<sup>413</sup> Claimant’s Reply Memorial, para. 179.

<sup>414</sup> Claimant’s Reply Memorial, para. 180; Claimant’s Rejoinder Memorial on Jurisdiction, para. 62.

<sup>415</sup> CLA-11, Vienna Convention, Article 32.

<sup>416</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 64; see *supra* para. 228, footnote 305.

<sup>417</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 64; CLA-179, Sir Humphrey Waldock, Special Rapporteur, “Third Report on the law of treaties,” in Yearbook of the International Law Commission (1964), vol. II at p. 59, at 22.

<sup>418</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 64; referring to the Bolivia-France, Bolivia-BLEU, Bolivia-Switzerland, and Bolivia-Italy BITs. See also Hearing Transcript, Day 1, 125:15 – 126:2 (English);

<sup>419</sup> Hearing Transcript, Day 1, 126:3-8 (English);

<sup>420</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 64. See Claimant’s Reply Memorial, para. 181.

265. The Claimant further contends that the case law in investment arbitration has regularly refused to rely on other treaties when interpreting the provisions of a specific treaty<sup>421</sup> and concludes by noting that, consequently, Article 32 of the Vienna Convention is of no assistance to the Respondent's flawed interpretation of Article 8(1) of the Treaty.<sup>422</sup>

**(b) On the protection of indirect investors under the Treaty**

266. The Claimant submits that for the jurisdiction of the Tribunal to be established, it is sufficient for the Claimant to show that it satisfies the Treaty definition of 'national' or 'company' (Articles 1.c o 1.d), that its investment meets the requirements set forth at Article 1(a), and that it owns, directly or indirectly, the investment.<sup>423</sup> There are no other requirements under the Treaty and the Respondent has admitted that SAS is a protected company under the Treaty and that owns qualifying investments in Bolivia.<sup>424</sup> The Claimant further states that: "*investment treaty tribunals have consistently held that it is not open to them to impose additional jurisdictional requirements on claimants which the parties to the underlying treaty could have added but did not*".<sup>425</sup>

267. The Claimant maintains that ultimate ownership is irrelevant for purposes of the jurisdiction of the Tribunal.<sup>426</sup>

268. First, the Respondent does not identify which provision of the Treaty would require the investor to be the ultimate owner, and the preamble, cited by the Respondent,<sup>427</sup> does not provide for such requirement.<sup>428</sup> The award of the *Lemire* case, which according to the Claimant applied a BIT with a preamble similar to the Treaty, found that an origin-of-capital requirement cannot be required or inferred.<sup>429</sup> Regarding the other arbitral awards cited by the Respondent that

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<sup>421</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 65; Claimant's Reply Memorial, para. 182; Hearing Transcript, Day 1, 126:9-18 (English).

<sup>422</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 65.

<sup>423</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 66; Claimant's Reply Memorial, para. 186; SAS' Post-Hearing Brief, para. 44.

<sup>424</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 66.

<sup>425</sup> Claimant's Reply Memorial, para. 187; Claimant's Rejoinder Memorial on Jurisdiction, para. 67; Hearing Transcript, Day 1, 127:6 – 128:3 (English); SAS' Post-Hearing Brief, paras. 40-47.

<sup>426</sup> Claimant's Reply Memorial, para. 184.

<sup>427</sup> See *supra* para. 233.

<sup>428</sup> Claimant's Reply Memorial, para. 185. See also Hearing Transcript, Day 1, 128:21 – 129:13 (English); SAS' Post-Hearing Brief, para. 40.

<sup>429</sup> SAS' Post-Hearing Brief, para. 41; CLA-49, *Lemire*, Decision on Jurisdiction & Liability, paras. 56-57.

interpreted the definition of “investment”, all are ICSID cases that are wholly irrelevant to this UNCITRAL Rules arbitration proceeding pursuant to the UK-Bolivia Treaty.<sup>430</sup>

269. In brief, the Treaty protects indirect owners even when they are not the ultimate owners of the qualifying investments, because there is no requirement in the Treaty stating otherwise.<sup>431</sup>
270. Second, the Claimant contends that none of the awards the Respondent relies on, provide, as Bolivia alleges, that an investment treaty that protects indirect ownership only protects ultimate owners.<sup>432</sup> The Claimant submits that the tribunals in *Siemens v. Argentina*, *Kardassopoulos v. Georgia*, or *BG Group v. Argentina*, and even more so in *Rurelec*, did not state that ultimate ownership was a mandatory condition that needed to be satisfied in order to benefit from a treaty that protects indirect ownership. On the contrary, several tribunals have held that they had jurisdiction over claimants that were the indirect owners of qualifying investments without at the same time being the ultimate owners of those investments.<sup>433</sup>
271. Further, as the party asserting this jurisdictional objection, the Respondent has the burden to demonstrate that only ultimate indirect owners have protection, and the Respondent has yet to articulate a cogent argument for why the Treaty, when protecting indirect ownership, would limit itself to the protection of ultimate owners.<sup>434</sup>
272. The Claimant notes that the Respondent, in its Rejoinder, appears to have abandoned its claim on the absence of protection for the ultimate owner under the Treaty. Instead, it raised a new allegation that the Tribunal lacks jurisdiction because SAS has not “made” any investment in Bolivia.<sup>435</sup> The Claimant criticizes the Respondent’s interpretation that the terms “investment of the former” in Article 8(1) of the Treaty require the Claimant to have been actively involved in the realization of the investment.<sup>436</sup> Article 8(1) requires that the investment *belongs* to a claimant directly or indirectly, but not an active participation in the realization of the investment.<sup>437</sup>
273. Nor does the Treaty contain such a requirement, and the *Caratube* and *Standard Chartered Bank* cases do not support the position of the Respondent because the underlying treaties in such cases

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<sup>430</sup> Claimant’s Reply Memorial, para. 185. See *supra* paras. 233-233(a).

<sup>431</sup> Claimant’s Reply Memorial, para. 188.

<sup>432</sup> Claimant’s Reply Memorial, para. 189.

<sup>433</sup> Claimant’s Reply Memorial, para. 194.

<sup>434</sup> Claimant’s Reply Memorial, para. 195.

<sup>435</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 70, referring to Respondent’s Rejoinder, paras. 264-265.

<sup>436</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 70, referring to Respondent’s Rejoinder, paras. 264-265.

<sup>437</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 71; RLA-48, Oxford English Dictionary (the preposition “of” (“de”) may indicate “an association between two entities, typically one of belonging”). See also Hearing Transcript, Day 1, 129:14 – 130:2 (English).

are not sufficiently similar to the BIT in this arbitration and the facts were also different.<sup>438</sup> Indeed, in this arbitration the issue of foreign control is not addressed as it was in the *Caratube* case,<sup>439</sup> nor does the Treaty contain language which provides that an investment has to be “made” in the territory of the Contracting Party, such as in the *Standard Chartered Bank* case.<sup>440</sup> The Claimant further states that “[h]ere, there can be no dispute that South American Silver Ltd. ‘did something as part of the investing process’,”<sup>441</sup> unlike *Standard Chartered Bank*, where the connection between the claimant and the investment was highly attenuated.<sup>442</sup>

274. Finally, the Claimant rejects the existence of the so-called objective definition of ‘investment’<sup>443</sup> and states that the *Salini* test is not recognized or accepted in the terms indicated by the Respondent.<sup>444</sup> The test was developed within the framework of ICSID arbitrations<sup>445</sup> and it is not even always adopted even in said arbitrations.<sup>446</sup> Furthermore, out of the two cases that the Respondent cites –as non-ICSID arbitration cases having relied upon the *Salini* test– one in fact never even mentioned the test, whereas the second was criticized for doing so (*Romak*).<sup>447</sup> The Claimant further states that the *Romak* case involved factual circumstances and policy considerations that are not present here.<sup>448</sup>

275. In sum, there is no reason for the Tribunal to apply the *Salini* test in this case. The Tribunal need only ensure, in order to ascertain its jurisdiction, that SAS’ investments satisfy the definition of ‘investment’ at Article 1(a) of the Treaty.<sup>449</sup> And even if the requirements of the *Salini* test were applicable (which the Claimant repeats is not the case), then it is not possible to dispute that the shares in CMMK and the Concessions, i.e. the investment at issue in this case, satisfy the test

<sup>438</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 72, referring to Respondent’s Rejoinder, paras. 268-270, and para. 76. See also Hearing Transcript, Day 1, 130:3-7 (English).

<sup>439</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 73.

<sup>440</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 74; SAS’ Post-Hearing Brief, paras. 45-46.

<sup>441</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 75. See Statement of Claim and Memorial, para. 33 (Fig. 1). Claimant submits the structure that connects it to the investment (its ownership of 100% of the shares in the Bahamian subsidiaries, and their 100% ownership of the shares in CMMK, i.e. the owner of Mining Concessions comprising the Project).

<sup>442</sup> Claimant explains that credit was acquired by a Hong-Kong subsidiary of Claimant (corporate entity of the United Kingdom), which was not controlled by Claimant. See SAS’ Post-Hearing Brief, para. 46.

<sup>443</sup> SAS’ Post-Hearing Brief, paras. 53-54. Claimant addresses the allusion Respondent makes to the *Saba Fakes v. Turkey* case and states that the reference is immaterial as the tribunal in that case addressed the definition of ‘investment’ within the meaning of Article 25(1) of the ICSID Convention, rather than the objective meaning of the term outside of the framework of the ICSID Convention.

<sup>444</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 77, citing Respondent’s Rejoinder, para. 266.

<sup>445</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 77; SAS’ Post-Hearing Brief, paras. 48-50.

<sup>446</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 77; Hearing Transcript, Day 1, 131:11-17 (English); SAS’ Post-Hearing Brief, para. 49.

<sup>447</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 79. Commenting on the use of the *Salini* test by the *Romak* tribunal, Claimant notes that the *Rurelec* tribunal underscored the “exceptional” and “fact-specific” nature of its application.

<sup>448</sup> SAS’ Post-Hearing Brief, paras. 51-52.

<sup>449</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 80; SAS’ Post-Hearing Brief, para. 50.



criteria of resource contribution, risk, duration, and contribution to the economic development of the host State (Bolivia, in this case).<sup>450</sup>

**(c) On whether SAS is an interested party in this dispute**

276. The Claimant contends that accepting the Respondent's argument to pierce the corporate veil would add a further requirement for the jurisdiction of the Tribunal that is not provided for under the Treaty.<sup>451</sup> The Claimant argues that neither Article 8(1) nor the preamble of the Treaty requires the Tribunal to consider the nationality of SAS' ultimate owner to decide on its jurisdiction.<sup>452</sup>
277. The Claimant submits that tribunals have unanimously held that, when considering the nationality of the claimant for purposes of jurisdiction, the corporate veil should not be pierced except in exceptional circumstances such as fraud.<sup>453</sup> The Claimant notes that no such circumstances exist or have been alleged in this case.<sup>454</sup> Moreover, as to the awards relied upon by the Respondent, the Claimant holds that they are irrelevant as they are based on a set of legal elements that are absent in this arbitration.<sup>455</sup>
278. In connection with *TSA Spectrum v. Argentina*, the Claimant notes that the tribunal's decision to pierce the corporate veil was warranted by the express terms of the ICSID Convention, which is irrelevant in this arbitration.<sup>456</sup>
279. The Claimant posits that the *Venoklim Holding v. Venezuela* case—an arbitration initiated pursuant to the Venezuelan Law on the Promotion and Protection of Investments—is also irrelevant<sup>457</sup>. The Claimant notes that the tribunal's decision to pierce the corporate veil was based on the definition of 'investor' under Venezuelan law, requiring effective control over the investment, which is not at issue here.<sup>458</sup>
280. The Claimant submits that, in the *Loewen* case, the piercing of the veil was decided on the basis of the continuous nationality rule because one of the claimants had changed nationality during the

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<sup>450</sup> SAS' Post-Hearing Brief, para. 50.

<sup>451</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 81.

<sup>452</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 82.

<sup>453</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 82; Hearing Transcript, Day 1, 132:4-8 (English).

<sup>454</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 82.

<sup>455</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 82.

<sup>456</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 83; Hearing Transcript, Day 1, 132:19-133:2 (English).

<sup>457</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 84; Hearing Transcript, Day 1, 133:3-7 (English).

<sup>458</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 84.

arbitration.<sup>459</sup> The Claimant argues that this case is not relevant for the purposes of the present case because such rule has not been invoked and it is not applicable.<sup>460</sup> The Claimant further contends that the decision was criticized by leading commentators.<sup>461</sup>

281. In conclusion, the Claimant submits that neither the Treaty nor investment treaty jurisprudence justifies the piercing of the corporate veil in this case.<sup>462</sup>

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

#### **(a) The scope of Article 8(1) of the Treaty regarding indirect ownership**

282. The Parties do not dispute that the interpretation of the Treaty in general, and of Article 8(1) of the Treaty in particular, must be done by reference to Articles 31 and 32 of the Vienna Convention.

283. It is also not in dispute that (a) the Claimant is a company incorporated in Bermuda,<sup>463</sup> one of the territories to which the Treaty is extended in accordance with Article 11 thereof;<sup>464</sup> (b) the Claimant is the sole shareholder of Malku Khota Ltd., G.M. Campana Ltd. and Productora Ltd., companies incorporated in Bahamas;<sup>465</sup> (c) Malku Khota Ltd., G.M. Campana Ltd. and Productora Ltd., are CMMK's sole shareholders;<sup>466</sup> and (d) CMMK is a company incorporated in Bolivia,<sup>467</sup> and the owner of the Mining Concessions.<sup>468</sup> It is thus a situation in which clearly the Claimant holds all the shares of those entities, who are at the same time shareholders of the company owning the Mining Concessions (CMMK).

284. The dispute, with regard to the jurisdictional objection being examined, focuses specifically on determining whether the fact that the Claimant holds all the shares of CMMK's sole shareholders

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<sup>459</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 85; Hearing Transcript, Day 1, 133:8-13 (English); RLA-223, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, para. 225.

<sup>460</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 85.

<sup>461</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 85. See, for example, CLA-190, Maurice Mendelson, "Runaway Train: The 'Continuous Nationality' Rule from the *Panavezys-Saldutiskis Railway* case to *Loewen*", in Todd Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005) in 51.

<sup>462</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 86.

<sup>463</sup> C-10.

<sup>464</sup> C-1, Article 11 and C-02.

<sup>465</sup> C-6, p. 11; C-7, pp. 16-17; C-8, p. 11

<sup>466</sup> C-9 and C-37.

<sup>467</sup> C-11.

<sup>468</sup> See C-31; C-32; C-33; C-34; C-35; C-36.

and yet it is not the direct shareholder of CMMK results, in light of Article 8(1) of the Treaty, in the Tribunal lacking jurisdiction due to the Claimant not being the direct owner of the shares.

285. Article 8(1) of the Treaty, whose interpretation is contested by the Parties, provides:

*(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement **in relation to an investment of the former** which have not been legally and amicably settled shall after a period of six months from written notification of a claim be submitted to international arbitration if either party to the dispute so wishes.*  
(emphasis added)

286. According to the Respondent, for the reasons stated in the summary of its position, the consent to arbitration in Article 8(1) of the Treaty was given for disputes between Bolivia and a UK investor regarding Bolivia's obligations towards a UK company regarding an investment "of" that company. The expression "of", according to the Respondent, implies that the investor must be owner or direct holder of the investment. Since the Claimant does not have direct ownership of CMMK's shares, nor of the Mining Concessions, the Respondent argues that the Tribunal would not have jurisdiction because the dispute does not relate to an investment "of" the Claimant.

287. The Tribunal's task in this case is not to establish a general doctrine on the protection of so-called "indirect investments", nor to take a stand in general terms on the eventual rights of a company's shareholders for the acts of a State that may affect a company of which they are shareholders. The jurisdictional exception raised by the Respondent refers specifically to the Treaty and the scope of the Respondent's consent in the Treaty. In this vein, the Tribunal will analyse the jurisdictional exception as it was raised, in connection with the Treaty, and will interpret the Treaty in light of Articles 31 and 32 of the Vienna Convention.

288. The above-mentioned rules of interpretation of the Vienna Convention provide:

*Article 31. General Rule of Interpretation*

*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

*2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

*(a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*

*(b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

*3. There shall be taken into account, together with the context:*

*(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*

*(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*

*(c) Any relevant rules of international law applicable in the relations between the parties.*

*4. A special meaning shall be given to a term if it is established that the parties so intended.*

*Article 32. Supplementary Means of Interpretation*

*Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 :*

*(a) Leaves the meaning ambiguous or obscure; or*

*(b) Leads to a result which is manifestly absurd or unreasonable.*

289. Two conclusions result from the rules of the Vienna Convention. First, the rule of interpretation found in Article 31 is one integral rule that must be applied in its entirety and not by applying the text, context, object and purpose as isolated or separate elements. Article 31 enshrines a “General Rule of Interpretation” – not independent interpretation rules – by which the Treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of it in their context and in the light of its object and purpose. Additionally, the Treaty’s context is also composed of its preamble, its annexes, every agreement or practice between the Contracting Parties regarding the Treaty or its interpretation, or application. The Tribunal shall also apply the systemic interpretation principle, as per it was stated in paragraphs 212 *et seq.* of the award.
290. Second, the rule in Article 32 is supplementary and it only applies when it is needed to confirm the meaning resulting from the application of Article 31 or to establish the meaning of a term that, when applying the rule in Article 31, produces results that are ambiguous, obscure or lead to a manifestly absurd or unreasonable result.
291. In other words, the Tribunal must make an effort to interpret the Treaty granting primacy to the ordinary meaning of the text, taking into account its context, and its object and purpose. In order to confirm the meaning resulting from this interpretative exercise, or insofar as that interpretation leaves a degree of ambiguity or obscurity with regard to the meaning of any term, or leads to a manifestly absurd or unreasonable result, the Tribunal may resort to the means of supplementary

interpretation provided in Article 32 of the Vienna Convention, *i.e.*, the *travaux préparatoires* of the Treaty or the circumstances of its conclusion.

292. It is true, as the Respondent points out, that in English and in Spanish, the preposition “of” denotes ownership. The Dictionary of the *Real Academia Española* and the Oxford Dictionaries cited by the Respondent say so. In principle, this would be the ordinary meaning of the expression. But even if the Tribunal would stop at the ordinary meaning of the word, on the basis of the dictionaries cited by the Respondent, the term “ownership” does not only mean “property” and much less, “direct property”.<sup>469</sup>
293. The interpretation rule of Article 31 of the Vienna Convention does not allow one, as the Tribunal indicated, to stop only at the ordinary meaning of the text. Rather it has to be analyzed by taking into account the context, with all its elements, and the object and purpose of the Treaty.
294. Regarding the context, the Tribunal finds relevant the definition of investment provided in Article 1 of the Treaty, which states:

*For the purposes of this Agreement;*

*(a) “investment” means every kind of asset which is capable of producing returns and in particular, though not exclusively, includes:*

*(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;*

*(ii) shares in and stock and debentures of a company and any other form of participation in a company;*

*(iii) claims to money or to any performance under contract having a financial value;*

*(iv) intellectual property rights and goodwill;*

*(v) any business concessions granted by the Contracting Parties in accordance with their respective laws, including concessions to search for, cultivate, extract or exploit natural resources.*

*A change in the form in which assets are invested does not affect their characters as investments. Investments made before the date of entry into force as well as those made after entry into force shall benefit from the provisions of this Agreement;*

*(b) “returns” means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees;*

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<sup>469</sup> Although the Dictionary of the *Real Academia Española* includes “a thing that is property of someone particular” as the meaning of the word ownership, it also includes, for example, “relation between a thing and who has a right to it”. On behalf of Oxford Dictionaries, equally cited by Respondent, it does not limit the preposition ‘of’ to a meaning of property.

295. It is not in dispute that company shares, on the one hand, and concessions for the exploration of mineral resources, on the other, constitute investments under the Treaty.<sup>470</sup> The abovementioned article contains a broad definition that starts with equating investments with an “*asset which is capable of producing returns*” and a series of assets and rights are listed that constitute an investment. The same provision points out that it is not a restrictive list. Although the examples listed there serve as reference for what the States wanted to protect as an investment under the Treaty, nothing in the text of the definition of investment made under the Treaty, nor in the investments listed as examples, suggests that the “ownership” to which the preposition “of” in Article 8(1) refers to, is limited to direct ownership. In the present case, the Parties do not contest that both CMMK’s shares and the Mining Concessions are included under the definition of investment provided under Article 1 of the Treaty.<sup>471</sup>
296. Further looking at context, from the revision of its provisions it is clear for the majority of the Tribunal that there is no article in the Treaty that, in isolation or in the context of the others, corroborates or suggests as plausible, an interpretation such as the one proposed by the Respondent for Article 8(1) or that would lead to conclude that indirect property must be excluded.
297. Regarding the object and purpose of the Treaty, its preamble, which is also part of the context in accordance with Article 31(2) of the Vienna Convention, provides that the Contracting Parties are animated by the “*desir[e] to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State*” and “*recognis[e] that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States*”.
298. For its part, Article 2(1) of the Treaty establishes that every Contracting Party of the Treaty “*shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital*”. The majority of the Tribunal observes that the preamble uses broad language in which the Contracting Parties undertake to create favourable conditions for the

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<sup>470</sup> Indeed, Respondent expressly recognized it, when asserting: “*In this case, even though SAS fits the definition of investor and both the shares in CMMK and the Mining Concessions fit the definition of investment, SAS is not the real owner of the investment*”. (Counter-Memorial, para. 224). See also Counter-Memorial, para. 240 (“When an objection refers to the definition of “investment”, it criticizes the form of assets reputed as investment (*v.gr.*, is the asset in question really a concession, action or title?), **which is not the case under our examination.**”). (emphasis added)

<sup>471</sup> Statement of Claim, para. 110; Counter-Memorial, para. 224; Claimant’s Reply Memorial, para. 150; Hearing Transcript, Day 1, 120:20-24, 210:2-3 (English).

investment, without appearing to restrict the manner in which an investment can be made when it comes to companies.

299. In short, the majority of the Tribunal does not find that the interpretation of the Treaty under Article 31 of the Vienna Convention can lead to a conclusion such as that proposed by Bolivia regarding the scope of Article 8(1) of the Treaty.
300. As regards Article 32 of the Vienna Convention, the conclusion to which the majority of the Tribunal has reached regarding Article 8(1) does not lead to a manifestly absurd or unreasonable result, nor does it leave the text of the Treaty ambiguous or obscure. But even if it was necessary to confirm the meaning resulting from the application of Article 31 of the Vienna Convention, or if such were ambiguous or obscure, or manifestly absurd or unreasonable, [REDACTED]  
[REDACTED]  
[REDACTED]
301. Specifically regarding corporate structures, nothing in the text, context, object and purpose of the Treaty, nor in any evidence from the time of the negotiation or conclusion of the Treaty suggests, as the Respondent does, that the corporate structure by which a company acquires full control of another company through one or more companies is a novel concept in corporate law that was not taken into account at the time of the conclusion of the Treaty. But additionally, the Tribunal observes that the structure under consideration is not particularly sophisticated or alien to the corporate world as to be unforeseeable for the Contracting Parties of the Treaty at the time of its conclusion, if they had wanted to restrict or prohibit it.
302. The Respondent asserts that contemporaneous treaties signed by Bolivia at the time when the Treaty was concluded must be taken into account among the circumstances of the conclusion of the Treaty that Article 32 of the Vienna Convention refers to. These treaties, according to the Respondent, cover indirect property, demonstrating that when the Respondent wished to cover indirect property, it did so expressly.
303. The majority of the Tribunal disagrees. First, because the circumstances that Article 32 of the Vienna Convention refers to are the circumstances of the conclusion of the Treaty (“*the circumstances of its conclusion*”) and the historical context in which the Treaty was concluded, not other treaties which have not been proven to have been part of the circumstances of the conclusion of the Treaty. Second, because the Respondent has not proven that the treaties signed prior to or contemporaneously with the Treaty, or the provisions on property contained in said treaties, were part of the circumstances of the conclusion of the Treaty, the discussions held by Bolivia and the UK regarding the content of the Treaty, or part of what was considered or taken

into account by both Contracting Parties – not just by one of them – when negotiating and concluding the Treaty. Third, because even if it were necessary to apply Article 32 of the Vienna Convention in this case, in the absence of evidence that the treaties invoked by Bolivia form part of the circumstances of the conclusion of the Treaty, the Tribunal could not restrict or extend the text and context of the Treaty through the simple exercise of textual comparison of the Treaty with other treaties concluded between third States and the Respondent. Finally, the Tribunal does not find that it has been pleaded nor demonstrated by the Respondent why a contemporaneous analysis of the circumstances of the conclusion of the Treaty can be done without taking into account facts or documents that reflect which was the position of the other Contracting Party on the treaty under analysis.

304. As regards the awards invoked by the Parties, the majority of the Tribunal finds two of them to be particularly relevant. The first one, the jurisdictional decision in *Cemex v. Venezuela*, featured a text almost identical to the one in the Treaty. In respect of the phrase “investment of”, the tribunal concluded that:

*157. The Tribunal further notes that, when the BIT mentions investments “of” nationals of the other Contracting Party, it means that those investments must belong to such nationals in order to be covered by the Treaty. But this does not imply that they must be “directly” owned by those nationals. Similarly, when the BIT mentions investments made “in” the territory of a Contracting Party, all it requires is that the investment itself be situated in that territory. It does not imply that those investments must be “directly” made in such territory.*

*158. Thus, as recognized by several arbitral tribunals in comparable cases, the Claimants have jus standi in the present case. The Respondent’s objection to the Tribunal jurisdiction under the BIT cannot be upheld.<sup>472</sup>*

305. The second award, the *Rurelec v. Bolivia* award, is relevant because the tribunal, when interpreting Article 8(1) of the Treaty, noted:

*As regards the Respondent’s argument that indirect investments are not protected under the UK-Bolivia BIT, the Tribunal notes that Article 1 contains—as the majority of BITs do—a very broad definition of “investment”. Article 1 defines “investment” as “every kind of asset which is capable of producing returns,” which would naturally include “indirect investments” through the acquisition of shares in a company. In addition, the non-exhaustive list of protected investments described in the BIT explicitly includes the example of “shares in and stock and debentures of a company and any other form of participation in a company”. Finally, in its broadest example, Article 1(a)(iii) of the BIT provides that any “claims to money or to any performance under contract having a financial value” are considered to be protected investments under the BIT.*

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<sup>472</sup> CLA-100, *CEMEX Caracas Investments B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, Dec. 30, 2010, paras. 157-158.



*353. In the Tribunal's opinion, all of the above mentioned examples contribute to the conclusion that indirect investments were intended to be protected by the UK-Bolivia BIT. Moreover, given that the purpose of the BIT is to promote and protect foreign investment, the Tribunal considers that the BIT would require clear language in order to exclude coverage of indirect investments—language that the BIT does not contain.*

*354. According to the Tribunal, the fact, invoked by the Respondent, that other BITs concluded by Bolivia explicitly include indirect investments, is insufficient to support an a contrario sensu interpretation that only those BITs containing such an explicit reference cover indirect investments, since it is well accepted that this kind of argument is not on its own strong enough to justify a particular interpretation of a rule of law. The mere absence of an explicit mention of the different categories of investment (direct and indirect) cannot be interpreted as narrowing the definition of investment under the BIT to only direct investment.*

*355. The Tribunal therefore agrees with the Claimants and concludes that terms employed in the UK-Bolivia BIT are broad enough on their own to include indirect investments, even without employing further qualifications that would only reinforce what is already clear from the text of the BIT.<sup>473</sup>*

306. The majority of the Tribunal concurs with the reasons set forth in these passages, and, as pointed out above, does not find that the term “of” in Article 8(1) of the Treaty implies direct property or excludes indirect investments.
307. At this stage a distinction should be made between the SAS' indirect shareholding in CMMK's share capital and its rights over the Mining Concessions. It has been proven in the record that SAS is the 100% owner of the shares of each one of the three companies incorporated in Bahamas which, at the same time, are owners of all CMMK's shares, a company incorporated in Bolivia, holder of the Mining Concessions, in accordance with Bolivian law.<sup>474</sup> As noted by the Tribunal, both Parties agree that CMMK's shares and the Mining Concessions fall within the definition of “investment” under the Treaty.<sup>475</sup>
308. Although its indirect shareholding does not give it a direct right over the Company's assets pursuant to Bolivian law, nothing in the Treaty prevents the Claimant from submitting claims based on measures adopted against CMMK's assets which affect the value of the shares indirectly owned by the Claimant. Indeed, Article 5(2) of the Treaty considers this situation, when providing that:

*Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory,*

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<sup>473</sup> CLA-1, *Guaracachi America, Inc., and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, January 31, 2014, paras. 352-355.

<sup>474</sup> See *supra* para. 283.

<sup>475</sup> See *supra* para. 295.

*and in which nationals or companies of the other Contracting Party own shares , it shall ensure that the provisions of paragraph ( 1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares..*

309. In the present case, SAS’ indirect shareholding of CMMK’s share capital – which is in turn the owner of the Mining Concessions– is an investment protected under the Treaty. In that sense, SAS can submit claims based on conducts or measures attributable to the State that affect CMMK’s assets as it undermines the value of its shares in the Company. The Tribunal understands that the Claimant’s claim falls under this hypothesis, as is apparent from the First FTI Report, SAS’ expert:

*[...] the Claimant indirectly held 100.0% of the shares of CMMK. CMMK’s sole corporate purpose was the development of the Project and thus the value of CMMK depended entirely on the concessions it held for the Project. Thus, when CMMK’s concessions were revoked, the value of the Claimant’s investments in Bolivia (its shares in CMMK) were rendered worthless.<sup>476</sup>*

310. For the above reasons, the majority of the Tribunal does not find any reason to accept the jurisdictional objection put forward by the Respondent based on Article 8(1) of the Treaty and, so, rejects the jurisdictional objection put forward by the Respondent based on said Article.

**(b) On the protection of indirect investors by the Treaty**

311. The majority of the Tribunal already determined the scope of Article 8(1) of the Treaty and established that its text –particularly, the expression “investment of the former”– does not imply that the investor must be the direct owner of the investment. Similarly, it noted that the question is not whether indirect property or ownership is generally protected in international investment law, but the specific scope of Article 8(1) in the Treaty for the purposes of this dispute.<sup>477</sup>
312. The Tribunal must then decide whether, as claimed by the Respondent, notwithstanding that the Treaty covers the investment of a company having indirect control over CMMK it is still necessary to (i) determine who controls the company –SAS– that indirectly controls CMMK; (ii) establish whether the resources for the Project come from the ultimate parent company– SASC– or from the Claimant; and (iii) decide if the *Salini* test should be applied to determine who made the investment.

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<sup>476</sup> First FTI Report, para. 8.5.

<sup>477</sup> See *supra* para. 284.

313. The Respondent argues, in short, that if indirect investments are protected, then the Tribunal must consider SASC as the investor – the Claimant’s parent company – and not the Claimant. Since SASC is a Canadian company, it would not be protected under the Treaty and, consequently, the Tribunal would lack jurisdiction.
314. The Respondent further asserts that it is SASC who has the direct, objective link with the investment, as it was the one who provided the funds, who has the title over the Metallurgical Process, who made the strategic decisions and who concluded the consulting contracts. It adds that, if the Treaty and the *Salini* test are applied to SAS, the conclusion reached is that SAS does not have an investment in Bolivia and, consequently, the Tribunal lacks jurisdiction.
315. In order to decide these issues, the Tribunal must look at the Treaty, as the primary source of law, which contains the consent of the Respondent to arbitration and establishes the protection that the Claimant alleges it has a right to.
316. The Tribunal already determined at paragraphs 287 to 291 above, what are –according to the Vienna Convention– the rules of interpretation that it must apply in order to unravel the proper construction of the Treaty, in light of the different interpretations raised by the Parties.
317. There are two provisions of the Treaty which the Respondent invokes as the basis for its jurisdictional objection. First, the repeatedly mentioned Article 8(1), according to the Respondent, requires title or a direct link between the investor and the investment and, further that the claimant have been actively involved in the realization of the investment in the host State.<sup>478</sup> Second, the Treaty’s preamble, according to the Respondent, refers to the promotion of capital flows between investors of the Contracting Parties to the Treaty, which would exclude the possibility of capital flows coming from a company of a third State.
318. It is not disputed that the Treaty protects nationals or companies of the States parties. In respect of the United Kingdom, the Treaty provides that “*companies*” means “*corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article II.*”<sup>479</sup> The Parties do not dispute that the Claimant is a corporation in accordance with the above-mentioned definition or that the Claimant is indirectly the sole shareholder of CMMK. The dispute hinges on whether, for the purposes of the jurisdiction, given the existence of a parent company controlling the Claimant, the Tribunal should take such company as an investor, and in particular,

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<sup>478</sup> Respondent’s Rejoinder, para. 265.

<sup>479</sup> C-1, Treaty, Article 1(d).

whether the origin of the totality of the funds or resources used in the investment must necessarily and solely come from the investor – the Claimant in this case – such that if the controlling parent company of the Claimant provides the funding or resources, it should be considered as the investor.

319. In terms of Article 8(1), the majority of the Tribunal does not find in its text and context a requirement of direct ownership or other direct relationship between the investment and the investor. As the Tribunal has already noted, nothing in Article 8(1) prevents the investment from belonging to an investor (being “of” an investor) despite the lack of direct control over the investment by the investor except through intermediary companies also controlled by the investor.
320. The text and context of the Treaty, taking account its object and purpose, do not include any provisions which state or imply that the Tribunal must determine who is the Claimant’s ultimate parent company, or that the Tribunal’s jurisdiction is predicated on the determination of the ultimate parent company of the party presenting the claim and that such ultimate parent company be a corporation of one of the States parties to the Treaty.
321. The preamble to the Treaty, which helps to determine its object and purpose, notes that the States parties have entered into the Treaty:

*Desiring to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State;*

*Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States.*

322. It is true, as the Respondent asserts, that the above-mentioned preamble notes that the States party to the Treaty wish to create favorable conditions for “greater investment” by companies of the other State. However, it cannot be concluded that whoever qualifies as an investor, because it is a company of a State party to the Treaty, may not obtain resources from third parties or companies of the group to which it belongs in order to make the investment. In fact, nothing in the Treaty states that the Tribunal must examine the origin of the capital invested by an investor in order to decide on its jurisdiction.<sup>480</sup>
323. States are free to negotiate treaties and include broad or restrictive language as deemed appropriate; and it is not for the Tribunal to create requirements in addition to those which the States, in exercise of their sovereign power, have included in the relevant Treaty. In the present

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<sup>480</sup> Along these lines, see CLA-115, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004, paras. 77, 80.

case, the States parties to the Treaty – Bolivia and the United Kingdom – freely decided to establish the requirement that “companies” in order to be considered an “investor” of the United Kingdom, must be incorporated or constituted “*under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 11.*”<sup>481</sup> The Treaty establishes only one requirement of a link between the investor – the legal person – and the State party to the Treaty: that of incorporation or constitution under the law in force in such State.

324. States, in the exercise of their sovereignty, may include in treaties additional requirements for the investor or the investment, as is the case with clauses requiring that, in addition to incorporation or constitution in the State party under the corresponding Treaty, the company have its principal place of business in that State or that substantial business activities in that State, or that the capital or the resources used in the investment have their origin in the State where the investor was constituted or incorporated, or even denial of benefits clauses under certain circumstances. None of these requirements or restrictions have been included in the Treaty by Bolivia or the United Kingdom and, as already mentioned, the Tribunal may not create additional requirements for the investor or the investment beyond the ones agreed by the two sovereign States.
325. It is true, as the Respondent suggests, that some tribunals have decided to determine the ultimate controlling entity of the investment and some – the Tribunal notes – some of them have even declined jurisdiction upon determining that the ultimate investor was not a national of one of the States party to the respective treaty. However, those were cases in which the facts and treaties were substantially different from the ones under consideration before this Tribunal – as stated in paragraphs 326 *et seq* below – or where the tribunals declined jurisdiction due to abuse of process or some sort of fraud in the structure used to access the treaty. Yet, none of the decisions cited by the Respondent to support their argument are conclusive that under a treaty such as this one, the Tribunal must always find that a party who is not the ultimate controlling entity in the chain is not an investor, or that there is an implicit origin-of-capital requirement that calls for the non-recognition of an investor who has not contributed all of the funds, equipment, or elements used to make the investment. Furthermore, the Tribunal finds that no abuse of process has been demonstrated nor that SAS has been used fraudulently to access the Treaty or, in sum, that the Treaty has been used contrary to its text, context, object, or purpose.
326. In particular, el Tribunal does not find that the awards the Respondent cited in support of its thesis make the protection of so-called indirect investments conditional on the claimant being the

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<sup>481</sup> C-1, Treaty, Article 1(d).

ultimate holder or controller of the investment. As the Tribunal has already noted, it is not incumbent upon it to establish a general thesis on so-called indirect ownership, but rather to interpret the Treaty in the present case for the corporate structure on the record.

327. In the *Siemens v. Argentina* case, despite the argument by the respondent State that the treaty required a direct relationship between the investor and the investment and that the claimant was not the direct owner of the investment, in the first place, it was a defense founded on a treaty with a content different from the one under the consideration of this Tribunal. In second place, even though the *Siemens v. Argentina* tribunal held that the treaty included indirect investments, it did not suggest that it meant that only the ultimate owner of the company was protected.<sup>482</sup>
328. The *Kardassopoulos v. Georgia* decision was based on the reasoning of the *Siemens* tribunal regarding the claimant's indirect share ownership, but there is no finding there either that the claimant's *ius standi* was based on being the ultimate owner of the investment.<sup>483</sup>
329. Similarly, the tribunal in *BG Group v. The Republic of Argentina* based its analysis on a different treaty to conclude that the claimant was an investor that had made investments that qualified as such, but it never stated that the claimant was the ultimate owner of the investment, nor did it base its decision on that circumstance.<sup>484</sup>
330. With respect to the decision in the *Rurelec v. Bolivia* arbitration interpreting the Treaty, the paragraph cited by the Respondent, whereby the tribunal concludes that "*the best interpretation of Article 2(2) of the BIT, when it refers to 'investments of nationals', is the one that considers that the investments may belong to nationals of one Contracting Party, both directly or indirectly through equity ownership of the companies that own the ultimate investment in Bolivia, in this case EGSA,*"<sup>485</sup> does not state or require that the investor be the ultimate owner of the investment. The reference to "companies that own the ultimate investments in Bolivia" means the controlled company that holds the investment – EGSA – rather than the ultimate holding company.
331. Finally, in connection with the award in the *Standard Chartered Bank v. Tanzania* case, the majority of the Tribunal finds that despite the Tribunal's finding that the preposition "of" in the phrase "investment [of the claimant]" required "some activity of investing", the tribunal in that

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<sup>482</sup> RLA-55, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, paras. 123, 137.

<sup>483</sup> RLA-54, *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, July 6, 2007, para. 124.

<sup>484</sup> CLA-4, *BG Group plc v. The Republic of Argentina*, UNCITRAL, Final Award, December 24, 2007, paras. 109, 138.

<sup>485</sup> CLA-1, *Guaracachi America, Inc. et al. v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, January 31, 2014, para. 360.

case based its analysis on the bilateral investment treaty between the United Kingdom and Tanzania, whose definition of “investment” is different from the definition in the Treaty.<sup>486</sup> Furthermore, in the above-mentioned decision, it was particularly relevant that the company that commenced the arbitration did not control the subsidiary that had made the investment<sup>487</sup> – a loan to a Tanzanian company – a fundamentally different situation from the one discussed in this arbitration where the investment comprises shares in a Bolivian company – CMMK – and the Claimant holds 100% of the shares in the intermediary companies which, in turn, hold 100% of CMMK’s shares.

332. In conclusion, the investor for all purposes is SAS, who fulfills the incorporation requirement under the Treaty, and it is with respect to SAS that the existence or not of the investment should be predicated for the purposes of the Tribunal’s jurisdiction. SAS owns the shares of CMMK – holder of the Mining Concessions – through three companies in which SAS holds the totality of the shares. As stated at paragraph 309 of this award, the Claimant’s indirect participation in CMMK’s equity constitutes an investment protected under the Treaty.
333. The Respondent does not question SAS’ ownership of the shares in the companies that are CMMK’s shareholders or the origin of the funds for the acquisition of such shares that – it is reiterated – constitute an investment protected under the Treaty. Its objection focuses on the origin of certain resources and technologies CMMK uses for the Mining Concessions. The Tribunal does not consider the origin of such resources and technologies to be relevant for its jurisdiction. On the one hand, as it has previously been said, the Treaty does not include an origin requirement for the resources used in the investment. On the other hand, to accept the Respondent’s argument would lead one to conclude that the resources used by the company constituted in the territory of a contracting party for the development of its activities should be derived directly and exclusively from its shareholders for them to be protected under the relevant treaty.

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<sup>486</sup> Article 1(a) of the Bilateral Investment Treaty between the United Kingdom and Tanzania states: “‘investment’ means every kind of asset admitted in accordance with the legislation and regulations in force in the territory of the Contracting Party in which the investment is made and, in particular, though not exclusively, includes: (i) moveable and immovable property and any other property rights such as mortgages, liens or pledges; (ii) shares in and stock and debentures of a company and any other form of participation in a company; (iii) claims to money or any performance under contract having a financial value.” (Emphasis added). To support the assertion that the treaty in the case required certain investment activity, the *Standard Chartered v. Tanzania* tribunal made special emphasis on the term “made” included in the “investment” definition transcribed above, as well as on other provisions of the corresponding treaty. (See RLA-60, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, November 2, 2012, paras. 222, 225, 257)

<sup>487</sup> See RLA-60, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, November 2, 2012, paras. 230-232, 261-265, 270. For example, at paragraph 232, the *Standard Chartered v. Tanzania* tribunal noted: “Rather, for an investment to be ‘of an investor in the present context, some activity of investing is needed, which implicates the claimant’s control over the investment or an action of transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to the other.” (Emphasis added).

334. Based on the same argument, an investment tribunal would have to decline its jurisdiction if it finds that, notwithstanding being the direct or indirect holding of all of the shares recognized as investments under the corresponding treaty, the shareholder or the domestic company used technologies from other related companies or obtained their assistance for the execution of contracts or received contributions from third parties interested in participating without becoming company shareholders. Bolivia is asking the Tribunal to disregard the protected investment – SAS’ indirect ownership of CMMK’s shares and CMMK’s ownership of the Mining Concessions – by analyzing who contributed the resources to the Project, an economic test that is not provided for anywhere in the Treaty.
335. As such, based on the Treaty and the application of the so-called subjective test, SAS has an investment in Bolivia. SAS owns all of the shares in CMMK – the owner of the Mining Concessions – and thus has an investment if the definition of “investments” contained in the Treaty is applied taking account of its context, object and purpose.
336. In its Rejoinder, the Respondent invoked the so-called objective test based on the *Salini* test to support its position that “*for an asset to constitute an investment of a company, that company must have an objective link to that asset: it must have been actively involved in the realization of the investment in the host State.*”<sup>488</sup>
337. The invocation of the *Salini* test in the Respondent’s Rejoinder does not seem intended to disregard the existence of an investment – since the Respondent accepts that both the shares in CMMK as well as the Mining Concessions fit the definition of “investment” under the Treaty<sup>489</sup> – but to apply such a test to determine the ownership of the investment.
338. In fact, CMMK’s shares and the Mining Concessions constitute an investment under the Treaty and the Parties do not seem to deny that, by applying the *Salini* test, there exists an investment with the requirements mentioned by the Respondent in its Rejoinder. However, the Respondent would like to go beyond this and, in a brief aside in its Rejoinder, seeks to have the Tribunal determine the ownership of the investment based on the *Salini* test, by establishing that even when an investment fulfills all of the *Salini* test requirements, only the entity making the contribution directly and undertaking the risk directly and exclusively can be considered an investor under the Treaty.

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<sup>488</sup> Rejoinder Memorial, para. 265.

<sup>489</sup> Counter-Memorial, para. 224.



339. The Parties are in dispute – and the Tribunal is cognizant of the controversy in international investment law – over the application of the so-called objective test to determine the existence of an investment. Such a controversy exists not only in connection with the applicability of the test in general, but even if one were to accept its application as a general rule, there is a disagreement on whether it applies to non-ICSID arbitrations which are not governed by the Washington Convention of 1965. However, the disputed issue concerns the existence or not of an investment, which is not challenged in this case. In the present case, the Tribunal is asked to create a *Salini* test to determine an investor's qualification as such, even if the investment qualifies as such and the Claimant meets the definition of investor under the Treaty.
340. The Tribunal has already indicated that the Treaty determines an investor's status and that the Claimant is an investor under the Treaty. Similarly, it has found – and the Parties do not dispute – that the shares in CMMK and the Mining Concessions are investments under the Treaty. The Tribunal is not convinced that it should develop an additional test to add requirements for the determination as investors that are not provided for in the Treaty.
341. In conclusion, and based on the reasons given, the Tribunal, by a majority vote, will dismiss this jurisdictional objection.

**(c) On whether SAS is an interested party in this dispute**

342. The Tribunal reiterates that the Treaty only contains a requirement related to the laws on a company's constitution to consider such a company as an investor. Nothing in the Treaty requires that a company incorporated under the laws of the United Kingdom, or of any other territory to which this Treaty is extended pursuant to article 11, must operate in the place it was incorporated or have substantial businesses in the United Kingdom or in such territory in order to qualify as an investor. The Treaty does not even require the investor to have its seat or principal place of business in the United Kingdom.
343. It is true, as the Respondent notes, that Bolivia extended its consent to disputes between a company of a Contracting State and the other Contracting State. But it is no less true that the Treaty itself established that, for a company to belong to a Contracting State, it suffices that it was constituted or incorporated under the laws of the corresponding contracting State. SAS fulfills this requirement.
344. The Tribunal has already established that SAS is an investor under the Treaty, such that it cannot be said that protection is being given to an unprotected company.

345. As to the cases the Respondent cites in support of its allegation, the Tribunal agrees with the Claimant that the treaties, the facts, and the issues in dispute in the *TSA Spectrum v. Argentina* and *Loewen v. USA* cases make those cases inapposite to the situation under consideration in the present arbitration. As to the *Venoklim v. Venezuela* case, it was an arbitration commenced under the Venezuelan Law on the Promotion and Protection of Investments where the dispute was over the definition of “investor” and, in particular, the requirement of effective control over the investment, which is not provided for under the Treaty.
346. Therefore, the Tribunal, by a majority vote, rejects the jurisdictional objection presented by the Respondent.

**B. THE CLAIMS AS A WHOLE ARE INADMISSIBLE SINCE SAS DID NOT HAVE CLEAN HANDS AND DID NOT SATISFY THE LEGALITY OF THE INVESTMENT REQUIREMENT**

347. The Parties dispute the relevance of the alleged actions by the Claimant to the enjoyment of protection under the Treaty. The Parties present conflicting positions on the existence and application of the clean hands doctrine **(a)**, on the legality requirement **(b)**, and on the alleged lack of clean hands by the Claimant **(c)**.

**1. The Respondent’s Position**

**(a) On the existence and application of the clean hands doctrine**

348. The Respondent argues that the clean hands doctrine is part of the applicable law and requires that the party seeking protection of its rights has not acted illegally or illegitimately.<sup>490</sup> The Respondent contends that this doctrine derives from the fundamental principles of equity and justice, and is a corollary to the maxim “*nemo auditor propiam turpitudinem allegans*”.<sup>491</sup>
349. Relying upon the *Al-Warraq v. Indonesia*, *Fraport v. Philippines II*, and *Hamester v. Ghana* tribunals, the Respondent contends that having clean hands as a condition to access justice is a general principle of international law.<sup>492</sup> Moreover, the Respondent posits that investment tribunals have been consistent in rejecting claims brought by parties that have acted unfairly and illegally<sup>493</sup> and states that acts of bad faith, corruption, fraud, or deceitfulness lead to the

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<sup>490</sup> Counter-Memorial, section 5.2.1.1.

<sup>491</sup> Counter-Memorial, para. 272.

<sup>492</sup> Counter-Memorial, paras. 273-274.

<sup>493</sup> Counter-Memorial, para. 276. The Respondent refers to the tribunals in *World Duty Free v. Kenya*, *Plama v. Bulgaria*, and *Al-Warraq v. Indonesia*.

inadmissibility of the claims brought by an investor.<sup>494</sup> The Respondent argues that these decisions should be considered as an application of the clean hands doctrine.<sup>495</sup>

350. Furthermore, to support the assertion that the clean hands doctrine constitutes a general principle of international law that must be applied by the Tribunal,<sup>496</sup> the Respondent invokes individual and dissenting opinions of judges of the Permanent Court of International Justice (the “**PCIJ**”) and the ICJ,<sup>497</sup> as well as other tribunals and international courts, including the Iran-United States Claims Tribunal, and the PCA.<sup>498</sup> Finally, the Respondent alleges that renowned scholars have confirmed the requirement to appear before a tribunal with clean hands.<sup>499</sup>
351. In its Rejoinder, the Respondent reiterates that the clean hands doctrine is recognized under international law and is part of international public order. Further, it states that the clean hands doctrine is an expression of the good faith principle, is included in various legal maxims (“*he who comes to equity for relief must come with clean hands*”) and principles (*ex jure jus non oritur, nemo auditur propriam turpitudinem allegans, ex turpi causa non oritur actio, ex dolo malo non*

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<sup>494</sup> Counter-Memorial, para. 277. In this context, Respondent cites the *Phoenix Action v. Czech Republic*; *Plama v. Bulgaria*; *Hamester v. Ghana*; *Inceysa v. El Salvador*; *Al-Warraq v. Bulgaria*; and *World Duty Free v. Kenya* tribunals.

<sup>495</sup> Counter-Memorial, para. 275.

<sup>496</sup> Counter-Memorial, para. 278.

<sup>497</sup> Counter-Memorial, paras. 280-282. Respondent refers to RLA-75, *Diversion of Water from the Meuse*, PCIJ Case, Judgment, June 28, 1937, individual opinion of M. Hudson, PCIJ Ser. A/B No. 70, p. 77; RLA-76, *Diversion of Water from the Meuse*, PCIJ Case, Judgment, June 28, 1937, dissenting opinion of M. Anzilotti, PCIJ Ser. A/B No. 70, p. 50; RLA-77, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, ICJ Case, Judgment, December 19, 2005, dissenting opinion of ad-hoc Judge J. Kateka, para. 46; RLA-78, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, ICJ Case, Order on Precautionary Measures, June 2, 1999, dissenting opinion of vice-president C. Weeramantry, p. 184; RLA-79, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ case, Judgment, June 27, 1986, dissenting opinion of Judge S. Schwebel, para. 75; RLA-80, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, ICJ Case, Judgment, February 14, 2002, dissenting opinion of ad-hoc Judge C. Van den Wyngaert, paras. 35, 84; RLA-81, *United States Diplomatic and Consular Staff in Tehran (United States of America vs. Iran)*, ICJ Case, Judgment, May 24, 1980, dissenting opinion of Judge P. Morozov, para. 3.

<sup>498</sup> Counter-Memorial, para. 283. Respondent refers to RLA-82, *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC Case No. ICC-01/09-02/11, Decision on the Prosecution’s reconsideration of the decision to excuse Mr. Kenyatta from continuous presence at trial, November 26, 2013, dissenting opinion of Judge C. Eboe-Osuji, para. 51; RLA-83, *United States of America v. Flick*, United Nations War Crime Commission, *Law Reports of Trials of War Criminals*, vol. IX, The United Nations War Crimes Commission by His Majesty’s Stationary Office, 1949, p. 36; RLA-84, *Rouhollah Karubian v. Islamic Republic of Iran*, Iran-United States Claims Tribunal case No. 419 (569-419-2), Award, March 6, 1999, paras. 159-161; RLA-85, *James M. Saggi, Michael R. Saggi and others v. Islamic Republic of Iran*, Iran-United States Claims Tribunal Case No. 298 (544-298-2), Award, January 22, 1993, paras. 54, 62; RLA-86, *Guyana v. Suriname*, PCA case, Award, September 17, 2007, paras. 417-422.

<sup>499</sup> Counter-Memorial, paras. 284-285; RLA-87, J. Crawford, *Brownlie’s Principles of Public International Law*, 8<sup>th</sup> ed., Oxford University Press, 2012, p. 701; RLA-88, I. Brownlie, *Principles of Public International Law*, 7<sup>th</sup> edición, Oxford University Press, 2008, p. 503, cited by P. Dumberry and G. Dumas-Aubin, *The Doctrine of ‘Clean Hands’ and the Inadmissibility of Claims by Investors Breaching International Human Rights Law*, 10 Transnational Dispute Management, issue 1, 2013, p. 1; RLA-89, S. Schwebel, *Clean Hands in the Court*, 31 Studies in Transnational Legal Policy, 1999, p. 74; RLA-90, E. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, Banks Law Publishing, 1925, p. 713; RLA-88, G. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 Revue Canadienne de Droit International 1, 1957, p. 119, cited by P. Dumberry y G. Dumas-Aubin, *The Doctrine of ‘Clean Hands’ and the Inadmissibility of Claims by Investors Breaching International Human Rights Law*, 10 Transnational Dispute Management, issue 1, 2013, p. 2; RLA-74, H. Lauterpacht, *Recognition in International Law*, Cambridge University Press, 1947, pp. 420-421.

*oritur actio*), and operates as an impediment to the admissibility of claims in cases where the claimant has acted inappropriately in relation to the subject matter of its claim.<sup>500</sup>

352. Similarly, the Respondent alleges that the doctrine has been recognized as such, or in some of the principles mentioned above, as an accepted principle of international law.<sup>501</sup> Contrary to the Claimant's suggestion, Bolivia explains that the analysis and application of the clean hands doctrine was relevant in the decision of the *Al-Warraq v. Indonesia* and *Fraport v. Philippines II* tribunals<sup>502</sup>.
353. The Respondent further argues that the clean hands doctrine is recognized in civil law and common law systems,<sup>503</sup> and quotes legal authorities that would confirm the existence of such principle in the United States, the United Kingdom, Germany, and France.<sup>504</sup> The Respondent concludes that the clean hands doctrine is one of the "general principles of law recognized by civilized nations" under Article 38(1)(c) of ICJ Statute.<sup>505</sup>
354. Further, the Respondent notes that the clean hands doctrine has been recognized as part of international public order.<sup>506</sup> Relying upon the tribunals in *World Duty Free v. Kenya* and *Plama v. Bulgaria*, the Respondent argues that conducts contrary to international public order result in the rejection of the claims.<sup>507</sup>
355. The Respondent alleges that the argument put forward by the Claimant stating that arbitral case law is "*unequivocally against Bolivia*" as to the existence of the clean hands doctrine under international law is based on an erroneous interpretation of international case law.<sup>508</sup>
356. Regarding ICJ case law, the Respondent notes that the cases invoked by the Claimant are irrelevant<sup>509</sup> or fail to support its position that the ICJ has declined to recognize the clean hands

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<sup>500</sup> Respondent's Rejoinder, paras. 301-302.

<sup>501</sup> Respondent's Rejoinder, para. 307.

<sup>502</sup> Respondent's Rejoinder, paras. 308-309. See also Hearing Transcript, Day 1, 255:24 – 256:20 (Spanish).

<sup>503</sup> Respondent's Rejoinder, para. 301.

<sup>504</sup> Respondent's Rejoinder, paras. 303-306, citing RLA-228, J. N. Pomeroy, *A Treatise on Equity Jurisprudence*, 5<sup>th</sup> edition, Bancroft-Whitney Company, 1941, para. 397; RLA-230, *Jones v. Lenthal*, decision of the House of Lords, [1669] 1 Chan. Cas. 153, p. 739; RLA-233, *Stone & Rolls Ltd (in liquidation) v. Moore Stephens (a firm)*, decision of the House of Lords, [2009] 1 AC, pp. 1462 y 1476; and in RLA-234, *Safeway Stores Ltd. And others v. Twigger and others*, decision of the House of Lords, [2010] EWCA Civ 1472, pp. 1629, 1634-1635; RLA-66, R. Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine", in *Between East and West: Essays in Honour of Ulf Frank*, K. Hobér and others (eds.), Juris Publishing, 2010, p. 318; RLA-235, French Court of Appeal, II Civil Chamber, Decision, February 4, 2010, n° 09-11.464; RLA-236, French Court of Appeal, II Civil Chamber, Decision, January 24, 2002, n° 99-16.576.

<sup>505</sup> Respondent's Rejoinder, para. 306.

<sup>506</sup> Respondent's Rejoinder, para. 310.

<sup>507</sup> Respondent's Rejoinder, paras. 310-311.

<sup>508</sup> Respondent's Rejoinder, para. 313.

<sup>509</sup> Respondent's Rejoinder, para. 315, referring to *La Grand* and *Avena* cases.

doctrine.<sup>510</sup> Moreover, Bolivia notes that at least one of the cases cited by Claimant – *Niko Resource v. Bangladesh* – admits that the clean hands doctrine is a general principle recognized by civilized nations.<sup>511</sup>

357. As regards the characterization the Claimant makes of Professors Dugard and Crawford’s position as Special Rapporteurs to the ILC on diplomatic protection and State responsibility, respectively, the Respondent explains that Prof. Dugard’s report does not analyze the existence of the clean hands doctrine, but rather whether it is appropriate to codify the principle as part of the law of diplomatic protection,<sup>512</sup> whereas Prof. Crawford refers to the principle in a chapter “*not concerned with such procedural questions as locus standi, or with the admissibility of claims*”.<sup>513</sup>
358. The Respondent also criticizes the characterization that the Claimant makes of the *Yukos* case, asserting among other things that the tribunal’s conclusion on the status of the clean hands doctrine under international law is irrelevant because the tribunal did not take into consideration the practice of the States and only considered the practices of international courts and tribunals.<sup>514</sup>
359. Regarding the criteria for the application of the clean hands doctrine, the Respondent contends that the only relevant criteria – which is satisfied in the present case – is the causal link between SAS’ abuses and the inadmissibility of its claims.<sup>515</sup> In any event, the Respondent argues that the alleged reciprocity criterion invoked by the Claimant is also fulfilled. This criterion would require the existence of a reciprocal relationship between the underlying facts of the claim and the facts invoked by the Respondent as “unclean hands”.<sup>516</sup> The Respondent states that the reciprocity of the obligations between the Parties is enshrined in the Treaty and it is implicit in investment treaty law.<sup>517</sup> Thus, while Bolivia was obliged to protect the investment made in its territory by a national of the United Kingdom, the Claimant, as alleged investor, was obliged to invest in accordance with Bolivia’s laws.<sup>518</sup> The Respondent argues that the Claimant, through CMMK, failed to

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<sup>510</sup> Respondent’s Rejoinder, paras. 315-316, referring to *Oil Platforms* and *Legality of the Use of Force* cases.

<sup>511</sup> Respondent’s Rejoinder, para. 316; Hearing Transcript, Day 1, 254:7-19 (Spanish).

<sup>512</sup> Respondent’s Rejoinder, para. 317; CLA-119, J. Dugard, *Sixth report on diplomatic protection* (57<sup>a</sup> Session of the International Law Commission), A/CN.4/546, 2005, para. 1.

<sup>513</sup> Respondent’s Rejoinder, para. 318; CLA-120, International Law Commission, *Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur* (May 3 – July 23, 1999), Document A/CN.4/498/Add.2, in *II Yearbook of the International Law Commission*, 1999, para. 335.

<sup>514</sup> Respondent’s Rejoinder, para. 321.

<sup>515</sup> Respondent’s Rejoinder, para. 324.

<sup>516</sup> Respondent’s Rejoinder, para. 325.

<sup>517</sup> Respondent’s Rejoinder, para. 326.

<sup>518</sup> Respondent’s Rejoinder, para. 326.

comply with such obligation in its treatment of the Indigenous Communities, and that it was in fact its conduct that led to the Reversion.<sup>519</sup>

360. Finally, the Respondent argues that the other criteria identified by the Claimant, allegedly resulting from the *Guyana* and *Niko Resources* cases, do not correspond to the criteria underlying the clean hands doctrine and would be incoherent and inconsistent.<sup>520</sup>

**(b) On the legality requirement**

361. The Respondent argues that, in addition to the clean hands doctrine, in order to be protected under international law, the investment needs to be established in accordance with domestic and international law.<sup>521</sup> The Respondent alleges that, under this principle, if the investment was not made pursuant to the law, the tribunal must decline jurisdiction to hear any claim or, at least, deem it inadmissible.<sup>522</sup> The Respondent notes that the tribunals' jurisdiction is restricted to the consent of the State, and they do not agree to the arbitration of claims resulting from investments made in a manner contrary to the law, so that no tribunal has jurisdiction to decide over these cases.<sup>523</sup>
362. The Respondent holds that, even if this legality requirement was not expressly provided for under a treaty, the obligation to comply with the law of the host State and international law is implicit and its violation shall be punished.<sup>524</sup> The Respondent submits three reasons: (i) this is the only interpretation consistent with the fundamental purpose of respect for the rule of law;<sup>525</sup> (ii) it is incoherent to assume that a State would accept protection of an investment made in violation of the law;<sup>526</sup> (iii) "*the purpose of the investment arbitration system is to protect solely legal and bona fide investments*".<sup>527</sup>
363. The Respondent argues that the Claimant does not deny the existence of this legality requirement or its applicability to this case, and acknowledges that it "*is implicit in the system of investment treaty arbitration*."<sup>528</sup>

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<sup>519</sup> Respondent's Rejoinder, para. 326.

<sup>520</sup> Respondent's Rejoinder, paras. 327-329.

<sup>521</sup> Counter-Memorial, para. 287. See Respondent's Rejoinder, para. 331.

<sup>522</sup> Counter-Memorial, para. 289. See also Respondent's Rejoinder, para. 331.

<sup>523</sup> Counter-Memorial, paras. 289-290.

<sup>524</sup> Counter-Memorial, para. 291.

<sup>525</sup> Counter-Memorial, para. 292.

<sup>526</sup> Counter-Memorial, para. 292.

<sup>527</sup> Counter-Memorial, para. 292.

<sup>528</sup> Respondent's Rejoinder, para. 331, footnote 547, citing Claimant's Reply Memorial, para. 219.

364. The Respondent argues that the Claimant's defense in this issue is unfounded for two reasons. First, the Respondent argues that, contrary to SAS' defense, the legality requirement is not limited to the laws governing the admission or the establishment of an investment in Bolivia.<sup>529</sup> The Respondent notes that the decision in *Saba Fakes* cannot support the Claimant's positions as that tribunal's assertion on what laws constitute the legality requirement was mere *obiter dictum* and the decision about lack of jurisdiction was limited to verifying that the claimant had no investment, making it unnecessary to analyze its legality or illegality.<sup>530</sup>
365. The Respondent further states that to accept, as the Claimant proposes, to exclude consideration of all laws that do not concern the admission of foreign investment would be contrary to the spirit of international investment law.<sup>531</sup> The Respondent invokes several investment arbitration cases to support its argument that the main purpose of the investment treaty system is limited to the protection of legal investments.<sup>532</sup> The Respondent submits that the exclusion of illegal investments can only be effective if the legal and regulatory framework of the host State is considered as a whole in order to determine the legality of such investments.<sup>533</sup> The Respondent argues that SAS violated, through CMMK, fundamental principles of Bolivian law, as well as international law, which according to the Respondent "*has the direct consequence of having claims fall outside the jurisdiction of the Tribunal under the Treaty*".<sup>534</sup>
366. Second, the Respondent alleges that the assessment of the legality of an investment must be made in respect of the entire duration of the investment and the consequence in this case is that SAS' claims are left outside the Tribunal's scope of jurisdiction.<sup>535</sup> At any rate, the Respondent submits that CMMK's conduct occurred during the making of the alleged investment, as CMMK was still in the process of making the investment at the time of the enactment of the Reversion Decree.<sup>536</sup>

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<sup>529</sup> Respondent's Rejoinder, para. 332.

<sup>530</sup> Respondent's Rejoinder, paras. 333-334.

<sup>531</sup> Respondent's Rejoinder, para. 335.

<sup>532</sup> Respondent's Rejoinder, paras. 335-336; RLA-92, *SAUR International S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability of June 6, 2012, para. 308. See also RLA-72, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award of April 15, 2009, paras. 100-102; CLA-121, *Hulley Enterprises Limited (Chipre) v. Russian Federation*, PCA Case No. AA 226, Final award of July 18, 2014, para. 1352; CLA-122, *Yukos Universal Limited (Isle de Man) v. Russian Federation*, PCA Case No. AA 227, Final award of July 18, 2014, para. 1352; CLA-123, *Veteran Petroleum Limited (Chipre) v. Russian Federation*, PCA Case No. AA 228, Final award of July 18, 2014, para. 1352; RLA-71, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [III]*, ICSID Case No. ARB/11/12, Award of December 10, 2014, para. 332.

<sup>533</sup> Respondent's Rejoinder, para. 337.

<sup>534</sup> Respondent's Rejoinder, para. 337.

<sup>535</sup> Respondent's Rejoinder, Section 4.2.2.2; Hearing Transcript, Day 1, 253:9 – 254:5 (Spanish).

<sup>536</sup> Respondent's Rejoinder, paras. 339-340;

367. The Respondent notes that the Claimant's argument that it could act illegally after having made the investment cannot be accepted given that the purpose of the investment treaty system is not the promotion of illegal investments.<sup>537</sup> The Respondent submits that the decisions cited by the Claimant are irrelevant and do not support the position that if the unlawful conduct occurs after the investment is made, it has no impact on jurisdiction;<sup>538</sup> they are merely *obiter dictum*<sup>539</sup> or they refer to cases with legality clauses expressly limiting their analysis to the time the investment was made.<sup>540</sup>
368. In light of the above, the Respondent reaffirms the duty of the Tribunal to decline jurisdiction to hear the Claimant's claims as they are tainted with unlawful acts pursuant to Bolivian and international law or, alternatively, declare them inadmissible.<sup>541</sup>

**(c) On the Claimant's alleged lack of clean hands**

369. The Respondent contends that the Claimant caused a situation that led to the reversion of concessions.<sup>542</sup> According to the Respondent, the Claimant undermined the human, social, and collective rights of a community that requires special protection under international law.<sup>543</sup> The Respondent asserts that the Tribunal must construe the Treaty pursuant to the Vienna Convention which, in the opinion of the Respondent, requires the application of all sources of law guaranteeing the protection of the Indigenous Communities.<sup>544</sup> The Respondent argues that, by doing so, the Tribunal will find that the Claimant does not have clean hands and, consequently, its claims are inadmissible.<sup>545</sup>

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<sup>537</sup> Respondent's Rejoinder, para. 341; RLA-92, *SAUR International S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability of June 6, 2012, para. 308; RLA-72, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, paras. 100-102.

<sup>538</sup> Respondent's Rejoinder, para. 342; CLA-121, *Hulley Enterprises Limited (Chipre) v. Russian Federation*, PCA Case No. AA 226, Final award of July 18, 2014, para. 1370; CLA-122, *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final award of July 18, 2014, para. 1370; CLA-123, *Veteran Petroleum Limited (Ciprus) v. Russian Federation*, PCA Case No. AA 228, Final award of July 18, 2014, para. 1370.

<sup>539</sup> Respondent's Rejoinder, para. 343; CLA-128, *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, Award of January 16, 2013, paras. 165-167.

<sup>540</sup> Respondent's Rejoinder, para. 344; RLA-31, *Gustav F. W. Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, para. 127; RLA-56, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, September 27, 2012, para. 266; CLA-126, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Republic of Argentina*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, December 21, 2012, paras. 318-319; RLA-91, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, August 16, 2007, para. 345; CLA-127, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, October 4, 2013, para. 193.

<sup>541</sup> Counter-Memorial, para. 293.

<sup>542</sup> Counter-Memorial, para. 294.

<sup>543</sup> Counter-Memorial, para. 294. See also Hearing Transcript, Day 1, 256:20 – 258:3 (Spanish).

<sup>544</sup> Counter-Memorial, para. 295.

<sup>545</sup> Counter-Memorial, para. 295.



370. First, the Respondent refers to the alleged physical attacks against the personal integrity of women from the Indigenous Communities. The Respondent submits that “*CMMK employees disrespected women from the Indigenous Communities, violating their right to personal, physical, psychological, and moral integrity and acting against the prohibition of any form of ‘physical, sexual, psychological violence [against women] [...] that includes rape, abuse and sexual violence’.*”<sup>546</sup> These actions would have consisted of constant verbal harassment, discrimination based on their indigenous identity, and abuse (including against minors), with some of these abuses resulting in pregnancies.<sup>547</sup>
371. Second, the Respondent attributes to the Claimant the infringement of the right to self-determination and, in particular, self-government, of the Indigenous Communities in order to impose its vision of development.<sup>548</sup> The Respondent notes that this fundamental right is internationally recognized, in the national laws of Bolivia, its Constitution, and it is applicable to the mining activity by express provisions in the Mining Law.<sup>549</sup>
372. The Respondent asserts that the Indigenous Communities have established legitimate authorities and specific mechanisms for decision-making and that, in this specific case, the decision to perform large scale open-pit mining had to be reached unanimously by an assembly.<sup>550</sup> The Respondent argues that given the impossibility to reach the necessary consensus, the Claimant attempted to fabricate it “*by using several stratagems which included the use of force, intimidation, unauthorized entry into the territory of the Indigenous Communities, failure to recognize the legitimate authorities and, in full disregard for the right to self-government, the creation of illegitimate authorities*”.<sup>551</sup>
373. The Respondent argues that the Claimant implemented a strategy to gain followers in the most remote communities, which were the least affected by the Project, and to silence the opposition in the Malku Khota and Kalachaca communities.<sup>552</sup> Similarly, the Respondent asserts that the Claimant imposed its own decision-making process based on majorities, and legitimized a “new authority”, COTOA-6A, which, as confirmed during the examination of Mr. Mallory, was created with the sole purpose of allowing CMMK to develop its Project and had no other will than the

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<sup>546</sup> Counter-Memorial, para. 297.

<sup>547</sup> Counter-Memorial, para. 299.

<sup>548</sup> Counter-Memorial, para. 302.

<sup>549</sup> Counter-Memorial, para. 303.

<sup>550</sup> Counter-Memorial, para. 307; Hearing Transcript, Day 1, 257:7-20 (Spanish); Bolivia’s Post-Hearing Brief, paras. 22-24. See Counter-Memorial, section 2.2.

<sup>551</sup> Counter-Memorial, para. 309; Bolivia’s Post-Hearing Brief, paras. 24-26. See also Counter-Memorial, sections 3.3.3, 3.4, 3.5.

<sup>552</sup> Bolivia’s Post-Hearing Brief, paras. 38-39.

Company's own will, and that also supported it actively.<sup>553</sup> The Respondent asserts that *"this system caused a profound division within the Indigenous Communities, which rely on their unity to survive, and the overruled minority had to resort to extreme means to have its voice heard."*<sup>554</sup>

374. The Respondent contends that, in order to silence the leaders who defended the interest of minorities, CMMK carried out an intimidation strategy, including baseless criminal claims against community leaders,<sup>555</sup> and violence, withholding, and threats against community member Benedicto Gabriel Veizaga, and his family members, who was also forced to sign an agreement approving of the activities performed by the Company and warned not to attend another community or cooperative meeting in Malku Khota.<sup>556</sup>
375. The Respondent further argues that, in an attempt to influence and undermine decisions made by the Indigenous Communities, CMMK employees, dressed with the communities' typical clothing, infiltrated an important ceremony of the Indigenous Communities, the Tantachawi (Council or Assembly), where the assistance of outsiders is specifically forbidden.<sup>557</sup> According to the Respondent, *"with such act the ayllu's fundamental value not to lie (ama llulla) was violated because the infiltrator lied to an entire collectivity, in this case, the ayllus and communities from Mallku Khota"*.<sup>558</sup> In addition to the above-mentioned, CMMK began to take *de facto* control of houses and the territory of the community members, also preventing them from moving freely for cattle-grazing purposes.<sup>559</sup>
376. Finally, the Respondent alleges that the Project threatened the fundamental right of the Indigenous Communities to preserve and protect the environment in their territories<sup>560</sup> and to *"strengthen their own relationship with their land [...] and other resources which they have traditionally possessed and occupied [...]"*.<sup>561</sup> The Respondent contends that the Project implied a serious environmental risk, which could even lead to the destruction of the sacred mountain and surrounding lagoons of the Indigenous Communities from Northern Potosi,<sup>562</sup> in addition to

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<sup>553</sup> Counter-Memorial, para. 312; Bolivia's Post-Hearing Brief, paras. 44-47.

<sup>554</sup> Counter-Memorial, para. 313.

<sup>555</sup> Counter-Memorial, para. 314. See Counter-Memorial, section 3.5. See also Hearing Transcript, Day 9, 1880:5-8 (Spanish); Bolivia's Post-Hearing Brief, paras. 42, 47.

<sup>556</sup> Counter-Memorial, paras. 315-316.

<sup>557</sup> Counter-Memorial, para. 318.

<sup>558</sup> Counter-Memorial, para. 318.

<sup>559</sup> Counter-Memorial, para. 319.

<sup>560</sup> Counter-Memorial, para. 320.

<sup>561</sup> Counter-Memorial, para. 319, citing RLA-39, United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, September 13, 2007, Article 25.

<sup>562</sup> Counter-Memorial, paras. 321-322. See Counter-Memorial, section 2.2.

involving “*an inexorable forced displacement of the community outside their ancestral territories*”.<sup>563</sup>

377. The Respondent argues that the risk to the environment and the risk of dispossession of their lands was a matter of special concern for the Indigenous Communities, which led to significant social tension.<sup>564</sup> According to the Respondent, the Indigenous Communities have the right to decide their means of development insofar as said development affects their territories and, in this case, the Indigenous Communities decided that the Project development ran counter to their own development. This decision was reflected in the reversion of the Mining Concessions.<sup>565</sup>
378. In its Rejoinder Memorial on Jurisdiction, the Respondent rejects the Claimant’s position regarding the fulfillment of the burden of proof. First, the Respondent argues that under Article 27(1) of the UNCITRAL Rules, the burden of proof was met in its Counter-Memorial by stating the facts supporting its objections based on the clean hands doctrine and the illegality of the investment. Therefore, the Claimant would have had to submit evidence in its Reply Memorial on the admissibility of its claims and the Tribunal’s jurisdiction over them.<sup>566</sup>
379. The Respondent further argues that the applicable standard of proof is the preponderance of evidence or the balance of probabilities<sup>567</sup> and that the Claimant’s arguments to contend that the applicable standard is “clear and convincing evidence” on this point are wrong and unsupported by the doctrine.<sup>568</sup> Regarding the three decisions the Claimant cites to support its position, the Respondent submits that in *Rompetrol* and *Libananco* no clear and convincing evidence was required. Instead, the standard of balance of probabilities was applied and, in *Siag v. Egypt*, the standard of proof was not a controversial issue.<sup>569</sup>
380. Second, the Respondent asserts that, notwithstanding the burden of proof and its assessment, there is sufficient evidence to dismiss SAS’ claims since they are not within the Tribunal’s jurisdiction.<sup>570</sup> In this connection, the Respondent contends to have proven that CMMK engaged in some conduct, including the creation of illegitimate organizations, physical abuse against the Malku Khota community members, the presentation of baseless criminal claims against the

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<sup>563</sup> Counter-Memorial, para. 321.

<sup>564</sup> Counter-Memorial, para. 323.

<sup>565</sup> Counter-Memorial, para. 324.

<sup>566</sup> Respondent’s Rejoinder, para. 348.

<sup>567</sup> Respondent’s Rejoinder, para. 349.

<sup>568</sup> Respondent’s Rejoinder, paras. 347-349.

<sup>569</sup> Respondent’s Rejoinder, para. 350.

<sup>570</sup> Respondent’s Rejoinder, para. 351.

Indigenous Authorities and the payment of bribes to police officers and journalists, which are contrary to Bolivian and international law and led to division and violence within the Indigenous Communities.<sup>571</sup>

381. In its Post-Hearing Brief, Bolivia argued that “*CMMK committed several abuses that led to an unsustainable escalation of violence that endangered the life and rights of the Local Communities and the public officials and forced the State, after having supported the continuity of the Project, to decree Reversion as an ultima ratio*”.<sup>572</sup> The Respondent notes that these abuses warrant the rejection of SAS’ claims.<sup>573</sup>
382. First, the Respondent argues that CMMK’s negligence in the management of community relations resulted in the opposition of the communities to the Project, as reflected in the authoritative votes of December 2010 and January 2011.<sup>574</sup> Contrary to the Claimant’s argument, Bolivia notes that there is no evidence that the voting took place amidst intimidation or coercion. Further, Mr. Gonzales Yutronic did not report to the authorities the violent acts he supposedly witnessed nor did Mr. Angulo mention this in any of his reports on these meetings.<sup>575</sup>
383. The Respondent contends that the Hearing confirmed, at least, four forms of negligence by CMMK in the management of the community relations: (i) its person in charge of community relations, Mr. Angulo, was not aware of BSR’s recommendations (the only report on community relations commissioned by SAS, SASC, or CMMK) and, therefore, acted contrary to the recommendations made by BSR;<sup>576</sup> (ii) the hiring of Ms. Carmen Huanca into the community relations team caused major problems that led to her dismissal;<sup>577</sup> (iii) the failure to communicate the true Project implications, and information on the impact of exploration activities, despite the recommendations made by BSR and its identification of these shortcomings in the Company program;<sup>578</sup> and (iv) SAS dismissal of women’s rape accusations while CMMK management was involved in covering up these events.<sup>579</sup>

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<sup>571</sup> Respondent’s Rejoinder, para. 352.

<sup>572</sup> Bolivia’s Post-Hearing Brief, para. 20.

<sup>573</sup> Bolivia’s Post-Hearing Brief, section 3.

<sup>574</sup> Bolivia’s Post-Hearing Brief, para. 26.

<sup>575</sup> Bolivia’s Post-Hearing Brief, para. 27.

<sup>576</sup> Bolivia’s Post-Hearing Brief, paras. 29-31.

<sup>577</sup> Bolivia’s Post-Hearing Brief, para. 32.

<sup>578</sup> Bolivia’s Post-Hearing Brief, paras. 33-34.

<sup>579</sup> Bolivia’s Post-Hearing Brief, para. 36.

384. Second, Bolivia argues that the Hearing confirmed that CMMK's illegal abuses to silence the opposition to the Project resulted in significant acts of violence in mid-2012 and left Bolivia no other option than to decree the Reversion.<sup>580</sup>
385. The Respondent emphasizes that "*the illegalities committed by CMMK were implemented by recommendation of Witness X under the supervision and approval of Messrs. Mallory and Gonzales Yutronic*";<sup>581</sup> and they were concealed in CMMK's accounting books.<sup>582</sup> Bolivia underscores that, during the Hearing, the Claimant did not cross-examine Witness X on facts such as the strategy to criminalize the leaders of the Indigenous Communities that opposed to the Project, the induced kidnapping of Saul Reque, undue payments to police officers, the arrest of Cancio Rojas, and the alleged "historic town hall (*cabildo histórico*)".<sup>583</sup> As to the credibility of Witness X, the Respondent draws attention to the fact that Witness X was not CMMK's counsel,<sup>584</sup> nor was there a contractual relationship with the State.<sup>585</sup>
386. Bolivia reiterated that the alleged "historic town hall" had been orchestrated by CMMK and Witness X to approve the popular consultation required under the law,<sup>586</sup> a fact that is "particularly serious" for the following reasons: (i) despite the fact that Mr. Gonzales Yutronic admitted that "*it is not correct for one to prepare beforehand*" the minutes of a meeting, this did not prevent Saúl Reque from drafting a text for this town hall as ordered by Witness X;<sup>587</sup> (ii) although Mr. Mallory acknowledged that if no consensus is reached for a meeting, it should not take place, the town hall took place even though Malku Khota and Kalachaca were not in attendance (they were marching to La Paz); (iii) Mr. Mallory admitted that CMMK intended to replace the early consultation process with the authoritative vote at the town hall.<sup>588</sup>
387. Finally, the Respondent claims that the participation of two CMMK employees in a town hall meeting in the area of Malku Khota, on May 28, 2012, triggered grave acts of violence in the area that killed community member José Mamani.<sup>589</sup>

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<sup>580</sup> Bolivia's Post-Hearing Brief, paras. 38-39.

<sup>581</sup> Bolivia's Post-Hearing Brief, para. 40; Hearing Transcript, Day 2, 419:22-13 (English).

<sup>582</sup> Bolivia's Post-Hearing Brief, para. 48.

<sup>583</sup> Bolivia's Post-Hearing Brief, paras. 42-43; 48-51.

<sup>584</sup> At any rate, Respondent alleges that attorney-client privilege does not protect against reporting a crime (Hearing Transcript, Day 9, 1850:2-16 (Spanish)); Bolivia's Post-Hearing Brief, para. 41.

<sup>585</sup> Bolivia's Post-Hearing Brief, para. 41.

<sup>586</sup> Bolivia's Post-Hearing Brief, para. 51.

<sup>587</sup> Bolivia's Post-Hearing Brief, para. 52.

<sup>588</sup> Bolivia's Post-Hearing Brief, para. 54.

<sup>589</sup> Bolivia's Post-Hearing Brief, para. 55.

388. The Respondent argues that, despite its support for the Project, the violent situation created by CMMK left the State with no other alternative than to decree reversion.<sup>590</sup> In this context, the Respondent argues that SAS' witnesses confirmed that Bolivia expressed its support for the Project, even in 2012,<sup>591</sup> and that it supported CMMK by sending police officers to the area to avoid violent clashes.<sup>592</sup>
389. On the other hand, the Respondent submits that during the Hearing the following claims against SAS were refuted: (i) that the Government of Potosí had demanded the creation of a mixed company, given that as Mr. Mallory confirmed at the Hearing, it was only suggested by the Governor;<sup>593</sup> (ii) that illegal mining was as important as SAS alleges, since it really involved "*some community members 'grinding rocks'.*"<sup>594</sup> and (iii) that Bolivia would have an economic interest in the Project which led it to enact the Reversion Decree.<sup>595</sup> In connection with this last point, the Respondent emphasizes that the Immobilization Zone was an area assigned to the COMIBOL since 2007, over which CMMK had no rights,<sup>596</sup> that there was no cooperation agreement with Chinese investors in order for them to take control of the Project (which is evidenced by the fact that four years after the Reversion there is no economic exploitation of the area),<sup>597</sup> and that to develop the Project, "[a]n agreement needs to be reached with the communities through consultation".<sup>598</sup>
390. According to the Respondent, the Hearing confirmed that the Reversion was the most appropriate measure to pacify the area, as other measures, such as the militarization suggested by SAS, are not effective to solve conflicts amongst the Indigenous Communities and have had disastrous consequences in the past.<sup>599</sup> Further, Mr. Chajmi confirmed that the conflicts would have ceased following the Reversion.<sup>600</sup>
391. Finally, the Respondent refers to the award in the *Copper Mesa* case to assert that the facts it had presented "*can and must be subject to different legal characterizations under international*

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<sup>590</sup> Bolivia's Post-Hearing Brief, para. 56

<sup>591</sup> Bolivia's Post-Hearing Brief, paras. 57-62.

<sup>592</sup> Bolivia's Post-Hearing Brief, para. 63; Hearing Transcript, Day 4, 870:20-25 (Spanish).

<sup>593</sup> Bolivia's Post-Hearing Brief, para. 66.

<sup>594</sup> Bolivia's Post-Hearing Brief, para. 67.

<sup>595</sup> Bolivia's Post-Hearing Brief, para. 69.

<sup>596</sup> Bolivia's Post-Hearing Brief, para. 70; Hearing Transcript, Day 3, 677:4-16 (Spanish).

<sup>597</sup> Bolivia's Post-Hearing Brief, para. 71.

<sup>598</sup> Bolivia's Post-Hearing Brief, para. 72.

<sup>599</sup> Bolivia's Post-Hearing Brief, para. 74.

<sup>600</sup> Bolivia's Post-Hearing Brief, para. 75.

*investment law and thus lead to different solutions*”.<sup>601</sup> In this connection, the Respondent finds that the abuses carried out by SAS and CMMK should lead the Tribunal to conclude that:

1. *The alleged investment by SAS is illegal and, accordingly, the Tribunal has no jurisdiction to resolve this dispute;*
2. *SAS’ claims are, in any case, inadmissible, because of the lack of ‘clean hands’;*
3. *If, par impossible, the Tribunal finds that it has jurisdiction and SAS’ claims are admissible, there is no causality between the actions of the State (according to domestic and international law) and the alleged damages to SAS (for being exclusively a consequence of its own acts); or*
4. *At most, the Tribunal shall reduce any sanction in this case by, at least, 75% to reflect SAS’ contribution to its own damages.*<sup>602</sup>

392. The Respondent argues that “*given the extreme seriousness of the facts in this case, solutions in subsections (a) and (b) of the preceding paragraph are the most appropriate*”.<sup>603</sup>

## **2. The Claimant’s Position**

### **(a) On the existence and application of the clean hands doctrine**

393. The Claimant argues that the clean hands doctrine – that is, a rule rendering inadmissible the entire case because of wrongs committed by the Claimant – is not recognized in international law.<sup>604</sup>

394. The Claimant submits that the authorities cited by the Respondent are insufficient to draw any conclusion that the principle exists, whether as customary international law or as a general principle of law.<sup>605</sup> The Claimant holds that the PCIJ and the ICJ have declined to declare that the clean hands doctrine exists, despite having had many opportunities to do so, having been invoked by numerous States pleading before them.<sup>606</sup> The Claimant disagrees with Bolivia’s criticism of

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<sup>601</sup> Bolivia’s Post-Hearing Brief, para. 77.

<sup>602</sup> Bolivia’s Post-Hearing Brief, para. 78.

<sup>603</sup> Bolivia’s Post-Hearing Brief, para. 79.

<sup>604</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 88. See also Claimant’s Reply Memorial, paras. 197, 201; SAS’ Post-Hearing Brief, para. 56.

<sup>605</sup> Claimant’s Reply Memorial, para. 202.

<sup>606</sup> Claimant’s Reply Memorial, para. 202; Hearing Transcript, Day 1, 137:5-12 (English). The Claimant submits that the clean hands doctrine has been invoked unsuccessfully by a number of States in other I.C.J. proceedings, namely, by the United States in CLA-116, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Decision on the Merits, I.C.J. Reports 161, 176-178 (2003)); CLA-117, *La-Grand (Germany v. United States of America)*, Judgment, I.C.J. Reports 466, 488-489 (2001)) and CLA-118, *Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 12, 38 (2004)), by the NATO respondents in the Legality of the Use of Force cases, RLA-89, Stephen Schwebel, “Clean Hands in the Court”, 31 *Stud. Transnat’l Legal Pol’y* 74 [1999]), and by Israel in the advisory proceedings on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory; CLA-119, John Dugard, *Sixth Report on Diplomatic Protection* (57th Session of the UN International Law Commission, 2005), A/CN.4/546, para. 5). See also Claimant’s Rejoinder Memorial on Jurisdiction, para. 89.

the ICJ cases cited by SAS to support this conclusion and adds that Bolivia's discussion is inherently contradictory.<sup>607</sup>

395. Regarding the *Guyana v. Suriname* award, Claimant submits that the Respondent misinterprets this decision that, according to SAS, “*actually expressed doubt as to whether the doctrine actually exists*”.<sup>608</sup>
396. The Claimant argues that the Respondent's attempt to invoke the clean hands doctrine and related principles as found in early claims commission cases fails to consider the proper context of those cases. Claimant submits that those claims concerned violations of laws on slavery and neutrality within the context of diplomatic protection.<sup>609</sup> Claimant cites Professor Crawford, who explains that these cases are all characterized by the fact that the breach of international law by the victim was the sole cause of the damage claimed, and that, on the contrary, when the State has violated international law in taking repressive action against the applicant, arbitrators have never declared the claim inadmissible.<sup>610</sup>
397. The Claimant further states that, in his report as Special Rapporteur on State Responsibility to the ILC, Professor Crawford concluded that it was not possible to consider the clean hands theory as an tenet of general customary law. Similarly, Claimant underscores that Professor Dugard, Special Rapporteur on Diplomatic Protection, saw no reason to include a provision in the draft articles dealing with the clean hands doctrine, based on the consideration that the evidence favoring the doctrine was inconclusive.<sup>611</sup>
398. Regarding the Respondent's dismissal of these reports, the Claimant notes that Professor Dugard's report examined the roots and application of the clean hands doctrine in international law to analyze whether there was international consensus as to its applicability within diplomatic protection.<sup>612</sup> In regard to with the Respondent's criticism of Professor Crawford's report, the

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<sup>607</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 99.

<sup>608</sup> Claimant's Reply Memorial, para. 203. See also Hearing Transcript, Day 1, 137:13-21 (English).

<sup>609</sup> Claimant's Reply Memorial, para. 204.

<sup>610</sup> Claimant's Reply Memorial, para. 205; CLA-120, James Crawford, *Second Report on State Responsibility* (51st Session of the UN International Law Commission, 1999), UN Doc A/CN.4/498/ and Add.1-4, p. 83, para. 334, citing Jean J.A. Salmon, “Des ‘Mains Propres’ Comme Condition de Recevabilité des Réclamations Internationales”, *10 Annuaire Français de Droit International*, 1964, pp. 224, 259.

<sup>611</sup> Claimant's Reply Memorial, para. 205; CLA-120, James Crawford, *Second Report on State Responsibility* (51st Session of the UN International Law Commission, 1999), UN Doc A/CN.4/498/ and Add.1-4, citing Rousseau, *Droit International Public*, p. 177, para. 170 (“it is not possible to consider the ‘clean hands’ theory as an institution of general customary law”); CLA-119, John Dugard, *Sixth Report on Diplomatic Protection* (57th Session of the UN International Law Commission, 2005), A/CN.4/546, para. 18.

<sup>612</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 101.



Claimant submits that his conclusions are no less true or relevant simply because the particular chapter under which the analysis is included does not deal with “procedural questions”.<sup>613</sup>

399. The Claimant criticizes Bolivia for failing to take into account the final awards in the *Yukos* case that, as the Claimant holds, are the most considered expression of the status of the clean hands doctrine. Indeed, the Claimant continues, the *Yukos* tribunal analyzed many of the cases invoked by the Respondent and concluded that unclean hands does not exist as a general principle of international law which would bar a claim by an investor.<sup>614</sup>
400. The Claimant submits that the only truly new legal authority is the *Al-Warraq v. Indonesia* case, which alone cannot “create from whole cloth an opposable clean hands doctrine in international law”.<sup>615</sup> The Claimant asserts that, as distinct from the present case, in *Al-Warraq* the basis for the invocation of the doctrine was related to fraud and corruption in relation to the claims themselves, which were proven and led to convictions in domestic courts;<sup>616</sup> further, the claimant in that case did not contest the existence of the doctrine, stating only that it was irrelevant.<sup>617</sup> At any rate, the Respondent submits that the statement about this doctrine is very cursory and does not identify it as a principle of international law.<sup>618</sup> Further, the Respondent submits that the application of the clean hands doctrine in *Al-Warraq* was not unanimous and that the caveat is important because there, like here, Bolivia’s claims of illegality do not relate to the acquisition of the investment.<sup>619</sup> Finally, the Claimant warns that there is no evidence that Professor Crawford did submit any expert report in support of the clean hands doctrine in that award, and any suggestion that Professor Crawford as Special Rapporteur on State Responsibility supported the existence of such doctrine is “highly misleading”.<sup>620</sup>
401. In its Rejoinder Memorial on Jurisdiction, the Claimant further argues that Bolivia’s assertion that the doctrine of clean hands is a general principle of law that should be applied in all cases rests on scholarly commentary advocating for it to be so, *i.e.*, *lege ferenda*.<sup>621</sup> Indeed, the very articles

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<sup>613</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 102.

<sup>614</sup> Claimant’s Reply Memorial, para. 206; See also Claimant’s Rejoinder Memorial on Jurisdiction, para. 93; Hearing Transcript, Day 1, 138:7-13 (English).

<sup>615</sup> Claimant’s Reply Memorial, para. 207; Claimant’s Rejoinder Memorial on Jurisdiction, footnote 319.

<sup>616</sup> Claimant’s Reply Memorial, para. 208.

<sup>617</sup> Claimant’s Reply Memorial, para. 208.

<sup>618</sup> Claimant’s Reply Memorial, para. 209.

<sup>619</sup> Claimant’s Rejoinder Memorial on Jurisdiction, footnote 319.

<sup>620</sup> Claimant’s Reply Memorial, para. 210. See also Claimant’s Rejoinder Memorial on Jurisdiction, footnote 319.

<sup>621</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 90; see Respondent’s Rejoinder, paras. 301-302 (citing RLA-66, R. Kreindler, “Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine”, *Between East and West: Essays in Honour of Ulf Frank, K. Hobér and others* (eds.), Juris Publishing, 2010; RLA-88, P. Dumberry, G. Dumas-Aubin, “The Doctrine of ‘Clean Hands’ and the Inadmissibility of Claims by Investors Breaching International Human Rights Law”, *10 Transnational Dispute Management*, issue 1, 2013).

cited by the Respondent acknowledge that the doctrine has yet to reach international consensus and acceptance.<sup>622</sup>

402. The Claimant further criticizes Bolivia's attempt to equate clean hands with the general principle of good faith or other Latin maxims, by means of "*broad and unspecified*" reference".<sup>623</sup> The Claimant asserts that should Bolivia insist that this Tribunal utilize good faith for regulating its jurisdiction, it would have to identify the source in international law for doing so, the rules and the conditions for the implementation of this principle, as well as its limits.<sup>624</sup> The Claimant contends that the Tribunal will not find support in international law for this task, including by reference to a non-opposable unclean hands doctrine.<sup>625</sup>
403. Similarly, the Claimant reproaches the Respondent's attempt at establishing that recognition and consensus exist between States as to the clean hands doctrine's existence by referring in a piecemeal and contextualized fashion to German, French, British, and U.S. law.<sup>626</sup> The Claimant does not dispute that iterations of the clean hands doctrine exist in certain national jurisdictions, but submits that these rules, grounded as they are in equity, are not automatic, binary rules requiring courts to declare inadmissibility without ascertaining relative fault and proportionality.<sup>627</sup>
404. Contrary to the Respondent's arguments in its Rejoinder, the Claimant contends that the clean hands doctrine is not part of international public policy, and neither *Fraport* nor *World Duty Free* support such an assertion.<sup>628</sup> Further, the Claimant states that the Respondent does not and cannot point to a "universal" or "standard" definition of the clean hands doctrine; nor to international agreements or conventions between States agreeing to the clean hands doctrine; nor to any United Nations declaration on the scope, content or implementation of the clean hands doctrine.<sup>629</sup>
405. Finally, in its Post-Hearing Brief, the Claimant emphasizes that the *Copper Mesa v. Ecuador* tribunal declined to apply the clean hands doctrine and further noted the claimant's activities in

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<sup>622</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 90; RLA-66, R. Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine", *Between East and West: Essays in Honour of Ulf Frank, K. Hobér and others* (eds.), Juris Publishing, 2010, pp. 1, 2 y 10; RLA-88, P. Dumbery, G. Dumas-Aubin, "The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law," *10 Transnational Dispute Management*, issue 1, 2013, p. 318). See also Hearing Transcript, Day 1, 136:21-25 (English).

<sup>623</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 90.

<sup>624</sup> Claimant's Rejoinder Memorial on Jurisdiction, footnote 269.

<sup>625</sup> Claimant's Rejoinder Memorial on Jurisdiction, footnote 269.

<sup>626</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 92.

<sup>627</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 92; Hearing Transcript, Day 1, 138:14-24 (English).

<sup>628</sup> Claimant's Rejoinder Memorial on Jurisdiction, paras. 96, 98.

<sup>629</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 97; Hearing Transcript, Day 1, 139:5-15 (English).

that case had taken place in view of the respondent's government authorities and they had never complained of such conduct when the events took place.<sup>630</sup> The Claimant rejects Bolivia's allegations, but at any rate underscores that the Respondent did not investigate SAS' alleged actions.<sup>631</sup>

406. For all these reasons, the Claimant submits that the jurisdictional objection against clean hands should be dismissed, since there is clearly no opposable doctrine of clean hands in international law, whether as customary law (Article 38(1)(b) of the ICJ Statute) or as a general principle of law (Article 38(1)(c)).<sup>632</sup> Similarly, the Claimant contends that the dismissal of all its claims on the grounds of alleged unclean hands would have an unfair and inequitable outcome as it would prevent Bolivia's wrongs from being examined and remedied.<sup>633</sup>
407. At any rate, the Claimant argues that even if the Tribunal were to find that the clean hands doctrine were to exist as a principle of international law, the Respondent cannot meet the strict criteria for its application.<sup>634</sup>
408. The Claimant asserts that in *Niko Resources v. Bangladesh*, the tribunal set a legal test for the application of the clean hands doctrine composed of three elements derived from the *Guyana v. Suriname* arbitration, namely: (i) claimant's conduct said to give rise to "*unclean hands*" must amount to a continuing violation; (ii) the remedy sought by the respondent in the proceedings must be "*protection against continuance of that violation in the future*", not damages for past violations, and (iii) there must be a relationship of reciprocity between the obligations considered.<sup>635</sup> Pursuant to this last criterion, the clean hands doctrine would not be triggered when the investor's misconduct is unrelated to the claims set forth before the tribunal.<sup>636</sup>
409. SAS argues that the Respondent has not explained how the three groups of acts it alleges to be violating the clean hands doctrine comply with each of these criteria,<sup>637</sup> nor does it identify any alternative set of criteria for the application of the clean hands doctrine.<sup>638</sup> In particular, the Claimant contends that the reciprocity criterion is not fulfilled in this case, since the Respondent's allegations have nothing to do whatsoever with the causes of action on which the Claimant has

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<sup>630</sup> SAS' Post-Hearing Brief, para. 58.

<sup>631</sup> SAS' Post-Hearing Brief, para. 59.

<sup>632</sup> Claimant's Reply Memorial, para. 211.

<sup>633</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 104. See also Hearing Transcript, Day 1, 134:18 – 135:9 (English).

<sup>634</sup> Claimant's Reply Memorial, para. 212. See also Claimant's Rejoinder Memorial on Jurisdiction, section IV.1.

<sup>635</sup> Claimant's Reply Memorial, para. 213; Hearing Transcript, Day 1, 139:23 – 140:13 (English).

<sup>636</sup> Claimant's Reply Memorial, para. 214.

<sup>637</sup> Claimant's Reply Memorial, para. 214.

<sup>638</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 105.

made its claims, namely Bolivia's alleged violation of the investor protection guarantees embodied in the Treaty.<sup>639</sup>

410. The Claimant cites the reasoning of the *Yukos* tribunal according to which if an investor acts illegally, the host State can request it to correct its behavior and impose upon it sanctions available under domestic law; however, if an investor believes these sanctions to be unjustified, it must have the possibility of challenging their validity in accordance with the applicable investment treaty.<sup>640</sup> The Claimant submits that the same reasoning applies in this case: if SAS' allegedly illegal acts form the very basis of Bolivia's acts of expropriation, the Claimant must have the possibility of challenging their validity in accordance with the Treaty.<sup>641</sup>
411. The Claimant concludes that none of the criteria necessary for the application of the clean hands doctrine is present in this case, and notes that in the event of national iterations of the clean hands doctrine, plaintiffs are not required to have led blameless lives in order to access justice.<sup>642</sup> Moreover, the Claimant reiterates that is a protected company under the Treaty that owns qualifying investments in Bolivia, and the faults raised by Bolivia, none of which concerns the making of an investment, should not distract this Tribunal from a fair hearing of the Claimant's claims under the Treaty on the merits.<sup>643</sup>

**(b) On the legality requirement**

412. The Claimant does not contest that the requirement that investors comply with the law of the host State when making an investment is implicit in the system of investment treaty arbitration.<sup>644</sup> However, the Claimant posits that Bolivia's invocation has two serious deficiencies: (i) that none of the purported illegal conduct complained of relates to violations of laws concerning the admission of the Claimant's investment; and (ii) that none of the instances of alleged illegal conduct occurred at the time it made its investment.<sup>645</sup> The Claimant argues that these requirements must be met in order to be able to invoke this doctrine and the absence of either one is fatal to the Respondent's asserted defense.<sup>646</sup>

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<sup>639</sup> Claimant's Reply Memorial, para. 216; Claimant's Rejoinder Memorial on Jurisdiction, para. 109.

<sup>640</sup> Claimant's Reply Memorial, para. 217.

<sup>641</sup> Claimant's Reply Memorial, para. 218.

<sup>642</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 110.

<sup>643</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 110.

<sup>644</sup> Claimant's Reply Memorial, para. 219.

<sup>645</sup> Claimant's Reply Memorial, para. 219; Hearing Transcript, Day 1, 140:18 – 141:2 (English).

<sup>646</sup> Claimant's Reply Memorial, para. 219.

413. In relation to the first requirement, the Claimant, citing the *Saba Fakes v. Turkey* award, contends that violations of the laws of the host State not directly concerned with “the admission of investments” or “investment regulation” should not serve as a bar to jurisdiction.<sup>647</sup>
414. In this connection, the Claimant submits that none of the alleged illegal conduct argued by Bolivia specifically concern legislation meant to regulate the inflow of foreign investment, nor do they concern the very nature of investment regulation.<sup>648</sup>
415. In relation to the second requirement, the Claimant argues that none of the illegalities alleged concern conduct that occurred when its investment was made, which would render the legality doctrine irrelevant.<sup>649</sup> The Claimant bases its assertion on the decisions of various investment tribunals that have reached the conclusion that subsequent wrongdoing after the initiation of an investment does not have jurisdictional consequences,<sup>650</sup> for the legality requirement operates as a limit on the host State’s consent to participate in investment arbitration.<sup>651</sup>
416. For that matter, the Claimant explains that if the investor makes, effects or acquires the initial investment illegally, then it takes itself out of the ambit of the protections of the investment treaty.<sup>652</sup> However, the Claimant further submits that, if the State complains of breaches of the host State’s laws in the course of the investment and then imposes sanctions on the investor that violate the investment treaty, the investor must have the possibility of challenging their validity in accordance with the applicable investment treaty.<sup>653</sup> In this context, the Claimant cites the *Yukos* tribunal that noted that “*it would undermine the purpose and object of the BIT to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits*”.<sup>654</sup>

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<sup>647</sup> Claimant’s Reply Memorial, para. 220.

<sup>648</sup> Claimant’s Reply Memorial, para. 222.

<sup>649</sup> Claimant’s Reply Memorial, para. 223; Claimant’s Rejoinder Memorial on Jurisdiction, paras. 88 and 112.

<sup>650</sup> Claimant’s Reply Memorial, para. 226; RLA-31, *Gustav F.W. Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award of June 18, 2010, para. 127; RLA-56, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, September 27, 2012, para. 266; CLA-126, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Republic of Argentina*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, December 21, 2012, para. 328. See also RLA-91, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Award of August 16, 2007, para. 345; CLA-127, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award of October 4, 2013, para. 193; CLA-128, *Vannessa Ventures Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, January 16, 2013, para. 167.

<sup>651</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 112; RLA-31, *Gustav F.W. Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, para. 125.

<sup>652</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 112

<sup>653</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 112.

<sup>654</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 112, citing CLA-121, *Hulley Enterprises Limited (Ciprus) v. Russian Federation*, PCA Case No. AA 226, Final Award, July 18, 2014, para. 1355; CLA-122, *Yukos Universal Limited (Isle of Man)*

417. The Claimant draws attention to the fact that the *Copper Mesa* award also rejected the applicability of the legality doctrine based on conduct that occurred after the initial investment, and explained that to impose it subsequently would require clear wording in the Treaty.<sup>655</sup>
418. Thus, the Claimant argues that it is necessary to ascertain that its conduct violated Bolivian law at the time it made the investment, and further argues that the key question involves ascertaining when SAS made its investment.<sup>656</sup> The Claimant contends that an ‘investment’ is deemed to have been made when a contract is concluded with the host State or one of its authorized entities, or in the absence of a contract with the State, when “definite commitments” are first made.<sup>657</sup> With that guidance, the Claimant’s investment was made “years” before the illegalities alleged by the Respondent, namely the key period for making the investment was between 2003 and 2008, when the Claimant obtained the ten Mining Concessions covering the entire Project area, and incorporated a wholly-owned Bolivian subsidiary, CMMK, for the purpose of exploring, developing, managing, and exploiting the Project.<sup>658</sup>
419. The Claimant notes that the period of the alleged illegalities was significantly later and that the argument submitted by the Respondent that the investment was still being made when the Reversion Decree was issued would require extending the stage of making of the initial investment indefinitely.<sup>659</sup>
420. The Claimant notes that the Respondent has been unable to provide this Tribunal with a compelling reason as to why should it depart from established arbitral practice.<sup>660</sup> Further, the Claimant argues that Bolivia is asking the Tribunal to read a legality requirement into the Treaty where there is none, and to use that very absence of a legality requirement as permission to “extend” the legality doctrine to the entire life of an investment, which would imply rewriting the language of virtually all investment treaties that contain the “in accordance with law” language upon which the legality doctrine is based.<sup>661</sup>

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v. *Russian Federation*, PCA Case No. AA 227, Final Award, July 18, 2014, para. 1355; CLA-123, *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA Case No. AA226-228, Final Award, July 18, 2014, para. 1355. [Tribunal’s translation]

<sup>655</sup> SAS’ Post-Hearing Brief, paras. 60-61.

<sup>656</sup> Claimant’s Reply Memorial, para. 227.

<sup>657</sup> Claimant’s Reply Memorial, para. 227; Claimant’s Rejoinder Memorial on Jurisdiction, para. 117.

<sup>658</sup> Claimant’s Reply Memorial, para. 228; Statement of Claim and Memorial, paras. 25-26. See Claimant’s Rejoinder Memorial on Jurisdiction, para. 117.

<sup>659</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 117.

<sup>660</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 115.

<sup>661</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 118; Hearing Transcript, Day 1, 141:15-20 (English).

421. The Claimant further states that the possibility to incorporate additional language into the Treaty to expand the legality requirement was expressly rejected by the *Metal Tech* and *Saba Fakes* tribunals.<sup>662</sup> In this case, the Claimant notes that there is no express legality clause in the Treaty requiring SAS to maintain, operate or expand its investment in accordance with national law or good faith. Accordingly, the Tribunal “*cannot incorporate such a requirement to the performance or expansion of the investment ‘without doing violence’ to the language as well as spirit of the BIT*”.<sup>663</sup>
422. The Claimant notes that it is not asking the Tribunal to ignore Bolivia’s allegations; its argument is that these are allegations to be weighed along with the merits, and not as an obstacle to prevent the Tribunal from hearing the Claimant’s claim.<sup>664</sup> For that matter, the Claimant asserts that the relevant question for the Tribunal is whether an arbitration provides the proper timing, context, and forum to resolve allegations of wrongful conduct.<sup>665</sup> The Claimant further contends if the allegations were true, Bolivia’s proper recourse would be to investigate and prosecute the perpetrators of these crimes following appropriate procedures and due process, instead of using these allegations as a means to avoid its legitimate obligations under the Treaty.<sup>666</sup>

**(c) On the Claimant’s alleged lack of clean hands**

423. The Claimant argues that the Respondent has not even begun to fulfill the burden of proof regarding Claimant’s alleged illegal conduct,<sup>667</sup> despite the fact that the Respondent bears the burden of proving its jurisdictional objections under Article 27(1) of the UNCITRAL Rules and the *onus probandi incumbit actori* maxim.<sup>668</sup>
424. The Claimant contends that Bolivia should bear its burden through clear and convincing evidence, not merely a preponderance, since the applicable standard of proof is heightened given grave allegations, such as the ones expressed in the Counter-Memorial.<sup>669</sup> At any rate, the Claimant

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<sup>662</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 119.

<sup>663</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 119.

<sup>664</sup> Claimant’s Rejoinder Memorial on Jurisdiction, paras. 113-114. See also Hearing Transcript, Day 1, 141:21 – 142:3 (English).

<sup>665</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 120.

<sup>666</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 120. See Claimant’s Reply Memorial, para. 222.

<sup>667</sup> Claimant’s Reply Memorial, Section III.C.4.

<sup>668</sup> Claimant’s Reply Memorial, para. 229; Claimant’s Rejoinder Memorial on Jurisdiction, para. 121; SAS’ Post-Hearing Brief, para. 62.

<sup>669</sup> Claimant’s Reply Memorial, paras. 230-231; Claimant’s Rejoinder Memorial on Jurisdiction, para. 122; Hearing Transcript, Day 1, 143:18-23 (English).

alleges that the Tribunal must, at a minimum, demand “*more confidence [from] the evidence relied on.*”<sup>670</sup>

425. The Claimant asserts that the Respondent offers only “*pure probabilities or circumstantial inferences,*” none of which are sufficient to prove the acts it accuses the Claimant of.<sup>671</sup> Similarly, Claimant argues that although it does not have the burden of proof, SAS has provided evidence demonstrating that the Respondent’s factual assertions are either incorrect, taken out of context, or simply insufficient to trigger the application of the legality or clean hands doctrines.<sup>672</sup>
426. The Claimant denies Bolivia’s accusations regarding the alleged wrongful acts by the Claimant.<sup>673</sup> The Claimant submits that Bolivia mostly relies on resolutions that CONAMAQ and FAOI-NP imposed on the communities between December 2010 and February 2011, and, according to the Claimant, Government officials had analyzed these in February 2011 and confirmed that they had no grounds<sup>674</sup> and that CMMK complied with “*all*” legal and administrative regulations applicable to the mining industry.<sup>675</sup>
427. Similarly, the Claimant alleges that Bolivia ignored the resolutions when they were brought to its attention<sup>676</sup> and that the Minister of Mining and Metallurgy, Mario Virreira, on different occasions confirmed that the allegations that the Respondent now submits to be true were made by “*some illegal miners*” and that these are tactics used by community members from mining areas with the purpose of illegally exploiting mining deposits.<sup>677</sup> The Claimant contends that illegal miners, together with CONAMAQ and FAOI-NP leaders promoted divisions amongst the communities, and the government, in particular the Government of Potosí, joined these efforts after the PEA 2011 was published in March 2011 showing the true magnitude of the “*megayacimiento*”.<sup>678</sup>
428. Thus, in response to the Respondent’s accusations regarding CMMK causing division within the Indigenous Communities, the Claimant argues that it was supported by the majority of the *ayllus* and communities surrounding the Project, and that the efforts to divide the community came from

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<sup>670</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 122.

<sup>671</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 122; Hearing Transcript, Day 1, 143:23 – 144:1 (English); SAS’ Post-Hearing Brief, para. 62.

<sup>672</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 123.

<sup>673</sup> Hearing Transcript, Day 1, 144:2-8 (English).

<sup>674</sup> Claimant’s Reply Memorial, para. 232.

<sup>675</sup> Claimant’s Reply Memorial, para. 232.

<sup>676</sup> SAS’ Post-Hearing Brief, para. 16.

<sup>677</sup> Claimant’s Reply Memorial, para. 233

<sup>678</sup> Claimant’s Reply Memorial, para. 233. See Claimant’s Reply Memorial sections II.C.3 and II.C.4.



FAOI-NP and CONAMAQ, illegal miners, and the government itself.<sup>679</sup> The Claimant explains that its decision to expand the Project Area of Influence was pursued precisely to avoid dividing *ayllus*, and taking into account the location of the exploration works, geographical limitations, and potential employment needs.<sup>680</sup>

429. Similarly, the Claimant asserts that contemporaneous evidence shows that COTOA-6A was an initiative taken by the leaders of the six *ayllus* surrounding the Project, who were concerned that “*their interests were not being properly represented by CONAMAQ [sic] or FAOI-NP*”.<sup>681</sup> The Claimant maintains that Bolivia’s allegations that COTOA-6A was under CMMK’s control are groundless.<sup>682</sup>
430. Regarding the alleged physical abuses by CMMK employees against community members of the Malku Khota area, the Claimant asserts that the Respondent relies, in part, on a 2016 resolution “*made specifically in response to this arbitration*,”<sup>683</sup> and that the only evidence of these alleged physical abuses against women from the community were “*resolutions ‘adopted’ by opponents to the Project back in 2011 [which] do not even name the basic element – “who” or “when” – of the alleged wrongful conduct*.”<sup>684</sup> The Claimant further states that the failure to investigate these facts by Bolivian authorities shows that these allegations are groundless.<sup>685</sup>
431. The Claimant also rejects the Respondent’s accusations that CMMK promoted violence amongst the communities. The Claimant notes that CMMK’s policy was to respect traditions, customs, and the local authorities and instructed its employees to act accordingly.<sup>686</sup> The Claimant argues that CMMK, starting in 2007 and until the alleged illegal expropriation of the Project, maintained a close relationship with the communities and respected their rights at all times, and that the support of the communities was confirmed also at the *Gran Cabildo* on June 8, 2012, attended by 800 families from 42 communities surrounding the Project.<sup>687</sup> Regarding the facts of Acasio in May 2012, the Claimant argues that CMMK did not plan, provoke or approve the violence that

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<sup>679</sup> Claimant’s Rejoinder Memorial on Jurisdiction, paras. 124-125. See also Claimant’s Reply Memorial, section II.C.3; SAS’ Post-Hearing Brief, para. 10.

<sup>680</sup> Claimant’s Rejoinder Memorial on Jurisdiction, paras. 124-125. See also Claimant’s Reply Memorial, paras. 69-72.

<sup>681</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 126; SAS’ Post-Hearing Brief, paras. 8, 11.

<sup>682</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 126.

<sup>683</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 127.

<sup>684</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 127.

<sup>685</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 127.

<sup>686</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 128.

<sup>687</sup> Claimant’s Reply Memorial, para. 236; Statement of Claim and Memorial, para. 77.

took place, and that the Respondent has submitted no evidence to prove otherwise “*other than Witness X*” who is also contradicted by contemporaneous evidence.<sup>688</sup>

432. The Claimant submits that the Respondent’s accusations that CMMK paid journalists and police officers to exaggerate the severity of the situation in Malku Khota and Acasio are untrue and taken out of context.<sup>689</sup> The Claimant argues that the payments made to journalist Gonzalo Gutiérrez were related to his services as CMMK’s media coordinator,<sup>690</sup> and that the public statements made by the police officers were made at the officers’ own initiative.<sup>691</sup> The Claimant maintains that the payment made to one of the police officers for rendering a public and court-related declaration was not contingent on the content of the declarations which remained consistent before and after the payment.<sup>692</sup> In connection with the allegations of Witness X regarding the detention of Cancio Rojas, the Claimant contends that it never authorized Witness X’s payment to policemen in relation to said detention and neither was aware of it.<sup>693</sup>
433. The Claimant underscores that Bolivia’s accusations on the alleged promotion of violence in the communities near the Project, the alleged bribes to journalists and police officers, and the existence of an alleged ‘Plan B’, are entirely dependent on Witness X’s testimony. The Claimant contends that, Witness X’s testimony is unreliable given (i) the contradictions between its testimony at the Hearing and the written testimony, in addition to corrections to the latter, (ii) the documents contemporaneous with the events, including the ones produced by Witness X; and (iii) its involvement in the bidding process that the Government of Bolivia had in 2016.<sup>694</sup>
434. Finally, the Claimant contends that the Malku Khota Project presented no risk to the environment since CMMK secured the corresponding environmental license and submitted to the relevant authorities over eight environmental and socioeconomic studies, including compliance reports.<sup>695</sup>
435. The Claimant concludes that the Respondent’s allegations are without merit and have nothing to do with the making of the Claimant’s investment or with the Claimant’s cause of action: Bolivia’s

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<sup>688</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 128.

<sup>689</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 129.

<sup>690</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 129.

<sup>691</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 129.

<sup>692</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 129.

<sup>693</sup> Claimant’s Rejoinder Memorial on Jurisdiction, para. 130.

<sup>694</sup> SAS’ Post-Hearing Brief, paras. 17-21; Hearing Transcript, Day 1, 43:14 – 44:8 (English), Day 9, 1677:22 – 1679:4 (English).

<sup>695</sup> Claimant’s Reply Memorial, para. 234.

violation of the Treaty. Thus, the Claimant submits that the Respondent's allegations of wrongful conduct cannot affect the Tribunal's jurisdiction or the admissibility of SAS claims.<sup>696</sup>

### 3. The Tribunal's Analysis

436. In addition to its jurisdictional objection related to the alleged absence of a protected investor or investment under the Treaty, the Respondent requests the Tribunal to declare the inadmissibility of the Claimant's claims "*as SAS does not have 'clean hands' and does not comply with the requirement of legality of the investment.*"<sup>697</sup>
437. Despite relying on the same factual grounds, the Respondent addressed the clean hands objection and the objection on the alleged breach of the legality requirement under different subheadings and attributed different effects to each. Regarding the clean hands objection, the Respondent noted consistently that it was an objection to the admissibility of SAS' claims. On the other hand, the Respondent invoked the alleged breach of the legality requirement as an objection to the Tribunal's jurisdiction and, alternatively, to the admissibility of the claims presented by the Claimant.<sup>698</sup> However, in its prayer, it only requested the Tribunal to declare SAS' claims inadmissible due to their failure to comply with the above-mentioned requirement.<sup>699</sup>
438. For clarity, the Tribunal will first refer to the clean hands objection with the understanding that it is an objection to the admissibility of the Claimant's claims. Subsequently, it will address the Respondent's allegations that the Tribunal "*must decline its jurisdiction to decide on SAS' claims as they are contaminated with illegal acts under Bolivian law and international law, or alternatively, declare them inadmissible.*"<sup>700</sup>

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<sup>696</sup> Claimant's Rejoinder Memorial on Jurisdiction, para. 131.

<sup>697</sup> Respondent's Rejoinder, paras. 714, 715(b) ("[...] Bolivia respectfully requests the Arbitral Tribunal that: [o]n jurisdiction and admissibility declares: in addition [to the above-mentioned claim], that [the] claims [presented by SAS] are inadmissible as SAS does not have 'clean hands' and does not comply with the requirement of legality of the investment"). (Emphasis added). The Tribunal notes that in the prayer included in the Counter-Memorial, Bolivia did not expressly refer to the alleged breach of the legality requirement. Similarly, it notes that, in its Post-Hearing brief, the Respondent requested the Tribunal to accept the relief sought by Bolivia in its Rejoinder. (See Bolivia's Post-Hearing brief, para. 164).

<sup>698</sup> See Counter-Memorial, paras. 289, 293; Respondent's Rejoinder, para. 345.

<sup>699</sup> Respondent's Rejoinder, paras. 714, 715(b).

<sup>700</sup> Counter-Memorial, para. 293. See also Counter-Memorial, para. 289; Respondent's Rejoinder, para. 345.

**(a) On the existence and application of the clean hands doctrine**

439. In respect of the clean hands objection raised by Bolivia, the Parties first dispute whether clean hands is a principle applicable to the present case that, if satisfied, would prevent the Claimant from availing itself of Treaty protection.
440. The Respondent alleges that the clean hands doctrine is a general principle of international law, which is also part of international public policy, and “*operates as a bar to the admissibility of the claims in cases where the claimant has acted improperly in relation to the subject matter of its claims.*”<sup>701</sup> Conversely, the Claimant argues that the clean hands doctrine does not exist under international law, and that, even if it did, the requirements for its application are not met in this case.<sup>702</sup>
441. First, the Tribunal notes that the text of the Treaty does not include any reference to the clean hands doctrine. Nor does the Respondent propose an interpretation of the Treaty, under Article 31 of the Vienna Convention, that would result in the claims of an investor who “*has acted improperly in relation to the subject matter of its claim*” being inadmissible.
442. Bolivia’s main argument is that the clean hands requirement is a principle of international law and, as such, it should be applied by the Tribunal.<sup>703</sup> The Claimant accepts that the Treaty should be supplemented, where appropriate, by the relevant principles of international law.<sup>704</sup> However, it rejects the notion that the clean hands doctrine forms part of such relevant principles.<sup>705</sup>
443. Without prejudice to the conclusions reached by the Tribunal regarding the law applicable to this dispute as outlined in section V.3 of this award, for the Tribunal to examine the merits of Bolivia’s admissibility defense, it would have to be convinced that the clean hands doctrine is a general principle of international law or that it forms part of international public policy. However, based on the arguments and the evidence on the record, the Tribunal is not convinced that this is the case.
444. The rubric “general principles of international law” may have different meanings.<sup>706</sup> The Respondent noted that the clean hands doctrine has been applied by international investment

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<sup>701</sup> Respondent’s Rejoinder, para. 302. See also Respondent’s Rejoinder, para. 330

<sup>702</sup> Claimant’s Reply Memorial, paras. 201-218.

<sup>703</sup> Counter-Memorial, para. 278.

<sup>704</sup> Claimant’s Reply Memorial, para. 238 (“*The Tribunal [...] must rely on the Treaty as the primary source of applicable law, supplemented where appropriate by relevant principles of international law.*”)

<sup>705</sup> Claimant’s Reply Memorial, paras. 201, 211.

<sup>706</sup> See RLA-87, J. Crawford, *Brownlie’s Principles of Public International Law*, 8<sup>o</sup> ed., Oxford University Press, 2012. (“The rubric ‘general principles of international law’ may alternately refer to rules of customary international law, to general principles

tribunals,<sup>707</sup> defended by judges to the PCIJ and the ICJ,<sup>708</sup> and recognized by international tribunals and courts,<sup>709</sup> and by the international doctrine.<sup>710</sup> Similarly, it asserted that the clean hands doctrine is reflected in several legal maxims and principles,<sup>711</sup> that it is a reflection of the principle of good faith, and that “*it is also one of the ‘general principles of law recognized by civilized nations’ pursuant to article 38(1)(c) of the Statute of the ICJ.*”<sup>712</sup>

445. Regardless of the source advocated by the Respondent, it is undisputed that general principles of law require certain degree of recognition and consensus.<sup>713</sup> According to the Respondent, the analysis of these principles should principally consider “*the practice of the States.*”<sup>714</sup> However, Bolivia did not submit sufficient evidence to establish that the clean hands doctrine enjoys the required recognition and consensus among the States to reach the status that Bolivia attributes to it.
446. Bolivia asserted that the clean hands doctrine is widely recognized in civil law and common law systems, and cites some decisions of the British House of Lords and the French Court of Cassation, as well as scholarly articles on the existence of the principle in the United States and Germany.<sup>715</sup> In the opinion of this Tribunal, these are insufficient and not determinative regarding the alleged status of the clean hands doctrine as a general principle of international law under the terms of article 38(1)(c) of the ICJ Statute.
447. The Respondent also invoked various international court and tribunal decisions that would confirm that the clean hands doctrine is a principle of international law.<sup>716</sup> In particular, Bolivia cited various opinions by members of the PCIJ and the ICJ that, in its view, defend the “clean

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of law as in Article 38(1)(c), or to certain logical propositions underlying judicial reasoning on the basis of existing international law.”)

<sup>707</sup> Counter-Memorial, paras. 273-278

<sup>708</sup> Counter-Memorial, paras. 280-282.

<sup>709</sup> Counter-Memorial, para. 283.

<sup>710</sup> Counter-Memorial, paras. 284-285.

<sup>711</sup> Respondent’s Rejoinder, para. 302.

<sup>712</sup> Respondent’s Rejoinder, para. 306.

<sup>713</sup> See Respondent’s Rejoinder, para. 321; Claimant’s Reply Memorial, para. 201.

<sup>714</sup> See Respondent’s Rejoinder, para. 321.

<sup>715</sup> Respondent’s Rejoinder, paras. 303-306, citing RLA-228, J. N. Pomeroy, A Treatise on Equity Jurisprudence, 5<sup>th</sup> edition, Bancroft-Whitney Company, 1941; RLA-230, Jones c. Lenthal, House of Lords, decision, [1669] 1 Chan. Cas. 153; RLA-233, Stone & Rolls Ltd (in liquidation) v. Moore Stephens (a firm), House of Lords, decision, [2009] 1 AC; RLA-234, Safeway Stores Ltd. and others v. Twigger and others, House of Lords, decision, [2010] EWCA Civ 1472; RLA-66, R. Kreindler, “Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine,” in Between East and West: Essays in Honour of Ulf Frank, K. Hobér and others (eds.), Juris Publishing, 2010; RLA-235, French Court of Cassation, 2nd Civil Chamber, Judgment, February 4, 2010, No. 09-11.464; RLA-236, French Court of Cassation, 2nd Civil Chamber, Judgement, January 24, 2002, No. 99-16.576.

<sup>716</sup> See Counter-Memorial, paras. 271-283.

hands” doctrine.<sup>717</sup> However, these are individual or dissenting opinions that do not seem even to reflect the majority position of the respective courts in connection with the application of the clean hands doctrine. In fact, this doctrine was not applied in any of the decisions the Respondent cited as grounds to decline jurisdiction or to declare the inadmissibility of the claims.

448. Bolivia also referred to various investment arbitration tribunal decisions that, in its view, rejected an investor’s claims based on the clean hands doctrine.<sup>718</sup> The Tribunal has reviewed these decisions and finds that they do not support the premise that the clean hands doctrine is a general principle of international law. In fact, the Respondent invoked tribunals that reached their respective conclusions based on the appropriate treaty provisions or the applicable national law without basing their decisions on the clean hands doctrine or advancing it as a general principle of international law.
449. The only exception would seem to be the *Al-Warraq* case where the tribunal majority considered that the clean hands doctrine made the claimant’s claims inadmissible.<sup>719</sup> However, in the *dispositif* of its decision, the tribunal referred expressly to Article 9 of the *OIC Agreement* as the basis to conclude that the claimant was not entitled to any damages in respect of the breaches of the fair and equitable treatment standard, and not that its claims were inadmissible due to the clean hands doctrine.<sup>720</sup> Therefore, the *Al-Warraq* tribunal’s decision also fails to prove the acceptance and application of the above-mentioned principle under international investments law.
450. The Respondent also referred to certain authors who have stated that the clean hands doctrine constitutes a principle of international law. However, as the Claimant notes, those same authors recognize that the existence and application of this doctrine, as a matter of international law, are still controversial.<sup>721</sup>
451. Finally, in its Rejoinder the Respondent argued, for the first time in the arbitration, that the clean hands doctrine is part of international public policy. Pursuant to the definition proposed by the

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<sup>717</sup> See Counter-Memorial, paras. 280-284.

<sup>718</sup> Counter-Memorial, paras. 271-277, citing, among others, RLA-65, *Inceysa Vallisoletana S.L. v. The Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006; RLA-68, *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, October 4, 2006; RLA-69, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008; RLA-70, *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL Case, Award, December 15, 2014; RLA-71, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, December 10, 2014; RLA-31, *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010; RLA-72, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009.

<sup>719</sup> RLA-70, *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL Case, Award, December 15, 2014, para. 646..

<sup>720</sup> RLA-70, *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL Case, Award, December 15, 2014, para. 683(6).

<sup>721</sup> See Claimant’s Rejoinder Memorial on Jurisdiction, para. 90.

*World Duty Free v. Republic of Kenya* tribunal, and adopted by the Respondent itself, the term “international public policy” refers to an international consensus on universal standards and norms of conduct that must be applied in all fora.<sup>722</sup>

452. The Respondent invoked the decisions of two investment arbitration tribunals that have dismissed claims presented by claimants, among other reasons, due to the fact that such claims were based on conduct contrary to international public policy.<sup>723</sup> Beyond the factual differences between the facts in the present case and those invoked by Bolivia, the Tribunal does not find that the decisions cited support the general assertion that the clean hands doctrine is part of international public policy. The Respondent did not invoke other materials in support of this allegation.
453. Based on the foregoing reasoning, the Tribunal finds that Bolivia has not shown that the clean hands doctrine is part of international public policy or constitutes a principle of international law applicable to the present case that defeats the jurisdiction of the Tribunal or affects the admissibility of the claims filed by the Claimant. Given the above, the Tribunal does not consider it necessary to examine compliance in this case with the requirements for the application of the clean hands doctrine.

**(b) On the legality requirement**

454. The Respondent alleges that the Tribunal “*must decline its jurisdiction to decide on SAS’ claims as they are contaminated with illegal acts under Bolivian law and international law, or alternatively, declare them inadmissible.*”<sup>724</sup> Similarly, it argues that the unlawful conduct after making the investment also impacts on the jurisdiction, but it states that, in any event, SAS’ unlawful conduct occurred during the making of its investment.<sup>725</sup>
455. The Claimant, for its part, notes that Bolivia’s invocation of the “legality doctrine” is pointless since none of the purported illegal conduct complained of relate to the admission or making of SAS’ investment.<sup>726</sup> In accordance with the Claimant, any illegality that occurs in the

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<sup>722</sup> RLA-68, *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, October 4, 2006, para. 139. See Respondent’s Rejoinder, para. 310.

<sup>723</sup> The Respondent referred to the tribunals in *World Duty Free v. Republic of Kenya* and *Plama v. Bulgaria*. In the former case, the tribunal found that corruption ran counter to international public policy. In the latter case, the tribunal observed that a basic notion of international public policy was that the tribunals should not enforce contracts unlawfully obtained.

<sup>724</sup> Counter-Memorial, para. 293. See also Counter-Memorial, para. 289; Respondent’s Rejoinder, para. 345.

<sup>725</sup> Respondent’s Rejoinder, paras. 339-340.

<sup>726</sup> Claimant’s Reply Memorial, Section III.C.3.

performance or implementation of an investment is an issue of the merits, and not of jurisdiction or admissibility.<sup>727</sup>

456. The Tribunal notes that the Treaty does not contain an express requirement of the legality of the investment or, in other words, the “in-acquordance-with-law clause”. However, the Parties seem to agree that the requirement of legality of the investment is implicit in the international investment arbitration system and therefore operates even when a treaty provision is absent.<sup>728</sup>
457. The Respondent has invoked several investor-State tribunal decisions finding that an investment made in violation of the laws of the host State or international law (a) does not qualify as an investment under the respective treaty and, therefore, deprives the tribunal of jurisdiction (*ratione materiae*);<sup>729</sup> (b) falls beyond the consent granted by the State to submit the dispute to arbitration (jurisdiction *ratione voluntatis*);<sup>730</sup> or (c) entails the denial of the substantive protections of the treaty.<sup>731</sup> The Tribunal observes that in (a) and (b) the corresponding treaties contained an express “in-acquordance-with-law clause”.
458. In any event, in order to resolve the objection raised the Tribunal must refer to the Treaty. It is uncontested that the Tribunal’s jurisdiction results from the agreement between the Parties. Similarly, it is uncontested that, when entering into the Treaty, Bolivia offered to submit investment disputes to arbitration under the terms of article 8(1) of the Treaty, and the investor accepted this offer with the presentation of its Notice of Arbitration.
459. Article 8(1) of the Treaty provides:

Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former [...] shall [...] be submitted to international arbitration if either party to the dispute so wishes. [Emphasis added].

460. Since the Parties’ consent was granted for disputes concerning investments, what is relevant to determine whether the Tribunal has jurisdiction is that an investment exists under the terms of the Treaty.

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<sup>727</sup> Claimant’s Reply Memorial, para. 219.

<sup>728</sup> Counter-Memorial, para. 291 (“Also, it is worth mentioning that even if a treaty does not contain an express clause with the legality requirement, different tribunals have confirmed that the obligation to comply with international law and the law of the host State is implicit and its violation must be punished.”); Claimant’s Reply Memorial, para. 219 (“Notwithstanding the absence of an explicit requirement under the BIT that investments be made in accordance with the laws of the host State, South American Silver does not contest that what might be called the “Legality Doctrine” – the requirement that investors comply with the law of the host State when making an investment – is implicit in the system of investment treaty arbitration.”)

<sup>729</sup> See RLA-65, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006.

<sup>730</sup> See CLA-127, *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, October 4, 2013.

<sup>731</sup> See RLA-69, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008.



461. Article 1(a) of the Treaty defines “investment” as “*every kind of asset which is capable of producing returns and in particular, though not exclusively, includes [...] shares in and stock and debentures of a company and any other form of participation in a company, [...] any business concessions granted by the Contracting Parties in accordance with their respective laws, including concessions to search for, cultivate, extract or exploit natural resources.*”
462. It is not disputed that the shares in CMMK fall within the definition of “investment” under the Treaty.<sup>732</sup> There is also no assertion that the investment is not recognized under the laws of Bolivia, or as the investor’s assets.<sup>733</sup> Therefore, the fundamental question is whether under the laws of Bolivia or international law, the conduct alleged to be a breach has the effect of depriving the Claimant of its rights as a shareholder or, in general, its rights over its investment in Bolivia, or that the investment *per se* ceases to exist due to the illegality.
463. The Respondent alleges that SAS, acting through CMMK, took a series of actions that violate the right to self-determination of the Indigenous Communities, violate the personal integrity of their women, and endanger their right to a healthy environment in their territories.<sup>734</sup> Cognizant of the severity of these allegations, the Tribunal notes that none of the alleged violations have the legal consequence, under the laws of Bolivia or international law, of depriving SAS of the ownership of, or its rights over, the corresponding assets, or of eliminating the existence of the investment.
464. Having established the existence of an investment under the terms of the Treaty, it remains to be examined if what Bolivia alleges as SAS’ violations constitute conduct that taints the investment with an illegality that precludes access to the Treaty’s protections – an admissibility issue – or that there is a protected investment, but the unlawful investor’s conduct must be taken into account as a defense of the Respondent on the merits of the case.
465. Based on the evidence on the record and Bolivia’s allegations in connection with this objection, the Tribunal cannot conclude that SAS’ alleged unlawful conduct has resulted in the investment – recognized as such under Bolivian law – no longer being recognized as a legal investment under international law. Indeed, there is no evidence of a causal link between the alleged illegalities and the investment itself for the purposes of jurisdiction or admissibility, and Bolivia does not seem to allege the existence of such a relationship. This is, in the view of the Tribunal, a fundamental

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<sup>732</sup> See Statement of Claim and Memorial, paras. 112-113; Counter-Memorial, para. 224.

<sup>733</sup> The Tribunal observes that when referring to its jurisdictional objection on indirect ownership, Bolivia expressly noted that “[w]hen an objection refers to the definition of ‘investment’, it criticizes the form of assets reputed as investment (v.gr., is the asset in question really a concession, action or title?), which is not the case under our examination.” (Counter-Memorial, para. 240).

<sup>734</sup> Counter-Memorial, paras. 296-324; Respondent’s Rejoinder, para. 352.

difference with other cases invoked by the Respondent itself wherein the tribunal held that it lacked jurisdiction or that the claims were inadmissible as a result of the unlawful conduct of the investor.

466. For example, in *Inceysa v. El Salvador*, the tribunal found a series of actions to be in violation of the principle of good faith, in connection with the bidding process that allowed the investor to obtain the investment (a concession contract for the inspection of vehicles).<sup>735</sup> In this context, the *Inceysa v. El Salvador* tribunal noted:

This Tribunal considers that these transgressions of this principle committed by Inceysa represent violations of the fundamental rules of the bid that made it possible for Inceysa to make the investment that generated the present dispute. It is clear to this Tribunal that, had it known the aforementioned violations of Inceysa, the host State, in this case El Salvador, would not have allowed it to make its investment.<sup>736</sup>

467. Aside from the considerations of the tribunal in that case regarding the “in-accordance-with-law clause” expressly established in that treaty, and the other considerations outlined by the tribunal to conclude that it lacked jurisdiction over the dispute, the Tribunal notes that the reasoning underlying its decision is the evident relationship between the investors’ illegal acts and the asset constituting the investment.
468. Additionally, the *Plama v. Bulgaria* tribunal concluded that it had jurisdiction, but it could not grant the investor the substantive protections under the Energy Charter Treaty, since the investment had been obtained through fraudulent means, in violation of Bulgarian law and contrary to the principle of good faith under domestic and international law. The decisive factor for the tribunal’s holding was the relationship between the investment (the shares in Nova Plama) and the investor’s illegal conduct (the deliberate concealment of information amounting to fraud) that allowed it to acquire the investment.<sup>737</sup>
469. Thus, referring to the decisions of other tribunals, the *Fraport v. Philippines II* tribunal observed that “*there is an increasingly well-established international principle which makes international legal remedies unavailable with respect to illegal investments, at least when such illegality goes to the essence of the investment*.”<sup>738</sup>

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<sup>735</sup> RLA-65, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006, paras. 234-238.

<sup>736</sup> RLA-65, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006, para. 237 [emphasis added].

<sup>737</sup> See RLA-69, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, para. 135.

<sup>738</sup> RLA-71, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, December 10, 2014, para. 332 [emphasis added].

470. In the present case, the Respondent has not shown that the alleged violations go to the essence of the investment such that it must be considered illegal. It is a different matter to say that CMMK's conduct gave rise to a *de facto* situation that motivated the reversion of the Mining Concessions, as the Respondent seems to allege.<sup>739</sup> This does not mean that the investment ceased to exist under the terms of the Treaty or became unlawful. Consequently, the Tribunal will take account of these allegations as it examines the merits of the claims submitted by the Claimant and the defenses raised by the Respondent.
471. Based on the above reasoning, the Tribunal concludes that the objection filed by the Respondent on the basis of the alleged breach by SAS of the legality requirement applicable to the investment cannot succeed. Consequently, the Tribunal has jurisdiction and the claims presented by the Claimant are admissible.

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<sup>739</sup> See Respondent's Rejoinder, para. 326. ("[...] SAS, as alleged investor, was required to invest in accordance with the laws of Bolivia. However, as explained above, SAS (through CMMK) failed with its obligations, as it systematically ignored the human and indigenous peoples' rights of the Indigenous Communities, in violation of Bolivian law. It was precisely the conduct adopted by SAS that caused the Reversion.")

## VII MERITS

### A. PRELIMINARY CONSIDERATIONS OF THE TRIBUNAL ON THE FACTS

472. The Parties dispute several facts relevant to the dispute that resulted from the reversion of the Mining Concessions. The Claimant accuses Bolivia of breaching its obligations under articles 2, 3, and 5 of the Treaty. The Respondent, in turn, rejects any breach of the Treaty and justifies the decision contained in the Reversion Decree on the need to pacify the conflicts in the area of Malku Khota and the duty to ensure respect for the rights of the Indigenous Communities. According to Bolivia, the conflicts originated with CMMK's negligent management of its relationship with the local communities.<sup>740</sup> Reportedly, these conflicts escalated until they became uncontrollable for reasons attributable to the Claimant.<sup>741</sup>
473. The Claimant rejects the Respondent's accusations and alleges that Bolivia's concern for human and indigenous rights are *ex post facto* justifications manufactured by the Respondent to defend itself in this arbitration.<sup>742</sup> Contrary to Bolivia's allegations, the Claimant argues that (i) the indigenous communities surrounding the Project supported both SAS and CMMK; (ii) CMMK was working towards consensus with the Malku Khota and Kalachaca communities through a formal community relations program; and (iii) the violence was not caused by CMMK or SAS, but by illegal miners whose interests lied in forming a cooperative to exploit the Malku Khota deposit.<sup>743</sup>
474. Considering that the facts the Parties dispute in connection with the origin and development of the community conflicts in the Malku Khota area span all the claims and defenses in this arbitration, the Tribunal will address these facts before delving into the review and legal analysis of the claims of the Claimant, without prejudice to the Tribunal subsequently expanding upon its considerations and conclusions regarding the facts in discussion.
475. As a starting point, the Tribunal observes that some facts have been proven in this arbitration and are not contested by the Parties.
476. It is undisputed that Bolivia is a country with a large indigenous population, possibly the country with the highest percentage of indigenous population in Latin America;<sup>744</sup> that it is organized as

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<sup>740</sup> Bolivia's Post-Hearing Brief, § 3.1.1.1.

<sup>741</sup> See, for example, Counter-Memorial, paras. 8 and 84.

<sup>742</sup> Claimant's Reply Memorial, ¶ 272.

<sup>743</sup> SAS' Post-Hearing Brief, para. 2.

<sup>744</sup> See Counter-Memorial, para. 33; R-23, International Labor Organization, Indigenous and Tribal Peoples - Bolivia.

a Plurinational State;<sup>745</sup> that the Project is located in an extremely poor area, which is inhabited by various indigenous communities, which belong to the Aymara or Quechua ethnic groups;<sup>746</sup> and that these communities follow a particular political organization, whose decision-making system is governed by consensus or unanimity.<sup>747</sup>

477. Similarly, it is uncontested that the mining activities would have an impact on the communities living in the area of influence of the Project. Therefore, the Claimant needed to implement a community program that would enable it to develop positive relations with the local communities from the onset.<sup>748</sup>
478. The Claimant alleges that it developed a community relations program that contributed to the needs of the communities affected by the Project. Likewise, it acknowledged that some investments were necessary to improve the standard of living in the community.<sup>749</sup> Although apparently the inexistence of a regulatory framework in Bolivia governing the community relations programs was uncontested, the Claimant itself has recognized the need to advance a program;<sup>750</sup> it hired advisors on the subject and put together a community relations team.
479. The evidence on record in this arbitration indicates that CMMK focused its community relations strategy on convincing a part of the community to support the Project against its objectors, that is, it sought to obtain the approval of a majority of individuals to advance the Project, which gave rise to problems with the Indigenous Communities given their organization and consensus-based decision-making process.
480. Despite SAS' assertion that it had established a community relations program since 2007,<sup>751</sup> the assessment of its own advisors on the subject shows that its community relations strategy had serious shortcomings which remained uncorrected. Thus, for example, the Company held individual meetings with some community members, disregarding their preference to have collective meetings, and, similarly, made donations to individuals, rather than to the community.<sup>752</sup> The same report issued in 2009 by BSR, advisor to the Claimant, warned about the

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<sup>745</sup> RLA-3, New Political Constitution of the State, dated February 7, 2009, Article 1; RLA-2, Political Constitution of the State, Law No. 1615, on the adjustment and concordance of the Political Constitution of the State, February 6, 1995, articles 1 and 171; RER-1, Prof. Uño Report, § III.

<sup>746</sup> See Counter-Memorial, paras. 40-41; Reply Memorial, para. 29.

<sup>747</sup> See Counter-Memorial, paras. 54-56; Hearing Transcript, Day 2, 362:12-22, 368:11-15 (English).

<sup>748</sup> See Reply Memorial, para. 21; paras. 29 *et seq.*, 73.

<sup>749</sup> See Statement of Claim and Memorial, para. 48.

<sup>750</sup> See Reply Memorial, paras. 21, 29 *et seq.*, 73.

<sup>751</sup> Reply Memorial, para. 21.

<sup>752</sup> At the hearing, Mr. Angulo accepted that he sometimes held meetings with some members of the community and not with others. (Hearing Transcript, Day 2, 436:5-8 (English)). Likewise, the evidence showed that the Company provided financial

problems with holding individual meetings and recommended providing economic support to the community in general.<sup>753</sup> However, the BSR report was not duly conveyed to the ones in charge of CMMK's community relations, as Mr. Santiago Angulo acknowledged during his cross-examination at the Hearing.<sup>754</sup> As a result, the recommendations were not implemented.

481. The evidence on the record also shows that CMMK did not adequately communicate the implications of the Project, nor did it address the concerns expressed very early on by the members of the affected communities, for example, in connection with environmental pollution.<sup>755</sup> The workshops held by the Company covered basic topics on mining and the environment, and did not even seem to correspond to the characteristics of the Project.<sup>756</sup> The Company's contributions to the community did not seem to be tailored to the Project, rather they addressed specific requests made by certain community members.<sup>757</sup> The Claimant's alleged actions and investments benefiting the community were nothing but basic instruction on what a mining project consists of, some minor investments in repairs and basic courses and, above all, an action directed to obtain the support of the majority – emphasized by the Claimant throughout its briefs – without clear evidence that an attempt was made to approach or reach consensus among the indigenous communities, respecting their indigenous decision-making processes.
482. The body of evidence on the record indicates that the Company and its management knew that, from the outset of the works, problems communicating with the communities emerged;<sup>758</sup> that the communities had expressed their disagreement with the treatment granted by some members of the Company's community relations team,<sup>759</sup> and that the community members perceived that CMMK did not comply with its promises, thus generating mistrust.<sup>760</sup> Even Fernando Cáceres

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assistance to individuals. (See, for example, C-284, Fernando Cáceres, *Monthly Report Malku Khota Mining Project*, September 2007; Hearing Transcript, Day 3, 558:12-19 (English))

<sup>753</sup> C-154, Business for Social Responsibility, *Social Risks and Opportunities for South American Silver Corporation's Malku Khota Project in Potosí*, May 2009, pp. 8, 16.

<sup>754</sup> When asked about the BSR report conclusions, Mr. Angulo replied: "Well, in connection with this report, I didn't see that at that point in time or at that moment. The head of project gave me that, and since it was in English, I wasn't able to read that report." And later on added: "As I said, the report was given to me by my head of project, but I cannot read English, so I wasn't able to interpret it. I didn't know what the Report contained." (See Hearing Transcript, Day 2, 436:14-17, 25-437:1-2 (English))

<sup>755</sup> C-154, Business for Social Responsibility, *Social Risks and Opportunities for South American Silver Corporation's Malku Khota Project in Potosí*, May 2009, pp. 4, 9.

<sup>756</sup> R-165, CMMK, *Presentation Mallku Khota Trabaja con Valores y Principios de la Nueva Minería* (Malkhu Khota works with values and principles of the new mining industry).

<sup>757</sup> See, for example, Reply Memorial, para. 52.

<sup>758</sup> Hearing Transcript, Day 3, 760:11-22 (English).

<sup>759</sup> See, for example, R-157, CMMK Monthly Report on Community Relations, March 2011, p. 1.

<sup>760</sup> For example, the report on a visit of Witness X to Mallku Khota indicates that the community members "do not believe in the fulfillment of the commitments undertaken by Malku Khota because, despite several opportunities and conversations, the Company did not comply and actually did not talk any more with the Company Malku Khota, and definitely did not accept jobs within their community." (C-310, E-mail from Witness X to J. Mallory attaching "Travel report to the Malku Khota and Cochabamba communities," January 12, 2012).

expressed his concern since December 2010 regarding the state of the Company's relationship with the communities.<sup>761</sup>

483. The disagreement in the community became obvious, at least since late 2010. Indeed, on December 11, 2010, the *ayllus* of Sullka Jilatikani, Takahuani, Urinsaya, and Samka passed a resolution warning as follows:

*[CMMK] must suspend the works for the following reasons: Abuses, contamination, lack of respect for the indigenous authorities and bases in general, deceitful proposals, projects; threats, reduction of stream water and destruction of our crop areas, rape of our women in the [Community].*<sup>762</sup>

484. On December 19 of the same year, the *ayllus* of Sullka Jilatikani, Takahuani, Urinsaya and Samka approved a town hall resolution, whereby CMMK was accused of violating the collective rights of the communities based on assertions similar to the ones contained in the above-mentioned resolution.<sup>763</sup> In early 2011, the FAOI-NP and the *ayllu* of Sullka Jilakitani issued resolutions reiterating that CMMK had incurred in conduct that undermined their rights.<sup>764</sup>

485. The Claimant suggests that the assertions included in these resolutions should not be considered truthful because (i) the Government confirmed that they were unfounded;<sup>765</sup> (ii) they were adopted through intimidation or use of force;<sup>766</sup> and (iii) they do not represent the opinion of the majority of the communities, but the opinion of illegal miners whose interests are aligned with those of some leaders of the CONAMAQ and FAOI-NP.<sup>767</sup>

486. The Tribunal does not consider that such allegations by the Claimant were proven in the course of the arbitration. First, the communication of the Vice-Ministry of Communication, Social Movement and Civil Society referred to by SAS to support its assertion that the Government dismissed the accusations contained in the above-mentioned resolutions does not contain any assessment on the validity or truthfulness of such assertions, but merely points out that the Vice-Ministry lacks jurisdiction to carry out the actions requested by the Claimant.<sup>768</sup> In addition, the excerpt from the communication cited by Mr. Gonzales Yutronic in his witness statement is part

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<sup>761</sup> R-160, Monthly Operational Report from CMMK to SASC, December 2010, p. 4.

<sup>762</sup> R-46, Resolution of the *ayllus* Sullka Jilatikani, Takahuani, Urinsaya, and Samka, December 11, 2010.

<sup>763</sup> R-49, *Ayllus* of Sullka Jilatikani, Takahuani, Urinsaya and Samka Townhouse resolution, December 19, 2010.

<sup>764</sup> *Véase* R-50, FAOI-NP Resolution, January 11, 2011; R-51, *Ayllu* of Sullka Jilatikani Resolution, February 15, 2011.

<sup>765</sup> Reply Memorial, paras. 115, 119.

<sup>766</sup> CWS-8, Gonzales Yutronic's Second Witness Statement, paras. 17-18.

<sup>767</sup> See Reply Memorial, para. 79.

<sup>768</sup> C-230, Letter from Cesar Navarro Miranda to Xavier Gonzales, February 10, 2011.

of the petition's background and it does not correspond to a proper conclusion from the above-mentioned Vice-Ministry.<sup>769</sup>

487. Second, Mr. Gonzales Yutronic's statements in support of the allegation that the resolutions were issued through intimidation or by the use of force were disproved at the Hearing. During his cross-examination, the witness recognized that he did not have direct knowledge that the community members had been forced to sign the resolutions of CONAMAQ and FAOI-NP.<sup>770</sup> As Mr. Gonzales Yutronic explained, Mr. Angulo *"told me that he had talked to leaders and community members at that location, and that in many cases they were forced to take the vote or put the seal on them, which is their custom."*<sup>771</sup>
488. Despite the seriousness of the facts alleged, the Tribunal did not find evidence that the information on said facts had been conveyed to the company management nor to the competent authorities. Indeed, Mr. Gonzales Yutronic conceded that he had not presented the communications in which he supposedly reported to his superiors at SAS and SASC that the 2010 resolutions had been adopted through threats.<sup>772</sup> Likewise, he acknowledged not informing the Government about those events or the alleged violent actions against one of the community members who supported the Company, which he claims to have witnessed.<sup>773</sup>
489. Finally, the Tribunal is not convinced that the opposition to the Project came exclusively from a group of illegal miners that intended to exploit minerals in the place of the Mining Concessions. In fact, the mining activity identified by Witness X in a report on the visit to the Malku Khota community in January 2012 corresponds, in its own words, to mining activities developed by some community members in a makeshift fashion in front of their own homes.<sup>774</sup> In other words, it was artisanal mining and not large-scale mining. In the view of the Tribunal, it is impossible to reconcile the explanations provided by the Claimant regarding the complexity of the processes to be undertaken for the extraction the minerals in the area, with its allegations regarding the significance that the activity of "illegal miners" would have had in blocking the Project.

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<sup>769</sup> C-230, Letter from Cesar Navarro Miranda to Xavier Gonzales, February 10, 2011. See also Hearing Transcript, Day 3, 492:18-496:21 (English).

<sup>769</sup> Hearing Transcript, Day 3, 483:1-484:11 (English).

<sup>770</sup> Hearing Transcript, Day 3, 485:6-9 (English).

<sup>771</sup> Hearing Transcript, Day 3, 485:14-486:1 (English).

<sup>772</sup> Hearing Transcript, Day 3, 567:18-568:7 (English).

<sup>773</sup> See Hearing Transcript, Day 3, 486:2-490:9 (English).

<sup>774</sup> C-310, E-mail from Witness X to J. Mallory attaching "Report on the trip to the Malku Khota and Cochabamba communities," January 12, 2012.



490. Based on the foregoing, the Tribunal concludes that, despite having implemented a community relations program, the Company had serious shortcomings in its relationship with the community from the outset which were not corrected, despite the recommendations of the consultants hired to assess such programs. The evidence on the record shows that the community expressed early on their concerns regarding the Company's activities<sup>775</sup> and that, at least since late 2010, there was opposition to the Project, which was expressed through the resolutions of the Indigenous Communities' government bodies.
491. That said, the Parties do not dispute the existence of a social conflict, and that marches, demonstrations, and violent acts, including physical violence and deaths, emerged. Evidence on the existence of the social conflict is abundant in the record. The substantive difference between the Parties is that each of them holds the other one responsible for causing the conflict. In the view of the Tribunal, it is clear, as mentioned in the paragraphs above, that the conflict with the indigenous communities had its genesis in the Project. It is possible that poverty in the area and even a history of actions or omissions by the government of Bolivia towards the communities had contributed to the conflict, but even if it were assumed that the Claimant was not involved in instigating the conflict, the actions it took upon seeing the first seeds of the conflict contributed to the divisiveness and more profound clashes among the Indigenous Communities.
492. The Claimant explains that in early 2011 – *i.e.*, when the signs of opposition to the Project were clear – it decided to formalize its community program and brought additional community relations staff, including Witness X.<sup>776</sup> However, the evidence on the record shows that the community relations strategies implemented by CMMK as of that year sought to garner the support of the majority and weaken the opposition, instead of finding consensus or agreements with the community as their own advisors recommended.
493. First, the documentation provided by Witness X indicates that its recommendations were mainly aimed to implement strategies to weaken the opposition, instead of promoting consensus. Thus, for example, in a report dated January 2012 addressed to Jim Mallory, Witness X recommends, among other things, the following:

*Legal actions have to be brought against the individuals who were responsible for the crimes, since this is the only way to set a precedent before the other community members, because they do not want to speak and, as time goes by, they will take more control of the current exploitation they have underway.*

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<sup>775</sup> See, for example, C-154, Business for Social Responsibility, *Social Risks and Opportunities for South American Silver Corporation's Malku Khota Project in Potosí*, May 2009, pp. 4, 9.

<sup>776</sup> Statement of Claim and Memorial, para. 47.

*I suggest broadening the action based on anti-economic conduct and economic damage to the State based on their illegal exploitation within the Malku Khota concession.*

*Internally within the ayllu a suggestion could be made to the authorities of the ayllu itself to bring community justice with the eradication of the misconduct, thefts, and threats.*

*If, in parallel, work is done in the legal, labor and social areas, these people will be weakened.*<sup>777</sup>

494. In fact, it has been shown that the Company filed criminal complaints against several community leaders, which were later dismissed by the competent authorities.<sup>778</sup>
495. The Tribunal does not deny the Company's right to take legal action to protect its interests. However, that right cannot be exercised as a means to scare the members of the community and appease the opposition, much less when there seems to be no basis for the exercise of the action, as suggested by the fact that the Company's accusations did not prevail.
496. Second, the evidence on the record suggests that CMMK focused its efforts on attempting to communicate and impose support for the Project through COTOA-6A, instead of truly seeking an actual approach with the communities that opposed the Project.
497. The Parties dispute whether COTOA-6A was an illegal organization created with the purpose to serve as a platform for CMMK to displace the communities that opposed the Project, misinform the central authorities and delegitimize the intervention of indigenous associations and genuine authorities, as stated by Bolivia,<sup>779</sup> or whether, on the contrary, it was an autonomous regional commission autonomously established by the communities that felt unrepresented by the authorities opposing the Project, as SAS alleged.<sup>780</sup>
498. Based on the available evidence, the Tribunal cannot be certain that COTOA-6A was created by CMMK, as Bolivia alleges, nor does it have to determine for the purposes of this arbitration whether it was an illegal organization or not under the laws of Bolivia. But even assuming that it was an organization created spontaneously by certain community members, as the Claimant alleges, what has in fact been demonstrated is that the Company focused its efforts on supporting, coordinating and even attempting to monitor and control the actions advanced by COTOA-6A to

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<sup>777</sup> C-310, E-mail from Witness X to J. Mallory attaching "Report on the trip to the Malku Khota and Cochabamba communities," January 12, 2012, pp. 5-6.

<sup>778</sup> R-75, Resolution on file for the complaint of Xavier Gonzales against members of the Indigenous Peoples dated February 28, 2014.

<sup>779</sup> Counter-Memorial, para. 126.

<sup>780</sup> See Reply Memorial, paras. 33, 97.

claim the continuity of the Project.<sup>781</sup> It is unclear to the Tribunal how this strategy is to be reconciled with the alleged intention to “*build[] consensus with Mallku Khota and Calacacha.*”<sup>782</sup>

499. Throughout the present arbitration, the Claimant has repeatedly noted that evidence shows support for the Project by most of the population in the Project Area of Influence. The Tribunal considers that, on the one hand, the Claimant did not establish the existence of the alleged majority support and, on the other hand, the insistence on seeking majority support within a group against the Project objectors not only threatened a decision-making structure that the Claimant was aware of or should have been aware of, but it also undermined the recommendations of their own advisors and decisively contributed to aggravating the conflict.
500. In connection with the first assertion, it was established that the community members who opposed the Project neither participated in the meeting held on May 28, 2012, convened by the Office of the Governor and the Ministry of Mines and Metallurgy, nor in the “*gran cabildo*” on June 8, 2012 – two events that the Claimant cites as evidence of the so-called substantial support of the communities for the Project – included the participation of the community members who opposed the Project since they were marching to La Paz precisely to protest against it.<sup>783</sup> Circumstantial evidence on the record also shows the Company’s involvement in the organization of this “*gran cabildo*” and, therefore, that it was not an impromptu meeting in support of the Project, as the Claimant alleges.<sup>784</sup>
501. In connection with the second assertion, the Tribunal has already established that the Indigenous Communities made decisions unanimously or by consensus, such that insisting on mechanisms to garner the support of the majority was not only insufficient to adequately develop the Project but also contributed to increasing the unease and confrontation among the community members. The Tribunal also notes, and the Claimant accepts, that the communities that opposed the project – Malku Khota and Kalacacha – were the closest to the mine.<sup>785</sup> Therefore, it was not about “two tiny communities,” as SAS suggests,<sup>786</sup> but rather the communities most directly impacted by CMMK’s mining activities.

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<sup>781</sup> See, for example, C-316, R Report “*Situación de Conflicto Malku Khota - Informe de Acontecimientos*” (Conflict situation in Malku Khota – Report on the events), prepared by Witness X, May 19, 2012; C-319, E-mail from Witness X to J. Mallory, May 29, 2012; Hearing Transcript, Day 2, 336:17-20 (English).

<sup>782</sup> SAS’ Post-Hearing Brief, para. 13.

<sup>783</sup> RWS-1, Gob. Gonzales’ First Witness Statement, para. 69; R-89, CF Noticias, Comunarios de Mallku Khota agredieron a policías en La Paz (Malku Khota Community members attacked police officers in La Paz), June 8, 2012, video.

<sup>784</sup> See, for example, R-280, E-mail from Witness X to managers of CMMK and SASC, June 7, 2012; R-281, E-mail from Witness X to Agustín Cárdenas, June 10, 2012 (II).

<sup>785</sup> See Hearing Transcript, Day 2, 448:10-13 (English).

<sup>786</sup> Hearing Transcript, Day 1, 15:10-13 (English).

502. The evidence on the record shows that the expressions of opposition to the Project, in particular by the *ayllu* of Sullka Jilakitani, increased during 2011.<sup>787</sup> Similarly, the violent clashes between the community members that opposed the continuation of the Project and those that supported it increased until reaching a critical point between April and July 2012.
503. The uncontroverted facts at the time include the hostage taking of an objector to the Project and a Company employee by the community members;<sup>788</sup> clashes between the community members and the police in the Project area, during which two police officers were taken hostage;<sup>789</sup> violent clashes between members of COTOA-6A and objectors to the Project in Acasio;<sup>790</sup> the taking of Kuraka Cancio Rojas as a hostage by members of COTOA-6A;<sup>791</sup> and new violent clashes between the police and the community members, in which one of the demonstrators died in July 2012.<sup>792</sup>
504. Even though the Parties dispute their respective roles in connection with these facts, and hold each other responsible, neither Party fails to acknowledge their gravity. In any event, it is clear to the Tribunal that, by the time the Reversion Decree was issued, there was an acute social conflict in the Project area, resulting from the increasingly radical clash between the community members in support of the Company – mainly COTOA-6A – and those who objected to their continuation in the area.
505. The Tribunal cannot conclude that the Company has directly and exclusively generated the hostilities or that, as Bolivia claims, was the sole cause of the social conflict and the severe clashes in the area. [REDACTED]  
[REDACTED] What is clear for the Tribunal in connection with the Project, is that the Company undertook certain

<sup>787</sup> See, for example, R-50, FAOI-NP Resolution, January 11, 2011; R-51, *Ayllu* of Sullka Jilakitani Resolution, February 15, 2011; R-52, FAOI-NP Resolution, February 18, 2011; R-60, Letter from the *ayllu* of Sullka Jilakitani to the President of the Republic, May 1, 2011; R-61, Letter from the *ayllu* of Sullka Jilakitani to the Minister of Mining and Metallurgy, May 1, 2011; R-71, Resolution of CONAMAQ Government Council, December 13, 2011.

<sup>788</sup> R-70, Minutes of the statements of abuse suffered by members of the Indigenous Peoples; Reply Memorial, para. 133; CWS-10, Malory's Second Witness Statement, para. 42; C-241, Memorandum from Agustin Cárdenas and Fernando Fernández to Fernando Caceres, Report on the incident of June 28, 2012.

<sup>789</sup> R-78, News release, El Potosí, *Confirmation of a hostage taking in Mallku Khota*, May 5, 2012; R-76, Complaint filed by the Indigenous Communities regarding police intervention, May 8, 2012. See Hearing Transcript, Day 1, 53:3-4 (English); 229:19 – 229:25 (Spanish).

<sup>790</sup> C-316, Report "*Situación de Conflicto Malku Khota - Informe de Acontecimientos*" (Conflict situation in Malku Khota – Report on the events), prepared by Witness X, May 19, 2012; R-174, Noticias Fides, *Enfrentamientos en Mallque Qhuta*, video published on May 18, 2012; R-80, Press release, *Pelea por Mallku Khota deja 10 heridos y 12 desaparecidos* (Fight over Mallku Khota results in 10 wounded and 12 missing), May 19, 2012.

<sup>791</sup> Hearing Transcript, Day 3, 518:22-519:1 (English).

<sup>792</sup> See R-96, Noticias PAT, *1 muerto 8 heridos tras enfrentamiento en Mallku Khota* (1 casualty, 8 wounded after clashes in Mallku Khota), video.

community relations activities which led to unrest in the communities directly affected by the Project and which were questioned by its own advisors, and that, as the conflict ensued, the Company adopted a strategy that contributed to increase the divisions among the Indigenous Communities, the radicalization of the opposition groups and the practical impossibility of seeking the consensus that its advisors warned would be necessary in order to operate in the region. The documents provided by Witness X render an account of an aggressive strategy that helped worsen the conflict and that is very far from the search for consensus or agreement, and which intended to show majority support and to weaken the Project's objectors.

506. It is uncontested that, until the date the Reversion Decree was issued, CMMK owned the rights over the Mining Concessions and complied with the strict legal requirements to develop the Project in the exploration stage. However, CMMK was to operate in an area characterized by a delicate social and cultural balance, which followed a political organization and particular decision-making process based on consensus. Neither the community relations programs that the Company implemented, nor the Company's attitude took into account these characteristics. Rather, they attempted to establish an alleged majority supportive of its cause and have it prevail, thus furthering the conflict within the Indigenous Communities, which eventually resulted in severe violent clashes in the Project area.
507. In brief, based on the evidence on the record, the Tribunal concludes that: (i) despite having implemented an allegedly appropriate and adequate community relations program, CMMK had serious failures in its community relations from the outset which remained uncorrected in spite of BSR's warnings; (ii) there was opposition to the Project and to CMMK's presence since at least December 2010, expressed through the resolutions of Indigenous Communities government bodies; (iii) starting in 2011, CMMK implemented a strategy for the management of the communities focused mainly on weakening the opposition and consolidating a majority opinion, supposedly represented by COTOA-6A, which contributed to the aggravation of the conflict; and (iv) at the time the Reversion of the Mining Concessions was decreed, there was a social conflict in the Project area that had been escalating for some time and that resulted in violent clashes between community members in relation to it. In the corresponding sections, the Tribunal will analyze the implications of this situation.

## B. THE CLAIM FOR EXPROPRIATION

### 1. The Claimant's Position

508. The Claimant asserts that, notwithstanding the terms used in a governmental measure – whether nationalization, reversion or expropriation<sup>793</sup> – and the title of the investor impacted by such measure – whether it is ownership of a physical asset or “*rights that are economically significant to the investor*”,<sup>794</sup> such as the rights arising from a concession agreement<sup>795</sup> –, the “*outright seizure or formal or obligatory transfer of title in favour of the host State*” undoubtedly constitutes expropriation under international law.<sup>796</sup> The Claimant considers obvious that the Reversion, which ordered “*unambiguously [...] the taking of CMMK's rights over the Mining Concessions by the Government*”,<sup>797</sup> constitutes direct expropriation of the Claimant's investment in the Project.<sup>798</sup>

509. The Claimant alleges that upon expropriation of the Mining Concessions of CMMK, a Bolivian corporation wholly owned by SAS, Bolivia should have paid the Claimant “*prompt, adequate and effective compensation*” pursuant to the terms of Article 5(2) of the Treaty.<sup>799</sup> In particular, the Claimant asserts that Article 5 of the Treaty, which reflects “*the customary international law standard of compensation*”,<sup>800</sup> lays down the following requirements for the compensation:

- a) Fair and adequate compensation, i.e. based on the fair market value of the taken investment.<sup>801</sup> The Claimant submits that compensation should “*amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge*”, as provided for expressly under Article 5(1) of the Treaty.<sup>802</sup>

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<sup>793</sup> Statement of Claim and Memorial, paras. 121-122.

<sup>794</sup> Statement of Claim and Memorial, para. 124.

<sup>795</sup> Statement of Claim and Memorial, para. 125; CLA-25, *Phillips Petroleum Company Iran v. Islamic Republic of Iran*, Iran-United States Claims Tribunal Case No. 39 (425-39-2), Award, June 28, 1989, para. 76. See also Hearing Transcript, Day 1, 73:25 – 74:19 (English).

<sup>796</sup> Statement of Claim and Memorial, para. 123, citing CLA-17, *Metalclad Corporation v. Claimant's Reply on Costs*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, para. 103.

<sup>797</sup> Statement of Claim and Memorial, para. 126, relying on C-16, Memorandum of Agreement, July 8, 2012 (“*Control of said mining areas shall revert to the Plurinational State of Bolivia*”; “*The State shall take over the entire production chain at the Malku Khota Mining Center*”); C-4, Reversion Decree, August 1, 2012 (Mining Concessions “*shall revert back to the original ownership of the State*”; “*COMIBOL shall take over the management and mining development of the 219 mining blocks*”; “*No other non-State mining producer may perform mining activities by itself [...] in the areas that have reverted to the State*”).

<sup>798</sup> Statement of Claim and Memorial, para. 120; Claimant's Reply Memorial, paras. 265, 304, 309.

<sup>799</sup> Statement of Claim and Memorial, paras. 119-120, 130-131; Claimant's Reply Memorial, paras. 264, 289, 293.

<sup>800</sup> Statement of Claim and Memorial, para. 132.

<sup>801</sup> Statement of Claim and Memorial, para. 137; Claimant's Reply Memorial, para. 296.

<sup>802</sup> Statement of Claim and Memorial, paras. 129-131; Claimant's Reply Memorial, para. 264.

- b) Prompt compensation, namely done without delay.<sup>803</sup> The Claimant, relying on legal authorities and the conclusions of other arbitral tribunals, argues that the payment of compensation should be contemporaneous with the expropriation and be made as quickly as possible, or at least within a reasonable period of time.<sup>804</sup> The Claimant contends that the State breaches the promptness requirement cited when the investor has not received any compensation “*several months*” after the date of the effective taking.<sup>805</sup>
510. The Claimant argues that Bolivia has yet to pay a compensation to SAS that amounts to the market value of the investment, following a reasonable length of time after the expropriation of the Mining Concessions.<sup>806</sup> The Claimant submits that it cannot be considered that Bolivia has made “*any meaningful offer of payment*” during this period,<sup>807</sup> as the valuation process under the Reversion Decree (i) was never negotiated with the Claimant, despite the fact that the Claimant “*did seek to engage with Bolivia and sought to meet to discuss valuation,*”<sup>808</sup> and (ii) it would only be based on costs incurred by CMMK, and, therefore, any compensation based on the Reversion Decree would also completely ignore the fair market value of the Project.<sup>809</sup>
511. The Claimant argues that failure to pay compensation is a fact “*sufficient in itself to establish the expropriation’s unlawful nature in light of both the Treaty and international law.*”<sup>810</sup> The Claimant submits that valuation and the corresponding payment of compensation are a “*pre-existing obligation*” to arbitration, which establishes the legality of expropriation and cannot be a consequence of the arbitral process because if that was the case “*the States would no longer have an incentive to provide prompt, adequate, and effective compensation to the expropriated investor.*”<sup>811</sup>
512. The Claimant challenges the relevance of the case law invoked by Bolivia as it not only refers to alleged scenarios of indirect expropriation, as opposed to direct expropriations, such as the

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<sup>803</sup> Claimant’s Reply Memorial, para. 296.

<sup>804</sup> Statement of Claim and Memorial, paras. 133-134; Claimant’s Reply Memorial, para. 297.

<sup>805</sup> Claimant’s Reply Memorial, paras. 297-298.

<sup>806</sup> Statement of Claim and Memorial, paras. 128, 131-133; Claimant’s Reply Memorial, paras. 290, 299, 308; SAS’ Post-Hearing Brief, para. 26.

<sup>807</sup> Claimant’s Reply Memorial, para. 293; Hearing Transcript, Day 1, 79:1-10 (English). See C-20, Letter of COMIBOL addressed to SAS, August 24, 2012.

<sup>808</sup> Claimant’s Reply Memorial, para. 291; Hearing Transcript, Day 1, 79:11-10 (English); CWS-9, Malbran’s Second Witness Statement, para. 37. See also C-21, SAS letter to COMIBOL, September 4, 2012.

<sup>809</sup> Statement of Claim and Memorial, paras. 135-138; Claimant’s Reply Memorial, paras. 291, 311-314; Hearing Transcript, Day 1, 77:24 – 78:13 (English).

<sup>810</sup> Statement of Claim and Memorial, paras. 143-144; SAS’ Post-Hearing Brief, para. 26. See also Hearing Transcript, Day 1, 78:14-25 (English).

<sup>811</sup> Claimant’s Reply Memorial, paras. 306-307; CLA-31/RLA-103, S. Rapinsky, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008, p. 68.

Reversion,<sup>812</sup> but it establishes that expropriation without compensation is not *per se* illegal provided the State has made an offer of payment, something that Bolivia has not done in this case.<sup>813</sup>

513. The Claimant further argues that the Reversion did not comply with the other cumulative legal criteria provided for under Article 5(1) of the Treaty, since:

- (a) The Reversion violated due process. The State must offer the investor the opportunity to “*assert its rights*”, i.e. to challenge the legality of the expropriation and to participate in the determination of adequate compensation. However, Bolivia formalized its decision to expropriate in the course of a series of meetings where the Claimant was never present; and the valuation process it imposed in the Reversion Decree would have been carried out unilaterally by COMIBOL, without the Claimant being able to participate in the quantification of compensation.<sup>814</sup>
- (b) The Reversion did not have a public purpose. Expropriation must (i) be based on a “*genuine*” public purpose,<sup>815</sup> and (ii) constitute a proportionate and necessary measure in relation to the aim sought.<sup>816</sup>
  - i. As to the genuine public purpose, the Claimant contends that the true motivation behind the Reversion was for Bolivia to seize control of the multi-million dollar deposit SAS discovered,<sup>817</sup> and that the alleged concerns for human rights or for the specific rights of the Indigenous Communities are “*ex post facto justifications manufactured by Bolivia*” to defend itself in this arbitration.<sup>818</sup> The Claimant submits that the Reversion Decree refers solely to the “*social conflict*” in Malku Khota,<sup>819</sup> which is a false pretext, rather than a cause with a genuine public purpose given that “*to placate a violent minority*” is a temporary security concern that the investor could have resolved.<sup>820</sup> For the Claimant, it is proven that the Reversion was adopted solely

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<sup>812</sup> Claimant’s Reply Memorial, paras. 304-305. See also Hearing Transcript, Day 1, 83:23 – 85:11 (English).

<sup>813</sup> Claimant’s Reply Memorial, para. 302, referring to RLA-105, *Venezuela Holdings et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, October 9, 2014, para. 301. See also Claimant’s Reply Memorial, paras. 312-313; Hearing Transcript, Day 1, 75:9 – 77:7, 77:24 – 78:13, 83:23 – 85:11 (English).

<sup>814</sup> Statement of Claim and Memorial, paras. 139-140.

<sup>815</sup> Statement of Claim and Memorial, para. 141; Claimant’s Reply Memorial, para. 270.

<sup>816</sup> Statement of Claim and Memorial, para. 142; Claimant’s Reply Memorial, para. 271.

<sup>817</sup> Statement of Claim and Memorial, para. 144; Claimant’s Reply Memorial, paras. 277, 284; Hearing Transcript, Day 1, 67:15-21 (English); SAS’ Post-Hearing Brief, para. 24. See Hearing Transcript, Day 4, 809:9 – 810:2 (Spanish).

<sup>818</sup> Claimant’s Reply Memorial, para. 272; Hearing Transcript, Day 1, 67:2-21 (English); SAS’ Post-Hearing Brief, para. 23.

<sup>819</sup> Claimant’s Reply Memorial, paras. 272-273.

<sup>820</sup> Statement of Claim and Memorial, para. 144; Claimant’s Reply Memorial, para. 273.



to satisfy Bolivia's economic interests<sup>821</sup> as the social conflict started in May 2012,<sup>822</sup> while Bolivia had intended to expropriate since the establishment of the Immobilization Zone in 2011, just as SAS released the results of the PEA 2011.<sup>823</sup>

- ii. The Claimant further argues that the Reversion is wholly disproportionate with the stated objective of pacifying the social conflict.<sup>824</sup> Illegal gold mining was the root cause of the conflict in Malku Khota,<sup>825</sup> and instead of punishing the illegal gold miners, Bolivia by its own actions and inactions preferred to stoke conflict and the “*anti-CMMK*” sentiment in the region, as an excuse to expropriate SAS’ lawful investment.<sup>826</sup> The Claimant mentions other measures that Bolivia could have taken as an alternative to expropriation to avoid the conflict, including the militarization of the area surrounding Malku Khota,<sup>827</sup> and concludes that expropriation “*did nothing meaningful to stop the violence in the area,*” as violent protests continued at least until July 2015.<sup>828</sup>

- (c) The Reversion did not serve a social benefit related to the domestic needs of Bolivia. While the Malku Khota Project could have brought “*millions of dollars of investments to one of the poorest areas of Bolivia,*” neither the Government nor the local communities have obtained any benefit from the Reversion, and community representatives request that SAS comes back to the area to continue with the Project.<sup>829</sup>

514. As to the Respondent’s argument that the Reversion does not constitute an internationally wrongful act because there was a state of necessity, the Claimant submits that by invoking this defense Bolivia acknowledges that the expropriation was illegal, as the state of necessity is a

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<sup>821</sup> See Hearing Transcript, Day 1, 67:22 – 70:25 (English).

<sup>822</sup> See Counter-Memorial, para. 143; RWS-1, Gob. Gonzales’ First Witness Statement, para. 50; SAS’ Post-Hearing Brief, para. 24.

<sup>823</sup> Claimant’s Reply Memorial, paras. 274-276; Hearing Transcript, Day 1, 67:22 – 69:24 (English); Statement of Claim and Memorial, para. 127.

<sup>824</sup> Statement of Claim and Memorial, para. 144; Claimant’s Reply Memorial, para. 278.

<sup>825</sup> Claimant’s Reply Memorial, paras. 278-279; C-223, “Explotación ilegal de oro es el origen del conflicto en Mallku Khota”, La Paz, May 21, 2012.

<sup>826</sup> Claimant’s Reply Memorial, paras. 280-282.

<sup>827</sup> Claimant’s Reply Memorial, paras. 281-282. See also Hearing Transcript, Day 1, 71:151 – 72:2 (English). See also SAS’ Post-Hearing Brief, para. 6, referencing the statement of Governor Gonzales (Hearing Transcript, Day 4, 872:3-5 (Spanish)).

<sup>828</sup> Claimant’s Reply Memorial, para. 283; Hearing Transcript, Day 1, 72:8 – 73:7 (English). See C-242, “Se teme mayores actitudes violentas en Malku Khota”, *EFE*, October 5, 2012; C-243, “Toman de nuevo 50% de Mallku Khota”, *Los Tiempos*, October 3, 2012; C-149, “Policía evitará explotación ilegal en Malku Khota”, *La Patria*, October 19, 2012, C-244, “Ayllus de Malku Khota toman sede de Comibol”, *Los Tiempos*, January 29, 2014; C-245, “Comibol cambia personal y niega toma en Mallku Khota”, *Los Tiempos*, January 30, 2014; C-246, “Protestas en Bolivia: 12 días de bloqueos y dinamita paralizan La Paz”, *BBC*, July 20, 2015; C-247, “Los enfrentamientos de los mineros en Bolivia se intensifican”, *El País*, July 23, 2015.

<sup>829</sup> Statement of Claim and Memorial, para. 145; CWS-5, Angulo’s First Witness Statement, para. 19. See also Claimant’s Reply Memorial, paras. 285-288.

circumstance that would exclude the wrongfulness of the actions that would, otherwise, be unlawful.<sup>830</sup>

515. The Claimant further argues that the defense related to the state of necessity cannot prevail as (a) Article 25 of the ILC Articles on State Responsibility<sup>831</sup> provides that this defense can only be invoked in a situation between two States, which is not the case;<sup>832</sup> (b) the rigorous requirements established in Article 25 for this defense to prevail are not met,<sup>833</sup> since the Reversion Decree was not intended to safeguard an essential interest of the Respondent. Neither was it faced with a grave and imminent peril, or even if faced with such a peril, the Reversion Decree would not have been the only option for Bolivia, nor was there a violation of an obligation owed to another State, but to a foreign investor.
516. The Claimant states that the Treaty implicitly “excludes necessity” because it constitutes a special set of rules of international law that displaces the customary international law minimum standard of treatment as well as any defenses that would be available under customary international law.<sup>834</sup> Finally, the Claimant submits that the Respondent failed to show that it did not “*contribute to the alleged situation of necessity*.”<sup>835</sup>
517. The Claimant contends that the wording of Article 25 is formulated in the negative in order to show that this defense constitutes an exception,<sup>836</sup> and that investment tribunals have addressed this exceptional nature. Similarly, the Claimant submits that the requirements need to be complied with cumulatively.<sup>837</sup>
518. Finally, the Claimant further argues that, even if the Tribunal accepted that Bolivia faced a state of necessity when it took the measures, it would still have to compensate the Claimant as that is a separate and distinct obligation.<sup>838</sup> The Claimant notes that Article 27 provides that invocation

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<sup>830</sup> Hearing Transcript, Day 1, 85:23 – 86:17 (English); CLA-201, Report of the International Law Commission on the work of its Thirty-second session, Official Records of the General Assembly, Thirty-fifth session, May 5, to July 25, 1980, Article 3, para. 3.

<sup>831</sup> CLA-160, *Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR 6th Comm., 56th Sess., U.N. Doc. A/Res/56/83, January 28, 2002, Article 25.

<sup>832</sup> Hearing Transcript, Day 1, 87:1 – 88:5 (English); SAS’ Post-Hearing Brief, para. 27.

<sup>833</sup> Hearing Transcript, Day 1, 89:6 – 93:8 (English); SAS’ Post-Hearing Brief, para. 28.

<sup>834</sup> Hearing Transcript, Day 1, 92:13 – 94:1 (English).

<sup>835</sup> SAS’ Post-Hearing Brief, para. 28. The Claimant argues that Bolivia contributed to the conflict with its decision to ignore the communities and its lack of support and protection for the Project (see Statement of Claim and Memorial, section II.C and Claimant’s Reply Memorial, section II.C).

<sup>836</sup> Hearing Transcript, Day 1, 88:10-22 (English).

<sup>837</sup> Hearing Transcript, Day 1, 89:17-20 (English).

<sup>838</sup> Hearing Transcript, Day 1, 93:9 – 94:10 (English).

of a circumstance precluding wrongfulness is without prejudice to the question of compensation.<sup>839</sup>

519. In regards to the argument that the Reversion was an exercise of the State's police powers, the Claimant asserts that the Respondent is not entitled to invoke this doctrine as a defense to liability or the obligation to compensate<sup>840</sup> since the Reversion was not the enactment of a regulation but a specific action to deprive the Claimant of its investment, which constitutes an unlawful expropriation pursuant to the Treaty which, as *lex specialis*, displaces any possible exception to the obligation to compensate under customary international law.<sup>841</sup>
520. Further, it is an *ex post facto* justification because, had Bolivia considered that it was exercising its police powers at the moment it took the measures, it would have not included a compensation provision in the Reversion Decree.<sup>842</sup>
521. If the Tribunal nevertheless decides to consider this defense, the Reversion Decree did not comply with the applicable standard<sup>843</sup> because (i) it did not serve a public purpose;<sup>844</sup> (ii) it was not enacted *bona fide*; (iii) it was discriminatory as it was intended exclusively for the Claimant; (iv) it did not comply with due process;<sup>845</sup> (v) it was not proportional;<sup>846</sup> and (vi) Bolivia had already breached its international obligations before enacting the Reversion Decree (*inter alia*, that of providing full protection and security for the concessions<sup>847</sup> and granting fair and equitable treatment<sup>848</sup>).
522. Thus, the Claimant submits that the Reversion was an expropriation measure adopted in breach of the Treaty, which constitutes a wrongful act under international law.<sup>849</sup>

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<sup>839</sup> SAS' Post-Hearing Brief, para. 29.

<sup>840</sup> SAS' Post-Hearing Brief, para. 30.

<sup>841</sup> SAS' Post-Hearing Brief, para. 30.

<sup>842</sup> SAS' Post-Hearing Brief, para. 30.

<sup>843</sup> Hearing Transcript, Day 1, 95:2-23 (English); SAS' Post-Hearing Brief, para. 31.

<sup>844</sup> See *supra* para. 513(b).

<sup>845</sup> See *supra* para. 513(a).

<sup>846</sup> Claimant's Reply Memorial, para. 397; SAS' Post-Hearing Brief, para. 31. The Claimant argues that a measure would not be proportional if the investor bore "an individual and excessive burden" (CLA-40, *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/02, Award, July 14, 2006, para. 311). Claimant argues that Bolivia could have adopted more reasonable measures to comply with the stated objectives of pacifying the area but, also, only sent the military after the Reversion, despite which violence in the area did not cease. See SAS' Post-Hearing Brief, para. 32.

<sup>847</sup> See *infra* paras. 675-678.

<sup>848</sup> See *infra* paras. 632-636.

<sup>849</sup> Statement of Claim and Memorial, paras. 138, 146.

## 2. The Respondent's Position

523. The Respondent argues that SAS has not demonstrated that the Reversion constitutes an expropriation under Article 5 of the Treaty.<sup>850</sup> Bolivia argues that the first requirement for a State measure to be considered expropriation is that the measure in question constitutes “*a real expropriation and not a legitimate exercise of police powers*” by the State.<sup>851</sup> The Respondent contends that measures adopted under the sovereign prerogative of the State to exercise its police powers for a public purpose<sup>852</sup> enjoy a presumption of legality<sup>853</sup> and are excluded from expropriation provisions in treaties,<sup>854</sup> as well as an arbitral tribunal's review of legitimacy.<sup>855</sup> These measures include those (i) adopted to safeguard a public interest, and (ii) proportional to the public purpose at stake.<sup>856</sup>
524. The Respondent alleges that the Reversion is a “*legitimate exercise of [Bolivia's] police powers in response to the crisis created and aggravated by CMMK,*” and, therefore, cannot be called an expropriation.<sup>857</sup>
525. The Respondent submits that the Reversion was adopted to protect human rights and the indigenous rights of the Indigenous Communities, which constitute the “*overriding public interest*” warranting the exercise of police powers.<sup>858</sup> Protection of such rights is more than justified under both international law and arbitral jurisprudence.<sup>859</sup>
526. The Respondent argues that the Reversion was a proportional measure to guarantee the human rights of the Indigenous Communities given “*the repeated and continuous violations that were being committed by CMMK*”.<sup>860</sup> The Reversion was enacted after Bolivia attempted to exhaust other options, whose failure is only attributable to SAS.<sup>861</sup> Moreover, the Reversion did not have a “*substantial economic impact*” on the rights arising from the Mining Concessions, as these were

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<sup>850</sup> Statement of Claim and Memorial, paras. 138, 146.

<sup>851</sup> Respondent's Rejoinder, paras. 379-382.

<sup>852</sup> Respondent's Rejoinder, para. 389.

<sup>853</sup> Respondent's Rejoinder, para. 391;

<sup>854</sup> Respondent's Rejoinder, paras. 385, 388.

<sup>855</sup> Respondent's Rejoinder, paras. 392-393.

<sup>856</sup> Respondent's Rejoinder, paras. 385-387.

<sup>857</sup> Respondent's Rejoinder, para. 384.

<sup>858</sup> Respondent's Rejoinder, paras. 394-395.

<sup>859</sup> Respondent's Rejoinder, para. 395. See also Hearing Transcript, Day 1, 260:9-19 (Spanish).

<sup>860</sup> Respondent's Rejoinder, paras. 395-396.

<sup>861</sup> Respondent's Rejoinder, paras. 397-399; RWS-1, Gob. Gonzales' First Witness Statement, para. 71.

in the exploration stage and the Reversion Decree “*offered equivalent compensation to the amount invested in the exploration activities*”.<sup>862</sup>

527. The Respondent argues that “*Bolivia fully satisfied the compensatory provision of the [Treaty] – even though it had no obligation to do so*”.<sup>863</sup> Fulfillment of the compensation standard under Article 5 of the Treaty does not require payment of a compensation, or for the amount of the compensation to be estimated definitely; rather it is “*sufficient that the State adopted measures to determine compensation at the date of expropriation*”.<sup>864</sup>

528. According to the Respondent contends that adequate and prompt compensation establishes consecutive conditions that require the State (a) to proceed with the estimation of the market value of the investment, i.e. “*to estimate just compensation*”;<sup>865</sup> the Respondent contends that the Treaty establishes arbitration as one of the ways to determine compensation when there is a dispute over the existence of an expropriation and the amount owed;<sup>866</sup> and (b) once just compensation has been estimated, to pay “*without delay*”.<sup>867</sup> Contrary to the Claimant’s allegations, within “*several months*,” the State must indicate “*whether compensation is going to be paid, but they do not [require] that compensation be actually paid within that period*”.<sup>868</sup> Neither the Treaty nor international law set a specific deadline for estimating fair compensation and the corresponding payment.<sup>869</sup>

529. The Reversion Decree provides for payment of compensation upon completion of an independent valuation process to estimate the amount, and Bolivia began the process provided for in Article 5 in compliance with the compensation provision.<sup>870</sup>

530. The Respondent asserts that “*the mere fact that compensation has not been paid before the arbitration cannot constitute a violation of the [Treaty]*”.<sup>871</sup> Bolivia submits that a payment offer was made directly to SAS as provided for in the Reversion Decree and that it “*tried, in good faith, to involve [SAS] in the process of determining the compensation*”, but it was the Claimant who declined to participate in any way in the valuation process and opted for arbitration to determine

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<sup>862</sup> Respondent’s Rejoinder, para. 396; Hearing Transcript, Day 1, 260:20-25 (Spanish).

<sup>863</sup> Respondent’s Rejoinder, para. 422.

<sup>864</sup> Counter-Memorial, paras. 383-384, 400.

<sup>865</sup> Counter-Memorial, para. 382.

<sup>866</sup> Respondent’s Rejoinder, paras. 432-436.

<sup>867</sup> Counter-Memorial, para. 382.

<sup>868</sup> Respondent’s Rejoinder, para. 424.

<sup>869</sup> Counter-Memorial, paras. 387-389.

<sup>870</sup> Counter-Memorial, paras. 382, 385; Respondent’s Rejoinder, paras. 425-429.

<sup>871</sup> Respondent’s Rejoinder, para. 434.

the compensation amount.<sup>872</sup> Therefore, fair compensation shall be determined in this arbitration and payment shall be made promptly “*provided it is made promptly upon a final decision by this Tribunal ordering payment (quod non) has been issued and remedies have been exhausted.*”<sup>873</sup>

531. Similarly, the Respondent alleges that SAS has not shown that the Reversion was adopted in violation of the legality conditions under Article 5 of the Treaty.<sup>874</sup> Bolivia considers that legality refers to “*whether the State is authorized to expropriate or not,*” and that payment of the compensation “*is a separate obligation, a consequence of expropriation*”.<sup>875</sup> Thus, citing decisions of various international tribunals,<sup>876</sup> the Respondent contends that “*the expropriations that meet all other conditions except for the payment of compensation are lawful*”.<sup>877</sup> The Respondent contends that no arbitral tribunal, including those that have decided on direct expropriations, has concluded that an expropriation is unlawful based solely on lack of compensation.<sup>878</sup>

532. The Respondent submits that, had there been an expropriation, it would have been lawful,<sup>879</sup> since:

- (a) Bolivia complied with due process. Relying upon the Treaty and the doctrine, arbitral tribunals have confirmed that respect for due process consists merely in making available to the investor remedies for challenging an expropriation measure, once adopted.<sup>880</sup> CMMK could have challenged the Reversion Decree and its valuation process before the Bolivian authorities, but never did.<sup>881</sup> Contrary to the Claimant’s assertion, neither the Treaty nor international law provide for the obligation to include the investor in the decision-making or the valuation process.<sup>882</sup> At any rate, on the one hand, Bolivia invited CMMK to attend several meetings where the Reversion was discussed as an alternative,

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<sup>872</sup> Respondent’s Rejoinder, paras. 430-432; C-20, Letter of COMIBOL addressed to SAS, August 24, 2012; C-21, Letter of SAS addressed to COMIBOL, September 4, 2012. See also Counter-Memorial, paras. 401-403; Hearing Transcript, Day 1, 261:9 – 262:7 (Spanish).

<sup>873</sup> Counter-Memorial, para. 385; Respondent’s Rejoinder, paras. 432, 437.

<sup>874</sup> Counter-Memorial, paras. 379-380; Respondent’s Rejoinder, paras. 381-382.

<sup>875</sup> Respondent’s Rejoinder, paras. 441-444.

<sup>876</sup> Counter-Memorial, paras. 394-398.

<sup>877</sup> Respondent’s Rejoinder, para. 442.

<sup>878</sup> Respondent’s Rejoinder, paras. 445-447.

<sup>879</sup> Respondent’s Rejoinder, para. 384.

<sup>880</sup> Counter-Memorial, paras. 363-364, 374-376.

<sup>881</sup> Counter-Memorial, para. 377.

<sup>882</sup> Counter-Memorial, paras. 360-364, 368, 373.

but limited its participation due to security concerns<sup>883</sup> and, on the other hand, it is perfectly legitimate for the valuation process to be exclusively determined by the State.<sup>884</sup>

- (b) The Reversion served a public purpose. The concept of public purpose needs to be analyzed pursuant to Bolivian law,<sup>885</sup> and under such law, the Reversion has a public purpose as it was necessary to preserve public order, and guarantee the human and collective rights of the Indigenous Communities.<sup>886</sup> The State has broad discretion to determine the measures that meet this requirement, including “*taking of measures that are deemed necessary to protect human and indigenous rights*”.<sup>887</sup> Contrary to the Claimant’s allegations, Bolivia considers it patent, under the provisions of the Reversion Decree, that the only motivation for this measure was the protection of the human rights and indigenous rights of the Indigenous Communities.<sup>888</sup> Bolivia rejects the idea that there is a hidden economic interest since (i) areas, such as the Immobilization Zone, were established at the same time for other mining projects; (ii) no mining project has been developed in Malku Khota following the Reversion; and (iii) Bolivia has respected the rights of other investors who had a proper public relations program with the indigenous communities.<sup>889</sup>
- (c) The Claimant’s formulation of proportionality does not apply and only a “*rational link*” is required between the measure and the public purpose.<sup>890</sup> The Respondent contends that the grave emergency situation created and promoted by CMMK and its inability to resolve the conflict justify Bolivia’s adoption of the Reversion Decree to reestablish public order and protect the rights of the Indigenous Communities.<sup>891</sup> The Respondent considers that the Reversion was the most appropriate measure to pacify the area given the seriousness of the situation and that other measures (such as the militarization SAS proposed) would not be

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<sup>883</sup> Counter-Memorial, paras. 365-367.

<sup>884</sup> Counter-Memorial, paras. 371-372.

<sup>885</sup> Counter-Memorial, para. 340.

<sup>886</sup> Counter-Memorial, paras. 341-343.

<sup>887</sup> Respondent’s Rejoinder, paras. 404-405.

<sup>888</sup> Counter-Memorial, paras. 345-346, Respondent’s Rejoinder, paras. 409-410.

<sup>889</sup> See *supra* para. 388. Respondent’s Rejoinder, paras. 414-417.

<sup>890</sup> Respondent’s Rejoinder, para. 420.

<sup>891</sup> Counter-Memorial, paras. 347-353.

effective to resolve conflicts with the Indigenous Communities<sup>892</sup> and have in fact had terrible consequences in the past;<sup>893</sup> moreover, at present, there is no conflict in the area.<sup>894</sup>

- (d) The Reversion served a social benefit. According to the Respondent, the Reversion contributed to the social benefit of the Indigenous Communities, “*by pacifying the conflicts in the Mallku Khota area and avoiding new violations of [their] rights*”.<sup>895</sup>

533. In short, the Respondent contends that the Reversion “*cannot be considered as an expropriatory measure, much less an unlawful one*”.<sup>896</sup>

534. The Respondent moreover invokes the state of necessity as the reason to preclude the alleged wrongdoing under the Reversion.<sup>897</sup>

535. Based on the ILC Articles on State Responsibility,<sup>898</sup> the Respondent asserts that the Reversion was “*the only way for the State to safeguard an essential interest against grave and imminent peril*.” The Respondent details that (i) the human and indigenous rights of the Indigenous Communities “*constitute, at the very least, a fundamental interest*” for Bolivia;<sup>899</sup> (ii) CMMK represented a grave and imminent peril due to the fact that its actions “*promoted and exacerbated social conflict, generating a constant violation*” of Bolivia’s fundamental interest;<sup>900</sup> and (iii) there is no doubt that the only way to protect this fundamental interest was by expelling CMMK from Malku Khota, since the Indigenous Communities agreed with this measure. The Government suggested other viable alternatives that were rejected by CMMK or failed because of CMMK, and the Government’s experience shows that “*retaking the State control is the most effective measure to end a conflict between Indigenous Communities resulting from the operation of a mining project*”.<sup>901</sup>

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<sup>892</sup> Bolivia’s Post-Hearing Brief, para. 74, referring to the statement of Governor Gonzales (Hearing Transcript, Day 4, 877:8-14 (Spanish)). See also Respondent’s Rejoinder, paras. 365-370, 418-420.

<sup>893</sup> Bolivia’s Post-Hearing Brief, para. 74, referring to the statement of Minister Navarro Miranda (Hearing Transcript, Day 3, 758:2-14 (Spanish)). See also Respondent’s Rejoinder, paras. 365-370, 418-420.

<sup>894</sup> Bolivia’s Post-Hearing Brief, para. 75, referring to the statement of Mr. Chajmi (Hearing Transcript, Day 4, 947:21-25 (Spanish)).

<sup>895</sup> Counter-Memorial, paras. 355-357. See also Respondent’s Rejoinder, paras. 406-407.

<sup>896</sup> Respondent’s Rejoinder, para. 448.

<sup>897</sup> Respondent’s Rejoinder, paras. 357-358, 375.

<sup>898</sup> Respondent’s Rejoinder, para. 357; RLA-126, United Nations, *Responsability of States for internationally wrongful acts*, Resolution approved by the General Assembly No. A/RES/56/83, January 28, 2002, art. 25(1).

<sup>899</sup> Respondent’s Rejoinder, paras. 360-361; Hearing Transcript, Day 1, 259:5-14 (Spanish).

<sup>900</sup> Respondent’s Rejoinder, para. 362; Hearing Transcript, Day 1, 259:5-14 (Spanish).

<sup>901</sup> Respondent’s Rejoinder, paras. 363-370; C-16, Memorandum of Agreement, July 8, 2012; C-17, Agreement signed at the Government Palace, July 10, 2012; RWS-7, Witness X’s Witness Statement, paras. 25, 33; RWS-4, Gob. Gonzales’ Second Witness Statement, para. 43; RWS-2, Minister Navarro Miranda’s First Witness Statement, paras. 25, 44. See also Hearing Transcript, Day 1, 259:5-14 (Spanish).



536. The Respondent further submits that the Reversion “*does not affect gravely the fundamental interests of a State or States against which there is an obligation, or the international community as a whole*”,<sup>902</sup> and, at any rate, the protection of the human rights of the Indigenous Communities prevail over any economic interest of the United Kingdom;<sup>903</sup> and Bolivia respected any hypothetical interest of the United Kingdom or the international community when offering compensation to the investor.<sup>904</sup>
537. The Respondent alleges that, in this case, there are no impediments to Bolivia invoking the state of necessity as, on the one hand, the Treaty does not include any provision barring such an invocation and, on the other hand, CMMK is the only party responsible for the violations of the human rights of the Indigenous Communities.<sup>905</sup>
538. Therefore, the Respondent considers that “*Bolivia’s actions, including the Reversion Decree, could not have been illegal, even if those actions were contrary to the Treaty*”.<sup>906</sup>

### **3. The Tribunal’s Analysis**

539. The Claimant’s principal claim is that the Tribunal declares that the Respondent, through the Reversion, illegally expropriated its investment in breach of Article 5 of the Treaty.
540. The Respondent counters the Claimant’s claim with three defenses on the merits: (i) the Reversion was lawful, and it was issued in observance of international law, (ii) the state of necessity, (iii) the Reversion involved the legitimate exercise of police powers and not an expropriation.
541. The Tribunal observes that the arguments concerning the legitimate exercise of police powers and the state of necessity were only raised by the Respondent in this arbitration with the filing of its Rejoinder. The Tribunal does not find that the Respondent has provided convincing support for how Bolivia’s conduct and the evidence it introduced in support of its argument that Reversion was a lawful expropriation under the Treaty – the defense on the merits put forward by the Respondent at the outset of the arbitration–also supports the alleged exercise of police powers or the state of necessity.

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<sup>902</sup> Respondent’s Rejoinder, para. 373.

<sup>903</sup> Respondent’s Rejoinder, para. 372; Hearing Transcript, Day 1, 259:15-20 (Spanish).

<sup>904</sup> Respondent’s Rejoinder, para. 374.

<sup>905</sup> Respondent’s Rejoinder, paras. 376-377; RLA-126, United Nations, *Responsability of States for internationally wrongful acts*, Resolution approved by the General Assembly No. A/RES/56/83, January 28, 2002, Art. 25(2) (“*In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: a) The international obligation in question excludes the possibility of invoking necessity; or b) The State has contributed to the situation of necessity*”).

<sup>906</sup> Respondent’s Rejoinder, para. 378.

542. The Tribunal will analyze the substantial defenses asserted by Bolivia in the order they were presented in the arbitration. First, the Tribunal will examine if the Reversion constitutes an expropriation which fulfills the requirements of Article 5 of the Treaty, then, it will address the state of necessity defense and, finally, the police powers.

**(a) On the alleged unlawfulness of the Reversion**

543. The Tribunal will proceed to consider if the Reversion Decree constitutes an unlawful expropriation, as the Claimant alleges, or whether it is an expropriation meeting the requirements of Article 5 of the Treaty, as the Respondent alleges.

544. Article 1(a) of the Treaty defines “investment” as “*every kind of asset which is capable of producing returns,*” and includes as examples the same concessions awarded by the Contracting Parties in accordance with their respective laws, including concessions to explore, develop, extract, or exploit natural resources. The Tribunal has already found that the shares that SAS holds indirectly in CMMK are an investment for the purposes of the Treaty. It is undisputed that CMMK is the holder of the Mining Concessions and that their expropriation affects the value of SAS’ shares.

545. In turn, Article 5 of the Treaty provides the following:

*(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for a public purpose and for a social benefit related to the internal needs of that Party and against just and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party, until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have the right to establish promptly by due process of law in the territory of the Contracting party making the expropriation, the legality of the expropriation, the legality of the expropriation and the amount of the compensation in accordance with the principle set out in this paragraph.*

*(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any party of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraphs (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares.*

546. The Parties do not contest that the Contracting Parties under the Treaty may expropriate investments of investors of the other Contracting Party, provided it is done in accordance with the requirements of Article 5 of the Treaty. It is equally understood between the Parties that only expropriations carried out (a) for a public purpose and a social benefit related to the internal needs of that Contracting Party; (b) in accordance with due process, and (c) against just and effective compensation, will be lawful under Article 5 of the Treaty. These are cumulative conditions that need to be observed by the State.
547. The difference between the Parties is that, while the Claimant considers that Bolivia did not comply with any of the conditions mentioned above such that the expropriation is unlawful, the Respondent considers that the expropriation is lawful as it complied with each and every requirement mentioned above.<sup>907</sup>
548. As a starting point, the Tribunal observes that neither the Memorandum of Understanding of July 7, 2012 – an act that initiated the expropriation process, according to the Claimant –, nor the Reversion Decree – the act to be understood as the beginning of the expropriatory process, according to the Respondent – use the term “expropriation” but rather refer to the “annulment” and the “reversion” of the Concessions. The Tribunal considers that this is not on its own a reason to conclude that there was no expropriation.
549. On the one hand, Article 5 of the Treaty reads: “*shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as ‘expropriation’)* in the territory of the other Contracting Party.” Based on the above, a measure does not have to be called “expropriation” to be considered as such.
550. On the other hand, the contemporaneous evidence shows that the Bolivian authorities themselves in their public statements referred to the measures as a “nationalization,”<sup>908</sup> a term expressly included in the Treaty.
551. For the Tribunal, consequently, there is no doubt that the Respondent expropriated the Mining Concessions through the issuance of the Reversion Decree. Therefore, it must examine whether Bolivia acted in accordance with the requirements of Article 5 of the Treaty, that is: (a) whether there was a public purpose and a social benefit related to the internal needs of the State of Bolivia;

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<sup>907</sup> Counter-Memorial, § 6.1.

<sup>908</sup> See C-61, *Morales confirma nacionalización de Malku Khota* (Morales confirms nationalization of Malku Khota), Agencia Boliviana de Información, July 8, 2012 and C-64, *Definen que el Estado se hará cargo de la mina Malku Khota* (*The State will take over the Malku Khota mine*), Página Siete, July 11, 2012.

(b) whether due process was observed, and (c) whether the obligation of providing just and effective compensation was observed.

- i. *Was there a public purpose and social benefit cause related to the internal needs of the State of Bolivia?*

552. Article 5 of the Treaty, which has been cited so many times, provides:

*“Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for a public purpose and for a social benefit related to the internal needs of that Party.” [Emphasis added]*

553. In its eleventh and twelfth preambular paragraphs, the Reversion Decree provides as follows:

*“WHEREAS, the prospecting and exploration activities carried out by Compañía Minera Mallku Khota S.A. in the Mallku Khota sector and the process for the socialization of the mining project with the various communities and ayllus has created problems which, in the past few months, have caused the social conflicts to escalate, thus jeopardizing the life of the local population and the company’s staff.*

*WHEREAS, the claim held by Compañía Minera Mallku Khota S.A. over the 219 mining blocks was vested in it under the pre-2009 legislation; accordingly, in the face of the extreme social situation in the Mallku Khota sector, and with a view to preserving social peace and guaranteeing the area’s return to a normal state of affairs, intervention by the Government has become necessary in accordance with the provisions of the New Political Constitution of the State.”*

554. The Claimant considers that the expropriation was not carried out for a public purpose and for a social benefit related to the internal needs of the Respondent.<sup>909</sup>

555. The Claimant does not seem to dispute the Respondent’s position regarding the State’s discretion to establish public purposes.<sup>910</sup> However, it notes that this discretion cannot be mistaken with the possibility to be unreasonable or arbitrary decisions in the exercise of that discretion.<sup>911</sup>

556. The Claimant believes that the expropriation is not in accordance with the Treaty provisions as to the public purpose and social benefit for the reasons summarized below:

- (a) The Reversion Decree only made vague reference to problems which resulted “*in the past few months have caused the social conflicts to escalate,*” but never once mentions human

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<sup>909</sup> Statement of Claim and Memorial, paras. 139-146; Claimant’s Reply Memorial, paras. 269-288.

<sup>910</sup> Claimant’s Reply Memorial, para. 270.

<sup>911</sup> Claimant’s Reply Memorial, para. 270.

rights or the protection of the indigenous communities, which are *ex post facto* justifications brought by Bolivia to defend itself in this arbitration.<sup>912</sup>

- (b) The only public purpose declared by Bolivia was the need to end the social conflict in the Malku Khota region and restore peace. According to the Claimant, this is truly a pretext since these were temporary security problems that could have been remedied by the investor and the ulterior motives for the expropriation were different.<sup>913</sup>
- (c) The Claimant asserts that Bolivia had announced, at least a year before the escalation of the conflict mentioned in the Reversion Decree, that it intended to expropriate the Mining Concessions.<sup>914</sup> Additionally, the conflict referred to in the Reversion Decree started in 2012 when Bolivia already intended to expropriate and the true purpose of the expropriation was that Bolivia intended to gain control of a mining project worth US\$13 billion.<sup>915</sup> The motive behind Bolivia's announcement, prior to the issuance of the Reversion Decree, that it intended to expropriate was the public release of the PEA 2011 reflecting the deposit's size.<sup>916</sup>
- (d) The social conflict mentioned in the Reversion Decree is not attributable to the Claimant, but was initiated by illegal miners and by individuals interested in creating a cooperative to exploit the deposit, and it is the Respondent's actions and inactions that led to the extreme social situation mentioned in the Reversion Decree.<sup>917</sup>
- (e) The expropriation was neither a necessary nor proportionate measure to restore public order. Bolivia had other alternatives, which included the appointment of a special commission, insulated from political pressure, to gather information and communicate with the communities; to implement an emergency plan to improve infrastructure and services in the area; or to militarize the area.<sup>918</sup> The fact is that social discontent continued after the expropriation and press reports document that the violent protests continued. Therefore, the expropriation was not the solution to the social problem, as Bolivia alleges.<sup>919</sup>

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<sup>912</sup> Statement of Claim and Memorial, paras. 144 and 145; Claimant's Reply Memorial, para. 272.

<sup>913</sup> Claimant's Reply Memorial, para. 273.

<sup>914</sup> Claimant's Reply Memorial, para. 274.

<sup>915</sup> Claimant's Reply Memorial, paras. 275 and 277.

<sup>916</sup> Claimant's Reply Memorial, para. 275.

<sup>917</sup> Claimant's Reply Memorial, para. 280.

<sup>918</sup> Claimant's Reply Memorial, paras. 281 and 338.

<sup>919</sup> Claimant's Reply Memorial, para. 283.

- (f) Finally, the Claimant states that the Reversion was not carried out with a social benefit related to the internal needs of Bolivia because the Project would have brought millions of dollars of investments to one of the poorest areas of Bolivia, and neither the Government nor the local communities have derived any benefit after the Reversion, and the Indigenous Community representatives have requested that SAS come back to the area to continue with the Project.<sup>920</sup>

557. The Reversion Decree does not include, as the Claimant alleges, just vague references to a social conflict. The preambular paragraphs of the Reversion Decree, in particular the eleventh and twelfth paragraphs already cited at paragraph 553 above declares, on the one hand, that

*“the prospecting and exploration activities of the Compañía Minera Mallku Khota S.A. in the area of Mallku Khota and the communication process for the mining project with the communities and ayllus have faced difficulties leading over recent months to an escalation of social conflicts, risking the lives of the population in the area and the company staff [...] as a result of the extreme social situation in the Mallku Khota area, and with the purpose of preserving the social peace and guaranteeing the return to normalcy in the area, it becomes necessary for the Government to intervene within the framework of the provisions under the New Political Constitution of the State.”* [Emphasis added]

558. The Claimant notes the absence of an express reference in the Reversion Decree to human rights or to the protection of the indigenous communities seeing as that is the rational that the Respondent invoked in this arbitration. The Tribunal disagrees that the lack of an express reference results in the Reversion Decree not observing the requirement under the Treaty here analyzed.

559. First, as the Tribunal has already indicated in the analysis of the facts of the case, there is no doubt that there was a conflict that aggravated and led to serious acts of violence, whose occurrence is accepted by both Parties. Second, the indigenous communities’ opposition to the Project is established as well as significant shortcomings in the management of the community relations programs that were identified by the Claimant’s own advisors.<sup>921</sup> Third, it has been equally established that the conflict existed with the communities and the *ayllus*, and that it caused acts of violence, including death of people.<sup>922</sup>

560. These are precisely the reasons invoked in the Reversion Decree. The difficulties generated with the communities and the *ayllus* in the prospecting and exploration activities, and in the conduction

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<sup>920</sup> Statement of Claim and Memorial, para. 145; CWS-5, Angulo’s First Witness Statement, para. 19. See also Claimant’s Reply Memorial, paras. 285-288.

<sup>921</sup> See *supra* paras. 480-482.

<sup>922</sup> See *supra* paras. 150, 152, 162.

of the process of the communication of the Project; the escalation of social conflicts; the risk to the life and the population in the area; and the need to preserve the peace and return to normalcy.

561. If the protection of life – the quintessential human right – and the need to return to normalcy in a region with an indigenous population that is affected and altered by the Project emerge clearly as motivations in the Reversion Decree, the Tribunal cannot understand that the mere absence of a sacramental formula to expressly refer to human rights or to the protection of the communities may lead to the conclusion that the Reversion was not conducted in a social benefit related to the internal needs of Bolivia. In other words, the premises mentioned in the Reversion Decree as causes for Reversion have been proven and such premises include the protection of human rights – the right to life and the right to peace, both expressly mentioned in the Reversion Decree – and the protection of the communities and the *ayllus* against the difficulties resulting from the Project.
562. The Tribunal is not convinced that, as the Claimant notes, it was a temporary security concern that could have been remedied by the investor. On the one hand, it was not merely a security concern. The facts which transpired and have been proven convince the Tribunal of the existence of a serious social conflict that grew until it resulted in grave acts of violence, divisiveness at the community level, marches, and attacks against life and personal integrity. On the other hand, these were not sporadic clashes, rather a conflict that had been developing since at least late 2010 and that, as already mentioned, escalated until it reached a breaking point toward mid-2012. In the view of the Tribunal, the fact that the violence had continued in the weeks following the Reversion does not show that this measure had been ineffective at pacifying the area, but, on the contrary, it denotes that the situation affecting public order was the result of a serious and ongoing social conflict.
563. In any event, the investor has not demonstrated that it could, as it now alleges, remedy the clashes, or that the measures it claims to have adopted would have been sufficient to solve the problem. On the contrary, the strategy CMMK adopted as of 2011, as already mentioned by the Tribunal, appears to have contributed to the escalation of the conflict and ultimate acts of violence.
564. The Claimant complains that Bolivia had already declared its intention to expropriate, at least a year before the conflict escalated,<sup>923</sup> and that the real motive behind the expropriation was for Bolivia to gain control of the Project upon realizing the size of the deposit once the PEA 2011 was made public.<sup>924</sup>

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<sup>923</sup> Claimant's Reply Memorial, para. 274.

<sup>924</sup> Claimant's Reply Memorial, para. 275.

565. The Tribunal finds that the Claimant's assertion is unsupported by the record. It is true that the President of Bolivia referred to expropriation.<sup>925</sup> However, nothing establishes, nor even suggests, that such a political statement was related to the public release of the PEA 2011, or that the Respondent has used the social conflict or contributed to it as a pretext or a strategy to gain control of the deposit. On the contrary, as the Tribunal has already mentioned, the existence of a conflict as well as the shortcomings in CMMK's management of the community relations, coupled with the already-mentioned strategy adopted by CMMK as of 2011, were already evident from the outset of the Project.
566. The social conflict and the situation of violence are undeniable given the evidence furnished, and the Reversion Decree was issued for said reasons. Even if the conduct of some Bolivian officials can be called into question, in particular the timing of their interventions to remedy the conflict and the absence of higher-ranking officials at certain fundamental meetings, this does not mean that the Reversion Decree was issued as a mere pretext nor that Bolivia has exercised its discretionary power in an arbitrary or abusive manner. It is incumbent upon the investor to demonstrate that the motivations invoked by the State in the Reversion Decree were not in accordance with the facts on the ground or that they were arbitrary or abusive. In this case, not only are said allegations unsupported, but the evidence on the record confirms the reasons invoked by Bolivia behind its decision to reverse the Concessions.
567. The Claimant argues that the social conflict referred to in the Reversion Decree was initiated by illegal miners and individuals interested in creating a cooperative to exploit the deposit, and that it was Bolivia's own actions and inactions that led to the situation mentioned in the Reversion Decree.<sup>926</sup> In the analysis of the facts, the Tribunal has already referred to the allegation related to illegal mining,<sup>927</sup> and it refers to its findings in that regard. Likewise, in section VII.C.1 of this award, the Tribunal refers to Bolivia's conduct and its alleged actions and omissions, and the Tribunal once again recalls its findings in that regard.<sup>928</sup> Based on those findings, the Tribunal concludes that the reasons offered by the Claimant explain neither the causes of the conflict nor its escalation.
568. Next, the Tribunal will address the Claimant's allegation according to which the expropriation was neither a necessary nor proportionate measure to restore public order. The Claimant argues

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<sup>925</sup> See C-61, *Morales confirma nacionalización de Malku Khota* (Morales confirms nationalization of Malku Khota), Agencia Boliviana de Información, July 8, 2012.

<sup>926</sup> Claimant's Reply Memorial, para. 280.

<sup>927</sup> See *supra* section VII.A.

<sup>928</sup> See *infra* section VII.C.1.



that Bolivia had other options, including, for example, the appointment of a special commission, the implementation of an emergency plan to improve the infrastructure and the services in the area, or the militarization of the area.<sup>929</sup> It adds that press reports document that violent protests were still occurring, and thus that the expropriation was not the solution to the social problem, as Bolivia alleges.<sup>930</sup>

569. The Claimant contends that the decision included in the Reversion Decree is disproportionate considering, on the one hand, the true scope of the public order problem, which the Claimant does not consider to be as serious as Bolivia does and, on the other hand, the immense value of the deposit. Similarly, it notes that the measure adopted in the Reversion Decree was not the only one available to Bolivia to resolve the situation, and it is incumbent upon Bolivia to establish that the measure adopted was the only one possible.<sup>931</sup>

570. The Tribunal notes that Article 5 of the Treaty does not expressly refer to a proportionality requirement as an element to establish the lawfulness of the expropriation. The Parties also do not address whether the standard for the lawfulness of an expropriation requires the expropriatory measure to be proportionate and, therefore, the Tribunal will not address this issue. In connection with the Claimant's allegation that the Reversion is disproportionate, the Tribunal finds that the relevant elements with which to assess the proportionality of the measure are those found in the record. First, as already mentioned by the Tribunal in several parts of the present award, the public order issue was not a temporary concern, or an issue created by a few illegal miners, or a situation created by a few objectors to the Project, or Bolivia's strategy to gain control of the deposit, as the Claimant alleges. The evidence of the situation in the area is conclusive that it was far from being a minor or temporary concern.<sup>932</sup> Second, as discussed in chapter VII of the present award, the Project was in a nascent stage and the PEA 2011 results, on which the Claimants base the size of the Project and the alleged damage, do not establish an impairment of the Claimant's investment beyond the amounts invested in the Project.

571. The Claimant suggests other measures that could have remedied the conflict in the area,<sup>933</sup> but it does not explain how those measures, within the context of the facts, could have solved the problem, and much less indicates or proves that such measures have been recommended or discussed at the time of the conflict.

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<sup>929</sup> Claimant's Reply Memorial, paras. 281 and 338.

<sup>930</sup> Claimant's Reply Memorial, para. 283.

<sup>931</sup> Claimant's Reply Memorial, para. 284.

<sup>932</sup> See *supra* section VII.A.

<sup>933</sup> Claimant's Reply Memorial, para. 282.

572. For example, would the creation of a special commission “insulated from political pressure” to discuss with the communities and CMMK imply that neither CMMK nor the State of Bolivia would be involved? Would it be a mixed commission comprising both Parties? The Claimant does not elaborate on this alternative. As regards the proposed emergency measures to commit to developing better infrastructure and services, this solution is based on the unsupported assumption that the conflicts in the area stemmed from Bolivia’s failures in the provision of infrastructure and services, and not from the Project. Regardless of who is held responsible for the events that led to the conflict, it has not been shown, as the Claimant alleges, that the shortage of infrastructure or services resulted in the conflict and the violent acts. As for the militarization of the area, the Tribunal does not see how a solution of that sort is useful to placate a social conflict derived from the alteration in the management of the structure and decision-making process of the communities of the area and from the implementation of actions that sought to exert pressure on those who did not support the Project and to provide support only to those within the communities that agreed with CMMK.
573. The Claimant asserts that Bolivia solely organized meetings with CMMK and the communities to seek a solution,<sup>934</sup> but that even at those meetings Bolivia had no intention of seeking a viable solution and instead used the meetings to stoke anti-CMMK sentiment in the area and to seek the expropriation, and that those meetings, in any event, were insufficient to address the concerns of the communities and CMMK.<sup>935</sup>
574. The evidence on record and, in particular but not exclusively, the witness statement of Governor González<sup>936</sup> and the documents attached to the witness statement of Witness X, do not support the Claimant’s allegations. Even if some officials may have missed some meetings or coordination may have been lacking at some of the meetings, neither of those events is significant enough to sustain that Bolivia did not intend to seek a solution or that it used those meetings to stoke anti-CMMK sentiment.
575. For one thing, it is clear that the Respondent, in particular through Governor Gonzalez, supported the meetings and attempts to mediate, which culminated, *inter alia*, in the Agreement with the Office of the Governor.<sup>937</sup> Bolivia offered a suspension of the activities to placate the conflict, which CMMK rejected, and Bolivia’s officials met on several occasions with the community members and with CMMK to seek solutions to the conflict. It is not the task of the Tribunal to

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<sup>934</sup> Claimant’s Reply Memorial, para. 282.

<sup>935</sup> Claimant’s Reply Memorial, para. 282.

<sup>936</sup> RWS-4, Gob. Gonzales’ Second Witness Statement.

<sup>937</sup> C-51, Minutes of Meeting between the Government of Potosi and Community Members, May 9, 2012.

speculate *ex post facto* and with a retroactive bias whether other measures could have been implemented or whether the military intervention requested by the Claimant would have been effective.

576. The divide created among the community members, aggravated by the strategy that CMMK adopted in an attempt to strengthen those who the company believed to support the Project and to weaken the objectors by various actions; the violence unleashed at the Acasio meeting on May 18, 2012 among the community members; the violence resulting from the detention of Kuraka Cancio Rojas, in which CMMK's strategy came into play;<sup>938</sup> the organization of meetings without the attendance of the objecting community members<sup>939</sup> contrary to the recommendations of the advisors retained by CMMK; the march of the communities towards La Paz; the facts of July 5 and 6, 2012 whereby CMMK employees were held hostage and a community member lost his life are not insignificant or isolated facts, as presented by the Claimant, but rather facts that reflect a severe social conflict that did not seem to be temporary but, on the contrary, was escalating into increasingly difficult situations.
577. Bolivia sought a dialogue,<sup>940</sup> proposed solutions, attempted to reach an agreement with the community members,<sup>941</sup> and finally issued the Reversion Decree in response to the general violence, the social conflict – which based on the evidence was neither simply temporary nor minor – making it clear that the risk existed that the conflict would continue for as long as CMMK remained in the region. Having established the existence of the conflict, as well as its severity and consequences, the Tribunal is unable to conclude that the measure adopted by Bolivia was unnecessary or disproportionate and, much less, to speculate without any evidence on other measures that could have been implemented to resolve the conflict.
578. Finally, the Tribunal does not share the Claimant's view that the Reversion did not serve a social benefit related to the internal needs of Bolivia because the Project would have brought millions of dollars of investments to one of the poorest areas of Bolivia, and that neither the Government nor the local communities have derived any benefit ever since the Reversion, and that the indigenous community representatives have requested that SAS come back to the area to continue with the Project.<sup>942</sup> The Claimant cannot simply equate social benefit with purely economic

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<sup>938</sup> See RWS-7, Witness X's Witness Statement, para. 32; R-257, E-mail from Witness X to CMMK officials, May 26, 2012; R-294, E-mail from Witness X to CMMK management, June 21, 2012.

<sup>939</sup> R-257, E-mail from Witness X to CMMK officials, May 26, 2012.

<sup>940</sup> See RWS-3, Chajmi's Witness Statement, para. 35; R-95, News release, El Potosí, Comisión gubernamental instalará diálogo en la zona de Chiro Khasa (Government commission will implement a dialogue in the Chiro Khasa area), July 5, 2012.

<sup>941</sup> C-17, Agreement, July 10, 2012.

<sup>942</sup> See Statement of Claim and Memorial, para. 145.

benefit and expect the Tribunal to analyze compliance with this requirement from the point of view of the returns that the Project would have generated for the community, ignoring the social, cultural and political situation and the seriousness of the existing social conflict in the area.

ii. *Was due process observed?*

579. The Claimant asserts that through the decision contained in the Reversion Decree, the Respondent breached the requirement of due process under the Treaty as one of the conditions for expropriation. According to the Claimant, the obligation of Bolivia to grant an opportunity to the investor to “*assert its rights*” includes granting an opportunity to participate in the expropriatory decision and in the determination of the adequate level of compensation.<sup>943</sup> However, the Claimant alleges that Bolivia made the decision to expropriate at a series of meetings without the Claimant being present and that the valuation process resulting from the Reversion Decree was carried out unilaterally by COMIBOL, without the Claimant’s participation in the quantification of compensation.<sup>944</sup>
580. The Respondent, in turn, states that the Treaty does not require the Contracting Party to consult with the investor on the decision on expropriation, or to allow participation in the reversion decision or in the establishment of compensation, but only provides that the Contracting Parties – Bolivia and the United Kingdom – must make legal recourse available for the investor to challenge the legality of the measure and the amount of the compensation established.<sup>945</sup> In other words, the due process under the Treaty is guaranteed by allowing the investor to legally challenge the decision to expropriate and the amount of compensation after the decision to expropriate is taken by the State and not prior to the decision being taken.
581. Article 5 of the Treaty provides that “[t]he *national or company affected* shall have the right to establish promptly by due process of law in the territory of the Contracting Party *making the expropriation, the legality of the expropriation and the amount of the compensation in accordance with the principle set out in this paragraph.*” [Emphasis added]
582. The text of the Treaty does not support the Claimant’s position. The verbs governing the conduct of expropriation suggest that it is the “affected” investor of a Contracting Party that “makes” the expropriation who must challenge the “legality” of the expropriation, *i.e.* the question concerns a challenge to a decision that has already been taken and not participation in the decision-making

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<sup>943</sup> Statement of Claim and Memorial, para. 139.

<sup>944</sup> Statement of Claim and Memorial, paras. 139-140.

<sup>945</sup> Counter-Memorial, paras. 362-363.

process. In the context of an expropriation, and what due process under the Treaty requires is that the foreign investors have timely access to a legal proceeding in the territory of the host State of the investment which allows them to question the legality of the expropriation and the amount of the compensation, but not to participate in the making of the sovereign decision to expropriate.

583. Neither the context of the Treaty nor its object and purpose support the Claimant's position that, in any event, only rises to the level of arguing that it should have been invited to the meetings where the expropriation was decided and to participate in the process advanced by COMIBOL to establish compensation. The Treaty does not forbid the Contracting Parties from expropriating. Rather, it imposes certain conditions on an expropriation, which if disregarded will result in the international responsibility of the State. That is, the Treaty preserves the State's sovereign right to expropriate subject to certain specific conditions. The Treaty does not make that State prerogative conditional on the investor's participation in the issuance of the act that formalizes the expropriation, nor does the Claimant explain – aside from a reading of Article 5 that the Tribunal does not share, as already noted in paragraph 582 above – why the investor's right to specifically establish “by due process of law” the legality of the investment and the amount of compensation involves a participation in the sovereign exercise of a State prerogative.
584. Such a result does not arise from the object and purpose of the Treaty, and the Claimant does not allege or substantiate that the effective protection of the investment under the Treaty requires participation to the investor in the sovereign decision to expropriate. Nothing in the Treaty mandates a Contracting Party, as the Claimant argues, to establish “legal recourse” to call into question the “legality” of a decision that has not yet been made.
585. Finally, the Tribunal notes that the Claimant did not resort to any legal proceeding to challenge the legality of the Reversion under the laws of the Respondent, but instead chose to submit an international arbitral claim that resulted in this arbitration. If the Claimant considered that the corresponding legal proceeding was not a viable option, or that it was not going to be afforded impartial treatment or, in the end, that it was a futile exercise, it cannot allege lack of due process based solely on its decision not to pursue the legal remedies available under the laws of Bolivia without proving the circumstance that would make the legal proceeding futile or impossible. The exercise of legal actions in Bolivia to challenge the lawfulness of the Reversion Decree is not a precondition to pursue arbitration. However, the Claimant cannot claim a violation of due process when it decided not to exercise the remedies available under the national law of Bolivia. In fact, the Claimant never alleged that such remedies were unavailable or that they did not comply with the due process guarantee.

586. Consequently, the Tribunal considers that the expropriation complied with the Treaty requirement of due process.

*iii. Was the obligation to compensate observed?*

587. In relation to compensation, Article 5 of the Treaty establishes as one of the conditions that expropriation should be

*against just and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party, until the date of payment, shall be made without delay, be effectively realizable and be freely transferable.*

588. [REDACTED]

589. The evidence presented in this arbitration by the Parties establishes the following:

- (a) Under the Reversion Decree, COMIBOL “*shall hire the services of an independent firm to carry out a valuation of the investments made by Compañía Minera Mallku Khota S.A. and Exploraciones Mineras Santa Cruz Ltda. EMICRUZ LTDA, within a period not to exceed one hundred and twenty (120) business days.*”<sup>946</sup> The Reversion Decree further states that based on the findings of such valuation, “*COMIBOL shall define the amount and conditions under which the Government of Bolivia shall recognize the investments made by Compañía Minera Mallku Khota S.A. and Exploraciones Mineras Santa Cruz Ltda. EMICRUZ LTDA*”<sup>947</sup>.
- (b) By letter of August 24, 2012, COMIBOL invited the Claimant to a meeting “*in order to hand over all of the relevant documents related to the development of the activities*” at the Malku Khota mining deposit. Based on the invitation, the meeting would take place on August 28, 2012.<sup>948</sup>
- (c) On September 4, 2012, the Claimant responded to COMIBOL stating that the invitation to attend the meeting had been delivered to the offices of CMMK in La Paz on August 27, 2012 – *i.e.*, a day before the date of the meeting – and that it was practically impossible for

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<sup>946</sup> C-4, Reversion Decree, article 4.

<sup>947</sup> C-4, Reversion Decree, article 4.

<sup>948</sup> C-20, Letter from SAS to COMIBOL, September 4, 2012.

SAS to attend the meeting “*due to the short time frame proposed and the fact that SAS personnel are not resident in La Paz.*”<sup>949</sup> However, the Claimant also stated: “[w]e will be pleased to discuss the COMIBOL proposal and respectfully request that a meeting be arranged on a date in the near future that is mutually acceptable to both parties.”<sup>950</sup> [REDACTED]

- (d) On October 24, 2012, SAS served notice of the dispute on the Respondent.<sup>951</sup>
- (e) In December 2012, COMIBOL initiated the hiring process with a request for proposals for the valuation of the investments made by Compañía Minera Mallku Khota S.A. and Exploraciones Santa Cruz Ltda. Emicruz Ltda.<sup>952</sup> and only one company presented a proposal.<sup>953</sup>
- (f) By letter dated December 12, 2012, SAS expressed its willingness to hold meetings with representatives of the Government of Bolivia “*with the purpose of achieving a legal and amicable settlement to this dispute within the six-month period provided in Article 8(1) of the UK Treaty.*”<sup>954</sup> The Claimant sent Bolivia two similar communications on January 16 and February 15, 2013.<sup>955</sup>
- (g) On February 21, 2013, the Office of the Attorney General of the State invited SAS to a “*meeting in order to reach amicable alternatives under the provisions of Supreme Decree No. 1308 [...].*”<sup>956</sup> The meeting would take place on April 17, 2013.
- (h) On April 17, 2013, two members of SAS’ legal team in Bolivia met in La Paz with several officials of the Respondent, including the Attorney General, the Minister of Mining and Metallurgy and the President of COMIBOL, with the purpose of discussing a potential amicable resolution for the dispute between the Parties under the Treaty.<sup>957</sup>

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<sup>949</sup> C-21, Letter from SAS to COMIBOL, September 4, 2012.

<sup>950</sup> C-21, Letter from SAS to COMIBOL, September 4, 2012.

<sup>951</sup> C-22, SAS’ Notice of dispute, October 22, 2012.

<sup>952</sup> See R-98, Request for proposals published in the press on December 9, 2012; R-99, Request for proposals sent by COMIBOL in December 2012.

<sup>953</sup> R-100, Proposals recorded, December 14, 2012.

<sup>954</sup> C-23, Letters from SAS to the First Attorney General of the State, dated December 12, 2012, January 16, 2013, and February 15, 2013.

<sup>955</sup> C-23, Letters from SAS to the First Attorney General of the State, dated December 12, 2012, January 16, 2013, and February 15, 2013.

<sup>956</sup> C-24, Letter from the State Attorney General to SAS, February 21, 2013.

<sup>957</sup> See C-27, Letter from SAS to the State First Attorney General, April 24, 2013.

- (i) At the meeting SAS' legal counsel in Bolivia was informed that the failure to hire a valuation company was supposedly due to the fact that CMMK had not provided all of the technical information that COMIBOL had requested on the Project.<sup>958</sup> In this regard, in a letter dated April 24, 2013 in connection with the aforementioned meeting, SAS reiterated that much of the information on the Project was highly confidential and proprietary, and that there was publicly available information that Bolivia could use for valuation purposes.<sup>959</sup> Consequently, SAS requested that Bolivia "*comply with its obligation to engage a valuation expert and provide us with a compensation offer.*"<sup>960</sup> Likewise, it stated that "[w]hile South American Silver intends to pursue its claims in arbitration, we also want to make clear that we intend to continue discussions with the State with the hope of reaching an amicable resolution."<sup>961</sup>
- (j) COMIBOL reviewed the terms of reference and published a new request, which was annulled on March 31, 2014 due to technical errors.<sup>962</sup>
- (k) COMIBOL then issued new terms of reference that were sent directly to two companies that submitted proposals on April 7, 2014.<sup>963</sup>
- (l) COMIBOL granted the valuation contract to the company Quality Audit Consultores y Contadores Públicos S.R.L., on April 23, 2014; the corresponding contract was entered on May 8, 2014, and, on June 27, 2014, the valuation report was submitted.<sup>964</sup>

590. The Tribunal has already concluded that the Respondent has complied with the requirements under Article 5 of the Treaty relating to public purpose and social benefit causes as well as due process. The question now is whether failure to pay compensation before the initiation of the arbitration and failure to make any payment to date constitute a violation of the Treaty.

591. The Claimant complains, on the one hand, that Bolivia has neither paid nor offered any compensation to date and, on the other hand, even if Bolivia had effectively quantified and paid the sums invested in connection with the Project, such a payment would still be insufficient to satisfy the obligation to compensate pursuant to Article 5 of the Treaty, which requires that

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<sup>958</sup> See C-27, Letter from SAS to the State First Attorney General, April 24, 2013.

<sup>959</sup> C-27, Letter from SAS to the State First Attorney General, April 24, 2013, p. 5.

<sup>960</sup> C-27, Letter from SAS to the State First Attorney General, April 24, 2013, p. 5.

<sup>961</sup> C-27, Letter from SAS to the State First Attorney General, April 24, 2013, p. 5.

<sup>962</sup> R-104, Annulment resolution for the hiring process, March 31, 2014.

<sup>963</sup> R-100, Proposals recorded, April 7, 2014.

<sup>964</sup> See R-108, Service order for the hiring of a consultancy for Quality, April 25, 2014; R-109, Service Contract for the provision of investment valuation services for CMMK and EMICRUZ Ltda., May 8, 2014; R-110, Letter from Quality to COMIBOL, June 27, 2014; R-111, Investment valuation report by Compañía Minera Mallku Khota S.A., June 2014.



compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is earlier.<sup>965</sup>

592. According to the Claimant, the valuation and the corresponding payment of compensation are an obligation that predates the arbitration, which determines the legality of the expropriation. The compensation cannot be a consequence of the arbitral proceeding – the Claimant asserts – because if it was, “*States would no longer have any incentive to provide prompt, adequate, and effective compensation to the expropriated investor at all.*”<sup>966</sup>
593. Pursuant to the Claimant, lack of compensation is in itself sufficient “*to establish the expropriation’s unlawful nature in light of both the Treaty and international law.*”<sup>967</sup> In turn, the Respondent argues that “*the lack of compensation does not make the expropriation per se illegal dispossession, regardless of the time elapsed from the expropriation,*”<sup>968</sup> and that the unlawfulness of an expropriation where there has been no compensation shall be determined upon consideration of the facts.<sup>969</sup>
594. The dispute between the Parties in this case reflects the different approaches that the arbitral tribunals and scholars have had in connection with the failure to pay compensation for expropriation. There is no clear or uniform answer.
595. Some decisions and commentaries suggest that the non-payment of compensation, regardless of the circumstances, makes a taking *ipso facto* unlawful, whereas other decisions and commentaries point out that non-payment of compensation does not entail an *ipso facto* violation of international law.<sup>970</sup>
596. The Tribunal finds, and the Parties do not seem to dispute, that a direct expropriation entails, under the Treaty, the obligation of the State to provide compensation to the expropriated investor, generally-speaking the owner of the expropriated asset or the holder of the expropriated right. However, the Tribunal does not find support for the Claimant’s assertion that the payment of

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<sup>965</sup> Statement of Claim and Memorial, paras. 102-103.

<sup>966</sup> Claimant’s Reply Memorial, paras. 306-307; CLA-31 / RLA-103, S. Ripinsky, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008, p. 68.

<sup>967</sup> Statement of Claim and Memorial, paras. 143-144; SAS’ Post-Hearing Brief, para. 26. See also Hearing Transcript, Day 1, 78:14-25 (English).

<sup>968</sup> Counter-Memorial, para. 397.

<sup>969</sup> Counter-Memorial, para. 399.

<sup>970</sup> See S. Ripinsky y K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008, pp. 67-69.

compensation is a kind of condition precedent to arbitration.<sup>971</sup> It is not a question of simply verifying whether payment was made or not. Rather, it is necessary, on the one hand, to take into account the substance of the international obligation of the State to compensate under the corresponding international instrument – the Treaty in this case – and, on the other hand, the circumstances that led to the non-payment.<sup>972</sup>

597. As the Tribunal has already noted, the Claimant alleges, first, that Bolivia breached the Treaty because it has yet to pay or even offer any compensation. According to the Claimant, compensation should be provided without delay,<sup>973</sup> *i.e.* compensation should be provided contemporaneously with the expropriation and as quickly as possible, or at least within a reasonable period of time.<sup>974</sup> Consequently, the State would breach the above-mentioned promptness requirement when the investor has not received any compensation “*several months*” after the effective taking.<sup>975</sup>
598. The Respondent, in turn, considers that the appropriate steps were promptly taken for payment, and the corresponding hiring was ordered and done,<sup>976</sup> such that once the Claimant opted to pursue arbitration and the Respondent accepted that it would be the tribunal the one establishing compensation, Bolivia cannot be alleged to have breached its Treaty obligations.<sup>977</sup>
599. The Treaty does not establish a deadline for the payment of compensation. It establishes that it has to be provided promptly, without delay. In connection with the meaning of “prompt” compensation “without delay,” both Parties invoke, to different ends, the text of L.B. Sohn & R.R. Baxter to the effect that, while no hard and fast rule may be laid down for promptness, the passage of several months after the taking without the furnishing by the State of any real indication that compensation would be forthcoming would raise serious doubts that the State intended to make prompt compensation.<sup>978</sup> Bolivia emphasizes the existence of an “indication” that compensation

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<sup>971</sup> See Claimant’s Reply Memorial, paras. 306-307.

<sup>972</sup> See RLA-105, Venezuela Holdings and others and the Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, October 9, 2014, para. 301.

<sup>973</sup> Claimant’s Reply Memorial, para. 296; CLA-163, Oxford Dictionary of English.

<sup>974</sup> Statement of Claim and Memorial, paras. 133-134; Claimant’s Reply Memorial, para. 297.

<sup>975</sup> Claimant’s Reply Memorial, paras. 297-298.

<sup>976</sup> Counter-Memorial, para. 403.

<sup>977</sup> Respondent’s Rejoinder, para. 432.

<sup>978</sup> RLA-104, L.B. Sohn & R.R. Baxter, “Responsibility of States for Injuries to the Economic Interest of Aliens” (1961), 55 *American Journal of International Law* 545, p. 558. (“While no hard and fast rule may be laid down, the passage of several months after the taking without the furnishing by the State of any real indication that compensation would shortly be forthcoming would raise serious doubt that the State intended to make prompt compensation at all.”)

would be forthcoming,<sup>979</sup> while the Claimant emphasizes the “passage of several months” after the emergence of the obligation to provide compensation.<sup>980</sup>

600. The Respondent argues that to establish the lawfulness of the Reversion, the Tribunal should consider “(i) *the provision of compensation under the Reversion Decree, (ii) the negotiations between Bolivia and SAS to reach an agreement, both before and after the Reversion, and (iii) the award to an independent company of CMMK’s investment valuation.*”<sup>981</sup>

601. It is true that the Reversion Decree provided for compensation to CMMK in the amount and under the payment conditions to be established based on the outcome of the valuation of CMMK’s investments.<sup>982</sup> It is also true that Bolivia awarded the valuation contract to an independent third party.<sup>983</sup> However, the Tribunal considers that it is insufficient to assert that a provision exists which states that payment shall be provided based on an investment valuation by a third party.

[REDACTED]

602. [REDACTED]

603. However, beyond the delay in the valuation process, the Tribunal does not find any evidence on the record establishing that Bolivia made a payment offer to SAS or CMMK based on the

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<sup>979</sup> See Respondent’s Rejoinder, paras. 424-425.

<sup>980</sup> See Claimant’s Reply Memorial, paras. 297-298.

<sup>981</sup> Counter-Memorial, para. 403.

<sup>982</sup> C-4, Reversion Decree, arts. 4.I, 4.II.

<sup>983</sup> R-108, Service order for the hiring of a consultant directed to Quality, April 25, 2014; R-109, Service Contract for the provision of investment valuation services for CMMK and EMICRUZ Ltda., May 8, 2014.

<sup>984</sup> See *supra* para. 589.

<sup>985</sup> C-4, Reversion Decree, Art. 4.I.

valuation report of June 2014, as provided in the Reversion Decree, or based on any other valuation criteria.

604. As to the alleged negotiations between Bolivia and SAS to reach an agreement, “*both before and after the Reversion*,”<sup>986</sup> the Tribunal does not find them to be sufficient to conclude that the compensation requirement under the Treaty is fulfilled or that they are a clear indication that compensation would be forthcoming. First, the Respondent does not identify the meetings that took place before the Reversion and the context in which they were held. Even if they had taken place, the Tribunal does not consider that such meetings are conclusive with regard to compliance with an obligation that only arose afterwards.

605. [REDACTED]

606. As to the subsequent meetings between the Parties, if any, there is no evidence on the record of their scope. [REDACTED]

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<sup>986</sup> Counter-Memorial, para. 403.

<sup>987</sup> C-21, Letter from SAS to COMIBOL September 4, 2012.

<sup>988</sup> C-23, Letters from SAS to the First Attorney General of the State, dated December 12, 2012, January 16, 2013, and February 15, 2013.

607. In its Rejoinder, the Respondent alleged – for the first time in the arbitration – that insofar as SAS had opted to pursue international arbitration and have the Tribunal establish whether there was an expropriation and to determine the amount of compensation, Bolivia complied with its obligation to compensate without delay by participating in the arbitral proceeding.<sup>989</sup>

608. This argument by the Respondent is not only late but also contradicts prior actions by the State. In fact, Bolivia (i) recognized that it had to provide compensation under the Reversion Decree; (ii) continued with the hiring process of the valuation company, even after the Claimant had initiated this proceeding through the Notice of Arbitration; (iii) defended Reversion as a legal expropriation; and (iv) at least until the presentation of its Counter-Memorial, maintained that it had to provide compensation.<sup>990</sup> [REDACTED]

[REDACTED] Based on the foregoing, the Tribunal cannot accept the Respondent's position that its participation in this arbitration fulfills the compensation requirement established under the Treaty.

609. In sum, [REDACTED]

610. Based on the above reasons, the Tribunal concludes that, although the Reversion fulfills the requirements under Article 5 of the Treaty relating to public purpose and social benefit, as well as due process, it does not fulfill the compensation requirement established under the same article.

**(b) On the alleged state of necessity**

611. Regarding the state of necessity, the Parties do not seem to dispute that its substance is reflected in Article 25 of the Articles on State Responsibility, which reads:

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<sup>989</sup> Counter-Memorial, paras. 432-437.

<sup>990</sup> See, for example, Counter-Memorial, paras. 401-402 (“In our case, the Reversion Decree provided for the payment of compensation. The Parties maintained negotiations before and after the Reversion. Such negotiations are a clear sign of the willingness Bolivia had to comply with the obligation to compensate [...]. Moreover, under the current dispute, the facts that show the willingness Bolivia has to compensate CMMK are even more glaring than in Exxon Mobil and Tidewater: [...], Bolivia not only provided for compensation, but it also took the necessary steps to hire an independent company to perform the valuation of the investments carried out by CMMK. [...].”)

*1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:*

*a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and*

*b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*

*2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:*

*a) the international obligation in question excludes the possibility of invoking necessity; or*

*b) the State has contributed to the situation of necessity.*

612. The Claimant is correct to point out that the state of necessity is a circumstance that would exclude the wrongfulness of the actions which would otherwise be unlawful.<sup>991</sup> This is clearly established in the commentaries to Article 25 of the Articles on the Responsibility of the State. In fact, commentary 1 states that:

*The term “necessity” (état de nécessité) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. Under conditions narrowly defined in article 25, such a plea is recognized as a circumstance precluding wrongfulness.<sup>992</sup>*  
[Emphasis added]

613. Commentary number 2 adds that the plea of necessity is exceptional and that it arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. Therefore, the necessity defense of the State will only rarely be available to excuse non-performance of an obligation.<sup>993</sup>

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<sup>991</sup> Transcript of the Hearing, Day 1, 85:23 – 86:17 (English); CLA-201, Report of the Commission on the work of its thirty-second session, Official Documents of the General Assembly, 35th session, May 5 to July 25, 1980, Article 3, para. 3.

<sup>992</sup> RLA-159, United Nations International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001. (“(1) The term “necessity” (état de nécessité) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. Under conditions narrowly defined in article 25, such a plea is recognized as a circumstance precluding wrongfulness.”)

<sup>993</sup> RLA-159, United Nations International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* 2001. [“(2) The plea of necessity is exceptional in a number of respects. Unlike consent (art. 20), self-defense (art. 21) or countermeasures (art. 22), it is not dependent on the prior conduct of the injured State. Unlike *force majeure* (art. 23), it does not involve conduct which is involuntary or coerced. Unlike distress (art. 24), necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.”]

614. Finally, commentary number 14 notes that State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions. The cases show that necessity has been invoked to preclude the wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin.<sup>994</sup>
615. In legal authority CLA-202, submitted to the record by the Claimant, Professor August Reinisch explains that the state of necessity excuses a wrongful act of a State, where that State has breached an obligation.<sup>995</sup> The tribunals and other legal authorities cited by the Parties evince a similar opinion.<sup>996</sup>
616. Based on the foregoing, an essential prerequisite for the application of the state of necessity is the existence of an act by the State that constitutes an international wrong, and that such act is the only means that the State has to safeguard an essential interest against a grave and imminent peril. This is so established by Article 25 when providing that the State may invoke the necessity as “*the only way for the State to safeguard an essential interest against a grave and imminent peril is... not to comply with another international obligation.*” (Emphasis added)
617. In the case before this Tribunal, this means that the Respondent could invoke a state of necessity to excuse the breach of the Treaty.
618. The Respondent invoked the state of necessity in its Rejoinder Memorial to justify the Reversion of the Mining Concessions if the Tribunal were to find that the Reversion breached the Treaty. According to Bolivia, this “*was a necessary measure to protect a fundamental interest, such as*

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<sup>994</sup> RLA-159, United Nations International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* 2001. (“(14) On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25. The cases show that necessity has been invoked to preclude the wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin. It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population. But stringent conditions are imposed before any such plea is allowed. This is reflected in article 25. In particular, to emphasize the exceptional nature of necessity and concerns about its possible abuse, article 25 is cast in negative language (‘Necessity may not be invoked ... unless’). In this respect it mirrors the language of article 62 of the 1969 Vienna Convention dealing with fundamental change of circumstances. It also mirrors that language in establishing, in paragraph 1, two conditions without which necessity may not be invoked and excluding, in paragraph 2, two situations entirely from the scope of the excuse of necessity.” [footnotes omitted])

<sup>995</sup> CLA-202, Reinisch, August. “Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases?” (2007), 8(2) *The Journal of World Investment & Trade* 191.

<sup>996</sup> RLA-126, United Nations, *Responsibility of States for internationally wrongful acts*, Resolution approved by the General Assembly No. A/RES/56/83, January 28, 2002, Art. 25(1); RLA-238, *Gabcikovo-Nagymaros Project*, ICJ Case, Judgment, September 25, 1997, paras. 40-41; CLA-42, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, para. 274; RLA-240, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, September 25, 2007, para. 132; RLA-241, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment, June 29, 2010, para. 200; RLA-242, *Enron Creditors Recovery Corp. and Ponderosa Assets, LP. v. Argentine Republic*, ICSID Case No. ARB/01/13, Decision on Annulment, July 30, 2010, para. 393.

*human and indigenous rights, of the grave and imminent peril posed by the continuity of CMMK, without any other equivalent interest being affected.”*<sup>997</sup>

619. The Tribunal has already concluded that the Reversion (i) constitutes a direct expropriation under the Treaty, and (ii) complies with the requirements thereby established regarding the public purpose and social benefit cause related to the internal needs of the State of Bolivia, as well as due process. The Tribunal has also concluded, on the basis of the materials put forward in this arbitration, that the Reversion was a proportionate measure. The only obligation under Article 5 of the Treaty which the Tribunal has found to have been breached was the obligation to provide compensation.
620. It is clear that Bolivia’s state-of-necessity defense was not designed to excuse the non-payment of compensation for the expropriation, nor could it, since the invocation of this defense does not preclude the payment of compensation by the State for the damages effectively resulting from acts attributable to it.<sup>998</sup>
621. Based on the foregoing reasons, the Tribunal dismisses the state of necessity defense invoked by Bolivia in its Rejoinder Memorial.

**(c) On the alleged police powers**

622. Regarding Bolivia’s allegation – [REDACTED] – that the Reversion constituted the legitimate exercise of police powers and not an expropriation, the Tribunal finds that not only is there no evidence to support this defense, but that Bolivia’s conduct prior to and throughout this arbitration leads to the opposite conclusion.
623. It is true, as Bolivia asserts, that several arbitral tribunals have accepted that compensation provisions under the treaties are inapplicable to measures adopted in the State’s sovereign exercise of its police powers.<sup>999</sup> Similarly, several of the tribunals cited by Bolivia in its Rejoinder have analyzed situations in which the States have issued regulations in exercise of their police powers

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<sup>997</sup> Respondent’s Rejoinder, para. 375.

<sup>998</sup> RLA-159, United Nations International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, art. 27(b) (“*The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: [...] (b) the question of compensation for any material loss caused by the act in question.*”)

<sup>999</sup> Rejoinder Memorial, para. 385.



and have concluded that, in such circumstances, compensation for the investor does not apply. This is the reasoning behind Bolivia's argument that compensation would not apply.

624. Bolivia's acts prior to the issuance of the Decree, the text of the Decree, Bolivia's position on its Counter-Memorial, and the evidence submitted therewith, lead the Tribunal to conclude that the Respondent understood at all times that it was a direct expropriation and that compensation was owed, and it was only with the presentation of its Rejoinder that Bolivia decided to assert a defense on the basis of the exercise of police powers.
625. The evidence on record establishes that, given the considerations of public order and social unrest, Bolivia initially considered the possibility of creating a company with both public and private shareholding.<sup>1000</sup> Later on, several authorities of Bolivia, including the President himself, referred to the need to expropriate the Mining Concessions.<sup>1001</sup> There is no evidence on record, nor does Bolivia cite it in its Rejoinder, that the Respondent's authorities understood that they were exercising police powers, rather than taking measures to expropriate the Concessions. Article 4(1) of the Reversion Decree undeniably refers to the way in which Bolivia will estimate and provide compensation for the reversion, providing that COMIBOL shall "*hire the services of an independent firm to carry out a valuation of the investments*" and on the basis of such valuation "*COMIBOL shall define the amount and conditions under which the Government of Bolivia shall recognize the investments made.*" Additionally, the Decree orders COMIBOL to add the amount to its budget in order to proceed with the corresponding payment.
626. As Bolivia itself asserts, after the issuance of the Decree, measures were adopted to hire the services of an independent company to value the investments;<sup>1002</sup> terms of reference were issued for the valuation;<sup>1003</sup> the company Quality Audit Consultores y Contadores Públicos S.R.L. was hired to perform the valuation and the valuation report was received from the company;<sup>1004</sup> and negotiations were held with the Claimant before and after the Reversion,<sup>1005</sup> which Bolivia has characterized as reflecting a clear willingness to "*comply with its obligation to compensate.*"<sup>1006</sup>
627. In its Counter-Memorial, Bolivia performed, based on Article 5 of the Treaty, an analysis of each of the requirements included therein to establish that the expropriation was not illegal as it

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<sup>1000</sup> <sup>1000</sup> See CWS-3, Mallory's First Witness Statement, para. 25; RWS-1, Gob. Gonzales' First Witness Statement, para. 52.

<sup>1001</sup> Véase, C-61, *Morales confirma nacionalización de Malku Khota (Morales confirms nationalization of Malku Khota)*, Agencia Boliviana de Información, July 8, 2012.

<sup>1002</sup> Counter-Memorial, paras. 332-335.

<sup>1003</sup> Counter-Memorial, paras. 181-184.

<sup>1004</sup> Counter-Memorial, para. 184.

<sup>1005</sup> Counter-Memorial, para. 401.

<sup>1006</sup> Counter-Memorial, para. 401.

complied with all of the requirements under the article.<sup>1007</sup> While Bolivia refers to the Reversion as having a public purpose and social benefit, it does so with a view to establishing compliance with the Treaty requirements for an expropriation, as mentioned above. Bolivia did not refer in any part of its Counter-Memorial to exercising police powers and, much less, to compensation being inapplicable due to the Reversion arising from the exercise of such powers.

628. On the contrary, Bolivia devotes a significant part of its Counter-Memorial to asserting that it fulfilled its obligation to compensate under the Treaty and to alleging that it was always willing to compensate the Claimant in compliance with the above-mentioned Article 5.
629. Although in its Rejoinder Bolivia simply states that it offered to provide compensation without being compelled to do so,<sup>1008</sup> it does not explain why, absent such obligation, it not only included the compensation in the Reversion Decree but also proceeded with the measures to hire a valuator. The Respondent itself states that the Reversion Decree has a presumption of legality. The selfsame State may not, by means of a belated allegation, disavow its own act by arguing that payment of compensation, as established under the Reversion Decree, is not required.
630. Based on the above reasoning, the Tribunal rejects the defense presented by Bolivia in its Rejoinder in connection with the alleged exercise of its police powers.

### **C. THE OTHER CLAIMS OF THE CLAIMANT**

631. In addition to its expropriation claim, the Claimant raised four other claims under the Treaty which are substantially based on the same facts as its expropriation claim. In fact, the Claimant alleges that Bolivia: (i) failed to treat its investments fairly and equitably; (ii) failed to afford full protection and security to its investments; (iii) impaired its investments through unreasonable and discriminatory measures; and (iv) treated its investments less favorably than investments of its own investors.<sup>1009</sup> Below the Tribunal will analyze each of these allegations.

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<sup>1007</sup> Counter-Memorial, para. 403.

<sup>1008</sup> Respondent's Rejoinder, para. 422.

<sup>1009</sup> See Statement of Claim and Memorial, para. 230(ii); Claimant's Reply Memorial, Section VII(ii).

## 1. The claim for fair and equitable treatment

### (a) The Claimant's Position

632. The Claimant contends that Bolivia, through its actions and omissions, violated the standard of fair and equitable treatment, as it (i) frustrated its legitimate expectations, and (ii) did not act in good faith or in a transparent and consistent manner.

#### (i) *Bolivia frustrated the Claimant's legitimate expectations*

633. Referring to several arbitral awards, the Claimant asserts that safeguarding the investor's legitimate expectations is a component of fair and equitable treatment.<sup>1010</sup> Safeguarding legitimate expectations requires the State to guarantee the stability of the legal and business framework and to act "*consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued [...] that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities*".<sup>1011</sup> The Claimant submits that this is the correct interpretation of Article 2(2) of the Treaty, which refers to fair and equitable treatment, rather than "*the minimum international standard of treatment under customary international law*".<sup>1012</sup>

634. The Claimant invested in the Project based on the reiterated "*expressions of support*" by the Government of Bolivia, and the legal framework of Bolivia, which afforded protection to foreign investments, the investor's property, and the rights associated with the Mining Concessions. Relying on this, the Claimant "*formed legitimate expectations regarding the key protections to their investment*".<sup>1013</sup> However, Bolivia deliberately undermined the rights over the Mining Concessions as it allowed the conflict and opposition to CMMK to escalate, and decided to expropriate these concessions without paying any form of compensation, violating the stability of the legal framework, and frustrating the Claimant's legitimate expectations.<sup>1014</sup> The Claimant explains that "*it is Bolivia's utter failure to protect the Mining Concessions [...], that violated Claimant's legitimate expectations*",<sup>1015</sup> and that, even if Reversion resulted out of concern for the protection of human rights and the rights of the indigenous communities, there is no reason

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<sup>1010</sup> Statement of Claim and Memorial, para. 148.

<sup>1011</sup> Statement of Claim and Memorial, para. 148, citing CLA-13, *Técnicas Medioambientales Tecmed, S.A. v. Claimant's Reply on Costs*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, para. 154.

<sup>1012</sup> Claimant's Reply Memorial, para. 317; Hearing Transcript, Day 1, 96:11-24 (English); SAS' Post-Hearing Brief, para. 34.

<sup>1013</sup> Statement of Claim and Memorial, para. 153; Claimant's Reply Memorial, para. 319; SAS' Post-Hearing Brief, para. 35.

<sup>1014</sup> Statement of Claim and Memorial, para. 153; Claimant's Reply Memorial, para. 320; SAS' Post-Hearing Brief. See also Hearing Transcript, Day 1, 97:13-20 (English).

<sup>1015</sup> Claimant's Reply Memorial, para. 322.

why Bolivia's obligation "*to protect indigenous communities necessarily relieved it of its obligations vis-a-vis [SAS] pursuant to the [Treaty]*".<sup>1016</sup>

*(ii) Bolivia failed to act in good faith or in a transparent and consistent manner*

635. The Claimant asserts that the fair and equitable treatment standard requires States to act in good faith and to afford investments transparent and consistent treatment.<sup>1017</sup> However, in light of the facts detailed below, the Claimant submits that Bolivia failed to act in accordance with these obligations:

- (a) Bolivia was planning the Reversion since 2011;<sup>1018</sup>
- (b) Bolivia implemented the Immobilization Zone to preclude the expansion of CMMK's mining coverage;<sup>1019</sup>
- (c) The root of the problem was illegal gold mining. However, Bolivia staked the social conflict in Malku Khota, fostering and protecting opposition to CMMK, as a pretext to expropriate the Claimant's investment and take control of the deposit;<sup>1020</sup>
- (d) Bolivia excluded the Claimant from the process of approving the Reversion;<sup>1021</sup> and
- (e) In May 2012, Bolivia declared that the Project was lawful, and, in August 2012, Bolivia adopted the Reversion and failed to pay any compensation.<sup>1022</sup>

636. The Claimant contends that these facts are sufficient to conclude bad faith and the lack of transparency and consistency in Bolivia's conduct.<sup>1023</sup>

#### **(b) The Respondent's Position**

637. The Respondent denies that it has violated the standard of fair and equitable treatment articulated by the Claimant, as Bolivia (i) respected at all times SAS' legitimate expectations; and (ii) acted

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<sup>1016</sup> Claimant's Reply Memorial, para. 321.

<sup>1017</sup> Statement of Claim and Memorial, paras. 150-151.

<sup>1018</sup> Statement of Claim and Memorial, para. 154; Claimant's Reply Memorial, para. 331.

<sup>1019</sup> Claimant's Reply Memorial, paras. 328-329.

<sup>1020</sup> Statement of Claim and Memorial, para. 154; Claimant's Reply Memorial, paras. 326-327; SAS' Post-Hearing Brief, para. 35. See also Hearing Transcript, Day 1, 97:13-20 (English).

<sup>1021</sup> Statement of Claim and Memorial, para. 154; Claimant's Reply Memorial, paras. 332-333.

<sup>1022</sup> Statement of Claim and Memorial, para. 154; Claimant's Reply Memorial, paras. 330-331.

<sup>1023</sup> Claimant's Reply Memorial, para. 325; SAS' Post-Hearing Brief, para. 35.

in conformity with the principle of good faith, in a manner that is transparent and consistent with its international obligations.

*(i) Bolivia respected the Claimant's legitimate expectations*

638. The Respondent argues that the standard of fair and equitable treatment provided for in Article 2(2) of the Treaty “*grants the investor the protections of international law –and nothing else*”.<sup>1024</sup> The Respondent agrees that the investor’s legitimate expectations form part of fair and equitable treatment, but rejects that these expectations may *per se* constitute the only basis for a claim related to the breach of fair and equitable treatment.<sup>1025</sup>
639. The Respondent contends that the investor’s legitimate expectations do not imply the “*immutability of the legal and regulatory framework applicable to the investment, nor do they prevent the State from legislating and guaranteeing the application and observance of its laws in its territory*”.<sup>1026</sup> In the absence of a specific commitment by the State not to modify its legal framework,<sup>1027</sup> the fair and equitable treatment standard only protects the investor’s legitimate expectations against (i) arbitrary changes of the legal framework applicable to the investment,<sup>1028</sup> and (ii) the egregious or manifestly abusive conduct of the State.<sup>1029</sup> The Respondent asserts that the foregoing applies to the fair and equitable standard as well as to the minimum level of treatment under international customary law.<sup>1030</sup>
640. In the present case, the Respondent considers evident that there was no violation of fair and equitable treatment as Bolivia did not modify, but rather limited itself to applying, the legal framework applicable to the Mining Concessions.<sup>1031</sup> This legal framework included the principles that govern mining activities of the natural resources of Bolivia, as well as domestic and international provisions that mandate Bolivia to protect human rights and the rights of indigenous communities.<sup>1032</sup> Given that knowledge of the legal and regulatory framework applicable to the investor’s investment is a *sine qua non* condition for the protection of its legitimate expectations, the Claimant had to be aware of the existence of such provisions and

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<sup>1024</sup> Counter-Memorial, para. 407.

<sup>1025</sup> Counter-Memorial, paras. 409-412.

<sup>1026</sup> Counter-Memorial, para. 412.

<sup>1027</sup> Counter-Memorial, paras. 418-420; Respondent’s Rejoinder, para. 456.

<sup>1028</sup> Respondent’s Rejoinder, paras. 454-455.

<sup>1029</sup> Counter-Memorial, para. 433; Respondent’s Rejoinder, paras. 457-458; Hearing Transcript, Day 1, 262:14 – 263:2 (Spanish).

<sup>1030</sup> Respondent’s Rejoinder, para. 459.

<sup>1031</sup> Counter-Memorial, paras. 422, 432; Respondent’s Rejoinder, para. 460.

<sup>1032</sup> Counter-Memorial, paras. 422-426, 431, 434.

“was fully aware that if it failed to respect the Indigenous Communities, the Government of Bolivia would act accordingly”.<sup>1033</sup> Thus, the “legitimate expectations [of the Claimant] necessarily included Bolivia’s obligation to protect human rights and the rights of indigenous peoples,” which is precisely what Bolivia did through the Reversion.<sup>1034</sup>

(ii) *Bolivia acted in good faith, transparently and consistently*

641. The Respondent contends that SAS’ allegations are plagued with “multiple inaccuracies” and they are insufficient to establish the violation of the principle of good faith under international law.<sup>1035</sup> In particular, the Respondent notes that:

- (a) In 2011, Bolivia was already receiving requests from the Indigenous Communities to expel CMMK, but Bolivia “always maintained its support for [CMMK]”.<sup>1036</sup>
- (b) The Immobilization Zone is a “simple demarcation of an area whose exploitation corresponds to COMIBOL for business purposes, as established by law,” in compliance with Bolivia’s policy in force since 2006. Moreover, immobilization zones were established in 18 different areas, making it impossible to determine whether this policy was implemented against CMMK.<sup>1037</sup>
- (c) The only motivation behind the Reversion, and the sole cause of the social conflict was the violence and violations of human rights and the rights of indigenous peoples by CMMK.<sup>1038</sup> The Respondent notes that the Project was never affected by illegal gold mining.<sup>1039</sup>
- (d) Bolivia asked CMMK to attend several meetings to “reach agreements that would allow CMMK to continue the Project development”.<sup>1040</sup>
- (e) Bolivia’s legal framework allowed for the Reversion before August 2012, and Bolivia initiated the valuation process in accordance with the Reversion Decree, thus beginning the compensatory process.<sup>1041</sup>

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<sup>1033</sup> Counter-Memorial, paras. 425-430; Respondent’s Rejoinder, para. 463; Hearing Transcript, Day 1, 263:5-21 (Spanish).

<sup>1034</sup> Respondent’s Rejoinder, para. 465.

<sup>1035</sup> Counter-Memorial, paras. 437-438, 441.

<sup>1036</sup> Counter-Memorial, para. 442.

<sup>1037</sup> Counter-Memorial, paras. 443-445.

<sup>1038</sup> Counter-Memorial, paras. 440-441, 446-447; Respondent’s Rejoinder, paras. 470-471.

<sup>1039</sup> Respondent’s Rejoinder, paras. 472-475.

<sup>1040</sup> Counter-Memorial, para. 454.

<sup>1041</sup> Counter-Memorial, paras. 440 y 449.

**(c) The Tribunal's Analysis**

642. The Claimant argues that Bolivia violated the fair and equitable treatment standard under Article 2(2) of the Treaty, since (i) it failed to protect SAS' legitimate expectations and to guarantee the existence of a stable legal and business framework in connection with its investment<sup>1042</sup> and, additionally, (ii) it failed to act in good faith and in a transparent and predictable manner.<sup>1043</sup>
643. The Respondent rejects SAS' accusations and, in its defense, argues that (i) the Claimant should have legitimately expected that Bolivia would protect its natural resources and the Indigenous Communities in accordance with its national and international obligations,<sup>1044</sup> and (ii) Bolivia acted in good faith and treated the Claimant's investment in a transparent and consistent manner.<sup>1045</sup>
644. Article 2(2) of the Treaty provides that "*investments of nationals or companies of each Contracting Party shall at all times be afforded fair and equitable treatment [...] in the territory of the other Contracting Party.*" As is frequently done in investment treaties, the Treaty establishes the obligation of the host State to afford fair and equitable treatment to the protected investments, without establishing the elements comprising the standard.
645. However, in this case, the Parties do not dispute that, for the purposes of the analysis and the decision of this Tribunal, the obligation of the State to afford fair and equitable treatment to foreign investments implies acting in a transparent and consistent manner. Neither do they dispute that the investor's legitimate expectations are part of the fair and equitable treatment standard. Nor do they dispute the relationship between legitimate expectations and the legal framework in the host State of the investment.<sup>1046</sup> All told, the Parties differ as to the expectations to be protected under the Treaty<sup>1047</sup> and as to how the standard should be applied to the facts of the case.<sup>1048</sup>
646. Based on the above, the Tribunal will start by examining to the standard of protection of legitimate expectations and subsequently examine the factual allegations underlying the present claim, including the actions that the Claimant considers contrary to good faith, transparency, and predictability.

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<sup>1042</sup> Statement of Claim and Memorial, para. 153.

<sup>1043</sup> Statement of Claim and Memorial, para. 154.

<sup>1044</sup> Counter-Memorial, Section 6.2.1.

<sup>1045</sup> Counter-Memorial, Sections 6.2.2 and 6.2.3.

<sup>1046</sup> Statement of Claim and Memorial, para. 148; Counter-Memorial, para. 409.

<sup>1047</sup> See Counter-Memorial, para. 410.

<sup>1048</sup> See Counter-Memorial, para. 413.

647. Despite differences in approach, international investment tribunals have outlined the requirements underlying which investor expectations are to be afforded protection under investment treaties. The Tribunal considers relevant to highlight the two requirements that are relevant for the resolution of the dispute before it.
648. First, several international investment tribunals have established that the investor is entitled to protection of its legitimate expectations provided (i) that it exercised due diligence, and (ii) that its legitimate expectations were reasonable in light of the circumstances.<sup>1049</sup> The circumstances to be taken into consideration by the investor are not merely legal in nature, but they should also include the social, cultural, and economic environment of the host State of the investment, amongst other factors. According to the *Duke Energy v. Ecuador* tribunal, “[t]he assessment of the reasonableness or legitimacy [of the investor’s expectations] must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State.”<sup>1050</sup>
649. Second, international investment tribunals have also recognized that the commitment of the State to afford fair and equitable treatment to foreign investments does not entail relinquishing their regulatory powers in the public interest or the need to adapt their legislation to changes and emerging needs.<sup>1051</sup> As stated by the *Copper Mesa v. Ecuador* tribunal, under the fair and equitable treatment standard, there is a weighing of the legitimate interests of the foreign investor with the legitimate interests of the host State and others, including (in particular) its own citizens and residents.<sup>1052</sup>
650. While tribunals have referred to the conditions under which the legal and economic framework may be altered without violating the fair and equitable treatment standard,<sup>1053</sup> in this particular

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<sup>1049</sup> RLA-113, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007, para. 333; CLA-46, *Saluka Investments BV v. Czech Republic*, UNCITRAL Case, Partial Award, March 17, 2006, para. 304; CLA-52, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, para. 340.

<sup>1050</sup> CLA-52, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, para. 340.

<sup>1051</sup> RLA-26, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, December 27, 2010, para. 115. See also CLA-46, *Saluka Investments BV v. The Czech Republic*, Partial Award, March 17, 2006, para. 305; RLA-113, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007, para. 332.

<sup>1052</sup> RLA-281, *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, March 15, 2016, para. 6.81 (“Under this FET standard, there is a balancing exercise permitted to the host State, weighing the legitimate interests of the foreign investor with the legitimate interests of the host State and others, including (especially) its own citizens and local residents.”) See also CLA-46, *Saluka Investments BV v. The Czech Republic*, Partial Award, March 17, 2006, paras. 305-306; RLA-272, *Franck Charles Arif v. Republic of Ecuador*, ICSID Case No. ARB/11/23, Award, April 8, 2013, para. 537.

<sup>1053</sup> See, for example, CLA-56, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, para. 364; CLA-157, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, November 8, 2010, para. 420.



case the issue is not a change to the general legal and economic framework, or a change to the legal framework for a specific economic sector, but rather the specific actions of the Claimant and its controlled company, CMMK, *vis-a-vis* the Respondent.

651. Next, the Tribunal will evaluate the claim put forward by the Claimant based on the criteria established above.
652. The Claimant claims to have formed legitimate expectations regarding the key protections afforded to their investments in Malku Khota and the stability of Bolivia's legal and business framework based on the laws of Bolivia in force at the time of its investment, and the "repeated and specific expressions of support" it received from the Government since the investment was made until mid-2011.<sup>1054</sup> Likewise, it asserts that Bolivia ceased to protect its legitimate expectations and to guarantee the existence of a stable legal and business framework in connection with its investments "[b]y *deliberately undermining the exercise by [SAS] of CMMK's rights over the Mining Concessions and by ultimately nationalizing these concessions without offering or paying any form of compensation.*"<sup>1055</sup>
653. Except for the issuance of the Reversion Decree, the Claimant has not alleged that Bolivia had introduced any general regulatory change or any change in the mining sector that impaired the rights on the Mining Concessions after SAS' investment. It has not explained exactly which legitimate expectations were frustrated due to conduct attributable to the State, or which of Bolivia's specific acts violated those legitimate expectations. In general terms, its allegation of the violation of legitimate expectations seems to be exclusively based on the fact that the State decided to revert the Mining Concessions. That is, it would be the issuance of the Reversion Decree that violated the Claimant's legitimate expectations. Based on the reasons that follow, the Tribunal considers that the Reversion did not violate the fair and equitable treatment standard and, in particular, did not violate the expectations that, given the circumstances of the case, could be considered legitimate.
654. As the Tribunal previously noted, it is undisputed that the State may legally expropriate the investments made by an investor of the other Contracting Party under the Treaty, provided that the requirements under Article 5 are met.<sup>1056</sup> Certainly, Bolivia did not relinquish this power, nor did it commit to unconditionally maintaining untouched SAS' or CMMK's rights over the Mining Concessions.

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<sup>1054</sup> Statement of Claim and Memorial, para. 153; Claimant's Reply Memorial, para. 319.

<sup>1055</sup> Statement of Claim and Memorial, para. 153.

<sup>1056</sup> See *supra* para. 546.

655. As previously noted, the Tribunal should assess the legitimacy and reasonableness of the investor's expectations, taking account of all the circumstances of the case and the investor's conduct. In this case, the Claimant knew, or should have known, that CMMK operated in an area inhabited by indigenous communities, under specific political, social, cultural, and economic conditions.<sup>1057</sup> CMMK's own advisors, as the Tribunal has already mentioned, warned of this situation and recommended that certain measures be taken for the development of the Project. On the one hand, this implies that SAS, through CMMK, should develop the Project based on the special characteristics of the place where it operated. On the other hand, this supposes that Bolivia had a heightened duty of protection and oversight regarding the communities that inhabit the Project area.
656. The Tribunal has found that CMMK's conduct contributed to the social conflict and that, even if its conduct had not had such an impact on the origin of the conflict, its actions during the conflict contributed to aggravating it by generating divisiveness and escalating the clashes within the indigenous communities.<sup>1058</sup> Likewise, the Tribunal also found that the Reversion was enacted for the purpose established in the Reversion Decree – to end the social conflict in the Project area – rather than other economic interests of the State, as the Claimant has alleged.<sup>1059</sup> The grave social conflict in the Project area is a supervening situation, generated in part by the Company's conduct, against which the State had to take action to restore public order and thus protect the life and integrity of the population in the area and CMMK's employees.
657. Upon analyzing the expropriation claim, the Tribunal has concluded that, except for the requirement to provide compensation, the Reversion complied with the Treaty. As a matter of fact, and contrary to the Claimant's allegations, the Tribunal found that the reversion had a public purpose and was for a social benefit,<sup>1060</sup> and it complied with due process.<sup>1061</sup>
658. The Claimant has not invoked additional reasons for this Tribunal to conclude that an expropriatory measure in accordance with the public purpose and due process requirements is, in this particular case, contrary to the obligation to afford fair and equitable treatment under Article 2(2) of the Treaty. Therefore, the Tribunal refers back to its findings in section VII.B of this award which are applicable to the factual allegations also presented by the Claimant as the basis for its

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<sup>1057</sup> See *supra* section VII.A.

<sup>1058</sup> See *supra* paras. 505, 507.

<sup>1059</sup> See *supra* section VII.B.3.a.i.

<sup>1060</sup> See *supra* section VII.B.3.a.ii.

<sup>1061</sup> See *supra* section VII.B.3.a.ii.

claim for the alleged violation of the fair and equitable treatment standard, and concludes that the Reversion was not contrary to that standard.

659. However, the Claimant alleges that Bolivia's actions preceding Reversion also violated the fair and equitable treatment standard. In general, the Claimant argues that Bolivia publicly and deliberately undermined its ownership rights over the Mining Concessions, stoked opposition to the Project and the Company, and allowed the conflict in Malku Khota to escalate.<sup>1062</sup> The Tribunal will now examine these allegations.
660. The Claimant alleges that Bolivia breached the fair and equitable treatment standard by ordering the immobilization of the area surrounding the Project in accordance with Resolution DGAJ-0073/2011 issued by COMIBOL on April 26, 2011. This designation would have had the effect of precluding SAS from freely expanding the Project or expanding the footprint of the planned mine and, additionally, it was supposedly an early indication of Bolivia's expropriatory intent.<sup>1063</sup>
661. The Tribunal does not consider that the implementation of the Immobilization Zone constitutes a violation of the duty incumbent on the State to afford fair and equitable treatment to SAS' investments.
662. It is uncontested that the Immobilization Zone corresponds to an area different from the Mining Concessions, over which neither SAS nor CMMK had acquired rights.<sup>1064</sup> It is also uncontested that the exploitation and management of this area was assigned to COMIBOL since 2007.<sup>1065</sup> Therefore, the issuance of Resolution DGAJ-0073/2011 of April 2011 and its reference to the discovery of a silver deposit in Northern Potosi by CMMK does not imply the infringement of SAS' or CMMK's rights on the Mining Concessions, nor does it reveal an "expropriatory intention" of the State, which acted in the legitimate exercise of its powers.
663. As previously noted, neither the Claimant nor CMMK had acquired rights over this area, and even assuming that they had an interest or plans to expand the Project area or the mine footprint – as SAS now suggests<sup>1066</sup> – there is no contemporaneous evidence on the record that they had communicated their intentions to the Government and that the Government had made a commitment in this regard. Therefore, it is not possible to conclude that this action frustrated a

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<sup>1062</sup> Claimant's Reply Memorial, para. 320.

<sup>1063</sup> Statement of Claim and Memorial, paras. 56-57.

<sup>1064</sup> Hearing Transcript, Day 3, 577:23-25 (English).

<sup>1065</sup> R-119, Resolution DGAJ-0073/2011, third *whereas* clause. At the hearing, Mr. Felipe Malbran confirmed that he understood that the Immobilization Zone had been assigned to COMIBOL since 2007. (See Hearing Transcript, Day 3, 576:21-578:3 (English))

<sup>1066</sup> See Statement of Claim and Memorial, para. 56.

legitimate expectation of the Claimant or represented an inconsistent or arbitrary exercise of the powers of the State.

664. As previously noted, even if the Tribunal considers that there were circumstances in which some officials of Bolivia might have had a greater degree of presence and control in some instances, the Tribunal does not find that Bolivia stoked the opposition to the Project to gain control of the Mining Concessions or that the escalation of the conflict in the area was attributable to the conduct of the State.
665. The Claimant does not deny that Bolivia initiated actions to resolve the conflict generated within the community members in the Project area. However, the Claimant suggests that such actions were really designed to undermine SAS' rights over the Mining Concessions. According to the Claimant, officials of Bolivia excluded the Company from the meetings with the community; communicated to the indigenous communities that they disagreed with the Project; demanded a stake in the Project; urged the Company to cease operations; and did not deploy the armed forces to the area in an effort to control the violence.<sup>1067</sup>
666. The Tribunal finds that SAS' assertions regarding the State's conduct in connection with the Malku Khota conflict have not been proven and that the actions of some Bolivian officials, as the Claimant described them, despite being questionable, are insufficient to conclude, as asserted by the Claimant, that they were part of a plan by the State to gain control of the Project or to have the indigenous communities oppose CMMK. The evidence on the record shows that the State attempted to mediate in the conflict between supporters and objectors to the Project. The record shows that in early 2011, officials with the Governor's Office visited the Project area and met with the community members and organizations that opposed the Project.<sup>1068</sup> Similarly, the record shows that the Governor's Office held at least two meetings with CMMK and the Indigenous Communities and representatives of the Governor's Office, in which options to remedy the conflict were discussed.<sup>1069</sup> In 2011 and 2012, both the Office of the Potosi Governor and the

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<sup>1067</sup> See, for example, Claimant's Reply Memorial, paras. 100 *et seq.*, 281.

<sup>1068</sup> RWS-1, Gob. Gonzales' First Witness Statement, para. 20; R-170, SASC, Minutes of the Directors' meeting, January 12, 2011, para. 1; R-59, Minutes of the visit by the Secretary of the Madre Tierra Department to the Malku Khota community on May 10, 2011.

<sup>1069</sup> R-32, Minutes of the outreach meeting for the Project, July 23, 2011; R-63, Report on the second outreach meeting for the Malku Khota Project, September 6, 2011.

central Government convened and held joint and individual meetings, with members of the community, objectors, and supporters of the Project,<sup>1070</sup> and with the Company.<sup>1071</sup>

667. Contrary to SAS' assertions, there is no evidence that at the meetings with the communities the Governor's Office expressed its opposition to the Project. In fact, the Claimant's assertions in this regard are not supported in the contemporaneous documents,<sup>1072</sup> and in addition, are contrary to the view that SAS' officials and directors expressed with regard to Bolivia's support between January 2011 and mid-2012.<sup>1073</sup>
668. There is no evidence either that, as SAS suggests, the Government of Potosi had demanded a stake in the Project as a condition for its viability. At the Hearing, Mr. Mallory, the Claimant's witness, stated that, in a conversation with the Governor in July 2011, he had suggested that "*if we ever went to the market and tried to create or raise shares, that they come to the Governor first.*"<sup>1074</sup> Mr. Mallory reiterated that the proposal was surprising, but emphasized that it was a "suggestion,"<sup>1075</sup> and not a "demand," as he and Mr. Gonzalez Yutronic implied in their written witness statement.<sup>1076</sup>

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<sup>1070</sup> See, for example, R-66, Minutes of the meeting at the Office of the Government of La Paz with COTOA-6A, November 24, 2011; CWS-10, Mallory's Second Witness Statement, paras. 62-63; R-262, E-mail of Witness X to CMMK's directors, December 3 2011; CWS-3, Mallory's First Witness Statement, para. 25; RWS-1, Gob. Gonzales' First Witness Statement, para. 52; CWS-7, Angulo's Second Witness Statement, para. 53; C-272, Memorandum from Santiago Angulo to Xavier Gonzales Malbran, Report on the trip to Potosi, Mar. 28 – 30, 2012; R-82, 28 – 30, 2012; R-82, Letter from the Governor of Potosi to the Malku Khota and Kalachaca Communities, May 23, 2012; C-15, Minutes of the meeting on the Malku Khota case, May 28, 2012; R-92, Notice of Convocation by the Ministry of Mining and Metallurgy, June 27, 2012; RWS-1.

<sup>1071</sup> See, for example, CWS-4, Gonzales Yutronic's First Witness Statement, para. 24; RWS-1, Gob. Gonzales' First Witness Statement, para. 53.

<sup>1072</sup> Mr. Angulo said to have participated at the meetings of March 28 and May 28, 2012 as a community member and not as a CMMK employee (See CWS-5, Angulo's First Witness Statement, paras. 10-17; CWS-7, Angulo's Second Witness Statement, para. 53). In his report on the trip to Potosi between March 28 and 30, 2012 (C-272), Mr. Angulo does not state that his perception would have been that the Governor's Office opposed the Project. Based on this report, Governor Gonzales personally expressed that he did not agree with the private company, but there were alternatives for the development of the Project, and that this was a reason for hope for Malku Khota. In turn, Messrs. Mallory and Gonzales Yutronic assert that at a meeting held on September 25, 2011, Mr. Yerco Cervantes, Director of Mining and Development with the Government of Potosi, had announced that the Government would support the actions of the community for the creation of a cooperative (CWS-4, Gonzales Yutronic's First Witness Statement, para. 13; CWS-3, Mallory's First Witness Statement, para. 22). However, the witnesses do not cite any contemporaneous document supportive of his assertions.

<sup>1073</sup> In January 2011, Mr. Fitch reported that the SASC's Board of Directors continued supporting the effort to solve the community problems (R-170, Minutes of the SASC's Board of Directors, January 12, 2011, page. 1). Also, SASC's report of July 8, 2012 expressly shows that the government authorities continued their efforts to reestablish peace and order in Malku Khota (C-305, South American Silver Corp., News Release, "South American Silver Provides Further Update on Bolivia," July 8, 2012, p. 1). At the hearing, Mr. Fitch confirmed the contents of the report and accepted that "the Government of Bolivia showed some level of support" (Hearing Transcript, Day 2, 394:7-13 (Spanish)). Similarly, Mr. Mallory ratified that by February 2012, his view was that Governor Gonzales understood his concern about the Malku Khota community (Hearing Transcript, Day 2, 453:23-454:4 (Spanish)).

<sup>1074</sup> See Hearing Transcript, Day 2, 408:9-409:7 (English).

<sup>1075</sup> Hearing Transcript, Day 2, 408:6-7 (English).

<sup>1076</sup> CWS-10, Mallory's Second Witness Statement, para. 45; CWS-8, Gonzales Yutronic's Second Witness Statement, para. 28.

669. The Tribunal understands that the proposal to constitute a mixed company with Bolivia's participation was presented in the context of the conflict with the community members, as an option to ensure the continuation of the Project led by CMMK.<sup>1077</sup> Based on the evidence on the record and the social context in the Project area,<sup>1078</sup> the Tribunal cannot conclude that this proposal – not demand – had an ulterior motive or undermined SAS' rights over the Mining Concessions. On the contrary, it was a proposal to ensure continuity for the Project, which is precisely what SAS requested.
670. Similar considerations apply to the suggestion made by government officials in May 2012 for the Company to temporarily suspend its operations.<sup>1079</sup> This proposal, not a demand either, was made in the context of escalating violence in the Project area<sup>1080</sup> and there is no evidence that its purpose was other than an attempt to have the objecting communities reach consensus in this period of time.<sup>1081</sup> The Tribunal does not find that this proposal impaired in any way SAS' rights over the Mining Concessions, more so when the proposal was not accepted by the Claimant and, therefore, did not even materialize.
671. Finally, SAS complains that Bolivia had not deployed the armed forces to protect CMMK's employees and assets from the alleged threats and actions by the community members who opposed the project.<sup>1082</sup> However, the evidence in the record shows that Bolivia did take measures to address the situation in Malku Khota and the Company's requests,<sup>1083</sup> including the deployment of a police contingent to the areas surrounding Malku Khota to contain the violent actions of the clashing community members,<sup>1084</sup> and the investigation, and, in some cases, the arrest of the individuals subject of a criminal complaint filed by CMMK.<sup>1085</sup>

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<sup>1077</sup> See, for example, R-32, Minutes of the Project outreach meeting, July 23, 2011; CWS-4, Gonzales Yutronic's First Witness Statement, para. 24, in connection with the meeting held on June 19, 2012 whereby the central Government also presented the alternative.

<sup>1078</sup> See *supra* section VII.A.

<sup>1079</sup> The Tribunal notes that this suggestion was made by officials with the Ministry of Mining at a meeting held on May 5, 2012 with CMMK's officials, including Xavier Gonzales Yutronic and Witness X (see R-265). Subsequently, at a meeting with representatives of the Government and the communities held on May 9, 2012, the Potosí Governor suggested that CMMK temporarily suspended the activities (see C-51). The Claimant alleges that CMMK did not attend this meeting.

<sup>1080</sup> See *supra* sección III, paras. 147, 150, 152.

<sup>1081</sup> The contemporaneous documents show that the purpose of this proposal was to find a more enabling environment to seek solutions to the community conflict. See C-51; R-265.

<sup>1082</sup> Reply Memorial, para. 338.

<sup>1083</sup> See *supra* *inter alia* paras. 135-136, 150, 153.

<sup>1084</sup> RWS-1, Gob. Gonzales's First Witness Statement I, paras. 70-71. See also R-91, News release, El Potosí, *Presencia policial genera calma en Mallku Khota*, June 14, 2012.

<sup>1085</sup> R-77, News release, El Potosí, *Comunarios se enfrentan por un megayacimiento de plata* del 6 de mayo de 2012; R-78, News release, El Potosí, *Confirmation of a hostage taking in Mallku Khota*, May 5, 2012; R-75, Resolution on file for the complaint of Xavier Gonzales against members of the Indigenous Peoples dated February 28, 2014.

672. In any event, there is no evidence that the militarization of the area would have been an appropriate measure conducive to remedying the social conflict and allowing the Project to continue.
673. It is true, as the Claimant asserts, that in some situations and during the conflict, some of the Respondent's officials could have had a more efficient and prompt action. It is also true that the area is characterized by poverty and insufficient infrastructure that could have contributed to the unrest generated by the Project and CMMK's presence. However, on the one hand, the lack of opportunity or efficiency in some actions is not, in this case, sufficient to qualify as a violation of the fair and equitable treatment standard and, much less, to conclude that Bolivia acted with premeditation and under a plan to gain control of the Project. Such an allegation requires a high standard of proof as it entails establishing an act of the State in bad faith or intolerable negligence, and such evidence is inexistent in this case.
674. Based on the reasons expressed in this section, the Tribunal concludes that it has not been proven that Bolivia violated the fair and equitable treatment standard under Article 2(2) of the Treaty.

## **2. The claims for full protection and security**

### **(a) The Claimant's Position**

675. The Claimant contends that under the full protection and security standard the State is obliged to act diligently to ensure the "*legal and physical*" security of the investments in its territory,<sup>1086</sup> adopting every necessary and reasonable measure to that end, "*without any need to establish malice or negligence*" to establish violation of such an obligation.<sup>1087</sup>
676. In light of the facts, the Claimant asserts that "*Bolivia's actions fell well below*" this standard.<sup>1088</sup>
677. On the one hand, the Claimant alleges that Bolivia failed to act with due diligence to afford full protection and security to SAS' investment. The Claimant asserts that the Government never provided assistance to CMMK to solve the conflict, despite CMMK's request for its intervention in December 2010, and did not militarize the area surrounding Malku Khota when the conflict became unsustainable. The Claimant submits "[a]nd in fact –and this is very telling and important: Once [Bolivia] did control the Concessions, it is only then that it sent the police and

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<sup>1086</sup> Statement of Claim and Memorial, para. 155; Claimant's Reply Memorial, para. 335; SAS' Post-Hearing Brief, para. 36.

<sup>1087</sup> Statement of Claim and Memorial, para. 155; citing CLA-8, AAPL, Award, para. 77.

<sup>1088</sup> Statement of Claim and Memorial, para. 156.

*the military to secure the area.*”<sup>1089</sup> Thus, Bolivia did not take the necessary measures to prevent an escalation of the social conflict.<sup>1090</sup> The Claimant submits that Bolivia encouraged opposition to the Project led by the illegal gold miners,<sup>1091</sup> and granted immunity to opposition leaders through the Memorandum of Agreement, thus undermining “*the [full protection and security] that [SAS] was entitled to for its investments in Bolivia.*”<sup>1092</sup>

678. On the other hand, the Claimant submits that Bolivia deliberately withdrew the full protection and security that it had granted to the Project. The Claimant contends that through the Reversion and the purported withdrawal of the environmental permits, Bolivia “*undermined and effectively negated [the full security and protection] afforded to [SAS’] investment.*”<sup>1093</sup>

#### **(b) The Respondent’s Position**

679. The Respondent argues that the obligation to afford full protection and security “*is not absolute and does not impose strict liability upon the State that grants it.*”<sup>1094</sup> It is an obligation of means that requires the State to adopt the necessary measures to protect an investment, only when it is threatened by the illicit interference of non-State agents.<sup>1095</sup> Thus, the full protection and security standard does not require “*to obtain accurate results and, even less, to protect SAS from CMMK’s actions.*”<sup>1096</sup>
680. According to the Respondent, despite not having any international obligation to protect CMMK as the opposition of the Indigenous Communities was legitimate,<sup>1097</sup> The Respondent argues that Bolivia complied with the obligation to grant full protection and security as “*Bolivia protected SAS’ investment until the Reversion date, insofar as possible.*”<sup>1098</sup> The Respondent attempted to maintain peace in the area by means of direct dialogue with the Government of Potosí, and mediation meetings; and when the conflict escalated, Bolivia sent police officers and high-ranking officials to help resolve it.<sup>1099</sup> Contrary to the Claimant’s allegations, military repression is not a

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<sup>1089</sup> Hearing Transcript, Day 1, 98:9-12 (English).

<sup>1090</sup> Statement of Claim and Memorial, para. 156; Claimant’s Reply Memorial, paras. 336-340.

<sup>1091</sup> Hearing Transcript, Day 1, 98:13-17 (English).

<sup>1092</sup> Statement of Claim and Memorial, para. 156; Claimant’s Reply Memorial, paras. 341-342. See also Hearing Transcript, Day 1, 98:13-17 (English).

<sup>1093</sup> Statement of Claim and Memorial, para. 156.

<sup>1094</sup> Counter-Memorial, para. 467, citing RLA-96, *Técnicas Medioambientales Tecmed S.A. c. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, para. 177.

<sup>1095</sup> Counter-Memorial, paras. 465-466.

<sup>1096</sup> Respondent’s Rejoinder, para. 478. See also Hearing Transcript, Day 1, 264:8-13 (Spanish).

<sup>1097</sup> Respondent’s Rejoinder, para. 486.

<sup>1098</sup> Counter-Memorial, para. 461. See also Respondent’s Rejoinder, paras. 479-482.

<sup>1099</sup> Counter-Memorial, para. 463.



reasonable solution, as (i) it is incompatible with a free and democratic society, (ii) it is banned under international law, and (iii) Bolivia's experience shows that military intervention worsens social conflicts.<sup>1100</sup>

681. The Respondent denies that Bolivia encouraged opposition to CMMK. Instead, Bolivia asserts that it defended CMMK and attempted to reach an agreement to satisfy the interests of both parties to the conflict, and, to that end, Bolivia's government representatives put their safety at stake. The Respondent submits that the violation of human rights and the rights of indigenous peoples by CMMK was the only cause fueling the Indigenous Communities' opposition.<sup>1101</sup>
682. Similarly, the Respondent denies granting immunity to opposition leaders through the Memorandum of Agreement; the criminal liability of the leaders was simply determined to be subject to the indigenous justice system. The Respondent states that the Government does not even have the power to grant such immunity, in accordance with the principle of the separation of powers. At any rate, the Respondent contends that there is no justification to consider that the prosecution of the opposition leaders is a reasonable measure to protect the Mining Concessions, and, thus, there could be no violation of the full protection and security standard if immunity was granted.<sup>1102</sup>
683. Consequently, Bolivia asserts that it took the measures available to avoid the social conflict and that the Reversion only came into play once Bolivia had exhausted all other alternatives "*to address a social conflict created and exacerbated by CMMK.*" Moreover, Bolivia offered CMMK the necessary means to resort to the courts in Bolivia, fulfilling its obligation to grant full protection and security.<sup>1103</sup>
684. Finally, the Respondent denies that Bolivia attempted to revoke CMMK's environmental permits, alleging that the Claimant's argument in this connection is "*frivolous and demonstrates SAS' lack of solid arguments*".<sup>1104</sup>

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<sup>1100</sup> Respondent's Rejoinder, paras. 483-485.

<sup>1101</sup> Counter-Memorial, 488-492; Respondent's Rejoinder, para. 463.

<sup>1102</sup> Counter-Memorial, para. 471; Respondent's Rejoinder, paras. 493-496.

<sup>1103</sup> Counter-Memorial, paras. 474-475; Respondent's Rejoinder, para. 479.

<sup>1104</sup> Counter-Memorial, para. 476.

**(c) The Tribunal's Analysis**

685. Article 2(2) of the Treaty provides that “*investments of nationals or companies of each Contracting Party [...] shall enjoy full protection and security in the territory of the other Contracting Party.*”
686. The Parties agree that the full protection and security standard requires the host State of the investment to exercise due diligence and take reasonable measures to protect the investments.<sup>1105</sup> Likewise, Bolivia notes, and the Claimant does not contest, that the obligation to afford full protection and security for the investments is an obligation of means and not of result.<sup>1106</sup>
687. The Tribunal agrees that the full protection and security standard under the Treaty imposes on Bolivia the duty to act with due diligence, i.e. to adopt measures that are reasonable to protect the investment, taking account of the circumstances of the case.<sup>1107</sup>
688. The Claimant accuses the Respondent of (i) refusing or simply failing to intervene when requested to do so by SAS; (ii) encouraging opposition to the Project led by cooperatives and illegal miners in the area; and (iii) granting immunity to opposition leaders and authors of the violence.<sup>1108</sup> The Tribunal does not find these accusations to be supported or that, given the circumstances of the case, Bolivia's conduct has not met the full protection and security standard under the Treaty.
689. First, it has not been shown that Bolivia refused or failed to intervene when requested to do by SAS. On the contrary, the evidence on record shows that since early 2011 and until mid-2012, officials of the Potosi Government and of the National Government participated in meetings with community members, objectors, and supporters of the Project, and also with the Company, several of which were convened by the Governor's Office, for the purpose of resolving the social conflict that had erupted in the area due to the Project.<sup>1109</sup> Again, the delays or inefficiencies regarding some specific actions are insufficient to qualify as actions in breach of the full protection and security standard.
690. The Claimant has complained in particular that Bolivia did not militarize the areas surrounding Malku Khota and presented this fact as proof that the Respondent did not act with due

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<sup>1105</sup> See Counter-Memorial, para. 465; Claimant's Reply Memorial, para. 335; Respondent's Rejoinder, para. 478.

<sup>1106</sup> See Counter-Memorial, paras. 465-467.

<sup>1107</sup> See, for example, CLA-8, *Asian Agric. Prods., Ltd. (AAPL) v. Prods., Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, 30 I.L.M. 580 (1991), paras. 76-77; CLA-43, *Suez, Sociedad General de Aguas de Barcelona, S.A. and ors. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, July 30, 2010, para. 156; CLA-46, *Saluka Investments BV v. Czech Republic*, UNCITRAL Case, Partial Award, March 17, 2006, para. 484.

<sup>1108</sup> Statement of Claim and Memorial, para. 156; Claimant's Reply Memorial, para. 336.

<sup>1109</sup> See *supra* para. 671, footnote 1083.

diligence.<sup>1110</sup> The Tribunal cannot accept this view. On the one hand, the militarization of the area has not been shown to be an adequate measure conducive to resolving the social conflict and allowing for the continuation of the Project. On the contrary, the experience of the State in this regard shows that the measure is not only ineffective, but that it may also have fatal consequences.<sup>1111</sup> Indeed, the events that occurred in Malku Khota as a result of the police intervention in May and July 2012 suggest that the intervention of the armed forces in this type of conflict was not an appropriate solution for the conflict, as the Claimant suggests.

691. On the other hand, the fact that Bolivia did not order the militarization of the area is not evidence that it had stopped implementing measures to seek the continuation of the Project. As noted already, the officials of the Governor's Office and of the National Government convened and participated in outreach meetings for Project as well as dialogue with the objecting community members, responded to concerns of the Company, as well as those of the supporters and objectors to the Project, and proposed alternatives to resolve the conflict.<sup>1112</sup>
692. Second, as the Tribunal noted at paragraphs 666 to 674 of this award, there is no evidence that Bolivia in any way furthered or promoted opposition to the Project.<sup>1113</sup>
693. Third, the Tribunal is not convinced that the alleged abandonment of the criminal proceedings and investigations against the leaders of indigenous organizations recorded in the Memorandum of Agreement of July 7, 2012 is, in this case, a violation of the full protection and security standard.
694. On the one hand, the commitment to suspend the criminal proceeding against the leaders of the indigenous organizations came about as a concession within the framework of an agreement to end the social conflict in the Malku Khota area. It did not constitute general inaction by the State against the alleged threats and aggressions directed at the Company. On the contrary, the fact that there were investigations and criminal proceedings against the objectors to the Project shows that the State did respond to the charges brought forward by CMMK.
695. On the other hand, and even if it was true that the alleged individuals responsible for some act against the company went unpunished after the meeting on July 7, 2012, the Claimant has not established that this negatively impacted its investment. The State's commitment to abandon the

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<sup>1110</sup> Statement of Claim and Memorial, para. 156; Claimant's Reply Memorial, para. 336.

<sup>1111</sup> Hearing Transcript, Day 4, 753:15-22 (English).

<sup>1112</sup> See *supra* paras. 575, 577, 671.

<sup>1113</sup> See *supra* paras. 642 *et seq.*

criminal proceedings and investigations against the leaders of the indigenous organizations that opposed the Project did not mean a deterioration of the security situation for CMMK or SAS.

696. Finally, SAS alleged in its Statement of Claim and Memorial that the purported withdrawal of the environmental permits had undermined the legal security and protection it was entitled to under the Treaty.<sup>1114</sup> Even accepting that the full protection and security standard encompasses legal security – something that the Parties have not discussed and need not be addressed by the Tribunal – the Claimant has not established that the purported permit withdrawal had a negative effect on the investments. In fact, there is no evidence that the permit had been effectively revoked or that the internal draft on which it founded its allegation included the official and final position of the corresponding entity or that it became public and somehow impacted the investment. Therefore, the Tribunal also rejects this allegation.
697. In connection with the Reversion of the Mining Concessions, the Tribunal refers to the considerations presented *supra*<sup>1115</sup> and concludes on that basis that Reversion is not a violation of the full protection and security standard under the Treaty.
698. Based on the reasoning set forth in this section, the Tribunal finds that it has not been shown that Bolivia violated the full protection and security standard provided under Article 2(2) of the Treaty.

### **3. The claims for unreasonable or discriminatory measures**

#### **(a) The Claimant's Position**

699. Relying on the definition developed in the *Toto v. Lebanon* case, the Claimant submits the following definition for an unreasonable or discriminatory measure:

*(i) a measure that inflicts damages on the investor without serving any apparent legitimate purpose, (ii) a measure that is not based on legal standards but on discretion, prejudice or personal preference, (iii) a measure taken for reasons that are different from those put forward by the decision maker, or (iv) a measure taken in willful disregard of due process and proper procedure.*<sup>1116</sup>

700. The Claimant submits that the measures Bolivia adopted in the present case, including the Immobilization Zone, the decree freezing the area, the withdrawal of the support for the Project, fueling the opposition to CMMK, and the Reversion, meet all of these requirements and,

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<sup>1114</sup> Statement of Claim and Memorial, para. 156.

<sup>1115</sup> See *supra* paras. 610, 657-658.

<sup>1116</sup> Statement of Claim and Memorial, para. 158, referring to CLA-65, *Toto Construzioni Generali S.P.A. v. the Lebanese Republic*, ICSID Case No. ARB/07/12, Award, June 7, 2012, para. 157.

therefore, are irrational.<sup>1117</sup> In particular, (i) the measures caused damages to “*the management, maintenance, development, use, enjoyment, and extension*” of SAS’ investments, without serving any legitimate purpose, and actually deprived the country of various opportunities; (ii) the Reversion was based on “*mere executive fiat*”; (iii) the Reversion was adopted in order for Bolivia to appropriate the deposit, instead of for the purpose of pacifying the social conflict; and (iv) Bolivia deprived SAS of due process.<sup>1118</sup>

701. Moreover, the Claimant argues that the measures adopted were also discriminatory. The Claimant defines a discriminatory measure as one granting “*a differential treatment of people or companies in like circumstances, without a rational justification for that different treatment*”.<sup>1119</sup> According to the Claimant argues that the measures adopted by Bolivia fit this definition as (i) prior to expropriation, several Bolivian government officials openly antagonized SAS for being a “*transnational*” company; (ii) the Mining Concessions were expropriated “*at least in part*” based on the fact that CMMK was owned by SAS;<sup>1120</sup> and (iii) there is no rational justification for the expropriation.<sup>1121</sup> Contrary to the Respondent’s allegations, the actions discussed above establish the existence of discriminatory measures because, as found by the *Lemire v. Ukraine* tribunal, “*a discriminatory measure [is] a measure that targets the claimant’s investments, specifically as foreign investments*”.<sup>1122</sup>

#### **(b) The Respondent’s Position**

702. The Respondent contends that SAS’ arguments are insufficient to establish the irrationality of Bolivia’s measures.<sup>1123</sup> The Respondent submits that the Immobilization Zone did not have the slightest effect on the Mining Concessions because it was applied in areas outside the area of concession, and the other measures, excluding the alleged encouragement of opposition, which the Respondent denies occurred, were reasonable,<sup>1124</sup> seeing as (i) they were justified by the legitimate purpose of pacifying the Malku Khota area, which was achieved through the Reversion;<sup>1125</sup> (ii) the Reversion was adopted in compliance with the legal and regulatory

<sup>1117</sup> Claimant’s Reply Memorial, para. 345. See also Hearing Transcript, Day 1, 99:2-17 (English).

<sup>1118</sup> Statement of Claim and Memorial, para. 159; Claimant’s Reply Memorial, paras. 345-346.

<sup>1119</sup> Statement of Claim and Memorial, para. 158.

<sup>1120</sup> Statement of Claim and Memorial, para. 160; Claimant’s Reply Memorial, para. 347.

<sup>1121</sup> Claimant’s Reply Memorial, para. 348.

<sup>1122</sup> Claimant’s Reply Memorial, para. 348, referring to CLA-49, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, January 14, 2010, para. 261.

<sup>1123</sup> Counter-Memorial, para. 482; Respondent’s Rejoinder, paras. 500-501.

<sup>1124</sup> Respondent’s Rejoinder, paras. 498-499.

<sup>1125</sup> Counter-Memorial, para. 483; Respondent’s Rejoinder, para. 501.

framework of Bolivia, and by means of a legitimate legal instrument (a Supreme Decree), which CMMK could have sought recourse against;<sup>1126</sup> (iii) there is no economic interest behind the Reversion;<sup>1127</sup> and (iv) Bolivia did not deprive CMMK of due process.<sup>1128</sup>

703. Similarly, the Respondent contends that SAS has not demonstrated that the measures adopted by Bolivia are discriminatory.<sup>1129</sup> The Respondent contends that arbitral decisions, including the *Lemire v. Ukraine* case, require that the investor demonstrate that “(i) *there is an investor from Bolivia or another State, (ii) in circumstances similar to CMMK’s (iii) to whom Bolivia afforded more favorable treatment*”.<sup>1130</sup> However, SAS has not demonstrated any of these requirements.<sup>1131</sup> The Respondent argues that SAS cannot satisfy its burden of proof as (i) the other company that participated in the conflict was also expelled,<sup>1132</sup> (ii) “*other companies operate in the area without difficulty due to their good management of community relations,*”<sup>1133</sup> and (iii) any differentiated treatment afforded to CMMK is justified by it being a “*key element in the dispute amongst the communities*”.<sup>1134</sup>

### (c) The Tribunal’s Analysis

704. Article 2(2) of the Treaty also provides that “[n]either Contracting Party shall, in any way, impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party.”

705. The Claimant asserts that a measure need only be unreasonable or discriminatory to violate this provision but, in any event, the measures imposed by Bolivia were both arbitrary and discriminatory.<sup>1135</sup> The Respondent does not dispute this interpretation that is, in any event, derived from the use of the disjunctive term “or” in the text of the provision transcribed above.

706. First, the Claimant alleges that the Reversion and the preceding measures are unreasonable and impaired the investment. Based on the definition proposed by SAS and not contested by Bolivia, a measure is unreasonable if it: (i) inflicts damages on the investor without serving any apparent

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<sup>1126</sup> Counter-Memorial, para. 484.

<sup>1127</sup> Counter-Memorial, para. 485.

<sup>1128</sup> Counter-Memorial, para. 486.

<sup>1129</sup> Respondent’s Rejoinder, para. 502; Hearing Transcript, Day 1, 263:22 – 264:7 (Spanish).

<sup>1130</sup> Counter-Memorial, para. 491; Respondent’s Rejoinder, paras. 503-505.

<sup>1131</sup> Counter-Memorial, paras. 488-490; Respondent’s Rejoinder, paras. 501-504.

<sup>1132</sup> Counter-Memorial, para. 490.

<sup>1133</sup> Respondent’s Rejoinder, para. 506.

<sup>1134</sup> Counter-Memorial, para. 492.

<sup>1135</sup> Statement of Claim and Memorial, para. 157.

legitimate purpose; (ii) is not based on legal standards but on discretion, prejudice or personal preference; (iii) is taken for reasons that are different from those put forward by the decision maker; or (iv) is taken in willful disregard of due process and proper procedure.<sup>1136</sup>

707. The only disagreement between the Parties regarding the applicable standard is whether there is a difference between “unreasonable” and “arbitrary” measures. According to the Claimant, “arbitrariness” involves a higher threshold than “unreasonableness”, which is referred to in Article 2(2) of the Treaty.<sup>1137</sup> On the contrary, the Respondent argues that the meaning of both terms is substantially the same in the sense of something done capriciously, without reason.<sup>1138</sup>
708. In the view of the Tribunal, this debate is irrelevant for the resolution of the instant case. Based on the factual and legal reasons already noted, the Tribunal does not find that the measures in question were unreasonable or arbitrary. In fact, the Tribunal has already concluded that the Reversion served a legitimate public purpose; it had the effective purpose of pacifying the area, in accordance with due process.<sup>1139</sup>
709. Similarly, the Tribunal concluded that Resolution DGAJ-0073/2011 did not disregard or impair the rights CMMK or SAS held over the Mining Concessions;<sup>1140</sup> that there is no evidence that Bolivia stated opposition to the Project;<sup>1141</sup> that the proposal to create a mixed company did not result from illegitimate motives or negatively affect CMMK’s or SAS’ rights;<sup>1142</sup> and, finally, that the Reversion was warranted and, except for the requirement of compensation, was carried out in conformity with the Treaty.<sup>1143</sup> Based on the foregoing, the Tribunal rejects the Claimant’s allegations regarding the purported imposition of unreasonable measures that impacted “*the management, maintenance, use, enjoyment or disposal in its territory*” of SAS’ investment in Bolivia.
710. Second, the Claimant alleges that Bolivia’s measures were discriminatory and impacted the investment. Again, the Tribunal notes that the Parties agree on the standard for discriminatory measures.<sup>1144</sup> Consistent with the definition endorsed by both Parties, discrimination involves “*a*

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<sup>1136</sup> Statement of Claim and Memorial, para. 158, referencing the decision of the *Toto v. Lebanon tribunal*. (CLA-65, *Toto Construzioni Generali S.P.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, June 7, 2012, para. 157).

<sup>1137</sup> Claimant’s Reply Memorial, para. 344.

<sup>1138</sup> Respondent’s Rejoinder, para. 500, citing CLA-41, *National Grid v. Argentine Republic*, UNCITRAL Case, Award, November 3, 2008, para. 197.

<sup>1139</sup> See *supra* section VII.B.3.a.i, paras. 552-578, section VII.B.3.a.ii, paras. 579-586.

<sup>1140</sup> See *supra* paras. 660-662.

<sup>1141</sup> See *supra* paras. 666-667.

<sup>1142</sup> See *supra* paras. 668-670.

<sup>1143</sup> See *supra* para. 610.

<sup>1144</sup> Statement of Claim and Memorial, para. 158; Counter-Memorial, paras. 488-489.

*differential treatment of people or companies in like circumstances, without a rational justification for that differential treatment.*”<sup>1145</sup> The Tribunal accepts the definition of the standard proposed by the Parties and, based on that and the facts established in the present case, it concludes that Bolivia did not impair by discriminatory measures “*the management, maintenance, use, enjoyment or disposal*” of SAS’ investments in its territory.

711. In fact, the Claimant did not establish the presence, much less the cumulation, of any of the elements derived from the standard mentioned above, that is: (i) the existence of another person or company in like circumstances, (ii) differential treatment, and (iii) the absence of rational justification for such treatment.
712. In any event, the Tribunal finds unproven the Claimant’s allegation that the Reversion of the Mining Concessions resulted, at least in part, from the fact that they were owned by a transnational company.<sup>1146</sup> Similarly, there is insufficient evidence to establish that government officials attacked or antagonized SAS for being a “transnational” company.<sup>1147</sup>
713. Based on the foregoing, the Tribunal concludes that there is no support for the allegation that Bolivia violated Article 2(2) of the Treaty regarding the provision that the host State of the investment shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of the investment in its territory.

#### **4. The claims for less favourable treatment than Bolivian investors**

##### **(a) The Claimant’s Position**

714. Based on the same arguments described in paragraph 701 *supra*, the Claimant asserts that the discriminatory treatment to which SAS was subjected is a violation of Article 3 of the Treaty.<sup>1148</sup>

##### **(b) The Respondent’s Position**

715. The Respondent contends that SAS has not demonstrated that Bolivian investors received more favorable treatment than CMMK in similar circumstances, and SAS’ foreign nationality was not

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<sup>1145</sup> Statement of Claim and Memorial, para. 158; Counter-Memorial, para. 488.

<sup>1146</sup> See Statement of Claim and Memorial, paras. 160-161.

<sup>1147</sup> The Tribunal notes that the Claimant bases its assertion that government officials “*openly antagonized SAS for being a ‘transnational’ and not a Bolivian company*” mainly on the testimony of witnesses Santiago Angulo and Xavier Gonzales Yutronic (Statement of Claim and Memorial, para. 160, referencing CWS-5, paras. 11 and 18, and CWS-4, para. 25). However, neither of the witnesses attended the meetings where Government officials supposedly made assertions against CMMK or SAS for being foreign companies.

<sup>1148</sup> Statement of Claim and Memorial, 161; Claimant’s Reply Memorial, paras. 350-351.



one of the reasons behind the Reversion. Therefore, the Respondent submits that the Tribunal should reject the claim for violation of Article 3 of the Treaty.<sup>1149</sup>

**(c) The Tribunal's Analysis**

716. Article 3(1) of the Treaty provides that “[n]either Contracting Party shall in its territory subject investments or returns of nationals of companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.”
717. The Respondent argues that to substantiate allegations that Bolivia afforded SAS’ investment treatment less favorable than that which it accords to investments of its own nationals, the Claimant must establish (i) the existence of a comparable national company which (ii) has been accorded better treatment.<sup>1150</sup> Similarly, it alleges that, pursuant to “international jurisprudence,” the party that alleges discrimination based on nationality must demonstrate that the measure in question was motivated by the foreign nationality of the investor.<sup>1151</sup>
718. The Claimant has not questioned the standards proposed by Bolivia, nor has it invoked different standards. On the contrary, its allegation that the Reversion was motivated, at least in part, by its foreign nationality would seem to confirm the standard proposed by the Respondent.
719. Based on the text of Article 3(1) of the Treaty, in order to establish a violation of a national treatment standard, it must be demonstrated, at a minimum, that a national of the host State of the investment received more favorable treatment than the investor of the other Contracting Party. In this case, the Tribunal does not need to go any further to conclude that Bolivia did not breach its obligations under this provision.
720. In fact, the Claimant has not identified a Bolivian company – and much less one in like circumstances – whose investments received more favorable treatment than that afforded to SAS. On the contrary, it has been established that, by means of the Reversion Decree, Bolivia also reverted the EMICRUZ concessions, a Bolivian company located in the Malku Khota conflict area.<sup>1152</sup>

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<sup>1149</sup> Counter-Memorial, para 493-500; Respondent’s Rejoinder, paras. 508-513.

<sup>1150</sup> Respondent’s Rejoinder, para. 511.

<sup>1151</sup> Counter-Memorial, para. 496.

<sup>1152</sup> C-4, Reversion Decree, Article 1(a).

721. In any case, and as noted above, it has not been established that the Reversion was due, even in part, to the fact that it concerned the property of a foreign or transnational company, or that officials of Bolivia had antagonized the Company for this reason.<sup>1153</sup> Consequently, the Tribunal also dismisses SAS' claim for the purported violation of the national treatment standard under Article 3(1) of the Treaty.
722. Based on the foregoing, the Tribunal concludes that it cannot be established that Bolivia violated the national treatment standard under Article 3(1) of the Treaty.

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<sup>1153</sup> See *supra* para. 712.

## VIII DAMAGES

### A. THE CLAIMANT'S POSITION

#### 1. Right to compensation

723. The Claimant submits that it is entitled to receive compensation for the total loss of the Project value due to Treaty violations by Bolivia.<sup>1154</sup>
724. According to the Claimant, based on the report by RPA, as of March 30, 2011, the Project contained an estimated ore deposit of 434.9 million tons total (including 31 million tons of measured resources, 224 million tons of indicated resources, 179.9 million tons of inferred resources), under a cut-off grade of 10 gram/ton of silver equivalent (10 g/t AgEq), based on a US\$16/ounce silver price, and US\$550 kg/indium; therefore, it *“was in the top 10 silver projects in the world in 2012, and is the largest located in Bolivia”*.<sup>1155</sup>
725. Contrary to the Respondent's allegations, the Claimant contends that the Project has a value that is certain and its loss needs to be compensated by Bolivia.<sup>1156</sup> The Claimant argues that Bolivia confirms and understands that Malku Khota is a significant and strategic ore deposit.<sup>1157</sup>
726. The Claimant considers that the Respondent's position on the certainty of the damages is unfounded and presents three arguments.
727. First, the Claimant underscores that the Mineral Resource estimate for the Project has been analyzed by three independent experts (GeoVector within the PEA 2011 framework, and within the framework of this arbitration, by RPA and Dr. Dagdelen, the Respondent's economic expert), and all agree that there is a significant mineral resource deposit in the Project area.<sup>1158</sup> The Claimant explains that RPA estimates a deposit of 435 million tons<sup>1159</sup> and Dr. Dagdelen estimates

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<sup>1154</sup> Statement of Claim and Memorial, para. 206; Claimant's Reply Memorial, paras. 352-353; CER-1, First FTI Report, para. 8.41.

<sup>1155</sup> Claimant's Reply Memorial, paras. 354-355; CER-1, First FTI Report, para. 5.29; CER-2, First RPA Report, pp. 1-2, 9-1, table 9-1; CER-3, Cooper Report, para. 37. See also CER-4, Second FTI Report, fig. 1. See C-14, PEA 2011, table 1-2.

<sup>1156</sup> Claimant's Reply Memorial, para. 355.

<sup>1157</sup> C-150, Plan Sectorial de Desarrollo Minero Metalúrgico 2015–2019; C-151, *En debate documento preliminar de Plan Sectorial de Desarrollo Minero Metalúrgico 2015–2019*, Minería Noticias, June 5, 2015; C-64, “Definen que el Estado se hará cargo de la mina Mallku Khota”, Página Siete, July 11, 2012; C-45, Acta de la Mesa de Trabajo entre el Gobierno de Potosí y las Comunidades locales, February 14, 2012. See also SAS' Post-Hearing Brief, para. 7, referring to the statement of Minister Navarro during the hearing (Hearing Transcript, Day 3, 758:24 – 760:25, 762:16-25 (Spanish)).

<sup>1158</sup> Claimant's Reply Memorial, paras. 394-396; CER-2, First RPA Report, p. 9-6; CER-5, Second RPA Report, pp. 1.3-1.4, 5.1, 5.3, 5.4, 5.7; RER-2, First Dagdelen Report, paras. 72, 78, 123. See also Hearing Transcript, Day 1, 104:4 – 106:4 (English).

<sup>1159</sup> CER-2, First RPA Report, table 9-2, pp. 9-6; CER-5, Second RPA Report, table 5-1, pp. 5-7.

it at 416 million tons.<sup>1160</sup> According to the Claimant, the main difference relies on the amounts that would remain in the various categories of mineral resources (measured, indicated, or inferred), which the experts admit is a matter of professional judgment.<sup>1161</sup>

728. Similarly, the Claimant reiterates that the 10g/t AgEq cut-off grade used in GeoVector's estimate<sup>1162</sup>, which RPA confirmed,<sup>1163</sup> is the correct one. The Claimant maintains that the cut-off grade of 20.4 g/t AgEq used by Dr. Dagdelen,<sup>1164</sup> is incorrect since it uses only silver, ignoring the remaining recoverable metals.<sup>1165</sup> The Claimant further explains that Dr. Dagdelen used the US\$18.00/oz. base case silver price to estimate the cut-off grade, and he confirmed at the Hearing that using a higher metal price as the silver price at the date of valuation proposed by the Claimant would result in a lower cut-off grade.<sup>1166</sup>

729. The Claimant concludes by asserting that RPA's conclusion that GeoVector's resource estimate in the PEA 2011 is reasonable (as adjusted downward for the "low grade halo" reclassification),<sup>1167</sup> should be given more weight than Dr. Dagdelen's.<sup>1168</sup> The Claimant asserts that Dr. Dagdelen admitted the following at the Hearing:

- (a) That SAS did not violate Canadian securities laws (NI 43-101) and that he ignored provision 5.3(i)(c), that clarifies that Mr. Pennstrom did not need to be an independent Qualified Person in connection with the PEA 2011;<sup>1169</sup> and

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<sup>1160</sup> RER-2, First Dagdelen Report, table 1, p. 23; RER-4, Second Dagdelen Report, table 1, p. 24.

<sup>1161</sup> SAS' Post-Hearing Brief, para. 90; CER-5, Second RPA Report, p. 5-7; Hearing Transcript, Day 7, 1181:4-8, 1181:19-25 (English).

<sup>1162</sup> C-14, PEA 2011, table 1-3, p. 13.

<sup>1163</sup> CER-2, First RPA Report, table 5-7, pp. 5-8.

<sup>1164</sup> RER-2, First Dagdelen Report, paras. 79-82.

<sup>1165</sup> SAS' Post-Hearing Brief, para. 91.

<sup>1166</sup> SAS' Post-Hearing Brief, para. 92; Hearing Transcript, Day 1, 104:4 – 106:4 (English).

<sup>1167</sup> GeoVector classified a less well defined part of the Malku Khota deposit, described as "Low Grade Halo", as part of the Inferred Mineral Resource. RPA considers that the Low Grade Halo is more appropriately classified as Exploration Potential, and has done so for the purposes of the RPA Valuation Report. See CER-2, First RPA Report, p. 9-1.

<sup>1168</sup> SAS' Post-Hearing Brief, para. 92.

<sup>1169</sup> SAS' Post-Hearing Brief, para. 93, footnote 269; DAG-3, National Instrument 43-101, June 24, 2011; Hearing Transcript, Day 7, 1203:1- 15 (English); C-13, 2009 PEA, section 1.7, table 1-4; C-14, PEA 2011, section 1.3, table 1-3 (that according to the Claimant reflects only a 27% change in Mineral Resources and that the major change was that infill drilling converted Inferred Resources to Indicated Resources).

- (b) Regarding the gold credits, that (i) no gold credit was used in the mineral resource estimate in the PEA 2011,<sup>1170</sup> (ii) RPA did not use the gold credit in either resource estimate or valuation,<sup>1171</sup> and (iii) Pincock Allen & Holt used a gold credit in the PEA 2009.<sup>1172</sup>

730. Second, the Claimant asserts that inferred resources are sufficient in themselves for transactions of mineral properties in the market and, therefore, all the categories of mineral resources (indicated, measured and inferred) are treated similarly for the valuation of a mining project.<sup>1173</sup> The Claimant alleges that, at any rate, whether or not value is ascribed to the inferred resources is irrelevant for valuation purposes: (i) if RPA's estimates are accepted because these quantities, or very similar quantities, were already taken into account in the various valuations considered by FTI when estimating the Project's fair market value; the same applies to Brattle's valuation based on the price share value;<sup>1174</sup> (ii) because the impact of the adjustments advocated by the Respondent's experts would be insignificant, as the inferred resources would be removed from all of the comparable transactions selected by RPA, but the transaction price would remain the same, which would result in the value ascribed to the measured and indicated resources being increasing accordingly.<sup>1175</sup> The Claimant also asserts that, contrary to Dr. Dagdelen's suggestion,<sup>1176</sup> all Mineral Resources do not need to be constrained within a pit.<sup>1177</sup> The Claimant argues that there is no such requirement within any of the reporting codes, the test is "*reasonable prospects for economic extraction*",<sup>1178</sup> and a putative buyer would take into account all identifiable Mineral Resources.<sup>1179</sup>

731. Third, the possibility for metal extraction with acid chloride leaching (the "**Metallurgical Process**") has been demonstrated on a laboratory scale, and its effectiveness has been demonstrated, on a commercial scale, in other successful projects that use the various steps of the

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<sup>1170</sup> SAS' Post-Hearing Brief, para. 93, footnote 269; Hearing Transcript, Day 7, 1182:1-4 (English).

<sup>1171</sup> SAS' Post-Hearing Brief, para. 93, footnote 269; Hearing Transcript, Day 7, 1182:25 – 1183:2, 1185:6 – 1186:5 (English).

<sup>1172</sup> SAS' Post-Hearing Brief, para. 93, footnote 269; Hearing Transcript, Day 7, 1184:5-8 (English).

<sup>1173</sup> Claimant's Reply Memorial, paras. 397-400; CER-5, Second RPA Report, pp. 5.12-5.13; RPA-01, Canadian Institute of Metallurgy and Petroleum Valuation of Mineral Properties 203, Standard G4.1, p. 24; CER-4, Second FTI Report, para. 5.11-5.14. See also Hearing Transcript, Day 7, 1213:19 – 1214:9, 1215:24 – 1216:2 (English).

<sup>1174</sup> SAS' Post-Hearing Brief, para. 94.

<sup>1175</sup> SAS' Post-Hearing Brief, para. 97, referring to Dr. Dagdelen's transfer of 17% of Indicated Resources and the discount advocated by Mr. Davis (Brattle) between 5-10% and 50% for Inferred Resources relative to Measured and Indicated Resources (Hearing Transcript, Day 8, 1634:19 – 1635:1, 1635:23 – 1636:9 (English)).

<sup>1176</sup> Hearing Transcript, Day 7, 1170:11-22 (English).

<sup>1177</sup> SAS' Post-Hearing Brief, para. 98.

<sup>1178</sup> SAS' Post-Hearing Brief, para. 98; DAG-1, CIM Definitions Standards, November 27, 2010 (unofficial translation).

<sup>1179</sup> SAS' Post-Hearing Brief, para. 98; RPA-01, Canadian Institute of Metallurgy and Petroleum Valuation of Mineral Properties 203, Standard G4.1, p. 24; CER-4, Second FTI Report, para. 65, p. 5.14.

process on a commercial scale.<sup>1180</sup> The Claimant contends that, contrary to Dr. Dagdelen's suggestion,<sup>1181</sup> there are many examples of acid chloride leaching of various metals.<sup>1182</sup>

732. The Claimant submits that, the Respondent's expert on metallurgy, Dr. Taylor, admitted at the Hearing that his characterization of the amount of metallurgical test-work done was inaccurate and that this test-work was consistent with the prefeasibility and feasibility phases.<sup>1183</sup> The Claimant rebuts Dr. Taylor's criticism that testing was done on synthetic ore samples, referring to Dr. Dreisinger's explanation on how they are meant to replicate the leach-solution composition that one would come to expect from an ore leach.<sup>1184</sup> As to the criticism that a pilot plant had not been built for additional testing, the Claimant argues that Dr. Dreisinger confirmed, and Dr. Taylor admitted, that at the time of the expropriation there were plans in place to build an on-site pilot plant for further testing, but the expropriation prohibited SAS from advancing.<sup>1185</sup> The Claimant also contends that Dr. Taylor admitted that he cherry-picked data from the voluminous amount of SGS testing data, making it appear as if the extraction rates were lower than they were.<sup>1186</sup>
733. The Claimant further states that, in May 2012, Asian investors invested US\$16 million, and in making that investment they clearly conducted due diligence on the metallurgical process.<sup>1187</sup>
734. As to the cause of the damages, the Claimant contends its injuries are solely attributable to Bolivia's actions.<sup>1188</sup> The Claimant argues that if the Mining Concessions had not been nationalized by Bolivia, SAS would continue to own the Project.<sup>1189</sup> The Claimant asserts that the measures adopted by Bolivia, in particular the Reversion but also its refusal to intervene to avoid the conflict and the subsequent clashes, were the cause of the total loss of the investment.

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<sup>1180</sup> Claimant's Reply Memorial, paras. 405-406; SAS' Post-Hearing Brief, paras. 99-101; CER-5, Second RPA Report, pp. 5.10-5.11; RER-2, First Dagdelen Report, paras. 88-91; CWS-6, Dreisinger's Witness Statement, paras. 18-50; Hearing Transcript, Day 1, 107:20 – 108:20 (English), Day 7, 1259:10 – 1262:13 (English), Day 9, 1695:2 – 1698:13 (English).

<sup>1181</sup> RER-2, First Dagdelen Report, paras. 88-91.

<sup>1182</sup> SAS' Post-Hearing Brief, para. 100; CER-5, Second RPA Report, p. 5.10. See also CWS-6, Dreisinger's Witness Statement, paras. 113-17, 51-53.

<sup>1183</sup> SAS' Post-Hearing Brief, para. 102; Hearing Transcript, Day 7, 1275:24 – 1277:4, 1288:7-24, 1294:10 – 1295:14 (English).

<sup>1184</sup> SAS' Post-Hearing Brief, para. 102; Hearing Transcript, Day 7, 1322:21-24, 1328:13 – 1330:14 (English).

<sup>1185</sup> SAS' Post-Hearing Brief, para. 102. For Dreisinger's reference, see Hearing Transcript, Day 7, 1263:16 – 1264:7 (English); for Taylor, see Hearing Transcript, Day 7, 1322:25 – 1323:6 (English).

<sup>1186</sup> SAS' Post-Hearing Brief, para. 102; Hearing Transcript, Day 7, 1325:10 – 1326:15 (English) ("*Q: So, the 61% is not representative of the weighted average of the extraction percentages, is it? A: It doesn't appear to be, no*"); C-14, PEA 2011, Figure 16- 1, at 71 (reflecting 73,6% weighted average silver leach recovery at 1/4 inch crush size).

<sup>1187</sup> SAS' Post-Hearing Brief, para. 99; CWS-13, Fitch's Second Witness Statement, para. 9; Hearing Transcript, Day 7, 1224:20 – 1225:17 (English).

<sup>1188</sup> Statement of Claim and Memorial, paras. 118-127; Claimant's Reply Memorial, paras. 375-383; SAS' Post-Hearing Brief, para. 82.

<sup>1189</sup> Claimant's Reply Memorial, para. 376.

Therefore, the injury suffered by SAS “*is solely and directly attributable to Bolivia’s actions*”.<sup>1190</sup> The Claimant contends that Bolivia’s allegations in this connection are unsubstantiated, as (i) the reasoning followed in the cases invoked by Bolivia is not applicable, as they deny compensation to the investor due to its state of insolvency, while in the present case, there is a sound financial footing;<sup>1191</sup> and (ii) the Reversion Decree expressly provides for Bolivia’s obligation to pay compensation to SAS, and thus, the Respondent itself “*acknowledged the direct causation between Supreme Decree No. 1308 [the Reversion] and the takeover of South American Silver’s investments in the Malku Khota Project.*”<sup>1192</sup>

## **2. Standard of compensation for an expropriation**

735. The Claimant argues that in the absence of an applicable *lex specialis*, since article 5 of the Treaty refers exclusively to compensation for lawful expropriations, customary international law provides the governing rules for an unlawful expropriation of SAS’ investment by Bolivia.<sup>1193</sup>
736. The Claimant argues that, under the standard of compensation of customary international law set forth in the *Chorzow* case, a claimant who has suffered an unlawful expropriation by a State has a right to full reparation that would “*wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*”, in the form of restitution in kind or its monetary equivalent, plus compensation for any additional loss not covered by restitution in kind or its monetary equivalent.<sup>1194</sup>
737. During the Hearing,<sup>1195</sup> the Claimant abandoned its claim for restitution. Therefore, its arguments on this topic are omitted.
738. Regarding the equivalent monetary compensation,<sup>1196</sup> the Claimant asserts that to re-establish the situation which would have existed but for the wrongful act, the compensation must be equal to

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<sup>1190</sup> Claimant’s Reply Memorial, para. 376.

<sup>1191</sup> Claimant’s Reply Memorial, para. 375, referring to RLA-17, *Elettronica Sicula SpA (ELSI)* (United States of America v. Italy), ICJ case, Judgment of July 20, 1989, para. 101; RLA-142, *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, para. 786.

<sup>1192</sup> Claimant’s Reply Memorial, para. 377.

<sup>1193</sup> Statement of Claim and Memorial, paras. 163-165; CLA-29, *Amoco*, Partial Award, paras. 112, 189, 199-93; CLA-35, , *ADC*, Award, paras. 481, 483; CLA-68, *Ruemli*, Award, para. 789. See also Hearing Transcript, Day 1, 100:18 – 101:11 (English).

<sup>1194</sup> Statement of Claim and Memorial, paras. 167, 182-183; Hearing Transcript, Day 1, 101:3-18 (English); CLA-69, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, PCIJ Case, Judgment, September 13, 1928, CPJII (ser. A), No. 17., p. 40.

<sup>1195</sup> Transcript, Day 1, 17:11-24, 117:9-11, 258:1-5 (English).

<sup>1196</sup> Statement of Claim and Memorial, para. 176; Claimant’s Reply Memorial, paras. 356-359.

the greater of the market value of the investment at the time of expropriation and the value on the date of the award,<sup>1197</sup> plus compensation for additional losses.<sup>1198</sup>

739. The Claimant contends that in the event the Tribunal finds that Bolivia's expropriation was lawful and, accordingly, that the standard of compensation under Article 5 of the Treaty was applicable, or that such standard applies to both lawful and unlawful expropriations, the Claimant would be entitled, at least, to receive "*prompt, adequate and effective compensation*," pursuant to the provisions of Article 5 of the Treaty.<sup>1199</sup>

### **3. Standard of valuation for compensation**

740. The Claimant argues that valuation of any compensation granted should be performed based on the fair market value of the Project.<sup>1200</sup>
741. The Claimant asserts that arbitral tribunals have unanimously asserted that the "*full compensation*" to which an investor is entitled in case of expropriation, either pursuant to customary international law or specific treaty provisions, is determined based on the fair market value of the investment taken.<sup>1201</sup> Article 5(1) of the Treaty confirms this expressly by establishing that compensation for expropriation "*shall amount to the market value of the investment*".<sup>1202</sup> Therefore, the Claimant concludes that "*while customary international law and the Treaty offer two different paths to determine the compensation owed to Claimant, that compensation would essentially be the same under both approaches since it would amount in both cases to the [fair market value] of the Project*".<sup>1203</sup>
742. Similarly, based on the reports submitted by FTI and RPA, the Claimant argues that compensation based on fair market value is the only one available in the present case, since given the stage of Project development, discounted cash flow valuation would not be reliable, and given the estimated mineral resource deposit, a cost-based valuation would not be "*indicativ[e] of the Project's prospective cash flow*".<sup>1204</sup> According to the Claimant a cost-based valuation would also

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<sup>1197</sup> Statement of Claim and Memorial, paras. 168-181.

<sup>1198</sup> Statement of Claim and Memorial, paras. 183, 202.

<sup>1199</sup> Statement of Claim and Memorial, para. 193; Claimant's Reply Memorial, para. 368.

<sup>1200</sup> Statement of Claim and Memorial, paras. 185-188; Claimant's Reply Memorial, paras. 367-368.

<sup>1201</sup> Statement of Claim and Memorial, paras. 169-193; Claimant's Reply Memorial, paras. 364-368; SAS' Post-Hearing Brief, paras. 64, 66.

<sup>1202</sup> Statement of Claim and Memorial, paras. 185-192; Claimant's Reply Memorial, paras. 366-367.

<sup>1203</sup> Claimant's Reply Memorial, para. 367.

<sup>1204</sup> Statement of Claim and Memorial, paras. 207-209; CER-1, First FTI Report, paras. 5.8, 8.29-8.41; CER-2, First RPA Report, pp. 3-1, 3-2.



be impossible, as (i) the Treaty specifically refers to the market value of the investment;<sup>1205</sup> (ii) it is inconsistent with the internationally accepted standards for the valuation of mineral properties at the stage of development of the Project;<sup>1206</sup> (iii) the reimbursement of the investment costs does not amount to full compensation, as it would not compensate for the lost return due to expropriation<sup>1207</sup> nor are the years SAS invested in discovering, developing, and increasing the value of the Project taken into consideration;<sup>1208</sup> and (iv) a cost-based valuation would reward Bolivia “*for expropriating investments at an earlier point in time, no matter how egregious the conduct*”.<sup>1209</sup>

743. Thus, the Claimant contends that from a legal and an economic perspective, valuation based on fair market value is the only one applicable to the Project.<sup>1210</sup>

744. However, if the Tribunal adopts an investment-cost valuation, the Claimant asserts that the Respondent’s expert, Brattle, did not take into consideration general and administrative costs estimated at US\$ 12.9 million, for a total amount invested of US\$ 31.6 million.<sup>1211</sup>

#### 4. Valuation Date

745. The Claimant argues that the business day immediately preceding the date the expropriation became public was July 6, 2012 (“**Claimant’s Valuation Date**”) and that this is the date to consider for the determination of compensation pursuant to Article 5(1) of the Treaty.<sup>1212</sup> The Claimant alleges that the Memorandum of Agreement “*formally marks the beginning of the expropriation process*”.<sup>1213</sup> Thus, the Claimant rejects the date proposed by Bolivia, i.e. July 9, 2012, as Bolivia’s authorities met with Project’s opponents the evening of Saturday July 7, 2012, and agreed to annul the Mining Concessions at that meeting.<sup>1214</sup> Such agreement was reflected in

<sup>1205</sup> Claimant’s Reply Memorial, para. 421; CER-4, Second FTI Report, para. 4.14. See also Hearing Transcript, Day 9, 1702:8-19 (English).

<sup>1206</sup> Claimant’s Reply Memorial, para. 421; RPA-1, CIMVal, 2003, *Standards and Guidelines for Valuation of Mineral Properties*, Special Committee of the Canadian Institute of Mining, Metallurgy and Petroleum on Valuation of Mineral Properties, February 2003; RPA-2, SAMREC Code, 2009, *The South African Code for the Reporting of Exploration Results, Mineral Resources and Mineral Reserves*, July 2009 (2007, ed.); RPA-3, JORC, 2012, *Australasian Code for Reporting of Exploration Results, Minerals Resources and Ore Reserves*, The JORC Code, December 20, 2012 (2012 ed)

<sup>1207</sup> Claimant’s Reply Memorial, para. 422; CER-4, Second FTI Report, para. 4.15, 9.12.

<sup>1208</sup> SAS’ Post-Hearing Brief, para. 65.

<sup>1209</sup> Claimant’s Reply Memorial, para. 423; CER-4, Second FTI Report, para. 4.15, 9.16.

<sup>1210</sup> Statement of Claim and Memorial, paras. 193, 209; Claimant’s Reply Memorial, para. 368.

<sup>1211</sup> CER-1, First FTI Report, para. 5.27.

<sup>1212</sup> Claimant’s Reply Memorial, paras. 385-386; Hearing Transcript, Day 1, 110:14 – 111:4 (English); SAS’ Post-Hearing Brief, para. 79.

<sup>1213</sup> Claimant’s Reply Memorial, para. 385.

<sup>1214</sup> SAS’ Post-Hearing Brief, para. 79; C-16, Memorandum of Agreement, July 8, 2012.

the Memorandum of Agreement signed on Sunday July 8, 2012, which was made public on that same day.<sup>1215</sup>

746. In connection with the date of valuation proposed by the Respondent, the Claimant further states:

*Indeed, despite uncritically accepting its client's instruction to use a Valuation Date of July 9th, Brattle's own expert acknowledges that the market was aware and reacted negatively to the expropriation announcement during the July 6th and 9th time period, and this is in Paragraph 19 of RER 5. Consequently, the only proper Valuation Date is June 6th, 2012.*<sup>1216</sup>

*[T]here was a significant drop in the share Price from a dollar on June 6, a Friday, to 71 cents on June 9.*<sup>1217</sup>

747. In connection with the Respondent's argument that the Claimant communicated to the market that there were no changes in the Project's status, the Claimant states the following:

*[T]he Project had not been nationalized on that date, but the fact is the market was reacting very strongly to the public announcements by Bolivia on July 8, and we can't avoid the fact that, on July 9, the stock price had been contaminated by Bolivia's own actions.*<sup>1218</sup>

748. The Claimant concludes that "[t]o use July 9, 2012 as the valuation date would allow Bolivia to benefit from its wrongful actions, which contradicts principles of international law. Accordingly, the appropriate valuation date is July 6, 2012."<sup>1219</sup>

## **5. Valuation method**

749. The Claimant asserts that the valuation method in the report by FTI, that seeks to determine what the actual market participants would do, rather than performing an academic exercise, is the appropriate method in this case,<sup>1220</sup> based on two points:

1. The three valuations used by FTI are reliable. The Claimant asserts that FTI, upon analyzing various approaches and methodologies, identified "*three sources of information*

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<sup>1215</sup> SAS' Post-Hearing Brief, para. 79; C-16, Memorandum of Agreement, July 8, 2012; C-61, *Morales confirma nacionalización de Malku Khota* (Morales confirms nationalization of Malku Khota), Agencia Boliviana de Información, July 8, 2012; C-63, *Gobierno dice que tenía hace un año la intención de anular contrato con minera en Malku Khota*, LA RAZÓN, July 9, 2012.

<sup>1216</sup> Hearing Transcript, Day 1, 111:5-11 (English).

<sup>1217</sup> Hearing Transcript, Day 9, 1703:3-5 (English).

<sup>1218</sup> Hearing Transcript, Day 9, 1703:13-18 (English).

<sup>1219</sup> SAS' Post-Hearing Brief, para. 79.

<sup>1220</sup> Hearing Transcript, Day 9, 1707:8 – 1708:16 (English); SAS' Post-Hearing Brief, para. 68.

*that are sufficiently reliable for the purpose of determining the FMV of the Project.”*<sup>1221</sup>

The Claimant’s expert assessed the information available for the market participants at the Claimant’s Valuation Date.<sup>1222</sup> The three market-based value indicators are mentioned below:

- First, the Claimant argues that RPA’s comparable transaction valuation (“**RPA’s Valuation**”), which yielded an estimated US\$270 million (i) is a widely accepted valuation approach and recognized as such internationally,<sup>1223</sup> (ii) the properties selected “*are sufficiently similar to support a comparable transactions analysis*,”<sup>1224</sup> and (iii) the Metal Transaction Ratio (the “**MTR**”) developed by RPA is appropriate to determine the applicable value range applicable to mining properties containing several metals, such as the Project.<sup>1225</sup>

Regarding the Respondent’s criticism, the Claimant contends that this approach accounts for the various risks projects have in selecting the ones it considers “comparable” and alleges “*that social and technological risk could be further addressed through a downward adjustment of [Dr. Roscoe’s] preferred multiple of 2 percent, and [Dr. Roscoe] suggested you could move the multiple closer toward the midpoint of 1.75 percent.*”<sup>1226</sup> During the Hearing, the Claimant, in answering Brattle’s criticism that the preferred MTR-based value of (US\$ 270 million) would not exceed CIMVal’s reasonableness check, asserted:

*that \$270 million number is much less than the analyst average, and it’s less than three of the four individual analysts’ valuations. It’s less than FTI’s comparable companies ratios, which you recall FTI said we’re not using as an indicator value, but it’s a reasonableness check, and it’s less than the high end of the share price that South American Silver attained a little over a year before the expropriation.*<sup>1227</sup>

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<sup>1221</sup> Statement of Claim and Memorial, para. 209; Claimant’s Reply Memorial, para. 417; CER-4, Second FTI Report, para. 4.15, 9.16.

<sup>1222</sup> SAS’ Post-Hearing Brief, para. 68.

<sup>1223</sup> Claimant’s Reply Memorial, para. 392; CER-5, Second RPA Report, p. 6.4; CER-4, Second FTI Report, para. 4.16.

<sup>1224</sup> Claimant’s Reply Memorial, paras. 402, 404; Hearing Transcript, Day 1, 113:24 – 114:15 (English); CER-5, Second RPA Report at 3.6, 6.14-6.18; CER-4, Second FTI Report, para. 9.5, 9.11-9.14; CER-2, First RPA Report, pp. 1-2, 1-3, 7-1, 9-8; CER-5, Second RPA Report, pp. 6.6-6.7

<sup>1225</sup> Statement of Claim and Memorial, paras. 210-212; Claimant’s Reply Memorial, paras. 403-404; Hearing Transcript, Day 1, 111:24 – 112:13 (English); CER-1, First FTI Report, para. 8.32. See also RPA-K-ix, Roscoe, W.E., 2012, Metal Transactions Ratio Analysis – A Market Approach for Valuation of Non-Producing Properties with Mineral Resources, Victoria: The Australian Institute of Mining and Metallurgy, pp. 85-91, VALMIN Seminar Series, Oct. 18, 2011, Perth & Apr. 17, 2012, Brisbane.

<sup>1226</sup> Hearing Transcript, Day 9, 1713:16-20 (English); SAS’ Post-Hearing Brief, para. 71; Witness Statement of Dr. Roscoe at the hearing (Hearing Transcript, Day 6, 1013:20-25, 1015:19 – 1016:2, 1016:14-24, 1113:16-20, 1123:9 – 1024:9 (English)).

<sup>1227</sup> Hearing Transcript, Day 9, 1713:25 – 1714:10 (English).

- Second, the Claimant asserts that the Project valuations by industry analysts, resulting in a US\$ 572.1 million valuation, (i) “*would have been considered by notional buyers and sellers*” of the Project as they were public at the Claimant’s Valuation Date, (ii) they were performed by experts bound by their applicable professional codes of conduct, and (iii) they all agree on the high value of the Project.<sup>1228</sup> The Claimant submits that the existence of valuations prepared by third parties outside a litigation context is an indicator of the value of the asset the Tribunal cannot ignore.<sup>1229</sup> The Claimant asserts that the fact that they use DCF does not detract from their value as the contemporaneous indicators of the value of the asset.<sup>1230</sup>
- Third, the Claimant contends that the value implied by private placement transactions for SASC’s shares is a reliable indicator of fair market value since they “*were necessary for [CMMK] to continue to make progress in the Project and occurred two months before the [expropriation].*”<sup>1231</sup> The Claimant states that FTI explains that “*they’re more useful market indicators or indicators of Fair Market Value than the daily trading price because the latter usually are smaller retail transactions that do not often capture the intrinsic value of a traded share’s underlying assets.*”<sup>1232</sup>

Given Bolivia’s criticism that these private placements occurred months before the date of valuation, and, thus fail to capture the 60% drop in share price that preceded the expropriation, the Claimant alleges that this drop in share price is attributable to Bolivia’s wrongful conduct and, therefore, should be ignored for valuation purposes.<sup>1233</sup> The Claimant further submits that, for this reason, they are a better indicator than the share price at the time of expropriation.<sup>1234</sup>

Further, the Claimant explains that “*even if it had used the daily trading price on the date prior to the expropriation in place of the private placement transactions, the impact on the*

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<sup>1228</sup> Statement of Claim and Memorial, para. 213; Claimant’s Reply Memorial, paras. 409-414; CER-1, First FTI Report, para. 9.40-43, 9.53; CER-4, Second FTI Report, para. 4.16, 6.5-6.8, 6.73. See also FTI-58, CFA Institute, “Code of Ethics and Standards of Professional Conduct.”

<sup>1229</sup> Hearing Transcript, Day 9, 1710:2 – 1711:12 (English); SAS’ Post-Hearing Brief, para. 72.

<sup>1230</sup> Hearing Transcript, Day 9, 1711:20 – 1712:24 (English).

<sup>1231</sup> Statement of Claim and Memorial, paras. 213-215; Claimant’s Reply Memorial, para. 418; CER-1, First FTI Report, para. 9.53; CER-4, Second FTI Report, para. 3.6.

<sup>1232</sup> Hearing Transcript, Day 1, 115:15-19 (English). See also Hearing Transcript, Day 9, 1708:17 – 1710:1 (English).

<sup>1233</sup> SAS’ Post-Hearing Brief, para. 73.

<sup>1234</sup> SAS’ Post-Hearing Brief, para. 73.

*overall result would be immaterial and damages would decrease from 307 million to just under 300 million”.*<sup>1235</sup>

2. FTI’s weighing is appropriate. The Claimant contends that FTI performed a critical review and considered the strengths and shortcomings of each of the three valuations, weighting at 50% RPA’s valuation, at 25% the valuations for the Project produced by market analysts, and at 25% the valuations implied by the private placement transactions.<sup>1236</sup>

750. To defend the methodology used by FTI in this case:

- (a) The Claimant argues that, contrary to Bolivia’s assertion,<sup>1237</sup> the methodology applied by FTI in the *Copper Mesa* case was not diametrically opposed to the methodology it used in this case.<sup>1238</sup> The Claimant contends that FTI used a “*market approach*” and presented a cost-based valuation as an “*alternative approach*”.<sup>1239</sup> The Claimant underscores that FTI made the professional decision based on the facts in the *Copper Mesa* case, where the project assessed did not even have a PEA and where the claimant had been unable to conduct its own testing and drilling.<sup>1240</sup>
- (b) The Claimant denies that Brattle did in this case what FTI did in the *Bear Creek v. Peru* case. The Claimant argues that FTI explained during the Hearing that the property in *Bear Creek* was at a different stage for mineral properties, which made FTI’s approach in that case appropriate.<sup>1241</sup> The Claimant explains that it does not criticize Brattle for finally deciding to use a share-price approach instead of a comparable analysis, but rather for not describing in its report their alleged attempt to find comparables.<sup>1242</sup> The Claimant refers to Mr. Davis’s (Brattle) testimony and contends that, apparently, Brattle discarded the comparable approach because “*the share analysis was there and [Brattle] felt it what was [sic] reliable, [which] caused [Brattle] to not do more than that amount of contemplation about comparison sales*”.<sup>1243</sup>

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<sup>1235</sup> Hearing Transcript, Day 1, 115:21-25 (English).

<sup>1236</sup> Statement of Claim and Memorial, para. 212; Claimant’s Reply Memorial, paras. 409-414; CER-1, First FTI Report, para. 9.40-43, 9.53; CER-4, Second FTI Report, para. 4.16, 6.5-6.8, 6.73

<sup>1237</sup> See *infra* para. 780(c).

<sup>1238</sup> SAS’ Post-Hearing Brief, para. 80.

<sup>1239</sup> SAS’ Post-Hearing Brief, para. 80 (emphasis added by Claimant).

<sup>1240</sup> SAS’ Post-Hearing Brief, para. 80; RLA-281, *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, March 15, 2016, para. 7.9 (indicating that the claimant requested FTI an independent valuation).

<sup>1241</sup> SAS’ Post-Hearing Brief, para. 81, referring to the statement of Mr. Rosen (FTI) (Hearing Transcript, Day 8, 1374:15 – 1375:17 (English)).

<sup>1242</sup> SAS’ Post-Hearing Brief, para. 81.

<sup>1243</sup> SAS’ Post-Hearing Brief, para. 81, citing the statement of Mr. Davis Hearing Transcript, Day 8, 1629:3-6 (English).

751. The Claimant addresses the Respondent's criticism on the apparent discrepancy between the US\$ 307.2 million (without interest) figure of FTI for fair market value and the US\$ 75 million for the Project share value (a figure which is more or less acceptable for Brattle and FTI at the Claimant's date of valuation: July 6, 2012). The Claimant draws attention to the explanation provided by Mr. Cooper who explained the difference when examining the "*acquisition premia*" of junior mining companies (whose application would result in a range of US\$ 126 to 376 million)<sup>1244</sup> and the analysts' valuations ("*Consensus of Analyst Valuations of US\$ 572.1 million*").<sup>1245</sup> The Claimant submits that the Respondent and its expert ignore the undeniable disconnection between the share price of a single-asset junior mining company and the underlying value of its mineral assets.<sup>1246</sup> Mr. Cooper explained that junior mining companies commanded acquisition bonuses over their share price of 54% to 67% during the period preceding the expropriation.<sup>1247</sup> He also provided a graph showing that, at the date of expropriation, the underlying net asset value of non-producing junior mining companies was on average 2.44 times higher than their share price, within a range that was 1.25 to 5 times the share price.<sup>1248</sup> The Claimant submits that this is consistent with the contemporaneous analysts' valuation of the Project, all of which had valuations significantly higher than the share price on the respective report date.<sup>1249</sup>
752. As to the cost-based valuation method presented by Bolivia, the Claimant holds that, in addition to being legally excluded as it does not relate to the fair market value required under the Treaty, the approach used in Brattle's report "*is erroneous and nakedly geared towards driving Claimant's damages to the lowest possible number.*"<sup>1250</sup> The Claimant elaborates on various reasons below:
- (a) Excluding the general and administrative expenses from the valuation is inconsistent with the cost-based approach followed in Brattle's report. According to the Claimant, Brattle's report does not respect its own standard of valuation, since the general and administrative expenses are investment costs, as (i) the Project is the cause for incurring in such expenses;

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<sup>1244</sup> CER-3, Cooper Report, para. 42.

<sup>1245</sup> Hearing Transcript, Day 9, 1703:23 – 1706:12 (English); SAS' Post-Hearing Brief, para. 76.

<sup>1246</sup> SAS' Post-Hearing Brief, para. 76.

<sup>1247</sup> SAS' Post-Hearing Brief, para. 76.

<sup>1248</sup> SAS' Post-Hearing Brief, para. 76; Claimant's closing arguments, slide 102.

<sup>1249</sup> SAS' Post-Hearing Brief, para. 76.

<sup>1250</sup> Claimant's Reply Memorial, paras. 424, 426.

and (ii) a return on all the expenses incurred is expected, not just the drilling and exploration expenses.<sup>1251</sup>

- (b) Deduction of the hypothetical value of Protected Information from the compensation amount cannot be justified. The Claimant contends that the value of technical information bears no relationship to the Project market value and, at any rate, the information would only be valuable for Bolivia, as it is the one that currently has control over the Mining Concessions.<sup>1252</sup>

753. During the Hearing, in connection with the Respondent's valuation, the Claimant asserted that Brattle was instructed to estimate only the Project investment cost, and that only in the Second Brattle Report was a fair market value used.<sup>1253</sup> The Claimant underscored that Brattle used only a "share approach," which according to CIMVal is a secondary approach, the "market approach" being the primary approach."<sup>1254</sup> The Claimant also submitted that Brattle had acknowledged during the Hearing that it had not analyzed the comparable method in depth.<sup>1255</sup>

754. The Claimant further argues that the methodology used by Brattle "*does not reward Claimant at all for the risk it took in converting Malku Khota from an exploration property to a mineral resource property and on to the cusp of being a development property.*"<sup>1256</sup>

755. Similarly, the Claimant refers to the alternative damage valuation presented by the Parties and states the following:

*Brattle also, in its Rejoinder, for the first time, finds that the share price on July 9th implied a Fair Market Value for the Project of between 35 and 48 million, depending on the value attributed to the non-expropriation Escalones Project in Chile.*

*FTI noted that, as already discussed, Brattle used the wrong Valuation Date and also overvalued Escalones. When these adjustments are made, Brattle's alternative implies a valuation of between 69 million and 83 million. Regardless, Brattle's unadjusted alternative valuation is some four to six times higher than the valuation it provided in its initial report.*<sup>1257</sup>

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<sup>1251</sup> Claimant's Reply Memorial, para. 424; CER-1, First FTI Report, para. 5.27; CER-4, Second FTI Report, para. 9.4 – 9.5.

<sup>1252</sup> Claimant's Reply Memorial, para. 425; CER-4, Second FTI Report, para. 4.8-4.9. See also Hearing Transcript, Day 1, 117:1-4 (English).

<sup>1253</sup> Hearing Transcript, Day 9, 1699:15 – 1702:7 (English).

<sup>1254</sup> Hearing Transcript, Day 1, 1700:17-20 (English); SAS' Post-Hearing Brief, paras. 74-75.

<sup>1255</sup> Hearing Transcript, Day 9, 1699:15 – 1702:7 (English).

<sup>1256</sup> Hearing Transcript, Day 1, 116:22-25 (English).

<sup>1257</sup> Hearing Transcript, Day 1, 117:11-23 (English).

756. Finally, the Claimant deems unsubstantiated the argument Bolivia presents on the reduction of compensation on account of contributory negligence,<sup>1258</sup> adding that Bolivia has been unable to prove any of its allegations of wrongdoing, such that there is no justification for such a reduction.<sup>1259</sup>
757. According to the Claimant, (i) the decision in the *Abengoa v. Mexico* case, by analogy, confirms that the Respondent cannot invoke contributory negligence, as “*there is no regulatory framework in Bolivia defining the obligations of CMMK to implement a community relations program*” and Bolivia presented no specific requests to CMMK in this regard;<sup>1260</sup> and (ii) at any rate, the invocation of contributory negligence requires a willful or negligent action by the investor, but “*SAS always acted lawfully and is not responsible for the politically-motivated opposition*”, as confirmed by Bolivia’s representatives themselves.<sup>1261</sup>
758. The Claimant submits that the underlying facts and evidence in the *Copper Mesa* case, invoked by the Respondent, are very different from this case.<sup>1262</sup> In that case, the tribunal concluded that “*by the acts of its agents in Ecuador, the Claimant [resorted] to recruiting and using armed men, firing guns and spraying mace at civilians, not as an accidental or isolated incident but as part of premeditated, disguised and well-funded plans to take the law into its own hands.*”<sup>1263</sup> The Claimant contends that Bolivia has the burden of proof regarding these purported violations that the Claimant would have committed, and it has not proven that the Claimant provided weapons to the community members or otherwise fostered violence in the area.<sup>1264</sup> The Claimant further contends that, contrary to the *Copper Mesa* case, SAS never paid those communities or community members for their formation of COTOA-6A, rather they did it voluntarily and these were also communities who lived within the Project area.<sup>1265</sup> The Claimant contends that the 75% reduction requested by Bolivia is unwarranted.<sup>1266</sup>

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<sup>1258</sup> Claimant’s Reply Memorial, paras. 378, 383.

<sup>1259</sup> SAS’ Post-Hearing Brief, para. 106.

<sup>1260</sup> Claimant’s Reply Memorial, paras. 379-380; CLA-162, *Abengoa v. Mexico*, para. 673.

<sup>1261</sup> Claimant’s Reply Memorial, paras. 379-382.

<sup>1262</sup> SAS’ Post-Hearing Brief, para. 84.

<sup>1263</sup> RLA-281, *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, March 15, 2016, para. 6.99 (unofficial translation).

<sup>1264</sup> SAS’ Post-Hearing Brief, para. 86.

<sup>1265</sup> SAS’ Post-Hearing Brief, para. 86.

<sup>1266</sup> SAS’ Post-Hearing Brief, para. 86.



## 6. Compensation for other Treaty violations

759. The Claimant argues that, in the event that the Tribunal should determine that Bolivia did not violate the expropriation provision under Article 5 of the Treaty, it would be entitled to receive compensation for Bolivia's violation of the other standards of protection in the Treaty.<sup>1267</sup>
760. The Claimant submits that, despite the fact that the Treaty does not assign a particular standard of compensation for the other violations aside from expropriation, compensation for such injury must "*be sufficient to compensate the affected party fully and to eliminate the consequences of the State's action.*"<sup>1268</sup> To restore the situation that would have existed but for Bolivia's acts and omissions, the Claimant submits that compensation needs to be equivalent to the Project value, "*but for Bolivia's unlawful acts, [SAS] would still own the [Mining] Concessions through its wholly-owned subsidiary, CMMK.*"<sup>1269</sup>
761. In respect of the standard of valuation, the Claimant states that there is a "*clear emerging trend*" toward adopting the fair market value standard.<sup>1270</sup> The Claimant submits that "*numerous arbitral tribunals have held that [fair market value] constructed an appropriate measure of damages for non-expropriation claims when the measures at issue have resulted in the loss of the protected investment*".<sup>1271</sup> Thus, the Claimant submits that the standard of fair market value is appropriate in this case, since the actions adopted by Bolivia violating the Treaty resulted in "*the total loss of [SAS'] investment*".<sup>1272</sup>

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<sup>1267</sup> Statement of Claim and Memorial, para. 194.

<sup>1268</sup> Statement of Claim and Memorial, paras. 195-196, citing CLA-10, *Compañía de Aguas del Aconquija S.A., and Vivendi Universal v. Republic of Argentina*, ICSID Case No. ARB/97/3, Award, August 20, 2007, para. 8.2.7; Claimant's Reply Memorial, paras. 369-370; CLA-47, *MTD Equity Sdn. Bhd. and MTD Chile S.A., v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, para. 238; CLA-69, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, PCIJ Case, Judgment, September 13, 1928, CPJI (ser. A), No. 17, p. 40; CLA-160, *Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR 6th Comm., 56<sup>th</sup> Sess., U.N. Doc. A/Res/56/83, January 28, 2002, Article 31. See also Hearing Transcript, Day 1, 101:12-23 (English).

<sup>1269</sup> Claimant's Reply Memorial, paras. 370-371.

<sup>1270</sup> Statement of Claim and Memorial, paras. 198-200; CLA-5, *CMS Gas Transmission Co. v. República of Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, para. 410; CLA-40, *Azurix Corp., v. Republic of Argentina*, ICSID Case No. ARB/01/12, Award, October 5, 2012, paras. 424, 429-430; CLA-41, *National Grid v. Argentine Republic*, UNCITRAL Case, Award, November 3, 2008, paras. 269-70.

<sup>1271</sup> Claimant's Reply Memorial, para. 372; RLA-27, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014, para. 674; CLA-47, *MTD Equity Sdn. Bhd. and MTD Chile S.A., v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, para. 238; CLA-10, *Compañía de Aguas del Aconquija S.A., and Vivendi Universal v. Republic of Argentina*, ICSID Case No. ARB/97/3, Award, August 20, 2007, para. 8.2.7; CLA-76, *S.D. Myers, Inc. v. Canada*, UNCITRAL (NAFTA), Second Partial Award, October 21, 2002, para. 309; CLA-5, *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, para. 410; CLA-40, *Azurix Corp., v. Argentina*, ICSID Case No. ARB/01/12, Award, October 5, 2012, paras. 424, 429-430.

<sup>1272</sup> Claimant's Reply Memorial, para. 373.

762. In sum, if the Tribunal finds that Bolivia violated any of the standards of protection in the Treaty, the Claimant requests compensation equivalent to the Project's fair market value.<sup>1273</sup>

## **7. Interests**

763. The Claimant submits that Bolivia's annual statutory rate of 6% (i) is the only applicable interest rate that has been suggested before the Tribunal, as none of Bolivia's proposals represents "*a normal rate*," and (ii) is the "*minimum applicable interest rate*" pursuant to Article 5(1) of the Treaty, as the commercial interest rate per the Central Bank of Bolivia ranges between 6.5% and 7.0%.<sup>1274</sup>

764. Regarding the interest rate, the Claimant submits that "*international law now recognizes the awarding of compound interest as the generally accepted standard of compensation in international investment arbitrations.*"<sup>1275</sup> Moreover, the Claimant asserts that compound interest is part of the full reparation to which SAS is entitled to.<sup>1276</sup>

765. Contrary to Bolivia's allegations, the Claimant asserts that (i) the prohibition in the Bolivian Civil Code does not apply in this case; and (ii) Bolivia's argument in this connection "*was soundly rejected*" in the *Rurelec* case.<sup>1277</sup>

## **B. THE RESPONDENT'S POSITION**

### **1. Right to compensation**

766. The Respondent submits that for damages to be recoverable under international law, the alleged victim of a wrongful act must prove, on the one hand, the certainty of damages,<sup>1278</sup> and, on the other hand, that there is sufficient causality between the damages claimed and the unlawful act.<sup>1279</sup> However, the Respondent alleges that SAS did not meet the burden of proof regarding the

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<sup>1273</sup> Statement of Claim and Memorial, para. 201; Claimant's Reply Memorial, para. 374.

<sup>1274</sup> Claimant's Reply Memorial, paras. 427-428; SAS' Post-Hearing Brief, para. 104; CER-4, Second FTI Report, para. 10.13-10.22; CLA-1, *Guaracachi America Inc. et al. v. Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, January 31, 2014, para. 615.

<sup>1275</sup> Statement of Claim and Memorial, paras. 223, 227-228; SAS' Post-Hearing Brief, para. 105; CLA-87, *Santa Elena*, Award, para. 101; CLA-94, Natasha Affolder, "Awarding Compound Interest In International Arbitration", *12 Am. Rev. Int'l. Arb.* 45, p. 80 (2001); CLA-90, Gotanda, *A Study of Interest*, p. 31; CLA-93, Colón & Knoll, p. 10; CLA-92, F.A. Mann, *Compound Interest*, pp. 581-582; CLA-86, *Starrett Housing Interlocutory*, Iran-United States Claims Tribunal Case No. 24 (32-24-1), Award, December 19, 1983.

<sup>1276</sup> Statement of Claim and Memorial, paras. 222-226; Claimant's Reply Memorial, para. 429.

<sup>1277</sup> Claimant's Reply Memorial, para. 431; SAS' Post-Hearing Brief, para. 105; CLA-1, *Guaracachi America, Inc. et al. v. Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, January 31, 2014, para. 616.

<sup>1278</sup> Counter-Memorial, paras. 529-534; Hearing Transcript, Day 1, 282:10-18 (Spanish).

<sup>1279</sup> Counter-Memorial, paras. 565-567.

existence of these indispensable circumstances in the present case.<sup>1280</sup> The Respondent submits that SAS' claims are unfounded and the fact that the Claimant abandoned its claim for restitution during the Hearing<sup>1281</sup> confirms its frivolous nature.<sup>1282</sup>

767. The Respondent submits that the damages SAS alleges "*are merely hypothetical*,"<sup>1283</sup> for the reasons detailed below:

- (a) The progress of the Malku Khota Project to the exploitation stage is merely speculative, given its embryonic stage. The Respondent submits that "*it can take 15 to 20 years from the discovery of a mining site to a mine's production stage*," if attained.<sup>1284</sup> Bolivia contends that the development of a mining project up to the exploitation stage requires several environmental studies, including an environmental impact study and a series of geological studies starting with the PEA, and followed by a pre-feasibility study, concluding, in this case, with a feasibility study. Once these studies have been performed and a favorable outcome is obtained, there follows the procurement of all necessary licenses and permits, securing external financing, complying with the early consultation stage with local communities and the beginning of a series of complex and costly construction activities.<sup>1285</sup> Therefore, "*only a minimum percentage of the mining projects are able to be developed*," as acknowledged in the RPA's report presented by the Claimant.<sup>1286</sup> In this case, the Malku Khota Project was at the PEA stage, i.e. the earliest stage of development of a mining project.<sup>1287</sup> For all these reasons, the Respondent submits that SAS is requesting this Tribunal to compensate for a hypothetical damage and to ignore all the risks that a mining operation such as the Project entailed,<sup>1288</sup> whose technical and/or economic feasibility was uncertain.<sup>1289</sup>

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<sup>1280</sup> Counter-Memorial, paras. 534, 567; Respondent's Rejoinder, paras. 531-532; Hearing Transcript, Day 1, 282:19-22 (Spanish).

<sup>1281</sup> See *infra* para. 737.

<sup>1282</sup> Bolivia's Post-Hearing Brief, para. 80.

<sup>1283</sup> Counter-Memorial, para. 564.

<sup>1284</sup> Counter-Memorial, para. 544; RER-2, First Dagdelen Report, para. 33.

<sup>1285</sup> Counter-Memorial, paras. 535-546; Hearing Transcript, Day 1, 285:22 – 292:4 (Spanish); RER-2, First Dagdelen Report, paras. 12-61.

<sup>1286</sup> Counter-Memorial, paras. 544-545; Respondent's Rejoinder, paras. 539-541; RER-2, First Dagdelen Report, para. 32; R-121, W. E. Roscoe, *Valuation of Mineral Exploration Properties Using the Cost-Based Approach*, p. 2; CER-5, Second RPA Report, pp. 5-14. See also Hearing Transcript, Day 1, 271:21 – 273:2 (Spanish).

<sup>1287</sup> Counter-Memorial, para. 546; Respondent's Rejoinder, paras. 537, 566.

<sup>1288</sup> Hearing Transcript, Day 9, 1887:3 – 1888:5, 1889:7 – 1890:21 (Spanish).

<sup>1289</sup> Bolivia's Post-Hearing Brief, paras. 85-88, referring to the statement of RPA (Hearing Transcript, Day 6, 1121:1 – 1122:8 (English)).

- (b) The economic potential of the Malku Khota Project development is mere speculation as it only had one PEA<sup>1290</sup> and the technical and economic feasibility of a mining project can only be determined from a pre-feasibility study.<sup>1291</sup> The Respondent argues that the PEA simply collects results from limited drilling to determine the feasibility of continuing with the exploration stage, and only through pre-feasibility and feasibility studies, which identify the economic potential of mineral reserves, is it possible to determine the economic feasibility of exploitation of the Project.<sup>1292</sup> The Respondent underscores that the existence of mineral resources, which is what the Project has, does not imply that it is technically and/or economically feasible.<sup>1293</sup> Thus, the Respondent submits that, given its speculative character, as recognized by SASC, the Claimant's experts and the Project's PEA itself, and given the very low level of reliability, the PEA is considered only as a mere "*conceptual study*," and not as a "*solid economic study*".<sup>1294</sup> Therefore, the estimation of mineral resources and predictable revenue and extraction costs included in the PEA, which was never confirmed in the pre-feasibility and feasibility studies, is eminently speculative.<sup>1295</sup> The Respondent reiterates that the Project remained at an embryonic stage and contends that, as recognized by SASC in 2012, it was two or three years away from completing financing and guaranteeing the development of the procedure.<sup>1296</sup>
- (c) The estimation of the mineral resources in the PEA 2011 is exaggerated. The Respondent argues that the PEA 2011 attributes US\$ 0.72 to each ton of estimated mineral resource due to the existence of gold credits, which is equivalent to a total of US\$ 144 million, and overestimates indicated resources by 70,806 million tons and underestimates inferred resources by 49,855 million tons. The PEA artificially increases the size of the estimated

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<sup>1290</sup> Bolivia's Post-Hearing Brief, para. 86, referring to the statement of RPA whereby it was acknowledged that the Project only had one PEA (Hearing Transcript, Day 6, 969:24 – 970:10 (English)).

<sup>1291</sup> Bolivia's Post-Hearing Brief, para. 87, referring to the statement of RPA (Hearing Transcript, Day 6, 1120:5-7 (English)). See also Bolivia's Post-Hearing Brief, paras. 91-95.

<sup>1292</sup> Counter-Memorial, paras. 538-539, 550; Respondent's Rejoinder, paras. 563-564; Hearing Transcript, Day 1, 273:4 – 274:3, 274:4 – 282:7 (Spanish); CER-5, Second RPA Report, pp. 3-2; Bolivia's Post-Hearing Brief, paras. 86, 94.

<sup>1293</sup> Bolivia's Post-Hearing Brief, paras. 92-93.

<sup>1294</sup> Counter-Memorial, paras. 538, 547-554; Respondent's Rejoinder, paras. 536-538, 544; RER-2, First Dagdelen Report, paras. 46, 123-127.

<sup>1295</sup> Counter-Memorial, paras. 550, 558, 561; Respondent's Rejoinder, para. 563; Hearing Transcript, Day 1, 275:1 – 279:1 (Spanish). For the definitions cited in the hearing transcript, see R-125, CIM Standing Committee on Reserve Definitions, *CIM Definition Standards - For Mineral Resources and Mineral Reserves*, 2010, pp. 3-6. See also Hearing Transcript, Day 9, 1889:7 – 1892:2 (Spanish).

<sup>1296</sup> Hearing Transcript, Day 9, 1894:17 – 1895:23 (Spanish), relying on R-299, SASC's letter to the Trade Commissioner of the Embassy of Canada in Lima, May 31, 2012, p. 2.

mineral deposit as the alleged gold credits are inexistent and it is highly probable that inferred resources, which have a lower geological reliability, do not exist either.<sup>1297</sup>

- (d) The valuation of mineral resources in RPA's report, based on the PEA 2011, is inaccurate. First, the Respondent argues that RPA does not differentiate inferred resources from measured resources for valuation purposes in spite of the fact that in the mining industry inferred mineral resources "*have no value*".<sup>1298</sup>

Second, the Respondent argues that RPA uses an unjustifiably low 10 g/t AgEq cut-off grade, reducing the minimum metal concentration required in a ton of material for it to be included in the mineral resources.<sup>1299</sup> The Respondent argues that, taking into account capital and operating costs, the cut-off grade applicable to the Malku Khota Project is, at least, 20.4 g/t AgEq, with the capability of reaching 30 g/t AgEq. The Respondent submits that the PEA 2011 was significantly higher (20.9%).<sup>1300</sup> The above shows that RPA overstates indicated mineral resources by 110.6%, measured mineral resources by 84%, and inferred mineral resources by 127%.<sup>1301</sup>

Third, the Respondent alleges that RPA's valuation solely reflects estimated mineral resources and not economically mineable resources as RPA never performed an analysis of the pit limit,<sup>1302</sup> rather assessed the Project "*assuming that a hundred percent of what is characterized as 'resource' is to be mined*".<sup>1303</sup> At any rate, the Respondent clarifies that: (i) upon analyzing the pit limit under a 20 g/t AgEq cut-off grade, the Project's economically mineable resources (113.1 million tons) represent less than half of the estimated mineral resources (231.6 million tons);<sup>1304</sup> and (ii) the effective economic feasibility of the extraction would still depend on the expected revenue to be sufficient to cover the Project exploitation costs.<sup>1305</sup>

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<sup>1297</sup> Counter-Memorial, paras. 556, 559-560; 563; Respondent's Rejoinder, paras. 547-549, 556; RER-2, First Dagdelen Report, paras. 80, 84; RER-4, Second Dagdelen Report, para. 10; CER-5, Second RPA Report, pp. 5-9.

<sup>1298</sup> Counter-Memorial, para. 559; Respondent's Rejoinder, paras. 549, 556; Hearing Transcript, Day 1, 279:2 – 282:7 (Spanish); RER-2, First Dagdelen Report, para. 80. See also DAG-3, National Instrument 43-101, June 24, 2011, Companion Policy 43-101 CP, sections 2.3(1)(b), and 2.3(3)(a). See also Hearing Transcript, Day 9, 1910:7 – 1911:8 (Spanish).

<sup>1299</sup> Respondent's Rejoinder, paras. 550-552; RER-2, First Dagdelen Report, para. 80; CER-5, Second RPA Report, pp. 5-6 and 5-7; RER-4, Second Dagdelen Report, Section 4.1.2.

<sup>1300</sup> Bolivia's Post-Hearing Brief, para. 142.

<sup>1301</sup> Respondent's Rejoinder, paras. 553-558; RER-4, Second Dagdelen Report, paras. 75-76.

<sup>1302</sup> Respondent's Rejoinder, para. 559; RER-2, First Dagdelen Report, para. 83. See also Bolivia's Post-Hearing Brief, para. 140.

<sup>1303</sup> Bolivia's Post-Hearing Brief, para. 140, citing RPA during the Hearing (Hearing Transcript, Day 6, 1095:14-19 (English)).

<sup>1304</sup> Respondent's Rejoinder, paras. 560-561; RER-2, First Dagdelen Report, paras. 83-85.

<sup>1305</sup> Respondent's Rejoinder, para. 562; RER-4, Second Dagdelen Report, para. 44; RER-6, Taylor Report, para. 28.

- (e) The damage valuation by FTI and RPA does not take into consideration the uncertainty of the Metallurgical Process. The Respondent submits that “[t]he Tribunal cannot, without violating due process, supersede SAS in proving its damages.”<sup>1306</sup> The Respondent contends that estimates by the Claimant’s economic experts are based on the assumption that the Metallurgical Process works and that it is feasible at a commercial scale.<sup>1307</sup> However, the Respondent argues that the Metallurgical Process: (i) has not been used before in mining;<sup>1308</sup> (ii) has never been tested in a pilot plant, or in actual mineral samples of the Project;<sup>1309</sup> and (iii) it is a new and unique process, which increases the profitability and feasibility risks of the Project.<sup>1310</sup> Therefore, the Respondent argues that there is no certainty that the Metallurgical Process can be used in the Project.<sup>1311</sup>

The Respondent underscores that Dr. Dreisinger acknowledged during the Hearing that his testimony regarding the Metallurgical Process’ feasibility is based on *Flowsheet B* only<sup>1312</sup>, and argues that the report on which the Claimant bases its metallurgical arguments, and in which, for the first time, *Flowsheet B* is mentioned, is the SGS report *from August 2013*, one year *after* the date of valuation, and there is no evidence that *Flowsheet B* existed at the date of valuation<sup>1313</sup> (emphasis added by Respondent). The Respondent argues that, at the date of valuation, the Metallurgical Process was incomplete<sup>1314</sup> and *Flowsheet B* did not exist,<sup>1315</sup> which is why it was uncertain that the Metallurgical Process would be capable of *economically* extracting the Project metals<sup>1316</sup> (emphasis added by Respondent). The Respondent contends that this is fundamental because, according to the PEA 2011

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<sup>1306</sup> Bolivia’s Post-Hearing Brief, para. 91.

<sup>1307</sup> Respondent’s Rejoinder, para. 567; Hearing Transcript, Day 1, 287:8-12 (Spanish); Day 9, 1896:6 – 1897:3 (Spanish); RER-5, Second Brattle Report, para. 53. See also Bolivia’s Post-Hearing Brief, para. 91.

<sup>1308</sup> Respondent’s Rejoinder, para. 568; CER-2, First RPA Report, p. 10-5; RER-6, Taylor Report, para. 40; RER-5, Second Brattle Report, para. 112; C-14, PEA 2011, sections 1.4, 1.8. See also Bolivia’s Post-Hearing Brief, para. 103.

<sup>1309</sup> Respondent’s Rejoinder, paras. 569-570; Bolivia’s Post-Hearing Brief, paras. 101-102; RER-6, Taylor Report, para. 44(1), 44(3). See also TAY-5, A. Mezei & Todd R. Molnar, “Can Complex Hydrometallurgical Pilot Plants Effectively Reduce Project Risks?”, SGS Minerals Services, Technical Paper, 2006-4, p. 2.

<sup>1310</sup> Respondent’s Rejoinder, para. 571; RER-6, Taylor Report, para. 44(2). See also Bolivia’s Post-Hearing Brief, para. 103.

<sup>1311</sup> Counter-Memorial, para. 562; Respondent’s Rejoinder, paras. 572-573; Hearing Transcript, Day 1, 283:25 – 287:7 (Spanish); R-222, Transcript of conversation between FTI and Tom Pfister, October 20, 2015, p. 14.

<sup>1312</sup> Bolivia’s Post-Hearing Brief, para. 98.

<sup>1313</sup> Bolivia’s Post-Hearing Brief, para. 99; C-133, SGS Canada Inc., An Investigation into Metal Recovery from Malku Khota Leach Liquors, August 19, 2013.

<sup>1314</sup> Bolivia’s Post-Hearing Brief, paras. 100-101, referring to RPA’s statement during the hearing (Hearing Transcript, Day 6, 1003:15-18 (English)).

<sup>1315</sup> Bolivia’s Post-Hearing Brief, para. 100.

<sup>1316</sup> Bolivia’s Post-Hearing Brief, paras. 100-101.

estimates, the estimated value of the Project is reduced by 50% under the “classic” cyanide-leaching method.<sup>1317</sup>

At any rate, even assuming the feasibility of the Metallurgical Process, there would be still uncertainties as to its profitability, because the Respondent contends that: (i) there are serious doubts as to the impact of this process on the recovery values for precious metals; (ii) the use of new technology implies cost overruns and delays; and (iii) the use of the Metallurgical Process in the Project would imply very high additional costs derived from the refining of indium.<sup>1318</sup> Despite all these reasons, “*RPA and FTI make no adjustment in their valuations to reflect the uncertainty of the Metallurgical Process and the possible cost overruns that it can generate*”.<sup>1319</sup>

The Respondent further questions the credibility of the Claimant’s expert, Dr. Dreisinger, based on the fact that he, as owner of Class B shares of SASC, “*has a direct economic interest in the outcome of this arbitration*,”<sup>1320</sup> which he did not disclose in his witness statement or over the course of direct examination.<sup>1321</sup>

- (f) The Project would have never received external financing. Relying on the Equator Principles, the regulations of major international financial institutions, and the corporate social responsibility policies and programs adopted by the main mining companies, the Respondent concludes that “*every mining project must respect [the rights of indigenous communities, their resources, and the environment] to be financed*.”<sup>1322</sup> However, due to CMMK’s violation of human and indigenous rights, and the risk that the Project entailed for the resources and the environment of the area, the Respondent considers that there is abundant evidence that the Project would have never been funded.<sup>1323</sup> Thus, even if Bolivia had not adopted the Reversion, the Project could not have been developed since it is “*not*

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<sup>1317</sup> Bolivia’s Post-Hearing Brief, para. 100.

<sup>1318</sup> Counter-Memorial, para. 562; Respondent’s Rejoinder, para. 574; Hearing Transcript, Day 1, 287:13 – 288:4 (Spanish); RER-2, First Dagdelen Report, para. 89; RER-6, Taylor Report, paras. 24-26, 37-47; C-14, 2001 PEA 2011, pp. 10, 19-20.

<sup>1319</sup> Respondent’s Rejoinder, para. 567; Hearing Transcript, Day 1, 287:8-12 (Spanish); Bolivia’s Post-Hearing Brief, para. 104.

<sup>1320</sup> Hearing Transcript, Day 9, 1897:4-21 (Spanish); Bolivia’s Post-Hearing Brief, paras. 105-106. See Hearing Transcript, Day 7, 1272:18-20, 1270:24 – 1271:2 (English); R-207, SASC Shareholding 2014, pp. 6, 41.

<sup>1321</sup> Bolivia’s Post-Hearing Brief, para. 106.

<sup>1322</sup> Respondent’s Rejoinder, paras. 578-586; Hearing Transcript, Day 1, 290:3 – 291:10 (Spanish); Bolivia’s Post-Hearing Brief, para. 90.

<sup>1323</sup> Respondent’s Rejoinder, paras. 587-591; Hearing Transcript, Day 1, 291:11-17 (Spanish); RER-2, First Dagdelen Report, para. 98.

*disputed that, without external funding, SAS could not build, much less operate a mine in Malku Khota”.*<sup>1324</sup>

- (g) The Project could not have been developed due to significant social opposition. The Respondent submits that the Project would have never overcome the early consultation stage with the local communities, a *sine qua non* requirement for the exploitation of a mining project in Bolivia and, therefore, even if Bolivia had not adopted the Reversion, SAS would have never been able to develop the Project.<sup>1325</sup>

768. Based on the foregoing, the Respondent concludes that SAS is not entitled to compensation as it has not met the burden of proving the certainty of its damages.<sup>1326</sup>

769. At any rate, even if the Tribunal finds that damages suffered by SAS are certain, the Respondent submits that the proximate cause of these damages is attributable exclusively to SAS and, therefore, Bolivia has no obligation to compensate it as the required causal link between the Reversion and the damages claimed by SAS does not exist.<sup>1327</sup>

770. The Respondent contends that decisions by other international tribunals confirm that an investor should not be compensated when its own conduct is the proximate cause of the damages, even if this conduct is not the exclusive cause.<sup>1328</sup> The Respondent accepts that these decisions entailed companies with financial difficulties; however, contrary to SAS’ allegations, the Claimant contends that the determining factor in these decisions “*are not such difficulties in themselves, but that they were caused by the affected companies themselves*”.<sup>1329</sup> Consequently, the Respondent submits that this reasoning is applicable to the present case since, in light of the facts, “*although Reversion was a formal act that put an end to SAS’ exploration activities, SAS was the real causing agent of its damages*”.<sup>1330</sup>

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<sup>1324</sup> Respondent’s Rejoinder, paras. 576, 592.

<sup>1325</sup> Respondent’s Rejoinder, paras. 593-595; Hearing Transcript, Day 1, 288:12 – 290:2 (Spanish).

<sup>1326</sup> Respondent’s Rejoinder, para. 596; Hearing Transcript, Day 9, 1898:8-12 (Spanish). See also Bolivia’s Post-Hearing Brief, paras. 83-107. The Respondent states that SAS has not presented a claim for the opportunity loss or alternative estimates that took uncertainty into account, for example, the Metallurgical Process (Hearing Transcript, Day 9, 1899:6-15 (Spanish)).

<sup>1327</sup> Counter-Memorial, paras. 568, 572; Respondent’s Rejoinder, paras. 601-602; Hearing Transcript, Day 1, 292:5-15 (Spanish).

<sup>1328</sup> Counter-Memorial, paras. 570-571; Respondent’s Rejoinder, para. 598; Hearing Transcript, Day 1, 292:5-15 (Spanish); RLA-17, *Elettronica Sicula SpA (ELSI)* (United States of America v. Italy), ICJ case, Award of July 20, 1989, para. 101; RLA-142, *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID Case No. ARB/05/22, Award of July 24, 2008, para. 786.

<sup>1329</sup> Respondent’s Rejoinder, para. 600.

<sup>1330</sup> Counter-Memorial, 569; Respondent’s Rejoinder, para. 602.



## 2. Standard of compensation for an expropriation

771. The Respondent submits that monetary compensation is the most common form of reparation used by arbitral tribunals to repair the damages caused by the actions of a sovereign State, and, in particular, is the form of reparation provided for in Article 5 of the Treaty for cases of expropriation. Thus, if the Tribunal considers that there is damage to be compensated, the Respondent submits that reparation in this case should be limited to monetary compensation for the damages suffered as a result of the Reversion, be it lawful or unlawful.<sup>1331</sup>
772. In this regard, the Respondent deems SAS' compensation claim to be arbitrary, as there is no reason to justify a monetary compensation at the date of the award and, it should therefore be rejected by the Tribunal.<sup>1332</sup> In particular, the Respondent argues that: (i) the standard of compensation under Article 5(1) of the Treaty, which "*guarantees full reparation*", does not provide for the date of the award for this purpose;<sup>1333</sup> (ii) the rules governing compensation preclude the use of the date of the award as it is not related to the facts of the case;<sup>1334</sup> (iii) SAS is not entitled to benefit from the date of the award, as any hypothetical increase in the value of the Project "*would be ascribable to the departure of SAS*";<sup>1335</sup> and (iv) the jurisprudence invoked by SAS does not support its position.<sup>1336</sup>

## 3. Standard of valuation for expropriation

773. The Respondent submits that "*if the Tribunal concluded that Bolivia should compensate SAS (quod non), such compensation should be limited to the reimbursement of the costs incurred by SAS in relation to the Project.*"<sup>1337</sup>
774. Relying on the decisions of other arbitral tribunals, the Respondent contends that the market value of the expropriated asset, absent a solid base to establish that such asset would generate future revenue, is based on costs.<sup>1338</sup> Then, given the Project's speculative nature, the Respondent

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<sup>1331</sup> Counter-Memorial, paras. 512-513; 525.

<sup>1332</sup> Counter-Memorial, paras. 636, 675; Respondent's Rejoinder, paras. 675-679.

<sup>1333</sup> Counter-Memorial, paras. 664, 666.

<sup>1334</sup> Counter-Memorial, para. 665; RLA-149, Markham Ball, *Assessing Damages in Claims by Investors against States*, 16 ICSID Review Foreign Investment Law Journal, 2001, p. 417.

<sup>1335</sup> Counter-Memorial, para. 667.

<sup>1336</sup> Counter-Memorial, paras. 668-674; CLA-69, *Chorzów Factory*, p. 40; CLA-35, *ADC*, Award, para. 496; CLA-2, *Siemens*, Award, para. 8.3, 12.3

<sup>1337</sup> Respondent's Rejoinder, para. 613.

<sup>1338</sup> Counter-Memorial, paras. 579-581; Respondent's Rejoinder, paras. 604-606; Hearing Transcript, Day 1, 293:2 – 295:16 (Spanish); RLA-145, *Wena Hotels v. República Árabe de Egipto*, ICSID Case No. ARB/98/4, Award, December 8, 2000, paras. 123-125; RLA-105, *Venezuela Holdings and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award of October 9, 2014, paras. 382, 385; RLA-146, *Hasan Awdi and other v. Romania*, ICSID Case No. ARB/10/13, Award

considers that the only way to determine market value for SAS' investment is based on investment costs.<sup>1339</sup>

775. Moreover, the Respondent submits that other tribunals confirm that cost-based valuation is the method used when a discounted cash flow method is not applicable, or when the compensation requested is disproportionate to the investment costs.<sup>1340</sup> Both circumstances arise in the present case, in the Respondent's view.<sup>1341</sup>

776. Contrary to SAS' arguments, the Claimant argues that: (i) the method for calculating the fair market value of the expropriated investment by reference to costs has "*proved quite popular in arbitral practice*";<sup>1342</sup> (ii) SAS' economic experts accept that the cost-based assessment is consistent with the international standards applicable;<sup>1343</sup> (iii) any prospect of future development of the Project is merely speculative;<sup>1344</sup> and (iv) a cost-based valuation would not create an incentive for Bolivia to expropriate assets in its earliest stage as, in the present case, Bolivia "*was forced to reverse the Mining Concessions,*" and at any rate, "*the earlier in time an asset is taken, the bigger the risk that the asset has no value*".<sup>1345</sup>

#### 4. Valuation Date for the expropriation

777. The Respondent submits that the valuation should be performed as at July 9, 2012 ("**Respondent's Valuation Date**"), and the date of valuation in FTI's report is contrary to the Treaty. The Claimant asserts that there is no justification to consider July 6, 2012 as the day immediately preceding the announcement of the expropriation, since on July 9, 2012, SAS communicated to the market that the Memorandum of Agreement had no impact on the Project.<sup>1346</sup> The Respondent argues that expropriation came into force on August 1, 2012 through

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of March 2, 2015, para. 514; CLA-51, *PSEG Global, Inc. v. Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007, para. 321.

<sup>1339</sup> Counter-Memorial, paras. 576, 582; Respondent's Rejoinder, para. 607.

<sup>1340</sup> Counter-Memorial, paras. 578, 583; RLA-103, S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008, p. 227; RLA-96, *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, para. 186; RLA-281, *Copper Mesa Mining Corporation v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-2, Award, March 15, 2016, paras. 7.3, 7.21, 7.24, 7.26-7.28.

<sup>1341</sup> Counter-Memorial, paras. 577, 584; RER-3, First Brattle Report, para. 80.

<sup>1342</sup> Respondent's Rejoinder, para. 611; Hearing Transcript, Day 1, 295:17 – 296:8 (Spanish). RLA-103, S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008, p. 227; RLA-281, *Copper Mesa Mining Corporation v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-2, Award, March 15, 2016, para. 7.3, 7.21, 7.24, 7.26-7.28.

<sup>1343</sup> Respondent's Rejoinder, para. 609; CER-2, First RPA Report, p. 3-1; CER-5, Second RPA Report, Table 3-2, p. 3-6.

<sup>1344</sup> Respondent's Rejoinder, paras. 611-612; RER-2, First Dagdelen Report, para. 122.

<sup>1345</sup> Respondent's Rejoinder, para. 610.

<sup>1346</sup> Counter-Memorial, paras. 638-640; Respondent's Rejoinder, paras. 670-673; Bolivia's Post-Hearing Brief, para. 161.

the Reversion Decree, and “it was only on July 10, 2012 that SASC informed the market that – that same day– Bolivia had announced its intention to nationalize the Mining Concessions.”<sup>1347</sup>

In view of the above, under Article 5(1) of the Treaty, the date of valuation should be July 9, 2012, the day immediately preceding the date expropriation was publicly announced.<sup>1348</sup>

## 5. Valuation method for compensation

778. The Respondent submits that the cost approach is used by international arbitration tribunals to evaluate incipient mining projects.<sup>1349</sup> The Respondent quotes the decision of the tribunal in the *Copper Mesa* case which, with respect to the cost approach, concluded that it was “the most reliable, objective and fair method in this case for valuing the Claimant’s investments,” and asserted that the other methodologies were “uncertain, subjective, and dependent upon contingencies.”<sup>1350</sup> The Respondent submits that this is exactly the case in this Project: the Project is at an early stage without any mining activity, and the valuations proposed by SAS are uncertain, subjective, and dependent upon contingencies.<sup>1351</sup>

779. The Respondent argues that the cost approach presented by Brattle has two advantages: on the one hand, only true damages are compensated, and, on the other hand, the risk of overcompensation is avoided.<sup>1352</sup> Contrary to SAS’ allegations, the Claimant argues that:

- (a) It has not been established that the investment costs of the Project included general and administrative expenses, and therefore “to consider this concept in the calculation would be arbitrary and speculative;”<sup>1353</sup> and
- (b) The deduction of the value of Protected Information is imperative, otherwise, SAS would be allowed to continue to benefit economically from the Project through the sale of technical information and, thus, “SAS would be overcompensated.”<sup>1354</sup>

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<sup>1347</sup> Counter-Memorial, para. 639; Respondent’s Rejoinder, para. 669; Hearing Transcript, Day 1, 298:7 – 299:10 (Spanish); R-129, SASC’s News Release, *South American Silver Responds Strongly to Bolivian Government Statements* of July, 10 2012.

<sup>1348</sup> Counter-Memorial, para. 641; Respondent’s Rejoinder, para. 674.

<sup>1349</sup> Bolivia’s Post-Hearing Brief, para. 110; RLA-281, *Copper Mesa Mining Corporation v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-2, Award of March 15, 2016, para. 7.24-27.

<sup>1350</sup> Bolivia’s Post-Hearing Brief, para. 110; RLA-281, *Copper Mesa Mining Corporation v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-2, Award, March 15, 2016, para. 7.24-27.

<sup>1351</sup> Bolivia’s Post-Hearing Brief, para. 110; RLA-281, *Copper Mesa Mining Corporation v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-2, Award, March 15, 2016, para. 7.24-27.

<sup>1352</sup> Counter-Memorial, para. 585; Respondent’s Rejoinder, para. 611.

<sup>1353</sup> Respondent’s Rejoinder, para. 615; RER-5, Second Brattle Report, Section IV.D.

<sup>1354</sup> Counter-Memorial, para. 592; Respondent’s Rejoinder, paras. 614-619; RER-3, First Brattle Report, paras. 175-177, Section VIII D); RER-5, Second Brattle Report, paras. 252-259; BR-122, “Face the Analyst” interview with Greg Johnson, published July 26, 2011, at 22:20; RWS-7, Witness X’s Witness Statement, para. 20.

780. Similarly, the Respondent submits that even if the Tribunal were to find a valuation based on fair market value to be applicable, the valuation method in FTI's report should be rejected completely,<sup>1355</sup> for the following reasons:

- (a) The three valuations on which the FTI's report is based are not reliable; they are *fundamentally* wrong and do not reflect fair market value<sup>1356</sup> (emphasis added by Respondent).
  - i. The Respondent argues that RPA's valuation should be rejected. The Respondent maintains that the comparables method used by RPA is inherently speculative, as has been acknowledged by the mining industry, the legal authorities, the case law and FTI itself.<sup>1357</sup>

The Respondent argues that FTI's sources recognize that the Project does not have any comparable in the market<sup>1358</sup> and, at any rate, the mining assets selected by RPA are different from the Project "*in all the relevant criteria*" (for example, geographical location, stage of development, mineralogy, and density of resources).<sup>1359</sup> The Respondent underscores that RPA's comparability analysis ignores the *fundamental* risks of the Project that directly impact its value,<sup>1360</sup> such as the metallurgical risk<sup>1361</sup> (the alleged "comparables" use *conventional* metallurgical processes), social risk and environmental risk.<sup>1362</sup> Consequently, the Respondent submits that RPA overvalues the Project and compares it with properties that are not *really* comparable, which invalidates its valuation.<sup>1363</sup>

The Respondent argues that the determination and application of an MTR in this case is arbitrary<sup>1364</sup> and that the MTR method developed by RPA (i) has never been

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<sup>1355</sup> Counter-Memorial, paras. 573, 634; Respondent's Rejoinder, paras. 621, 667; Hearing Transcript, Day 1, 300:2 – 303:8 (Spanish).

<sup>1356</sup> Bolivia's Post-Hearing Brief, paras. 112-113.

<sup>1357</sup> Counter-Memorial, paras. 579-580; Respondent's Rejoinder, paras. 635, 641-642; RER-3, First Brattle Report, paras. 46, 123.

<sup>1358</sup> Respondent's Rejoinder, para. 633; Bolivia's Post-Hearing Brief, para. 123; Hearing Transcript, Day 8, 1412:5 – 1416:6, 1425:20 – 1428:21 (English).

<sup>1359</sup> Counter-Memorial, paras. 606-607; Respondent's Rejoinder, para. 634; Hearing Transcript, Day 1, 304:9 – 310:22 (Spanish), Day 9, 1906:21 – 1908:8 (Spanish); Bolivia's Post-Hearing Brief, paras. 122, 124, 126. See RER-3, First Brattle Report, section IV A); RER-5, Second Brattle Report, paras. 109, 125-127.

<sup>1360</sup> Bolivia's Post-Hearing Brief, para. 128.

<sup>1361</sup> See *supra* para. 767(e).

<sup>1362</sup> Bolivia's Post-Hearing Brief, para. 127; Hearing Transcript, Day 6, 1013:11-14, 1013:18-25, 1029:6-11, 1031:17-19 (English).

<sup>1363</sup> Bolivia's Post-Hearing Brief, para. 128.

<sup>1364</sup> Bolivia's Post-Hearing Brief, section 4.4.2.2. See also Counter-Memorial, para. 601; Respondent's Rejoinder, para. 624.

scientifically validated<sup>1365</sup> and (ii) its application in practice is void.<sup>1366</sup> The Respondent submits that when determining and applying an MTR to the Project, RPA incorporated a degree of arbitrariness that invalidates its valuation: (1) arbitrariness in determining the MTR of the supposedly comparable properties,<sup>1367</sup> (2) arbitrariness in determining the MTR applicable to the Project,<sup>1368</sup> and (3) arbitrariness in applying the MTR to the Project resources.<sup>1369</sup>

Regarding the first arbitrariness, the Respondent compares this case, where RPA has estimated an MTR considering five option agreements, to the *Bear Creek* case, where FTI excluded the option agreements because they make the value of the underlying silver asset difficult to establish.<sup>1370</sup> Moreover, the Respondent alleges that price determination for the option agreements by RPA is “*totally subjective*,” since it has no scientific support.<sup>1371</sup> The Respondent further contends that RPA took into consideration transactions that were performed more than five years before the date of valuation,<sup>1372</sup> while in *Bear Creek*, FTI only used transactions that were performed two years before the date of valuation<sup>1373</sup> and mentions that, under RPA’s own premises, only transactions performed 18 months before the date of valuation should be considered and the older the transaction, the less reliable the information would be.<sup>1374</sup> The Respondent underscores that “*RPA resorted to historic resource estimates of 4 properties in spite of the fact that the Qualified Persons (QPs) who performed such estimations said that they ‘should not be relied upon or cannot be relied upon’*” to determine an MTR of comparable properties<sup>1375</sup> and that “*the reasonable and diligent approach would have been not to rely upon unreliable historic estimates*”.<sup>1376</sup>

<sup>1365</sup> Counter-Memorial, paras. 602-603; Respondent’s Rejoinder, para. 636; RER-3, First Brattle Report, para. 97.

<sup>1366</sup> Respondent’s Rejoinder, para. 639; RER-3, First Brattle Report, para. 97; RER-4, Second Dagdelen Report, para. 81.

<sup>1367</sup> Bolivia’s Post-Hearing Brief, paras. 130-131.

<sup>1368</sup> Bolivia’s Post-Hearing Brief, paras. 132-137.

<sup>1369</sup> Bolivia’s Post-Hearing Brief, paras. 138-144.

<sup>1370</sup> Bolivia’s Post-Hearing Brief, para. 130; Hearing Transcript, Day 8, 1439:12-16 (English).

<sup>1371</sup> Counter-Memorial, paras. 609-614; RER-3, First Brattle Report, paras. 88-93.

<sup>1372</sup> Bolivia’s Post-Hearing Brief, para. 130; Hearing Transcript, Día 6, 1046:2-16 (English). The six transactions considered comparable by RPA occurred between 2 and 5 years before the date of valuation used by FTI. See Counter-Memorial, paras. 615-618; CER-2, First RPA Report, Table 12-1, Annex 2; RER-3, First Brattle Report, paras. 94-95.

<sup>1373</sup> Bolivia’s Post-Hearing Brief, para. 130; Hearing Transcript, Day 8, 1446:14-17 (English).

<sup>1374</sup> R-127, W. E. Roscoe, *Valuation of non-producing mineral properties using market comparables*, Journal of Business Valuation, July 15, 2007, p. 215; Hearing Transcript, Day 6, 1044:21-25 (English).

<sup>1375</sup> Bolivia’s Post-Hearing Brief, para. 130, citing Hearing Transcript, Day 6, 1067:20-23 (English).

<sup>1376</sup> Bolivia’s Post-Hearing Brief, para. 130.

As to the arbitrariness in determining the MTR applicable to the Project, the Respondent alleges that the 2% MTR was determined through a subjective process,<sup>1377</sup> which cannot be validated as it cannot be replicated by other experts given that RPA does not detail the formulas used for its comparability index<sup>1378</sup> and merely indicated at the Hearing that it is “*in line with [their] experience doing other studies, other Comparable Transactions Analysis where there is invariably a fairly range of MTR values*”.<sup>1379</sup> The Respondent alleges that CIMVal was trying to get away from this type of valuations that are impenetrable to other experts<sup>1380</sup> and the *Copper Mesa* award confirms that the valuation of the Project cannot be based upon the subjective and unverifiable judgment of one person.<sup>1381</sup>

In connection with the arbitrariness in applying the MTR to the Project resources, the Respondent argues that the application of the MTR developed by RPA attributes the same value to indicated and measured resources as to inferred resources<sup>1382</sup> and overestimates the Project resources by using a 10 g/t AgEq cut-off grade that artificially overstates the value of the Project.<sup>1383</sup>

The Respondent argues that the Hearing demonstrated that RPA did not perform capping when calculating the Project’s resources, despite having recognized that it should be done,<sup>1384</sup> because it would have reduced the Project’s valuation.<sup>1385</sup>

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<sup>1377</sup> RPA explained such a process during the hearing to determine the 2% MTR starting with a 0.10% to 9.6% range; after excluding the *outliers* created a comparability index, by applying the “*6 middle transactions*” that ranged between 1.03% and 2.38%. See Hearing Transcript, Day 6, 1055:6 – 1057:4, 949:11-25 (English).

<sup>1378</sup> Bolivia’s Post-Hearing Brief, paras. 133-135; Hearing Transcript, Day 8, 1574:17-20 (English); RER-5, Second Brattle Report, para. 156.

<sup>1379</sup> Bolivia’s Post-Hearing Brief, para. 137, citing RPA during the hearing (Hearing Transcript, Day 6, 956:20 – 957:3 (English)).

<sup>1380</sup> Bolivia’s Post-Hearing Brief, para. 136; Hearing Transcript, Day 8, 1571:16 – 1572:1 (English).

<sup>1381</sup> Bolivia’s Post-Hearing Brief, para. 137.

<sup>1382</sup> See *supra* para. 767(d).

<sup>1383</sup> See *supra* para. 767(d). Counter-Memorial, paras. 604-605; RER-3, First Brattle Report, paras. 100-101; Bolivia’s Post-Hearing Brief, paras. 139, 141-143; Hearing Transcript, Day 8, 1646:16-172 (English). See also RER-5, Second Brattle Report, para. 125; DAG-3, National Instrument 43-101, June 24, 2011, Companion Policy 43-101 CP, section 2.3(1) in connection with the use of inferred and historical resources in the economic assessment.

<sup>1384</sup> Hearing Transcript, Day 6, 1107:12-14 (English); RPA-11, RPA notes from October 20, 2015 meeting with K. Dagdelen and T. Matthews, p. 7.

<sup>1385</sup> Bolivia’s Post-Hearing Brief, para. 144.

The Respondent asserts that, at any rate, the resulting value range is not reliable as its application on the mining assets used by RPA “*overestimates or underestimates the alleged ‘comparables’*.”<sup>1386</sup>

The Respondent concludes that the valuation is subjective (since the selection of comparables is an inherently subjective exercise), uncertain (given the use of a wide range of values – US\$ 13.8 million to US\$ 1,300 million) and dependent upon contingencies (for example, that the Metallurgical Process works).<sup>1387</sup>

- ii. Likewise, the Respondent considers that the Project’s valuation by industry analysts should be ruled out. The Respondent argues that (i) there were commercial ties amongst three out of the four analysts and SASC at the time of valuation;<sup>1388</sup> (ii) the valuations are based on the DCF method,<sup>1389</sup> which, as recognized by FTI itself,<sup>1390</sup> is not applicable to the Project;<sup>1391</sup> (iii) the drop in SASC’s stock value proves that the valuations are not relevant to determine the fair market value as “*the market itself did not consider them reliable*”;<sup>1392</sup> and (iv) the analysts did not consider important risks related to the Project, and made fundamental errors which FTI did not correct.<sup>1393</sup> The Respondent considers absurd the justification offered by FTI during the Hearing that its report is not based on the analysts’ DCF estimates but on their conclusions, as the conclusions are based on the DCF model.<sup>1394</sup> The Respondent concludes that the valuation is subjective<sup>1395</sup>, uncertain (given the wide range of

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<sup>1386</sup> Counter-Memorial, paras. 619-621; Respondent’s Rejoinder, paras. 636-639; RER-3, First Brattle Report, paras. 97, 117-118, section V; RER-5, Second Brattle Report, para. 161. See also Hearing Transcript, Day 9, 1908:19 – 1910:6 (Spanish).

<sup>1387</sup> Bolivia’s Post-Hearing Brief, para. 110.

<sup>1388</sup> Counter-Memorial, paras. 623-628; Respondent’s Rejoinder, paras. 650-651; Hearing Transcript, Day 1, 303:13-17, 304:8-23 (Spanish); RER-3, First Brattle Report, paras. 135-136; RER-5, Second Brattle Report, paras. 217-220; CER-4, Second FTI Report, paras. 6.25-6.27. See FTI-37, Redchip, “April 3, 2012 Report”, p. 10; BR-45, Redchip, Research Issues Research Updated on South American Silver, p. 2; FTI-15, Edison, “January 10, 2012 Report”, p. 1.

<sup>1389</sup> Bolivia’s Post-Hearing Brief, para. 115; Hearing Transcript, Day 8, 1434:2-3 (English).

<sup>1390</sup> Bolivia’s Post-Hearing Brief, para. 116; Hearing Transcript, Day 8, 1436:21 – 1437:2 (English).

<sup>1391</sup> Counter-Memorial, para. 630; Respondent’s Rejoinder, para. 644; Hearing Transcript, Day 1, 302:18-25 (Spanish), Day 9, 1903:10 – 1904:3 (Spanish); Bolivia’s Post-Hearing Brief, para. 116; R-241, M. Maher, C. Stickney and R. Weil, Managerial Accounting. *An Introduction to Concepts, Methods and Uses*, Thomson South-Western, 2008, p. 184; CER-4, Second FTI Report, para. 6.23 y 6.38; CER-1, First FTI Report, para. 8.33; CER-2, First RPA Report, p. 3-1.

<sup>1392</sup> Respondent’s Rejoinder, paras. 645-649, 652; RER-5, Second Brattle Report, para. 201

<sup>1393</sup> Counter-Memorial, para. 631; Respondent’s Rejoinder, paras. 651, 653; Hearing Transcript, Day 1, 303:18-24, 304:24 – 305:8 (Spanish); RER-3, First Brattle Report, paras. 140-147; R-222, Transcripts of conversation between FTI and Tom Pfister (Redchip), October 20, 2015, pp. 2, 15.

<sup>1394</sup> Bolivia’s Post-Hearing Brief, para. 117. For FTI’s explanation, see Hearing Transcript, Day 8, 1437:3-7 (English).

<sup>1395</sup> The Respondent cites the statement of Mr. Cooper during the hearing that “*they incorporate all kinds of assumptions that are personal to them*” (Hearing Transcript, Day 8, 1501:23 – 1502:1 (English)).

values between US\$ 117 million and US\$ 992 million) and dependent upon contingencies (for example, the DCF model premises that analysts use).<sup>1396</sup>

- iii. Regarding the valuation based on private placements, the Respondent admits that it does not share the deficiencies of being subjective, uncertain, and dependent on contingencies as with the previous models. However, it argues that “*various market indicators had a negative evolution between the date of such placements and the valuation date in July 2012*”, and therefore, the values in April and May 2012 should be excluded when assessing the fair market value of the Project, as they do not reflect the fall of various market indicators between April-May and July.<sup>1397</sup> The Respondent argues that the available evidence confirms that the fall of these indicators affected the value of SASC’s shares and, accordingly, the Project. Therefore, FTI’s valuation based on private placements should be discarded as it does not reflect this evolution.<sup>1398</sup>
- (b) The weighting given by FTI is arbitrary.<sup>1399</sup> The Respondent contends that the weighting given by FTI does not provide an objective method as it is impossible to prove that a hypothetical buyer of the Project would weigh the valuations used by FTI in the same way.<sup>1400</sup>
- (c) The Respondent further argues that the *Copper Mesa* award reveals that FTI’s position in this arbitration contradicts the one it adopted in the *Copper Mesa* case, where advised by FTI, the claimant proposed to value the mining concessions based on the cost approach to estimate fair market value.<sup>1401</sup> Moreover, the Respondent argues that, in the *Bear Creek* case, FTI recognized the relevance of the geographical differences in the value of mining properties and did not consider properties located in different countries to be comparable.<sup>1402</sup> In clear contradiction, in the present case, FTI gave a 50% weigh to the valuation (RPA) based upon 12 properties, 11 of which are located outside Bolivia.<sup>1403</sup> The

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<sup>1396</sup> Bolivia’s Post-Hearing Brief, para. 110.

<sup>1397</sup> Bolivia’s Post-Hearing Brief, paras. 110, 146; Counter-Memorial, para. 633; Respondent’s Rejoinder, paras. 655-656; Hearing Transcript, Day 1, 311:16 – 312:1 (Spanish); RER-3, First Brattle Report, para. 151; RER-5, Second Brattle Report, para. 237. Respondent refers to the 13% drop in the price of the main metal for the Project (silver), the 5% drop in the Toronto Stock Exchange index and the 23% drop of other junior mining companies that FTI considered comparable.

<sup>1398</sup> Bolivia’s Post-Hearing Brief, paras. 148-149.

<sup>1399</sup> Hearing Transcript, Day 1, 301:19 – 302:17 (Spanish).

<sup>1400</sup> Respondent’s Rejoinder, para. 628; RER-5, Second Brattle Report, para. 211.

<sup>1401</sup> Bolivia’s Post-Hearing Brief, para. 109; RLA-281, *Copper Mesa Mining Corporation v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-2, Award, March 15, 2016, para. 7.3, 7.21.

<sup>1402</sup> Bolivia’s Post-Hearing Brief, para. 125, referring to FTI’s statement (Hearing Transcript, Day 8, 1441:11-20 (English)).

<sup>1403</sup> Bolivia’s Post-Hearing Brief, para. 125, referring to RPA’s statement (Hearing Transcript, Day 6, 995:4-7 (English)).



Respondent argues that “[i]f RPA had considered the only ‘comparable’ property located in Bolivia (Pulacayo), the value of the Project –under the same economic premises of the PEA– would be US \$ 32,5 [sic].”<sup>1404</sup>

781. The Respondent argues that the arbitrariness of the fair market valuation for the Project performed by FTI is demonstrated in light of SASC’s share value since “according to FTI’s valuation, the Project would be worth 530% more than SASC itself”.<sup>1405</sup> The Respondent argues that, at the Respondent’s date of valuation, (i) SASC’s value in the stock exchange was US\$ 48.7 million and (ii) the Project value would range between US\$ 35.2 and US\$ 48.7 million (depending on the value assigned to the Escalones project, another asset owned by SASC).<sup>1406</sup> The Respondent argues that SAS did not question this calculation during the Hearing, nor that such valuation, being based on the publicly traded value, is objective, verifiable and gives a narrow range of values.<sup>1407</sup>
782. The Respondent argues that the CIMVal Rules consider the share value method (market capitalization) as a secondary method because most companies have more than one major project, which makes it difficult to assess what value to assign to each of the major projects.<sup>1408</sup> The Respondent submits that this is not the case with SASC.<sup>1409</sup>
783. The Respondent explains that since the enterprise value of SASC (determined by deducting debts and available cash from capital value) as of August 1, 2012 amounted to US\$ 13.5-14 million, the value of the Escalones project would range between US\$ 0, as a minimum, and US\$ 13.5 million, as a maximum.<sup>1410</sup> Based on the value FTI attributes to Escalones (US\$ 7.3), the Project would be worth, at a maximum, US\$ 41.4 million.
784. The Respondent argues that, in this case, only the share value properly reflects the risks of the Project,<sup>1411</sup> and there is no reason to think that the stock value of SASC does not adequately reflect

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<sup>1404</sup> Bolivia’s Post-Hearing Brief, para. 125; RER-3, First Brattle Report, Workpaper 6, p. E-7.

<sup>1405</sup> Respondent’s Rejoinder, paras. 658-667; RER-5, Second Brattle Report, paras. 20-25, 31, 34-35, Table 2, section II.D.

<sup>1406</sup> Respondent’s Rejoinder, paras. 665-668. See RER-5, Second Brattle Report, Table 2.

<sup>1407</sup> Bolivia’s Post-Hearing Brief, paras. 152, 159. See Brattle’s statement, Hearing Transcript, Day 8, 1558:16-23 (English).

<sup>1408</sup> Bolivia’s Post-Hearing Brief, para. 153; Hearing Transcript, Day 8, 1587:9-11 (English).

<sup>1409</sup> Bolivia’s Post-Hearing Brief, para. 153.

<sup>1410</sup> Respondent’s Rejoinder, paras. 660, 662; RER-5, Second Brattle Report, paras. 20-21, 31. See also Bolivia’s Post-Hearing Brief, para. 151.

<sup>1411</sup> Bolivia’s Post-Hearing Brief, section 4.5.2.

its enterprise value and thus the value of its assets.<sup>1412</sup> The Respondent contends that this value reflects all publicly available information and the relevant risks of its assets.<sup>1413</sup>

785. The Respondent further states that FTI, in weighting the private placements of SASC's shares in April and May 2012 at 25%, recognizes that SAS' share value is indicative of the Project fair market value.<sup>1414</sup> The Respondent further argues that: (i) at the time of the private placements, SASC had the cash balance necessary to move forward with the operations, therefore it had no urgency to get financing;<sup>1415</sup> (ii) the lack of urgency in connection with financing is demonstrated by the long time the company took to advertise and place the shares; (iii) to accept that these were "*compelled transactions*" would lead to the absurd conclusion of accepting that SASC was willing to take a loss higher than the amount obtained.<sup>1416</sup> The Respondent concludes that, if the shares traded at prices very similar to the stock market value, it is because the latter does reflect its fair market value.<sup>1417</sup>

786. Further, the Respondent argues that the deduction of the Protected Information value is imperative even if the share value is used as valuation method because "*if someone has taken the total fair market value of the asset, it should have been taken with information*",<sup>1418</sup> and regarding the patent,

*one thing is what happens with the ownership of the patent. But another thing is the license to use that patent. Why am I saying this? Its fair market value is based as a premise on the operation of the metallurgical process. No fair market value compensation can be expected as if the process worked and later say that whoever comes afterwards to develop this has no access to the same patent necessary to estimate the fair market value.*<sup>1419</sup>

787. The Respondent submits that FTI recognized at the Hearing that if Bolivia were ordered to compensate SAS due to the Reversion (*quod non*), the value of the Protected Information should be discounted from such compensation.<sup>1420</sup> The Respondent contends that neither SAS nor its

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<sup>1412</sup> Respondent's Rejoinder, para. 666; RER-5, Second Brattle Report, section II D. In response to FTI's statement at the hearing that SASC's private placements in April and May 2012 were performed at a value below their fair market value since the company was forced to obtain financing (FTI's statement at the hearing, Hearing Transcript, Day 8, 1457:4-12 (English)), see Hearing Transcript, Day 9, 1911:25 – 1913:11 (Spanish); Bolivia's Post-Hearing Brief, para. 154.

<sup>1413</sup> Respondent's Rejoinder, para. 663; RER-5, Second Brattle Report, para. 25. See also Hearing Transcript, Day 9, 1911:25 – 1913:11 (Spanish); Bolivia's Post-Hearing Brief, para. 160.

<sup>1414</sup> Bolivia's Post-Hearing Brief, para. 150.

<sup>1415</sup> Bolivia's Post-Hearing Brief, para. 155; see Brattle's statement, Hearing Transcript, Day 8, 1556:17 (English), 1643:3-4 (English).

<sup>1416</sup> Bolivia's Post-Hearing Brief, para. 155, related to the statement of FTI (Hearing Transcript, Day 8, 1459:12-18 (English)).

<sup>1417</sup> Bolivia's Post-Hearing Brief, para. 156.

<sup>1418</sup> Hearing Transcript, Day 9, 1913:12-22 (Spanish).

<sup>1419</sup> Hearing Transcript, Day 9, 1913:23 – 1914:8 (Spanish).

<sup>1420</sup> Bolivia's Post-Hearing Brief, para. 162; Hearing Transcript, Day 8, 1472:17-22 (English).

experts questioned (i) the calculation of the value of the Protected Information made by Brattle nor (ii) that there are third parties interested in acquiring such Information.<sup>1421</sup> The Respondent argues that SAS did not cross-examine Bolivia's witnesses on this regard either, and therefore if it is ordered to compensate SAS (*quod non*), such compensation should be reduced by US\$ 6.2 million.<sup>1422</sup>

788. At any rate, relying upon the decisions of other arbitral tribunals, the Respondent contends that SAS' conduct should be taken into consideration when establishing the compensation amount, to reflect its contributory negligence in the production of damages.<sup>1423</sup> Contrary to what the jurisprudence invoked by SAS may suggest, the Respondent clarifies that contributory negligence in this case is not focused on "*the obligations of investors regarding social communication*",<sup>1424</sup> but the violations of human and indigenous rights, the social conflict and the infringement of other laws of Bolivia attributable to SAS.<sup>1425</sup> Thus, the Respondent requests the amount of such compensation granted to the Claimant "*be reduced by, at least, 75%, considering that the actions and omissions of Claimant itself were the ones that contributed to the damage that it claims to have suffered.*"<sup>1426</sup>

## **6. Compensation for other violations of the Treaty**

789. The Respondent argues that "*SAS has not demonstrated why, in cases other than expropriation, compensation should be calculated based on the standard of [fair market value].*"<sup>1427</sup>

790. First, the Respondent argues that SAS' position is contrary to the Treaty, since Article 5(1) provides for the exclusive application of fair market value in cases of expropriation. Thus, the Respondent contends that, "[a]pplying this standard to cases other than expropriation would imply ignoring the will of the parties".<sup>1428</sup>

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<sup>1421</sup> Bolivia's Post-Hearing Brief, para. 162; Hearing Transcript, Day 8, 1550:2-7 (English).

<sup>1422</sup> Bolivia's Post-Hearing Brief, para. 162.

<sup>1423</sup> Counter-Memorial, paras. 728-736; Hearing Transcript, Day 1, 313:9 – 314:23 (Spanish); RLA-164, *MTD Equity Sdn. Bhd. and MTH Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, paras. 178, 242-243; RLA-166, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, October 5, 2012, paras. 678, 680, 687; RLA-161, *Iurii Bogdanov v. Republic of Moldova*, SCC Case No. V091/2012, Award, September 22, 2005, chap. 5.2; RLA-281, *Copper Mesa Mining Corporation v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-2, Award, March 15, 2016, paras. 6.97, 6.100.

<sup>1424</sup> Respondent's Rejoinder, paras. 704-705, 709, referring to CLA-162, *Abengoa S.A. and Cofides S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, April 18, 2013, para. 665.

<sup>1425</sup> Respondent's Rejoinder, paras. 707-708, 710-712; Hearing Transcript, Day 1, 314:24 – 316:9 (Spanish).

<sup>1426</sup> Counter-Memorial, para. 725; Hearing Transcript, Day 1, 316:10-15 (Spanish).

<sup>1427</sup> Respondent's Rejoinder, para. 680.

<sup>1428</sup> Counter-Memorial, para. 678; Respondent's Rejoinder, paras. 681-682.

791. Second, the Respondent argues that other arbitral tribunals have repeatedly confirmed that the fair market value standard is not applicable other than to expropriation.<sup>1429</sup> In this sense, the Respondent considers that the decisions invoked by SAS do not support its position, as (i) in the *Gold Reserve v. Venezuela* case, the application of the fair market value standard was justified by the existence of an agreement between the parties, but not “*for the loss of investment*,”<sup>1430</sup> and (ii) other cases establish that arbitral tribunals decline the application of the fair market value standard, even when the non-expropriation measures caused the investment to be “*economically unsustainable*.”<sup>1431</sup>
792. At any rate, based on the decisions of other arbitral tribunals, the Respondent argues that compensation for other Treaty violations requires proof of the specific damage caused by each alleged violation, as well as the causal link between the damage and the violation.<sup>1432</sup> However, the Respondent contends that SAS has not identified or provided an itemized valuation of the damages arising from the non-expropriation measures.<sup>1433</sup> Consequently, the Respondent alleges that, “*if the Tribunal concluded that Bolivia did not breach Article [5] of the Treaty, regarding expropriation, it must deny any compensation due to failure to produce evidence*”.<sup>1434</sup>

## 7. Interests

793. The Respondent argues that a commercial interest rate is preferable in this case, because (i) pursuant to article 411 of the Bolivian Civil Code, “*applying the statutory interest rate would overcompensate SAS in this case*”,<sup>1435</sup> and (ii) at any rate, SAS has not provided any argument to explain “*why the statutory interest rate is preferred over the commercial rate*.”<sup>1436</sup>

<sup>1429</sup> Counter-Memorial, paras. 679-681; RLA-150, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award of December 16, 2002, para. 194; CLA-76, *S.D. Myers, Inc. v. Canada*, UNCITRAL, Second partial award of October 21, 2002, para. 144; CLA-51, *PSEG Global, Inc. v. Turkey*, ICSID Case No. ARB/02/5, Award of January 19, 2007, paras. 305-308.

<sup>1430</sup> Respondent’s Rejoinder, para. 682, referring to RLA-127, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/01, Award of September 22, 2014, para. 674.

<sup>1431</sup> Respondent’s Rejoinder, para. 683, referring to RLA-150, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award of December 16, 2002, para. 188.

<sup>1432</sup> Counter-Memorial, paras. 685-688; Respondent’s Rejoinder, para. 687; RLA-125, *S. D. Myers, Inc. v. Canada*, Partial Award, November 13, 2000, paras. 315-317; RLA-134, *LG&E et al. v. Republic of Argentina*, ICSID Case No. ARB/02/1, Award, July 25, 2007, para. 87; RLA-150, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, para. 194; CLA-104, *BG Group Plc. v. Argentina*, UNCITRAL, Final Award, December 24, 2007, para. 428; RLA-141, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, para. 115.

<sup>1433</sup> Counter-Memorial, paras. 683-684, 688; Respondent’s Rejoinder, paras. 685-686; CER-1, First FTI Report, para. 2.2, section 2; CER-4, Second FTI Report, section 3.

<sup>1434</sup> Counter-Memorial, para. 689.

<sup>1435</sup> Counter-Memorial, paras. 693-694; Respondent’s Rejoinder, para. 689; RLA-49, Article 411 of Bolivia’s Civil Code; CER-1, First FTI Report, para. 12.5.

<sup>1436</sup> Counter-Memorial, para. 695; Respondent’s Rejoinder, para. 690.

794. The Respondent contends that the interest rate to apply should be the risk-free U.S. Treasury rate (0.21%). In the alternative, the Respondent argues that the commercial rate should be estimated based on Bolivia's issuance of 10-year sovereign bonds in October 2012, a date very close to the Respondent's Date of Valuation, and later add the results to the risk-free interest rate (resulting in an annual rate of 2.9%),<sup>1437</sup> for the following reasons: (i) the risk premium is a natural baseline to estimate the interests to be applied to the amounts owed by Bolivia;<sup>1438</sup> (ii) it is a method regularly used by arbitral tribunals;<sup>1439</sup> and (iii) "*the [commercial] rate obtained is even higher than the ones usually applied by arbitral tribunals (based on LIBOR),*"<sup>1440</sup>
795. The Respondent rejects compound interest as: (i) there is an express prohibition under Bolivian law regarding the capitalization of interest, and several arbitral tribunals have applied a simple rate whenever a national prohibition of this sort applies;<sup>1441</sup> and (ii) there is no constant jurisprudence establishing the principle of granting compound interests and, as a matter of fact, recent awards have favored simple interest.<sup>1442</sup>

### C. THE TRIBUNAL'S ANALYSIS

796. The Tribunal has found that the reversion of the Mining Concessions constitutes a direct expropriation pursuant to Article 5 of the Treaty. Likewise, it has found that Bolivia breached the obligation to provide compensation as required by said provision.
797. Regarding the expropriation, the original claim filed by the Claimant sought restitution and only in the event that this was not feasible, it requested the Tribunal to award compensation for the damages caused due to conduct of Bolivia which it considered to be contrary to international law.

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<sup>1437</sup> Counter-Memorial, paras. 697-707; Respondent's Rejoinder, paras. 691-698.

<sup>1438</sup> Counter-Memorial, para. 710.

<sup>1439</sup> Counter-Memorial, para. 711; Respondent's Rejoinder, para. 697; RLA-150, *Marvin Roy Feldman Karpa v. Claimant's Reply on Costs*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, para. 205.

<sup>1440</sup> Counter-Memorial, paras. 712-713; Respondent's Rejoinder, para. 697.

<sup>1441</sup> Counter-Memorial, paras. 717-721; Respondent's Rejoinder, para. 699; RLA-155, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, para. 457; RLA-157, *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, February 6, 2008, paras. 294-295; RLA-158, *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, September 23, 2003, para. 396.

<sup>1442</sup> Counter-Memorial, para. 716; Respondent's Rejoinder, para. 701; RLA-272, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award of April 8, 2013, para. 617; RLA-273, *Antoine Abou Lahoud y otros v. Democratic Republic of Congo*, ICSID Case No. ARB/10/4, Award of February 7, 2014, para. 633; RLA-159, United Nations International Law Commission, *Responsibility of States for internationally wrongful acts*, with commentaries, 2001, p. 108; RLA-155, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, para. 473.

However, the Claimant expressly abandoned its claim for restitution,<sup>1443</sup> and therefore the Tribunal will not address it.

798. Regarding compensation for expropriation, Article 5(1) of the Treaty provides that it shall be:

*just and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party, until the date of payment, shall be made without delay, be effectively realizable and be freely transferable.*

799. The Treaty provides that compensation shall amount to the market value of the investment expropriated, but does not prescribe a valuation method to estimate that value. Therefore, it is for the Tribunal to determine the appropriate valuation method to obtain the market value mentioned, taking account of the terms of the Treaty and the characteristics of the investment in question.

800. The Claimant considers that its investment consists of “*the investor’s shares in the local company as well as the assets of that local company,*”<sup>1444</sup> i.e., CMMK’s shares and assets. On this point, the Tribunal notes that, even if it controls 100% of CMMK, the Claimant has not established that said control affords it a direct right over the assets of the Company under the applicable laws, in particular the law of Bolivia. CMMK is the owner of the Mining Concessions and the assets, and SAS’ investment consists of the totality of CMMK’s shares. Consequently, for purposes of compensation, the valuation is based on the effect of the expropriation on the value of the shares that SAS indirectly owns in CMMK, taking into account that the Mining Concessions and the investment made in the Project by the Company are the only assets of CMMK that are established in the record.

801. The Claimant considers that the above-mentioned Article 5 of the Treaty applies only to lawful expropriation and, in the event of an unlawful expropriation, customary international law applies.<sup>1445</sup> However, the Claimant itself argues that “*while customary international law and the Treaty offer two different paths to determine the compensation owed to Claimant, that compensation would essentially be the same under both approaches since it would amount in both cases to the [fair market value] of the Project.*”<sup>1446</sup> The Respondent, in turn, argues that the

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<sup>1443</sup> Hearing Transcript, Day 1, 17:11-24, 117:9-11, 258:1-5 (English).

<sup>1444</sup> Statement of Claim and Memorial, para. 110.

<sup>1445</sup> Statement of Claim and Memorial, paras. 163-164.

<sup>1446</sup> Claimant’s Reply Memorial, para. 367.

standard of compensation under the Treaty applies regardless of the lawfulness or unlawfulness of the expropriation.<sup>1447</sup>

802. Additionally, the Parties differ in two substantial respects. On the one hand, they differ regarding the date of valuation for compensation. While the Claimant considers that the relevant date is July 6, 2012, the day immediately preceding the signature of the Memorandum of Agreement of July 7, 2012,<sup>1448</sup> the Respondent considers that, at the earliest, it should be July 9, 2012, as the expropriation was made public on July 10, 2012.<sup>1449</sup>
803. On the other hand, they differ as to the correct method to determine compensation. FTI, the Claimant's expert, calculates the compensation owed to SAS due to the expropriation as the fair market value of its 100% ownership interest in the Project as of the Claimant's Valuation Date.<sup>1450</sup> To calculate such compensation, FTI uses three sources of market-based information: (i) comparable transactions identified by RPA; (ii) analysts' reports, and (iii) private placement transactions involving SASC's shares in the period preceding the Claimant's Valuation Date.<sup>1451</sup>
804. In turn, Bolivia considers that if compensation is to be provided, it should be limited to the costs incurred by the Claimant in connection with the Project.<sup>1452</sup> If the Tribunal does not accept the cost-based assessment, and as a subsidiary valuation, the Respondent argues that the Project can only be reliably valued based on SASC's share value.<sup>1453</sup> Along these lines, in its first report, Brattle, the Respondent's expert, quantified the costs of investment in the Project<sup>1454</sup> and, in its second report, presented an alternative valuation for the Project based on the market value of SASC's shares at the Respondent's Valuation Date (July 9, 2012).<sup>1455</sup>
805. The Parties do not dispute that the appropriate valuation approach depends on the state of exploration or development of the relevant mineral property.<sup>1456</sup> Similarly, the Parties do not dispute that, based on the categories proposed by CIMVal, the Project would qualify as a "mineral

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<sup>1447</sup> See Counter-Memorial, paras. 512-513, 525.

<sup>1448</sup> Reply Memorial, para. 385.

<sup>1449</sup> Respondent's Rejoinder, paras. 668-674.

<sup>1450</sup> Statement of Claim and Memorial, para. 206.

<sup>1451</sup> Reply Memorial, paras. 417 and 418.

<sup>1452</sup> Counter-Memorial, para. 573.

<sup>1453</sup> Bolivia's Post-Hearing Brief, para. 80.

<sup>1454</sup> RER-3, First Brattle Report, para. 2.

<sup>1455</sup> RER-5, Second Brattle Report, para. 10.

<sup>1456</sup> CER-1, First FTI Report, para. 8.27.

resource property,”<sup>1457</sup> corresponding to those mineral properties that have “mineral resources” which have not been demonstrated to be economically viable in a feasibility study or a prefeasibility study.<sup>1458</sup>

806. According to CIMVal, “mineral resource properties” can be valued using a market approach and, in some cases, an income or cost-based approach.<sup>1459</sup> The experts for both Parties agree that an income approach – in particular, the discounted cash flow approach – is not appropriate.<sup>1460</sup> The Claimant’s experts advocate for a market approach and argue that a cost-based approach is not appropriate.<sup>1461</sup> In turn, Bolivia’s experts argue that the methods that FTI uses to arrive at its estimate of the Project’s fair market value are unreliable and, based on the instructions received, they present the calculation of the costs invested in the Project.<sup>1462</sup>
807. The Tribunal shall first analyze the stage of development of the Project as of July 2012 and, subsequently proceed to examine the valuation methods presented by the damages experts for both Parties, and to establish the criteria based on which compensation is to be paid to the Claimant.

### **1. The Project development stage at the date of expropriation**

808. It is not contested that a mining project has to complete several stages before reaching the production phase. The experts for both Parties agree that a mineral property may be categorized as one of four types, according to its level of progress: (i) exploration; (ii) mineral resources; (iii) development; and (iv) production.<sup>1463</sup>
809. To advance to the next production stage, several studies have to be conducted to determine whether the continuation of the Project is warranted. In order of increasing certainty and accuracy

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<sup>1457</sup> According to CIMVal, Mineral Properties can be categorized as the following types, based on their level of development: (i) exploration properties; (ii) mineral resource properties; (iii) development properties, and (iv) production properties. (FT-27, p. 21).

<sup>1458</sup> CER-1, First FTI Report, para. 8.30; RER-3, First Brattle Report, para. 31. The Tribunal notes that, in their respective expert reports, the experts for both Parties have referred to the “Standards and Guidelines for Valuation of Mineral Properties” of the Special Committee of the Canadian Institute of Mining, Metallurgy and Petroleum on Valuation of Mineral Properties (“CIMVal”), introduced in the arbitration as Exhibit FTI-27, in connection with the standards applicable to the valuation of mineral properties. Regarding this topic, the Tribunal will refer to the standards but they will not be considered binding.

<sup>1459</sup> CER-1, First FTI Report, para. 8.29, referring to Exhibit FTI-27, p. 22.

<sup>1460</sup> Statement of Claim and Memorial, para. 207; CER-2, First RPA Report, p. 3-1; RER-3, First Brattle Report, para. 138.

<sup>1461</sup> CER-1, First FTI Report, para. 8.32 and para. 8.36; CER-2, First RPA Report, pp. 3-1, 3-2.

<sup>1462</sup> See RER-3, First Brattle Report, paras. 14-15 and 25.

<sup>1463</sup> These categories are taken from CIMVal definitions (See Exhibit FTI-27). CER-1, First FTI Report, para. 8.28; CER-2, First RPA Report, p. 3-1; RER-3, First Brattle Report, para. 31, footnote 14. Dr. Dagdelen, Respondent’s expert, divides the mining life cycle into the following categories: (i) exploration; (ii) evaluation and design; (iii) construction; (iv) commissioning and ramp up; (v) production; (vi) mine closure, and (vi) reclamation (RER-2, First Dagdelen Report, para. 12).



regarding the feasibility of the project, these studies are categorized as: (i) conceptual study or Preliminary Economic Assessment; (ii) prefeasibility; and (iii) feasibility.<sup>1464</sup> Only after each of these studies is completed, a decision on production can be made and financing sought.<sup>1465</sup> Additionally, in parallel and as a requirement to obtain financing, substantial work has to be conducted regarding environmental and social issues, and a series of permits and licenses have to be obtained.<sup>1466</sup>

810. In the present case, the experts from FTI, RPA and Brattle agree that the Project could be categorized as a “mineral resource property” since a PEA had been completed and the existence of mineral resources had been established.<sup>1467</sup>
811. The Claimant and its experts noted in their written submission that, in addition to completing a PEA, SAS had started to work on a prefeasibility study.<sup>1468</sup> However, the Tribunal finds no support in the record that such studies were underway at the time the Reversion occurred and, much less, that they had been completed. In fact, RPA confirmed during the Hearing that the Project did not have a feasibility or a prefeasibility study necessary to demonstrate economic feasibility.<sup>1469</sup> Therefore, the Tribunal concludes that, at the time of the Reversion, the Project did not have any completed studies aside from the PEA 2011.
812. It is uncontested that the PEA is the first stage of economic evaluation for a mining project.<sup>1470</sup> As Dr. Dagdelen explains, the PEA “*is a first level study and the preliminary evaluation of the mining Project. The principal parameters for a conceptual study are mostly assumed and/or factored. Accordingly, the level of accuracy is low.*”<sup>1471</sup> The purpose of a PEA is to determine if a mining project demonstrates potential to continue investing in it and advancing to a feasibility study.<sup>1472</sup>
813. Dr. Dagdelen also notes that, as no engineering work is performed at this stage, the PEA is a highly speculative study that cannot be used to determine the viability of a mining project or its

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<sup>1464</sup> RER-2, First Dagdelen Report, para. 27.

<sup>1465</sup> See, for example, Hearing Transcript, Day 6, 1112:21-1113:4 (English).

<sup>1466</sup> See RER-2, First Dagdelen Report, para. 30; Hearing Transcript, Day 6, 1113:5-9 (English).

<sup>1467</sup> CER-1, First FTI Report, para. 8.30; CER-2, First RPA Report, p. 3-1; RER-3, First Brattle Report, para. 31.

<sup>1468</sup> See, for example, SAS’ Reply Memorial, para. 25; CER-1, First FTI Report, para. 8.30.

<sup>1469</sup> Hearing Transcript, Day 6, 969:21-970:10 (English).

<sup>1470</sup> In fact, this is expressly recognized by RPA, Respondent’s expert. See Hearing Transcript, Day 6, 972:20-973:2, 1112:11-13 (English).

<sup>1471</sup> RER-2, First Dagdelen Report, para. 34.

<sup>1472</sup> RER-2, First Dagdelen Report, paras. 34, 46; Hearing Transcript, Day 6, 1112:21-23 (English).

value.<sup>1473</sup> Although RPA asserts that projects at this stage are the subject of transactions and have a value, it agrees that at the PEA level it is not possible to demonstrate the economic viability of a mining project.<sup>1474</sup> In particular, the expert for the Claimant confirmed that, at this stage, the economic viability of the Project had not been demonstrated and that there were no guarantees that it would be economically viable at any point.<sup>1475</sup>

814. In sum, whether the PEA is qualified or not as speculative, the experts agree, and the Tribunal finds proven, that the Project had barely progressed to the completion of a PEA which, as noted, is a preliminary study – a first level study for the economic evaluation of a mining project – based mainly on assumptions, which simply indicates whether further exploration should be pursued, without offering any certainty whatsoever as to the economic viability of the project.
815. Given this state of affairs, even accepting that the PEA 2011 showed great potential for the Project – as argued by SAS in the present arbitration – the fact is that given the stage of progress in which the Project was in at the time of the Reversion, there was no certainty that such potential would be realized. In fact, SASC acknowledged as much in a May 2012 communication, wherein it also mentioned that it expected to undertake between 120,000 and 150,000 additional meters of drilling – *i.e.* approximately three times more drilling than that undertaken by that point – and that substantial further investments in technical, environmental, social and feasibility studies would be required over the next two to three years before project financing could be completed and development assured.<sup>1476</sup>
816. On the other hand, it is undisputed that, at the time of the Reversion, the Project had mineral resources but no reserves.<sup>1477</sup> The Tribunal understands that only the portion of the resources categorized as reserves can be economically extracted.<sup>1478</sup> On the contrary, and as stated in the

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<sup>1473</sup> RER-2, First Dagdelen Report, para. 46.

<sup>1474</sup> Hearing Transcript, Day 6, 1120:7-9, 1120:13-19 (English).

<sup>1475</sup> Hearing Transcript, Day 6, 1121:1-4 (English).

<sup>1476</sup> R-299, Letter from Phillip Brodie-Hall to Alexandra Laverdure, May 31, 2012, p. 2. (“Clearly, we have a project with potential but that potential is a long way from being realized. We expect to have to undertake between 120,000 and 150,000 metres of additional diamond drilling and will be required to make substantial additional investments in technical, environmental, social and feasibility studies over the next 2-3 years before the project financing can be completed and development assured.”)

<sup>1477</sup> This was expressly recognized by RPA, Claimant’s expert, during the Hearing. (See Hearing Transcript, Day 6, 933:8-9 (English)). See also C-14, Preliminary Economic Assessment Update Technical Report for the Malku Khota Project, May 10, 2011, p. 14. (“No reserve estimate has been carried out for the PEA because the extent of mineralization is not considered sufficiently defined at this stage to create a reserve. This PEA is preliminary in nature and includes inferred mineral resources that are considered too speculative geologically to have the economic considerations applied to them that would enable them to be categorized as mineral reserves and there is no certainty that the preliminary assessment will be realized. Mineral resources that are not mineral reserves do not have economic viability.”)

<sup>1478</sup> RER-3, First Brattle Report, para. 33 (“Reserves are the portion of the resource base that can be mined economically, after taking into account geological structure, geophysical elements, mine plan, metallurgical recoveries, treatment and refining

PEA 2011 text, mineral resources that are not mineral reserves have no demonstrated economic viability.<sup>1479</sup>

817. Similarly, it is undisputed that most of the resources identified in the PEA 2011 were categorized as inferred resources.<sup>1480</sup> Based on geological certainty and estimation accuracy, the mineral resources are classified in decreasing order as either measured, indicated, or inferred.<sup>1481</sup> Inferred resources have a lower level of geological confidence and, therefore, are not relevant for the determination of the existence of mineral reserves.<sup>1482</sup>
818. However, the Parties and their experts dispute if the inferred resources may or may not be taken in consideration to value the Project. According to Dr. Dagdelen, since inferred resources cannot be used in determining the size of the mineable deposit, they do not and cannot contribute to the valuation of a mining property.<sup>1483</sup> RPA asserts that the premise that the inferred resources cannot be used for the valuation of the mineral properties is false and that transactions of mineral properties in the early stages take place in exchange for the value agreed between the Parties for the inferred mineral resources.<sup>1484</sup>
819. The Tribunal does not ignore that early stage mineral properties may be the object of market transactions and that the Parties to a market transaction may agree a value for the inferred resources. However, it is not established that the valuation criteria employed by the Claimant have been employed to value market transactions of a mineral property with the characteristics of the Project and with such a high percentage of inferred resources and may be valued for market effects as the Claimant proposes.
820. Finally, the Tribunal finds that, at the date of the Reversion, there was no certainty that the Metallurgical Process could be used to economically extract Project metals. Even though it is true that SASC had performed some testing of the Metallurgical Process and that its individual components had been tested, the Claimant's own experts recognize that at the time of Reversion

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*logistics, metals prices, and mining costs.”). See also R-125, p. 5 (“A Mineral Reserve is the economically mineable part of a Measured or Indicated Mineral Resource demonstrated by at least a Preliminary Feasibility Study. [...]”);*

<sup>1479</sup> C-14, Preliminary Economic Assessment Update Technical Report for the Malku Khota Project, May 10, 2011, p. 14.

<sup>1480</sup> The Tribunal observes that, in accordance with the PEA 2011, inferred resources ranged between 55% and 64% of the total resources (CER-2, First RPA Report, p. 9-4). Likewise, it notes that RPA reclassified some inferred resources as “exploration potential” (CER-2, First RPA Report, p. 1-2). In turn, Dr. Dagdelen indicated that the PEA 2011 overestimated indicated resources and underestimated inferred resources (RER-2, First Dagdelen Report, para. 80). Pursuant to the observations by RPA and Dr. Dagdelen, the Tribunal understands that the percentage of resources that need to be classified as inferred may be even higher than the one mentioned in the PEA 2011.

<sup>1481</sup> RER-2, First Dagdelen Report, para. 15.

<sup>1482</sup> See RER-2, First Dagdelen Report, para. 19.

<sup>1483</sup> RER-2, First Dagdelen Report, para. 25.

<sup>1484</sup> CER-5, Second RPA Report, pp. 1-4; 3-15; 5-1; 5-13 - 5-15.

(i) the components of the Metallurgical Process had not been combined sequentially in a commercial application;<sup>1485</sup> (ii) the Metallurgical Process had not been tested at a pilot plant;<sup>1486</sup> and (iii) it had not been tested completely on the Project minerals, but on synthetic samples.<sup>1487</sup>

821. Considering the novelty and uncertainty of the Metallurgical Process, on the one hand, and the characteristics of the metal mixture in the Project, on the other hand, the Tribunal concludes that, at the time of Reversion, there was no certainty that the Metallurgical Process could work, and, if it worked, what the recovery level of metals or the cost of the process would be.
822. Neither the Claimant nor its experts dispute that the impossibility to use the Metallurgical Process to economically extract the Project's metals – in particular, indium and gallium – would gravely affect the technical and economic viability of the Project and, therefore, its value. The lack of certainty regarding the Metallurgical Process impacts on the reliability of the analysis conducted by RPA which, as indicated below, assumes that the Metallurgical Process would work with certainty.<sup>1488</sup>
823. In sum, the Tribunal finds that, at the time of Reversion, (i) the Project was not at an advanced stage since it only had the PEA 2011 and had not conducted a prefeasibility or feasibility study; (ii) it did not have mineral reserves, but merely resources, most of them inferred; and (iii) there was no certainty that the metals could be economically extracted through the Metallurgical Process. The Tribunal considers that the Project's state of progress cast serious doubt as to its economic viability and, based on the reasons elaborated below, they preclude acceptance of the valuation presented by the Claimant.

## **2. The valuation methods presented by the Parties**

824. As a starting point to decide on the determination of compensation, the Tribunal notes that an accepted principle for assigning the burden of proof is that the party which alleges damage should establish its quantum. The Respondent is correct that the damage needs to be certain although the Tribunal notes that mathematical or absolute certainty is not required. In particular, when it comes to estimating future damages, it is impossible to achieve total certainty and what the Tribunal requires is evidence that establishes with a particular degree of certainty that, on the one hand, the variables on which a calculation is based have a solid foundation and a reasonable probability of

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<sup>1485</sup> CER-2, First RPA Report, p. 10-5.

<sup>1486</sup> Hearing Transcript, Day 7, 1263:18-1263:7 (English).

<sup>1487</sup> Hearing Transcript, Day 7, 1287:21-1288:23 (English).

<sup>1488</sup> See *infra* para. 848.

occurrence, and, on the other hand, that the combination of such variables yields a high level of probability that the result would actually correspond to the damage suffered by the investor.

825. The foregoing rules out calculations based on premises or variables that do not produce a reliable degree of certainty, and, obviously, variables that are merely speculative, that yield unpredictable results, or that ultimately do not convince the adjudicator that, absent the State's conduct in question, it is highly probable that the investor would have received the amount it alleges to have suffered in damages.
826. The case before this Tribunal is about a Project that is not in the production stage and for which it is not possible, as accepted by both Parties, to estimate future cash flows. Bolivia considers that the investment is worth at most what the Claimant invested in the Project and the Claimant considers that its value is substantially higher. It is for the Claimant to establish this higher value with a degree of certainty that allows the Tribunal to conclude that, absent the State's conduct at issue, it is highly probable that the investor would have received the amount it claims.
827. The Tribunal has already noted that Bolivia breached the Treaty given its failure to provide the Claimant the compensation it owed for the expropriation. Since the Respondent has not paid any compensation to the Claimant, it is for the Tribunal to establish the amount of the compensation for the expropriation, which is the subject of fundamental disagreements between the Parties.
828. Bolivia considered, in the Reversion Decree, that the value of compensation amounted to the value of the investments made in the Project. This same position was adopted by the Respondent in its Counter-Memorial.<sup>1489</sup> However, in its Rejoinder, Bolivia puts forward two new theories that would lead to no compensation – based on the exercise of police powers or a state of necessity – theories which the Tribunal already rejected. It also put forward a new theory for calculating compensation on the basis of the value of SASC's shares at the Respondent's Date of Valuation (July 9, 2012).<sup>1490</sup>
829. The Claimant, in turn, presented a valuation based on the variables analyzed below starting at paragraph 832. Additionally, the Claimant complains in its Rejoinder that the Respondent criticizes the opinions presented by FTI's and RPA's experts, but it does not offer any alternative valuation of the Project or calculation of the damages suffered by SAS.<sup>1491</sup>

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<sup>1489</sup> Counter-Memorial, para. 573.

<sup>1490</sup> Bolivia's Post-Hearing Brief, § 4.5.

<sup>1491</sup> Claimant's Reply Memorial, para. 381.

830. Regarding the absence of an alternative valuation, the Tribunal observes that since the issuance of the Reversion Decree, Bolivia has argued that the only appropriate compensation would be the one based on the Project's costs. Regarding the valuation based on the value of SASC's shares, as already noted, said valuation was only presented by Bolivia in its Rejoinder and was extensively discussed during the Hearing, but Bolivia clearly stated that this valuation approach was put forward to show that the compensation calculated by the Claimant is "*clearly exaggerated and must be discarded*,"<sup>1492</sup> adding in its Post-Hearing Brief that this method of compensation would only apply if the Tribunal were to consider that compensation based on the Project's costs would not apply.<sup>1493</sup>
831. The Tribunal will first analyze the compensation presented by the Claimant, followed by the compensation based on the costs incurred in the Project and, if this were inapplicable, the valuation based on SASC's share value as presented by Bolivia.
832. In its valuation of the compensation, FTI, expert for the Claimant, noted that to determine the fair market value of the Project it applied a market based approach and, to that end, used information from three sources: (i) information from transactions involving comparable mineral properties as set out in the RPA Report; (ii) reports by industry analyst, and (iii) information on private placement transactions for SASC's shares in the months leading up to the Claimant's Date of Valuation.<sup>1494</sup>
833. FTI assigns a percentage to each of the three sources of market information as part of the weighting based on their strengths and shortcomings it attributes to each source. Thus, FTI assigns 50% weight to transactions that involved comparable mineral properties, 25% to market analysts; and 25% to the data from private placement transactions for SASC's shares.<sup>1495</sup> Based on this percentage allocation, FTI establishes an average of the three sources to determine the fair market value of the shares that SAS holds indirectly in CMMK.
834. The Tribunal considers that the valuation method that FTI uses is not a convincing estimation of fair market value for the reasons presented in the following paragraphs.
835. In fact, there is no clear and convincing explanation as to the reasons that lead FTI to assign the specific weighting percentages to each of the sources used to estimate the average of the three variables. On the contrary, the evidence suggests that the assignment of a 50% weighting to

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<sup>1492</sup> Respondent's Rejoinder, para. 667.

<sup>1493</sup> Bolivia's Post-Hearing Brief, § 4.5.

<sup>1494</sup> CER-1, First FTI Report, para. 8.10.

<sup>1495</sup> CER-4, Second FTI Report, para. 3.6.

comparable operations and 25% to the analyst reports and private placements accounts more for a discretionary assignment of percentages than a scientifically or financially based determination. At the Hearing, the experts for both Parties agreed that the allocation of percentages was subjective.<sup>1496</sup>

836. In addition, it involves an exercise of weighting sources that is highly sensitive to changes to any of the percentages assigned and thus requires, on the one hand, a detailed analysis of the reasons underlying the respective percentage attributed to each source and, on the other hand, an analysis of the sensitivities in the potential adjustments made to each percentage. As the Tribunal has already noted, the experts agree that the assignment of percentages is subjective, and it is dependent on the party performing the valuation. In the opinion of the Tribunal, that would require a detailed and convincing explanation of the reasons underlying the assignment of percentages, and the elements that would introduce an increase or decrease for each percentage, as well as the impact that the variations would have on the fair market value estimated by the Claimant's experts. The report presented by FTI does not fully or convincingly explain the reasons behind a 50% assignment to one of the sources and a 25% to each of the other two.
837. In the opinion of the Tribunal, the foregoing is sufficient to discard the valuation presented by the Claimant. However, given that the Parties have discussed each of the sources taken into account by FTI to calculate the fair market value, the Tribunal will refer next to each of these sources.
838. Regarding the first source mentioned by the Claimant, i.e. the information on transactions involving comparable mining properties, the Tribunal observes that the calculations performed by FTI are based on the comparability analysis performed by RPA, also the Claimant's expert. However, such comparability analysis by RPA does not support a clear conclusion that the mining properties that RPA took into account for its analysis are comparable to the Project.
839. The Parties' experts agree that the Project is unique with respect to the mineral composition of the deposit and that it is difficult to find transactions on comparable projects.<sup>1497</sup> RPA, the Claimant's expert, is clear when asserting that:

*there are no truly comparable properties, however, if a number of transacted properties with similar attributes can be found, they can be analyzed to develop a range of values. RPA agrees with the Brattle Report in that there are differences between the comparable transactions used and the MK property, but considers that*

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<sup>1496</sup> See Hearing Transcript, Day 8, 1363:11-15, 1547:15-19 (English).

<sup>1497</sup> CER-2, First RPA Report, p. 3-3; CER-5, Second RPA Report, pp. 6-8, 6-9. Hearing Transcript, Day 8, 1412:5-7, 1425:20-1428:21 (English) (FTI acknowledges that the analyst asserted that the Project had very specific characteristics and that basically there were no comparables).

*the properties selected are sufficiently similar to support a comparable transactions analysis to determine an appropriate range of values to apply to the MK property.*<sup>1498</sup>

840. Witness Cooper<sup>1499</sup> and the analysts<sup>1500</sup> also share the opinion that Malku Khota is a unique project. Moreover, the same analysts – whose reports FTI uses as a source – considered the possibility of conducting an analysis based on comparable transactions, and discarded it,<sup>1501</sup> opting instead for a discounted cash flow analysis.<sup>1502</sup>
841. The comparative analysis RPA performed, which is summarized at Table 6-1 of its Second Report, includes the following comparability factors: (a) location; (b) metal content; (c) access; (d) stage of development; (e) geological setting; (f) deposit type; (g) country ranking.<sup>1503</sup>
842. In its Second Report, RPA notes that, instead of adjusting the value of each comparable transaction to simulate the Project value, it has researched “*a number of market transactions which are generally comparable to the MK Project in terms of the comparability factors listed in Table 6-1*”<sup>1504</sup> and mentioned at paragraph 841 above.
843. The Tribunal finds that, given the unique characteristics of the deposit, which is not contested by the Parties, a comparability analysis cannot be performed on the basis of a number of “generally comparable”<sup>1505</sup> properties, and excluding factors that even one of the Claimant’s own experts considers relevant to such analysis.<sup>1506</sup> However, even if the comparison factors proposed by RPA constituted all of the relevant factors to consider, the Tribunal finds that some of the factors proposed have only been partially analyzed and others yield ranges so broad or lead to results that are so uncertain that they cast serious doubt on the result and validity of the comparison.
844. Regarding the location of the projects, RPA proposes as comparable transactions projects located from Mexico to Chile, and for comparison purposes, it notes that these are projects located in the Cordillera Central and that they result in a significant level of geological and metallurgical

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<sup>1498</sup> CER-5, Second RPA Report, p. 6-9.

<sup>1499</sup> CER-3, Cooper Report, para. 26.

<sup>1500</sup> Exhibits BR-98 and BR-99 corresponding to the analysts’ notes, taken by FTI during conversations with them.

<sup>1501</sup> Hearing Transcript, Day 8, 1412:5-7, 1425:20-1428:21 (English).

<sup>1502</sup> CER-1, First FTI Report, para. 9.18; 9.25; 9.34; 9.35.

<sup>1503</sup> CER-5, Second RPA Report, p. 6-11.

<sup>1504</sup> CER-5, Second RPA Report, p. 6-11.

<sup>1505</sup> CER-5, Second RPA Report, p. 6-11.

<sup>1506</sup> Dr. Roscoe, one of the experts of RPA, ascertains as factors to take into consideration for comparability purposes political jurisdiction, access, infrastructure, geological setting, mineralization type, potential to increase mineral resources, location in “hot” areas with new mineral discoveries, activity in neighboring properties, and environmental, social or political issues that are potential liabilities. (See Roscoe, W.E., 2012, Metal Transaction Ratio Analysis – A Market Approach for Valuation of Non-Producing Properties with Mineral Resources: Proceedings of VALMIN Seminar Series, October 18, 2011, Perth & April 17, 2012, Brisbane, Australasian Institute of Mining and Metallurgy, p. 86 – Document attached to the Second RPA Report [CER-5]).



comparability.<sup>1507</sup> The Tribunal agrees with the Claimant's expert that the similarities within the geological and metallurgical aspects of a project can make it comparable to projects with similar geological and metallurgical characteristics. However, it also agrees with the comment made by Brattle, Bolivia's expert, to the effect that the different location of a project affects not only the geological and metallurgical aspects but also other aspects that impact the valuation, including climate conditions, infrastructure availability, workforce, tax treatment, investment conditions, tax burden, and social and political risks.<sup>1508</sup> None of these factors are discussed by the Claimant's expert to explain the comparability of the Project to projects located in Mexico, Guatemala, Peru, Argentina, and Chile.

845. However, even assuming that a comparison of the geological and metallurgical aspects would suffice, the Tribunal finds enough differences in the stage of development of what RPA considers comparable projects to cast doubt on their comparability. In fact, (a) eleven of the projects that RPA deems comparable are in the advanced exploration stage, without any evidence of a PEA comparable to the Project; (b) two have feasibility studies; and (c) one is in the exploitation stage.<sup>1509</sup> Only Malku Khota appears with a PEA. It has been established, and the Parties do not seem to dispute that the exploration stage precedes the stage where a PEA has been produced and this, in turn, precedes and is subject to a higher degree of uncertainty than a project with a feasibility study.<sup>1510</sup> The Parties dispute whether or not a project with a PEA is in an advanced stage of exploration that would reduce the uncertainty on the deposit content and the viability of its exploitation.<sup>1511</sup> RPA, the Claimant's expert, does not convincingly explain the level of development for the eleven projects that it categorizes as projects in the advanced stage of exploration, nor does it establish that they have a PEA comparable to the Project's, or explain how that level of development compares to a project that already had two PEAs, such as the Malku Khota Project.

846. Similarly, the metal combination that the Claimant alleges is contained in the Project and the metal combination in the comparable projects cast serious doubts as to the comparability of the projects. Even if all of the projects presented as comparable contain silver, as Malku Khota does, the Tribunal finds two substantial differences that, again, add uncertainty to the comparison. On the one hand, Malku Khota, contrary to the other projects listed by RPA, seems to have indium

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<sup>1507</sup> CER-5, Second RPA Report, p. 6-11.

<sup>1508</sup> RER-5, Second Brattle Report, para. 109.

<sup>1509</sup> CER-5, Second RPA Report, p. 6-10.

<sup>1510</sup> CER-1, First FTI Report, paras. 8.28-8.30; CER-2, First RPA Report, p. 3-1; RER-3, First Brattle Report, para. 31.

<sup>1511</sup> See CER-1, First FTI Report, paras. 8.30-8.36; CER-2, First RPA Report, p. 3-1; RER-3, First Brattle Report, paras. 31-41.

and gallium which contribute to the fair market value estimated by FTI.<sup>1512</sup> However, the extraction of indium and gallium depends on novel technology, which has not been tested and, if it were to fail, it could result in higher operational costs as compared to the costs of the projects considered comparable but for indium and gallium. The PEA 2011 itself, prepared at CMMK's request, includes an alternative plan in case the Metallurgical Process option – the untested technology – is not viable,<sup>1513</sup> an alternative plan that is not taken into account for the purposes of the comparison and that would affect RPA's comparison. On the other hand, half of the projects analyzed as comparable have gold, a metal that is not present in Malku Khota and that, according to the Parties' experts themselves, changes the cost composition of the projects, although the experts disagree on the effect on such composition.<sup>1514</sup>

847. RPA, the Claimant's expert, was extensively examined at the Hearing on the comparables method used and the answers cast similar doubts as to the comparability of the Project with the other projects selected.
848. In fact, RPA admitted to not calculating in particular the "metallurgical risk" or the value differential if the Project did not have indium and gallium, which are not present in the projects selected for the comparison.<sup>1515</sup> Similarly, it accepted that its model did not consider the economics of using "cyanide leaching" (the conventional process) to extract the metals,<sup>1516</sup> and that it did not review the economics of the PEA 2011 if cyanide leaching were applied.<sup>1517</sup> Additionally, although RPA asserted that the "country risk" which it estimated included "social risk", this does not appear in their report,<sup>1518</sup> which is why the Tribunal concludes that RPA did not take specific account of social risk. In addition, RPA's model assumes that 100% of what is characterized as resource is mineable,<sup>1519</sup> which seems to run counter to what the Parties' experts themselves have accepted regarding the uncertainty of a project without a prefeasibility study.
849. On the other hand, FTI, the Claimant's expert, notes that the analysts considered and discarded the *comparables approach* – the method adopted by RPA – and opted for a discounted cash flow valuation, a method that FTI discarded.<sup>1520</sup> That is, the analysts who prepared one of the variables

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<sup>1512</sup> CER-5, Second RPA Report, p. 6-13, Table 6-2.

<sup>1513</sup> C-14, PEA 2011, sections 1.4, 1.8.

<sup>1514</sup> RER-5, Second Brattle Report, paras. 115-117.

<sup>1515</sup> Hearing Transcript, Day 6, 1001:16-1002:6 (English).

<sup>1516</sup> Hearing Transcript, Day 6, 1008:7-11 (English).

<sup>1517</sup> Hearing Transcript, Day 6, 1010:21-1011:5 (English).

<sup>1518</sup> Hearing Transcript, Day 6, 1016:14-25, 1013:11-14 (English).

<sup>1519</sup> Hearing Transcript, Day 6, 1095:14-19 (English).

<sup>1520</sup> Hearing Transcript, Day 8, 1381:16-21, 1398:19-21, 1404:3-10, 1405:7-11 (English).

used by FTI applied a valuation method that FTI discarded as not viable and, in spite of that, FTI assigned a 25% specific weighting to that valuation.

850. Finally, it is undisputed that, for a mining project to be economically viable, the metals at issue not only need to exist, but must also be economically mineable. A very elementary financial exercise shows that if the metal exists in the deposit, but the extraction cost exceeds the potential sale price on the market, the project would not be economically viable. This means that a comparables exercise should take into consideration, as accurately as possible, the factors that affect the costs, including, *inter alia*, the location and depth of the deposit, the minerals surrounding the deposit, the geological specifications of the location, the conditions of the country, and a full analysis of access. The comparison suggested by RPA does not analyze these aspects at a sufficiently detailed level to be convincing that the operation costs of the projects considered comparable and their economic viability, are comparable to those of Malku Khota.
851. FTI assigns the valuation performed by the analysts, one of the sources that FTI identifies, a weight of 25% in the valuation for compensation. As the Tribunal has already noted at paragraph 835, there is no convincing explanation for how and why these percentages were assigned. However, in addition, in the case of the analysts there are further issues that seriously call into question the consistency and objectivity of the methodology used.
852. In fact, on the one hand, the analysts valued the Project with the discounted cash flow method, a method that FTI as the Claimant's expert considers inappropriate for the valuation of Malku Khota.<sup>1521</sup> FTI explains that the analysts' role is different from the role of damage experts in an arbitration,<sup>1522</sup> but, it fails to satisfactorily explain the reasons for giving a specific 25% weighting in a calculation performed through a method that, according to FTI itself, is not appropriate.
853. Nonetheless, the Tribunal also notes the lack of a validation or verification of the estimates provided by the analysts, who differ substantially in their valuations for Malku Khota, ranging between US\$ 195.9 million (Byron) and US\$ 922.2 million (Edison).<sup>1523</sup> This difference, additionally, is due to the analysts' personal views, as recognized by the expert Cooper.<sup>1524</sup>

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<sup>1521</sup> CER-4, Second FTI Report, para. 6.38.

<sup>1522</sup> CER-4, Second FTI Report, para. 6.40.

<sup>1523</sup> See Hearing Transcript, Day 8, 1403:12-24, 1406:22-24 (English).

<sup>1524</sup> Hearing Transcript, Day 8, 1501:23-1502:1 (English).

854. The analysts' models, based on a discounted cash flow model, were also not the object of due diligence by the expert Cooper<sup>1525</sup> and were accepted in spite of the fact that none of the experts consider that a discounted cash flow valuation is appropriate for the current stage of the Project.
855. The circumstances mentioned result in an extremely high uncertainty regarding the analysts' estimate, which prevents a valuer from having any degree of certainty over the value of Malku Khota.
856. Regarding private placements, to which FTI assigns a 25% specific weighting in the valuation, these are placements from April/May 2012 and the Parties' experts agreed that between the dates of the placements and the date the expropriation was made public – July 2012 – circumstances that affected the value of the Company's shares, including a 13% reduction in the silver spot price that is, according to both Parties, the most prevalent metal in Malku Khota.<sup>1526</sup> The Tribunal finds that a significant variation in the prices of the most prevalent metal affects the asset's value and, therefore, the value of the company who owns it, which is why the value at the date of the private placements was higher than the value at the date of expropriation. For this reason, it was necessary to make adjustments to determine the value of a placement at the time of expropriation.<sup>1527</sup>
857. In summary, the valuation method put forward by FTI is subject to uncertainties that do not permit even a reasonable level of conviction regarding which could be the Project's value. This was a valuation subject to a high degree of contingencies, to the development of hypotheses, and to subjective appreciation criteria in light of the absence of objective grounds. In the view of the Tribunal, this results from the clear difficulty of valuing with any degree of precision and objectivity a project that, as indicated at paragraphs 808 to 823 above, is at an incipient stage, without mining activity, with a significant amount of exploration still to be done, without a prefeasibility study and subject to serious uncertainties covering not only the technical aspects, including the uncertainty of using the untested Metallurgical Process, but also the real scope of the resources and their marketability given the lack of a degree of certainty with respect to the costs to attain commercially viable exploitation. It is, in the end, a project at an almost embryonic stage that precludes a valuation with the required certainty as to its actual value.

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<sup>1525</sup> Hearing Transcript, Day 8, 1513:13-19 (English).

<sup>1526</sup> On the price drop for silver see FTI examination (Hearing Transcript, Day 8, 1450:21-1451:14 (English)). In addition, there was a decline in the values at the Toronto Stock Exchange and the values of other mining companies that FTI considered comparable to the Project for its valuation (RER-5, Second Brattle Report, § IV-C).

<sup>1527</sup> See RER-3, First Brattle Report, paras. 150-152; RER-5, Second Brattle Report, paras. 234-239; Hearing Transcript, Day 8, 1567:22-1568:9 (English).

858. Based on the reasons above, the Tribunal finds that the valuation proposed by the Claimant cannot be accepted and, thus, in accordance with the text of paragraph 831 above, the Tribunal will first determine the applicability of the cost-based valuation method of the Project and then the components of such approach in the present case before the Tribunal.
859. Cost-based valuation is not foreign to international investment arbitration. In various circumstances, tribunals have discarded other methods in favor of the valuation by reference to actual investments or cost of investment<sup>1528</sup> for reasons such as that the project is not in the production stage,<sup>1529</sup> or that, given the stage of the project, the estimation of future cash flows would be wholly speculative,<sup>1530</sup> or that there is an insufficiently solid basis on which to calculate profits or growth,<sup>1531</sup> or that it is not a going concern and there are uncertainties regarding future income and costs,<sup>1532</sup> or that there is a particularly large difference between the investments made and the compensation claimed.<sup>1533</sup>
860. Although the Respondent's expert notes that his cost estimate was not performed with a view to establishing fair market value, he does not take a defined legal position on the issue – and expressly disavows doing so<sup>1534</sup> – and thus does not discard the possibility that a cost-based valuation might correspond to fair market value. In turn, the Claimant's expert has recognized that a cost-based valuation may be used to determine fair market value.<sup>1535</sup>
861. Therefore, the Tribunal must decide whether or not, considering the facts established in this arbitration, from the point of view of the law and the Treaty, a cost-based valuation can be used to determine the value of the investment.
862. The Claimant does not agree with a cost-based valuation for several fundamental reasons:
- (a) It would be inconsistent with the terms of the Treaty which specifically refers to the “market value of the investment” which is the fair market value, a key principle of which is that

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<sup>1528</sup> RLA-103, S. Ripinsky y K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008, p. 227.

<sup>1529</sup> CLA-51, *PSEG Global, Inc. v. Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007, para. 321.

<sup>1530</sup> RLA-141, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, paras. 121-122.

<sup>1531</sup> RLA-145, *Wena Hotels v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, paras. 124-125.

<sup>1532</sup> RLA-146, *Hasan Awdi and others v. Romania*, ICSID Case No. ARB/10/13, Award, March 2, 2015, para. 514.

<sup>1533</sup> RLA-96, *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, paras. 191 *et seq.*

<sup>1534</sup> RER-5, Second Brattle Report, para. 13; Hearing Transcript, Day 8, 1579:8-18 (English).

<sup>1535</sup> See RLA-281, *Copper Mesa Mining Corporation v. The Republic of Ecuador*, PCA Case No. 2012-2, Award, March 16, 2016, paras. 7.1, 7.6.

value is a function of the future cash flows that the Project would generate over its lifetime.<sup>1536</sup>

- (b) It would be inconsistent with internationally accepted standards for the valuation of mineral properties at the stage of development of Malku Khota, as set out in guidelines in Canada, South Africa and Australia.<sup>1537</sup>
- (c) It would not wipe out the consequences of the alleged breaches of the Treaty incurred in by the Respondent.<sup>1538</sup>
- (d) It would not provide compensation for the lost return on the risks incurred upto the date of violation of the Treaty or for the lost opportunity to earn additional returns by continuing to advance the Project's development towards the production stage.<sup>1539</sup>
- (e) The Claimant also argues that, if a State could take a mining project once the investor has made a significant discovery and only pay the direct costs expended, no rational investor would invest in such exploration activities as they would face all of the downside risk and the State would reap all of the upside potential.<sup>1540</sup>

863. The Claimant assumes, in several of the arguments noted above, that the Reversion did not fulfill the public purpose and social benefit requirements, or due process. The Tribunal noted that the Reversion fulfilled these requirements, and will not revisit this point.

864. As to the Claimant's assertions on valuation, the Tribunal agrees that the evidence provided demonstrates that it is a mining project in a development stage that allows for the estimation with some degree of certainty of the Project's value as an asset of CMMK. However, as the Tribunal has already discussed at length at paragraphs 808 to 857 of the award, there is no basis to attach any certainty to such a value, first, because it is a project at an incipient stage that is not in the development stage as the Claimant argues and, second, because even if it was theoretically at such stage of development, the valuation method proposed by the Claimant has a high level of uncertainty, which prevents the Tribunal from reaching any reasonable degree of certainty as to the existence and amount of the alleged damages.

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<sup>1536</sup> Claimant's Reply Memorial, para. 421.

<sup>1537</sup> Claimant's Reply Memorial, para. 421.

<sup>1538</sup> Claimant's Reply Memorial, para. 422.

<sup>1539</sup> Claimant's Reply Memorial, para. 422.

<sup>1540</sup> Claimant's Reply Memorial, para. 423.

865. It is true that the Treaty requires compensation for the “market value of the investment” and that this should be fair value, as stated in Article 5 of the Treaty. However, in the case before the Tribunal, this does not mean that compensation must be tied to the productivity of the Project which would in turn impact the value of the shares held indirectly by SAS in CMMK. It is undisputed that this is a Project that is not in the production stage. If it is not possible to estimate the value of the Project by applying the discounted cash flow method since it is not a project in the production stage, as the experts for both Parties accept; if it is not possible to value the Project on the basis of comparable projects, which do not appear to exist in this case; if, as the Tribunal has noted, there is no evidence of the economic viability of the Project with which to estimate its value with some degree of certainty; and if there is no reliable evidence that confers any degree of certainty as to the value at which SAS’ shares are traded in the market, then the market value of such shares would have to be determined by reference to CMMK’s value, which for the purposes of compensation and on the basis of the evidence in the record, corresponds to the value of what CMMK invested in the Project.
866. The Tribunal proceeds then to determine the value of compensation based on costs, i.e. the value of the investment made by CMMK in the Project.
867. The Parties’ experts agree that exploration costs account for US\$18.7 million.<sup>1541</sup> However, the Parties disagree on two points of the cost-based valuation: (i) the Claimant considers that US\$12.5 million accounting for general and administrative expenses should be added,<sup>1542</sup> which is opposed by the Respondent, and (ii) Bolivia considers that the value of the confidential information held by the Claimant must be subtracted,<sup>1543</sup> which SAS rejects.
868. Regarding the first of the issues mentioned, the Tribunal does not find evidence that the amount of US\$12.5 million claimed by the Claimant corresponds to SAS’ general and administrative expenses attributable to the Project.
869. First, the record does not contain financial statements of SAS, but those of its parent, SASC, and this company has expenses that are not associated only with CMMK’s operation but also with different projects. The Tribunal is not convinced that the administrative costs recorded on SASC’s financial statements can be apportioned simply by applying a percentage based only on the relative value of each of SASC’s projects without even attempting to establish a proportional relationship between administrative costs and project value. Second, there is no evidence that the

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<sup>1541</sup> RER-3, First Brattle Report, para. 165; CER-4, Second FTI Report, para. 9.4.

<sup>1542</sup> CER-1, First FTI Report, para. 5.27; CER-4, Second FTI Report, paras. 9.4-9.5.

<sup>1543</sup> RER-3, First Brattle Report, paras. 159, 175-178; RER-5, Second Brattle Report, paras. 11, 254-259.

administrative and general costs included by FTI in Appendix 6 to their Report bear a causal relationship with the Project. Third, in CMMK's financial statements it is not possible to identify, from an accounting perspective, the administrative and general expenses supposedly incurred by the direct and indirect shareholders on their own or during the development of the Project. Such financial statements only reflect accounts payable to SASC for approximately US\$6 million included in the US\$18.7 million charged to the Project's costs by the experts.

870. In sum, it has not been established that the US\$12.5 million that the Claimant claims corresponds to administrative and general costs of SAS which are exclusively attributable to CMMK's operations. Therefore, the addition of US\$12.5 million requested by the Claimant cannot be accepted.
871. Regarding Bolivia's request to deduct the value of the Protected Information, the Tribunal finds such claim contradictory in two respects. First, as the Tribunal has noted, the Respondent has held since the issuance of the Reversion Decree that compensation would depend on the value of the investments, without referencing potential deductions on account of the Protected Information. Second, since the Respondent alleged that there are serious doubts as to the effectiveness and use of a significant portion of the Protected Information for this Project given its stage of development and the fact that it had not been used in the field, it would not be appropriate, on the one hand, to ignore the Protected Information for the purposes of determining the future viability of the Project and, on the other hand, to assign it a value such as the one alleged by the Respondent based on the possibility of selling it to a third party.
872. The Tribunal has already found that it has not been shown that the extraction process included in the Protected Information can be successfully used in the Project and that, along with the other factors previously assessed, impedes having any degree of certainty as to the Project's viability. In any event, the level of development and market value of this information are completely uncertain, making any valuation arbitrary. The Tribunal cannot speculate on the value of the Protected Information for a purported future developer of the Project and assign it a value that has not been proven in the proceedings. Consequently, the Tribunal will not deduct from the compensation to be provided by Bolivia any amount on account of the Protected Information. As a result, the amount of compensation corresponds to the costs incurred in the Project, *i.e.* the amount of US\$18.7 million, without any deductions for the value of the Protected Information.
873. Considering the Tribunal's decision regarding the valuation method, the Date of Valuation, which was an important difference in a valuation scenario based on the valuation method proposed by the Claimant and the alternative system proposed in the Respondent's Rejoinder, is immaterial to



a cost-based valuation since the market changes between the dates disputed by the Parties do not affect the determination of the Project's costs.

874. Having established the method to determine compensation, the Tribunal will now examine whether a reduction should be applied based on the Claimant's conduct, as alleged by Bolivia. Indeed, in the Counter-Memorial and in the subsequent briefs, the Respondent requested, in the event that the Tribunal were to order that compensation be paid to the Claimant, that the amount of such compensation be reduced by at least 75% on the basis that "*the actions and omissions of the Claimant itself were the ones that contributed to the damage that it alleges to have suffered.*"<sup>1544</sup>
875. In the present case, the Tribunal has found that the State's sovereign decision to expropriate the Mining Concessions was the result of a severe and prolonged social conflict that originated with the Project. In other words, the Tribunal found that the expropriation complied with the requirements of public purpose and social benefit established in Article 5 of the Treaty. In this case, the violation of the Treaty arose from Bolivia's failure to compensate or offer to provide compensation, a violation that, as established by the Tribunal, is not attributable to the investor nor is based on the conduct that the Respondent attributes to the investor. The Tribunal may not reduce the amount of compensation owed to the investor for a Treaty violation unrelated to its conduct.
876. Additionally, even if the investor or CMMK contributed to the social conflict that led to the Reversion, the sovereign decision to expropriate the Mining Concessions deprived them from the possibility of continuing with the development of the Project and of receiving any benefit therefrom. [REDACTED]  
[REDACTED]  
[REDACTED]
877. Given the above, the Tribunal will examine the question of interest on the amount of compensation.
878. Based on Article 5(1) of the Treaty, compensation shall "*include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Part, until the date of payment.*"

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<sup>1544</sup> Counter-Memorial, para. 725.

879. For the Claimant's experts, the applicable rate should be the statutory interest rate fixed at 6% and, alternatively, a commercial interest rate based on a 1 year risk-free rate on US Treasury bills plus a premium, and they add that the LIBOR rate could be used as benchmark, even if that is the rate at which banks lend to one another.<sup>1545</sup> In its Second Report, FTI presented an alternative rate based on the award in the *Rurelec v. Bolivia* case that reflects the interest rate set by the Central Bank of Bolivia.<sup>1546</sup>
880. The Respondent's experts, for their part, calculate the interest rate based on the commercial interest rate derived from Bolivia's 10-year sovereign bond issuance in October 2012.<sup>1547</sup>
881. The Parties do not dispute that interest should compensate for the remuneration the Claimant would have received on the amount of compensation paid by Bolivia, had such compensation been paid at the date of expropriation. They do not dispute either that the applicable rate shall be a rate "*applicable in the territory of the expropriating Contracting Party*," based on Article 5 of the Treaty.
882. This means that the applicable rate shall be, in accordance with the Treaty, one applicable in the territory of Bolivia and that it can be a commercial or legal interest rate.
883. Regarding the statutory rate of 6% applied by the Claimant's expert, the Tribunal does not find that this expert has presented financial support for the application of such interest rate, other than that he was instructed to use it.<sup>1548</sup> The Claimant also does not put forward any legal reason why the statutory interest rate would be applicable in this case. Bolivia, in turn, considers that the statutory interest rate is a maximum rate which cannot be exceeded under the law of Bolivia and, therefore, it cannot be the rate applicable in this case.<sup>1549</sup>
884. On the contrary, before referencing the instructions received, the Claimant's expert agrees with the Respondent's expert that the interest should be the commercial interest rate taken as a benchmark with the addition of a premium.<sup>1550</sup>
885. Similarly, the experts agree on the risk-free rate of the US Treasury bills plus a premium, but they differ in (a) the term of the US Treasury bills, which should be one year, according to the Claimant,

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<sup>1545</sup> CER-1, First FTI Report, paras. 12.5-12.8.

<sup>1546</sup> CER-4, Second FTI Report, paras. 10.5-10.7.

<sup>1547</sup> RER-5, Second Brattle Report, para. 261.

<sup>1548</sup> CER-1, First FTI Report, para. 12.8.

<sup>1549</sup> Counter-Memorial, para. 694.

<sup>1550</sup> CER-1, First FTI Report, para. 10.16; RER-5, Second Brattle Report, para. 264.

or one month, according to the Respondent;<sup>1551</sup> and (b) how to determine the margin or premium on the base rate.

886. The Treaty, as previously reiterated, establishes that compensation “*shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party.*” It is, first, a normal commercial or legal interest rate and, second, an interest rate applicable in the territory of Bolivia.
887. The Tribunal considers as a starting point that the terms of Article 5 of the Treaty are binding on this Tribunal. Additionally, the interest rate to be applied shall be a “normal” rate and shall take into account the rate to be applied in the territory of Bolivia, which implies a limitation of the potential interest rates to be considered by the Tribunal. Only the “normal” rates applicable in the territory of Bolivia shall be considered.
888. Neither the Treaty nor the law of Bolivia as explained by the Parties establish what a “normal” commercial interest rate is. As to the statutory rate, the Respondent neither provides an explanation for the application of an interest rate from the Bolivian Civil Code which seems to be established for civil obligations rather than commercial operations or bank loans, nor provides a persuasive argument when it argues that, under the Law of Bolivia, the Civil Code, and not the commercial or bank regulations, establishes the rules and limits to the interest rates for commercial operations. Bolivia itself argues that the statutory interest rate has a marginal commercial application in Civil Law countries<sup>1552</sup> leaving the Tribunal with no reason to apply such interest rate or its limits to purely civil matters.
889. The Tribunal agrees with Bolivia that to establish an interest rate based on the risks SAS would have faced if it invested the money or SAS’ risk as a lender would be inappropriate – and, moreover, speculative given the circumstances of the case in light of the uncertainty of how each investor may invest the funds – but it does not agree that the “normal” interest rate should reflect only the US Treasury bill rate without any premium. Even under Bolivia’s theory, the debtor of the compensation is the Respondent and the Respondent’s obligations, as reflected in the very same rate for the Bolivian bills put forward by Bolivia, are subject to an additional premium attributable to the risk over and above the risk-free rate.

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<sup>1551</sup> CER-4, Second FTI Report, paras. 12.5-12.7; RER-3, First Brattle Report, para. 181.

<sup>1552</sup> Counter-Memorial, para. 693.

890. The Claimant's expert proposes the interest rate certified by the Central Bank of Bolivia for dollar-denominated commercial loans;<sup>1553</sup> the Respondent's expert argues that such a rate is not applicable since the interest rates established by the central banks are not necessarily commercial rates determined by the market and can reflect monetary policies that are unrelated to this case.<sup>1554</sup>
891. The Tribunal agrees with the rate proposed by the Claimant. First, because the rate of the Central Bank of Bolivia referred to by the Claimant is not a rate established by the aforementioned bank, but a rate that the bank certifies or publishes taking into account various interest rates used by various financial players. Consequently, the Tribunal does not find support for the assertion that these are rates that are not determined by the market or that they are fixed for economic policy reasons. Second, given that these are the rates for commercial and financial operations in Bolivia, they are a normal commercial rate in the territory of the Respondent.
892. Therefore, the Tribunal will fix the interest rate published by the Central Bank of Bolivia as the applicable interest rate.
893. Finally, the Parties dispute whether the interest rate should be simple or compound. The Claimant considers that compound interest is the generally-accepted standard in international investment arbitration.<sup>1555</sup> The Respondent, in turn, invokes Article 412 of the Civil Code of Bolivia, which, according to Bolivia, precludes the capitalization of interest.
894. The Tribunal considers that the limiting factor invoked by Bolivia would not apply to commercial interest rates. Bolivia itself argues that the statutory interest rate is only rarely applied in commercial matters. The same reasoning would have to apply for the limitations set out in the Civil Code regarding interest-bearing civil operations. Bolivia does not explain why the limits on the civil interest rate established in the Civil Code would apply to the commercial operations or if the limits in the Civil Code—including the alleged maximum rate of 6%—apply to commercial operations, how it is that the interest rates certified by the Central Bank of Bolivia exceed that purported legal limit.
895. Additionally, a compound interest rate is a “normal” interest rate in commercial operations and a rate that has been accepted by several tribunals as an appropriate rate to compensate for the time value of money.

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<sup>1553</sup> CER-4, Second FTI Report, paras 10.5-10.7.

<sup>1554</sup> RER-5, Second Brattle Report, para. 262.

<sup>1555</sup> Escrito de Demanda, paras. 222-226; Claimant's Reply Memorial, para. 429.

896. In conclusion, the Respondent shall pay compound interest on the amount of compensation at the rate previously established.
897. As to the starting date for the accrual of interest, the Tribunal finds that the date shall be the date the expropriation became effective and Bolivia established the applicability of compensation, i.e. the date of the Reversion Decree. It is from that date onward that the expropriation became effective based on the law of Bolivia and the Treaty obligation to provide compensation applied to Bolivia.
898. Finally, the Parties dispute whether the fair market value standard is applicable to the calculation of compensation owed for the other Treaty violations alleged by the Claimant. As the Tribunal did not find any violations of the Treaty other than the breach of the requirement to provide compensation under Article 5 of the Treaty, the Tribunal need not decide this point.
899. In any event, the Tribunal observes that the Claimant (i) indicated that the Tribunal must award compensation to the Claimant for the other violations alleged in the event the Tribunal finds that there was no expropriation,<sup>1556</sup> and (ii) claimed the same compensation in each instance – “full compensation” – regardless of the violation to be found by the Tribunal.<sup>1557</sup> In other words, the Claimant did not allege or establish that compensation for the alleged violations other than the expropriation would be based on facts or calculations different from the ones presented for the expropriation, and the compensation requested by the Claimant for the other violations was also presented as equivalent and alternative, not additional, to the compensation claimed for expropriation.

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<sup>1556</sup> See Statement of Claim and Memorial, para. 194 (“*In the unlikely event the Tribunal should determine that Bolivia did not expropriate South American Silver’s investments, either lawfully or unlawfully, the Tribunal must still award compensation to Claimant if it determines that Bolivia violated one or more of the other substantive standards of protection in the BIT.*”)

<sup>1557</sup> See Statement of Claim and Memorial, para. 201 (“*In sum, Claimant is entitled to full compensation for Bolivia’s violations of the Treaty provisions relating to fair and equitable treatment, the umbrella clause, arbitrary and discriminatory measures, and full protection and security. Although it is Claimant’s contention that Bolivia violated each of these provisions in multiple respects (as well as the expropriation provision of Article 5), a violation of any one of them would entitle Claimant to full compensation.*”); Claimant’s Reply Memorial, paras. 369-374.

## IX COSTS

### A. THE CLAIMANT'S POSITION

900. The Claimant requests reimbursement of all recoverable fees and expenses in connection with its representation in this arbitration pursuant to Articles 40 to 42 of the UNCITRAL Arbitration Rules.<sup>1558</sup> Similarly, the Claimant requests that the Tribunal deny the Respondent recovery of its costs for “*failure to make a detailed request*” in its statement of costs dated November 28, 2016, in which, according to the Claimant, “*it is not even clear that Bolivia is requesting an award on costs*”, and for all other reasons set forth in this section.<sup>1559</sup> The Claimant argues that the Respondent’s submission ought to be disregarded by the Tribunal, as should any arguments submitted by the Respondent for the first time with its Comments on Claimant’s Statement of Costs dated December 12, 2016 (“**Respondent’s Reply on Costs**”), to which the Claimant has not had an opportunity to respond.<sup>1560</sup>
901. Thus, the Claimant requests this Tribunal to award it all its costs in connection with this arbitration, plus the corresponding success fees the Claimant is obliged to pay counsel<sup>1561</sup> and compound interest at a reasonable rate until the date of Bolivia’s full payment.<sup>1562</sup> The Claimant bases its request on (i) the fact that its costs and expenses are reasonable and appropriate in this arbitration given the reasons mentioned in the oral and written submissions,<sup>1563</sup> and (ii) Bolivia’s persistent misconduct throughout this proceeding.<sup>1564</sup>
902. The Claimant’s counsel certifies that the fees and expenses covering the Claimant’s costs were necessary for the proper conduct of this case, and are reasonable and appropriate in light of the complexity of this case, its duration, and the amount of damage that Bolivia’s violations of the Treaty have caused to the Claimant’s investment.<sup>1565</sup>
903. The Claimant’s costs, fees and total expenses in this arbitral proceeding at the time of drafting the Claimant’s Statement of Cost in this arbitral proceeding amounted to US\$ 6,645,445.59.<sup>1566</sup> This

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<sup>1558</sup> Claimant’s Costs Submission, para. 1; Claimant’s Reply on Costs, para. 4.b.

<sup>1559</sup> Claimant’s Reply on Costs, para. 4.a.

<sup>1560</sup> Claimant’s Reply on Costs, para. 1.

<sup>1561</sup> See *infra* para. 902.

<sup>1562</sup> Claimant’s Costs Submission, para. 26.

<sup>1563</sup> Claimant’s Costs Submission, paras. 1, 21-25.

<sup>1564</sup> Claimant’s Costs Submission, paras. 1-20.

<sup>1565</sup> Claimant’s Costs Submission, paras. 21, 24.

<sup>1566</sup> Claimant’s Costs Submission, para. 23. The Tribunal observes that in paragraph 23 of the Claimant’s Costs Submission, it states: “*Counsel for Claimant certifies that Claimant have to date incurred US \$6,645,445.59 in total [...]*” (added emphasis). However, in the previous paragraph of the same Costs Submission, it asserts: “*Claimant seeks recovery of its costs beginning July 16, 2012, when Claimant began working with King & Spalding and local Bolivian counsel to build a case and evidentiary*

sum is comprised of experts' fees and expenses (under Article 40(c) of the UNCITRAL Rules), the "[w]itnesses' fees and expenses" (under Article 40(d) of the UNCITRAL Rules), "[f]ees and legal expenses", "[t]ranslation services" and "[d]iscovery data processing and storage" (under Article 40(e) of the UNCITRAL Rules) and Claimant's share of Tribunal's and PCA's fees and expenses.<sup>1567</sup> However, taking into account that the Tribunal may issue further invoices requiring the Claimant to make additional payments and/or apply prior amounts advanced by the Claimant, the Claimant submits that it may be necessary to adjust costs.<sup>1568</sup>

904. The Claimant states that the line item corresponding to fees owed to King & Spalding will increase by between US\$ 400,000 and US\$ 2 million,<sup>1569</sup> depending on the amount of any award.<sup>1570</sup>
905. The Claimant argues that it is uncontroversial that in cases under the UNCITRAL Rules, the conduct of the parties may be taken into account by a tribunal in apportioning costs.<sup>1571</sup> In particular, tribunals have looked to whether parties filed large numbers of procedural requests, advanced manifestly frivolous claims, engaged in time-wasting tactics and failed to meet deadlines.<sup>1572</sup> The Claimant argues that the Tribunal should take into account Bolivia's procedural misconduct when determining the appropriateness of a decision on costs against the Respondent, including the reasonableness of the Claimant's fees and expenses.<sup>1573</sup>
906. The Claimant argues that Bolivia repeatedly obstructed the course of these proceedings through procedural misconduct and it should be ordered to pay costs.<sup>1574</sup> The Claimant alleges that Bolivia on several occasions obstructed and delayed the proceedings. Accordingly, the Claimant mentions Bolivia's attempt to challenge arbitrator Prof. Orrego Vicuña, to submit witness statements at the

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*record for an arbitral proceeding against Respondent, through October 31, 2016. Counsel for Claimant will submit any relevant fees and expenses incurred by Claimant during November and December 2016 by January 31, 2017.*" (added emphasis) Since the Claimant's Costs Submission is dated November 28, 2016, it is not clear whether the amount claimed includes costs to the date of the Statement or only to October 31, 2016. At any rate, and based on the reasons established in the considerations of the Tribunal, this difference is irrelevant for purposes of the Tribunal's decision.

<sup>1567</sup> Claimant's Costs Submission, table at p. 10.

<sup>1568</sup> Claimant's Costs Submission, para. 22.

<sup>1569</sup> See Claimant's Costs Submission, footnote 44, for a breakdown of how this amount will change depending on the award amount.

<sup>1570</sup> Claimant's Costs Submission, para. 23.

<sup>1571</sup> Claimant's Reply on Costs, para. 3; *Mesa Power Group LLC v. the Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award of March 24, 2016, paras. 703-705.

<sup>1572</sup> Claimant's Costs Submission, para. 3; *European American Investment Bank AG (Austria) v. Slovak Republic*, UNCITRAL, PCA Case No. 2010-17, Award on costs, August 20, 2014, para. 43.

<sup>1573</sup> Claimant's Costs Submission, para. 3; *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, October 25, 2012, n. 377 (citing *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, August 13, 2009, and other cases).

<sup>1574</sup> Claimant's Costs Submission, para. 3.

wrong procedural opportunity and to exclude documentary evidence presented by the Claimant, as well as its extension requests and uncooperative attitude and intransigence in attempting to reach agreement with the Claimant on procedural matters or implementing the Tribunal's decisions.<sup>1575</sup> The Claimant also characterizes Bolivia's *Cautio Judicatum Solvi* request as frivolous and as an attempt at harassment and intimidation.<sup>1576</sup> The Claimant further argues that Bolivia submitted two completely new legal arguments in its Rejoinder, violating the Claimant's entitlement to due process and causing the Claimant to incur into additional expenses by having to answer these allegations.<sup>1577</sup>

907. Further, the Claimant contends that, in connection with the document production phase, the Respondent adopted a posture that was obstructionist<sup>1578</sup> and aggressive, reaching the point of harassment of the Claimant.<sup>1579</sup> Additionally, the Claimant submits that the form of the Respondent's requests for documents constituted an abuse of the arbitral process as it did not limit its requests to the designated columns of the Redfern Schedule provided by the Tribunal (pursuant to Section 5.2.5 of Procedural Order No. 1), but repeatedly submitted lengthy supplemental letters and tables, beyond the arguments included in the Parties' Redfern Schedule.<sup>1580</sup> Moreover, the Claimant notes that Bolivia made a frivolous request for documents two and a half months after the Claimant presented its Reply and seven months after the conclusion of the document production phase.<sup>1581</sup>
908. Additionally, the Claimant argues that the Respondent's acts of procedural harassment routinely created additional and unnecessary work for the Claimant and the Tribunal, and that the Respondent's harassment also took on a personal tone against the Claimant's witnesses and former CMMK employees.<sup>1582</sup> The Claimant alleges that the Respondent's actions constitute

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<sup>1575</sup> Claimant's Costs Submission, paras. 2-9, 13-15.

<sup>1576</sup> Claimant's Costs Submission, para. 19.

<sup>1577</sup> Claimant's Costs Submission, para. 15.

<sup>1578</sup> The Respondent compares the volume of documents submitted by each Party (close to 5,800 pages by the Claimant and 11 documents with a total of 43 pages by the Respondent –all within only one category of documents requested by the Claimant in its *Redfern Schedule*–). The Claimant states in particular that the Respondent did not submit documents on the COMIBOL President's, Héctor Córdova, trip to China in August 2012 to meet with partners who could contribute to the development of the Malku Khota Project, or documents on meetings in Bolivia with potential Chinese partners, and underscores that Minister Navarro Miranda confirmed at the hearing that several documents, including the type of documents whose existence had been denied by Bolivia, were created when officials of the Government of Bolivia travelled abroad (Hearing Transcript, Day 3, 699:14 – 700:4 (Spanish)).

<sup>1579</sup> Claimant's Costs Submission, para. 16.

<sup>1580</sup> Claimant's Costs Submission, para. 17.

<sup>1581</sup> Claimant's Costs Submission, para. 18.

<sup>1582</sup> Claimant's Costs Submission, paras. 10-12.



harassment that aggravated the dispute between the Parties and, at worst, they represented an attempt to undermine the Claimant's ability to present its witnesses at the Hearing.<sup>1583</sup>

909. Finally, the Claimant argues that an entire day of the Hearing was taken up by the examination of a witness (Witness X), whom the Respondent had clearly sought out, notwithstanding the provisions of Bolivian law on attorney-client confidentiality.<sup>1584</sup>

## **B. THE RESPONDENT'S POSITION**

910. The Respondent details in its cost certification that: (i) counsel fees amount to US\$ 2,548,532.59 and experts' fees amount to US\$ 1,233,255.17, totaling US\$ 3,781,787.76 for both items;<sup>1585</sup> (ii) administrative costs such as advance deposits paid to the PCA amount to US\$ 600,000;<sup>1586</sup> and (iii) expenses for travel, accommodation, food and administrative expenses (courier services, bundles, photocopying, overtime for administrative staff, demonstrative evidence, etc.) amount to US\$ 382,996.58.<sup>1587</sup> The Respondent's total cost are US\$ 4,764,784.34.<sup>1588</sup>
911. The Respondent submits that the Tribunal has wide discretion to decide on the apportionment of costs under Article 40 of the UNCITRAL Rules,<sup>1589</sup> and contends that SAS must be ordered to cover these costs.<sup>1590</sup> The Respondent argues that SAS's conduct and, in particular, its lack of clean hands should be considered by the Tribunal in ordering SAS to pay costs.<sup>1591</sup> The Respondent submits that if, *par impossible*, the Tribunal considers that Bolivia is found liable, the Tribunal must consider that the "*costs follow the event*" rule has been qualified to take into account the circumstances of the case.<sup>1592</sup> The Respondent submits that the Tribunal, in deciding on the apportionment of costs, must take into account that: (i) SAS' claims have been unnecessarily complex and the amount claimed is absurd, and (ii) SAS modified its case between the Statement of Claim and the Reply, and submitted a claim for restitution in its Request for Arbitration which

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<sup>1583</sup> Claimant's Costs Submission, para. 12.

<sup>1584</sup> Claimant's Costs Submission, para. 20.

<sup>1585</sup> Respondent's Costs Submission, p. 2.

<sup>1586</sup> Respondent's Costs Submission, p. 3.

<sup>1587</sup> Respondent's Costs Submission, p. 3.

<sup>1588</sup> Respondent's Costs Submission, p. 3.

<sup>1589</sup> Respondent's Reply on Costs, para. 9.

<sup>1590</sup> Respondent's Reply on Costs, para. 3.

<sup>1591</sup> Respondent's Reply on Costs, para. 10.

<sup>1592</sup> Respondent's Reply on Costs, para. 11; UNCITRAL Rules, Article 42(1).

it only withdrew at the Hearing.<sup>1593</sup> The Respondent alleges that this obliged the State to allocate time and money for the preparation of these arguments.<sup>1594</sup>

912. As to the Claimant's Statement of Costs, the Respondent argues that it invokes false or irrelevant reasons to justify an award of costs to SAS.<sup>1595</sup> The Respondent contends that SAS distorts the procedural history of the case and omits the numerous procedural incidents caused by SAS and invokes mere procedural anecdotes that had no impact (on costs or time) for the Parties.<sup>1596</sup>

913. The Respondent maintains that SAS' criticisms regarding procedural orders are unfounded in light of the reasons for Bolivia's requests for such procedural orders and their outcome, and that these would not justify an order for the State to pay costs, since:<sup>1597</sup>

- (a) The Respondent rejects the alleged procedural harassment mentioned by the Claimant,<sup>1598</sup> and asserts that the Claimant should be punished for its extreme position regarding the review of Protected Information.<sup>1599</sup> The Respondent contends that, given SAS' intransigence, Bolivia's experts were unable to carry out their work efficiently and include evidence in their reports for all of their claims, based on which the State maintains its reservation of rights.<sup>1600</sup>
- (b) Moreover, the Respondent rejects the alleged personal harassment of the Claimant's witnesses and former CMMK employees<sup>1601</sup> and reiterates that (i) this matter was already dealt with and explained before and during the Hearing,<sup>1602</sup> (ii) the criminal investigation also included Bolivia's witnesses and other government officials,<sup>1603</sup> (iii) the Attorney General requested from the Prosecutor that, as far as possible and in keeping with the independence of the Prosecutor's Office, the ongoing investigation should not interfere

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<sup>1593</sup> Respondent's Reply on Costs, para. 12.

<sup>1594</sup> Respondent's Reply on Costs, para. 12.

<sup>1595</sup> Respondent's Reply on Costs, section 3.

<sup>1596</sup> Respondent's Reply on Costs, sections 3.1, 3.2.

<sup>1597</sup> Respondent's Reply on Costs, paras. 14-18.

<sup>1598</sup> See *supra* para. 908.

<sup>1599</sup> Respondent's Reply on Costs, para. 19.

<sup>1600</sup> Respondent's Reply on Costs, para. 20.

<sup>1601</sup> See *supra* para. 908.

<sup>1602</sup> Respondent's Reply on Costs, para. 22; Hearing Transcript, Day 4, 950:15 – 971:7 (Spanish); Bolivia's letter to the Tribunal, July 4, 2016.

<sup>1603</sup> Respondent's Reply on Costs, para. 22.

with the normal course of this arbitration,<sup>1604</sup> and (iv) it was SAS who intimidated witnesses with the criminal proceedings.<sup>1605</sup>

- (c) In connection with the Respondent's attempt to introduce witness statements in an untimely manner during the proceedings, the Respondent denies such an accusation and maintains that, if any Party abused its right to submit evidence, it was SAS.<sup>1606</sup> The Respondent refers to: (i) SAS' attempt to introduce statements CWS-14 and CWS-15, and the circumstances surrounding their potential admission into the record, which resulted in four procedural orders and numerous communications,<sup>1607</sup> as well as the conditions it attempted to impose on the management of said statements;<sup>1608</sup> (ii) its untimely attempt to introduce documentary evidence during the proceedings and sections in its Rejoinder on Jurisdiction that did not refer to jurisdictional issues.<sup>1609</sup>
- (d) Regarding the Claimant's criticism of Bolivia's conduct in connection with document production,<sup>1610</sup> the Respondent asserts that its request before the beginning of such a procedural stage was due to SAS' failure to communicate together with its Statement of Claim the documents cited by its experts, and notes that its request was accepted by the Tribunal.<sup>1611</sup> Moreover, the Respondent asserts that the documents pertaining to COMIBOL's President's trip to China mentioned by the Claimant do not exist because such a trip never took place and denies the Claimant's allegation that Bolivia has failed to produce them.<sup>1612</sup> The Respondent submits that SAS' conjecture that Minister Navarro Miranda is lying is unfounded and should be taken into consideration by the Tribunal in apportioning costs.<sup>1613</sup>

914. The Respondent submits that the Tribunal must take into account, in contrast to the above, the incident regarding the documents obtained from the Government of Canada, which the Respondent deems important, an responsive to RDD categories accepted by the Tribunal, and

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<sup>1604</sup> Respondent's Reply on Costs, para. 22.

<sup>1605</sup> Bolivia refers to Mr. Chajmi's cross-examination on whether he knew of a criminal case against him (line of questions that was objected by Bolivia's counsel and that the Tribunal ordered to stop) (Hearing Transcript, Day 4, 937:4-9 (Spanish)).

<sup>1606</sup> Respondent's Reply on Costs, para. 23.

<sup>1607</sup> Respondent's Reply on Costs, para. 27.

<sup>1608</sup> Respondent's Reply on Costs, para. 24.

<sup>1609</sup> Respondent's Reply on Costs, para. 25.

<sup>1610</sup> See *supra* para. 907.

<sup>1611</sup> Respondent's Reply on Costs, para. 28.

<sup>1612</sup> Respondent's Reply on Costs, para. 28.

<sup>1613</sup> Respondent's Reply on Costs, para. 28.

whose production (in unredacted form) had to be ordered by the Tribunal during the Hearing.<sup>1614</sup> Given SAS' refusal to communicate documents whose production the Tribunal had ordered, the Tribunal must apply the provisions of Guideline No. 14 of the IBA Guidelines on Party Representation in International Arbitration,<sup>1615</sup> which recommend that the Tribunal "*consider misconduct in apportioning the costs of the arbitration.*"<sup>1616</sup>

915. Additionally, the Respondent submits there has not been a delay in the proceedings in light of the time elapsed between Procedural Order No. 1 and the Hearing (two years and two months), in particular taking into account the complexity of the case and that all the issues related to admissibility, jurisdiction, merits, and quantum have been addressed jointly.<sup>1617</sup> The Respondent asserts that the extensions granted by the Tribunal were warranted,<sup>1618</sup> and underscores that the Claimant also requested extensions, which were partially rejected.<sup>1619</sup> The Respondent further argues that the extensions that were not granted to Bolivia did not impact on the timeline and costs,<sup>1620</sup> and that the ones that were granted did not increase SAS' costs (who does not work on the case while Bolivia prepares a brief) and some were due to SAS' own conduct.<sup>1621</sup>
916. Finally, the Respondent asserts that the expenses presented by SAS are unjustified and that it has serious doubts as to their reasonableness.<sup>1622</sup> First, the Respondent submits that it considers the costs claimed by the Claimant to be unreasonable as they are 40% higher than Bolivia's (before including in this calculation the success fee that SAS alleges to have offered to its counsel). The Respondent submits that there are no objective reasons to justify this difference, such as a substantive difference in the number of briefs, witnesses or experts, or a multiplicity of claimants.<sup>1623</sup> Second, the Respondent alleges that SAS' failure to break down and itemize costs raises doubts as to their accuracy.<sup>1624</sup>

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<sup>1614</sup> Respondent's Reply on Costs, para. 29.

<sup>1615</sup> IBA Guidelines on Party Representation in International Arbitration, Guideline No. 14, "*A Party Representative should explain to the Party whom he or she represents the necessity of producing, and potential consequences of failing to produce, any Document that the Party or Parties have undertaken, or been ordered, to produce.*"

<sup>1616</sup> Bolivia's Comments on Claimant's Statement of Costs, para. 29; IBA Guidelines on Party Representation in International Arbitration, Guideline No. 26.

<sup>1617</sup> Respondent's Reply on Costs, para. 36.

<sup>1618</sup> Respondent's Reply on Costs, paras. 34-35.

<sup>1619</sup> Respondent's Reply on Costs, para. 33; Procedural Order No. 5, para. 5.

<sup>1620</sup> Respondent's Reply on Costs, para. 33.

<sup>1621</sup> Respondent's Reply on Costs, para. 38.

<sup>1622</sup> Respondent's Reply on Costs, Section 4.

<sup>1623</sup> Respondent's Reply on Costs, paras. 3, 40.

<sup>1624</sup> Respondent's Reply on Costs, para. 41.

917. In this connection, the Respondent draws attention to two issues: (i) a difference (albeit minimal)<sup>1625</sup> in the amount corresponding to deposits paid to the PCA, which is not justified since both Parties made the same advances to the deposit;<sup>1626</sup> (ii) under the item corresponding to SAS' fees and expenses there is no itemization of the amount for these two items.<sup>1627</sup>
918. In connection with the second issue, the Respondent maintains that, first, the Claimant's costs show that some of SAS' witnesses have been paid a salary by SASC for appearing as witnesses in this arbitration, which raises serious doubts as to their credibility.<sup>1628</sup> The Respondent asserts that assuming that US\$4,631 paid to Mr. Dreisinger (the lowest line item within the category) covers expenses exclusively, and assuming that other witnesses' expenses were similar, the remainder (amounts higher than US\$20,000) would have been paid as a "fee" for the presentation of statements.<sup>1629</sup> The Respondent submits that these fees do not fall within "*reasonable compensation for the loss of time incurred by a Witness in testifying and preparing to testify*" allowed under Guideline 25 of the IBA Guidelines on Party Representation in International Arbitration, and confirms the lack of credibility of SAS' witnesses.<sup>1630</sup>
919. The Respondent requests that the Tribunal order the Claimant to reimburse the Respondent all of the costs incurred in this arbitration.<sup>1631</sup>

### C. THE TRIBUNAL'S ANALYSIS

920. Both Parties request the Tribunal to order the other Party to reimburse all costs incurred in connection with this arbitration.<sup>1632</sup>
921. Pursuant to Article 40 of UNCITRAL Arbitration Rules, "[t]he arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision." In turn, Article 42(1) provides that "[t]he costs of the arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determined the apportionment is reasonable, taking into account the circumstances of the case."

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<sup>1625</sup> US\$ 1,991,80.

<sup>1626</sup> Respondent's Reply on Costs, para. 41.

<sup>1627</sup> Respondent's Reply on Costs, para. 42.

<sup>1628</sup> Respondent's Reply on Costs, para. 42. See also Hearing Transcript, Day 2, 489:20-22 (Spanish), in connection with Mr. Angulo and Hearing Transcript, Day 3, 556:12-23 (Spanish), in connection with Mr. Gonzales Yutronic.

<sup>1629</sup> Respondent's Reply on Costs, paras. 43-44.

<sup>1630</sup> Respondent's Reply on Costs, para. 44.

<sup>1631</sup> Respondent's Reply on Costs, para. 45.

<sup>1632</sup> See Claimant's Costs Submission, para. 1; Respondent's Reply on Costs, para. 45.

922. Based on the above-mentioned provisions, the Tribunal will now (i) fix the costs of arbitration and (ii) apportion the costs and other reimbursable expenses based on the UNCITRAL Rules.
923. The Claimant has made advance payments to cover the costs of the arbitration for US\$701,500,<sup>1633</sup> and the Respondent for US\$700,000<sup>1634</sup>, for a total of US\$1,401,500 as advance payment.
924. The remuneration per hour for the members of the Tribunal was established at paragraphs 12.1 and 12.2 of the Terms of Appointment of March 4, 2014. Based on the remuneration established, the Tribunals' fees are US\$891,700.<sup>1635</sup>
925. Likewise, at paragraph 12.3 of the Terms of Appointment it was established that the members of the Tribunal shall be reimbursed for all charges reasonably incurred in connection with the arbitration. The reasonable charges of the Tribunal, incurred in connection with this arbitration amount to US\$25,023.30.
926. The PCA has charged the amount of US\$167,362.49 for the administration of the case and its registry and appointing authority services. Other costs of the PCA amount to US\$17,414.21, for a grand total of PCA costs equivalent to US\$184,776.70.
927. Consequently, the total cost of the arbitration amounts to US\$1,401,500.
928. Finally, costs of the legal representation and assistance costs for the Claimant (including fees and expenses of representatives, experts, and witnesses, and other costs and expenses) amount to US\$6,043,453.79.<sup>1636</sup> In turn, the costs of legal representation and assistance for the Respondent (including fees and expenses of representatives, and experts, and administrative expenses) amount to US\$4,164,784.34.<sup>1637</sup>
929. Article 42(1) of the above-mentioned UNCITRAL Rules provides that “[t]he costs of the arbitration shall in principle be borne by the unsuccessful party.” However, the same article provides that the Tribunal may deviate from the general rule and “*apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*”

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<sup>1633</sup> Claimant's Costs Submission, p. 11.

<sup>1634</sup> Respondent's Costs Submission, p. 2.

<sup>1635</sup> The remuneration for each of the members of the Tribunal is the following: (i) Prof. Francisco Orrego Vicuña: US\$192,026.96; (ii) Mr. Osvaldo César Guglielmino: US\$301,505.93, (iii) Dr. Eduardo Zuleta Jaramillo: US\$398,167.11.

<sup>1636</sup> See Claimant's Costs Submission, p. 11.

<sup>1637</sup> See Respondent's Costs Submission, pp. 2-3.

930. Both Parties appear to accept that the apportionment of costs depends not only on the outcome of the case but also on the Parties' conduct in the course of the arbitration.<sup>1638</sup> Based on the applicable provisions and taking account of the considerations presented by the Parties, the Tribunal will proceed to apportion costs and other recoverable arbitration expenses taking into account the relative success of the claims and defenses presented by the Parties, as well as their conduct throughout the proceeding and other circumstances of the case.
931. Regarding the outcome of the case, the Tribunal notes that the Respondent presented two objections to the Tribunal's jurisdiction and to the admissibility of the Claimant's claims that were rejected by the Tribunal in whole. Therefore, it could be considered that in relation to jurisdiction and admissibility, the Respondent was unsuccessful.
932. Regarding the merits, the Claimant alleged that Bolivia had breached its obligations under Articles 2, 3, and 5 of the Treaty and claimed compensation for an amount exceeding US\$300 million plus interest. The Tribunal found that the Reversion is a direct expropriation under the Treaty that did not fulfill the requirement to provide compensation. Similarly, the Tribunal dismissed the defenses presented by the Respondent based on the exercise of the police powers and the state of necessity. On the other hand, the Tribunal did not find evidence of the other violations of the Treaty alleged by the Claimant.
933. In connection with compensation, the Tribunal found that it amounted to the costs invested in the Project plus compound interest at the interest rate certified by the Central Bank of Bolivia for dollar-denominated commercial loans. This sum is far from the amount claimed by the Claimant as compensation, an amount that was not proven in the arbitration. Based on the foregoing, it cannot be said that the Respondent was unsuccessful in relation to the merits and compensation.
934. However, both Parties accuse the other of procedural conduct that resulted in delays and higher costs for the proceedings. The Tribunal does not deem it necessary to review every instance of alleged misconduct by the Parties; however, it notes that, there were instances in which both the Claimant and the Respondent behaved in a manner that did not contribute to the efficient course of the arbitration. In fact, this arbitration has seen an unusually high number of procedural orders to address issues raised by both Parties, often outside of the scope of the procedural calendar and without warning the Tribunal, regarding evidence, handling of confidential information and procedural issues. Since both Parties behaved in this way, the Tribunal will not assign any specific

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<sup>1638</sup> See Claimant's Costs Submission, para. 1; Respondent's Reply on Costs, paras. 10-12.

weighting to this factor for the apportionment of costs, nor shall it impose on either Party the obligation to reimburse the other its fees in whole or in part.

935. Finally, the Tribunal does not find any reason to order the payment of interest on the costs of arbitration.

936. Based on the aforementioned considerations, the Tribunal decides that:

- (a) The Claimant shall assume 65% of the arbitration costs noted at paragraph 927 of this award and the Respondent shall assume the remaining 35%, and
- (b) Each Party shall assume their own legal costs and expenses in this arbitration, including the fees and expenses of their representatives, experts, and witnesses, and other costs and expenses incurred in connection with the arbitration.

937. This decision shall be recorded in the operative part of this award.



## **X DECISION**

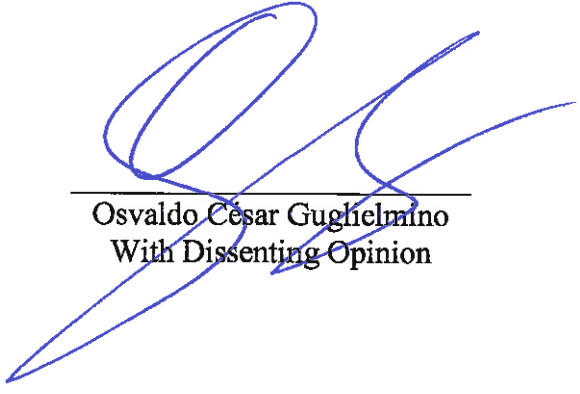
938. For the reasons stated, the Tribunal, by a majority vote, decides to:

- (a) Dismiss all of the Respondent's objections to the jurisdiction of the Tribunal and to the admissibility of the Claimant's claims, and to declare that it has jurisdiction over this dispute.
- (b) Declare that the Respondent breached the requirement to provide compensation as established under Article 5 of the Treaty.
- (c) Declare that the Respondent did not breach its obligation to afford fair and equitable treatment to the investment.
- (d) Declare that the Respondent did not breach its obligation to afford full protection and security to the investment.
- (e) Declare that the Respondent did not breach its obligation not to adopt arbitrary and discriminatory measures that preclude the use and enjoyment of the investment.
- (f) Declare that the Respondent did not breach its obligation not to afford less favorable treatment to SAS' investments than the investments of its own investors.
- (g) Order the Respondent to provide compensation to the Claimant in the amount of US\$18.7 million.
- (h) Order the Respondent to pay the Claimant compound interests on the amount established at subparagraph (g) above at the interest rate established by the Central Bank of Bolivia as of August 1, 2012 and until the date the payment of the compensation is completed.
- (i) Order the Claimant to assume 65% of the amount of the arbitral costs mentioned at paragraph 927 of this award, and the Respondent shall assume the remaining 35%.
- (j) Order each Party to assume their own legal costs and expenses in the arbitration, including the fees and expenses of their representatives, experts, and witnesses, and other costs and expenses incurred in connection with the arbitration.

Done at The Hague, this 30<sup>th</sup> of August, 2018.

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Francisco Orrego Vicuña  
With Concurring Opinion



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Osvaldo César Guglielmino  
With Dissenting Opinion

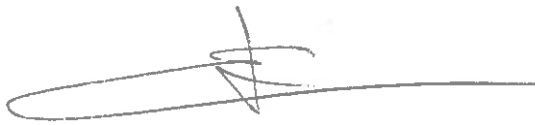


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Eduardo Zuleta Jaramillo  
Presiding Arbitrator

As indicated to the Parties on 22 October 2018, Professor Orrego Vicuña approved and signed the present Award in Spanish, whereas the English version of the Award was not able to be approved or signed by Professor Orrego Vicuña due to his unfortunate passing. The Tribunal therefore indicated to the Parties that it would issue the Spanish version of the Award over the signature of all three arbitrators, and the English version of the Award would be issued over the signatures of arbitrators Eduardo Zuleta and Osvaldo Guglielmino, in accordance with the provisions of the UNCITRAL Rules applicable in circumstances such as those arising from the passing of Professor Orrego Vicuña.

Done at The Hague, being the place of arbitration, on 7 November 2018.

A black ink signature consisting of a horizontal line with a stylized 'Z' and 'J' shape above it.

Eduardo Zuleta Jaramillo  
Presiding Arbitrator

A blue ink signature consisting of a large, stylized 'G' and 'G' shape with a horizontal line through the middle.

Osvaldo César Guglielmino