

UNOFFICIAL ENGLISH TRANSLATION

PCA Case No. 2013-15

SOUTH AMERICAN SILVER LIMITED
(Claimant)

-v-

ESTADO PLURINACIONAL DE BOLIVIA
(Respondent)

REJOINDER

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NOTE: Unofficial English translation. The original language of Bolivia's Rejoinder is Spanish. In case of contradictions or inconsistencies between the Spanish and English versions, the Spanish version shall prevail.

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1. In accordance with the procedural schedule in Procedural Order No. 11 and article 24 of the Arbitration Rules of the United Nations Commission on International Trade Law, as revised in 2010 (the "Regulation"), the Plurinational State of Bolivia ("Bolivia" or the "State") submits its Rejoinder (the "Rejoinder") in response to SAS Reply¹ dated November 30, 2015 (the "Reply").

2. This Rejoinder includes:

- a. Witness statement from Minister César Navarro Miranda, current Minister of Mining and Metallurgy of Bolivia and former Vice-minister of Coordination with Social Movements and Civil Society, period 2010 and 2013 ("Navarro" or "RWS-2");
- b. witness statement from Mr. Andrés Chajmi, member and former *Mallku* (indigenous community leader) from the Community of Mallku Khota, in Quechua, with corresponding translation to Spanish ("Chajmi" or "RWS-3");
- c. second witness statement from Mr. Félix Gonzales Bernal, former Governor for the Autonomous Departmental Government of Potosí ("Gov. Gonzales II" or "RWS-4");
- d. witness statement from Mr. Javier Díez de Medina, Manager of Social Corporate Responsibility and Environment from mining corporation Minera San Cristóbal S.A. ("Díez de Medina" or "RWS-5");
- e. witness statement from Mr. Juan Mamani, Coordinator for Community Relations from mining corporation Minera San Cristóbal S.A. ("Mamani" or "RWS-6"); and

f. 

3. Similarly, this Rejoinder includes:

¹ The terms in capital lettering that are not expressly defined within this document shall have the meaning provided in the previous documents prepared by Bolivia and, especially, within the Respondent's Statement on Objections to the Jurisdiction, Admissibility of Claims and Answer to the Statement of Claim dated March 31st 2015 (the "Counter-Memorial").

- a. the second technical expert report prepared by Prof. Kadri Dagdelen, B.Sc., M.Sc., PhD, Professor of *Mining Engineering Department of the Colorado School of Mines* ("Dagdelen II" or "RER-4");
- b. the second technical expert report prepared by The Brattle Group ("Brattle") and Prof. Graham Davis, Ph.D., MBA, B.Sc., *William J. Coulter Professor of Mineral Economics within the Division of Economics & Business of the Colorado School of Mines* ("Brattle II" or RER-5);
- c. the technical expert report from Prof. Patrick R. Taylor, Ph.D., P.E., FASM, *George S. Ansell Chair & Distinguished Professor of Chemical Metallurgy from the Department of Metallurgical & Materials Engineering of the Colorado School of Mines* ("Taylor" or "RER-6"); and
- d. exhibits R-155 to R-295 and legal authorities (doctrine and jurisprudence) RLA-185 to RLA-280.

1. **INTRODUCTION**

- 4. The facts confirm that the Reversion of the Mining Concessions was the only possible, necessary and appropriate measure in order to preserve life, physical integrity, autonomy and uses and traditions of Indigenous Communities directly affected by the Northern Potosi Project. It is a Constitutional and International Obligation for the State to ensure Human Rights and protect Indigenous Peoples and Indigenous Communities.
- 5. In addition, the facts discovered by Bolivia after the Reply and SAS's document production show that the behavior of the alleged investor was utterly illegal and negligent which justifies the *in limine* rejection of all its claims. The behavior of the mining corporation *Compañía Minera Malku Khota, S.A. ("CMMK")*, of which SAS intends to be an indirect shareholder, is not worthy of someone requesting protection from an international tribunal.
- 6. In its Reply, SAS had to address the severe events that led to the Reversion. In this regard, the contrast between the "story" narrated by SAS in its Statement of Claim and the narrative that it now presents is eloquent; SAS cannot continue denying reality.
- 7. This case can be summarized in four essential propositions:

8. *First, SAS complaints constitute an abuse of process. SAS is a "shell company" from Bermuda, and pretends to be the holder of an alleged investment, which, in reality, belongs solely to the mining corporation South American Silver Corp. ("SASC", nowadays TriMetals), a junior Canadian mining company dedicated to the speculation of underdeveloped mining projects. In view that SASC does not enjoy the protection of a the bilateral investment treaty, it pretends to use SAS to benefit from the Agreement between the United Kingdom of Great Britain and Northern Ireland and Bolivia for the Promotion and Protection of Investments (the "Treaty") against its text and spirit.*
9. *SAS denied this fact. However, the evidence submitted by Bolivia, the lack of evidence on behalf of SAS and, the fact that SASC has taken charge of this arbitration (with support of a third funding party and issuing stock in the Toronto Stock Exchange, whose dividends shall be the subsequent revenues from this arbitration) leave no doubt: SAS does not have and has never had any part in the dispute between SASC and Bolivia.*
10. *Second, SASC (and not SAS) has undertaken incipient exploration activities in Bolivia through CMMK with the sole purpose of identifying mineral resources it could sell – before commencing the exploitation – to the highest bidder. This shortsighted desire explains the deficient plan for community relations from CMMK and, at the same time, justifies the generalized rejection of the Project from the neighboring Indigenous Communities (those that SAS calls "a handful of illegal miners").*
11. *Instead of implementing a serious community relations program (which is expensive, as shown by the efforts undertaken by other mining companies within the region), CMMK promoted confrontation with and between Indigenous Communities in order to neutralize those who opposed a Project that would affect their environment (including sacred lagoons) and their way of life. CMMK did not hesitate to payoff wills and use undignified and illegal strategies such as the creation of an illegal organization (COTOA-6A) in order to replace the true and real Ancestral Authorities, bribing police officers (including the imprisonment of one of its authorities opposing to the Project) and payments made to journalists aimed at creating misinformation, which lead to militarization of the area.*
12. *CMMK's strategy unleashed violence and public disorder in the Northern Potosí Region (for example, Mallku Khota received support from 4000 community members*

that marched from Potosí to La Paz demanding CMMK's expulsion) which resulted in one dead person and many injured, forcing the State to Reverse the Mining Concessions to pacify the area and safeguard the life of its inhabitants.

13. The Reply is surprising as it suggests that the State had other alternatives, such as militarizing the area or judiciary prosecution of the community members that opposed the Project. Likewise, it is incredible that SAS requests the restitution of the Mining Concessions knowing that this could result in new and greater social conflicts. As the Minister of Mining and Metallurgy explains, the idiosyncrasy of the Indigenous Peoples and the history of the Department of Potosí, show that a military intervention will only exacerbate conflicts instead of resolving them. SAS position does not do more than confirm its lack of knowledge regarding the area and its peoples (ignorance that is reflected in the way in which CMMK has managed its community relations).
14. *Third*, SAS continues to deny its mistakes and fault in the Reversion. It pretends, for example, to have presented evidence that would demonstrate that "CMMK's robust community efforts"¹ were "a positive initiative that enjoyed success"². Nothing further from reality.
15. In fact, SAS communicated evidence during the document production phase that has allowed Bolivia [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
16. [REDACTED]
 - a. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹ Reply, par. 29.

² Reply, section B(1).

[REDACTED]

b. [REDACTED]

c. [REDACTED]

17. The events described by [REDACTED] make SAS's claims inadmissible due to the lack of "clean hands" and destroy every link between Bolivia's conduct and the damages allegedly caused to SAS. *Ex abundante cautela*, the proven facts must, minimally, reduce any compensation, in at least 75% due to SAS contributory fault. In addition, the facts reported by [REDACTED] are of such gravity that could be considered felonies in Bolivia. Therefore, they have been made known to the Attorney General for investigation and, if appropriate, proceed in accordance with the law. Bolivia must enforce all its rights in this regard.
18. These facts have also revealed SAS unfortunate procedural conduct. It has been demonstrated that SAS (i) omitted to communicate documents in response to Bolivia's exhibit requests and the Tribunal's order, and (ii) made false statements. Bolivia, expressly reserves all its rights on this regard.
19. *Fourth*, and in the hypothetical event that the Tribunal, *par impossible*, decides to analyze SAS claims and determines that the State owes any form of compensation, it shall also note that Bolivia has acted lawfully and SAS is claiming damages that are hypothetical and highly speculative. In fact, besides the fact that SAS assessment is

based on a conceptual study (*Preliminary Economic Assessment*) characterized by its highly speculative character, the Tribunal must take into account that SASC has already been sanctioned in the past – by the *British Columbia Securities Commission* – for presenting inaccurate estimates of resources which infringed Canadian regulations.

20. As Bolivian experts have shown, there are few possibilities that the Project would reach an exploitation phase (in general, 1 between 10,000, according to SAS witnesses). Furthermore, SAS experts are artificially inflating the *indicated* resources and underestimate the *inferred* resources – which, in spite of this situation, represent 60% of the Project's mineral resources. *Inferred resources* “have the ‘lowest level of geological confidence’”⁴ and, therefore, highly probable that these are inexistent, (“*expected resources simply may not be in the ground*”⁵). Likewise, SAS's experts have not calculated how estimated resources may be able to be economically extracted, which is even more uncertain as to the value of the Project. Finally, although SAS stands by a highly experimental metallurgic process that makes any kind of exploitation uncertain, SAS and its experts assume a 100% of probability that such metallurgical process would work.
21. Given the uncertain and unverifiable character of the damages claimed and, in the hypothetical case that the Tribunal decides that SAS has the right to some kind of indemnification, this must be limited to the reimbursement of the investments that have been undertaken. SAS is aware of this. However, SAS has used this arbitration for presenting an apparently complex calculation but, this is no more than a succession of arbitrary choices that result in an exorbitant figure of over US \$300 million. Upon the incorrect assessment of its *inputs*, the result follows the same fate: “*A model is only as good as the assumptions it uses. Faulty assumptions or bad data result in faulty output*” (*garbage in, garbage out*)⁶.
22. The absurdity of FTI's assessment is patent taking into account that all of SASC's assets in Bolivia and Chile are not worth even a fifth of what it now it claims in this arbitration belongs to one of its branches. Without a doubt, SAS pretends the Tribunal

⁴ *Gold Reserve Inc. v. República Bolivariana de Venezuela*, case CIADI No. ARB(AF)/09/01, award dated September 22, 2014, par. 780, RLA-27.

⁵ *Brattle II*, par. 132, RER-5.

⁶ M. Maher, C. Stickney and R. Weil, *Managerial Accounting. An Introduction to Concepts, Methods and Uses*, Thomson South-Western, 2008, pg. 184, R-241.

to consider its figure as a superior value within a range of possibilities and, that the Tribunal uses this as starting point to award an average point. The Tribunal cannot incur in this error.

23. Based on these four essential premises, the Tribunal shall conclude that SAS claims are inadmissible by reason of their lack of “*clean hands*” and, in any case, they are not within the Tribunal’s jurisdiction in view that SASC is the real proprietor of the investment. Any compensation awarded by the Tribunal to SAS (*par impossible*, given the seriousness of these objections), should be limited to the costs of the investments and reduced, at least, in a 75% by reason of their contributory fault.
24. *Finally*, Bolivia must express its discomfort given the SAS uncooperative attitude in this arbitration. Aware of the weakness of its evidence, among other recent incidents, SAS has hidden technical evidence in a *Data Room* which prevents Bolivian experts to attach these evidence to their reports (and it is unclear as to how they will be able to make reference to them during the hearing); it has refused to disclose evidence during the document production phase, requiring a constant intervention from the Tribunal; and, has even refused to comply with the Tribunal’s instruction regarding protection of Witness X proposed by the State, in terms similar to those that Bolivia must meet regarding the *Highly Confidential Information*. The Tribunal shall take into consideration SAS behavior when evaluating this evidence and awarding the procedural costs.
25. This Rejoinder is structured as follows:
 - a. First, Bolivia shall describe the facts that confirm that CMMK’s presence in the Project’s area and its actions and omissions did not leave the State with any other alternative than that of Reversion (Section 2).
 - b. Then, Bolivia will refer to the applicable legislation and shall confirm that the protection of human rights and indigenous peoples in the Bolivian Constitution and International Law is applicable and essential for solving this dispute (Section 3). Further on, Bolivia shall explain why the Tribunal does not have jurisdiction for resolving SAS claims (that, in any event, are inadmissible) (Section 4) and why Bolivia has fulfilled at all given times its international obligations (Section 5).
 - c. If, *par impossible*, the Tribunal considers that the claims are admissible, that it has jurisdiction and, that Bolivia is responsible, the State will prove that SAS

has not suffered any damage subject to compensation and, that any compensation shall be limited to its costs (Section 6). Bolivia will respond to SAS analysis on the applicable interests in Section 7.

26. Finally, Bolivia will refer to SAS contributory fault, which shall be taken into account in order to reduce any form of compensation (Section 8).
2. **THE REPLY CONFIRMS THAT CMMK'S PRESENCE AND ACTIONS IN THE PROJECT AREA DID NOT LEAVE THE STATE ANY OTHER ALTERNATIVE THAN THE REVERSION IN ORDER TO PROTECT THE LIFE AND TRADITIONS OF THE INDIGENOUS COMMUNITIES**
27. As Bolivia has shown in its Reply, this case constitutes one of the clearest examples of social irresponsibility and abuse from an international mining corporation towards indigenous communities that have been directly affected by the mining project.
28. In its Reply, SAS has not been able to rebut the overwhelming documentary and testimonial evidence presented by Bolivia, which proves that CMMK is the sole responsible for the Reversion of the Concessions. CMMK has unleashed, through its actions and omissions, a wave of unprecedented and uncontrollable violence, which threatened the life, physical integrity and the ancestral heritage of the Indigenous People of Northern Potosí. The State had no alternative other than proceed with the Reversion in order to pacify the area.
29. The description of the facts within the Reply is plagued with inaccuracies and loopholes. Even though SAS has had to recognize the severity of the events (something that it completely ignored in its Statement of Claim), SAS seeks to hide the facts that do not suite them and alter reality presenting a biased vision on its favor. This strategy, which seeks to mislead the Tribunal to error, merits, at least, two preliminary comments.
30. *As first preliminary comment*, the way in which SAS quotes the documents is, to say the least, disturbing. Aware that the documents do not benefit its case, SAS and its witnesses have chosen to say something that the documents do not express. An eloquent example is a Concept of the former Vice-minister César Navarro dated February 10, 2011, which expresses the opposite of what SAS intends. Another example is a meeting minute of the Indigenous Workers' Central Union (Central Sindical de Trabajadores Originarios) which has been signed by former Governor Gonzales as "received" but that SAS presents as if it had been approved by the Governor.

31. As *second preliminary comment*, Bolivia is obliged to denounce the procedural behavior of SAS, whom has hidden several relevant documents and, which had to be communicated during the document production phase. It has been proven, [REDACTED] [REDACTED] that SAS has undertaken false statements, hence, contravening the IBA Rules on Taking of Evidence and the *IBA Guidelines on Party Representation*. Bolivia must make an express reserve of all its rights. Only one document presented by SAS (maybe by error) [REDACTED] [REDACTED] [REDACTED] [REDACTED] solid documentary evidence, has brought to light facts and actors that SAS had kept hidden. The events narrated by [REDACTED] are alarming and justify the rejection of SAS claims due to the lack of “*clean hands*” (or, minimally make disappear any causal link between the actions of the State and the hypothetical damage caused by the Reversion, this being the sole fault of the alleged victim).
32. The facts that are described as follows show, with no doubt, that as Bolivia had anticipated in its Reply, CMMK’s actions and omissions provoked severe divisions between Indigenous Communities since the beginning of the Project. In its Reply, SAS has undertaken a desperate attempt to present “*CMMK’s robust community efforts*”⁷ as “*a positive initiative that enjoyed success*”⁸. Nothing further from reality.
33. On one hand, as Bolivia was able to prove based on the few documents obtained through the document production, CMMK developed a deficient community relations program and minimum effort in attempt to minimize expenses while it was seeking a buyer for the Project. The lack of efforts and interest in community relations has even been identified by consultants hired by SASC (and not SAS) in order to evaluate CMMK’s performance.
34. On the other hand, the comparison between CMMK’s actions towards the Indigenous Communities, and the efforts deployed by another mining corporation in Potosí, mining corporation *Compañía Minera de San Cristóbal* (the “*CMSC*”), shows the degree to which CMMK has been negligent in its community relations, resulting in Mallku Khota Indigenous Communities’s rejection to the Project. CMSC made great efforts during its exploration phase in order to earn trust and support from the

⁷ Reply, par. 29.

⁸ Reply, section II (B)(1).

Indigenous Communities that were directly affected by the mining activity. Similar to CMMK, CMSC identified the drilling area right near a Community (in that case, San Cristóbal). Knowing that the support from that community was essential for the feasibility of the Project, CMSC concentrated its efforts in reaching an agreement with the inhabitants. After over a year of negotiations, CMSC and the Community of San Cristóbal agreed to move the entire town 45km away, including its Church (declared as national heritage) and its cemetery. Conversely, CMMK was never able (or never wanted) to reach an agreement with the Community of Mallku Khota, settled in the drilling area. Instead of working in a professional manner with the community, CMMK decided to buy off wills from distant Community leaders and catalog members from the Community of Mallku Khota as a "handful of illegal miners". As it was obvious, this aggravated the conflict and, instead of seeking agreements, CMMK encouraged persecution (even judiciary) from those that opposed the Project (Section 2.1).

35. Unlike the assertions made by SAS and its witnesses, the Bolivian Government offered its support to CMMK in order to reach an agreement with the Indigenous Communities, which would have allowed the Project's continuance. As proven by Bolivia's witnesses (including the former Governor of Potosí and the former Vice-minister of Coordination with Social Movements and Civil Society, currently Minister of Mining and Metallurgy), the authorities acted in good faith seeking the Project's feasibility and social peace.
36. However, these efforts were futile given CMMK's actions, which aggravated the confrontation. By the year 2012, opposition from the Indigenous Communities was strong. [REDACTED]
[REDACTED]
[REDACTED] the maximum indigenous authorities at a national level (such as the Counsel of Ayllus and Markas of Qullasuyu or "CONAMAQ") and regional (such as the Federation of Indigenous Ayllus of Northern Potosí or "FAOI-NP") expressed their support to the Communities that were affected by the Project and demanded the immediate withdrawal of the Company from the region (Section 2.2).
37. Instead of reinforcing its community relations program, CMMK tried to counter rest these major organizations and neighboring Communities to the Project, increasing the Project's area of influence, in order to reach distant communities, and creating a parallel and illegitimate organization called Coordinadora Territorial Originaria

Autónoma de los Seis Ayllus (or COTOA-6A) (composed by the Communities that supported the Project, which it persuaded with futile promises). Both, Communities and Government rejected the legitimacy of this parallel organization.

38. Given the escalation of violence and as Bolivia has been able to discover [REDACTED]
[REDACTED]
[REDACTED] This strategy consisted in initiating legal criminal proceedings against the leaders of those Communities that opposed the Project, provide weapons to community members that supported the Project and create confrontation scenarios between Communities in order to later request the militarization of the area. The situation became unbearable to the point in which it risked the life of the inhabitants and even some national authorities, such as Governor Gonzales. Faced with this situation, the Bolivian Government had no other alternative than the Reversion, in order to reestablish public order and pacify the area (Section 2.3).
39. Since then, and in compliance with the Reversion Decree, Bolivia has assumed the administration of the Project's area in accordance to the agreements reached with the Indigenous Communities, hence, reestablishing the public order and peace (Section 2.4).
- 2.1 There is no dispute between the Parties on the fact that CMMK's actions and omissions caused violent confrontations between the Indigenous Peoples**
40. Both, the Reply and documentation provided by SAS confirm that the Indigenous Communities did not support the Project. From the beginning, CMMK had to confront a strong opposition from the neighboring Indigenous Communities close the Project, whom would be directly affected by the Project (Section 2.1.1). This opposition did not decrease nor was disqualified by the State, as SAS pretends (Section 2.1.2). Quite contrary, opposition escalated. As Bolivia has proven in its Counter-Memorial, the multiplication and aggravation of social conflicts surrounding the Project was the outcome of a poor community relations strategy of this company (Section 2.1.3).
- 2.1.1 From the beginning of CMMK's activities in Mallku Khota, Indigenous Peoples opposed to the Project.**
41. Bolivia proved, in its Counter-Memorial that CMMK's activities in Mallku Khota created, since 2008, rejection and concern within Indigenous Communities. This

opposition became evident in the year 2010 when, [REDACTED] and, the lack of serious social projects from the Company, the Communities – supported by the maximum indigenous authorities from the region and the country (FAOI-NP and CONAMAQ, accordingly) – demanded the immediate expulsion⁹ of CMMK.

42. SAS now alleges that the evidence of this serious opposition would be “solely [] resolutions by opponents to the project”¹⁰. Furthermore, it contends that CMMK had developed a broad community relations program which would have neutralized the “opposition to the Project existing in small pockets”¹¹. The assertions are false.
43. Documentation from SAS (some which were obtained during the document production phase) and Bolivia’s witnesses show that, since the beginning of CMMK’s activities, there was a generalized opposition to the Project by the Indigenous Communities.
44. First, SAS’s consultants in community relations affairs confirmed that, before 2010, there was a clear opposition to the Project.
45. First, SASC contracted the consulting firm *Business for Social Responsibility* (“BSR”) in 2009 in order to monitor the level of acceptance of the Project by those that were affected (stakeholder). After undertaking several interviews, BSR issued a report containing its evaluation of CMMK’s community relations program and the Project’s level of acceptance¹². SAS expresses that the BSR report “concluded that there was an overall acceptance of the Malku Khota Project”¹³. This is an interpretation, to say the least, scarcely rigorous from this consulting company.

⁹ Counter-Memorial, paras. 101 and ff.

¹⁰ Reply, section II (D) (1).

¹¹ Reply, par. 44.

¹² Business for Social Responsibility, *Social Risks and Opportunities for South American Silver Corporation’s Malku Khota Project in Potosí*, May 2009, pg. 6 (“BSR traveled to Bolivia to identify and interview stakeholders associated with the Malku Khota exploration project currently being carried out by South American Silver Corporation”), C-154.

¹³ Reply, par. 39.

46. Even though BSR noted that “[t]he majority of the stakeholders interviewed do not object to the Malku Khota project”¹⁴, this company explained that “very few actively support it”¹⁵. Furthermore, it also expressed that there was “widespread perception that the results of the environmental studies have not been shared at any level (mayor, sub prefecture, community)” and that “there is also widespread concern about contamination of lagoons, springs, as well as cropland and pasture from misuse of chemicals by the company”¹⁶. The resolution votes from indigenous authorities from December 11¹⁷ and 19¹⁸ 2010 – aside from others from the year 2011¹⁹ – confirm the aforementioned and, even requested CMMK to suspend activities.
47. On the other hand, BSR recollected the perception of the level of social acceptance of the Project by CMMK’s²⁰ employees. The “stakeholder map” prepared by BSR confirmed that there were Indigenous Authorities with a negative perception towards the Project and, that more than half of the Communities (including those from Mallku Khota and Calachaca)²¹ rejected it:

¹⁴ Business for Social Responsibility, *Social Risks and Opportunities for South American Silver Corporation’s Malku Khota Project in Potosí*, May 2009, pg. 9, C-154.

¹⁵ *Id.*

¹⁶ *Id.*

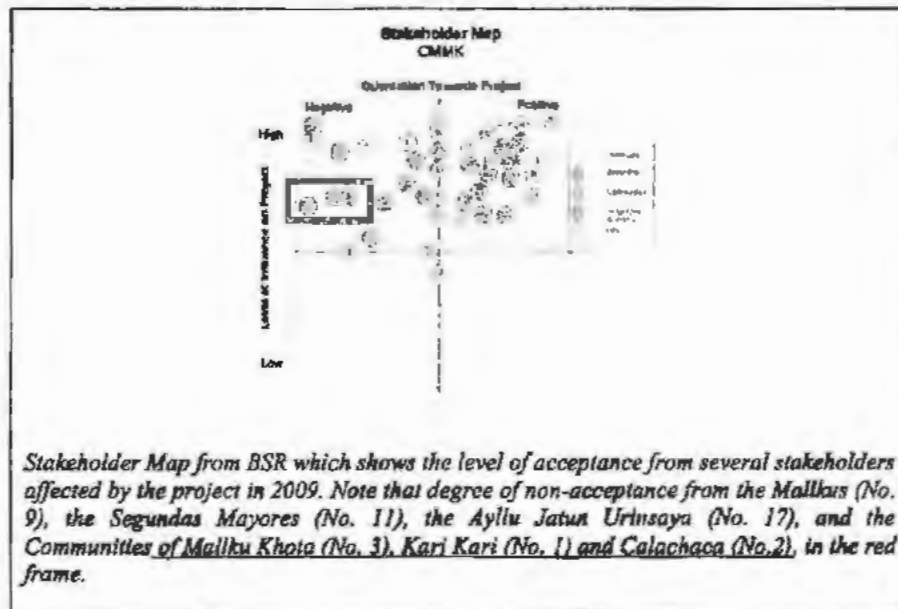
¹⁷ Resolution Vote from the Ayllus Sullka Jilatikani, Takahuani, Urinsaya and Samka dated December 11, 2010 (“We, the four Ayllus from the province determine that [CMMK] must suspend (sic) the work due to the following (sic) reasons: [...] threats to decrease (sic) water sources [...]”) (emphasis added), R-46.

¹⁸ Meeting Resolution from the Ayllus Sullka Jilatikani, Takahuani, Urinsaya and Samka dated December 19th 2010 (“That the illegal presence of the mining corporation ‘Minera Mallku Qota S.A.’ has violated the collective rights: The Right to Previous Consultation (sic), free and informed (sic) in order to obtain its previous consent (sic) to the development of mining activities. Abuse of Authority, environmental pollution [...]”), R-49.

¹⁹ See, for example, Resolution from the Primera Sección de la Central Sindical de Trabajadores Originarios de San Pedro de Buonavista de Potosí, dated February 6, 2011 (“mining activity is the activity that more pollutes the pacha mama, the mining concessions are granted from the top and are apart from the legal framework established in the Constitution, mining business people pollute the rivers with chemicals that they use and the water, which is the earth’s blood and are no longer useful for irrigation and produce our food”), R-54.

²⁰ Business for Social Responsibility, *Social Risks and Opportunities for South American Silver Corporation’s Malku Khota Project in Potosí*, May 2009, pg. 11 (“Figure 2 illustrates CMMK’s personnel current view of stakeholders’ influence and orientation towards the project. The mapping exercise was done with a team of 3 company staff and one NGO partner, and the results were validated with three more company members in the capital office”), C-154.

²¹ Cumbre del Sajama, another SAS Consultant Company, recollected similar impressions through the workshops they carried out with Indigenous Communities. See SASC and Cumbre del Sajama S.A., *Series of Workshops Knowing and Taking Care of Our Communitarian Environment*, May 2009, pg. 15 (“The community members also expressed their concern regarding the activities that



48. This clear opposition, from neighboring Communities to the Project, had to be turned around by CMMK in order to continue with the Project.
49. Second, and different to SAS assertions²², opposition to the Project did not come from a reduced group of illegal miners. The MEDMIN Foundation (contracted by CMMK to carry out environmental monitoring reports) confirmed, in the year 2010, that “there are no mining activities”²³ from community members. The documentation obtained by Bolivia during the documentation exhibition phase²⁴ also show the falseness of the so called theory of an “a handful of illegal miners”²⁵.

the mining company Malku Khota is undertaking in the area; they say that ‘the activities of opening roads, the use of dynamite and the drilling is negatively damaging their environment and could pollute their hydro resources, aside from damaging their livestock and plants’), C-166.

²² Reply, par. 79.

²³ Fundación MEDMIN, Second Monitoring Report, Implementation Plan and Environmental Plan (Segundo Informe de Monitoreo, Plan de Aplicación y Seguimiento Ambiental - PASA), Project Malku Khota, February 2009, pg. 75 (“The Community’s main economic activity in Mallku Khota is agriculture with low yields due to extreme weather conditions. The potato, barley, oat, lima bean and pea crops constitute the household income; however, there are secondary activities such as livestock and trade, currently there is not mining activity”), C-143.

²⁴ MEDMIN’s Report for 2005 confirms that, “in the Community of Mallku Khota, the main economic activity is agriculture, livestock and trade, there is no mining activity”, MEDMIN, Preliminary Environmental Baseline Study – Project *Mallku Khota* from May 2005, pg. 5, R-155.

²⁵ Claim, par. 58.

50. *Second, Indigenous* [REDACTED] and, the lack of action from the Company to correct or avoid these incidents. In spite of the warnings given by the Communities²⁷, CMMK did not put in place any appropriate measures. As it has been confirmed by Andrés Chajmi, member of the Community of Mallku Khota and witness in this arbitration proceedings, [REDACTED] [REDACTED] This is confirmed, in general²⁸, by the Community of Mallku Khota. Therefore, Indigenous Authorities from the Ayllu Sullka Jilatikani rejected through a resolution vote [REDACTED] [REDACTED] [REDACTED] [REDACTED]

²⁶ See Answer, par. 106.

²⁷ See, for example, the Monthly Report on Community Relations from CMMK, January 2009, pg. 1 (*“They also proposed to us not to bring outsiders (sic) to the workplaces next to the geology work in the area that belongs to each Ayllu and communities and that this would not be allowed and it could result in a problem with these people”*), R-156.

²⁸ Chajmi, par. 16 (*“they mocked our uses and traditions, they humiliated and discriminated us. I remember, for example, that one time Ms. Carmen Huanca was dressing up with clothing from Mama T’Alla, the maximum female authority and they mocked her saying she was Mama T’Alla from Mallku Khota”*), RWS-3.

²⁹ CMMK’s community relations reports confirm this problem with Ms. Carmen Huanca, coordinator for community relations from CMMK, during the Project’s socialization work, See Monthly Community Relations Report from CMMK dated March 2011, pgs. 1 (*“The community members expressed that the most important factors which determined the resolution vote to expel the company, according to their opinions were: [...] They did not pay attention to us when we asked them to remove Ms. Carmen because she did wrong (they saw that she divided communities within the Ayllu)”*) and 5 (*“In a personal interview from Rosenda Flores to Cirilo Mamani, he expressed that all the problem began last year, by September, when Ms. Carmen, during the meeting in Tacahuani, in which high female authorities attended, she expressed her disappointment and she got angry at everyone and left the room abruptly and almost picked up the aguayos in which they were eating coca leaves, that is why all the grass root organizations requested the removal of this lady and, and that they understand that we are different people and think differently, but, that was no excuse to be treated poorly”*) (emphasis added), R-157.

³⁰ Resolution Vote from the Community of Mallku Khota dated February 26, 2016, R-158.

³¹ Resolution from the Ayllu Sullka Jilatikani dated February 15, 2011 (*“[REDACTED]”*), R-51. See, also, Resolution Vote from the Ayllus of Sullka Jilatikani, Takahuani, Urinsaya and Samka dated December 11, 2010, R-46; Meeting Resolution from the Ayllus Sullka Jilatikani, Tacahuani, Urinsaya and Samka dated December 19, 2010, R-49, Resolution from FAOI-NP dated January 11, 2011, R-50; Resolution from FAOI-NP dated February 28, 2011, R-52.

³² Angulo II, par. 51, CWS-7; Malbran, par. 30, CWS-9.

██████████. As the community relations coordinator from Minera San Cristóbal explained, the arrival of people foreign to a community, in Potosí, usually brings problems which should be closely monitored by the mining company³³. Therefore, a diligent mining company would have had a system to attend complaints and claims.

51. Furthermore, SAS explanations³⁴ are solely based on their own assertions or their witnesses. Especially their arguments regarding the lack of legitimacy or the authenticity of the resolution votes from the Indigenous Communities shall be dismissed due to four reasons:
52. First, CMMK's documentation show that the alleged illegitimacy of the resolution votes is an argument created in this arbitration and that never before had they been protested by CMMK. For example, CMMK requested intervention from the Departmental Government on December 23, 2010 after the issuance of the resolution votes dates December 11 and 19th from that year³⁵. At no given time has CMMK denounced what SAS is now attempting to allege; specifically that (i) "*Andres Chajmi and Feliciano Gabriel proposed the adoption of a pre-drafted resolution that demanded that CMMK suspend its activities*"³⁶; (ii) that "*Jatun Urinsaya, and Qullana Ayllus strongly opposed both the December 11 and December 19, 2010 resolutions*"³⁷; or (iii) that "[d]ifferent communities confirmed to CMMK that they supported the Project despite their signing of the resolution"³⁸. If such facts existed, surely CMMK would have denounced them. It did not (because they did not exist).
53. Second, CMMK's own employees knew that the relationship with the Indigenous Communities was deficient³⁹ and acknowledged failure in their attempts. Fernando Cáceres, member of CMMK's community relations team reported to his SASC

³³ Mamani, par. 32, RWS-6.

³⁴ Reply, par. 127.

³⁵ Letter from Xavier Gonzales Yutronic to the Governor of Potosí dated December 21, 2010, R-55.

³⁶ Reply, par. 84.

³⁷ *Id.*, par. 86.

³⁸ *Id.*, par. 85.

³⁹ See, for example, CMMK's Monthly Operations Report to SASC, November 2010, pg. 4 ("*During the meetings held with the Ayllus we were able to reach agreements that could have future consequences. In spite that the first meeting was a total success and different tasks could be scheduled for the following (sic) meeting, this second meeting never (sic) had the expected success, however we were able to agree to a third meeting that will take place on December 11, including authorities from CONAMAQ and local authorities*"), R-159.

supervisors, on December 2010, that, *“of what has been done during this month regarding the work on community relations, we should seriously make a self-critique leaving personal egos aside in benefit of this company”*⁴⁰.

54. Third, Mr. Gonzales Yutronic⁴¹ accuses the Indigenous Communities authorities, for the very first time in this arbitration, of allegedly punishing by “whiplashing” and threatening other community members to issue resolution dated January 11, 2011, ordering CMMK to leave the area⁴². As the former Governor explains⁴³, Mr. Gonzales Yutronic has never denounced these serious acts to the proper authorities (it is especially remarkable the lack of complaint or denounce in the communication submitted by CMMK to the mayor and members of council of Sacaca on January 26th 2011⁴⁴). The accusations tailored for this arbitration, by SAS, cannot refute the evidence that, in the year 2010, the Communities did not unanimously support the Project due to the actions taken by CMMK.
55. *Last*, SAS cannot deny that, even if they do not favor its interests during this arbitration⁴⁵, CONAMAQ and FAOI-NP are two very relevant indigenous organizations at the national and regional levels⁴⁶. Likewise, it is undeniable that these organizations backed, by the end of 2010 and beginning of 2011, the rejection of the Ayllus close to the Project area. SAS attempt to equate these organizations with the parallel group COTOA-6A, is part of their confrontation strategy. As Bolivia will demonstrate, COTOA-6A was created by CMMK in order to simulate social support to the Project and fight the detractors⁴⁷.

⁴⁰ Monthly Operations Report from CMMK to SASC, December 2010, pg. 4 (emphasis added), R-160.

⁴¹ Gonzales Yutronic II, paras. 17 and 19, CWS-8.

⁴² Resolution from FAOI-NP dated January 11, 2011, R-50.

⁴³ Gov. Gonzales II, par. 12 (*“I became aware of a similar brief, which I received on December 2010, which Mr. Gonzales Yutronic had sent to the Mayor and members of Council from the Municipality of Sacaca, in which he comments on the events of the meeting dated January 11, 2011. It surprises me that Mr. Gonzales Yutronic has not denounced, back then (nor has he told me later on), of the alleged physical abuses to which he makes reference in his witness statements, which were committed against Mr. Santiago Calle”*), RWS-4.

⁴⁴ Letter from Xavier Gonzales Yutronic to the Municipal Mayor and members of Council from the Municipality of Sacaca dated January 26, 2011, C-273.

⁴⁵ See Reply, paras. 79 and 80.

⁴⁶ Ufo, paras. 21 and 67, RER-1.

⁴⁷ See section 2.1.3.3, *infra*.

56. The aforementioned shows that, by the end of 2010 and beginning of 2011, there was already a strong opposition to CMMK's Project from the Indigenous Communities that were directly affected by it.
- 2.1.2 Contrary to SAS contentions, Bolivia never described the Indigenous Peoples' allegations as "unsubstantiated"
57. In its Reply, SAS pretends that the claims made by the Indigenous Communities against it "were without merit"⁴⁸ and that the State had confirmed that such denounces were "groundless"⁴⁹. SAS misrepresents the responses that CMMK received from different State entities and its position is not congruent with the measures adopted by the State in order to mediate in the conflict between the Indigenous Communities upon receiving such claims.
58. *In limine*, it is not true that CMMK had to approach governmental instances different to the Departmental Government of Potosí because the latter "took no measures to protect CMMK"⁵⁰. As we will demonstrate⁵¹, the important mediator role of the Departmental Government during 2011 and 2012 (which was not acknowledged by CMMK) was in response to the request for mediation made by CMMK and, which objective was to establish a dialogue with the opposing Communities to seek the feasibility of the Project. CMMK's strategy to approach the Central government was part of a misinformation plan prepared by CMMK⁵².
59. In any event, the Tribunal shall examine, very carefully, SAS assertions and verify what is truly being said in the documentation (to which SAS makes reference in very general terms).
60. *First*, it is not true that the Ministry of Mining and Metallurgy has confirmed that CONAMAQ and FAOI-NP's claims were "without merit"⁵³. As SAS states, on January 26, 2011, Xavier Gonzales Yutronic sent certain letters to the Ministries of Presidency and Mining and Metallurgy. Such communications (incompletely

⁴⁸ Reply, par. 92.

⁴⁹ Reply, par. 120.

⁵⁰ Reply, par. 89.

⁵¹ See section 2.2.1, *infra*.

⁵² See Counter-Memorial, par. 142(b). See, also, section 2.1.3.3, *infra*.

⁵³ Reply, par. 92.

submitted by SAS⁵⁴) were similar to those that had already been sent to the Departmental Government on December 2010⁵⁵. The current Minister of Mining, César Navarro, back then former Vice-minister of Coordination with Social Movements and Civil Society, explains, within his witness statement, that given the gravity of CMMK's claim, the Minister of Presidency instructed him to follow-up⁵⁶, for which he requested the legal assessment presented by SAS with its Reply⁵⁷.

61. Contrary SAS and Mr. Gonzales Yutronic's assertions, this assessment did not determine that the accusations made by the Ayllus near the Project on dates December 11 and 19, 2010 "had no grounds"⁵⁸. Case contrary, the general conclusion of such assessment was that "it is not competence [of the Vice-ministry of Coordination with social Movements and Civil Society], to respond favorably to the request made by the representative of [CMMK], in reason that such request is not framed of the (sic) regulatory legal framework of the functions of the Executive Branch of the Plurinational State"⁵⁹. For this reason, Minister Navarro expresses that "Mister Gonzales Yutronic partially quotes and misinterprets in its second witness statement the response given by my office to CMMK. Contrary to this assertion, the Vice-ministry did not say CMMK was right, nor has it disqualified claims made by the Communities"⁶⁰.
62. In this regard, Bolivia shall expose two additional premises:
63. First, the legal assessment is limited to the resolutions issued by the Ayllus Sullka Jilatikani, Takahuani, Urinsaya and Samca which "apparently" would have no justification "in merit thereof that [CMMK], as they express [...], would not be

⁵⁴ With their Reply, SAS only presented the first couple of pages (C-229) from the communication sent to the Ministry of the Presidency. See Letter from Xavier Gonzales to the Minister of the Presidency from January 26, 2011, R-161.

⁵⁵ Letter from Xavier Gonzales Yutronic to the Governor of Potosí dated December 21, 2010, R-55.

⁵⁶ Navarro, par. 19, RWB-2.

⁵⁷ Letter from the Vice ministry of Coordination and Social Movements and Civil Society dated February 10, 2011, C-230.

⁵⁸ Reply, par. 120.

⁵⁹ Legal assessment attached thereto the letter from the Vice ministry of Coordination and Social Movements and Civil Society dated February 10, 2011, pg. 6, C-230.

⁶⁰ Navarro, par. 20, RWS-2.

*affecting the environmental quality*⁶¹. This description of events does not equate to ensuring that the Indigenous Communities' complaints were "groundless"⁶² and only reflects CMMK's opinion. Anyway, the office of the Vice-ministry added that CMMK's activities could potentially "result in damages to the environment, in accordance to the means and techniques used for the exploration"⁶³. If this conclusion is to say anyone is right, it is precisely the Indigenous Communities that had been denouncing, insistently, the threat that the Project represented to the environment⁶⁴.

64. Second, even though, as SAS states, is true that "*the 'consulta previa' was still not regulated*"⁶⁵, this does not mean that this requirement (of constitutional mandate since 2009) was not applicable to CMMK. As Mr. Navarro clarifies, "*under the legal framework in effect in 2012 and, in accordance to the Political Constitution of the State, in order for this Project to commence the exploitation phase, CMMK would have had to request an environmental license to the Ministry of Environment and Waters, presenting an environmental impact study and, later on, the State would have had to undertake a public prior consultation with the Indigenous Communities affected by the Project*"⁶⁶.
65. In *second place*, SAS ignores the truly important aspects within the response of the Ministry of Mining and Metallurgy to a mediation request formulated by CMMK by the end of January 2011. This document does not conclude that the Indigenous Communities' claims "*had no grounds*"⁶⁷. Conversely, the report submitted by the Ministry of Mining and Metallurgy to CMMK confirms the severity of the conflict in the Project's area. For the Ministry, it was clear that, in spite that CMMK "*would be*" complying with the legal requirements, "*as it can be observed, the problem presented by the mining company Malku Khota has become a social conflict with irreducible*

⁶¹ Legal assessment attached to the letter from the Vice ministry of Coordination and Social Movements and Civil Society dated February 10, 2011, pg. 5, C-230.

⁶² Reply, par. 120.

⁶³ Legal assessment attached to the letter from the Vice ministry of Coordination and Social Movements and Civil Society dated February 10, 2011, pg. 5, C-230.

⁶⁴ See section 2.1, *supra*. See, also, Answer, par. 107.

⁶⁵ Reply, par. 120.

⁶⁶ Navarro, par. 22, RWS-2.

⁶⁷ Reply, par. 120.

*characteristics on behalf of the Ayllus from Northern Potosí*⁶⁸. Furthermore, this response also shows the *non sequitur* that SAS pretends: that CMMK would possibly be complying with the environmental regulation does not mean that there was not a social conflict.

66. In *third place*, the Ministry of Mining and Metallurgy recommended “*establishing the basis for the initiation of a dialogue between the parties, oriented towards resolving the problem*”⁶⁹, measure that the State adopted through the Departmental Government⁷⁰. If the State would have truly thought that these claims were “*groundless*”⁷¹, the Ministry of Mining and Metallurgy would not have formulated a recommendation in this sense.

67. *Last*, the historical background of violence due to the division amongst Indigenous Communities led State authorities to take these claims and denounces very seriously. In Minister Navarro’s words:

*In the past, these kinds of claims in the Northern Region of the Department of Potosí unleashed serious events of violence that forced the Government to terminate major mining projects. This was the case of a gold mining project in the locality of Amayapampa in which the Canadian company Da Capo Resources did not respect the uses and traditions (coca leaf consumption), labor rights, agreements between the company and the union, which were recognized by the Ministry of Labor. These circumstances caused violent clashes which resulted in 14 people dead, among there were miners, peasants, women and one student belonging to the municipality of Llallagua*⁷².

68. The evidence presented by SAS and the mediation on behalf of the State in response to CMMK’s requests⁷³ show that Bolivia has never disqualified the claims made by the Indigenous Communities. SAS’s accusation that Bolivia “*will sink to the lowest*

⁶⁸ Internal Memorandum attached to the Letter from the Ministry of Mining and Metallurgy to CMMK dated March 16, 2011 (emphasis added), C-231.

⁶⁹ *Id.*, pg. 3.

⁷⁰ Gov. Gonzales II, par. 15 (“*The assertion made by SAS and Mr. Gonzales Yutronic in which I supposedly encouraged opposition to the Company on February 2011 is refuted upon recalling the several conciliation scenarios I promoted during the year 2011, in favor of the Company and which I describe don my First Deposition. As I expressed, a short period of time after and after the attempts of contact undertaken by Departmental Government officials, we were able to open several dialogue spaces in order to make CMMK’s Project feasible*”), RWS-4.

⁷¹ Reply, par. 120.

⁷² Navarro, par. 25, RWS-2.

⁷³ See section 2.2.1, *infra*.

levels to smear the Company and try to divert the Tribunal's attention"⁷⁴ is unacceptable (in its content and form) and must be rejected by the Tribunal.

2.1.3 As stated in Bolivia's Counter-Memorial, CMMK's community relations' strategy multiplied and aggravated the conflicts in the Project's area

69. In its Reply, SAS pretends that the community relations program from CMMK would be enough and, that it would be aligned with what has been recommended by international consultants. Nevertheless, as Bolivia stated in its Counter-Memorial⁷⁵, CMMK's community relations program presented serious flaws (Section 2.1.3.1), which contributed to the increase of opposition to the Project.

70. Once the situation became uncontrollable (and in view that SASC, as *junior* mining company only needed to display an apparent support from the Communities to sell the Project), CMMK hired Mr. Mallory in the year 2011 to design a strategy that would allow diluting and neutralizing those that opposed the Project (Section 2.1.3.2). One of the most important elements of this plan was that of the creation of COTOA-6A, an indigenous based committee with no kind of legitimacy and under complete and total control of CMMK (Section 2.1.3.3).

2.1.3.1 Since the beginning of the Project, CMMK's community relations program was deficient

71. SAS accuses Bolivia of ignoring "*CMMK's robust community relations efforts*"⁷⁶, which are described as "*a positive initiative that enjoyed success*"⁷⁷. Once again, SAS misinterprets the evidence that it presents. These show that, counter wise, CMMK's community relations strategy was plagued with deficiencies that triggered the division amongst Indigenous Communities. These flaws were noted by the international consultants that were contracted by SASC and are evident if compared to the socialization program developed by CMMK and other mining companies.

72. *First*, CMMK did not observe good practices to establish contact with the Communities. In its 2009 study, BSR noted that "*many community members preferred*

⁷⁴ Reply, par. 122.

⁷⁵ Counter-Memorial, paras. 100-103.

⁷⁶ Reply, par. 29.

⁷⁷ Reply, section II(B)(1).

meeting together to respond to the interview rather than individually”⁷⁶ and that “[t]his communication style [was] useful to understand for future engagement activities conducted by the company”⁷⁹. As commented from Prof. Uño, expert in indigenous peoples’ rights, in difference with western societies, Indigenous Communities adopt their decisions unanimously and not by majority⁸⁰. Mr. Mamani confirms the importance of respecting this decision-making system for the success of a community relations program⁸¹.

73. In spite of this, Mr. Angulo favored the meetings with members of those Communities that favored the Project and even tried to prevent meetings from any other Community that opposed the Project and tried to make them fail. As Mr. Angulo explained through internal reports (which he “forgot” to present with jointly with his witness statements):

For January 20th, Andrés Chajmi convoked (sic) a meeting with community leaders and the Company’s participation, to discuss the raise of daily payments and coordinate the work, but, the intent was to incite people to demand from the Company the incorporation of the communities of totoroco and huartmarca according to the information provided by Eulogio Mendoza for this meeting not to take place, the meeting needed to fail and so was done. The failure was provoked (sic) in the following manner; day before there were conversations (sic) with community leaders telling them not to attend to this meeting because there wasn’t consensus from the ayllu⁸².

74. As Mr. Mamani confirmed, interfering in the way in which Indigenous Communities made their decisions or discussed their interests is serious and does not contribute to secure their support to the Project⁸³. For this reason, BSR recommended SASC “to

⁷⁶ Business for Social Responsibility, *Social Risks and Opportunities for South American Silver Corporation’s Mallku Khota Project in Potosí*, mayo de 2009, pg. 8, C-154.

⁷⁹ *Id.*

⁸⁰ Uño, paras. 52-54, RER-1.

⁸¹ Mamani, par. 18 (“Furthermore, we have always been careful on negotiating with the entire community or with the representatives appointed by them through assembly and, not with certain individuals, because this promotes division among community members. It is important to point out that, for these communities, it is essential to achieve a consensus amongst community members. Therefore, MSC does not take forward any kind of project or work without the support and without confirming that there is a high degree of acceptance within the community”), RWS-6.

⁸² Monthly community relations report from CMMK, from January 2008, pg. 1 (emphasis added), R-162. In this report, Mr. Angulo states that there was a “private meeting” with Victoriano Condori from the Community of Mallku Khota and another meeting with Segundo Mamani from the Ayllu Tacahuani.

⁸³ Mamani, par. 21 (“Furthermore, we have always been very respectful of the decision making instances within the indigenous communities. To interfere general meetings, counsel of authorities or committees from the indigenous communities can have hindering effects regarding the

*develop engagement mechanisms that include the broad community, not just identified leaders and authorities*⁸⁴.

75. CMMK, however, did not stop privileging contact with supportive individuals (and avoid contact with Communities⁸⁵) to try to influence Indigenous Authorities⁸⁶, which, as has been confirmed by Mr. Mamani was not recommendable for socializing a Project to be developed with Indigenous Communities. Therefore, CMSC has always been *“careful of negotiating with the entire community or with the representatives that have been appointed by the assembly and not with certain individuals, because this results in division amongst the community members”*⁸⁷. And, it could not be in any other way, as explained by Mr. Javier Diez de Medina, CMSC’s Social Corporate Responsibility Manager, the permanent dialogue, but, moreover, *transparent*, at all times which allowed them to create an enabling environment with the Indigenous Communities⁸⁸.
76. *Second*, CMMK implemented poor practices with the scarce benefits that it awarded the Indigenous Communities (and did not fulfill the acquired commitments).
77. *First*, BSR criticized, upon reviewing the agreement minutes in which they registered the donations made to the Communities that *“both individuals and communities have*

legitimacy of the project because we would be interfering in their uses and traditions and, the decision that was taken would not represent the community’s expression”), RWS-6.

⁸⁴ Business for Social Responsibility, *Social Risks and Opportunities for South American Silver Corporation’s Malku Khota Project in Potosí*, May 2009, pg. 15, C-154.

⁸⁵ See, for example, CMMK’s Report on the site visit to San Pedro de Buena Vista dated February 21, 2011, R-163. This document reflects how Mr. Angulo, through Martin Condori sought organizing a meeting only with *“some ayllu authorities and leaders (sic)”*. This document proves that throughout the month of February 2011, Mr. Angulo met with certain individuals in order to influence the decisions from the Indigenous Authorities.

⁸⁶ CMMK’s Report on the site visit to San Pedro de Buena Vista dated February 21, 2011, pg. 3 (*“February 18, meeting with Cirilo Mamani in Toracari: The document that you are giving me will be useful to explain the people, at the meetings, what is being done at the community, and if the Company has or does not have documents [...] with this I will explain and the authorities will observe (sic)”*), R-163.

⁸⁷ Mamani, par. 18, RWS-6.

⁸⁸ Diez de Medina, par. 25 (*“Minera San Cristóbal developed a relationship model based on values. If we, as a company, want to create value and benefits for our shareholders and ‘stakeholders’, we must ‘know’ what impacts we will create (social, environmental and others) and how they have to be managed, in the future. We create an ‘engagement’ with the ‘stakeholders’ in order to, through dialogue, identify the solutions that will benefit both, the company as the ‘stakeholders’. These solutions, in their implementation, is what we call ‘co-creation’ in which jointly we undertake the solutions”*), RWS-3.

received financial and in kind support"⁸⁹, which was contrary to the good practices in affairs of community relations. In effect, "[t]his type of actions may reinforce the perception that support for the project is being 'bought'. International best practices suggest giving donations to community boards/councils and not individuals, and to conduct these transactions in a transparent and public manner to avoid misinterpretations"⁹⁰. As CMSC's Social Corporate Responsibility Manager explains, money is not the means to obtaining social success in a mining project⁹¹.

78. Second, SAS states that the Bolivian criticism to the low social impact from CMMK's donations to the Communities (a shower, a registry ledger, a pipelines for irrigation, etc.⁹²) are not justified due to the extreme poverty in which these Indigenous Communities live in⁹³. Beyond confirming the lack of respect towards the Communities, SAS's argument ignores what has been stated by their own consultant, BSR: "*CMMK should consider some level of investment that provides an indicator of the company's philosophy and potential future behavior in this respect and allows increased engagement with local stakeholders*"⁹⁴.
79. CMSC's relations program is a proper example of positive commitment with Indigenous Communities. As it has been explained by Mr. Díez de Medina, mining corporation Minera San Cristóbal realized important contributions to the Communities (in spite of their extreme poverty), and especially during the exploration phase, in order to ensure the understanding between the company and the Communities:

Having been in the region for several years, on June 9th 1998, Minera San Cristóbal and the Community of San Cristóbal subscribed a Social Pact

⁸⁹ Business for Social Responsibility, *Social Risks and Opportunities for South American Silver Corporation's Malku Khota Project in Potosí*, May 2009, pg. 16 (emphasis from the original text), C-154.

⁹⁰ *Id.*

⁹¹ Díez de Medina, footnote 7 ("*It is very common to hear, at international and national events, among others, the question of how much is invested or how much money is needed for staff. This is not the correct approach. It doesn't depend on how much money or how much staff is needed, but, case contrary, of 'how', 'with whom' and what is decided to do jointly, taking into account their uses and traditions, the place and region in which you operate and the mutual respect and to adjust the context to the principles and international standards*"), RWS-5.

⁹² See Counter-Memorial, par. 102.

⁹³ Reply, par. 48.

⁹⁴ Business for Social Responsibility, *Social Risks and Opportunities for South American Silver Corporation's Malku Khota Project in Potosí*, May 2009, pg. 22, C-154.

defining its main rights, obligations and expectations (the 'Social Pact'), to which we have made reference many times since then (we call it the 'framework agreement'). In this agreement, we set the conditions for moving the Town of San Cristóbal, the establishment of a Foundation, the compensation and several other themes (amongst them, give priority to the community members for the job openings). The convened compensation was of \$2,000,000 and it would be part of a Community Trust Fund administered by the Foundation San Cristóbal. Later on, on May 12th 1999, an agreement was signed with Culpina K for the area destined for tail waste. It is here when the company achieves high credibility levels and later on trust⁹⁵.

80. In view that there are Communities settled around CMMK's planned drilling area, it was expected that the Company would reach agreements with these communities in order to obtain their support from the beginning. This was the case, for example, of Mínera San Cristóbal, which, after long and complex negotiations⁹⁶, committed, during the exploration phase, to relocate the entire village which was located in the drilling area at 45 km distance and implement a community relations program with over \$2 million dollars in order to secure social acceptance from the Indigenous Communities. In spite that Communities such as Maliku Khota and Calachaca were in a similar position than that of the town of San Cristóbal⁹⁷ in relation to the Project, SAS has not demonstrated that CMMK has complied with the international regulations⁹⁸ (which demanded the execution of a program similar to the one





⁹⁵ Díez de Medina, par. 39 (emphasis added), RWS-5. See, also, Mamani, paras. 7 ("When MSC began undertaking their first prospection activities in the area of San Cristóbal, in 1998, the team members from the community relations identified that the communities would be directly affected by MSC's work") and 29 ("We must clarify that large part of the benefits and agreements to which I make reference to, were agreed and fulfilled during the exploration phase. During the exploration and construction phase, our community relations program has evolved and has implemented new channels of communication between the company and the communities, with the objective of ensuring the project's legitimacy"), RWS-6.

⁹⁶ See Mamani, paras. 25 and 26 ("Moving the town implied a very complex negotiation process between MSC and the communities but, thanks to the work performed, we were able to achieve very high levels of legitimacy and trust. I remember that, in order to negotiate the resettlement, we created three different commissions in which there were representatives from the communities and MSC. In order to provide the proper solemnity and faith, we began negotiating at the Church, in front to the Holy Patron of San Cristóbal. In order to ensure a high level of consensus regarding the decisions we were making, each week we prepared technical reports in the consultations and we met with all the members from the community to explain them the advances regarding the negotiations and the agreements we had reached"), RWS-6.

⁹⁷

⁹⁸ See, for example, Mamani, par. 14, RWS-6.

developed by CMSC). The following photographs show the location of the towns regarding the area of influence of the mines:

San Cristóbal	Mallku Khota
	
	
<p>Town moved by CMSC (in red, location of the old town in mining area)</p>	<p>Approximate location of the Community of Mallku Khota (in red) and the mining area foreseen by CMMK (in white)</p>

81. In fact, SAS recognizes that CMMK postponed any possible significant contribution announcing to the Communities that there would be cooperation agreements after the exploration phase finished⁹⁹ (meaning, once SASC would have sold the Project).
82. Third, SAS exaggerates the commitments it has subscribed with the Ayllus¹⁰⁰ and omits to mention that these (i) were not necessarily of great social impact and, were even (ii) quickly infringed. For example, within the environmental mitigation plan, which was prepared for the year 2011, MEDMIN reported as a deficiency “the breach of agreements between communities and the company”¹⁰¹. Furthermore, it intended that CMMK “*should have promoted projects oriented towards improving the livelihood of the community members*”¹⁰². As Mr. Mamani states, “[*the*] *breach of any commitment [...], be it by Word of mouth, no matter how small it were, could put at risk the negotiations that were taken forth with the communities*”¹⁰³.
83. *Third*, and in spite of the recommendations presented by the consultants, CMMK never communicated the real implications of the Project and limited its socialization work to basic mining courses. In the year 2009, BSR had warned CMMK that “[*t*]here is a clear lack of information about the impacts of mining and industry best practice in the external stakeholder groups surveyed. As noted previously, many complained that they did not have information about CMMK’s specific plans for the Malku Khota project”¹⁰⁴. BSR emphasized that “[*w*]orkshops on basic mining concepts or environment should not be substitutes for the company’s presentations on project status and progress”¹⁰⁵.

⁹⁹ Reply, par. 65 (“*The commitments reached in the RCAs were limited to the exploration phase. All RCAs expressly provided that new RCAs with greater benefits for the communities would be entered into once the Project evolved to the construction phase*”).

¹⁰⁰ Reply, paras. 50 y 62.

¹⁰¹ Fundación MEDMIN, Environmental Mitigación Plan (PMA for its acronym in Spanish) and PASA for the year 2011, prepared on December 2010, pg. 12 (emphasis added), R-164.

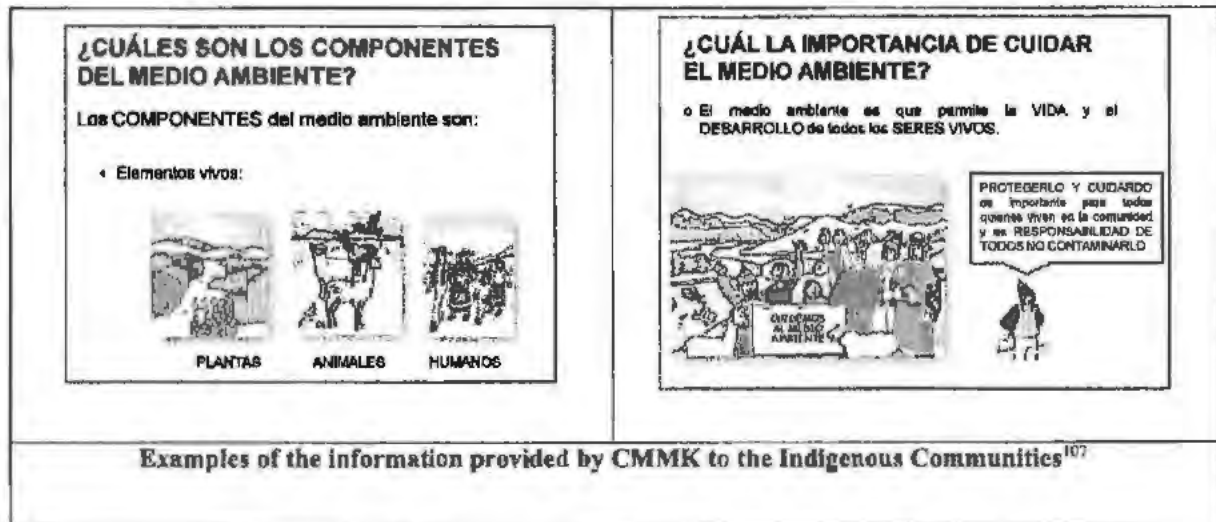
¹⁰² *Id.*, pg. 3.

¹⁰³ Mamani, par. 18, RWS-6.

¹⁰⁴ Business for Social Responsibility, *Social Risks and Opportunities for South American Silver Corporation’s Malku Khota Project in Potosí*, May 2009, pg. 23, C-134.

¹⁰⁵ *Id.*, pg. 15.

84. In spite of this, as it is confirmed in the Reply¹⁰⁶, between 2008 and 2011, CMMK only developed workshops regarding simple basic mining concepts, without clear explanations regarding the scope of the Project.



85. Contrary to CMMK, as stated by Mr. Díez de Medina, the mining corporation Minera San Cristóbal made available for the Indigenous Communities the results of the studies it undertook in the area from the moment in which these were available, which contributed to the establishment of an enabling cooperation environment¹⁰⁸. Mr. Mamani, CMSC's community relations coordinator states that, "[u]ntil now, I am still convinced that the transparency on the communications regarding the scope of the project [San Cristóbal] and its impacts was essential for receiving the acceptance of the communities"¹⁰⁹ and, that without this information, "it would have been impossible to gain the community's trust"¹¹⁰.

¹⁰⁶ Reply, paras. 37 and 38.

¹⁰⁷ CMMK, Presentation *Mallku Kkota Works with Values and Principles of New Mining*, R-165.

¹⁰⁸ Díez de Medina, par. 35 ("As I previously explained, the mining rights from the San Cristóbal Project were consolidated in 1994, year in which we also obtained the acceptance and Green light from the communities to access the area. Upon beginning exploration in 1995, the company rapidly achieved legitimacy by providing information and creating Jobs. The geological results that we obtained through the exploration led to an auditing process of the Social Environmental baseline and the corresponding Environmental Impact Study, whose results were timely disseminated to the local population through meetings with the authorities and community delegates"), RWS-5.

¹⁰⁹ Mamani, par. 17, RWS-6.

¹¹⁰ *Id.*

86. *Last*, SAS pretends to validate its community relations program alleging that the State never criticized it or void it¹¹¹. What is true is that Bolivia never became aware of the community relations program because CMMK never made it available for any authority.

87. First, as SAS recognizes¹¹², the environmental reports that CMMK submitted to the Natural Resources Secretariat in the Department of Potosí were of a technical and environmental character and did not constitute any kind of community relations plan¹¹³. In words of former Governor Gonzales:

Such documents [the environmental monitoring reports] should be communicated by CMMK to the Departmental Government in accordance to its environmental license. Even though these documents contain descriptions of some of the donations made to the Community (such as road maintenance by the community members, provision of materials for building a church, maintenance of a solar shower for the school, donation of a 45kg. bag of sugar and a bag of coca leaves, among other), I do not share SAS's perception and its witnesses, according to which these reports contain a serious socialization and community relations program for the mining project¹¹⁴.

88. Second, SAS pretends that certain documentation from the Natural Resources Secretariat would prove that CMMK was fulfilling its commitments with the Communities¹¹⁵. However, SAS only mentions as support a notice from the Secretariat, for CMMK to “1. Present its Environmental License; 2. Report on incident (sic) of Water used during the spill (sic) 3. Specific Report on Waters used [...]”¹¹⁶. Best case scenario, this document would only confirm that CMMK would

¹¹¹ Reply, par. 78.

¹¹² Reply, par. 75.

¹¹³ See, for example, Fundación MEDMIN, Second Monitoring Report and Environmental Follow-up (PASA), Project Malku Khota, February 2009, submission letter (“we address you with the purpose of presenting you the Second Environmental Monitoring Report [...] as fundamental part of the PASA which response to the Dispensation Certificate issued by your authority”) and pg. 1 (“The Exploration Project Minera Malku Khota has the corresponding environmental documentation and has accredited its activities, hence, approved through dispensation certificate type 3 in August 2006, in which in a parallel manner, the PMA (Environmental Mitigation Plan) and the PASA are presented, in which the monitoring Schedule is established and will be undertaken per semester”), C-143.

¹¹⁴ Gov. Gonzales II, par. 6, RWS-4.

¹¹⁵ Reply, par. 76.

¹¹⁶ Notification No. 28 from the Natural Resources Departmental Secretariat dated November 13, 2010, C-201.

be “fulfilling most of its commitments”¹¹⁷ in the environmental aspect, but it does not express anything regarding its Project’s socialization program.

89. **Third**, SAS cannot seriously allege that the State approved its community relations program because once, in the year 2007, Mr. Mario Virreira, Prefect of the Department of Potosí, visited the Project and expressed its support to the exploration¹¹⁸.

90. In conclusion, CMMK’s community relations program was deficient and the few commitments with the Communities were, as Mr. Mallory recognized in the year 2011, “breached commitments”¹¹⁹. As we will see in the next section, to develop a proper socialization program (as for example, the one developed by Minera San Cristóbal) was not a priority for a *junior* mining company such as SASC, whom preferred to implement low cost solutions and at a short term (because its end objective was to sell the Project as soon as possible).

2.1.3.2 *The changes implemented by Mr. Mallory in CMMK’s community relations program starting from 2011 multiplied and aggravated the conflicts*

91. As Bolivia stated in its Reply¹²⁰, Mr. Mallory gave a twist to the way in which CMMK’s community relations were managed. Improving the community relations program to obtain a high degree of acceptance (as it was done by Minera San Cristóbal) was a highly costly option for a *junior* mining company such as SASC. Case contrary, to do what Mr. Mallory proposed (to silence those that opposed the Project) resulted more appealing and cheaper, but – at the end – lead to the Project’s failure. Each and one of the steps taken by Mr. Mallory show the intent and confirms the existence of “*alternative work plans at the project in the event that the Corporation does not receive the necessary support*”¹²¹:

92. In *first place*, Mr. Mallory decided to increase the Area of Influence of the Project in order to include the totality of the Communities from other six Ayllus that little or

¹¹⁷ *Id.*, detail of inspection.

¹¹⁸ Monthly activity report from CMMK to SASC for August 2007 pg. 6 (“*In all these visits we were able to get support (sic) of all the aforementioned authorities, regarding the work that we are undertaking in the area*”), C-258.

¹¹⁹ Minute and report in regards to the Meeting held on September 25, 2011, pg. 2, R-65.

¹²⁰ Counter-Memorial, paras. 118-122.

¹²¹ SASC Board Minute dated May 10, 2011, pg. 2, R-166.

almost nothing were affected by the Project at the same time that he began making appealing promises (including the two way cooperation agreements that were submitted by SAS in its Reply¹²²). The increase in the Area of Influence sought to dilute opposition from the closest and directly affected Communities (by the Project). As Mr. Chajmi confirms, “CMMK made it more difficult every time to establish a dialogue with them when it started including distant communities in the discussion table, to whom they were offering jobs”¹²³.

93. SAS attempts to justify this change invoking a recommendation made by BSR which does not appear in any part of the BSR report¹²⁴, and the fact is, that allegedly, the areas of influence of mining corporations from Inti Raymi and San Cristóbal include all the areas located between 60 and 140 km of distance, accordingly¹²⁵. What SAS fails to indicate is that these aforementioned areas in its Reply constitute the indirect areas of influence of these other projects. As it has been explained by Mr. Díez de Medina, from mining corporation Minera San Cristóbal, the direct area of influence of CMSC (where the communities with which they sign agreements for the realization of the project are located¹²⁶) is limited to four communities that suffers a direct affectation from the mining project:

The Direct Area of Influence of the Project includes those nearest to the San Cristóbal Project, which – due to their physical closeness and/or the affection of land uses - are the ones mainly affected by the mining operation. Usually, on this area, the necessary roads are built in order to move materials and equipment from and to the mine [...]

At the beginning of the Project, the Direct Area of Influence was centered in the Communities of San Cristóbal, Culpina K and Vila Vila. In the case of San Cristóbal, because the entire town of San Cristóbal had to be moved (because it was on top of the current mine deposit); in the case of Culpina K, because the area that now is being used for mine tails was needed; and, in the case of Vila Vila, because it is a detachment of the community of San Cristóbal. Later on, the community of Rio Grande was included, because a

¹²² Reply, par. 63.

¹²³ Chajmi, par. 24 (unofficial translation in quechua: “Nuqaq mmasqayqa karga. CMMK chay qhuya wakichiywan chay kikinapi aythakamallaek'aywan beneficiawanankuta, yachayniyku usuyku ima yupaychasqa kamanta, ajinallaraq Pachamamata mana unquchwanankuta. Llakty, CMMK, sapa kuti rimanakunayku mana atikunanta nwarqa. Chaywan arwan karunanta ayllukuna rimanakuyman yachunankuta, chaykunamanga llank'anata jaywananmanla parlarqa”), RWS-3.

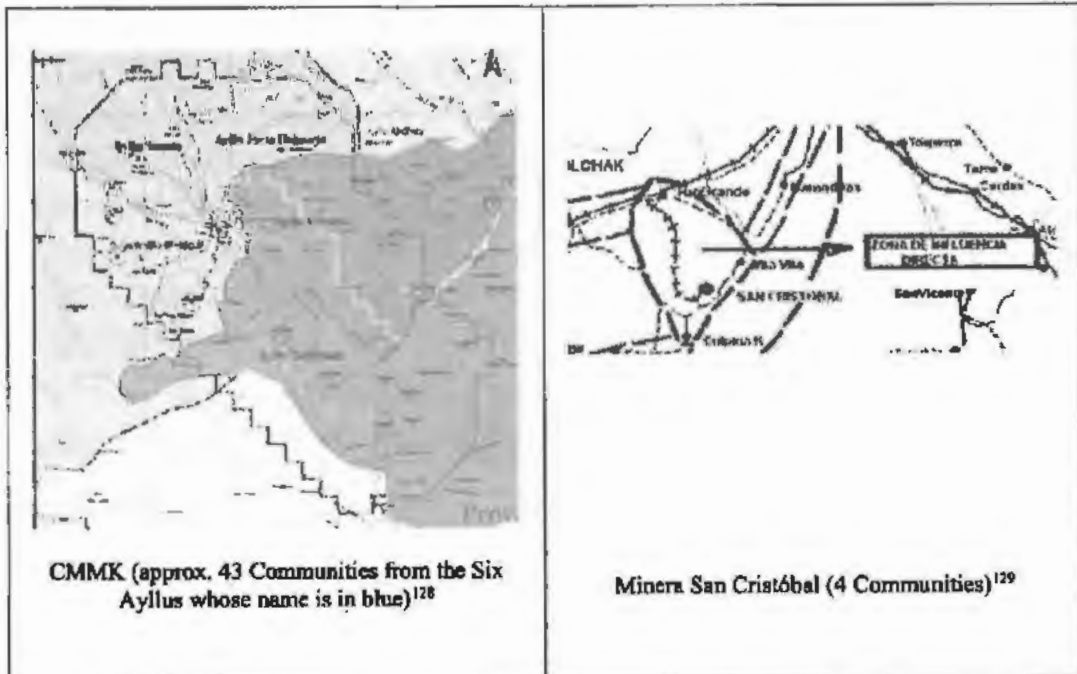
¹²⁴ Reply, par. 71. Supposedly, BSR had communicated this information, verbally, to Mr. Malbran. See Malbran II, par. 14, CWS-9.

¹²⁵ Reply, par. 72.

¹²⁶ Díez de Medina, paras. 36 and 39 (emphasis added), RWS-5.

portion of the railway line was built and would pass through its territory and, changes to the use of land had to be established¹²⁷.

94. A comparison of the Communities that were involved in the socialization of the Project by Mr. Mallory and the direct area of influence of the mining corporation Minera San Cristóbal reveal the lack of justification for CMMK's increase of the area of influence:



95. As Bolivia has stated in its Counter-Memorial, CMMK's strategy for silencing the opposing minority seriously affects the decision making process form the Ancestral Organization of the Indigenous Communities¹³⁰.

96. *Second,* [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

¹²⁷ *Id.*, paras. 31 and 34.
¹²⁸ Mallory I, pg. 8, CWS-3.
¹²⁹ Díez de Medina, par. 33, RWS-5.
¹³⁰ See Counter-Memorial, paras. 52 and ff.
¹³¹ [REDACTED]

[REDACTED]

[REDACTED] Due to the severity of her statements, Bolivia has requested SAS and the Tribunal to protect her identity and take any precautionary measure to preserve the confidentiality of her witness statement¹³³.

97. [REDACTED] is particularly enlightening regarding three aspects:

98. First, it confirms that the management of the community relations on behalf of Mr. Angulo was deficient and had caused serious divisions that took place in the year 2011. [REDACTED]

[REDACTED]

99. Second, confirms that CMMK'S intransigence had triggered the opposition from the Community of Mallku Khota, one of the most affected by the Project. [REDACTED]

[REDACTED]

[REDACTED]

¹³² [REDACTED]

¹³³ Letter from Bolivia to the Tribunal dated March 10, 2016.

¹³⁴ [REDACTED]

¹³⁵ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

100. *Last,* [REDACTED]
[REDACTED]
[REDACTED]

2.1.3.3 *COTOA-6A was an illegitimate committee created by CMMK in order to subdue opposition to the Project*

101. Bolivia has proven¹³⁷ that, contrary to what is alleged by SAS, COTOA-6A was an illegitimate committee, organized by CMMK in order to displace opposing Communities, create misinformation and to delegitimize (as it is being done by SAS in its Reply) historical and legitimate indigenous organizations, in accordance to their traditional ways of political and cultural organization, such as CONAMAQ or FAOI-NP. It is not true that COTOA-6A (i) “*was in the ayllu leaders’ mind since [2009]*”¹³⁸, (ii) “*was an initiative taken by the leaders of six Ayllus*”¹³⁹ or that it was “*independent from CMMK*”¹⁴⁰.

102. *First,* [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹³⁶ [REDACTED]

¹³⁷ Counter-Memorial, par. 125.

¹³⁸ Reply, par. 33.

¹³⁹ *Id.*, par. 94.

¹⁴⁰ *Id.*, par. 97.

[REDACTED]

103. The fictional character of COTOA-6A explains why there aren't any records of this organization within the Departmental Government of Potosí¹⁴², nor within the CONAMAQ¹⁴³ nor within the FAOI-NP. As Minister Navarro recalls, COTOA-6A was especially disturbing for governmental authorities for it "was outside the Ayllus' organizational structure"¹⁴⁴. Contrary to what SAS suggests¹⁴⁵, the fact that the authorities received their representative at given times does not change this circumstance¹⁴⁶.

104. *Second*, t[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹⁴¹ [REDACTED]

¹⁴² Certification from the Departmental Legal Directorate from the Department of Potosí dated February 10, 2015 ("Based on what has been presented and, in accordance to the review undertaken, it is that we report that NO kind of information can be given in view that there is no record of the so-called [COTOA-6A] in our registries [...] from the Autonomous Departmental Government of Potosí"), R-58.

¹⁴³ Certification issued by CONAMAQ on March 3, 2015 ("We respond to your note [...] in which we put into consideration of your distinguished authority that the Ayllu COTOA-6A is not (sic) an existent representative and therefore cannot be recognized and included to our organization called Consejo Nacional de Ayllus y Markas del Qullasuyu"), R-57. See, also, Certification issued by CONAMAQ on March 10, 2016, R-168.

¹⁴⁴ Navarro, par. 29 ("When I found out about the existence of this organization COTOA-6A, I immediately inquired, through the Vice ministry's staff and, we were able to evidence that nor FRTCQ-NP nor FAOI-NP acknowledged it and, subsequently, it was an organization that was at margin from the farmers' organization structure and from the Ayllus"), RWS-2.

¹⁴⁵ Reply, par. 95.

¹⁴⁶ Navarro, par. 32 ("I must clarify that, even though as National Government authorities we meet and interview with members from civil society, this does not mean that because we have met with community or Ayllus' leaders, which apparently composed COTOA-6A, I acknowledged any kind of legitimacy as it is alleged by SAS in their Reply. Case contrary, the complex political reality from the Indigenous Communities from North Potosí, would never recognize a parallel organization that does not have the approval from FAOI-NP or from FRTCQ-NP"), RWS-2.

[REDACTED]

[REDACTED]

105. [REDACTED]

147 [REDACTED]

148 [REDACTED]

149 [REDACTED]

150 [REDACTED]

106. *Third,* [REDACTED]

107. *Fourth,* the creation and establishment of a parallel indigenous organization such as COTOA-6A is extremely serious for the Plurinational State of Bolivia due to certain historical events. In effect, *"during the military dictatorship under Hugo Banzer, in order to weaken the mining union, the so-called 'union coordinators' were created, which were at margin of the union. For Banzer, these coordinators were the sole interlocutors which represented the workers. Therefore, it used an organization to divide and fragment. This also happened in other regions of the country, with the sole purpose of fragmenting the unity of certain Communities in order to ignore interests"*¹⁵⁴. To establish a committee such as COTOA-6A is not only irregular, but, it is also contrary to the Plurinational character of the State.

108. Finally, it is necessary to comment regarding the procedural behavior of SAS in regards to COTOA-6A. In its Counter-Memorial, Bolivia expressed its doubts regarding the legitimacy of this organization¹⁵⁵ and CMMK's participation in its creation. In its Reply, SAS assured that CMMK had not created COTOA-6A nor had it participated in their resolutions¹⁵⁶, statements which were repeated *ad verbatim* by one of their witnesses, Mr. Mallory.

[REDACTED]

¹⁵¹ [REDACTED]

¹⁵² Answer, par. 156.

¹⁵³ See section 2.3.1, *infra*. See, also, Answer, par. 157; Payment receipts dated May 10, 2012 for mobilizing the communities to the meeting in Acasio, R-79.

¹⁵⁴ Navarro, par. 30, RWS-2.

¹⁵⁵ Counter-Memorial, paras. 65 y 124-128.

¹⁵⁶ Reply, par. 97 (*"Contrary to Bolivia's allegations, CMMK did not use COTOA-6A as a vehicle to establish a parallel agenda or to generate a false impression that only a few communities were*

109. Bolivia requested SAS to exhibit all “*the documents related to COTOA-6A*” including the internal correspondence from CMMK as for any other document regarding its administration and functions¹⁵⁷. In its response, SAS mentioned that these documents were “*irrelevant*” and, voluntarily shared 22 documents. After the Tribunal’s instruction to share and communicate all other documentation corresponding to this category, SAS only provided one additional document.
110. It has been proven that SAS failed to communicate all other documentation corresponding to Category #10 which they had in their power, custody or control and, that their assertions in the Reply are false. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
111. This behavior (not communicating the documentation in spite of the Tribunal’s instruction and making evident false assertions) must be taken into account by the Tribunal upon assessing the merit of claims made by SAS and its witnesses’ credibility, as well as for the allocation of costs of the proceedings in accordance to the Rules 9(5) and 9(7) of the *IBA Rules on the Taking of Evidence* and Guidelines 9-11 of the *IBA Guidelines on Party Representation*.
112. If, there were any doubts regarding the irregularity and illegitimacy of the committee so-called COTOA-6A, it is now very clear that its purpose was to subdue any opposition from the Communities near the Project and, to create a false sense of support to CMMK’s Project. This committee was actively utilized by CMMK during the socialization meetings summoned by the Departmental Government to mediate in the conflict and has created an active counter weight (sometimes violent) to the legitimate opposition to the Project from the maximum Indigenous Authorities at a regional (FAOI-NP) and national level (CONAMAQ).

opposing the Project. The actions taken, and resolutions adopted, by COTOA-6A in support of the Malku Khota Project were independent from CMMK”).

¹⁵⁷ Decision regarding the Request for Documentation made by Bolivia dated July 21, 2015, Category # 10.

2.2 SAS tries to mislead the Tribunal on the State's role in the mediation of the conflict with the Indigenous Peoples

113. Contrary to what is assured by SAS in its Reply, the Departmental Government attended, in good faith, CMMK's requests, and tried to guarantee the Project's feasibility (Section 2.2.1). Likewise, other authorities from the Central Government recognized the severity of the conflict created by CMMK within the region of Mallku Khota in spite of CMMK's misinformation (Section 2.2.2).

2.2.1 During 2011, the Government of Potosi played an important role in the mediation and attempt to pacify the conflict created by CMMK

114. As Bolivia has expressed in its Counter-Memorial¹⁵⁸, since the beginning of 2011 and upon request made by CMMK¹⁵⁹, Departmental Government officials visited the Project's area in order to assess the severity of the conflict denounced by the Company, as for the alternatives of solutions. The assertions made by SAS regarding the alleged bad faith of the State and its lack of collaboration are untenable.

115. *First, it is false the Departmental Government has adopted a passive attitude towards the request to mediate in the conflict¹⁶⁰. SAS ignores that, as expressed by former Governor Gonzales, the Departmental Government instructed that "site visits be made to the Communities, in which the Departmental Government's officials confirmed the existence of opposition to the [Project] which came from the communities of Mallku Khota and Calachaca, near the area in which CMMK was performing the exploration activities"¹⁶¹. At least three circumstances confirm this fact:*

116. *First, as expressed by Mr. Gonzales Yutronic, during the meeting held on January 11, 2011, convened by FAOI-NP, there was attendance by "representatives from the Departmental Government of Potosi (from the departments of Environment, Mining and Mining Taxation)"¹⁶². Likewise, Mr. Fitch informed the SASC's Board, on*

¹⁵⁸ See Answer, section 3.4.

¹⁵⁹ Letter from Xavier Gonzales Yutronic to the Governor of Potosi dated December 21, 2010, pg. 4 ("Based on the previous, we contact your authority to request, very respectfully, that you mediate in this impasse with the Ayllus Sullka-Jikallkani, Tucawani, Urinsaya and Samca and the Federation of Ayllus Originarios del Norte de Potosi (FAOI-NP) in order to avoid a major conflict"), R-55.

¹⁶⁰ Reply, par. 91.

¹⁶¹ Gov. Gonzales II, par. 10, RWS-4.

¹⁶² Gonzales Yutronic II, par. 16, CWS-8. See, also, Gov. Gonzales II, par. 11 ("In such meeting, which was attended by officials from the Departmental Government, Indigenous Authorities ratified their rejection to CMMK's activities in the area of Mallku Khota, supported by FAOI-NP and

January 2011 that “the Government continues to support the Corporation in its efforts to resolve the issue”¹⁶³.

117. Second, during the months following the meeting held on January 11, 2011, Departmental Government officials visited the area, in which they noticed that the community members of Mallku Khota opposed the Project and expressed that “CMMK would not be admitted”¹⁶⁴.
118. Third, as expressed by Mr. Gonzales Yutronic in his first witness statement, the Project’s socialization meetings by mid-2011 were held in Toro Toro arranged by CMMK and the Departmental Government in order to create the proper spaces for dialogue between the disputing parties¹⁶⁵. This was a proper measure in order to mediate the conflict given that SASC’s consultants had denounced that CMMK was not providing clear information regarding the Project’s implications within the Communities¹⁶⁶.
119. Second, the Tribunal shall also dismiss the alarmist rhetoric made by SAS regarding an alleged animosity from the Departmental Government towards the Project. In its Reply, SAS even accuses Governor Gonzales of having “an active role in leading opposition to the Project”¹⁶⁷. SAS assumes this attitude as result of a signature of former Governor Gonzales in a minute dated February 2011 from the Central Sindical de Trabajadores Originarios de la Primera Sección de San Pedro de Buena Vista. However, as stated by the Former Governor, “the signature that they use as my alleged support to the resolution is, in reality, a confirmation of receipt of the

CONAMAQ, which are the maximum indigenous representation instances at the regional level of North Potosí and at the national level, accordingly. Mr. Gonzales Yutronic’s narration not only ratifies what I have stated in my first Deposition but, also confirms the existence of a division between Indigenous Communities that justified the Departmental Government’s intervention as mediator during the following months.”), RWS-4.

¹⁶³ SASC Board Minute dated January 12, 2011, pg. 1, R-170.

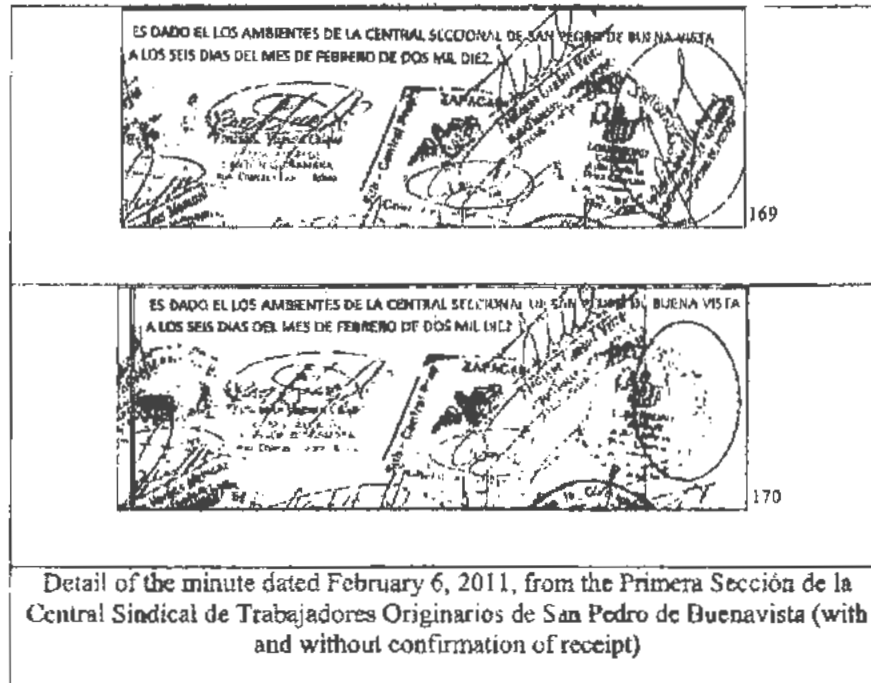
¹⁶⁴ Site visit Minute from the Departmental Secretariat for Mother Earth to the Community of Mallku Khota dated May 10, 2011 (“Meeting with the community members from Mallkukota whom declared that [CMMK] (sic) would not be admitted because it was polluting the lagoons and there were dead animals. Community members, jointly with Departmental Government Authorities from the Secretariat for Mother Earth”), R-59.

¹⁶⁵ Gonzales Yutronic I, par. 8 (“In July 2011 we approached the Governor of Potosí, mister Félix Gonzales, to organize a meeting with some local communities located in surrounding areas of the Project”), CWS-4.

¹⁶⁶ See section 2.1.3.1, *supra*.

¹⁶⁷ Reply, par. 93. See, also, Gonzales Yutronic II, par. 23, CWS-8.

document and it only reflects that I have become aware of the agreements and the determinations adopted in that meeting”¹⁶⁸. This is confirmed by the original document received from the Departmental Government in which the signature of Former Governor Gonzales does not appear:



Detail of the minute dated February 6, 2011, from the Primera Sección de la Central Sindical de Trabajadores Originarios de San Pedro de Buenavista (with and without confirmation of receipt)

120. The alleged conspiracy from the Departmental Government against CMMK's interest only results from SAS's and its witnesses unmeasured assertions. Even the media reported that on July 2011 the statements made by the former Governor supported the Corporation so that the Department of Potosí could benefit "from the mining royalties"¹⁷¹ that would receive from CMMK (event that was reproached even by Mr.

¹⁶⁸ Gob. Gonzales II, par. 14, RWS-4.

¹⁶⁹ Resolution from the Primera Sección de la Central Sindical de Trabajadores Originarios de San Pedro de Buena Vista dated February 6, 2011 (copy of the receipt confirmation), R-54.

¹⁷⁰ Resolution from the Primera Sección de la Central Sindical de Trabajadores Originarios de San Pedro de Buenavista dated February 6, 2011 (copy without the confirmation receipt), R-171.

¹⁷¹ Press release, El Potosí, *The Departmental Government will move forward the mega mining project from July 21, 2011 ("today, the Governor wants to save the project that, if it continues, will be one of the largest in the world and will provide benefits to the community, the municipality and the Department of Potosí through mining royalties")* (emphasis added), R-62.

Chajmi to the Governor¹⁷²). The speculation made by the Complainant and their witnesses regarding the intent of the Departmental Government is, therefore, groundless¹⁷³.

121. *Third*, SAS ignores, because it is suites them, the interventions made by Bolivia in regards to what has happened during the socialization meetings organized by the Departmental Government during 2011, aimed at making the Project feasible¹⁷⁴. During the year 2011, upon express request made by CMMK, the Departmental Government convened meetings with the objective of "saving the project"¹⁷⁵ and remediate the confrontation between the Indigenous Communities.

First socialization meeting – Toro Toro, July 23rd 2011

122. In relation to this meeting, held July 2011 in Toro Toro, Bolivia must make four punctual comments:
123. *First*, SAS acknowledges, in its Reply, that the proposal to incorporate a mixed company between CMMK and a governmental instance for the production phase resulted from this meeting¹⁷⁶. It could not be any other way. It is explained by former Governor Gonzales, that this was the only proposal that allowed the communities of Mallku Khota and Calachaca to accept continuance of the negotiations and, it came from the Communities¹⁷⁷. As it is confirmed by Mr. Chajmi:

¹⁷² Chajmi, par. 29 ("I remember I accused Governor Gonzales as traitor for not supporting us during the meetings and asking us to find a way to keep CMMK's project"), BWS-3.

¹⁷³ See Gonzales Yutronic II, par. 29, CWS-8.

¹⁷⁴ Answer, paras. 131-138.

¹⁷⁵ Press release, El Potosí, *Departmental Government will impulse the mega mining project* dated July 21, 2011, R-62.

¹⁷⁶ Reply, par. 101.

¹⁷⁷ Gov. Gonzales II, par. 19 ("It is not true, as Mr. Gonzales Yutronic and Mr. Mallory assure that, the proposal of constituting a mixed partnership has come from the Departmental Government and, that instead of being a 'proposal' it would be a 'demand' made by the Departmental Government. As I explained in my first Deposition, during its presentation, CMMK officials mentioned that the company was valued in the Toronto Stock Exchange in Canada. At the end of the meeting, the 'proposal' was included as 'one to analyze that before including it in the stock Exchange, consult with the government to analyze the possibility of becoming shareholders (the the national and the departmental governments as for the municipal government in order to create economic benefits', which was the sole proposal that allowed ensuring the continuity of the dialogue with the Communities of Mallku Khota and Calachaca, with which without it, CMMK would have not been able to continue with their exploration tasks. I am surprised that Mr. Gonzales Yutronic ignores

I recall that during the first of these meetings, on July 2011, with the intent of reaching an agreement that would allow the company to continue, my community proposed the creation of company with the Departmental Government so that the State would guarantee jobs in the mine (something that was not made by CMMK). This was the only proposal that us, community members from Calachaca and Mallku Khota, wanted to hear¹⁷⁸.

124. SAS and its witnesses insist that there is no evidence in the meeting minutes that this proposal was made “*specifically to the Mallku Khota o Kalachaca Communities*”¹⁷⁹. This is an incorrect interpretation of what has happened. As stated by former Governor Gonzales, “*include this proposal in the minute was the only thing that allowed counting with the support from the Communities of Calachaca and Mallku Khota to ensure continuity of the dialogue and that CMMK could continue exploring*”¹⁸⁰.
125. Second, SAS’s arguments such as that (i) this kind of proposals “*had the natural effect of undermining the Company*”¹⁸¹ and (ii) recall that CMMK had to comply with Bolivian legislation was equivalent to asserting that “*CMMK was not complying with the legal framework*”¹⁸² reflect the alarmism with which SAS and its witness refer to the Departmental Government.
126. On one side, SAS does not show how a mixed partnership proposal could have the effect it alleges it had, moreover, when the Departmental Government does not have the competence to confirm such mixed partnership. As expressed by Minister Navarro, “*I see that [Mr. Mallory and Mr. Gonzales Yutronic] give a unproportionate and incorrect importance to the facts that supposedly happened within the framework of these meetings. Specifically, I must clarify that the proposal of constituting a mixed partnership with the Departmental Government has no legal basis and, that in any case, the competence to formulate this type of proposals does not fall under the Departmental Government but lies within COMIBOL*”¹⁸³.

my good intentions in this negotiation and creates the impression that the Departmental Government wanted to take over the Project”), RWS-4.

¹⁷⁸ Chajmi, par. 28, RWS-3.

¹⁷⁹ Reply, par. 104.

¹⁸⁰ Gob. Gonzales II, par. 20, RWS-4.

¹⁸¹ Reply, par. 103.

¹⁸² Gonzales Yutronic II, par. 28, CWS-8.

¹⁸³ Navarro, par. 27, RWS-2.

127. On the other hand, as it is clarified by former Governor Gonzales, reiterating that CMMK should comply with the law was relevant because, *“for the Indigenous Communities it was very important to have certainty that foreign companies would not infringe their rights, granted by the Constitution and our legislation, as for their uses and traditions”*¹⁸⁴. Assertions such as the ones made by Mr. Gonzales Yutronic reflect the bias interpretation of how CMMK interpreted (and now SAS interprets) the good proceedings from the Departmental Government.

128. [REDACTED]

129. Third, SAS does not prove - because it is not possible - that the mixed partnership proposal was nothing more than that: a mere proposal (in fact, Bolivia agrees that *“the Company was under absolutely no obligation to accept”*¹⁸⁵). If, the attitude of former Governor Gonzales would have indicated something different (meaning, that CMMK was being forced to create a mixed partnership), CMMK would have denounced this situation to the Ministry of Mining or to the Vice-ministry of Coordination with Social Movements. It never did.

130. Fourth, even though SAS does not says so, this socialization meeting was a success because it kept all stakeholders at the negotiation table and got them to agree to a second meeting in order to continue socializing the Project.

Second socialization meeting - Toro Toro, August 31st 2011

131. SAS insists in giving importance to the fact that, due to reasons of an agenda from the Departmental Government of Potosí, former Governor Gonzales was not able to attend the meeting dated August 2011 in Toro Toro and, on his behalf, he was represented by the Departmental Secretaries of Coordination and Mining and Metallurgy. However, SAS does not prove why this fact would have affected the course of the meetings, especially when *“upon delegating two high ranking officials from the departmental level to represent the Departmental Government shows full*

¹⁸⁴ Gov. Gonzales II, par. 21, RWS-4.

¹⁸⁵ [REDACTED]

¹⁸⁶ Reply, par. 103.

*commitment on behalf of the Departmental Government so that these meetings reach positive outcomes and smoothed the path to CMMK's project*¹⁸⁷.

132. On the other hand, even though it is accurate, as described by SAS¹⁸⁸, that Mr. Mallory made a presentation regarding CMMK's Project (including the presentation of the reciprocal cooperation agreements with five out of the six Ayllus of COTOA-6A), this meeting made it very clear that the opposition from the Communities from Mallku Khota and Calachaca was still strong and had even become more radical. In fact, even before the meeting finished, these Communities stood up and left the negotiation table¹⁸⁹.
133. In view of this situation – whose relevance is minimized by SAS ignoring the decision making system used by Indigenous Communities, the Departmental Government proposed organizing a meeting with smaller delegations. Once again, SAS, limits to assert that “Governor Gonzales never convened that meeting”¹⁹⁰ without clarifying that the meetings convened by FAOI-NP in September and COTOA-6A in November of that year changed the course of the conflict created by CMMK and made this meeting impossible¹⁹¹.
134. The descriptions offered by SAS¹⁹² regarding what happened during the meetings on September 25 and November 27, 2011 are implausible.
135. First, as they can no longer allege that the Departmental Government prepared some kind of ambush (as Mr. Mallory and Mr. Gonzales Yutronic expressed in their first witness statements¹⁹³), SAS now focuses on assuring something that does not have

¹⁸⁷ Gov. Gonzales II, par. 24, RWS-4.

¹⁸⁸ Reply, par. 106.

¹⁸⁹ Report of the second socialization meeting regarding the Mallku Khota Project dated September 6, 2011, R-63; Minute from the second socialization meeting dated August 31, 2011, (“Ayllu Tacahuani (sic) We do not want the company which has not fulfilled its commitments. Oppositors left the room”), C-43.


¹⁹⁰ Reply, par. 107.

¹⁹¹ Gov. Gonzales II, par. 32 (“In this meeting, as it can be seen from the minute and the report, some community members have even denounced that CMMK was offering ‘land plots in Cochabamba for those that gave their support’. In this context, it was impossible to plan a small meeting such as the one we thought would be feasible on August 31 of that same year”), RWS-4. See, also, Gov. Gonzales I, paras. 38-48, RWS-1.

¹⁹² Reply, paras. 108-109.

¹⁹³ In paragraph 13 of his first witness statement (CWS-4), Mr. Gonzales Yutronic assures that the presence of FAOI-NP or CONAMAQ was “completely unexpected” when those two entities had convened this Meeting (R-64). See Mallory I, par. 22, CWS-3. See, also, Gov. Gonzales II, par. 28 (“For the same reason, if Mr. Mallory believed that this Meeting had been organized by the

any evidence: that Mr. Yercio Cervantes, from the Departmental Secretariat of Mining and Metallurgy, has supposedly supported the creation of a mining cooperative¹⁹⁴. CMMK, with no doubt, would have denounced this event to the authorities if it were true (or, at least, would have made former Governor Gonzales aware of this fact). They did not do so either¹⁹⁵.

136. On the other hand, SAS ignores that the Indigenous Communities denounced to the highest Indigenous Authorities from FAOI-NP and CONAMAQ (that the Claimant tries to reduce a group to illegal miners), during the Meeting held in September 2011, that (i) “since 2010 the relationship has not prospered” and, that CMMK “has not fulfilled its commitments”; (ii) that “there isn’t only silver and indium, they lie, they have not honored their commitments, we want the company to leave, they have not respected our women”; and (iii) that, in the Ayllu Tacahuani “they have divided us” or, furthermore, that CMMK was offering “land areas in Cochabamba for those that gave them their support”¹⁹⁶.
137. Second, if CMMK and Mr. Mallory were optimistic about the “overwhelming support” of the Project¹⁹⁷ after the meeting summoned by COTOA-6A held on November 17, 2011, it was because the meeting and the resolution vote had been orchestrated by CMMK to create this image¹⁹⁸. 

Departmental Government, it was because he was misinformed. Also knowing that Mr. Angulo used to confuse the Indigenous Communities to attend their meetings and assure that he had a very close relationship with them; I think that he should have been aware of these meeting and should have informed CMMK’s directors”), RWS-4.

¹⁹⁴ Reply, par. 108.

¹⁹⁵ Gov. Gonzales II, par. 30 (“I see that Mr. Gonzales Yutronic and Mr. Mallory insist that during this meeting Eng. Cervantes had expressed on open support on behalf of the Departmental Government in order to create a mining cooperative. This is not only false, because the records do not mention this aspect, nor does the report I requested (which would have been expected faced with such a significant statement) but, also that it would be illegal in view that the Departmental Government does not have the competence to approve the creation of a mining cooperative or to grant a license that breaches CMMK’s rights”), RWS-4.

¹⁹⁶ Minute and report of the Meeting held September 25, 2011, R-65.

¹⁹⁷ Reply, par. 109; Mallory II, par. 24, CWS-10.

¹⁹⁸ 

[REDACTED]

due to the absence of the Communities of Mallku Khota and Calachaca, “*main opposing communities to CMMK and in which territory the Project is envisioned*”²⁰¹.

138. *Fifth*, it is not true that the Departmental Government “*failed to convene the meeting with the Malku Khota and Kalachaca communities that had been requested by Vice Minister Navarro*” for before December 15, 2011²⁰². First, former Governor Gonzales undertook the necessary steps at his reach²⁰³ so that the Communities attended this meeting, [REDACTED]

[REDACTED]. However, these Communities did not attend to display opposition to the Project, reason why the meeting held on December 15, 2011 was merely informative.

139. *Last*, contrary to what SAS asserts²⁰⁴, the meetings held at the beginning of the year 2012 between the Departmental Government and CMMK or members from the Indigenous Communities, show that, in spite of the increasing tensions caused by CMMK and COTOA-6As’ actions, the Departmental Government continued having the intention of creating scenarios for dialogue:

- a. What SAS states as a “*meeting*” from former Governor Gonzales and the Indigenous Communities for discussing the “*mega-deposit*” was, actually, a working table in which Departmental Government officials (not the

[REDACTED]

¹⁹⁹ Gov. Gonzales I, par. 47 (“*It called my attention that a notary public has participated in the meeting to allegedly validate the vote that was being casted, very uncommon situation when you deal with Indigenous Community Authorities.*”), RWS-1.

²⁰⁰ [REDACTED]

²⁰¹ Gov. Gonzales II, par. 34, RWS-4.

²⁰² Reply, par. 110.

²⁰³ Gov. Gonzales II, paras. 36 and 37, RWS-4.

²⁰⁴ [REDACTED]

²⁰⁵ Reply, par. 111.

Governor)²⁰⁶ attended concerns from community members from the regional in relation to the Project²⁰⁷;

- b. The descriptions provided by SAS and Mr. Mallory regarding the meeting dated February 16, 2012 are false²⁰⁸. As former Governor Gonzales has expressed repeatedly, *"when I said 'mix company' in this meeting, I said so meaning that not even this proposal had convinced the community members of Mallku Khota and Calachaca to accept CMMK's Project within the framework of our discussion regarding the potential confrontation between the Indigenous Communities, which were forecasted at the beginning of 2012 caused by the divisions, which were most evident every time"*²⁰⁹. [REDACTED]

- c. The description provided by Mr. Angulo in his witness statement regarding the meeting held March 28, 2012²¹¹ is not only discordant to what Mr. Angulo himself has expressed in the report he prepared back then²¹² but with the attitude that the Departmental Government had towards the other socialization meetings.

140. In conclusion, throughout 2011, the Departmental Government not only attended the requests for intervention made by CMMK, but also performed a major role as

²⁰⁶ *Id.*, footnote 274.

²⁰⁷ Gov. Gonzales II, par. 39 (*"I must clarify that during the first months of 2012 I did not meet with the Indigenous Communities from the area of Mallku Khota as it has been suggested by Mr. Gonzales Yutronic and Mr. Mallory. As I expressed in my First Deposition, Department Government officials met with them and discussed, in discussion tables – upon requests made by several community members – regarding the claims aroused from CMMK's exploration"*), RWS-4. See, also, Gov. Gonzales I, par. 52, RWS-1.

²⁰⁸ Reply, par. 111; Mallory II, par. 64, CWS-10.

²⁰⁹ Gov. Gonzales II, par. 40, RWS-4.

²¹⁰ [REDACTED]

²¹¹ Angulo I, par. 10-13, CWS-5; Angulo II, paras. 53 and 54, CWS-7.

²¹² Memorandum from Santiago Angulo to Xavier Gonzales Malbrán, Report regarding the trip to Potosí, from March 28 to March 30, 2012, C-272.

mediator in the conflict that the Company created with and between the Indigenous Communities.

2.2.2 Other State entities also recognized the seriousness of the conflict between the Indigenous Peoples caused by CMMK and offered their support to pacify the area

141. Bolivia already explained in its Counter-Memorial that, contrary to SAS assertions²¹³, CMMK started with COTOA-6A a strategy of disinformation of senior government officials in order to make them believe that the conflicts in the Project area came from some illegal miners and that the support of the Communities was vast and unquestionable²¹⁴. This disinformation strategy included:

- a. Conducting COTOA-6A town meetings in the Project area in the presence of national authorities, such as the one organized on November 17, 2011²¹⁵ or the Great Historic Meetings of June 8, 2012 [REDACTED]²¹⁶;
- b. Manage the delivery of correspondence²¹⁷ and meetings between COTOA-6A and authorities from La Paz, as the one held on November 24, 2011 at the Government Palace²¹⁸; and
- c. Plan and execute meetings between directors from CMMK and members of the National Government (as the one held on January 26, 2012²¹⁹) making sure the Departmental Government did not participate.

²¹³ Reply, par. 97.

²¹⁴ Counter-Memorial, par. 142.

²¹⁵ See Section 2.2.1, *supra*.

²¹⁶ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²¹⁷ Letter of COTOA-6A to the President of the Plurinational State of Bolivia of October 10, 2011, C-233; Letter of COTOA-6A to the Minister of Mining and Metallurgy of October 10, 2011, C-234.

²¹⁸ Minute of Meeting at the Government Palace of La Paz with COTOA-6 of November 24, 2011, R-66.

²¹⁹ Gonzales Yutronic I, par. 15. CWS-4. See, also, Letter of CMMK to the Minister of Mining and Metallurgy of May 17, 2012, R-67.

142. The answers received by SAS from the national authorities confirm that Bolivia never sought to take advantage of the conflict between the Indigenous Communities created by CMMK to “*further its economic and politic interests by expropriating the mining concessions*”²²⁰, as is intended by SAS. On the contrary, State authorities confirmed their support to the Project and proposed measures to resolve the conflict with and between the Indigenous Peoples.

143. *First*, as described by César Navarro, back then the Vice Minister of Coordination of Social Movements and Civil Society, after meeting with community members who called themselves COTOA-6A, he recommended to no longer hold meetings if all actors of the conflicts were not present. Commenting on the meeting of November 25, 2011 in the Presidential Palace of La Paz, the Minister recalls:

At this meeting, I found striking the difference in treatment that the company was giving to the community members who supported the Project. Unlike what FAQI-NP and CONAMAQ claimed, members of COTOA-6A seemed to be benefiting from economic privileges offered by CMMK. My experience in managing such conflicts and numerous violent events in Potosi indicated that this action taken by CMMK was not adequate and could generate serious public disturbance in the Project area.

In addition, in this meeting with the Communities (which are illegally grouped in COTOA-6A) I noticed there was much insistence on the existence of a broad acceptance of the Project, except for the Communities of Mallku Khota and Calachaca, the closest to the drilling areas. Given this situation, I proposed the organization of a meeting which also involved the Communities of Mallku Khota and Calachaca. Aiming to reach an agreement between the Communities and make the Project possible, I sent a letter to the Governor of the Department of Potosi, to which Messrs. Gonzales Yutronic and Mallory refer in their second witness statement.²²¹

144. Meanwhile, and to create the appearance that there was no conflict in the area of Mallku Khota, COTOA-6A continued to pressure the authorities to hold meetings in which opposing communities could not participate, as happened in the meetings of May 28 and July 2, 2012, which we will discuss later²²².

145. The position of Vice Minister Navarro was not isolated. For example, in a meeting promoted by CMMK on October 13, 2011 at the Ministry of Mining and Metallurgy, Ministry officials noted that, “*given the complaint of the town peoples of having*

²²⁰ Reply, Section II(C)(3).

²²¹ Navarro, paraa. 33 and 34 (Emphasis added), KWS-2. See Letter from the Vice Minister of Coordination of Social Movements to the Governor of Potosi of November 28, 2011, R-68.

²²² See Section 2.3.1, *infra*.

received the pseudo representatives in a meeting, it was clearly established, that as authorities the mission was to listen to all parties that relate to a specific case.”²²³ Similarly, at this meeting, representatives of CMMK had to leave the premises “due to the sensitivity of the issues that were going to be talked about, in view that they would have pointed at some time that certain residents of the area would be subject to corruption by the Mallku Khota mining company”²²⁴.

146. *Second,* [REDACTED]
[REDACTED]
[REDACTED]

a. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

b. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

c. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²²³ Minute of the Meeting in the Ministry of Mining and Metallurgy, point VII, C-232.

²²⁴ Minute of the Meeting in the Ministry of Mining and Metallurgy, point V, C-232.

²²⁵ [REDACTED]
[REDACTED]

²²⁶ [REDACTED]
[REDACTED]

²²⁷ [REDACTED]

147. In conclusion, not only the Departmental Government, but all state entities contacted by CMMK made their best efforts to mediate the conflict with and between the Indigenous Communities and supported the continuation of the Project. Now, the fact that SAS blames the State of being the architect of its failure due to its own bad socialization of the Project, is an absurdity. If the State saw the need to enact the Reversion, it was only to end the unsustainable and serious situation created exclusively by CMMK.
- 2.3 In contrast to what SAS implies, the Reversion was a necessary measure against numerous violent and increasingly serious events in 2012**
148. To sustain that the Reversion was not necessary, SAS minimizes the violent events in 2012 (Section 2.3.1). However, these facts show that the State had no alternative but to order the Reversion to end the escalation of violence generated by CMMK and protect the fundamental right to life (Section 2.3.2).
- 2.3.1 SAS minimizes the extreme violence, product of the disagreement between the Indigenous Peoples caused by CMMK**
149. In early 2012, the project's future was already uncertain and the attempt to subdue the Indigenous Peoples through COTOA-6A was not delivering the results expected by CMMK. As acknowledged by SAS²²⁸, clashes between this illegitimate organization and members of the Indigenous Communities became increasingly violent in early 2012, as evidenced by the [REDACTED] of FAOI-NP by COTOA-6A²²⁹.
150. Unlike other mining companies (who, for example, promoted public consultation processes during the exploration phase and negotiated for years the conditions under which their mining projects would operate in the area²³⁰), CMMK had only one goal in mind: to sell the Project to the highest bidder and leave the country.

²²⁸ Reply, par. 133.

²²⁹ Declaration Act on abuses against members of Indigenous Communities, R-70.

²³⁰ As Mr. Díez de Medina tells, initial negotiations with the Indigenous Communities near the project of Minera San Cristobal began in 1995 and culminated in a process of public consultation in 1998 and subsequent agreements throughout 1999, 2000 and 2001. This means that, regardless of the delay in the start of the construction phase because of the drop in international prices of minerals, Minera San Cristobal took six years to build an enabling environment to start operations in the area. See Díez de Medina, paras. 35-41, RWS-5. See, also, Mamani, paras. 22-29, RWS-6.

151. [REDACTED]

[REDACTED]

152. In its reply, SAS selectively narrates the serious acts of violence that occurred in 2012 so the Tribunal forgets that it was CMMK which caused this situation by mobilizing community members, criminalizing the opposition and paying bribes to police officers and journalists to create the image that "most of the communities surrounding the Project supported it"²³². In view of this, Bolivia is compelled to make at least four comments on the violent events in early 2012:

153. First, the Tribunal must not forget that the escalation of violence in the Project area (which the Departmental Government had managed to avoid thanks to its good efforts²³³) was triggered by allegations promoted by CMMK against opponents of the Project²³⁴. Although SAS merely states that such complaints were filed "in good faith", evidence of the time [REDACTED]

²³¹ [REDACTED]

²³² Reply, par. 139.

²³³ Gob. Gonzales II, par. 38 ("As indicated in my First Deposition, at the beginning of 2012, the CMMK continued performing activities in the area, despite tensions with the communities of Mallku Khota and Calachaca. This was not due to community relations programs (which CMMK had continued to develop only related to Communities near the Project), as Mr. Gonzales Yutronic says, but rather to the good efforts of the Departmental Government with opposing Communities in 2011. I must reiterate, moreover, that the Departmental Government, in addition to this support, managed and implemented with state funding a project of irrigation system in the Community of Ovejería and improved the road of Sacaca - Mallku Khota. These works also benefited exploration work done by CMMK"), RWS-4.

²³⁴ See Answer, par. 150-153.

²³⁵ [REDACTED]

154. [REDACTED]

155. [REDACTED]

156. [REDACTED]

236 **Gonzales Yutronic II, par. 27, CWS-8.**

237 [REDACTED]

238 [REDACTED]

239 [REDACTED]

240 [REDACTED]

241 *Id.*

242 **Gonzales Yutronic II, par. 47, CWS-8.**

[REDACTED]

[REDACTED]

157. This strategy led to the violent confrontation between police and community members in the project area in the early hours of May 5, 2012, during which two policemen were held hostages by community members.
158. State intervention to pacify the area was immediate (SAS does not mention that Governor Gonzales immediately coordinated the establishment of a mediation commission²⁴⁵ and sent police to surrounding areas as a preventive measure²⁴⁶). However, CMMK intransigence prevented to reach agreements on measures to resolve the conflict. In fact, at a meeting held the same day of May 5, 2012 at the Ministry of Mining and Metallurgy, Mr. Gonzales Yutronic refused to consider the proposal of a waiting period of three months for the exploration while the situation cooled²⁴⁷. This proposal could have prevented the wave of violence that took place in Northern Potosi.

243 [REDACTED]

244 [REDACTED]

245 Gob. Gonzales I, paras. 58 y 59, RWS-1. See, also, Answer, par. 154.

246 Press Release, El Potosi, *Confirmed: There is a hostage in Mallku Khota of May 5, 2012* ("There are more than 150 police officers in Llalagua" said the authority arguing that the officers were to rescue their comrade, but there is no order yet. González (sic) claims that he does not want it to happen as happened with the 4 police officers who were lynched on May 22, 2010. There is no intervention order since community members are requesting the presence of authorities of Comibol and the Minister of Mining, Mario Virreira"), R-78.

247 [REDACTED]

159. Similarly, CMMK took advantage of the abduction of police officers in Mallku Khota to create the impression in the media that the State was sponsoring serious crimes, to pressure the authorities to militarize the area and neutralize the opposition, once and for all.

160. [REDACTED]

[REDACTED]

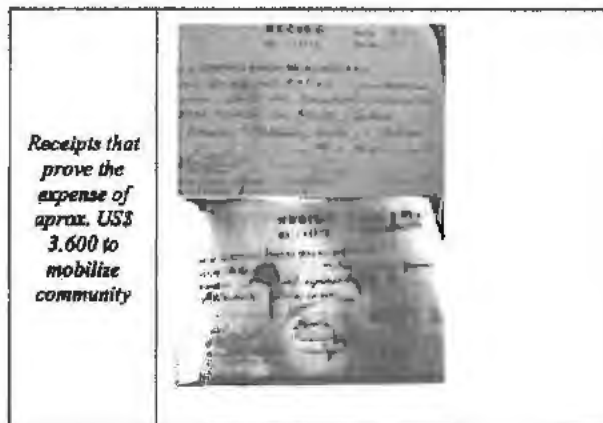
[REDACTED]

²⁴⁸ Press Release, El Potosí, *Tension remains in the area of Mallku Khota* of May 9, 2012 (“[the Governor] reported that a Human Rights Commission managed to enter the place where a tense-calm situation was in place and he regretted that some media magnified the existing situation about the threat that they would bury alive police officers. ‘It was an exaggeration from some media that are misinforming’ he expressed by arguing that there are people evidently retained, but they are stable”), **R-172**.

²⁴⁹ [REDACTED]



161. Finally, mediation headed by the then Governor González allowed to temporarily pacify the area and achieved the signing of a memorandum of agreement on May 9, 2012²⁵¹. Due to this agreement, community members released the detained policemen and agreed to carry out a meeting between the groups in contention in the town of Acasio (on May 18, 2012).
162. *Second*, CMMK's intervention was crucial in the fact that the meeting that should have been held on May 18, 2012 ended up in serious violent clashes that even jeopardized the life of the then Governor Gonzales and officials of the Ministry of Mining and Metallurgy²⁵².
163. First, Bolivia indicated in its Counter-Memorial that, in an unprecedented event, CMMK financed the mobilization to Acasio of a large number of community members affiliated to COTOA-6A, although the agreement with the Departmental Government of May 9 had provided that only a delegation of 30 community members against and 30 in favor of the Project would attend²⁵³. SAS does not deny— because they can not deny – this fact:



250



²⁵¹ Memorandum of Agreement between the Departmental Government and members of the community, C-51.

²⁵² Gob. Gonzales I, par. 61, RWS-1. See, also, Press Release, *Fight for Mallku Khota leaves 10 injured and 12 missing* of May 19, 2012, R-80.

²⁵³ Counter-Memorial, paras. 155 y 156.

<i>members to Acario</i> ²⁵⁴	
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164. [REDACTED]

[REDACTED]

²⁵⁴ Payment receipts for mobilizing communities to the meeting of Acario, May 9 and 10, 2012, R-79.

255 [REDACTED]

256 [REDACTED]

257 [REDACTED]

165. Third, as the Center for Documentation and Information of Bolivia (*Centro de Documentación e Información de Bolivia* "CEDIB", for its acronym in Spanish) states, after the agreement for the meeting at Acasio, opposing community members of the Project were attacked by those who supported CMMK, so a large group of community members decided to go to Acasio and support their opposition leaders²⁵⁸.

166. Instead of avoiding violent clashes, CMMK provoked them. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

167. Finally, the confrontation between the Communities on 18 May 2012 left a balance of more than 10 wounded²⁶⁰ and endangered the life of the Governor, who had to escape through the roof and walk long hours disguised in overalls until he was safe²⁶¹.

168. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²⁵⁸ Center of Documentation and Information of Bolivia, *Mallku Khota, Mining, Earth and Territory* of November 2012, pg. 2 ("The committee includes 30 community members, which agreed on an upcoming meeting in the town of Acasio and received the government's commitment not to retaliate against the people and leaders for the events of May 5 in Mallku Khota. Residents reported that after the arrival to the agreement, the commission was ambushed by followers of the company who wanted to force them to sign a consent to the activities of the transnational. This caused that the meeting scheduled for May 18 in Acasio, the people of Mallku Khota decided not to leave alone their representatives and accompany them in a massive mobilization and maintaining a vigil in the area until the arrival of definitive agreements"), R-17.

²⁵⁹ [REDACTED]

²⁶⁰ Noticias Fides, *Confrontations in Mallku Khota*, video published May 18, 2012, R-174.

²⁶¹ Gob. Gonzales I, par. 61, RWS-I. See, also, Press Release, *Fight for Mallku Khota leaves 10 injured and 12 missing* of May 19, R-80.

²⁶² [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

169. [REDACTED]
[REDACTED]

[REDACTED]

170. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

171. On the one hand, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

263 [REDACTED]

264 Reply, par. 136.

265 [REDACTED]

266 [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

172. [REDACTED]

173. As stated in Bolivia's Counter-Memorial²⁷², Cancio Rojas' arrest precipitated the call for a protest to the city of La Paz²⁷³ for the protection of natural resources in Mallku

[REDACTED]

²⁶⁷ Press Release, El Potosí, *Indigenous leader accused of 8 offenses for the Mallku Khota case* of May 23, 2012, R-83.

²⁶⁸ [REDACTED]

²⁶⁹ [REDACTED]

²⁷⁰ [REDACTED]

²⁷¹ Decision to Dismiss of the complaint against Cancio Rojas dated June 13, 2014, R-84.

²⁷² Counter-Memorial, paras. 160 and 161.

²⁷³ Interview of Félix Becerra, member of CONAMAQ, video, May 2012, R-86; Press Article, Boris Bernal Mansilla, *The march (protest) of Mallku Khota arrives Thursday in La Paz and will not leave until their demands are met* of June 7, 2012, R-85; Página Siete, *Community Members of*

Khota and demanding the expulsion of CMMK. The protest, which was convened on May 25, 2012, arrived in La Paz on June 7, where violent disturbances occurred, (as shown by videos of the time²⁷⁴).



174. *Thirdly*, CMMK continued to organize, through COTOA-6A, meetings without the presence of opponents of the Project to further promote the idea that there was widespread support for the Project and that militarization was necessary²⁷⁶. SAS notes that “[i]t is irrelevant whether the resolutions at the May 28, 2012 and June 8, 2012 gatherings were adopted with or without opposition being present, since they still illustrate the significant support that the Project enjoyed²⁷⁷. This statement is false and deserves at least two comments:
175. First, insinuating that the opposition to the project was *insignificant* shows that SAS does not know (as does CMMK) that the principles governing decision-making in the Indigenous Communities require the presence of all members and a unanimous

Mallku Khota will protest Monday requesting the freedom of Cancio Rojas, video published on May 24, 2012, R-175; *Página Siete, Commission of protestors request hearing with the President*, video published on June 4, 2012, R-176.

²⁷⁴ Gob. Gonzales I, paras. 68 y 69, RWS-1. See, also, CF Noticias, *Community Members of Mallku Khota assaulted police officers in La Paz* of June 8, 2012, video, R-89.

²⁷⁵ CF Noticias, *Community Members of Mallku Khota assaulted police officers in La Paz* of June 8, 2012, video, R-89.

²⁷⁶ See Counter-Memorial, paras. 162 y 163.

²⁷⁷ Reply, par. 139.

decision²⁷⁸. Since these communities make decisions *unanimously*, no opposition is *insignificant*²⁷⁹.

176. Second, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

177. Therefore it is not surprising that opposing Communities to the Project were increasingly reluctant to sit down and negotiate and SAS can not seriously attribute this lack of dialogue to an alleged Government inaction. A clear example is the meeting that the Ministry of Mining and the Departmental Government convened for

²⁷⁸ See Section 2.1.3, *supra*.

²⁷⁹ In the words of Mr. Mamani “given the way these communities are organized, no claim or complaint is irrelevant because not be addressed promptly can lead to problems in communities that affect relations with the MSC”, Mamani, par. 34, RWS-6.

²⁸⁰ Statement of Claim, par. 77 (“800 families from 42 communities surrounding the areas as well as representatives from the local ayllus and municipalities and the company held a gran cabildo (the highest form of official community meeting) where they confirmed their support for the Company and its Project, and condemned the violent opponents to the Project led by Cancio Rojas”).

281 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

282 [REDACTED]

July 2, 2012²⁸³ and in which community members who opposed the project decided at the last minute not to participate²⁸⁴. These meetings, as noted by Bolivia, were instead exploited by COTOA-6A (and CMMK) to encourage the militarization of the Project area²⁸⁵.

178. *Finally*, CMMK provoked police intervention in the area of Mallku Khota between July 5 and 6 2012 while some of its employees were retained by the Indigenous Communities. This triggered a series of clashes in the area, in which Mr. José Mamani of the Community of Mallku Khota was tragically killed²⁸⁶. The death of Mr. Mamani prompted the intervention of an inter-institutional Government commission (installed on July 4 in Chiro Q'hasa²⁸⁷), which reached an agreement to pacify the area. This agreement, called Memorandum of Understanding, was signed in the town of Chiro Qh'asa and is one in which the Reversion was preliminarily agreed upon with the Communities²⁸⁸. This agreement would only be endorsed on July 10, 2012²⁸⁹ and the Reversion would be enacted on August 1 of that year²⁹⁰.
179. For all the above, claiming that CMMK had not provoked a series of violent acts but rather "*was in the middle of them*"²⁹¹ is nonsense. The facts show that CMMK was in the origin and aggravation of violent clashes in the Project area during 2012, including those that left no choice but to order the Reversion.

²⁸³ See Counter-Memorial, par. 169 and 170.

²⁸⁴ Response of the Indigenous Communities to the Ministry of Mining and Metallurgy and to the Governor of Potosí dated July 1, 2012, R-93.

²⁸⁵ In the meeting of July 2, 2012, COTOA-6A he requested the intervention of "*1000 (thousand) police officer and patrols in al áreas of the region*", Minute of the meeting in the city of Cochabamba, July 2, 2012, C-75.

²⁸⁶ Chajmi, par. 35 ("*After this, the police entered the area in the following days to take out with force retained employees of CMMK, creating a confrontation that caused several to be injured and the death of Jose Mamani, one of the members of my community. It was at this time a government commission contacted us and came to talk to us. After the death of Jose Mamani, we stayed in vigil and achieved dialogue to convince communities that this disunity was not good. At this meeting, we agreed the termination of the activities of CMMK*"), RWS-3.

²⁸⁷ Press Release, El Potosí, Government Commission will install dialogue in the area of Chiro Khasa of July 5, 2012, R-95.

²⁸⁸ Memorandum of Understanding of July 7, 2012, C-16.

²⁸⁹ Memorandum of Agreement of July 10, 2012, C-17.

²⁹⁰ Reversion Decree dated August 1, 2012, C-4.

²⁹¹ Reply, par. 138.

2.3.2 In view of the unsustainable violent situation in Mallku Khota, Bolivia was forced to decree the Reversion

180. As Bolivia explained in its Counter-Memorial, the whole series of violent events that were triggered by CMMK in Northern Potosi made that, by July 2012, the situation in the area was unsustainable. The Reversion was the only reasonable alternative²⁹².

181. *First*, SAS intends to question the reasonability of the measure but does so by omitting all violent events that constitute its background. The facts show that the State had no other alternative but the Reversion after CMMK provoked:

- a. police intervention in Mallku Khota in the early hours of May 5, 2012;
- b. the violent confrontation between community members in Acasio on May 18, 2012;
- c. the mobilization of community members to La Paz after the capture of Kuraka Cancio Rojas, in addition to the riots in State Capital on June 8, 2012; and
- d. the infiltration of Agustín Cárdenas and Fernando Fernández to the project area on June 28, 2012 wearing garments native, which caused violent clashes between the police and the indigenous Peoples on July 5 and 6, 2012 that ended in the tragic death Mr. José Mamani.

182. It is also incredible that SAS omits all the details regarding the violent events created by CMMK²⁹³ and limits its comments thereon to an inaccurate account of the retention of Agustín Cárdenas and Fernando Fernández in late June 2012²⁹⁴. SAS does not put into context how this retention took place and the State efforts to restore public order, which had been altered by the infiltration of these officials to town meetings in the area Mallku Khota.

183. First, as confirmed by the narration of Messrs. Cardenas and Fernandez, their retention was because they were wearing native clothing²⁹⁵. Belatedly, SAS tried to

²⁹² Counter-Memorial, Section 3.6.

²⁹³ See Section 2.3.1, *supra*.

²⁹⁴ Reply, par. 140.

²⁹⁵ Memorandum of Agustín Cárdenas and Fernando Fernández to Fernando Cáceres, Incident Report of June 28, 2012 ("*Between 10:30 and 11:45 we walked from Chijchani to Jantapalca, having as guide a community member of Sakani called Casto NN. For this walk we put on several jackets and hats [Community garments]*") (Emphasis added), C-241.

explain that the engineers were “gather[ing] information and tak[ing] photographs”²⁹⁶ when they were really trying to infiltrate meetings of Indigenous Communities of the area. Minister Navarro, who is a native of Potosi, explains the seriousness of this fact given that “to infiltrate in union, peasant and other organizations, has been used in the past to influence the decisions of those organizations with opinions, attitudes, perquisites or other facts, and thus obstruct the autonomous deliberation of the Communities”²⁹⁷. Therefore, he said that “I was not surprised that, as I was informed, community members had decided to retain CMMK employees”²⁹⁸.

184. Second, SAS fails to clarify in its account that the entrance of policemen to the area of Mallku Khota that triggered a violent clash, which killed Mr. Mamani, was prompted by CMMK to rescue the retained engineers.
185. Second, as Minister Navarro points out, the Reversion was a measure that allowed restoring public order in the Project area:

As I noted earlier, from the information I know, the Indigenous Communities held meetings, which resulted in physical confrontations between them. These clashes erupted because some communities were opposed to the company and other demanded respect for it. Therefore, we knew that there was a level of confrontation generated by an external actor which was not the community, but a company that had the goal of exploiting and enjoying the wealth of the natural resources. The Reversion of Concessions allowed to exclude the external actor (CMMK) and end this confrontation²⁹⁹.

186. These types of measures, as noted by the Minister Navarro, have proved to be the only available alternative in the presence of violent conflicts generated as a result of a collision between a mining company and indigenous communities. Recent cases of deposits of Colquiri and Huanuni (the latter also in Potosi) are examples of such³⁰⁰. The *ex post facto* exercise proposed by SAS to consider that alternatives were available to the State³⁰¹ is not serious, as such does not take into account the totality

²⁹⁶ Reply, par. 140.

²⁹⁷ Navarro, par. 39, RWS-2.

²⁹⁸ Navarro, par. 39, RWS-2.

²⁹⁹ Navarro, par. 43 (Emphasis added), RWS-2.

³⁰⁰ Navarro, par. 44-47, RWS-2.

³⁰¹ Reply, par. 282.

of circumstances justifying the Reversion or the historical background of these types of projects in Bolivia.

187. [REDACTED]

188. *Fourth*, the Reversion was not taken to satisfy the economic interests of Bolivia, much less, of mining cooperatives.

189. First, it makes no sense that SAS claims that Bolivia had a financial interest in the Project³⁰³ and holds that the State favored the interests of mining cooperatives³⁰⁴. Both scenarios, besides being false, are incompatible, since the public interest in the Project would be incompatible with the interest of assigning it to cooperatives, private actors in Bolivian mining³⁰⁵.

190. Second, Bolivia has not developed any production mining Project in the area, other than certain exploration activities. As Minister Navarro points out:

At present the Mallku Khota Mining Project is under the administration of COMIBOL under Supreme Decree No. 1308. This entity, together with the Geological Mining Service (Servicio Geológico Minero - "SERGEOMIN", for its acronym in Spanish) have developed activities opening roads, topographic surveying and certifying the quality and quantity of mineralogical reserves, employing community members in the area³⁰⁶.

191. Third, the Project's current reality shows that Bolivia had no interest in taking over it for financial gain. This is demonstrated by the fact that, today, Chinese investors to

³⁰² [REDACTED]

³⁰³ Reply, Section II(C)(3).

³⁰⁴ Reply, Sections II(C)(1) y II(C)(4).

³⁰⁵ See Section 5.2, *infra*.

³⁰⁶ Navarro, par. 48, RWS-2.

which SAS refers again in its Reply³⁰⁷ have not appeared in public, they do not exploit the project or work with COMIBOL.

192. Despite this, SAS requests that an adverse inference is performed against Bolivia based solely on two press releases that do not provide any details about the alleged approaches the State would have made with Chinese companies³⁰⁸. COMIBOL confirmed that there is no documentary record of the alleged contacts that would have been made by the State to develop the Project³⁰⁹, information which was also confirmed by the Minister of Mining and Metallurgy of Bolivia.

2.4 Bolivia has complied and continues to comply with the agreements reached with the Indigenous Peoples to pacify Mallku Khota

193. Bolivia explained in its Counter-Memorial³¹⁰ that, with the Reversion, the State established as an essential condition for the development of any mining activity “social peace”³¹¹ between the Indigenous Communities of the area of Mallku Khota. Based on the vague allegations made by SAS on the implementation of these commitments, it is necessary to clarify at least two points:

194. *First, as confirmed by Mr. Chajmi, the Reversion was an effective measure to end the conflict between Indigenous Communities caused by CMMK. “Now that CMMK is not here and although there have been some misunderstandings between community members and there are expectations about the possibility of new mining projects by COMIBOL; peace has been kept in the area of five ayllus and there has been no more confrontations between brothers as those of 2012”³¹².*

195. The evidence presented by SAS confirms that since the Reversion, there has been no major conflict related to the Project in the area. First, besides an isolated incident of violence in October 2012 and a misunderstanding between the Communities and COMIBOL in early 2014³¹³, COMIBOL has peacefully conducted its exploration

³⁰⁷ Reply, par. 145.

³⁰⁸ *Id.*

³⁰⁹ 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, R-177.

³¹⁰ See Counter-Memorial, Section 3.6.

³¹¹ Reversion Decree, Whereas, pg. 3, C-4.

³¹² Chajmi, par. 36, RWS-3.

³¹³ Reply, par. 283.

program³¹⁴ using as workforce, community members of the area³¹⁵. Second, it is biased to compare - as SAS does - the demands of the region of Northern Potosi with a conflict in the Project area. In fact, that there had been protests in 2015 for the Government to build "an international airport, a hydroelectric plant, hospitals and factories of cement, lime and glass"³¹⁶ is not even comparable to a conflict for the development of a mining project as the one caused by CMMK.

196. Second, Bolivia must emphasize that there is no "Plan to Develop the Project"³¹⁷ in the sense alleged by SAS. COMIBOL and SERGEOMIN have limited their activities in the exploration area. In fact, references to Mallku Khota in the Sector Development Plan of the Ministry of Mining and other public events (which have been agreed by the Claimant's lawyers) were merely indicative of the possible existence of a reservoir³¹⁸. In this regard, SAS states, without any evidence, that Bolivia would have prevented access to their lawyers to an event promoting foreign investment made in New York on October 27, 2015³¹⁹. This event was open to the public prior registration on a website. As can be seen in the list of attendees to this event, (i) no lawyer from King & Spalding registered; (ii) Mr. Enrique Barrios, a lawyer for SAS in the record, attended the event, unlike what is said by SAS; and (iii) other foreign firm attorneys representing investors were also present³²⁰.
197. In any case, as pointed out by Minister Navarro, now that the State has control over the area of Concessions, it corresponds, as with any deposit under its responsibility, to carry out exploration tasks and exploit it, if the reserves make it economically

³¹⁴ *Bocamina Magazine, Mallku Khota prepares for first steps in Mining – February 2013 ("Commanders of army posts and police reported that the social situation in the region is of absolute tranquility and there have been no hostile acts")*, R-113.

³¹⁵ Payroll of COMIBOL of the exploration of Mallku Khota, R-178.

³¹⁶ Press Release, BBC, *Protests in Bolivia: 12 days of blockades and dynamite paralyze La Paz* dated July 20, 2015, C-246.

³¹⁷ Reply, paras. 146 y 147.

³¹⁸ Navarro, par. 51 (*"In my position as Minister, I referred to the area Mallku Khota (although we do not know for sure the extent of its reserves) at the end of 2015 at an event in New York to show the mineralogical wealth of Bolivia so investors visit our country and decide to develop the fields throughout the production chain. I never forbade, nor do I know anyone in the Government that has prohibited lawyers of SAS to enter this event"*), RWS-2.

³¹⁹ Reply, par. 28.

³²⁰ List of attendees to the event "Investing in Bolivia" of October 27, 2015, R-225.

viable³²¹. However, “with CMMK’s history, in the Government we are aware that these tasks will only be executed if community members in the area agree with the implementation of a mining project”³²².

198. Therefore, since the Reversion, the State has complied with the agreement made the Indigenous Peoples and has ensured social peace in the area of Concessions.

3. **THE PROTECTION OF HUMAN AND INDIGENOUS RIGHTS IN THE BOLIVIAN CONSTITUTION AND INTERNATIONAL LAW IS APPLICABLE AND ESSENTIAL FOR THE RESOLUTION OF THIS DISPUTE AS ITS VIOLATION JUSTIFIED THE REVERSION**

199. As Bolivia explained in its Counter-Memorial, given the extraordinary factual circumstances described in the previous section, the Tribunal shall apply the provisions of human and indigenous rights to the resolution of this dispute³²³.

200. In its Reply, SAS argues that the Tribunal “*must rely upon the Treaty as the primary source of applicable law, supplemented where appropriate by relevant principles of international law*”³²⁴ but excludes Bolivian law from such complementary norms and, more specifically, the rules on the protection of human and indigenous rights³²⁵. And it could not be otherwise. Knowing that the violation of these rules justifies the Reversion, SAS has simply decided to deny their application.

201. CMMK’s disregard for human and indigenous rights is a key element of this dispute. The Bolivian Constitution, which is binding for the State and individuals (as for CMMK) contains several provisions guaranteeing the protection of the Indigenous Communities. Furthermore, the Constitution incorporates protections of international law in Bolivian law through its constitutionality block (Section 3.1). As Bolivia has just demonstrated, CMMK systematically violated these provisions, forcing the State to intervene to pacify the region and protect the life, integrity and customs of the Indigenous Communities (Section 3.2).

³²¹ Navarro, par. 51, RWS-2.

³²² *Id.*, par. 50.

³²³ Counter-Memorial, paras. 189-221.

³²⁴ Reply, par. 238.

³²⁵ *Id.*, paras. 239-240.

- 3.1 **The Bolivian Constitution guarantees the protection of human and indigenous rights, and incorporates international rules on the matter, making them binding on the State and individuals**
202. According to SAS, human and indigenous rights' legal provisions would be inapplicable or irrelevant since (i) such provisions would not be binding between Bolivia and the United Kingdom; (ii) the international instruments in question would not be part of customary international law; and (iii) such provisions would be mere facts with no legal relevance³²⁶. These statements are incorrect.
203. *First*, Bolivia is a Plurinational State that, therefore, has pluralism as one of its fundamental principles and acknowledges the exercise of democracy in its liberal and community-based model. Bolivia's legal and social reality does that the State be conceived as a plurality of preexisting nations and native indigenous peoples, in which the sovereign power lies³²⁷. Regarding this plurality, the State has adopted a decentralized political organization that provides a considerable degree of autonomy to indigenous groups in order for them to decide and manage their interests at the political, legal and economic level, without involving the central Government, as it has been sustained by the Bolivian Constitutional Court³²⁸.
204. For example, when referring to the cultural pluralism of the Plurinational State of Bolivia, the Bolivian Constitutional Court explained that:

In effect, this new reality invites and requires the mutual and respectful recognition between the peoples, the understanding and mutual appreciation between them, in their knowledge, wisdom, values and world views on equal terms, for only in such manner can we meet the mandate of joint construction of the desired State: with unity, equality, inclusion, dignity, freedom, solidarity, reciprocity, respect, complementarity, harmony, transparency, balance, equal opportunities, social and gender equality in participation, common welfare, responsibility, social justice, distribution and redistribution of products and social goods, in order to live well. (Values expressed in art. 8. II of the PCS), and above all, to establish a just and harmonious society, founded on decolonization, without discrimination or exploitation with full social justice that consolidates plurinational identities³²⁹.

³²⁶ *Id.*, paras. 246-247 and 261.

³²⁷ New Political Constitution of the State of February 7, 2009, arts. 3 and 7, RLA-3.

³²⁸ New Political Constitution of the State of February 7, 2009, art. 2, RLA-3. See, also, Plurinational Constitutional Tribunal of Bolivia, Ruling No. 0645/2012 dated July 23, 2012, Section III.1, RLA-185; Plurinational Constitutional Tribunal of Bolivia, Ruling No. 0300/2012 dated June 18, 2012, Section III.1.1, RLA-186.

³²⁹ Plurinational Constitutional Tribunal of Bolivia, Ruling No. 0551/2014 dated March 10, 2014, RLA-274. See, also (*While inserting Ama Qhilla in the Fundamental Law, the Constituent*

205. Furthermore, when referring to “*living well*” (*buen vivir*) as a fundamental principle of the State:

*living well (gamaña sum), as goal of the State, in the sphere of its judicial function, seeks to build a plural, impartial, transparent and fair, timely, prompt and expeditious justice respecting fundamental rights, judicial guarantees and defense actions and constitutional norms set forth in the Political Constitution of the State*³³⁰.

206. Similarly, the supreme jurisdiction of the constitutional confirms the right to self-determination of the peoples:

*Under this regulatory framework, and applying a systemic interpretation of the aforementioned international instruments, an essential right for the nations and native indigenous peoples, emerges: The right to self-determination, which, for the Plurinational State of Bolivia, is further configured as a guiding principle of the State’s model and the constitutional regime and as a supreme plural value*³³¹.

207. Bolivian law, which must be applied to complement the Treaty³³², provides for the protection of Indigenous Communities from its highest ranks. On the one hand, the Bolivian Constitution states that “*the State guarantees, respects and protects the rights of native indigenous nations and peoples enshrined in the Constitution and the*

Assembly, aimed to fight, inter alia, against the delay of justice which is mainly caused by laziness, negligence. Ama Qhilla is aimed at this, ‘do not be lazy’, so that operators of justice dispatch their memorials in one day, refer the cases to the appropriate authorities, notify the parties of their own motion, etc., the practice of this principle is necessary if we want to change and enter the prompt justice to live well. In Bolivia we have laid the foundation for materializing a Constitutional State of Law”), *Id.*

³³⁰ Plurinational Constitutional Tribunal of Bolivia, Ruling No. 1876/2013 dated October 29, 2013, RLA-275.

³³¹ Plurinational Constitutional Tribunal of Bolivia, Ruling No. 0551/2014 dated March 10, 2014, RLA-274.

³³² *El Paso Energy International Company v. Argentina*, ICSID case No. ARB/03/15, award dated October 31, 2011, par. 135 (“*The fact that the BIT and international law govern the issue of Argentina’s responsibility for violation of the treaty does not exclude that the domestic law of Argentina has a role to play too. The Tribunal agrees with the Claimant that this role is to inform the content of those commitments made by Argentina to Claimant that the latter alleges to have been violated. Thus, in order to establish which rights have been recognised by Argentina to the Claimant as a foreign investor, resort will have to be had to Argentina’s law*”), RLA-26; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID case No. ARB (AF)/09/01, award dated September 22, 2014, paras. 534 and 535 (“*the content of Claimant’s rights and obligations within the legal framework established by the relevant municipal legislation, as in the field of mining, social rights and the protection of the environment [...] the content of commitments made by Respondent to Claimant that the latter alleges have been violated [and] establishing the rights Venezuela recognises as belonging to Claimant*”), RLA-27; *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID case No. ARB/87/3, award dated June 27, 1990, pg. 533, RLA-28.

law³³³. Moreover, Bolivian law incorporates rules on the protection of human and indigenous rights which are binding on the State and individuals, such as:

208. The United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), part of Bolivia's domestic law as a result of Law No. 3760 of 2007, which establishes the right of indigenous peoples to self-determination and ensures their autonomy and self-government in the decisions over their local affairs³³⁴;
- a. The International Covenant on Civil and Political Rights ("ICCPR"), incorporated by Law No. 2119 of 2000³³⁵ (also ratified by the United Kingdom), which recognizes the indigenous peoples' right to autonomy in decision-making regarding their livelihoods and natural environment, in accordance with their cultural identity and self-determination³³⁶; and
 - b. The Indigenous and Tribal Peoples Convention (No. 169) of the ILO³³⁷ and the American Convention on Human Rights (the "ACHR"), incorporated by Law No. 1257 of 1991³³⁸ and Law No. 1430 1993³³⁹, respectively.
209. *Second*, besides these international instruments having been incorporated into the national legislation with force of law, the international treaties on the protection of human and indigenous rights have also been granted constitutional status through the constitutionality block³⁴⁰. Moreover, the Constitution provides that, when both the

³³³ New Political Constitution of the State of February 7, 2009, art. 30(III), RLA-3.

³³⁴ United Nations, *Declaration on the Rights of Indigenous Peoples*, September 13, 2007, arts. 3 and 4, RLA-39.

³³⁵ Law No. 1219 dated September 11, 2000, art. 1, RLA-187.

³³⁶ United Nations, *International Covenant on Civil and Political Rights*, December 16, 1966, arts. 1(1) and 27, RLA-188; UN Human Rights Council, *Compilation of General Comments and General Recommendations Adopted by Human Rights Bodies established under Treaty*, *General Observation 29 – Art. 27 (HRI/GEN/1/Rev.1)* of July 29, 1994, par. 3.2 RLA-189; UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant (CCPR/CO/14/SWE)* April 24, 2002, par. 15, RLA-190; UN Human Rights Committee, Report (HRC, A/55/40, [VOL. I] (SUPP)) July 28, 2000, paras. 506 and 507, RLA-191; UN Human Rights Committee Communication No. 1457/2006 (CCPR/C/95/D/1457/2006) April 24, 2009, par. 7.6, RLA-192.

³³⁷ International Labour Organization, *Convention 169 on Indigenous and Tribal Peoples in Sovereign countries*, June 27, 1989, art. 7(1), RLA-37.

³³⁸ Law No. 1257 of 1991, RLA-38.

³³⁹ Law No.1430 of 1993, RLA-33.

³⁴⁰ New Political Constitution of the State of February 7, 2009, art. 256(I), RLA-3; Plurinational Constitutional Tribunal of Bolivia, Ruling No. 1250/2012 of September 20, 2012, Section III.1,

constitutional text and international law deal with the protection of human rights, the norm that grants more protection should prevail³⁴¹. These provisions are not only enshrined in the new Constitution of 2009. Since 1967, the Constitution already recognized the autonomy and the right to self-government of indigenous peoples³⁴² and directly incorporated the international treaties' guarantees as part of its constitutional provisions³⁴³.

210. *Third*, the norms of protection of human and indigenous rights are compelling towards both the State and individuals. This is determined under the Constitution³⁴⁴, which even provides for constitutional actions against those individuals (public or private) that restrict or violate these rights³⁴⁵, and it is also expressly provided in mining legislation for mining companies operating in the country³⁴⁶.
211. *Finally*, the provisions of Bolivian and international law concerning the protection of the Indigenous Communities must be applied by the Tribunal as norms complementary to the Treaty, and not as mere factual elements.
212. To substantiate its position, SAS evokes three investment cases, in which one party requested the application of this type of rights and the tribunal rejected such request³⁴⁷. However, SAS fails to mention that, in the cases cited, the tribunals did not have to analyze the applicability of these rules since they decided the dispute based on other legal arguments³⁴⁸. Now, given the unique and serious facts of this case, the rules on

RLA-194; Plurinational Constitutional Tribunal of Bolivia, Ruling No. 0014/2012 of March 16, 2012, Section III.1, RLA-195.

³⁴¹ New Political Constitution of the State of February 7, 2009, art. 256(II), RLA-3.

³⁴² Political Constitution of the State of February 2, 1967, art. 171, RLA-94.

³⁴³ *Id.*, art. 6(V).

³⁴⁴ New Political Constitution of the State of February 7, 2009, art. 108, RLA-3; Plurinational Constitutional Tribunal of Bolivia, Ruling No. 0085/2012 of April 16, 2012, Section III.1.2 ("*the horizontal application of fundamental rights finds direct genesis in the dogmatic part of the Political Constitution of the State, particularly in art. 109.1 which enshrines the principle of direct application of the Constitution*"), RLA-41. See, also, among others, Plurinational Constitutional Tribunal of Bolivia, Ruling No. 1673/2013 of October 4, 2013, Section III.2, RLA-42; Plurinational Constitutional Tribunal of Bolivia, Ruling No. 1478/2013 of August 22, 2013, Section III.2, RLA-43.

³⁴⁵ New Political Constitution of the State of February 7, 2009, art. 128, RLA-3.

³⁴⁶ Mining Code of 1997, art. 15, C-30.

³⁴⁷ Reply, paras. 252-255.

³⁴⁸ *Grand River Enterprises Six Nations, LTD. and others v. United States of America*, UNCITRAL award dated January 12, 2011, paras. 210-212, CLA-138; *Glamis Gold, Ltd. v. United States of*

human and indigenous rights should not only be taken into account by the Tribunal, but are essential to the resolution of the dispute since they are part of Bolivian domestic law and international law. This is so, due to at least four reasons:

213. First, as acknowledged by SAS, “*Bolivian law may be relevant to certain limited areas of the dispute, such as the question of whether the Legality Doctrine was met*”³⁴⁹. The arbitral tribunals cited by SAS have confirmed that national legislation and international law are applicable to matters not covered by the Treaty³⁵⁰, provided that they do not involve independent claims³⁵¹. Since this case involves the active participation of Indigenous Communities and the State’s actions in to defend them, the Tribunal shall consider the relevant rules on the subject.
214. Second, the fact that CMMK is obliged to comply with the law applicable to an extractive project in Bolivia is not in question. Failure to comply with these provisions has serious consequences under international law, such as, for example, the lack of jurisdiction due to the illegality of the investment and the non-admissibility of the claims in the absence of *clean hands*³⁵². As explained above, Bolivian mining law incorporates the norms for the protection of the communities.
215. Third, the Tribunal shall consider the obligations of the Plurinational State of Bolivia in accordance with the regulations cited in this section in order to decide, among other things, that the Reversion was a legitimate exercise of governmental authority, which was pursuing purposes of valid public interest and was consistent with the legitimate expectations protected under the Treaty.

America, UNCITRAL award dated June 8, 2009, par. 8, CLA-141; *Bernhard von Pezold and others v. Zimbabwe and Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Zimbabwe*, ICSID case No. ARB/10/15, Procedural Order No. 2 dated June 26, 2012, CLA-142.

³⁴⁹ Reply, par. 261.

³⁵⁰ *Quiborax S.A y Non Metallic Minerals S.A., v. Plurinational State of Bolivia*, ICSID case No. ARB/06/2, award dated September 16, 2015, par. 91, CLA-158; *Chevron Corporation & Texaco Petroleum Company v. Ecuador*, partial UNCITRAL award on the merits dated March 30, 2010, par. 159, CLA-159.

³⁵¹ *The Rompetrol Group N.V. v. Romania*, ICSID case No. ARB/06/3, award dated May 6, 2013, par. 170, CLA-132.

³⁵² See Section 4.2, *infra*.

216. Fourth, other instruments of international law are also relevant to the resolution of this dispute since the Tribunal must seek a harmonious interpretation of Bolivia's international obligations, unless it is impossible to do so³⁵³.
217. In this regard, the Tribunal shall apply as a rule of interpretation the presumption that Bolivia's international obligations are consistent with each other and shall declare them incompatible only as a last resort³⁵⁴. Moreover, if it considers them incompatible or inconsistent, the Tribunal shall then prioritize obligations concerning the protection of human rights since, as noted by Judge Simma and confirmed by the Inter-American Court, human rights are fundamental to human dignity, while investment rights are merely instrumental³⁵⁵.
218. In this dispute, it is easy to achieve a harmonious interpretation of the international obligations of Bolivia, since the Treaty itself makes other sources of law relevant to determine whether Bolivia has fulfilled its obligations under such instrument. Other international obligations, for example, show that, in accordance with the Treaty, Bolivia acted in the exercise of its police powers pursuing a public purpose and respected SAS' legitimate expectations. Human and indigenous rights limit how Bolivia can act and therefore define what constitutes public policy powers, a public purpose and legitimate expectations. This remains true regardless of whether the obligations arise from a treaty signed with the United Kingdom, from customary international law or from any other source of international law³⁵⁶. SAS argues that

³⁵³ SAS would unjustifiably reject any preference for a harmonious interpretation on the basis of a highly formalistic reading of the Vienna Convention on the Law of Treaties. SAS assumes that the Vienna Convention supports the rejection of a harmonious interpretation because it requires an interpretation based on the text of the treaty, as well as the object and purpose of it, in accordance with article 31(1), but requires an interpretation based on other international obligations of article 31(3) (Reply, par. 244). However, article 31 does not establish a hierarchy between its subsections and the explanatory comments to the draft of the Vienna Convention.

³⁵⁴ 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, RLA-18; B. Simma, "Foreign Investment Arbitration. A Place for Human Rights?", in *60 International and Comparative Law Quarterly* (2011), pg. 583, CLA-136.

³⁵⁵ B. Simma, "Foreign Investment Arbitration. A Place for Human Rights?", in *60 International and Comparative Law Quarterly* (2011), pg. 591, CLA-136, quoting the Report of the High Commissioner for Human Rights; *Sawhoyamaya v. Paraguay*, IACHR case, ruling dated March 29, 2006, par. 140, RLA-20. SAS' only response is that the United Kingdom is not part of the IACHR (Reply, par. 258). Obviously, SAS does not consider that this criterion is relevant because it simply quotes investment courts that interpret treaties that are not a part of either the United Kingdom or Bolivia.

³⁵⁶ SAS erroneously insists that other instruments are only relevant if they were agreed between the parties to the Treaty (in this case between the UK and Bolivia) (Reply, par. 246). However, the Treaty does not require that a State must act following a public purpose or legitimate expectations

this form of holistic interpretation would alter or degrade the Treaty's protection³⁵⁷. However, this statement reflects an analytical confusion, since the relevant provisions of the Treaty render other relevant international (and internal) obligations applicable for its interpretation.

219. For all the above reasons, the provisions of international law and Bolivian legislation that protect human rights and indigenous peoples are not only relevant but also necessary for the resolution of this dispute, and should therefore be applied by the Tribunal.
- 3.2 CMMK repeatedly infringed the rights of the Indigenous Communities of Maifku Khota, forcing Bolivia to intervene and order the Reversion when the communities requested that their rights be protected**
220. SAS argues that "*Bolivia's allegations of wrongdoing by the Company are recklessly made and demonstrably false*"³⁵⁸. Nothing could be further from the truth. Bolivia has demonstrated that CMMK acted against the rights and autonomy of the Indigenous Communities, ignored the Indigenous Authorities, disrespected the ancestral forms of decision-making of the Indigenous Communities and motivated violent clashes between community members. As described above in Section 2, the fundamental motive for the Reversion was to protect the fundamental rights of the Indigenous Communities and, in particular, to protect their lives.
221. First, the Bolivian Constitution, the UNDRIP, the ILO Convention No. 169 and the ACHR – all incorporated in Bolivian Legislation – establish the Indigenous Communities' fundamental right to autonomy when determining their own issues³⁵⁹.
222. In accordance with international law and Bolivian legislation, the actions of CMMK constituted repeated violations of the rights of indigenous communities to self-determination and caused the social conflict described in Section 2 above. Bolivia had, therefore, the constitutional duty to take reasonable measures to stop these abuses.

or according to its police powers arising from international instruments, much less instruments in force between the United Kingdom and Bolivia.

³⁵⁷ Reply, par. 245.

³⁵⁸ *Id.*, Section II(D).

³⁵⁹ See Section 3.1, *supra*.

223. [REDACTED]

224. Second, CMMK infringed the right to autonomy of indigenous peoples when, with no reason other than to dilute the opposition, it increased the Area of Impact of the Project to involve distant Communities to whom it had promised important benefits. This created tensions and divisions in the area, especially amongst the Communities of Maliku Khota and Calachaca, which, besides being radically opposed to the Project, were the most directly affected by the perforations planned by CMMK³⁶³.

225. SAS does not deny this event but undermines its relevance by claiming that there was an “overwhelming” or “significant support”³⁶⁴ for the Project. As we have explained³⁶⁵, the image of widespread support created by CMMK is false (since it results from the creation and manipulation of COTOA-6A) and in any case, cannot replace the *consensus* of the Indigenous Communities, which requires the system of decision-making of the Ancestral Organization. SAS implicitly recognizes this

³⁶⁰ [REDACTED]

³⁶¹ See Ufo, par. 51 (“the [indigenous jurisdiction] may only be exercised through their legitimate authorities, which vary according to the area and the territorial level concerned. They are also responsible for mediation with the State and private institutions”), RER-1.

³⁶² Criminal Code of the Plurinational State of Bolivia, arts. 124 and 163, RLA-196.

³⁶³ See Section 2.1.1, *supra*.

³⁶⁴ Reply, par. 139.

³⁶⁵ See Section 2.2.2, *supra*.

requirement since it does not make any criticism of the explanations given by Bolivia³⁶⁶ or Dr. Uño on this point³⁶⁷.

226. Third, CMMK also infringed the Indigenous Communities' right to autonomy when in late June 2012, some of its employees entered the area Mallku Khota wearing traditional costumes of these Communities³⁶⁸ in order to infiltrate a meeting of the Indigenous Communities.
227. *Second*, both the ICCPR and the ACHR – which are part of Bolivian constitutional law – recognize and enshrine the fundamental human rights to life and physical integrity. According to these instruments, everyone has the right to life, which prohibits its arbitrary deprivation³⁶⁹. Furthermore, everyone has the right to the protection of its physical integrity, which prohibits torture and cruel, inhuman or degrading punishment³⁷⁰. These rights also prohibit any action that could create serious risks of non-compliance.
228. In addition to violating the right to self-government of the Indigenous Communities, CMMK actions also violated the human rights of the indigenous people who are part of the Indigenous Communities. CMMK violated the rights to life and physical integrity when, defying local authorities, it encouraged violence in and around the affected Indigenous Communities, to benefit its interest in continuing with the exploration.

³⁶⁶ Counter-Memorial, paras. 52-53.

³⁶⁷ Uño, par. 57 (“Overall, in the field of ancestral organization, legitimate authorities in the various territorial levels are characterized by a duality, in which there is always a male and a female authority figure: the *Mama Talla*. In addition, government systems are primarily based on consensus. For example, if an authority of a territorial level cannot solve a conflict that involves another territorial unit, it shall transmit the case to the authority of an upper territorial level, who must seek a solution in consensus with those involved without being able to impose its will”), RER-1.

³⁶⁸ See Section 2.3.2, *supra*.

³⁶⁹ United Nations, *International Covenant on Civil and Political Rights*, December 16, 1966, art. 6(1), RLA-188; Organization of American States, *American Convention on Human Rights*, November 7 – 22, 1969, art. 4(1), RLA-32.

³⁷⁰ United Nations, *International Covenant on Civil and Political Rights*, December 16, 1966, art. 7, RLA-188; Organization of American States, *American Convention on Human Rights*, November 7 – 22, 1969, arts. 5(1) and (2), RLA-32.

229. As Bolivia has demonstrated³⁷¹, CMMK caused or aggravated, at least, the following violent events that violated the human rights of the Indigenous Communities:

230. First, in April 2012, community members of COTOA-6A [REDACTED]³⁷², as acknowledged by SAS³⁷³.

231. Second, by the filing of reckless criminal accusations (one of them on the basis of the abduction that Saul Reque, of CMMK, himself provoked³⁷⁴) the police intervened on May 5, 2012 in the Community of Mallku Khota. This led to a clash of serious proportions between community members and government forces³⁷⁵ which ended in the retention two policemen.

232. [REDACTED]

233. [REDACTED]

[REDACTED]

234. [REDACTED]

³⁷¹ See Sections 2.1.3 and 2.3.1, *supra*.

³⁷² Sworn declaration on abuses against members of Indigenous Communities, R-70.

³⁷³ Reply, par. 133.

³⁷⁴ Resolution from file of the Complaint of Xavier Gonzales Yutronic against members of the Indigenous Communities of February 28, 2014, R-75. See, also, Counter-Memorial, paras. 151-154.

³⁷⁵ See Section 2.3.1, *supra*.

³⁷⁶ *Id.*

³⁷⁷ [REDACTED]

[REDACTED]

235. Fifth, the infiltration of CMMK's employees in the area of Mallku Khota wearing costumes of the Indigenous Communities on June 28, 2012 caused a wave of violence that killed Mr. José Mamani³⁸³. The police confrontation that led to these unfortunate events would not have happened if CMMK had not provoked a police intervention³⁸⁴

[REDACTED]

236. The social conflict and discomfort intentionally generated (and aggravated) by CMMK were a constant threat to the rights to life and physical integrity of the

³⁷⁸ See Section 2.3.1, *supra*.

³⁷⁹ *Id.*

³⁸⁰ [REDACTED]

³⁸¹ Interview to Félix Becerra, member of CONAMQ, video, May 2012, R-86.

³⁸² Gov. Gonzales I, par. 69, RWS-1. See, also, CF News, Mallku Khota community members attacked police officer in La Paz, dated June 8, 2012, video, R-89.

³⁸³ See Section 2.3.2, *supra*.

³⁸⁴ Gov. Gonzales I, paras. 77 and 78, RWS-1. See, also, Navarro, par. 40 ("As we could clarify in the next few days, CMMK encouraged public forces to enter into the Community of Mallku Khota, which was completely inadvisable given the history of other confrontations between these communities. As a result of the police raid, the Indigenous Communities began a confrontation in which unfortunately a member of the Mallku Khota community lost his life"), RWS-2.

³⁸⁵ Mr. Gonzales Yutronic accuses the then Governor (Gonzales) of not having adopted this measure harshly enough. See Gonzales Yutronic II, par. 50, CWS-8.

³⁸⁶ [REDACTED]

members of the Indigenous Communities (and even, other Bolivian citizens) and constituted a continuing violation of such rights³⁸⁷.

237. [REDACTED]

238. Fourth, Bolivia had the legal obligation to protect the rights of Indigenous Communities in response to CMMK's systematic violations of their rights. This is established by Bolivian constitutional law and international law³⁹¹. On the one hand, Convention No. 169 requires governments to act to protect the rights of indigenous peoples and to guarantee the respect for those rights³⁹². Moreover, both the ICCPR and the ACHR require states to protect the human rights of all persons within their

³⁸⁷ See, for example, *Perozo and others v. Venezuela*, IACHR case, ruling dated January 28, 2009, paras. 160-161, RLA-197; *Ríos and others v. Venezuela*, IACHR case, ruling dated January 28, 2009, paras. 148-149, RLA-198.

³⁸⁸ CMMK's monthly report on community relations, March 2008, pg. 3 (Emphasis added), C-163.

³⁸⁹ [REDACTED]

³⁹⁰ *Fernández Ortega v. Mexico*, IACHR case, ruling dated August 30, 2010, paras. 78, 128 and 131, RLA-199; *Rosendo Cantí and other v. Mexico*, IACHR case, ruling dated August 30, 2010, paras. 71, 118 and 121, RLA-200.

³⁹¹ New Political Constitution of the State of February 7, 2009, arts. 13(I) and 98(I), RLA-3.

³⁹² International Labour Organization, *Convention No. 169 on Indigenous and Tribal Peoples*, June 27, 1989, art. 2(1), RLA-37.

jurisdiction³⁹³. Bolivian constitutional law provides for equivalent obligations based on international law³⁹⁴.

239. The Inter-American Court of Human Rights (the “Inter-American Court”), interpreting the ACHR in its well-known *Velasquez Rodriguez v. Honduras* decision, was the first to explain the State’s obligation to protect human rights and take measures to prevent its violation. The Court concluded that “*the State has a legal duty to take reasonable steps to prevent violations of human rights [...]*”³⁹⁵. It also noted that “*the duty to prevent includes all those means of legal, political, administrative and cultural nature that promote the protection of human rights [...]*”³⁹⁶.
240. For its part, the Human Rights Committee, the body authorized to interpret and implement the ICCPR, has adopted a broad interpretation of the State’s duty to protect human rights. Specifically, General Comment No. 31 states that “*failure to ensure the rights recognized under the Covenant as required by article 2, would give rise to violations by States Parties of those rights, allowing individuals and entities to commit such acts or failing to take appropriate measures or to exercise due diligence to prevent [...]*”³⁹⁷.
241. This duty to protect and prevent violations of human rights extends to the rights of indigenous peoples, including the right to organize their internal affairs autonomously and independently and to make decisions on issues affecting their community and their rights. As decided by the Inter-American Court, the States have:

The obligation [...] of ensuring the indigenous and tribal peoples’ participation in decisions on measures that may affect their rights, and in particular their right to communal property, in accordance with their values, customs and forms of organization. [...] In this regard, the State must ensure that the rights of indigenous and tribal peoples are not overlooked in any activity or agreement made with third parties or within

³⁹³ United Nations, *International Covenant on Civil and Political Rights*, December 16, 1966, art. 2, RLA-188; Organization of American States, *American Convention on Human Rights*, November 7 – 22, 1969, art. 1(1), RLA-32.

³⁹⁴ Plurinational Constitutional Tribunal of Bolivia, Ruling No. 0112/2014-S1 dated November 26, 2014, Section III.2, RLA-201.

³⁹⁵ *Velasquez-Rodriguez v. Honduras*, IACHR case, ruling dated July 29, 1988, paras. 174-175, RLA-202.

³⁹⁶ *Id.*

³⁹⁷ UN Human Rights Committee, General Comment No. 31, *Nature of the General Legal Obligation on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add.13) dated May 26, 2004, par. 8, RLA-203.

*the framework of public policy decisions that may affect their rights and interests*³⁹⁸.

242. The Reversion was the only reasonable means of protection available to Bolivia in the face of the continuous situation of violence and when confronted with the dilemma to favour, or not, the Project over the rights of the Indigenous Communities. The effectiveness of this measure is confirmed by Minister Navarro³⁹⁹ and Mallku Khota's community members⁴⁰⁰.
243. Similarly, the Departmental Government intervened as a mediator⁴⁰¹ but CMMK undermined this effort, while trying to implement a strategy of disinformation on central government authorities, all in order to deny that there was a conflict with the Indigenous Communities. CMMK's actions against the mediation efforts of the State, coupled with the violence it had created, made impossible any other means of resolving the conflict.
244. *Finally*, the behavior of CMMK did not allow the State to trust that the Company would comply with Bolivian and international law to ensure respect for the human rights of the Indigenous Communities, so the Reversion was the only alternative available to ensure such compliance.

³⁹⁸ *Comunidad Garfuna Triunfo de la Cruz & sus miembros v. Honduras*, IACHR case, ruling dated October 8, 2015, paras. 158 and 160, RLA-204.

³⁹⁹ Navarro, par. 43 (*"from what I know, the Indigenous Communities held meetings, expanded, which resulted in physical confrontations between them. These clashes occurred because some communities were opposing the company and others demanded respect for it. Therefore, we knew that there was a level of confrontation generated by an external actor who was basically not from the community, but a company that aimed at the exploitation and utilization of the wealth of natural resources. The reversion of the Concessions allowed to exclude the external actor (CMMK) and end this confrontation"*), RWS-2. See section 2.3.2, *supra*.

⁴⁰⁰ Chajmi, par. 36 (*"Now that CMMK is no longer there, and although there have been some misunderstandings between community members and there are expectations about the possibility of new mining projects by COMIBOL, peace has been kept in the area of the five ayllus and there have not been new clashes between brothers as those of 2012"*), RWS-3; Resolute vote of the Community of Mallku Khota dated February 26, 2016 (*"We clarified that we fought (sic) between brothers for the division the company made, which brought community members from other areas to work, did not respect the traditions and customs of the community and attacked us physically with police and prosecutors. They did not respect our autonomy (sic) and ended the life of Brother Jose Maman"*), R-158.

⁴⁰¹ See Section 2.2.1, *supra*.

4. THE ARBITRAL TRIBUNAL LACKS JURISDICTION OVER THE CLAIMS SUBMITTED BY SAS AND, IN ANY EVENT, MUST DISMISS THEM AS INADMISSIBLE

245. The Tribunal has no jurisdiction over SAS' claims and, in any case, these are inadmissible. As Bolivia stated in its Counter-Memorial, this is so because the Treaty does not protect indirect investments and, in any case, if it did (*quod non*), SAS is neither an *investor* nor has it made an *investment* in accordance with the Treaty (Section 4.1). In any case, CMMK's illegal and inappropriate actions, render SAS' claims inadmissible as it approaches the Tribunal without *clean hands* (Section 4.2).

4.1 The Tribunal lacks jurisdiction given that SAS is not the direct owner of CMMK or the Mining Concessions, has not made any investments in Bolivia and is not a party to the dispute with Bolivia

246. SAS holds that "*South American Silver is a protected 'company' under the Treaty that owns qualifying 'investments' in Bolivia, in the form of its 100 percent shareholding in CMMK and the ten Mining Concessions*"⁴⁰².

247. However, SAS has the burden of proving that the Treaty grants the Tribunal jurisdiction. The general principle of international law *actori incumbit onus probando*, encoded by the UNCITRAL's General Assembly in the Rules states that "*each party shall have the burden of proving the facts relied on to support its claim or defence*"⁴⁰³. SAS has not denied that it has the burden of proof regarding the Tribunal's jurisdiction in this proceeding.

248. SAS, however, is unable to demonstrate even *prima facie* that the Tribunal has jurisdiction over its claims. *First*, SAS cannot be qualified as an investor in Bolivia because CMMK's shares and the Mining Concessions were held by intermediary companies in the Bahamas and the Treaty does not protect indirect investments (Section 4.1.1). *Second*, SAS has no, direct or indirect, investment because it is not an investor in CMMK or the Mining Concessions. The only indirect investor that would have an investment would be SASC (Section 4.1.2). *Third*, jurisdiction only extends to interested parties in this arbitration and SAS is not one (Section 4.1.3).

⁴⁰² Reply, par. 150.

⁴⁰³ UNCITRAL Arbitration Rules, art. 27(1).

4.1.1 The Tribunal lacks jurisdiction as the Treaty only protects direct investments

249. SAS argues that “[a]rticle 8(1) of the Treaty clearly applies to both the direct and indirect owners of a qualifying investment [...]”⁴⁰⁴. However, the Treaty only protects direct invests.
250. First, the text of article 8 (1) of the Treaty regarding the parties’ consent to arbitration does not mention indirect investments:

*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*⁴⁰⁵.

251. If the parties to the Treaty had intended to grant jurisdiction to a tribunal to decide on indirect investments, they would have done so expressly, as in many other treaties⁴⁰⁶.
252. Second, the parties limited the jurisdiction of article 8 (1) to “an investment of [a company of a Contracting Party]”⁴⁰⁷. The preposition “of” or “de” (in Spanish) entails, according to the Royal Spanish Academy, a relationship of “belonging” and implies, according to the English Oxford Dictionary, “an association between two entities, typically one of belonging [...]”⁴⁰⁸. The prepositions “of” or “de” necessarily imply a direct connection.
253. SAS, invoking the *Standard Chartered v. Tanzania* case, tries to prove that the meaning of the preposition “de” or “of” would be ambiguous and that the Tribunal could not interpret the Treaty solely on the basis of lexicographical definitions⁴⁰⁹. However, the text of this article, coupled with article 8 (1) cited above, confirms that the intention of the contracting parties to the Treaty was to protect direct investments. *In claris non fit interpretatio.*

⁴⁰⁴ Reply, par. 153.

⁴⁰⁵ Treaty, art. 8(1), C-1.

⁴⁰⁶ *Brown v. Stott*, Privy Council of the United Kingdom, Ruling of Lord Bingham of Cornhill dated December 5, 2000, 1 AC 681, 2003, pg. 703, RLA-51.

⁴⁰⁷ Treaty, art. 8(1), C-1.

⁴⁰⁸ Royal Spanish Academy, Dictionary of the Spanish language, 22nd ed., “de”, RLA-47; Oxford Dictionaries, “of”, RLA-48.

⁴⁰⁹ Reply, paras. 155-157.

254. SAS, therefore, cannot avail itself of the Treaty as:
- a. CMMK, the company that owns the Concessions, is a company incorporated under the laws of Bolivia⁴¹⁰;
 - b. Companies Productora Ltd.⁴¹¹, GM Campana Ltd.⁴¹² and Mallku Khota Ltd.⁴¹³ are the *direct* owners⁴¹⁴ of the alleged investment and are incorporated under the laws of the Bahamas, territory in which the Treaty does not apply; and
 - c. in any case, if it were admitted that the Treaty protects the indirect ownership of an investment (*quod non*), SASC is the true *indirect* owner of the alleged investment affected by the Reversion⁴¹⁵ and it is incorporated under the laws of Canada⁴¹⁶.
255. The use of SAS (a company incorporated in Bermuda) by SASC to access the jurisdiction of the Treaty is a *treaty shopping* maneuver that ignores the text of the Treaty and, therefore, should be rejected by the Tribunal.
256. In this regard, SAS' attempt to evade this provision of the Treaty by referring to the ICJ's decision in the *ELSI* case is inappropriate. According to SAS, *ELSI* would allow to conclude that tribunals have jurisdiction over an indirect investment unless there is an express statement in the treaty to the contrary⁴¹⁷. However, the ICJ indicated otherwise⁴¹⁸.

⁴¹⁰ Certificate of Shares of CMMK, C-9; CMMK's articles of Incorporation, C-11.

⁴¹¹ Productora, Ltd's certificate of incorporation, C-7.

⁴¹² GM Campana, Ltd.'s certificate of incorporation, C-8.

⁴¹³ Malku Khota, Ltd.'s certificate of incorporation, C-6.

⁴¹⁴ CMMK's certificate of stock composition, R-179.

⁴¹⁵ See Section 4.1.2, *infra*; SASC's list of properties, R-180.

⁴¹⁶ SASC's certificate of incorporation and change of name, C-10.

⁴¹⁷ Reply, par. 168.

⁴¹⁸ *Elektronica Sicula SpA (ELSI) (United States of America v. Italy)*, IJC case, ruling dated July 20, 1989, par. 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"), RLA-17.

257. Far from assuming that there is jurisdiction and admissibility in the absence of an express exclusion of the protection of indirect investments, the ICJ in *ELSI* made it clear that all of a party's claims must meet the requirements to be eligible for jurisdiction and be admissible, unless there is a manifest waiver. Similarly, it is a principle of customary international law that tribunals only have jurisdiction over the disputes for which there is express consent⁴¹⁹. Thus, following the reasoning of the ICJ, the Tribunal could only stop applying this principle if there were "words making clear an intention to do so"⁴²⁰. It is not the case.
258. *Third*, the circumstances in which the Treaty was entered confirm that the Contracting Parties intentionally excluded indirect investments of its scope of application. The evidence of the Parties' intention (and especially of Bolivia's intention) emerges from the analysis of other investment treaties entered into by the State during the same period. Bolivia expressly extended the scope of protection to indirect investment in the treaties it entered into with Switzerland in 1987, France in 1989, and the Belgium-Luxembourg Economic Union in 1990⁴²¹. Just as in these cases the protection was included by the parties, it was excluded from the treaties entered with Germany in 1987, Sweden in 1990 and Italy in 1990⁴²².

⁴¹⁹ *Plama Consortium Limited v. Bulgaria*, ICSID case No. ARB/03/24, decision on jurisdiction dated February 8, 2005, par. 198 ("Nowadays, arbitration is the generally accepted avenue for resolving disputes between investors and states. Yet, that phenomenon does not take away the basic prerequisite for arbitration: an agreement of the parties to arbitrate. It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous") (Emphasis added), RLA-205. See, also, *Wintershall Aktiengesellschaft v. Argentina*, ICSID case No. ARB/04/14, award dated December 8, 2008, par. 167, RLA-206; *Telenor Mobile Communications A.S. v. Hungary*, ICSID case No. ARB/04/15, award dated September 13, 2006, par. 92, RLA-207; *Vladimir Berschader and Moïse Berschader v. Russia*, case No. 080/2004 of the Arbitration Institute of the Stockholm Chamber of Commerce, award dated April 21, 2006, par. 208, RLA-208; C. McLachlan QC, L. Shore, M. Weiniger, *International Investment Arbitration: Substantive Principles*, Oxford University Press, 2007, par. 7.168, RLA-209.

⁴²⁰ *Elektronica Sicula SpA (ELSI) (United States of America v. Italy)*, ICJ case, ruling dated July 20, 1989, par. 50, RLA-17.

⁴²¹ Treaty between the Belgium-Luxembourg Economic Union and the Republic of Bolivia on the promotion and reciprocal protection of investments, signed April 25, 1990, art. 1(2), RLA-210; Treaty between Switzerland and the Republic of Bolivia on the promotion and reciprocal protection of investments, signed November 6, 1987 in force since May 17, 1991, art. 1(b), RLA-52; Treaty between the Government of France and the Government of the Republic of Bolivia on the promotion and reciprocal protection of investments, signed October 25, 1989, art. 1(3), RLA-211.

⁴²² Treaty between Germany and the Republic of Bolivia on the promotion and reciprocal protection of investments, signed March 23, 1987, art. 1, RLA-212; Treaty between Italy and the Republic of Bolivia on the promotion and reciprocal protection of investments, signed April 30, 1990, art. 1(1), RLA-213; Treaty between the Kingdom of Sweden and the Republic of Bolivia on the promotion and reciprocal protection of investments, signed September 20, 1990, art. 1(1), RLA-214.

259. As stated by Prof. Zachary Douglas, these terminological differences are fundamental for the examination of jurisdiction. In his words, “[t]he principle *verba aliquid operari debent* as a canon of treaty interpretation requires that effect be given to the expansive terms ‘directly’ and ‘indirectly’ so that treaties with this stipulation can be meaningfully distinguished from treaties without it”⁴²³. Although SAS claims otherwise⁴²⁴, in Prof. Douglas’ opinion, the consequence of this principle is that the jurisdiction of this Tribunal is limited only to direct investments⁴²⁵.
260. In response, SAS confines itself to indicating that article 32 of the Vienna Convention does not support the examination of other treaties because (i) this article can only be applied when there are doubts about the correct interpretation of the text, object and purpose of the Treaty and, (ii) if applied, would only consider the *travaux préparatoires* as a source of interpretation. These arguments are incorrect.
261. First, article 32 of the Vienna Convention does not limit the sources that can be consulted to clarify the interpretation of a treaty to the *travaux préparatoires* only. On the contrary, this article admits, without distinction, that all the “*circumstances of its conclusion*”⁴²⁶ are taken into account. The tribunals cited by SAS to disregard the content of this rule of interpretation erred by failing to apply the principle *verba aliquid operari debent*⁴²⁷.
262. Second, while Bolivia considers that a systematic reading of the Treaty text is sufficient to conclude that it does not protect indirect investments (and *in claris non fit interpretatio*), SAS insists that the text of the Treaty is ambiguous and that, given this circumstance, the Tribunal should assume jurisdiction⁴²⁸. For such it quotes the *Standard Chartered Bank v. Tanzania* case, in which the Tribunal confirmed that:

⁴²³ Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, par. 578, RLA-53.

⁴²⁴ Reply, par. 174.

⁴²⁵ Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, par. 580, RLA-53.

⁴²⁶ Vienna Convention, art. 32, RLA-11.

⁴²⁷ *Rompotrol Group N.V. v. Romania*, ICSID case No. ARB/06/3, decision on preliminary objections to the jurisdiction and admissibility dated April 18, 2008, par. 108, CLA-112; *Tza Yap Shum v. Peru*, ICSID case No. ARB/07/6, Decision on Jurisdiction dated June 19, 2009, par. 109, CLA-104; *Agua del Tunari, S.A. v. Bolivia*, ICSID case No. ARB/02/3, decision on jurisdiction dated October 21, 2005, par. 314, CLA-99; *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA case No. 2011-17, award dated January 31, 2014, par. 354, RLA-29.

⁴²⁸ See, for example, Reply, paras. 166-170.

*“[t]he Tribunal is mindful that with respect to the preposition ‘of’ different meanings can be adduced”*⁴²⁹. It is precisely for this reason that other contemporary treaties signed by Bolivia are relevant under the rule of interpretation of article 32 of the Vienna Convention. These instruments make it clear that there is no such equivocal nature, since the exclusion of indirect investment was intentional.

263. Therefore, the text of the Treaty does not provide for the protection of indirect investments and, if considered ambiguous, the intention of the Parties was to exclude such investments by not expressly protecting them, as was done in other contemporary treaties.

4.1.2 Even by assuming that the Treaty protects indirect investment (*quod non*), the Tribunal lacks jurisdiction given that SAS has not made any investments in Bolivia and SASC would be the only indirect investor

264. SAS argues that *“whether South American Silver is the ultimate owner of the shares in CMMK and of the ten Mining Concessions is entirely irrelevant for purposes of the Tribunal’s jurisdiction”* because *“[t]he Treaty protects such indirect owners even if they are not the ultimate owners of the investments [...]”*⁴³⁰. This, however, does not answer Bolivia’s main argument according to which the Treaty only offers protection to those who made an investment⁴³¹. In this case, SASC was the last and sole owner of the investment in Bolivia because it was the only entity that had a real connection with CMMK and the Mining Concessions.

265. *First*, article 8 (1) of the Treaty confers jurisdiction only to investments *“of a company of [a] Contracting Party”*⁴³². However, 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.

266. As it is known, the tribunal in the *Salini* case explained that the act of investing implies that four elements are verified: (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

⁴²⁹ Reply, par. 157, quoting *Standard Chartered Bank v. Tanzania*, ICSID case No. ARB/10/12, award dated November 2, 2012, par. 216, RLA-60.

⁴³⁰ Reply, paras. 151 and 184.

⁴³¹ Counter-Memorial, par. 245.

⁴³² Treaty, art. 8(1), C-1.

development of the Host State⁴³³. Although the *Salini* tribunal identified these factors when analyzing the jurisdictional requirements under the Convention of the International Centre for Settlement of Investment Disputes (“ICSID Convention”), other investment tribunals under other treaties and rules have considered them relevant and applicable when assessing the definition of “investment”⁴³⁴. Similarly, the doctrine – including Profs. Zachary Douglas and Christoph Schreuer – has endorsed the objective nature of the investment taking into account these elements⁴³⁵, so that the requirements of the so-called *Salini test* are a recognized and authoritative explanation of the concept of investment under international investment law.

267. While the existence of an investment requires compliance with the four *Salini* factors, the form an investment can take is specific to the treaty itself⁴³⁶. Under this understanding, the tribunal in *Quiborax* concluded that, in order for there to be jurisdiction, an investment must meet the *Salini* factors besides complying with the provisions of the treaty:

According to Bolivia, a distinction should be made between the objects of an investment, ‘such as shares or concessions [...] and the action of investing.’

⁴³³ *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID case No. ARB/00/4, decision on jurisdiction dated July 23, 2001, par. 52, RLA-215.

⁴³⁴ For Investment Treaties, *Romak S.A. (Swiza) v. Republic of Uzbekistan*, PCA case No. AA280, award dated November 26, 2009, par. 207, RLA-216; *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID case No. ARB/03/11, award on jurisdiction dated August 6, 2004, par. 44, RLA-217; *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID case No. ARB/08/12, award dated June 5, 2012, paras. 357-360, RLA-59; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID case No. ARB/03/29, decision on jurisdiction dated November 14, 2005, paras. 121 and 136-138, RLA-218. For the Washington Convention, *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID case No. ARB/03/11, award of jurisdiction dated August 6, 2004, par. 53, RLA-217; *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID case No. ARB/00/4, decision on jurisdiction dated July 23, 2001, par. 52, RLA-215; *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID case No. ARB/08/8, decision on jurisdiction dated March 8, 2010, par. 131, RLA-219; *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Ecuador*, UNCITRAL case, partial award dated December 1, 2008, par. 192, CLA-102; *Saba Fakes v. Turkey*, ICSID case No. ARB/07/20, award dated July 14, 2010, paras. 108 and 110, RLA-61.

⁴³⁵ Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, “Rule 23”, pgs. 189-202, RLA-53; C. H. Schreuer, *The ICSID Convention – A Commentary*, Cambridge, 2nd edition, 2009, par. 154, RLA-230.

⁴³⁶ Treaty, art. 1(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”), C-1.

*The Tribunal agrees. While shares or other securities or title may be the legal materialization of an investment, mere ownership of a share is, in and of itself, insufficient to prove a contribution of money or assets. In the present case, the record shows that Mr. Fosk received a share to comply with a formality under Bolivian corporate law, and that at no point did he make a personal contribution to the investment. In the circumstances, the Tribunal finds that Mr. Fosk does not hold an investment under Article 25(1)*⁴³⁷.

268. The object and purpose of investment treaties require that the jurisdiction of the tribunals be limited to those investments in which the existence of an economic relationship, as the one described in *Salini*, is verified. 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”⁴³⁸ 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”⁴³⁹.
269. SAS fails to mention⁴⁴⁰ that the Treaty establishes as a general objective “to stimulate private economic initiative and increase [...] the prosperity of both States”⁴⁴¹. In line with what was established by the tribunal in *Caratube*, the preamble shows the Treaty’s object and purpose. These elements, in turn, confirm that jurisdiction exists only in respect of certain economic relations: jurisdiction can only exist over assets that have contributed to the stimulation of capital flows between certain States. For this reason, only the companies of such States may invoke those treaties. Otherwise,

⁴³⁷ *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 dated September 27, 2012, par. 233, RLA-56.

⁴³⁸ *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID case No. ARB/08/12, award dated June 5, 2012, par. 351 (Emphasis added), RLA-59.

⁴³⁹ *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID case No. ARB/08/12, award dated June 5, 2012, par. 351, RLA-59. Similarly, the tribunal in *Standard Chartered Bank* concluded that “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” (*Standard Chartered Bank v. Tanzania*, ICSID case No. ARB/10/12, award dated November 2, 2012, par. 232, RLA-60).

⁴⁴⁰ Reply, par. 185.

⁴⁴¹ Treaty, Preamble (“The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Bolivia; 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; [...]”) (Emphasis added), C-1.

one would be interpreting the Treaty against the principle of the relative effect of treaties.

270. Confronted to this evidence, SAS limits itself to indicate that *Caratube* and *Standard Chartered Bank* applied various instruments other than the Treaty⁴⁴². This argument is, to say the least, inadequate. As the Tribunal⁴⁴³ may observe, the treaties analyzed by these tribunals are sufficiently similar, they pursue the same objective of encouraging economic development and the flow of capital between certain States and, therefore, confirm that SAS cannot prevail itself on the Treaty.
271. *Second*, SAS is not the owner of an investment according to the *Salini* factors and, therefore, CMMK and the Mining Concessions are not investments of SAS.
272. *First*, SAS did not make a financial contribution (the origin of the resources was SASC's). Nor did it help, as stated by *Standard Chartered Bank*, providing "know-how, contacts, or expertise"⁴⁴⁴, since it was SASC who provided foreign staff and hired experts in reserves and metallurgical processes. Clearly, SAS could not have made any contribution since it had no staff or office, and even less the Project. In fact,
- a. It was General Minerals Corporation (SASC's former name⁴⁴⁵) and CMMK (not SAS) who entered into a contract with Apex Silver Mines Ltd. and SILEX Bolivia S.A. to perform sampling in the Limosna hills in 2005⁴⁴⁶;
 - b. Similarly, it was General Minerals Corporation that hired and paid Mr. Dreisinger to design the metallurgical process that CMMK and SASC were going to use to extract minerals in the Project⁴⁴⁷;

⁴⁴² Reply, par. 185.

⁴⁴³ Treaty between the United States of America and the Republic of Kazakhstan on the promotion and reciprocal protection of investments, signed May 19, 1992, RLA-221; Treaty between the United Kingdom and Northern Ireland and the United Republic of Tanzania for the promotion and protection of investments, signed January 7, 1994, RLA-222.

⁴⁴⁴ *Standard Chartered Bank v. Tanzania*, ICSID case No. ARB/10/12, award November 2, 2012, par. 232, RLA-60.

⁴⁴⁵ Statement of Claim, par. 33.

⁴⁴⁶ Contract between General Minerals Corporation, CMMK, Apex Silver Mines Ltd. and SILEX Bolivia S.A. dated February 18, 2005, R-181.

⁴⁴⁷ Contract between General Minerals Corporation and Dreisinger Consulting Inc. dated May 4, 2006, R-182.

- c. Pincock, Allen & Holt was retained by SASC (not SAS) for the preparation of the PRA 2009⁴⁴⁸;
- d. In 2009, SASC entered into a confidentiality agreement with several companies to explore possible strategic commercial/trade agreements⁴⁴⁹. In said agreement, SASC stated that it “holds rights to certain properties known as Malku Khota through its wholly owned subsidiary [CMMK]”⁴⁵⁰. Agreements containing this same statement were signed with: Compañía de Minas Buenaventura S.A.A.⁴⁵¹; Coeur d’Alene Mines Corporation⁴⁵², Pan American Silver Corp.⁴⁵³, Koromet Co.⁴⁵⁴ and SK Networks Co.⁴⁵⁵.
- e. It was SASC (and not SAS) who negotiated consulting services for the Project’s financing⁴⁵⁶;
- f. Similarly, it was SASC who selected and retained BSR as consultants in community relations⁴⁵⁷; and

⁴⁴⁸ Contract between Pincock, Allen & Holt and SASC dated September 2, 2008, R-183.

⁴⁴⁹ Minute of Board of Directors of SASC of July 11, 2008, pg. 2 (“The directors decided that if a partner is sought, this should be done sooner rather than later while the Corporation’s cash position, and thus bargaining power, is strong. It was suggested that getting multiple potential partners involved in discussions may be advantageous and the Corporation should think about who would make an ideal partner before entering into extensive or exclusive negotiations with any one party. Ralph Fitch informed the board that more detailed indium metallurgy would be completed in one month and the Corporation should consider negotiations with large indium players at that time”), R-184.

⁴⁵⁰ Confidential Agreement between SASC and Compañía de Minas Buenaventura dated December 3, 2009, R-185.

⁴⁵¹ Confidential Agreement between SASC and Compañía de Minas Buenaventura dated December 3, 2009, R-185.

⁴⁵² Confidential Agreement between SASC and Coeur d’Alene Mines Corporation dated November 13, 2008, R-186.

⁴⁵³ Confidential Agreement between SASC and Pan American Silver Corp. dated July 27, 2008, R-187.

⁴⁵⁴ Confidential Agreement between SASC and Koromet Co. Ltd. dated December 8, 2009, R-188.

⁴⁵⁵ Confidential Agreement between SASC and SK Networks Co. dated December 1, 2009, R-189.

⁴⁵⁶ Service Proposal from Optimum Project Services to SASC dated January 30, 2009, R-190.

⁴⁵⁷ Minute of Board of Directors of SASC dated January 31, 2009, pg. 4 (“IT WAS RESOLVED THAT the Corporation retain BSR Group’s services substantially on the terms set out in their proposal previously delivered to the directors, with such modifications as the President and Chief Executive Officer of the Corporation sees fit”), R-191.

g. It was SASC's Board of Directors who made the key decisions for the development of the Project, for example, the acquisition of the Mining Concessions⁴⁵⁸, conducting geological studies⁴⁵⁹, the metallurgical process to be used in the operation of the Project⁴⁶⁰, the provision of funds and preparation of the budget and business plan for the Project⁴⁶¹ or drilling programs.

273. Second, SAS did not assume any of the risks associated with the investment and therefore had no expectation of a return on investment. The risk and potential benefit corresponded exclusively to SASC.
274. Third, SAS did not contribute to the economic development of Bolivia. In fact, it is questionable that the Project, having such a negative impact on the Indigenous

⁴⁵⁸ Minute of the Board of Directors of General Minerals Corporation dated February 27, 2003, pg. 2 ("Similarly, key ground in the Atocha trend, calle Manco Kota, is available for acquisition [...]. The Board agreed that the acquisition be made if cash is available"), R-192; Minute of the Board of Directors of General Minerals Corporation dated May 5, 2003, R-193; Minute of the Board of Directors of General Minerals Corporation dated May 30, 2003, pg. 4 ("Mr. Fitch indicated that cash payments of US\$ 5,000 each were required to finalize the pending negotiations for the two properties in Bolivia called Malku Khota and Laurani"), R-194; Minute of the Board of Directors of General Minerals Corporation dated September 18, 2003, R-195; Minute of the Board of Directors of SASC dated April 18, 2008, pg. 4 ("IT WAS RESOLVED that Mr. Malbran is authorized to continue negotiations (sic) for the Villa Khota land package and that expenditures are not to exceed US\$ 100,000 for the first two years and they are not to exceed a total of US\$ 650,000 for the entire five year period"), R-196.

⁴⁵⁹ Minute of the Board of Directors of General Minerals Corporation dated December 9, 2003 ("In Bolivia, the Corporation is performing basic geology and geochemistry at Laurani and is looking for a geologist at Malku Khota"), R-197; Minute of the Board of Directors of General Minerals Corporation dated March 7, 2005, R-198; Minute of the Board of Directors of SASC dated March 22, 2007, pg. 3 ("At Malku Khota, Mr. Fitch explained that all of the drilling bids have been received and the Corporation would be making a decision shortly and begin drilling in April"), R-199; Minute of the Board of Directors of SASC dated November 9, 2007, R-200; Minute of the Board of Directors of SASC dated January 18, 2008, pg. 1 ("We are currently waiting on the metallurgical test results being performed by the Lakefield laboratory on the course material from Malku Khota. We have started discussions with Pinecock Alan and Holt on conducting a scoping study later in the year following completion of the resource study"), R-201.

⁴⁶⁰ Minute of the Board of Directors of SASC dated April 14, 2009, pg. 1 ("During the visit, there was some discussion as to whether the Corporation should consider first processing the material at Malku Khota using a cyanide leach to recover the silver to then be followed by an acid chloride leach to recover the silver and indium. Since the acid-chloride leach process is a less conventional recovery method than the cyanide leach process, it may be worth considering this approach, although no determination has yet been made"), R-202. See, also, Minute of the Board of Directors of SASC dated August 12, 2009, pg. 3, R-203.

⁴⁶¹ Minute of the Board of Directors of SASC dated August 12, 2010, pg. 3 ("Mr. Johnson reviewed the revised Budget document that had been presented to the Board. He advises the updated PEA and drilling programs are on track and the goal is to move toward a Feasibility Study on Malku Khota"), R-204; Minute of the Board of Directors of SASC dated December 7, 2011, pg. 3 ("IT WAS RESOLVED THAT the business Plan and Budget as presented be approved"), R-205; Corporate Presentation of SASC for Budget approval and Business plan for 2012 dated December 7, 2011, R-206.

Communities and public order of Northern Potosi⁴⁶², could be even considered as a contribution to economic development. In any case, should any contribution to the development of Bolivia had been made, like everything else, it was made by SASC⁴⁶³.

275. For all the above reasons, even if the Tribunal considers that the Treaty protects indirect investments (*quod non*), SAS did not make an investment in the territory of Bolivia, and, therefore, the Tribunal lacks jurisdiction.

4.1.3 **Assuming that the Treaty protects indirect investors (*quod non*), the Tribunal lacks jurisdiction over SAS given that it is a shell company with no interest in this dispute**

276. The premise of jurisdiction in investment arbitration cannot be the protection of a shell company if the party whose interests are truly in dispute does not meet the requirements of the jurisdiction required by the Treaty.

277. *In limine*, SAS does not deny being a shell company with no material interest in this dispute, nor does it refute the facts presented by Bolivia that prove so⁴⁶⁴. As demonstrated by the following circumstances, SAS has no interest in the outcome of this arbitration.

278. *First*, the dispute submitted by a shell company cannot be settled under the Treaty if there is no jurisdiction over the parent company. The real dispute in this case is with a company over which the Tribunal has no jurisdiction, because it is a Canadian company (SASC). SAS does not meet the Treaty's requirements.

279. First, the Treaty clearly states that the Tribunal has jurisdiction only with respect to those companies whose interests are in dispute. According to article 8 (1) of the Treaty, jurisdiction requires "*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 [...]*"⁴⁶⁵.

⁴⁶² See Section 3.2, *supra*.

⁴⁶³ This is demonstrated by the budget figures that were approved by SASC to be executed in Bolivia by CMMK. See, among others, Corporate Presentation of SASC for Budget approval and Business plan for 2012 dated December 7, 2011, R-206; List of Properties of SASC, R-180.

⁴⁶⁴ Counter-Memorial, par. 258-265.

⁴⁶⁵ Treaty, art. 8(1), C-1.

280. As shell companies do not exist as an independent economic reality, when they initiate an arbitration, they are not a party with an interest in resolving the dispute.
281. SAS' assertion according to which tribunals cannot incorporate jurisdictional requirements in the text of the Treaty, but must make a formal interpretation⁴⁶⁶ of it, is irrelevant. The Treaty provides *verbatim* in article 8 (1) that the jurisdiction requires that the dispute be between a company of a Contracting Party and the other Contracting State⁴⁶⁷. The fact that the dispute in this case is with a Canadian company, which is not incorporated in the other Contracting Party under article 8 (1) does not imply that a new requirement be inserted into the text of the Treaty. On the contrary, it is to apply the Treaty.
282. Second, although the need for the dispute to arise with the party who has an interest in it emanates from the text of the Treaty itself, its object and purpose confirm this requirement. In fact, the promotion and protection of investments under the Treaty applies solely to investors from the United Kingdom and Bolivia. In this regard, the Vienna Convention is clear that the same value needs to be given to the provisions of the treaty as to its object and purpose, when interpreting its meaning⁴⁶⁸.
283. The object and purpose of the Treaty, as stated in its preamble⁴⁶⁹, are to encourage investment by companies of one contracting party in the territory of the other contracting party. To this end, the Treaty provides these companies with a special protection, which includes a commitment to resolve disputes that may arise through arbitration. Its object and purpose is not to provide investment protection and arbitral jurisdiction to any foreign company clever enough to establish a shell company in a British territory such as Bermuda. Nor is it the will of the States to extend the protection of investment treaties they entered into to any company in the world; Bolivia, in particular, has not concluded an investment treaty with Canada to protect Canadian companies such as SASC. To allow the use of a shell company to establish jurisdiction would disavow Bolivia's consent.

⁴⁶⁶ Reply, par. 187.

⁴⁶⁷ Treaty, art. 8(1), C-1.

⁴⁶⁸ Vienna Convention, art. 31, RLA-11.

⁴⁶⁹ Treaty, Preamble ("*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*"), C-1.

284. To demonstrate the interest of Canada in this dispute, Bolivia requested, on December 16, 2014, public documents to the Canadian Foreign Ministry under the *Access to Information Act*⁴⁷⁰. After several exchanges of communication, on February 25, 2016, we were informed that there were over 850 pages of response but the Foreign Ministry was still reviewing the documents. Bolivia reserves its right to submit these documents once they are reported by the Foreign Ministry.
285. Third, arbitral tribunals have confirmed that the content, object and purpose of the Treaty preclude the existence of jurisdiction over a dispute raised by a shell company.
286. The *Loewen* tribunal faced a case in which an interested party changed nationality (Canadian to US) while the arbitration was ongoing. While much of its analysis focused on whether it was sufficient that the party was Canadian at the beginning of the arbitration, it finally concluded that it lacked jurisdiction because the party concerned was no longer protected by the investment treaty:

*Claimant TLGI urges that since it had the requisite nationality at the time the claim arose, and, antedate the time that the claim was submitted, it is of no consequence that the present real party in interest - the beneficiary of the claim - is an American citizen. Both as a matter of historical and current international precedent, this argument must fail*⁴⁷¹.

287. Similarly, in the case of a group of companies controlled by an unprotected parent company, the *Venoklim Holding* tribunal pierced the corporate veil in order to ascertain the real party to the dispute, with important consequences in terms of its jurisdiction:

*In addition, it has been shown that the Venezuelan company Industrias Venoco CA that controls Venoklim is in turn effectively controlled by the Venezuelan company Inversora Petroklm, C.A. [...] Given this reality, Venoklim may not be treated as an international investor in the terms of the Investment Law, which means that it cannot base its request for arbitration on Article 22 of that law, which is applicable only to foreign investors. Consequently it cannot be granted the protection of the Dutch Treaty, which it seeks to invoke through the reference made by said Article 22*⁴⁷².

⁴⁷⁰ Communications between Bolivia and the Canadian Foreign Ministry between December 16, 2014 and February 25, 2016, R-218.

⁴⁷¹ *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID case No. ARB(AF)/98/3, award dated June 26, 2003, par. 223, RLA-223.

⁴⁷² *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID case No. ARB/12/22, award dated April 3, 2015, par. 148, RLA-224.

288. Other tribunals have ordered to pierce the corporate veil to analyze who is the real party to the disputes and decline their jurisdiction. This is so because the ICSID Convention contains a provision similar to that of the Treaty, according to which a tribunal has jurisdiction to decide “any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State [...]”⁴⁷³.
289. In *TSA Spectrum*, for example, the tribunal considered necessary to pierce the corporate veil to determine the party whose interests were in dispute. When it got knowledge of the identity of the party truly in dispute, it declined its jurisdiction over the claims of the claimant:

The Tribunal has found above that in the application of the second part of Article 25(2)(b) it is necessary to pierce the corporate veil and establish whether or not the domestic company was objectively under foreign control. [...]

The only conclusion that can be drawn from the information and evidence available to the Tribunal is thus that the ultimate owner of TSA on and around the date of consent was the Argentinian citizen Mr. Jorge Justo Neuss. [...] [T]he Arbitral Tribunal therefore lacks jurisdiction to examine TSA's claims⁴⁷⁴.

290. SAS' last resort is to refer to several tribunal decisions that declared themselves competent. However, the cases cited do not support its position. *Saluka* – like the rest of the tribunals cited by SAS⁴⁷⁵ – does not deal with the same legal question as the Tribunal in this case. The tribunal in *Saluka* declared that it has to rule on the objections to its jurisdiction on the basis of the treaty's provisions, which meant that it was not authorized to alter the definition of “investor”⁴⁷⁶. If the tribunal in *Saluka* had been to rule on whether a shell company could be considered an investor under

⁴⁷³ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of the International Centre for Settlement of Investment Disputes, art. 25(1), RLA-225.

⁴⁷⁴ *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID case No. ARB/05/5, award dated December 19, 2008, paras. 160-162, RLA-226.

⁴⁷⁵ Reply, par. 187, citing *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID case No. ARB (AF)/09/01, award dated September 22, 2014, par. 255, RLA-27; *Yukos Universal Limited v. Russia*, PCA case No. AA 227, CNUDMI, partial award on jurisdiction and admissibility dated November 30, 2009, paras. 432-435, CLA-113; *Siag and others v. Arab Republic of Egypt*, ICSID case No. ARB/05/15, decision on jurisdiction dated April 11, 2007, paras. 208-210, CLA-114; *ADC v. Hungary*, ICSID case No. ARB/03/16, award dated October 2, 2006, paras. 357 and 359, CLA-35; *Tokios Tokelés v. Ukraine*, ICSID case No. ARB/02/18, decision on jurisdiction dated April 29, 2004, par. 77, CLA-115.

⁴⁷⁶ *Saluka Investments BV v. Czech Republic*, UNCITRAL case, partial award dated March 17, 2006, par. 240, CLA-46.

the definition of the treaty, it would have reached the same conclusion that Bolivia defends in this case.

291. *Second*, notwithstanding that a dispute under an investment treaty cannot exist with a shell company, the facts of this case demonstrate that the dispute is not with SAS.

292. In fact, SASC is the one who initially had an economic interest in this arbitration. Therefore, it has not only promoted it through a shell company (SAS) but has also sought agreements for funding and guaranteed them. As Bolivia has been able to establish⁴⁷⁷, SASC has informed its investors about the execution of an agreement with a third party funder and provided guarantees (acts that are specific to a party with an interest in the outcome of a dispute). Similarly, by virtue of the agreement with the funder of SASC, that SAS has refused to produce, the funder could also have a direct interest in the Tribunal's decision.

On May 23, 2013, the Company [SASC] entered into an agreement (the 'Arbitration Costs Funding Agreement') with a third party funder (the 'Fund') pursuant to which the Fund will cover most of SASL's [South American Silver Limited] future costs and expenses related to its international arbitration proceedings against Bolivia. [...] Under the terms of the privileged Arbitration Costs Funding Agreement, the Company has given certain warranties⁴⁷⁸.

293. Therefore, SASC has been the only company that made an alleged investment in Bolivia, and the only one who has had an interest in starting this arbitration and obtain a favorable award. Should SASC want to invoke the rights granted by the Treaty, it has to directly meet the requirements (and not through a third party such as SAS) to which the consent from the State to arbitration is granted.

4.2 SAS' claims cannot be considered by the Tribunal since SAS does not have clean hands

294. SAS insists that its claims are admissible and are subject to the jurisdiction of the Tribunal, even though they are flawed by the illegality of its actions. In fact, SAS argues that "*Bolivia's entire legal case on this matter rests on the assumption that a 'clean hands' doctrine exists as a matter of law*"⁴⁷⁹, and argues that this principle does not exist⁴⁸⁰. SAS also states that the underlying criteria of *clean hands* – assuming

⁴⁷⁷ Request of *Cautio Juristicum Solvi*, par. 16.

⁴⁷⁸ Management's Discussion & Analysis of SASC published August 7, 2015, pg. 4, R-148.

⁴⁷⁹ Reply, par. 197.

⁴⁸⁰ *Id.*, par. 197.

this doctrine was recognized – are not met in this case⁴⁸¹. Ultimately, SAS argues that its unlawful conduct, which it dismisses as mere “*three instances of alleged unclean hands*”⁴⁸², “*cannot possibly be matters affecting the Tribunal’s jurisdiction*”⁴⁸³ since they did not take place at the time of its alleged investment.

295. As explained by Bolivia in its Counter-Memorial, SAS does not appear before this Tribunal with *clean hands*. SAS is responsible for much more than “*three instances*” of improper and illegal conduct in relation to its alleged investment and, as a result, its claims are inadmissible and are found outside the jurisdictional scope of this Tribunal. The vast evidence presented by Bolivia demonstrates SAS’ misconduct. The evidence uncovered by Bolivia after the phase of document production has confirmed SAS’ wrongdoing during the execution of the Project.

296. Hence, the claims presented by SAS before this Tribunal are inadmissible (Section 4.2.1) and are excluded from the jurisdictional scope thereof (Section 4.2.2). Despite not having the burden of proof, Bolivia has presented conclusive evidence supporting its jurisdictional objections (Section 4.2.3). For this reason, the claims presented by SAS must be dismissed by the Tribunal.

4.2.1 The “*clean hands*” doctrine is a principle of international law and international public policy that renders SAS’ claims inadmissible in this arbitration

297. SAS appears before this Tribunal without “*clean hands*”. SAS’ conduct and illegal acts in Mallku Khota⁴⁸⁴ prevent it from filing before this Tribunal claims for damages allegedly suffered.

298. In an attempt to salvage its claims, SAS states that the “*entire case on unclean hands [of Bolivia] is fundamentally flawed*”⁴⁸⁵. SAS bases its claim on two main arguments: according to SAS, the doctrine of *clean hands* does not exist under international

⁴⁸¹ *Id.*, par. 198.

⁴⁸² *Id.*, par. 199.

⁴⁸³ *Id.*

⁴⁸⁴ See Section 4.2, *supra*.

⁴⁸⁵ Reply, par. 197.

law⁴⁸⁶, and even if it did, the criteria for its application are not verified in the present case⁴⁸⁷.

299. SAS' arguments are based on an incorrect and narrow understanding of the doctrine of *clean hands* (Section 4.2.L.1) and on an incorrect interpretation of case law (Section 4.2.1.2).

4.2.1.1 *The clean hands doctrine is recognized in international law and is part of international public policy*

300. SAS claims that the "*clean hands*" doctrine is not a principle recognized by public international law or international investment law⁴⁸⁸. That is not true.

301. *First*, the "*clean hands*" doctrine is the manifestation of a fundamental principle of law and international law: good faith⁴⁸⁹. In keeping with its origins, the "*clean hands*" doctrine is widely recognized, both in civil law and common law systems⁴⁹⁰, as a "*general principle of law that should be applied in all cases*"⁴⁹¹.

302. The "*clean hands*" doctrine is included in legal the maxim "*he who comes to equity for relief must come with clean hands*"⁴⁹² and on the principles *ex injuria jus non*

⁴⁸⁶ Reply, par. 201-211.

⁴⁸⁷ Reply, par. 212-218.

⁴⁸⁸ Reply, par. 201.

⁴⁸⁹ M. Kotzur, "Good faith (Bona fide)", *Max Planck Encyclopedia of Public International Law*, 2009, paras. 5-6, 7-9, RLA-227.

⁴⁹⁰ 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, pg. 317, RLA-66, quoting paras. 242 and 817(2) of the *Bürgerliches Gesetzbuch*. See, also, J.N. Pomeroy, *A Treatise on Equity Jurisprudence*, 5^a edición, Bancroft-Whitney Company, 1941, par. 397 ("*[I]t is rather a universal rule guiding and regulating the action of equity courts in their interposition on behalf of suitors for any and every purpose, their administration of any and every species of relief*") (Emphasis added), RLA-228.

⁴⁹¹ R. Moloo, A. Khachaturian, "The Compliance with the Law Requirement in International Law," 34 *Fordham International Law Journal* 1473, issue 6, 2011, pg. 1485, RLA-67.

⁴⁹² 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, pg. 119, quote in 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, pg. 2, RLA-88. See, also, *Tinsley v. Milligan*, House of Lords Judgment, [1993] 3 WLR 126, pg. 344, par. C, RLA-229.

*oritur*⁴⁹³, *nemo auditur propriam turpitudinem allegans*⁴⁹⁴, *ex turpi causa non oritur actio*⁴⁹⁵ or *ex dolo malo non oritur actio*⁴⁹⁶. The “clean hands” doctrine operates as an impediment to the admissibility of the claims in cases where the claimant has acted inappropriately in relation to the subject matter of its claims.

303. As Pomeroy explains regarding the application of this principle in the United States:

*[W]henever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy*⁴⁹⁷.

304. The “clean hands” doctrine is a principle of English common law the application of which can be traced back to at least the 17th century⁴⁹⁸. The principle of *ex turpi causa non oritur actio*, one of the forms in which the principle of “clean hands” is expressed, was applied by the House of Lords in *Stone & Rolls v. Moore Stephens*⁴⁹⁹ to dismiss the complaint of a company against its auditor for not having detected a fraud for which the company itself was responsible, who had only one owner and manager (the one who sought to sue)⁵⁰⁰. Similarly, the Court of Appeal of England and Wales in the *Safeway Stores v. Twigger* case held that the principle of *ex turpi causa* prevented

⁴⁹³ *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA case No. AA 226, final award dated July 18, 2014, par. 1360, CLA-121; *Yukos Universal Limited (Isle Of Man) v. Russian Federation*, PCA case No. AA 227, final award dated July 18, 2014, par. 1360, CLA-122; *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA case No. AA 228, final award dated 18 July 2014, par. 1360, CLA-123. See, also G. Fitzmaurice, “The General Principles of International Law Considered from the Standpoint of the Rule of Law”, *Recueil des Cours*, 1957, pgs. 117-120, RLA-231. H. Lauterpacht, *Recognition in International Law*, Cambridge University Press, 1947, pgs. 420-421, RLA-74.

⁴⁹⁴ Counter-Memorial, par. 272.

⁴⁹⁵ 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. Hober and others (eds.), Juris Publishing, 2010, pgs. 317-318, RLA-66.

⁴⁹⁶ *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID case No. ARB/03/26, award dated August 2, 2006, paras. 240-241, RLA-65.

⁴⁹⁷ J. N. Pomeroy, *A Treatise on Equity Jurisprudence*, 5th edition, Bancroft-Whitney Company, 1941, par. 397, RLA-228.

⁴⁹⁸ *Jones v. Lenthall*, House of Lords Judgment, [1669] 1 Chan. Cas. 153, pg. 739, RLA-230.

⁴⁹⁹ *Stone & Rolls Ltd (in liquidation) v. Moore Stephens (a firm)*, House of Lords Judgment, [2009] 1 AC, RLA-233.

⁵⁰⁰ *Id.*, pgs. 1462 and 1476.

the claimant from claiming the responsibility of its former employees and directors for the payment of fines that had been imposed on these companies⁵⁰¹.

305. The “clean hands” doctrine is also recognized in German law, in the Bürgerliches Gesetzbuch or BGB, the German Civil Code. As noted by one commentator, “[i]his principle [is] developed from the principle *exceptio doli specialis seu prateriti* of Roman and Common law. It corresponds to the ‘unclean hands’ defense known in Anglo-American law”⁵⁰².
306. Furthermore, in French law, the principle *nemo auditur propriam turpitudinem allegans* is applied by the courts which recognize that “the principle that no one can seek justice based on its own fault”⁵⁰³. The “clean hands” doctrine is thus, a reflection of the principle of good faith and is, also one of “the general principles of law recognized by civilized nations”⁵⁰⁴ under article 38(1)(c) of the Statute of the ICJ. There is no doubt that it is a relevant and applicable principle in this case⁵⁰⁵.
307. Second, the principle of “clean hands” has been recognized as such or in the form of some of the principles outlined above, as an accepted principle in international law⁵⁰⁶.
308. This principle was analyzed by the tribunal in the *Al Warraq* case – with the depth it deserved and not just over the “surface” as SAS suggests⁵⁰⁷. Although the claimant argued that the principle of “clean hands” was “irrelevant” in such case, the tribunal

⁵⁰¹ *Safeway Stores Ltd. And others v. Twigger and others*, House of Lords Judgment, [2010] EWCA Civ 1472, pgs. 1629, 1634-1635, RLA-234.

⁵⁰² 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 et al. (eds.), Juris Publishing, 2010, pg. 318, RLA-66.

⁵⁰³ French Supreme Court, 2nd Civil Chamber, Ruling dated February 4, 2010, n° 09-11.464, RLA-235. See, also, French Supreme Court, 2nd Civil Chamber, Ruling dated January 24, 2002, n° 99-16.576 (“a victim can only obtain compensation for the loss of its remuneration if the latter is lawful”) (free translation of “une victime ne peut obtenir la réparation de la perte de ses rémunérations que si celles-ci sont licites”), RLA-236.

⁵⁰⁴ 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 et al. (eds.), Juris Publishing, 2010, pg. 318, RLA-66.

⁵⁰⁵ 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, pg. 3, RLA-88.

⁵⁰⁶ B. Cheng, *General Principles of Law as Applied by International Courts and tribunals*, Cambridge University Press, 1953, pg. 155, RLA-73.

⁵⁰⁷ Counter-Memorial, par. 209.

acknowledged that “the ‘clean hands’ principle has been invoked in the context of the admissibility of claims before international courts and tribunals”⁵⁰⁸. Taking into account that the claimant had “[f]ailed] to uphold the Indonesian laws and regulations” and had “[acted] in a manner prejudicial to the public interest”⁵⁰⁹, the tribunal in *Al Warraq* determined that the proven conduct was within the scope of the “clean hands” doctrine and that, therefore, the submitted claims were inadmissible⁵¹⁰.

309. Similarly, the tribunal in *Fraport II* considered that in the field of international law, the principle of “clean hands” or “doctrines to the same effect” allow to reject the application of the protection of an investment treaty to an illegal investment⁵¹¹. SAS makes a flawed criticism of this award, claiming that it makes a simple “tangential reference” to “clean hands”⁵¹². In fact, the analysis of “clean hands” was fundamental for the *Fraport II* tribunal in deciding whether an illegal investment may or may not benefit from the protection of the treaty⁵¹³. The *Fraport II* tribunal concluded that an illegal investment cannot be protected by an investment treaty⁵¹⁴.

310. Third, the “clean hands” doctrine has also been recognized as part of international public policy, which has been defined by arbitral tribunals as “an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora”⁵¹⁵. International public policy can prevent improper claims⁵¹⁶.

⁵⁰⁸ *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL case, award dated December 15, 2014, par. 646, RLA-70.

⁵⁰⁹ *Id.*, par. 647.

⁵¹⁰ *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL case, award dated December 15, 2014, par. 647, RLA-70. To be clear, it was not because prosecutions and convictions had been carried out that the *Al Warraq* tribunal found in favor of the respondents, as SAS incorrectly suggests (*Reply*, par. 208). Instead, such measures were proof that the claimant did not come before the tribunal with “clean hands”, facts on which the tribunal relied in its decision.

⁵¹¹ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [II]*, ICSID case No. ARB/11/12, award dated December 10, 2014, par. 328 and footnotes 386-387, RLA-71.

⁵¹² *Reply*, par. 209 and footnote 444.

⁵¹³ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [II]*, ICSID case No. ARB/11/12, award dated December 10, 2014, Section VI.B, RLA-71.

⁵¹⁴ *Id.*, paras. 467-468.

⁵¹⁵ *World Duty Free Company Limited v. Republic of Kenya*, ICSID case No. ARB/00/7, award dated October 4, 2006, par. 139, RLA-68.

⁵¹⁶ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID case No. ARB/03/25, Dissenting opinion of Bernardo M. Cremades dated July 19, 2007, par. 40, RLA-237.

311. The tribunal in *World Duty Free* dismissed the claims, because it felt that they were based on a conduct contrary to international public policy⁵¹⁷. Similarly, the tribunal in *Plama* denied the Claimant protection under the Energy Charter Treaty on the grounds that its claim was based on a conduct contrary to international public policy and to the principle of *nemo auditur propriam turpitudinem allegans*⁵¹⁸, by invoking a contract that had been entered by illegal means.
312. The “*clean hands*” doctrine, a fundamental manifestation of the principle of good faith and undeniably part of international law and international public policy, prevents the Tribunal to declare SAS' claims admissible.
- 4.2.1.2 *SAS' attempt to distort or belittle the legal evidence that confirms the existence of the principle of “clean hands” is useless*
313. SAS argues that “no principle of ‘clean hands’ exists as a matter of international law”⁵¹⁹ and, to support it, allegedly scans arbitral case law which it considers to be “unequivocally against Bolivia”⁵²⁰. This statement is not correct and is based on an erroneous interpretation of international case law.
314. First, SAS argues that the ICJ and the Permanent Court of International Justice (“PCIJ”) “declined to declare that the clean hands doctrine exists in international law, despite having had many opportunities to do so”⁵²¹. This classification of the reasoning of such courts is incorrect.

⁵¹⁷ *World Duty Free Company Limited v. Republic of Kenya*, ICSID case No. ARB/00/7, award dated October 4, 2006, par. 157, RLA-68.

⁵¹⁸ *Plama Consortium Limited v. Bulgaria*, ICSID case No. ARB/03/24, award dated August 27, 2008, par. 143, RLA-69.

⁵¹⁹ Reply, par. 201.

⁵²⁰ *Id.*

⁵²¹ *Id.*, par. 202.

315. First, SAS argues that in *La Grand*⁵²¹ and *Avena*⁵²³, the ICJ implicitly rejected the application of the doctrine of “clean hands”. However, none of these cases dealt with the principle of “clean hands”; moreover, the principle is not even mentioned in any of these cases, so they are irrelevant.
316. Second, the *Oil Platforms* and *Legality of the Use of Force* cases do not support SAS’ position because the ICJ concluded, on both occasions, in favor of the party who filed the objection of “clean hands”⁵²⁴. These two cases are insufficient to conclude, as intended by SAS, that the ICJ “has declined”⁵²⁵ to recognize the principle of “clean hands”. The cases cited are simply false leads on which SAS relies given the lack of legal basis for its position. In contrast, the opinions already quoted by Bolivia of judges of the ICJ that have invoked and relied on the principle of “clean hands” confirm that the ICJ maintains a favorable attitude towards this manifestation of the principle of good faith⁵²⁶. In fact, at least one of the cases cited by SAS admits that

⁵²¹ *La Grand (Germany v. United States of America)*, ICJ ruling dated June 27, 2001, ICJ Reports, paras. 61-63, CLA-117. The USA argues that “it would be contrary to basic principles of administration of justice and equality of the Parties to apply against the United States alleged rules that Germany appears not to accept for itself” (par. 63). ICJ did not consider it relevant to comment on this issue, since the evidence submitted by the USA “did not justify the conclusion that Germany’s own practice fails to conform to the standards it demands from the United States” (par. 63).

⁵²² *Avena and others of Mexican nationality (Mexico v. USA)*, ICJ Ruling dated March 31, 2004, ICJ Reports, paras. 45-47, CLA-118. As in *La Grand*, the USA argues that “the claim of Mexico is inadmissible in that Mexico should not be allowed to invoke against the United States standards that Mexico does not follow in its own practice. The United States contends that, in accordance with basic principles of administration of justice and the equality of States, both litigants are to be held accountable to the same rules of international law. The objection in this regard was presented in terms of the interpretation of Article 36 of the Vienna Convention, in the sense that, according to the United States, a treaty may not be interpreted so as to impose a significantly greater burden on any one party than the other” (par. 45). The ICJ deemed that art. 36 of the Vienna Convention, was not a motive of objection of admissibility of the complaint of Mexico (par. 47).

⁵²³ In the case of *Oil Platforms*, the ICJ, dismissed the claims for compensation of Iran, which evidently made it “unnecessary for the Court to examine the argument [...] that Iran might be debarred from relief on its claim by reason of its own conduct” (*Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Ruling dated November 6, 2003, merits, ICJ Reports, par. 100, CLA-116). In the case regarding the *Legality of the use of force*, “[h]aving rejected Yugoslavia’s requests on grounds of lack of prima facie jurisdiction, the Court did not find it necessary to address the argument about Yugoslavia’s lack of clean hands.” (S. Schwebel, “Clean Hands in the Court”, 31 *Studies in Transnational Legal Policy*, 1999, pg. 74, BLA-89).

⁵²⁴ Reply, par. 202.

⁵²⁵ Counter-Memorial, paras. 280-282.

the “*clean hands*” doctrine is a general principle recognized by civilized nations⁵²⁷ and, as such, can be applied by investment tribunals.

317. *Second*, SAS relies on the observations of *Special Rapporteur* John Dugard in the *Sixth Report on Diplomatic Protection* regarding the eventual inclusion of an article governing the “*clean hands*” doctrine, in the draft of articles on diplomatic protection of 2004⁵²⁸. However, the report by Prof. Dugard is only on whether it is appropriate to codify the principle of “*clean hands*” as part of the right of diplomatic protection. SAS distorts the opinion of Prof. Dugard on “*clean hands*” by suggesting that it is an analysis on the existence of this principle, generally, under international law⁵²⁹.
318. SAS also relies on the opinion expressed by *Special Rapporteur* James Crawford, on the *Second Report on State Responsibility*, to suggest that the principle of “*clean hands*” cannot be considered as part of the institutions of customary international law⁵³⁰. Once again, SAS misunderstands the doctrine it quotes. The “*clean hands*” doctrine was discussed as part of the draft of articles on the circumstances that exclude the wrongfulness of the state conduct, *i.e.*, in a chapter “*not concerned with such procedural questions as locus standi, or with the admissibility of claims*”⁵³¹. Therefore, this argument is not relevant to this case.
319. *Third*, SAS resorts to the only ruling that it thinks may be useful, the *Yukos* case, which is wrongly presented as “*the most considered expression of the status of the clean hands doctrine in [investment arbitration]*”⁵³². However, the *Yukos* ruling does not reinforce the position of SAS and is not that respected by the arbitral community as SAS pretends it to be.
320. First, SAS conveniently ignores that the *Yukos* tribunal recognized that the “*principles associated with the clean hands doctrine, such as [...] ex iniuria ius non oritur* have

⁵²⁷ *Niko Resources (Bangladesh) Ltd. v. Bangladesh and other*, ICSID case No. ARB/10/11 and ARB/10/18, decision on jurisdiction dated August 19, 2013, paras. 478 and ff., CLA-124.

⁵²⁸ J. Dugard, *Sixth report on diplomatic protection* (57th Session of the International Law Commission), A/CN.4/546, 2005, par. 1, CLA-119.

⁵²⁹ Reply, par. 205.

⁵³⁰ *Id.*

⁵³¹ 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, par. 335, CLA-120.

⁵³² Reply, par. 206.

been endorsed by the PCIJ and the ICJ⁵³³. This conclusion directly contradicts SAS's position and supports the application of "clean hands", under the maxim *ex injuria* (as we detailed above) as part of international law.

321. Second, SAS attempts to minimize the flagrant contradictions incurred by the *Yukos* tribunal by analyzing the principle of "clean hands" as a general principle of law recognized by civilized nations⁵³⁴. While it is true that the tribunal stated that "[g]eneral principles of law require a certain level of recognition and consensus"⁵³⁵, it failed to mention that such recognition and consensus exists between States and not between the courts and international tribunals. The opinion of the *Yukos* tribunal loses all its value since it incorrectly applied international law, by not considering states' practice.
322. In addition, although the tribunal noted that Russia based itself on the dissenting opinion of Judge Schwebel in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, it failed in its attempt to reconcile this with its own conclusion, two paragraphs later, claiming that the "clean hands" doctrine is not a general principle of international law. Clearly there is an obvious contradiction, since Judge Schwebel has spoken, at least more than once, in favor of the applicability of the principle of "clean hands" in international law⁵³⁶.

⁵³³ *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA case No. AA 226, final award dated July 18, 2014, par. 1360, CLA-121; *Yukos Universal Limited (Isle Of Man) v. Russian Federation*, PCA case No. AA 227, final award dated July 18, 2014, par. 1360, CLA-122; *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA case No. AA 228, final award dated July 18, 2014, par. 1360, CLA-123, quoting *Diversion of Water from the Meuse*, PCIJ, Ruling dated 28 June 1937, personal opinion of M. Hudson, CPJ Series A/B No. 70, pgs. 73 and 77, RLA-75. See, also, *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Ruling dated September 25, 1997, ICJ Reports, par. 133, RLA-238.

⁵³⁴ *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA case No. AA 226, a final award dated July 18, 2014, paras. 1361-1363, CLA-121; *Yukos Universal Limited (Isle Of Man) v. Russian Federation*, PCA case No. AA 227, final award dated July 18, 2014, paras. 1361-1363, CLA-122; *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA case No. AA 228, final award dated July 18, 2014, par. 1361-1363, CLA-123.

⁵³⁵ *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA case No. AA 226, final award dated July 18, 2014, par. 1359, CLA-121; *Yukos Universal Limited (Isle Of Man) v. Russian Federation*, PCA case No. AA 227, final award dated July 18, 2014, par. 1359, CLA-122; *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA case No. AA 228, final award dated July 18, 2014, par. 1359, CLA-123.

⁵³⁶ S. Schwebel, "Clean Hands in the Court", 31 *Studies in Transnational Legal Policy* 74, 1999, pg. 74 ("Is the doctrine of clean hands one that is supported in international law? In my view, it is"), RLA-89.

323. Consequently, the alleged conclusions from an isolated tribunal as *Yukos* in relation to the principle of “*clean hands*”,⁵³⁷ should not prevent this Tribunal from performing its own analysis and reach its own conclusion. As explained above, the “*clean hands*” doctrine, which is nothing but a manifestation of the principle of good faith, should be recognized as a valid, enforceable and binding principle of international law.
324. Fourth, aware that, contrary to its claims, the “*clean hands*” doctrine is a principle of international law, SAS insists that its illegal actions do not meet the criteria for applying such principle (which SAS aims to derive from the *Guyana v. Suriname* and *Niko Resources v. Bangladesh* cases). However, SAS’ actions give it “*unclean hands*” because they meet the only requirement that would be relevant: the causal link between the abuses of SAS and the inadmissibility of its claims.
325. Contrary to what SAS claims, the alleged criterion of reciprocity is fulfilled in this case. This criterion requires the existence of a link, a relationship of mutual dependence between the factual bases underlying the claimant’s complaint and the facts invoked by respondent as giving the claimant “*unclean hands*”⁵³⁸.
326. The reciprocity of the Parties’ obligations is enshrined in the Treaty and is implicit in investment treaty law. Bolivia had the obligation to provide protection to the investment made in its territory by a national of the United Kingdom, while 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

⁵³⁷ *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA case No. AA 226, final award dated July 18, 2014, paras. 1361-1363, CLA-121; *Yukos Universal Limited (Isle Of Man) v. Russian Federation*, PCA case No. AA 227, final award dated July 18, 2014, paras. 1361-1363, CLA-121; *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA case No. AA 228, final award dated July 18, 2014, paras. 1361-1363, CLA-123. The only explanation given by the court of Yukos in its conclusion was that the defendant had failed by not quoting “a single majority decision where an international court or tribunal has applied the principle of ‘unclean hands’ in an inter-State or investor-State dispute and concluded that, as a principle of international law, it operated as a bar to a claim” (par. 1362). Since, Bolivia has repeatedly cited the court in *Al Warrag*, which determined that the principle of “*clean hands*” constitutes an obstacle to the admissibility of the claims submitted to it, the “*emphatic*” denial of this principle by the court of Yukos has little relevance.

⁵³⁸ *Guyana v. Suriname*, PCA case, award dated September 17, 2007, par. 421, RLA-86; *Niko Resources (Bangladesh) Ltd. v. Bangladesh and others*, ICSID case No. ARB/10/11 y ARB/10/18, decision on jurisdiction dated August 19, 2013, paras. 421 and 483, CLA-124.

Communities, in violation of Bolivian law. It was precisely the conduct adopted by SAS that caused the Reversion³³⁹.

327. As for the other criteria identified by SAS, allegedly resulting from the *Guyana* and *Niko Resources* cases³⁴⁰, they do not correspond to the underlying criteria of the “clean hands” doctrine, under any of the legal systems considered above. In addition, these criteria are incoherent and inconsistent.
328. On the one hand, according to the first of those criteria, SAS argues that the conduct giving rise to “unclean hands” should correspond to a continuous violation of the obligations of such party³⁴¹. The foregoing is meaningless, since it directly contradicts the criteria of reciprocity, mentioned above. In fact, since Bolivia’s intervention was intended to put an end to the illegal and improper conduct of CMMK, the principle of “clean hands” cannot imply that such illegal and improper conduct continues. As expected, English law does not recognize such a criterion of continuity; quite the opposite³⁴².
329. On the other hand, SAS overlooked the contradiction between the conclusions of the *Guyana* and *Niko Resources* tribunals in relation to the second criterion (“relief sought”). While the *Guyana* tribunal held that compensation for an alleged previous violation is a recourse to which the principle of “clean hands”³⁴³ does not apply, the tribunal of *Niko Resources* held that the principle of “clean hands” did not apply

³³⁹ 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, pg. 119, cited in 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, pg. 2, RLA-88.

³⁴⁰ Reply, par. 213.

³⁴¹ *Guyana v. Suriname*, PCA case, award dated September 17, 2007, par. 421, RLA-86; *Niko Resources (Bangladesh) Ltd. v. Bangladesh and others*, ICSID case No. ARB/10/11 y ARB/10/18, decision on jurisdiction dated August 19, 2013, par. 421, CLA-124.

³⁴² As an issue of fact, in the case discussed above, *Safeway*, “unclean hands” referred to that the claimants had had anti-competitive behavior, which had been the subject of fines by the Office of Fair Trading. Similarly, we found a fraud committed by the plaintiff in the case of *Stone & Rolls* that had ceased prior to the start of the procedure.

³⁴³ *Guyana v. Suriname*, PCA case, award dated September 17, 2007, par. 421, RLA-86.

*precisely because relief sought did not relate to the protection against a past violation*⁵⁴⁴.

* * *

330. In conclusion, the “*clean hands*” principle is a principle fully developed under international law, which is also part of international public policy. It has been recognized as such by international courts and arbitral tribunals 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. In this case, considering the inappropriate behavior of CMMK, the “*clean hands*” doctrine renders SAS’ claims inadmissible before the Tribunal. In addition, SAS’ allegations do not fall within the scope of the jurisdiction of the Tribunal, since they are vitiated by illegality, as explained below.

4.2.2 The Tribunal may only exercise its jurisdiction over an investment that meets the condition of legality

331. It is undisputed that the claims vitiated by illegality are outside the scope of the jurisdiction of investment arbitral tribunals⁵⁴⁵. In fact, investment treaties do not protect investments made violating the laws of the host state⁵⁴⁶. SAS does not deny the existence of this requirement of legality or its applicability to this case (nor can it do so)⁵⁴⁷, but it does try to divert the attention of the Tribunal regarding the illegality. For this reason, SAS claims that the illegality is not the result of the violation of applicable standards for its alleged investment and that the unlawful conduct did not occur during the process of making the alleged investment.

⁵⁴⁴ *Niko Resources (Bangladesh) Ltd. v. Bangladesh and others*, ICSID case No. ARB/10/11 and ARB/10/18, decision on jurisdiction dated August 19, 2013, par. 483, CLA-124.

⁵⁴⁵ Answer, Section 5.2.1.1; *World Duty Free Company Limited v. Republic of Kenya*, ICSID case No. ARB/00/7, award dated October 4, 2006, par. 157, RLA-68; *Gustav F. W. Hamaster GmbH & Co KG v. Republic of Ghana*, ICSID case No. ARB/07/24, award dated June 18, 2010, par. 123, RLA-31.

⁵⁴⁶ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [II]*, ICSID case No. ARB/11/12, award dated December 10, 2014, par. 328, RLA-71; *SAUR International S.A. v. Argentine Republic*, ICSID case No. ARB/04/4, decision on jurisdiction and on responsibility dated June 6, 2012, par. 308, RLA-92.

⁵⁴⁷ Reply, par. 219 (SAS recognizes that: “[n]otwithstanding the absence of an explicit requirement under the BIT that investments must be made in accordance with the laws of the host State, [...] 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”).

332. SAS's allegations are groundless for two reasons. On the one hand, the requirement of legality is not limited only to those laws governing the admission or the establishment of an investment in Bolivia (Section 4.2.2.1). On the other hand, the requirement of legality is not limited to the timing of the investment, and in any case, the illegal conduct of SAS occurred while performing its alleged investment (Section 4.2.2.2).

4.2.2.1 *The requirement of legality is not limited solely to laws relating to the admission or the establishment of an investment*

333. SAS argues that "violations of host State law not directly concerned with 'the admission of investments' or 'investment regulation' should not serve as a bar to jurisdiction"⁵⁴⁸. SAS claims that the ruling of the *Saba Fakes* tribunal sustains its position⁵⁴⁹.

334. However, the assertion (in one paragraph) by that tribunal on the category of laws that constitute the legality requirement was an *obiter dictum* that did not even take into consideration the arguments of the parties. None of the parties sought to limit the *corpus juris* applicable to the legality requirement to those laws governing the admission of foreign investment⁵⁵⁰. The tribunal's decision in *Saba Fakes* concerning its lack of jurisdiction over the claimant's claims, merely limited its decision to the fact that Mr. Fakes had no investment⁵⁵¹, which made the analysis of the legality unnecessary⁵⁵².

335. Besides being unsustainable, SAS' proposition that many laws of the host State (all those that do not regulate the admission of foreign investment) should not be taken into account to determine the legality of an investment is also contrary to the spirit of international investment law. In this sense, the *SAUR* tribunal emphasized that the

⁵⁴⁸ Reply, par. 220.

⁵⁴⁹ *Id.*, paras. 220-221.

⁵⁵⁰ Turkey's opposition was that an investment contrary to the provisions of the host State, could in no way be protected by the ICSID Convention or the investment treaty. Mr. Fakes however, argued that a violation of fundamental legal principles was necessary so that the condition of legality would have effect, *Saba Fakes v. Turkey*, ICSID case No. ARB/07/20, award dated 14 July 2010, paras. 117-118, RLA-61.

⁵⁵¹ *Id.*, par. 147.

⁵⁵² *Id.*, par. 148.

main purpose of the investment treaty system is limited to the protection of legal investments:

The purpose of the investment arbitration system is to protect only legal and bona fide investments. The requirement of not committing a serious violation of the law is a tacit condition, implanted in all APRI, because it can not be understood in any case that a State is offering the benefit of protection through investment arbitration, if the investor, to achieve such protection, has incurred in an unlawful action⁵⁵³.

336. This opinion was shared by the tribunals in *Yukos*⁵⁵⁴ and *Fraport II*. The latter, for example, noted that international protection of an investment is not available for illegal investments, at least when the illegality refers to “*the essence of the investment*”⁵⁵⁵.
337. Such exclusion of illegal investments from protection of international law can only be effective if the law of the host State is considered as a whole to determine the legality of such investments. As explained above, SAS (through CMMK) violated fundamental principles of Bolivian and international law, which has as a direct consequence that its claims fall outside the scope of jurisdiction of the Tribunal under the Treaty.
- 4.2.2.2 *The assessment of the legality of an investment should be carried out throughout the duration of the investment and the result in this case is that SAS’ claims are outside the scope of jurisdiction of the Tribunal*
338. SAS states that Bolivia’s illegality arguments are irrelevant, because the conduct complained of occurred after making the alleged investment⁵⁵⁶. According to SAS, the legality (or lack thereof) of an investment should be determined only at the time of

⁵⁵³ *SAUR International S.A. v. Argentine Republic*, ICSID case No. ARB/04/4, decision on jurisdiction and on responsibility dated 6 June 2012, par. 308 (Emphasis added), RLA-92. See, also, *Phoenix Action, Ltd. v. Czech Republic*, ICSID case No. ARB/06/5, award dated 15 April 2009, paras. 100-102, RLA-72.

⁵⁵⁴ *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA case No. AA 226, final award dated July 18, 2014, par. 1352, CLA-121; *Yukos Universal Limited (Ile Of Man) v. Russian Federation*, PCA case No. AA 227, final award dated July 18, 2014, par. 1352, CLA-122; *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA case No. AA 228, final award dated July 18, 2014, par. 1352, CLA-123.

⁵⁵⁵ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [II]*, ICSID case No. ARB/11/12, award dated 10 December 2014, par. 332, RLA-71.

⁵⁵⁶ Reply, par. 223.

performing the investment. This statement is based on a misinterpretation of the case law cited by SAS.

339. *First*, even if (*quod non*) that legality should be determined only when making an investment, this does not help SAS, since the unlawful conduct of CMMK occurred during the performance of its alleged investment.
340. In fact, as the *Yukos* tribunal points out, “[t]he making of an investment will often consist of several consecutive acts and all of these must be legal and bona fide”⁵⁵⁷. Since, as we shall see, CMMK was still in the process of making an investment at the time of the Reversion Decree, the illegal acts it performed during that time frame exclude the jurisdiction of this Tribunal.
341. *Second*, SAS’ argument according to which it could act illegally after having made its investment does not hold. In fact, as accurately pointed out by the tribunals in *SAUR* and *Phoenix Action*, the purpose of the investment treaty system is not to promote illegal investments⁵⁵⁸. Therefore, from the beginning, the position of SAS is contrary to the spirit in which it was agreed to establish this Tribunal.
342. *First*, the *Yukos* tribunal examined whether the illegal actions that had occurred previously to the investor’s acquisition of the investment (or previously to the investor being otherwise involved in such investment) could exclude jurisdiction over its claims⁵⁵⁹. Since SAS does not argue a change of ownership of the investment, the decision in *Yukos* is irrelevant. *Yukos* furthermore does not support the position according to which SAS’ unlawful conduct has no effect on the jurisdiction if it takes place after the completion of the investment.

⁵⁵⁷ *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA case No. AA 226, a final award dated July 18, 2014, par. 1369, CLA-121; *Yukos Universal Limited (Isle Of Man) v. Russian Federation*, PCA case No. AA 227, final award dated July 18, 2014, par. 1369, CLA-122; *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA case No. AA 228, final award dated July 18, 2014, par. 1369, CLA-123.

⁵⁵⁸ *SAUR International S.A. v. Argentine Republic*, ICSID case No. ARB/04/4, decision on jurisdiction and on responsibility dated 6 June 2012, par. 308 (Emphasis added), RLA-92. *See, also, Phoenix Action, Ltd. v. Czech Republic*, ICSID case No. ARB/06/5, award dated 15 April 2009, paras. 100-102, RLA-72.

⁵⁵⁹ *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA case No. AA 226, final award dated July 18, 2014, par. 1370, CLA-121; *Yukos Universal Limited (Isle Of Man) v. Russian Federation*, PCA case No. AA 227, final award dated July 18, 2014, par. 1370, CLA-122; *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA case No. AA 228, final award dated July 18, 2014, par. 1370, CLA-123.

343. Second, in *Vannessa Ventures*, the statement of the tribunal about the moment when the legality of an investment should be evaluated was simply an *obiter dictum* since, in any case, the parties had not expressed their views on this point⁵⁶⁰.
344. Third, the *Inceysa* treaty and the other cases' treaties in which SAS bases its position⁵⁶¹ contained express clauses on the condition of legality of the investment. As these tribunals⁵⁶² have rightly pointed out, these clauses expressly limit the scope of the analysis of legality at the time of making the investment. On the contrary, there is nothing in the Treaty that limits the analysis of the legality at the time of realization of the investment in this case.

* * *

⁵⁶⁰ *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID case No. ARB(AF)04/6, award dated January 16, 2013, paras. 165-167, CLA-128.

⁵⁶¹ *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID case No. ARB/03/26, award dated August 2, 2006, par. 201, (in Article III of the Treaty between the Kingdom of Spain and the Republic of El Salvador it is established that "Each Contracting Party will protect in its territory the investments made in accordance to its law [...]") (Emphasis added), RLA-65. *Gustav F. W. Hamster GmbH & Co KG v. Republic of Ghana*, ICSID case No. ARB/07/24, award dated June 18, 2010, paras. 126-127, (in Article 10 of the Treaty between Germany and the Republic of Ghana, it is indicated that "[t]his Treaty shall also apply to investments made prior to [the Treaty's] entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party consistent with the latter's legislation") (Emphasis added), RLA-31. *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fask Kaphin v. Bolivia*, ICSID case No. ARB/06/2, decision on jurisdiction dated September 27, 2012, paras. 255 and 266 (in art. I(2) of the Treaty between the Plurinational State of Bolivia and Chile, is indicated that "[t]he term 'investments' shall mean any kind of assets, such as property and rights of every kind, acquired or effected in accordance with the legislation of the country receiving the investment") (Emphasis added), RLA-56. *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentina*, ICSID case No. ARB/09/1, decision on jurisdiction dated December 21, 2012, paras. 318-319 (Treaty between Argentina and the Kingdom of Spain, Art. I(2) provides: "[t]he term 'investments' shall mean any kind of assets, such as property and rights of every kind, acquired or effected in accordance with the legislation of the country receiving the investment") (Emphasis added), CLA-126. *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines*, ICSID case No. ARB/03/25, award dated August 16, 2007, paras. 335 and 345 (art. 1(1) of the Treaty between Germany and the Philippines, States "[t]he term 'investment' shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State [...]") (Emphasis added), RLA-91. *Metal-Tech Ltd. v. Uzbekistan*, ICSID case No. ARB/10/3, award dated October 4, 2013, paras. 185-186, 193 (Art. 1(1) of the Treaty between Israel and Uzbekistan, provides: "[t]he term 'investments' shall comprise any kind of assets, implemented in accordance with the laws and regulations [...]") (Emphasis added), CLA-127.

⁵⁶² *Gustav F. W. Hamster GmbH & Co KG v. Ghana*, ICSID case No. ARB/07/24, award dated June 18, 2010, par. 127, RLA-31; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fask Kaphin v. Bolivia*, ICSID case No. ARB/06/2, decision on jurisdiction dated September 27, 2012, par. 266, RLA-56; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentina*, ICSID case No. ARB/09/1, decision on jurisdiction dated December 21, 2012, paras. 318-319, CLA-126; *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID case No. ARB/03/25, award dated August 16, 2007, par. 345, RLA-91; *Metal-Tech Ltd. v. Uzbekistan*, ICSID case No. ARB/10/3, award dated October 4, 2013, par. 193, CLA-127.

345. In conclusion, even in the absence of an express provision in the Treaty, the condition of legality is inherent to investment arbitration, so the demands that are vitiated by illegality fall outside the jurisdiction of the Tribunal. The legality of the actions of SAS (through CMMK) should be assessed under Bolivian law as a whole (not only with respect to those provisions applicable to foreign investment) and this assessment should include actions subsequent to the making of the investment. Given that SAS had not finished making its "investment" in Bolivia when the Reversion Decree was enacted, regardless of the temporal aspect, the result is the same: due to the illegal conduct of CMMK, the claims filed before this Tribunal are outside its jurisdiction and therefore must be dismissed.
- 4.2.3 **Although the burden of proof does not fall on Bolivia, it has submitted and presented abundant evidence that SAS does not have "clean hands"**
346. Given the weakness of its legal arguments on the principle of "*clean hands*" and the requirement of legality, SAS uses a purely theoretical discussion on the evidence to distract the attention of the Tribunal from the facts of the case. SAS' strategy must not prevail.
347. *First*, the legal arguments on the burden of proof presented by SAS are incorrect. SAS argues, without any basis, that Bolivia has not provided sufficient evidence to meet what SAS claims is the appropriate standard: "*clear and convincing evidence*"⁵⁶³.
348. However, the burden of proof no longer lies with Bolivia, because, in accordance with Article 27 (1) of the Rules, Bolivia fulfilled the burden of proof in its earlier brief in proving that the facts that support its objections are based on the principle of "*clean hands*" and the illegality of the investment. The *de jure* and *de facto* arguments underlying those objections were widely developed in the Counter-Memorial. The burden of proof now rests with SAS, who, in its Reply, should have presented evidence to prove that its claims are admissible and subject to the jurisdiction of this Tribunal. It did not.
349. Regardless of who bears the burden of proof, the applicable standard of evidence to the allegations of violation of human and indigenous rights test is the preponderance

⁵⁶³ Reply, paras. 229-231.

of evidence or balance of probabilities⁵⁶⁴. SAS' arguments on this point are wrong and have no support in the doctrine and case law.

350. On the one hand, in *Rompetrol*⁵⁶⁵ and *Libananco*⁵⁶⁶, the tribunals applied the standard of balance of probabilities and did not require "clear and convincing evidence". Furthermore, in *Siag v. Egypt*⁵⁶⁷, the respondent did not dispute that the applicable standard to the issue of fraud was "clear and convincing evidence", as proposed by the claimants. Instead, Egypt argued that the burden of proof corresponded to one of the claimants, but the tribunal rejected this argument. Clearly, the standard of proof was not a controversial issue in that case.
351. *Second*, regardless of the burden of proof and the assessment thereof, there is sufficient evidence to dismiss SAS' claims which are not subject to the jurisdiction of the Tribunal.
352. As has been demonstrated by Bolivia:
- a. CMMK caused the division between the Indigenous Communities, which is contrary to Bolivian and international law on the protection of indigenous rights;
 - b. CMMK expanded the Area of Impact of the Project for the sole purpose of diluting the opposition of the Communities near the Project;
 - c. CMMK created an illegitimate parallel organization (COTOA-6A) to create a semblance of support for the Project and subdue the opposition of the two main indigenous organizations (at national and regional level); this strategy had

⁵⁶⁴ *Bernhard von Pezold and other v. Zimbabwe*, ICSID case No. ARB/10/15, award dated July 28, 2015, par. 177 ("the standard of proof applied in international arbitration is that a claim must be proven on the 'balance of probabilities'"), *RLA-239*; *Ioannis Kardassopoulos v. Georgia*, ICSID case No. ARB/05/18, award dated March 3, 2010, par. 229 ("The Tribunal finds that the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings applies in these concurrent proceedings and does not impose on the Parties any burden of proof beyond a balance of probabilities"), *CLA-3*.

⁵⁶⁵ *The Rompetrol Group N.Y. v. Romania*, ICSID case No. ARB/06/3, award dated May 6, 2013, par. 182, *CLA-132*.

⁵⁶⁶ *Libananco Holdings Co. Limited v. Turkey*, ICSID case No. ARB/06/8, award dated September 2, 2011, par. 125, *CLA-133*.

⁵⁶⁷ *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID case No. ARB/05/15, award dated June 1, 2009, paras. 325-326, *CLA-44*.

tragic results in the past and caused the withdrawal of the Communities who opposed the Project from all dialogue tables;

d. In violation of the rules on self-government and self-determination of Indigenous Communities, CMMK employees violated their customs and traditions (to the point of trying to infiltrate meetings disguised in traditional attire);

e. [REDACTED]
[REDACTED];

f. CMMK encouraged violence between the Indigenous Communities in favor and against the Project by providing logistical support and training related community members to Acasio, causing a situation that endangered the integrity and life of these communities and even of State authorities;

g. Using lawyers hired by CMMK, the Company used community members in favor of the Project to file criminal complaints against Indigenous Authorities who opposed the Project;

h. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

i. [REDACTED]
[REDACTED]
[REDACTED]

353. Therefore, the facts proven by Bolivia show that SAS has "*unclean hands*", and therefore, if the Tribunal has jurisdiction (*quod non*), SAS' claims would be inadmissible.

⁵⁶⁸ [REDACTED] R-75; Resolution vote of the Community of Maliku Khota dated 26 February 2016, R-158.

⁵⁶⁹ See Section 2.1.3, *supra*.

5. BOLIVIA COMPLIED AT ALL TIMES WITH ALL OF ITS INTERNATIONAL OBLIGATIONS

354. SAS argues that Bolivia failed to comply with its obligations under the Treaty and international law. In this sense, the new arguments laid down by SAS in its Reply are no more effective than the previous ones. Bolivia has proven that (i) SAS violated human and indigenous rights of Indigenous Communities and that, (ii) as a consequence of that infringement and the situation of growing violence, Bolivia was obliged to protect the rights of Indigenous Communities through the Reversion Decree.

355. As to the merits of the dispute, SAS' argumentation cannot succeed. Bolivia has proven that its actions, including the decision to reverse the Mining Concessions, does not constitute an international wrongdoing because it acted under a state of necessity (Section 5.1); that the Reversion of the Mining Concessions did not constitute an expropriation and, much less, one contrary to the terms of the Treaty (Section 5.2); that the Mining Concessions received, at all times, fair and equitable, transparent and good faith treatment (Section 5.3); that Bolivia complied with its obligation of means to provide full protection and security (Section 5.4); that the Mining Concessions were not subject to unreasonable or discriminatory measures (Section 5.5); and that they did not receive treatment less favorable to the one granted to other Bolivian investors (Section 5.6).

5.1 Bolivia's response to the human and indigenous rights crisis instigated by SAS, including its decision to revert the Mining Concessions, does not constitute an internationally wrongful act since there was a state of necessity

356. SAS insists that Bolivia not only unjustly expropriated its investment, but also that the actions of Bolivia violated the provisions of the Treaty regarding the standards of fair and equitable treatment, full protection and security, non impairment of the investment and most-favoured-nation treatment⁵⁷⁰.

357. SAS is wrong. International law precludes the wrongfulness of any action taken on the basis of necessity and the Reversion Decree is, obviously, an example of this. The Draft of the articles on responsibility of States for internationally wrongful acts ("Articles on State Responsibility") states that:

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

⁵⁷⁰ Reply, Section V.

*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*⁵⁷¹.

358. The ICJ and arbitral tribunals agree that necessity precludes wrongfulness when the requirements of Articles on State Responsibility are met⁵⁷². In *Gabčíkovo-Nagymaros*, the ICJ held that “*the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation*”⁵⁷³.
359. The necessity, therefore, precludes the wrongfulness of the Reversion Decree since (i) Bolivia acted to protect fundamental interests regarding human and indigenous rights recognized by the Bolivian Constitution and international law; (ii) CMMK represented a grave and imminent peril to the rights of the inhabitants of the area of Mallku Khota; (iii) the only way to protect those rights was to suspend the Project (ordering the Reversion) in order to pacify the area; and (iv) the actions in question did not seriously affect the fundamental interests of the United Kingdom (or SAS).
360. *First*, the actions of Bolivia throughout the crisis instigated by the Company, always sought to protect the fundamental rights recognized by both Bolivian law and international law: the human and indigenous rights of the Indigenous Communities. As has been explained in Section 3 above, Bolivia had a legal duty to intervene to guarantee these rights and restore the social peace that was altered by CMMK.
361. There is no doubt that the protection of human and indigenous rights constitutes a fundamental interest for Bolivia. The ICJ has indicated that “*one should not, in that context, reduce an ‘essential interest’ to a matter only of the ‘existence’ of the State, and that the whole question was, ultimately, to be judged in the light of the particular*

⁵⁷¹ 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-126; *Gabčíkovo-Nagymaros Project*, ICJ case, ruling dated September 25, 1997, paras. 40-41, RLA-238.

⁵⁷² *Gabčíkovo-Nagymaros Project*, ICJ case, Ruling dated September 25, 1997, par. 51, RLA-238; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentina*, ICSID case No. ARB/02/1, decision on responsibility dated October 3, 2006, par. 274, CLA-42; *CMS Gas Transmission Company v. Argentina*, ICSID case No. ARB/01/8, annulment decision dated 25 September 2007, par. 132, RLA-240; *Sempra Energy International v. Argentina*, ICSID case No. ARB/02/16, annulment decision dated June 29, 2010, par. 200, RLA-241; *Euron Creditors Recovery Corp. and Panderosa Assets, LP. v. Argentina*, ICSID case No. ARB/01/13, annulment decision dated July 30, 2010, par. 393, RLA-242.

⁵⁷³ *Gabčíkovo-Nagymaros Project*, ICJ case, ruling dated September 25, 1997, par. 51, RLA-238.

case [...]”⁵⁷⁴. The LG&E tribunal established that the fundamental interests include “economic [and] financial interests”⁵⁷⁵ and the Suez tribunal included, in addition, the protection of “health and well-being” of individuals⁵⁷⁶. Human and indigenous rights recognized by international instruments and modern constitutions constitute, as a minimum, a fundamental interest.

362. *Second*, it is undeniable that CMMK represented a grave and imminent risk to the human and indigenous rights of the peoples living on the exploration area of Mallku Khota because of its abuse and its lack of knowledge of autonomy of Indigenous Communities and violent conflicts. CMMK actions promoted and exacerbated social conflict, generating a constant violation of the rights of Indigenous Communities in the Project area.
363. *Third*, from August 1, 2012 onwards, there was no doubt that the only way to protect the Indigenous Communities from CMMK’s repeated violations was to expel the latter in order to pacify the uncontrollable situation of impact of the public order in the Project area.
364. First, the Indigenous Communities agreed that the expulsion of CMMK from Mallku Khota was needed to restore social peace, as evidenced by the Minutes of Agreement signed at Chiro Qhasa on July 7, 2012⁵⁷⁷ and the agreement signed at the Government Palace on July 10 of that same year⁵⁷⁸.
365. Second, the Departmental Government made its good efforts available to CMMK in order to ensure the continuity of the Project but the actions of CMMK hindered this

⁵⁷⁴ *Gabcikovo-Nagymaros Project*, ICJ case, ruling dated September 25, 1997, par. 53, RLA-238.

⁵⁷⁵ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentina*, ICSID case No. ARB/02/1, decision on responsibility of October 3, 2006, par. 251, CLA-42.

⁵⁷⁶ *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina*, ICSID case No. ARB/03/19, decision on responsibility of July 30, 2010, par. 260, CLA-43.

⁵⁷⁷ Memorandum of Understanding dated July 7, 2012 (“*Fourth Point. Annulment and Reversion. In this respect the Mining Concessions (sic) of [CMMK] are void. These areas will revert to the Plurinational State of Bolivia, having such consensus of the 5 provinces of Northern Potosí*”), C-16.

⁵⁷⁸ Agreement signed in the Government Palace on July 10, 2012 (“*The State will take over the Mining Center of Mallku Khota, throughout its production chain [...] peaceful coexistence, social peace, free movement between all communities, and inhabitants of the region is guaranteed*”), C-17.

result. CMMK opted to use COTOA-6A, through illegal means, to crush the opposition to the Project, as explained above⁵⁷⁹.

366. Third, the central government proposed alternatives (such as the temporary suspension of activities after the violent events of May 5, 2012) in order to ensure, not only the viability of the Project, but the rights of Indigenous Communities.

[REDACTED]

367. Fourth, SAS' proposals to mitigate the social conflict through community participation in a neutral commission, the provision of additional infrastructure or even, military intervention⁵⁸² – would not have helped to solve the problem and are only an academic exercise (and *ex post facto*) by SAS on what now seems that the State could have done.

368. On the one hand, militarization is an ineffective measure to manage conflicts between Indigenous Communities in Northern Potosi. As pointed out by former Governor Gonzales,

Referring to the militarization ordered in May 2012, Mr. Gonzales Yutronic seems to reproach me for not having taken action since 2011. However, knowing the history of violence in Northern Potosi, I always felt it necessary to assert the dialogue before the action of public forces, however important CMMK's Project, for the future of our Department and our country. An example of this, which I have a clear recollection of, is the case of the Amayapampa mine. During the administration of Gonzalo Sanchez de Lozada in 1996, the use of force resulted in a rapid and serious confrontation that led to the death of nine Bolivian citizens⁵⁸³.

369. Moreover, as mentioned by Minister Navarro, "our experience in the Government has shown us that if the State retakes control, it is the most effective measure to end a

⁵⁷⁹ See Section 2.1.3.3, *supra*.

⁵⁸⁰ [REDACTED]

⁵⁸¹ [REDACTED]

⁵⁸² Reply, par. 338. See, also, Reply, par. 281.

⁵⁸³ Gob. Gonzales II, par. 43, RWS-4. See, also, Navarro, par. 25, RWS-2.

*conflict between Indigenous Communities resulting from the operation of a mining project*⁵⁸⁴. Two recent examples – the deposits in Colquiri and Huanuni – are proof of this⁵⁸⁵.

370. Even today, SAS remains indifferent to the impact of its actions on the members of the Indigenous Communities. For example, SAS argues that a military occupation, which would have repressed the opposition of indigenous communities, would have been an adequate solution to the problem⁵⁸⁶ [REDACTED]. However, a measure of this magnitude would have affected the rights of free expression and assembly (in addition to life and integrity) of citizens who legitimately expressed their dissatisfaction against abuses suffered from CMMK⁵⁸⁸. It is important to recall, once again, the serious events of July 5, 2012, when, due to CMMK, the police intervened in Mallku Khota leading to serious unrest and the death of Jose Mamani.
371. Therefore, SAS has not shown that its alternative proposals were sufficient to adequately protect the Indigenous Communities against a company defending its economic interests at the expense of fundamental rights.
372. *Fourth*, the fundamental rights of Indigenous Communities are worth more than any economic interest that the United Kingdom could have on the performance of the exploration carried out by CMMK in benefit of a Canadian company.
373. The *Suez* tribunal concluded that the acts that affect the interests of an investor do not affect the fundamental interests of a State, party to an investment treaty, or the international community:

In failing to accord the Claimants' investments fair and equitable treatment, Argentina may have injured the Claimants' interests, but it is difficult to see how Argentina's actions impaired an essential interest of France, Spain, the

⁵⁸⁴ Navarro, par. 44, RWS-2.

⁵⁸⁵ *Id.*, paras. 45 and 47.

⁵⁸⁶ Reply, par. 338. *See, also*, Reply, par. 281.

⁵⁸⁷ [REDACTED]

⁵⁸⁸ *See, for example, Granier and others (Radio Caracas Televisión) v. Venezuela*, IACHR case, ruling dated 22 June 2015, par. 135-136, RLA-243; *Castañeda Gutman v. United Mexican States*, IACHR case, ruling dated 6 August 2008, par. 140, RLA-244; *Olmedo Bustos and others v. Chile*, IACHR case, ruling dated 5 February 2001, paras. 65-68, RLA-245.

*United Kingdom, or the international community. The Tribunal therefore finds that Argentina has satisfied the second condition for the defense of necessity*⁵⁸⁹.

374. As in *Suez*, neither the Reversion Decree nor the other actions by Bolivia harmed a fundamental interest of the United Kingdom or the international community. However, even assuming that the interests of an investor could be considered fundamental to the United Kingdom or the international community, any concerns about sustained impact was mitigated when Bolivia offered fair compensation for the loss of the Mining Concessions based on the investments made.

* * *

375. For all the above, the wrongfulness of the Reversion Decree should be excluded as it was a necessary measure to protect a fundamental interest, such as human and indigenous rights, of the grave and imminent peril posed by the continuity of CMMK, without any other equivalent interest being affected.

376. Nor are there reasons for denying that there are grounds to claim that the state of necessity applies. The Articles on State Responsibility provide that:

*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*⁵⁹⁰.

377. Neither of these grounds applies to the actions of Bolivia. First, the Treaty does not contain any provision that could be interpreted as a prohibition to invoke the state of necessity. Second, as has been widely demonstrated, it was CMMK (and not Bolivia) who was responsible for creating and aggravating the social conflict that led to the Reversion. SAS has not argued, nor can it do so, that Bolivia has been somehow responsible for the violations of human and indigenous rights committed by CMMK.

378. Consequently, the actions of Bolivia, including the Reversion Decree, could not have been illegal, even if those actions were contrary to the Treaty (which Bolivia rejects).

- 5.2 The Reversion of the Mining Concessions does not constitute an expropriation (let alone an illegal expropriation), but rather the**

⁵⁸⁹ *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina*, ICSID case No. ARB/03/19, decision on responsibility dated 30 July 2010, par. 261, CLA-43.

⁵⁹⁰ 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(2), RLA-126.

legitimate exercise of police attributions to protect human and indigenous rights

379. SAS insists that, in accordance with the Treaty, the Reversion Decree (i) constituted an expropriation; (ii) was not carried out for a public purpose or social benefit; and (iii) did not provide an adequate compensation⁵⁹¹. SAS is wrong again. Article 5 of the Treaty establishes the conditions under which an expropriation must be made:

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 transferable⁵⁹².

380. Consequently, in order for an expropriation under the terms of the Treaty to be made, the measure shall (i) be a real expropriation and not a legitimate exercise of police powers; (ii) not meet a public purpose or a social benefit; and (iii) not provide for adequate compensation conditions. Bolivia's actions, including the Reversion Decree, did not violate these conditions.
381. It is revealing that SAS states that it does not need to prove it suffered an unjust expropriation, and that the burden of proof lies with Bolivia that should prove that it did not expropriate the Mining Concessions⁵⁹³. This statement is incorrect and contrary to the law. In fact, the awards which allegedly impose the burden of proof on Bolivia to refute the allegations of expropriation⁵⁹⁴ do nothing but repeat the principle that "[e]ach party shall have the burden of proving the facts relied on to support its claim or defense"⁵⁹⁵. Other awards cited on expropriation confirm that SAS has the burden of proof.

⁵⁹¹ Reply, Sections V(A) and (B).

⁵⁹² Treaty, Art. 5, C-I.

⁵⁹³ Reply, par. 266.

⁵⁹⁴ *Pac Rim Cayman LLC v. El Salvador*, ICSID case No. ARB/09/12, decision on Jurisdiction dated June 1, 2012, par. 2.11, CLA-147; *Saipem S.p.A v. Bangladesh*, ICSID case No. ARB/05/7, award dated June 30, 2009, par. 113, CLA-148.

⁵⁹⁵ Rules, Art. 24(1).

382. SAS has been unable to comply with this burden of proof. The Claimant has not demonstrated that the actions of Bolivia, including the Reversion Decree, (i) constitute an expropriation (Section 5.2.1), (ii) lacked a public purpose and a social benefit (Section 5.2.2), or (iii) did not provide for adequate compensation (Section 5.2.3).
- 5.2.1 The Reversion did not constitute an expropriation, but rather the legitimate exercise of Bolivia's police powers over the repeated and continuous violations of human and indigenous rights by SAS and the social conflict therefore generated
383. SAS insists that the Reversion was an expropriation under Article 5 of the Treaty and claims that “[t]here is no issue as to whether an expropriation took place: Bolivia freely concedes that it expropriated South American Silver’s Malku Khota Mining Concessions”⁵⁹⁶.
384. SAS errs in this statement because Bolivia has never acknowledged an expropriation, and even if the Reversion Decree had been an expropriation (*quod non*), it would have been legal. The Reversion Decree cannot be described as an expropriation but rather as the legitimate exercise of police powers in response to the crisis created and aggravated by CMMK.
- 5.2.1.1 *Bolivia has the sovereign right to adopt regulative and administrative measures in accordance with its police powers*
385. International investment law recognizes that treaty provisions on compensation for expropriation are not applicable to measures adopted in the sovereign exercise by the State of its police powers. These police powers include all measures that (i) are taken to safeguard an important public interest and (ii) are proportionate to it.
386. As explained by the tribunal in *Tza Yap Shum*, a State action is an exercise of its police powers “when it warns that the State acts in pursuit of public interest of great importance as preserving order, health or morals [...]”⁵⁹⁷. Thus, the tribunal indicated

⁵⁹⁶ Reply, par. 262, quoting Answer, par. 332.

⁵⁹⁷ *Tza Yap Shum v. Peru*, ICSID case No. ARB/07/6, award dated July 7, 2011, par. 95, RLA-246.

that, for example, “the confiscation or seizure of property for failure to pay taxes is a legitimate tool of tax administrations [...]”⁵⁹⁸.

387. The tribunal in *Fireman's Fund Insurance Company*, chaired by Professor Albert Jan van den Berg added that there should also be “proportionality between the means employed and the aim sought to be realized [...]”⁵⁹⁹.
388. Signing an international treaty does not imply that States relinquish their authority and sovereign prerogative to act in the public interest (without paying compensation to foreign investors), especially when faced with threats to public order, health and morality. This is so because, as indicated by the CME tribunal, “[r]egulatory measures are common in all types of legal and economic systems in order to avoid use of private property contrary to the general welfare of the (host) State”⁶⁰⁰.
389. There is no substantial disagreement on the fact that States retain their right to exercise police powers for regulation and internal control. This was the case of tribunals in *Saluka*, *Methanex* and *Chemtura*, which had among its members James Crawford, Gabrielle Kaufmann-Kobler, L. Yves Fortier, Charles Brower and V.V. Veeder, who have recognized this sovereign prerogative⁶⁰¹.

⁵⁹⁸ *Id.*

⁵⁹⁹ *Fireman's Fund Insurance Company v. United Mexican States*, ICSID case No. ARB(AF)02/01, award dated July 17, 2006, par. 176, RLA-247.

⁶⁰⁰ *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL case, partial award dated September 13, 2001, par. 603, CLA-50.

⁶⁰¹ *Saluka Investments B.V. v. Czech Republic*, UNCITRAL case, partial award dated March 17, 2006, paras. 254-255 (“The Tribunal acknowledges that Article 5 of the Treaty in the present case is drafted very broadly and does not contain any exception for the exercise of regulatory power. However, in using the concept of deprivation, Article 5 imports into the Treaty the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order. [...] It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare”), CLA-46; *Methanex Corporation v. The USA*, NAFTA case, award dated August 3, 2005, pg. 278, par. 7 (“In the Tribunal’s view, Methanex is correct that an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation”), RLA-114; *Chemtura Corporation v. Canada*, NAFTA case, award dated August 2, 2010, par. 266 (“Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent’s police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the

5.2.1.2 *The measures adopted by Bolivia in the exercise of its police powers enjoy a presumption of legality and not are subject to revision during arbitration*

390. In accordance with the principle that States have the sovereign prerogative to exercise police powers, they should be given deference to assess whether the measures taken in the exercise of those powers constitute a legitimate use of that prerogative.

391. The decisions of States deserve this deference and, as regulatory and administrative measures, they are subject to a presumption of legality. This was the opinion of the tribunal in *Tzu Yap Shum*, “*the exercise of regulatory and administrative power of the State entails a presumption of legitimacy.*”⁶⁰²

392. The tribunal in *Investmart* ruled that it does not correspond to international tribunals to question whether the actions taken by a State while defending public interest are correct or not:

*A decision to revoke a bank's licence, which takes place within a detailed national legal framework that includes administrative and judicial remedies, is not reviewed at the international law level for its “correctness”, but rather for whether it offends the more basic requirements of international law. Numerous tribunals have held that when testing regulatory decisions against international law standards, the regulators’ right and duty to regulate must not be subjected to undue second-guessing by international tribunals. Tribunals need not be satisfied that they would have made precisely the same decision as the regulator in order for them to uphold such decisions*⁶⁰³.

393. Other investment tribunals have rejected similar attempts to challenge a decision by the State. The tribunal in *Renée Rose Levy de Levi*, for example, concluded that “*it is unacceptable that an Arbitral Tribunal ‘is placed in shoes of the body [...] and question a posteriori its actions*”⁶⁰⁴. It also explained that “*an Arbitral Tribunal can*

increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation”), RLA-248.

⁶⁰² *Tzu Yap Shum v. Peru*, ICSID case No. ARB/07/6, award dated July 7, 2011, par. 95, RLA-246.

⁶⁰³ *Investmart, B.V. v. Czech Republic*, UNCITRAL case, award dated June 26, 2009, par. 501, RLA-249.

⁶⁰⁴ *Renée Rose Levy de Levi v. Peru*, ICSID case No. ARB/10/17, award dated February 26, 2014, par. 161, RLA-250.

*not replace an organ of the State, or become an appellate body to review acts or decisions taken by the relevant authorities*⁶⁰⁵.

5.2.1.3 *The Reversion was conducted to protect the rights of Indigenous Communities and prevent social conflict aggravation*

394. Bolivia adopted the Reversion Decree to protect an essential public interest: human and indigenous rights. This measure was also fully proportional to that interest, so the Reversion Decree was a legitimate exercise of police powers and is not, under any circumstances, an expropriation.
395. The Reversion Decree protects human and indigenous rights of Indigenous Communities near the Project area due to the repeated and continuous violations that were being committed by CMMK. Respect for these rights is an overriding public interest, especially in view of the protection afforded by international law as a result of the historical vulnerability of Indigenous Communities. Defending these rights has much more weight, for example, than the concerns of public interest relating to obligations with bank depositors or interest in an efficient tax administration mentioned by the tribunals in *Investmart* and *Tza Yap Shum* respectively, and which were considered sufficient to justify the exercise of police powers by the State⁶⁰⁶.
396. Moreover, the Reversion was proportionate to the public interest at stake. The Reversion extinguished the rights of a Concession in an exploration phase, where mining was not yet authorized and that, therefore, lacked a substantial economic impact for the concessionaire (there was uncertainty about existing reserves in this deposit and the economic feasibility of the project⁶⁰⁷). In addition, instead of completely eliminating the concessionaire's rights, the Reversion Decree offered equivalent compensation to the amount invested in the exploration activities to maintain full proportionality. This effort contrasts with the decisions of the tribunals in *Investmart* and *Tza Yap Shum*, which concluded that the complete deprivation of

⁶⁰⁵ *Id.*

⁶⁰⁶ *Investmart, B.V. v. Czech Republic*, UNCITRAL case, award dated June 26, 2009, par. 501, RLA-249; *Tza Yap Shum v. Peru*, ICSID case No. ARB/07/6, award dated July 7, 2011, par. 95, RLA-246.

⁶⁰⁷ See Section 6.2.1, *infra*.

property without compensation is proportionate to the public interest, even in less severe situations than those of respect for human and indigenous rights⁶⁰⁸.

397. The proportionality of the measure is confirmed by the fact that Bolivia implemented the Reversion Decree only after exhausting other possibilities.

398. On the one hand, as already noted, the State actively promoted dialogue for the Project in order for CMMK to obtain the agreement of all the Indigenous Communities for the Project. The State even proposed the temporary cessation of exploration activities⁶⁰⁹. The failure of this measure is attributable solely to CMMK.

399. Furthermore, the State preventively deployed police personnel in areas surrounding the project in May and June 2012 and formed high-level institutional commissions to restore public order in the Project area, when the infiltration of CMMK employees in the conflict area made the situation untenable⁶¹⁰.

400. Considering that the Reversion Decree completely satisfied the standards of the exercise of police powers and in light of the substantial deference owed to States, the Reversion Decree does not consist in an expropriation.

5.2.2 The Reversion of the Mining Concessions had a public purpose and represented a social benefit since Bolivia was fulfilling its duty to guarantee human and indigenous rights in the communities where CMMK committed repeated and continuous violations of rights

401. SAS argues that, *“unless an expropriation satisfies both [the public purpose and social benefit] requirements, it will be considered unlawful and in violation of the Treaty”*⁶¹¹ and denies that the Reversion Decree was carried out with a public purpose and represented a social benefit responding to the internal necessities.

402. *First*, the Reversion was enacted for a public purpose and corresponding social benefit to the internal necessities of Bolivia, and was conducted in order to guarantee the human rights of Indigenous Communities against the abuses of CMMK and the

⁶⁰⁸ *Investment, B.V. v. Czech Republic*, UNCITRAL case, award dated June 26, 2009, par. 501, RLA-249; *Tza Yap Shun v. Peru*, ICSID case No. ARB/07/6, award dated July 7, 2011, par. 95, RLA-246.

⁶⁰⁹ See Section 2.3, *infra*.

⁶¹⁰ Gov. Gonzales I, par. 71 and Section VII, RWS-1. See Section 2.3.2, *supra*.

⁶¹¹ Reply, par. 268.

violence it had caused. Bolivia fulfilled, in this manner its obligations concerning human rights (that include the right to life and personal integrity).

403. Nevertheless, SAS surprisingly argues that the measures that the State took to ensure respect for human and indigenous rights would not meet a public purpose and social benefit⁶¹². This argument is unavailing.
404. With this argument, SAS ignores the widely accepted principle according to which a State is sovereign to determine what actions are taken to serve a public purpose and social benefit. The *Rurelec* tribunal, commenting on the requirements of the Treaty, concluded that “*the precise contours of public purpose and social benefit lie with the internal constitutional and legal order of the State in question [...]*”⁶¹³. Other tribunals, including *British Caribbean Bank*, which SAS relies on, have similarly stressed that the State has broad discretion to decide what satisfies this requirement⁶¹⁴. The *ADC* case does not assert otherwise; it only indicates that the State must provide a coherent explanation of how a measure serves a public purpose⁶¹⁵.
405. Within the discretion of each State to determine what meets a public purpose and a social benefit, is the taking of measures that are deemed necessary to protect human and indigenous rights, such as for example, the decision to expel CMMK for causing a violent social conflict. In fact, since the main purpose of the State is to protect the rights of individuals, it is hard to imagine that its actions fulfill any other purpose than a public and socially beneficial one.

⁶¹² Reply, paras. 270, 286-288.

⁶¹³ *Guaracachi America, Inc. And Rurelec Plc v. Bolivia*, PCA case No. 2011-17, award dated January 31, 2014, par. 437, RLA-29.

⁶¹⁴ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplan v. Bolivia*, ICSID case No. ARB/06/2, award dated September 16, 2015, par. 245 (“*The Tribunal defers to Bolivia’s sovereign right to determine what is in the national and public interest. It accepts that Bolivia may have had a legitimate interest in protecting the Gran Salar de Uyuni Fiscal Reserve*”), CLA-158; *British Caribbean Bank Limited (Turks & Caicos) v. Belize*, PCA case No. 2010-18, award dated December 19, 2014, par. 236 (“*the Tribunal accepts that a State is entitled to broad latitude to devise its public policy as it sees fit*”), RLA-139.

⁶¹⁵ *ADC Affiliate Limited y ADC & ADMC Management Limited v. Hungary*, ICSID case No. ARB/03/16, award dated October 2, 2006, par. 431, CLA-35.

406. In a last attempt to defend its absurd proposition that human and indigenous rights do not qualify as public interest, SAS insists that the public purpose and social benefit would be independent requirements that must be satisfied separately⁶¹⁶.
407. SAS is wrong. All social benefit related to the internal needs of a State shall constitute a public purpose under international law. SAS provides no argument, nor does it explain how the requirement of social benefit may diverge from the requirement of public purpose, given the obvious fact that any action with social interest has a public purpose.
408. Furthermore, the position of SAS ignores Bolivia's basic prerogative to determine what measures serve a public purpose or social benefit. We must therefore conclude that these terms are certainly within the scope of Bolivia's discretion.
409. *Second*, SAS argues that Bolivia's concern for human and indigenous rights "*are ex post facto justifications manufactured by Bolivia to defend itself in this arbitration*"⁶¹⁷. Nevertheless, at least five circumstances show that Bolivia's concern was, and still is, the respect for the rights of Indigenous Communities. SAS insists that the Reversion Decree does not refer to human and indigenous rights, but to the social conflict, the threat to life and social peace⁶¹⁸.
410. First, as SAS acknowledges, the Reversion Decree refers in its preamble to the threat to life, social peace and the conflict created by CMMK between the Indigenous Communities⁶¹⁹. Although the Reversion Decree does not specifically use the word "*human rights*", it is clear that the State wanted, in referring to those circumstances, give prevalence to the protection of the integrity, dignified life and customs and traditions of the Indigenous Communities, in accordance with the Constitution and international law on human rights.

⁶¹⁶ Reply, par. 286.

⁶¹⁷ Reply, par. 272.

⁶¹⁸ Reply, par. 272.

⁶¹⁹ *Id.*

411. Second, SAS cannot be serious when indicating that security problems “*can abate after a short period*” and that they “*are in any case capable of being remedied by the investor*”⁶²⁰.
412. On the one hand, as recognized by [REDACTED], the conflict with the Indigenous Communities dated back to 2010. By 2012, even after having created COTOA-6A, CMMK was not close to reaching a solution to the conflict that it had provoked between the Indigenous Communities⁶²¹. The violence experienced that year in Northern Potosi clearly proves it⁶²². In addition, the communities of Mallku Khota and Calachaca did not even want to meet with the Government or CMMK to discuss the continuation of the Project and demanded the expulsion of the Company as the only solution.
413. On the other hand, the State could not trust that a company like CMMK (source of the conflict) could solve those security problems, when its presence and actions made things worse⁶²³.
414. Third, SAS infers that Bolivia's motives were false and that it had a supposed economic interest in the Project. However, the current reality shows that this is not so. First, the State has not granted Mallku Khota in concession to any investor and has not developed any mining project in the area (and only undertook certain exploration tasks performed by COMIBOL and SERGEOMIN, which have employed community members in the area)⁶²⁴.
415. If what SAS claimed were true, almost four years after the Reversion, other investors would have been installed in the area of Mallku Khota. This has not happened and

⁶²⁰ *Id.*, par. 273.

⁶²¹ [REDACTED]

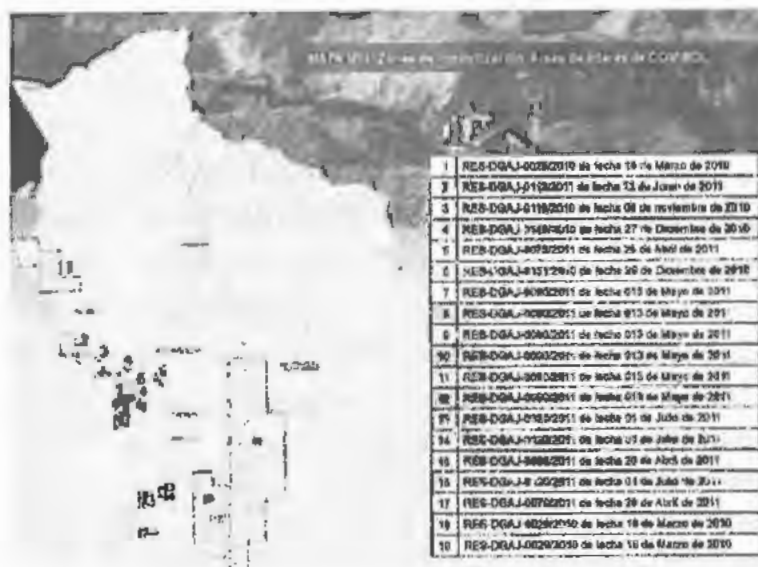
⁶²² See Section 2.3.1, *supra*.

⁶²³ Navarro, par. 43 (“*As I mentioned before, the Indigenous Communities held meetings, expanded, which resulted in physical confrontations between them. These clashes occurred because some communities were opposing the company and others demanded respect for it. Therefore, we knew that there was a level of confrontation generated by an external actor who was not basically from the community, but a company that aimed at the exploitation and utilization of the wealth of natural resources.*”), RWS-2.

⁶²⁴ See Navarro, paras. 48-51, RWS-2.

will only happen “if the community members in the area agree with the implementation of a mining project”⁶²⁵,

416. Fourth, the Immobilization Zone does not show Bolivia’s alleged motives to enact the Reversion, contrary to what SAS says. As Bolivia clarified in its Counter-Memorial, the Immobilization Zone is a delineation of an area owned by COMIBOL since 2007⁶²⁶. Besides formulating a mere conjecture⁶²⁷, SAS has not demonstrated how this would have affected the interests of CMMK, especially when such areas exist in surrounding areas of 19 mining projects in Bolivia and were all established during the same time.



Immobilization Zones of COMIBOL⁶²⁸

417. Fifth, if Bolivia’s motives to enact the Reversion were false, it would not be possible to explain why the State has respected the work of investors such as Compañía Minera San Cristóbal. The answer is simple: unlike CMMK, CMSC had, from the exploration

⁶²⁵ *Id.*, par. 50.

⁶²⁶ Counter-Memorial, paras. 443 and 444.

⁶²⁷ Reply, par. 275.

⁶²⁸ The effectiveness of the neoliberal mining legislation, Petropress Magazine, pg. 24, C-42.

stage, an appropriate and ambitious community relations program and respected the traditions, customs and rights of indigenous communities near its project⁶²⁹.

418. In addition, SAS argues that *"the nationalization of the mining concessions was certainly not the only solution to resolve the situation"*⁶³⁰. However, SAS simply ignores the fact that the creation of a special commission or new social infrastructure – as SAS suggests⁶³¹ – would not have prevented the social conflict that was created and aggravated by CMMK.
419. SAS also insists that a military occupation would have solved the situation. This solution, besides inadequate for the reasons we have explained⁶³², demonstrates SAS' indifference for the rights of local communities. Military action against the opposition to a project is not adequate to protect the rights of indigenous communities and, in fact, is contrary to the respect of such rights in a free and democratic society⁶³³.
420. Besides the fact that SAS' alternative proposals are not reasonable ways to protect the rights of Indigenous Communities, SAS does not deny that the Treaty does not provide that expropriation is the only way to achieve the identified public purpose. As long as there is a rational link – which is subject to the discretion of the State – between the measure and the public purpose, the Treaty will have been respected⁶³⁴. The CMMK's expulsion from the Project area was undoubtedly the most reasonable way to pacify the area and protect the rights of Indigenous Communities, especially the right to life and physical integrity.

⁶²⁹ See Díez de Medina, par. 40, RWS-5; Mamani, Section III, RWS-6.

⁶³⁰ Reply, par. 278. See, also, Reply, paras. 281-282.

⁶³¹ Reply, par. 30.

⁶³² See Section 5.1, *supra*.

⁶³³ See, for example, *Granier and others (Radio Caracas Televisión) v. Venezuela*, IACHR case, ruling dated June 22, 2015, paras. 164 y 195, RLA-243; *Castañeda Gutman v. United Mexican States*, IACHR case, ruling dated August 6, 2008, par. 140, RLA-244; *Olmedo Bustos and others v. Chile*, IACHR case, ruling dated February 5, 2001, paras. 65-68, RLA-245.

⁶³⁴ See, for example, *Achmea B.V. v. Slovakia*, PCA case No. 2013-12, award on jurisdiction dated May 20, 2014, par. 251, RLA-251.

- 5.2.3 For the Reversion to be legal, it should not be followed by a fair and effective compensation and, in any case, Bolivia fully complied with the requirement of compensation established under the Treaty**
421. SAS sustains that *“Bolivia did not provide South American Silver with prompt, adequate and effective compensation amounting to the market value of the expropriated investments, making its expropriation of Claimant’s investments unlawful and in violation of the Treaty”⁶³⁴.*
422. SAS is wrong. First, Bolivia fully satisfied the compensatory provision of the Treaty – even though it had no obligation to do so. It was SAS who chose to initiate an arbitration in order to determine adequate compensation, although the Reversion Decree provided for compensation , which was immediately offered to SAS (Section 5.2.3.1). In any case, payment of compensation in accordance with of the Treaty is irrelevant for purposes of determining whether an expropriation is lawful or not, because that depends only on how the expropriation was carried out (Section 5.2.3.2).
- 5.2.3.1 *Bolivia has complied with the compensatory provision of the Treaty by offering compensation and by participating in this arbitration*
423. SAS sustains that *“Bolivia’s failure to pay any compensation to South American Silver means that its expropriation of the Malku Khota Mining Concessions was in breach of the Treaty”⁶³⁵.* The only support on which SAS relies is the opinion of L.B. Sohn, R.R. Baxter and S. Ripinsky according to which compensation should be paid within a reasonable period of time, at most a few months.
424. Nevertheless, what Sohn and Baxter actually hold is that, the State should indicate within several months whether compensation is going to be paid, but they do not require that compensation be actually payed within that period: *“[w]hile 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 doubts that the State intended to make prompt*

⁶³⁵ Reply, Section V(B)(3).

⁶³⁶ Reply, Section V(B)(3)(a).

compensation at all⁶³⁷. Ripinsky is even clearer, stating that only the persistent lack of payment is contrary to this requirement⁶³⁸.

425. Bolivia met this requirement since the Reversion Decree offered compensation and set the parameters of such compensation. However, SAS chose to resort to arbitration to demand a clearly exaggerated compensation.

426. First, Bolivia offered to pay compensation at the time of issuing the Reversion Decree.

427. First, the Reversion Decree explicitly declared that CMMK would be compensated for the loss of its Concessions according to an independent evaluation⁶³⁹.

428. SAS argues, however, that the Reversion Decree did not contain a compensation offer⁶⁴⁰. Nevertheless, the award in *Venezuela Holdings*, in which SAS mainly relies to support its position⁶⁴¹, said that Venezuela made no offer of compensation because “there are no provisions in Decree-Law No. 5200 that provide for compensation”⁶⁴². According to *Venezuela Holdings*, an offer of compensation is a provision for compensation, such as Article 4 of the Reversion Decree. This article provided for the payment of a compensation to be established by an independent valuator. Since Bolivia made a clear offer of compensation, SAS insistence on the *Tidewater* decision to base its assertion regarding lack of compensation is not relevant⁶⁴³.

⁶³⁷ L. B. Sohn y R. R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 *American Journal of International Law* 545, 1961, pg. 558 (Emphasis added), RLA-104.

⁶³⁸ S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008, pg. 68, RLA-103.

⁶³⁹ Reversion Decree, art. 4, (“I. La Corporación Minera de Bolivia - COMIBOL will hire an independent firm to conduct a the process of evaluation of the investments made by the Compañía Minera Mallku Khota S.A and Exploraciones Mineras Santa Cruz Ltda. - EMICRUZ LTDA, within a maximum period of one hundred twenty business (120) days. II. From the results of the evaluation, COMIBOL will establish the amount and conditions under which the Bolivian government will recognize the investments made by the Compañía Minera Mallku Khota S.A and Exploración, Mineras Santa Cruz Ltda. - EMICRUZ LTDA. III. The amount stated in the previous paragraph, shall be paid by COMIBOL, and must incorporate it into its budget as own resources”), C-4.

⁶⁴⁰ Reply, par. 311.

⁶⁴¹ *Id.*, par. 302.

⁶⁴² *Venezuela Holdings and others v. Bolivarian Republic of Venezuela*, ICSID case No. ARB/07/27, award dated October 9, 2014, par. 301 (Emphasis added), RLA-105.

⁶⁴³ Reply, par. 312.

429. SAS' only response is to insist that the Reversion Decree did not provide for sufficient compensation (as such, it does admit that it offered compensation)⁶⁴⁴. But SAS is confused regarding what constitutes a proper valuation of a concession in an exploration phase (and thus speculative), by denying that the compensation amounting to the investment costs it incurred is enough. As Bolivia will develop further on, only damages that are reasonably certain must be compensated. When a project has not begun to generate income and if it is uncertain whether it will be able to do so in the future, compensation is limited to the amount of the investment made⁶⁴⁵.
430. Second, notwithstanding SAS' unjustified claim, Bolivia tried, in good faith, to involve SAS in the process of determining the compensation. SAS, however, rejected this opportunity. CMMK did not respond to Bolivia's request to meet in order to discuss the valuation and, instead, SAS declared it would not participate, something that SAS omits to mention in its Reply⁶⁴⁶. SAS notified the dispute to Bolivia on October 22, 2012⁶⁴⁷, less than three months after the Reversion had been enacted and before the 120 days established by the Reversion Decree to retain an independent expert had expired.
431. Although SAS itself refused to participate in the process of determining the compensation, SAS now complains that "*Bolivia contends that it was under no obligation to consult with CMMK regarding the procedure to evaluate the compensation owed*"⁶⁴⁸. Bolivia did not, in fact, have any obligation to consult SAS. Neither the Treaty nor any other source cited by SAS provided for such alleged obligation⁶⁴⁹.
432. Second, given that SAS prefers to obtain compensation through this arbitration, Bolivia fully met the obligation of compensation by participating in the arbitration

⁶⁴⁴ *Id.*, par. 311.

⁶⁴⁵ See Section 2.1, *infra*.

⁶⁴⁶ Letter dated August 24, 2012 of COMIBOL to SAS, C-20; Letter from SAS to COMIBOL dated September 4, 2012, C-21.

⁶⁴⁷ Notification of dispute from SAS to Bolivia dated October 22, 2012, C-22.

⁶⁴⁸ Reply, par. 313.

⁶⁴⁹ Analyzing the treaty that gives origin to this dispute, *see, for example, Guaracachi America, Inc. and Rurelec Plc v. Bolivia*, PCA case No. 2011-17, award dated January 31, 2014, par. 439 ("*the Tribunal considers that Article 5.1) of the BIT UK-Bolivia [...] does not impose on the Expropriating State the obligation to determine the amount of compensation through a process in which the expropriated national or company must necessarily participate*"), RLA-29.

proceeding. The Treaty provides for arbitration as a way to determine compensation precisely when there is a dispute over the legal nature of certain measures taken by a State – whether or not it constitutes an expropriation under the Treaty – or the amount of adequate compensation. Both elements are in dispute between the Parties in this case.

433. The Treaty provides that the State must provide the investor a legal procedure to challenge an alleged expropriation and determine appropriate compensation (if any):

*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 and the amount of the compensation in accordance with the principle set out in this paragraph*⁶⁵⁰.

434. As results from this provision, the Treaty recognizes that a judicial decision may be necessary in order to set the amount of compensation. The investor can choose the legal process to determine the compensation that is due. Since the Treaty does not require the claimant to exhaust recourses, the investor can opt for international arbitration to establish whether there is an expropriation and, if necessary, set the amount due⁶⁵¹. The mere fact that compensation has not been paid before the arbitration cannot constitute a violation of the Treaty since due compensation shall be set during the arbitration.

435. In this regard, the World Bank Guidelines recognize that it is acceptable for States to offer, and for investors to agree, that an international arbitration sets the amount of compensation that may be due after an expropriation:

*Determination of the 'fair market value' will be acceptable if conducted according to a method agreed by the State and the foreign investor (hereinafter referred to as the parties) or by a tribunal or another body designated by the parties*⁶⁵².

436. The *Tidewater* tribunal, adopting the World Bank Guidelines, argued that because arbitration is the way through which adequate compensation is fixed, non-payment of a compensation prior to the arbitration does not violate the Treaty's compensation provision:

⁶⁵⁰ Treaty, art. 5, C-1.

⁶⁵¹ World Bank, *Guidelines on the Treatment of Foreign Direct Investment*, 1992, item IV, par. 4, RLA-97.

⁶⁵² *Id.*

*It follows that such a tribunal must have an opportunity to make its determination as to compensation. Where such a tribunal has done so (and assuming that the other conditions are met) the expropriation will not be illegal. [...] An expropriation only wanting fair compensation has to be considered as a provisionally lawful expropriation, precisely because the tribunal dealing with the case will determine and award such compensation*⁶⁵³.

437. In this case, SAS directly proceeded to international arbitration. Therefore, the participation of Bolivia in this arbitration satisfies the Treaty's obligation to compensate "without delay". Payment will be considered timely, provided that it is done promptly after a final decision of the Tribunal ordering a payment (*quod non*) after having exhausted every remedy.

438. Finally, SAS alleges that the *Funnkötter* and *Vivendi II* tribunals held that non-payment of a compensation would constitute a violation of the treaty⁶⁵⁴. However, the tribunal in *Funnkötter* litigated an arbitration initiated in June 2003, i.e., several years after the alleged expropriatory measures (of 2000), during which no process for setting a compensation took place⁶⁵⁵. In *Vivendi II*, it based itself in Argentina's prolonged refusal to offer compensation. These tribunals did not conclude that the treaty's provision for compensation had been violated when the State offered to pay compensation while a decision on the exact amount was still pending.

5.2.3.2 *In any case, Bolivia did not have to make any payment for the Reversion to be lawful under international law*

439. SAS argues that "Bolivia's failure to pay any compensation to South American Silver means that its expropriation of the Malku Khota Mining Concessions was unlawful"⁶⁵⁶.

440. SAS is wrong. The mere failure to pay compensation does not render an expropriation unlawful. SAS's argument is incompatible with the classical definition of lawful

⁶⁵³ *Tidewater Investment Srl v. Bolivarian Republic of Venezuela*, ICSID case No. ARB/10/5, award dated March 13, 2015, paras. 140-141, RLA-104.

⁶⁵⁴ Reply, par. 293 citando *Bernardus Henricus Funnkötter and other v. Zimbabwe*, ICSID case No. ARB/05/6, award dated April 22, 2009, par. 107, CLA-34; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.*, ICSID case No. ARB/97/3, award dated August 20, 2007, par. 7.5.21, CLA-10.

⁶⁵⁵ *Bernardus Henricus Funnkötter and other v. Zimbabwe*, ICSID case No. ARB/05/6, award dated April 22, 2009, par. 1.40, CLA-34.

⁶⁵⁶ Reply, Section V(B)(3)(b).

expropriations, the decisions of other investment tribunals and even the purpose of the distinction between lawful and unlawful expropriations.

441. *Chorzow Factory* established the classic distinction between lawful and unlawful expropriation, and exempted from illegal expropriations those in which only the payment of compensation is missing:

*The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation - to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation, save under the exceptional conditions fixed by Article 7 of the said Convention [...] It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated [...]*⁶⁵⁷.

442. Since the distinction between lawful and unlawful expropriations (which is criticized and criticizable by its alleged effects) was conceived, it has been clear that the expropriations that meet all other conditions except for the payment of compensation are lawful, as explained in *obiter* by the Iran-US Claims Tribunal in 1987⁶⁵⁸.
443. An expropriation cannot be considered unlawful only for non-payment of compensation, because legality refers to whether the State is authorized to expropriate or not. Compensation is a separate obligation, a consequence of the expropriation. As clearly explained by Mohebi, “*the non-payment of compensation does not, as such, make a taking ipso facto wrongful, rather it is a violation by the expropriating state of an independent duty which applies evenly to both unlawful and lawful taking [...]*”⁶⁵⁹.
444. Scholars such as Crawford, Brownlie, Salacuse and Sheppard agree with Mohebi, in that the lack of payment of compensation cannot alone make an expropriation

⁶⁵⁷ *Chorzów Factory*, PCIJ case No. 13, Ruling dated September 13, 1928, pgs. 46 and 47 (Emphasis added), CLA-69.

⁶⁵⁸ *Amoco International Finance Corporation v. the Islamic Republic of Iran*, Iran-United States Claims Tribunal No. 56, award dated July 14, 1987, paras. 189-206, CLA-29.

⁶⁵⁹ M. Mohebi, *The International Law Character of the Iran-United States Claims Tribunal*, Springer, 1999, pág. 289, RLA-252.

unlawful⁶⁶⁰. As Salacuse points out, any other result “would not accord with the intention of the contracting parties as evidenced by the treaty text”⁶⁶¹.

445. No arbitral tribunal has accepted what SAS intends in this arbitration, *i.e.*, that the legal consequence of nonpayment would be to declare an expropriation unlawful. In fact, SAS has been unable to identify any tribunal that has accepted its position. Although it has quoted *Funekotter* and *Vivendi II*⁶⁶², neither considered that the legality of the expropriation as a relevant question.
446. In fact, the case of *Venezuela Holdings*, in which SAS also relies on, explicitly rejected that the expropriation was unlawful for lack of compensation⁶⁶³. The tribunal found that the participation in negotiations to agree on compensation was sufficient to constitute an “offer of compensation”⁶⁶⁴ and preclude the wrongfulness of expropriation⁶⁶⁵.
447. SAS is aware of the weakness of its position, and therefore maintains that there is a crucial difference between direct and indirect expropriation⁶⁶⁶. Nevertheless, in the

⁶⁶⁰ I. Brownlie, *Principles of Public International Law*, 7th ed. 2008, pg. 539, RLA-253. See, also, J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press, 2012, pg. 625, RLA-87; A. Sheppard, *The distinction between lawful and unlawful expropriation in Investment Arbitration and the Energy Charter Treaty*, JurisNet LLC, 2006, pg. 171, RLA-254; J. Salacuse, *The Law of Investment Treaties*, Oxford International Law Library, 2015, pg. 328, RLA-255.

⁶⁶¹ J. Salacuse, *The Law of Investment Treaties*, Oxford International Law Library, 2015, pg. 328, RLA-255.

⁶⁶² *Bernardus Henricus Funekotter and others v. Zimbabwe*, ICSID case No. ARB/05/6, award dated April 22, 2009, par. 107 (“As a consequence, the Tribunal concludes that Zimbabwe breached its obligation under Article 6(c) of the BIT to pay just compensation to the Claimants. Accordingly, as stated in paragraph 98 above, the Tribunal does not need to consider whether other provisions of the BIT have been violated”), CLA-34; *Compañía de Aguas del Aconguija S.A. and Vivendi Universal S.A., ICSID case No. ARB/97/3*, award dated August 20, 2007, par. 7.5.21 (“If we conclude that the challenged measures are expropriatory, there will be violation of Article 5(2) of the Treaty, even if the measures might be for a public purpose and nondiscriminatory, because no compensation has been paid”), CLA-10.

⁶⁶³ *Venezuela Holdings and others v. Bolivarian Republic of Venezuela*, ICSID case No. ARB/07/27, award dated October 9, 2014, par. 306, RLA-105.

⁶⁶⁴ *Venezuela Holdings and others v. Bolivarian Republic of Venezuela*, ICSID case No. ARB/07/27, award dated October 9, 2014, par. 301, RLA-105.

⁶⁶⁵ *Venezuela Holdings and others v. Bolivarian Republic of Venezuela*, ICSID case No. ARB/07/27, award dated October 9, 2014, par. 305, RLA-105.

⁶⁶⁶ Reply, par. 305.

few cases that address direct expropriation – *Venezuela Holdings v. Venezuela*⁶⁶⁷, *Santa Elena v. Costa Rica*⁶⁶⁸ and *SPP v. Egypt*, among others⁶⁶⁹, no tribunal has concluded that an expropriation is unlawful only for the lack of compensation. Also, the UNCTAD document presented by SAS as support for its position, does not reach a clear conclusion and does not identify any tribunal or scholar that shares its position⁶⁷⁰. There is no doubt that arbitration is an appropriate means to determine compensation for both a direct or indirect expropriation since both generate controversy over the amount.

448. For these reasons, the Reversion Decree cannot be considered as an expropriatory measure, much less unlawful one.

5.3 Bolivia provided fair and equal treatment to the Mining Concessions by not encouraging or allowing resistance to SAS' activities and acting with genuine concern to comply with all its international obligations

449. SAS cites article 2(1) of the Treaty and argues that “*Bolivia failed to treat Claimant’s investments fairly and equitably*” because (i) it would not have respected SAS’ legitimate expectations and (ii) it would not have acted in good faith and in a transparent and consistent manner⁶⁷¹.

450. The Treaty provides that “[i]nvestments of nationals or Companies of each Contracting Party shall at all times be accorded fair and equitable treatment [...]”⁶⁷².

451. However, Bolivia acted in accordance with applicable laws when it intervened to protect the human and indigenous rights of the communities near Mallku Khota. Bolivia always respected the legitimate expectations of SAS (Section 5.3.1) and acted in accordance with the principles of good faith, in a transparent and consistent manner with its international obligations (Section 5.3.2).

⁶⁶⁷ *Venezuela Holdings and others v. Bolivarian Republic of Venezuela*, ICSID case No. ARB/07/27, award dated October 9, 2014, par. 305, RLA-105.

⁶⁶⁸ *Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica*, ICSID case No. ARB/96/1, award dated February 17, 2000, paras. 71-72, CLA-87.

⁶⁶⁹ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID case No. ARB/84/3, award dated May 20, 1992, paras. 158-159, RLA-256.

⁶⁷⁰ UNCTAD, “Expropriation”, *UNCTAD Series on Issues in International Investment Agreements II*, 2012, pg. 44, CLA-151.

⁶⁷¹ Reply, par. 316.

⁶⁷² Treaty, Art. 2(1), C-1.

5.3.1 Bolivia's actions were consistent with SAS' legitimate expectations since, at all times, the State sought to meet its domestic and international obligations

452. In its Reply, SAS argues that Bolivia would not have respected its legitimate expectations, and thus incurred in a violation of the standard of fair and equitable treatment, because it allegedly (i) fostered an opposition to its mining project, (ii) allowed the conflict to aggravate, (iii) expropriated the Mining Concessions, and (iv) denied compensation for it⁶⁷³.

453. Unlike what is alleged by SAS, the fair and equitable treatment requires the respect for SAS' expectations, provided that such expectations are reasonable and legitimate. Bolivia acted in accordance with this standard by not arbitrarily altering the rules applicable to the investment. All measures taken by Bolivia to protect human and indigenous rights have their foundation in domestic legislation and international law that was applicable at the time CMMK obtained the Mining Concessions. As already explained, Bolivia did not encourage opposition to the mining project nor did it allow the conflict with the Indigenous Communities to intensify, on the contrary.

454. First, SAS argues that the fair and equitable treatment requires an almost absolute respect for the expectations of investors⁶⁷⁴ when, in reality, this standard only prohibits arbitrary changes in legislation that is applicable to the investment, and that would result in a serious violation of these expectations.

455. Actually, the cases invoked by SAS show that only the measures that involve an arbitrary change of the legal framework in which the investment was made, can be considered as contrary to the legitimate expectations of investors⁶⁷⁵. The tribunal in *Spyridon Roussalis*, basing itself on *Sahuka* and *S.D. Myers*, indicated that legitimate expectations must be assessed by considering "the host State's legitimate right subsequently to regulate domestic matters in the public interest [...]"⁶⁷⁶. Accordingly,

⁶⁷³ Reply, paras. 319-320.

⁶⁷⁴ Reply, par. 309.

⁶⁷⁵ See, also, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Turkey*, ICSID case No. ARB/02/5, award dated January 19, 2007, par. 240 ("Legitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed."), *CLA-51*; *Eurako B.V. v. Poland, Ad Hoc case*, partial award dated August 19, 2005, par. 234, *CLA-48*.

⁶⁷⁶ *Spyridon Roussalis v. Romania*, ICSID case No. ARB/06/1, award dated December 7, 2011, par. 317, *CLA-156* quoting *Sahuka Investments BV v. Republica Checa*, caso CNUDMI, partial award dated March 17, 2006, par. 305, *CLA-46* basing itself on *S.D. Myers, Inc. v. Canada*, NAFTA case, partial award dated November 13, 2000, par. 263, *RLA-125*.

as explained in *Alpha Projektholding*⁶⁷⁷, the only limit to the discretion of the State is that you cannot arbitrarily alter the state of play.

456. The same sources on which SAS relies confirm the conclusion of *Parkerings v. Lithuania* (which SAS has not denied), namely:

*It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time*⁶⁷⁸.

457. In addition to ignoring the doctrine it refers to, and that allows the State to amend its legal framework in favor of public interest, SAS fails to mention that only a serious violation of the legitimate expectations may constitute a violation of fair and equitable treatment.
458. The *Gentn* case, for example, established that a violation of fair and equitable treatment is "a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith"⁶⁷⁹. This recent case summarizes a long line of case law, that originated in the *Neer* case of the early twentieth century, which established that a state measure can only be an international wrongful act if it amounts "to an outrage, to bad faith, to wilful neglect of duty, or to a insufficiency of governmental action [...] far short of international standards [...]"⁶⁸⁰. This requirement was recently restated by the tribunal in *Glamis Gold*⁶⁸¹.

⁶⁷⁷ *Alpha Projektholding GmbH v. Ukraine*, ICSID case No. ARB/07/16, award dated November 8, 2010, par. 420, CLA-157 quoting *CMS Gas Transmission Company v. Argentina*, ICSID case No. ARB/01/8, award dated May 12, 2005, par. 277 ("It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects"), CLA-5.

⁶⁷⁸ *Parkerings-Compagniet AS v. Lithuania*, ICSID case No. ARB/05/8, award dated September 11, 2007, par. 332, RLA-113.

⁶⁷⁹ *Alex Gentn, Eastern Credit Limited, Inc. and A.S. Baltoil v. Estonia*, ICSID case No. ARB/99/2, award dated June 25, 2001, par. 367, RLA-117.

⁶⁸⁰ *L. F. H. Neer y Pauline Neer v. United Mexican States*, CPU case, Ruling dated October 15, 1926, par. 4, RLA-257.

⁶⁸¹ *Glamis Gold Ltd. v. USA*, UNCITRAL case, award dated June 8, 2009, par. 616, CLA-141.

459. SAS questions the relevance of the *Genin* case and this case law line because it assumes, wrongly, that they address only the minimum standard of treatment in international law and not the standard of fair and equitable treatment⁶⁸². Ironically, SAS bases its position on the *Rumeli* case that indicates “[i]t shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law”⁶⁸³. That is, even according to the decisions cited by SAS, *Genin* limits the scope of protection of fair and equitable treatment to the standard proposed by Bolivia in this case.
460. *Second*, it is clear that SAS’ legitimate expectations may not have been undermined, by the mere fact that Bolivia did not make any regulatory changes that could have affected the Mining Concessions. Bolivia simply applied the existing legal framework, as was its obligation, to the actions and violence caused by CMMK.
461. SAS argues, however, that it had legitimate expectations under the Treaty and the Mining Law and that these expectations were destroyed when Bolivia allegedly encouraged the opposition to the Project by the Communities, allowed the conflict to escalate and issued the Reversion Decree without compensation⁶⁸⁴.
462. It is striking how SAS ignores the most relevant provisions that define its legitimate expectations. As *Methanex* and *Generation Ukraine* noted, it is a *sine qua non* requirement that the investor have knowledge of the framework applicable to its investment in the territory of the host State. SAS does not deny this principle⁶⁸⁵. But it omits in its analysis that the applicable framework includes the rules that guided the conduct of Bolivia in this case.
463. SAS knew that its legitimate expectations were conditioned by, *inter alia*, the ICCPR, Convention No. 169, the UNDRIP, the ACHR, Bolivia’s Constitution and the provisions of Bolivian law. This legal framework was in place before CMMK

⁶⁸² Reply, par. 317.

⁶⁸³ *Rumeli Telekom A.S. v. Kazakhstan*, ICSID case No. ARB/05/16, award dated July 19, 2008, par. 611, CLA-68.

⁶⁸⁴ Reply, paras. 319-320.

⁶⁸⁵ *Methanex Corporation v. USA*, NAFTA case, award dated August 3, 2005, paras. 8-10, RLA-114; *Generation Ukraine, Inc. v. Ukraine*, ICSID case No. ARB/00/9, award dated September 16, 2003, par. 20.37, RLA-115.

obtained the Mining Concessions. In addition, SAS does not deny that this legal framework remained substantially unchanged⁶⁸⁶.

464. In fact, SAS succinctly mentions that “*Bolivia has not established the reason why its obligation to protect the indigenous communities necessarily relieved it of its obligations vis-à-vis South American Silver pursuant to the Treaty*”⁶⁸⁷

465. SAS distorts Bolivia’s argument. In fact, it is incorrect to state that Bolivia’s obligations under the Treaty had been replaced by its duty to protect the Indigenous Communities. This is not what Bolivia argues. Legitimate expectations necessarily included the obligation of Bolivia to protect human and indigenous rights. In this sense, SAS has not provided any evidence (nor could it do so) to demonstrate a legitimate expectation according to which Bolivia would not act so as to end the violence instigated by CMMK against the Indigenous Communities.

466. *Third*, the true important issue is not the standard required to comply with fair and equitable treatment, nor an alleged change of the legal framework of Bolivia. In fact, SAS does not deny that both the provisions of Bolivian national law and international law, forced Bolivia to take measures to protect human and indigenous rights. Therefore, there can be no violation of the legitimate expectations of SAS as long as Bolivia abides by these provisions, as has happened in this case⁶⁸⁸.

467. As already mentioned, SAS’ core statement is that “*Bolivia’s invocation of this justification is an ex post facto excuse manufactured for purposes of this arbitration*”⁶⁸⁹. According to SAS, the real intention of Bolivia would not be to protect the legitimate human and indigenous rights, but to take control of the Mining Concessions⁶⁹⁰. SAS even dares to argue that Bolivia promoted the conflict in order to achieve this goal⁶⁹¹. However, as we have already explained⁶⁹², SAS’ speculation is belied by the good efforts of the State to reach an agreement with the Indigenous

⁶⁸⁶ Counter-Memorial, paras. 422-427; Reply, paras. 319-322.

⁶⁸⁷ Reply, par. 321.

⁶⁸⁸ Counter-Memorial, par. 432; Reply, paras. 319-322.

⁶⁸⁹ Reply, par. 321.

⁶⁹⁰ *Id.*

⁶⁹¹ *Id.*

⁶⁹² See Section 5.2.2, *supra*.

Communities that would allow CMMK to develop the Project, as well as by the express references to life and social peace of the Indigenous Communities in the preamble to the Reversion Decree and by the fact that, today, after four years, there is not a new investor or a new mining project in the area of Mallku Khota. This shows that there was no economic interest by the State to take over the Project.

468. SAS also argues that Bolivia would not have taken the necessary measures at the beginning of the conflict, and would have helped to intensify said conflict until it got out of control, thus violating its legitimate expectations. All of which, according to SAS, even if Bolivia had been legally obliged to issue the Reversion Decree⁶⁹³. However, Bolivia has shown that the state acted as a mediator in the conflict between the Indigenous Communities, by the end of 2010 (for example, during the meetings of socialization in Toro Toro, proposing the temporary suspension of the activities and sending police officers to the Project's surrounding areas⁶⁹⁴). If the violent situation became untenable by mid-2012, it was due to CMMK's actions and omissions⁶⁹⁵.

5.3.2 Bolivia acted in good faith and in a transparent and consistent manner, while legitimately intervening to protect human and indigenous rights in accordance with its legal mandate

469. SAS argues that "*Bolivia failed to act in good faith vis-à-vis South American Silver's investments*" and that "*Bolivia did not treat South American Silver's investments in a transparent or consistent manner*" as it would have (*quod non*) (i) violated its rights while pretending that it provided protection; (ii) expropriated the Mining Concession without any valid reason; (iii) not applied the Bolivian Constitution and Mining Code in a transparent and consistent manner; and (iv) not granted an adequate compensation⁶⁹⁶.

470. Contrary to what SAS claims, Bolivia acted at all times in good faith, transparently and consistently when confronted to CMMK's systematic violation of the human and indigenous rights of the Indigenous Communities directly affected by the Project. The only behavior that shows bad faith is the one exhibited by SAS, which knows that

⁶⁹³ Reply, par. 322.

⁶⁹⁴ See Section 2.2, *supra*.

⁶⁹⁵ See Section 2.3.1, *supra*.

⁶⁹⁶ Reply, paras. 323 and 331.

CMMK caused a social conflict between the Indigenous Communities, and is now brazenly trying to blame Bolivia for its actions.

471. SAS argues that Bolivia did not applied the Constitution and mining legislation in a transparent and consistent manner, but does not provide any support or provide further details on it. On the contrary, Bolivia acted, at all times, in a transparent and consistent manner, in accordance with legal provisions. The Reversion Decree is the direct consequence of the existing legal framework that requires Bolivia to protect fundamental rights such as human and indigenous rights of Indigenous Communities, including the right to life.
472. *Lastly*, SAS claims that Bolivia would have fueled a conflict that originated in illegal mining⁶⁹⁷. At least three facts show that it is not so:
473. First, CMMK's consultants (especially MEDMIN) confirmed that there was no illegal mining in the Project area or that it was was not significant⁶⁹⁸.
474. Second, the facts proven by Bolivia show that it was CMMK that created a parallel indigenous organization (COTOA-6A) to break the opposition to the Project.
475. Third, SAS does not explain why Bolivia would have been interested in sponsoring illegal mining. In addition, SAS incurs in an obvious contradiction: it cannot simultaneously claim that Bolivia had an economic interest⁶⁹⁹ in taking over the Project and that Bolivia wanted to sponsor illegal mining in the Project.
- 5.4 **Bolivia fulfilled its duty to provide full protection and security at all times, since it never stopped taking reasonable measures to protect the Mining Concessions**
476. SAS holds that "*Bolivia did not provide full protection and security to Claimant's investments*" given that (i) it would have failed to act when CMMK requested protection for the Project against the opposition of Indigenous Communities; (ii) it

⁶⁹⁷ Reply, par. 326.

⁶⁹⁸ MEDMIN Foundation, Second Control Report, Environmental Implementation and Control Plan (EICP), Mallku Khota Project, February 2009, pg. 75 ("*The main economic activity in the community of Mallku Khota is agriculture with low returns by severe weather conditions. Potato crops, barley, oats, beans and peas are the basis of family income, but there are secondary activities such as livestock and trade, there is currently no mining activity*") (Emphasis added), C-143. See, also, Section 2.1.1 *supra*.

⁶⁹⁹ Reply, paras. 327-328.

would have instigated the opposition to the Project; and (iii) it would have granted immunity to the leaders of the Indigenous Communities⁷⁰⁰.

477. *In limine*, SAS no longer alleges that legal certainty was denied⁷⁰¹ and, therefore, such claim should be considered withdrawn. With respect to its remaining arguments, they are plagued with *de facto* and *de jure* errors.
478. *First*, Bolivia intervened in the most reasonable manner possible under the circumstances. SAS accepts that the guarantee of full protection and security only forces Bolivia “to exercise due diligence and take reasonable measures to protect [...]”⁷⁰². Therefore, this standard does not require (nor can it) to obtain accurate results and, even less, to protect SAS from CMMK’s actions.
479. First, Bolivia had no other reasonable options to address a social conflict created and aggravated by CMMK to subdue the Indigenous Communities that opposed the Project. Bolivia’s actions cannot constitute a violation of the guarantee of full protection and security.
480. SAS has a socially and legally naïve vision (to say the least) of what could be achieved in the circumstances of the case and even argues that Bolivia could have created a “special commission” or an “emergency plan [...] to develop better infrastructure and services in the area”⁷⁰³ to solve the conflict.
481. Beyond the fact that it is not for SAS (or, with all due respect, the Tribunal) to establish how Bolivia should relate to the Indigenous Communities or what actions it should take for their development, it is illusory to think that those actions might have been a solution to the social conflict provoked by CMMK. Moreover, as already noted, SAS’ solutions are an academic exercise that do not take into account the special cultural characteristics of Northern Potosí, where such conflicts have only been effectively solved in the past through measures such as the Reversion⁷⁰⁴.

⁷⁰⁰ *Id.*, par. 336.

⁷⁰¹ Reply, paras. 335-343.

⁷⁰² *Id.*, par. 335.

⁷⁰³ *Id.*, par. 340, quoting paras. 281 and 282 of the Reply.

⁷⁰⁴ Navarro, par. 44 (“our experience in the government has shown us that retaking control by the State is the most effective measure to end a conflict between original communities resulting from the operation of a mining project”), RWS-2. See, also, Sections 2.3.2 and 5.1, *supra*.

482. On the other hand, any effort to promote a reconciliation between CMMK and the affected Indigenous Communities would have been futile, since it was CMMK who fomented confrontation between the community members, who, therefore, refused to consider any option other than the expulsion of CMMK.
483. In the absence of a successful agreement, SAS suggests that Bolivia should have repressed the opposition, if necessary, by military means⁷⁰³. Suggesting a military repression as a solution confirms SAS' ignorance on how to relate or deal with problems related to the Indigenous Communities of Northern Potosí⁷⁰⁴.
484. The latter also confirms SAS' indifference for the rights of Indigenous Communities. The obligation of due diligence requires only reasonable measures. Military repression of dissidence is unacceptable in a free and democratic society, and is prohibited by international law so it cannot constitute an internationally acceptable solution⁷⁰⁵. No other interpretation is compatible with the proper respect for a free and democratic society required by international law⁷⁰⁶. The fact that the legitimate opposition of the community may be a setback for an investor can not imply that the investor may demand that the State eliminates the opposition by restricting the rights to freedom of expression and assembly that are duly established in the Bolivian Constitution.
485. Moreover, the recent history of social conflicts in Bolivia shows that military intervention aggravates conflicts instead of solving them⁷⁰⁷ as it was the case following to the police intervention on July 5, 2012 in Mallku Khota.

⁷⁰³ Reply, par. 338. See, also, Reply, par. 281.

⁷⁰⁴ See Section 2.3.1, *supra*. See, also, Gov. Gonzales II, par. 43 ("*Referring to the militarization order in May 2012, Mr. Gonzales Yutronic seems to reproach myself with not having taken this kind of actions since 2011. However, knowing the history of violence in Northern Potosí, it always seemed necessary to make dialogue prevail before the actions of security forces, however important CMMK project was for the future of our Department and our country. An example of this, which I have a clear memory of, is the case of the Amayapampa. During the administration of Gonzalo Sanchez de Lozada in 1996, the use of force resulted in a rapid and serious confrontation that ended with the death of nine Bolivian citizens*"), RWS-4.

⁷⁰⁵ See, for example, *Granler and others (Radio Caracas Televisión) v. Venezuela*, IACHR case, ruling dated June 22, 2015, par. 195, RLA-243; *Castañeda Gutman v. United Mexican States*, IACHR case, ruling dated August 6, 2008, par. 140, RLA-244; *Olmedo Bustos and others v. Chile*, IACHR case, ruling dated February 5, 2001, paras. 65-68, RLA-245.

⁷⁰⁶ See, for example, *Granler and others (Radio Caracas Televisión) v. Venezuela*, IACHR case, ruling dated June 22, 2015, paras. 135-136, RLA-243.

⁷⁰⁷ Gov. Gonzales I, par. 57, RWS-1. See, also, Press Release, El Potosí, *There is a hostage in Mallku Khota* of May 5, 2012 ("*There are more than 150 police officers in Llalagua*" said the authority

486. Second, Bolivia had no international obligation to protect CMMK from a legitimate opposition of the Indigenous Communities. All arbitration tribunals that have examined the obligation of full protection and security against physical interference against an investment have concluded that the State must take the necessary measures only in the case of an unlawful interference by non-state actors⁷¹⁰. In this case, the interference of the State was not unlawful and even if it were so, its unlawfulness was the result of the coordinated and promoted action of CMMK, not the State.

487. Second, Bolivia did not encourage the opposition to the Project.

488. First, as we have demonstrated⁷¹¹, the resistance of community members was a response to the violations by CMMK and its employees of the human and indigenous rights of Indigenous Communities. As Mr. Chajmi recalls, “[d]ue to these actions from CMMK, by the end of 2010, many members of nearby communities agreed that the mining company should leave the area, as it was conducting its activities ignoring the interests of the communities of Mallku Khota”⁷¹².

489. Second, SAS questions the seriousness of the allegations of the community members [REDACTED] pointing to the alleged passive attitude of the State⁷¹³. However, SAS can only reach this conclusion because it ignores two important facts:

490. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

arguing that the officers were to rescue their comrade, but there is no order yet. González claims that he does not want it to happen as happened with the 4 police officers who were lynched on May 22, 2010. There is no intervention order since community members are requesting the presence of authorities of Comibol and the Minister of Mining, Mario Virreira⁷¹⁴), R-78.

⁷¹⁰ See, for example, *Wena Hotels v. Arab Republic of Egypt*, ICSID case No. ARB/98/4, award dated December 8, 2000, par. 83, RLA-145; *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID case No. ARB/87/3, award dated June 27, 1990, par. 87, CLA-8; *American Manufacturing & Trading, Inc. v. Zaire*, ICSID case No. ARB/93/1, award dated February 21, 1997, par. 6.08, RLA-123; *Bernhard Friedrich Arnd Rüdiger Von Pezold and others v. Zimbabwe*, ICSID case No. ARB/10/15, award dated July 28, 2015, par. 597, CLA-142.

⁷¹¹ See Section 2.1, *supra*.

⁷¹² Chajmi, par. 17, RWS-3.

⁷¹³ Reply, par. 124.

⁷¹⁴ Monthly report on community relations of CMMK, March 2008, pg. 3, C-163.

[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

718 See, among others, Bolivia, MAIPO, Report on special necessities of TCO Ayllu Sullk'a Jilatikani, pg. 24 ("57.8 percent of women are left without receiving any education, being at a disadvantage compared to men, where only 21.6 percent is illiterate"), R-146.

719 Monthly report on community relations of CMMK, March 2008, pg. 3, C-163.

720 Chajmi, par. 15, RWS-3.

721 Uño, par. 46 ("Equality and equality between ordinary jurisdiction and JIOC has two key implications. First, indigenous and tribal authorities of different territorial levels have the same constitutional status to the judicial authorities of the ordinary courts and are not subject to or are dependent on, prosecutors and ordinary judges. Second, the authorities of the ordinary courts may

492. Third, the actions of CMMK to criminalize opponents and ignore the Ancestral Organization by creating COTQA-6A only renewed and radicalized this feeling of opposition⁷²².
493. *Third*, contrary to SAS' assertions, Bolivia did not grant immunity to the community leaders in the Memorandums of Understanding of July 7, 2012, but entrusted the decision on the criminal liability to the Indigenous judicial system.
494. Said Minutes of Understanding establish that:
- Regarding the persecution, the national government dismissed all processes, investigations, arrest warrants and persecution against indigenous and union leaders, indigenous authorities, leaders and bases of the 3 provinces of Northern Potosi within the conflict of Malleu Qota in defense of nonrenewable natural resources*⁷²³.
495. Even assuming that the Minutes of Understanding was a legally binding instrument that grants immunity – which it is not – that Memorandum only suggests that the leaders of the Indigenous Communities would not be subject to criminal prosecution nationwide. According to the Memorandum, they remained accountable to the indigenous judicial system, as they should, given the location of the facts and the identity of the groups and the leading community members⁷²⁴. SAS has not denied this fact, so it must be considered implicitly accepted⁷²⁵.
496. On the other hand, SAS has not explained why, if the granting of immunity to community leaders had occurred, it would have constituted a violation of the full protection and security required under the Treaty. SAS does not claim that the prosecution constitutes a necessary measure to protect the Concessions – something that would be unthinkable. The prosecution of the community's leaders would have no legal effect over the Concessions.

not interfere, review or receive objections on the decisions of the indigenous and tribal judicial authorities"), RER-1.

⁷²² See Section 2.1.3.3, *supra*.

⁷²³ Memorandum of Understanding, July 7, 2012, pg. 3 (Emphasis added), C-16.

⁷²⁴ See Law No. 073 dated December 29, 2010, Arts. 7, 9-10, RLA-263.

⁷²⁵ Counter-Memorial, par. 471; Reply, par. 342.

5.5 Bolivia did not impair the Mining Concessions through arbitrary or discriminatory measures

497. SAS argues that “*Bolivia impaired Claimant’s investments through unreasonable and discriminatory measures*”⁷²⁶.

498. However, to support the claim that the CMMK Project was affected, SAS limits itself to present a list of measures which it considers contrary to the Treaty, without giving any explanation, much less justification, as to how they would be contrary to the Treaty⁷²⁷. Many of these measures, allegedly violating the Treaty, such as the creation of the Immobilization Zone⁷²⁸, did not have the slightest effect on the Mining Concessions, because they were only applied in areas outside the concession. For that only reason, they could not constitute a violation of the Treaty.

499. All other measures – except for the accusation of sponsoring the opposition, which Bolivia categorically rejects – were reasonable because Bolivia had an obligation to protect the communities that were affected directly by the abuses of CMMK. Confronted to the systematic violation of human rights by CMMK and its incitement to violence, Bolivia was legally obliged to withdraw its support to the Project and have CMMK abandon the area. SAS’ only defense is to repeat once again its baseless claims and insist that Bolivia would not have acted in the interest of the Indigenous Communities⁷²⁹.

500. Precisely because Bolivia adopted the appropriate measure (and only viable) to pacify the Project area and thus protect the life and physical integrity of the community members, Bolivia has not affected CMMK’s Mining Concessions through unreasonable measures. Although SAS tries to eviscerate the standard of unreasonableness, the *National Grid* tribunal made clear that “*the plain meaning of the terms ‘unreasonable’ and ‘arbitrary’ is substantially the same in the sense of something done capriciously, without reason*”⁷³⁰. *BG Group*, invoked by SAS, does

⁷²⁶ Reply, Section V(E).

⁷²⁷ Reply, par. 345.

⁷²⁸ See Section 5.2.2, *supra*.

⁷²⁹ Reply, par. 346.

⁷³⁰ *National Grid v. Argentina*, UNCITRAL case, award dated November 3, 2008, par. 197, CLA-41.

not deny that, to be unreasonable, an action should be capricious and carried out for no reason⁷³¹.

501. In any case, SAS has not presented any argument to demonstrate that the actions of Bolivia - whose objective was to protect human and indigenous rights against the actions of CMMK - would not have been reasonable under any standard. Bolivia has widely demonstrated that its actions were reasonable⁷³². Today, as confirmed by the Minister Navarro and community member Chajmi, peace has been restored in Mallku Khota⁷³³.
502. SAS has not shown that Bolivia affected its investment through discriminatory measures. SAS has been unable to point out a single case of a Bolivian (or foreign) company that received better treatment in circumstances equivalent to CMMK. On the contrary, Bolivia has demonstrated that other mining companies under foreign control have been able to operate in the area thanks to good management of their relations with local Communities⁷³⁴.
503. The inability to identify and substantiate a single similar case in which a company has received better treatment is fatal to SAS' position concerning an alleged discrimination, as unanimously accepted by international case law. *ECE* argued that "*the Tribunal accepts the test enunciated by the Saluka Tribunal, namely that: 'State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification'*"⁷³⁵. Many tribunals share the same criteria⁷³⁶.

⁷³¹ *BG Group Plc. v. Argentina*, UNCITRAL case, award dated December 24, de 2007, par. 341, CLA-4.

⁷³² See Section 5.4, *supra*.

⁷³³ Chajmi, par. 36, RWS-3. See, also, Navarro, paras. 43 and 48, RWS-2.

⁷³⁴ See Section 2.1.3.1, *supra*.

⁷³⁵ *ECE Projektmanagement International GmbH y Kommanditgesellschaft Punta Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. Czech Republic*, PCA case No. 2010-5, award dated September 19, 2013, par. 4.825, RLA-258.

⁷³⁶ See, for example, *Saluka Investments BV v. Czech Republic*, UNCITRAL case, partial award dated March 17, 2006, paras. 313, 460, CLA-46; *Nykomb Synergetics Technology Holding AB v. Latvia*, Arbitration Institute of the Stockholm Chamber of Commerce case, award dated December 16, 2003, par. 4.3.2(a), RLA-259; *CMS Gas Transmission Company v. Argentina*, ICSID case No. ARB/01/8, award dated May 12, 2005, par. 293, CLA-6. See, also, *Invesmart, B.V. v. Czech Republic*, UNCITRAL case, award dated June 26, 2009, par. 415, RLA-249; *Boytnder Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID case No. ARB/03/29, award dated August 27, 2009, par. 389, RLA-260; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID case No. ARB(AF)/99/1, award dated December 16, 2002, par. 170, RLA-150; *Total S.A. v. Argentina*, ICSID case No. ARB/04/1, decision on responsibility dated December 27, 2010, par. 210, RLA-

504. Given its inability to provide an analogous case, SAS insists that it does not need to prove that there was a discrimination in order to establish that its investment was affected by a discriminatory measure. The only legal basis of this, to say the least, singular allegation comes from *Lemire v. Ukraine*⁷³⁷. However, contrary to the assertion of SAS, even *Lemire* requires proof of different treatment:

*Discrimination, in the words of pertinent precedents, requires more than different treatment. To amount to discrimination, a case must be treated differently from similar cases without justification; a measure must be 'discriminatory and expose[s] the claimant to sectional or racial prejudice'; or a measure must 'target[ed] Claimant's investments specifically as foreign investments'*⁷³⁸.

505. In other words, even the doctrine cited by SAS insists that discrimination requires different treatment, even when it explains that this differential treatment is not sufficient to establish discrimination. SAS has not even attempted to demonstrate such discriminatory treatment and cannot evade its legal obligation to do so.
506. Proof that the discriminatory treatment alleged by SAS has no basis is its assertion that the Reversion would be a measure inspired, in part, by the fact that CMMK was controlled by a "transnational" company⁷³⁹. There is no proof of this in the Reversion Decree. In addition, as mentioned by former Governor Gonzales, if at some point he referred to the need for CMMK to fulfill local regulations (what Mr. Gonzales Yutronic interpretes as an "attack" on CMMK⁷⁴⁰), is because "[f]or the Indigenous Communities, it is very important to be certain that foreign companies will not ignore their rights, enshrined in the Constitution and our laws, as well as their customs and traditions"⁷⁴¹. Finally, as discussed above, other transnational companies operate in the area without difficulty, thanks to good management of community relations.

²⁶¹; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID case No. ARB(AF)/04/5, award dated September 21, 2007, par. 202, RLA-151.

⁷³⁷ *Joseph Charles Lemire v. Ukraine*, ICSID case No. ARB/06/18, decision on jurisdiction and responsibility dated January 14, 2010, par. 261, CLA-49.

⁷³⁸ *Joseph Charles Lemire v. Ukraine*, ICSID case No. ARB/06/18, decision on jurisdiction and responsibility dated January 14, 2010, par. 261, (Emphasis added), CLA-49.

⁷³⁹ Statement of Claim, par. 160; Reply, par. 247.

⁷⁴⁰ Gonzales Yutronic II, par. 28, CWS-8.

⁷⁴¹ Gov. Gonzales II, par. 21, RWS-4.

507. Based on the foregoing, Bolivia did not violate its obligations provided for in article 2(1) of the Treaty.
- 5.6 Bolivia did not grant SAS treatment less favorable than that granted to its own nationals**
508. SAS also argues that “*Bolivia treated Claimant’s investments less favorably than the investments of its own investors*”⁷⁴².
509. SAS does not substantiate its claim, devoting it only half a page. SAS merely states that Bolivia would have accepted that “*South American Silver ‘must demonstrate that its foreign nationality motivated the Reversion’*” and that Bolivia would not have denied that it acted against SAS because it was a foreign company⁷⁴³.
510. SAS ignores international law.
511. To demonstrate that the investment was subject to less favorable treatment than that received by a national company, SAS must identify a national company in a similar situation that has been treated differently and more beneficially than SAS. The tribunals invariably require the investor to prove (i) the existence of a comparable national company and (ii) that such company has received better treatment to assess whether there has been a violation of the national treatment obligation⁷⁴⁴. This requirement is not only unanimously accepted by international tribunals, but it also follows clearly from the Treaty provisions.

⁷⁴² Reply, Section V(F).

⁷⁴³ Reply, par. 350.

⁷⁴⁴ *Renée Rose Levy de Levi v. Peru*, ICSID case No. ARB/10/17, award dated February 26, 2014, par. 396, RLA-250; *Champion Trading Company Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID case No. ARB/02/9, award dated October 27, 2006, par. 134, RLA-262; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID case No. ARB/03/29, award dated August 27, 2009, par. 389, RLA-260; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID case No. ARB(AF)/99/1, award dated December 16, 2002, par. 170, RLA-150; *Total S.A. v. Argentina*, ICSID case No. ARB/04/1, decision on responsibility dated December 27, 2010, par. 210, RLA-261; *Archer Daniels Midland Company v. Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID case No. ARB(AF)/04/5, award dated September 21, 2007, par. 202, RLA-151. See, also, *Sabuka Investments BV v. Czech Republic*, UNCITRAL case, partial award dated March 17, 2006, paras. 313, 460, CLA-46; *Nykomb Synergetics Technology Holding AB v. Latvia*, Arbitration Institute of the Stockholm Chamber of Commerce case, award dated December, 2003, par. 4.3.2(a), RLA-259; *CMS Gas Transmission Company v. Argentina*, ICSID case No. ARB/01/8, award dated May 12, 2005, par. 293, CLA-5; *ECE Projektmanagement International GmbH v. Kommanditgesellschaft Panta Achtundsechzigste Grundstücks-Gesellschaft mbH & Co. v. Czech Republic*, PCA case No. 2010-5, award dated September 19, 2013, par. 4.825, RLA-258; *Investment, B.V. v. Czech Republic*, UNCITRAL case, award dated June 26, 2009, par. 415, RLA-249.

512. In this case, there is no company similar to CMMK that has been treated differently and more beneficially than CMMK or SAS.

513. On the other hand, Bolivia categorically denies that it has “nationalized South American Silver’s Malku Khota Mining Concessions, at least in part, because of its status as a foreign company”⁷⁴⁵. Bolivia issued the Reversion Decree due to CMMK’s systematic violations of the human and indigenous rights of the Indigenous Communities directly affected by the Project, as Bolivia has repeated *ad nauseam* in this arbitration.

* * *

514. Therefore, Bolivia, has fulfilled its obligations under the Treaty and international law at all times, with respect to SAS.

6. IF THE TRIBUNAL CONSIDERS (QUOD NOM) THAT BOLIVIA HAS BREACHED ANY OF ITS OBLIGATIONS UNDER THE TREATY, IT SHALL NOTE THAT SAS HAS NOT PROVEN TO HAVE SUFFERED ANY DAMAGES AND, IN ANY CASE, ANY COMPENSATION SHALL BE LIMITED TO THE REIMBURSEMENT OF ITS COSTS

515. Restitution has a very limited application in international law and in addition, in this case, the requirements to grant it are not met. It follows that the Tribunal should outright reject this claim (Section 6.1). SAS has not proven to have suffered any certain damage, supporting its claim for compensation on mere speculation over the future of a Project that was at an early stage (Section 6.2). If, despite this, the Tribunal concludes that Bolivia should compensate SAS, this compensation shall be limited to the reimbursement of the costs incurred in the Project (Section 6.3). RPA and FTI’s analysis are arbitrary and plagued with errors, and must therefore be dismissed (Section 6.4). Any compensation should be calculated as of July 9, 2012 (“Bolivia Valuation Date”) and without considering subsequent events (Section 6.5). Finally, SAS has not proven to have suffered any damage due to other alleged violations other than article 5(1) of the Treaty (Section 6.6).

6.1 SAS acknowledges that restitution has a very limited application in international law and that the requirements for it to be granted are not met

516. Having failed to produce any decision where an international arbitral tribunal has ordered a State to retribute, SAS recognizes that restitution has a very limited

⁷⁴⁵ Reply, par. 351.

application at the international level (Section 6.1.1). In any case, restitution is impossible since it would interfere with Bolivia's sovereignty (Section 6.1.2) and it would impose a completely disproportionate burden on the State (Section 6.1.3), and, therefore, this claim must be rejected.

6.1.1 SAS acknowledges that restitution has a very limited application in international law

517. *In limine*, Bolivia has proven that the Reversion of the Mining Concessions was conducted in accordance with the Treaty and international law⁷⁴⁶. Since, as SAS recognizes, restitution is a remedy that can only be *considered* upon the commission of an unlawful act⁷⁴⁷, this is sufficient for the Tribunal to conclude, without further analysis, that SAS is not entitled to restitution.

518. Even if it is assumed, for purposes of the analysis, that the Reversion of the Mining Concessions was contrary to the Treaty (*quod non*), SAS continues without providing any decision where an international tribunal granted restitution. SAS recognizes, therefore, that this remedy is not applied in practice. This is confirmed, for example, by the tribunal in the *Occidental* case:

*The Tribunal is not aware of any case in which an ICSID tribunal has awarded a request of specific performance against a State [...]*⁷⁴⁸.

519. Given this scenario, SAS argues that it is irrelevant that restitution is "*seldom awarded in practice*" and that in any case, every decision is based on different factual premises⁷⁴⁹. This argument demonstrates the lack of support of what is claimed by SAS. In any case, SAS confirms that – regardless of the different circumstances of each case – international arbitral tribunals agree that restitution has no practical application and is, to say the least, a remedy of unusual character.

520. Although SAS does not mention it, the only case where restitution of an asset was awarded is the recent case of *Bernhard Von Pezold v. Zimbabwe*. This decision,

⁷⁴⁶ Counter-Memorial, Section 6.

⁷⁴⁷ Statement of Claim, par. 167 ("*It is a well-established principle of customary international law that a claimant whose investment has been subject to an unlawful expropriation is entitled to be compensated by means of, first, restitution in kind [...]*").

⁷⁴⁸ *Occidental Petroleum Corporation y Occidental Exploration and Production Company v. Ecuador*, ICSID case No. ARB/06/11, decision on precautionary measures dated August 17, 2007, par. 78, RLA-132.

⁷⁴⁹ Reply, par. 356.

besides being exceptional, is erroneous because it ignores the purpose and importance of sovereignty. Its terse reasoning on this issue confirms this. In any event, the case *Bernhard Von Pezold* is significantly different from this one, for at least *four* reasons:

- First, in the case of *Bernhard Von Pezold*, in order to become effective, restitution only required that the legal title (deed) on the expropriated land be given back, since the claimant were already in possession of the vast majority of the expropriated land (between 59% and 84% of the land was already in the claimant's possession⁷⁵⁰). This is something to which the Tribunal gave much value ("*Especially relevant here is the fact that the Claimants remain in substantial occupation of most of their properties*"⁷⁵¹) and that does not occur in the present case;
- Second, in *Bernhard Von Pezold*, the available evidence suggested that restitution of the *scarce* properties that were *not* in possession of the claimant, would not generate conflicts. The tribunal noted that, to the date of the award, Zimbabwe had already made 4 restitutions of land without difficulty ("*chaos does not appear to have ensued on the four occasions where Zimbabwe has provided for restitution in the past*"⁷⁵²). This situation is significantly different in this case, where there is ample evidence of social conflicts caused by SAS in the Project area⁷⁵³. It is foreseeable that new conflicts would arise if SAS returned to the area;
- Third, in the *Bernhard Von Pezold* case, the third parties who occupied the land either had no titles or deeds or these were precarious (some of them were simple invaders⁷⁵⁴). Therefore restitution would not severely impact the rights of third parties. In this case, on the contrary, the constitutional rights of Indigenous Communities to their lands, their physical integrity, etc., would be directly affected by a hypothetical restitution of the Mining Concessions; and

⁷⁵⁰ *Bernhard Von Pezold and others v. Zimbabwe*, ICSID case No. ARB/10/15, award dated July 28, 2015, par. 728, RLA-239.

⁷⁵¹ *Id.*

⁷⁵² *Id.*, par. 733.

⁷⁵³ See Section 2.3, *supra*.

⁷⁵⁴ *Bernhard Von Pezold and others v. Zimbabwe*, ICSID case No. ARB/10/15, award dated July 28, 2015, par. 730, RLA-239.

Fourth, in *Bernhard Von Pezold*, the identity of the claimant was not a problem for restitution. The claimant was not responsible for abuse, abductions, etc. In this case, the opposite has occurred.

6.1.2 SAS acknowledges that restitution is impossible

521. In its Reply, SAS does not question any of the arbitral decisions which show that – by interfering with state sovereignty – it is *impossible* to force a state to restitute⁷⁵⁵. As the tribunal in *Occidental* noted:

*It is a firmly established principle that when a State, in exercise of its sovereign powers, has terminated a contract or a license, or any other security of a foreign investor, specific compliance should be considered legally impossible*⁷⁵⁶.

522. In view of this, SAS argues that Bolivia only mentions *impossibility* to reject restitution, when – according to article 35(a) of the Articles on State Responsibility – it would be necessary to demonstrate the *material* impossibility⁷⁵⁷. This argument is surprising for two reasons. First, attempting to introduce nuances in the concept of *impossibility* is absurd. The text is binary: it is either impossible or possible. There is no third option. Second, there is no support to classify *impossibility*. In fact, in rejecting the restitutive claims, the decisions cited by Bolivia (and not contested by SAS) simply refer to the existence of an impossibility or, at most, mention a legal impossibility⁷⁵⁸. Prof. Crawford, repeatedly quoted by SAS, only mentions *impossibility*, without qualification. Third, regardless of the name used, international case law is unanimous in saying that, by interfering with sovereignty, restitution is impossible.

523. Even if it is considered to be legally possible to order a sovereign State to restitute (*quod non*), Bolivia has proven that – in the present case – such restitution would be *factually* impossible given the opposition to SAS in the Project area. The Tribunal cannot ignore the serious social conflicts that SAS generated while in the area of

⁷⁵⁵ Counter-Memorial, Section 7.1.2.

⁷⁵⁶ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, ICSID case No. ARB/06/11, decision on precautionary measures dated August 17, 2007, par. 79 (Emphasis added), RLA-132. See, also, *BP Exploration Company (Libya) Limited v. Libya*, award dated August 1, 1974, pg. 354, RLA-129.

⁷⁵⁷ Reply, par. 359.

⁷⁵⁸ See, for example, *Libyan American Oil company (LIAMCO) v. Libya*, award dated April 12, 1977, 20 I.L.M., 1981, pg. 124, RLA-133; *Occidental Petroleum Corporation y Occidental Exploration and Production Company v. Ecuador*, ICSID case No. ARB/06/11, decision on precautionary measures dated August 17, 2007, par. 79, RLA-132.

Mallku Khota (which, among others, led to a protest into La Paz⁷⁵⁹) and the risk of further clashes occurring if SAS came back to the area. As recognized by international case law, this Tribunal cannot ignore the social reality of the Project⁷⁶⁰.

6.1.3 SAS acknowledges that restitution would impose a disproportionate burden on Bolivia

524. Article 35(b) of the Articles on State Responsibility establishes as second (cumulative) condition in order for restitution to proceed, that such restitution does not impose a *“totally disproportionate burden in relation to the benefit deriving from restitution instead of compensation”*⁷⁶¹.

525. Preliminarily, it should be noted that that provision contains, in turn, two important conditions. The *first*: that restitution is objectively more beneficial than compensation. The *second*: that the burden represented by restitution is not disproportionate to that extra benefit. None of these conditions is met in this case.

526. *First*, restitution would not grant SAS an additional benefit in relation to compensation. In fact, SAS itself states that the compensation would allow to erase *“all the effects of the expropriation”*⁷⁶². SAS admits, therefore, that restitution would not entail any additional benefit. This is sufficient for the Tribunal to reject this claim. Two additional reasons confirm this. On the one hand, Prof. Dagdelen shows (and SAS’ experts agree) that *“very few identified mineralized targets ever advance through the feasibility stage to operations because their technical, economic, environmental and/or social viability cannot be established”*⁷⁶³. The Project is in an exploration phase (incomplete and paralyzed since the Reversion) and there is no certainty that it can resume. On the other hand, as explained in section 6.2.1.3, below,

⁷⁵⁹ Counter-Memorial, Sections 3.5 and 3.6; Statement of Claim, par. 67.

⁷⁶⁰ As indicated in the case of *CMS v. Argentina* “[i]n a situation such as that characterizing this dispute and the complex issues associated with the crisis in Argentina, it would be utterly unrealistic for the Tribunal to order the Respondent to turn back to the regulatory framework existing before the emergency measures were adopted, nor has this been requested. However, as the Tribunal has repeatedly stated in this Award, the crisis cannot be ignored [...]” (*CMS Gas Transmission Company v. The Argentine Republic*, ICSID case No. ARB/01/8, award dated May 12, 2005, par. 406 (Emphasis added), CLA-5).

⁷⁶¹ UN International Law Committee, *Draft of articles on the responsibility of the State for internationally unlawful events, with comments*, 2001, art. 35(b) (Emphasis added), RLA-159.

⁷⁶² Statement of Claim, par. 183.

⁷⁶³ Dagdelen I, par. 32, RER-2.

by violating the rights of the Indigenous Communities, damaging their resources and the environment, no institution would have agreed to fund the Project.

527. *Second*, SAS has not disputed any of the decisions that demonstrate that it would be disproportionate – as well as impossible – to interfere with the sovereignty of a State when the damage allegedly caused can be compensated through compensation⁷⁶⁴. SAS does not show, therefore, that the second condition of Article 35(b) is met in this case.

528. The disproportionate burden that restitution would generate is also confirmed by the social chaos that prevailed while SAS was in the Project area. Bolivia and the Indigenous Communities would face serious security risks if the Tribunal would allow SAS to return to Malku Khota.

529. Based on the foregoing, the Tribunal must reject SAS' restitutionary claims.

530. Finally, FTI's analysis of the *denied* scenario for restitution is erroneous and incomplete. FTI recognizes to not have considered factors that have a direct impact on the valuation of the Project⁷⁶⁵, and admits that "we have not performed a full valuation as of the date of assumed restitution"⁷⁶⁶. Consequently, FTI's valuation should be dismissed by the Tribunal.

6.2 The damages claimed by SAS are hypothetical and, even if any existed (quod non), Bolivia did not cause them

531. SAS has not proven that the Reversion of the Mining Concessions may have caused any certain damages. In fact, although its claim for damages is based on the premise that the Project had a promising future and would have been economically viable, SAS does not provide any evidence of this (Section 6.2.1).

532. In any case, Bolivia has demonstrated that SAS, CMMK, and its staff, violated the rights of Indigenous Communities in various ways, which caused a serious social

⁷⁶⁴ Counter-Memorial, Section 7.1.3.

⁷⁶⁵ FTI II, par. 8.6 ("The Brazil Report cites a number of other inputs that may impact the value of the Project such as commodity prices, construction costs, operating costs, fiscal and regulatory regimes, and community relations. While these factors would impact the Project's FMV and differ between the 'bus for' case and the delay case contemplated in the restitution scenario, incorporating the impact of the changes in these variables would require one to conduct a full valuation as of a current date. This was beyond the scope of valuation we were asked to consider") (Emphasis added), CER-4.

⁷⁶⁶ FTI II, par. 8.7, CER-4.

conflict in the Project area. As the dominant cause of any alleged damage was the negligent behavior of SAS, it has no right to be compensated (Section 6.2.2).

6.2.1 SAS has still not proven that its damages are certain

533. In the Counter-Memorial, Bolivia demonstrated that in international law, (i) an unlawful act only creates an obligation to compensate if the victim can prove that it suffered some damage; and (ii) the burden of proving the existence of such damage falls on *that who claims it*⁷⁶⁷. SAS does not question any of these principles in its Reply but maintains its claim.
534. After making some *preliminary comments*, Bolivia will prove that SAS has not proven to have sustained any damage in so far as (i) the mineral resource estimate by RPA is erroneous and, in any case, there were no mineral reserves in the Project (Section 6.2.1.1); (ii) the metallurgical process (the “Metallurgical Process”) is not complete or has been shown to work (among other things, the Metallurgical Process was designed based on *synthetic* laboratory samples and has no precedent in the mining sector) (Section 6.2.1.2); (iii) due to the violations of indigenous and human rights of members of the Indigenous Communities, the Project would have never been funded (Section 6.2.1.3); and (iv) in any case, the Project could not have been developed due to the existing social opposition (Section 6.2.1.4).
535. Bolivia makes *three* preliminary comments.
536. *First*, in the Counter-Memorial, Bolivia quoted publications of SASC that recognized the speculative nature of the PEA and that its contents could materially differ from reality⁷⁶⁸. SAS has not challenged the speculative nature of the PEA. In fact, expert Cooper acknowledges that “[e]ven when an initial discovery of interesting mineralization has been made, less than 1 in 10,000 of those deposits makes to the mine status”⁷⁶⁹. SAS ignores the testimony of its own expert in its claim for damages by ignoring the excessively speculative nature of its claim.
537. *Second*, SAS has not provided any evidence that, as of the date of the Reversion, “*prefeasibility level work was well underway*”⁷⁷⁰. On the contrary, since the PEA

⁷⁶⁷ Counter-Memorial, Sections 7.2.1 and 7.2.2.

⁷⁶⁸ Counter-Memorial, paras. 553-554.

⁷⁶⁹ Cooper, par. 36, CER-3.

⁷⁷⁰ Reply, par. 25.

2011 was published in May 2011 and the Project was suspended during 2011⁷⁷¹, the beginning of the prefeasibility study (which normally starts after the publication of the PEA) could not have been more than *nominal* until the Reversion in mid-2012.

538. *Third*, in his first expert report, Prof. Dagdelen explained that it takes about 15 to 20 years – since the discovery of a mineral deposit – for a project to reach the production stage (if it ever reaches it)⁷⁷². Therefore, the Malku Khota operation is not a certain event, and not even a predictable event (it is mere speculation).
539. RPA denies this, pointing out that the average time from a *mining discovery* up to the “start up” of a mine is 7.7 years⁷⁷³. This is false and, even if was correct, shows how uncertain and speculative the alleged damages are.
540. Actually, RPA calculations do not start from the date of the *mining discovery* but rather in later stages, which obviously reduces the time limits. Just to mention a few examples:
- RPA states that the discovery of the mineral deposit of the Gualcamayo project would have occurred in 1997⁷⁷⁴. However, as indicated by the updated technical report of said project “[g]old mineralization at Gualcamayo was discovered in 1980 by Mincorp Exploration S.A.”⁷⁷⁵. 28 years passed since the mining discovery (and not 11 as RPA indicates) until the start of production in 2008.
 - RPA states that the discovery of the mineral deposit of the Maricunga project would have occurred in 1988⁷⁷⁶. However, as indicated by the technical report of said project, “David Thomson and Mario Hernandez discovered gold mineralization at Maricunga in 1984”⁷⁷⁷. Given that

⁷⁷¹ Reply, par. 89 (“On December 22, 2010, the Company decided to temporarily suspend CMMK’s operations [...]”).

⁷⁷² Dagdelen I, par. 33, RER-2.

⁷⁷³ RPA II, pg. 5-14, CER-5.

⁷⁷⁴ RPA II, Table 5-2, pg. 5-14, CER-5.

⁷⁷⁵ Updated Technical Report of the Gualcamayo Project dated February 27, 2009, pg. 16, R-219.

⁷⁷⁶ RPA II, Table 5-2, pg. 5-15, CER-5.

⁷⁷⁷ Technical Report of the Maricunga Project dated December 31, 2007, pg. 29, R-220.

production in the mine started in 1996, 12 years passed since the mining discovery (and not 8, as indicated by RPA).

541. RPA also incorrectly computes the time frames of Bolivian mining projects since it considers dates after the mining discovery (e.g. date of the first mineral resource estimate and scoping study) and prior to the beginning of production⁷⁷⁸. When time limits are calculated based on the milestones proposed by Prof. Dagdelen, periods are considerably higher than those reported by RPA.
542. The Project's own experience shows that RPA's assertion regarding the time it would take to start production is false. In fact, (i) witness Fitch explains that SASC would have discovered the deposit of the mining Project in 2003, when several Mining Concessions were acquired and CMMK was created⁷⁷⁹; and (ii) the PEA 2011 envisaged that the project would start production in late 2015⁷⁸⁰. Taking these dates, the period from the mining discovery to start of production would be of 13 years (excluding, of course, contingencies).
- 6.2.1.1 *RPA's mineral resource estimate (based on the PEA 2011) is erroneous and, in any case, SAS admits that there are no mineral reserves in the Project*
543. Before analyzing the uncertainties and inaccuracies of the PEA 2011 and RPA's mineral resource estimate, Bolivia must make two preliminary comments.
544. *First*, while assessing the reasonableness of the resource estimate presented in the PEA 2011 (taken by RPA as the basis), the Tribunal must consider that SASC (now Trimetals) has been recently sanctioned by the *British Columbia Securities Commission* ("BCSC")⁷⁸¹ for having published estimates of mineral resources that are inaccurate and in violation of *National Instrument 43-101* (the "NI 43-101") regarding the Gold Spring mining project. NI 43-101 establishes the rules to be met by companies listed in Canada's stock exchange in order to inform the market about

⁷⁷⁸ RPA II, pg. 5-14, CER-5.

⁷⁷⁹ Fitch, paras. 12-13, CWS-1.

⁷⁸⁰ *Preliminary Economic Assessment Update Technical Report for the Malku Khoya Project* dated May 10, 2011, pg. 150, C-14.

⁷⁸¹ The BCSC is the entity responsible for ensuring investor protection and market integrity of Canadian capital. As part of its mission, the BCSC reviews some of the technical reports published by junior mining companies, as was the case of the PEA published by SASC regarding the Gold Springs project.

their companies' mining projects. Since June 4, 2014, the BCSC placed SASC on its list of companies non-compliant with the NI 43-101⁷⁸².

545. *Second*, it is striking that in its second expert report (the "Second RPA Report"), RPA casts doubt upon the ability of Prof. Dagdelen to perform a mineral resource estimate because he would have been assisted by Mr. Thomas Mathews ("Mathews")⁷⁸³. Prof. Dagdelen's credentials, which include having over 30 years of international experience in the mining industry, having directed the Department of Mining Engineering at the prestigious Colorado School of Mines, having written over 40 scientific publications on topics of his specialty (including estimation of mineral resources and reserves) and being a member of the Board of Directors of Randgold Resources (an internationally renowned mining company), leave no doubt regarding his experience in the estimation of mineral resources and reserves. Notwithstanding the foregoing, Prof. Dagdelen explained that he requested Mathews' assistance because the computer located in the Data Room did not have the *MineSight* software (used by Prof. Dagdelen to conduct its mineral resource estimates) but only the *GEMCOM* software⁷⁸⁴. In this sense, it is not an issue of *capacity* from Prof. Dagdelen, but of the *means* provided by SAS for Bolivia's independent experts to conduct their mineral resources estimate. In any event, at the hearing, Prof. Dagdelen will have the opportunity to explain in detail, as mentioned in his second report, the steps he has taken and the reliability of his findings and conclusions.
546. There are several proofs that the mineral resource estimate presented in the PEA 2011 (and on which RPA bases its conclusion) is inaccurate.
547. First, as shown by Prof. Dagdelen in his second expert report, the estimation of mineral resources in the PEA 2011 (and which RPA takes as a basis) is unreliable and exaggerated. In fact, the PEA 2011 overestimates the resources indicated in [REDACTED] million tons and underestimates the *inferred* resources in [REDACTED] million tons⁷⁸⁵. This is relevant because there is no certainty that the *inferred* resources actually exist and

⁷⁸² See, for example, e-mails exchanged by SASC and the BCSC dated June 2, 2014 to June 4, 2014, R-221.

⁷⁸³ RPA II, pg. 5-3, CER-5.

⁷⁸⁴ Dagdelen II, par. 4, RER-4.

⁷⁸⁵ Dagdelen II, par. 10, RER-4.

therefore, in a valuation, they cannot be considered equivalent the *indicated* or *measured* resources. As Prof. Dagdelen explains:

*The overstatement of tons in the Indicated category, and understatement of tons in the Inferred category, are significant and further make it difficult to determine the potential size of the deposit. Although the viability of the Project cannot be analyzed at the level of a PEA, any such analysis would be impacted by these inaccurate estimates*⁷⁸⁶.

548. The Resource estimate by Prof. Dagdelen also reveals other exaggerations in the PEA 2011 (for example, in the level of concentration of metals in the mineral resources of the Project, which is directly related to the economic viability of a possible mine⁷⁸⁷). Therefore, as Prof. Dagdelen explains:

*Thus, it is not accurate to say that my 'Mineral Resource estimate is not materially different to that in the 2011 PEA Update reviewed by RPA and used for RPA's valuation'. The material differences between both resource estimates become apparent when the individual categories of resource classification are compared*⁷⁸⁸.

549. Second, as explained by Bolivia in its Counter-Memorial⁷⁸⁹ and accepted by SAS, more than ■% of all mineral resources of the Project are *inferred*. This percentage rises to ■% after repositioning the *indicated* resources (overestimated, as indicated above) in the category of *inferred* resources. *Inferred* resources are “*that part of a Mineral Resource for which quantity and grade or quality can be estimated on the basis of geological evidence and limited sampling and reasonably assumed, but not verified, geological and grade continuity*”⁷⁹⁰. Arbitration case law recognizes that said *inferred* resources “*have the 'lowest level of geological confidence'*”⁷⁹¹ and therefore, most likely do not exist (“*inferred resources simply may not be in the*

⁷⁸⁶ Dagdelen I, par. 81, RER-2.

⁷⁸⁷ Dagdelen II, par. 10, RER-4.

⁷⁸⁸ Dagdelen II, par. 10, RER-4. For the same reason, it is false that “*Bolivia's experts do not disagree that there is a significant mineral resource at Malku Khota*” (Reply, par. 387).

⁷⁸⁹ Counter-Memorial, par. 559.

⁷⁹⁰ Dagdelen I, par. 18 (Emphasis added), RER-2.

⁷⁹¹ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID case No. ARB(AF)/09/01, award dated September 22, 2014, par. 780, RLA-27.

ground”⁷⁹²). This was confirmed by the PEA 2011⁷⁹³ and Canadian standards by providing that any communication to the market regarding *inferred* resources should include “*cautionary language*”⁷⁹⁴. This has a fundamental impact on the size of the mineral deposit estimated by the PEA 2011 and used for purposes of valuation by RPA. It is simply absurd to postulate – as RPA does – that (i) *inferred* resources should be treated in the same way as *indicated* and *measured* mineral resources⁷⁹⁵; or (ii) that the reclassification of [REDACTED] million tons of *indicated* resources in the category of *inferred* resources is irrelevant for valuation purposes⁷⁹⁶.

550. Third, as Prof. Dagdelen explains, RPA artificially increases the amount of mineral resources of the Project by using an excessively low *cut-off grade*.
551. The cut-off grade reflects the minimum concentration of metal required in a ton of mineralized material so that ton has a positive economic value. If that ton does not reach the cut-off grade, then it is not an “*ore*” and should be considered as “*waste*”. Only when a ton of mineralized material has a higher level of concentration than the cut-off grade can it be classified as part of the mineral resources. As Prof. Dagdelen explains: “*It is best practice to use economic cutoff grade for [estimation of] the in-situ resources as well*”⁷⁹⁷.
552. RPA estimates the Project’s mineral resources by using a cut-off grade of only 10 grams per ton (“*silver equivalent*”)⁷⁹⁸, which is extremely low and artificially inflates the amount of mineral resources of the Project. RPA has no justification whatsoever to use such a low cut-off grade. In fact, at the Bolivia’s Request for Document Production so SAS could communicate “*the documents and studies that justify the*

⁷⁹² Brattle II, par. 132, RER-5.

⁷⁹³ *Preliminary Economic Assessment Update Technical Report for the Malku Khota Project* of May 10, 2011, pg. 14 (“*This PEA is preliminary in nature and includes inferred mineral resources that are considered too speculative geologically [...]*”), C-14.

⁷⁹⁴ Counter-Memorial, par. 553.

⁷⁹⁵ Equally absurd is to postulate, as RPA does, that for not equating and valuing in the same way inferred, indicated and measured mineral resources, Prof. Dagdelen “*has no expertise and experience in the valuation of a property by any other method than the Income Approach using a DCF analysis*” (RPA II, pág. 5-2, CER-5). In fact, as part of its obligations in the Board of Directors of Randgold Resources, Prof. Dagdelen frequently reviews valuations of mining projects (Dagdelen II, par. 3, RER-4).

⁷⁹⁶ Dagdelen I, par. 80, RER-2.

⁷⁹⁷ Dagdelen I, par. 82, RER-2.

⁷⁹⁸ RPA II, pgs. 5-6 and 5-7, CER-5.

estimate of the mineral deposit (in-pit resources) using a 10 grams per ton silver equivalent cut-off grade, SAS responded that “*Claimant is not aware of the existence of any document responsive to Bolivia’s request and RPA did not review or prepare any document responsive to Bolivia’s request*”⁷⁹⁹. As demonstrated by Dagdelen’s Second Report, the cut-off grade is determined based on calculations that take as a basis the value of mineralized material, the costs of processing the “*ore*” (among other costs), metallurgical recovery rates, etc.⁸⁰⁰. It is therefore outrageous (and proof of the arbitrariness of its resource estimate) that RPA has no document justifying the use of a cut-off grade of 10 grams per tone (“*silver equivalent*”).

553. Prof. Dagdelen has calculated the minimum cut-off grade applicable to the Project, which is equivalent to 20.4 grams per ton (“*silver equivalent*”). In having used a lower cut-off grade, RPA artificially inflated the mineral resources of the Project. The contrast in the number of *inferred*, *indicated* and *measured* resources calculated by Prof. Dagdelen under a cut-off grade of 10 and 20 grams per ton is shown in Tables 1 and 2 below⁸⁰¹:

Table 1: Prof. Dagdelen’s Model – cut-off grade of 10 grams per ton (*silver equivalent*)

⁷⁹⁹ Tribunal decisions on Requests of Documentation of Bolivia dated July 7, 2015, as well as Procedural Order No. 7

⁸⁰⁰ Dagdelen II, Section 4.1.2, RER-4.

⁸⁰¹ Dagdelen II, Tables 1 and 2, par. 76, RER-4.

	Expert Model						Grade, g/t				Tonnage			
	Tonnes (x1000)	Tonnes (millions)	Ag gpt	In gpt	Ag MoZ	In Tonnes	Cu	Pb	Zn	Ga	Cu (Mlb)	Pb (Mlb)	Zn (Mlb)	Ga (Mlb)
Limona														
Measured														
Indicated														
Inferred														
Wara Wara														
Measured														
Indicated														
Inferred														
Suze														
Measured														
Indicated														
Inferred														
Combined														
Measured														
Indicated														
Inferred														

Table 2: Prof. Dagdelen's Model – cut-off grade of 20 grams per ton (silver equivalent)

	Expert Model						Grade, g/t				Tonnage			
	Tonnes (x1000)	Tonnes (millions)	Ag gpt	In gpt	Ag MoZ	In Tonnes	Cu	Pb	Zn	Ga	Cu (Mlb)	Pb (Mlb)	Zn (Mlb)	Ga (Mlb)
Limona														
Measured														
Indicated														
Inferred														
Wara Wara														
Measured														
Indicated														
Inferred														
Suze														
Measured														
Indicated														
Inferred														
Combined														
Measured														
Indicated														
Inferred														

554. On the other hand, it is important to note that the cut-off grade (being the balance between income and costs) depends heavily on costs. By reducing costs, *ceteris paribus*, the cut-off grade is reduced and those tons that were previously "waste" become considered "ore". This explains the importance of analyzing the costs of the

Project and SAS' incentive to ignore in its analysis, before this Tribunal, the items that suggest very high costs.

555. For example, as explained by Profs. Dagdelen and Taylor, assuming it would work (*quod non*), the Metallurgical Process proposed by SAS would significantly increase capital and operation expenses (costs) of the Project. This can be explained because, as the Metallurgical Process is a new and very complex technology, its implementation would require constant adjustments to the process, and hiring specially qualified personnel, etc.⁸⁰².
556. The Project's costs would also be higher (and the cut-off grade higher as well) by excluding the \$144 million that the PEA 2011 attributed to nonexistent gold grades. Bolivia requested SAS, in its Document Production Request, to produce "*Documents and studies relating to the existence of gold grades*", but SAS did not provide Bolivia with any information⁸⁰³. RPA recognizes that "*the level of basic data is insufficient to estimate gold grade in the Mineral Resource*" and thus that gold grades should not have been considered in the PEA 2011⁸⁰⁴.
557. Since, according to the above, the Project's capital and operation costs would be foreseeably higher than expected in the PEA 2011, Prof. Dagdelen has estimated that the appropriate cut-off grade in this case could be 30 grams per ton⁸⁰⁵. When using a lower cut-off grade, the PEA 2011 (and RPA, which based itself on said document) considerably inflated the Project's mineral resources. It is sufficient to compare the mineral resources calculated by Prof. Dagdelen with a cutoff grade of 30 grams per ton (see Table 3 below⁸⁰⁶) with those derived from Tables 1 and 2 (see Table 4 below) to confirm the large difference in the number of mineral resources resulting from the use of different cut-off grades:

Table 3: Prof. Dagdelen's Model – cut-off grade of 30 grams per ton (silver equivalent)

⁸⁰² Taylor, par. 31, RER-6.

⁸⁰³ See *Redfern* Chart with Tribunal decisions on Bolivia's Request for Document Production dated July 7, 2015, as well as Procedural Order No. 7.

⁸⁰⁴ RPA II, pg. 5-9, CER-5.

⁸⁰⁵ Dagdelen II, par. 75, RER-4.

⁸⁰⁶ Dagdelen II, Table 3, par. 76, RER-4.

	Expert Model 30 gpt AgEq Cutoff				Expert Model 20 gpt AgEq Cutoff				Expert Model 10 gpt AgEq Cutoff			
	Ag gpt	In gpt	AgEq gpt	In Tons (M)	Cu	Pb	Zn	Ga	Cu (Mto)	Pb (Mto)	Zn (Mto)	Ga (Mto)
Combined												
Measured												
Indicated												
Inferred												

Table 4: Comparative Table of Mineral Resources estimated by Prof. Dagdelen under cut-off grades of 10, 20 and 30 grams per ton (silver equivalent)

	30 grams/ton (AgEq) Cutoff	20 grams/ton (AgEq) Cutoff	10 grams/ton (AgEq) Cutoff
Measured (MM tons)			
Indicated (MM tons)			
Inferred (MM tons)			
Combined (MM tons)			

558. As shown in Table 4, there are significant differences between the *estimated* mineral resources under different *cutoff grades*:

- While with a cut off grade of 30 grams per ton the Project would have [redacted] million tons of *indicated* resources; with a cutoff grade of 10 grams per ton the Project would have [redacted] million tons (i.e. [redacted] % more);
- While with a cut off grade of 30 grams per ton the Project would have [redacted] million tons of *measured* resources; with a cutoff grade of 10 grams per ton the Project would have [redacted] million tons (i.e. [redacted] % more); and
- While with a cut off grade of 30 grams per ton the Project would have [redacted] million tons of *inferred* resources (that probably do not exist); with a cutoff grade of 10 grams per ton the Project would have [redacted] million tons (i.e. [redacted] % more);

559. These calculations reflect the Project's *estimated* mineral resources (*i.e. in-situ resources*). To determine which of these *estimates* could be economically extractable, it is necessary to conduct a *pit-limit analysis*. As explained by Prof. Dagdelen: "*Pit limit analysis intends to replicate the economic analysis of mineability of the resource*"⁸⁰⁷. Said analysis, allows to "*determine what proportion of the in-situ mineral resource may be mineable*" it is necessary because "*[a] significant portion of the mineral resources [...] may not be mined due to the fact that they are overlain by significant quantities of waste rock.*"⁸⁰⁸.

560. Unlike RPA, Prof. Dagdelen did conduct a *pit-limit analysis* and, with a cut-off grade of 20 grams per ton (*silver equivalent*), he estimated that the *in-pit resources* of the Project are as follows⁸⁰⁹:

Measured, Indicated and Inferred pit shell using PEA PIT Parameters (No Au Credit)

	Tonnes (Mt)	kg Grade	IN Grade	AgEq (kg)	In Tonnes	Grade, g/t			
						Cu	Pb	Zn	Ag
Measured									
Indicated									
Inferred									
Combined									

561. The difference between the (*in-situ*) *estimated* mineral resources and *in-pit resources* is significant. Using the same cut-off grade of 20 grams per ton, the *in-pit resources* (combined: [redacted] million tons) are less than half of the (combined: [redacted] million tons⁸¹⁰) *estimated* mineral resources. The amount of *in-pit resources* would be even lower with a cut-off grade of 30 grams per ton. This *pit-limit analysis*, as mentioned above, has not been conducted by RPA.

562. The Tribunal should not lose sight that the fact that there are *in-pit resources* does not guarantee that its extraction is economically viable. This will depend on whether the projected revenues (which will depend on the actual size of the mineral deposit, performance of the Metallurgical Process, metal extraction rates and metal pricing) can cover all the costs of implementing the mining project (costs of economic, social

⁸⁰⁷ Dagdelen I, footnote 49, RER-2.

⁸⁰⁸ Dagdelen I, par. 83, RER-2.

⁸⁰⁹ Dagdelen I, Table 3, par. 85, RER-2. RPA did not calculate the Project's *in-pit resources*.

⁸¹⁰ See Table 4, *supra*.

and environmental studies, costs of designing and building the metallurgical treatment plant⁸¹¹, and the mine's operating⁸¹²).

563. Lastly, the fact that the Project has only one scoping study is not under dispute, scoping study that does not measure with a reasonable degree of certainty the foreseeable revenue or costs. For this reason, as explained by Bolivia in the Counter-Memorial⁸¹³, the Project has no mineral reserves, defined as:

*[T]he economically mineable part of a Measured and/or Indicated Mineral Resource as defined by studies at Pre-Feasibility or Feasibility level that include application of Modifying Factors (these include, but are not restricted to, mining, processing, metallurgical, infrastructure, economic, marketing, legal, environmental, social and governmental factors)*⁸¹⁴.

564. Based on the foregoing, there can be no doubt over the level of uncertainty regarding the possibility to economically extract mineral resources from the Project. As Bolivia has proven, the mineral resource estimate by RPA is inflated, it is composed by more than ■% for *inferred* mineral resources, has much less *in-pit* resources than those claimed by the PEA 2011 and has no mineral reserves.

6.2.1.2 *The Metallurgical Process is not complete and has never been used on an industrial scale, so it is not proven that it works*

565. Prof. Patrick Taylor ("Prof. Taylor") describes the actual state of the Metallurgical Process that SAS intends to use in the Project. Prof. Taylor is a George S. Ansell Distinguished Professor of Chemical Metallurgy at the prestigious Colorado School of Mines⁸¹⁵. He specializes in extractive metallurgical processes and mineral processing. In addition to his academic background (with more than 140 scientific publications), Prof. Taylor provides consulting services, since 1979, to some of the largest mining companies in the world, including Newmont, Gold Resources, and

⁸¹¹ As explained by Prof. Taylor, "[t]he metallurgical processing plant represents the most significant factor in capital and operating costs for almost all mining operations" (Taylor, par. 28, RER-6).

⁸¹² Dagdelen II, par. 44, RER-4.

⁸¹³ Answer, paras. 555-558.

⁸¹⁴ RPA II, pg. 3-2, CER-5.

⁸¹⁵ Taylor, par. 2, RER-6.

Atlantis Mining. To date, Prof. Taylor has invented and registered 9 metallurgical patents in the United States and has one (additional) under evaluation⁸¹⁶.

566. Prof. Taylor agrees with all the experts in that – to have only one *scoping study* – the Project is at an early stage, characterized by speculation and a high level of uncertainty⁸¹⁷.
567. As Prof. Taylor explains, there are multiple reasons why there is no certainty that the Metallurgical Process could work in the Project. On the contrary, there are many doubts regarding its viability. This is relevant mainly because RPA and FTI's calculations "*assumed that the acid-chloride heap leach process would work and be commercially viable*"⁸¹⁸. In fact, RPA and FTI make *no* adjustment in their valuations to reflect the uncertainty of the Metallurgical Process and the possible extra costs that it can generate.
568. *First*, the Metallurgical Process has no precedent in the mining sector. RPA implicitly recognizes this by stating that "*[t]he individual components of the metals recovery have all been proven in other operations, however, to the best of RPA's knowledge, they have not been combined sequentially in a commercial application*"⁸¹⁹. Prof. Taylor shows the risks of using new technologies in the mining industry. In fact, several mining projects have failed or resulted exponentially more expensive with the use of new technologies. As Prof. Taylor says: "*There are many examples in the mining industry where new technology has led to economic underperformance and/or failure*"⁸²⁰. The PEA 2011 recognizes the risk that the metallurgical process does not work⁸²¹, and SASC itself has noted that "*it is conceivable that there may be a mixed process employing both cyanide and the acid chloride leach methods*"⁸²².

⁸¹⁶ *Id.*, paras. 1-3.

⁸¹⁷ *Id.*, par. 16.

⁸¹⁸ Brattle II, par. 53, RER-5.

⁸¹⁹ RPA I, pg. 10-5 (Emphasis added), CEB-2.

⁸²⁰ Taylor, par. 40, RER-6.

⁸²¹ Brattle II, par. 112 ("*the Updated PEA considered two cases in its evaluation of the property, a base-case with recovery of indium and gallium and a fallback case without, 'in the event that the acid-chloride leach option proves not to be viable'*"), RER-5. See, also, *Preliminary Economic Assessment Update Technical Report for the Malku Khota Project* dated May 10, 2011, Sections 1.4 and 1.8, C-14.

⁸²² Minute of the Board of SASC dated August 12, 2009, pg. 3, R-203.

569. *Second*, since it is at an early stage, the Metallurgical Process has not been tested in a pilot plant, which means that *“the risks in making the operation work are significant”*⁸²³. As Prof. Taylor explains, *“this is very important for new technology as the various unit operations are operated in series and an upset in one part of the process affects everything downstream”*⁸²⁴.
570. *Third*, the Metallurgical Process has not been fully tested in the Project’s minerals, but in *synthetic* samples created in the laboratory. There is, therefore, no certainty on how the metallurgical process will react when applied to *real* samples. As Prof. Taylor explains, *“this testing based on synthetic solutions’ samples could very well lead to incorrect conclusions regarding the behavior of the real solutions during the metal recovery step in operations”*⁸²⁵.
571. *Fourth*, the Metallurgical Process is particularly *complex* due to its 9 “*sequential steps*” (described in a flow sheet) that should work in coordination, feeding each other, which significantly increases the risk of failure. As Prof. Taylor explains; *“[a] flow sheet with so many (nine) separate, co-dependent, unit operations is also unique. Tying all of these separate unit operations into one continuous flow sheet provides an argument for both it being new and unique (thus, the patent) and for adding significant risk to the potential profitability”*⁸²⁶.
572. *Fifth*, the financial analysts used by FTI recognize that there are serious doubts regarding the viability of the Metallurgical Process. For example, the notes of the conversation between FTI and RedChip’s Director of Research, Tom Pfister, show how the latter indicated that *“[t]he newness of the processing methodology was what gave him [SASC’s CEO] pause”* regarding the viability of the Project⁸²⁷.
573. For all of the above, contrary to the assumptions by RPA and FTI, there is no certainty that the metallurgical process could work in the Project. This lack of evidence should lead the Tribunal to conclude that SAS shows no true damage.

⁸²³ Taylor, par. 44(3), RER-6.

⁸²⁴ Taylor, par. 44(3), RER-6.

⁸²⁵ Taylor, par. 44(1), RER-6.

⁸²⁶ Taylor, par. 44(2), RER-6.

⁸²⁷ Conversation notes between FTI and Tom Pfister (Redchip) dated October 20, 2015, pg. 14 (transcription), R-222.

574. Even assuming that the Metallurgical Process would work (*quod non*), there is no certainty that the Project would be profitable because (i) there is great uncertainty about the recovery percentages of metals allowed by the Metallurgical Process and (ii) the PEA 2011 fails to consider very significant costs of the Project:

- First, tests conducted by SGS (linked to the operation of the metallurgical process in *synthetic* laboratory samples) demonstrate that there are serious doubts about the recoveries of metals. The percentage of recovery is a function, as explained by Prof. Taylor, with two main variables: size of fragmentation of “ore” and leaching time (the smaller the size and the longer the time, better recovery, and vice versa). These two variables, in turn, have a great economic impact: the smaller the size, higher cost of processing and the longer the time, lower plant productivity, *ceteris paribus*⁸²⁸. To quote some of the questions that exist:

*Were the leach recoveries obtained from bench scale tests, done on certain fragmentation size and leach durations, representative of the results expected from the crush size assumed in the PEA 2011? The crush sizes assumed in the PEA 2011 appear to be much larger, and the leach durations assumed in the PEA 2011 appear to be much shorter than those considered in the bench scale tests, which might result in significantly lower leach recoveries for silver and indium than those projected in the PEA 2011*⁸²⁹.

- Second, contrary to what is recommended in the industry, the PEA 2011 does not consider extra costs and delays expected to result from the use of *new* technology which viability has not been proved⁸³⁰; and
- Third, the PEA 2011 does not consider the need to refine the indium and therefore, transportation costs and refining by third parties or the cost of construction of an indium refinery plant in the Project area. Given the high costs involved in refining indium (either by third parties or by building an own plant) and the low concentration of indium estimated by SAS in the resulting solution of the Metallurgical Process (█% In)⁸³¹, extraction of indium would probably not be profitable. However, the PEA 2011 assumes that “*the mine is anticipated*

⁸²⁸ Taylor, paras. 24-26, RER-6.

⁸²⁹ *Id.*, par. 47(b).

⁸³⁰ *Id.*, par. 37.

⁸³¹ *Id.*, par. 44(6).

to produce approximately 80 tonnes of indium⁸³² per year, at a value of US\$ 500 per kilogram⁸³³.

575. Given the high risk that the metallurgical process does not work or, in any case, that its use is not profitable, it cannot be considered that SAS has proven to have suffered damages.

6.2.1.3 *Given the violations of the rights of members of the Indigenous Communities, the Project would never have been funded*

576. In his first expert report, Prof. Dagdelen explained the various phases of a mining project before starting production (if that ever happens)⁸³⁴. One such step is to obtain funding to develop the Project. It is not disputed that, without external funding, SAS could not build, much less operate a mine in Malku Khota. As recognized by SASC itself, “[t]he Company is not in commercial production on any of its mineral properties and, accordingly, it does not generate cash from operations. The Company is dependent on raising additional financing”⁸³⁵.

577. There are two reasons why SASC could not have obtained financing to develop the Project.

578. *First, as a condition to grant financing, financial institutions require that mining projects respect the rights of indigenous communities, preserve their resources and the environment*⁸³⁶. The main international instrument in this area are the Equator Principles III (the “Equator Principles”)⁸³⁷, which have been ratified by 83 financial institutions in 36 countries. As indicated in the *Global Mining Finance Guide*, the Equator Principles:

*Covers over 70% of international project finance debt in emerging markets.
Not only must prospective borrowers make a business case to lenders*

⁸³² *Preliminary Economic Assessment Update Technical Report for the Malku Khota Project* dated May 10, 2011, pg. 10, C-14.

⁸³³ *Id.*, pg. 11.

⁸³⁴ Dagdelen I, Section 2, RER-2.

⁸³⁵ TruMetals Mining Inc, *Management’s Discussion & Analysis*, November 6, 2015, pg. 10, R-223.

⁸³⁶ Diez de Medina, par. 20, RWS-5; Mantani, par. 13, RWS-6.

⁸³⁷ Equator Principles previously in force (Equator Principles II) were approved in 2006 and were in force until end of 2013.

regarding financing a project, these days they will likely also need to demonstrate compliance with the EPs (Equator Principles)⁸³⁸.

579. The PEA 2011 recognizes that, in order to obtain financing, the Project had to meet (among others) the Equator Principles:

For projects that will be debt-funded there are effectively two parallel environmental and review processes that need to be merged:

- *One that meets the requirements of the Bolivian government; and*
- *One that meets the standards applied to the banking community. These can be "IFC" or the "Equator Principles" standards, which are generally more stringent than government requirements.*

*In order to meet both the Bolivian government and the international banking community requirements [...]*⁸³⁹.

580. The Equator Principles provide that, in order to be considered for financing purposes, a mining project must pass an assessment process of social and environmental risks. Principles 2 and 3 indicate, respectively, that:

For all Category A and Category B Projects, the EPFI (Equator Principles Financial Institutions) will require the client to conduct an Assessment process to address, to the EPFI's satisfaction, the relevant environmental and social risks and impacts of the proposed Project.

*The Assessment process should, in the first instance, address compliance with relevant host country laws, regulations and permits that pertain to environmental and social issues*⁸⁴⁰.

581. As explained by Mr. Diez de Medina, Director of Social Responsibility of Minera San Cristobal, his company was required – as a *condition* to obtain funding – to comply with the Equator Principles⁸⁴¹.

582. In addition to the Equator Principles, the major international financial institutions have regulations that *condition* project funding with respect to the rights of indigenous

⁸³⁸ Mining Journal, *The Global Mining Finance Guide*, January 2014, pg. 21 (Emphasis added), R-224.

⁸³⁹ *Preliminary Economic Assessment Update Technical Report for the Malku Khola Project* dated May 10, 2011, Section 18.2, pg. 113 (Emphasis added), C-14.

⁸⁴⁰ Equator Principles, June 2013, pgs. 5-6 (Emphasis added), R-214. According to the Principles, Category A projects are those "with potential significant adverse environmental and social risks and/or impacts that are diverse, irreversible or unprecedented", Category B those "with potential limited adverse environmental and social risks and/or impacts that are few in number, generally site-specific, largely reversible and readily addressed through mitigation measures".

⁸⁴¹ Diez de Medina, par. 20, RWS-5.

communities, the protection of their resources and the environment. Just to cite a few examples:

- The *Policy on Environmental & Social Sustainability* of the International Finance Corporation (IFC) indicates that:

*IFC recognizes the responsibility of business to respect human rights, independently of the state duties to respect, protect, and fulfill human rights. This responsibility means to avoid infringing on the human rights of others and to address adverse human rights impacts business may cause or contribute to. [...] Consistent with this responsibility, IFC undertakes due diligence of the level and quality of the risks and impacts identification process carried out by its clients against the requirements of the Performance Standards, informed by country, sector, and sponsor knowledge*⁸⁴².

Among the recently indicated *Performance Standards* (with which, according to the PEA 2011⁸⁴³, the Project had to comply):

- To ensure that the development process fosters full respect for the human rights, dignity, aspirations, culture, and natural resource-based livelihoods of Indigenous Peoples.

*- To ensure the Free, Prior, and Informed Consent (FPIC) of the Affected Communities of Indigenous Peoples when the circumstances described in this Performance Standard are present*⁸⁴⁴.

- The *Environmental and Social Practices and Standards* of the European Investment Bank (composed of all member States of the European Union) indicate that:

17. The promoter will take the necessary measures to appropriately manage the risks and adverse impacts of the EIB [European Investment Bank] operation on vulnerable individuals and groups, including on women and girls, minorities and indigenous peoples. [...]

18. The need for such measures is particularly critical in [...] potential conflict or post-conflict zones. [...]

24. Indigenous peoples are a specific case in terms of their history, their social and political organization, their land-dependent livelihood strategies, their rights to self-determination and the need to safeguard both their collective and individual human rights. [...] A gender-sensitive approach endeavoring to promote the rights and interests of

⁸⁴² International Finance Corporation, *Policy on Environmental and Social Sustainability*, dated January 1, 2012, par. 12 (Emphasis added), R-226.

⁸⁴³ *Preliminary Economic Assessment Update Technical Report for the Malku Khota Project* dated May 10, 2011, Section 18.2, pg. 113, C-14.

⁸⁴⁴ International Finance Corporation, *Performance Standards on Environmental and Social Sustainability*, dated January 1, 2012, pg. 47 (Emphasis added), R-237.

*women and girls in indigenous communities constitutes a further layer of due diligence required*⁸⁴⁵.

583. Aware of the urgent need to adopt policies to protect Indigenous Communities (inclusive for financing purposes), major mining companies in the world have adopted policies similar to those outlined above⁸⁴⁶.

584. For example, the *International Council on Mining and Metals* (which brings together mining companies like Barrick, BHP Billiton, Glencore, Newmont, Rio Tinto and Anglo American) as well as the *Mining Association of Canada* and the *Prospectors and Developers Association of Canada*, have approved a *position statement* that requires:

• respect the rights, interests, special connections to lands and waters, and perspectives of Indigenous Peoples, where mining projects are to be located on lands traditionally owned by or under customary use of Indigenous Peoples

*• adopt and apply engagement and consultation processes that ensure the meaningful participation of Indigenous communities in decision making, through a process that is consistent with their traditional decision-making processes and is based on good faith negotiation*⁸⁴⁷.

585. Major mining companies around the world also have Corporate Social Responsibility programs with emphasis on protection of the rights of indigenous communities, their

⁸⁴⁵ European Investment Bank, *Environmental and Social Handbook*, 2013, pgs. 65-67 (Emphasis added), R-228.

⁸⁴⁶ States have also adopted a policy to promote sustainable development. For example, the Governments of the United Kingdom and the United States signed the Voluntary Principles on Security and Human Rights, which seek to encourage the development of mining projects in a "framework that ensures respect for human rights and fundamental freedoms", *Voluntary Principles on Security and Human Rights*, 2000, pg.1, R-229.

⁸⁴⁷ International Council on Mining and Metals, *Position Statement on Indigenous Peoples and Mining*, May 2013, pg. 2 (Emphasis added), R-230.

resources and the environment⁴⁴⁸. Others have developed specific tools to measure the impact of their mining activities over affected communities⁴⁴⁹.

586. It is clear, therefore, (i) the importance that all relevant stakeholders in the mining sector grant protection to the rights of indigenous communities, their resources and the environment and (ii) that all mining project respect those rights and resources in order to be financed.

587. In view of the serious events in the present case (before the Reversion of the Mining Concessions), the Project could never have been funded. There is abundant evidence that CMMK violated the rights of Indigenous Communities, and that the project put at serious risk the resources and environment of the area of Mallku Khota. In fact:

- Bolivia has proven that SAS and CMMK's staff violated the rights of the Indigenous Communities and their members⁴⁵⁰.
- Bolivia has proven that the Project posed a serious threat to Mallku Khota lagoons, water supply and environmental balance⁴⁵¹:

1. By referring to the impact of the Project on water resources, the CEDIB indicated in 2012, that:

*This will consume an estimated of 4,800 m3/day (for a parameter, this amount would supply nearly 74 thousand people in the city of El Alto) of water from surface and groundwater sources affecting one of the most important basin headwaters of the Amazon macro-basin*⁴⁵².

⁴⁴⁸ BHP Billiton's website indicates: "We acknowledge our activities have the potential to have an impact on human rights. We seek to respect the rights of our employees, individual contractors and members of our host communities and support fundamental human rights consistent with the articles set out in the United Nations (UN) Universal Declaration of Human Rights and Principles 1 and 2 of the UN Global Compact", BHP Billiton's website, "Indigenous communities", pg. 1, R-231. See, also, Rio Tinto's website, "Sustainable Development" in *Rio Tinto 2012 Annual Report*, R-232; Vale's website, *2014 Sustainability Report*, R-233.

⁴⁴⁹ This is the case of Anglo American, a company that developed a *Socio-Economic Assessment Toolbox (SEAT)*, AngloAmerican, *SEAT Toolbox – Socio-Economic Assessment Toolbox Version 3*, 2014, R-234.

⁴⁵⁰ See Section 4.2, *supra* and Section 8, *infra*.

⁴⁵¹ SASC did not conduct any environmental study in relation to the Project. As explained by Prof. Dagdelen: "I note that environmental matters, which would be expected to affect permitting and financing for the Mallku Khota Project, have not at all been considered, either in the PEA 2009 or the Updated PEA" (Dagdelen I, par. 98, RER-2).

⁴⁵² Center of Documentation and Information of Bolivia, "Water. Between mining conflicts and legislation propose", *Petropress Magazine* No. 29, July – September 2012, pg. 11 (Emphasis added), R-31.

2. The PEA 2011 also recognizes such impact:

*Detailed analyses and studies of current water right status, availability of water, and the potential impacts to Laguna Wara Wara and Laguna Malku Khota (the high elevation natural lakes) will be required for subsequent planning studies*⁸⁵³.

3. Also, referring to the environmental impact of the Project, the report prepared by *Business for Social Responsibility* (company hired by SASC to assess the perception of the Project in the area of Malku Khota) states that:

*There is also widespread concern about contamination of lagoons, springs, as well as cropland and pasture from misuse of chemicals by the company*⁸⁵⁴.

- The impact over the hills and lagoons surrounding the Project was especially serious because both are considered sacred by the Indigenous Communities⁸⁵⁵.

588. *Second, SASC is a junior mining company involved in a highly speculative market. Since "[the] speculative practices of junior mining companies have made them great protagonists of global financial scandals and frauds"*⁸⁵⁶, these companies are subject to a higher level of scrutiny and have difficulty obtaining financing. As recognized by Byron Capital, one of the financial analysts considered by FTI for valuation purposes: *"The biggest issue that holds down the junior mining companies is that perception is that projects will not get themselves financed"*⁸⁵⁷.

589. Since 2012, the prospects of funding for *junior* mining companies are scarce. As PricewaterhouseCoopers ("PwC") explained in 2002:

This year's [2012] Top 100 TSXV mining companies saw a 52% decrease in debt and equity financing compared to 2011's Top 100 junior mining companies. Investors are skittish; wary of the volatile market. They aren't looking to add more risk to their portfolios; instead, they are risk adverse and

⁸⁵³ *Preliminary Economic Assessment Update Technical Report for the Malku Khota Project* dated May 10, 2011, Section 18.4.4, pg. 120 (Emphasis added), C-14.

⁸⁵⁴ *Business for Social Responsibility, Social Risks and Opportunities for South American Silver Corporation's Malku Khota Project in Potosi*, May 2009, pg. 9, C-154.

⁸⁵⁵ Chajmi, par. 11, RWS-3.

⁸⁵⁶ Counter-Memorial, par. 30.

⁸⁵⁷ Notes of the conversation between FTI and Jon Hykawy (Byron Capital) dated October 6, 2015, pg. 11 (transcription), R-235.

shying away from investments with a high risk-reward ratio. Unfortunately for juniors, this is their 'sweet spot'⁶⁵⁸.

590. The lack of historical profits of SASC further aggravates its situation. As noted by a recent publication: *"banks traditionally adopt very stringent policy towards lending to miners with no historic profit record [...]"*⁶⁵⁹.

591. SASC itself acknowledges that: *"[t]he Company is not in commercial production on any of its mineral properties and, accordingly, it does not generate cash from operations. The Company is dependent on raising additional financing [...] The Company's capital resources are largely determined by the strength of the junior resource markets [...]"*⁶⁶⁰.

592. For all the above, even if the Mining Concessions had not been reversed, SASC would not have been able to get funding to develop the Project. Even if such financing had been obtained (*quod non*), as explained below, the Project could not have developed due to the social opposition existing towards SASC's remaining in the area of Malku Khota.

6.2.1.4 *In any case, the Project could not have developed due to the great social opposition*

593. The area of Northern Potosi is especially sensitive to foreign mining activities given the abuses that its people have suffered in the past (since colonial times). This background created the perception that foreign mining leads to *exploitation without compensation*. As explained by economist and sociologist Itiguez:

Understanding history is anchored in the belief that the conditions of plundering that have hit the region are reproduced inescapable and continuously, which implies the existence of a negative assessment when dealing with what is 'external', 'foreigner'. [...]

The speech of 'exploitation without compensation' is complementary to the previous and is used steadily and even ritualistic in the succession of regional movements [...] being able to define a collective identity by differentiating the

⁶⁵⁸ Pricewaterhousecoopers, *Junior Mine 2012. Must survive before you can thrive*, pág. 4 (Emphasis added), R-236. To date, the financial prospects of junior mining companies have gotten worse: *"Junior miners need to take urgent action [...] The junior mining industry remains caught in the midst of an unparalleled downturn, the likes of which we haven't seen since the 1990's. The recovery simply hasn't materialized"*, Pricewaterhousecoopers, *Junior Mine 2015. Time for change*, pg. 2, R-237.

⁶⁵⁹ W. Lonergan and H. Chu, "Practical problems in Mining Valuations", in *Contemporary Issues in Mining: Leading Practice in Australia*, Ed. Palgrave Macmillan, 2012, pg. 90, R-238.

⁶⁶⁰ TriMetals Mining Inc, *Management's Discussion & Analysis*, November 6, 2015, pg. 10 (Emphasis added), R-223.

fate of Potosi and its inhabitants with the fate of the other regions and especially the so-called center 'axis'⁸⁶¹.

594. Although this *sensitivity* still exists today, it has not barred mining projects that respectful of the idiosyncrasy, customs and traditions of Indigenous Communities to develop in Northern Potosi. A good example is the mining project currently being developed by Minera San Cristobal, whose success reflects, among others, the respect of the rights of communities and their transparent relationship with them⁸⁶².
595. SAS and CMMK implemented a poor community relations policy, very different from that adopted by Minera San Cristobal, repeatedly violating indigenous and human rights of Indigenous Communities and seeking by various means (even illegal) to impose their position. Before the great social rejection generated by SAS (supported by the two major indigenous organizations in the country), it is clear that – if the State had not issued the Reversion of the Mining Concessions – SAS would not have been able to develop the Project. For example, it is obvious that the Project would have been rejected during the previous consultation that, according to Bolivian Constitutional Court case law⁸⁶³ and the *Policy on Environmental & Social Sustainability of the IFC*⁸⁶⁴, must be carried out before a project can move on to the exploitation phase. This is also recognized by SAS while noting that “*any public consultation would only be required only before starting the exploitation phase*”⁸⁶⁵.

⁸⁶¹ E. Itiguez Araujo, *Regional Movements. Speech, Ideology and Identity*, Sucre, 2007, pgs. 122-124 (Emphasis added), R-239.

⁸⁶² Diez de Medina, Section IV, RW5-5. As indicated in a renowned publication: “*Summit Mining International, a Denver, CO-based wholly owned subsidiary of Sumitomo Corp. of Japan has achieved some remarkable success with its Minera San Cristobal silver and zinc mine in the Nor Lipez province of Bolivia*”, Mining Engineering, *Summit Mining International finds success in Bolivia at Minera San Cristobal*, April 2015, pg. 1, R-240.

⁸⁶³ Ruling 2003/2010-R from the Constitutional Tribunal of Bolivia dated October 25, 2010, pgs. 20-21 (“*On the assumptions recorded, a third must be added, which was established by case law by the Inter-American Court of Human Rights in the Case of the Saramaka People v Suriname, which recognized the right to consent '[...] in the case of development plans or large-scale investment that would have a major impact within Saramaka territory, the State has the obligation not only to consult with the Saramakas but also to obtain their free, informed and prior to them, according to their customs and traditions. [...] As noted, to implement the projects of the three assumptions mentioned above, must obtain the consent of indigenous peoples, which means that in such cases the people have the power to veto the project.*”) (Emphasis added), RLA-34.

⁸⁶⁴ See Section 6.2.1.3, *supra*.

⁸⁶⁵ Reply, par. 253.

596. Based on the foregoing, the Tribunal must conclude that SAS has not proved to have suffered damage because the continuity of the Project up to exploitation is exceedingly uncertain.
- 6.2.2 Even if the Tribunal considers that SAS has suffered certain damages, these were not caused by Bolivia**
597. SAS does not dispute that the burden of proving the causal link – between an alleged unlawful act and a damage – rests with the one who claims such damage⁶⁶⁶. However, SAS denies that its own behavior was the *dominant* cause of its damage.
598. *First*, the Tribunal must note that – to deny compensation – case law does not require the conduct of the investor to have been the *sole* cause of the damage. As noted by the court in the *ELSI* case, it is sufficient for an investor behavior to have been “*one of the possible causes*” of its damage for any compensation to be denied⁶⁶⁷.
599. *Second*, SAS argues that the case law on which Bolivia relies would not support its case (and is distinguishable from this case) because in it “*arbitral tribunals observed that the claimants’ investment had already been bankrupt or near bankruptcy at the time of the investment. This is not the case of CMMK or the Malku Khola Project, which were in sound financial footing*”⁶⁶⁸.
600. SAS’s position is incorrect and demonstrates its lack of understanding of the *ELSI* and *Btwater* cases cited by Bolivia. Those decisions confirm that if the conduct of the investor – prior to the alleged wrongdoing in question – is the *dominant cause* of the damage, the investor should not be compensated. While the *ELSI* and *Btwater* cases involved companies with financial difficulties, the motives of the decision were not such difficulties in themselves, but that they were caused by the affected companies themselves. This was the determining factor in the decision of such tribunals to deny any compensation⁶⁶⁹, and this reasoning is fully applicable to this case.

⁶⁶⁶ Counter-Memorial, par. 367.

⁶⁶⁷ *Elektronika Sicula SpA (ELSI) (United States of America v. Italy)*, IIC case, Judgment dated July 20, 1989, par. 101, RLA-17.

⁶⁶⁸ Reply, par. 375.

⁶⁶⁹ The tribunal of the *ELSI* case indicated: “*If, therefore, the management of ELSI, at the material time, had no practical possibility of carrying out successfully a scheme of orderly liquidation under its own management, and may indeed already have forfeited any right to do so under Italian law, it cannot be said that it was the requisition that deprived it of this faculty of control and management*” (*Elektronika Sicula SpA (ELSI) (United States of America v. Italy)*, ICJ case,

601. Bolivia has shown that, prior to the Reversion of the Mining Concessions, SAS and CMMK's staff members conducted a series of acts that sharply deteriorated the relations with the Indigenous Communities (e.g., [REDACTED] the violation of social customs and the culture of Indigenous Communities, strategies for remote communities of the area of influence of the Project to dilute the opposition of nearby communities, etc.⁸⁷⁰).
602. In this context, it was clear – even before the Reversion – that the Indigenous Communities would not allow SAS to continue with the Project, and that this situation was attributable to SAS, CMMK and its staff. The Reversion of the Mining Concessions was a purely *formal* act. Since its own negligent conduct was the dominant cause of any damage, SAS cannot claim compensation.
- 6.3 **If, *par impossible*, the Tribunal deems the existence of a compensable damage, any compensation must be limited to the costs incurred by SAS in relation to the Project**
603. If, although the damages SAS alleges to have suffered are hypothetical and speculative, the Tribunal was to decide that SAS should be compensated (*quod non*), such compensation should be limited to the reimbursement of the costs incurred by SAS in relation to the Project. RPA recognizes that the cost method is used in the mining industry to value *Mineral Resource Properties* such as the Project, and international arbitral case law confirms this (Section 6.3.1). The value of the geological and metallurgical information that SAS has in its possession must be deducted from the cost-based compensation (Section 6.3.2).
- 6.3.1 **SAS acknowledges that several international arbitral tribunals have compensated the investor only for the costs**
604. In the Counter-Memorial, Bolivia invoked several decisions in which – in the absence of a solid basis for predicting whether an asset would generate future earnings – arbitral tribunals determined the asset's market value based on the cost method. For example, the tribunal in *Wena* indicated:

Like the Metalclad and SPP disputes, here, there is insufficiently 'solid base on which to found any profit... or for predicting growth or expansion of the investment made' by Wena. [...] Rather, the Tribunal agrees with the parties that the proper calculation of 'the market value of the investment expropriated

Judgment dated July 20, 1989, par. 101, RLA-17). See, also, *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID case No. ARB/05/22, award dated July 24, 2008, paras. 788-791, RLA-142.

⁸⁷⁰ Counter-Memorial, par. 568.

*immediately before the expropriation' is best arrived at, in this case, by reference to Wena's actual investments in the two hotels*⁶⁷¹.

605. Similarly, in the case of *Mobil v. Venezuela*, since the oil project object of the valuation was still under development⁶⁷², the tribunal concluded that compensation should be limited to the reimbursement of the costs incurred in connection to the project⁶⁷³. The doctrine is of the same opinion stating that “[p]rojects that have not been completed and their track record does not amount to several years are as a rule compensated on book value (i.e. expenditures) [...]”⁶⁷⁴.
606. SAS does not dispute any of the legal authorities cited by Bolivia⁶⁷⁵, recognizing that the valuation based on costs (i) is used to calculate the *market value* of an asset and (ii) is used by arbitral tribunals when there is no solid basis to predict if an asset will generate future earnings.
607. Since, as Bolivia has shown, the Project was at an early stage and any prospect of future development is merely speculative⁶⁷⁶, if the Tribunal was to decide that Bolivia should compensate SAS (*quod non*), such compensation must be limited to the reimbursement of the costs incurred by SAS in relation to the Project (after deductions, as Brattle⁶⁷⁷ explains, of the value of the confidential information that SAS has retained).

⁶⁷¹ *Wena Hotels v. Arab Republic of Egypt*, ICSID case No. ARB/98/4, award dated December 8, 2000, paras. 124-125 (Emphasis added), RLA-145.

⁶⁷² *Venezuela Holdings and others v. Bolivarian Republic of Venezuela*, ICSID case No. ARB/07/27, award dated October 9, 2014, par. 382 (“It is not disputed that, at the time of the expropriation, the La Ceiba Project was in a phase of development, which excludes the application of the DCF method in order to evaluate the market value of the Claimants’ interests in accordance with Article 6 of the BIT.”), RLA-105.

⁶⁷³ *Venezuela Holdings and others v. Bolivarian Republic of Venezuela*, ICSID case No. ARB/07/27, award dated October 9, 2014, par. 385 (“[...] the market value of the Claimants’ interests in the La Ceiba Project must be established at the total of their investment in that Project, i.e., US\$ 179.3 million”), RLA-105.

⁶⁷⁴ T. W. Walde and B. Sabahi, *Compensation, Damages and Valuation in International Investment Law*, *Transnational Dispute Management*, vol. 4, issue 6, 2007, pg. 23, RLA-162.

⁶⁷⁵ Counter-Memorial, Section 7.3.1.

⁶⁷⁶ See Section 6.2.1, *supra*; Counter-Memorial, Section 7.2.3.

⁶⁷⁷ Brattle I, Section VIII D, RER-3; Brattle II, Section IV.E, RER-5.

608. In its Reply, SAS states that a compensation based on the costs would be contrary to the Project's applicable standards, that it would generate perverse incentives, and that it would not adequately compensate SAS⁶⁷⁸. This is incorrect.
609. First, the cost-based assessment is consistent with the international standards applicable to *Mineral Resource Properties*, such as the Project (as RPA admin)⁶⁷⁹. Table 3-2 of the second expert report of RPA confirms this, noting that the cost method is applicable "in some cases" to *Mineral Resource Properties*⁶⁸⁰:

TABLE 3-2 VALUATION APPROACHES FOR DIFFERENT TYPES OF MINERAL PROPERTIES
South American Silver Limited – Malku Khots Project

Valuation Approach	Exploration Properties	Mineral Resource Properties	Development Properties	Production Properties
Income	No	In some cases	Yes	Yes
Market	Yes	Yes	Yes	Yes
Cost	Yes	In some cases	No	No

610. Second, it is not true that limiting compensation to the reimbursement of costs would create perverse incentives for a State to take ownership of assets earlier in time⁶⁸¹. On the one hand, this theoretical statement is irrelevant in the present case, where it is proven that Bolivia was forced to reverse the Mining Concessions due to the serious clashes in the Project area. On the other hand, SAS loses sight that, the earlier in time an asset is taken, the bigger the risk that the asset has no value. There is, thus, a natural counterweight to the alleged perverse incentive to which SAS alludes.
611. Third, it is not true that a cost-based assessment does not adequately compensate SAS⁶⁸². This is demonstrated by the fact that this method has been consistently applied in international arbitration practice: "[t]he method of calculating FMV by reference to actual investments has proved quite popular in arbitral practice"⁶⁸³. On the contrary, in the circumstances of this case, using a different method would mean that

⁶⁷⁸ Reply, paras. 421-423.

⁶⁷⁹ RPA I, pg. 3-1, CER-2.

⁶⁸⁰ RPA II, Table 3-2, pg. 3-6, CER-5.

⁶⁸¹ Reply, par. 423.

⁶⁸² Reply, par. 422.

⁶⁸³ S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008, pg. 227, RLA-103.

SAS would be “compensated” for *hypothetical and speculative damages*⁶⁸⁴ (i.e. unproven damages), which would be contrary to law. In fact, it must be recalled that (i) most of the mineral resources of the Project are *inferred* resources which existence is uncertain; (ii) in respect of other “resources” it is not in dispute that they are not “*mineral reserves*”, so the economic viability of the Project is uncertain⁶⁸⁵; (iii) as recognized by RPA⁶⁸⁶ and financial analysts consulted by FTI⁶⁸⁷, the hydrometallurgical process of SASC has not been tested, so its actual use in the Project is also uncertain; and (iv) in any case, the Project would not have obtained financing⁶⁸⁸ or could have been developed due to the opposition of the Indigenous Communities⁶⁸⁹. The Tribunal cannot lose sight that the *ordinary course* of a mining discovery is not to reach production, but quite the opposite. As recognized by SAS’ expert, Mr. Cooper “[e]ven when an initial discovery of interesting mineralization has been made, less than 1 in 10,000 of those deposits makes to the mine status”⁶⁹⁰.

612. Finally, despite criticizing a costs-based valuation, SAS proposes no better alternative. FTI valuation only aggravates the *hypothetical and speculative* compensation for damages. Among others (i) FTI grants a 50% value to the assessment made by RPA based on the comparables analysis although, as recognized by the analysts consulted by FTI⁶⁹¹, the project has no comparables on the market and (ii) FTI awards a value of 25% to the average of the valuations made by four analysts

⁶⁸⁴ A serious deficiency of the FTI analysis is to assume that what is compensable from an economic perspective must also be from a legal perspective. This is not so. The factors considered in making an investment decision (speculation; risk) are very different from those applicable to the valuation of an asset (certainty) (FTI II, par. 9.16, CER-4).

⁶⁸⁵ Dagdelen I, par. 122, RER-2. See, also, CIM Standing Committee on Reserve Definitions, *CIM Definition Standards - For Mineral Resources and Mineral Reserves*, pg. 6 (“*Mineral Reserves are those parts of Mineral Resources which, after the application of all mining factors, result in an estimated tonnage and grade which, in the opinion of the Qualified Person(s) making the estimates, is the basis of an economically viable project [...]*”), R-125.

⁶⁸⁶ RPA I, pg. 10-5, CER-2.

⁶⁸⁷ Conversation notes between FTI and Tom Pfister (Redchip) dated October 20, 2015, pg. 14 (transcription), R-222.

⁶⁸⁸ See Section 6.2.1.3, *supra*.

⁶⁸⁹ See Section 6.2.1.4, *supra*.

⁶⁹⁰ Cooper, par. 36, CER-3.

⁶⁹¹ As recognized by Tom Pfister (Redchip), Paolo Lostritto (NBF) and Byron Capital. See Section 6.4.1, *infra*.

that assessed the Project based on the method of discounted cash flow, method which – experts on both sides agree⁸⁹² – is inapplicable to this case.

613. Consequently, 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.

6.3.2 Calculation of the Mining Concessions' value based on the cost method

614. Brattle has quantified the costs incurred by SAS in relation to the Project at US\$ 18.75 million⁸⁹³.

615. In its calculation of expenses, Brattle did not consider the *G&A expenses* since neither SAS nor FTI proved that any *G&A expenses* were incurred in relation to the Project⁸⁹⁴. To consider this concept in the calculation would be arbitrary and speculative⁸⁹⁵ and, as Bolivia explained, only certain damages can be compensated⁸⁹⁶.

616. In the Reply, SAS recognizes (i) that it has geological and metallurgical information related to the Project (the "Technical Information") and (ii) that this latter has value⁸⁹⁷. Brattle confirms that the Technical Information has economic value because it "would be valuable to a company that wanted to continue the development of the *Malhu Khota project*"⁸⁹⁸ [REDACTED]

⁸⁹² RPA I, pg. 3-1, CER-2; Brattle I, par. 41, RER-3.

⁸⁹³ Brattle I, par. 170, RER-3.

⁸⁹⁴ Brattle II, Section IV.D, RER-5. Although the Court ordered SAS to deliver to Bolivia documents that distinguish the G&A expenses, in proportion to the Exploration expenses made in the Project, and the Escalones Project, SAS did not provide any information. See, also, Procedural Order No. 7 and *Redfern Schedule* dated July 7, 2015, category 24.

⁸⁹⁵ Brattle II, Section IV.D, RER-5. It is unreasonable to distribute G&A expenses in proportion to exploration expenses incurred in the Project and the Escalones Project. Exploration expenses are related to factors such as expectation of success of a mining project, which are not related to the administrative costs of each project.

⁸⁹⁶ See Section 6.2.1, *supra*.

⁸⁹⁷ Reply, par. 425.

⁸⁹⁸ Brattle I, par. 175, RER-3.

⁸⁹⁹ [REDACTED]

617. The costs incurred to generate the Technical Information constitute an indicator of its value, since “[i]f the Project developer does not purchase it [the Technical Information] from SASC, it would have to repeat the drilling and metallurgical tests to obtain the data”⁹⁰⁰. By a communication of February 10, 2016, Bolivia requested from SAS the documents detailing all “costs incurred to generate the Technical Information”⁹⁰¹. SAS refused to communicate such information. By Procedural Order No. 12, the Tribunal stated that SAS should have already submitted all the documents showing the costs of the Project (as part of Category 24 of Bolivia’s first *Redfern* Table) and that therefore there was no reason to order the production of additional documents in that respect⁹⁰².
618. Since SAS did not produce – as part of Category 24 of Bolivia’s first *Redfern* Table – any documents that would allow to identify the costs incurred to generate the Technical Information, Brattle has calculated them on the basis of the information available in the consolidated financial statements of SASC. According to Brattle, the value of the Technical Information ranges from US\$ 6.2 million to US\$ 12.3 million⁹⁰³.
619. The value of the Technical Information should be deducted from any compensation since, otherwise, SAS would be over-compensated. In fact, besides being compensated by the Reversion of the Mining Concessions (*quod non*), SAS would receive additional income – also related to the Mining Concessions – for the sale of the Technical Information.
620. For all of the above, in case the Tribunal orders Bolivia to compensate SAS, such compensation should be limited to the reimbursement of costs (minus the value of the Technical Information), *i.e.* between US\$ 6,450,000 and US\$ 12,550,000⁹⁰⁴.

⁹⁰⁰ Brattle I, par. 177, RER-3.

⁹⁰¹ Communication from Bolivia to SAS of February 10, 2016.

⁹⁰² Procedural Order No. 12 dated March 8, 2016, paras. 9-10.

⁹⁰³ Brattle II, paras. 257-259, RER-5.

⁹⁰⁴ This result is obtained by the following arithmetic operation: costs incurred in relation to the Project (US\$ 18.75 million) - value of the Technical Information (between US\$ 6.2 million and US\$ 12.3 million) = final compensation (between US\$ 6.45 million and US\$ 12.55 million).

- 6.4 **If the Tribunal considers that the market-based approach is applicable (*quod non*), it must discard RPA and FTI's valuations**
621. FTI supports its valuation of the Project on a seemingly complex process. This complexity, however, is not synonymous with accuracy nor does it imply that the method is scientific. On the contrary.
622. FTI's analysis is the result of adding disparate elements with arbitrary weights:
- FTI gave a weight of 50% to RPA's valuation based on the comparables analysis. This valuation has three stages: (i) *first*, RPA selects a group of supposedly "comparable" mining properties; (ii) *second*, RPA calculates the *Market Transaction Ratio* (MTR) of each of the selected properties, which is achieved by dividing (a) the price paid for each property by (b) the *in situ* value of the metals of each property (that is, the amount of metals in the subsurface for its price at the time of purchase); and (iii) *third*, RPA arbitrarily selects a MTR and multiplies it by the *in situ* value of the metals that supposedly exist in the Project. As can be seen, the final value of the Project primarily depends on the amount of estimated resources, so SAS has an incentive to exaggerate said resources;
 - FTI gave a weight of 25% to the valuations based on calculating the discounted cash flows made by analysts Byron, Red Chip, Edison and NBF; and
 - FTI gave a weight of 25% to private placements of shares of SASC in April and May 2012.
623. These three valuations are based on the resource estimate contained in the PEA 2011. Based on them, FTI valued the Project at \$307.2 million. None of the valuations on which FTI bases itself is, however, reliable.
624. *First*, RPA's valuation based on the comparables analysis and the MTR is speculative and arbitrary since:
- There are no true comparables. This is recognized by the financial analysts on who FTI bases its assessment: "*You look at comps, but this was a unique project [...] The project was too unique to really look at comps*"⁹⁰⁵. The

⁹⁰⁵ Conversation notes between FTI and Paolo Lostritto (NBF) of September 29, 2015, pg. 9 (transcription) (Emphasis added), R-244.

absence of comparables eliminates the possibility of using this method to value the Project;

- It is not disputed that the Project does not have any mineral reserves. The parties agree that “[m]ineral resources that are not mineral reserves do not have economic viability”⁹⁰⁶;
- The project has only mineral resources, which are inflated by tens of millions of tons and are composed in over 60% for *inferred* mineral resources. The parties agree that *inferred* resources “have the lowest level of geological confidence”⁹⁰⁷ and, therefore, most likely not exist (“[i]nferred resources simply may not be in the ground”⁹⁰⁸);
- There is no certainty that the extraction of the estimated mineral resources is economically viable. For example, there is great uncertainty about whether the Metallurgical Process would have worked. This process, designed based on *synthetic* laboratory samples, has no precedent in the mining sector, and there are “many examples in the mining industry where new technology has led to economic underperformance and/or failure”⁹⁰⁹. Despite this, SAS and its experts assume a 100% probability that the metallurgical process would work; and
- There is no guarantee that the exploitation of the Project is economically viable. It is not disputed that, without external funding, SAS could not have build, much less operate a mine in Malku Khota. Project financing would have required compliance with the Equator Principles and, therefore, respect for human and fundamental rights of Indigenous Communities, which does not exist in this case.

625. Second, FTI’s valuation based on the valuations of financial analysts is also arbitrary and speculative since:

⁹⁰⁶ PBA 2011, pg. 14, C-14.

⁹⁰⁷ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID case No. ARB(AF)/09/01, award dated September 22, 2014, par. 780, RLA-27.

⁹⁰⁸ *Brattle II*, par. 132, RER-5.

⁹⁰⁹ *Taylor*, par. 40, RER-6.

- These analysts assessed the project based on the method of discounted cash flow, a method which the experts on this arbitration agree cannot be applied to the Project (due to the early stage it is at and its high level of uncertainty); and
- The divergent results of the analysts demonstrate their null reliability. For example, while Byron values the Project at US\$ 195.9 million, Edison valued it at US\$ 922.2 million. This range shows the arbitrariness of their valuations.

626. *Third*, FTI's valuation based on private share placements is not reliable since:

- SAS recognizes the importance of the market value of SASC's shares giving a weight of 25% to the private placements of SASC's shares in April and May 2012. These placements, however, are not a reliable indicator of the value of the Project since they occurred several months before the Reversion and do not reflect the *negative* trend in several important market indicators; and
- The stock value of SASC shows that FTI's valuation is exaggerated and unreasonable. FTI argues that the Project would be worth US\$ 307.2 million, *i.e.* 530% more than the total value calculated by SAS based on its shareholder value. This is clearly absurd.

627. As established under the principle of *garbage in – garbage out*: “*A model is only as good as the assumptions it uses. Faulty assumptions or bad data result in faulty output*”⁹¹⁰. As the factors FTI relies upon are incorrect, so is its valuation. At best, SAS' compensation should be limited to reimbursement of the costs calculated by Brattle at US\$ 18.75 million after deducting the value of Technical Information (section 6.3.2 above).

628. The Tribunal must note that the weighting given by FTI to each of the methods listed above (50%, 25% and 25%) is totally arbitrary. As Brattle further explains, “*FTI has not provided any evidence that a potential buyer or seller of the Project would use these methods*”, nor has it proven that such *potential buyer* “*would weigh them as FTI did [...] FTI did not, and cannot, provide an objective method by which to determine*

⁹¹⁰ M. Maher, C. Stickney and R. Weil, *Managerial Accounting. An Introduction to Concepts, Methods and Uses*, Thomson South-Western, 2008, pg. 184, R-241.

what weights to assign to the multiple indicators on which they rely”⁹¹¹. FTI simply “applies arbitrary weightings of 50%, 25%, and 25% to its sources of estimates to try and reconcile” the ample differences between the values each of the valuations throws⁹¹².

629. Bolivia will now explain, in detail, why FTI’s calculation of damages is highly speculative and erroneous, and should be discarded. SAS has avoided responding to the criticisms made by Bolivia and its independent experts to RPA (Section 6.4.1) and FTI’s (Section 6.4.2) valuations. In addition, SAS’s stock value demonstrates that FTI’s calculation is exaggerated and lacks any basis (Section 6.4.3).

6.4.1 SAS evades answering the criticism over RPA’s valuation based on allegedly “comparable” projects

630. In the Counter-Memorial, Bolivia demonstrated the fundamental flaws in RPA’s comparable-based valuation. On the one hand, the basic conditions for this method to be used – *property comparability* and *transaction comparability* – are not verified in this case. On the other hand, Bolivia explained that the MTR (i.e., the parameter RPA derived from its comparables to assess the Project) is not a scientific method and its application by RPA in this case, is arbitrary⁹¹³.

631. SAS avoids to answer Brattle’s demonstration regarding the lack of *transaction comparability*⁹¹⁴. The Tribunal should consider this silence by rejecting this method, which FTI ponders at 50% in its valuation. On the other hand, RPA insists that the selected properties would be comparable to the Project and that the MTR method – and its application to this case – would be reasonable. The following explains why this is false⁹¹⁵.

6.4.1.1 RPA’s method is not based on true comparables (lack of property comparability)

⁹¹¹ Brattle II, paras. 4 and 9, RER-5.

⁹¹² Brattle II, par. 211, RER-5.

⁹¹³ Answer, Section 7.4.1.

⁹¹⁴ Brattle II, Section III.B, RER-5.

⁹¹⁵ Bolivia will make a summary presentation of some of the central ideas of Brattle’s second expert report on the method of comparables. The tribunal should refer to section III of Brattle’s second expert report for further details.

632. In his first expert report, Brattle demonstrated that there are substantial differences – in all relevant criteria – between the Project and the properties used by RPA as alleged comparables⁹¹⁶. RPA’s explanations on these differences and their alleged irrelevance do not demonstrate that the properties are comparable.

633. *In limine*, analysts whose valuations were considered by FTI recognized that the Project has no comparables on the market. As evidenced by the notes taken by FTI during its conversations with said analysts:

- According to Tom Pfister, of Redchip: “*This mine was unique relative to most mines [...] The geology is significantly different and the metallurgy*”⁹¹⁷;

- According to Paolo Lostritto, of NBF: “*This is a pretty unique play, hard to make comparables*”⁹¹⁸ and “*You look at comps, but this was a unique project [...] The project was too unique to really look at comps*”⁹¹⁹; and

According to a (not identified) representative of Byron Capital: “*There were’t any available comps on size and metal values*”⁹²⁰.

634. The Project and the properties used by RPA as allegedly “comparable” have differences on all the relevant criteria:

- **Geographical location.** Geographical location is relevant, as “[it] affects costs, climate conditions and operating seasons, infrastructure and workforce availability, tax burden, and social and political risks”⁹²¹. RPA does not deny these differences⁹²². Furthermore, in its analysis, RPA does not take into consideration that, unlike the Project, none of the “comparable” properties is located in areas with indigenous opposition, which makes them much less risky

⁹¹⁶ Brattle I, Section IV.A, RER-3.

⁹¹⁷ Conversation notes between FTI and Tom Pfister (Redchip) of September 18, 2012, pg. 2 (transcription) (Emphasis added), R-242.

⁹¹⁸ Conversation notes between FTI and Paolo Lostritto (NBF) of September 18, 2012, pg. 3 (transcription) (Emphasis added), R-243.

⁹¹⁹ Conversation notes between FTI and Paolo Lostritto (NBF) of September 29, 2015, pg. 9 (transcription) (Emphasis added), R-244.

⁹²⁰ Conversation notes between FTI and Byron Capital of September 24, 2012, pg. 6 (transcription) (Emphasis added), R-245.

⁹²¹ Brattle II, par. 109, RER-5.

⁹²² *Id.*, par. 111.

than the Project⁹²³. In its first report, Brattle also demonstrated that Bolivia is located well below – in terms of *investment attractiveness* – all other countries where properties considered as “comparables” by RPA are located⁹²⁴.

Mineralogy. In its first report, Brattle explained that (i) the Project has traces of indium and gallium, which are not found in any of the allegedly “comparable” properties and (ii) the Project has no gold, present in half of the “comparable” properties⁹²⁵. RPA replies that the existence of gold would be irrelevant since “[g]old is generally low as a component of the *in situ* dollar content of the comparable properties, ranging from zero to 31%”⁹²⁶. However, 31% is almost a third of the value, something that is not irrelevant. In any case, the presence of gold significantly increases the value of a mineral deposit because (i) gold is worth much more than other metals (including silver), and (ii) gold can be extracted as a derivative of silver (*i.e.*, without incurring in extra costs). As Brattle explains: “Gold in silver concentrate can be recovered with little or no additional processing costs and its value is over 50 times as much as silver [...]”⁹²⁷. In this context, the Project (which lacks gold) is not comparable to mineral properties that have such precious metal up to a 31%.

- **Development Status.** In its first report, Brattle demonstrated that the Project and the “comparable” (properties) have very different levels of development⁹²⁸ since (i) only 1 of the “comparables” has a PEA (all others are in different stages) and (ii) while the Project’s mineral resources are classified into *inferred*, *indicated* and *measured*, 6 “comparable” properties only have historical resource estimates (which do not reflect those categories)⁹²⁹. As for the former, RPA indicates that “the size of the Mineral Resource is a more important consideration in property acquisition agreements than the stage of exploration or development”⁹³⁰. This

⁹²³ *Id.*, par. 110 (“None of the properties that RPA used in its analysis had known community opposition to the same extent as Malku Khota”).

⁹²⁴ Brattle I, par. 68, RER-3. The only exception is Guatemala.

⁹²⁵ Brattle I, Section IV.A.2, RER-3.

⁹²⁶ RPA II, pg. 6-13, CER-5.

⁹²⁷ Brattle I, par. 63, RER-3.

⁹²⁸ Minas Chanca 1 and 2, Rosario 1 and 2, Dios Padre y Chucara (Mines).

⁹²⁹ Brattle I, par. 73, RER-3.

⁹³⁰ RPA II, pg. 6-13, CER-5.

response is not valid because, as explained by Brattle “[m]ineral properties in more advanced development stages have higher perceived odds of becoming producing mines and hence have higher values”⁹³¹. As for the latter, RPA indicates that the historical resource estimates were reviewed by a *Qualified Person* and therefore their accuracy could not be doubted⁹³². This response is not valid either. The CIMVAL Standards and Guidelines only allow use of historical resource estimates for valuation purposes when the valuer classifies these resources in *inferred*, *indicated* or *measured*, what the RPA’s *Qualified Person* has not done⁹³³.

- ***Size of the mineral deposit.*** The Project and the properties selected by RPA are not comparable based on the size of their mineral deposits. RPA’s analysis in this respect is arbitrary and does not follow any reasonable criteria. On the one hand, to determine the size of the mineral deposit of the Project, RPA adds and treats equally – despite their different degree of geological certainty – *inferred*, *indicated* and *measured* mineral resources reported in the PEA 2011. On the other hand, for “comparable” properties, RPA considered mineral deposits composed *exclusively* of historical resources⁹³⁴. This approach is incorrect. *Inferred* mineral resources should not be considered because the level of geological certainty is very low. To do so means to inflate the size of an orebody artificially. As Brattle explains, the practice is to consider only the measured and indicated resources for comparison purposes⁹³⁵. Neither can be considered mineral deposits consisting *exclusively* of historical resources, as their existence is also uncertain. By ignoring these rules, RPA is comparing mineral deposits whose size is probably very different from the estimate (and thus, not *really* comparable).

- ***Metallurgical Process.*** As explained in section 6.2.1.2 above, the Metallurgical Process is unprecedented in the mining industry and its operating conditions are extremely complex. This has a fundamental impact on any target value of the Project, because it can lead to its failure or, in any case, to high overruns that

⁹³¹ Brattle I, par. 68, RER-3.

⁹³² RPA II, pg. 6-16, CER-5.

⁹³³ Brattle II, paras. 125-127, RER-5.

⁹³⁴ *Id.*, paras. 123-125.

⁹³⁵ Brattle I, par. 77, RER-3.

make it unviable⁹³⁶. RPA does not consider this factor, in any way, in its comparability analysis, and it is reasonable to think – as this is the general rule – that the “comparable” (properties) are based on *conventional* metallurgical processes. SAS does not argue otherwise. This is an additional reason to consider that the Project and the properties selected by RPA are not comparable⁹³⁷.

635. The difficulty of finding *true* comparables (confirmed by both Parties in this case) explains why arbitral tribunals often refuse to use the method of comparables. As the recent award of *Khan v. Mongolia* states:

Overall, the Tribunal agrees with the Respondents' observations that the comparables chosen represent 'companies whose sites are based in different countries, under varying climatic, geographical and regulatory conditions to those experienced by Khan.' This is one of the key reasons why arbitral tribunals are often reluctant to rely on a comparables analysis as the sole or primary method of valuation⁹³⁸.

- 6.4.1.2 *The MTR (Market Transaction Ratio) method is not scientific, produces contradictory results and its application, in this case, is arbitrary*

636. Brattle has already extensively demonstrated that the MTR (the basic parameter used by RPA to reach a “comparable value”) is an unscientific method and its application is arbitrary in this case. RPA’s “explanations” in its second report did not respond to Brattle’s critiques. Therefore, we refer to Brattle’s comments on the issue⁹³⁹.

637. Here we will simply demonstrate, through two examples, the contradictions inherent to the MTR method. As Bolivia explained in the Counter-Memorial, RPA calculates the MTR of a mining property by dividing (i) the price paid by the mining property by (ii) the *in situ* value of the metals of each property (that is, the amount of metals in the subsurface for its price at the time of purchase)⁹⁴⁰.

638. Among the “comparable” (properties) used by RPA, are (i) the Minas Chanca project in Peru (identical properties) and (ii) the Rosario mine in Mexico. Each of these mines

⁹³⁶ Taylor, Section 4, RER-6.

⁹³⁷ As Prof. Taylor explains, the Metallurgical Process has a fundamental impact on the profitability of any mining project (Taylor, Section 3.2, RER-6).

⁹³⁸ *Khan Resources Inc, Khan Resources B.V., CAUC Holding Company Ltd., v. Mongolia, MonAtom LLC*, PCA case No. 2011-09, award dated March 2, 2015, par. 399 (Emphasis added), RLA-193.

⁹³⁹ Brattle II, Sections III.C and III.D, RER-5.

⁹⁴⁰ Counter-Memorial, par. 596.

was the subject of two transactions that RPA analyzes as independent “comparables” in its calculations (Minas Chanca 1 and 2, and Rosario 1 and 2). Well, if the MTR was a reasonable method, the MTR of the first sale (Minas Chanca 1 and Rosario 1) should predict the price of the second sale (Minas Chanca 2 and Rosario 2). To do this, only adjustments for the change in the price of metals should be made between the dates of each transaction. Since these sales occurred in reality, the data is real and allows to check the unreliability of the MTR. In fact, the results are very different from those expected by RPA (and demonstrate the inadequacy of the MTR)⁹⁴¹:

- Minas Chanca 1’s MTR is 1.53%. Minas Chanca 2 transacted two years later. Based on the MTR of Minas Chanca 1, making the appropriate adjustments for the change in the price of metals, the price of Minas Chanca 2 should have been US\$ 3.9 million according to the MTR. However, the actual transaction value was nearly three times higher (US\$ 10.2 million); and
- Rosario 1’s MTR is 1.27%. Rosario 2 transacted two years later. After making the appropriate adjustments, the MTR of Rosario 1 predicts a transaction value 25% higher than the actual transaction value of Rosario 2.

639. As can be seen, MTR’s method is not reliable (not even to estimate the price of a project that was already sold once) and leads to overestimating or underestimating the alleged “comparables”. Furthermore, this method is not used in practice. As Brattle indicates: “*The MTR method has not been peer reviewed in a refereed publication and has never been tested for accuracy. It is not taught as a valuation tool at the Colorado School of Mines or any other institution that we are aware of, and is not mentioned by CIMVal as a valid valuation method*”⁹⁴². Prof. Dagdelen confirms: “*I have not seen the MTR approach proposed by RPA used in practice*”⁹⁴³.

640. In the absence of true comparables and the impossibility to rely on the results of the MTR method, the Tribunal must reject RPA’s comparable-based valuation.

6.4.2 SAS evades the deficiencies of FTI’s valuation

641. In addition to the comparables method (which FTI weighted at 50%), FTI uses the valuations of financial analysts such as Edison, Byron, RedChip and NBF (to which

⁹⁴¹ Brattle II, par. 161, RER-5.

⁹⁴² Brattle I, par. 97, RER-3.

⁹⁴³ Dagdelen II, par. 81, RER-4.

it gives a weight of 25%) and private placements of shares of SASC in April and May 2012 (to which it also gives a weight of 25%) in its Project valuation.

642. *In limine*, by giving a 50% value to the valuation of RPA based on “comparables”, FTI falls into a latent contradiction with the position taken in another international arbitration (in progress), in which it also acts as expert for the claimant. As indicated by Brattle, to whose detailed explanation we refer: “*In its valuation analysis in that [other] matter, FTI stated that it attempted to use the comparable transactions approach but could not because it could not identify any suitable transaction that met FTI’s selection criteria. Had FTI applied the same selection criteria in this case, it would have excluded all fourteen transactions on which RPA relied*”⁹⁴⁴.

643. The analysts’ valuations are not reliable since they are not independent, their valuations employ methods that are not applicable in this case and in any case, they are plagued with errors (Section 6.4.2.1). The valuation based on the two private placements of SASC’s shares can also not be used because it is not a valuation as of the date of the allegedly unlawful event and ignores the evolution of relevant market indicators (Section 6.4.2.2).

6.4.2.1 *As FTI recognizes, the analysts employ methods that are not applicable in this case, are not independent and are plagued with errors*

644. FTI expressly recognizes that the method of discounted cash flow (“DCF”) cannot be used to value the Project⁹⁴⁵. However, FTI gives a 25% value to the valuation made by four financial analysts based on the DCF method⁹⁴⁶.

645. In order to justify the use of the analysts’ reports, FTI argues that (i) such reports would have a high informative value in the market and (ii) the analysts would be entitled to use the DCF method because their role “*is very different from our role as experts in arbitration proceedings as we are tasked with assisting the Tribunal in its deliberations regarding the quantum of damages*”⁹⁴⁷.

⁹⁴⁴ Brattle II, par. 196, RER-5.

⁹⁴⁵ FTI II, par. 6.38 (“*we had determined that an income approach would generally not be applicable as a primary valuation approach for the purposes of determining the Claimant’s damages*”), CER-4.

⁹⁴⁶ FTI II, par. 6.23, CER-4.

⁹⁴⁷ *Id.*, par. 6.40.

646. Even assuming that the analysts' reports have an informative role, FTI's response makes it clear that they cannot be considered for valuation purposes. As Brattle explains: "*FTI's statements are an acknowledgement that analysts' valuations do not meet the standards required by international arbitration tribunals for damages expert testimony. If that is what FTI believes, then FTI should have placed no weight on them*"⁹⁴⁸. The same should be done by this Tribunal.
647. Beyond this fundamental contradiction incurred by FTI, there are at least *four* reasons why the analysts' valuations should not be considered in this case⁹⁴⁹.
648. *First*, because the market itself did not consider them reliable. This is evidenced by the difference between the value that the analysts attributed to the shares of SASC and the value at which the shares traded on the stock exchange. The value of the shares estimated by the analysts is, on average, 621% higher than the market value of SASC's shares. As Brattle explains:
- During the approximately six months period between the first analyst report date and FTI's Valuation Date, analysts put forward target prices between C\$2.75 and C\$9.41 based on DCF models, while investors bought and sold the same asset in the stock market at substantially lower prices, ranging between C\$0.99 and C\$1.92 per share. The discrepancy between analysts and the market reveals that the analysts' models overstate the market value of SASC's shares*⁹⁵⁰.
649. FTI suggests that such discrepancy can be explained because 45% of SASC's shareholders are non-specialized investors (*retail investors*) who act irrationally in the stock market. The evidence refutes this speculation. As Brattle explains: "*evidence suggests that the luck of a price alignment to analysts' views of SASC's share value is due to the informed trading of institutional investors, rather than the potentially unsophisticated trading of retail investors*"⁹⁵¹. Moreover, even if what is indicated by FTI were true, FTI does not explain why private placements of SASC's shares (conducted in April and May 2012 by institutional investors⁹⁵²) were made at a discount of 72% compared to the value estimated by the analysts.

⁹⁴⁸ Brattle II, par. 207, RER-5.

⁹⁴⁹ The Tribunal must refer to Section IV.B of Brattle's second expert report for further details.

⁹⁵⁰ Brattle II, par. 201 (Emphasis added), RER-5.

⁹⁵¹ *Id.*, par. 203.

⁹⁵² FTI I, par. 9.44, CER-1.

650. *Second*, the financial analysts were not *independent* from SASC. For example, SASC was a client of Edison at the time it issued its valuation report. RedChip provided SASC investor relations services in 2010 and 2011, and was also holder of warrants (assets whose value rises with the value of SASC's shares⁹⁵³). FTI recognizes this⁹⁵⁴. These conflicts of interest affect the impartial work of financial analysts. As Brattle explains: "*there is evidence that analysts who are subjects to conflicts of interest of the kind present here are associated, on average, with biased recommendations*"⁹⁵⁵.

651. *Third*, despite knowing that the analysts were not independent, FTI did not *validate* their economic models. FTI says it did not have to do so, since (i) the analysts would have incentives to be impartial; (ii) they have an ethical duty to be so; and in any case (iii) there were internal mechanisms in the industry to limit the impact of conflicts of interest⁹⁵⁶. However, this *theoretical* explanation does not fit reality. Commenting on a recent study on how conflicts of interest affect the recommendations of analysts, Brattle explains:

*The analysts whose price targets were reflected in this study operated in the kind of environment described by FTI and the Cooper Report: subject to ethical codes, restrictions on compensation and improper communications, conflict disclosure rules, and reputation concerns. Yet, their valuations were more optimistic in the presence of conflicts of interest. This is why it is reasonable to apply heightened scrutiny to valuations prepared by analysts who are not independent from the company they value*⁹⁵⁷.

652. For the rest, if 45% of SASC's shareholders, as FTI suggests, are *retail* investors acting irrationally, that does not explain why the other 55% (*specialized* investors), with full knowledge of the analysts' reports, did not trust those reports (of trusting them, they would have bought shares and raised the stock price).

653. *Fourth*, in addition to the flaws identified by Brattle⁹⁵⁸, the analysts assessed incorrectly and/or failed to consider several important risks:

⁹⁵³ Brattle I, paras. 134-135, RER-3.

⁹⁵⁴ FTI II, par. 6.27, CER-4.

⁹⁵⁵ Brattle II, par. 218, RER-5.

⁹⁵⁶ *Id.*, par. 217.

⁹⁵⁷ *Id.*, par. 220.

⁹⁵⁸ *Id.*, Section IV.B.4.

- The analysts incorrectly assessed Bolivia's country risk. As indicated by the notes taken by FTI in its meeting with Tom Pfister, from Redchip: "*[l]ooking back he didn't evaluate the political environment correctly*"⁹⁵⁹ and "*[a]nalytsts can typically be overly optimistic*"⁹⁶⁰;
- The analysts took for granted that the Metallurgical Process would work. However, as explained by Prof. Taylor, there is no guarantee of it (and, rather, experience suggests otherwise); and
- The analysts did not consider the risk arising from the existence of Indigenous Communities in the Project area and, therefore, that this latter might not obtain the necessary *social license to operate*.

654. Based on the foregoing, the Tribunal should not grant any value to the valuations made by the financial analysts used by FTI.

6.4.2.2 *The valuation based on private placements of shares in April and May 2012 ignores the subsequent evolution of relevant market indicators*

655. It is also not appropriate to value the Project on the basis of the private placements of SASC's shares in April and May 2012, without any adjustment. This is explained in so far as various market indicators evolved *negatively* between the date of such placements and the Valuation Date in July 2012. As Brattle explains:

*The silver spot price fell by 13%, the TSX market index fell by 5%, and an index of the publicly traded companies that FTI deemed comparable to SASC fell by 23%. SASC's stock price fell by 39%*⁹⁶¹.

656. Due to the drop of these market indicators, the stock value of SASC as of the Valuation Date is necessarily inferior, something that FTI has chosen to ignore⁹⁶². Consequently, using the values derived from private placements of shares in April and May 2012 would overvalue the project.

⁹⁵⁹ Conversation notes between FTI and Tom Pfister (Redchip) of October 20, 2015, pg. 2 (transcription), R-222.

⁹⁶⁰ *Id.*, pg. 15.

⁹⁶¹ Brattle I, par. 151, RER-3.

⁹⁶² Brattle II, par. 237, RER-5.

657. Therefore, the Tribunal must discard the valuation of the Project based on private placements of SASC's shares.
- 6.4.3 SASC's stock value shows that FTI's calculations are exaggerated and completely unfounded
658. In addition to being unreliable for the reasons already stated, the unfounded nature of FTI's valuation is evident when comparing the value FTI assigned to the Project (US\$ 307.2 million) with the value the market assigns – through the stock exchange listing of SASC's shares – to the Project. In fact, according to FTI's valuation, the Project would be worth 530% more than SASC itself (which, in addition to the Project, had another asset in Chile). This is absurd.
659. The market value of SAS' shares allows to calculate the total value of the company and therefore of its assets, including the Project (Section 6.4.3.1). These figures clearly show that FTI's valuation is exaggerated and unreasonable (Section 6.4.3.2).
- 6.4.3.1 *The market value of SAS' shares allows to calculate the total value of the company and therefore of its assets, including the Project*
660. Are basic economic principles that (i) the value of a company (*enterprise value*) ("EV") is equal to the value of its productive assets and (ii) the EV is determined by discounting the debts and available cash from the value of capital (equity)⁹⁶³. Since SASC had no debt at the Valuation Date, its *EV = equity - available cash*.
661. Every time SASC is listed on the Toronto Stock Exchange (TSX), the market value of its capital is reflected in the market value of its shares, as explained in greater detail in the next section. If the value of 1% of SASC's shares is equivalent to US\$ 1, it would suffice multiplying US\$ 1 x 100 to obtain the value of 100% of SASC's shares. By discounting the available cash from that equity value, SASC's EV would be obtained (which, as noted above, equals the value of its productive assets).
662. Given that SASC's only assets are two mining projects, to obtain the value of the Project, it would be enough to deduct from SASC's EV the value of its other project in Chile (*Escalones*). The latter value can be calculated from SASC's EV that remains

⁹⁶³ *Id.*, paras. 20-21.

after the Reversion of the Mining Concessions⁶⁶⁴. Since SASC's EV as of August 1, 2012 amounted to US\$ 13.5 million, the value of the *Escalones* project would range from US\$ 0, as a minimum, to US\$ 13.5 million, as a maximum⁶⁶⁵.

6.4.3.2 *The value of the Project, calculated based on SASC's market value, shows that the FTI's valuation of exaggerated and unreasonable*

663. The stock value of SASC reflects all publicly available information (including reports of financial analysts, the transaction values of comparable mining properties, etc.) and reflects all of its assets' relevant risks. As Brattle explains:

The buyers and sellers of SASC's shares had reasonable information available through the public disclosures made by the Company pursuant to Canadian securities regulations, as well as through analyses published by research analysts. SASC's shareholders included large investors with experience in the mining industry and the resources to analyze the available information effectively. As a result, share prices reflect all relevant publicly available information, including Project-specific technical data, local community developments, and transactions in other silver mining properties⁶⁶⁶.

664. SAS recognizes that the stock value of a company listed on the stock exchange is indicative of its market value⁶⁶⁷, and doctrine and international case law confirm this⁶⁶⁸.

665. At the Bolivia Valuation Date, the value of the Project and of SASC – calculated based on the latter's equity (stock) value – is shown in the following table⁶⁶⁹:

⁶⁶⁴ At this time, the EV of SASC is obtained by adding (i) the value of the *Escalones* project and (ii) the value of any potential claim of SASC against Bolivia for the Reversion of the Mining Concessions.

⁶⁶⁵ Brattle II, par. 31, RER-5.

⁶⁶⁶ *Id.*, par. 25.

⁶⁶⁷ FTI gives 25% of value to the private placement SASC's shares in April and May 2012. See Brattle II, paras. 34-35, RER-5.

⁶⁶⁸ As for the doctrine N. Blackaby, C. Partasides and others, *Redfern and Hunter on International Arbitration*, "Chapter 8. Arbitration under Investment Treaties", Oxford University Press, Sixth Edition, 2015, pgs. 441-500, par. 8.151, RLA-232 and B. Sabahi, *Compensation and Restitution in Investor-State Arbitration. Principles and Practice*, Oxford University Press, 2011, pg. 112, RLA-269. As for case law, *Khan Resources Inc, Khan Resources B.V., CAUC Holding Company Ltd., v. The Government of Mongolia, MonAtom LLC*, PCA case No. 2011-09, award on the merits dated March 2, 2015, paras. 400-401, RLA-193 and *CMS Gas Transmission Co v. Argentina*, ICSID case No. ARB/01/8, award dated May 12, 2005, par. 403, CLA-5.

⁶⁶⁹ Brattle II, Table 2, RER-5.

		High End	Low End	Based on FTI Escalones Estimate
Assumed Value of Escalones	[1]	0.0	13.5	7.3
SASC Enterprise Value as of July 9, 2012	[2]	48.7	48.7	48.7
Malku Khota FMV as of July 9, 2012	[3]	48.7	35.2	41.4

Sources and Notes:

[1]: Table 1 and CER-1: First FTI Report, p. 62.

[2]: Table 1.

[3]: [2] - [1].

666. As can be seen, as the Bolivia Valuation Date (i) SASC's value in the stock market was US\$ 48.7 million and (ii) the Project's value would range between US\$ 35.2 and US\$ 48.7 million (depending on the value assigned to the *Escalones* project). Considering the value attributed by FTI to *Escalones*, then the project would have a maximum value of US\$ 41.4 million. As Brattle explains, there is no reason to think that the stock value of SASC does not adequately reflect its EV and thus the value of its assets⁹⁷⁰.
667. Notwithstanding the foregoing, FTI contends that the Project would be worth US\$ 307.2 million. Thus, according to FTI, the Project would be worth 530% more than the total value of SASC – at Bolivia Valuation Date – calculated based on the shareholder value. FTI's valuation is clearly exaggerated and must be discarded.
- 6.5 The Project's valuation must take place at the Bolivia Valuation Date without considering subsequent events**
668. If the Tribunal decides Bolivia must compensate SAS (*quod non*), it must use as valuation date July 9, 2012 (Bolivia Valuation Date). This date is consistent with SASC's public communications as well as with the comments of its own officials (Section 6.5.1). In any case, SAS has waived any claim for a higher value of the Project after the Bolivia Valuation Date (Section 6.5.2).
- 6.5.1 The Project must be assessed at the Bolivia Valuation Date**
669. Bolivia has already demonstrated that the valuation date to be used is, at the earliest, July 9, 2012 (Bolivia Valuation Date), since it was only the next day – as recognized

⁹⁷⁰ *Id.*, Section IID.

by SAS – that the Reversion of the Mining Concessions was announced, which would become effective on August 1, 2012 through the Reversion Decree⁹⁷¹.

670. In its Reply, despite not responding to any of Bolivia’s arguments on why the Bolivia Valuation Date should be used, SAS insists that the valuation must be made on July 6, 2012 (the “FTI Valuation Date”) for it is “the business day immediately preceding signature of the Memorandum of Agreement”⁹⁷², dated July 7, 2012. According to SAS, the Memorandum of Agreement would have marked “the beginning of the expropriation process”⁹⁷³.

671. SAS conveniently “forgets” to mention that, in a communication to the market of July 9, 2012, it explained that the Memorandum of Understanding *did not impact in any way* the Project and that SASC was still working with the Bolivian government and the Indigenous Communities to develop the Project. Specifically, on July 9, 2012, SAS reported that:

*At this time there has been no change in the status of the project concession. The Company is continuing to work with the government at all levels and with the local communities to agree on an approach to development that is inclusive of all communities in the project area and allows development of the Malku Khota project to its fullest potential*⁹⁷⁴.

672. [REDACTED]

673. In this context, it is clear that the Memorandum of Understanding could not have marked “the beginning of the expropriation process” and that a valuation dated July

⁹⁷¹ Counter-Memorial, par. 639.

⁹⁷² Reply, par. 385.

⁹⁷³ *Id.*

⁹⁷⁴ SASC Press Release, *Two employees freed, South American Silver in discussion with Bolivian government and indigenous authorities* dated July 9, 2012, R-128.

⁹⁷⁵ [REDACTED]

6, 2012 is not acceptable. To support SAS' position would imply to accept that the expropriation occurred with the Memorandum of Understanding and, therefore, that SASC's communication of 9 July 2012 violated article 126.2(1) of the *Ontario Securities Act*, under which :

A person or Company shall not make a statement that the person or company knows or reasonably ought to know,

(a) in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue [...] and

(b) would reasonably be expected to have a significant effect on the market price or value of a security⁹⁷⁶.

674. In view of the above, and since SAS does not deny that on July 10, 2012 the nationalization was publicly announced, under article 5(1) of the Treaty, the previous day (July 9) should be used as the Project's valuation date⁹⁷⁷.

6.5.2 SAS has waived any right to claim any value greater than the Project could have after the Bolivia Valuation Date

675. SAS stated in its Statement of Claim that “[n]otwithstanding its selection of a valuation date as of the date of expropriation, Claimant reserves the right to claim for any increase in the loss in fair market value of the investment resulting from subsequent events⁹⁷⁸. FTI made a similar note in its first report⁹⁷⁹.

676. In the Counter-Memorial, Bolivia explained why the valuation of the Project cannot consider events that occurred posteriorly to the Bolivia Valuation Date⁹⁸⁰. While Bolivia referred to a valuation close to the date of the award, the same arguments show that *dates and/or events subsequent* to the Bolivia Valuation Date cannot be taken into account.

⁹⁷⁶ *Ontario Securities Act*, art. 126.2(1) (Emphasis added), RLA-270.

⁹⁷⁷ SAS questions that Brazil “does not provide its own view of the appropriate valuation date to apply in this case” (Reply, footnote 800). Here there is a new contradiction of SAS with its own actions. In fact, beyond the unfounded criticism (the valuation date is a matter of eminently legal character), SAS instructed its economic expert to use July 6, 2012 as the date of valuation (FTI I, par. 8.41, CER-1).

⁹⁷⁸ Statement of Claim, footnote 392.

⁹⁷⁹ FTI I, par. 8.42, CER-1.

⁹⁸⁰ Counter-Memorial, Section 7.5.3.

677. In its Reply, SAS describes Bolivia's explanation as *useless*, indicating that "*Bolivia devotes five additional pages of its Counter Memorial to arguing against using the date of the award as the valuation date in this case. Bolivia's exposé serves no purpose other than to portray the approximations and inconsistencies underlying Bolivia's submission*"⁹⁸¹. Therefore, SAS admits that, in this case, it is not necessary to discuss over a valuation with a date subsequent to the alleged expropriation.
678. Given this change in position, the Tribunal must consider that SAS has waived its claim for the higher value that the Project could have (which has not been argued nor demonstrated) between the Bolivia Valuation Date and the award.
679. Notwithstanding the foregoing, the Tribunal should note that SAS has not responded to any of Bolivia's arguments on why the valuation of the Project should not consider dates and/or events *subsequent* to the Bolivia Valuation Date⁹⁸².
- 6.6 The Tribunal must reject any compensation for other alleged breaches of the Treaty**
680. SAS has not demonstrated why, in cases other than expropriation, compensation should be calculated based on the standard of Fair Market Value ("FMV") (Section 6.6.1). In any case, SAS has not proven to have suffered damages by other alleged violations of the Treaty (Section 6.6.2).
- 6.6.1 SAS has still not proven why the Fair Market Value standard should be applied on scenarios other than that of article 5(1) of the Treaty**
681. As Bolivia explained in the Counter-Memorial⁹⁸³ and SAS recognized in its Reply⁹⁸⁴, article 5(1) of the Treaty provides that – in cases of expropriation – compensation should be calculated based on the Fair Market Value ("FMV") of the expropriated assets⁹⁸⁵. The Treaty does not provide for the application of FMV for other cases.

⁹⁸¹ Reply, par. 386.

⁹⁸² Counter-Memorial, Section 7.5.3.

⁹⁸³ *Id.*, Section 7.6.1.

⁹⁸⁴ Reply, par. 366.

⁹⁸⁵ Treaty, Art. 5(1), C-1.

Therefore, and since the claims discussed herein suppose that an expropriation⁹⁸⁶ has not taken place, the FMV standard is not applicable.

682. To try to overcome this legal barrier, SAS states that some tribunals have compensated on the basis of FMV when the non-expropriatory measures in question entailed the *loss of the investment*⁹⁸⁷. This argument is not convenient. On the one hand, if the parties to the Treaty had wanted the FMV to be applied to situations where there is no expropriation, they would have agreed so. They did not. Applying this standard to cases other than to expropriation would involve, therefore, ignoring the will of the parties. On the other hand, the case law invoked by SAS does not support its position. For example, in the *Gold Reserve* case, although the tribunal applied the FMV to the violation of the standard of Fair and Equitable Treatment, it did not do so for the *loss of investment* but because the parties had agree so. In fact, demonstrating its discomfort with the parties' agreement, the tribunal made the caveat that "*other solutions could have been adopted*"⁹⁸⁸.
683. SAS intends to *distinguish* the case law invoked by Bolivia (where there was no compensated based on the FMV) arguing that, in such cases, the expropriation measures in question did not involve the *loss of the investment*⁹⁸⁹. Again, this is not accurate. For example, in *Feldman*, despite finding that the non-return of taxes on cigarette export rendered the business economically unsustainable, the tribunal did not apply the FMV standard⁹⁹⁰.
684. Therefore, the Tribunal must conclude that, in cases other than those referred to in article 5(1) of the Treaty, compensation cannot be calculated on the basis of FMV.

⁹⁸⁶ Statement of Claim, par. 194 ("*In the unlikely event the Tribunal should determine that Bolivia did not expropriate South American Silver's investments, either lawfully or unlawfully [...]*").

⁹⁸⁷ Reply, par. 372.

⁹⁸⁸ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID case No. ARB(AF)/09/01, award dated September 22, 2014, par. 674, RLA-27.

⁹⁸⁹ Reply, par. 373.

⁹⁹⁰ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID case No. ARB(AF)/99/1, award dated December 16, 2002, par. 188 ("*To reach the conclusion that the Respondent has violated its obligations to the claimant in accordance with Article 1102, most observe that cigarette exports of the Claimant, and other resellers in a similar situation, can be economically unsustainable, if returns of IEPS are not available*") (Emphasis added), RLA-150. See, also, par. 194.

6.6.2 SAS has still not proven to have sustained damages as a consequence of the other measures in question

685. In the Counter-Memorial, Bolivia demonstrated that SAS does not “*identify what would be the damages arising from each of the alleged violations of the Treaty*”⁹⁹¹. This situation persists to date. In fact, SAS has failed to demonstrate what would be the damage arising from:

- The alleged decision of the Minister of Mining to not militarize the area around the Project (which, according to SAS, constitutes a violation of the standard of full protection and security)⁹⁹²;
- The decision to delineate as immobilization zone the areas surrounding the Project (which, according to SAS, constitute an unreasonable and/or discriminatory measure)⁹⁹³; and
- Bolivia’s alleged request to have a participation in the Project (which, according to SAS, would constitute an unreasonable and/or discriminatory measure)⁹⁹⁴.

686. In the absence of evidence, SAS is limited to equate the effects of the contested measures (which it qualifies as *non-expropriatory*) to those of the Reversion of the Mining Concessions (which it qualifies as an *expropriatory measure*)⁹⁹⁵. FTI follows this line while presenting a single Project valuation⁹⁹⁶. This is incorrect. If, as SAS itself points out, it just “*lost its investment at the time when Bolivia nationalized the Malku Khota Concessions*”⁹⁹⁷, the damage allegedly suffered in a non-expropriatory scenario can not be the same⁹⁹⁸.

⁹⁹¹ Counter-Memorial, par. 684.

⁹⁹² Reply, paras. 338-339.

⁹⁹³ *Id.*, par. 345.

⁹⁹⁴ *Id.*, par. 344.

⁹⁹⁵ *Id.*, par. 370.

⁹⁹⁶ FTI I, Section 2, CER-1; FTI II, Section 3, CER-4.

⁹⁹⁷ Reply, par. 376.

⁹⁹⁸ Statement of Claim, par. 194-195.

687. Not having SAS proven the damage allegedly suffered over the other alleged breaches of the Treaty, the Tribunal must deny any compensation for violations other than those resulting from article 5(1) of the Treaty. As noted by the tribunal in the *Feldman* case, “only the actually incurred loss or damages” can be compensated⁹⁹⁹.

7. INTEREST

688. SAS offers no justification for applying a legal rate, and a commercial interest rate should be applied (Section 7.1). The criteria used by SAS to calculate the commercial interest rate are wrong (Section 7.2), and this latter should be calculated based on the issuance of Bolivia’s sovereign (government) bonds of October 2012 (Section 7.3). Since Bolivian law prohibits the capitalization of interest, the interest must be simple (Section 7.4).

7.1 The commercial interest rate is to be chosen over the legal interest rate

689. Article 5(1) of the Treaty provides that any compensation under this Article “shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party”¹⁰⁰⁰. In the Counter-Memorial, Bolivia explained that a commercial interest rate is to be preferred since (i) the legal interest rate has a supplementary character, and any funding to which SAS and/or Bolivia would have resorted to, would have fixed a specific interest rate for this case, and (ii) the legal interest rate is a maximum rate, so applying it in this case would over-compensate SAS¹⁰⁰¹.

690. SAS has not responded to any of Bolivia’s arguments and FTI merely states that “we have been instructed that an interest rate [legal interest] of 6.0% per annum is the minimum rate that the Claimant is entitled to”¹⁰⁰². In view of the obvious lack of arguments provided by SAS and FTI to apply a legal rate, the Tribunal must apply a commercial interest rate.

⁹⁹⁹ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID case No. ARB(AF)/99/1, award dated December 16, 2002, par. 194, RLA-150.

¹⁰⁰⁰ Treaty, Art. 5(1), C-1.

¹⁰⁰¹ Counter-Memorial, Section 8.1.

¹⁰⁰² FTI II, par. 10.15, CER-4. FTI did the same thing in its first expert report, FTI I, par. 12.8, CER-1.

7.2 The criteria used by FTI to calculate the commercial interest rate are erroneous

691. In its first report, FTI calculated the commercial interest rate by using a risk-free rate and adding a margin ("risk premium")¹⁰⁰³. Since its calculations threw rates below 6%¹⁰⁰⁴, FTI was instructed to use a higher rate: the legal interest rate (equivalent to 6%).

692. In its second report, based on the rates for commercial loans issued by the Central Bank of Bolivia¹⁰⁰⁵, FTI calculates an *alternative* commercial interest rate that would range between 6.5% and 7%¹⁰⁰⁶.

693. FTI's analysis lacks all credibility as it reflects a radical change in the way FTI *really* believes that the commercial interest rate should be calculated (reflected in its first expert report and consistent with the scheme proposed by Brattle). If FTI considered that the rates published by the Central Bank of Bolivia truly reflect commercial interest rates, certainly it would have used them in its first report. It did not. FTI makes this *alternative* calculation because it was legally instructed to do so and to make *believe* that the legal interest rate of 6% would be reasonable.

694. In any case, as Brattle explains:

*We note that interest rates fixed by central banks are not necessarily commercial rates (meaning they are not determined by market transactions in financial instruments) and can reflect objectives on monetary policy unrelated to this case*¹⁰⁰⁷.

695. The Tribunal must take into account that neither FTI nor SAS responded to any of the criticisms made by Bolivia and Brattle to FTI's *original* estimate of the commercial interest rate¹⁰⁰⁸. Given this lack of response, the Tribunal must dismiss all commercial interest rates calculated by SAS.

¹⁰⁰³ FTI I, par. 12.7, CER-1.

¹⁰⁰⁴ *Id.*, paras. 12.7-12.8.

¹⁰⁰⁵ FTI II, paras. 10.5-10.6, CER-4.

¹⁰⁰⁶ *Id.*, par. 10.7.

¹⁰⁰⁷ Brattle II, par. 262, RER-3.

¹⁰⁰⁸ Brattle I, Section IX.C, RER-3. The only exception is that indicated by FTI regarding the use of the *annual* rate of the US Treasury as the risk-free rate.

7.3 The commercial rate must be calculated using as reference Bolivia's issuance of sovereign (government) bonds of October 2012

696. FTI does not explain why the *commercial* interest rate should not be calculated with reference to Bolivia's issuance of sovereign bonds of October 2012. In fact, FTI appears to consider that the reference to the bonds is adequate but cannot consider them because it was "*instructed that an interest rate of 6.0% per annum is the minimum rate that the Claimant is entitled to*"¹⁰⁰⁹.

697. SAS also refutes the case law submitted by Bolivia, which proves (i) that several arbitral tribunals have calculated the commercial interest rate based on the issuance of sovereign bond and (ii) that the rate obtained in this manner, is even higher than those commonly applied by arbitral tribunals (based on the LIBOR rate)¹⁰¹⁰. This is confirmed by the very recent decision in *Tenaris*, which fixes the interest rate on the basis of Venezuela's *borrowing rate*¹⁰¹¹.

698. Therefore, the Tribunal must calculate the commercial interest rate based on Bolivia's issuance of sovereign bonds to 10 years that took place in October 2012¹⁰¹². As of March 11, 2016, Brattle calculates this commercial interest rate at 10.5%¹⁰¹³.

7.4 The interest rate must be simple

699. SAS does not dispute the legal authorities that show that various arbitral tribunals have applied a simple interest rate when the domestic legislation (the host country of investment) prohibits the capitalization of interest, as is the case in Bolivia¹⁰¹⁴. For its part, FTI merely states that "[w]e have been instructed that the Bolivian Civil Code's prohibition against compounding interest does not apply to these proceedings"¹⁰¹⁵.

¹⁰⁰⁹ FTI II, par. 10.15, CER-4.

¹⁰¹⁰ Counter-Memorial, Section 8.3.

¹⁰¹¹ *Tenaris S.A. and Tolla-Trading E Marketing Sociedad Unipersonal LDA v. Bolivarian Republic of Venezuela*, ICSID case No. ARB/11/26, award dated January 29, 2016, par. 587, RLA-271.

¹⁰¹² Counter-Memorial, par. 710.

¹⁰¹³ Brattle II, par. 261, RER-5.

¹⁰¹⁴ Counter-Memorial, paras. 720-721.

¹⁰¹⁵ FTI II, par. 10.10, CER-4.

700. SAS bases its request for compound interest on the *Rurelec* decision¹⁰¹⁶. While the tribunal sidestepped the prohibition of the Bolivian Civil Code regarding the capitalization of interest, that decision – besides not being binding on this Tribunal – is clearly wrong. In fact, the reference in the Treaty to the interest “*applicable in the territory of the expropriating Contracting Party*”¹⁰¹⁷ assumes that it must be applied to the current interest in Bolivia and to the rules governing that interest (including the prohibition of capitalizing interests, contained in Article 412 of the Bolivian Civil Code). The interest rate is fixed and applied in a regulatory context that cannot be neglected. Otherwise, there is the risk of disintegrating an orderly and consistent system, producing unwanted effects.
701. In any case, notwithstanding the express prohibition that exists in Bolivia regarding the capitalization of interest, recent awards recognize that “*the general view in international law is in favour of simple and not compound interest*”¹⁰¹⁸. This is confirmed by a tribunal chaired by Prof. William Park that recently awarded simple interest¹⁰¹⁹. This is also consistent with the Articles on State Responsibility, according to which “[t]he general view of courts and tribunals has been against the award of compound interest [...]”¹⁰²⁰.
702. Based on the foregoing, the Tribunal must apply a simple interest rate.
- 8. ANY COMPENSATION SHALL BE SIGNIFICANTLY REDUCED TO REFLECT SAS’ CONTRIBUTION TO ITS OWN LOSSES**
703. In the Counter-Memorial, Bolivia mentioned several arbitral decisions that reduced compensation for the shared guilt of the victim¹⁰²¹. SAS did not dispute any of these decisions, recognizing the power of the Tribunal to reduce any compensation awarded to SAS (*quod non*) on account of its own fault.

¹⁰¹⁶ *Guaracachi America, Inc., y Rurelec PLC v. Plurinational State of Bolivia*, ICSID case No. 2011-17, award dated January 31, 2014, CLA-1.

¹⁰¹⁷ Treaty, Art. 5(1), C-1.

¹⁰¹⁸ *Mr. Franck Charles Arif v. Moldova*, ICSID case No. ARB/11/23, award dated April 8, 2013, par. 617, RLA-272.

¹⁰¹⁹ *Antoine Abou Lahoud y otros v Congo*, ICSID case No. ARB/10/4, award dated February 7, 2014, par. 633, RLA-273.

¹⁰²⁰ UN International Law Committee, *Draft of articles on the responsibility of the State for internationally unlawful events, with comments*, 2001, pg. 108, RLA-159.

¹⁰²¹ Counter-Memorial, paras. 734-735.

704. Now, SAS denies having contributed to the generation of its damage. SAS invokes the case of *Abengoa v. Mexico*, noting that – just as in said dispute – in the current one (i) no rule imposes on SAS the obligation to implement a community relations plan and, in any event, (ii) Bolivia never complained about SAS' community relations plan¹⁰²². Therefore, according to SAS, it cannot be said that its fault contributed to the events that led to the Reversion.
705. *In limine*, it is outrageous that – at this point and after everything that happened – SAS claims that it had no duty to implement a community relations program. This shows the little importance that community relations had and have for SAS (just like the clashes, abductions and the sacrificed life in the area Malku Khota). This is confirmed by the fact that SAS only invested US\$ 770,000 in community relations, equivalent to 4.11% of the total costs of the Project¹⁰²³. This contrasts with the diligence of other mining companies, such as CMSC, which considered “social issues as important as the results of the exploration”¹⁰²⁴ and invested up to US\$ 2 million until it obtained the approval of the nearest community¹⁰²⁵.
706. Notwithstanding the above, SAS' position is incorrect for at least three reasons.
707. *First*, SAS tries to mislead the Tribunal over what is relevant for the purposes of contributory fault in this case. This does not revolve *solely* around the duty to implement adequate community relation plans but also (and especially) the duty to respect the human and fundamental rights of the members of the Indigenous Communities. The fact that SAS had this obligation¹⁰²⁶, or failed to comply with it, and that its actions forced the state to reverse the Mining Concessions in order to pacify the area, is not in question.
708. In fact, as Bolivia has proven, SAS and CMMK's staff:

¹⁰²² Reply, paras. 379-380.

¹⁰²³ The total amounts invested in the Project sum up to US\$ 18.7 million (Brattle I, pgs. 75-77, RER-3). If the US\$ 31.6 million are taken as base for the calculation of what SAS alleges to have invested in the Project (FTI II, par. 9.4, CER-4), the percentage of investment on community relations would be 2.43%.

¹⁰²⁴ Mamani, par. 7, RWS-6.

¹⁰²⁵ Mamani, par. 24, RWS-6.

¹⁰²⁶ See Section 2, *supra*.

- [REDACTED]
[REDACTED]

- Violated the rights to self-determination and self-government of Indigenous Communities, creating and promoting a false organization (COTOA-6A), whose members were given jobs and sticks, and provided legal assistance to file criminal charges against community members who opposed the Project¹⁰²⁸;
- Attended the *Tantachawi* ceremony – whose access is forbidden to foreigners – carrying sacred garments, which violated the rights of Indigenous Communities¹⁰²⁹;

- [REDACTED]
[REDACTED]
[REDACTED];

- [REDACTED]
[REDACTED]
[REDACTED];

- [REDACTED]
[REDACTED]

- Triggered clashes between the Indigenous Communities¹⁰³³.

709. *Second*, the facts of the *Abengoa* case invoked by SAS are very different from the facts of this case. In *Abengoa*, the discussion focused on “the obligations of investors regarding social communication”¹⁰³⁴ and the tribunal based its decision (not to reduce

¹⁰²⁷ Chajmi, par. 18, RWS-3; Resolute vote of the Community of Mallku Khota dated February 26, 2016, R-158.

¹⁰²⁸ Counter-Memorial, paras. 312 and ff.; [REDACTED]

¹⁰²⁹ Counter-Memorial, paras. 318 and ff.; [REDACTED]

¹⁰³⁰ [REDACTED]

¹⁰³¹ [REDACTED]

¹⁰³² [REDACTED]

¹⁰³³ [REDACTED] 7.

¹⁰³⁴ *Abengoa S.A. y Cofides S.A. v. United Mexican States*, ICSID case ARB(AF)/09/2, award dated April 18, 2013, par. 665, CLA-162.

compensation due to contributory fault) on the fact that “there was, therefore, a certain level of uncertainty as to the modalities of compliance” of such obligations¹⁰³⁵.

710. In this case, the issue under discussion is fundamentally different. On the one hand, Bolivia does not accuse SAS of breaching a duty of social communication but rather of violating the human and fundamental rights of members of the Indigenous Communities and of creating conflicts between Indigenous Communities in order to subdue the opponents to the Project. On the other hand, because there is no doubt that SAS and CMMK's staff violated those rights and provoked and fomented conflicts¹⁰³⁶.
711. Another element that justified the tribunal's decision in *Abengoa*, was the passivity of the respondent State¹⁰³⁷. In this case, by contrast, Bolivia has always had an active attitude and tried to mediate with (and between) the Indigenous Communities. Bolivia tried to mediate to solve the conflicts¹⁰³⁸, to the point that Governor Gonzales put his own life at risk¹⁰³⁹.
712. Third, SAS also violated other Bolivian laws that justify the reduction of compensation. For example (i) SAS exceeded the scope of activities permitted by its mining license, which led to this latter's being revoked¹⁰⁴⁰ and (ii) [REDACTED]
[REDACTED]
[REDACTED]¹⁰⁴¹. Ley alone they are contrary to Bolivian law, these actions aggravated the tensions in the Project area and

¹⁰³⁵ *Id.*

¹⁰³⁶ See Section 2, *supra*; Counter-Memorial, Section 3; [REDACTED]

¹⁰³⁷ *Abengoa S.A. y Cofides S.A. v. United Mexican States*, ICSID case ARB(AF)/09/2, award dated April 18, 2013, paras. 667-668, CLA-162.

¹⁰³⁸ Counter-Memorial, Section 3.4.

¹⁰³⁹ Press Release, *Fight for Malku Khota leaves 10 injured and 12 missing* of May 19, 2012, R-80; Counter-Memorial, par. 157.

¹⁰⁴⁰ Memorandum of Teresa B. Paredes to Wilfredo B. Alfaro, Environmental License Report 'Malku Khota Exploration Project' dated 7 May 2012, pg. 2 (“As a result of the modification or extension of the initial activity of the MALKU KHOTA MINERAL EXPLORATION, the license (DRNMA-CD-35/06), issued on date of September 5, 2006, is void under Article 64 General environmental Management Regulation, so that exploration activity currently is without an environmental license”) (Emphasis on original text), C-53.

¹⁰⁴¹ [REDACTED]

made the Reversion necessary to protect the right to life and physical integrity of the community members.

713. For these reasons, any damage suffered by SAS is the result of its exclusive fault and therefore, there is no causal link that requires Bolivia to pay any compensation to SAS. *Ex abundante cautela*, if the Tribunal orders Bolivia to compensate SAS due to the Reversion (*quod non*), such compensation must be reduced by at least 75%.

9. RELIEF SOUGHT

714. In view of the above, and reserving the right to explain and expand its presentation further on in view of the ulterior presentation by SAS, as well as, for the proof obtained in the discovery process, Bolivia kindly requests the Arbitral Tribunal that:

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.

Respectfully submitted on behalf of the Plurinational State of Bolivia

[Signed]

