UNOFFICIAL ENGLISH TRANSLATION

PCA Case No. 2013-15

SOUTH AMERICAN SILVER LIMITED
(Claimant)

v.

PLURINATIONAL STATE OF BOLIVIA
(Respondent)

OBJECTIONS TO JURISDICTION, ADMISSIBILITY AND COUNTER-MEMORIAL ON THE MERITS

Dr. Héctor Arce Zaconeta
Dr. Pablo Menacho Diederich
Dr. Franz Zubieta Mariscal
Attorney General of the State
Calle Martín Cárdenas No. 9
Zona Ferropetrol de El Alto
La Paz
Bolivia

Eduardo Silva Romero
José Manuel García Represa
Dechert (Paris) LLP
32 Rue de Monceau
Paris, 75008
France

Álvaro Galindo Cardona
Juan Felipe Merizalde
Dechert LLP
1900 K Street, NW
Washington, D.C., 20006
United States of America

Representing Respondent

March 31, 2015

NOTE: Unofficial English translation. The original language of Bolivia's Objections to Jurisdiction, Admissibility and Counter-Memorial is Spanish. In case of contradictions or inconsistencies between the Spanish and English versions, the Spanish shall prevail.

INDEX

1. INTRODUCTION……………………………………………………………………………………………………..-1-
2. PARTIES AND THE RELEVANT ACTORS OF THIS DISPUTE………………………………………………….-4-
   2.1 Parties of the Arbitration…………………………………………………………………………………….-4-
      2.1.1 South American Silver is a shell company of Bermuda owned by South American Silver Corp. (today known as Trimetals Mining Inc.), a Canadian company that speculates on the Toronto Stock Exchange (TSX) with undeveloped mining projects……………………………………….-4-
      2.1.2 The Plurinational State of Bolivia……………………………………………………………......-8-
   2.2 The Indigenous Communities of Northern Potosi……………………………………………………-10-
      2.2.1 Organization and Government of Indigenous Communities……………………….-12-
      2.2.2 Idiosyncrasy of Indigenous Communities of Northern Potosi…………………….-17-
3. THE FACTS PROVE THAT SAS CAUSED – THUS BREACHING HUMAN RIGHTS – A VIOLENT CONFRONTATION BETWEEN THE INDIGENOUS COMMUNITIES THAT FORCED THE STATE TO REVERT THE MINING CONCESSIONS………………………………..-22-
   3.1 The Mallku Khota area and its fragile socio-environmental balance……………….……..-24-
   3.2 The alleged acquisition of the mining concessions by CMMK coincided with a period of major political changes to ensure the rights of Indigenous Communities……………………………………………………………………………….….-26-
   3.3 Contrary to the assertions of SAS, CMMK never had a good relationship with the Indigenous Communities and did not manage to gain their support for the development of the Project…………………………………………………………………..…….-28-
      3.3.1 Since the beginning of the operation in 2010, and instead of generating benefits for the Indigenous Communities, CMMK committed assaults and acts of violence against Indigenous Communities………………………………..-29-
      3.3.2 Contrary to the assertions of SAS, opposition to the Project did not arise from a “handful of illegal miners” but rather from the nearby Indigenous Communities to Mallku Khota……………………..……………………………-32-
      3.3.3 In view of the lack of support, in 2011, CMMK launched a campaign to create intrigues and divisions among Indigenous Communities…..............-35-
   3.4 In view of the existing division between Indigenous Communities, and to prevent escalation of the conflict, the Government of Potosi intervened as a mediator........-39-

.

3.5 CMMK aggravated the division between Indigenous Communities and tried to criminalize Indigenous Authorities who opposed the Project……………………………..-45-
3.6 In view of the unsustainable violent situation caused by CMMK, the Government was forced to revert the Mining Concessions…………………………………….-52-
3.7 In complying with the Reversion Decree, COMIBOL ordered a valuation of the expenses incurred by CMMK and took over the management in the Project area………………………………………………………………………………………….....-54-
3.7.1 COMIBOL hired the services of an independent company that valuated the expenses incurred by CMMK ……………………………………………………………….-54-
3.7.2 Contrary to the assertions of SAS, COMIBOL has not started Exploitation in the region of Mallku Khota……………………………………………...-56-
4 APPLICABLE LAW TO THE TREATY DEMANDS THE PROTECTION OF RIGHTS OF INDIGENOUS COMMUNITIES………………………………………………………………………….-57-
4.1 International law requires the “systematic interpretation” of the Treaty and, in case of dispute, prevalence of human rights………………………………………………..-58-
4.2 Bolivian law is relevant in this case to determine essential matters…………………………..-63-
4.3 Applicable International and Bolivian law instruments require the Protection of Indigenous Communities…………………………………………………………………..-65-
5 THE ARBITRAL TRIBUNAL LACKS JURISDICTION TO DECIDE THE CLAIMS SUBMITTED BY SAS AND, IN ANY EVENT, MUST DISMISS THEM AS INADMISSIBLE……………..-68-
5.1 The Arbitral Tribunal lacks jurisdiction to decide the claims submitted by SAS because SAS is not the owner of the investment whose protection it claims…………………………………………………………………………………………………….-68-
5.1.1 The ownership link between SAS and the investment is a *sine qua non* Requirement for the jurisdiction of the Arbitral Tribunal…………………………-69-
5.1.2 Only the direct link of ownership between SAS and the investment, which does not exist in this case, would trigger the jurisdiction of the Arbitral Tribunal……………………………………………………………………………..-70-
5.1.3 Even if indirect ownership was sufficient to trigger the jurisdiction of the Arbitral Tribunal (*quod non*), it lacks jurisdiction since the indirect owner of the investment is a Canadian Company………………………………………………………………………….-73-
5.2 SAS cannot benefit from the protection of the Treaty since it does not have “clean hands”…………………………………………………………………………………………………….-79-
5.2.1 Investor who lacks “clean hands” may not benefit from the Protection of the Treaty……………………………………………………………………….-79-

5.2.2 In any case, the investor who does not respect the law (either of the host State or International Law) is not protected by the Treaty………-85-
5.2.3 SAS lacks “clean hands”……………………………………………………………………………….-87-
6 ASSUMING THE TRIBUNAL ADMITS ITS JURISDICTIONS (*QUOD NON*), BOLIVIA HAS FULFILLED ITS OBLIGATIONS UNDER THE TREATY AND INTERNATIONAL LAW……………………………………………………………………………………………-97-
6.1 Reversion of Mining Concessions was conducted in accordance with the Treaty and International Law……………………………………………………………………………..-97-
6.1.1 Reversion of Mining Concessions met the requirement of public interest and social benefit………………………………………………………………………...-98-
6.1.2 The Mining Concessions’ Reversion respected SAS’s due process of Law…………………………………………………………………………………………….-103-
6.1.3 Even if the Arbitral Tribunal deems that the State breached the Condition concerning the prompt, adequate and effective Compensation (*quod non*), such breach does not affect the legality of the Reversion……………………………………………………………………...-107-
6.2 Bolivia gave a fair and equitable treatment to CMMK investment…………………………-113-
6.2.1 CMMK could legitimately expect that Bolivia would protect its natural resources and Indigenous Communities in accordance with its national and international obligations……………………………………….-114-
6.2.2 Bolivia acted in good faith……………………………………………………………………. -119-
6.2.3 Bolivia treated CMMK investment in a transparent and consistent manner……………………………………………………………………………………………..-123-
6.3 SAS other claims under the Treaty are unfounded …………………………………………….-124-
6.3.1 The State complied with its obligation to provide full protection and security to SAS investments…………………………………………………………..-124-
6.3.2 The State complied with its obligation of refraining from introducing arbitrary and discriminatory measures that hinder the use and enjoyment of CMMK investment………………………………………………………..-127-
6.3.3 The State fulfilled its obligation in providing no less favorable treatment to the investments made by SAS that it accords to its own investors…………………………………………………………………………..-129-
7 IF THE TRIBUNAL CONSIDERS THAT BOLIVIA HAS BREACHED ANY OBLIGATION UNDER THE TREATY OR CUSTOMARY INTERNATIONAL LAW (*QUOD NON*), IT SHALL NOTE THAT SAS HAS NOT PROVEN TO HAVE SUFFERED ANY DAMAGES, AND IN ANY CASE, THE COMPENSATION SHALL BE LIMITED TO THE REIMBURSEMENT OF COSTS………………………………………………………………………………………-132-

7.1 The restitutionary claim pretended by SAS is contrary to the Treaty and Customary international Law……………………………………………………………………………-133-

7.1.1 Restitution has a very limited application in International law……………………………………………………………………………-133-

7.1.2 In this case, restitution is impossible……………………………………………………..-135-

7.1.3 Restitution would impose a disproportionate burden on Bolivia……………….-136-

7.2 The damages claimed by SAS are hypothetical and, even if any (*quod non*), SAS has not proved they were caused by Bolivia……………………………………………………-137-

7.2.1 Hypothetical or speculative damages are not compensable……………………-138-

7.2.2 The burden of the proof of the certainty of damages falls on SAS…………………………………………………………………………………………………..-139-

7.2.3 SAS has not proven that its damages are certain…………………………………-139-

7.2.4 Even if the Arbitral Tribunal deems that SAS has suffered certain Damages, these were caused by SAS, not by Bolivia……………………………….-147-

7.3 If, *par impossible*, the Arbitral Tribunal deems the existence of a Compensable damage, any compensation must be limited to the reimbursement of the costs incurred by SAS in relation to the Project……………………-150-

7.3.1 Given the speculative nature of the Project, any compensation must be limited to the reimbursement of costs made by SAS…..................-150-

7.3.2 Project Valuation based on costs…………………………………………………………-154-

7.4 If the Tribunal considers that the market-based approach is applicable (*quod non*), it must determine that the RPA and FTI analysis is essentially flawed and overvalued………………………………………………………………….....-155-

7.4.1 The valuation conducted by RPA based on comparable methods is arbitrary and essentially wrong…………………………………………………………..-155-

7.4.2 The valuation conducted by the four analysts which used by FTI are not reliable given that three of them are not independent of SASC and, in any case, all valuations suffer from essential errors……………………….-163-

7.5 The valuation of the Project must not consider events arising after the Bolivia Valuation Date……………………...-165-

7.5.1 Pursuant to the Treaty, the Project must be assessed at the Bolivia Valuation Date……………………………………………………………………………………....-165-

7.5.2 Contrary to the assertions of SAS, failure to pay (non-payment) compensation does not turn it, *per se*, into unlawful expropriation…….......-167-

7.5.3 It would be arbitrary to consider the date of the award for the purposes of Project valuation………………………………………………………………-171-

7.6 The Arbitral Tribunal must deny any compensation to SAS by other alleged breaches of the Treaty other than those in Article V (1)……………………………………..…….-174-
7.6.1 It is incorrect to calculate damages for reasons other than expropriation based on fair market value standards……………………………......-174-
7.6.2 SAS has not proved to have suffered damages from alleged breaches of the Treaty nor the total amount of such………………………….…….-176-
8 INTERESTS…….....-177-
8.1 The commercial interest rate should be preferred over the legal interest rate………….-173-
8.2 The criteria used by the FTI to calculate the commercial rate is erroneous…………....-178-
8.3 The commercial rate must be calculated using as reference the issuance of sovereign bonds performed by Bolivia in October 2012………………………………….-180-
8.4 The interest rate must be simple………………………………………………………………………...-128-
9 IN ANY EVENT, ANY COMPENSATION OF SAS SHALL BE SIGNIFICANTLY REDUCED TO REFLECT THE CONTRIBUTION OF SAS TO ITS LOSSES...-184-
10 RELIEF SOUGHT……...-188-
10.1 As to jurisdiction and admissibility……………………………………………………….……….-188-
10.2 As to the merits…………………………………………………………………………………………..-188-

1. In accordance with the timetable set out in Procedural Order No. 5 dated February 17, 2015 and Articles 21 and 23 of the Arbitration Rules of the United Nations Commission on International Trade Law, as revised in 2010 (the "**Rules**")[1], the Plurinational State of Bolivia ("**Bolivia**" or the "**State**") submits its Objection to Jurisdiction, Admissibility and Counter-Memorial on the Merits (the "**Counter-Memorial**") in response to the Statement of Claim and Memorial by South American Silver Limited ("**SAS**" or "**Claimant**") dated September 24, 2014 (the "**Statement of Claim**").

2. This Counter-Memorial includes the Witness Statement of Mr. Felix Gonzales Bernal, Governor of the Department of Potosí ("**Gov. Gonzales**" or "**RWS-1**") and expert affidavit of Dr. Liborio Uño Acebo ("**Uño**" or "**RER-1**"), Professor Kadri Dagdelen of OptiTech Engineering Solutions Inc. and the Colorado School of Mines ("**Dagdelen**" or "**RER-2**"), and Messrs. Graham A. Davis and Florin A. Dorobantu at The Brattle Group ("**Brattle**" or "**RER-3**"), and documentary attachments **R-9** to **R-146** and judicial attachments (doctrine and case law) **RLA-1** to **RLA-175**.

1. INTRODUCTION

3. The current case constitutes one of the clearest examples of social irresponsibility by an international mining company. In addition to causing serious events with their actions and omissions that unleashed massive protests and critical state of public commotion in the North of the Potosi Department, SAS's claims constitute, from at least three points of view, an abuse to the procedure:

4. *First*, as was just announced, and Bolivia shall demonstrate in this Counter-Memorial, the facts that led to the reversion of the mining concessions of the Bolivian company Compañía Minera Malku Khota S.A. (**"CMMK"** or the "**Company**"), of which SAS preaches itself as owner, were caused by their own actions. During the two and half years in which CMMK performed exploration activities in the ten mining concessions of the Malku Khota area (the "**Project**"), CMMK ignored and even violated human, social an collective rights of the Indigenous Communities that live in the area. The Arbitral Tribunal cannot allow that an international dispute resolution system be used by a claimant that has no "*clean hands*".

5. *Second*, the investment that SAS (a company from Bermuda) intends to hold actually belongs to the company South American Silver Corp. (**"SASC"**), a Canadian company that

[1] Capitalized terms that are not expressly defined herein shall have the meaning provided in earlier documents and/or correspondence of Bolivia.

speculates in the Toronto Stock Exchange with undeveloped mining projects. As shall be demonstrated, SAS abuses the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments (the "**Treaty**") by submitting claims being a shell company when the true owner of the investment is a Canadian company that is not protected by the Treaty or any other instrument of protection of investments.

6. *Third*, SAS intends to abuse the norms provided in the Treaty (if applicable, *quod non*) by intending to ignore the sovereign right that the State had to order the reversion of the Mining Concessions for motives of public utility and social benefit (the restoration of the public order to the area of North Potosí) on August 1st, 2012 (the "**Reversion**") by means of Supreme Decree No. 1308 (the "**Reversion Decree**") and intend that this Arbitral Tribunal restitutes the Mining Concessions. Even more, the alternate claim of SAS consisting in the compensation for the alleged expropriation of its investment is also abusive by claiming hypothetical damages that are not compensable under international law, and by being supported by exaggerated and arbitrary valuations.

7. This Counter-Memorial is structured as follows: *first*, given the sociological complexity and idiosyncrasy of the Indigenous Communities that live in the area of the Project and their relation with the different actors of the Project, Bolivia will make a presentation of the different parts and actors of this dispute. This presentation will be essential to understand the gravity of the actions taken by SAS and the obligation that the State had of preserving the rights of the Indigenous Communities of the North of Potosí (the "**Indigenous Communities**"). As will be demonstrated, SAS is a shell company (*shell company*) that belongs to SASC, a "junior" Canadian mining company, which like others of their kind dedicate itself to speculate with undeveloped mining projects. Meanwhile, Bolivia is a State conceived under a "Plurinational" model where the protection of Indigenous Communities is an essential mandate of the State that prevails over the rights of the private companies **(section 2)**.

8. *Second,* Bolivia will detail the facts of the case from the acquisition of the Mining Concessions up to the facts subsequent to the Reversion. As will be demonstrated, CMMK incurred in repeated and systematic violations of human, social and collective rights of the Indigenous Communities. [redacted] . Such facts (i) produced the total rejection of the Project by the near communities and most affected by such Project and (ii) created a violent opposition between such communities and the more distant communities that had been persuaded by the Company. There were serious confrontations between both sides. By the end of May 2012, more than 4000 Indigenous Communities of the North of Potosí marched towards La Paz to express their opposition to

the Project and warn not to withdraw until the Government revokes the Mining Concessions. New confrontations arouse, wounded and even one dead. Given this uncontrollable situation, the Bolivian Government had no other option but to declare the Reversion to reestablish the public order **(section 3).**

9. *Third*, in order to analyze the legal effects of these facts it is necessary to determine which is the applicable law to current dispute. The Treaty does not include a clause relating the applicable law, and there is no agreement between the Parties. Therefore, the Arbitral Tribunal must apply "*the law that they consider appropriate*" (article 35(1) of the Regulation). Considering that the extraordinary factual circumstances of this case, the Arbitral Tribunal must interpret the Treaty in light of the international law and Bolivian law sources which guarantee (and obligates the State to guarantee) the protection of rights of the Indigenous Communities **(section 4)**.

10. *Fourth*, Bolivia will demonstrate that the Arbitral Tribunal must reject *in limine* the claims submitted by SAS due to the fact that it lacks of jurisdiction, and, in any case, such claims are inadmissible. In effect, in this case there is no ownership link between SAS and the investment of which protection is claimed. Such link is a requirement *sine qua non* for the jurisdiction of this Arbitral Tribunal. As will be demonstrated, the Mining Concessions of CMMK actually belong to a Canadian investor that is not protected by the Treaty and not to the shell company SAS. Even if, *par impossible*, the Arbitral Tribunal considers that SAS is the owner of the investment, it must reject their claims by appearing before this Arbitral Tribunal with no "clean hands" (**section 5**).

11. *Fifth*, and assuming that the Arbitral Tribunal has jurisdiction over the claims of SAS and such are admissible (*quo non*), Bolivia will demonstrate that it did not breach its obligations under the Treaty and international law. Actually, the Reversion was a necessary measure, broadly and proportionally justified. Bolivia, acting always in good faith, made the efforts to find an exit different from the Reversion. However, given the unsustainable situation of the public order produced by the actions of CMMK, the State was forced to declare the Reversion for reasons of public utility and social benefit. By starting an independent valuation process and negotiations with SAS that today are still ongoing, Bolivia has not breached its obligation of not expropriate – without compensation - the investments of SAS. Likewise, Bolivia gave a fair and equitable treatment to SAS, who could anticipate that the State would protect the collective and social rights of the Indigenous Communities. It will also be demonstrated that Bolivia has not breached its obligations of granting full protection and security to the investments of SAS, of not adopting arbitrary and discriminatory measures that hinder the use and benefit of the investment, and of not granting a less favorable treatment to the investments of SAS than it accords to its own investors **(section 6)**.

12. *Sixth*, if, *par impossible,* the Arbitral Tribunal considers that Bolivia breached its international obligations, it must conclude that the damages claimed by SAS are hypothetical and that, in any case, any compensation should be limited to the reimburse of investments made. As is will be demonstrated, the Project was in an embryonic stage, having only a conceptual study based on wrong premises characterized by its high level of speculation, preventing it of granting any economic value to the Project. The persistent opposition by SAS to allow Bolivia and its independent experts to have access to technical documents used by their experts, in addition to being a violation of the minimum standards of due process[2], is symptomatic to the fear by SAS that the speculative nature of its alleged investment be revealed. Likewise, it shall be demonstrated that the valuations made by the financial and mining experts of SAS are plagued with errors and must be entirely dismissed **(section 7)**.

13. *Seventh*, Bolivia will explain why the interest rate that SAS claims is unjustified both from a financial point of view as well as legal, and why interests can only be simple under Bolivian law **(section 8)**.

14. Finally, and assuming the hypothetical scenario that the Arbitral Tribunal considers that Bolivia is responsible, it must establish the enormous responsibility (of at least 75%) that SAS had in the final outcome by means of the Reversion. The behavior by SAS must be considered as contributory negligence at the moment of quantifying whichever compensation, if applicable **(section 9).**

15. For these reasons, the Arbitral Tribunal must accept Bolivia's claims **(section 10)**.

2. PARTIES AND THE RELEVANT ACTORS OF THE THIS DISPUTE

16. Given the complexity of the communities and parties that intervene in the current dispute, a presentation, *in limine,* of the Parties to this arbitration **(2.1)** and other essential stakeholders is necessary.

2.1 Parties of the Arbitration

17. The Parties of this Arbitration are: South American Silver Limited **(2.1.1)** and the Plurinational State of Bolivia **(2.1.2).**

2.1.1 South American Silver is a shell company of Bermuda owned by South American Silver Corp. (today known as Trimetals Mining Inc.), a Canadian company that speculates on the Toronto Stock Exchange (TSX) with undeveloped mining projects

[2] Bolivia does the most ample reserve of rights in this regards.

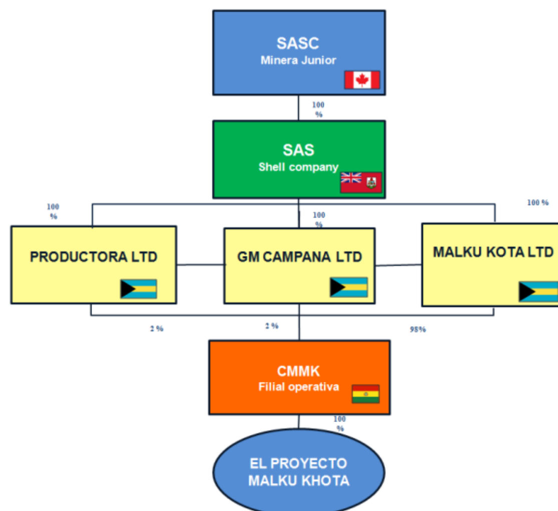
18. The Plaintiff in this case is South American Silver Limited ("**SAS**"). Given the restricted jurisdiction of the Arbitral Tribunal, it cannot include their "*predecessor, parent companies and subsidiary*", as suggested by SAS in its Statement of Claim[3].

19. SAS describes itself as a company incorporated in the Bermuda Isles, overseas British territory, owned by a group of companies headed by South American Silver Corp. ("**SASC**"), currently Trimetals Mining Inc., "**Trimetals**")[4], a Canadian company register in the Toronto Stock Exchange since 2006, specialized in development and exploration of silver mining projects in South America[5].

20. SAS claims to hold 100% of the stock of the Bolivian company Compañía Minera Malku Khota S.A. ("**CMMK**") through three affiliates incorporated in the Bahamas: Malku Khota Ltda., Productora Ltd. and GM Campana Ltd[6].

21. The description provided by SAS deserves two clarifications. First, the Arbitral Tribunal must consider that SAS is a shell company (*shell company*). Second, SASC, the actual owner of the Project, in addition of not being British[7], belongs to a type of mining companies known in the industry as "junior", whose economic activity is inherently speculative[8].

Organizational Chart of SASC and its affiliates (according to SAS)



[3] Statement of Claim, p.1.
[4] Id.
[5] *Id.*, ¶ 16.
[6] *Id.*, ¶ 1.
[7] *See* section 5.1 *below*.
[8] Junior Miners, *Silver Mining Companies*, ("*South American Silver Corp. (TSX: SAC) Mallku Khota silver project in Bolivia*"), **R-9**.

22. *First*, SAS is only one more of the *off shore* companies of its Canadian parent company, which differ in nothing from intermediate companies constituted in the Bahamas.

23. In effect, despite of claiming in this arbitration that it has suffered massive financial losses, SAS does not provide any document that demonstrates the performance of any economic activity that could have been affected by the actions of Bolivia. This is understandable, since the real owner of the Project is SASC[9]. It was this Canadian company that led the Project, born the scarce costs incurred in its development and, even, who covers the costs of this arbitration[10].

24. As will be detailed further on[11], this arbitration is based on the abuse of the corporate structure of a business group. SASC intends to obtain, by means of use and abuse of the British nationality of a shell company, benefits that the Treaty does not grant to Canadian nationals.

25. *Second,* it is appropriate to reveal the nature of SASC's inherently speculative economic

[9] SAS declares that "*CMMK is the Bolivian operational subsidiary of SASC[...][and not SAS]a mining company specialized in development and exploitation of silver mining projects in South America"* Statement of Claim, ¶ 1 (emphasis added). *See,* for example, Press Release of SASC dated June 28, 2007, *South American Silver Corp. Announces First Drilling Results at the Malku Khota Silver Project in Bolivia* ("*South American Silver Corp. ("SASC" or the "Company") is pleased to announce the results of its first diamond drill hole at its Malku Khota silver property in Bolivia"*), **R-10**; Press release of SASC dated August 28, 2008, *South American Silver Announces Intersection of New Lead-Zinc-Silver SEDEX Mineralization at Malku Khota*, **R-11**; Press release of SASC dated December 7, 2009, *South American Silver Corp. Completes Final Tranche of $3.25 Million Financing* ("*SASC is a mineral exploration company that acquires, explores and develops mineral properties, primarily silver, gold and copper in South America. The Company presently holds interests in two material properties: the flagship Malku Khota silver-indium-gold property in Bolivia and the Escalones copper-gold-molybdenum property in Chile*"), **R-12**; Press release of SASC dated September 11, 2009, *South American Silver Provides a Metallurgical Update at Malku Khota Showing Improved Metal Recoveries* ("*South American Silver Corp. ("SASC" or the "Company") announces that it has completed a series of metallurgical tests on samples from the Malku Khota silver-indium project in Bolivia"*), **R-13**; Press release of SASC dated November 8, 2010, *South American Silver Announces $28 Million Financing ("South American Silver Corp. is a growth focused mineral exploration company creating value through the exploration and development of the 100% owned Malku Khota Silver-Indium project in Bolivia*"), **R-14**.

[10] In effect, the strictly necessary investments to cover costs and expenses inherent to the exploitation of the project were financed by SASC – and not by SAS – by means of its quotation in the stock exchange and the issuance of new shares whose only purpose was to finance the exploration costs. Press release of SASC dated November 8, 2010, *South American Silver Announces $28 Million Financing* **R-14**; Press release of SASC dated November 18, 2010, *South American Silver Third Quarter President's Message and Project Update*, **R- 15**. *See*, also, Press release dated March 24, 2014, **R-16**.

[11] *See* section 5.1, *below*.

activity, the truly owner of the investment. SASC is a "*junior*" Canadian mining company, a type of company that has proliferated in the last years due to high quotes of the mineral resources[12].

26. *First,* it should be emphasized that these junior mining companies rarely exploit the reservoir that they hold[13]. Their lack of its own capital implies a *modus operandi* characterized for transfer of their rights over the reservoirs to other companies named: *"senior companies"* which are who, *a posteriori*, make the necessary investment for the effective exploitation of the reservoirs.

27. The junior mining companies maintain only a small portion of the profits generated by the exploitation, which is enough to guarantee important benefits without a major investment. This strategy assures them an accelerated enrichment, even when the reservoirs that they hold, like the Project, are not in production or are in an early stage of development.

28. *Second*, the majority of the junior mining companies – such as SASC – are registered before the Toronto Stock Exchange and are protected by permissive Canadian laws that, in addition to an extensive legal protection, grant an active support in financial, political, legislative and diplomatic fields[14]. The abovementioned, as explained by the mining industry experts, enables them to develop a mining project with minimum cost and maximum judicial protection:

> *The permissiveness of the TSX's [Toronto Stock Exchange] regulations, and the financial, political, moral and diplomatic support of the Canadian government towards transnational mining companies is unique in the World and has made Canada a true haven in the mining sector*
>
> [...]
>
> *The Canadian jurisdiction allows <u>both junior companies as well as major companies to minimize their costs without having to be accountable for their practices in the field</u>. This impunity opens the door to <u>multiple actions against the nations, workers and the environment</u>[15].*

---

[12] Information and Documentation Centre of Bolivia, *Mallku Khota, Mining Land and Territory* of November, 2012, p. 10, **R-17**.

[13] Press release, *The junior mining, a segment to explore*, dated September 6, 2011, **R-18.**

[14] *Id., See,* also, W. Sacher, *The Canadian mining model, institutionalized looting and impunity,* dated July, 2011, **R-19**.

[15] A. Deneault and W. Sacher, *Canada, A legal haven for transnational mining companies,* dated December 13, 2013, unofficial translation, **R-20**.

29. In general, experts in the industry also warn the danger that junior mining companies represent, given that:

> t*hey are associated to corruption cases, tax evasion, massive contamination, attacks on public health,* *criminalization of the resistance, complicity in rape and murder of mining oppositionists,* *pacts with paramilitary groups,* *violent expropriations*, *arms trafficking, etc; the list is never-ending*[16].

30. The speculative practices of junior mining companies made them protagonists of big world frauds and worldwide financial scandals, such as the Bre-X case. Bre-X was a junior mining company that during the 90's claimed to have found in Busang, Indonesia the biggest gold reservoir of the World. The information published by Bre-X over the potential of such reservoir triggered a frenetic increase in their stock market value, even though the company did not extracted a single grain of gold, as its project – as the one at hand – was only at exploration stage. Later it would be found that Bre-X had deceitfully inflated the valuation of the mining reservoir causing the collapse of the price of its shares, and with that, the ruin of several investors[17].

31. These clarifications result relevant given, as will be shown further ahead, that they have a fundamental impact on the work of the Arbitral Tribunal by establishing its jurisdiction over the claims submitted, analyze their merit and the exaggerated amount of the claimed compensation.

2.1.2 The Plurinational State of Bolivia

32. The Plurinational State of Bolivia as party to this arbitration cannot be considered without acknowledging the particularities of its people, model of State and recent history. In addition, it is also necessary to present the authorities that participated in the events that led to this controversy.

33. *First*, it should be noted that Bolivia is the country with the highest percentage of indigenous population in Latin America[18]. By the time SAS supposedly had acquired its investment, 62% of the Bolivian population identified themselves as indigenous[19].

---

[16] *Id.* (emphasis added).

[17] Finances, *Who remembers today Bre-X, the biggest fraud commit in the history of Gold*? dated December 30, 2012, **R-21**; The Economist, Gold mining-Rumbled dated May 8, 1997, **R-22**.

[18] International Labor Organization, *Indigenous and Tribal Peoples* – Bolivia**, R-23**

[19] In the 2001 Census, 62% of the Bolivian population identified themselves as indigenous. In the next census, in 2012, 40,3% of the population identified themselves as indigenous. The Inter-American Development Bank, Gender and Diversity Section (SCL/GDI), *Calculating the Indigenous Population in Bolivia*, dated January 2015, **R-24**.

34. In Bolivia, over 30 Indigenous Communities are recognized, being the majority from the tribes Quechua and Aymara[20]. In turn, the biggest Bolivian indigenous concentration is located in the known "*high lands*" corresponding to the area dominated by Andes Mountain Range that is commonly associated with the Departments of the *altiplano*; La Paz, Potosí and Oruro[21]. In effect, in the "*high lands*", the entirety of the municipalities has a mainly indigenous population[22].

35. The Bolivian demographic composition makes that one of the essential features of its model of State be its "*plurinational*" nature[23]. A "*plurinational*" State implies an institutional structure and legal regime that acknowledges:

> *<u>[T]he precolonial existence</u> of indigenous nations and peoples and its <u>ancestral domain over the territories</u>* [and] *guarantees their <u>free determination</u> with the frame of the unity of the State, that consists in their <u>right to autonomy, self government, their culture, acknowledgement of their institutions and the consolidation of its territorial entities</u> in accordance with* [the] *Constitution and the law*[24]*.*

36. For this reason, the Plurinational Constitutional Tribunal of Bolivia has explained that:

> *[T]he Plurinational nature implies the breakdown of the State-nation fundaments based on culture and legal monism, given that it not only acknowledges the indigenous peoples as different cultures with a frame of multicultural notion, but also as "nations", understanding such not only as historical communities with a determined home territory that shares differentiated language and culture, but as peoples with political capability to define their destiny (free will) within the scope of the unity of the State, in accordance with article 2 of the Political State Constitution*[25]*.*

---

[20] Bolivian National Statistics Institute, *Main results of national census of population and housing 2012* (CNPV 2012), p. 50, **R-25**. International Labor Organization, Indigenous and Tribal Peoples – Bolivia, **R-23.**

[21] G. Colque, *Indigenous autonomies in high lands: Brief mapping of implementation of the Indigenous Peoples Autonomy*, Earth Foundation, 2009, p. 21, **RLA-1.**

[22] *Id.*, p. 43.

[23] As of the year 1995 Bolivia acknowledged itself as a Republic "*multiethnic and pluricultural*" in which the social, economic and cultural rights of the indigenous peoples should be respected, "*specially those related to their indigenous peoples lands, guarantying the sustainable use and exploitation of natural resources, their identity, values, languages, uses and institutions".* Political Constitution of the State, Law 1615 of adjustment and concordance of the Political Constitution of the State dated February 6, 1995, articles 1 and 171, **RLA-2.**

[24] New Political Constitution of the State, dated February 7, 2009, article 2, unofficial translation,**RLA-3**.

[25] Plurinational Constitutional Tribunal of Bolivia, resolution 0112/2012 dated April 27, 2012, section III, **RLA-4.**

37. This nature of "plurinational" of the State of Bolivia is the achievement of a memorable indigenous fight that was manifested with special vigor at the beginning of the 90's (given the fifth centenary of the Spanish colonization). By them, as explained by Professor Liborio Uño, legal expert of Bolivia, lawyer of quechua origin and one of the most recognized authorities in indigenous peoples rights, "*for the first time, the Indigenous Communities have achieved to become a political central force of its own vindication process*"[26].

38. Several social marches and protests led to the constituent process that started after the consolidation of the "*Pact of Unity of the indigenous communities organization*" at the social summit that took place in the city of Santa Cruz from the 15th to the 17th of February, 2006 and that resulted in the full acknowledgement of the Bolivian plurinational reality, leaving behind, "*under the political strategy of integration of the indigenous to the western national life, which implied a national homogenization under a State and nation profoundly monist in national, state and legal terms*"[27].

39. *Second,* the Arbitral Tribunal must consider that, as will be explained in the following section, several Bolivian authorities played an essential role in the dispute acting as keepers of the regional public order, mediators of the conflicts that arouse in the Project area and as facilitators of the agreements reached in July, 2012, that resulted in the Reversion. These authorities are (i) the Government of the Department of Potosi, headed by Mr. Félix González, witness of Bolivia in this arbitration, and (ii) the Department Office of Mother Earth and Environment of Potosí, office of the Government in charge of proposing and executing sustainable development and environmental polices in the Department of Potosí, as well as the coordination and management of the use of natural and renewable resources in the Department.

2.2 The Indigenous Communities of Northern Potosí

[26] Uño, ¶ 19, **RER-1**. As explained by Dr. Liborio Uño, "[u]ntil the early XVI century, the present Bolivian territory lived under the Federative State of the Tahuantinsuyo. This State collapsed at that time with the arrival of the Spanish colonization, which destroyed the then in force government institutions and usurped the governmental functions and roles that were performed by their authorities. As a consequence, the community, participative and federal democracy of the Tahuantinsuyo State was replaced by a State based in the vertical and centralistic colonial monarchy. For that, since the anticolonial rebellions of 1780, the leaders of the Indigenous Peoples had as one of its main purposes the recuperation of state and governmental positions that they had before the invasion by the Spaniards", unofficial translation. Id., paragraph 13.

[27] *Id*., ¶ 17. This marches included, (i) the "March for the Territory and Dignity" f 1990; (ii) the "March for Territory, Development and Political Participation of the Indigenous Peoples" of 1996; (iii) "March for Land, Territory and Natural Resources" of 2000; (iv) the "Water War" in Cochabamba in the year 2000M and (v) the "March for Popular Sovereign and Natural Resources" of 2002. *Id*., ¶ 22.

40. The CMMK Project is located in the Bolivian "*high lands*", specifically in the area of high concentration of indigenous population: the north of the Department of Potosí[28]. Precisely, the mining reservoir of Malku Khota is located in the municipalities of Sacaca (capital of the province of Alonso de Ibañez), Toracari (province of Charcas) and San Pedro de Buena Vista (capital of the province of Charcas), as shown in the following graph[29]:

41. As acknowledged by SAS[30], there are several Indigenous Communities in the area of the Project, whose existence is before the colony and whose population shares territory, culture, history, languages and organizations or legal, political, social and economic institutions of their own[31].

42. For that, even that they are not a party of this arbitration, it is undeniable that the Indigenous Communities of the North of Potosí (the "Indigenous Communities") played an essential role in the events that give place to this dispute and in the decision of the Reversion.

[28] Mallory, ¶ 6, **CWS-3**.

[29] Information and Documentation Centre of Bolivia, *Mallku Khota, Mining Land and Territory* of November, 2012, p. 5, **R-17**.

[30] Statement of claim, ¶ 45; Mallory,¶. 6, **CWS-3**.

[31] The Political Constitution of the State defines nation and indigenous peoples as "*all the human collectivity that shares cultural identity, language, historical tradition, institutions, territoriality and worldview, whose existence is prior the Spanish colonial invasion"* New Political Constitution of the State dated February 7, 2009, article 30 (I), unofficial translation, **RLA-3.** Specifically, the law defines it as "*peoples and nation that exists prior the invasion or colonization, that constitutes a sociopolitical unit, historically developed, with organization, culture, institutions, rights, rites, religion, language and other common and integrated characteristics",* Framework law of Autonomies 031 dated July 19, 2010, article 6 (III), unofficial translation, **R-7**. In Bolivia their rights (**RLA-3**) to free will and territoriality (article 30.4), their institutions to be part of the general structure of the State (article 30.5), the protection of their sacred places (article 30.7), live in a healthy environment (30.10) and to prior consultation (article 30.15) among others, are acknowledged.

43. In order to evaluate the behavior of CMMK and the Bolivian State, it is necessary to understand how the Indigenous Communities are organized and self-governed, given the fact that, as will be explained further on[32], national and international law establish that such forms of organization and self-government must be respected by all individuals. In addition, the Arbitral Tribunal must consider the distinctive features of the affected Indigenous Communities, which will allow understanding the motives that led to the failure of the mining project in Malku Khota.

2.2.1 Organization and government of the Indigenous Communities

44. *In genere,* the Indigenous Communities constitute *indigenous peoples territories* ("**TIOC**" in its Spanish acronym). The TIOCs correspond to a form of territorial organization acknowledged in Bolivia under the principle of "*preexistence of nations and indigenous peoples"*[33]*,* along with the departments, provinces and municipalities[34].

45. The TIOCs can be composed by communities[35], and are self defined as "*the ancestral territory over which the collective or indigenous communities' lands were constituted"*[36]*.*

46. The TIOCs have an "*an indigenous peoples autonomy consisting in the self governing as exercise of the nations and indigenous peoples free will"*[37]. This self-governing is performed "*pursuant to norms, institutions, authorities and procedures in accordance with their powers and competencies in harmony with the Constitution and the law"*[38].

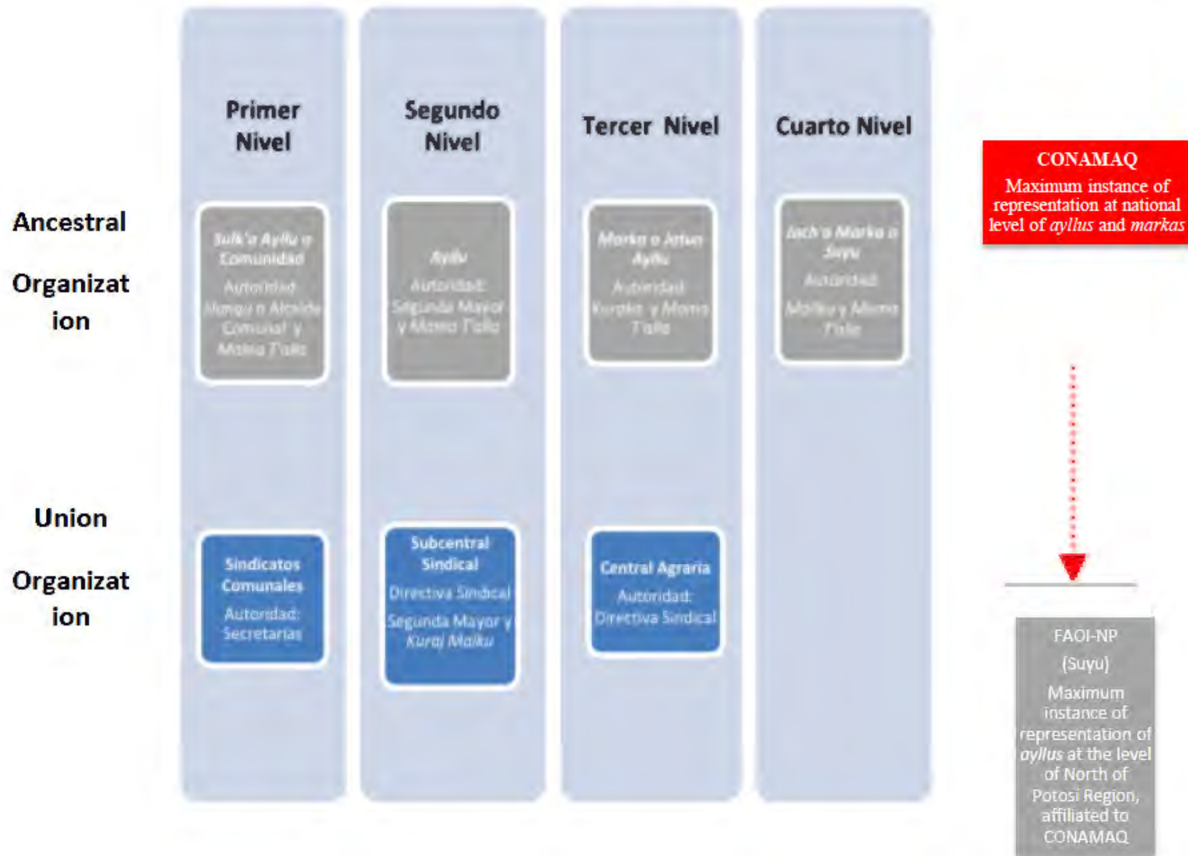
47. In sum, the TIOCs have their "*integrality*" acknowledged, which includes:

> *[t]he right to land, the exclusive use and exploitation of the renewable natural resources in the terms provided by law; to the prior and informed consultation and the participation in the benefits for the exploitation of the non-renewable natural resources that are located in their territory; the power to apply their own norms, managed by their representation structures and the definition of their development in accordance with their cultural criteria and principles of harmonic coexistence with mother nature*[39]*.*

[32] *See* section 4, *below*.
[33] New Political Constitution of the State dated February 7, 2009, article 270, unofficial translation, **RLA-3**.
[34] *Id.*, article 269, (unofficial translation).
[35] *Id.*, article 40, (unofficial translation).
[36] Framework Law of Autonomies 031 dated July 19, 2010, article 6 (i) (2), **R-7**.
[37] New Political Constitution of the State dated February 7, 2009, articles 289 and 291, **RLA-3**.
[38] *Id.*, article 290, (unofficial translation).
[39] *Id.*, article 403, (unofficial translation).

48. The Indigenous Communities, as TIOCs, have two methods of territorial organization with power and decision taking systems of their own[40]: the structure of ancestral type (the "**Ancestral Organization**") and the structure of union type (the "**Union Organization**").

Organization of Indigenous Communities in the Old Territory of the Charkas-Qhara Quara Nation



49. The type of structure varies from one community to another. Particularly, in the global area of the Project, there is an overlapping of the structures of the Ancestral and Union Organizations.

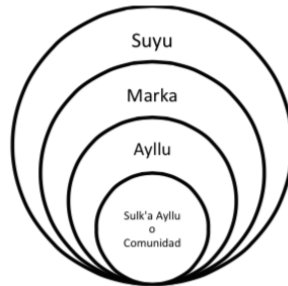
2.2.1.1 Ancestral Organization

50. Since the Tahuantinsuyu State[41], the Ancestral Organization in the "*high lands*" had been divided in (i) *sullk'a ayllus*, (ii) *ayllus*, (iii) *markas* and (iv) *suyus*[42]. The *sullk'a ayllu* is the

[40] Mallory ¶ 6, **CWS-3.**

[41] As explained by Dr. Uño, "The Tahuantinsuyo was a tetra-federation of four suyus or macro states conformed to the North by the Chinchasuyu, to the South by Qollasuyu, to east by the Antisuyu and to the west by the Contisuyu, with their capital and center in Cuzco. The Tahuantimsuyo occupied the current

base community in the Aymaras and Quechuas nations and its conformed by several families. At the same time, the union of several *sullḱa ayllus* conform an *ayllu*, the union of several *ayllus* conforms a *marka* and the union of several *markas* conforms a *suyu*[43].



51. Each level of organization has their maximum authority, as shown in the chart of paragraph 48 *above*[44], characterized by the duality of the existence of a male and female figure, the *Mama T'alla*[45]. Their functions cover the political and legal administration of the territorial unity (*e.g.*, the possession of land and rites), as well as the mediation or intermediation with the State and private institutions[46].

52. When the leader of a minor organization level cannot resolve a conflict, for example, involving another territorial unity, it must remit the case to the next level authority. The higher-level authority must seek a consensus solution with the leaders of the lower levels, but it cannot impose its will on the lower level authorities[47].

---

territories of the north of Ecuador up to the Argentinian north and from the forests of the Amazons to the Pacific coasts" Uño, footnote 1, unofficial translation, **RER-1**.

[42] The "Nations and Indigenous Peoples" are defined as "peoples and nation that exists prior the invasion or colonization, that constitutes a sociopolitical unit, historically developed, with organization, culture, institutions, rights, rites, religion, language and other common and integrated characteristics. They are located in a determined ancestral territory and through their own institutions, in high lands by the Suyus conformed by Markas, Ayllus and other forms of organization, and in low lands with characteristics of each indigenous peoples, in accordance with article 2, paragraph I of article 30 and article 32 of the Political Constitution of the State", Framework law of Autonomies 031 dated July 19, 2010, article 6 (III), unofficial translation, **R-7**.

[43] Uño, **¶¶** 52-64, **RER-1.**

[44] Id., This are remunerated positions, that constitutes a way of fulfilling the obligation of the land, and that usually it is assumed by rotation of family heads, in accordance to a family parcel occupation order.

[45] *Id*., ¶ 53.

[46] *Id*., ¶ 51.

[47] *Id*., ¶ 53.

53. Thus, for example, should the *Jilanqu* of a community have a problem which involves another community, it must remit the matter to the *Segunda Mayor*, maximum authority of the *ayllu,* who must seek a consensus between the *Jilanqus* and the communities involved, but cannot impose their will. If the problem is not resolved, it can be required to be submitted to the collective decision making instance.

54. The place of debate for the collective decision making in each level of the Ancestral Organization is the "Tantachawil", "the *Assembly*" or "*Cabildo*"[48], being such the maximum decision making instance[49].

55. The assemblies are governed by the consensus and unanimity principle, distancing itself from majority and minority criteria known by modern societies[50]. The decisions taken that way are reflected in minutes signed by the participants and marked with a seal that indicated lawfulness[51]. Such decisions must be complied with by not only the members of the Indigenous Communities, but also by any individual, even if they are not members[52].

56. In case not all individuals that must participate are present for a specific decision or if consensus is not reached, the decisions shall not be taken and it should be postponed to a new opportunity[53]. On the other hand, the unauthorized assistance of members not related to the *Cabildo* is strictly prohibited[54], a huge error that, as will be explained further on, was committed by CMMK.

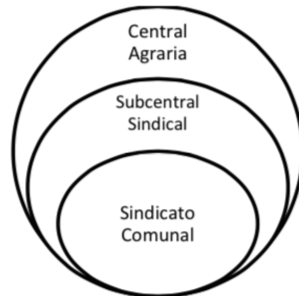
57. The assemblies or *Cabildos* can be organized at a community, *ayllu, marka, suyu* or national level. Their competence will vary according to the level of territorial unity to which it was organized[55].

2.2.1.2 Union Organization

58. The Union Organization was introduced in the *exhacienda* areas as of the land reform of 1953, by which the landowner had to give back their lands to the Indigenous Communities, and in the way of the western labor union, it was formed for the defense and promotion of their labor interests[56].

48 *Id*.,¶ 55.
49 *Id*., ¶ 56.
50 Id. See also, Press Release, Eju News dated Abril 9, 2012, There are 298 titled indigenous peoples territories; indigenous peoples of low lands decide by consensus, R-26: Chapter of Human Rights Democracy and Development, In The acclamation is based on uses and practices, date February 1st, 2010, R-27.
51 Uño, ¶ 56, RER-1.
52 *Id*.
53 *Id*.
54 *Id*.,¶ 55.
55 *Id*., ¶ 59.
56 *Id*.,¶ 52.

59. The Union Organization has three levels, each of them with a maximum authority, according to the table of paragraph 48 *above*. In the first level, communal unions are organized in positions named: "secretaries". In the second level, a Sub central Union is formed as an association of base communities that follows the *ayllu* model in regards to culture and territory. In the third level, located above the Sub centrals Union, the Agrarian Central is located[57].



60. In every level of the Union Organization, the Assembly is the maximum instance of decision making to recommend and resolve problems between its members and to supervise the performance of the board of directors[58]. The collective decision making process in the Union Organization is also essentially based in the consensus, even though in some cases the decisions are taken by majority of the votes[59].

2.2.1.3 Indigenous Organizations

61. In addition, two indigenous organization are to be mentioned, whose participation in the events that contributed to this dispute was crucial and, that represents the interests of the Indigenous Communities:

62. *First*, the Ayllus and Markas of Quillasuyu Council ("**CONAMAQ**")[60], which is the maximum instance of political representation of existing *ayllus* and *markas* at national level in the region of "*high lands*" of Bolivia.

63. The CONAMAQ is one of the essential political stakeholders in the vindication process of the indigenous' rights in Bolivia[61]. Conformed by the representation of several *suyus*, the

---

[57] *Id.*, ¶¶ 52 – 64.
[58] *Id.*, ¶ 57.
[59] *Id*.
[60] CONAMAQ is an indigenous organization, identified with legal personality 0342 dated September 28, 1998. Government of the Department of La Paz, Governmental Resolution 0342 dated September 28, 1998, **R-28**.
[61] Uño, ¶ 20, **RER-1**

decisions taken within are mandatory for its members[62].

64. *Second*, the Federation of Indigenous Peoples Ayllus of North Potosí ("**FAOI-NP**")[63] is a *suyus* conformed of more than 40 *ayllus* and is the maximum representation of the *ayllus* of the North Potosí region[64]. FAOI-NP belongs to CONAMAQ and, since 1993, has been promoting a reconstruction and recuperation process of the authorities of indigenous peoples *ayllus* weakened as of the emergence of the agrarian unions[65].

65. As will be explained in detail further on, during the operation of CMMK in the Project, CMMK promoted the alleged creation of a parallel third entity called COTOA-6A. Such organization, however, has no legitimacy among the ancestral or union organization of the Indigenous Communities and served as platform to dilute the proposals of the Communities and *ayllus* that were opposed to the Project.

* * *

66. In sum, the Indigenous Communities have an institutionalism of its own inherent to the social and cultural reality of a Plurinational State. Any decision that affects its interests, particularly with regards to measures adopted within its territory, must be taken with strict respect to such institutionalism in order to prevent fragmentations within that jeopardize its own existence.

2.2.2 Idiosyncrasy of the Indigenous Communities of Northern Potosí.

67. SAS acknowledges that the Concessions are located in the intersection of five *ayllus* in North Potosí[66]. In effect, the Reversion Decree provides that:

> *The ten Special Transitory Authorizations [...] are located in the territory of the ayllus: Takahuani, Sulk'a Jilatikani, Urinsaya, Jatun Urinsaya and Samca, of the Alonso Ibañez and Charcas provinces of the Department of Potosí. With the exception of ayllu Samca, the above-mentioned ayllus have a Community Title Land*

[62] *Id.* CONAMAQ groups 19 *suyus:* Jach´a Carangas (Oruro), Jatun Killakas Asanajaquis (Oruro), Indigenous Peoples Ayllus of Suyus Charka Qhara Qhara "FAOI-NP" (North of Potosí), CAOP (Indigenous Peoples Ayllus of Potosí), Qhara Qhara Suyu (Chuquisaca), Ayllus of Cochabamba (Cochabamba), Jach´a Pakajaqui (La Paz), Urus (Oruro y La Paz), Kallawayas (La Paz), Qullas (La Paz), Qhapac Omasuyu (La Paz), Suras (Oruro), Chuwis (Cochabamba), Chichas (South Potosí), Yampara Suyu (Chuquisaca), Yapacaní (Santa Cruz), Suyus Larecaja (North La Paz), Afro-bolivians and Indigenous Peoples of Tarija. The representation of CONAMAQ has presence in the high lands of Bolivia in seven departments: La Paz, Oruro, Potosí, Cochabamba, Tarija, Sucre and Santa Cruz.

[63] FAOI-NP is a *suyus* and an indigenous organization with legal personality 06/2000 dated August 16, 2000. Government of the Department of Potosí, Governmental Resolution 06/2000 dated August 16, 2000, **R-29**.

[64] Uño, ¶ 67, **RER-1**

[65] *Id*.

[66] Statement of Claim, ¶¶ 45-46; Mallory, ¶ 6 **CWS-3**.

(TCO in its Spanish acronym)[67].

68. Among the five above mentioned *ayllus,* the community of Mallku Khota was the most affected community by the activities of CMMK, as will be explained in detail in the following section.

Identification of the Indigenous Communities in the area of the Project

Marka or *Jatun Ayllu*	***Ayllu***	**Community or *Sulk'a Ayllu***
Sacaca	Sulk'a Jilatikani	Colpani Carpakani Pampa
		Janta Palka
		Ovejería
		Wuarimarka Papajasi
		(Totorojo)
		Kari Kari - Mallku Khota
Chayanta	Tacahuani	Tacahuani
		Poetira
		Molle Molle
		Paqueri
		Vilacala
		Jancoyo
		Larkeri
		Calachaca
Sacaca	Urinsaya	Alpayaque
		Escoma
		Toracari
		Alcalaca
		Jach' acalla
		Huaylloma

[67] Reversion Decree, p. 2 (unofficial translation), **C-4**.

		Winqaylla
		Pumiri
		Sikiri
		Condor Khasa
		Ulleria
Sacaca	Jatum Urinsaya	Jach’u uyu
		Wich’u K’uru
		Chiku Iturata
		Ch’amakuma
		Siriqi
		Lakhata
		Chuñuma
		Niqiwinki
		Qaymani
		Vilapampa
		Tujuta
		Huancarani
		Jayuma
		Sut’awaña Chico
		Qu’chini
		Ch’aphikass
		Kjuruyo
		Pichakani
		Hiskwani
		Keñuma
		Porta
		Patapani
		Q’ara Yapu

		Sak'ani Alto Lege
		Uma Ch'iwiri
		Cayara
		Jank'u Willki
		Leke
		Mesekune y Qaymak'ucho
		Wallquire
		Nuñumayani
		Vaqueria
		Tayara
		Churiqala
		Tekaña
		Vitora
		Jist'añani
		Sakani Chico
		Chayaqueña Grande – Chico – Wakhanchuru
		Wisqu
		Tuntani
		Awjila Pampa
		Turki
		Uma Chiwiri
Sacaca	Samca	Kisivillque
		Kayastía
		Acomarca
		Alta Tica Norma II
		Wakamachura
		Chivirita
		Cantuyo

Mallcuchapi

Taipiloma

69. The community of Mallku Khota is located in an area of extreme poverty[68]. Composed by approximately 50 families, the community of Mallku Khota adopts the Ancestral Organization and is a part of the Sullk'a Jilatikani *ayllu* that, in turn, is part of the Sacaca *marka,* capital of the indigenous Peoples nation of Charkas – Qhara Qhara.

70. Over the Mallku Khota area two observations must be made which allow us to comprehend the particularities of the behaviors of its villagers against the activities of CMMK:

71. *First*, it has to be borne in mind that the Mallku Khota hill was object of exploitation since the Spanish colony[69]. For the Indigenous Communities, this was registered in their collective mind as a loot of their minerals, a synonym of slavery, and a precedent that impoverished themselves through the collection of exorbitant taxes[70]. Dr. Uño explains that

> *[T]he memory and oral conscience of the Mallku Khota communities carries this experience of the colonial loot of the minerals of the sacred hill or Uncle of Mallku Khota and the exploitation of others indigenous peoples that, owner of the resources, see them extinct, without obtaining any benefit in return. From there, among other events, the most profound vindications arise over minerals that are contained in the sacred mountains of the Mallku Khota region[71].*

72. The Indigenous Communities consider themselves ancestral owners of the minerals of the Andean mountains[72]. In their worldview, the role of these minerals differs from the western view that existed since the colony. As explained by Dr. Uño:

> *Since the times of the Tahuantinsuyo State, gold and silver were considered by the Indigenous Peoples as a mineral reproduction of father Sun and mother Moon [...]In the vision of the ownership of minerals in the Andean world there is the worldview that minerals are part of mountain guts and, thus, they cannot be exploited without essential rites in favor of the Uncles or sacred bodies of the Andean gods. Without the payments to the Uncle for his minerals, the exploitation of Andean metals is not possible [...] By comparison, for the European colonial*

68 Uño, ¶ 78, RER-1

69 *Id*., ¶ 57.

70 *Id*.

71 *Id*., ¶ 80, (unofficial translation).

72 *Id*., ¶ 69.

mercantilism; gold and silver were simply considered as an essential expression of wealth. The majority of the Spaniards that came to America and Potosí had the dream of enriching themselves as fast as possible in order to return to Spain and live a majestic and noble life, therefore, they overexploited the indigenous peoples[73]*.*

73. *Second*, it must be noted that the Mallku Khota community and the neighboring communities govern their conduct through ancestral principles such as *ama quilla, ama llulla, ama suwa* (don´t be lazy, dont be a liar, don't be a thief), principles of quechua and aymara tradition, elevated today to constitutional rank as principles of the Bolivian society to determine the content of legal norms and as a maxima that every Bolivian and foreign must respect in national territory[74].

74. In view of the above, the Arbitral Tribunal will be able to conclude that the performance of any mining activity in the area of Mallku Khota is a particularly sensitive matter from the social point of view and that, for its development, a special level of transparency and diligence is required by the private investor. As described below, this did not occur with CMMK.

3. THE FACTS PROVE THAT SAS CAUSED – THUS BREACHING HUMAN RIGHTS – A VIOLENT CONFRONTATION BETWEEN THE INDIGENOUS COMMUNITIES THAT FORCED THE STATE TO REVERT THE MINING CONCESSIONS

75. As will be demonstrated below, the facts surrounding the alleged investment of SAS in Bolivia are very different from those described in the Statement of Claim.

76. In view of the imprecision of the description of the facts in the Statement of Claim, Bolivia is forced to describe in detail the actual account of what happened during the two and half years that CMMK developed the Project. This account includes actions by CMMK that violated human rights, social and collective rights of the Indigenous Communities.

77. In this regard, it is noticeable that the Statement of Claim by SAS contains an incomplete or biased description of some of the events that occurred during the exploitation of the Project. But even more noticeable than the incomplete and biased description of an event, is the intentional omission of mentioning extremely serious events. In its reading of the

[73] *Id.*, ¶¶ 71-72 and 74, (unofficial translation).

[74] Plurinational Constitutional Tribunal of Bolivia, resolution No. 951/2012 dated August 22, 2012, **RLA-5**.

Statement of Claim, the Arbitral Tribunal must consider with caution the periods of time in which, according to SAS, "*nothing happened*".

78. Conscious of the social and cultural particularities that characterize the Indigenous Communities of North Potosí and the impending opposition that they manifested in the past regarding large-scale natural resources exploitation projects, CMMK decided to acquire some Mining Concessions located in an area with a fragile socio-environmental balance **(3.1)**.

79. Contrary to what SAS is trying to assert, the acquisition of the Mining Concessions was carried out during a period of important political changes in Bolivia intended to guarantee the rights of the Indigenous Communities. Such political changes, which SAS knew or should have known, allowed to anticipate the opposition of the Indigenous Communities to large-scale exploitation of the Mallku Khota hill **(3.2)**.

80. For this reason, it was not strange that the CMMK Project had a radical and generalized opposition from the beginning. Contrary to the impression that SAS seeks to create in its Statement of Claim, this opposition did not come from "*a handful of unlawful miners*" but the neighboring Indigenous Communities of the Project that saw in it a violation to their ancestral beliefs and an impending risk to the environment on which their survival depended on. Contrary to other mining projects in the region who knew how to gain the acceptance of the Indigenous Communities, thanks to the socialization efforts and social labors to improve their living conditions, CMMK did not properly socialize the Project and made derisory social labors that increased the discomfort of the local population.

81. In view of this opposition, CMMK initiated a campaign of wrongly called "*public relations*" that actually sought to create intrigues and divisions amongst the Indigenous Communities. This strategy, as will be described, came to the point of "consciences' buying" of Communities foreign to the Project and even provide for the creation of an alleged organization of Indigenous Peoples that, according to SAS, supported the Project, even though it was actually an unlawful and illegitimate organization (**3.3**).

82. The inexorable risk on the public order of the region did not escape the attention of the Government of Potosí. Conscious of the tenacity of the Indigenous Communities, the Departmental Government made its best efforts to prevent the exacerbation of a conflict that seemed impeding and to find a pacific solution (**3.4**).

83. However, these mediation efforts were affected once more by the conduct of CMMK. By early 2012, and in view of the increasing community opposition and the necessity of achieving a consensus in a divided population, the Company started a campaign of threats (physical and legal) and incitement to violence amongst Indigenous Communities that both supported and opposed the Project. The Company went so far as to criminalize the

Indigenous Communities Authorities that expressed their opposition to the Project. By early 2012, the situation of the public order was so serious and unsustainable that the physical integrity of the governmental authorities, headed by the Governor, was compromised **(3.5)**.

84. By May 2012, the situation was uncontrollable. While the Government was insisting on reaching an agreement with the Indigenous Communities that allowed CMMK to continue with the Project, the Company was persisting in its efforts to silence the Indigenous Communities' leaders that reject it. In an unprecedented event, CMMK organized the mobilization of Indigenous Communities that lived far from the area and supported the Project as a consequent of derisory promises, to a confrontation with sticks and stones with the Mallku Khota and Calachaca Indigenous Communities (neighboring communities directly affected by the Project). By early June 2012, more than 4000 indigenous people marched towards La Paz to express their opposition to the Project, they tried to overtake the Vice-presidency office, and warned they would not leave until the Mining Concessions were revoked. At the same time, the police force tried to calm the disturbances. There were many indigenous people wounded and even a resident from the Mallku Khota community, Mr. José Mamani (a 45 years old man) died, all of which produced a declaration that was reported by the United Nations Higher Commissioner for Human Rights in Bolivia. In view of this uncontrollable situation, the Bolivian Government did not have any other option but to declare the Reversion to reestablish the public order **(3.6)**.

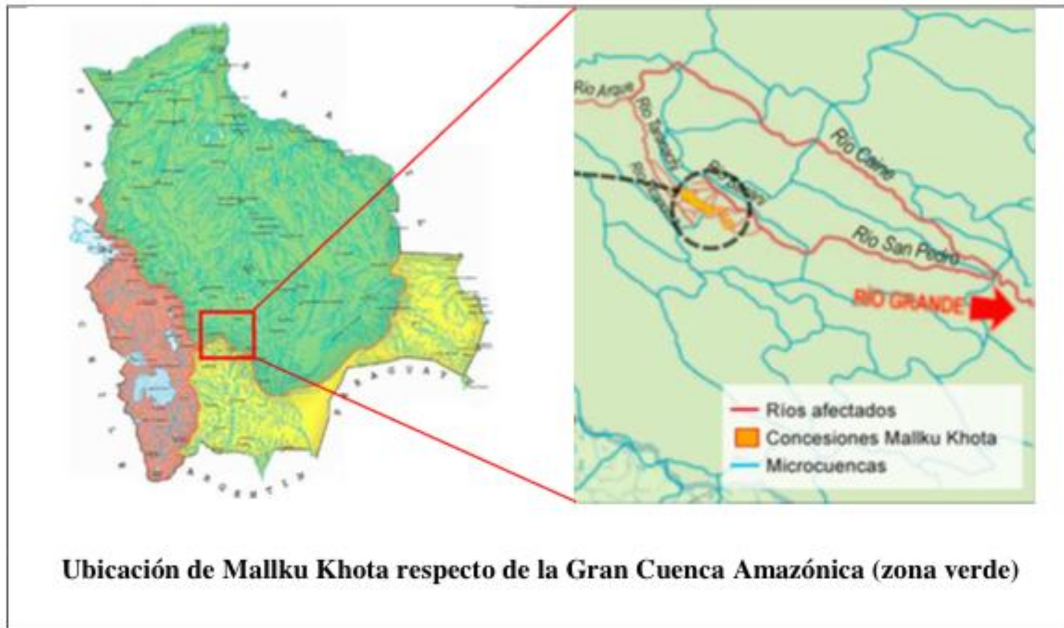
85. Since then, and in compliance with the Reversion Decree, the State started with the administration of the area of the Project and instructed an independent valuation to determine the compensation that would correspond to CMMK (**3.7**). To this date, an agreement with the Company was not reached, which motivated the current arbitration.

3.1 The Mallku Khota area and its fragile socio-environmental balance

86. The Mallku Khota area, in the north of the Department of Potosí, is part of the Great Watershed of the Amazon. Specifically, the area of the Project is located in the headwater of Grande's river watershed, region of fragile environmental balance in which any intervention that implies the modification of the mountainous formations compromises the natural balance of several hydrographic sub watersheds. In a study published in the year 2010 by the Andean Center for the Management and Use of Water, it was found that the hydrographic system to which Mallku Khota belongs "*due to its geological and physiographic nature, slope and use of soil, more than 80% of its area presents risk of erosion between moderate and high*"[75] thus, constitute "*a Watershed very susceptible to*

[75] Andean Center for the Management and Use of Water, *Characterization of the High Watershed of Rio Grande and Chaco Cruceño* of 2010 of 2010, p. 40, **R-30**.

changes in use that man may implement"[76] with serious environmental consequences thereto.



Ubicación de Mallku Khota respecto de la Gran Cuenca Amazónica (zona verde)

87. In a recent publication, the Documentation and Information Center of Bolivia ("**CEDIB**" in its Spanish acronym) denounced the potential risks that the Project represented for the environmental balance and the water supply in the area:

The concession of 5.475 hectares, their 3 project areas of extraction in the Limosna Wara Wara and Sucre areas, in 3 pits characteristics of open-pit mining and the lixiviation techniques by hydrochloric acid, would directly impact on the 42 TCOs [in its Spanish acronym]*, the community settlement and four glacier lakes. By referring to direct impact soil we are referring that the open pits would be made in the locations of the village and of one of the lagoons. The programed production gives us a better overview of the situation that is yet to come: 410,57 tons of silver per year in the first five years, and during the next 15 years of exploitation an annual average of around 326.59 tons, 158 million of ounces of silver; 1.184 tons if indium; 191 million of pounds of lead; 135 million of pounds of zinc; 88 million pounds of copper and 212 tons of gallium. <u>This would consume an estimated of 4.800 m3/day (as parameter this amount would supply almost 74 thousand people in the city of El Alto)</u> of water emerging from superficial and groundwater sources affecting one of the most important headwater of the Amazon macro watershed*[77]*.*

[76] *Id*.

[77] Documentation and Information Center of Bolivia, *Water. Amongst mining conflicts and regulation proposal,* Petropress Magazine No. 2, July – September 2012, pp. 10 and 11 (emphasis added), **R-31**.

88. In this regard, "*a modification to these crests*" as drilling and earth movement expected by CMMK in order to advance the Project, "*may cause an unbalancing in the hydrographic system, causing the water to drain towards another location (in other words, it becomes part of another system (another watershed))*[78].

89. Even though CMMK never performed a study that allowed establishing with certainty the impact on fluvial watersheds of an open-pit mine as the intended to be developed in the Project, from the differents Preliminary Economic Assessments ("**PEA**") it was concluded that the environmental impact was a factor that would surely affect its development. In effect, since the PEA of the year 2009, it was known that "[i]*n the areas possibly impacted by any future mining activity are several high elevation alpine lakes, which may constitute sensitive environmental ecosystems, and the potential impact to these lakes will require careful study*"[79].

90. These lagoons are not only a fragile ecosystem of the area. As explained earlier, for the Indigenous Communities, these lagoons are sacred and represent the main source of supply of potable water of the area. In the year 2012, the Chief (*Kuraka*) of the Sacaca Marka (Charkas Qhara Qhara Nation), Cancio Rojas, maximum authority of four of the five *ayllus* involved in the conflict[80], manifested to the United Nations Higher Commissioners for Human Rights in Bolivia that:

> *Mallku quta is a mountain range at 4500 meters over the sea level, <u>deemed as a sacred place</u>, water fountains, trout farm, there are several lagoons, of the 3 permanent lagoons water is distributed to more than 30 communities at the mountainside, over 70 Mallku quta and Qalachaka families, some communities are 3,4 and 5 kilometers of distance away*[81].

91. Thus, the area of the Project constitutes an area of complex social and cultural relations located in a region particularly sensitive to an industrial intervention such as an open-pit mine.

3.2 The alleged acquisition of the Mining Concessions by CMMK coincided with a period of major political changes to ensure the rights of Indigenous Peoples

---

[78] *Id*.

[79] Preliminary Economic Assessment Technical Report for the Malku Khota Project, March 13, 2009, p. 18.2, **C-13**.

[80] Minutes of the socialization meeting of the project dated July 23, 2011, **R-32.**

[81] Letter from Cancio Rojas to the United Nations Higher Commissioner of Human Rights in Bolivia dated April 16, 2012 (emphasis added), **R-33**.

92. As acknowledged by SAS[82], the acquisition of the 10 Mining Concessions that conform the area of the Project was made by CMMK between the years 2003 and 2008. In fact, the exercise of the option to acquire the concession Norma on April 22, 2008 marked the beginning of the exploration activities mentioned in the account of the Statement of Claim[83].

93. By the time that CMMK finally consolidated its ownership over the Project and decided to undertake its program in the Mallku Khota area, Bolivia was living one of the most important changes of its history. In effect, the election of president Evo Morales Ayma on January 22, 2006 marked the beginning of a process of expansion and legal acknowledgement of social and collective rights of the Indigenous People, their institutions and ancestral traditions of life.

94. However, Bolivia must clarify that this phenomenon only meant an *expansion* of the legal framework of protection of the existing rights and that any foreign investor could and should know. Precisely, in 1991, Bolivia had already approved and ratified Convention 169 of the International Labor Organization on Indigenous and Tribal Peoples (the "**Convention 169 of the ILO**"), by which it assumed obligations in matters relating protection, guaranties and respect of traditions, institutions and the right to exploitation of natural resources in indigenous territories[84].

95. Specifically, Law 1777 of March 17, 1997 (the "Mining Law of 1997"), integral part of the elements that, according to SAS, constituted "*the commitment of Bolivia to attract and protect foreign investments*"[85]*,* provided since its enactment that "*the provisions of article 171 of the Political Constitution of the State and the relevant provisions of the convention 169 of the Labor Organization ratified by Law 1257 of July II, 1991 are applicable to mining sector*"[86]*.*

96. For this reason, the election of President Morales and the enactment of the new Constitution marked a legislative breakthrough. The tendency for the acknowledgement of local and ancestral forms of government of the Indigenous Communities were expressed by means of several forms:

97. <u>On one part</u>, the Development National Plan for the period 2006 to 2010 established as purpose of the State the acknowledgement of the Indigenous Communities as essential

[82] Statement of Claim, ¶ 35.
[83] *Id.*, ¶ 39.
[84] *See* Uño, ¶¶ 27-31, **RER-1.** It should be added that Bolivia is a signatory State of the American Convention on Human Rights and since June 27, 1993 acknowledges the competence of the Commission of the Inter-American Court in accordance with such instrument **(R-34)**.
[85] Statement of Claim, ¶ 18.
[86] Mining Law of 1997, article 15, **C-30.**

cores of the society and main actor of the government at a local level[87].

98. On the other hand, the Political Constitution of the State, enacted on February 7, 2009 included new provisions relating rights and prerogatives of the indigenous peoples, such as (i) parliamentary representation; (ii) acknowledgement of indigenous peoples justice management systems at the same level than the ordinary justice; (iii) representation in the Plurinational Constitutional Tribunal; (iv) the right to exploit the natural and hydric resources of the community; (v) the right to exclusive ownership of forest resources; and (vi) the right to an indigenous land.

99. This major changes in the institutions and political life of the State are decisive to comprehend the role of the authorities of the Department of Potosi and the National Government in the events that took place from the arrival of CMMK up to the Reversion of the Concessions. As will be shown further on, the mediation and further intervention of the departmental and national Government were always guided by the respect to the rights of the Indigenous Communities and the autonomy of their decisions[88]. The application of this legal framework does not obey any abrupt or unknown change for the Company.

3.3 Contrary to the assertions of SAS, CMMK never had a good relationship with the Indigenous Peoples and did not achieve to gain their support for the development of the Project

100. As CMMK started to undertake minor activities in the area of the Project and before consolidating their ownership over the entirety of the Mining Concessions, the Company undertook a community support program with a derisory impact in the Indigenous Communities, who, on the contrary, were subject to serious harassment and aggressions as consequence of the Company´s presence (**3.3.1**). This explains that, contrary to the assertions by SAS, by the year 2010, a generalized rejection to the presence of SAS existed in the Mallku Khota area (3.3.2). This would cause, by the year 2011, CMMK to change their strategy in regards to its community relations, and implement a strategy tending to create internal divisions amongst the Indigenous Communities in order to obtain the support of some of them (**3.3.3**).

[87] *See*, for example, Development National Plan for the period 2006-210, p. 134 ("*Strengthening of the exercise of rights of the Indigenous Peoples. Proposes collective constructing and implementation of a legal and institutional framework that favors the full exercise of the rights of the indigenous peoples. This strategy is orientated to build the institutional support in the State that allows and promotes the validity of the territorial rights in particular and the rights of the indigenous peoples in genera*l"), **R-35**.

[88] Gob. Gonzales, ¶ 10, **RWS-1**.

3.3.1 Since the beginning of the operation in 2010, and instead of generating benefits for the Indigenous Peoples, CMMK committed assaults and acts of violence against Indigenous Peoples

101. In their Statement of Claim, SAS states that the presence of CMMK in the area of the Project came along with a community development program "*in a manner that promotes sustainable development, improves the social welfare of the regio*[n] *in which it operates, and contributes to the country's economic growth*"[89]. However, the commitments signed by CMMK with the Indigenous Communities – expressly referred by SAS' witnesses[90] - proves that the Company never had the intention of seriously investing in the welfare of the Communities and that, on the contrary, sought to gain support from the people with projects whose costs and social impact resulted derisory.

102. The alleged "*high social impact projects*" that CMMK alleges to have carried out, as demonstrated by these commitments, included, *inter alia*:

a. The provision of "*cement, zinc sheets, beams, strips, wire and adove (sic) transfer and sand in the sector"* in order for the Chalachaca Community (one the closest communities to the drilling area) to construct a church of 6 by 4 meters[91]. It is not true, as Mr. Gonzales Yutronic insinuates, that CMMK have done any construction in such building[92];

b. The provision of zinc sheet ("*zinc sheet*") for the roof of a church of 8 by 4 meters[93] as beneficial activity for three communities of the Urinsaya Ayllu, as well as other material of the same nature in the Kisiwill Comunity[94]. These last materials cost the Company 4.324 Bolivianos (around US$625)[95];

c. Improvements in certain roads of the area. Such works mentioned by Mr. Gonzales Yutronic[96] were in effect promised by CMMK. However, they were meant to be performed by the Indigenous Communities[97] or, in the best scenario, were offered in

[89] Mallory, ¶ 7, **CWS-3**. See also, Statement of Claim, ¶ 48.

[90] Gonzales Yutronic, ¶ 5, **CWS-4**.

[91] Minutes of commitment dated May 1, 2007 ("*Chalachaca Community hereby commits to: "contribute with workforce for the building of a chapel, manufacturing of necessary adoves* (sic) on its own"), **R-36**.

[92] Gonzales Yutronic, ¶ 5 ("Some of the projects included [...] building the church in Calachaca"), **CWS-4**.

[93] Minutes of commitment dated July 4, 2009 **R-37**.

[94] In this community, CMMK compromised itself to "donate a certain amount of zinc sheet for an area of 9x4 meters that would be used in the School" and to provide galvanized pipeline. Minutes of commitment dated April 24, 2007, **R-38**.

[95] Minutes of commitment signed on April 24, 2007 (no date) **R-39**.

[96] Gonzalez Yutronic, ¶ 5 ("*Some of the projects included widening the road to Kari Kari...*"), **CWS-4**.

[97] Minutes of commitment dated October 7, 2007 ("[T]he Company compromises itself to support the

exchange that the Indigenous Communities assign their lands to undertake activities related to the Project[98]; and

d. Finally, other contributions by CMMK demonstrates the little interest that the Company had in developing a serious program that represented real benefits for the Indigenous Communities such as sport uniforms[99], book of minutes[100], an irrigation pipe[101] or a shower[102].

103. Consequently, the presence of CMMK never translated into real benefits (or in the best scenario significant) for the Indigenous Communities of the Project. In fact, the derisory promises by CMMK on these dates were never complied with, that is why the Indigenous Communities denounced the Company for having established itself in the area through "*deceit of project proposals*"[103], particularly, they commented on the unfulfilled promises of providing labor to the Indigenous Peoples. As mentioned by the Governor of the Department of Potosí, Mr. Felix Gonzales, the social investment in the first stages of development had been essential in the past in order to develop mining projects when those affected nearby Indigenous Communities. This had been the case, for example, of the mining project of the mining company Minera San Cristobal, company that had to develop an important community development program before initiating activities in the area[104].

104. On the contrary, the increase of CMMK's personnel in the area of the Project, come along with generalized fear from the Indigenous Communities, whom saw their traditional ways of life threatened. From the technical documents drafted by SASC, it can be evidenced that, during the year 2010, "*drilling* [progressed] *to bring the total drilled at Mallku Khota to over 40,000 m*"[105]. Also in its Statement of Claim, SAS claims that, during such time,

---

Tacahuani ayllu with the improvement of the road with the participation of the communities"), **R-40**.

[98] Minutes of commitment dated September 26, 2007 ("The community compromises itself to provide a space of land for the construction of water dam for the deposit of the drilling residues (water) [...] The company in compensation of this agreement accepts to build a road from the Challuastiri river to the Kayestia Community"), **R-41**.

[99] Minutes of commitment dated April 16, 2007 **R-42**.

[100] Minutes of commitment dated April 20, 2008 ("The mining company Mallku Khota made the delivery of 10 book of minutes for each ayllu community, in accordance with the commitments"), **R-43**.

[101] Minutes of commitment dated September 1, 2007 **R-44**.

[102] Minutes of commitment dated April 16, 2007 (Cayastia Community) **R-45**.

[103] Resolution vote of the Ayllus Sullka Jilaticani, Takahuani, Urinsaya y Samka dated December 11, 2010, **R-46**.

[104] Gob. Gonzales, ¶¶ 15-16, **RWS-1**. *See,* also, Community Relations Program of Minera San Cristóbal, **R-47**.

[105] Preliminary Economic Assessment Update, Technical Report for the Malku Khota Project dated May 10, 2011, p. 12, **C-14**.

"*CMMK drilled 26 additional drill holes and collected over 10.000 meters of samples*"[106] . The above involved (i) a higher presence of employees and persons foreign to the Indigenous Communities, and with that, (ii) abuse complaints against its members and (iii) activities by Company that jeopardize their ancestral ways of life.

105. To the contrary of the assertion by SAS, the problems with the Indigenous Communities were not "*clearly in the line with what it can be expected in a project of this magnitude*"[107]. On the Contrary, the Indigenous Communities denounced from the beginning harassments against its members and a generalized rejection to the presence of CMMK, which was already evident in February 2010[108]. Given the seriousness, Bolivia must narrate the types of abuses most significant that are unacceptable, even more when the company had compromised itself to respect the uses and traditions of the Indigenous Communities[109].

106. The first and most serious type of events denounced [redacted]. Despite the seriousness of the acts performed by its employees, CMMK never took actions against them, who not also continued related to the

[106] Statement of Claim, ¶ 42.

[107] *Id.*, ¶ 49.

[108] [redacted]

[109] See for example, Minutes of commitment dated April 16, 2007 (Cayastia Community) ("*the company compromises itself to respect the uses and traditions of the community, without affecting the environment of the area of the project*"), **R-45**; Minutes of commitment dated July 20, 2007 (*"the company compromises itself to maintain their Social Commitment in respect to the uses and Traditions of the Community")*, **R-48**; Minutes of Commitment dated September 1, 2007 (*"The Mining Co. compromises itself to respect the uses and traditions of the community and environment"),* **R-44**; Minutes of commitment date April 24, 2007, **R-38**; Minutes of commitment dated May 1, 2007, **R-36**.

[110] [redacted]

[111] [redacted]

[112] Letter from Cancio Rojas to the Ministry of Justice dated April 16, 2012; **R-53** Resolution of the Ayllu Sullka Jilatikani dated February 15, 2011, **R-51**.

Company, but also present in the area. This, naturally, aggravated the spirits of the Indigenous Communities against the Company.

107. The second type of events denounced are referred to the environmental contamination of the Indigenous Communities sacred places, of which their survival depended upon. Since February 2010, a Union Organization to which members of the Indigenous Communities of the area of the Project belonged[113] denounced, in relation the mining activity of the area, that "*mining is what most contaminates the pacha mama mining concessions* […] *the mining businessmen contaminates the rivers with chemical products that they use and the water which is the blood of the land it no longer serves to water and to produce our food, not only for us as humans but also affects the survival of our animals of any kind*"[114]. Broader complaints, as the one made by FAOI-NP on February 28, 2011, reflected the discomfort for the threats to the environment that represented the presence of CMMK in the area[115]. In conclusion, the activities of the Company in the area during the year 2010 made clear that (i) for one hand; CMMK was not seriously developing the project, given that they were not complying with previous assumed compromises (that, by the way, are derisory), and for the other, (ii) the failure to comply the uses and traditions – and even several abuses against members of such communities – from CMMK's employees (whose aggravation in the future with the development of the Project was predictable) represented a threat to the traditional ways of existence and collective rights.

109. For these reasons, as will be explained below, the Indigenous Communities, specially those that were near the impact area of the Project, who strongly and continuously opposed to the activities by CMMK.

3.3.2 Contrary to the assertions of SAS, opposition to the Project did not arise from a "handful of unlawful miners" but rather from the nearby Indigenous Peoples to Mallku Khota

110. SAS acknowledges that the year 2010 marked the beginning of a more intense activity in the area of the Project, but it limits itself to claim (as their witness[116]) that "[u]*ntil mid 2011, the problems with the communities were limited*"[117]. In fact, SAS has not presented

---

[113] The First Section of the Union Central of the Indigenous Peoples Workers of the San Pedro de Buenavista de Potosí is constituted by, among other members, the Tacahuani Community settled in the same area where the Mining Concessions are located.

[114] Resolution of the First Section of the Union Central of the Indigenous Peoples Workers of the San Pedro de Buenavista de Potosí dated February 6, 2010, R-54.

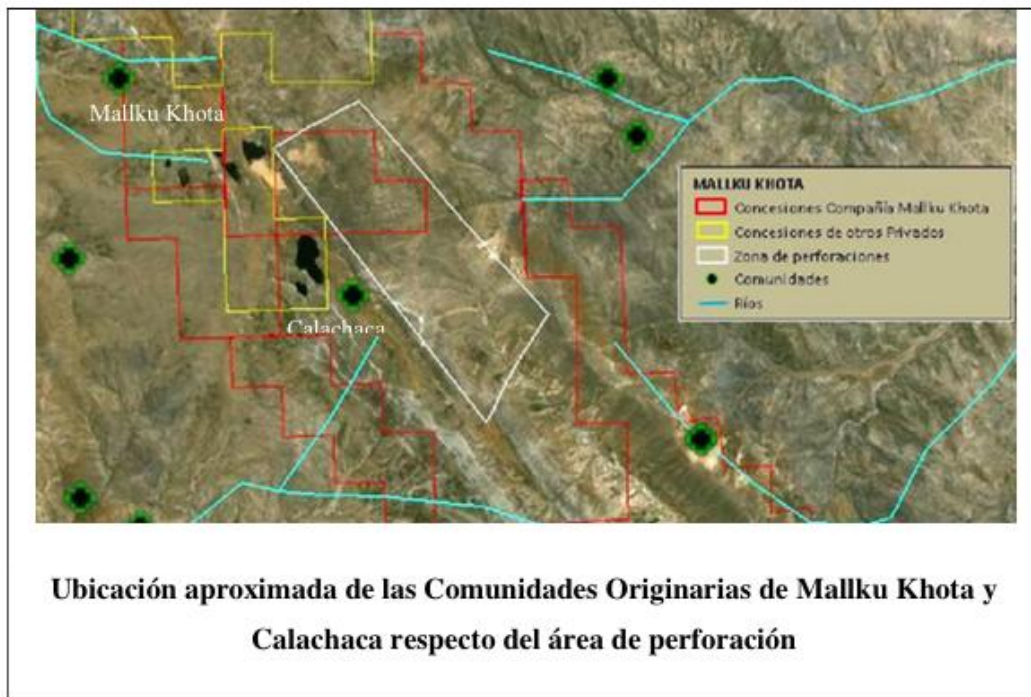
[115] Resolution of FAOI-NP dated February 28, 2011, **R-52**. See also Resolution of the Ayllu Sullka Jilatikani dated February 15, 2011, **R-51**.

[116] Gonzales Yutronic, ¶ 4, **CWS-4**.

[117] Statement of Claim, ¶ 49.

any agreement that demonstrates some sort of support from the Indigenous Communities prior to September 25, 2011[118].

111. The truth is that the documents prior to September 2011 confirm that CMMK faced a generalized rejection from the Indigenous Communities. In effect, during the year 2010, the Indigenous Communities expressed in multiple occasions their absolute rejection to the development of the Project. Particularly, a strong opposition to the activities of the Company came from the communities of Mallku Khota (which belongs to the Ayllu Sullka Jilatikani) and Calachaca (which belongs to the Ayllu Tacahuani) located a few kilometers from the drilling area of the Project. The opposition from these Communities – that in view of their location were directly affected by the development of the Project – continued during 2011 and 2012.



Ubicación aproximada de las Comunidades Originarias de Mallku Khota y Calachaca respecto del área de perforación

112. During the year 2010, the rejection also came from the other Communities. On December 11, 2010, the Ayllus Sullka Jilaticani, Takahuani, Urinsaya and Samka, and in particular the nearest communities to the Project[119], denounced the actions by CMMK as abusive and contrary to the beliefs and traditions of the Indigenous Communities. Specifically, the opposition of the communities came from the "*abuses, contamination, disrespect to the indigenous peoples authorities and bases in general, deceit of project proposals, threats of*

[118] See Resolution vote dated September 25, 2001, **C-44**.

[119] CMMK started a community support program in certain Communities of these Ayllus, such as Alpayaque, Alcalaca, Cayastia, Kisiwill, Calachaca, Ovejería, Janta Palka, Mallku Khota, among others. *See* ¶¶ 102-103 above.

decrease of water from the slopes and destruction of our crops, [redacted]"[120].

113. Later, on December 19, 2010, the same 4 *ayllus* demanded "*the immediate standstill and suspension of all mining activities"*[121] in their territories as consequence of "*the illegal presence of the Mining Company Mallqu Qota S.A. has breached the collective rights"*[122], and other reasons, as consequence of the "[a]*buse of authority, contamination of the environment, breach to the structure of the Government itself as abuse of trust, intimidation, threats, [redacted], intromission and division generated by the Structure of the Ayllu."*[123]

114. Despite that the narration of SAS intends to delegitimize these proclamations, the contemporary evidence demonstrates that in the year 2010, CMMK informed its concern over the generalized opposition to the Project. In a letter dated December 21, 2010, Mr. Gonzales Yutronic requested the Governor of Potosi to "*mediate this impasse emerged with the Ayllus Sullka-Jilatikani, Tacawani, Urinsaya and Smaca and* [FAOI-NP] *in order to avoid a major conflict"*[124].

115. Even though Mr. Gonzales Yutronic denied back then – without any reason[125] – that the complaints by these Communities had basis, the relevant was the fact that he accepted the existence of a generalized opposition in the area of the Project. Thus, it is not true, as stated in its affidavit, that "[b]*oth the Government and the vast majority of the local communities, and corresponding ayllus, repeatedly demonstrated their strong support to the Company and the Mallku Khota project until mid-2011"*[126].

116. The interest of the Communities (in any case, of the *ayllus* truly affected by the development of the Project) was not, therefore, to exploit the mineral resources in the area of the Concessions in a traditional manner, nor the opposition to the Project aroused from a handful of unlawful miners. On the contrary, it demonstrated the lawful concern of such communities for the abuses committed against them and a total ignorance of their traditional ways of life.

---

[120] [redacted]

[121] [redacted]

[122] *Id*.

[123] *Id*.

[124] Letter of Xavier Gonzales Yutronic to the Governor of Potosí dated December 21, 2012, **R-55**. *See* Gob. Gonzales, ¶ 17, **RWS-1**.

[125] Gob. Gonzales, ¶ 18, **RWS-1**.

[126] Gonzales Yutronic, ¶ 4, **CWS-4**.

3.3.3 In view of the lack of support, in 2011, CMMK launched a campaign to create intrigues and divisions among the Indigenous Communities

117. CMMK was aware of the fact that winning the approval of a Project that could virtually make the traditional ways of life and the respect for the uses and traditions disappear would not be easy. This explains the turn in the strategy of the Company by 2011. In words of SAS "[b]*y early 2011, South American Silver decided to formalize its community program and brought additional community relations personnel"*[127]*.* What SAS calls "*formalization*" of the program by CMMK was, actually, the beginning of the strategy that had as purpose to promote the divisions amongst the Indigenous Communities and gain followers by means of consciences' buying and threats.

118. Once it was clear for CMMK that the entirety of the Communities that were directly affected by the execution of the Project would not allow its progress, the Company opted, in the year 2011, to change the interlocutors and establish dialogues with six *ayllus* (second level of community government above the Communities[128]) arbitrarily chosen. SAS acknowledges that "[s]*ince the year 2008 up to the year 2011, South American Silver worked closely with the local communities in order to inform them about the Mining Project Malku Khota and to integrate them to it"*[129]*.*

119. Mr. Mallory would be hired to draft a new strategy intended to gain the will of the local communities. Such strategy first demanded to increase the Project Area of Influence (area where the social efforts were concentrated) to include *ayllus* and distant Communities that would be easily persuaded by not having a direct impact from the Project. In his own words, such consisted in the following:

> *The Company focused its community relations efforts not only on the communities within the actual concession area, but also within a certain distance from the Project which we called the Area of Influence (the "AoI"). Prior to me joining the company, the AoI was determined by allocating a 2.5 kilometer line around the area of the concession, as suggested by the Ministry of Mining. We subsequently expanded this AoI to not just those communities that touched the line of demarcation, but also to all of the communities that were part of the ayllus potentially impacted by the Project*[130]

120. In practical terms, CMMK's step to directly manage its community relations with each of the Communities to try and establish itself as a direct spokesperson for six *ayllus*[131] has

[127] Statement of Claim, ¶ 47.
[128] *See* ¶ 48, above.
[129] Statement of Claim, ¶ 47.
[130] Mallory, ¶ 11 (emphasis added), **CWS-3**.
[131] Id., ¶ 14 ("Prior to my joining, the Company had entered into multiple individual agreements with

two benefits for the Company (both detrimental to the interests of the Communities which were truly affected by the Project):

a. <u>On one hand</u>, the new community program allowed them to dilute the opposition from the near communities with a greater number of indigenous people, represented in higher community requests, as the *ayllus*. The numbers presented by SAS speak for themselves: the relation which the Company had held with more or less a dozen Communities was replaced from one day to the other with a forum of over 43 (meaning 381 families according to Mr. Mallory[132] or 800 according to Mr. Gonzales Yutronic[133]); and,

b. <u>On the other hand</u>, with a direct relation to the afore mentioned, the implementation of an attractive benefit program, employment offers and opportunities in the year 2011[134] extended to communities which were little or not at all affected by the development of the project.

121. Mr. Mallory's strategy had a perverse effect for the defense of the interests of the affected Indigenous Communities: distant *ayllus,* which would only receive benefits from the Project, entered into a direct confrontation with the nearby communities. The cases of two of the six *ayllus* with which CMMK initiated a direct treaty with, are particularly representative of this circumstance, according to what is observed on the map presented by Mr. Mallory in his witness statement:

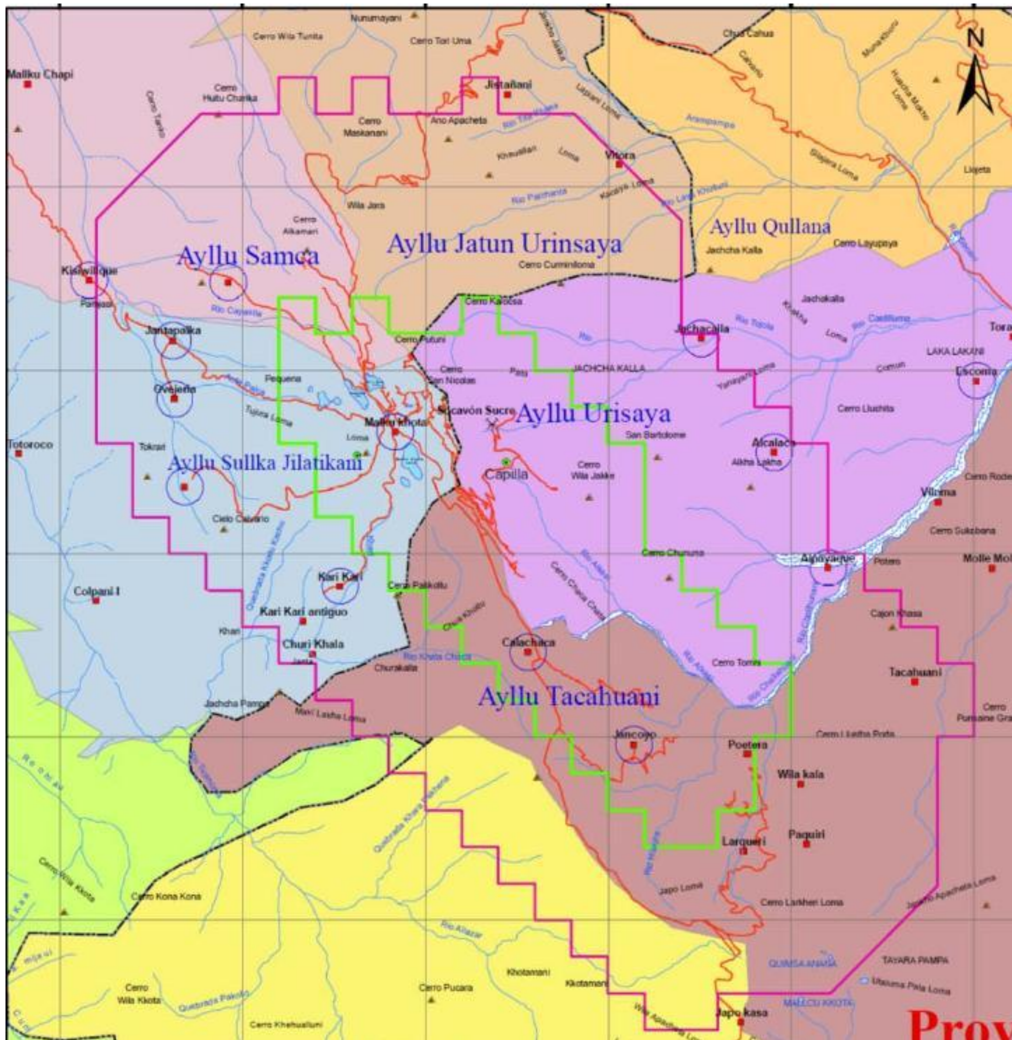
---

communities within the AoI. We then decided to pursue more formal negotiations setting out the respective responsibilities of the Company and the ayllus, which we referred to as Reciprocal Cooperation Agreement").

[132] Id., ¶ 13.

[133] Gonzales Yutronic, ¶ 22, **CWS-4**.

[134] Mallory, ¶12, **CWS-3**.



Map of the Project area. In blue font the *ayllus* which were part of the Company's new community strategy[135].

122. Indeed, before 2011, the pronounces against the Project by the Communities had coincided in several occasions with the rejection demonstrations of the Tacahuani, Sullka Jilatikani, Urisaya and Samca *ayllus*. Within these 4 *ayllus* most of the directly affected Communities are found (and are within the Influence Area)[136]. Nevertheless, as of 2011, CMMK sought to also involve Jatun Urinsaya and Qullana *ayllus* even though:

[135] *Id.*, p. 8. The green line corresponds to the Concessions area and the red line to the initially established Influence Area. Communities much more distant from the red line became involved gradually in detriment of the truly affected ones.

[136] *See also*, for example, Sullka Jilaticani, Tacawani, Urinsaya and Samka Ayllu Townhall Resolution from 19 December 2010, **R-49** and ¶¶ 112-113, *above*.

a. The communities within Jatun Urinsaya Ayllu (with the exception of Vitora) were not within the Area of Influence which was originally considered; and

b. The Qullana Ayllu is even found outside of the Area of Influence.

123. CMMK did not elect its spokespeople by chance. Being able to involve, for example, Chiro Ayllu, south of Tancahuani Ayllu, they didn't because the Indigenous Authorities of this *ayllu*, the closest to the project, were opposed to its development[137].

124. The final step in the consolidation of this strategy was to promote the creation of an alleged parallel indigenous association whose final goal would be to challenge the decisions and indigenous authority of the Ancestral Organization, Union (Organización Ancestral, Sindical) and the recognized indigenous associations such as CONAMAQ and FAOI-NP. Knowing that the *ad hoc* committees do not exist and discord with the social and cultural organization of the Indigenous Communities[138], CMMK promoted the creation of the Autonomous Indigenous Territorial Coordinator of the Six Ayllus (--**COTOA-6A** for its acronym in Spanish), described by SAS as a *"committee formed by the six ayllus which are part of the expanded Area of Influence to communicate with the Company and Governmental Agencies[139]*.

125. Even though SAS nor their witnesses analyze the legitimacy of said committee, such mentioned association type lacks representation and legitimacy in regards to the indigenous people ancestral and unionized ways[140]. COTOA-6A is an organization which is not registered[141], lacks recognition as TCO, TIOC, and does not obey a territorial group of *ayllus* nor can claim legitimacy from FAOI-NP or CONAMAQ which, as we have pointed out previously[142], have a legal personality recognized by the State and constitute first level political actors in the recent history of rights vindication for the indigenous people.

126. As the accounts of the years 2011 and 2012[143] demonstrate, COTOA-6A was created with the specific purpose of working as a platform so that CMMK could displace the Indigenous Communities that opposed the Project, misinform the high level authorities of La Paz which were not up to date on the specific situation of North Potosí (specifically the Mining

[137] *See, also*, for example, resolution Vote of Chiro Ayllu from 11 April 2012, **R-56**.

[138] Certification issued by CONAMAQ dated 3 March 2015 (-We reply your note […] where we inform your distinguished authority that Ayllu COTOA-6A is not a existing representation (sic) which is why it cannot be recognized and affiliated to our Organization named National Council of Ayllus and Markus of Qullasuyu) **R-57**.

[139] Statement of Claim, Glossary, p. iii.

[140] Uño, ¶ 68, **RER-1**.

[141] Certification of the Departmental Judicial Direction of the Potosi Department dated 10 February 2015 (-We must inform that from the search in the information and documentation system from the Single Counter for Proceedings of the Autonomous Government of the Potosi Department from the year 1996 up to date we could not find any registry (sic) of legal personality that carries the name COORDINADORA TERRITORIAL ORIGINARIA DE LOS SEIS AYLLUS (COTOA-6A) -), **R-58**.

[142] *See,* also, ¶¶ 62-64, *above*.

[143] *See,* also, ¶¶ 124 and 142, *below*.

Minister of that time, Mr. Mario Virreira), and delegitimize the intervention by the indigenous associations and legitimate authorities (such as Chief (Kuraka) Cancio Rojas, top authority of the Sacaca Marka). CMMK was always aware of a strong opposition to the Project due to its potential environmental damaging and the effect to the traditional ways of life, with irreversible consequences. To create a parallel indigenous association was the solution to replace and hide the will of the Indigenous Communities.

127. The CMMK strategy proved from early on to be very effective confronting the Indigenous Communities. The unanimous voice of disapproval of the Indigenous Authorities, which had been expressed until the beginning of 2011[144], would be seen slowly diluted in the following months (as new actors from the distant *ayllus* and distant communities were involved by the Company) until causing violent events and an unsustainable situation in the public order, in the Project area. As Governor Gonzales recalls, during the first socialization meetings, the Potosí Government (the "**Government**") noticed the existence of these divisions with surprise, given that, toward the end of 2010, it was clear that the opposition to the Project was –as CMMK recognized[145]- unanimous.

128. Meanwhile, the Indigenous Communities of the Project area would begin, by turn, a confrontational dynamic and growing division. On request of the Company, the Government would lead a series of meetings and reconciliation approaches with the Indigenous Communities in order to make the project viable and keep CMMK's presence in the area.

3.4 In view of the existing division between the Indigenous Communities and to prevent escalation of the conflict, the Government of Potosí intervened as a mediator

129. As Mr. Felix Gonzales explains, Governor of the Department of Potosi and witness for Bolivia, the intervention by the Government was not encouraged by a desire to obtain a participation in the Project. On the contrary, the Government mediation obeyed an express request by CMMK in view of the need to create a dialogue scenario in which there would be an active participation by the government authorities. The Government intervention would allow making the Project viable in view of the existence of a general opposition from the Indigenous People[146].

130. By CMMK's request, Government officials started visiting the area in early 2011 where the opposition to the Project (mainly by the Mallku Khota Community[147]) was evident. In

---

[144] FAOI-NP Resolution dated 11 January 2011, **R-50**.

[145] Letter from Xavier Gonzales Yutronic to the Governor of Potosí dated 21 December 2010, **R-55**. See also, Gob. Gonzales, ¶¶ 27, **RWS-1**.

[146] Gob. Gonzales, ¶ 26, ("*It is not true that I made negative declarations against the project or suggested its expelling during the meeting of 23 de July 2011, as Mr. Sr. Gonzales Yutronic mentions. On the contrary we publicly announced to the media that this meeting would have the goal of providing viability to the Mallku Khota Project and allow the presence of CMMK en the area*"), **RWS-1**.

[147] Minutes of the visit of the Department Office of Mother Earth to the Mallku Khota Community dated 10 May 2011, ("*Activities Performed: Meeting with the Indigenous Peoples from Mallkukota who declared that they would not admit (sic) the Malkukota Mining Company S.A. (sic)*"), **R-59**.

addition, the Indigenous Communities from Ayllu Sullka Jilatikani had expressed, to the national government officials, their disconformity with the presence of CMMK in the area, even threatening by taking matters in to their own hands if the Company did not abandon the Project. In reference to their presence in Mallku Khota, the Ayllu Sullka Jilatikani wrote president Evo Morales in May 2011:

[T]*he settlers of the afore mentioned Ayllu* [Sullka Jilaticani]*, tired and surprised by the way of the breaching activities to our collective rights […] in consequence the bases along with the indigenous authorities in an agreed upon way and exercising their rights (sic) to the free determination (sic) we determine CONCLUSIVELY TO NOT ALLOW EVER AGAIN THE ENTRY OF MINING COMPANIES UNDER ANY TITLE to develop mining activities to our ancestral territory of Ayllu Sullka Jilaticani, specifically we are willing to defend, even with our lives, the life of our mother earth* […][148].

131. As it can be evidenced by the tone of the letter, the mediation to continue with the mining exploration was necessary. For that reason, with the Company's consensus, Governor Gonzales called for a <u>first socialization meeting</u> in the Toro Toro region on July 23rd, 2012. The goal of this meeting was to make the Project viable, for CMMK to give a presentation to the Indigenous Communities, and to seek an agreement with the opposing Indigenous Communities[149]. It is not true, therefore, that the goal of this meeting was to "*address the activities of a group of illegal gold miners in the Project Area*"[150], as SAS affirms erroneously.

132. The statements provided by Governor Gonzales to the media, provide account of the support to the presence of the Company. As was published during that time by a local newspaper:

The Government called for a meeting in the Toro Toro municipality, with the goal of seeking the Mallku Khota project viability […]. *The silver exploitation project could be addressed by [CMMK] in the Toracari area, where there is a high concentration of the mineral and the installation of a plant with cutting edge technology is planned for the recovery* […]. *Today the Governor wants to save the project that, if it goes through, would be one of the largest of the world and would provide benefits to the community, the municipality and the Department of Potosí through the mining royalties*[151].

133. The meeting which was called for by Governor Gonzales took place, according to plan, on July 23rd, 2011 in the Toro Toro region, North Potosi. As Governor Gonzales explains, during the first part of the meeting, representatives of CMMK explained the Communities the different phases of the Project and the different benefits that, according to them,

[148] Letter from the Ayllu Sullka Jilatikani to the President of the Republic dated 1 May 2011, **R-60**. *See,* also, Letter from Ayllu Sullka Jilatikani to the Ministry of Mining and Metallurgy dated 1 May 2011, **R-61**.

[149] Gob. Gonzales, ¶ 25, **RWS-1**.

[150] Statement of Claim, ¶ 58.

[151] Press release, El Potosí, *Local Government will push mega mining project* dated 21 July 2011, **R-62**

would bring having the presence of the Company in the area[152].

134. Once CMMK finalized their presentation, it became clear for the governmental official that there was a clear opposition coming from several Communities and a division towards the presence of CMMK in the area. Indeed, some of the present members denounced that the Project –*it is not beneficial for us*[153]-, -*it steals the water*-[154], and –*there is a fight amongst the Indigenous sector, others who support and others who are against*[155]. As Governor Gonzales recalls, there was little probability that CMMK would be able to develop the Project under these circumstances[156].

135. In view of the impossibility of arriving at an agreement and the divergent opinions from different Communities, debate proposals and topics were used, with the goal of guaranteeing CMMK's presence. As Governor Gonzales[157] recalls, there were two specific proposals that were discussed during the meeting:

a. The first proposal consisted in the creation of an interinstitutional commission, which would have an ample participation of the affected Indigenous Communities, the municipal, department and national Government instances, and the Company. It is not true, as Mr. Mallory affirms, that it was "*a small committee to meet again and reach consensus on whether or not to allow the Company to continue activities*"[158]. It seems, to say the least, surprising that Mr. Mallory affirms this, when, during the meeting, he manifested his support to the proposal, noting that, "[i]*n coordination between municipal and department authorities and indigenous authorities the continuity of the project can be promoted*" and affirmed "*the indigenous authorities can help us walk together and push the project, with protection, towards an integral development* (sic)"[159].

b. The second proposal consisted in submitting to consideration a participation form –during the exploitation phase – of the national, department or local governments which would allow to generate additional economic resources (as was registered in the minutes "*before entering the stock exchange, consult with the government to look in to the possibility of the national, department and municipal governments becoming shareholders to generate economic resources*"[160].) As Governor Gonzales points out "*this idea emerged after the representatives of CMMK mentioned the issuance of stocks in the Toronto Stock Exchange*"[161] and "*it was the only proposal which counted with a partial acceptance from the Calachaca and*

[152] Gob. Gonzales, ¶ 29, **RWS-1**.
[153] Minutes of the project socialization meeting dated 23 July 2011, **R-32**.
[154] *Id*.
[155] *Id*.
[156] Gob. Gonzales, ¶ 30, **RWS-1**.
[157] *Id*., ¶ 31.
[158] Mallory, ¶ 21, **CWS-3**.
[159] Minutes of the socialization meeting dated 23 July 2011, p. 8, **R-32**. *See also*, Gob. Gonzales, ¶ 32, **RWS-1**.
[160] Minutes of the socialization project meeting dated 23 July 2011, p. 5, **R-32**.
[161] Gob. Gonzales, ¶ 32, **RWS-1**.

Mallku Khota Communities"[162].

136. However, SAS and their witnesses have used the good offices of the Government in an opportunist form to try to show a lack of collaboration and an intention to deprive CMMK of the Project. It is striking that Mr. Mallory and SAS interpret Governor Gonzales' affirmation that he did not want a "*second San Cristobal*"[163] in the sense that he rejected the presence of foreign investors. As Governor Gonzales explains, San Cristobal (a mine currently operated by foreign investors in the Potosi Department) was a severely criticized project due to the consequences it brought to the near Indigenous Communities from the area in the Potosi Department and it only managed to recover with the support of all the affected communities thanks to a solid policy of social support and socialization[164].

137. With the Company's agreement, a second socialization meeting was summoned, which was held in Toro on August 31st, 2011. It is not true as SAS and Mr. Gonzales Yutronic affirm[165], that "*The Government continued digging in to the Company's indigenous efforts by not attending key follow-up meetings*"[166], for example, "*sending* […] *two lower ranking government officials*"[167]. As Governor Gonzales explains, both officials that were sent to this meeting were high-ranking officials closely involved in the monitoring of the Project[168].

138. As in what happened in the first meeting, the representatives of CMMK gave a presentation of their indigenous program that, by not convincing the Communities close to the Project, generated a heated debate. The Community of Mallku Khota even abandoned the premises before the meeting concluded[169]. For the Government, it was clear that, besides existing an "*advance in the socialization*", there was still a lack in achieving an agreement with certain groups which opposed the Project[170]. According to what Governor Gonzales[171] explains (and Mr. Gonzales Yutronic confirms[172]), the Government officials proposed – given that this is what was most beneficial to the Company- to have a meeting with smaller Indigenous Communities delegations which rejected the presence of CMMK in the area and those that supported it.

139. However, before the mentioned meeting could take place, FAOI-NP summoned a meeting called "*cabildo*" in the area in order to discuss possible alternatives considering the divisions that were generated by the presence of CMMK[173]. It is incredible that SAS can

---

[162] *Id*.
[163] Statement of Claim, ¶ 59. Mallory, ¶ 19, **CWS-3**.
[164] Gob. Gonzales, ¶¶ 15-16, **RWS-1**; Community Relations Program of Minera San Cristóbal, **R-47**.
[165] Gonzales Yutronic, ¶ 12, **CWS-4**.
[166] Statement of Claim, ¶ 62.
[167] *Id*.
[168] Gob. Gonzales, ¶ 36, **RWS-1**.
[169] Report on the second socialization meeting of the Mallku Khota Project dated 6 September 2011, **R-63**.
[170] Minutes of the socialization meeting dated 31 August 2011, **C-43**.
[171] Gob. Gonzales, ¶ 39, **RWS-1**.
[172] Gonzales Yutronic, ¶ 13, **CWS-4**.
[173] Summon to the Town Hall dated 25 September 2011, **R-64**.

insinuate (as well as its witnesses[174]) that the Government planned a sort of setup[175] against CMMK. As Governor Gonzales explains, the *cabildo* of September 25th, 2011, summoned by FAOI-NP, does not correspond to the socialization meeting that the Government planned on holding[176].

140. In the mentioned *cabildo*, and in the presence of the highest-ranking authorities of the North Potosi Communities and the CONAMAQ, the Indigenous Communities denounced that the Company was generating divisions and that it had not complied with the commitments it had assumed with the Communities. Some Indigenous Communities also denounced that the Company had "*paid for the hiring of buses for the transportation*" of people from distant Communities akin to the Project and that CMMK "[made] *the people fight by giving money to some and offer*[ing] *land in Cochabamba to have support*"[177]. Mr. Mallory even recognized, in regards to the indigenous work of the Company, that "*in the past there was no coordination between the Community and the mining company*"[178]. As a consequence of the Project, the division between communities, was more than clear and the tone, which was always more aggressive, made it impossible to establish a dialoged scenario[179].

141. Once seeing that the Indigenous Communities would not concede to their conditions, the Company and groups akin to their interests gathered as the COTOA-6A committee (created in 2011 with the support of CMMK[180]) and established their own parallel agenda. The goal was simple: to accentuate the false impression that the Communities which opposed the Project were, as SAS affirms in their claim, "*a handful of illegal miners*", and mislead the authorities from La Paz (especially officials of the Minister of Mining) regarding the events from the meetings in presence of the Governor.

142. Several events from the end of 2011 and start of 2012 demonstrate the existence of this parallel agenda:

a. The first act of the parallel agenda consisted in drafting minutes (in coordination with CMMK[181]) after the meeting of the *cabildo* summoned by FAOI-NP, but signed only by some of the *cabildo* participants. In the mentioned minutes, members of COTOA-6A with the support of the Company made biased accusations, such as that the Chief (Kuraka) of the Sacaca Marka was a foreigner to the territory of the area of Mallku Khota (even though that the Mallku Khota Community is within that Marka)[182]. At the same time, and

[174] Gonzales Yutronic, ¶ 13, **CWS-3**; Mallory, ¶ 22, **CWS-3**.
[175] Statement of Claim, ¶ 63.
[176] Gob. Gonzales, ¶¶ 39-40, **RWS-1**.
[177] Minutes and report of the *Cabildo* dated 25 September 2011, **R-65**.
[178] *Id*., p. 2.
[179] Gob. Gonzales, ¶ 44, **RWS-1**.
[180] Mallory, ¶ 15, **CWS-3**.
[181] Mallory, ¶ 23, **CWS-3**.
[182] Resolution vote dated 25 September 2011 ("Communicate and inform the authorities of the Indigenous

in an unbelievable way, the committee requested FAOI-NP and CONAMAQ, whom had brought to light the complaints from the Communities which opposed the Project in the past, to not get involved in the affairs of the *ayllus* from North Potosi[183]. This request would equal to imposing a chaotic anarchy (as in fact COTOA-6A wanted to) within the decision making of the Ancestral Organization;

b. The second act of the parallel agenda was the campaign started by COTOA-6A to win the support of the national government in detriment of the affected Indigenous Communities (specially Mallku Khota and Calachaca), whom continued to oppose the project. In this manner, this committee would achieve having representatives of the Ministry of Mining and Metallurgy attend a meeting on November 17th, 2011 in Mallku Khota (without inviting the local Government) in spite of the persistent and almost violent opposition from the Community[184]. In the end, it was very important for COTOA-6A (and the Company) that the minutes be signed in the Project area, where there was opposition (an opportunistic maneuver which would be repeated on June 8th, 2012 in a supposed "Historical Great *Cabildo*"[185]). COTOA-6A persisted through all means in the continuation of the Project in spite of the "*precedent of the none participation of the Mallkucota and Calachaca communities*"[186];

c. In the same manner and as the third act of the parallel agenda, COTOA 6A would meet in La Paz city with the Vice ministers of the Presidency and Mining, César Navarro and Halation Bustos, respectively. The purpose of this meeting, once again, would be to mislead these officials that the complaints from CONAMAQ, FAOI-NP and the Mallku Khota Community were unlawful and that, on the contrary, there was an almost unanimous support in the Project area[187].

In fact, bringing the meetings forward without the presence of the Indigenous Communities that opposed the Project, would be a strategy that COTOA-6A would use time and time again until before the tragic events that would entail the reversion of the Mining Concessions (the "Reversion"[188]). This circumstance always worried the local Government, since this type of biased information delivered to high ranking officers of the national Government whom had not performed a detailed follow-up to the socialization of the Project, was counter-productive to the interests of the Indigenous Communities[189]; and

---

Peoples Ayllus Federation of North Potosi and CONAMAQ, the ignorance of those people that do not belong to ayllus […] as is Mr. Cancio Rojas") (emphasis added), **C-44**.

[183] *Id*. *See,* also, Gob. Gonzales, ¶ 48, **RWS-1**.

[184] Gob. Gonzales, ¶ 47, **RWS-1**.

[185] *See* ¶ 163, *bellow*.

[186] Minutes of the meeting in a large committee as a *Cabildo* dated 17 November 2011, **C- 68**. Gob. Gonzales, ¶ 47, **RWS-1**.

[187] Minutes of the meeting in the Government Palace in La Paz with COTOA-6 dated 24 November 2011, **R-66**.

[188] *See* **¶¶** 162-164, below.

[189] Gob. Gonzales, ¶ 47, **RWS-1**.

d. As the forth act of the parallel agenda, CMMK met with officials from the Ministry of Mining on January 26th, 2012 (as well as on subsequent dates[190]) without giving notice to the local Government. Even though no result came from this meeting (because the central Government kept a neutral position, as in previous occasions[191]), these types of meetings had the goal of winning over the sympathy of officials who were not up to date (at a detailed level) of the events of the Project area. As Governor Gonzales points out, during the first few months of 2012, no socialization meeting took place in the area. The working table which SAS[192] makes reference to, corresponds to an activity log performed by local Government officials exercising their duties.

143. As Mr. Mallory concedes[193], the good office of the local Government allowed CMMK to continue working during 2011 and the beginning of 2012. However this mediation would be frustrated due to the rise of violence caused by CMMK's actions, which would eventually lead up to an unsustainable public order situation, starting May 2012.

3.5 CMMK aggravated the division between the Indigenous Communities and tried to criminalize the Indigenous Authorities that were opposed to the Project

144. The stress between the different Indigenous Communities continued during the year 2011, and some specific events started aggravating the situation. Since May of that year, different Authorities mentioned the existence of individuals that, pretending to represent the Indigenous Communities, advocated for the continuation of the project. For example the Cabildo Chirimiya from the Tacahuani Ayllu denounced the acting of some of their Authorities akin to the Company's interests and requested the intervention by FAOI-NP and CONAMAQ[194].

145. As a result of these divisions, the situation between the Communities started turning more troubled.

---

[190] CMMK's letter to the Minister of Mining and Metallurgy dated 17 May 2012, **R-67**.

[191] Letter of the Vice-minister off Social Movement Coordination to the Governor of Potosí dated 28 November 2011, **R-68**. See Gob. Gonzales, ¶ 53, **RWS-1**.

[192] Statement of Claim, ¶ 66.

[193] Mallory, section II, **CWS-3**.

[194] Resolution of the Tacahuani Ayllu dated 28 August 2011, **R-69**.

[195]

[196]

146. To a great extent, motivated by the decisions made by the Indigenous Communities who were favorable to the Company during the year 2011, CONAMAQ would intervene to denounce and demand "*to drop the divisive actions to the Mallku Quota company"*[197]. Quoting this association:

> [T]*he presence of the Mallku Khota mining company is evident; and which is eager to gain* (sic) *leaders, Indigenous Authorities and divide the organic and political structure of the Ayllus, to the extent of causing confrontations between them and has generated uneasiness and conflict*[198].

147. The year of 2012 marked a new dynamic in the conflict created by CMMK between the Indigenous Communities. On February 1st, 2012 the Authorities from Sullka Julatikani Ayllu requested CONAMAQ and FAOI-NP to intervene and determine the existence of false authorities that, by instruction of CMMK, would have created the impression of a generalized (and none-existing) support to the continuation of the Project[199].

148. Meanwhile, members of the opposing Communities would denounce to several national and international agencies, the methods that CMMK had used and the manner in which it intended to win support and continue with the mining activity at any cost. As Chief (Kuraka) Cancio Rojas manifested to the United Nations High Commissioner for Human Rights in Bolivia on April 2nd, 2012:

> *On January 11th, 2011 we all signed a consensus agreement to not allow the presence of this foreign company* [CMMK]*, but, since they have a lot of money, they have started buying peoples conscience whom are so poor, which are the indigenous peoples from the area, besides this, the State never remembered us, but if they authorize the company to be granted the consesion (*sic*) of mining properties in the indigenous peoples territories, and this is causing serious division problems of their organizations, unlawful detention of leaders and ignorance of indigenous authorities who were legitimately and rightfully elected, it is clear that they are motivated and supported by the Canadian transnational company*[200].

149. Not being able to intimidate their opponents, CMMK decided to start legal action for their criminalization.

150. SAS stays quite over the recklessness of these complaints. On the contrary, it limits itself to confirm that, "[O]*n April 1st, 2012, one of the community relations coordinators from*

---

[197] Resolution of the Government Council of CONAMAQ dated 13 December 2011, **R-71**.

[198] *Id*.

[199] Letter from the Sullka Jilatikani Ayllu to FAOI-NP dated 1 February 2012, **R-72**.

[200] Letter from Cancio Rojas to the United Nations High Commissioner for Human Rights in Bolivia dated 2 April 2012, **R-73**. See also, Letter from Cancio Rojas to the Minister of Justice dated 2 April 2012, **R-74**.

CMMK, Saúl Reque, was kidnapped by force by some Mallku Khota locals"[201]. This way SAS only limits itself to replicate in its claim the criminal complaint that Mr. Xavier Gonzales Yutronic presented on April 11th, 2012, against, amongst others, 5 authorities from the Mallku Khota community[202] (including Mr. Andrés Chajmi, current leader of the Community). It is odd that, even though this complaint was presented, Mr. Gonzales Yutronic keeps quite regarding this in his witness statement.

151. Nevertheless, the Prosecutor's office determined the recklessness of the CMMK accusations and closed the case when they verified that the witnesses for CMMK were in La Paz and not in Mallku Khota. The Prosecutor in charge of the case mentioned in her closure resolution:

"*that there are no elements that enable the identification of the authors or participants of the incident, even though we have the names of such participants, the incident took place in a deserted area, reason for which there hasn't been an in fact eye witness found, given that witnesses Edmund Coronel and Eulogio Mendoza manifest that the engineer was taken from the vehicle violently, nevertheless by the statement taken from witnesses Juan de la Cruz Mamani and Nelson Gabriel, we can establish that Edmundo Coronel and Eulogio Mamani were with them in La Paz city, and that they were not present in the place were the incident took place, existing serious contradictions in their statement*s[203].

152. In spite of the clear recklessness, the seriousness of the accusations resulted in the criminal Authority issuing arrest warrants against the imputed, which resulted in an abrupt police intervention in the Mallku Khota area in order to comply with the Prosecutor's order. This would contribute in the aggravation of the fragile violent situation that would end up getting out of control.

153. In effect, on the morning of May 5th, 2012, the police deployed a task force, according to what the Communities denounced that involved 50 members of the public force[204]. This fact would be confirmed by the local media on May 6th, 2012 day in which it was reported that "[t]*he police force acted under a judicial order <u>because the businessmen of the north American company South American Silver started legal actions against the Indigenous Communities that oppose mining activity in their territory</u>*"[205].

154. As was anticipated, members of the Communities violently opposed the police

---

[201] Statement of Claim, ¶ 67. Mallory, ¶ 28, **CWS-3**.

[202] Closing resolution from the complaint of Xavier Gonzales against members of the Indigenous Peoples dated 28 February 2014, p. 3 (precedents), **R-75**.

[203] Closing Resolution of the complaint by Xavier Gonzales against members of the Indigenous Peoples dated 28 February 2014, p. 8 (emphasis added), **R-75**.

[204] Denunciation of the Indigenous Peoples on the police intervention dated 8 May 2012, **R-76**.

[205] Press release, El Potosí, *Indigenous Peoples confront for a mega silver deposit* dated 6 May 2012 (the highlighting is ours), **R-77**. *See also*, Press release, El Potosí, *They confirm there is a hostage in Mallku Khota* dated 5 May 2012,(—[t]*he representative of the Public Minister had the judicial order to arrest the main head of the community who allegedly opposes the mining project which the north American company South American Silver intends to develop-*, **R-78**.

intervention unleashing a confrontation that resulted in the withholding of 2 police officers between May 5th and 8th. The intervention by the Potosi Governor made possible (i) the release of both police officers on May 9th, 2012 and, finally (ii) the signing of a pacification minutes. As Governor Gonzales points out, in spite of the heated temper, he was able to meet on May 9th in the Acasio village with the people who caused the unrest[206]. The minutes prove that the involved parties commit to stopping any violent act and start a dialogue process the following week in that village[207].

155. As Governor Gonzales points out, the agreement with the Indigenous Communities specifically consisted in a round of negotiations with the participation of 60 indigenous people (30 in favor and 30 against the Project) in the Acasio region in the following days[208]. The meeting in Acasio was programmed for May 18th, 2012.

156. CMMK, nevertheless, did whatever possible to stop this meeting from taking place. Even though this meeting had to take place between the proposed representatives with the Governor of Potosi, CMMK – in an unprecedented event- arranged 25.000 Bolivianos (approximately US$ 3.600) to mobilize members of the Indigenous Communities that supported the Project[209]. In view of this circumstance, and having been victim to several harassments and pressure after the signing of the pacification meeting, the Indigenous Communities who opposed the project decided to also accompany their representatives to Acasio, which was completely unexpected, as the Governor explained[210].

157. The mobilization of sympathizers to Acasio generated a wave of confrontation that extended during the whole day and even put Governor Gonzales life at stake, which had to leave from the *Cabildo* scrapping through the rooftops[211]. The Company's maneuvers were denounced by members of the Communities in Acasio on the same day[212]. In an effort to achieve reconciliation between the confronted parties, three days after the events of Acasio, the Potosi Government and the Ministry of Mining and Metallurgy called for a new meeting on May 28th, this time in La Paz[213].

158. In the meantime, the misinformation promoted by the Company provoked new complaints against the Indigenous Authorities that opposed the project. Specifically, a criminal complaint against Chief (kuraka) Cancio Rojas and other leaders of the community was submitted on account of the violent events that took place in Mallku Khota. The

[206] Gob. Gonzales, **¶¶** 58-59, **RWS-1**.

[207] Minutes of the pacification between communities dated 9 de May 2012, **C-51**.

[208] Gob. Gonzales, **¶¶** 59, **RWS-1**.

[209] Payment receipts for the mobilization of communities to the meeting in Acasio dated 9 and 10 May 2012, **R-79**.

[210] Gob. Gonzales, ¶ 60, **RWS-1**.

[211] Press Release, *Fight for Mallku Khota leaves 10 wounded and 12 missing* dated 19 May 2012, **R-80**. Gob. Gonzales, ¶ 61 **RWS-1**.

[212] Resolution of the Indigenous Peoples dated 18 May 2012, **R-81**.

[213] Letter from the Governor of Potosí to the Mallku Khota and Calachaca Communities dated 23 May 2012, **R-82**. *See* Gob. Gonzales, ¶ 63, **RWS-1**. It is not true, however, the affirmation by Mr. Angulo, according to whom a meeting took place with certain Ayllus on 23 May 2012. *See* Angulo, ¶ 10, **CWS-5**.

Prosecutor's office issued a warrant for the arrest of the indigenous leader on May 18th, 2012.

159. According to press releases, while Mr. Cancio Rojas was in La Paz on May 21st, 2012 in preparation for the meetings with the Government, he was injured by followers of CMMK. Police intervened to stop the aggressions and, once in police custody, he was finally arrested and transferred to Potosi[214].

160. As had happened with the complaint presented by Xavier Gonzales, the Prosecutor's office resolved to release Cancio Rojas weeks after that they verified that the Chief (Kuraka) was not present in Mallku Khota on May 5th, when the police officers were withheld[215]. At the same time, other community members, sponsored by CMMK presented a second criminal complaint against the Chief (Kuraka) for the violent events of Acasio, which was also found to lack grounds by the Prosecutor's office[216]. Nevertheless, these reckless complaints would result in several weeks of detainment for Mr. Rojas and would hasten a new escalation in the violent events between the Indigenous Communities that had confronted previously. Indeed, the unfounded detention of the Chief (kuraka) further heated the animosity of the Indigenous Communities and CONAMAQ.

161. On May 25th, 2012, CONAMAQ called for a massive march towards La Paz to demand the protection of the natural resources of the Mallku Khota region and the expelling of CMMK. According to what the *Mallku* of the Suyu Charka Qhara Qhara declared, the march would continue until the government revert the Mining Concessions[217]. The spirits of the march which started on May 28th, 2012, were clearly influenced by the unfair arrest of the Chief (Kuraka), as the Indigenous Authorities narrated[218]. A demonstration of over 4000 people (300 from which had left from Mallku Khota) arrived on June 7th to the city of La Paz.

162. These circumstances explain why the meeting that took place on May 28th, 2012, called for by the local Government and the Ministry of Mining and Metallurgy and described by SAS and their witnesses as an unconditional support to the Project, was only attended by those *ayllu* groups that were in favor of it. As the press observed, while the opposition marched towards La Paz, other Indigenous Communities advanced with meetings with the Government:

---

[214] Press release, El Potosí, A Indigenous leader is accused on eight counts for the Mallku Khota case dated 23 May 2012, **R-83**.

[215] Center for Documentation and Information of Bolivia, *Mallku Khota: Mining Land and Territory* dated November 2012, p. 3, **R-17**.

[216] The not guilty resolution relating to the complaint submitted against Cancio Rojas dated 13 de June 2014, **R-84**.

[217] Press release, Boris Bernal Mansilla, The Mallku Khota demonstration arrives this Thursday to La Paz and they will not leave until their demands are met dated 7 June 2012 ("T*he mallku of the Charka Qhara Qhara Suyus from north Potosí, Damián Colque, informed this Wednesday that the demonstrators of Mallku Khota will arrive to the city of La Paz this Thursday and assured that they will not leave until the government reverts the mining concession of this town to the Bolivian State*"), **R- 85**.

[218] Interview to Félix Becerra, CONAMAQ member, video, May 2012, **R-86**.

Las autoridades durante el diálogo con comunarios del norte potosino

SE DIALOGÓ SIN PRESENCIA DE OPOSITORES

Comunarios piden que continúe exploración en zona Mallku Khota

Los movilizados se oponen al desarrollo del proyecto que a futuro permitiría la explotación de plata

Aproximadamente 300 comunarios del ayllu Sullk'a Jilatikani comenzaron ayer una marcha en la población de Mallku Khota demandando que el Gobierno deje sin efecto las concesiones que posee la Compañia Minera Mallku Khota.

Press releases from May 29th, 2012[219]

[219] Press Release, El Potosí, Indigenous Peoples request the exploration in the Malku Khota area to continue dated 29 May 2012, **R-87**.

163. This is the reason why the minutes presented by SAS to demonstrate the supposed lack of opposition did not count with the participation of the opposition, which were marching towards La Paz[220]. The time that passed from the start of the march on May 28th, 2012 and their arrival to La Paz, was taken advantage by COTOA-6A and CMMK to call for a supposed "Great *Cabildo*". With the same pretension to discredit the role that CONAMAQ and FAOI-NP played, COTOA-6A

a. described this *cabildo* as "historical" because of the fact that "*45 communities of over 500 families*"[221] would be present in Mallku Khota; and

b. informed Governor Gonzales that –an illegal and illegitimate march was observed arriving to La Paz-[222].

164. Once the march arrived to La Paz, the high number of participants and some violent acts prevented the Government from receiving the Indigenous Authorities[223]. Irritated, the Indigenous Communities tried to take the Vice-presidency of Bolivia by force[224]. After this, the representatives of FAOI-NP (and from the Mallku Khota Community) rejected any dialogue alternative and requested the authorities that their arrested leaders be released and decreed the physical overtaking of the "*mineral deposits*" of Mallku Khota[225].

165. In view of the challenging resolution adopted in La Paz, the Governor decreed for the militarization of the area around Mallku Khota, including the Company's camps[226]. Nevertheless, the Mallku Khota Community blocked the entrance of the public force or members of the Company[227]. SAS describes the act as a declaration of "*red zone*"[228] but omits to mention that the area had been heavily militarized with the goal of avoiding conflict and protecting the company[229].

166. In view of a practically unsustainable situation, the department and national Governments proposed, in a last effort to achieve a dialogue scenario, repeating the initially planned formula for the Acasio meeting (call for 15 Indigenous People in favor of the Project and 15 against).

167. On June 27th, 2012, the Ministry of Mining and Metallurgy called for a meeting in

---

[220] Minute of the meeting with the Minister of Mining and Governor Gonzales dated 28 May 2012, **C-76**.

[221] Invitation of COTOA-6A to the Governor of Potosí to the Town Hall of 6 June 2012, **R-88**.

[222] *Id*.

[223] Gob. Gonzales, ¶ 68, **RWS-1**.

[224] CF Noticias, Indigenous Peoples of Mallku Khota assaulted the policemen in La Paz on 8 June 2012, video, **R-89**.

[225] Resolution of the Town hall from 8 June 2012, **R-90**.

[226] Gob Gonzales, ¶ 71, **RWS-1**.

[227] *Id*., ¶ 72.

[228] *See* Statement of Claim, ¶ 76; Press release, Diario Opinión online, *Indigenous Peoples of Mallku Khota take over a mining camp* dated 13 June 2012, **C-55**.

[229] Press release, El Potosí, *Police presence generates calm in Mallku Khota* dated 14 June 2012, **R-91**. *See also*, Gob. Gonzales, ¶ 71, **RWS-1**.

Cochabamba for that following July 2nd[230]. However, before this meeting took place, new events, sponsored by the Company would prevent it from taking place as was planned and forced the State to decree the Reversion.

3.6 In view of the unsustainable violent situation generated by CMMK, the Government was forced to revert the Mining Concessions

168. On June 28th, 2012, while the authorities of the Mallku Khota Community were deciding who would attend the meeting in Cochabamba, two CMMK officials infiltrated dressing attire typical to the Indigenous Authorities[231]. This constituted a grave violation to the practices and customs of the Communities, while (i) the company's employee entered without an authorization to interfere in a decision-making instance where only members of the stated Communities would participate, and (ii) they dressed attire that is only allowed for the Indigenous Authorities, an offense that has the same connotation as the identity theft of a civil State official.

169. The infiltration by these two employees implied a decisive deterioration in the position of the Indigenous Communities, which, as a consequence of this act, rejected assisting the Cochabamba meeting and requested the direct intervention by President Evo Morales and the beginning of dialogues in the Mallku Khota area[232].

170. In the meeting held on July 2nd, 2012, with the Minister of Mining and Metallurgy and the Governor of Potosi, COTOA-6A pressed for an intervention by the police in Mallku Khota. Despite the violent events that had been happening, such committee, sponsored by CMMK, requested the intervention of "*1000 (one thousand) policemen and patrol cars in all the sectors of the area*"[233]. The reports by the Potosi Government show that, even though the Government of Potosí tried to calm the animosity, the Indigenous Communities in favor of the project insisted in the militarization[234].

171. As the Governmental authorities were deciding how to approach the problem of the withholding of the two company employees, the press reported that, in facts not completely clarified, the Indigenous Communities that opposed the Project, withheld three more employees from CMMK. Despite this, and in a last effort to release the hostages, a commission from the Ministry of Labor and the Vice Minister of Mining got installed in the Chiro Q'hasa community during the night of July 4th, 2012[235]. A commission

---

[230] Summon from the Ministry of Mining and Metallurgy dated 27 June 2012, **R-92**. Gob. Gonzales, ¶ 73, **RWS-1**.

[231] Center of Documentation and Information of Bolivia, *Mallku Khota: Mining Land and Territory* dated November 2012, p. 4, **R-17**. Gob Gonzales, ¶ 74, **RWS-1**.

[232] Reply by the Indigenous Peoples to the Ministry of Mining and Metallurgy and to the Governor of Potosí dated 1 July 2012, **R-93**.

[233] Minutes of the meeting in the city of Cochabamba dated 2 July 2012, **C-75**.

[234] Report from the Potosí Government regarding the visit to the city of Cochabamba dated 4 July 2012, **R-94**.

[235] Press release, El Potosí, Governmental committee will establish dialogue in the Chiro Kasha area dated 5 July 2012, **R-95**.

from the local government, led by General Secretary Mr. Rene Navarro, went straight to Mallku Khota in the morning.[236]

172. The situation would eventually get out of control. As Governor Gonzales recalls:

While the local Government officials tried to access the area through a hillside, the police entered through the opposing hillside. According to what we clarified a few days later, members of CMMK incited the police to enter Mallku Khota to release their employees taking advantage of the meeting with the local Government (which would foreseeably leave an open field to enter through the opposing hillside)[237].

173. During the violent confrontations between Indigenous Communities and the police that prolonged until July 6th, a member of the confronted Communities, Mr. José Mamani (45 years old) died[238]. The events of July 5th and 6th, were so violent that the United Nations High Commissioner for Human Rights Office in Bolivia drew attention in their annual report for 2012:

In July, in Mallku Khota (Potosi), violent events between indigenous people that reclaimed the exploitation and property rights of a mine and police forces that were spread out in the area caused the death of a demonstrator through firearm wounds, José Mamani, and left 13 people wounded. Three police officers were kidnapped and physically assaulted by the demonstrators[239].

174. After the loss of a life and in an unusual pacific context due to the fact of the loss, after a large series of violent events, officials from the Potosi Government, the Ombudsman's Office and other Government instances, would reach an agreement with the Mallku Khota Indigenous Communities which would be stated in a Minutes of Understanding signed on July 7th, 2012 (the "**Minutes of Understanding**"[240]).

175. In the mentioned Minutes of Understanding, the local and department Governments achieved an agreement on (i) the compensation to the family of Mr. Mamani, (ii) the investigation of the violence wave produced by the police raid, (iii) the subjugation of the two employees that were withheld in Mallku Khota to the indigenous justice, and finally, as a final measure to dismiss the divisions between communities, (iv) the Reversion of the CMMK Concessions in favor of the State[241].

176. The Minutes of Understanding would be later endorsed in an agreement subscribed between the Indigenous Communities and the President of the Republic on July 10th, 2012. In the mentioned agreement it was stated, amongst others, to conform a technical

---

[236] Gob. Gonzales, ¶ 76, **RWS-1**.
[237] Gob. Gonzales, ¶ 77, **RWS-1**.
[238] Noticias PAT, 1 dead and 8 wounded after confrontation in Mallku Khota, video, **R-96**.
[239] Annual Report of the United Nations High Commissioner for Human Rights regarding the activities of its office in the Plurinational State of Bolivia for 2012, ¶ 67, **R-97**.
[240] Minutes of Understanding dated 7 July 2012, **C-16**. *See also*, Gob. Gonzales, ¶ 82, **RWS-1**.
[241] Gob. Gonzales, ¶¶ 81-82, **RWS-1**.

commission for the elaboration of the Reversion Decree and the social peace maintenance as an essential condition for the development of any project in the North Potosi region[242]. The Reversion Decree was enacted on August 1st, 2012. This decree would prepare the reversion of the mining Concessions in favor of CMMK, taking into account:

That the prospection and exploration activities of the Mallku Khota Mining Company S.A. in the Mallku Khota area and the management of the socialization process of the mining project with the communities and the ayllus *__have confronted difficulties leading in the past months to an escalation of social conflict, putting at risk the lives of the people of the area and the employees of the company__.*

That the right which the Mallku Khota Mining Company S.A. holds in the 219 grids is delimited in a norm valid before the year 2009, *__because of the extreme social situation in the Mallku Khota area, and with the means of preserving social peace and guaranteeing the return to normality in the area__, the intervention by the Government becomes necessary in the established framework of the New Political Constitution of the State[243].*

177. According to the power granted by the Reversion Decree, COMIBOL took control of the Project area and started the process for the study of the expenses incurred by CMMK up the current date.

3.7 In complying with the Reversion Decree, COMIBOL ordered a valuation of the expenses incurred by CMMK and took over the management in the Project area.

178. Pursuant to the Reversion Decree, COMIBOL ordered an independent valuation of the expenses incurred by CMMK within the timeframe planned by the Decree. The result of the mentioned valuation, however, was delayed mainly due to the lack of information from CMMK (3.7.1). On the contrary to what SAS states, COMIBOL did not start exploitation activities in the Project area (3.7.2).

3.7.1 COMIBOL hired the services of an independent company that valuated the expenses incurred by CMMK

179. The Reversion Decree ordered, *inter alia*, that the Bolivian Mining Corporation ("**COMIBOL**") "*hire an independent company that perform a valuation process of the investments made by the Mallku Khota Mining Company S.A. and the Santa Cruz Mining Explorations LLC.- EMICRUZ LTDA, in the maximum timeframe of one hundred and twenty (120) working days*"[244]. Once the valuation was complete, COMIBOL would establish "*the amount and conditions under which the Bolivian government will recognize the*

[242] Agreement dated 10 July 2012, **C-17**.

[243] Reversion Decree, p. 3 (emphasis added), **C-4**.

[244] Reversion Decree, article (I), **C-4**.

investments"[245] made by such companies. As we will further explain[246], and contrary to what SAS maintains, if the Arbitral Tribunal considers that they have jurisdiction over the claims from SAS and that the State would have not complied its international obligations (*quod non*), the compensation standard (if any damage would exist) established by the Reversion Decree is according to the ordered by the treaty[247].

180. Even though having invited CMMK and SASC to a meeting with the goal of counting with the necessary supplies to perform the valuation of the incurred costs by CMMK[248], COMIBOL did not receive any answer from the Company. On the contrary it received a reply from SAS in which they stated their immediate impossibility of attending meetings in La Paz[249]. Before COMIBOL would decide on which course of action to take in view of the appearance of SAS (a company from Bermuda up to then, unknown), SAS notified the present dispute to the State on October 22nd, 2012[250].

181. COMIBOL, pursuant to with the Reversion Decree, began the hiring process of an independent valuation company. For that matter, it made two local press releases on December 9th, 2012[251] and, between the 10th and 12th of December, 2012, it sent out special invitation letters to nine companies for them to express their interest[252].

182. The only company that replied was the BDO Berthing Amengual & Associates society[253]. However their proposal contained an important quantity of technical restrictions and questions (which were explained mainly by the lack of information provided by CMMK and SASC, regarding the investments made). For this reason COMIBOL considered that "*BDO's reply before being a proposal is a requirement for expansion to the presented Terms of Reference*"[254]. On the same date the technicians in charge of receiving the proposal recommended the conformation of a committee to reformulate the terms of reference of the selection process in conformance with the observations presented by the only participating company[255].

183. On February 14th, 2013, the Technical Management Office of COMIBOL received a new version of the terms of reference[256]. Taking into account the precedent of the only participating company, and before sending out invitations to different companies, COMIBOL assigned employees from its Oruro offices to perform an inventory of the assets

---

245 *Id*.

246 Statement of Claim, ¶ 102.

247 *See* section 7.3, *bellow*.

248 Letter from COMIBOL to CMMK dated 24 August 2012, **C-20**.

249 Letter from SAS to COMIBOL dated 4 September 2012, **C-21**.

250 Dispute notice from SAS to Bolivia dated 22 October 2012, **C-22**.

251 Invitation to present interest expression published by COMIBOL in the press on 9 December 2012, **R-98**.

252 Invitation to present interest expressions sent by COMIBOL in December 2012, **R- 99**.

253 Minutes of proposal reception dated 14 December 2012, **R-100**.

254 Internal COMIBOL report on the closure of the proposal receptions dated 14 December 2012, **R-101**.

255 *Id*.

256 Remission report of the corrected reference terms dated 14 February 2013, **R-102**.

that CMMK had left in the area and that were found in several towns close to the Project with the intention to ease the workload of the independent valuation company[257]. After performing this inventory, COMIBOL made a new invitation to receive offers which had to be annulled on March 31st, 2014 as a consequence of technical mistakes identified during the procedure of reformulating the Terms of Reference[258].

184. After the annulment announcement of this hiring process, and looking into accelerating the hiring of a valuation company, the new terms of reference were sent directly to the companies Mineral Processing S.R.L. and Quality Audit Consultores y Contadores S.R.L., which presented their proposals on April 7th 2014[259]. After the analysis by the proposal evaluation committee,[260] on April 23rd 2014, COMIBOL awarded the independent valuation of the investments of CMMK and EMICRUZ Ltda, to Quality Audit Consultores y Contadores Publicos S.R.L. ("**Quality**")[261]. Once the formalities had been carried out required by the Bolivian legislation[262], Quality and COMIBOL celebrated the contract for the "*Study and Valuation of the Investments Made by the Mallku Khota Mining Company S.A. and Santa Cruz Explorations LTDA. – EMICRUZ LTDA.*" on May 8th 2014[263].

185. On June 27th, 2014[264], in accordance with the terms in the awarded contract and what was decreed in the Reversion Decree, Quality presented their report of valuation of expenses incurred by CMMK and EMICRUZ Ltda. Up to the date of the Reversion (the "**Quality Report**"[265]).

3.7.2 Contrary to what SAS asserts, COMIBOL has not started the exploitation of the Mallku Khota region

186. The Reversion Decree anticipated that COMIBOL would assume "*the prospection and exploration activities*"[266] in the project area under the fundamental premise that any mining activity performed in the area would not cause an alteration to the public order. Under this assumption, starting from the Reversion, the National Geological and Mining Service ("**SERGEOMIN**") a decentralized (autonomous) body in charge of generating base geological information of the country, had developed certain geological research and exploration studies in the Project area with the cooperation of the local Government[267].

---

[257] Inventory performed by COMIBOL in the Mallku Khota area between 19 and 28 February 2013, **R-103**.

[258] Annulment resolution on the hiring procedure dated 31 March 2014, **R-104**.

[259] Minutes of the reception of offers dated 7 April 2014, **R-105**.

[260] Analysis from the proposal evaluation committee dated 8 April 2014, **R-106**.

[261] Authorization resolution for the hiring of Quality dated 23 April 2014, **R-107**.

[262] Service order for the hiring of a consulter directed to Quality dated 25 April 2014, **R-108.**

[263] Service provider contract for the valuation of the investments of CMMK and EMICRUZ Ltda. dated 8 May 2014, **R-109**.

[264] Quality's letter to COMIBOL dated 27 June 2014, **R-110**.

[265] Valuation report of the investments performed by the Mallku Khota S.A. Mining Company dated June 2014, **R-111**.

[266] Reversion Decree, article 3 (I), **C-4**.

[267] Mining Geological Research and Exploration of the Mineral Deposit of Mallku Khota, web, p. SERGEOMIN,

On the contrary to what SAS pretends, SERGEOMIN does not have exploitation purposes but instead only of the elaboration of the national geological map and identification of mining areas.

187. For its part, COMIBOL has developed some exploration programs in the area without opposition from the Indigenous Parties[268]. These activities are limited only to the rehabilitation of the old underground gallery from the area, the establishing of a camp, topographic surveying, as well as the rehabilitation of several roads[269].

188. In view of all of the above, there is no doubt of the flippancy with which SAS has described the events before and after the Reversion. As has been demonstrated, CMMK's and its representative's behavior was the social conflict generating event in the Project area, that escalated to a social commotion level, in which the State had to revert the Concessions.

4. APPLICABLE LAW TO THE TREATY DEMANDS THE PROTECTION OF THE THE INDIGENOUS COMMUNITIES RIGHTS

189. The treaty does not contain an applicable law clause and there is no agreement between the Parties on this matter. In consequence, the Arbitral Tribunal is vested with broad discretion to determine the applicable law given the circumstances of the case.

190. Article 35(1) from the UNCITRAL Arbitration Rules provides that*, "Failing* [a] *designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate*"[270]. In a similar way, article 1054 of the Netherlands Arbitral Law, seat of this arbitration, provides that the Arbitral Tribunal must issue the award in accordance with the law chosen by the Parties and, in lack of an agreement, in accordance with the norms it considers appropriate, taking into account any applicable usage of trade [271].

191. The United Nations International Law Commission (the "**ILC**") recognizes this discretion by explaining that:

The jurisdiction of most international tribunals is limited to particular type of disputes arising from particular treaties. A limited jurisdiction does not, however, imply a limitation

---

R-112.

[268] Bocamina magazine, Mallku Khota prepares to give its first steps in mining dated February 2013, **R-113**.

[269] Presentations by COMIBOL regarding the job done in the Mallku Khota area, **R-114**.

[270] UNCITRAL Arbitration Rules, article 35(1).

[271] The Netherlands Arbitral Law dated 1 December 1986, article 104 ("Rules applicable to the substance of the dispute 1. The arbitral tribunal shall make its award in accordance with the rules of law. 2. If a choice of law is made by the parties, the arbitral tribunal shall make its award in accordance with the rules of law chosen by the parties. Failing such choice of law, the arbitral tribunal shall make its award in accordance with the rules of law which it considers appropriate. 3. The arbitral tribunal shall decide as amicable compositeur if the parties by agreement have authorized it to do so. 4. In all cases the arbitral tribunal shall take into account any applicable trade usages"), **RLA-6**.

to the scope of the law applicable in the interpretation and application of those treaties[272].

192. Thus, in the exercise of its broad discretion, the Arbitral Tribunal must conclude that, given the extraordinary factual circumstances described in the previous section, it will not only be appropriate but also necessary to interpret the Treaty in light of the sources of international and internal law that guarantee the protection of the rights ofthe Indigenous Communities that live in the Project area.

4.1 International law requires a "systemic interpretation" of the Treaty and, in case of conflict, prevalence of human rights

193. There is no dispute that the Vienna Convention on the Law of Treaties from 1969 (the **"Vienna Convention**") is appropriate to determine the applicable law to the Treaty[273], since it constitutes a declaration of the customary law on the interpretation of treaties[274]. According to the Vienna Convention, the text of international treaties must be interpreted in good faith and in the light of its object and purpose[275]. Moreover, its context shall be taken into account, which includes, according to its article 31(3)(c), "[a]ny relevant rules of international law applicable in the relations between the parties"[276].

194. According to the ILC, article 31 (3)(c) of the Vienna Convention enshrines the so called "*systemic interpretation*" of international law, according to which, "*whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact*"[277]. Therefore, scholars consistently indicate that "*[a] treaty cannot be considered in isolation [because] it is not only rooted in social realities, but also its dispositions must confront other legal norms with which it can compete*"[278].

[272] United Nations International Law Committee, International Law Fragmentation: Difficulties derived from the diversification and expansion of international law (A/CN.4/L.682), 13 April 2006, ¶ 45, **RLA-7**.
[273] Statement of Claim, ¶¶ 116 y 117.
[274] *See*, for example, C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 International and Comparative Law Quarterly, 2005, p. 293, **RLA-8**; *Kasikili/Sedudu Island (Botsuana/Namibia)*, CIJ case, sentence of 13 December 1999, ¶ 18, **RLA-9**; *Territorial Dispute (Grand Arabe Yamahiriya Socialist Popular Lybia/Chad Republic)*, CIJ case, sentence of 3 February 1994, ¶ 41, **RLA-10**.
[275] United Nations, Vienna Convention regarding the Law of Treaties, 23 May 1969, article 31 (1), **RLA-11**.
[276] *Id.*, article 31 (3)(c).
[277] United Nations International Law Committee, International Law Fragmentation: Difficulties derived from the diversification and expansion of international law (A/CN.4/L.702), 18 July 2006, ¶ 17, **RLA-12**
[278] P. Daillier & A. Pellet, *Droit international public*, 7° ed., Librairie générale de droit et de jurisprudence, 2002, p. 266. Quoted by the United Nations International Law Committee, *International Law Fragmentation: Difficulties derived from the diversification and expansion of international law (A/CN.4/L.682)*, 13 April 2006, ¶ 418, **RLA-7**. *See*, also, C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 International and Comparative Law Quarterly, 2005, p. 280 (—*it is submitted that the principle is not to be dismissed as a mere truism. Rather, it has the status of a constitutional norm within the international legal system*), **RLA-8**; D. French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 International and Comparative Law Quarterly, 2006, pp. 300-301, **RLA-13**.

195. In Oil Platforms, the International Justice Court (the "**ICJ**"), when performing a systemic interpretation of a treaty, required the content of a term of the treaty, which was not determined or vague, to be completed with other provisions of international law[279]. In this case, Iran sued the US for the destruction of oil platforms. In their defense, the US appealed to a clause in the relevant bilateral friendship treaty, which allowed, despite there were conflicting obligations in such treaty, to perform acts necessary to guarantee safety. The ICJ interpreted this clause in a systemic manner, based on international law on the use of force[280] and *"Article 31(3)(c) was thus used to introduce* [in its] *entirety the law of jus ad bellum*" in the clause[281].

196. This "*systemic interpretation*" aims to, *inter alia*, avoid the fragmentation of international law, partly caused by the rising of certain groups of norms and specialized institutions that, as investment law, pretend to define themselves as "*self-contained regimes*"[282].

197. The systemic interpretation does not only demand the use of other norms to remedy omissions or vagueness but the application of a presumption against the conflict of norms[283]. One must assume that a treaty does not violate the parties' international obligations, and because of that, it is necessary to interpret it in a consistent manner with those obligations.

---

[279] C. McLachlan, The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention, 54 International and Comparative Law Quarterly, 2005, p. 311 (—even when it is not made express, the principle of systemic interpretation will apply, and may be articulated as a presumption [...] that the parties are taken to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way"), **RLA-8**.

[280] Oil Platforms (Islamic Republic of Iran v. United States of America), CIJ case, sentence of 6 November 2003, ¶ 41, **RLA-14**.

[281] R. Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 International and Comparative Law Quarterly, 2006, p. 802, **RLA-15**.

[282] United Nations International Law Committee, International Law Fragmentation: Difficulties derived from the diversification and expansion of international law (A/CN.4/L.682), 13 April 2006, ¶¶ 8 and 152, (-the notion of an 'autonomous' regime is simply misleading. Even though the degree in which a regime of responsibility is variable, a group of norms regarding a problem or a branch from International Law should be complemented with general norms, there is no support for the opinion of disregarding the general norms completely at any moment-), **RLA-7.**

[283] C. McLachlan, The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention, 54 International and Comparative Law Quarterly, 2005, p. 311 (—even when it is not made express, the principle of systemic interpretation will apply, and may be articulated as a presumption [...] that, in entering into treaty obligations, the parties intend not to act inconsistently with generally recognized principles of international law or with previous treaty obligations toward third states), **RLA-8**; M. Jacob, International Investment Agreements and Human Rights, INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development, Institute for Development and Peace, University of Duisburg-Essen, 2010, p. 28, **RLA-16**; Electronica Sicula SpA (ELSI) (United States v. Italia), CIJ case, sentence of 20 July 1989, ¶ 50 ("the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispense with, in the absence of any words making clear an intention to do so"), **RLA-17**.

198. The fragmentation of international law worries the international community[284]. Professor Bruno Simma, former judge of the International Court of Justice and former president of the ILC, explains that the fragmentation of the international law, concerning investment law, could result in a violation of human rights:

Scenarios under which an investor's rights may be affected by human rights-motivated government policy are easy to imagine: a government intervenes in an enterprise to prevent human rights abuses perpetrated by the enterprise itself [...]. *The tendency towards considering international investment law in a vacuum is perhaps most disturbing with regard to humans rights law* [...] *the failure of investment tribunals to take international human rights law into account could potentially undermine a State's ability to fulfill its human rights obligations*[285].

199. Under a systemic interpretation of international law, the Arbitral Tribunal shall resort to the sources of law which protect the rights of the Indigenous Communities when ginving content to certain concepts that are constantly evolving such as fair and equitable treatment, full protection and security, arbitrariness and the legality or illegality of an expropriation[286].

200. Pursuant to article 38 of the Statute of the International Court of Justice (the "**Statute**"), these sources include international conventions, whether general or particular, international custom and the general principles of law, with no hierarchy amongst them[287].

201. The Arbitral Tribunal shall also give a broad interpretation to the expression "*any relevant*

---

[284] United Nations International Law Committee, International Law Fragmentation: Difficulties derived from the diversification and expansion of international law (A/CN.4/L.682), 13 April 2006, ¶ 9, ("some commentators have heavily criticized what they consider as the eroding of general international law, the appearance of contradictory jurisprudence, the search for the most favorable forum [forum shopping] and the loss of judicial security"), **RLA-7**

[285] B. Simma y T. Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, *en* —International Investment Law for the 21st Century: Essays in Honor of Christophe Schreuer, Oxford University Press, 2009, pp. 678 and 679, **RLA-18**.

[286] Id., p. 704. See also, Id., pp. 704 and 705, ("while BITs commemorate a promise of fairness and equity running from the host-State to the investor, consideration of fairness and equity under the totality of circumstances demands that a tribunal take into account not only a State's human rights obligations, but indeed the citizens' human rights in determining whether an investor has been treated equitably [...] Another channel through which considerations of human rights may inform the interpretation of the fair an d equitable treatment standard is by informing the concept of investor expectations. An investor's legitimate expectations' form the dominant element' in the fair and equitable treatment standard. Therefore a tribunal in interpreting what is and what is not a legitimate expectation should have reference also to the host State's obligations under international human rights law. Whatever expectations an investor might have had, these must have included an expectation that the State would honor its international human rights obligations").

[287] International Justice Court, *International Justice Court Statute*, article 38, **RLA-19**.

rules of international law applicable in the relations between the parties" contained in article 31(3)(c) of the Vienna Convention. As Judge Simma points out:

> [E]*quating the concept of 'applicability' with the concept of 'bindingness' has undesirable consequences as concerns international human rights law. If we assume that a rule is applicable only if it is legally binding, then certain rules of human rights law may only be applicable for purposes of the Vienna Convention as between two States that are both parties to the relevant treaties. This dynamic could produce results which appear to be in contradiction with the object and purpose of international human rights treaties.* [...] *This could also lead to BIT forum shopping, whereby investors might structure their deals through enterprises incorporated in States that have failed to ratify the most relevant human rights treaties*[288]*.*

202. On the other hand, in cases of "*conflict*" when the systemic interpretation cannot assure harmony between norms[289], the Arbitral Tribunal must take into consideration that, under the international public law, the obligations concerning the fundamental rights of the Indigenous Communities prevail over the obligations concerning foreign investment protection.

203. In this regard, the reasoning of the Inter-American Court of Human Rights (the "**ICHR**") in the case of the *Indigenous Peoples of Sawhoyamaxa v. Paraguay* is enlightening. In this case, the ICHR examined the responsibility of the State for failing to guarantee the Sawhoyamaxa community and its members the right to their ancestral property. One of the State's defense arguments was the fact that those specific lands were being exploited by an individual who was protected under an investment protection treaty, between Paraguay and Germany[290]. The ICHR found that the State's defense was ungrounded and concluded that:

> [A]*pplying bilateral commercial agreements does not justify breaching State obligations arising out of the American Convention; on the contrary, its application must always be compatible with the American Convention, a multilateral treaty on human rights endowed with its own specificity, which creates rights in favor of individuals and does not entirely depend on the reciprocity of the States*[291].

---

[288] B. Simma y T. Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, *in* —International Investment Law for the 21st Century: Essays in Honor of Christoph Schreuer , Oxford University Press, 2009, p. 700, **RLA-18**.

[289] United Nations International Law Committee, International Law Fragmentation: Difficulties derived from the diversification and expansion of international law (A/CN.4/L.682), 13 April 2006, ¶ 24 ("[t]his is the basic situation of incompatibility: when an obligation can only be fulfilled leaving another obligation unfulfilled. However there are other looser ways of understanding the notion of conflict. A treaty can sometimes frustrate the goals of another treaty without there being any strict incompatibility between their dispositions"), **RLA-7**.

[290] *Indigenous Peoples of Sawhoyamaxa v. Paraguay*, CIDH case, sentence 29 March 2006, ¶ 137, **RLA-20**.

[291] *Id.*, ¶ 140.

204. The latter makes sense if one takes into account that, as the ILC recognized, while there is no hierarchy between the sources of international law, there are certain norms that "*enjoy a superior position or special status in the international legal system*"[292]. The ILC has identified two circumstances that confirm the supremacy of human and collective rights:

205. First, the Charter of the United Nations provides in article 103 the supremacy of the obligations established therein over any other obligation acquired by its members[293]. Under article 56 of the Charter, its members pledge to take action for the achievement of the purposes established therein[294]. One of these purposes is, precisely, the respect of human rights[295].

206. Second, the existence of *ergo omnes* obligations, which are the ones acquired by a "*State vis-á-vis the international community [given that] all States have a legal interest in its protection [of the rights of which they concern*]"[296]. This is the case for example of "*the principles and norms concerning the fundamental human rights of the human being*"[297].

---

[292] United Nations International Law Committee, International Law Fragmentation: Difficulties derived from the diversification and expansion of international law (A/CN.4/L.702), 18 July 2006, ¶ 31, **RLA-12.**

[293] United Nations, Charter of the United Nations, 26 June 1945, article 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail"), **RLA-21**.

[294] *Id*., article 56 ("All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55").

[295] *Id*., article 1(3) and article 55 (c) ("[t]he purposes of the United Nations are [...] the development and stimulation of the respect towards human rights and to the fundamental freedoms of all, without distinction between on race, sex, language or religion") United Nations Committee on Economic, Social and Cultural Rights, Statement on Globalization, 11 de mayo de 1998, ¶ 3 ("globalization risks downgrading the central place accorded to human rights by the Charter of the United Nations in general and the International Bill of Human Rights in particular"), **RLA-22**.

[296] Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase), I.C.J. Reports 1970, ¶¶ 33-34. Quoted by the United Nations International Law Committee, International Law Fragmentation: Difficulties derived from the diversification and expansion of international law (A/CN.4/L.682), 13 April 2006, ¶ 387, **RLA-7.**

[297] Id. Former International Justice Court Judge, Bruno Simma, considers that "State's obligations with regard to the basic welfare of its citizens has unquestionably become a matter for community interest. Since these norms have taken the first steps away from bilateralism, it is possible that norms relating to economic, social and cultural rights could also constitute rules applicable in the relations' among States, even if there is no independent treaty obligation running between the States in question, an even if we assume that such obligations are not owed erga omnes. In close cases, the fact that the Vienna Convention's preamble proclaims the State Parties universal respect for, and observance of, human rights and fundamental freedoms for all may tip the scale towards a broader conception of applicability". B. Simma y T. Kill, Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology, in "International Investment Law for the 21st Century: Essays in Honor of Christophe Schreuer", Oxford University Press, 2009, p. 702, **RLA-18**.

207. Recognizing the supremacy of human rights, 171 States adopted the Vienna Declaration, which establishes in its first article that "*[h]uman rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments*"[298]. This statement indicates that the customary law demands the prevalence of human rights norms[299].

208. It is noteworthy that the respect of human rights implies the respect of the fundamental rights of the indigenous peoples. The ICHR recognized it in the case of the *Indigenous Peoples of Yakye Axa v. Paraguay*, in which the State failed to guarantee the Yakye Axa community and its members their right to their ancestral property :

In other opportunities this Tribunal as well as the European Court of Human Rights have pointed out that the treaties on human rights are living documents, which interpretation must accompany the evolution of time and current life conditions. *Such evolutionary interpretation is consistent with the general rules of interpretation established in article 29 of the American Convention, as the ones established by the Vienna Convention on the Law of Treaties*[300] […] *In the current case, in analyzing the scope of the mentioned article 21 of the Convention, the Tribunal considers useful and appropriate to use other international treaties different from the American Convention, such as Convention No. 169 of the ILO [concerning Indigenous and Tribal Peoples in Independent Countries], to interpret its provisions according to the evolution of the inter-american system, given the consideration of the development in this matter in the International Law of Human Rights*[301]*.*

209. Thus, when interpreting the Treaty in light of the Vienna Convention, the Arbitral Tribunal may guide its duty with the preamble of the said instrument, which provides that it was signed by the States "*[h]aving in mind the principles of international law embodied in the Charter of the United Nations, such as the […] universal respect for, and observance of, human rights and fundamental freedoms for all*"[302].

4.2 Bolivian Law is relevant in this case to determine fundamental issues

210. Besides international law, the Arbitral Tribunal shall apply and consider Bolivian Law when interpreting the scope of the rights and obligations provided in the Treaty.

---

[298] Human Rights World Conference, *Vienna Declaration and Program of Action (A/CONF.157/23)*, 12 July 1993, article 1, **RLA-23**.

[299] See Also, for example, United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Resolution 1998/12, human rights as the main political purpose in the matter of commerce, investment and finance, E/CN.4/Sub.2/1998/45, 20 August 1998, p. 43 ("the exercise of human rights and the fundamental freedoms [...] is the responsibility and purpose firstly and most fundamentally of the States in all aspects of public management and development"), **RLA-24**.

[300] *Indigenous Peoples of Yakye Axa v. Paraguay*, CIDH case, sentence of 17 June 2005, ¶ 125, **RLA-25**.

[301] *Id.*, ¶ 127.

[302] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, preamble, **RLA-11**.

211. In fact, several international tribunals have applied the law of the host State to determine certain matters[303], which is particularly appropriate when there is no incompatibility between international law and domestic law[304].

212. In the current case, Bolivian Law results relevant for the determination of, at least, three fundamental issues:

213. *First*, there should be no dispute on the fact that the content of Bolivian Law is relevant to determine whether the obligation of providing a fair and equitable treatment was complied with or not. Indeed, SAS indicated that it "*relied upon Bolivia´s legal framework [to form itself] legitimate expectations regarding the key protections afforded to their investment in Mallku Khota and the stability of Bolivia's legal and business framework of [and that] Bolivia failed to protect South American Silver's legitimate expectations and to guarantee the existence of a stable legal and business framework*"[305]. SAS offers, in their Statement of Claim, a description of this framework[306], which, as will be seen below, is incomplete, and has been respected by Bolivia[307].

214. *Second*, international tribunals have recognized the prevailing role that the law of the host State plays in the determination of the existence of public interest purpose in case of expropriation. As established by the tribunal in *Rurelec*, applying the same Treaty that concerns us, "*the precise contours of public purpose and social benefit lie with the internal*

---

[303] El Paso Energy International Company v. Republic of Argentina, ICSID case No. ARB/03/15, Award of 31 October 2011, ¶ 135 ("[t]he fact that the TBI and international law govern the matter of responsibility of Argentina due to the violation of the treaty does not imply that the internal law of Argentina does not also have a role to play. The Tribunal coincides with the Plaintiff that the role is to determine the content of the commitments assumed by Argentina in regards to the Plaintiff whom mentions these have been violated. Thus, in order to determine what rights Argentina recognized to the Plaintiff as a foreign investor, it is necessary to resort to Argentinian Law"), **RLA-26**; Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID case No. ARB(AF)/09/01, Award from 22 September 2014, ¶¶ 534 y 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 recognizes as belonging to Claimant"), **RLA- 27**; Asian Agricultural Products Ltd. (AAPL) v. Socialist Republic of Sri Lanka, ICSID case No. ARB/87/3, Award from 27 June 1990, p. 533, **RLA- 28**.

[304] Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Republic of Argentina, ICSID case No. ARB/01/3, Award from 22 May 2007, ¶¶ 206 and 209 ("[t]he Respondent is right in arguing that domestic law is not confined to the determination of factual questions [...] The Tribunal must also note that in examining the Argentine law as pertinent to various issues disputed by the parties, it finds that there is generally no inconsistency with international law as far as the basic principles governing the matter are concerned. The Tribunal will accordingly apply both Argentine law and international law to the extent pertinent and relevant to the decision of the various claims submitted"), **CLA-58**.

[305] Statement of Claim, ¶ 153.

[306] *Id*. ¶¶ 18,19, 147 - 150.

[307] Section 6 *bellow.*

constitutional and legal order of the State in question [Bolivia]"[308].

215. *Third*, as explained below, the Arbitral Tribunal should establish if SAS's claims are admissible, for which it will have to, *inter alia*, determine if the investment was carried out according to the relevant norms of internal law[309]. As the tribunal in *Gustav Hamster v. Ghana* recognized, *"an investment will not be protected if it has been created in violation of national or international principles of good faith* [...] [or] *<u>if it is made in violation of the host State's law</u>*"[310].

216. In sum, the Arbitral Tribunal, will have to observe the internal Bolivian Law, when appropriate. As the tribunal in *AAPL v. Sri Lanka* recognized:

> *[T]he Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider judicial context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character <u>or of domestic law nature</u>*[311].

4.3 Applicable International and Bolivian law demands the Protection of the Indigenous Communities.

217. In order to guarantee legal protection to the Indigenous Communities, the Arbitral Tribunal must construe the Treaty in harmony with the instruments listed below (besides any regulation that develops them, which will be detailed below on each relevant section):

a. The American Convention on Human Rights of 1969 –"*Pacto de San José*"[312], ratified by Bolivia on January 20, 1979, and incorporated in the Bolivian legal system as national law 1430 of 1993[313], which is a part of the constitutionality block[314];

---

[308] *Guaracachi America, Inc. and Rurelec Plc v. Plurinational State of Bolivia*, PCA case No. 2011- 17, Award from 31 January 2014, ¶ 437, **RLA-29**. *Antoine Goetz et consorts v. Burundi Republic*, ICSID case No. ARB/95/3, Award from 10 February 1999, ¶ 126 ("*An [expropriatory]measure is internationally lawful if the reasons of public utility, security or national interest require it so in exceptional cases. Obviously it is under Burundi's national law that this condition must be evaluated"*. Unofficial translation from: "U]*ne mesure telle que celle qui a été prise à l'encontre d'AFFIMET n'est internationalement licite que <u>si</u> des impératifs d'utilité publique, de sécurité ou d'intérêt national l'exigent exceptionnellement'. C'est de toute évidence au regard du droit national burundais que cette condition doit s'apprécier*"), **RLA-30**. *See* Section 6.1.1 *bellow.*

[309] *See* section 5.2 *bellow.*

[310] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID case No. ARB/07/24, Award from 18 June 2010, **RLA-31** (emphasis added).

[311] Asian Agricultural Products Ltd. (AAPL) v. Socialist Republic of Sri Lanka, ICSID case No. ARB/87/3, Award from 27 June 1990, p. 21, **RLA- 28**.

[312] American States Organization, *American Convention on Human Rights*, 7 to 22 of November of 1969, **RLA-32**.

[313] Law 1430 dated February 11, 1993, **RLA-33**.

b. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women – "*Convención De Belem Do Para*" of 1994[315], ratified by Bolivia on November 12, 1994, and incorporated in the Bolivian legal system as national law 1599 of June 12, 1996;

c. The Convention 169 of International Labor Organization[316], international treaty ratified by Bolivia and included in the Bolivian legal system as national law 1257 of 1991[317], which also is a part of its constitutionality block [318] and results directly applicable to the mining sector as per article 15 of the 1997 Mining Code[319];

d. The United Nations Declaration on the Rights of Indigenous Peoples of 2007[320], included in the Bolivian legal system as national law 3760 of 2007[321], which also is a part of Bolivian constitutionality block[322]; and

e. The Bolivian Political Constitution, *Grundnorm* of the Bolivian legal system[323], which governs the State's activity as well as that of private actors[324].

---

[314] New State's Political Constitution dated February 7, 2009, article 410 ("The Constitution is the supreme norm of the Bolivian legal system and has primacy over any other legal disposition. The constitutionality block is composed of Treaties and international Conventions on Human Rights and Communitary Law provisions, ratified by the State"), **RLA-3**. *See*, also, Id., articles 13, 256 and 257, **RLA-3**. Plurinational Constitutional Tribunal of Bolivia, sentence No. 2003/2010-R dated October 25, 2010, section III.5 ("in the light of constitutional and international dispositions on indigenous peoples rights, which –as stated- form the constitutionality block , as per article 410 of the CPE"), **RLA-34**.

[315] American States Organization, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, dated June 9, 1994, **RLA-35**.

[316] International Labor Organization, Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, dated June 27, 1989, **RLA-37**.

[317] Law 1257 dated July 11, 1991, **RLA-38**.

[318] *See* ¶ 217 (a) above.

[319] 1997 Mining Code, article 15 ("precepts of article 171 of the State's Political Constitution (of 1995) and pertinent dispositions of Convention 169 by the International Labor Organization ratified by Law 1257 dated July II, 1992, are applicable to the mining sector"), **C-30**.

[320] United Nations Declaration on the Rights of Indigenous Peoples, September 13, 2007, **RLA-39**.

[321] Law 3760 dated November 7, 2007, **RLA-40**.

[322] *See* paragraph 217(a) above.

[323] New State's Political Constitution dated February 7, 2009, **RLA-3**.

[324] Plurinational Constitutional Tribunal of Bolivia, sentence No. 0085/2012 dated April 16, 2012, section III.1.2 ("horizontal application of fundamental rights finds its direct origin in the dogmatic part of the State's political Constitution, particularly, in article 109.1 which provides the principle of direct application of the Constitution")

218. In its interpretative duty, the Arbitral Tribunal shall also take into account the general principles of law, including the "*clean hands*" principle, the good faith principle and the principle *nemo auditor propriam turpitudinem allegans* and *nullus commodum capere de sua injuris propria*. By virtue of the systematic interpretation of international law, it is understood that "*by assuming obligations in virtue of a treaty, parties do not pretend to act against generally recognized principles of international law*"[325]. As stated by the ILC, the application of general principles of law is particularly important when the treaty, as in this case, does not have a reference on the applicable law[326].

219. Also, the Arbitral Tribunal must apply customary international law, which also demands the protection of Indigenous Peoples' fundamental rights. Such position is straightforwardly affirmed by the *International Law Association* by acknowledging that:

> *the unequivocal judicial and para-judicial practice of treaty bodies, as well as the pertinent state practice at both the domestic and international level, unequivocally show that a general opinio iuris as well as consuetudo exists within the international community according to which certain basic prerogatives that are essential in order to safeguard the identity and basic rights of indigenous peoples are today crystallized in the realm of customary international law*[327].

220. Lastly, within applicable usages of trade and as evidence of the international public order, the Arbitral Tribunal shall consider some instruments such as "*United Nations Guiding Principles on Business and Human Rights*"[328] and the "*OECD guidelines for Multinational Enterprises*"[329], which expressly provide the need to respect and protect human rights, and particularly, indigenous peoples' rights.

---

[325] United Nations International Law Commission, Fragmentation of International Law: Difficulties derived from Diversification and Expansion of International law (A/CN.4/L./702), dated July 18, 2006, ¶ 19(b), **RLA-12**.

[326] Id., ¶ 20(c).

[327] International Law Association, *Rights of Indigenous Peoples*, The Hague Conference, 2010, **RLA-44**.

[328] United Nations Council for Human Rights, *Guiding Principles on Business and Human Rights: implementing the United Nations "Protect, Respect and Remedy Framework*", June 16, 2011, p. 15, Principle 11 ("Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved") and page 16, principle 12, comment ("*enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples*"), **RLA-45**.

[329] Organization for Economic Cooperation and Development, OECD guidelines for Multinational Enterprises, May 25, 2011, paragraph 40 ("enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of

221. As analyzed below, such provisions confirm that Bolivia acted pursuant to the Treaty and its applicable law by dictating the Reversion and that SAS claims are inadmissible.

5. THE ARBITRAL TRIBUNAL LACKS JURISDICTION TO DECIDE THE CLAIMS SUBMITTED BY SAS AND, IN ANY EVENT, IT SHALL DISMISS THEM ON ADMISSIBILITY GROUNDS

222. The Arbitral Tribunal lacks jurisdiction to settle SAS claims because the owner of the investment which protection is claimed is a Canadian company to which the Treaty does not apply (**5.1**). Even if, *par impossible*, the Arbitral Tribunal were to consider that SAS is the owner of such investment, it shall dismiss the claims because SAS illegal behavior deprives the Arbitral Tribunal of jurisdiction and turns such claims inadmissible for lack of "*clean hands*" (**5.2**).

5.1 The Arbitral Tribunal lacks jurisdiction to decide the claims submitted by SAS because SAS is not the owner of the investment which protection it claims

223. At least three circumstances must be met for triggering the Arbitral Tribunal's jurisdiction, *i.e.,* (i) that whoever submits a claim is an individual or entity matching the definition of investor provided in the Treaty; (ii) that the claim concerns assets that fit the definition of investment provided in the Treaty; and (ii) that there is a link between that investor and that investment, *i.e.,* ownership.

224. In this case, even though SAS fits the definition of investor[330] and both the shares in CMMK and the Mining Concessions fit the definition of investment[331], SAS is not the real owner of the investment.

225. The Arbitral Tribunal shall consider that the ownership link between the investment and the investor is a *sine qua non* requirement for its jurisdiction (**5.1.1**). Contrary to SAS

---

indigenous peoples; persons belonging to national or ethnic, religious and linguistic minorities; women; children; persons with disabilities; and migrant workers and their families"), **RLA-46**.

[330] Statement of Claim, ¶ 108. Treaty, article I(d)(i) ("For the purposes of this Agreement (d) "companies" means in respect of the United Kingdom: corporation, firms and associations incorporated or constituted under the law in force in any part of the united Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article XI."), **C-1**.

[331] Id., ¶ 109. Treaty, article I(a)(ii) ("For the purposes of this Agreement, "investment" means every kind of asset which is capable of producing returns and in particular, though not exclusively, includes (…) (ii) shares in and stock and debentures of a company and any other form of participation in a company") and article I(a)(v) ("For the purposes of this Agreement (a) "investment" means every kind of asset which is capable of producing returns and in particular, though not exclusively, includes (…) (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**.

contention, the protection of the Treaty and the Arbitral Tribunal's jurisdiction only emerge when such link is direct, which is not the case here (**5.1.2**). In any event, even if indirect ownership was considered as sufficient (*quod non*), the Arbitral Tribunal must dismiss SAS claims for it is not the ultimate owner of the investment (**5.1.3**).

5.1.1 The ownership link between SAS and the investment is a *sine qua non* requirement for the Arbitral Tribunal's jurisdiction

226. The Treaty grants jurisdiction to the Arbitral Tribunal to settle disputes regarding investments located in Bolivian territory, when a national or company of the United Kingdom is the real owner thereof.

227. Article VIII (1) of the Treaty clearly establishes that it may only be submitted to arbitration:

> *Disputes between a national or a company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement and in relation to an investment* **of** *the former*[332].

228. By construing the Treaty "*in accordance with the ordinary meaning to be given to its terms*", according to article 31 of the Vienna Convention[333], the Arbitral Tribunal shall find that a fundamental requirement for its jurisdiction is that whoever presents a claim is the investment's owner[334]. Indeed, the term "de", as defined by the Royal Academy of Spanish Language, is a preposition denoting "pertenencia"[335]. The same idea is transmitted by the English version of the treaty with regard to the preposition "of" which, as its Spanish equivalent, denotes a relation of ownership, defined as "*an association between two entities, typically one of belonging*"[336].

---

[332] Treaty, article 8.1 (emphasis added), **C-1**.

[333] United Nations, *Vienna Convention on the Law of Treaties*, May 23, 1969, article 31 (1), **RLA-11**.

[334] Furthermore, the ownership link also determines protection of investments under the Treaty. *See*, for example, Treaty, article II(2) ("*Investments of nationals or companies* ***of*** *each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party*") and article 5.1 ("*Investments* ***of*** *nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization 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"* (emphasis added), **C-1**.

[335] Royal Academy of Spanish Language, *Diccionario de la Lengua española*, 22 ed., http://www.rae.es, last Access: March 29, 2015, "of", **RLA-47**. *See,* also, Id., "belonging" ("*belonging. 1.f. Relation of a thing to whom is entitled to it. 4.f. Accessory or depending thing from a principal, and to which is owner. Francisco bought the land with all its belongings. 5.f. Thing which is property of someone*").

[336] Oxford Dictionaries, "of", http://oxforddictionaries.com, last access: March 29, 2015, **RLA-48**.

229. As suggested by SAS, legally there are two ways in which the ownership link may be established, <u>direct</u> and <u>indirect</u>[337]. Generally, while in the direct ownership the investor has a legal title over the assets in question, in the indirect ownership it is not necessary for the investor to be the immediate holder of the asset, reason why "*[i]t is thus irrelevant whether an investor of one country owns a protected investment in another country directly or indirectly, that is, through one or more other intermediary corporate entities*"[338].

230. On this point, SAS incorrectly asserts that the Arbitral Tribunal would have jurisdiction under the Treaty, not only when the ownership link is direct but also when it is indirect[339].

5.1.2 Only the direct link of ownership between SAS and the investment, which does not exist in this case, would trigger the jurisdiction of the Arbitral Tribunal

231. One cannot add words to the Treaty which it does not contain. Nowhere in the Treaty's text the term "indirect" is to be found and much less regarding the required ownership link. Consequently, the Arbitral Tribunal only has jurisdiction when there is a direct ownership link between the investor and the investment.

232. In the *first place*, the foregoing conclusion derives from the interpretation of the preposition "of" as per its ordinary meaning, pursuant to article 31 of the Vienna Convention[340]. Ownership through intermediary companies, using sophisticated corporate structures, is a relatively modern phenomenon; thus, in order to alter the usual and natural sense of the term "ownership"[341], the inclusion of a reference to "indirect" ownership would be necessary[342]. An interpretation to the contrary would imply rewriting the Treaty, allowing arbitration of disputes "*between a national or a company from a Contracting Party and the other Contracting Party concerning an obligation of the latter*

---

[337] Statement of Claim, paragraph 110.

[338] Statement of Claim, ¶ 110 (emphasis added).

[339] *Id*.

[340] United Nations, *Vienna Convention of the Law of Treaties*, May 23, 1969, article 31(1), **RLA-11**.

[341] For example, the Bolivian Civil Code defines "ownership" as "a legal power that allows the use, enjoyment and disposition of a good and must be exercised in a compatible manner with the collective interest, within the limits and with obligations provided by our legal system (…) Owner may vindicate the good from third parties and exercise other actions in defense of his property". Only he who has legal title over an asset may exercise actions in defense of his property. Plurinational State of Bolivian Civil Code, article 105, **RLA-49**.

[342] International jurisprudence has confirmed the amending effect of the term "indirectly". For example, in *Anglo Iranian Oil*, Judge Read considered as to the effects of the expression "direct and indirect" included in Iran's declaration on the tribunal's jurisdiction that: "*If the words 'directly or indirectly' had been omitted from the Declaration, it would have been possible to assume that the jurisdiction was restricted to situations or facts which related directly to treaties or conventions accepted by Persia*". *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, 1952, case ICJ, sentence July 22, 1952, dissident opinion by Judge Read, **RLA-50**.

under this Agreement and in relationto a [***direct or indirect***] *investment of the former*". The Arbitral Tribunal shall consider that:

> [I]*t is generally to be assumed that the parties have included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include and on which they were not able to agree*[343].

233. *Second*, if the Treaty's interpretation as per the ordinary meaning given to its terms (according to article 31 of the Vienna Convention) still does not clarify the sense of the preposition "of", the Arbitral Tribunal would reach the same conclusion by applying article 32 of the Vienna Convention which mandates taking into account the circumstances surrounding the Treaty's conclusion[344].

234. The circumstances surrounding the Treaty's conclusion indicate that the parties deliberately omitted protection of "indirect" ownership. The Arbitral Tribunal will confirm that contemporaneous treaties entered into by Bolivia demonstrate that, when Bolivia accepts protecting indirect ownership, it does so expressly. Should such mention not appear is due to the fact that parties could not agree upon such particular matter.

235. For example, on 1987, a year before the Treaty's conclusion, Bolivia entered into investments protection treaties with Germany and Switzerland. While the Treaty with Germany does not include a reference to "direct or indirect", the treaty with Switzerland does include such reference in the definition of protected Swiss companies[345].

---

[343] *Brown v. Stott*, Private Council of the United Kingdom, sentence by Lord Bingham of Cornhill dated December 5, 2000, 1AC 681, 2003, p. 703 (emphasis added), **RLA-51**.

[344] United Nations, Vienna Convention on the Law of Treaties, May 23, 1969, article 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 : (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable"), **RLA-11**.

[345] The investment protection treaty between Switzerland and Bolivia protects investments owned by Swiss companies which directly or indirectly holds in its patrimony Swiss capital. Indeed, article 1(b) of such treaty provides that: ("*the term "company" means: (aa) with respect to the Swiss Confederation, legal entities or societies of people with no legal personality but capable to hold assets, in which exist, directly or indirectly, a preponderant Swiss interest*". Treaty between Swiss Confederation and the Republic of Bolivia on reciprocal promotion and protection of investments entered into on November 6, 1987 in force since May 17, 1991 (non official translation from French original): "*On entend par «sociétés»: (aa) en ce qui concerne la Confédération suisse, les personnes morales ou sociétés de personnes sans personnalité juridique mais capables de posséder un patrimoine, dans lesquelles existe, directement ou indirectement, un intérêt suisse prépondérant* »), **RLA-52**.

236. Such election by parties must produce legal effects. In this sense, Professor Zachary Douglas explains that:

> *Investment treaties generally either permit the claimant to exercise control over its investment directly or indirectly, or are silent on the question. The 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.*
>
> [...]*A great number of investment treaties do not contain a provision of the type under consideration and hence there must be a concomitant limitation upon the tribunal's jurisdiction ratione personae: the claimant must exercise effective control directly over the investment*[346].

237. Furthermore, SAS refers to cases that do not demonstrate that indirect ownership of the investment grants jurisdiction to this Arbitral Tribunal[347]. Such cases, except for *Rurelec*, do not refer to the question presented before this Arbitral Tribunal[348] or pertained treaties with a text different from the Treaty's text[349].

238. With regard to the *Rurelec*, a case in which the tribunal interpreted the Treaty's text under our examination, two comments must be made.

239. First, even though the Arbitral Tribunal may use to its discretion the reasoning of the tribunal in such case to guide its interpretation in this case, the interpretation made by such tribunal is not binding[350].

---

[346] Z. Douglas, *The International Law of Investment Claims,* Cambridge University Press, 2009, ¶¶ 578 and 580 (emphasis added), **RLA-53**.

[347] Statement of Claim, footnotes 227 and 228.

[348] SAS refers to awards in the cases *Ioannis Kardassopoulos and Ron Fuchs v. Georgia* and *Siemens v. Argentina*. However, such tribunals discussed indirect investments protection in their decision on jurisdiction. Those tribunals interpreted the term "investment" and not preposition "of". Also, those tribunals did not examine the circumstances surrounding the conclusion of such treaties. *See Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, cases ICSDI Nos. ARB/05/18 and ARB/07/15, decision on jurisdiction dated July 6, 2007, ¶ 123, **RLA-54**;

[349] In *BG Group Plc v. Republic of Argentina*, the treaty between Argentina and the United Kingdom included certain provisions indicating that the concept of "protected investment" under the treaty in question did not require the "direct" ownership by the Contracting Parties investors, and thus, it was not relevant. *BG Group Plc v. Republic of Argentina*, award UNCITRAL, December 24, 2007, ¶ 125, **CLA-4**.

[350] Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, case ICSID No. ARB/06/2, decision on jurisdiction dated September 27, 2012, ¶ 46, **RLA-56**; Saipem SpA. v. Popular Republic of Bangladesh, case ICSID No. ARB/05/07, decision on jurisdiction and recommendation on precautionary measures dated March 21, 2007, ¶ 67, **RLA-57**; AES Corporation v. Republic of Argentina, case ICSID No. ARB/02/17, decision on jurisdiction dated April 26, 2005, ¶¶ 30-32, **RLA-58.**

240. Second, the Arbitral Tribunal must consider that the *Rurelec* tribunal wrongly based its decision to protect indirect ownership on an interpretation of the term "investment" and not an interpretation of the term "of"[351]. As explained above, both terms correspond and establish two different requirements as to the Arbitral Tribunal's jurisdiction. When an objection refers to the definition of "investment", it criticizes the form of assets reputed as investment (*v.gr.,* is the asset in question really a concession, action or title?), which is not the case under our examination.

241. The Arbitral Tribunal has no jurisdiction for there is no direct link between SAS and the investment. In this case, the fact that those who hold direct ownership of the investment are companies which are not from the United Kingdom is not in dispute, and thus, they do not have protection under the Treaty. On one hand, CMMK's shareholders are Mallku Khota Ltd., G.M. Campana Ltd. And Productora Ltd., companies incorporated in the Bahamas and not in the United Kingdom[352]. On the other hand, "*CMMK (who) acquired full legal title over ten Mining Concessions*"[353], is a company incorporated in Bolivia which does not have the Treaty's protection.

5.1.3 Even if indirect ownership was sufficient to trigger the Arbitral Tribunal's jurisdiction (*quod non*), it lacks jurisdiction since the indirect owner of the investment is a Canadian Company

242. If, as affirmed by SAS, under the preposition "of", parties to the Treaty extended its protection to investments whose property indirectly lies with British Companies, the Arbitral Tribunal must verify whether the British Company filing the claim is the real owner of the investment, even though such investment is may be held through intermediary instrumental entities.

243. In the pursue of legal certainty, and given that in such scenario ownership is not credited by means of a legal title, the Arbitral Tribunal must verify, at least, who is the real beneficiary or owner of the investment (**5.1.3.1**).

---

[351] *Guaracachi America, Inc. and Rurelec Plc v. Plurinational State of Bolivia*, PCA case No. 2011-17, award dated January 31, 2014, ¶ 352, **RLA-29**.

[352] Arbitration Notification, ¶¶ 13-16. Statement of Claim, ¶¶ 29-32. See Treaty, article V(2) ("Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, <u>and in which nationals or companies of the other Contracting Party **own** shares</u>, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation <u>in respect of their investments to such nationals or companies of the other Contracting Party who are **owners of those shares**</u>")(emphasis added), **C-1**..

[353] Statement of Claim, ¶ 35.

244. By undertaking such verification, the Arbitral Tribunal will find that SAS is not the investment's owner, but simply one of the many instruments which granted indirect ownership of the investment to a Canadian Company, SASC (**5.1.3.2**).

5.1.3.1 *The ultimate owner of the investment is the one that can benefit of treaties that protect indirect ownership*

245. In order to determine who holds the indirect ownership of an asset, one has to go beyond the "form" of the legal title and seek the ultimate beneficiary owner or proprietor. Only then it would be justified that it is not relevant "*if an investor from a country is owner (…) of an investment (…) by means of one or more corporate intermediary entities*"[354]. Indeed, this mediate ownership relation presupposes the existence of intermediary entities that are merely instrumental and with no own free will, and for that reason their existence does not affect the asset's disposition by the indirect owner.

246. Even though SAS claims being the owner of investments in Bolivia[355], "*labeling is no substitute for analysis*". The Arbitral Tribunal must investigate if the investment's ownership really resides on British territory.

247. In the *first place*, the duty to ensure that SAS is the real owner of the investment is given to the Arbitral Tribunal as per article 31 of the Vienna Convention, according to which the Arbitral Tribunal must interpret the Treaty "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*"[356].

248. The Treaty's object and purpose is to promote the capital flow from United Kingdom, and not from another country, in Bolivia[357]. The latter is evidenced in the Treaty's preamble where the parties acknowledge that they enter into the agreement "*desiring to create favorable conditions for greater investment by nationals and companies of one State in the territory of the other*"[358].

249. *Second*, especially when protecting indirect ownership and overlooking the formality of a legal title, such ownership through intermediary companies cannot be, precisely, merely

[354] *Id.*, ¶ 110.
[355] *Id.*, ¶ 112.
[356] United Nations, *Vienna Convention on the Law of Treaties*, May 23, 1969, article 31, **RLA-11**.
[357] *See*, for example, Caratube International Oil Company LLP v. Republic of Kazakhstan, case ICSID No. ARB/08/12, award dated June 5, 2012, ¶ 351 ("Article I(1)(a) of the BIT defines "investment' from the perspective of assets, claims and rights to be protected (or accorded specific treatment, prescribed in the following provisions of the BIT). As one of the goals of the BIT is the stimulation of flow of private capital, BIT protection is not granted simply to any formally held asset, but to an asset which is the result of such a flow of capital. Thus, even though the BIT definition of "investment" does not expressly qualify the contributions by way of which the investment is made, the existence of such a contribution as a prerequisite to the protection of the BIT is implied") (emphasis added), **RLA-59**.
[358] Treaty, preamble, **C-1**.

formal. As acknowledged by the tribunal in *Standard Chartered Bank v. Tanzania*, investment protection treaties seek a transfer of value from a State to another:

> *The Tribunal is not persuaded that an "investment of" a company or an individual implies only the abstract possession of shares in a company that holds title to some piece of property.*
>
> *Rather, for an investment to be "of" an investor in the present context, some activity of investing is needed, which implicates the claimant's control over the investment or an action of* ***transferring something of value (money, know-how, contacts, or expertise) from one treaty-country to the other***[359].

250. *Thirdly*, cases relied on by SAS to demonstrate that the Treaty supposedly protects indirect ownership[360] actually demonstrate that a treaty, when protecting indirect ownership, only protects the beneficiary or the ultimate owner of such investment.

251. First, the *Siemens v. Argentina* tribunal concluded that the investment protection treaty between Argentina and Germany protected indirect ownership because "*The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company*"[361]. Hence, albeit the existence of intermediary entities between the investment and the claimant, the tribunal granted protection to Siemens A.G., a German Company and ultimate owner of the investment.

252. Second, referring to the *Siemens* case, the tribunal in *Rurelec* granted protection to Rurelec Plc under the same Treaty under study, as it was a British Company and ultimate owner of the investment[362], under a notion of indirect ownership according to which "*investments can belong to nationals of a Contracting Party (…) by means of participation in the companies which ultimately are owners of the investment in Bolivia*"[363].

253. Third, based on the *Siemens* case, in *Ioannis Kardassopoulos* and *Ron Fuchs c. Georgia*, the tribunal decided to grant protection to the claimants, despite having no direct link with the

---

[359] *Standard Chartered Bank v. Republic of Tanzania,* case ICSID No. ARB/10/12, award November 12, 2012, ¶¶ 231-232, (emphasis added), **RLA-60**. *See*, also, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, case ICSID No. ARB/08/12, award dated June 5, 2012, ¶ 435 ("*Indeed, payment of only a nominal price and lack of any other contribution by the purported investor must be seen as an indication that the investment was not an economic arrangement, is not covered by the term "investment" as used in the BIT, and thus is an arrangement not protected by the BIT*") (emphasis added), **RLA-59**; and *Saba Fakes v. Turkey*, case ICSID No. ARB/07/20, award July 14, 2010, ¶ 110, **RLA-61**.

[360] Statement of Claim, footnotes 227 and 228.

[361] *Siemens A.G. v. Republic of Argentina*, case ICSID No. ARB/02/8, jurisdiction decision dated August 3, 2004, ¶ 137, **RLA-55**.

[362] Guaracachi America, Inc. and Rurelec Plc v. Plurinational State of Bolivia, PCA case No. 2011-17, award dated January 31, 2014, p. 34, **RLA-29**.

[363] *Id*., ¶ 360 (emphasis added).

investment, for being both national individuals from the States whose protection was claimed and ultimate owners of the investment[364].

254. Fourth, in *BG Group v. Argentina*, the tribunal also decided to grant protection under the investment treaty between Argentina and the United Kingdom, in favor of BG Group Plc, a British multinational oil company, considering that, while it did not have a direct link to the investment, it was the ultimate owner[365].

255. Thus, the Arbitral Tribunal must determine where the ultimate beneficiaries of the investment are located, and if they are located in a State different from the United Kingdom, it shall decline its jurisdiction and dismiss the claim submitted.

5.1.3.2 *The indirect owner of the investment is a Canadian Company and not SAS*

256. Under the principle *actori incumbit probatio*, confirmed by numerous international tribunals, whoever affirms the jurisdiction or competence of an international tribunal must demonstrate existence of the elements on which it is based on[366]. As explained, one of such elements is the investment´s ownership. Far from proving its ownership of the investment, SAS provides the necessary elements to conclude that the only indirect owner of the investment is SASC, a Canadian Company which is not protected under the Treaty.

257. A shell company, such as SAS, could never claim to be ultimate owner or beneficiary proprietor of an investment. SAS is simply one of the numerous instruments in the chain that leads to the actual indirect owner of the investment. For example, on its Complaint, SAS acknowledges that "*CMMK is the Bolivian operative subsidiary **of** South American Silver Corp (presently Trimetals Mining Inc., "TriMetals")*"[367].

258. The fact that SASC is the actual indirect owner of the investment is evidenced in several ways.

---

[364] *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, cases ICSID Nos. ARB/05/18 and ARB/07/15, decision on jurisdiction dated July 6, 2007, ¶¶ 123-124, **RLA-54**.

[365] *BG Group Plc v. Argentine Republic*, case UNCITRAL, award dated December 24, 2007, **CLA-4.**

[366] For example, Limited Liability Company AMTO v. Ukraine, case SCC No. 80/2005, award dated March 26, 2008, ¶ 64 ("The burden of proof of an allegation in international arbitration rests on the party advancing the allegation, in accordance with the maxim onus probandi actori incumbit. In application of this principle, a claimant has the burden to prove that it satisfies the definition of an Investor so as to be entitled to the Part III protections and the right to arbitrate disputes in Article 26. On the same basis, the claimant would be expected to have the burden of proof that it controls, directly or indirectly, an Investment for which protection is sought"), **RLA-62**; Salini Costruttori S.P.A. and Italstrade S.P.A v. Jordania, caso ICSID No. ARB/02/13, award dated January 31, 2006, ¶ 71 ("[Actori incumbit probatio] has been recognized in international law more than one century ago by arbitral tribunals. Thus in 1872, such a Tribunal stated that «On doit suivre comme règle générale de solution, le principe de jurisprudence consacré par la législation de tous les pays, qu'il appartient au réclamant de faire la preuve de sa prétention »), **RLA-63**; G. Niyungeko, La preuve devant les juridictions internationales, Editions Bruylant – Editions de l'Université de Bruxelles, 2005, ¶ 50, **RLA-64**.

[367] Statement of Claim, ¶ 1 (emphasis added).

259. *In the first place*, the FTI Consulting Inc.'s report itself ("**FTI**") clearly admits that any amount invested in Bolivia would have been contributed by SASC Canada and not by the British SAS[368].

260. *Second*, Greg Johnson, President and CEO of Canadian SASC, publicly acknowledges that SASC's shares issuance allowed them to finance exploration activities in Mallku Khota[369].

261. *Third*, it is eloquent that SAS only communicated SASC's interim consolidated financial statements[370] and not its own financial statements. Also, such documents do not allow to identify if the source of the cash flows derive from SAS, given the fact that such documents present results from operations, net patrimony amendments and cash flows from the parent company and its subsidiaries (including SAS, among others), as if they were a sole company.

262. *Fourth*, despite considering its "*patented metallurgical process to exploit the vast mineral deposits at the Project*"[371] as a fundamental contribution to the Project, SAS does not provide any evidence demonstrating that such transfer of *know-how* would come from the United Kingdom. On the contrary, SAS admits that "*SASC invented and patented (the) hydrometallurgical process of exclusive ownership*"[372], which belongs to SASC[373].

---

[368] FTI, Appendix 6, **CER-1**. Also noteworthy is that in order to calculate the applicable discount rate, FTI uses the average capital cost from SASC and not from SAS. *Id.* ¶ 11.7. *See* also: *Id.* paragraph. 5.10 ("*At the Valuation Date, SASC* […] *held mining concessions for both the Malku Khota Project (through the Claimant) and the Escalones Porphyry Copper Project ("Escalones") which is located in Chile (through a separate corporate entity)* (emphasis added); *Id.* ¶ 5.14 ("*In 2003 SASC entered into an option agreement to acquire the Malku Khota property*"); and *Id. footnote* 21 ("*As a Canadian company SASC was required to conform to CIM standards in their mineral resource reporting and thus we have focused on the CIM/CIMVAL standards herein"*) (emphasis added).

[369] SASC's press release, *South American Silver Announces $28 million Financing* dated November 8, 2010, p. 1, **R-14**. It draws attention that in CMMK's financial statements is stated that more than 80% of its debts as of September 30, 2012 were "Canadian Payable Accounts". Compañia Minera Mallku Khota S.A.'s General balance Sheet dated October 1, 2001 to September 30, 2012, point F, p. 13, **Annex FTI-10**.

[370] SASC's Financial Statements dated September 30, 2012, **Annex FTI-10**.

[371] SAS's letter to the Arbitral Tribunal dated October 15, 2014.

[372] Statement of Claim, ¶ 44.

[373] United States Patent No. US8,585,991 B2, Method for Recovering Indium, Silver, Gold and Rare, Precious and Base Metals from Complex Oxide and Sulfide Ores, November 19, 2013, **C-38**.

263. *Fifth*, if the investment's owner is supposedly a company from the United Kingdom, it surprises that, according to SAS, the Canadian Ambassador (and not the United Kingdom Ambassador) attended certain meetings held to discuss the Project's issues. According to SAS, "*Messrs. Fitch, Malbran and Johnson met with the Vice Minister of Mining and Metallurgic of Bolivia, Mr. Hector Cordova, and the Canadian Ambassador, Mr. Edgar Torrez Mosqueira*"[374].

264. *Sixth*, SASC affirms on its press releases to be the ultimate investments' owner[375]. Therefore, it is not surprising that, in general, every press article regarding the Mallku Khota conflict and this dispute only refer to the "Canadian" in order to identify the alleged investor[376].

265. *Seventh*, naturally, SASC is the financer of the costs of this arbitration[377].

266. In sum, the Arbitral Tribunal must dismiss the claim presented by SAS due to lack of standing. SAS is not the investment's owner whose protection it seeks: it does not hold

[374] Statement of Claim, ¶¶ 52-54 (emphasis added).

[375] SASC's press release, South American Silver Corp. Announces First Drilling Results at the Malku Khota Silver Project in Bolivia dated June 28, 2007 ("South American Silver Corp. ("SASC" or the "Company") is pleased to announce the results of its first diamond drill hole at its Malku Khota silver property in Bolivia"), **R-10**; SASC's press release, South American Silver Announces Intersection of New Lead-Zinc-Silver SEDEX Mineralization at Malku Khota dated August 28, 2008, **R-11**; SASC's press release, South American Silver Corp. Completes Final Tranche of $3.25 Million Financing dated December 7, 2009 ("SASC is a mineral exploration company that acquires, explores and develops mineral properties, primarily silver, gold and copper in South America. The Company presently holds interests in two material properties: the flagship Malku Khota silver-indium-gold property in Bolivia and the Escalones copper-gold-molybdenum property in Chile"), **R-12**; SASC's press release, South American Silver Corp.Provides a Metallurgical Update at Malku Khota Showing Improved Metal Recoveries dated September 11, 2009 ("South American Silver Corp. ("SASC" or the "Company") announces that it has completed a series of metallurgical tests on samples from the Malku Khota silver-indium project in Bolivia"), **R-13**; SASC's press release, South American Silver Announces $28 Million Financing dated November 8, 2010 ("South American Silver Corp. is a growth focused mineral exploration company creating value through the exploration and development of the 100% owned Malku Khota Silver-Indium project in Bolivia"), **R-14**.

[376] Press release, Pagina Siete, State protects Canadian mining company's rights dated May 31, 2012 ("Comibol announces that the State shall protect the rights of Candian Company South American Silver"), **R-115**; Press article, Erbol, warning, 14 towns shall no water May 22, 2012, ("Mallku Qota lagoon is located at the deposit's skirt, which was concessioned to the Canadian Company South American Silver"), **R-116**; Press note, Government executes agreement with Mallku Khota leaders and three hostages are released, July 8, 2012, **C-62**.

[377] Press note, Market Watch, South American Silver Announces Arbitration Costs Funding Arrangement, may 24, 2013 ("South American Silver Corp. (SAC)(otcqx:SOHAF) (the "Company") is pleased to announce that on May 23, 2013 the Company entered into an agreement with a third party funder (hereinafter the "Fund") pursuant to which the Fund will cover South American Silver's future costs and expenses related to the international arbitration proceedings against the Plurinational State of Bolivia for the expropriation of the Malku Khota Project"), **R-16**.

legal title crediting as such and it is not the investment' beneficiary. Indeed, there is no difference between SAS and the companies from Bahamas which, being mere instruments, allowed its actual owner, the Canadian SASC, entire disposition of its assets in Bolivia.

267. Bolivia entered into a treaty with the United Kingdom in order to attract capital from such country. Should the Arbitral Tribunal accept SAS's claims, it would be –in practice- creating an investment protection treaty between Canada and Bolivia, which is clearly illegal, absurd and unfair. Moreover, that would imply adopting a notion of ownership which does not legally exist, the "intermediate ownership", suited to SASC's interests, absolutely ignoring the Treaty's text and the spirit of investments treaties in general, creating an inadmissible legal uncertainty.

5.2 SAS cannot benefit from the protection of the Treaty since it does not have "clean hands"

268. SAS has no "*clean hands*". Its Mining Concessions' management and the tormented relations with the Indigenous Communities implied violations to the most elementary principles of Bolivian and international law. Therefore, SAS does not deserve the Treaty's protection.

269. As explained below, facts show that SAS has no "*clean hands*" (**5.2.3**). Thus, the Arbitral Tribunal must not even analyze the merits of its claim. Under international law, an investor's illegal conduct turns its claims inadmissible and/or they escape the Arbitral Tribunal's jurisdiction (**5.2.1** and **5.2.2**).

5.2.1 An investor who lacks "clean hands" may not benefit from the protection of the Treaty

270. The Arbitral Tribunal has the duty to verify, *in limine*, that whoever presents a claim has "*clean hands*". Such position is confirmed by international tribunals (**5.2.1.1**) and required by international laws principles (**5.2.1.2**).

5.2.1.1 The *"clean hands" doctrine is a part of the applicable law and demands that whoever seeks the protection of its rights has not acted illegally or illegitimately*

271. Fundamental principles of law and justice require the dismissal of claims based on unfair or illegal conducts[378]. In the words of the tribunal in *World Duty Free*, to protect investors' illegal conducts would convert arbitral tribunals in accomplices of its authors[379].

[378] Such principles include the Maxim that "no right to action may have its origin in negligence" and that "no indulgency must be shown before malicious conduct". Inceysa Vallisoletana S.L. v. Republic of El Salvador, case ICSID No. ARB/03/26, award dated August 2, 2006, ¶ 240, **RLA-65**. Pursuant to Kreindler, "[r]eliance on [such] maxim[s...] can and should be considered as another application of the Unclean Hands Doctrine . R. Kreindler, Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine, en "Between East and West: Essays in Honour of Ulf Frank", Kaj Hobér and others (eds.), Juris Publishing, 2010, p. 319, **RLA-66**. *See*, also, R. Moloo and A. Khachaturian, The Compliance with the Law Requirement in International Law, 34 Fordham International Law Journal, issue 6, 2011, p. 1485 ("[t]he approach of the Plama tribunal is consistent with the clean hands doctrine – a general principle of law that should be

272. The "*clean hands*" doctrine derives from fundamental principles of equity and justice and is the corollary of the maxim "*Nemo Auditor Propiam Turpitudinem Allegans*" pursuant to which nobody can benefit from its own wrong or negligence[380].

273. The requirement to have "*clean hands*" as a condition to access justice is a general principle in international law. In a recent decision, the *Al-Warraq* tribunal, referring to Judge Crawford's expert opinion, stated that "*the 'clean hands' principle has been invoked in the context of admissibility of claims before international courts and tribunals"* and concluded that "*the doctrine of 'clean hands' renders the Claimant's claim inadmissible*"[381]. In a similar vein, the *Fraport II* tribunal acknowledged that "[i]*nvestment treaty cases confirm that such treaties do not afford protection to illegal investments* […] *based on rules of international law, such as the 'clean hands' doctrine or doctrines to the same effect*"[382].

274. Without expressly mentioning the "*clean* hands" doctrine, other investments tribunals have reached the same conclusion. For example, in *Hamester*, the tribunal explained that:

> *An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law*[383].

---

applicable in all cases"), **RLA-67**.

[379] World Duty Free Company Limited v. Republica of Kenya, case ICSID No. ARB/00/7, award dated October 4, 2006, ¶ 178 ("[I]t would be an "affront to public conscience" to grant to the Claimant the relief which it seeks because this Tribunal "would thereby appear to assist and encourage the plaintiff in his illegal conduct" […] Accordingly, the Tribunal rejects the Claimant's submissions"), **RLA-68**.

[380] *Inceysa Vallisoletana S.L. v. Republica of El Salvador*, case ICSID No. ARB/03/26, award dated August 2, 2006, ¶ 240, **RLA-65**. *See*, also, *Plama Consortium Limited v. Republic of Bulgaria*, case ICSID No. ARB/03/24, award dated August 27, 2008, ¶ 143, **RLA-69**.

[381] *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, case UNCITRAL, award dated December 15, 2014, ¶ 646 (in the case, the claimant illegally abused its control of *Bank Century* -the bank subject of its investment— for its own benefit resulting in the bank's liquidity crisis), **RLA-70**.

[382] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines*, case ICSID No. ARB/11/12, award dated December 10, 2014, ¶ 328, **RLA-71**. Professor Orrego Vicuña was clear in this sense indicating in *Siag v. Egypt* that "[w]*hether the principle of ex turpi causa non oritur actio, the doctrine of unclean hands or the policy of eliminating corruption domestically and internationally are relied upon, the result is that an arbitration tribunal cannot find for a claim that is tainted by such practices*". *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, case ICSID No. ARB/05/15, award dated June 1, 2009, dissident opinion from Francisco Orrego Vicuña dated May 11, 2009, pp. 4 and 5, **CLA-44**. In this case, ilegal practice consisted in the alleged procurement of a certifícate of nationality registry "*by improper means*".

[383] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, case ICSID No. ARB/07/24, award dated June 18, 2010, ¶ 123, **RLA-31**. *See*, in the same sense, *Phoenix Action, Ltd. v. Check Republic*, case ICSID No. ARB/06/5, award dated April 15, 2009, ¶ 106, **RLA-72**.

275. On the other hand, scholars have confirmed that decisions rejecting a claim for unfair or illegal acts "*can and should be considered as another application of the Unclean Hands Doctrine*"[384].

276. Investments tribunals have been consistent rejecting claims from who has acted unfairly or illegally. In the case *World Duty Free*, for example, the tribunal dismissed the claims of a claimant who had paid bribes to high officers in order to obtain the investment[385]. Also, the *Plama* tribunal denied the investor protection given that the contract underlying the investment had been obtained by means of false and fraudulent representations[386]. The same decision was adopted by the *Al-Warraq* tribunal considering that the claim was grounded in a series of illegal acts contrary to public interest and with serious effects on the financial system[387].

277. Thus, the author of an illegal or improper conduct under local regulations[388], international law[389] or international public order[390] must be punished for such conduct. Therefore, actions of bad faith[391], corruption, fraud or deceitfulness[392] lead to the inadmissibility of

---

[384] R. Kreindler, *Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine*, *in* —Between East and West: Essays in Honour of Ulf Frank , Kaj Hobér and others (eds.), Juris Publishing, 2010, p. 319, **RLA-66**.

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

[386] *Plama Consortium Limited v. Republic of Bulgaria*, case ICSID No. ARB/03/24, award dated August 27, 2008, ¶ 144, **RLA-69**.

[387] *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, case UNCITRAL, award dated December 15, 2014, ¶¶ 645-647, **RLA-70**.

[388] Id., paragraph 645; Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philipines, case ICSID No. ARB/11/12, award dated December 10, 2014, ¶ 468, **RLA-71**; Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, case ICSID No. ARB/07/24, award dated June 18, 2010, ¶ 123, **RLA-31**; Phoenix Action, Ltd. v. Check Republic, case ICSID No. ARB/06/5, award dated April 15, 2009, ¶ 102, **RLA-72**; Plama Consortium Limited v. Republic of Bulgaria, case ICSID No. ARB/03/24, award dated August 27, 2008, ¶¶ 143 y 144, **RLA-69**; Inceysa Vallisoletana S.L. v. Republic of El Salvador, case ICSID No. ARB/03/26, award August 2, 2006, ¶ 207, **RLA-65**.

[389] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, case ICSID No. ARB/07/24, award dated June 18, 2010, ¶ 123, **RLA-31**

[390] *See Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, case UNCITRAL, award dated December 15, 2014, ¶ 645, **RLA-70**; *Plama Consortium Limited v. Republic of Bulgaria*, case ICSID No. ARB/03/24, award dated August 27, 2008, ¶ 143, **RLA-69**; *World Duty Free Company Limited v. Republic of Kenya*, case ICSID No. ARB/00/7, award dated October 4, 2006, ¶ 157, **RLA-68**; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, case ICSID No. ARB/03/26, award August 2, 2006, ¶ 252, **RLA-65**.

[391] *Phoenix Action, Ltd. v. Check Republic*, case ICSID No. ARB/06/5, award dated April 15, 2009, ¶ 106, **RLA-72**; *Plama Consortium Limited v. Republic of Bulgaria*, case ICSID No. ARB/03/24, award dated August 27, 2008, ¶ 144, **RLA-69**; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, case ICSID No. ARB/07/24, award dated June 18, 2010, ¶ 123, **RLA-31**; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, case ICSID No. ARB/03/26, award August 2, 2006, ¶¶ 230 and 239, **RLA-65**.

[392] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, case ICSID No. ARB/07/24, award dated June 18, 2010, ¶ 123, **RLA-31**; *Plama Consortium Limited v. Republic of Bulgaria*, case ICSID No. ARB/03/24, award

the claim[393]. As observed by the *World Duty Free* tribunal, a tribunal may not "*condone such practices"* not even when they are "*widespread either within the purchasing country or in the particular sector of activity"*[394].

5.2.1.2 *The "clean hands" requirement is a principle of international law, and as such, it must be applied by the Arbitral Tribunal*

278. Beyond broad application of the "*clean hands*" doctrine by international tribunals in investments matters[395], it is a fact that such doctrine constitutes a general principle of international law which must be applied by the Arbitral Tribunal[396].

279. The "*clean hands*" doctrine has had a broad acceptance in international justice administration since the XIX century. A classic example is the *Clark Claim* from 1862 – quoted by Bin Cheng in his reputed study on the general principles of law - settled by a United States-Ecuador Commission, on which the American commissioner affirmed that "*a party who asks for redress must present himself with clean hands*"[397].

280. Several judges from worldwide courts – first the Permanent Court of International Justice ("**PCIJ**") and then the International Court of Justice ("**ICJ**")- have defended the "*clean hands*" doctrine[398].

---

dated August 27, 2008, ¶ 143, **RLA-69**; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, case ICSID No. ARB/03/26, award August 2, 2006, ¶ 242, **RLA-65**.

[393] Hesham Talaat M. Al-Warraq v. Republic of Indonesia, case UNCITRAL, award dated December 15, 2014, ¶ 646, ("the Tribunal is of the view that the doctrine of "clean hands" renders the Climant's claim inadmissible"), **RLA-70**; See Plama Consortium Limited v. Republic of Bulgaria, case ICSID No. ARB/03/24, award dated August 27, 2008, ¶ 146, **RLA-69**; World Duty Free Company Limited v. Republic of Kenya, case ICSID No. ARB/00/7, award dated October 4, 2006, ¶ 157, **RLA-68**; Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, case ICSID No. ARB/07/24, award dated June 18, 2010, ¶ 127, **RLA-31**; Phoenix Action, Ltd. v. Check Republic, case ICSID No. ARB/06/5, award dated April 15, 2009, ¶¶ 102 and 104, **RLA-72**.

[394] *World Duty Free Company Limited v. Republic of Kenya*, case ICSID No. ARB/00/7, award dated October 4, 2006, ¶ 156, **RLA-68**

[395] According to Kreindler, "[t]he wide adoption of the Unclean Hands Doctrine and similar principles could justify treating it as a "general principle of law recognized by civilized nations" as cited in Article 38(1)(c) ICJ Statute". R. Kreindler, Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine, in "Between East and West: Essays in Honour of Ulf Frank , Kaj Hobér y otros (eds.), Juris Publishing, 2010, p. 318, **RLA-66**.

[396] *Id*., pp. 316-317 ("international tribunals have dismissed claims tainted by illegal behavior by applying the Unclean Hands Doctrine as a general principle of public international law").

[397] B. Cheng, General Principles of Law as Applied by International Courts and Tribunals, Cambridge University Press, 1953, p. 156, **RLA-73**.

[398] On his discussion on the maxim *ex injuria jus non orbitur*, Lauterpacht described several cases of the PCIJ that applied equivalent principles to the clean hands doctrine. "*It is of interest to note the way in which the Permanent Court of International Justice has given expression, on a number of occasions, to the principle that no rights can be derived from an illegality. Thus, in the Free Zones dispute between Switzerland and France the Court pointed out in its Order of 6 December 1930 that France could not invoke against Switzerland any changes resulting from the unilateral transfer, which the Court held to be illegal, of the*

281. In the *Diversion of Water from the Meuse* case before the PCIJ, when broadening the Court's reasoning, Judge Hudson stated that "*a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper*"[399]. Judge Anzilotti confirmed such principle[400]. According to these Judges, the "*clean hands*" principle "*is one of these 'general principles of law recognized by civilized nations" which the Court applies in virtue of Article 38 of its Statute"*'[401].

282. Likewise, ICJ judges have confirmed application of this requirement as a general principle of international law in their dissident and clarifying opinions[402]. For example, in the

---

French customs line. […] *In the Judgment of 26 July 1927 in the Case concerning the Factory at Chorzów, the Court disposed of one aspect of the Polish objection to its jurisdiction by stating that it is "a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him'*". H. Lauterpacht, *Recognition in International Law*, Cambridge University Press, 1947, pp. 421-422, **RLA-74**.

[399] Diversion of Water from the Meuse, case PCIJ, sentence dated June 28, 1937, individual opinion by M. Hudson, PCIJ Ser. A/B No. 70, p. 77 ("It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of the Anglo-American law. Some of these maxims are, 'Equality is equity':'He who seeks equity must do equity'. It is in line with such maxims that "a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper'. 13 Halsbury's Laws of England (2nd ed., 1934), p. 87. A very similar principle was received into Roman Law. The obligations of a vendor and a vendee being concurrent, 'neither could compel the other to perform unless he had done, or tendered, his own part'. Buckland, Text Book of Roman Law (2nd ed, 1932), p. 493. The exceptio non adimpleti contractus required a claimant to prove that he had performed or offered to perform his obligation. Girard, Droit romain (8th ed., 1929) p. 567; Saleilles, in 6 Annales de Droit commercial, (1892), p. 287, and 7 id. (1893) pp. 24, 97 and 175 .), **RLA-75**.

[400] *Diversion of Water from the Meuse*, case PCIJ, sentence dated June 28, 1937, dissident opinion by M. Anzilotti, PCIJ Ser. A/B No. 70, p. 50, **RLA-76**.

[401] *Id.*, page 50; *Diversion of Water from the Meuse*, case PCIJ, sentence dated June 28, 1937, individual opinion by M. Hudson, PCIJ Ser. A/B No. 70, p. 77, **RLA-75**.

[402] *See,* also, Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), case CIJ, sentence dated December 19, 2005, dissident opinion by ad'hoc judge J. Kateka, ¶ 46 ("On the basis of the "clean hands theory" the principle that an unlawful action cannot serve as the basis of an action in law — the DRC should be debarred from raising such accusations."), **RLA-77**; Legality of Use of Force (Serbia and Montenegro v. Belguim), case CIJ, order on precautionary meassuresdated June 2, 1999, dissident opinion by Vice-President C. Weeramantry, p. 184 ("[The Respondent] invokes the 'clean hands' principle, a principle of equity and judicial procedure, well recognized in all legal systems, by which he who seeks the assistance of a court must come to the court with clean hands. He who seeks equity must do equity. […] It is patently clear however that it is a precondition to the granting of any relief to the Applicant that if the Applicant is engaged on a course of violence relevant to the subject-matter of the Application, that violence should

Military and Paramilitary activities in and against Nicaragua case (Nicaragua v. United States) – Judge Schwebel stated the importance of "*that fundamental general principle of law so graphically phrased in the term, 'clean hands'*"[403]. Also, Judge Van den Wyngaert indicated in the case *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* that the Court should dismiss the application due to the plaintiff's lack of "clean hands"[404]. In *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, judge Morozov applied the same principle describing it as a general principle of law[405].

283. Being a general principle based on fundamental notions of equity and justice, it is not surprising that other international tribunals and courts have taken into account the "*clean hands*" requirement[406]. The Iran-Unites States Claims Tribunal, for example, has rejected several claims grounded on law or nationality abuses even when the claimant has committed no illegal acts[407]. Also, the Permanent Court of Arbitration in *Guyana v. Surinam* recognized the "*clean hands*" doctrine even though it did not applied in the precise case[408].

284. The most renown scholars have confirmed the requirement to show before a tribunal with "*clean hands*"[409]. Fitzmaurice –judge to the Permanent Court of Arbitration, the International Court of Justice and the European Court of Human Rights- affirmed that:

---

immediately cease."), **RLA-78**.

[403] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. Unites States of America)* case ICJ, sentence dated June 27, 1986, dissident opinion by judge S. Schwebel, ¶ 75, **RLA-79**.

[404] *Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v. Belgium*), case ICJ, sentence dated February 14, 2002, dissident opinion by ad-hoc judge C. Van den Wyngaert, paragraphs 35, 84, **RLA-80**.

[405] *United States Diplomatic and Consular Staff in Tehran* (*Unites States of America v. Iran*), case ICJ, sentence dated May 24, 1980, dissident opinion by judge P. Morozov, ¶ 3, **RLA-81**.

[406] Even in the international criminal law ambit, the doctrine has been positively received. For example, judge Eboe-Osuji of the International Criminal Court wanted to deny Uhuru Kenyatta's claim, who stated that it was unfair to judge him in his absence, due to the fact that the defendant have fled, and thus, had unclean hands. *Prosecutor v. Uhuru Muigai Kenyatta*, case No. ICC-01/09-02/11, resolution on reconsideration by prosecutor on the decision to excuse Mr. Kenyatta of his attendance in the trial dated November 26, 2013, dissident opinion by Judge C. Eboe-Osuji, ¶ 51, **RLA-82**. Likewise, during the later processes of Nuremberg, the *United States of America v. Flick* tribunal rejected the claim against application of ex post facto laws due to unclean hands of the defendant. United Nations War Crime Commission, *Law Reports of Trials of War Criminals*, vol. IX, The United Nations War Crimes Commission by His Majesty's Stationary Office, 1949, p. 36, **RLA-83**.

[407] *Rouhollah Karubian v. Islamic Republic of Iran*, case of the Iran-Unites States Claims Tribunal No. 419 (569-419-2), award dated March 6, 1999, ¶¶ 159-161, **RLA-84**; *James M. Saghi, Michael r. Saghi and others v. Islamic Republic of Iran*, case of the Iran-Unites States Claims Tribunal No. 298 (544-298-2), award dated January 22, 1993, ¶¶ 54, 62, **RLA-85**.

[408] *Guyana v. Surinam*, case PCA, award dated September 17, 2007, ¶¶ 417-422, **RLA-86**.

[409] James Crawford has sustained that a basis for a claim's rejection is the 'clean hands' doctrine, according to which a claimant's involvement in unlawful activity under either municipal or international law may bar the claim. J. Crawford, Brownlie's Principles of Public International Law, 8° ed., Oxford University Press, 2012, p. 701, **RLA-87**; *See*, also, I. Brownlie, Principles of Public International Law, 7a ed., Oxford University

He who comes to equity for relief must come with clean hands. Thus a State which is guilty of illegal conduct may be deprived of the necessary locus standi injudicio for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality – in short were provoked by it[410].

285. Also, Hersch Lauterpacht, renowned internationalist from the XX century, explained that the base for this doctrine is a fundamental principle of law:

The principle ex injuria jus non oritur is one of the fundamental maxims of jurisprudence. An illegality cannot, as a rule, become a source of legal right to the wrongdoer. […] [T]*o admit that, apart from well-defined exceptions, an unlawful act, or its immediate consequences, may become suo vigore a source of legal right for the wrongdoer is to introduce into the legal system a contradiction which cannot be solved except by a denial of its legal character*[411].

286. Therefore, it is undeniable that the "clean hands" doctrine is a general principle of law that has been confirmed by investments tribunals and international courts, and that has received the support of important scholars and international judges.

5.2.2 In any case, the investor who does not respect the law (either of the host State or International Law) is not protected by the Treaty

287. Besides the "*clean hands*" doctrine, which as explained, is a part of the general principles of international law, it is well known that in order to access the protection of international law, an investment must be established pursuant to internal and international law.

288. The fundamental idea behind such principle is that an investor undertaking his investment in violation of national or international law should not receive treaty protection. For example, in *Inceysa v. El Salvador*, the tribunal determined that Inceysa's false

---

Press, 2008, p. 503, quoted by P. Dumberry and G. Dumas-Aubin, The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law, 10 Transnational Dispute Management, issue 1, 2013, p. 1, **RLA-88**. See, also, S. Schwebel, Clean Hands in the Court, 31 Studies in Transnational Legal Policy, 1999, p. 74 ("Is the doctrine of clean hands one that is supported in international law? In my view, it is."), **RLA-89**; E. Borchard, The Diplomatic Protection of Citizens Abroad or the Law of International Claims, Banks Law Publishing, 1925, page 713 ("It is an established maxim of all law, municipal and international, that no one can profit by his own wrong, and that a plaintiff or a claimant must come into court with clean hands."), **RLA-90**.

[410] G. Fitzmaurice, The General Principles of International Law Considered from the Standpoint of the Rule of Law, 92 Revue Canadienne de Droit International 1, 1957, p. 119, quoted by P. Dumberry and G. Dumas-Aubin, The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law, 10 Transnational Dispute Management, issue 1, 2013, p. 2, **RLA-88**.

[411] H. Lauterpacht, *Recognition in International Law*, Cambridge University Press, 1947, pp. 420 and 421, **RLA-74**.

representation "*constitute an obvious breach to the good faith principle which must prevail in all legal relationships*"[412] as a general principle of law[413]. Thus, the tribunal declined its jurisdiction to solve the claimant's claims[414]. Such solution was confirmed by other tribunals[415].

289. Under this principle, should the investment not be undertaken in accordance law, the tribunal must deny its jurisdiction to know any claim, or at least, not admit it. Given that the tribunal's jurisdiction is limited to the State's consent, no investment undertaken in a manner contrary to law should enter its jurisdiction. As the first *Fraport* tribunal indicated:

> *It is further observed that the boundaries of this Tribunal's jurisdiction are delimited by the arbitration agreement* […]*. With respect to a bilateral investment treaty that defines —investment||, it is possible that an economic transaction that might qualify factually and financially as an investment* […]*, falls, nonetheless, outside the jurisdiction of the tribunal established under the pertinent BIT, because legally it is not an "investment" within the meaning of the BIT*[416].

290. It is well-known that States do not consent submitting to arbitration any claims arising from investments undertaken in violation of law and that no international tribunal has jurisdiction to decide over these claims[417]. Even though tribunals may reject such claims for jurisdictional reasons, it has also happened that due to process economy and the complexity of the analysis, the Tribunal decides to wait until the merits phase to reject the claims[418].

291. Also, it is worth reminding that even if a treaty does not contain an express clause with the legality requirement, different tribunals have confirmed that the obligation to comply with

---

[412] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, case ICSID No. ARB/03/26, award dated August 2, 2006, ¶¶ 229 and 237, **RLA-65**.

[413] *Id.*, ¶¶ 254 and 255.

[414] *Id*.

[415] *See*, for example, Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines, case ICSID No. ARB/11/12, award dated December 10, 2014, ¶¶ 468, **RLA-71**; Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines, case ICSID No. ARB/03/25, award dated August 16, 2007, ¶¶ 396-397, **RLA-91**.

[416] *Id*., ¶¶ 305-306.

[417] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, case ICSID No. ARB/07/24, award dated June 18, 2010, ¶ 123, **RLA-31;** *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines*, case ICSID No. ARB/03/25, award dated August 16, 2007, ¶¶ 396-402, **RLA-91**; *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, cases ICSID Nos. ARB/05/18 and ARB/07/15, decision on jurisdiction dated July 6, 2007, ¶ 182, **RLA-54**.

[418] *Phoenix Action, Ltd. v. Check Republic*, case ICSID No. ARB/06/5, award dated April 15, 2009, ¶ 102, **RLA-72**.

international law and the host State's law is implicit and its violation must be punished[419]. For example, the recent tribunal in *Fraport II* stated that "*even absent the sort of explicit legality requirement that exists here, it would still be appropriate to consider the legality of the investment*"[420].

292. The logic is simple. *First*, such interpretation is the only consistent interpretation with the fundamental purpose of respect for the host state's law[421]. *Second*, it is incoherent to suppose that a State would accept the protection of an investment undertaken in violation of the law[422]. *Third*, as stated by the tribunal of the *SAUR* case, "*the objective of the investment arbitration system is to only protect legal and bona fide investments*"[423].

293. Consequently, the Arbitral Tribunal must decline its jurisdiction to decide on SAS's claims as they are contaminated with illegal acts under Bolivian law and international law, or alternatively, declare them inadmissible.

5.2.3 SAS does not have "*clean hands*"

294. SAS pretends to obtain a multimillion dollar compensation for a situation it has itself created. Its conduct infringed the Indigenous Communities' and their members' rights, creating the social tension and violence in the Project's area that *in fine* resulted in the decision to decree the Reversion. As anticipated on section 3 above, with its behavior, SAS affected human, social and collective rights of a community which requires special protection by international law.

---

[419] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines*, case ICSID No. ARB/11/12, award dated December 10, 2014, ¶ 332, **RLA-71**; *SAUR International S.A. v. Republic of Argentina*, case ICSID No. ARB/04/4, decision on jurisdiction and responsibility dated June 6, 2012, ¶ 308, **RLA-92**; *Plama Consortium Limited v. Republic of Bulgaria*, case ICSID No. ARB/03/24, award dated August 27, 2008, ¶ 139, **RLA-69**; *Phoenix Action, Ltd. v. Check Republic*, case ICSID No. ARB/06/5, award dated April 15, 2009, ¶ 101, **RLA-72**; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, case ICSID No. ARB/03/26, award dated August 2, 2006, ¶ 207, **RLA-65**; [419] *World Duty Free Company Limited v. Republica of Kenya*, case ICSID No. ARB/00/7, award dated October 4, 2006, ¶ 178, **RLA-68**.

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

[421] *Plama Consortium Limited v. Republic of Bulgaria*, case ICSID No. ARB/03/24, award dated August 27, 2008, ¶ 139, **RLA-69**

[422] *SAUR International S.A. v. Republic of Argentina*, case ICSID No. ARB/04/4, decision on jurisdiction and responsibility dated June 6, 2012, ¶ 308, **RLA-92**; *See* also, *Phoenix Action, Ltd. v. Check Republic*, case ICSID No. ARB/06/5, award dated April 15, 2009, ¶ 101, **RLA-72**, and *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, case ICSID No. ARB/03/26, award dated August 2, 2006, ¶ 207, **RLA-65**.

[423] *SAUR International S.A. v. Republic of Argentina*, case ICSID No. ARB/04/4, decision on jurisdiction and responsibility dated June 6, 2012, ¶ 308, **RLA-92**.

295. The Arbitral Tribunal must construe the Treaty pursuant to the Vienna Convention, as stated above[424], which demands application of the sources of law that guarantee the protection of the Indigenous Communities. By doing so, the Arbitral Tribunal shall conclude that SAS lacks *clean hands* and thus its claims shall be dismissed.

296. infringed the Indigenous Communities' fundamental right to self-determination (**5.2.3.2**) and endangered the Indigenous Communities' right to a healthy environment in their territories (**5.2.3.3**).

5.2.3.1

297.

298. On its Statement of Claim, SAS has deliberately omitted to indicate that such conduct was one of the fundamental reasons why the community opposed to CMMK's presence from the beginning of its activities, demanding first the suspension of all activities and then CMMK's expulsion[427].

---

[424] Section 4, *above*.

[425]

[426]

[427]

299.

5.2.3.2 SAS infringed the Indigenous Communities' fundamental right to their self-determination

300. From the Statement of Claim, one can infer that, for SAS, the Indigenous Communities are not in condition to determine their own economic, social and cultural development. SAS attempted to impose its development vision on the Indigenous Communities and reproached Bolivia not to coincide with it. For SAS, it is *"absurd"* claiming that the Reversion would have pursued a public interest purpose, considering that *"While the Malku Khota Project would have brought hundreds of millions of dollars of investments to one of the poorest areas of Bolivia, the Government's takeover has put any development and industrialization plans to an abrupt end"*[434].

301. However, it is not only questionable whether these hypothetical "millions of dollars" would have reported any real benefit for the Indigenous Communities and, in fact, the derisory "investments" undertaken in benefit of the community as of the date of the Reversion show the opposite[435]; but also, for SAS, money and industrialization prevail over the respect of the Indigenous Communities fundamental rights.

302. In order to impose its development vision, SAS systematically infringed one of the Indigenous Communities' fundamental rights whose respect is imposed from international customary law: self-determination, and particularly, self-government[436].

---

[428]

[429]

[430]

[431]

[432]

[433]

[434] Statement of Claim, ¶ 145.

[435] Section 3.3.1, *above*.

[436] After a careful study on international law, the International Law Association recognized that respect for certain indigenous peoples' fundamental rights is a part of customary international law, *i.e.*, *"self-determination, autonomy or self-government, cultural rights and identity, land rights as well as reparation, redress and remedies* [which] *are all strictly interrelated with each other as building blocks of the unique*

303. This fundamental right has been recognized at an international level by the ILO Convention 169[437] and the UN Declaration on the Rights of Indigenous Peoples of 2007[438], both adopted by Bolivia as national laws[439]. Also, Bolivian Constitution recognizes these rights in favor of the Indigenous Communities, and as explained above, they apply to the mining activity by express mandate of the Mining Law[440].

304. Self-determination and self-government include the right to have "*a defined leadership structure*"[441]. In exercise of its right to self-determination and self-government, indigenous peoples (i) freely pursue their economic, social and cultural development and (ii) have their own political, judicial, economic, social and cultural institutions.

305. There are certain values which are more important for Indigenous Communities than industrialization, which were endangered by SAS. As acknowledged by the ICHR:

> *The culture of indigenous peoples' members correspond to a particular lifestyle of being, seeing, and acting in the world, constituted from their close relationship with their traditional lands and natural resources, not only for they are their main means of subsisting but also because they constitute an integral element of their worldview, religiosity and, thus, their cultural identity*[442].

Circle of Life representing the heart of indigenous peoples' identity, to the extent that 'the change of one of its elements affects the whole'". International Law Association, *Rights of Indigenous Peoples*, The Hague Conference, 2010, p. 43, **RLA-44**.

[437] International Labor Organization, Convention 169 on Indigenous and tribal peoples in Independent Countries, June 27, 1989, article 5 ("(…) a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals; b) he integrity of the values, practices and institutions of these peoples shall be respected") and article 8 ("2. These peoples shall have the right to retain their own customs and institutions"), **RLA-37**.

[438] United Nations, UN Declaration on the Rights of Indigenous Peoples, September 13, 2007, article 3 ("Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"), article 4 ("Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions") and article 5 ("Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State"), **RLA-39**.

[439] Section 4.3, *above*.

[440] Section 2.2, *above*.

[441] Statement of Claim, ¶ 45.

[442] *Comunidad Indigena Sawhoyamaxa v. Paraguay*, case ICHR, sentence dated march 29, 2006, ¶ 118, **RLA-20**. *Comunidad Indigena Yakye Axa v. Paraguay*, case ICHR, sentence dated June 17, 2005, ¶ 135, **RLA-25**. *See* also, *Comunidad Indigena Sawhoyamaxa v. Paraguay*, case ICHR, sentence dated march 29, 2006, ¶ 119, ("the foregoing relates to article 13 of ILO Convention 169, in the sense that States must respect "the special meaning for cultures and spiritual values of indigenous peoples, their relation with lands and territories, according to the cases, that they occupy or use in one way or another, and particularly the collective aspects

306. The Indigenous Communities have the right to make decisions "*to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions*"[443].

307. The Indigenous Communities have established their legit authorities and specific decision-making mechanisms[444]. In the specific case, the decision of carrying out a big scale mining exploitation under the open-pit system should be taken in an Assembly, unanimously[445].

308. As stated above, the Project's environmental and social impacts particularly affected the Mallku Khota community[446]. Therefore, Mallku Khota was one of the communities who strongly opposed the Project[447]. The Indigenous Communities government system guaranteed that this minority's interests were not crushed by the indifferent majority, which inhabitants of an extremely poor zone[448], constituted an easy target ensuring adepts in favor of SAS in exchange of scarce economic offerings[449].

309. Faced with the impossibility to obtain the necessary consent to keep developing the Project, SAS attempted to fabricate it by using several stratagems which included the use of force, intimidation, non authorized intromission in the Indigenous Communities' territory, disregard of legit authorities, and in total disregard of the right to self-government, the creation of fake authorities[450].

---

of such relation"), **RLA-20**; Section 2, *above*.

[443] United Nations, *UN Declaration on the Rights of Indigenous Peoples*, September 13, 2007, article 18, **RLA-39**.

[444] See section 2.2, *above.*

[445] Uño, ¶ 56, **RER-1**.

[446] See section 3.3, *above*.

[447] *Id*.

[448] Statement of Claim, ¶ 105.

[449] *See* section 3.3.1, *above*. *See* also, Indigenous Peoples Resolution dated May 18, 2012, **R-81**; Letter from Cancio Rojas to the UN High Commissioner for Human Rights in Bolivia dated April 16, 2012, **R-33**.

[450] *See* section 3.3.3, 3.4 and 3.5 *above*. *See*, for example, Resolutive Vote by Ayllus Sullka Jilaticani, Takahuani, Urinsaya and Samka dated December 11, 2010 ("the four ayllus of the two provinces determined that COMPAÑIA MINERA MALKU QUTA S.A. *must suspend its work for the following reasons: Abuses, (…) disrespect for indigenous authorities and bases in general, deceits of proposals of projects*");

310. CONAMAQ, the Indigenous Communities' highest instance of representation nationwide, had to intervene in order to demand "*Mallku Qota company to depose the separatist actions*"[451]. In the words of this association:

> *Mallku Qota mining company's presence is evidenced; which is in pursue of copta (sic) of leaders, indigenous authorities and divide the organic and political structure of the Ayllus, to the extent of causing confrontations between them and it has generated fear and conflict*[452].

311. Cancio Rojas (Kuraka of the Sacaca marka) expressed his concern to the UN High Commissioner for Human Rights in Bolivia in similar terms. In his letter dated April 2, 2012 he stated that:

> *On January 11, 2011, we all entered into a agreement in consent not to allow the presence of this foreign company (CMMK); but, as they have a lot of money, it has begun to buy consciences of poor people in the area; besides the State has forgotten us but it does authorize the company to hold mining concessions in indigenous peoples' territories which is causing serious separatist problems within their organizations, illegal detentions of leaders and disregard of ancestral authorities legally and legitimately elected, evidently motivated and supported economically by the Canadian transnational company*[453].

312. Indeed, SAS imposed its own decision-making system and legitimated a "new authority": COTOA-6A. CMMK decided to communicate with this "*ad-hoc committee*" for all purposes, which was created with the sole purpose that CMMK could carry out its Project, allowing it to oversee the high ancestral interests of the indigenous struggle and to take advantage of western decision-making systems based on majority[454].

313. The western decision-making system imposed by the Company caused a profound division within Indigenous Communities, which depend of their unity in order to survive, and the crushed minority had to appeal to extreme measures to make their voice be heard[455].

314. In order to silence the leaders who defended the minority's ancestral interests, the Company presented reckless criminal claims against legitimate authorities (Mr. Andres

---

[451] Resolution by CONAMAQ Government Council dated December 13, 2011, **R-71**.

[452] *Id*.

[453] Letter from Cancio Rojas to the UN High Commissioner for Human Rights in Bolivia dated April 2, 2012, **R-73**. *See* also, Letter from Cancio Rojas to the Ministry of Justice dated April 2, 2012, **R-74**.

[454] *See* sections 3.3 and 3.4 *above*.

[455] Resolution by the CONAMAQ Government Council dated December 13, 2001, **R-71**. *See* also, Minutes and report con the Council dated September 25, 2001, **R-65**; Council resolution by Ayllus Sullka Jilatinaki, Tacahuani, Urinsaya y Samka dated December 19, 2010, **R-49**; Resolution by FAOI-NP dated February 28, 2011, **R-52**.

Chajmi, current Mallku and Mr. Cancio Rojas, Kuraka of the Sacaca marka), resulting in arrest warrants or actual arrests which contributed to aggravate the fragile situation of violence that would end up going out of control and that would lead to the Reversion. As demonstrated above, such criminal claims were dismissed by the investigation organs due to absolute lack of merits[456].

315. These would not be isolated cases within the Company's intimidation strategy. The case is eloquent. With the purpose of making the opposition to the Project invisible, CMMK's employees assaulted

316.

317. CMMK employees intimidated forcing him to sign an Memorandum of Understanding approving the Company's activities. They informed him that they did not to have any intention to solve the conflict with the Chirimira Council authorities [459]. Also, CMMK employees warned him that all possible upcoming conflicts would be his fault and . Even more, they warned him that if he participated in another communal or cooperative meeting in Mallku Khota they would expel him from his lands and loot his and his family's assets[460].

318. Finally, in a desperate attempt to influence and undermine the Indigenous Communities' decision-making, CMMK profaned a very important ceremony to Indigenous Communities such as Tantachawi (Council or Assembly) to which external people are banned to attend[461]. On June 28, 2012, two CMMK's engineers dressed with Indigenous Peoples

[456] *See* section 3.5 *above*.

[457]

[458] *Id.*

[459] *Id.*

[460] *Id.*

[461] Uño, ¶ 55, **RER-1**. United Nations, UN Declaration on the Rights of Indigenous Peoples, September 13, 2007, article 12(1) ("Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains") and article 26 ("1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as

clothes entered uninvited to Mallku Khota surroundings, where such important ceremony was taking place and took pictures and recordings without any authorization[462]. In order not to be exposed, CMMK employees usurped clothing from indigenous peoples, which naturally, have great significance for the community and cannot be used by people unrelated to the community. With such act the ayllu's fundamental value not to lie (*ama* llulla) was violated *inter alia*, because the infiltrator lied to an entire collectivity, in this case, the ayllus and communities from Mallku Khota.

319. This would was not the only time CMMK employees would disrespect the Indigenous Communities' rights over their sacred lands[463]. CMMK began to appropriate *de facto* of the houses and territory of community members, impeding their free transit in order to graze their livestock[464].

5.2.3.3 The Project menaced the Indigenous Communities' right to a healthy environment in their territories

320. The Indigenous Communities have the fundamental right to preserve and protect the environment in their territories[465]. Also, Indigenous Peoples have the right to "*strengthen their own relationship with their lands (…) and other resources which they have traditionally possessed and occupied and used, and to assume responsibilities for benefit of future generations*"[466].

321. The Project's development in a zone of fragile environmental balance such as Mallku Khota[467] implied a serious environmental risk which could even lead to the destruction of the mountain and surrounding lagoons[468]. Also, the Project's development would have

---

well as those which they have otherwise acquired(…)"), **RLA-39**. International Labor Organization, Convention 169 on Indigenous and tribal peoples in Independent Countries, June 27, 1989, article 18 ("Adequate penalties shall be established by law for unauthorized intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences"), **RLA-37**.

[462] Gov. Gonzales, paragraph 74, **RWS-1**. *See,* also, Documentation and Information Centre of Bolivia, *Mallku Khota, Minería Tierra y Territorio* dated Novemner 12, 2012, p. 4, **R-17**.

[463] Resolution by FAOI-NP dated March 18, 2012, **R-117**.

[464] Letter from Cancio Rojas to the United Nations High Commissioner for Human Rights in Bolivia dated April 16, 2012, **R-33**.

[465] United Nations, UN Declaration on the Rights of Indigenous Peoples, September 13, 2007, article 29(1)("Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources"), **RLA-39**; International Labor Organization, Convention 169 on Indigenous and tribal peoples in Independent Countries, June 27, 1989, article 15(1)("The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources"), **RLA-37**.

[466] United Nations, *UN Declaration on the Rights of Indigenous Peoples*, September 13, 2007, article 25, **RLA-39**.

[467] *See* section 3.1, *above*.

[468] Documentation and Information Centre of Bolivia, *Mallku Khota, Minería Tierra y Territorio*, dated November 2012, p. 18, **R-17**. Open pit mining undertakings imply, with no exception, the use of great

involved an inexorable forced displacement of the community outside their ancestral territories[469].

322. As stated above, indigenous peoples' worldview is constituted "*from their close relation with their traditional lands and natural resources*"[470]. Also, in this case, the mountains on which the Project was planned for developing and the surrounding lagoons have particular importance for the Indigenous Communities of North Potosi, given that they conceive them as sacred entities[471].

323. The environmental risk and the fear to be dispossessed of their lands was naturally a matter of special concern for the Indigenous Communities, which created an important part of the social tension[472]. On this point, it is worth noting the letter from Ayllu Sullka Jilatikani to President Evo Morales on May, 2012, in which he manifested:

---

amounts of water and, in the Mallku Khota case, it would have been necessary to use underground waters due to the minimum requirements for exploitation with the corresponding contamination. Documentation and Information Centre of Bolivia, *Mallku Khota, Minería Tierra y Territorio*, dated November 2012, p. 19, **R-17**.

[469] Documentation and Information Centre of Bolivia, *Mallku Khota, Minería Tierra y Territorio*, dated November 2012, p. 18, **R-17**.

[470] *Comunidad Indigena Sawhoyamaxa v. Paraguay*, case ICHR, sentence dated march 29, 2006, ¶ 118, **RLA-20**. *Comunidad Indigena Yakye Axa v. Paraguay*, case ICHR, sentence dated June 17, 2005, ¶ 135, **RLA-25**. *See* also, *Comunidad Indigena Sawhoyamaxa v. Paraguay*, case ICHR, sentence dated march 29, 2006, ¶ 119, ("the foregoing relates to article 13 of Convention 169 of ILO, in the sense that States must respect 'the special meaning for cultures and spiritual values of indigenous peoples that their relation with lands and territories have, according to the cases, that they occupy or use in one way or another, and particularly the collective aspects of such relation"), **RLA-20**; International Labor Organization, *Convention 169 on Indigenous and tribal peoples in Independent Countries*, June 27, 1989, article 13(1)("*In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship*"), **RLA-37**.

[471] Section 2.2, *above.*

[472] Letter from Ayllu Sullka Jilatikani to the Ministry of Mining and Metallurgic dated May 1, 2011, **R-61**; CONAMAQ release dated May 8, 2012, **R-118**; Resolution by FAOI-NP dated January 11, 2011, **R-50**; Resolution by the First Section of the San Pedro de Buena Vista Indigenous Workers Union Center dated February 6, 2010 ("*the mining industry is the most contaminating to mother earth, mining concessions are imposed from above and out of the constitution framework, entrepreneurs contaminate the rivers with chemical products and the rivers which are the earth's blood are no longer useful to produce our food, not only to us as humans but also affecting the survival of our animals and of all species*"), **R-54**; Letter from Cancio Rojas to the UN High Commissioner for Human Rights in Bolivia dated April 2, 2012, **R-73**; Resolution by Ayllu SUllka Jilatikani dated February 15, 2011, **R-51**. Resolutive vote by the Ayllus Sullka Julaticani, Takahuani, Urinsaya and Samka dated December 11, 2010 ("*the four ayllus of the two provinces determined that COMPAÑIA MINERA MALKU QUTA S.A. must suspend its work for the following reasons: Abuses, contamintation, disrespect for indigenous authorities and bases in general, deceits of proposals, of projects, diminution of water from springs and destruction of our crops*"), **R-46**.

> *Members of the referred Ayllu (Sullka Jilaticani), tired and surprised by such violating activities to our collective rights (…) consequently, the bases along with the indigenous authorities in a consensual manner and exercising their rights to free determination hereby compellingly determine NOT TO ALLOW AGAIN THE ACCESS OF MINING COMPANIES UNDER NO TITLE to develop mining activities in the ancestral territory of Ayllu Sullka Jilaticani, <u>otherwise we are predisposed to defend our mother land even with our own lives</u>* (…)[473].

324. The Indigenous Communities' supplications could not been ignored. As explained, indigenous peoples have the right to decide upon their means of development where their territories are affected[474]. In this case, the Indigenous Communities decided that the Project's exploitation planned by CMMK was contrary to their development and such decision was reflected on the Mining Concessions Reversion.

* * *

325. In sum, there were causes of social discontent that led to an unsustainable violence in the Project's area and SAS cannot hide the fact that it caused it. Where these kinds of abuses took place during the Project's management, SAS may not allege that the community members' dissatisfaction represented by FAOI-NP "*deliberate campaign to force South American Silver to abandon the Malku Khota Project and the multi-billion dollar silver-indium-gallium deposit it had discovered in Malku Khota*"[475].

326. CMMK's illegal acts impede SAS from presenting a claim before this Arbitral Tribunal. CMMK incurred in numerous conducts proscribed by national and international law and which affect the ancestral indigenous peoples' survival. The Arbitral Tribunal shall conclude that the described conducts, at least, violate the good faith principle and that SAS's claims cannot be admitted. In the words of the *World Duty Free* tribunal, by protecting SAS's illegal conducts, this Arbitral Tribunal would become its accomplice[476].

---

[473] Letter from Ayllu Sullka Jilatinaki to the President of the Republic dated May 1, 2011 (emphasis added), **R-60**; *See,* also, Letter from Ayllu Sullka Jilatikani to the Ministry of Mining and Metallurgic dated May 1, 2011, **R-61**.

[474] International Labor Organization, Convention 169 on Indigenous and tribal peoples in Independent Countries, June 27, 1989, article 7(1) *("the peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly*"), **RLA-37**.

[475] Statement of Claim, ¶ 88.

[476] World Duty Free Compnay Limited v. Republic of Kenya, case ICSID No. ARB/00/7, award dated October 4, 2006, ¶ 178 ("it would be an 'affront to public conscience' affront to public conscience' to grant to the Claimant the relief which it seeks because this Tribunal "would thereby appear to assist and encourage the plaintiff in his illegal conduct' […] Accordingly, the Tribunal rejects the Claimant's submissions"), **RLA-68**.

6. ASSUMING THAT THE TRIBUNAL HAS JURISDICTION (*QUOD NON*), BOLIVIA HAS FULFILLED ITS OBLIGATIONS UNDER THE TREATY AND INTERNATIONAL LAW

327. Should *par impossible* the Arbitral Tribunal consider it has jurisdiction over SAS' claims and that they are admissible, it shall conclude that Bolivia fulfilled its obligations under the Treaty and International Law.

328. As explained below, Reversion was a necessary measure, broadly justified and proportional. Indeed, the facts described in section 3 above show that Bolivia (i) employed all efforts to find a different way to Reversion; (ii) Reversion was the only available way out due to the unsustainable public order situation; and (iii) CMMK's conduct was the direct cause that led to such situation. Therefore, Reversion was justified by public interest and social benefit reasons. Bolivia has not breached its obligation not to expropriate SAS' investment (**6.1**).

329. Also, Bolivia provided fair and equitable treatment to SAS. As will be demonstrated below, SAS could anticipate that Bolivia would protect the Indigenous People's collective and social rights by decreeing the Reversion. SAS has not demonstrated – asit cannot demonstrate- that Bolivia has acted in bad faith or that its actions would have been unpredictable or non-transparent (**6.2**).

330. Lastly, Bolivia will demonstrate that it has not breached its obligation to grant full protection and security to SAS' investment. As facts show, Bolivia employed its best efforts at all times in order to offer CMMK physical and legal security. Such efforts included risking the physical security of its authorities. If the situation of physical security of some CMMK's representatives was ever compromised, it was because of their own actions. Also, it shall be demonstrated that the State fulfilled its obligations not to adopt arbitrary or discriminatory measures that impede the use and enjoyment of the investment and not to provide a less favorable treatment to SAS' investments than that provided to its own investors (**6.3**).

331. With that regard, it is eloquent that SAS has instructed its economic experts to calculate damages only related to the expropriation[477]. SAS has confirmed the frivolity of its claims by not demonstrating any damage due to the violation of other obligations supposedly invoked.

6.1 The Reversion of Mining Concessions was conducted in accordance with the Treaty and International Law

332. Article V of the Treaty provides as follows:

[477] FTI, section 2, pp. 2 and 3, **CER-1**.

> *(1) Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose and for a social benefit related to the internal needs of that Party and against just and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party, until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have the right to establish promptly by due process of law in the territory of the Contracting Party making the expropriation the legality of the expropriation and the amount of the compensation in accordance with the principle set out in this paragraph*.
>
> *(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares*[478].

333. The fact that Bolivia has the power to revert British investments is not in dispute.

334. However, SAS alleges that Bolivia "*has illegally expropriated*" its investments since Bolivia would not have conducted the Reversion (i) due to public interest and for social benefit, (ii) respecting due process and (iii) in exchange of a prompt, just and effective compensation[479].

335. Bolivia will demonstrate that, contrary to SAS's allegations, Reversion was motivated by causes of public interest and for social benefit (**6.1.1**) and respected at all times CMMK's due process (**6.1.2**). Also, Bolivia will demonstrate that it has fulfilled the Treaty's conditions regarding compensation, and that in any event, non-compliance of such requirement, if ever happened (*quod non*), would not make of the Reversion an illegal act (**6.1.3**).

6.1.1 The Reversion of the Mining Concessions met the requirements of public Interest and social benefit

[478] Treaty, article V. **C-1**.

[479] Statement of Claim, section V.A.

336. With no arguments whatsoever, SAS alleges that "the expropriation of *CMMK's Mining Concessions was not in the public interest and social benefit of local communities and Bolivia in general*"[480].

337. In this section, Bolivia will demonstrate that the public interest of the Reversion was justified by (i) the need to pacify the conflicts caused in the Mallku Khota area and (ii) the duty to protect the respect for Indigenous Communities' rights (**6.1.1.1**). Also, Bolivia will demonstrate that the pacification of the conflicts and the protection of Indigenous Communities' rights constitute a social benefit related to the State's internal needs (**6.1.1.2**).

6.1.1.1 The need of pacifying conflicts and protecting the Indigenous Communities' rights constitute a cause of public interest

338. Article V (1) of the Treaty provides that "(1) *Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (…)* <u>except for a public purpose</u> (…)"[481].

339. According to SAS, the fact that the Reversion pursued a purpose of public interest is "*absurd*" because "*neither the local populations nor the Bolivian government have derived any benefit from the Malku Khota mineral deposits since the nationalization*"[482]. However, such position grants a very narrow notion of public interest (that the State exploit mines) and excludes other fundamental reasons such as assure public order and protect human and collective rights.

340. The concept of public interest is not defined by the Treaty or by international law. Due to such lack of definition, scholars[483] and international tribunals[484] have stated that the concept of public interest must be analyzed based on the host State legislation.

---

[480] Id., ¶ 144.

[481] Treaty, article V(1) (emphasis added), **C-1**.

[482] Statement of Claim, ¶ 145.

[483] R. Dolzer y M. Stevens, Bilateral Investment Treaties, Kluwer Law International, 1995, p. 104, (—in the absence of an internationally agreed upon definition, the notion of what in fact constitutes public purpose will to a considerable extent rest with the State concerned. One authority has noted that because the determination of the public or national interest in any specific situation can only be effected by the State concerned, it is hardly conceivable that it can be reviewed or contested by another organ), **RLA-93**.

[484] Guaracachi America Inc. and Rurelec Plc v. Plurinational State of Bolivia, PCA Case No. 2011-17, award dated January 31, 2014, ¶ 437, ("the precise framework for causes of public interest and social benefit is based on the State's internal constitutional and legal legislation"), **RLA-29**. In the same line, Antoine Goetz et consorts v. Republic of Burundi, ICSID Case No. ARB/95/3, award dated February 10, 1999, ¶ 126, ("an [expropriating] measure is internationally licit if `public interest reasons, national security or interest require so in exceptional cases`. Obviously, such condition must be evaluated under Burundi's national law (…) and the Court may not substitute its own judgment by the appreciation undertaken by the Government of Burundi over `public interest or national interests imperatives`". Unofficial translation of: "[U]ne mesure

341. Bolivian legislation has traditionally given public interest a relevant role when regulating the governmental authorities' power to expropriate. In this sense, article 22(II) of the 1967 Constitution provided that "*[E]xpropriation is imposed due to public interest or when the property does not have a social function*"[485]. The present Constitution has a similar text in article 57: "*[E]xpropriation shall be imposed due to causes of public interest or need*"[486].

342. According to one of the most important Bolivian scholars, public interest consists in:

i. "*public interest in a strict sense, meaning when the expropriated asset is directly destined to a public service*";

ii. "*social interest, which is characterized by directly and immediately satisfying a determined social class and the collectivity in a mediate fashion*"; and

iii. "*National interest which demands the satisfaction of the Nation's needs to adopt measures to confront situations affecting it as a political and international entity*"[487].

343. As Bolivia has demonstrated, the Reversion was a necessary measure in order to preserve the public order in the North of Potosi and to assure Indigenous Communities' human rights and collective rights. In fact, Bolivia has demonstrated that the Reversion of the Mining Concessions was the only remedy available in order to pacify the conflicts that CMMK provoked and supported among the local communities[488]. Contrary to what SAS affirmed, local communities and the Bolivian Government have obtained benefit from the decision to revert the Mining Concessions, considering that the pacification of the area and the protection of Indigenous Communities' human rights were assured by this measure.

344. However, SAS alleges that Bolivia did not decree the Reversion due to public interest, but due to an economic interest[489]. To support this position, SAS alleges that (i) Bolivia has not

---

telle que celle qui a été prise à l'encontre d'AFFIMET n'est internationalement licite que si ‗des impératifs d'utilité publique, de sécurité ou d'intérêt national l'exigent exceptionnellement'. C'est de toute évidence au regard du droit national burundais que cette condition doit s'apprécier. […] il n'appartient pas au Tribunal de substituer son propre jugement à l'appréciation faite discrétionnairement par le Gouvernement du Burundi des ‗impératifs d'utilité publique… ou d'intérêt national'), **RLA-30**.

[485] State's Political Constitution dated February 2, 1967, article 22 (II), **RLA-94**.

[486] New State's Political Constitution dated February 7, 2009, article 57, **RLA-3**.

[487] C. Morales Guille, Civil Code: commented and revised, Ed. Gisbert y Asociados, La Paz, 2004, vol. 1-2, p. 148, **RLA-95**.

[488] *See* section 3.6, *above*.

[489] Statement of Claim, ¶ 144 ("Bolivia revoked the Mallku Khota Mining Concessions in order to seize control of 13 billion dollars worth of silver, indium, gallium and other minerals contained in the "megayacimiento" discovered by South American Silver").

based its decision to revert the mines[490]; (ii) Reversion had no logical or proportional relation with the purpose to pacify the area[491]; and (iii) Bolivia executed the Reversion with the purposes of pacifying a violent minority which acted illegally[492].

345. Regarding the economic interest which Bolivia would have pursued by the Reversion of the Mining Concessions, neither the Reversion Decree nor the previous agreements contain any reference to the economic interest of the measure. On the contrary, the Agreement dated July 10, 2012 and the Reversion Decree refer to the need to reach a pacific coexistence in the area which ends social conflicts generated by CMMK[493]. Consequently, SAS' thesis is inaccurate.

346. Firstly, it is not true that Bolivia has reversed the Mining Concessions without articulating any reason in the Reversion Decree. As the Arbitral Tribunal can verify, Bolivia has exposed the reasons all over the Decree and, specially, on its eleventh whereas:

> *[Whereas] prospection and exploration activities undertaken by the Compañia Minera Mallku Khota S.A. in the Mallku Khota sector and the performance of themining project to socialize the process with the communities and the ayllus have faced difficulties provoking social conflicts in the last months, risking the lives of members of the population and the company's staff.*
>
> *That Compañia Minera Mallku Khota S.A.'s right on the 219 mining grids is framed within the legislation in force before 2009, the reason why i<u>n light of the extreme social situation in the Mallku Khota sector</u> the Government's involvement is necessary according to the New Political Constitution of the State.*[494].

347. Secondly, the argument formulated by SAS in the sense that the Reversion did not have a logical or proportional relation with the purpose of pacifying the area, quoting the case *Tecmed v. Mexico* to support the idea that expropriation "*must constitute a proportional measure*"[495], is incorrect due to two reasons:

348. <u>First</u>, as Bolivia has demonstrated in section 3.6 above, Reversion was the only possible remedy in order to resolve the unsustainable situation of public order and social commotion in the Project's area as a consequence of CMMK's actions. [redacted] . Furthermore, as demonstrated in the above-mentioned section, the social emergency of such Indigenous Communities was so grave that no other option (including the creation of a "mixed company" that SAS rejects) would have reestablished public order. Lastly, Bolivia and its witness have demonstrated the organization of several meetings with CMMK and Indigenous Communities in order to seek a solution.

---

[490] *Id*.

[491] *Id*.

[492] *Id*.

[493] Agreement dated July 10, 2012, point 4, **C-17** and p. 3 of Reversion Decree, p. 3, **C-4**.

[494] *Id*. (emphasis added).

[495] Statement of Claim, ¶ 142.

349. Second, the case quoted by SAS confirms Bolivia's position. The tribunal in *Tecmed* issued an opinion directly to the core of the question:

> *In this case* [Tecmed v. Mexico]*, there are no similar or comparable circumstances of emergency* [to the case Elettronica Sicula S.p.A.]*, no serious social situation, nor any urgency related to such situations in addition to the fact that the Mexican courts have not identified any crisis. The actions undertaken by the authorities in order to face these socio-political difficulties, where these difficulties do not have serious emergency or public hardship connotations, or wide-ranging and serious consequences, may not be considered from the standpoint of the Agreement or international law to be sufficient justification to deprive the foreign investor from its investment with no compensation, particularly if it has not been provedthat Cytrar or Tecmed's behavior has been determinant of the political pressure or the demonstrations that lead to such deprivation, which underlie the Resolution and conclusive conditioned it*[496].

350. In other words, the tribunal in *Tecmed* evidenced that the authorities' actions in order to face socio-political difficulties, when they do have connotations of grave emergency or public need or social crisis or general commotion of broad repercussion and graveness (as demonstrated in the Mallku Khota case before the Reversion), may be considered from the stand point of international law, as a sufficient justification to deprive a foreign investor from its investment without compensation when it is demonstrated that the situation was created by the investor – as was demonstrated in the present case.

351. Thirdly, SAS' argument that Bolivia reverted the Mining Concessions "*in order to pacify a violent minority which acted illegally*"[497] is incorrect for two reasons:

352. First, as Bolivia has exposed in section 3.3.2 above, the origin of the conflicts in Mallku Khota was not a "*violent minority which acted illegally*", but in the absolute opposition by several Indigenous Communities surrounding the Project, which foresaw a threat to their traditional ways of life and to the environment. Also, the conflict's origin was the negligent management of CMMK's relationships with the local communities which resulted in the inter-communities conflicts promoted and boosted by CMMK.

353. Second, by reverting the Mining Concessions, Bolivia did not appease any violent minority but instead contributed to the harmony between Indigenous Communities of the area and the reestablishment of public order which was gravely affected.

354. Definitively, SAS pretends to transmit the image that the Reversion was Bolivia's capricious and arbitrary decision. With its restrictive interpretation of "public interest", SAS omits considering that Bolivia, besides the obligation to react in order to pacify the area before a violent conflict, had the duty to guarantee the respect for (i) its citizens' human rights and

---

[496] *Tecnicas Medioambientales Tecmed S.A. v. Estados Unidos Mexicanos*, ICSID Case No. ARB (AF)/00/2, award dated May 29, 2003, ¶ 147, **RLA-96**.

[497] Statement of Claim, ¶ 144.

(ii) the Indigenous Communities specific rights[498]. Safeguard such interests is precisely act favor of public interest. This was acknowledged by HRIC by considering that the respect for rights protected by the American Convention may constitute a cause of public interest and that "*the application of bilateral trade agreements does not justify the breach of the obligations of the State arising from the American Convention*"[499].

6.1.1.2 The most important protection of the Indigenous Communities constitute a social benefit related to the internal needs of the State

355. Article V(1) of the Treaty foresees that "*Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (…) except for a public purpose and for a social benefit related to the internal needs of that Party (…)*"[500].

356. SAS alleges that Bolivia did not issue the Reversion in the "*social benefit of the local communities and Bolivia in general*"[501]. SAS' arguments in this point are the same used to allege that the Reversion was not undertaken due to public interest. In this sense, Bolivia reiterates that the Reversion was the only means to solve the grave situation of public order and violation of human and collective rights caused by CMMK.

357. By pacifying the conflicts in the Mallku Khota area and thus avoiding new violations to the Indigenous Communities' rights, the Reversion contributed to the social benefit of such Indigenous Communities which are, as explained above, a mayor subject protected by international and domestic law.

6.1.2 The Mining Concessions' Reversion respected SAS's due process of Law

358. Article V(1) *in fine* of the Treaty provides that "*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*."[502].

[498] Counter-Memorial, section 4.

[499] "*The [Treaty for Investments Protection between Germany and Paraguay] allows the expropriation or nationalization of capital investments of one of the Contracting Parties "due to public utility or interest", which may justify the devolution of land in favor of indigenous people. Also, the Court considers that the application of bilateral trade agreements does not justify de breach of the State's obligations arising from the American Convention; on the contrary, its application must always be compatible with the American Convention, a multilateral treaty of human rights with its own specificity, which generates rights in favor of individuals and does not entirely depend on reciprocity of the States*". Comunidad indigena Sawhoyamaxa c. Paraguay, ICHR Case, sentence dated March 29, 2006, ¶ 140, **RLA-20**.

[500] Emphasis added.

[501] Statement of Claim, ¶¶ 144.

[502] Emphasis added.

359. SAS alleges that Bolivia did not conduct the Reversion in compliance of due process, considering that CMMK (i) was not present at the meetings prior the Reversion (ii) was not able to participate in the valuation process which was unilaterally undertaken by Bolivia[503].

360. Bolivia will demonstrate in this section that nor the treaty or international law establish the obligation to undertake a consultation to CMMK before reverting its Mining Concessions (**6.1.2.1**) or valuating the compensation after the reversion (**6.1.2.2**).

6.1.2.1 Bolivia was not under any obligation to consult CMMK before the Reversion, and in any event, CMMK never requested to be consulted

361. SAS affirms that "*the [Bolivian] Government formalized its decision to expropriate the Malku Khota Project during a series of meetings to which the Company was never present, let alone able to assert any right*"[504].

362. Therefore, SAS alleges that Bolivia did not respect due process considering that it never consulted CMMK before reverting the Concessions. However, in order to legally substantiate CMMK's alleged right to be consulted prior the Reversion, SAS quotes the last paragraph of article V(1) of the Treaty, which provides that "*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*"[505].

363. From the referred text we can infer that (i) the Treaty only acknowledges the investor's right to a due process once the expropriation has taken place –contemplating only the possibility to establish the legality of the measure and the amount of the due compensation- and (ii) that consequently, the Treaty does not acknowledge any right in favor of investors to participate in the decision prior to the expropriation.

364. Based on the foregoing, Bolivia did not breach the Treaty by not letting CMMK attend the negotiations between the Indigenous Communities and the State's representatives.

365. If, *par impossible*, the Arbitral Tribunal understands that due process implies CMMK's right to participate in the Mining Concessions Reversion, it must consider two important factors.

366. *Firstly*, that CMMK's limited participation in such process was justified due to security reasons, considering that the confrontational situation between the Indigenous Communities was generated by CMMK's misconduct[506]. Considering the Indigenous Communities mistrust towards CMMK, its presence at the meetings would only have generated tensions, making the pacification agreement unfeasible. Furthermore, as demonstrated, after the violent acts on May 18, 2012 and July 5, 2012, the Mallku Khota Community made clear the fact that it would not have any contact with CMMK.

---

[503] Statement of Claim, ¶¶ 139-140.
[504] *Id*., ¶ 140.
[505] *Id*., ¶ 139.
[506] *See* section 3.6 *above*.

367. *Secondly*, as demonstrated by the facts and the witness declaration of Governor Gonzales, the Departmental Government invited CMMK to several meetings and attempted to conciliate, insofar as possible, in order to find an agreed solution. At these meetings, the Reversion was discussed as an alternative, as acknowledged by SAS[507].

368. Therefore, SAS cannot claim the existence of an obligation of consultation prior to the Reversion. In any event, the Departmental Government undertook all efforts in order to find solutions with CMMK's participation.

6.1.2.2 Bolivia was not obliged to consult CMMK regarding the procedure to evaluate the compensation, and in any event, CMMK opted not to participate in such procedure

369. SAS affirms that "*the valuation process contemplated in the Supreme Decree would have taken place unilaterally without the Company being able to analyze or challenge COMIBOL's determinations*"[508].

370. SAS' affirmation has no grounds because neither the Treaty nor international law demands the participation of the investor in the valuation proceeding. SAS attempts to rewrite the Treaty in order to create a new condition of legality of the reversion.

371. The Treaty does not establish how (by means of which proceeding) the State should determine the amount of compensation. This is something that corresponds solely to the State's determination.

372. The World Bank Guidelines on the treatment of Foreign Direct Investments of 1992 consider that the proceeding to evaluate investments after expropriation or nationalization be exclusively determined by the State:

> *In the absence of a determination agreed by, or based on the agreement of the parties* [*i.e.*, the State and the foreign investor]*, the fair market value will be acceptable if determined by the State according to reasonable criteria related to the market value of the investment* [...][509].

373. SAS attempts to hold Bolivia liable for the breach of an obligation (not to nationalize without a valuation process with SAS' participation) that simply does not exist under the Treaty or international law.

---

[507] Statement of Claim, ¶ 61.

[508] Statement of Claim, ¶ 140.

[509] World Bank, Guidelines on the Treatment of Foreign Direct Investment, 1992, item IV, ¶ 5 (emphasis added), **RLA-97**. *See,* also, Amoco International Finance Corporation v. Iran Islamic Republic, Case from the Iran-United States Claim Tribunal No. 56, partial award dated July 14, 1987, ¶ 137 (—More usually, compensation is decided by administrative authorities, very often without formal negotiation with the interested parties, but, in many cases, in implementation of principles defined by statute, or by constitutional law, with a possible recourse to ordinary judicial remedies), **CLA-29**.

374. In the recent *Rurelec* case, in which the same Treaty invoked by SAS was analyzed, the arbitral tribunal rejected the same allegation by the investor stating that:

> *The investor's recourse, if it disputes the valuation performed by the expropriating State, is to seek review through procedures made available in that State's internal law (…) or to submit the matter to international arbitration in accordance with article 8*[510].

375. Regarding the respect to due process, the *Rurelec* arbitral tribunal concluded that it does not consist in allowing the participation of the investor in the valuation of an expropriated asset, but to leave at its disposition remedies to challenge the valuation once it has been undertaken.

376. Such position coincides with the doctrine confirming that:

> *The due process prerequisite is usually understood as a requirement to provide for a possibility to have* […] *the determination of the amount of compensation reviewed before an independent body* [and] *the limited case law suggest that a fair procedure offering the possibility of judicial review is crucial* [511].

377. SAS submissions regarding due process, are not only groundless, but are also incoherent with CMMK's conduct once the Reversion Decree was published. CMMK could have challenge the Reversion Decree before Bolivian authorities, but it decided not to do so[512].

---

[510] Guaracachi America, Inc. and Rurelec Plc v. Plurinational State of Bolivia, PCA case No. 2001-17, award dated January 31, 2014, ¶ 440, **RLA-29**.

[511] A. Reinisch, *Legality of Expropriations*, in A. Reinisch (ed), Standards of Investment Protection, Oxford University Press, 2008, p. 191 and 193, **RLA-98**. The foregoing is also consistent with the text of the Treaty which states that: "*the national or company affected shall have the right to establish promptly <u>by due process of law</u> in the territory of the Contracting Party making the expropriation the legality of the expropriation and <u>the amount of the compensation</u> in accordance with the principle set out in this paragraph.*" (emphasis added), Treaty, Article V(1), **C-1**.

[512] It is allowed by article V(1) of the Treaty ("the national or company affected shall have the right to establish promptly <u>by due process of law</u> in the territory of the Contracting Party making the expropriation <u>the legality of the expropriation</u> and <u>the amount of the compensation</u> in accordance with the principle set out in this paragraph.") (emphasis added) **C-1**. It is also possible through an unconstitutional claim ("acción de inconstitucionalidad"), ruled by articles 132 and 133 of the New Political Constitution of the State dated February 7, 2009, **RLA-3**, and articles 72 to 84 of the Bolivian Constitutional Procedural Code, decreed by Law 254 dated July 5, 2012, **RLA-99**, which regulates unconstitutional remedies. CMK could have requested the Ombudsman -for example- to interpose a constitutional abstract action, based on the attributions and faculties conferred to such authority by numerals 1 and 3 and article 222 of the New Political Constitution of the State dated February 7, 2009, **RLA-3**, and articles 19 to 24 of Law 1818 dated December 22, 1997, **RLA-100**. Also, should CMMK have initiated a judicial or administrative process regarding the reversion measures, it could have requested the authority in charge of the process to interpose a concrete constitutional action based on articles 72 and 73.2 of Law 254 dated July 5, 2012, **RLA-99**.

CMMK could also have challenge the compensation valuation process before Bolivian authorities, but it decided not to do so[513].

378. Lastly, as explained by Bolivia in section 3.7, Bolivia initiated process to hire an independent audit company after the Reversion, as required by the Reversion Decree.

6.1.3 Even if the Arbitral Tribunal deems that the State breached the condition concerning the prompt, adequate and effective Compensation (*quod non*), such breach has no bearing on the legality of the Reversion

379. SAS alleges that Bolivia has breached its duty to compensate (i) by not granting the compensation as of this date and (ii) by having foreseen compensation based on the costs incurred by SAS as of the Reversion date. Therefore, SAS concludes that the Reversion is illicit.

380. In this section, Bolivia will demonstrate that it has not breached its obligation to indemnify CMMK, as it has done all legitimate efforts and in good faith to compensate it (**6.1.3.1**). Also, Bolivia will demonstrate that the valuation method provided for in the Reversion Decree is the appropriate one in order to compensate the Reversion of the Concessions (**6.1.3.2**). Lastly, Bolivia will demonstrate that the alleged lack of payment of compensation does not make of the Reversion an illegal act (**6.1.3.3**).

6.1.3.1 The Reversion of the Mining Concessions was in conformance with the conditions regarding compensation as the State has made legitimate efforts and in good faith in order to compensate CMMK

381. The Treaty demands for the expropriation to be undertaken "*in exchange of a just and effective compensation*" which "*shall amount to the market value of the investment*", and whose "*payment shall be made without delay*"[514].

382. From the text of the Treaty, it can be concluded that there is no requirement of a previous compensation, but that the State must, firstly, calculate the just compensation that corresponds to the investor (meaning the market value of the investments) and, once the calculation is done, *pay* the corresponding compensation "*without delay*". This is exactly

[513] CMMK could have presented in a first stage a compliance action as per article 4 of the Reversion Decree (due to non-compliance of the term provided for the valuation), and challenge the resolution by which COMIBOL adjudicated the valuation process of CMMK's investments, Resolution of authorization of hiring Quality dated April 23, 2014, **R-107**. Article 56.1 of the Administrative Procedure Law, Law 2341 dated April 23, 2002 provides that: "*administrative resources proceed against all types of resolution of a definitive nature or administrative acts with an equivalent nature, provided that such administrative acts affect, harm or may provoke a damage its subjective rights or legitimate interests, according to the interested party's criteria*", **RLA-101**. Also, article 70 of the same Law would have allowed CMMK, if necessary, to interpose a Administrative Contentious complaint against the Resolution which resolved its recourse. In fact, should CMMK have been rejected in all its petitions, it could also have presented a constitutional complaint pursuant to articles 128 and 129 of the Constitution, *Id*.

[514] Treaty, article V(1), **C-1**.

the proceeding undertaken by Bolivia with the Reversion Decree, which provides for the payment of compensation after a valuation process:

> *Corporación Minera de Bolivia – COMIBOL shall hire an independent company in order to undertake a valuation process on the investment made by Compañia Minera Mallku Khota S.A. and Exploraciones Mineras Santa Cruz Ltda. – EMICRUZ LTDA, in a maximum term of one hundred and twenty (120) working days.*
>
> *From the results of the valuation, COMIBOL shall establish the amount and conditions under which the Bolivian government shall acknowledge the investments undertaken by Compañia Minera Mallku Khota S.A. and Exploraciones Mineras Santa Cruz Ltda. – EMICRUZ LTDA*[515].

383. The doctrine confirms that the compliance with the condition to indemnify does not require, for the purposes of determining the legality of the expropriation that the compensation is paid to the investor or even that such compensation is definitively calculated. It suffices that the State has taken the measures to determine the compensation as of the expropriation date:

> *A number of investment tribunals have dealt with the question of whether the compensation requirement demands that compensation has been actually paid. In this context, tribunals have consistently held that an offer of compensation or other provision for compensation, in particular where the exact amount may still be in controversy, is enough to satisfy this legality requirement*[516].
>
> [T]*oday it seems to be consensus that it is sufficient, if a State, at the time of the expropriation, offers compensation* […] *One may, therefore conclude that according to arbitral practice and scholarly writing, the mere existence of a dispute about the amount of compensation does not render the expropriation unlawful*[517].
>
> *It appears also that the requirement of good faith should be given an important role in deciding on the lawfulness of expropriation. If on the facts of the particular case, a tribunal establishes that a State has made good faith efforts to comply with its obligation to pay compensation, it should not be held to be in violation of the compensation requirement. For example, a good faith offering of, or provision for,*

---

[515] Reversion Decree, article 4, **C-4**. Unofficial translation of : "*La Corporación Minera de Bolivia – COMIBOL contratará una empresa independiente que realice un proceso de valuación de las inversiones realizadas por la Compañía Minera Mallku Khota S.A. y Exploraciones Mineras Santa Cruz Ltda. – EMICRUZ LTDA, en el plazo máximo de ciento veinte (120) días hábiles. A partir de los resultados de la valuación, la COMIBOL establecerá el monto y condiciones bajo las cuales el gobierno boliviano reconocerá las inversiones realizadas por la Compañía Minera Mallku Khota S.A. y Exploraciones Mineras Santa Cruz Ltda. – EMICRUZ LTDA*".

[516] A. Reinisch, *Legality of Expropriations*, in A. Reinisch (ed), Standards of Investments Protection, Oxford University Press, 2008, p. 198 (emphasis added), **RLA-98**.

[517] I. Marboe, *Calculation of Compensation and Damages in International Investment Law*, Oxford International Arbitration Series, 2009, ¶¶ 3.46 and 3.48 (emphasis added), **RLA-102**.

compensation (even if not in sufficient amount, as long as not manifestly unreasonable) should render the expropriation lawful[518].

384. In the *Amoco* case, the Iran-United States Claims Tribunal considered the steps taken by the special commission to determine compensation, in order to conclude that the annulment of contracts was not an expropriation without compensation violating the applicable treaty:

> *In practice, the Special Commission instituted negotiations with the companies party to the nullified contracts, in order to arrive at settlement agreements. Furthermore, in case of failure of the negotiations, the interested companies were entitled to have recourse to the procedures of settlement provided for in the contracts, usually by international arbitration. A number of settlement agreements were in fact executed and, in a few cases, arbitration procedures took place. In view of these facts, the Tribunal deems that the provisions of the Single Article Act for compensation were neither in violation of the Treaty nor, indeed, in violation of rules of customary international law*[519].

385. In the present case, the Arbitral Tribunal should reach the same conclusion. Bolivia has foreseen in the Reversion Decree the payment of compensation and has hired independent experts in order to undertake the calculation of the just market value of CMMK's investments[520]. Also, the amount of compensation is now a matter of discussion in this arbitration, where the just market value of CMMK's investments shall be debated along with the participation of economic experts. In this context, Reversion may not be considered a measure contrary to the Treaty due to lack of compensation.

386. Nonetheless, SAS seeks to demonstrate that Bolivia has breached its obligation under the Treaty by not paying a "*promptly*" compensation or "*without delay*".

387. However, neither the Treaty nor international law define the terms "*without delay*" and "*promptly*", nor do they fix a determined term to undertake the valuation of the compensation and payment. Scholars affirm that:

> [T]*he requirement of —prompt|| compensation does not require that compensation be paid in advance but within a reasonable period of time after the taking. Vague assurances at the time of the taking of property to the effect that compensation will be paid in the future are insufficient if action is not taken within a reasonable time thereafter to grant that compensation*[521].

---

[518] S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008, pp. 68-69, **RLA-103**.

[519] *Amoco International Finance Corporation v. Islamic Republic of Islam*, case of the Iran-United States Claims Tribunal No. 56, partial award dated July 14, 1987, ¶ 138, **CLA-29**.

[520] *See* Section 3.7 *above*.

[521] L.B. Sohn and R.R. Baxter, *Responsibility of States for Injuries to the Economic Interest of Aliens*, 55 American Journal of International Law, 1961, p. 558 (emphasis added), **RLA-104**.

388. The limited decisions on this matter demonstrate that a term is considered to be unreasonable long when, for instance, it took 12 years to pay the compensation[522].

389. The doctrine and the jurisprudence quoted by SAS supporting its thesis do not sustain its affirmation that Bolivia has breached its obligation to compensate. SAS relies on the following:

- A quote by Dr. Ripinsky in which he affirms that "*the non-payment of any compensation for an unreasonable length of time may cannot be seen as a lawful behavior, because this would undermine the whole regime of international law on expropriation*"[523]. Neither Dr. Ripinsky nor SAS explain what is considered as a "*irrationally extended period of time*";

- A quote from the Norwegian Shipping Lines Complaint in which the tribunal made a reference to the "*right of the claimants to receive immediate and full compensation* (…) *at the latest on the day of the effective taking*"[524]. SAS seeks the application of a criteria that is not adopted by theTreaty (compensation before Reversion); and

- A quote of the Goldenberg case which indicates that "fair payment shall be made for the expropriated or requisitioned property as quickly as possible"[525]. Neither the sole arbitrator in the Goldenberg case nor SAS explain the meaning of "*as quickly as possible*".

6.1.3.2 *The valuation method foreseen in the Reversion Decree is appropriate in order to compensate the Reversion of the Mining Concessions*

390. SAS questions if the method to evaluate compensation foreseen in the Reversion Decree is the appropriate one to determine the market value of its alleged investment[526].

391. We refer to the detailed explanation made on section 7.3 regarding the valuation method in order to calculate the market value for CMMK's investment. However, it is important to clarify that considering the preliminary status of the prospecting activities in Mallku Khota, the method to be used in order to calculate the market value shall be the "*cost-based approach*".

6.1.3.3 Absence of compensation does not, in and of itself, make of the Reversion an unlawful act

---

[522] Waguih Elie George Siag amd Clorinda Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, award dated June 1, 2009, ¶ 435 (—[e]ven the most charitable of impartial observers would not, in the Tribunal's view, contend that a 12-year delay (at the least) was ‗prompt'), **CLA-44**.

[523] Statement of Claim, ¶ 133, quoting **CLA-31**. Bolivia notes that the document presented by SAS does not contain the quote by Mr. Ripinsky, which is on p. 68 of his book (SAS has mentioned pp. 148-161 and 397)

[524] Statement of Claim, ¶ 134, quoting **CLA-32**.

[525] *Id*.

[526] *Id*., ¶¶ 135-138.

392. SAS concludes its submissions about lack of compensation with a serious affirmation: "*Bolivia never paid nor offered any compensation to South American Silver, a fact sufficient in itself to make Bolivia's expropriation of the Malku Khota Project an unlawful act under the Treaty and international law*"[527]*.*

393. Contrary to SAS' allegations, neither the Treaty nor international laws condition the legality of an expropriation to the payment of compensation.

394. The award rendered in the case *Exxon Mobil v. Venezuela* confirms that the position defended by Bolivia is the predominant position in international law. The award provides that:

> *The mere fact that an investor would not have received compensation does not become in itself as an illegal expropriation. An offer for compensation could have been made in favor of the investor, and in that event, the expropriation legality shall depend on the terms of such offer. In order to decide if an expropriation is illegal or not due to lack of compensation, a tribunal must consider the facts of the case*[528].

395. Also, the recent award *Tidewater* confirms that the lack of payment does not convert *per se* an expropriation into an unlawful act. Just like SAS, *Tidewater* sustained that the absence of payment made of the expropriation of its investment an unlawful act[529]. The tribunal concluded that:

> *The* [World Bank] *Guidelines thus reinforce the conclusion of the Tribunal that an expropriation wanting only a determination of compensation by an international tribunal is not to be treated as an illegal expropriation. They prescribe a standard for compensation that is identical to that required under Article 5 of the BIT in the present case and then provide that the amount of such compensation will be acceptable if determined ‗by a tribunal … designated by the Parties.' 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*[530].

396. Two important conclusions may be extracted from the awards *Exxon Mobil* and *Tidewater:*

397. In the first place, of the absence of compensation does not convert the expropriation into an illegal dispossession *per se*, irrespectively of the time passed from the expropriation. *Exxon Mobil v. Venezuela* uses the evolution of a doctrinal and jurisprudential line that has

---

[527] *Id*., ¶ 138.

[528] *Venezuela Holdings and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, award dated October 9, 2014, ¶ 301, **RLA-105**.

[529] Tidewater Investment SRL v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5. Award dated March 13, 2015, ¶ 44 (Claimants thus begin by submitting that the mere failure of Respondent to pay compensation in accordance with the BIT renders the expropriation unlawful), **RLA-106**.

[530] *Id*., ¶ 140.

been applied by several international tribunals[531]. The *Tidewater v. Venezuela* tribunal confirms that this analysis would imply that all expropriations debated in arbitration are illicit, depriving of any useful sense the distinction between legal an illegal of modern treaties[532].

398. In cases in which the sole noncompliance of the State was the lack of payment of due compensation, in order to determine the adequate compensation, international tribunals fix as compensation the value of the expropriated goods as of the date on which the expropriation took place, more interests[533]. Interests compensate the investor for the delayed payment.

399. Secondly, (or illegality) of an expropriation without compensation, must be determined by taking into account the facts of the case.

400. The *Exxon Mobil v. Venezuela* arbitral tribunal determined that proposals made by Venezuela during negotiations contemporary to the reversion were enough to understand that the requirement of just compensation required by the applicable treaty had been fulfilled, and thus to conclude that the expropriation was not illegal[534]. The *Tidewater* tribunal confirmed such position[535].

401. In our case, the Reversion Decree foresaw the compensation payment. Parties held meetings before and after the Reversion. Such negotiations are a clear demonstration of Bolivia's willingness to comply with its obligation to compensate. SAS has not demonstrated that the proposals made by Bolivia were incompatible with the requirements provided for in the Treaty or that negotiations were held in bad faith.

---

[531] *Former King of Greece and other v. Greece*, case CEDH No. 25701/94, Main room, sentence regarding equitable satisfaction dated November 28, 2002, ¶ 78, **RLA-107**.

[532] Tidewater Investment Srl v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, award dated March 13, 2015, ¶ 138 (—Such an approach thus would make a detailed and elaborate element of the expropriation provision in modern BITs, including the provisions of Article 5 of the Venezuela- Barbados BIT, effectively nugatory), **RLA-106**.

[533] See, for example, *Guaracachi America, Inc. and Rurelec Plc v. Plurinational State of Bolivia*, PCA Case No. 2011-17, award dated January 31, 2014, **RLA-29**; *Former King of Greece and other v. Greece*, case CEDH No. 25701/94, Main room, sentence regarding equitable satisfaction dated November 28, 2002, **RLA-107**; *Scordino v. Italia (no. 1)*, case CEDH No. 36813/97, Main Room, sentence dated March 29, 2006, **RLA-108**; *Compañia de Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica,* ICSID Case No. ARB/96/1, award dated February 17, 2000, **CLA-87**; *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award dated April 22, 2009; **CLA-34**; *Börekçioğulları (Çökmez) and others v. Turkey*, case CEDH No. 58650/00, Third Section, sentence dated October 19, 2006, **RLA-109**. The only exception is *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1 and ARB/09/20. Award May 16, 2012, **RLA-110**, in the particular context of a valuation of lands and in a matter with no validity term.

[534] *Venezuela Holdings and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award dated October 9, 2014, ¶ 305, **RLA-105**.

[535] *Tidewater Investment SRL v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/5, award dated March 13, 2015, ¶ 124, **RLA-106**.

402. Furthermore, in this dispute, the facts that show Bolivia's willingness to compensate CMMK are clearer than those of *Exxon Mobil* and *Tidewater*. While Venezuela did not foresaw a compensation in its nationalization decree[536], Bolivia not only foresaw a compensation, but also undertook all necessary proceedings in order to hire an independent company in charge of valuating CMMK's investments. The *Tidewater* tribunal confirmed that an offer to compensate in the expropriating law was sufficient to fulfill the requirement of a legal expropriation[537].

403. Bolivia calls the Arbitral Tribunal's attention to three facts that shall be considered in order to determine the legality of the Reversion: (i) the prevision of compensation in the Reversion Decree, (ii) the negotiations between Bolivia and SAS to reach an agreement, before and after the Reversion, and (iii) the adjudication to an independent company for CMMK's investments valuation.

404. On the other hand, SAS does not contribute with any facts or legal arguments to undermine the legality of the expropriation, limiting its defense to allege that the Reversion was illegal due to the lack of compensation.

6.2 Bolivia gave a fair and equitable treatment to CMMK's investment

405. Article II(2) of the Treaty establishes that "*investments of nationals or companies of each Contracting Party shall at all times be granted a fair and equitable treatment (…)*"[538].

406. As will be demonstrated below, Bolivia has always respected such obligation. With that regard, the fact that SAS did not instruct its experts to undertake a calculation of the alleged damages caused by the breach of this obligation demonstrates the absence of credibility of its claim.

407. The "fair and equitable treatment" standard contained in the Treaty grants the investor the protections of international law – and nothing else. SAS alleges that by establishing a "fair and equitable treatment" standard, the Treaty obliged Bolivia to (i) protect SAS' legitimate expectations, (ii) act in good faith, and (iii) act in a predictable and transparent manner.

408. Bolivia will demonstrate in this section that CMMK could have expected Bolivia to protect its natural resources and the Indigenous Communities according to its national and international obligations (**6.2.1**). Also, Bolivia will demonstrate that it has acted in good faith –even if not obliged to- (**6.2.2**) and in a predictable and transparent manner (**6.2.3**).

---

[536] *Venezuela Holdings and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award dated October 9, 2014, ¶¶ 305, **RLA-105**.

[537] *Tidewater Investment SRL v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/5, award dated March 13, 2015, ¶ 124, **RLA-106**.

[538] Treaty, article II (2), **C-1**.

6.2.1 CMMK could legitimately expect that Bolivia would protect its natural resources and Indigenous Communities in accordance with its national and international obligations

409. Bolivia agrees with SAS that the legitimate expectations of the investors are part of the fair and equitable treatment standard. Also, Bolivia agrees that the respect of legitimate expectations of an investor must go together with the stability of the legal framework of the State receiving the investment[539].

410. However, Bolivia disagrees on the relevance given by SAS to its expectations to measure Bolivia's compliance with such standard. Contrary to SAS' claims, the breach of Bolivia's obligation to grant fair and equitable treatment to investors cannot be the sole basis of SAS' expectations"[540].

411. In fact, the decision on which SAS relay upon to analyze this standard (*Tecmed v. Mexico*) was criticized by the *ad hoc* committee in *MTD and others v. Chile*, for having granted an excessive importance to the investor's expectations. The *ad hoc* committee, aligned with Professor Paulsson and Sir Watts (Defendant's experts in this case), stated that:

> *For example the TECMED Tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations (such as the obligation to compensate for expropriation) is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have*[541].

412. Besides of not being dependent on the expectations an investor may have, the fair and equitable treatment standard does not guarantee the immutability of the legal framework applicable to the investment nor does it impede the State to legislate and ensure the application and fulfillment of its laws in its territory. The investor lacks "legitimate expectation" that the State will not comply with its role and ensure the fulfillment of its internal legislation. Also, the State may undertake changes to its legal system provided that such changes "*remain within the boundaries of normal adjustments customary in the host state and accepted in other states*"[542].

413. Bolivia does not agree with the manner in which SAS seeks to apply the standard to the facts..

414. SAS alleges that "*by investing in the Mallku Khota Project*", it created legal expectations based on (i) Bolivia's legal framework and (ii) "*the Government's repeated expressions of support*"[543]. According to SAS, Bolivia "*by deliberately undermining the exercise by South*

---

[539] Statement of Claim, ¶ 148.

[540] *Id*., ¶ 153.

[541] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, annulment decision adopted by the *ad hoc* committee on March 21, 2007, ¶ 67, **RLA-111**.

[542] R. Dolzer and C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 2nd ed., 2012, p.105, **RLA-112**.

[543] Statement of Claim, ¶ 153.

American Silver of CMMK's rights over the Mining Concessions and by ultimately nationalizing these concessions without offering or paying any form of compensation" failed to "*protect South American Silver's legitimate expectations and to guarantee the existence of a stable legal and business framework in connection with South American Silver's investments*"[544].

415. SAS' allegation is vague. SAS does not explain which were its legitimate expectations when CMMK invested in Mallku Khota, nor the basis for such expectations. SAS does not explain how the decision to revert the Mining Concessions could demonstrate Bolivia's breach of the legal framework on which CMMK relied upon at the time of investing in Mallku Khota.

416. In view of SAS' insufficient explanations, its accusation may be construed in two ways: either Bolivia would have modified its legal framework between the time on which SAS allegedly invested and the time of the reversion, or Bolivia would have breached its legal framework by reverting the Mining Concessions.

417. Bolivia will show that it never undertook, in respect of SAS, to not change the relevant legal framework (**6.2.1.1**). In any event, Bolivia will show that the legal framework that SAS should have known when CMMK was interested in Mallku Khota did not suffer any substantial modification (**6.2.1.2**). Lastly, Bolivia will demonstrate that it was limited to legislate and assure the respect of law on its territory, what has not violated CMMK's legitimate expectations (**6.2.1.3**).

6.2.1.1 Bolivia never undertook to not change the relevant legal framework in respect of SAS

418. To violate the legitimate expectations of an investor by amendments to thelegal framework applicable to its investment, the State must undertake not to amend such framework.

419. Among other tribunals, it has been acknowledged by the *Parkering v. Lithuania* case:

> *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. <u>Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment</u>. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power*[545].

420. On the same line, Dolzer and Schreuer affirm that "[u]*ndertakings and representations made explicitly or implicitly by the host state are the strongest basis for legitimate expectations*"[546], and quote several decisions in order to sustain that "[p]*articularly*

[544] *Id.*

[545] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, award dated September 11, 2007 (emphasis added), **RLA-113**.

[546] R. Dolzer and C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 2° ed.,

important in the creation of legitimate expectations are specific assurances and representations made by the host state in order to induce investors to make investments"[547].

421. However, SAS provides no evidence that Bolivia would have agreed not to modify the laws that could affect the Mining Concessions nor that Bolivia have accepted to breach its domestic and international obligations to protect the Indigenous Communities' rights and the peace in its territory.

6.2.1.2 When CMMK showed interest in Mallku Khota, Bolivia's legal framework was very similar to the one existing at the Reversion date

422. SAS has not demonstrated that Bolivia's valid legal framework at the beginning of the Mallku Khota Project by CMMK suffered changes "[that would not] *remain within the boundaries of normal adjustments customary in the host state and accepted in other states*"[548].

423. In fact, on 2003 when CMMK showed interest in Mallku Khota, the Bolivian legal framework contemplated the protection of Indigenous Communities' rights at least through CADH and Convention 169 of ILO[549].

424. On this line, before CMMK undertook its capital investments in Mallku Khota, Bolivia had confirmed the relevance of protecting the Indigenous Communities' rights with the new text of the 2009 Constitution and with the incorporation of the United Nations Declaration on the Rights of Indigenous Communities into the Bolivian legal framework – Declaration that could not have been incorporated before, as it was enacted in 2007[550].

425. The respect for Indigenous Communities' rights was a key factor that Bolivia had to assess at the time of the Mining Concessions reversion. CMMK knew (or should have known) the existence of such rights and thus it was able to foresee that the State would protect their strict compliance.

426. On the other hand, CMMK knew (or should have known) the importance traditionally granted by the Bolivian legal framework to its natural resources. The 1997 Mining Code, which was in force during the years that CMMK was in Mallku Khota, provided that "*mining activities are projects of national interest, they are governed by this Code, they have a nature of public interest when constitute a integral part of the concessionaire's or mining operator's production process*"[551]. Bolivia granted a constitutional

---

2012, p.145, **RLA-112**.

[547] *Id.*, p. 149. The author quotes cases Kardassopoulos v. Georgia, Parkerings v. Lithuania, Sempra v. Argentina, OKO Pankki v. Estonia, Duke Energy v. Ecuador, Continental Casualty v. Argentina and Total v. Argentina.

[548] R. Dolzer and C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 2° ed., 2012, p. 105, **RLA-112**.

[549] See section 4.3 *above*.

[550] *Id*.

[551] 1997 Mining Code, article 24, **C-30**.

acknowledgement to such principle by establishing in the New Political Constitution that "*activities of exploration, exploitation, refinement, industrialization, transport and commercialization of non renewable natural resources shall have state necessity and public interest nature*"[552].

427. The importance of the knowledge by the investor about the context of the State in which it invests has been highlighted, among others, by the arbitral tribunals in *Methanex v. United States*[553] and *Generation Ukraine v. Ukraine*[554]. CMMK should have foreseen at all times that its operations were located in a geographical, social, cultural and economical area which demands particular vigilance from Bolivia and that the Mining Concessions revocation was foreseeable before a substantial change of the existing conditions.

6.2.1.3 Bolivia only legislated and enforced its laws within its territory

428. As demonstrated, Bolivia was forced to revert the Mallku Khota mining concession in order to finish the unsustainable conflicts promoted by CMMK.

429. Bolivia made such decision respecting the Bolivian rules which governed the Indigenous Communities' rights. In other words, Bolivia only applied the existing rules since the beginning of CMMK's investment in Mallku Khota.

430. This application was aligned with a strong policy to respect a key element of the Bolivian identity that the Government of President Evo Morales has been carrying out since 2006. Therefore, CMMK was aware that any disrespect to the Indigenous Communities would generate an immediate reaction of the Government.

431. The relevance of the respect for Indigenous Communities' rights has been scarcely analyzed by international arbitral tribunals, as a few international arbitrations were related to these communities and/or its rights. *Grand River v. United States of America* is

---

[552] New State's Political Constitution dated February 7, 2009, article 356, **RLA-3**.

[553] *Methanex Corporation v. United States of America*, August 3, 2005, CNUDMI/TLCAN Case, final award over jurisdiction and grounds dated August 3, 2005, part IV, chapter D, article 1110, ¶¶ 8-10 (—[A] *political economy in which it was widely known, if not notorious, the governmental environmental and health protection institutions that the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons*), **RLA-114**.

[554] Generation Ukraine v. Ukraine, ICSID Case No. ARB/00/9, award dated September 16, 2003, ¶ 20.37 (—The Claimant was attracted to the Ukraine because of the possibility of earning a rate of return on its capital in significant excess to the other investment opportunities in more developed economies. The Claimant thus invested in the Ukraine on notice of both the prospects and the potential pitfalls. Its investment was speculative […] The Claimant had undoubtedly experienced frustration and delay caused by bureaucratic incompetence and recalcitrance in various forms. But equally, the Claimant had managed to secure a 49-year leasehold over prime commercial property in the centre of Kyiv without having participated in a competitive tender and without having made any substantial payment to the Ukrainian authorities), **RLA-115**.

certainly the case in which the arbitral tribunal made several considerations over this matter. The arbitral tribunal acknowledged that —*significant and constructive roles treaties may have in securing the rights of indigenous peoples*, as well as —*strong international policy and standards articulated in numerous written instruments and interpretive decisions that favor state action to promote such rights and interests of indigenous peoples*"[555]. Also, the tribunal stated that: "*there does exist a principle of customary international law requiring governmental authorities to consult Indigenous Communities on governmental policies or actions significantly affecting them*"[556].

432. Bolivia's behavior to revert the Mining Concessions was irreproachable from the stand point of the Treaty and international law. The State has the competence to legislate and the obligation to ensure the application and compliance of its laws within its territory. The investor does not have a "legitimate expectation" that the State won't comply with its role to ensure the fulfillment of its internal legality. This would be equivalent to deny the State's sovereign prerogatives which is clearly inadmissible.

433. Arbitral tribunals have confirmed this reasoning. For example, in the *Genin* case, the claimants, EIB's main shareholders –Estonian Innovation Bank- alleged that the revocation of its license by the Estonian Bank constituted an unfair and inequitable treatment. The tribunal dismissed the claim as, even if the standard of fair and equitable treatment standard is independent from domestic legislation, such standard is not breached if the actions undertaken by the State are justified under its laws and do not constitute "*a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith*:

> *In sum, the Tribunal finds that the Bank of Estonia acted within its statutory discretion when it took the steps that it did, for the reasons that it did, to revoke EIB's license. Its ultimate decision cannot be said to have been arbitrary or discriminatory against the foreign investors in the sense in which those words are used in the BIT.* [...]
>
> *Article II(3)(a) of the BIT requires the signatory governments to treat foreign investment in a —fair and equitable|| way. Under international law, this requirement is generally understood to —provide a basic and general standard which is detached from the host State's domestic law||. While the exact content of this standard is not clear, the Tribunal understands it to require an —international minimum standard|| that is separate from domestic law, but that is, indeed, a minimum standard. Acts that would violate this minimum standard would include acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith. Under the present circumstances—where ample grounds existed for the action taken by the Bank of Estonia—Respondent cannot be held to have violated Article II(3)(a) of the BIT* [557].

[555] Grand River Enterprises Six Nations Ltd. And others v. United States of America, case CNUDMI/TLCAN, award dated January 12, 2011, ¶¶ 143, 186, **RLA-116**.
[556] *Id*., ¶ 210.
[557] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Estonia*, ICSID Case No. ARB/99/2, award dated June 25, 2001, ¶¶ 363,367, **RLA-117**.

434. SAS failed to demonstrate that Bolivia's behavior shows any of the extraordinary circumstances mentioned by the *Genin* tribunal. What SAS requests the Arbitral Tribunal is that Bolivia be condemned under the Treaty and international law for having complied with:

- The Constitution;
- The CADH;
- The Convention 169;
- The Declaration;
- The Mining Code of 1997;
- Law 3720 dated July 31, 2007[558];
- Law 3787 dated November 24, 2007[559];
- Supreme Decree 29117 dated May 1, 2007[560];
- Supreme Decree 29894 dated February 7, 2009[561];
- Supreme Decree 726 dated December 6, 2010[562]; and
- Supreme Decree 1308 dated August 1, 2012[563].

435. In a nutshell, Bolivia is legitimated under the Treaty and international law to exercise its sovereign powers to legislate and ensure the compliance of its laws within its territory. The reversion undertaken in exercise of such powers cannot constitute a violation of a fair and equitable treatment under the Treaty.

6.2.2 Bolivia acted in good faith

436. SAS alleges that Bolivia did not act in good faith by :

i. undermining SAS' rights;

[558] Law 3720 dated July 31, 2007, **RLA-118**
[559] Law 3787 dated November 24, 2007, **RLA-119**
[560] Supreme Decree 29117 dated May 1, 2007, **RLA-120**
[561] Supreme Decree 29894 dated February 7, 2009, **RLA-121**
[562] Supreme Decree 726 dated December 6, 2010, **RLA-122**
[563] Reversion Decree, **C-4**.

ii. "*deciding, negotiating and ultimately formalizing the revocation of CMMK's mining concessions for reasons other than those officially stated and while deliberately keeping South American Silver and CMMK outside of its process";*

iii. "*failing to define and apply the provisions of the Bolivian Constitution and mining law in a transparent and consistent manner*"; and

iv. "failing to abide by its commitment to offer compensation to CMMK following the expropriation".[564]

437. Even though SAS has the burden of proof, it does not prove any of its accusations nor does it explain why Bolivia's behavior would be contrary to the good faith standard as applied in international law.

438. SAS' accusations are serious because it attributes to Bolivia the intention to damage an investor. Bolivia can only express its disagreement to such accusation.

439. Contrary to SAS' allegations, Bolivia did act in good faith by reverting the Mining Concessions.

440. Firstly, Bolivia has not undermined SAS' rights. The Bolivian legal framework would have allowed Bolivia to revoke the Mining Concessions before August 2012. However, as demonstrated, Bolivia made its best efforts for the Indigenous Communities and CMMK to agree that the Project could continue with CMMK's participation. Once the situation in Mallku Khota turned unsustainable due to CMMK's attitude, Bolivia was forced to revert the Mining Concessions in order to protect the rights of citizens and to pacify the area. Should CMMK suffer any damage due to the reversion, (i) it was a consequence of its own misconduct and (ii) it was not attributable to Bolivia's will to damage it.

441. Secondly, Bolivia has not decided, negotiated and formalized the revocation of the Mining Concessions due to reasons other than those officially stated, nor it deliberately kept CMMK out of the process. Multiple omissions in SAS' statements allow it to affirm with no basis that: "*the Government's decision (…) was not primarily motivated by considerations of public security*"[565] but it obeyed a "*deliberate campaign to force South American Silver to abandon the Malku Khota Project*"[566]. On the contrary, as demonstrated, Bolivia was clear by stating that the cause justifying the Reversion was the situation of conflict generated by CMMK in the Mallku Khota area. Bolivia must correct multiple inaccuracies that sustain such affirmations.

442. First, SAS affirms that the State would have premeditated the Reversion since 2011[567]. That is not true. Even though the State had to consider petitions submitted by Indigenous Communities in the past, requesting "*not to allow the admission of mining companies*

[564] Statement of Claim, ¶ 154.
[565] *Id*., ¶ 98.
[566] *Id*., ¶ 88.
[567] *Id*., ¶ 91.

under any circumstance"[568], it has always supported the Company. SAS' submissions are surprising, particularly when CMMK tried to bypass the Departmental Government[569] and show to some of the State's high officers (with COTOA-6A) the appearance of a unanimous support to the Project[570]. Sustain that this situation extends beyond the loss of human lives is an absurd.

443. Nor is it true, as alleged by SAS, that the creation of the immobilization zone at the Concessions' surroundings ("the **Immobilization Zone**") constituted one of the early stages by the State to own the Project[571]. On the contrary, the Immobilization Zone constitutes a simple demarcation of an area whose exploitation corresponds to COMIBOL for business purposes, as established by law. Indeed all areas of the national territory that have not been granted as mining concessions constitute fiscal reserve, and therefore, can and must be exploited by the State Company. It is demonstrated by the administrative resolution that created the Immobilization Zone:

> *Supreme Decree 29117 dated May 1, 2007 provides in article 1 "This Supreme Decree has as its purpose the declaration of all national territory as Mining Fiscal Reserve, comprising all mineral metallic, non metallic, evaporitics, gemstones and brines resources, being the State in exercise of its property right on the Fiscal Reserve, who grants to [COMIBOL] the faculty and attribution to its exploitation and administration, saving all pre constituted rights over the mining areas granted in concession, which are under municipal jurisdiction*"[572].

444. Leaving aside the fact that SAS' complaint is absurd by referring to a different an area different of the Concessions, SAS misinterprets COMIBOL's decision. This is part of a change in Bolivian policies since 2006. Before CMMK initiated its activities in the area of the Project, the State has enacted provisions pursuant to which COMIBOL had the prerogatives of exploitation in all areas of the national territory that were not granted as concessions. This is coherent with the Bolivian State's decision not to consider COMIBOL as a simple manager of resources from mining royalties, but as a State Company that would actively intervene within the Bolivian mining sector "*in a competitive manner and with efficiency in all the productive chain <u>whether in new areas as in non compromised concessions</u>*"[573]. The measure of creating the Immobilization Zone –which SAS presents as it was adopted against CMMK- was also adopted in other 18 areas of the national territory:

[568] Letter from Ayllu Sullka Jilatinaki to the President of the Republic dated May 1, 2011, **R-60**.

[569] Gov. Gonzales, ¶ 53, **RWS-1**.

[570] Gonzales Yutronic, ¶ 15, **CWS-4**.

[571] Statement of Claim, ¶¶ 55 to 57.

[572] COMIBOL resolution (DAJ-0073/2011) dated April 26, 2011, **R-119**.

[573] Development National Plan for the 2006-2010 period, p. 106 (emphasis added), **R-35**.

COMIBOL's Immobilization Zones[574]

445. Therefore, the denomination "immobilization zones" does not turn them in arbitrary measures, as SAS intends to make the Arbitral Tribunal believe. The Immobilization Zone was (as the 18 others) a demarcation of areas that, being property of COMIBOL since 2007, represent a commercial interest for the State Company.

446. Second, SAS ignores, because it is convenient for it, the fact that in both the agreements with Indigenous Communities and the Reversion Decree, violence in the Project's area had a primordial place as precedent. Indeed (i) the minutes of understanding dated July 7, 2012 mentions as first point a list of offenses prepared by the family of the deceased member of the community[575], (ii) the agreement entered into by the Indigenous Communities Authorities and the President of the Republic provides as an assumption of any mining activity in the area of the Project "*the pacific harmony, social peace, free transit between communities and habitants of the region*"[576], and (iii) the Reversion Decree provides as its basis the "*difficulties (which have been) generated in the last months in a scale of social conflicts, risking the life of the populations and the company's staff*'[577].

447. It is surprising that SAS suggests that these antecedents are false or that they were an excuse for a hidden action plan against CMMK. However, SAS does not mention the

[574] Validity term of neoliberal mining legislation, Petropress Magazine, p. 24, **C-42**.

[575] Minutes of Understanding dated July 7, 2012, **C-16**.

[576] Agreement minutes dated July 19, 2012, **C-17**.

[577] Reversion Decree, p. 3, **C-4**.

serious incidents in the Mallku Khota area which were broadcasted by national press[578], which had no doubt in affirming that the measures adopted by the State "*allow the pacification in the area*"[579], and highlightedthat "*the conflict was generated by a request to banish the Canadian company*"[580].

448. Third, Bolivia applied the provisions contained in the Constitution and the Bolivian mining law in a transparent and consistent way. SAS' accusation on this point is groundless and unintelligible. SAS does not mention the provisions in the Constitution or in the Bolivian mining law that would not have been applied by Bolivia in a transparent and consistent manner. In any event, by reverting the Mining Concessions, Bolivia applied its Constitution and laws in a manner consistent with the policies adopted by the Government of President Evo Morales since 2006[581], always aligned with the Bolivian legislation of the last decades.

449. Fourth, Bolivia undertook all the necessary proceedings to valuate CMMK compensation, and as per the Reversion Decree, hired an independent company to undertake the valuation. Also, Bolivia negotiated and continues negotiating with SAS in good faith.

6.2.3 Bolivia trated CMMK's investment a transparent and consistent treatment

450. SAS alleges that Bolivia has not treated CMMK's investment in a transparent and consistent manner, using the same grounds it has used to allege that Bolivia has not acted in good faith[582].

451. Bolivia has already replied to such accusations[583]. In this sense, it is worthy to reanalyze SAS' affirmation that Bolivia failed to "*define and apply the provisions in the Bolivian Constitution and mining law in a transparent and consistent manner*"[584]. Showing the insufficiency of its arguments, as in its entire Statement of Claim, SAS does not develop on why Bolivia would not have defined or applied the provisions in the Constitution and the Bolivian mining law in a transparent and consistent manner. SAS does not develop such argument nor does it identify any example, simply because this example does not exist: Bolivia has always acted in a transparent and consistent manner regarding the application of its norms – including the Constitution.

452. Bolivia could not be any more transparent in management of the conflict generated by CMMK in Mallku Khota.

[578] *See,* for example, PAT News, 1 deceased and 8 wounded in confrontations in Mallku Khota, video, **R-96**.

[579] Press note, Pagina Siete, It is defined: the Stated shall be in charge of the Mallku Khota mine, July 11, 2011, **C-64**.

[580] Press note, La Razon, Government states that it had the intention to annul the contract with mining company in Mallku Khota one yera ago, July 9, 2012, **C-64**.

[581] *See* section 3.2, *above*.

[582] Statement of Claim, ¶¶ 153-154.

[583] *See* section 6.2.2, *above*.

[584] Statement of Claim, ¶ 154.

453. Firstly, Bolivia was transparent by carrying out a policy that considered the protection of Indigenous Communities' rights as afundamental pillar of the State, in compliance with national and international regulations.

454. Secondly, Bolivia was transparent by letting CMMK attend numerous meetings with the purpose of reaching agreements that would allow CMMK to continue the Project's development.

6.3 All other claims submitted by SAS under the Treaty are unfounded

455. As will be demonstrated below, Bolivia did not breach any of its obligations to provide full protection and security to SAS' investment (**6.3.1**), not to adopt arbitrary and discriminatory measures that impede the use and enjoyment of its investment (**6.3.2**) and not to provide a less favorable treatment to SAS' investments (**6.3.2**).

6.3.1 The State complied with its obligation to provide full protection and security to SAS' investment

456. The Treaty provides that "*investments of nationals or companies of each Contracting Party (…) shall enjoy full protection and security in the territory of the other Contracting Party*"[585].

457. SAS alleges that Bolivia did not provide full protection and physical or legal security to SAS' investment[586].

458. In this section, Bolivia shall demonstrate that it provided full protection and physical (**6.3.1.1**) or legal security (**6.3.1.2**) to SAS' investment, in compliance with its obligations under the Treaty.

6.3.1.1 *Bolivia provided full protection and physical security to SAS' investment*

459. SAS alleges that Bolivia did not provide full protection and physical security to CMMK's investment by:

a. Not providing relevant protection or assistance to CMMK when its intervention was requested;

b. "*encourag[ing] the opposition led by cooperatives and illegal miners in the area*"; and

c. "*Grant[ing] immunity to opposition leaders and authors of the violence*"[587].

---

[585] Treaty, article II (2), **C-1**.

[586] Statement of Claim, ¶ 156.

[587] *Id.*

460. SAS does not provide any evidence to sustain its severe accusations. Bolivia, on the contrary, has demonstrated that SAS' accusations are false.

461. First, Bolivia protected SAS' investment until the Reversion date, insofar as possible.

462. SAS does not identify the way in which Bolivia, "*refused or did not provide protection or assistance to (CMMK) when its intervention was requested*"[588]. Nor does SAS allege having suffered any damage as a consequence of the alleged lack of protection by Bolivia.

463. Bolivia has already demonstrated that it did everything that was possible to avoid the conflict created by CMMK in the Mallku Khota area. Bolivia acted with the intention to maintain the harmony in the area before every CMMK's reckless and provocative action. First, by means of direct dialogue between the Departmental Government and the parties involved; then with its participation at the conciliation meetings. Once the conflict was aggravated, Bolivia provided all available means in order to avoid that the violent situation became out of control, transporting police officers and first rank authorities to Mallku Khota (Governor of Potosí, Minister of Labor and Mining Minister, among others) in order to assist in the solution of the conflict. As explained by Governor Gonzales, the Departmental Government sent 200 police officers during the most critical moments[589]. Bolivia's mediation in the social conflicts in Mallku Khota was considered positive by the United Nations High Commissioner for Human Rights[590].

464. SAS exceeds itself by blaming Bolivia for not having intervened in the regrettable acts that were a consequence of CMMK's misconduct. Bolivia had the obligation to protect CMMK's investment but with certain limitations.

465. Professors Dolzer and Schreuer clearly establish that the standard of protection and security standard does not grant the investor an absolute protection against violations:

> *There is a broad consensus that the standard does not provide absolute protection against physical or legal infringement. In terms of the law of state responsibility, the host state is not placed under an obligation of strict liability to prevent such violations. Rather, it is generally accepted that the host state will have to exercise "due diligence" and will have to take such measures to protect the foreign investment as are reasonable under the circumstances*[591].

466. Indeed, international arbitral tribunals have confirmed that there are limits to the protective tasks of the States and that this duty to protect is an obligation of means and not of results.

---

[588] Statement of Claim, ¶ 156.

[589] Gov. Gonzales, ¶ 71, **RWS-1**.

[590] Annual report by the United Nations High Commissioner for Human Rights about hisactivities in the Plurinational State of Bolivia in 2012, ¶ 6 ("*The ombudsman office had a positive role in the mediation of some social conflicts such as the march organized by handicapped people in January and the violent incidents between indigenous people and police officers on July in Mallku Khota (Potosí)*"), **R-97**.

[591] R. Dolzer y C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 2° ed., 2012, p. 161, **RLA-112**.

467. Among others, and relying on precedent decisions, *Tecmed v. Mexico* tribunal stated that "*the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it*"[592].

468. Based on certain facts similar to the present case (governmental measures to pacify a conflict generated by the investor), the ICJ stated the following in the decision *Elettronica Sicula S.p.A.*:

> *The reference* […] *to the provision of —constant protection and security|| cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed. The dismissal of some 800 workers could not reasonably be expected to pass without some protest*[593].

469. Bolivia's behavior cannot be compared to the behavior of other States in a few cases in which international tribunals have declared the non-compliance with the standard of protection. Bolivia's intention to mediate the conflict between CMMK and the Indigenous Communities cannot be compared, for example, with the destruction of an investment by security forces[594] or with looting incidents by armed forces[595].

470. Secondly, it is not true that Bolivia promoted the opposition to the Project or "illegal miners" – as SAS contemptuously refers to the Indigenous Communities with historical rights in the Mallku Khota area. In fact, Bolivia protected CMMK before the reaction of the Indigenous Communities to CMMK's insults. As Bolivia has explained, it defended CMMK and by means of mediation and meetings, it acted as mediator between different Indigenous Communities and CMMK in order to reach a satisfactory agreement for all parties involved in the Mallku Khota area[596]. Furthermore, as demonstrated, Bolivia's public agents such as Potosí's Governor risked their lives to attempt an agreement with the Indigenous Communities to pacify the conflict.

471. Thirdly, Bolivia did not grant any immunity to opposition leaders. The Bolivian Government did not have powers to do so, considering that there is a division of branches in Bolivia that would never have allowed the Government to interfere in the tasks of the judiciary. Also, the Government has the constitutional obligation to respect communal justice ("*justicia comunitaria*"). As demonstrated, the authorities acted pursuant to the law whenever CMMK had legal complaints.

6.3.1.2 *Bolivia granted full protection and legal security to SAS' investment*

---

[592] *Técnicas Medioambientales Tecmed S.A. v. United States of Mexico*, ICSID Case No. ARB (AF)/00/2, award dated May 29, 2003, ¶ 177, **RLA-96**.

[593] *Elettronica Sicula SpA (ELSI) (United States of America v. Italia),* case ICJ, sentence dated July 20, 1989, ¶ 108, (emphasis added), **RLA-17**.

[594] *Asian Agricultural Products Ltd. (AAPL) v. Socialist republic of Sri Lanka*, ICSID Case No. ARB/87/3, award dated June 27, 1990, ¶¶ 45 et seq., **RLA-28**.

[595] *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, award dated February 21, 1997, ¶¶ 6.02 and following, **RLA-123**.

[596] *See* section 3.4, *above*.

472. By linking the standard of full protection and legal security to certainty and predictability of the rules[597], SAS alleges that Bolivia did not grant legal security to CMMK's investment by:

i. Revoking the mining concessions; and

ii. Attempting to revoke the corresponding environmental permits[598]

473. SAS' accusation is not sustainable due to three fundamental reasons:

474. First, Bolivia has demonstrated that it ordered the Reversion based on applicable laws in Bolivia, which are aligned with international standards and that CMMK should have known[599]. Bolivia had no other alternative to the Reversion if it wanted to fulfill its national and international obligations, and over all, if it wanted to pacify the conflict generated by CMMK. It is unconceivable that a State that complies with its laws (internationally accepted) be condemned for not granting protection and security to an investor.

475. Second, Bolivia has also demonstrated that CMMK could have appealed all decisions that SAS questions now in this arbitration[600] before Bolivian Courts of Justice. Bolivia granted protection and full security to CMMK by providing all means to appeal all and any decisions.

476. Third, Bolivia did not attempt to revoke CMMK's environmental permits. Considering that SAS does not provide a clear explanation with that regard[601], Bolivia assumes that SAS bases its accusation on an internal memorandum from the Departmental Office of Mother Earth of the Potosí Government dated May 7, 2012[602]. Such document only contains a recommendation to the Departmental Secretary regarding CMMK proceeding to obtain a new environmental license after extending its initial activity[603]. To relay on such report – whose acquisition by SAS generates many questionings- in order to allege that Bolivia violated its obligation to grant CMMK legal security is frivolous and demonstrates SAS' lack of solid arguments to determine Bolivia's responsibilities on its alleged damages.

6.3.2 The State complied with its obligation to refrain from introducing arbitrary and discriminatory measures that hinder the use and enjoyment of CMMK's investment

477. The Treaty provides that "*neither Contracting Parties shall, in any way, impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment*

[597] Statement of Claim, ¶ 155.
[598] *Id*., ¶ 156.
[599] *See* section 6.1, *above*.
[600] See ¶ 377, above.
[601] Statement of Claim, ¶ 69.
[602] Internal Memorandum from the Mother Earth Secretary of Potosí Government dated May 7, 2012, **C-53**.
[603] *Id*.

or disposal of investments in its territory of nationals or companies of other Contracting Party"[604].

478. In this section, Bolivia will demonstrate that contrary to SAS' allegations, Bolivia did not act in an arbitrary (**6.3.2.1**) or discriminatory (**6.3.2.2**) manner by reverting the Mining Concessions.

6.3.2.1 *The Reversion was not an arbitrary measure*

479. SAS alleges that Bolivia acted in an arbitrary manner because the Reversion and the precedent measures:

i. "*Did not serve any legitimate public purpose and actually deprived the Government, the local communities and the country as a whole from much-needed revenues and opportunities*";

ii. "*was not based on any legal standard but on a mere executive* fiat";

iii. "*was decided for the purpose of appropriating at no cost the benefits associated with the discovery of a "megayacimiento" of silver, indium and gallium by the Company instead of the ostensibly-stated purpose of pacifying the area*"; and

iv. "*Deprived South American Silver of the due process and proper procedure it was entitled to, both prior and after the revocation of the Mining Concessions*"[605].

480. SAS' arguments have no grounds.

481. Firstly, the Reversion was the opposite of an arbitrary measure. The Reversion was the last decision that Bolivia was forced to make after having assumed a conciliating strategy during the past years to avoid conflicts arising out of CMMK's attitude in the management (i) of the Mining Concessions and (ii) of its relationship with the Indigenous Communities. Bolivia sought dialogue with CMMK and the Indigenous Communities upon the first frictions. Bolivia mediated between CMMK and the Indigenous Communities when conflicts worsened. Lastly, facing CMMK's obstinacy to create distress among the Indigenous Communities and the severity of the public order in the region, Bolivia was forced to revert the Mining Concessions in order to end the local conflicts, which were unsustainable. Such decision was taken in compliance with applicable laws in Bolivia and aligned to the policy of respect for the Indigenous Communities' rights carried out by President Evo Morales since the beginning of his mandate.

482. The non-arbitrary nature of the solution adopted by Bolivia is confirmed by one of the leading cases in international public law. Indeed, ICJ in the case *Elettronica Sicula S.p.A.* acknowledged that a decision adopted in order to pacify an area in which an investment is

[604] Treaty, article II(2), **C-1**.

[605] Statement of Claim, ¶ 159.

located is not arbitrary. Such case arose from the seize order of *Elettronica Sicula S.p.A.*'s plant issued by the Palermo's Mayor in order to mitigate disturbances generated by the company's decision to close the plant and dismiss thousands of workers. The claimant (United States) alleged that such order of seizure was arbitrary under the treaty between the United States and Italy as (i) it was based on erroneous reasons (including local political pressure) and (ii) it was illegal under Italian Law[606]. The ICJ rejected such argument by deciding that "*by itself, and without more, unlawfulness cannot be said to amount to arbitrariness*[607], and that —[i]*t was of course understandable that the Mayor, as a public official, should have made his order, in some measure, as a response to local public pressures*[608]. It should be noted that, contrary to the Palermo's Mayor's decision, the Reversion Decree is entirely legal and SAS did not challenge it before the Bolivian jurisdiction.

483. Secondly, Bolivia did pursue a legal public purpose with the Reversion of the Mining Concessions: pacify the Mallku Khota area and protect the Indigenous Communities' rights. In this point, it surprises that SAS accuses Bolivia of depriving the Government, the Indigenous Communities and the State from needed earnings and opportunities, when in two and a half years of exploration in Mallku Khota CMMK only contributed with internal conflicts among Indigenous Communities, . SAS did not contribute with rents and opportunities and it was never going to make such contribution, because its objective was not the provision of income and opportunities but to sell its Project to the best bidder and abandon the Mallku Khota area.

484. Thirdly, the Reversion was not "*a mere executive order*" "*not based on any legal standard*". The Reversion was adopted by the Supreme Decree, a perfect legal instrument to make decision of such magnitude, and it could not be otherwise, as it was subject to recourses – which CMMK never initiated. In order to evaluate the Reversion, it may also be considered that it was undertaken within a context of emergency and risk of conflict in the Mallku Khota area.

485. Fourthly, contrary to SAS' submissions, Bolivia did not carry out the Mining Concessions reversion to appropriate benefits of the "megayacimiento" "*instead of doing it to pacify the area*". Bolivia has demonstrated that it undertook the reversion with the purpose of pacifying the area and respecting the Indigenous Communities' rights –purpose which was achieved. Should Bolivia have wanted to appropriate the "megayacimiento" it could have done so based on articles of the Constitution and the Mining Code which allowed it to revert the Mining Concessions for an economic sector considered to be of public interest. Another evidence that demonstrates that Bolivia did not intend to appropriate the "megayacimiento" is the fact that there was given no priority to the Mallku Khota mines after the Reversion, but to the consolidation of peace in the area.

---

[606] Elettronica Sicula SpA (ELSI) (United States of America v. Italia), case ICJ, sentence dated July 20, 1989, ¶ 123, **RLA-17**.
[607] *Id.*, ¶ 124.
[608] *Id*., ¶126.

486. Lastly, Bolivia did not deprive CMMK of due process. In order to avoid repetitions, Bolivia remits to the submission formulated in this regard in section 6.1.2 above, where it was demonstrated (i) that Bolivia had no obligation to consult CMMK before or after the Reversion and (ii) the CMMK renounced to be consulted and to use the legal resources foreseen under Bolivian law.

6.3.2.2 *The Reversion was not a discriminatory measure*

487. SAS alleges that the measures adopted by Bolivia were discriminatory. As Bolivia will demonstrate, this claim is manifestly frivolous.

488. SAS states that "*international tribunals interpreted the prohibition regarding discriminatory measures in light of term's ordinary meaning as a differential treatment of people or companies in like circumstances, without a rational justification for that different treatment*"[609].

489. Bolivia agrees with such definition of the standard, which clearly demonstrates that it was not breached by Bolivia.

490. In first place, it is conspicuous that SAS, after establishing the fundamental requirement which characterizes a discriminatory treatment –"*a differential treatment of people or companies in like circumstances*" – not only does not identify which investors Bolivia has treated in a different manner in similar circumstances, but it does not even undertakes an effort to allege that SAS has been treated differently than other people or companies. SAS cannot make such submission, as it has not been treated differently from any person or company in similar circumstances. Furthermore, the only company in the Mallku Khota area during the conflict between local communities was EMICRUZ, whose concessions were reverted, just as CMMK's[610].

491. A review of decisions rendered by international arbitral tribunals that have analyzed claims due to discrimination shows that "*a comparison is necessary with an investor in like circumstances*"[611]. The burden of proof relays on the investor alleging discriminatory treatment, reason why in this case, SAS should have demonstrated that (i) there is an investor from Bolivia or another State, (ii) in similar circumstances to those from CMMK, (iii) who received a more favorable treatment by Bolivia. SAS not even indicates which investor would have been treated differently, thus demonstrating that it did not identify similar circumstances or the existence of a more favorable treatment. SAS accuses Bolivia of discriminatory treatment but it does not allege nor prove it.

[609] Stament of Claim, ¶ 158.

[610] Reversion Decree, p. 3 ("ARTICLE 1.- From the publication date of this Supreme Decree the Special Transitory Authorizations are reverted to the State's original domain: a) "MALLKU KHOTA" of 170 hectares located in Charcas Province of the Department of Potosí, <u>registered in favor of Exploraciones Mineras Santa Cruz Ltda. – EMICRUZ LTDA.</u>") (emphasis added), **C-4**.

[611] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, award dated September 11, 2007, ¶ 369, **RLA-113**.

492. In second place, if *par impossible,* the Arbitral Tribunal considers that Bolivia treated CMMK differently from other investors in similar circumstances, it shall conclude that such treatment responded to a rational justification: CMMK was a key element in the dispute of between the communities, what it has promoted and sponsored. CMMK's ownership on the Mallku Khota Mining Concessions had turn into an impediment to pacify the area.

6.3.3 The State fulfilled its obligation to not afford SAS' investments less favorable treatment that that afforded to its investors

493. The Treaty provides that: "*Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favorable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State*"[612].

494. SAS accuses Bolivia of having infringed this obligation. Although it does not analyze the content of the standard. The basis for such accusation is that, according to SAS, Bolivia's officers (including the President of Bolivia and the Governor of Potosí) (i) were antagonist to SAS for being a transnational company and not a Bolivian company, and (ii) they based their decision to revert the concessions "*partially on the fact that it was property of a transnational company*"[613] .

495. Basically, SAS reiterates a discriminatory treatment adding the factor of being a foreign company.

496. International jurisprudence has established that who alleges discrimination due to nationality must demonstrate that the measure in question does not "*bear a reasonable relationship to rational policies <u>not motivated by preference of domestic over foreign owned investments</u>*"[614]. Therefore, SAS must demonstrate that its foreign nationality motivated the Reversion.

497. However, as Bolivia has explained above, SAS' allegation of a discriminatory treatment is frivolous. The same can be said about the allegation that Bolivia did not fulfill its obligation imposed by article III(1) of the Treaty.

498. Firstly, because SAS does not even allege that Bolivia treated it differently than other Bolivian investors in similar circumstances. In fact, EMICRUZ –who also suffered the reversion of its concessions by means of the Reversion Decree – is a Bolivian company.

499. Secondly, because Bolivia's decision to revert the Mining Concessions responded to a rational justification: the end the conflicts in the Mallku Khota area and to defend the Indigenous Communities' rights.

---

[612] Treaty, article III(1), **C-1**.

[613] Statement of Claim, ¶ 160.

[614] *Pope & Talbot c. Canada*, CNUDMI (TLCAN) case, award dated 10 April 2001, ¶ 79 (emphasis added), **RLA-124**. *See,*also, *S.D. Myers, Inc. c. Canada*, award dated 13 November 2000, ¶ 250, **RLA-125**.

500. In conclusion, the Arbitral Tribunal shall dismiss SAS' claim based on the alleged violation of Bolivia's obligations to grant full protection and security to SAS' investments, not to adopt arbitrary and discriminatory measures impeding its use and not promoting a less favorable treatment to its investment than to its own investors.

7. IF THE TRIBUNAL CONSIDERS THAT BOLIVIA BREACHED ANY OBLIGATION UNDER THE TREATY OR CUSTOMARY INTERNATIONAL LAW (*QUOD NON*), IT SHALL NOTE THAT SAS HAS NOT PROVEN TO HAVE SUFFERED ANY DAMAGES, AND IN ANY CASE, THE COMPENSATION SHALL BE LIMITED TO THE REIMBURSEMENT OF COSTS

501. The Reversion was lawful. As explained[615], the social chaos and violence caused by SAS forced Bolivia to revert the Mining Concessions on August 1, 2012. Once the Reversion was undertaken, Bolivia took all necessary steps to, following the corresponding legal procedures, hire a company to evaluate CMMK's investments in the Project.

502. Article V(1) of the Treaty establishes that compensation for expropriation "*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*"[616].

503. As may be seen, the Treaty established that compensation is the remedy and that it must correspond to the market value of the expropriated investment, leaving the arbitral tribunal to decide on the adequate valuation method to estimate such value.

504. In *limine*, the Arbitral Tribunal must dismiss SAS's restitution claim for being contrary to the Treaty, and in any event, for not complying with the requirements set forth by international law. (**7.1**).

505. With regard to compensation, it is known in international law that hypothetical damages are not recoverable. Damages claimed by SAS are hypothetical and, even if considered as certain (*quod non*), SAS has not demonstrated that they were caused by Bolivia (**7.2**).

506. Should the Arbitral Tribunal conclude that Bolivia caused certain damages to SAS (*quod non*), compensation should comprise, at most, the investments' value in the Project. This is in harmony with international jurisprudence, that has applied the cost-based approach in speculative contexts where the value of the affected assets is uncertain (**7.3**).

507. Notwithstanding the foregoing, should the Arbitral tribunal conclude (*quod non*) that compensation must be calculated applying the market method (*market-based approach*) proposed by SAS, it must conclude that valuations undertaken by FTI and RPA are arbitrary and incur in several fundamental errors which invalidate them (**7.4**).

508. Contrary to SAS's allegations, international doctrine and jurisprudence acknowledge that lack of compensation payment does not convert *per se* an expropriation into an illegal act.

[615] *See* section 3, *above*.

[616] Treaty, article V(1), **C-1**.

In any event, the Arbitral Tribunal must valuate the Project using as valuation date July 9, 2012 ("the **Bolivia Valuation Date**") and without considering the award's date (**7.5**).

509. Finally, SAS alleges that Bolivia violated other obligations under the Treaty, such as providing a fair and equitable treatment and granting full protection and security. Even if the Arbitral Tribunal considers that Bolivia violated certain obligations (*quod non*), it must conclude that SAS has no right to compensation as it has not demonstrated what damages it suffered from such violations, and much less to how much the damages amount (**7.6**).

7.1 The restutonary claim pretended by SAS is contrary to the Treaty and Customary international Law

510. Even though theoretically possible, restitution has a limited application in international law (**7.1.1**). Also, in this case, restitution is impossible (**7.1.2**) and would impose a disproportionate burden over Bolivia (**7.1.3**). Therefore, it must be dismissed.

7.1.1 Restitution has a very limited application in International law

511. Restitution is a form of reparation which comprises the reestablishment of the situation which existed before the wrongful act was comitted, or *status quo ante*. Even though is true that restitution has been considered as the means of reparation by excellence, as suggested by article 36 of International Law Commission Articles on State Responsibility ("the **Articles on State Responsibility**")[617], its application in international practice is almost non-existent.

512. Indeed, the commonly used remedy to make good for losses suffered by an individual as a consequence of a sovereign State's actions is the payment of a monetary compensation equivalent to the incurred damage. As stated in *Sistem Muhendislik Insaat*:

> *In any event, <u>restoration of expropriated property is plainly no longer the primary judicial remedy in cases of expropriation, if it ever was</u>. Monetary compensation is the normal remedy, and its role is precisely —to take the place of restitution*[618].

513. This is explained, among others, by the evident difficulties arising from forcing a State to restitute an expropriated asset. As stated by Schachter:

---

[617] United Nations, Responsibility of States for Internationally Wrongful Acts, Resolution approved by General Assembly No. A/RES/56/83 dated January 28, 2002 ("Article 36 – Compensation: 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution"), **RLA-126**.

[618] *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kirghizstan*, ICSID Case No. ARB(AF)/06/1, award dated September 9, 2009, ¶ 158, **RLA-127**. See also, *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, award dated July 14, 2006, ¶ 438, **RLA-128**; *BP Exploration Company (Libya) Limited v. Arabic Republic of Libya*, award dated August 1, 1974, 52 I.L.R. 297, 1974, **RLA-129**; and J. Crawford, A. Pellet and S. Olleson, *The Law of International Responsibility*, Oxford Commentaries on International Law, p. 589, **RLA-130**.

The more disputed issue concerns the political and social difficulty in requiring a State to restore property to an individual or company which has been expropriated either as part of a national programme of nationalization or for transfer to nationals under an "indigenization" policy. Even where such expropriation has been held unlawful by an arbitral tribunal, compensation rather than restitution (or specific performance of a concession agreement) has been the more usual remedy[619].

514. SAS is fully aware about this reality: In its Statement of Claim, SAS does not present <u>any</u> authority to support its claim for restitution[620]. That is explained by the fact that, unless we go back several decades in time, in recent times no arbitral tribunal has ordered a State to restitute expropriated goods. Cases brought before the International Centre for Settlement of Investment Disputes – ICSID are good examples. As stated by the tribunal in the *Occidental v. Ecuador* case:

> *<u>the Tribunal is not aware of any case</u> where an ICSID tribunal has granted the kind of specific performance against a State that the Claimants seek in the present arbitration* [621].

515. In any event, in order to be admissible, restitution must fulfill two very strict (cumulative) conditions: (i) it must be possible and (ii) it shall not impose a disproportionate burden compared to the (additional) benefit provided by restitution over compensation. Such conditions are contained in article 35 of the Articles on State Responsibility:

> *Article 35: Restitution*
>
> *A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:*
>
> *(a) is not materially impossible;*
>
> *(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation*[622].

---

[619] O. Schachter, *International Law in Theory and Practice*, 178 Recueil des Cours, 1982, p. 191, **RLA-131**.

[620] Section VI. A (1), misleadingly titled "*South American Silver has right to restitution or monetary equivalent of its investments illegally taken by Bolivia*", SAS only mentions restitution twice: *first*, on paragraph 167 in order to allege (with no grounds whatsoever) that it is entitled to restitution, and *then* in paragraph 182 to indicate that restitution is its first option. That is all SAS's interest (and trust) on its restituting pretension.

[621] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, decision on provisional measures dated August 17, 2007, ¶ 78, (emphasis added), **RLA-132**.

[622] United Nations, *Responsibility of States for Internationally Wrongful Acts*, Resolution approved by General Assembly No. A/RES/56/83 dated January 28, 2002, article 35, **RLA-126**.

516. Even if, for purposes of the analysis, one assumes that Bolivia has committed an international wrongful act (*quod non*), the Arbitral Tribunal cannot order restitution since none of its conditions are met in this case.

7.1.2 In this case, restitution is impossible

517. In the international context, the fact that restitution is impossible in cases of expropriation is broadly accepted because it would suppose an unacceptable interference in the Respondent State's sovereignty. As stated in *LIAMCO v. Libya*:

> [The] *general principle is common to international law, in which restitutio in integrum is conditioned by the possibility of performance, and consequently hindered by its impossibility.*
>
> *Such impossibility is in fact most usual in the international field. For this reason, it has been asserted that "it is impossible to compel a State to make restitution, this would constitute in fact an intolerable interference in the internal sovereignty of States"*[623].

518. In that same sense, the *Occidental v. Ecuador* tribunal explained that:

> *It is well established that where a State has, in the exercise of its sovereign powers, put an end to a contract or a license, or any other foreign investor's entitlement, specific performance must be deemed legally impossible.*[624].

519. Order Bolivia to restitute the Mining Concessions, besides reviving social conflicts in the area, would lead to an unacceptable intromission in its sovereignty, and specifically in its executive branch of government as it would mean repudiating the scope and effects of the Reversion Decree adopted by the President of the Plurinational State of Bolivia and its Ministers Council on August 1, 2012. As stated by *LG&E Energy Corp.*:

> *The judicial restitution required in this case would imply modification of the current legal situation by annulling or enacting legislative and administrative measures that make over the effect of the legislation in breach. The Tribunal cannot compel Argentina to do so without a sentiment of undue interference with its sovereignty.*

---

[623] *Libyan American Oil company (LIAMCO) v. Government of Libya*, award dated April 12, 1977, 20 I.L.M., 1981, p. 124 (emphasis added), **RLA-133**.

[624] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, decision on provisional measures dated August 17, 2007, ¶ 79, (emphasis added), **RLA-132**.

Consequently, the Tribunal arrives at the same conclusion: the need to order and quantify compensation[625].

520. Should SAS wanted to ask for the revocation of the Reversion Decree, it should have initiated the proper legal actions in Bolivia. However, this never happened. The Tribunal cannot substitute the Bolivian competent entity and revoke the Decree[626].

521. In any event, restitution of the Mining Concession in favor of SAS would not achieve any purpose. Local community still suffers the abuse and violations to its rights, thus there is a major opposition to SAS returning to the area and resuming the Project. The Mining Concessions' restitution would generate a risk that would make the Project's development impossible to undertake[627].

7.1.3 Restitution would impose a disproportionate burden on Bolivia

522. The second condition for restitution to proceed is not to *involve a burden out of all proportion to the benefit deriving from restitution instead of compensation*. Such condition was not fulfilled either in this case.

523. *In the first place*, assuming that restitution is possible (*quod non*), it would result out of proportion to interfere with a State's sovereignty when damages can be entirely made good by means of a monetary compensation. As stated by the *Occidental v. Ecuador* tribunal:

---

[625] LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Republic of Argentina, ICSID Case No. ARB/02/1, award dated July 25, 2007, ¶ 87, (emphasis added), **RLA-134**. *See*, also, BP Exploration Company (Libya) Limited v. Arab Republic of Libya, award dated August 1, 1974, 52 I.L.R. 297, 1974 ("a reasonability rule leads to a conclusion which is congruent with international law, as arising from the States' practice, and the treaties laws and the recto principle of English and American law on contracts, consisting in the fact that if a State in exercise of its sovereign powers, has incurred in a fundamental violation of a concession agreement, repudiating this latter by means of nationalization of the company or its assets in a manner implying intention, the concessionaire has no right to demand specific fulfillment of the agreement by the Government nor the reestablishment of its contractual rights, but its only remedy is a damages and losses action") p. 354, **RLA-129**.

[626] In *Amco*, even though the tribunal considered that the plaintiff was deprived from its rights, such tribunal adverted that it lacks of necessary authority to order restitution because it could not replace the competent entity (as per internal law) to make such decisions. The *Amco* tribunal considered that it was entitled only to order payment of compensation for economic losses. *See Amco Asia Corpd. v. Indonesia*, ICSID Case No. ARB/81/1, award dated November 20, 1984, ¶ 202, **CLA-78**; and D. W. Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach*, 59 British Yearbokk of International Law, p. 60, 1988, **CLA-73**.

[627] Acknowledging such impossibility, Oscar Schachter states "there may be reasons of a material or social character that make it "impossible" or "impracticable" for the offending State to restore the situation to its prior state". O. Schachter, International Law in Theory and Practice, 178 Recueil des Cours, 1982, p. 190, **RLA-131**.

> *To impose on a sovereign State reinstatement of a foreign investor in its concession, after a nationalization or termination of a concession license or contract by the State, would constitute a reparation disproportional to its interference with the sovereignty of the State when compared to monetary compensation*[628].

524. The alleged damages suffered by SAS can be entirely redressed by means of a monetary compensation. This is acknowledged by SAS on its Statement of Claim when requesting payment of an amount that "*wipe out all the consequences of the illegal act*"[629], and SAS reaffirms such petition in its press notes regarding the Project's situation, where it refers to "*pursuit of compensation*"[630]. It is not under dispute that the rights SAS pretends to claim in this arbitration have an exclusively economic nature.

525. Also, the Treaty provides that in cases of expropriation, the applicable remedy is monetary compensation. Article V(1) clearly states that it corresponds to the payment of a "*just and effective compensation*". Having being agreed upon by the Contracting Parties, there is no reason to think that compensation is not suitable or that it does not compensate SAS adequately.

526. *Secondly*, in consideration of the social context in the Project's area, restitution of the Mining Concessions would only contribute to revive chaos, generating new violent confrontations and turning social situation unsustainable. This situation would generate an out of proportion burden over Bolivia. When restitution is contrary to the society's interests, it must be discarded[631].

527. Based on the foregoing, the Arbitral Tribunal must dismiss SAS's restituting pretension. If, *par impossible*, the Tribunal considers restitution viable and decides to compensate SAS for delays in the Project's development, it must note that FTI's valuation is arbitrary and must be dismissed[632].

7.2 The damages claimed by SAS are hypothetical and, even if they existed (*quod non*), SAS has not proved they were caused by Bolivia

---

[628] Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11, decision on provisional measures dated August 17, 2007, ¶ 84, **RLA-132**.

[629] Statement of Claim, ¶ 183.

[630] SASC Press communication, South American Silver Announces Receipt of Formal Decree and Provides Update on Plan Action of August 2, 2012 ("We will continue to pursue all channels available to us' said Greg Johnson, President and CEO of South American Silver Corp."This action plan includes the prospect of negotiating a resolution of the situation with the Bolivian government, or, if required, <u>the pursuit of compensation for the full value of the project</u> through international arbitration'), (emphasis added), **R-120**.

[631] J. Crawford, A. Pellet and S. Olleson, The Law of International Responsibility, Oxford Commentaries on International Law, p. 597, ("Thus it seems important that the limits on restitution should be flexibly interpreted, ideally in such a way as to cover cases such as Walter Fletcher Smith, where the Tribunal simply held that <u>in the best interests of the parties it would not award restitution</u>"), (emphasis added), **RLA-130**.

[632] Brattle, section VII, **RER-3**.

Principles acknowledged by international law are that the hypothetical or speculative damage is not recoverable (**7.2.1**) and that the burden of demonstrating the certainty of damages corresponds to whom demands them (**7.2.2**). SAS has not demonstrated having suffered certain damages (**7.2.3**) and, even if the Arbitral Tribunal thinks otherwise (*quod non*), it must conclude that the dominant cause of such damages was SAS's own misconduct, and thus Bolivia should not compensate them (**7.2.4**).

7.2.1 Hypothetical or speculative damages are not recoverable

528. Under international law, an act, even an unlawfull one, does not create the obligation to compensate the victim if this victim does not demonstrate having suffered a certain economic damage. The award in the Chorzów case states that "*the Court can only observe that the damage alleged to have resulted from competition is* <u>*insufficiently proved*</u>*. Moreover,* <u>*it would come under the heading of possible but contingent and indeterminate damage which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account*</u>"[633].

529. The Mixed Claims Commission USA-Venezuela affirmed on early XX century, that "[d]*amages to be recoverable must be shown with a reasonable degree of certainty, and cannot be recovered for an uncertain loss*"[634]. Also, the Iran-United States Claims Tribunal declares that: "*one of the best settled rules of the law on international responsibility of States is that* <u>*no reparation for speculative or uncertain damage can be awarded*</u>"[635]. Similarly, *LG&E Energy Corp* declared that *"Tribunals have been reluctant to provide compensation for claims with inherently speculative elements*"[636]. Finally, the *Gemplus* case tribunal affirmed that "[*I*]*f that loss is found to be too uncertain or speculative or*

---

[633] *Chorzów factory (Germany v. Poland)*, IPCJ Case No. 13, award dated September 13, 1928, p. 48 (emphasis added), **CLA-69**.

[634] *Rudloff*, Mixed Claim Commission Venezuela – United States of America, merit decision, IX Reports of International Arbitral Awards, 2006, p. 258, **RLA-135**.

[635] *Amoco Internacional Finance Corporation v. Islamic Republic of Iran*, Iran-United States of America Claims Tribunal Case No. 56, award dated July 14, 1987, ¶ 238, (emphasis added), **CLA-29**. *See,* also, *The Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, ICPJ Case, award dated March 26, 1925, ICPJ Series A02, No. 5, 1925, p. 390 ("*although United Kingdom breached its international obligations, no compensation was awarded for no damages were demonstrated*: *—That no loss to M. Mavrommatis, resulting from this circumstance, has been proved; That therefore the Greek Government's claim for an indemnity must be dismissed*"), **RLA-136**; *Martini (Italia v. Venezuela) 2 U.N.R.I.A.A 554,* award dated May 8, 1930, 25 American Journal of International Law, 1931, p. 585 (there is no economic compensation for the concession agreement's termination if no damage is demonstrated: "*For the reasons given above, the Arbitral Tribunal considers that there is no ground to allow pecuniary reparation to the Italian Government as a result of the cancellation of the contract of concession. It has not been proven that the Martini Company has suffered other damages as a consequence of the parts of the decision vitiated with manifest injustice*"), **RLA-137**.

[636] LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Republic of Argentina, ICSID Case No. ARB/02/1, award dated july 25, 2007, ¶ 51, **RLA-134**.

otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent"[637].

530. Hypothetical damages are no recoverable. SAS must demonstrate that its damages are real.

7.2.2 The burden of the proof of the certainty of damages falls on SA

531. It is an indisputable principle of international law that the burden to prove certainty of damages is on claimant, *i.e.* SAS (*actori incumbit probatio*).

532. Such principle was recently acknowledged in *Gemplus* and *Gold Reserve Inc*. cases:

> *Under international law and the BITs, the Claimants bear the overall burden of proving the loss founding their claims for compensation*[638].
>
> *The Tribunal agrees with the Parties that Claimant bears the burden of proving its claimed damages*[639].

533. In doctrine, Ripinsky and Williams confirm this principle:

> *In the damages context, it is always the claimant who alleges that it has suffered a loss as a result of the respondent's conduct; therefore, the claimant bears the burden of proof in relation to the fact and the amount of loss*[640].

534. SAS has the burden to prove the certainty of its damages. In this case, SAS has not fulfilled such burden.

7.2.3 SAS has not proven that its damages are certain

535. There is abundant evidence regarding the Project's embryonic stage as of the Reversion date and the enormous uncertainty over the actual existence of a mine in Mallku Khota (and much more uncertainty over the minerals to be extracted). Any future prospect on the Project, as presented by SAS in this arbitration, is merely speculative.

536. This is confirmed by Prof. Dagdelen, mining expert appointed by Bolivia for this arbitration. Prof. Dagdelen has more than 30 years of experience in the mining industry, having worked with some of the biggest mining companies worldwide such as Newmont Mining,

---

[637] Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. United States of Mexico, ICSID Case No. ARB(AF)/04/3, award dated June 16, 2010, ¶¶ 12-56, **RLA-138**.

[638] *Id*., ¶ 12-56. *See* also ¶¶ 13-80 of the award.

[639] Gold Reserve Inc. c. Boliviarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/01, award dated September 22, 2014, ¶ 685, **RLA-27**. See also, recent decision in case British Caribbean Bank Limited (Turks & Caicos) v. Belize, PCA Case No. 2010-18, award dated December 19, 2014, ¶ 266, **RLA-139**, as well as S.D. Myers, Inc. v. Canada, partial award dated November 13, 2000, ¶ 316, **RLA-125**.

[640] S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008, p. 162, **RLA-10**.

Barrick Gold and Phelps Dodge in mining projects located in United States, Canada, Africa, South America and Turkey. Prof. Dagdelen's work has been focused on, among others, estimation of resources and mineral reserves, and valuation of technical reports, matters of great relevance in this arbitration. Prof. Dagdelen is also a renowned academic. He holds a PhD degree and is Professor of Mining Engineering in the prestigious Colorado School of Mines , where he was Head of the Mining Engineering Department between 2008 and 2012. In 2012, Prof. Dagdelen was honored with the "Distinguished Member" award by the Society of Mining, Exploration and Metallurgy, due to his outstanding academic and professional experience.

537. *First*, as explained by Prof. Dagdelen[641], mining projects must go through several stages, each presenting uncertainties (to a greater or lesser degree) that risk the mining project's development (assuming that it has an economic value).

538. A mining project begins by undertaking exploration activities that initially involve field work, studies and limited drilling, and its results normally materialize in a *Preliminary Economic Assessment* ("the **PEA**"). As explained by Prof. Dagdelen, the PEA "*is a first level study and the preliminary evaluation of the mining project. The principal parameters for a conceptual study are mostly assumed and/or factored. Accordingly, the level of accuracy is low*[642]. This is why, contrary to what its denomination may suggest, the PEA does not constitute a solid economic study and "*is not valid for economic decision-making nor is it sufficient for reserve reporting to securities regulators*"[643].

539. Indeed, the PEA is a conceptual study that just allows deciding –based on non corroborated assumptions– whether it is convenient to continue exploring or not. In the affirmative, new and more detailed exploration studies should be undertaken which will lead to, first, a prefeasibility study and, if results are favorable, to a feasibility study. Such studies allow completing the limited amount of drilling undertaken at the PEA level. Based on the feasibility study one can evaluate the economic viability of a mining project. It is not disputed that the Project never passed the PEA level.

540. Parallel to the foregoing studies, a substantial work on environmental and social aspects must be undertaken. As stated by Prof. Dagdelen:

> *Throughout the evaluation and design process, a substantial body of work needs to be completed on environmental and social issues. In most projects, consultations with local authorities and communities on the environmental and social aspects related to the project and environmental baseline studies (which define the state of the receiving environment) must be conducted in order to prepare an Environmental and Social Impact Assessment (ESIA) report on the project*[644].

[641] Dagdelen, ¶ 12-61, **RER-2**.

[642] *Id*., ¶ 34.

[643] *Id*.

[644] *Id*., ¶ 28, **RER-2**.

541. Should the results of the exploration and of the environmental and social studies be favorable, the process to obtain permits and licenses initiates, which constitutes a pre-requirement to get external financing.

542. Given the magnitude of mining projects and the great number of actors involved (State, social communities, contractors, financial experts, environmental protection organisms, etc.), it takes several years to go through the above mentioned stages.

543. Assuming again that results from the foregoing stages are favorable, other activities of great complexity and cost must then be undertaken (e.g. construction of mining facilities, project's start-up, etc.).

544. It can take between 15 to 20 years from the discovery of a mining site to a mine's production stage[645]. Given the process's complexity and its uncertainties, as stated by Prof. Dagdelen, only a minimum percentage of the mining projects are able to be developed:

> *In practice, <u>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</u>. For example, the Minas Conga mine in Cajamarca, Peru could not be developed into an operational mine, despite having projected reserves of over 6 million ounces of gold to produce 350,000 ounces of gold and 120,000,000 pounds of cooper per annum with a 19 year life of mine, because of social and environmental issues related to the contamination and the usage of water. Thus, there are many factors that affect whether a mineral deposit will become an operating mine irrespective of the projected level of resources and reserves*[646].

545. The exceptional case in which a mining project becomes developed is also acknowledged by one of the RPA report authors: "*Only a very small number of exploration properties will ultimately become mining properties*"[647].

546. The Mallku Khota Project was at the earliest stage of development of a mining project: the exploration stage, having only a conceptual study denominated PEA[648] that, as explained below, stands out for its level of speculation and inaccuracy[649]. In this context, besides the

---

[645] *Id.*, ¶ 33.

[646] *Id.*, ¶ 32, (emphasis added).

[647] W. E. Roscoe, Valuation of Mineral Exploration properties Using the Cost-Based Approach, p. 2, **R-121**.

[648] We refer to the Preliminary Economic Assessment Report for the Malku Khota Project dated march 13, 2009, **C-13** (the "PEA 2009"), and to the Preliminary Economic Assessment Update Technical Report for the Malku Khota Project dated May 10, 2011, **C-14** (the "PEA 2011").

[649] Unlike prefeasibility and feasibility studies, the PEA does not involve the undertaking of any engineering task and has an uncertainty level of +-50%. Dagdelen, ¶¶ 34-37, **RER-2**.

Project's *geological* and *economic* uncertainty[650], it had to go through several stages and face uncertainties associated to such stages (with uncertain results). For example, the Project should have fulfilled the local communities' previous consultation stage[651] before initiating any exploitation activities[652]. Given the local social context, there is more than a reasonable doubt that the Project would have obtained approval to such previous consultation. Also, an Environmental Impact Study should have been undertaken to evaluate the Project's impact on flora, fauna, different endangered species and natural ecosystems existing in the Project's area[653].

547. *Second*, as stated above, the Project only had a PEA. Precisely, for being a (i) preliminary document; (ii) based on non-corroborated assumptions and (iii) with a very low level of reliability, the PEA is considered in practice as a mere conceptual study ("*conceptual, scoping study*")[654].

548. As Prof. Dagdelen states:

> *The conceptual study, also commonly referred to as a "Preliminary Economic Assessment (PEA)", is a first level study and the preliminary evaluation of the mining Project. The principal parameters of a conceptual study are mostly assumed and/or factored. Accordingly, the level of accuracy is low*[655].

549. The 2009 and 2011 PEAs prepared for the Project, explicitly acknowledge its speculative character. Indeed, they state that: (i) they are based on limited and disperse information; (ii) subsequent studies may demonstrate that the PEA's assumptions must be considerably adjusted; (iii) estimated resources may be inaccurate; and (iv) there is no certainty that the projected results will be reached:

PEA 2009

---

[650] As explained by Prof. Dagdelen, GeoVector (and therefore RPA, who confirmed its mineral resources estimation) overestimate the quantity of mineral resources and underestimate the quantity of inferred mineral resources (Dagdelen, ¶ 80, **RER-2**). Also, PEA 2011 acknowledges that its costs estimation have an uncertainty level of +-35% - 50%. See PEA 2011, p. 16, **C-14**.

[651] Statement of Claim, footnote 172.

[652] No social studies were undertaken for the Project. *See* Preliminary Economic Assessment Update Report for the Mallku Khota Project, May 10, 2011, p. 113 ("*The environmental and social review process will be carried out in parallel with the feasibility study stages*"), **C-14**.

[653] Referring to environmental studies, PEA 2009 states that: "*[T]hese studies will have to include but are not limited to the collection of data on flora and fauna studies including the identification of rare and endangered species; hydrogeological and hydrology data collection; soil studies; geotechnical data collection including an analysis of the regional seismicity; and an overall analysis of impacts on the local project environment […] In the areas possibly impacted by any future mining activity are several high elevation alpine lakes, which may constitute sensitive environmental ecosystems, and the potential impacts to these lakes will require careful study"*. PEA 2009, p. 18.2, **C-13**.

[654] Dagdelen, ¶¶ 46, **RER-2**.

[655] *Id*., ¶ 34 (emphasis added).

There is *no certainty that a detailed feasibility study would result in a decision to place the property into production. The risks associated with the Project are similar to those for all projects* *at this stage, including,* *but not limited to:*

- The resources as calculated may not be born out in subsequent estimations after the drilling programs are completed, creating either lower tonnages and/or lower grades.

- The resource estimate is based in some cases on relatively sparse data. More exploration and detailed measurements may reveal that these assumptions require considerable modification and that they were unrealistic[656].

PEA 2011

There is no certainty that the results projected in the PEA will be realized and actual results may vary substantially[657].

No reserve estimate has been carried out for the PEA because the extent of mineralization is not considered sufficiently defined at this stage to create a reserve. This PEA is preliminary in nature and includes inferred mineral resources that are considered too speculative geologically to have the economic considerations applied to them that would enable them to be categorized as mineral reserves and there is no certainty that the preliminary assessment will be realized. Mineral resources that are not mineral reserves do not have economic viability[658].

550. The Project's PEA 2011 did not identify any mineral reserve, so –even under its own assumptions– there is no evidence on the economic potential of extraction. Indeed, the sole identification of mineral resources does not guarantee that the extraction is economically viable, for that shall depend, among others, on the analysis of several geological (density, type of precious metal) and economic (location, extraction costs, metallurgical process employed) factors, which are precisely the subject of more advanced prefeasibility and feasibility studies, not undertaken for the Project.

551. The same speculation degree exists regarding the Project's *estimated* costs that, as evidently, have a fundamental impact on its value. The PEA 2011 acknowledges that its estimations have an uncertainty ranging +-35% -50%.

Capital and operating cost estimates for this PEA Update are expressed in US dollars, based on Q1 2011 costs. Estimates have a scoping study accuracy range of +- 35-50% and do not include provisions for inflation risks or future Price escalation factors[659].

---

[656] PEA 2009, March 13, 2009, p. 19.1, **C-13**.

[657] *Id*., p. 1.1 and PEA 2011, May 10, 2011, p. 11, **C-14**.

[658] *Id*., p. 14 (emphasis added). *See,* also, Financial Report 2011, *Mineral Reserves and Mineral Resources*, p. 181, **R-122**.

[659] Preliminary Economic Assessment Update Report for the Mallku Khota Project, May 10, 2011, p. 16, **C-14**.

552. As explained by Brattle[660], if one considers that small variations in costs may deprive the Project of any value, speculation becomes evident. Comparing two mining projects with identical characteristics, Brattle states that:

> *As shown in Table 1, the seemingly small difference in costs creates very large differences in the present value of the two mines' cash flows. The value of the first mine, which requires $500 million in initial capital investment and has expected operating costs of $17 per ounce of silver, is $108 million. If initial capital costs are increased by 10%, the value falls roughly by half. If only operating costs are increased by 10%, the project value is wiped out. If both operating and capital costs increased by only 5% due to the more challenging location or geological properties of the second mine, the value drops by nearly 85%. In other words, these otherwise identical mines have values that differ by a factor of more than five times due only to small differences in costs related to location, well within the margin of error for cost estimates available at this stage of development. Cost differences due to differing ore grades or stripping ratios could create similar differences in value*[661].

553. Based on the foregoing, when releasing the results of the PEA 2011 to the market, regulations applicable to Canadian mining companies forced SASC to include *cautionary language*:

> *Under the second element of the definition, a PEA is a conceptual study of the potential viability of mineral resources. In this context, section 3.4(e) of NI 43-101 <u>requires specific cautionary language indicating that the economic viability of the mineral resources has not been demonstrated</u>. This cautionary language is <u>in addition to the cautionary statement for inferred mineral resources</u> required by section 2.3(3)(a). <u>Any disclosure that implies the PEA has demonstrated economic or technical viability would be contrary to NI 43-101 and the definition of PEA</u>*[662].

554. SASC observed such mandate by stating:

> *Factors that could cause results or events to differ <u>materially</u> from current expectations expressed or implied by the forward-looking statements, include, but are not limited to, <u>possible variations in mineral resources, grade or recovery rates</u>, silver or indium prices or <u>operating or capital costs</u>* […] *failure of equipment or processes to operate as anticipated; <u>ongoing positive community support</u>*[663].

---

[660] Brattle, ¶ 38, **RER-3**.

[661] *Id*., ¶ 27 (emphasis added). See also p. 19 of PEA 2011 ("The Project is also sensitive to operating cost changes (mining, processing and G&A), with each 1% change impacting NPV around $12.7M"), **C-14**.

[662] Canadian Securities Administrators, CSA Notice 43-307 Mining Technical Reports – Preliminary Economic Assessments dated August 16, 2012, **R-123**.

[663] *See* Press Communication from SAS, South American Silver provides Update on Malku Khota Silver-Indium Project May 4, 2011, which also provides "*This press release contains forward-looking statements*

555. *Third*, the estimation of resources undertaken by Geovector and confirmed by RPA (i) is wrong; and (ii) is based on limited geological studies which do not allow determination of mineral reserves[664].

556. As to first point, as [redacted] demonstrates, from the limited available data one can imply that [redacted] overestimated the quantity of mineral resources indicated in [redacted] millions and underestimated the quantity of inferred mineral resources in [redacted] million, [redacted][665].

557. [redacted]. Brattle adds that:

> *the Project is not sufficiently advanced to enable the calculation of reserves. Reserves are the portion of the resource base that can be mined economically, after taking into account geological structure, geophysical elements, mine plan, metallurgical recoveries, treatment and refining logistics, metals prices, and mining costs. This explains why the Updated PEA concludes that mineral resources do not have economic viability*[667].

558. The fact that identified mineral resources have not been classified as *mineral reserves* is clear evidence of the limited studies undertaken and the uncertainty surrounding the Project. One can only consider extraction as economically viable when mineral reserves exist and this must be demonstrated, at least, by a prefeasibility study[668]. Until then, any economic study is eminently speculative[669].

559. Also, according to the PEA 2011, more than 55% of the Project's mineral resources are inferred[670]. In the mining industry, it is a fact that such resources <u>have no value at all</u>. As

---

<u>based on current expectations and assumptions and which involve known and unknown risks, uncertainties and other factors</u> […] Readers are cautioned not to place undue reliance on these statements as <u>actual events, results and achievements may differ materially from any future events, results or achievements expressed or implied by such forward-looking statements</u> if known or unknown risks, uncertainties or other factors occur or assumptions prove inaccurate. Therefore, <u>the Company cannot provide any assurance that forward-looking statements will materialize</u>" (emphasis added), **R-124**.

[664] Dagdelen, ¶ 123-127, **RER-2**.

[665] *Id.*, ¶ 80.

[666] *Id.*, ¶ 70 (emphasis added).

[667] Brattle, ¶ 33 (emphasis added), **RER-3**.

[668] CIM Standing Committee on Reserve Definitions, CIM Definition Standards - For Mineral Resources and Mineral Reserves, p. 3, **R-125**.

[669] Dagdelen, ¶ 34, **RER-2**.

[670] Id., ¶ 73. As explained by Prof. Dagdelen, an inferred mineral resource "*is that part of a Mineral Resource for which quantity and grade or quality can be estimated on the basis of geological evidence and limited*

explained by the *Canadian Institute of Mining, Metallurgy and Petroleum Standing Committee on Reserve Definitions:*

> *Due to the uncertainty that may be attached to Inferred Mineral Resources, it cannot be assumed that all or any part of an Inferred Mineral Resource will be upgraded to an Indicated or Measured Mineral Resource as a result of continued exploration. Confidence in the estimate is insufficient to allow the meaningful application of technical and economic parameters or to enable an evaluation of economic viability worthy of public disclosure. Inferred Mineral Resources must be excluded from estimates forming the basis of feasibility or other economic studies*[671].

560. This is also the view of arbitral tribunals. As stated in *Gold Reserve Inc.*:

> *Given that, as described by Respondent, these resources have the "lowest level of geological confidence" and that the Canadian Institute of Mining, Metallurgy and Petroleum on Valuation of Mineral Properties ("**CIMVal**") Guidelines, to which Claimant refers, acknowledges the "higher risk or uncertainty" associated with these resources and cautions that they should only be used with great care, the Tribunal finds the additional resources to be too speculative to include in the present valuation*[672].

561. The limited nature of the geological studies undertaken, reflected on the mere existence of a PEA and on the impossibility of identifying mineral reserves, creates serious doubts as to the existence of all the mineral resources estimated in the PEA 2011 (specially inferred mineral resources).

562. *Fourth*, as explained by Prof. Dagdelen[673] and acknowledged in the PEA 2009[674], the metallurgical studies undertaken were at an incipient stage, and there was no certainty on the possibility of using –at a commercial scale– the *acid leaching technique*. The different metals existing in the Project may only be extracted by means of this technique. If such technique does not work and SASC must use the *cyanide leaching technique*, an alternative

---

sampling and reasonably assumed, but not verified, geological and grade continuity. The estimate is based on limited information and sampling gathered through appropriate techniques from locations such as outcrops, trenches, pits, workings and drill holes". Id., ¶ 18.

[671] CIM Standing Committee on Reserve Definitions*, CIM Definition Standards - For Mineral Resources and Mineral Reserves* (emphasis added), **R-125**. *See,* also PEA 2011, p. 14, **C-14**.

[672] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/01, award dated September 22, 2014, ¶ 780 (emphasis added), **RLA-27**.

[673] Dagdelen, ¶ 89, **RER-2**.

[674] In the PEA 2009 it was states that: "T*he recovery values determined in the metallurgical test work and those assumed for this conceptual study are presented in Table 18-9. As shown in the Table, the test results representing a heap leaching operation are very limited*". PEA 2009, p. 18.18 (emphasis added), **C-13**.

method considered in the PEA 2011[675], only silver and potentially copper may be extracted from the Project[676] (leaching based on cyanide, due to chemical reasons, does not allow extraction of any other metals). The impact of both methods in the precious metals recovery values and thus in the Projects viability, is evident. Given the Project's status, it is not possible to know which metallurgic process could have been used.

563. *Fifth*, without any grounds whatsoever, the [redacted] adds [redacted] per each ton of mineral resource identified in the Project, responding to supposedly existing gold credits. This is wrong. [redacted]. The evident effect is that the [redacted] inflates in [redacted] the supposed value of the Project's mineral deposit.

564. Based on the foregoing, the Arbitral Tribunal must conclude that SAS's claimed damages for the Mining Concessions reversion are merely hypothetical and thus should not be compensated. As stated by Prof. Dagdelen in his report's conclusions:

> *Due to the insufficient number of drill holes available (resulting in significant uncertainty related to Mineral Resource estimates), the uncertainty regarding the metallurgical process and the recoveries based on insufficient test work, and the lack of environmental and social baseline studies (that can result in permitting issues to prevent economic extraction from a given deposit), one cannot classify Mineral Resources estimates into Mineral Reserves that have economic implications at Malku Khota*[678].

7.2.4 Even if the Arbitral Tribunal finds that SAS has suffered certain damages, these were caused by SAS, not by Bolivia

565. Besides being real, in order for a damage to be recoverable, international law requires the existence of adequate causality: the damage must derive from an unlawfull act. As stated by *S.D. Myers*:

> *Compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific* [treaty] *provision that has been breached; the economic losses claimed by* [the claimant] *must be proved to be those that have arisen from a breach of the* [treaty]*, and not from other causes*[679].

---

[675] PEA 2011, p. 19, **C-14**.

[676] Dagdelen, ¶ 67, **RER-2**. Also, extraccion under the *cyanide leaching technique* results more onerous.

[677] Id., ¶ 84 (emphasis added), **RER-2**.

[678] Id., ¶ 126, **RER-2**.

[679] S.D. Myers, Inc. v. Canada, partial award dated November 13, 2000, ¶ 316, **RLA-125**. See also, BG Group Plc. v. Republic of Argentina, UNCITRAL, Award dated December 24, 2007, ¶ 428 ("*The damage, nonetheless, must be the consequence or the proximate cause of the wrongful act*"), **CLA-04**; and Metalclad Corporation v. United States of Mexico, case ICSID No. ARB(AF)/97/1, award dated August 30, 2000, ¶ 115, **RLA-141**.

566. Article 31 of the Articles on State responsibility provides that:

> 1. *The responsible State is under an obligation to make full reparation for the* <u>*injury caused*</u> *by the internationally wrongful act.*
> 2. *Injury comprises any damage, whether material or moral,* <u>*caused*</u> *by the internationally wrongful act of a State*[680].

567. The burden of proof regarding the existence and sufficiency of such causal link is on the person who claims damages[681]. SAS has not fulfilled such burden.

568. Indeed, as Bolivia has made clear[682], the social opposition to the Project was caused by SAS. Among others, it is important to remember that:

- [redacted]

- CMMK breached its assistance commitments with Indigenous Communities, who denounced the Company for having settled in the area through "*tricky proposals of projects*";

- The Company insisted on developing the Project at any cost, even though Indigenous Communities had manifested in several occasions that it would risk their ancestral lifestyles and the fragile environmental balance in the area;

- Considering the enormous opposition to the Project, the Company designed a strategy to involve distant Communities out of the Zone of Influence, which would be easily persuaded as they were not directly affected by the Project. The Company even sponsored members of such communities in the creation of a committee unfamiliar to the Ancestral and Union Organization (COTOA-6A) to cast a shadow over the complaints of people who opposed the project (the real

---

[680] United Nations, *Responsibility of States for Internationally Wrongful Acts*, Resolution approved by General Assembly No. A/RES/56/83 dated January 28, 2002, **CLA-126**.

[681] *See* Biwater Gauff (Tanzania) Limited v. Tanzania, ICSID Case No. ARB/05/22, award dated July 24, 2008, ¶ 787 ("*The Arbitral Tribunal considers that in order to succeed in its claim for compensation, BGT has to prove that the value of its investment was diminished or eliminated, and that the actions BGT complains of were the actual and proximate cause of such diminution in, or elimination of, value*"), **RLA-142**; and S. Ripinsky and K. Williams, Damages in International Investment Law, British Institute of International and Comparative Law, 2008, p. 162 ("*In the damages context, it is always the claimant who alleges that it has suffered a loss as a result of the respondent's conduct; therefore, the claimant bears the burden of proof in relation to the fact and the amount of loss, as well as to the causal link between the respondent's conduct and the loss*"), **RLA-103**.

[682] *See* section 3, *above*.

affected), which ended in serious confrontations. CMMK also hired transportation for supporters to massively assist the Acasio meeting, which ended in a violent confrontation that risked the life of Potosi Governor; and

- Between 2011 and 2012, CMMK met with Central Government's officers in La Paz with the purpose of misinforming them about the existence of a genuine opposition in the Project's area and to gain its support, in detriment of the Departmental Government's mediating efforts and the interests of surrounding communities truly affected by the Project.

569. In this context, despite Potosi Government's mediation efforts, serious confrontations occurred, leading to kidnappings, wounded people and one death, forcing Bolivia to revert the Mining Concessions. These events make it clear that, although the Reversion was a *formal act* that put an end to SAS's exploration activities, SAS was the real causing agent of its damages.

570. Analysis of causality includes identifying which was the *dominant* cause of damages. When such cause is related to the plaintiff's conduct, as in this case, the causality on which the right to any compensation depends is broken. As the ICJ stated in *ELSI*:

> *Furthermore, one feature of ELSI's position stands out: the uncertain and speculative character of the causal connection, on which the Applicant's case relies, between the requisition and the results attributed to it by the Applicant. <u>There were several causes acting together that led to the disaster to ELSI</u>. No doubt the effects of the requisition might have been one of the factors involved. <u>But the underlying cause was ELSI's headlong course towards insolvency</u>; which state of affairs it seems to have attained even prior to the requisition*[683].

571. Making reference to the *ELSI* case, the *Biwater* tribunal stated that:

> *In that case, the ICJ held that <u>the primary cause</u> of the claimant's difficulties lay <u>in its own mismanagement over a period of years</u>, and not the act of requisition imposed by the governmental authorities*[684].

572. Based on the foregoing, and considering that SAS's own actions were the *dominant* cause for any suffered damage; Bolivia has no obligation to compensate it.

---

[683] *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, ICJ Case, award dated July 20, 1989, ¶ 101, (emphasis added), **RLA-17**.

[684] *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID Case No. ARB/05/22, award dated July 24, 2008, ¶ 786, **RLA-142**. It is noted that in *Biwater* the tribunal applied the same analysis of dominant cause used in *ELSI* (see ¶ 787).

7.3 If, ***par impossible***, the Arbitral Tribunal finds that a recoverable damage exist, any compensation shall be limited to the reimbursement of the costs incurred by SAS in relation to the Project

573. For the reasons expressed in section 7.2.3 above, there cannot be any doubt regarding the Project's speculative nature –in an economic, geological and legal level. Despite the foregoing, should the Arbitral Tribunal conclude that SAS should be compensated, such compensation must be limited to reimbursement of the undertaken investments (**7.3.1**). Based on SASC's financial statements, Brattle has evaluated such investments in the amount of USD18,706,936 (**7.3.2**).

7.3.1 Given the speculative nature of the Project, any compensation must be limited to the reimbursement of costs made by SAS

574. In this case, SAS's experts acknowledge that the Discounted Cash Flow ("**DCF**") method is not applicable because the Project was in an incipient stage and there was not a prefeasibility study[685]. Notwithstanding the foregoing limitations, FTI considers the *market-based approach* appropriate in order to determine the Project's value[686].

575. This is wrong for at least three reasons:

576. *First*, because as explained above, the Project was at an embryonic stage (PEA), with only a conceptual study (PEA) that, besides being based on wrong and speculative *geological* and *economic* assumptions, considered that more than 50% of the Project's resources were inferred mineral resources, *i.e.*, resources with no economic value[687].

577. In this context, that explains the absence of *mineral reserves*, a valuation based on the *market-based approach* faces the same difficulties than a DCF valuation. The Project's speculative nature does not fade out by applying the *market-based approach*. Using the comparables method is unsupported: How do you expect to obtain a reliable result via comparison, if there is no certainty regarding the existing minerals resources, the metallurgic process to be used or the costs related to the Project's development? As explained by Brattle "*to attempt to compare properties based in metal contents within inferred or historic resources is even more problematic, as we have no way of knowing if that resource is there and what value, if any, market participants put on those resources*"[688]. Should the Arbitral Tribunal apply the *market-based approach* in these

---

[685] *See* Expert Report RPA, p. 3.1, **CER-2** and Expert Report FTI, ¶ 8.33, **CER-1**.

[686] *See* Expert Report RPA, p. 3-2, **CER-2** and Expert Report FTI, ¶ 2.3, **CER-1**.

[687] It is convenient to reiterate, following CIM Definition Standards that —it cannot be assumed that all or any part of an Inferred Mineral Resource will be upgraded to an Indicated or Measured Mineral Resource as a result of continued exploration (emphasis added), p. 4, **R-125**.

[688] Brattle, ¶ 80, **RER-3**. This, of course, regardless the fact that it is tremendously difficult to identify

circumstances, it would be speculating over the Project's value, which would be a denial of justice for Bolivia.

578. When tribunals have discarded using the DCF method, they have directly employed the valuation based on investments undertaken[689]. As explained by Ripinsky and Williams:

> *The method of calculating FMV by reference to actual investments has proved quite popular in arbitral practice. Although tribunals tend to recognize that an income-based method generally provides a better measure of the market value of a business, they have turned to the historic costs of investment as the relevant approach to valuation when the evidence necessary to apply an income-based method has been considered insufficient*[690].

579. International tibunals and scholars acknowledge that, in speculative contexts, when compensation has been granted, it has been based on the investments undertaken. As explained by Prof. Marboe:

> *The valuation of damages on the basis of past costs and expenses* […] *seems to be a "solid" valuation approach that has been applied in numerous cases where other items of damages were considered to be too speculative or were not supported by sufficient evidence*[691].

580. The costs method was used, for example, in *PSEG Global Inc. (US) v. Turkey*, a case related to the construction of an energy plant to be fueled by a coal mine. Although the project was in a relatively advanced stage (*e.g.* feasibility studies were concluded favorably), the energy plant and the coal mine were not built due to disagreements between the investor and Turkey. By rejecting the application of other methods and applying the costs method[692], the Tribunal emphasized that unlike other cases, the project was not in production:

> *Yet, in all these cases the breach that was compensated had resulted in damage to investments that were at the production stage, not merely in planning or under negotiation*[693].

---

comparable mining properties. *See* W.e. Roscoe, *Valuation of non-producing mineral properties using market comparables*, Journal of Business Valuation, July, 15, 2007, p. 207, **R-127**.

[689] Also denominated "costs-based valuation".

[690] S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008, p. 227, (emphasis added), **RLA-103**.

[691] I. Marboe, *Compensation and Damages in International Law - The Limits of "Fair Market Value",* 7 The Journal of World Investments and Trade, 2006, p. 745 (emphasis added), **RLA-144**.

[692] *PSEG Global, Inc, v. Turkey*, ICSID Case No. ARB/02/5, award dated January 19, 2007, ¶ 321, **CLA-51**.

[693] *Id.*, ¶ 308, (emphasis added).

581. The costs method was also used in the *Wena* case and recently in the *Awdi* case, where the tribunals concluded that there was not a solid basis to predict if the expropriated asset would produce future earnings or what would be the future investments' costs:

In *Wena,* the arbitral tribunal stated that:

> *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. Wena had operated the Luxor Hotel for less than eighteen months, and had not even completed its renovations on the Nile Hotel, before they were seized on April 1, 1991* […] *Rather, the Tribunal agrees with the parties that the proper calculation of "the market value of the investment expropriated immediately before the expropriation" is best arrived at, in this case, by reference to Wena's actual investments in the two hotels*[694].

In *Awdi*, it was stated that:

> [t]*he Tribunal considers appropriate to base compensation on sunk costs, namely on the amount invested by Claimants regarding Rodipet in the expectation that such amount would have been earned back had Law 442 remained in force. The application of the DCF method relied upon by Claimants as "the most appropriate way to determine the fair market value" is not justified in the circumstances. This is because Rodipet is not a going concern, it has a history of losses. There are moreover uncertainties regarding future income and costs of an investment in this industry in the Romanian market*[695].

---

[694] *Wena Hotels v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4, award dated December 8, 2000, ¶¶ 124-125, (emphasis added), **RLA-145**. In the same sense, see *Azurix Corp. v. Republic of Argentina*, ICSID Case No. ARB/01/12, award dated July 14, 2006, ¶¶ 424-425 ("*In the present case, the Tribunal is of the view that a compensation based on the fair market value of the Concession would be appropriate, particularly since the Province has taken it over.* […] *The Tribunal agrees that the actual investment method is a valid one in this instance*"), **RLA-128**; *Metalclad Corporation v. United States of Mexico,* case ICSID No. ARB(AF)/97/1, award dated August 30, 2000, ¶¶ 121-122: "*The Tribunal agrees with Mexico that a discounted cash flow analysis is inappropriate in the present case because the landfill was never operative and any award based on future profits would be wholly speculative. Rather, the Tribunal agrees with the parties that fair market value is best arrived at in this case by reference to Metalclad's actual investment in the project*", **RLA-141**; and *Técnicas Medioambientales Tecmed S.A. v. United States of Mexico*, case ICSID No. ARB (AF)/00/2, award dated May 29, 2003, ¶ 191 and following, **RLA-96**.

[695] *Hasan Awdi and others v. Romania*, ICSID Case No. ARB/10/13, award dated March 2, 2015, ¶ 514 (emphasis added), **RLA-146**.

582. *Second*, although one of the RPA Report's authors acknowledges that the costs method is applicable to *Mineral Resource Properties*[696], neither RPA nor FTI provide any reasonable and objective justification for not applying such method in this case. RPA simply dismisses the method because "*Malku Khota has a Mineral Resource estimate and was being evaluated for economic viability at the time of expropriation*"[697]. However: (i) the Project's mineral resources estimation, besides being inflated[698], according to the PEA 2011 is composed in more than 55% by inferred mineral resources that possibly do not exist[699]; and (ii) neither SAS nor its experts have provided any evidence that a prefeasibility study was in progress at the time that the Reversion took place. One can appreciate the same lack of grounds in the FTI Report[700].

583. *Third*, international tribunals have also used the costs method when a great difference between investments undertaken and the claimed compensation exists. In *Tecmed v. Mexico*, the tribunal noted that "*the considerable difference between the amount paid under the tender offer for the assets related to the Landfill –USD4,028,788– and the relief sought by the Claimant, amounting to USD52,000,000*"[701] before rejecting application of the DCF method and applying the costs method[702].

584. A greater disproportion than the one verified in *Tecmed* (1 to 12 ratio) exists in this case. Indeed, while the investments undertaken in the Project amount to USD18,706,936, according to SASC's financial statements, the claimed compensation (excluding interests) amount to USD307,200,000 (a 1 to 16 ratio). This shows the purely speculative nature of the claimed compensation.

585. Finally, the Arbitral Tribunal must not lose sight of the fact that, in addition to being realistic and reliable, the costs method avoids overcompensation in favor of the investor and thus, it prevents negative distortions to its incentives[703].

---

[696] W. E. Roscoe, *Valuation of Mineral Exploration Properties Using the Cost-Based Approach*, p. 10, **R-121**. As per RPA, the Project is a "*Mineral Resource Property*". Expert Report RPA, p. 3-1, **CER-2**.

[697] Expert Report RPA, pp. 3-1, 3-2, **CER-2**.

[698] Dagdelen, pp. 80-82, **RER-2**.

[699] CIM Standing Committee on Reserve Definitions, CIM Definition Standards - For Mineral Resources and Mineral Reserves, p. 4, **R-125**.

[700] FTI limits to affirm (groundlessly) "We did not perform a valuation under a cost approach since one of the fundamental principles of valuation theory states that value is a function of prospective cash flow and, in our view, the costs incurred to develop the Project to date are not indicative of the Property's prospective cash flows". *See* Expert Report FTI, ¶ 8.36, **CER-1**.

[701] *Técnicas Medioambientales Tecmed S.A. v. United States of Mexico*, case ICSID No. ARB (AF)/00/2, award dated May 29, 2003, ¶ 186, **RLA-96**.

[702] *Ibid*. *See*, also, Wena Hotels v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, award dated December 8, 2000, ¶ 124 ("[…] *the Tribunal is disinclined to grant Wena's request for lost profits and lost opportunities given the large disparity between the requested amount (GB£ 45.7 million) and Wena's stated investment in the two hotels (US$8,819,466.93)*"), **RLA-145**.

[703] As explained by Wells "*Excessive awards to investors have serious implications […] in the case of a foreign investor, such awards encourage investment in projects with great political risk, and behavior on the part of the investor that increases the likelihood that the project will be taken by the government or its agents. A*

586. Considering the foregoing reasons, should the Arbitral Tribunal grant any compensation to SAS, it must be limited to the reimbursement of its investments in the Project.

7.3.2 Project valuation based on costs

587. In *limine*, only those reasonable costs which contributed to the Project's value increase are refundable. As acknowledged by one of the experts of the RPA Report:

> *An important element of this* [cost-based] *method, which is often overlooked in its application, is that only those past expenditures which are considered reasonable and productive are retained as value* […] *if exploration work downgrades potential, it is not productive and its cost should not be retained as value or should be reduced*[704].

588. Considering that SAS has not provided its financial statements, Brattle has calculated the investments undertaken in the Project based on SASC's financial statements (listed company).

589. The reasonability of the valuation based on SASC's financial statements was confirmed by Brattle by undertaking alternative valuations based on (i) exploration costs and expenses reported by CMMK in its financial statements and (ii) funds obtained by CMMK for the Project's development (both, debt and capital).

590. The cost-based assessment must start from 2003, when the acquisition of the Mining Concessions begun. In SASC's consolidated financial statement there is a list of costs related to the Project under the item "*exploration deferred costs*", including among them the engineering consultancy expenses and expenses from geology and geophysics, excavations, laboratory, supervision, community relations, etc.

591. Based on the foregoing, Brattle has assessed SAS's damages in USD18,706,936[705].

---

greedy investor would also purchase and over-invoice investment goods and services from or through affiliates to raise the reported investment figure, at no real cost to the investor. An investor is even encouraged to engineer an apparent default in order to reap greater profit by not performing than it would have earned if it performed. Moreover, excessive awards discourage government takings, or breach of contracts, when such actions are in fact efficient and thus desirable" (emphasis added). Louis T. Wells, Double Dipping in Arbitration Awards? An Economist Questions Damages Awarded to Karaha Bodas Company in Indonesia, 19 Arbitration International, No. 4, 2003, p. 477, **RLA-147**.

[704] W. E. Roscoe, Valuation of Mineral Exploration properties Using the Cost-Based Approach, p. 4, (emphasis added), **R-121**.

[705] Quality's report drafted as per the Reversion Decree, had reached a similar value (USD17,047,190,01), Reporto n Assessment of investments undertaken by Compañía Minera Mallku Khota S.A. dated June, 2014, p. 18, **R-111**.

592. Finally, as explained by Brattle[706], the value of the confidential information in its possession should be deduced from the compensation granted to SAS, considering that it can be sold and that it has a market value.

7.4 If the Tribunal considers that the market-based approach is applicable (*quod non*), it must determine that the RPA and FTI analysis are essentially flawed and overvalued

593. FTI comes to an absurd amount of US$307,200,000 in its valuation of the Project[707] by means of a subjective and arbitrary weighting of three sources:

- 50% of value conferred to the valuation made by RPA based on the comparables method (*i.e.* US$ 135M);
- 25% of value conferred to the average of the valuations made by analyst Byron, Edison, Redchip and NBF (*i.e.* US$ 143 M); and
- 25% of value conferred to the two private placement of SASC's stocks more than two months prior to the valuation date considered by FTI, July 6, 2012 (the – "FTI Valuation Date") (*i.e.* US$29.2M).

594. The valuation made by RPA is arbitrary and makes several major mistakes that disqualify it (7.4.1). In addition, the valuations made by analysts Byron, Edison, Redchip y NBF are not reliable since three of them are not independent and, in any case, they make major mistakes that FTI fails to amend. The valuation based on the two private placements of stocks is also unreasonable and should be dismissed (7.4.2).

7.4.1 The valuation conducted by RPA based on comparable methods is arbitrary and essentially wrong

595. RPA claims to use the comparable method to establish the value of the Project[708]. As explained by Brattle[709], the comparables method in the valuation of mining projects requires two fundamental conditions (i) *transaction comparability* (which means, for example, that the transactions selected for the comparison had not occurred on a date too distant from the date of the valuation used, and that through them the market value of the mineral asset transacted can be reasonably obtained), and (ii) *property comparability* (which means, for example, that the mineral assets selected for the comparison are similar to the asset to be compared to).

596. The valuation by RPA was made as follows:

---

[706] Brattle, section VIII D), **RER-3**.

[707] *See* Figure 18 - Project FMV Conclusion, Expert Report FTI, **CER-1**. To said valuation, interests are later added in the amount of US$ 78'500.000 M, which brings a final number of US$ 385'700.000. See Figure 24 – Summary of Damage Conclusion, FTI Expert Report, **CER- 1**.

[708] RPA Expert Report, p. 3-2, **CER-2**.

[709] Brattle, ¶¶ 51, **RER-3**.

- *First*, RPA selects a group of 14 sales of assets that RPA considers comparable to Mallku Khota;
- *Second,* RPA calculates the Metal Transaction Ratio ("MTR") of the supposed comparable resources.[710] In each case, in order to calculate the MTR, RPA divides (i) the price paid for the supposed comparable asset; by (ii) the *in situ* value of the metals that comprise the asset (obtained by multiplying the amount of metals that the mineral asset contains with its price at the moment of sale). RPA thus obtains an MTR for each of the supposed comparable mineral assets; and
- *Third,* after selecting an MTR within the range of obtained MTRs, RPA multiplies it by the *in situ* value of metals of the Project (obtained by multiplying the amounts of metals supposedly existing in the Project by its price at the FTI Valuation Date). This operation produce, according to RPA, the price that a third party would pay (at the FTI Valuation Date) to acquire the Project.

597. To start with, the comparable method is not a reliable method in the mining sector. The "VALMIN" Committee, jointly created by the Australasian Institute of Mining and Metallurgy and the Australian Institute of Geoscientists, explains that:

> *Market based comparable valuations are widely used in the industry. Whilst widely used they are often flawed because companies are not truly comparable as risks and opportunities can be very different between compared projects/companies*.[711]

598. For his part, Sabahi explains that:

> *Market comparison has not been widely used in investment treaty arbitration. This is partly because investment treaty disputes very often concern investments in developing and emerging markets, which make them effectively unique. Finding appropriate comparables may be very difficult and perhaps even speculative*[712].

599. In the recent *Gold Reserve* award, the tribunal dismissed the comparable method by stating that:

> *On several occasions in this Award, the tribunal has rejected a comparable with other mines on the basis that many variables are specific to each mine (such as climatic and geological conditions) all of which have an impact on value*[713].

600. It suffices to contrast the values assigned by RPA to the mineral assets that it considers

[710] Pursuant to RPA: "*MTR is the ratio of the value of the transaction divided by the gross, in situ dollar content of the Mineral Resources transacted, expressed as a percentage*". RPA Expert Report, pp. 1-2, **CER-2**
[711] Brattle, ¶ 46, **RER-3**.
[712] B. Sabahi, *Compensation and Restitution in Investor-State Arbitration: principles and practice*, Oxford University Press, 2011, p. 114, **RLA-148**.
[713] *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, ICSID Case ARB(AF)/09/01, award dated September 22, 2014, ¶ 831 (emphasis added) **RLA-27**.

comparable to the value assigned to the Project, to realize that those are very different in relation to each other. In fact, the values assigned to the comparable assets are exponentially lower than those assigned to the Project: the first values must be adjusted between 500% and 14,000% to reach the value of the Project calculated by RPA[714]. Such adjustments are, without a doubt, beyond the adjustment margin that can be considered reasonable, invalidating any possible comparison.

601. In any case, the valuation made by RPA is unreliable and should be dismissed. The MTR is a subjective method and not a scientific one **(7.4.1.1)**. In addition, the two fundamental conditions of the comparable method are not complied with: the selected assets are not comparable to the Project **(7.4.1.2)** and the analysis of the transaction comparability is subjective and incurs in several mistakes **(7.4.1.3)**. Lastly, the final determination of the MTR applicable to the Project, according to RPA (within a range of 6 MTRs), is arbitrary **(7.4.1.4)**.

7.4.1.1 The MTR is a subjective method created by the RPA that has no support nor has been scientifically validated.

602. MTR is a valuation method developed by one of the authors of the RPA Report, Mr. William Roscoe[715]. The MTR is the key element in the calculation made by RPA. Contrary to what is often thought, this method has no scientific support. As explained by Brattle:

> *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*[716].

603. Despite being a purportedly serious method, the simplistic formula of the MTR does not reflect several key factors in the determination of the value of a mineral asset, nor allow making basic adjustments between mining projects to be compared. As explained by Brattle:

> *It is immediately evident that the model cannot adjust for fundamental differences among properties. At most, the MTR can adjust for differences in three dimensions: resource size, metal prices, and mix of metals. In essence, the model assumes that gross in-situ value alone is a reasonable predictor of FMV, and that one does not need any other dimension of the asset, like operating costs, capital costs, metal recoveries, resource stage, resource uncertainties, permitting uncertainties, time to production, taxes, royalties, in-pit resource, or mine life to determine value. It is a*

[714] *See* Brattle, Table 9, ¶ 123, **RER-3**.
[715] *Id.,* ¶ 97.
[716] *Id.,* (emphasis added)

> *model that we have never seen used. It also fails as a matter of basic economics, because a mine's cash flows, which determine its FMV do not depend on revenues alone*[717].

604. Similarly, despite its different level of geological uncertainty (specially notable in case of inferred mineral resources), the MTR treats all mineral resources equally. As explained by Brattle:

> *With respect to resource size, the MTR method does not distinguish between metals contained in measured and indicated resources and metals contained in inferred and historic resources, which are less certain to exist. RPA treats all these resources equally in coming up with an in-situ value, something reporting standards expressly prohibit*[718].

605. Given these serious deficiencies, it can only be concluded that MTR does not constitute a reliable method of valuation of mineral assets.

7.4.1.2 Mineral assets selected by RPA are not comparable with the Project.

606. The mining projects selected by RPA are not comparable with the Project because they: (i) exist in different locations, (ii) have different mineral composition and production costs; (iii) have mineral resources subject to different densities; (iv) are found in different exploration phases:[719]

- Geographic location: Only one of the mineral assets selected by RPA is located in Bolivia. The others are located in Argentina, Chile, Guatemala, Mexico and Peru. The country where the mining project is located has fundamental importance. Except for Guatemala, Bolivia has been considered one of the 10 less attractive countries for mining investments, ranked well below Argentina, Chile, Mexico and Peru. The relevance of the geographic location for the value of a mining project is evident.
- Mineral composition and production costs: The mineral resources identified in the Project and the mining projects used as comparable are remarkably different. For example, none of the purportedly comparable mining projects has Indium or Gallium, metals that are present in the Project in high amounts, according to SAS.[720] Some of the compared projects have gold, while the Project does not. The difference in the mix of metals could have a considerable impact in the production costs, especially if the method to be applied for the extraction of such metals is

[717] *Id.,* ¶ 100 (emphasis added).
[718] *Id.,* ¶ 101 (emphasis added).
[719] The following considerations are based on section IV A) of Brattle, **RER-3**.
[720] Statement of Claim, ¶ 3: "*It was clear that the Malku Khota Mining Project was classified as one of the biggest resources of silver, indium and gallium of the World.*"

new.[721] As Brattle explains:

> *Non-proven technology can cause unanticipated increases in costs, which can translate to large decreases in value compared to similar properties that use standard extraction methods*[722].

- Silver density: According to RPA, silver density in the comparable mining projects is of 3 to 61 times higher than the existing one in the Project. This has a direct impact in the value of the asset: the higher the density of a mineral resource, the higher the value of the mining project.
- Exploration phase: The supposedly comparable mining projects are found in phases which are different to the Project: in most cases, they are found in previous phases, and, in some fewer cases, in more advanced phases. The different phases of the projects have two important consequences: *First*, 6 of the 14 mining projects selected by RPA do not have a *NI 43-101 complaint resource statement,* standard that regulates and tends to guarantee the exactness of mineral resources and reserves whose existence is informed to the public[723]. *Second,* 9 of the mining projects used as comparable only have *inferred or historical* mineral resources. These differences make the quantity and quality of the existing mineral resources less reliable, and prevent the mineral assets from being comparable.

607. The large amount of existing differences between the Project and the comparable mining projects, which have a big impact in their respective values, make it impossible to consider them "similar". The best evidence of that is found in the valuation made by RPA: the comparable mining projects require adjustments of 500% to 14,000% in order to achieve the value assigned by RPA to the Project.

7.4.1.3 *The analysis of the transaction comparability made by RPA is subjective and is fundamentally wrong.*

608. RPA uses a method with no scientific support to establish the value of option agrements that it considers as comparable **(a)**. Even if such method were valid (*quod non*), the date in which the option agreements were made is sufficient reason to dismiss them for comparison purposes **(b).**

[721] As, SAS acknowledges, is precisely our case: *"In order to extract these different metals from the arsenics obtained in Malku Khota, South American Silver and its headquarters SASC created and registered a patent for a hydrometallurgical process of exclusive ownership [...] All individual components of the metal recuperation have been tested in these other operations; however, to best knowledge of RPA, those have not been combined in a sequential way in a commercial application"*. Statement of Claim, ¶ 44.

[722] Brattle, ¶ 61, **RER-3**.

[723] *Id.*, ¶ 73, **RER-3**.

a) The valuation method based on option agreements is ad hoc and has no scientific support.

609. Of 14 sales selected by RPA as supposedly comparable, 5 are just option rights for the acquisition of shares issued by the company holding the mineral asset.

610. RPA uses an *ad hoc* method to infer which would have been the price of the sale based on the terms of option agreements, to what it calls *Option Agreement Terms Analysis*. In addition of not having scientific support, such method violates basic financial principles. As explained by Brattle:

> *This approach was developed by one of the authors of the RPA Report in 2007, but has not been published in a major finance or economics journal and has not been peer reviewed. More importantly, as explained below, it is contrary to well-established principles of option pricing that are standard in financial economics and that form the basis of rigorous valuation techniques applied to a wide variety of derivative financial instruments and physical assets*[724].

611. The fundamental element of the *Option Agreement Terms Analysis* is the probability that the holder of the option finally decides to execute it (Probability of Realization). Such probability, multiplied by the amount that has to be paid in each moment in which the option has to be executed gives, according to ROA, the implicit value of the sale[725]. Notably, RPA does not provide any criteria to define the probability of realization, thus its determination is totally subjective. As Brattle explains:

> *The only information RPA provided about how the probability of realization is determined is that it should decrease over time, so that optional payments that are farther into the future are assigned a lower probability. There are an infinite number of possibilities that satisfy this condition, and RPA provided no explanation as to how their specific probabilities were determined*[726].

612. As shown by Brattle, 4 of the 5 options have never been exercised.[727]

613. In any event, as explained at the beginning of this section, RPA initially considered 14 sales for comparison purposes, of which it concluded with only 6, used to calculate an average MTR that it later applied for Project valuation. Considering that from the 6 transactions that were finally selected, 3 were option agreement, and the abovementioned flaws

---

[724] *Id.*, ¶ 88, (emphasis added), **RER-3**.
[725] *Id.,* ¶ 87.
[726] *Id.*, ¶ 90, (emphasis added).
[727] *Id.*, Appendix A.

fatally impact the conclusions by RPA.[728]

614. To the same conclusion is reached if we consider the date in which the purportedly comparable sales were made.

b) The period covered by the purportedly *comparable sales is excessive and distorts the valuation.*

615. Brattle identifies several other mistakes in the transaction comparability analysis made by RPA[729]. Here we would simply refer to the unjustified broad period of time covered by the sales that RPA considers comparable. Specifically, 10 of the transactions considered by RPA were concluded more than 24 months before the FTI Valuation Date (and some almost 5 years earlier)[730], which restrains reliable adjustments. As Brattle explains:

> *Given the fluctuation of metal prices and mining costs, as well as market conditions in the world economy in recent years, which include the global financial crisis, the ensuing global recession, and the ongoing recovery, reliable adjustments for these differences in timing cannot be made*[731].

616. Notwithstanding the evident problems that results from taking into consideration a period of time so broad[732], one of the authors of the RPA Report acknowledges that, in the mining industry, the comparability analysis should normally consider sales only made months before the valuation date (up to 18 months at most):

> *As the market for non-producing mineral properties changes over time, market comparable transactions should be within a reasonable time period of the subject property valuation date and in similar market conditions. Typical time periods may be within 6 to 18 months, depending on market conditions and number of transactions available for analysis*[733].

617. For unknown reasons, RPA totally excludes such practice in its valuation of the Project.

618. The 6 transactions finally considered comparable by RPA (from the 14 originally analyzed) exceed said 18-month period. Specifically, all of them occurred between February of 2007 and April of 2010, or in other words, between 2 and 5 years before the FTI Valuation Date, which hinders its relevancy for comparison purposes.

---

[728] *Id*., ¶ 93.
[729] *See* section IV (b) of Brattle, **RER-3**.
[730] *See* Table 12-1 and Appendix 2, RPA Expert Report, **CER-2**.
[731] Brattle, ¶ 94 (emphasis added), **RER-3**.
[732] Brattle, ¶ 95 (emphasis added), **RER-3**.
[733] W. E. Roscoe, Valuation of non-producing mineral properties using market comparables, Journal of Business Valuation, dated July 15, 2007, p. 215 (emphasis added), **R-127**.

7.4.1.4 *The determination of the MTR applicable to the Project is arbitrary.*

619. The procedure followed by RPA – once the MTRs from the several comparable assets have been obtained – to determine the value of the Project is totally arbitrary. The sole description of the steps followed by RPA confirms it:

- *First,* RPA dismisses the MTRs located at the endpoints because it considers them as *outliers*, later selecting from the resulting 12 MTRs, those 6 that are located at medium range. This selection excludes mining properties that, according to the same RPA, would be more comparable to the Project. As Brattle points out:

  > *For example, one transaction deemed 50% comparable by RPA is included in the range, but four others are not. A transaction deemed 80% comparable by RPA is excluded, but four of the six that are included have lower comparability factors according to RPA's data*[734].

- *Second,* despite that the 6 selected MTRs generate a range between 1.0% and 2.5%, RPA sets the MTR to be applied to the Project at 2% without following any objective criteria.

- *Third,* in a clear contradiction with its own report, RPA applies an MTR of 1% to the identified mineral resource in the *low grade halo*[735], thus artificially increasing the value of the Project. As Brattle explains:

  > *With no explanation, RPA also applies an MTR of 1% to the in-situ resource in the low grade halo, <u>which RPA concludes cannot be classified as a mineral resource</u>, to add $9 million to the valuation, with a range of $4 million to $11 million. <u>It is unacceptable to add value to mineralized zones that are not resources in any valuation study</u>*[736].

620. This arbitrary procedure generates, naturally, inconsistent results. Proof of that is, if we apply the MTR of 2% (selected by RPA) to the mining projects used by RPA as comparables, we would obtain values very different from those determined by RPA.[737] As Brattle explains:

> *Using an MTR of 2% would value Dios Padre at $36 million, whereas the transaction value was $1.9 million, an overvaluation by a factor of about 19. It would overvalue Pulacayo by a factor of 8, undervalue Escobal by factor of about 5,*

---

[734] Brattle, ¶ 113, **RER-3.**

[735] As explained by Brattle "*The "low grade halo" is an area which GeoVector Management, Inc. ("GeoVector") identifies as a "a less well defined part of the Malku Khota deposit*". Brattle, Footnote 129, **RER-3**.

[736] *Id.*, ¶ 117 (emphasis added).

[737] *Id.*, Table 8.

and so on[738].

621. In view of the above, the Arbitral Tribunal must reject the valuation based on comparables made by RPA.

7.4.2 The valuations conducted by the four analysts used by FTI are not reliable given that three of them are not independent from SASC and, in any case, all valuations suffer from fundamental errors

622. As stated before, FTI gives a 25% of the average value of the valuations made by analysts Byron, Edison, Redchip and NBF[739]. The Arbitral Tribunal should not accept any value to those valuations, at least for four reasons[740].

623. *First,* because 3 of the 4 analysts mentioned above (Edison, Redchip and NBF) are not independent from SASC at the moment of making their valuation.

624. Commenting of the Redchip case, Brattle explains:

> *SASC paid RedChip for investor awareness and relations services during 2010 and 2011. SASC also provided RedChip with warrants, which are assets whose value rises if SASC's share price rises. RedChip stated that the April 3, 2012 report on which FTI relied was issued with the intention to engage in business with SASC again*[741].

625. RedChip itself stated in its report that:

> *RedChip Companies, Inc. intends to seek compensation from SAC for investor relations services within the next three months, following the publication of the research report* [...][742]

626. With regards to Edison, the first page of its report indicates that: "*South American Silver is a research client of Edison Investment Research Limited*" and, immediately claims that the report *"<u>has not</u> been prepared in accordance with the legal requirements designed to promote the independence of investment research"*[743](emphasis added).

---

[738] *Id.*, ¶ 118.

[739] *See* Figure 18 – Project FMV Conclusion, FTI Expert Report, **CER-1.**

[740] The following explanation is based mainly in section V of Brattle, **RER-3.**

[741] Brattle, ¶ 135 (emphasis added), **RER-3**

[742] Annex to FTI Expert Report, **CER-1.**

[743] Brattle, ¶ 134, **RER-3**.

627. Finally, the report by NBF was prepared by Wellington West Capital Markets Inc. ("WWCMI"), a company that, besides having been the main underwriter for the private placement of stocks of SASC in 2010, is the holder – directly or through its affiliates – of more than 1% of stocks from SASC. In this context, any increase in the value of stocks from SASC would have benefited NBF[744].

628. It is clear that these 3 analysts are not independent from SASC, either because (i) through their reports they tried to resume business or demand payment of compensation from SASC (RedChip), (ii) SASC is a client of the analyst (Edison), or (iii) the analyst is the shareholder of SASC (NBF). Consistently with this lack of independence, the valuations of these 3 analysts are the highest that were taken into consideration by FTI.

629. *Second,* the valuations made by the analysts are not reliable as shown by the great disproportion among them. For example, there is a difference of 450% (or US$726 M) between the valuations of Byron and Edison[745]. This, as mentioned by Brattle, "*should give one pause*"[746]:

630. *Third,* the analysts valuate the Project using a method of DCF, method that the experts of SAS acknowledge that cannot be applied to the current case[747]. This indicates a serious inconsistence in the valuation by FTI: even though it accepts that the method of DCF cannot be used in this case, it indirectly applies it by giving 25% of value to the valuation made by the analysts using the DCF.

631. *Fourth*, the analysts rely on wrong premises that FTI omits by not making a critical analysis of the reports[748]. In its valuation, Edison does not include the capital expenditures necessary for the Project to start operating (in other words, he valuates the Project as if it is a mine already in production stage). The valuation made by RedChip does not take into consideration the PEA 2011, on the contrary, it uses its subjective expectations regarding the future of the Project[749] (which constitutes a serious mistake because an hypothetical buyer would consider the most updated technical report of the Project – the PEA 2011 – in order to establish how much it is going to pay). Byron, by calculating the future flows of the Project, omits to discount those that would have been generated during the period 2021 – 2030, over valuating the Project in more than 300%. All the mistakes made by the

[744] *Id.*, ¶ 136.

[745] *Id.*, ¶ 131.

[746] *Id.*

[747] FTI Expert Report, ¶ 8.33, **CER-1**; RPA Expert Report, p. 3-1, **CER-2**.

[748] Brattle, ¶ 140-147, **RER-3.**

[749] "[b]*ased on our assumption that the Company will increase its silver and indium production estimates in its updated economic assessment, we have revalued the deposit to take this into account"*. Annex FTI 37, p. 1, **CER-1.**

analysts produce an important overvaluation of the Project (which should have had been corrected by FTI).

632. In view of the above, the Arbitral Tribunal must not give any weight to the valuations made by Byron, Edison, RedChip and NBF.

633. The Arbitral Tribunal should also reject the valuation made by FTI based on the two private placement of stocks occurred between April and May of 2012, given that, as explained by Brattle, several factors (with a direct impact on the value of the Project) suffered sensitive alterations between such dates and the FTI Valuation Date. As explained by Brattle, "*[T]he 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%*"[750].

634. In view of the above, the Tribunal must reject all the valuations made by RPA and FTI.

7.5 The valuation of the Project must not consider events arising after the Bolivia Valuation Date

635. According to the Treaty, the Project must be valuated as of July 9, 2012, the day immediately before SASC informed the market about the intention of Bolivia to revert the Mining Concessions (the "Bolivia Valuation Date") **(7.5.1).**

636. Contrary to what is stated by SAS, the doctrine and international case law agree that the failure to pay compensation does not make an expropriation unlawful *per se* **(7.5.2)**. In any event, it would be arbitrary to consider the date of the award for the purposes of valuating the Project **(7.5.3).**

7.5.1 Pursuant to the Treaty, the Project must be evaluated at the Bolivia Valuation Date

637. According to SAS, the valuation date should be July 6, 2012 "*date immediately preceding the announcement of Bolivia regarding the nationalization*"[751]. The nationalization announcement would have been made on July 8, 2012[752], when Bolivia made public the signature of the Memorandum of Agreement. As mentioned by SAS:

> *The signature of this Memorandum of Agreement was made public the next morning. It formally marks the beginning of the expropriation process and must therefore be used for the determination of the Valuation Date for the purpose of assessing the compensation owed to South America Silver under Article 5 of the*

[750] Brattle, ¶ 151, **RER-3.**

[751] Statement of Claim, ¶ 10.

[752] SAS does not consider July 7, 2012 as the valuation date because it was a Saturday. The immediately preceding working day to July 8, 2012 was Friday July 6, 2012.

BIT[753].

638. Adopting July 6, 2012 as the valuation date is unjustified and manifestly contradicts press releases issued by SASC. In effect, in the press release from July 9, 2012, SASC informed the market that – at that date – there was no modification as to the status of the Mining Concessions or the Project and that SASC was still working with the Bolivian Government to develop the Project up to its maximum potential:

> *Also, on Sunday, President Evo Morales and the Government Minister Carlos Romero agreed that a "prior consultation" among all indigenous peoples in the Project area would be needed to proceed to determine the direction of the Project based on the consensus view of all communities. <u>At this time there has been no change in the status of the project concession</u>. The Company is continuing to work with the government at all levels and with the local communities <u>to agree on an approach to development</u> that is inclusive of all communities in the project area <u>and allows development of the Malku Khota project to its fullest potential</u>*[754].

639. It was only on July 10, 2012 that SASC informed the market that – that same day – Bolivia had announced its intention to nationalize the Mining Concessions:

> ***South American Silver Corp. (TSX: SAC, US OTC: SOHAF)** today expressed extreme disappointment in statements <u>made this evening</u> by the Bolivian government that it <u>intends to nationalize</u> the company's development stage Malku Khota silver-indium-gallium project*[755].

640. In light of the statements above transcribed, SAS cannot claim that the Memorandum of Agreement *"Formally marks the beginning of the nationalization process"*[756]*.* In its press release dated July 9, 2012, SASC referred to the signing of the Memorandum of Agreement and stated that such did not generate any impact on the status of the Mining Concessions or the Project. Furthermore, if what SAS alleges were true, SASC would have lied to the market and violated, *inter alia*, the regulations established in its *Corporate Disclosure Policy*[757].

---

[753] Statement of Claim, ¶ 89.

[754] SASC press release dated July 9, 2012, Two employees freed, South American Silver in discussion with Bolivian government and indigenous authorities (emphasis added), **R-129**.

[755] SASC press release, South American Silver Responds Strongly to Bolivian Government Statements, dated July 10, (emphasis added), **R-129**.

[756] Statement of Claim, ¶ 89 (emphasis added).

[757] Pursuant to Section VII - Disclosure of Material Changes and Material Information of the Corporate Disclosure Policy of SASC, "*The Company is required by law to immediately disclose a —material change|| in its business. A material change is a change in the business, operations or capital of the Company that would*

641. In view of the above, pursuant to article V(1) of the Treaty, the valuation date should be July 9, 2012 – the date that, according to SASC itself, results immediately preceding to "*the public announcement of the imminent expropriation*".

7.5.2 Contrary to the assertions of SAS, failure to pay compensation does not turn expropriation *per se* unlawful

642. SAS claims to have right to compensation "*on the basis of the higher of the market value at the time of expropriation plus interests or the value on the date of the award*"[758] SAS supports this right in the unlawful nature of the expropriation, which would be given because of "*Bolivia's failure to pay or even offer to pay contemporaneous compensation*"[759].

643. As Bolivia explained above[760], the lack of compensation does not make an expropriation unlawful *per se.* Recent awards in *Tidewater* and *Exxon Mobil* cases acknowledge this:

644. In *Tidewater*:

> *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*[761].
>
> *More recent investment arbitral practice also supports the same approach. In Santa Elena, the Tribunal determined compensation at the date of the taking on the basis that the expropriation was lawful, even though no compensation had been paid for many years. In Goetz v. Burundi, the Tribunal held that, all other conditions for a lawful taking having been met, the failure to pay prompt and adequate compensation did not suffice "to taint this measure as illegal under international law"*[762].

645. In *Exxon Mobil*:

---

reasonably be expected to have a significant effect on the market price or value of any of the securities of the Company [...] In complying with the requirement to immediately disclose all material information under applicable laws and stock exchange rules, the Company will adhere to the following additional basic disclosure principles: [...] all disclosures must include any information the omission of which would make the rest of the disclosure misleading (half truths are misleading)" (emphasis added), **R-130**.

[758] Statement of Claim, ¶ 177.

[759] *Id.*, ¶ 164.

[760] Section 6.1.3 *above*.

[761] *Tidewater Investment Srl v. Bolivarian Republic of Venezuela*, ICSID No. ARB/10/5, award dated March 13, 2015, ¶ 141, (emphasis added), **RLA-106.**

[762] *Id.*, ¶ 135 (emphasis added). The Tidewater Tribunal presents several additional reasons to which the lack of compensation cannot result in the illegality of the expropriation. See *id.*, ¶¶ 130-146.

the mere fact that an investor has not received compensation does not in itself render an expropriation unlawful[763].

646. The *Tidewater* and *Exxon Mobil* awards gather the evolution of the doctrinal and case law line that has been applied by several international courts: the failure to pay compensation does not make an expropriation an illegal dispossession *per se* (*per se illegal dispossession*[764]).

647. For this reason, in cases where the only breach of the State was the failure to pay the due compensation in view of a treaty, international courts set as compensation the value of the expropriated asset on the date in which the expropriation took place, plus interests[765]. It is the interests that compensate the investor for the delay in payment. When the only breach of the State was not compensating, the remedy cannot be the same as when the breach also implies a violation to the conditions of due process, public use and non-discrimination.

648. In any case, international doctrine acknowledges that when evaluating an expropriation, actions deployed by the expropriating State and other factual circumstances of the particular case must be considered:

> *It appears also that the requirement of good faith should be given an important role in deciding on the lawfulness of expropriation. If on the facts of the particular case, a tribunal establishes that a State has made good faith efforts to comply with*

---

[763] *Venezuela Holdings and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, award dated October 9, 2014, ¶ 301, (emphasis added), **RLA-106.**

[764] *Former King of Greece and others v. Greece*, ECHR Case No. 25701/94, Grand Chamber, award regarding just compensation dated November 28, 2002, ¶ 78, **RLA-107.**

[765] *Id.*, ¶ 78 (*"However, in case of non-restitution, the compensation to be fixed in the present case need not, unlike in the above-mentioned cases concerning per se illegal dispossessions, reflect the idea of wiping out all the consequences of the interference in question. As the lack of any compensation, rather than the inherent illegality of the taking, was the basis of the violation found, the compensation need not necessarily reflect the full value of the properties*"), (emphasis added); Scordino v. Italia (No. 1), ECHR case No. 36813/97, Great Chamber, sentence dated March 29, 2006, ¶ 99 (*"In the instant case, having regard to the fact that it has already been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary, less than full compensation does not make the taking of the applicants' property eo ipso wrongful (see, mutatis mutandis, The former King of Greece and Others (just satisfaction), cited above, § 78"*), **RLA-108**; *Bernardus Henricus Funnekotter and others v. Republic of Zimbawe*, ICSID Case No. ARB/05/6, award dated April 22, 2009, ¶ 115 (*"The Tribunal is of the opinion that the damages suffered by the Claimants must be evaluated at the date of dispossession"*), **CLA-34**; *Börekçioğulları (Çökmez) and others v. Turkey*, ECHR Case No. 58650/00, Third Section, sentence dated October 19, 2006, ¶ 37, **RLA-109**; and *Compañia del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, award dated February 17, 2000, **CLA-87.**

> *its obligation to pay compensation, it should not be held to be in violation of the compensation requirement. For example, a good faith offering of, or provision for, compensation (even if not in sufficient amount, as long as not manifestly unreasonable) should render the expropriation lawful*[766].

649. Bolivia acted reasonably and in good faith from the beginning.

650. *First*, Bolivia established in article 4 of the Decree that, within a term of 120 working days, it would hire an independent assessment company to assess the investments made by CMMK[767].

651. *Second*, on December 9, 2012 (*i.e.* within the term established by the Decree), Bolivia publicly requested the presentation of expressions of interest for the hiring of the assessment service before mentioned[768]. This process culminated with the hiring of the company Quality.

652. *Third*, the hired assessment company prepared the Quality Report.

653. *Fourth*, both before and after the Reversion of the Mining Concessions, Bolivia have held negotiations with SAS in order to reach an agreement over the current dispute. These negotiations even caused the temporary suspension of the current arbitral procedure, having been held more frequently after the issuance of the Quality Report.

654. The importance of these negotiations cannot go unnoticed. In *Exxon Mobil v. Venezuela*, the arbitral tribunal determined that the proposals made by Venezuela during the negotiations at the time of the nationalization were sufficient to understand as fulfilled the just compensation requirement required by the applicable treaty – and therefore, to conclude that the expropriation was not unlawful[769]. In the current dispute, the facts that show the will of Bolivia to compensate SAS are even more glaring than in *Exxon Mobil v. Venezuela.* While Venezuela did not envisage compensation in its nationalization decree, Bolivia did envisage it in the Reversion Decree and hired a company to assess the Project[770].

655. Bolivia presents, therefore, three facts that must be considered by the Arbitral Tribunal in order to determine the legality of the claimed expropriation (i) the provision of compensation in the Decree, (ii) the negotiations between Bolivia and SAS in order to

---

[766] S. Ripinsky y K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008, p. 68, (emphasis added), **RLA-103**.

[767] Reversion Decree, article 4, **C-4**.

[768] Invitation to present expressions of interest published in the press on October 9, 2012, **R-98**.

[769] *Venezuela Holdings and others v. Bolivarian Republic of Venezuela*, ICSID case No. ARB/07/27, award dated October 9, 2014, ¶ 305, **RLA-106.**

[770] This is acknowledged by SAS at ¶ 101 of the Statement of Claim.

reach an agreement, both before and after the Reversion of the Mining Concessions, and (iii) the engagement of an independent company to undertake the assessment of the Project. In addition, the amount of compensation is now under debate in the current arbitration where it will be discussed, in a non-consented scenario that the Arbitral Tribunal considers that it has jurisdiction and that Bolivia breached its international obligations, with the participation of financial experts, what is the just market value of the Project. In this context, the Reversion of the Mining Concessions cannot be considered a measure contrary to the Treaty for current lack of compensation.

656. If the Arbitral Tribunal considers that any delay existed in the assessment of the Project *(quod non)*, such delay is not ascribable to Bolivia. Any delay in the engagement of the assessment company was due to COMIBOL's lack of information regarding the Project[771], aggravated by SAS's request (conceded by the Tribunal) to keep the strict confidentiality of all information regarding the Project. Likewise, the complexity of the work undertaken by Quality cannot be underestimated. Without having major information regarding the Project, COMIBOL and Quality had to make an extensive fieldwork and gathering of information to determine the past activities performed by CMMK, and thus, calculate the investments made.

657. SAS cites the *Rurelec* case to sustain the alleged illegality of the expropriation for lack of compensation[772]. The facts of such case, however, do not support its position: the *Rurelec* tribunal based its decision on the fact that there had never been an intention to compensate[773].

658. SAS also cites the *Amoco* case with similar purpose. However, in such case, the Iranian-American tribunal stated that: "*the compensation to be paid in case of a lawful expropriation (or of <u>a taking which lacks only the payment of a fair compensation to be lawful) is limited to the value of the undertaking at the moment of dispossession</u>*"[774].

659. SAS also states that the expropriation was unlawful because Bolivia only offered to reimburse the investments made by SAS in the Project[775]. This observation is incorrect, at least, for two reasons. *First*, as acknowledged in the recent *Tidewater* decision, bilateral investment treaties do not establish which method should be applied to define the amount of compensation, such task that lies with the arbitral tribunal:

---

[771] Letter dated August 24, 2012 from COMIBOL to SAS, **C-20**

[772] Statement of Claim, ¶ 143.

[773] *Guaracachi America, Inc. v. Rurelec Plc v. Estado Plurinacional de Bolivia*, PCA case No. 2011-17, award dated January 31, 2014, ¶ 438, **RLA-29**. Bolivia emphatically rejects the conclusion reached by the Rurelec tribunal.

[774] *Amoco Internacional Finance Corporation v. the Islamic Republic of Iran*, Iran-United States Claims Tribunal Case No. 56, partial award dated July 14, 1987, ¶ 196, (emphasis added), **CLA-29**.

[775] Statement of Claim, ¶¶ 102-103.

> *Claimants submit that the taking is to be treated as illegal, since the Reserve Law mandates a level of compensation that is limited to the book value of the assets and it prohibits the taking into account of lost profits or indirect damages [...] The Tribunal observes that Article 5 defines the compensation payable for expropriation simply as the market value of the investment expropriated immediately before the expropriation'. It does not prescribe how that market value is to be determined [...] The appropriate method of valuation will depend upon the context [...] The record does not demonstrate a refusal on the part of the State to pay compensation. Rather, it discloses that the Parties were unable to agree on the basis or the process by which such compensation would be calculated and paid. This is therefore a task that they have submitted to this Tribunal. For present purposes, it suffices to conclude that the present expropriation was lawful, since it wants only compensation, a matter vouchsafed by the Parties to this Tribunal to determine according to the standards prescribed in the BIT*[776].

660. *Second,* as it was demonstrated[777], several arbitral tribunals have applied the method of costs to assess projects whose future profitability is uncertain and where, therefore, any damage is speculative.

661. Finally, the Arbitral Tribunal must note the existing inconsistencies in the position of SAS. While, on one hand, SAS preaches the illegality of the expropriation (for lack of compensation) to "escape" the text of the Treaty, and to demand an assessment on the date of the award, and on the other hand, SAS stays "within" the text of the Treaty, instructing FTI to make its assessment under the standard of the FMV and to apply a legal interest rate[778], pursuant to the provision of article V(1) of the Treaty.

662. In view of the above, the Arbitral Tribunal must conclude that the Project must be assessed at the date of valuation established in the Treaty, not considering – if it be the case – a higher value at the date of the award.

7.5.3 It would be arbitrary to consider the date of the award for the purposes of Project valuation

663. There are at least four additional reasons to reject the valuation of the Project at the date of the award.

664. *First*, there is no reason to think that the payment of the market value of the Project – at the date established in the Treaty – would not be sufficient to entirely compensate the

---

[776] *Tidewater Investment Srl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, award dated March 13, 2015, ¶¶ 143-146, (emphasis added), **RLA-106.**
[777] *See* Section 7.3.1 *above*.
[778] FTI Expert Report, ¶ 12.8, **CER-1.**

supposed damages suffered by SAS. To the contrary, considering that article V(1) of the Treaty aims to guarantee that the investor remains undamaged, it should be considered that the standard of compensation set therein guarantees a full reparation[779].

665. *Second,* unlike the valuation date established in the Treaty, the date of the award has no relation to the facts of the case (*i.e.* it is an arbitrary date)[780]. To use such date would be contrary to the rules that govern compensation. As stated by Ball:

> *The use of hindsight is arbitrary in that it considers all facts up to a fixed point in time –the time of the award– that bears no relation to the events in issue (except that it is later). If the award had been a year earlier or later, the facts would likely have been different, and the award different in amount. Furthermore, valuing an asset as of the time of the award is also wholly inconsistent with the principle that compensation must be "prompt"*[781]*.*

666. *Third*, valuation at the date of the award is inconsistent with the standard of compensation based on the FMV, which SAS acknowledges as applicable[782] and that is established by article V(1) of the Treaty. The determination of the FMV demands to be placed at the date of valuation established in the Treaty and only to consider the information reasonably available at such date. For this reason, in addition to contradict the analysis of its financial expert, to value using the date of the award leads to speculation over what a potential buyer would have paid for the Project at such moment.

667. *Fourth*, there is no reason to think that, if CMMK had continued with the Project, its value would have increased. On the contrary, it is reasonable to assume that the social situation would have continued to aggravate itself until it would have forced CMMK to abandon the

---

[779] Pursuant to article V(1) of the Treaty, the compensation "*shall amount to the market value of the investment expropriated immediately before the expropriation or before the impeding expropriation became public knowledge, whichever is the earlier* [...]", **C-1.**

[780] SAS seeks to obtain benefits without bearing the risks: if the value increases, it requests that it be granted; if it decreases, however, it intends that it does not affect them.

[781] Markham Ball, *Assessing Damages in Claims by Investors against States*, 16 ICSID Review Foreign Investment Law Journal, 2001, p. 417, **RLA-149**.

[782] FTI uses the definition of market value established by the American Institute of Certified Public Accountants and the International Valuation Standards. According to the first one, market value is *"the price, expressed in terms of cash equivalents, at which property would changes hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts"* (emphasis added), Statement of Claim, ¶ 187. According to the second definition, "*Market value is the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion*" (emphasis added), Statement of Claim, ¶ 188.

Project. The unfruitful intermediation attempts undertaken by the Governor of Potosi confirm it[783]. In this context, if there were any increase in the value of the Project at the date of the award, such would be ascribable to the departure of SAS and, for obvious reasons, SAS would not have the right to benefit from it. Otherwise, SAS would be unjustly enriched.

668. Notwithstanding the foregoing, SAS expects to support its request of compensation at the date of the award with the *Siemens*, *ADC* and *Vivendi* cases. Those cases, however, are distinguishable from our case and do not reflect what is claimed by SAS.

669. In effect, in *Siemens* and *Vivendi*, the tribunal did not use the date of the award, but instead it considered the investments made until the date of the expropriation[784] as the market value of the expropriated investment (*i.e.* it applied the method of costs). Both tribunals rejected the compensation requested by the investor given the speculative nature of the damages sought.

670. It is true; on the other hand, that the *ADC* award determined the compensation considering information arising after the expropriation. However, this only occurred given the existence of exceptional circumstances consisting in a "*very considerable*" increase of the value of the investment since its expropriation[785]. Indeed, in *ADC*, the revenue projections of the airport concession radically changed since its expropriation by Hungary (in December 2001) given the great increase in passenger traffic (an external factor); specifically, it was estimated that between 2004 and 2008 the Hungarian airport market had increased in a ratio of 9,6% (third largest of the World).

671. SAS has not demonstrated, in the current case, that exceptional circumstances have had occurred after the reversion of the Mining Concessions that would have had increased the value of the Project. It does not even claim that it has happened. In any case, if the value of the Project were to be increased until the date of the award, that would not be due to external causes, but to the departure of SAS from the Project. For obvious reasons, SAS cannot benefit from such higher value.

672. The *Chorzów* case, in which SAS also attempts to sustain its request of valuation at the date of the award[786], is also distinguishable. In *Chorzów*, the "take-over" by Poland was considered unlawful because such country did not had the prerogative to expropriate the companies of German ownership in Alta Silesia. It is for this particular reason that the PCIJ

---

[783] *See* section 3.4 *above*.

[784] *Siemens A.G. v. Republic of Argentina*, ICSID Case No. ARB/02/8, award dated February 6, 2007, ¶ 377, **CLA-2**; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Republic of Argentina*, ICSID Case No. ARB/97/3, award dated August 20, 2007, ¶ 8.3.13, **CLA-10**.

[785] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, award dated October 2, 2006, ¶ 496, **CLA-35**.

[786] Statement of Claim, ¶ 168.

concluded that (i) it was a seizure and (ii) the compensation was not limited to the existing value at the date of confiscation:

> *The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation [...] it is a seizure of property, rights and interests which could not be expropriated even against compensation*[787].

673. For this reason:

> [...] *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. <u>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</u>*[788].

674. Consequently, the *Chorzów* case has little to do with the current case. While Poland had no right to expropriate the investment in question, in the current dispute there is no discussion that Bolivia has such prerogative and that its exercise is lawful.

675. In view of the above, the Tribunal must assess the Project value at the Bolivia Valuation Date and not consider the date of the award.

7.6 The Arbitral Tribunal must deny any compensation to SAS for other alleged breaches of the Treaty other than those in Article V (1)

676. It is not correct, as claimed by SAS, that in case of breaches other than expropriation, the valuation must based on the FMV standard **(7.5.1)**. In any case, SAS has not proven to have suffered damages nor to how much those would amount **(7.5.2).**

7.6.1 It is incorrect to calculate damages for breaches other than expropriation based on fair market value standards

677. Starting with the premise that there was no expropriation, but that Bolivia had, somehow, breached other obligations under the Treaty, SAS claims to have the right for total compensation of damages calculated in accordance with the standard of the FMV[789].

678. The assumptions of SAS does not find support in the text of the Treaty, which only orders compensation based on the FMV for expropriation cases[790].

---

[787] *Chorzów Factory (Germany v. Poland)*, PCIJ case No. 13, resolution dated September 13, 1928, p. 40, **CLA-69**.

[788] *Id.,* pp. 39-40, (emphasis added). For this reason, in its private vote, Judge Rabel emphasizes that the Polish State did not had "any right" to expropriate. *Id.*, private vote of Judge Rabel, p. 67.

[789] Statement of Claim, ¶ 198.

[790] Article V(1) of the Treaty, **C-1**.

679. Several arbitral tribunals have confirmed that the standard of compensation based on the FMV is not applicable to breaches other than expropriation. The tribunal in *Feldman*, for example, stated that:

> *NAFTA provides no further guidance as to the proper measure of damages or compensation for situations that do not fall under Article 1110 (expropriation); the only detailed measure of damages specifically provided in Chapter 11 is in Article 1110(2-3), "fair market value" which necessarily applies only to situations that fall within that Article 1110*[791].

680. In the same sense, in *S.D. Myers* the arbitral tribunal stated that:

> *SDMI relies on authorities that include decisions of the Iran-United States Claims Tribunal, but they concern the measure of damages in an expropriation. While some assistance can be obtained from a consideration of these authorities, the NAFTA deals explicitly with the measure of damages for an expropriation and those provisions are not controlling in this case*[792].

681. The arbitral tribunal in *PSEG* also confirmed it:

> *The Tribunal will accordingly consider first whether the claim to a fair market value of the Project is justified in light of the nature of the investment made. It must be noted in this respect that the BIT, like most treaties of its kind, provides for the fair market value as the measure for compensation only in connection with expropriation. Since the Tribunal has found above that there is no expropriation in this case, either direct or indirect, the fair market value does not appear to be justified as a measure for compensation in these circumstances [...] While the Tribunal has found that there is in this case a breach of fair and equitable treatment, this breach relates not to damages to productive assets but to the failure to conduct negotiations in a proper way and other forms of interference by the Respondent Government. The appropriate remedies thus do not relate to a compensation for the market value of those assets but to a different objective*[793].

682. In view of the above, the standard of the FMV is not applicable to the calculation of damages suffered for breaches other than expropriation.

[791] *Marvin Roy Feldman Karpa v. United States of Mexico*, ICSID Case No. ARB (AF)/99/1, award dated December 16, 2002, ¶ 194, (emphasis added), **RLA-150**.
[792] *S.D. Myers, Inc. v. Canada*, UNCITRAL, Second partial award dated October 21, 2002, ¶ 144, (emphasis added), **CLA-76**.
[793] *PSEG Global, Inc. v. Turkey*, ICSID case No. ARB/02/5, award dated January 19, 2007, ¶¶ 305-308, **CLA-51**.

7.6.2 SAS has not proved to have suffered damages from alleged breaches of the Treaty nor their total amount

683. Beyond making generic statements, SAS has not proved which are the damages that it would have suffered from the other breaches of the Treaty, nor their total amount.

684. Regarding the *first part*, SAS has not identified which would be the damages caused from each of the breaches of the Treaty that it claims. For example, SAS sates that Bolivia would have breached its obligation to grant full protection and security because "*by requesting its intervention, the Government refused or did not provide any relevant protection or assistance to the Company*"[794], but fails to identify which would be the damages caused from such alleged breach. The same occurs with the other alleged breaches, which is an eloquent sample of how little SAS relies on those claims.

685. This is an essential flaw in SAS's case, because the Tribunal must be able to analyze the specific damages caused by each alleged breach of the Treaty. As stated by the tribunal in *S.D. Myers*:

> [t]*he Tribunal will assess the compensation payable to SDMI on the basis of the economic harm that SDMI legally can establish*[795].

686. Likewise, in LG&E, the tribunal stated:

> *The fundamental concept of 'damage' is […] reparation for a loss suffered; a judicially ascertained compensation for wrong.* […] *Following this approach and to establish compensation for discriminatory treatment, the tribunal in Feldman v. Mexico noted that […] in case of discrimination […] what is owed by the responding Party is the amount of loss or damage*[796].

687. Besides proving the damage, as explained in section 7.2.4 supra, SAS must prove the existence of an adequate causal relation between the breach of the Treaty and the damage. As stated in S.D. Myers:

> *Compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific [treaty] provision that has been breached; the economic losses claimed by [the claimant] must be proved to be those that have arisen from a breach of the [treaty], and not from other causes*[797].

---

[794] Statement of Claim, ¶ 156.

[795] *S.D. Myers, Inc. v. Canada*, partial award dated November 13, 2000, ¶¶ 315-317, **RLA-125**.

[796] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Republic of Argentina*, ICSID Case No. ARB/02/1, award dated July 25, 2007, ¶ 87, **RLA-134**.

[797] S.D. Myers, Inc. v. Canada, partial award dated November 13, 2000, ¶ 316, **RLA-125**. *See* also *BG Group*

688. With regard to the *second part*, and in line with the above, SAS has not provided a valuation (nor total nor individualized) of the alleged damages caused by each of the breaches of the Treaty that it claims. FTI was only instructed to valuate the damages in an expropriation scenario according to the FMV standard[798]. FTI does not make any valuation of (i) damages supposedly suffered by SAS by causes different from the expropriation, nor (ii) under standards different from FMV.

689. Therefore, if the Tribunal concludes that Bolivia did not breach article V of the Treaty, regarding expropriation, it must deny any compensation due to lack of proof.

8. INTERESTS

690. SAS requests the payment of interests at the statutory interest rate in Bolivia, equivalent to 6%. In an attempt to increase its claim, it also requests that the interests should de compound and capitalized on a quarterly basis[799].

691. Article V(1) of the Treaty, in its section relating to interests, provides:

> *Such compensation* [...] *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* [...].

692. In this case, the commercial interest is to be preferred over the statutory interest rate, as it conforms to Bolivian law and the economic reality **(8.1)**. However, the criterion used by SAS to calculate the normal commercial rate is incorrect[800] **(8.2)**. If the Arbitral Tribunal considers that the interest should not be calculated solely on the basis of the risk free rate, then it should conclude that the pre-award interest rate should be of 2.9% (annual), which is a reasonable and normally used rate **(8.3)**. The interest must be simple, as Bolivian law forbids the capitalization of interest **(8.4)**.

8.1 The commercial interest rate should be preferred over the statutory interest rate

---

Plc. v. Argentina, UNCITRAL, award dated December 24, 2007 ("*The damage, nonetheless, must be the consequence or the proximate cause of the wrongful act*"), ¶ 428, **CLA-04**; and *Metalclad Corporation v. United States of Mexico*, ICSID Case No. ARB(AF)/97/1, award dated August 30, 2000, ¶ 115, **RLA-141**.

[798] FTI Expert Report, ¶ 2.2 ("Under the first scenario we have calculated the Claimant's damages due to the alleged unlawful expropriation of the Project by the Respondent as the fair market value ("FMV") of the Claimant's interest in the Project as at July 6, 2012"), **CER-1**. The only other valuation scenario of FTI is the one based in the restitution of the Mining Concessions.

[799] Statement of Claim, ¶¶ 219-230.

[800] The inconsistencies in SAS' reasoning are striking. The FTI report dedicates several paragraphs (12.4-12.9) to explain the criteria that supposedly must be used to define the commercial rate, but, finally and without major explanation, it applies the legal interest rate by instruction of SAS (¶ 12.8). The same lack of justification is seen in the Statement of Claim (Statement of Claim, ¶¶ 219-221).

693. In line with civil-law countries, the statutory interest rate has a marginal application (in the business context) in Bolivia. As provided by article 411 of the Bolivian Civil Code, its purpose is to serve as a default rule for cases where parties have not established an applicable interest rate[801]. As it will be easily seen by the Arbitral Tribunal, these cases are exceptional because the interest rate is essential key element of financing operations. Without a doubt, and as it was acknowledged by the FTI[802], this would have been the case of any financing that SAS or Bolivia would have had resorted to.

694. In addition, the Arbitral Tribunal must not lose sight of the fact that the statutory interest rate is a maximum rate. The Bolivian Civil Code provides that any charge exceeding the statutory interest constitutes usury and it is subject to criminal sanctions[803]. Therefore, applying the statutory interest rate would over compensate SAS in this case.

695. In any event, SAS does not explain – in light of article V(1) of the Treaty – why the statutory interest rate is to be preferred over the commercial rate. In fact, the analysis of FTI suggests that the second is to be preferred[804]. The only reason SAS provides for applying the statutory interest is that this would supposedly result similar to the cost of debt of SASC[805]. However, as explained in the next section, it is financially wrong to consider SASC's cost of debt in order to determine the applicable interest rate.

696. In view of the above, the Arbitral Tribunal must conclude that the statutory interest rate is not applicable, but a normal commercial interest rate, in accordance with the Treaty.

8.2 The criterion used by the FTI to calculate the commercial rate is erroneous

697. In order to calculate the interest rate, FTI proposes to use a *risk-free rate* and add a *spread*[806].

698. Bolivia concurs with FTI in using the U.S. Treasury Bill rate as a risk free rate. However, the short-term rate (monthly) is to be used and not the long term rate (annually) because the latter includes a liquidity premium and inflationary risk, and therefore is not really a risk-free rate.

---

[801] Article 411 of the Civil Code of the Plurinational State of Bolivia: "*The conventional interest is established in written, regardless the main amount over which it should be applied. In other cases, and provided that is not otherwise recognize, the legal interest shall be applied*" (emphasis added), **RLA-49**.

[802] FTI Expert Report, ¶ 121.5, **CER-1.**

[803] Article 413 of the Civil Code of the Plurinational State of Bolivia: "*Charging conventional interests at a higher rate than the maximum legally permitted, as well as of capitalized interests, constitutes usury and is subject to restitution, regardless of criminal sanctions".* **RLA-49.**

[804] FTI Expert Report, ¶ 12.6: "*As our starting point to determine a normal commercial rate [...]*", **CER-1.**

[805] Statement of Claim, ¶ 219. Note that there is a difference of 0.4% between the intended cost of debt of SASC (5.6%) and the legal interest rate (6%).

[806] FTI Expert Report, ¶ 12.5, **CER-1.**

699. To the extent that the interest has the purpose of compensating the value of money in time, the pre-award interest that the Arbitral Tribunal orders must be limited to reflect the U.S. Treasure risk-free rate, which Brattle has calculated at 0.12% as of March 20, 2015.

700. This rate was adopted by several tribunals. For example, the arbitral tribunal in *Archer Daniels* explained:

> *The interest shall be calculated for each month of the period (December 31, 2005 until payment is made) at a rate equivalent to the yield for the month, at the interest rate which is more closely connected with the currency of account in which the award of compensation is made (See S.D Myers v. the Government of Canada, Second Partial Award, paragraph 304). As compensation in the present arbitration is to be awarded in U.S. Dollars, the simple interest rate for U.S. Treasury bills is appropriate*[807].

701. If the Arbitral Tribunal considers (*quod non*) that the pre-award rate must reflect a *spread* over the risk-free rate, it must reject the criteria under which FTI calculates such spread. Specifically, FTI considers (i) the average interest rate for financing in American dollars and (ii) the cost of debt of SASC[808].

702. As stated by Brattle, *"FTI's reasoning in proposing these alternative rates follows from the assumption that the pre-award interest rate should —reflect the risks that the Claimant would have faced if they had invested or borrowed funds themselves"*[809]. There is no financial support to use these rates in the calculation of the *spread* that would be added to the risk free rate.

703. Indeed, using a rate that seeks to compensate SAS for the risks that would have borne for investing the money is wrong, because SAS did not invested the money nor, therefore, borne such risks. As explained by Brattle:

> *it would put the Claimant in a better position than if it had received the award amount right away, because the Claimant would obtain the reward for bearing investment risk (an expected return above the risk-free rate) without actually bearing that investment risk*[810].

704. The above would also mean that the pre-award interest to be paid varies depending on who is the claimant and what is its investment profile, which, as explained by Brattle,

---

[807] Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United States of Mexico, ICSID Case No. ARB(AF)/04/5, award dated November 21, 2007, ¶ 294, **RLA-151.**

[808] FTI Expert Report, ¶ 12.7, **CER-1**.

[809] Brattle, ¶ 192, **RER-3**.

[810] *Id*., ¶ 193, **RER-3**.

would be wrong[811].

705. For its part, the interest does not have to compensate the claimant as lender. As recently stated in the Gold Reserve case:

> *The Tribunal considers that the appropriate purpose of pre-Award interest is to ensure Claimant is properly compensated for the FET breach that has occurred, although it need not compensate Claimant as a "borrower. The Tribunal finds that the US Government Treasury Bill rate represents a reasonable and fair rate of interest that would fulfil this purpose*[812].

706. In any case, as acknowledged by FTI[813], there is no information regarding the cost of debt of SAS or SASC. FTI has to resort to the average cost of debt of other companies that operate in the same industry. However, this is not reliable given that within the SIC 104 category used by FTI, there are companies of different sizes, ages and purposes than SASC. For example, within such category there is Newmont Mining Corporation[814], incorporated in 1921 (SASC was incorporated in 1994[815]), which has operations in 5 continents and 7 countries (SASC only has operations in Nevada/Utah and Chile), is dedicated to exploration and exploitation of mining projects (SASC is a junior mining company dedicated only to exploration[816]) and which has over 30,000 employees (SASC lists in its web page only 6 management members[817]). Thus, there are no reliable bases to calculate the cost of debt of SASC.

707. In view of the above, the criteria provided by FTI to calculate the commercial rate must be rejected.

8.3 The commercial rate must be calculated based on the sovereign bonds issued by Bolivia in October 2012

708. The Treaty only provides that interests must be paid at a "normal" commercial rate. In that case, considering that commercial rates vary depending on the risks of each borrower, there is no "normal" or "typical" commercial rate.

---

[811] Ibid.

[812] *Gold Reserve Inc. v Bolivarian Republic of Venezuela*, ICSID Case ARB(AF)/09/01, award dated September 22, 2014, ¶ 853, **RLA-27**.

[813] FTI Expert Report, ¶ 12.7, **CER-1**.

[814] The information of Newmont Mining Corporation was obtained from http://www.newmont.com/about-us/default.aspx (date of access: March 18, 2015), **R-138**.

[815] Statement of Claim, ¶ 14.

[816] *See* http://www.trimetalsmining.com/ (*"TriMetals Mining Inc. is a growth focused mineral exploration company"*) (date of access: March 18, 2015), **R-139**.

[817] *See* Management of TriMetals Mining Inc. http://www.trimetalsmining.com/about/management/ (date of access: March 18, 2015), **R- 140**.

709. Under these circumstances, given the fact that pre-award interests are to be applied over any amount owed by Bolivia, the risk premium applicable to Bolivia constitutes a natural benchmark.

710. This premium risk is reflected in the yield of its sovereign bonds. Bolivia issued a ten-year sovereign bond in October 2012, that is, very close to the Bolivia Valuation Date. Considering this information, and after adding up the results of the risk-free rate, Brattle calculated an annual interest rate of 2.9%. This rate has been calculated as of March 20, 2015.

711. The use of sovereign bonds as a benchmark for calculating pre-award interest rates is not unusual in international case law. For example, in the Feldman case, the tribunal reasoned that:

> *The total revised award indicated above of $9,464,627.50 Mexican pesos is increased by simple interest calculated from the date the rebates should have been paid (see below) to the date of this decision, in accordance with the interest rate paid on Federal Treasury Certificates or bonds issued by the Mexican Government*[818].

712. In the international arena, as acknowledged by FTI[819], the interest rates are normally calculated with reference to LIBOR. In these cases, by calculating normal or reasonable interest rates, the investment tribunals (some of them cited by SAS[820]) use LIBOR + 2%. For example, in *Joseph Charles Lemire v. Ukraine*, the tribunal stated that:

> *LIBOR is universally accepted as a valid reference for the calculation of variable interest rates. In the present case, an additional reason for the selection of LIBOR is that it is consistent with Article III.1 of the BIT, which provides that compensation for expropriation shall include "interest at a commercially reasonable rate, such as LIBOR plus an appropriate margin" [...]. Claimant has proposed a margin of 2%. The Tribunal concurs: 2% is a reasonable margin, which reflects the surcharge which an average borrower would have to pay for obtaining financing based on LIBOR*[821].

---

[818] *Marvin Roy Feldman Karpa v. United States of Mexico*, ICSID case No. ARB(AF)/99/1, award dated December 16, 2002, ¶ 205, **RLA-150**. FTI acknowledges the importance of considering the risks of the debtor in the calculation of the pre-award interest rate. See FTI Expert Report, ¶ 12.5, **CER-1**.

[819] FTI Expert Report, ¶ 12.6 *("The London Interbank rate is another benchmark rate that may be used...")*, **CER-1.**

[820] PSEG Global, Inc. v. Turkey, ICSID Case No. ARB/02/5, award dated January 19, 2007, ¶ 348, **CLA-51**; Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentina, ¶ 452, **CLA-58.**

[821] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, award dated March 28, 2011, (emphasis

713. The rate established by Brattle is equivalent to LIBOR + 2.72% (monthly periodicity) or LIBOR +2.21% (annual periodicity), granting SAS a compensation higher than that normally granted by arbitral tribunals[822].

714. In view of the above, if the Tribunal considers that the pre-award interest rate must not be based solely on the U.S. Treasury free risk rate, it must use instead the alternative pre-award annual rate established by Brattle, equivalent to 2.9%.

8.4 The interest rate must be simple

715. SAS cites case law that would purportedly support a trend of international arbitrations to order payment of compound interests[823].

716. The decisions cited by SAS are far from establishing a constant jurisprudence and much less a principle of international law regarding interests. As mentioned in the *Duke* case: *"In addition, although increasingly common in ICSID practice, the award of compound interest is not a principle of international law"*[824]. Likewise, in *Archer Daniels Midland Company*, "*The Tribunal concluded that with regards to the dispute of the parties over the interests in this case, no consistent legal framework regarding international arbitration practice arouse in relation to the application of simple or compound interests in determined cases*"[825]. For this reason, it is not unusual to find recent decisions that order the payment

---

added), **RLA-152**. The LIBOR + 2% rate was applied in several other cases, such as *Sempra Energy International v. Republic of Argentina*, ICSID Case No. ARB/02/16, award dated September 28, 2007, ¶ 486, **RLA-153**; *El Paso Energy International Company v. Republic of Argentina*, ICSID Case No. ARB/03/15, award dated October 31, 2011, ¶ 745, **RLA-26**; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, award dated July 29, 2008, ¶ 818, **CLA-68**; and *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, award dated June 29, 2012, ¶ 279, **RLA-154.**

[822] Brattle, ¶ 186, **RER-3**.

[823] Statement of Claim, ¶¶ 222-229. Despite the notable effort by SAS, John Gotanda, to whom SAS ranks as "*a remarkable scholar in regards to interests*", acknowledges in a publication of 2008 that the arbitral tribunals have only, in some cases, strayed from the traditional practice of granting simple interests. See John Y. Gotanda, *Compound Interest in International Disputes,* 34 Law & Pol'y Int'l. Bus. 393, 397-98 (2003) ("Gotanda, Compound Interest"), p. 14, **CLA-91.** The same effort of SAS is not seen, however, when postulating that the periodicity of the capitalization of interests should be quarterly. SAS limits itself to claim it without any support. It claims it once and, surprisingly, at the Relief Section of the Statement of Claim.

[824] *Duke Energy Electroquil Partners and Electroquil S.A. v. Ecuador*, ICSID case No. ARB/04/19, award dated August 18, 2008, ¶ 473, **RLA-155**.

[825] Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United States of Mexico, ICSID Case No. ARB(AF)/04/5, award dated November 21, 2007, ¶ 296, **RLA-151**, citing with authorization Compañia del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, award dated February 17, 2000, **CLA-87**.

of simple interests, as the *Yukos* case[826].

717. In any case, SAS omits to mention that the Bolivian Civil Code forbids compound interests, providing for civil and criminal sanctions for the violation of such rule.

718. Article 412 of the Bolivian Civil Code[827] provides that:

> *Anatocism and any other form of capitalization of interests is forbidden. Any convention in the contrary is void.*

719. Also, article 413 of the Bolivian Civil Code[828], provides that:

> *Charging conventional interests at a higher rate than the maximum legally permitted, as well as of capitalized interests, constitutes usury and is subject to restitution, regardless of criminal sanctions.*

720. The relevance of the local law in the determination of the interest that could be granted has been acknowledged by several investment tribunals. For example, the tribunal of *Duke Energy v. Ecuador* stated:

> *The Tribunal must further decide whether simple or compound interest should be awarded. It agrees with the Respondent's argument in favor of simple interest. Indeed, Ecuadorian law prohibits compound interest in the present case. Specifically, Article 244 of the Ecuadorian Constitution prohibits compound interest in the context of credits. Similarly, Article 2140 of the Civil Code provides that "it is prohibited to stipulate interest on interest" (Spanish original, Tribunal's translation). The same prohibition is contained in the Code of Commerce* [...][829]

721. This same reasoning was followed, *inter alia*, in the *Desert Line v. Yemen*[830] and *Aucoven v. Venezuela*[831] cases, where the capitalization of interests was also forbidden (by the Yemen law and the Venezuelan law, respectively). In these cases, the tribunal ordered the payment of simple interests.

722. Even if the existence of a tendency for arbitral tribunals to grant compound interest was

---

[826] *Yukos Universal Limited (Isle Of Man) v. Russian Federation*, PCA case No. AA 227, award dated July 18, 2014, ¶ 1689, **RLA-156**.

[827] *See* Civil Code of the Plurinational State of Bolivia, article 412, **RLA-49**.

[828] *See* Civil Code of the Plurinational State of Bolivia, article 413, **RLA-49**.

[829] *Duke Energy Electroquil Partners and Electroquil S.A. v. Ecuador*, ICSID Case No. ARB/04/19, award dated August 18, 2008, ¶ 457, **RLA-155.**

[830] *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, award dated February 6, 2008, ¶¶ 294-295, **RLA-157**.

[831] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, award dated September 23, 2003, ¶ 396, **RLA-158**.

accepted, as claimed by SAS, this does not occur automatically. On one hand, John Gotonda acknowledges that compound interests would only be granted, *"when the claimant can prove that it would have earned compound interest in the normal course of business on the money owed if it had been paid in a timely manner*"[832]. SAS has not fulfilled this burden of proof, limiting itself to claim that it has the right to payment of compound interests. On the other hand, as mentioned in the *Gemplus S.A.* case, compound interests should not be granted whenever "inappropriate"[833]. In the current case, granting compound interest would clearly be inappropriate as it is contrary to Bolivian law[834].

723. In view of the foregoing, if the Tribunal considers that Bolivia must compensate SAS, the interests can only be simple[835].

724. Finally, despite everything mentioned in this Section 8, if the Tribunal concludes that the applicable interest rate is the statutory one (*quod non*), it should necessarily conclude that the interests could only be simple. It would be blatantly contradictory to apply the Bolivian Civil Code for some effects (statutory interest) but not for others (prohibition of anatocism or compound interests).

9. IN ANY EVENT, ANY COMPENSATION OF SAS SHALL BE SIGNIFICANTLY REDUCED TO REFLECT THE CONTRIBUTION OF SAS TO ITS LOSSES

725. Based on the facts described in Section 3 *above*, Bolivia requests the Arbitral Tribunal that, in the hypothetical and improbable case, it orders the payment of a compensation to SAS (and, for that, considers that SAS (and not SASC) was the actual owner of the investment), the amount of such compensation be reduced in, at least, 75%, considering that the actions and omissions of the Respondent itself were the ones that contributed to the damage that it claims to have suffered.

726. There hardly is a case of contributory negligence of the victim as clear as this one. The actions and omissions by SAS and the behavior of the representatives of CMMK were the

[832] *See* John Y. Gotanda, *Compound Interest in International Disputes*, 34 Law & Pol'y Int'l. Bus. 393, 397-98 (2003) ("Gotanda, Compound Interest"), p. 16, **CLA-91**. This is coherent with the mandate that the damages must be certain.

[833] *Gemplus S.A.,SLPS.A.,Gemplus IndustrialS.A.deC.V.v. United States of Mexico*, ICSID Case No. ARB(AF)/04/3, award dated June 16, 2010, ¶¶ 16-26, **RLA-138**.

[834] The need for special circumstances to not exist for compound interests to be granted is also highlighted by F.A. Mann, cited by SAS. See F.A. Mann, *Compound Interest as an Item of Damage in International Law*, 21 U.C. Davis L. Rev. 577, 585 (1987-88), p. 586, **CLA-92**.

[835] SAS does not provide any support for its claim that compound interests be capitalized quarterly. It limits itself to only mention it once, and surprisingly, which occurs in the relief section. In view of this lack of support, and having established that the Tribunal cannot order the payment of compound interests, Bolivia does not consider necessary to make a detailed analysis over this issue.

trigger of a public commotion that severely affected the public order of North Potosí. In other words, the Reversion did not obey a capricious or arbitrary decision of Bolivia, but rather a forced consequence of the conduct by SAS.

727. For these reasons, the Arbitral Tribunal must apply the legal rule of "contributory negligence" or "guilt of the victim", acknowledged both by Bolivian Law and international law, and annul or reduce the eventual compensation that may be ordered to reflect adequately the grade of the unlawful contribution of SAS in the production of the damaging final result.

728. Under international law, it is a recognized principle that if one of the parties has acted neglectfully and, therefore, has contributed to the production of the damage, the compensation must be eliminated or reduced in proportion to such contribution[836].

729. This is one manifestation of the theory of the "concurrence of causes" or "causation" that prevents one party to be condemned to respond entirely for actions or omissions that only belong in part to it, either because an exonerating circumstance exists for the specific case[837] or because the compensation must reflect in its exact measure the contribution to the injury from each party.

730. This last position is modernly adopted by the international law. Article 39 regarding Responsibility of States of the ILC provides that "[*I*]*n the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sough"*[838].

731. The commentary to article 39 emphasizes that:

> *Article 39 deals with the situation where damage has been caused by an*

[836] I. Marboe, *Calculation of Compensation and Damages in International Investment Law*, Oxford International Arbitration Series, 2009, p. 120-121, RLA-102; S. Ripinsky y K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, 2008, p. 314-319, **RLA-103**.

[837] In general, this is the theory adopted by local laws and responds the old 19-century principle by which a proper causation must exist between the alleged operative event and the damage in order for a reparation duty to exist. Thus, for example, the Bolivian law acknowledges the guilt of the victim as an exoneration of liability. Along with the fortuitous event and the guild of a third party, the guilt of the victim is an exoneration of liability in as much as it provokes the rupture of the causal link and the consequent unimputable nature of the damaging event. See, for example, Civil Code of the Plurinational State of Bolivia, articles 995 to 998, **RLA-49**.

[838] United Nations, *Responsibility of States for Internationally Wrongful Acts*, as adopted by the approved General Assembly Resolution No. A/RES/56/83, January 28, 2002, article 39, **RLA- 126**.

internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with Articles 1 and 28, but where the injured State, or the individual victim of the breach, has materially contributed to the damage by some willful or negligent act or omission. Its focus is on situations which in national law systems are referred to as "contributory negligence", "comparative fault", "faute de la victim", etc[839]*.*

732. In international law, contributory negligence has been acknowledged in several occasions by international tribunals[840], not only when the claimant has incurred in unlawful or forbidden acts that, totally or partially, contribute to the production of the claimed damage, but is rather enough that such behavior was merely negligent[841].

733. In several investment arbitrations, the tribunals have also acknowledged the contributory negligence of the investor and have reduced the amount of the compensation accordingly as to reflect its negligent behavior in the production of the damage[842]. For which it does not correspond to condemn States beyond the actual injury caused by them.

734. In *MTD v. Chile*, the tribunal concluded that the investor had acted negligently for the simple fact of not having obtained certain construction permits for a real estate venture that should have been granted by local authorities – in regards to a land in which the projected construction was forbidden pursuant to applicable urban regulations – after the host State has already granted the authorization for the investment. On this basis, the tribunal held that the investor *"should bear part of the damages suffered and the Tribunal estimates that share to be 50% after deduction of the residual value of their investment*

---

[839] International Law Committee of the United Nations, Draft Articles on Responsibility of State for Internationally Wrongful Acts, with commentaries, 2001, pages 109-110 (emphasis added), **RLA-159.**

[840] *See*, for example, Commentaries to Delagoa Bay Railway (*Great Britain, United States of America v. Portugal*), Special Arbitral Tribunal in Berne, award dated March 29, 1900 at H. La Fontaine, Pasicrisie Internationale. Histoire Documentaire des Arbitrages Internationaux, 1902, p. 402. In this case, the tribunal reduced the damages due to an investor for the termination of its concession due to the fact that such termination was caused, partially, to a certain negligent behavior of the investor. *"All these circumstances that can be argued against the concessionary company and in favor of the Portuguese Government, mitigates the responsibility of the last and provides for a reduction in the compensation".* Un official translation of: *"Toutes ces circonstances qui peuvent être alleguées à la charge de la compagnie concessionnaire et à la décharge du gouvernement portugais attenuent la respousabilité de ce dernier et jusfifient, comme il va être exposé plus loin, une réduction de la réparation à allouer"*, *Id.*, p. 402, **RLA-160**.

[841] S. Ripinsky and K. Williams, *Damages in International Investment Law, British Institute of International and Comparative Law*, 2008, p. 315, **RLA-103**.

[842] *See*, for example, Iurii Bogdanov v. Republic of Moldova, SCC, award dated September 22, 2005, chap. 5.2, **RLA-161**. See, also, T.W. Wälde and B. Sabahi, Compensation, Damages and Valuation in International Investment Law, 4 Transnational Dispute Management, issue 6, 2007, pp. 37-38, **RLA-162**; B. Bollecker-Stern, Le Préjudice dans la Théorie de la Responsabilité Internationale, 1973, p. 310, **RLA-163**.

calculated on the basis of the following considerations"[843]. The decision was confirmed by the ICSID Annulment Committee[844].

735. Likewise, in *Occidental v. Ecuador,* the tribunal found that the investor had contributed with its unlawful behavior – *v.g.* transfer of 40% of the shares without governmental approval - to the decision by the host State to declare the expiration of the concession granted. On this basis, the majority of the tribunal reduced the compensation in 25%[845]. In his dissident opinion, Prof. Stern considered that the responsibility of the investor should be established in 50%, relying on the MTD case, and be reflected in that magnitude in the compensation granted.

736. In sum, the international arbitration practice broadly demonstrates that the consideration of negligent, unreasonable and unlawful conduct of the investor corresponds at the moment of establishing the eventual compensation, with the purpose of reducing it proportionally in accordance with its contribution to the production of damages.

737. As Bolivia has demonstrated in this Counter-Memorial, SAS was responsible for the Reversion by (i) fomenting the divisions among Indigenous Communities; (ii) mistreating Indigenous Communities and not taking actions against its employees ███████████ ████; (iii) usurping ancient traditions by infiltrating a *Cabildo* using solemn clothes of Indigenous Communities Authorities; (iv) making reckless accusations against such Authorities; (v) instigating Indigenous Communities distant from the Project to confront with opposing Communities by means of a "buying of consciences" program; (vi) creating an alleged unlawful Indigenous Authority; and (vii) requesting the police to violently intervene. All these facts, as was demonstrated, were the main cause for the Reversion,

---

[843] MTD Equity Sdn. Bhd. and MTH Chile S.A v. Republic of Chile, ICSID case No. ARB/01/7, award dated May 25, 2004, ¶¶ 178, 242-243, **RLA-164**. See, also, S. Ripinsky, Assessing Damages in Investment Disputes: Practice in Search of Perfect, 10 J. World Investment & Trade, 2009, pp. 19-20, **RLA-165**.

[844] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID case No. ARB/01/7, annulment decision adopted by the ad hoc committee dated March 21, 2007, ¶ 101, **RLA- 111**. The committee established that: "*[t]he Tribunal had already analysed the faults of both sides in some detail, holding both to be material and significant in the circumstances. As is often the case with situations of comparative fault, the role of the two parties contributing to the loss was very different and only with difficulty commensurable, and the Tribunal had a corresponding margin of estimation [...] In such circumstances, is not unusual for the loss to be shared equally. International tribunals which have reached this point have often not given any "exact explanation" of the calculations involved. In the event, the Tribunal having analysed at some length the failings of the two parties, there was little more to be said – and no annullable error in not saying it*." *Id*.

[845] Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID case No. ARB/06/11, award dated October 5, 2002, ¶ 678, ("*The Tribunal agrees that an award of damages may be reduced if the claiming party also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should be bear some responsibility*"), **RLA-166.**

sole alternative for the State to reestablish the public order.

10. RELIEF SOUGHT

738. 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:

10.1 As to jurisdiction and admissibility:

739. Declares:

a. that the Arbitral Tribunal lacks jurisdiction over all claims as SAS does not have a protected investment under the Treaty since it has not proved to be the actual owner of the Mining Concessions;

b. *alternatively,* that these claims are inadmissible as SAS does not have "*clean hands*"; and

740. Orders:

a. SAS to entirely reimburse Bolivia for the costs incurred in the defense of its interests in this arbitration, along with interests at a reasonable commercial rate to be determine by the Arbitral Tribunal from the date of disbursement thereof until the date of full payment; and

b. any other measure of satisfaction as the Arbitral Tribunal considers appropriate.

10.2 As to the merits

741. If, *par impossible*, the Arbitral Tribunal considers that it has jurisdiction and the claims are admissible, declares

a. that Bolivia has acted in accordance with the Treaty and international law when declaring the Reversion;

b. that Bolivia has acted in accordance with its obligation of giving the investment fair and equitable treatment;

c. that Bolivia has acted in accordance with its obligation of not adopting arbitrary and discriminatory measures that interferes 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 that it accords to its own investors;

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 the Arbitral Tribunal may provide; and

742. Orders:

a. SAS to entirely reimburse Bolivia for the costs incurred in the defense of its interests in this arbitration, along with the interests at the reasonable commercial rate to be determined by the Arbitral Tribunal from the date of disbursement thereof until the date of full payment; and

b. any other measure of satisfaction as the Arbitral Tribunal considers appropriate.

Respectfully submitted on behalf of the Plurinational State of Bolivia

____

ATTORNEY GENERAL OF THE STATE

____

DECHERT (PARIS) LLP