PCA CASE NO. 2013-15

IN THE MATTER OF
AN ARBITRATION UNDER THE RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

SOUTH AMERICAN SILVER LIMITED
CLAIMANT

v.

THE PLURINATIONAL STATE OF BOLIVIA
RESPONDENT

CLAIMANT'S POST-HEARING BRIEF

October 31, 2016

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Claimant, South American Silver Limited ("Claimant" or "SAS") hereby submits its Post-Hearing Brief in this arbitration proceeding against the Plurinational State of Bolivia ("Respondent" or "Bolivia") pursuant to Article 8 of 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, extended to Bermuda on December 9, 1992 (the "UK-Bolivia BIT" or the "Treaty").[1]

I. INTRODUCTION

1. There is no dispute that Bolivia directly expropriated SAS's validly-acquired and lawfully-held Malku Khota Concessions (the "Concessions") and its Malku Khota Mining Project (the "Project"), and that it did not provide any compensation to SAS. Since the payment of compensation, amounting to the Project's fair market value, is a mandatory requirement under the Treaty in the event of an expropriation, it follows that Bolivia unlawfully expropriated the Project and, thus, the only question left for the Tribunal to settle is the quantification of damages owed to SAS. In that regard, relying on the unmatched expertise of RPA and FTI in valuing mining projects, and using the MTR methodology and methodologies based upon contemporaneous market data (*i.e.*, analyst valuations and private-placement transactions), Claimant demonstrated that the fair market value of the Project, which is the amount the Tribunal should award, is US$ 307.2 million, plus pre-award interest, which has been mounting and continues to mount, and post-award interest, both of which should be compounded.

2. To obfuscate the simplicity of the Tribunal's task in this arbitration, Bolivia repeated during the hearing its groundless accusations of wrongdoing against SAS. Yet, Bolivia failed to substantiate these allegations in any credible way, and Claimant denies these accusations in the strongest possible terms. These absurd allegations rest on the bought but not paid for testimony of Witness X, whose lack of credibility was firmly established during cross-examination; and upon vague statements in documents that the Bolivian Government never acted upon because Respondent itself did not take them seriously (until, of course, Bolivia tried to use them to recreate history in this arbitration). On the other hand, the testimony of

[1] References to paragraphs of prior pleadings or presentations should be taken to include all exhibits and legal authorities cited therein. Not all relevant exhibits and legal authorities are cited or discussed here due to page limit constraints.

SAS's witnesses, *and Bolivia's own witnesses*, further confirmed the evidence in the record proving that: (i) the indigenous communities surrounding the Project supported both CMMK and the Project; (ii) CMMK was working towards consensus with the Malku Khota and Calachaca communities through a formal community relations program, despite Bolivia's failure to provide assistance and its undermining of CMMK's efforts; and (iii) the violence in the Project area was not caused by CMMK or Claimant, but by outsiders and illegal miners whose interests lied in forming a cooperative to exploit the massive Malku Khota deposit, and who Respondent tolerated and failed to control.

3. Bolivia's preposterous allegation that Claimant orchestrated its own expropriation (the so-called "Plan B") was completely undermined during the cross-examination of Bolivia's witnesses and by Mr. Fitch, President and Director of SAS, who clearly articulated the importance of the Project to Claimant:

> … you spend your entire life trying to discover a deposit of the magnitude of Malku Khota. They're extremely rare. Maybe only ten or twenty in the world ever get to this sort of dimensions. So, when you find something like this, you hang on to it for dear life because this is the lifeblood of your company. This is the company-maker. This is how major companies like Barrick got created. So, it's absolute rubbish to suggest that we had any interest in losing this property. This was a prize that had taken a lifetime to find.[2]

4. Respondent also reiterated at the hearing its baseless and ever-shifting jurisdictional and admissibility objections, even requesting the Tribunal to turn the Treaty on its head and read into it requirements that simply do not exist. The Tribunal should naturally dismiss these unfounded allegations, and interpret the Treaty as it is, recalling that Bolivia has already conceded that Claimant is a "company" under Article 1(d), having been "incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which [the Treaty] is extended;"[3] and that it owns a qualifying "investment" in accordance with Article 1(a), which includes "every kind of asset which is capable of producing returns," such as "shares in and stock and debentures of a company and any other form of participation in a company," or "any business concessions granted by [Bolivia]" … "including concessions to search for,

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[2] **Hearing on Jurisdiction and Merits Transcript** ("**Hearing Tr.**, Day #"), Day 2, 293:10-19 (R. Fitch) (English).
[3] **Exhibit C-1**, Treaty, Art. 1(d).

cultivate, extract or exploit natural resources."[4] Since Article 8(1) provides that disputes between a UK company and Bolivia concerning an obligation of the latter under the Treaty in relation to an investment of that company can be submitted to international arbitration, the Tribunal has jurisdiction over SAS's claims.

5. In sum, the evidence is irrefutable. Respondent seized SAS's valuable investment for its own economic interests as part of its ongoing nationalization program, and failed to compensate Claimant. It is also clear that Bolivia's allegations and legal defenses have no foundation in fact or law, and are simply *ex post facto* creations aimed at diverting the Tribunal's attention from the real issues in this arbitration. It is incontrovertible that SAS, for its part, developed the Project for several years before Bolivia took it, demonstrated the presence of a massive poly-metallic deposit which even Bolivia's own experts acknowledge, properly engaged with the surrounding communities, and did nothing wrong. The Tribunal can arrive at no other conclusion in this case but to find Bolivia liable for violating the Treaty and award SAS compensation in the amount of the fair market value of the Project, which Claimant's mining and quantum experts concluded is US$ 307.2 million, plus compounded pre- and post-award interest.

II. FACTUAL BACKGROUND

A. BOLIVIA EXPROPRIATED SAS'S INVESTMENT TO FURTHER ITS OWN ECONOMIC INTERESTS

6. Bolivia agrees that SAS had valid title over the Concessions, and does not dispute that it expropriated SAS's investment without compensation, but alleges that the expropriation was necessary to end the violence near the Project. That is false. CMMK did not cause the violence, which continued after the expropriation.[5] Governor Gonzales even conceded at the hearing that a military unit, which community members had requested to "permanently secure" the Project area, was only sent after Bolivia had expropriated and taken control of the Project.[6]

7. Rather, it was established at the hearing that Bolivia expropriated the Project to further its own economic interests. Governor Gonzales testified that the Potosí Government repeatedly proposed to

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4 **Exhibit C-1**, Treaty, Art. 1(a).

5 **Exhibit C-242**, *Se teme mayores actidudes violentas en Malku Khota*, JORNADANET, Oct. 5, 2012.

6 **Hearing Tr.**, Day 4, 872:3-5: "*Posterior a la nacionalización sí hubo presencia de militares. Pero durante el conflicto, no; sí hubo presencia solo policial*" (F. Gonzales) (Spanish).

become CMMK's "partner" in the Project.[7] Likewise, statements by high-level Bolivian officials, including the President and the Minister of Communications, prove Bolivia's interest in expropriating the Project as early as mid-2011,[8] as part of a nationalization program to revert ownership to the State of strategic national resource projects held by foreign investors.[9] Thus, it is no surprise that COMIBOL President Héctor Córdova traveled to China in early August 2012, days after the expropriation, to meet with potential partners who would assist Bolivia in continuing to develop the Project (a trip that would have been planned well before the expropriation), or that a Chinese delegation traveled to Bolivia to discuss the topic.[10] Minister Navarro also confirmed that Bolivia organized a summit in New York to promote foreign investment in 11 mining projects, including Malku Khota, and, begrudgingly, that Bolivia viewed the Project as valuable enough to market to investors.[11]

B. THE AYLLUS SURROUNDING THE PROJECT SUPPORTED CMMK

8. The six Ayllus surrounding the Project supported CMMK, and the two opposing communities could not halt a project supported by 49 communities, as Minister Navarro noted.[12] It follows that Bolivia cannot continue to claim that CMMK created and manipulated COTOA-6A. These six Ayllus believed that their interests were not being properly represented by CONAMAQ and FAOI/NP, which were being used to further the ends of those seeking to exploit the Malku Khota reserves themselves, and formed

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7 **Hearing Tr.**, Day 4, 809:9-810:2 (F. Gonzales) (Spanish). *See also* **Exhibit R-32**, Acta de la reunión de socialización del Proyecto, July 23, 2011 at 5, 9. During a socialization hearing on July 23, the government proposed to enter in a "*empresa mixta, para que el estado boliviano mejore su nivel de participación*"; **Exhibit C-272**, Memorándum de Santiago Angulo a Xavier Gonzales, Informe sobre viaje a Potosí, Mar. 28-30, 2012: "*Lic. Félix Gonzales el manifestó que personalmente no apoya a la Empresa Privada, más al contrario dijo hay alternativas como se puede formar una gran Empresa entre el Gobierno Nacional, Gobierno, Departamental y el Municipio Local una Empresa grande para que sea controlada los recursos naturales por el Estado…*"

8 **Exhibit C-61**, *Morales confirma nacionalización de Malku Khota*, AGENCIA BOLIVIANA DE INFORMACIÓN, July 8, 2012; **Exhibit C-63**, *Gobierno dice que tenía hace un año la intención de anular contrato con minera en Mallku Khota*, LA RAZÓN, July 9, 2012.

9 **Exhibit C-150**, Plan Sectoral de Desarrollo Minero Metalúrgico 2015 – 2019 at 157.

10 **Exhibit C-65**, *Comibol busca apoyo técnico para explotar indio*, LA PRENSA, Aug. 8, 2012; **Exhibit C-66**, *Comibol busca que China asuma la exploración en Malku Khota*, PÁGINA SIETE, Aug. 12, 2012. Minister Navarro confirmed that many documents are generated when government representatives travel abroad on official business: **Hearing Tr.**, Day 3, 699:14-700:4 "R. *Eso tiene que estar en el informe de la autoridad pública que realiza un viaje al exterior …* R. *Hay una agenda de reuniones para que un funcionario público salga fuera del país …* R. *Eso es algo normal. Todo funcionario público que viaja al exterior presenta un informe que justifica su ausencia oficial fuera del país*" (C. Navarro) (Spanish). The Tribunal should draw adverse inferences against Bolivia for withholding documents related to meetings about the Project between the Bolivian Government and Chinese investors in China and Bolivia.

11 **Hearing Tr.**, Day 3, 758:24-760:25, 762:16-25 (C. Navarro) (Spanish).

12 **Hearing Tr.**, Day 3, 733:11-14: "P. *Y usted también dijo que no creía que dos comunidades debieran interrumpir el proyecto cuando 49 lo apoyaban*. R. *Correcto*" (C. Navarro) (Spanish).

COTOA-6A as a result.[13] In any event, Minister Navarro and Governor Gonzales admitted at the hearing that they met with COTOA-6A on several occasions,[14] further confirming the organization's legitimacy.

9. Minister Navarro tried to undermine COTOA-6A at the hearing by comparing it to the "*organización paraestatal*" formed by the "*famosos coordinadores laborales*" during the "*dictadura militar de Banzer*."[15] That comparison is absurd. A State-like organization created by a military dictatorship has nothing to do with a group formed by six Ayllus in support of a mining project. If it were true, he would never have met with COTOA-6A, as he conceded.

10. There is no doubt that the few groups that opposed the Project were interested in forming cooperatives and illegally mining the deposit. Mr. Chajmi, who opposed the Project, testified that he wanted to form a cooperative,[16] confirming Mr. Angulo's contemporaneous reports.[17] Despite Respondent's efforts to hide the obvious truth, by referring for example to Mr. Chajmi's testimony that the population's livelihood depended upon livestock breeding and agriculture activities,[18] the evidence in the record is conclusive that illegal mining existed in the Project area. Minister Virreira repeatedly denounced the presence of illegal miners there and the damage that they were causing to the environment.[19] Even Witness X, after initially denying the existence of illegal mining (contradicting all contemporaneous communications he/she sent to Claimant on the issue),[20] finally conceded that there were illegal miners in

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13 *See* Claimant's Rejoinder, ¶¶ 22-26; **CWS-11**, Second Rebuttal Witness Statement of J. Mallory, ¶ 8 ("COTOA-6A was created by the leaders of Ayllus Sulka Jilatikani, Tacahuani, Samca, Jatun Urinsaya and Qullana who felt their voice was not being heard by the Government, CONAMAQ and FAOI-NP, and who wanted their communities to receive the benefits that a project like Malku Khota would bring").

14 **Hearing Tr.**, Day 3, 724:2-5 (C. Navarro) (Spanish); Day 4, 838:21-839:5 (F. Gonzales) (Spanish).

15 **Hearing Tr.**, Day 3, 686: 3 to 687: 22 (C. Navarro) (Spanish); Respondent's Closing Presentation at 37.

16 **Hearing Tr.**, Day 4, 922:4-22 (A. Chajmi) (Spanish).

17 **Exhibit C-169**, E-mail from S. Angulo to F. Malbran, Dec. 11, 2007: "*También se tiene el Compromiso de llevar adelante una reunión en la ciudad de La Paz para el 18 de Diciembre con Vitoriano Condori y Andrés Chajmi, ellos insisten con obtener una cuadrícula de la Empresa y así formar una cooperativa en la zona del Proyecto*."

18 Respondent's Closing Presentation at 26-27.

19 **Exhibit C-223**, *Explotación ilegal de oro es el origen del conflicto en Mallku Khota*, ANF, May 21, 2012; **Exhibit C-222**, *Denuncian contaminación ambiental en Mallku Khota*, LA RAZÓN, May 26, 2012; **Exhibit C-149**, *Policía evitará explotación ilegal en Mallku Khota*, LA PATRIA, Oct. 19, 2012.

20 *See* **Hearing Tr.**, Day 5, 1017:19-1018:3 (Witness X) (Spanish); **Exhibit C-310**, E-mail from Witness X to J. Mallory with attachment "*Informe Viaje a la Comunidad Malku Khota y Cochabamba*", Jan. 12, 2012: "*Hechos realizados en la Comunidad Malku Khota. (…) no necesitan nada de la empresa porque ellos ya están trabajando el oro en su comunidad que ha hecho su cooperativa, textualmente "Hay abajito están trabajando". (…) En un análisis de la situación, podemos observar que, ellos saben que están explotando de forma ilegal y saben que cometieron delitos, por ello actúan de manera agresiva cuando le habla la compañía para solucionar los problemas que a la compañía si le*

Malku Khota, who were trying to form a cooperative.[21]

11. Mr. Chajmi used his position as a CONAMAQ leader and his *de facto* influence over FAOI-NP (an organization that is a part of CONAMAQ) to fuel opposition to the Project through these organizations' vast networks.[22] Governor Gonzáles in his testimony at the hearing confirmed that FAOI-NP encompasses over 40 Ayllus; CONAMAQ is even larger, reaching La Paz, Oruro and Cochabamba.[23] These organizations did not represent the interests of the indigenous communities in the six Ayllus, and Bolivia knew this. In the November 24, 2011 meeting between Minister Navarro and COTOA-6A, he resolved that the "*consulta previa*" required prior to constructing the mine would not involve FAOI-NP, but only the six Ayllus surrounding and affected by the Project.[24]

12. During the hearing, Governor Gonzáles also explained CONAMAQ's *modus operandi*, namely to gather as many people as possible from as many communities as possible to protest.[25] This is exactly what happened here as CONAMAQ enlisted outsiders to oppose the Project. FAOI-NP's and CONAMAQ's interference, together with Bolivia's inability and/or unwillingness to control these groups, caused many outsiders, including illegal gold miners, to invade the Project area. Those outsiders caused the violent events in Acasio and elsewhere by sparking confrontations with community members that

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afecta".

21 **Exhibit C-310**, E-mail from Witness X to J. Mallory with attachment "*Informe Viaje a la Comunidad Malku Khota y Cochabamba*," Jan. 12, 2012; "*Los comunarios de Mallku Khota y los seis Ayllus de COTOA-6A, las 46 comunidades no trabajan en minería ninguna. La gente foránea era la que ha venido a hacer minería ilegal. Y ahora se ha ido*". **Hearing Tr.**, Day 5, 1059:4-8 (Witness X) (Spanish).

22 **Hearing Tr.**, Day 3, 609:14-23: "*… en la marcha estuvieron un par de familias de la comunidad de Mallku Khota que evidentemente allegados al señor Andrés Chajmi. Ellos partieron a la marcha hacia la ciudad de La Paz pero fue muy poca gente del lugar. Esa marcha se constituyó con fuerza recién en la ciudad de Oruro, donde confluyeron gente de muchas otras partes. Pero realmente de Mallku Khota marchó muy poca gente en esa ocasión*" (X. Gonzales) (Spanish).

23 **Hearing Tr.**, Day 4, 838:4-12 (Spanish).

24 **Exhibit R-66**, Acta de reunión en el Palacio de Gobierno de La Paz con COTOA-6A, Nov. 24, 2011: "*En el punto de la opinión de la FAOINP con respecto a la consulta solo se debe realizar a las seis Ayllus la dicha consulta.*" *See also* **Exhibit R-261**, E-mail from Witness X to CMMK, Nov. 25, 2011: "*En resumen lo que se determine con el gobierno y los Ayllus de la zona es lo siguiente: 4.- La consulta se realizará en el área de los 6 Ayllus solamente*". *See also* **Hearing Tr.**, Day 5, 870:22-871:1 (English); 1023:12-16 (Spanish): "Q. *And was that meeting by any chance on November 24th, 2011? R. Creo que sí. No estoy muy segura*. Q. *Was Hilarión Bustos there as well*? R. *Sí, sí*."

25 **Hearing Tr.**, Day 4, 854:24-855:8: "*Esto ha sido convocado por la FAOI y también han estado representantes de CONAMAQ, y ellos pueden convocar a todos sus asociados para que se realice. Y yo creo que ese es el motivo de esta participación. Y normalmente no realizan en una sede sino que van rotando a las diferentes comunidades para, inclusive congresos y otro tipo de reuniones – ellos van rotando a las diferentes comunidades y van siempre con sus asociados, con todos los miembros*" (F. Gonzales) (Spanish).

peacefully supported the Project. [redacted]

Both Governor Gonzáles and Mr. Mallory also confirmed that outsiders caused the violence in Acasio.[28] In light of the above, Bolivia's attempt to blame the violent events in Acasio and elsewhere on CMMK and its allegedly deficient community relations program fails.

C. THROUGH ITS CONCERTED COMMUNITY RELATIONS PROGRAM, AND DESPITE BOLIVIA'S UTTER FAILURE TO ASSIST, CMMK WAS BUILDING CONSENSUS WITH THE MALKU KHOTA AND CALACHACA COMMUNITIES

13. CMMK was building consensus with Malku Khota and Calachaca through the implementation of its community relations program, despite Bolivia's failure to assist CMMK with this endeavor. As SAS's witnesses confirmed at the hearing, CMMK sought dialogue with the communities, and in particular with Malku Khota and Calachaca.[29] Even Bolivia highlighted Mr. Mallory's testimony that CMMK respected the communities' traditions and forms of decision-making, and that it had been seeking consensus within the Ayllus.[30]

14. CMMK also entered into Reciprocal Cooperation Agreements with the Ayllus, reflecting CMMK's commitment to building consensus with every community in Ayllu Sulka Jilatikani, including

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26 [redacted]

27 [redacted]

28 **Hearing Tr.** Day 4, 868:5-18: "*El reporte policial que yo tengo es que posiblemente haya intervenido gente de fuera, y entre ellos me dijeron que posiblemente había gente de Llallagua y Huanuni… Llallagua está en el norte de Potosí …debe estar a unos 100 kilómetros aproximadamente. Y Huanuni está un poquito más allá, en el departamento de Oruro*" (F. Gonzales) (Spanish); *See also* **Hearing Tr.**, Day 2, 417:21-418:2 (J. Mallory) (English).

29 **Hearing Tr.**, Day 3, 610:19-25: "Presidente Zuleta Jaramillo: "*Y qué resultados esperaban ustedes con esos pagos* [redacted] *R. Que efectivamente logremos la comunicación efectiva con estas dos comunidades e integrarlos en el proyecto para poder tener el total de comunidades apoyándonos…*" (X. Gonzales) (Spanish); **Hearing Tr.**, Day 3, 580:6-16: "P. *Y ustedes ante esta recomendación, acudieron a la autoridad competente, que era Superintendencia de Minas para solucionar este impasse*? R. *Acudimos a la autoridad jurisdiccional primero para que informarnos cómo se hacía el procedimiento. Sin embargo de ello, al conversar con esta autoridad nos dijeron de que la mejor alternativa era siempre buscar el diálogo. Y así lo hicimos. Intentamos buscar por todos los medios el diálogo*" (X. Gonzales) (Spanish); **Hearing Tr.**, Day 2, 378:13-21; 415:11-416:9 (J. Mallory) (English).

30 Respondent's Closing Presentation at 34.

Malku Khota.[31] When Respondent expropriated the Project, CMMK had made good progress in fulfilling its commitments.[32] It is also worth emphasizing that, contrary to Mr. Chajmi's testimony at the hearing, CMMK did employ community members from the communities surrounding the Project.[33]

15. For its part, Bolivia failed to assist CMMK in its efforts to build consensus. Minister Navarro testified at the hearing that he requested Governor Gonzáles to organize a meeting in December 2011 with Malku Khota and Calachaca to seek consensus in connection with the Project.[34] Governor Gonzáles acknowledged that he had been so instructed.[35] As Mr. Mallory testified, the meeting would get the Malku Khota and Calachaca communities "back to the table."[36] Yet, despite the clear importance of such a meeting, both Minister Navarro and Governor Gonzáles admitted at the hearing that they were too busy to convene it.[37] This is only one of the many examples briefed by SAS of Bolivia's failure to assist CMMK in its efforts to seek consensus and, more broadly, to protect and support the Project.[38]

D. BOLIVIA'S ALLEGATIONS OF WRONGDOING ARE BASELESS

16. Respondent's allegations [redacted] are based on groundless resolutions "adopted' by CONAMAQ and FAOI-NP,[39] which requested "*la intervención en la pronta solución de este problema a [Bolivia] para evitar mayores conflictos o en su defecto serán los*

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31 Claimant's Reply, ¶¶ 45, 62-68. *See e.g.*, **Exhibit C-208,** Reciprocal Cooperation Agreement between Ayllu Sulka Jilatikani [the Malku Khota community is within this Ayllu] and CMMK, Aug. 29, 2011 ("2.3 *Ambas partes expresan que, luego de varias reuniones entre las autoridades locales de EL AYLLU y los representantes de la COMPAÑÍA reinicie y prosiga sus actividades de exploración minera en las áreas de las concesiones mineras ya citadas*" […] "3.4 *El objetivo de la socialización del Convenio es* ***la obtención del consenso de todas las comunidades del Ayllu Sulka Jilatikani****…*") (emphasis added).

32 Claimant's Reply, ¶¶ 67-68.

33 **Hearing Tr.**, Day 4, 946:13-21 (A. Chajmi) (Spanish); *see also* **Exhibit C-184**, Fernando Cáceres, Informe Mensual Proyecto Minero Malku Khota, May 2007 and **Exhibit C-261**, Fernando Cáceres, Informe Mensual Proyecto Minero Malku Khota, June 2008.

34 **Hearing Tr.**, Day 3, 742:16-21.

35 **Hearing Tr.**, Day 4, 845:19-846-5.

36 **CWS-10**, Rebuttal Witness Statement of J. Mallory, ¶ 60.

37 **Hearing Tr.,** Day 3, 750:1-4: "*No puedo hacer seguimiento a todas las notas que envían las diferentes reparticiones*" (C. Navarro) (Spanish); **Hearing Tr.**, Day 4, 847:8-14: "*Fundamentalmente porque en la Gobernación yo tenía demasiadas actividades, y me resulta imposible inclusive trabajando hasta 18 horas, atender todos los problemas personalmente*" (F. Gonzales) (Spanish).

38 Claimant's Statement of Claim, § II C (3); Claimant's Reply, § II C; **CWS-10**, Rebuttal Witness Statement of J. Mallory, ¶ 60.

39 *See* Claimant's Reply, § II D.

responsables por las acciones y omisiones."[40] Bolivia ignored these resolutions when they were brought to its attention, as Minister Navarro and Mr. Chajmi both confirmed.[41] Clearly, Bolivia at the time did not take the CONAMAQ and FAOI-NP resolutions seriously. Yet, it is relying on them to support claims of its illegality allegations in this arbitration. Bolivia in any event has failed to prove that its claims of wrongdoing are true.

17. Bolivia's other accusations, regarding CMMK's alleged promotion of violence in the communities near the Project and alleged bribes to journalists and police officers, are entirely dependent on Witness X's unreliable written testimony. Apart from the fact that the allegations are wholly unsupported, Witness X's complete lack of credibility at the hearing further discredits Bolivia's accusations. For example, [redacted]

18. Another example of Witness X's unreliability is the "correction" of his/her witness statement at the hearing. [redacted]

40 **Exhibit R-49**, Resolución de Cabildo, Dec. 19, 2010.

41 **Hearing Tr.**, Day 3, 717:19-718:8 (C. Navarro); Day 4, 919:21-920:17 (A. Chajmi) (Spanish).

42 [redacted]

43 **Hearing Tr.**, Day 5, 1034:8-1035:5 (Witness X) (Spanish).

44 [redacted]

19. This is not believable and should be disregarded by the Tribunal.

45 **Hearing Tr.**, Day 5, 983:23–984:8 (Spanish).
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47 **RWS**-7, Witness Statement of Witness X, ¶ 32.
48 **Hearing Tr.**, Day 5, 983:23–984:8 (Witness X) (Spanish).
49 **Hearing Tr.**, Day 5, 1042:16-21:
(Witness X) (Spanish).
50
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52 **Hearing Tr.**, Day 5, 1050:2-8 (Witness X) (Spanish).
53 **Hearing Tr.**, Day 5, 897:15-898:9 (English); 1053:25-1054:10 (Spanish):

20. Finally, Witness X testified that Claimant had a "Plan B," which consisted of provoking Bolivia to expropriate the Project.[54] [redacted][56]

21. Bolivia conceded in its closing argument that Witness X was not reliable ("*puede que ustedes crean o no crean lo que les dijo el Testigo X*") and asked the Tribunal to focus on the documents in the record.[57] But that would not benefit Bolivia because, as SAS has explained,[58] the documents contradict Witness X's witness statement and testimony, and are of no assistance to Bolivia. [redacted] To be clear, CMMK did not plan, provoke or approve any violence, and Bolivia has submitted no evidence to prove otherwise. Tolerance or promotion of violence in the area would not have benefited CMMK.[60] Likewise, Bolivia's accusations that CMMK paid journalists and police officers to exaggerate the situation of confrontation in Malku Khota and Acasio are untrue and taken out of context. SAS has shown that the payments to Gonzalo Gutiérrez, a media consultant, were specifically related to his services as CMMK's media coordinator.[61]

[redacted]

54 Witness X's Witness Statement, ¶ 23.
55 **Hearing Tr.**, Day 5, 994:7-24.
56 **Hearing Tr.**, Day 5, 994:25 to 997: 5.
57 **Hearing Tr.**, Day 9, 1880:11-18.
58 Claimant's Rejoinder, ¶¶ 27-30; 36-44.
59 [redacted]
60 **CWS-10**, Rebuttal Witness Statement of J. Mallory, ¶ 13: "it makes no sense and serves no purpose from a community relations standpoint to divide communities when what you are looking for is an overall acceptance."
61 *See* Claimant's Rejoinder, ¶ 27-30.

III. BOLIVIA UNLAWFULLY EXPROPRIATED SAS'S MALKU KHOTA PROJECT

22. The conditions for a lawful expropriation are set forth in Article 5 of the Treaty: if the Tribunal finds that Bolivia breached any one of them, then it must conclude that Bolivia's expropriation of the Project breached the Treaty.[62] Respondent alleges that its expropriation of the Project was lawful because it complied with the requirements of Article 5.[63] This is false. Bolivia's expropriation of Claimant's investment was not carried out for a public purpose or for a social benefit related to its internal needs (**A**), nor was prompt, adequate, and effective compensation provided to SAS (**B**). Bolivia also belatedly raised, for the very first time in its Rejoinder,[64] two meritless defenses to the unlawfulness of its expropriation of the Project (depriving Claimant of its right to respond in writing): a state of necessity defense, and a police powers defense.[65] Both of these defenses fail (**C**).

A. THE EXPROPRIATION WAS NOT FOR A PUBLIC PURPOSE OR A SOCIAL BENEFIT

23. Respondent claims that it expropriated the Project to protect human and indigenous rights, and to put a stop to the ongoing violence allegedly caused by CMMK.[66] But Supreme Decree No. 1308 does not mention human or indigenous rights violations, nor does it refer to CMMK as having caused the violence.[67] Moreover, Bolivia ignored the indigenous communities' unfounded requests for government intervention.[68] Bolivia's allegations are thus *ex post facto* justifications for an unlawful expropriation to take control of one of the world's largest silver, indium, and gallium deposits.

24. Bolivia's real interest was in the Project itself, once the results of the PEA Update, reflecting the deposit's enormous size, became public. On April 26, 2011, less than one month after release of the PEA Update results,[69] Bolivia "immobilized" the area immediately surrounding the Project,

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62 Claimant's Reply, ¶ 265.
63 **Hearing Tr.**, Day 1, 260:3-5 (Spanish); **Exhibit C-1**, Treaty, Arts. 5(1), 5(2).
64 Procedural Order No. 22, June 30, 2016, ¶ 33.
65 Respondent's Rejoinder, § 5.1; § 5.2.1.
66 **Hearing Tr.**, Day 1, 258:5-10 (Spanish); Respondent's Rejoinder, ¶¶ 402-403.
67 **Exhibit C-4**, Supreme Decree No. 1308, Aug. 1, 2012. The language of the Decree is consistent with Bolivia's nationalization efforts over foreign investments in the extractive sector. Arts. 1-3 provide that the mining concessions shall revert back to the original ownership of the State; COMIBOL shall take over the management and mining development of the Project; and COMIBOL shall perform prospection and exploration activities in coordination with the National Technical and Geology Service of Bolivia.
68 *See supra* at ¶ 16.
69 **Exhibit C-41**, *Updated Malku Khota Study Doubles Production Levels and 1st 5 Year Cashflow Estimates*, South

prohibiting anyone from acquiring land or concessions therein.[70] Bolivia also confirmed that it intended to nationalize the Project as early as July 2011,[71] *i.e.*, ten months *before* May 2012, when Bolivia alleges that the events that precipitated the expropriation took place.[72] Minister Navarro and Governor Gonzales also admitted that it was only after Bolivia expropriated the Project that it sent the military in to secure the area.[73]

25. It is clear, therefore, that Bolivia unlawfully expropriated the Project to further its own economic interests, and not out of a concern for the welfare of the indigenous communities or "social peace." But even if the Tribunal were to find otherwise, the evidence shows that the expropriation was not reasonably related to those goals.[74] The violence continued after the expropriation,[75] and Bolivia could have adopted more reasonable measures to achieve its objectives, such as militarizing the area surrounding Malku Khota in May 2012, or holding the meeting that Minister Navarro and Governor Gonzales said they were too busy to convene.[76]

B. BOLIVIA FAILED TO PROVIDE COMPENSATION TO SAS

26. Bolivia owed prompt, adequate, and effective compensation to SAS for its expropriation of the Project, in the amount of the fair market value of the expropriated investment.[77] Bolivia has not compensated SAS for the expropriation of the Project, over four years ago, despite marketing it to foreign

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American Silver Corp. Press Release, Mar. 31, 2011.

70 During its closing argument, Bolivia noted Mr. Malbran's "admission" that the Immobilization Area had been assigned to COMIBOL since 2007 (**Hearing Tr.**, Day 9, 1877:17-20). However, it cannot be disputed that the Immobilization Area was assigned to COMIBOL on April 26, 2011: "*En atención a sus instrucciones referente al hallazgo de un yacimiento de plata en el Norte de Potosí por la empresa Canadiense Mallku Khota* […] *analizada dicha solicitud en merito a misiva DARF-1130/2011 se indica; SIC "Inmovilización de Área" y siendo que dichas áreas a la fecha serán objeto de prospección y exploración corresponde dar viabilidad a la solicitud toda vez que dicha área es considerada estratégica y se requiere declarar como área de resguardo*" (**Exhibit R-119**, Resolución de COMIBOL (DAJ-0073/2011) del 26 de abril de 2011).

71 *See supra* at ¶ 7; **Exhibit C-61**, *Morales confirma nacionalización de Malku Khota*, AGENCIA BOLIVIANA DE INFORMACIÓN, July 8, 2012 and **Exhibit C-63**, *Gobierno dice que tenía hace un año la intención de anular contrato con minera en Malku Khota*, LA RAZÓN, July 9, 2012.

72 Respondent's Counter-Memorial, ¶ 143.

73 **Hearing Tr.**, Day 3, 767:12-18 (Spanish); Day 4, 871:19-872:5 (Spanish).

74 **RLA-139**, *British Caribbean Bank Limited (Turks & Caicos) c. Bélice*, caso CPA No. 2010-18, laudo del 19 de diciembre de 2014, ¶ 241.

75 **Exhibit C-242**, *Se teme mayores actitudes violentas en Malku Khota*, JORNADANET.COM, Oct. 5, 2012.

76 Claimant's Reply, ¶ 282; **Hearing Tr.**, Day 3, 742:16-21, 750:1-4 (C. Navarro) (Spanish); Day 4, 847:8-14 (F. Gonzales) (Spanish).

77 **Hearing Tr.**, Day 1, 260:13-21 (Spanish); **Exhibit C-1**, Treaty, Arts. 5(1), 5(2).

institutional investors. Since the relevant case law stands for the proposition that a failure to pay compensation constitutes a treaty breach,[78] and is unlawful as a matter of international law,[79] Respondent's failure to compensate Claimant for the expropriation is a breach of the Treaty and of international law.[80]

C. BOLIVIA'S BELATEDLY ASSERTED DEFENSES ARE UNAVAILING

1. Bolivia's Necessity Defense Fails

27. Bolivia belatedly alleged in its Rejoinder, on the basis of Article 25 of the ILC Articles,[81] that its unlawful expropriation of the Project should be excused because it acted under a state of necessity.[82] Bolivia is precluded from relying on Article 25 because necessity can only be invoked in respect of an obligation owed to a State.[83] Here, Bolivia breached obligations it owed under the Treaty to *SAS*, not to a State. Even if Bolivia could invoke necessity under Article 25 of the ILC Articles, the Tribunal may accept this exceptional defense only if Respondent demonstrates the existence of extraordinary circumstances by establishing that it cumulatively satisfied the provision's *six* requirements.[84]

28. Bolivia failed to show that it satisfied any of the six requirements of Article 25 of the ILC Articles, let alone that it did so cumulatively. For example, it has not presented a single shred of evidence demonstrating that CMMK's presence constituted an extremely grave threat or danger to human or

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78 **CLA-150**, *Bernardus Henricus Funnekotter et al., v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, Apr. 22, 2009, ¶¶ 99, 207; **CLA-10**, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, Aug. 20, 2007, ¶ 7.5.21.

79 **CLA-69**, *Case Concerning the Factory at Chorzów (Ger. v. Pol.)*, Judgment, Sept. 13, 1928 at 46; **CLA-29**, *Amoco Int'l Fin. v. Islamic Rep. of Iran*, Iran-U.S. Claims Trib. Case No. 56, Partial Award No. 310-56-3, July 17, 1987, ¶ 196.

80 Claimant's Reply, ¶¶ 142-143, 293-299; **Hearing Tr.**, Day 1, 83:6-85:11.

81 Respondent's Opening Presentation at 61 (referring to **RLA-126**, Naciones Unidas, *Responsabilidad del Estado por hechos internacionalmente ilícitos*, Resolución aprobada por la Asamblea General No. A/RES/56/83, 28 de enero de 2002, Art. 25).

82 **Hearing Tr.**, Day 1, 257:12-14 (Spanish); Respondent's Rejoinder, ¶¶ 356-57.

83 **CLA-160**, Responsibility of States for Internationally Wrongful Acts, U.N. GAOR 6th Comm., 56th Sess., Jan. 28, 2002, Art. 25 ("Responsibility of States for Internationally Wrongful Acts"); **CLA-201**, Report of the International Law Commission on the work of its Thirty-second session, 5 May - 25 July 1980, Official Records of the General Assembly, Thirty-fifth session, Supplement No. 10 at 49-50, ¶ 33 ("Report of the International Law Commission"); **CLA-4**, *BG Group Plc v. Argentine Republic*, UNCITRAL Award, Dec. 24, 2007, ¶ 408 ("*BG Group v. Argentina* Award"). The unavailability of necessity as a defense here explains why Bolivia cannot show that the expropriation of the Project does not seriously impair an essential interest of the State towards which the obligation exists.

84 **RLA-238**, *Gabcíkovo-Nagymaros Project (Hungría/Eslovaquia)*, sentencia del 25 de septiembre de 1997, ¶ 51 ("*Gabcíkovo-Nagymaros Project* Decision"); **CLA-43**, *Suez, Sociedad General de Aguas de Barcelona, S.A. and ors. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, July 30, 2010, ¶ 236; **CLA-4**, *BG Group v. Argentina* Award, ¶ 410; **CLA-5**, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶¶ 317, 330; **CLA-41,** *National Grid v. Argentine Republic*, UNCITRAL, Award, Nov. 3, 2008, ¶ 256.

indigenous rights, or to the conservation of peace.[85] Nor has Respondent shown that the expropriation of the Project was the only way to safeguard its essential interests from any grave and imminent peril. To do so, Bolivia would have had to prove that there could have been no other manner, even a less convenient or more costly one, for it to preserve that essential interest.[86] Yet, Governor Gonzales conceded at the hearing that Bolivia did not send in the military that the communities near the Project requested to assure "permanent security" until after it expropriated the Project.[87] Thus, Bolivia had other ways to keep the peace, as it has in fact admitted in its submissions.[88] As previously discussed, Bolivia also failed to show that it did not contribute to the alleged situation of necessity.[89] Its decision to ignore the communities,[90] together with other acts and omissions,[91] contributed to the conflict that Bolivia says it ended (it did not) by expropriating the Project.[92]

29. Since Bolivia failed to satisfy the six requirements of Article 25 of the ILC Articles, its necessity defense fails. And even if the Tribunal were to conclude otherwise, Bolivia would still owe compensation to SAS for the expropriation.[93]

2. Bolivia's Police Powers Defense Fails

30. Bolivia also belatedly claimed in its Rejoinder that its expropriation of the Project was not

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85 **CLA-42**, *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006, ¶ 253; **RLA-238**, *Gabcikovo-Nagymaros Project* Decision, ¶ 54. A grave and imminent peril means an extremely grave threat or danger that will occur soon.

86 **CLA-201**, Report of the Int'l Law Commission at 49-50, ¶ 33; **CLA-5**, *CMS v. Argentina* Award, ¶ 324.

87 **Hearing Tr.**, Day 4, 871:19-872:5 (Spanish); **Exhibit R-91**, Nota de prensa, El Potosí, Presencia policial genera calma en Malku Khota del 14 de junio 2012.

88 Respondent's Rejoinder, ¶ 420; **RWS-2**, Witness Statement of C. Navarro, ¶ 44.

89 **CLA-160**, Responsibility of States for Internationally Wrongful Acts, Art. 25.

90 *See supra* at ¶¶ 23-24.

91 Claimant's Reply, ¶ 280.

92 Respondent has not demonstrated that the protection of human and indigenous rights and the conservation of peace constituted essential interests of Bolivia *in the circumstances of this case*, given that it ignored the indigenous communities, and Supreme Decree No. 1308 does not refer to these supposed essential interests as a reason for expropriating the Project (**Exhibit C-4**, Supreme Decree No. 1308, Aug. 1, 2012). The Treaty also implicitly excludes necessity as a defense, as the Treaty is a special set of rules of international law that replaces the customary international law minimum standard of treatment, and the defenses available under customary international law (**CLA-201**, Report of the International Law Commission; **CLA-202**, August Reinisch, *Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on CMS v. Argentina and LG&E v. Argentina*).

93 **CLA-160**, Responsibility of States for Internationally Wrongful Acts, Art. 27; **CLA-5**, *CMS v. Argentina* Award, ¶ 388; **CLA-4**, *BG Group v. Argentina* Award, ¶ 409; **RLA-238**, *Gabcíkovo-Nagymaros Project* Decision, ¶ 48; **CLA-201**, Report of the International Law Commission at 38-39, ¶ 13.

unlawful because it qualified as an exercise of its police powers.[94] Respondent is not entitled to invoke "police powers" as a defense to liability or compensation. Bolivia did not enact any "regulation", but took specific action to deprive SAS of its investment without compensation. That constitutes an unlawful expropriation, which requires, pursuant to the Treaty as *lex specialis*, a finding of liability and an order of compensation, since the Treaty displaces any general "police power" exception to compensation under customary international law (to the extent that it exists). Bolivia should also be precluded from raising this defense because Supreme Decree No. 1308 provided that compensation would be paid to SAS for the expropriation, and Bolivia, including Procurador Arce at the hearing, acknowledged its obligation to compensate Claimant.[95] Thus, it is clear that, *at the time*, Bolivia did not consider that it was exercising its police powers when it deprived SAS of the Project. If it had, it would not have included a compensation provision in the decree. This police powers defense is thus another of Bolivia's *ex post facto* justifications that the Tribunal should dismiss out of hand.

31. If the Tribunal nevertheless decides to consider this defense, it should recall that a State's exercise of its police powers is not limitless,[96] and that the Tribunal has the authority to determine whether a State measure constitutes a legitimate use of that prerogative.[97] A State may only enact such a regulation and avoid paying compensation for any losses caused, provided that the measure is for a public purpose, *bona fide*, non-discriminatory, and proportional to its objective, that due process is respected throughout,[98] and that the State has not breached its international obligations.[99] Proportionality is achieved by balancing the interests of the State with any burden imposed on the investor; a measure would not be proportional if

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94 **Hearing Tr.**, Day 1, 258:21-25 (Spanish); Respondent's Rejoinder, ¶¶ 383-400.

95 **Hearing Tr.**, Day 1, 260:13-21 (Spanish); Day 4, 951:24-952:14 (Spanish); **Exhibit C-4**, Supreme Decree No. 1308, Aug. 1, 2012, Art. 4.

96 **CLA-35**, *ADC v. Hungary*, ICSID Case No. ARB/03/16, Award, Oct. 2, 2006, ¶ 423 ("*ADC v. Hungary* Award").

97 **CLA-46**, *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006, ¶ 264 ("*Saluka v. Czech Republic* Partial Award").

98 **RLA-114**, *Methanex Corporation c. Estados Unidos de América*, 3 de Agosto de 2005, caso CNUDMI/TLCAN, laudo final sobre jurisdicción y fondo del 3 agosto de 2005, Part IV, Chapter D at 4, ¶ 7; **CLA-46**, *Saluka v. Czech Republic* Partial Award, ¶ 255; **CLA-204**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, Dec. 19, 2013, ¶¶ 492-493; **RLA-247**, *Fireman's Fund Insurance Company c. Estados Unidos Mexicanos*, Caso CIADI No. ARB(AF)/02/01, laudo del 17 de Julio de 2006, ¶ 176(j).

99 **RLA-92**, *SAUR International S.A. c. República Argentina*, caso CIADI No. ARB/04/4, decisión sobre jurisdicción y sobre responsabilidad del 6 de junio de 2012, ¶ 401.

the investor bore "an individual and excessive burden."[100]

32. Bolivia's expropriation of the Project was clearly discriminatory, was not a *bona fide* measure, was not carried out for a public purpose, was not proportional to its alleged objective, due process was not respected, and Respondent breached its international obligations beforehand. Bolivia expropriated SAS's investment to further its own economic interests, and not out of a concern for the welfare of the indigenous communities or "social peace."[101] Bolivia argued that the measure was proportional because although SAS's rights over the Concessions were extinguished, the deposit itself was still being explored, mining was not yet authorized, and there were uncertainties regarding the existing reserves and the deposit's economic viability.[102] However, none of these assertions matter given that Bolivia could have adopted more reasonable measures to achieve its alleged objectives.[103] Governor Gonzales admitted on cross-examination that Bolivia had not sent military units to Malku Khota until after the expropriation,[104] despite the community members' express requests,[105] thereby disavowing the misleading language of his first witness statement in which he declared that he had ordered Malku Khota's "militarization,"[106] and which Bolivia misleadingly reproduced in its Opening Statement slides in connection with its police powers defense.[107] Moreover, the violence continued in the Project area after the expropriation.[108] Therefore, Bolivia's decision to extinguish SAS's rights over the Concessions was not proportional to its alleged objectives.

33. Bolivia's police powers defense also fails for other reasons that it chose not to address at the hearing. Its expropriation of the Project was discriminatory, as Supreme Decree No. 1308 specifically targeted SAS, and was not carried out with due process, given that Claimant was not provided with a reasonable or timely opportunity to assert its rights and have its claims heard prior to the measure's

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100 **CLA-40**, *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, July 14, 2006, ¶ 311.
101 *See supra* at ¶¶ 23-24.
102 **Hearing Tr.**, Day 1, 259:20-25 (Spanish).
103 *See supra* at ¶ 25.
104 **Hearing Tr.**, Day 4, 872:3-5 (Spanish).
105 **Exhibit R-91**, Nota de prensa, El Potosí, *Presencia policial genera calma en Malku Khota* del 14 de junio 2012.
106 **RWS-1**, Witness Statement of F. Gonzales, ¶ 71.
107 Respondent's Opening Statement at 62.
108 **Exhibit C-242**, *Se teme mayores actitudes violentas en Malku Khota*, JORNADANET.COM, Oct. 5, 2012.

enactment. Also, Bolivia breached its international obligations prior to enacting Supreme Decree No. 1308 by, for example, failing to treat Claimant fairly and equitably, and failing to provide full protection and security to SAS's investment.[109]

IV. BOLIVIA ALSO BREACHED OTHER TREATY OBLIGATIONS

34. SAS's investments are granted fair and equitable treatment under the Treaty.[110] This means that Bolivia committed to act in good faith, predictably and transparently, and to protect SAS's reasonable and legitimate expectations related to its investment. SAS does not have to show a willful neglect of duty or an insufficiency of action falling far below international standards,[111] because those are references to the international minimum standard of treatment under customary international law,[112] and that standard is not contained in the Treaty. As such, Bolivia's discussion of the *Genin*, *Neer*, and *Glamis Gold* cases is immaterial.[113]

35. Bolivia breached its obligation to accord fair and equitable treatment to SAS's investments by failing to address illegal gold miners' opposition to the Project and their persistent efforts to form illegal cooperatives, despite acknowledging repeatedly that illegal gold miners were present in the area.[114] Bolivia let the conflict escalate, fueling it by undermining CMMK's rights to the Concessions, and when the situation became "unsustainable," it immediately took away SAS's investment.[115] That conduct was neither predictable nor transparent, was not in good faith, and was contrary to Claimant's reasonable and legitimate expectations regarding the treatment of its investment in Bolivia. SAS also had legitimate expectations regarding the key protections afforded to its investment in Bolivia and the stability of Bolivia's legal and business framework.[116] By deliberately undermining SAS's ownership rights over the

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109 Claimant's Reply, ¶¶ 320; 335-343.
110 **Exhibit C-1**, Treaty, Art. 2(2).
111 Claimant's Statement of Claim, ¶153 *et seq*.; **Hearing Tr.**, Day 1, 261:14-21 (Spanish).
112 Claimant's Reply, ¶ 317.
113 **Hearing Tr.**, Day 1, 261:21-262:2 (Spanish); Respondent's Opening Presentation at 64; Respondent's Rejoinder, ¶ 458.
114 **Exhibit C-223**, *Explotación ilegal de oro es el origen del conflicto en Mallku Khota*, LA PAZ, May 21, 2012; **Exhibit C-222**; *Denuncian contaminación ambiental en Mallku Khota*, LA RAZÓN, May 26, 2012; **Exhibit C-149**, *Policía evitará explotación ilegal en Mallku Khota*, LA PATRIA, Oct. 19, 2012.
115 Claimant's Opening Presentation at 182-184.
116 Claimant's Statement of Claim, ¶¶ 18-19, 51-53.

Concessions, and by ultimately nationalizing them without offering or paying any compensation whatsoever, Bolivia violated SAS's legitimate expectations.

36. Bolivia also failed to provide full protection and security to the Project. The full protection and security standard requires a host State to take every measure necessary to protect and ensure the legal and physical security of the investments made by a protected investor in its territory.[117] Instead of affording such protection, Bolivia encouraged and tolerated the illegal miners who were mining the Concessions and causing violence in the Project area. What is worse, Bolivia ultimately granted immunity to the authors of the violence, while expropriating the Project.[118] Bolivia further impaired Claimant's investments through unreasonable and discriminatory measures, and treated those investments less favorably than the investments of Bolivia's own investors, as discussed more fully in SAS's submissions.[119]

V. THE TRIBUNAL HAS JURISDICTION OVER SAS'S CLAIMS

37. Bolivia conceded that Claimant SAS is a company for purposes of Article 1(d) of the Treaty, *i.e.*, a corporation incorporated under the laws of Bermuda, a UK territory to which the Treaty was extended; and that SAS owns protected investments per Article 1(a) of the Treaty, which defines "investments" as including "shares in and stock and debentures of a company and any other form of participation in a company," namely 100% of the shares in CMMK as well as the Concessions.[120] Since Article 8(1) of the Treaty provides that disputes between a company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under the Treaty in relation to an investment of that company can be submitted to international arbitration,[121] it follows that the Tribunal has jurisdiction over SAS's claims.

38. That outcome is consistent with the recognized principle that subsidiaries of international groups are protected investors under bilateral investment treaties, regardless of where the funds that were

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117 Claimant's Statement of Claim, ¶ 155 *et seq.*
118 Claimant's Reply, ¶¶ 85, 86. **Exhibit C-16**, Minutes of Understanding, July 7, 2012, Arts. 3.1, 3.2 and 3.3.
119 Claimant's Reply, ¶¶ 335-351.
120 Respondent's Counter-Memorial, ¶ 224.
121 **Exhibit C-1**, Treaty, Art. 8(1).

invested in the protected investment originated.[122] Such circumstances, as many tribunals have held, do not warrant the piercing of the corporate veil.[123] In fact, the *Saluka* tribunal unambiguously concluded that the claimant, a so-called "shell company," satisfied the definition of investor under the applicable treaty.[124]

A. THE TRIBUNAL SHOULD NOT READ REQUIREMENTS INTO THE TREATY THAT THE PARTIES THEMSELVES DID NOT INCLUDE

39. Bolivia alleged in its closing statement that the phrase "investment of the former" in Article 8(1) of the Treaty requires that the investor be involved in the making of the investment.[125] Respondent also referred to the Treaty's preamble, claiming that the phrase "for greater investment by nationals and companies of one State in the territory of the other State" means that the Treaty's objective was to incentivize investments from the United Kingdom to Bolivia and vice versa,[126] and that to benefit from the Treaty's protections, Claimant needed to show that it had undertaken some kind of investment activity or made some kind of contribution directly in its own name,[127] as opposed to incorporating the Bahamian entities and acquiring 100% of CMMK's shares. Bolivia concluded that SAS had done nothing in respect of the investments at issue in this case.[128]

40. Respondent's allegations are false. First, the Treaty does not require the claimant to do anything more than it did here, namely acquire 100% of the shares of CMMK, in order for that investment

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122 **RLA-239**, *Von Pezold et al. v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, Jul. 28, 2015, ¶ 288; **RLA-272**, *Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, Apr. 8, 2013, ¶¶ 381-382 ("*Arif v. Moldova* Award"); **CLA-105**, *Venezuela Holdings et al. v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, Jun. 10, 2010, ¶ 198 ("*Venezuela Holdings* Decision on Jurisdiction"); **CLA-049**, *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Jan. 14, 2010, ¶ 56 ("*Lemire* Decision on Jurisdiction & Liability"); **CLA-113**, *Yukos Universal Limited v. Russia*, PCA Case No. AA 227, UNCITRAL, Interim Award on Jurisdiction and Admissibility, Nov. 30, 2009, ¶¶ 432-435 ("*Yukos* Interim Award on Jurisdiction & Admissibility"); **CLA-112**, *Rompetrol v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, Apr. 18, 2008, ¶¶ 97-101, 110 ("*Rompetrol* Decision on Respondent's Preliminary Objections on Jurisdiction & Admissibility"); **CLA-114**, *Siag et al. v. Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, Apr. 11, 2007, ¶¶ 208-210 ("*Siag v. Egypt* Decision on Jurisdiction"); **RLA-57**, *Saipem v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, ¶ 106; **CLA-115**, *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, Apr. 29, 2004, ¶ 77 ("*Tokios v. Ukraine* Decision on Jurisdiction"); **CLA-050**, *CME v. Czech Republic*, UNCITRAL, Partial Award, Sept. 13, 2001, ¶ 418 ("*CME v. Czech Republic* Partial Award"); **CLA-064**, *Wena Hotels v. Egypt*, ICSID Case No. ARB/98/4, Award, Dec. 8, 2000, ¶ 126.

123 Claimant's Rejoinder, ¶ 82, n. 246.

124 **CLA-46**, *Saluka v. Czech Republic* Partial Award, ¶¶ 239-242.

125 **Hearing Tr.**, Day 9, 1867:19-23 (Spanish).

126 **Hearing Tr.**, Day 9, 1867:13-18 (Spanish); **Exhibit C-1**, Treaty, Preamble.

127 **Hearing Tr.**, Day 9, 1867:22-1868:1 (Spanish).

128 **Hearing Tr.**, Day 9, 1867:23-24 (Spanish).

to be protected. There are no such references anywhere in the Treaty's text or preamble to suggest otherwise, nor is there a denial of benefits clause. Moreover, tribunals have rejected similar arguments by respondent states.

41. For example, the *Saba Fakes* tribunal, which Bolivia cited during its closing, held that while the preamble refers to the "'need for international cooperation for economic development,' it would be excessive to attribute to this reference a meaning and function that is not obviously apparent from its wording."[129] The *Lemire* tribunal analyzed the preamble of the USA-Ukraine BIT, which is similar to the Treaty's preamble,[130] to determine whether it included additional requirements that the claimant had to meet to show that he had a protected investment. The tribunal found that the preamble did not contain any: "[N]either the BIT nor the ICSID Convention includes an origin-of-capital requirement. Nor is such a requirement to be inferred from the purposes of the BIT and/or the ICSID Convention. In setting out the purposes of the BIT, the Preamble emphasizes the promotion of investments of nationals of one party in the territory of the other, without any references to the origin of the funds invested."[131]

42. The *Rompetrol* tribunal for its part interpreted the phrase "For the purposes of this Agreement," which appears in the text of Article 1 of the Treaty: "[W]hen the rubric to Article 1 specifies that the definitions it lays down are 'for the purposes of this Agreement,' the Tribunal cannot see what warrant there can be for not reading that as meaning, for <u>all</u> purposes under the Agreement."[132] In other words, for *all* purposes of the Treaty, which includes for purposes of the dispute resolution provision at Article 8(1), SAS's investment in Bolivia is an investment *of* Claimant that is subject to this Tribunal's jurisdiction.

43. The *CME* tribunal considered whether it had jurisdiction under Article 8 of the Netherlands-Czech Republic BIT, which, like Article 8(1) of the Treaty, provides that a tribunal has jurisdiction in

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[129] **RLA-61**, *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award, July 14, 2010, ¶ 111 ("*Saba Fakes v. Turkey* Award").

[130] **CLA-049**, *Lemire* Decision on Jurisdiction & Liability, ¶ 272.

[131] **CLA-049**, *Lemire* Decision on Jurisdiction & Liability, ¶¶ 56-57. *See also* **RLA-272**, *Arif v. Moldova* Award, ¶¶ 381-382.

[132] **CLA-112**, *Rompetrol* Decision on Respondent's Preliminary Objections on Jurisdiction & Admissibility, ¶ 101.

respect of "all disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter."[133] The tribunal concluded that it had jurisdiction:

> Article 8 of the Treaty does not set specific requirements related to the circumstances under which an investment can be regarded as belonging to the investor protected by the Treaty. This is in accord with the great majority of bilateral investment treaties.[134]

44. Thus, it would be inappropriate for the Tribunal to infer an additional requirement of the sort suggested by Bolivia simply from the phrase "investment of the former," and more particularly from the preposition 'of,' or from the preamble, where that requirement is not apparent from the ordinary meaning of the relevant terms. And as the case law has consistently held, this Tribunal may not impose upon the Parties additional jurisdictional requirements that they chose not to include in the Treaty.[135] As explained throughout SAS's submissions,[136] so long as a claimant can show that it satisfies the Treaty's definition of "national" or "company" in Articles 1(c) or 1(d), that its investment meets the definition of "investment" in Article 1(a), and that it owns directly or indirectly the investment, then a tribunal necessarily has jurisdiction under the Treaty over that claimant's claims. Claimant here has shown all three.

45. In support of its unpersuasive interpretation of Article 8(1) of the Treaty, Bolivia heavily relied at the hearing on the *Standard Chartered v. Tanzania* award, where the tribunal held that the preposition 'of' in the phrase "investment of [the claimant]" required "some activity of investing."[137] But that analysis was based on the specific wording of the UK-Tanzania BIT and the case's unique facts, and is

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133 **CLA-050**, *CME v. Czech Republic* Partial Award, ¶ 288.

134 **CLA-050**, *CME v. Czech Republic* Partial, ¶ 400. *See also* ¶ 376: "The Claimant is the 99% shareholder of CNTS [the equivalent of CMMK in our case]. These shares as well as all rights deriving therefrom qualify as an investment of the Claimant under Article 8.1 and Article 1(a)(ii) of the Treaty."

135 Claimant's Rejoinder, ¶ 67; Claimant's Reply, ¶ 187. *See also* **CLA-46**, *Saluka v. Czech Republic* Partial Award, ¶ 241; **RLA-27**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014, ¶ 255 ("*Gold Reserve v. Venezuela* Award"); **CLA-113**, *Yukos* Interim Award on Jurisdiction & Admissibility, ¶¶ 432-435; **CLA-112**, *Rompetrol* Decision on Respondent's Preliminary Objections on Jurisdiction & Admissibility, ¶ 110; **CLA-114**, *Siag v. Egypt* Decision on Jurisdiction, ¶¶ 208-210; **CLA-35**, *ADC v. Hungary* Award, ¶¶ 357, 359; **CLA-115**, *Tokios v. Ukraine* Decision on Jurisdiction, ¶ 77.

136 Claimant´s Rejoinder, ¶ 66.

137 **Hearing Tr.**, Day 1, 248:22-250:22; Day 9, 1868:2-19 (Spanish); **RLA-60**, *Standard Chartered Bank c. Republica de Tanzania*, caso CIADI No. ARB/10/12, laudo del 2 noviembre de 2012, ¶ 232 ("*Standard Chartered v. Tanzania* Award").

irrelevant for purposes of determining jurisdiction here. For example, the tribunal relied on the UK-Tanzania BIT's definition of 'investment,' which refers to the "territory of the Contracting State in which the investment is *made*."[138] There is no such language in the Treaty's definition of 'investment,' which merely defines the term as "every kind of asset which is capable of producing returns."[139]

46. The facts of *Standard Chartered* are also distinguishable. In short, that case was about a parent that began an arbitration regarding an investment made by its subsidiary that it did not control, whereas here, Claimant owns 100% of the shares in CMMK and the Concessions. Specifically, *Standard Chartered* involved Standard Chartered Bank ("SCB"), the claimant, and its subsidiary Standard Chartered (Hong Kong) Limited ("SCBHK"), which SCB expressly admitted it did not control.[140] The dispute arose as a result of SCBHK's acquisition of credit facilities extended to Independent Power Tanzania Limited ("IPTL") by a consortium of Malaysian banks in order to finance a power plant in Tanzania.[141] The tribunal noted that SCBHK had initiated a separate ICSID arbitration against Tanzania Electric Company in 2010 to recover payments due to IPTL (ICSID Case No. ARB/10/20).[142] This is very different from the facts in the present case,[143] where Claimant SAS owned and *controlled* its investment *at all relevant times*, from the moment it was acquired until its unlawful expropriation by Bolivia.

47. Even if the Tribunal decided to adopt *Standard Chartered*'s interpretation of the preposition 'of' in the phrase "investment of [the claimant]" (which SAS rejects), it would still have jurisdiction over SAS's claims. The *Standard Chartered* tribunal concluded that "to constitute Claimant's status as treaty investor, so that the Loans may be considered investments "of" Claimant, implicates Claimant doing something as part of the investing process, either directly or through an agent or entity under the investor's direction."[144] Contrary to Bolivia's repeated claims in this regard,[145] SAS participated in the "investing

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138 **RLA-60**, *Standard Chartered v. Tanzania* Award, ¶¶ 204, 222 (emphasis in original).
139 **Exhibit C-1**, Treaty, Art. 1(a).
140 **RLA-60**, *Standard Chartered v. Tanzania* Award, ¶ 142.
141 **RLA-60**, *Standard Chartered v. Tanzania* Award, ¶ 2.
142 **RLA-60**, *Standard Chartered v. Tanzania* Award, ¶ 46.
143 Claimant's Memorial, ¶¶ 28 *et seq.*
144 **RLA-60**, *Standard Chartered v. Tanzania* Award, ¶ 198.
145 **Hearing Tr.**, Day 1, 248:14-21; 251:7-8; 251:16-22; Day 9, 1861:9-13; 1864:10-22; 1867:22-1868:1 (Spanish).

process" by incorporating and then directly acquiring 100% of the shares of G.M. Campana Ltd.,[146] Productora Ltd.,[147] and Malku Khota Ltd.[148] Through these three subsidiaries, SAS later acquired 100% of the shares in CMMK,[149] which owned the Concessions until Bolivia expropriated them. Unlike the claimant in *Standard Chartered*, the entire *raison d'être* of this structure, of which SAS was an integral part, was to invest in the Project in Bolivia. SAS participated in the investment by incorporating subsidiary companies and acquiring shares therein, with the expectation that returns from that investment would flow back to it. Consequently, the Tribunal would have jurisdiction over SAS's claims in this arbitration even under *Standard Chartered*'s unduly restrictive analysis.

B. THE OBJECTIVE NOTION OF INVESTMENT AND THE *SALINI* TEST ARE INAPPLICABLE

48. Bolivia alleged at the hearing that the Tribunal should decline jurisdiction by holding that an objective notion of the term "investment," which would require the action of investing, existed in international law and was applicable to this case, and that SAS had not carried out any such actions in respect of the Concessions.[150] In so doing, Respondent ignored the consistent case law in investment arbitration holding that a broad definition of "investment," as the one contained in the Treaty, necessarily includes indirect investments of the kind made by SAS.[151] In other words, tribunals have upheld these types of investment strategies over and over.

49. And to the extent that Respondent claims that the *Salini* test applies, another argument that Bolivia first raised in its Rejoinder,[152] both Parties agree that it was developed for the sole purpose of

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146 Claimant's Memorial, ¶ 32.
147 Claimant's Memorial, ¶ 31.
148 Claimant's Memorial, ¶ 30.
149 Claimant's Memorial, ¶ 29.
150 **Hearing Tr.**, Day 9, 1865:6-11 (Spanish).
151 Claimant's Rejoinder, ¶ 58; Claimant's Reply, ¶¶ 165-166. *See also* **CLA-1**, *Guaracachi America, Inc. and Rurelec PLC. v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, Jan. 31, 2014, ¶¶ 352-353 ("*Rurelec v. Bolivia* Award"); **RLA-55**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, Aug. 3, 2004, ¶ 137; **RLA-54**, *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, July 6, 2007, ¶¶ 123-124; **CLA-104**, *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction, June 19, 2009, ¶¶ 105-111; **CLA-105**, *Venezuela Holdings* Decision on Jurisdiction, ¶¶ 162-166; **CLA-100**, *CEMEX Caracas Investments B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, Dec. 30, 2010, ¶¶ 150-156; **CLA-106**, *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, June 20, 2006, ¶¶ 37, 63; and **CLA-4**, *BG Group v. Argentina* Award, ¶¶ 112, 467.
152 Respondent's Rejoinder, ¶ 266.

determining whether a given economic operation constitutes an investment within the meaning of Article 25(1) of the ICSID Convention, since neither the convention nor its *travaux préparatoires* define what an investment is.[153] Thus, the Tribunal should reject Respondent's senseless argument. The objective notion of investment on the basis of the *Salini* test is not applicable in non-ICSID arbitrations, as many tribunals have held.[154] It is not even authoritative within the ICSID arbitration framework, given that ICSID tribunals do not always adopt it.[155]

50. Since the Treaty sets forth a definition of investment at Article 1(a), the Tribunal need only ensure, in order to ascertain its jurisdiction over SAS's claims, that the investments SAS owns satisfy that definition.[156] As already noted, both Parties agree that the shares in CMMK and the Concessions constitute investments pursuant to Article 1(a).[157] Thus, SAS maintains its position that the objective notion of investment and the corresponding *Salini* test are not applicable in this UNCITRAL-rules arbitration. And even if these requirements were applicable (which Claimant reiterates they are not), then it cannot be possibly be disputed that the shares in CMMK and the Concessions, *i.e.*, the investment at issue in this case, satisfy the *Salini* criteria of resource contribution, risk, duration, and contribution to the host State's economic development.

51. Bolivia also referred to the *Romak v. Uzbekistan* award during the hearing,[158] where a tribunal constituted under the UNCITRAL Rules nonetheless applied the objective notion of investment and the *Salini* test. Putting aside the criticism that this decision received,[159] and even assuming that it binds this Tribunal (it does not), *Romak* was decided on the basis of specific factual circumstances and policy considerations that are not present here. The claimant in that case alleged that commercial contracts entered into with Uzbek State entities and an arbitral award constituted investments under the Switzerland-

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153 **Hearing Tr.**, Day 9, 1866:3-6 (Spanish); Respondent's Rejoinder, ¶ 266; Claimant's Rejoinder, ¶ 77.
154 Claimant's Rejoinder, ¶ 79.
155 Claimant's Rejoinder, ¶ 77.
156 Claimant's Rejoinder, ¶ 80.
157 *See supra* at ¶ 38.
158 **Hearing Tr.**, Day 9, 1866:11-13 (Spanish); Respondent's Closing Presentation at 14.
159 Claimant's Rejoinder, ¶ 79.

Uzbekistan BIT.[160] The respondent argued that Romak had failed to identify a qualifying investment under the BIT.[161] The *Romak* tribunal expressed its concern that if it did not apply an objective definition of investment *in that case*, the line between investments and ordinary commercial transactions would become blurred,[162] and every contract entered into by Swiss nationals with Uzbek authorities would be considered an investment.[163] The tribunal also feared that recognizing an arbitration award as an investment would provide parties with the possibility of engaging in a *de novo* review of a State court's decision not to enforce the award.[164]

52. The circumstances of the present case are very different. Most importantly, Bolivia has not disputed that SAS owns a qualifying investment under the Treaty, namely its shares in CMMK and the Concessions.[165] Furthermore, the nature of SAS's investments, *i.e.*, shares in a company and mining concessions, do not give rise to the policy concerns identified by the *Romak* tribunal (or any other such concerns for that matter). Therefore, the decision in *Romak* to rely on the objective notion of investment and the *Salini* test should be viewed as exceptional, and has no relevance whatsoever to the Tribunal's considerations on its jurisdiction here. As the *Rurelec* tribunal held: "The Tribunal also considers that it is not appropriate to import "objective" definitions of investment created by doctrine and case law in order to interpret Article 25 of the ICSID Convention when in the context of a non-ICSID arbitration such as the present case. On the contrary, the definition of protected investment, at least in non-ICSID arbitrations, is to be obtained only from the (very broad) definition contained in the BIT concluded by Bolivia and the United Kingdom."[166]

53. Finally, Bolivia briefly alluded to the *Saba Fakes v. Turkey* award in connection with the

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160 **RLA-216**, *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, PCA Case No. AA 280, UNCITRAL, Award, Nov. 26, 2009, ¶ 101 ("*Romak v. Uzbekistan* Award").
161 **RLA-216**, *Romak v. Uzbekistan* Award, ¶ 97.
162 **RLA-216**, *Romak v. Uzbekistan* Award, ¶ 185.
163 **RLA-216**, *Romak v. Uzbekistan* Award, ¶ 187.
164 **RLA-216**, *Romak v. Uzbekistan* Award, ¶ 186.
165 Respondent's Counter-Memorial, ¶ 224.
166 *See* **CLA-1**, *Rurelec v. Bolivia* Award, ¶ 364.

objective notion of investment.[167] However, that reference is immaterial as the tribunal in that case clearly addressed the definition of investment within the meaning of Article 25(1) of the ICSID Convention.[168] It was not pontificating about the term's objective meaning outside of the Convention's framework.

54. In light of the above, the Tribunal should reject Bolivia's reliance on the objective notion of investment and the *Salini* test. To decide on its jurisdiction, the Tribunal need only ensure that SAS satisfies the Treaty's definition of "company" in Article 1(d), that the investment at issue comports with the conditions of Article 1(a), and that Claimant owns that investment. Since Bolivia has already conceded that SAS met these requirements, the Tribunal has jurisdiction over SAS's claims in this arbitration.

VI. BOLIVIA FAILED TO PROVE UNCLEAN HANDS AND ILLEGALITY

55. Throughout this arbitration, Bolivia has sought to deny the protection of the BIT to Claimant by accusing it of wrongdoing. By the end of the hearing, however, faced with the fact that it was unable to prove its allegations, which mostly relied on Witness X, Bolivia resigned itself to claiming that SAS had nonetheless contributed to its own damages and requested a corresponding 75% reduction of any award on the basis of *Copper Mesa*. But far from assisting Bolivia, the *Copper Mesa* award only highlights the hollowness of its allegations, which cannot defeat this Tribunal's jurisdiction, nor render Claimant's case inadmissible, nor support a reduction of Claimant's damages. In any event, and to be absolutely clear, SAS denies all allegations of wrongdoing raised by Respondent in this case.

A. THE DOCTRINE OF CLEAN HANDS IS NOT RECOGNIZED IN INTERNATIONAL LAW

56. Claimant's legal arguments regarding the clean hands doctrine remain unchanged: the doctrine "does not exist as a general principle of international law which would bar a claim by an investor."[169] More importantly, Respondent's claims cannot and should not serve as a jurisdictional or admissibility defense for Bolivia's blatant and uncompensated expropriation of SAS's investment. As the Tribunal can now appreciate, Bolivia's attempt to argue that the doctrine of clean hands is a general

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[167] **Hearing Tr.**, Day 9, 1866:13-1867:1 (Spanish); Respondent's Closing Presentation at 14.

[168] **RLA-61** *Saba Fakes v. Turkey* Award, ¶¶ 95 *et seq.*, 98; 107-108, 110.

[169] *See, e.g.*, **CLA-121**, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, Final Award, July 18, 2014, ¶ 1363 ("*Hulley v. Russia* Final Award").

principle of law that would bar Claimant's claims fails: the "application of the 'clean hands' doctrine in international law is still controversial," and "[i]nternational tribunals have so far been reluctant to recognize its existence."[170]

57. The *Copper Mesa* tribunal did not dispute the *Yukos* tribunal's finding that there is no general principle of law "that would bar an investor from making a claim before an arbitral tribunal under an investment treaty because it has so-called 'unclean hands.'"[171] In that case, the respondent invoked the clean hands doctrine based on the claimant's alleged misconduct during performance of the investment.[172] The tribunal reviewed the respondent's "impressive amount of expert testimony and materials" regarding the clean hands doctrine "under international law, including the obligations of foreign investors on human rights."[173] The tribunal ultimately declined to apply the "doctrine of clean hands as such."[174] The *Copper Mesa* award underscores that the doctrine of clean hands is not a recognized principle of international law.

58. Moreover, the *Copper Mesa* tribunal declined to apply the clean hands doctrine as a bar to jurisdiction and admissibility.[175] It noted that the respondent's accusations had almost all taken place "openly and in view of the Respondent's governmental authorities," and thus expressly rejected the respondent's clean hands admissibility objection because it had never complained of such conduct when the events took place.[176] The tribunal concluded that it was far too late to raise these objections for the first time during the arbitration.

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[170] **RLA-88**, P. Dumberry, G. Dumas-Aubin, "*The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law*", 10 Transnational Dispute Management, issue 1, 2013), at 1. Claimant also explained that Bolivia failed to specify the precise content of the doctrine of clean hands and criteria for the doctrine to apply in international law. Claimant's Reply, ¶¶ 212 *et seq.* Yet, if the Tribunal were to recognize and apply the doctrine based on *Niko Resources v. Bangladesh*, then Bolivia's case would still fail because Bolivia does not meet the criteria for its application. As previously explained, the criteria involves a 3-part test. Here, Bolivia's "clean hands" argument fails to meet each of the criteria of the 3-part test. Claimant's Rejoinder, ¶¶ 105-110.

[171] **RLA-281**, *Copper Mesa Mining Corp. v. Ecuador*, PCA Case No. 2012-2, Award, Mar. 15, 2016, ¶ 6.93 ("*Copper Mesa v. Ecuador* Award") (noting that the *Yukos* awards "add nothing new to the state of international law"); **CLA-121**, *Hulley v. Russia* Final Award, ¶¶ 1358-1359.

[172] **RLA-281**, *Copper Mesa v. Ecuador* Award, ¶ 5.60.

[173] **RLA-281**, *Copper Mesa v. Ecuador* Award, ¶ 5.60.

[174] **RLA-281**, *Copper Mesa v. Ecuador* Award, ¶ 5.65.

[175] **RLA-281**, *Copper Mesa v. Ecuador* Award, ¶¶ 5.62, 5.65. Instead, the tribunal opted to apply "analogous doctrines of causation and contributory fault applying to the merits of the Claimant's claims arising from events subsequent to the acquisition of its investment." Bolivia asserts that the facts of *Copper Mesa* are similar to the facts in this case. SAS disagrees.

[176] **RLA-281**, *Copper Mesa v. Ecuador* Award, ¶¶ 5.63-5.64.

59. Bolivia did not investigate the groundless allegations against SAS. During the hearing, Minister Cesar Navarro testified that he ignored them.[177] Mr. Chajmi also confirmed this fact.[178] In any event, SAS rejects these allegations. Yet, Respondent insists that its bevy of unsupported allegations against Claimant, which it did not act upon at the time, still warrant wholesale dismissal of this arbitration. The Tribunal should reject Bolivia's belated attempt to use unfounded allegations as a means to avoid its legitimate obligations under the Treaty.

B. THE ILLEGALITY DOCTRINE DOES NOT APPLY IN THIS CASE

60. For the legality doctrine to apply, the violation of host State law must occur *at the date of admission or establishment of an investment*.[179] If the respondent State complains of breaches of the host State's laws during the *course* of the investment, as Bolivia does here, and then imposes sanctions on the investor in breach of the BIT, the investor "must have the possibility of challenging their validity in accordance with the applicable investment treaty."[180] Nothing that Bolivia presented during the hearing—including its reliance on the *Copper Mesa* award—change the consistent line of case law and analysis presented by SAS.

61. In fact, the *Copper Mesa* tribunal rejected the respondent's invocation of the illegality doctrine based on conduct that occurred after the initial investment.[181] It explained that to impose a jurisdictional requirement based on legality after the initial making of the investment would require "clear wording" in the Treaty.[182] There is no such "clear wording" in the Treaty creating a jurisdictional bar. Accordingly, this Tribunal cannot incorporate such a requirement.

C. BOLIVIA'S FACTUAL ALLEGATIONS OF WRONGDOING ARE UNSUPPORTED

62. Bolivia must prove the facts that it relies on in accordance with the maxim "*onus probandi*

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177 **Hearing Tr.**, Day 3, 717:19-718:8 (Spanish).
178 **Hearing Tr.**, Day 4, 920:10-17 (Spanish).
179 Claimant's Reply, ¶ 223 *et seq*; Claimant's Rejoinder, § IV(B).
180 *See, e.g.*, **CLA-121**, *Hulley v. Russia* Final Award, ¶ 1355.
181 **RLA-281**, *Copper Mesa v. Ecuador* Award, ¶ 5.54.
182 **RLA-281**, *Copper Mesa v. Ecuador* Award, ¶ 5.55.

incumbit actori."[183] There is no "shifting" of that burden just because Bolivia would have it so. Moreover, Claimant established that an allegation of wrongdoing must be proven with "sufficient weight of positive evidence – as opposed to pure probabilities or circumstantial inferences."[184] None of Bolivia's arguments alter this basic tenet.

63. Bolivia fails miserably at meeting its burden. At best, the Tribunal only heard unreliable testimony [redacted], whom for years did not voice any of his/her accusations, and only did so after being "invited" to testify in this arbitration by Minister Navarro.[185] In any event, Claimant addressed the fact that Bolivia's allegations of misconduct are groundless, and that Bolivia did not present a shred of credible evidence to support them.[186]

VII. SAS IS ENTITLED TO FULL REPARATION FOR BOLIVIA'S NATIONALIZATION OF THE MALKU KHOTA MINING PROJECT

64. Among the basic and undisputed facts in this case are the following: *First*, Bolivia had a duty to comply with the provisions of the BIT. *Second*, Bolivia nationalized the Project without paying compensation, contrary to the terms of the BIT. The undeniable conclusion that follows is that Bolivia has committed an unlawful act and therefore has a duty under customary international law to pay full reparation for that act. SAS has conservatively based its full reparation claim on the fair market value ("FMV") of the Project just prior to the expropriation becoming public (which is the same measure as under the BIT for lawful expropriation).[187] SAS's experts, Messrs. Rosen and Milburn of FTI, have conservatively calculated the Project's FMV on that date (*i.e.*, July 6, 2012) to be US$ 307.2 million, and it is this amount that the Tribunal should award as damages (plus pre- and post-award interest).

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183 Claimant's Rejoinder, § IV(C).

184 **CLA-132**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013, ¶ 182. A tribunal must have "confidence [from] the evidence relied on" to make a finding of wrongful or illegal conduct. **CLA-116**, *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, I.C.J., Reports 2003, at 161, Separate Opinion of Judge Higgins, Nov. 6, 2003 at 234 §33, 42 ILM 1334, 1384-86 (2003). *See also*, Claimant's Rejoinder, § IV(C).

185 **Hearing Tr.**, Day 5, 999:4-16 (Spanish).

186 *See supra* at ¶¶ 16-21; Claimant's Reply, § II; Claimant's Rejoinder, §§ II and IV.

187 Claimant's Memorial, ¶¶ 169-193; Claimant's Reply, ¶¶ 364-368.

65. Bolivia, in contrast, asks the Tribunal to award damages equal to SAS's sunk costs.[188] Bolivia advocates for this valuation measure even though its own experts, Prof. Davis and Dr. Dorobantu of Brattle, agree that, "to the extent that [FMV] is the appropriate approach, [the parties] need to look at some other approach than the cost of investment prior to the reversion of the concession" to determine FMV.[189] Further, Bolivia's "sunk costs" approach ignores the many years that SAS invested in discovering, developing, and increasing the value of the Project—a world-class asset that Bolivia now admits it is trying to sell to other foreign investors (with the benefit of the information obtained from the many years that SAS dedicated to testing and ensuring the viability of the mineral resources).[190] The Tribunal should not hesitate to reject Bolivia's approach.

66. As SAS has explained, numerous investment arbitration tribunals have held that FMV is an appropriate measure of damages for a host State's unlawful conduct even if that conduct did not give rise to an expropriation *per se*.[191] For example, the tribunal in *Gold Reserve v. Venezuela* (which also involved mining concessions) used FMV to determine the compensation owed to the claimant after finding that Venezuela's actions violated the fair-and-equitable-treatment standard.[192] In particular, the *Gold Reserve* tribunal found that "the fact that the breach has resulted in the total deprivation of mining rights suggests that, under the principles of full reparation and wiping-out the consequences of the breach, a fair market value methodology is also appropriate."[193] Further, that tribunal used FMV even though the expropriation in that case took place prior to the project's construction and entry into production. Similarly, Bolivia's measures here have resulted in the "total deprivation of [SAS's] mining rights." Accordingly, "under principles of full reparation," SAS is entitled to recover the FMV of its investment in Malku Khota.

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188 *See e.g.*, **Hearing Tr.**, Day 1, 292:2-9 (Spanish).

189 **Hearing Tr.**, Day 8, 1581:22-1582:3 (Brattle Group, F. Dorobantu) (English). Recognizing that sunk costs are not equivalent to FMV, in its second report and at the hearing, Brattle offered an alternative "share price" valuation of Malku Khota. SAS will address below the many problems with this approach. Regardless, Bolivia advocates only for the "sunk costs" approach, so for this reason alone, the Tribunal should reject Brattle's "share price" alternative.

190 **Hearing, Tr.**, Day 3, 758:24-760:25 (C. Navarro) (Spanish); **Exhibit C-150**, Plan Sectoral de Desarrollo Minero Metalúrgico 2015–2019 at 157; **Exhibit C-65**, *Comibol busca apoyo técnico para explotar indio*, LA PRENSA, Aug. 8, 2012; **Exhibit C-66**, *Comibol busca que China asuma la exploración en Malku Khota*, PÁGINA SIETE, Aug. 12, 2012.

191 Claimant's Memorial, ¶¶ 194-201. Claimant's Reply, ¶¶ 186-201.

192 **RLA-27**, *Gold Reserve v. Venezuela* Award, ¶ 674.

193 *Id*. at ¶ 680.

67. Throughout these proceedings, including at the hearing, Bolivia has not meaningfully contested these basic principles of compensation.[194] Rather, Bolivia's defense is centered on arguing that (i) SAS caused its own damages (and therefore any amount awarded should be reduced on the basis of comparative fault);[195] (ii) SAS's damages are hypothetical and/or uncertain;[196] and (iii) the methodology used by SAS's independent experts is not reliable.[197] SAS will address herein each of these groundless allegations. In so doing, SAS will also re-emphasize the soundness and reasonability of its own damages approach. In the end, the Tribunal should award damages to SAS equivalent to the FMV of Malku Khota as measured by FTI of US $307.2 million, plus pre- and post-award interest.

A. THE METHODOLOGIES EMPLOYED BY CLAIMANT'S INDEPENDENT DAMAGES EXPERTS PROPERLY REFLECT THE FMV OF THE MALKU KHOTA PROJECT

1. Overview of FTI's Approach and Bolivia's Main Criticisms

68. As its very name indicates, the objective of an FMV assessment is to determine the value at which the asset at issue (here, the Project) would exchange hands in a notional transaction between market participants—*i.e.*, a willing buyer and a willing seller—on the valuation date (here, July 6, 2012).[198] As Mr. Rosen of FTI explained at the hearing:

> We must assess at what price the project would transact for in a notional marketplace. This requires a view of how actual transactions are done in the industry. This is not an academic exercise that's based on a paper that has been written or Googled on how certain things are treated. This requires an understanding of how transactions in this industry are done in practice.[199]

69. FTI's valuation accomplishes exactly this by looking to all the information that would have been available to market participants at the valuation date. FTI based its FMV assessment on a weighting of three different market-based indicators of value. *First*, RPA's metal transactions ratio ("MTR"), which estimated a value of US$ 270 million and to which FTI assigned a 50% weighting. *Second*, the consensus forecasted valuation of analysts, which yielded a valuation of US$ 572.1 million and to which FTI assigned

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194 *See e.g.*, Respondent's Counter-Memorial, ¶¶ 511, 524.
195 Respondent's Counter-Memorial, ¶ 725; Tr. Day 9 1885:7-1886:21.
196 **Hearing Tr.**, Day 9 1887:3-10 (Spanish).
197 **Hearing Tr.**, Day 9 1887:10-13, 1888:6-14 (Spanish).
198 To the extent there remains any meaningful dispute between the parties as to the correct valuation date, SAS explains below why July 6, 2012 is the only date consistent with the BIT and customary international law.
199 **Hearing Tr.**, Day 8, 1337:3-9 (FTI, H. Rosen) (English).

a 25% weighting. *Lastly*, private-placement transactions that took place just a couple of months prior to the expropriation, which implied a valuation of US$ 116.7 million and to which FTI likewise assigned a weighting of 25%. These result in a weighted valuation of US $307.2 million, excluding interest.

70. Bolivia calls this approach a "Frankenstein" among other criticisms,[200] but it is nothing of the sort. To the contrary, it applies contemporaneous market data (*i.e.*, analyst valuations and private-placement transactions) together with the unmatched expertise of RPA in valuing comparable early-stage mining projects. As Mr. Rosen of FTI explained at the hearing:

> [L]et me say this about Dr. Roscoe and RPA and this methodology [MTR] I've been around valuations for over 30 years and I've known Dr. Roscoe and RPA for over 25 years and worked closely with them on projects during that period of time. When companies actually transact--and you should understand that about 70% of all equity raised globally for the mining industry is raised in Toronto, okay? So, a substantial portion of equity raised globally is raised in Toronto. Dr. Roscoe is frequently called upon to assist companies in understanding transactions, and that's one of the reasons we place so much reliance on Dr. Roscoe and his analysis. It's very important for the Tribunal to understand that.[201]

71. Bolivia's criticism of RPA's MTR valuation (and by extension FTI's reliance on it) is unwarranted. Bolivia attacks this approach primarily by stating that it does not take into account the Project's environmental, social or taxation risk.[202] As RPA explained, however, these risks were indeed taken into account through its choice of comparables, which were all early-stage projects with similar risk levels as Malku Khota.[203] Additionally, RPA selected silver-dominant properties in the cordillera of Mexico to Chile and Argentina. These properties have similar geographical and geological conditions as Malku Khota. RPA also explained that technological and other risks could, if necessary, be further addressed through a downward adjustment of its preferred multiple of 2%, closer toward the midpoint of 1.75%.[204]

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200 **Hearing Tr.**, Day 9, 1888:6-20 (Spanish) (describing Claimant's damages assessment as "*inaudita en este tipo de procedimientos" and stating that "[e]l hecho de multiplicar una gran cantidad de peritos económicos, de multiplicar los cálculos y las medias y los insumos, no convierte un cálculo errado en un cálculo correcto. Les mencioné el garbage in-garbage out, este es un ejemplo paradigmático de eso*").

201 **Hearing Tr.**, Day 8, 1349:20-1350:7 (FTI, H. Rosen) (English).

202 **Hearing Tr.**, Day 9, 1907:6-18 (Spanish).

203 **Hearing Tr.**, Day 6, 1015:19-1016:2; 1016:14-24; 1013:20-25 (RPA, W. Roscoe) (English).

204 **Hearing Tr.**, Day 6, 1123:9-1124:9 (RPA, W. Roscoe) (English). The effect of applying a 1.75% MTR instead of 2% would reduce RPA's preferred valuation from US$ 270.0 million to US$ 227.5 million, which in turn would reduce

72. Bolivia's criticism of FTI's reliance on the analyst reports is equally misplaced.[205] Bolivia stresses that these analysts were not called as experts in this arbitration and therefore the Tribunal should not rely on them.[206] This is remarkable. The Tribunal cannot possibly ignore contemporaneous valuations prepared by third parties outside a litigation context of the very asset that the Tribunal is now being asked to value. They are unquestionably a real-world indicator of value, which is what real market participants would have looked to if they had wanted to purchase the Project[207] before any knowledge of Bolivia's wrongful conduct.

73. Unlike the MTR and analyst valuations, Bolivia does not dispute the relevance of the private-placement transactions in principle, but it says they occurred several months before the valuation date and therefore do not capture the 60% drop in SAS's share price that preceded the expropriation. It is SAS's position, however, that this drop in share price is attributable to Bolivia's wrongful conduct, which should be ignored for valuation purposes.[208] For this reason, the private-placement transactions are a better indicator of value than the share price at the time of the expropriation.

74. In contrast to FTI, Bolivia's experts at Brattle were specifically instructed to only calculate the cost of SAS's investment in the Project—an admittedly distinct concept from FMV.[209] Brattle only purported to calculate the Project's FMV in its second report and following FTI's criticism of Brattle's failure to calculate it in its first report.[210] In that report and at the hearing, Brattle argued that SAS's share

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FTI's valuation from US$ 307.2 million to US $286.0 million. In any event, Bolivia's criticism of FTI's use of RPA's MTR valuation is somewhat puzzling, because excluding it from FTI's valuation would *increase* SAS's damages. Indeed, if FTI had relied only on an equal weighting of the analyst average (US$ 572.1 million) and the private-placement transactions (US$ 116.7 million), its valuation would have been US $344.4 million instead of US$ 307.2 million.

205 **Hearing Tr.**, Day 9, 1903:10-25 (Spanish).

206 **Hearing Tr.**, Day 9, 1904:5-8 (Spanish).

207 **Hearing Tr.**, Day 8, 1360:13-1361:7 (FTI, H. Rosen) (English) (explaining that "*buyers and sellers actually look to … all information" when doing a transaction, including "analyst reports*"); **Hearing Tr.**, Day 8, 1376:9-1377:3 (FTI, C. Milburn) (English) (explaining the role of industry analysts).

208 Claimant's Statement of Claim, ¶ 156; Claimant's Reply, ¶ 336. It is worth recalling that SAS's share price attained a high of just under US$ 300 million on April 11, 2011, a little over a year prior to the expropriation. *See* Claimant's Closing Presentation at 113.

209 **RER-3**, Brattle First Report, ¶ 2.

210 **RER-5**, Brattle Second Report, ¶ 2(c).

price (less the FTI-assessed value of SAS's other project, Escalones) reflects the market value of the Project, and that only this marker of value should be used in assessing FMV.

75. In light of the evidence adduced at the hearing, it should be obvious to the Tribunal that Professor Davis of Brattle's self-described classroom experience calculating FMV of mineral properties[211] is not more reliable than FTI's reasonable real-world approach. Brattle used only one methodology to calculate the Project's FMV (*i.e.*, its share price approach) despite being aware that CIMVal recommends that more than one methodology be used to value mineral properties (*i.e.*, FTI's approach).[212] Brattle also chose to rely only on the share-price approach even though this type of valuation is (i) considered by CIMVal as only a secondary method of valuation and (ii) recommended for "single asset junior companies" (which SAS is not).[213]

76. Brattle's approach also ignores the undeniable disconnect between the share price of a single-asset junior mining company and the underlying value of its mineral assets.[214] As SAS's expert Mr. Cooper explained, junior mining companies commanded acquisition premia over their share price of 54% to 67% during the period preceding the expropriation. He also provided a chart showing that, on the expropriation date, non-producing junior mining companies' underlying net asset values were on average 2.44 times higher than their share price, within a range of 1.25 to 5 times the share price.[215] This is consistent with the contemporaneous analyst valuations of Malku Khota, all of which reached valuations that were significantly higher than the share price on the respective report date.

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211 **Hearing Tr.**, Day 8, 1634:21-24: "*I value mineral properties every day in classes*" (Brattle Group, G. Davis) (English).

212 **Hearing Tr.**, Day 8, 1576:24-1577:2 (Brattle Group, G. Davis) (English). In fact, Brattle admits that SAS's experts in this case followed CIMVal's guidelines. *Id*. at 1580:17-19. Prof. Davis also admitted that his share-price approach is contrary to a paper he wrote in 2003, which not only did not mention using share price to assess value of an early-stage mineral property, but also described the use of comparable transactions (*i.e.*, RPA's MTR approach) as "indispensable" even if "radical adjustments" are required. *See* **FTI- 56**, *Economic theory and the valuation of mineral assets*, Graham A. Davis, at 402.

213 **Hearing Tr.**, Day 8, 1577:22-1578:6, 1579:8-18 (Brattle Group, G. Davis) (English).

214 *See* **CER-1**, First FTI Report, ¶¶ 10.8-10.17; **CER-4**, Second FTI Report, App. 2.

215 *See* Claimant's Closing Presentation at 102.

77. The chart below summarizes FTI's results and weighting. For comparative purpose, it also shows the SAS share price (if adjusted for Mr. Cooper's acquisition premium) and the FTI set of comparables,[216] to neither of which FTI assigned any weight.

Market Approach Valuation Methodology	Unweighted			Weighting Applied	Weighted		
	Low FMV Estimate	High FMV Estimate	Point Estimate		Low FMV Estimate	High FMV Estimate	Point Estimate
MTR Analysis	$ 130.0	$ 330.0	$ 270.0	50%	$ 65.0	$ 165.0	$ 135.0
Analyst Reports	$ 195.9	$ 922.2	$ 572.1	25%	$ 49.0	$ 230.5	$ 143.0
SASC Private Placements	$ 116.7	$ 116.7	$ 116.7	25%	$ 29.2	$ 29.2	$ 29.2
SASC Share Price*	$ 115.8	$ 125.5	$ 120.6	0%	$ -	$ -	$ -
Comparable Companies	$ 239.2	$ 478.4	$ 358.7	0%	$ -	$ -	$ -
Project FMV					**$ 143.2**	**$ 424.7**	**$ 307.2**

Based on: FTI Report. Figure 18
FTI Report. Paragrap
* Includes Mr. Cooper's 54% to 67% acc

FTI's Direct Presentation, Slide 30

78. In sum, FTI's valuation provides the Tribunal with an accurate FMV of Malku Khota—a valuation that real market participants would have used in order to purchase Malku Khota in a real arms-length transaction.

2. Valuation Date

79. SAS maintains that the correct valuation date is July 6, 2012. The parties agree that the valuation date should be determined according to the BIT, which provides that "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*."[217] Bolivia does not disagree with the principle that the valuation date should be set on the day prior to the day when the expropriation was made public.[218] Rather, Bolivia argues that the expropriation was only made public on July 10, 2012, and thus that the appropriate valuation date is July 9, 2012.[219] Bolivia is wrong. As SAS demonstrated, governmental authorities convened a meeting between the State and opponents of the Project for the

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216 The Tribunal will recall that FTI attempted a comparable company trading analysis as part of its first report but did not find it sufficiently reliable as a primary valuation approach for a number of reasons, including the comparability of FTI's identified set of comparables. Rather, the range obtained by FTI under this methodology was used as a reasonableness check on the primary methodologies selected by FTI. *See* **Hearing Tr.**, Day 8, 1420: 17-1422:1 (FTI, H. Rosen); **CER-1**, First FTI Report, ¶¶ 10.6-10.7.

217 **Exhibit C-1**, Treaty, Art. 5.

218 **Hearing Tr.**, Day 1, 297:21-25: "*Conforme al artículo 5.1 del Tratado, puesto que la fecha de valuación debe ser la fecha previa a hacerse pública la inminente expropiación no debería estar en disputa que esa fecha es el 9 de julio de 2012*" (Spanish).

219 Hearing, Tr., Day 1, 297:7-25 (Spanish).

evening of Saturday July 7, 2012.[220] The State agreed to annul SAS's Mining Concessions at that July 7, 2012 meeting.[221] It then signed a Memorandum of Agreement to that effect on Sunday, July 8, 2012, which was made public on that same day.[222] Those public statements had an actual effect on the Project's share price, which went from a dollar on July 6, 2012, to 71 cents on July 9, 2012.[223] Even Bolivia's expert admitted during the hearing that by July 9, 2012, the market had already devalued the Project with "public information related to the potential nationalization."[224] To use July 9, 2012 as the valuation date would allow Bolivia to benefit from its wrongful actions, which contradicts principles of international law. Accordingly, the appropriate valuation date is July 6, 2012.

3. Bolivia's Remaining Comments about FTI are Without Merit

80. Bolivia is grasping at straws by arguing that FTI advocated for the use of sunk costs as the valuation method in *Copper Mesa*.[225] As a preliminary matter, FTI's primary valuation approach in *Copper Mesa* was a market-based quantification: "the weighted average of three different market approaches to determine the fair market value of the Claimant's concessions: 40% to the market transactions involving mineral assets that are similar to the Claimant's concessions; 40% to the Claimant's share price in the thirty days prior to the valuation date; and 20% to the public offering of the Claimant's shares that occurred six months prior to the valuation date."[226] In other words, FTI's methodology in *Copper Mesa* was not "diametrically opposed" to the methodology it used in this case, as Bolivia wrongly suggests. Although it is true that FTI also presented a cost-based valuation as an *alternative* approach in

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220 **Exhibit C-16**, Minutes of Understanding, July 7, 2012 at 4; **RWS-1**, Witness Statement of F. Gonzales, ¶ 82(d) (Spanish) ¶ 81 (English) (confirming that on July 7, 2012 the Government and certain communities agreed on the immediate reversion of the mining concessions"); Claimant's Reply, ¶¶ 98, 385.

221 *Id*.

222 **Exhibit C-61**, *Morales confirma nacionalización de Malku Khota*, AGENCIA BOLIVIANA DE INFORMACIÓN, July 8, 2012; **Exhibit C-63**, *Gobierno dice que tenía hace un año la intención de anular contrato con minera en Malku Khota*, LA RAZÓN, July 9, 2012.

223 The Brattle Group's Direct Presentation, Slide 26.

224 **Hearing Tr.**, Day 8, 1609:16-1610:3 (Brattle Group, F. Dorobantu) (English).

225 **Hearing Tr.**, Day 9, 1900:1-10: "*Tienen también un par de referencias en el Laudo -- al Laudo Copper Mesa y ahí sí quiero que quede muy claro por qué consideramos que los costos sí son un parámetro relevante para ustedes. Y es que como ya considero en el caso Copper Mesa, la incertidumbre es fundamental para esa determinación. Y sí debo decir que en el Laudo Copper Mesa casualmente son los mismos expertos de FTI de la contraparte el que estaba solicitando que se calculara en base a costos*" (Spanish).

226 **RLA-281**, *Copper Mesa v. Ecuador* Award, ¶ 7.5.

Copper Mesa, FTI made that professional and independent decision based on the facts of that case.[227] Notably, the project at issue in that case was at an early exploration stage with not even a preliminary economic assessment in place, and where the claimant had been unable to conduct its own testing and drilling. That is in stark contrast to SAS's case, where it already had a preliminary economic assessment in place, was working on its Pre-Feasibility Study, and had conducted extensive testing on the property.

81. Bolivia also criticizes FTI's use of comparables in *Bear Creek v. Peru* and its reliance on RPA to conduct that same type of valuation in this case, rather than making its own valuation.[228] Bolivia argues that in *Bear Creek*, FTI attempted a comparables analysis, ultimately concluding that there were no comparable properties to the project at issue in that case (which Bolivia states is the same thing Brattle did in this case and why it is criticized by Claimant).[229] Bolivia is mistaken. SAS does not criticize Brattle for analyzing comparables but ultimately only applying a share-price approach. Rather, SAS criticizes Brattle for not describing in its report the comparables analysis that it allegedly conducted. As Professor Davis of Brattle admitted, Brattle did not "describe in [its] Report [its] attempt to find comparables."[230] Apparently, Brattle discarded a comparables approach essentially because "the share analysis was there and [Brattle] felt it what was [sic] reliable, [which] caused [Brattle] to not do more than that amount of contemplation about comparison sales."[231] Brattle discarded this valuation even though Professor Davis has described the comparables approach as "indispensable" for exploration properties such as Malku Khota.[232] As to FTI's approach in *Bear Creek*, during the hearing, FTI explained that the property in that case was at a different stage for mineral properties, which made FTI's approach in that case appropriate.[233]

B. BOLIVIA'S ACTIONS ARE THE ONLY CAUSE OF SAS'S DAMAGES

82. SAS has conclusively established that its damages are solely and directly attributable to

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[227] **RLA-281**, *Copper Mesa v. Ecuador* Award, ¶ 7.9 (stating that the claimant instructed FTI to conduct an independent valuation).
[228] **Hearing Tr.**, Day 9, 1906:1-11 (Spanish).
[229] **Hearing Tr.**, Day 9, 1906:12-21 (Spanish).
[230] **Hearing Tr.**, Day 8, 1627:11-24 (Brattle Group, G. Davis) (English).
[231] **Hearing Tr.**, Day 8, 1629:3-6 (Brattle Group, G. Davis) (English).
[232] **FTI-56**, Economic theory and the valuation of mineral assets, Graham A. Davis at 402; **Hearing Tr.**, Day 8, 1621:7-13, 1622:1-19, 1625:21-1626:3 (Brattle Group, G. Davis) (English).
[233] **Hearing Tr.**, Day 8, 1374:15-1375:17 (FTI, H. Rosen) (English).

Bolivia's actions: SAS lost its investment when Bolivia nationalized the Project for its own political and financial gain, and following its failure to intervene to prevent escalation of opposition that could result in confrontations in the area.[234] In this arbitration, however, Bolivia claims that SAS caused its own damages and asks this Tribunal to apply the theory of contributory fault to reduce SAS's damages by 75%.[235] During the hearing, Bolivia asked the Tribunal to review the *Copper Mesa* award (that Bolivia added to the record on the eve of closing arguments), claiming that it was analogous to the facts of this case.[236] Contrary to Bolivia's allegations, the *Copper Mesa* award instead exemplifies how application of the theory of contributory fault and Bolivia's proposed reduction of SAS's damages in any amount are unwarranted here.

83. The *Copper Mesa* case involved three different mining concessions (not adjacent to each other) in Ecuador. Ecuador cancelled all three concessions in 2008, citing Ecuadorian mining law.[237] But only the damages related to one of those concessions, the Junin concession, were analyzed under the causation theory of contributory fault. The tribunal first found that Ecuador had unlawfully expropriated the claimant's investment. But it also concluded that Ecuador had proved that the claimant had contributed to its damages by acting negligently in the conduct of its business with respect to the Junin concession. The tribunal accordingly awarded damages to the claimant but reduced the damages related to Junin by 30%.[238]

84. The underlying facts and evidence in *Copper Mesa* are widely different from this case. Critically, Copper Mesa directly contributed to poor community relations through an armed conflict *planned and sponsored by the claimant itself* (through its agents and/or employees). The evidence in that case included (i) witness evidence—from both parties—showing a 2006 contract between the claimant and a private security company;[239] (ii) video footage of the claimant's security company marching to the

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234 Claimant's Memorial, ¶¶ 118-27; Claimant's Reply, ¶¶ 375-383.
235 *See, e.g.*, Respondent's Rejoinder, ¶¶ 17, 23; **Hearing Tr.**, Day 9 1885:7-1886:21 (Spanish).
236 **Hearing Tr.**, Day 9, 1885:7-1886:17 (Spanish).
237 **RLA-281**, *Copper Mesa v. Ecuador* Award, ¶ 6.53.
238 **RLA-281**, *Copper Mesa v. Ecuador* Award, ¶ 6.102.
239 **RLA-281**, *Copper Mesa v. Ecuador* Award, ¶¶ 4.172, 4.179.

concession area armed with firearms, tear gas, bombs, and bullet-proof vests, and causing a violent confrontation with anti-mining protestors;[240] (iii) video footage of the claimant's security company interfering with anti-mining protests and targeting certain anti-mining protestors;[241] (iv) documentary evidence showing a contract between the claimant and a community committee by which the claimant paid thousands of dollars to the committee members in exchange for their support for the project and neutralization of the opposition;[242] and (v) admissions by the claimant's witnesses.[243]

85. Based in large part on the above-described evidence, the tribunal found that Ecuador had met its burden of proving its allegations. Specifically, the tribunal concluded that, "by the acts of its agents in Ecuador, the Claimant [resorted] to recruiting and using armed men, firing guns and spraying mace at civilians, not as an accidental or isolated incident but as part of premeditated, disguised and well-funded plans to take the law into its own hands."[244] Importantly, by the end of 2007, the claimant did not have access to the concession area, was unable to prepare an environmental impact study for the project, and was ordered by Ecuadorian authorities to halt its community relations efforts following these violent confrontations in the area. Those were the very circumstances that Ecuador had cited as a basis to cancel the Junin concessions, and the tribunal concluded that Copper Mesa's own acts were a contributing factor (in the amount of 30%) to those circumstances.[245]

86. In sharp contrast to *Copper Mesa*, Bolivia has not proved SAS's alleged wrongful conduct. As a preliminary manner, "Bolivia does not accuse SAS of breaching a duty of social communication but rather of violating the human and fundamental rights of members of the Indigenous Communities and of creating conflicts between Indigenous Communities in order to subdue the opponents to the Project."[246] It is Bolivia's burden to prove these purported violations. Yet there is zero evidence that SAS armed

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240 **RLA-281**, *Copper Mesa v. Ecuador* Award, ¶¶ 4.214-4.230, 4.251, 4.286.
241 **RLA-281**, *Copper Mesa v. Ecuador* Award, ¶¶ 4.173.
242 **RLA-281**, *Copper Mesa v. Ecuador* Award, ¶¶ 4.105, 4.98.
243 *See e.g.*, **RLA-281**, *Copper Mesa v. Ecuador* Award, ¶¶ 4.105; 4.179-80; 4.214; 4.286.
244 **RLA-281**, *Copper Mesa v. Ecuador* Award, ¶ 6.99.
245 **RLA-281**, *Copper Mesa v. Ecuador* Award, ¶ 6.100.
246 Respondent's Rejoinder, ¶ 710.

community members or otherwise fostered violence in the area.[247] The unfortunate confrontations in the Malku Khota area were politically motivated, caused by outsiders[248] and willfully ignored by Bolivian authorities.[249] Bolivia has also not demonstrated that SAS created and controlled COTOA-6A to subdue the opponents to the Project.[250] In fact, during the hearing, it was established that COTOA-6A was actually formed by communities who lived within the Project's area of impact. Those communities were voluntarily part of COTOA-6A.[251] SAS never paid those communities or community members for their formation of, or for their continued membership in, COTOA-6A (unlike the committee at issue in *Copper Mesa*). SAS submits that the *Copper Mesa* award speaks for itself and the Tribunal should easily (i) distinguish the facts and evidence adduced in both cases; and (ii) determine that Bolivia's request for a 75% reduction in SAS's damages is wholly unwarranted.

C. SAS'S DAMAGES ARE REASONABLY CERTAIN

87. Bolivia further argues that SAS's damages are based on unproved mineral resources and untested metallurgy, such that there is no certainty that SAS would have been able to exploit the resource in the absence of the expropriation. To a large extent, however, this is already captured in FTI's FMV

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247 [redacted]

248 [redacted] **Hearing Tr.**, Day 4, 854:24-855:8: "*Esto ha sido convocado por la FAOI y también han estado representantes de CONAMAQ, y ellos pueden convocar a todos sus asociados para que se realice. Y yo creo que ese es el motivo de esta participación. Y normalmente no realizan en una sede sino que van rotando a las diferentes comunidades para, inclusive congresos y otro tipo de reuniones – ellos van rotando a las diferentes comunidades y van siempre con sus asociados, con todos los miembros*" (F. Gonzáles) (Spanish).

249 **Hearing Tr.**, Day 3, 717:19-718:8 (C. Navarro) (Spanish); Day 4, 919:21-920:17 (A. Chajmi) (Spanish).

250 *See* Claimant's Rejoinder, ¶¶ 22- 26. Contemporaneous records demonstrate that the communities wanted to align themselves in a committee as early as 2009 (**Exhibit C-155**, Memorándum de Santiago Angulo a Felipe Malbran, Informe Mensual Proyecto Malku Khota, May 2009). The communities then took actual steps to form an organization in April 2011 (**CWS-10**, Rebuttal Witness Statement of J. Mallory, ¶ 15, **CWS-11**, Second Rebuttal Witness Statement of W.J. Mallory, ¶ 10; **Exhibit C-309**, Acta de Conformidad del Comité Consultivo de Organizaciones Originarias de los Seis Ayllus (COTOA-6A), May 2, 2011). COTOA-6A was finally formed in early October 2011 (**Exhibit C-233**, Letter from COTOA-6A to President Evo Morales, Oct. 10, 2011; **Exhibit C-234**, Letter form COTOA-6A to the Ministry of Mines, Oct. 10, 2011).

251 *Id. See also* **Hearing Tr.**, Day 2, 419:8-13 (J. Mallory): "*[t]he best we could do was to offer [COTOA-6A] guidance, coaching. Some of the ideas that presented by Witness X I can see that were never – never went through. Some of the proposals were just those, proposals. The COTOA and the COTOA leadership were leading their own story, making their own decisions*" (English).

assessment because such uncertainties are already reflected in the analyst valuations, the private-placement transactions, and RPA's selection of comparables in its MTR analysis. In any event, there is no doubt that SAS was deprived of mining concessions with significant Mineral Resources. The parties' experts agree that the Project area is rich in silver, gold, copper, indium, gallium, lead, and zinc. When the expropriation took place, SAS was working on its pre-feasibility study, had secured financing for the Project, and had potential business partners interested in providing more financing.[252] Bolivia itself acknowledges the value of the Project, as it is presently marketing it to other foreign investors. Given this context, the Tribunal should not hesitate to rely on FTI's valuation.

1. Malku Khota Contains a Significant Polymetallic Mineral Resource – One of the Largest in Latin America[253]

88. Both SAS's mining expert, RPA, and Bolivia's mining expert, Dr. Kadri Dagdelen, agree that the Malku Khota deposit contains a significant Mineral Resource: RPA – 435 million tonnes[254] v. Dr. Dagdelen – 416 million tonnes.[255] While both experts agree that these are all Mineral Resources, the point of difference between the two is as to the amounts that fall into each of the three categories of Mineral Resources, *i.e.*, Measured, Indicated or Inferred.

89. RPA estimates the Malku Khota Mineral Resources as follows: 31 million tonnes (Measured), 224 million tonnes (Indicated Mineral Resources), and 179.9 million tonnes (Inferred Mineral Resources).[256] This is consistent with the estimates by GeoVector in the PEA Update with the sole exception that RPA re-classified a less-well-defined portion of the Inferred Mineral Resources in the 2011 PEA Update (50 million tonnes out of 230 million tonnes) as "Exploration Potential" for purposes of

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252 **Hearing Tr.**, Day 2, 292:14-293:15; 349:2-15; 349:24-350:2 (R. Fitch) (English).

253 **CER-4**, FTI Rebuttal Report. Fig. 1 (Malku Khota 10th largest silver projects in the world by number of ounces); **CER-3**, Cooper Expert Witness Statement at ¶ 37 ("…planned annual production levels of about 13 million ounces of silver would have put the deposit in the middle of the pack of the 10 biggest silver deposits in the world."); **Exhibit C-111**, *The 10 biggest silver mines in the world*, MINING TECHNOLOGY, Nov. 19, 2013.

254 **CER-2**, First RPA Expert Report, Table 9-2 at 9-6; **CER-5**, RPA Rebuttal Report, Table 5-1 at 5-7; RPA Hearing Presentation at 16.

255 **CER-5**, RPA Rebuttal Report, Table 5-1 at 5-7; **RER-2**, Dagdelen First Report, Table 1 at 23; **RER-4**, Dagdelen Second Report, Table 1 at 24.

256 **CER-2**, First RPA Expert Report, Table 9-2 at 9-6; **CER-5**, RPA Rebuttal Report, Table 5-1 at 5-7; RPA Hearing Presentation at 16.

RPA's Valuation Report.[257] Dr. Dagdelen, on the other hand, estimates the Malku Khota Mineral Resources as follows: 32.9 million tonnes (Measured), 153.2 million tonnes (Indicated Mineral Resources), and 229.8 million tonnes (Inferred Mineral Resources).[258]

90. Thus, RPA's total Mineral Resources are 434.9 million tonnes while Dr. Dagdelen's are 415.9 million tonnes – *a mere 4% difference*.[259] As for the difference in classification within the overall Mineral Resource amount, RPA states this is a matter of professional judgment and in any event does not affect its valuation because CIMVal states that"[a]ll Mineral Reserves and Mineral Resources on a Mineral Property should be considered in its Valuation."[260] Dr. Dagdelen likewise admits that classification of Mineral Resources into the different categories (Measured, Indicated, Inferred) is a matter of professional judgment.[261]

91. RPA's estimates were all done using the 10 g/t silver equivalent (AgEq) cut-off grade ("COG") used by GeoVector from the PEA Update, which RPA confirms is the appropriate COG.[262] Dr. Dagdelen adopted an incorrect COG of 20.4 g/t Ag.[263] Instead of 10 g/t AgEq as used by GeoVector in the PEA Update and confirmed by RPA,[264] Dr. Dagdelen uses *only silver* to calculate the Silver Equivalent to determine revenue contribution to the COG calculation, ignoring the remaining recoverable revenue-generating metals of indium, gallium, copper, lead, and zinc.[265] RPA therefore concludes that Dr. Dagdelen has not given proper credit to by-product metals of indium, gallium, copper, lead, and zinc; as a result, he has incorrectly estimated the COG at 20.4 g/t Ag.

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257 **Exhibit C-14**, Preliminary Economic Assessment Update Technical Report for the Malku Khota Project dated May 10, 2011 ("PEA Update") § 1.2, Table 1-3; **CER-2**, First RPA Expert Report, Table 9-2 at 5-7; RPA Hearing Presentation at 16.

258 **RER-2**, Dagdelen First Expert Report, Table 1 at 23; **RER-4**, Dagdelen Second Expert Report, Table 1 at 24.

259 RPA Hearing Presentation at 25; **RER-2**, Dagdelen First Expert Report Table 1 at 23; **CER-2**, First RPA Expert Report, Table 9-2 at 9-6.

260 **RPA-01**, Canadian Institute of Metallurgy and Petroleum Valuation of Mineral Properties ("CIMVal") 203, Standard G4.1 at 24; **CER-5**, RPA Rebuttal Report at 5.7.

261 **Hearing Tr.**, Day 7, 1181:4-8; 1181:19-25: "*Q: …So if the same professional looks at data, drilling data, and makes a determination, this is Indicated, this is Measured," anther professional could look at the same data and come up with slightly different categorizations based on the information…" A: Yes, yes*" (English).

262 **Exhibit C-14**, PEA Update, Table 1-3 at 13; **CER-2**, First RPA Expert Report at 1-2.

263 **RER-2**, Dagdelen First Expert Report, ¶¶ 79-82.

264 **Exhibit C-14**, PEA Update, Table 1-3 at 181; **CER-5**, RPA Rebuttal Report at 5-7 – 5-8.

265 **RER-4**, Dagdelen Second Expert Report, ¶¶ 61-62.

92. Dr. Dagdelen also used the $18.00/oz Base Case silver price from the PEA Update instead of the $25.00/oz Middle Case, the $35.00/oz Recent Case, or the $27.10/oz price as of July 6, 2012 – the Valuation Date (the average silver price in 2011 being $35.00/oz). When questioned about this decision, Dr. Dagdelen said he used it to "demonstrate how the cut-off grade is calculated …"[266] Dr. Dagdelen confirmed that using a higher metal price would result in a lower COG.[267] Nor did Dr. Dagdelen dispute that the COG would go down to 13.5 g/t Ag if he had used the $27.10/oz silver price from the Valuation Date or that it would go down to 10.6 g/t by using the $35.00/oz silver Recent Case price from the PEA Update.[268]

93. RPA's conclusion that GeoVector's resource estimate in the PEA Update is reasonable, as adjusted downward for the Low Grade Halo, should be given more weight than Dr. Dagdelen's.[269] RPA's experience and expertise in advising buyers and sellers of mineral properties day-in and day-out on all aspects of due diligence including Resource and Reserve estimates and valuations of mineral properties makes RPA uniquely qualified to accurately estimate Mineral Resources.[270]

2. All Mineral Resources Are To Be Used In Valuing The Project

94. Dr. Dagdelen asserts that because Inferred Resources have a lower level of confidence than Indicated Resources, no value should be given to the Inferred Resources when valuing Malku Khota.[271] On

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266 **Hearing Tr.**, Day 7, 1213: 19-1214:9 (K. Dagdelen) (English).

267 **Hearing Tr.**, Day 7, 1215:24-1216:2 (K. Dagdelen) (English).

268 **Hearing Tr.**, Day 7, 1217:24-1219:14 (K. Dagdelen) (English).

269 On cross-examination, Dr. Dagdelen's lack of independence was readily apparent. First, he was forced to admit his allegation that SAS violated Canadian securities laws (NI 43-101) was incorrect and that he ignored NI 43-101 5.3(I)(c) making clear that Mr. Pennstrom did not need to be an independent Qualified Person in connection with the PEA Update. **DAG-3**- NI 43-101; **Hearing Tr.**, Day 7, 1203:1-15; **Exhibit C-13**, Preliminary Economic Assessment Technical Report, Mary 13, 2009, § 1.7, Table 1-4 and **Exhibit C-14**, PEA Update, § 1.3, Table 1-3 (reflecting only a 27% change in Mineral Resources and that the major change was that infill drilling converted Inferred Resources to Indicated Resources). Second, with respect to the alleged improper use of the gold credit, Mr. Dagdelen admitted: (i) no gold credit was used in the PEA Update Mineral Resource estimate (**Hearing Tr.**, Day 7, 1182:1-4); (ii) PPA did not use the gold credit in either its resource estimate or valuation (**Hearing Tr.**, Day 7, 1182:25–1183:2); and (iii) Pincock Allen & Holt used a gold credit in the 2009 PEA (**Hearing Tr.**, Day 7, 1184:5-8).

270 **CER-5**, RPA Response Report at 1-4 – 1-7 and Appendix 2; **Hearing Tr.**, Day 6, 929:22-931:12; RPA Hearing Presentation at 2-9 (For example, in the last five years, RPA has conducted over 700 valuations of mining properties since 2005 and over 50 using MTR).

271 **RER-4**, Dagdelen Second Expert Report at 9, ¶¶ 24-25 ("*As such, Inferred Mineral Resources do not and cannot contribute to the valuation of a mining property of company*."); **Hearing Tr.**, Day 7, 1237:18-1238:3 (*Arbitrator Orrego: Q: So, my question to you is: Should they [Inferred Resources] be included in some measure, whichever that is-I have no idea-or is something you just throw away entirely? A: If I was buying, looking at the buying a property, or*

cross-examination, however, he admitted, consistent with Barry Cooper's testimony, that properties with only Inferred Resources, or less, are bought and sold all the time.[272] He also backtracked and confirmed that "you may assign some value" to Inferred Resources if, like here, one is "unable to explore that area or to undertake samplings of to do anything, and "you are exchanging a reasonable assumption for an inexistent price…"[273] However, as set forth below, whether or not value is ascribed to Inferred Resources is largely irrelevant with respect to Claimant's valuation.

95. Bolivia also fails to mention that NI 43-101 permits disclosure of Inferred Resources in a PEA[274] or to acknowledge the CIMVal Standards stating that all Mineral Resources should be used in the valuation of Mineral properties and they are defined as "that part of a Mineral Resource for which quantity and grade or quality can be estimated on the basis of geological evidence and limited sampling and *reasonably assumed*, but not verified, geological grade and continuity."[275]

96. In responding to questions by Arbitrator Orrego, Professor Davis, one of Bolivia's quantum experts, was unequivocal in stating Brattle Group's opinion that Inferred Resources have value in the marketplace, but that they should be treated differently than Measured and Indicated Resources.[276] In his experience, Inferred Resources are discounted by 5% or 10% up to 50% relative to Measured and Indicated Resources.[277] However, this is a red herring and does not impact Claimant's valuation in any material way.

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if I was – yeah, buying a property, I would not give any value to the mineral resource that's defined as Inferred. Q: In spite of the reasonable assumption? A: In spite of the reasonable assumption.").

272 **Hearing Tr.**, Day 7, 1186:8-13; 1187:20–1188:8: "*Q: Okay. And we just discussed that and I think I heard you right that properties are bought and sold all the time on the basis of mineral resources alone. A: Yes. Q: In fact, properties change hands all the time that don't even have Measured, Indicated and Inferred, but they're of some value to a buyer who wants to a mining company that things it's an interesting area. A: Yeah, I've directed many authorizations that purchased properties without mineral resource*" (English); *see also* **CER-3**, Expert Witness Statement of B. Cooper, ¶¶ 53-55; Barry Cooper Hearing Presentation at 14: "*Senior companies will utilize inferred resources and even lower categories (eg. Tier 3) for valuation purposes as evidence by these purchases and the treatment of their own assets*."

273 **Hearing Tr.**, Day 7, 1239: 3-23 (K. Dagdelen) (English).

274 **BR-1**, NI 43-101 Standards of Disclosure for Mineral Projects, Form 43-101F1 Technical Report and Related Consequential Amendments, June 24, 2011.

275 **DAG-1**: CIM Definitions Standards, November 27, 2010 at 4.

276 **Hearing Tr.**, Day 8, 1634:19-1635:1 (Brattle Group, G. Davis) (English).

277 **Hearing Tr.**, Day 8, 1635:23-1636:9 (Arbitrator Orrego*: Q: Discount, you mean? A: Yes, a discount. Block per block or dollar per dollar, they have a factor of from 5% to 50% applied to them, no matter what technique you are using"*) (Brattle Group, G. Davis) (English).

97. Two scenarios therefore present themselves. *First*, if RPA's estimates of Measured, Indicated and Inferred are accepted, as they should be, then it does not matter what value is placed on the Inferred Resources because those figures, or figures very close to them, were taken into account in the various valuations that informed FTI's FMV estimate, *i.e.*, the MTR valuation based on RPA's expertise and experience, analyst consensus, and the private placement transactions. The same is true for Brattle's share-price valuation. *Second*, under the assumptions that (i) Dr. Dagdelen's transfer of 17% of Indicated Resources to Inferred is correct; and (ii) Inferred Resources are to be discounted by between 5% and 50%, as Brattle advocates, the impact would be negligible because the Inferred Resources would be removed from all of the comparable transactions selected by RPA, but the transaction price would remain the same, which would result in the value ascribed to the Measured and Indicated Resources increasing accordingly. Thus, while arguably the gross in-situ ounces would be reduced, the MTR percentage would go up and valuation would remain unchanged.

98. Dr. Dagdelen also tried to create the false impression that all Mineral Resources need to be constrained within a pit.[278] In fact, there is no such requirement within any of the reporting codes. The test is "reasonable prospects for economic extraction."[279] When looking at comparable Mineral Resource properties that are at the PEA stage, there is no reason to constrain the Mineral Resources by a pit, as a putative buyer will take into account all identifiable Mineral Resources.[280]

3. Malku Khota's Metallurgical Process Was Extensively Tested And Advanced Into The Feasibility Stage At The Time of Expropriation

99. The metallurgical process developed by SAS for the Project has been demonstrated at laboratory scale and the individual process steps are used in other processing plants around the world at commercial scale.[281] Dr. Dreisinger, whose credentials and experience are beyond reproach,[282] summarized the key elements of the SAS Process, the variety of ore samples collected, and the range of metallurgical

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278 **Hearing Tr.**, Day 7, 1170:11-22 (K. Dagdelen) (English).
279 **DAG-1**: CIM Definitions Standards, November 27, 2010 at 4 (emphasis added).
280 **RPA-01**, CIMVal 203, Standard G4.1 at 24; **CER-4**, FTI Rebuttal Report at 65, ¶ 5.14.
281 *See* SGS Lakefield testing data: **Exhibits C-130 - C-137 and Exhibits C-295 - C-296**.
282 **CWS-6**, Witness Statement of David B. Dreisinger, ¶¶ 5-12.

testing undertaken on composite samples to develop the process flowsheet.[283] The majority of the testwork was conducted at SGS Lakefield Research's facilities in British Colombia, a preeminent testing laboratory with 1650 offices and laboratories globally and over 80,000 employees.[284] In addition, in May 2012, one month prior to the expropriation, Asian investors interested in the indium invested US $16 million, and in making that investment they clearly conducted due diligence on the metallurgical process to be used to extract it.[285]

100. Dr. Dreisinger also emphasized that the cycle of process development for the Project is similar to other successful projects with which Dr. Dreisinger has been involved in Australia, Laos, Mexico, and Minnesota.[286] Contrary to Prof. Dagdelen's suggestions, there are many examples of acid chloride leaching of various metals.[287] Dr. Dreisinger described several current and historical metallurgical operations, which are precursors for the individual process steps found in the SAS Process.[288]

101. In RPA's opinion, the metallurgical test program undertaken for the Project was detailed and systematic in its approach and was following a solid development path.[289] The acid-chloride leach hydrometallurgical process developed for the Project can selectively recover Ag/Au, Cu, In/Ga, Pb, and Zn from ores produced at Malku Khota.[290] The individual process steps are commonly practiced in industry and have been combined in a unique way to enable metal extraction in the Project.[291]

102. On cross-examination, Bolivia's expert on metallurgy, Patrick Taylor, admitted that his characterization of the amount of metallurgical testwork done was inaccurate and that significant testing had been done, even reaching Feasibility stage work.[292] His two primary criticisms were: (i) testing was done on synthetic ore samples; and (ii) an on-site pilot plant had not been built for further testing. Dr.

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283 **CWS-6**, Witness Statement of David B. Dreisinger, ¶¶ 18-50.
284 **CWS-6**, Witness Statement of David B. Dreisinger, ¶ 29; **Hearing Tr.**, Day 7, 1262:17-1263:15.
285 **CWS-13**, Rebuttal Witness Statement of R. Fitch, ¶ 9, **Hearing Tr.**, Day 7, 1224:20-1225:17.
286 **CWS-6**, Witness Statement of David B. Dreisinger, ¶¶ 13-17, 51-52.
287 **RER-2**, First Dagdelen Expert Report, ¶¶ 88-91; **CER-5**, RPA Rebuttal Report at 5.10.
288 **CWS-6**, Witness Statement of David B. Dreisinger, ¶ 53.
289 **CER-5**, RPA Rebuttal Report at 5.9-5.10.
290 **CWS-6**, Witness Statement of David B. Dreisinger, ¶¶ 27-28; **Hearing Tr.**, Day 7, 1259:10-1262:13.
291 **CER-5**, RPA Rebuttal Report at 5.11.
292 **Hearing Tr.**, Day 7, 1322:21-24; 1328:13-1330:14 (Dr. Taylor admits the work done was consistent not only with a PEA stage project, but was also consistent with Pre-Feasibility and Feasibility stage work).

Taylor's criticisms are without merit. Dr. Taylor acknowledged on cross-examination that there was, in fact, significant testwork on Malku Khota ores.[293] Dr. Dreisinger also provided a detailed explanation at the hearing regarding use of synthetic samples and how they are meant to replicate the leach-solution composition that one would expect to come from an ore leach.[294] In short, there is nothing wrong with conducting testwork on synthetic samples. As for the on-site pilot plant, Dr. Dreisinger confirmed, and Dr. Taylor admitted, that at the time of the expropriation there were plans in place to build an on-site pilot plant for further testing, but the expropriation prohibited SAS from moving forward.[295] Clearly, Bolivia should not be heard to argue that SAS did not conduct enough testing on actual ores or build a pilot plant when it was Bolivia's own actions that prevented SAS from building the pilot plant where it could more easily conduct testing on Malku Khota ores. Dr. Taylor also admitted that he cherry-picked data from the voluminous amount of SGS testing data, making it appear that extraction rates were lower than they are.[296]

4. Summary of SAS's Damages and their Reasonableness

103. The preceding sections have demonstrated that there is no basis to adjust any of FTI's calculations of SAS's damages. Indeed, the table below, which was presented as Slide 10 of FTI's direct presentation, shows that, if anything, FTI's calculations are conservative when compared to other indicators of value. It also demonstrates how unreasonable Brattle's valuation is, whether it be its belated share-price valuation or its original "sunk costs" valuation to which Bolivia still clings despite its own experts' disagreement that it represents FMV.

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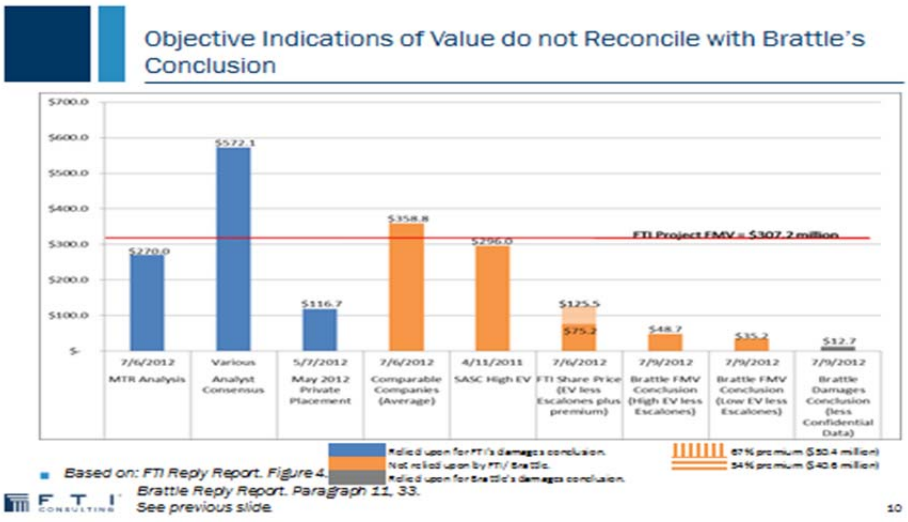
293 **Hearing Tr.**, Day 7, 1322:7-13; 1323:12-19.

294 **Hearing Tr.**, Day 7, 1275:24-1277:4; 1288:7-24; 1294:10-1295:14.

295 **Exhibit C-14**, PEA Update, Figure 18-16 at 150; **Hearing Tr.**, Day 7, 1263:16-1264:7 (D. Dreisinger) (English); 1322:25-1323:6 (P. Taylor) (English).

296 **Hearing Tr.**, Day 7, 1325:10-1326:13 ("*Q: So, the 61% is not representative of the weighted average of the extraction percentages, is it? A: It doesn't appear to be, no*"); **Exhibit C-14**, PEA Update, Figure 16-1, at 71 (reflecting 73.6% weighted average silver leach recovery at 1/4 inch crush size).



5. Pre- and Post-Award Interest Should be Set at 6%, Which is Bolivia's Commercial Rate

104. As SAS has explained, Article 5 of the Treaty expressly provides that compensation for expropriation "shall include interest at a normal commercial or legal rate … ."[297] FTI confirmed that the Bolivian statutory rate of 6% should be used as the pre-award interest rate. This approach is similar to the approach used by the tribunal in *Rurelec v. Bolivia*.[298] Bolivia was silent on this issue at the hearing; therefore, SAS will not rehash its briefing on this matter. The same rate should be used for post-award interest as well.

6. Interest Should be Compounded

105. As SAS has also explained, international law now recognizes the awarding of compound interest as the generally-accepted standard for compensation in international investment arbitration.[299] Bolivia's invocation of its own law to prevent compounding should be dismissed, as was done by the tribunal in *Rurelec v. Bolivia*.[300]

D. CONCLUSION

106. The unlawfulness of Bolivia's expropriation is clearly established in light of the BIT and international law. It falls to this Tribunal to determine the reparation owed to SAS for the total

297 **Exhibit C-1**, Treaty, Art. 5; Claimant's Reply, ¶¶ 427-428.
298 **CLA-1**, *Rurelec v. Bolivia* Award, ¶ 615.
299 Claimant's Memorial, ¶ 222; Claimant's Reply, ¶¶ 429-432.
300 **CLA-1**, *Rurelec v. Bolivia* Award, ¶ 616.

expropriation and nationalization of its investment in the Project—an investment that was poised to be a world-class mining project and that Bolivia is actively promoting to other foreign investors. Bolivia was unable to prove any of its allegations of wrongdoing; therefore, there is no justification for a reduction in SAS's damages. Accordingly, the Tribunal should order "full reparation" equivalent to the Project's FMV as calculated by FTI of US$ 307.2 million, plus compounded pre- and post-award interest.

VIII. REQUEST FOR RELIEF

107. For the reasons stated herein, Claimant reiterates its request for relief as stated in its previous pleadings,[301] and requests the Tribunal, once again,[302] to draw an adverse inference against Bolivia that the documents it withheld regarding meetings about the Project with Chinese investors in China and Bolivia contain information showing Bolivia's desire to reap significant economic benefits from its expropriation of the Project.

Respectfully submitted,

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[301] Claimant's Memorial, ¶ 230; Claimant's Reply, § VII.
[302] Claimant's Reply, ¶ 145.