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 REPLY TO RESPONDENT'S COUNTER-MEMORIAL ON THE MERITS AND RESPONSE TO RESPONDENT'S OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

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Claimant, South American Silver Limited ("South American Silver" or, together with its predecessor, parents and subsidiary, the "Company") hereby submits its Reply Memorial in this arbitration proceeding against the Plurinational State of Bolivia ("Respondent", "Bolivia" or the "Government" or the "State") 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").

I. INTRODUCTION

1. Bolivia seeks to turn what is a straightforward case of admitted expropriation without compensation into a lamentation on alleged wrongdoings South American Silver has inflicted upon the people inhabiting the Malku Khota Project area. It seeks to poison the Tribunal's view of the Claimant through the raising of incendiary claims of wrongdoing that Bolivia has not substantiated in any serious manner. It then compounds its mudslinging by invoking a grab bag of jurisdictional defenses aimed at stopping this Tribunal from even considering the merits of South American Silver's claims. This kind of sharp practice should not detract the Tribunal's attention from the central fact of this case: *that Bolivia directly expropriated South American Silver's investment without compensation, in unambiguous violation of the Treaty*. Despite the length of its Counter-Memorial and the many ancillary arguments made in it, Bolivia has no real answer to that basic truth. Bolivia seeks to be absolved from any accountability despite having expropriated Claimant with the unmistakable aim of gaining control over one of the largest silver, indium, and gallium resources in the world which contains nearly USD $13 billion worth of minerals and precious metals. This is an injustice the Tribunal should not countenance.

2. Jurisdiction. In its Counter-Memorial, Bolivia would deprive this Tribunal of jurisdiction through two principal submissions: first, that the Tribunal has no jurisdiction *ratione personae*, as South American Silver is not entitled to the protections of the Treaty, not being the direct enterprise holding and implementing the mining concessions on the ground nor the ultimate parent of CMMK. Second, it argues that by virtue of the principle of unclean hands, international law requires that this Tribunal

dismiss this case at the outset for lack of jurisdiction or inadmissibility, due to alleged illegalities that occurred over the course of CMMK's operations.

3. Neither of these jurisdictional defenses have any serious founding in law, and should not deter the Tribunal from deciding this case on the merits. Investment tribunals confronted with treaty language similar to the UK-Bolivia BIT, and under the UK-Bolivia BIT itself, have repeatedly rejected the argument that indirect, intermediate shareholders are not protected by the investment treaties such as the Treaty. Indeed, Article 1 of the Treaty contains a very broad definition of "investment" as "*every kind of asset which is capable of producing returns*," which would include indirect investments through purchase of shares in a company. The non-exhaustive list of protected investments under the Treaty includes "*shares in and stock and debentures of a company and any other form of participation in a company*." Thus, it is clear that indirect investments were intended to be protected under the Treaty unless clear language excluding coverage, which the Treaty most certainly does not contain. As to Bolivia's invocation of the clean hands doctrine, the investment tribunals that have studied the issue most closely, including the eminent tribunal in *Yukos v. Russian Federation*, have concluded that such a principle does not exist as a matter of international law. Even if clean hands or its cognate principles are considered opposable by this Tribunal, they can only affect the jurisdiction of the Tribunal or admissibility of an investor's claims if the alleged illegality occurred during the making of the investment – an impossibility under Bolivia's own submissions, as the alleged unlawful conduct occurred years after the investments were first made.

4. Applicable Law. Contrary to Bolivia's assertion, the law applicable to the merits of this arbitration is the law selected by the parties themselves as required by Article 35(1) of the 2010 UNCITRAL Rules which states, "[t]he arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute." The parties, by consenting to arbitrate under the Treaty relating to the Treaty's substantive protections, the parties have designated the Treaty, which constitutes *lex specialis* as the applicable law. Indeed, Tribunals accept that the bilateral investment treaty invoked by the claimant in an investment dispute is the primary source of law, to be supplemented, when appropriate, by relevant principles of international law.

5. As set forth more fully below, Bolivia's assertion that the Tribunal should interpret the concepts of expropriation, fair and equitable treatment and full protection and security in light of sources of law that protect the rights of indigenous communities, is fundamentally flawed. For example, Bolivia relies on non-binding instruments or instruments to which the United Kingdom is not a party, ignores that this proceeding relates to measures taken by Bolivia that destroyed the Company's investment (and not the purported rights of indigenous communities under international law) and that at least three tribunals have declined to make community issues outcome-determinative. Bolivia has failed to demonstrate that the unspecified indigenous peoples' rights are part of the corpus of international law the Tribunal must obey or that such principles somehow trump protections afforded to South American Silver under the Treaty. Nor does Bolivian law, with certain limited exceptions, apply to the substantive protections provided to investors under the Treaty.

6. Merits. Bolivia's allegations in its screed-like Counter-Memorial are false or grossly exaggerated to divert the Tribunal's attention from the fact that Bolivia violated its obligations under the Treaty. Indeed, despite the uncontroverted fact that—as different high-ranking Bolivian government officials admitted before the expropriation—CMMK operated in compliance with all applicable laws and regulations, and in good faith implemented a community relations program that Bolivia approved, Bolivia now attempts to justify its unlawful expropriation of South American Silver's investment on the basis of unfounded accusations of wrongdoing made by some community members (including illegal miners and FAOI-NP and CONAMQ leaders) that opposed the Project . Bolivia does not, and cannot, allege that no expropriation took place. Nor can Bolivia come close to carrying its burden to demonstrate its expropriation of the Malku Khota Project was in compliance with the Treaty.

7. Its expropriation was neither for a "public purpose" or for a "social benefit related to [its] internal needs" as required by the Treaty. Even if it complied with either, Bolivia cannot show that its actions were reasonably related to the fulfillment of that purpose. In fact, the evidence shows that Bolivia's temporary security concerns were not real and the unrest was, in fact, fomented by the Government's encouragement and tolerance of certain community members forming a cooperative and illegal mining and

the State's desire to gain an ownership interest in the deposit - evidenced by its seizing all the concession areas surrounding the Malku Khota Project shortly after SASC publicy released the results of its 2011 Updated PEA.

8. Nor, as the Treaty also requires, did Bolivia provide South American Silver with "prompt, adequate and effective compensation," amounting to the "market value of the investment expropriated immediately before the expropriation." As previously explained in Claimant's Memorial on the Merits, and as explained more fully below, Bolivia has provided no compensation and takes the position that, if anything, Claimant is entitled to only a portion of expenditures it made related to exploration activity at the Malku Khota Project. Of course, this does not comport with the Treaty nor does it constitute an adequate measure of compensation to wipe out all the consequences of Bolivia's treaty violations.

9. In addition, Bolivia failed to treat South American Silver's investments fairly and equitably, failed to provide full protection and security, impaired South American Silver's investment through unreasonable and discriminatory measures and treated South American Silver's investments less favorably than the investments of its own investors.

10. Damages. The illegality of Bolivia's expropriation is clearly established in light of the treaty and international law and it falls to this Tribunal to determine the reparation owed to South American Silver for the total expropriation and nationalization of its investment in the Malku Khota Mining Project. To that end, it is a well-established principle of customary international law that a claimant whose investment has been subject to an unlawful expropriation is entitled to restitution in kind and damages for any additional loss not covered by the restitution in kind and, when restitution is not available, full compensation, which is generally understood as the fair market value of the expropriated investments.

11. South American Silver has retained Howard N. Rosen and Chris Milburn of FTI Consulting ("FTI") to calculate the FMV of its interest in the Project (expressed as the value of its shares of CMMK) as of July 6, 2012—the business day immediately preceding Bolivia's announcement of the nationalization (the "Valuation Date"). FTI performed a valuation of the Claimant's interest in the Project under a market-based

approach to value by using three sources of market based South American Silver retained Roscoe, Postle & Associates ("RPA") – the leading mining consultancy – to conduct a comprehensive evaluation of the Malku Khota mineral resource and to perform a Metal Transaction Ratio ("MTR") analysis in order to value the project on the basis of comparable transactions. Based on these sources, FTI estimates that the FMV of the Malku Khota Project at the Valuation Date was **US$307.2 million**, excluding pre-award interest.

12. Claimant has also retained FTI to calculate the value of the additional damages owed to South American Silver if the Tribunal chooses to award restitution of the Malku Khota Project. FTI calculated the loss South American will incur as a result of the delay in advancing the Project from 2012 to at least 2016 (the date of the Award) and the potential increase in project-related risk factors caused by Bolivia's conduct at **US$140.5 million**, excluding pre-award interest.

13. Bolivia summarily opposes South American Silver's claim for restitution and does not provide any estimate of the amount of compensation owed to South American Silver. In fact, Bolivia has instructed its experts not to estimate the Malku Khota Project's fair market value independently. Instead of an independent valuation of the Project and estimation of South American Silver's damages, Bolivia offers little else than a series of unsubstantiated criticisms of the Malku Khota Project and of the analysis performed by FTI and RPA. Even though market-based valuation approaches are widely accepted for early stage mining properties and are recognized as such under internationally accepted valuation standards such as the Standards and Guidelines for Valuation of Mineral Properties, Special Committee of the Canadian Institute of Mining, Metallurgy and Petroleum on Valuation of Mineral Properties ("CIMVAL"), Bolivia argues that it is impossible to ascribe a value to the Malku Khota Project.

14. Bolivia contends that South American Silver should only receive an amount based on the sums invested in Malku Khota – regardless of the actual value of the Malku Khota Project. Bolivia's experts confirmed nonetheless the work carried out by South American Silver in exploring and developing the property and agreed that the Malku Khota Project contains a substantial Mineral Resource. Bolivia itself has also recognized repeatedly that the Malku Khota Project contains one of the largest silver,

indium and gallium deposits in the world, and is actively marketing the project to private investors. Bolivia makes no effort to address the fundamental inconsistency between the value of the project and its contention that South American Silver should receive nothing more than the amount it invested in the Project. For the foregoing reasons – and as explained in more detail in the FTI Rebuttal Report, the RPA Rebuttal Report and below in this Reply – the Tribunal should disregard Bolivia's attempts to reduce the amount of compensation owed to Claimant.

15. FTI also calculates the pre-award interest applicable to the losses under both restitution and compensation claims in order to place South American Silver in the economic position it would have occupied absent the alleged breaches, from the Valuation Date to an estimated hearing date of May 31, 2016 based on a statutory annual interest rate in Bolivia of 6.0%, compounded annually including pre-award interest, FTI quantified the total damages to South American Silver as follows (in US$ million):

	Scenario 1 Compensation	Scenario 2 Restitution
Damages	$ 307.2	$ 140.5
Pre-Award Interest	$ 78.5	$ 35.9
Total	**$ 385.7**	**$ 176.4**

Fig. 3: Summary of FTI Report Damages Conclusions (USD Millions)

16. This Reply Memorial will demonstrate that Bolivia's factual allegations and legal defenses have no foundation in fact or law. Its attempt to distract the Tribunal into bypassing a fair hearing on its unlawful and expropriatory conduct through bare allegations of international law violations and unclean hands is itself an injustice that should not be indulged by this Tribunal.

II. FACTUAL BACKGROUND

A. SOUTH AMERICAN SILVER'S INVOLVEMENT IN THE BOLIVIAN MINING SECTOR

17. South American Silver, a Bermudian company, is a protected investor under the Treaty. As Claimant explained in its Statement of Claim and Memorial, the

Company's presence in Bolivia dates back to 1994.[1] Over the years, the Bolivian government encouraged the Company to invest in the country and to continue with exploration activities in the area.[2] Thus, for 18 years, South American Silver has invested heavily in Bolivia in order to achieve success. The Company's efforts in Bolivia over a number of years, and its deep understanding of the country's geology, led it to discover the massive silver, indium and gallium deposit at issue in this arbitration.[3] While at first expressing support for the project, the Government then performed a *volte face*, motivated by the prospect of obtaining a participation in the Company and gaining political capital. Despite its position at the First Procedural Meeting that this was not an expropriation but rather a "reversion," it is uncontroverted that Bolivia, by Supreme Decree No. 1308 dated August 1, 2012, expropriated South American Silver's Mining Concessions. It is also undisputed that Bolivia has not compensated South American Silver.

18. South American Silver's corporate structure was defined many years prior to this arbitration.[4] South American Silver was incorporated in October 1994 with the purpose of identifying, exploring and developing mineral properties around the world, particularly in South America.[5] South American Silver Corp. ("SASC", now TriMetals Mining Inc.) was incorporated in September 2006. SASC is now South American Silver's parent company. By the time SASC acquired South American Silver in December 2006, South American Silver had already a long-presence in Bolivia.[6] At all relevant times, South American Silver indirectly owned the Mining Concessions through its subsidiary Compañía Minera Malku Khota, S.A. ("CMMK").[7]

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1 *See e.g*. Claimant's Statement of Claim and Memorial, Sept. 24, 2014 at ¶¶ 14-17 ("Claimant's Memorial").

2 *See* Claimant's Memorial at ¶¶ 51-53; **CWS-1**, Witness Statement of Ralph G. Fitch, Sept. 16, 2014 at ¶ 17 ("Fitch Witness Statement"); **CWS-2**, Witness Statement of Felipe Malbran, Sept. 18, 2014 at ¶ 26 ("Malbran Witness Statement"); **CWS-9**, Rebuttal Witness Statement of Felipe Malbran, Nov. 12, 2015 at ¶ 2 ("Malbran Rebuttal Witness Statement").

3 *See e.g.* Claimant's Memorial at ¶¶ 14-17.

4 *See e.g.* Claimant's Memorial at ¶¶ 29-34.

5 Claimant's Memorial at ¶ 14.

6 *Id*. ¶ 27.

7 *Id*. ¶ 28.

19. Bolivia's characterization of SASC, and in particular, Bolivia's attack on Canadian junior mining companies in general, are entirely inaccurate,[8] and in any case, irrelevant for the purposes of this arbitration. Whether SASC is a junior company or not does not determine jurisdiction or any other relevant issue in this arbitration. To be clear, the claimant in this arbitration is South American Silver, a protected investor under the UK-Bolivia BIT.

1. The Company operated in compliance with national laws including those regarding the mining industry, environment, and indigenous communities

20. In its 18 years of presence in Bolivia, and in particular in the years of exploration and development of the Malku Khota Project, the Company complied at all times with the applicable laws and regulations. From the outset, the Company validly acquired the Mining Concessions, it obtained the relevant environmental permits and for all intents and purposes, paid taxes and complied with the Bolivian legal framework applicable to foreign investors in the mining sector.[9] *In this arbitration*, however, Bolivia makes blanket, and unsupported, accusations against the Company for purported illegal conduct and other misdeeds.[10] South American Silver unequivocally denies Bolivia's accusations which are false. It should suffice to point out that in its Counter-Memorial, Bolivia does not refer to any administrative, civil or criminal sanctions against the Company or its employees in support of those accusations. But because Bolivia's apparent defense strategy in this arbitration is centered on attacking the Company's reputation rather than addressing the merits of Claimant's case, South American Silver addresses Bolivia's bogus allegations below.

21. The Company always strived to maintain good relations with the communities surrounding the Mining Concessions. South American Silver established its community relations program as early as 2007, despite the fact that Bolivia's legal

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[8] *See* **CER-3**, Expert Witness Statement of Barry Cooper, Nov. 22, 2015 at ¶¶ 34-52 ("Cooper Expert Witness Statement") (providing a description of the junior mining sector and its significance to the mining industry).

[9] Claimant's Memorial at ¶¶ 25, 26.

[10] *See, e.g.*, Respondent's Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, Mar. 31, 2015 at 1 ("Respondent's Counter-Memorial").

framework did not require it.[11] The Company's community relations program was in line with one of South American Silver's core values: *developing mines in a manner that promotes sustainable development, improves the social welfare, and contributes to the country's economic growth.*[12] South American Silver recognized that its mining activities would have an impact—the same way mining activities generally do—in the Area of Influence of the Project. Therefore, it devoted significant resources to ensure that the communities' rights and interests were respected and that they would benefit in many different ways from the Malku Khota mining project and from CMMK's work.

22. South American Silver engaged independent consultants and skilled personnel to assist with the social and environmental front. The Company hired Cumbre del Sajama S.A. ("Cumbre del Sajama"), a Bolivian firm specializing in consulting services to the mining industry[13] in 2008, and Business for Social Responsibility ("BSR"), a global consultancy firm based in California in early 2009. BSR's vision is "to work with business to create a just and sustainable work."[14] Despite having no obligation to do so, the Company retained both these firms to assess the Company's community relations program and to help it implement different programs with the communities within the Area of Influence.

23. Also, since 2005, the Company hired Fundación Medmin ("Medmin"), a Bolivian environmental consultancy firm. Medmin helped CMMK to develop its environmental program and secure the needed environmental license, the Dispensation Certificate for Mining Exploration Activities. That certificate was granted on September 5, 2006, by the Governor of Potosí at the time, Mr. Mario Virreira Iporre, who served as Governor of Potosí from 2006-2010 and later became the Bolivian Minister of Mining and Metallurgy in January 2012.[15] Medmin also assisted CMMK by monitoring its environmental activities to ensure that it complied with all environmental laws and

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[11] **CWS-7**, Rebuttal Witness Statement of Santiago Angulo, Nov. 14, 2015 at ¶ 3 ("Angulo Rebuttal Witness Statement"); **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 5-7.

[12] **CWS-3**, Witness Statement of W.J. Mallory, Sept. 12, 2014 at ¶ 17 ("Mallory Witness Statement").

[13] **Exhibit C-139**, SASC & Cumbre del Sajama S.A., Informe Final, "*Conociendo la Minería*," 2008.

[14] Business for Social Responsibility's stated mission is "to work with business to create a just and sustainable work." http://www.bsr.org/en/about.

[15] **Exhibit C-140**, Certificado de Dispensación para Actividades de Exploración-Minera, suscrito por el Ing. Mario Virriera I., Prefecto y Comandante General del Departamento de Potosí, Sept. 5, 2006.

regulations throughout the exploration phase.[16] From 2006 to 2012, Fundación Medmin conducted over eight environmental and socioeconomic studies, including compliance reports filed with the environmental department of the Government of Potosí.[17]

24. The actions described above, and described in detail in the next sections of this Memorial, completely undercut Bolivia's accusations of social irresponsibility aimed at the Company.[18] Bolivia's accusations are simply a blatant attempt to distract the Tribunal's attention from the fact that Bolivia illegally expropriated South American Silver's investment, without compensation.

2. Prior to the expropriation, the Company's business in Bolivia was established, extensive and its long-term prospects were bright

25. At the time of the expropriation, the Malku Khota Project was primed for success as South American Silver had discovered massive mineral ore-bodies and developed and patented a proprietary hydrometallurgical process to maximize the recovery of precious and industrial metals from the Malku Khota Project deposit.[19] In fact, the Malku Khota Project was at an advanced stage of exploration and pre-development activities were underway.[20] For example:

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16 **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 23

17 **Exhibit C-141**, Fundación Medmin, *Plan de Mitigación Ambiental y Plan de Aplicación y Seguimiento Ambiental (PMA-PASA)* dated Oct. 2006 and filed on Oct. 10, 2006 ("Medmin Report October 2006"); **Exhibit C-142**, Fundación Medmin, *Informe de Monitoreo Ambiental Semestral "l"Plan de Mitigación Ambiental y Plan de Aplicación y Seguimiento Ambiental (PMA-PASA)* dated Sept. 2008 and filed in Jan. 2009 ("Medmin Report September 2008"); **Exhibit C-143**, Fundación Medmin, *Segundo Informe de Monitoreo, Plan de Aplicación y Seguimiento Ambiental (PASA*,) dated Feb. 2009 and filed in Aug. 2009 ("Medmin Report February 2009"); **Exhibit C-144**, Fundación Medmin, *Primer Informe de Monitoreo 2010 (Epoca Humeda) Plan de Aplicación y Seguimiento Ambiental (PASA)* dated Sept. 2010 and filed in Dec. 2010 ("Medmin Report September 2010"); **Exhibit C-145**, Fundación Medmin, *Segundo Informe de Monitoreo Ambiental 2010 (Epoca Seca)* dated Dec. 2010 and filed on Dec. 15 2010 (Medmin Report December 2010"); **Exhibit C-146**, Fundación Medmin, *Informe de Seguimiento Ambiental 2011*, dated Jan. 2012 and filed on Feb., 2012 ("Medmin Report I, January 2012"); **Exhibit C-147**, Fundación Medmin, *Actualizacion de Formulario EMAP, PMA and PASA* dated Jan. 2012 and filed on February 23, 2012 ('Medmin Report II, January 2012); **Exhibit C-148**, Fundación Medmin, *Actualizacion de Formulario EMAP, PMA and PASA*, dated Apr. 2012 and filed on Apr. 13, 2012 ("Medmin Report April 2012").

18 *See, e.g.*, Respondent's Counter-Memorial at ¶¶ 3-4.

19 *See, e.g.*, Claimant's Memorial at ¶¶ 39-44.

20 **CER-2**, Roscoe, Postle and Associates, Valuation Report on the Malku Khota Project, Department of Potosí, Bolivia, Sept. 16, 2014 at 3-2 ("First RPA Expert Report"); **CER-1**, FTI Consulting Inc., Valuation Report, Sept. 23, 2014 at 8.33 ("First FTI Expert Report").

- CMMK conducted an exploration and drilling program from May 2007 to December 2010.[21]

- In 2009, the Company hired external mining consultants Pincock Allen & Holt to complete a PEA for the Malku Khota Project.[22]

- In 2010, the Company designated an intensive drilling program to improve the data relied upon in the Preliminary Environmental Assessment ("PEA") and refine the underlying geological model.[23]

- The Company completed its PEA Update, which was published on May 10, 2011 (although the results were made publicly available on March 31, 2011) confirming that, among other things, it increased its exploration program to include drilling over 40,000 meters, significantly increased its resource estimates and made considerable progress with metallurgical testing including an extensive acid-chloride and cyanide leach testing program.[24]

- Prefeasbility level work was well underway.[25]

26. As explained by former Minister of Mining and Metallurgy, Mario Virreira, these exploration and development activities are required to obtain "official information" to develop the Project and take "a very long time."[26] Similarly, but for the expropriation, South American Silver had plans to employ more than 1,000 workers from the local communities during the construction of the mining infrastructure and approximately 400–500 permanent workers during the operational phase of the Project.[27]

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[21] **CER-2**, First RPA Expert Report at 8-2; **Exhibit C-14,** Preliminary Economic Assessment Update Technical Report for the Malku Khota Project, May 10, 2011 at §1.2.

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

[23] **CWS-2**, Malbran Witness Statement at ¶ 46; Claimant's Memorial at ¶ 43.

[24] **Exhibit C-14**, Preliminary Economic Assessment Update Technical Report for the Malku Khota Project, May 10, 2011 at § 1.2-1.5.

[25] *See* **CER-2**, First RPA Expert Report at 3-2.

[26] **Exhibit C-149**, *Policía evitará explotación ilegal en Mallku Khota*, LA PATRIA, Oct. 19, 2012 (quoting former Minister of Mines, Mario Virreira, explaining that Bolivia "'needed to know the official information that South American Silver would have obtained,' otherwise, 'we would have to start everything again and that [takes] a very long time'") (Unofficial English translation). In it's original Spanish version: ("'nececitamos conocer la información official que South American Silver habría obtenido,' porque si no es así, 'tendriamos que empezar todo de nuevo y eso es un tiempo bastante largo'").

[27] **CWS-3**, Mallory Witness Statement at ¶ 12. *See also* **CWS-1**, Fitch Witness Statement at ¶ 26.

27. Up to and until the illegal expropriation, the Company was completely transparent with information about its discoveries, its plans for expansion and the projected value of the Project. Bolivia cannot, and indeed does not, challenge that: (i) the Company informed Bolivian authorities of the magnitude and potential of the Malku Khota deposit in a number of meetings, including one on March 9, 2011;[28] (ii) the Company made the results of the PEA Update publicly available on March 31, 2011;[29] (iii) issued the corresponding complete technical report on May 10, 2011; and (iv) the PEA Update indicated a pre-tax net present value for the project at a 5% discount rate comprised between **US$704 million** and **US$2.571 billion** using silver metal pricing of **US$18.00-US$35.00**.[30]

28. Even though Bolivia tries to undermine the reliability of the PEA Update results in this arbitration,[31] Bolivia itself used the PEA Update as one of the bases for its national mining strategy.[32] On June 5, 2015, Bolivia's Ministry of Mines published a preliminary "Sectoral Plan for Metallurgic Mining Development 2015–2019."[33] The Sectoral Plan establishes "strategic guidelines grounded on prospection, exploration, exploitation, concentration, smelting, refining, industrialization, technological modernization and institutional strengthening."[34] It highlights the Malku Khota Project as "one of the largest undeveloped silver and indium reserves in the world."[35] This conclusion is based on South American Silver's "prospecting and exploration studies,"

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[28] **CWS-2**, Malbran Witness Statement at ¶ 52. *See also* **CWS-1**, Fitch Witness Statement at ¶ 21.

[29] **Exhibit C-41**, *Updated Malku Khota Study Doubles Production Levels and 1st 5 Year Cashflow Estimates*, South American Silver Corp. Press Release, Mar. 31, 2011.

[30] **Exhibit C-14,** Preliminary Economic Assessment Update Technical Report for the Malku Khota Project, May 10, 2011 at § 11.1; Claimant's Memorial at ¶ 43.

[31] Respondent's Counter-Memorial at ¶¶ 538-539.

[32] **Exhibit C-150**, Plan Sectoral de Desarollo Minero Metalúrgico 2015-2019.

[33] **Exhibit C-151**, *En debate documento preliminar de Plan Sectorial de Desarrollo Minero Metalúrgico 2015 – 2019*, MINERIA NOTICIAS, Jun. 5, 2015.

[34] **Exhibit C-151**, *En debate documento preliminar de Plan Sectorial de Desarrollo Minero Metalúrgico 2015 – 2019*, MINERIA NOTICIAS, Jun. 5, 2015.

[35] **Exhibit C-150**, Plan Sectoral de Desarollo Minero Metalúrgico 2015-2019 at 32 (stating that "the Malku Khota Project possesses … (230.3 million ounces of silver and 1,481 tons of indium), in addition to significant amounts of gallium and germanium").

which "shed[] light on the massive scale of resources the deposit contains."[36] In fact, the Bolivian Government has been marketing the Malku Khota Project to potential investors as recently as October 27, 2015 at an investment roadshow in New York City that Bolivia co-hosted with the Financial Times.[37] It should be noted that not surprisingly based on its planned promotion of the Malku Khota Project, the night before the event, the undersigned was advised that the Bolivian Government would not permit anyone from King & Spalding to attend the New York City investment roadshow.

B. SOUTH AMERICAN SILVER'S COMMUNITY RELATIONS EFFORTS IN CONNECTION WITH THE MALKU KHOTA MINING PROJECT WERE A PRIORITY FROM THE BEGINNING

29. As South American Silver explained in its Statement of Claim and Memorial, the vast majority of local residents in and around the Malku Khota Mining Project are indigenous people, of the Aymara or Quechua ethnic groups.[38] Bolivia agrees.[39] Because the Company was committed to making a long-term investment in the area, it was a priority to develop close and positive relationships with the local communities from the onset.[40] Yet, Bolivia accuses the Company of creating "intrigues and divisions" among the communities and ignores CMMK's robust community relations efforts.[41]

1. The company's community relations program was a positive initiative that enjoyed success

30. The Company was respectful of, and sensitive to, the rights and interests of the indigenous communities surrounding the Project and aware of the complexities and challenges ahead. Furthermore, the Company also recognized the importance of

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[36] **Exhibit C-150**, Plan Sectoral de Desarollo Minero Metalúrgico 2015-2019 at 56.

[37] **Exhibit C-152**, *Navarro busca atraer inversiones para la minería en Bolivia*, MINISTERIO DE MINERIA Y METALURGIA, Oct. 26, 2015; **Exhibit C-153**, *Gobierno ofertó mina Mallku Khota en Nueva York*, ERBOL DIGITAL, Oct. 28, 2015.

[38] Claimant's Memorial at ¶ 45 et. seq.

[39] Respondent's Counter-Memorial at ¶ 40.

[40] **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 5; **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 7.

[41] Respondent's Counter-Memorial at ¶ 81.

developing close relationships with local communities from the onset.[42] Because of that, the Company identified the communities that may be impacted by the Project and worked on developing relationships with those communities. The Company started working with community members as early as December 2003, when it first hired members from the Malku Khota, Ovejeria and Kalachaca communities to work for the Company during the exploration phase.[43]

31. As previously explained, in 2007, the Company hired Santiago Angulo, a local Aymaran with significant experience in the mining sector, including interacting with local communities. Even though in 2007 the project was in the exploration stage, the Company's goal was to identify the needs of the communities and—to the extent that it could—satisfy those needs.[44] As Bolivia points out, the Project was located in an "extremely poor zone."[45] Thus, what Bolivia denounces as "scarce economic offerings" were in truth, a direct response to the demands presented by the communities themselves,[46] and for which the communities were grateful.[47] In short, the Company asked the communities what they wanted instead of imposing its own views on the communities as to their own needs.

32. Further, the Company was committed to maintaining communication with the communities regarding the Project and addressing the different inquiries and/or concerns they had.[48] From 2007 onwards, the Company's communities relations team held scores of meetings with different communities, including the communities of Kalachaca and Malku Khota, to discuss the Project and its implications.[49]

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[42] **Exhibit C-154**, Business for Social Responsibility, *Social Risks and Opportunities for South American Silver Corporation's Malku Khota Project in Potosí*, May 2009.

[43] **CWS-2**, Malbran Witness Statement at ¶ 32; **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 4.

[44] **CWS-7**, Angulo Rebuttal Witness Statement ¶ 4.

[45] Respondent's Counter-Memorial at ¶ 308.

[46] **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 8.

[47] *Id*. ¶ 11.

[48] **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 11; **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 4.

[49] **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 19; **CWS-7**, Angulo Rebuttal Witness Statement ¶¶ 6, 7, 18, 19-21 , 25-27; **Exhibit C-155**, Memorándum de Santiago Angulo a Felipe Malbran, *Informe Mensual Proyecto Malku Khota*, May 2009; **Exhibit C-156**, Memorándum de Santiago Angulo a Felipe Malbran, *Informe relacionen comunitarias Proyecto Malku Khota*, June 2009; **Exhibit C-157**,

33. A few examples of these meetings include meetings that Santiago Angulo held between 2008 and 2009 with leaders from the Tacahuani *ayllu* and the Kalachaca community to discuss the extent of the Project, job opportunities, environmental monitoring, and the implementation of educational workshops for the communities.[50] In February 2009 the Company invited community members from the Kalachaca community to participate with Medmin in taking samples from the Malku Khota and Wara Wara water sources to address any concern that the Company was contaminating the ponds.[51] A couple of months later, in a meeting that Mr. Angulo held with the Kalachaca community on May 16, 2009, the community members proposed the formation of a regional commission to represent the different *ayllus* within the area of influence as a block to communicate with the CMMK.[52] Although the *ayllus* did not form the regional commission until 2011 (i.e. the COTOA-6A), the idea was in the *ayllu* leaders' minds since then.

Memorándum de Santiago Angulo a Felipe Malbran, *Informe Mensual Proyecto Malku Khota*, July 2009; **Exhibit C-158**, Memorándum de Santiago Angulo a Fernando Cáceres, *Informe relacionen comunitarias Noviembre 2009*, Nov. 2009; **Exhibit C-159**, Memorándum de Santiago Angulo a Fernando Cáceres, *Informe relacionen comunitarias diciembre 2009*, Dec. 2009; **Exhibit C-160**, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, Oct. 2010; **Exhibit C-161**, Memorándum de Santiago Angulo a Fernando Cáceres, *Informe correspondiente al mes de noviembre de 2010*, Dec. 2, 2010; **Exhibit C-162**, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, Nov. 2010.

[50] **Exhibit C-163**, Memorándum de Santiago Angulo a Felipe Malbran, *Informe Mensual Proyecto Malku Khota*, March 2008; **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 15.

[51] **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 24; **Exhibit C-164**, Memorándum de Santiago Angulo a Felipe Malbran, *Informe Mensual Proyecto Malku Khota*, Feb. 2009.

[52] **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 18; **Exhibit C-155**, Memorándum de Santiago Angulo a Felipe Malbran, *Informe Mensual Proyecto Malku Khota*, May 2009.

Kalachaca community members with Fundación Medmin representatives taking samples from Malku Khota and Wara Wara, February 2009

34. In June 2008, the Company retained Cumbre del Sajama, a Bolivian firm specializing in consulting services to the mining industry.[53] Cumbre del Sajama was specifically retained to support the Company's community relations efforts. Part of this support entailed conducting workshops (*talleres*) in different communities. The purpose of these workshops was to reinforce community relations and to educate the communities on the social, mining, and environmental aspects of mining and the Malku Khota Project.[54]

35. These workshops, which took place between July 2008 and September 2011, were conducted by Environmental Engineers, Mining Engineers, and community relations experts employed by Cumbre del Sajama and CMMK's community relations coordinators, Santiago Angulo and Carmen Huanca.[55] The workshops were initially

[53] **Exhibit C-139**, SASC & Cumbre del Sajama S.A., Informe Final, "*Conociendo la Minería*," 2008.

[54] **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 28.

[55] **Exhibit C-165**, Cumbre del Sajama S.A., Informe Final, *Talleres: "Una Exploración Minera en Marcha Hacia el Futuro*," 2010 at 6.

conducted in the Quechua and Aymaran languages. At the communities' request, the workshops were later conducted in Spanish, with Quechua and Aymaran translations.[56]

36. Topics discussed in these workshops included: (i) introduction to mining (i.e. mining cycle, the importance of minerals, etc.);[57] (ii) mining development (i.e. different mining phases from development to production, etc.) and community participation in the mine;[58] (iii) the environmental impact of the Project and how to protect the environment;[59] and (iv) identifying communities' needs and potential projects to develop.[60] The workshops included power point presentations, integration and group activities, videos related to the topic and question and answer sessions. They reached over 400 community members of different communities in the area.

37. As evidenced in the reports of Cumbre del Sajama, the participants showed general support for the Project,[61] with CMMK's community relations coordinators, Santiago Angulo and Carmen Huanca, addressing the different questions and concerns that community members presented. The following chart lists the workshops conducted by the Company and Cumbre del Sajama:

TOPIC	DATE	COMMUNITY
Learning About Mining (*Conociendo la Mineria)*	July 13, 2008	Malku Khota
	July 14, 2008	Ovejeria
	July 15, 2008	Collpani
	July 16, 2008	Kisiwilqui
	July 19, 2008	Poetera
	July 20, 2008	Kalachaca
	July 21, 2008	San Pedro

[56] **Exhibit C-166**, SASC & Cumbre del Sajama S.A., Talleres "*Conociendo y Cuidando Nuestro Medio Ambiente Comunitario*," May 2009 at 23.

[57] **Exhibit C-139**, SASC & Cumbre del Sajama S.A., Informe Final, "*Conociendo la Minería*," 2008; **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 29-31.

[58] **Exhibit C-165**, Cumbre del Sajama S.A., Talleres "*Una Exploración Minera en Marcha Hacia el Futuro*," Feb. 2010; **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 34-35.

[59] **Exhibit C-166**, SASC & Cumbre del Sajama S.A., Talleres "*Conociendo y Cuidando Nuestro Medio Ambiente Comunitario*," May 2009; **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 32-33.

[60] **Exhibit C-167**, Cumbre del Sajama, Informe Taller "*Identificación y Priorización de Demandas / Proyectos de Desarrollo Comunitario*," 2011.

[61] **CWS-7**, Angulo Rebuttal Witness Statement at ¶¶ 31, 35, 37; **Exhibit C-139**, SASC & Cumbre del Sajama S.A., Informe Final, "*Conociendo la Minería*," 2008; **Exhibit C-165**, Cumbre del Sajama S.A., "*Una Exploración Minera en Marcha Hacia el Futuro*," Feb. 2010; **Exhibit C-166**, SASC & Cumbre del Sajama S.A., Talleres "*Conociendo y Cuidando Nuestro Medio Ambiente Comunitario*," May 2009.

TOPIC	DATE	COMMUNITY
Learning About and Taking Care of Our Environment (*Conociendo y Cuidando Nuestro Medio Ambiente*)	July 22, 2008	Toracari
	July 23, 2008	Toracari
	July 24, 2008	Sacaca
	April 27, 2009	Malku Khota
	April 28, 2009	Ovejeria
	April 29, 2009	Kisiwilqui
	April 30, 2009	Portera
	May 1, 2009	Kalachaca
	May 2, 2009	Toracari
	May 3, 2009	Collpani
	May 4, 2009	San Pedro
	May 5, 2009	Sacaca
Mining Exploration Towards the Future (*Una Exploración Minera Hacia el Futuro*)	January 14, 2010	Malku Khota
	January 15, 2010	Malku Khota
	January 16, 2010	Jancuyo
	January 17, 2010	Poetera
	January 18, 2010	Kalachaca
	January 19, 2010	Toracari
	January 20, 2010	Kisiwilqui
	January 21, 2010	Toracari
	January 22, 2010	San Pedro
	January 23, 2010	Sakani
	January 24, 2010	Sacaca
	January 25, 2010	Ovejeria
Identifying and Prioritizing Claims/ Community Development Projects (*Identificación y Priorización de Demandas / Proyectos de Desarrollo Comunitario*)	August 28, 2011	Sakani
	August 29, 2011	Ch'alla K'asa
	September 23, 2011	Ovejeria
	September 24, 2011	Loqheta

Workshop "Conociendo la Minería" at Ayllu Tacahuani

38. The Company itself organized workshops in addition to the Cumbre del Sajama workshops. For example, in April 2010, CMMK's community relations coordinators, Santiago Angulo and Carmen Huanca, conducted a workshop entitled "*Mensajes*".[62] The purpose of this workshop was to convey the principles and values of the Company to the *ayllus* Samca, Urinsaya, Sulka Jilatikani and Tacahuani, and to inform them about the status of the Project.[63]

39. In furtherance of identifying the communities' needs and perceptions about the Company, South American Silver commissioned a California based, global consultancy firm, Business for Social Responsibility ("BSR"). BSR was to "assess community perceptions around mining issues, identify the range of stakeholders and the varying degrees of support and opposition to the Malku Khota project, and increase the understanding of the role of civil society and government in the project's success."[64] To accomplish this, BSR representatives traveled to Bolivia and interviewed stakeholders associated with the Malku Khota Project, including local community members, indigenous authorities, local and regional government officials, and NGOs.[65] The report concluded that there was an overall acceptance of the Malku Khota Project.[66]

40. The Company's respect for indigenous traditions and culture was recognized by the communities surrounding the Project. By May 2009, the Company's community relations coordinators had achieved success by explaining the goals and projected needs of the Malku Khota Project. The communities in the Area of Influence, agreed that the Company supported and respected the indigenous traditions and culture.[67]

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62 **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 36-37.

63 **CWS-7**, Angulo Rebuttal Witness Statement at ¶¶ 36-37; *see also* **Exhibit C-168**, Memorándum de Carmen Huanca a Felipe Malbran, *Informe correspondiente al mes de abril de 2010*, Apr. 30, 2010.

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

65 *Id*. at 4.

66 **Exhibit C-154**, Business for Social Responsibility, *Social Risks and Opportunities for South American Silver Corporation's Malku Khota Project in Potosí*, May 2009 at 4.

67 **Exhibit C-154**, Business for Social Responsibility, *Social Risks and Opportunities for South American Silver Corporation's Malku Khota Project in Potosí*, May 2009 at 8 ("BSR was able to verify that the community relations coordinators have achieved great coverage in the communication on the project (all the communities surveyed had heard of CMMK and/or can remember when was the first time the

41. South American Silver's commissioning of the BSR report was in line with its core value of developing mines in a manner that promotes sustainable development and improves social welfare. The Company's actions demonstrate its goal of learning about the needs of the communities and taking those needs into account for the development of the project. As BSR acknowledged, CMMK's "pioneering approach to engage with host communities from the beginning […] allowed the company to differentiate itself from other mining companies which engage with communities as a reaction to a provocation, or when it is too late."[68] BSR also made a series of recommendations that consisted mainly of informing the communities about the development and details of the Malku Khota Project.[69] This is exactly what CMMK continued to do throughout its community relations efforts by, for example, conducting the different workshops alongside Cumbre del Sajama and expanding its Community Relations Program in 2011. As BSR concluded, the Company "clearly recognize[d] the importance of developing close relationships in local towns and […] tried to maximize local hiring in support of this imperative."[70]

42. Bolivia alleges that prior to September 2011 there was a "generalized rejection" of the Company. Obviously, Bolivia's assertion is untrue. Although some community members expressed certain concerns—all of which the Company sought to address in different workshops and informational meetings, including the ones described above—there was general support for the Project from 2007 and through September 2011.[71]

43. From 2007 to the end of 2010, there were only pockets of opposition to the project. The existing opposition was led by Andres Chajmi, one of the leaders of *Consejo Nacional de Ayllus y Markas* ("CONAMAQ)" and Benedicto Gabriel, a leader

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company contacted someone from their community even if it was not the respondent. With the exception of one community, all agreed that the company supports and respected the indigenous traditions and culture.")

[68] **Exhibit C-154**, Business for Social Responsibility, *Social Risks and Opportunities for South American Silver Corporation's Malku Khota Project in Potosí*, May 2009 at 5.

[69] **Exhibit C-154**, Business for Social Responsibility, *Social Risks and Opportunities for South American Silver Corporation's Malku Khota Project in Potosí*, May 2009.

[70] *Id*. at 25.

[71] **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 23.

of the *Federación de Ayllus Originarios Indígenas del Norte de Potosí* ("FAOI-NP"), who both advocated in favor of forming a cooperative to exploit the mineral resources located in the Company's concessions.[72] Nevertheless, the support for the Project among the communities remained strong. Thus, for example, in October 2010, only a couple of months before CONAMAQ and FAOI-NP leaders requested the Company to leave the area in December 2010, CMMK organized an arts and crafts fair, and educational and environmental programs in the Malku Khota community. The fair and programs were well attended by community members and was developed under a peaceful and collaborative atmosphere. High ranking officers of the Company, including Ralph Fitch, the CEO, and his wife, Lucy Fitch and Felipe Malbran, Executive Vice-President of Explorations, also participated in the program.[73]

Arts and crafts fair in Malku Khota with Company officials, December 10, 2010

Education and environmental program in Kalachaca School, October 12, 2010

44. Even after the CONAMAQ and FAOI-NP leaders requested the Company to leave the area in December 2010, the vast majority of the communities (including some members of the Malku Khota community) supported the Project. As Mr. Mallory testifies,[74] and as he informed SASC's Corporate Social Responsibility Committee (after three weeks of conducting information sessions in the Project area soon after his arrival

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72 **CWS-7**, Angulo Rebuttal Witness Statement at ¶¶ 14, 41; **Exhibit C-169,** E-mail from S. Angulo to F. Malbran, Dec. 11, 2007; **CWS-8**, Rebuttal Witness Statement of Xavier Gonzales, Nov. 13, 2015 at ¶¶ 20, 31 ("Gonzales Rebuttal Witness Statement").

73 **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 22; **Exhibit C-160**, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, Oct. 2010.

74 **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 22.

to the Company), most of the communities were supportive of the Project, with some opposition to the Project existing in small pockets.[75]

45. Thus, contrary to Bolivia's assertion of "generalized rejection" prior to September 2011, the Company, as described more fully below and in the Rebuttal Witness Statement of Jim Mallory,[76] negotiated and signed Reciprocal Cooperation Agreements ("RCAs") with five of the six *ayllus prior to September 2011* demonstrating generalized support for the Project, as opposed to the "generalized rejection" that Bolivia alleges. In fact, the September 6, 2011 Informe Técnico, which the Government itself prepared, and which describes the Toro Toro meeting of August 31, 2011, sets forth very clearly that the Company had the support of Ayllu Qullana, Ayllu Tacahuani, Ayllu Jatun Urinsaya, Allyu Samca and Ayllu Jilatikani.[77]

2. The company made substantive and meaningful contributions to the neighboring communities

46. The Company made significant contributions to the communities in direct response to their requests based upon their own needs.[78] Part of the purpose in making contributions to communities is to generate an atmosphere of cooperation, collaboration, mutual understanding, and a sense of ownership by the communities.[79] Naturally, these contributions varied depending on (i) the needs of the communities and (ii) the Project's progress and the impact it may cause in those communities.[80] The Company's contributions were consistent with BSR's recommendations: "CMMK's engagement process and efforts should be proportional to the status of the project."[81]

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75 **Exhibit C-170**, Malku Khota Project Community Relations Update, May 25, 2011.

76 See, *infra*, ¶¶ 62 - 64; **CWS-10**, Mallory Rebuttal Witness Statement at ¶¶ 23-27.

77 **Exhibit R-63**, Informe de la segunda reunión de socialización del Proyecto Malku Khota, Sept. 6, 2011 at 2-3.

78 **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 8.

79 **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 36.

80 **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 10; **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 8.

81 **Exhibit C-154**, Business for Social Responsibility, *Social Risks and Opportunities for South American Silver Corporation's Malku Khota Project in Potosí*, May 2009 at 4.

47. The Company also focused on identifying and prioritizing contributions that would benefit the communities as a whole and not individuals in particular.[82] Contributions made by the Company, and specifically, during the exploration phase, need to be differentiated, both in type and size, from the kind of projects that a State has the duty of implementing in its territory for the welfare of its citizens.

48. Despite the Company's good faith efforts, Bolivia now denounces the Company's contributions to the communities as "scarce economic offerings." As Medmin acknowledged in 2008, "the implementation of the Malku Khota exploration mining project had had a positive impact in the region as [the Company] greatly supported the *ayllus* with respect to generating jobs, health, sports, education and infrastructure." [83] Medmin reiterated its positive feedback throughout the years, until its last report, for 2011, which it submitted to the Government of Potosí on February 9, 2012.[84] Thus, the Company's support of the communities in their efforts to build churches, promote sportsmanship, entrepreneurship, agriculture, and personal welfare,[85] responded to specific requests received by CMMK and should not now be tainted by Bolivia.

49. The communities and their leaders were responsible for identifying their needs or requests and communicating them to the Company, first through Santiago Angulo, and later through Jim Mallory. CMMK also received written requests for aid. [86] The goal was for the Company and communities to mutually collaborate in fulfilling those requests as well as advancing the Project.[87] Bolivia blames the Company for, in some cases, providing only materials and tools to the communities to develop a project instead of constructing the entire Project. As Mr. Mallory observes, it was important for

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82 **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 10; **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 8.

83 **Exhibit C-142**, Medmin Report September 2008.

84 **Exhibit C-146**, Medmin Report I January 2012.

85 **CWS-7**, Angulo Rebuttal Witness Statement at ¶¶ 9, 10; **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 8; **Exhibit C-171**, Actas de Compromiso, Cumplimiento y Entrega suscritas por la Compañía Minera Malku Khota con distintos Ayllus y Comunidades entre 2007 y 2011.

86 **Exhibit C-171**, Actas de Compromiso, Entrega, Cumplimiento y Solicitudes suscritas por la Compañía Minera Malku Khota con distintos Ayllus y Comunidades entre 2007 y 2011.

87 **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 35.

the communities to have some level of involvement and ownership in the programs the Company was implementing; working together generated an atmosphere of cooperation, collaboration and mutual understanding.[88] The communities also gained an additional benefit: community members were paid by the Company for working in projects that benefitted both the communities and the Project (i.e. road construction).[89]

50. From 2007 to 2011, the communities' requests were memorialized in "*actas de compromiso*."[90] The Company and the communities would then record the fulfillment of these requests in "*actas de cumplimiento*" or "*actas de entrega*."[91] CMMK satisfied the vast majority of the communities' specific requests, including road improvements, building or renovating schools, refurbishing community centers, establishing livestock improvement programs, funding educational scholarships and growing the local workforce in general.[92]

51. The different contributions to communities in *ayllus* Sulka Jilatikani, Tacahuani, Urinsaya and Samca, included, among others, the following:

a) Road construction and repairs. This was one of the most common and urgent petitions by the communities as it helped to integrate, and establish communications with, remote communities. It also provided jobs to community members as CMMK employed them for road constructions and repairs.[93]

b) Refurbishments, construction and construction materials for schools, churches, community centers, houses and community bathrooms and showers (cement, corrugated iron for rooftops,

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88 **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 35.

89 **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 24.

90 **Exhibit C-172**, Actas de Compromiso suscritas por la Compañía Minera Malku Khota con distintos Ayllus y Comunidades entre 2007 y 2011.

91 **Exhibit C-171**, Actas de Compromiso, Cumplimiento y Entrega suscritas por la Compañía Minera Malku Khota con distintos Ayllus y Comunidades entre 2007 y 2011**.**

92 **CWS-3**, Mallory Witness Statement at ¶¶ 7-13; **Exhibit C-146**, Medmin Report I, January 2012; **Exhibit C-142**, Medmin Report September 2008; **Exhibit C-143**, Medmin Report February 2009.

93 **Exhibit C-173**, Acta de Entrega entre el Ayllu Tacahuani de la Provincia Charcas del Municipio de San Pedro de Buena Vista del Departamento de Potosí y la Compañia Minera Malku Khota SA., Dec. 16, 2007; **Exhibit C-174**, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, June 2007; **CWS-9**, Malbran Rebuttal Witness Statement ¶ 24.

wire, sand, beams, and electricity generation kits), and transportation of materials.[94]

c) Trout farming including providing thousands of fingerlings as well as tools and training for cultivation and breeding.[95]

d) Livestock vaccination, breeding, nutrition and husbandry.[96]

e) Ground levelling for football fields and football uniforms.[97]

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[94] **Exhibit C-175**, Acta de Cumplimiento entre la comunidad Kalachaca de la Provincia Charcas del Departamento de Potosí y la Compañía Minera Malku Khota, SA., Jun. 22, 2008; **Exhibit C-176**, Acta de Entrega entre la comunidad Kalachaca de la Provincia Charcas del Departamento de Potosí y la Compañia Minera Malku Khota, May, 6, 2007; **Exhibit C-177**, Acta de Entrega entre la comunidad de Kalachaca de la Provincia Charcas del Departamento de Potosí y la Compañia Minera Malku Khota, Nov. 30, 2007; **Exhibit C-178**, Letter from Comunidad Kalachaca to Compañia Minera Malku Khota, July 31, 2007; **Exhibit C-179**, Acta de Cumplimiento entre la comunidad de Kisiwillque de la Provincia Alonso de Ibañez del Municipio de Sacaca del Departamento de Potosí y la Compañia Minera Malku Khota, Aug. 15, 2007; **Exhibit C-180**, Acta de Cumplimiento entre la comunidad de Kayestia de la Provincia Alonzo de Ibañez del Municipio de Sacaca del Departamento de Potosí y la Compañia Minera Malku Khota, Sept. 26, 2007; **Exhibit C-181**, Acta de Cumplimiento entre las comunidades Alpayeque, Escoma y Alcalaca del Ayllu Urinsaya de la Provincia Charcas, Departamento de Potosí y Compañia Minera Malku Khota SA., Oct. 20 2007; **Exhibit C-182**, Memorándum de Santiago Angulo a Felipe Malbran, *Informe Mensual Proyecto Malku Khota*, Apr. 2008; **Exhibit C-183**, Memorándum de Santiago Angulo a Felipe Málbran, *Informe Mensual*, Jun. 2008; **Exhibit C-156**, Memorándum de Santiago Angulo a Felipe Malbran, *Informe relacionen comunitarias Proyecto Malku Khota*, Jun. 2009; **Exhibit C-157**, Memorándum de Santiago Angulo a Felipe Malbran, *Informe Mensual Proyecto Malku Khota*, July 2009; **Exhibit C-158**, Memorándum de Santiago Angulo a Fernando Cáceres, *Informe relacionen comunitarias Noviembre 2009*, Nov. 2009; **Exhibit C-159**, Memorándum de Santiago Angulo a Fernando Cáceres, *Informe relacionen comunitarias diciembre 2009*, Dec. 2009; **Exhibit C-156**, Memorándum de Santiago Angulo a Felipe Malbran, *Informe relacionen comunitarias Proyecto Malku Khota*, Jun. 2009; **Exhibit C-185**, Acta de Cumplimiento entre la comunidad de Kisiwillke de la Provincia Alonso de Ibañez del Departamento de Potosí y la Compañía Minera Malku Khota, Apr. 24, 2007; **Exhibit C-174**, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, Jun. 2007; **CWS-10**, Mallory Rebuttal Witness Statement ¶ 31.

[95] **Exhibit C-185**, Acta de Cumplimiento entre la comunidad de Kisiwillke de a Provincia Alonso de Ibañez del Departamento de Potosí y la Compañia Minera Malku Khota SA., Apr. 24, 2007; **Exhibit C-186**, Acta de Cumplimiento entre la comunidad Ovejería del Ayllu Sulka Jilticani de la Provincia Alonso de Ibañez del Departamento de Potosí y la Compañia Minera Malku Khota SA., Mar. 29, 2008; **Exhibit C-187**, Acta de Cumplimiento entre la comunidad Jantapalka de la Provincia Alonso de Ibañez del Departamento de Potosí y la Compañia Minera Malky Khota SA., Oct. 20, 2007.

[96] **CWS-3,** Mallory Witness Statement at ¶13.

[97] **Exhibit C-185**, Acta de Cumplimiento entre la comunidad de Kisiwillke de a Provincia Alonso de Ibañez del Departamento de Potosí y la Compañia Minera Malku Khota SA., Apr. 24, 2007; **Exhibit C-188**, Letter from Comunidad de Kisiwillque to Compañia Malku Khota, Jan. 17, 2007; **Exhibit C-189**, Letter from Comunidad Kisiwillque to Compañia Malku Khota, Jun. 11, 2009; **Exhibit C-190**, Acta de Apoyo de la comunidad Kisiwillque de la Provincia Alonso Ibañez de1 Departamento de Potosí a la Compañia Minera Malku Khota, Aug. 11, 2008; **Exhibit C-191**, Acta de Cumplimiento entre la comunidad de Kayestia de la Provincia Alonzo de Ibañez del Municipio de Sacaca del Departamento de Potosí y la Compañia Minera Malku Khota, Sept. 26, 2007; **Exhibit C-192**, Acta de Cumplimiento entre las comunidades de Alpayaque, Escoma y Alcalaca de la Provincia Charcas del Departamento de Potosí y la Compañia Minera Malku Khota SA., Aug. 1, 2007; **Exhibit C-193**, Letter from Comunidad Kari Kari to Compañia Minera Malku Khota, Oct. 17, 2007.

f) Working tools (shovels, picks, wheelbarrows, etc.) and food (salt, fish, oil, rice, pasta, sardines, cocaine leafs, etc.).[98]

g) Educational scholarships.[99]

Trout farming, September 2007

Construction of bathrooms in Kalachaca

52. Bolivia alleges that the Company's contribution of a chapel to the Kalachaca community (as well as similar contributions) was not a "real benefit."[100] First, this contribution was made in response to a specific request received by the Company in May 2007.[101] The materials required for the chapel (including size and specifications) were provided by the Kalachaca community.[102] Second, this request was one of the first made by the communities, which is why it was particularly important for the Company. Lastly, the Government was satisfied with CMMK's contributions: CMMK informed the Government about this and other contributions to the communities and the Government never provided any negative comments regarding any of them.[103]

53. The communities were grateful for the Company's support. For example, Bolivia criticizes the Company for promising and not completing the "improvements in

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98 **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 9, 10.

99 **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 32; **Exhibit C-194**, South American Silver Corp., Operations Report - March 2012.

100 Respondent's Counter-Memorial at ¶ 103.

101 **Exhibit R-36**, Acta de Compromiso, May 1, 2007; **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 10.

102 **Exhibit R-36**, Acta de Compromiso, May 1, 2007.

103 This information was contained in Medmin Monitoring Environmental Reports filed before the Ministry of Environment of the Government of Potosí. *See, e.g.*, **Exhibit C-146**, Medmin Report I January 2012; **Exhibit C-142**, Medmin Report September 2008; **Exhibit C-143**, Medmin Report February 2009.

certain roads."[104] However, the truth is that the Company, together with community members that it employed and paid (at above-average wages),[105] completed the construction of numerous roads,[106] including a road of the Kayestia community of *ayllu* Samca.[107] Kayestia community members expressed their appreciation to CMMK in an *acta de cumplimiento* dated September 20, 2007:

> The community of Kayestia thanks Cia. Minera Malku Khota SA for their support and the works made for the benefit of the region and ratifies its unconditional support to the Company to continue with the exploration works. [108]

54. The Company's community relations program was meant to strengthen bonds with the communities and further advance the Project. In furtherance of these goals, from the onset, the Company made it a priority to hire workers from the local communities to assist with the Company's exploration and drilling program and to compensate them at a higher wage than other companies in the region were paying.[109] During this time, the community relations program also included frequent meetings with community members and the development of workshops (*talleres*) organized by the Company with the help of Cumbre del Sajama. The feedback that the Company received from the communities was positive.[110]

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104 Respondent's Counter-Memorial at ¶102.

105 **Exhibit C-142**, Medmin Report September 2008; **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 24.

106 **Exhibit C-173**, Acta de Entrega entre el Ayllu Tacahuani de la Provincia Charcas del Municipio de San Pedro de Buena Vista del Departamento de Potosí y la Compañia Malku Khota SA., Dec. 16, 2007; **Exhibit C-174**, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, June 2007; **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 8.

107 **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 11.

108 **Exhibit C-191**, Acta de Cumplimiento entre la comunidad de Kayestia de la Provincia Alonzo de Ibañez del Municipio de Sacaca del Departamento de Potosí y la Compañia Minera Malku Khota, Sept. 26, 2007; *see also* **Exhibit C-171**, Actas de Compromiso, Entrega, Cumplimiento y Solicitudes suscritas por la Compañía Minera Malku Khota con distintos Ayllus y Comunidades entre 2007 y 2011.

109 In 2007 CMMK paid 40 Bolivianos per day, later increased to 45 Bolivianos per day, while most of the companies in the region and in the mining sector paid only 15 Bolivianos. **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 24.

110 **Exhibit C-139**, SASC & Cumbre del Sajama S.A., Informe Final, "*Conociendo la Minería," 2008*; **Exhibit C-165**, Cumbre del Sajama S.A., Talleres "*Una Exploración Minera en Marcha Hacia el Futuro*," February 2010; **Exhibit C-166**, SASC y Cumbre del Sajama S.A., Talleres "*Conociendo y Cuidando Nuestro Medio Ambiente Comunitario*," May 2009; **Exhibit C-167**, Cumbre del Sajama,

55. In 2010 the Company expanded its exploration and drilling program which required additional personnel.[111] The Company hired local community members to work on site performing drilling activities.[112] By doing this, the communities benefited from the Company's presence in the Project area while the Company received the benefit of having local people who were part of the communities and understood their traditions. This aided the transition process into the new exploration and drilling phase while maintaining the communities' support.

56. New CMMK employees and new employees of CMMK's contractors had to attend an orientation program that the Company designed.[113] The orientation program conveyed to these new employees the Company's policy to respect the communities' traditions (*usos y costumbres*) and instructed them to protect the environment, and respect the communities' traditions (*usos y costumbres*) and authorities.[114] The program also made clear that relationships between employees/contractors and community members were forbidden.[115] The handouts distributed during the program were translated into Quechua.[116] Additionally, CMMK had internal processes to ensure and promote a sustainable work environment. Every morning Santiago Angulo held meetings with

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Informe Taller "*Identificación y Priorización de Demandas / Proyectos de Desarrollo Comunitario*, 2011.

111 **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 6.

112 **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 6; *see also* **Exhibit C-195**, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, May 2010; **Exhibit C-196**, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, June 2010; **Exhibit C-197**, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, July 2010; **Exhibit C-198**, Fernando Cáceres, *Informe Mensual Proyecto Minero Malku Khota*, Aug. 2010.

113 **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 6.

114 **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 6. *See also* **Exhibit C-199**, Compañia Minera Malku Khota S.A., Orientation Course, 2010; **Exhibit C-200**, Compañía Minera Malku Khota S.A., Work Plan; **Exhibit C-201**, Inspection Report No. 28 issued from the Government of Potosí to Xavier Gonzales, Compañia Malku Khota, Nov. 13, 2010.

115 **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 6. *See also* **Exhibit C-199**, Compañia Minera Malku Khota S.A., Orientation Course, 2010; **Exhibit C-200**, Compañía Minera Malku Khota S.A., Work Plan; **Exhibit C-201**, Inspection Report No. 28 issued from the Government of Potosí to Xavier Gonzales, Compañia Malku Khota, Nov. 13, 2010.

116 **Exhibit C-201**, Inspection Report No. 28 issued from the Government of Potosí to Xavier Gonzales, Compañia Malku Khota, Nov. 13, 2010.

CMMK's employees to discuss the work day ahead and to remind them of the company's principles and the communities' traditions.[117]

3. The company expanded the scope and reach of its community relations program

57. In early 2011, South American Silver hired additional community relations staff, including Jim Mallory, to expand its community relations efforts.[118] Mr. Mallory is an experienced figure in the mining world renowned for his work with communities.[119] Before joining the Company, Mr. Mallory had years of experience working with communities in different international mining projects in Latin America, including in Peru, Argentina, Chile, and Mexico.[120]

58. The Company's goal with its expanded community relations program was to acquire overall acceptance of the Project as it started to move forward.[121] Bolivia's claim that the Company "sought to create intrigues and divisions amongst the Indigenous Communities"[122] as part of the improved community relations program that Jim Mallory implemented, is groundless. As Mr. Mallory observes, "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."[123]

59. Mr. Mallory tailored a Community Relations Program that was inclusive and designed to obtain an overall level of acceptance. As Mr. Mallory noted, although a high level of acceptance already existed when he arrived, he was seeking to achieve an overall level of acceptance to dampen the "pockets of conflict" that existed at that time.[124] The new program called for continuing the already established communication

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[117] **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 7.

[118] **CWS-2**, Malbran Witness Statement at ¶ 58.

[119] **CWS-3**, Mallory Witness Statement at ¶¶ 2-4; **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 4.

[120] **CWS-3**, Mallory Witness Statement at ¶¶ 2-4; **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 4; **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 27.

[121] **Exhibit C-170**, Malku Khota Project Community Relations Update, May 25, 2011 at 3.

[122] Respondent's Counter-Memorial at ¶ 81.

[123] **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 13.

[124] **Exhibit C-170**, Malku Khota Project Community Relations Update, May 25, 2011 at 3; **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 17.

channels with different community leaders at *Ayllu* and Municipal levels.[125] It also called for community outreach programs that built on the acceptance levels already achieved with local communities.[126] In the short term, the program called for increasing the level of acceptance in the communities closer to the project (in the Sulka Jilatikani and Tacahuni *Ayllu*s) while maintaining community outreach programs for the remainder of the area. [127] The long term goal was to maintain the lines of communication with the communities open, promote the communities' traditional cultural values, and improve the quality of life among the communities.[128]

60. Additionally, CMMK's management engaged with community leaders to discuss the Project's status and listen to their concerns. Community relations coordinators worked with families implementing the different programs.[129] In 2011 and 2012, CMMK's community relations coordinators and management held dozens of meetings with communities within the Area of Influence (including with the few communities that opposed the Project), as well as with local and national authorities.[130] These meetings covered a wide array of matters, including presentations on the Project's status, progress and benefits to local communities, negotiations of agreements between the company and local communities, and discussions on the design and implementation of social programs (*e.g.*, employment opportunities for community members, the improvement of schools and road infrastructure, and livestock vaccination programs).[131]

61. CMMK also organized guided visits for community members to other mines in Bolivia. For example, community members and CMMK's management toured

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[125] **Exhibit C-170**, Malku Khota Project Community Relations Update, May 25, 2011 at 2.

[126] *Id*. at 3.

[127] **Exhibit C-170**, Malku Khota Project Community Relations Update, May 25, 2011 at 3; **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 18.

[128] **Exhibit C-170**, Malku Khota Project Community Relations Update, May 25, 2011.

[129] *Id*. at 6.

[130] **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 19.

[131] **Exhibit C-202**, Presentation "*Compañía Minera Malku Khota, S.A. – Exploración y Desarrollo Enfocada en el Crecimiento*" Aug. 31, 2011.

the Inti Raymi facilities near Oruro on May 6, 2011.[132] The visitors gained insight into open pit mining and large mining operations, many for the first time. The visit also showcased the positive impact that mining could bring to communities.[133]

62. As mentioned previously, the community relations efforts also included entering into RCAs with the *ayllus*, represented by its highest authorities.[134] The purpose of these agreements was to formalize the way CMMK would work with the communities on environmental and social development programs on the one hand, and how the communities would get involved in the development of the Malku Khota Project, on the other hand.[135] As Mr. Mallory observes, these types of agreements are common practice in the industry and their purpose is for the Company and the communities to work together to achieve common goals. [136]

63. The Company extensively discussed and negotiated the terms and conditions of the RCAs with the six *ayllu*s in a series of workshops and meetings.[137] After considerable open dialogue with community leaders, CMMK signed the first RCA on July 3, 2011 with *Ayllu* Jatun Urinsaya.[138] Shortly thereafter, CMMK entered into RCAs with (i) *ayllu* Samca on July 30, 2011;[139] (ii) *ayllu* Sulka Jilatikani on August 29,

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[132] **Exhibit C-203**, Letter from X. Gonzales to E. Nuñez, Apr. 15, 2011; **Exhibit C-204**, Letter from X. Gonzales to F. Romero, Apr. 26, 2011; **Exhibit C-205**, Letter from X. Gonzales to J. Sunagua, Apr. 26, 2011**.**

[133] **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 20.

[134] *Id*. ¶ 23.

[135] *Id*.

[136] *Id*.

[137] *Id*. ¶ 24.

[138] **Exhibit C-206**, Reciprocal Cooperation Agreement ("RCA") between Ayllu Jatun Urinsaya and CMMK, July 3, 2011.

[139] **Exhibit C-207**, Reciprocal Cooperation Agreement ("RCA") between Ayllu Samca and CMMK, July 30, 2011.

2011;[140] (iii) *ayllu* Qullana on August 10, 2011;[141] and (iv) *ayllu* Tacahuani, on August 20, 2011.[142]

RCA Discussions between CMMK and Ayllu Tacahuani, June 17, 2011

64. These five *ayllus* expressed their support for the continuation of the Project. In the RCAs, the different *ayllus* acknowledged that they were entirely supportive of the Company resuming its exploration activities. For example, Clause 2.3 of *ayllu* Tacahuani provides as follows:

> **2.3** Ambas partes expresan que, luego de varias reuniones entre las autoridades locales de EL AYLLU y los representantes de LA COMPAÑÍA, a la actualidad existe total predisposición de parte del AYLLU para que la COMPAÑÍA reinicie y prosiga sus actividades de exploración minera en las áreas de sus concesiones mineras ya citadas y, asimismo, existe total predisposición de LA COMPAÑÍA para ejecutar proyectos y/o programas de desarrollo económico y social a favor de EL AYLLU.

[140] **Exhibit C-208**, Reciprocal Cooperation Agreement ("RCA") between Ayllu Sulka Jilatikani and CMMK, Aug. 29, 2011.

[141] **Exhibit C-209**, Reciprocal Cooperation Agreement ("RCA") between Ayllu Qullana and CMMK, Aug. 10, 2011.

[142] **Exhibit C-210**, Reciprocal Cooperation Agreement ("RCA") between Ayllu Tacahuani and CMMK, Aug. 21, 2011.

65. The commitments reached in the RCAs were limited to the exploration phase. All RCAs expressly provided that new RCAs with greater benefits for the communities would be entered into once the Project evolved to the construction phase.[143]

66. Some of the Company's commitments under the RCAs included: (i) human resources training; (ii) rotational jobs; (iii) support for different basic infrastructure, health, and livestock projects; (iv) environmental training; and (v) support in education.[144] As Mr. Mallory states, the contributions set forth in the RCAs for the exploration phase were appropriate and in line with best practices.[145]

67. By the time of the expropriation, the Company had made good progress in fulfilling its commitments:

(a) To begin with, the Company retained Cumbre del Sajama to conduct four workshops between August and September 2011 to identify specific requests and/or community projects, and the priority that the *ayllus* gave to the different projects.[146]

(b) The Company hired territorial promoters as full time employees in each of the six *ayllus* as early as September 2011 to facilitate the communications between the Company and communities and simplify the implementation of the RCAs.[147]

(c) In December 2011, the Company reconditioned the community hall in Ovejeria, *ayllu* Sulka Jilatikani, which was used as an information center for the Project (the Company rented the space from the community).[148]

(d) By March 2012, the first scholarships campaign concluded, benefitting 68 students from the five *ayllus* with which the Company had signed RCAs.[149]

(e) By May 2012, the environmental monitor training program conducted by Medmin, consisting of eight modules with the

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143 See for example Fifth Clause of Ayllu Sulka Jilatikani RCA, **Exhibit C-208.**

144 *See* Clause "Objetivos del Convenio" of RCAs.

145 **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 27.

146 **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 29; **Exhibit C-167**, Cumbre del Sajama, Informe Taller: "*Identificación y Priorización de Demandas / Proyectos de Desarrollo Comunitario*," 2011.

147 **Exhibit C-211**, List of territorial promoters hired as of September 2011; **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 30.

148 **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 31.

149 **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 32; **Exhibit C-194**, South American Silver Corp., Operations Report March – 2012.

participation of 35 community members of the different *ayllus*, was halfway to being completed, and already having a positive impact.[150]

(f) The Company funded a livestock enhancement program in 43 communities that benefitted 23,583 animals.[151]

(g) The Company was in the process of implementing a grievance mechanism to help resolve complaints or issues that community members could have with the Company.[152]

(h) The Company's rotational work program was averaging 60 positions between mid-2011 and May 2012, giving job opportunities to community members from *ayllus* Samca, Sulka Jiltaikani and Tacahuani. [153]

68. The foregoing activities not only evidence the different commitments that the Company undertook and fulfilled, but also show the collaborative atmosphere that existed at that time between the Company and the communities, as well as the communities' interest in the continuation of the Project.

Reconditioned Community Center, January 2012

[150] **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 33; **Exhibit C-212**, South American Silver Corp., Operations Report February - 2012; **Exhibit C-194**, South American Silver Corp., Operations Report March -2012; **Exhibit C-213**, South American Silver Corp., Operations Report April - 2012; **Exhibit C-214**, South American Silver Corp., Operations Report May – 2012.

[151] **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 35.

[152] **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 34; **Exhibit C-212**, South American Silver Corp., Operations Report February – 2012.

[153] **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 32; **Exhibit C-212**, South American Silver Corp., Operations Report - February 2012.

Environmental monitor training program, March 2012

Grievance mechanism workshop, February 2012

4. Extending the area of influence was precisely to avoid dividing the *ayllus*

69. Reaching out to communities and *ayllu*s beyond the original Area of Influence was a challenge, and not, as Bolivia alleges a way to dilute opposition to the Company.[154] Bolivia further suggests that the Company included *ayllus* Jatun Urinsaya and Qullana in the Area of Influence, even though they were not as directly affected as the other four *ayllus* that were included in the original Area of Influence. There is no provision in Bolivian environmental mining law regarding the extension of the area of influence or how to delimit such area. However, as CMMK's environmental consultant, Medmin, noted, the Regulation for Environmental Prevention and Control suggests that the area of influence should include the population that is susceptible of being affected by the project.[155]

70. The Area of Influence was originally determined by allocating a 2.5 kilometer line around the area of the concession, as suggested by the Ministry of Mining. Although this was the formal delimitation, the Company decided to include *ayllus* and communities that were susceptible of being affected by the Project and, to the extent possible, all of the communities of the *ayllus* that surrounded the area of influence.

[154] Respondent's Counter-Memorial at ¶¶ 119-121.

[155] **Exhibit C-215**, E-mail from A. Cárdenas to F. Caceres et. al, Jun. 11, 2012.

Bolivia criticizes the Company's strategy to include *ayllus* Jatun Urinsaya and Qullana to the north of the Proyect, instead of including, for example *ayllu* Chiro, south of *ayllu* Tacahuani.[156] The reason for involving *ayllus* Jatun Urinsaya and Qullana was not arbitrary. Different factors were considered: *first*, the exploration works were taking place in the northern tip of the concessions, in the area known as Wara Wara. Both *ayllus* Jatun Urinsaya and Qullana are located within the northern tip of the concessions, next to the Wara Wara region. Their proximity to the Project area made it logical to include them as they were directly affected by the Project.[157] In fact, the Company's exploration office and facilities were located in the community of Sakani of *Ayllu* Jatun Urinsaya.[158] *Second*, communities located in both *ayllus* are within the same valley and surrounded by the same rivers where the project is located.

71. The Company decided to involve, to the extent possible, all of the communities in the six *ayllus* that comprised the extended Area or Influence. *Ayllus* operate as a unit and BSR had recommended that the Company expand its area of influence to engage as many communities of all of the affected *ayllus* as possible.[159] The purpose was to avoid dividing the *ayllus* and interfering with their traditions. [160] There was another reason to expand the area of influence. The majority of the communities in the six ayllus surrounding the Project are very small and the Company had plans to employ approximately 1,000 community members during the construction phase of the Project and approximately 400-500 on a permanent basis when the mine went into production. Thus, reaching out to more communities would help the Company form relations with more potential employees.[161]

72. Finally, extending a mining project's area of influence beyond 2.5 kilometers was not unreasonable. For example, the area of influence of the San Cristobal mine goes as far as 140 kilometers from the project. The area of influence in Inti Raymi

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156 Respondent's Counter-Memorial at ¶123.

157 **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 11.

158 *Id*. ¶¶ 11, 12.

159 **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 14.

160 *Id*. ¶ 14.

161 **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 10.

extends 60 kilometers from the project.[162] In this case, the furthest community within the new Area of Influence, was less than 15 kilometers away from the Project.

5. Bolivia's regulatory framework did not require the company to undertake any community relations efforts and the government approved the company's efforts.

73. At the time of the expropriation, there was no regulatory framework in Bolivia requiring the Company to undertake any community relations program. No guidelines existed and the Government provided no guidance on the matter. As numerous Government officials acknowledged, the Company at all times complied with all applicable mining and environmental laws and regulations.[163] Thus, by definition, the Company went beyond any legal requirement in implementing the community relations program and the Government never suggested that it was insufficient.

74. Despite the Company's good faith efforts, Bolivia now denigrates the Company's community relations programs and describes the Company's contributions to the communities as "scarce economic offerings." But as early as August 2007, Vice Minister of Mines Pedro Mariobo and the then Governor of Potosí Mario Virreria visited the Project area and congratulated the company for the environmental and social programs that the Company was implementing.[164] These are the same social programs and contributions that Bolivia now criticizes.

75. Further, between 2008 and 2012, the Company submitted the different environmental and socioeconomic reports prepared by its environmental consultant, Medmin, to the Office of the Government of Potosí.[165] These reports listed the different contributions made by CMMK. Yet, the Government never made any negative observations regarding the nature of these contributions or suggested that these were insufficient. Nor did the Government recommend that CMMK implement different

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[162] **Exhibit C-215**, E-mail from A. Cárdenas to F. Caceres et. al, Jun. 11, 2012.

[163] *See infra* ¶¶91, 92, 111, 123, 132.

[164] **CWS-7**, Angulo Rebuttal Witness Statement at ¶13.

[165] **Exhibit C-142**, Medmin Report September 2008; **Exhibit C-143**, Medin Report February 2009; **Exhibit C-144**, Medimin Report September 2010; **Exhibit C-145**, Medmin Report December 2010; **Exhibit C-146**, Medmin Report I January 2012.

measures (other than Governor Gonzales requesting a financial stake in the Project, as discussed below).

76. In fact, on November 13, 2010, officials from Governor Gonzales' office and from the Municipality of Sacaca conducted an official inspection of the Project area, concluding that the "Company was in compliance with most of its commitments"[166] with the communities. After the inspection, the Governor's office did not make any observations or recommendations in connection with the Company's contributions or commitments to the communities.[167] Oddly enough, despite the different reports that CMMK submitted to the Governor of Potosí's office and the November 13, 2010 inspection, Governor Gonzales now claims that in 2010 he "had no information regarding the existence of social or socialization programs in the mining project."[168] He then contradicts himself by stating that by "the end of 2010" he identified that "CMMK socialization programs were insufficient." To the contrary, officials from the Governor's office and the Municipality of Sacaca confirmed that the Company's community relations programs were, in fact, sufficient.

77. Moreover, in subsequent meetings with government officials—discussed below[169]— Company representatives presented CMMK's community relations program. Jim Mallory presented the company's community relations program in May 2011 to the communities and to the Director of Public Consultation of the Ministry of Mining and Metallurgy, Oscar Iturri.[170] Likewise, the Company presented its community engagement plan and commitments and delivered a strategic framework for community relations in a meeting convened by the Governor of Potosí on August 31, 2011. A week after this meeting, Mr. Mallory met with Governor Gonzales' staff members, including the Potosí Secretary of Mining, Mr. Arnulfo Gutierrez, and the Director of Mining

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166 **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 9; **Exhibit C-145**, Medmin Report December 2010 at 84; **Exhibit C-201**, Inspection Report No. 28 issued from the Government of Potosí to Xavier Gonzales, Compañia Malku Khota, Nov. 13, 2010.

167 **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 9.

168 **RWS-1**, Witness Statement of Felix Gonzales Bernal, Mar. 26, 2015 at 16 ("Gonzales Bernal Witness Statement").

169 *See infra* Sections II.C.3 and II.C.4.

170 **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 16.

Development, Mr. Yerco Cervantes, to hand deliver, among other documents, copies of the RCAs and copies of presentations made by the Company to the communities.[171]

78. Thus, Bolivia was well aware of the Company's community relations program. It never criticized that program or the many contributions that the Company made to the local communities.[172] Thus, Bolivia cannot claim now, as a defense in this arbitration, that the Company's community relations program was deficient (which, in any case, it was not).

C. BOLIVIA'S FAILURE TO PROTECT AND SUPPORT THE PROJECT

79. In late 2010, the Company began to face opposition initiated by illegal miners who sought to exploit mineral resources in the area.[173] The illegal miners' interests were aligned with those of some leaders of the CONAMAQ and FAOI-NP indigenous organizations.[174] In fact, it was CONAMAQ and FAOI-NP leaders who directed efforts to divide the communities by, among other things, advocating for the formation of a cooperative to exploit the CMMK concessions. The Government later aggravated these divisive efforts.

80. Bolivia paints CONAMAQ as a benevolent organization and a united front which "takes political decisions in organic instances established in their organizational statutes and their decisions are mandatory for its members."[175] But this description is not reflective of reality.[176] CONAMAQ members not only disagree on substantial issues but are often driven by hidden political agendas. The height of this division occurred in 2013 when the organization "fractured into warring parallel organizations, one supporting the Movement Towards Socialism (MAS) government of Evo Morales, and the other—the

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[171] **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 51.

[172] **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 9.

[173] **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 31; **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 41; **Exhibit C-216**, E-mail from S. Angulo to X. Gonzales, Mar. 16, 2012.

[174] **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 31; **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 41; **Exhibit C-216**, E-mail from S. Angulo to X. Gonzales, Mar. 16, 2012.

[175] Respondent's Counter-Memorial ¶¶62, 63; **RER-1**, Expert Report of Liborio Uño Acebo, Mar. 26, 2015 at ¶ 21 ("Uño Expert Report").

[176] This is only one of many examples on how Mr. Liborio Uño Acebo's Expert Report is an academic exercise, where the actual situation is much different than the theoretical world he describes.

original "organic" CONAMAQ—increasingly turning against it."[177] This fracture was preceded by violent confrontations between the two factions, hunger strikes, vigils, road blockades and similar protests.[178] This division was condoned—if not encouraged—by the Bolivian Government.[179] FAOI-NP is also no stranger to division and political interference.[180]

81. In this arbitration, Bolivia tries to discredit accounts of illegal mining in the Project area and how this was crucial to fuel opposition to the Project.[181] But only a few months after the expropriation, Minister of Mining, Mario Virreira, who was Governor of Potosí from 2006-2010 and obviously familiar with the facts and circumstances of which he spoke, explained that "'[t]here has been in that region, a sort of illegal mining exploitation of the deposit,' a clandestine activity that has been 'somehow agreed to with some leaders.'"[182] Similarly, in May 2012, Minister Virreira confirmed that the opposition faced by the Company was in reality about economic interests surrounding illegal gold mining activity."[183] Minister Virreira also confirmed that contrary to alleged environmental wrongdoing by CMMK, "[i]t is not visible that the interest is to defend the State's resources, because these gentlemen who oppose the presence of the mining company Malku Khota, are actually illegally mining for gold in that region."[184]

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[177] **Exhibit C-217**, *Rival Factions in Bolivia's CONAMAQ: Internal Conflict or Government Manipulation?*, NCLA, Feb. 2, 2014.

[178] **Exhibit C-218**, *Denuncian intento de toma de CONAMAQ*, LOS TIEMPOS, July 5, 2012; **Exhibit C-219**, *CONAMAQ: Nuevas agresiones contra las legítimas organizaciones indígenas*, SOMOS SUR Dec. 10, 2013; **Exhibit C-220**, *CONAMAQ, dividida y con injerencia política*, PAGINA SIETE, Jan. 1, 2014; **Exhibit C-217**, *Rival Factions in Bolivia's CONAMAQ: Internal Conflict or Government Manipulation?* NCLA, Feb. 2, 2014.

[179] **Exhibit C-218**, *Denuncian intento de toma de CONAMAQ*, LOS TIEMPOS, July 5, 2012; **Exhibit C-219**, *CONAMAQ: Nuevas agresiones contra las legítimas organizaciones indígenas*, SOMOS SUR, Dec. 10, 2013; **Exhibit C-220**, *CONAMAQ, dividida y con injerencia política*, PAGINA SIETE, Jan. 1, 2014; **Exhibit C-217**, *Rival Factions in Bolivia's CONAMAQ: Internal Conflict or Government Manipulation?*, NCLA, Feb. 2, 2014.

[180] **Exhibit C-221**, *Division en ayllus de Potosí resta fuerza a bloqueo*, ERBOL DIGITAL, June 25, 2014.

[181] Respondent's Counter-Memorial at § 3.3.2.

[182] **Exhibit C-149**, *Policía evitará explotación ilegal en Mallku Khota,* LA PATRIA, Oct. 19, 2012.

[183] **Exhibit C-222**, *Denuncian contaminación ambiental en Mallku Khota,* LA RAZÓN, May 26, 2012. (Unofficial English translation).

[184] **Exhibit C-223**, *Explotación ilegal de oro es el origen del conflicto en Mallku Khota*, LA PAZ, May 21, 2012 (Unofficial English translation).

82. In 2014, Minister Virreira again stressed that "community members from mining areas oppose extraction operations denouncing environmental concerns and contamination to water, with the sole purpose of illegally exploiting mining deposits."[185] A clear example of this strategy, according to Minister Virreira, is what happened in

> "'the Malku Khota mine; community members say no to transnationals, no to the water issue, and what happens? After nationalization, we inspect, and what do we see? Community members and from other regions, working what we were supposed to defend from transnationals, contaminating the lagoons that were in that region. In other words, they reject the use of the water, reject benefits so that there is no contamination, but then they become illegal actors.'"[186]

Minister Virreira is not a lone voice denouncing illegal mining in the Malku Khota area. Community members also "confirmed [ ] that domineering groups or 'jucus,' foreign to the Malku Khota community, continue to illegally mine for gold … 'without any political or police authority doing something about it.'"[187] According to community members, "those so called 'jucus' (stealers of minerals) do not have papers and are peasants of other provinces north of Potosí who have 'political intentions.'"[188] South American Silver also denounced illegal mining in the area to Governor Gonzales to no avail.[189]

83. CMMK reached out to the Government for help but it failed to provide any meaningful support.[190] Governor Gonzales expressly acknowledges CMMK's

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185 **Exhibit C-224**, *Comunarios frenan operaciones mineras para iniciar trabajo ilegal*, PAGINA SIETE, Apr. 1, 2014 (Unofficial English translation).

186 **Exhibit C-224**, *Comunarios frenan operaciones mineras para iniciar trabajo ilegal*, PAGINA SIETE, Apr. 1, 2014 ("Un caso concreto: en la mina Mallku Khota (los comunarios) le dicen no a las transnacionales, no al tema del agua, ¿y qué ocurre?; después de la nacionalización, hacemos inspecciones, ¿y qué vemos? comunarios del lugar y de otras regiones trabajando aquello que debíamos defender de las transnacionales, contaminando las lagunas que estaban en ese sector. O sea rechazan para que no se use el agua, rechazan para que no haya beneficios, para que no haya contaminación, pero se convierten en actores ilegales", dijo Virreira a la red ERBOL.).

187 **Exhibit C-225**, *Avasalladores explotan oro en Mallku Khota*, LOS TIEMPOS, Aug. 1, 2012.

188 *Id*.

189 **Exhibit C-70**, Letter from Jim Mallory and Xavier Gonzales to Governor Felix Gonzales, Feb. 22, 2012. See, also, **CWS-4**, Gonzales Witness Statement at 16; **CWS-3**, Mallory Witness Statement at 26; **Exhibit R-55**, Letter from Xavier Gonzales to Governor Felix Gonzales, Dec. 21, 2010.

190 **Exhibit C-70**, Letter from Jim Mallory and Xavier Gonzales to Governor Felix Gonzales, Feb. 22, 2012.

requests for support in his witness statement.[191] Instead, the Government's actions and inactions fueled opposition to the Project. Although South American Silver expected the Government's support, it did not sit idly by waiting for it. At the beginning of 2011, South American Silver enhanced its already existing community relations program[192] in order to further integrate the communities and achieve an overall acceptance from all the communities in the Area of Influence. Bolivia's entire Counter-Memorial is simply an exercise in name calling and mudslinging in an effort to avoid the reality that Bolivia itself had an obligation to protect the Company and failed to do so.

1. While the majority of communities supported the project, FAOI-NP and CONAMAQ leaders fomented opposition and promoted illegal mining and formation of a cooperative to dislodge the company

84. The strategy of CONAMAQ and FAOI-NP was to pressure and shame community members to reject CMMK and to actively oppose the Project. For example, on December 11, 2010, CONAMAQ convened a meeting between four *ayllu*s (Sulka Jilatikani, Tacawni, Urinsaya, and Sanka) and representatives of CMMK.[193] Andres Chajmi, an authority from CONAMAQ summoned CMMK for it to purportedly present its 2011 work-plan. [194] Santiago Angulo attended on behalf of the Company and had prepared to give a presentation on the work plan. However, CONAMAQ and FAOI-NP authorities, in particular Feliciano Gabriel from FAOI-NP, prevented Mr. Angulo from speaking and from making the requested presentation. [195] Instead, Andres Chajmi and Feliciano Gabriel proposed the adoption of a pre-drafted resolution that demanded that CMMK suspend its activities. CONAMAQ and FAOI-NP representatives pushed this pre-drafted resolution and forced the communities to support it.[196] In fact, the pre-drafted

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[191] **RWS-1**, Gonzales Bernal Witness Statement at 17; **Exhibit R-55,** Letter from Xavier Gonzales to Governor Felix Gonzales, Dec. 21, 2010.

[192] Claimant's Memorial at ¶¶ 47-50.

[193] **Exhibit R-46**, Voto resolutivo de los Ayllus Sullka Jilatikani, Takahuani, Urinsaya y Samca, Dec. 11, 2010.

[194] **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 40.

[195] *Id*.

[196] **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 40. *See also,* **Exhibit C-226**, Memorándum de Santiago Angulo a Fernando Cáceres, *Informe correspondiente al mes de diciembre de 2010*, Jan. 5, 2011.

resolution included language calling for the "punishment of all the brothers of the four *ayllus* who do not comply with this resolution."[197] Thus, those present had little choice but to sign the resolution or face retribution.[198]

85. Different communities confirmed to CMMK that they supported the Project despite their signing of the resolution. Two days after the December 11, 2010 meeting at which CONAMAQ and FAOI-NP pressured the communities to sign the resolution, Santiago Angulo met with different community members (in particular from *Ayllu* Sulka Jilatikani) who expressed their support for the Project and confirmed that they did not agree with the resolution that CONAMAQ and FAOI-NP had imposed on them.[199] On December 19, 2010, authorities from FAOI-NP and CONAMAQ met again to impose a new resolution on the communities. This new resolution demanded that CMMK stop all activities related to the Project. Santiago Angulo was present at that meeting and again, CONAMAQ and FAOI-NP, and in particular Feliciano Gabriel of FAOI-NP, forced authorities from the four *ayllus* to sign the resolution. Mr. Angulo described the meeting as follows:

> On December 19, 2010 I attended the *cabildo* meeting convened by FAOI-NP and CONAMAQ. In this meeting, the Mallcus of CONAMAQ and FAOI-NP (Andres Chajmi and Feliciano Gabriel) and some authorities and leaders from certain *ayllus* determined that CMMK had to stop works in the region. Feliciano Gabriel, an authority from FAOI-NP presented the text of the *cabildo* resolution of December 19, 2010, that it had been previously prepared, and forced several community mayors [*alcaldes comunales*] to sign this resolution. One of the participants expressed its opposition to the resolution and stated that the resolution was illegal. Mallkus Andres Chajmi and

[197] "Sanciones a todos los hermanos de los cuatro ayllus que no cumplan con este voto resolutivo." (free translation).

[198] **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 40.

[199] **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 42, 43. *See also*, **Exhibit C-226**, Memorándum de Santiago Angulo a Fernando Cáceres, *Informe correspondiente al mes de diciembre de 2010*, Jan. 5, 2011.

> Feliciano Gabriel threatened to hit him and to keep his belongings and motor bicycle.[200]

86. Jatun Urinsaya, and Qullana *ayllu*s strongly opposed both the December 11 and December 19, 2010 resolutions. In a communication dated December 27, 2010, Jatun Urinsaya confirmed that authorities from the *ayllus* had been forced to sign the resolutions.[201] In particular, Jatun Urinsaya confirmed that the December 11 and 19, 2010 resolutions:

> "were not discussed with the authorities of the four ayllus that appear in the resolutions"[202]
>
> "the decisions were taken by a handful of persons, and some authorities on behalf of the four ayllus"[203]
>
> "the rights of the Alonzo Ivañez province were ambushed and subject to violence by unknown persons from other jurisdictions "[204]

87. *Ayllus* Jatun Urinsaya, and Qullana also requested the provincial and municipal Government to take note of this situation. [205]

88. Similarly, in a communication dated January 7, 2011,[206] community members from *Ayllu* Qullana confirmed that FAOI-NP and CONAMAQ representatives had forced them to sign the December 19, 2010 resolution. Community members from

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200 **CWS-7**, Angulo Rebuttal Witness Statement ¶ 44; *See also*, **Exhibit C-226**, Memorándum de Santiago Angulo a Fernando Cáceres, *Informe correspondiente al mes de diciembre de 2010*, Jan. 5, 2011.

201 **Exhibit C-227**, Statement issued by the authorities of *ayllu* Jatun Urinsaya on December 27, 2010 rejecting CONAMAQ and FAOI's resolutions of December 11 and 19, 2010

202 **Exhibit C-227**, Statement issued by the authorities of *ayllu* Jatun Urinsaya on December 27, 2010 rejecting CONAMAQ and FAOI's resolutions of December 11 and 19, 2010 ("no fue[ron] conversados con las autoridades de los cuatro ayllus que se mencina[n] en [los] votos resolutivos")

203 **Exhibit C-227**, Statement issued by the authorities of *ayllu* Jatun Urinsaya on December 27, 2010 rejecting CONAMAQ and FAOI's resolutions of December 11 and 19, 2010 ("las decisiones tomaron [sic] unas cuantas personas y algunas autoridades a nombre de los cuatro ayylus")

204 **Exhibit C-227**, Statement issued by the authorities of *ayllu* Jatun Urinsaya on December 27, 2010 rejecting CONAMAQ and FAOI's resolutions of December 11 and 19, 2010. ("fue avasallado y violentado los derechos de la provincial Alonzo de Ivañez por personas desconocidas de otra jurisdicción")

205 **Exhibit C-227**, Statement issued by the authorities of *ayllu* Jatun Urinsaya on December 27, 2010 rejecting CONAMAQ and FAOI's resolutions of December 11 and 19, 2010.

206 **Exhibit C-228**, Statement issued by *Ayllu* Qullana, January 7, 2011.

Chiro Kasa and Kalachaca also confirmed that Mr. Feliciano Gabriel had forced community members and authorities to sign the resolutions and to act violently against the CMMK.[207]

89. On December 22, 2010, the Company decided to temporarily suspend CMMK's operations, notwithstanding the general support for the Project from the communities within the Area of Influence. This was necessary given the fact that the government took no measures to protect CMMK and prevent violent acts against the Company and its employees.[208]

90. As Bolivia observes,[209] on December 23, 2010, CMMK wrote to the Governor of Potosí, Felix Gonzales to inform him about the December 11 and 19, 2010 resolutions.[210] It was imperative that the Company informed the Governor about the situation, given the seriousness of the false accusations contained in the resolutions and to request the Governors' help before the situation could escalate.[211] The letter from CMMK clarified the following:

- CMMK's presence in the Project area was legal as it complied with all applicable laws and regulations, including the Mining Law and the Bolivian Constitution.

- Although a "consulta previa" was not regulated by law, CMMK had made a series of commitments and signed different agreements with the different ayllus located within the Area of Influence.

- CMMK complied in full with all environmental regulations and it was not causing environmental harm in the area. CMMK reminded the Governor that it had (i) obtained Environmental License DRNMA-CD-35/06 on September 5, 2006; and (ii) submitted to the Government of Potosí 3 Environmental Monitoring Programs in January 2009, August 2009, and September 2010.

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207 **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 45.

208 **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 13.

209 Respondent's Counter-Memorial at ¶¶ 114-115.

210 **Exhibit R-55**, Letter from Xavier Gonzales to Governor Felix Gonzales, Dec. 21, 2010.

211 **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 14.

- CMMK had conducted different workshops in the communities in 2008, 2009, and 2010.

- Regarding the alleged "abuse of authority, violation to the government's structure, breach of trust, intimidation, [redacted], interference and division," CMMK denied all such allegations. It also confirmed that CMMK and its employees were respectful of the laws, the national, departmental and local authorities, that they had not committed any crime, and reiterated that its mission and practice required each and every employee to respect the laws and traditions of the area.[212]

91. CMMK waited for over a month for any response from Governor Gonzales to its December 23, 2010 letter. He never answered. Thus, having not heard from Governor Gonzales,[213] CMMK submitted a similar communication to the Ministry of Mines and Metallurgy and to the Vice Minister of Social Movements and Civil Society of the Ministry of Mines, Cesar Navarro, on January 31, 2011.[214] On February 10, 2011,[215] Vice Minister Navarro forwarded to CMMK a "Legal Opinion" issued on February 3, 2011, by the Vice Ministry's Head of Strategic Alliance, Mr. Alberto García Sandoval. The Legal Opinion confirmed that:

- the resolutions adopted by CONAMAQ and FAOI-NP on December 11 and 19, 2010 was groundless, as CMMK was not affecting the environment;

- the "consulta previa" was still not regulated, and thus not required; and

- allegations of criminal conduct, had to be presented before the competent authorities.[216]

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212 **Exhibit R-55** Letter from Xavier Gonzales to Governor Felix Gonzales, Dec. 21, 2010.

213 **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 15.

214 **Exhibit C-229**, Letter from Xavier Gonzales to Vice Minister of Social Movements and Civil Society of the Ministry of Mines, received by the Ministry, Jan. 31, 2011.

215 **Exhibit C-230**, Official Communication from Vice Minister of Social Movements and Civil Society of the Ministry of Mines to CMMK dated February 10, 2011 and Legal Opinion" issued on February 3, 2011 by the Vice Ministry's Head of Strategic Alliance, Mr. Alberto García Sandoval.

216 *Id*.

92. Similarly, on March 16, 2011, the Ministry of Mines and Metallurgy, through Fernando Vasquez, General Director of Environment and Public Consultation, informed CMMK that the FAOI-NP and CONAMAQ resolutions of December 19, 2010 and January 11, 2011, were without merit. Specifically, the Ministry of Mines and Metallurgy attached to its official communication a memorandum dated February 11, 2011, signed by Mr. Oscar Iturri, Responsible for the Public Consultation and Citizen Participation Unit, which analyzed the content and allegations[217] of the December 19, 2010, and January 11, 2011 resolutions. The memorandum concluded that:

> Luego de hacer un análisis del contenido del memorial presentado por la Compañía Minera Malku Khota, S.A. […] se puede establecer que la mencionada empresa posee diez concesiones mineras, las cuales estarían cumpliendo con **todas** las normas legales y administrativas que regulan las actividades del rubro de la minería.[218]
>
> […]

93. Despite the above, Governor Gonzales failed to address CMMK's petition for help and support. In fact, Mr. Gonzalez took an active role in leading opposition to the Project. For example, on February 6, 2011, he signed a petition by the *Central Sindical de Trabajadores Originarios de la Primera Seccion de San Pedro de Buena Vista* to have CMMK indefinitely suspend its activities to avoid any contamination to the environment.[219] However, there was no sign or any evidence whatsoever that the environment was being contaminated by CMMK – because no contamination had

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[217] **Exhibit C-231**, Official Communication from the office of the Ministry of Mines and Metallurgy to CMMK dated March 16, 2011 and Report issued on February 11, 2011 by Mr. Oscar Iturri, Responsible of the Public Consultation and Citizen Participation Unit. *([…]según la Resolución de Cabildo; la empresa tendría presencia ilegal en la zona, habría vulnerado sus derechos colectivos, no haber hecho consulta previa; abuso de autoridad, contaminación del medio ambiente, desconocimiento de la estructura del gobierno propio, abuso de confianza, intimidación, amenazas, [redacted] […]*)

[218] **Exhibit C-231**, Official Communication from the office of the Ministry of Mines and Metallurgy to CMMK dated March 16, 2011 and Report issued on February 11, 2011 by Mr. Oscar Iturri, Responsible of the Public Consultation and Citizen Participation Unit. (added emphasis)

[219] **Exhibit R-54,** Resolution of the *Central Sindical de Trabajadores Originarios de la Primera Seccion de San Pedro de Buena Vista,* of February 6, 2011. Although the resolution is dated February 6, 2010, the date is incorrect, because the resolution indicates that it was issued during the "2011 administration" and because it is signed by Felix Gonzales, in his capacity of Governor of Potosi, who took office on June 1, 2010.

occurred. Quite the opposite. In fact, prior to February 6, 2011, CMMK had already submitted four Environmental Monitoring Programs to the Environmental Secretary of the Government of Potosí, and such programs had already been approved.[220] Nevertheless, Governor Gonzales elected to sign a petition based on groundless allegations of contamination, even though he knew full well that no contamination had occurred and that CMMK's Programs had been submitted to his Environmental Secretary.

2. Leaders from the xix *Ayllus* formed COTOA-6A to communicate their support of the project to the government

94. Bolivia attempts to cast COTOA-6A as some sort of illegal organization.[221] COTOA-6A was an initiative taken by the leaders of six *ayllu*s (Sulka Jilatikani, Tacahuani, Qullana, Samca, Jatun Urinsaya and Urinsaya) who were concerned that their interests were not being properly represented by CONAMAQ or FAOI-NP.[222] Accordingly, the six *ayllu*s elected to form a commission that would truly represent their interests with respect to the Malku Khota Project. They named it "*Coordinadora Territorial Originaria Autónoma de los Seis Ayllus*" or COTOA-6A.[223] As one would expect, CMMK worked with COTOA-6A representatives in an effort to improve overall acceptance for the Project as it enabled it to have better communications with the communities.[224]

95. On October 10, 2011, the six *ayllu*s informed President Evo Morales and the Minister of Mines of Bolivia, Mr. Jose Pimentel, of the formation of COTOA-6A and about their decision to allow CMMK to continue with exploration efforts as it would

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220 **Exhibit C-142**, Medmin Report September 2008; **Exhibit C-143**, Medmin Report February 2009; **Exhibit C-144**, Medmin Report September 2010; **Exhibit C-145**, Medmin Report December 2010.

221 Respondent's Counter-Memorial at ¶¶ 65, 124-26.

222 **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 38; **Exhibit C-232**, Minutes of the Meeting Between Community Member of the North of Potosi and the Director of Environment of Bolivia's Ministry of Mining and Metallurgy, Oct. 13, 2011. In that meeting with the *ayllus* concluded all the *ayllus* within the Area or Influence supported the Company and that it was only the CONAMAQ who was opposing the Project ("*En conclusion indico que todos los Ayllus se encontraban de acuerdo a excepcion del CONAMAQ*").

223 **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 38; *see also* **Exhibit C-170**, Malku Khota Community Relations Update, May 25, 2011 at 6.

224 **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 40.

benefit the economic development of the region.[225] COTOA-6A requested that President Morales and the Minister of Mines host a meeting on October 12, 2011. At all times, the Government recognized COTOA-6A as an organization that represented the indigenous communities who supported the Project.[226]

96. This is so because these types of organizations are not unprecedented in Bolivia's indigenous culture. In fact, the Government itself has negotiated and signed agreements with *ad hoc* committees formed by members of indigenous communities. For example, *Ponchos Rojos* is an organization of indigenous people, often labeled as radical. This organization lacks separate legal personality. Yet, the government recognizes it as a valid organization and has concluded deals with it.[227] COTOA-6A is far from a radical organization. To the contrary, it was a peaceful and voluntary organization that only sought to reach an agreement between the communities and the Company.

97. Contrary to Bolivia's allegations,[228] CMMK did not use COTOA-6A as a vehicle to establish a parallel agenda or to generate a false impression that only a few communities were opposing the Project. The actions taken, and resolutions adopted, by COTOA-6A in support of the Malku Khota Project were independent from CMMK.[229] As explained above, the six *ayllu*s surrounding the Project formed COTOA-6A as a reaction to the lack of true representation by FAOI-NP and CONAMAQ.

3. Bolivia chose to further its economic and political interests by expropriating the mining concessions

98. Once the Bolivian Government learned in early 2011 of the magnitude of the mineral deposits in the Malku Khota Project, it choose to "actively intervene within"[230] the Project. Further, the Bolivian Government failed to afford any significant

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[225] **Exhibit C-233**, Letter form COTOA-6A to President Evo Morales, Oct. 10, 2011; **Exhibit C-234**, Letter form COTOA-6A to the Ministry of Mines, Oct. 10, 2011.

[226] **Exhibit C-68,** Meetings of the Minutes of the meeting between COTOA and the Ministry of Mining and Metallurgy, Dated November 17, 2011.

[227] **Exhibit C-235**, *Ponchos Rojos firman acuerdo con el Gobierno*, LOS TIEMPOS, Sept. 14, 2012.

[228] Respondent's Counter-Memorial at ¶ 141.

[229] **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 41.

[230] *See*, Respondent's Counter-Memorial at ¶ 444 (explaining the "Bolivian State's decision not to consider COMIBOL as a simple manager of resources from mining royalties, but as a State Company that would actively intervene within the Bolivian mining sector").

protection to the Company during 2011 and 2012 when violence reached its zenith.[231] Instead, the Government saw this as an opportunity to actively pursue "a commercial interest for the State Company" COMIBOL.[232] While Bolivia may try to deny this, the actual facts demonstrate the truth:

- **March 31, 2011**, the Company made the results of the PEA Update publicly available.[233]

- **April 26, 2011**, the Government issued a resolution declaring an area entirely surrounding the Malku Khota Mining Concessions as "Immobilization Zone – Area of Interest COMIBOL."[234] As Bolivia concedes, the immobilization zone constituted a "demarcation of the area whose exploitation corresponds to COMIBOL for business purposes."[235] The resolution expressly states that one of the reasons for declaring the area surrounding the Malku Khota Mining Concessions as "Immobilization Zone – Area of Interest COMIBOL" was the Company's finding of the silver deposit in Malku Khota and that the area surrouning the Company's concessions was still subject to exploration.[236]

  The April 26, 2011 Resolution could not be more clear that it is only after the Company had invested millions of dollars and discovered the vast polymetallic deposit that the Government decided to seize the areas surrounding the Project, less than a month after the public release of the Company's Updated PEA: "*[e]n atención a sus instrucciones referente al hallazgo de un yacimiento de plata en el Norte de Potosí por la empresa Canadiense Mallku Khota, se ha efectuado la revisión de la planimetría de concesiones del mencionado sector, encontrando lo*

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231 Claimant hereby incorporates by reference the events explained in its Statement of Claim and Memorial, Sept. 24, 2014.

232 *See*, Respondent's Counter-Memorial at ¶ 445 (explaining that the "immobilization zone" has been the State's property since 2007 and that it "represent[s] a commercial interest for the State Company.").

233 **Exhibit C-41,** *Updated Malku Khota Study Doubles Production Levels and 1st 5 Year Cashflow Estimates*, South American Silver Corp. Press Release, Mar. 31, 2011.

234 **Exhibit R-119**, Resolution DAJ-0073/2011 issued by COMIBOL, Apr. 26, 2011.

235 Respondent's Counter-Memorial at ¶ 443. The resolution granted COMIBOL the faculty and attribution the exploitation and administration of the area surrounding the Malku Khota Project. **Exhibit R-119**, Resolución de COMIBOL (DAJ-0073/2011), Apr. 26, 2011.

236 *Id*.

siguiente: -- la Compañía Minera Mllaku SA. tiene varias concesiones mineras en la provincia Charcas y Alonzo de Ibañez del departamento de Potosí … En los alrededores existe zonas que corresponde a Reserva Fiscal" 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."[237]

- **June 19, 2011,** the Government proposed that the Company sign an joint venture agreement with the Bolivian Government. The Government warranted that signing an agreement of such nature, would avoid any conflict with the mining cooperatives that wanted to extract minerals from the Company's concessions.[238]

- **July 23, 2011**, the Government met with the communities and unequivocally requested that the Company abandon its full stake in the Project and partner with the Government.[239]

- **September 2011 to June 2012**, the Government participated in at least 7 meetings with the communities where it repeated the message: the Company will not be allowed to continue operating without giving Bolivia "a bigger carrot."[240]

- **May 15, 2012,** Vice-Minister of Mining Policy Wilka met with, among others, Jim Mallory and requested that the Company provide highly confidential and proprietary information unrelated to the social conflict. The information requested by Vice Minister Wilka included: comprehensive drilling information (length drilled and drilling angles), drill characteristics, detailed expenses and expense forcasts.[241]

- **July 7, 2012**, the Government signs a Memorandum of Agreement with the representatives of the opponents to the Company agreeing to nationalize the Mining Concessions

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237 **Exhibit R-119**, Resolución de COMIBOL (DAJ-0073/2011), Apr. 26, 2011.

238 **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 27.

239 **RWS-1**, Gonzales Bernal Witness Statement; **Exhibit R-32**, Acta de la reunion de socialización del Proyecto del 23 de julio de 2011.

240 Claimant's Memorial at Section II.C.

241 **CWS-3**, Mallory Witness Statement at ¶ 34.

and grant immunity for violent acts to activists who were employing pressure tactics against the Company.[242]

- **July 8, 2012**, President Evo Morales publicly announced that the Government would nationalize the Malku Khota Mining Project, and that he had had that intention since 2011.[243]

- **July 9, 2012**, the Minister of Communication, Amanda Davila, openly acknowledged at a press conference that the Government had sought to nationalize the Malku Khota Project since 2011.[244]

- **On July 10, 2012**, President Morales called a meeting with the *ayllus* leadership at the presidential palace to ratify the nationalization of the Company's Mining Concessions.[245]

- **August 1, 2012**, President Morales formally issued the Supreme Decree expropriating the Mining Concessions.[246]

99. It is not apparent how the foregoing actions on Bolivia's part demonstrate a "reconciliation approach[]."[247]

4. Instead of serving as a true mediator the government fueled opposition to the project

100. Bolivia points to no meaningful actions taken by it to resolve the tension in the area. Instead, Bolivia "lead a series of meetings"[248] that, in reality, sought to undermine support for the Project. For example:

a. July 23, 2011 meeting in Toro Toro

101. As South American Silver witnesses in this arbitration, Messrs. Jim Mallory and Xavier Gonzales, originally testified[249] and now reaffirm,[250]at this meeting

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242 **Exhibit C-16**, Memorandum of Agreement, July 7, 2012.

243 **Exhibit C-61**, *Morales confirma nacionalización de Malku Khota*, AGENCIA BOLIVIANA DE INFORMACION, July 8, 2012; **Exhibit C-62**, *Gobierno firma acuerdo con dirigentes de Malku Khota y los últimos tres rehenes son liberados*, LA RAZÓN, July 8, 2012.

244 **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.

245 **Exhibit C-17**, Agreement, July 10, 2012. See also **CWS-4**, Gonzales Witness Statement at 25.

246 **Exhibit C-4**, Supreme Decree No. 1308, Aug. 1, 2012.

247 *See*, Respondent's Counter-Memorial at ¶ 128.

248 *Id*.

with communities of the Area of Influence, the Governor of Potosí unequivocally requested that the Company abandon its full stake in the Project and partner with the Government.[251] Bolivia was candid in its Counter-Memorial admitting that Governor Gonzales did in fact request the Company to partner with the Government,[252] and submitted evidence, including Governor Gonzales' own testimony, to that effect.[253]

102. The minutes of the meeting prepared by the office of the Ministry of Mines of Potosí confirm that the Governor proposed to: (i) form an "*empresa mixta* for the Bolivian State to increase its level of participation"[254] in the Project after the Company "concluded the exploration phase;"[255] (ii) consult the Government before taking the Company public for it to analyze the possibility of becoming a shareholder ("*Antes de poner en la bolsa de valores consultar al gobierno para ver la posibilidad de ser accionista*");[256] and (iii) lay the ground for the government of Potosí to become a shareholder in the Company during the operation phase ("*Pondremos bases sólidas para la explotación del Proyecto Malku Khota participemos la gobernación como accionista en la explotación*").[257]

103. Such proposals made in the presence of the communities had the natural effect of undermining the Company.[258] These were the first of a long series of demands from the Government of Potosí requesting that the Company abandon its 100% ownership stake in the Project and partner with the Government of Potosí. It bears reminding that the Company was under absolutely no obligation to accept, even more so

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249 **CWS-3**, Mallory Witness Statement at ¶ 19; **CWS-4**, Gonzales Witness Statement at ¶ 10.

250 **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 45. **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 28

251 **RWS-1**, Gonzales Bernal Witness Statement at ¶ 33; **Exhibit R-32**, Acta de la reunión de socialización del proyecto del 23 de julio de 2011.

252 Respondent's Couner-Memorial at ¶ 135.

253 *Id*.

254 **Exhibit R-32**, Acta de la reunión de socialización del proyecto del 23 de julio de 2011 at 5.

255 *Id*.

256 **Exhibit R-32**, Acta de la reunión de socialización del proyecto del 23 de julio de 2011 at 5**.**

257 *Id*. at 9.

258 **CWS-4**, Gonzales Witness Statement at ¶ 10.

due to the fact that the Company would be bringing significant benefits to the communities and tax revenues to the State.

104. Bolivia and the Governor of Potosí claim that "[T]his was the only proposal that was partially accepted by the Calachaca and Malku Khota communities."[259] However, neither Jim Mallory nor Xavier Gonzales recall that Governor Gonzales made this "proposal" specifically to the Malku Khota or Kalachaca communities or that it was "partially accepted."[260] Further, it is nowhere to be found in the minutes of the meeting prepared by the office of the Ministry of Mines of Potosí.

b. *August 31, 2011 Meeting in Toro Toro*

105. This meeting was convened by Governor Gonzales at the close of the July 23, 2011 meeting. However, as Governor Gonzales admits, he failed to attend. [261] It is relevant to reiterate the content of this meeting, for two reasons.

106. *First*, in its Counter-Memorial Bolivia alleges that "SAS has not presented any agreement that demonstrates some sort of support from the indigenous communities prior to September 25, 2011."[262] The Technical Report that Mr. Arnulfo Gutierrez, Secretary of Mining of Potosí, wrote reporting on the outcome of the August 31, 2011 meeting, expressly provides that 5 of the 6 *ayllus* supported the Company. [263] Also, at this meeting Mr. Mallory presented the Company's community engagement plan and commitments, delivered a strategic framework for community relations, and confirmed that RCAs had been entered into between five of the six *ayllus* and the Company.[264]

107. *Second*, as Governor Gonzales observes in his witness statement, "Regional Government officials proposed a next meeting with smaller groups in order to conciliate." However, Governor Gonzales never convened that meeting. It was

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[259] **RWS-1**, Gonzales Bernal Witness Statement at ¶ 33.

[260] **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 45. **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 28

[261] **RWS-1**, Gonzales Bernal Witness Statement at ¶ 36.

[262] Respondent's Counter-Memorial at ¶ 106.

[263] **Exhibit R-63**, Informe de la segunda reunión de socialización del Proyecto Malku Khota del 6 de septiembre de 2011 at 2.

[264] **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 46, 47; **Exhibit R-63**, Informe de la segunda reunión de socialización del Proyecto Malku Khota del 6 de septiembre de 2011 at 3.

important for the Company to have the Government's support in convening a small meeting with the two communities opposing the Project, without any outsiders, to be able to engage in meaningful dialogue with the Malku Khota and Kalachaka communities.[265] This never happened.

c. September 25, 2011 in Malku Khota

108. Governor Gonzales once again failed to attend this meeting which was led by CONAMAQ and FAOI-NP, with the presence of the *Federacion Nacional de Cooperativas Mineras de Bolivia* ("FENCOMIN").[266] At this meeting, held in the Malku Khota community, Yerco Cervantes, Director of Mining and Development for the Government of Potosí, announced, in the presence of numerous outsiders, illegal miners and *cooperativists*, that the Government would support community actions to form a cooperative that would allow them to extract minerals from the Company's concessions.[267] This unexpected statement, on behalf of the Government, of support for the formation of a cooperative, provoked a heated exchange between the Company and Mr. Cervantes.

d. November 17, 2011 Meeting in Malku Khota

109. This meeting again confirmed that there was overwhelming support among the communities for the Project.[268] Importantly, Cesar Navarro, the Vice Minister of Coordination with Social Movements and Civil Society, sent Governor Gonzales a letter after the meeting directing him to coordinate with the Ministry of Mines and Metallurgy to convene a conciliatory meeting with the Malku Khota and Kalachaca community leaders.[269] Despite Oscar Iturri, of the Ministry of Mines, reiterating that the Government wanted a stake in the Project,[270] Mr. Mallory felt that after this meeting, "all

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265 **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 56.

266 **CWS-4**, Gonzales Witness Statement at ¶ 13; **CWS-3**, Mallory Witness Statement at ¶ 22; **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 52; **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 33.

267 Claimant's Memorial at ¶ 63; **CWS-4**, Gonzales Witness Statement at ¶ 13; **CWS-3**, Mallory Witness Statement at ¶ 22-23.

268 **Exhibit R-133**, Informe sobre el Cabildo del 21 de noviembre de 2011**.**

269 *Id*.

270 **CWS-3**, Mallory Witness Statement at ¶ 24; **CWS-4**, Gonzales Witness Statement at ¶ 14, **Exhibit C-68,** Minutes of Meeting with Council in Malku Khota, November 17, 2011.

levels of Government would work together to get the Malku Khota and Calachaca communities back to the table."[271]

e. December 15, 2011 Meeting

110. Governor Gonzales failed to convene the meeting with the Malku Khota and Kalachaca communities that had been requested by Vice Minister Navarro. Instead, an "informational meeting" convened by Freddy Beltran, the Vice Minister of Productive Development, took place in La Paz on December 15, 2011. Hilarion Bustos, the Vice Minister of Mining Policy, Oscar Iturri, and Maria Galarza, respectively Director of Public Consultation and Director of Environment at the Ministry of Mining and Metallurgy, presided over the meeting. As Mr. Mallory recalls, the highest authorities from *Ayllu* Sulka Jilatikani were present at this meeting and reminded the Ministry representatives that the overwhelming majority of the communities supported the Project and that it was the leaders from FAOI-NP and CONAMAQ, who were predominantly from outside the Project Area, who did not.[272] At the end of this meeting, Mr. Bustos told Mr. Gonzales that the Company should think about giving away 25 hectares of land located in its concessions to Andres Chajmi and his followers to allow them to finalize their plan of forming a cooperative.[273]

f. Other relevant meetings

111. The meetings below confirm the Government's strategy to seize control of the Malku Khota Project. Each of these meetings, in conjunction with Bolivia's inactions, aggravated tension in the area:

- **February 14, 2012**: The Governor of Potosí, Felix Gonzalez, discussed with local communities the possibility of exploiting the Malku Khota's "mega deposit" though a mixed company involving the communities, the Government and the Private sector.[274] Governor Gonzales

[271] **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 60.

[272] *Id*. ¶ 62.

[273] **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 42.

[274] **CWS-3**, Mallory Witness Statement at ¶ 25; Governor Gonzales admits that he held this meeting **RWS-1**, Gonzalez Bernal Witness Statement at ¶ 52.

expressly admits holding these meetings with local communities.[275]

- **February 16, 2012**: Governor Gonzales suggested to Jim Mallory that the Company should "hang out a bigger carrot" to the Malku Khota community.[276]

- **March 28, 2012:**[277] Governor Gonzales stated unequivocally before communities that supported the Project that he did not support the Company and suggested the formation of a mixed company with the Government to exploit the Malku Khota Project or to form a cooperative in the Malku Khota area to directly obtain the benefits from the mining activity.[278]

- **May 28, 2012:** Minister of Mines Mario Virreira, told community members that the Vice President of Bolivia, Alvaro García Linera, asked that they stop supporting the Malku Khota Project.[279]

112. As the Minister of Communication, Amanda Davila, openly acknowledged at a July 9, 2012 press conference, it was the Government's purpose to nationalize the Malku Khota Project over a year before the expropriation took place:

> The Bolivian Government had always had the intention to suspend the agreement with the company and revert this concession in favor of the State since over a year ago, what happened is that there has been no agreement between the community members and the indigenous leaders.[280]

113. In addition to its general inaction in the face of outbreaks of violence, Bolivia also failed to maintain order in the area and protect all involved from the different acts of vandalism committed by the Malku Khota and Kalachaca communities. Indeed, from the very first moment when the Company requested help, Bolivia failed to:

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[275] **RWS-1**, Gonzales Bernal Witness Statement at ¶ 53.

[276] Claimant's Memorial at ¶ 65; **CWS-3**, Mallory Witness Statement at ¶ 24.

[277] *See* **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 53 for clarification on the date of this meeting.

[278] Claimant's Memorial at ¶ 73; **CWS-5**, Witness Statement of Santiago Angulo, July 18, 2014 at 10 ("Angulo Witness Statement"); **CWS-7**, Angulo Rebuttal Witness Statement at 53, 54.

[279] Claimant's Memorial at ¶ 75; **CWS-5**, Angulo Witness Statement at 17; **Exhibit C-15**, Minutes of Meeting on the Malku Khota Case, May 28, 2012.

[280] **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.

- Appoint local, non-political, and permanent government liaisons to establish lines of communication between the communities, indigenous organizations, and CMMK's representatives.

- Take proactive or otherwise preventative measures to avoid violent conflicts in the area. Instead, Bolivia took reactionary steps that escalated an already tumultuous situation.

- Develop better infrastructure in the region surrounding the Malku Khota mine at the onset of the Project.

- Conduct a thorough investigation of criminal acts denounced instead of sending a raid of policemen to break into the homes of local community members in the middle of the night. The raid crystallized the opposition and increased the ill-will toward the Project, directly leading to the violence that followed.

114. The Government's desire to benefit economically from the Company's Project was reaffirmed in June 2015, when the Government confirmed in its 2015-2019 Sectoral Plan for Metallurgic Mining Development that Malku Khota is "a highly profitable deposit" and one of its "strategic" projects for the 2015-2019 period.[281]

D. BOLIVIA'S ALLEGATIONS OF WRONGDOING BY THE COMPANY ARE RECKLESSLY MADE AND DEMONSTRABLY FALSE

1. Bolivia's general allegations rely solely on resolutions by opponents to the project

115. The CONAMAQ and FAOI-NP resolutions[282] "adopted" between December 2010 and February 2011 are Bolivia's only purported support of its allegations of misconduct on the part of CMMK [redacted]. However, as described above: (i) FAOI-NP and CONAMAQ representatives forced community members from the *Ayllu*s of Sulka Jilatikani, Tacawani, Urinsaya and Samka to adopt these resolutions; (ii) these resolutions were pre-drafted without the communities having had an opportunity to review and comment on

[281] **Exhibit C-150**, Plan Sectoral de Desarrollo Minero Metalúrgico 2015 – 2019; **Exhibit C-151**, *En debate documento preliminar de Plan Sectorial de Desarrollo Minero Metalúrgico 2015 – 2019*, MINERIA NOTICIAS, June 5, 2015.

them; and (iii) there is no evidence to support the accusations contained in these resolutions.[283]

116. For example, the January 11, 2011 resolution was adopted in a meeting convened by the Mayor of San Pedro de Buena Vista.[284] This meeting took place in Malku Khota and was attended by representatives of FAOI-NP, CONAMAQ, the four *ayllus* (Sulka-Jilatikani, Tacahuani, Urinsaya and Samca), the Mayor and Counselors of San Pedro and Sacaca, the Environmental Director of the Ministry of Mining, representatives of the Department of Potosí and Xavier Gonzales from CMMK.[285] As Xavier Gonzales describes, Feliciano Gabriel, an authority of FAOI-NP took over the floor and gave little opportunity for other community members supporting CMMK or Xavier Gonzales to express themselves.[286] Without allowing the intervention of the people that spoke in favor of CMMK, Feliciano Gabriel pushed for the signing of a pre-drafted resolution against the company.[287]

117. As Xavier Gonzales recalls, before the meeting began, Mr. Gabriel, as *Mallku* of FAOI-NP, and other FAOI-NP leaders, physically punished Santiago Calle, *sub-alcalde* of Malku Khota, by whipping him for supporting the company after Santiago Calle destroyed an anti-CMMK banner that was displayed on the side of a building.[288] Other authorities present at the meeting that had previously showed support for the Company refrained from doing so after seeing how FAOI-NP leaders had physically punished Mr. Calle. [289]

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[282] **Exhibit R-46**, Voto resolutivo de los Ayllus Sullka Jilatikani, Takahuani, Urinsaya y Samka del 11 de diciembre de 2010; **Exhibit R-49**, Resolución de Cabildo de los Ayllus Sullka Jilatikani, Tacahuani, Urinsaya y Samka del 19 de diciembre de 2010; **Exhibit R-50**, Resolución de FAOI-NP del 11 de enero de 2011; **Exhibit R-51**, Resolución del Ayllu Sullka Jilatikani del 15 de febrero de 2011; **Exhibit R-52**, Resolución de FAOI-NP del 28 de febrero de 2011.

[283] *See supra* Section II.C.1

[284] **Exhibit R-50**, Resolución de FAOI-NP del 11 de enero de 2011; **Exhibit R-51**, Resolución del Ayllu Sullka Jilatikani del 15 de febrero de 2011; **Exhibit C-248**, Carta de Martín Condori Flores a los Ayllus Originarios de los Suyos Charka Qhara Qhara, Dec. 22, 2010.

[285] **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 18.

[286] *Id.* ¶ 18.

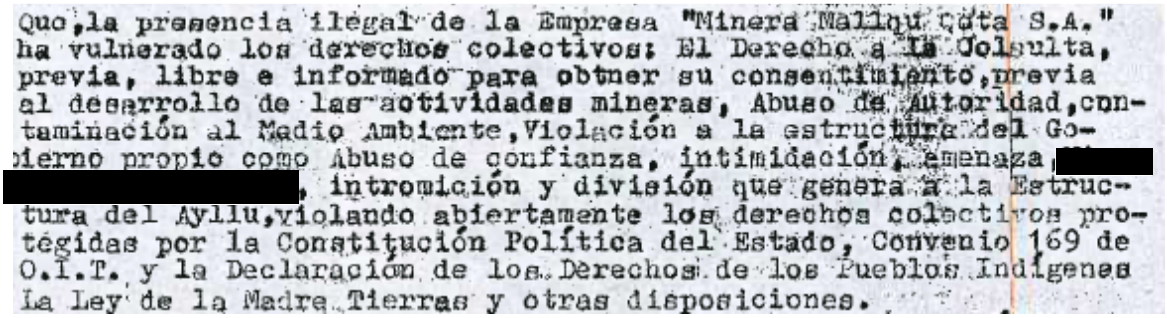
[287] *Id.* ¶ 18.

[288] *Id.* ¶ 17.

[289] *Id.* ¶ 18.

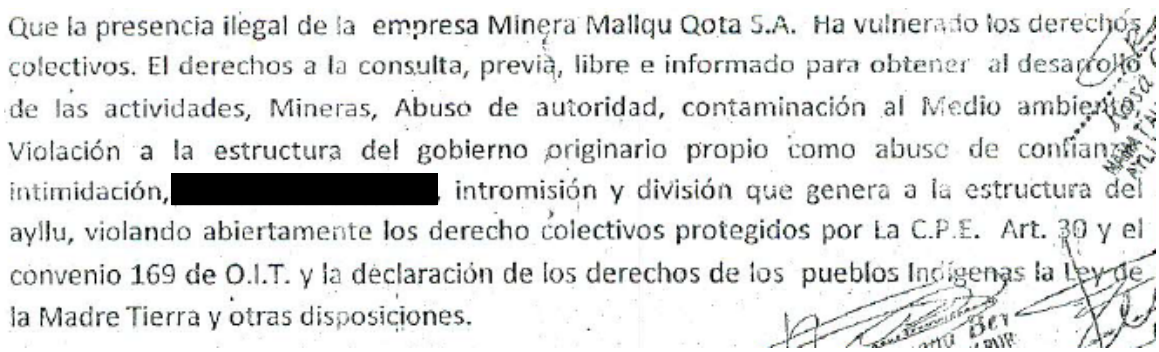
118. CMMK representatives did not attend the February 15 and 28, 2011 meetings at which the respective resolutions were adopted. However, on the basis of the text of these resolutions, it is evident that they were part of CONAMAQ's and FOAI-NP's campaign against CMMK. These two February resolutions contain identical text used in the January 11, 2011 resolution.

119. In any event, the accusations leveled in the FAOI-NP and CONAMAQ resolutions are utterly false, inflammatory and without foundation. The exact same text and accusations are repeated through all of the pre-drafted resolutions demonstrating their pretextual nature:



Que,la presencia ilegal de la Empresa "Minera Mallqu Qota S.A." ha vulnerado los derechos colectivos: El Derecho a la Consulta, previa, libre e informado para obtner su consentimiento,previa al desarrollo de las actividades mineras, Abuso de Autoridad,contaminación al Medio Ambiente,Violación a la estructura del Gobierno propio como Abuso de confianza, intimidación, amenaza [redacted], intromición y división que genera a la Estructura del Ayllu,violando abiertamente los derechos colectivos protegidas por la Constitución Política del Estado, Convenio 169 de O.I.T. y la Declaración de los Derechos de los Pueblos Indígenas La Ley de la Madre Tierras y otras disposiciones.

December 19, 2010 Resolution [X-49]



Que la presencia ilegal de la empresa Minera Mallqu Qota S.A. Ha vulnerado los derechos colectivos. El derechos a la consulta, previa, libre e informado para obtener al desarrollo de las actividades, Mineras, Abuso de autoridad, contaminación al Medio ambiente, Violación a la estructura del gobierno originario propio como abuso de confianza intimidación, [redacted] intromisión y división que genera a la estructura del ayllu, violando abiertamente los derecho colectivos protegidos por La C.P.E. Art. 30 y el convenio 169 de O.I.T. y la declaración de los derechos de los pueblos Indígenas la Ley de la Madre Tierra y otras disposiciones.

January 11, 2011 Resolution [R-50]

120. Even Bolivia confirmed that such allegations were groundless, through the communications of Vice Minister of Social Movements and Civil Society of the Ministry of Mines Cesar Navarro, on January 31, 2011, and of the Minister of Mines and Metallurgy on March 16, 2011.[290] Specifically, in an opinion dated February 3, 2011, the

[290] **Exhibit C-230**, Official Communication from Vice Minister of Social Movements and Civil Society of the Ministry of Mines to CMMK dated February 10, 2011 and Legal Opinion" issued on February 3, 2011 by the Vice Ministry's Head of Strategic Alliance, Mr. Alberto García Sandoval; and **Exhibit C-231**, Official Communication from the office of the Ministry of Mines and Metallurgy to CMMK dated March 16, 2011 and Report issued on February 11, 2011 by Mr. Oscar Iturri, Responsible of the Public Consultation and Citizen Participation Unit.

office of Cesar Navarro observed that the accusations described in the resolutions were unsupported.[291] It confirmed that the resolutions adopted by CONAMAQ and FAOI-NP on December 11 and 19, 2010, had no grounds; that the "*consulta previa*" was still not regulated, and thus not required; and that the allegations of criminal conduct had to be presented before the competent authorities.[292]

121. Likewise, the office of the Ministry of Mines and Metallurgy, after analyzing the allegations that FAOI-NP and CONAMQ had made in the December 19, 2010, and January 11, 2011 resolutions, expressly concluded, in a memorandum signed by the Ministry's Public Consultation and Citizen Participation Unit, that the Company complied with *all* the legal and administrative laws regulating mining activities. [293]

122. The fact that the allegations leveled against the Company in this arbitration are based upon documents that were found by the Government itself to be baseless demonstrates Bolivia's bad faith conduct in this proceeding. It shows that Bolivia will sink to the lowest levels to smear the Company and try to divert the Tribunal's attention from Bolivia's illegal expropriation of South American Silver's investment.

123. Further, the Minister of Mines, Mario Virreira acknowledged that the opposition to the Project was led by "some illegal miners"[294] and that "community members from mining areas oppose extraction operations denouncing environmental concerns and contamination to water, with the sole purpose of illegally exploiting mining

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[291] **Exhibit C-230**, Official Communication from Vice Minister of Social Movements and Civil Society of the Ministry of Mines to CMMK dated February 10, 2011 and Legal Opinion" issued on February 3, 2011 by the Vice Ministry's Head of Strategic Alliance, Mr. Alberto García Sandoval.

[292] *Id*.

[293] **Exhibit C-231**, Official Communication from the office of the Ministry of Mines and Metallurgy to CMMK dated March 16, 2011 and Report issued on February 11, 2011 by Mr. Oscar Iturri, Responsible of the Public Consultation and Citizen Participation Unit. *([…]según la Resolución de Cabildo; la empresa tendría presencia ilegal en la zona, habría vulnerado sus derechos colectivos, no haber hecho consulta previa; abuso de autoridad, contaminación del medio ambiente, desconocimiento de la estructura del gobierno propio, abuso de confianza, intimidación, amenazas,* [redacted] *[…]*)

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

deposits,"[295] referring to the Malku Khota Project as falling prey to such tactics.[296] Again, Bolivia seeks to divert the Tribunal's attention from the merits of this case by making serious and false accusations, originally made by CMMK's opponents who were, in the words of the Minister of Mines "illegal miners."[297]

124. Finally, but probably more importantly, if Bolivia believes the accusations contained in this resolutions to be true (which they are not), then it admittedly tolerated them. Indeed the Goverment never initiated any formal investigation in connection with the accusations described in the resolutions, even when the resolutions expressly requested *"**la intervención en la pronta solución de este problema** al Ministro de Minería, Gobernación de Potosí, Asambleistas Departamentales y Nacionales, para evitar mayores conflictos **o en su defecto serán responsables por las acciones y omisiones**."*[298] Either the Government was extremely negligent in taking any actions to investigate the accusations or it simply chose to ignore them because it knew that these resolutions lacked any truth and support. In any case, as the resolutions point out, the Government would be solely responsible for any conflicts deriving from the Government's omission to take these resolutions seriously.

2. [redacted]

125. [redacted]. Bolivia relies solely on the CONAMAQ and FAOI-NP resolutions, which are nearly five years old, which community members were forced to sign, and which are themselves vague and full of incorrect and baseless allegations. Bolivia provides no other support whatsoever. [redacted]

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[295] **Exhibit C-224**, *Comunarios frenan operaciones mineras para iniciar trabajo ilegal*, PAGINA SIETE, Apr. 1, 2014 (Unofficial English translation).

[296] *Id.*

[297] **Exhibit C-224**, *Comunarios frenan operaciones mineras para iniciar trabajo ilegal*, PAGINA SIETE, Apr. 1, 2014 (Unofficial English translation); **Exhibit C-223**, *Explotación ilegal de oro es el origen del conflicto en Mallku Khota*, LA PAZ, May 21, 2012; **Exhibit C-149**, *Policía evitará explotación ilegal en Mallku Khota*, LA PATRIA, Oct. 19, 2012; **Exhibit C-222**, *Denuncian contaminación ambiental en Mallku Khota*, LA RAZÓN, May 26, 2012.

[298] **Exhibit R-49**, Resolución de Cabildo de los Ayllus Sullka Jilatikani, Tacahuani, Urinsaya y Samka, Dec. 19, 2010.

[redacted]

299 **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 50.

300 **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 31; **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 51.

301 **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 31.

302 **Exhibit C-237**, Carta de Entendimiento entre Alberto Mamani Ramos, Sansusta Gabriel Chambi de Mendoza y Maximo Mendoza Chiri, Mar. 19, 2008.

[redacted].

3. Bolivia's environmental claims are utterly without foundation as the company's environmental plans were submitted to and approved by the government

130. Bolivia makes another unsubstantiated allegation by claiming that CMMK was responsible for environmental contamination.[303] However, Bolivia submits no credible evidence whatsoever to prove that CMMK's exploration activities affected the environment. In truth, they did not.[304] Bolivia once again bases its accusations on the same resolutions. It fails to mention, however, that technical inspectors from the Bolivian Ministry of Mining and Metallurgy conducted an inspection of the Project Area in May 2012, and confirmed that it was the illegal miners who had contaminated the land near the Project.[305] Moreover, Minister Virreira's public statements confirm that (i) Bolivia was aware that contamination in the Project Area was generated by illegal miners; and (ii) the Government appeared to tolerate illegal mining in the area of South American Silver's Mining Concessions. Thus, Bolivia's allegations that CMMK contaminated the Project area are both false and made with reckless disregard for the truth.

131. In addition, the government of Bolivia itself confirmed that the Malku Khota Project presented no risk to the environment. Indeed, CMMK secured Environmental License DRNMA-CD-35/06 on September 5, 2006 from the Government of Potosí. It also submitted to the Ministry of Environment or the *Secretaría de la Madre Tierra* of the Government of Potosí, from 2006 to 2012, over eight environmental and socioeconomic studies that Medmin had conducted, including compliance reports.[306]

132. Cesar Navarro, the Vice-Minister of Social Movements and Civil Society of the Ministry of Mining and Metallurgy, confirmed that the accusations made in the

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303 *See, e.g.*, Respondent's Counter-Memorial at ¶ 107.

304 **CWS-8**, Gonzales Rebuttal Witness Statement at ¶¶ 14, 22.

305 **Exhibit C-218**, *Denuncian intento de toma de CONAMAQ*, LOS TIEMPOS, July 5, 2012.

306 **Exhibit C-141**, Medmin Report October 2006; **Exhibit C-142**, Medmin Report September 2008; **Exhibit C-143**, Medmin Report February 2009; **Exhibit C-144**, Medmin Report September 2010; **Exhibit C-145**, Medmin Report December 2010; **Exhibit C-146**, Medmin Report I, January 2012; **Exhibit C-147**, Medmin Report II, January 2012; **Exhibit C148M**, Medmin Report April 2012.

resolutions had no support whatsoever, and that CMMK was not contaminating the environment in the region.[307]

4. The Company did not promote or instigate violence

133. The Company did not participate in or promote any violence, as alleged by Bolivia. Bolivia cites an alleged incident of threat and assault by community members that supported the company against another community member and his family.[308] This relates to an unfortunate incident that occurred on April 1, 2012 where community members from the *ayllu* Tacahuani held hostage Benedicto Gabriel, a community member who was attempting to set up a meeting in Malku Khota in support of the formation of an illegal cooperative. Mr. Mallory, who is aware of this incident, describes it as follows:

> Despite increased community support in the Project area, community members became angry at Benedicto Gabriel's efforts to promote the formation of an illegal cooperative and this incident resulted. Shortly thereafter on the same day, community members from Malku Khota took hostage Saul Reque, CMMK's Community Relations Coordinator, in response to Benedicto Gabriel's kidnapping.
>
> As soon as I became aware of the situation, I established a crisis control center in Sakani and our staff tried to establish contact with the authorities in Sacaca, Potosí and San Pedro to request their intervention and with community members in Tacahuani and Malku Khota to ask them to release Benedicto Gabriel and Saul Reque. Mr. Saul Reque was released first on the morning of April 2, 2012, and Mr. Gabriel soon afterwards. Again, these were community members acting on their own and were not part of any sort of intimidation strategy by the Company. No such strategy ever existed.[309]

134. The 20 hour incident ended when *Ayllu* Tacahuani agreed to release Mr. Gabriel. Police and prosecutors arrived on the scene only after the incident had ended.[310]

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[307] *See supra* ¶91*;* **Exhibit C-230**, Official Communication from Vice Minister of Social Movements and Civil Society of the Ministry of Mines to CMMK dated February 10, 2011 and Legal Opinion" issued on February 3, 2011 by the Vice Ministry's Head of Strategic Alliance, Mr. Alberto García Sandoval**.**

[308] **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 42.

[309] *Id*. ¶¶ 42, 43.

[310] **Exhibit C-194**, South American Silver Corp., Operations Report March – 2012.

5. The criminal actions commenced by cmmk to protect its employees and assets were made in good faith

135. Bolivia claims that the Company prosecuted its opponents by filing baseless criminal actions.[311] This is not true. In the case of Mr. Saul Reque, Mr. Xavier Gonzales, General Manager of CMMK, filed the criminal complaint at the request and on behalf of Mr. Reque on April 11, 2012. The action was filed against the individuals that he had identified as his captors.[312] As Mr. Xavier Gonzales testifies, he felt that he had a duty to protect CMMK employees who were the victims of crime, in light of the lack of protection by the authorities.[313] Bolivia does not dispute the fact that Mr. Reque was kidnapped. The fact that the criminal investigation did not proceed, because the Prosecutor's office could not find any eyewitness to support Mr. Reque's declaration, has nothing to do with the fact that Mr. Reque had the right to file a criminal complaint against his abductors.

6. CMMK did not influence the criminal action filed against Cancio Rojas by community members.

136. A similar situation happened with Mr. Cancio Rojas's arrest. Bolivia alleges that CMMK's misinformation provoked a complaint against Cancio Rojas that led to his arrest. CMMK did not engage in any kind of misinformation. The violence in Malku Khota on May 5, 2012, and in Acasio on May 19, 2012, led by community members and in which Mr. Rojas participated, was covered by the media. Bolivia also acknowledges these incidents in its memorial. The resolution adopted by *ayllu* COTOA-6A leaders on May 19, 2012, also confirmed Cancio Rojas's involvement in the events of Acasio, which resulted in extreme physical violence.[314] In addition, Santiago Calle, an authority from the Malku Khota community, reported that a "group led by Mr. Cancio Rojas destroyed and ransacked CMMK's equipment."[315]

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311 Respondent's Counter-Memorial, Section 3.5

312 **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 47.

313 *Id*.

314 **Exhibit C-47**, Vote by the *ayllu* Community of Jatun Urinsaya, May 19, 2012.

315 **Exhibit C-238**, *Una empresa minera denuncia saqueo y destrucción de equipos*, OPINION.COM.BO, 5 de mayo de 2012.

137. Cancio Rojas's arrest happened a few minutes after Minister of Mining and Metallurgy Mario Virreira stated at a press conference that the Ministry requested the Prosecutor's Office of Potosí "to pursue all required actions to investigate the aggression against the local authorities" that took place in Acasio on May 18, 2012.[316] In fact, Minister Virreira also declared that CMMK "had the right to request that the State [Bolivia] guarantee legal security and that all laws are followed."[317]

138. By May 18, 2012, it was clear that there were confrontations between the communities that supported the Project and those that opposed it. CMMK was not part of any of these confrontations. Rather, it was in the middle of them. Had the Government of Bolivia intervened to "guarantee legal security,"[318] by protecting South American Silver's investment as well as its rights under the Concessions, these confrontations would have been avoided.

7. Both the May 28, 2012 meeting in La Paz and the June 8, 2012 Gran Cabildo in Malku Khota demonstrated overwhelming support for the Project

139. Most of the communities surrounding the Project supported it. Bolivia attempts to undermine the communities' support, which was visible at the May 28, 2012 meeting with Minister of Mines Mario Virreira, and at the June 8, 2012 *gran cabildo*, because opponents were not present at those meetings, as they were marching towards La Paz. However, Bolivia ignores the fact that, at that time, 42 out of 44 communities within the Project area supported the Project.[319] It is irrelevant whether the resolutions at the May 28, 2012 and June 8, 2012 gatherings were adopted with or without opposition being present, since they still illustrate the significant support that the Project enjoyed. In particular, the June 8, 2012 *gran cabildo* was attended by 800 families from 42 communities surrounding the Project.[320] As Minister Virreira acknowledged, the people that marched towards La Paz that were demanding the expulsion of the CMMK were

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316 **Exhibit C-239**, *Fiscalía investigará conflicto en Mallku Khota*, LA RAZÓN, 22 de mayo de 2012.

317 **Exhibit C-240**, *Mallku Khota: Silver tiene derechos hasta el 2015*, OBIE May 22, 2012.

318 *Id*.

319 Malku Khota on May 5 and in Acasio in May 19, 2012.

320 Claimant's Memorial at ¶ 77; **CWS-4**, Gonzales Witness Statement ¶ 22. *See also* **Exhibit C-49**, Resolution Cabildo, June 8, 2012;

members from *ayllus* outside the Project area that did not represent the interests of the *ayllus* and communities within the Area of Influence.[321]

8. The kidnapping of Agustin Caceres and Fernando Fernandez was unlawful and the government granted immunity to the kidnapers

140. Bolivia fails to address the fact that on July 7, 2012, the Government signed an official Memorandum of Agreement confirming the kidnapping of Agustin Cardenas and Francisco Fernandez and agreeing to subject them to the indigenous justice system.[322] It should be noted that they were only trying to gather information and take photographs of the environmental contamination resulting from the illegal mining activities that were taking place on the Company's legally acquired concessions.[323] Bolivia tries again to divert the Tribunal's attention by alleging that, on June 28, 2012, Messrs. Cardenas and Fernandez infiltrated a meeting of the Malku Khota Community dressed in indigenous clothing.[324] Bolivia also implies that they somehow deserved to be kidnapped and tortured.[325] However, the truth is that Bolivia not only failed to provide any legal protection to CMMK or its employees, but it went so far as to grant immunity to the kidnappers themselves. As Messrs. Cardenas and Fernandez described, they were kidnapped and held for eleven days under inhumane conditions and subjected to continuous threats and abuse.[326] On the eleventh day, they were brought to the Chiro Khasa Square to be tried for their actions. This all occurred with the Government's consent and support.[327]

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321 **Exhibit R-85** Artículo de prensa, Boris Bernal Mansilla, *La marcha de Mallku Khota llega este jueves a La Paz y no se irán hasta que atiendan sus demandas* del 7 de junio de 2012.

322 **Exhbit C-16,** Memorandum of Agreement, July 7, 2012, Arts. 3.1, 3.2 and 3.3. *See also*, Clamants Memorial ¶85, 86

323 **Exhibit C-241**, Memorándum de Agustín Cárdenas y Fernando Fernández a Fernando Cáceres, *Informe Incidente del 28 de junio 2012*, July 25, 2012.

324 Respondent's Counter-Memorial at ¶ 318.

325 *Id*. ¶ 168.

326 **Exhibit C-241**, Memorándum de Agustín Cárdenas y Fernando Fernández a Fernando Cáceres, *Informe Incidente del 28 de junio 2012*, July 25, 2012.

327 **Exhibit C-241**, Memorándum de Agustín Cárdenas y Fernando Fernández a Fernando Cáceres, *Informe Incidente del 28 de junio 2012*, July 25, 2012.

E. THE UNCONTROVERTED TRUTH: BOLIVIA EXPROPRIATED THE PROJECT IN BREACH OF ITS TREATY OBLIGATIONS

141. "The Bolivian Government had always had the intention to suspend the agreement with the company and revert this concession in favor of the State."[328] It is uncontroverted that Bolivia expropriated South American Silver's investment in Bolivia. Bolivia does not dispute this fact. Instead, Bolivia tries to cast blame on the Company in an attempt to hide the fact that Bolivia failed to protect South American Silver's investment, and that it illegally expropriated South American Silver's investment without compensation.

1. Bolivia does not dispute that it never paid compensation to South American Silver

142. Bolivia does not dispute that it never offered or paid any compensation to South American Silver for the expropriation of South American Silver's investment in Bolivia. Nor does Bolivia dispute the fact that it instructed valuation companies, and its valuation experts in this case, to conduct the valuation based only on sums invested by CMMK, subject to COMIBOL's guidance.

143. Any delay in Bolivia's valuation process can only be attributed to Bolivia. As Bolivia acknowledges in its Counter-Memorial, after having to reiterate its original invitation of December 2012 to prospective valuation companies on March 20, 2014, and having to annul that second invitation on March 31, 2014, due to its own "technical mistakes," it finally concluded the process of retaining a valuation company on May 8, 2014.[329] That company issued its report (based on sums invested by CMMK, i.e., contrary to the Treaty) on June 27, 2014.[330] This lengthy process was not only in breach of the Treaty, but also contrary to Supreme Decree No. 1308 of August 1, 2012, which mandated COMIBOL to complete the valuation within a period not exceeding 120 days.

144. It is not true, as Bolivia claims, that it invited South American Silver to a meeting to discuss the valuation of South American Silver's investment.[331] Nor is it true

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[328] **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.

[329] Respondent's Counter-Memorial at ¶ 183.

[330] *Id*. ¶ 184.

[331] Respondent's Counter-Memorial at ¶ 180.

that South American Silver did not respond to Bolivia's "invitation."[332] COMIBOL only invited South American Silver, on August 27, 2012, to a meeting scheduled for the day after (August 28, 2012), in order to "hand over all relevant documents related to the development of the activities" of the Malku Khota mining deposit.[333] Unable to attend this meeting on such short notice, South American Silver subsequently advised COMIBOL that it would be pleased to meet with COMIBOL at a mutually acceptable date.[334] COMIBOL never responded to South American Silver's proposal.

2. New facts demonstrate Bolivia uses sham allegations to suggest that nationalization was necessary

145. New facts developed since South American Silver's Statement of Claim and Memorial confirm Bolivia's economic interest in the Project. It is now confirmed that in August 2012, only a few days after the Supreme Decree was issued, COMIBOL was seeking another company to partner with to explore and develop the Project. Bolivia failed to produce the documents that South American Silver requested regarding its efforts to find partners to develop the Malku Khota Mineral resource, despite the fact that press articles revealed the existence of these meetings, including official trips to China undertaken by Bolivian officials for this express purpose.[335] It is simply not credible, as Bolivia asserted during the document production phase of this arbitration, that no documents exist related to these meetings. These meetings could not have taken place without any advance communications regarding the subject of the meetings, the purpose of the meetings, the topics discussed, the identities of the attendees, etc. Based on the sheer implausibility of Bolivia's claim that no documents related to its efforts exist, South American Silver requests the tribunal to draw an adverse inference against Bolivia on this issue. The Tribunal should infer that such documents do, in fact, exist and that they contain information demonstrating Bolivia's desire to reap significant economic benefits from the Malku Khota Project, based on the Company's discovery of one of the largest silver, indium, and gallium deposits in the world.

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[332] *Id*.

[333] **Exhibit C-20,** Letter from COMIBOL addressed to South American Silver, Aug. 24, 2012.

[334] **Exhibit C-21,** Letter from South American Silver to COMIBOL, Sept. 4, 2012.

[335] **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.

146. Bolivia's desire to profit from South American Silver's investment is further confirmed by recent publications, as well as Bolivia's efforts to market the Project to investors. In its 2015-2019 Sectorial Plan for Metallurgic Mining Development,[336] Bolivia expressly acknowledges that the Project's nationalization was part of its "Process of Change" framework to nationalize mining companies. The Mining Development Plan states the following:

> Within the framework of the "Process of Change," the State initiated a gradual restoration of the State's role in the sector by reviving COMIBOL's part in production, applying initiatives to nationalize mining and metallurgic companies, reactivating abandoned projects or pushing forward with newly created projects:
>
> […]
>
> - The upturn of a productive COMIBOL has taken place through the nationalizations of Huanuni (2006), Vinto (2007), the antimony smelter at Vinto (2010) and Colquiri (2012), Mallku Khota (2012) […][337]

147. To further this goal, Bolivia recently decided to start with the execution of its plan to develop the Project. On October 2, 2015, Bolivia's Geological Mineral Service (*Servicio Geologico Minero - SERGEOMIN*) started the perforation of four holes in Malku Khota to verify the mineral reserves.[338] And very recently, on October 27, 2015, President Evo Morales and Minister of Mining and Metallurgy Cesar Navarro travelled to New York City to hold an investment symposium with the Financial Times before at least 130 investors. Despite the fact that South American Silver is seeking restitution in this arbitration, Bolivia actively marketed the Malku Khota Project to the investment community at the event.[339]

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336 **Exhibit C-150**, Plan Sectoral de Desarollo Minero Metalúrgico 2015-2019.

337 *Id*. at 157.

338 **Exhibit C-249**, *Segeomin iniciará perforación exploratoria en Mallku Khota*, BOLIVIAMINERA.BLOGSPOT.COM, Oct. 5, 2015.

339 **Exhibit C-152**, *Navarro busca atraer inversiones para la minería en Bolivia, Ministerio de Mineria y Metalurgia*, Oct.26, 2015. **Exhibit C-153**, *Gobierno ofertó mina Mallku Khota en Nueva York*, Erbol Digital, Oct. 28, 2015.

148. Finally, only three days ago, on November 27, 2015, at the "International Summint of Bolivia's Legal Defense", Bolivia's Attorney General, Hector Arce, confirmed that Bolivia's nationalization strategy had been a great economic success. Mr. Arce made the following statement:

> En Bolivia hemos concluido la etapa de las grandes nacionalizaciones con un éxito extraordinario, hemos desarrollado con mucho éxito y responsabilidad. Bolivia es el país que más ha nacionalizado, que más beneficios ha recibido de la nacionalización, somos uno de los países íconos en el crecimiento latinoamericano[340]

149. The Malku Khota Project was, without doubt part of Bolivia's nationalization starategy to further its economic interests, and not, as Bolivia attempts to portray in this arbitration, an action it was required to undertake to protect communities' rights.

III. THE TRIBUNAL HAS JURISDICTION OVER CLAIMANT'S CLAIMS

150. In its first jurisdictional argument, Bolivia would have this Tribunal dismiss the arbitration without hearing South American Silver's claims because the Treaty's dispute settlement provision, Article 8(1), purportedly does not apply to an investment's *indirect* owner.[341] It further alleges that even if Article 8(1) of the Treaty were to apply to indirect owners, only the investment's *ultimate* owner may benefit from the Treaty's protections.[342] Bolivia makes these arguments despite having agreed that South American Silver is a protected "company" under the Treaty that owns qualifying "investments" in Bolivia, in the form of its 100 percent shareholding in CMMK and the ten Mining Concessions.[343]

151. Both of Bolivia's submissions are erroneous. As discussed in the succeeding sections, Article 8(1) of the Treaty clearly applies to the indirect owners of qualifying investments (**A**). The Treaty protects such indirect owners even if they are not the ultimate owners of the investments (**B**). These are not novel propositions – they are

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340 **Exhibit C-250**, *Procurador defiende nacionalización*, LOS TIEMPOS, Nov. 27, 2015.

341 Respondent's Counter-Memorial at ¶¶ 231 *et seq.*

342 Respondent's Counter-Memorial at ¶¶ 242 *et seq.*

343 *See* Claimant's Memorial at ¶¶ 107 *et seq.*; ¶¶ 109 *et seq.*; and Respondent's Counter-Memorial at ¶ 224.

firmly established principles of international investment law, and to hold otherwise would amount to an unwarranted and dangerous upending of investor protections currently relied upon by untold numbers of investors in Bolivia and across the globe. The Tribunal should therefore reject this jurisdictional objection summarily.

A. ARTICLE 8(1) OF THE TREATY APPLIES TO THE INDIRECT OWNERS OF QUALIFYING INVESTMENTS

152. Article 8(1) of the Treaty (entitled "Settlement of Disputes between an Investor and a Host State") provides:

> Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an **investment of the former** which have not been legally and amicably settled shall after a period of six months from written notification of a claim be submitted to international arbitration if either party to the dispute so wishes.[344]

153. According to Bolivia, Article 8(1) – in particular the phrase "investment of the former" – means that only a *direct* owner of a qualifying investment may submit its dispute to international arbitration.[345] Bolivia bases its contention on a deeply outcome-oriented use of the interpretative principles found in the Vienna Convention on the Law of Treaties ("Vienna Convention"),[346] irrelevant non-investment case law,[347] and misrepresentations of the most material arbitral awards, including *Rurelec v. Bolivia, Ron Fuchs v. Georgia,* and *Siemens v. Argentina*.[348] South American Silver submits that Article 8(1) of the Treaty clearly applies to both the direct and indirect owners of a qualifying investment, for a number of related reasons.

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344 **Exhibit C-1**, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government and the Government of the Republic of Bolivia for the Promotion and Protection of Investments, signed on May 24, 1988 and entered into force on February 16, 1990, Article 8(1) ("Treaty").

345 Respondent's Counter-Memorial at ¶¶ 231 *et seq.*

346 Respondent's Counter-Memorial at ¶¶ 228, 232-235.

347 Respondent's Counter-Memorial at ¶ 232.

348 Respondent's Counter-Memorial at ¶¶ 237-240.

1. Bolivia incorrectly applies the Vienna Convention's principles of interpretation

154. A treaty is presumed to be the authentic expression of the parties' intentions. The starting point of every exercise of treaty interpretation is therefore an elucidation of the real meaning of its terms.[349] This inquiry involves a holistic view of the treaty: its text and its context, as well as its object and purpose, considered *together*,[350] as encapsulated authoritatively in Article 31(1) of the Vienna Convention: "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[351] Article 31(2) clarifies that the "context", for the purpose of the interpretation of a treaty, comprises *inter alia* the text, including its preamble and annexes."[352]

155. The foregoing interpretative methodology is in no way controversial: the International Court of Justice has observed that Article 31 contains a general rule of interpretation of treaties that reflects customary international law,[353] and investment tribunals have endorsed this holistic method of treaty interpretation repeatedly.[354] For Bolivia, however, the question of which entities are entitled to treaty protection for covered "investments" involves an inquiry into the text of Article 8(1) alone, in accordance with dictionary meanings, and no more.[355] Bolivia argues, inaccurately, that

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349 *See* **CLA-95**, International Law Commission, Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission, 1966*, Vol. II, 187 at 220 (¶ (11)).

350 **CLA-95**, International Law Commission, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission, 1966*, Vol. II, 187 at 219-220 (¶ (8)): "All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation."

351 **CLA-11**, Vienna Convention on the Law of Treaties, May 23, 1969, Article 31(1) ("Vienna Convention").

352 **CLA-11**, Vienna Convention, Article 31(2).

353 See, e.g., **CLA-96**, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, I.C.J. Reports 2007 at 43, 109-110 (¶ 160).

354 See, e.g., **CLA-97**, *Poštová Banka, A.S. and Istrokapital SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, Apr. 9, 2015, ¶¶ 282-283; **CLA-98**, *Hrvatska Elektroprivreda D.D. v. The Republic of Slovenia*, ICSID Case No. ARB/05/24, Decision on the Treaty Interpretation Issue, June 12, 2009, ¶ 164; and **CLA-99**, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, Oct. 21, 2005 at ¶ 91.

355 Respondent's Counter-Memorial at ¶¶ 228, 232-233.

Article 8(1) applies only "when there is a direct ownership link between the investor and the investment,"[356] relying exclusively upon dictionaries to inform its reading of the phrase "investment of the former".[357] But, as noted in *Aguas del Tunari v. Bolivia*, "the meaning of a word or phrase is not solely a matter of dictionaries and linguistics. … Rather, the interpretation of a word or phrase involves a complex task of considering the ordinary meaning of a word or phrase in the context in which that word or phrase is found and in light of the object and purpose of the document."[358] Bolivia has clearly not undertaken this more "complex task."

156. South American Silver submits that the proper interpretation of Article 8.1, taking full account of the different elements set forth in Article 31 of the Vienna Convention – text, context, and object and purpose – is that direct as well as indirect owners of a qualifying investment are covered.

a. The ordinary meaning of the terms "investment of the former" refers to direct and indirect owners of qualifying investments

157. Contrary to Bolivia's premise, direct "ownership" by a claimant of the covered investment is not the only ordinary meaning of the phrase "investment **of** the former" in Article 8(1) of the Treaty.[359] The phrase may equally be indicative of a contributory relationship between the claimant and the investment. As discussed cogently by the *Standard Chartered v. Tanzania* tribunal, the word "of" is a word capable of different meanings, depending on the context*:*

> The Tribunal is mindful that with respect to the preposition "of" different meanings can be adduced. Some uses indicate a contributory relationship (as in the "the plays of Shakespeare" or "the paintings of Rembrandt"), while others define ownership (as in "the house of Shakespeare" or "the hat of Rembrandt").[360]

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356 Respondent's Counter-Memorial at ¶ 231.

357 *Id.* ¶ 228.

358 **CLA-99**, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, Oct. 21, 2005 at ¶ 91 (emphasis added).

359 Respondent's Counter-Memorial at ¶ 228.

360 **RLA-60**, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, Nov. 2, 2012, ¶ 216.

158. Thus, Bolivia's contention that "the interpretation of the preposition 'of' as per its ordinary meaning" leads to the conclusion that the "Tribunal only has jurisdiction when there is a direct ownership link between the investor and the investment"[361] is pure self-interested assertion, and is incorrect. Without further qualifying language, the phrase "investment of the former" in Article 8(1) can be read as a purely textual matter as requiring that the ownership link be either direct *or* indirect, as Bolivia itself acknowledges.[362]

159. Ascertaining the "ordinary meaning" of "of" is not novel, and the weight of case law falls squarely against Bolivia. In *CEMEX v. Venezuela*, the tribunal interpreted the preposition "of" in the same context as the present case and held that the use of the term did not imply that investments needed to be directly owned by investors:

> The Tribunal further notes that, when the BIT mentions investments "of" nationals of the other Contracting Party, it means that those investments must belong to such nationals in order to be covered by the Treaty. <u>But this does not imply that they must be "directly" owned by those nationals</u>.[363]

160. The relevant bilateral investment treaty in that case was between The Netherlands and Venezuela, and provided, in very similar language to Article 8(1) of the Treaty, that "[d]isputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter" could be submitted to arbitration.[364] Venezuela argued that the claimants, whose investment in Venezuela was held through a company incorporated in the Cayman Islands,[365] did not have stan7ding under the treaty because there was no express reference therein to direct or indirect ownership.[366] The *CEMEX*

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361 Respondent's Counter-Memorial at ¶¶ 231-232.

362 Respondent's Counter-Memorial at ¶ 229.

363 **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 at ¶ 157 (emphasis added).

364 **CLA-101** Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela, Oct. 22, 1991, Article 9(1).

365 **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 at ¶ 144.

366 *Id.* ¶ 146.

tribunal rejected Venezuela's jurisdictional objection on the basis of the analysis above.[367]

161. Similarly, the *Rurelec v. Bolivia* tribunal was tasked with interpreting the UK-Bolivia BIT, the same treaty as the one before this Tribunal. The *Rurelec* tribunal affirmed the *CEMEX* tribunal's interpretation of the preposition "of."[368] It found that, under the Treaty, it had jurisdiction over Rurelec's indirect investments in Bolivia,[369] stating in the dispositif "that the Tribunal has jurisdiction over the claims made under the UK-Bolivia BIT in respect of the indirect investments of Rurelec".[370]

162. All told, the ordinary meaning of the phrase "investment of the former" in Article 8(1) of the Treaty is that the investment in question may be owned either directly or indirectly by the investor, including South American Silver. There is simply no textual reason for the restrictive interpretation Bolivia would have the Tribunal adopt.

b. The context of the Treaty as well as its object and purpose all demonstrate that Article 8(1) applies equally to direct and indirect owners of qualifying investments

163. An examination of the context in which the phrase "investment of the former" in Article 8(1) of the Treaty is used, as well as the Treaty's object and purpose, support South American Silver's view that Article 8(1) applies equally to direct and indirect owners of qualifying investments.

164. Bolivia alleges that any analysis of the term "investment" is irrelevant in determining which entities are covered by the protections of the Treaty.[371] However, following Article 31(2) of the Vienna Convention, the text of the entire Treaty, not only Article 8(1), is highly relevant, as it forms part of the context informing the proper interpretation of the phrase "investment of the former".[372] Placing Article 8(1) in context, the definition of "investment" found in Article 1(a) of the Treaty is particularly

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367 *Id.* ¶ 160(a).

368 **CLA-1**, *Guaracachi America, Inc. et al. v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, Jan. 31, 2014 at ¶ 356.

369 *Id.* ¶ 365.

370 **CLA-1**, *Guaracachi America, Inc. et al. v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, Jan. 31, 2014, Ch. XII(c).

371 Respondent's Counter-Memorial at ¶¶ 237, 240.

372 Respondent's Counter-Memorial at ¶ 252.

instructive: ""Investment" means every kind of asset which is capable of producing returns and in particular, though not exclusively, includes: … (ii) shares in and stock and debentures of a company and any other form of participation in a company."[373] Thus, "investments" under the Treaty are very broadly conceived, and necessarily include, by virtue of the phrases "every kind of asset" and "any other form of participation in a company," indirect investments of the kind South American Silver made in Bolivia.

165. South American Silver's position finds direct and unequivocal support in the *Rurelec* case, which looked into both the text *and* context of "investment" in Article 1(a) of the Treaty, and concluded that the term included indirect investments.[374] Though the *Rurelec* tribunal's interpretation of Article 1(a) does not bind this Tribunal,[375] it certainly carries persuasive weight,[376] particularly as it interpreted the very same treaty that is currently at issue here, the UK-Bolivia BIT.

166. The *Rurelec* tribunal's interpretation of Article 1(a) of the Treaty is all the more persuasive because it is based on consistent case law. In *Siemens v. Argentina*, the tribunal held that the definition of "investment" in the underlying bilateral investment treaty, which described the category widely as "every kind of asset," but did not explicitly refer to direct or indirect investments, could not be interpreted as excluding indirect investments.[377] Similarly, the tribunals in *Kardassopoulos v. Georgia*,[378] *Tza Yap Shum v. Peru*,[379] *Venezuela Holdings B.V. v. Venezuela*,[380] and *CEMEX v.*

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373 **Exhibit C-1**, Treaty, Article 1(a).

374 **CLA-1**, *Guaracachi America, Inc. et al. v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, Jan. 31, 2014, ¶¶ 352-353.

375 Respondent's Counter-Memorial at ¶ 239.

376 In fact, arbitral awards are "supplementary means of interpretation," in accordance with Article 32 of the Vienna Convention. *See, e.g.*, **CLA-102**, *Chevron Corporation et al. v. Republic of Ecuador*, PCA Case No. AA 277, UNCITRAL, Interim Award, Dec. 1, 2008 at ¶ 121; and **CLA-103**, *Canadian Cattlemen v. United States of America*, UNCITRAL, Award on Jurisdiction, Jan. 28, 2008 at ¶ 50.

377 **RLA-55**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, Aug. 3, 2004 at ¶ 137.

378 **RLA-54**, *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, July 6, 2007 at ¶¶ 123-124.

379 **CLA-104**, *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction, June 19, 2009 at ¶¶ 105-111.

380 **CLA-105**, *Venezuela Holdings B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, June 10, 2010 at ¶¶ 162-166.

Venezuela[381] all endorsed the *Siemens* tribunal's reasoning and held that the respective treaties' broad definition of "investments" included indirect investments.[382]

167. As it is settled law that the term "investment" in Article 1(a) of the Treaty encompasses indirect investments, the only sensible and consistent interpretation of the phrase "investment of the former" in Article 8(1) is that it includes the "*indirect* investment of the former." As the *CEMEX* tribunal noted, "[b]y definition, an indirect investment is an investment made by an indirect investor. As the BIT covers indirect investments, it necessarily entitles indirect investors to assert claims for alleged violations of the Treaty concerning the investments that they indirectly own."[383] Thus, on the basis of the definition of "investment" at Article 1(a), it is clear that Article 8(1) applies equally to direct and indirect owners of a qualifying investment.

168. A second contextual element that is relevant in interpreting the phrase "investment of the former" in Article 8(1) of the Treaty is the fact that there is no express exclusion of indirect investments in the Treaty. The absence of exclusionary language limiting a tribunal's jurisdictional remit was considered famously in the *ELSI* case, where the United States argued before a chamber of the International Court of Justice that the exhaustion of local remedies rules did not apply because there was no specific reference thereto in Article XXVI of the Treaty of Friendship, Commerce and Navigation it entered into with Italy in 1948.[384] The United States contended that "the parties to the FCN Treaty, had they intended the jurisdiction conferred upon the Court to be qualified by the local remedies rule in cases of diplomatic protection, would have used express words to

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381 **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 at ¶¶ 150-156.

382 *See also* **CLA-106**, *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, June 20, 2006, ¶ 37 and at 63; and **CLA-4**, *BG Group plc v. The Argentine Republic*, UNCITRAL, Final Award, Dec. 24, 2007 at ¶¶ 112, 467. In those two cases, the tribunals held that they had jurisdiction over the claimants, who were the indirect owners of qualifying investments, pursuant to the definition of the term "investment" in the UK-Argentina bilateral investment treaty, which defined the term very broadly but did not explicitly refer to direct or indirect investments. Bolivia argues that the *BG* case is irrelevant because the UK-Argentina treaty included certain provisions indicating that the concept of "protected investments" did not require the "direct" ownership by the investors (Respondent's Counter-Memorial at ¶ 237). However, this assertion is threadbare, as Bolivia does not even identify the provisions in question.

383 **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 at ¶ 156.

384 **CLA-107**, *Elettronica Sicula S.p.A. (ELSI)*, Judgment, ICJ Reports 1989 at 15, ¶ 50.

that effect."[385] The ICJ chamber rejected the United States' argument, holding that it was "unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so."[386]

169. The tribunal in *Tza Yap Shum v. Peru* adopted the ICJ's reasoning in *ELSI* in respect of indirect investments. It held that if it had been the parties' intention to exclude indirect investments from the underlying treaty's protection, they would have done so expressly:

> *Por lo tanto, el Tribunal no encuentra indicaciones en el APPRI que lo lleven por principio a excluir del ámbito de aplicación del Tratado las inversiones indirectas de nacionales chinos en territorio Peruano particularmente cuando se prueba que ejercen la propiedad y el control sobre las mismas.*
>
> *El Tribunal esperaría que una limitación en este sentido hubiese sido plasmada de forma expresa en el APPRI. Por ejemplo, las Partes Contratantes al APPRI bien pudieron acordar un artículo por medio del cual le denegarían los beneficios del Tratado a aquellos inversionistas calificados bajo el mismo pero con inversiones canalizadas a través de terceros países.*[387]

170. Likewise, in respect of the Treaty at issue in this arbitration, the *Rurelec* tribunal held that it "would require clear language in order to exclude coverage of indirect investments – language that the [Treaty] does not contain."[388]

171. The same analysis applies to the Treaty. Bolivia alleges that the Treaty would protect indirect investments only if a specific reference to indirect ownership had been included therein,[389] but that is exactly the wrong conclusion to draw from the lack of

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385 *Id.*

386 *Id.*

387 **CLA-104**, *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction, June 19, 2009 at ¶¶ 106-107.

388 **CLA-1**, *Guaracachi America, Inc. et al. v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, Jan. 31, 2014 at ¶ 353.

389 Respondent's Counter-Memorial at ¶ 232. In that regard, Bolivia's reliance on its own Civil Code to define "ownership," in an international arbitration proceeding governed by international law, is inapposite.

exclusionary language concerning indirect investments. In the absence of such clear and specific exclusionary language, and in light of the broad definition of investments in Article 1(a) encompassing indirect investments, the more jurisprudentially-consistent interpretation of Article 8(1) is that it applies equally to direct and indirect owners of qualifying investments.

172. Moreover, the legal authorities that Bolivia relies upon to support its allegation are of no assistance.[390] Judge Read's dissent in *Anglo Iranian Oil* is irrelevant. Setting aside the fact that his individual opinion did not reflect the majority view of the ICJ, Judge Read's dissent concerned the interpretation of a phrase that precisely included the terms "directly or indirectly."[391] Thus, his discussion of the effect of omitting the terms "directly or indirectly" is pure *obiter dicta*.[392] Moreover, far from being a definitive conclusion on the issue, Judge Read's statement was more akin to speculation, as suggested by the use of the words "it would have been possible to assume that…" (in French, "on aurait pu présumer que…").[393] A speculative *obiter* statement contained in a dissent is hardly persuasive evidence and should be disregarded by the Tribunal.

173. Bolivia's reliance upon *Brown v. Stott* is similarly irrelevant. There, the Privy Council stated that "it is generally to be assumed" that parties to a treaty omit terms "which they did not wish to include and on which they were not able to agree".[394] Bolivia took that very general statement as basis for arguing that the absence of the terms "direct or indirect" in Article 8(1) of the Treaty means that the parties purposefully did not include them and/or did not agree on their inclusion. But Bolivia conveniently omits to cite the Privy's Council reasoning in full, where it noted that the general assumption (on which Bolivia relies) does "not mean that nothing can be implied into the [European

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390 Respondent's Counter-Memorial at ¶¶ 232, 236.

391 **RLA-50**, *Anglo-Iranian Oil Co. case (jurisdiction)*, Judgment of July 22, 1952, ICJ Reports 1952, at 93, 145.

392 **RLA-50**, *Anglo-Iranian Oil Co. case (jurisdiction)*, Judgment of July 22, 1952, ICJ Reports 1952, at 93, 145. Bolivia relies on the following statement in Judge Read's dissent: "If the words 'directly or indirectly' had been omitted from the Declaration, it would have been possible to assume that the jurisdiction was restricted to situations or facts which related directly to treaties or conventions accepted by Persia."

393 **RLA-50**, *Anglo-Iranian Oil Co. case (jurisdiction)*, Judgment of July 22, 1952, ICJ Reports 1952, at 93, 145.

394 **RLA-51**, *Brown v. Stott* [2003] 1 AC 681, 703 (emphasis added).

Convention on Human Rights]. The language of the Convention is for the most part so general that some implication of terms is necessary, and the case law of the European court shows that the court has been willing to imply terms into the Convention when it was judged necessary or plainly right to do so."[395] This concern of overbroadness simply does not exist in the case of bilateral investment treaties whose overt purpose is to protect foreign investment, and where an interpretation that the phrase "investment of the former" as covering investments that are owned directly or indirectly by the investor is entirely consistent with the context of the Treaty.

174. As for Professor Douglas' opinion that there must be a limitation on a tribunal's *ratione personae* jurisdiction if the terms "direct or indirect" are not expressly included in a treaty,[396] Bolivia fails to square this view with Rule 33 of Douglas' own treatise, which contains a more direct statement that "[i]f an investment treaty stipulates that the investment can be held directly or indirectly by the claimant, then it is immaterial that the investment is held through an intermediate legal entity with the nationality of a third state."[397] Tellingly, Professor Douglas does not include the converse as a rule. Moreover, he refers to two cases where the tribunals held that they had jurisdiction over claimants that indirectly owned qualifying investments, despite the fact that the underlying treaties did not contain the terms "direct or indirect."[398] In fact, there are many more such cases, which are referred to above,[399] than the opposite.

175. The Treaty's object and purpose also support the view that Article 8(1) applies equally to direct and indirect owners of qualifying investments. The Treaty's title refers to the promotion and protection of investments. Its preamble notes that it was designed "to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State."[400] Likewise, Article 2(1)

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395 *Id*.

396 **RLA-53**, Zachary Douglas, The International Law of Investment Claims (Cambridge University Press, 2009) at 311, ¶ 580.

397 **RLA-53**, Zachary Douglas, The International Law of Investment Claims (Cambridge University Press, 2009) 310.

398 **RLA-53**, Zachary Douglas, The International Law of Investment Claims (Cambridge University Press, 2009) 311, ¶ 580.

399 *See supra* ¶ 164-166.

400 **Exhibit C-1**, Treaty, preamble.

provides that "[e]ach Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory…"[401] These provisions suggest that the parties to the Treaty desired to maximize the flow of investments which would include, in the absence of language to the contrary, indirect investments.

176. For these reasons, the context in which the phrase "investment of the former" is used, as well as the Treaty's object and purpose, all indicate that Article 8(1) applies equally to direct and indirect owners of qualifying investments. Thus, contrary to Bolivia's contentions, the Tribunal has jurisdiction over the claims of South American Silver.

c. There is no need to resort to supplementary means of interpretation, but even if there was, the "circumstances" invoked by Bolivia are inapposite

177. Reflective of the thinness of its arguments based on the Treaty's text, context and object and purpose, Bolivia's next alleges that the parties to the Treaty "deliberately omitted protection of 'indirect' ownership" because in 1987, Bolivia entered into treaties with Germany and Switzerland, and the treaty with Germany did not include a reference to "direct or indirect," whereas the treaty with Switzerland did include such a reference.[402] This evident recourse to supplementary means to interpret the Treaty has no founding in law or fact.

178. Under Article 32 of the Vienna Convention, *if* an interpretation in accordance with the general rule set out at Article 31 leaves the meaning ambiguous or obscure, or leads to a manifestly absurd or unreasonable result, *then* recourse may be had to supplementary means of interpretation, such as a treaty's *travaux préparatoires*:

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

[401] **Exhibit C-1**, Treaty, Article 2(1).

[402] Respondent's Counter-Memorial at ¶¶ 234-235.

> obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.[403]

179. Thus, supplementary means of interpretation is not an alternative, autonomous, means of interpretation, but only an aid to the general interpretive rule set out at Article 31.[404] If the terms to be interpreted in the treaty are clear and make sense in their context, and in light of the treaty's object and purpose, then there is no need to resort to the supplementary means of interpretation of Article 32. As the ICJ noted in *Admission of a State to the United Nations*: "[t]he Court considers that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself." [405] That position has been adopted by investment treaty tribunals as well.[406]

180. In this case, there is no reason to resort to the supplementary means of interpretation envisaged in Article 32 of the Vienna Convention. As set forth in the previous section, South American Silver submits that the general rule of interpretation (Article 31, Vienna Convention) yields a reading of Article 8(1) of the Treaty that applies to direct as well as indirect owners of qualifying investments, and there is simply no scope to argue that this reading is in any way "ambiguous or obscure" or leads to "manifestly absurd or unreasonable" results.

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403 **CLA-11**, Vienna Convention, Article 32.

404 **CLA-95**, International Law Commission, Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission, 1966*, Vol. II, 187 at 223 (¶ (19)).

405 **CLA-108**, Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, ICJ Reports 1948, p. 57, 63. *See also* **CLA-109**, Competence of Assembly regarding admission to the United Nations, Advisory Opinion, ICJ Reports 1950 at 4, 8: "The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and only then, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words."

406 *See, e.g.*, **CLA-110**, *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, Dec. 15, 2010 at ¶ 71; and **CLA-111**, *Canfor Corporation et al. v. United States of America*, UNCITRAL, Decision on Preliminary Question, June 6, 2006 at ¶ 324.

181. But even if it were necessary to confirm the meaning of Article 8(1) of the Treaty after following Article 31 of the Vienna Convention, the "circumstances" invoked by Bolivia amount to little more than bare and unfounded assertion, and are in any event inapposite to that analysis. First and foremost, Bolivia's claim that the parties to the Treaty "deliberately omitted protection of 'indirect' ownership" has its foundation in fantasy – it has simply failed to produce the Treaty's *travaux préparatoires*.

182. Second, Bolivia's reliance on the German and Swiss 1987 treaties is misplaced. Those agreements are irrelevant to the specific circumstances surrounding the Treaty's conclusion. As held by the tribunal in *Rompetrol v. Romania*, "[t]here is nothing in the Vienna Convention that would authorize an interpreter to bring in as interpretative aids when construing the meaning of one bilateral treaty the provisions of other treaties concluded with other partner States."[407] Indeed, investment tribunals have held that reliance on such third-party treaties is of limited probative value.[408] As held in *Rurelec* with respect to Bolivia in particular, the fact that other treaties concluded by Bolivia explicitly referred to indirect investments did not mean that the Treaty itself excluded indirect investments from its protection:

> According to the Tribunal, the fact, invoked by the Respondent, that other BITs concluded by Bolivia explicitly include indirect investments, is insufficient to support an *a contrario sensu* interpretation that only those BITs containing such an explicit reference cover indirect investments, since it is well accepted that this kind of argument is not on its own strong enough to justify a particular interpretation of a rule of law. The mere absence of an explicit mention of the different categories of investment (direct and indirect) cannot be interpreted as narrowing the definition of investment under the BIT to only direct investment.[409]

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[407] **CLA-112**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, Apr. 18, 2008 at ¶ 108.

[408] *See, e.g.*, **CLA-104**, *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction, June 19, 2009 at ¶ 109; and **CLA-99**, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, Oct. 21, 2005 at ¶ 314.

[409] **CLA-1**, *Guaracachi America, Inc. et al. v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, Jan. 31, 2014 at ¶ 354.

183. Thus, tenuous comparisons with the German and Swiss treaties pale in significance to the actual meaning of Article 8(1) of the Treaty, which is arrived at by looking to that Treaty's text, context, and object and purpose, all of which confirm that the provision applies equally to direct and indirect owners of qualifying investments. South American Silver submits that the principles of interpretation of the Vienna Convention lead demonstrably to the conclusion that the Tribunal has jurisdiction over the claims of South American Silver, as it the 100% shareholder of CMMK, which held title to the ten Mining Concessions.

B. THE TREATY PROTECTS THE INDIRECT OWNERS OF QUALIFYING INVESTMENTS EVEN IF THEY ARE NOT THE ULTIMATE OWNERS OF THOSE INVESTMENTS

184. Bolivia maintains that even if Article 8(1) of the Treaty applies equally to the direct and indirect owners of qualifying investments (as established above), only the ultimate owner of those investments may benefit from the Treaty's protections.[410] That specicous allegation is has no support whatsoever from the record. As Bolivia has already admitted that South American Silver is a protected company under the Treaty that owns qualifying investments in Bolivia,[411] whether South American Silver is the ultimate owner of the shares in CMMK and of the ten Mining Concessions is entirely irrelevant for purposes of the Tribunal's jurisdiction. This argument is clearly a frantic effort to conjure any ground that would prevent the Tribunal from exercising jurisdiction over South American Silver's claims.

185. Bolivia does not identify which provision of the Treaty requires that the investor be the investment's ultimate owner to benefit from its protections – and it cannot. Instead, it simply alludes to the preamble,[412] which does not provide for such a requirement. It also refers to three arbitral awards that interpreted the definition of "investment" in, respectively, a bilateral investment treaty between the United States and Kazakhstan, another treaty between the United Kingdom and Tanzania, and the ICSID

[410] Respondent's Counter-Memorial at ¶¶ 245 *et seq.*

[411] Respondent's Counter-Memorial at ¶ 224.

[412] Respondent's Counter-Memorial at ¶ 248.

Convention,[413] all of which are wholly inapposite to this UNCITRAL rules arbitration proceeding pursuant to the UK-Bolivia BIT.

186. The reason why Bolivia cannot articulate a reason is because the Treaty simply does not have that requirement. The parties to the Treaty agreed that a tribunal would have jurisdiction over "disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former."[414] As 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 requirements set forth at Article 1(a), and that it owns, directly or indirectly, that investment, then a tribunal necessarily has jurisdiction over the claims of that claimant. No other requirements need be fulfilled.

187. In that regard, investment treaty tribunals have consistently held that it is not open to them to impose additional jurisdictional requirements on claimants which the parties to the underlying treaty could have added but did not:

> The predominant factor which must guide the Tribunal's exercise of its functions is the terms in which the parties to the Treaty now in question have agreed to establish the Tribunal's jurisdiction. In the present context, that the means the terms in which they have agreed upon who is an investor who may become a claimant entitled to invoke the Treaty's arbitration procedures. The parties had complete freedom of choice in this matter, and they chose to limit entitled "investors" to those satisfying the definition set out in Article 1 of the Treaty. The Tribunal cannot in effect impose upon the parties a definition of "investor" other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and **it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add**.[415]

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413 *Id.* ¶¶ 248-249.

414 **Exhibit C-1**, Treaty, Article 8(1).

415 **CLA-46**, *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, at ¶ 241 (emphasis added). *See also* **RLA-27**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014 at ¶ 255; **CLA-113**, *Yukos Universal Limited v. The Russian Federation*, PCA Case No. AA 227, UNCITRAL, Interim Award on Jurisdiction and Admissibility, Nov. 30, 2009 at ¶¶ 432-435; **CLA-112**, *The Rompetrol Group N.V. v. Romania*, ICSID

188. Thus, the Treaty protects the indirect owners of qualifying investments who are not the ultimate owners of those investments, because there is no requirement in the Treaty that provides otherwise. As the owner of 100 percent of the shares in CMMK and of the ten Mining Concessions, South American Silver is a protected investor under the Treaty, and the Tribunal accordingly has jurisdiction over its claims in this arbitration. Whether or not South American Silver is the ultimate owner of the shares in CMMK and of the ten Mining Concessions is immaterial for purposes of the Tribunal's jurisdiction.

189. Finally, Bolivia relies on four other investment treaty awards to allege, incorrectly, that an investment treaty that generally protects indirect ownership only protects ultimate owners.[416] But these awards say no such thing.

190. In *Siemens v. Argentina*, the respondent argued that the underlying treaty required a direct relationship between the investor and the investment, and that the claimant in the case did not have *ius standi* because it did not own the investment in question directly.[417] The tribunal dismissed Argentina's objection, holding that the treaty's definition of "investment" encompassed indirect investments: "[t]he plain meaning of this provision is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments."[418] Read in context, the reference to "ultimate owner" was simply meant to designate the claimant, Siemens. It was certainly not intended to suggest that Siemens had *ius standi* under the treaty only because it was the investment's ultimate owner.

Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, Apr. 18, 2008 at ¶ 110; **CLA-114**, *Siag et al. v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, Apr. 11, 2007 at ¶¶ 208-210; **CLA-35**, *ADC Affiliate Limited et al. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, Oct. 2, 2006 at ¶¶ 357, 359; and **CLA-115**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, Apr. 29, 2004 at ¶ 77.

416 Respondent's Counter-Memorial at ¶¶ 250-254.

417 **RLA-55**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, Aug. 3, 2004 at ¶ 123.

418 **RLA-55**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, Aug. 3, 2004 at ¶ 137.

191. The tribunal in *Kardassopoulos v. Georgia* relied on the *Siemens* tribunal's reasoning to find that the claimant's indirect ownership of shares constituted an investment under the underlying treaties.[419] However, by referring to the *Siemens* case, the *Kardassopoulos* tribunal did not hold, for the reasons set forth above, that the claimant had *ius standi* only because it was the ultimate owner of the investment.

192. The tribunal in *BG Group v. Argentina* held, in accordance with the definitions provided in the underlying treaty, that the claimant was an investor that had made qualifying investments.[420] The tribunal never mentioned that the claimant was the ultimate owner of the investment and, as a result, did not rely on that fact to find that it had jurisdiction over the claims of BG Group.

193. Finally, in *Rurelec v. Bolivia*, the tribunal concluded that "the best interpretation of Article 2(2) of the [Treaty], when it refers to 'investments of nationals,' is the one that considers that the investments may belong to nationals of one Contracting Party, both directly or indirectly through equity ownership of the companies that own the ultimate investment in Bolivia, in this case EGSA."[421] Bolivia relies on this statement to claim that the tribunal held that it had jurisdiction over Rurelec only because it was the ultimate owner of the investments in Bolivia. This is utter nonsense. As is clear, the tribunal referred to EGSA, the Bolivian company that Rurelec owned shares of, as the company "that own[ed] the ultimate investment in Bolivia;" and to the direct or indirect equity ownership of EGSA as the "investments of nationals" pursuant to Article 2(2). The Spanish language version of the *Rurelec* award is even clearer.[422]

194. Thus, Bolivia is wrong when it alleges that these four awards demonstrate that a treaty protecting indirect ownership only protects ultimate owners. The awards do

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[419] **RLA-54**, *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, July 6, 2007 at ¶ 124.

[420] **CLA-4**, *BG Group plc v. The Argentine Republic*, UNCITRAL, Final Award, Dec. 24, 2007 at ¶¶ 109, 138.

[421] **CLA-1**, *Guaracachi America, Inc. et al. v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, Jan. 31, 2014 at ¶ 360.

[422] **CLA-1**, *Guaracachi America, Inc. et al. v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, Jan. 31, 2014 at ¶ 360: "El Tribunal concluye entonces que la mejor interpretación del artículo 2(2) del TBI, cuando se refiere a 'inversiones de capital de nacionales', es la que considera que las inversiones pueden pertenecer a nacionales de una Parte Contratante de manera tanto directa como indirecta, mediante la titularidad de participaciones de las sociedades que en definitiva son propietarias de la inversión en Bolivia; en este caso, EGSA."

not stand for that proposition. In fact, in none of these decisions did the tribunal indicate that ultimate ownership was a mandatory condition that needed to be satisfied in order to benefit from a treaty that protected indirect ownership. Moreover, to the extent that it is relevant to this arbitration, which South American Silver submits it is not, several tribunals have held that they had jurisdiction over claimants that were the indirect owners of qualifying investments without at the same time being the ultimate owners of those investments.[423]

195. On the basis of the above, the Tribunal should reject Bolivia's unfounded jurisdictional objections and find that it has jurisdiction pursuant to the Treaty over South American Silver's claims in this arbitration. As the party asserting this jurisdictional defense, it is Bolivia's burden to demonstrate that only ultimate indirect owners are protection; but Bolivia has yet to articulate a cogent argument for why the Treaty, having already been assumed to protect indirect ownership, would then limit itself only to the protection of ultimate owners.

C. BOLIVIA'S "CLEAN HANDS" ALLEGATIONS ARE FUNDAMENTALLY FLAWED AND SHOULD BE DISMISSED SUMMARILY

196. Bolivia's other principal basis for contesting this Tribunal's jurisdiction is the alleged lack of "clean hands" on the part of the Claimant, which in Bolivia's submission, bars the Tribunal from "even analyz[ing] the merits of [SAS'] claim", as "SAS does not deserve the Treaty's protection."[424] Bolivia raises three serious allegations against the Claimant: (i) [redacted] (ii) that "SAS systematically infringed one of the Indigenous Communities' fundamental rights … [t]o self-determination, and particularly, self-government";[426] and

[423] *See, e.g.*, **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 at ¶¶ 143-144, 160(a); and **CLA-105**, *Venezuela Holdings B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, June 10, 2010 at ¶¶ 147-148, 209(a).

[424] Respondent's Counter-Memorial at ¶¶ 268-69.

[425] *Id*. ¶¶ 297.

[426] *Id*. ¶¶ 301-302.

(iii) that the Project "menaced the Indigenous Communities' right to a healthy environment in their territories".[427]

197. With great respect, Bolivia's entire case on unclean hands is fundamentally flawed. Leaving aside for a moment the completely unsubstantiated nature of its factual claims, Bolivia's entire legal case on this matter rests on the assumption that a "clean hands" doctrine exists as a matter of international law. It does not, as seen in various cases in inter-state adjudication and arbitration, by leading figures at the International Law Commission, and as analyzed and confirmed definitively by the *Yukos v. Russian Federation* tribunal **(1)**. That truth alone renders this entire jurisdictional objection moot.

198. But even on the assumption, *quod non*, that an opposable unclean hands doctrine does exist as a matter of international law, Bolivia does not meet the criteria for that doctrine to apply, particularly because of the lack of reciprocity between the acts the Claimant alleges as basis for its claims to be facts alleged by Bolivia as basis for its Clean Hands defense. **(2)**

199. In addition, Bolivia's three instances of alleged unclean hands also do not relate to the *making* of the investment, and therefore cannot possibly be matters affecting the Tribunal's jurisdiction – they can only be heard and decided on the merits, along with the Claimant's substantive claims for breach of the Treaty. **(3)**

200. Before discussing each of these three points, it bears stressing from the outset that South Amercian Silver's engagement with Bolivia's "clean hands" doctrine submissions should not imply any admission that Bolivia's allegations are in any way true. South American Silver categorically denies all of these bare, unsubstantiated allegations and their attributability to it. Thus, even if – contrary to international law – the Tribunal decides that Bolivia's 'clean hands' arguments are indeed jurisdictionally relevant issues, Bolivia would still have to *prove* its allegations as a matter of fact. The burden of proving these very serious allegations rests firmly with Bolivia, and the standard of proof applied is high, requiring clear and convincing evidence, not a mere preponderance. Bolivia has not even begun to meet its burden in this regard.

[427] Respondent's Counter-Memorial, heading at §5.2.3.3.

1. The "Unclean Hands" doctrine does not exist in international law

201. Bolivia asserts that the Claimant cannot claim the protections of the BIT because of its 'unclean hands.' Its entire case on the matter is built on the premise that "[t]he requirement to have 'clean hands' as a condition to access justice is a general principle in international law."[428] But the current state of public international law and international investment law in particular is unequivocally against Bolivia: no principle of 'clean hands' exists as a matter of international law.

202. The various authorities cited by Bolivia from individual judicial opinions from the World Court – the International Court of Justice and its predecessor, the Permanent Court of International Justice, various international investment tribunals, and legal scholarship, [429] are individually and collectively insufficient to draw any conclusion that the principle exists, whether as customary international law or as a general principle of law under Article 28(1)(b) and (c) of the ICJ Statute. Read closely, it is clear that the World Court has yet to uphold the clean hands doctrine in any single majority opinion. Indeed, if anything at all can be ascertained from the World Court's jurisprudence, it is that the Court has declined to declare that the clean hands doctrine exists in international law, despite having had many opportunities to do so, having been invoked by numerous States pleading before it.[430]

203. The invocation of the PCA *Guyana v. Suriname* award[431] is similarly misconceived, as that inter-state tribunal actually expressed doubt as to whether the doctrine actually exists: "use of the clean hands doctrine has been sparse, and its

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428 Respondent's Counter-Memorial at ¶ 273.

429 *Id*. ¶¶ 280-82.

430 The clean hands doctrine has been invoked unsuccessfully by a number of States in other I.C.J. proceedings, namely, by the United States in **CLA-116**, *Oil Platforms* (*Islamic Republic of Iran v. United States of America*, Merits, I.C.J. Reports 161, 176-178 (2003)); **CLA-117**, *La-Grand* (*Germany v. United States of America*, Judgment, I.C.J. Reports 466, 488-489 (2001)) and **CLA-118**, *Avena and other Mexican Nationals* (*Mexico v. United States of America*, Judgment, I.C.J. Reports 12, 38 (2004)), by the NATO respondents in the Legality of Use of Force cases, (*see* **Exhibit RLA-89**, Stephen Schwebel, *Clean Hands in the Court*, 31 STUD. TRANSNAT'L LEGAL POL'Y 74 (1999)), and by Israel in the advisory proceedings on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. (*see* **CLA-119**, John Dugard, *Sixth Report on Diplomatic Protection* (57th Session of the UN International Law Commission, 2005), A/CN.4/546, ¶ 5).

431 Respondent's Counter-Memorial at ¶ 283.

application in the instances in which it has been invoked have been inconsistent".[432] In any event, as will be developed in the succeeding section, even assuming that an opposable clean hands doctrine exists, the criterion for its application as developed in *Guyana v. Suriname* could not possibly arise in this case.

204. Bolivia's attempt to appropriate the clean hands doctrine and related principles as found in early claims commission cases[433] fails to consider the proper context of those cases. Those claims commissions concerned violations of laws on slavery and neutrality, and also arose within the context of diplomatic protection. According to Professor Crawford, "it appears that these cases are all characterized by the fact that the breach of international law by the victim was the sole cause of the damage claimed, [and] that the cause-and-effect relationship between the damage and the victim's conduct was pure, involving no wrongful act by the respondent State. When, on the contrary, the latter has in turn violated international law in taking repressive action against the applicant, the arbitrators have never declared the claim inadmissible."[434]

205. Professor Crawford's *caveat* on the early case law was amplified further as Special Rapporteur on State Responsibility to the UN International Law Commission. In that report, he concluded that "it is not possible to consider the 'clean hands' theory as an institution of general customary law".[435] Similarly, the ILC Special Rapporteur on diplomatic protection, Professor John Dugard, stated that "evidence in favour of the clean hands doctrine is inconclusive. [...] In these circumstances the Special Rapporteur sees no reason to include a provision in the draft articles dealing with the clean hands doctrine. Such a provision would clearly not be an exercise in codification and is unwarranted as

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[432] **RLA-86**, *Guyana v. Suriname* (UNCLOS Annex VII Tribunal), Award, PCA Awards Series, Sept. 17, 2007 at ¶ 418.

[433] *See* Respondent's Counter-Memorial at ¶ 279, *citing* the *Clark Claim* as found in Bin Cheng, General Principles of law as Applied by International Courts and Tribunals 156 (1953).

[434] **CLA-120**, ILC Second Report on State Responsibility by James Crawford, Special Rapporteur (May 3 – July 23 1999), UN Doc A/CN.4/498/Add.2, in II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION) 83, ¶ 334 (1999), A/CN.4/SER.A/1999/Add.1 (part 1 *citing* Jean J.A. Salmon, *Des 'Mains Propres' Comme Condition de Recevabilite des Reclamations Internationales*", 10 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 224, 259 (1964).

[435] **CLA-120**, ILC Second Report on State Responsibility by James Crawford, Special Rapporteur (May 3 – July 23 1999), UN Doc A/CN.4/498/Add.2, in II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 83, ¶ 336(1999), A/CN.4/SER.A/1999/Add.1 (part 1) 83, *citing* ROSSEAU, DROIT INTERNATIONAL PUBLIC 177, ¶ 170.

an exercise in progressive development in the light of the uncertainty relating to the very existence of the doctrine and its applicability to diplomatic protection."[436]

206. Similarly, Bolivia's invocation of various investment arbitration awards takes no account whatsoever of most considered expression of the status of the clean hands doctrine in that body of case law – the July 2014 *Yukos v. Russian Federation* final awards.[437] In those cases, the Tribunal – which included Judge Schwebel, upon whose dissenting opinion in *Nicaragua v. United States of America* Bolivia relies for support – analyzed many of the cases invoked by Bolivia in its Counter-Memorial, including *Inceysa v. El Salvador*, *Hamester v. Ghana*, *Plama v. Bulgaria*, and *Phoenix Action v. Czech Republic*,[438] and concluded:

> "[t]he Tribunal is not persuaded that there exists a 'general principle of law recognized by civilized nations' within the meaning of Article 38(1)(c) of the ICJ Statute that would bar an investor from making a claim before an arbitral tribunal under an investment treaty because it has so-called 'unclean hands.' General principles of law require a certain level of recognition and consensus. However, on the basis of the cases cited by the Parties, the Tribunal has formed the view that there is a significant amount of controversy as to the existence of an 'unclean hands' principle in international law."[439]

The Tribunal then closed the door to the application of the unclean hands principle emphatically: "[t]he Tribunal therefore concludes that 'unclean hands' does not exist as a

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436 **CLA-119**, John Dugard, *Sixth Report on Diplomatic Protection* (57th Session Session of the UN International Law Commission, 2005), A/CN.4/546, ¶ 18.

437 **CLA-121**, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, Final Award, July 18, 2014; **CLA-122**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award, July 18, 2014; **CLA-123**, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA226-228, Final Award, July 18, 2014.

438 *See* Respondent's Counter-Memorial at ¶¶ 274, 276, 277.

439 **CLA-121**, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, Final Award, July 18, 2014; **CLA-122**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award, July 18, 2014; **CLA-123**, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA226-228, Final Award, July 18, 2014, at ¶¶ 1358-1359.

general principle of international law which would bar a claim by an investor, such as the Claimants in this case."[440]

207. The only truly new legal authority cited by Bolivia to upend the conclusions drawn in by Special Rapporteurs Crawford and Dugard as well as the *Yukos* awards is the recent *Al-Warraq v. Indonesia* award,[441] which, by Bolivia's own admission, is one of the only cases that employed the clean hands doctrine by name.[442] But *Al-Warraq* alone cannot create from whole cloth an opposable clean hands doctrine in international law.

208. First, the basis for the invocation of the 'clean hands' doctrine in *Al-Warraq* related to fraud and corruption in relation to the claims themselves, which were proven and led to convictions in Indonesian courts,[443] a very different set of facts from the present case, where no prosecutions, much less convictions, for criminal acts has occurred. Second, the Claimant in that case did not contest the existence of the clean hands doctrine, stating only that it was irrelevant.

209. Third, and with great respect to that tribunal, *Al-Warraq*'s very cursory statement about the clean hands doctrine, covering only one paragraph of the Award (with the *Fraport II* case cited by Bolivia making an even more marginal reference to the doctrine),[444] should not be given any precedence vis-à-vis the *Yukos* final awards, where

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[440] **CLA-121**, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, Final Award, July 18, 2014; **CLA-122**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award, July 18, 2014; **CLA-123**, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA226-228, Final Award, July 18, 2014, at ¶ 1363.

[441] **RLA-70,** *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, Dec. 15, 2014.

[442] *See* Respondent's Counter-Memorial at ¶¶ 273-74, where apart from *Al-Warraq* and the *Fraport II* cases, Bolivia states that, "[w]ithout *expressly* mentioning the 'clean hands' doctrine, other investment tribunals have reached the same conclusion." (italics added)

[443] **RLA-70,** *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, December 15, 2014 at ¶¶ 161, 164.

[444] In the second *Fraport v. Philippines* award, the tangential reference to the unclean hands doctrine was contained in paragraph 328, which states in its entirety: "[i]nvestment treaty cases confirm that such treaties do not afford protection to illegal investments either based on clauses of the treaties, as in the present case according to the above analysis, or, absent an express provision in the treaty, based on rules of international law, such as the "clean hands" doctrine or doctrines to the same effect. One of the first cases having ruled on this issue, *Inceysa v El Salvador*, has held that 'because Inceysa's investment was made in a manner that was clearly illegal, it is not included in the scope of consent

the existence, scope, and effects of the unclean hands doctrine was litigated extensively and was decided upon after far more extensive analysis by that prominent tribunal. Indeed, even on its own terms, the *Al-Warraq* tribunal's holding on unclean hands is modest: it does not identify unclean hands as a principle of international law, stating only that "it has been *invoked* in the context of admissibility of claims before international courts and tribunals", and citing as authority a national court judgment from 1775 – that of Lord Mansfield in *Holman v Johnson* – the same case cited in *World Duty Free v. Kenya*[445], which utilized the case because it was a contract-based ICSID arbitration where the applicable law was English and Kenyan law, *not* international law.

210. Finally, Bolivia's reference to a supposed opinion of Professor Crawford in *Al-Warraq* in support of the clean hands doctrine[446] is likely to be a misrepresentation, as there is no evidence in that award that Professor Crawford did submit any expert report, much less one in support of the existence in international law of the clean hands doctrine. It is far more likely that the Tribunal's citing of Professor Crawford was made in reference to his report as Special Rapporteur on State Responsibility at the United Nations' International Law Commission.[447] But any suggestion that Professor Crawford as Special Rapporteur on State Responsibility supported the existence of the unclean hands doctrine, as Bolivia is clearly attempting to do, is highly misleading. When one actually reads Professor Crawford's report, there cannot be any doubt that his actual view is that no principle of unclean hands actually does exist as a matter of international law (see discussion *supra* at ¶ 206).

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expressed by Spain and the Republic of El Salvador in the BIT and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre."

When placed in its context, the *Fraport II* tribunal's mention of unclean hands was clearly *obiter*, as the true lens from which that tribunal considered investor illegality was in relation to the "legality clause" of the Germany-Philippines Bilateral Investment Treaty. As with *Al-Warraq*, the *Fraport II* decision did not attempt to discern the true scope and nature of the unclean hands doctrine, as was done by the *Yukos* tribunal.

445 *See* **RLA-68**, *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award Oct. 4, 2006 at ¶ 181.

446 Respondent's Counter-Memorial at ¶ 273 ("In a recent decision, the *Al-Warraq* tribunal, referring to Judge Crawford's expert opinion, stated that …").

447 *See* **RLA-70**, *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, Dec. 15, 2014 at ¶ 162, footnote 44, which cites **RLA-82** "Yearbook of the International Law Commission, 1999, documents of the fifty-first session at ¶ 333."

211. For all these reasons, the Claimant submits that the weight of international law, exemplified in the *Yukos* final award (where the issue of unclean hands was a central argument that was briefed and argued extensively and decided directly by the Tribunal), is more than sufficient to dispose of Bolivia's clean hands jurisdictional objection. There is clearly no opposable principle of clean hands international law, whether as customary law (Article 38(1)(b), ICJ Statute) or a general principle of law (Article 38(1)(c)).

2. **Even assuming that the Clean Hands principle exists in international law, Bolivia doe**s not meet the criteria for its application.

212. Even if, contrary to the most authoritative sources of international law, this tribunal were to find that the clean hands doctrine were to exist as an opposable principle of international law vis-à-vis South American Silver, the clean hands doctrine would still have no application in this case, as Bolivia cannot meet its strict criteria.

213. In *Niko Resources v. Bangladesh*, the eminent ICSID tribunal (Schneider (P), Paulsson, McLachlan) found that "[t]he question whether the principle forms part of international law remains controversial and its precise content is ill defined".[448] Nonetheless, the tribunal discussed the doctrine at length, setting a legal test for the application of the clean hands doctrine composed of three elements derived from the PCA *Guyana v. Suriname* arbitration: (i) the claimant's conduct said to give rise to "unclean hands" must amount to a continuing violation, (ii) the remedy sought by the claimant in the proceedings must be "protection against continuance of that violation in the future", not damages for past violations, and (iii) there must be a relationship of reciprocity between the obligations considered.[449]

214. Bolivia has not begun to articulate how the three groups of acts it alleges to be violative of the clean hands doctrine complies with each of these criteria. Nor can it. To take just one of these, Bolivia cannot possibly meet the requirement that there be a relationship of reciprocity between the obligations considered. The *Niko* tribunal found

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[448] **CLA-124**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh & Ors* (ICSID Case No. ARB/10/11 and ARB/10/18), Decision on Jurisdiction, Aug. 19, 2013 at ¶ 477.

[449] **CLA-124**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh & Ors* (ICSID Case No. ARB/10/11 and ARB/10/18), Decision on Jurisdiction, Aug. 19, 2013 at ¶¶ 420-21, *citing Guyana v. Suriname*, Award, Sept. 17. 2007 at ¶¶ 420-421.

that the respondents' objection based on the investor's alleged "unclean hands" by reason of corruption did not meet the articulated criteria for the application of the doctrine.[450] As seem from *Niko*, not every instance of investor misconduct triggers the clean hands doctrine; any alleged investor misconduct that is unrelated to the claims set forth before this Tribunal will not trigger the doctrine of unclean hands. That requirement of reciprocity was not met when corruption implicating the investor occurred after the joint venture agreement which was the subject of the investment had already been concluded; according to the tribunal, "there is no relation of reciprocity between the relief which the Claimant now seeks in this arbitration and the acts in the past which the Respondents characterise as involving unclean hands."[451] This finding comports with scholarly commentary such as that of Bin Cheng, who observes that the *ex turpi causa* principle applies "insofar as the claim itself is based on an unlawful act. It does not apply to cases where, although the claimant may be guilty of an unlawful act, such act is judicially extraneous to the cause of the action."[452]

215. The kind of reciprocity required from a respondent to permit the use of the clean hands doctrine as a defense is exemplified in the *Clark Claim*, a case that Bolivia itself invokes.[453] There, Captain John Clark was found to have engaged in piracy and then sought to claim the fruits of *that same piracy* before the U.S.-Ecuador mixed claims commission. It was the direct causal relationship between the illegality Captain Clark engaged in (piracy) and the relief he was seeking (the "proceeds of his misdemeanors")[454]

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[450] **CLA-124**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh & Ors* (ICSID Case No. ARB/10/11 and ARB/10/18), Decision on Jurisdiction, Aug. 19, 2013 at ¶¶ 483-485.

[451] *Id*. ¶ 484.

[452] **RLA-73**, Bin Cheng, General Principles of law as Applied by International Courts and Tribunals 157-58 (1953).

[453] Respondent's Counter-Memorial at ¶ 279 ("A classic example [of the clean hands doctrine] is the *Clark Claim* from 1862 … on which the American commissioner [of the United States-Ecuador Commission] affirmed that 'a party who asks for redress must present himself with clean hands.").

[454] **CLA-125**, Cases of the *Good Return* and the *Medea*, opinion of the Commissioner, Mr. Hassaurek, of 8 August 1865, 29 RIAA 99, 107 (2012), *reprinting* JOHN BASSET MOORE (ED.), III HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 2731 (1898).

that caused the dictum "[a] party who asks for redress must present himself with clean hands."[455]

216. Applying the reciprocity criterion to this case, it becomes apparent that Bolivia has no basis for seeking dismissal of this arbitration for lack of jurisdiction on clean hands grounds. Its allegations on [redacted], the self-determination of the Indigenous Communities, and environmental harm, all of which Claimant debunks in its present submission have nothing whatsoever to do with the causes of action on which the Claimant has made its claims pursuant to the protections afforded by the BIT, namely Bolivia's unlawful expropriation of South American Silver's investment, its failure to treat that investment fairly and equitably and to provide it full protection and security, and the imposition of unreasonable and discriminatory measures and treatment less favorable than investments of its own investors.

217. Doubtlessly, Bolivia will argue that the same governmental acts that South American Silver complains of as violations of Treaty protections were in fact valid exercises of governmental authority. But a dispute over the proper *legal characterization* of the same set of facts is not sufficient to allow Bolivia to then argue that the Tribunal lacks jurisdiction or that South American Silver's claims are inadmissible. The *Yukos* tribunal emphasized that

> If the investor acts illegally, the host state can request it to correct its behavior and impose upon it sanctions available under domestic law, as the Russian Federation indeed purports to have done by reassessing taxes and imposing fines. However, if the investor believes these sanctions to be unjustified (as Claimants do in the present case), it must have the possibility of challenging their validity in accordance with the applicable investment treaty. It would undermine the purpose and object of the ECT to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits.[456]

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455 *Id*.

456 **CLA-121**, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, Final Award, July 18, 2014; **CLA-122**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award, July 18, 2014; **CLA-123**, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA226-228, Final Award, July 18, 2014, at ¶ 1355.

218. The same reasoning applies in this case: if Bolivia truly believes that South American Silver and its investment is guilty of the illegal acts alleged, it can impose sanctions and fines under Bolivian law, [redacted]. But if those alleged acts form the very basis of Bolivia's expropriatory acts, South American Silver "must have the possibility of challenging their validity in accordance with the applicable investment treaty". To paraphrase the *Yukos* tribunal, it would undermine the BIT's very object and purpose to deny South American Silver the right to make its case before this Tribunal based on the same alleged violations on grounds of a lack of jurisdiction or inadmissibility.

3. Bolivia's invocation of the the 'Legality Doctrine' is unavailing, as none of the alleged illegal conduct relates to the admission of South American Silver's investment, and did not occur during the *making* of the investment

219. Apart from the clean hands doctrine, Bolivia seeks to deprive the Tribunal of jurisdiction over the Claimant's claims through the principle that, in its words, "an investment must be established pursuant to internal and international law."[457] Notwithstanding the absence of an explicit requirement under the BIT that investments must be made in accordance with the laws of the host State, South American Silver does not contest that what might be called the "Legality Doctrine" – the requirement that investors comply with the law of the host State when making an investment – is implicit in the system of investment treaty arbitration. However, Bolivia's hortatory invocation of the doctrine masks two serious deficiencies: first, that none of the purported illegal conduct complained of relates to violations of laws concerning the admission of South American Silver's' investment; and second (and more importantly), that none of the instances of alleged illegal conduct – [redacted] self-determination violations, environmental degradation – occurred at the time South American Silver *made* its investment. Both of these requirements must be met in order for Bolivia to be able to invoke the Legality Doctrine, and the absence of either one is fatal to Bolivia's jurisdictional defense. Investment tribunals are crystal clear that any investor illegality that occurs in the

[457] Respondent's Counter-Memorial at ¶ 287.

performance or implementation of an investment is a merits, not jurisdiction or admissibility issue, to be weighed along with the host State's own breaches of the BIT.

a. South American Silver's alleged illegal conduct does not concern the admission of its investment

220. In relation to the requirement that investments be made in accordance with the laws of the host State, investment tribunals have insisted that violations of host State law not directly concerned with "the admission of investments" or "investment regulation" should not serve as a bar to jurisdiction. In *Saba Fakes v. Turkey*, for example, the tribunal explained that it was

> not convinced by [Turkey's] position that any violation of any of the host State's laws would result in the illegality of the investment within the meaning of the BIT and preclude such investment from benefiting from the substantive protection offered by the BIT. […] the legality requirement contained therein concerns the question of the compliance with the host State's domestic laws governing the admission of investments in the host State. […] it would run counter to the object and purpose of investment protection treaties to deny substantive protection to those investments that would violate domestic laws that are unrelated to the very nature of investment regulation. In the event that an investor breaches a requirement of domestic law, a host State can take appropriate action against such investor within the framework of its domestic legislation. However, **unless specifically stated in the investment treaty under consideration, a host State should not be in a position to rely on its domestic legislation beyond the sphere of investment regime to escape its international undertakings vis-à-vis investments made in its territory**.[458]

221. Concretely, the *Saba Fakes* tribunal considered that Turkish law relating to the encouragement of foreign investment could fall within the ambit of the legality requirement found in the Netherlands-Turkey BIT, whereas violations of Turkish law

[458] **RLA-61,** *Saba Fakes v. Republic of Turkey* (ICSID Case No. ARB/07/20), Award, July 14, 2010, at ¶ 119.

concerning the regulation of the telecommunications sector as well as competition laws "would not trigger the application of the legality requirement …"[459]

222. Self-evidently, none of the three areas of alleged South American Silver illegal conduct meet the *Saba Fakes* test that these illegalities must concern "the very nature of investment regulation." [redacted], the right of the Indigenous Peoples to self-determination, and environmental degradation would, if true, all be serious and even criminal; but these are all areas governing the conduct of all persons in Bolivia in general, and *none* of them specifically concern legislation meant to regulate the inflow of foreign investment. Bolivia would, if true, have every right to pursue the perpetrators of these crimes; but the attempt to use these allegations as a means to avoid Bolivia's legitimate obligations under the Treaty is misconceived and borders on the nonsensical.

b. South American Silver's alleged illegal conduct did not occur during the making of the investment

223. In any event, none of the illegalities alleged against South American Silver concern conduct that occurred when its investment was first made. This obvious, incontrovertible fact renders the Legality Doctrine inapposite in its entirety in this case.

224. The weight of arbitral practice firmly supports the conclusion that, absent express words to the contrary, the legality requirement in investment treaty arbitration is concerned with wrongdoing solely at the date of admission or establishment of an investment. A consistent line of decisions in this regard can be traced at least to *Inceysa v. El Salvador*, a case relied upon by Bolivia repeatedly. In that case, the tribunal found that "[a] foreign investor cannot seek to benefit from an investment *effectuated* by means of one or several illegal acts and, consequently, enjoy the protection granted by the host state, such as access to international arbitration to resolve disputes, because its act had a fraudulent origin".[460]

225. With greater clarity, the *Yukos* tribunal rejected the contention that the right to invoke the Energy Charter Treaty must be denied to an investor not only in the

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[459] **RLA-61**, *Saba Fakes v. Republic of Turkey* (ICSID Case No. ARB/07/20), Award, July 14, 2010, at ¶ 120.

[460] **RLA-65**, *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award, Aug. 2, 2006 at ¶ 242 (emphasis added).

case of illegality in the making of the investment but also in its performance. The tribunal held:

> In imposing obligations on States to treat investors in a fair and transparent fashion, investment treaties seek to encourage legal and *bona fide* investments. An investor who has obtained an investment in the host State only by acting in bad faith or in violation of the laws of the host State, has brought to itself within the scope of the application of the ECT through wrongful acts. Such an investor should not be allowed to benefit from the Treaty.
>
> . . .
>
> [T]he Tribunal does not need to address Respondent's contention that the right to invoke the ECT must be denied to an investor not only in the case of illegality in the *making* of the investment but also in its *performance*. The Tribunal finds Respondent's contention unpersuasive.
>
> There is no compelling reason to deny altogether the right to invoke the ECT to any investor who has breached the law of the host State in the course of its investment.[461]

226. Other tribunals have reached the same conclusion that subsequent wrongdoing after the initiation of an investment does not have jurisdictional consequences.[462] The *Fraport* tribunal rejected the argument that a legality requirement applied beyond the acquisition of the investment. Subsequent illegality "might be a defense to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction."[463] In *Metal-Tech*, the tribunal elaborated that the legality requirement, in that treaty (as with the UK-Bolivia BIT),

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461 **CLA-121**, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, Final Award, July 18, 2014; **CLA-122**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award, July 18, 2014; **CLA-123**, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA226-228, Final Award, July 18, 2014, at ¶¶1352, 1354-1355.

462 **RLA-31**, *Gustav F.W. Hamester GmbH & Co KG v. Republic of Ghana*, (ICSID Case No. ARB/07/24), Award, June 18, 2010 at ¶ 127; **RLA-56**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisdiction, Sept. 27, 2012 at ¶ 266; **CLA-126**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Jurisdiction, Dec. 21, 2012 at ¶ 328.

463 **RLA-91,** *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines* (ICSID Case No. ARB/03/25), Award, Aug. 16, 2007 at ¶ 345.

"simply does not address whether or not the investment must be operated lawfully after it is in place."[464] Similarly, the tribunal in *Vannessa Ventures v. Venezuela* found that "the jurisdictional significance of the 'legality requirement' in the definition of an investment ... is exhausted once the investment has been made."[465]

227. Thus, the key question in relation to the legality requirement as it applies to South American Silver involves ascertaining when it *made* its investment. That is the point at which the legality of South American Silver's conduct as a matter of Bolivian law must be tested, as a breach of host State law may be raised only in relation to the inception of an investment but "not with regard to the subsequent conduct of the claimant in the host state, even in relation to the expansion or development of the original investment".[466] According to Professor Schreuer, an "investment" is deemed to have been made when a contract is concluded with the host State or one of its authorized entities, or in the absence of a contract with the State, when "definite commitments" are first made:

> The material step at which a project moves beyond the step of preparation and becomes an actual investment is the conclusion of a contract. In certain circumstances the contract itself constitutes the investment. Where investments are made without a contract with the host State or one of its authorized entities, the decisive stage will usually be the making of definite commitments with partners, suppliers, subcontractors, or similar legally binding steps.[467]

228. With that guidance, it becomes clear that South American Silver's investment was made well before the alleged illegalities complained of by Bolivia, all of which occurred far later. The key period was between 2003 and 2008, when South American Silver obtained ten mining concessions covering the entire Malku Khota project area, and incorporated a wholly-owned Bolivian subsidiary, CMMK, in

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[464] **CLA-127**, *Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award, Oct. 4, 2013 at ¶ 193.

[465] **CLA-128**, *Vannessa Ventures Ltd v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/04/6), Award, Jan. 16, 2013 at ¶ 167.

[466] **RLA-53,** Zachary Douglas, *The International Law of Investment Claims* 53, fn. 33, ¶¶ 106-108 (2012).

[467] **CLA-129**, Christoph H. Schreuer et al., The ICSID Convention – A Commentary 135 (Cambridge, 2d ed. 2009).

November 2003 for the purpose of exploring, developing, managing, and exploiting the Malku Khota Mining Project.[468] By contrast, the period when the alleged illegalities occurred was well after the investments were made. No amount of creativity in the use of the Legality Doctrine can bridge this vast temporal gulf. For this reason alone, Bolivia's jurisdictional objections based on illegality are fundamentally misconceived and must be dismissed summarily.

4. Bolivia has not even begun to meet its burden of proof on the alleged illegal conduct

229. Bolivia's unclean hands submissions suffer from a final, fatal defect. As an affirmative defense, Bolivia bears the burden of proving its jurisdictional objections. The UNCITRAL Rules provide that "[e]ach party shall have the burden of proving the facts relied on to support its claim or defence."[469] And Bolivia must meet its burden through clear and convincing evidence, not merely a preponderance, as the consensus articulated in the very same cases cited by Bolivia is that applicable standard of proof is a heightened one when grave allegations (such as those made in Bolivia's Counter-Memorial) are made. Bolivia has failed utterly to meet its burden.

230. When serious allegations of wrongdoing are made in civil proceedings, common law as well as civil law systems both demand a heightened standard of proof. [470] In *Siag v. Egypt,* the tribunal found that

> [i]t is common in most legal systems for serious allegations such as fraud to be held to a high standard of proof. The same can be said in international proceedings.... The Tribunal accepts that the applicable standard of proof is greater than the balance of probabilities but less than beyond reasonable doubt. The term favoured by the Claimants is 'clear and convincing evidence.' The Tribunal agrees with that test.[471]

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[468] Claimant's Memorial at ¶ 25-26.

[469] **CLA-130**, UNCITRAL Arbitration Rules 2010, Article 27(1).

[470] **CLA-131**, Andreas Reiner, *Burden and General Standards of Proof*, 10 ARBITRATION INTERNATIONAL 336 (1994) ("the Anglo-Saxon and the continental systems require higher standards of proof for particularly important or delicate questions such as bribery or other types of fraud").

[471] **CLA-44**, W*aguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15), Award, June 1, 2009 at ¶¶ 325-326.

231. *Siag* comports with the applicable standard of proof articulated in general international law. Judge Higgins observed in *Oil Platforms* that there is "general agreement" that, "the graver the charge the more confidence must there be in the evidence relied on."[472] This standard has been applied by numerous investment tribunals, including *Rompetrol v. Romania*,[473] and *Libananco v. Turkey*.[474]

232. As South American Silver has established in section II.D above, Bolivia's allegations of wrongdoing by the Company are made without any reliable foundation. In support of its allegations, Bolivia mostly relies on resolutions that CONAMAQ and FAOI-NP imposed on the communities between December 2010 and February 2011 and that Government officials, including the Ministry of Mines and Metallurgy, the Vice Minister of Social Movements and Civil Society of the Ministry of Metallurgy Mines and the Responsible of the Public Consultation and Citizen Participation Unit of the Ministry of Metallurgy and Mines had analyzed in February 2011 and confirmed that they had no grounds[475] and that CMMK complied with ***all*** legal and administrative regulations applicable to the mining industry. [476]

233. Further, the Ministry of Mines and Metallurgy, Mario Virreira, in different occasions confirmed that the allegations that Bolivia now submits to be truth, were made by "some illegal miners"[477] and that "community members from mining areas oppose extraction operations denouncing environmental concerns and contamination to water,

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472 **CLA-116**, *Oil Platforms (Islamic Republic of Iran v United States of America*), I.C.J., Reports 2003, ¶ 161, Separate Opinion of Judge Higgins, Nov. 6, 2003 at 234 §33, 42 ILM 1334, 1384-86 (2003).

473 **CLA-132**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013 at ¶ 182.

474 **CLA-133**, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, Sept. 2, 2011 at ¶117.

475 **Exhibit C-230**, Official Communication from Vice Minister of Social Movements and Civil Society of the Ministry of Mines to CMMK dated February 10, 2011 and Legal Opinion" issued on February 3, 2011 by the Vice Ministry's Head of Strategic Alliance, Mr. Alberto García Sandoval.

476 **Exhibit C-231**, Official Communication from the office of the Ministry of Mines and Metallurgy to CMMK dated March 16, 2011 and Report issued on February 11, 2011 by Mr. Oscar Iturri, Responsible of the Public Consultation and Citizen Participation Unit. (added emphasis)

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

with the sole purpose of illegally exploiting mining deposits"[478] referring to the Malku Khota Project as falling prey to such tactics. [479] Thus, it is clear that illegal miners, together with CONAMAQ and FAOI-NP leaders promoted divisions amongst the communities, despite the Company's legitimate efforts with the communities to achieve an overall consent. Further, the Government, an in particular the Government of Potosí joined these efforts to divide the communities and fuel the opposition after the Company published information of the PEA Update in March 2011 that showed the true magnitude of the "*megayacimiento.*"[480]

234. The Malku Khota Project presented no risk to the environment: CMMK (i) secured Environmental License DRNMA-CD-35/06 on September 5, 2006 from the Government of Potosí; and (ii) from 2006 to 2012 submitted to the Ministry of Environment or the *Secretaría de la Madre Tierra* of the Government of Potosí over eight environmental and socioeconomic studies that Fundación Medmin conducted, including compliance reports.[481]

235. Finally, the Company did not participate in or promote any violence. It was truly CONAMQ and FAOI-NP leaders and other instigators such as Cancio Rojas that promoted the violence in the area and the Government failed to do anything to protect the Company from such violence.[482] Bolivia's strategy to blame any acts of violence on the Company is an attempt to cover its failure to protect the Company, its employees and the Project. Especially when it had acknowledged that it was the illegal miners that created the conflict in the region. [483]

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[478] **Exhibit C-224**, **"***Comunarios frenan operaciones mineras para iniciar trabajo ilegal*," PAGINA SIETE, Apr. 1, 2014, (Unofficial English Translation).

[479] *Id.*

[480] *See* Sections II.C.3 and II.C.4 *supra*.

[481] **Exhibit C-141**, Medmin Report October 2006; **Exhibit C-142**, Medmin Report September 2008; **Exhibit C-143**, Medmin Report February 2009; **Exhibit C-144**, Medmin Report September 2010; **Exhibit C-145**, Medmin Report December 2010; **Exhibit C-146**, Medmin Report I, January 2012; **Exhibit C-147**, Medmin Report II, January 2012; **Exhibit C-148**, Medmin Report April 2012.

[482] *See* section II.D.4, II.D.5 and II.D.6 *supra.*

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

236. Although Bolivia does not contend that the Company had an obligation to undergo a previous consultation at the exploration phase, it is worth that the Government and the communities confirmed in different instances that no such requirement existed at that stage of the Project.[484] In any event, the Company from 2007 and until the illegal expropriation of the Project maintained a close relationship with communities and respected their rights at all times. The vast majority of the communities and all of the *ayllus* confirmed their support in the different meetings described above, and by entering into the RCAs with the CMMK. Communities' support was further confirmed in the Gran Cabildo of June 8, 2012, attended by 800 families from 42 communities surrounding the Project.[485]

IV. THE LAW APPLICABLE TO THE ARBITRATION IS THE TREATY, SUPPLEMENTED BY RELEVANT PRINCIPLES OF INTERNATIONAL LAW; THESE DO NOT INCLUDE THE SPRAWLING INDIGENOUS RIGHTS CLAIMS MADE BY BOLIVIA

237. As to the law applicable to this arbitration, Bolivia alleges that the parties have not agreed on the law governing the dispute and that the Tribunal is therefore "vested with broad discretion" to determine that law.[486] Bolivia asks the Tribunal, in light of the circumstances of the case, "to interpret the Treaty in light of the sources of international and internal law that guarantee the protection of the rights of the Indigenous Communities that live in the Project area."[487] This untethered approach to the law applicable to the issues of this arbitration is erroneous.

238. Contrary to Bolivia's contention, the law applicable to the merits of this arbitration has already been selected: it is the Treaty itself. The Tribunal is bound by that agreement and must rely upon the Treaty as the primary source of applicable law,

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[484] **Exhibit C-230**, Official Communication from Vice Minister of Social Movements and Civil Society of the Ministry of Mines to CMMK dated February 10, 2011 and Legal Opinion" issued on February 3, 2011 by the Vice Ministry's Head of Strategic Alliance, Mr. Alberto García Sandoval; **Exhibit C-233**, Letter from COTOA-6 to President Evo Morales, Oct. 10, 2011; **Exhibit C-231**, Official Communication from the office of the Ministry of Mines and Metallurgy to CMMK dated March 16, 2011 and Report issued on February 11, 2011 by Mr. Oscar Iturri, Responsible of the Public Consultation and Citizen Participation Unit.

[485] Claimant's Memorial at ¶ 77; **CWS-4**, Gonzales Witness Statement ¶ 22. *See also* **Exhibit C-49**, Resolution Cabildo, June 8, 2012.

[486] Respondent's Counter-Memorial at ¶ 189.

[487] *Id.* ¶ 192.

supplemented where appropriate by relevant principles of international law (**A**). While South American Silver does not dispute that a systemic interpretation of the Treaty is called for under international law, Bolivia has not satisfactorily established why the Tribunal should give primacy to the rights of indigenous communities over the clear terms of the Treaty, much less demonstrated the scope and content of indigenous people's rights as a matter (**B**). Finally, Bolivian law has limited relevance to this dispute, particularly on the merits, and should be treated (**C**).

A. THE PARTIES CHOSE THE TREATY AS THE LAW APPLICABLE TO THE DISPUTE

239. Article 35(1) of the 2010 UNCITRAL Arbitration Rules provides that "[t]he arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute." Bolivia predicates its entire applicable law argument on the premise that the parties have not designated the law governing the dispute.[488] But that is simply not true. By consenting to arbitrate disputes relating to the substantive protections provided by the Treaty, the parties have effectively designated the Treaty, which constitutes *lex specialis* governing the specific relationship between South American Silver and the Republic of Bolivia, as the applicable law. *Rompetrol v. Romania* is instructive, as that tribunal found that its sole function was to decide the dispute between the parties "in accordance with '*such rules of law as may be agreed by the parties,*' which in the present case means essentially the BIT..."[489]

240. Moreover, the Parties are in agreement that the starting point for the Tribunal is the Treaty itself. South American Silver argues that its claims are based on Treaty provisions.[490] Likewise, Bolivia admits that the Tribunal must "interpret the

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[488] *Id*. ¶¶ 190 *et seq.*

[489] **CLA-132**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013 at ¶ 170. Although the tribunal in that case relied on Article 42(1) of the ICSID Convention, which provides that "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties," the terms of that provision are sufficiently similar to Article 35(1) of the 2010 UNCITRAL Arbitration Rules to provide a valid basis for comparison. Moreover, the underlying bilateral investment treaty in that case did not contain a clause specifying the law to be applied in case of a dispute between an investor and a contracting party (*see* **CLA-134**, Agreement on encouragement and reciprocal protection of investments between the Government of the Kingdom of the Netherlands and the Government of Romania, April 19, 1994).

[490] Claimant's Memorial at ¶ 116.

Treaty."[491] Tribunals similarly accept that the bilateral investment treaty invoked by the claimant in an investment dispute is the "primary source of law."[492] It thus cannot be said that the parties failed to designate the law applicable to the dispute. To the contrary, they affirmatively selected the Treaty.

241. Since the parties designated the Treaty as the law that would apply to the substance of their dispute, it follows that the Tribunal does not have "broad discretion" to determine the applicable law in this case. Rather, as a result of the parties' choice, the Tribunal is bound to apply the Treaty as the *lex specialis* of this arbitration, and may only *supplement* the Treaty by relying on relevant principles of general international law[493] when appropriate to do so because of some *lacuna* in the Treaty. This is so because the terms used in the Treaty, such as expropriation, fair and equitable treatment, and full protection and security, are expansive terms that have well-developed meanings in customary international law, which the parties to the Treaty can be taken to have intended to refer to.[494]

B. THE SCOPE AND CONTEXT OF INDIGENOUS COMMUNITY RIGHTS IN INTERNATIONAL LAW IS UNCLEAR, AND IN ANY CASE, CANNOT TRUMP THE PROTECTIONS GRANTED TO SOUTH AMERICAN SILVER BY THE TREATY

242. Bolivia contends that the principle of "systemic interpretation" (or more accurately systematic *integration*) [495] of treaties is enshrined in Article 31(3)(c) of the

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[491] Respondent's Counter-Memorial at ¶ 192.

[492] **CLA-158**, *Quiborax S.A. et al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, Sept. 16, 2015 at ¶ 90. *See also* **CLA-159** *Chevron Corporation et al. v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, Mar. 30, 2010 at ¶ 159 ("The substantive law to be applied by the Tribunal consists of the substantive provisions of the BIT…"). The underlying bilateral investment treaty in that case did not contain a clause specifying the law to be applied in case of a dispute between an investor and a contracting party (*see* **CLA-135**, Treaty between the United States of American and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, Aug. 27, 1993.

[493] Contrary to Bolivia's contention, these principles do not include the "*clean hands*" principle (Respondent's Counter-Memorial at ¶ 218). That is because there is no such principle in public international law (*see supra* ¶¶ 204-206).

[494] **RLA-8**, Campbell McLachlan, *"The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention"* (2005), 54(2) International & Comparative Law Quarterly 279, 312.

[495] *See* **CLA-136**, Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L. AND COMPARATIVE LAW QUARTERLY 573, 584 (2011).

Vienna Convention.[496] On that basis, it alleges that the Tribunal should interpret the notions of expropriation, fair and equitable treatment, and full protection and security in light of sources of law that protect the rights of indigenous communities.[497] Bolivia also argues that in the event of a conflict of norms, the rights of indigenous communities trump the protections granted to South American Silver pursuant to the Treaty.[498] The basic flaws in these arguments are almost self-evident.

243. South American Silver has already set forth above the correct application of the general rule of interpretation of treaties contained at Article 31 of the Vienna Convention.[499] Unsurprisingly, in its arguments regarding the law applicable to this dispute, Bolivia once again misconstrues Article 31 by describing the "relevant rules of international law" referred to in Article 31(3)(c) as part of the context of the treaty.[500] That is simply incorrect. Article 31(3) sets out that which "shall be taken into account, *together with the context*."[501]

244. This is an important distinction. Although the International Law Commission ("ILC") has stated that the different elements set out in Article 31 of the Vienna Convention must be considered together to arrive at the legally relevant interpretation,[502] it is also true that Article 31 "is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text."[503] That explains why Article 31(1) sets out the primary rule for the interpretation of treaties,[504] and also why the ILC was careful to note that "the relevant rules of

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496 Respondent's Counter-Memorial at ¶ 193.

497 *Id.* ¶ 199.

498 *Id.* ¶ 202.

499 *See supra* ¶¶ 131-135.

500 Respondent's Counter-Memorial at ¶ 193. Article 31(3)(c) of the Vienna Convention provides that "[t]here shall be taken into account, together with the context: … (c) Any relevant rules of international law applicable in the relations between the parties."

501 **CLA-11**, Vienna Convention, Article 31(3) (emphasis added).

502 *See supra* ¶ 154.

503 **CLA-95**, International Law Commission, Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission, 1966*, Vol. II, 187 at 220-221 (¶ (11)).

504 *See supra* ¶ 154.

international law" referred to in Article 31(3)(c) are considered to be "extrinsic both to the text and to the 'context' as defined in paragraph 2."[505] As noted by Professor McLachlan, "it is always essential to keep in mind that Article 31(3)(c) is only part of a larger interpretation process, in which the interpreter must first consider the plain meaning of the words in their context and in the light of the object and purpose of the provision."[506]

245. Notwithstanding Bolivia's interpretative confusion, South American Silver does not dispute the basic notion that treaties should generally be construed in harmony with international law, without forgetting that the Treaty is the primary part of international law that must be applied to this dispute. Bolivia fails to demonstrate how the application of the systemic integration principle would result in the Tribunal having to degrade the protections granted to South American Silver under the Treaty in order to uphold the putative rights of indigenous communities under international law.[507] The only evidence Bolivia cites for that proposition is a passage in an article by Judge Bruno Simma and Theodore Kill, which never specifically mentions indigenous community rights.[508] And Judge Simma is far more circumspect about the harmonization of investor protections and human rights through 'systemic integration' and Article 31(3)(c) than Bolivia lets on; indeed he cautions against the use of what is a purely interpretative principle to modify the substantive obligations found in the investment treaty, which is precisely against what Bolivia suggests:

> Article 31(3)(c) has developed from a doctrinal wallflower, described as 'curious' by Professor McDougal around the time of its inclusion in the Vienna Convention, into a darling of recent international legal literature. It was termed no less than the 'master key to international law' by the International Law Commission, codifying the so-called

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505 **CLA-95**, International Law Commission, Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission, 1966*, Vol. II, 187 at 222 (¶ (16)).

506 **RLA-8**, Campbell McLachlan, *"The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention"* (2005), 54(2) International & Comparative Law Quarterly 279, 311.

507 Respondent's Counter-Memorial at ¶ 199.

508 **RLA-18**, Bruno Simma and Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology, in* CHRISTINA BINDER, URSULA KRIEBAUM, AUGUST REINISCH AND STEPHAN WITTICH (EDS.), INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOR OF CHRISTOPH SCHREUER 678, 704-705 (2009).

> 'systemic integration' of treaties, and is by now itself part of customary international law. **As against such enthusiasm, I would advice keeping in mind what the provision was designed to be, namely a principle for the interpretation of treaties, nothing more**. Defined as such, what can article 31(3)(c) yield as an entry point for international human rights law in the interpetation of an investment treaty? Again, and most importantly, **it can only be employed as a means of harmonization *qua* interpretation, and not for the purpose of modification, of an existing treaty**.[509]

246. Moreover, Bolivia fails to explain how the specific instruments it would have the Tribunal take into consideration fall within the purview of a truly systemic integration of the Treaty with customary international law. The phrase "relevant rules of international law" in Article 31(3)(c) of the Vienna Convention refers to the sources of law set forth in Article 38 of the Statute of the ICJ,[510] *i.e.*, international conventions, customary international law, general principles of law recognized by civilized nations.[511] Thus, a *sine qua non* condition that must be met in order for the Tribunal to rely on a particular human rights instrument is for that instrument to constitute a binding source of law identified at Article 38 of the ICJ Statute. Bolivia admits this as well.[512] And proving the binding nature of the human rights principle invoked is only the first of a three-pronged inquiry under Article 31(3)(c): apart from the requirement that (1) there be a true international law "rule", (2) this rule must be "relevant", and (3) must also be "applicable in the relations between the parties."

247. Leaving aside (2) and (3) above, which Bolivia has not even begun to substantiate, Bolivia has not established that the instruments it relies upon – including the

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509 **CLA-136**, Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L. AND COMPARATIVE LAW QUARTERLY 573, 584 (2011).

510 *See* **RLA-18**, Bruno Simma and Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, *in* CHRISTINA BINDER, URSULA KRIEBAUM, AUGUST REINISCH AND STEPHAN WITTICH (EDS.), INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOR OF CHRISTOPH SCHREUER 678, 695 (2009); and **RLA-8**, Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention* 54(2) International & Comparative Law Quarterly 279, 310 (2005).

511 **RLA-19**, Statute of the International Court of Justice, Article 38(1).

512 Respondent's Counter-Memorial at ¶ 200.

2007 United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**"),[513] the United Nations Guiding Principles on Business and Human Rights,[514] and the OECD Guidelines for Multinational Enterprises[515] – constitute binding international law within the meaning of Article 38 of the ICJ Statute. Nor can it: on their face, these three documents are **non-binding**, *de lege ferenda* instruments and lack the State practice and *opinio* juris elements that would transform them into embodiments of customary international law.

248. The 1969 American Convention on Human Rights ("**American Convention**"),[516] the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women,[517] and the 1989 ILO Convention No.169[518] are all international conventions within the meaning of Article 38 of the ICJ Statute. However, Bolivia fails to specify how exactly the Tribunal would rely on these instruments in the context of a systemic interpretation of the Treaty. Unless these instruments are reflective of custom (which has not been established at all), they can only be binding should the Parties consent to do so. Indeed, Professor McLachlan noted that with regard to international conventions and systemic interpretation, one possible solution would be to require all parties to the treaty under interpretation to be parties to any other treaties relied upon.[519] He qualified his position further as follows:

> If on its proper construction, a particular obligation in the treaty is owed in a synallagmatic way between pairs of parties, rather than *erga omnes partes* (even if contained within a multilateral treaty), then the *application* of that obligation as between the relevant pair of parties (as opposed to its interpretation generally) may properly be

[513] *Id.* ¶ 217(d).

[514] *Id.* ¶ 220.

[515] *Id.* ¶ 220.

[516] *Id.* ¶ 217(a).

[517] *Id.* ¶ 217(b).

[518] *Id.* ¶ 217(c).

[519] **RLA-8**, Campbell McLachlan, *"The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention"* (2005), 54(2) International & Comparative Law Quarterly 279, 314.

> considered in the light of other obligations applying bilaterally between those parties only.[520]

249. The United Kingdom is not party to the three treaties referred to. Thus, following Professor McLachlan, Bolivia cannot rely on these instruments in the context of a systemic interpretation of the Treaty. Bolivia must be aware of this fact, and yet has not proposed any alternative explanation.

250. Indeed, when States wish to maintain a preference for indigneous peoples' rights over investor protections, they do so explicitly, as was done in the ASEAN-New Zealand Free Trade Agreement of 2010, where the contracting States made clear that "nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favorable treatment to Maori in respect of matters covered by this Agreement including in fulfillment of its obligations under the Treaty of Waitangi."[521]

251. Likewise, Bolivia has not established, let alone suggested, that the documents set forth in paragraphs 247 and 248 above constitute either customary international law or general principles of law recognized by civilized nations, such that the Tribunal could rely on them as proper "rules" of international law pursuant to Article 31(3)(c) of the Vienna Convention. Its related contention that customary international law "demands the protection of Indigenous Peoples' fundamental rights,"[522] is bare assertion. Article 38(1)(b) of the ICJ Statute defines "international custom" as "evidence of a general practice accepted as law."[523] Given that the only basis for Bolivia's statement is a paper published by the International Law Association, it is obvious that it has failed to substantiate, much less prove, that its assertions concerning the content of indigenous peoples' rights forms part of customary international law.

252. More curious still, Bolivia has omitted to mention that on at least three occasions, investment treaty tribunals have had an opportunity to make issues of

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[520] **RLA-8**, Campbell McLachlan, *"The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention"* (2005), 54(2) International & Comparative Law Quarterly 279, 315 (emphasis in original).

[521] **CLA-137**, ASEAN-Australia-New Zealand Free Trade Agreement (2010) at 202, Article 5.

[522] Respondent's Counter-Memorial at ¶ 219.

[523] **RLA-19**, Statute of the International Court of Justice, Article 38(1)(b).

indigenous peoples' rights outcome-determinative, and have declined to do so. The most substantial of these was *Grand River v. United States*,[524] where the claimants argued that as indigenous people, they were entitled to a "heightened level of vigilance and care", which required more proactive consultations.[525] They contended that the U.S. had treated them "contrary to the basic human rights norms that condition how customary international law standards of fair and equitable treatment should be interpreted particularly when the interests of First Nations members and communities are at stake."[526] As a contracting party to NAFTA, Canada argued against the invocation of indigenous rights as customary international law. Canada submitted that the ILO Convention 169 and UNDRIP do not constitute customary international law. Canada stated that "ILO Convention 169 lacks the generality of State practice required to constitute customary international law: as of December 2008, only 20 out of the 193 United Nations member states have ratified ILO Convention 169. … Similarly, UNDRIP does not meet the generality of State practice threshold and lacks the *opinio juris* required to be considered customary international law. Although 144 of the 193 United Nations member States voted in favor of UNDRIP, States with significant indigenous populations, including Canada, the United States, Australia and New Zealand, all voted against the adoption of the Declaration."[527]

253. South American Silver submits that Canada's argument on the absence of customary international law norms governing indigenous peoples' rights is compelling on the matter of a supposed duty to consult indigenous peoples, which Bolivia has argued exists, the tribunal acknowledged the *possibility* of the existence of a customary norm concerning the consultation of indigenous peoples without explicitly ruling that such a norm exists, the tribunal stated: "[i]t may well be … that there does exist a principle of customary international law requiring governmental authorities to consult indigenous

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524 **CLA-138**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, Jan 12, 2011.

525 **CLA-139**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Claimant's Memorial (Merits), July 10, 2008 at ¶ 2.

526 *Id*. ¶ 3.

527 **CLA-140**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Amicus Curiae Submission of the Office of the National Chief of the Assembly of First Nations, Jan. 19, 2009 at ¶¶ 13-14.

peoples on governmental policies or actions significantly affecting them … in any event, any obligations requiring consultation run between the state and indigenous peoples as such, that is, as collectivities [not as individuals]."[528] In that case claimant sought redress through indigenous peoples' rights. Here, Bolivia seeks to use indigenous peoples' rights as a shield to justify their unlawful conduct against South American Silver and its investment. In either situation it is equally the case that any obligations owed to indigenous peoples are opposable against the relevant State, not between the claimant and respondent. And in any case, as different Bolivia Government officials and communities acknowledged, any public consultation would only be required only before starting the exploitation phase, and not, at the exploration phase, in which the Company was.[529]

254. *Glamis Gold v. United States of America* is another example of investment tribunals treading carefully on claims and defenses based on purported indigenous peoples' rights. In that case, the Quechan people opposed the mining project that constituted the investor's investment, maintaining that it would destroy important cultural and sacred sites in violation of international law. The tribunal simply declined to rule on the issue.[530]

255. The latest relevant case dealing with indigenous peoples' rights in an investment treaty arbitration is *von Pezold v. Zimbabwe* particularly its Procedural Order No. 2.[531] There, the tribunal rejected a request to submit an *amicus* submission on indigenous peoples rights, specifically on the importance of the UNDRIP. The tribunal held that the proposed submission would have been on the purported rights of indigenous

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528 **CLA-138**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, Jan 12, 2011 at ¶ 210.

529 **Exhibit C-230**, Official Communication from Vice Minister of Social Movements and Civil Society of the Ministry of Mines to CMMK dated February 10, 2011 and Legal Opinion" issued on February 3, 2011 by the Vice Ministry's Head of Strategic Alliance, Mr. Alberto García Sandoval; **Exhibit C-233**, Letter from COTOA-6 to President Evo Morales, Oct. 10, 2011; **Exhibit C-251**, *Garcia no descarta el control estatal de Mallku Khota*, LA RAZÓN, May 31, 2012; **Exhibit C-231**, Official Communication from the office of the Ministry of Mines and Metallurgy to CMMK dated March 16, 2011 and Report issued on February 11, 2011 by Mr. Oscar Iturri, Responsible of the Public Consultation and Citizen Participation Unit.

530 **CLA-141**, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award June 8, 2009 at ¶ 8.

531 **CLA-142**, *Bernhard von Pezold and Others v. Republic of Zimbabwe and Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2, June 26, 2012.

communities under international law, whereas the arbitral proceedings related to measures taken by Zimbabwe that have allegedly interfered with the claimants' investment. For the tribunal, indigenous peoples rights are not within the scope of ICSID proceedings:

> The Petitioners refer in particular to Article 26 of the UN Declaration on the Rights of Indigenous Peoples, which they say requires States to give legal recognition and protection to lands, territories and resources possessed by indigenous peoples by reason of traditional ownership or other traditional occupation or use, and other unspecified customary international law norms which they claim are binding.
>
> The Arbitral Tribunals are not persuaded that consideration of the foregoing is in fact part of their mandate under either the ICSID Convention or the applicable BITs.[532]

Moreover, the very matter of indigenous peoples' rights requires a determination of whether the community that is alleged to constitute "indigenous peoples" is indeed to be considered such as a matter of international law, a decision which was clearly outside this Tribunal's scope and mandate. As stated by the von Pezold tribunal:

> As noted above, the Petitioners propose to make a submission on the putative rights of the indigenous communities as "indigenous peoples" under international human rights law, a matter outside of the scope of the dispute, as it is presently constituted. Indeed, as the Claimants have noted, in order for the Arbitral Tribunals to consider such a submission, they would need to consider and decide whether the indigenous communities constitute "indigenous peoples" for the purposes of grounding any rights under international human rights law. Setting aside whether or not the Arbitral Tribunals are the appropriate arbiters of this decision, the decision itself is clearly outside of the scope of the dispute before the Tribunals.[533]

256. Thus, Bolivia has failed to prove its contention that a systemic interpretation of the Treaty would result in the Tribunal having to interpret the

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[532] *Id*. ¶¶ 58-59.

[533] **CLA-142**, *Bernhard von Pezold and Others v. Republic of Zimbabwe and Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2, June 26, 2012 at ¶ 60.

protections granted to South American Silver in light of sources of law that protect the rights of indigenous communities. Bolivia's Counter-Memorial gives little indication of the scope and specific content of the rights of indigenous peoples. It fails to prove the customary international law nature of those putative rights. Indeed, it fails to demonstrate how the tribunal would even have the mandate or expertise to identify what communities actually form part of "indigenous peoples" as a matter of international law In the light of the three cases mentioned above, there is no warrant whatsoever for investment treaty tribunals to consider purported indigenous peoples' rights.

257. Relatedly, Bolivia has failed to meet its burden of proof in connection with its allegation that in the event of a conflict of norms, indigenous community rights would trump the protections granted to South American Silver under the Treaty.[534] In support thereof, Bolivia relies solely on the Inter-American Court's finding in *Sawhoyamaxa v. Paraguay* that the existence of a bilateral commercial agreement does not justify the State's breach of its obligations arising under the American Convention,[535] and its proposition that a State's *erga omnes* obligations include the protection of indigenous community rights.[536] Neither of these two arguments withstands scrutiny.

258. First, Bolivia does not explain why the Court's reasoning in *Sawhoyamaxa v. Paraguay* would be relevant to this arbitration proceeding. South American Silver submits that it is inapplicable here because the UK is not party to the American Convention.[537] As a result, an Inter-American Court judgment has no bearing on the interpretation by this Tribunal of the scope of the protections granted to South American Silver under the Treaty.

259. Second, Bolivia's contention that a State's *erga omnes* obligations include the protection of indigenous community rights is specious. It is based on the *Barcelona Traction* case,[538] where the ICJ held that the protections extended by a State to foreign nationals and investments, as well as the obligations assumed by that State concerning

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534 Respondent's Counter Memorial at ¶ 202.

535 *Id.* ¶¶ 202-203.

536 *Id.* ¶¶ 203-208.

537 *See supra* ¶ 249.

538 Respondent's Counter-Memorial at ¶ 206.

their treatment, could be trumped by obligations *erga omnes*, *i.e.*, "obligations of a State towards the international community as a whole."[539] But the Court's examples of *erga omnes* violations carry the unmistakable characteristics of *jus cogens* violations, as they include only fundamental rights from which no derogation can be permitted, such as "the outlawing of acts of aggression, and of genocide, [and] also the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[540] Bolivia has not adduced any evidence whatsoever establishing that the protection of indigenous community rights have advanced to the level of *erga omnes* obligations. The passage that Bolivia cites from the Inter-American Court's judgment in *Yakye Axa v. Paraguay*, regarding the Court's interpretation of Article 21 of the American Convention, is of no particular assistance in that regard.[541]

260. In conclusion, Bolivia has failed to clarify the scope and specific content of indigenous peoples' rights that it seeks to apply here, and more importantly, to demonstrate that those alleged rights form part of the corpus of international law that the Tribunal must obey, much less that such supposed principles should trump the protections accorded to South American Silver by Bolivia under the Treaty.

C. THE RELEVANCE OF BOLIVIAN LAW TO THE DISPUTE IS LIMITED

261. South American Silver does not dispute that Bolivian law may be relevant to certain limited areas of the dispute, such as the question of whether the Legality Doctrine was met, *i.e.*, the requirement that an investor complies with the laws of the host State when *making* its investment. However, these limited extensions of Bolivian law cannot be viewed as having Bolivian law form part of the law applicable to the merits of the arbitration proceeding. It bears reiterating the primary source of law when deciding the merits of the case is the Treaty itself, which sets forth all the substantive protections accorded to the parties to the Treaty and their investors. The Treaty is then supplemented only to the extent necessary by general international law. There is simply no basis for applying Bolivian law to most of these issues, and the Tribunal should therefore treat

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[539] **CLA-143**, *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, at 3, 32, ¶ 33.

[540] **CLA-143**, *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, at 3, 32, ¶ 34.

[541] Respondent's Counter-Memorial at ¶ 208.

Bolivian law as a factual circumstance to be taken into consideration when assessing whether Bolivia breached its obligations under the Treaty, as has been done in a host of investment arbitration decisions.[542]

V. BOLIVIA VIOLATED ITS OBLIGATIONS UNDER THE TREATY AND GENERAL INTERNATIONAL LAW

262. Bolivia declares in its Counter-Memorial that it complied with its international law obligations to South American Silver and the latter's investments, including those under the Treaty.[543] Bolivia does so even as it admits that it expropriated South American Silver's Malku Khota Mining Concessions and that it has paid no compensation.[544] Without adducing any relevant evidence whatsoever, it claims that its expropriation – or "reversion" as Bolivia labels it – complied with the requirements of the Treaty and international law.[545] South American Silver will show that these assertions are as bereft of fact as they are false (**A**). Bolivia also contends that it did not violate the fair and equitable treatment and full protection and security protections of the Treaty.[546] Bolivia maintains, further, that it did not impair South American Silver's investments through unreasonable and discriminatory measures,[547] and that it did not treat South American Silver's investments less favorably than investments of its own investors.[548] The reality, however, is that Bolivia demonstrably violated each and every one of those treaty standards, and that its cascade of empty denials are not a defense and deserve short shrift (**B**).

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[542] *See, e.g.*, **CLA-144**, *Binder v. The Czech Republic*, UNCITRAL, Final Award, July 15, 2011 at ¶ 391; **CLA-145**, *AFT v. The Slovak Republic*, UNCITRAL, Award, Mar. 5, 2011 at ¶ 197(ii); **CLA-146**, *AES Summit Generation Limited et al. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, Sept. 23, 2010 at ¶ 7.6.6.

[543] Respondent's Counter-Memorial at ¶¶ 327 *et seq.*

[544] *Id.* ¶¶ 332 *et seq.*

[545] Respondent's Counter-Memorial at ¶ 335.

[546] Respondent's Counter-Memorial at ¶¶ 405 *et seq.*, 456 *et seq.*

[547] Respondent's Counter-Memorial at ¶¶ 477 *et seq.*

[548] Respondent's Counter-Memorial at ¶¶ 493 *et seq.*

A. BOLIVIA'S EXPROPRIATION OF SOUTH AMERICAN SILVER'S INVESTMENTS WAS UNLAWFUL AND IN BREACH OF THE TREATY

263. Article 5(1) of the Treaty provides that qualifying investments may not be expropriated by a Contracting State "except for a public purpose and for a social benefit related to the internal needs of that Party and against just and effective compensation."[549] The Treaty then specifies 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," and "shall be made without delay."[550]

264. Article 5(2) of the Treaty, which applies when, as was the case here, "a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares," provides that the expropriating Contracting Party "shall ensure that the provisions of [Article 5(1)] are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares."[551]

265. There is no issue as to whether an expropriation took place: Bolivia freely concedes that it expropriated South American Silver's Malku Khota Mining Concessions.[552] As a result, the critical question for the Tribunal is whether that expropriation violated Article 5 of the Treaty. The conditions for a lawful expropriation set forth in Article 5 are distinct and stand alone – if the Tribunal finds that Bolivia violated any one of those conditions, such lack of public purpose or the failure to pay "just and effective" compensation, then it must conclude that Bolivia's nationalization of the mining concessions was an unlawful breach of the Treaty.

266. Moreover, under these circumstances, it is Bolivia's burden, not South American Silver's, to demonstrate that its expropriation was compliant with the Treaty.

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549 **Exhibit C-1**, Treaty, Article 5(1).

550 *Id.*

551 *Id.* at Article 5(2).

552 Respondent's Counter-Memorial at ¶¶ 332 *et seq.*

It is an elementary principle that a party alleging a specific fact must prove it to the tribunal's satisfaction.[553] Given that the Treaty prohibits expropriations *except* for those that meet specific requirements, and given that the Parties do not dispute that an expropriation actually took place, the onus is on Bolivia to show that it carried out the expropriation of the Malku Khota Mining Concessions for a public purpose and for a social benefit related to its internal needs, and that it provided South American Silver with prompt, adequate and effective compensation amounting to the market value of the expropriated investment.

267. Bolivia's Counter-Memorial is revelatory, as it shows that Bolivia it has no real defense. Its nationalization of the mining concessions was neither for a "public purpose" nor for a "social benefit related to [its] internal needs" (**1**). Moreover, Bolivia did not provide South American Silver with "prompt, adequate and effective compensation" amounting to the "market value of investment expropriated immediately before the expropriation", as was its obligation under the Treaty (**2**). In light of Bolivia's abject inability to show that its expropriation complied with the Treaty, and on the basis of the positive, contemporary evidence that South American Silver particularizes below, Claimant submits that the only reasonable conclusion that can be drawn is that Bolivia unlawfully expropriated the Malku Khota Mining Concessions belonging to South American Silver, in violation of the Treaty.

B. BOLIVIA'S EXPROPRIATION OF THE MALKU KHOTA MINING CONCESSIONS WAS NEITHER FOR A PUBLIC PURPOSE NOR FOR A SOCIAL BENEFIT RELATED TO ITS INTERNAL NEEDS, AND WAS THUS UNLAWFUL AND IN VIOLATION OF THE TREATY

268. According to Article 5(1) of the Treaty, expropriations are prohibited except for those that are undertaken "for a public purpose *and* for a social benefit related to the internal needs of that Party…"[554] The use of the term 'and' indicates that unless an expropriation satisfies both requirements, it will be considered unlawful and in violation

[553] *See, e.g.*, **CLA-147**, *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, June 1, 2012 at ¶ 2.11; **CLA-148**, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, June 30, 2009 at ¶ 113.

[554] **Exhibit C-1**, Treaty, Article 5(1) (emphasis added).

of the Treaty. Bolivia does not dispute this interpretation.[555] Thus, each requirement is considered in turn below.

1. Bolivia's expropriation of the Malku Khota Mining Concessions was not for a public purpose, and was thus unlawful and in violation of the Treaty

269. Bolivia alleges that its expropriation of the Malku Khota Mining Concessions was carried out for a public purpose because it "preserve[d] the public order in the North of Potosí and … assure[d] Indigenous Communities' human rights and collective rights." Bolivia claims that the expropriation "was the only remedy available in order to pacify the conflicts that CMMK provoked and supported among the local communities."[556] Bolivia adds, almost as an afterthought, that the expropriation's public purpose is also established because of its "duty to guarantee the respect for (i) its citizens' human rights and (ii) the Indigenous Communities' specific rights," referring in that connection to the *Sawhoyamaxa v. Paraguay* Inter-American Court case.[557]

270. Deciding what amounts to a "public purpose" should not be unduly confined, and States should have the ability to identify the public good they seek to public. However, the grant of discretion, which host States have, should not be confused with a warrant to be unreasonable or arbitrary in the exercise of that discretion, which States cannot do. The tribunal in *ADC v. Hungary* opined that

> a treaty requirement for '*public interest*' requires some genuine interest of the public. If mere reference to '*public interest*' can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met."[558]

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555 Respondent's Counter-Memorial at ¶¶ 338 *et seq.*, 355 *et seq.*

556 Respondent's Counter-Memorial at ¶ 343.

557 Respondent's Counter-Memorial at ¶ 354. Bolivia's reference to the *Sawhoyamaxa v. Paraguay* Inter-American Court case is inapposite. That court's finding was based on the Germany-Paraguay bilateral investment treaty, which is not at issue in this case. It also yields no insight on the nature of "public purpose," the relevant question in this arbitration, especially as Bolivia itself acknowledges that that concept should be based on the host State's legislation. *See* Respondent's Counter-Memorial at ¶ 340.

558 **CLA-149**, *ADC Affiliate Limited et al. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, Oct. 2, 2006 at ¶ 432 (emphasis in original).

271. The same can said of the Treaty's "public purpose" requirement. It is not sufficient for Bolivia to simply state, as it does in its Counter-Memorial, that the taking of the Malku Khota Mining Concessions was carried out for a public purpose. Rather, Bolivia must, as was held in *British Caribbean Bank Limited v. Belize*, "set out the public purpose for which the expropriation was undertaken and offer a *prima facie* explanation of how the acquisition of the particular property was reasonably related to the fulfilment of that purpose."[559] Bolivia has utterly failed to satisfy that standard.

272. In fact, Bolivia did not expropriate the Malku Khota Mining Concessions out of a concern for human rights or for the specific rights of the indigenous communities. These are *ex post facto* justifications manufactured by Bolivia to defend itself in this arbitration. The critical government measure, Supreme Decree No.1308 of August 1, 2012, never once mentions human rights or the rights of indigenous communities. At most, it references "social conflicts" that have allegedly "jeopardize[ed] the life of the local population and the company's staff," "the extreme social situation in the Malku Khota sector," and the need to "preserv[e] social peace and guarantee[ ] the area's return to a normal state of affairs."[560] Bolivia cites to these same passages throughout its Counter-Memorial to justify the alleged public purpose of its expropriation of the Malku Khota Mining Concessions.[561]

273. Thus, the only declared, ostensible public purpose Bolivia had to justify its expropriation of South American Silver's Malku Khota Mining Concessions was the need to end the existing social conflict in the Malku Khota region and restore peace. Whether these temporary security concerns – which by their nature, can abate after a short period and are in any case capable of being remedied by the investor, truly meets the "public purpose" requirement of the Treaty is open to question. But the facts reveal that security concerns are a sham and a pretext.

274. On July 8, 2012, President Evo Morales declared that he had intended to nationalize South American Silver's Malku Khota Mining Concessions back in 2011: "*El*

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559 **RLA-139**, *British Caribbean Bank Limited v. The Government of Belize*, UNCITRAL, PCA Case No. 2010-18, Award, Dec. 19, 2014 at ¶ 241.

560 **Exhibit C-4**, Supreme Decree No. 1308, Aug. 1, 2012 at 3.

561 Respondent's Counter-Memorial at ¶¶ 176, 346.

año pasado yo había planteado hay que nacionalizar…"[562] The next day, July 9, 2012, Bolivia's Communications Minister, Amanda Dávila, held a press conference in which she confirmed that, for more than a year, Bolivia had intended to expropriate the mining concessions: "*El Gobierno boliviano tenía siempre la intención de suspender el contrato con la empresa y revertir esta concesión a favor del Estado desde hace más de un año.*"[563] That means that by July 2011, at the very latest, Bolivia had already made up its mind to expropriate South American Silver's investments. Yet, according to Bolivia, the "unsustainable public order situation," which is the official reason that it invoked to carry out the expropriation, only began in May 2012.[564] It is self-evident that Bolivia expropriated the Malku Khota Mining Concessions for an ulterior motive, and not because of the "extreme social situation" referred to in Supreme Decree No. 1308, which was merely used as a pretext.

275. The available, contemporaneous evidence makes abundantly clear what that real motive is: Bolivia's purpose in seizing the Malku Khota Mining Concessions was to gain control of US$ 13 billion worth of silver, indium, gallium, and other minerals contained in the "megayacimiento" discovered by South American Silver. Both President Morales and Minister Dávila indicated that Bolivia had intended to expropriate South American Silver's investments since 2011. This makes sense, given that on March 31, 2011, South American Silver had publicly released the results of the PEA Update for the Malku Khota Mining Project reflecting the deposit's truly enormous size:[565]

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[562] **Exhibit C-61**, *Morales confirma nacionalización de Malku Khota*, AGENCIA BOLIVIANA DE INFORMACIÓN, July 8, 2012.

[563] **Exhibit C-63**, *Gobierno dice que tenía hace un ano la intención de anular contrato con minera en Malku Khota*, LA RAZÓN, July 9, 2012.

[564] Respondent's Counter-Memorial at ¶ 143. *See also* Respondent's Counter-Memorial at ¶ 147: "The year of 2012 marked a new dynamic in the conflict created by CMMK between the Indigenous Communities."

[565] Claimant's Memorial at ¶ 54.

Highlights

- Updated Malku Khota economic assessment study doubles mine throughput to 40,000 tonnes per day (tpd) for a 15 year mine life with excellent potential for extension through additional drilling.
- Annual silver production for the first 5 years of 13.2 million ounces at a cash cost of $2.94 per ounce net of by-product credits at "base case" metal prices putting it in the lower quartile of producer costs.
- Annual production 80 tonnes per year of indium and 15 tonnes of gallium.
- Pre-tax NPV at a 5% discount rate of $704 million and IRR of 37.7% at "base case" metal prices of $18.00/oz silver, and $500/kg indium, increasing to a $NPV_{5\%}$ of $1.536 billion and IRR to 64.3% at "middle price case" of $25.00/oz silver, and to a $NPV_{5\%}$ of $2.571 billion at the "recent price case" of $35/oz silver
- Cash flows for the first 5 years increase to average $185 million per year at the base case, to $287 million per year at the middle case and to $430 million per year for the recent price case.
- Updated resource estimate expands Measured and Indicated resources 60% to 230 million ounces of silver with an additional Inferred resource of 140 million ounces of silver.
- 2010 drill program successfully confirms the geologic model with over 80% of the life-of-mine silver resources classified as the Measured and Indicated category in the pit model.
- During the construction phase approximately 1,000 new jobs would be created in the region with over 400 employees likely during operations.
- Budget of $16 million approved for 2011 with Pre-Feasibility activities beginning in Q2.

Exhibit C-41 *Updated Malku Khota Study Doubles Production Levels and 1st 5 Year Cashflow Estimates*, South American Silver Corp. Press Release, Mar. 31, 2011

Shortly thereafter, on April 26, 2011, Bolivia declared an area entirely surrounding the Malku Khota Mining Concessions as an "Immobilization Zone – Area of Interest of COMIBOL," prohibiting anyone from acquiring land or being granted a concession in that area.[566] Thus, from the very beginning, Bolivia intended to expropriate South American Silver's investments for financial gain.

276. In that regard, the Potosí Governor, Mr. Félix Gonzales, Bolivia's only witness in this case, noted in July 2012 that Bolivia would benefit economically from the impending nationalization: *"el Estado gana con la nacionalización, pues económicamente representaría, al menos, 'cerca de 800 millones de dólares todos los años. La plata, inicialmente hay más de 300 millones de onzas troy en todo el cerro de Mallku Khota; tenemos 1.800 toneladas de indio, galio, cobre y zinc, y el oro que todavía no ha sido valorado.'"*[567] Moreover, Supreme Decree No.1308 itself acknowledged the economic value of the Malku Khota Mining Concessions by granting COMIBOL

[566] Claimant's Memorial at ¶ 55. *See* ¶ 98 *supra*

[567] **Exhibit C-64**, *Definen que el Estado se hara cargo de la mina Mallku Khota*, PÁGINA SIETE, July 11, 2012.

exclusive control over them and authorizing it to "perform all the activities making up the mining production chain."[568]

277. Bolivia denies that it expropriated the mining concessions to serve its economic interests because "neither the Reversion Decree nor the previous agreements contain any reference to the economic interest of the measure."[569] This is a weak – and inaccurate – defense in the face of the damning evidence described above. Bolivia cannot mask of the true reasons for its exporpriatory impulses and then claim that very concealment as a defense. **The simple truth is that by nationalizing the Malku Khota Mining Concessions, Bolivia gained control of a mineral resource deposit worth nearly US$ 13 billion making up one of the largest silver, indium, and gallium deposits in the world.** Against this very obvious motive, Bolivia has failed to show any legitimate public purpose the expropriation of Claimant's investments serves.

278. Even assuming *arguendo* that Bolivia's expropriation was for a public purpose, Bolivia would still have to "offer a *prima facie* explanation of how the acquisition of the particular property was reasonably related to the fulfilment of that purpose."[570] Bolivia alleges that the nationalization of the Malku Khota Mining Concessions was the only solution to end the conflict that CMMK had supposedly initiated.[571] Bolivia also rejects South American Silver's assertion that those opposed to the project were a handful of illegal gold miners in the area, and maintains that indigenous communities opposed it because they "foresaw a threat to their traditional ways of life and to the environment."[572] The Tribunal should dismiss those spurious statements. The conflict was begun by illegal gold miners and those seeking to form a cooperative to exploit the deposit, not by CMMK, and the nationalization of the mining concessions was certainly not the only solution to resolve the situation.

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568 **Exhibit C-4**, Supreme Decree No. 1308, Article 2.I, Aug. 1, 2012: "La Corporación Minera de Bolivia – COMIBOL, se hará cargo de la administración y desarrollo minero en las 219 cuadriculas señaladas en el Articulo precedente, que incluyen las 170 Has registradas a nombre de EMICRUZ LTDA., ejerciendo todas las actividades de la cadena productiva minera…"

569 Respondent's Counter-Memorial at ¶ 345.

570 **RLA-139**, *British Caribbean Bank Limited v. The Government of Belize*, UNCITRAL, PCA Case No. 2010-18, Award, Dec. 19, 2014 at ¶ 241.

571 Respondent's Counter-Memorial at ¶ 348.

572 *Id.* ¶ 352.

279. In May 2012, Bolivia's own Minister of Mines, Mario Virreira, confirmed South American Silver's position by declaring that illegal gold mining was the root cause of the conflict in Malku Khota: "*El oro y su explotación ilegal por parte de comunarios son la causa de la oposición de grupos originarios a la minera Malku Khota y no así la defensa de la 'madre tierra.'*" He added: "*estos señores que se oponen a la presencia de la compañía minera Malku Khota, en realidad están haciendo es explotar ilegalmente el oro en esa región.*"[573]

280. Moreover, as explained earlier and in greater detail in the Statement of Claim and above,[574] it is Bolivia's own actions and inactions (including the conduct and negligence of government officials attributable to Bolivia) – and nothing CMMK ever did – that fueled opposition to the mining project in Malku Khota and that ultimately led to the alleged "extreme social situation" that Supreme Decree No. 1308 purportedly intended to cure. For example, the Potosí Governor, Mr. Gonzales, failed to respond to CMMK's initial request for help sent in December 2010.[575] Compounding his inaction, Governor Gonzales signed a petition in February 2011 to have CMMK suspend its activities indefinitely to allegedly avoid any environmental contamination.[576] Then, at the Toro Toro meeting of July 23, 2011, he declared that the Potosí Government wanted shares in CMMK – a statement that helped strengthen opposition to the Malku Khota project to the detriment of South American Silver.[577] Demands for Claimant to abandon its full stake in CMMK soon followed.[578] In the face of this blatantly arbitrary conduct, CMMK acted in good faith throughout, never incited violence, and sought to work with the communities to obtain mutual benefits.[579] Further, despite the Government's

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[573] **Exhibit C-223**, *Explotación ilegal de oro es el origen del conflicto en Mallku Khota*, LA PAZ, May 21, 2012.

[574] *See supra* Section II.C; *See* also Claimant's Memorial Section II.C.

[575] CMMK requested for help from the Governor of Potosí, December 21, 2010.

[576] **Exhibit R-54**, Resolution by the Central Sindical de Trabajadores Originarios de la Primera Sección San Pedro de Buena Vistas de Potosí, Feb. 6, 2011.

[577] **CWS-4**, Gonzales Witness Statement at ¶ 10. *See also* **RWS-1**, Gonzales Bernal Witness Statement at ¶ 33.

[578] *See supra* ¶ 108; **RWS-1**, Gonzales Bernal Witness Statement at ¶33; **Exhibit R-32,** Acta de la reunión de socialización del proyecto del 23 de julio de 2011**; CWS-10**, Mallory Rebuttal Witness Statement at ¶ 46. **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 28.

[579] *See supra* Section II.B.

admission that the "gentleman who oppose the presence of the mining company Malku Khota, [were] actually illegally mining for gold in that region"[580] the Government failed to do anything to sanction those illegal actors. Bolivia simply found it easier to sanction South American Silver, whom, as the Government also acknowledged, was acting legally and complied with all administrative and legal regulations related to mining activities. [581]

281. Bolivia's outright expropriation of South American Silver's investments was neither a necessary nor proportionate measure to restore public order. Instead of taking preventive measures to avoid conflict and serving as a true mediator between South American Silver and those opposing the company, as was its duty, Bolivia chose to stand by, aggravate tensions in the area, and then capitalize on the opportunity to gain an extraordinary source of revenue by swooping in and expropriating the Malku Khota Mining Concessions. Thus, for example, in May 2012, when protests were taking place, Bolivia's Ministry of Mines decided not to militarize the area surrounding Malku Khota.[582]

282. Bolivia had viable alternatives to outright expropriation. It could have appointed a special commission, insulated from political pressure, to gather information and communicate with local communities and CMMK. It could also have implemented an emergency plan to address the situation by, for example, committing to develop better infrastructure and services in the area. But Bolivia did none of those things, a further demonstration of the expropriation's arbitrariness and lack of true public purpose. Indeed, Bolivia points to no preventive or proactive actions on its part (nor can it, as there were none), other than "the organization of several meetings with CMMK and Indigenous Communities in order to seek a solution."[583] However, as also explained in the Statement of Claim and above,[584] even in those meetings Bolivia had no intention to

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[580] **Exhibit C-223**, *Explotación ilegal de oro es el origen del conflicto en Mallku Khota*, LA PAZ, May 21, 2012 (Unofficial English Translation).

[581] **Exhibit C-231**, Official Communication from the office of the Ministry of Mines and Metallurgy to CMMK dated March 16, 2011 and Report issued on February 11, 2011 by Mr. Oscar Iturri, Responsible of the Public Consultation and Citizen Participation Unit. (added emphasis)

[582] **Exhibit C-223**, *Explotación ilegal de oro es el origen del conflicto en Mallku Khota*, LA PAZ, May 21, 2012.

[583] Respondent's Counter-Memorial at ¶ 348.

[584] *See supra* Sections C.3 and C.4; Claimant's Memorial Section II.C.

seek meaningful solutions; instead, those meetings were used to stoke anti-CMMK sentiment in the area,[585] furthering its ultimate expropriatory intentions. In any event, the meetings organized were insufficient to address the professed concerns of the communities, and those of CMMK.

283. Finally, to justify its unlawful actions, Bolivia asserts in its Counter-Memorial that its expropriation of the mining concessions ensured "the pacification of the area," and "contributed to the harmony between Indigenous Communities,"[586] without providing any evidence of this palliative effect. The facts on the ground tell a different story, however: unrest continued to occur well after the expropriation took place. Press reports from October 2012 document the violent protests that were still occurring in Malku Khota.[587] This time, Bolivia did not hesitate to send in response a "preventive police unit" to secure the area and gather information.[588] In 2014, the local communities were still complaining that the government had failed to progress the Malku Khota project.[589] In July 2015, three years after Bolivia's nationalization of the Malku Khota Mining Concessions, general discontent was reported in the Potosí mining sector and violent protests erupted due to Bolivia's failure to provide long-promised services to the local communities.[590] In short, contrary to Bolivia's assertions, Bolivia's taking of South American Silver's investments did nothing meaningful to stop the violence in the area.

284. Thus, Bolivia has not satisfactorily established why the expropriation of South American Silver's Malku Khota Mining Concessions was, in its own words, the "only possible remedy" available to it to resolve the situation. It has failed to establish that its expropriation of South American Silver's Malku Khota Mining Concessions was undertaken for a public purpose. Nor can it, as Bolivia's evident motivation behind the

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585 *Id*.

586 Respondent's Counter-Memorial at ¶¶ 343, 353.

587 **Exhibit C-242**, *Se teme mayores actitudes violentas en Malku Khota*, EFE, Oct. 5, 2012; **Exhibit C-243**, *Toman de nuevo 50% de Mallku Khota*, LOS TIEMPOS, Oct. 3, 2012.

588 *Id*.

589 **Exhibit C-244**, *Ayllus de Mallku Khota toman sede de Comibol*, LOS TIEMPOS, Jan. 29, 2014; **Exhibit C-245**, "*Comibol cambia personal y niega toma en Mallku Khota*," LOS TIEMPOS, Jan. 30, 2014.

590 **Exhibit C-246**, *Protestas en Bolivia: 12 días de bloqueos y dinamita paralizan La Paz*, BBC, July 20, 2015; **Exhibit C-247**, *Los enfrentamientos de los mineros en Bolivia se intensifican*, EL PAÍS, July 23, 2015.

expropriation was not related to "public purpose", but rather by the desire to control US$ 13 billion worth of silver, indium, gallium, and other minerals. The evidence shows that that Bolivia illegally expropriated Claimant's investments in violation of Article 5 of the Treaty. This is a thinly-disguised property grab, an unreasonable and wholly disproportionate measure that is antithetical to international law.

2. Bolivia's expropriation of the Malku Khota Mining Concessions was not for a social benefit related to its internal needs, and was thus unlawful and in violation of the Treaty

285. It is undisputed that, to be legal and compliant with Article 5(1) of the Treaty, Bolivia's expropriation of the Malku Khota Mining Concessions must have been "for a social benefit related to [its] internal needs." As noted above, the onus is on Bolivia to establish this.[591] If it fails to do so, then its expropriation must be considered unlawful and in breach of the Treaty.

286. In its Counter-Memorial, Bolivia states the following about that requirement, and nothing more: "[b]y pacifying the conflicts in the Mallku Khota area and thus avoiding new violations to the Indigenous Communities' rights, the Reversion contributed to the social benefit of such Indigenous Communities which are, as explained above, a major subject protected by international and domestic law."[592] Bolivia does not attempt to interpret the meaning of the terms "social benefit" or "internal needs." Nor does it provide any evidence of that which it asserts. This is especially surprising in light of the fact that this requirement is, on the face of the Treaty's terms, as important as the "public purpose" criterion.

287. South American Silver has produced evidence showing that, contrary to Bolivia's claims, the conflicts in Malku Khota have not abated.[593] Moreover, South American Silver has demonstrated that Bolivia's newfound concern for indigenous communities in this arbitration is not mentioned at all in the contemporaneous documents relating to the expropriation. Rather, these indicate that Bolivia invoked the need to end the existing social conflict in the Malku Khota region and restore peace as the reason for

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591 *See supra* ¶ 254.

592 Respondent's Counter-Memorial at ¶ 357.

593 *See supra* ¶¶ 272.

expropriating Claimant's investments.[594] And even that is a phony justification, as it is clear from the evidence that Bolivia seized the Malku Khota Mining Concessions to take control of one of the largest silver, indium, and gallium resources in the world.[595]

288. Thus, on the basis of the above, the Tribunal must conclude that Bolivia's allegations regarding the nationalization's purported "social benefits related to [its] internal needs" are wrong. For this additional reason, Bolivia's expropriation of Claimant's investments was illegal and in violation of Article 5 of the Treaty.

3. Bolivia did not provide South American Silver with prompt, adequate and effective compensation amounting to the market value of the expropriated investments, making its expropriation of Claimant's investments unlawful and in violation of the Treaty

289. Bolivia concedes that it nationalized South American Silver's Malku Khota Mining Concessions.[596] Because the Mining Concessions were assets of CMMK, a company incorporated in Bolivia and owned by South American Silver, a foreign investor, Article 5(2) of the Treaty applies, i.e., Bolivia "shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation" in respect of the expropriated investments.[597] In turn, Article 5(1) provides, in addition to the requirements that the expropriation be conducted for a public purpose and for a social benefit related to the internal needs of Bolivia (as addressed above), that the compensation owed to the expropriated foreign investor "*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…*"[598]

290. The nationalization of the Malku Khota Mining Concessions thus triggers a Treaty obligation on the part of Bolivia to pay to South American Silver prompt, adequate and effective compensation amounting to the market value of the mining

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[594] *See supra* ¶¶ 261-262.

[595] *See supra* ¶¶ 263-266.

[596] Respondent's Counter-Memorial at ¶¶ 332 *et seq.*

[597] **Exhibit C-1**, Treaty, Article 5(2).

[598] *Id.* at Article 5(1).

concessions. Bolivia does not dispute this.[599] **Nor does it dispute that, to date, it has neither paid nor offered to pay any compensation at all to South American Silver for the expropriation of its investments that took place more than three years ago**.[600] Bolivia's uncontestable failure to provide prompt, adequate, and effective compensation to Claimant makes its expropriation of the mining concessions unlawful and in violation of the Treaty.

291. Bolivia's defense in this regard is two-fold: first, it suggests that it took steps to compensate, but that it was Claimant's failure to participate in the valuation process undertaken by Bolivia that caused the breakdown of the compensation process.[601] But its valuation process was, by its own admission, limited only to the "incurred costs by CMMK",[602] *not* the prompt, adequate and effective compensation and market value of the investment required by the Treaty; this false premise rendered the entire exercise empty. Moreover, Bolivia's claims to have taken meaningful steps towards offering compensation to South American Silver for its expropriation is false, as discussed above: despite being provided with almost no advanced notice of the valuation process, Claimant did seek to engage with Bolivia and sought to meet to discuss valuation. It was Bolivia that failed to proceed with the process, without so much as an explanation. [603]

292. Bolivia's second defense is a purely legal one. It alleges that its failure to pay any compensation to Claimant does not mean that its expropriation was in breach of the Treaty or unlawful.[604] It also claims that the nationalization of the mining concessions complied with the requirements for compensation set out in Article 5 of the Treaty.[605] As discussed below, these arguments are all legally indefensible.

a. Bolivia's failure to pay any compensation to South American Silver means that its expropriation of the

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599 Respondent's Counter-Memorial at ¶ 381.

600 Respondent's Counter-Memorial at ¶¶ 392 *et seq.*

601 Respondent's Counter-Memorial at ¶¶ 178-185.

602 *Id.* ¶ 180.

603 See *supra* ¶¶ 142-144; Claimant's Memorial at ¶ 104; **CWS-9**, Malbran Rebuttal Witness Statement at ¶ 37.

604 Respondent's Counter-Memorial at ¶¶ 385, 392 *et seq.*

605 Respondent's Counter-Memorial at ¶¶ 381 *et seq.*

Malku Khota Mining Concessions was in breach of the Treaty

293. Article 5(2) of the Treaty provides that Bolivia must pay prompt, adequate and effective compensation to South American Silver for having nationalized the Malku Khota Mining Concessions on August 1, 2012. Bolivia has not paid such compensation to Claimant; indeed, it has not even made any meaningful *offer* of payment. Thus, Bolivia's expropriation of South American Silver's investments is in open breach of the Treaty. Investment treaty tribunals have endorsed this logical conclusion. For example, the tribunal in *Funnekotter v. Zimbabwe*, chaired by Judge Guillaume, held that Zimbabwe's expropriation of the claimants' assets had violated the Netherlands-Zimbabwe bilateral investment treaty because, contrary to its obligations under the treaty, Zimbabwe had failed to pay compensation to the claimants.[606]

294. Bolivia rejects this reasoning on the basis that the terms "without delay" and "promptly" are not defined in the Treaty,[607] and that "prompt" means that compensation should be paid "within a reasonable period of time after the taking."[608] Absurdly, Bolivia then concedes that a period of 12 years to pay compensation is "unreasonably long," suggesting implicitly that a period of three years (and counting) from the time the Claimant's Mining Concessions were expropriated is reasonable or, at least, not "unreasonably long."[609]

295. Every single one of Bolivia's allegations under this head of argument is difficult to take seriously. There is no need at all for the Treaty to define the terms "prompt, adequate and effective compensation" because that standard has such a universally understood meaning in customary international law as to render citation unnecessary. Indeed, as Bolivia asserts in other contexts, interpretation of "prompt, adequate and effective compensation" can be taken straight from general international

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606 **CLA-150**, *Bernardus Henricus Funnekotter et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, Apr. 22, 2009 at ¶ 107. *See also* **CLA-10**, *Compañía de Aguas del Aconquija S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, Aug. 20, 2007 at ¶ 7.5.21 ("If we conclude that the challenged measures are expropriatory, there will be violation of Article 5(2) of the Treaty, even if the measures might be for a public purpose and non-discriminatory, because no compensation has been paid").

607 Respondent's Counter-Memorial at ¶ 387.

608 *Id.* ¶ 387.

609 *Id.* ¶ 388.

law by virtue of the general rules on the interpretation of treaties contained at Article 31 of the Vienna Convention. For Bolivia to suddenly deny "prompt, adequate and effective compensation" the meaning ascribed to it under international law is nothing short of disingenuous.

296. Given Bolivia's penchant for using dictionary meanings, it bears noting that the Oxford Dictionary of English defines the adjective "prompt" as meaning "done without delay; immediate."[610] Likewise it defines the noun "delay" as meaning "a period of time by which something is late or postponed."[611] According to a recent UNCTAD study on expropriation, "[c]ompensation is considered to be prompt if paid without delay; adequate, if it has a reasonable relationship with the market value of the investment concerned; and effective, if paid in convertible or freely useable currency."[612] Relying upon these definitions, Bolivia's failure to provide compensation to South American Silver immediately or at least "without delay" after the nationalization of its Malku Khota Mining Concessions is in breach of Article 5(2) of the Treaty.

297. The sources that both Parties suggest that the "prompt, adequate and effective compensation" standard is not breached if the State pays compensation to the expropriated investor as quickly as possible according to the sole arbitrator in the *Goldenberg* case,[613] or within a reasonable period of time according to both L.B. Sohn and R.R. Baxter and Sergey Ripinsky.[614] However, Bolivia conveniently omits to add that in their article, Sohn and Baxter specified what they meant by a reasonable period of time:

> While no hard and fast rule may be laid down, the passage of **several months** after the taking without the furnishing by the State of any real indication that compensation would

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610 **CLA-163**, Oxford Dictionary of English.

611 *Id*.

612 **CLA-151**, UNCTAD, *Expropriation*, UNCTAD Series on Issues in International Investment Agreements II (2012), UNCTAD/DIAE/IA/2011/7 at 40.

613 **CLA-33**, *Goldenberg case (Germany v. Romania)*, Award, Sept. 27, 1928, UN RIAA Vol. II at 909.

614 **RLA-104**, L.B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interest of Aliens* (1961), 55 American Journal of International Law 545, 558; **RLA-103**, Sergey Ripinsky with Kevin Williams, Damages in International Investment Law (British Institute of International and Comparative Law, 2008) 68.

> shortly be forthcoming would raise serious doubt that the State intended to make prompt compensation at all.[615]

298. The "several months" standard articulated by Sohn and Baxter has been met many times over in this case: it has been three years (and counting) since Bolivia's nationalization of South American Silver's Malku Khota Mining Concessions. In that time, Bolivia has not compensated Claimant, let alone provided it with "any real indication that compensation would shortly be forthcoming." Thus, by Bolivia own legal authority, it has failed to provide compensation to South American Silver within a reasonable period of time.

299. All told, Bolivia's argument that three years (and counting) is not unreasonable, demonstrates a disquietingly arbitrary and cavalier attitude towards the Claimant's treaty right to be compensated in a "prompt, adequate and effective" manner. Bolivia's ongoing failure to compensate South American Silver for the nationalization of the Mining Concessions on August 1, 2012 is a violation of its Article 5 obligations under the Treaty.

b. Likewise, Bolivia's failure to pay any compensation to South American Silver means that its expropriation of the Malku Khota Mining Concessions was unlawful

300. A related but distinct issue centers on whether Bolivia's failure to pay compensation renders its expropriation "unlawful" as a matter of international law. Bolivia takes issue with South American Silver's argument that Bolivia' non-payment of compensation for the taking of the Malku Khota Mining Concessions rendered that nationalization unlawful.[616] It believes that payment (or more accurately, non-payment) of compensation is not a factor when deciding whether an expropriation is (or is not) unlawful. [617] But this objection is not well-founded.

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615 **RLA-104**, L.B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interest of Aliens* (1961), 55 American Journal of International Law 545, 558. (emphasis added)

616 Claimant's Memorial at ¶ 138; Respondent's Counter-Memorial at ¶¶ 392-393.

617 Respondent's Memorial at ¶ 397.

301. A State's failure to pay compensation after expropriating an investment renders that expropriation unlawful.[618] As succinctly put by a leading French scholar: "the State has the right to carry out an expropriation as long as it provides compensation to the expropriated person; if it does not, that expropriation becomes automatically unlawful, the State is held liable and is obligated to remedy the loss incurred by the expropriated person."[619] Investment treaty tribunals have adopted that position as well.[620]

302. When read closely, the case law that Bolivia relies upon to argue that the absence of compensation does not, by itself, make an expropriation unlawful actually fails to support its position. For example, the passage from the *Venezuela Holdings* award cited by Bolivia actually stands for the proposition that if an expropriated investor does not receive compensation, the expropriation at issue may not necessarily be unlawful because the State may have made an offer of compensation to that investor.[621] This is not the case here, however – Bolivia does not dispute that it neither paid **nor offered to pay** compensation to South American Silver. Instead, after a lengthy administrative procedure that can only be attributed to Bolivia (as Bolivia admits, the procedure included the cancellation of the terms of reference for the participation of valuation companies due to administrative deficiencies and the firing and hiring of different valuation firms[622]), it instructed the valuation company to estimate only the expenditure made by the Company. [623]

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618 **CLA-152**, Arnaud de Nanteuil, Droit international de l'investissement (Pedone, 2014) at 346, ¶ 741: "Indiscutablement, une expropriation ne peut avoir lieu dans le respect de la licéité internationale sans qu'une compensation financière soit versée à l'investisseur qui en est l'objet" ("Unquestionably, an internationally lawful expropriation may not take place without financial compensation being provided to the expropriated investor").

619 **CLA-152**, Arnaud de Nanteuil, Droit international de l'investissement (Pedone, 2014) at 347, ¶ 743: "l'Etat a le droit de procéder à une expropriation sous réserve de verser une compensation à la personne expropriée ; s'il ne le fait pas, son expropriation devient automatiquement illicite, ce qui engage sa responsabilité et l'oblige à indemniser la perte ainsi subie."

620 *See, e.g.*, **CLA-2**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, Feb. 6, 2007 at ¶ 273.

621 Respondent's Counter-Memorial at ¶ 394; **RLA-105**, *Venezuela Holdings et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, Oct. 9, 2014 at ¶ 301.

622 Respondent's Counter-Memorial at ¶¶182-185.

623 Respondent's Counter-Memorial at ¶185.

303. The numerous decisions of the European Court of Human Rights ("**ECHR**") that Bolivia relies upon are also irrelevant to this dispute.[624] Guided by Article 1 of Protocol No. 1, the ECHR has developed a distinction between inherently illegal takings and those takings that are illegal because no compensation was paid.[625] That distinction is not applicable in the current case. The ECHR and its animating legal framework, the European Convention of Human Rights, is very different from the legal framework freely entered into by these parties as part of the *lex specialis* of the Treaty that forms the primary law applicable to the dispute. Protocol No. 1 of the ECHR confirms this, as it only speaks of general property rights, not the property rights of aliens, and also circumscribes that right through a renvoi to "general principles of international law",[626] including norms such as prompt, adequate, and effective compensation for expropriation.

304. Finally, South American Silver disagrees with Bolivia's attempt to portray the recent award in *Tidewater v. Venezuela* as having ruled that compensation is not a factor when distinguishing lawful from unlawful expropriations. It is true that *Tidewater* tribunal decided that "an expropriation wanting only a determination of compensation by an international tribunal is not to be treated as an illegal expropriation."[627] However, Bolivia neglects to situate that finding in its proper context. An impartial reading of *Tidewater* will show that while Venezuela admitted to have directly expropriated certain of the claimant's assets, the core legal issues centered on its *indirect* expropriation of Tidewater's other investments. It goes without saying that in virtually all cases of indirect expropriation, no offer or payment of compensation is made by the State because the very question of whether the States measures were tantamount to an expropriation is at issue.

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624 Respondent's Counter-Memorial at ¶¶ 397-398.

625 **RLA-103**, Sergey Ripinsky with Kevin Williams, Damages in International Investment Law (British Institute of International and Comparative Law, 2008) 67; **RLA-107**, *Case of the Former King of Greece & others v. Greece*, ECHR, Application No. 25701/94, Judgment (Just satisfaction), Nov. 28, 2002 at ¶ 78.

626 **CLA-153**, Article 1 of Protocol No. 1 of the ECHR provides, in part: "*Protection of Property.* Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

627 **RLA-106**, *Tidewater Investment SRL et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, Mar. 13, 2015 at ¶ 140.

As the *Tidewater* tribunal itself noted, "[m]ost expropriation claims turn on the question whether a measure is expropriatory at all. In such cases, where the tribunal finds expropriation, compensation is almost always due. Cases where expropriation is acknowledged and the dispute revolves around the proper amount of compensation are rare; cases where no compensation has been paid because the label of expropriation itself is contested are the norm."[628] But this case is precisely one of those "rare" instances – Bolivia itself acknowledges that it expopriated South American Silver's investment through its reversion decree; indeed, it emphasizes the fact that COMIBOL ordered a valuation that if completed, was claimed to have been "the compensation standard … according to [that] ordered by the treaty."[629] *Tidewater* is thus of no assistance to Bolivia, which engaged in a direct exproproation of South Amercian Silver's investment, for which it bore a treaty obligation to offer compensation.

305. State-centric inter-governmental bodies such as the United Nations Conference on Trade and Development ("UNCTAD") confirm the foregoing analysis. In its 2012 publication dedicated to expropriation, the UNCTAD analyzed the nature of the compensation requirement and found that a distinction needs to be made between direct and indirect expropriation: "[w]hile **failure by a State to pay any commpensation for a direct expropriation can be seen as rendering such an expropriation unlawful**, this should not be the case when a measure at stake allegedly constitutes an indirect expropriation. Even if the measure is found by a tribunal to be expropiratory, the obligation to pay compensation should arise only as a consequence of such finding."[630] Indeed, even NGOs such as the Institute for Sustainable Development note the real difference between direct and indirect expropriation vis-à-vis compensation: "in direct expropriation, the host State acquires an economic gain. There is, indeed, a transfer of ownership over private property to the public, and therefore an enrichment of the State. In such circumstances then, it is only right that the State should pay for what it has taken. However, in indirect expropriation through a general regulatory measure, the State does

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628 **RLA-106**, *Tidewater Investment SRL et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, Mar. 13, 2015 at ¶ 138.

629 Respondent's Counter-Memorial at ¶ 179.

630 **CLA-151**, UNCTAD, *Expropriation*, UNCTAD Series on Issues in International Investment Agreements II (2012), UNCTAD/DIAE/IA/2011/7 at 44.

not normally make any financial profit out of the measure in question…The standard of full compensation, therefore, becomes difficult to justify."[631]

306. The object and purpose of the Treaty's expropriation protections add further reason for this Tribunal to reject Bolivia's claim that lack of compensation in this case is inconse By the logic of Bolivia, a State could carry out a putatively "lawful" direct expropriation by expropriating an investment, meeting public purpose conditions required for that expropriation to be lawful, but nevertheless withhold compensation completely, which it would be permitted to do until the expropriated investor initiated costly arbitration proceedings to seek redress, and only then proceed with the determination of the fair market value of the expropriated investment. This pathological conduct could not possibly comport with basic notions of due process and fair play. Indeed, If this approach was lawful, then States would no longer have any incentive to provide prompt, adequate, and effective compensation to the expropriated investor at all. That cannot be right. As Dr. Ripinsky wrote, "the non-payment of *any* compensation for an unreasonable length of time cannot be seen as lawful behavior because this would undermine the whole regime of international law on expropriation."[632]

307. Thus, only appropriate reading of the Treaty that is consistent with international law and policy is, in a situation where a State engaged in direct expropriation that is otherwise lawful (such as when public policy and non-discimination criteria have been met) the State must also promptly pay the investor the market value of the expropriated investment, and does so within a reasonable period of time. Its failure to do so renders that expropiration unlawful. Of course, if an investor believed that the compensation offered by the State did not amount to the market value of its investment, it would be entitled to initiate arbitration proceedings; but this does not mean that the host State did not have a pre-existing obligation to provide prompt, adequate, and effective compensation, as mandated by the Treaty even before the arbitration was instituted.

308. In this case, the Tribunal is not even faced with the question of whether "adequate" compensation was made: Bolivia expropriated South American Silver's

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631 **CLA-154**, Suzy Nikiema, *Compensation for Expropriation*, International Institute for Sustainable Development, Best Practices Series, Mar. 2013.

632 **RLA-103**, Sergey Ripinsky with Kevin Williams, Damages in International Investment Law (British Institute of International and Comparative Law, 2008) 68 (emphasis in original).

investment without providing nor even offering any compensation at all, and over three years (and counting) after the fact, it is undeniable that Bolivia's breach continues by failing to provide compensation "promptly", as required by the Treaty. Having engaged in *direct* expropriation, it was incumbent upon Bolivia to provide prompt, adequate and effective compensation at market value, as was required by the Treaty, something it did not do.

309. All told, Claimant maintains that Bolivia's failure to provide or offer any compensation as a result of its nationalization of the Malku Khota Mining Concessions – an undeniable instance of direct expropriation admitted as such by Bolivia – can only mean that the expropriation was unlawful.

4. In any event, Bolivia's enactment of Supreme Decree No. 1308 did not comply with the requirements of prompt, adequate, and effective compensation set out in Article 5 of the Treaty

310. Bolivia makes one further attempt to absolve itself from liability, by claiming that that the terms of Supreme Decree No. 1308 and the alleged "efforts" that it undertook to provide compensation to South American Silver are sufficient to satisfy the requirements of prompt, adequate and effective compensation set forth in Article 5 of the Treaty.[633] According to Bolivia, case law supports the proposition that as long as the State offers compensation and/or makes good faith efforts in that regard, it cannot be said that the Treaty has been violated.[634] This line of argument is incorrect as a matter of law and fact.

311. Article 5 of the Treaty unambiguously provides that the compensation offered by the State in the event of an expropriation "shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier."[635] Supreme Decree No. 1308 does not even remotely approach this standard: it provided only that COMIBOL would hire an independent company to value the investments made by CMMK and Emicruz Ltda, and that on the basis of that valuation, COMIBOL would

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633 Respondent's Counter-Memorial at ¶¶ 382, 385, 401-402.

634 Respondent's Counter-Memorial at ¶¶ 383-384, 400.

635 **Exhibit C-1**, Treaty, Article 5(1).

establish the amount and conditions under which Bolivia would acknowledge (the term used in Spanish is "*reconocer*") the investments made by CMMK and Emicruz Ltda.[636] In other words, Bolivia's expropriation decree is not an offer of compensation. Indeed, nowhere in this document does Bolivia actually offer to compensate Claimant for its loss. And even if Supreme Decree No. 1308 could be construed as an offer of compensation, which South American Silver denies, it states that the independent company is to value the investments made by CMMK and Emicruz Ltda and not, as provided by the Treaty, assess the market value of the expropriated investment. Thus, contrary to Bolivia's contention, its "proposals" were, in fact, incompatible with the requirements provided for in the Treaty.[637]

312. As a result, since Supreme Decree No. 1308 neither constitutes an offer of compensation nor provides for the evaluation of the market value of Claimant's investments, the doctrine and jurisprudence relied upon by Bolivia to justify its position are inapposite. The writings of August Reinisch, Sergey Ripinsky, and Irmgard Marboe that Bolivia cites, as well as the *Tidewater* award, all refer to an offer of compensation,[638] which Bolivia never made. The consequences of the absence of an offer of compensation is clear: "where no compensation at all has been paid for a protracted period of time or, where the compensation paid or offered has been manifestly unreasonable, should be treated as unlawful"[639] Similarly, the *LETCO* tribunal held that the expropriation at issue in the case was unlawful because it "was not accompanied by an offer of appropriate compensation."[640]

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636 **Exhibit C-4**, Supreme Decree No. 1308, Articles 4.I and 4.II, Aug. 1, 2012.

637 Respondent's Counter-Memorial at ¶ 401.

638 Respondent's Counter-Memorial at ¶¶ 383-384, 400, 402.

639 **RLA-103**, Sergey Ripinsky with Kevin Williams, Damages in International Investment Law (British Institute of International and Comparative Law, 2008) 68 ("Therefore, it seems that those takings, where no compensation at all has been paid for a protracted period of time or, where the compensation paid or offered has been manifestly unreasonable, should be treated as unlawful"); **RLA-102**, Irmgard Marboe, Calculation of Compensation and Damages in International Investment Law (Oxford University Press, 2009) 59, ¶ 3.50 this breach are clear. ("[i]f the State does not comply with [the treaty's provisions on expropriation], it commits an internationally wrongful act.").

640 **CLA-155**, *LETCO v. Liberia*, ICSID Case No. ARB/83/2, Award, Mar. 31, 1986 in 2 ICSID Reports 343, 367; **RLA-98**, August Reinisch, "Legality of Expropriations" in August Reinisch (ed.), Standards of Investment Protection (Oxford University Press, 2008) 171, 199.

313. The remaining case law that Bolivia cites is also irrelevant. In both *Amoco* and *Venezuela Holdings*, the circumstances attendant to those two cases are simply not comparable with the facts here. Indeed, quite the opposite occurred: through Supreme Decree No. 1308, Bolivia imposed on South American Silver a non-negotiable method to determine the value of the investments made by CMMK and Emicruz Ltda. And in this very arbitration, Bolivia contends that it was under no obligation to consult with CMMK regarding the procedure to evaluate the compensation owed.[641]

314. Bolivia's enactment of Supreme Decree No. 1308 thus failed to satisfy the compensation requirement of Article 5 of the Treaty, as it does not even begin to provide for prompt, adequate, and effective compensation amounting to the market value of the expropriated investment. The Decree was neither an offer of compensation nor did it provide for the correct calculation of the compensation owed to Claimant. Any subsequent steps that Bolivia took to comply with that decree are, consequently, not of any assistance to the Tribunal's assessment of compliance with Article 5 (leaving aside the fact that even those subsequent steps taken did not comply with the Decree).

C. BOLIVIA'S ACTS AND OMISSIONS WITH RESPECT TO CLAIMANT'S INVESTMENTS BREACHED OTHER PROVISIONS OF THE TREATY

315. In addition to its unlawful expropriation, Bolivia's acts and omissions with respect to South American Silver's Malku Khota Mining Concessions violated the standards of fair and equitable treatment (**1**) and full protection and security (**2**) that are enshrined in the Treaty. Bolivia also impaired Claimant's investments through unreasonable and discriminatory measures (**3**), and treated such investments less favorably than investments of its own investors (**4**).

1. Bolivia failed to treat Claimant's investments fairly and equitably

316. Article 2(2) of the Treaty provides that "[i]nvestments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment … in the territory of the other Contracting Party."[642] The Parties agree that with respect to South American Silver's Malku Khota Mining Concessions, the fair and

[641] Respondent's Counter-Memorial at ¶¶ 369 *et seq.*

[642] **Exhibit C-1**, Treaty, Article 2(2).

equitable treatment standard requires Bolivia to (a) protect the Claimant's legitimate expectations; (b) act in good faith; and (c) act in a predictable and transparent manner.[643] In its own words, "Bolivia agrees with SAS that the legitimate expections of the investors are part of the fair and equitable treatment standard. Also, Bolivia agrees that the respect of legitimate expections of an investor must go together with the stability of the legal framework of the State receiving the investment."[644]

317. Bolivia disagrees, however, with Claimant's reliance on the tribunal's reasoning in *Tecmed v. Mexico*,[645] specifically which held that fair and equitable treatment safeguards the *claimant's* legitimate expectations.[646] To this effect, it cites the *MTD v. Chile ad hoc* committee's criticism of the decision.[647] But that criticism rings hollow in light of the many investment treaty tribunals that have subsequently endorsed the *Tecmed* tribunal's position.[648] In Bolivia's reliance on the tribunal's findings in *Genin v. Estonia* is similarly inapposite.[649] The *Genin* tribunal interpreted not fair and equitable treatment, but the *international minimum standard of treatment* under customary international law, which is not at issue in this arbitration.

318. In any case, as demonstrated below, Bolivia's maltreatment of South American Silver and its investment is a violation of any expression of the fair and equitable treatment standard.

a. Bolivia violated Claimant's legitimate expectations

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643 Claimant's Memorial at ¶¶ 148-151; Respondent's Counter-Memorial at ¶¶ 407-409.

644 Respondent's Counter-Memorial at ¶ 409.

645 *Id* ¶ 410.

646 Claimant's Memorial at ¶ 148.

647 Respondent's Counter-Memorial at ¶ 411.

648 *See, e.g.*, **RLA-27**, *Gold Reserve Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014 at ¶ 572; **CLA-156**, *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, Dec. 7, 2011 at ¶ 316; **CLA-157**, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, Nov. 8, 2010 at ¶ 420; **CLA-03**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award, Mar. 3, 2010 at ¶ 440; **CLA-68**, *Rumeli Telekom A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008 at ¶ 609; **CLA-51**, *PSEG Global v. Turkey*, ICSID Case No. ARB/02/5, Award, Jan. 19, 2007 at ¶ 240; **CLA-42**, *LG&E Energy Corp. et al. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, Oct.3, 2006 at ¶ 127; **CLA-48**, *Eureko v. Poland*, *Ad hoc*, Partial Award, Aug. 19, 2005 at ¶ 235; **CLA-53**, *Occidental Exploration and Production Company v. Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, July 1, 2004 at ¶ 185.

649 Respondent's Counter-Memorial at ¶¶ 433-434.

319. An investor's legitimate expectations are based on "the state of the law of the host country at the time of the investment."[650] Thus, in Claimant's case, its expectations were based on, *inter alia*, the Treaty; Bolivia's 1990 Investment Law, which encouraged and guaranteed foreign investments;[651] and Bolivia's 1997 Mining Law, which provided for a clear method for the acquisition and recording of mining concessions, as well as legal certainty in respect of such concessions.[652] South American Silver's expectations were also based on Bolivia's repeated and specific expressions of support when it invested in Malku Khota and during the course of that investment, up until mid-2011.[653]

320. After that time, Bolivia proceeded to subvert Claimant's legitimate expectations by (i) publicly undermining South American Silver's ownership rights over the Malku Khota Mining Concessions and fostering opposition to the project and the Company;[654] (ii) allowing the conflict in Malku Khota, the root cause of which was the presence of illegal gold miners in the area[655] and the interest of some to form a cooperative to escalate;[656] (iii) deciding, negotiating, and ultimately formalizing the expropriation of Claimant's investments, without giving appropriate notice or affording CMMK an opportunity to be heard, allegedly because this was the only way to end the social conflict in the Malku Khota region, but in fact because the nationalization served its financial agenda;[657] and (iv) failing to compensate South American Silver after the expropriation.[658]

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650 **RLA-112**, Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, 2nd ed. (Oxford University Press, 2012) 115.

651 Claimant's Memorial at ¶ 18; **CWS-1**, Fitch Witness Statement at ¶ 17; **CWS-2**, Malbran Witness Statement at ¶ 13

652 Claimant's Notice of Arbitration, Apr. 30, 2013 at ¶12; Claimant's Memorial at ¶ 19; **Exhibit C-30**, Bolivia's Mining Code, Law 1777, published in Gaceta No. 1987, Mar. 17, 1997.

653 *See* Claimant's Memorial Section II.B.5

654 *See, e.g.*, **CWS-4**, Gonzales Witness Statement at ¶¶ 10, 24; **RWS-1**, Gonzales Bernal Witness Statement at ¶ 33; *See also supra* 100 *et seq.*

655 *See supra* ¶¶ 81 and 82.

656 *See supra* ¶¶ 79, 84 *et seq.*, 98 and 108-111.

657 Claimant's Memorial Section II.D.4

658 *Id*.

321. In its defense, Bolivia alleges that the acts and omissions described above were not a breach of South American Silver's legitimate expectations because it should have expected Bolivia to protect the indigenous communities in accordance with its national and international obligations.[659] That defense does not stand up to scrutiny, however. As noted above, Bolivia did not nationalize the Malku Khota Mining Concessions out of a concern for human rights or for the specific rights of the indigenous communities.[660] Bolivia's invocation of this justification is an *ex post facto* excuse manufactured for purposes of this arbitration. And even if Bolivia had nationalized the mining concessions out of a concern for the rights of the indigenous communities, which Claimant denies, Bolivia has not established the reason why its obligation to protect the indigenous communities necessarily relieved it of its obligations vis-à-vis South American Silver pursuant to the Treaty.

322. Bolivia should have stepped in to protect both the indigenous communities and South American Silver when the first signs of potential conflict arose. Instead, Bolivia chose to stand by and watch,[661] and now blames Claimant for the unfortunate events that followed. In truth, the conflict's escalation and ill-fated consequences are evidence of Bolivia's failure to comply with its obligations to both the indigenous communities and South American Silver. And in the end, it is Bolivia's utter failure to protect Claimant's Malku Khota Mining Concessions, as described above,[662] that violated Claimant's legitimate expectations. For these reasons, the Tribunal should hold that Bolivia's acts and omissions in connection with South American Silver's mining concessions were in breach of the fair and equitable treatment standard enshrined at Article 2 of the Treaty.

b. Bolivia failed to act in good faith vis-à-vis South American Silver's investments

323. Another element of fair and equitable treatment is the requirement that Bolivia act in good faith vis-à-vis South American Silver's investment. Bolivia did not

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659 Respondent's Counter-Memorial at ¶¶ 409 *et seq.*, in particular 423-425, 429-431.

660 *See supra* ¶¶ 281.

661 *See supra* ¶¶ 281-282.

662 *See supra* ¶ 322.

meet its obligations in this regard, as it (i) undermined Claimant's rights, which government officials pretended to protect; (ii) negotiated, decided, and ultimately formalized the revocation of CMMK's mining concessions for reasons other than those officially stated, while deliberately keeping Claimant and CMMK out of the process; (iii) failed to define and apply the provisions of the Bolivian Constitution and mining law in a transparent and consistent manner; and (iv) failed to abide by its commitment to offer compensation to CMMK following the expropriation.[663]

324. In its Counter-Memorial, Bolivia claims that South American Silver has not proven any of its contentions and that it has not shown that Bolivia's acts and omissions were contrary "to the good faith standard as applied in international law."[664] Bolivia then alleges that it acted in good faith during the nationalization of the Malku Khota Mining Concessions.[665] These defenses are unavailing.

325. Claimant has demonstrated the truth of its contentions in its submissions,[666] and the bad faith underlying Bolivia's acts and omissions are of a *res ipsa loquitur,* self-explanatory nature. There is consequently no need to show the manner in which Respondent's conduct was contrary to the good faith standard. Bad faith is made even more evident in the following paragraphs, which respond to Bolivia's allegations on this point.

326. First, Bolivia argues that it did not undermine Claimant's rights.[667] It did. As discussed above, the Company did not initiate the conflict in Malku Khota, contrary to Bolivia's allegation.[668] Rather, the conflict's root cause was illegal gold mining in the area, as confirmed by Minister Virreira.[669] Moreover, Bolivia's lack of candor is evident in suggesting that it "made its best efforts" for the project to continue with CMMK.[670] It did not. To the contrary, Bolivia publicly undermined South American Silver's

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663 Claimant's Memorial at ¶ 154.

664 Respondent's Counter-Memorial at ¶ 437.

665 Respondent's Counter-Memorial at ¶¶ 439 *et seq.*

666 Claimant's Memorial at ¶ 54 *et seq.*

667 Respondent's Counter-Memorial at ¶ 440.

668 *See supra* ¶¶ 81, 82, 83-85.

669 *See supra* ¶¶ 279-280.

670 Respondent's Counter-Memorial at ¶ 440.

ownership rights over the Malku Khota Mining Concessions and fostered opposition to the project and the Company.[671] Once the situation at Malku Khota – that Bolivia itself had fueled – became "unsustainable," it swooped in under the pretext of restoring the peace and expropriated Claimant's investments.[672] That is evidence of bad faith conduct.

327. Second, Bolivia argues that the only reason why it nationalized the Malku Khota Mining Concessions was to end the ongoing conflict that was taking place in the project area.[673] It also denies premeditating the expropriation since 2011,[674] and denies that the creation of an immobilization zone around the concession area constituted a first step in dispossessing Claimant of its investments.[675] These blanket denials are belied by the facts. As established above, Bolivia's intention to "pacify" Malku Khota may have been the official reason for the seizure of the mining concessions, but it was certainly not the real reason.[676] The real reason for Bolivia's expropriation of Claimant's investments was to gain control of a US$ 13 billion mine that contains one of the largest silver, indium, and gallium resources in the world. That intention originated in 2011, as confirmed by President Morales himself and Minister Dávila,[677] shortly after South American Silver publicly released the results of the PEA Update for the Malku Khota Mining Project reflecting the deposit's truly enormous size.[678]

328. Bolivia's enactment of Resolution DGAJ-0073/2001, which declared an area surrounding the Malku Khota Mining Concessions an immobilization zone, is further evidence of Bolivia's expropriatory intentions.[679] In fact, the resolution expressly states that one of the reasons for declaring that area an immobilization zone is due to the

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671 *See, e.g., See supra* Section II.C.4; **CWS-4**, Gonzales Witness Statement at ¶¶ 10, 24; **RWS-1**, Gonzales Bernal Witness Statement at ¶ 33.

672 *See, e.g., See supra* ¶ 97; Claimant's Memorial Section II.D.2

673 Respondent's Counter-Memorial at ¶ 441.

674 *Id.* ¶ 442.

675 Respondent's Counter-Memorial at ¶¶ 443-445.

676 *See supra* ¶¶ 273-277.

677 *See supra* ¶ 274.

678 *See supra* ¶ 275.

679 Claimant's Memorial at ¶ 55.

Company's finding of the silver deposit in Malku Khota, and that the area surrounding the Company's concessions was still subject to exploration.[680]

329. In light of the above, Bolivia's explanations regarding the nature of immobilization zones are unconvincing. If, as Bolivia alleges, all areas of its national territory that have not been granted as mining concessions constitute a fiscal reserve since 2007,[681] it is striking that Bolivia established an immobilization zone around the mining concessions less than a month after Claimant publicly released the results of the PEA Update in 2011. The fact that the resolution established 18 other such zones is not an explanation.[682] Far from being absurd as Bolivia claims,[683] it is actually quite obvious that Bolivia purposefully limited the Company's ability to exploit other mineralized areas surrounding the mining concessions or to expand the planned mine's footprint. Bolivia was thus well aware, since 2011, of the magnitude and potential of the deposit discovered by South American Silver, and this knowledge sheds new light on the declarations of President Morales and Minister Dávila.

330. Thus, Bolivia's conduct is evidence of its bad faith, as is its failure to pay, or offer, compensation to South American Silver three years (and counting) after having nationalized the Malku Khota Mining Concessions. For these reasons, Bolivia's failure to act in good faith vis-à-vis Claimant's investments is a breach of the fair and equitable treatment standard set forth in Article 2 of the Treaty.

c. Bolivia did not treat South American Silver's investments in a transparent or consistent manner

331. In addition to being in bad faith, the conduct of Bolivia described in paragraphs 323 to 330 above was neither transparent nor consistent. For example, South American Silver has shown that starting in 2011, Bolivia had the intention of expropriating Claimant's Malku Khota Mining Concessions.[684] At about the same time,

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680 **Exhibit R-119**, Resolución de COMIBOL (DAJ-0073/2011), Apr. 26, 2011.

681 Respondent's Counter-Memorial at ¶ 443.

682 *Id.* ¶ 444.

683 *Id.*

684 *See supra* ¶¶ 254-255.

Bolivia withdrew its support for the project and fueled opposition to it.[685] Yet, in late May 2012, Minister Virreira declared that the Company's mining project in Malku Khota was lawful.[686] Less than three months later, Bolivia nationalized the mining concessions. This sequence exemplifies the inconsistent treatment of Claimant's investments that Respondent is guilty of.

332. Bolivia denies all of this,[687] alleging instead that it behaved transparently (without mention of consistency, notably) because it enacted "a policy that considered the protection of Indigenous Communities' rights as a fundamental pillar of the State,"[688] and because it let CMMK "attend numerous meetings" in order to reach an agreement "that would allow CMMK to continue the Project's development."[689]

333. However, as discussed above, Bolivia did not nationalize the Malku Khota Mining Concessions out of a concern for human rights or for the specific rights of the indigenous communities.[690] Even the official reason that it invoked for the nationalization was, in fact, a sham.[691] Conduct of this nature can hardly be characterized as transparent. As for the "meetings" that Bolivia refers to, these were used by it to stoke anti-CMMK sentiment in the Malku Khota area, not to achieve any kind of agreement.[692]

334. In light of the above, South American Silver submits that the Tribunal should also find that Bolivia's non-transparent and inconsistent treatment of Claimant's investments was in violation of the fair and equitable treatment standard set forth in Article 2 of the Treaty.

D. BOLIVIA DID NOT PROVIDE FULL PROTECTION AND SECURITY TO CLAIMANT'S INVESTMENTS

685 Claimant's Memorial at ¶ 62 *et seq.*

686 **Exhibit C-223**, *Explotación ilegal de oro es el origen del conflicto en Mallku Khota*, LA PAZ, May 21, 2012.

687 Respondent's Counter-Memorial at ¶¶ 450 *et seq.*

688 Respondent's Counter-Memorial at ¶ 453.

689 *Id*.

690 *See supra* ¶¶ 272.

691 *See supra* ¶¶ 273-277.

692 *See supra* ¶¶ 280-282.

335. Article 2(2) of the Treaty provides that "[i]nvestments of nationals or companies of each Contracting Party shall at all times be accorded … full protection and security in the territory of the other Contracting Party."[693] The Parties agree that this standard obligates Bolivia to exercise due diligence and take reasonable measures to protect the investments of South American Silver.[694] Thus, although Bolivia attempts to skew the debate by suggesting that its conduct cannot be compared to a State's armed forces destroying or looting an investment,[695] Claimant need only show that Respondent did not act with the requisite due diligence, or failed to take reasonable measures, to establish that it violated the full protection and security standard.

336. Bolivia failed to provide full protection and security to Claimant's investments by (i) refusing or failing to intervene when requested to do so by South American Silver; (ii) encouraging the opposition to the project led by cooperatives and illegal miners in the area; (iii) and ultimately granting immunity to opposition leaders and authors of the violence.[696] Bolivia's acts and omissions in this regard directly undermined the full protection and security that South American Silver expected Respondent to accord to its investments, culminating in the nationalization of the Malku Khota Mining Concessions.

337. Bolivia rejects these accusations,[697] even alleging that Claimant has not provided any evidence to substantiate its contentions.[698] This is untrue, as South American Silver has supplied ample factual evidence, as more fully described in the Statement of Claim and above. In any event, Bolivia's defenses are factually incorrect.

338. Respondent claims that "it did everything that was possible to avoid the conflict created by CMMK in the Malku Khota area,"[699] but that, ultimately, it "had no other alternative" but to expropriate South American Silver's investments.[700] As already

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693 **Exhibit C-1**, Treaty, Article 2(2).

694 Claimant's Memorial at ¶ 155; Respondent's Counter-Memorial at ¶ 465.

695 Respondent's Counter-Memorial at ¶ 469.

696 Claimant's Memorial at ¶ 156.

697 Respondent's Counter-Memorial at ¶ 456 *et seq.*

698 Respondent's Counter-Memorial at ¶ 460.

699 Respondent's Counter-Memorial at ¶ 463.

700 *Id*.

noted above, CMMK did not initiate the conflict and Bolivia did not do everything in its power to arrive at a peaceful solution.[701] For example, the Potosí Governor, Mr. Gonzales, failed to respond to CMMK's initial request for help sent in December 2010.[702] Likewise, in May 2012, despite the ongoing protests, Bolivia's Ministry of Mines decided not to militarize the area surrounding Malku Khota.[703]

339. Yet, Bolivia should have known that conflict could escalate quickly but Bolivia failed to take proactive steps to prevent a similar situation from arising against South American Silver. In the circumstances, Bolivia's omissions show that it did not act with the requisite due diligence, and that it failed to take the reasonable measures that Claimant could have expected it to take to protect its investments.

340. Moreover, Bolivia did not establish that expropriating Claimant's investments was the only option available to it in order to "pacify the conflict." In fact, South American Silver has set out above the numerous alternatives that Bolivia could have explored – but did not – short of nationalizing the mining concessions.[704]

341. Bolivia also claims that it did not promote opposition to the Malku Khota project, but that it acted "with the intention to maintain the harmony in the area."[705] It also accuses South American Silver of referring "contemptuously" to the indigenous communities as "illegal miners."[706] That last statement is particularly out of order given the declarations of Bolivia's own Minister of Mines, in which he confirms that illegal gold mining was the root cause of the conflict in Malku Khota.[707] In any event, Claimant has shown that Respondent fueled opposition to the Malku Khota project and used the meetings between CMMK and the communities to stoke anti-CMMK sentiment.[708] In

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701 *See supra* ¶¶ 280-282.

702 CMMK requested for help from the Governor of Potosí, December 21, 2010.

703 **Exhibit C-223**, *Explotación ilegal de oro es el origen del conflicto en Mallku Khota*, LA PAZ, May 21, 2012.

704 *See supra* ¶¶ 281,282.

705 Respondent's Counter-Memorial at ¶¶ 463, 470.

706 Respondent's Counter-Memorial at ¶ 470.

707 *See supra* ¶ 279.

708 *See supra* ¶¶ 280, 282.

doing so, Bolivia failed to act with the requisite due diligence in order to protect Claimant's investments.

342. Finally, Bolivia denies granting immunity to opposition leaders.[709] However, that is exactly what Bolivia did. In the July 7, 2012 Memorandum of Agreement, Bolivia undertook to "end and desist from all proceedings, investigations, warrants, and persecution against the leaders of indigenous groups and unions, the authorities, leaders and members of the 5 provinces of the Northern Potosí area within the Mallcu Qota conflict in defense of non-renewable natural resources."[710] That measure was patently unreasonable in circumstances where the integrity of South American Silver's Malku Khota Mining Concessions was being threatened.

343. For these reasons, the Tribunal should hold that Bolivia's acts and omissions in connection with South American Silver's mining concessions were in breach of the full protection and security standard set forth at Article 2 of the Treaty.

E. BOLIVIA IMPAIRED CLAIMANT'S INVESTMENTS THROUGH UNREASONABLE AND DISCRIMINATORY MEASURES

344. Article 2(2) of the Treaty provides that "[n]either Contracting Party shall, in any way, impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party."[711] South American Silver described the standard implied by this obligation in its Statement of Claim,[712] and Bolivia does not appear to dispute it. That being said, Bolivia focuses on the notion of "arbitrariness," in particular by relying on the International Court of Justice's *ELSI* decision.[713] However, the arbitrariness of Bolivia's measures is not at issue in this dispute. Claimant contends that these measures were unreasonable, which is a different standard that involves a lower

[709] Respondent's Counter-Memorial at ¶ 471.

[710] **Exhibit C-16**, Memorandum of Agreement, July 7, 2012, Article 3.1.

[711] **Exhibit C-1**, Treaty, Article 2(2).

[712] Claimant's Memorial at ¶¶ 157-158.

[713] Respondent's Memorial at ¶¶ 481-482.

threshold than arbitrariness. As noted by the tribunal in *BG v. Argentina*, it is inappropriate to equate "unreasonableness" and "arbitrariness."[714]

345. In addition to not meaningfully disputing the applicable legal standard, Bolivia does not dispute that the measures it took prior to nationalizing the Malku Khota Mining Concessions, which Claimant contends violated the Treaty,[715] impaired the management, maintenance, development, use, enjoyment, and extension of South American Silver's investments. These measures include the freezing of the area surrounding the Malku Khota project via the enactment of Resolution DGAJ-0073/2001 and the establishment of an immobilization zone;[716] as well as the withdrawal of Bolivia's support to the project, including by requesting a participating stake therein,[717] fueling opposition thereto,[718] and ultimately requesting South American Silver to abandon the project.[719] Thus, Claimant submits that Bolivia's measures were manifestly unreasonable and resulted in the impairment of its investments, in violation of Article 2 of the Treaty.

346. Bolivia contests that its nationalization of the Malku Khota Mining Concessions was an arbitrary measure. It alleges that Bolivia was forced to proceed in this way as a result of CMMK's actions,[720] justifies that measure's public purpose,[721] and denies that it expropriated Claimant's investments for economic reasons.[722] These defenses are all false. South American Silver has already shown that Respondent's expropriation of its investments was unreasonable,[723] and that it was not for a public purpose (or a social benefit related to Bolivia's internal needs), but to serve its financial

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[714] **CLA-4**, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, December 24, 2007, ¶ 341.

[715] Claimant's Memorial at ¶ 159.

[716] Claimant's Memorial at ¶¶ 54 *et seq.*

[717] Claimant's Memorial at ¶¶ 58 *et seq.*

[718] Claimant's Memorial at ¶¶ 62 *et seq.*

[719] Claimant's Memorial at ¶¶ 69 *et seq.*

[720] Respondent's Counter-Memorial at ¶ 481.

[721] *Id.* ¶ 483.

[722] *Id.* ¶ 485.

[723] *See supra* ¶¶ 278-284.

agenda and gain control of a US$ 13 billion mine that contains one of the largest silver, indium, and gallium resources in the world.[724] The expropriation also obviously impaired South American Silver's mining concessions.

347. As to whether the measures taken by Bolivia are discriminatory, Bolivia does not dispute that its own government officials, including President Morales and the Governor of Potosí, openly antagonized Claimant for being a "transnational" and not a Bolivian company.[725] Nor does it dispute that its decision to nationalize South American Silver's Malku Khota Mining Concessions was based, at least in part, on the fact that it was owned by a "transnational" company.[726] In any event, the veracity of these statements was recently confirmed by Minister Virreira.[727]

348. Instead, Bolivia alleges that South American Silver has not legally established that Bolivia's measures were discriminatory.[728] Claimant begs to differ. In *Lemire v. Ukraine,* the tribunal held that a discriminatory measure was a measure that targeted the claimant's investments specifically as foreign investments.[729] Bolivia's actions discussed above demonstrates that Bolivia targeted South American Silver prior to the expropriation because it was a "transnational" company, and subsequently proceeded to nationalize the Malku Khota Mining Concessions also, in part, because of Claimant's foreign status. Furthermore, South American Silver has already established that there was no rational justification to the nationalization,[730] contrary to what Bolivia may now claim.[731]

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724 *See supra* ¶¶ 273-275.

725 Claimant's Memorial at ¶ 160.

726 *Id.*.

727 **Exhibit C-224**, *Comunarios frenan operaciones mineras para iniciar trabajo ilegal*, PAGINA SIETE, Apr. 1, 2014: "Un caso concreto: en la mina Mallku Khota (los comunarios) le dicen no a las transnacionales, no al tema del agua, ¿y qué ocurre?; después de la nacionalización, hacemos inspecciones, ¿y qué vemos? comunarios del lugar y de otras regiones trabajando quello que debíamos defender de las transnacionales…"

728 Respondent's Counter-Memorial at ¶¶ 490-491.

729 **CLA-49**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Jan. 14, 2010 at ¶ 261.

730 *See supra* ¶¶ 278-284.

731 Respondent's Counter-Memorial at ¶ 492.

349. Thus, the measures that Bolivia took against South American Silver's mining concessions, in addition to being unreasonable, were discriminatory, and impaired Claimant's investments. Accordingly, the Tribunal should conclude that Bolivia violated Article 2 of the Treaty.

F. BOLIVIA TREATED CLAIMANT'S INVESTMENTS LESS FAVORABLY THAN THE INVESTMENTS OF ITS OWN INVESTORS

350. Article 3(1) of the Treaty provides that "[n]either Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies…"[732] Bolivia contends that to show a violation of that treaty standard, South American Silver "must demonstrate that its foreign nationality motivated the Reversion."[733]

351. As established above, Bolivia nationalized South American Silver's Malku Khota Mining Concessions, at least in part, because of its status as a foreign company.[734] Claimant raised this argument in its Statement of Claim,[735] and Bolivia has not denied it. South American Silver has also shown that there was no rational justification to the nationalization.[736] The tribunal should therefore hold that Bolivia's acts and omissions were also in breach of Article 3 of the Treaty.

VI. DAMAGES

A. SOUTH AMERICAN SILVER IS ENTITLED TO FULL REPARATION

352. In its Counter-Memorial, Bolivia seems to adopt the position that South American Silver should (in Bolivia's opinion) not be entitled to damages, and therefore Bolivia should not bother providing the Tribunal with an estimate of these damages.[737] Bolivia limits its discussion of South American Silver's damages, as calculated by South American Silver's experts RPA and FTI, to a series of unsubstantiated criticisms.

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732 **Exhibit C-1**, Treaty, Article 3(1).

733 Respondent's Counter-Memorial at ¶ 496.

734 *See supra* ¶¶ 347-348.

735 Claimant's Memorial at ¶ 160.

736 *See supra* ¶ 278 *et seq.*

737 Respondent's Counter-Memorial at ¶¶ 501-09.

Bolivia, however, does not provide an indication as to what these damages should be even though Bolivia clearly acknowledges that the Malku Khota Project contains a significant mineral resource. Thus, Bolivia leaves the Tribunal wondering what position it advocates.

353. As South American Silver demonstrated in its Memorial on the Merits and in this Reply, it is entitled to US$ 385.7 million in damages (including US$ 78.5 million of pre-award interest) as compensation for Bolivia's breaches of the Treaty. If Bolivia is ordered to return the Malku Khota Project to South American Silver, the Company would still be entitled to the sum of US$ 176.4 million (including US$ 35.9 million in pre-award interest) in damages caused by the delay in returning the Project to Claimant.[738]

354. The Malku Khota Project contains approximately 255 million tonnes of ore in the Measured and Indicated category, with an additional 179.9 million tonnes of ore in the Inferred category (excluding 50.1 million tonnes of Low Grade Halo which RPA re-categorized as Exploration Potential) for total ore tonnage of 434.9 million tonnes.[739] As of the Valuation date, FTI calculated the Project Resources using an equivalent silver ounce method as follows: 309.2 million silver equivalent ounces in the Measured and Indicated category, 169.2 million silver equivalent ounces in the Inferred category for a total of 478.4 million silver equivalent ounces excluding 33.4 silver equivalent ounces from the Low Grade Halo that were reclassified as Exploration Potential.[740] The silver equivalent measurement includes silver, indium, gallium, lead, zinc and copper.

355. Based on contained silver ounces of Resources and planned annual production levels, the Malku Khota project is in the top 10 of silver projects in the world in 2012, and is the largest located in Bolivia.[741] Yet Bolivia would have this Tribunal believe that the Project is somehow worthless and that South American Silver should not receive compensation. To reach this absurd conclusion, Bolivia resorts to a series of questionable tactics: misapplication of the methodologies employed, mischaracterizations

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738 **CER-4**, Reply Report of FTI Consulting at ¶ 3.13, Fig. 3, Nov.30, 2015, ("FTI Rebuttal Report").

739 **CER-2**, First RPA Expert Report at 5-7, Table 5-1.

740 **CER-1**, First FTI Report at ¶ 5.29, Figure 3.

741 **CER-4**, FTI Rebuttal Report. Fig. 1 and **CER-3**, Cooper Expert Witness Statement at ¶ 37.

of South American Silver's arguments and, most glaring of all, mis-instruction of its expert witnesses. Instead of instructing Prof. Dagdelen and Brattle to provide an independent estimate of the Malku Khota Project's value and of South American Silver's damages, Bolivia expressly prohibited them from calculating such amounts.[742] Bolivia's efforts to mislead the Tribunal must fail.

1. Standard of Reparation

a. South American Silver is entitled to restitution or the monetary equivalent of its investment in the Malku Khota Project

356. As Bolivia itself recognizes, restitution constitutes "the means of compensation by excellence, as suggested by article 36 of the International Law Commission Articles on State Responsibility."[743] Bolivia nevertheless goes on to belittle South American Silver's right to seek restitution of the Malku Khota Project by suggesting that restitution is seldom awarded in practice.[744] This is not a serious argument. The fact is that South American Silver is legally entitled to seek restitution of its Malku Khota Project, regardless of whether other arbitration tribunals – deciding over different factual backgrounds and circumstances on the basis of different legal instruments – have ordered restitution in other cases.

357. Not only is restitution available, it is also regarded as preferable to other modes of reparation under public international law.[745] ILC Article 34 enumerates the three different forms of reparation available by degree of desirability: "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter."[746] ILC Article 35 is even more straightforward in this respect:

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742 **RER-3**, The Brattle Group, Quantum Damages Analysis Expert Economic Report on FTI Consulting's Quantum of Damages Report, Mar. 30, 2015 at ¶ 14 ("Brattle Report").

743 Respondent's Counter-Memorial at ¶ 511.

744 *Id*.

745 **CLA-14**, James R. Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 213 (2002).

746 **CLA-160**, Responsibility of States for Internationally Wrongful Acts, U.N. GAOR 6th Comm., 56th Sess., U.N. Doc. A/Res/56/83, Jan. 28, 2002, Article 34.

> A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:
>
> (a) is not materially impossible;
>
> (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.[747]

358. Prof. Crawford – on whom Bolivia relies in its discussion of South American Silver's right to claim for restitution – concludes in this respect that:

> The primacy of restitution was confirmed by the Permanent Court in the *Factory at Chorzów* case when it said that the responsible State was "under the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is deigned to take the place of restitution which has become impossible." […] It can be seen in operation in the cases where tribunals have considered compensation only after concluding, for one reason or another, restitution could not be effected.[748]

359. Thus, as one can see, the primacy of restitution over compensation is firmly enshrined in international law. Contrary to what Bolivia suggests, none of the arbitral awards it refers to have rejected that supremacy or the principle of restitution itself. They explain instead that while compensation is preferable, it is not necessarily appropriate under the circumstances of those cases.[749] Bolivia also conveniently omits to mention the requirement that restitution be awarded unless it is "materially impossible"

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[747] *Id*. at Article 35.

[748] **CLA-14**, James R. Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 213-14 (2002), citing Case Concerning the Factory at Chorzów (Ger. v. Pol.), Judgment, Sept. 13, 1928 ("Chorzów Factory Case"), 1928 P.C.I.J. (ser. A), No. 17 at 48 (Sept. 13).

[749] **CLA-161**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, Jun. 8, 2010 at ¶¶ 47, 50-51; **RLA-132**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, Aug. 17, 2007 at ¶ 75; **CLA-05**, *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005 at ¶ 407.

and not merely impossible.[750] Under [ILC] article 32, the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation, and the mere fact of political or administrative obstacles to restitution do not amount to impossibility."[751]

360. Bolivia does not even begin to meet its burden of proving circumstances making it "materially impossible" for it to enact a supreme decree or taking a similar measure reinstating South American Silver's rights over Malku Khota Concessions and paying accompanying damages caused by the delay in returning the Project to Claimant. Instead, Bolivia points out to its discomfort at "repudiating the scope or effects of the Reversion Decree adopted by the President of the Plurinational State of Bolivia and its Ministers Council" – in other words, the Bolivian administration wants to spare itself the political embarrassment of having to take action suggesting that it did in fact mistreat South American Silver's investment.[752] Such purported excuse is impermissible and does not exonerate Bolivia's liability.[753]

361. Bolivia's suggestion that restitution is impossible because the "local community still suffers the abuse and violations to its rights, thus there is a major opposition to SAS returning to the area" is equally perplexing.[754] Bolivia expropriated the Malku Khota Project over three years ago and South American Silver has not returned to the Project area ever since. Accordingly the responsibility for any continuing "abuse and violations" would rest squarely on Bolivia itself and certainly not on South American Silver. Contrary to Bolivia's bare assertions, the local communities are not opposed to South American Silver and have in fact repeatedly requested that the Company come back to move forward with the Project.[755] The same communities have also expressed

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750 **CLA-160**, Responsibility of States for Internationally Wrongful Acts, U.N. GAOR 6th Comm., 56th Sess., U.N. Doc. A/Res/56/83, Jan. 28, 2002, Article 35(a).

751 **CLA-14**, James R. Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 216 (2002).

752 Respondent's Counter-Memorial at ¶ 519.

753 **CLA-160**, Responsibility of States for Internationally Wrongful Acts, U.N. GAOR 6th Comm., 56th Sess., U.N. Doc. A/Res/56/83, Jan. 28, 2002, Article 32; **CLA-14**, James R. Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 216 (2002).

754 Respondent's Counter-Memorial at ¶ 521.

755 **CWS-5**, Angulo Witness Statement at ¶ 19; **CWS-7**, Angulo Rebuttal Witness Statement at ¶ 55.

their frustration at the lack of progress of Bolivia and COMIBOL regarding the development of Malku Khota.[756] Accordingly, there cannot be any "material impossibility" justifying that South American Silver be denied its right to the restitution of the Malku Khota Project.

362. Bolivia does not either justify how reinstating South American Silver's rights over Malku Khota Concessions would "involve a burden out of proportion to the benefit deriving from restitution instead of compensation."[757] Bolivia does not explain how doing so "would only contribute to revive chaos" when the local communities have repeatedly requested that South American Silver return to Malku Khota to develop the project. [758] Instead it is clear that the only reason why Bolivia opposes restitution is because it wants to keep the Project for itself and exercise complete control over the Project, which it lacked while the Project was in the Company's legal and rightful possession. Bolivia has recognized repeatedly that Malku Khota contains one of the largest silver, indium and gallium deposits in the world.[759] Bolivia knows very well that the value of the Malku Khota Project is considerable and, in any case, substantially higher than what South American Silver can claim as compensation in this Arbitration. That is why Bolivia is currently marketing the Malku Khota deposit to foreign investors.[760] Bolivia's opposition to restitution is motivated by nothing else than a desire to capture the economic benefit of Malku Khota for itself, while paying as low a compensation as possible to South American Silver – the very same reason Bolivia expropriated the Project in the first place.

363. For the foregoing reasons, there are no obstacles to the Tribunal ordering the restitution of the Malku Khota Project to South American Silver. As Claimant explained in considerable detail in its Statement of Claim, restitution must be

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[756] *Id*.

[757] **CLA-160**, Responsibility of States for Internationally Wrongful Acts, U.N. GAOR 6th Comm., 56th Sess., U.N. Doc. A/Res/56/83, Jan. 28, 2002, Article 35(b); Respondent's Counter-Memorial at ¶¶ 522-27.

[758] Respondent's Counter-Memorial at ¶ 526.

[759] *See supra* at ¶ 28.

[760] *See supra* at ¶¶ 28,147.

accompanied by damages in order to re-establish the situation which would have existed if Bolivia had not nationalized the Project.[761]

2. At a minimum, South American Silver is entitled to "Prompt, Adequate and Effective Compensation" pursuant to the Treaty

364. It is clear that Bolivia's nationalization of South American Silver's investments was in breach of the Treaty and thus unlawful. Accordingly, and as discussed in the Statement of Claim, the measure of compensation owed to South American Silver for the nationalization of the Malku Khota Project is not controlled by the terms of Article 5 of the Treaty but instead is to be derived from customary principles of international law.[762] ILC Article 36.2 provides in this respect that: "The Compensation shall cover any financially assessable damage including loss of profits insofar as it is established."[763]

365. Bolivia does not contest the principle of compensation or the applicability of customary international law to determine the measure of compensation in cases of unlawful expropriation. In fact, Bolivia states emphatically that the "alleged damages suffered by SAS can be entirely redressed by means of a monetary compensation."[764] Bolivia alleges, however, that the compensation in this case should be calculated on the basis of Article 5 of the Treaty because the expropriation of the Malku Khota should not be considered as an illegal expropriation.[765]

366. While South American Silver has already addressed the unlawful nature of Bolivia's actions in its Statement of Claim and earlier in this Reply, it would nevertheless remain entitled to prompt, adequate and effective compensation in accordance with Article 5(2) of the Treaty, even if the Tribunal were to consider the expropriation of South American Silver's investments as lawful.[766] Article 5 of the Treaty effectively

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761 Claimant's Memorial at ¶ 183.

762 *Id*. ¶¶ 168-83.

763 **CLA-160**, Responsibility of States for Internationally Wrongful Acts, U.N. GAOR 6th Comm., 56th Sess., U.N. Doc. A/Res/56/83, Jan. 28, 2002, Article 36.2.

764 Respondent's Counter-Memorial at ¶ 524.

765 *Id*. ¶¶ 642-62.

766 Claimant's Memorial at ¶¶ 184-93. *See also supra* at ¶¶ 264 – 267; Section V.B.3.

articulates the main components of the standard of compensation under customary international law:

> Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party, until the date of payment, shall be made without delay, be effectively realizable and be freely transferable.[767]

367. Therefore, while customary international law and the Treaty offer two different paths to determine the compensation owed to Claimant, that compensation would essentially be the same under both approaches since it would amount in both cases to the fair market value of the Malku Khota Project immediately prior to the expropriation. International law and international arbitral tribunal have consistently equated the outcome of compensation under customary international law and under the specific provisions of investment treaties. The Tribunal in *CME v. Czech Republic* explains that: "These concordant provisions are variations on an agreed, essential theme, namely, that when a States takes foreign property, full compensation must be paid."[768] Likewise, the Tribunal in *Biloune v. Ghana* notes that: "Under the principles of customary international law, a claimant whose property has been expropriated by a foreign state is entitled to full—*i.e.*, to prompt, adequate and effective—compensation."[769] Awards of the Iran-US Claims Tribunal have also displayed near unanimity that the standard of compensation for expropriation is "full" compensation.[770]

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[767] **Exhibit C-1**, Treaty, Article 5(1).

[768] **CLA-75**, *CME Czech Republic B.V. v. Czech Republic*, Final Award, Mar. 14, 2003 at ¶ 497.

[769] **CLA-77**, *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Damages and Costs, June 20, 1990, 95 I.L.R. 210-211 (1994). "Full and effective compensation" was also awarded by both *Amco* Tribunals (*see* **CLA-78**, *Amco Asia Corp. v. Indonesia* (First Tribunal), ICSID Case No. ARB/81/1, Award on the Merits, Nov. 21, 1984 ("*Amco Asia* Award (First Tribunal)"), 24 I.L.M. 1022, 1038 ¶ 280 (1985); and **CLA-79**, *Amco Asia Corp. v. Indonesia* (Resubmission), ICSID Case No. ARB/81/1, Award, May 31, 1990 at ¶ 267.

[770] **CLA-80**, John A. Westberg, *Compensation in Cases of Expropriation and Nationalization: Awards of the Iran-United States Claims Tribunal*, 5(2) ICSID Rev.– Foreign Inv. L.J. 256, 280-82 (1990). *See also* **CLA-81**, John A. Westberg, *Applicable Law, Expropriatory Takings and Compensation in Cases*

Prof. Crawford concludes in this respect that: "Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the 'fair market value' of the property lost."[771]

368. Accordingly, Claimant reiterates its position that even in the event the Tribunal determines either that Bolivia's expropriation of Claimant's investment complied with the Treaty (which is impossible) or, alternatively, that the expropriation was unlawful but that the standard of compensation should be the same as that under Article 5 for a lawful expropriation, then South American Silver should receive "full" compensation equivalent to the fair market value of its investment.[772]

3. South American Silver is entitled to full compensation as a result of Bolivia's other Treaty Breaches

369. While the Treaty does not assign a particular standard of compensation for violations other than expropriation, international law is clear that South American Silver is entitled to be fully compensated for such violations. ILC Article 31 provides in this respect that: "[T]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."[773] The Permanent Court of Arbitration went on to specify in more detail the content of the obligation of the reparation in the *Factory at Chorzów* case:

> The essential principle contained in the actual notion of an illegal act – a principle that seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of

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of Expropriation; ICSID and Iran-United States Claims Tribunal Case Law Compared, 8(1) ICSID Rev.– Foreign Inv. L.J. 1, 16-18 (1993).

[771] **CLA-14**, James R. Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 225 (2002).

[772] Claimant's Memorial at ¶ 193.

[773] **CLA-160**, Responsibility of States for Internationally Wrongful Acts, U.N. GAOR 6th Comm., 56th Sess., U.N. Doc. A/Res/56/83, Jan. 28, 2002, Article 31.

> damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due of an act contrary to international law.[774]

370. In this case, determining the amount of compensation owed to South American Silver as a result of Bolivia's unlawful acts (namely the series of measures culminating with the announcement and enactment of Supreme Decree No. 1308 nationalizing the Malku Khota Concessions) presupposes to identify "the situation which would, in all probability, have existed if [these acts] had not been committed."

371. This first step is straightforward: Bolivia nationalized the Malku Khota Concessions, thus transferring the ownership of the Project from South American Silver to the Government. Bolivia became the owner of a valuable project and, at the same time, SAS lost its entire investment in Malku Khota. In other words, "but-for" Bolivia's unlawful acts, South American Silver would still own the Malku Khota Concessions through its wholly-owned subsidiary, CMMK. Accordingly, the compensation should consist of "a sum corresponding to the value which a restitution in kind would bear." The value of the Malku Khota Concessions is equal to the value of the Malku Khota Project. The Project is worthless without the Concessions and the Concessions would only have a nominal value but-for the discovery of mineral deposits and the development of the Malku Khota Project. Therefore, the fair market value of the Malku Khota Project (as calculated by FTI and RPA) constitutes an adequate measure of compensation to wipe out all the consequences of Bolivia's Treaty violations. Of course, it would not account for the likely expansion of the Project or new projects based upon other ore-bodies discovered on CMMK's Concessions.

372. As South American Silver explains in its Statement of Claim, numerous investment arbitration tribunals have held that fair market value constructed an appropriate measure of damages for non-expropriation claims when the measures at issue have resulted in the loss of the protected investment.[775] Ruling over similar

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[774] **CLA-69**, *Case Concerning the Factory at Chorzów (Ger. v. Pol.), Judgment*, Setp. 13, 1928, P.C.I.J. (ser. A), No. 17 at 40. (emphasis added).

[775] Claimant's Memorial at ¶¶ 194-201. *See also* **CLA-47**, *MTD Equity Sdn. Bhd. And MTD Chile S.A., v. The Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25 2004 at ¶ 238; **CLA-10**, *Compañia de Aguas del Aconquija S.A., and Vivendi Universal v. Argentine Republic*, ICSID Case No.

circumstances (the nationalization of gold mining concessions in Venezuela prior to construction and entry into production), the Tribunal in *Gold Reserve v. Venezuela* did not hesitate to use fair market value to determine the compensation owed to the claimant after finding that Venezuela's actions did not constitute an unlawful expropriation but violated the fair-and-equitable treatment standard.[776]

373. In its Counter-Memorial, Bolivia adopts the view that fair market value is not adapted to compensate treaty breaches other than expropriation.[777] Bolivia does not provide any explanation as to why this should not be the case. Bolivia does not explain either what standard of compensation should apply for such breaches. Instead, Bolivia cites to three arbitral decisions supporting the proposition that fair market value does not "necessarily" apply to situations where, unlike here, the measures at issue have not resulted in the loss of the protected investment.[778] This is clearly not the case here, where Bolivia's actions have resulted in the nationalization of the Malku Khota Project and the total loss of South American Silver's investment.

374. In sum, South American Silver is entitled to full compensation for Bolivia's violations of the Treaty provisions relating to fair and equitable treatment, the umbrella clause, arbitrary and discriminatory measures, and full protection and security. Although it is Claimant's contention that Bolivia violated each of these provisions in multiple respects (as well as the expropriation provision of Article 5), a violation of any one of them would entitle Claimant to full compensation.

4. Bolivia's actions are the only cause of South American Silver's damages

375. In its counter-Memorial, Bolivia adopts the dubious notion that South American Silver was somewhat responsible for its own injury and that Bolivia's decision to nationalize the Malku Khota Project was only a "formal act" and not the "dominant

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ARB/97/3, Award, Aug. 20, 2007 at ¶ 8.2.7; **CLA-76**, *S.D. Myers, Inc., v. Canada, UNCITRAL (NAFTA), Second Partial Award*, Oct. 21, 2002 at ¶ 309; **CLA-05**, *CMS Gas Transmission Co., v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005 at ¶ 410; **CLA-40**, *Azurix Corp., v. Argentina*, ICSID Case No. ARB/01/12, Award, Oct. 5, 2012 at ¶¶ 424, 429-30.

776 **RLA-27**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014 at ¶ 674.

777 Respondent's Counter-Memorial at ¶¶ 677-82.

778 Respondent's Counter-Memorial at ¶¶ 679-81.

cause" of the taking of South American Silver's investment.[779] Bolivia does not provide any legal support whatsoever for its fantasist "formal act" theory. Instead, Bolivia refers to two cases (*ELSI* and *Biwater*) where arbitral tribunals observed that the claimants' investment had already been bankrupt or near bankruptcy at the time of the investment.[780] This is not the case of CMMK or the Malku Khota Project, which were on sound financial footing and moving towards planning and construction following the discovery of a massive silver-indium-gallium mineral resource.

376. In sharp contrast with Bolivia's bare assertions, South American Silver has conclusively established in its Statement of Claim that its injury is solely and directly attributable to Bolivia's actions: South American Silver lost its investment at the time when Bolivia nationalized the Malku Khota Concessions.[781] Bolivia – and Bolivia only – had the power to nationalize the Malku Khota Project by issuing a supreme decree "reverting" the concessions to the "original ownership of the State." This is precisely what Bolivia did when it announced and issued Supreme Decree No. 1308.[782] It is not in dispute that South American Silver indirectly owned the Malku Khota Concessions prior to Bolivia enacting Supreme Decree No. 1308 and that it no longer owned these concessions after Supreme Decree No. 1308 was passed. It is preposterous for Bolivia to suggest that its measures are not the cause of South American Silver's injury when it is precisely Bolivia's measures (and particularly Supreme Decree No. 1308) that caused South American Silver's concession to be nationalized and transferred to Bolivia and COMIBOL.

377. It is also worth mentioning that Bolivia itself has acknowledged the direct causation between Supreme Decree No. 1308 and the takeover of South American Silver's investments in the Malku Khota Project. Article 4 of Supreme Decree No. 1308 expressly provides for the payment of compensation for the nationalization of the Malku Khota Concessions.[783] Bolivia cannot argue today that it actions were not the cause of

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779 Respondent's Counter-Memorial at ¶ 569.

780 Respondent's Counter-Memorial at ¶¶ 570-71.

781 Claimant's Memorial at ¶¶ 118-27.

782 **Exhibit C-4**, Supreme Decree No. 1308, Aug. 1, 2012.

783 **Exhibit C-4**, Supreme Decree No. 1308, Aug. 1, 2012.

South American Silver's injury when Supreme Decree No. 1308 itself recognized expressly that Bolivia had a duty to pay compensation to South American Silver for the nationalization of the Malku Khota Concessions.

378. For good measure, Bolivia also asserts that any amount awarded to South American Silver should be summarily reduced by a factor of at least 75% "considering that the Respondent [sic] itself were the ones that contributed to the damages that it claims to have suffered."[784] This is in keeping with Bolivia's empty mudslinging strategy. Bolivia's efforts to characterize its own measures as motivated by anything else than a desire to obtain the massive Malku Khota mineral resources for itself are, at best, unconvincing. SAS always acted lawfully and is not responsible for the politically-motivated opposition – which the Government tacitly and at times expressly encouraged – to the project that Bolivia now seeks to use as a fig leaf to cover its own unlawful actions.[785] There is thus no ground whatsoever for Bolivia to suggest that South American Silver's damages should be reduced. Bolivia does not even bother providing any explanation of its choice of "at least 75%" as a factor to reduce Claimant's damages, which underlines the utter lack of seriousness of its position.[786]

379. The *Abengoa v. Mexico* case concerns circumstances similar to this case, alleged that the claimant had failed to implement an effective community relations strategy and argued that the investor had contributed to any injury suffered. [787] While the *Abengoa* Tribunal acknowledged that the claimant could have implemented more effective measures in seeking consent from the communities to operate its hazardous waste processing facility,[788] it ultimately found that such shortcoming did not contribute to the injury suffered. [789] The Tribunal's concluded that there was no regulatory framework to define the obligations that the owner of a toxic waste management plant

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[784] Respondent's Counter-Memorial at ¶ 725.

[785] *See supra* at Section II.C.3.

[786] Respondent's Counter-Memorial at ¶ 725.

[787] **CLA-162**, *Abengoa S.A. y COFIDES S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, Apr. 18, 2013 at ¶ 659.

[788] *Id*. ¶ 661.

[789] **CLA-162**, *Abengoa v. Mexico* at ¶ 673

had with respect to the community;[790] and that the Mexican Government had ever requested that the investor implement a community relations strategy or to implement a more effective strategy and never made any negative comments to the investor's strategy,[791] Mexico was estopped from relying on the investor's alleged shortcomings with the communities to exclude or reduce its liability and damages.

380. As discussed above, the circumstances of this case are similar to *Abengoa* with: no regulatory framework in Bolivia defining the obligations of the Company to implement a community relations program; no specific requests from Bolivia that the Company implement a community relations program; and no specific comments by Bolivia concerning the Company's community relations program. [792] Accordingly, the Tribunal should deny Bolivia's request to reduce the measure of damages it must pay to the Claimant.

381. ILC Article 39 makes clear that not every action or omission which contributes to the damage suffered is relevant for the purpose of determining the amount of compensation.[793] Rather, as explained by Prof. Crawford, "[A]rticle 39 allows to be taken into account only those actions or omissions which can be considered as willful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his own property or rights."[794] Bolivia has not met the burden of proving how South American Silver could have acted "willfully" or "negligently" in connection with Bolivia's nationalization of the Malku Khota Project. Bare assertions that "SAS was responsible for the Reversion" do not suffice to show how any action by South American Silver could have contributed to its injury.[795]

382. It is uncontested that Bolivia has never charged South American Silver, CMMK or any of their employees with any misconduct – or negligence – in connection

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790 *Id*. ¶ 664

791 *Id*. ¶ 667.

792 *See supra* section II.B.5

793 **CLA-160**, Responsibility of States for Internationally Wrongful Acts, U.N. GAOR 6th Comm., 56th Sess., U.N. Doc. A/Res/56/83, Jan. 28, 2002, Article 39.

794 **CLA-14**, James R. Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 241 (2002).

795 Respondent's Counter-Memorial at ¶ 737.

with the discovery and development of the Malku Khota Project.[796] If Bolivia had any evidence that South American Silver or CMMK had acted illegally or negligently, it would certainly have submitted such evidence prior to, or during, this arbitration. Instead, Bolivian officials admitted at the time of the expropriation that: "The Bolivian Government had always had the intention to suspend the agreement with the company and revert this concession in favor of the State since over a year ago."[797] In addition, other high-ranking government officials have confirmed that the Company was acting legally in connection with the Malku Khota Project. For example, Oscar Iturri, Director of the Public Consultation and Citizens Participation Units of the Ministry of Mines and metallurgy so advised Minister Mario Virreira in a memorandum dated February 21, 2011.[798]

383. The Tribunal must therefore reject Bolivia's unsubstantiated attempts to invoke contributory negligence on the part of the Company in a last-ditch effort to escape its obligation to pay compensation for the nationalization of the Malku Khota Project.

B. QUANTUM OF REPARATION

384. As a preliminary matter, Bolivia does not challenge South American Silver's calculations of the amount of additional damages owed in connection with the restitution of the Malku Khota Concessions. Bolivia takes issue with the amount of compensation calculated by FTI and RPA but does not offer any value for the Malku Khota Project or the damages owed to South American Silver. Instead, Bolvia simply reiterates Supreme Decree No. 1308's directive that South American Silver only receive an amount based on the sums invested in Malku Khota – regardless of the actual value of

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796 *See supra* at ¶¶ 20, 115.

797 **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.

798 *See supra*; ¶¶ 92, 233; **Exhibit C-231**, Official Communication from the office of the Ministry of Mines and Metallurgy to CMMK dated March 16, 2011 and Report issued on February 11, 2011 by Mr. Oscar Iturri, Responsible of the Public Consultation and Citizen Participation Unit; **Exhibit C-230**, Official Communication from Vice Minister of Social Movements and Civil Society of the Ministry of Mines to CMMK dated February 10, 2011 and Legal Opinion" issued on February 3, 2011 by the Vice Ministry's Head of Strategic Alliance, Mr. Alberto García Sandoval; **Exhibit C-223**, *Explotación illegal de oro es el origen del conflict en Mallku Khota*, LA PAZ, May 21, 2012; **Exhibit C-224**, *Comunarios frenan operaciones mineras para iniciar trabajo illegal*, PÁGINA SIETE, Apr. 21, 2012.

the Malku Khota Project.[799] As Claimant explains below, Bolivia's approach is built on various mischaracterizations of the RPA and FTI reports, and on serious methodological flaws – starting with Bolivia's instruction to its experts not to provide a value for the Malku Khota Project.

1. Valuation date

385. Bolivia argues that the valuation date in this case should be July 9, 2012 (one day after the Company "informed the market" of the nationalization) and not July 6, 2012 (the business day immediately preceding signature of the Memorandum of Agreement dated July 7, 2012 formally marking the beginning of the expropriation process) as suggested by South American Silver.[800] Bolivia is incorrect. The Treaty (which Bolivia argues should be used to determine the applicable standard of valuation in this case) expressly 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."[801] The Treaty does not contemplate a date posterior to the expropriation, as Bolivia now suggests. Accordingly, the date of July 6, 2012 must be considered as the proper valuation date for the determination of the compensation owed to Claimant this case.

386. Notwithstanding its acknowledgement that "[a]ccording to SAS, the valuation date should be July 6, 2012," Bolivia devotes five additional pages of its Counter Memorial to arguing against using the date of the award as the valuation date in this case.[802] Bolivia's exposé serves no purpose other than to portray the approximations and inconsistencies underlying Bolivia's submission. South American Silver reiterates

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799 Respondent's Counter-Memorial at ¶ 573.

800 *Id.* ¶¶ 637-41. Likewise, although Brattle did not conduct an independent valuation analysis, Brattle was instructed by the Respondent to use a valuation date of July 9, 2012 which according to Brattle is the "…day before SASC first informed investors that Bolivia intended to reverse the Malku Khota concessions." Brattle does not provide its own view of the appropriate valuation date to apply in this case.

801 **Exhibit C-1**, Treaty, Article 5.

802 Respondent's Counter-Memorial at ¶¶ 661-75.

its selection of the date immediately prior to the July 7, 2012 Memorandum of Agreement (July 6, 2012) as valuation date in this case.[803]

2. The methodology employed by RPA and FTI adequately reflects the fair market value of the Malku Khota Project

387. The reports submitted by Bolivia's experts do not cast doubt on any of the valuation methodologies employed by Claimant as set forth in the RPA and FTI expert reports. To the contrary, they support Claimant's methodology for calculating the fair market value of the Malku Khota Project using the comparable transaction approach, analyst consensus and private placements. Bolivia's experts do not disagree that there is a significant mineral resource at Malku Khota. This is simply a fact that has been recognized by the Bolivian Government for years and that explains why the Malku Khota Project is included in Bolivia's five-year economic plan.[804] This is also why the Government is actively marketing it to foreign investors so that the Government can obtain the deal it wants as opposed to Claimant's legal 100% ownership pursuant to valid concessions.

a. Summary of Brattle's Comments and Conclusions

388. Brattle was retained by counsel to the Respondent to review and provide comments on the FTI Report. Brattle's experts do not independently assess the Claimant's damages, noting they *"…were not asked to estimate the Project's FMV independently."*[805] Rather, Brattle was instructed by Respondent's counsel, *"…to quantify the damages to Claimant from the alleged expropriation under the assumption that damages should reflect Claimant's cost of investment prior to the reversion of the mining concessions."*[806]

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[803] Notwithstanding its selection of a valuation date the date immediately preceding the commencement of the expropriation process, Claimant reserves the right to claim for any increase in the loss in fair market value of the investment resulting from subsequent events due to the unlawful nature of the taking. This is consistent with the *Chorzów Factory* lines of cases discussed above, and is also consistent with placing Claimant in the same position where it would have been in the absence of Bolivia's expropriation of Claimant's investment.

[804] **Exhibit C-151**, *En debate documento preliminar de Plan Sectorial de Desarrollo Minero Metalúrgico 2015 – 2019*, MINERIA NOTICIAS, Jun. 5, 2015; **Exhibit C-150**, Plan Sectoral de Desarollo Minero Metalúrgico 2015-2019.

[805] **RER-3**, Brattle Report at ¶ 14.

[806] **RER-3**, Brattle Report at ¶ 2.

389. Brattle rejects the valuation methodologies presented in the FTI Report. First, Brattle's principal complaint with respect to RPA's comparable transactions analysis is that it does not consider the transactions that RPA identified as comparable transactions to be sufficiently comparable to Malku Khota.[807] Second, Brattle considers the reports published by financial and market analysts that vary from $196 million to $922 million to be "unreliable" and assert that the analysts' themselves are "…either not independent or their target valuations are biased upwards…."[808] Finally, Brattle asserts that the value implied by the private placement transactions for SASC's shares overstate the company's market value at the Valuation Date as they occurred two months before the Valuation Date since the publicly traded price of SASC's shares and other market indicators declined over this period.[809]

390. Brattle has not conducted an objective, independent analysis of the Claimant's losses and has not provided its opinion of the damages sustained by the Claimant as a result of the Respondent's alleged wrongful actions. The scope of Brattle's analysis was strictly limited by the mandate imposed by the Bolivia, which restricted the analysis to provide only criticisms on the FTI and RPA approaches in order to minimize the claim and to consider only the costs incurred by South American Silver directly on mineral exploration at the Project site as a measure of damages.[810]

391. As demonstrated below, Brattle's criticisms of the approaches used and conclusions reached in the FTI Report and RPA Report are largely based on arguments that are either unsupported or are factually or technically incorrect.

b. Comparable Transactions

392. Claimant retained RPA to prepare an independent opinion and report (the "RPA Valuation Report") on the fair market value of the Malku Khota Project at the time of its expropriation by Bolivia (June 6, 2012).[811] RPA used the market approach to value

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807 *Id*. ¶ 16.

808 *Id*. ¶ 20.

809 *Id*. ¶ 23.

810 **CER-4**, FTI Rebuttal Report at ¶ 4.12

811 **CER-5**, Roscoe, Postle and Associates, Response Report on the Maku Khota Project, Department of Potosí, Bolivia, Nov. 30, 2015 at 1.1 ("RPA Rebuttal Report").

the Malku Khota Project.[812] As both RPA and FTI note, the comparable transactions approach (market approach) is a widely accepted valuation approach for early stage mining properties and is recognized as such under internationally accepted valuation standards such as Standards and Guidelines for Valuation of Mineral Properties, Special Committee of the Canadian Institute of Mining, Metallurgy and Petroleum on Valuation of Mineral Properties ("CIMVAL").[813] In fact it was also recognized as such by Bolivia's expert Dr. Davis in his own article on the subject in 2003.[814] Market transactions on silver dominant properties in the Cordillera with Mineral Resources were analyzed to derive a Metal Transactions Ratio ("MTR") to apply to the total Mineral Resources.[815] MTR is the ratio of the value of the transaction divided by the gross, in situ dollar content of the Mineral Resources transacted, expressed as a percentage.[816] In the opinion of RPA, the fair market value of the Malku Khota Project as of July 6, 2012 was US$270 million within a range of US$130 million to US$330 million.[817] This value is estimated taking into account the US$12.9 billion gross in situ dollar content of the total Malku Khota Mineral Resources using an MTR of 2.0% within a range of 1.0% to 2.5%.[818]

393. In response to the RPA Report, Bolivia submitted reports by Prof. Kadri Dagdelen (the "Dagdelen Report") and by Dr. Davis and Dr. Dorobantu of the Brattle

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[812] **CER-5**, RPA Rebuttal Report at 3.7.

[813] **CER-5**, RPA Rebuttal Report at 6.4; **CER-4**, FTI Rebuttal Report at ¶ 4.16.

[814] Graham A. Davis. "Economic Theory and the Valuation of Mineral Assets". Journal of Business Valuation. July 15, 2003 at 402. (**CER-4, Exhibit FTI -56**). Claimant understands that since being retained by a number of sovereign states where they are alleged to have expropriated mineral assets at early stages, Prof. Davis has recently published an article that downplays the role of comparable transactions in the valuation of "target assets". Graham A. Davis, "The Comparison Sales Approach to Valuation: Science or Black Magic". article abstract as presented in the February 2015 Newsletter of the International Institute of Minerals Appraisers. (FTI 57). Notwithstanding this evolution in Prof. Davis' view, it is FTI'sunderstanding that market participants, and capital markets still make extensive use of this methodology, and that internationally accepted valuation standards continue to recognize it to be a primary valuation approach for mines in certain stages of development (such as Malku Khota).

[815] **CER-5**, RPA Rebuttal Report at 1.2.

[816] *Id*.

[817] *Id*.

[818] **CER-5**, RPA Rebuttal Report at 1.2.

Group (the "Brattle Report").[819] Although its mandate is not stated, the Dagdelen Report reviews and comments on the 2011 PEA Update of the Malku Khota Project and the technical aspects of the 2011 PEA Update referred to in the RPA Valuation Report, in particular the Mineral Resource estimate.[820] Quite misleadingly, Prof. Dagdelen also refers numerous times to the 2009 PEA despite the fact that this document has been superseded by the 2011 PEA Update and is no longer reliable.[821] While the Brattle Report principally reviews and comments on the FTI Report, it also reviews and comments on portions of the RPA Valuation Report on which the FTI Report relies.[822]

c. Resource estimate

394. As a preliminary comment, it is worth mentioning that in preparing his own Mineral Resource estimate, Prof. Dagdelen confirmed the work carried out by SAS in exploring and developing the property and agreed that the Malku Khota Project contains a significant Mineral Resource.[823] Following his investigative work and assessment, his estimate is not materially different to that in the 2011 PEA Update reviewed by RPA.[824] In his site visit he saw drill hole locations and his review of the drill hole database found it acceptable for Mineral Resource estimation.[825]

395. The Dagdelen Report presents an alternative Mineral Resource estimate on the Malku Khota Project to that presented in the 2011 PEA Update and reviewed by RPA.[826] By preparing his own Mineral Resource estimate using the SAS database as confirmed by GeoVector, Prof. Dagdelen is in agreement that a significant Mineral Resource exists at the Malku Khota Project.[827]

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819 *See Gen.* **RER-2**, Dr. Kadri Dagdelen & OptiTech Engineering Solutions Inc., Expert Mining Report of Kadri Dagdelen on RPA's Malku Khota Project Valuation Report, Mar. 30, 2015, ("Dagdelen Report"); **RER-3**, Brattle Report.

820 **CER-5**, RPA Rebuttal Report at 1.3.

821 **RER-2**, Dagdelen Report at e.g. ¶¶ 70, 82.

822 **RER-3**, Brattle Report at ¶¶ 42-124.

823 **CER-5**, RPA Rebuttal Report at 1.3.

824 **CER-5**, RPA Rebuttal Report at 1.3-1.4.

825 **CER-5**, RPA Rebuttal Report at 1.3.

826 **CER-5**, RPA Rebuttal Report at 5.3.

827 *Id*. at 5.3.

396. Overall, the total Mineral Resource in the Dagdelen model did not change materially from the GeoVector 2011 PEA Update Mineral Resource as reclassified by RPA. The Dagdelen model has reduced the tonnage of the Malku Khota mineral deposit by 4.6%, and the grade of Ag and In by 2.9% and 4.0%, respectively.[828] These differences are within the range to be expected for resource estimates by different practitioners, and are not considered to be significant.[829] The largest difference between the 2011 PEA Update Mineral Resource Estimate and that by Prof. Dagdelen is the classification whereby Prof. Dagdelen has more Inferred Mineral Resource and less Indicated Mineral Resource than the 2011 PEA estimate.[830] In RPA's view, this is due to a difference in professional judgement and in any case does not affect the valuation since all three categories of Mineral Resource are used together.[831] Prof. Dagdelen states that RPA found errors in the GeoVector 2011 PEA Update Mineral Resource estimate, reclassifying 50 million tonnes of Inferred Resources into exploration potential.[832] RPA made no such claim, and the reclassification of Inferred Mineral Resources by RPA, all from the Low Grade Halo, is a difference of professional opinion on the classification of some of the 2011 PEA Update Inferred Resource.[833] To sum up, the Mineral Resource for the Malku Khota Project has been estimated/reviewed by three independent professional groups – GeoVector, RPA, and Prof. Dagdelen assisted by Gustavson. All three agree that a significant Mineral Resource exists on the Project.

d. Use of inferred resources in a valuation

397. A significant part of the Dagdelen Report is devoted to the premise that Inferred Mineral Resources cannot be used for the valuation of mineral properties.[834] It is

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828 *Id*. at 5.7.

829 *Id*. at 5.7.

830 **RER-2**, Dagdelen Report at ¶ 123; **CER-5**, RPA Rebuttal Report at 5.7.

831 **CER-5**, RPA Rebuttal Report at 5.7.

832 **RER-2**, Dagdelen Report at ¶ 72.

833 **CER-5**, RPA Rebuttal Report at 5.4.

834 Importantly, RPA's valuation relied only on the GeoVector Mineral Resource estimate and did not rely on the 2011 PEA Update. The GeoVector Mineral Resource estimate does classifies the mineral resources not distinguish betweenas measured, indicated and inferred mineral resources. The RPA Report provides an independent review evaluation of the Malku Khota mineral resource and does not rely on NI 43-101 resource classification to do so. RPA Rebuttal Report at 5.1.

Prof. Dagdelen's contention that the inclusion of Inferred Resources makes an economic analysis unusable due to the lower level of confidence of an inferred estimate.[835] As RPA points out, most of these comments are inaccurate and/or misleading and demonstrate a lack of understanding on the part of Prof. Dagdelen of some aspects of valuation methodology for mining projects.[836]

398. In fact, Inferred Resources can be considered in a PEA, and transactions of mineral properties occur regularly in the market with valuations based in whole or in part on Inferred Resources.[837] Early stage mineral property transactions regularly occur with the value agreed by arm's length parties on the basis of Inferred Mineral Resources, or even no Mineral Resources at all.[838]

399. Prof. Dagdelen also refers to comments in NI 43-101 and the CIM Definition Standards (CIM, 2010) on the reliability and use of Inferred Resources in economic analyses for public disclosure.[839] These comments are inapposite and misleading since neither NI 43-101 nor the CIM Definition Standards cover valuation.[840] Inferred Resources, or a portion thereof, are always included as part of a valuation by any methodology.[841] FTI confirms that buyers in the market place have demonstrated they are willing and able to perform due diligence to value mining properties with only inferred resources in order to consummate significant transactions.[842]

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835 **RER-2**, Dagdelen Report at ¶ 122.

836 **CER-5**, RPA Rebuttal Report at 5.12-5.13. Despite his erroneous contention that Inferred Resources cannot be used in a valuation, throughout his report, Dagdelen makes continued acknowledgement of the fact that the Malku Khota Project does host significant Mineral Resources and his own estimate is not materially different from the GeoVector Mineral Resource estimate as used in the RPA valuation.

837 **CER-5**, RPA Rebuttal Report at 5.12

838 **CER-5**, RPA Rebuttal Report at 1.3 – 1.4, 5.1; *see also* **CER-3**, Cooper Expert Witness Statement at ¶¶ 52-55.

839 **RER-2**, Dagdelen Report at ¶ 21.

840 **RER-2, Dagdelen Report, Exhibit DAG-1**, CIM Definition Standards for Mineral Resources and Mineral Reserves; prepared by the CIM Standing Committee on Reserve Definitions, Canadian Institute of Mining, Metallurgy and Petroleum (CIM), Nov. 27, 2010; **RER-2, Dagdelen Report, Exhibit DAG-3**, NI 43-101, 2011, National Instrument 43-101 Standards of Disclosure for Mineral Projects, Jun. 24, 2011.

841 **CER-5**, RPA Rebuttal Report at 5.12.

842 **CER-4**, FTI Rebuttal Report, 5.11-5.14 and Figure 5.

400. Based on the foregoing, Prof. Dagdelen's conclusion that "Inferred Resources do not and cannot contribute to the valuation of a mining company or property" is simply not true.[843]

e. Metal Transactions Ratio Analysis

401. The Brattle Report includes a wide ranging critique of the MTR methodology, the comparability of the market transactions, and of RPA's analysis of the comparable transactions, however, it offers no alternative to valuation of the Malku Khota Project.[844] As RPA explains, the MTR is mathematically the same as combining more than one metal together as the equivalent of one metal, calculating a transaction value per unit metal equivalent in the resource, and dividing it by the metal price at the transaction date.[845] In the case of the mineral properties comparable to Malku Khota, a value per ounce of silver equivalent can be divided by the silver price at the transaction date to derive a ratio which is the same as the MTR.

402. The Brattle Report states that the mineral properties used by RPA for comparable transactions analysis are not comparable to the Malku Khota Project.[846] While there are some differences between the comparable transactions used and the Malku Khota property, the properties selected are sufficiently similar to support a comparable transactions analysis to determine an appropriate range of values to apply to the Malku Khota property.[847] RPA carefully and methodically selected the comparable properties on the basis of the following factors:

- **Geographical and Geological Location:** The comparable properties are all located in the Cordillera of western South America, Central America, and Mexico, which represents a distinct geological and metallogenic region. Selection of comparable transactions on properties located along Ag-Pb-Zn belt from Mexico to Chile resulted in a significant level of

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843 **CER-5**, RPA Rebuttal Report at 5.12.

844 Both Brattle and Dagdelen are of the opinion that the value can only be established by the Income method. Again, this is not true. The market uses comparable transactions methods, such as MTR, to transact early stage properties. **CER-5**, RPA Rebuttal Report at 1.4, 5.1.

845 **CER-5**, RPA Rebuttal Report at 3.9,-3.10, 6.5.

846 **RER-3**, Brattle Report at ¶¶ 62, 84.

847 **CER-5**, RPA Rebuttal Report at 6.8.

geological and metallogenic comparability to the Malku Khota property.[848]

- **Metal Mix:** Silver is the largest component in all of the comparable transactions, ranging from 41% to 100% and averaging 75%, which is similar to the Malku Khota property which averages 74% silver. Gold is generally low as a component of the in situ dollar content of the comparable properties, ranging from zero to 31% and averaging 6%, compared to zero for the Malku Khota property. Metals other than silver total 19% on average for the comparable properties, compared with 26% for the Malku Khota property. In RPA's opinion, the mix of metals in the Mineral Resources of the comparable properties is sufficiently similar to that of the Malku Khota property to permit comparable transactions analysis.[849]

- **Grade:** Contrary to what the Brattle Report suggests, higher grade does not necessarily equate to higher value, since tonnage and metal content must be taken into account as well.[850] An analysis of the comparable properties used by RPA reveals that the property values do not increase with higher silver equivalent grade. With respect to costs, lower grade deposits commonly have lower costs than higher grade deposits, the converse of Brattle's conclusions in this respect.[851] This is because lower grade deposits need to be larger to be mined at a higher rate to achieve economies of scale and consequently have lower operating costs than smaller higher grade deposits.[852]

- **Stage of Exploration or Development:** The Brattle Report argues that none of the 14 RPA comparable transactions are comparable based on the stage of exploration or development, whereby properties at a more advanced stage should have higher values.[853] In RPA's experience, the size of the Mineral Resource is a more important consideration in property acquisition agreements than the stage of exploration or development unless Mineral Reserves have been demonstrated. None of the comparable transactions had Mineral Reserves reported, nor had the

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848 **CER-5**, RPA Rebuttal Report at 6.11-6.12.

849 *Id*. at 6.13- 6.14.

850 **RER-3**, Brattle Report at ¶¶ 65- 67; **CER-5**, RPA Rebuttal Report at 6.14.

851 *Id*.

852 **CER-5**, RPA Rebuttal Report at 6.14.

853 **RER-3**, Brattle Report at ¶¶ 68-74.

Malku Khota Project.[854] At the valuation date of July 6, 2012, the Malku Khota Project was considered to be a Mineral Resource Property.[855] RPA considers all of the properties used in its comparable transactions analysis to be Mineral Resource Properties also and comparable as such to the Malku Khota Project.[856]

- **Size of the Mineral Resource:** The Brattle Report argues that the size of the Malku Khota silver resource is significantly larger than all but one of the silver resources in RPA's comparable transactions and that value adjustments cannot be reasonably made.[857] RPA disagrees and considers that the MTR range derived from the comparable transactions analysis is reasonable to apply to the Malku Khota mineral resource.[858]
- **Dates of the Comparable Transactions:** The Brattle Report notes that the RPA comparable transactions cover a period of more than five years prior to the valuation date of July 6, 2012.[859] Although general guidelines for comparable transactions suggests a maximum of two years prior to the valuation date, RPA considers that a longer period can be justified using the MTR method since it adjusts for changes in metal prices over time.[860]

403. The Brattle Report also attempts to make a point that the MTR method is not valid because it is based on "gross in situ" value and does not take into account the costs of developing and operating and the time value of the revenue and expenditures.[861] In fact, the MTR method does take these into account, by estimating a value that is only a very small percentage of the "gross in situ" value of the metals.[862] The Brattle Report also suggests that future metal prices over the life of the mine should be used instead of spot prices, which RPA used in the MTR analysis.[863] The Brattle Report appears to be confusing the Income Approach (DCF analysis) with the Market Approach (MTR

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854 **CER-5**, RPA Rebuttal Report at 6.15 - 6.16.

855 **CER-5**, RPA Rebuttal Report at 3.6; **CER-4**, FTI Rebuttal Report at ¶ 9.14.

856 **CER-5**, RPA Rebuttal Report at 6.17.

857 **RER-3**, Brattle Report at ¶ 76.

858 **CER-5**, RPA Rebuttal Report at 6.16.

859 **RER-3**, Brattle Report at ¶¶ 94-96, Fig. 6.

860 **CER-5**, RPA Rebuttal Report at 6.18.

861 **RER-3**, Brattle Report at ¶ 100.

862 **CER-5**, RPA Rebuttal Report at 6.6

863 **RER-3**, Brattle Report at ¶ 104

analysis) since it uses expressions such as "output from the mines would be sold many years into the future", "expected prices over the life of the mine", "expected timing of cash flows from production", and "timing of future cash flows".[864] In RPA's experience, Mineral Resource Properties transact more on the basis of spot metal prices rather than long term future metal prices.[865]

404. Based on the foregoing, there is no doubt that the properties chosen for analysis in the RPA Valuation Report are reasonably comparable to the Malku Khota mineral property, and the MTR analysis as used to analyze the comparable transactions is an acceptable comparable transactions method.[866] The MTR range of 1.0% to 2.5% with a preferred value of 2.0%, as derived from the comparable transactions, is reasonable, in RPA's opinion, to apply to the in situ dollar content of the Malku Khota mineral property.[867]

f. Metallurgical process

405. The metallurgical process developed by SAS for the Malku Khota Project has been demonstrated at laboratory scale and the individual process steps are used in other processing plants around the world at commercial scale. Dr. Dreisinger summarizes the key elements of the SAS Process, the variety of ore samples collected, and the range of metallurgical testing undertaken on composite samples to develop the process flowsheet.[868] Dr. Dreisinger also emphasizes that the cycle of process development for the Malku Khota Project is similar to other successful projects Prof. Dreisinger has been involved with, including Mount Gordon (Australia), Sepon (Laos), Boleo (Mexico), and Northmet (Minnesota, US).[869] Contrary to Prof. Dagdelen's suggestions, there are many examples of acid chloride leaching of various metals.[870] Dr.

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[864] **RER-3**, Brattle Report at ¶ 104; **CER-5**, RPA Rebuttal Report at 6.7.

[865] **CER-5**, RPA Rebuttal Report at 6.7.

[866] *Id*.

[867] *Id*. at 6.234.

[868] **CWS-6**, Rebuttal Witness Statement of David B. Dreisinger, Nov. 23, 2015 at ¶¶ 18-50 ("Dreisinger Rebuttal Witness Statement").

[869] **CWS-6**, Dreisinger Rebuttal Witness Statement at ¶¶ 13-17, 51-52.

[870] **RER-2**, Dagdelen Witness Statement at ¶¶ 88-91; **CER-5**, RPA Rebuttal Report at 5.10.

Dreisinger describes several current and historical metallurgical operations, which are precursors for the individual process steps found in the SAS Process.[871]

406. In RPA's opinion, the metallurgical test program undertaken for the Malku Khota Project was detailed and systematic in its approach and was following a solid development path.[872] The hydrometallurgical process developed for the Malku Khota Project can selectively recover Ag/Au, Cu, In/Ga, Pb, and Zn from ores produced at Malku Khota. The individual process steps are commonly practiced in industry and have been combined in unique way to enable metal extraction in the Malku Khota Project.[873]

g. Conclusion on comparable transactions

407. Based on the foregoing, RPA is of the conclusion that there is no reason to change the value conclusion in the RPA Valuation Report. RPA's opinion remains that the Market Value of the Malku Khota Project as of July 6, 2012 was $270 million within a range of $130 million to $330 million.[874]

408. Likewise, FTI also concludes that the standard to which Brattle holds the comparable transactions method is unrealistic and unreasonable, and is inconsistent with its use in practice to price actual transactions.[875] FTI reviewed the transactions applied in the RPA Report and while there are differences between the comparable transactions and the Project, this is to be expected when comparing mineral properties.[876] Despite these differences, FTI concludes that market actors would consider these transactions as benchmarks to determine the amount they would be willing to buy/sell the Project in an arm's length transaction – along with other available information as discussed in detail in

871 **CWS-6**, Dreisinger Rebuttal Witness Statement at ¶ 53.

872 **CER-5**, RPA Rebuttal Report at 5.10.

873 *Id*. at 5.11.

874 *Id*. at 1.4.

875 **CER-4**, FTI Rebuttal Report at ¶ 4.16(i).

876 *Id*. ¶ 9.53(i).

the FTI Report.[877] Hence FTI ascribes a weighting of 50.0% on the comparable transactions valuation analysis set out in the RPA Report.[878]

h. Valuations of Industry Analysts

409. Brattle's comments with respect to the role of the industry analysts and the valuation analyses they published are mostly gratuitous and largely unsupported by any shred of evidence.[879] As FTI explains, Brattle has clearly misunderstood the methodologies applied by the industry analysts to determine the value of the Project and did not contact the analysts to discuss the concerns raised in the Brattle Report.[880]

410. Contrary to what Brattle suggests, analysts serve an important function in the efficiency of the capital market with the dissemination and analysis of information and are bound by professional codes of conduct that require them to *"…use reasonable care and judgment to achieve and maintain independence and objectivity in their professional activities."*[881] As explained by Mr. Barry Cooper, one of the most prominent analysts to have covered the mining sector and a witness in this arbitration, if analysts were systematically biased or routinely incorrect, they would not continue to be followed by investors and would not remain in business.[882] The analysts that prepared the valuations of SASC had many years of experience in the industry, and had detailed knowledge of the mining industry, the Project, and SASC management.[883] All of these analysts continue to work as analysts today.

411. Brattle's comment that a Company's share price should immediately move to an analyst's target price demonstrates a lack of understanding of the calculation of a target price and the workings of the stock market. As noted by Mr. Cooper, it is not surprising that the reports of these analysts did not *"…entice significant buying in the shares of South American Silver to push the market price anywhere near the price targets*

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877 **CER-4**, FTI Rebuttal Report at ¶ 4.16(i).

878 *Id.* ¶ 5.15.

879 **RER-3**, Brattle Report at ¶¶ 125-49.

880 **CER-4**, FTI Rebuttal Report at ¶¶ 6.5-6.8.

881 **CER-4, Exhibit FTI-58**, CFA Institute. "Code of Ethics and Standards of Professional Conduct."

882 **CER-3**, Cooper Expert Expert Witness Statement at ¶ 33.

883 **CER-4**, FTI Rebuttal Report at ¶ 4.16.

of the analysts…that does not mean that the analysts' reports, updates and initiation pieces are of lesser quality than that of larger firms, or that their analysis is not detailed, accurate or reliable."[884]

412. Brattle suggests that FTI did not conduct sufficient due diligence to rely upon the analyst reports and should have "fixed" the analyst valuations for various perceived issues or errors they identify.[885] To the contrary, in preparing their report, FTI's experts spoke at length with each analyst to understand their analyses, and were satisfied that each conducted a thoughtful and professional analysis.[886] As clearly stated in the FTI Report, FTI has purposefully presented the analyst opinions of value without imposing our own views, as those were their views at the time that were informing the market and would have been considered by notional buyers and sellers in the determination of the price at which they would transact, consistent with the definition of fair market value.[887] Not only is there no need to make adjustment to the analyst's valuations, but doing so would actually defeat the entire purpose of relying of these analysts' consensus in the first place.

413. Finally, one can also consider the valuations conducted by the analysts as a proxy for the types of analyses that notional sellers and buyers would have performed themselves at the time.[888] By taking an average, FTI effectively removed the high and low values to arrive at the estimated figure to obtain the analyst consensus that an arm's length buyer and seller may have negotiated at the Valuation Date for the Project.[889] As noted, FTI applied a 25.0% weighting to the US$ 572.1 million value reached based on the types of analyses conducted by the industry analysts as they were "*…not based on objective transaction data, but rather is based on assessment of the analysts, whose views differed significantly."*[890]

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884 **CER-3**, Cooper Expert Witness Statement at ¶ 26.

885 **RER-3**, Brattle Report at ¶¶ 138-49.

886 **CER-4**, FTI Rebuttal Report at ¶ 6.21.

887 **CER-1**, First FTI Report at ¶ 9.42.

888 **CER-4**, FTI Rebuttal Report at ¶ 4.16(ii)(4).

889 *Id*.

890 **CER-1**, First FTI Report at ¶ 9.53(ii).

414. Based on the foregoing, FTI determined that Brattle's comments did not warrant any adjustment to its analysis.[891]

i. Private Placements

415. Brattle's comments on the private placement transactions that were relied upon in the FTI Report ignore the differences between private placement and retail transactions.[892] These differences make the private placement transactions more useful as indicators of the Project's fair market value at the Valuation Date (recognizing the stage of financing the company/project is at) than the daily trading price.[893] Although private placement transactions are typically consummated at a premium or discount to the trading price, the transactions cited involved sophisticated investors and would have been subject to a higher level of due diligence than that which a typical retail investor would be capable of performing. Further, these transactions were required for the Company to continue to advance the Project and occurred only 2 months prior to the Valuation Date. Thus, the private placements are properly considered in a fulsome valuation analysis. Considering these factors against the shortcomings of the share price, FTI applied a 25% weighting to the US$ 116.7 million value of the Project implied by the private placement transactions.[894]

j. Conclusion on Quantum of Damages

416. FTI calculated the damages incurred by South American Silver based on the principle set out in the Factory at Chorzów case that damages are to "…as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[895] FTI provided damages calculation under two scenarios: Compensation Damages and

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891 **CER-4**, FTI Rebuttal Report at ¶ 6.73.

892 *Id*. ¶¶ 7.7-7.12.

893 *Id*. ¶ 4.16(iii).

894 *Id*.

895 **CLA-69**, *Case Concerning the Factory at Chorzów (Ger. v. Pol.), Judgment*, Setp. 13, 1928, P.C.I.J. (ser. A), No. 17 at 40.

Restitution Damages. Compensation damages were determined as the fair market value of the Claimant's interest in the Project as at a Valuation Date of July 6, 2012.[896]

417. Pursuant to internationally accepted valuation standards and standards specific to the valuation of mineral properties FTI's experts considered multiple valuation approaches and methodologies in their analysis. For calculation of Compensation Damages they selected a market based approach to value which his consistent with CIMVAL standards for a project at the Mineral Resource Property stage of development. As discussed above, they used three sources of market based information: Comparable transactions; Analyst reports on the Claimant's parent company SASC; and, Private placement transactions involving SASC's shares in the period prior to the Valuation Date. [897]

418. FTI then weighted the values obtained from these three sources based on its assessment of their relative strengths and shortcomings at 50.0% of the value provided from the comparable transactions analysis conducted by RPA, 25.0% from values for the Project derived by market analysts, and 25.0% from the value implied by the private placement transactions.[898] The figure below provides a summary of FTI's conclusion of the fair market value of the Project on the Valuation Date as presented in the FTI Report and the relative weightings applied to each of the three market-based sources of information:

[896] **CER-4**, FTI Rebuttal Report at ¶ 3.3. Fair market value is defined as, "the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts." *Id*. at ¶ 8.8.

[897] **CER-1**, First FTI Report at ¶ 2.3.

[898] **CER-1**, First FTI Report at ¶ 9.53; CER-4, FTI Rebuttal Report at ¶ 3.6.

Market Approach Valuation Methodology	Unweighted				Weighted		
	Low FMV Estimate	High FMV Estimate	Point Estimate	Weighting Applied	Low FMV Estimate	High FMV Estimate	Point Estimate
Comparable Transactions	$ 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
Project FMV					**$ 143.2**	**$ 424.7**	**$ 307.2**

Fig. 2: Summary of Compensation Damages[899]

419. FTI also calculated the Restitution Damages to the Claimant under the assumption that the Project will be restored to it in May of 2016.[900] FTI calculated the Restitution Damages as the difference between the fair market value of the Project on the Valuation Date absent or "but-for" the alleged breaches of the Respondent (the fair market value of the Project determined in connection with the computation of Compensation Damages), and the estimated value of the Project at the Valuation Date given the alleged breaches, assuming a 4 to 6 year delay in the project schedule.[901] Based on this approach, FTI calculated the Restitution Damages to South American Silver to be $140.5 million.[902]

3. The sums invested by South American Silver do not reflect the fair market value of the Malku Khota Project

420. As noted, Brattle did not independently determine the methodology it felt was appropriate to calculate the Claimant's damages but rather was instructed by Respondent's counsel that *"SASC should not be compensated for reversion of the mining concessions because the Project's prospects were too uncertain…at most, the Claimant is entitled to the costs incurred to acquire and develop the Project up to the date the concessions were reversed."*[903] Using the damages framework provided to them by

899 **CER-4**, FTI Rebuttal Report at ¶ 3.8 – Fig. 2.

900 **CER-1**, First FTI Report at ¶ 2.5.

901 *Id.* ¶ 2.6.

902 *Id.* ¶ 11.9.

903 **RER-3**, Brattle Report at ¶ 24.

Respondent, Brattle calculated the costs incurred by the Claimant to be $18.7 million, based the exploration costs reported by SASC in its audited financial statements.[904]

421. As FTI points out, Brattle's approach to use only the costs invested by the Claimant is also inconsistent with the terms of the Treaty which specifically references the "market value of the investment"[905] and the definition of fair market value, a key principle of which is that value is prospective that is it is a function of the prospective cash flows the Malku Khota Project would generate over its lifetime.[906] It is also inconsistent with internationally accepted standards for the valuation of mineral properties at the stage of development of Malku Khota, as set out in guidelines in Canada, South Africa and Australia.[907]

422. Returning the costs spent on the Project would also not wipe out the consequences of the alleged breaches of the Respondent. This is primarily because it would not compensate the Claimant for the lost return for the risks it had overcome to the date that the alleged breaches occurred, or for the loss of opportunity to earn additional returns by continuing to advance the Project's development towards a productive mine, absent the alleged breaches.[908] As a project is advanced and it moves through the various stages of development, its value increases as the asset is de-risked.[909] An award restricted to costs incurred by Claimant would also not provide compensation for the Claimant's lost opportunity to continue to develop the Project into a productive mine, and earn additional returns therefrom.[910]

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904 *Id*. ¶ 25.

905 **Exhibit C-1**, Treaty, Article 5.

906 **CER-4**, FTI Rebuttal Report at ¶ 4.14.

907 **CER-5**, **Exhibit RPA-1**, CIMVal, 2003, Standards and Guidelines for Valuation of Mineral Properties, Special Committee of the Canadian Institute of Mining, Metallurgy and Petroleum on Valuation of Mineral Properties, Feb. 2003; **Exhibit RPA-2**, SAMREC Code, 2009, The South African Code for the Reporting of Exploration Results, Mineral Resources and Mineral Reserves, July 2009 (2007, ed.); **Exhibit RPA-3**, JORC, 2012, Australasian Code for Reporting of Exploration Results, Minerals Resources and Ore Reserves, The JORC Code, Dec. 20, 2012 (2012 ed).

908 **CER-4**, FTI Rebuttal Report at ¶ 9.12.

909 **CER-4, Exhibit FTI-63**, Credit Suisse. "Financing life cycle of junior miners" at 1.

910 **CER-4**, FTI Rebuttal Report at ¶ 4.15.

423. Moreover, as FTI explains, the economic implications of Respondent's damages methodology are illogical.[911] If a mining company can have their project taken once they make a significant discovery and only receive the direct costs expended (after incurring the litigation cost and risks recovering them), no rational investor would invest in such exploration activities as they would face all of the downside risk and the government would reap all of the upside potential.[912] South American Silver put its own capital at risk when exploring and developing Malku Khota in anticipation of earning a significant return thereon. South American Silver then found and defined a significant silver-indium gallium resource that could potentially be one of the 10 largest silver mines in the world. Bolivia should not be permitted to take the Malku Khota Project and be required to simply reimburse Claimant for the expenditures made prior to the taking. This would reward States from expropriating investments at an earlier point in time, no matter how egregious the conduct.

424. Brattle also summarily excluded the general and administrative ("G&A") expenses from the Claimant's investment in the Malku Khota Project from inception through September 30, 2012 as computed by FTI.[913] FTI allocated US$12.9 million of SASC's G&A expenses to the Malku Khota Project based on the relative exploration costs between SASC's two projects over time.[914] Brattle did not attribute any of these costs as meeting the Respondent's definition of damages as, although it agrees *"…in principle it possible that some G&A expense are directly linked to the investment in the Project, absent more information, calculating how much is arbitrary."*[915] Brattle's approach is erroneous and nakedly geared towards driving Claimant's damages to the lowest possible number. As FTI explains, it is appropriate to include an allocation of G&A expenses as a cost of the Claimant's investment in the Project since investors would expect a return on all expenses incurred to advance the Project, not just the drilling

911 *Id*. ¶ 9.16.

912 *Id*. ¶ 9.16.

913 **RER-3**, Brattle Report at ¶ 166.

914 **CER-1**, First FTI Report at ¶ 5.27; **CER-4**, FTI Rebuttal Report at ¶ 9.4 – 9.5.

915 **RER-3**, Brattle Report at ¶ 166.

and exploration expenses.[916] Absent the Malku Khota Project, a significant portion of the G&A expenses would never have been incurred.[917]

425. In another effort to reduce the amount of compensation owed to Claimant, Brattle asserts that SASC is in possession of confidential metallurgical test results and geological information and that since *"[a] buyer of the concessions would have to either purchase this information from SASC or repeat the drilling campaign and metallurgical tests to continue the development of the project…this information may have market value that should be deducted from any damages amount awarded to the Claimant."*[918] It is not clear, however, whether this is Brattle's own view or whether this view was also provided to them by the Respondent. Brattle does not attempt to place a value on this information.[919] As FTI explain, in any event, the Project data still in the possession of the Claimant would only have value to the Respondent, the current operator of the concessions through COMIBOL, or a future partner.[920] FTI disagrees that the costs SASC, CMMK, and the Claimant invested less the market value of this data (if any) would represent the market value of the Project immediately prior to the expropriation per the Treaty, or the appropriate amount of compensation required to wipe out the effects of the expropriation.[921]

426. To sum up, notwithstanding the fact that Brattle was instructed by the Respondent not to independently calculate the fair market value of the Malku Khota Project (a task which falls properly within the expertise of a qualified and independent damages expert), its implied conclusion that the Project was not valuable at the Valuation Date is not substantiated.[922] Brattle accepts, uncritically, that the cost of investment is the appropriate standard of compensation for the Respondent's alleged breaches. As FTI explains, this is not a sufficient rationale to default to costs incurred as a legitimate

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916 **CER-4**, FTI Rebuttal Report at ¶ 9.5.

917 FTI addresses Brattle's tabulation of costs in Annex 3 to the FTI Rebuttal Report.

918 **RER-3**, Brattle Report at ¶ 28.

919 **CER-4**, FTI Rebuttal Report at ¶ 4.8.

920 **CER-4**, FTI Rebuttal Report at ¶ 4.9.

921 *Id*. ¶ 4.9.

922 **RER-3**, Brattle Report at ¶¶ 14.

measure of economic damages.[923] The conclusion that is implied by the damages methodology provided to Brattle by the Respondent is that the Project was not a valuable asset at the date of expropriation. This conclusion is clearly not supported by the available objective market evidence as illustrated in the following figure:

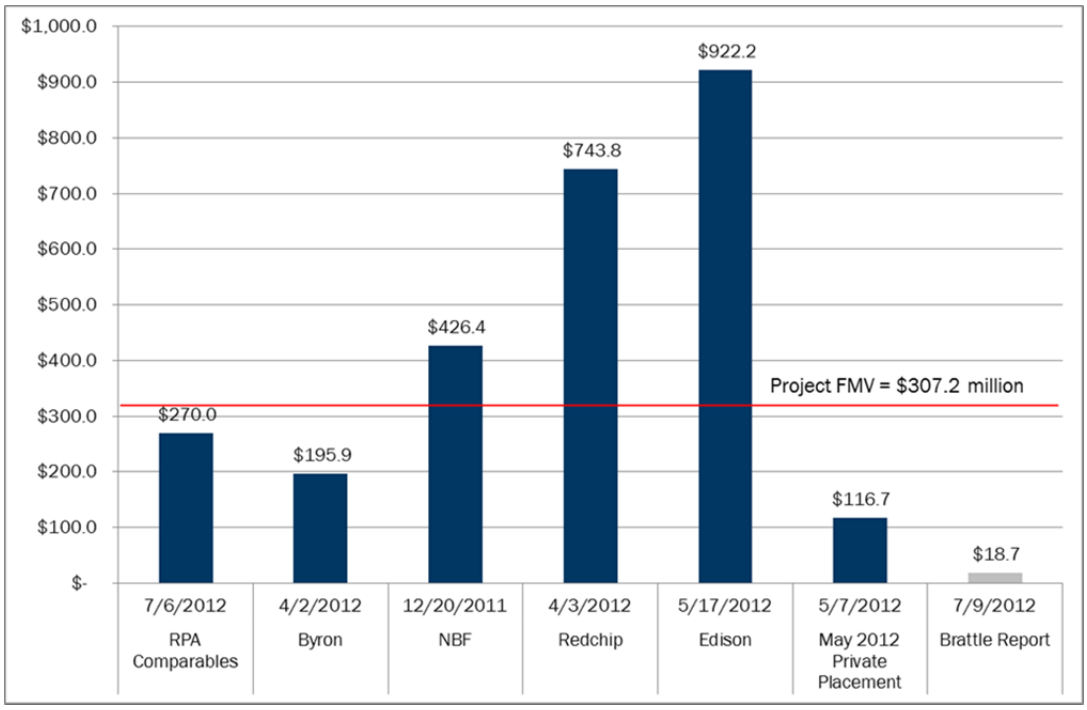

Fig. 4: Indications of value considered in FTI Report, Fair Market Value per FTI Report and Costs per Brattle Report (USD Millions).

C. COMPOUND POST-AWARD INTEREST

1. Rate of interest

427. Article 5 of the Treaty expressly provides that compensation for expropriation "shall include interest at a normal commercial or legal rate […]."[924] Accordingly, FTI selected the Bolivian statutory rate of 6.00% as pre-award interest rate. As is commercially reasonable, pre-award interest was compounded annually. Brattle does not object to the choice of the Bolivian statutory rate but, on instruction from Respondent's counsel, requires that interest be calculated on a simple, not compounded,

[923] **CER-4**, FTI Rebuttal Report at ¶ 4.18.

[924] **Exhibit C-1**, Treaty, Article 5.

basis.[925] Brattle also discussed two alternative reference rates (Bolivia's sovereign borrowing rate and the bare risk-free rate) that it does not ultimately use to calculate its pre-award interest. As FTI observes, both rates do not constitute "normal commercial or legal rates."[926] Accordingly, they cannot be used to calculate pre-award interest pursuant to Article 5 of the Treaty.

428. In line with the approach followed by the Tribunal in *Rurelec v. Bolivia*,[927] FTI has also identified the commercial interest rate reported on the website of the Central Bank of Bolivia from July 2012 (the valuation date) to the end of October 2015, which varies between 6.5% and 7.0%.[928] Therefore, as discussed by FTI, the statutory rate of 6.0% is a minimum applicable interest rate and the commercial interest rate per the Central Bank of Bolivia would be higher (between 6.5% and 7.0%).[929]

2. Compounding of interest

429. As Claimant explained in its Statement of Claim, international law now recognizes the awarding of compound interest as the generally accepted standard for compensation in international investment arbitrations.[930] A recent study performed by

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925 **RER-3**, Brattle Report at ¶180.

926 **CER-4**, FTI Rebuttal Report at ¶¶ 10.13-10.22

927 **CLA-1**, *Guaracachi America, Inc. et al. v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, Jan. 31, 2014 at ¶ 615.

928 **CER-4**, FTI Rebuttal Report at ¶ 10.7

929 **CER-4**, FTI Rebuttal Report at ¶ 10.7.

930 Claimant's Memorial at ¶ 222, citing to e.g., **CLA-87**, *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, Feb. 17, 2000, 15 ICSID Rev.–Foreign Inv. L.J. 169 (2000) at ¶ 104 ("[W]here an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then becomes due to him, the amount of compensation should reflect […] the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest […] [Compound interest] is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances."); **CLA-64**, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, Dec. 8, 2000, 41 I.L.M. 896 (2002) at ¶ 129; **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 at ¶ 9.2.6; **CLA-9**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, Apr. 12, 2002 at ¶ 174; **CLA-88**, *LG&E Energy Corp., LG&E Captial Corp.& LG&E International v. The Argentine Republic*, ICSID Case No. ARB/02/1, Award, July 25, 2007 at ¶ 103; **CLA-35**, *ADC v. Hungar*y, ICSID Case No. ARB/03/16, Award, Oct. 2, 2006 at ¶ 522; **CLA-40**, *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, July 14, 2006 at ¶ 440; **CLA-47**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004 at ¶ 251; **CLA-13**, *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF/00/2), Award, May 29, 2003 at ¶ 196; **CLA-2**, *Siemens A.G. v. Argentine Republic*, ICSID Case No.

leading audit firm PwC confirms in this respect that compound interest "is now applied in a vast majority of cases" that grew to 86% of all awards decided between 2011 and 2015.[931] As FTI confirms, modern economic reality, as well as equity, demands that injured parties be compensated on a compound basis in order to be made whole.[932] As such, no doubt remains that international law now recognizes that awarding compound interest is the generally-accepted standard in international investment arbitrations.

430. Bolivia nevertheless instructed its experts to apply simple interest since Article 412 of the Bolivian Code mandates the use of simple interest for certain domestic transactions.[933] Using simple instead of compound interest, Brattle concludes that pre-award interest should be US$ 72.0 million instead of US$ 78.5 million and US$ 32.9 million instead of US$ 35.9 million in the compensation and restitution scenarios, respectively.[934]

431. While this difference is relatively minor, it is based on a false premise because the Bolivian's Civil Code prohibition against compounding interest does not apply in these proceedings. Bolivia raised the exact same argument in the *Rurelec* case, which was soundly rejected by the Tribunal:

> As for the question of simple versus compound interest, the Tribunal considers that this issue does not fall within the ambit of the UK-Bolivia BIT's reference to the rate "applicable in the territory of the expropriating Contracting Party". Moreover, the Tribunal doubts that any prohibition of compound interest that may exist under Bolivian law is applicable to commercial loans, as opposed to consumer

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ARB/02/8, Award, Feb. 6, 2007 at ¶ 399; **CLA-51**, *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Uretim ve Ticaret Limited Sirketi v. Turkey*, ICSID Case No. ARB/02/5, Award, Jan. 19, 2007 at ¶ 348; **CLA-59**, *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award on the Merits, Nov. 13, 2000 at ¶ 96; **CLA-58**, *Enron Corp. and Ponderosa Assets v. Argentina*, ICSID Case No. ARB/01/3, Award, May 22, 2007 at Enron Award ¶¶ 451-52; **CLA-5**, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005 at ¶ 471. See also **CLA-76**, *S.D. Myers, Inc. v. Canada*, UNCITRAL (NAFTA), Second Partial Award, Oct. 21, 2002 at S.D. Myers Second Partial Award ¶ 307; **CLA-89**, *Pope & Talbot, Inc. v. Canada*, UNCITRAL (NAFTA), Award on Damages, May 31, 2002 at ¶¶ 89-90; **CLA-17**, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 2000 at ¶ 128.

931 **CER-4, FTI Rebuttal Report, Exhibit FTI-65**, PWC "2015 – International arbitration damages research" at 9.

932 **CER-4**, FTI Rebuttal Report at ¶¶ 10.8-10.12

933 **RER-3**, Brattle Report at ¶¶ 180.

934 **CER-4**, FTI Rebuttal Report at ¶¶ 10.3-10.4.

> loans, and questions whether Bolivia should be allowed to avail itself of potential limits imposed by the BIT on compensation that it has failed to provide "without delay" or at all. The Tribunal therefore decides to use compound interest in accordance with normal commercial practice.[935]

432. Based on the foregoing, there is no basis for FTI to change its calculation of pre-award interest based on the comments in the Brattle Report. FTI continues to apply a pre-award interest rate of 6.0% per annum and calculate pre-award interest on a compounded basis.[936]

D. SUMMARY OF DAMAGES

433. Based on the analysis above, FTI calculated pre-award interest to an estimated hearing date of May 31, 2016 and quantified South American Silver's damages as follows:

	Scenario 1 Compensation	Scenario 2 Restitution
Damages	$ 307.2	$ 140.5
Pre-Award Interest	$ 78.5	$ 35.9
Total	**$ 385.7**	**$ 176.4**

Fig. 3: Summary of FTI Report Damages Conclusions (USD Millions)[937]

VII. CLAIMANT'S REQUEST FOR RELIEF

For the reasons stated herein, Claimant, South American Silver, requests an award granting it the following relief:

(i) A declaration that Bolivia has violated the Treaty;

(ii) A declaration that Bolivia's actions and omissions at issue and those of its instrumentalities for which it is internationally responsible are unlawful,

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935 **CLA-1**, *Guaracachi America, Inc. et al. v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, Jan. 31, 2014 at ¶ 616.

936 **CER-4**, FTI Rebuttal Report at ¶ 10.23.

937 **CER-4**, FTI Rebuttal Report at ¶ 3.13, Fig. 3.

constitute a nationalization or expropriation or measures having effect equivalent to nationalization or expropriation without prompt, adequate and effective compensation, failed to treat South American Silver's investments fairly and equitably and to afford full protection and security to South American Silver'sinvestments, and impaired South American Silver's investments through unreasonable and discriminatory measures and treated South American Silver's investments less favorably than investments of its own investors;

(iii) An award to South American Silver of full restitution or the monetary equivalent of all damages caused to its investments, including historical and consequential damages;

(iv) An award to South American Silver for all costs of these proceedings, including attorney's fees; and

(v) Post-award interest on all of the foregoing amounts, compounded quarterly, until Bolivia pays in full.

Respectfully submitted,

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