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 REJOINDER MEMORIAL TO RESPONDENT'S OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

May 2, 2016

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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 Rejoinder on Jurisdiction 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's jurisdictional and admissibility objections are no less baseless now than they were prior to its most recent submission. As such, they should be dismissed because the Tribunal clearly has jurisdiction over South American Silver's claims.

2. In an effort to turn the Treaty on its head and read into it requirements that simply do not exist, Bolivia ignores the broad definition of "investment" which encompasses "every kind of asset which is capable of producing returns," without further qualifications on the identity of the "investor." Thus, the Treaty clearly covers both direct and indirect investors. Claimant proceeds to rehash old arguments, even in light of ample jurisprudence that cuts against it, including *Rurelec v. Bolivia*, to argue that the dispute resolution section of the Treaty, Article 8(1), covers only direct investments because it provides that "[d]isputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an ***investment of the former***," may be submitted to international arbitration. But *Rurelec* is clear in holding that Art. 8(1) does not restrict the Treaty's protections to direct investments only. As such, the Treaty clearly covers South American Silver's indirect ownership of CMMK and the Malku Khota Project. Because South American Silver satisfies the Treaty's definition of "national" or "company" it meets the Treaty's definition of "investment" under Article 1(a).

3. Faced with the fact that the Treaty applies to both direct and indirect investments and South American Silver is a protected company that owns qualifying investments, Bolivia argues that jurisdiction should nonetheless be denied because South American Silver was not "actively involved" in the making of the investment in CMMK, and urges a piercing of the

corporate veil to show that Claimant is not the real party in interest. Bolivia's attempt to foist upon South American Silver additional jurisdictional requirements not present in the Treaty seeks to upturn consistent case law spanning over a decade and must be rejected. The Treaty does not contain any requirement that in order to be considered to have a covered investment an indirect owner of an investment must have been actively involved in the realization of the investment. Further, as discussed below, the cases upon which Bolivia relies are inapposite and irrelevant to this case and its reliance on the *Salini* test as applicable to this non-ICSID case is misplaced. By asserting that the Tribunal should pierce the corporate veil because South American Silver's Canadian parent, South American Silver Corp., is the real party-in-interest, Bolivia seeks to graft onto the Treaty a requirement of immediate, active control. There is simply no requirement that the Tribunal must consider the nationality of Claimant's ultimate owner when deciding on jurisdictional objections, and there is no basis whatsoever on the facts of this case to pierce the corporate veil.

4. After failing to make headway with its direct - versus - indirect and real party-in-interest arguments, Bolivia turns to unclean hands and illegality, which are similarly wrong-headed. Bolivia seeks to introduce additional evidence in support of its argument that the "clean hands" doctrine applies to deprive this Tribunal of jurisdiction over South American Silver's claims. As set forth more fully below, the unclean hands doctrine does not exist in international law and Bolivia has failed to demonstrate otherwise. But even if the doctrine were to exist (which it does not), Bolivia fails miserably in demonstrating that the criteria for its application found in *Niko Resources v. Bangladesh* have been met. Bolivia asks the Tribunal to disregard those criteria for good reason, as it cannot meet them. Bolivia cannot show, for example, that a relationship of reciprocity between the obligations considered, which requires that the parties have an "identical or reciprocal obligation," exists in this case.

5. In an effort to further smear Claimant in the minds of the Tribunal, [redacted]

[redacted] Also, before even revealing Witness X's identity to Claimant, and without Claimant seeing even a redacted version of the witness statement, Bolivia asked the Tribunal to force Claimant to waive any legal recourse against Witness X. The Tribunal denied the request. In any event, South American Silver's witnesses confirm that the testimony of Witness X is not to be believed because that testimony completely misrepresents reality and is unsupported by the competent evidence. The documents Witness X cites do not support the statements he/she makes in the statement. South American Silver, [redacted]

6. In any event, [redacted] This is a particularly preposterous assertion, especially in light of actual evidence that the Company was doing anything and everything it could to resolve the issues and continue with the Malku Khota Project that stood to be hugely profitable based primarily on the huge amount of silver and indium that would be mined there.

7. Bolivia also introduces for the first time testimony of Mr. Andrés Chajmi, the ringleader of the small minority of community members who opposed the Malku Khota Project, and who recruited people from far away from the project area to oppose the project. However, Mr. Chajmi's testimony should be disregarded as his opposition to the Malku Khota Project was motivated by personal economic motives, which were supported by the Potosí government, and

the desire to continue illegal mining in the project area until he was able to form a mining cooperative to exploit the massive Malku Khota deposit. Mr. Chajmi's testimony is not only demonstrably false and devoid of evidentiary foundation, but it is also contradicted by contemporaneous documentary evidence [redacted] Thus, Mr. Chajmi's witness testimony does not help Bolivia's attempt to promote the non-existent "clean hands" doctrine.

8. Thus, as set forth herein, Bolivia's jurisdictional objections should be dismissed by the Tribunal.

II. FACTUAL BACKGROUND

A. BOLIVIA ATTEMPTS TO SUPPORT CMMK'S ALLEGATIONS OF WRONGDOING WITH THE IMPROPER TESTIMONY OF [redacted]

1. [redacted]

9. Bolivia introduced a new witness with its rejoinder, Witness X. Before revealing his/her identity and the content of his/her testimony, however, Bolivia made an application to the Tribunal for an order requiring South American Silver and its witnesses to *waive* any right to pursue any claims it may have against this as of yet unidentified new witness.[1] The Tribunal properly rejected Bolivia's petition.[2] [redacted]

[1] Respondent's Letter to the Tribunal, Mar. 16, 2016 (applying for a protective order requiring "SAS, its attorneys, witnesses and independent experts to commit not to take any retaliation against the Protected Witness") ("*SAS, sus abogados, testigos y expertos independientes se comprometan a no tomar ninguna represalia contra el Testigo Protegido*").

[2] Procedural Order No. 14, Apr. 1, 2016.

[redacted]

10. In addition, Bolivia has the audacity to accuse South American Silver of "hiding" documents and correspondence sent or received by Witness X and withholding them from production during the document production phase of this arbitration.[3] But there was no misconduct on South American Silver's part because [redacted]

11. [redacted]

[3] Respondent's Rejoinder, Mar. 21, 2016, at ¶¶ 18, 24, 31 ("Respondent's Rejoinder").

[4] See **CWS-11**, Second Rebuttal Witness Statement of W.J. Mallory, Apr. 29, 2016, at ¶¶ 2-7 ("Second Rebuttal Witness Statement of Mallory"); **CWS-12**, Second Rebuttal Witness Statement of Xavier Gonzales, Apr. 27, 2016, at ¶¶ 3, 4 ("Second Rebuttal Witness Statement of Gonzales"); [redacted]

[redacted]

12. [redacted]

[redacted]

5 [redacted]

6 [redacted]

[redacted]

13. [redacted]

[redacted]

7 [redacted]

8 [redacted]

9 [redacted]

10 [redacted]

11 [redacted]

[redacted]

14. [redacted]

[redacted]

12 [redacted]

13 [redacted]

14 *See* **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 3.

15 *Id.* at ¶¶ 2, 3, 4.

16 [redacted]

[redacted]

15. [redacted] The proposed *cabildo* would take place on November 17, 2011. In it, the communities that supported the Project would publicly express their approval before the Minister of Mining and Metallurgy.[19] CMMK saw this as an opportunity to achieve full community support for the Malku Khota Project. Indeed, there was overwhelming support by the communities that surrounded the Project but their voice was being muted by opposition leaders and individuals far from the Project area (except for Malku Khota and Calachaca) that wanted to illegally exploit the Project themselves. [redacted]

16. It should be noted that, [redacted]

[redacted]

17 **CWS-13**, Rebuttal Witness Statement of Ralph G. Fitch, Apr. 29, 2016 at ¶ 5 ("Rebuttal Witness Statement of Fitch")

18 *See* **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 4.

19 *Id.* [redacted]

20 [redacted]

21 [redacted]

[redacted]

B. CMMK Did Not Attempt to Divide the Communities. It Sought Consensus And Dividing The Communities Would Make No Sense

17. Bolivia does not dispute the fact that all but two of the communities that were directly or indirectly impacted by the Project, supported the Project.[23] Witness X[24] and the Ministry of Mining and Metallurgy also confirmed that fact when events first unfolded.[25] [redacted]

[redacted]

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22 [redacted]

23 *See, gen*. Respondent's Rejoinder (not contradicting this statement and referring to "the more radical Communities against the Project: Malku Khota and Calachaca)

24 [redacted]

25 **Exhibit C-314**, Minutes of Meeting between Officials of the Ministry of Mines, Oscar Iturri and Emil Balcázar, with the *ayllus* of Alonso de Ibánez Province, Apr. 18, 2012 whereby the Government acknowledges the existence of an "absolute majoritarian consensus in favor of the project, with exception of 2 communities [Calachaca and Malku Khota]".

26 [redacted]

27 [redacted]

[redacted] To be clear: South American Silver is not downplaying the importance of the opposition by the majority of members of the Malku Khota and Calachaca communities, but their lack of support does not show that there was any intent by the Company to divide the communities located within the Area of Influence.

18. Still, Bolivia insists that CMMK promoted and caused division within the communities.[30] But South American Silver has submitted sufficient evidence to show that the efforts to divide the communities came from: (i) FAOI-NP and CONAMAQ led by Messrs. Feliciano Gabriel and Andrés Chajmi, respectively, who did not represent the true interests of the communities in the Area of Influence;[31] (ii) illegal miners, as expressly acknowledged by the Minister of Mining and Metallurgy;[32] (iii) the Government's failure to protect and support the Project;[33] and (iv) the Government's active fueling of the opposition[34] to further political and

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28 [redacted]

29 [redacted]

30 Respondent's Rejoinder at ¶ 352 a.

31 Claimant's Reply to Respondent's Counter-Memorial on the Merits and Response to Respondent's Objections to Jurisdiction and Admissibility, Nov. 30, 2015 at ¶ 139 ("Claimant's Reply").

32 Claimant's Reply at ¶ 81; **Exhibit C-149**, *Policía evitará explotación ilegal en Mallku Khota*, LA PATRIA, Oct. 19, 2012: 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.'"

33 Claimant's Reply at ¶¶ 90, 91, 93.

34 Claimant's Reply at ¶ 100 *et seq*. Bolivia tries to deny that its active fueling of the opposition by, for example, arguing that Potosí's former Governor, Felix Gonzales, did not sign a resolution against CMMK as show of support for CMMK's opponents. Respondent's Rejoinder at ¶ 119. Both Bolivia and Mr. Felix Gonzales claim that his personal signature is merely a "confirmation of receipt" of that document. But, multiple documents in the record show that the "confirmation of receipt" used by the former Governor's office during his tenure is a different seal altogether and usually signed by his office's secretary. It is difficult to understand why the former Governor would depart from his office's standard practices but for wanting to appear supportive of CMMK's opposition to that group. This conduct is without doubt active fueling of the opposition. *See, e.g.,* **Exhibit R-055**, Letter from Xavier Gonzales Yutronic to Potosí's Governor, Dec. 21, 2010; **Exhibit R-068**, Letter from

economic interests.[35] [redacted] As Mr. Jim Mallory confirmed "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."[38]

19. Bolivia, [redacted] It is a fact that illegal miners—and the Government's tolerance towards them—fomented division between the communities.[41] [redacted] Before this arbitration started the Minister of Mining and Metallurgy, Mario Virreira, and Bolivia's witnesses, Mr. Andrés Chajmi [redacted] expressly acknowledged the existence of illegal mining activity in the Project area:

- Minister of Mining and Metallurgy, Mario Virreira, expressly admitted in different occasions that those who opposed the Project and hence,

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the Vice-Minister of Coordination of Social Movements to Potosí's Governor, Nov. 28, 2011; **Exhibit R-136**, Letter from Cancio Rojas to Potosí's Governor, Apr. 16, 2012; **Exhibit C-71**, Letter from Xavier Gonzales Yutronic to Potosí's Governor, June 4, 2012.

35 Claimant's Reply at ¶ 98 *et seq*.

36 [redacted]

37 [redacted]

38 **CWS-10,** Rebuttal Witness Statement of W. J. Mallory, Nov. 14, 2015 at ¶ 13 (Mallory Rebuttal Witness Statement").

39 Respondent's Rejoinder at ¶¶ 98, 128.

40 *Id.*

41 Claimant's Reply at ¶¶ 81, 82.

fomented any division were "actually illegally mining for gold in that region."[42]

- Mr. Andrés Chajmi declares in his witness statement that "as a part of the indigenous communities, we do not have technical knowledge to exploit a mine on our own, much less to manage a mining cooperative. We either dedicate ourselves to agriculture, or work for mining companies. I don't understand how we could have organized a mining cooperative, as Mr. Angulo says, an idea I never had." Yet, on May 2012, Mr. Chajmi confirmed to the media that the 80 members of the cooperative he planned to form were "exploiting [on their own the Malku Khota deposit] with whatever we have, with pickaxes and gimlets."[43]

- [redacted]

[redacted]

42 **Exhibit C-223**, *Explotación ilegal de oro es el origen del conflicto en Mallku Khota*, LA PAZ, May 21, 2012.

43 **Exhibit C-328**, *Los comunarios apuestan por explotación de indio,* MINERÍA DE BOLIVIA, May 2, 2012.

44 [redacted]

45 [redacted]

46 [redacted]

[redacted]

20. [redacted] Bolivia cannot validly deny that: (i) it chose to tolerate illegal mining within the Project area; (ii) it proposed the idea of forming a cooperative to exploit the Project (even if it was legally impossible), instead of (iii) protecting CMMK's concessions and right to develop the Project.[52]

C. SOUTH AMERICAN SILVER'S COMMUNITY RELATIONS STRATEGY WAS LEGITIMATE

1. The Purpose of Expanding the Area of Influence was to Unite Communities

21. Bolivia insists that expanding the Area of Influence was South American Silver's strategy to divide the a*yllus* or silence the opposition. Yet, Bolivia provides no evidence to support such proposition. As South American Silver explained in its Reply, it had legitimate reasons to expand the area of influence.[53] One of them, was to involve, to the extent possible, all of the communities of the six *ayllus* susceptible of being affected by the Project. Communities in the *ayllus* operate as a unit, with a common leadership.[54] Hence, the importance of involving the communities from the six *Ayllus* that surrounded the project area. Doing so, avoided

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47 [redacted]

48 [redacted]

49 [redacted]

50 [redacted]

51 Respondent's Rejoinder at ¶ 128.

52 Claimant's Reply at ¶¶ 98, 108, 110, 111, 130.

53 *See* Claimant's Reply at ¶¶ 69-72 and **CWS-10**, Mallory Rebuttal Witness Statement at ¶¶ 9-13.

54 **RER-1**, Expert Report of Liborio Uño Acebo, Mar. 26, 2015 at ¶ 58.

dividing the *ayllus* and/or interfering with their traditions.[55] Notably, the furthest community within the new Area of Influence was only 15 kilometers away from the Project. Other factors CMMK considered in expanding the Area of Influence were: (i) the location of the exploration works;[56] (ii) the location of exploration offices and CMMK's facilities; [57] (iii) geographical delimitations such as rivers and valleys;[58] and (iv) potential employment needs.

2. COTOA-6A was formed by the communities that supported the Company and was recognized by the Bolivian Government

22. Bolivia continues to attempt to characterize COTOA-6A and the Company's support for that organization as illegal. [redacted] Contemporaneous records demonstrate that the communities wanted to align themselves in a committee as early as 2009.[62] The communities then took actual

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55 Claimant's Reply at ¶ 71.

56 Claimant's Reply at ¶ 70.

57 *Id*.

58 *Id*.

59 Claimant's Reply at ¶ 94, **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 38. [redacted]

60 [redacted]

61 **CWS-12**, Second Rebuttal Witness Statement of Xavier Gonzales, Apr. 27, 2016 at ¶ 5 ("Second Rebuttal Witness Statement of Gonzales").

62 **Exhibit C-155**, Memorándum de Santiago Angulo a Felipe Malbrán, *Informe Mensual Proyecto Malku Khota*, May 2009.

steps to form an organization in April 2011.[63] COTOA-6A was finally formed in early October 2011.[64] These records alone showcase the communities' own initiative to form COTOA-6A. Specifically:

- Santiago Angulo reported in his May 2009 report that community members had proposed the formation of a regional commission to represent the different *ayllus* within the area of influence as a united block to communicate with CMMK.[65]

- On April 2011, the authorities of *Ayllu* Urinsaya, *Ayllu* Tacahuani, *Ayllu* Qullana, *Ayllu* Jatun Urinsaya, and *Ayllu* Samca discussed the possibility of creating an *ad-hoc* communications community[66] and on May 2, 2011 the *ayllu* leaders expressly decided to create a "*Comité de Sociabilización Ad Hoc, para impulsar la continuidad de las actividades de exploración del Proyecto*" and programed to meet again on May 30, 2011 to definitively create a "*Comité Consultivo de Organizaciones Originarias de los 6 ayllus*."[67]

- Further, on October 10, 2011, [redacted] informed President Evo Morales and the Minister of Mining and Metallurgy of Bolivia at that time, Jose Pimentel, of the formation of COTOA-6A and about their absolute support to the Project.[68]

Finally, witnesses in this arbitration confirm that COTOA-6A was not CMMK's idea.[69] [redacted]

[redacted]

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63 **CWS-10**, Mallory Rebuttal Witness Statement ¶ at 15, **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 10; **Exhibit C-309**, *Acta de Conformidad del Comité Consultivo de Organizaciones Originarias de los Seis Ayllus (COTOA-6A)*, May 2, 2011.

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

65 Claimant's Reply at ¶ 33; **Exhibit C-155**, Memorándum de Santiago Angulo a Felipe Malbrán, *Informe Mensual Proyecto Malku Khota*, May 2009.

66 **CWS-10**, Mallory Rebuttal Witness Statement ¶ at 15, **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 10.

67 **Exhibit C-309**, *Acta de Conformidad del Comité Consultivo de Organizaciones Originarias de los Seis Ayllus (COTOA-6A)*, May 2, 2011.

68 **Exhibit C-233**, Letter from COTOA-6 to President Evo Morales, Oct. 10, 2011; **Exhibit C-234**, Letter from COTOA-6 to the Minister of Mines, Oct. 10, 2011.

69 **CWS-10**, Mallory Rebuttal Witness Statement ¶ at 38, **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 10.

[redacted] Mr. Jim Mallory also confirms that "COTOA-6A was created by the leaders of *ayllus* Sulka Jilatikani, Tacahuani, Samca, Jatun Urinsaya and Qullana who felt their voice was not being heard by the Government, CONAMQ and FAOI-NP and who wanted their communities to receive the benefits that a project like Malku Khota would bring."[71] According to Mr. Mallory, back in "April 2011 there was a consensus among the communities to plan the formation of an *ad-hoc* communications committee to communicate more efficiently with the Company and to communicate to the Government their support for the Project."[72] [redacted] Then, "[a]fter September 25, 2011, there seemed to be momentum by the *ayllus* supporting the Project to join forces once again." This momentum culminated with "the leaders from the *ayllus* surrounding the Project area inform[ing] President Evo Morales and the Minister of Mines, Jose Pimentel, on October 10, 2011, that they had come together to form COTOA-6A."[74]

23. [redacted] As South American Silver's stated in its Reply, CMMK did work closely with COTOA-6A representatives in an effort to improve overall acceptance of the Project.[75] This, however, is a far cry from what Bolivia attempts to portray as some sort of illegal action by CMMK [redacted]

24. Although COTOA-6A was an initiative by the leaders of the six *ayllus*, [redacted]

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70 [redacted]

71 **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 8.

72 **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 10 (citing **Exhibit C-309**, *Acta de Conformidad del Comité Consultivo de Organizaciones Originarias de los Seis Ayllus (COTOA-6A)*, May 2, 2011).

73 [redacted]

74 **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 10 (citing **Exhibit C-232**, Minutes of the Meeting between Community Members of the North Potosí and the Director of Environment of Bolivia's Ministry of Mining and Metallurgy, Oct. 13, 2011; **Exhibit C-233**, Letter from COTOA-6 to President Evo Morales, Oct. 10, 2011; **Exhibit C-234**, Letter from COTOA-6 to the Minister of Mines, Oct. 10, 2011; **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 15).

75 Claimant's Reply at ¶ 94.

[redacted]

25. Notwithstanding CMMK's help to COTOA-6A, it was ultimately COTOA-6A's own leaders who took decisions, implemented them and acted for their own benefit.[79] [redacted] In fact, "COTOA-6A's leadership held CMMK accountable for the commitments made in the RCAs

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76 *See* **CWS-11**, Second Rebuttal Witness Statement Mallory at ¶ 11; [redacted]

77 **CWS-11**, Second Rebuttal Witness Statement Mallory at ¶ 11. [redacted]

78 [redacted]

79 **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 12.

80 [redacted]

between the Company and the *ayllus*. Throughout the time period that CMMK interacted with COTOA-6A, it was their leaders who took action, adopted and implemented their decisions for the benefit of the communities themselves."[81] [redacted] There can be no doubt that "the Company did not control COTOA-6A. The Company never insisted that COTOA-6A do anything that was against the wishes of the communities and *ayllus* who were part of that organization."[83] [redacted]

26. [redacted]

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81 **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 12.

82 [redacted]

83 **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 12. [redacted]

84 [redacted]

85 **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 13.

86 **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 6 (stating that [redacted]

[redacted]

3. [redacted]

27. [redacted] Accordingly, Mr. Gonzalo Gutiérrez was in charge of CMMK's media coverage: preparing media reports, organizing press conferences, arranging the transportation of journalists to Acasio, briefing journalists with information about the Company and the Project and providing them with any documentation that the journalists requested.[92] It is not illegal, inappropriate or abnormal for companies, especially smaller companies such as junior mining companies, to have an outside media coordinator and to pay for those services. In fact, "the mining industry and other industry associations often hire

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87 **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 13.

88 **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 13; **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 6.

89 **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 13.

90 **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 6 (stating that [redacted]

91 **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 16 (stating that "[u]pon Witness X's recommendation CMMK retained Mr. Gonzalo Gutiérrez of Ekos Comunicación [redacted]). *See also*, **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 17 (explaining that CMMK [redacted]

92 **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 17. [redacted] **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 16.

media coordinators and [Mr. Mallory] currently work[s] with a media relations agency for a mining project [he is] working on in Mexico."[93] Obviously, they do not work for free.

28. [redacted] But, these allegations are false and nothing more than another attempt on Bolivia's part to poison the Tribunal's view of the Company. Bolivia's attempt cannot survive scrutiny. In support of its allegation, Bolivia provides an incomplete document, apparently removing the first email in the e-mail chain it cites. [redacted]

29. [redacted] In other words, it was CMMK communicating its position to the public. [redacted]

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93 **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 16.

94 Respondent's Rejoinder at ¶ 169.

95 *See* **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 17. [redacted]

96 Respondent's Rejoinder at ¶ 169.

97 [redacted]

[redacted]

30. As shown, Bolivia alters the evidence to favor its story; an attempt that should be rejected by this Tribunal.

98 [redacted]

D. BOLIVIA'S ALLEGATIONS OF WRONGDOING BY CMMK ARE UNSUPPORTED

31. As South American Silver demonstrated in section II.D of its Reply memorial, Bolivia's allegations of wrongdoing rely solely on resolutions "adopted" by opponents to the Project. Notably, the Government found these resolutions to be baseless or otherwise, chose to ignore them. Bolivia now claims that South American Silver mischaracterized documentary evidence showing that the Government found FAOI-NP and CONAMQ's allegations of wrongdoing by CMMK to be groundless.[99] This is simply not true. The multiple evidence submitted by South American Silver[100] supports the fact that: (i) the FOAI-NP and CONAMQ resolutions "had no real ground whatsoever;"[101] (ii) if the allegations of criminal activity were true, they "had to be denounced before the corresponding legal authorities" [102] (they were not); and (iii) "community members from mining areas oppose extraction operations denouncing environmental concerns and contamination to water, with the sole purpose of illegally exploiting mining deposits."[103] Similarly, the February 2016 resolution filed by Bolivia and purportedly signed by members of the *Ayllu* Sullka Jilatikani is groundless and tailored-made in response to this arbitration.[104] As a preliminary matter, South American Silver notes that Bolivia did not offer any of the signatories of that resolution as witnesses in this arbitration. Yet, it files a resolution as confirmation of allegations of wrongdoing. Bolivia's conduct deprives Claimant of the availability to verify the authenticity and credibility of the signatories of that resolution. In

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99 Respondent's Rejoinder at ¶¶ 57-68.

100 **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-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-223**, *Explotación illegal de oro es el origen del conflict en Mallku Khota*, LA PAZ, May 21, 2012; **Exhibit C-149**, *Policía evitará explotación illegal en Mallku Khota*, LA PAZ, Oct. 19, 2012; **Exhibit C-222**, *Denuncian contaminación ambiental en Mallku Khota*, LA RAZÓN, May 26, 2012; **Exhibit C-224**, *Comunarios frenan operaciones mineras para iniciar trabajo illegal*, PÁGINA SIETE, Apr. 1, 2014.

101 **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.

102 **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.

103 **Exhibit C-224**, *Comunarios frenan operaciones mineras para iniciar trabajo illegal*, PÁGINA SIETE, Apr. 1, 2014.

104 **Exhibit R-158**, Voto Resolutivo de la Comunidad de Malku Khota del 26 de febrero de 2016.

any event, the resolution merely recites statements contained in the 2011 resolutions. Again, the document does not even name the basic element of "who" or "when" of the alleged wrongful conduct. There is simply no evidence to support the accusations contained in this resolution.

32. In any event, it is undisputed that the Bolivian Government chose to ignore the accusations contained in the resolutions. This inaction serves as a telling sign that the Bolivian Government considered these allegations to be groundless (and probably it still believes that they are groundless). To date, Bolivia has only raised accusations of wrongdoing in an attempt to discredit South American Silver in this arbitration.

E. CMMK DID NOT PROMOTE VIOLENCE AMONGST INDIGENOUS COMMUNITIES

33. Bolivia argues that South American Silver provoked the conflicts that took place at the beginning of 2012. [redacted]

34. [redacted]

105 [redacted]

106 Respondent's Rejoinder at ¶ 231; [redacted]

107 [redacted]

[redacted]

35. [redacted] Mr. Mallory "at no time was aware of any intent by Mr. Reque to 'provoke' his own capture. The Company would never have put its people in harm's way."[110] In fact, the Company "worked hard to secure Mr. Reque's release."[111] This reckless allegation is nonsense and this event deeply affected Mr. Reque both physically and emotionally.[112] Mr. Gonzales even recalls that "the Company at some point considered providing him psychological support."[113] [redacted]

2. The Violence in Acasio Was the Result of the Government's Lack of Control Over Illegal Miners and Violent Opponents to the Project

36. Bolivia argues that CMMK provoked violence in Acasio on May 18, 2012.[115] Again, Bolivia misconstrues the facts in order to mislead the Tribunal. CMMK did not plan, provoke or approve the violence that took place in Acasio.

37. *First*, the May 18, 2012 meeting in Acasio was suggested by the Government during an April 18, 2012 meeting between COTOA-6A members and the Ministry of Mining and

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[108] **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 15; **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶16.

[109] **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 15; **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 15.

[110] **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 15.

[111] **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 15; **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 43.

[112] **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 16.

[113] **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 16 ("*Inclusive, la Compañía en algún punto considero brindarle apoyo psicológico*").

[114] **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 16; **Exhibit R-75**, *Resolución de archivo de la denuncia de Xavier Gonzales Yutronic contra miembros de las Comunidades Originarias del 28 de febrero de 2014.*

[115] Respondent's Rejoinder at ¶ 162.

Metallurgy (specifically with the head of the public consultation and citizen participation unit, Mr. Oscar Iturri).[116] Notably, during this April 18, 2012 meeting the Government acknowledged the existence of an "absolute majority consensus" in favor of CMMK's mining project with exception of two communities (Malku Khota and Calacacha).[117] The meeting was to take place on May 8, 2012.[118] [redacted] This tension referred to the May 5, 2012 kidnaping of two policemen. This episode was "led by Cancio Rojas" and it "involved members of the Malku Khota community" who "attacked and kidnapped police members, in circumstances where the Prosecutor of Sacaca tried to arrest individuals accused of the crime of robbery."[121] Bolivia's witness, Mr. Andrés Chajmi, does not deny these events. Rather, he glazes over them stating that he and others "rejected the arrival of the police" and that the police's presence "ended in a violent incident in Malku Khota."[122] Mr. Chajmi's statement is less than candid. [redacted]

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116 **Exhibit C-314**, Minutes of Meeting between Officials of the Ministry of Mines, Oscar Iturri and Emil Balcázar, with the ayllus of Alonso de Ibánez Province, Apr. 18, 2012.

117 **Exhibit C-314**, Minutes of Meeting between Officials of the Ministry of Mines, Oscar Iturri and Emil Balcázar, with the ayllus of Alonso de Ibánez Province, Apr. 18, 2012.

118 **Exhibit C-314**, Minutes of Meeting between Officials of the Ministry of Mines, Oscar Iturri and Emil Balcázar, with the ayllus of Alonso de Ibánez Province, Apr. 18, 2012.

119 [redacted]

120 [redacted]

121 **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶¶ 10, 13: ("miembros de la comunidad de Malku Khota, liderado por Cancio Rojas, agredieron y secuestraron a policías, en circunstancias en las que la Fiscal de Sacaca pretendía aprehender a imputados por delitos de robo"); [redacted]

122 **RWS-3**, Witness Statement of Andrés Chajmi, Feb. 24, 2016 at ¶ 31 ("Chajmi Witness Statement") ("lo que terminó en un incidente de violencia en Mallku Khota en mayo de 2012 cuando nos enviaron a la policía para arrestarnos. Nosotros … rechazamos la llegada de la policía").

[redacted]

38. *Second*, it is undisputed that some of Malku Khota community members, kidnapped two policemen.[124] [redacted]

[123] [redacted]

[124] *See* Respondent's Rejoinder at ¶ 157 (stating that there was a "violent confrontation … in the early hours of May 5, 2012, during which two policemen were held hostages by community members"); **RWS-3**, Chajmi Witness Statement at ¶ 31.

[125] [redacted]

[126] **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 11 [redacted]

[127] **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 11.

[128] [redacted] **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 11.

[129] *See* **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 11.

[redacted]

39. [redacted]

40. *Finally*, it was the Minister of Mining and Metallurgy who on May 9, 2012, convened the Acasio May 18, 2012 meeting.[137] [redacted]

[130] **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 11 [redacted]

[131] [redacted]

[132] Respondent's Rejoinder at ¶ 160.

[133] **Exhibit R-172**, *Tension remains in the área of Mallku Khota*, EL POTOSI, May 9, 2012.

[134] **Exhibit R-172**, *Tension remains in the área of Mallku Khota*, EL POTOSI, May 9, 2012. ("Sin embargo, la autoridad lamentó que el policía retenido tenga hematomas en el cuerpo y, es más, perdió una pieza dental en los sucesos violentos que se produjeron el pasado fin de semana.")

[135] [redacted]

[136] **Exhibit C-313**, E-mail from F. Cáceres to several South American Silver Officials and Witness X, May 11, 2012.

[137] **Exhibit C-51**, Minutes of Meeting between the Government of Potosí and Community Members, May 9, 2012.

[redacted] But, CMMK's assistance consisted of "training COTOA-6A on how to effectively communicate their message to the authorities and the Malku Khota community and facilitate their transportation to Acasio."[139] It should not be surprising that CMMK did this, the Company wanted the communities to reach an agreement as this would benefit the Project. CMMK did not help COTOA-6A to generate violence as Bolivia claims.

41. [redacted]

42. [redacted]

138 [redacted]

139 **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 14.

140 [redacted]

141 [redacted]

142 [redacted]

143 [redacted]

144 [redacted]

[redacted]

43. Bolivia's portrayal of Mr. Cancio Rojas and others that opposed the project, including its witness Mr. Andrés Chajmi, as mere community leaders rather than violent individuals, comes as no surprise. It is, however, undisputed that Mr. Cancio Rojas was one of the main actors that instigated the violence in Acasio on May 18, 2012.[147] Potosi's Public Prosecutor concluded that:

> ***"A la fecha habiéndose procedido a desarrollar actos investigativos en su periodo de la etapa preliminar de investigación, se pudo recolectar suficientes elementos de convicción que se detalla a continuación.***
>
> *[…]*
>
> *[…] una gran mayoría de hombres quienes se encontraban portando objetos contundentes consistentes en chicotes, piedras, palos, hondas, dinamitas completamente furiosos y agresivo sin que medie provocación alguna este numeroso contingente de personas liderizados, dirigidos y conducidos por el imputado CANCIO ROJAS COLQUE de manera sigilosa premeditada y aprovechando su número llegaron a emboscarlos logrando abalanzarse hacia las víctimas querellantes y a la agente (comunarios y autoridades comunales) que se encontraba junto a ellos los cuales fueron objeto de agresiones físicas y como también las mujeres vejadas sexualmente profiriéndoles golpes con los objetos contundentes […]*
>
> *[…]*
>
> *Que impartida directrices a los Investigadores Asignados al caso para que efectúen las diligencias necesarias y tendientes a arribar a la veracidad de los hechos citados en fecha 18 de Mayo de 2012 años en el Municipio de Acasio los asignados al caso se constituyeron en fecha 15 de*

145 [redacted]

146 [redacted]

147 *See* Claimant's Reply at ¶ 136; **CWS-8**, Rebuttal Witness Statement of Xavier Gonzales, Nov. 13, 2015 at ¶¶ 48-49 ("Gonzales Rebuttal Witness Statement").

Junio de la presente gestión a las localidades de Acasio, Sakani y otros lugares […]donde se recogió testimonios de las víctimas, testigos presenciales de los hechos quienes manifestaron en sus partes más relevantes y principales los señores […] manifiestan los siguientes aspectos: Que refieren conocer al Sr. Cancio Rojas Calque quien en esa oportunidad se encontraba junto a los Señores Feliciano Gabriel, Marcial Condori, Andrés Chajme, Rene Chajme, Damian Calque, Paulina Choque Calque, Félix Calque, Alberto Choque Mamani, fue así que en fecha 18 de Mayo de 2012 […] cuando embarcados en un camión llegaron a la tranca de Acasio se reunieron junto a otras Autoridades Comunales acordaron dirigirse por la avenida a establecer el dialogo previsto para ese entonces donde sorpresivamente se percataron la presencia del imputado y los que en esa ocasión le acompañaban en un numero de 800.00 (Ochocientos) personas de distinto sexo armados con objetos contundentes consistentes en (piedras palos dinamitas) de manera imprevista reaccionaron violentamente agrediéndoles físicamente con golpes de puño y puntapiés y arrojándoles piedras y dinamitas en su humanidad oponiendo defensa en un principio lo cual desato en un ***enfrentamiento dirigidos por Cancio Rojas Colque*** *[…]*[148]

[redacted]

44. These facts, without doubt, constituted sufficient reason for the community members who were victims of violence in Acasio to file criminal complaints against Mr. Cancio Rojas. [redacted]

[148] **Exhibit R-84**, Decision to Dismiss the Complaint Against Cancio Rojas dated June 13, 2014. Although the Prosecutor ultimately concluded that there was no sufficient evidence beyond reasonable doubt to continue with the prosecution of Mr. Cancio Rojas for the crime of "instigation to violence," it did refer to different evidence confirming Mr. Rojas's violent actions.

[149] [redacted]

[150] *Id.*

[redacted]

Cancio Roja's arrest on May 21, 2012, took place in the context of the violent action he lead on May 5, 2012 in Malku Khota and May 18, 2012 in Acasio and as Bolivia admits, based upon an arrest warrant issued by the Prosecutor against Cancio Rojas on May 18, 2012.[153]

3. Messrs. Cardenas and Fernandez' Kidnap occurred due to Bolivia's failure to protect the Project and its own citizens

45. Bolivia insists on the fact that Messrs. Agustin Cardenas and Fernando Fernandez allegedly infiltrated the communities, implying that such "infiltration" was some sort of plan by the Company to harm other communities, interfere with their *usos y costumbres*, or instigate violence. Although, as South American Silver acknowledged in its Reply, Messrs. Cardenas and Fernandez did in fact travel to the proximity of the Malku Khota community, it was for the sole purpose of gathering information and taking photographs of the environmental contamination resulting from the illegal mining activities that were taking place in the Project area.[154] There was no intent by CMMK or Messrs. Cardenas or Fernandez to do any wrong or to "infiltrate" the community. As Messrs. Cardenas and Fernandez described in the report they prepared recounting the events of their kidnapping, they stayed away from the communities and only from the distance they observed with binoculars and recorded with cameras the illegal mining activities taking place in CMMK's concessions. This is certainly very different from the "infiltration" to the community or "infiltration" to a *cabildo* that Bolivia claims took place.

46. Mr. Andrés Chajmi claims that he was not in Malku Khota when Messrs. Cardenas and Fernandez were captured and that he was only informed by other community members that Messrs. Cardenas and Fernandez were detained for allegedly infiltrating the Malku

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151 [redacted]

152 **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 2 [redacted]

153 Respondent's Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, Mar. 31, 2015 at ¶ 158 ("Respondent's Counter-Memorial").

154 Claimant's Reply at ¶ 140; **Exhibit C-241**, Memorándum de Augustín Cárdenas y Fernando Fernandez a Fernando Caceres, *Informe Incidente del 28 de junio 2012*, July 25, 2012.

Khota *cabildo*. But Mr. Chajmi's testimony contradicts contemporaneous evidence. Indeed, Cardenas's and Fernandez's report prepared a few days after they were released in June 2012, not only confirms that they did not infiltrate the Malku Khota community, but also, that it was Mr. Andrés Chajmi and others who captured and harshly attacked them.[155]

47. [redacted]

4. [redacted] The actual plan was to "add[] shareholder value at Malku Khota through a process of refining engineering" and expansion of the Project

48. [redacted]

[155] **Exhibit C-241**, Memorándum de Augustín Cárdenas y Fernando Fernandez a Fernando Caceres, *Informe Incidente del 28 de junio 2012*, July 25, 2012.

[156] [redacted]

[157] [redacted]

[158] [redacted]

49. Testimony by Mr. Ralph Fitch, President and Director of South American Silver, as well as contemporaneously filed corporate documents and press releases, [redacted] As Mr. Fitch explains, the best account of the Company's plans are contained in its 2011 Corporate Report which was published on May 2, 2012. [redacted] The corporate report contains the Company's true outlook for the Project which included plans for expansion:

> In particular, the management team at South American Silver is focused on adding shareholder value at Malku Khota through a process of refining engineering with the move to feasibility in the second half of 2012, understanding the resource expansion potential and moving forward with the permitting process while working closely with the local communities to facilitate local economic and business development.
>
> * * *
>
> The year ahead will see expanded activities at both Malku Khota and Escalones including a total of 27,000 meters of drilling along with engineering projects planned on both projects over the course of the year. At Malku Khota pre-feasability level studies are underway and a major Economic Assessment update is due out Q-2-2012 and with the project moving into feasibility in the second half of the year.[160]

The Company, accordingly, anticipated the Project to "become an important new, long life, low cost, Western source of these strategic metals … With Malku Khota targeted to produced 10% or

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[159] **CWS-13**, Rebuttal Witness Statement of Fitch at ¶ 8 (emphasis in original).

[160] **Exhibit C-300**, South American Silver Corp., *Corporate Report 2011*, May 2, 2012 at 2-3. *See also* id at 4 (describing 2011 achievements at Malku Khota); (describing project development at Malku Khota, i.e., *"[C]urrent economic modeling demonstrates a robust project with strong operating cash flow, high rates of returns and modest capital and operating costs, particularly on a cost per ounce basis"*) at 5; (describing Community Relations and Corporate Social Responsibility programs, i.e., *"[A]dditionally, we have recruited a team of representatives from the local Ayllus with the purpose of improving our communication with local leaders and supporting the local implementation teams responsible for each of the Impact and Benefit Agreements in place. Together with community representatives, we are also developing processes for constructing resolution of any community concerns and will be establishing a multi-stakeholder Advisory Committee with other commissions to address labor and environmental management"*) at 7; (providing a Project Overview of Malku Khota) at 8; (providing a detailed description of the project) at 10-11; (setting forth resource estimates for Malku Khota) at 14; **Exhibit C-301**, South American Silver Corp., *First Quarter Ended March 31, 2012 – Management's Discussion & Analysis ("MD&A")*, May 11, 2012 at 4, *("Due to the bulk mineable and heap leachable nature of the deposit, there remains excellent potential to continue to expand production levels beyond the 13.2 million ounces of silver per year level in the 2011 Economic Assessment study through further optimization of the resource and increases in overall mine throughput. Current optimization studies are targeting expansion of annual silver production toward 18 – 20 million ounces per year as part of the updated Economic Assessment and would make Malku Khota one of the largest producing silver mines in the world"*).

more of the global indium and gallium supply, the Company may review possible indium/gallium off-take or streaming-type opportunities as a source of project financing during the Feasibility process."[161] Plans for expansion were already materializing as "in March-May 2012, [the Company was] in discussions with the owners of Cerusita Andina to acquire concessions owned by it."[162] The Company was also pursuing other land leases and option agreements.[163] [redacted]

50. Indeed a planning meeting did take place in La Paz in early January 2012. The Company's senior managers attended this meeting including Mr. Jim Mallory. Mr. Mallory recounts in his witness statement that he "invited Mr. Xavier Gonzáles and Mr. Fernando Caceres" to attend this meeting as well as "a number of environmental consultants to assist in the planning."[165] [redacted]

51. For example, the "first day of meetings included discussion on exploration activity, community relations activities, engineering requirements and other administrative requirements."[166] The "second day of meetings was held to specifically discuss the scheduling of the environmental baseline studies required for the Project."[167] The Company's environmental consultants actively participated in these discussions.[168] The location of the meeting then moved with "the entire team travel[ing] to Sakani to view the preparations to resume exploration activity in *ayllu* Samca, discuss temporary and permanent camp locations that would be acceptable to *ayllu* Sulka Jilatikani, and investigate water bore hole options for water supply to the camp installations."[169] [redacted]

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161 **Exhibit C-302**, South American Silver Corp. News Release, "*South American Silver Corp. Announces Final Closing of $16 Million Financing with Asian based High Technology Groups*," May 7, 2012.

162 **CWS-13**, Rebuttal Witness Statement of Fitch at ¶ 10.

163 *Id*.

164 **CWS-13**, Rebuttal Witness Statement of Fitch at ¶ 7.

165 **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 17.

166 *Id*., at ¶ 18.

167 *Id*.

168 **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 18.

[redacted]

52. [redacted]

53. Thus, based on the foregoing, it is clear that Bolivia's allegations of wrongdoing are a result of distortions and outrights falsehoods that are not supported by credible or competent evidence. However, as set forth below, even if true (which are not), such acts in no way deprive this Tribunal of jurisdiction over South American Silver's claims under the Treaty.

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169 **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 18.

170 **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 18, **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 22.

171 **CWS-13**, Rebuttal Witness Statement of Fitch at ¶ 12.

172 [redacted]

173 **CWS-5**, Witness Statement of Santiago Angulo, July 18, 2014 at ¶ 19.

174 *Id*.

175 [redacted]

III. THE TRIBUNAL HAS JURISDICTION OVER CLAIMANT'S CLAIMS

54. The weakness of Bolivia's objections to the Tribunal's jurisdiction in this arbitration is illustrated not just by the fact that it has already admitted that South American Silver is a protected company under the Treaty that owns qualifying investments in Bolivia.[176] It is also evidenced by Bolivia's failure to respond to South American Silver's submissions in its Reply Memorial. In its Rejoinder Memorial, Bolivia has maintained, unchanged, some of the original allegations it made in its Counter-Memorial while abandoning others. It has also raised entirely new jurisdictional objections. As a result, it is obvious that Bolivia is grasping at straws, and that the Tribunal has jurisdiction over this dispute.

55. As discussed in the following sections, the Treaty protects both direct and indirect owners of qualifying investments, contrary to Bolivia's allegations (**A**). Moreover, Bolivia's attempts to impose upon Claimant and the Tribunal jurisdictional requirements that are not included in the Treaty must fail (**B**). For these reasons, the Tribunal should reject Bolivia's objections and declare that it has jurisdiction over South American Silver's claims.

A. THE TREATY PROTECTS THE DIRECT AND INDIRECT OWNERS OF QUALIFYING INVESTMENTS

56. Remarkably, Bolivia almost completely ignores the jurisdictional arguments raised by South American Silver in its Reply Memorial and proceeds in its Rejoinder Memorial to make the same improper allegations as in its Counter-Memorial. Bolivia claims that Article 8(1) of the Treaty does not refer to indirect investments,[177] that the provision's reference to "investment of the former" excludes indirect investments from the parties' consent to arbitration,[178] and that the circumstances in which the Treaty was entered confirm its position.[179] However, as South American Silver explained in its Reply Memorial, and explains again below, these are erroneous submissions that the Tribunal should wholeheartedly reject.

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[176] Respondent's Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, Mar. 31, 2015 at ¶ 224 ("Respondent's Counter-Memorial").

[177] Respondent's Rejoinder at ¶ 250.

[178] Respondent's Rejoinder at ¶¶ 252 *et seq.*

[179] Respondent's Rejoinder at ¶¶ 258 *et seq.*

1. The ordinary meaning of the terms "investment of the former" and the Treaty's context, object, and purpose all indicate that Article 8(1) applies equally to direct and indirect owners of qualifying investments

57. The ordinary meaning of the terms "investment of the former," in Article 8(1) of the Treaty, refers to direct and indirect investments.[180] Bolivia does not dispute that the term "of" is capable of different meanings, depending on the context.[181] In fact, the Oxford English Dictionary, on which Bolivia relies, indicates as much.[182] Nor does Bolivia refute the *Rurelec v. Bolivia* tribunal's holding that Article 8(1) of this Treaty applies to direct and indirect investments,[183] or the reasoning of the *CEMEX v. Venezuela* tribunal, on which that holding was partly based,[184] that the use of the preposition "of" did not imply that investments needed to be directly owned by investors.[185]

58. Likewise, Bolivia ignores and fails to respond to South American Silver's argument that because the notion of "investment" under the Treaty is broad and includes indirect investments of the kind South American Silver made in Bolivia,[186] Article 8(1) necessarily refers to direct and indirect investments.[187] Nor does Bolivia dispute the existence of consistent case law on this issue.[188] Bolivia also overlooks the fact that the object and purpose of the Treaty

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180 Claimant's Reply at ¶¶ 157 *et seq.*

181 Claimant's Reply at ¶ 157; **RLA-60**, *Standard Chartered v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, Nov. 2, 2012 at ¶ 216.

182 **RLA-48**, Oxford English Dictionary. According to the Dictionary, the preposition "of" may indicate "an association between two entities, typically one of belonging." In other words, contrary to Bolivia's position, the preposition does not imply a direct connection (*see* Respondent's Rejoinder Memorial at ¶ 252).

183 Claimant's Reply at ¶ 161; **CLA-1**, *Guaracachi America, Inc. et al. v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, Jan. 31, 2014 at ¶ 365.

184 Claimant's Reply at ¶ 161; **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.

185 Claimant's Reply at ¶¶ 159-160; **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.

186 Claimant's Reply at ¶ 164.

187 Claimant's Reply at ¶ 167.

188 Claimant's Reply at ¶¶ 165-166; **CLA-1**, *Guaracachi America, Inc. et al. v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, Jan. 31, 2014 at ¶¶ 352-353; **RLA-55**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, Aug. 3, 2004 at ¶ 137; **RLA-54**, *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, Jul. 6, 2007 at ¶¶ 123-124; **CLA-104**, *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction, Jun. 19, 2009 at ¶¶ 105-111; **CLA-105**, *Venezuela Holdings B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, Jun. 10, 2010 at ¶¶ 162-166; **CLA-100**, *CEMEX Caracas Investments B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case

support the view that Article 8(1) applies equally to the direct and indirect owners of qualifying investments.[189]

59. Bolivia takes issue with South American Silver's reliance on the *ELSI* case for the proposition that, in the absence of clear and specific language excluding indirect investments from the Treaty's protection, Article 8(1) should be interpreted as referring to such indirect investments.[190] Yet, that is precisely the reasoning that the International Court of Justice adopted when it held 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."[191] Moreover, Bolivia disregards the fact that investment treaty tribunals refused to exclude indirect investments from treaty protection because there was no express language to that effect.[192]

60. Instead, Bolivia relies awkwardly on the *ELSI* decision to argue that the principle that tribunals have jurisdiction over disputes for which there is express consent should not be considered tacitly dispensed with, and that Article 8(1) of the Treaty should thus not be viewed as encompassing indirect investments.[193] Bolivia's claim is flawed. Indeed, Claimant is not suggesting that the Tribunal dispense with this principle.[194] Rather, South American Silver submits that the parties to the Treaty have expressly consented to arbitration in relation to indirect investments *because* Article 8(1) refers to such investments.

No. ARB/08/15, Decision on Jurisdiction, Dec. 30, 2010 at ¶¶ 150-156; **CLA-106**, *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, Jun. 20, 2006 at ¶¶ 37 and 63; and **CLA-4**, *BG Group plc v. The Argentine Republic*, UNCITRAL, Final Award, Dec. 24, 2007 at ¶¶ 112 and 467.

189 Claimant's Reply at ¶ 175.

190 Respondent's Rejoinder at ¶¶ 256-257; Claimant's Reply at ¶¶ 168, 171.

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

192 Claimant's Reply at ¶¶ 169-170; **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; **CLA-104**, *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction, Jun. 19, 2009 at ¶¶ 106-107.

193 Respondent's Rejoinder at ¶ 257.

194 In any event, South American Silver notes that the case law and doctrine that Bolivia cites in support of its allegation relate to most-favored-nation clauses and are thus irrelevant (*see* Respondent's Rejoinder at ¶ 257, n. 419).

61. Thus, South American Silver's position on the scope of Article 8(1) of the Treaty remains largely unchallenged.[195] Bolivia's failure to engage with Claimant's arguments should lead the Tribunal to conclude that it properly has jurisdiction over the claims of South American Silver in this arbitration.

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

62. South American Silver noted in its Reply Memorial that there was no reason to resort to the supplementary means of interpretation envisaged in Article 32 of the Vienna Convention with respect to Article 8(1) of the Treaty because the proper application of the Convention's general rule of interpretation (enshrined at Article 31) yielded a reading of it – that it applies to the direct and indirect owners of qualifying investments – that was neither "ambiguous or obscure" nor "manifestly absurd or unreasonable."[196] Bolivia mischaracterizes South American Silver's position, alleging that Claimant "insists that the text of the Treaty is ambiguous and that, given this circumstance, the Tribunal should assume jurisdiction," and then relies on that mischaracterization to invoke Article 32.[197]

63. Bolivia does not dispute the fact that Article 32 of the Vienna Convention should only be referred to if the proper application of Article 31 yields an ambiguous result.[198] However, South American Silver never suggested that Article 8(1) is ambiguous. To the contrary, it has repeatedly argued that the ordinary meaning of the terms "investment of the former" and the Treaty's context, object, and purpose all indicate that Article 8(1) applies

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[195] Bolivia has not rebutted South American Silver's criticisms of Judge Read's dissent in *Anglo Iranian Oil* and of the *Brown v. Stott* decision (*see* Claimant's Reply at ¶¶ 172-173), which Bolivia relied on in its Counter-Memorial to support its jurisdictional objections. Although Bolivia no longer relies on Judge Read's dissent in its Rejoinder Memorial, it has once again cited to *Brown v. Stott* as if nothing were amiss (*see* Respondent's Rejoinder Memorial at ¶ 251, n. 406).

[196] Claimant's Reply at ¶ 180.

[197] Respondent's Rejoinder at ¶ 262.

[198] Respondent's Rejoinder at ¶ 263 ("Therefore, the text of the Treaty does not provide for the protection of indirect investments and, if considered ambiguous, the intention of the Parties was to exclude such investments by not expressly protecting them, as was done in other contemporaneous treaties").

equally to the direct and indirect owners of qualifying investments. Thus, the parties agree that there is no need to resort to Article 32 in the instant case.[199]

64. But even if the Tribunal decided to rely upon supplementary means of interpretation, which include "the preparatory work of the treaty and the circumstances of its conclusion,"[200] to interpret Article 8(1) of the Treaty, the treaties invoked by Bolivia are not part of such "circumstances."[201] Indeed, the phrase "circumstances of [a treaty's] conclusion" refers to "the contemporary circumstances and the historical context in which the treaty was concluded."[202] Since the Treaty was signed on May 24, 1988, the circumstances of its conclusion logically cannot cover treaties signed *after* that date, such as the Bolivia-France, Bolivia-BLEU, Bolivia-Sweden, and Bolivia-Italy treaties that Bolivia attempts to rely on.[203] Nor has Bolivia established that the Bolivia-Switzerland and Bolivia-Germany treaties, on which it also relies (and which were signed before the Treaty), formed part of the contemporary circumstances and the historical context in which the Treaty was specifically concluded. Bolivia has not shown that the parties discussed these two treaties when negotiating the Treaty or that the United Kingdom was even aware (or should have been aware) that Bolivia had concluded two treaties with Switzerland and Germany in 1987. Tellingly, Bolivia has yet again failed to produce the Treaty's *travaux préparatoires*, despite the fact that South American Silver had already noted their absence from the record in its Reply Memorial.[204]

65. Moreover, investment treaty tribunals have regularly refused to rely on other treaties when interpreting the provisions of a specific treaty.[205] Bolivia's only response to this

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199 Respondent's Rejoinder at ¶ 262 ("Bolivia considers that a systematic reading of the Treaty text is sufficient to conclude that it does not protect indirect investments"); Claimant's Reply at ¶ 180.

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

201 Respondent's Rejoinder at ¶ 258.

202 **CLA-179**, Sir Humphrey Waldock, Special Rapporteur, "Third Report on the law of treaties," in Yearbook of the International Law Commission (1964), vol. II at p. 59, ¶ 22.

203 Respondent's Rejoinder at ¶ 258, n. 421-422.

204 Claimant's Reply at ¶ 181.

205 Claimant's Reply at ¶ 182; **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; **CLA-104**, *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction, Jun. 19, 2009 at ¶ 109; **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; **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.

consistent line of case law is to belittle the analysis conducted by these tribunals,[206] an unbecoming tactic to say the least. Consequently, Article 32 of the Vienna Convention is of no assistance to Respondent's flawed interpretation of Article 8(1) of the Treaty.

B. THE TRIBUNAL SHOULD DISREGARD THE JURISDICTIONAL REQUIREMENTS THAT BOLIVIA RELIES UPON BUT THAT ARE NOT INCLUDED IN THE TREATY

66. The Treaty provides that a tribunal has 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."[207] Thus, 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. There are no other requirements under the Treaty that need be satisfied for a tribunal to accept jurisdiction over a claimant's claims, and Bolivia has already admitted that South American Silver is a protected company under the Treaty that owns qualifying investments in Bolivia.[208]

67. In its latest submission, Bolivia alleges that the Tribunal should decline jurisdiction over this dispute because South American Silver was not "actively involved" in the making of the investment at issue in the arbitration;[209] and because piercing the corporate veil would show that Claimant is not the real party in interest.[210] However, these requirements are not included in the Treaty and should be ignored. Moreover, investment treaty tribunals have consistently rejected parties' efforts to impose additional jurisdictional requirements beyond those already included in the underlying treaty.[211]

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206 Respondent's Rejoinder at ¶ 261.

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

208 Respondent's Counter-Memorial at ¶ 224.

209 Respondent's Rejoinder at ¶¶ 264 *et seq.*

210 Respondent's Rejoinder at ¶¶ 276 *et seq.*

211 Claimant's Reply at ¶ 187; **CLA-46**, *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 at ¶ 241; **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 Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, Apr. 18, 2008 at ¶ 110; **CLA-114**,

68. Bolivia's attempt to distinguish these cases misses the mark.[212] The awards are relevant as they stand for the simple proposition that tribunals must interpret treaties as they are written, respecting the terms in which the parties have agreed to establish jurisdiction. In fact, Bolivia has not disputed that it would be improper for the Tribunal to impose jurisdictional requirements on claimants which the parties to the Treaty could have added but did not. The Tribunal should therefore dismiss Bolivia's jurisdictional objections and affirm that the Treaty only requires a claimant to own, directly or indirectly, the investment (**1**); and that the Treaty does not provide a basis for piercing the corporate veil in this case (**2**).

1. The Treaty only requires a claimant to own, directly or indirectly, the investment that is the subject of the dispute

69. In its Counter-Memorial, Bolivia alleged that even if Article 8(1) of the Treaty applies equally to direct and indirect investments (as established above), only the ultimate owner of those investments could benefit from the Treaty's protections.[213] South American Silver indicated in its Reply Memorial that the Treaty did not contain that requirement;[214] and that Bolivia had misconstrued the decisions that it had relied upon in support of that allegation.[215]

70. Bolivia appears to have abandoned that claim since it has failed to respond to South American Silver's submission on this point. Instead, it has raised a new allegation in its Rejoinder Memorial: that the Tribunal lacks jurisdiction over this dispute because South American Silver has purportedly not "made" any investment in Bolivia. According to Respondent, the terms "investment of the former," in Article 8(1) of the Treaty mean that there

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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; **CLA-115**, *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, Apr. 29, 2004 at ¶ 77.

212 Respondent's Rejoinder at ¶ 290. Bolivia alleges that "[i]f the tribunal in *Saluka* had been to rule on whether a shell company could be considered an investor under the definition of the treaty, it would have reached the same conclusion that Bolivia defends in this case." However, that is exactly the objection that the respondent in the *Saluka* case raised and that the *Saluka* tribunal proceeded to reject (*see* **CLA-46**, *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 at ¶¶ 239-242).

213 Respondent's Counter-Memorial at ¶¶ 245 *et seq.*

214 Claimant's Reply at ¶¶ 185-188.

215 Claimant's Reply at ¶¶ 189-194.

must be an "objective link" between the company and the investment, *i.e.*, that the company "must have been actively involved in the realization of the investment in the host State."[216]

71. Bolivia's allegation, however, is flawed. For purposes of a tribunal's jurisdiction, Article 8(1) of the Treaty only requires that the investment *belong* to the claimant, as Bolivia's own evidence makes clear[217] (and as shown above, the claimant may own that investment either directly or indirectly).[218] The Treaty does not require that Claimant be "actively involved" in the realization of the investment. Bolivia's attempt to read in such a subjective requirement is a blatant attempt at misleading the Tribunal into applying a different standard than the objective ownership criterion that the Contracting Parties agreed to, and should accordingly be rejected.

72. Nor does the Treaty's preamble contain such a requirement, contrary to Bolivia's position.[219] In that regard, Bolivia's reliance on the *Caratube* and *Standard Chartered* cases is inappropriate. Although it claims that "the treaties analyzed by these tribunals are sufficiently similar,"[220] that is not the case.

73. As to *Caratube*, Bolivia cites perceived similarities between the preambles of the U.S.-Kazakhstan BIT and the Treaty as a warrant to import a "require[ment] that the jurisdiction of the tribunals be limited to those investments in which the existence of an economic relationship … is verified," as jurisdiction supposedly "can only exist over assets that have contributed to the stimulation of capital flows between certain States."[221] Setting aside the rather dubious premise that indirect investments necessarily dilutes or negates the economic benefits *to Bolivia* of an investment like the Malku Khota Project, it must be emphasized that the *Caratube* case had a peculiar fact pattern that led to legal conclusions having nothing to do with this case. *Caratube* only reached its conclusion because the claimant there was a Kazakh entity suing the State of its incorporation, Kazakhstan, under the U.S. – Kazakhstan BIT, a situation ordinarily prohibited in investment law. However, the U.S.— Kazakhstan BIT expressly permitted this by

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216 Respondent's Rejoinder at ¶¶ 264-265.

217 **RLA-48**, Oxford English Dictionary (the preposition "of" may indicate "an association between two entities, typically one of belonging").

218 *See supra* ¶¶ 56 *et seq.*

219 Respondent's Rejoinder at ¶¶ 268-270.

220 Respondent's Rejoinder at ¶ 270.

221 Respondent's Rejoinder at ¶ 268-69.

reference to Article 25(2)(b) of the ICSID Convention, which allows nationals to sue their own States of incorporation when, "because of *foreign control"*, that local company would be considered a national of the person or entity controlling it. The *Caratube* tribunal emphasized that in addition to ownership over the investment, control was *also* required not because of the U.S. Kazakhstan BIT (which covered investments "owned *or* controlled" by qualified investors – language that does not even exist in the U.K.-Bolivia BIT), but because "foreign control" was a requirement found in the Article 25(2)(b) of the ICSID Convention.[222] *Caratube* is thus nothing like this case, which is an UNCITRAL Rules arbitration where Claimant is indisputably not an entity incorporated in Bolivia that would need to fulfill the "foreign control" test of the ICSID Convention to be able to access the protections of the Treaty.

74. Similarly, the *Standard Chartered* tribunal based its analysis on the unique facts of that case and the specific wording of Article 1(a) of the U.K.-Tanzania BIT, which provides that an investment has to be "made" in the territory of the Contracting Party.[223] However, Article 1(a) of the Treaty contains no such language, merely defining the term "investment" as "every kind of asset which is capable of producing returns."[224] Moreover, even if this Tribunal adopted *Standard Chartered's* interpretation of the phrase "*investment of latter* in the territory of the former" (which Claimant rejects), the Tribunal would still retain jurisdiction in this arbitration. The *Standard Chartered* tribunal concluded that, "to constitute Claimant's status as treaty investor, so that the Loans may be considered investments 'of' Claimant, implicates

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[222] Caratube, at para. 380 ("As found above, in order to find that this Tribunal has jurisdiction, the Claimant must prove that it satisfies the requirements both of Article 25(2)(b) of the ICSID Convention, and of Article VI(8) of the BIT. Regarding the term 'investment' in Article VI(8), the BIT's definition in Article I(1)(a) uses the phrase 'owned or controlled' not merely 'control' as does Article 25(2)(b). The two words are connected by an 'or'. While, thus, this wording of the BIT seems to imply that it is sufficient to prove either ownership or control to satisfy this requirement, as seen above, the definition in the BIT cannot go beyond the limits established by Art. 25(2)(b) of the ICSID Convention which makes no reference to ownership, but expressly requires control.").

[223] **RLA-60**, *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award, Nov. 2, 2012 at ¶¶ 204 ("Article 1(a) of the BIT provides that: (a) "investment" means every kind of asset admitted in accordance with the legislation and regulations in force in the territory of the Contracting Party in which the investment is made…"), 222 ("Article 1(a) of the BIT defines the term "investment" for purposes of the treaty. In its first paragraph, it refers to the "territory of the Contracting State in which the investment is *made*") (emphasis in original).

[224] **Exhibit C-1**, Treaty, Article 1(a).

Claimant doing something as part of the investing process, either directly or indirectly through an agent or entity under the investor's direction. No such actions were performed."[225]

75. Here, there can be no dispute that South American Silver Ltd. "did something as part of the investing process,"[226] namely:

- it acquired ownership of 100% of the shares of its wholly owned Bahaman subsidiaries (Malku Khota Ltd., Productora Ltd. and G.M. Campana Ltd.) in 1994 and 2003;
- in turn, Malku Khota Ltd., Productora Ltd. and G.M. Campana Ltd acquired 100% of the shares of CMMK (incorporated on November 7, 2003)[227] in 2003 and 2007. CMMK is the Bolivian entity that owns the ten mining concessions constituting the Malku Khota Project.

Thus, unlike *Standard Chartered* – where the U.K. Claimant had a highly attenuated connection to the investment (purchase of loans), which was made exclusively by its Hong Kong affiliate, – here, the entire *raison d'être* of the structure in place was to make the investment in the Malu Khota Project in Bolivia, an activity in which South American Silver directly participated through acquisition of shares, expecting that returns from the project would necessarily flow to South American Silver.

76. Since the underlying treaties in the *Caratube* and *Standard Chartered* cases are materially different from the Treaty, the decisions of those two tribunals are not relevant in the present case.

77. Given that the Treaty does not support its position, Bolivia resorts to the *Salini* test, claiming, without providing any persuasive evidence whatsoever, that its requirements "are a recognized and authoritative explanation of the concept of investment under international investment law."[228] Respondent is wrong. The *Salini* test, as Bolivia itself concedes,[229] was in

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[225] Standard Charter ¶ 198.

[226] *See* Claimant's Statement of Claim at ¶ 33 (Fig. 1).

[227] **Exhibit C-11**, Incorporation of Compania Malku Khota (CMMK), Public Deed No. 204/2003 and Public Deed No. 288/2003.

[228] Respondent's Rejoinder at ¶ 266.

[229] Respondent's Rejoinder at ¶ 266.

fact only developed to determine whether a given economic operation constitutes an investment within the meaning of Article 25(1) of the ICSID Convention, since neither the convention nor its *travaux préparatoires* define what an investment is.[230] The test is not even that authoritative in the ICSID arbitration framework, since ICSID tribunals themselves do not always adopt it.[231] Moreover, it is not true that "the doctrine … has endorsed the objective nature of the investment taking into account [the *Salini* test]."[232] For example, Professor Douglas, on whom Bolivia purports to rely,[233] has criticized the *Salini* test, noting that it contains "unworkable" criteria that generate "too much subjectivity," making it "unfit for the purpose" of defining an investment.[234]

78. In any event, it should come as no surprise that the awards that Bolivia relies on to allege that "other investment tribunals under other treaties and rules have considered [the *Salini* test] relevant and applicable when assessing the definition of investment" were all issued in the context of ICSID cases (save two, discussed below).[235] Therefore, the fact that the ICSID tribunal in *Quiborax v. Bolivia* allegedly decided, according to Respondent,[236] that the investment at issue had to both satisfy the *Salini* criteria and comply with the provisions of the underlying bilateral investment treaty, is of no particular assistance to Bolivia in its attempt to impose the *Salini* test on this non-ICSID Tribunal.

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230 *See* **CLA-180**, Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, 2nd ed. (Oxford University Press, 2012) 65-66; **CLA-181**, *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, Nov. 30, 2011 at ¶ 7.4.8.

231 *See, e.g.*, **CLA-182**, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, Nov. 8, 2010 at ¶ 311; **CLA-183**, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, Feb. 12, 2010 at ¶¶ 97, 108; **CLA-184**, *Philip Morris Brands S.à.r.l. et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, Jul. 2, 2013 at ¶¶ 204-206; **CLA-185**, *Inmaris v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, Mar. 8, 2010 at ¶ 129.

232 Respondent's Rejoinder at ¶ 266.

233 Respondent's Rejoinder at ¶ 266.

234 **RLA-53**, Zachary Douglas, The International Law of Investment Claims (Cambridge University Press, 2009) at pp. 191 (¶ 402), 198 (¶ 407), 202 (¶ 408).

235 Respondent's Rejoinder at ¶ 266, n. 435.

236 Respondent's Rejoinder at ¶ 267. The *Quiborax* tribunal actually rejected the requirement that an investment had to contribute to the development of the host State (*see* **RLA-56**, *Quiborax S.A. et al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, Sept. 27, 2012 at ¶¶ 219-220, 235).

79. The truth is that in non-ICSID arbitrations, such as the present case, the *Salini* test is simply not applicable.[237] Professor Schreuer agrees with this position,[238] despite Bolivia's contrary assertion.[239] Furthermore, of the two non-ICSID cases that Respondent cites as having relied upon the *Salini* test,[240] one in fact never even mentioned it (*Chevron*), whereas the second was criticized for doing so (*Romak*).[241]

80. In sum, there is no reason for the Tribunal to apply the *Salini* test in this case. Given that the Treaty sets forth a definition of "investment" at Article 1(a), the Tribunal need only ensure, in order to ascertain its jurisdiction over South American Silver's claims, that the investments it owns satisfy that definition. That is the case here, since Claimant owns qualifying investments in Bolivia in the form of its 100 percent shareholding in CMMK and the ten Mining Concessions. The Tribunal should accordingly disregard Bolivia's attempt to rely on a jurisdictional requirement that the Treaty does not contain.

2. Bolivia's request that the Tribunal pierce the corporate veil is unavailing

81. Bolivia alleges that the dispute in this case is not between Claimant, South American Silver, and Bolivia, but between the ultimate owner of South American Silver, TriMetals Mining Inc. (formerly South American Silver Corp.) and Bolivia.[242] Since the Tribunal does not have jurisdiction over TriMetals Mining Inc., which is a Canadian company,

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237 *See, e.g.*, **CLA-1**, *Guaracachi America, Inc. et al. v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, Jan. 31, 2014 at ¶ 364; **CLA-181**, *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, Nov. 30, 2011 at ¶ 7.4.9; **CLA-186**, *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, Sept. 8, 2006 at ¶¶ 117-118.

238 **CLA-180**, Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, 2nd ed. (Oxford University Press, 2012) 65 ("The current wide-ranging debate on 'investment' does not arise out of the definitions in investment treaties, but out of the search for the proper understanding of the non-defined term found in the ICSID Convention").

239 Respondent's Rejoinder at ¶ 266, n. 435. The passage quoted by Bolivia from Professor Schreuer's commentary to the ICSID Convention is not at all an endorsement of "the objective nature of the investment."

240 Respondent's Rejoinder at ¶ 266, n. 434.

241 Commenting on the *Romak* tribunal's use of the *Salini* test, the *Rurelec* tribunal noted that its application had been "exceptional" and "fact-specific" (*see* **CLA-1**, *Guaracachi America, Inc. et al. v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, UNCITRAL, Award, Jan. 31, 2014 at ¶ 364).

242 Respondent's Rejoinder at ¶¶ 278, 281, 284, 292.

Bolivia claims that it should decline its jurisdiction over this dispute.[243] Although Bolivia denies doing so,[244] it is in effect asking this Tribunal to read into the Treaty an additional jurisdictional requirement by piercing the corporate veil and denying jurisdiction over South American Silver's claims in this arbitration simply because it is owned by a Canadian company. This is utter nonsense.

82. Neither Article 8(1) nor the Treaty's preamble requires this Tribunal to consider the nationality of South American Silver's ultimate owner to decide on its jurisdiction, contrary to Bolivia's allegations.[245] Moreover, tribunals unanimously have held that when considering the nationality of the claimant for purposes of jurisdiction, the corporate veil should not be pierced except in exceptional circumstances such as fraud.[246] No such circumstances exist (or have been alleged) in this case. Moreover, the three awards relied upon by Bolivia in support of its request that the Tribunal pierce the corporate veil are irrelevant because they are based on a set of legal elements that are absent from this arbitration.[247]

83. In *TSA Spectrum v. Argentina* and *Venoklim Holding v. Venezuela*, the tribunals' decision to pierce the corporate veil was warranted by the express terms of the underlying treaty. The claimant in *TSA Spectrum* was an Argentinian company that attempted to gain ICSID jurisdiction by arguing that it was controlled by a Dutch company.[248] The tribunal held that when a claimant attempts to gain ICSID jurisdiction based on the second limb of Article 25(2)(b)

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243 Respondent's Rejoinder at ¶¶ 276, 278.

244 Respondent's Rejoinder at ¶ 281.

245 Respondent's Rejoinder at ¶¶ 279, 282-283.

246 *See, e.g.*, **CLA-187**, *Longreef A.V.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/5, Decision on Jurisdiction, Feb. 12, 2014 at ¶¶ 199, 202-206, 229; **CLA-188**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, Oct. 17, 2013 at ¶¶ 110-116, 139; **CLA-189**, *Swisslion DOO Skopje v. FYR Macedonia*, ICSID Case No. ARB/09/16, Award, Jul. 6, 2012 at ¶¶ 127, 132; **CLA-68**, *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, Jul. 29, 2008 at ¶¶ 324, 326, 328, 331; **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 ¶¶ 78-83, 93, 110; **CLA-149**, *ADC Affiliate Limited et al. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, Oct. 2, 2006 at ¶ 334-335, 354, 357-358, 364; **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 ¶¶ 207, 245, 323; **CLA-115**, *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, Apr. 29, 2004 at ¶¶ 21, 24-26, 28, 38, 71.

247 Respondent's Rejoinder at ¶¶ 285 *et seq.*

248 **RLA-226**, *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, Dec. 19, 2008 at ¶¶ 1, 21.

of the ICSID Convention (the so-called "foreign control" provision), it is appropriate to lift the corporate veil in order to objectively prove "the existence and materiality of this foreign control."[249] The tribunal then held that it lacked jurisdiction to examine the claimant's claims because its ultimate owner was an Argentine citizen.[250] In other words, the tribunal's decision to pierce the corporate veil was based on the specific language of the second part of Article 25(2)(b) (and not on Article 25(1), as Bolivia alleges).[251] Since the ICSID Convention is not material to this arbitration, the tribunal's ruling in *TSA Spectrum* is not applicable.

84. The claimant in *Venoklim Holding* was a Dutch company that initiated the arbitration pursuant to the Venezuelan Law on the Promotion and Protection of Investments.[252] The tribunal then proceeded to pierce the corporate veil because the term "investor" under that law required effective control over the investment.[253] It concluded that the claimant was not an "investor" because it did not effectively control the investment.[254] Thus, the tribunal's decision in *Venoklim Holding* to pierce the corporate veil is irrelevant to this case because it was based on the Venezuelan's law's definition of "investor," which is not at issue here.

85. The tribunal in the *Loewen* case decided to pierce the corporate veil on the basis of the continuous nationality rule because, as Bolivia notes, TLGI, one of the two claimants, had changed nationality during the arbitration.[255] The tribunal's decision to decline jurisdiction over TLGI is not relevant for purposes of this case, however, because the continuous nationality rule

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249 **RLA-226**, *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, Dec. 19, 2008 at ¶ 147.

250 *Id*., at ¶ 162.

251 Respondent's Rejoinder at ¶ 288.

252 **RLA-224**, *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award, Apr. 3, 2015 at ¶ 7-8, 44.

253 *Id*., at ¶ 141.

254 **RLA-224**, *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Award, Apr. 3, 2015 at ¶ 148.

255 Respondent's Rejoinder at ¶ 286; **RLA-223**, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, Jun. 26, 2003 at ¶ 225 ("In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*").

has not been invoked. Moreover, the *Loewen* tribunal's decision to deny jurisdiction was criticized by leading commentators.[256]

86. In conclusion, the Tribunal should reject Bolivia's unfounded request that it pierce the corporate veil, as neither the Treaty nor investment treaty jurisprudence justifies it. The Tribunal should declare instead that it has jurisdiction pursuant to the Treaty over South American Silver's claims in this arbitration.

IV. BOLIVIA'S CLAIMS OF UNCLEAN HANDS AND ILLEGALITY ARE LEGALLY FLAWED AND FACTUALLY INCORRECT

87. Bolivia continues to plead for the application of the "clean hands" and "Legality" doctrines as a complete defense that would absolve it entirely of its blatant, unapologetic, and uncompensated expropriation of Claimant's investment. It asserts a flurry of alleged wrongdoings South American Silver has supposedly inflicted upon the people inhabiting the Malku Khota Project area in support of its plea. But these allegations of wrongdoing are simply not true, and in any event, cannot deprive this Tribunal of its jurisdiction to hear South American Silver's claims. Bolivia's claims should by all means be considered by the Tribunal, but that analysis must be done at the merits phase, together with South American Silver's claims – it cannot be allowed to avoid a reckoning on the merits.

88. As already explained in South American Silver's Reply Memorial,[257] and as further detailed below, Bolivia's invocation of unclean hands and illegality cannot defeat this Tribunal's jurisdiction because:

(A) the clean hands doctrine—that is, a rule rendering *inadmissible* the Claimant's *entire case* because of wrongs committed by it—is not recognized in international law;

(B) the "Legality Doctrine"[258] cannot apply to purported wrongdoing done years after the investment was made, and in any case are unrelated to the investment itself; and

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[256] *See, e.g.*, **CLA-190**, Maurice Mendelson, "Runaway Train: The 'Continuous Nationality' Rule from the *Panavezys-Saldutiskis Railway* case to *Loewen*," in Todd Weiler (ed.), International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law (Cameron May, 2005) at 51 ("Be that as it may, the decision upholding this objection to jurisdiction was dispositive of the case, and it was therefore inconsistent with the principle of judicial economy for the Tribunal to have gone on to consider other objections based on the continuous nationality rule. And having entered into this domain, it has to be said, with respect, that the panel did not make a particularly impressive job of it. No authority was cited, and unsupported assertions were made").

[257] Claimant's Reply at ¶¶ 196 *et seq*.

(C) Bolivia's factual allegations are simply untrue.

No compelling reason exists, therefore, to deny altogether Claimant's right to invoke the BIT, and the Tribunal's jurisdiction is well established.

A. INTERNATIONAL LAW DOES NOT RECOGNIZE THE CLEAN HANDS DOCTRINE, AND BOLIVIA'S EFFORT TO SHOW OTHERWISE IS INEFFECTIVE

89. The clean hands doctrine is not recognized in international law, and Bolivia's attempt to establish such a doctrine cannot succeed. For all its stringent rhetoric, Bolivia's latest submission has simply been unable to show that the clean hands doctrine itself has been accepted and applied by the International Court of Justice ("ICJ") in a single case; nor has it found favor in international arbitration. Equally important, even assuming that aspects of the doctrine had some life in international law, Bolivia failed utterly to specify the precise content of this doctrine, let alone articulate a set of criteria to be met for the doctrine to apply. Bolivia attempts to conceal this crucial shortcoming, by effectively proposing a new definition of the clean hands doctrine that eviscerates the requirement that the illegality complained of by the respondent be directly linked to the claimant's cause of action.[259]

90. Further, Bolivia's assertion that the doctrine of clean hands is a "general principle of law that should be appli[ed] in all cases" rests on scholarly commentary advocating for it to be so *de lege ferenda*— not on actual international case law recognizing the doctrine.[260] Indeed, the very articles cited by Bolivia openly acknowledge that the doctrine has yet to acquire international consensus and acceptance:

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[258] Namely, the requirement that investors comply with the law of the host State when making an investment. Claimant's Reply Memorial at ¶¶ 219 *et seq.*

[259] Respondent's Rejoinder at ¶ 302 (stating that the clean hands doctrine "operates as an impediment to the admissibility of the claims in cases where the claimant has acted inappropriately in relation to the subject matter of its claims" without citing a single source in support of this definition).

[260] *See* e.g., Respondent's Rejoinder at ¶¶ 301-302 (citing **RLA-66**, R. Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine", in Between East and West: Essays in Honour of Ulf Frank, K. Hobér and others (eds.), Juris Publishing, 2010; **RLA-88**, P. Dumberry, G. Dumas-Aubin, "The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law", 10 Transnational Dispute Management, issue 1, 2013).

- "The application of the 'clean hands' doctrine in international law is still controversial;"[261]
- "International tribunals have so far been reluctant to recognize its existence;"[262]
- The clean hands doctrine's "inconsistency has indeed been underlined in the recent PCA arbitration between Guyana and Suriname;"[263]
- The clean hands doctrine "has been rarely applied;"[264]
- The clean hands doctrine "is still considered as a controversial principle;"[265]
- The "ICJ has not explicitly upheld the Unclean Hands Doctrine by any majority opinion;"[266]

Perhaps understanding that the clean hands doctrine has no foundation in international law, Bolivia then seeks in its *Rejoinder* to equate clean hands with the general principle of good faith. The same can be said of the Latin maxims such as *ex turpi causa non oritur action* outlined by Bolivia in its Rejoinder.[267] Broad and unspecified reference to various legal maxims to see what might stick is necessary for Bolivia precisely because "[t]he question whether the principle [of clean hands] forms part of international law remains controversial and its precise content is ill defined."[268]

91. But, at the risk of stating the obvious, good faith is hardly the same as clean hands. Although international law —indeed all law— valorizes the principle of good faith, good faith is not a principle that regulates the *jurisdiction* of an investment arbitration tribunal or to the

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[261] **RLA-88**, P. Dumberry, G. Dumas-Aubin, "The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law", 10 Transnational Dispute Management, issue 1, 2013), at 1.

[262] *Id*.

[263] *Id*.

[264] *Id*. at 2.

[265] *Id*. at 10.

[266] **RLA-66**, R. Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine", in Between East and West: Essays in Honour of Ulf Frank, K. Hobér and others (eds.), Juris Publishing, 2010 at 318.

[267] Respondent's Rejoinder at ¶ 302-06.

[268] **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.

admissibility of a Claimant's claims, as the clean hands principle purports to do—the principle says nothing about *how*, by *what rules*, and *under what conditions* a purported lack of good faith actually would operate as a jurisdictional rule.[269] Thus, Bolivia's attempt to prop up the clean hands doctrine under the aegis of good faith cannot succeed.

92. The essential question remains: is the doctrine of clean hands recognized and opposable principle of international law? The answer is no.[270] Bolivia's next attempt at establishing the principle's international status is to reference, in a piecemeal and contextualized fashion, German, French, British and U.S. law.[271] This is not a serious effort to establish that "recognition and consensus exists between States"[272] as to the doctrine's existence in a manner that would allow it to be considered a rule of customary international law or a general principle of law within the meaning of Article 38(1)(b) and (c) of the ICJ Statute. South American Silver does not dispute that iterations of the clean hands doctrine exists in certain national jurisdictions. But these rules, grounded as they are in equity, are not automatic, binary rules requiring courts to declare inadmissibility without ascertaining relative fault and proportionality.[273]

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[269] The ad hoc committee in *Klöckner v. Cameroon* illustrated the limits—or vagueness—of relying solely on the existence of the principle of good faith to evaluate the conduct of a party while discussing the duty of loyalty between contractual parties: "[i]t is true that the principle of good faith is 'at the basis' of French civil law, as of other legal systems, but this elementary proposition does not by itself answer the question. In Cameroonian or Franco-Cameroonian law does the 'principle' affirmed or postulated by the Award, the 'duty of full disclosure', exist? If it does, no doubt flowing from the general principle of good faith, from the obligation of frankness and loyalty, then how, by what rules and under what conditions is it implemented and within what limits?." **CLA-191**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), Decision of the ad hoc Committee, 3 May 1985. Should Bolivia insist that this Tribunal utilize good faith as a basis for regulating its jurisdiction, it would have to identify the source in international law for doing so, the rules and the conditions for the implementation of this principle as well as its limits. South American Silver submits that the Tribunal would not find support in international law for this task, including from reference to a non-opposable unclean hands doctrine.

[270] **RLA-88**, P. Dumberry, G. Dumas-Aubin, "The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law", 10 Transnational Dispute Management, issue 1, 2013), at 1, 10.

[271] Respondent's Rejoinder at ¶ 303-306.

[272] Respondent's Rejoinder at ¶ 321.

[273] *See* **CLA-193**, Ori Herstein, A Normative Theory of the Clean Hands Defense, Legal Theory, Vol. 17 (2011), p. 3 (explaining that "[a]ny willfull conduct that is iniquitous, unfair, dishonest, fraudulent, unconscionable, or performed in bad faith may constitute 'unclean hands'." The wrongful conduct "must somehow connect or relate to the conduct, interaction, or transaction underlying the plaintiff's cause of action … where a plaintiff's wrongdoing is collateral to the subject matter of her suit, her wrongful conduct is not sufficiently connected or related to the litigation so as to give rise to a defense of unclean hands." But, "even when all the elements of the [clean hands doctrine]—plaintiff wrongdoing that is connected to the underlying transaction—are satisfied,

93. Additionally, Bolivia's lengthy criticism of the *Yukos* Final Award fails. Bolivia already admits that there is no "recognition and consensus … between the courts and international tribunals" as to the applicability of the clean hands doctrine in international law.[274] Yet, somehow, Bolivia is able to find fault when the same basic assessment is made by the *Yukos* tribunal. Specifically, Bolivia contends that the *Yukos* tribunal "recognized that the 'principles associated with the clean hands doctrine have been endorsed by the PCIJ and the ICJ."[275] Because of this, Bolivia argues, the "application of 'clean hands'" is supported "as part of international law."[276] But this confuses the essential point made by the *Yukos* tribunal, which is that the clean hands doctrine "does not exist as a general principle of international law which would bar a claim by an investor."[277] However, Bolivia tries to re-state the doctrine or rely on cognate principles, the *Yukos* tribunal clearly considered *and rejected* the proposition that a general principle of international law exists that would bar claims made by an investor based on illegalities directly linked to the claimant's own cause of action (this is after all the essence of co-called "unclean hands").

94. Moreover, faulting the *Yukos* tribunal for excessive reliance on cases and not referring to State practice when making its analysis is also disingenuous.[278] In its attempt to establish the clean hands doctrine, Bolivia itself fails to make a comprehensive review of the status of the doctrine amongst States that it would have had the *Yukos* tribunal do. More importantly, Bolivia itself relies on case law throughout its memorial—including *Yukos*—in order to further its international law arguments.[279]

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courts maintain discretion as to whether to apply the defense where the injustice to the plaintiff significantly outweighs the severity of her own wrongdoing or where there are overriding public-policy reasons.")

274 Respondent's Rejoinder at ¶ 321.

275 Respondent's Rejoinder at ¶ 320, *citing,* **CLA-121**, *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA case No. AA 226, Final Award, July 18, 2014, ¶ 1360 (citing the maxims *exceptio non adimpleti contractus* and *ex iniuria ius non oritur*).

276 Respondent's Rejoinder at ¶ 320.

277 *See, e.g.*, **CLA-121**, *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA case No. AA 226, Final Award, July 18, 2014, ¶ 1363.

278 Respondent's Rejoinder at ¶¶ 321, 331.

279 *See, gen.*, Respondent's Rejoinder.

95. Bolivia then conflates concepts again by purporting to equate the clean hands doctrine with the Legality Doctrine.[280] Bolivia cites to the *Fraport* decision to assert that "an illegal investment cannot be protected by an investment treaty."[281] But the *Fraport* decision did not apply the clean hands doctrine, instead, it relied on the terms of the investment treaty and determined that an in order to fall within the scope of the BIT, an investment needed to be "lawful under (i.e. 'in accordance with') the host State's laws and regulation *at the time the investments were made*."[282] Thus, *the timing of the breach* of host State's law is one of the salient features required for the application of the Legality Doctrine—absent specific language in the applicable treaty, the determinative time will be the moment when the investment was first made.[283] This contrasts with the clean hands doctrine, which does not have the same timing requirement. Thus, the *Fraport* case is inapposite to the discussion regarding the applicability of the clean hands doctrine in international law.[284]

96. The clean hands doctrine is not part of international public policy. Simply citing the definition of international public policy, as Bolivia does,[285] does not prove that clean hands forms part of international public policy. Issues that fall under the purview of international (or, more accurately, 'truly international' or 'transnational') public policy are "norms of conduct"[286] so universally abhorrent as to violate fundamental rules of natural law and *jus cogens* violations in public international law, such as prohibitions against corruption, the use of force, and slavery.[287] Clean hands is a legal principle and a (purported) rule of admissibility, and cannot

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280 Respondent's Rejoinder at ¶ 309.

281 Respondent's Rejoinder at ¶ 309.

282 **RLA-71**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philipines [II]*, ICSID case No. ARB/11/12, award dated December 10, 2014, ¶ 331 (emphasis on the original).

283 *See, e.g., Id.;* **RLA-65**, *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award, Aug. 2, 2006 at ¶ 242

284 In any event, the wrongful conduct Bolivia accuses the Company of could not have occurred during the making of the investment as further explained below. The *Fraport* case indeed supports South American Silver's position regarding the bounds of the Legality doctrine.

285 Respondent's Rejoinder at ¶ 310.

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

287 *See* **CLA-194**, Nigel Blackaby, Constantine Partasides, *et al*., Redfern and Hunter on International Arbitration ¶ 10.87 (6th ed. 2015) (quoting the International Law Association's *Interim Report on Public Policy as a Bar to enforcement of International Arbitral Awards*, which identified a category of "truly international" or "transnational" public policy "comprising fundamental rules of natural law, principles of universal justice, *jus*

possibly be considered part of this very narrow category of norms. Bolivia's claim that the doctrine of clean hands is part of international public policy should thus be summarily disregarded.

97. Assuming, for the sake of argument, that the doctrine of clean hands could in principle form part of "international public policy," Bolivia has still not shown why the doctrine so qualifies. Bolivia relies on two cases to support its argument: 1) *World Duty Free v. Kenya*[288] and 2) Professor Cremades' dissenting opinion in *Fraport v. The Philippines*.[289] However, the *World Duty Free* tribunal endorsed the view that "[t]ribunals must be very cautious in this respect and must carefully check the objective existence of a particular transnational public policy rule in *identifying it through international conventions, comparative law and arbitral awards*."[290] The tribunal then carried out a careful review of many sources and found that: (i) Corruption—a type of conduct—was criminalized "in most, if not all, countries," including respondent's state (in that case Kenya);[291] (ii) A "number of international conventions" had been executed "to render more effective this general condemnation" of corruption;[292] (iii) The General Assembly of the United Nations adopted a declaration condemning corruption; (iv) A working group of the United Nations drafted a convention later "signed by 140 States" and at that time "ratified by 46 States (including Kenya);"[293] (v) Domestic and international arbitration tribunals sanctioned actions of corruption.[294] Only after this extensive analysis the *World Duty Free* tribunal was "convinced that bribery is contrary to the international public policy of most, if not

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cogens in public international law, and the general principles of morality accepted by what are referred to as 'civilized nations'). *See further* **CLA-195**, P. Lalive, *Transnation (or Truly International) Public Policy and International Arbitration,* 3 ICCA CONGRESS SERIES 258-318 (1987).

288 Respondent's Rejoinder at ¶ 310.

289 Respondent's Rejoinder at ¶ 310.

290 **RLA-68**, *World Duty Free Company Limited v. Republic of Kenya*, ICSID case No. ARB/00/7, award dated October 4, 2006, ¶ 141 (citing Emmanuel Gaillard – Trente ans de Lex Mercatoria – Pour une application sélective de la méthode des principes généraux de droit –Journal du droit international 1995 p. 5) (emphasis added).

291 *Id*. at ¶ 142.

292 *Id.* at ¶¶ 143-144.

293 **RLA-68**, *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award Oct. 4, 2006 at ¶¶ 145-146.

294 *Id.* at ¶¶ 147-149.

all, States."[295] Here, Bolivia does not and cannot point to a "universal" definition or "standard" of the clean hands doctrine; nor to international agreements or conventions between states agreeing to the clean hands doctrine; nor to any United Nations declarations on the scope, content, or implementation of the clean hands doctrine. The *World Duty Free* Tribunal's decision to apply the principle of *ex turpi causa non oritur action* was not based on international public policy as asserted by Bolivia.[296] Nor was it based on international law, which did not form part of the applicable law in that contract (not treaty)-based arbitration. Rather, the Tribunal based its decision on the applicable English and Kenyan law (per the arbitration agreement).[297] Obviously, neither English or Kenyan law form part of this arbitration's applicable law.

98. As to Bolivia's assertion that "international public policy can prevent improper claims" citing to the dissenting opinion in *Fraport,*[298] it should suffice to cite Professor Cremades' cautionary words regarding "the practice of the casual use of citations from other awards without regard to their original contexts."[299] Professor Cremades took particular issue with the citation of "Awards … as if they were authorities or precedents on, for example, the significance of illegal conduct by the investor that bear no similarity to the case at issue."[300] Which is exactly what Bolivia does in its Rejoinder: Bolivia relied upon Professor Cremades' *Fraport* dissent, which in turn made reference to the holding in *World Duty Free v. Kenya*[301]—a case with a completely different fact pattern that involved bribery, which does (unlike unclean hands) form part of transnational public policy. *Fraport* itself involved the investor entering into

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295 *Id.* at ¶¶ 157.

296 Respondent's Rejoinder at ¶ 311.

297 **RLA-68**, *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award Oct. 4, 2006 at ¶ 179 (holding, *inter alia*, that "as regards public policy both under English law and Kenyan law (being materially identical) and on the specific facts of this case, the Tribunal concludes that the Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of *ex turpi causa non oritur action*").

298 Respondent's Rejoinder at ¶ 310.

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

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

301 Respondent's Rejoinder at ¶ 310 (stating that "[i]nternational public policy can prevent improper claims," *citing,* **RLA-237**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philipines*, ICSID case No.ARB/03/25, Dissenting opinion of Bernardo M. Cremades dated July 19, 2007, ¶ 40).

secret shareholder agreements in violation of applicable Philippine law (the "Anti-Dummy Law") concerning the manner by which foreign investors can do business in regulated sectors of the host State's economy. Virtually nothing about those cases are similar to Bolivia's allegations here. Also, the *Fraport* decision dealt with illegality at the time of the making of the investment, expressly rejecting the argument that a legality requirement applied beyond that date.[302] Neither *Fraport* or *World Duty Free* can support a finding that the clean hands doctrine is part of international public policy as Bolivia advocates.

99. Curiously, Bolivia's *Rejoinder* then revisits the ICJ's case law on unclean hands at length as if that body of jurisprudence is beneficial to it. No amount of obfuscation, however, can mask the fact that the "ICJ has not explicitly upheld the Unclean Hands Doctrine by any majority opinion."[303] Moreover, Bolivia's discussion of cases decided by the International Court of Justice is inherently contradictory. On the one hand, Bolivia wants this Tribunal to dismiss the *La Grand* and *Avena* cases as "irrelevant" because "none of these cases dealt with the principle of 'clean hands'" and because "the principle is not even mentioned in any of these cases."[304] But on the other, Bolivia wants this Tribunal to find that the "clean hands doctrine is recognized in international law" by invoking legal maxims and cases where the clean hands doctrine "is not even mentioned."[305] In any event, while not mentioning the clean hands doctrine by name, there can be no doubt that the United States sought dismissal of the cases based on that doctrine. There can also be no doubt that the ICJ declined to reach a decision on those grounds.[306] Both the *La Grand* and *Avena* cases have in fact been analyzed by distinguished international law professors and scholars in the course ofanalyzing the clean hands doctrine and

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302 **RLA-237**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philipines*, ICSID case No.ARB/03/25, dated July 19, 2007, ¶ 345.

303 *See* **RLA-66**, R. Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine", in Between East and West: Essays in Honour of Ulf Frank, K. Hobér and others (eds.), Juris Publishing, 2010, p. 318.

304 Respondent's Rejoinder at ¶ 315.

305 *See e.g.* Respondent's Rejoinder at ¶¶ 302, 304, 306; 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."

306 **RLA-66**, R. Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine", in Between East and West: Essays in Honour of Ulf Frank, K. Hobér and others (eds.), Juris Publishing, 2010 at 318.

its applicability in international law.[307] Bolivia is also in error when it asserts that the *Oil Platforms* and *Legality of Use of Force* cases do not support South American Silver's position that the ICJ has consistently declined to apply the clean hands doctrine. The language used by the Court in the *Oil Platforms* case speaks for itself: "the Court does not need to deal with the request of the United States to dismiss Iran's claim and refuse the relief that it seeks on the basis of the conduct attributed to Iran,"[308] i.e. on the basis of the application of the clean hands doctrine. The fact that the party calling for the application of the clean hands doctrine eventually prevailed on the merits, bears no relevance whatsoever to the question of whether the doctrine of clean hands exists as a matter of international law, especially given the Court's explicit statement declining to rule on the basis of that doctrine.

100. Bolivia then surreptitiously refers to *a contract-based investment arbitration case* to reinforce its position that individual "opinions already quoted by Bolivia of judges of the ICJ that have invoked and relied on the principle of 'clean hands' confirm that the ICJ maintains a favorable attitude towards this manifestation of the principle of good faith."[309] Specifically, Bolivia states that "at least one of the cases cited by SAS [*Niko Resources v. Bangladesh*] admits that the 'clean hands' doctrine is a general principle recognized by civilized nations."[310] There are at least three issues with Bolivia's assertion: (i) Bolivia overstates its position considerably, as the paragraphs it cites actually say that "*others are of the view* that" the clean hands doctrine "must be qualified as a general principle of law."[311] Notably, "others" does not refer to majority

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307 *See .e.g.*, **CLA-119,** John Dugard, Sixth Report on Diplomatic Protection (57th Session of the UN International Law Commission, 2005), A/CN.4/546, ¶¶ 5(c), 5(d), 9.

308 **CLA-116**, *Oil Platforms (Islamic Republic of Iran v United States of America)*, I.C.J., Reports 2003, ¶ 29, Separate Opinion of Judge Higgins, Nov. 6, 2003. In that case, the United States argued that "Iran's conduct is such that it 'precludes it from any right to the relief it seeks from this Court', or that it 'should not be permitted to recover on its claim'.' And, like Bolivia here, "invite[d] the Court to make a finding 'that the [Respondent] measures … were the consequence of [the Claimant's] own unlawful uses of force' and submit[ted] that the 'appropriate legal consequences should be attached to that finding'." *Id.* at ¶ 29. Similarly, the Court in the *Legality of Use of Force* cases, "did not find it necessary to address the argument about Yugoslavia's lack of clean hands." **RLA-89**, Stephen Schwebel, Clean Hands in the Court, 31 STUD. TRANSNAT'L LEGAL POL'Y, 74 (1999).

309 Respondent's Rejoinder at ¶ 316 (citing **CLA-124**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh and other*, ICSID case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, August 19, 2013).

310 Respondent's Rejoinder at ¶ 316 (citing **CLA-124**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh and other*, ICSID case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, August 19, 2013).

311 **CLA-124**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh and other*, ICSID case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, August 19, 2013 at ¶ 478.

opinions by international tribunals, rather, it refers to two commentaries and two individual judicial opinions, all of which have already been cited by Bolivia (and, for that matter, were also raised by the respondent State, was considered, and was rejected as basis for establishing the doctrine as international law in *Yukos*).[312] (ii) What the tribunal in *Niko Resources v. Bangladesh* actually decided on the clean hands doctrine is emphatically not what Bolivia would have this Tribunal believe. Instead of "admitting" that the clean hands doctrine is a general principle of law, the Tribunal unequivocally stated that the "question whether the principle forms part of international law remains controversial."[313] (iii)The *Niko Resources* tribunal only explored the clean hands doctrine and the criteria necessary for its application in international law on an "assuming arguendo" basis—it ultimately rejected the doctrine's application to that case.[314]

101. Lastly, Bolivia's summary dismissal of the reports issued by Special Rapporteurs Dugard and Crawford's is—to use Bolivia's own words—"based on an incorrect and narrow understanding" of international law. Incredibly, Bolivia would have this Tribunal dismiss the considered views of leading publicists in international law on whether the clean hands doctrine exists as a principle of international law by pointing to entirely irrelevant "facts." The International Law Commission is tasked with "the progressive development of international law and its codification."[315] The Commission's work allocation is divided in particular topics of

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[312] **CLA-124**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh and other*, ICSID case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, August 19, 2013 at ¶ 478 (citing **RLA-88**, P. Dumberry, G. Dumas-Aubin, "The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law", 10 Transnational Dispute Management, issue 1, 2013; **RLA-66**, R. Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine", Essays in honour of Ulf Franke, 2010, p. 317, and to the opinions of Judges Schwebel and Anzilotti in cases of the ICJ and the PCIJ, respectively).

[313] **CLA-124**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh and other*, ICSID case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, August 19, 2013 at ¶ 477.

[314] **CLA-124**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh and other*, ICSID case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, August 19, 2013 at ¶¶ 483-485.

[315] **CLA-196**, Article 13 (1) (a) of the Charter of the United Nations. According to Article 15 of the Statute of the International Law Commission, progressive development refers to "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States." Codification is defined as "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine." **CLA-197**, Article 15 of the Statute of the International Law Commission.

international law.[316] For example, state responsibility, provisional application of treaties, crimes against humanity, etc. This allocation of work, however, does not reduce the importance of their studies on the scope and content of general international law and their determination on whether specific concepts warrant recognition and codification within international law.

102. There can be no doubt that Special Rapporteur Dugard's report examined the roots and application of the clean hands doctrine in international law to analyze whether there was international consensus as to its applicability within diplomatic protection. He concluded that there was "uncertainty *relating to the very existence* of the doctrine" in addition to "uncertainty relating to …. its applicability to diplomatic protection."[317] Similarly, Special Rapporteur Crawford analyzed the application of the clean hands doctrine within international law and found that "'[I]t is not possible to consider the 'clean hands' *theory as an institution of general customary law'*."[318] Professor's Crawford's conclusions are no less true or relevant simply because the particular chapter under which the analysis is included does not deal with "procedural questions." Surely Bolivia is not about to admit that the clean hands doctrine is a mere procedural issue.

103. Amidst this scrutiny of crucial aspect to Bolivia's jurisdictional case, one important point bears reiterating: it is Bolivia who carries the burden of proving the existence and applicability of the clean hands doctrine as an affirmative defense. Nothing proffered by Bolivia in two rounds of pleading have brought it any closer to demonstrating that international law recognizes the clean hands doctrine. Indeed, Claimant submits that it has clearly shown otherwise, through a comprehensive survey of leading authorities and case law, as opposed to the episodic, highly selective, and de-contextualized submissions made by Bolivia.[319] At most,

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316 *See* description of the Commission's Work available at http://legal.un.org/ilc/work.shtml.

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

318 **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 (citing Rousseau, Charles, Droit international public, Vol. I, p. 177, para. 170).

319 A further example of this is found in Bolivia's reliance on the *Al-Warraq v. Indonesia* arbitration. The entirety of the *Al-Warraq* case's findings on the clean hands doctrine is as follows (at para. 646):

> "In this regard, the Tribunal is of the view that the doctrine of 'clean hands' renders the Claimant's claim inadmissible. As Professor James Crawford observes, the *'clean hands'* principle has been invoked in the

"there is a significant amount of controversy as to the existence of an 'unclean hands' principle in international law."[320] Therefore, this Tribunal, should "not [be] 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.'"[321]

> context of the admissibility of claims before international courts and tribunals. Also the Tribunal refers to the decision of *Lord Mansfield in Holman v Johnson* (1775) which states: 'No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from /he plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted.'"

To add to Claimant's prior analysis of this case (*See* Claimant's Reply Memorial at ¶¶ 207-210), it should be added that unfortunately, Professor Crawford's real views are not captured accurately by the tribunal. Professor Crawford may have observed that the clean hands doctrine has been *invoked* by respondents before international courts and tribunals, but he clearly did not opine that the clean hands doctrine was a principle of international law—indeed, as discussed *supra*, his real view is exactly the opposite (Claimant's Rejoinder on Jurisdiction at ¶ 100). *Al Warraq's* second authority—Lord Mansfield in *Holman v Johnson*— was invoked as well in *World Duty Free*, for good reason— that case applied English law. There is simply no reason—and none was made in *Al Warraq*—why that ruling from 1775 should be the basis of an opposable rule of international law.

Claimant thus continues to submit that this single paragraph, which relies on two authorities inappropriately for the reasons stated above, cannot operate to suddenly create, out of whole cloth, a new principle of clean hands under international law. Much more is required for rule of international law—within the meaning of Article 38(1)(b) or (c) of the ICJ Statute—to be established.

It must also be emphasized that the arbitrators were not unanimous about the clean hands doctrine's application as a rule of admissibility—tellingly, the award states: *"[t]he minority [of the tribunal] does not agree that the doctrine of 'clean hands' applies to render the Claimant's claims inadmissible by virtue of his illegality unless that illegality relates to the acquisition of his investment, which is not the present case."* (*Dispositif*, para. 683, n. 217) This is an important caveat to *Al Warraq.* There, as here, Bolivia's claims of illegality do not relate to the acquisition of the investment.

[320] **CLA-121**, *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA case No. AA 226, Final Award, July 18, 2014 at ¶ 1359; **CLA-124**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh and other*, ICSID case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, August 19, 2013 at ¶ 477; **RLA-88**, P. Dumberry, G. Dumas-Aubin, "The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law", 10 Transnational Dispute Management, issue 1, 2013), p. 1-2, 10; **CLA-119**, John Dugard, Sixth Report on Diplomatic Protection (57th Session of the UN International Law Commission, 2005), A/CN.4/546, ¶ 18; **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 (citing Rousseau, Charles, Droit international public, Vol. I, p. 177, para. 170).

[321] **CLA-121**, *Hulley Enterprises Limited (Cyprus) v. 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. AA 226-228, Final Award, July 18, 2014 at ¶ 1358; **CLA-124**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh and other*, ICSID case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, August 19, 2013 at ¶ 477.

104. To conclude, while Bolivia advocates for the application of the doctrine of clean hands and calls for this Tribunal to decline jurisdiction, it forgets that "allowing a legally recognized injustice or wrong to go unchallenged and not remedied also cuts against the grain of the court's nature as a court of justice. This is especially true where but for her unclean hands the claimant would have been, for all practical matters, entitled to a remedy."[322] Such a one-sided plea of equity is precisely the situation here: Claimant, South American Silver, is entitled as a matter of international law to a remedy due to Bolivia's breaches of the BIT. Yet, on the grounds of supposed unclean hands, Claimant is being set up for an unfair and inequitable outcome– the dismissal of all its claims on grounds of supposed illegality. Professor Cremades' dissent in *Fraport* should be remembered in this regard:

> "If the legality of the Claimant's conduct is a Jurisdictional issue, and the legality of the Respondent's conduct a merits issue, then the Respondent Host State is placed in a powerful position. In the Biblical phrase, the Tribunal must first examine the speck in the eye of the investor and defer, and maybe never address, a beam in the eye of the Host State. Such an approach does not respect fundamental principles of procedure."[323]

Through the artifice of an inflexible clean hands doctrine, Bolivia would have this Tribunal dismiss the case entirely, and in doing so, Bolivia is able to capture the entirety of the benefit of Claimant's investment without any consequences. The law abhors such unfairness.

1. Even assuming that the clean hands doctrine exists in international law, Bolivia does not meet the criteria for its application

105. Although South American Silver maintains that the clean hands doctrine does not exist as a matter of international law,[324] it has, in an effort to address all of Bolivia's arguments, explained the criteria necessary for its potential application should this Tribunal decide to recognize and apply the doctrine, based on *Niko Resources v. Bangladesh*.[325] Unfortunately, Bolivia has chosen to criticize the 3-part test established by the *Niko Resources* tribunal for the application of the clean hands doctrine, without identifying any alternative set of criteria it would

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322 **CLA-193**, Ori Herstein, A Normative Theory of the Clean Hands Defense, Legal Theory, Vol. 17 (2011), p. 8.

323 **RLA-237**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philipines*, ICSID case No.ARB/03/25, Dissenting opinion of Bernardo M. Cremades dated July 19, 2007, ¶ 37.

324 Claimant's Reply at ¶¶ 201 *et seq.*; Claimant's Rejoinder at 87-102 *supra*.

325 Claimant's Reply at ¶¶ 212 *et seq.* 212.

need to fulfill.[326] In Bolivia's view, the *Niko Resources* criteria, which were based on the *Guyana v. Suriname* award, "do not correspond to the underlying criteria of the 'clean hands' doctrine, under any of the legal systems considered" by Bolivia in its submission.[327] Even assuming this is true, Bolivia's submission only serves to showcase how the "precise content" of the clean hands doctrine "is ill defined,"[328] and of how its application in international fora has been "sparse" and "inconsistent."[329]

106. To be clear, Bolivia asks this Tribunal to disregard the *Niko Resources* criteria fully understanding that it would not meet those requirements. *First,* the claimant's conduct said to give rise to 'unclean hands' must amount to a continuing violation.[330] This criterion traces back to "the doctrine's origins in the laws of equity and its *limited application* to situations *where equitable remedies, such as specific performance, are sought*."[331] This is important because application of the doctrine is only appropriate "where a claimant is seeking … protection against a continuance of that violation in the future, in other words a 'kind of specific performance of a reciprocal obligation which the demandant itself is not performing.'"[332] The *Guyana v Suriname* tribunal took that criterion directly from judge Hudson's individual opinion, which Bolivia itself cited to support its claim that the clean hands doctrine is a principle of international law.[333] This breathtaking inconsistency notwithstanding, Bolivia criticizes this criterion because it purportedly "contradicts the criteria of reciprocity." Bolivia misses the point recognized by the cases and opinions: reciprocity actually forms the basis for the continuity requirement—both are closely linked and must be present for the doctrine to apply.

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326 Respondent's Rejoinder at ¶¶ 324-330.

327 Respondent's Rejoinder at ¶¶ 327.

328 **CLA-124**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh and other*, ICSID case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, August 19, 2013 at ¶ 477.

329 **RLA-86**, *Guyana v. Suriname*, PCA case, award dated September 17, 2007 at ¶ 418.

330 **CLA-124**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh and other*, ICSID case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, August 19, 2013 at ¶¶ 420-421, 477.

331 **RLA-86**, *Guyana v. Suriname*, PCA case, award dated September 17, 2007 ¶ 420 (emphasis added).

332 **RLA-86**, *Guyana v. Suriname*, PCA case, award dated September 17, 2007 ¶ 420 (citing **RLA-75**, Judge Hudson's individual opinion in the *Diversion of Water from the Meuse* also cited by Bolivia in its Reply).

333 Respondent's Rejoinder at ¶ 320, fn 533.

107. *Second*, 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.[334] This criterion also traces back to "the doctrine's origins in the laws of equity"[335] and is grounded on the "principle of international law that any breach leads to an obligation to make reparation."[336] Equity principles should be applied sparingly.[337] Accordingly, the clean hands doctrine will only apply "where a claimant is seeking *not reparation for a past violation*, but protection against a continuance of *that violation in the future*."[338] Here, South American Silver is seeking payment for a past violation not continued in the future: Bolivia's past violation of the BIT, including the illegal expropriation of South American Silver's investment. Thus, the remedy South American Silver seeks is "not … a remedy of the type to which the clean hands doctrine would apply, even if it were recognised as a rule of international law."[339] Separately, there is no "contradiction between the conclusions of the *Guyana* and *Niko Resources*" decisions as argued by Bolivia.[340] Bolivia's mistake is a result of the isolated reading of a sentence.[341]

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334 **CLA-124**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh and other*, ICSID case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, August 19, 2013 at ¶¶ 420-421; 477.

335 **RLA-86**, *Guyana v. Suriname*, PCA case, award dated September 17, 2007 ¶ 420.

336 *Id.* (citing **RLA-75**, Judge Hudson's individual opinion in the Diversion of Water from the Meuse also cited by Bolivia in its Reply).

337 *Id*.

338 **RLA-86**, *Guyana v. Suriname*, PCA case, award dated September 17, 2007 ¶ 420 (emphasis added).

339 **RLA-86**, *Guyana v. Suriname*, PCA case, award dated September 17, 2007 at ¶ 421.

340 Respondent's Rejoinder at ¶ 329.

341 Specifically, Bolivia argues that "[w]hile the Guyana tribunal held that compensation for an alleged previous violation is a recourse to which the principle of 'clean hands' does not apply, the *Niko Resources* tribunal held that the principle of 'clean hands' did not apply precisely because relief sought did not relate to the protection against a past violation." Respondent's Rejoinder at ¶ 329. But, what the *Niko Resources* tribunal actually held while applying the 3-part test was that: (i) The claimant's conduct of which respondent complaint was "not continuing;" rather, it "consisted in two acts that have been completed long ago." **CLA-124**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh and other*, ICSID case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, August 19, 2013 at ¶ 483. (ii) The "remedy which the Claimant seeks," *i.e.* payment for delivery of gas performed under a joint venture agreement (in the words of the Guyana tribunal "reparations for an alleged past violation") "does not concern protection against this past violation" from *either continuing or repeating itself "in the future"* as required by the second prong of the test enumerated in the paragraphs preceding in the tribunal's analysis. *Id.* at ¶¶ 481-483; **RLA-86**, *Guyana v. Suriname*, PCA case, award dated September 17, 2007 at ¶ 421. (iii) Finally, there was "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." **CLA-124**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh and other*, ICSID case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, August 19, 2013 at ¶ 483.

108. *Finally*, there must be a relationship of reciprocity between the obligations considered.[342] This reciprocity relationship is present when two parties have an "identical or reciprocal obligation" and one party "is engaged in a continuing non-performance of that obligation" while trying to "take advantage of *a similar non-performance of that obligation* by the other party."[343] There will be no reciprocity where the claimant's claim is based on a "different obligation" from the one the respondent is complaining of.[344] In other words, it will not apply when the conduct the respondent complaints of is judicially extraneous to the claimant's cause of action.[345]

109. Here, as already explained by Claimant,[346] none of the actions Bolivia complained of in its Reply bear any reciprocal relationship with South American Silver's cause of action. In fact, is likely that for this very reason, Bolivia went out of its way to find new witnesses and presented them with its last Rejoinder. Yet, none of the new factual allegations made by Bolivia bare relation with South American Silver's cause of action: Bolivia's violation of the investor protection guarantees embodied in the BIT.

110. To conclude, none of the criteria necessary for the application of the clean hands doctrine is present in this case. The Tribunal should also note that event in national iterations of the doctrine of clean hands, plaintiffs are not required to have led blameless lives in order to access justice: "equity does not demand that its suitor shall have led blameless lives … it does require that they shall have acted fairly and without fraud or deceit as to the *controversy in issue*."[347] South American Silver is a protected company under the Treaty that owns qualifying investments in Bolivia,[348] and the fault raised by Bolivia, not of which concern the making of its investment, should not distract this Tribunal from a fair hearing of the Claimant's claims under the Treaty on the merits.

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342 **CLA-124**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh and other*, ICSID case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, August 19, 2013 at ¶¶ 420-421; 477.

343 **RLA-86**, *Guyana v. Suriname*, PCA case, award dated September 17, 2007 at ¶ 419.

344 **RLA-86**, *Guyana v. Suriname*, PCA case, award dated September 17, 2007 at ¶ 421.

345 *See* Claimant's Reply at ¶¶ 216-222.

346 *See* Claimant's Reply at ¶¶ 216-222.

347 **CLA-193**, Ori Herstein, A Normative Theory of the Clean Hands Defense, Legal Theory, Vol. 17 (2011), p. 3.

348 Respondent's Counter-Memorial at ¶ 224.

B. BOLIVIA'S INVOCATION OF 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

111. Bolivia maintains that the legality doctrine should be applied by this Tribunal regardless of the fact that, in direct contravention of the requirements of that doctrine: (i) the alleged wrongful acts do not relate to the nature of the investment itself; and (ii) temporally, those acts did not occur during the making of the investment.[349] According to Bolivia, these criteria are unnecessary because limiting the application of the legality doctrine to illegality at the time of the making of the investment would be "contrary to the spirit in which it was agreed to establish this Tribunal."[350] In essence, Bolivia tries to redefine the scope of the Legality Doctrine and scape its confines through a one-sided appeal to *ethos*.

112. As Claimant has explained before, for the legality doctrine to apply, investment arbitration case law has consistently required that the violation of host State law occur at the date of admission or establishment of an investment.[351] This is so because the legality requirement operates as a limit on the host State's consent to participate in the BIT arbitration.[352] If the investor makes,[353] effects,[354] or acquires[355] the initial investment in a wrongful matter, then it takes itself out from the protections of the BIT.[356] But, if the respondent state complaints of

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349 *See* Claimant's Reply at ¶¶ 219 *et seq*.

350 Respondent's Rejoinder at ¶¶ 338-341.

351 Claimant's Reply Memorial at ¶ 223 *et seq*; **RLA-65**, *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID case No. ARB/03/26, award dated August 2, 2006*;* **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, 27 September 2012 ¶ 266; **RLA-31**, *Gustaf F. W. Hamester GmbH amp; Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010 ¶ 127; **CLA-192**, Zachary Douglas, The International Law of Investment Claims 53-54, ¶¶ 106-108 (2009).

352 **RLA-31**, *Gustaf F. W. Hamester GmbH amp; Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010 ¶ 125.

353 **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, 27 September 2012 ¶ 266.

354 **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, 21 December 2012 ¶ 318.

355 **RLA-237**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philipines*, ICSID case No.ARB/03/25.

356 **RLA-31**, *Gustaf F. W. Hamester GmbH amp; Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010 ¶ 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, 27 September 2012 ¶ 266;

breaches of the host state laws in the course of the investment, as Bolivia does here, and then imposes sanctions on the investor that violate the BIT, the investor "must have the possibility of challenging their validity in accordance with the applicable investment treaty."[357] The Tribunal must therefore have in mind the mutual *ethos* of the BIT system. Otherwise, "[i]t would undermine the purpose and object of the [BIT] to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits."[358]

113. Investor illegality that occurs in the performance, implementation or even expansion of an investment is not ignored, as Bolivia seeks to mislead the Tribunal into thinking. It simply ceases to become a jurisdictional "trump" that absolves the host State of its own violations of international law, and becomes instead a merits issue, to be weighed—if appropriate— along with the host State's own breaches of the BIT.[359] It is "mistaken to adopt an interpretation of a standard phrase in investment instruments in a manner capable of leaving an investor without a remedy, and a Host State secure and immune in a gross violation of a Bilateral Investment Treaty."[360] Accordingly, as the *Quiborax* tribunal held "to the extent that the Respondent's allegations refer to the operation or performance of the investment (Bolivia's allegations of 'ongoing illegality'), they are not relevant to the availability of the BIT's

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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, December 21, 2012 ¶ 318.

357 **CLA-121**, *Hulley Enterprises Limited (Cyprus) v. 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. AA 226-228, Final Award, July 18, 2014 at ¶ 1355.

358 **CLA-121**, *Hulley Enterprises Limited (Cyprus) v. 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. AA 226-228, Final Award, July 18, 2014 at ¶ 1355.

359 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." **CLA-192**, Zachary Douglas, The International Law of Investment Claims 53-54, ¶¶ 106-108 (2009).

360 **RLA-237**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philipines*, ICSID case No.ARB/03/25, Dissenting opinion of Bernardo M. Cremades dated July 19, 2007, ¶ 39.

substantive protections. Instead, they are matters for the merits which the Tribunal will address when determining whether the respondent breached" the BIT.[361]

114. In other words, Claimant is not asking the Tribunal to ignore Bolivia's allegations—it is simply asking that the legality doctrine be applied as it is meant to be applied: as a rule prohibiting tribunals from acquiring jurisdiction only in the exceptional case where the investor's serious illegal conduct is found at the very inception of the investment, tainting the entirety of it. That is simply not the case here, where the alleged illegalities occurred years later, well into the performance phase of the investment. Bolivia will have every opportunity to have its illegality defense heard—but those allegations will be given their proper weight and will be assessed together with other issues on the merits, and not as a trump that overrides all other issues.

115. Bolivia is unable to provide this Tribunal with a compelling reason as to why it should depart from established arbitral practice. In fact, Bolivia's criticism of the case law referenced by South American Silver regarding the limitations of the legality doctrine, is painfully superficial. For example, Bolivia seeks to belittle findings made by the *Saba Fakes* Tribunal.[362] Yet, this "*obiter dictum*"—as characterized by Bolivia—was endorsed by two subsequent tribunals: *Quiborax v. Bolivia* and *Metal-Tech v. Uzbekistan*.[363]

116. Perhaps recognizing its flawed logic, Bolivia now asserts that the alleged misconduct did occur during the making of South American Silver's investment—A clear attempt to place its allegations within the temporal bounds of the Legality Doctrine. Apparently, Bolivia took South American Silver's statement that no "creativity in the use of the Legality Doctrine can bridge th[e] vast temporal gulf" between the alleged misconduct and the time when the investment was first made, as an invitation to reinterpret the factual background of this case. It is an audacious act, but no amount of creativity can change the timeline of the facts.

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361 **CLA-158**, *Quiborax S.A. et al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, Sept. 16, 2015 at ¶ 129.

362 Respondent's Rejoinder Memorial at ¶ 334 (stating that the "statement (in one paragraph) by that tribunal on the category of laws that constitute the legality requirement was an obiter dictum").

363 **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, 27 September 2012, ¶ 266; **CLA-127**, *Metal-Tech Ltd v. The Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award, 4 October 2013, ¶ 165.

117. South American Silver's investment was already long made at the time the alleged illegalities that led to the Reversion Decree purportedly occurred. It is well established that "[w]here investments are made without a contract with the host State," as in this case, "the decisive stage" for determining the timing of the making of the investment "will usually be the making of definite commitments with partners, suppliers, subcontractors, or similar legally binding steps."[364] In this case, those "definite commitments" were South American Silver's acquisition of ten mining concessions covering the entire Malku Khota Project area and the incorporation of CMMK. This process was completed *years* before the Reversion Decree was issued. Bolivia's theory that the investment was still being made when the reversion decree was issue,[365] would require this tribunal to extend the stage of initial investment making indefinitely. That would be absurd.

118. Lastly, and most incredibly, Bolivia argues that the analysis of legality should not be limited to the time of realization of the investment because the BIT lacked a legality clause.[366] According to Bolivia, this Tribunal should impose a legality clause requiring South American Silver to comply with host state law as a jurisdictional hurdle in absence of express language in the BIT to that effect. This is an amazing argument, and not in a good way. Effectively, Bolivia is asking the Tribunal not only to read a legality requirement into the treaty where there is none; it then goes a step beyond the Legality Doctrine itself by using that very absence of a legality requirement as permission to *extend* the doctrine to the *entire life of an investment.* In other words, Bolivia wants this Tribunal to rewrite the language of *virtually all investment treaties* that contain the "in accordance with law" language upon which the Legality Doctrine is based, eliminating the "*made* in accordance with law" requirement entirely. No investment tribunal has ever done this, and this Tribunal should not be the first.

119. Two cases are particularly enlightening on this regard. First, in *Metal-Tech*, the tribunal unequivocally found that the applicable BIT clause "simply does not address whether or not the investment must be operated lawfully after it is in place."[367] Accordingly, the Tribunal

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[364] **CLA-129**, Christoph H. Schreuer et al., The ICSID Convention – A Commentary 135 (Cambridge, 2d ed. 2009).

[365] Respondent's Rejoinder at ¶¶ 339-340.

[366] Respondent's Rejoinder at ¶ 344.

[367] **CLA-127**, *Metal-Tech Ltd. v. Uzbekistan*, ICSID case No. ARB/10/3, award dated October 4, 2013 ¶ 193.

did *not* incorporate such a requirement into the BIT, the exact reverse of what Bolivia now advocates. Similarly, while analyzing the definition of "investment" under the ICSID Convention, the *Saba Fakes* tribunal found that it could not itself incorporate the "principles of good faith and legality [] into the definition of Article 25(1) of the ICSID Convention *without doing violence to the language* of the ICSID Convention."[368] The Tribunal explained that the investment only needs to qualify as an investment under local law but that Article 25(1) of the ICSID Convention did not include qualifying words or additional requirements such as investment made "in 'good faith'." Thus, the tribunal could not incorporate these principles into the language of the Convention because while "an investment might be 'legal' or 'illegal,' made in 'good faith' or not, it nonetheless remains an investment. The expressions 'legal investment' or 'investment made in good faith' are not pleonasms, and the expressions 'illegal investment' or 'investment made in bad faith' are not oxymorons." Here, there is no express legality clause in the BIT requiring South American Silver to maintain, operate or expand its investment in accordance with national law or in good faith. Accordingly, this Tribunal cannot incorporate such a requirement to the performance or expansion of the investment "without doing violence" to the language as well as spirit of the BIT.

120. Lastly, Bolivia tries to misguide the Tribunal into applying the Legality Doctrine thereby dismissing all of South American Silver's Claims for Bolivia's breach of the BIT, appealing to a one-sided sense of *ethos*. South American Silver, however, is not asking the Tribunal for impunity for alleged wrongdoings (if those actually existed), Claimant only wants a just and proper compensation for its investment as the substantive protections of the BIT provide. As explained by Professor Cremades, the relevant question for the tribunal is whether an arbitration provides the proper timing, context and forum to resolve allegations of wrongful conduct:

> "It is important to emphasise that there is no question of an Arbitral Tribunal passing over or treating lightly any illegal conduct by the investor. The question is the proper time and context to consider and evaluate the proof and consequences of illegality. In many cases, legal action will also be possible in competent domestic tribunals. There is no question of impunity for the foreign investor. The foreign investor that

[368] **RLA-61**, *Saba Fakes v. Turkey*, ICSID case No. ARB/07/20, award dated July 14, 2010 ¶ 112 (emphasis added).

> commits a crime should go to jail or suffer the other penalties prescribed by law."[369]

Claimant's position on this score has been clear: If true, Bolivia's proper recourse against the types of violation it alleges would be to investigate and prosecute the perpetrators of these crimes following appropriate procedures and due process.[370] But, Bolivia's attempt to use unfounded allegations as a means to avoid its legitimate obligations under the Treaty should be rejected.

C. BOLIVIA'S FACTUAL ALLEGATIONS REGARDING SOUTH AMERICAN SILVER'S SUPPOSED UNCLEAN HANDS ARE WRONG

121. As a preliminary manner, both parties agree that, in accordance with the UNCITRAL Rules, "[e]ach party shall have the burden of proving the facts relied on to support its claim or defence."[371] Bolivia, however, advocates for a shifting of the burden of proof based on its clean hands arguments.[372] There is simply no question that the guiding principle regarding burden of proof in international investment arbitration is that each party must prove the facts it relies on in accordance with the maxim *onus probandi incumbit actori*.[373] Accordingly, the burden of proof for facts and defenses argued by Bolivia do not shift to South American Silver.

122. Regarding the burden of proof, the consensus among cases where allegations of serious wrongdoing have been waged remains the same: The applicable standard of proof is a heightened one.[374] Even when the *Rompetrol* and *Libananco* tribunals did not refer to the standard of proof as "clear and convincing" as argued by Bolivia,[375] they nonetheless applied a heightened standard. As explained by the *Rompetrol* tribunal:

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369 **RLA-237**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philipines*, ICSID case No.ARB/03/25, Dissenting opinion of Bernardo M. Cremades dated July 19, 2007, ¶ 39.

370 Claimant's Reply at ¶ 222.

371 **CLA-130**, UNCITRAL Arbitration Rules 2010, Article 27(1); Claimant's Reply at ¶ 229; Respondent's Rejoinder at ¶ 247.

372 Respondent's Rejoinder at ¶ 348.

373 **CLA-194**, Nigel Blackaby, Constantine Partasides, et al., Redfern and Hunter on International Arbitration ¶ 6.84 (6th ed. 2015) ("The generally accepted answer is that the 'burden of proof' of any particular factual allegation is upon that party which makes the allegation."). *See also*, **CLA-127**, *Metal-Tech Ltd. v. Uzbekistan*, ICSID case No. ARB/10/3, award dated October 4, 2013 at ¶ 237 ("The principle that each party has the burden of proving the facts on which it relies is widely recognised and applied by international courts and tribunals.").

374 Claimant's Reply at ¶ 229 *et seq*.

375 Respondent's Rejoinder at ¶ 350.

> "given the nature of an allegation of wrongful (in the widest sense) conduct, and in the light of the position of the person concerned, an adjudicator would be reluctant to find the allegation proved in the absence of a sufficient weight of positive evidence – as opposed to pure probabilities or circumstantial inferences."[376]

[redacted] *At best*, Bolivia offers only—to echo the *Rompetrol* tribunal—"pure probabilities or circumstantial inferences'" none of which are sufficient to prove the wrongful acts it accuses Claimant of. Finally, whether the standard this Tribunal chooses to apply is referred to as "clear and convincing" or not, the Tribunal must at a minimum demand "more confidence [from] the evidence relied on."[377] [redacted] The Answer to both those questions is an unequivocal no.

123. South American Silver has already shown why Bolivia's throng of factual accusations simply falls apart upon scrutiny.[378] Although South American Silver does not have the burden of proving any of Bolivia's factual assertions, it has nonetheless provided probative evidence demonstrating that Bolivia's accusations are either incorrect, taken out of context, mislead, or simply insufficient to trigger the application of the Legality or clean hands doctrines. Bolivia's factual allegations of wrongdoing are discussed more fully in Section II of this Rejoinder.[379] Nonetheless, Claimant addresses four of the broad categories of wrongdoing claimed by Bolivia to showcase their lack of merit:

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[376] **CLA-132**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013 at ¶ 182. *See also*, **CLA-133**, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, Sept. 2, 2011 at ¶117.

[377] **CLA-116**, *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, I.C.J., Reports 2003, p. 161, Separate Opinion of Judge Higgins, Nov. 6, 2003 at 234 §33, 42 ILM 1334, 1384-86 (2003).

[378] Section II of this Rejoinder as well as Section II of Claimant's Reply.

[379] *See also* Claimant's Reply, § II.

124. *First*, Bolivia's accusations regarding CMMK causing division within the indigenous communities are untrue. South American Silver has demonstrated that CMMK was supported by the majority of the *ayllus* and communities surrounding the Project—except for two smaller communities (not *ayllus*): Malku Khota and Calachaca.[380] Contemporaneous statements made by Bolivian authorities, Witness X and members of the communities all confirm this.[381] [redacted]

125. South American Silver has also demonstrated that its decision to expand the Project's Area of Influence was pursued precisely to avoid dividing *ayllus*.[383] Additionally, the Company had other legitimate reasons for expanding the Project's Area of Influence, including the location of the explorations works, geographical limitations and potential employment needs.[384] The efforts to divide the community actually came from FAOI-NP and

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380 [redacted] **Exhibit C-314**, Minutes of Meeting between Officials of the Ministry of Mines, Oscar Iturri and Emil Balcázar, with the ayllus of Alonso de Ibánez Province, Apr. 18, 2012 (whereby the Government acknowledges the existence of an "absolute majoritarian consensus in favor of the project, with exception of 2 communities [Calachaca and Mallku Khota]"); **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; **Exhibit R-63**, Informe de la segunda reunión de socialización del Proyecto Malku Khota, Sept. 6, 2011 at 2-3; **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; **Exhibit C-170**, Malku Khota Project Community Relations Update, May 25, 2011; **CWS-10**, Mallory Rebuttal Witness Statement at ¶¶ 23-27.

381 *Id.*

382 [redacted]

383 Since each *ayllu* is formed by separate family groups and communities located throughout the area. **CWS-3**, Witness Statement of W.J. Mallory, Sept. 12, 2014 at ¶ 6. The expansion allowed for the inclusion of population 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, as recommended by CMMK's consultants. **Exhibit C-215**, E-mail from A. Cárdenas to F. Caceres et. al, Jun. 11, 2012; **CWS-10**, Mallory Rebuttal Witness Statement at ¶¶ 10-11; **CWS-9**, Rebuttal Witness Statement of Felipe Malbrán, Nov. 12, 2015 at ¶ 14. *See also* Claimant's Reply at ¶¶ 69-72.

384 *See* Claimant's Reply at ¶¶ 70-71.

CONAMAQ;[385] illegal miners;[386] and the government itself.[387] The Company sought from the very beginning an overall acceptance of the Project. Thus, "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."[388]

126. South American Silver has also shown that COTOA-6A was an initiative taken by the leaders of the six *ayllus* surrounding the Project, who were concerned that their interests were not being properly represented by CONAMQ or FAOI-NP.[389] The evidence offered by Bolivia on this front was created for purposes of this arbitration and cannot contradict the contemporaneous evidence on the record.[390] Specifically, contemporaneous documents demonstrate that the communities wanted to align themselves in a committee as early as 2009.[391]

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385 **Exhibit C-169**, E-mail from S. Angulo to F. Malbran, Dec. 11, 2007; **Exhibit C-216**, E-mail from S. Angulo to X. Gonzales, Mar. 16, 2012; **CWS-7**, Rebuttal Witness Statement of Santiago Angulo, Nov. 14, 2015 at ¶¶ 14, 41; **CWS-8**, Gonzales Rebuttal Witness Statement at ¶¶ 20, 31. *See also* Claimant's Reply at § II.C.

386 **Exhibit C-223**, *Explotación ilegal de oro es el origen del conflicto en Mallku Khota*, LA PAZ, May 21, 2012 (quoting the Minister of Mining and Metallurgy, Mario Virreira, stating "[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"); **Exhibit C-149**, *Policía evitará explotación ilegal en Mallku Khota*, LA PATRIA, Oct. 19, 2012 (quoting the Minister of Mining and Metallurgy stating 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'"); **Exhibit C-225**, *Avasalladores explotan oro en Mallku Khota*, LOS TIEMPOS, Aug. 1, 2012; **Exhibit C-222**, *Denuncian contaminación ambiental en Mallku Khota*, LA RAZÓN, May 26, 2012. [redacted]

387 By, for example, failing to protect the Project in order to pursue the Government's economic and political interests. *See, e.g.,* **Exhibit R-119**, Resolution DAJ-0073/2011 issued by COMIBOL, Apr. 26, 2011; Respondent's Counter-Memorial at ¶¶ 443-445; **CWS-8**, Gonzales Rebuttal Witness Statement at ¶ 27. *See also* Claimant's Reply at § II.C.3.

388 **CWS-10,** Mallory Rebuttal Witness Statement.

389 **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶¶ 8-15; **Exhibit C-155**, Memorándum de Santiago Angulo a Felipe Malbrán, *Informe Mensual Proyecto Malku Khota*, May 2009; **Exhibit C-309**, *Acta de Conformidad del Comité Consultivo de Organizaciones Originarias de los Seis Ayllus (COTOA-6A),* May 2, 2011; **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; **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.

390 Respondent's Rejoinder at ¶¶ 352(a), 352(b), 352(c) (mainly relying on the witness testimony of [redacted] Mr. Mr. Andrés Chajmi and other testimonies stricken from the record).

391 **Exhibit C-155**, Memorándum de Santiago Angulo a Felipe Malbrán, *Informe Mensual Proyecto Malku Khota*, May 2009.

This initiative materialized with COTOA-6A's formation in October 2011.[392] [redacted] It was COTOA-6A's own leaders who took decisions, implemented them and acted for their own benefit.[393]

127. *Second*, [redacted]

128. *Third*, Bolivia's accusations that CMMK promoted violence amongst the communities are wrong. The Company takes strong exception to any suggestion that it

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392 **Exhibit C-233**, Letter from COTOA-6 to President Evo Morales, Oct. 10, 2011; **Exhibit C-234**, Letter form COTOA-6A to the Ministry of Mines, Oct. 10, 2011. The communities had begun to take actual steps to form COTOA-6A back in April 2011. *See*, CWS-10, Mallory Rebuttal Witness Statement ¶ at 15; **Exhibit C-309**, *Acta de Conformidad del Comité Consultivo de Organizaciones Originarias de los Seis Ayllus (COTOA-6A)*, May 2, 2011.

393 *See* **CWS-11**, Second Rebuttal Witness Statement of Mallory at ¶ 12.

394 Claimant's Reply at § II.D.2.

395 *See* Respondent's Counter-Memorial at ¶ 106 (citing **Exhibit R-46**, Resolution vote of the Ayllus Sullka Jilaticani, Takahuani, Urinsaya y Samka dated December 11, 2019; **Exhibit R-49**, Resolution of the Town Hall of the Ayllus Sullka Jilatikani, Tacahuani, Urinsaya y Samka dated December 19, 2010; **Exhibit R-50**, Resolution of FAOI-NP dated January 11, 2011; **R-51**, Resolution of the Ayllu Sullka Jilatikani dated February 15, 2011, **Exhibit R-52**, Resolution of FAOI-NP dated February 28, 2011).

396 Respondent's Rejoinder at ¶ 352(e). The other piece of "evidence" cited by Bolivia is an order closing the investigation originally filed by CMMK's employee, Mr. Xavier Gonzales, after the kidnapping of another of CMMK's employees Mr. Saul Reque by members of the Malkhu Khota community. *Id*. This document does not support Bolivia's assertions. Instead it shows Mr. Saul Reque validly exercising his rights as a citizen to pursue his attackers. That the Prosecutor's Office closed the investigation because it could not confirm the identity of the attackers cannot weight on Bolivia's favor.

provoked, induced or promoted violence amongst the communities.[397] Tolerance or promotion of violence in the area would not benefit the Company in any way.[398] Again, Bolivia makes wholly unsupported, reckless accusations (stating for example that the Company armed the communities) with no evidence whatsoever.[399] CMMK has always instructed its supporters to act peacefully and to reject any requests for weapons made by the communities.[400] One of CMMK's working policies was to work "by the principle of social and environmental responsibility" by "respecting and valuing beliefs, traditions and customs" of the indigenous communities.[401] CMMK stressed to all of its employees that "complying with regulations was 'mandatory' for all personnel, contractor companies and other actors that are involved in the operations."[402] Similarly, CMMK asked its employees to "respect the place's authorities and comply with their regulations."[403] [redacted]

[redacted]

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397 Claimant's Rejoinder at Section II.E.

398 *See* **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 13 (stating that "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.").

399 Respondent's Rejoinder at ¶¶ 38, 352 (f). [redacted]

400 *See* **CWS-10**, Mallory Rebuttal Witness Statement at ¶ 40; **Exhibit C-293**, E-mail from F. Caceres to A. Cardenas and F. Ali, June 25, 2012 and **Exhibit-294**, E-mail to A. Cardenas, F. Caceres and F. Ali, undated. *See also* **Exhibit R-255**, E-mail from G. Funes to Mr. Fernando Caceres *et. al.*, dated May 6, 2012 where Mr. Guillermo Funes instructs Mr. Fernando Caceres the following: "Fernando, como sabemos, el criterio máximo a seguir será actuar con la maxima prudencia posible en todo momento, y siendo siempre primero la protección de las personas y luego del mismo Proyecto."

401 **Exhibit C-199**, Compañia Minera Malku Khota S.A., Curso de Inducción, September 2010, Slide 9 (emphasis in the original); Exhibit C-200, Compañía Minera Malku Khota S.A., Work Plan.

402 **Exhibit C-199**, Compañia Minera Malku Khota S.A., Curso de Inducción, September 2010, Slide 11 (emphasis in the original); Exhibit C-200, Compañía Minera Malku Khota S.A., Work Plan.

403 **Exhibit C-199**, Compañia Minera Malku Khota S.A., Curso de Inducción, September 2010, Slide 12 (emphasis in the original); Exhibit C-200, Compañía Minera Malku Khota S.A., Work Plan; **Exhibit C-200**, Compañía Minera Malku Khota S.A., Work Plan.

[redacted] To conclude, the Company never promoted violence in the area; doing so would go against CMMK's policies and operating principles.

129. *Fourth*, Bolivia's accusations that CMMK paid journalists and police officers "to exaggerate the situation of confrontation in Malku Khota and Acasio" are untrue and taken out of context. Claimant has provided evidence that payments made to journalist Gonzalo Gutiérrez were specifically related to his services as the Company's media coordinator.[405] Bolivia's effort to smear the Company's interactions with Mr. Gutiérrez falls apart upon review of the very communication Bolivia provided as "evidence."[406] Thus, the Tribunal should reject these accusations. Similarly, South American Silver has provided evidence that public statements made by the police officers who were kidnapped by the Malku Khota community were made at the officers' own initiative.[407] [redacted]

404 [redacted]

405 *See* **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 17; [redacted]

406 *See Supra* at II.C.3.

407 [redacted]

408 **RWS**-7, Witness X Witness Statement at ¶ 27.

409 [redacted]

130. Lastly, it is undisputed that on May 18, 2012 the Bolivian Prosecutor's Office issued an arrest warrant against Mr. Rojas.[410] The warrant was issued in response to Mr. Rojas' participation in violent acts. His arrest then took place on May 21, 2012 after the victims of Cancio Rojas started a street fight with Cancio Rojas.[411] [redacted]

131. The rest of Bolivia's allegations are equally without merit and unsupported, and in event, have nothing to do with the making of Claimant's investment or with Claimant's cause of action: Bolivia's violation of the BIT. Thus, Bolivia's allegations of wrongful conduct cannot possibly affect the Tribunal's jurisdiction.

V. REQUEST FOR RELIEF

For the reasons stated herein, Claimant, South American Silver, requests an award granting it the following relief:

(i) A declaration that the dispute is within the jurisdiction of the Tribunal;

(ii) A finding dismissing all of Bolivia's objections to the admissibility of the claims and the tribunal's jurisdiction.

In addition Claimant hereby reiterates the substantive relief it seeks from this Tribunal, namely:

[redacted]

410 Respondent's Reply to the Statement of Claim, March 31, 2015 at ¶ 158.

411 *Id.*

412 *Id.*

413 **CWS-12**, Second Rebuttal Witness Statement of Gonzales at ¶ 20 [redacted]

(iii) A declaration that Bolivia has violated the Treaty;

(iv) A declaration that Bolivia's actions and omissions at issue and those of its instrumentalities for which it is internationally responsible are unlawful, constitute a expropriation without prompt, adequate and effective compensation, failed to treat South American Silver's investments fairly and equitably and to afford full protection and security to South American Silver's investments, and impaired South American Silver's investments through unreasonable and discriminatory measures and treated South American Silver's investments less favorably than investments of its own investors;

(v) 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;

(vi) An award to South American Silver for all costs of these proceedings, including attorney's fees; and

(vii) Post-award interest on all of the foregoing amounts, compounded quarterly, until Bolivia pays in full.

Respectfully submitted,

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