UNOFFICIAL ENGLISH TRANSLATION

PCA CASE No. 2013-15

SOUTH AMERICAN SILVER LIMITED

(Claimant)

-v-

PLURINATIONAL STATE OF BOLIVIA

(Respondent)

POST HEARING BRIEF

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

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1. In light of what was agreed at the hearing held in Washington, D.C. between 11 and 21 2016 (the "**Hearing**"), paragraph 40 of the Procedural Order No. 21 and the agreement of the Parties of 3 August 2016, the Plurinational State of Bolivia ("**Bolivia**" or the "**State**")[1] submits this Post-Hearing Brief.

1 INTRODUCTION

2. The Hearing confirmed what was denounced by Bolivia from the beginning of this proceeding: the abuse that SAS intends to perpetrate. Indeed, this case illustrates the abuses that some unscrupulous companies – claiming to be qualified as foreign investors – are willing to commit in order to exploit natural resources in sensitive areas from a social and environmental point of view. This kind of behavior cannot be protected by an international tribunal.

3. *First*, SAS does not possess an investment protected by the Treaty or International Law, since SASC – a Canadian company – is the real owner of the Project. During the Hearing, SAS witnesses confirmed that the little effort and money invested in the Project came from Canada. SAS is a shell company created to illegally benefit from Treaty protection, so it cannot be considered that there is an investment *of* SAS (in the *Standard Chartered Bank* tribunal's words) in the case that fits in the objective definition of *investment* required by International Law. Moreover, SAS' failed attempts to conceal evidence (even breaching the orders of the Tribunal to exhibit documents) did not enable them to hide the support that SASC requested and received from the Government of Canada, the only concerned

[1] Terms in capital letters that are not expressly defined in this brief shall be understood as specified in Bolivia's previous briefs.

State – besides Bolivia – with regard to this alleged investment. To protect investments that, in fact, are owned by nationals of a third State was not the purpose of the parties in signing the Treaty and manipulates the international investment protection regime, explaining why the system as recently been the subject of serious criticisms. The Tribunal should reject its jurisdiction because SAS does not possess a protected investment (Section 2).

4. Second, it was demonstrated that SASC – a Canadian *junior* mining company – did not have any intent to exploit the Project. Its intent, in fact, was to sell the Project to the highest bidder, which translated into reducing investments and efforts to the minimum necessary. The result was a mediocre community relations program implemented by CMMK with dire consequences for the Communities and the Project itself.

5. By means of a strategy of (i) buying the goodwill of the Local Communities the most distant from the Project; (ii) the artificial creation of territorial groupings that supported CMMK (such as COTOA-6A); and (iii) the criminalization of the leaders of the Communities closest to the Project and opposed to it – especially Malku Khota and Calachaca –, the community relations program of CMMK went as far as to commit serious illegalities such as bribing journalists and police officers (in order to get local leader Cancio Rojas arrested and to exaggerate his press declarations), the submission of reckless allegations against local leaders and the transportation of community members who were foreign to the project to meetings with the Authorities, even knowing that this actions would generate violence between the Communities. The community relations program of CMMK was so poor that it lacked social impact studies or conduct manuals. [redacted]

[redacted]

6. During the Hearing, instead of cross-examining Bolivian witnesses who denounced all of these illegalities regarding the facts of their testimonies, SAS preferred to intimidate them (as it did by invoking a criminal proceeding against Mr. Andres Chajmi) and attack their credibility (as it did with Witness X [redacted]

CMMK molestations of the Communities generated riots supported by the highest indigenous authorities at the local and national level that endangered the lives of the inhabitants of the region (it is undisputed that the clashes caused at least one death and several events) and of several public officials, such as former Governor Gonzales and the police officers who were detained, forcing the State to reverse the concessions.

7. These serious illegalities should be taken into account by the Tribunal to reject its jurisdiction, conclude that there were no breaches of the Treaty or, where appropriate, to reduce any award by, at the least, 75% (Section 3).

8. *Ultimately*, it was determined during the Audience that the damages claimed by SAS are entirely speculative given the incipient state of the Project (according to SAS' witnesses, at the actual stage of the Project there was a 1 in 10,000 probability to get to exploitation phase) and the great uncertainty about the existing resources and its possible exploitation through a metallurgical process that had never been used before and that was never tested with the Mallku Khota samples. It was also demonstrated that the "*Frankenstein*" valuation

proposed by SAS combines in an arbitrary and insufficient way three valuation methods that do not reflect CMMK's concessions fair market value.

9. Thus, if, *par impossible*, the Tribunal considers that SAS has the right to any kind of compensation, it should be limited to the reimbursement of the Project's expenses, as proposed by Bolivia in the Reversion Decree (**Section 4**).

2 IT WAS DEMONSTRATED DURING THE HEARING THAT THE PROJECT IS AN INVESTMENT OF SASC (A CANADIAN INVESTOR), AND THAT THE TRIBUNAL THEREFORE HAS NO JURISDICTION OVER THIS DISPUTE

10. It was demonstrated during the Hearing that SAS is a shell company that – in addition to not being the direct owner of CMMK – does not hold any interest in this claim. The examination of SAS' witnesses and the recently obtained documents from the Canadian diplomatic authorities (despite SAS' opposition, even in breach of the Tribunal's order) confirm that SAS is opportunistically used by a Canadian company (SASC) to obtain a protection that neither Bolivia nor the United Kingdom offered to Canadian nationals when signing the Treaty.

11. As explained by Bolivia in its submissions, the Tribunal has no jurisdiction to resolve this dispute because the Treaty does not protect indirect investments and, in any case, the only company that owns an indirect investment is SASC. This was confirmed by, at least, five circumstances during the Audience:

12. *First*, Mr. Fitch confirmed that, since the 1990s, when initiating the exploration of natural resources in Bolivia, he constituted the Canadian company General Minerals Corp. (later

SASC). For this reason, it is no wonder that SASC (i) authorized the payments for CMMK to acquire the concessions [D2:P309-310:L24-10] and (ii) introduced itself publicly in Bolivia and Canada as the only owner of the Project [D2:P319-320:L17-11].

13. *Second*, the technical studies of the Project and the metallurgical process studies were carried out by SASC. Mr. Dreisinger recognized that, before being the Vice President for TriMetals (current name of SASC), he provided services for SASC as a technical consultant in the metallurgical area [D7:P1266-1267:L21-10]. Besides that, as recognized by Mr. Fitch, SASC is the owner of the metallurgical process patent developed by Mr. Dreisinger [D2:P315-316:L15-6] and it was SASC that recommended (R-183) the making of the PEAs 2009 (C-13) y 2011 (C-14).

14. *Third*, the management of the risk to "socialize" the Project implied, in the words of Mr. Malbrán, "*un vínculo absolutamente directo*" between CMMK and SASC [D3:P647:L13-22]. For this reason, it was SASC (and not SAS) that directly hired the consulting firm *Business for Social Responsibility* ("BSR") to evaluate the Community relations of CMMK. Similarly, Mr. Mallory made it clear that he was "*hired by South American Silver Corporation*" with the purpose of start the new community relations program of CMMK [D2:P356:L1-3].

15. *Fourth*, SASC had no hesitation in characterizing the Project as a Canadian investment before the authorities of that country to request its diplomatic protection. As established during the Hearing, given the violent situation caused by CMMK in the Mallku Khota area, SAS requested the Canadian authorities to intervene to prevent that the violent events "*inhibit future Canadian investment*" in Bolivia (R-300). SAS refused to submit to Bolivia

the correspondence exchanged between SASC and the Canadian diplomatic authorities (failing to comply with Procedural Order No. 7) in order to hide this circumstance. Nevertheless, Bolivia directly obtained such relevant documents from the Canadian authorities.

16. *Fifth*, the Hearing also confirmed that SAS has no economic interest in the outcome of this case. Despite Mr. Fitch's reluctance [D2:P318-319:L16-2], it was established that it was SASC that entered into an agreement with the Financier (R-16; R-148, pages 4 and 7). In the same way, SASC issued a special class of shares of which the revenues are dependent on the results of this arbitration, some of them held by Mr. Dreisinger [D7:P1270-1271:L24-5].

17. Aware of its weak jurisdictional position, SAS limited itself to affirming that "*the definition of 'investment' should be the one contained in the BIT*" and not an objective vision as the one proposed by Bolivia, which would correspond only to ICSID arbitrations [D1:P259:L6-10]. However, it is precisely when analyzing the text of reciprocal protection of investments treaties (like the Treaty) and <u>*not*</u> the ICSID Convention that other tribunals, as in the *Standard Chartered Bank* case presided by Prof. "Rusty" Park, concluded that the expression "*investment of*" does not mean "*the abstract possession of shares in a company that holds title to some piece of property*" (**RLA-60**, par. 231). *Au contraire*, it required "*an active relationship between the investor and the investment, [i.e.] that the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner*" (*Id.*, par. 230). SAS aims to ignore the very existence of an objective notion of investment under International

Law against the purpose of the Treaty and the practice of international tribunals (Bolivia Closing Statements, slide 14; RLA-216; RLA-61).

18. SAS, in summary, does not own an investment under the Treaty because SASC is the only one that performed an alleged investment in Bolivia. Since SASC cannot avail itself of the rights provided for under the Treaty to Bolivian and UK nationals, the Tribunal lacks jurisdiction over this dispute.

3 ABUSES BY SAS AND CMMK FORCED THE STATE TO DECREE THE REVERSION AND JUSTIFY THE REJECTION OF SAS' CLAIMS

19. During the Hearing, as well as in the written phase, SAS presented an incomplete and incoherent factual narration in order to give the Tribunal the false impression that Bolivia ordered the Reversion with a purpose other than protecting the lives of the members of the Local Communities.

20. However, during the Hearing it was confirmed that CMMK committed several abuses that led to an unsustainable escalation of violence that endangered the life and rights of the Local Communities and the public officials and forced the State, after having supported the Project's continuity, to decree the Reversion as an *ultima ratio* (3.1). There are several legal qualifications that the Tribunal may use to sanction these abuses of the alleged investor (3.2).

3.1. SAS and CMMK committed several abuses that forced the State to order the reversion

21. During the Hearing, it was established that the CMMK abuses and/or those of its subcontractors caused serious clashes between the Local Communities (3.1.1) that, eventually, forced the State to intervene to protect human lives and pacify the area (3.1.2). There, Bolivia denied SAS' false accusations tending to minimize the Government's support of its Project (3.1.3) and confirmed that the escalation of violence caused by CMMK by mid-2012 left no other alternative to the State than to order the Reversion (3.1.4).

3.1.1. During the Hearing, it was established that CMMK caused and exacerbated the serious clashes between Local Communities in the area of Mallku Khota

22. In its opening statement, and as it has been doing since the beginning of the proceeding, SAS (i) trivialized the importance of consensus in the decision-making system of the Local Communities (alleging that there existed an "*overwhelming support for the Project*" [D1:P34:L22]) and (ii) ignored FAOI-NP and CONAMAQ as legitimate and fundamental Local Authorities in the plurinational structure of the State [D1:P44:L9-21]. An obvious sign of its lack of interest in this crucial issue – and its procedural bad faith – was not to request the presence of Professor Uño at the Hearing and attempt – in vane – to deny the conclusions of his report asking questions to the then Governor Gonzales (SAS's Closing Statements, slide 28). Nevertheless, SAS' witnesses confirmed two fundamental premises on the organization of the Communities:

23. <u>On the one hand</u>, Mr. Mallory admitted that one of the "*special features [and] traditions that [Indigenous Communities] follow to make decisions*" is that the Ayllus "*operate as a*

unit" [D2:P362:L12-22]. This implies that, "*if there was no consensus for [a] meeting, then it shouldn't go ahead*" [D2:P368:L11-15].

24. On the other hand, despite SAS efforts to qualify the members of FAOI-NP and CONAMAQ as "*Outsiders*" (SAS Closing Statement, slide 29), Mr. Angulo admitted on cross-examination that "*FAOI-NP y CONAMAQ, son las máximas organizaciones indígenas de Bolivia*" [D2:P500:L8-11]. Mr. Malbrán, on his side, admitted that, being part of these two organizations, the operative votes issued by the Ayllus of the area reflected the will of the Local Communities [D3:P666-667:L23-5].

25. The Hearing also proved that CMMK breached these forms of ancestral organization and caused serious clashes between the members of the Communities with its deficient community relations program (**3.1.1.1**) and its strategy to silence the community members who opposed the Project (**3.1.1.2**).

3.1.1.1.SAS' witnesses confirmed that, from the beginning of the exploration activities, CMMK was negligent to manage its community relations, which caused the opposition of the Communities to the Project

26. In its Rejoinder, Bolivia demonstrated that SAS' deficient community relations program caused poor levels of social acceptance of the Project between Local Communities in the beginning of operations in 2008. SAS' witnesses admitted that the consequence of the latter was the rejection of the Project which materialized in the operative votes of December 2010 (R-46; R-49) and January 2011 (R-50).

27. *In limine*, it is astonishing, to say the least, that SAS insists on alleging in this arbitration that those operative votes were taken by means of intimidation or the use of force when there is no evidence at all for such accusations. Mr. Gonzales Yutronic admitted that, despite allegedly having seen some community members whip Mr. Santiago Calle (supporter of the Project) in a FAOI-NP *cabildo* in January 2011 (R-50), he never denounced this event to the authorities [D3:P572:L2-14]. Similarly, Mr. Angulo admitted that, in his report on an 11December 2010 meeting (C-226), he did not mentioned the use of force by the Local Authorities to allegedly obtain the signing of the operative vote (R-46) [D2:P510-511:L21-1]. The witness lacks credibility, including over the equally serious accusations he makes in relation to the January 2011 operative vote (R-49).

28. In any case, the Hearing confirmed, at least, four forms of CMMK's negligence in the management of community relations:

29. *First*, Mr. Fitch admitted, regarding the engagement of BSR by SASC in 2009, that "*[c]ommunity relations are always an issue in mining ventures*" and that SASC "*took very seriously and was looking into ways how they could develop a very strong program*" [D2:P307:L5-8]. Despite the latter, Mr. Angulo recognized that "*[e]l informe [de BSR] yo no lo vi en su momento ni en ese instante, sino que además después de un tiempo me entregó el jefe del proyecto y como estaba en inglés yo no pude interpretar ese informe*" [D2:P504:L9-13] or, simply, that he "*no sabía qué contenía ese informe*" [D2:P504:L25]. It is striking and symptomatic of how CMMK worked that its community relations manager did not know the recommendations by BSR (the only report on community relations ordered by SAS, SASC or CMMK).

30. The lack of awareness of the recommendations by BSR – formulated in May 2009 – explains why, in 2010, Mr. Angulo was still "*organiza[ndo] a veces reuniones con algunas personas de la comunidad y no con otras*" [D2:P504:L1-3], in spite that, in 2009, as it was admitted by Mr. Malbrán, "*BSR les recomendaba [] evitar reuniones individuales para evitar tensiones en la zona*" [D3:P657:L1-4].

31. In the same way, Mr. Malbrán confirmed that CMMK did not improve its policies on donations to the Local Communities, ignoring BSR's recommendations. When asked about the arrangement between CMMK and Martín Condori (CONAMAQ Authority) to offer "*ayuda necesaria para resolver conflictos a condición de que se le suministre combustible*" (C-284, page 5), Mr. Malbrán recognized that this arrangement was one of those reached during the period analyzed by BSR[2] which led that consulting firm to conclude that the CMMK policy on aid "*may reinforce the perception that support for the project is being 'bought'*" (C-154, page 16). In spite of the latter, in February 2011 (R-163), Mr. Angulo kept holding meetings with Mr. Condori to discuss a "*planteamiento económico*" for him to "*continua[se] apoyando el proyecto minero y coadyuva[se] en todo lo que se refiere al proyecto minero*" [D3:P653-654:L18-1 (Malbrán)].

32. *Second*, SAS' witnesses admitted that the hiring of Mrs. Carmen Huanca for the CMMK community relations team caused greater problems. On one hand, Mr. Mallory admitted that some community members explained the "*vote asking for the exit of the Company*" [D2:P371:L8-11] (i.e. R-49) in the fact that "*the problems were initiated last year [2010]*

[2] D3:P649-650:L23-1 (Malbrán) ("*P. De tal manera que cuando aquí BSR hace referencia a donaciones que ocurrieron en el 2007, puede estar haciendo referencia a eso. R. Pudiera hacer referencia a eso*").

in September by Carmen [Huanca] in Cabildo de Takahuani," [D2:P371:L9-11]. On the other hand, Mr. Malbrán admitted that "*existían ciertas diferencias entre la señora Huanca y el resto del equipo de relaciones comunitarias de CMMK*" [D3:P660:L17-20] that might be "*afectando la forma como CMMK estaba informando a las comunidades sobre el Proyecto*" (D3:P662:L11-14). The problems between Mrs. Huanca, the Local Communities and other CMMK employees were so serious that Mr. Mallory had to fire her [D2:P371:L13-14].

33. *Third*, even more shocking is the candor with which SAS' witnesses admitted that CMMK never "socialized" the real implications of the Project, in spite of the fact that BSR pointed in 2009 the existence of a "*clear lack of information about the impacts of mining and industry best practices in the external stakeholders groups surveyed*" (C-154, page 23) and that "*[w]orkshops on basic mining concepts or environment should not be substitutes for the company's presentations on project status and progress*" (C-154, page 15 (emphasis added)).

34. Indeed, Mr. Angulo confirmed that, as to "*la gente del lugar […] hay que volver a enseñarle igual que a un niño*" [D2:P513:L12-14], CMMK did not take the effort to explain to the Communities what the Project was about nor the implications of exploiting an open pit mine [D2:P513:L7-10; Bolivia Opening Statement, slide 12]. Mr. Angulo also didn't make any effort for the Communities to be informed on the exploration activities effects. For example, aware of the complaint by a community member about the death of a sheep that drank water from a river neighboring the exploration area, Mr. Angulo demanded evidence of such pollution instead of explaining to her about the use of water by CMMK

or offering a solution. The coldness with which Mr. Angulo solved this matter is a reflection of the way in which CMMK carried out its community relations.[3]

35. On the other hand, when asked about the Communities complaints as to the lack of information about the ecological impact of the Project, Mr. Malbrán pointed out that by 2011, "*era difícil transmitir una versión de lo que ellos [i.e. los comunarios] esperaban*" [D3:P652:L4-13]. After 7 years of exploration, the former Manager of CMMK and Founder of SASC did not even know what Communities were expecting.

36. [redacted]

[3] D2:P524-525:L20-1 (Angulo) ("*Entonces en el terreno le preguntó la señora que le dijo 'se me murió la oveja', y la respuesta que usted le dio es: 'Usted me tiene que demostrar que la oveja había tomado agua contaminada y, como se comieron la oveja, no hay nada que hacer'. ¿esta fue la respuesta? R. Así es*").

37. The latter confirms the reasons why the Local Communities – specifically, Mallku Khota and Calachaca – rejected the Project by the end of 2010 with the support of the mayor authorities of FAOI-NP and CONAMAQ. Mr. Chajmi explained to the President of the Tribunal: "*va a disculpar. Lo antes, la empresa, a pueblos originarios […]. hay muchas cosas,* [redacted] [D4:P947:L15-20].

3.1.1.2.The Hearing also demonstrated that CMMK illegal abuses to silence the opponents of the Project caused serious violent events by mid-2012

38. Bolivia proved that, in order to create the appearance of Project approval, CMMK initiated, from the beginning of 2011, a strategy to gain followers in Communities further away from the Project. This strategy tried to silence the opposition from the Mallku Khota and Calachaca communities, located in the drilling area of the Project. This strategy was consistent with the intentions of SASC, a Canadian *junior* mining company, only interested in quickly finishing the exploration phase at the lowest possible cost in order to sell the Project to the highest bidder.

39. The hearing confirmed that CMMK's abuses not only harmed the rights of the Communities, but caused serious violent clashes that left no other alternative to the State than ordering the Reversion. For this purpose, (i) SASC hired Mr. Mallory (to initiate a program to buy the goodwill of distant communities) and (ii) CMMK [redacted] (to silence the Mallku Khota and Calachaca Communities).

40. *In limine*, the Tribunal cannot forget that the illegalities committed by CMMK were implemented [redacted] under the supervision and approval of Mr. Mallory and Gonzales Yutronic. In the words of Mr. Mallory, to adopt the

recommendations [redacted] was a decision "*that management would make, either myself or the General Manager*" [D2:P419:L22-23].

41. During the Hearing, SAS tried to put into question the credibility of Witness X in spite of the fact that [redacted] (unlike Mr. Angulo and Gonzales Yutronic, who receive a salary from SASC on a monthly basis just for being witnesses in this arbitration ([D2:P489:L20-22 (Angulo); D3:P556:L12-23 (Gonzales Yutronic)]). The Hearing confirmed that the CMMK abuses – [redacted] and regarding which SAS omitted to ask any questions during the Hearing (Bolivia Closing Statements, slide 42) – created a serious confrontation between Local Communities demanding that the State take any measures (including Reversion) to maintain public order in the region and prevent more deaths.

42. *First,* [redacted] It also did not cross-examine her/him on the induced sequestration by Saúl Reque, denounced by CMMK using witnesses that were not even in the place of the alleged events (R-75; Bolivian Opening Statement, slide 35). As proven by Bolivia in its submissions, these circumstances caused the police intervention in the

[4] [redacted]

Community of Mallku Khota on 5 May 2012, and the violent reaction of the community members.

43. This confrontation, in addition to the people wounded, resulted in [redacted] During the Hearing, SAS had no intention of clarifying these facts with Witness X. Mr. Gonzales Yutronic admitted that [redacted]

44. *Second*, the cross-examination of Mr. Mallory confirmed that COTOA-6A was not a Local Communities initiative given the alleged lack of representativeness of FAOI-NP or CONAMAQ, as held by SAS until the Hearing. On the contrary, COTOA-6A's origins are in "*the decision to form [an] ad hoc Committee [that] was made on the occasion of a meeting held by [CMMK]*" [D2:P393:L11-15].

45. In the same way, after reviewing several emails in which [redacted] suggested for COTOA-6A to send a letter or operative votes to the authorities – for example, to record the incidents that were affecting the interests of CMMK [D2:P399-400:L22-17; D2:P400-401:L16-4] – Mr. Mallory admitted that he could not "*identify any report on COTOA-6A's decision to send the letters Witness X mentions*" [D2:P402:L5-8]. His reticence to answer the questions on why [redacted]

[redacted] confirm that this organization – created to suit CMMK needs – lacked a self-will different than that of CMMK [D2:P405-406:L10-15].

46. *Third*, CMMK not only took care of forming a committee to silence the opponents (COTOA-6A), but actively supported them. This fact – openly admitted by Mr. Fitch in his second witness statement (paragraph 6) – was confirmed during his cross-examination: "*[i]n the sense that they were pro the Project, clearly we would be supportive of that opinion*" [D2:P335:L12-17].

47. The active support for COTOA-6A consisted in "*coaching*" its members [D2:P404:L5-6], the provision of banners prepared [redacted] and transportation and logistics to demonstrate in favor of the Project and against the opponents (R-79). [redacted]

This presence of community members from COTOA-6A remote to the Project was the cause of a massive demonstration in Acasio on 18 May 2012, with tragic results which compromised the lives of its inhabitants and even the former Governor Gonzales' life (R-17). In its strategy to silence the opposing Local Communities, CMMK took advantage once again of the confrontations between the Communities in Acasio and coordinated the filling of more reckless denunciations (R-84) against the opponents (Bolivia Opening Statement, slide 42; R-257).

48. *Fourth*, as the execution of the plans [redacted] required the commission of unlawful acts, it was necessary to "*encubrir la contabilidad de la [CMMK]*" [redacted]

[redacted]. The lack of an explanation of these payments made by Mr. Gonzales Yutronic or SAS should be considered an admission.

49. [redacted] As noted by Bolivia in its submissions, the arrest of Cancio Rojas – and his disappearance for several days until he was admitted to the Cantumarca prison in Potosi – caused a massive demonstration of CONAMAQ against CMMK (R-86) and the call for a march to La Paz that also became violent (Bolivia Opening Statement, slide 43 (with video)).

50. In its Closing Statement (slide 28), SAS took advantage of the fact that FAOI-NP and CONAMAQ are organizations that have presence in several departments of Bolivia and

provinces of Potosi in order to distract the Tribunal's attention from a relevant issue for this case: that CMMK's actions caused dissatisfaction among the highest indigenous authorities with presence in the region, which generated the reaction of indigenous authorities from all over the country. This fact shows to what extent the conflict created by CMMK escalated by mid-2012. The fact that the indigenous people marching to La Paz have or have not been from the area is irrelevant when analyzing the violence of the riots and the risks that CMMK actions were generating for the public order and the physical integrity of the people.

51. *Sixth*, SAS also didn't cross-examined Witness X [redacted]

The fact that CMMK called for this *cabildo* is especially serious because of three reasons:

52. First, despite the fact that Mr. Gonzales Yutronic admitted that "*no está bien que uno prepare antes*" the minutes of the meeting [D3:P596-597:L20-1], he never prevented Saúl Reque [redacted] "*hacer un borrador de acta*" (R-281) for such *cabildo* [D3:P596:L13-19 (Gonzales Yutronic].

53. Secondly, in spite of, as recognized by Mr. Mallory during his cross-examination, "*if there was no consensus for [a] meeting, then it shouldn't go ahead*" [D2:P368:L14-15], CMMK carried out this *cabildo* (C-49) although "*ni Mallku Khota ni Calachaca estaban*" [D3:P593-594:L24-1 (Gonzales Yutronic)] because they were marching to La Paz. This was admitted during the Hearing by Mr. Gonzales Yutronic, although he tried to minimize the seriousness of this fact stating that the march had taken greater strength in the city of Oruro [D3:P609:L14-23].

54. Thirdly, Mr. Gonzales Yutronic ended up admitting that CMMK was trying to supersede the previous consultation process, a citizen consultation mechanism of great importance in the Bolivian constitutional regime which must be performed "*antes de entrar a la fase de explotación de un proyecto minero*" [D3:P591:L12-17], by the operative vote to be signed at this *cabildo* [D3:P595:L11-15]. This fact confirms that CMMK had no intention to carry out a serious community relations program and was only intending to create the appearance of unanimous support for the Project to sell it to the highest bidder.

55. *Finally*, the intrusion, on 28 May 2012, in a *cabildo* being held in the area of Mallku Khota, by Fernando Fernandez and Agustin Cardenas – CMMK employees that SAS did not offer as witnesses – unleashed the serious events of violence in Mallku Khota that ended the life of the community member Jose Mamani (R-96; Bolivia Closing Statement, slide 44).

56. As will be noted below, the Hearing also confirmed that this violent situation created by CMMK left no other alternative to the State than to order the Reversion.

3.1.2. The Hearing proved that, despite its support of the Project, the State was obliged to order the Reversion

57. The Hearing proved that the Government acted at all times in good faith as mediator in the conflict between the Local Communities and that the public officials supported CMMK (even providing police presence) for the development of the Project. The latter also allowed putting in evidence the false accusations that SAS created during the arbitration to call into question such support (3.2.1). Similarly, the Hearing allowed to confirm that the Reversion was the only alternative that the State had to put an end to the escalation of violence caused

by CMMK by mid-2012 (3.2.2), which was part of SAS' Plan B to leave the country with an arbitration between hands.

3.1.3. Bolivia denied SAS' false accusations to downplay the support that the State gave at all times to the Project

58. In its written submissions, Bolivia proved that, given the growing conflict created by CMMK between the Local Communities, several government agencies gave their support to CMMK. The Hearing not only confirmed the latter but also revealed the false excuses made by SAS to conceal it.

59. In the *first place*, State's support to the Project was confirmed during the Hearing by SAS' own witnesses.

60. First, Mr. Fitch admitted that, in July 2012 (C-305), SASC was convinced that "*[t]he Bolivian Government authorities continue[d] in their efforts to restore peace and order to the Mallku Khota Region*" [D2:P328:L12-23]. For this reason, it had difficulties in explaining why his witness statements contradicted the contemporary documents [D2:P329:L19-24]. Finally, he recognized that, in any case, "*the Bolivian Government did show some support*" to CMMK [D2:P330:L11-16].

61. Second, Mr. Mallory recognized that, even by February 2012 (R-288), the then Governor Gonzales understood "*[CMMK's] concern about the situation with the Mallku Khota Communities*" [D2:P388:L20-24]. The latter contradicts the alleged attitude contrary to the Project that Mr. Mallory falsely denounced in his first (paragraph 26) and second declarations (paragraph 64).

62. Third, even Mr. Angulo recognized that, by March 2012, (C-272) "*distintas instituciones [i.e. COMIBOL y SERGEOTECMIN] también dijeron 'Estamos a favor de la empresa'*" [D2:P541:L1-7].

63. *Secondly*, the Hearing also confirmed that the State supported CMMK by sending policemen to the Mallku Khota area to prevent violent confrontations. The then Governor Gonzales confirmed that "*se envió y por todos los acontecimientos que ya los he relatado desde el mes de mayo [de 2012], y había una presencia permanente de policías que inclusive vinieron de otros departamentos. Hablo de Cochabamba y también de Oruro*" [D4:P870:L20-25]. The emails sent by Guillermo Fines – a key actor that SAS also did not offer as a witness – to the Canadian authorities submitted by Bolivia during the Hearing (in spite of SAS' efforts to conceal them) confirm the police support (R-300; R-301).

64. In sum, the Hearing and the evidence confirmed that, as pointed out by the then Governor Gonzales, "*lo que nosotros [i.e. la Gobernación] siempre hicimos fue cuidar la vida de la gente, porque para nosotros era lo primero. Y eso es lo que hice, generar espacios de diálogo*" to make the Project feasible [D4:P878:L4-7].

65. *Thirdly,* in spite of the latter, during the arbitration SAS made false accusations against the State that were denied during the Hearing.

66. First, SAS introduced the proposal to create a mixed company during the socialization meeting held in July 23, 2011, as a "*demanda*" of the Governor's Office.[5] Nevertheless, when he was asked about such "*demanda*", Mr. Mallory recognized that, even though it

[5] Gonzales Yutronic II; para. 28.

"*came from the Governor. It was a conversation he had with me as a suggestion*" [D2:P409:L6-7]. This explains why Mr. Mallory could not identify any decision "*regarding the ownership of the Project*" that was taken at that meeting and he had to confirm what was obvious: that CMMK was the only owner of the Project [D2:P375:L15-25].

67. Second, the Hearing confirmed that the alleged illegal mining activities to which SAS attaches so much importance were, in fact, a few community members "*moliendo piedras*" [D5:P1020:L17-19 (Witness X)], [redacted] This explains why MEDMIN (consulting firm for CMMK) did not identify any artisanal mining activity before December 2010 (C-145, page 78) and informed, by January 2012, that agriculture was the main economic activity of the Mallku Khota Community (C-146, page 4). This, also, matches the answers that Mr. Chajmi gave to Prof. Orrego Vicuña during his cross-examination [D4:P943:L1-6].

68. Insinuations by SAS in the sense that the Government slowed down the development of the Project in order to support these rustic mining works are meaningless. In fact, Mr. Chajmi clarified that, not having the proper means, the Local Communities were not able to exploit the Project by themselves [D4:P922-923:L19-4].

69. Third, the alleged economic interest that the State would have in the Project as to order the Reversion was also a false excuse by SAS.

70. It is false, on the one hand, that Bolivia had "*inventado*" the Immobilization Area to prepare the grounds for the Reversion. Mr. Malbrán confirmed that the Immobilization Area was a

zone (i) over which CMMK had no right whatsoever and (ii) that was assigned to COMIBOL since 2007, long before the first EPA [D3:P677:L4-16].

71. On the other hand, it is false, as the State proved in its written submissions and during the Hearing, that there was a cooperation agreement with Chinese investors for them to take over the Project (the proof of this is that, 4 years after the Reversion, there is not any kind economic exploitation of the area). So it was expressly confirmed by COMIBOL to the Procuraduría General del Estado on the occasion of SAS' document request in that regard (R-177).

72. As Bolivia explained in its Rejoinder (section 2.4), the State must develop any mining project under its responsibility. This also matches Mr. Navarro's statement, which SAS draws from context in its Closing Statement (slide 18). Nonetheless, the Project will only be exploited as long as the State complies with what was agreed with the Local Communities. In the words of the then Governor Gonzales, "*el Estado de todas maneras tiene que ponerse de acuerdo con las comunidades. Se realiza la consulta correspondiente y ellos aprueban a través de una consulta para que pues el proyecto vaya adelante […]. Necesariamente tiene que haber un acuerdo con las comunidades a través de una consulta*" [D4:P880:L8-19].

3.1.4. The Hearing proved that the escalation of violence caused by CMMK by mid-2012 left no other alternative to the State than ordering the Reversion

73. Bolivia proved that, as a consequence of CMMK's actions, the North of Potosi experienced very serious episodes of violence that left no other alternative to the State than ordering the

Reversion (Bolivia Closing Statement, slide 44). The Hearing confirmed that this was the most appropriate measure to pacify the area for, at least, two reasons:

74. In the *first place*, the then Governor Gonzales had the opportunity to explain why other measures (such as the militarization proposed by SAS) are not effective to solve the conflicts with the Local Communities [D4:P877:L8-14]. Referring to the same events, Minister Navarro clarified that, in practice, the presence of the military to defend a mining project privately held had harmful consequences in the past [D3:P758:L2-14].

75. *Secondly*, Mr. Chajmi confirmed that "*hoy en día estamos tranquilos los que peleábamos con nuestros hermanos […] hoy estamos en un solo plato tranquilo, en paz con nuestras familias, la circulación tranquila*" [D4:P947:L21-25].

76. It is an indisputable fact, therefore, that the Reversion was an effective measure to cease the violence caused by CMMK. SAS' questioning about its effectiveness is merely speculative and it does not take into account, once more, the socio-cultural characteristics of the Communities in the North of Potosi.

3.2. The illegality of CMMK's conduct justifies that the Tribunal reject SAS claims

77. The facts reported above can and must be subject to different legal qualifications under International Law of investments and, therefore, to allow different solutions. In this sense, for example, the Tribunal in the *Copper Mesa* case, presided by Johnny Veeder, held the following (RLA-281, paragraph 6.97):

> *For present purposes, the Tribunal considers that the general approach taken in all these decisions, whether treated as causation, contributory fault (based on*

> *wilful or negligent act or omission) or unclean hands, is materially the same, deriving from a consistent line of international legal materials. The Tribunal decides to apply that general approach in this case. As further explained below, it decides that the Claimant's injury was caused both by the Respondent's unlawful expropriation and also by the Claimant's own contributory negligent acts and omissions and unclean hands. Given that the Tribunal draws no distinction between these different concepts for this case, it prefers to refer only to Article 39 of the ILC Articles*.

78. Thus, as Bolivia explained in its written submissions and during its Closing Statement (D5:P1884-1886:L5-17; slides 45 to 49), SAS and CMMK abuses can and should lead the Tribunal to the inexorable conclusion that:

a. The alleged investment by SAS is illegal and, accordingly, the Tribunal has no jurisdiction to resolve this dispute;

b. SAS claims are, in any case, inadmissible, because of its lack of "*clean hands*";

c. if, *par impossible*, the Tribunal finds that it has jurisdiction and SAS claims are admissible, there is no causality between the actions of the State (according to national and international Law) and the alleged damages to SAS (for being exclusively a consequence of its own acts); or

d. at most, the Tribunal shall reduce any sanction in this case by, at least, 75% to reflect SAS' contribution to its own damages.

79. Given the extreme seriousness of the facts in this case, solutions in subsections (a) and (b) of the preceding paragraph are the most appropriate.

4 THE HEARING PROVED THAT SAS DID NOT SUFFER ANY CERTAIN DAMAGE AND THAT, IN ANY CASE, ANY COMPENSATION SHOULD BE LIMITED TO THE REIMBURSEMENT OF COSTS

80. If, *par impossible*, the Tribunal finds that it has jurisdiction and that Bolivia breached any obligation under the Treaty, the Hearing confirmed that SAS' economic claims are baseless. The lack of seriousness of the *restitutory* claim was confirmed at the beginning of the Hearing, when SAS gave it up (4.1). Regarding the *compensatory* claim, the Hearing proved that SAS did not suffer any certain damage (4.2) and that, in any case, in accordance with the most recent jurisprudence, the compensation should be limited to the reimbursement of the expenses incurred in the Project (4.3). If the Tribunal decides to apply (*quod non*) the "*Frankenstein*" methodology of FTI, the Hearing proved that such valuation weights in an *arbitrary* manner three deficient valuations and that it does not reflect the fair market value (the "FMV") of the Project (4.4). In this case, if the Tribunal rejects the reimbursement of expenses (*quod non*), the Project could only be reliably valuated based on the value of SASC's share (4.5).

4.1. SAS waived its restitutory claim at the beginning of the Hearing, confirming its lack of seriousness

81. Bolivia raised the lack of seriousness of SAS' restitutory claim from the beginning of this arbitration (for example, paragraph 514 of the Counter-Memorial: "*SAS no presenta ningún comentario de doctrina o decision que sustente su pretensión restitutoria*"). This was confirmed at the beginning of the Hearing, when SAS waived this claim [D1:P17:L11-14 (SAS Opening Statement)].

82. Bolivia incurred serious expenses to respond to SAS' claim for restitution, a reason why the Tribunal should take into consideration SAS' waiver when deciding on the arbitration costs.

4.2. The Hearing confirmed that the damages claimed by SAS are not certain and are based on mere speculations

83. It is undisputable that SAS bears the burden to prove the certainty of its damages, a burden that – as SAS' witnesses and experts confirmed during the Hearing – has not been satisfied.

84. The Hearing confirmed that all damages claimed by SAS are based on mere *speculations* on the results of a pending exploration – in a remote and uncertain future – in a mining Project that is still in an incipient stage (as we will see, according to SAS, it had to drill between 120,000 and 150,000 meters to complete the exploration phase, that is, between 3 and 4 times more than what was drilled by the time of the Reversion) (4.2.1). It is not in dispute that the Project has no mineral *reserves* (but only mineral *resources*, most of which has no certain economic value) (4.2.2) and that, by July 9, 2012 ("Valuation Date"), the metallurgical process that SAS required for the feasibility of the Project (the "Metallurgical Project") was incomplete and it was only being tested on synthetic laboratory samples (4.2.3). Mere speculations cannot serve as a basis for a multimillion dollar damage claim.

4.2.1. SAS' witnesses recognized that the Project was in an incipient phase and required a lot more exploration to evaluate its feasibility

85. It is not in dispute that, by the Valuation Date, the Project was in an incipient phase and there was still a lot of exploration to carry out in order to evaluate its feasibility. This was recognized by SAS and its experts during the Hearing.

86. On one side, RPA recognized that the Project only had a *Preliminary Economic Assessment* (PEA) [D6:P969-970:L24-10], a scoping study that only serves to define – on the basis of uncorroborated premises – if it is worth to continuing to explore. In the words of RPA, "*So, after the Preliminary Economic Assessment, [the purpose is] to make a decision whether or not to spend more money on the Project*" [D6:P1112:L21-23]. Since, as recognized by Mr. Cooper, "*there is a lot of uncertainty still at the stage of a Preliminary Economic Assessment*" [D8:P1517:L18-21], PEA cannot serve as a basis for a technical and/or economic feasibility assessment of a mining Project [D6:P1120:L5-7].

87. On the other side, RPA also recognized during the Hearing that the Project does not have a Pre-Feasibility Study. When asked "*And [the Project] has no feasibility or Pre-feasibility Study; correct?*", RPA answered "*No. That's correct*" [D6:P969:L21-23]. Only through a Pre-Feasibility Study the technical and economic feasibility of a mining project can be determined. This was admitted by RPA: "*[a mining project] can only be demonstrated to be economic by a Pre-Feasibility or a Feasibility Study*" [D6:P1120:L5-7].

88. Therefore, it is not in dispute that, by only having a PEA, the Project was in an incipient phase of development and its technical and/or economic feasibility was uncertain. As recognized by RPA, "*right now there is no demonstrated economic viability, and* ***there is no guarantee that [the Project] will be economically viable at some state****"(...) "****There's***

a risk that the next study level may say, okay, it's not really worth doing more investment*"* [D6:P1121-1122:L1-8].

89. The letter SASC sent to the Canadian Embassy in Lima, on May 31, 2012 (R-299), and which SAS should have communicated to Bolivia according to Category 11 of its document request [D2:P352:L3-8 (President Zuleta)], confirms the incipient phase of the Project and that there was still a lot exploration (and investments) to be carried out. In said letter, SASC noted that "*We expect to have to undertake between 120,000 and 150,000 meters of additional diamond drilling and will be required to make substantial additional investments in technical, environmental, social and feasibility studies over the next 2-3 years (…)*". Since, by the Valuation Date, there were only 40,000 meters drilled (R-299), this letter shows that SAS knew about the necessity to drill between 3 to 4 times more (and to make large investments) to evaluate the technical and/or economic feasibility of the Project.

90. It is also not in dispute that the Project does not include the studies (social and environmental) nor the necessary permits for its development, nor is it guaranteed to be financed. For example, SAS had to comply with the Equator Principles in order to – where appropriate (*quod non*) – be able to obtain financing for the Project, which is very unlikely to have happened given the relation with local communities. SAS did not cross-examine Bolivia's experts on any of these issues during the Hearing.

91. SAS hopes the Tribunal will evaluate the Project as if it were an ongoing mining project, assuming that, by the Valuation Date, (i) its technical and economic feasibility was proven and (ii) it would have obtained all the studies and permits (and capital) needed to be

developed. For example, during the Hearing, RPA stated that "*there's metallurgical risk here [at the Project], but our assumption was that* ***our valuation was based on the assumption that the process would work***" [D6:P1012:L22-24]. This is a fundamental mistake because the Project faces risks that cannot be ignored. SAS could have filed a loss of opportunity claim (that reflects a discount for the risks of the Project) but it did not [D9:P1899:L4-15 (Bolivia Closing Statement)]. Aware of this error, during the Hearing SAS attempted to get RPA to present a new valuation of the Project reflecting its risks [D6:P1122-1128:L20-3 (Mr. Burnett)] but, as the Tribunal stated, it was too late to correct the error [D6:P1125:L18-21 (President Zuleta)]. The Tribunal should reject SAS' claim for damages. The Tribunal cannot, without violating due process, supersede SAS in proving its damages.

4.2.2. SAS' witnesses recognized that the Project has no mineral *reserves* and that it only has, mostly, *inferred* mineral *resources* that, probably, do not exist and that, in any case, have no certain economic value

92. The Hearing confirmed that the Project only has mineral *resources*, but no mineral *reserves*. In the words of RPA, "*[the] [i]mportant fact here is that the Mallku Khota contains mineral resources, but not mineral reserves*" [D6:P933:L8-9].

93. *First*, it is not in dispute that the mineral resources consist in "*mineralization and natural material (…) which has been identified and estimated through exploration and sampling and within which Mineral Reserves* ***may subsequently be defined*** *by the consideration and application of technical, economic, legal, environmental, socio-economic and governmental factors*" [CIM Definitions, page 4, **R-125**]. The existence of mineral

resources, therefore, does not imply that it is technical and/or economically feasible to remove them from the subsoil.

94. *Second*, only mineral reserves have proven economic feasibility, because they are determined "*after taking account of all relevant processing, metallurgical, economic, marketing, legal, environment, socio-economic and government factors*" [CIM Definitions, page 6, *Id*.]. Only a Pre-Feasibility or Feasibility Study – that, as we have already seen, do not exist in this case – can determine the existence of mineral *reserves*. As explained by RPA "*[a]t the PEA stage, by definition, **you cannot demonstrate economic viability** and convert resources into reserves*" [D6:P1120:L7-9]. In spite of the latter, SAS hopes that the Tribunal will evaluate the Project as if it was an ongoing mining project which technical and economic feasibility was already proven.

95. *Third*, in addition to not having mineral *reserves*, most of the Project's mineral *resources* are *inferred* resources, that is, resources that – as recognized by RPA – have the lowest level of geological certainty of all mineral resources [D6:P932-933:L25-3]. By simply "validar" the resources estimate performed by GeoVector [D6:P941:L12-13 (RPA)]), which did not appear in this arbitration, RPA confirmed during the Hearing that the *inferred* resources of the Project represent, at least, 47% of the total resource estimates of the Project [PEA 2011, page 112, **C-14**] (according to Prof. Dagdelen's estimate, 60% - Bolivia Opening Statement, slide 78). Since these resources are, by definition, "*too speculative geologically to have the economic considerations applied to them*" [NI 43-101, paragraph 2.3(3)(a), **DAG-3**], they have no certain economic value.

4.2.3. SAS witnesses recognized that, by the Valuation Date, there was no certainty that the Metallurgical Process worked or would work in the future

96. Mr. Dreisinger admitted that, by the Valuation Date, the Metallurgical Process was incomplete and was only being tested on synthetic laboratory samples (4.2.3.1). In any event, Mr. Dreisinger admitted to having a direct economic interest in the outcome of this arbitration, therefore his testimony lacks credibility (4.2.1.2).

4.2.3.1. The Metallurgical Process was incomplete by the Valuation Date and it was only being tested on synthetic laboratory samples

97. The Hearing proved that, by the Valuation Date, there was no certainty that the Metallurgical Process could work someday, and that the statements by Mr. Dreisinger to sustain the alleged feasibility of the Metallurgical Process are based on a report from SGS after the Valuation Date.

98. *First*, Mr. Dreisinger recognized during the Hearing that his testimony regarding the Metallurgical Process feasibility was based in *Flowsheet B* only [D7:P1290-1291:L22-16]. He explained that *Flowsheet B* replaced *Flowsheet A* [D7:P1290-1291:L22-6] because in the latter the iron contained in the solution consumed a large quantity of hydrochloric acid and prevented the economic extraction of the metals. When asked "*So, **in order to make the process economically viable**, you have to find a way to sort of recycle part of the acid so that it could be reused; is that right?*", Mr. Dreisinger answered "**Yes**" [D7:P1278:L10-13]. *Flowsheet B* created a phase in the Metallurgical Process to remove the iron (which consumed a good part of the hydrochloric acid) and recycle the hydrochloric acid [D7:P1277-1278:L14-2]. As explained by Mr. Dreisinger, "*if you compare Flowsheet A*

and Flowsheet B there would be a reduction in acid required, and more value return to the process (…)" [D7:P1292:L6-8].

99. This is relevant because, as it was proven during the Hearing, *Flowsheet B* did not exist by the Valuation Date. Indeed, Mr. Dreisinger recognized that – several months after July 2012 – laboratory tests were still underway in order to avoid the re-introduction of iron [D7:P1296-1297:L20-5], as well as to evaluate the results on Zinc (October 2012 – D7:P1299:L5-8]), Indium and Gallium (August 2012 – D7:P1299:L14-18]) precipitation, and there were still several tests to be performed in what later on was going to become *Flowsheet B* [D7:P1299-1300:L19-13]. SAS' report on which its metallurgical arguments are based and on which, by the first time, *Flowsheet B* appears, is an SGS report from August 2013 (C-133), that is, over 1 year after the Valuation Date. There is, therefore, no evidence that *Flowsheet B* existed by the Valuation Date.

100. Accordingly, on the Valuation Date, *Flowsheet B* did not exist and it was uncertain if the Metallurgical Process could economically extract the metals of the project (among them, Indium and Gallium). This is fundamental because, according to PEA 2011 estimates, the estimated value of the Project is reduced by 50% under the "clásico" method of *cyanide-leaching* [D6:P1011-1012:L14-6 (RPA)].

101. *Second*, RPA confirmed that the Metallurgical Process was *incomplete* by the Valuation Date [D6:P1003:L15-18], and Mr. Dreisinger recognized that the pilot plant was not yet constructed that would allow the determination of the *real* level (if any) of metal recovery [D7:P1263-1264:L22-1] and the costs of such a process (which, as explained by Prof. Taylor, "*have a great impact on profitability*" – [D7:P1308:L17-18]).

102. *Third*, the Hearing confirmed that the Metallurgical Process was not tested on the Project's samples but only on synthetic laboratory samples, that is, "*prepared solutions that are meant to mimic the actual leach solutions [that would be expected] to come from the bottom of the heap leach*" [D7:P1288:L9-11 (Dreisinger)]. This was recognized by Mr. Dreisinger, by noting that "*detailed flow-sheet development test work was conducted using experimental and synthetic leach liquors*" [*Id.*]. The metallurgical Process was never tested on real solutions from the minerals of the Project [D7:P1288:L2-6 (Dreisinger)], which – considering the "*unique mix of elements and minerals with highly variable ore types and mineralogy*" of the Project – makes it uncertain that it could have worked [D7:P1310:L1-2 (Taylor)].

103. *Fourth*, the Hearing confirmed that the Metallurgical Process "*is a new technology, [that] has no predecessors*" [D7:P1315-1316:L25-2 (Taylor)]. As explained by Mr. Dreisinger, because of its novel character, the Metallurgical Process was patented in the U.S. [D7:P1279:L15-19]. Neither SAS nor its experts denied the documented cases on failed new metallurgical processes [D7:P1306:L3-13 (Prof. Taylor)], and SAS did not cross-examine Bolivia´s experts on this issue.

104. The admissions on the great uncertainty of the Metallurgical Process are relevant because, in addition to proving that SAS has not suffered any certain damage, they confirm that evaluations by FTI and RPA are not reliable (because they assume that the Metallurgical Process will work with 100% probability – section 4.5.2 *infra*).

4.2.3.2.In any case, Mr. Dreisinger admitted having a direct economic interest in the outcome of this arbitration, therefore his testimony lacks credibility

105. During the Hearing, Mr. Dreisinger recognized being the owner of ordinary shares, Class B shares and options in SASC and, consequently, having a direct economic interest in the outcome of this arbitration. When asked "*But you do have a financial interest in the outcome of this arbitration, do you not*"?, Mr. Dreisinger replied "*I do, by virtue of the shares, yes*" [D7:P1272:L18-20]. Among Mr. Dreisinger shares there are Class B shares which gives him the right to a "*portion of the proceeds from this arbitration*" [D7:P1270-1271:L24-2].

106. Mr. Dreisinger did not disclose his ownership of shares or his direct economic interest in the outcome of this arbitration in his witness statement or during the direct examination. He had to confess these facts when answering the questions by Bolivia during his cross-examination at the Hearing. These facts deprieve Mr. Dreisinger testimony of all credibility.

107. For all the above mentioned reasons, SAS has no right to compensation.

4.3. If, despite the latter, the Tribunal finds that SAS should be compensated (*quod non*) any compensation shall be limited to the reimbursement of the Project's expenses

108. *In limine*, the Tribunal will recall SAS' strong opposition to the incorporation of the *Copper Mesa* award to the record. This opposition is explained by, at least, two reasons:

109. *First*, the *Copper Mesa* award reveals that FTI's position in this arbitration contradicts the one it adopted in the *Copper Mesa* case, confirming its lack of independence and

credibility. In the *Copper Mesa* case, advised by FTI, the claimant proposed to evaluate the mining concessions based on the cost-approach, pointing out that such a methodology would allow one to "*calculate [the] fair market value*" [Laudo, párr. 7.3, **RLA-281**] and constitute "*one of the generally accepted approaches to valuation*" [Laudo, párr. 7.21, **RLA-281**]. This position is openly in contradiction with the position adopted by FTI in this arbitration.

110. *Second*, the *Copper Mesa* award confirms that the cost-approach is used by international arbitration tribunals to evaluate incipient mining projects, such as the Project. In *Copper Mesa*, taking into account that the mining concessions "*remained in an early exploratory stage with no actual mining activities*" [Award, paragraph 7.24, **RLA-281**], the tribunal found that the cost-approach was "*the most reliable, objective and fair method in this case for valuing the Claimant's investments*". The tribunal rejected any other valuation methodology as being "*uncertain, subjective, and dependent upon contingencies*" [Award, paragraphs. 7.24 – 7.27, **RLA-281**]. This is exactly the case of the Project. Indeed, besides the fact that the Project is in an early stage without any mining activity, the valuations proposed by SAS are "*inciertas, subjetivas y dependen de diversas contingencias*":

- The valuation based in alleged comparable (that FTI weights with 50%) is highly (i) *subjective* (the selection of the supposedly comparable properties is an inherently subjective exercise), (ii) *uncertain* (it yields a wide range of values, that gofrom US $ 13,8 M to US $ 1300 M) and (iii) *depend upon contingencies* (for example, that the Metallurgical Process works, a process that other "*comparable*" projects do not need in order to be feasible).

- The valuation based upon the analyst's reports (that FTI weights with 25%) is also (i) *subjective* (as stated by Cooper, "*they incorporate all kinds of assumptions that are personal to them*" [D8:P1501-1502:L23-1 (Cooper)]), (ii) *uncertain* (the range of values goes from US $ 117 M to US $ 992 M) and (iii) *depend upon contingencies* (for example, the premises of the Discounted Cash Flows – "DCF" – models that the analysts use).

- *Finally*, even though the *private placements of SASC´s shares* (that FTI weights with 25%) do not share these deficiencies, as explained in section 4.4.3 *infra*, the values used by FTI in April and May, 2012, should be rejected as they do not reflect the fall of various market indicators between that date and the Valuation Date (July 2012).

111. In ligh of the above, if the Tribunal finds that SAS should be compensated (*quod non*), such compensation should be limited to the reimbursement of the expenses incurred in the Project, equivalent to US $ 18.7 M [D8:P1548-1549:L16-2 (Brattle)]. As we will see in section 4.5.3 *infra*, from such amount it should be discounted the value of the Protected Information (US $ 6.2 M).

4.4. The Hearing confirmed that SAS' "Frankenstein" valuation is arbitrary and does not reflect the fair market value of the Project

112. *In limine*, the Hearing confirmed that SAS' valuation is based in an *arbitrary* weighting of three disparate unreliable valuations (which do not even reflect the Project´s FMV). This arbitrariness was recognized by FTI [D8:P1363:L11-15 (FTI)] and confirmed by Prof. Graham Davis ("*it's based on an arbitrary average of three unreliable estimates*"

[D8:P1547:L17-18 (Brattle)]). It only takes to slightly modify FTI weightings for its valuation of the Project to be reduced by more than half (from US $ 307.2M to US $ 155.02M) [Bolivia Closing Statement, slides 67 and 68]. This arbitrariness is, itself, sufficient for the Tribunal to reject SAS' valuation.

113. Without prejudice to the latter, the Hearing also proved that the three valuations on which FTI bases its calculation are *fundamentally* wrong and do not reflect the FMV of the Project. The analyst calculated the Project based on DCF methodology, regarding which all the experts agree in affirming that it is not applicable in this arbitration (4.4.1). RPA's valuation is based on *non-comparable* properties and ignores the fundamental risks of the Project (4.4.2). The private placements of shares months before the Valuation Date are not reliable either because they do not reflect the fall of several market indicators by the Valuation Date (4.4.3).

4.4.1. The analysts valuated the Project based upon DCF methodology, which – all the experts agree – cannot be applied in this case

114. At least two aspects are not in dispute and, as seen during the Hearing, are sufficient to reject the analyst's valuations that FTI intends to use.

115. On the one hand, it is not in dispute that the analyst's valuations are based upon DCF methodology. According to FTI: "*We stick to what [the analysts] did rely on, which was the DCF Approach*" [D8:P1434:L2-3].

116. On the other hand, it is not in dispute that the DCF methodology cannot be used to evaluate the Project. When asked "*And, in RPA's view, DCF analysis could not be run on Malku*

Khota because of -- because the Project was not sufficiently advanced (…), correct?", FTI replied "*Correct. They [RPA] concurred with our [FTI] view on the DCF*" [D8:P1436-1437:L21-2 (FTI)]

117. In spite of the latter, FTI weighted with 25% the valuation of the Project performed by the analysts. Trying to justify this evident incoherence, when asked "*And you still relied on the DCFs prepared by the analysts, right?*", FTI answered: "*I'll answer it exactly the same way I answered it last time: I don't rely on their DCF calculations. I rely on their conclusions (…)*" [D8:P1437:L3-7]. It is obvious that the conclusions of the analysts are based in their DCF model, so that the distinctions that FTI tries to draw is absurd.

118. Without prejudice of the latter, the Hearing also proved that Mr. Cooper's testimony is irrelevant. Allegedly SAS presented Mr. Cooper to convince the Tribunal to use the valuations of the analysts Byron, Edison, Redchip and NBF. Nonetheless, Mr. Cooper admitted during the Hearing that he did not even critically revise the valuations of such analysts and that SAS never asked him to comment on them [D8:P1506-1507:L8-2].

119. Mr. Cooper did not comment on any of the valuations by the analysts because, as Brattle proved, they are plagued with errors, are not independent and do not reflect the FMV of the Project [Brattle II, sección IV-B, **RER-5**]. Besides, during the Hearing, Mr. Cooper disclosed that he had performed his own valuation of the Project but he did not attach it to his expert report [D8:P1505:L18-23 (Cooper)].

120. For all the above mentioned reasons, the Tribunal should not consider the analyst's valuations.

4.4.2. The Hearing confirmed that RPA's valuation based on "comparables" is based on non-comparable projects, ignores fundamental risks of the Project and applies an arbitrarily wrong parameter (the MTR)

121. The Hearing proved that RPA's valuation based on alleged "comparables" is plagued with defects (in addition to not complying, as RPA recognized, with the CIMVal Rules [D6:P987-988:L10-13 (RPA)]). Even though there are defects in *every single one* of the steps of such valuation, it is enough for the Tribunal to find one wrong step in order to reject the whole RPA valuation.

4.4.2.1. The properties used as purportedly "comparable" are not really comparable to the Project and do not carry the same risks of the Project

122. The Hearing proved that RPA's valuation is not based on mining properties that are *really* comparable to the Project and, in any case, that its comparability analysis ignores the fundamental risks of the Project,

123. *First*, the analysts that follow SASC recognize that the Project is unique and has no comparable in the market. As recognized by FTI during the Hearing, such analyst consider that "*the mine [is] unique relative to most mines*", "*there are no real comparable properties with this kind of metal combination*", "*this is a pretty unique play*", etc. [D8:P1412-1416:L5-6 (FTI) y D8:1425-1428:L20-21 (FTI)]. Prof. Taylor also explained that "*[The Project's] ore contains a unique mix of elements and minerals with highly variable ore types and mineralogy. The PEA list of primary minerals shows significant differences in the conventional ore metals (...)*" [D7:P1310:L1-4 (Taylor)]. These

particularities of the Project, which are not in dispute, make it impossible to valuate it based on comparables.

124. Given the lack of *real* comparables, SAS' experts consider as purported "comparable" properties that do not comply with the minimum requirements of comparability in terms of, for example, stage of development, mineralogy and level of resource density [Direct Presentation of Brattle, slide 44].

125. In the *Bear Creek* case, FTI recognized the relevance of the geographical differences in the mining properties value [D8:P1441:L11-20 (FTI)] and did not consider as comparable properties located in different countries. In a clear contradiction with the latter, FTI weighted with 50% the valuation of the Project based upon 11 properties (out of a total of 12) located outside of Bolivia [D6:P995:4-7 (RPA)]. If RPA had considered the only "comparable" property located in Bolivia (Pulacayo), the value of the Project – under the same economic premises of the PEA – would be US $ 32.5 M [Brattle I, Workpaper 6, pág. E-7].

126. The Hearing also confirmed that there are other fundamental differences between the Project and the properties used as supposedly "comparable". For example, RPA recognized that the Project has a "*very, very low grade*" [D6:P995:L21-22 (RPA)] which is between 3 and 61 times lower than the "comparable" properties, and that the latter are not in the same stage of development of the Project [D6:P1145:L19-25 (RPA)]. RPA also recognized that the Project does not have gold (while 7 of the properties used as "comparable" do) [D6:P998-1000:L7-12 (RPA)] and that only the Project would have Indium and Gallium [D6:P1000-1001:L25-3 (RPA)].

127. *Second*, RPA recognized during the Hearing that its comparability analysis ignores fundamental risks of the Project. For example:

- RPA ignored the metallurgical risk of the Project. Despite recognizing that there is a risk that the Metallurgical Process do not work [D6:P1012:L22-24 (RPA)], RPA used as "comparable" projects that use *conventional* metallurgical processes [Bolivia Closing Statement, slide 75].

- RPA ignored the social risk of the Project. When asked "*Could you tell me where in the reports do you factor in for comparability purposes the social risks that were faced by the Malku Khota Project?*", RPA answered "*That's not factored in*" [D6:P1013:L11-14 (RPA)]. And all of this in spite of what RPA recognized, during the Hearing, that the social factor is relevant for comparability [D6:P1013:L18-25 (RPA)].

- RPA ignored the environmental risk of the Project. When asked "*[Did you consider] the environmental risk specifically at the [Malku Khota] property?*", RPA answered "*No, I would say just in general, in the country*" [D6:P1029:L6-11 (RPA)]. When asked "*Did you assess the relative comparability of the sensitive ecosystems in those other projects and Mallku Khota*", RPA answered "*I didn't do it*" [D6:P1031:L17-19 (RPA)].

128. The risks pointed out have a direct impact on the Project's value. By omitting them, RPA overvalues the Project and compares it with properties that are not *really* comparable, which invalidates its valuation.

4.4.2.2.The determination and application of an MTR in this case is arbitrary

129. The Hearing confirmed that, when *determining* and *applying* an MTR to the Project, RPA incorporated a degree of arbitrariness that invalidates its valuation.

a) Arbitrariness when <u>determining</u> the MTR of the <u>supposedly comparable properties</u>

130. The Hearing proved the arbitrariness of RPA when determining an MTR for the supposedly comparable properties, especially if they are compared with the *Bear Creek* case:

- In this case, RPA calculated an MTR considering 5 *option agreements*. On the contrary, in *Bear Creek*, FTI excluded the *option agreements* because "*they make the value of the underlying silver asset difficult to establish*" [D8:1439:L12-16(FTI)].

- In this case, RPA calculated an MTR taking into account transactions that took place <u>more than 5 years before</u> the Valuation Date [D6:P1046:L2-16 (RPA)]. On the contrary, in *Bear Creek* only transactions that took place "*two years before the Valuation Date*" [D8:P1446:L14-17 (FTI)] were considered. The date of the transactions is important because, as RPA recognized, the older the transaction is "*the less reliable that the information would be*" [D6:P1044:L21-25 (RPA)].

- RPA was based upon *historic* resource estimates of 4 properties in spite of the fact that the *Qualified Persons* (QPs) that performed such estimations said that they "*should not be relied upon or cannot be relied upon*" [D6:P1067:L20-23 (RPA)] to determine an MTR of the comparable properties [D6:P1066:L19-21 (RPA)]. RPA tried to justify this incongruity by stating that "*we didn't see any reason to question*

the historical resources *without doing any detailed review*" [D6:P1066:L23-25 (RPA)]. The justification is absurd. Without such "*detailed review*", and given the QPs warnings, the reasonable and diligent approach would have been not to rely upon unreliable historic estimates.

131. Beyond RPA's arbitrariness, the MTR is an unscientific method. If this method, as RPA holds, was reliable, the MTR of transactions that involve the *same asset* should be similar. Nevertheless, as Brattle proved, the MTR of Minas Chanca 1 and 2, and Rosario 1 are different from each other, which lacks any logic [Brattle I, párr. 108, **RER-3**].

b) Arbitrariness in determining the MTR applicable to the Project

132. The Hearing confirmed that RPA determined the MTR applicable to the Project (2%) in an *arbitrary* manner and, at best, purely *subjectively*.

133. *First*, despite that, in its expert reports, RPA had affirmed that it excluded the outliers based upon the "*year of transaction, size of mineral resource, and geographic region [de la propiedad comparable]*", RPA recognized during the Hearing that neither of these factors allowed it to explain why Dios Padre – the property with the lowest MTR and that, therefore, would have resulted in a lower valuation – was excluded from the group of "comparables" [D6:P1055-1057:L6-4 (RPA)]. Given this fact, RPA alleged that the exclusion was because of an "*[additional] analysis of the differences*" which is neither stated nor mentioned in its expert reports [D6:P1057:L7-8 (RPA)].

134. *Second*, in its expert reports, RPA had explained that, in order to determine the 2% MTR applicable to the Project (starting from a range MTRs of 0.10% to 9.6%), after excluding

the *outliers* (i) it created a comparability index, which when applied (ii) selected the "*middle-six transactions*" to (iii) *finally*, out of the range of such "*middle-six transactions*" (1.03% to 2.38%), select the 2% MTR applicable to the Project [D6:P949:L11-25 (RPA)].

135. Nonetheless, the Hearing proved that this process is totally subjective and cannot be validated. Brattle explained, regarding the comparability index, that "*They [RPA] eliminate **half the data** using this comparability index. **Again, that's impenetrable. We have no idea how they did their comparability index, there's no formulas for it***" [D8:P1574:L17-20 (Brattle)]. Also, the index is inconsistent, because it assigns ratios of comparability *different* to transactions on the *same mining property* (Minas Chanca 1 would be 60% comparable to the Project, but Minas Chanca 2 only 40%; there is the same inconsistency between Rosario 1 and 2) [Brattle II, paragraph 156, **RER-5**].

136. Equally, regarding the selection of the 2% MTR, Brattle explained that "***There is no way we as experts can try to replicate their 2 percent number**. That's in the opinion of Dr. Roscoe. (...) And one of the things I will point out that **CIMVal was trying to get away from is these black box valuations that are impenetrable to other experts***" [D8:P1571-1572:L16-1 (Brattle)]

137. During the Hearing, RPA tried to justify the arbitrariness in its determination of the MTR applicable to the Project pointing out that it is "*in line with [their] experience doing other studies, other Comparable Transactions Analysis where there is invariably a fairly wide range of MTR values*" [D6:P956-957:L20-3 (RPA)]. As confirmed by the *Copper Mesa* award, this justification is unacceptable. The valuation of the Project cannot be based upon the subjective and unverifiable judgment of one person.

c) Arbitrariness in applying the MTR to the Project's resources

138. The Hearing also confirmed that RPA applied the MTR to the Project's resources in an *arbitrary* manner, inflating the valuation.

139. *First*, RPA recognized during the Hearing that the *inferred* resources have a level of geological certainty lower than the *indicated* and *measured* resources. [D6:P932-933:L25-3 (RPA)]). However, it assigned to all of these resources the same value. This is inaccurate and *artificially* inflates the value of the Project. As explained by Brattle, the *inferred* resources "*should be valued differently from Measured and Indicateds* (sic)" [D8:P1646:L16-17 (Brattle)].

140. *Second*, RPA also recognized that the resources considered in its valuation (this is, *in situ* resources) can not necessarily be extracted. When asked "*You do accept, do you not, that [mineralized] material can be an in situ resource but not an in-pit resource*", RPA answered "*Depending on when you get to a design pit (...), then* ***some of that material won't be mined. It might be in a resource and not make it into that****"* [D6:P1087-1088:L17-2 (RPA)]. In spite of the latter, and that – as RPA recognized – the PEA 2011 considered that only 59% of the in situ resources would be removable [D6:P1089:L22-25 (RPA)], RPA valuated the Project "*assuming that a hundred percent of what is characterized as "resource" is to be mined*" [D6:P1095:L14-19 (RPA)]. RPA did not even perform a calculation of the *in-pit resources* of the Project [D6:P1095:L6-8 (RPA)]. With this, again, as explained by Prof. Dagdelen, RPA inflated the value of the Project [D7:P1174-1175:L19-20 (Dagdelen)].

141. *Third*, the Hearing confirmed that RPA *overestimated* the Project's resources by using a *cutoff grade* of 10 grams per ton of Ag-equivalent ("**gpt**") [D6:P1077:L9-12 (RPA)]. During this arbitration SAS never submitted <u>any calculation</u> that justifies such a low *cutoff grade*. Given the lack of basis, SAS tried to catch out Bolivia and Prof. Dagdelen during the Hearing submitting a new improvised calculation [D7:P1216:L7-18 (Sr. Burnett)]. Beyond unacceptability of this attempt (in breach of due process, for which Bolivia reserves its rights), such improvised calculation did not support SAS' position.

142. Specifically, SAS attempted to justify the *cutoff grade* of 10 gpt by increasing, in its calculation formula, the price of silver. *Ceteris paribus*, a higher price of silver would allow making economically feasible resources that, otherwise , would not be exploited. But it was proven that such analysis is incomplete and wrong by not reflecting the actual value of the other components of the formula (operative costs, general and administrative costs, metal recovery rate, etc.) [D7:P1218:L4-10 (Dagdelen)]. The arbitrariness of the *cutoff grade* used by RPA was, also, confirmed when compared to that used by SAS in PEA 2011, which is *considerably* higher (21.9 gpt) [D6:P1076:L13-16 (RPA)]. RPA used a very low *cutoff grade* because, as recognized during the Hearing, *"<u>as you increase the cut-off grade, **some of the tons drop out** because that means that **more resources below the cut-off grade would not be included</u>***" [D6:P1073-1074:L24-1 (RPA)].

143. When comparing RPA's resource estimates with Prof. Dagdelen's under their respective *cutoff grades* (10 and 20 gpt, respectively) it can be appreciated that the resources estimated by Prof. Dagdelen are *substantially lower* than the ones estimated by RPA. SAS attempted to confuse the Tribunal showing resource estimations under the same *cutoff grade* (of 10

gpt), which RPA recognized was incorrect [D6:P1147:L11-20 (RPA)], to conceal the magnitude of the differences between RPA and Prof. Dagdelen.

144. *Fourth*, the Hearing proved that RPA did not perform the *capping* when calculating the Project's resources. The latter, despite having recognized during this arbitration that it was appropriate to do it [D6:P1107:L12-14 (RPA) + **RPA-11**, page 7]. RPA did not perform the *capping* because "*[it] would reduce the total percentage of metal content by approximately 10.2 percent*" [D6:P1107:L15-19 (RPA)] and, therefore, it would have reduced the valuation of the Project.

145. For all of the above mentioned reasons, RPA's valuation should be rejected.

4.4.3. The Hearing confirmed that the Project´s valuation based on private placements of SASC's shares in April and May 2012, does not reflect the negative evolution of the market till the Valuation Date

146. FTI recognized that, between the date of the private placements of SASC's shares (April/May, 2012) and the Valuation Date of the Project, the price of the main metal of the Project (silver) fell 13% [D8:P1450-1451:L21-14 (FTI)], the Toronto Stock Exchange index fell 5% and the index of the other *junior* mining companies that FTI regarded as comparable to the Project fell 23% [Brattle II, IV-C, **RER-5**]. FTI did not reflect the negative evolution of any of these indicators in its valuation of the Project based upon the placements of April/May, 2012 [D8:P1417:L1-5 (FTI)], justifying itself in that "*short-term fluctuations in spot price will not change the underlying fundamentals or value of a project*" [D8:P1448:L16-18 (FTI)].

147. This is not a valid justification. As FTI recognized during the Hearing "*[i]f you're buying or selling a business or you're buying or selling a property, mineral property,* ***you're going to look at every piece of information as a buyer or a seller that you can, and you're going to consider it and you're going to weight it*** *(...)*" [D8:P1360-1361:L24-5 (FTI)]. A hypothetical buyer of the Project at the Valuation Date would consider, for example, the price of its *main* metal when deciding how much to pay for such an asset. Precisely, because the variations in metal prices and the other indicators are relevant, as Brattle explained during the Hearing, "*FMV changes day by day and you need to adjust it*" when carrying out a valuation [D8:P1625:L7-8 (Brattle)].

148. The available evidence confirms that the fall of the silver price and the other indicators till the Valuation Date did affect the value of SASC's shares and, accordingly, the Project. As FTI recognized during the Hearing, the value of SASC's shares in April/May, 2012, was *highe*r than in July, 2012 (which is consistent with the fall of the above mentioned indicators), and the sophisticated buyers who participated in the private placements of April/May, 2012, paid an almost identical price to stock market value – then – of SASC's shares (this is, they paid a *higher* price when market indicators were higher) [D8:P1455:L9-14 (FTI)].

149. It cannot, therefore, be denied that the fall of silver price and the other market indicators reduced the value of the Project. By failing to reflect such evolution, FTI's valuation based upon private placements of shares should be discharged.

4.5. The Hearing proved that the only reliable market valuation method, in case that the cost-approach is rejected, would be SASC's share value on the Valuation Date

4.5.1. The Hearing confirmed that SASC's share value reflects the value of its assets (and, with it, the Project), and that the latter can be evaluated in an objective and simple manner

150. *In limine*, by weighting with 25% the private placements of SASC's shares in April and May, 2012, [D8:P1388:L10-22 (FTI)], FTI recognizes that SASC's share value is indicative of the Project's fair market value.

151. As Brattle explained during the Hearing, to determine the value of the Project based upon SASC's share value is simple because:

- SASC is a publicly traded company in the Toronto Stock Exchange;
- By the Valuation Date, SASC only had two assets: the Project and Escalones; and
- The value of Escalones can be assed with a minimum range of error because, by the Valuation Date (1 August 2012), when 100% of SASC had a share value of US $ 14 M (after deducting available cash), "*the Company no longer owned Malku Khota. It only owned Escalones [y una eventual expectativa de compensación por la reversión de las Concesiones Mineras]*" [D8:P1553:L21-23 (Brattle)]. The value of Escalones, therefore, is between US $ 0 and US $ 14 M (depending upon the value assigned to the expectation of compensation).

152. In order to obtain the value of the Project, it would suffice to deduce from SASC's *Enterprise Value* as of the Valuation Date (US $ 81 M) (i) SASC's available cash (US $ 32 M) and (ii) the value of Escalones (US $ 0 and US $ 14 M), which gives a range of values for the Project between US $ 35 M and US $ 49 M [D8:P1516-1517:L21-4

(Brattle)]. SAS did not question this calculation during the Hearing, nor that such valuation, being based on the publicly traded value, is *objective*, *verifiable* and gives a *narrow* range of values [D8:P1558:L16-23 (Brattle)].

153. As Brattle explained, if the share value method ("*market capitalization*") was included in the CIMVal Rules as a secondary method it is only because "*Most companies have more than one major Project -- they might have two or three or four*", which makes it difficult to assess what value to assign to each one of the *major projects* [D8:P1587:L9-11 (Brattle)]. However, this is not SASC's case. The validity of the share value method cannot be seriously questioned either because such a method was not mentioned in an article published by Prof. Davis in 2003, an article which – as the expert explained – was focused on the analysis of other valuation methods [D8:P1606:L2-6 (Brattle)].

154. Given its lack of arguments, FTI attempted to catch on Bolivia during the Hearing with a *new* argument to discredit the relevance of share value [D8:P1568:L14-15 (Brattle)]. FTI affirmed, for the first time, that SASC's shares were traded – in April and May 2012, private placements – at a price lower than their fair market value because, as a *junior* mining company, SASC was "forced" to sell its shares to obtain financing ("*compelled transactions*") [D8:P1457:L4-12 (FTI)]. Given that SASC's shares in such placements were traded in prices almost identical to their stock market value, FTI attempted to demonstrate, with this new argument, that the stock market value would be lower than the fair market value of SASC's shares and, therefore, it would not properly reflect the value of the Project.

155. Nevertheless, there are, at least, *three* reasons why this argument cannot succeed. First, by the time of the private placements, SASC "*had a cash balance of approximately $24-$25 million*" [D8:P1556:L17 (Brattle)], this is, "*had the cash necessary to move forward with its operations*" [D8:P1643:L3-4 (Brattle)], therefore it had no urgency to get financing, thus rebutting the idea of "*forced*" selling. Second, this alleged urgency is also denied by the long time SASC took to advertise and place the shares [D8:P1617:L9-16 (Brattle)]. *Third*, FTI's argument would lead to the absurd consequence of accepting that "*in order to raise [16] million of capital, they [SASC] were willing to take a loss of 17 million*" [D8:P1459:L12-18 (FTI)].

156. Therefore, private placements of shares in April and May, 2012, were not "*forced*" and, as FTI recognizes, sophisticated well-informed buyers were part of them [D8:P1456:L15-18 (FTI)]. If the shares were traded at prices very similar to the stock market value, is because the latter reflects its fair market value.

4.5.2. During the Hearing it was confirmed that only a valuation based upon SASC's share value would properly reflect the risks of the Project

157. The Hearing proved that, in this case, only the share value method allows evaluating the Project by properly assessing the risks.

158. As presented in section 4.4.2.1 *supra*, despite the fact that the Project faced serious social and metallurgical risks by the Valuation Date, RPA ignored such risks in its valuation. This is incorrect because, as explained by Brattle, "*any valuation method should reflect [these risks] because <u>they affect the likelihood that the Project would succeed; and, if it succeeds, the magnitude of the cash flows that it can generate</u>*" [D8:P1558:L11-15 (Brattle)]. The

analysts' valuations did not consider the risks either (for example, when assuming in its DCF models that there would be incomes for Indium and Gallium, the analysts assumed that the Metallurgical Process would work with a 100% probability) and, even if they did, their weightings are completely subjective.

159. The valuation based upon share value reflects these risks in an objective manner. As explained by Brattle during the Hearing "*the advantage of the share-price method is that it reflects the market assessments of those risks. We don't have to take a stand and go and say we think the social license risk implies a 20 percent or 40 percent probability of failure. Or we think that the technology risk of failure is 20 percent. We don't have to make those assessments because we can't make those assessments*" [D8:P1558:L16-23 (Brattle) (emphasis added)]. The valuation based upon share value prevents, thus, introducing subjectivity in the analysis and reflects a real market valuation.

160. None of the latter is in dispute. During the arbitration, SAS has not questioned that the shares method reflects the risks of the Project, neither did it cross-examine Bolivia´s experts on these issues during the Hearing. And the aforementioned mentioned risks (metallurgical and social) are only *some* of the relevant risks. If, in general, *junior* mining companies like SASC have no access to bank financing it is because their mining assets are in an early stage and are exposed to serious risks that make their feasibility uncertain. A valuation that does not take into account these risks (like SAS') is, by definition, incomplete and overvalues the asset. Brattle's valuation based upon share value does reflect all of these risks inherent to the Project.

4.5.3. The Hearing confirmed that the Valuation Date of the Project should be 9 July 2012, and the value of Protected Information should be discounted

161. During the Hearing, SAS omitted again SASC's 9 July 2012, press release, informing the market that "*At this time there has been no change in the status of the Project concession*" (R-128). Given that it is not in dispute that Bolivia announced its intention to revert the Concessions by 10 July 2010, the valuation date of the Project should be the previous day (9 July 9 2012).

162. During the Hearing, FTI also recognized that, if Bolivia was ordered to compensate SAS because of the Reversion (*quod non*), the value of the Protected Information should be discounted from such compensation [D8:P1472:L17-22 (FTI)]. Neither SAS nor its experts questioned (i) the calculation of the Protected Information made by Brattle nor (ii) that there are third parties interested in acquiring such Information [D8:P1550:L2-7 (Brattle)]. SAS did not cross-examine Bolivia's witnesses on this regard either. Therefore, in case that the payment of compensation to SAS is ordered (*quod non*), such compensation should be reduced by US $ 6.2 M.

163. Finally, regarding the interests applicable to the payment of any compensation, SAS still has not answer Bolivia's arguments in its Counter-Memorial (SAS was silent on this issue during the Hearing). Bolivia requests that the Tribunal adopt the arguments held in section 7 of its Rejoinder.

5 RELIEF SOUGHT

164. For all the above, Bolivia respectfully requests the Tribunal to accept the relief sought by Bolivia in its Rejoinder (section 9).

Respectfully submitted on behalf of the Plurinational State of Bolivia.

[Signature]

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PROCURADURIA GENERAL DEL ESTADO

[Signature]

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DECHERT LLP