

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 Statement of Claim and Memorial

September 24, 2014

KING & SPALDING LLP
Henry G. Burnett
Roberto J. Aguirre-Luzi
Fernando Rodriguez-Cortina
Louis-Alexis Bret

On behalf of Claimant South American Silver Limited

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GLOSSARY OF TERMS

Area of Influence	Area comprised of communities within the actual concession area and also within a certain distance from the Project
<i>Ayllus</i>	The traditional form of community in the Andes, originally comprised of family groups, but now including various communities
Bolivia, Government, Respondent or State	The Plurinational State of Bolivia
Claimant	South American Silver Limited
CMMK	Compañía Minera Malku Khota, S.A.
COMIBOL	Corporación Minera de Bolivia
Company	South American Silver or, together with its predecessors, parents and subsidiary
CONAMAQ	National Council of Ayllus and Markas of Qullasuyu, an administrative council of the Bolivian State
Cooperatives or Mining Cooperative	Tax-exempt organization that pay royalties at lower rates than mining companies and is owned and run jointly by individual miners, the form of organization advocated by the Government to exploit the Malku Khota mineral deposits instead of the Company
COTOA-6A	<i>Coordinadora Territorial Originaria Autónoma de los Seis Ayllus</i> , the committee formed by the six ayllus comprising the expanded Area of Influence to communicate with the Company and Government agencies with respect to the Project

Fair Market Value, Market Value or FMV	The standard of compensation required under the BIT, that is, the price at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts
FAOI-NP	<i>Federación de Ayllus Originarios Indígenas del Norte de Potosí</i> , a political organization opposed to foreign investment
FENCOMIN	The Bolivian National Federation of Mining Cooperatives
FTI	FTI Consulting Inc., the damages valuation firm retained by South American Silver in this Arbitration
General Minerals	General Minerals Corporation Limited, a Bermudan corporation
GMC	General Minerals Corporation, a Canadian corporation and parent of General Minerals
GM Campana Ltd.	GM Campana Ltd., a Bahaman corporation owning 2% of CMMK and itself wholly-owned by South American Silver
HDGC	High Desert Gold Corporation
ILC Articles	The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts
Immobilization Zone	Area entirely surrounding the Project Area that was subject to COMIBOL Resolution DGAJ-0073/2001
Investment Law	Law No. 1182, published in the Gaceta Oficial No. 1662, September 17, 1990
Malku Khota Ltd.	Malku Khota Ltd., a Bahaman corporation owning 96% of CMMK and itself wholly-owned by South American Silver

Malku Khota Mining Project or Project	All mining activities and assets (tangible and intangible) related to and including the Mining Concessions
Mining Concessions	The ten mining concessions owned by CMMK: name Cobra, Daniel, Takhuani, Alkasi, Jalsuri, Takhaua, Silluta, Antacunna, Norma and Viento, covering an area of 5,475 hectares
Mining Law	Bolivian Mining Code, Law No. 1777, published in Gaceta Oficial No. 1987, March 17, 1997
MTR	Metal Transaction Ratio, the methodology devised by RPA to value Mineral Resource properties
Notice of Dispute	The Notice of Dispute delivered by South American Silver on October 23, 2012
Notice of Arbitration	The Notice of Arbitration submitted by South American Silver on April 30, 2013
PEA	Preliminary Economic Assessment Technical Report for the Malku Khota Project dated March 13, 2009.
PEA Update	Preliminary Economic Assessment Update Technical Report for the Malku Khota Project dated May 10, 2011.
Potosí or the Department of Potosí	The Department of Potosí where the Malku Khota Mining Project is situated
Productora Ltd.	Productora Ltd., a Bahaman corporation owning 2% of CMMK and itself wholly-owned by South American Silver
RPA	Roscoe Postle Associates, Inc., the mining consultancy retained by South American Silver in this arbitration
SASC	South American Silver Corporation, a Canadian corporation and parent of South American Silver
Silex	SILEX Bolivia, S.A.
South American Silver	South American Silver Limited, a Bermudan corporation

Supreme Decree	Supreme Decree No. 1308 issued on August 1, 2012 by the Government.
“Treaty”, “UK-Bolivia BIT”, or “BIT”	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, signed on 24 may 1988 and entered into force on 16 February 1990, extended to Bermuda on December 9,1992
TriMetals	TriMetals Mining Inc.
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	2010 Arbitration Rules of the United Nations Commission on International Trade Law
Valuation Date	July 6, 2012
Vienna Convention	The Vienna Convention on the Law of Treaties adopted on 22 May 1969 and entered into force on 27 January 1980

Claimant, South American Silver Limited (“South American Silver” or, together with its predecessor, parents and subsidiary, the “Company”) hereby submits its Statement of Claim and Memorial in this arbitration proceeding against the Plurinational State of Bolivia (“Respondent”, “Bolivia” or the “Government” or the “State”) pursuant to Article 8 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments, extended to Bermuda on December 9, 1992 (the “UK-Bolivia BIT” or the “Treaty”).

I. INTRODUCTION

1. This is a straightforward case of nationalization without compensation by the Government of Bolivia. At all pertinent times prior to the nationalization which commenced in July 2012, South American Silver, a Bermudan company, owned 100% of the shares of Compañía Minera Malku Khota (“CMMK”) through its Bahaman subsidiaries, Malku Khota Ltd., Productora Ltd. and GM Campana Ltd. CMMK is the Bolivian operating subsidiary of South American Silver Corp. (“SASC”, now TriMetals Mining Inc., “TriMetals”), a mining company focusing on the development and exploitation of silver mining projects in South America.
2. Prior to the nationalization, the Company’s business in Bolivia was established, extensive and its long-term prospects were bright. Since 1994, South American Silver and CMMK, and their predecessors, explored, discovered and developed vast mineral resources in Bolivia. In 2003, the Company identified promising silver mineralization near the village of Malku Khota in the Bolivian Province of Potosí. The Company subsequently engaged in extensive exploration efforts in the area, which led to the discovery of massive silver, indium and gallium deposits. Between 2003 and 2008, South American Silver, through CMMK, acquired or obtained title to ten mining concessions (together, the “Mining Concessions”) covering an area of 5,475 hectares centered on the Malku Khota mineral deposits (the “Project Area”).
3. As the Company was moving towards development and exploitation of the Malku Khota mining project (the “Malku Khota Mining Project” or the “Project”), it completed a Preliminary Economic Assessment (“PEA”) on March 13, 2009 based on resource

estimates of November 2008, and following an initial resources estimate conducted by the mining consultancy Pincock Allen & Holt earlier in 2008. After conducting significant additional exploration, the Company published the results of the PEA Update on March 31, 2011 and issued the corresponding complete technical report on May 10, 2011. The PEA Update revised the measured and indicated resource estimate for the project to 230.3 million ounces of silver, 1,481 tons of indium and 1,082 tons of gallium and inferred resources of 140 million ounces of silver, 935 tons of indium and 1,001 tons of gallium. The PEA Update also contemplated an annual production of 13.2 million ounces of silver and approximately 80 tons of indium and 15 tons of gallium, as well as significant quantities of copper, lead and zinc. The PEA Update indicated a pre-tax net present value for the project at a 5% discount rate comprised between US\$704 million and US\$2.571 billion depending on metal prices. It was clear that the Malku Khota Mining Project ranked among the largest silver, indium and gallium resources in the world.

4. Beginning about a year before the nationalization, the Government began a campaign to obtain a participating interest in the Malku Khota Mining Project. On April 26, 2011—a few weeks after the publication of the PEA Update results on March 31, 2011 and after a meeting between the Company’s top executives and Bolivian Government officials where the Company explained the magnitude and potential of the Malku Khota deposit—the Government issued Resolution DGAJ-0073/2001, declaring an area entirely surrounding the Project Area as an “Immobilization Zone.” The resolution prohibited the company (or anyone else, for that matter) from acquiring mineral rights for the areas surrounding the Project Area. South American Silver was suddenly no longer able to freely expand the Project Area to exploit continuing mineralized areas or to expand the footprint of the planned mine. Instead, the Company would have to partner with the Bolivian national mining company to do so.
5. Immediately afterwards, Government officials including the Governor of Potosí, Felix Gonzales, and the Minister of Mining, Mario Virreira, began to advocate for the constitution of a “joint-enterprise” where the Government would obtain a large participating interest in the Project or a “mining cooperative” where the local communities and the Government would jointly develop and exploit the vast Malku

Khota silver and indium deposits. At the same time, the Company was facing the opposition of a small group of illegal gold miners who opposed the project in order to continue their illegal, dangerous and extremely polluting activities in the Project Area. As this opposition began to disrupt the CMMK's activities, the Company repeatedly requested the State's assistance in enforcing the Company's mineral rights and pacifying the area.

6. The Government, however largely ignored the Company's entreaties to address the situation and decided instead to use the disruption caused by the illegal miners to its own advantage. Instead of expressing support, the Government fueled the opposition against the Company to force it to cede a stake in the Project, even suggesting that the Company give a portion of its concessions to the illegal miners. Matters worsened substantially between August 2011 and April 2012 when Government officials repeatedly expressed their support in public for the creation of a mining cooperative led by the illegal miners to exploit the silver and indium resources discovered by the Company in the Malku Khota area.
7. By July 2012, the Government decided that the violent opposition between supporters and opponents of the project over the previous months could constitute a good excuse to take over the Project. On July 7, 2012, the Government signed a "Memorandum of Agreement" with the activists opposing the Project whereby: (i) "the Mining Concessions held by South American Silver 'Mallcu Quota S.A.' will be annulled;" (ii) "Control of said mining areas shall revert to the Plurinational State of Bolivia;" and (iii) "the National Government will end and desist from all proceedings, investigations, warrants and persecutions against the leaders of indigenous groups and unions, the authorities, leaders and members of the 5 provinces of the Northern Potosí area within the Mallcu Qota conflict in defense of non-renewable natural resources." Simply put, the Government decided to nationalize the Company's lawfully-acquired property and to grant complete immunity to the authors of the violent campaign against the Project.
8. Three days later, on July 10, 2012, President Evo Morales himself pressured local community representatives supporting the project into agreeing that: "The State shall take over the entire production chain at the Malku Qhota Mining Center." On August 1, 2012,

President Morales and his Government issued Supreme Decree No. 1308 (the “Supreme Decree”), which formally nationalized the ten Mining Concessions held by CMMK. While the Supreme Decree also provided for the principle of compensation to the Company, Bolivia never paid or offered any compensation to South American Silver or CMMK, let alone the “prompt, adequate and effective compensation” required under the Treaty.

9. It is uncontroversial on the facts of this case that Bolivia expropriated the Malku Khota Mining Concessions, without paying prompt, adequate and effective compensation. There can therefore be no doubt that Bolivia has breached its obligations under the Treaty, particularly the prohibition against expropriation. The illegality of Bolivia’s expropriation is thus clearly established in light of the treaty and international law and it falls now to this Tribunal to determine the reparation owed to South American Silver for the total expropriation and nationalization of its investment in the Malku Khota Mining Project.
10. To that end, it is a well-established principle of customary international law that a claimant whose investment has been subject to an unlawful expropriation is entitled to, restitution in kind and damages for any additional loss not covered by the restitution in kind. As for compensation when restitution is not available, both the Treaty and customary international law require “full compensation” for the nationalization, generally understood as the fair market value (“FMV”) of South American Silver’s 100% interest in the Malku Khota Mining Project as of July 6, 2012—the date immediately preceding Bolivia’s announcement of the nationalization (the “Valuation Date”). South American Silver has retained Howard N. Rosen and Chris Milburn of FTI Consulting (“FTI”) to calculate the FMV of its interest in the Project (expressed as the value of its shares of CMMK). FTI performed a valuation of the Claimant’s interest in the Project under a market-based approach to value by using three sources of market based information including comparable transactions, analyst reports on the Claimant’s parent company SASC, and private placement transactions involving SASC’s shares in the period prior to the Valuation Date. South American Silver retained Roscoe, Postle & Associates (“RPA”)—the leading mining consultancy—to conduct a comprehensive evaluation of the Malku Khota mineral resource and to perform Metal Transaction Ratio (“MTR”)

analysis to value the project on the basis of comparable transactions. Based on these sources, FTI estimates that the FMV of the Malku Khota Project at the Valuation Date was **US\$307.2 million**, excluding pre-award interest.

11. To calculate the value of the additional damages owed to South American Silver if the Tribunal chooses to award restitution of the Mining Concessions, Claimant has also retained FTI, who are among the most renowned and respected independent experts in the world for this type of valuation. FTI estimates the loss South American will incur as a result of the delay in advancing the Project from 2012 to at least 2016 (the date of the Award), and the potential increase in project-related risk factors caused by Bolivia’s conduct. This loss consists in the difference between the estimated value of the Project absent or “but-for” Bolivia’s unlawful measures on the Valuation Date based on the estimated development schedule per the PEA Update and the estimated value of the Project at the Valuation Date assuming a 4 to 6 year delay in the project schedule. FTI calculates this loss at **US\$140.5 million**, excluding pre-award interest.
12. FTI also calculates the pre-award interest applicable to the losses under both restitution and compensation claims in order to place South American Silver in the economic position it would have occupied absent the alleged breaches, from the Valuation Date to an estimated hearing date of May 31, 2016 based on a statutory annual interest rate in Bolivia of 6.0%, which is consistent with the 5.6% median cost of debt for similarly-situated companies. Including pre-award interest, FTI quantified the total damages to South American Silver as follows (in US\$ million):

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

Table 1: FTI Summary of Damage Conclusions

13. Bolivia's nationalization of the Malku Khota Mining Project resulted in Claimant's total loss of control over its investments which are now in the hands of the Bolivian State. Bolivia's expropriation of Claimant's investments and its pattern of unfair treatment of CMMK constitute multiple violations of the Treaty.

II. FACTUAL BACKGROUND

A. SOUTH AMERICAN SILVER HAS BEEN INVOLVED IN THE BOLIVIAN MINING SECTOR SINCE 1994

1. History and Activity of South American Silver

14. In 1994, a group of senior geologists led by Ralph Fitch—President and Director of South American Silver and a witness in this arbitration—created a company with the purpose of identifying, exploring and developing mineral properties around the world, particularly in South America. The company, named General Minerals Corporation Limited (“General Minerals”), was incorporated in Bermuda in October 1994, and its parent company General Minerals Corporation (“GMC”) was taken public on the Toronto Stock Exchange in 1995.¹ General Minerals’ name changed to South American Silver in October 2008 following its acquisition by SASC.²
15. Mr. Fitch had previously served as Chief Geologist for Chevron Mineral Group, a division of Chevron Corporation where he was responsible for the discovery of the Ujina deposit at the Collahuasi, now the world's third largest copper mine.³ General Minerals initially focused on identifying copper porphyry deposits in Chile and, in late 1994, Mr. Fitch travelled from Chile to Bolivia to explore for copper mineralization in the area surrounding Turco, a small municipality located approximately 150 kilometers from the

¹ **CWS-1**, Witness Statement of Ralph G. Fitch (“Fitch Witness Statement”) ¶ 5; **Exhibit C-10**, Certificate of Incorporation of General Minerals Corporation Limited, Certificate of Incorporation on Change of Name certifying the change of name to South American Silver Limited, Register of Members and Certificate of Compliance of South American Silver Limited.

² **CWS-2**, Witness Statement of Felipe Malbran (“Malbran Witness Statement”); **Exhibit C-10**, Certificate of Incorporation of General Minerals Corporation Limited, Certificate of Incorporation on Change of Name certifying the change of name to South American Silver Limited, Register of Members and Certificate of Compliance of South American Silver Limited.

³ **CWS-1**, Fitch Witness Statement ¶ 4.

city of Oruro and 35 kilometers south of the Malku Khota project area.⁴ These early efforts led to the Azurita mining project, the first of the Company's projects in Bolivia.⁵

16. General Minerals made its first large discovery at the Vizcachitas copper porphyry deposit in Chile in 1996 and went on to develop Vizcachitas and identify other mines in North and South America.⁶ In September 2006, four General Minerals executives—Ralph Fitch, Felipe Malbran (also a witness in this arbitration), William Filtness and Richard Doran—created SASC, a Canadian corporation focusing on the development and exploitation of silver mining projects in South America.⁷ They took SASC public by listing shares on the Toronto Stock Exchange in February 2007. SASC acquired all the issued and outstanding common stock of General Minerals on December 18, 2006 which was subsequently renamed South American Silver on October 22, 2008.⁸
17. South American Silver successfully explored various mineral resources since its inception. South American Silver's discoveries include the Malku Khota silver/indium/gallium mining project in Bolivia and the Escalones copper/gold/silver/molybdenum mining project in Chile. On October 21, 2013—after the commencement of this arbitration—SASC acquired High Desert Gold Corporation (“HDGC”). As part of the acquisition of HDGC, SASC obtained a 100% direct interest in HDGC's Gold Springs gold-silver project, located along the Nevada/Utah border in the United States.⁹ SASC subsequently changed its name to TriMetals in order to accurately reflect the expanded scope of its activities.¹⁰ The acquisition of HDG and subsequent name change of SASC to TriMetals have not impacted South American Silver's corporate structure, ownership and rights in this arbitration.¹¹

⁴ *Id.* at 4.

⁵ *Id.* at 6. *See also* CWS-2, Malbran Witness Statement at 14.

⁶ CWS-1, Fitch Witness Statement ¶ 6; CWS-2, Malbran Witness Statement ¶ 8.

⁷ CWS-2, Malbran Witness Statement ¶ 9.

⁸ **Exhibit C-10**, Certificate of Incorporation of General Minerals Corporation Limited, Certificate of Incorporation on Change of Name certifying the change of name to South American Silver Limited, Register of Members and Certificate of Compliance of South American Silver Limited.

⁹ **Exhibit C-28**, *South American Silver Corp. Enters into an Agreement to Acquire High Desert Gold Corporation*, South American Silver Corp., Press Release, October 21, 2013.

¹⁰ **Exhibit C-29**, *South American Silver Corp. Announces Intent to Change Name to TriMetals Mining Inc.*, BLOOMBERG NEWS, February 27, 2014.

¹¹ *See infra* at II.B.2.

2. Bolivia's Legal Framework Promoted Foreign Investment in the Bolivian Mining Sector

18. When managers of General Minerals (later South American Silver) initially decided to invest in Bolivia in 1995, it was based on Bolivia's commitment to attract and protect foreign investments.¹² Specifically, in September 1990, Bolivia enacted its law on investments (the "Investment Law") encouraging and guaranteeing foreign investment, *inter alia* through the negotiation and ratification of multiple bilateral investment treaties with its main trading partners.¹³ In that context, the Treaty entered into force on February 16, 1990 and was extended to Bermuda on December 9, 1992.¹⁴
19. Bolivia also reformed the legal framework applicable to the mining sector in 1997 through Law No. 1777 (the "Mining Law"), which provided a clearer method for the acquisition and recording of mining concessions, substantially increased the legal certainty associated with these concessions, and created a highly-efficient supervisory body and a tax structure allowing foreign investors to credit local taxes against taxes owed in their respective countries of origin.¹⁵

3. South American Silver has Been Involved in Five Large-Scale Mining Projects in Bolivia Prior to Malku Khota

20. As mentioned earlier, Mr. Fitch identified the Azurita mining property while traveling to Bolivia in late 1994.¹⁶ The Company subsequently entered into an agreement to explore and potentially exploit copper deposits at Azurita.¹⁷ After thoroughly exploring the area

¹² **CWS-1**, Fitch Witness Statement ¶ 17; **CWS-2**, Malbran Witness Statement ¶ 13.

¹³ **Exhibit C-5**, Investment Law No. 1182, published in the Gaceta Oficial No. 1662 on September 17, 1990 (the "Investment Law").

¹⁴ **Exhibit C-1**, 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, signed on 24 May 1988 and entered into force on 16 February 1990 (the "Treaty"); **Exhibit C-2**, Statement by the UK on the Exchange of Notes at La Paz (dated 3 and 9 Dec. 1992) extending the Treaty to Bermuda.

¹⁵ Claimant's Notice of Arbitration dated April 30, 2013 (the "Notice of Arbitration") ¶ 12; **Exhibit C-30**, Bolivian Mining Code, Law No. 1777, published in Gaceta No. 1987, March 17, 1997.

¹⁶ **CWS-1**, Fitch Witness Statement ¶ 6.

¹⁷ **CWS-1**, Fitch Witness Statement ¶ 6; **CWS-2**, Malbran Witness Statement ¶ 14. *See also* **Exhibit C-31**, Agreement between José Luis Velasco, Ralph G. Fitch, and Compañía Minera General Minerals (Bolivia) S.A., ("Azurita Agreement"), May 12, 1995.

between 1995 and 1997, it was nevertheless concluded that the mineralization present (one million tons of 1% copper ore) would not justify a commercial exploitation.¹⁸

21. Company management continued to work on identifying mining properties in the Bolivian Altiplano and, in 1998, discovered a potential large silver deposit in Atocha, a village located in the department of Potosí.¹⁹ After acquiring the corresponding mining concessions and engaging into an extensive and sophisticated exploration program, the Company developed a test mine at Atocha.²⁰ Although this test mine was primarily intended to provide precise mining data in order to prepare for large-scale exploitation, it nevertheless produced 81 tons of silver concentrate from 2000 to 2001.²¹ While successful from a geological and technical standpoint, the Atocha project came at a time of rapidly dropping silver prices and Fitch and his colleagues thus decided not to move forward with full-scale production and focused on other ongoing projects instead.²²
22. With metal prices still low, the Company partnered with a Bolivian cement manufacturing concern in 1999 to explore and develop gypsum and limestone deposits near Cochabamba.²³ While the area appeared initially promising, drill tests revealed that the limestone contained in the area was not suitable for cement production.²⁴ The Company thus withdrew from that venture and, in 2001, turned its attention to a potential tantalite deposit located north of Santa Cruz in the Bolivian Amazon basin.²⁵ There, the Company successfully identified commercial deposits, built a plant, and began production. Shortly after production started, however, tantalum prices dropped from US\$200/lb to US\$40/lb which led to the decision to stop exploitation.²⁶
23. Next, in September 2003, General Minerals—through its subsidiary Minera Laurani—entered into an option agreement for an area of 1750 hectares located approximately 100

¹⁸ CWS-1, Fitch Witness Statement ¶ 6; CWS-2, Malbran Witness Statement ¶ 14.

¹⁹ CWS-1, Fitch Witness Statement ¶ 7; CWS-2, Malbran Witness Statement ¶ 16.

²⁰ CWS-1, Fitch Witness Statement ¶ 7; CWS-2, Malbran Witness Statement ¶ 17.

²¹ *Id.*

²² CWS-1, Fitch Witness Statement ¶ 7; CWS-2, Malbran Witness Statement ¶ 20.

²³ CWS-1, Fitch Witness Statement ¶ 8; CWS-2, Malbran Witness Statement ¶ 21.

²⁴ *Id.*

²⁵ CWS-1, Fitch Witness Statement ¶ 9; CWS-2, Malbran Witness Statement ¶ 22.

²⁶ *Id.* Tantalum is a metal derived from tantalite, which is used to produce electronic equipment and high performance metallic alloys.

kilometers southwest of La Paz.²⁷ Detailed geological studies and exploration program confirmed the existence of gold, copper and silver deposits in the area.²⁸ The Company nevertheless decided to withdraw from the project because legislative changes in Bolivia had affected Minera Laurani's ability to effectively lease the property, which was encumbered by several liens.²⁹ At the same time Company management decided to focus its attention on the Malku Khota trend, identified after its exploration at Atocha, which it had begun to consider as a potential "world class" deposit.³⁰

24. Decisions to reconsider or postpone projects constitute a normal occurrence in the mining sector. It is the nature of the exploration activity to look at many different prospects knowing that most of them will not immediately result in commercial exploitation.³¹ At the same time, the Company was successful with other projects outside Bolivia. As Ralph Fitch explains: "Exploration is a very "high risk" business and it is very rare to find a new mine. It is all too common for geologists to spend their careers exploring for economic deposits but never finding one. The fact that our exploration ended up with a major discovery at Malku Khota is an excellent outcome."³²

B. INVESTMENTS AND ACTIVITY AT MALKU KHOTA

1. Identification of the Malku Khota Mineral Deposits and Acquisition of the Corresponding Mining Concessions

25. While exploring the Atocha mineral formation between 1998 and 2002, Messrs. Fitch and Malbran discovered that the silver mineralization at Atocha were likely part of a much larger system running on a north-south axis through Atocha.³³ Encouraged by the Government's support,³⁴ Messrs. Fitch and Malbran, and their colleagues thus decided to continue exploring for potential silver deposits along that axis. In October 2002, the Company surveyed two mining concessions located near the tiny community of Malku

²⁷ CWS-1, Fitch Witness Statement ¶ 10; CWS-2, Malbran Witness Statement ¶ 23.

²⁸ *Id.*

²⁹ *Id.*

³⁰ CWS-1, Fitch Witness Statement ¶ 10.

³¹ *Id.* at 11.

³² *Id.*

³³ CWS-1, Fitch Witness Statement ¶ 12; CWS-2, Malbran Witness Statement ¶ 24.

³⁴ CWS-1, Fitch Witness Statement ¶ 17; CWS-2, Malbran Witness Statement ¶ 26.

Khota approximately 50 kilometers east of Oruro.³⁵ This preliminary assessment convinced the Company that the two concessions, Daniel and Cobra, were worthy of subsequent exploration.³⁶ In June 2003, Mr. Malbran, the Company's Vice President of Explorations for South America, visited the area and, on July 30, 2003, General Minerals de Bolivia entered into a unilateral promise of sale with the owners of the Daniel and Cobra concessions.³⁷

26. This promise of sale marked the formal beginning of the Malku Khota mining project. On September 2003, Mr. Malbran requested four mining concessions adjacent to Daniel and Cobra from the Mining Superintendent of Potosí-Chuquisaca.³⁸ In addition to these four additional mining concessions (named Alkasi, Takhuani, Takhaua and Jalsuri), the Company subsequently acquired four other concessions in the area (named Silluata, Antacuna, Viento and Norma).³⁹ These ten Mining Concessions comprised 219 mining blocks located over 5,475 hectares and constituted the entire Malku Khota project area.⁴⁰
27. South American Silver (which was then known as General Minerals) incorporated its wholly-owned Bolivian subsidiary, CMMK on November 7, 2003 for the purpose of exploring, developing, managing and exploiting the Malku Khota Mining Project.⁴¹ As with earlier projects in Bolivia, South American Silver decided to incorporate a Bolivian subsidiary to facilitate day-to-day operations and payments in the country. In setting up local entities, South American Silver relied on the Government's unambiguous commitment to treat foreign investors and foreign-owned local companies the same and,

³⁵ **CWS-1**, Fitch Witness Statement ¶ 12; **CWS-2**, Malbran Witness Statement ¶ 27.

³⁶ **CWS-1**, Fitch Witness Statement ¶ 12; **CWS-2**, Malbran Witness Statement ¶ 29.

³⁷ *Id.* See also **Exhibit C-32**, Exercise of Unilateral Promise of Sale of Daniel and Cobra Mining Concessions between Francisco R. Kempff Mercado, Patricia Inéz Urquizu de Kempff, and Compañía Minera Malku Khota S.A., March 30, 2007.

³⁸ **Exhibit C-33**, Sale of Mining Concessions Alkasi, Jalsuri, Takhaua and Takhuani between Felipe B. Malbran Hourton and Compañía Minera Malku Khota S.A., May 4, 2005.

³⁹ **Exhibit C-34**, Viento Mining Concession, June 5, 2007; **Exhibit C-35**, Public Deed of Purchase and Sale of Norma Mining Concession signed by Hugo Murillo Velazaco and Compañía Minera Malku Khota S.A., April 22, 2008; **Exhibit C-36**, Sale of Mining Concessions between Silex Bolivia S.A., and Compañía Minera Malku Khota, September 22, 2006.

⁴⁰ **Exhibit C-4**, Supreme Decree No. 1308, August 1, 2012.

⁴¹ **Exhibit C-11**, Incorporation of Compañía Minera Malku Khota (CMMK), Public Deed No. 204/2003 and Public Deed No. 228/2003.

under any circumstance, same as domestic investors in Bolivia.⁴² As a wholly-owned subsidiary of South American Silver in Bolivia, CMMK was the legal owner of the ten Mining Concessions constituting the Malku Khota Project Area.

2. At all Relevant Times South American Silver Owned the Mining Concessions

28. South American Silver indirectly owned the Mining Concessions through its subsidiary CMMK at all relevant times in this arbitration up until the expropriation of the Malku Khota mining project by the Government. This is because (a) South American Silver owns CMMK; and (b) CMMK held title to the ten Mining Concessions at all relevant times.

a. South American Silver Owns CMMK

29. CMMK was incorporated on November 7, 2003 with a share capital of 5,000 bolivianos divided in 50 shares with a nominal value of 100 bolivianos each.⁴³ CMMK was incorporated in La Paz by Public Deed No. 204/2003.⁴⁴ It is registered before the Bolivian Commercial Registry with Commercial License No. 00106205.⁴⁵ CMMK's owners were Mr. Malbran (with 48 shares), Fernando Rojas (with one share) and Carlos Ferreira (with one share).⁴⁶ These shares were subsequently transferred to Malku Khota Ltd. and Productora Ltd. on December 12, 2003 and to G.M. Campana Ltd. on October 16, 2007.⁴⁷

⁴² **Exhibit C-5**, Investment Law, Art. 2: "Foreign investors and the business or company in which said investors hold an interest are recognized the same rights, duties and guarantees afforded to domestic investors under the Laws and Regulations, subject to no Limitation other than those prescribed by law."

⁴³ **Exhibit C-11**, Incorporation of Compañía Minera Malku Khota (CMMK), Public Deed No. 204/2003 and Public Deed No. 228/2003.

⁴⁴ *Id.* See also Notice of Arbitration at 15.

⁴⁵ **Exhibit C-12**, Certificate of Registration at the Commercial Registry (Certificado de Actualización de Matricula de Comercio) of CMMK. See also Notice of Arbitration at 15.

⁴⁶ **CWS-2**, Malbran Witness Statement ¶ 31. See also **Exhibit C-11**, Incorporation of Compañía Minera Malku Khota (CMMK), Public Deed No. 204/2003 and Public Deed No. 228/2003.

⁴⁷ **Exhibit C-9**, Share Certificate issued by CMMK in favor of Productora Ltd., Malku Khota Ltd., and G.M., Campana Ltda. (Title 4); **Exhibit C-37**, CMMK Shareholders' Registry for Productora Ltd., Malku Khota Ltd., and G.M., Campana Ltda. See also **CWS-2**, Malbran Witness Statement at 31.

30. **Malku Khota Ltd.** was incorporated in Nassau, Bahamas on October 27, 2003.⁴⁸ Malku Khota Ltd.'s outstanding capital consists of 100 ordinary shares owned by general Minerals (renamed South American Silver on October 22, 2008) since October 27, 2003.⁴⁹ South American Silver thus owns 100% of Malku Khota Ltd. and thus indirectly owns 96% (48 shares) of CMMK through Malku Khota Ltd.⁵⁰
31. **Productora Ltd.** was incorporated in Nassau, Bahamas on October 10, 1994 with an outstanding capital of two shares, allotted to South American Silver Limited on December 19, 1995.⁵¹ Since then, South American Silver has owned 100% of Productora Ltd. and thus indirectly owns 2% (1 share) of CMMK through Productora Ltd.⁵²
32. **G.M. Campana Ltd.** was incorporated in Nassau, Bahamas on September 8, 1994 with an outstanding capital of three shares, respectively allotted to South American Silver Limited on October 10, 1994, December 31, 1994 and December 5, 2003.⁵³ South American Silver cancelled that third share on the date of its allotment, thus reducing G.M. Campana Ltd.'s outstanding capital to two shares, which it both owns.⁵⁴ Since then, South American Silver has owned 100% of G.M. Campana Ltd. and thus indirectly owns 2% (1 share) of CMMK through G.M. Campana Ltd.⁵⁵
33. As discussed above, General Minerals was incorporated in Hamilton, Bermuda on October 7, 1994 as General Minerals Corporation Limited,⁵⁶ and subsequently changed its name to South American Silver Limited on October 22, 2008.⁵⁷ SASC—now TriMetals—acquired the totality of South American Silver's shares on December 18,

⁴⁸ **Exhibit C-6**, Certificate of Incorporation, Certificate of Good Standing and Register of Members of Malku Khota Ltd.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ **Exhibit C-7**, Certificate of Incorporation, Certificate of Good Standing and Register of Members of Productora Ltd, Stock Certificates.

⁵² **Exhibit C-9**, Share Certificate issued by CMMK in favor of Productora Ltd. (Title 8).

⁵³ **Exhibit C-8**, Certificate of Incorporation, Certificate of Good Standing and Register of Members of G.M. Campana Ltd.

⁵⁴ *Id.*

⁵⁵ **Exhibit C-9**, Share Certificate issued by CMMK in favor of G.M. Campana Ltd. (Title 9).

⁵⁶ **Exhibit C-10**, Certificate of Incorporation of General Minerals Corporation Limited, Certificate of Incorporation on Change of Name certifying the change of name to South American Silver Limited, Register of Members and Certificate of Compliance of South American Silver Limited.

⁵⁷ *Id.*

2006. At all relevant times in this arbitration, South American Silver was, and remains in good standing with the Bermudan Registrar of Companies.⁵⁸

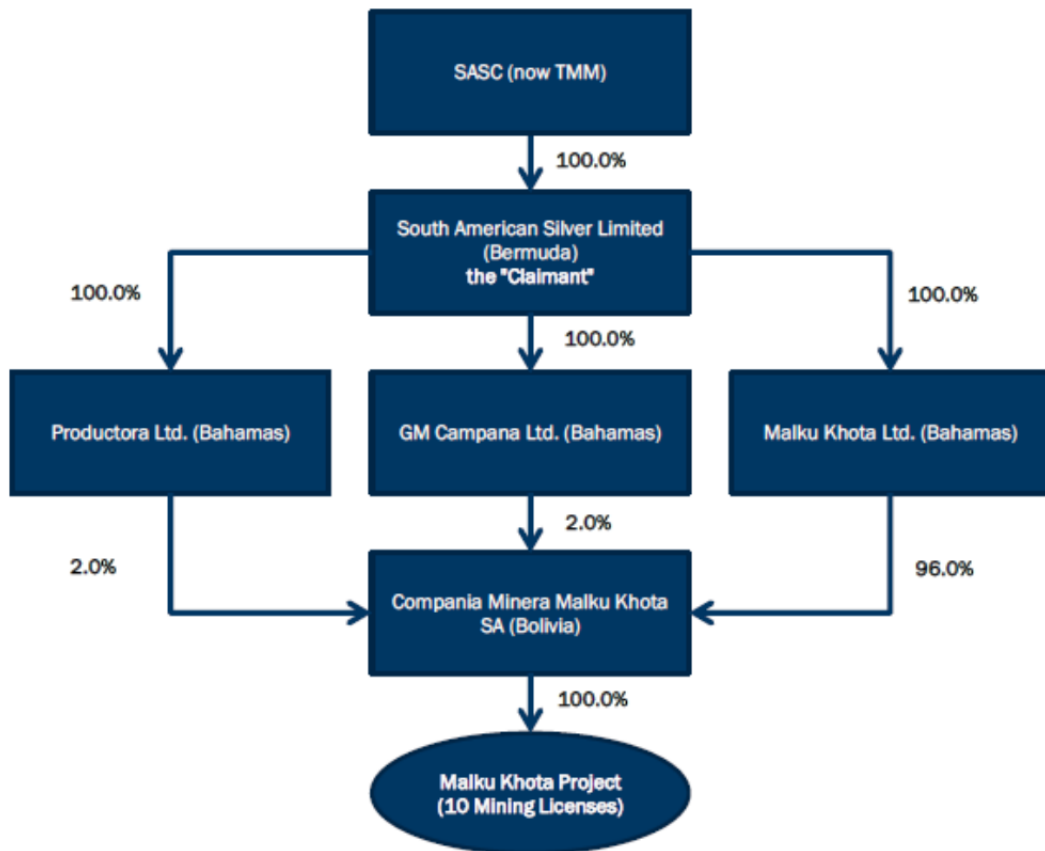


Fig. 1: South American Silver Organizational Chart⁵⁹

34. At all relevant times, South American Silver thus indirectly owned and still owns 100% of CMMK through its Bahaman subsidiaries, Malku Khota Ltd., Productora Ltd., and G.M. Campana Ltd.

b. CMMK Legally Owned the Mining Concessions

35. CMMK acquired full legal title to the ten Mining Concessions constituting the Malku Khota Project Area in the course of various transactions that took place between July 30, 2003 and September 17, 2008. CMMK thus legally owned the Mining Concessions at all

⁵⁸ *Id.*

⁵⁹ **CER-1**, FTI Consulting Inc., Valuation Report dated September 23, 2014 (the “FTI Expert Report”), Fig. 2, ¶ 5.11.

relevant times up until the expropriation. The following paragraphs individually describe these acquisitions.

36. On July 30, 2003, General Minerals Bolivia—one of the Company’s Bolivian subsidiaries—entered into an Unilateral Promise of Sale for the **Daniel** and **Cobra** mining concessions with Patricia Urquiza de Kempff and Francisco Rolando Kempff Mercado, respectively.⁶⁰ General Minerals Bolivia subsequently assigned this Unilateral Promise of Sale to CMMK on December 15, 2003.⁶¹ The Unilateral Promise of Sale for these two concessions led to their sale to CMMK on March 30, 2007, as described in Public Deed No. 40/2007.⁶²
37. CMMK acquired the **Alkasi**, **Jalsuri**, **Takhaua** and **Takhuani** mining concession from Mr. Malbran on May 4, 2005, as recorded by Public Deed No. 79/2005.⁶³ CMMK subsequently acquired the **Antacuna** and **Silluta** mining concessions from Silex Bolivia S.A. on September 22, 2006, as recorded by Public Deed No. 102/2006.⁶⁴ CMMK acquired the **Norma** mining concession from Hugo Murillo Velazco on April 22, 2008, as recorded by Public Deed No. 39/2008.⁶⁵ The Regional Superintendent of Mines Potosí-Chuquisaca granted the **Viento** mining concession to CMMK by Constitutive Resolution No. 155/2007 dated April 5, 2007.⁶⁶ The Government recognized the validity of CMMK’s title over the 10 Mining Concessions in the Supreme Decree, which expressly mentions their acquisition and attribution.⁶⁷

⁶⁰ **CWS-2**, Malbran Witness Statement ¶ 29.

⁶¹ **Exhibit C-32**, Exercise of Unilateral Promise of Sale of Daniel and Cobra Mining Concessions between Francisco R. Kempff Mercado, Patricia Inéz Urquiza de Kempff, and Compañía Minera Malku Khota S.A., March 30, 2007.

⁶² *Id.*

⁶³ **Exhibit C-33**, Sale of Mining Concessions Alkasi, Jalsuri, Takhaua and Takhuani between Felipe B. Malbran Hourton and Compañía Minera Malku Khota S.A., May 4, 2005.

⁶⁴ **Exhibit C-36**, Sale of Mining Concessions between Silex Bolivia S.A., and Compañía Minera Malku Khota, September 22, 2006.

⁶⁵ **Exhibit C-35**, Public Deed of Purchase and Sale of Norma Mining Concession signed by Hugo Murillo Velazco and Compañía Minera Malku Khota S.A., April 22, 2008.

⁶⁶ **Exhibit C-34**, Viento Mining Concession, June 5, 2007.

⁶⁷ **C-4**, Supreme Decree No. 1308, August 1, 2012.

Concession	Concession Grant	Executorial Title Grant		Transfer to CMMK	
	Date	Date	Deed No.	Date	Deed No.
Cobra	11/14/2001	12/05/2001	731/2001	07/30/2003	Promise
				03/30/2007	40/2007
Daniel	06/08/2001	01/03/2002	001/2002	07/30/2003	Promise
				03/30/2007	40/2007
Takhuani	01/05/2004	03/12/2004	99/2004	05/04/2005	79/2005
Alkasi	01/05/2004	05/12/2004	112/2004	05/04/2005	79/2005
Jalsuri	01/06/2004	05/12/2004	113/2004	05/04/2005	79/2005
Takhaua	01/06/2004	03/12/2004	100/2004	05/04/2005	79/2005
Silluta	07/18/2005	08/10/2005	5/2005	09/22/2006	102/2006
Antacuna	08/08/2005	08/22/2005	6/2005	09/22/2006	102/2006
Norma	06/09/2005	09/08/2005	109/2005	04/22/2008	39/2008
Viento	04/05/2007	06/05/2007	141/2007	N.A.	N.A.

Table 2: Summary of the Relevant Documentation for the Mining Concessions

38. Thus, at all relevant times and up to the time of Bolivia’s expropriation of the Malku Khota Project, CMMK—a wholly-owned subsidiary of South American Silver at all relevant times—was the sole legal owner of the Mining Concessions.

3. South American Silver’s Exploration and Pre-Development Efforts at Malku Khota

39. At the time of the expropriation, the Malku Khota Mining project was at an advanced stage of exploration and pre-development activities were well underway.⁶⁸ Following its original assessment of the Cobra and Daniel Concessions, CMMK conducted its first ground exploration campaign between 2004 and 2005, collecting and analyzing over 1,120 rock samples over an area of 4,125 ha.⁶⁹ This sampling project covered an

⁶⁸ CER-2, Roscoe, Postle and Associates, Valuation Report on the Malku Khota Project, Department of Potosí, Bolivia (the “RPA Expert Report”) 3-2; CER-1, FTI Expert Report ¶ 8.33.

⁶⁹ CER-2, RPA Expert Report 8-1. See also CWS-2, Malbran Witness Statement at 32.

approximate 15 km strike length of the sandstone units and resulted in the definition of an area of approximately 3,500 m long by 800 m wide that exhibited anomalous silver, gold, bismuth, and base metal values.⁷⁰ Within this area, there is a well-defined zone of 3,450 m by 263 m in which anomalous silver values of approximately 0.5 oz/t to 1.0 oz/t were found, including 228 m that averaged 40 g/t Ag.⁷¹

40. Following this ground sampling campaign, in 2005, the Company partnered with SILEX Bolivia, S.A. (“Silex”), a mining service company, to complete a substantial program of ground and underground sampling.⁷² A total of 1,111 surface and underground samples were collected and the initial surface program focused on Cerro Limosna where Silex defined anomalous silver values hosted by sandstones along a strike distance of approximately 1.4 km long and varying in width from approximately 30 m to 180 m true width.⁷³ During 2005, Silex continued with the program of surface channel sampling and identified two additional target areas, referred to as the Sucre and Wara Wara areas.⁷⁴ The surface sampling programs identified approximately 320,000 m² in the Limosna and Wara Wara and Sucre areas that averaged greater than 10 g/t Ag.⁷⁵ The underground sampling and mapping revealed that high-grade mineralization was also present in the area and that observed mineralization starts at surface and there is no overburden.⁷⁶

⁷⁰ **CER-2**, RPA Expert Report 8-1. *See also Exhibit C-13*, Preliminary Economic Assessment Technical Report for the Malku Khota Project dated March 13, 2009 (the “PEA”).

⁷¹ **CER-2**, RPA Expert Report 8-1.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

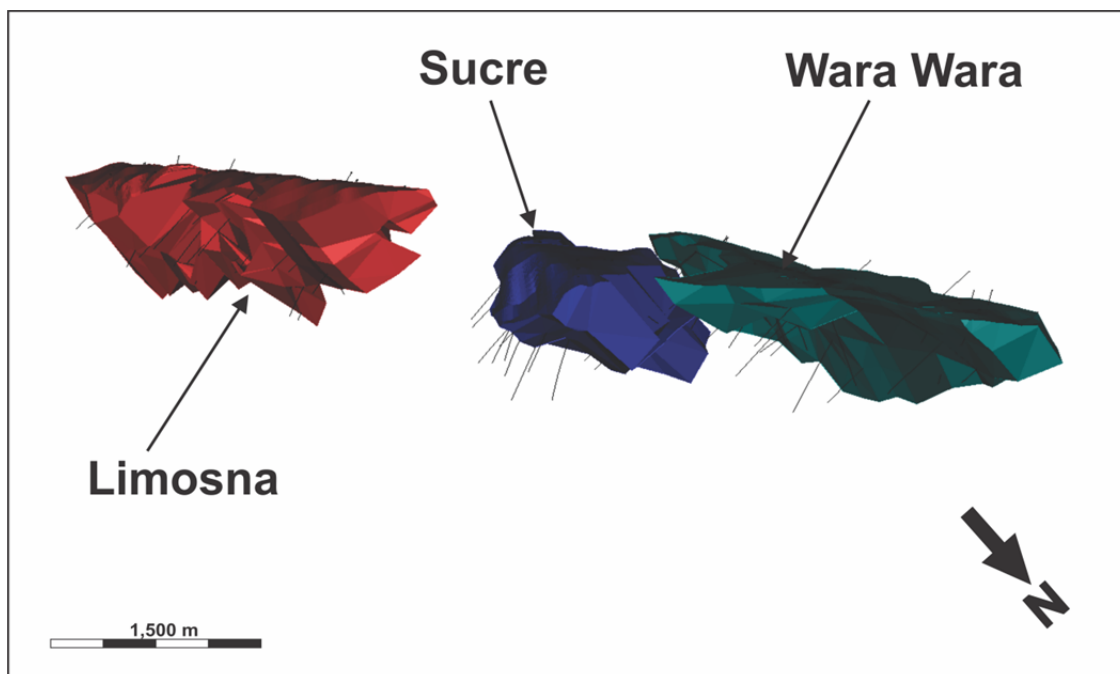


Fig. 2: Isometric 3D view of the Malku Khota mineralized wireframes looking Southwest⁷⁷

41. After advanced sampling confirmed the existence of highly-mineralized targets areas, CMMK conducted an underground exploration program from May 2007 to December 2010.⁷⁸ During that period, CMMK completed a total of 42,704 meters of drilling in 121 diamond core holes in the Limosna, Sucre and Wara Wara resource areas.⁷⁹ Drill holes were initially drilled from the base of the ridge formed by the Malku Khota and Wara Wara sandstones and, in 2008, roads were built along the tops of the ridges such that drill holes could be designed to penetrate the mineralization in the 150 meter high ridge which earlier drilling had drilled underneath.⁸⁰ These later holes gave useful assays of the upper portion of the ridge which proved important due to the high grades near the surface.⁸¹
42. External mining consultants Pincock Allen & Holt completed a PEA for the Malku Khota Project in March 2009 on the basis of resource estimates as of November 2008.⁸² In

⁷⁷ *Id.* at Fig. 9-1.

⁷⁸ *Id.* at 8-2. See also **Exhibit C-14**, Preliminary Economic Assessment Update Technical Report for the Malku Khota Project dated May 10, 2011 (the “PEA Update”) § 1.2.

⁷⁹ **CER-2**, RPA Expert Report ¶ 8-2.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² **Exhibit C-13**, Preliminary Economic Assessment Technical Report for the Malku Khota Project, March 13, 2009. See also Notice of Arbitration at 18.

2010, the Company designed an intensive drilling program designed to improving the data relied upon in the PEA and refining the underlying geological model.⁸³ For this purpose, CMMK drilled 26 additional holes and collected over 10,000 meters of samples.⁸⁴ The Company published the results of the PEA Update on March 31, 2011 and issued the corresponding complete technical report on May 10, 2011. The PEA Update accounted for the additional data collected and the company's progress in creating a hydrometallurgical process to recover the different precious and other metals contained in the Malku Khota sandstone.⁸⁵

43. The PEA Update revised the mineral resource estimate for the project and indicated a pre-tax net present value for the project at a 5% discount rate of US\$704 million at metal prices of US\$18.00/oz silver and US\$500/kg indium, increasing to US\$1.482 billion at metal prices of US\$25.00/oz silver and US\$570/kg indium, and to US\$2.571 billion at prices of US\$35.00/oz silver and US\$650/kg indium.⁸⁶ From a mining standpoint, the PEA Update contemplated the construction and operation of a 40,000 tons-per-day (tpd) open pit acid-chloride heap leach operation over a period of 15 years.⁸⁷ The PEA Update contemplated silver production of 13.2 million ounces per year for the first five years and 10.5 million ounces per year for the remaining life of the mine.⁸⁸ It also anticipated the production of approximately 80 tons of indium and 15 tons of gallium per annum, as well as significant quantities of copper, lead and zinc.⁸⁹
44. In order to extract these diverse metals from the sandstone mined in Malku Khota, South American Silver and its parent SASC invented and patented a proprietary hydrometallurgical process.⁹⁰ To do so, SASC hired David Dreisinger, a Professor and Chair of Metallurgy at the University of British Columbia, as Vice President of

⁸³ CWS-2, Malbran Witness Statement ¶ 46.

⁸⁴ Exhibit C-14, PEA Update § 11.1.

⁸⁵ *Id.* at 1.2.

⁸⁶ *Id.* at 1.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Exhibit C- 38, United States Patent No. US8,585,991 B2, Method for Recovering Indium, Silver, Gold and Rare, Precious and Base Metals from Complex Oxide and Sulfide Ores, November 19, 2013.

Metallurgy. Prof. Dreisinger is a widely-recognized expert on hydrometallurgy.⁹¹ Prof. Dreisinger devised and conducted an extensive testing program with different rock samples extracted from the project area.⁹² RPA describes the metallurgical process devised by the Company as “a combination of unique and commercially proven individual components. The leach medium is a combination of acid, chloride salt, and soluble oxidant for metals extraction. These are readily available and common reagents, however, the combination and use on the MK material is unique. The recovery of payable metals from the heap leach liquor is complex due to the concentrated acid-salt solution matrix and the variety of metals present. The individual components of the metals recovery have all been proven in other operations; however, to the best of RPA’s knowledge, they have not been combined sequentially in a commercial application.”⁹³

4. South American Silver’s Community Relations Efforts in Connection With the Malku Khota Mining Project

45. The vast majority of local residents in and around the Malku Khota Mining Project are indigenous people, of the *Aymara* or *Quechua* ethnic groups, organized into communities, themselves organized in *ayllus*, with a distinct leadership structure.⁹⁴ *Ayllus* are the traditional form of community in the Andes, especially among *Quechuas* and *Aymarans* people.⁹⁵ *Ayllus* were essentially extended family groups but now comprise various communities. For instance, *Ayllu Sullka Jilatikani*, one of the six *ayllus* located around the project area, is composed of seven communities: *Colpani*, *Huarimarca*, *Jantapalca*, *Kari Kari*, *Malku Khota*, *Ovejeria* and *Totoroco*. *Ayllu* members collectively own the corresponding land and have reciprocal obligations to each other.⁹⁶
46. South American Silver, focused the community relations efforts not only on the communities within the actual concession area, but also within a certain distance from the

⁹¹ **Exhibit C-39**, Resume of David Dreisinger, available at <http://www.mtrl.ubc.ca/departement/faculty-staff/dreisinger.php> (last visited on September 20, 2014).

⁹² **Exhibit C-14**, PEA Update §§ 16.1-16.3.7. See also **CWS-1**, Fitch Witness Statement at 15; **CWS-2**, Malbran Witness Statement at 34.

⁹³ **CER-2**, RPA Expert Report 10-5.

⁹⁴ **CWS-3**, Witness Statement of W.J. Mallory (“Mallory Witness Statement”) ¶ 6.

⁹⁵ *Id.*

⁹⁶ *Id.*

Project which South American Silver called the Area of Influence (the “AoI”).⁹⁷ This AoI included the communities from six *ayllus* potentially impacted by the Malku Khota Mining Project:⁹⁸

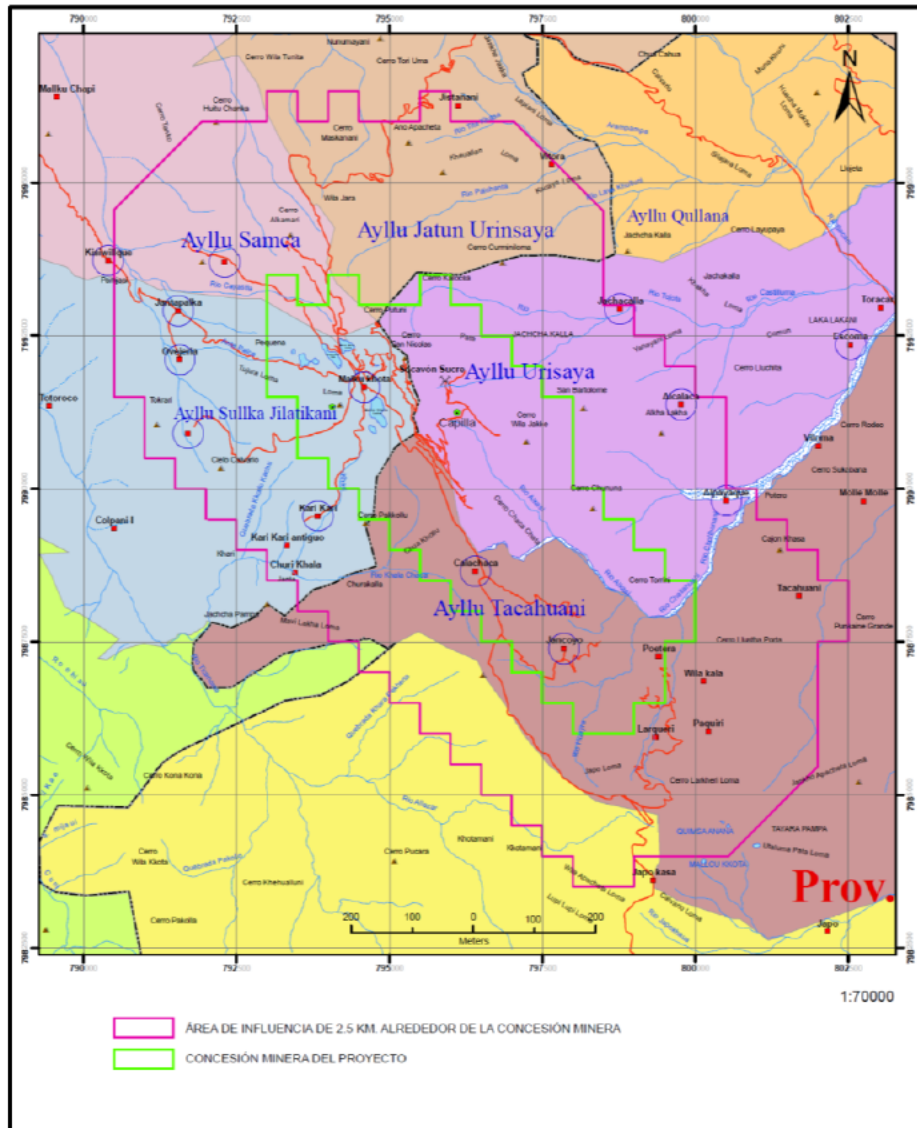


Fig. 3: Territories of the six *ayllus* in and around the project area (the green line represents the Project’s mining concession and the purple line the original AoI)

47. In 2007 South American Silver hired [REDACTED], who is *Aymara* and possessed vast experience working with communities in different mining projects, to work on-site

⁹⁷ *Id.* at 11.

⁹⁸ *Id.*

maintaining an ongoing dialogue between the Company and the communities.⁹⁹ From 2008 through the beginning of 2011, South American Silver worked closely with local communities to educate them about, and integrate them into the Malku Khota Mining Project.¹⁰⁰ In the beginning of 2011, South American Silver decided to formalize its community program and brought additional community relations staff, including Jim Mallory, a very experienced figure in the mining world for his work with communities, to expand its community relations efforts.¹⁰¹

48. One of South American Silver's core values is developing mines in a manner that promotes sustainable development, improves the social welfare, and contributes to the country's economic growth. South American Silver's community relations program focused on the following aspects: (i) policies and programs dedicated to the development of South American Silver's workforce, such as environmental monitoring training programs and visits to other existing mine sites;¹⁰² (ii) infrastructure projects to improve roads, refurbish community centers and schools; (iii) livestock improvement programs to eliminate disease and contribute to stronger livestock;¹⁰³ (iv) educational scholarships at the primary and secondary levels to promote learning and increased school attendance;¹⁰⁴ and (v) growing the local workforce, developing their skills, and paying them above national standards.¹⁰⁵ Had it not been for the Government's expropriation of its investments in Bolivia, South American Silver had plans to employ more than 1,000 highly-skilled and well-paid workers during the construction of the mining infrastructure, and approximately 400–500 permanent workers during the operational phase of the Project.¹⁰⁶
49. The six *ayllus* surrounding the project area and its communities generally welcomed the Company's community program and supported the Malku Khota Project. The few

⁹⁹ CWS-4, Witness Statement of [REDACTED] (" [REDACTED] Witness Statement") ¶ 5; CWS-5, Witness Statement of [REDACTED] (" [REDACTED] Witness Statement") ¶ 3.

¹⁰⁰ CWS-4, [REDACTED] Statement ¶ 5.

¹⁰¹ *Id.* at 7. See also CWS-3, Mallory Witness Statement at 5.

¹⁰² CWS-3, Mallory Witness Statement ¶ 17.

¹⁰³ *Id.* at 13.

¹⁰⁴ *Id.* at 7.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 12. See also CWS-1, Fitch Witness Statement at 26.

individuals affected by South American Silver's exploration and development efforts, and who opposed the project, were a handful of illegal gold miners.¹⁰⁷ Up until mid-2011, community issues were limited and plainly in-line with what could be expected for a project of this magnitude in an area without prior industrial mining tradition.¹⁰⁸ Tensions between local communities and violence against the Company subsequently increased once the Government declared its intention to obtain a stake in the Project and decided to instrumentalize the illegal miners' opposition to the Company to achieve that purpose.¹⁰⁹ The Government's irresponsible decision to encourage the illegal miners and activist leaders—and ultimately grant them immunity from prosecution for their actions—instead of condemning violence, played a crucial role in the escalation of tensions during the year preceding the expropriation.¹¹⁰

50. As Mr. Fitch explains, governmental support is critical during the early-stage of any large-scale infrastructure project because the substantial benefits brought by those projects to the community at large generally take some time to materialize while the impact of the project may be immediately felt by a minority of individuals:

At the same time—and as is the case with any large-scale project—a minority of individuals would have been directly impacted by the project's progress before these benefits started to inure to the community in general. There is thus an inherent tension during the early stages between these few individuals and the community at large. It becomes crucial that the government supports the project, explains the significant benefits it will provide to the surrounding communities and, when necessary, step in to ensure that laws are being respected and everyone's safety and property guaranteed.¹¹¹

5. The Bolivian Government Initially Supported the Malku Khota Mining Project

51. South American Silver and its executives had regular, positive contact with the Bolivian Government in connection with the Company's investments and operations in Bolivia prior to the Malku Khota mining project. As previously noted, Messrs. Fitch and

¹⁰⁷ CWS-4, ██████████ Witness Statement ¶¶ 8-9.

¹⁰⁸ CWS-1, Fitch Witness Statement ¶ 24.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 28. See also **Exhibit C-16**, Memorandum of Understanding, July 7, 2012.

¹¹¹ CWS-1, Fitch Witness Statement ¶ 27.

Malbran had met with the Minister of Mining and Metallurgy, Epifanio Mamani Alizares, on May 16, 2002 and with the President of Corporación Minera de Bolivia (the State-owned mining company or “COMIBOL”), Jose Cordoba Eguiras, on the same next day to discuss exploration projects in Bolivia.¹¹² Minister Mamani and Mr. Cordoba assured them of the Government’s support for the Company and its projects.¹¹³

52. South American Silver and its executives continued to enjoy a productive relationship with the Government afterwards in connection with the Company’s other projects in Bolivia, including the Malku Khota Mining Project. Mr. Fitch and Greg Johnson (SASC’s President and CEO at that time) met on April 21, 2010 with then-Minister of Economy and Public Finances Mr. Luis Alberto Arce Catacora to introduce the Malku Khota mining project and the perspectives it opened for the Bolivian mining and industrial sector.¹¹⁴ As Mr. Fitch relates, the Minister gave a positive reception to his presentation:

The Minister’s response to our presentation was positive, particularly with respect to the industrialization possibilities offered by the project. The Minister also expressed his appreciation at the fact that we intended to produce refined silver bars in Bolivia instead of exporting concentrate to be refined elsewhere. He also was pleased to hear about our efforts to work with and contribute to the development of the local communities. The Minister told us that the Government would support our development project, particularly if it opened significant prospects for industrialization.¹¹⁵

53. Messrs. Fitch, Malbran and Johnson also met with the Bolivian Deputy Minister of Mining and Metallurgy, Mr. Hector Cordova, and Ambassador to Canada, Mr. Edgar Torrez Mosqueira, on March 9, 2011 to discuss the Malku Khota project.¹¹⁶ Other employees, including [REDACTED] and Jim Mallory (both witnesses in this arbitration), also met regularly with Government representatives and observed firsthand the Government’s support to the project until mid-2011 when it became apparent that the

¹¹² CWS-1, Fitch Witness Statement ¶ 17; CWS-2, Malbran Witness Statement ¶ 26.

¹¹³ *Id.*

¹¹⁴ CWS-1, Fitch Witness Statement ¶¶ 18-19.

¹¹⁵ *Id.* at 19 (footnotes omitted). *See also* Exhibit C-40, Email from Ralph Fitch to SASC Board of Directors, April 29, 2010.

¹¹⁶ CWS-1, Fitch Witness Statement ¶ 28; CWS-2, Malbran Witness Statement ¶ 52.

Government would condition its support to the obtention of a participating interest in the project.¹¹⁷

C. BOLIVIA’S EFFORTS TO OBTAIN A PARTICIPATING INTEREST IN THE PROJECT PRIOR TO THE EXPROPRIATION

1. Bolivia “Froze” the Area Surrounding the Malku Khota Project

54. When Messrs. Fitch, Malbran and Johnson met with the Bolivian Deputy Minister of Mining and Metallurgy, Mr. Hector Cordova, and Ambassador to Canada, Mr. Edgar Torrez Mosqueira, on March 9, 2011, the Company executives made no secret of the Malku Khota Project’s magnitude and immense potential.¹¹⁸ Instead, they insisted on how Malku Khota constituted a strategic resource of precious metals and could contribute to the industrialization of Bolivia.¹¹⁹ A few days later, on March 31, 2011, South American Silver publicly released the results of the PEA Update for the Malku Khota Mining Project reflecting that the deposit was truly enormous.¹²⁰ The PEA Update contemplated the annual production of 13.2 million ounces of silver, 80 tons of indium and 15 tons of gallium, effectively making Malku Khota one of the largest projects in the world for these metals.¹²¹
55. After becoming aware of that information and realizing the magnitude and importance of the deposit, the Government commenced a year-long campaign to wrestle the control of the Project away from South American Silver. On April 26, 2011—a few weeks after the March 9, 2011 meeting and the publication of the PEA Update results on March 31, 2011—the Government issued Resolution DGAJ-0073/2001 declaring an area entirely surrounding the Malku Khota Mining Concessions as “Immobilization Zone – Area of

¹¹⁷ CWS-4, ██████████ Witness Statement ¶ 4; CWS-3, Mallory Witness Statement ¶¶ 9, 19.

¹¹⁸ CWS-1, Fitch Witness Statement ¶ 28; CWS-2, Malbran Witness Statement ¶ 52.

¹¹⁹ *Id.*

¹²⁰ CWS-2, Malbran Witness Statement ¶ 55. *See also Exhibit C-41, Updated Malku Khota Study Doubles Production Levels and 1st 5 Year Cashflow Estimates*, South American Silver Corp. Press Release, March 31, 2011.

¹²¹ CWS-2, Malbran Witness Statement ¶ 55.

Interest of COMIBOL.”¹²² This declaration prohibited designated “Immobilization Zone” from being acquired by, or granted in concession, to anyone else.¹²³

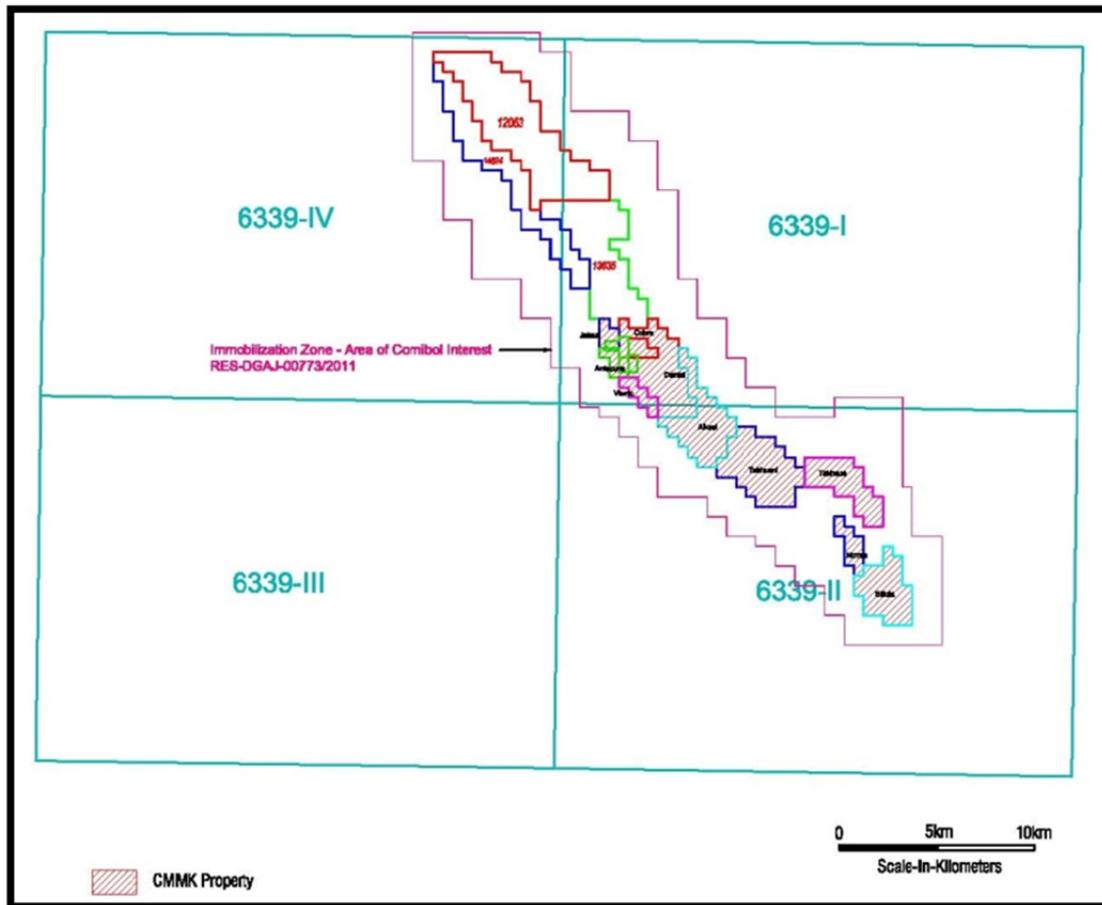


Fig. 4: Area of Immobilization surrounding the Malku Khota Mining Concession.¹²⁴

56. This designation had particularly clear practical consequences for South American Silver: the Company would no longer be able to freely expand the Malku Khota Project to exploit other mineralized areas or to expand the footprint of the planned mine. Instead, the only way for the Company to do so would be to partner with COMIBOL, who was now in a position to dictate its conditions because of Resolution DGAJ-0073/2001.¹²⁵ COMIBOL would in any case be free to exploit any deposits located in the

¹²² *Id.* See also **Exhibit C-42**, V. Díaz C., *La Vigencia de la Legislación en Minería*, PETROPRESS.

¹²³ **CWS-2**, Malbran Witness Statement ¶ 55.

¹²⁴ *Id.* The three concession on the northern part of the map are not owned by CMMK but were nevertheless surrounded by the area of interest because they were placed on the same formation than the Malku Khota mine.

¹²⁵ *Id.*

“Immobilization Zone” as it saw fit, thus effectively piggybacking on the Company’s considerable exploration expertise and investments.

57. This naked land grab marked the first step towards the Government’s ultimate nationalization of the Malku Khota Project.

2. The Government Sought to Obtain a Participating Interest in the Project

58. A few months after Resolution DGAJ-0073/2001, the Governor of Potosí requested a stake in the project for the Department of Potosí. The Company had reached out to the Governor, Mr. Felix Gonzales, in July 2011 to organize a meeting with some of the local communities around the project area.¹²⁶ This meeting was intended to address the activities of a handful of illegal gold miners in the Project Area.¹²⁷ These illegal miners had decided to oppose the Project by any means possible, including threats of physical violence and property destruction.¹²⁸ [REDACTED] and Jim Mallory met with the Governor to prepare the meeting with the communities and expressed their concern that the leader of the illegal miners would be present at, and could disrupt the conduct of that meeting.¹²⁹

59. The meeting between Governor Gonzales and the communities took place in Toro Toro (a village near the project area) on July 23, 2011.¹³⁰ The Governor’s message came as a complete surprise to the Company: Instead of expressing his support for the project, Governor Gonzales stated before the assembled crowd that the Government of Potosí wanted to obtain shares in CMMK.¹³¹ As Jim Mallory recalls:

The Governor mentioned that the Province should become a shareholder in the Project or that a “Sociedad de Economía Mixta” be constituted to exploit the Project. The Governor expressly mentioned that he didn’t want “another San Cristobal in my Department,” a project that is 100% owned by foreign

¹²⁶ CWS-4, [REDACTED] Witness Statement ¶ 8; CWS-3, Mallory Witness Statement ¶ 19.

¹²⁷ CWS-4, [REDACTED] Witness Statement ¶¶ 8-9.

¹²⁸ *Id.* at 9.

¹²⁹ *Id.*

¹³⁰ CWS-4, [REDACTED] Witness Statement ¶ 10; CWS-3, Mallory Witness Statement ¶ 19.

¹³¹ *Id.*

multinationals without a participation interest by the Government.¹³²

60. As [REDACTED] observes about the same meeting: “The Governor’s statements proved extremely damaging to the Company because they demonstrated that the Government had no interest in respecting or enforcing the Company’s rights. Community opposition led by the illegal miners strongly increased in the months following that meeting, ultimately resulting in the paralysis of the Project.”¹³³
61. As set forth before, Governor Gonzales’ request was the first of a long series of demands from the Department of Potosí and the Government that the Company abandon a stake in the project and partner with the Government. To further that agenda, various Government representatives made it progressively clear that they would not support the Malku Khota project unless the Government was made a partner.

3. The Government Withdrew its Support to the Project, Fueling Opposition to the Project

62. In the months following the meeting in Toro Toro, the Government continued to undermine the Company’s community efforts by failing to attend key follow-up meetings with the local communities intended to address the situation caused by the illegal miners. For instance, the Governor failed to attend a meeting with the communities that he had himself convened on August 31, 2011, sending two low-ranking government employees instead.¹³⁴
63. One month later, on September 25, 2011, the Governor’s office organized another meeting, this time in the community of Malku Khota.¹³⁵ The Company had been instructed to bring only a small delegation to the meeting. However, when Messrs. [REDACTED] and Mallory arrived at the meeting, they were met by a crowd of over 100 people, most of which did not even belong to the six *ayllus* surrounding the Project Area

¹³² CWS-3, Mallory Witness Statement ¶ 19.

¹³³ CWS-4, [REDACTED] Witness Statement ¶ 10.

¹³⁴ Exhibit C-43, Minutes of Meeting regarding Malku Khota Mining Project, August 31, 2011. See also CWS-4, [REDACTED] Witness Statement ¶ 12.

¹³⁵ CWS-4, [REDACTED] Witness Statement ¶ 13; CWS-3, Mallory Witness Statement ¶ 22.

and did not live anywhere near.¹³⁶ They had been brought to the meeting by the leaders of organizations supporting the illegal miners, also present at the meeting.¹³⁷ Instead of reiterating his support for the Company, the Director for Mining and Metallurgy for the Department of Potosí, Mr. Yercó Cervantes—the sole government official present at the meeting—announced to everyone that the Government would support any action by the community members to form a cooperative in order to exploit the Malku Khota mine.¹³⁸ This statement, in complete contradiction with the Concession Agreements and Bolivian law, made clear to everyone present that the Government would not support the Company and side with the illegal miners instead.¹³⁹ As ██████████ recalls, that same day and as a response to the opposition, the *ayllu* representatives that supported the Malku Khota Mining Project left the meeting and held a separate meeting at which they rejected the mining cooperatives and requested that the Company continue operations.¹⁴⁰

64. At another meeting with the representatives of the six *ayllus* in the Project Area held in Malku Khota on November 17, 2011, the Ministry of Mines’ representative, Mr. Oscar Iturri, reiterated that the Government wanted a stake in the Project.¹⁴¹ In this context of dwindling governmental support for the Company and growing impunity for the illegal miners—who had seized upon the idea of forming a cooperative to displace the Company—the security situation progressively deteriorated in the Project area, forcing the Company to seek—once again—the Government’s assistance in reestablishing the order in the area.¹⁴²
65. On February 16, 2012 Jim Mallory met in Potosí with Governor Gonzales and three officials from the Potosí mining administration.¹⁴³ Instead of expressing his support for the project, the Governor suggested that the company should “hang out a bigger carrot” to the Malku Khota community before calling for the creation of a mixed-company

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ CWS-4, ██████████ Witness Statement ¶ 13; CWS-3, Mallory Witness Statement ¶ 23.

¹⁴⁰ Exhibit C-44, Vote by the *ayllu* Communities of Tacahuani, Sulka Jilatikani, Samka, Jatun Urinsaya and Qullana, September 25, 2011.

¹⁴¹ CWS-4, ██████████ Witness Statement ¶ 14; CWS-3, Mallory Witness Statement ¶ 24.

¹⁴² CWS-4, ██████████ Witness Statement ¶¶ 15-18.

¹⁴³ CWS-3, Mallory Witness Statement ¶ 24.

between South American Silver and the Government of Potosí to exploit the Malku Khota Project.¹⁴⁴

66. Two days earlier, on February 14, 2012, the Governor's office had convened a working meeting with the local communities to discuss, among other things, the existence of the "mega-deposit" ("*megayacimiento*") of silver, indium and gallium in Malku Khota and its exploitation by a mixed-company involving the Government, the communities and the private sector (that is, the Company).¹⁴⁵ No one from the Company had been invited to or informed about that meeting.¹⁴⁶
67. The security situation continued to deteriorate in the Project Area, particularly around the small community of Malku Khota, where some inhabitants had been convinced to join the illegal miners in their opposition to the Company. As a result, CMMK's activity in the area had come to a standstill as its equipment had become the target of attacks of vandalism by the members of the Malku Khota and Calachaca communities.¹⁴⁷ On April 1, 2012, one of the CMMK's community relations coordinators, Saul Reque, was forcibly abducted by some Malku Khota inhabitants and held hostage for 20 hours. The Company and the communities from the project area repeatedly requested that the Government send assistance.¹⁴⁸ While the Government sent some policemen to the area, their action appeared to have further exacerbated tensions with the villagers of Malku Khota (led by illegal miners), who abducted two policemen and one medical worker on May 5 and May 7, 2012.¹⁴⁹ Tension further escalated with the May 6, 2012 attack by Malku Khota villagers of a drilling rig hired by the Company on the Project Area.
68. Far from taking any meaningful steps towards restoring order in the area, the Government met instead with the opposition led by illegal miners without the company being informed or present. In one of these meetings, held in the neighboring village of Acacio

¹⁴⁴ *Id.*

¹⁴⁵ **Exhibit C-45**, Minutes of Working Meeting between the Government of Potosí and Local Communities, February 14, 2012.

¹⁴⁶ **CWS-3**, Mallory Witness Statement ¶ 25.

¹⁴⁷ **CWS-2**, Malbran Witness Statement ¶¶ 44, 51.

¹⁴⁸ **Exhibit C-46**, Letter from *ayllu* Sullka Jilatokani to the Mayor of Sacaca requesting an "Ordenanza Municipal," March 16, 2012; **Exhibit C-47**, Vote by the *ayllu* Community of Jatun Urinsaya, May 19, 2012; **Exhibit C-48**, Vote by the *ayllus* communities, May 27, 2012; **Exhibit C-49**, Resolution Cabildo, June 8, 2012.

¹⁴⁹ **Exhibit C-50**, *Malku Khota: toman como rehenes a otras dos personas*, LOS TIEMPOS, May 8, 2012.

on May 9, 2012, the Governor of Potosí insisted that the Company suspend and cease operations for one week.¹⁵⁰ Governor Gonzales' request was very surprising given that no company representatives were present at the meeting, to which they had not been invited. It also directly undermined Minister Virreira's comment at the same meeting that the Company's licenses and exploration work were entirely legal.¹⁵¹

4. The Government Increased the Pressure on South American Silver to Abandon a Stake in the Project

69. On May 9, 2012, an individual refusing to give its name, but claiming to be employed at the Bolivian Attorney General's Office delivered a package at the CMMK's la Paz office.¹⁵² It contained an internal memorandum from Ing. Teresa Balderamma Pares, *Directora de la Unidad de Gestion Ambiental*, at the Government of Potosí to Ing. Wilfredo Blanco Alfaro, *Secretario Department de la Madre Tierra* at the Government of Potosí dated May 7, 2012.¹⁵³ That internal memorandum made clear that the Departmental Authority intended to revoke the Company's environmental license on a bogus ground.¹⁵⁴ While the Company had previously sought a modification of its environmental license, it had subsequently withdrawn that application after being advised it was objectionable. The memorandum advocated that the rejection of the request for a modification of the environmental license was sufficient in itself to invalidate the original environmental license and thus preclude the Company from engaging in any mining related activity.¹⁵⁵
70. Jim Mallory subsequently met with Vice-Minister of Mining Policy Wilka on May 15, 2012.¹⁵⁶ As Jim Mallory explains, Vice-Minister Wilka repeatedly requested that the Company provide highly confidential and proprietary information unrelated to the ongoing social situation in the area surrounding the Project:

¹⁵⁰ **Exhibit C-51**, Minutes of Meeting between the Government of Potosí and Community Members, May 9, 2012.

¹⁵¹ *Id.* See also **CWS-3**, Mallory Witness Statement at 31.

¹⁵² **Exhibit C-52**, Email from Jim Mallory to Walker San Miguel and Danilo Bocángel, May 9, 2012. See also **CWS-4**, [REDACTED] Witness Statement at 19.

¹⁵³ **Exhibit C-53**, Memorandum from Teresa B. Paredes to Wilfredo B. Alfaro, *Environmental License Report "Malku Khota Mining Exploration Project"*, May 7, 2012.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ **CWS-3**, Mallory Witness Statement ¶ 34.

At that meeting, and in repeated phone calls afterwards, the Ministry requested that the Company provide detailed information with respect to its drilling and exploration efforts including: comprehensive drilling information (length drilled and drilling angles), drill characteristics, detailed expenses and expense forecasts. I was very surprised by some of these requests, as they pertained to highly confidential and proprietary information and were completely inappropriate as they had nothing to do with our efforts to reach consensus with the Malku Khota community. [...] I had become increasingly concerned that the Government was seeking this information for an improper purpose.¹⁵⁷

71. Three days later, on May 18, 2012, Congressman Angel Gomez called the CMMK office to inform that the Congressmen from the political party of President Morales had met on the same day and resolved to support the opposition seeking to nationalize the Malku Khota Project and expel the Company from Bolivia.¹⁵⁸ Congressman Gomez's call confirmed that the Government was more interested in nationalizing a foreign company's mining project than assisting the Company by restoring order in the area surrounding the project.
72. The Government's steps towards nationalizing the project did not stop with these threats to the Company. The Minister of Mines and the Governor of Potosí also made clear to the local communities—and particularly to the illegal miners and those opposed to the Company's Project—that future plans for the development of the Malku Khota mine no longer involved South American Silver and CMMK.¹⁵⁹
73. As ██████████ recalls, Governor Gonzales organized a meeting with members of the communities who supported the Company on or around May 23, 2012.¹⁶⁰ As it had become common practice by now, the Company was not invited to that meeting and Mr. ██████████ attended as a community member, not as a CMMK employee.¹⁶¹ While community representatives requested that the Governor militarize the area to allow for exploration work to resume, the Governor "proceeded to explain to the meeting's

¹⁵⁷ *Id.*

¹⁵⁸ **Exhibit C-54**, Email from Ariannet Morgado Ramos to Guillermo Funes, et al., May 18, 2012.

¹⁵⁹ **CWS-5**, ██████████ Witness Statement ¶¶ 10-17.

¹⁶⁰ *Id.* at 10.

¹⁶¹ *Id.* at 11.

attendees that this government would never support a foreign company.”¹⁶² In Mr. [REDACTED] own words:

He stated that the Government was always against any foreign involvement in the project’s region and proposed the following three options to eject SAS’s presence in the area:

- a. The first option proposed by Governor Gonzales was for the members of the community to form their own cooperative in the Malku Khota area. He said that the members of the community could then directly obtain the benefits from the mining activity.
- b. The second option he proposed was to create a new company comprised of the Municipality of San Pedro, the Sacaca Province, the Government of Potosí, and the communities. He stressed that this option, similar to the first option, would involve only Bolivians and no foreigner, given that foreigners “take everything and leave nothing for the country”.
- c. If neither of the first two alternatives worked out, he proposed a third and final option: for the members of the communities themselves to extract the minerals and transport the concentrates to the Karachipampa Smelting Plant for processing. This smelting plant had been recently nationalized by the Bolivian government, taken from a Canadian company.¹⁶³

74. The Governor openly sought to remove the Company from the area—precisely because it was a foreign company and not out of any concern for the local security situation, contrary to what Bolivia has repeatedly alleged in this arbitration—and sought to use the local communities to achieve that covert and illegal objective. Members of the communities in attendance paid no heed to these options and insisted on the Government securing the area and guaranteeing the safety of the inhabitants and the Company.¹⁶⁴
75. At a subsequent May 28, 2012 meeting between the communities and Government officials at which the Company was not invited but which [REDACTED] again attended as a community member, Minister of Mines Mario told the community members in attendance that the Vice President of Bolivia, Mr. Alvaro Garcia Linera suggested that they stop supporting the Malku Khota Project and requesting the Government’s support

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 13.

in that respect.¹⁶⁵ Governor Gonzales, the Director of the Environment (Mr. Gunnar Perreira) and an official from the Presidency (Mr. Juan de la Cruz Vilka) were also present at that meeting. As Mr. ██████ observes: “Once again, the Government was sending clear signs of its opposition to the Company and encouraging the members of the communities to oppose the Company. However, the communities present opposed the Minister’s comments and suggestions and pressured the authorities in attendance (including the Minister) to sign the minutes with the agreement to allow CMMK to continue the exploration activities, to respect their concessions, to continue the social programs and to implement greater security measures in the zone.”¹⁶⁶

76. Encouraged by the Government’s openly-stated goal to withdraw support for South American Silver in Malku Khota, the illegal miners and their supporters ramped up their violent attacks against the Company and the communities supporting the Project. On June 12, 2012, the dissidents decided to blockade the access route to the Project area and declared the area a “red zone” forbidden to Company employees and supporters of the Project.¹⁶⁷
77. The vast majority of the local communities, who supported the company, unambiguously condemned these callous acts of violence: On June 8, 2012, 800 families from 42 communities surrounding the areas as well as representatives from the local *ayllus* and municipalities and the company held a *gran cabildo* (the highest form of official community meeting) where they confirmed their support for the Company and its Project, and condemned the violent opponents to the Project led by Cancio Rojas.¹⁶⁸ At the same meeting, the participants formally resolved to request that the Government secure the area and guarantee the safety of its inhabitants.¹⁶⁹ Four days later, on June 12, 2012,

¹⁶⁵ CWS-5, ██████ Witness Statement ¶ 17. See also **Exhibit C-15**, Minutes of Meeting between Communities and Government Officials, May 28, 2012.

¹⁶⁶ *Id.*

¹⁶⁷ **Exhibit C-55**, *Comunarios de Malku Khota toman un campamento minero*, OPINION.COM.BO, June 13, 2012; **Exhibit C-56**, *Comunarios toman un campamento minero*, LA RAZÓN, June 13, 2012.

¹⁶⁸ CWS-4, ██████ Witness Statement ¶ 22. See also **Exhibit C-49**, Resolution Cabildo, June 8, 2012; **Exhibit C-47**, Vote by the *ayllu* community of Jatun Urinsaya, May 19, 2012; **Exhibit C-48**, Vote by the *ayllu* communities, May 27, 2012. Cancio Rojas was a political activist seeking political office within the National Council of Ayllus and Markas of Qullasuyu (“CONAMAQ”) with the support of various groups of illegal miners. While Mr. Rojas was not from the Malku Khota area, he quickly organized and led the violent opposition against the project as part of his political effort to organize mining cooperatives in the areas.

¹⁶⁹ **Exhibit C-49**, Resolution Cabildo, June 8, 2012.

representatives from the *ayllus* surrounding the project area requested that the company step in and secure the area since the Government had turned a blind eye to the inhabitants' plea for assistance.¹⁷⁰

78. In an effort to discuss a solution to this situation, ██████████ met on June 19, 2012 with Vice-minister of Mining Freddy Beltran, the Legal Director at the Ministry of Mining Juan Carlos Carrasco and Gunnar Pereira, the Director of the Environment at the Ministry of Mining.¹⁷¹ As Mr. ██████████ notes in his statement: “[they] offered two options to overcome this opposition: either to enter into a partnership agreement with the Government or to hold a *consulta previa* with the stakeholders. It was clear that the Government was trying to pressure us into abandoning a stake in the project, which we could not agree to.”¹⁷² With the Government unwilling to restore order in the Malku Khota area, the project opponents continued with their harassment strategy. On June 28, 2012, two CMMK employees named Augustin Cardenas and Francisco Fernandez were taken hostage and held for 11 days—during which they were badly mistreated—by opponents of the Project.¹⁷³ A few days later, on July 2, 2012, the same opponents ransacked one of the Company's drilling camps.¹⁷⁴
79. Realizing that the local opposition was spiraling out of its control, the Government finally decided to move ahead with its plan to nationalize the Malku Khota Project.

¹⁷⁰ **Exhibit C-57**, Certificate of Guarantees of the COTOA-6A Organization, June 12, 2012.

¹⁷¹ **CWS-4**, ██████████ Witness Statement ¶ 24.

¹⁷² Holding a *consulta previa*, even at this early stage of the project, was not required under the applicable legal framework and inadvisable because the Company's right to explore the area was not subordinated to a particular form of community approval. Holding a *consulta previa* could only become necessary once the Company began to exploit the area. Minister Virreira was well aware of that distinction, as evidenced by his statements on May 31, 2012:

"We firmly maintain the view expressed by the five *ayllus*, who are the real inhabitants of the region, that they want the company to continue the exploration work; They [the five *ayllus*] had already asked a public consultation before entering the exploitation phase and today asked the same thing again in the Office (of Ministers); the consultation will take place before the exploitation phase," said Minister Virreira in a press at the Government Palace.

Exhibit C-58, *Gobierno anuncia consulta previa para explotar en Malku Khota*, EL PAÍS, May 31, 2012.

¹⁷³ **Exhibit C-59**, *Denuncian secuestro de dos trabajadores de la compañía minera Malku Khota*, EL DIARIO NACIONAL, June 29, 2012.

¹⁷⁴ **Exhibit C-60**, *Compañía minera se pronuncia*, EL DIARIO, July 4, 2012.

D. BOLIVIA EXPROPRIATED MALKU KHOTA WITHOUT PROVIDING ANY COMPENSATION

1. The Government Nationalized the Malku Khota Mining Project

80. On Saturday, July 7, 2012 in the evening, various Ministers and high-level Government officials met with the representative of the opponents to the Company to outline the Government's plan to nationalize South American Silver's concession and grant immunity to the activist leaders responsible for the violent campaign against Company employees and communities in support of the Project.¹⁷⁵
81. "On behalf of the Plurinational State of Bolivia and in the name of the Government"—as mentioned in the Memorial of Agreement signed at that meeting—attended Mr. Daniel Santalla Torrez, the Minister of Labor, Employment and Social Security; Mr. Tiburcio Aguilar, the Vice-minister of Employment, Cooperatives and Civil Service; Mr. Jorge Villca Condori, the Vice Minister of Mining Policy; and Mr. Rene Navaro Miranda, the Secretary-General for Coordination of the Government of Potosí.¹⁷⁶ Importantly, the communities located in or around the project area were not represented at that meeting. Instead, various regional political organizations opposing the Malku Khota Project seized on the opportunity to negotiate their own immunity from prosecution under the guise of representing the local communities.¹⁷⁷ Mr. Rene Arroyo was also present on behalf of the Office of the Ombudsman.¹⁷⁸ No Company representative was present because the Company had not been invited to, or even informed of that meeting.
82. The Ministers, Government officials and political representatives present at the meeting signed an official Memorandum of Agreement. Article 4 of the Memorandum of Agreement unambiguously provides for the nationalization of South American Silver's Mining Concessions:

Annulment and Reversal. In this regard, the Mining Concessions held by South American Silver "Mallcu Quota S.A." will be

¹⁷⁵ **Exhibit C-16**, Memorandum of Understanding, July 7, 2012.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* These activist organizations included *FAOI-NP* and the *Barolina Women* (an association promoting the cause of women of Aymara and Quechua descent) had no particular connection to the project area and its inhabitants.

¹⁷⁸ *Id.*

annulled. Control of said mining areas shall revert to the Plurinational State of Bolivia; the 5 provinces of Northern Potosí have agreed to this, for which purpose a Supreme Decree will be issued within such period as will be established with the President of the Plurinational State of Bolivia.¹⁷⁹

83. Article 4 makes clear that the Government had no doubts about the fact that it was expropriating South American Silver's Mining Concession and that South American Silver wholly owned and controlled CMMK (referred to as "Mallcu Quota S.A."), contrary to what Bolivia has repeatedly sought to argue in this arbitration.
84. A meeting between Governmental officials and declared adversaries to South American Silver in the absence of any Company representative is certainly not the proper forum to decide of the expropriation of a multi-billion dollar mining project. It is not the "5 provinces of Northern Potosí" to decide of the revocation of mining concessions and cause a Supreme Decree to be issued by the President of the Republic. The reference to the "5 provinces of Northern Potosí" is itself a fallacy as no official provincial representatives were present at that meeting.¹⁸⁰ Instead the "5 provinces of Northern Potosí" refers to the Federación de Ayllus Originarios Indígenas del Norte de Potosí ("FAOI-NP"), a radical political organization opposed to any foreign investments in the region.¹⁸¹
85. The Government also granted complete immunity to the opposition leaders and authors of violence against the Company and inhabitants of the local communities: "[...] the National Government will end and desist from all proceedings, investigations, warrants and persecutions against the leaders of indigenous groups and unions, the authorities, leaders and members of the 5 provinces of the Northern Potosí area within the Mallcu Quota conflict in defense of non-renewable natural resources."¹⁸² Simply put, the executive branch of the Bolivian Government agreed to guarantee the authors of

¹⁷⁹ *Id.* at 4.

¹⁸⁰ **Exhibit C-16**, Memorandum of Understanding, July 7, 2012.

¹⁸¹ FAOI-NP defines its mission as follows: "La misión de la FAOI-NP es: "Impulsar y consolidar los procesos de reconstitución y restitución de las autoridades originarias para defender y promover el ejercicio pleno de los derechos colectivos e individuales de las naciones originarias, consolidando su proyecto político e histórico de llegar al Sumaj Kawsay, a través de la articulación, participación, fortalecimiento e incidencia en los diferentes ámbitos y niveles de acción.» See <http://www.boliviarural.org/index.php/directorio-instituciones1/39-organizaciones-sociales/52-faoi-np> last visited September 23, 2014.

¹⁸² **Exhibit C-16**, Memorandum of Understanding, July 7, 2012, Arts. 3.1 and 3.2.

violence, kidnappings and destructions, as well as their leaders, from prosecution by the judicial branch.

86. Perhaps even more shocking is the Government's ratification of the kidnapping of the two CMMK employees—Augustin Cardenas and Francisco Fernandez—held by the opponents to the project: “As regards the two people currently in holding, they will be subjected to the native Indigenous [...] Justice System.”¹⁸³ Expressly recognizing that two of its own citizens were currently held hostage by the very organizations it was negotiating with, the Government did not seek to have them freed, but agreed instead to their punishment in the hands of their captors.
87. But the Government's support for the activists opposed to the project would not be complete without the decision to “order the police forces currently in Malku Khota in connection with the mining conflict to withdraw immediately.”¹⁸⁴ At the same time, the parties to the Memorandum of Agreement unambiguously recognized that the unions, FAOI-NP and activist groups—the very organizations signing this agreement with the Government—were in fact responsible for the politically-motivated violence targeting the communities in support of the Project and the Company itself: “The authorities of the native groups, FAOI-NP and unions agreed to immediately suspend the pressuring measures in place.”¹⁸⁵
88. The use of the term “pressuring measures” (*las medidas de presion* in the Spanish original) made clear that the violent events that took place over the past months were not a spontaneous reaction to the Company's action, but rather part of a deliberate campaign to force South American Silver to abandon the Malku Khota Project and the multi-billion dollar silver-indium-gallium deposit it had discovered in Malku Khota.
89. The signature of this Memorandum of Agreement was made public the next morning.¹⁸⁶ It formally marks the beginning of the expropriation process and must therefore be used

¹⁸³ *Id.* at 3.3.

¹⁸⁴ **Exhibit C-16**, Memorandum of Understanding, July 7, 2012.

¹⁸⁵ *Id.*

¹⁸⁶ **Exhibit C-61**, *Morales confirma nacionalización de Malku Khota*, AGENCIA BOLIVIANA DE INFORMACIÓN, July 8, 2012; **Exhibit C-62**, *Gobierno firma acuerdo con dirigentes de Malku Khota y los últimos tres rehenes son liberados*, LA RAZÓN, July 8, 2012, (“Existe un firme compromiso de nuestro gobierno de anular la concesión, de revertir al Estado Boliviano el verro del Malku Khota a favor del Estado Boliviano” sostuvo el

for the determination of the Valuation Date for the purpose of assessing the compensation owed to South American Silver under Article 5 of the BIT.¹⁸⁷

2. President Morales Confirmed the Expropriation of the South American Silver's Investment

90. On Sunday, July 8, 2012, President Evo Morales publicly announced that the Government would nationalize the Malku Khota Mining Project.¹⁸⁸ In a press release issued by the Bolivian national press agency, President Morales recognized that the local communities were not overwhelmingly in support of the nationalization: “There are always some problems, in Malku Khota for example the brothers in confrontation, some want to nationalize others don’t want to nationalize. Last year I had suggested let’s nationalize, but other group doesn’t want to, other group wants to.”¹⁸⁹
91. On the next day, July 9, 2012, the Minister of Communication, Amanda Davila, openly acknowledged at a press conference that the Government had sought to nationalize the Malku Khota Project since one year ago:

“The Bolivian Government had always had the intention to suspend the agreement with the company and revert this concession in favor of the State since over a year ago, what happened is that there has been no agreement between the

ministro [de trabajo]”Algunos grupos no quieren y otros quieren, y ahí no sabemos a quién hacer caso...” señaló Morales en un acto en el municipio cochabambino de Colomi. Romero, por su parte, señaló este domingo que existen algunas comunidades que estarían de acuerdo con la canadiense South American Silver para su permanencia en el lugar y realicen los trabajos de exploración en Malku Khota. Mientras, otro grupo representativo exige lo contrario argumentado que la empresa minera ocasiona un daño ambiental.”).

¹⁸⁷ **Exhibit C-1**, Treaty, Art. 5. See also **CER-1**, FTI Expert Report at 8.38-42; **CER-2**, RPA Expert Report at 1-1.

¹⁸⁸ **Exhibit C-61**, *Morales confirma nacionalización de Malku Khota*, AGENCIA BOLIVIANA DE INFORMACION, July 8, 2012 ; **Exhibit C-62**, *Gobierno firma acuerdo con dirigentes de Malku Khota y los últimos tres rehenes son liberados*, LA RAZÓN, July 8, 2012, (“Existe un firme compromiso de nuestro gobierno de anular la concesión, de revertir al Estado Boliviano el verro del Malku Khota a favor del Estado Boliviano’ sostuvo el ministro [de trabajo] ‘Algunos grupos no quieren y otros quieren, y ahí no sabemos a quién hacer caso’ señaló Morales en un acto en el municipio cochabambino de Colomi. Romero, por su parte, señaló este domingo que existen algunas comunidades que estarían de acuerdo con la canadiense South American Silver para su permanencia en el lugar y realicen los trabajos de exploración en Malku Khota. Mientras, otro grupo representativo exige lo contrario argumentado que la empresa minera ocasiona un daño ambiental.”).

¹⁸⁹ *Id.*

community members and the indigenous leaders” informed the minister today in a press conference at the Government palace.¹⁹⁰

92. As anyone can attest, this is a far cry from Respondent’s misleading efforts throughout this arbitration to depict the nationalization as a last-minute decision reluctantly adopted out of security concerns.¹⁹¹ Instead, Minister Davila made clear that the Government has “always” intended to expropriate the concessions and that the disagreement at issue was “between the community members and the indigenous leaders” and not between the community members and the Company.¹⁹²
93. On July 10, 2012 President Morales called a meeting with the *ayllus* leadership at the presidential palace to ratify the nationalization of the Company’s Mining Concessions.¹⁹³ The representatives of the *ayllus* comprising the Project’s area of influence participated in that meeting, along with union leaders from Northern Potosí, the Minister of Mining, Mario Vierreira; the Minister of Labor, Employment and Social Security, Daniel Santalla; and the Governor of Potosí, Felix Gonzales.¹⁹⁴
94. Among the different issues discussed at the meetings, the parties present at the meeting agreed that: (i) a committee tasked with drafting the Supreme Decree “reversing” the Company’s Mining Concessions to the State would be constituted;¹⁹⁵ (ii) any type of exploration or mining activity at the Malku Khota Project Area was suspended;¹⁹⁶ and (iii) that “the State shall take over the entire production chain at the Malku Qhota Mining Center.”¹⁹⁷ That last decision left no doubt as to the fact that the “reversion” was nothing but a straightforward nationalization of the Malku Khota Project.

¹⁹⁰ **Exhibit C-63**, *Gobierno dice que tenía hace un año la intención de anular contrato con minera en Malku Khota*, LA RAZÓN, July 9, 2012.

¹⁹¹ As explained by Bolivia during the procedural hearing: “So, we need to clarify that Bolivia, on taking this measure to revert the mining concessions, but not expropriation, it was actually an emergency measure just to safeguard the social situation of the country because the mining sector in Bolivia is a very sensitive sector.” English transcript of the May 13, 2014 procedural hearing at p. 8.

¹⁹² **Exhibit C-63**, *Gobierno dice que tenía hace un año la intención de anular contrato con minera en Malku Khota*, LA RAZÓN, July 9, 2012.

¹⁹³ **Exhibit C-17**, Agreement, July 10, 2012. *See also* CWS-4, [REDACTED] Witness Statement at 25.

¹⁹⁴ **Exhibit C-17**, Agreement, July 10, 2012.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

95. Shortly after that meeting concluded, on the same day, ██████████ spoke with two of the *ayllu* leaders present at the meeting: Edmundo Coronel from *Ayllu Samca* and Andres Sonco from *Ayllu Jatun Urinsaya*.¹⁹⁸ They told Mr. ██████████ that the *ayllus* continued to support the Company but were pressured by President Morales into agreeing to the nationalization.¹⁹⁹ As Mr. ██████████ recalls: “[...] they made it clear that the President Evo Morales entered the meeting and applied pressure to the supporting communities by telling them that they could not support a transnational company and that if they did, they would be considered supporters of the right (*la derecha*) and would be acting contrary to the interests of the State.”²⁰⁰
96. Again, the Government itself, and not the local communities, was the one pressing for the nationalization of the Malku Khota Project. President Morales made clear that South American Silver could not be supported because it is a “transnational corporation” irrespective of its rights under the Concession Agreements and the support provided by the overwhelming majority of local inhabitants.²⁰¹
97. As for Governor Gonzales, he could not hide its satisfaction at the nationalization:
- The Governor of Potosí, Felix Gonzales, welcomed the agreement and stated that the State wins with the nationalization, as economically, it represents, at least “near to 800 million dollars every year”. “Silver, initially there is over 300 million ounces in all of the Malku Khota hill: we have 1.800 tons of indium, gallium, copper, zinc and gold has still not been valued” he said.²⁰²
98. It is clear from Governor Gonzales’ statements that the Government’s decision to nationalize Malku Khota was not primarily motivated by considerations of public security but first and foremost by a desire to appropriate for itself the considerable mineral resources discovered by South American Silver.

¹⁹⁸ CWS-4, ██████████ Witness Statement ¶ 25.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ **Exhibit C-67**, *Morales destaca acuerdo con originarios de Malku Khota que permite recuperar recursos naturales*, AGENCIA BOLIVIANA DE INFORMACIÓN, July 10, 2012.

²⁰² **Exhibit C-64**, *Definen que el Estado se hará cargo de la mina Malku Khota*, PÁGINA SIETE, July 11, 2012.

3. COMIBOL Seeks to Bring Back South American Silver as a Partner

99. Four days after President Morales coaxed the *ayllu* representatives into “agreeing” to the Government’s plan to nationalize Malku Khota, COMIBOL realized that it would not be able to exploit the Malku Khota by itself and would need South American Silver’s mining expertise and knowledge of the Project. On July 14, 2012, Felipe Malbran met with COMIBOL’s President, Hector Cordova, at COMIBOL’s office.²⁰³ As Mr. Malbran recalls, Mr. Cordova told him that he “would like that we continue to be together, an apparent partnership can be made between the company, COMIBOL and the community” and that he would be interested in forming a joint company in order to develop the Malku Khota Project.²⁰⁴ Mr. Cordova went on to explain that he had proposed that idea to President Morales even if others present at that particular meeting did not like the idea of creating a joint company.²⁰⁵ During the same meeting with Mr. Malbran, Mr. Cordova also acknowledged that revocation of the concessions would be unjust, illegal and unconstitutional, that President Morales’s decision left him “speechless” and that the Government would have to consider the financial cost, as it would have to compensate not only for the investment made by the Company but also for what the Company expected to gain.²⁰⁶ Mr. Cordova added that CMMK still had legal title over the Mining Concessions as of that date.²⁰⁷ These statements came as a surprise to Mr. Malbran because they took place only four days after President Morales had officially decided to revoke CMMK’s Mining Concession.²⁰⁸
100. A few days later, on July 21, 2012, Felipe Malbran and ██████████ wrote to Minister Virreira on CMMK’s behalf to request a meeting in an attempt to avoid nationalization.²⁰⁹ On July 31, 2012, Ralph Fitch and Greg Johnson wrote to Vice-President Alvaro Garcia Linera on behalf of South American Silver to request a meeting to discuss a potential resolution of the situation.²¹⁰ Both requests remained dead letter,

²⁰³ CWS-2, Malbran Witness Statement ¶ 63.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Exhibit C-18, Letter from Felipe Malbran and ██████████ to Mario V. Iporre, July 21, 2012.

²¹⁰ Exhibit C-19, Letter from Ralph G. Fitch and Greg S. Johnson to Álvaro García Linera, July 31, 2012.

since President Morales formally issued the Supreme Decree expropriating the Mining Concessions on August 1, 2012.

4. Bolivia Never Paid or Offered Any Compensation to South American Silver

101. President Morales issued Supreme Decree No. 1308 on August 1, 2012, whose relevant provisions can be summarized as follows:

- The Mining Concessions shall revert back to the original ownership of the State;²¹¹
- COMIBOL shall take over the management and mining development of the Mining Concessions;²¹²
- COMIBOL shall perform prospection and exploration activities in coordination with the National Technical Mining and Geology Service of Bolivia;²¹³
- COMIBOL shall retain the services of an independent firm to value the investments made by CMMK within 120 days of the enactment of the Supreme Decree (by November 29, 2012);²¹⁴ and
- Based on the findings of that valuation, COMIBOL shall determine the amounts and conditions of the payment of compensation to CMMK, and pay those amounts to CMMK.²¹⁵

102. The valuation methodology contemplated in the Supreme Decree falls short from the standard of compensation required pursuant to the BIT, namely, that “such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier”.²¹⁶ Instead, the Supreme Decree only contemplated a

²¹¹ **Exhibit C-4**, Supreme Decree No. 1308, August 1, 2012, Art. 1.

²¹² *Id.* at 2.

²¹³ *Id.* at 3.

²¹⁴ *Id.* at 4.

²¹⁵ *Id.*

²¹⁶ **Exhibit C-1**, Treaty, Art. 5.

compensation based on the sums invested by CMMK, subject to COMIBOL's appreciation, which is radically different.

103. Consequently, even if Bolivia had effectively quantified and paid to the Company the sums invested in connection with the Malku Khota Project, this would have still not be sufficient to satisfy its obligation to compensate South American Silver pursuant to Article 5 of the BIT. Since President Morales enacted Supreme Decree No. 1308 on August 1, 2012, Bolivia has neither paid nor offered any form or amount of compensation to South American Silver or CMMK. Counsel for Bolivia confirmed themselves at the hearing that, in fact, Bolivia had not even completed the valuation process at the time of the first procedural meeting held on May 13, 2014,²¹⁷ even though Article 4.1 of the Supreme Decree required that this assessment be completed within a period not exceeding 120 days.²¹⁸
104. A few days after Supreme Decree No. 1038 was issued, on August 7, 2014, COMIBOL President Mr. Hector Cordova announced that COMIBOL was seeking to partner with a Chinese mining company to develop the Malku Khota silver and indium deposits.²¹⁹ Thereafter, by letter addressed to South American Silver and dated August 24, 2012, but only delivered on August 27, 2012, Mr. Cordova requested that Company representatives meet at COMIBOL's office the next morning to "hand-over all relevant documents related to the development of the activities" of the Malku Khota mining deposit.²²⁰ Unable to attend this meeting on such short notice, South American Silver subsequently advised COMIBOL that it would be pleased to meet and discuss COMIBOL's proposal at a mutually acceptable date. COMIBOL never responded to this proposal.²²¹
105. As of today, COMIBOL and Bolivia have still not paid compensation to the Company and exploration work has yet to resume in Malku Khota. The local communities still live

²¹⁷ As explained by Bolivia during the procedural hearing: "It is obvious that this compensation, in any case, is guided towards what was invested, not the perspective or the forecast of work that the Malku Khota company had. Unfortunately, up to date, we do not have...the Bolivian State is doing all the activities and tasks and is driving the valuation that obviously had to be finished by COMIBOL, the Mining Corporation of Bolivia, but this is not ready." English transcript of procedural hearing of May 13, 2014 at pp. 10-11.

²¹⁸ **Exhibit C-4**, Supreme Decree No. 1308, August 1, 2012, Art. 4.1.

²¹⁹ **Exhibit C-65**, *Comibol busca apoyo técnico para explotar indio*, LA PRENSA, August 8, 2012; **Exhibit C-66**, *Comibol busca que China asuma la exploración en Malku Khota*, PAGINA SIETE, August 12, 2012.

²²⁰ **Exhibit C-20**, Letter from COMIBOL addressed to South American Silver, August 24, 2012.

²²¹ **Exhibit C-21**, Letter from South American Silver to COMIBOL, September 4, 2012.

in extreme poverty; the Government does not receive any revenues or royalty from the Malku Khota vast metal resources; and the Company has been deprived of the fruits of its world-class discovery and considerable exploration efforts. As Mr. Fitch concludes: “Besides decimating the value of our investment, the expropriation of the project has destroyed significant opportunities for many Bolivians to live better lives.”²²²

III. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE

106. As explained above and in the Notice of Arbitration, South American Silver is a Bermudan company with protected investments in Bolivia.²²³ South American Silver and Bolivia have both consented to the arbitration of this dispute. Finally, all requirements under the Treaty and the UNCITRAL Rules for the submission of this dispute to arbitration have been fulfilled. This arbitral Tribunal is therefore competent to decide the present dispute.

A. SOUTH AMERICAN SILVER IS A PROTECTED COMPANY UNDER THE TREATY

107. The Treaty protects “companies” of a Contracting Party against adverse actions by the opposite Contracting Party. Article 1(d) of the Treaty, defines “companies” from the United Kingdom as: “Corporations, firms and associations, incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 11.”²²⁴ The Contracting Parties extended the Treaty to Bermuda by Exchange of Notes on December 3 and 9, 1992.²²⁵ Thus, as of December 9, 1992, corporations, firms and associations incorporated or constituted under the laws of Bermuda qualify as “companies” of the United Kingdom under Article 1(d) of the Treaty.

108. As discussed in Section II.B.2 above, South American Silver is a Bermudan Company duly incorporated under the laws of Bermuda and registered at the Bermudan Registrar of

²²² **CWS-1**, Fitch Witness Statement ¶ 31.

²²³ *See supra* at II.B.2.

²²⁴ **Exhibit C-1**, Treaty, Art. 1(d).

²²⁵ **Exhibit C-2**, Statement by the UK on the Exchange of Notes at La Paz, extending the Treaty to Bermuda, December 3 and 9, 1992.

Companies on October 7, 1994. South American Silver therefore qualifies as a protected company under the Treaty.

B. SOUTH AMERICAN SILVER HAS MADE QUALIFYING INVESTMENTS IN BOLIVIA

109. Articles 1(a) of the Treaty broadly defines a protected “investment” as “every kind of asset which is capable of producing returns and in particular, though not exclusively, [...] shares in and stock and debentures of a company and any other form of participation in a company, [...] any business concessions granted by the Contracting Parties in accordance with their respective laws, including concessions to search for, cultivate, extract or exploit natural resources.”²²⁶
110. International arbitration tribunals and commentators widely acknowledge that the notion of “investments” in bilateral investment treaties extends to both direct and indirect investments.²²⁷ It is thus irrelevant whether an investor of one country owns a protected investment in another country directly or indirectly, that is, through one or more other intermediary corporate entities.²²⁸ These intermediary corporate entities can be registered or incorporated in the investor’s country of origin, in a foreign country that is not a party to the treaty in question, and in the country where the investment is located.²²⁹ In the later case, the protected investments will consist in the investor’s shares in the local company as well as the assets of that local company.²³⁰

²²⁶ **Exhibit C-1**, Treaty, Art. 1(a). Art. 1(a) and 1(b) in turn, defines “returns” as “the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees.”

²²⁷ **CLA-1**, *Guaracachi America, Inc., and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL Case No. 2011-17, Award, January 31, 2014 (“*Rurelec Award*”) ¶ 348.

²²⁸ **CLA-2**, *Siemens A. G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, Feb. 6, 2007 (“*Siemens Award*”) ¶ 206; **CLA-3**, *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, Mar. 3, 2010 (“*Kardassopoulos Award*”) ¶ 2; **CLA-4**, *BG Group Plc v. Argentine Republic*, UNCITRAL Award, Dec. 24, 2007 (“*BG Award*”) ¶ 125.

²²⁹ *Id.*

²³⁰ **CLA-5**, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005 (“*CMS Award*”) ¶ 124; **CLA-4**, *BG Award* ¶ 125; **CLA-6**, *GAMI Investments, Inc. v. Government of United Mexican States*, NAFTAUNCITRAL, Final Award, November 15, 2004 (“*GAMI Award*”) ¶ 33; **CLA-7**, Abby Cohen Smutny, *State Responsibility and Attribution/When is a State Responsible for the Acts of State Enterprises? ‘Emilio Agustín Maffezini v. The Kingdom of Spain’* in *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW* 17 (Todd Weiler ed., Cameron May 2005).

111. Tasked with determining whether Article 1(a) of the UK-Bolivia BIT applies to indirect investments in Bolivia, the *Rurelec* Tribunal unambiguously concluded that the Treaty’s definition of investment naturally includes indirect investments:

In the Tribunal’s opinion, all of the above examples [of what constitute an investment under the UK-Bolivia BIT] contribute to the conclusion that indirect investments were intended to be protected by the UK-Bolivia BIT. Moreover, given that the purpose of the BIT is to promote and protect foreign investment, the Tribunal considers that the BIT would require clear language in order to exclude coverage of indirect investments—language that the BIT does not contain.²³¹

112. As explained in considerable detail at Section II.B.2 above, Claimant, South American Silver, owned at the time of the expropriation and continues to own 100% of the shares in CMMK, a company established under the laws of Bolivia, through its wholly-owned Bahaman subsidiaries, Malku Khota Ltd, Productora Ltd. and G.M. Campana Ltd.²³² CMMK, in turn, held the ten Mining Concessions constituting the Malku Khota Project Area.²³³
113. South American Silver therefore has made significant investments in Bolivia that fall within the definition of “investment” under the Treaty and are thus protected by the Treaty.

C. THE PARTIES HAVE CONSENTED TO ARBITRATION OF THIS DISPUTE AND ALL REQUIREMENTS UNDER THE TREATY AND THE UNCITRAL RULES HAVE BEEN FULFILLED

114. Bolivia expressly and unequivocally consented to resolve investment disputes with UK—and, by extension, Bermudan—investors through international arbitration by virtue of Article 8 of the Treaty, which South American Silver has quoted *in extenso* in its Notice of Arbitration.²³⁴ South American Silver consented to the arbitration of this dispute in its Notice of Arbitration dated April 30, 2013.²³⁵

²³¹ **CLA-1**, *Rurelec* Award ¶ 353.

²³² *See supra* at II.B.2.a.

²³³ *Id.* at II.B.2.b.

²³⁴ Notice of Arbitration ¶ 55.

²³⁵ *Id.*

115. South American Silver formally notified Bolivia of the dispute under the Treaty in its Notice of Dispute dated October 23, 2012.²³⁶ No amicable resolution of the dispute has been reached during the six-month waiting period following the Notice of Dispute's submission, as contemplated in Article 8(1) of the Treaty.²³⁷ South American Silver and Bolivia have not agreed on any alternative arbitration mechanisms established in Article 8(2) of the Treaty.²³⁸ Accordingly, this dispute is validly submitted to arbitration under the UNCITRAL Rules pursuant to Article 8(2) of the Treaty.²³⁹

IV. APPLICABLE LAW

116. South American Silver's claims are based on Treaty provisions, as supplemented by international law. International jurisprudence is clear regarding the applicable law in investment treaty cases: tribunals apply the treaty itself, as *lex specialis*, supplemented by international law if necessary.²⁴⁰ Investment treaties grant foreign investors direct access to arbitration in order to allow investors to invoke the substantive protections afforded by the relevant treaty itself. Thus, the substantive standards of treatment and protections of the Treaty must primarily govern this case.

117. The Vienna Convention on the Law of Treaties (the "Vienna Convention") provides that "treaties are governed by international law" and must be interpreted in light of "any relevant rules of international law."²⁴¹ The Vienna Convention further consecrates the primacy of international law over domestic law in the area of State responsibility: "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."²⁴² The International Law Commission's Draft Articles on

²³⁶ **Exhibit C-22**, Notice of Dispute from South American Silver dated October 22, 2012. On October 23, 2012, South American Silver sent via facsimile the Notice of Dispute under the Treaty to the Minister of Mining and Metallurgy. Additionally, South American Silver served the Notice of Dispute by hand delivery to the Minister of Mining and Metallurgy and the First Attorney General of the State on October 24, 2012.

²³⁷ **Exhibit C-1**, Treaty, Art. 8(1).

²³⁸ *Id.* at 8(2).

²³⁹ *Id.*

²⁴⁰ **CLA-8**, *Asian Agric. Prods., Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, 30 I.L.M. 580, (1991) ("AAPL Award") ¶ 54; **CLA-9**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, Apr. 12, 2002 ("Middle East Cement Award") ¶¶ 85-87; **CLA-10**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ICSID Case No. ARB/97/3, Award, Aug. 20, 2007 ("Vivendi II Award") ¶ 102.

²⁴¹ **CLA-11**, Vienna Convention, Arts. 2(1)(a) and 31(3)(c).

²⁴² *Id.* Art. 37.

Responsibility of States for Internationally Wrongful Acts (the “ILC Articles”) confirm that: “The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”²⁴³ Therefore, the Treaty supplemented as necessary by international law governs this dispute.

V. BOLIVIA VIOLATED ITS OBLIGATIONS UNDER THE TREATY AND INTERNATIONAL LAW

A. BOLIVIA UNLAWFULLY EXPROPRIATED SOUTH AMERICAN SILVER’S INVESTMENTS

118. Bolivia unlawfully expropriated South American Silver’s investment by nationalizing the Malku Khota Mining Concessions without paying prompt, just and effective compensation to South American Silver.²⁴⁴ Bolivia thus breached its obligations under Article 5(1) and 5(2) of the Treaty. Article 5(1) requires, among other things, that the expropriating party pay without delay just and effective compensation for the expropriated investment, determined on the basis of the expropriated investment’s market value:

Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “expropriation”) in the territory of the Contracting Party except for public purpose and for social benefit related to the internal needs of that Party and against just and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at

²⁴³ **CLA-12**, Responsibility of States for Internationally Wrongful Acts, U.N. GAOR 6th Comm., 56th Sess., U.N. Doc. A/Res/56/83, Jan. 28, 2002, art. 3; **CLA-13**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 (“*Tecmed Award*”) 120 (quoting **CLA-14**, James R. Crawford, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 84 (2002)).

²⁴⁴ For the purpose of determining Bolivia’s liability in this arbitration—with respect to the expropriation of South American Silver’s investments as well as the other breaches of the BIT and international law argued in this arbitration—Bolivia’s conduct include those of the central government and of any territorial units of the State (including, but not limited to, the Department of Potosí) as well as those of persons or entities exercising elements of governmental authority or acting on the instruction of, or under the direction or control of, Bolivia in carrying a particular conduct. **CLA-15**, International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (the “ILC Articles”), Art. 4, 5 and 8.

a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party, until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have the right to establish promptly by due process of law in the territory of the Contracting Party making the expropriation the legality of the expropriation and the amount of the compensation in accordance with the principle set out in this paragraph.²⁴⁵

119. Article 5(2) of the Treaty expressly provides for the situation where the expropriating party expropriates the assets of a local company owned in whole or in part by a foreign investor. In that case, the expropriating party must guarantee that the foreign investor receives prompt, adequate and effective compensation for its investment:

Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other contracting party own shares, it shall ensure that the provisions of paragraph (1) of this Article [5] are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares.²⁴⁶

120. Article 5(2) plays a particularly crucial role in this dispute because Bolivia has expropriated the Mining Concessions, an asset of CMMK, itself a Bolivian corporation wholly-owned by South American Silver. Bolivia thus had—and failed—to pay prompt, adequate and effective compensation to South American Silver for its investment in the Malku Khota Mining Project.

1. Bolivia Nationalized the Malku Khota Mining Concessions

121. Article 5 of the Treaty does not distinguish between nationalization, expropriation and measures having effect to nationalization or expropriation, which it collectively refers to as “expropriation”. International law recognizes that an investment can be expropriated regardless of the vocabulary used to describe the government’s action: “seizure,

²⁴⁵ **Exhibit C-1**, Treaty, Art. 5(1) emphasis added.

²⁴⁶ *Id.* at 5(2).

confiscation, nationalization, sequestration, condemnation—and an even larger number of ways that property can be expropriated.”²⁴⁷

122. Bolivia has sought to obfuscate the Mining Concession’s nationalization by arguing that: “The term expropriation has at no time been established by Bolivia in the Supreme Decree.”²⁴⁸ To be clear, that Bolivia chose to call the nationalization of CMMK’s concession “reversion” instead of “expropriation” is completely irrelevant for the purpose of determining whether Bolivia breached Article 5 of the Treaty. In this respect, Dugan *et al.* have explained that “expropriation can be direct, indirect, creeping, de facto, or a government act may be ‘tantamount to,’ equivalent to,’ or ‘have similar effects as’ expropriation.”²⁴⁹ Article 5(1) of the Treaty also makes clear that “measures having effect equivalent to nationalization or expropriation” are also considered to be “expropriation.”²⁵⁰ Thus, Bolivia’s resort to arguments based upon semantics when its actions are clearly “equivalent to” expropriation must fail.
123. The term expropriation, as interpreted by international law, clearly includes open and acknowledged takings of property and titles, or, as the *Metalclad v. Mexico* tribunal puts “outright seizure or formal or obligatory transfer of title in favour of the host State.”²⁵¹ As observed by Dugan *et al.*, international law doctrine leaves no doubt as to the fact that direct taking of legal titles constitutes expropriations under international law:

Although direct expropriations are not as prevalent now as in the past, especially with the demise of Marxist-Leninist regimes, they still occur. Such physical seizures or the outright transfer of legal title to an investment cause few doctrinal problems because both the character and consequence of such acts is readily apparent.

²⁴⁷ **CLA-16**, Christopher Dugan, Don Wallace, Jr., Noah Rubins and Borzu Sabahi, INVESTOR-STATE ARBITRATION 450 (2008) (“Dugan and Wallace et al., *Investor-State Arbitration*”). The concepts of nationalization and expropriation are sufficiently clear and well defined under international law and various domestic legal orders so as to be self-explanatory and obviate the need for a specific definition in treaties or similar instruments.

²⁴⁸ English Transcript of procedural hearing on May 13, 2014.

²⁴⁹ **CLA-16**, Dugan and Wallace et al., *Investor-State Arbitration* at 450.

²⁵⁰ **Exhibit C-1**, Treaty, Art. 5(1)

²⁵¹ **CLA-17**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of August 30, 2000 (“*Metalclad Award*”) ¶ 103.

Indeed, for purposes of legal classification, such direct expropriations are the easy cases.²⁵²

124. There is a broad consensus in scholarly writings relating to expropriation that protection relates not only to tangible property or physical assets, but also to a broad range of rights that are economically significant to the investor.²⁵³ As Judge Rosalyn Higgins has noted: “[...] the notion of ‘property’ is not restricted to chattels. Sometimes rights that might seem more naturally to fall under the category of contract rights are treated as property.”²⁵⁴ Likewise, the *Tecmed v. Mexico* tribunal defines direct expropriation as “a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect.”²⁵⁵
125. Investment tribunals also recognize that concession rights are subject to expropriation.²⁵⁶ In the Phillips Case, the Iran-US Claims Tribunal dealt with rights arising from a concession agreement, which it held were subject to expropriation:

As the Tribunal has held in a number of cases, expropriation by or attributable to a State of the property of any aliens gives rise under international law to liability for compensation, and this is so whether the expropriation is formal or *de facto* and whether the property is tangible, such as real estate or a factory, or intangible, such as contractual rights involved in the present Case.²⁵⁷

²⁵² **CLA-16**, Dugan and Wallace et al., *Investor-State Arbitration* at 450-51.

²⁵³ See, e.g., **CLA-18**, G.C. Christie, What Constitutes a Taking of Property under International Law?, 38 BRIT. Y.B. INT’L L. 305, 311 (1962); **CLA-19**; B.H. Weston, “Constructive Takings” under International Law: A Modest Foray into the Problem of “Creeping Expropriation,” 16 VIR. J. INT’L L. 103, 112-13 (1975) (who uses the term “wealth deprivation” in this context); **CLA-20**, T. Waelde & A. Kolo, Environmental Regulation, Investment Protection and Regulatory Taking in International Law, 50 INT’L COMP. L.Q. 811, 835 (2001); **CLA-21**, G. H. Sampliner, Arbitration of Expropriation Cases Under US Investment Treaties - A Threat to Democracy or the Dog That Didn’t Bark?, 18 ICSID REV.—F.I.L.J. 1, 14 (2003); **CLA-22**, J. Paulsson & Z. Douglas, Indirect Expropriation in Investment Treaty Arbitrations, ARBITRATING FOREIGN INVESTMENT DISPUTES (N. Horn, S. Kroll eds.) 145, 152 (Kluwer 2004); **CLA-23**, S. Alexandrov, Breaches of Contract and Breaches of Treaty, The Jurisdiction of Treaty based Arbitration Tribunals to Decide Breach of Contract Claims in *SGS v. Pakistan* and *SGS v. Philippines*, 5 J. WORLD INV. TRADE 555, 559 (2004).

²⁵⁴ **CLA-24**, R. Higgins, The Taking of Property by the State: Recent Developments in International Law, 176 REC, DES Cours 263, 271 (1982-III).

²⁵⁵ **CLA-13**, *Tecmed* Award ¶ 113.

²⁵⁶ **CLA-25**, *Phillips Petroleum Company Iran v. Islamic Republic of Iran, Iran-U.S. Claims Trib.*, Case No. 39, Chamber 2, Award No. 425-39-2, June 29, 1989 (“*Phillips* Award”).

²⁵⁷ **CLA-25**, *Phillips* Award ¶ 76, (citing e.g., *Starrett Housing Corporation and The Government of the Islamic Republic of Iran*, Interlocutory Award No. ITL 32-24-1 (19 December 1983), reprinted in 4 IRAN-U.S. C.T.R. 122, and Award No. 314-24-1 (14 August 1987), reprinted in 16 Iran-U.S. C.T.R. 112; **CLA-26**, *Tippetts*,

126. It is uncontroversial on the facts of this case that Bolivia expropriated the Malku Khota Mining Concessions. All three governmental acts deciding and ratifying the expropriation unambiguously provide for the taking of CMMK's rights over the Mining Concession by the Government. The Memorandum of Agreement dated July 7, 2012 prescribes that "the Mining Concessions held by South American Silver 'Mallcu Quota S.A.' will be annulled. Control of said mining areas shall revert to the Plurinational State of Bolivia."²⁵⁸ The July 10, 2012 Agreement negotiated by the Office of the President clarifies that: "The State shall take over the entire production chain at the Malku Qhota Mining Center."²⁵⁹ Finally, Supreme Decree No. 1308 unambiguously provides that the Mining Concessions "shall revert back to the original ownership of the State" and that "Corporacion Minera de Bolivia – COMIBOL shall take over the management and mining development of the 219 mining blocks" constituting these concessions and "perform all the activities making up the mining production chain."²⁶⁰ The same decree further states that "No other non-State mining producer may perform mining activities by itself in the areas that have reverted back to the State hereunder."²⁶¹
127. When announcing the Mining Concessions revocation, President Morales has claimed that: "Nationalization is our obligation."²⁶² Likewise, Governor Gonzales stated to the press that the State wins with the nationalization, as economically, it represents, at least "near to 800 million dollars every year."²⁶³ Minister of Communications Davila

Abbott, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, Award No. 141-7-2 (29 June 1984), reprinted in 6 IRAN-U.S. C.T.R 219; **CLA-27**, *Phelps Dodge Corp. and Overseas Private Investment Corp. and The Islamic Republic of Iran*, Award No. 217-99-2 (19 March 1986), reprinted in 10 IRAN-US. C.T.R 121; **CLA-28**, *SEDCO, Inc. and National Iranian Oil Company*, Interlocutory Award No. ITL 55-129-3 (28 October 1985) ("*SEDCO* Interlocutory Award"), reprinted in 9 IRAN-U.S. C.T.R 248 and Award No. 309-129-3 (7 July 1987), reprinted in 15 IRAN-U.S. C.T.R 23). *See also* **CLA-29**, *Amoco International Finance Corp. v. Islamic Republic of Iran, Iran-U.S. Claims Trib*, Case No. 56, Chamber 3, Award No. 310-56-3, Partial Award, July 14, 1987, 27 I.L.M. 1314 ("*Amoco* Partial Award") 108 (1988).

²⁵⁸ **Exhibit C-16**, Memorandum of Understanding July 7, 2012.

²⁵⁹ *Id.*

²⁶⁰ **Exhibit C-4**, Supreme Decree No. 1308, August 1, 2012.

²⁶¹ *Id.*

²⁶² **Exhibit C-61**, *Morales confirma nacionalización de Malku Khota*, AGENCIA BOLIVIANA DE INFORMACIÓN, July 8, 2012.

²⁶³ "El gobernador de Potosí, Félix Gonzales, saludó el acuerdo y sostuvo que el Estado gana con la nacionalización, pues económicamente representaría, al menos, "cerca de 800 millones de dólares todos los años". "La plata, inicialmente hay más de 300 millones de onzas troy en todo el cerro de Mallku Khota; tenemos 1.800 toneladas de indio, galio, cobre y zinc, y el oro que todavía no ha sido valorado", dijo. *See Exhibit C-64*, *Definen que el Estado se hará cargo de la mina Malku Khota*, PÁGINA SIETE, July 11, 2012.

confirmed that: “The Bolivian Government had always had the intention to [...] revert this concession in favor of the State since over a year ago.”²⁶⁴ These statements by high-level government officials firmly establish that the Government had planned for at least a year to nationalize the Malku Khota Project.

2. Bolivia’s expropriatory measures were not taken against prompt, just and effective compensation.

128. It is also undisputed that Bolivia has never paid or offered any compensation to South American Silver.
129. Article 5(1) of the Treaty makes clear that to be legal, an expropriation must—among other things—be “against just and effective compensation” paid “without delay.”²⁶⁵ Importantly, Article 5(1) adds that “such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier.”²⁶⁶ Article 5(1) further prescribes that the compensation shall be effectively realizable and freely transferable and “include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party, until the date of payment.”²⁶⁷
130. As discussed above, Article 5(2) of the Treaty specifically provides for the situation where a party expropriates the assets of a local company owned in whole or in part by a foreign investor.²⁶⁸ In that case, the expropriating party “shall ensure that the provisions of [Article 5(1)] are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment” to the foreign investor.²⁶⁹

²⁶⁴ **Exhibit C-63**, *Gobierno dice que tenía hace un año la intención de anular contrato con minera en Malku Khota*, LA RAZÓN, July 9, 2012, (“La ministra de Comunicación, Amada Dávila, informó que el Gobierno ya tenía hace un año la intención de revertir la concesión Minera de la empresa South American Silver en Malku Khota [...] ‘El Gobierno boliviano tenía siempre la intención de suspender el contrato con la empresa y revertir esta concesión a favor del Estado desde hace más de un año, lo que pasa es que no hubo acuerdo entre los propios comunarios y los dirigentes indígenas’, informo la ministra hoy en una conferencia de prensa en Palacio Nacional”).

²⁶⁵ **Exhibit C-1**, Treaty, Art. 5(1).

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

131. Article 5 of the Treaty thus requires Bolivia to pay without delay compensation to South American Silver in the amount of the market value of the Malku Khota Mining Project, plus interest, as a result of its decision to expropriate CMMK's Mining Concession.
132. These requirements reflect and expressly endorse the general international law principle that compensation must be prompt, adequate and effective, as articulated in 1938 US Secretary of State Cordell Hull: "no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore."²⁷⁰ The Hull formula has been widely regarded ever since as an expression of the customary international law standard of compensation.²⁷¹
133. Bolivia has admitted in this arbitration that it has yet to pay—or even offer—compensation to South American Silver two years after having expropriated the Malku Khota Project.²⁷² Bolivia nevertheless insists that it "is going to compensate" South American Silver at some undetermined point in the future.²⁷³ Even if this hypothetical compensation were to materialize, it would still violate the Treaty and international law requirement that compensation be paid promptly. Dr. Ripinsky explains in this respect that: "the non-payment of *any* compensation for an unreasonable length of time cannot be seen as lawful behavior because this would undermine the whole regime of international law on expropriation."²⁷⁴
134. Similarly, in the case of the *Norwegian Shipowners' Claims* case, the arbitral tribunal recognized "the right of the claimants to receive immediate and full compensation [...] at the latest on the day of the effective taking."²⁷⁵ Likewise, the arbitrator in the *Goldenberg* case considered that international law authorizes a State to expropriate the

²⁷⁰ **CLA-30**, Tali Levy, NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the "Prompt, Adequate and Effective" 31 *Stan. J. Int'l L.* 423 (1995).

²⁷¹ *Id.*

²⁷² English transcript of procedural meeting of May 13, 2014 at p. 11.

²⁷³ *Id.*

²⁷⁴ **CLA-31**, Sergey Ripinsky (with Kevin Williams), *DAMAGES IN INTERNATIONAL INVESTMENT LAW* (British Institute of International and Comparative Law 2008, p. 68 (emphasis in original)).

²⁷⁵ **CLA-32**, *Norwegian Shipowners' Claims (Norway v. USA)*, Award, October 13, 1922, UN RIAA Vol. I, p. 34.

private property of aliens “on the condition *sine qua non* that fair payment shall be made for the expropriated or requisitioned property as quickly as possible.”²⁷⁶

135. While Article 5 of the Treaty also provides that Bolivia must pay compensation determined on the basis of the market value of the Malku Khota Project, Bolivia has repeatedly stated that any compensation to be paid to South American Silver or CMMK would be derived instead from the sums invested by CMMK in the Malku Khota Project.²⁷⁷ Article 4 of the Supreme Decree provides, in relevant parts, that COMIBOL shall “define the amount and conditions under which the Government of Bolivia shall recognize the investments made by CMMK” based on the findings of a valuation of the investments by CMMK to be conducted by an independent firm retained by COMIBOL.²⁷⁸
136. Leaving aside the fact that this nebulous valuation process would be carried out unilaterally and remain subject to COMIBOL’s discretion, the standard adopted would violate the Treaty’s requirement that “compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier.” The market value of South American Silver’s investment in the Malku Khota Project is intrinsically different from costs incurred by CMMK in this respect.²⁷⁹ RPA explains in this respect that a cost-based approach “is not applicable to the Malku Khota Project which has a Mineral Resource estimate and was being evaluated for economic viability at the time of the expropriation.”²⁸⁰ Similarly, FTI concludes that while “a fundamental principle of valuation theory is that value is a function of prospective cash flow,” “the costs incurred by the Claimant to advance the Mineral Properties in the period leading up to the Valuation Date may not be reflective of the Project’s future discretionary cash flows.”²⁸¹

²⁷⁶ **CLA-33**, Goldenberg case (Germany v. Romania), Award, 27 September 1928, UN RIAA Vol II, p. 909 (emphasis added).

²⁷⁷ English transcript of procedural meeting of May 13, 2014 at p. 11.

²⁷⁸ **Exhibit C-4**, Supreme Decree No. 1308, August 1, 2012, Art. 4.

²⁷⁹ **CER-1**, FTI Expert Report ¶ 8.36; **CER-2**, RPA Expert Report 3-1.

²⁸⁰ **CER-2**, RPA Expert Report 3-1.

²⁸¹ **CER-1**, FTI Expert Report ¶ 8.36.

137. Bolivia’s insistence to base any hypothetical compensation to South American Silver on the sums invested by CMMK would also violate the notion of just and adequate compensation under international law.²⁸² In this regard, the World Bank Guidelines on the Treatment of Foreign Direct Investment provide:

Compensation will be deemed “adequate” if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known.²⁸³

138. The *Rurelec v. Bolivia* Tribunal concluded that “any State which carries out an expropriation is expected to accurately and professionally assess the true value of the expropriated assets.”²⁸⁴ Bolivia has manifestly—and admittedly—failed to do so in the present case. In fact, Bolivia never paid nor offered any compensation to South American Silver, a fact sufficient in itself to make Bolivia’s expropriation of the Malku Khota Project an unlawful act under the Treaty and international law.

3. The expropriation was not conducted with due process and for public purpose and social benefit

139. Article 5(1) of the Treaty expressly requires that “the Nationals or company affected shall have the right to establish promptly by due process of law in the territory of the Contracting Party making the expropriation the legality of the expropriation and the amount of the compensation in accordance with the principle set out in this paragraph.”²⁸⁵ BIT jurisprudence has interpreted due process as requiring that the nationalization be conducted so as to afford to the expropriated investor a reasonable and timely opportunity

²⁸² See, e.g., **CLA-34**, *Funnekotter et al. v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, Apr. 22, 2009 (“Funnekotter Award”) ¶¶ 98, 107; **CLA-35**, *ADC v. Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006 (“ADC Award”) ¶¶ 444, 481, 483. See also **CLA-29**, *Amoco* Partial Award ¶¶ 112, 189 (“[A] lawful expropriation must give rise to ‘the payment of fair compensation, or of the just price of what was expropriated.’ Such an obligation is imposed by a specific rule of the international law of expropriation.”) (citations omitted).

²⁸³ **CLA-36**, World Bank, “Guidelines on the Treatment of Foreign Direct Investment” reprinted in 7 ICSID Review – Foreign Investment Law Journal (1992) 297.

²⁸⁴ **CLA-1**, *Rurelec* Award ¶ 441.

²⁸⁵ **Exhibit C-1**, Treaty, Art. 5(1).

to assert its rights and have its claim heard, including in connection with the determination of adequate compensation.²⁸⁶

140. The Government formalized its decision to expropriate the Malku Khota Project in the course of a series of meetings where the Company was never present—let alone able to assert any right. Likewise, the valuation process contemplated by the Supreme Decree would have taken place unilaterally without the Company being able to analyze or challenge COMIBOL’s determinations. Under any circumstances, this valuation process never took place and South American Silver has yet to receive any form of compensation. The expropriation was therefore not conducted with due process and thus violates the Treaty and international law.
141. Article 5 prohibits expropriatory measures that are not taken for a public purpose and for social benefit related to internal needs of the party.²⁸⁷ International law also prohibits expropriatory measures that are not taken for a public purpose. As Professor Garcia Amador explains:

[T]he least that can be required of the State is that it should exercise [the] power [to expropriate] only when the measure is clearly justified by the public interest. Any other view would condone and even facilitate the abusive exercise of the power to expropriate and give legal sanction to manifestly arbitrary acts of expropriation [...] [A]ll states should comply with the condition or requirement which is common to all; namely, that the power to expropriate should be exercised only when expropriation is necessary and is justified by a genuinely public purpose or reason. If this *raison d’être* is plainly absent, the measure of expropriation is ‘arbitrary’ and therefore involves the international responsibility of the State.²⁸⁸

142. Numerous investor-State arbitration tribunals have similarly held that expropriation must serve a public purpose and constitute a proportionate measure in relation with the

²⁸⁶ **CLA-35**, ADC Award ¶ 435; **CLA-3**, Kardassopoulos Award ¶ 402; **CLA-37**, Mohammad Ammar Al-Bahloul v. Republic of Tajikistan, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, September 2, 2009 ¶ 221.

²⁸⁷ **Exhibit C-1**, Treaty, Art. 5.

²⁸⁸ **CLA-38**, F.V. Garcia-Amador, *State Responsibility: Fourth Report by the Special Rapporteur on International Responsibility*, UN Doc. A/CN.4/119, (1959) II Y.B. Int’l. L. Comm’n. 1 ¶ 59 (1960).

objectives it serves.²⁸⁹ In this respect, the *Tecmed v. Mexico* Tribunal made clear that “there must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.”²⁹⁰

143. The *Rurelec* tribunal determined that even if the measures adopted by Bolivia in that case had evidently met the public purpose requirement,²⁹¹ it nevertheless concluded that they constituted an illegal expropriation, simply because “Bolivia did not actually compensate (or intend to compensate) Rurelec as it did not make an accurate assessment of EGSA’s value at the time.”²⁹² In reaching that conclusion, the *Rurelec* tribunal confirmed that the expropriation be accompanied by prompt, adequate and effective compensation is sufficient in itself to determine the legality of an expropriation pursuant to the UK-Bolivia BIT.
144. Since the undisputed fact that Bolivia has not paid compensation to South American Silver over the past two years is sufficient in itself to establish the expropriation’s unlawful nature in light of both the Treaty and international law, there is this little need to delve again into the circumstances establishing that the expropriation of CMMK’s Mining Concessions was not in the public interest and social benefit of the local communities and Bolivia in general. As South American Silver amply demonstrates in this Statement of Claim:
- Bolivia revoked the Malku Khota Mining Concessions in order to seize control of 13 billion dollars’ worth of silver, indium, gallium and other minerals contained in the “*megayacimiento*” discovered by South American Silver;²⁹³

²⁸⁹ **CLA-35**, ADC Award; **CLA-39**, *Occidental Petroleum Corporation v Ecuador*, ICSID Case No. ARB/06/11, Award, Oct. 5, 2012 (“*Occidental Award*”) ¶¶ 404-405, 424-436, 442-452.

²⁹⁰ **CLA-13**, *Tecmed Award* ¶ 122.

²⁹¹ **CLA-1**, *Rurelec Award* ¶ 437.

²⁹² *Id.* at 441.

²⁹³ **Exhibit C-45**, Minutes of Working Meeting between the Government of Potosí and Local Communities, February 14, 2012; **Exhibit C-63**, *Gobierno dice que tenía hace un año la intención de anular contrato con minera en Malku Khota*, LA RAZÓN, July 9, 2012; **Exhibit C-64**, *Definen que el Estado se hará cargo de la mina Malku Khota*, PÁGINA SIETE, July 11, 2012.

- The Supreme Decree did not articulate any reason for the nationalization of the Malku Khota Project besides from vague reference to “problems, which in the past few months, have caused the social conflicts to escalate”;²⁹⁴
- The confiscation and nationalization of CMMK’s rights under the Mining Concessions bear no logical or proportional relationship with the stated objective of pacifying the area;²⁹⁵ and
- Expropriating legally-acquired rights in order to placate a violent minority acting illegally can under no circumstances be considered as serving a public purpose.²⁹⁶

145. Any argument that the nationalization of the Malku Khota Project could have served a public purpose and the interest of the Bolivian population would be equally ludicrous: While the Malku Khota Project would have brought hundreds of millions of dollars of investments to one of the poorest areas of Bolivia, the Government’s takeover has put any development and industrialization plans to an abrupt end;²⁹⁷ and while the Malku Khota Project would have directly employed hundreds of community members and generated hundreds of millions of dollars in taxes for various levels of Government, neither the local populations nor the Bolivian government have derived any benefit from the Malku Khota mineral deposits ever since the nationalization.²⁹⁸ Community representatives repeatedly reached out to CMMK employees since the expropriation to express their dissatisfaction with the complete absence of progress with the Project since COMIBOL took over and to request that the Company come back to the area.²⁹⁹

146. It follows that Bolivia unlawfully nationalized South American Silver’s investment in breach of the Treaty.

²⁹⁴ **Exhibit C-4**, Supreme Decree No. 1308, August 1, 2012.

²⁹⁵ *See supra* at II.D.1.

²⁹⁶ *Id.*

²⁹⁷ *See supra* at 105.

²⁹⁸ *Id.*

²⁹⁹ **CWS-5**, [REDACTED] Witness Statement ¶ 19.

B. BOLIVIA FAILED TO TREAT SOUTH AMERICAN SILVER’S INVESTMENTS FAIRLY AND EQUITABLY AND TO AFFORD FULL PROTECTION AND SECURITY TO SOUTH AMERICAN SILVER’S INVESTMENTS

1. The Fair and Equitable Treatment Standard

147. Article 2(2) of the Treaty provides that “Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.”³⁰⁰ While the Treaty does not ascribe a specific meaning to “fair and equitable treatment,” a considerable body of case law has imparted specific meaning and content to that particular phrase.³⁰¹ Although the fair and equitable treatment standard is inherently flexible and potentially applicable to any type of host State conduct, recurring fact patterns and similarities between cases have enabled international tribunals and scholars to articulate categories of behavior that clearly violate the standard.³⁰² The Fair and equitable treatment standard thus reflects a certain variety of distinct components, each of them constituting a discrete ground for a cognizable violation of the standard as a whole.
148. At least 24 investor-State arbitral tribunals have found that the fair and equitable standard encompasses the **legitimate expectations** of investors regarding the key terms of their investment and the **stability of the host State’s legal and business framework**.³⁰³ As

³⁰⁰ **Exhibit C-1**, Treaty, Art. 2(2).

³⁰¹ In terms of Article 31 of the Vienna Convention, Tribunals have interpreted the “fair and equitable” standard in accordance with the ordinary meaning, in their context and in lights of its object and purpose. **CLA-40**, *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, July 14, 2006 (“*Azurix Award*”) ¶ 360. *See also* **CLA-2**, *Siemens Award* ¶ 290, (“In their ordinary meaning, the terms “fair” and “equitable” mean “just,” “even-handed,” “unbiased,” “legitimate”); **CLA-41**, *National Grid v. Argentine Republic*, UNCITRAL, Award, Nov. 3, 2008 (“*National Grid Award*”) ¶ 168. Tribunals have also looked at the preambles of relevant BITs to ascertain the parties’ objectives when entering into the treaty. *See, e.g.*, **CLA-42**, *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006 (“*LG&E Decision on Liability*”) ¶¶ 124-25; **CLA-43**, *Suez, Sociedad General de Aguas de Barcelona, S.A. and ors. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, July 30, 2010 (“*Suez Decision on Liability*”) ¶ 201.

³⁰² **CLA-44**, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* (ICSID Case No. ARB/05/15), Award, 1 June 2009, (“*Siag Award*”) ¶ 450; **CLA-45**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13) Award, 6 November 2008 ¶ 185.

³⁰³ *See, e.g.*, **CLA-13**, *Tecmed Award* ¶ 154; **CLA-46**, *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006 (“*Saluka Partial Award*”) ¶ 302; **CLA-47**, *MTD Equity Sdn. Bhd. v. Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004 (“*MTD Award*”) ¶¶ 113-15; **CLA-48**, *Eureko B.V. v. Poland*, Ad Hoc, Partial Award, Aug. 19, 2005 (“*Eureko Partial Award*”) ¶ 235; **CLA-3**, *Kardassopoulos Award* ¶¶ 428-41; and **CLA-49**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Jan. 14, 2010 (“*Lemire Decision on Jurisdiction and Liability*”) ¶ 264; **CLA-50**, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, Sept. 13, 2001 (“*CME Partial Award*”) ¶ 157; **CLA-51**, *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Uretim ve*

the *CMS v. Argentina* tribunal unambiguously recognized: “There can be no doubt [...] that a stable legal and business environment is an essential element of fair and equitable treatment.”³⁰⁴ Similarly, *Tecmed v. Mexico* tribunal stated that the fair and equitable treatment provision in a BIT safeguards the claimant’s legitimate expectations:

The Arbitral Tribunal considers that this provision of the Agreement [FET], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments [...] The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions [...] that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.³⁰⁵

149. The *Tecmed* interpretation is widely acknowledged as the seminal decision on fair and equitable treatment and has numerous investor-State arbitral tribunals have adopted that

Ticaret Limited Sirketi v. Turkey, ICSID Case No. ARB/02/5, Award, January 19, 2007 (“PSEG Award”) ¶ 240; **CLA-10**, *Vivendi II Award* ¶¶ 7.4.18-46; **CLA-168**, *Rumeli Telekom A.S. v. Kazakhstan* (ICSID Case No. ARB/05/16), Award, July 29, 2008 (“Rumeli Award”) ¶ 609; **CLA-52**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, Aug. 18, 2008 (“Duke Energy Award”) ¶¶ 340, 347; **CLA-53**, *Occidental Exploration and Production Co. v. Republic of Ecuador*, Case No. UN 3467, Award, July 1, 2004 (“Occidental I Award”) ¶ 185; **CLA-41**, *National Grid Award* ¶ 173; **CLA-44**, *Siag Award* ¶ 450; **CLA-54**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, Nov. 14, 2005 (“Bayindir Decision on Jurisdiction”) ¶ 239; **CLA-4**, *BG Group Award* ¶¶ 306-7; **CLA-17**, *Metalclad Award* ¶ 99; **CLA-55**, *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, Award, Oct. 12, 2005 (“Bogdanov Award”) p. 16; **CLA-40**, *Azurix Award* ¶ 316; **CLA-56**, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, Oct. 31, 2011 (“El Paso Award”) ¶ 356; **CLA-57**, *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award, Sept. 28, 2007 (“Sempra Award”) ¶¶ 303-4; **CLA-58**, *Enron Corp. and Ponderosa Assets v. Argentina*, ICSID Case No. ARB/01/3, Award, May 22, 2007 (“Enron Award”) ¶¶ 262-66; **CLA-5**, *CMS Award* ¶¶ 274, 279; **CLA-42**, *LG&E Decision on Liability* ¶ 127.

³⁰⁴ **CLA-5**, *CMS Award* ¶ 274.

³⁰⁵ **CLA-13**, *Tecmed Award* ¶ 154 (emphasis added).

approach: *Enron*, *Sempra*, *CMS*, *Azurix*, *LG&E*, *MTD v. Chile*, *Occidental v. Ecuador*, *Kardassopoulos v. Georgia*, and *Lemire v. Ukraine*, among others.³⁰⁶

150. The fair and equitable treatment standard also requires host States to treat investments **transparently and consistently**.³⁰⁷ In *LG&E v. Argentina* the arbitral tribunal found that “having considered [...] the sources of international law, understands that the fair and equitable standard consists of the host State’s consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor.”³⁰⁸ Similarly, the *Metalclad v. Mexico* tribunal concluded that Mexico’s lack of clear rules regarding the municipal permit at issue violated the fair and equitable treatment standard.³⁰⁹ The United Nations Commission on Trade and Development has explained that “transparency” plays a central role in ensuring fair and equitable treatment to investors.³¹⁰
151. Finally, the fair and equitable treatment standard mandates that a government act in **good faith**. International tribunals have consistently found that the requirement to act in accordance with the principle of good faith constitutes a fundamental aspect of the fair and equitable treatment standard.³¹¹ Reflecting this view, Professors Dolzer and Schreuer observe that: “arbitral tribunals have confirmed that good faith is inherent in [fair and equitable treatment]” and went on to cite the decisions in *Waste Management*, *Bayindir*, and *Saluka* as support for this proposition.³¹² Although conduct in bad faith is clearly sufficient to violate fair and equitable treatment, a violation of the standard “does not

³⁰⁶ **CLA-58**, *Enron* Award ¶ 257; **CLA-57**, *Sempra* Award ¶ 298; **CLA-5**, *CMS* Award ¶ 279; **CLA-47**, *MTD* Award ¶ 114; **CLA-42**, *LG&E* Decision on Liability ¶ 127; **CLA-40**, *Azurix* Award ¶ 372; **CLA-39**, *Occidental* Award ¶ 185; **CLA-3**, *Kardassopoulos* Award ¶ 440; **CLA-49**, *Lemire* Decision on Jurisdiction and Liability ¶ 262.

³⁰⁷ **CLA-13**, *Tecmed* Award; **CLA-46**, *Saluka* Partial Award ¶¶ 498-99. See also *id.* at 420-23.

³⁰⁸ See, e.g., **CLA-13**, *Tecmed* Award ¶¶ 154, 165-66; and **CLA-59**, *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award, Nov. 13, 2000 (“*Maffezini* Award”) ¶ 83; **CLA-49**, *LG&E* Decision on Liability ¶ 131.

³⁰⁹ *Id.* at 88.

³¹⁰ **CLA-60**, UNCTAD, *Fair and Equitable Treatment*, U.N. Doc. UNCTAD/ITE/IIT/11(vol. III), U.N. Sales No. E.99.II.D.15, at 51 (1999) (references omitted).

³¹¹ See, e.g., **CLA-13**, *Tecmed* Award ¶¶ 153-54; **CLA-61**, *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004 (“*Waste Management* Award”) ¶ 138.

³¹² **CLA-62**, Rudolf Dolzer & Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 145 (Oxford University Press 2008).

require bad faith or malicious intention of the recipient State as a necessary element.”³¹³ The *CMS v. Argentina* tribunal noted likewise that fair and equitable treatment “is an objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question.”³¹⁴ Thus—and as held by the *Tecmed v. Mexico* tribunal—bad faith from the State is not required for a violation of the fair and equitable treatment standard to occur.³¹⁵

152. A remarkable feature of this case is that Bolivia has violated nearly every one of the components of the fair and equitable treatment standard that have been recognized to date. In previous cases in which a violation of the standard has occurred, tribunals have often focused on just one or two of the components of the fair and equitable treatment requirement. This Tribunal should suffer no such limitation.

2. Bolivia Failed to Treat South American Silver’s Investments Fairly and Equitably

153. South American Silver relied upon Bolivia’s legal framework (including the protections afforded to foreign investments, the protection afforded to private property and investments, and the provisions guaranteeing the stability of the rights associated with the Mining Concessions and related permits and authorizations) as well as on the Government’s repeated expressions of support, when investing in the Malku Khota Mining Project.³¹⁶ South American Silver thus formed legitimate expectations regarding the key protections afforded to their investment in Malku Khota and the stability of Bolivia’s legal and business framework. By deliberately undermining the exercise by South American Silver of CMMK’s rights over the Mining Concessions and by ultimately nationalizing these concessions without offering or paying any form of

³¹³ **CLA-40**, *Azurix* Award ¶ 372.

³¹⁴ **CLA-5**, *CMS* Award ¶ 280.

³¹⁵ **CLA-13**, *Tecmed* Award ¶ 153 (“The Arbitral Tribunal finds that the commitment of fair and equitable treatment included in Article 4(1) of the Agreement is an expression and part of the *bona fide* principle recognized in international law, although bad faith from the State is not required for its violation.”); **CLA-40**, *Azurix* Award ¶ 372; **CLA-42**, *LG&E* Decision on Liability ¶ 129; **CLA-39**, *Occidental I* Award ¶ 186; **CLA-5**, *CMS* Award ¶ 280; **CLA-51**, *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Uretim ve Ticaret Limited Sirketi v. Turkey*, ICSID Case No. ARB/02/5, Award, Jan. 19, 2007 (“*PSEG* Award”) ¶¶ 245-46; **CLA-2**, *Siemens* Award ¶ 299; **CLA-58**, *Enron* Award ¶ 263; **CLA-41**, *National Grid* Award ¶ 173.

³¹⁶ *See supra* at III.A.2.

compensation, Bolivia effectively failed to protect South American Silver’s legitimate expectations and to guarantee the existence a stable legal and business framework in connection with South American Silver’s investments.³¹⁷

154. The Government also failed to act in good faith and in a transparent and predictable manner by: (i) undermining South American Silver’s rights that Government official ostensibly pretended to protect; (ii) deciding, negotiating and ultimately formalizing the revocation of CMMK’s mining concessions for reasons other than those officially stated and while deliberately keeping South American Silver and CMMK outside of this process; (iii) failing to define and apply the provisions of the Bolivian Constitution and mining law in a transparent and consistent manner; and (iv) by failing to abide by its commitment to offer compensation to CMMK following the expropriation.³¹⁸

3. Bolivia Failed to Afford Full Protection and Security to South American Silver’s Investments

155. Article 2(2) of the Treaty states that protected investments “shall enjoy full protection and security in the territory of the Contracting Party.”³¹⁹ While the “full protection and security” standard of treatment is sometimes considered to be part of the fair and equitable treatment, other treaties such as the UK-Bolivia BIT define the two terms separately. The full protection and security standard requires a host State to take every measure necessary to protect and ensure the legal and physical security of the investments made by a protected investor in its territory.³²⁰ The *Siemens v. Argentina* tribunal has defined legal security as “the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application.”³²¹ In *AAPL v. Sri Lanka*—the case on full protection and security—the tribunal explained that full

³¹⁷ See *supra* at III.C, III.D.

³¹⁸ In doing so, including by failing to uphold the Mining Concessions and formally “reverting” them in favor of the State itself, Bolivia also failed to observe its obligations with regards to South American Silver’s investment, as required by Article 2(2) of the Treaty which provides, in relevant part, that: “Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.”

³¹⁹ **Exhibit C-1**, Treaty, Art. 2(2).

³²⁰ **CLA-63**, *American Manufacturing & Trading, Inc. (AMT) c. Zaire*, Case ICSID ARB/93/1, Award, February 21, 1997 ¶¶ 6-11; **CLA-50**, *CME Partial Award* ¶ 613; **CLA-40**, *Azurix Award* ¶ 408; **CLA-2**, *Siemens Award* ¶ 303; **CLA-64**, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, Dec. 8, 2000, 41 I.L.M. 896 (2002) (“*Wena Award*”).

³²¹ **CLA-2**, *Siemens Award* ¶ 303.

protection and security entails a very low standard as it does not even require negligence on the part of the host State: “the violation of international law entailing the State’s responsibility has to be considered constituted by ‘the mere lack or want of diligence,’ without any need to establish malice or negligence.”³²²

156. Not only did Bolivia fail to take all measures necessary to ensure the protection and security of South American Silver’s investment, as required under international law, it also participated in undermining that protection and security afforded to the Malku Khota Project. When asked to intervene, the Government refused or failed to afford any meaningful protection or assistance to the Company.³²³ Instead, Bolivia encouraged the opposition led by cooperatives and illegal miners in the area,³²⁴ and ultimately granted immunity to opposition leaders and authors of the violence.³²⁵ These actions directly undermined the full protection and security that South American Silver was entitled to for its investments in Bolivia. Likewise, Bolivia’s revocation of the Mining Concessions and purported withdrawal of the corresponding environmental permits undermined and effectively negated the legal security and protection afforded to the Company’s investment.³²⁶ Thus, Bolivia’s actions fell well below the standard of full protection and security that South American Silver was entitled to expect under the Treaty.

C. BOLIVIA 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

157. Article 2(2) of the Treaty provides that: “Neither Contracting Party shall, in any way, impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party.”³²⁷ The use of the disjunctive term “or” between “unreasonable” and “discriminatory” denotes that a measure need only be either unreasonable or

³²² **CLA-8**, *AAPL* Award ¶ 77.

³²³ *See supra* at III.C.3, II.C.4.

³²⁴ **CWS-4**, [REDACTED] Witness Statement ¶ 13; **CWS-5**, [REDACTED] Witness Statement ¶¶ 10-18. *See also supra* at II.C.4.

³²⁵ *See supra* at II.D.1.

³²⁶ **CLA-75**, *CME* Partial Award ¶ 137.

³²⁷ **Exhibit C-1**, Treaty, Art. 2(2).

discriminatory to violate the Treaty. Regardless, in the instant case, Bolivia's conduct towards South American Silver's investment was both arbitrary and discriminatory.

158. Consistent with the ordinary meaning of the terms “unreasonable” and “discriminatory,” the tribunal in *Toto v. Lebanon* found that an unreasonable or discriminatory measure is “(i) a measure that inflicts damages on the investor without serving any apparent legitimate purpose; (ii) a measure that is not based on legal standards but on discretion, prejudice or personal preference, (iii) a measure taken for reasons that are different from those put forward by the decision maker, or (iv) a measure taken in willful disregard of due process and proper procedure.”³²⁸ Numerous investor-State arbitration tribunals and scholars, including Professor Schreuer,³²⁹ have similarly interpreted the prohibition against unreasonable measures.³³⁰ Likewise, international tribunals interpreted the prohibition against discriminatory measures in light of term's ordinary meaning as a differential treatment of people or companies in like circumstances, without a rational justification for that differential treatment.³³¹
159. Bolivia breached its obligation under the Treaty by acting in an unreasonable and discriminatory manner. As a starting point, there can be no doubt that Bolivia's measures caused considerable damages to—and impaired the management, maintenance, development, use, enjoyment, and extension of—South American Silver's investments.³³² As South American Silver previously explained, it is beyond doubt in this arbitration that the nationalization and the Governmental measures that preceded it: (i) did not serve any legitimate public purpose and actually deprived the Government, the local communities and the country as a whole of much-needed revenues and opportunities;³³³ (ii) was not based on any legal standard but on mere executive *fiat*;³³⁴ (iii) was decided for the purpose of appropriating at no cost the benefits associated with the discovery of

³²⁸ **CLA-65**, *Toto Construzioni Generali S.P.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, June 7, 2012 (“*Toto Award*”) ¶ 157.

³²⁹ **CLA-66**, Christoph Schreuer, Protection against Arbitrary or Discriminatory Measures, in Roger P. Alford and Catherine A. Rogers, eds., *THE FUTURE OF INVESTMENT ARBITRATION* 183 (2009).

³³⁰ **CLA-75**, *CME Award*; **CLA-46**, *Saluka Partial Award*.

³³¹ **CLA-67**, *Antoine Goetz et al. v. Burundi*, ICSID Case No. ARB/95/3, Final Award, Feb. 10, 1999 (“*Goetz Award*”) ¶ 121; **CLA-68**, *Rumeli Award* ¶ 680; **CLA-49**, *Lemire Decision on Jurisdiction and Liability* ¶ 261.

³³² *See supra* at II.C, II.D.

³³³ *Id.* at 105.

³³⁴ *Id.* at 84-86.

“megayacimiento” of silver, indium and gallium by the Company instead of the ostensibly-stated purpose of pacifying the area;³³⁵ and (iv) deprived South American Silver of the due process and proper procedure it was entitled to, both prior to and after the revocation of the Mining Concessions.³³⁶

160. It is also clearly established that government officials, including the Governor of Potosi,³³⁷ and President of Bolivia,³³⁸ openly antagonized South American Silver for being a “transnational” and not a Bolivian company, and based their decision to expropriate the Malku Khota Project at least in part on the fact that it was owned by a “transnational” company.³³⁹
161. By adversely discriminating against South American Silver on the basis of its foreign and “transnational” nature, Bolivia also breached Article 3(1) of the Treaty, which expressly prohibits a Contracting Party from subjecting protected investments “to treatment less favourable than that which it accords to investments or returns of its own nationals.”³⁴⁰

VI. COMPENSATION

162. As explained above, that Bolivia unlawfully expropriated South American Silver’s investment cannot be seriously disputed. Thus, determining compensation owed to Claimant is, in essence, the Tribunal’s only task in this arbitration. This section describes the applicable compensation standards (A.), analyzes the *quantum* of restitution or compensation owed by Bolivia (B.), and identifies two additional issues related to compensation that the Tribunal should analyze: cost and expenses (C.) and compound post-award interest (D.).

³³⁵ *Id.* at 91-92, 97.

³³⁶ *Id.* at II.D.

³³⁷ **CWS-5**, [REDACTED] Witness Statement ¶ 11.

³³⁸ **CWS-4**, [REDACTED] Witness Statement ¶ 25; **CWS-5**, [REDACTED] Witness Statement ¶ 18; **Exhibit C-67**, *Morales destaca acuerdo con originarios de Malku Khota que permite recuperar recursos naturales*, AGENCIA BOLIVIANA DE INFORMACIÓN, July 10, 2012.

³³⁹ *Id.*

³⁴⁰ **Exhibit C-1**, Treaty, Art. 3(1).

A. STANDARDS OF COMPENSATION

1. South American Silver is Entitled to Restitution or the Monetary Equivalent of the Investments Unlawfully Taken by Bolivia

163. To determine the compensation that Bolivia owes South American Silver, the Tribunal should in the first instance look to any *lex specialis* in the Treaty and, in the absence of any *lex specialis*, to the rules of customary international law.³⁴¹ The only *lex specialis* standard of compensation found in the Treaty is in Article 5(1), which sets out the conditions that Bolivia must comply with in order to lawfully expropriate investments held by protected investors in Bolivia. It provides that, in the event the other requirements of Article 5(1) are complied with (*i.e.*, the taking is for a public purpose and for a social benefit and in accordance with the law), the expropriation must also be “against just and effective compensation [...] to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investments” to foreign investors. If any of those requirements is not met, the expropriation is not in compliance with Article 5 and is, therefore, unlawful.
164. Claimant has already established beyond cavil that Bolivia’s expropriation of South American Silver’s investment was unlawful, if for no other reason than Bolivia’s failure to pay or even offer to pay contemporaneous compensation.³⁴² The Treaty is silent as to the standard of compensation for an unlawful expropriation. In these circumstances, customary international law fills the *lacuna* and provides the governing rules of compensation. This was precisely the holding of the Tribunal in *ADC v. Hungary*:

[I]n the present case the BIT does not stipulate any rules relating to damages payable in the case of an unlawful expropriation. The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation [...]. Since the BIT does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the

³⁴¹ **CLA-29**, *Amoco* Partial Award ¶¶ 112, 189, 199-93.

³⁴² *See supra* II.D.4.

default standard contained in customary international law in the present case.³⁴³

165. The decision of the Iran-US Claims Tribunal in the case of *Amoco v. Iran* is in accord with this analysis:

Both parties consider that this issue must be decided by reference to customary international law. The Tribunal agrees. Article IV, paragraph 2 of the Treaty determines the conditions that an expropriation should meet in order to be in conformity with its terms and therefore defines the standard of compensation only in case of a lawful expropriation. A nationalization in breach of the Treaty, on the other hand, would render applicable the rules relating to State responsibility, which are to be found not in the Treaty but in customary law.³⁴⁴

166. More recently, the Tribunal in *Rumeli v. Kazakhstan* reached the same conclusion in respect of non-expropriation breaches:

For claims for breaches other than expropriation, neither the BIT nor the [LPPI] offer any guidance for evaluating the damages arising from such breaches. Under Article 1 of the ILC Articles, every ‘internationally wrongful act’ of a State entails the ‘international responsibility’ of that State. An ‘internationally wrongful act’ is defined under Article 2 as an act which is (i) attributable to the State under international law and (ii) a breach of an international obligation of the State.³⁴⁵

167. It is a well-established principle of customary international law that a claimant whose investment has been subject to an unlawful expropriation is entitled to be compensated by means of, first, restitution in kind or its monetary equivalent, and second, compensation for any additional loss not covered by restitution in kind or its monetary equivalent.
168. As for compensation when restitution is not available, the Court in *Chorzów Factory* posed three questions to the expert witnesses in the case. First, the Court asked the experts to determine the value of the factory at the date of the expropriation.³⁴⁶ Second,

³⁴³ **CLA-35**, ADC Award ¶¶ 481, 483.

³⁴⁴ **CLA-29**, *Amoco* Partial Award ¶ 189.

³⁴⁵ **CLA-68**, *Rumeli* Award ¶ 789.

³⁴⁶ **CLA-69**, *Case Concerning the Factory at Chorzów (Ger. v. Pol.)*, Judgment, Sept. 13, 1928 (“*Chorzów Factory Case*”), 1928 P.C.I.J. (ser. A), No. 17, at 43 (Sept. 13) (“What was the value, on July 3rd, 1922, expressed in Reichsmarks current at the present time, of the undertaking for the manufacture of nitrate products

the Court asked the experts to value the lost profits during the period between the date of expropriation and the date of the judgment.³⁴⁷ Finally, the Court asked the experts to compute the current value of the factory as of the date of the judgment.³⁴⁸ Commentators and case law have consistently interpreted *Chorzów Factory* to require tribunals to award the higher of the value on the date of expropriation plus interest, or the value on the date of the award (in either case, accompanied by further compensation for any additional loss not covered by the restitutionary monetary equivalent).³⁴⁹

169. The *Chorzów Factory* standard continues to be cited and followed in contemporary cases. In *Amoco v. Iran*, the Tribunal said:

[*Chorzów Factory*] is widely regarded as the most authoritative exposition of the principles applicable in this field and is still valid today.

* * * *

Undoubtedly, the first principle established by the Court is that a clear distinction must be made between lawful and unlawful expropriations, since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking [...] Such a principle has been recently and expressly confirmed by the celebrated *AMINOIL* case.

* * * *

According to the Court in *Chorzów Factory*, an obligation of reparation of all the damages sustained by the owner of

of which the factory was situated at Chorzów in Polish Upper Silesia, in the state in which that undertaking (including the lands, buildings, equipment, stocks and processes at its disposal, supply and delivery contracts, goodwill and future prospects) was, on the date indicated, in the hands of the Bayerische and Oberschlesische Stickstoffwerke?”).

³⁴⁷ *Id.* (“What would have been the financial results, expressed in Reichsmarks current at the present time (profits or losses), which would probably have been given by the undertaking thus constituted from July 3rd, 1922, to the date of the present judgment, if it had been in the hands of the said Companies?”).

³⁴⁸ *Id.* at 44 (“What would be the value at the date of the present judgment, expressed in Reichsmarks current at the present time, of the same undertaking (Chorzów) if that undertaking (including lands, buildings, equipment, stocks, available processes, supply and delivery contracts, goodwill and future prospects) had remained in the hands of the Bayerische and Oberschlesische Stickstoffwerke, and had either remained substantially as it was in 1922 or had been developed proportionately on lines similar to those applied in the case of other undertakings of the same kind, controlled by the Bayerische, for instance, the undertaking of which the factory is situated at Piesteritz?”).

³⁴⁹ See, e.g., **CLA-70**, William C. Lieblich, *Determinations by International Tribunals for the Economic Value of Expropriated Enterprises*, 7(1) J. Int'l. Arb. 37, n.36 (1990); **CLA-35**, *ADC Award* ¶¶ 495-99; **CLA-2**, *Siemens Award* ¶¶ 351-52.

expropriated property arises from an unlawful expropriation. The rules of international law relating to international responsibility of States apply in such a case. They provide for *restitutio in integrum*: restitution in kind or, if impossible, its monetary equivalent. If need be, ‘damages for loss sustained which would not be covered by restitution’ should also be awarded.³⁵⁰

170. According to the Tribunal in *ADC v. Hungary*, “there can be no doubt about the present vitality of the *Chorzów Factory* principle, its full current vigor having been repeatedly attested to by the International Court of Justice.”³⁵¹ And as the *Rumeli* Tribunal decided:

In assessing compensation for internationally wrongful acts other than expropriation, the Tribunal considers that it should apply the principle of the *Factory at Chorzow* case, according to which any award should ‘as far as possible wipe out all the consequences of the illegal act and reestablish the situation which would in all probability have existed if that act had not been committed.’³⁵²

171. *ADC v. Hungary* arose out of a 12-year concession agreement with the Hungarian Air Traffic and Airport Authority (“ATAA”), which included the construction of a new airport terminal, and modernization and management of the Budapest Airport. ADC owned 34% of the concession, while ATAA held the rest. At the same time, ADC entered into a Terminal Management Agreement to provide technical and managerial assistance to operate the airport. In 2001, the Hungarian Government took possession of the terminal facilities and transferred operations to a newly-created company.
172. The Tribunal concluded that ADC had suffered an unlawful taking of its stake in the airport concession. In assessing damages, the Tribunal applied the customary international law standard from *Chorzów Factory*. The Tribunal noted that in a typical expropriation, the expropriated investment often declines in value following the taking. In *ADC*, however, the expropriated asset actually gained in value after the date of expropriation. The Tribunal thus held that the *Chorzów Factory* standard necessitated the use of the date of the award as the valuation date:

³⁵⁰ **CLA-29**, *Amoco* Partial Award ¶¶ 191-93.

³⁵¹ **CLA-35**, *ADC* Award ¶ 493. The Tribunal in the recent *Vivendi* Award issued a similar statement: “There can be no doubt about the vitality of [the *Chorzów Factory*] statement of the damages standard under customary international law, which has been affirmed and applied by numerous international tribunals as well as the PCIJ’s successor, the International Court of Justice.” **CLA-10**, *Vivendi II* Award ¶ 8.2.5.

³⁵² **CLA-68**, *Rumeli* Award ¶ 792.

[I]n the present, *sui generis*, type of case the application of the *Chorzów Factory* standard requires that the date of valuation should be the date of the Award and not the date of expropriation, since this is what is necessary to put the Claimant in the same position as if the expropriation had not been committed.³⁵³

173. As a result, the Tribunal awarded the higher of the values between the date of expropriation and the date of the award; its award was thus based on a US\$76 million value at the time of the award rather than a US\$68 million value at the time of the expropriation. The Tribunal also awarded consequential damages not covered by the monetary equivalent of restitution in kind, from the date of expropriation until the date of the award (in that case, all unpaid dividends and management fees).³⁵⁴
174. Other recent arbitral awards have also applied *Chorzów Factory*'s "higher of" damages principle. For example, according to the *Vivendi* Tribunal: "It is also clear that such a standard permits, if the facts so require, a higher rate of recovery than that prescribed in Article 5(2) for *lawful* expropriations."³⁵⁵
175. Likewise, in *Siemens v. Argentina*, the Tribunal relied on *Chorzów Factory* to conclude that:

[U]nder customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages [...] It is only logical that, if all the consequences of the illegal act need to be wiped out, the value of the investment at the time of this Award be compensated in full. Otherwise compensation would not cover all the consequences of the illegal act.³⁵⁶

176. Articles 31 to 36 of the ILC Articles confirm that restitution (plus compensation for additional losses sustained if restitution alone is insufficient) is the preferred remedy when available. Article 31 of the ILC Articles ("Reparation") provides:

³⁵³ **CLA-35**, *ADC Award* ¶ 497.

³⁵⁴ *Id.* at 518.

³⁵⁵ **CLA-10**, *Vivendi II Award* ¶ 8.2.5 (italics in original).

³⁵⁶ **CLA-2**, *Siemens Award* ¶¶ 352-53.

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.³⁵⁷

Article 35 of the ILC Articles (“Restitution”) adds:

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed [...]³⁵⁸

Articles 36 of the ILC Articles (“Compensation”) states:

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.³⁵⁹

177. Moreover, payment of compensation to Claimant on the basis of the higher of the market value at the time of expropriation plus interest or the value on the date of the award accords with the universal principle of law that a wrongdoer should not benefit from his wrong—*commodum ex inuria sua nemu habere debet*. As stated by Judge Brower in *Amoco*: “[N]o system of law sensibly can be understood as intended to reward unlawful conduct.”³⁶⁰ Further, this result is consistent with the opinion of Professors Reisman and Sloane that “BITs and comparable multilateral investment treaties should, as a matter of both the intent of their drafters and the policies that animate them, be construed to deter, not reward, unlawful expropriation of all kinds.”³⁶¹

178. It is also consistent with the principle stated in *Chorzów Factory* that the compensation due to a claimant in respect of the unlawful taking of property should not be limited to “the value of the undertaking at the moment of dispossession plus interest,” since such a

³⁵⁷ **CLA-15**, ILC Articles, Arts. 31, 35 and 36 (emphasis added).

³⁵⁸ *Id.* (emphasis added).

³⁵⁹ *Id.* (emphasis added).

³⁶⁰ **CLA-29**, *Amoco* Partial Award ¶ 17 n.22 (Concurring Opinion of J. Brower).

³⁶¹ **CLA-71**, W. M. Reisman & R. D. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74 *Brit. Y.B. Int'l. L.* 115, 148 (2004).

limitation could place the claimant in a position more unfavorable than if the State had complied with its legal obligations.

179. As Professor Irmgard Marboe concludes in her recent treatise on damages:

[T]he function of compensation [for lawful expropriation] is primarily the replacement of the value of the expropriated property, while the function of damages [for unlawful expropriation] is the full reparation of the damage incurred.³⁶²

180. For lawful expropriations, the focus is on finding the neutral or objective “value of the property concerned.”³⁶³ For unlawful expropriations, as in the present dispute, the focus is on the subjective “financial situation the injured person would be in if the unlawful act had not been committed.”³⁶⁴ For unlawful expropriations, Marboe concludes:

[A] method should be applied that allows evaluating the loss actually incurred by the individual affected. [...] As the concrete financial situation of the individual must be considered, a number of disadvantages may be relevant that affect his or her financial situation as a whole. This includes, in particular, consequential damages. One must take into account additional costs incurred, such as costs for transportation and storage or for a necessary loan but also costs remedying the breach, negotiating, mitigation of damages, and pursuing the claims. Furthermore, depreciation of other assets of the injured party and lost opportunities can have negative effects on the overall financial situation of the victim.”³⁶⁵

181. In sum, that there must be a difference between lawful and unlawful expropriations is intuitive and generally accepted.³⁶⁶ It would be illogical and counterintuitive “that it

³⁶² **CLA-72**, I. Marboe, *CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW* 34 (Oxford University Press 2009) (emphasis added).

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 35-36.

³⁶⁶ **CLA-69**, *Chorzów Factory Case* at 40 (“Such a consequence [of equating lawful with unlawful expropriation] would not only be unjust, but also and above all incompatible with the aim of Article 6—that is to say, the prohibition, in principle, of the liquidation of the property—since it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned”); **CLA-28**, *SEDCO Interlocutory Award*, 25 I.L.M. 629 (1986), 10 Iran-U.S. Cl. Trib. Rep. 180, 189, 205, n.40 (1986) (“the injured party would receive nothing additional for the enhance wrong done it and the offending State would experience no disincentive to repetition of unlawful conduct”).

makes no difference whether the taking is lawful or unlawful and that the financial consequences will be the same in both cases.”³⁶⁷

182. In this case, Bolivia must, therefore, “re-establish the situation which existed” before the wrongful act, that is, before the expropriation, was committed. In that respect, South American Silver is seeking the restitution of the Malku Khota Mining Concessions necessarily accompanied by damages and Government guarantees with respect to, at a minimum, full protection and security and legal stability, to make full reparation for the injury caused by Bolivia’s conduct and thus “re-establish the situation which existed before the wrongful act was committed.”
183. If the Tribunal were not to award the restitution of South American Silver’s investment and accompanying historical damages, Bolivia must be ordered to pay the monetary equivalent, that is, in the words of the *Chorzów Factory* case, a sum which would “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.” Therefore, in addition, Bolivia must pay “damages for loss sustained which would not be covered by restitution in kind or payment in place of it.” Article 31 of the ILC Articles explains that this covers “any damage, whether material or moral” caused by the unlawful expropriation. Article 36 of the ILC Articles, in turn, provides that these damages must “cover any financially assessable damage including loss of profits insofar as it is established.”

2. At a Minimum, South American Silver is Entitled to “Prompt, Adequate and Effective Compensation”

184. It is clear that Bolivia’s expropriation of Claimant’s investments was in breach of the Treaty, and thus, unlawful. Accordingly, the measure of compensation due to Claimant for this expropriation is not controlled by the terms of Article 5 of the Treaty but instead is to be derived from customary principles of international law.

³⁶⁷ **CLA-73**, D. W. Bowett, *State Contracts with Aliens*, 59 Brit. Y.B. Int’l. L. 47, 61 (1988). See also **CLA-74**, Ignaz Seidl-Hohenveldern, *L’évaluation des dommages dans les arbitrages transnationaux*, 33 *Annuaire Français de Droit International* 7, 12 (1987); **CLA-72**, I. Marboe, *CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW* 68 (Oxford University Press 2009) (“As a matter of principle, a differentiation appears to be necessary because the financial consequences of lawful and unlawful behavior would otherwise be the same. This would clearly be against the interest of legal justice and the general preventive function of law”).

185. Nonetheless, even if the expropriation of Claimant's investments were lawful, South American Silver would nonetheless remain entitled to prompt, adequate and effective compensation in accordance with Article 5(2) of the Treaty. Likewise, even if the measure of compensation due to Claimant for the unlawful expropriation of South American Silver's investments were the same as that provided for in the Treaty with respect to a lawful expropriation, Claimant would remain entitled to prompt, adequate and effective compensation.
186. Article 5 of the Treaty elaborates on the standards for "just and effective" and "prompt, adequate and effective" compensation as follows:

Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial or legal rate, whichever is applicable in the territory of the expropriating Contracting Party, until the date of payment, shall be made without delay, be effectively realizable and be freely transferable.

187. While the Treaty does not define the term "market value," FTI used the definition of FMV provided by the American Institute of Certified Public Accountants:

the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.³⁶⁸

188. FTA referred to "Market Value or Fair Market Value," as defined in the International Valuation Standards:

Market Value is the estimated amount for which an asset or liability should exchange on the Valuation Date between a willing buyer and a willing seller in an arm's length transaction, after

³⁶⁸ **Exhibit FTI 25**, American Institute of Certified Public Accountants. "International Glossary of Business Terms, Appendix B of Statement of Standards for Valuation Services".

proper marketing wherein the parties had each acted knowingly, prudently, and without compulsion.³⁶⁹

189. The Tribunal in the *CME* case made the following observation about “fair market value”:

Today [the 2200 BITs and a few multilateral treaties] are truly universal in their reach and essential provisions. They concordantly provide for payment of ‘just compensation,’ representing the ‘genuine’ or ‘fair market’ value of the property taken. Some treaties provide for prompt, adequate and effective compensation amounting to the market value of the investment expropriated immediately before the expropriation [...]. Others provide that compensation shall represent the equivalent of the investment affected. These concordant provisions are variations on an agreed, essential theme, namely, that when a State takes foreign property, full compensation must be paid.³⁷⁰

190. International law and international tribunals have consistently applied the “full” compensation standard to expropriation claims in investment disputes,³⁷¹ and determined “full” compensation on the basis of the fair market value of the expropriated investment.³⁷² The Tribunal in *Biloune v. Ghana* noted:

Under the principles of customary international law, a claimant whose property has been expropriated by a foreign state is entitled to full—*i.e.*, to prompt, adequate and effective—compensation.³⁷³

191. Awards of the Iran-US Claims Tribunal have displayed near unanimity that the standard of compensation for expropriation is “full” compensation.³⁷⁴ In *SEDCO v. Iran*, the

³⁶⁹ CER-2, RPA Expert Report 1-2.

³⁷⁰ CLA-75, *CME Czech Republic B.V. v. Czech Republic*, Final Award, Mar. 14, 2003 (“*CME* Final Award”) ¶ 497.

³⁷¹ See, e.g., CLA-76, *S.D. Myers, Inc. v. Canada*, UNCITRAL (NAFTA), Second Partial Award, Oct. 21, 2002 (“*S.D. Myers* Second Partial Award”), Chapter VI, at 59; CLA-17, *Metalclad* Award ¶ 122.

³⁷² CLA-36, World Bank, “Guidelines on the Treatment of Foreign Direct Investment” reprinted in 7 ICSID Review – Foreign Investment Law Journal (1992) 303. Compensation for expropriation “will be deemed adequate if it is based on the fair market value of an asset.”

³⁷³ CLA-77, *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Damages and Costs, June 20, 1990 (“*Biloune* Award”), 95 I.L.R. 210-211 (1994). “Full and effective compensation” was also awarded by both *Amco* Tribunals (see CLA-78, *Amco Asia Corp. v. Indonesia* (First Tribunal), ICSID Case No. ARB/81/1, Award on the Merits, Nov. 21, 1984 (“*Amco Asia* Award (First Tribunal)”), 24 I.L.M. 1022, 1038 ¶ 280 (1985); and CLA-79, *Amco Asia Corp. v. Indonesia* (Resubmission), ICSID Case No. ARB/81/1, Award, May 31, 1990 (“*Amco Asia* Resubmission Award”) ¶ 267.

³⁷⁴ CLA-80, John A. Westberg, *Compensation in Cases of Expropriation and Nationalization: Awards of the Iran-United States Claims Tribunal*, 5(2) ICSID Rev.– Foreign Inv. L.J. 256, 280-82 (1990). See also CLA-81, John A. Westberg, *Applicable Law, Expropriatory Takings and Compensation in Cases of Expropriation*;

Tribunal confirmed that “full” compensation is the standard under customary international law:

Opinions both of international tribunals and of legal writers overwhelmingly support the conclusion that under customary international law [...] full compensation should be awarded for the property taken.³⁷⁵

192. Professor Crawford explains: “Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the ‘fair market value’ of the property lost.”³⁷⁶ The Iran-US Claims Tribunal further explained that fair market value could be determined by reference to an hypothetical transaction between a willing buyer and a willing seller.³⁷⁷
193. Accordingly, in the event the Tribunal determines either that Bolivia’s expropriation of Claimant’s investment was lawful or, alternatively, that the expropriation was unlawful but that the standard of compensation should be the same as that under Article 5 for a lawful expropriation, then Claimant should receive “full” compensation equivalent to the fair market value of its investment.

3. Standard of Compensation for Other Treaty Violations

194. In the unlikely event the Tribunal should determine that Bolivia did not expropriate South American Silver’s investments, either lawfully or unlawfully, the Tribunal must still award compensation to Claimant if it determines that Bolivia violated one or more of the other substantive standards of protection in the BIT. South American Silver has amply

ICSID and Iran-United States Claims Tribunal Case Law Compared, 8(1) ICSID Rev.– Foreign Inv. L.J. 1, 16-18 (1993).

³⁷⁵ **CLA-28**, *SEDCO* Interlocutory Award at 634; **CLA-82**, *American Int’l. Group, Inc. v. Iran*, Iran-U.S. Claims Tribunal Case No. 2, Award No. 93-2-3, Dec. 19, 1983 (“AIG Award”), 4 Iran-U.S. Cl. Trib. Rep. 96 (1983); **CLA-26**, *Tippetts* Award; **CLA-83**, Peter Schaufelberger, *LA PROTECTION JURIDIQUE DES INVESTISSEMENTS INTERNATIONAUX DANS LES PAYS EN DEVELOPPEMENT* 85 (1993) (“In practice, the traditional rule of full indemnity is endorsed...”); **CLA-84**, Brice M. Clagett, *Just Compensation in International Law: The Issues Before the Iran-United States Claims Tribunal*, in 4 *THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW* 31, 71-79 (Richard B. Lillich ed., University of Virginia 1987); **CLA-78**, *Amco Asia* Award (First Tribunal), at 1038; **CLA-8**, *AAPL* Award at 577.

³⁷⁶ **CLA-85**, James Crawford, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 225 (2002).

³⁷⁷ **CLA-86**, *Starrett Housing Corp. v. Iran*, Iran-U.S. Claims Tribunal Case No. 24, Interlocutory Award No. ITL32-24-1, Dec. 19, 1983, 23 I.L.M. 1090 (1984).

demonstrated that Bolivia (i) failed to treat South American Silver's investments fairly and equitably and to afford full protection and security to South American Silver's investments;³⁷⁸ (ii) impaired South American Silver's investments through unreasonable and discriminatory measures;³⁷⁹ and (iii) treated South American Silver's investments less favorably than investments of its own investors.³⁸⁰

195. The Treaty does not assign a particular standard of compensation for these other violations. International law is clear, however, that Claimant is entitled to be fully compensated for such violations. Such actions are akin to unlawful expropriation in that they breach the terms of the Treaty, and accordingly, ought to be compensated on the basis of the same principles that apply in the case of an unlawful expropriation. In this vein, the Tribunal in *MTD v. Chile* observed:

[T]he BIT provides for the standard of compensation applicable to expropriation, 'prompt, adequate and effective' (Article 4(c)). It does not provide what this standard should be in the cases of compensation for breaches of the BIT on other grounds. The Claimants have proposed the classic standard enounced by the Permanent Court of Justice in the *Factory at Chorzów*: compensation should "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that had not been committed." The Respondent has not objected to the application of this standard and no differentiation has been made about the standard of compensation in relation to the grounds on which it is justified. Therefore, the Tribunal will apply the standard of compensation proposed by the Claimants to the extent of the damages awarded.³⁸¹

196. More recently, the *Vivendi* Tribunal observed that it is generally accepted that, "regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action."³⁸²

³⁷⁸ See *supra* at V.B.

³⁷⁹ *Id.* at V.C.

³⁸⁰ *Id.*

³⁸¹ **CLA-47**, *MTD* Award ¶ 238 (footnote omitted).

³⁸² **CLA-10**, *Vivendi II* Award ¶ 8.2.7.

197. The quantification of “full” compensation for non-expropriatory violations will necessarily vary from case to case. According to the Tribunal in *S.D. Myers v. Canada* (a NAFTA case):

By not identifying any particular methodology for the assessment of compensation in cases not involving expropriation, the Tribunal considers that the drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA.³⁸³

198. There is, however, a clear emerging trend toward basing such damages on the fair market value standard, plus historical or discrete losses when applicable. Thus, according to the Tribunal in *CMS*:

While this [fair market value] standard figures prominently in respect of expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses.³⁸⁴

199. Similarly, in *Azurix v. Argentina*, the Tribunal determined that the fair market value standard was appropriate for Argentina’s breaches of the fair and equitable treatment, full protection and security, and arbitrary measures provisions in taking over a 30-year water concession in the Province of Buenos Aires in only its third year.³⁸⁵ The Tribunal awarded US\$60 million as the fair market value of the Canon that Azurix paid for the concession and an additional US\$105 million for the amounts that Azurix invested during the concession’s short life.³⁸⁶
200. When faced with a BIT that provided guidance on the measure of compensation for expropriation breaches (*i.e.*, fair market value, as the applicable Treaty in this case) but was silent on non-expropriation breaches, the Tribunal in *National Grid v. Argentina*

³⁸³ **CLA-76**, *S.D. Myers* Second Partial Award ¶ 309.

³⁸⁴ **CLA-5**, *CMS* Award ¶ 410.

³⁸⁵ **CLA-40**, *Azurix* Award ¶ 424.

³⁸⁶ *Id.* at 429-30.

cited the “the principles of compensation under customary international law” set out in *Chorzów Factory* to award “full compensation” in excess of US\$60 million.³⁸⁷

201. In sum, Claimant is entitled to full compensation for Bolivia’s violations of the Treaty provisions relating to fair and equitable treatment, the umbrella clause, arbitrary and discriminatory measures, and full protection and security. Although it is Claimant’s contention that Bolivia violated each of these provisions in multiple respects (as well as the expropriation provision of Article 5), a violation of any one of them would entitle Claimant to full compensation.

B. QUANTUM OF COMPENSATION OR RESTITUTION

202. As explained above, under customary international law South American Silver is entitled to full reparation in the form of restitution or its monetary equivalent measured as the higher of the value of South American Silver’s investment on the date of the treaty breach or breaches, plus interest, or the value on the date of the award; in either case accompanied by compensation for additional losses not covered by the restitution or monetary equivalent. As detailed below, Claimant presents damages methodologies that (1.) measure the fair market value of Claimant’s investment in Bolivia as of the day immediately preceding of the expropriation on July 7, 2012 and (2.) of the damages that additional losses not covered by the restitution of the Malku Khota Project.
203. As mentioned, South American Silver has retained FTI to calculate these values. FTI is a world-recognized leader in the field of forensic accounting and damages valuation. Howard Rosen, who authored the present report, has extensive experience in the valuation and quantification of damages relating to mineral properties at all stage of development and served as an expert witness in over 100 quantification and valuation matters before courts and arbitral tribunals.³⁸⁸
204. FTI’s experts relied, in part, on the expert report prepared at their request by William E. Roscoe, Paul Chamois and Katya Masun of RPA which details a MTR analysis of the Malku Khota Mineral Resource. RPA is widely recognized as the specialty firm of

³⁸⁷ **CLA-41**, *National Grid Award* ¶¶ 269-70.

³⁸⁸ **CER-1**, FTI Expert Report ¶¶ 3.2, 3.3.

choice for resource and reserve work and has carried valuations of more than a thousand mineral exploration properties across the world over its nearly 30 years of existence.³⁸⁹ William Roscoe, who authored RPA's report in this arbitration, co-founded RPA in 1985 and now serves as Chairman Emeritus and Principal Geologist of RPA.³⁹⁰ A highly respected geologist, Dr. Roscoe also serves as Co-Chairman of the Special Committee of the Canadian Institute of Mining, Metallurgy and Petroleum on Valuation of Mineral Properties ("CIMVal), which set out the Standards and Guidelines for Valuation of Mineral Properties.³⁹¹

205. South American Silver submits with this Statement of Claim the report of FTI's and RPA's experts, which estimates the fair market value of Claimant's investment in the Malku Khota Project at the time of the expropriation, and South American Silver's losses linked to the delay and higher level of risk associated with the Project in case of restitution.³⁹²

1. Full Compensation Damages

206. FTI calculates the compensation owed to South American Silver due to the expropriation as the FMV of its 100% ownership interest in the Malku Khota Mining Project at of the Valuation Date (the date immediately preceding the expropriation: July 6, 2012).³⁹³ As FTI notes: "Since CMMK's principal asset was the Project and since the Claimant (indirectly) held 100% of the shares of CMMK, the value of the Claimant's investment in CMMK was equal to the value of the Project. Thus, when the Respondents revoked CMMK's 10 concessions relating to the Project, the value of the Claimant's investment in Bolivia, in CMMK, was reduced to nil."³⁹⁴

³⁸⁹ CER-2, RPA Expert Report 4-1.

³⁹⁰ *Id.* at 4-2.

³⁹¹ *Id.*

³⁹² Notwithstanding its selection of a valuation date as of the date of expropriation, Claimant reserves the right to claim for any increase in the loss in fair market value of the investment resulting from subsequent events. This is consistent with the *Chorzów Factory* lines of cases discussed above, and is also consistent with placing Claimant in the same position where it would have been in the absence of Bolivia's expropriation of Claimant's investment.

³⁹³ CER-1, FTI Expert Report ¶ 8.41.

³⁹⁴ *Id.* at 5.8.

207. To assess the FMV of South American Silver’s investment, FTI and RPA determine that the Project would be classified as a Mineral Resource Property under the applicable valuation guidelines.³⁹⁵ Mineral Resource properties can be valued using a market-based approach and, in some cases, income-based and cost-based approaches.³⁹⁶ Both FTI and RPA conclude that the income-based approach (the discounted cash-flow or “DCF” analysis) and cost-based approach could not be used to value the Malku Khota Project. As RPA points out, the Project was not “sufficiently advanced that enough reliable information exists to value the property by discounted cash flow analysis, with a reasonable degree of confidence.”³⁹⁷
208. With respect to the availability of a cost-based valuation approach, FTI and RPA make clear that it is not appropriate to use a cost-based approach to value the Malku Khota Mining Project.³⁹⁸ Noting that a cost-based approach can only be considered “where income and market based approaches cannot be performed,” FTI concludes: “We did not perform a valuation under a cost approach since one of the fundamental principles of valuation theory states that value is a function of prospective cash flow and, in our view, the costs incurred to develop the Project to date are not indicative of the Project’s prospective cash flows.”³⁹⁹ Similarly, “RPA considers that while the Cost Approach is generally more applicable to Exploration Properties, is not applicable to the Malku Khota Project which has a Mineral Resource estimate and was being evaluated for economic viability at the time of the exploration.”⁴⁰⁰
209. Conversely, FTI and RPA both determine that the market approach is the most applicable to value the Project. As FTI states: “Based on the stage of development of the Project at the Valuation date we have determined that the Market Approach is the most appropriate approach in this case and thus is our primary valuation approach.”⁴⁰¹ This is confirmed in the RPA Report which states, “RPA considers that the Market Approach is the most

³⁹⁵ *Id.* at 8:30.

³⁹⁶ *Id.* at 8.29-31.

³⁹⁷ **CER-2**, RPA Expert Report 3-1.

³⁹⁸ **CER-1**, FTI Expert Report ¶ 8.36; **CER-2**, RPA Expert Report 3-1, 3-2.

³⁹⁹ **CER-1**, FTI Expert Report ¶ 8.36.

⁴⁰⁰ **CER-2**, RPA Expert Report 3-1, 3-2.

⁴⁰¹ **CER-1**, FTI Expert Report ¶ 8.32.

applicable for valuation of the Malku Khota Project.”⁴⁰² FTI identifies three source of information that are sufficiently reliable for the purpose of determining FMV of the Project at the Valuation Date: (i) comparable market transaction data for similar mineral properties as set out in the RPA Report; (ii) investment analyst reports on SASC; and (iii) information on private placement transactions for shares of SASC in the months prior to the Valuation Date.⁴⁰³

Comparable Transaction Methodology

210. As FTI explains: “Under the comparable transactions valuation method, value metrics are obtained from transactions involving mineral properties that are similar in major respects to the Project.”⁴⁰⁴ To conduct this valuation, RPA’s experts delved on their substantial geology expertise to conduct an extensive assessment of the mineral resource present at Malku Khota.⁴⁰⁵ RPA then reviewed similar transactions and identified 14 comparable transactions from February 2007 to April 2012 including properties in Bolivia, Peru, Chile, Guatemala, Argentina and Mexico.⁴⁰⁶ RPA then applied a valuation methodology referred to as Metal Transaction Ratio (“MTR”), which FTI describes as follows:

The MTR method allows for the valuation of multi-commodity projects by expressing the price paid in a given transaction as a percentage of the combined ‘in-situ’ dollar amount of all the different metals for a given project; calculated as the volume of contained metal in-situ multiplied by the commodity price for each metal at the transaction date.

This methodology is appealing as it allows for the comparison of transaction values for projects with different types of metals which are stated in different units of measure (i.e. silver in ounces, indium in tonnes, copper in pounds, etc.) and at different points in time, on a common basis - being the MTR percentage.

⁴⁰² CER-2, RPA Expert Report 3-2.

⁴⁰³ CER-1, FTI Expert Report ¶ 8.32. FTI also looked into share price data for comparable junior silver mining companies and public trading data for SASC’s shares prior to the valuation date. While FTI determined that these methods were not sufficiently reliable to be used in this arbitration, it nevertheless used them to check the consistency of the results obtained using the three methods discussed above. See CER-1, FTI Expert Report at 10-1, 10-17.

⁴⁰⁴ CER-1, FTI Expert Report ¶ 9.5.

⁴⁰⁵ CER-2, RPA Expert Report 7-1, 9-8.

⁴⁰⁶ *Id.* at 12-1, 12-7.

RPA then analyses the MTR percentages obtained from the comparable transactions to assess the relative comparability of each to the Project along a number of factors including the metals included in the Resources, the size of the Resource, the geological setting, and the type of mineral deposit. It then assigns estimated comparability weightings to each transaction's MTR and then calculate a weighted average MTR, in addition to an un-weighted average MTR.⁴⁰⁷

211. RPA explains how the application of the MTR methodology to the US\$12.9 billion gross in situ dollar content of the Malku Khota Mineral Resource leads to a value as of the Valuation Date of US\$270 million within a range of US\$130 to US\$330 million:

The total metals contained in the Mineral Resource estimate are: 351 million ounces of silver, 2,270 tonnes of indium, 1,833 tonnes of gallium, 197 million pounds of copper, 720 million pounds of lead, and 433 million pounds of zinc. The MK Mineral Resources represent not only a significant deposit of silver, but a very large potential source of indium, for which uses include liquid crystal displays, touchscreens, and semi-conductors.

RPA has used the Market Approach to value the MK Project. Market transactions on silver dominant properties in the Cordillera with Mineral Resources have been analyzed to derive a Metal Transaction Ratio ("MTR") to apply to the total Mineral Resources. MTR is the ratio of the value of the transaction divided by the gross, in situ dollar content of the Mineral Resources transacted, expressed as a percentage.

In the opinion of RPA, the Market Value of the Malku Khota Property as of July 6, 2012 is **\$270 million** within a range of **\$130 million to \$330 million**. As explained more fully below, this value is estimated taking into account the \$12.9 billion gross in situ dollar content of the total MK Mineral Resources using an MTR of 2.0% within a range of 1.0% to 2.5%.⁴⁰⁸

212. FTI critically reviewed the MTR valuation conducted by RPA before concluding that the methodology itself, the comparable transactions used, and the resulting valuation could

⁴⁰⁷ CER-1, FTI Expert Report ¶¶ 9.11-9.13.

⁴⁰⁸ CER-2, RPA Expert Report 1-2, 1.3.

be relied upon to measure the compensation owed to South American Silver in this arbitration.⁴⁰⁹

Industry Analysts Reports

213. Prior to the Valuation Date a number of industry/financial analysts published investment reports on SASC, each of which assessed the Project to be a high value silver, indium and gallium project with significant upside potential.⁴¹⁰ FTI reviewed reports published by four analysts in the period prior to, and after, the Valuation Date: Byron, NBF, Redchip, and Edison. FTI analyzed the reports issued by these four analysts and observes that “all of the analysts assessed the Project as being highly valuable and their analyses indicated that the SASC share price did not reflect the underlying value of the company’s project as all the analysts calculated share price targets well above the trading price from April 2011 through to July 2012.”⁴¹¹ While noting that the valuations assumptions and conclusions of these analysts varied significantly, FTI concludes that “since their views were publically available at the Valuation Date and served to inform market participants at that time we have included the range of values for the Project as derived by these analysts of from **\$195.9 million to \$922.2 million** with an **average of \$572.1 million** in our overall conclusion of value.”⁴¹²

Private Placement

214. The third source of market based information on which FTI relied relates to the price paid for shares of SASC in private placement transactions that occurred in the months prior to the Valuation Date.⁴¹³ In particular, FTI analyzed the information on three private placements for SASC shares in November 30, 2010, April 20, 2012 and May 7, 2012.⁴¹⁴ FTI then calculated the FMV of the Malku Khota Mining Project on the basis of these private placement by deducting the value ascribed to the Escalones project (another

⁴⁰⁹ CER-1, FTI Expert Report ¶ 9.15.

⁴¹⁰ *Id.* at 9.16.

⁴¹¹ *Id.* at 9.40.

⁴¹² *Id.* at 9.42.

⁴¹³ *Id.* at 9.43.

⁴¹⁴ *Id.* at 9.44-48.

mining protect held by South American Silver) from the value of SASC in light of these private placement transactions.⁴¹⁵ FTI concludes that: “Based on the private placement transactions, we have determined the FMV of the Project to be **\$116.7 million** on the Valuation Date.”⁴¹⁶

Weighting of the Methodologies Used

215. FTI’s experts then took the value ranges indicated above for each of these three market approach and applied weighting to each based on their assessment of their relative strengths.⁴¹⁷ FTI ascribed a 50% weighting to the comparable transactions analysis, noting that “it is based on observable actual market transaction data” and “was performed by Dr. Roscoe who has over 25 years of experience in the field.”⁴¹⁸ FTI ascribed a 25% weighing to the industry analysts reports and private placement analysis, noting that while reliable, these approached were inferior to the RPA comparable transaction methodology.⁴¹⁹ The table below shows the final results of FTI’s FMV analysis:

Market Approach Valuation Methodology	Unweighted			Weighting Applied	Weighted		
	Low FMV Estimate	High FMV Estimate	Point Estimate		Low FMV Estimate	High FMV Estimate	Point Estimate
Comparable Transactions	\$ 130.0	\$ 330.0	\$ 270.0	50%	\$ 65.0	\$ 165.0	\$ 135.0
Analyst Reports	\$ 195.9	\$ 922.2	\$ 572.1	25%	\$ 49.0	\$ 230.5	\$ 143.0
SASC Private Placements	\$ 116.7	\$ 116.7	\$ 116.7	25%	\$ 29.2	\$ 29.2	\$ 29.2
Project FMV					<u>\$ 143.2</u>	<u>\$ 424.7</u>	<u>\$ 307.2</u>

Table 3: FTI’s FMV Conclusions on Compensation for the Malku Khota Mining Project⁴²⁰

2. Restitution Damages

216. FTI’s experts note that even “in the event that the concessions are restored to CMMK in future, the Claimant will still incur a loss due to the delay they will experience in the

⁴¹⁵ *Id.* at 9.50-9.52.
⁴¹⁶ *Id.* at 9.52.
⁴¹⁷ *Id.* at 9.53.
⁴¹⁸ *Id.*
⁴¹⁹ *Id.*
⁴²⁰ *Id.* at Fig. 18 ¶ 9.54.

development of the Project and any increased project related risks caused by the Respondent's actions and/or the delay itself (*i.e.* due to less advantageous economic conditions in the mining sector)."⁴²¹ Because international law requires restitution accompanied by compensation for additional losses not covered by the restitution or monetary equivalent, FTI calculated the losses due to these delay and increased risk.⁴²²

217. While FTI's experts assume for the purpose of calculating South American Silver's losses that the concessions will be returned to CMMK on May 31, 2016 (at the date of the hearing), they also note that the delay may in fact be considerably longer and may also come with additional risk associated with the Project.⁴²³ They conclude: "Thus we have provided loss calculations assuming delays from 4 to 6 years and have used the mid-point of 5 years in our conclusion to reflect the fact that it will take an additional period of time in addition to the 4 year period from the Valuation Date to the assumed date of restoration, in order for the Claimant to recommence the Project."⁴²⁴
218. FTI therefore calculates the loss uncompensated by the restitution as the difference between the undiscounted FMV of the Project at the Valuation Date with a mid-point of \$307.2 million less this same value discounted for a period of from 4 to 6 years at a risk adjusted rate of return.⁴²⁵ FTI estimates that loss at \$140.5 million using mid-point estimates of delay and additional risk: "We have calculated the potential impact of the delay to develop the Project caused by the alleged breaches of the Respondents to be \$140.5 million assuming a total delay of 5 years and a 1% risk premium due to the delay and other factors given the alleged breaches of the Respondents."⁴²⁶ FTI also provides a sensitivity table illustrating the loss based on from 4 to 6 years of delay and discount rates of from 12% to 15%:

⁴²¹ *Id.* at 5.9.

⁴²² *Id.* at 11.1-11.9.

⁴²³ *Id.* at 11.2-11.3.

⁴²⁴ *Id.* at 11.5.

⁴²⁵ *Id.* at 11.9.

⁴²⁶ *Id.* at Fig. 21 ¶ 11.9.

		Discount Rate			
		12.0%	13.00%	14.00%	15.00%
Delay Years	4	\$ 112.0	\$ 118.8	\$ 125.3	\$ 131.6
	5	\$ 132.9	\$ 140.5	\$ 147.7	\$ 154.5
	6	\$ 151.6	\$ 159.6	\$ 167.2	\$ 174.4

Table 4: FTI's Restitution Damages Conclusions and Sensitivity Analysis⁴²⁷

3. Summary of Damages

219. FTI also calculates the pre-award interest applicable to the losses under both restitution and compensation claims in order to place South American Silver in the economic position it would have occupied absent the alleged breaches, from the Valuation Date to an estimated hearing date of May 31, 2016 based on a statutory annual interest rate in Bolivia of 6.0%, which is consistent with the 5.6% median cost of debt for similarly-situated companies. Including pre-award interest, FTI quantified the total damages to South American Silver as follows:

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

Table 5: FTI Summary of Damage Conclusions (in US\$ millions)⁴²⁸

C. COSTS AND EXPENSES

220. Claimant also requests that the Tribunal award South American Silver all of its costs and expenses associated with this arbitration proceeding, including attorneys' fees. Bolivia has breached its obligations to South American Silver under the Treaty and expropriated (or otherwise impaired by unlawful means) Claimant's investments. South American

⁴²⁷ *Id.*

⁴²⁸ *Id.* at Fig. 24 ¶ 13.1.

Silver would not have incurred these arbitration costs if Bolivia had complied with its Treaty obligations and paid compensation when it was owed. Therefore, in order to place South American Silver in the same position where it would have been had Bolivia not breached its international obligations, South American Silver should be awarded all costs, expenses and attorneys' fees incurred herein. South American Silver will set forth its full costs submission at the conclusion of this proceeding or as otherwise directed by the Tribunal.

D. COMPOUND POST-AWARD INTEREST

221. In addition to compensation for all damages it has suffered, South American Silver requests an award of post-award interest (until the date Bolivia pays in full) at the highest possible lawful rate, such as Bolivia's borrowing rate used for pre-award interest. In essence, Bolivia's failure to pay compensation to Claimant is effectively a loan to Bolivia. Hence, South American Silver should be compensated like any other lender to Bolivia during this period and thus, should receive interest at a rate equivalent to Bolivia's external cost of debt financing from private lenders.
222. Because international law recognizes that compound interest is the generally-accepted standard in international investment arbitrations, South American Silver further requests that any award of interest granted by this Tribunal be compounded. The recent practice of international investment tribunals confirms that awarding compound interest is the most accepted and appropriate method of making a claimant whole. Since 2000, at least 15 investment arbitration tribunals have awarded compound interest in cases involving diverse countries, different facts and various industries.⁴²⁹ As such, it can only be

⁴²⁹ See, e.g., **CLA-87**, *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, Feb. 17, 2000, 15 ICSID Rev.–Foreign Inv. L.J. 169 (2000) (“*Santa Elena Award*”) ¶ 104 (“[W]here an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then becomes due to him, the amount of compensation should reflect [...] the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest [...] [Compound interest] is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.”); **CLA-64**, *Wena Award* ¶ 129; **CLA-10**, *Vivendi II Award* ¶ 9.2.6; **CLA-9**, *Middle East Cement Award* ¶ 174; **CLA-88**, *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, July 25, 2007 (“*LG&E Award*”) ¶ 103; **CLA-35**, *ADC Award* ¶ 522; **CLA-40**, *Azurix Award* ¶ 440; **CLA-47**, *MTD Award* ¶ 251; **CLA-13**, *Tecmed Award* ¶ 196; **CLA-2**, *Siemens Award* ¶ 399; **CLA-51**, *PSEG Award* ¶ 348; **CLA-59**, *Maffezini Award* ¶ 96; **CLA-58**, *Enron Award* ¶¶ 451-52; **CLA-5**, *CMS Award* ¶ 471. See also **CLA-76**, *S.D. Myers Second Partial Award* ¶ 307; **CLA-89**,

concluded that international law now recognizes the awarding of compound interest as the generally accepted standard for compensation in international investment arbitrations.

223. In *Santa Elena v. Costa Rica*, the Tribunal, awarding compound interest to the claimant, noted that compound interest serves two distinct goals: (i) to ensure that the claimant receives “the full present value of the compensation that it should have received at the time of the taking,” and (ii) to prevent “the State [from being] unjustly [...] enrich[ed] [...] by reason of the fact that the payment of compensation has long been delayed.”⁴³⁰
224. Similarly, in *Wena v. Egypt*, the Tribunal explained its reasons for awarding compound interest as follows:

[A]n award of compound (as opposed to simple) interest is generally appropriate in most modern, commercial arbitrations [...] [A]most all financing and investment vehicles involve compound interest. [...] If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest.⁴³¹

225. Decisions by investment arbitration tribunals have confirmed that the awarding of compound interest is now the recognized standard of compensation in international law. For example, in *Middle East Cement v. Egypt*, the Tribunal confirmed that international jurisprudence and literature have recently, after detailed consideration, concluded that compound interest was now the international law standard in investment arbitration, noting that “interest is an integral part of the compensation due [...] and that compound (as opposed to simple) interest is at present deemed appropriate as the standard of international law in such expropriation cases.”⁴³²
226. In *Vivendi*, the Tribunal neatly summarized the prevailing jurisprudence of modern investor-State arbitration by stating that “a number of international tribunals have recently expressed the view that compound interest should be available as a matter of

Pope & Talbot, Inc. v. Canada, UNCITRAL (NAFTA), Award on Damages, May 31, 2002 (“*Pope & Talbot Award on Damages*”) ¶¶ 89-90; **CLA-17**, *Metalclad Award* ¶ 128.

⁴³⁰ **CLA-87**, *Santa Elena Award* ¶ 101.

⁴³¹ **CLA-64**, *Wena Award* ¶ 129.

⁴³² **CLA-9**, *Middle East Cement Award* ¶ 174.

course if economic reality requires such an award to place the claimant in the position it would have been in had it never been injured.”⁴³³

227. A leading scholar on compound interest in investment arbitration has suggested several reasons for requiring an award of compound interest.⁴³⁴ The same principles apply as justifications for awarding compound interest rather than simple interest. First, the payment of interest furthers the principle of full compensation because it aids in restoring the claimant to the position where it would have been had the respondent not committed the breach.⁴³⁵ Second, an interest award prevents unjust enrichment of the respondent by requiring it to pay compensation for the benefits received from using the money it wrongfully withheld. Third, interest awards promote efficiency. In the absence of interest, a respondent has an incentive to delay the arbitral proceedings (or payment of the award) because it is able to profit from the use of the claimant’s money during the pendency of the arbitration (or enforcement proceedings).⁴³⁶ As Colón & Knoll state: “Awarding simple interest generally fails to compensate claimants fully and can create strong incentives for respondents to delay arbitration proceedings and cause harms, thereby wasting resource.”⁴³⁷

⁴³³ **CLA-10**, *Vivendi II Award* ¶ 9.2.6.

⁴³⁴ **CLA-90**, John Y. Gotanda, *A Study of Interest 4* (Villanova University School of Law Working Paper Series, Working Paper No. 83, 2007) (“Gotanda, *A Study of Interest*”). See also **CLA-91**, John Y. Gotanda, *Compound Interest in International Disputes*, 34 *Law & Pol’y Int’l. Bus.* 393, 397-98 (2003) (“Gotanda, *Compound Interest*”); **CLA-92**, F.A. Mann, *Compound Interest as an Item of Damage in International Law*, 21 *U.C. Davis L. Rev.* 577, 585 (1987-88) (“F.A. Mann, *Compound Interest*”) (“[I]t is necessary first to take account of modern economic conditions. It is a fact of universal experience that those who have a surplus of funds normally invest them to earn compound interest. This applies, in particular, to bank deposits or savings accounts. On the other hand, many are compelled to borrow from banks and therefore must pay compound interest. This applies, in particular to business people whose own funds are frequently invested in brick and mortar, machinery and equipment, and whose working capital is obtained by way of loans or overdrafts from banks [...]. If, in accordance with the usual formula, damages are intended to afford *restitutio in integrum* (complete compensation for the wrong suffered) such items of damage should not be excluded.”).

⁴³⁵ **CLA-90**, Gotanda, *A Study of Interest* at 4; **CLA-91**, Gotanda, *Compound Interest* at 397. See also **CLA-93**, Jeffrey Colón & Michael Knoll, *Prejudgment Interest In International Arbitration*, 4(6) *Transnat’l. Disp. Mgmt.* 10 (2007) (“Colón & Knoll”) (“Because the goal of prejudgment interest is to place parties in the same position that they would have been had the award been made immediately after the cause of action arose, awarding simple interest fails to fully compensate claims. All awards of prejudgment interest should therefore be computed using compound interest.”).

⁴³⁶ **CLA-90**, Gotanda, *A Study of Interest* at 4. See also **CLA-93**, Colón & Knoll at 8 (“Awarding simple interest generally fails to compensate claimants fully and can create strong incentives for respondents to delay arbitration proceedings and cause harms, thereby wasting resource.”).

⁴³⁷ **CLA-93**, Colón & Knoll at 3.

228. The role of interest is to compensate a claimant fully for the delay between the date of harm suffered and the award of damages. Interest is, therefore, “an integral part of compensating the claimant for its injury” and a “properly calculated award should return the claimant to its position had the injury not occurred.”⁴³⁸ A tribunal’s failure to properly calculate the interest award would “thwart justice for claimants.”⁴³⁹ In this regard, interest awarded on a compound basis more accurately reflects what the claimant would have been able to earn on the sums owed if it had been paid in a timely manner.⁴⁴⁰ Moreover, because the goal of interest (as with compensation generally) is to place the parties in the same position where they would have been had the award been made immediately after the cause of action arose, “awarding simple interest fails to fully compensate claimants,” and “all awards of prejudgment interest should therefore be computed using compound interest.”⁴⁴¹
229. In sum, modern economic reality, as well as equity, demands that injured parties be compensated on a compound basis in order to be made whole. As such, no doubt remains that international law now recognizes that awarding compound interest is the generally-accepted standard in international investment arbitrations.

VII. REQUEST FOR RELIEF

230. For the reasons stated herein, Claimant, South American Silver, requests an award granting it the following relief:
- (i) A declaration that Bolivia has violated the Treaty;
 - (ii) A declaration that Bolivia’s actions and omissions at issue and those of its instrumentalities for which it is internationally responsible are unlawful, constitute a nationalization or expropriation or measures having effect equivalent to nationalization or expropriation without prompt, adequate and effective compensation, failed to treat South American Silver’s investments fairly and

⁴³⁸ *Id.* See also **CLA-94**, Natasha Affolder, *Awarding Compound Interest In International Arbitration*, 12 Am. Rev. Int’l. Arb. 45, 80 (2001).

⁴³⁹ **CLA-90**, Gotanda, *A Study of Interest* at 31.

⁴⁴⁰ **CLA-93**, Colón & Knoll at 10.

⁴⁴¹ **CLA-92**, F.A. Mann, *Compound Interest* at 581-82; **CLA-86**, *Starrett Housing Interlocutory Award*.

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

- (iii) An award to South American Silver of full restitution or the monetary equivalent of all damages caused to its investments, including historical and consequential damages;
- (iv) An award to South American Silver for all costs of these proceedings, including attorney's fees; and
- (v) Post-award interest on all of the foregoing amounts, compounded quarterly, until Bolivia pays in full.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be "Henry G. Burnett", with a long horizontal line extending to the right.

Henry G. Burnett
Fernando Rodriguez-Cortina
Louis-Alexis Bret
KING & SPALDING LLP
1185 Avenue of the Americas
New York, NY-10036
United States of America

Roberto Aguirre Luzi
KING & SPALDING LLP
1100 Louisiana Street
Houston, TX-77002
United States of America